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Die Arbeitsverwaltung im Protektorat Böhmen und Mähren (1939–1945)

(Work Administration in the Protectorate of Bohemia and Moravia 1939–1945)

Jaromír Tauchen *

Abstract

System of forced and directed labour was characteristic for protectorate labour law. In order for this system to work effectively, it was necessary to create some required effective managing and controlling mechanisms. Of major importance was a newly created system of employment offices and their subsidiaries which was directed by the Ministry of Social and Health Administration, later by the Ministry of Economy and Labour.

Employment offices constituted one of the most important and key instruments in the process of performing directed and forced labour. During World War II, their tasks and authority gradually grew and at the end of the war they applied basically to all areas related to work performance. Although the employment offices belonged to the so-called autonomous (Czech) administration, their leading positions were taken by German officers which had a considerable influence on their actual activity.

The Ministry of Social and Health Administration (later Ministry of Economy and Labour) represented an institution where legal regulations for the labour law area were made. Since 1942, mostly German officers were in charge of this area amongst whom can be named primarily Dr. Walter Bertsch and Dr. Wilhelm Dennler. German office workers transferred here from the Office of Reich Protector, thus they directly contributed to creating drafts of legislation.

Keywords: *Protectorate of Bohemia and Moravia; Labour Law; Labour; Forced Deployment; Employment Offices; Ministry of Social and Health Administration; Ministry of Economy and Labour; Wilhelm Dennler; Walter Bertsch.*

Sollten wir die in der Zeit des Protektorats Böhmen und Mähren [1] (1939-1945) geltenden Normen des Arbeitsrechts [2] ausführlich analysieren und untersuchen, wie diese in der Praxis angewandt wurden, ist es auch notwendig, sich mit den Behörden zu beschäftigen, welche diese Rechtsvorschriften erließen und anwandten sowie mit denjenigen, die sowohl die Erlassung

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1 Zum Charakter und Rechtssystem des Protektorats Böhmen und Mähren siehe folgende Standartwerke: BRANDES, D., *Die Tschechen unter deutschem Protektorat*. München, 1970; GEBHART, J., KUKLÍK, J., *Dramatické i všední dny protektorátu*. Prag, 1996; MARŠÁLEK, P., *Pod ochranou hákového kříže: nacistický okupační režim v českých zemích 1939-1945*. Prag, 2012; ders., *Protektorát Čechy a Morava: státoprávní a politické aspekty nacistického okupačního režimu v českých zemích 1939-1945*. Prag, 2002; PASÁK, T., *Pod ochranou říše*. Prag, 1998; SOBOTA, E., *Co to byl protektorát*. Prag, 1946; TAUCHEN, J., Protektorát Čechy a Morava (1939 – 1945). In: SCHELLE, K., TAUCHEN, J. (Hrsg.), *Encyklopedie českých právních dějin, IX. svazek Procesy (od roku 1950) – Pů*. Pilsen, 2017, S. 715-723.

2 Zum Arbeitsrecht aus dem deutsch- und englischsprachigen Schrifttum siehe vor allem: BECKER, S., *Von der Werbung zum „Totaleinsatz": die Politik der Rekrutierung von Arbeitskräften im „Protektorat Böhmen und Mähren" für die deutsche Kriegswirtschaft und der Aufenthalt tschechischer Zwangsarbeiter und -arbeiterinnen im Dritten Reich 1939-1945*. Berlin, 2005; KRIESER, H. (Hrsg.), *Das neue Recht in Böhmen und Mähren. Teil I-IV.* Prag, 1943-1944, S. 1455-1628; MARX, H., Die deutsche Arbeitspolitik im Protektorat Böhmen und Mähren. In: HARVEY, E., PRIEMEL, K. CH. (Hrsg.), *Working Papers of the Independent Commission of Historians Investigating the History of the Reich Ministry of Labour (Reichsarbeitsministerium) in the National Socialist Period*, Nr. 6, 2018; POSTA, S., *Tschechische „Fremdarbeiter" in der nationalsozialistischen Kriegswirtschaft*. Dresden, 2002; TAUCHEN, J., Einige Bemerkungen zur Entwicklung des Arbeitsrechts im Protektorat Böhmen und Mähren. In: *Journal on European History of Law*, vol. 6, Nr. 2, 2010, S. 50-54; TAUCHEN, J., The Status of Jews in Labor Relationships in the Protectorate of Bohemia and Moravia. In: *Miscellanea Historico-Iuridica*, vol. 10, Nr. 1, 2011, S. 183-190; TAUCHEN, J., Die Einführung der Arbeitspflicht und die Schaffung des Systems der Arbeitslenkung im Protektorat Böhmen und Mähren. In: *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, vol. 30, Nr. 1, 2012, S. 219-228; TAUCHEN, J., Labour Law in the Protectorate of Bohemia and Moravia. In: RÁKOSNÍK, J., ŠUSTROVÁ (Hrsg.), *War employment and social policies in the Protectorate Bohemia and Moravia 1939-1945*. Prag, 2019, S. 15-33; VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. (Hrsg.), *Die Entwicklung des tschechischen Privatrechts*. Brünn, 2011, S. 204-237; VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. (Hrsg.), *An introduction to history of Czech private law*. Brünn, 2011, S. 123-151.
Aus dem tschechischsprachigen Schrifttum siehe z. B.: KOKOŠKOVÁ, Z., PAŽOUT, J., SEDLÁKOVÁ, M. (Hrsg.), *Pracovali pro Třetí říši: nucené pracovní nasazení českého obyvatelstva Protektorátu Čechy a Morava pro válečné hospodářství Třetí říše (1939-1945): edice dokumentů*. Prag, 2011; MOJŽÍŠOVÁ, V., *Vývoj nucené práce na území České republiky ve 20. století*. Ostrava, 2014, S. 16-55; *„Nepřichází-li práce k Tobě": různé podoby nucené práce ve studiích a dokumentech = „Kommt die Arbeit nicht zu Dir": verschiedene Formen der Zwangsarbeit in Studien und Dokumenten*. Prag, 2003; TAUCHEN, J., Pracovní právo v Protektorátu Čechy a Morava - ještě soukromoprávní odvětví? In: *Dny práva 2011 – Days of Law 2011. Ovlivňování sféry soukromého práva právem veřejným v minulosti*. Brünn, 2012, S. 245-258; TAUCHEN, J., Pracovní právo v Protektorátu Čechy a Morava. In: VOJÁČEK, L.-TAUCHEN, J. (Hrsg.), *Vývoj soukromého práva na území českých zemí (II. díl).* Brünn, 2012, S. 862-877; TAUCHEN, J., *Práce a její právní regulace v Protektorátu Čechy a Morava (1939-1945).* Prag, 2016; TAUCHEN, J., Právo pracovní (1938-1945). In: SCHELLE, K., TAUCHEN, J. (Hrsg.), *Encyklopedie českých právních dějin, VII. svazek Právo pra – Prob*. Pilsen, 2017, S. 25-34.

der Vorschriften als auch die darauffolgende Anwendung zum großen Teil beeinflussten. Mit der Verwaltung der Arbeit im Protektorat Böhmen und Mähren waren vor allem die Arbeitsämter, das Ministerium für soziale und Gesundheitsverwaltung (später Ministerium für Wirtschaft und Arbeit), das Amt des Reichsprotektors und die Oberlandräte unmittelbar verbunden.[3]

1. Die Arbeitsämter

1.1 Über die Errichtung der Arbeitsämter

Die Vorbereitungsarbeiten betreffend die Errichtung von Arbeitsämtern[4] begannen relativ bald nach der Errichtung des Protektorats Böhmen und Mähren. Schon Ende Mai 1939 wurde die erste Fassung des Entwurfes durch das Ministerium für soziale und Gesundheitsverwaltung ausgearbeitet und an die sonstigen Ministerien zur Stellungnahme verschickt.[5] Die Arbeitsämter sollten auf dem Gebiet des Protektorats noch dem Vorbild der rechtlichen Regelungen im Reich errichtet werden, wo sie schon seit 1935 ihre Tätigkeit ausübten. Die ursprüngliche Absicht betreffend der Errichtung der Arbeitsämter bestand in der Vereinheitlichung der rechtlichen Regelung der Arbeitsvermittlung, die bisher in Böhmen und Mähren nicht einheitlich war. Die Konzentration der bisher zersplitterten öffentlichen Arbeitsvermittlungen bei den neu errichteten staatlichen Arbeitsämtern sollte ein wichtiges konstruktives Element zur Lösung der Arbeitslosenfürsorge darstellen.[6]

Der Entwurf der Regierungsverordnung über die Arbeitsämter beinhaltete eine Ermächtigung für das Ministerium für soziale und Gesundheitsverwaltung, welches den Wirkungsbereich der Arbeitsämter bestimmen und ihnen auch die Besorgung anderer Aufgaben aus seinem Wirkungsbereich anvertrauen konnte. Im Rahmen des Gesetzgebungsverfahrens gaben sowohl das Innen- als auch das Justizministerium eine Stellungnahme ab und äußersten verfassungsrechtliche Bedenken, da sie fürchteten, die Arbeitsämter könnten auch zur Verrichtung anderer Tätigkeiten herangezogen werden, was eine Überschreitung der Befugnisse darstellen würde. Wie sich zeigte, waren diese Befürchtungen begründet.

Die Ermächtigung blieb im Text der Regierungsverordnung auch nach Verhandlungen mit dem Amt des Reichsprotektors bestehen.[7] Die Regierungsverordnung über die Arbeitsämter wurde zwar auf der Sitzung der Protektoratsregierung am 25. Juli 1939 verabschiedet, zu ihrer Kundmachung in der Sammlung der Gesetze und Verordnungen kam es vorerst nicht. Nach weiteren Verhandlungen mit den Vertretern aus dem Amt des Reichsprotektors, übergaben diese dem Ministerium für soziale und Gesundheitsverwaltung eine endgültige Fassung des Textes der Verordnung und forderten die Protektoratsregierung zu ihrer sofortigen Kundmachung auf. Wenn auch das Komitee für Wirtschaftsfragen zu den durchgeführten Änderungen Stellung genommen hatte,[8] ist durch den oben erwähnten legislativen Vorgang deutlich sichtbar, dass das Amt des Reichsprotektors das Schlusswort betreffend die Endstilisierung der Regierungsverordnung hatte. Die Regierungsverordnung über die Arbeitsämter wurde in der Sammlung der Gesetze und Verordnungen am 24. August 1939 unter der Nummer 193 kundgemacht und trat am gleichen Tage in Kraft.

Die Regierungsverordnung über die Arbeitsämter hatte nur fünf Paragrafen. In Anbetracht ihrer Bedeutung handelte es sich als um keine sehr umfangreiche Rechtsvorschrift. Obwohl sie festsetzte, dass die Arbeitsämter für den Bereich eines oder mehrerer politischer Bezirke errichtet werden sollten, enthielt die Regierungsverordnung jedoch keine konkrete Abgrenzung dieser Bezirke und überließ dies den Durchführungsvorschriften. Die Arbeitsämter sollten nur eine Instanz darstellen und nach Bedarf konnten Landesarbeitsämter in Prag und in Brünn als zweite Instanz errichtet werden, wozu es jedoch nie gekommen ist. Die Arbeitsämter unterstanden dem Ministerium für soziale und Gesundheitsverwaltung, also einem „autonomen" (tschechischen) Organ und nicht den im Protektorat tätigen Reichsbehörden.

Die Arbeitsämter besorgten die Aufgaben der bisherigen öffentlichen Arbeitsvermittlungsstellen und diese waren ver-

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[3] Der Problematik der Arbeitsverwaltung im Protektorat Böhmen und Mähren hat die tschechische Rechtshistoriographie bisher nur wenig Aufmerksamkeit gewidmet.
Die vorliegende Studie beruht auf der durchgeführten Forschung der aus der Tätigkeit einiger Zentralbehörden des Protektorats stammenden Archivbestände und geht von der Habilitationsschrift des Autors aus. Die aus der eigenen Tätigkeit der Arbeitsämter stammenden Archivalien sind jedoch praktisch unzugänglich, denn in den Städten, wo ein Arbeitsamt seinen Sitz hatte, befand sich meistens auch eine Dienststelle der Gestapo, deren Angehörige die Liquidation des Aktenmaterials in den letzten Kriegstagen durchführten.
Erwähnungen über die Tätigkeit der für die Arbeitsverwaltung im Protektorat zuständigen Behörden kann man auch in den folgenden Werken finden: KRÁL, V., *Otázky hospodářského a sociálního vývoje v českých zemích v letech 1938-1945. I-III*. Prag, 1957-1959; HOUSER, J., Nucená práce a okupantské právo. In: *Právněhistorické studie*, vol. 13, 1967, S. 157-188; MAINUŠ, F., *Totální nasazení: Češi na pracích v Německu 1939-1945*. Brünn, 1970 oder BECKER, S., *Von der Werbung zum „Totaleinsatz": die Politik der Rekrutierung von Arbeitskräften im „Protektorat Böhmen und Mähren" für die deutsche Kriegswirtschaft und der Aufenthalt tschechischer Zwangsarbeiter und -arbeiterinnen im Dritten Reich 1939-1945*. Berlin, 2005.

[4] Aus dem Schrifttum ist in erster Linie vor allem auf folgende drei Werke aufmerksam zu machen: MARX, H., The German Labour Administration in the „Protectorate of Bohemia and Moravia". In: RÁKOSNÍK, J., ŠUSTROVÁ (Hrsg.), War employment and social policies in the Protectorate Bohemia and Moravia 1939-1945. Prag, 2019, S. 34-54; PAŽOUT, J., Úřady práce v Protektorátu. In: KOKOŠKOVÁ, Z., KOKOŠKA, S., PAŽOUT, J. (Hrsg.), *Museli pracovat pro Říši: nucené pracovní nasazení českého obyvatelstva v letech 2. světové války*. Prag, 2004, S. 51-62; TAUCHEN, J., *Práce a její právní regulace v Protektorátu Čechy a Morava (1939-1945)*. Prag, 2016

[5] NA *(Nationalarchiv der Tschechischen Republik, Prag = Národní archiv České republiky)*, PMR, Kt. 2444 – Die Zuschrift des Ministeriums für soziale und Gesundheitsverwaltung betreffend die Arbeitsämter G.Z. 20.357/39-8 vom 24. Mai 1939.

[6] NA, PMR, Kt. 2444 – Motivenbericht zum Entwurf der Regierungsverordnung vom 25. Juli 1939 Nr. 193/1939 Slg., über die Arbeitsämter.

[7] NA, PMP, Kt. 2444 – Aktenvermerk der Regierung betreffend die Regierungsverordnung über die Arbeitsämter G.Z. 18.869/39 m.r.

[8] NA, PMP, Kt. 2444 – Vermerk Nr. 35 über die Sitzung des Ministerkomitees für Wirtschaftsfragen vom 22. August 1939.

pflichtet, den Arbeitsämtern gegen angemessenen Ersatz die Kanzleien und Kanzleieinrichtungen zur Benützung zu übergeben, wenn sie vom Ministerium oder von einem Arbeitsamt darum ersucht wurden.

Die Bediensteten der Arbeitsämter wurden vom Ministerium unter der Bedingung ernannt, dass sie die persönliche und fachliche Eignung für die Verrichtung der von ihnen zu erfüllenden Aufgaben vorweisen konnten. Die Bediensteten der territorialen Selbstverwaltungsverbände (Bezirksbehörden und Magistrate), die bisher die Agenda der Arbeitsvermittlung ausgeübt hatten, gingen in die Dienste der Arbeitsämter über.

1.2 Der Gebietsaufbau der Arbeitsämter

Der Gebietsaufbau der Arbeitsämter änderte sich im Laufe der Existenz des Protektorats mehrmals, um ihre Aufgaben bestmöglich erfüllen zu können. Die erste Gebietseinteilung der Arbeitsämter wurde Anfang September 1939[9] durchgeführt, als in Böhmen insgesamt 16 Arbeitsämter mit Sitz in České Budějovice *(Budweis)*, Mladá Boleslav *(Jungbunzlau)*, Německý Brod *(Deutsch-Brod)*, Kutná Hora *(Kuttenberg)*, Hradec Králové *(Königgrätz)*, Jičín *(Jitzschin)*, Kladno *(Kladno)*, Klatovy *(Klattau)*, Kolín *(Kolin)*, Mělník *(Melnik)*, Pardubice *(Pardubitz)*, Plzeň *(Pilsen)*, Praha *(Prag)*, Příbram *(Pibrans)*, Strakonice *(Strakonitz)* und Tábor *(Tabor)* errichtet wurden. In Mähren handelte es sich um sieben Arbeitsämter in folgenden Städten: Brno *(Brünn)*, Jihlava *(Iglau)*, Kroměříž *(Kremsier)*, Moravská Ostrava *(Mährisch-Ostrau)*, Olomouc *(Olmütz)*, Prostějov *(Proßnitz)* und Zlín *(Zlin)*.

Teilweise waren die Wohnsitze der Protektoratsangehörigen von den Arbeitsämtern ziemlich weit entfernt. Deshalb wurden, um die Arbeit des Amtes zu erleichtern, zwei bis sechs Zweigstellen für jedes Amt eingerichtet.[10] Insgesamt 23 Arbeitsämtern standen 88 Zweigstellen zur Verfügung.

Die Zweigstellen der Arbeitsämter verfügten jedoch über keine eigene Rechtspersönlichkeit, was sich z. B. darin äußerte, dass sie keine Rundschreiben an die Gemeindeämter ihres Sprengels oder Gendarmeriestationen herausgeben konnten. Auch der schriftliche Verkehr der Zweigstellen der Arbeitsämter mit den außerhalb ihres Wirkungsbereiches liegenden Behörden hatte grundsätzlich durch die Arbeitsämter zu erfolgen.[11] Alle im Wirkungsbereich eines Arbeitsamtes erlassenen Rundschreiben (Runderlässe) waren dem Ministerium für soziale und Gesundheitsverwaltung in zwei Exemplaren zu Evidenzzwecken zuzusenden. In den Fällen, wo die Rundschreiben die Auslegung der Rechtsfragen berührten, war im Vornhinein die Zustimmung des Ministeriums einzuholen.[12]

Die Organisation der Arbeitsämter änderte sich teilweise wieder im März 1941, nachdem einige Arbeitsämter in Zweigstellen anderer Arbeitsämter umgewandelt worden waren oder es zur Übertragung der Zweigstellen an Nachbararbeitsämter gekommen war.[13] Der definitive in der unveränderten Form bis Kriegsende funktionierende Aufbau der Arbeitsämter wurde im Juni 1942 geschaffen. Im Vergleich mit der ursprünglichen Regelung sank die Anzahl der Arbeitsämter von 23 auf 16.[14]

Wie das erhaltene Archivmaterial zeigt, wurde die Errichtung von Arbeitsämtern von Anfang an von großen Problemen begleitet. Einerseits handelte es sich um Schwierigkeiten mit der personellen Besetzung und andererseits herrschten logistische Probleme, da in relativ kurzer geeignete Räumlichkeiten zu finden waren. Die größten Schwierigkeiten bereitete das Arbeitsamt in Iglau, wo es im Rathausgebäude untergebracht wurde und nur ein einziger Raum von etwa 35 m^2 für die Erledigung der Geschäfte zur Verfügung stand. Beim Iglauer Arbeitsamt wurden 1939 sieben Personen eingestellt, die jedoch keine Vorkenntnisse in einer Verwaltungstätigkeit vorweisen konnten. Erst im November 1939 gelang es dem Arbeitsamtsleiter, ausreichende Räume zu finden, und zwar in einem einer Kartonagenfabrik gehörenden Haus, das sich im jüdischen Besitz befand. Wie der Bericht dazu anführt: *„Durch Vermittlung einer anderen geeigneten Wohnung war es dem Leiter des Arbeitsamts möglich den Juden zu veranlassen, das Wohnhaus zu räumen"*.[15] Obwohl die Arbeitsämter zu den sog. autonomen von der Protektoratsregierung errichteten Behörden gehörten, hatte der hiesige Oberlandrat dem Leiter des Arbeitsamtes den Betrag von 30.000 Kronen für die vorläufige Einrichtung des Arbeitsamtes in Iglau und für die notwendigen kleineren Reparaturen im neuen Gebäude, sehr schnell zur Verfügung gestellt. Die Erstattung dieses Betrages wurde jedoch vom Ministerium für soziale und Gesundheitsverwaltung zurückgefordert.[16] Ein Teil des Mobiliars stellte die ehemalige Arbeitsvermittlungsstelle in Iglau zur Verfügung, je-

[9] Kundmachung des Ministers für soziale und Gesundheitsverwaltung vom 5. September 1939 Nr. 202/1939 Slg., mit welcher die Sitze der Arbeitsämter bestimmt wurden.

[10] Kundmachung des Ministers für soziale und Gesundheitsverwaltung vom 5. Jänner 1940 Nr. 30/1940 Slg., mit welcher Zweigstellen der Arbeitsämter bestimmt werden.

[11] NA, ÚŘP, Kt. 784 – Erlass des Ministeriums für soziale und Gesundheitsverwaltung vom 25. August 1941 G.Z. E 4110-16/6 betreffend die Herausgabe von Rundschreiben durch die Zweigstellen der Arbeitsämter und deren Verkehr mit den Arbeitsämtern.

[12] SOkA Strakonice *(Staatsbezirksarchiv Strakonice = Státní okresní Archiv Strakonice)*, OÚOP Strakonice, Kt. 5, Inv.-Nr. 310 – Erlass des Ministeriums für soziale und Gesundheitsverwaltung vom 20. August 1940 G.Z. E 4110-20/8 betreffend die Evidenzführung der von den Arbeitsämtern herausgegebenen Rundschreiben.

[13] Kundmachung des Ministers für soziale und Gesundheitsverwaltung vom 23. Dezember 1940 Nr. 58/1941 Slg., womit die Sitze und Sprengel der Arbeitsämter und deren Zweigstellen geregelt werden.

[14] Kundmachung des Ministers für Wirtschaft und Arbeit vom 12. Juni 1942 Nr. 206/1942 Slg., über die Neuregelung der Bezirke und Sitze der Arbeitsämter und deren Zweigstellen.

[15] NA, ÚŘP, Kt. 23 – Aktenvermerk des Berichterstatters Dr. Pfaff aus der Gruppe X des Amts des Reichsprotektors über Inspektionsreise nach Iglau vom 23. November 1939.

[16] NA, ÚŘP, Kt. 23 – Die an das Ministerium für soziale und Gesundheitsverwaltung gerichtete Zuschrift des Reichsprotektors vom 8. Dezember 1939 Nr. II/4/I/1040 betreffend die Errichtung der Arbeitsämter: Arbeitsamt Iglau.

doch wurden die vom Ministerium versprochenen Möbel erst am Anfang des Jahres 1940 geliefert.[17] Anhand dieses Beispiels aus Iglau ist offensichtlich, dass die unzulänglichen materiellen Bedingungen in den ersten Monaten nach der Errichtung von Arbeitsämter, diese an ihrer vollwertigen Tätigkeit hinderten. Um sich über die Fortschritte beim Aufbau der Arbeitsämter zu überzeugen, realisierten die Vertreter des Amts des Reichsprotektors und des Ministeriums für soziale und Gesundheitsverwaltung eine gemeinsame Inspektionsreise nach Böhmen und Mähren von Ende November bis Anfang Dezember 1939.

Da auf die Arbeitsämter in den ersten Monaten nur Aufgaben betreffend die Arbeitsvermittlung übertragen wurden, verfügten sie über keine große Anzahl von Bediensteten. Sie waren selbstverständlich auf die Größe des vom Arbeitsamt verwalteten Sprengels und die in diesem Sprengel lebende Bevölkerungsanzahl angepasst. So hatte das Klattauer Arbeitsamt, das zu den kleineren Ämtern gehörte und im Gebäude der ehemaligen Bezirksbehörde untergebracht war, nur neun Bedienstete angestellt, die nur zwei Räume benötigten.[18] Bald wurde jedoch ihre Erweiterung gefordert, was mit den ständig anwachsenden Aufgaben zusammenhing, die 1940 und 1941 schrittweise auf die Arbeitsämter übertragen wurden. Auch in Brünn forderte das Arbeitsamt im Juni 1940 eine Erweiterung seiner Räumlichkeiten, denn den Besuchern standen nicht einmal Toiletten zur Verfügung, was regelmäßige Verschmutzungen nicht nur des Hofes des Amtes, sondern auch der Gänge und Treppen in unflätiger Weise zur Folge hatte.[19] Im Gegensatz dazu gab der Bischof von Olmütz ein relativ großes, unter Denkmalschutz stehendes, Gebäude auf dem Marktplatz dem Arbeitsamt Kremsier ab.[20]

1.3 Über die Personelle Besetzung der Arbeitsämter

Hinsichtlich der personellen Besetzung zeigten sich von Anfang an große Schwierigkeiten, vor allem bei der Besetzung der Leiter der Arbeitsämter. Weil die Arbeitsämter dem „autonomen" Ministerium für soziale und Gesundheitsverwaltung unterstanden, oblag die Ernennung der Leiter der Arbeitsämter dessen Wirkungsbereich. Mit der Besetzung musste jedoch der Reichsprotektor einverstanden sein, welcher ausdrücklich bestimmte, dass die Übernahme ehemaliger Berufsoffiziere der früheren tschechoslowakischen Armee in den Dienst als Leiter und Stellvertreter der Arbeitsämter keinesfalls in Betracht komme. Ganz ausgeschlossen vom Dienst in den Arbeitsämtern waren ehemalige Legionäre. Nach und nach arbeitete das Ministerium eine Liste mit den Namen der Vorgeschlagenen für die Besetzung der leitenden Stellen bei den Arbeitsämtern aus. In allen Fällen handelte es sich um tschechische Berufsbeamte der tschechischen inneren Verwaltung.[21]

Mit Schreiben vom 31. August 1939 an das Ministerium für soziale und Gesundheitsverwaltung wurde seitens des Amtes des Reichsprotektors ausdrücklich gesagt, dass die Arbeitsämter in Gebieten mit starker deutscher Volksgruppe, d.h. die Arbeitsämter Brünn, Budweis, Iglau, Mährisch-Ostrau und Olmütz mit volksdeutschen Leitern besetzt werden müsse. Im November 1939 wurden die Oberlandräte darauf hingewiesen worden, dass für die Arbeitsämter in den oben erwähnten Städten die Bestellung eines deutschen Leiters in Aussicht zu nehmen ist.[22] Bis auf Weiteres wurden die Sachbearbeiter für den Arbeitseinsatz bei den Oberlandräten mit kommissarischer Leitung dieser Arbeitsämter beauftragt. Dagegen stellte sich der Minister für soziale und Gesundheitsverwaltung, Dr. Vladislav Klumpar, vehement mit der Einwendung, dass es sich um einen Eingriff in die Protektoratsautonomie und einen Verstoß gegen den Erlass des Führers und Reichskanzlers über das Protektorat Böhmen und Mähren vom 16. März 1939 handle. Er machte auch auf die Tatsache aufmerksam, dass diese Arbeitsämter mit deutschen Leitern der Leitung und Einflussnahme des Ministeriums gänzlich entzogen worden seien und ihre Amtsführung in sachlicher wie personaler Beziehung nach eigenem Ermessen eingerichtet hätten. Klumpar strebte eine Kompromisslösung an, um die Stellung dieser Arbeitsämter mit der Rechtslage und mit der völkischen Gliederung der Bevölkerung ihrer Amtsbezirk wenigstens einigermaßen in Einklang zu bringen. Nach Klumpar sollte dies durch die Bestellung von stellvertretenden Leitern tschechischer Volkszugehörigkeit erfolgen.[23] Darauf teilte das Amt des Reichsprotektors dem Ministerium mit, dass die Leitung der Arbeitsämter Brünn, Budweis, Iglau, Mährisch-Ostrau und Olmütz im Interesse der wehrwirtschaftlichen Aufgaben und der wichtigen deutschen Volkstumsarbeit dieser Ämter in der Hand der Abteilungsleiter für den Arbeitseinsatz bei den Oberlandräten verleiben müsse. Die Personalunion allein sollte die notwendige straffe Lenkung des Arbeitseinsatzes im Sinne der Kriegswirtschaft und der deutschen Volkstumspolitik ermöglichen. Mit Rücksicht auf eine Sonderstellung der „Iglauer Sprachinsel" im deutschen Volkstumskampf sei darüber hinaus erwünscht, die Stelle des stellvertretenden Leiters des Arbeitsamtes Iglau deutsch zu besetzen. Die Stellvertreter der übrigen Ämter seien nach der Ansicht des Amtes des Reichsprotektors nicht von solcher Bedeutung gewesen, ihr Wirkungsbereich habe sich auf ein spezielles Sachgebiet – in der Regel die Ar-

[17] NA, ÚŘP, Kt. 23 – Die an das Amt des Reichsprotektors gerichtete Zuschrift des Oberlandrates in Iglau vom 4. Jänner 1940 Nr. Arb 200/02 betreffend die Errichtung des Arbeitsamtes Iglau.

[18] NA, ÚŘP, Kt. 785 – Aktenvermerk des Berichterstatters Dr. Pfaff aus der Gruppe X des Amts des Reichsprotektors über Inspektionsreise nach Klattau G.Z. II-4/I/1040 vom 8. Dezember 1939.

[19] NA, ÚŘP, Kt. 784 – Die an das Ministerium für soziale und Gesundheitsverwaltung gerichtete Zuschrift des Leiters des Arbeitsamtes Brünn G.Z. Arb/1600/I. vom 8. Juni 1940 betreffend die Erweiterung des Arbeitsamtes Brünn.

[20] NA, ÚŘP, Kt. 785 – Aktenvermerk des Berichterstatters Dr. Pfaff aus der Gruppe X des Amts des Reichsprotektors über Inspektionsreise nach Kremsier G.Z. X/II/1660/39 vom 24. November 1939.

[21] MZA *(Mährisches Landesarchiv Brünn = Moravský zemský archiv, Brno)*, Oberlandrát Prostějov, Kt. 8 – Die an die Oberlandräte gerichtete Zuschrift des Reichsprotektors G.Z. X/7541/39 vom 20. September 1939 betreffend die Errichtung der Arbeitsämter.

[22] NA, ÚŘP, Kt. 787 – Amtsvermerk des Oberregierungsrats Dr. Rieber aus dem Amt des Reichsprotektors betreffend die Besetzung der Stellen der Leiter und stellv. Leiter der Arbeitsämter, G.Z. II/4(1)2501/40 vom 25. Mai 1940.

[23] NA, ÚŘP, Kt. 787 – Amtsvermerk von Dr. Bertsch aus dem Amt des Reichsprotektors G.Z. Rpr. 786/40 vom 23. April 1940.

beitslosen und Kurzarbeiterhilfe – beschränkt, sodass diese mit tschechischen Angestellten besetzt werden konnten. Die politische Überprüfung der zur Ernennung zu stellvertretenden Leitern dieser Ämter vorgeschlagenen Tschechen ist durch die Gestapo erfolgt und Einwendungen wurden nur bezüglich des Vorschlages für Budweis erhoben.[24]

Gegen die Ernennung eines tschechischen Stellvertreters des Leiters des Arbeitsamts Brünn stellte sich der Brünner Oberlandrat, welcher vor nicht wiedergutzumachenden Schäden aus organisatorischer und politischer Sicht warnte.[25] Auf die Ernennung des tschechischen Vertreters des Leiters des Brünner Arbeitsamtes hatte dies jedoch keinen Einfluss.

In den an das Amt des Reichsprotektors gerichteten Berichten beschwerten sich die Oberlandräte ständig über eine schlechte Zusammenarbeit mit den tschechischen Angestellten der Arbeitsämter und über deren Fachniveau. Zum Beispiel beherrschte das Personal des Arbeitsamtes in Kremsier größtenteils die deutsche Sprache überhaupt nicht und trotz mehrfacher Aufforderung meldete sich seit Mai 1940 keiner der Angestellten zu einem Deutschkurs. Die Unkenntnis der deutschen Sprache machte die Abhaltung jedweder Dienstbesprechungen natürlich unmöglich. Die Nachbararbeitsämter in Mähren, welche infolge ihres deutschen Leiters in deutscher Sprache amtierten, beschwerten sich ständig darüber, dass sie die vom Arbeitsamt Kremsier und von seinen Zweigstellen stammenden Korrespondenz bloß in tschechischer Sprache erhalten würden, die sie nicht verstünden. Im Jahre 1940 wurde der Leiter der Zweigstelle Seelowitz des Arbeitsamtes Brünn seines Amtes mit der Begründung enthoben, dass *„er entgegen den geltenden Bestimmungen an der Eingangstüre zu seiner Zweigstelle mehrere einsprachige Anschläge in tschechischer Sprache angebracht habe“*.[26]

Zugleich wurde der tschechische Leiter des Arbeitsamtes Kremsier kritisiert, welcher keine eigene Initiative vorweisen konnte und versucht habe, die Anweisungen des Oberlandrates zu umgehen. Als der Verstoß festgestellt wurde, behauptete er, es habe sich bloß um einen einmalig vorkommenden Irrtum gehandelt. Der Oberlandrat in Kremsier forderte auch die Neubesetzung des Leiters des Arbeitsamtes mit einem deutschen Beamten, welchen er nicht kontrollieren müsse.[27]

Davon, dass die Errichtung der Arbeitsämter von einigen Schwierigkeiten geprägt war, zeugte auch der Fall der Angestellten des Arbeitsamtes Iglau. Hier kritisierte der Regierungsrat Dr. Pfaff aus dem Amt des Reichsprotektors bei seiner Inspektionsreise, dass die NSDAP für die Funktion des Arbeitsamtsleiters einen gelernten Tischler ohne jede Vorkenntnis in der Verwaltungstätigkeit durchsetzen wollte. Überhaupt ist von den sieben Beschäftigten nicht ein einziger aus einem kaufmännischen Beruf hervorgegangen, der von den verwaltungsrechtlichen Tätigkeiten des Arbeitsamtes aufgrund seiner bisherigen Erfahrungen Kenntnisse hatte. Deswegen wies das Ministerium für soziale und Gesundheitsverwaltung dem Amtsleiter zwei tschechische Militärgagisten als Beamte zu, die aber von dem deutschen Amtsleiter nicht akzeptiert wurden, da weil sie die deutsche Sprache überhaupt nicht beherrschten.[28] Gerade die Tatsache, dass die Arbeitsämter sowohl tschechische, als auch deutsche Beamte angestellt hatten, führte dazu, dass immer öfter gefordert wurde, dass vom Ministerium für Soziale und Gesundheitsverwaltung erlassene Verordnungen und Verfügungen zweisprachig erlassen werden mussten, damit diese auch von den deutschen Beamten verstanden werden konnten.[29]

Im Juni 1941 hat der Reichsprotektor entschieden, dass die Leiter der Abteilungen Arbeits- und Sozialangelegenheiten bei den Oberlandräten die kommissarische Leitung aller Arbeitsämter übernehmen sollten. Die bisherigen tschechischen Leiter der Arbeitsämter verblieben fernerhin auf ihren Dienstposten als Stellvertreter der kommissarischen Leiter und ihre Aufgabe war, den Verkehr mit tschechischen Beamten des Arbeitsamtes zu besorgen. Gemäß dem Runderlass des Ministeriums für soziale und Gesundheitsverwaltung sollte *„die Übergabe des Amtes glatt und reibungslos vollzogen werden und stets das gute Einvernehmen und gegenseitiges Verständnis mit dem kommissarischen Leiter des Amtes in Hinkunft gepflogen werden“*. Der bisherige Leiter des Arbeitsamtes hatte alle Angestellten seines Amtes und die Leiter der ihm nachgeordneten Zweigstellen einzuberufen und ihnen die erforderlichen Weisungen zu erteilen, wobei nachdrücklich zu betonen war, dass *„Alle auf ihren Plätzen gewissenhaft ihren Amtspflichten nachkommen werden“*.[30]

Die Arbeitsämter gerieten also endgültig unter deutsche Leitung und seit der Mitte des Jahres 1941 amtierten diese nur auf Deutsch bzw. zweisprachig. Nach der Errichtung des Ministeriums für Wirtschaft und Arbeit wurden die an die Leiter der Arbeitsämter gerichteten Runderlässe nur in deutscher Sprache erlassen; den sonstigen an alle Angestellten der Arbeitsämter gerichteten Runderlässe wurde die tschechische Übersetzung angeschlossen.

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[24] NA, ÚŘP, Kt. 787 – Amtsvermerk des Oberregierungsrats Dr. Rieber aus dem Amt des Reichsprotektors betreffend die Besetzung der Stellen der Leiter und stellv. Leiter der Arbeitsämter, G.Z. II/4(1)2501/40 vom 25. Mai 1940.

[25] NA, ÚŘP, Kt. 787 – Die an das Amt des Reichsprotektors gerichtete Zuschrift des Oberlandrats in Brünn betreffend den Stellvertreter des Leiters des Arbeitsamts Brünn, G.Z. Arb./2.700 vom 18. Juni 1940.

[26] MZA, B 251 Říšský protektor v Čechách a na Moravě, služebna pro zemi Moravu, Kt. 80 – Die an das Ministerium für soziale und Gesundheitsverwaltung gerichtete Zuschrift betreffend die Abberufung des Leiters der Zweigstelle Seelowitz des Arbeitsamtes Brünn, G.Z. Arb/2700/I. vom 8. Mai 1940.

[27] MZA, Oberlandrát Prostějov, Kt. 8 – Die an das Amt des Reichsprotektors gerichtete Zuschrift des Oberlandrats in Kremsier betreffend die Organisation der Arbeitsämter, G.Z. II A 120/40 vom 23. Mai 1940.

[28] NA, ÚŘP, Kt. 23 – Aktenvermerk des Berichterstatters Dr. Pfaff aus der Gruppe X des Amts des Reichsprotektors über Inspektionsreise nach Iglau vom 23. November 1939.

[29] NA, ÚŘP, Kt. 23 – Die an das Amt des Reichsprotektors gerichtete Zuschrift des Oberlandrates in Iglau betreffend die Zweisprachlichkeit der Regierungsverfügungen vom 7. September 1939.

[30] SOkA Strakonice, OÚOP Strakonice, Kt. 6, Inv.-Nr. 311 – Runderlass des Ministerium für soziale und Gesundheitsverwaltung betreffend die Ernennung der kommissarischen Leiter bei den Arbeitsämtern G.Z. P-P-3125-7/6 vom 7. Juni 1941.

Obwohl die Arbeitsämter unmittelbar nach ihrer Errichtung eine relativ niedrige Anzahl von Beamten anstellten, stieg die Anzahl der Angestellten mit den ständigen neuen Zuständigkeiten im Bereich der Arbeitslenkung sehr schnell an (im April 1943 arbeiteten bei den Arbeitsämtern 2633 Angestellten, daraus 2052 Tschechen und 581 Deutsche). Die leitenden Funktionen wurden jedoch mit Deutschen besetzt. Größtenteils wurden die deutschen Beamten in Städten mit starker deutscher Minderheit wie Budweis, Iglau oder Olmütz eingesetzt, wo sich also das Verhältnis von deutschen zu tschechischen Beamten stark zu Gunsten der Deutschen unterschied. Die Mehrheit der deutschen Beamten war beim Arbeitsamt Brünn (126 aus 232) angestellt. Im September 1943 stieg die Anzahl der Angestellten bei den Arbeitsämtern noch um weitere 200 auf 2871 Personen an.[31]

Wie das erhaltene Archivmaterial zeigt, weigerten sich einige deutsche Beamte jedoch vehement, den Dienst bei den Reichsbehörden (vor allem dann beim Amt des Oberlandrats) zu verlassen und in den Protektoratsdienst zu den Arbeitsämtern zu gehen. Sie lehnten vor allem ab, ein Gelöbnis auf die Protektoratsregierung zu leisten und begründeten dies mit angeblichem schikanösem Verhalten, welchem sie in der Zeit der Ersten Tschechoslowakischen Republik (1918-1938) seitens des tschechoslowakischen Staates ausgesetzt worden waren. So lehnte z.B. der Brünner Deutsche Viktor Stepek, als ihm vorgeschlagen wurde, sich zum hiesigen Arbeitsamt versetzen zu lassen, mit folgender Begründung ab:

„… Nun wo das jahrelange Hoffen in Erfüllung gegangen ist und ich durch die Tat des Führers deutscher Reichsbürger geworden bin, sogar bei einer deutschen Behörde Dienst tun und deutsche Volkstumsarbeit leisten kann, würde ich es als eine Kränkung und Erniedrigung empfinden, wenn ich mich jetzt den Tschechen verschreiben müsste".

… Ich würde auch nie zuwege bringen auf die Protektoratsregierung, die für mich eine tschechische Regierung ist, einen Eid abzulegen und würde es lieber vorziehen auf die Straße Steine klopfen zu gehen als mich so einer, eines Deutschen unwürdigen Handlung, schuldig zu machen".[32]

Während der ganzen Dauer der Existenz der Arbeitsämter oblag die Ernennung der Zweigstellen- oder Sachgebietsleiter der Zuständigkeit der Leiter der Arbeitsämter. Erst am Ende des Krieges behielt sich das Ministerium für Wirtschaft und Arbeit die Bestellung und Abberufung der vorgenannten leitenden Bediensteten im Interesse der Sicherung einer einheitlichen Personalpolitik vor.[33]

Die deutschen Leiter der Arbeitsämter veranstalteten jeden Monat regelmäßige Besprechung mit ihren unterstellten Mitarbeitern (meistens tschechischer Volkszugehörigkeit), wo von ihnen stets die Wichtigkeit der Tätigkeit der Arbeitsämter, die gewissenhafte Erfüllung von Dienstpflichten und ihre Verantwortung hervorgehoben wurden. Gefordert wurde auch die Erhöhung der Sprach- und Fachkompetenzen der Bediensteten, was sich im Rahmen von Schulungen und Arbeitsaufenthalten bei den Arbeitsämtern im Reich realisierte. Die Bediensteten der Arbeitsämter sollten Erfahrungen vor allem im Bereich der Berufsberatung oder mit der Karteiführung sammeln. In den oben erwähnten Besprechungen wurden die Bediensteten des Arbeitsamtes mit neuen in der Sammlung der Gesetze veröffentlichten arbeitsrechtlichen Vorschriften und mit einer Vielzahl von verschiedenen Runderlässen, Verordnungen und Anweisungen des Ministeriums, vertraut gemacht.

Der Hauptgrund, warum die Stellen der Arbeitsamtsleiter mit deutschen Beamten besetzt wurden, bestand jedoch darin, dass sie die Aufsicht über die tschechischen Bediensteten führen sollten. Im Falle eines Verdachtes, dass diese Bediensteten nicht auf die Art und Weise arbeiteten, welche von ihnen gefordert wurden, hatten die Arbeitsamtsleiter sofort einzugreifen und diese Tatsache an die Gestapo zu melden; die Gestapo führte dann die Festnahme wegen Sabotage des Kriegsarbeitseinsatzes von Arbeitskräften durch.

1.4 Innerer Aufbau der Arbeitsämter

Der innere Aufbau einzelner Arbeitsämter war von Anfang an nicht einheitlich geregelt, sodass es möglich ist, in den ersten Jahren ihrer Tätigkeit auf einen abweichenden inneren Aufbau der Arbeitsämter zu stoßen. Im Jahre 1942 entschied das Ministerium für Wirtschaft und Arbeit, dass die Organisation und Geschäftsverteilung innerhalb der Arbeitsämter einheitlich ausgerichtet werden musste, damit *„durch eine organisatorisch straffe Zusammenfassung aller Aufgaben eine sparsame, auf möglichst wenig Kräfte beschränkte Erledigung der anfallenden Arbeiten sichergestellt wird und damit die einzelnen Fachaufgaben des Arbeitsamts nur im Rahmen der zuständigen Sachgebiete, bzw. Abschnitte bearbeitet werden".*[34] Ein Arbeitsamt gliederte sich in Sachgebiete (bisher Abteilungen), diese wiederum in Abschnitte und letztere in Bearbeitungs-, Vermittlungs- oder Beratungsstellen. Es handelte es sich um:

1. Allgemeine Verwaltung,
2. Arbeitseinsatz,
3. Jugendeinsatz,
4. Arbeitseinsatzhilfe,
5. Statistik,
6. Lohnpolitik und Arbeitsrecht und
7. Gewerbeaufsicht.

Das Sachgebiet der allgemeinen Verwaltung beschäftigte sich insbesondere mit den Haushaltsfragen, der Liegenschaftsverwaltung, Materialverwaltung, Geräteverwaltung, Kraftwagenverwaltung, der Bearbeitung der Personalangelegenheiten oder

[31] PAŽOUT, J., Úřady práce v Protektorátu. In: KOKOŠKOVÁ, Z., KOKOŠKA, S., PAŽOUT, J. (Hrsg.), *Museli pracovat pro Říši: nucené pracovní nasazení českého obyvatelstva v letech 2. světové války*. Prag, 2004, S. 61.

[32] MZA, B 251 Říšský protektor v Čechách a na Moravě, služebna pro zemi Moravu, Kt. 80 – Die an den Leiter des Arbeitsamtes Brünn Dr. Peters gerichtete Zuschrift vom 8. Februar 1940.

[33] SOkA Strakonice, OÚOP Strakonice, Kt. 6, Inv.-Nr. 311 – Der an die Herren Leiter der Arbeitsämter gerichtete Runderlass des Ministeriums für Wirtschaft und Arbeit betreffend die Bestellung von Sachgebiets- und Zweigstellenleitern bei den Arbeitsämtern, G.Z. P I-3872/61/1944 vom 14. November 1944.

[34] NA, ÚŘP, Kt. 784 – Geschäftsverteilungsplan der Arbeitsämter (1942).

der Führung der Kassenbücher. Das Sachgebiet für Arbeitseinsatz gehörte zu den bedeutendsten Sachgebieten des Arbeitsamtes und wurde auch mit der größter Anzahl von Bediensteten besetzt. Darunter fielen insbesondere die Beschäftigungsgenehmigung von Ausländern, Ausländerkartei, Judeneinsatz, zentrale Aufgaben des Arbeitsbuches, Aufsicht über gewerbsmäßige und nichtgewerbsmäßige Arbeitsvermittlung und Arbeitseinsatz sowohl auf dem Protektoratsgebiet als auch im Reich. Im Sachgebiet Jugendeinsatz waren alle Aufgaben, die außerhalb der eigentlichen Beratungs- und Vermittlungstätigkeit lagen, zusammengefasst, also beispielsweise die psychologischen Eignungsuntersuchungen. Das sechste Sachgebiet beschäftigte sich mit den Aufgaben im Bereich der Arbeitseinsatzhilfe, wie der Unterstützung bei erster Jugendbeschäftigung, Unterstützung von Schulungen, ärztlichen Untersuchungen, Aufsicht über die Einhaltung der Arbeitsruhe im Bauwesen oder Gewährung von kurzfristigen Unterstützungen für Betriebe. Die Notwendigkeit, ein besonderes Sachgebiet Statistik zu schaffen, ergab sich daraus, dass die Statistik damals ein Aufgabengebiet von besonders großer Bedeutung war, denn sie sollte zur effizienteren Ausnutzung von Arbeitskräften beitragen. Die Arbeitsämter waren verpflichtet, Tausende von verschiedenen statistischen Berichten zu erstatten, die dann im Ministerium bearbeitet wurden. Die Aufsicht über die Einhaltung der geltenden Lohnvorschriften für einzelne Arbeitsbereiche übernahm das Sachgebiet für Lohnpolitik; es war auch für die Verfolgung der Verletzung der Arbeitsmoral zuständig. Die Aufsicht oblag auch dem weiteren Sachgebiet – der Gewerbeinspektion, die seit Oktober 1942 in die Arbeitsämter als eigenes Sachgebiet eingegliedert wurde. Ihre Aufgabe war, alle Betriebe ihres Bezirks auf Einhaltung der Arbeitsschutzbestimmungen zu überprüfen.

1.5 Funktion und Tätigkeit der Arbeitsämter

Die Arbeitsämter wurden 1939 dazu errichtet, um die bisherigen Aufgaben der öffentlichen Vermittlungsstellen zu übernehmen. Sie sollten sich also mit der Besetzung freier Arbeitsplätze, mit der Berufsberatung und der Kontrolle der Arbeitslosen beschäftigen, die eine Unterstützung aus öffentlichen Mitteln bezogen (Arbeitslosenunterstützung, produktive Fürsorge usw.). Das Arbeitsamt trug also Sorge dafür, dass die in seinem Sprengel freien Arbeits- und Lehrstellen besetzt wurden, wobei darauf Rücksicht genommen wurde, dass den besonderen Bedürfnissen des Arbeitsortes, den körperlichen und fachlichen Eigenschaften des Arbeitnehmers und seinen persönlichen und Familienverhältnissen Genüge getan wurde. So sollte es zu einem Ausgleich zwischen den freien Stellen und den freien Arbeitskräften kommen. Sofern die freien Stellen im eigenen Sprengel nicht besetzt werden konnten oder sofern die angemeldeten Arbeitsbewerber nicht untergebracht werden konnten, geschah die Arbeitsvermittlung unter Mitwirkung der benachbarten Arbeitsämter. Das Arbeitsamt wirkte weiter bei der Arbeitsvermittlung ins Reich mit.

Die Arbeitsämter führten auch die Vorschriften über die allgemeine Arbeitspflicht durch, wobei sie namentlich die Verpflichtungsbescheide herausgaben. Sie führten auch die Zählung der Arbeitslosen durch, erstellten eine Statistik, eine textliche Beschreibung des Arbeitseinsatzes aufgrund eines systematischen Berufsverzeichnisses und der wirtschaftlichen Verhältnisse und legten für ihren Sprengel monatlich statistische Meldung dem Ministerium vor.[35]

Seit Ende des Jahres 1939 wurden die Arbeitsämter in das System der Arbeitslenkung eingeschaltet und stellten seinen Grundpfeiler dar. Sie erteilten die Zustimmung zum Abschluss oder Änderung des Arbeitsverhältnisses und teilten die Arbeitskräfte in die Landwirtschaft und Industrie, sowohl im Protektorat als auch auf sonstigem Reichsgebiet, ein. Seit 1941 wurden den Arbeitsämtern die Aufgaben im Bereich der Steuerung der Lohnpolitik, der Berufsberatung und des Jugendeinsatzes anvertraut. Die Arbeitsämter waren nicht nur auf dem Gebiet der Arbeitsleitung tätig, sondern, als die Agenda der Auszahlung der Arbeitslosenhilfe auf sie im Mai 1940 übertragen wurde, auch im Bereich der Sozialversicherung.[36]

In der Zeit der Besatzung verbreitete sich unter der Bevölkerung des Protektorats Gerüchte über die Bestechlichkeit der bei den Arbeitsämtern angestellten Beamten, was auch eine entdeckte Korruptionsaffäre beim Arbeitsamt Brünn bestätigte. Sie rief seinerzeit eine relativ starke Reaktion bei den Besatzungsbehörden hervor, denn sie betraf vor allem deutsche Beamte, die alle Mitglieder der NSDAP waren und einige sogar der SS angehörten. Im Mai 1943 wurden der Leiter der Zweigstelle Göding des Arbeitsamtes in Brünn und weitere 15 Beamte, einschließlich zweier Amtsärzte, in Haft genommen. Sie hatten gestanden, Bestechungsgelder von einigen Personen für die Hilfe bei der Umgehung des Arbeitseinsatzes genommen zu haben. Die Höhe der angenommenen Bestechungsgelder sind aus heutiger Sicht als marginal zu betrachten, in Kriegszeiten hatten die übergebenen Lebensmittel jedoch einen nicht zu verachtenden Wert. Es handelte sich z.B. um 2 kg Fett, 15 Eier, 3/8 Sliwowitz, 3 kg Kirschen, 500 g Speck, 5 kg Marillen oder einen Weinkellerbesuch.[37] Die festgenommenen Beamten wurden vor das Sondergericht Brünn gestellt. Diese Korruptionsaffäre beunruhigte auch den Staatssekretär Karl H. Frank, der sich über die Ergebnisse der Ermittlungen ständig informieren ließ und sofort nach der Inhaftierung der verdächtigen Beamten einen Befehl an die Sicherheitskräfte erteilte, auch die sonstigen Arbeitsämter zu überprüfen, ob es bei ihnen zu Korruptionshandlungen gekommen war. Alle Amtsärzte, die für die Arbeitsämter ärztliche Untersuchungen durchführten, mussten zukünftig durch den Sicherheitsdienst erneut überprüft werden.[38] Zum Erwerb von Informationen über mögliches Kor-

[35] NA, ÚŘP, Kt. 23 – Dienstvorschrift des Ministers für soziale und Gesundheitsverwaltung betreffend den Wirkungsbereich der Arbeitsämter und ihrer Zweigstellen G.Z. E 4110-6/9-1939 vom 6. September 1939.

[36] Regierungsverordnung vom 19. März 1940 Nr. 101/1940 Slg., über die Gewährung einer Arbeitslosenhilfe.

[37] NA, ÚŘP-ST, Inv.-Nr. 568, sign. 109-4/315, Kt. 27 – Tagesbericht der deutschen Kriminalpolizei in Prag vom 13. September 1943.

[38] NA, ÚŘP-ST, Inv.-Nr. 568, sign. 109-4/315, Kt. 27 – Die an den Staatssekretär gerichtete Zuschrift des Leiters der Hauptabteilung V. des Amts des Reichsprotektors betreffend die Verhaftung von Angehörigen des Arbeitsamtes Brünn für passive Bestechung, G.Z. 1398/43 vom 6. Juli 1943.

ruptionsverhalten der Beamten der Arbeitsämter wurden auch Konfidenten ausgenutzt. Beispielsweise wurden im Arbeitsamt Prag im Oktober 1943 zwei Konfidenten tschechischer Volkszugehörigkeit eingesetzt. Diesen wurde dafür eine Entlohnung in der Höhe von 1000 Kronen monatlich ausgezahlt.[39]

Als 1939 die Arbeitsämter errichtet wurden, enthielten die entsprechenden Rechtsvorschriften keine Regelung über das Verfahren vor den Arbeitsämtern. Dieses Verfahren blieb lange also ohne eine verfahrensrechtliche Regelung und es existierten nicht viele Möglichkeiten, wie die Entscheidung des Arbeitsamtes umgestoßen werden konnte. Es war zwar möglich, ein Rechtsmittel beim Obersten Verwaltungsgericht einzulegen, jedoch blieb dies aufgrund der langen Verfahrensdauer und der hohen Kosten nur eine theoretische Möglichkeit zur Kontrolle der Tätigkeiten des Arbeitsamts. Die erste verfahrensrechtliche Norm für die Tätigkeit der Arbeitsämter wurde im April 1942 im Zusammenhang mit neuen strafrechtlichen Zuständigkeiten[40] erlassen, welche die Arbeitsämter mit der Regierungsverordnung Nr. 13/1942 Slg., über die Sicherung der Lohn- und Gehaltsstabilität, sowie der Arbeitsmoral erhalten haben. Diese Regierungsverordnung regelte die Sanktionen für Verstöße gegen die sich aus dem Arbeitsverhältnis ergebenden Pflichten, wie Verletzung der Arbeitsmoral, rechtswidrige Beendigung des Arbeitsverhältnisses oder Nichtantreten der Arbeit. Die Arbeitsämter waren berechtigt, auch den Arbeitgebern eine Ordnungsstrafe von bis zu 100.000 Kronen aufzuerlegen, welche Lohnvorschriften verletzten, die Arbeitskraft der Arbeitnehmer missbrauchten, die Ehre der Arbeitnehmer gröblich kränkten oder in sonstiger Weise ihre sozialen Pflichten gegenüber den Arbeitnehmern verletzten. Vor der Festsetzung einer Ordnungsstrafe sollte der Beschuldigte über den ihm zur Last gelegten Verstoß vernommen werden; erschien die vorgeladene Person ohne ausreichende Entschuldigung nicht, so konnte das Arbeitsamt um Vorführung bei der Bezirksbehörde (Regierungs--Polizeibehörde) ersuchen. Die Festsetzung einer Ordnungsstrafe erfolgte durch Ordnungsstrafbescheid. Dieser hatte den Ausspruch, die Begründung und die Rechtsmittelbelehrung zu enthalten. In dem Ausspruch war die strafbare Handlung, die verletzten Vorschriften, die auferlegte Strafe und gegebenenfalls die Entscheidung über die Verfahrenskosten anzuführen. In der Begründung waren die Ergebnisse des Verfahrens, die rechtliche Beurteilung der Sache und gegebenenfalls auch die Erwägungen, die bei der Beweiswürdigung maßgebend waren, zusammenzufassen. Gegen den Ordnungsstrafbescheid konnte der Betroffene binnen 15 Tagen nach Zustellung Berufung erheben, über die das Ministerium für Wirtschaft und Arbeit entschied.

Die Aufgaben der Bediensteten der Arbeitsämter bestanden auch in der Durchführung von Kontrollen direkt in den Betrieben, beim Einsatz der Arbeitskräfte zu landwirtschaftlichen Arbeiten oder auf den kriegswichtigen Bauten. Jedes Arbeitsamt verfügte mindestens über einen Dienstwagen, der für die Kontrollen genutzt wurde.

Als in den letzten Kriegsjahren der Krankenstand von Arbeitnehmern, die sich dem Einsatz und der schweren Arbeit in einigen Waffenbetrieben oder im Bergbau entziehen wollten, rapide anstieg, begannen die Arbeitsämter zu überprüfen, ob der Arbeitnehmer tatsächlich krank war oder ob ihm der behandelnde tschechische Arzt bloß eine Arbeitsunfähigkeitsbescheinigung ausstellte. Im Jahre 1943 erreichte der Krankenstand in einigen Industriebetrieben in Mährisch-Ostrau fast 20 %. Die Kontrollen führten die Arbeitsämter zusammen mit den Krankenkassen durch, wobei sie auch die Amtsärzte für die Kontrollen einteilten.[41]

Für Erfüllung der mannigfaltigen Aufgaben auf dem Gebiet des Arbeitseinsatzes nutzten die Arbeitsämter sehr oft die Mitwirkung des ärztlichen Dienstes. Der Arzt wurde vom Arbeitsamt zur Untersuchung herangezogen, wenn Zweifel über die Einsatzfähigkeit der in die Arbeit einzusetzenden Personen bestanden oder die Eignung für bestimmte Arbeiten oder Berufe ermittelt werden musste. Insbesondere handelte es sich um die Ablehnung angebotener Arbeit oder freiwilliger Aufgabe von Arbeitsstellen, wenn dies unter Hinweis auf körperliche Behinderung oder Krankheit erfolgte. Ferner wurden ärztliche Untersuchungen vor der Vermittlung von draußen geleisteten Arbeiten bzw. mit lagerähnlicher Unterbringung oder vor der Vermittlung von Arbeitskräften, die beruflich in engem Kontakt mit Menschen kamen und diese gegebenenfalls gesundheitlich gefährden konnten (z. B. im Nahrungs- und Genussmittelgewerbe). Bei den Untersuchungen waren Einzeluntersuchungen und Reihenuntersuchungen zu unterscheiden. Die Reihenuntersuchungen wurden dann vorgenommen, wenn in kurzer Zeit eine größere Zahl von Arbeitskräften für bestimmte Arbeiten gestellt werden mussten. Die Reihenuntersuchungen wurden nach völliger Entkleidung vorgenommen und beschränkten sich auf die Beurteilung der Eignung für eine bestimmte vorgesehene Arbeit. Bei einer lagermäßigen Unterbringung der Arbeitskräfte war unbedingt festzustellen, ob der Untersuchte frei von ansteckenden oder ekelerregenden Krankheiten und Ungeziefer war und keine besondere Diät einzuhalten hatte.

Die Einzeluntersuchung hingegen bezweckte eine einwandfreie Feststellung des körperlichen und geistigen Gesundheitszustandes mit dem Ziel zu beurteilen, für welche Arbeiten der Untersuchte tauglich war und welche Arbeiten er nicht verrichten konnte. Die ärztliche Untersuchung beim behandelnden Arzt oder beim Amtsarzt des Oberlandrats wurde vom Arbeitsamt beantragt. Die Anträge auf Untersuchung und Untersuchungsbogen durften nie dem Untersuchten mitgegeben werden, sondern waren in verschlossenem Umschlag mit der Post zu befördern.[42]

[39] NA, NSM, Inv.-Nr. 1081, sign. 110-11/19, Kt. 88 – Die an den Staatssekretär gerichtete Zuschrift des Leiters der Hauptabteilung V. des Amts des Reichsprotektors betreffend die Überwachung des Geschäftsverkehrs beim Arbeitsamt Prag, G.Z. 1338/43geh. vom 8. Dezember 1943.

[40] Regierungsverordnung vom 2. April 1942 Nr. 128/1942 Slg., über das Ordnungsstrafverfahren der Arbeitsämter.

[41] NA, MHP-dodatky, Inv.-Nr. A IV 3396, Kt. 250 – Bericht des Vertreters der Zentralsozialversicherungsanstalt betreffend die Mitwirkung des Arbeitsamtes bei der Krankenkontrolle vom 1. November 1943.

[42] MZA, Oberlandrát Prostějov, Kt. 8 – Die an die Oberlandräte gerichtete Zuschrift des Reichsprotektors betreffend die Richtlinien für die Durchführung von ärztlichen Untersuchungen bei den Arbeitsämtern, G.Z. 5422-X/8059/39 vom 7. Oktober 1939.

1.3 Das Ministerium für soziale und Gesundheitsverwaltung und das Ministerium für Wirtschaft und Arbeit

Das Ministerium für soziale und Gesundheitsverwaltung entstand aufgrund der in der Zeit der sog. Zweiten Tschechoslowakischen Republik (1938-1939) durchgeführten Reorganisation als Nachfolger des Ministeriums für öffentliche Gesundheit und Sport und des Ministerium für soziale Fürsorge. An der Spitze des neu errichteten Ministeriums stand mehr als drei Jahre, bis zu seiner Aufhebung im Jänner 1942, JUDr. Vladislav Klumpar (*1893 – †1979), bisher langjähriger Direktor der Zentralsozialversicherungsanstalt. Klumpar setzte sich während der ganzen Zeit seines Wirkens in dem Ministerium stets für den Schutz der tschechischen Arbeitnehmer im Bereich des Arbeitsrechts ein, erhob Einwendungen und verwahrte sich gegen einige aus dem Amt des Reichsprotektors stammende Entwürfe, und zwar vor allem gegen denjenigen betreffend des Arbeitseinsatz oder der Besetzung der leitenden Stellen bei den Arbeitsämtern durch deutsche Beamte. In den meisten Fällen kam es trotzdem zur Durchsetzung der deutschen Konzeption und der vom Amt des Reichsprotektors entworfenen Rechtsvorschriften.

Das Ministerium hatte zwei Hauptfunktionen, und zwar eine legislative und eine vollziehende. Hinsichtlich des Arbeitsrechts bereitete es für die Regierungssitzungen die Entwürfe von Regierungsverordnungen vor, die es dann durch eigene Verordnungen und Erlässen durchführte. Zugleich handelte es sich um eine übergeordnete Behörde für die Arbeitsämter, welchen es Weisungen erteilte und mit Hilfe von Tausenden verschiedener Runderlässe ihre Tätigkeit regelte. Das Ministerium funktionierte zugleich auch als ein Aufsichts- und Kontrollorgan und als Berufungsinstanz.

Aus organisatorischer Sicht ging das Ministerium für soziale und Gesundheitsverwaltung einige grundsätzliche Änderungen durch, welche eine Reflexion der fortschreitenden Erlassung von großer Anzahl arbeitsrechtlicher Normen, vor allem im Bereich des Arbeitseinsatzes darstellten.

Am Anfang des Jahres 1940 verfügte das Ministerium über insgesamt sieben Sachgebiete, welche weiter in Abteilungen gegliedert wurden. Der Bereich der Sozialpolitik, des Arbeitsrechts und des Verbraucherschutzes fiel in das dritte Sachgebiet.[43] Sowohl der Leiter des dritten Sachgebietes, als auch sein Stellvertreter waren Staatsangehörige des Protektorats tschechischer Volkszugehörigkeit. Die überwiegende Mehrheit der Abteilungsleiter verfügte über eine juristische Ausbildung und den Dienstgrad eines Oberregierungs- oder Ministerialrats.

Die Besetzung des Ministeriums für soziale und Gesundheitsverwaltung mit tschechischen Beamten dauerte jedoch nur bis Oktober 1941, als die Leitung des dritten Sachgebietes und einiger Abteilungen mit deutschen Beamten besetzt wurden, welche auf das Ministerium aus dem Amt des Reichsprotektors übergingen, wo sie sich bisher mit dem arbeitsrechtlichen Bereich beschäftigten und deswegen mit dem Arbeitsbereich sehr gut vertraut waren. Obwohl die deutschen Beamten in den vergangenen zweieinhalb Jahren die arbeitsrechtlichen Vorschriften nur indirekt aus ihren im Amt des Reichsprotektors bekleideten Funktionen, da sie dort nur die Zustimmung zur Verlautbarung der Normen der Protektoratsregierung und der Protektoratsministerien erteilten, beeinflussten, widmeten sie sich ab der Versetzung direkt den legislativen Tätigkeiten. Der ganze legislative Prozess wurde dadurch wesentlich verkürzt, da die Rechtsnormen jetzt den Interessen und Anforderungen des Deutschen Reiches entsprachen. Zusammen mit der deutschen Leitung des dritten Sachgebietes des Ministeriums kamen jedoch auch eine Reihe von deutschen Referenten, was zur Folge hatte, dass es zum Jahreswechsel 1941/1942 das Ministerium nur noch in deutscher Sprache amtierte, wenn auch noch in den Anfängen einige Runderlässe zweisprachig erlassen wurden.

Die wesentlichste Änderung wurde im Jänner 1942 im Rahmen der sog. Heydrichs Verwaltungsreform[44] durchgeführt, als ein neues großes mit umfangreichen Kompetenzen ausgestattetes Ministerium für Wirtschaft und Arbeit, auf welches die Zuständigkeiten des aufgehobenen Ministeriums für Industrie, Handel und Gewerbe und Ministeriums für soziale und Gesundheitsverwaltung übergingen.[45] Unter das neue Ministerium fielen sämtliche Wirtschaftsagenden, die eine weitreichende Exploitation der Wirtschaft in den böhmischen Ländern mithilfe der deutschen Leitung erreichen sollte. An der Spitze des Ministeriums für Wirtschaft und Arbeit stand Dr. Walter Bertsch, welcher bisher eine Spitzenfunktion im Amt des Reichsprotektors bekleidete. Bertsch war der einzige Deutsche, der das Amt eines Ministers in der Protektoratsregierung wahrgenommen hatte.

Gerade die aus politischer Sicht problematische Besetzung des Ministeriums für Wirtschaft und Arbeit mit einem Deutschen (in Bezug auf den Verstoß gegen die versprochene Autonomie des Protektorats) zeigt, welche Bedeutung und Wichtigkeit die Besatzungsorgane diesem Ministerium zusprachen. Minister Bertsch stellte ein wichtiges Glied in der deutschen Besatzungsorganisation dar und war für die wirtschaftliche Ausbeutung des Protektorats verantwortlich. Unter dem ansteigenden Einfluss vom Staatssekretär Karl H. Frank und den durch den Krieg hervorgerufenen Bedürfnissen setzte er die deutschen Forderungen immer nachdrücklicher durch.[46] Bertsch war ein außerordentlich fähiger Beamter und kennzeichnete sich durch großen Fleiß, jedoch auch durch eine absolute Zielstrebigkeit bei Durchsetzung seiner Ziele, ohne Rücksicht auf die Opfer, aus.

Er war im regelmäßigen Kontakt mit hohen Offizieren der Berliner Reichsführung der SS und erhielt von ihnen Anweisungen. Der Gehorsamkeit seiner Beamten versicherte sich angeblich dadurch, dass er sich auf seinen engen Kontakt zu dem

[43] SOkA Strakonice, OÚOP Strakonice, Kt. 5, Inv.-Nr. 301 – Runderlass des Präsidiums des Ministeriums für soziale und Gesundheitsverwaltung Nr. 19 betreffend die Organisationsübersicht des Ministeriums für soziale und Gesundheitsverwaltung G.Z. P-3121-31/1-1940 vom 28. Februar 1940.

[44] Dazu siehe ausführlich z. B. MILOTOVÁ, J., Výsledky Heydrichovy správní reformy z pohledu okupačního aparátu. In: *Paginae historiae: sborník Státního ústředního archivu v Praze*, vol. 2, 1994, S. 161-174.

[45] Regierungsverordnung vom 15. Jänner 1942 Nr. 14/1942 Slg., über die Neuorganisation einiger Zentralbehörden.

[46] SOA Praha *(Staatliches Gebietsarchiv Prag = Státní oblastní Archiv Praha)*, MLS Praha, Akte Ls. 1029/45 – Strafanzeige gegen Dr. Walter Bertsch, G.Z. 67124/48 vom 22. November 1948.

Befehlshaber der Sicherheitspolizei und des SD in Prag, Erwin Weinmann, berief.[47]

Aus organisatorischer Sicht gliederte sich das Ministerium in zwei Bereiche: Wirtschaft (W) und Arbeit (A). Der Bereich der Arbeit hatte fünf Sachgebiete, wobei an der Spitze von drei Sachgebieten ein deutscher Leiter stand und zwei wurden der tschechischen Leitung überlassen; es handelte sich jedoch aus Sicht der Deutschen um unbedeutende Bereiche (Zentralgewerbeinspektorat und Fürsorge der Kriegsbeschädigten).

Die deutschen Beamten im Ministerium für Wirtschaft und Arbeit stellten eine isolierte Sondergruppe dar, deren Kontakt mit den tschechischen Beamten sich auf ein absolutes Minimum beschränkte. Es fanden auch separate Besprechungen für deutsche und tschechische Bedienstete statt.[48]

Zum Leiter des Bereiches Arbeit (A) wurde der Ministerialrat Dr. Wilhelm Dennler ernannt, welcher ebenfalls aus dem Amt des Reichsprotektors stammte. Dennler galt als einer der leistungsfähigen Ministerialbeamten und als Vertreter des Ministers Bertsch unterzeichnete er die Mehrheit der vom Ministerium für Wirtschaft und Arbeit erlassenen Verordnungen, Runderlässe und Instruktionen. Die Stellen der Abteilungs- und Referatsleiter wurden von deutschen, beim Amts des Protektors tätigen, Beamten besetzt, wodurch eigentlich eine Personalunion geschaffen war, die in der parallelen Ausübung der Verwaltungstätigkeit durch die Besatzungsbeamten in deutschen und autonomen (tschechischen) Behörden bestand.[49]

Bei einer gründlicheren Analyse der erhaltenen Archivmaterialien stößt man jedoch im Zusammenhang mit personeller Besetzung des Ministeriums für Wirtschaft und Arbeit auf eine sehr interessante Tatsache, die einer allgemein eingelebten Vorstellung darüber widerspricht, dass *„sowohl in die Besatzungs- als auch in die autonomen Behörden die überzeugten Nationalsozialisten eingesetzt worden seien, denen um nichts anderes ginge als um Verfolgung von nationalsozialistischen Zielen“*.[50]

Gerade für zwei der höchsten Beamten des Ministeriums für Wirtschaft und Arbeit galt diese Einschätzung jedoch nicht. Es handelte sich gerade um den Ministerialrat Dr. Wilhelm Dennler[51] und den Leiter der wichtigen Abteilung A1, den Oberregierungsrat Dr. Heinrich Rieber.[52] Keiner von ihnen kann als fanatischer oder überzeugter Nationalsozialist betrachtet wer-

[47] ABS *(Archiv der Sicherheitseinheiten, Prag = Archiv bezpečnostních složek, Praha)*, Ústředna Státní bezpečnosti (305), Inv.-Nr. 305-361-6 – Bericht von Dr. Heinrich Rieber über den Minister für Wirtschaft und Arbeit Dr. Walter Bertsch vom 18. November 1946.

[48] ABS, Ústředna Státní bezpečnosti (305), Inv.-Nr. 305-701-1 – Zuschrift des Betriebsrates des Ministeriums für Industrie betreffend die Ermittlung von Dr. Wilhelm Dennler vom 15. Oktober 1945.

[49] MILOTOVÁ, J., *Heydrichova správní reforma v kontextu správně politického vývoje českých zemí v letech nacistické okupace*. Dissertation. Prag, 1988, S. 138.

[50] Zum Beispiel BRANDES, D., *Češi pod německým protektorátem. Okupační politika, kolaborace a odboj*. Prag, 1999.

[51] Dr. Wilhelm Dennler (*27. April 1902 in Lauf) war ursprünglich beim Landesarbeitsamt München angestellt und im Oktober 1939 nach Prag zum Amt des Reichsprotektors versetzt, wo er zuerst in der Wirtschaftsabteilung arbeitete und sich mit Sozialfragen beschäftigte. Nach der Ernennung W. Bertschs zum Minister für Wirtschaft und Arbeit ging auch Dennler auf dieses Ministerium über, wo er zum Stellvertreter des Ministers und zum Leiter des Bereiches Arbeit (A) wurde. In dem Ministerium verblieb er bis das Kriegsende.
Als einer der wenigen deutschen Beamten lernte er die tschechische Sprache und mit Personen, die des Deutschen nicht mächtig waren oder mit Beamten nur mit Teilkenntnissen des Deutschen, sprach er tschechisch. So hielt er z.B. beim Besuch von tschechischen Arbeitern seine Rede auf Tschechisch. Für seine Tschechofilie wurde er von Seiten der Deutschen mehrmals kritisiert. Im Jahre 1943 heiratete er eine Tschechin Marie Grégrová, was seinerzeit ein großes Aufsehen erregte, denn er hatte dazu keine Genehmigung seitens der deutschen Stellen und aus politischer Sicht war eine solche Ehe völlig unzulässig. Zur Strafe sollte er seinen hohen Posten auf dem Ministerium für Wirtschaft und Arbeit verlassen und zurück ins Reich versetzt werden. Aufgrund von mangelndem Personal kam es dazu jedoch nicht. In der Zeit des Maiaufstandes wurde Dennler in Prag verhaftet, unter unmenschlichen Bedingungen in Sammellagern interniert und einer grausamen Behandlung und den Ermittlungen unterzogen. Es konnte ihm jedoch keine Schuld nachgewiesen werden, zu seinen Gunsten sagten eine Reihe von Personen einschließlich des ehemaligen Ministers Klumpar aus. Nach den Nachkriegsaussagen der tschechischen Beamten des Ministeriums sollte Dennler beliebt und immer hoch geachtet gewesen sein und mehrmals für tschechische Interessen interveniert haben.
Dennler wurde freigelassen und erst am 27. August 1947 nach Deutschland vertrieben. Seine Erinnerungen an die Jahre 1939-1947 zeichnete er im Buch *„Die böhmische Passion“*. Freiburg i. Br., 1953 auf. Auf einigen Stellen in diesem Buch schildert Dennler die Verhältnisse im Protektorat sehr idyllisch, was der Wirklichkeit nicht entsprach.
ABS, Ústředna Státní bezpečnosti (305), Inv.-Nr. 305-701-1 – Ermittlungsakte von W. Dennler.

[52] Dr. Heinrich Rieber (* 14. August 1898 in Basel) arbeitete an der juristischen Fakultät und werkte als wissenschaftlicher Mitarbeiter an einigen wissenschaftlichen Werken aus dem Bereich des Arbeitsrechts mit. Nachstehend wurde er als Hilfskraft bei der Arbeitsverwaltung in Hessen und in Rheinland angestellt und bemühte sich mehrmals um Versetzung auf eine der süddeutschen Universitäten, um sich habilitieren zu können. Im Juni 1939 wurde er jedoch gegen seinen Willen nach Prag zum Amt des Reichsprotektors versetzt, wo ihm die Gruppe für allgemeine Verwaltungsangelegenheiten und Abteilung für Arbeitslosenversicherung zugeteilt wurde. Zugleich funktionierte er als eine Verbindungsperson zwischen dem Amt des Reichsprotektors und dem Ministerium für soziale und Gesundheitsverwaltung. Hier lernte er den Minister Klumpar und seine Mitarbeiter kennen; im Jahre 1941 wurde ihm seine Tschechofilie vorgeworfen. Nach der Errichtung des Ministeriums für Wirtschaft und Arbeit widersprach er einigen aus militärisch-wirtschaftlicher Sicht bedingten Maßnahmen des Ministers Bertsch, sodass er in den nächsten Jahren fachlich isoliert wurde. Rieber führte Kodifikationsarbeiten im Bereich des Arbeitsrechts zum Zwecke der Vereinheitlichung der Rechtsnormen über den Arbeitseinsatz und die Arbeitslosenversicherung in eine Regierungsverordnung.
Heinrich Rieber war gegen den Nationalsozialismus eingestellt und intervenierte seit seinem Aufenthalt in Prag zu Gunsten der Tschechen. Er schaltete sich sogar in die tschechische Widerstandsbewegung ein, welcher er vertrauliche Berichte über den Arbeitseinsatz in Orten mitteilte, wo die Fabriken gebaut wurden. Nach London wurde sogar eine Fotokopie des vertraulichen Berichtes aus der Beratung Hitlers mit A. Speer und F. Sauckel über die Mobilisierung der Arbeitskräfte in ganz Europa zugestellt.
Nach Kriegsende kehrte Rieber nach Deutschland zurück, wo er als Referent für die Sozialversicherung arbeitete. Im Juli 1946 wurde er jedoch von den Amerikanern festgenommen und nachstehend in die Tschechoslowakei gebracht, wo er ein Jahr lang ermittelt wurde, wo er jedoch aus den oben angeführten Gründen wieder freigelassen wurde.
ABS, Ústředna Státní bezpečnosti (305), Inv.-Nr. 305-361-6 – Lebenslauf von Dr. Heinrich Rieber und Zeugenaussagen von JUDr. Oldřich Pecl und MUDr. Quido Mann.

den, wenn auch beide selbstverständlich zu den Mitgliedern der NSDAP und der NS-Organisationen gehörten, denn ohne die Mitgliedschaft käme die Bekleidung solch hoher Funktionen im Staatsapparat überhaupt nicht in Betracht. Wenn auch der bedeutende tschechische Historiker Miroslav Kárný Dr. Dennler im Zusammenhang mit seiner Tätigkeit in dem Ministerium *„für einen Hauptorganisatoren des Totaleinsatzes von Tschechen im Reich"* [53] bezeichnet, ist es notwendig festzustellen, dass sowohl Dennler als auch Rieber nicht in der Absicht handelten, die tschechische Bevölkerung zu liquidieren oder zu schädigen, wie es z. B. bei den Oberlandräten der Fall war, sondern sich unter Beachtung der Traditionen des deutschen Beamtentums bemühten, konsequent ihre Pflicht zu tun und mithilfe der Rechtsnormen das gesetzte Ziel zu erreichen, d.h. so viel Arbeitskräfte wie möglich für die deutsche Wirtschaft anzuwerben. Die Erfüllung von Dienstpflichten bezeugt auch die Tatsache, dass im Unterschied zu anderen deutschen Beamten, die in den letzten Kriegstagen Prag verließen, Dennler auf seinem Platz blieb. Noch am 4. Mai 1945 unternahm er eine Inspektionsreise zum Arbeitsamt in Strakonitz und kehrte am nächsten Tag nach Prag in das Ministerium, obwohl er angesichts der geographischen Nähe von Strakonitz zu den damaligen Grenzen des Protektorats nach Deutschland fliehen und sich so seinem künftigen Schicksal entziehen hätte können.

Das Ministerium für Wirtschaft und Arbeit tagte zuletzt am 5. Mai 1945 vormittags, als der Prager Aufstand ausbrach. Während des Vormittags hatten die Beamten noch telefonische Anfragen der Arbeitsämter zu erledigen, wie diese vorgehen sollten, wenn es in ihrer Stadt zu einem Umsturz kam. Dennler traf sich noch in diesem Schicksalsmoment mit dem ehemaligem Minister Dr. Klumpar, mit welchem er in der Vergangenheit sehr gute Beziehungen pflegte, um die Sicherheit der deutschen Beamten seines Ministeriums, die bis Ende des Protektorats in Prag blieben zu gewährleisten.[54]

1.4 Das Amt des Reichsprotektors

Der Reichsprotektor[55] wurde durch den Führer und Reichskanzler als Wahrer der Reichsinteressen in Böhmen und Mähren ernannt. Er hatte als Vertreter des Führers und als Beauftragter der Reichsregierung die Aufgabe, für die Beachtung der politischen Richtlinien des Führers zu sorgen. Die Mitglieder der Regierung des Protektorats wurden vom Reichsprotektor bestätigt. Der Reichsprotektor war befugt, sich über alle Maßnahmen der Regierung des Protektorats unterrichten zu lassen und ihr Ratschläge zu erteilen. Er konnte gegen Maßnahmen, die das Reich zu schädigen geeignet waren, Einspruch einlegen und bei Gefahr im Verzug die im gemeinsamen Interesse notwendigen Anordnungen treffen. Der Reichsprotektor konnte also durch Verordnung das autonome (bisherige tschechische) Recht ändern, soweit das gemeinsame Interesse es erforderte. Bei Gefahr im Verzug konnte der Reichsprotektor Rechtsvorschriften jeder Art erlassen. Die Kundmachung von Rechtsvorschriften sowie der Vollzug von Verwaltungsmaßnahmen und rechtskräftigen gerichtlichen Urteilen war auszusetzen, wenn der Reichsprotektor Einspruch einlegte.[56]

Das in Prag 1939 errichtete Amt des Reichsprotektors stellte im Protektorat das oberste Organ dar, welches im Bereich des Arbeitsrechts und der Lenkung der Arbeit die Richtung bestimmte. In diesem Amt arbeiteten Hunderte von sehr gut qualifizierten Beamten, die im Laufe des Jahres 1939 aus den Reichsbehörden nach Prag versetzt wurden. Im Falle der Fachleute im Bereich des Arbeitsrechts und vor allem über den Arbeitseinsatz handelte es sich meist um Beamte der Arbeitsämter im Reich.

Die Beamten des Amtes des Reichsprotektors kontrollierten, ob die Regierungsverordnungen und sonstige Durchführungsvorschriften in Übereinstimmung mit deutschen Interessen waren. Die Abteilungen dieses Amtes waren im ständigen Kontakt mit den zuständigen Ministerien (im Bereich des Arbeitsrechts mit dem Ministerium für soziale und Gesundheitsverwaltung) und diesen Ministerien wurde oft direkt befohlen, welche Rechtsnormen zu erlassen wären. In einigen Fällen bereitete dieses Reichsorgan sogar den Wortlaut einer Rechtsvorschrift direkt vor und schickte ihn an das Ministerium zu weiteren Bearbeitung. Das Ministerium für soziale und Gesundheitsverwaltung, welche die Entwürfe von arbeitsrechtlichen und sozialversicherungsrechtlichen Normen vorbereitete, musste also die zuständige Abteilung des Amts des Reichsprotektors in den legislativen Prozess einschalten und sich mit der großen Anzahl von Einwänden und Anmerkungen auseinandersetzen.

Schon Ende April 1939 entstand im Rahmen des Amtes des Reichsprotektors eine spezielle Gruppe X., die mit Arbeits- und Sozialangelegenheiten beauftragt wurde. Ihre Aufgabe zu dieser Zeit bestand vor allem in der Vermittlung der tschechischen Arbeiter in Arbeitsstellen ins Reich. An der Spitze dieser Gruppe stand seit Oktober 1939 Dr. Wilhelm Dennler, dem am Anfang 14 Beamte und 16 weitere Hilfskräfte zur Verfügung standen.[57]

Die Organisationsstruktur des Amtes des Reichsprotektors änderte sich mehrmals bis zur im August 1943 durchgeführte Umwandlung in das Deutsche Staatsministerium für Böhmen und Mähren. Nach der Organisationsgliederung vom September 1940[58] gliederte sich das Amt in vier Abteilungen, wobei die Arbeit unter die von Walter Bertsch geführte Abteilung II –

[53] KÁRNÝ, M., MILOTOVÁ, J., KÁRNÁ, M., *Deutsche Politik im „Protektorat Böhmen und Mähren" unter Reinhard Heydrich 1941-1942: eine Dokumentation*. Berlin, 1997, S. 21.

[54] DENNLER, W., *Die böhmische Passion*. Freiburg i. Br., 1953, S. 149-155.

[55] Zur Stellung des Reichsprotektors s. ausführlich z. B.: JANEČKOVÁ, E., *Státoprávní uspořádání Protektorátu Čechy a Morava (1939-1945)*. Plzeň, 2013, S. 56-72 oder TAUCHEN, J., Říšský protektor. In: SCHELLE, K., TAUCHEN, J. (Hrsg.), *Encyklopedie českých právních dějin, X. svazek R – Říš*. Pilsen, 2017, S. 802-804.

[56] Erlass des Führers und Reichskanzlers über das Protektorat Böhmen und Mähren vom 16. März 1939 (RGBl. I. S. 485); Verordnung über das Rechtsetzungsrecht im Protektorat Böhmen und Mähren vom 7. Juni 1939 (RGBl. I. S. 1039).

[57] BECKER, S., *Von der Werbung zum „Totaleinsatz": Die Politik der Rekrutierung von Arbeitskräften im „Protektorat Böhmen und Mähren" für die deutsche Kriegswirtschaft und der Aufenthalt tschechischer Zwangsarbeiter und -arbeiterinnen im Dritten Reich 1939-1945*. Berlin, 2005, S. 61-62.

[58] Verordnung über die Gliederung der Behörde des Reichsprotektors in Böhmen und Mähren vom 18. September 1940 (VBl.RProt. S. 425).

Wirtschaft und Arbeit fiel. Diese Abteilung gliederte sich weiter in sieben Gruppen, wobei die für die Arbeitsangelegenheiten zuständige Gruppe 4 in vier Referate eingeteilt wurde:

A) Arbeitseinsatz, Arbeitslosenhilfe, Wohnungssiedlungswesen, Aufbau der Arbeitsämter, Arbeitskräfte aus der Slowakei und Ungarn, Arbeitseinsatz ins Reich und Arbeitseinsatz von Reichsdeutschen im Protektorat,
B) Lohnpolitik,
C) Sozialversicherung und
D) Versorgung für Reichsangehörige.

Die Bedeutung der Arbeit für die Kriegswirtschaft spiegelte sich auch in der neuen Gliederungsform des Amtes des Reichsprotektors seit 1. Dezember 1942[59] wider. Das Amt wurde in fünf Hauptabteilungen eingeteilt, wobei die Hauptabteilung V. die Bezeichnung „Wirtschaft und Arbeit" trug. Ihre zweite Gruppe widmete sich der Arbeit und verfügte über folgende Referate:

A) Arbeitseinsatz,
B) Lohnpolitik und Zentralgewerbeinspektorat,
C) Sozialversicherung und
D) Versorgung der Wehrmacht.

1.5 Die Oberlandräte

Neben der Funktion des an der Spitze des Besatzungsapparats stehenden Reichsprotektors wurden nach 15. März 1939 im Protektorat die Gebietsverwaltungseinheiten, genannt als „Oberlandräte" errichtet. Für jeden Oberlandratsbezirk wurde ein Oberlandrat bestellt. Der Oberlandrat war die nachgeordnete Behörde des Reichsprotektors für sämtliche in reichseigene Verwaltung übernommene Verwaltungszweige mit Ausnahme der Wehrmacht, des Reichsarbeitsdienstes, der Reichsfinanzverwaltung, der Reichspost, der Reichsbahn und der Justiz. In dem Amtsbezirk übte der Oberlandrat in seinem Bereich die Aufsicht über die Protektoratsbehörden (vor allem über die Bezirksbehörden, Stadtverwaltungen oder Arbeitsämter) aus. Die Protektoratsbehörden hatten die Rechtsvorschriften, soweit sich auf mehr als einen Oberlandratsbezirk erstreckten, dem Reichsprotektor, sonstige Rechtsvorschriften dem Oberlandrat vor der Verkündung vorzulegen.

Im ersten Monat nach der Errichtung des Protektorats wurden 23 Oberlandratsämter in Böhmen und zwölf in Mähren bestellt. Ihre örtliche Zuständigkeit entsprach im Prinzip den Grenzen der tschechischen Bezirke und ein Oberlandratsbezirk bezog sich auf einen bis sechs Sprengel der Bezirksbehörden. Im April 1939 nach der Beendigung der Militärverwaltung von Böhmen und Mähren wurde entschieden, dass die Oberlandräte ihre Tätigkeit auch weiter fortsetzen werden.

Eine ausführliche sich auf die Oberlandräte beziehende Regelung wurde erst am 1. September 1939 erlassen.[60] Diese Verordnung gliederte das Protektorat in Oberlandratsbezirke, wobei die Grenzen der Oberlandratsbezirke vom Reichsprotektor im Einvernehmen mit dem Reichsminister des Inneren bestimmte. Die Sitze der Oberlandräte befanden sich in folgenden Städten: Brünn, Budweis, Königgrätz, Jitzschin, Iglau, Kladno, Klattau, Kolin, Kremsier, Melnik, Mährisch-Ostrau, Deutsch-Brod, Olmütz, Pardubitz, Pilsen, Prag, Proßnitz, Tabor und Zlin. Im Laufe der Jahre verminderte sich ihre Anzahl.

Im Sommer 1939 wurden bei den Oberlandräten die Abteilungen für den Arbeitseinsatz errichtet. Ihre Aufgabe bestand in der Vermittlung von Arbeitsstellen für die im entsprechenden Oberlandratsbezirk lebende volksdeutsche Bevölkerung, vor allem die Vermittlung von arbeitslosen Deutschen. Die Abteilungen für den Arbeitseinsatz organisierten zusammen mit den Arbeitsämtern die freiwillige Meldung der tschechischen Arbeiter für die Arbeit im Reich. Der Beauftragter für den Arbeitseinsatz beaufsichtigte aus volkspolitischen Gründen, ob das deutsche Element in seinem Sprengel nicht geschwächt wurde. Aus diesem Grund kam z. B. eine Vermittlung der deutschen Arbeitslosen aus der Sprachinsel Iglau ins Altreich, die Ostmark und den Sudetengau nicht in Frage.[61]

Genauso wie für die materielle Sicherung der Arbeitsämter setzten sich die Beauftragten auch für neue, für den Arbeitseinsatz geeignete, Räumlichkeiten ein, sodass z. B. in Klattau der Beauftragte nicht im Amtsgebäude des Oberlandrats untergebracht wurde, sondern innerhalb von sieben Wochen in dem zum Amtsgebäude gehörigen Park ein Verwaltungsgebäude aus Holz errichtet wurde.[62]

Schon im September 1939 forderte das Amt des Reichsprotektors die Oberlandräte auf, die Errichtung von Arbeitsämtern zu unterstützen, da diese ihnen schon in den kommenden Monaten im Bereich der Arbeitsverwaltung zur Verfügung stehen sollten. Die Oberlandräte hatten sich jedoch zum Ziel gesetzt, ihren Einfluss auf die Organisation der Arbeitsämter, ihre Tätigkeit und vor allem bezüglich der personellen Besetzung geltend zu machen. Hier kam es zu einem Kompetenzstreit, da die die Arbeitsämter im Protektorat einen eigenen autonomen Verwaltungsbereich des Protektorats im Sinne des schon oben angeführten Erlasses des Führers und Reichskanzlers waren. Aus der staatsrechtlichen Stellung dieser Ämter ergab sich, dass sie die allgemeinen Weisungen unmittelbar von der Protektoratsregierung, d. h. in erster Linie vom Ministerium für soziale und Gesundheitsverwaltung erhielten. Dies galt insbesondere auf dem Gebiet der Organisation, des Haushaltswesens und der Personalpolitik der Arbeitsämter. Die Eingriffe der Oberlandräte in die Tätigkeit der Arbeitsämter beschäftigten sogar das Amt des Reichsprotektors am Ende des Jahres 1939, als er den Oberlandräten mitteilte, dass die Weisungen des Ministeriums im Einklang mit den politischen und wirtschaftlichen Belangen des

[59] Zweite Verordnung über die Gliederung der Behörde des Reichsprotektors in Böhmen und Mähren vom 25. November 1942 (VBl.RProt. S. 307).
[60] Verordnung über den Aufbau der Verwaltung und die Deutsche Sicherheitspolizei im Protektorat Böhmen und Mähren vom 1. September 1939 (RGBl. I. S. 1681).
[61] NA, ÚŘP, Kt. 23 – Die an den Reichsprotektor gerichtete Zuschrift des Beauftragten für den Arbeitseinsatz beim Oberlandrat in Iglau vom 31. Juli 1939.
[62] NA, ÚŘP, Kt. 785 – Aktenvermerk des Berichterstatters Dr. Pfaff aus der Gruppe X des Amts des Reichsprotektors über Inspektionsreise nach Klattau Gz. II-4/I/1040 vom 8. Dezember 1939.

Reiches und unter Beobachtung der Interessen des Protektorats und nach Einvernehmen mit dem Reichsprotektor ergingen. Bestanden über die Anwendung solcher Anweisungen örtlich im Einzelfalle Zweifel, sollte der Oberlandrat nicht selbst eingreifen, sondern dem Amt des Reichsprotektors berichten und seine Entscheidung einholen. Ihre Aufmerksamkeit sollten die Oberlandräte nicht auf die organisatorischen oder personellen Fragen, sondern hauptsächlich auf die fachliche Tätigkeit der Arbeitsämter lenken.[63]

Einen Einfluss auf das Funktionieren der Arbeitsämter hatten die Oberlandräte in Brünn, Budweis, Iglau, Mährisch-Ostrau und Olmütz, wo der Abteilungsleiter für den Arbeitseinsatz mit der kommissarischen Leitung des Arbeitsamtes beauftragt wurde. Die Oberlandräte sahen jedoch auch weiterhin ihre wichtige Aufgabe im Volkstumskampf zwischen Deutschen und Tschechen im Protektorat und lehnten deswegen die Besetzung der Arbeitsämter durch tschechische Beamte ab. Am markantesten war es bei der schon oben erwähnten Besetzung des Stellvertreters des Leiters des Arbeitsamtes Brünn durch tschechische Beamten sichtbar. Der Brünner Oberlandrat kritisierte die Einstellung sehr scharf und arbeitete ein fast zehnseitiges Memorandum aus, in dem er darlegte, warum der tschechische Beamte aus deutscher Sicht nicht in Betracht kommen konnte. Nachstehend wird die Intention des Memorandums deutlich gemacht. Hier werden die Befürchtungen der Vertreter der Besatzungsmacht bezüglich der Stärkung des „tschechischen Elements" bei den Arbeitsämtern sowie auch die Beziehungen, die beim Arbeitsamt tatsächlich herrschten, veranschaulicht.

Seitens der Brünner Deutschen wurde das Arbeitsamt in Brünn in erster Linie für ein Werkzeug der Vollziehung der deutschen Volkstumspolitik gehalten. Im Amt herrschte völlige Ruhe und der Kampf wurde hauptsächlich vom Ministerium für soziale und Gesundheitsverwaltung geführt, welches auch offensichtlich als Beschwerdeführer der tschechischen Gewerkschaften in Brünn fungierte, nachdem diese im Arbeitsamt nicht angekommen waren. *„Der Einsatz eines tschechischen Stellvertreters in diese Organisation würde jetzt nicht nur Unruhe bringen, sondern würde wie ein großer Sieg der Tschechen wirken. Er wäre ein bedeutender Rückschritt in der Arbeit und würde von der Gegenseite nicht etwa dankbar und gerecht empfunden, sondern nur als Schwäche ausgelegt werden… Nach den Erfahrungen erscheint es viel besser, die tschechische Seite durch eine, wenn auch harte Entscheidung, endlich vor die vollendete Tatsache zu stellen"*.[64]

Bei dem Amt des Oberlandrats wurden auch Lohnabteilungen errichtet, deren Aufgabe darin bestand, die Lohnpolitik in ihren Sprengeln zu steuern. Zum 1. Juli 1940 kam es zu ihrer Zusammenlegung mit den Abteilungen für den Arbeitseinsatz; den arbeitsrechtlichen Angelegenheiten widmeten sich neuerdings die Abteilungen für Arbeits- und Sozialangelegenheiten.[65]

Weil die Abteilungen für den Arbeitseinsatz bei den Oberlandräten in den ersten Jahren ihrer Existenz in die Tätigkeit der Arbeitsämter eingriffen und sich gemeinsam mit diesen sich an der Lenkung der Arbeitskräfte beteiligten, wurden sie daher unrichtig auch als „deutsches Arbeitsamt" bezeichnet.

6. Fazit

Wie dieser Artikel veranschaulicht, spielten im Bereich der Arbeitsverwaltung vor allem die im Jahr 1939 errichteten Arbeitsämter eine Schlüsselrolle als Instrument im Prozess der Lenkung der Arbeit. Obwohl sie ursprünglich zur Arbeitsvermittlung als Nachfolger der bisherigen öffentlichen Arbeitsvermittlungsstellen dienen sollten, wurden im Laufe des Zweiten Weltkrieges ihre Aufgaben und Kompetenzen schrittweise erweitert und ohne Zustimmung des Arbeitsamtes durfte kein Arbeitsverhältnis vereinbart oder gekündigt werden. Bestimmte Arbeitgeber, welche ihren Betrieb ganz oder nur teilweise einstellen oder ihre Arbeitskräfte massenhaft entlassen wollten, waren verpflichtet, diese Tatsache dem Arbeitsamt zu melden und einen Genehmigungsantrag zu stellen. Die Autonomie des Willens sowohl der Arbeitgeber als auch der Arbeitnehmer wurde in der Zeit des Protektorats wesentlich beschränkt. Obwohl die Arbeitsämter aus organisatorischer Sicht zur sog. autonomen (tschechischen) Verwaltung angehörten und dem Ministerium für soziale und Gesundheitsverwaltung (später dem Ministerium für Wirtschaft und Arbeit) unterstanden, wurden ihre leitenden Stellen von deutschen Beamten besetzt, was einen bedeutenden Einfluss auf ihre praktische Tätigkeit hatte. Die Existenz der Arbeitsämter war nicht nur für die Zeit des Protektorats Böhmen und Mähren charakteristisch, sondern auch für die Nachkriegszeit, da sie bis 1949 unter der Bezeichnung „Bezirksarbeitsschutzbehörden" fortbestanden. In ihren Wirkungsbereich gehörten weiterhin die Lenkung der Arbeit, die Lohnpolitik, Gewerbeinspektion oder der arbeitsärztliche Dienst.

Im Prozess der Lenkung der Arbeitskräfte spielten die Oberlandräte, welche die Tätigkeit der Arbeitsämter beaufsichtigten, eine wichtige Rolle. Die Hauptaufgaben des Ministeriums für soziale und Gesundheitsverwaltung (Ministeriums für Wirtschaft und Arbeit) bestanden im arbeitsrechtlichen Bereich in der Vorbereitung von Rechtsvorschriften, woran sich auch das Amt des Reichsprotektors beteiligte.

[63] NA, ÚŘP, Kt. 785 – Die an die Oberlandräte gerichtete Zuschrift des Reichsprotektors G.Z. II-4-/I/1240 vom 1. Dezember 1940.

[64] NA, ÚŘP, Kt. 787 – Die an das Amt des Reichsprotektors gerichtete Zuschrift des Oberlandrats in Brünn betreffend den Stellvertreter des Leiters des Arbeitsamts Brünn, G.Z. Arb./2.700 vom 18. Juni 1940.

[65] MZA, Oberlandrát Prostějov, Kt. 12 – Die an die Oberlandräte gerichtete Zuschrift des Reichsprotektors betreffend die Zusammenlegung der Arbeitseinsatz- und Lohnreferate bei den Oberlandräten, G.Z. II/4 (1) 1180/40 vom 28. Mai 1940.

A Historical Overview of Law and Neuroscience: From the Emergence of Medico-Legal Discourses to Developed Neurolaw

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Abstract

Nowadays, law is led to a widespread connection with neuroscience. Neurolaw as an interdisciplinary field of study has emerged in the post-modern era of law and neuroscience. However, it clearly has roots that directly trace back to several discourses have traditionally upheaved from the field of medico-legal approaches in the 19th century (the classic era), or the EEG and psychosurgery era in the 20th century (the modern era). This paper strives to put these three periods under scrutiny in order to display a relatively clear image of developed neurolaw background. In this paper it was found that the classic era was the platform for multidimensional medico-legal discourses to provide the ground for the brain evidence-based analysis of legal phenomena in the modern era and bring neurolaw into being as a consequence, which is increasingly encompassing litigations, legislations, and legal thoughts by employing the modern neuroscience findings. By scrutinizing these distinct historical periods, it became clear that medico-legal discourses took their path to the realm of neurolaw as a distinct field of study to transmogrify the practical and theoretical context of law by transition of the perspective from a pure legal to a specialized neurolaw approach.

Keywords: *EEG; FMRI; Neurolaw; Neuroscience evidence; Medico-legal discourse; The post-modern law.*

1. Introduction

By following out the post-modern[1] approaches to any legal phenomena and accentuating interdisciplinary studies on the relationship between the brain and law, to have a multi-dimensional delineation of human behavior in the context of legal system, law is led to a widespread connection with neuroscience. Mostly, in the late 20th century, owing to the fact that neuroscience evidence was increasingly risen in courtrooms and some novel studies on neuro-legal analysis of criminal responsibility were taken into account, 'Neurolaw' as a post-modern interdisciplinary field of study has emerged.[2] Intersection between law and neuroscience actually evinced neurolaw promising face as a portrait of the quite post-modern study which came forth into the realm of social sciences; however, it clearly has roots that directly trace back to several discourses that have traditionally upheaved from the field of 'medico-legal interchanges' in the 19th century or the 'electroencephalography and psychosurgery era' in the 20th century. Therefore, it must be acknowledged that the relationship between law and neuroscience is in line with history; somehow, it has been matured over the two centuries. Neurolaw was however born in the late 20th century. Hence, the history of law and neuroscience might be divided into the three main time frames:

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[1] We used the term 'post-modern' for the age of neurolaw due to the two main reasons. First, postmodernity is a contemporary state of human rationality evolution in the cultural, social, political, and legal plural contexts. As acknowledged in numerous scholarly works, inspired by the ideas of Foucault, Habermas and other postmodernists, modern thoughts gave way to postmodernism in the late 20th century. Neurolaw was born in this new age of the rationality and it seems that this interdisciplinary field of study is one of its outcomes. Second, in the context of 'law and neuroscience' history, as a result of brain-wave scanning in 20th century, neuro-legal analysis have begun to modernize. This path of progression continued with brain image evidence in the late 20th and 21st centuries. Since there is a dramatic development in the way of studying the human brain to understand the cognitive activity and sort it out, as well as employing neurolaw unparalleled approach in the analysis, the modernism took a great step forward, which can be called postmodernism. For a detailed description of post-modern era, see: Pottage, Alain, A unique and different subject of law, in goodrich p. and carlson d. g. (Eds.), *law and the postmodern mind*, University of Michigan Press, 2001; Minda, Gary, *postmodern legal movements: law and jurisprudence at century's end,* NYU Press, 1995; Petoft, Arian, A Foucauldian Analysis of Post-Modern Concept of Sovereignty in the Light of Public Law, *QJPL*, Vol.18, 2016, p. 9.

[2] See: Greely, Henry T., Neuroscience and Criminal Justice: Not Responsibility but Treatment, *U. KAN. L. REV.*, Vol.56, 2008, p. 1103; Pustilnik, Amanda C., Violence on the Brain: A Critique of Neuroscience in Criminal Law, *WAKE FOREST L. REV.*, Vol. 44, 2009, p. 183.

1) The classic period: The subjection of medico-legal discourses in the nineteenth and early twentieth centuries;
2) The modern period: The consideration of EEG findings in the legal context and the use of psychosurgical techniques to prevent violence in the 20th century;
3) The post-modern period: The representation of fMRI findings, the rise of neuroscience evidence in courtrooms and the advancement of neurolaw.

We divided the history into the three aforementioned periods in the interest of the essential differences in the three components that characteristically signify the substance of intellectual movements: 1) Perspective: In addition to sociopsychological scrutiny, the classic era chiefly employs a biological approach to legal phenomena, whereas a neurological inquiry into them was widespread in the modern era. With the emergence of neurolaw, the post-modern era confronted with a new innovative approach which is revolutionized, as it seems, despite maintaining its background; neurolaw provides us a new perspective in light of an authoritative distinct (medico-social) science. 2) Evidence: In the first period, scholars deal with biological evidence predominantly, while EEG evidence was at the core of modern investigations. In the age of neurolaw, scholars are exceedingly trying to discover the secrets of the brain and shed light on the cognitive networks; on that account, functional MRI evidence is ponderously considered. 3) Main subject: Law and neuroscience, as we will see below, took a historical path in which criminality elements revelation, violence eradication, and mind reading were the key factors in the three time frames, relatively.

This paper strives to put these three periods under scrutiny in order to display a relatively clear image of developed neurolaw background. It mainly seeks out the intersections during the time; since Shen briefly depicts neurolaw history,[3] his pattern could be fruitful for the generality of the issue, mainly, among the existing literature. Actually, some scholars in law and neuroscience have fully researched and described the history of law and neuroscience for the same time period covered by this paper; but This historical overview is a novel research because of the four distinctive features: 1) Dual aspect viewpoint: In this research we consider the historical intersections by an extensive medico-legal approach; while in other existing works one of these two aspects has been focused for the most part. 2) Neurolaw integrity appraisal: This research mainly is an attempt to substantively assess the neurolaw discourses in terms of originality, modernization and possible transitions. 3) Comprehensiveness: This paper presents a thoroughly-researched and concise history to a significant extent compared to other existing studies; nevertheless, this is not a decisively comprehensive study either; it looks into the time frames for the foremost issues. 4) Discourse-oriented: Here, many discourses are scrutinized in line with history to elucidate the advancement of pertinent arguments and illustrate succedent or contemporaneous argumentative chains. In order to somewhat remove shortcomings of the works in this regard, the main purpose of this paper is to review the history of neurolaw in the three phases to learn about what are the historical components of developed neurolaw and clarify the route through which law and neuroscience have jointly traversed. The history would show us whether there are possibilities and challenges that should be considered in the future of neurolaw. As a hypothesis, it seems that the discourses in neurolaw are the same traditional ones which have deep roots in the classic era; accordingly, neurolaw discourses are simply the repetition of previous issues. Hereupon, if there was a deadlock in the past, then homogeneous current neurolaw discourses will eventually meet the same.

2. The Classic Era: Medico-legal discourses

This era was the platform for communication between lawyers and medics who stoutly decided to engage and cooperate with one another for the first time in the context of medical law and some other related areas.[4] On the one hand, medics have confronted with numerous ethical and legal issues in fulfilment of their professional duties which put forward the need to employ legal proficiency; on the other hand, lawyers, having met the requirement of applying medical findings in legal systems (especially in criminal cases, such as maim, battery, insanity, etc.), acquainted with opportunities in medical sciences. This bilateral engagement kept the connection more robust. In 19th century, legal medicine began to be promoted.[5] Legal medicine was supposed to accumulate materials for applying medical knowledge to the administration of justice.[6] Later this field of study has expanded in a broad forensic science. It was an

[3] See: Shen Francis X., The Overlooked History of Neurolaw, *FORDHUM L. REV.*, Vol. 85, 2016, p. 667.

[4] E.g., New York meeting on March 19, 1873 that lead to a dialogue between jurists and medics. The main purpose of this event was to design some significant medico-legal discussions; such as taking advantage of some medical findings in the legal system, medical violations and appropriate disciplinary measures, the mental states of the human mind, juvenile delinquency, mental capacity and individual responsibility. See: Shen, *supra* note 5, at 670-671. For further medico-legal events in other countries, see: George, A. S., The Co-Operation of the Medical and Legal Professions, *NEW ENG. J. MED.*, Vol. 143, 1900, p. 499.

[5] As a matter of fact, the first known medico-legal clinics were established in Vienna and Berlin relatively in about 1830 and 1833. Medico-legal studies formally were inaugurated in France by establishing a clinic in 1840. From the very beginning of the nineteenth century, French judges were allowed to appoint medical experts who must have passed an examination in legal medicine. At the same time, Great Britain established its first Chair of Forensic Medicine at the University of Edinburgh. By 1876, there were chairs in all of its medical schools. See: Chaille, S. E., Origin and progress of medical jurisprudence, *J. CRIM. LAW CRIMINOL.*, Vol. 40, 1949, p. 397. In the United States, the first lecturer on legal medicine was Dr. J. S. Stringham, who gave his lectures in New York beginning at around 1804. After that, many American scholars' books provided legal medicine issues; e.g., see: Cooper, Thomas, *Tracts on medical jurisprudence,* James Webster, 1819; Ray, Isaac, *A treatise on medical jurisprudence of insanity,* Little, 1838; Elwell, John J., *A medico-legal treatise on malpractice, medical evidence, and insanity comprising the elements of medical jurisprudence*, Baker, 1860; Odronaux, John, *Jurisprudence of medicine,* T. & J.W. Johnson & Company, 1867; Witthaus, Randolph A. and Tracy C. Becker, *Medical jurisprudence, forensic medicine and toxicology*, W. Wood, 1894.

[6] Curran, W. J., Titles in the medicolegal field: a proposal for reform, *AM. J. LAW MED.*, Vol. 1, 1975, p. 1.

effort to "identify a growing group of subspecialties in science and medicine, all of which convey the fundamental concepts of methods, hopefully both scientifically valid and legally admissible, for the presentation of evidence in courts of law".[7] Legal medicine has accompanied by newly raised issues in the field of social sciences and humanities, which attracted the attention of medico-legal discourses to bio-psychological attitudes. In parallel with that, we have witnessed the emergence and development of neurology. In April 1878, the first issue of *Brain: A Journal of Neurology* has been published at Oxford University;[8] at that time, in particular, the journal was supposed to be a complementary source for psychology.[9] Nevertheless, this expert medical journal has shared some unprecedented experimental and clinical findings of the brain and introduced a new medical science of 'Neurology'. In the very first issues of the journal, we can find some topics that are essentially concerned with the current neuro-legal debates; howbeit, the approaches were purely medical and did not discuss the legal issues due to the subjects covered by the journal (e.g. children's brain force at school[10] or the effects of alcohol on the human brain[11]). Almost concurrent with the advances of neurology, prominent psychologists and psychiatrists of the nineteenth century were also addressing new issues in the field of mental disorientation and mesmerism,[12] telepathy,[13] spiritualism,[14] and phrenology.[15]

By considering the relationship between the mind and brain, and their interactions whereby human behavior is manipulated, psychology and neurology researches have indeed gotten closer by the middle of the century – in particular, by proposing issues related to physiological psychology (as it is clear in some novel works including the pathological study on some neuropsychological problems through nerve stimulation of ganglion cells).[16] This includes attempts for pondering over the state of mind in the organism, as well as its relation to the activity of the brain,[17] and the conceptualization of consciousness by depicting the mind in anticipation of the pertinent modernist ideas.[18] Inspired by such physio-psychological thoughts, some controversial criminal doctrines have theorized the bio-legal analysis for the first time. Indeed, the most significant amongst them is Lombroso's *"L'uomo delinquent* (criminal man)."[19] In quest of chromosomal (genetic), physical (physiological, sexual, etc.), psychological (mental disorders), and successional factors,[20] Lombroso augmented the criminological positivism by seeking the crime's roots in an offender who is *ipso facto* a criminal man intrinsically. Relying on some physiological findings on the human body and brain, to take into account the determinism, he concluded that a culprit congenitally commits any offenses since he/she is a criminal offender biologically. Thus in the context of anthropological criminology, he believed in criminal atavism by which countervailing measures (such as exile and execution) are advisedly subjected.[21] With more emphasis on sexual crimes, inasmuch as the body follows some physiological interactions of the pituitary, pineal, thyroid, and adrenal gland, especially due to hormonal disorders, he considered the effects of endocrine disruption on human behavior. Since internal glandular hormones directly enter the bloodstream and spread to all parts of the body, according to Lombroso, they are associated with different characteristics of human individuality and could impair the ordinary function by inducing bad temper, hatred, abhorrence, spite, etc.; so that it, in turn, may result personality disorder.[22] Brown-Séquard thoughts also reinforced these assertions.[23] At the present time, startling discoveries in genetics and neurology that have prompted a biological approach in developed neurolaw have likewise led to the emergence of a subfield in neurocriminology. Though the classic discourses were currently modernized, but their arguments paved the way for psychophysiological studies (that began in the middle of 20th). Literally hundreds of studies assessing EEG in criminals have been done over the past eighty years to implicate EEG abnormalities in violent recidivistic offending. Actually what we consider now as the neurological and genetic factors of crime

[7] Cyril H. Wecht, The History of Legal Medicine, *J. AM. ACAD. PSYCHIATRY LAW*, Vol. 33, 2005, p. 245.
[8] https://academic.oup.com/brain
[9] Chiefly for the journal entitled 'MIND: A QUARTERLY REVIEW OF PSYCHOLOGY AND PHILOSOPHY' (1876).
[10] Allbutt, Clifford, On Brain Forcing, *BRAIN*, Vol. 1, 1878, p. 60.
[11] Lawson, Robert, On the Symptomology of Alcoholic Brain Disorders, *BRAIN,* Vol. 1, 1878, 182.
[12] Winter, Alison, *Mezmerized: powers of mind in victorian Britain*, University of Chicago Press, 1998.
[13] Luckhurst, Roger, *The invention of telepathy*, Oxford University Press, 2002.
[14] Noakes, Richard, The Sciences of Spiritualism in Victorian Britain: Possibilities and Problems, in T. Kontou and S. Willburn (Eds.) *The ashgate companion to nineteenth-century spiritualism and the occult,* Routledge, 2012, p. 25; Thurschwell, Pamela, *Literature, technology and magical thinking: 1880-1920*, Cambridge University Press, 2001.
[15] Young, Robert M., *Mind, brain and adaptation in the nineteenth-century: cerebral localization and its biological context from gall to ferrier*, Oxford University Press, 1970; Cooter, Roger, *The cultural meaning of popular science: phrenology and the organisation of consent in nineteenth-century Britain*, Cambridge University Press, 1984.
[16] Mitchell, S. Weir, Some of the Lessons of Neurotomy, *BRAIN*, Vol.1, 1878, p. 287.
[17] For instance, the arguments of Lewes, G. H. in Spiritualism and Materialism, *FORTNIGHTLY REV.*, Vol. 19, 1876, p. 707 that mind could only be understood as a constant process of interaction between the whole organism and a physical and social medium.
[18] This is evident as well in Lewes' thought; he allegorically depicted the mind as a lake mingling beneath the surface of multiple streams entering at different levels. See: Lewes, G. H., *Problems of life and mind,* J.R. Osgood, 1877, p. 363.
[19] Gibson, Mary, *Born to crime: cesare lombroso and the origins of biological criminology*, Praeger, 2002, pp.47-49 & 97-101.
[20] Cesare Lombroso, Criminal Man (M. Gibson and N. H. Rafter, Trans., 2006).
[21] Bahman Shahryari and Mohammad ebrahim Shams nateri, *Extensive societal hazards in the context of criminal justice and criminology schools and thoughts*, *Journal of hazards*, Vol. 3, 2015, p. 275.
[22] Wolfgang, Marvin E., Pioneers in Criminology: Cesare Lombroso (1835-1909), *J. CRIM. L. CRIMINOLOGY & POLICE SCI.*, Vol. 52, 1961, p. 361.
[23] Aminoff, M. J., Brown-Séquard and his syndrome, *J. HIST. NEUROSCI.*, Vol.5, 1996, p. 14.

roots in the modern neurocriminology emerged from the shadows of such classical discourses.[24]

In contrast, based on sociopsychology, Emile Durkheim and some other scholars define the concept of crime in the context of society.[25] For Durkheim crime is immanent in society and results from social interaction. It may seem strange that he described criminality as a "Normal" factor rather than a pathological one: "Crime is normal because a society exempt from it is utterly impossible."[26] Similarly, Prins said: "Criminality proceeds from the very nature of humanity itself, it is not transcendent, but immanent".[27] Gabriel Tarde, contrary to Lombroso's theory of the determinism, believed that a wrongdoer consciously perpetrate a misdeed; however he/she is affected by nervous and mental factors *ad infinitum* that may give him a fearlessness, aggressiveness or abusiveness sense of doing so.[28] In the core of sociological psychology they believe that individual is rather a product than an author of society; in other words an offender is but a small image of the criminal constructor world in which he/she lives. However scientific investigations on criminal behavior showed that biological factors sporadically play a crucial role in that criminal constructing, in conjunction with environmental and sociological ones; like what modern neuroscientific models on brain–behavior interactions demonstrate, which have considerably profited from the advent of neuroimaging techniques and genetic analyses.[29] In the definition of offender, beside many biological factors, the psychosocial characteristics were kept under scrutiny; that is why Enrico Ferri's criminology explains the three radical components of a crime:[30] anthropological, physical, and the most forcefully, social.[31] This was an endeavor to advocate the crime predictability argument,[32] which indirectly distinguishes delinquents from the ordinary people of a society. In explaining the causes of the crime realization, Ferri has put forward an idea that the combination of those aforementioned factors is incontrovertible.[33]

These classic discourses were being advanced in light of neurocriminology during the progress of neuroscience (also genetics and neurobiology) in identifying and intervening in neural correlates of crime.[34] There is an evolutionary theory in neuropsychology that mainly focus on "ultimate" causes of crime instead of "proximal" ones. Evolutionary forces over the deep time of evolution shape ultimate causes of behavior while proximal causes are the specific developmental, biologic, and environmental variables.[35] Apart from the mental effects on human behaviors during the time[36] evolutionary neurobiological roots in a criminal mind might offer us an elucidation for the etiology of a wide range of human phenotypes; such as what Daly and Wilson explained for some types of homicides (e.g., infanticide, patricide, etc.).[37] Neurocriminologists track down the importance of neurological mechanisms in the etiology of human behavior.[38] For understanding the etiology of antisocial behavior, modern neuroscience researches clearly demonstrate that certain regions of the brain appear to be critically important. There are evolutionary, genetic, and biological risk factors that engender antisocial behavior; as some studies showed, it is likely that most of them are mediated by the brain by impacting on either the structure or the functioning of it.[39]

Reflecting on some medico-legal issues such as the consciousness, will, personality disorder, etc., numerous moral, legal and philosophical ideas have adhered to bio-psychological thoughts. These issues propelled scholars to an intellectual movement in which multi-dimensional analysis of phenomena was prevalent. Among them was Lewes who has described the body and mind in the social and cultural context.[40] Lewes linked the brain to mind in his neuropsychological explanations. He objected to one element being selected as indispensable. The interdependence of the brain and mind is an important issue in the modern neurolaw. Current neuropsychological studies on violence have gone deeper in understanding the brain-mind relationships. It often involves an objective assessment of how brain abnormalities produce psychological effects. It also evaluates brain damage and brain disorders in criminal responsibility.[41] This will be discussed further. Adding the brain to the analysis increasingly made the discourses more intricate. Alongside neurological dis-

[24] See: Rafter, Nicole, H., *The criminal brain: understanding biological theories of crime*, NYU Press, 2008. Advanced neurolaw discourses are provided at least in the context of five major domains: evolutionary criminology, biological criminology, behavior genetics, molecular genetics, and neurocriminology.

[25] Mehran, Nasser, Crime as an Uncertain Reality, *STRAT. MANA. RES. Q.*, Vol.25, 2001, p. 144.

[26] Dcrkiieim, E., *The Rules of Sociological Method*, Simon and Schuster, G. E. Gatlin, Ed., 1938.

[27] Prins, A., *Criminalite et repression*, Librairie Européenne C. Muquardt, 1886.

[28] Wilson, Margaret S., Pioneers in Criminology I--Gabriel Tarde (1843-1904), *J. CRIM. L. CRIMINOLOGY & POLICE SCI.*, Vol.45, 1954, p. 3.

[29] Markowitsch, Hans J., Neuroscience and crime, *NEUROCASE: THE NEURAL BASIS OF COGNITION,* Vol.14, 2008, p. 1.

[30] Carrabine, Eamon et al., *Criminology: a sociological introduction*, Psychology Press, 2004.

[31] Based on these factors, he divided criminals into five categories: lunatic, born incorrigible, irreversible, habitual, occasional and emotional.

[32] Brown, Sheila, *Understanding youth and crime*, McGraw-Hill Education, 2005, p. 28.

[33] Carrabine, *supra* note 32, at 36.

[34] E.g., see: Glicksohn, Joseph, Criminality, Personality and Cognitive Neuroscience, in Joseph Glicksohn, Ed., *The neurobiology of criminal behavior,* 2002; Focquaert, Farah, *Neurobiology and crime: A neuro-ethical perspective*, Journal of criminal justice, 10, January, 2018.

[35] Quinsey, Y. L., Evolutionary theory and criminal behavior, *Legal and criminological psychology*, Vol. 7, 2002, p. 1.

[36] Evolutionary psychology views humans as organism that confronted with millions of years of selection pressures and gives attention to aspects of the mind that were adept at solving ancestral problems (most notably survival and reproduction).

[37] Daly, m. and m. Wilson, *Homicide*, Transaction Publishers, 1988.

[38] Moftitt, Y. E., Ross, S. and Raine, A., Crime and biology, in J.Q. Wilson & J. Petersilia, Eds., *Crime and public policy*, 2011; Raine, A., et al., Corpus callosum abnormalities in psychopathic antisocial individuals, *Archives of general psychiatry*, Vol. 60, 2003, p. 1134.

[39] Raine, A., From genes to brain to antisocial behavior, *Current directions in psychological science*, Vol. 17, 2008, p. 323; Yang, 1, et al., *Volume reduction in prefrontal gray matter in unsuccessful criminal psychopaths*, *Biological psychiatry*, Vol. 57, 2005, p. 1103.

[40] See generally *supra* note 20.

[41] Oostrosky, Feggy and Ardila, Alfredo, Neuropsychology of criminal behavior, Routledge, 2017.

orders and their impact on human behavior,[42] there were some sophisticated issues (such as the concept of feeling, emotion, and aggression)[43] invited scholars to take advantage of neurology findings in the context of such an analysis. The researches emphasized on the psychological explanation at any rate.

One of the outcomes of such a multidimensional dialogue (in the context of legal medicine and the abovementioned discourses) was the *Medico-Legal Journal* at the beginning of the twentieth century, during which some remarkable researches on the insanity,[44] validity of medical evidences,[45] legal implications of drug use,[46] compensation for mental injuries[47], lie detection techniques,[48] and legal issues of traumatic brain injury (TBI) have carried out. Due to a fundamental principle in criminal law "volition" is a requisite element of every crime. The chief reason for this requirement is that without volition there can be no act. In this classic doctrine, it is stated that criminal intent requires volition. Since an irresistible impulse, resulting from mental derangement, necessarily negatives volition and criminal intent requires volition, the doctrine has logically followed that "irresistible impulse should constitute a defense." A committee of lawyers and physicians has recommended on this subject, that "No person suffering from mental disease shall hereafter be convicted of any criminal charge, when at the time of the act or omission alleged against him, he did not have, by reason of such mental disease, the particular state of mind that must accompany such act or omission in order to constitute the crime charge".[49] There are however some convincible reasons that this doctrine could not be reliable in some way: 1) when someone knows the difference between right and wrong to do harm, an impulse cannot be irresistible. 2) It is difficult to prove the impulse in many cases. 3) Impracticality of application. Nonetheless, a similar objection may be made to other types of mental disease; wherefore these objections are not an adequate reason for decisively rejecting the defense. The main subject in this dialectical discourse about medical evidence in courtroom was the "Difficulty of Proof". The core objection was that proving some mental diseases is positively difficult which leads to rejection of the defense. This was clearly recognized by the Supreme Court of Utah in *State v. Green*: "Insanity in all its forms is frequently difficult to determine with certainty, and yet courts all recognize that, if an accused does not know right from wrong and does not know the nature and quality of the act charged he should not be punished".[50] Admissibility of proof is quietly different from receiving it. Some neurological or psychological diseases are difficult to prove, but it is not likely that a court would refuse to receive evidence merely because of

[42] E.g., see a study of paralysis and convulsion by Jackson, J. Hughlings, Clinical and Physiological Researches on the Nervous System, MIND, Vol. 1, 1876, p. 125 on the anatomical and physiological localization of movements in the brain. He attentively has given throughout his inquiries to the latest results of psychological science, while he has at the same time a singularly clear apprehension of the limits of his functions as a clinical and physiological observer. He concluded that the organ of mind is made up of processes representing impressions and movements; hence, the physical substrata of mental states are sensori-motor processes. The brain areas are connected with conscious mental action; to take an example, the higher and highest parts of the nervous system are involved in intellection, feeling, and volition; Jackson puts forward the view as the only one consistent with the doctrine of organic evolution. Similarly see his work, *On Affections of Speech from Disease of the Brain*, *BRAIN*, Vol.1, 1878, p. 304.

[43] Lewes neuropsychology principally recognized that identity of "Tissue" everywhere carried with the identity of physiological "Property"; in his words, "similarity in the structure and connections of Organs involved corresponding similarity in Function". Lewes believed that the conception of "the Brain as the Organ of Mind" is irrational, since it would be the parallel conception of "the Heart as the Organ of Life". He particularly referred to the sensational and volitional functions of the spinal cord and asserted the histological identity of spinal cord and Brain. Lewes experiments showed that the brainless animal feels nothing, and therefore that its spinal cord is not a sensational center. The evidence of feeling being thus manifested when an individual has the brain. It is absolutely true about the mind. See: Lewes, G. H., What is Sensation?, *MIND,* Vol.1, 1876, p. 157; Lewes, G. H., Motor Feelings and the Muscular Sense, BRAIN, Vol.1, 1878, p. 14.

[44] Shaw, T. Claye, Impulsive Insanity, *MEDICO-LEGAL J.*, Vol.1, 1903, p. 30.

[45] Russell, Earl, The Weight to Be Attached to Medical Evidence, MEDICO-LEGAL J., Vol.1, 1903, p. 94.

[46] Crothers, T. D., Legal Responsibilities of Drug Takers, MEDICO-LEGAL J., Vol.33, 1916, p. 14. Scholars indicated that during the short time dramatic changes have occurred in drugs abuse and crime. Drug dependence and drug abuse was recognized as a disease that over the long term results in physical harm, behavioral problems, and association with people who also abuse drugs. Drug users turn to some form of crude amateur crime like burglary, robbery and even the prostitution to support their habits. Juvenile's addiction in the larger cities has become a major problem causing substantial harm to the society in every field. The majority of drug victims are neurotic individuals who are mentally unbalanced. Hence, this required a room for medico-legal debate. Some classic discourses claim that drug addicts cannot satisfy the conditions for criminal responsibility. In contrast, other ones defended the criminal law's commitment to holding people responsible for what they do. In recent years, neuroscientific studies have uncovered many of the physical processes and mechanisms involved in drug addiction and addiction-related behaviors. This evidence has prompted the diminish responsibility discourses; however, Stephen Morse believed that neuroscientific findings will not support the claim that drug addiction diminishes criminal responsibility. As a matter of fact, it is difficult to prove that drug addicted criminals "are relevantly compelled, coerced, or irrational and that they have either not had adequate opportunity to instigate self-control strategies, including receiving treatment that would have prevented their offending, or that they have mental impairments that render those strategies largely unavailable or ineffective" see: Kennett, Jeanette, Nicole A. Vincent, and Anke Snoek, Drug Addiction and Criminal Responsibility, in J. Clausen and N. Levy, (Eds.) *Handbook of neuroethics*, 2015.

[47] Goodrich, Herbert Funk, Emotional Disturbance as Legal Damage, MEDICO-LEGAL J., Vol. 39, 1922, p. 129.

[48] House, R. E., Why Truth Serum Should be Made Legal, *MEDICO-LEGAL J.*, Vol. 42, 1925, 138.
The first psycho-physiological lie detection technique was the Polygraph, which was patented in 1921 at the University of California. The device provides possibilities to examine and record several physiological indicators such as blood pressure, heartbeat, respiration, and nerve reflexes when an object responds to a set of questions, to manifest falsehood. Polygraph is also known as Psychophysiological Detection of Deception (PDD). See: Rosenfeld, J. P., Alternative Views of Bashore and Rapp's (1993) alternatives to traditional polygraphy: a critique, *PSYCHO. BULLETIN. J.*, Vol. 117, 1995, p. 159.

[49] Committee on Insanity and Criminal Responsibility of the American Institute of Criminal Law and Criminology, *J. CRIM. L. AND CRIMINOL.*, Vol. 3, 1913, pp.719, 720.

[50] State v. Green 78 Utah 580, 600, 6 P. 2d 177, 185 (1931).

the difficulty of proof. Accordingly, in *Parsons v. State*, regarding to insanity proof, the court stated the following: "It is no satisfactory objection to say that the rule above announced by us is of difficult application. The rule in *McNaghten's* Case is equally obnoxious to a like criticism. The difficulty does not lie in the rule, but is inherent in the subject of insanity itself".[51] Currently, Criminal responsibility is a neurocriminology core question; the modern rules (based on neuroscience findings) for determining such responsibility derived from the classic discourses. Principally, when a mental or neurological disease is set as a defense to a criminal charge, the testimony of qualified physicians is unavoidable. It is then the function of the jury to apply the rule of law to the medical testimony and arrive at a verdict accordingly.

One of the most important controversial discourses in the dialogue was the neuropsychological concept of 'Insanity'[52] by some determinative criteria, which were generally in disagreement due to differences in the literature of lawyers and medics as well as a dominant discrepancy in the conceptualization. Some scholars nonetheless expressed their hope to find a more precise understanding of the biological implications of mental disorders by understanding the brain. Henceforward, a debate about the neuropsychiatric fundamentals of madness[53] has become widespread. Insanity is an uncontrolled state mentally or neurologically eventuated in thought and will, predominantly, in terms of the late 19th century medical law.[54] In addition to difficulty of proof, a main problem with law was the ambiguity and indetermination of "insanity". The law has held that "mental disease" is an indeterminate and vague term (including conditions varying from mild indisposition to delirious and confusional states). Another problem was the differences between literatures and approaches of medicine and law. The form of insanity was a question of mental pathology that was not of particular interest to law (nor the causes of insanity). Actually, law was concerned in the legal consequences resulting from insanity. To fill this gap, medico-legal discourses have scrutinized any degree of madness, especially in the context of irresistible impulse and criminal responsibility as mentioned earlier. This was momentous in legal doctrine of criminal responsibility[55] due to the large number of important criminal prosecutions were accompanied by the plea of insanity or situations in which madness connected with criminal acts;[56] in view of the fact that "insanity in some form has always been regarded as an excuse for the commission of crime".[57] However, owing to the dissimilar definitional propositions (of the insanity), as Shen pointed, nowadays, despite the advances in neuroscience, there is no explicit "line between a criminal defendant who had the capacity to do otherwise versus a defendant who (due to his "insanity") did not really make a 'choice' in the way that criminal law requires for culpability".[58] Nowadays, the doctrine of irresistible impulse has been chiefly considering in the context of brain-damaged cases (mainly a disorder in the frontal lobes) by "control" tests; it seems that in many cases, defendants' criminal behavior appears to be the product of their extremely poor judgment and self-control. Modern neurolaw tries to substantively assess the responsibility of defendants with any type of insanity. It is Neurocriminologists' commitment to resist ascribing immoral behavior to an uncontrollable brain dysfunction while they holds individuals accountable for their criminal conduct.[59] Several criminal cases, have currently been confronting with a variety of pre-trial, adjudicatory, and dispositional issues that includes evidence of frontal lobe dysfunction; and this will increasingly continue in future litigations. "This trend is likely to accelerate, as the technologies available for diagnosing frontal lobe dysfunction improve, and as attorneys and courts become more familiar with, and receptive to, neuroscience evidence."[60]

Due to some new experiences in medicine, a discourse concerning the concept of 'Life' along with the 'Death' has held forth in legal arguments by analyzing the brain and mind in the state of death and its legal implications.[61] Noticeably, the biological components of the matter were taken into consideration for ascertaining an individual's legal status. Despite some existing scientific indicator of cell death and inactive state of

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51 Parsons v. State, 8 Ala. 577, 593, 8 So. 854, 864 (1887).

52 Ahrenfeldt, R. H., Legal and Medical Insanity, *BRIT. MED. J.,* Vol. 2, 1946, p. 710; Cook, William G. H., Insanity and mental deficiency in relation to legal responsibility: a study in psychological jurisprudence, Routledge, 1921, pp. 118-126 & 152-164.

53 Stella, Swain, *The uses of madness in nineteenth- and twentieth-century fiction*, PhD thesis, University of Warwick, 1992, pp. 129-138; Dain, Norman, *Concepts of insanity in the united states*, Rutgers University Press, 1964.

54 Bristow, Algernon, Medico-Legal Inspections and Post-Mortem Examinations, in Allan McLane Hamilton (Ed.) *A system of legal medicine*, 1894.

55 Keedy, Edwin R., Insanity and Criminal Responsibility, *J. CRIM. L. CRIMINOLOGY & POLICE SCI.,* Vol. 7, 1917, p. 484.

56 Winslow, Forbes, The Legal Doctrine of Responsibility in Cases of Insanity, Connected with Alleged Criminal Acts, *J. PSYCHOL. MED. MENT. PATHOL.*, Vol. 11, 1858, p. 214.

57 Reed, P. Holmes, Insanity as a Defence in Criminal Law, HIS. DISSERTATIONS & THESIS COLL., Vol. 68, 1895, p. 1.

58 Shen, *supra* note 5, at 674.

59 Seiden, Jessie A., Comment, The Criminal Brain: Frontal Lobe Dysfunction Evidence in Capital Proceedings, *CAP. DEF. J.*, Vol.16, 2004, pp.395, 419. As seiden said, "there is an important difference between being immoral and acting immoral. A defendant who acts immorally as a result of [brain dysfunction] is arguably not as culpable as a defendant who simply is immoral."

60 Redding, Richard E., The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century, *AMER. UNI. LAW REV.*, Vol. 56, 2006, p. 51.

61 In spite of substantial inconsistencies in the concept of life, the definition of death was more consenting. Actually, a process-based medical definition of life, as what Allan Hamilton has described in his work entitled "Identity of Living" in *A system of legal medicine* (Allan McLane Hamilton Ed., 1894), was not ideal in the legal setting. Howsoever, life and death have generally presumed to be interrelated processes, as it clear in some works, such as Francis Harris' "Death in its Medico-Legal Aspects" in the book mentioned above. This attitude was likewise reflected in the 1980 s thoughts; pursuant to what Green said "death commences with the very beginnings of life as the body constantly sloughs off and replaces dead cellular material'. See: Green, Ronald M., Toward a Copernican Revolution in Our Thinking about Life's Beginning and Life's End, *SOUNDINGS*, Vol. 66, 1983, p. 152.

mind (considerably unconsciousness) or body (such as cessation of cardio-pulmonary function), there was concern about the medical definition of death, since science was somewhat unable to diagnose it.[62] A conceptual obscurity at that time was the state of brain and mind in some unknown conditions including coma and the vegetative state, which was followed by a great deal of complexity in explaining the human consciousness and life. These subjects are still controversial in current neurolaw deliberations. To demonstrate the brain function in a vegetative state, neuro-psychologists, based on new discoveries in neuroscience,[63] have recently figured out that some patients are conscious and there is a way to directly communicate with his/her brain in a great surprise. This leads to a novel concept of life (somehow the death), of which an underlying assumption might be that the brain responses to stimuli could be considered as an assessment factor. Nowadays, current neuroscience comes to the conclusion that consciousness is directly related to the brain cognitive functions and can be scientifically evaluated with some techniques such as fMRI.[64] These findings undermine the traditional arguments in the medico-legal discourses, in addition to repelling the necessity of some alleged indicators (such as ability to talk) by replacing unprecedented factors (such as the brain neurofeedback and cognitive functioning) to redefine the concept of life and death.

Moreover, there was an argument about inducement of abnormalities in as much as cultural normative differences in the context of criminology such as what Durkheim[65] has theorized, as a matter of fact, in the light of socio-psychological discourses. In his book, *Conflits de Culture et Criminalité* (1938), Sellin also explained the relationship between cultural conflicts and delinquency in similar fashion. He emphasized on the psychological element of social norm acceptance regarding customary values and traditions, which are strictly influenced by a set of legal rules; and if these rules do not conform to the pattern of cultural norms, then some kind of cultural conflicts would arise by which contraventions are successively outcropped at the core of society.[66] If truth be told, Sellin and his sympathizers put confidence in psychological dependency of individuals' intellectual perspectives on cultural values as a part of their identity, which more often fashions the personality to a considerable extent; it is therefore deniable in criminology. As a result, paying attention to socio-psychological factors – of course not merely – has given rise to '*Élément dangereux* (dangerous element)' doctrine. According to the doctrine, in subordination to social norms, there are individuals who are psychologically recusant, potentially maladaptive, and have a high probability of committing a crime; therefore, recognition and identification of these probable malicious elements might be considered as a prerequisite for crime prevention. Based on the severity of their social abnormalities, they are frequently supposed to be categorized in the dangerous classes of society.[67] As Raffaele Garofalo has put forward about the potential criminality of individuals, *Temibilitŕ* (dangerousness) depends on possible antagonism, normative hostility, and incongruousness with self-relative social life.[68] The underlying distinction that some scholars have analytically placed among criminals with mental disorder and social abnormality might be rooted in the thought of Philippe Pinel at the beginning of the nineteenth century, who has differentiated between delinquency out of mental illness (*manie avec délire*) and misdemeanor without any psychopathy (*manie sans délire*).[69] Jean Pinatel also referred to the social incompatibility of some people, in terms of normative repugnance at what the society traditionally postulated (negation of society) and the psychological pressure on them, as the mutual factors to furnish a house for dangerous classes.[70]

Eventually, by focusing on a comprehensive approach to biological, psychological, and sociological factors, the 19th and early 20th centuries spread out medico-legal discourses, for the most part, in explaining criminality. The maturity of this discoursal link is more perspicuous in the middle of the twentieth century under the root causes of crime. These causes are mostly the existential and life-sustaining elements of a criminal phenomenon arising from physiological impairment, psychological disorderliness or antisocial conditions. The ideas of Stefani and Kinberg on the factors of crime realization, for example, can be pointed out.[71] Pursuant to them, in keeping with proportionate conditions, as long as the factors are not matchable, they will not engender a crime by a potential violator in the context of a particular society. As a matter of fact, they particularly believed that the deterministic influence of the brain physiologic factor could not be ignored in a criminological analysis (considering its impact on individuals' will and cognizance),

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[62] A neurological investigation of the matter was considered trivial; hence, it was assigned to the middle of 20th century. During that, there was advances in neuropsychology to define the death more precise in light of brain death and technological capabilities that allowed successful organ transplants. See: Capron, Alexander Morgan and Leon Kass, A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal, *U. Pa. L. Rev.*, Vol. 121, 1973, p. 87; De Georgia MA, History of brain death as death: 1968 to the present, *J. CRIT. CARE.*, Vol. 4, 2014, p. 673.

[63] Naci, Lorina et al., The Brain's Silent Messenger: Using Selective Attention to Decode Human Thought for Brain-Based Communication, *J. OF NEUROS.,* Vol. 33, 2013, p. 9385.

[64] Owen, Adrian M., M. R. Coleman, Detecting awareness in the vegetative state, *ANN. N. Y. ACAD. SCI.*, Vol.1129, 2008, p. 130.

[65] See: Lunden, Walter A., Pioneers in Criminology XVI--Emile Durkheim (1858-1917), *J. CRIM. L.* & *CRIMINOLOGY* & *POLICE SCI.*, Vol.49, 1958, p. 2; Thorlindsson, Thorolfur and Bernburg, Jón Gunnar, Durkheim's Theory of Social Order and Deviance: a Multi-level Test, *EURO. SOCIOLOGICAL REV.*, Vol. 20, 2004, p. 271; Smith, Philip, Durkheim and Criminology: Reconstructing the Legacy, *AUS.* & *NEW ZEALAND J. CRIMINOLOGY*, Vol.41, 2008, p. 333.

[66] Sellin, Thorsten, *Conflits de culture et criminalité*, Paris, 1984, pp.21-67.

[67] Gillis, A. R., Crime and State Surveillance in Nineteenth-Century France, *AM. J. SOCIOL.,* Vol. 95, 1989, p. 307.

[68] Barak, Gregg, *Battleground: criminal justice,* ABC-CLIO, 2007, at 162.

[69] Pinel, Philippe, A treatise on insanity, W. Todd, (trans. d. davis, 1962, original book: 1806).

[70] Jean Pinatel, le problčme de l'état dangereux (1954).

[71] Gaston Stefani, droit penal général et criminologie (1959); Olof Kinberg, les problčmes fondamentaux de la criminologie (1959).

such as a severe reaction (anger, exasperation, wrath, etc.), TBI, intellectual disability, alcoholism, epilepsy, and insanity.[72] Hence, the meticulous and evidence-based investigation into the brain, which was deemed as a newly proposed factor in medico-legal discourses, remained for the next era of law and neuroscience in order to ponder the human behavior more precisely with the neuroscientific approach, peculiarly in light of EEG evidences.

3. The Modern Era: EEG Evidences and Psychosurgery

Electrical activity in the brain was discovered more than a century ago by Richard Caton, a British physician and professor at University of Liverpool School of Medicine, who discovered electrical signals through direct communication with the animals' brain.[73] Following his findings, after about forty years (in the 1920 s), Hans Burger used the scalp to record the electric current of the human brain.[74] Berger's discoveries are typically one of the most important neurobiological developments that revolutionized the medical history of neurology[75] and, of course, 'Law and Neuroscience' gradually. With the advent of the EEG technique, over the time, law also took advantage of its beneficial findings. Since the middle of the 20th century, EEG was considered by practitioners as a technique for instrumental usage at first light;[76] and after some new neuroscience discoveries about the human brain, within a couple of decades, that the analytical platform of neurocognitive functions has typically preponderated over its pathless antecedent background, it found a way for legal normative implementation by some well-nigh concrete facts for legal decisions.

Following new EEG findings on the brain in the 1950 s, by the positive-pressure ventilators device, the concept of "Brain Death" was put into words for the first time. In 1956, according to an experimental study on six patients with inactive neurological reflexes (based on EEG data), hypotension, polyuria, and hypothermia, through angiography, it was concluded that in all of them, the brain blood flow was stopped and no neurocognitive function has been seen somehow the brains were dead as the patients hereto.[77] Subsequent to this study, a number of physicians worked on the state of coma.[78] Certainly, it was significantly important for legal practitioners who have confronted with some controversial ethical and legal issues in such unknown brain states. Here, consciousness was a key factor. After Berger's encephalographic investigations, piecemeal, works to explain the physical roots of consciousness have begun to emerge. Experimental reports[79] suggested that the feeling states are associated with relative preponderance of alpha activity over EEG responses; impactful enhancement of the activity affiliated with pleasant thoughts or feelings. However, neural mechanisms effecting enhancement of this alpha activity were unknown. The results indicated the discrimination between experimental and rest periods. A voluntary control, which signifies the awareness in biologic activity (e.g., feeling state), can be exerted exclusively with respect to the subconscious activity. Scholars have proposed that activated EEG patterns possibly might be resulted from the attention required while individuals are trying to perceive a phenomenon. The type or quality of the attention employed functions.

In light of intellectual activity experiments,[80] the EEG was supposed to relatively assess mental activity in various levels (subconscious, the conscious, and the superconscious)[81] or the

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[72] Stefani and Kinberg generally divided the root causes of crime into the biological, mental and social propellants (separate but under the interaction). On account of the diversity of statuses and characters, however, impression rates among individuals are different. Yet, there were some sociologists, such as Lemert and Becker, who only emphasized on the sociological factor. For a detailed description, see: Rosenberg, Michael J., Lemert Primary and Secondary Deviance, in Francis T. Cullen & Pamela Wilcox (Eds.) *Encyclopedia of criminological theory*, 2010; also see: Debro, Julius and Howard S. Becker, Dialogue with Howard S. Becker, *ISSUES IN CRIMINOLOGY,* Vol.5, 1970, p. 159.

[73] In 1875, for the first time, he published his examinations' results by a paper entitled: *The Electric Currents of the Brain* in the British Medical Journal. Caton utilized the galvanometer, a device which is invented by Lord Kelvin in 1858, and reported at the Ninth International Conference on Medicine in Washington (1887) about the electrical activity of the brain. See: Caton, R., Researches on electrical phenomena of cerebral grey matter, *Ninth international medical congress proceedings*, Vol. 3, 1887, p. 246.

[74] He named this device, "Electroencephalogram (EEG)". See: Berger, H., Über das Elektrenkephalogramm des Menschen, *Archiv für psychiatrie und nervenkrankheiten*, Vol. 87, 1929, p. 527.

[75] Gregory, L. Holmes, *Epilepsy*, in Martin R. Turner and Matthew C. Kiernan (Eds.) *Landmark papers in neurology*, Oxford University Press, 2015.

[76] E.g., application of EEG recording for the psychological assessment of the accused's insanity in the hospital; see: Downs v. State, 330 S.W.2d 281, 284 (Ark. 1959).

[77] Wijdicks, E. F., The diagnosis of brain death, *N. ENGL. J. MED.*, Vol. 16, 2001, p. 1215.

[78] For example, see: Wertheimer, P. et al., Diagnosis of death of the nervous system in comas with respiratory arrest treated by artificial respiration, PRESSE. MED., Vol. 67, 1959, p. 87. In 1959, under a momentous study on 23 patients with coma at the Paris Hospital, the researchers found that the brain pulses of those in absolute coma were inactive in EEG since the brains' tissue were completely necrotic by some means were deemed in a brain death state (irretrievable coma). See: mollaret, P. and M. goulon, The depassed coma (preliminary memoir), REV. NEUROL. (PARIS), Vol. 101, 1959, p. 3.

[79] For example, see: Brown, Barbara B., Recognition of aspects of consciousness through association with EEG alpha activity represented by a light signal, *PSYCHOPHYSIOLOGY*, Vol. 6, 1970, p. 442; Banquet, J. P., Spectral analysis of the EEG in meditation, *ELECTROENCEPHALOGR. CLIN. NEUROPHYSIOL.*, Vol. 35, 1973, p. 143.

[80] Brown, Barbara B., Awareness of EEG-subjective activity relationships detected within a closed feedback system, *PSYCHOPHYSIOLOGY*, Vol. 7, 1970, p. 451; Peper, Erik, Feedback regulation of the alpha electroencephalogram activity through control of the internal and external parameters, *BIOLOGICAL CYBERNETICS*, 7, 1970, p. 107.

[81] Atkinson, William walker, *The subconscious & the superconscious planes of mind*, e-artnow, 2016. As Tindall alluded, "The normal state of consciousness comprises either the state of wakefulness, awareness, or alertness… The abnormal state of consciousness is more difficult to define and characterize, as evidenced by the many terms applied to altered states of consciousness by various observers. Among such terms are: clouding of consciousness, confusional state, delirium, lethargy, obtundation, stupor, dementia, hypersomnia, vegetative state, akinetic mutism, locked-in syndrome, coma, and brain death". See: Tindall, Suzie C., Level of Consciousness, in Walker HK et al. (Eds.) *Clinical methods: the history, physical, and laboratory examinations*, 1990.

states of consciousness (sleep,[82] drunkenness, drug use,[83] etc.). Consciousness was typically defined as human knowledge about himself and his visual environment. The neurological events in consciousness have perceived as the events processed by the language system of the brain. Consciousness has a communicative essence that creates the ability of imaginary dialogue with oneself making self-consciousness. A relatively small part of the neocortex is its living substrate; it is mostly formed by neurodynamical activity of the left-hemisphere neocortex, where discrete fragments of imprinted reality are designated by symbols or words; hence, speech is an external manifestation of conscious thinking. Superconsciousness is a mysterious manifestation of mental activity of the entire brain with a dynamic awareness; in such a state of consciousness multidimensional imagery and huge complexity in perception are occurred in cognitive functions associated with higher potential, creativity, intuition, quantum reality and spiritual awareness. In subconsciousness, every mental activity is automatically realized (or can be) under certain conditions with no conscious skills. "Along with earlier realized experience filling consciousness with particular external content, there is a direct channel of influence on the subconsciousness in the form of imitative behavior. Thus, routine but important responses can be fixed and further carried out by column systems of lower (pre-verbal) levels, without being realized."[84] Based on psychological, metabolic, physiological and pharmacologic indicators, it was found that the brain's activities are disparate in consciousness raising or disturbance. Physicians like Donald Hebb mainly believed that the upper brainstem, thalamus, and basal forebrain play a crucial role in this regard; he argued that there is a set of neural cells which, in the state of consciousness, temporarily acts as a coherent system with neural communication network for facilitation of other systems at a given time in order to bring about cognitive capacities; however, it is still in controversy.[85] Neuroscience experiments consider the type of "consciousness accessibility" by focusing on the central nervous system and the electrical properties of neurons (particularly in the cerebral cortex). Neuroscientists linked access-conscious to "rational control" of behavior, which contrasts with a broader conception of "intentional access".[86] The later takes a mental state to be access-conscious if it can inform goal-directed or intentional behavior (whether irrational ore reasonable). As modern neuroscience experiments go, "Neural Correlates of Consciousness" (NCC)[87] is a first step for neurolaw in understanding consciousness. "An NCC is a minimal neural system N such that there is a mapping from states of N to states of consciousness, where a given state of N is sufficient under conditions C, for the corresponding state of consciousness."[88] Yet, there are many objection to the neuroscientific concept of consciousness on the grounds that it would be too superficial if we try to elucidate substantive components of mental experiments by the positive patterns of NCC displaying in fMRI. A plausible objection might be derived from the fact that mental activity of the brain follow a complex, diverse, and multilateral perception of any phenomenon.

Beyond, there were corroborated contemplations on the use of EEG in criminal justice systems. This has incorporated law cases bearing on the question of insanity and mental illness that have a potent effect on individual criminal responsibility; including what was strictly noted in the famous case of *Durham*.[89] For the juries, a specific rule (known as the *Durham rule*) was recognized to find a defendant is not guilty due to insanity: "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect".[90] Given that the EEG technique was recently introduced to the legal community and its efficiency was largely defensible for psychiatrics, criminologists have become increasingly familiar with it; involving what scholars learned by EEG experiences about the abnormal brain of individuals[91] with epilepsy,[92] tumors,[93] and neurological diseases[94] and behavioral responses to them. The clear example of this was Bennett's neuropsychological explanation for violence, social abnormalities and emotional disturbances in patients with epilepsy;[95] according to him, epilepsy causes some neurological responses by which atypical and violent behaviors become apparent. Such spontaneous reactions can lead to anomalous consequences in the social context; providing therapeutic measures in this regard, therefore, is an inevitable measure. It is mainly propounded in light of the right to treatment; as it is well articulated in *Rouse v. Cameron.*[96] Relying on

[82] Yoshii, K. TaniN, Efficiency of verbal learning during sleep as related to the EEG pattern, *Brain research,* Vol. 17, 1970, p. 277.
[83] Haider, Ijaz and Ian Oswald, Late Brain Recovery Processes after Drug Overdose, *BRITISH MED. J.*, Vol. 2, 1970, p. 318.
[84] Popov, L.E. et al., The phenomena of superconsciousness, consciousness and subconsciousness, *Natural resources and technologies in educational activities*, 2015, p. 57.
[85] See: Adam, Zeman and J. A. Coebergh, The nature of consciousness, in J.L. Bernat and R. Beresford (Eds.) *Handbook of clinical neurology,* 2013.
[86] Block, Ned, On a Confusion about a Function of Consciousness, *Behavioral and brain sciences,* Vol. 18, 1995, p. 227.
[87] Crick, Francis and Christof Koch, Consciousness and Neuroscience, *Cerebral cortex,* Vol. 8, 1998, p. 97.
[88] Chalmers, David J., What Is a Neural Correlate of Consciousness, in Thomas Metzinger, (Ed.) *Neural correlates of consciousness: empirical and conceptual questions,* 2000, p. 17.
[89] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954)
[90] Durham, 214 F.2d at 874-75.
[91] Williams, Denis, The Significance of an Abnormal Electroencephalogram, *J. NEURO. & PSY.*, Vol. 4, 1941, p. 257.
[92] Margerison, J. H. et al., Epilepsy and the temporal lobes. A clinical, electroencephalographical study of the brain in epilepsy, with particular reference to the temporal lobes, *BRAIN*, Vol. 89, 1966, p. 499.
[93] Williams, M. F. et al., clinico-eeg study of 128 gliomas and 50 intracranial metastatic tumours, *BRAIN,* Vol. 85, 1962, p. 1.
[94] Williams, M. F. et al., Clinico-EEG correlation with arterial and jugular venous biochemical studies in acute neurological disorder, *BRAIN*, Vol. 87, 1964, p. 281.
[95] Bennett, A. E., Psychiatric aspects of psychomotor epilepsy, *CALIF. MED.*, Vol. 6, 1962, p. 346.
[96] Rouse v. Cameron 373 F.2d 451 (D.C. Cir. 1966).

Durham rule, the court decided to hold the accused not guilty with regard to his madness and upheld its decision to confine him in a hospital for several years. In fact, lawyers believed that the mere subjection of confinement would not be in line with criminal justice and individual fundamental rights, but the community is responsible for providing appropriate therapeutic measures to them by developed medical sciences (especially psychiatry and neurology); indeed, scientists were somewhat expected to control and eradicate violence in human.[97] The use of neuroscientific evidence in criminal justice system will be further discussed in the post-modern era.

"Violence" was the key factor in the new criminology. Beside the psychological and neurological effects in emerging aggressions, some scholars recognized the term of 'dysfunctional society' as one of the main causes of pugnaciousness.[98] This led to a dialectic discourse between medicalization, socialization, and individualization of crime. As Mark and Ervin suggested, "that poverty, unemployment and substandard housing have a major role in provoking social protest and urban riots is obvious to an increasingly concerned and crowded American society. The more subtle, but equally important role of brain dysfunction, however, is often overlooked by sociologists and physicians who are prejudiced by the either environment or brain dysfunction dichotomy in explaining aberrant human behavior".[99] Indeed, the core of this discourse is to find the roots of crime in the environmental context, neuropsychological grounds or essentially individuals themselves. Critics of the biology of violence--propensity described it merely as a myth that did not have a well-founded scientific rationalization and was the same Lombroso's criminal man theory.[100] Based on this critique, thus, the biological theory of "Violence-Prone" is just a return to the classic biocriminology (19th century) that has formerly followed a seductive path. For the most part, sociological criminologists believed that the technological method for controlling behavioral violence is typically a pretext for turning a blind eye to the social injustice.[101] Nevertheless, medics have pointed out that the method could be a viable solution for social problems.[102]

Some neurosurgeons drew attention to the biological causes of mental illness in some delinquent patients; but on the contrary, a group of psychiatrists was more willing to explain it by taking into account the environmental causes.[103] The National Institute of Mental Health of the United States (NIMH) investigated both the biological (specifically neuropsychological) and sociological dimensions of mental illness;[104] in its basic biological research, the institute advanced the medicalization of behavioral violence.[105] However, the NIMH also alluded to some non-physical factors of violation among individuals. The research projects under the category of "Individual Violation" illustrated that despite the unbreakable link between violence and the brain, other factors (such as social, environmental, and educational) are also playing a significant role in this regard.[106] Anyhow, taking an one-dimensional approach obviously cannot depict a clear image of the violence roots; as Borogaonkar and Shah remarked,[107] putting social factors under scrutiny cannot merely ascertain the individuals' willingness to contravene the norms.[108] In the 1970 s, for example, there were abundant works to explain the violent states of those who suffered from neurological and psychological disorders, as well as epilepsy[109] with which abnormal behaviors are always associated.[110] Moreover, some EEG studies on the brain of prisoners showed that

[97] Largely, because of an experience gained in imprisonment system whereby offenders who were mentally ill, compared to others (With no mental disorder), spent more time in prison and it was not consistent with the requirements of criminal justice; psychopathic offender should be distinguished from common delinquents and be treated as a sick. See: Steadman, Henry J. and Joseph John Cocozza, *careers of the criminally insane: excessive social control of deviance*, Lexington, 1974; McGarry, J., The Fate of Psychotic Offenders Referred for Trial, AM. J.-PSYCHIAT., Vol. 127, 1971, p. 1181.

[98] Anon, Psychosurgery: A Political Weapon, *Chicago metro news* (21 December 1974).

[99] Mark, V. H. and F. Ervin, Role of Brain Disease in Riots and Urban Violence, *J. AMER. MED. ASSOC.,* Vol. 201, 1967, p. 895.

[100] Dougherty, Frank, Psychosurgery: Carte blanche?, *science news*, Vol. 111, 1977, p. 387; Coleman, Lee, Perspectives on the Medical Research of Violence, *AMER. J. ORTHOPSYCHIATRY*, Vol.44, 1974, p. 675.

[101] Conrad, Peter, The Discovery of Hyperkinesis: Notes on the Medicalization of Deviant Behavior, *social problems*, Vol. 23, 1975, p. 12; Conrad, Peter and Schneider, Joseph, *deviance and medicalization: from badness to sickness*, Temple University Press, 1980.

[102] Valenstein, Elliot, The Prefrontal Area and Psychosurgery, *progress in brain research, Vol.* 85, 1990, p. 539.

[103] Edson, Lee, The Psyche and the Surgeon: For the Mentally Ill, a Court of Last Resort, *NEW YORK TIMES* (30 September 1973).

[104] For some detailed descriptions, see: Valzelli, Luigi, Reflections on Experimental and Human Pathology of Aggression, *PROG. NEUROPSYCHOPHARMACOL. BIOL. PSYCHIATRY,* Vol. 8, 1984, p. 311*;* Nassi, A. and S. Abramowitz, From Phrenology to Psychosurgery and Back Again: Biological Studies of Criminality, *AMER. J. ORTHOPSYCHIATRY*, Vol. 46, 1976, p. 591.

[105] For instance, the genetic research showed that keeping juveniles in detention, due to the presence of additional Y chromosomes in their bodies, typically makes them more aggressive; in the pharmacological research about the hormonal imbalance and aggression, it is also found that some offenders at least are more susceptible to commit a crime.

[106] Casey, Brian P.*,* The Surgical Elimination of Violence? Conflicting Attitudes towards Technology and Science during the Psychosurgery Controversy of the 1970 s, *Science in context*, 28, 2015, p. 99.

[107] Borogaonkar, D. and S. Shah, Advances in Human Genetics and Their Impact on Society, *Science new series*, 170, 1970, p. 347.

[108] That is why developed neurocriminology reaffirmed a neuro-sociopsychological approach. See generally: Petoft, Arian, Neurolaw: A brief introduction, *IRAN. J. NEUROL.*, Vol.14, 2015, p. 53; Petoft, Arian and Ahmed momeni-Rad, Toward Human Behavior Sciences from the Perspective of Neurolaw, *INT. J. PUB. MEN. HEAL. & NEUROSCI.,* Vol. 2, 2015, p. 29.

[109] Ervin, F. R. et al., Focal cerebral disease, temporal lobe epilepsy and violent behavior, *TRANS. AM. NEUROL. ASSOC.,* Vol. 94, 1969, p. 253; Goldstein, M., Brain research and violent behavior, *Arch. Neurol.,* Vol.30, 1974, p. 26.

[110] Including severe physical reactions in the ictal and post-ictal states due to the frontal lobe epilepsy, antisocial behaviors by some psychiatric disorders in temporal lobe epilepsy, aggressive comportment in individuals with personality disorder and the like. See: Rita, G. et al., Episodic dyscontrol: a study of 130 violent patients, *AM. J. PSYCHIATRY*, Vol. 127, 1971, p. 1473; Riley, T. L., The electroencephalogram in patients with rage attacks or episodic violent behavior, *MIL. MED.*, Vol. 144, 1979, p. 515.

high rates of criminals suffered from mental illnesses.[111] By investigating into the human brain, likewise, a tremendous amount of works strived to find the neuropsychological causes of behavioral violence.[112] Biologists, neurophysiologists, biochemists, and geneticists, each with their own contribution, portrayed the anatomy of human violence.[113] Like what scientists found about the violence in individual with alcoholism. Skeleton was among the medics who examined the effects of alcohol on the brain and explicated the results by EEG data.[114] Following such findings, scholars has also proposed the question on the feasibility of detecting potential violent elements through the investigation on the offenders' brain[115] in order to provide convenient therapies or confinement. In fact, the possible use of neuroscience techniques in crime prevention has given an incentive for such efforts.[116] In spite of the neuroscience development, however, scholars have not yet been able to provide a convincing answer.

In order to prevent behavioral violence or treat some kinds of mental disorder, psychosurgery method has become an enormous movement in the 1970 s.[117] Efforts to discover the neural or mental roots of violence and provide a suitable method for cure, actually, were robustly made to prevent crime as a potential threat in individuals who are neuro-psychologically violent or abusive. Despite the criticisms of psychosurgery,[118] some scholars like Edson defended the use of its techniques even in cases where there is a deficient understanding of the correlation between human brain and behavioral violence. In his viewpoint, we should employ the psychosurgery techniques at least for untreatable psychiatric disorders (e.g., lack of improvement through pharmacotherapy, psychotherapy, and other methods).[119] Psychosurgeons expressed their hope that this would be a potential solution for preventing the growing illegality[120] at least towards the offenders who suffering from serious mental illnesses. According to judge Bazelon, "in the 1930's and 1940's atomic scientists stood on the threshold of unlocking the secrets of the atom, ushering in the nuclear era. Today, the bio-behavioral scientist stands on the threshold of unlocking many of the secrets of the brain."[121] Inspired by Hippocrates,[122] Mark and Erwin, called forth the "Violence Surgery" due to some successful and effective treatment for epilepsy and temporal lobe disorders.[123] In applying psychosurgery, hence, several programs were implemented to abate and eliminate the heroin-related crimes, and even to rehabilitate prisoners;[124] including a pilot study on 12 offenders in California who were subjected to aggressive behavior and temporal lobe epilepsy, or a study on 24 prisoners who are convicted of rape in Michigan, to appraise Mark and Erwin's hypothesis.[125] Contrary to what was expected,[126] the results showed that the invasive psychosurgery method jeopardize their health, therefore it does not meet the requirements of criminal justice. Although the practices were diverse[127] and

[111] I. Adrian, *Violent crime and the E.E.G.*, 2 BR. MED. J. 193 (1970).

[112] See: Mark, V. H. and F. R. Ervin, *violence and the brain*, Harper & Row, 1970; Raine, Adrian, the anatomy of violence: the biological roots of crime, Vintage, 2014; Bartholow, Bruce D., The Aggressive Brain, in Brad J. Bushman (Ed.) *Aggression and violence: a social psychological perspective*, Psychology Press, 2015; Volavka, Jan, *neurobiology of violence,* American Psychiatric Pub, 2008.

[113] Bylinsky, Gene, *new clues to the causes of violence,* 1973.

[114] He assessed the state of drunkenness and complete disturbance in attention and awareness to explain the extent to which cognitive or psychological perturbations were detected. See: Skelton, W. D., Alcohol, violent behavior, and the electroencephalogram, *SOUTH. MED. J.*, Vol. 63, 1970, p. 465.

[115] Anonymous author, Are violent criminals recognizable on the EEG?, *MUNCH. MED. WOCHENSCHR.*, Vol. 112, 1970, p. 3.

[116] Pharmacotherapy (exceedingly psychiatric medication) and psychosurgery were the most known methods in this regard. For example, pharmacotherapy of aggression in some patients with central brain disorders; see: Monroe, R. R., Anticonvulsants in the treatment of aggression, *J. NERV. MENT., DiS.*, Vol. 160, 1975, p. 1; or the treatment of epilepsy with carbamazepine; see: Tunks, E. R. and S. W. Dermer, Carbamazepine in the dyscontrol syndrome associated with limbic system dysfunction, *J. NERV. MENT., DiS.*, Vol. 164, 1977, p. 56.

[117] *Supra* note 103, p. 20; Kiloh, L. G. and J. S. Smith, The neural basis of aggression and its treatment by psychosurgery, *AUST. N. Z. J. PSYCHIATRY*, Vol. 12, 1978, p. 21.

[118] E.g., see: Greenblatt, Steven Jay, *The Ethics and Legality of Psychosurgery*, *N.Y.L. SCH. L. REV.*, Vol. 22, 1977, p. 961; Diamond, Bernard L., *The Psychiatric Prediction of Dangerousness*, *UNIV. PA. LAW REV.*, Vol. 123, 1974, p. 439. The controversy over the use of psychosurgery techniques has culminated with the sponsored mental health program: a two-year contract with a half million dollars fund between the US government and three physicians at the NMHI for the diagnosis, therapy and investigation of brain disease and violence. See: NA – File RES 9-19-E. Neuro-Research Foundation, Inc. No Date. "Organic Brain Disease and Violent Behavior: A Demonstration Program for Diagnosis, Treatment and Research." C.V. Mosby Company.

[119] Edson, Lee, For the Mentally Ill, a Court of Last Resort, *NEW YORK TIMES* (Sept. 30, 1973).

[120] Rosenfeld, Albert, The Psycho-Biology of Violence, *LIFE,* Vol. 21, 1968, p. 67; Meister, Joel, Violence and the Safe Society, *HASTINGS CENTER REPORT,* Vol. 4, 1974, p. 4. Among the concerns was the rapid deterioration of thuggery and murder status; from the mid-1960s until the mid-1970s, the homicide statistics was almost doubled. See: Sourcebook of Criminal Justice Statistics Online. Table 3.106.2011, available at http://www.albany.edu/sourcebook/pdf/t31062011.pdf

[121] Bazelon (Chief Judge), The Perils of Wizardry, *Annual Meeting of the American Psychiatric Association*, Detroit, Michigan, May 7, 1974, at 1.

[122] "For extreme diseases, extreme methods of cure, as to restriction, are most suitable." Adams, F., *The genuine works of Hippocrates,* Wood, 1972, p. 293.

[123] ERVIN, *supra* note 114, Chapter 6.

[124] Goldstein, Murray, *Brain Research and Violent Behavior*, *archives of neurology*, Vol. 30, 1974, p. 1.

[125] Gass, Ronald, Kaimowitz v. Department of Mental Health: the Detroit Psychosurgery Case, in Williard Gaylin, Joel Meister, and Robert Neville (Eds.) *operating on the mind,* 1975; Anon, Publicity Kills Brain Surgery Planned as Test on Inmate, *LOS ANGELES TIMES* (14 March 1973).

[126] NA – NIH Director's File class Res 9-19-E 1970, *The Violent Offender: the Development of Diagnostic Procedures*.

[127] There was a great deal of variation amongst practitioners due to several classes of patients with neuro-psychological disorders (epilepsy, schizophrenia, autistic spectrum, encephalopathy, spinal cord injury, paraneoplastic syndrome, functional neurological symptom, alcoholism, confusion, insanity, etc.), differences in surgical procedures (amygdala, posterior hypothalamus, etc.) and various invasive techniques (oil wax, lobotomy, stereo-encephalotomy, etc.). See: Narabayashi, Hirotar, Stereoencephalotomy in Japan, *confinia neurologica*, Vol.24, 1964, p. 314; Gostin, Larry and Paul Bridges, *Ethical Considerations of Psychosurgery: The Unhappy Legacy of the Pre-Frontal Lobotomy*, *J. MED. ETHICS*, Vol.6, 1980, p. 149.

merit of such techniques or their effectiveness were slightly unevaluable. The controversy among scholars was intensified to the extent that critics condemned psychosurgery as a misleading, worthless and even hazardous medical method.[128] Albeit, some psychiatrists contrarily referred to the lucrative function of psychosurgery in a legal system[129] and the need to modernize its techniques. Anyway, the use of traditional techniques (such as lobotomy) has been significantly reduced since the late 1970 s and new procedures were developed in neurosurgery, mainly the minimal surgery, and more specifically stereotactic surgery[130] with the use of radiographic imaging.[131] At the present time, psychosurgeons used these modern techniques also as the last solution for the treatment of severe mental disorders that cannot be cured in any other ways.

Meanwhile, a patient consent to psychosurgery was an argumentative ethical-legal question. In addition to be fully aware of the procedure details (including the necessary medical information and possible complications), a patient should voluntarily decide on performing the surgery. Psychosurgeons, thus, considered the processes entailing a "Voluntary Consent" of any subject. According to some critics,[132] however, psychosurgery sometimes has indeterminate and unpredictable consequences due to lack of sufficient knowledge about the human brain and make it somehow impossible to inform the subjected patient precisely. Additionally, in psychopathic cases that a chronic mental disorder typically impairs or substantially destroys patients' wise decision-making, the decision remains with a legally appointed guardian; and in any case, if the surgical procedures are experimental or innovative, there is no way to consent.[133] *Kaimowitz*[134] is a clear example of this. A Circuit Court sentenced John Doe to confine as a criminal sexual psychopath. He had been charged with the murder and subsequent rape of a nurse at a hospital while he was confined there as a mental patient. After more than 17 years, he was transferred to a clinic as a suitable subject for the research-project entitled "Treatment of Uncontrollable Aggression".[135] He and his parents signed an informed consent form to perform the experimental and innovative surgical procedures on his brain. The main question was about "whether legally adequate consent could be obtained from adults involuntarily confined in the state mental health system for experimental or innovative procedures on the brain to ameliorate behavior, and, if it could be, whether the State should allow such experimentation on human subjects to proceed". The court did not pass on whether such a procedure is unconstitutional (cruel and unusual punishment) because of "that the involuntarily detained mental patient may not give an informed and valid consent to experimental psychosurgery." The court held that "when the state of medical knowledge develops to the extent that the type of psychosurgical intervention proposed here becomes an accepted neurosurgical procedure and is no longer experimental, it is possible, with appropriate review mechanisms that involuntarily detained mental patients could consent to such an operation." Due to the advancement of psychosurgery and the legality of voluntarily expression of consent to an appropriate procedure as a last means, however, some scholars[136] and judges[137] criticized this decision.

The effectiveness of modern psychosurgery techniques in the treatment of mental disorders for controlling violent behaviors on the one hand, and the need to provide a proper legal mechanism for authorization of implementing them through determined formal procedures on the other hand, launched a movement to 'neurolegislation' in this regard. In 1973, Oregon approved the first comprehensive psychosurgery statutory law.[138] The statute provides that psychosurgery may be performed only under the Review Board[139] approval. For this purpose, first of all, a respected psychosurgeon must file a petition with the board including the patient (or legal guardian[140]) consent proof, the requisiteness of the proposed treatment, and

[128] They believed that psychosurgery is based on the inappropriate invasive method. Afterward, civil libertarians, a large number of practitioners, and political activists got indignant about the allegation. See: Breggin, Peter, Psychosurgery for Political Purposes, *Duquesne law review*, Vol.13, 1975, p. 841.

[129] Guedon, J., Comments on Foucault's 'About the Concept of the Dangerous Individual in 19th Century Legal Psychiatry, in D. Weisstub (Ed.) *law and psychiatry,* 1978.

[130] By emerging new neuroscience techniques, such as MRI in the 1980s, which gives more details of the brain anatomy, and PET (Positron-emission tomography) that detects changes in the brain metabolism and blood flow, physicians are able to operate stereotactic treatment for mental illnesses such as schizophrenia, severe depression, obsessive-compulsive disorder (OCD) and even antisocial personality disorder (ASPD) in order to frustrate the progress in which potential violence get objectivity. See: Faria, Miguel A., Violence, Mental illness, and the brain – A brief history of psychosurgery: Part 3, *SURG. NEUROL. INT.*, Vol. 4, 2013, p. 91.

[131] Robison, R. A. et al., Surgery of the mind, mood, and conscious state: an idea in evolution, *WORLD NEUROSURG.*, Vol. 77, 2012, p. 662.

[132] Zakowski, Phil, Psychosurgery, *J. LEGAL MED.*, Vol. 4, 1976, p. 26; Stevens, William, Psychosurgery Curbed by Court, *NEW YORK TIMES* (11 July 1973).

[133] Swan, L. Alex, Physical Manipulation of the Brain, *social policy*, Vol. 8, 1977, p. 52.

[134] Kaimowitz v. Department of Mental Health, 2 PRISON L. REP. 433 (Mich. Cir. Ct., Wayne County, 1973).

[135] The experiment was to compare the effectiveness of psychosurgery (specifically on the amygdala of the limbic system) with the effect of the drug cyproterone acetate on the 24 criminal sexual psychopaths' hormone flow.

[136] E.g. Murphy, Jeffrie, Total Institutions and the Possibility of Consent to Organic Therapies, *human rights*, Vol. 5, 1975, p. 25.

[137] E.g. Aden v. Younger, Civ. No. 14407. Court of Appeals of California, Fourth Appellate District, Division One. April 23, 1976.

[138] 35 Ore. Rev. Stat. § 426.700 et seq.

[139] The Board is composed of "…nine members appointed by the governor from specified medical, psychological, neuroscientific and lay backgrounds."

[140] If the patient is believed to lack the capacity for voluntary and informed consent, and there is no legal guardian, the Board must request that one be appointed.

its legitimacy (appropriateness of therapy,[141] legality and clinical merit). The board determines whether a "Voluntary and Informed" consent is given. But California has adopted a different approach to the act[142] in 1976; it provided the availability of treatments to have involuntarily confine pursuant to the penal code, wherever institutionalized.[143] The act requires a petition with a review committee[144] in order to assess the consent and the merits. There were also non-invasive treatments that had the analogous way of regulation. Among the most well-known was Electroconvulsive Therapy[145] (ECT), in which, a patient's brain, will be shocked by exposure to electric current to relieve the symptoms of some mental health problem (chiefly epileptic seizure,[146] severe depression,[147] and schizophrenia[148]). The U.S. case law[149] and legislations[150] recognized the right to refuse such shock treatments and also provide the requirements for obtaining the consent.[151]

This era encompasses the grounds for lawyers to be more familiar with the brain. EEG, as a correlation factor in the relation between law and neuroscience in the modern era, acquainted medico-legal discourses with the brain evidences representing new facts, principally, behind the behavioral violence. Indeed, this was an introduction to a motivation for the violence treatment by psychosurgical procedures predominantly. Since copious amount of criminal cases covered mental disorders, courts felt the robust need to EEG evidences of the individuals' brain, especially, following the novel findings in neurocriminology. But this required an expertise in the both fields of law and neuroscience in addition to neurolitigation proficiency qualification (neuroscience evidences in criminal procedure, to a large extent). Taylor was among neurolawyers who outstandingly investigated the connection between the fields and shared his neuro--procedure experiences[152] with lawyers. A new collaborative literature[153] actually was indispensable. He therefore coined the term "Neurolaw" as a distinct interdisciplinary field of study in 1991.[154] By exploring the effects of neuroscience findings on legal systems, neurolaw makes an effort to shed light on the relation between law and brain by taking into account a neuro--sociopsychological approach. Concurrent with the birth of neurolaw, the post-modern era is begun.

3. The Post-modern Era: fMRI Evidences and Advancement of Neurolaw

From the beginning of the 1990 s, neuropsychology and law were in the course of convergence.[155] The focus of the neuropsychologists was the human brain imaging and the presentation of medico-legal interpretations of its data in a courtroom.[156] Due to some critics on the reliability of neuroscience evidences in the context of legal system, however, some jurists refused to accept such data and the role of neuropsychology was supposed to be diminished in legal proceedings; but contrary to what was expected, now in the 21st century, we are witnessing an increasing number of neuroscientific evidences in courtrooms and the development of neurolitigations. The emergence of neurolaw coincided with the first successful experiment of fMRI in 1991.[157] By the combination of the MRI, PET and SPECT techniques, scientists were able to create another tech-

[141] To this end, several requirements must be met before an operation:
"(1) All conventional therapies must have been attempted;
(2) Criteria for selection of the patient must have been met;
(3) The operation must offer hope of saving life, reestablishing health or alleviating suffering;
(4) All other viable alternative methods of treatment must have been tried and have failed to produce satisfactory results." See: Department of Health, Education and Welfare, Use of psychosurgery in practice and research, *federal register,* Vol. 42, No.26318, 1977.

[142] Cal. Penal Code § 2670 et seq.

[143] The essential distinction between the Oregon and California legislation is that under the latter, legal representative or guardian consent is not recognized. Hence, the performance upon individuals who lack the capacity is absolutely prohibited in California; its legislation presumed that minors under the age of 18 years have not such a capacity.

[144] Dissimilar to the board, the committee is decentralized and composed only of physicians: one appointed by the facility (in which the psychosurgery will be operated) and two appointed by the local mental health director (must include two psychiatrists or neurosurgeons who are board-certified or eligible).

[145] Formerly known as Electroshock Therapy. For general descriptions of ECT treatment, see: Kalinowsky, The Convulsive Therapies, in A. Freedmand & H. Kaplan (Eds.) *comprehensive textbook of psychiatry*, 1967.

[146] Lunde, M. E., Electroconvulsive therapy in patients with epilepsy, *EPILEPSY BEHAV.,* Vol. 9, 2006, p. 355.

[147] Rosen, E. et al., *abnormal psychology*, Saunders, 1972, p. 433.

[148] Sullivan, M., Treatment of Acute Schizophrenia: The Place of ECT, *diseases of the nervous system,* Vol. 35, 1974, p. 467.

[149] E.g., Aden v. Younger, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Davis v. Watkins, 384 F. Supp. 1196, 1206 (N.D. Ohio 1973).

[150] Such as the statutes that provided the requirement of patient voluntarily informed consent to electroshock therapy: MICH. COMP. LAWS ANN. § 330.1716 (1974); N.Y. MENTAL HYGIENE LAW § 15.03(b)(4) (McKinney Supp. 1976). Also the acts that recognized the right to refuse shock treatment for patients: MASS. ANN. LAWS ch. 123 § 23 (Supp. 1974); WASH. REV. CODE § 71. 05. 370(7) (1974).

[151] For a detailed discussion, see: Anon, Regulation of Electroconvulsive Therapy, *Michigan L. Rev.,* Vol. 75, 1976, p. 363.

[152] He has presented numerous lectures on the subject in the US and England, and in 1989, by one of his prominent works entitled "Neuropsychological Evidence on Appeal", propounded his substantive and procedural methods of formulating neuroproceeding.

[153] Neuroscience and law are very different disciplines in nature from laboratory to the courtroom. Discrepancy of language was a critical issue with which neurolaw scholars are faced. Neurolawyers were being accosted with many concepts have slightly distinct meanings in the both sciences.

[154] Taylor, Sherrod J. et al., Neuropsychologists and neurolawyers, *neuropsychology*, Vol. 5, 1991, p. 293.

[155] *Ibid.*, p. 293.

[156] Shen, Francis X., Neuroscientific Evidence as Instant Replay, *J. L. & BIOSCIENCES,* Vol. 3, 2016, p. 343.

[157] Bandettini, P. A., Twenty years of functional MRI: the science and the stories, *neuroimage,* Vol. 62, 2012, p. 575.

nique called fMRI, which virtually displays the brain functions. The fMRI technique was successful in the path of progress[158] because of desirable access of countries to MRI scanners, the development of computer technology, and the medical advances in brain physiology. Nowadays, along with EEG evidences, fMRI data are also being examined to provide a more accurate understanding of activities and cognitive functions of the brain. FMRI has had significant scientific implications for other biomedical discoveries. More than clinical applications, it is used in neuroscience researches, especially in the field of cognitive studies,[159] in order to identify the brain and redefine human behavior in the context of legal approach. For example, fMRI considerably helps us to understand the memory status of individuals (especially for presenting witnesses in a court), abnormal behavior, violence, bias, feelings, emotions, and so on; despite the use of fMRI in diagnosis of neurological diseases and mental disorders, howbeit, it still does not play a main role in the pathology.[160] Neurolaw studies on the brain by fMRI have extended to complex moral and philosophical issues in the field of legal phenomena,[161] including the concept and states of consciousness, awareness, free will and legal responsibility. A dramatic increase in neuroscience findings that have affected social sciences unexpectedly extended the realm of neurolaw to the new subfields of study such as 'neuro-economic law',[162] 'neuro-constitutional law',[163] and 'neuro-human rights'.[164] Thus, by providing a novel perspective and new distinct interdisciplinary field of study, neurolaw strikingly outstretched the realm of 'law and neuroscience' to the extent that all legal issues could be subjected to modernization or reconsideration by neurolaw novel scholarly perspective in connection with new neuroscience discoveries. Clearly, behavior is the most core factor in a legal analysis of phenomena and, drawing from neuroscience, neurolaw scholars try to understand human behavior in a more deep deliberation; therefore, it will potentially shape future aspects of legal perspective (subjective transition) and issues (objective transition).

Efficiency of neuroscience findings in legal systems took the path to an ever-increasing presence of neuroscientific evidences in judiciary, legislature, and legal community.[165] Perhaps the most important effect that neuroscience has on the post--modern law is the mind reading and direct communication with the brain, largely, by the fMRI and EEG techniques. Investigation on the brain to clarify what goes on the mind caused many concerns about violation of right to privacy and cognitive liberty.[166] For the courts, in the current proceedings, resorting to neuroscience techniques in discovering the facts and issuing the appropriate verdict is a legitimate and virtuous matter, but the extent and limits of such an access to the individuals' mind and the maintenance of their fundamental rights are the controversial questions. Critics believe that the content of individuals' thought should be inviolable[167] and governments should respect the privacy of their mind.[168] Obviously, some primary conditions, in light of the rule of law requirements should be considered in this regard: such as effective judicial review, formal authorization, legality, taking non-punitive measures and health maintaining. Meantime, the concerns are not limited to these issues, but some recent findings also tag along with new challenges. Among the most notable ones is nootropics as the new smart drugs and cognitive enhancers to have an advanced mind. Neuropharmacologists developed these drugs for improving cognitive function of the brain and increasing learning ability and memory, with minimal side effects.[169]

[158] *Ibid.*

[159] Bullmore, E., The future of functional MRI in clinical medicine, *neuroimage,* Vol. 62, 2012, p. 1267.

[160] Rosen, B. R., and R. L. Savoy, fMRI at 20: has it changed the world?, *neuroimage*, Vol. 62, 2012, p. 1316.

[161] Greene, J. D. et al., *The neural bases of cognitive conflict and control in moral judgment*, *neuron*., Vol. 44, 2004, p. 389; Owen, A. M. et al., Detecting awareness in the vegetative state, *science,* Vol.313, 2006, p. 1402; Soon, C. S. et al., Unconscious determinants of free decisions in the human brain, *NAT. NEUROSCI.*, Vol. 11, 2008, p. 543.

[162] Remarkably, Neuroeconomics and Neuromarketing issues that could outstandingly be important in the context of post-regulatory states. This leads to a multidisciplinary study encompassing public economic law, neuroscience, business and economics. See generally: Ariely, D., and G. S. Berns, Neuromarketing: the hope and hype of neuroimaging in business, *NAT. REV. NEUROSCI.,* Vol.11, 2010, p. 284; Glimcher, Paul W. et al., A Brief History of Neuroeconomics*, in* Paul W. Glimcher, Ernst Fehr (Eds.) *neuroeconomics: decision making and the brain*, 2013. To study about the post-regulatory state, see: Scott, Colin, Regulation in the Age of Governance: The Rise of the Post-Regulatory State, *national europe centre paper*, No. 100: 6 June 2003.

[163] Including some issues in neuropolitics and neurolegislation; see: Shen, Francis X., Neurolegislation: How U.S. legislators are using brain science, *Harv. J.L.* & *Tech.*, Vol. 29, 2016, 495; Knutson, K. M. et al., Politics on the brain: an FMRI investigation, *SOC. NEUROSCI.,* Vol. 1, 2006, p. 25.

[164] Petoft, Arian et al., Controversial Brain Imaging as a Terrorism Emergency Measure in Neurolaw Discourse, *INT. J. NEUROL. NEUROTHER*., Vol. 2, 2017, p. 1.

[165] Shen, Francis X., The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw, *INT. J. LEGAL INF.*, Vol. 38, 2010, p. 352.

[166] *Supra* note 166.

[167] Their argument accentuates the new modern rights in the age of neurolaw: the right to cognitive liberty, the right to mental privacy, the right to mental integrity, and the right to psychological continuity. See: Ienca, Marcello and Roberto Andorno, Towards new human rights in the age of neuroscience and neurotechnology*, LIFE SCI. SOC. POLICY,* Vol. 13, 2017, p. 5.

[168] Kraft, Calvin J. and James Giordano, Integrating Brain Science and Law: Neuroscientific Evidence and Legal Perspectives on Protecting Individual Liberties, *FRONT. NEUROSCI.,* Vol. 11, 2017, p. 621.

[169] Nootropics are non-psychotropic drugs that extremely have low levels of toxicity. For more detailed explanation, see: Dejongh, R. et al., Botox for the brain: enhancement of cognition, mood and pro-social behavior and blunting of unwanted memories, *NEUROSCI. BIOBEHAV. R.*, Vol. 32, 2008, *p.* 760; Froestl, Wolfgang et al., Cognitive Enhancers (Nootropics). Part 1: Drugs Interacting with Receptors*, J. ALZHEIMER'S, DiS.*, Vol. 32, 2012, p. 793; Mondadori, C., The pharmacology of the nootropics; new insights and new questions, *BEHAV. BRAIN RES.,* Vol. 59, 1993, p. 1.

Although nootropic is advantageous in the rehabilitation and cognitive enhancement, but it could threaten some fundamental rights.[170] Hereupon, it gives rise to some legal and moral questions about equality of people, distributive justice, and fair competition in a society in which people are increasingly taking nootropics.[171]

By the new neuropsychological findings about the human brain and the nature of mental phenomena, neurolaw scholars strive to put forward new definition of human behavior and subsequently redefine the fundamental concepts in law[172] including free will, crime, adulthood, maturity and responsibility. Therefore, it seems that law is in transition. The concept and components of free will and criminal responsibility is a pivotal discussion of modern criminology in the 21st century that brings forth an argumentative debate regarding determinism discourse.[173] It seems that new discoveries in neuroscience ambiguously demonstrate that our behavior is determined by physical events in the brain; for that reason, we cannot be responsible for our actions. As Morse in criticizing this argument said "the challenge to free will from neurophysical determinism is familiar to similar challenges in the past, but it fails for three reasons. First, free will is not a criterion for the application of any legal rule. Second, free will is not foundational for criminal responsibility. Third, there is a philosophically plausible response to those who claim that determinism and responsibility are incompatible."[174] He even considers some arguments based on excessive reliance on neuropsychological findings and brain overclaim.[175] Nevertheless, many neuropsychologists speak of new findings based on neuroscience evidences of abnormalities and behavioral violence that may somehow change the nature and assessment of criminal responsibility. For example, Fields recently noted, "we are on the brink of a new understanding of the neuroscience of violence."[176] "Violence, like all behaviors, is controlled by the brain. New research in neuroscience is identifying the brain circuits of rage and aggression in ways that have not been possible before. Research to understand and cure disease is widely appreciated, but there is a larger unmet need to understand the neuroscience of violence."[177]

The spirit of radical determinism thought[178] might be similar to what Marc and Erwin have brought up in the context of psychosurgery, which is typically a recurrence of the twentieth century criminology. As it clear, there is a long way of neurolaw advancement that might gradually change our view of the concept of criminal responsibility. According to Greely, "certainly modern neuroscience works on the premise that our minds, our thoughts, our perceptions, our emotions, our beliefs, our actions, are all generated by our brains… This is important today because we are in the middle of a revolution in neuroscience. Compared to 30 years ago, we know almost infinitely more about how the human brain works."[179] Due to worthwhile application of neuroscience in the context of legal system including rehabilitation, mind advancement, violence prediction, and developing a more accurate approach to human behavior, it seems that neurocriminology has a bright future[180] in the conceptualization of free will and criminal responsibility. However, we should avoid engaging in paradoxical discourses that have led us to a deadlock in the historical path of 'law and neuroscience'. Exaggerating neuroscience findings in the context of neurocriminological determinism may deviate law from its correct path. Every human behavior is deeply rooted in the brain functions but it does not mean that we have no will. There are some philosophical explanations[181] and psychological experiments[182] to plausibly ascertain that human mind can control the brain and is not under its dictatorship. Neurological effects could encompass the elements

[170] Every day, pharmaceutical companies introduce new types of nootropics that people can buy most of them without any prescription. The demand for this kind of drugs creates a situation whereby supply arises from a black market. In addition, the widespread tendency in nootropic consumption to get a more advanced mind undermines the purpose of medicine. Therefore, there is a need for legal requirements by which a doctor can control over a patient's usage of a nootropic. See: Thorley, Emma et al., Varsity Medical Ethics Debate 2015: should nootropic drugs be available under prescription on the NHS?, *PHILOS. ETHICS. HUMANIT. MED.,* Vol.11, 2016, p. 6.

[171] Pham, Lilly, Nootropics: an ethical discussion, *duke university online archive* (November 5, 2012).

[172] Among multitude worthy works, see: Kolber, A., Free will as a matter of law, in M. Pardo and Patterson D. (Eds.) *philosophical foundations of law and neuroscience*, 2015; Morse, S. J., Neuroscience, free will, and criminal responsibility, In Glannon W. (Ed.) *free will and the brain: neuroscientific, philosophical, and legal perspectives*, 2015.

[173] Morse, Stephen J., Criminal Law and Common Sense: An Essay on the Perils and Promise of Neuroscience, *MARQ. L. REV.,* Vol. 99, 2015, p. 40; Greene, Joshua and Jonathan Cohen, For the Law, Neuroscience Changes Nothing and Everything, *PHIL. TRANS. R. SOC. A.,* Vol. 359, 2004, p. 1785.

[174] Morse, Stephen J., Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience, *MINN. J.L. SCI. & TECH.*, Vol. 9, 2008, p. 1.

[175] Morse, Stephen J., Brain Overclaim Redux, *LAW & INEQ.,* Vol. 31, 2013, 509 (2013).

[176] Douglas, Fields, The Neuroscience of Violence, *brainfacts* (Apr. 29, 2016).

[177] Douglas, Fields, The Neuroscience of Violence, again, *brainfacts* (Jul. 12, 2016).

[178] It suggests argue that "no one person is more or less responsible than any other for actions. We are all part of a deterministic system that someday, in theory, we will completely understand." See: Garland, Brent, *neuroscience and the law: brain, mind and the scales of justice*, Dana Press, 2004. For example, some studies concluded that the brain signals our body to act before we become consciously aware of it. Indeed, our actions are automatic responses to stimuli; therefore, if we consciously decide to act, it is merely *ex post* determinations. See: Dennett, Daniel, The Self as Responding – and Responsible – Artefact, *ANN. N.Y. ACAD. SCI.,* Vol. 1001, 2003, p. 39. Eventually, radical determinists come to the conclusion that we have, at best, "free won't" rather than "free will." GARLAND, at 56.

[179] Greely, Henry T., Law and the Revolution in Neuroscience: An Early Look at the Field, *AKRON L. REV.,* Vol. 42, 2009, p. 687.

[180] Shen, Francis X., Law and Neuroscience, *ARIZ. ST. U. L. REV.,* Vol. 48, 2017, p. 1043.

[181] See: Uttal, William R., *mind and brain: a critical appraisal of cognitive neuroscience*, MIT Press, 2011; Damasio, Antonio R., *self comes to mind: constructing the conscious brain*, Vintage, 2012.

[182] See: Schwartz, Jeffrey M., Rebecca Gladding, *you are not your brain*, Avery, 2012.

of will, or even in some cases put it under absolute brain control, but human authority and voluntarily deciding to act are undeniable in essence. As Opderbeck stated, "… some versions of reductive neurolaw are, to put it bluntly, redolent of fascism… They propose, not a concept of the 'rule of law,' but instead a dictatorship of the brain, or of some model of the brain, with 'neural reeducation camps' for those whose brains don't quite fall in line."[183] Lyashenko dialectically suggests some responses to a general critique of reductive neurolaw by emphasizing on nebulousness of "Uniqueness" and "Transcendence"[184] as the core concepts in the critique; furthermore, she alluded to some of the research projects, including the use of neuroimaging to predict recidivism rates and real-time brain feedback during drug rehabilitation, that reductive neurolaw offer us.[185] Notwithstanding, this argument does not demonstrate positivistic approach to the brain full control over the mind. New findings in modern neuroscience about the brain control over our habits, emotions, and thoughts do not necessarily assert mind subordination. As it seems, there is actually a mutual impact between the brain and mind. The mind is also able to control over our habits, emotions, and thoughts. Hereupon, an individual's will could be undermined by the brain malfunctioning as well as out of an abnormality of the mind.

This new route to reconceptualization of the core legal concepts, has found its practical way to criminal procedures. As it is clear in progressive implementation of the neuroscience techniques[186] in British,[187] Dutch,[188] Canadian,[189] and the U.S.[190] criminal proceedings, in order to assess criminal liability before a court. The extent to which neuroscience evidences are admissible is a controversial issue, anyhow.[191] In Canada, these evidences have usually been provided in sentencing decisions or dangerousness designations (an dangerous or long-term offender).[192] Neuropsychological or psychiatric assessments of the dangerousness and risk to the public from offenders is also addressed in England and Wales, particularly in the context of sexual offending.[193] Dutch courts admitted neuroscientific data as demonstrative facts in mitigating the punishment for the most part.[194] Generally, in the United States neuroscientific evidences are often used to evaluate the defendant's consciousness and free will in committing a crime, but they have been considerably less helpful for a judge in finding him/her guilty or not guilty.[195] Therefore, "if neuroscience matters, it is more likely to be at the sentencing as opposed to the guilt phase."[196] In the post-modern era, neuroscience evidences as expert testimonies have come up with a growing number of court cases.[197] These cases predominantly involve the death penalty and murder.[198] Today, 'neuro-criminal law' provides comparative systematic data and statistics on the status of neuroscience evidences in the context of cases, their reliability in judicial precedent, and procedures of 'neuro-criminal litigations'. FMRI evidences have admitted by the U.S. courts[199] in many cases for mitigating criminal responsibility[200] or determining the brain injury,[201]

[183] Opderbeck, David W., The Problem with Neurolaw, *Seton hall public law* (Research Paper No. 2214601, 2013). On the basis of reductive neuroscience, "the brain is a physical entity governed by the principles and rules of the physical world. In addition, it is increasingly clear that the brain determines the mind." GARLAND, *supra* note 182, at 8.

[184] In theorizing the concept of "Self", "Being", "Soul" and "God".

[185] Lyashenko, E., The Problem with Fearing the Unknown: A Response to David Opderbeck's The Problem With NeuroLaw, *SAINT LOUIS UNIVERSITY L.J., Vol.* 59, 2014, p. 11.

[186] *Supra* note 158, at 344.

[187] Catley1, Paul and Lisa Claydon, The Use of Neuroscientific Evidence in the Courtroom by Those Accused of Criminal Offenses in England and Wales, *J. L. & BIOSCIENCES,* Vol. *2*, 2015, p. 510.

[188] Kogel, C.H. de and E.J.M.C. Westgeest, Neuroscientific and behavioral genetic information in criminal cases in the Netherlands, *J. L. & BIOSCIENCES,* Vol. 2, 2015, p. 580.

[189] Chandler, Jennifer A., The Use of Neuroscientific Evidence in Canadian Criminal Proceedings, *J. L. & BIOSCIENCES,* Vol. 2, 2015, p. 550.

[190] Farahany, Nita A., Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis, *J. L. & BIOSCIENCES,* Vol. 2, 2015, p. 485.

[191] *Supra* note 190, at 564.

[192] *Ibid.*, at 559.

[193] *Supra* note 189, at 539.

[194] *Ibid.*, at 600. In most of cases, the defendant was presumed a person with mental disorder or who has a defective development; hereupon, these presumptions have mitigated his/her criminal responsibility.

[195] *Supra* note 191, at 501.

[196] *Supra* note 158, at 347.

[197] Neuroscientific evidences are presented in courts in many legal context, such as murder, dangerousness, drug usage, criminal mental states, competency, assault, robbery, fraud, etc.

[198] Deborah W. Denno, changing law's mind: how neuroscience can help us punish criminals more fairly and effectively, *Fordham Law Legal Studies*, Research Paper 1909958, 2016.

[199] However, the admissibility of fMRI image as a *substantive* or *demonstrative* evidence is still controversial. See: Feigenson, Neal, Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI, *INT. J. LAW CONTEXT,* Vol. 2, 2006, p. 233.

[200] For example, an accused's brain abnormalities as a mitigating factor that decreased his level of culpability and ability to commit a murder; e.g., *United States v. McCluskey*, 893 F. Supp. 2d 1117 (2012) (No. 10-cr-02734). As the U.S. Supreme Court has made it clear, for mitigating criminal responsibility, a neuroscientific evidence could be presented in court to "any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Kansas v. Marsh : 548 U.S. 163 (2006), at 174.

[201] Including possible causes of brain injury and trauma. See: Green Leaf Nursery, Inc. v. Kmart Corp., 485 F. Supp. 2d 815 - Dist. Court, ED Michigan 2007, Civil Case No. 05-40162. Also see: Penney v. Praxair, Inc., 116 F. 3d 330 - Court of Appeals, 8th Circuit 1997, Nos. 96-3312, 96-3247.

mental capacity,[202] and the brain death.[203] In the *Semrau* first instance trial (2010), also, fMRI data from the accused's brain was filed based on a lie detection technique;[204] results of the fMRI lie detector test indicated that Dr. Semrau was generally truthful when, during the test, he said his billing decisions were made in good faith and without an intent to defraud. However, the court of appeals did not admit the fMRI evidence:

> "The admissibility of fMRI lie detection testing in a criminal case is an issue of first impression for any jurisdiction in the country, state and federal. After carefully reviewing the scientific and factual evidence, we conclude that… the technology had not been fully examined in 'real world' settings and the testing administered to Dr. Semrau was not consistent with tests done in research studies. We also hold that the testimony was independently inadmissible… because the prosecution did not know about the test before it was conducted, constitutional concerns caution against admitting lie detection tests to bolster witness credibility, and the test results do not purport to indicate whether Dr. Semrau was truthful about any single statement."

Some fMRI findings offer us new facts on legal reasoning, i.e., the substantive interpretation of legal rules. A clear example is *Roper v. Simmons*,[205] in which, relying on new fMRI findings about the differences between adolescents' and adults' brain activity, the U.S. Supreme Court held that it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen. Moreover, in 2010, for the first time in Florida, the court ruled the qEEG evidence admissible in issuing the verdict.[206] Some scholars consider a neuroscientific evidence as a "double-edged sword" can act to promote a defendant's blameworthiness even as it is used to decrease judge's sentencing.[207] However, some studies show that such an evidence is commonly offered to mitigate punishments in a way that traditional criminal law has always allowed, especially in the penalty phase of death penalty trials.[208] In addition to mitigating the level of criminal responsibility, neuroscientific evidence may imply the probability of rehabilitation. Sometimes, there is a probable therapeutic activity for TBI treatment and recovery. Hence, a judge may hope for adopting therapeutic measures to reform a criminal offender. For instance, functional brain imaging data that provides objective evidence of brain injury in mild blunt head trauma patients with persistent post-concussive somatic or cognitive symptoms may be considered important for crafting sentences with "the greatest hope for success in rehabilitation". On the contrary, a TBI diagnosis is occasionally cited to explain why a more serious confinement is required to protect "the public safety". This confrontation is evident in Canadian criminal proceedings.[209] Therefore, evidence of brain damage may put a judicial decision in a path that a judge should decide whether rehabilitation measure or a more onerous sentence is required. Furthermore, neuropsychological evidences may illustrate developmental immaturity, which is considered as a mitigating factor when sentencing takes place. An offender who has a moderate to severe learning disability, which derived from a low IQ and cognitive weakness, may be subjected for the mitigation of punishment by the jury when assessing the *mens rea* required for the offense. Such evidences have being used in the British criminal proceedings in many contexts including racially aggravated harassment, manslaughter, robbery, etc.[210]

The increasing importance of neuroscience findings in the legal theories and practices has led to the establishment of expert exclusive research institutes[211] and the extensive development of neurolaw works in the vast majority of countries.[212] Over the past couple of decades, a large number of conferences, seminars and symposiums of law and neuroscience have been held at universities all over the world,[213] including Iran.[214] There

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[202] Including *mens rea* (e.g. People v. Williams, Supreme Court of California S110377, 2004), competency to stand trial (e.g. United States v. Gigante, 982 F. Supp. 140 - 1997) or to receive the death penalty (state of delaware v. red dog, 1993), and the insanity (e.g. People v. Weinstein 156 Misc.2d 34 - 1992).

[203] E.g. In Re Guardianship of Schiavo, 916 So. 2d 814 - Fla. Dist. Ct. 2005.

[204] See: *U.S. v. Semrau.* U.S. District Court for the Western District of Tennessee, No. 07-10074 (2010).

[205] 543 U.S. 551 (2005)

[206] *State* v. *Nelson,* 11th F] Cir. Ct., F05-846 (2010).

[207] See: Hardcastle, Valerie Gray et al., The Impact of Neuroscience Data in Criminal Cases Female Defendants and the Double-Edged Sword, *NEW CRIM. L. REV.,* Vol. 21, 2018, p. 291; Aspinwall, Lisa G. et al., The Double-edged Sword: Does Biomechanism Increase or Decrease Judges' Sentencing of Psychopaths? SCIENCE, Vol. 337, 2012, pp.846-849.

[208] E.g., Denno, Deborah W., The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases, *B.C. L. REV.,* Vol. 56, 2015, p. 498.

[209] As Chandler alluded, in *R. v. Harper* (2009 YKTC 18) "the judge sentenced a man for the sexual assault of a 13-year-old girl. He had severe FASD [Fetal Alcohol Spectrum Disorder] and a lengthy criminal history including four other convictions for sexual assault." On the contrary, in *R. v. Becker* (2009 ABPC 227) "the judge refused the defense request for a conditional sentence to be served in the community and incarcerated an offender with FASD, possible brain injury, ADHD [Attention Deficit Hyperactivity Disorder], and substance abuse." *Supra* note 190, at 569-570.

[210] *Supra* note 189, at 536-539.

[211] E.g., The MacArthur Foundation Research Network on Law and Neuroscience; Shen Neurolaw Lab; Fordham University Center of Neuroscience and Law.

[212] *Supra* note 5, at 670. You can find the bibliography of neurolaw and the statistics of researches in this new interdisciplinary field of study, on: http://www.lawneuro.org/bibliography.php; also see: *Supra* note 167, at 353.

[213] To read about some major events from 2003 to present, see: http://www.lawneuro.org/conferences.php.

[214] In Iran, neurolaw was presented at Tehran University of Medical Sciences (Department of Neurology) for the first time in 2015. See: *Supra* note 110. Since then, many neurolaw symposiums have been held in Tehran. E.g., "Toward Human Behavior Sciences from the Perspective of Neurolaw", Tehran University of Medical Sciences, 2015; "Modern Criminology in the Light of Neurocriminology" University of Judicial Sciences and Administrative Services, 2016; "Neuroscientific Techniques in Law: Opportunities and Challenges" Iran University of Medical Sciences (Brain & Cognition Clinic), 2017.

are currently more than 20 world-class universities that provide fellowship in postgraduate education or research-study programs[215] inviting scholars to join in the neurolaw researches. The dramatic effects of neuroscience findings on legal systems in the way of neurolaw advancement conduce to the evolutionary transition of law. In developing new norms and regulations, consequently, novel neuropolicy and neurolegislative movements were made in light of advanced neurolaw. France's prime minister unprecedentedly adopted a neuropsychological public policy program entitled "Neuropolicy" in Ministry of Social Affairs to take advantage of the potential opportunities arising from advanced neuroscience in public policy, in accordance with specific mechanisms.[216] In the U.S., there are also a number of state legislatures that have drafted laws or regulations on the neurolaw issues.[217]

A more-or-less progression of medico-legal discourses in line with history of law and neuroscience shows the connection between the advancement of the brain sciences and neurolaw development. Mind and brain sciences have tremendously advanced and certainly continue to do so; however, it seems that there is no symmetrical development in the connective discourses of law and neuroscience during the 19th and 20th centuries. This is because of the traditional segregated way of the social sciences from medical sciences. Notwithstanding, we believe that the advancement of law and neuroscience might be in a linear fashion in the age of neurolaw, which gives rise to a mutually consolidated way of science; indeed, the development of medico-legal discourses was a motivation for the sake of convergence and eventually integration into this newly born knowledge. Neurolaw provides us a common literature of law and neuroscience (that was not existed heretofore) by which the discourses reach maturity in line with scientific advances. Before the post-modern era there was no progressive interdependence between law and neuroscience owing to some restrictive factors such as scientific segregation, heterogeneous literature, legal conservatism towards evidence reliability, etc.; but the emergence of neurolaw dramatically changed the matter. Neurolaw somehow puts forward discourses in an integrated autonomous field of study by which a new scholarly perspective to phenomena is being presented. A great number of scholarly contributions and academic scholarships in the field of neurolaw during the last couple of decades simply demonstrates the interdependency between law and neuroscience in the advancement; however, this is particularly true for their common discourses in the context of neurolaw, and not for the pure disciplinary matters. This is why present-day law traces back the most modern neuroscience discoveries. Much inclination for using the brain evidences in legal practices or referring to their modern findings in legal argumentation in order to reshape the linked discourses, in the current life of neurolaw, is a motivation to keep up this interdependency and modernization of law.

4. Conclusion

The classic era of law and neuroscience was the platform for medico-legal discourses were remarkably initiated with physio--psychological thoughts inspired by which some controversial criminal doctrines including bio-legal analysis of crime in the context of determinism have emerged. This has led to a multidimensional analysis of legal phenomena that 'biocriminology' was conventionally in the core of it. By a primary understanding of the brain and its impact on human behavior, scholars became more familiar with neurological disorders and characterized some essential concepts including "Death", "Life" and "Consciousness". In this timeframe, by taking a comprehensive approach to biological, psychological, and sociological factors in human behavior, medico-legal discourses have been developed, particularly in explaining criminality. However, the meticulous and evidence-based investigation into the brain remained for the modern era. Almost at the commencement of the modern era, EEG technique was introduced in legal systems. Subsequent to some new neuroscience discoveries based on EEG evidences of the brain, this technique found a way for legal normative implementation by some well-nigh concrete facts for legal decisions. Physicians have coined the concept of "Brain Death" that the consciousness was at the core of it in medico--legal conceptualization. EEG evidences gradually found their way into courtrooms, mostly in the context of cases bearing on the question of insanity and mental illness that have a potent effect on individual criminal responsibility. Violence was the key factor in the criminology of the modern era. In order to call a dialectic discourse between medicalization, socialization, and individualization of crime in this new criminology, psychological, neurological, and dysfunctional society factors were considered in the anatomy of violence. For preventing behavioral aggressiveness or providing an effective treatment for a mental disorder, psychosurgery techniques have been remarkably used as a violence-surgery method in respect of employing modern scientific techniques for controlling violence. Meanwhile, the patient voluntarily informed consent to psychosurgery was regulated by neurolegislations. EEG acquainted medico-legal discourses with the brain evidences representing new facts that were important for courts, especially due to the novel findings in neurocriminology. This robust need to expertise in the both fields of law and neuroscience, and the advancement of neurolitigation led to the emergence of "Neurolaw" as a distinct interdisciplinary field of study in the next era. From the beginning of the post-modern era, neuropsychology and law were in the course of convergence. Nowadays, modern neuroscience, especially by FMRI evidences, provides us a more accurate understanding of activities and cognitive function of the brain; this includes the mind reading and direct communication with the brain. Discovering the secrets of the brain and

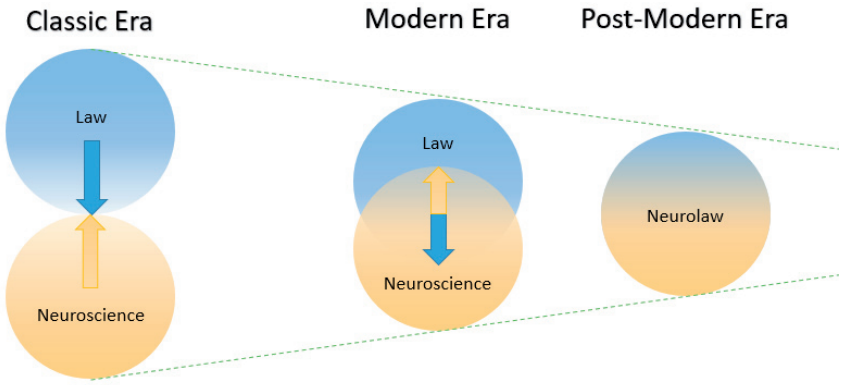
[215] Since 2006, courses in 'Law and Neuroscience' have been offered by many schools including: Harvard University; Yale Law School; William & Mary Law School; Stanford Law School; University of Pennsylvania; Vanderbilt Law School; University of Minnesota Law School; Fordham Law School; University of Kent (UK); Macquarie University (Australia); etc.

[216] https://mindhacks.com/2010/05/31/french-government-begins-neuropolicy.

[217] E.g., An act to amend the criminal procedure law, in relation to admissibility of magnetic resonance imaging (MRI) brain scans in criminal proceedings, Bill No. A9154 (State of New York); for more detailed explanation, see: Shen, *supra* note 165.

the manifestation of mind accompanied by new post-modern rights including the right to cognitive liberty, the right to mental privacy, etc. The modern neuroscience findings fertilize the ground for the reconceptualization of legal concepts including free will, crime, competency and criminal responsibility in the context of neurolaw. A dramatic development of 'law and neuroscience' unexpectedly outstretched the realm of neurolaw to the new subfields of study to the extent that all legal issues could be subjected to modernization or reconsideration in connection with new neuroscience discoveries. Therefore, it seems that law is in transition. In 21st neuroscience evidences took the path to an ever-increasing presence in courtrooms. In the post-modern era we are witnessing the extensive use of neuroscientific evidences in British, Dutch, Canadian, and the U.S. criminal proceedings in many legal contexts, such as murder, dangerousness, drug usage, criminal mental states, competency, assault, robbery, fraud, etc. These evidences are also used for mitigating criminal responsibility or determining the brain injury, mental capacity, the brain death, and the probability of rehabilitation. Besides, some fMRI findings offer us new facts on legal reasoning, i.e., the substantive interpretation of legal rules. Furthermore, in developing new norms and regulations, novel neuropolicy and neurolegislative movements were made in light of advanced neurolaw. Consequently, the post-modern law is currently employing the modern neuroscience findings by which neurolaw is increasingly encompassing litigations, legislations, and legal thoughts.

In conclusion, it seems that medico-legal discourses took their path to the realm of neurolaw as a distinct field of study to revise the law by transition of the perspective from a pure legal to a specialized neurolaw approach. In 19th and 20th centuries, the path has mainly sought out the reconceptualization of the core concepts in criminology, but in the post-modern era, coincident with the emergence of neurolaw, it penetrated the entire body of law. Hence, there is a distinct medico-legal analysis of phenomena in the current life of law from the traditional one; though this new neuroscientific evidence-based perspective has root in the history, as seen above, but it is clearly revolutionized in the context of neurolaw and evolving by the advancement of this newly born field. Somehow the convergence made this perspective novel and distinct. As a result, our hypothesis about the repetition is unreliable.



This historical study showed that medico-legal discourses took three steps in the three time frames relatively: development of multidimensional approach, discovering the brain facts, and brain decoding. By the first step, legal scholars found out they should substantively scrutinize the human behavior by a *de facto* approach in which biological, psychological, and sociological involved factors are considered. The multidimensional approach has encouraged scholars to explicate criminality and find a way to countervail it. The second step illustrated that in the realm of biological factors, there are brain facts that lead us to the neuroscience discoveries by which theoretical and practical aspect of law could be mutated. By taking into account the neurological factors, scholars have mainly strived to depict the anatomy of violence and develop violence-surgery. And the last one is the way to find the brain secrets in order to take advantage of neurolaw perspective for transition of law. In this era, scholars try to directly communicate with brain and look for some effective techniques in mind reading.

	Classic Era	Modern Era	Post-modern Era
Steps	Development of multidimensional approach	Discovering the brain facts	Brain decoding
Perspective	Bio-sociopsychological	Neuro-sociopsychological	Neurolaw approach
Key factor	Criminality	Violence	Mind reading
Subordinate factor	Countervailing	Surgery	Direct communication with the brain
Most known emerged neuroscientific evidence	-	EEG	fMRI
Practical impact in the legal context	-	The rise of neuroscientific evidence in courtrooms	Neurolitigation and neurolegislation advancement

Individual Ownership and Collective Ownership in the Nineteenth-Century Debate before the Sacred Economic Congregation

Simone Rosati *

Abstract

This work aims at retracing the origin and the characteristics of the debate on ownership in the Papal States during the 19th century. Such reconstruction will be possible thanks to the documents presented to the Sacred Economic Congregation. The latter, during the first two decades of the 19th century, received the papal mandate to discuss a draft law in order to eliminate all the obstacles opposed to the diffusion of the free and absolute private ownership. The notice related to a Law on ownership favoured the birth of an intense debate that created a division between the papal authorities, on the one hand, and the local communities, on the other hand. As we will see throughout the research, the two sides of the conflict protected two different models of ownership that, in turn, were expressions of two legal mentalities on the forms of appropriation: the individual one, typical of the modern world, and the collective one, an expression of the medieval civilisation.

Keywords: *Sacred Economic Congregation; 19th century; private ownership; collective ownership; Papal States.*

1. The debate on ownership in the Papal States: an issue related to an economic reform or to two opposing legal cultures?

Why, at the end of the 18th century, the pontifical territories were the forum of an intense debate on ownership?

We might dryly answer to this question by using the words of one of the unquestionable protagonists of this story, Monsignor Nicola Milella, Secretary of the Commission of cardinals constituted to discuss the project of a Law to abolish the servitudes of pasture, which would see the light shortly after [1]:

> "*Nel mentre presso altre nazioni si poneva ogni cura di giovare l'agricoltura, la pastorizia e l'industria col liberare la proprietŕ dall'odioso vincolo delle pubbliche servitů, il governo pontificio non si ristette indifferente* […] *fu allora che si concepě ragionevolmente la idea di una Legge generale per poter ad un tempo, ed in modo uniforme, provvedere a tutti i casi particolari, e cosě togliere il fastidio di lunghe e singolari discussioni* […] *e liberare dallo squallore in cui vedesi l'agricoltura e l'industria nelle suburbane provincie*" [2].

If we simply make a superficial reading of the work of the prelate, which is permeated by an enlightened and enthusiastic faith towards statistical and economic data, we would only deduce the conviction of a mere project of agrarian policy, aimed at improving the productivity of the lands; this is the interpretation given by some historians [3], which focuses on the detailed economic tables that are very present in the studies on agrarian issues of the nineteenth century.

Nevertheless, a more profound reading of the text allows to clarify some considerations that the Historians of Law can't disregard.

A first consideration that emerges from the text of the Pontifical Secretary is the reference to other European nations, a peremptory signal of the fact that such reform was not a simple procedure of economic-agrarian policy, aimed at favouring some crops instead of others or at improving the techniques of land use; instead, it aimed at far more profound and relevant goals for society, which express a mentality that had been existing during decades in the European states.

The mentality and the goals of the Pontifical Curia can be deduced from Milella's work: to free the individual ownership from the hateful bond of the servitudes of public use: "*liberare la proprietŕ dall'odioso vincolo delle pubbliche servitů*" [4]. These few words summarise the core of the ownership problem in the pontifical territories. Such words have more to do with legal science than with economic science. In this words, the historian of law, thanks to his awareness, is able to glimpse the trails that hide behind the apparently empty shell of the technical definitions.

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1 We refer to the *Notificazione della Commissione governativa di Stato*, 15 November 1849.

2 MILELLA, N., *I papi e l'agricoltura nei domini della S. Sede*. Roma, 1880, p. 311.

3 Among the historians who have analysed the vicissitudes of ownership in the territories of Saint Peter by omitting the social and legal data and by prioritising the economic field we mention Marina Caffiero's work, *L'erba dei poveri*. In some parts of the research, it seems to reduce the suppression of the rights of common to a mere procedure of agrarian economy. CAFFIERO, M., *L'erba dei poveri. Comunitŕ rurale e soppressione degli usi collettivi nel Lazio (secoli XVIII- XIX)*. Roma, 1983.

4 MILELLA, N., *I papi e l'agricoltura nei domini della S. Sede*. Roma, 1880, p. 311.

Behind the "ownership" and the "hateful bond of public servitudes" two opposed worlds, two opposed mentalities are hidden. They are the heirs of two irreconcilable civilisations [5]. Let us explain this better. All the great debate that ever since the end of the 18th century involved a lot of jurists, economists, towns, city associations, commissions of cardinals [6] is not only the slow implementation of a plan of economic renewal in the pontifical domains. It is a lot more, it is the tragic juxtaposition between ancient (the Medieval world) and modern (the world of ownership individualism).

"The ownership" to which Milella refers is the only individual ownership that centuries of legal stratification had delivered to modernity. "The public servitudes", on the other hand, derived from a more ancient civilisation, the one of the Middle Ages, an expression of *another modality* [7], extremely multifaceted and divided, of structuring the modalities of appropriation of the soil. Two distant mentalities, one of which is simple and unitary, while the other one is complex, were heading to a fatal clash.

The objective of this study is to retrace, through the works of the Sacred Economic Congregation, the two concepts regarding the modalities of appropriation of the goods that have been at the root of the political and legal discussions on ownership during the nineteenth century: on the one hand, the medieval voice, which is the expression of a legal mentality that gives to the community a central role; on the other hand, the "modern mentality", which mainly attributes to the individual the direct and absolute power to affect the *res.*

These two voices, the ancient one and the new one, are the extreme summary of two modalities of thought that reflect as many modalities of living the anthropological relation between the self and the environment: the first one is based on the central role of the community and of custom [8]; the second one focuses on the individual seen as the only term of the absolute relation with things [9].

Clearly, the term "modern", here, does not mean the authorship of the individualistic logic in the theory on ownerships, but only the fact that precisely such historical period - the legal modernity [10] - has witnessed the clear dominance of individual ownership as a characterising element of that era [11].

The main element to truly understand such debate is, first of all, man in his essence, as a being in relation to others and to the environment. This is the essential starting point of our research. In other words, behind the path that we will follow, we will not only find sentences, legislative works or law treatises, but also the thousand-year-old history of man in his natural instinct to possess the things that surround him. From this point of view, ownership no longer is the history of a specific legal order (of the Italian, the French or of any other legal order), but it rather is the history of man *tout court* [12].

2. The cause of the litigation: the *ius pascendi in re aliena*

The first important element consists in understanding the origin of the debate about ownership in the Papal States, which can be identified in the extremely peculiar ownership system that is typical of those places in which, ever since the beginning of the 20th century, a legal agrarian regime that caused hate and problems existed: the *iura in re aliena* and, in particular, the *ius pascendi in re aliena*, that is, the right to pasture cattle on private

[5] This is the famous theory of Paolo Grossi, according to whom ownership, before being a legal concept, is a mentality, "*non si riduce mai a una pura forma e a un puro concetto ma č sempre un assetto sostanziale, un nodo di convinzioni, sentimenti, certezze speculative, interessi grezzi, tanto che sarebbe avventatissimo –e addirittura risibile- chi tentasse di inseguire, in questo terreno, una sorta di termini, parole*". GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano, 1992, p. 630.

[6] For an in depth analysis see ROSATI, S., Comunitŕ e territorio: la difesa civica dei diritti agrari collettivi nello stato pontificio (sec. XIX). In: *Archivio Scialoja-Bolla*, Nr. 1, 2018, p. 157-181.

[7] The expression in italics is taken from the famous monograph of Paolo Grossi *Un altro modo di possedere*, that represents the essential source to understand the world of the rights of common both from the legal and from the anthropological point of view, as a relation between man and land alternative to the individualist one. The Title of Grossi's book is a quote and a tribute to another great jurist, Carlo Cattaneo who, in one of his essays entitled *Su la bonificazione del Piano di Magadino*, wrote: "questi non sono abusi, non sono privilegi, non sono usurpazioni: č un altro modo di possedere, un'altra legislazione, un altro ordine sociale, che, inosservato, discese da remotissimi secoli sino a noi". CATTANEO, C., *Su la bonificazione del piano di Magadino. Primo rapporto a nome della Societŕ promotrice*, Lugano, 1851, p. 5.

[8] BARCELLONA, P., *L'individualismo proprietario*, Torino, 1987, p. 110-111; GROSSI, P., *L'Europa del diritto*, Bari, 2007, p. 24; QUAGLIONI, D., La consuetudine come costituzione. In: NERVI, P. (Hrsg.), *Dominii collettivi e autonomia. Atti della V Riunione scientifica* (Trento, 11-12 November 1999), Padova, 2000, p. 21-37.

[9] Modernity is characterised, in relation to other legal experiences, by the all-embracing presence of the individual ownership as a "norma di funzionamento dell'intera societŕ e dei rapporti umani". BARCELLONA, P., *L'individualismo proprietario*, Torino, 1987, p. 13.

[10] We assume the famous doctrinal stance of Paolo Grossi, who sees in the long path of human history three legal experiences, which are the expression of as many historical civilisations well differentiated from the legal, cultural and social point of view: Middle Ages (IV-XIV), Modernity (XIV-XX), Post--Modernity, which starts at the beginning of the 20th century and is still following a path of development, therefore it is waiting to be decoded by the academic. GROSSI, P., *L'Europa del diritto*, Bari, 2007, p. 8.

[11] It should be noted that the signs of change are defined by Paolo Grossi already in the XIV century, a transition era during which "le linee di un edificio future" are placed; the egological dimension of it finds in this era the first signs that will solidify from the following historical passages, such as legal humanism, the doctrine of natural law, the Enlightenment, the French Revolution, until the nineteenth century, when, at last, the Pandectists deliver to the bourgeois culture a legally perfect model of individual ownership, faithfully based on the principles built throughout the experience of the previous centuries. GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali,* Milano, 1992, p. 624-626.

[12] We return to the enlightening words of Grossi: ownership, before being a legal concept, is a mentality, "non si riduce mai a una pura forma e a un puro concetto ma č sempre un assetto sostanziale, un nodo di convinzioni, sentimenti, certezze speculative, interessi grezzi, tanto che sarebbe avventatissimo –e addirittura risibile- chi tentasse di inseguire, in questo terreno, una sorta di termini, parole". GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali,* Milano, 1992, p. 630.

lands [13]. This was a promiscuous modality of enjoyment of the soil which was very present in the pontifical lands and that, due to its nature, put in relation two different and opposed centres of interest: on the one hand, the owner of the land (who was the holder of the *ius serendi*); on the other hand, the community, the holder of the collective right to pasture (those who were holders of the *ius pascendi*).

The *ius pascendi*, therefore, represents the concrete realisation of the theory of decomposition of the absolute dominion [14]. According to this theory, the absolute ownership is divided in as many forms of belonging as the *utilitates* that can be obtained from the land [15]. In our case, the *ius pascendi* and the *ius serendi*, which are identified precisely through the fruits from which the *utilitas* derives, that is, the natural fruits for grazing (the *ius pascendi*) and the industrial fruits that, on the other and, require the work of the owner of the land (the *ius serendi*) [16].

So, which is the legal culture that hides behind this theory? It is the legal culture of the medieval world in which, as Paolo Grossi underlines, each situation of enjoyment can be dominion, and it can be so beyond the excessive formalisations of the legal system [17]. Therefore, a fragmentation of ownership in as many forms of dominion as the *utilitates* obtainable from the soil took place; this situation reflected faithfully the extremely peculiar and fascinating culture that was able to preserve itself in the reality of the "pontifical" countryside throughout the entire 19th century.

Therefore, starting from the end of the 18th century, firstly in a marginal way and later with more strength, a serious ownership issue emerged regarding the modality to overcome such promiscuity; as we can imagine, this problem absorbed the values and the ideas underlying the two mentalities that we have identified at the beginning of this work.

Those who supported the individual property endorsed the complete liquidation of the collective agrarian rights, considered as the legacy of a murky past and of an unacceptable social and economic theory. Their ideal was the one of private property and the cult of the individual to the detriment of the values expressed by the community as a relational place for the intermediation between man and land. This ideal inspired the judgements of the Roman Rota towards the end of the 18th century [18], the work of the Economic Congregation (that we will analyse in this study) [19], the decisions of the Tribunal of

[13] On the "*ius pascendi in re aliena*" see: FALZACAPPA, C., *Sui pascoli comunali. Memoria del Conte Casimiro Falzacappa di Corneto*, Perugia, 1842; FREZZINI, L., *Sull'abolizione delle servitù di pascolo, legnatico e simili nelle provincie ex-pontificie*, Castelpiano, 1889; SERCIA, G., CANCANI-MONTANI, F., *Il castello di Montalto di Castro, la tenuta della "Pescia Romana" e la Dogana dei pascoli del Patrimonio. Rapporti economico-giuridici fra la Camera Apostolica, i Farnese e gli abitanti di Montalto di Castro*, Roma, 1926; VILLANI, P., Ricerche sulla proprietŕ e sul regime fondiario del Lazio. In: *Annuario storico italiano per l'etŕ moderna e contemporanea*, vol. XII, 1960; DANI, A., Aspetti e problemi giuridici della sopravvivenza degli usi civici in Toscana in etŕ moderna e contemporanea. In: *Archivio storico italiano*, vol. CLVII, 1999, p. 285-326; ZENDRI, C., Universitas, proprietŕ collettiva e servitů di pascolo nel tractatus de servitutibus di Bartolomeo Cipolla (CA. 1420-1475). In: NERVI, P. (Hrsg.), *Dominii collettivi e nuovi protagonismi per la promozione dello sviluppo rurale. Atti della VI Riunione Scientifica (Trento, 9-10 novembre 2000)*, Padova, 2002, p. 105-129; BARBACETTO, S., Servitů di pascolo, civicus usus e beni comuni nell'opera di Giovanni Battista De Luca († 1683). In: NERVI, P. (Hrsg.), *Cosa apprendere dalla proprietŕ collettiva. La consuetudine fra tradizione e modernitŕ. Atti della VIII Riunione Scientifica (Trento, 14-15 novembre 2002)*, Padova, 2003, p. 286-294; DANI, A., *Le risorse naturali come beni comuni*, Arcidosso, 2013; DANI, A., Profili giuridici del sistema senese dei pascoli tra XV e XVIII secolo. In: MATTONE, A., SIMBULA, P. F. (Hrsg.), *La pastorizia mediterranea. Storia e diritto*, Roma, 2011, p. 254-267; Dani, A., *Usi civici nello Stato di Siena di etŕ medicea*, Bologna, 2003.

[14] On the theory of the division of the absolute or divided dominion see PETRONIO, U., Usi e demani civici. Fra tradizione storica e dogmatica giuridica. In: CORTESE, E. (Hrsg.), *La proprietŕ e le proprietŕ*, Milano, 1998, p. 514; MEYNIAL, E., Notes sur la formation de la théorie du domaine divisé (domaine direct et domaine utile) du XIIe au XIVe siĕcle dans les romanistes. Étude de dogmatique juridique. In: *Mélanges Fitting*, vol. II, 1908, p. 409-461; THIBEAUT, A. F. J., Über dominium directum und utile. In: *Veruche über einzelne Theile der Theorie des Rechts*, vol. LXXVIII, 1970.

[15] Regarding this, we share the valid warning of Ugo Petronio: "*guardare agli usi e ai demani civici sotto il profilo del godimento delle utilitates e della loro appartenenza […] significa assumere un punto di osservazione che sembra più aderente a quanto suggeriscono le fonti del cosiddetto diritto intermedio, le quali, quando si riferiscono agli usi civici […] o agli stessi cosiddetti «demani civici» […] hanno riguardo soprattutto al godimento dei servizi prestati dal suolo, e quindi all'appartenenza di essi, piuttosto che al suolo in sé e alla sua titolaritŕ*". PETRONIO, U., Usi e demani civici. Fra tradizione storica e dogmatica giuridica. In: *La proprietŕ e le proprietŕ*, Milano, 1998, p. 514.

[16] The reference to the natural and industrial fruits is related to a distinction stated before by Cardinal De Luca in his most famous work, *Theatrum Veritatis et iustitiae*, in which, in reference to common pastures, in Book IV, Pars I (*De servitutibus*), disc. 35, he says the following: "*seu quod res sit in dominio unius quoad certum genus fructum, puta industrialium, et in dominio alterius quoad aliud genus, puta naturalium, ex iis, quae super hac distinctione dominorum diversis respectibus habentur praesertim sub tit. de feudis disc. 6*". Another jurist and judge of the Rota in Siena and Florence who exposed these principles is Neri Badia (1657-1726), in his work *Decisiones et responsa iuris*, dec. 51, as Alessandro Dani highlighted. DANI, A., *Usi civici nello Stato di Siena di etŕ medicea*, Bologna, 2003, p. 179.

[17] GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali,* Milano, 1992, p. 28.

[18] Coram Gamberini, decisio diei 19 aprilis 1822, Septempedana juris pascendi; coram Resta, decisio diei 22 martii 1803, Sutrina juris pascendi, Super bono jure; coram De Cursiis, decisio diei 9 junii 1840, Nepesina juris pascendi et registrendi; coram Cesarei, decisio diei 2 junii 1817, Praenestina juris pascendi; coram Bussio, decisio diei 9 junii 1755, Veliterna Juris pascendi; coram Bussio, decisio diei 26 maii 1755, Nepesina juris pasciendi super facultate faciendi restrictus; coram Migazzi, decisio diei 22 martii 1751, Sutrina juris pacendi; coram Elephantiuto, decisio diei 17 martii 1752, Sutrina juris pascendi quoad facultatem faciendi restrictus; coram Spada, decisio diei 4 junii 1832, Terracinen juris pascendi et restringendi. Super bono jure; coram Bussio, decisio diei 25 ianuarii 1751, Balneorogien juris pascendi; coram Rusconi, votum decisivum 26 aprilis 1780, Mathelicen juris lignandi et pascendi.

[19] *Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualitŕ di rappresentanti della popolazione di Corneto*, Roma, 1802; *Sacra Congregazione Economica. Prospetto generale delle servitů di pascolo dello Stato desunto dai stati particolari degli Em.i Legati e Monsignori Delegati trasmessi alla segreteria di Stato, e da questi passati al Segretario della S. Congregazione Economica*, Roma 1822.

the Roman Republic[20], until the Pontifical Notification of 1849[21].

Those who supported collective ownership, on the other hand, considered that those collective rights inherited from the past were a patrimony that had to be preserved and that those rights should not be considered as deplorable burdens imposed on someone else's property, but as an actual form of dominion given to a community. Ever since the first attempts of liquidation of the collective rights, the community itself protected the dignity of such forms of belonging that others wanted to erase without even giving a fair compensation to their holders[22].

This is the primary cause of the debate on ownership in the pontifical territories and it is easy to understand the reasons. The fact that various subjects, an individual and a collective one, could access the same land based on different legal titles was the origin of uncertainties and conflicts, mostly in the period we are analysing, in which the individualistic mentality grew increasingly strong.

In particular, such mentality became increasingly strong in the Papal States starting from Pius VII pontificate. The Pope put a great effort in the attempt to restore the tragic economic conditions of the State that, after the fall of the Jacobin government, was scourged especially by the lack of primary goods and by the galloping inflation[23].

In the economic field, the *opus magnum* of Pius VII is the *motu proprio* entitled "*Il vivo impegno*" of 15 September 1802, completely centred on the prevailing legal and economic idea that saw the individual ownership as the solution to every problem[24]. The strategy that had to be used to restore in the pontifical countryside the flourishing that the Roman citizens desired is well specified in the *motu proprio* itself, which shows the will to divide the large estates into various small private properties[25].

Therefore, the solution to the abandonment of the countryside was identified in the fragmentation of the big land properties into small parcels which were to be exploited at full capacity. The realization of this purpose faces various obstacles that were highlighted in this actual agrarian code. One of the most serious and widespread obstacle to the better culture (this was the definition used in the *motu proprio*) was the presence of the collective right to pasture, seen as a collective use of the *ius pascendi* on a private land[26].

If we were to choose a date that symbolically represents the explosion of this debate on ownership, the best choice would consist in the day, month and year printed in the *motu proprio* of Pius VII *«Il vivo impegno»*: September 15, 1802. The fate of the pontifical countryside and the way to interpret the same forms of appropriation started following a clear and unambiguous direction that would have continued, unaltered, until the beginning of the 20th century.

This is a very strong message that until now had not been underlined by historiography. The thing we want to bring out from the Agrarian Code is not the technical assessment on the implementation of its economic measures nor their success, but rather the strength to direct the way to conceive ownership and to approach to it. Precisely from this moment on, that process of *reductio ad unum* of the different forms of ownership exclusively in favour of that private property that represents the legal modernity commenced, with toughness and frequently with prevarication.

Pius VII himself places, at the beginning of the edict, the clear exposition of the guidelines of his government in the economic field, and he immediately specifies that precisely the economic policy will be a decisive factor in the future of the ownership structures[27].

These interventions were soon discussed and they immediately found a lot of difficulties which we will analyse during the rest of the dissertation. For the moment, it is sufficient to remember that, from the day of the promulgation of the pontifical edict, an insidious connection that was going to cause many legal and political controversy was created between the improvement of agriculture and the liquidation of the *iura pascendi in re aliena*. In fact, from that moment on, the topic of the rights to pasture started being entangled in the economic theory that was accepted as the unambiguous criterion to affect

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[20] *Tribunale civile del dipartimento del Tevere. Cornetana di manutenzione, o sia di Reintegrazione per i Consoli dell'Arte agraria di Corneto contro i Citt. Scipione Ex Marchese, Leonardo, ed altri Falzacappa, i fratelli Lucidi, ed altri consorti della Lite*, Roma, 1799; *Tribunale Civile del Dipartimento del Tevere. Cornetana per li Cittadini Leonardo Falzacappa, Gaetano e Fratelli Lucidi, e Scipione Sacchetti contro li sedicenti Consoli dell'Arte Agraria di Corneto. Risposta*, Roma, 1799

[21] *Notificazione della Commissione governativa di Stato*, 15 November 1849.

[22] ROSATI, S., Comunitŕ e territorio: la difesa civica dei diritti agrari collettivi nello stato pontificio (sec. XIX). In *Archivio Scialoja-Bolla*, vol. 1, Nr. 1, 2018, p. 157-181.

[23] MARCONCINI, F., *Le grandi linee della politica terriera e demografica di Roma da Gregorio I Magno a Pio IX. Fatti, leggi e dottrine*, Torino, 1930, p. 157-158; CECCHI, D., *L'amministrazione pontificia nella Prima Restaurazione*, 1800-1809, Macerata, 1975; CARAVALE, M., CARACCIOLO, A., Lo Stato pontificio da Martino V a Pio IX. In: GALASSO. G. (Hrsg.), *Storia d'Italia*, vol. XIV, Torino, 1971, p. 576-580.

[24] "*Lo stato moderno č la decisione di costruire un ordine della convivenza a partire da un'antropologia individualistica che assume l'individuo come soggetto di bisogno e come desiderio di possesso illimitato*". BARCELLONA, P., *L'individualismo proprietario*, Torino, 1987, p. 12.

[25] "*La ridente prospettiva delle innumerevoli avventurose conseguenze, che sarebbero certamente per derivarne tanto rapporto alla privata, che alla pubblica utilitŕ ci ha sostenuti nelle nostre considerazioni, e dopo di esserci lungamente occupati intorno a tale oggetto, abbiamo trovato, che sicuramente si arriverebbe ad ottenere l'intento, ove l'immensa quantitŕ de' Latifondi deserti, ed incolti, che al presente si scorge nelle Campagne Romane, venisse divisa in un maggior numero di possessi*". PIUS PP. VII, *Motu proprio*: *Il vivo impegno* (15 September 1802), p. 8

[26] PIUS PP. VII, *Motu proprio*: *Il vivo impegno*, p. 23-24.

[27] "*Noi abbiamo cominciato ogni nostra Operazione Economica dal togliere tutti quei Vincoli, che da tanto tempo imposti all'interna contrattazione dei Grani, e delle altre Derrate rendevano onerosa la condizione dell'Agricoltore* […] *E in tempo, che Noi levammo questi primarj ostacoli,* […] *non lasciamo di occuparsi a toglierne degli altri, che ugualmente pregiudicavano all'interesse dell'Agricoltura. La servitů dei Pascoli, per cui il Proprietario č costretto a lasciare le migliori terre bene spesso incolte, e spogliate* […] *anch'essi hanno interessato la nostra attenzione, e si stanno maturando su di essi gli opportuni piů utili regolamenti*". PIUS PP. VII, *Motu proprio*: *Il vivo impegno*, p. 1.

the ownership structures. Precisely for this reason, as we will see in the following paragraph, the Pontifical Dicastery that was charged with discussing the issue on land ownership was the Sacred Economic Congregation.

The continuation of this work includes 4 testimonies that describe the debate concerning ownership inside the Economic Congregation and that we have linked to two legal mentalities: the modern mentality and the medieval one.

3. The Sacred Economic Congregation

A proof of the fact that the ownership issue was increasingly becoming a field of the activity of the government that had to be managed exclusively through the precepts of the economic science - which inevitably tended to solve and simplify the complex anthropological relationships deriving from the relation man-land in a mere circumstance of circulation of any good - is the decision to entrust the elaboration of a draft of law on collective rights of enjoyment to the Sacred Economic Congregation, restored by Pius VII with the motu proprio *Post diuturnas* of 1800[28].

The origin of this congregation dates back to Pope Benedict XIV. This Pope, with the constitution *Ne igitur ea* of April 18, 1746, created a congregation that he defined as peculiar (*peculiarem Congregationem*), composed by the Camerlengo Annibale Albani (1682-1751), by the Cardinals Antonio Saverio Gentili (1681-1753), Domenico Riviera (1671-1752) and by the Secretary of State Silvio Valenti Gonzaga (1690-1756)[29].

In this way, the Congregation received the task of monitoring all the expenditures and revenues concerning the Apostolic Camera, to present to the pontiffs all those proposals that it considered more convenient for the better government of the Camera itself and of the public treasury[30]. Apart from this, Benedict XIV established as well that the congregation gathered on the first Wednesday of each month in the Apostolic Palace, that is, in the rooms of the Cardinal Secretary of State, Silvio Valenti Gonzaga, with the auditor-general of the apostolic camera itself, Francesco Simonetti[31].

In 1800, the new Pope, Pius VII, with an edict of the Secretariat of State of July 9 of the same year, instituted four congregations, among which we find, in the second place, the one related to the economic affairs that finally acquired the name of Sacred Economic Congregation.

Nevertheless, only with the bull *Post diuturnas, super restauratione regiminis Pontifici*, of the 3 October 1800, the Sacred Economic Congregation was regulated better and permanently confirmed.

In particular, in Article 2, *De publicae eeonomiae administratione, et administratoribus*, it was entrusted with the task of monitoring all the emoluments and fees received by those who carried out a specific mandate in the Papal States[32]. Articles 33[33], 34[34] of

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[28] On this topic, see MORONI, G., *Dizionario di erudizione storico-ecclesiastica da S. Pietro sino ai nostri giorni*, vol. XVI, Venezia, 1842, p. 192-195; DEL RE, N., *La curia romana. Lineamenti storico-giuridici*, Cittŕ del Vaticano, 1998, p. 407-409; DAL PANE, L., La Congregazione Economica istituita da Benedetto XIV e la libertŕ di commercio. In: *Rivista di Storia dell'Agricoltura*, Nr. 5, 1965, p. 371-418; FRANCHINI, V., *Gli indirizzi e le realtŕ del Settecento economico romano*, Milano, 1950, p. 69-74; LODOLINI, E., *L'archivio della Sacra Congregazione del Buon Governo (1592-1847). Inventario*, Roma, 1956, p. CXLVI--CXLVII; SPAGNUOLO, A., Fondi dell'Archivio di Stato di Roma relativi alle Congregazioni Economiche del secolo XVIII. In: *Rassegna storica del Risorgimento*, Nr. 53, 1996, p. 75-98.

[29] "*Cui quidem Congregationi Nos Ven. Fratrem Nostrum Hannibalem Episcopum Portuen. S. R. E. Camerarium S. Clementis, ac Dilectos Filios Nostros Antonium Xaverium Tit. S. Stephani in Monte Coelio Gentili, Dominicum Tit. SS. Duodecim Apostolorum Riviera, Sylvium Tit. S. Priscae Valenti Nostrum Secretarium Status, Presbyteros, et Hieronymum S. Angeli in Foro Piscium Diaconum Columna, respective nuncupatos, eiusdem S. R. E. Cardinales, nec non Dilectos etiam Filios Magistris Joannem Baptistam Mesmerum Thesaurarium Nostrum Generalem, Joannem Julianum Rubini praedictae Camerae Nostrae Commissarium Generalem, et Clementem Argenvilliers Auditorem Nostrum, tamquam ipsius Congregationis cum definitivi suffragii jure Secretarium, adscribimus*". Motu proprio ne igitur ea. In: *Sanctissimi Domini Nostri Benedicti Papae XIV. Bullarium*, Tomus Primus, Romae, 1754, p. 491.

[30] "*Huius autem Congregationis, et Personarum eam pro tempore constituentium munus sit, et assidua cura, non modo praemissorum omnium et singulorum plenam executionem, et exactissimum implementum urgere, et promovere, verum etiam ad omnia et singula genera et capita tam expensarum, atque onerum quam reddituum et proventuum Camerae Nostrae Apostolicae solicitum dirigendo considerationis intuitum, opportuna pro tempore Consilia et remedia excogitare, Nobisque et Successoribus Nostris Romanis Pontificibus insinuare, quaecumque ad optimum ipsius Camerae regimen, et Publici Aerarii emolumentum, ad subditarum Civitatum et Communitatum levamen, ac Populorum incolumitatem utilitatemque, in Dominio existimarint salubriter expedire*". Motu proprio ne igitur ea. In: *Sanctissimi Domini Nostri Benedicti Papae XIV. Bullarium*, Tomus Primus, Romae, 1754, p. 491.

[31] "*Quapropter volumus et mandamus, huiusmodi Congregationem semel singulis mensibus, mimirum prima Feria tertia cujuslibet mensis, quae de cetero impedita non fuerit, incipiendo a prima Feria tertia mensis Julii proxime futuri, (quo mimirum tempore rationes dati et accepti, quae pertinent ad elapsum annum millesimum septingentesimum quadragesimum quintum, confectas, atque inter se collatas fore praecipimus), et sic deinceps de mensem in mensem in Palatio Nostro, et in Aedibus solite habitationis praefati Nostri Secretarii Status, indesinenter congregari; eidemque praedictum Franciscum Simonetti in praeinserta Schedula saepe memoratum, sive alium pro tempore Camerae Nostrae praedictae Ratiocinatorem Generalem, semper interesse*". Motu proprio ne igitur ea. In: *Sanctissimi Domini Nostri Benedicti Papae XIV. Bullarium*, Tomus Primus, Romae, 1754, p. 491.

[32] "*Dalla congregazione economica deputata si fissi un annuo stabile assegnamento a monsignore tesoriere, ed anche a tutti quegl'impiegati, e ministri che dalle propine, e regalie convenute negl'istromenti traevano o in tutto, o in parte la lor sussistenza*". Bull Post diuturnas, super restauratione regiminis Pontifici. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 50.

[33] "*Anche dalla congregazione del Buon Gaverno si renderŕ conto al pieno tribunale della camera della erogazione di quegli assegnamenti, che dalla medesima camera si passano ad essa congregazione all'effetto di supplire alle spese occorrenti pel mantenimento de' suoi ministri, e suoi officj, ed in tanto si farŕ la maggior possibile riforma del le sue spese ordinarie da sottoporsi all'approvazione della congregazione economica*". Bull Post diuturnas, super restauratione regiminis Pontifici. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 53.

[34] "*Si farŕ similmente dalla camera capitolina la maggior possibile riforma di spese, incaricandone la diligenza, e lo zelo dei signori conservatori, dai quali se ne dovrŕ presentare la nota da approvarsi dalla congregazione economica, e discutendo sopratutto, se convenga per principal riforma ridurre gli onorarj del senatore, dei conservatori medesimi, e del priore de' caporioni a livello del tempo della santa memoria di Benedetto XIV, e sopprimendo le paghe de' caporioni che non hanno alcun esercizio, e si rendono affatto inutili*". Bolla Post diuturnas, super restauratione regiminis Pontifici. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 53.

the above mentioned bull, furthermore, entrusted to the congregation the reform of the expenditures of the Sacred Congregation of Good Government and of the apostolic camera.

The most relevant function of the economic congregation was the consultative nature that had to apply to all the economic--administrative affairs: for this reason, in the greatest part of the pontifical documents on free trade of wheat and cereals[35], on the tax system of industry[36], of agriculture[37], of the arts and manufactures[38] and, in general, in every law regarding public economy we find the indication of the prior consultation of the Economic Congregation.

During the Pontificate of Pius VII, the faculties of the economic congregation, that initially were exclusively consultative, were also extended to the litigation, so that the cases previously proposed by the Congregation could be discussed in a trial. A documentary proof of such judicial activity of the Sacred Economic Congregation can be deduced from the case analysed in this work. In fact, after its reconstruction, the Congregation was not only called to express a technical-economical assessment on the issue of ownership, but it also became, as we will see, a judicial instance that received the defensive memoirs of those who were favourable or opposed to the liquidation of the rights of pasture.

The sacred congregation, organised in this way, existed since 1809, year in which, due to the second French invasion and the consequent deportation of Pius VII, it stopped existing.

When the French domination ended in 1814, and Pius VII returned to Rome, the Sacred Economic Congregation was restored through a letter of the Secretariat of State on July 15, 1815, through which Monsignor Nicola Maria Nicolai was appointed secretary and Vincenzo Folcari was appointed Under--Secretary.

The last modification on the competences of the Economic Congregation was made, a few days later, with another letter of the Secretariat of State of July, 26. First of all, from that moment on, the college of the cardinal would be able only to discuss and make resolutions regarding the principles that must be established for a simpler and uniform public administration. Secondly, the Congregation was banned from dealing with particular issues related to the ordinary course of the administrations, since it could only provide general criteria from which the applicative regulations were going to derive. For this purpose, the Congregation only had the faculty and the right to request to the leaders of the administrations the clarifications and the documents necessary for the discussions of the general criteria. Thirdly, any faculty related to the litigation and any judicial faculty were removed from it, and it could only discuss and resolve issues submitted to it by the Secretariat of State. Lastly, every resolution of the Economic Congregation had to be submitted to the Roman Pontiff for the approval and the promulgation.

The continuation of this work includes 4 testimonies that describe the debate concerning ownership inside the Economic

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35 "*Le materie economiche saranno discusse, e decise dal pieno tribunale radunato in congregazione, e le giudiziali; quelle che riguardano strettamente il vero, e puro favor del commercio, a somiglianza di quanto abbiamo prescritto relativamente alle materie annonarie con altra cedola di Nostro motu proprio, e susseguenti Nostre dichiarazioni, saranno delineate dal suddetto monsignor presidente con due de`sei deputati da eleggersi per turno della stessa deputazione per quel corso di tempo, che sará da esso creduto opportimo, mentre le altre saranno privativamente giudicate da monsignor presidente della grascia. Incombera poi a tutti i deputati, e segnatamente a quelli, che verranno fra essi alternativamente dalla intera deputazione particolarmente destinati, l' invigiIare sui venditori, ed a tenore delle leggi condannare i trasgressori alle pene peculiare, dovendo peraltro su gli oggetti interessanti. E su gl' inconvenienti di maggior rimarco interpellare la piena deputazione. L' assessore eserciterŕ le veci del fisco, e sarŕ obbligato d' invigilare, e di communicare ai competenti superiori le denunzie, che gli perverranno contro i trasgressori, non che di ricorrere alla congregazione economica composta dal reverendissimo cardinal camerlengo, e di altri reverendiss. cardinali (dei consigli della quale ci siamo principalmente serviti nel combinare le provvidenze contenute in questa Nostra cedola di motu proprio) ove da alcuno nell'atto dell'esecuzione o in qualunque altra circostanza si portasse la minima alterazione all' adempimento del sistema da Noi adottato*". Motu proprio Le piů colte nazioni d'Europa. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 99-100.

36 "Vogliamo pertanto, che la Congregazione economica, la quale da Noi viene incaricata della direzione de' sistemi *ordinati in questa cedola di Nostro motu proprio non solo seguiti ad occuparsi, come abbiam detto disopra, della rettificazione dei dazj, e de'proventi, che restano a prendersi in esame; ma ci proponga ancora, in seguito di nuove riflessioni, e di ragionevoli e giusti ricorsi, che potessero sopravvenire, quelle modificazioni, Variazioni, O riforme, che crederŕ opportune, e necessarie, onde Noi le possiamo prendere in considerazione per ottenere sempre piů la felicita dei Nostri popoli, che č il voto piů ardente del Nostro cuore paterno. Intanto perň autorizziamo la congregazione suddetta a fornire ne' casi particolari quegli schiarimenti, che possono occorrere per la retta esecuzione di tutte le disposizioni contenute in questa Nostra cedola di motu proprio, non intendendo peraltro con questo provvedimento di togliere ai rispettivi tribunali alcuna facoltŕ di loro attribuzione, e che non si opponga ne direttamente nč indirettamente a quanto qui abbiamo disposto*". Motu proprio Dacchč piacque alla provvidenza. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 129.

37 "*Ad ottenere un tale intento Noi scorgemmo essere assolutamente necessario, che cessino, e sieno a tutti note le ipoteche, ed ogni altra sorta di vincolo, a cui si trovano sottoposti li terreni, cosicchč chi somministra il denaro sulla sicurezza di alcuno di detti fondi non corra rischio di perderlo per l'esistenza d' impegni anteriori. E rilevammo con piacere che in vista appunto di assicurare la sorte, e la condizione dei prestatori contro gli enunciati pericoli, fra le altre ispezioni, che attualmente si stanno maturando dalla Nostra congregazione economica, lodevolrnente essa si stava eziandio occupando di un regolamento, col mezzo di cui si rendesse a tutti noto, e potesse ognuno al momento rilevare con certezza le ipoteche, ed altri vincoli, ai quali restano sottoposti non solo i terreni, ma ogni altra sorta di fondo commerciabile, regolamento che per lo stesso importante oggetto d' in durre una tale sicurezza nei contratti d' investimento di denaro da molto tempo sotto nome d` ullězio d' inlavolazione, o di altri consimili titoli si trova felicemente introdotto, ed attivato nella maggior parte degli altri stati*". Motu proprio L'oggetto del maggio bene. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 207.

38 "*E l'esecuzione di tutte le anzidette determinazioni contenute nel presente Nostro moto proprio commettiamo all'enunciata congregazione economica, a qui per conseguenza conferiamo tutte le necessarie facolta, anche di suddelegare, peraltro col Nostro preventivo oracolo, tutte quelle persone, delle quali giudicasse espediente di servirsi per il piů sollecito ed esatto l'adempimento delle enunciate ingiuntegli incombenze: specialmente poi autorizziamo la stessa Nostra congregazione economica a dare nei casi particolari tutte quelle determinazioni, ordini, e decisioni, che per la migliore esecuzione delle disposizioni prescritte con questa stessa Nostra cedola di moto proprio, giudicherŕ occorrere. E vogliamo, ed espressamente dichiariamo che da queste risoluzioni, e decisioni della predetta congregazione come si conviene ad un tribunale, che non e giudiciale, ma bensě unicamente incaricato della riforma della legislazione, non si dia mai alcuna appellazione, ma che soltanto sia luogo alla revisione da commettersi da Noi alla congregazione medesima, poichč tale č mente, e volontŕ Nostra espressa*". EDITTO December 16, 1801: Providentiae, et favores concessi artibus, et commercio. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 235.

Congregation and that we have linked to two legal mentalities: the modern mentality and the medieval one.

4. The promoters of the modern ownership

Let us start with the sources that show a modern mentality regarding ownership, based on the cult of the individual; this idea was adopted by the Economic Congregation, in particular by two of the secretaries who guided the congregation: Paolo Vergani and Maria Nicola Nicolai.

4.1 The report of the Secretary of the Economic Congregation Paolo Vergani

The first official work of the Economic Congregation on *ius pascendi* was commissioned in 1801 to its Secretary, Paolo Vergani[39], in compliance with the already mentioned *motu proprio* that, in article 6 chapter II, exhorted to issue a Law to liquidate the collective rights as soon as possible. The technical economic report of the Prelate[40] is extremely interesting, especially in the conclusive part, in which the ancient collective rights of the rural communities are qualified with a definition that will remain unaltered in the literature regarding this topic: «hateful servitudes». The reason of such a harsh judgement is due to the consideration that the pontifical reforms on free commerce of wheat and of the other fruits of the land could not be fully effective until the removal of the obstacles that impeded to the owners to freely exploit their lands, above all the common grazing[41].

According to Vergani, the reference model had to be the Legislation adopted by Leopold II in the State of Siena[42], which had reached the longed-for goal of uniting the *ius pascendi* and the *ius serendi* in one person[43]. Nevertheless, the Tuscan regulation should have received two relevant corrections: first of all, the opportunity to compensate the holders of the *ius pascendi* with a congruous annual fee corresponding to the value of the pasture; secondly, the Secretary of the Commission of the cardinals considered preferable a Law that, instead of generally declaring as abolished all the collective rights to pasture in the pontifical domains, let to the owners themselves the faculty to liberate the land[44].

This was the action line shared by the political and economic action of Pius VII and by his *entourage*, favourable to the results produced by the indirect Laws that create all the necessary conditions to realise a specific goal, by removing all the material obstacles and, at the same time, by giving incentives to those who supported the initiative promoted by the government. It was the principle, described in the *motu proprio «il vivo impegno»*, of the award and of the punishment[45].

The social and legal culture that emerges from reading the document is a deeply individualist culture, intolerant towards everything that is an expression of the customary patrimony of the local communities and of their rights. A sign of this hostility can be deduced from the *vexata quaestio* of the compensations, which is discussed by Vergani with harsh tones. In fact, he considered that the union of the *ius pascendi* and of the *ius serendi* in the hands of only one owner should have been done in favour of the exclusive holder of the *ius serendi*, while the community of the holders of the *ius pascendi* would have received a small

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[39] Monsignor Paolo Vergani had a primary role in the economic policy of Pius VII. He participated, especially as General Assessor of Finance and of Commerce, before, and as Secretary of the Economic Congregation, later, in the writing and discussion of the provisions regarding the free trade of wheat, in the project on the Code of Commerce, in the plan of "land registration" and, as we will see soon, in the *vexata questio* of the rights to pasture. He wrote various texts with political and economic content: *Le idee liberali. Ultimo rifugio dei nemici della religione e del trono*, Genova, 1816; *Della importanza e dei pregi del nuovo sistema di finanza dello Stato pontificio. Discorso di Monsignor Paolo Vergani*, Roma, 1794; *Discorso storico-politico sull'autoritŕ del Romano pontefice*, Roma, 1815; *Analisi ragionata del Congresso di Vienna*, 2 books, Genova, 1818. On the life and political commitment of Paolo Vergani see DAL PANE, L., *Lo Stato pontificio e il movimento riformatore del Settecento*, Milano, 1959, p. 295; LA MARCA, N., *Tentativi di riforme economiche nel Settecento romano*, Roma, 1969, p. 131-134. On the legal stances of Vergani regarding the topic of pastures see PETRONIO, U., Qualche spunto sulla 'questione demaniale' in Italia prima della Legge Zucconi. In: FALASCHI, P. L. (Hrsg.), *Usi civici e proprietŕ collettive nel centenario della Legge 24 giugno 1888. Atti del Convegno in onore di Giovanni Zucconi (1845-1894)*, Camerino, 1991, p. 68-72.

[40] VERGANI, P., *Voto economico sopra le servitů de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801. The report is reported in full in Summary (n.3) of the above mentioned Memoir of Monsignor Nicolai on pastures.

[41] "*La felice necessaria influenza della nostra nuova Legislazione Economica sull'Agricoltura resta necessariamente limitata a una porzione soltanto dei Terreni, che compongono le indicate Provincie, cioč a quelli, i quali sono liberi. La linea, che divide questi Terreni liberi da quelli che proseguono ad essere sottoposti all'odioso vincolo del Pascolo, č un termine, il quale circoscrive gl'indicati vantaggi del libero Commercio, e oltre al quale, per conseguenza non possono penetrare le beneficienze dell'ottimo sovrano*". VERGANI, P., *Voto economico sopra le servitů de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801, p. 52.

[42] See DANI, A., *Usi civici nello Stato di Siena di etŕ medicea*, Bologna, 2003.

[43] "*L'imperadore Leopoldo II, dopo di aver incoraggiata generalmente l'Agricoltura in tutta l'estensione del Gran Ducato di Toscana mediante la celebre Legge delli 18 Settembre 1767, sulla estensione del libero commercio anco ai generi li piů necessarj all'umana sussistenza, rivolse le sue paterne cure a rimuovere, ed allontanare le cagioni particolari, che avevano procurato la depressione dell'Agricoltura stessa nel vastissimo Stato di Siena; Ed avendo iscoperto che la pricipale di queste cagioni consisteva nei perniciosi effetti, che ovunque in detto Stato produceva la separazione del Diritto del Pascolo dal Dominio del Suolo, venne nella determinazione, che effettuň coll'altra Legge delli 11 Aprile 1778 di riunire generalmente nel detto Stato di Siena, e di consolidare nel Padrone del Suolo il Dominio pieno, ed assoluto del Terreno colla percezione di tutti i suoi frutti*". VERGANI, P., *Voto economico sopra le servitů de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801, p 26.

[44] VERGANI, P., *Voto economico sopra le servitů de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801, p. 26-29.

[45] In the motu proprio *il vivo impegno*, the Legislator does not hide is faith in such system of indirect Laws that would have finally fulfilled the longed-for desire of a prosperous cultivation "*interessando le due molle, che muovono il cuore umano, cioč il premio e la pena*". PIUS PP. VII, Motu proprio: Il vivo impegno (September 15, 1802), p. 34

and inadequate monetary fee[46]. The distinction is evident also in the same legal terminology used by the Author of the document, when he qualifies the holder of the *ius serendi* as owner of the land and the community who holds the *ius pascendi* as the receiver of a mere servitude of use.

Such text will have a strong influence on the process of abolishment of the rights to pasture and it will even reach the Italian Parliament that, at first, will adopt a political stance in line with the Pontifical one[47].

The economic report of the Monsignor was discussed by the Economic Congregation in January 1802 and all the members, persuaded by his strong arguments, voted in favour of the abolishment of the rights to pasture, and they gave to Baldassarre Odescalchi, Duke of Ceri, the task of writing a draft of law, the first one created for the Papal territories[48]. It fully answered to the guidelines defined in the *motu proprio* of Pius VII on the agricultural increase; in fact, it foresaw the liquidation of the rights to pasture in every occasion in which a cultivation was made in the lands burdened with the "hateful" legal bond.

Therefore, the project, written in a very short time, was read and debated in the session of January 15, 1802, during which some doubts regarding the opportunity of some articles were posed. The criticisms were mainly connected to two issues: firstly, it was considered unfair to extend the abolishment Law also to lands belonging to the community, and not only to private citizens, since such patrimony was considered as a good to be preserved for the subsistence of the communities themselves; secondly, another element that was criticised was the termination clause which established, in case the freed lands were not used in any way during two years, the reintegration of the original condition and, therefore, the rebirth of the ancient collective right.

After modifying the text, the agrarian Law was submitted to Pope Pius VII for the supreme approval. Nevertheless, in spite of the general enthusiasm of the cardinals of the Congregation, it was not pronounced because, when the news of the abolition of the servitude of pasture spread, the ownership issue exploded. Some communities of the Papal States sent to the Congregation the Defensive Memoirs, which we will analyse in the following chapter, that claimed the dignity and the value of the agricultural Customs, liquidated by the economists that frequented the commission of cardinals as if they were mere flaws of the economic system.

It was probably at this time that it appeared clear how the Law on collective agrarian rights was not an economic operation like the other one that had just ended (for example the one on free circulation of wheat, but it rather was something that could not be understood exclusively by making assessments, from a cold technical office, on some cadastral mark, or by interpreting in a detached way the trends of the agricultural production of the previous year.

In sum, the Cardinals, and especially the Pope, understood that the Law that abolished the servitudes of pasture, which was so simple and triumphal in its abstract expressions, was much more than a modification of the ownership structure of a land; in fact, it was the dramatic attempt to dismantle from the deep roots of the land a mentality that had crystallised in the awareness of the rural communities.

4.2 *The Memoir of Mons. Nicola Maria Nicolai*

Another important moment in the debate on land ownership in the Papal States was the one that begun in 1815, when Mons. Maria Nicola Nicolai was appointed Secretary of the Sacred Economic Commission. His competences in the agrarian and economic field were unquestionable thanks to his great work on the countryside and the Roman Annona[49] and he wrote an extremely erudite Memoir with a summary on the servitudes of pasture[50]. This work deserves our attention since it allows us to have a complete overview of the works of the pontifical commission on our topic, from the beginning of the papal as-

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[46] "*E perciň la Nuova Legge Agraria, che io giudicherei piů opportuna in proposito di questa materia delle Servitů dei Pascoli sarebbe che a tutti lj Proprietarj si accordasse la libertŕ di liberarsi di tali Servitů, e di consolidare intieramente il godimento del Pascolo col dominio del Suolo, ogni qualunque volta ciscuno di essi si obbligasse di corrispondere alla Comunitŕ, o a chiunque altro si trovasse essere in possesso del Diritto del Pascolo un annuo Canone corrispondente all'importo del Pascolo stesso; Canone che per un maggior commodo de' Proprietarj medesimi dovrebbe esser loro permesso di affrancare mediante lo sborso del Capitale ad esso corrispondente*". VERGANI, P., *Voto economico sopra le servitů de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801, pp. 26-27.

[47] In the first Draft Law on the abolishment of the rights of common in the ex-pontifical provinces, presented to the Camera by the Minister of Agriculture, Industry and Commerce Bernardino Grimaldi on November 29, 1884, we find, between the annexes, the "*Voto economico sopra le servitů di pascolo*" of Paolo Vergani; this demonstrates the ideological continuity that permeated a part of the political class and, in particular, the Minister who proposed the abolishing law. *Atti parlamentari. Camera dei deputati. Legislatura XV, Ia sessione 1882-83-84. Documenti. Disegni di Legge e relazioni*, n. 270.

[48] We quote the most significant articles of the Law proposal of the Duke of Ceri, which included 12 articles:
"*Art. 1 Chiunque pianterŕ nel suo terreno vigne, o alberi di olivi, e moricelsi, o di frutti, rimarrŕ per diritto, e in forza della Legge libero dalla servitů del pascolo.*
Art. 3 Chiunque per altro vorrŕ coltivare il suo terreno […] *e per conseguenza rimanere libero dalla servitů, dovrŕ interpellare giudizialmente l'attual possessore del jus pascendi, e dichiarargli, che egli vuol ridurre il suo terreno a miglior coltivazione, e per conseguenza liberarsi dalla servitů, e tre mesi dopo seguita una tale intimazione avrŕ egli il diritto di espellere i bestiami dell'attual possessore del jus pascendi.*
Art. 4 Chiunque rimarrŕ in forza della sopraccennata coltivazione libero dalla servitů del pascolo dovrŕ pertanto pagare o al Barone, o alla Comunitŕ, o a quegli, che godeva prima il jus pascendi il prezzo, che questi ritraeva dall'erbe, e questo prezzo dovrŕ giustificarsi innanzi al giusdicente del luogo, desumendolo dall'ultimo decennio.
Art. 6 Chiunque sei mesi dopo l'intimazione da Noi accennata all'articolo 3., o non avrŕ fatta la piantaggione, o non avrŕ seminato, o rotto almeno il suo terreno, come č necessario, per coltivarlo, o seminarlo, o chi dopo averlo coltivato ancora per molti anni tralascerŕ poi la coltura accennata di sopra, decaderŕ ipso facto dall'accennata libertŕ, e quegli che godeva prima il jus pascendi, facendo solamente costare al giusdicente locale, che non si č coltivato il terreno secondo vien prescritto dalla legge, ritornerŕ nell'antico diritto, e farŕ pascere dai suoi bestiami il terreno rimasto incolto". The text of the Law Proposal is included in Summary n.4 of the above mentioned Memoir of Monsignor Nicolai.

[49] NICOLAI, M. N., *Memorie, Leggi, ed Osservazioni sulle campagne e sull'Annona di Roma*, Parte Seconda, Roma, 1803.

[50] M. N. NICOLAI, *Proposta di liberazione dei terreni dalla servitů de' pascoli. Memoria con Sommario*, Roma, 1823.

signment (right after the promulgation of the *motu proprio Il vivo impegno*) until the date of publication of the memoir (1823).

In particular, in order to clarify the situation better, the Congregation, through its Secretary, asked to all the Legates and Delegates of the Pontifical Provinces to provide the necessary information on the *ius pascendi*, by answering precisely to some fundamental questions that would have composed the entries of a «*Prospetto Generale delle servitù di pascolo*»[51]; in the document, it was necessary to specify if the lands burdened by the rights to pasture were a property of the community or of a private citizen, and also the legal title of the pretensions of the servitudes of pasture (*de jure dominii*, *de jure cessionis* and *de iure civico*)[52]. This three-fold division was so hard to reproduce that many Towns omitted it for lack of documents or other kinds of proofs.

Now, beyond the statistics, which are never exact and can be misleading, the most genuine and concrete part of the economic prospect is the one with the observations communicated by the representatives of the communities to the Economic Congregation on some points that are considered particularly important. In this way, next to a list of numbers and abstract statistics, we find a valuable testimony of the voice of the different communities and of the way in which they intended the *ius pascendi.*

The general impression that we have when we read the observations of the provincial Legates is that the pastures were protected as a patrimony of the city from which the economic subsistence of the population, and in particular of the poorest rural classes (who obtained from the common goods the necessary means for their subsistence) depended.

The population lives on such servitudes. If they are removed, it is better to emigrate[53]. This is the reflection of the Delegate of Frosinone, similar to the one of many other pontifical delegates. We do not only perceive the economic importance of the agrarian rights, but also, somehow, the pride of the communities in the defence of their own history, such as in the case of the city of Viterbo, which appealed to the ancient origin of the collective rights[54]. In sum, the plan of the economic reform clashed with the general sentiments of the inhabitants of the Papal States who were still tied to that past that the new ownership mentality defined as a remainder of the feudal barbarities.

Let us go back now to the Secretary Nicolai who, based on the above mentioned observations, prepared a sort of questionnaire divided into doubts to submit to the Fathers of the Economic Congregations, to finally decide which action line to follow. Let us see the more interesting ones.

The first doubt had been solved a long time before and it had to do with establishing whether the servitudes of pasture had to be preserved or abolished. Obviously, the answer of the sacred congress was "*affirmative*", considering the economic damage produced by the system of pastures[55].

The second point asked whether the abolishment of the collective rights of enjoyment should have been general for the entire Papal States or it should have concerned only some provinces, and whether such abolishment should have affected the lands owned by the community[56]. The Secretary had the idea, confirmed by the economic congregation, that the abolishment had to be general on all the lands, both of the private citizens and of the communities, in order to definitively eliminate every residue of the past and to respond both to the well-being of the State - that would have seen agriculture flourish again thanks to the creation of a small agricultural property aimed at the maximum profit - and to the local administrations, that would have filled the civic coffers with the taxes of the owners.

Let us move on to the third doubt that concerned the opportunity or lack of opportunity of a compensation in favour of the holder of the *ius pascendi*[57]. By voting «*affirmative*», the Congregation expressed a decision favourable to Nicolai's proposal. Nicolai, when dealing with the topic of the compensation due to the holder of the *ius pascendi*, reflected on the difficulty of determining the amount of the compensation in case of deciding to follow the classifications of the rights of pasture in the three famous categories (Civil Law, Divestment Law and Dominion Law) and on the possible distinction based on the physical or legal person that holds the right. Therefore, in order to accelerate the process, the Secretary proposed to determine a compensation (approved by the Congregation) that shall be applied in general to all the cases of liquidation, leaving aside the nature of

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[51] *Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari dagli E.mi Legati e Monsignori Delegati trasmessi alla Segreteria di Stato, e da questa passati al Segretario della S. Congregazione Economica,* Roma, 1822. The text is annexed to the Summary (n.1) of the Memoir on pastures of Mons. Nicolai. The data on pastures are related to the Towns of the Legations and Delegations of Frosinone, Civitavecchia, Ravenna, Macerata, Fermo, Ascoli, Perugia, Pesaro and Urbino and Viterbo.

[52] The communal pastures are divided into three classes: *de jure dominii*, *de jure cessionis* and *de iure civico* (or customary). The *de jure dominii* pastures are the ones in which the owner of the land (that is, the one who originally held the full ownership of the land) has given to others the right to seed, by reserving for himself the right to pasture. On the contrary, the *de jure cessionis* pastures are the ones in which the original owner of the land has given to others, free or upon consideration, the right to pasture by reserving the right to seed or any other *utilitas* deriving from the use of the land. Finally, the customary one is "quel diritto di pascere, che non ha altro titolo, se non la costante osservanza, ed a questa specie appartiene il pascolo civico, poiché per questo titolo ne godono i cittadini di più e più municipi senza conoscere donde provenga il loro diritto". FALZACAPPA, C., *Sui pascoli comunali. Memoria del Conte Casimiro Falzacappa di Corneto*, Perugia, 1842, p. 6.

[53] *Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari dagli E.mi Legati e Monsignori Delegati trasmessi alla Segreteria di Stato, e da questa passati al Segretario della S. Congregazione Economica*, p. 3.

[54] In reference to the community of Viterbo "*da lunghissimi tempi indietro possessitrice di detto pascolo per titoli antichi confermati da molti Pontefici, ne ha sempre difesa l'integritŕ contro qualunque particolare o Corporazione che abbia tentato liberarsene*". *Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari dagli E.mi Legati e Monsignori Delegati trasmessi alla Segreteria di Stato, e da questa passati al Segretario della S. Congregazione Economica*, p. 29

[55] NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario,* Roma, 1823, p. 31.

[56] NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario,* Roma, 1823, p. 32-35.

[57] NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario,* Roma, 1823, p. 35-39.

the servitude or the holders. To those who objected with the authority of De Luca or of the Judges of the Roman Rota, who had sanctioned such classification, Nicolai said that the Supreme legislator was the one who destroyed custom, by judging what was convenient for the well-being of the State [58].

Maybe this part of the discussion reached one of the highest moments of agrarian individualism, as a stubborn will to annihilate the vitality and the dignity of the community dimension of the agricultural villages, hit especially in their ability to organise and to express themselves through Custom, a place of normative production. In fact, after "destroying the Custom" and "the hateful servitudes of pasture", the communities would have been completely voided of their economic and legal identity.

Lastly, the last doubt concerned the possibility of substituting the monetary payment with the transfer of a part of the land [59]. According to Nicolai and the Cardinals themselves, this was an excellent method to favour the division of the land in small farms and it was even better that the other solution of the compensations, that would have caused fights and issues. It is important to highlight that the compensation through lands was not going to constitute what we define today as collective ownership (which refers to the goods whose holders are the individual citizens as an entity that is autonomous from the Town), but only a big quantity of goods to divide according to the only model accepted in this historical era, the individual ownership.

In this way, the Economic Congregation, in the session of 1823, voted in favour of all the points diligently discussed by its Secretary, thus paving the way to the longed-for Agrarian Law that would have transformed into verdant gardens the Roman countryside.

Nevertheless, once again, the opposition of the community and of some of its intermediate bodies, such as the Agrarian Guilds, interrupted the works. The Dicastery received, precisely in this moment, the greatest part of the memoirs - which we will analyse soon - that aimed at defending the collective rights, while other communities sent some letters directly to the Pope, asking him to put an end to the attempt to erase their primary source of subsistence. This determined the definitive closure of the works of the Sacred Economic Congregation.

5. The promoters of the medieval ownerships

Let us analyse now the documents presented to the Sacred Economic Congregation that, according to our interpretation, can be linked to the other legal mentality on ownership that is the one typical of the medieval world.

5.1 The memoirs presented by the local communities to the Sacred Economic Congregation

The main issue dealt with in the memoirs written to defend the servitude of pasture and submitted to the Economic Congregation is that they constituted an actual right of ownership with a very ancient origin, and they were not a mere servitude seen as a burden imposed on someone else's land [60]. In the lands subject to the civic pasture there is, as we have seen, a division of the absolute ownership in two forms of dominion: the *ius pascendi*, whose holders are the citizens as a whole, and the *ius serendi*, which belongs to an individual subject [61].

The proof of a similar functioning of ownership could also be presumed, according to the authors of the defensive memoirs, from the Papal Cadastre, where the *ius pascendi* and the *ius serendi* were registered separately and from each derived the obligation to pay the land tax (*Dativa reale*), in compliance with the *motu proprio* of March 3, 1819 on the estimates of the rustic lands [62]. If, on the one hand, the estimates were evoked to demonstrate the existence of a divided dominion, on the other hand, they also caused misunderstandings, since the natural fruits were generally registered in favour of the Community; this notion caused a deep uncertainty because it could be seen as a private property of the Town or as a patrimony of the individual members of the Community *uti cives* [63].

At this point, a question that is not at all obvious arises: who are the actual holders of the communal pastures? The Town seen as a moral body or the totality of the citizens? In fact, the adjective linked to the words pastures can lead to serious misunderstandings and can induce us to think that the rights to pasture belong to the Town, seen as a body that, as such,

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[58] NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario,* Roma, 1823, p. 36.

[59] NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario,* Roma, 1823, p. 42.

[60] *Memoria sul pascolo comune nel territorio di Viterbo per l'Universitŕ dell'Arte agraria di detta cittŕ*, Roma, 1823, nn. 12-15; *Cornetana di Pascoli Civici per Gli Agricoltori, e Partecipanti de' Pascoli Comunali del Territorio di Corneto. Memoriale di fatto, e di ragione*, Roma, 1806, nn. 105-107; *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della cittŕ di Toscanella*, Roma, 1822, nn. 27-37. The above mentioned memoirs, as we have already said, have been obtained from the Archive of the Family Falzacappa of Tarquinia, which is currently preserved by the Society of Art and History of Tarquinia (*Societŕ tarquiniense d'Arte e Storia*).

[61] Regarding this, one of the memoirs analysed contains a precise description of such *de facto* situation: "*la divisione dei dominj come puň farsi nella estensione, cosč puň anche eseguirsi nelle utilitŕ dei Fondi, che perciň puň nel medesimo fondo separarsi il dominio dei frutti naturali, cioč del pascolo, e dei frutti industriali, cioč della seminagione, che in fine questa distinzione dei dominj si deve presumere fin da principio accaduta, allorché ignorandosi l'origine, si trova il possesso fondiario diviso tra due, uno dei quali ha il solo diritto di seminare, e di percepirne il frutto industriale, l'altro quello di pascere, e di goderne il frutto naturale. In questa combinazione di cose non potendosi discernere, se il Possessore si sia spogliato del diritto di pascolo trasferendolo in altri o se si sia spogliato di quello della sementa, facendone una cessione, non puň piů all'uno, che all'altro diritto attribuirsi il titolo di Servitů, onde vuolsi egualmente all'uno, ed altro attribuire quello di proprietŕ, e di dominio*". *Cornetana di Pascoli Civici per Gli Agricoltori, e Partecipanti de' Pascoli Comunali del Territorio di Corneto*, *Memoriale di fatto, e di ragione*, Roma, 1806, n. 20.

[62] *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della cittŕ di Toscanella*, Roma, 1822, nn. 75-76.

[63] Paolo Grossi follows this line as well and he reveals the "*inadeguatezza per lo storico del diritto*" of the cadastres, since they "*hanno volto economico ma non giuridico, nel senso che si tratta di figure pensate e risolte al di lŕ di ogni grammatica giuridica sia pure elementare*". GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali,* Milano, 1992, p. 623.

can use them as it wishes; the system of pastures also knew this form of possession in the hands of the Town-body, but the defenders specified with extreme precision that the civic rights protected by them were completely different and belonged to the entirety of the citizens, as such[64].

The notions given by the defenders of the civic rights allow to avoid another kind of mistake and to understand that they cannot be confused, in any way, with those that were defined as "fiscal pastures", which were not enjoyed by the citizens but that actually belonged to the State, who allowed to use them only through the payment of a tax[65]. The example proposed to clarify the distance between the two legal figures is the one of the State of Siena, which managed, through the *Officio dei Paschi*, the lands that were rented to anyone who wanted to pasture his herd there; the proceeds did not give benefice to the community but rather to the Royal Treasury; this type of *ius pascendi*, called Customs Pasture, did not deserve any kind of protection and, in fact, the edict of the Grand Duke Leopold of 11 April 1778 that suppressed such institution[66] was considered, by the authors of the memoirs, as an example of a fair and wise Law, which was surely inapplicable by analogy to the situation of the territories of Saint Peter[67].

It remains to be seen who the citizens that held the right of ownership of the lands were: They were those who had established their own domicile in the Town in which the ancient Agrarian Customs still existed, regardless of the fact that they were native or foreigners; in the second case, however, the requirement of the continuous domicile was necessary in order to enjoy the privileges and the citizens' rights[68]. The possibility, for the foreigners, to enjoy the communal pastures, under the condition that they established their domicile in the Town that had the Agrarian Customs, was described by the authors of the memoirs, as a beneficial stimulus to the demographic increase, since the faculty to become the holder of the *ius pascendi* favoured the arrival of numerous families from various Italian villages; they were attracted by the subsidies given for agricultural development. An example of this was the possibility, for those who built a farmhouse and planted a vineyard or an olive grove, to appropriate a portion of communal pasture to enjoy it privately. This price was justified by the need to grant, in the countryside, the stable presence of families of small independent farmers[69].

The rights to pasture, apart from being an expression of actual dominion of the citizens on the land, were to be seen with great respect also for another reason; they were the crystallisation of a very ancient customary patrimony that, as such, was worthy of being preserved and recognised. This second element was one of the strengths of the promoters of the civic rights of pasture who, in order to demonstrate their *ab immemorabili* origin, used the most diverse and ancient quotes from ancient texts, which frequently led to flights of fancy. This is the case of a memoir in which they even tried to find the origin of such rights in the Etruscan civilisation[70].

All the Communities that presented their own pamphlets to protect the civil pastures adduced, as a documentary proof of their antiquity, the statutes of the communes, a large part of which concerned the regulation of the agricultural activity and was based on a system that, next to the individual ownership, accepted, especially in the case of pastures, the collective rights recognised to all the citizens, which could be exercised also on private lands[71]. Regarding this, Corneto's Statute of 1453,

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[64] "*il dire finalmente, come si č detto, che i pascoli comunali, a cui hanno diritto i singoli cittadini, sono un patrimonio privato della Comunitŕ, e non il patrimonio pubblico dell'universitŕ dei cittadini, č un attentare alle leggi fondamentali costitutive dell'umana societŕ, in cui tutte le nazioni in tutti i tempi sono state d'accordo; ea etenim in pecunia, et patrimonio civitatis sunt, quorum usus singolorum non est. Ma quelle cose, delle quali l'uso č di ciascuno, sono state dette dal Gius delle Genti – res universitatis – vale a dire di tutti – ut basilicae, porticus, balnea, fora, prata, et pascua publica, in quae scilicet pecudes immittere singulis civibus est». Therefore, the clear separation between the Town-body (alienable) and the ownership of the citizens (inalienable) was identified in the use, meaning that «se quest'uso non est singulorum, res est Civitatis, ma se la cosa č in publico civium usu, come sono i comunali, res est universatis, vale a dire di tutti*". *Memoria economica sui pascoli comunali cornetani*. *Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualitŕ di rappresentanti della popolazione di Corneto*, Roma, 1802, n. 111. This is one of the current theories on the legal nature of the collective rights, which are in fact qualified as rights whose holders would be the members of a specific community *uti cives.* This is the concept expressed by S. Pugliatti, *La proprietŕ e le proprietŕ*, p. 192; DANI, A., *Usi civici nello Stato di Siena*, Bologna, 2003, p. 28-29.

[65] *Memoria economica sui pascoli comunali cornetani*. *Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualitŕ di rappresentanti della popolazione di Corneto*, Roma, 1802, n. 70.

[66] The edict of September 11, 1778 entitled "*Soppressione dell'Ufficio dei Paschi di Siena*" confirms what has been declared by the promoters of the communal pastures. Nevertheless, it must be noted that the General Regulation for the Towns of the Lower Province of Siena of the same day and year of the above mentioned edict established the suppression of the communal pastures at the request of the owners of the land who wanted to free their lands from the *ius pascendi*. For an in-depth analysis see DANI, A., Aspetti e problemi giuridici della sopravvivenza degli usi civici in Toscana in etŕ moderna e contemporanea. In: *Archivio storico italiano*, vol. CLVII, 1999, pp. 298-307

[67] *Memoria economica sui pascoli comunali cornetani. Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualitŕ di rappresentanti della popolazione di Corneto*, Roma, 1802, nn. 141-142.

[68] *Memoria economica sui pascoli comunali cornetani*. *Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualitŕ di rappresentanti della popolazione di Corneto*, Roma, 1802, n. 63.

[69] *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della cittŕ di Toscanella*, Roma, 1822, nn. 28; 49.

[70] *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della cittŕ di Toscanella*, Roma, 1822, n.31. In fact, in the memoir, we read that «non dobbiamo arrestarci ai Romani, e cercare in essi le fonti della nostra agricoltura. La storia, e l'osservazion de' monumenti ogni giorno piů ci fa toccare con mani quella veritŕ, che ogni istituto di pace, e di guerra, di religione, e di politica, e di ogni arte domestica i romani presero dagli etrusci, da quel popolo cioč che aveva civilizzata, e retta, e nobilitata l'Italia ben prima che essi poveri, e rozzi comparissero nella scena del mondo».

[71] *Memoria economica sui pascoli comunali cornetani. Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualitŕ di rappresentanti della popolazione di Corneto*, Roma, 1802, nn. 24-26.

whose formulation is identical to the one of the nearby cities [72], describes very well the situation at that time:

> "*Quoniam pascuorum jura pariter, et aquarum in tenimento Corneti comunia sunt, ordinamus quod nemo praesumat prohibere quemquam sua animalia pascuare, et aquare in quibuscumque locis reservatis vineis, pratis, cannetis, et aliis locis bladatis et seminatis*" [73].

These few lines include the entire delicate balance between the *ius pascendi* and the *ius serendi* existing on the same land, because obviously, while the cultivated lands did not admit the pasture, since it would have destroyed the fruits, on the other hand, the empty fields, on which the holder of the *ius serendi* had not done any work, were freely accessible to the citizens to pasture their herds. Therefore, the balance stood between the cultivated and the uncultivated land. This rule seems easy in theory, but it actually requires more attention by the Local legislators, in order to establish the timing for the cultivation and, consequently, for the exclusion of the *ius pascendi* [74]. It was a particularly complex system, very distant from our way of seeing the productive activity on the lands, but it reflected very well the daily life of that time (which remained the same at least until the end of the nineteenth century), in which the population who lived in a Town was far less than the one that could materially work in an intensive way the entire agricultural surface of the city.

Once identified an important proof of the existence of these civil rights in the statutes of the Middle Ages, our tireless promoters put their effort on even more ancient sources, whose formulations were certainly vaguer. One of these monuments of the past was found in the Edict of Rothari (643), where article 363 established the same principle of the communal pastures as it was regulated in the statutes of the Middle Ages, that is, with the norm that as soon as the harvest is over, the population was free to introduce the herds in the lands [75]. Not satisfied with this, they even analysed the glorious texts of Roman Law, and also in this case the research gave its results. In fact, the great Latin Authors such as Scaevola, Cicero or Frontinus described the existence of the *ius pascendi* and of the *ager compascuus* [76]. Of course we have not reported this historical *excursus* because we believe in its scientific grounds; apart from the unequivocal demonstration of the medieval statutes, the rest of the digressions of our defendants of the civic rights are not examples of methodological rigour, but they help us understand the aim they pursued: to declare that the communal pastures were a Custom recognised since ever to every population. They were an extended system, which does not simply have the respectable seal of time, of experience, of many existing laws and customs, but that is also based on the inviolable Property Rights, and on the immutable basis of local necessities [77].

We could not avoid adding to the historical reconstruction the *auctoritas* of the Doctrine of that time or the more ancient one, an inevitable testimony to prove the social usefulness and the legitimacy of the agrarian rights. In spite of what the detractors of the communal pastures thought, that is, that only the vestiges of a very distant past could support a system of division of the land, the Lawyers of our memoirs put a lot of effort into searching for a doctrinal foundation for the rights to pasture; and their commitment led to a rich list of "celebrities" who, in their works (sometimes fleetingly and sometimes with more abundance), dealt with the topic concerned [78].

The list of the authorities favourable to the civic pastures is very rich and it includes the famous Otero, author of the Trea-

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[72] For example, the statutes of Tuscania (1423), Book I, Section LXXXI, say the following: "*Pascua, et silvae antiquae quae sunt in jurisdictione Communis Tuscanae, ad omnes usum, et utilitatem civium et singulorum Thuscanorum sint deputata, et quod exipsis percipietur sit Communis Thuscani*». The same thing applies to the Statute of Viterbo (1469), in which the subject of pastures was regulated in Section IV: «*Pro bono pacis, et pacifici Status Civitatis, et Populi nostri Viterbiensis statuimus, et ordinamus, quod pascuis herbarum, et spicarum planorum comunitatis, et tenimenti Civitatis Viterbii communiter fruant et ab omnibus Civibus, et continue habitantibus in dictu Civitate, et eius districtu, et comitatu, non autem a forensibus, ut supra dictum est, ut hactenus exsistit consuetum*".

[73] *Statuta Civitatis Corneti*, 1545, Liber V, Cap. XCIV.

[74] Monsignor Buttaoni, in the consultative report on the rights to pasture, states that the *ius pascendi* was not «eguale in tutti i luoghi: in alcuni campi č limitato al tempo estivo, cioč dal Giugno a tutto Settembre di ciascun'anno. In altri comprende anche il mese di Maggio. In altri si estende a tutte le stagioni. Ed in altri, cioč nei prati destinati alla falciatura de' fieni, il pascolo cessa nei mesi di Marzo, Aprile, e Maggio, perché appunto i rispettivi possessori possano avere il mezzo di fare il fieno». BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n.3. On this topic see DONDARINI, R., Comunitŕ rurali: beni comuni e beni collettivi. In: *Rivista storica del Lazio*, vol. XIII-XIV, Nr. 1, 2005-2006, pp. 115-124; ROSATI, S., Lo statuto degli ortolani di Corneto del 1379. Studio storico-giuridico. In: *Bollettino della Societŕ tarquiniense d'arte e storia*, vol. XL, Nr. 1, 2013-2014, p. 137-171.

[75] *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della cittŕ di Toscanella*, Roma, 1822, nn. 28 49. In fact, today, we consider that the Germanic legal culture has somehow favoured the presence of such community Customs in medieval Italy. In this sense see DANI, A., *Usi civici nello Stato di Siena*, Bologna, 2003, p. 19-23.

[76] *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della cittŕ di Toscanella*, Roma, 1822, nn. 27-37.

[77] BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 163.

[78] *Cornetana di pascoli civici*, cit., nn. 35-36. On the literature related to rights to pasture see ZENDRI, C., Universitas, proprietŕ collettiva e servitů di pascolo nel 'Tractatus de servitutibus' di Bartolomeo Cipolla (ca. 1420-1475). In: NERVI, P., *Dominii collettivi e nuovi protagonismi per la promozione dello sviluppo rurale*, Padova, 2002, p. 105-129; BARBACETTO, S., *Servitů di pascolo, civicus usus e beni comuni nell'opera di Giovanni Battista De Luca (†1683)*, cit., pp. 267-297; ZENDRI, C., Monti, colli e contadini alla fine del medio evo: Bartolomeo Cipolla e l'ereditŕ della grande dottrina trecentesca. In: *Archivio Scialoja-Bolla*, Nr. 1, 2004, p. 75-87; PIERGIOVANNI, V., De iure ovium: alle origini della trattatistica giuridica sulla pastorizia. In: MATTONE, A., SIMBULA, P. F. (Hrsg.), *La pastorizia mediterranea. Storia e diritto (secoli XI-XX)*, Roma, 2011, p. 33-40.

tise *De pascuis*[79], Perezio[80] and Capobianco[81], both convinced of the need to preserve the rights to pasture for the benefit of a Community, especially of the more disadvantaged part; furthermore, great importance is given to the authors that, in a specific way, recognised the legitimacy of the Customs of the city exercised on the lands of private owners of the *ius serendi*, true core of the entire "ownership issue". Among them we have Covarrubias, who analysed the situation in Spain[82] and, clearly, one of the greatest theorists of the *ius pascendi*, Cardinal De Luca, who in his most famous work, the *Theatrum Veritatis et Iustitiae*, deals with the praedial servitudes[83] specifically in Book IV.

5.2 The report of the Consistorial Lawyer Alessandro Buttaoni

We can now deal with another document, always written to defend the civic rights to pasture, not by the local communities, but by order of the Sacred Economic Congregation itself, which entrusted to Monsignor Alessandro Buttaoni the task of organising a consultative report on the right to pasture in force in the territories of the Papal States[84].

We consider that we should analyse this document individually, not because its author was selected directly by the cardinals to express his motives, but rather because of the types of arguments developed by Monsignor Buttaoni. Such reasons enrich the memoirs analysed with further specifications that are particularly important, especially from the legal point of view.

Buttaoni, at the beginning of his consultative report, based on a strong doctrine[85], divides the rights to pasture into three titles: firstly, they can derive from an actual dominion on the land; secondly, from a servitude that has been legally acquired or that can be established by contract or by prescription; lastly, they can derive from the so-called civil or customary right, by virtue of which it is licit for every member of the people to pasture his own livestock in the non-cultivated and opened lands[86].

Regardless of the threefold nature of the titles that justify its possession, the *ius pascendi* can belong to the barons, to the communities or to the "peoples", meaning the group of citizens *uti singulis*[87].

Since the three titles that support the rights to pasture are legitimate, the consistorial Lawyer affirms that the Sovereign could not decide to issue a Law that destroys or limits the different rights to pasture of the community and of the populations without using that Right of Majesty, called Eminent Domain[88], by virtue of which, in case of grave necessity, or of a public, great and evident usefulness he can limit, or remove the rights and the properties of the Subjects[89].

This is the fundamental point that must be solved to verify the opportunity or lack of opportunity of an abolishing Law: can the Prince exercise his Eminent Domain in relation to pastures?

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[79] In fact, this is what OTERO says in the *Tractatus de pascuis et jure pascendi*, in Chapter 6, num. 11: "*ratio propter quam usus pubblici Pascui conceditur habitantibus in Oppido, utique est, ut oppida populentur, et augeantur, et habitatoribus abhadent*".

[80] PEREZIO, in his Commentary on Justinian's Code, in title *De pascuis publicis*, number 12, states: «*principes supremi reliquerunt huiusmodi cultos agros suis subjectis ad pecora sua alenda, sine quibus nec ipsi vivere, neca agros suos colere possent*».

[81] CAPOBIANCO, G. F., in the *Tractatus de iure et officio Baronum erga Vassallos burgenses*, in Chapter 73 n. 8, declares that the pastures are a good recognised to each of the citizens so that they enjoy it *uti singulis*: "*ista bona fuerunt concessa pro vivere, et comoditate singolorum prasentium, et futurorum civium, et ideo jus pascendi dicitur competere singulis, uti singulis*".

[82] The Spanish jurist DIEGO COVARRUBIAS, in chapter 37 of his *Questionum praticarum earumque resolutionum amplissimarum liber unus*, says the following: "*In his publici Edictis Regia Auctoritate promulgatis expressim asseveratur, esse contra huius regni Leges, quod quis proprios fundos, et agros alisque legis permissione prata, et pascua civibus, et incolis interdicta efficiat, quamvis possit libere quilibet proprios fundos, et agros colere qua ei liberuit cultura, ita tamen, ut fructibus collectis, et agris vacantibus a semine pascua sint omnibus habitatoribus comunia. Quam equidem legem multis experimentis compertum est satis Rei Publicae convenire, justissimamque, atque aequissimam esse*".

[83] Among the various discourses of Cardinal of Venosa, we believe it is particularly interesting to quote discourse 37 number 4 of Book IV (De Servitutibus): "*agitur de quodam iure, seu verius quadam facultate, quae jure cujusdam consuetudinis universalis magis quam praescriptionis competit Civibus, et incolis ex iure Civico, et naturali deponendi cum eorum animalibus in agris, et fundis apertis, et campestribus destinatis ad culturam segetum post has recollectas, quae consuetudo videtur fere universalis per Europam ipsi juri naturae, seu naturali rationi innixa, et quodammodo necessaria, nec cives, et incolae inermem vitam ducant*".

[84] BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 2.

[85] Such three-folded division of the rights to pasture is traced back to cardinal Giovanni Battista De Luca, who in his *magnum opus*, the *Theatrum veritatis et iustitiae* (Book IV Firts part), describes in the discourses 36, 37 and 38 the three-fold distinction. On this topic, see PESCOSOLIDO, G., *Comunitŕ di villaggio e proprietŕ collettive in Italia e in Europa, Pieve di Cadore, 1986*, pp. 77-80; VILLANI, P., *Ricerche sulla proprietŕ e sul regime fondiario del Lazio*, cit., pp. 82-83; DANI, A., *Usi civici nello Stato di Siena*, Bologna, 2003, p. 172; RAFFAGLIO, G., *Diritti promiscui, demani comunali ed usi civici*, Milano, 1915, p. 140.

[86] BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 4.

[87] BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 2.

[88] A definition of the theory of the Eminent Domain, which is chronologically coeval to the author of the consultative report, can be deduced from the lessons of the *novissimum* civil law "*il Dominio eminente del Sovrano su' beni de' cittadini, versando sul potere di disporre de' medesimi per oggetto di utile pubblico e nella facoltŕ di imporre su' beni medesimi, fa sě ch'egli abbia il diritto di domandare il sacrificio della proprietŕ privata per causa di utilitŕ pubblica, previa una giusta indennizzazione*". MARINI, C., *Lezioni di diritto civile novissimo*. Book II, First part, Napoli, 1830, p. 30-31.

[89] BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 5.

By quoting Pufendorf[90] and Grotius's[91] doctrine, Buttaoni highlights how a similar Eminent Domain can be used in exceptional cases, only when there is an urgent need or utility of the State at stake. The latter is considered by Grotius as sufficient, by itself, to use the rights of the citizens. Now, neither of the two situations would occur in the case of pastures (except for the baronial pastures, which are considered negatively), since their constant presence in the territories of the sub-urban provinces, instead of representing a damage, represents a public utility.

In other words, the public pastures, that is, the ones that are in favour of the communities, must be seen as goods of public utility and also necessary for the preservation and the increase of the population, with the obvious consequence that a possible abolishing law would cause a damage rather than aiming at the common good. The proofs of the usefulness of the *ius pascendi* coincide with those that we have described in the previous memoirs, therefore we will not repeat their content. We simply wanted to see how Monsignor Buttaoni collected all the observations of the local communities to demonstrate the impossibility, for the Papal government, to exercise the Eminent Domain, a necessary requirement to affect the rights of the subjects.

The consistorial Lawyer did not stop with these considerations. He adds one more. Even in the hypothetical case in which the Prince decides to abolish the rights to pasture, and to abuse of his Eminent Domain, he would not be exempted from the obligation to compensate the community for the loss of the rights, a fundamental principle that is indissolubly related to the exercise of the right of Majesty[92], as confirmed again by the authority of Grotius[93] and Pufendorf[94]. The private citizens of the *ius pascendi*, in fact, would have the right to a double compensation: the one given by the Treasury of the Prince, with regard to the damages caused to the subjects for the public good, and the one due by the owners of the *ius serendi*, advantaged by the consolidation of the two forms of dominion in their hands[95].

Nevertheless, as we have already said, Buttaoni was sure of the illegitimacy of an abolishing Law, even in case it foresaw the compensation for the damages caused to the community, since the proof of an extremely evident, big and public utility lacked, and this element is always necessary to affect other's rights with a provision of the sovereign[96].

6. Conclusions

The memoirs examined allow us to understand the main core of the debate on ownership in the Papal States, and we have identified it in those that were defined as servitudes of pasture. They were very spread, as we have seen, in a period in which the economy was mainly based on agricultural and pastoral activities.

The problem was not caused by the actual servitudes, in which the owner of a dominant land took the herds to pasture in a servient land, but rather by those that we can call collective rights of enjoyment and use belonging to a population on lands in private dominion. In fact, they define all the cases in which a situation of promiscuity is created in the enjoyment of the *utilitates* that derive from the same land between the owner of the land and the community that holds the collective right. Therefore, two different subjects could access the same territory based on different legal titles: the owner of the land (the holder of the *ius serendi*) and the recipients of the civil rights (the holders of the *ius pascendi*).

On this fact, whose characteristics are clear, we have the intersection of the two voices that we have analysed, which gave rise to two very different legal qualifications of the collective rights to pasture. These opposed notions derive from the different modalities to understand the relation between man and land that have a different cultural background. The collective voice was the seal of the medieval legal culture in which the characteristics of that historical landscape led to accepting without difficulties the collective uses of pasture, while the individual voice represents modernity, which could no longer accept, nor understand, any slightest interference in the sacred and unlimited absolute ownership.

As we have seen in this work, the great resistance of the local communities interrupted the works of the Sacred Economic Congregation that, after the death of its Secretary Nicola Maria Nicolai, never discussed again about the Law for the abolishment of the pastures. Nevertheless, this was only a pause, because modernity and the new ownership culture based on individualism left their mark slowly and with some difficulties: a few years after, in fact, a Congregation specifically in charge of writing a Law to abolish the rights to pasture, which was created with the Pontifical Notification of 1849, was instituted.

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[90] This is what Pufendorf says in the *De iure naturae et gentium* (Book 8, Chapter V, § 7): "*Dominii eminentis non tam rem, quam vocabulum aliqui damnant. Ipsam enim vim imperii propter salutem publicam instituti, sufficientem principi titulum praebere, urgente necessitatae utendi bonis suorum subditorum; eo quod omnia simul concessa intelligantur, sine quibus obtineri bonum commune non potest*". PUFENDORFII, S. V., *De jurae naturae et gentium. Libri octo, cum annotatis Joannis Nicolai Hertii, apud David Mortier*, 1715, p. 875.

[91] Grotius follows the same line as Pufendorf in the "*De iure belli ac pacis*" (Book 2 Chapter 14 § 7): "*Hoc quoque sciendum est, posse subditis jus etiam quaesitum auferri per Regem duplici modo aut in poenam, aut ex vi supereminentis dominii. Sed ut id fiat ex vi supereminentis dominii, primum requiritur utilitas publica*". GROTIUS, H., *De jure belli ac pacis. Libri tres, in quibus jus naturae & gentium, item juris publici praecipua explicantur. Editio novissima, apud Janssonio – Waesbergios*, 1680, p. 284.

[92] BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 7.

[93] GROTIUS in the "*De iure belli et pacis*" (Book 3 Chapter 19 § 7) says the following: "*Sed notandum contra est, jus illud supereminens non promiscue competere, sed quatenus comuniter expedit in regimine non dominico sed civili, etiam regio. Adde, quo dubi huius dommini usum res exigit, compensatio tamen facienda est*". GROTIUS, H., *De jure belli ac pacis. Libri tres, in quibus jus naturae & gentium, item juris publici praecipua explicantur. Editio novissima, apud Janssonio – Waesbergios*, 1680, p. 632.

[94] Pufendorf, in the "*De iure naturae et gentium*" (Lib. 8 Chapter, V § 7) writes: "*Caeterum iis, qui hoc modo [nimirum vi dominii eminentis] sua publico impenderunt, aut perdiderunt, a tota Civitate quantum fieri potest ea restitui, aut pensari, manifestissima aequitate nititur*". PUFENDORFII, S. V., *De jurae naturae et gentium. Libri octo, cum annotatis Joannis Nicolai Hertii, apud David Mortier*, 1715, p. 876.

[95] BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 8.

[96] BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 62.

The Pre-Constantine Conciliar Season

Javier Belda Iniesta *

Abstract

The origins of the ecclesiastical institution of the synod are to be sought already in the first centuries of life of the Church, when, in the sometimes difficult environment of the imperial society, the sharing of the solutions to the problems that affected various neighbouring communities raised a sense of belonging to a universal reality, which transcended the individual particular Churches. It is no coincidence that the first problems dealt with by the most ancient synods and that we know of concern the worship of God, the liturgy, sublime expression of the religious belonging. Successively, the ancient Christian communities had to deal with the issue of defining the contents of faith, precisely when they were protecting them from the heterodox doctrines. In this manner, the supra-community decision-making body starts to assume also the role of tribunal, to which some types of cases were reserved.

Keywords: *pre-Constantine era; synod; council; unanimitas; canonical process.*

1. Introduction

Usually, when we take a superficial look at the origin of the Church, at first during clandestinity, later in the phase of the imperial permissiveness and finally as an Institution of the official religion, we tend to focus on the concentration of a strong power, maybe a holy one, that has specific temporal features, which were crystalized in the hieratic and strongly hierarchical vision of the Gregorian statements. Evidently, this vision forgets the historical and political circumstances of those statements that, in turn, are often re-elaborated by presumed apologists that frequently switch their meaning. Therefore, they reach conclusions that are opposed to the original ones, based on argumentations that can be exclusively theological or historical.

In this sense, the universal diffusion of Christianism, led to the flourishing of many Communities, some of which, by boasting a direct apostolic foundation, enjoyed a special recognition as compared to the other locations [1]. All these things favoured the appearance of certain forms of life and comprehension of the recently received faith – whose deposit was still acquiring its shape – that were practically autonomous [2].

2. The conciliar Institution

Undoubtedly, the members of the Community knew that they belonged to the universal Church, which means they were aware of the ecumenical unity [3]. The absence of a central authority, which was hard to obtain during the periods of persecution and illegality, as well as the resulting autonomy of these local Churches, favoured the development of different Traditions (a big risk for the unity over time).

Although the circumstances in which these types of assemblies between the close episcopates emerged seem quite clear, it is not easy to identify their origin and their organisation with certainty [4]. Some authors have underlined the convergence

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1 A supremacy that is mirrored in the later Conciliar Legislation, once the Christianism has obtained the civil recognition (cf. Eusebius Cæsariensis Ep., *De vita Constantini Imperatoris*, IV, 27, in J.P. Migne [cur.], *Patrologiæ cursus completus. Series Græca*, XX, Turnhout, s.d., col. 1176: «*Iam Episcoporum sententias quæ in Conciliis promulgatæ essent, auctoritate sua confirmavit; adeo ut Provinciarum rectoribus non liceret Episcoporum Decreta rescindere: cuivis enim Iudici præferendos esse særdotes Dei*» (from now on, the two Collections edited by Migne will be respectively referred to as: "*P. G.*" and "*P. L.*", omitting further data).

2 In fact, at first, the Heresies were, most of all, interpretations of acts of religious principles that were condemned by various authoritative voices. On the one hand, we must keep in mind that we can't yet connect these attitudes to the rejection of the official doctrine – which doesn't exist yet – and, on the other hand, at that time, some conflicting movements emerged regarding these issues and the Church, which was quite new, still had to face them and, therefore, it had no answer to give them (cf. J. Belda Iniesta, *Il trattamento canonico dell'eretico fino all'epoca medievale*, in *Apollinaris*, LXXXVIII [2015], 446).

3 Cf. Ignatius Antiochensis Ep., *Epistolæ genuinæ. Ad Smyrnæos*, in *P. G.*, V, col. 714 B: «Quemadmodum, ubi fuerit Christus Jesus, ibi catholica est Ecclesia (καθολική᾽Εκκλησία)»; Polycarpus Smirnensis Ep., *Ecclesiæ Smirnensis de martyrio S. Policarpi epistola circularis*, VIII, in *P. G.*, V, col. 1036 A: «totiusque per orbem terrarum catholicæ Ecclesiæ (καθολικῆς᾽Εκκλησίας)».

4 Cfr. J. Orlandis Rovira, *Consideraciones históricas sobre la disciplina de los Concilios provinciales*, in *Cuadernos de Historia del Derecho*, vol. ext. (2004), 203-210; F. Retamal, *El ejercicio del poder en la Iglesia*, in *Teología y Vida*, XLV (2004), 318-352; J. Orlandis Rovira, *Historia de las Instituciones de la Iglesia católica. Cuestiones fundamentales*, Pamplona, 2003, 75-76; J. Gaudemet, *L'Empire romain. IV-V siècle*, Paris, 1958; A.M. Jones, *The Later Roman Empire* (284-602), 4 voll., Oxford (UK), 1964.

points between these assemblies and the pre-existing Institutions, like the *Consilia Principum*[5]. We should not forget that, although the Church has taken advantage of the legal Institutions, the Council represents a completely different reality[6]. The answer of the Church was necessary. The Church itself has the duty, in every era, to carry out the mandate received by Christ; this can be accomplished in two ways: by dealing with both its own temporal dimension and the implications that necessarily derive from its secular nature. In order to do so, the Church has used the organisational instruments already used by other temporal realities, but not through simple imitation. The Church, instead, has adopted some legal forms, and it has transformed them into something completely new[7]: therefore, it is completely evident, ever since the beginning, that the Church has made a conscious choice of creating its own Law[8].

For these reasons, it is not even possible to see the Council as a mere continuation of the Jewish Sanhedrin, which the Church had not been using for a very long time[9]. Undoubtedly, the environment in which the conciliar practice developed must have had a great influence on it. We can't simplistically consider this Institution as the result of the mere canonisation of a practice that used to be Roman and Jewish at first and that later became Germanic[10].

Furthermore, apart from focusing on some pre-existing similar Institutions, from which the conciliar Institution necessarily derives (at least partially), we must also focus our attention on another issue: in the Roman world, the subject who had the highest authority was absolutely clear, while the primitive Church was involved in a process through which she should get to know herself, without breaking the peace and the communion between its members and by preserving, at the same time, a recently received deposit which she had not fully understood yet[11].

Two main terms allow us to comprehend how the counselling activity of the Council must have been realised in the ancient world: the *consensus* and the *unanimitas*[12]. The verb *consentio* (from which the substantivized participle *consensus* derives) is the result of the union of the preposition *cum* with the verb *sentio*[13].

Cum transmits the idea of social gathering, of participation, of company. *Sentio*, which means "to feel, to perceive through one of the senses"[14], acquires, at the same time, relevant con-

[5] Typical Institution taken from the Eastern world, in which those who had to carry out government functions asked for the opinion of others before they took their decisions (cf. F. Amarelli, *Consilia Principum*, Napoli, 1983, 41). Furthermore, we also find this Institution in Rome, where: «si riscontra nell'ambiente di corte la presenza dei giuristi: […] di essi si chiedeva spesso di ascoltarne l'opinione nello svolgimento sia delle funzioni di governo che delle altre attribuzioni legislative e giudiziarie» (cf. A. Schiavone [cur.], *Storia del Diritto romano e linee di Diritto privato*, Torino, 2005, 104).

[6] Varalda has highlighted it recently by using the following words: «Allargando lo sguardo, bisogna constatare che nei primi tre secoli dell'Impero l'esistenza di una pratica consultiva, ausiliaria dell'attività politica, amministrativa e giudiziaria dei Principi, è dato facilmente riscontrabile e che essa appare come qualcosa di normalmente indispensabile e profondamente connaturale alla concezione dell'esercizio del potere romano […]. Vi è, quindi, una profonda sinergia tra la concezione dell'attività consultiva presente nel Diritto romano e nel Diritto canonico, sinergia che contribuisce a chiarire l'identità stessa della funzione consultiva. Naturalmente, se osservata dal punto di vista del Diritto canonico, la funzione consultiva nel Diritto romano non è esente da limiti; essa, infatti, è essenzialmente finalizzata alla ricerca del consenso e non incide sulla natura e sull'esercizio del potere che se ne avvale» (C.E. Varalda, *Il ruolo dell'attività consultiva nell'avvio del pontificato di Papa Francesco*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica*, 14 luglio 2014
[URL:< http://www.statoechiese.it/images/uploads/articoli_pdf/varaldam_il_ruolo.pdf >], 9-10).

[7] «Desde nuestro punto de vista, si bien estos factores son los que determinarán la materialidad del derecho, la forma, esto es, el revestimiento jurídico que envuelve al mismo, será a veces producto de la mentalidad jurídica del momento, a veces de la circunstancia a tratar, o de la propia conciencia de potestad legislativa que tenga la autoridad emisora. Las relaciones externas nutren, informan la forma canónica, pero no la determinan». J. Belda Iniesta, *Las relaciones Papado-Imperio en el desarrollo de las Fuentes canónicas (ss. V-VIII)*, in *Apollinaris*, LXXXIX (2016), 12.

[8] Cf. M. Nacci, *L'evoluzione storica del Diritto canonico e delle sue fonte giuridiche*, in M.J. Arroba Conde (cur.), *Manuale di Diritto canonico*, 2014, 29.

[9] Cf. L. Duchesse, *Early History of Christian Church. From its Foundations to the End of the Fifth Century*, (versión inglesa del francés original) 3 voll., London, 1909-1924. The rupture between the Jewish Communities and the Christian ones takes place after the Pharisaic and Jewish Council of Jamnia of AD 70, which formally excommunicates the Christian Communities by excluding them from the synagogues, thus opening the way to the consolidation of the Pauline ecclesial model.

[10] The same dynamic occurs with the other canonical Source of the Antiquity, the Decretal, frequently considered as a mere sacralisation of the imperial *Rescriptum*, leaving aside many elements that demonstrate that is it an independent source, which is inspired by past models but that is completely new (cf. J. Belda Iniesta, *Las relaciones*, 18-21).

[11] Nicaea (325) established the Symbol, while the Canon of Scripture was not established until the so-called Decree of Damasus (ca 382) and the Councils of Hippo (393) and Carthage (397) – which transcribed the previous one –. Before, as is widely known, the expression "received Scriptures" or "canonical scriptures" was used, like in the case of can. 56 of the Council of Laodicea of 360 (cf. Concilium Laodicenum, *Can. 56*, in J.D. Mansi [cur.], *Sacrorum Conciliorum nova et amplissima collectio*, II, [rist.] Graz, 1960, col. 573 B – hereinafter: "Mansi"), but they won't be considered as divine, at least officially, until the Council of Hippo. The magisterial establishment of the Canon will take place with the *Bulla* "Cantate Domino" in the Council of Florence (cf. Eugenius Pp. IV, *Bulla unionis Coptorum Æthiopumque*: *Cantate Domino*, 4 februarii 1442, in H. Denzinger, *Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum*, [P. Hünermann, cur.] Bologna, 2009, nn. 1330-1353), but in that occasion the previous list was recalled, together with the Letter of Innocent I to Exuperius of 405 or the Council "in Trullo" of 692. The Tradition, in turn, was not unquestionable until the 2nd Council of Constantinople (cf. Concilium Constantinopolitanum II, *Can. 14*, in G. Alberigo Et Alii [curr.], *Conciliorum œcumenicorum Decreta*, bilingual edition, Bologna, 1991, 122).

[12] I won't make an in-depth study of the two terms, which has already been masterfully made by many other scholars (recently, Cosimo Cascione made a study regarding the *consensum*: C. Cascione, Consensus*. Problemi di origine, tutela processuale e prospettive sistematiche*, Napoli, [2003], which devotes an entire chapter to this topic that I'll refer to regarding this theme, and the classical text written by Grossi referred to *unanimitas*: P. Grossi, Unanimitas. *Alle origini del concetto di persona giuridica nel Diritto canonico*, in *Annali di Storia del Diritto*, II [1958], 229-231).

[13] C. Cascione, *Consensus*, 3.

[14] «*Sentio est sensu percipio*», in *Lexicon totius Latinitatis*, A.E. Forcellini Et Al. (cur.), Bologna, 1965, 315.

notations in the technical and legal field[15]; the meaning of the verb *consentire*, which is frequently used to describe an agreement, goes from the merely physical perception to the moral and intellectual perception[16].

The noun "consensus" discloses a common will and opinion, as a result of a psychological motion that is shared by many subjects[17]. Consequently, the term describes the agreement between persons, in relation to an opinion or a fact[18]; the consensus must be reciprocal, otherwise it would be a mere adhesion[19].

In the perspective of the primitive Church, this consensus became also *unanimitas*[20], not as a procedure to take a decision, but as the correct modality to fully understand the ecclesiastical Institution, which acts like a new reality and gradually becomes aware of being the sum of the individual members (and of their will)[21]. These two terms converge into one of the customary methods of the Conciliar Fathers: "*consensum nostrum subscripsi*".

3. The early council age: discussions on liturgy

Always considering that there are several doubts on the historical background of the model adopted in these deliberation and consultation assemblies, it is clear that the fact itself of gathering highlights the awareness of the Heads of the Community of having a shared responsibility in the universal Church[22].

As we have already mentioned, the first relevant disagreements concerned the liturgical issues and, in particular, the day of the celebration of Easter[23]. This discussion, although it didn't cause any rupture, provoked strong tensions in the Church of that time. The issue was dealt for the first time by Pope Anicetus (155-166) and Polycarp, bishop of Smyrna: they both maintained their stance peacefully, although they left the problem unsolved[24]. Later, Pope Victor (189-199) prohibited to the Asian quartodecimans, who had arrived to Rome, to observe their liturgical practices due to their difference with the Sunday practice. Since he considered that it would have been appropriate to unify the liturgy of Easter in the entire Church, Victor asked Polycrates, Bishop of Ephesus, to gather with the other Bishops of the quartodeciman communities to discuss the possibility of adapting to the liturgical norms observed by the rest of the Church. In The assembly Polycrates and the other Asian Bishops didn't back the request of the Roman Pontiff as they reiterated the intention to follow the quartodeciman practice[25].

In the wake of these facts, some synods summoned in Palestine, Rome, Pontus, Gaul established that Sunday was the day to celebrate Easter[26]. In these assemblies, there was an attempt to exclude from the ecclesial communion the Commu-

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15 C. Cascione, *Consensus*, 4.

16 C. Cascione, *Consensus*, 5.

17 G. Mancuso, *Potere e consenso nell'esperienza costituzionale romana*, in *Esercizio del potere e prassi della consultazione. Atti dell'VIII Colloquio internazionale romanistico- canonistico* (10-12 maggio 1990), A. Ciani - G. Diurni (curr.), Roma, 1991, 217-227.

18 «Consensus», in, *Lexicon*, cit. 800.

19 C. Cascione, *Consensus*, 4.

20 P. Grossi, *Unanimitas* cit., 193: «per circa undici secoli la Chiesa non conobbe quasi altra forma di manifestazione del volere collettivo, se non l'unanimità». E. Ruffini Avondo, *Il principio maggioritario nella storia del Diritto canonico*, in *Archivio Giuridico "Filippo Serafini"*, XCIII (1925), 34; C.E. Varalda, *Il ruolo*, 9.

21 «Questo *consentire in unum* che anche linguisticamente fonda l'idea di *consilium* – e poi, significativamente, di *concilium* –»: A. Zanotti, *Rappresentanza e voto negli Istituti religiosi*, Torino, 1997, 65.

22 Cf. P. Stockmeier, *Edad Antigua*, in J. Lenzenweger - P. Stockmeier - K. Amon - R. Zinnhobler (dirr.) *Historia de la Iglesia católica*, (A. Martinez De Lapera, trad.), Barcelona, 1989, 31.

23 The celebration of the death and resurrection of Christ had made it possible for the Easter celebration to soon become, in connection with the Jewish *Passah*, a key celebration in the Christian community. And its incomparable importance was highlighted through the administration of the Baptism. Without reducing the content of the Eastern celebration to the passion of Christ, a Christian *Passah* was celebrated on the 14th of *nisan* in the Churches of Asia Minor (quartodecimans), following the Jewish example, while in the West, and also in Egypt and Syria, the celebration of the resurrection began on the Sunday after the 14th of *nisan* (Sunday practice), probably to highlight the distancing from Judaism. This last practice used the chronology of the Gospel of John (cf. *ivi*, 30). Eusebius of Caesarea refers as well to the issues regarding the celebration of Easter in his *Historia*: «*Iisdem temporibus gravi controversia exorta, eo quod omne per Asiam Ecclesiæ vetusta quadam traditione nixæ, quartadecima luna salutaris Paschæ festum diem celebrandum esse censebant, quo die præscriptum erat Judæis ut agnum immolarent: eaque omnino luna in quemcumque demum diem septimanæ incidisset, finem ieiuniis imponendum esse statuebant: cum tamen reliquæ totius orbis Ecclesiæ alio more uterentur, qui ex Apostolorum traditione profectus etiamnum servatur, ut scilicet non alio quam resurrectionis Dominicæ die ieiunia solvi liceat: Synodi ob id, cætusque Episcoporum convenere*» (Eusebius Cæsariensis Ep., *Historia ecclesiastica* V, 23, in *P. G.*, XX, coll. 490C-491A).

24 «*Neque enim Anicetus Polycarpo persuadere unquam poterat ut observare desineret, quippe qui cum Joanne Domini nostri discipulo, et cum reliquis Apostolis quibuscum familiariter vixerat, eum morem perpetuo observasset. Neque item Polycarpus Aniceto persuadere conatus est ut observaret. […] Quæ cum ita se haberent, communicarunt sibi invicem (εκοινώνησαν εαυτοῖς): et Anicetus in Ecclesia consecrandi munus Polycarpo honoris causa concessit: tandemque cum pace a se invicem discesserunt*» (Eusebius Cæsariensis Ep., *Historia*, V, 24, in *P. G.*, XX, col. 507A-B).

25 Eusebius refers the words written by Polycrates to Victor at the end of the assembly: «*Possem etiam episcoprum qui mecum sunt, facere mentionem, quos petiistis ut convocarem, sicut et feci. Quorum nomina si ascripsero, ingens numerus videbitur. Hi cum me pusillum hominem invisissent, epistolam nostram assensu suo comprobarunt, gnari me canos istos non frustra gestare, sed vitam ex præceptis institutisque Jesu Christi semper egisse*» (Eusebius Cæsariensis Ep., *Historia,* V, 24, in *P. G.*, XX, col. 498A).

26 Eusebius mentions the list of the documents regarding the Councils that have been carried out in the catholic world about the topic of the celebration of Easter: «*Exstat etianum epistola sacerdotum, qui tunc in Palæstina congregati sunt: quibus præsidebant Theophilus Cæsareæ Palæstinæ, et Narcissus Hierosolymorum Episcopus. Alia item exstat epistola Synodi romanæ, cui Victoris Episcopi nomen præfixum est. Habentur præterea litteræ Episcoporum Ponti, quibus Palma utpote antiquissimum præfuit. Epistola quoque Ecclesiarum Gallliæ exstat, quibus præerat Irenæus. Ecclesiarum quoque in Osdronæ Provincia et in urbibus regionis illius constitutarum litteræ visuntur. Seorsum vero Bacchylli Corinthiorum Episcopi, aliorumque complurium epistolæ exstant*» (Eusebius Cæsariensis Ep., *Historia*, V, 23, in *P. G.*, XX, coll. 491B-494A). All these Councils, states the historian, have confirmed the Sunday practice (cf. *ivi*, col. 494A: «*Atque omnes uno consensu ecclesiasticam regulam universis fidelibus per epistolas tradiderunt: ne videlicet ullo alio quam Dominico die mysterium resurrectionis Domini unquam celebretur: utque eo duntaxat die Paschalium ieiuniorum terminum observamus*»).

nities from Asia Minor, in which the quartodeciman practice was observed, and even to exclude Polycrates of Ephesus. The schism was avoided exclusively thanks to the intervention of Irenaeus[27]. Undoubtedly, the assembly that took place later in Palestine was a synod of the bishops, in which participated Narcissus, the bishop of Jerusalem, Theophilus of Caesarea, the Bishop of Tyre and of Ptolemais, and many others «*qui simul cum ipsis convenerant* (συνεληλυθότες)*, postquam de traditione diei Paschalis…multa in suis litteris disseruerunt*»[28]. At the end of the Synod, a letter was sent to all the Dioceses to give information about the mandatory liturgical practice[29].

This letter highlighted that the issue didn't consist exclusively in giving a solution to temporary problems of certain regions, and that there was an awareness of the responsibility of the Institution for the life of the universal Church, both of the single episcopate and of the gathered episcopates. This authority dates back directly to the Council of Jerusalem and anticipates the practice of the future post-Constantinian Councils and of the Decretals. Nevertheless, a full comprehension of the authority of the Pope and the Council[30] was still necessary. At the same time, there's also the consciousness of the necessity to re-ensure the faithfulness in the Gospel and in the received Tradition. This Tradition is highlighted both in the long narration that the quartodeciman Bishops made in order to justify their practice, and in the motives of Irenaeus for inviting Victor to preserve peace, like his predecessors[31].

4. The disciplinary problem of the lapsi and the council as trial for heresy

Regarding the problems of faith, as we have said, the Church still had to establish the main elements of its own deposit. The disagreements on the issues of faith provoked a collegial response. The first themes analysed by the councils are referred to the Montanism, as it appeared in Asia Minor. First of all, the issue was discussed in the inter-community assemblies, in the involved regions that the Anonymous anti-Montanist mentioned in his letters, included in Eusebius *Historia*[32]. The Anonymous himself reports several gatherings of faithful, in various places of Asia, in which the new Montanist doctrine was discussed[33]. By reading the text, it is impossible to establish if they were community gatherings or bigger assemblies. Clearly, the solution of the Montanist problem needed the mobilization of various Communities involved in the diffusion of the heretic prophecy, which were in contact with each other. These communities sent their Bishops to these assemblies as spokesperson[34].

The condemnation of Noetus of Smyrma took place shortly after the liturgical issue that had involved the Asian Communities. It occurred during two assemblies of Presbyters carried out in a processual form:

> «*Iam igitur ex aliis actibus deprehensum est, quod non loquebatur spiritu mundo; qui enim in Spiritum sanctum blasphemus est, ex divina sorte ejectus est. Aiebat hic se esse Moysem, et fratrem suum esse Aaron. Hæc cum beati Presbyteri audirent, accersitum coram Ecclesia examinaverunt. Ille vero negabat principio sic se sentire. Postea vero in quibusdam delitescens, et collectiis aliis qui in eodem errorem erant, volebat aperte dogma suum defendere. Quem rursus accersitum Presbyteri redarguerunt […] Tunc istum convictum ejecerunt ex Ecclesia*»[35].

In the same way, in the Roman Africa of Saint Cyprian's era, in the second half of the 3rd century, seven Councils were summoned, (there was also a Roman council). These Councils concerned the *lapsi* and the repetition of the Baptism administered by the heretics. Cyprian refers to the case of the Councils to start a process against the heretic Privatus, which was held even before his episcopate: The Council took place between 236 and 240, and ninety bishops participated in it. The theme of the discussion was the treatment of heretics:

> «*Per Felicianum autem significavi tibi, frater, venisse Carthaginem Privatum veterem hæreticum in Lambesitana colonia ante multos fere annos ob multa et gravia Delicta nonaginta Episcoporum sententia condemnatum, antecessorum etiam nostrorum, quod et vestram conscientiam non latet, Fabiani et Donati [predecessore di Cipriano, ndr.] litteris serenissime notatum: qui cum causam suam apud nos in Concilio quod habuimus Idibus Mais quæ proximæ fu-*

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[27] «*Ac Irenæus quidem nomini suo vere respondens, nec solo nomine, sed etiam vitæ instituto ac proposito pacificus, pro Ecclesiarum pace hæc monuit et allegavit. Nec vero ad Victorem solum, sed ad multos alios Ecclesiarum antistites de quæstione proposita litteras in eadem sententiam misit*» (Eusebius Cæsariensis Ep., *Historia,* V, 24, in *P. G.*, XX, col. 507B). The issue remained unresolved until the Council of Nicaea (cf. Eusebius Cæsariensis Ep., *De vita*, III, 18-20, in *P. G.*, XX, coll. 1074C-1079B).

[28] Eusebius Cæsariensis Ep., *Historia,* V, 25, in *P. G.*, XX, col. 507B.

[29] «*Date operam ut epistolæ nostræ exemplaria per omnes Ecclesias mittantur, ne nobis crimen imputent qui animas suas a recto veritatis tramite facile abducunt*», Eusebius Cæsariensis Ep., *Historia*, V, 25, in *P. G.*, XX, col. 507C.

[30] We will analyse later the relationship between them both.

[31] Eusebius Cæsariensis Ep., *Historia,* V, 24, in *P. G.*, XX, col. 507A-B.

[32] «*Nuper vero cum essem Ancyræ in Galatia, et Ecclesiam illius loci nova illa non ut ipsi dicunt prophetia sed, ut postea demonstrabitur, pseudoprophetia turbatam deprehendissem; quantum facere potui, Deo iuvante, tum de his ipsis, tum de relinquis omnibus quæ ab illis proponebantur, singillatim in Ecclesia disserui pluribus diebus: adeo ut Ecclesia quidem incredibili gaudio affecta, et in veritate fidei magnopere confirmata sit; adversarii vero tunc quidem fugati et Dei hostes non mediocri dolore perclusi fuerint*». Eusebius Cæsariensis Ep., *Historia,* V, 16, in *P. G.*, XX, col. 466A-B. The local Communities were worried by the new prophecy of the Montanists. The Anonymous participated in the discussion that took place in a Church, which lasted various days and regarded the exponents of the heresy and their theses. At the end of the discussion, the local Church was strengthened, while the opponents, temporarily defeated, went away feeling saddened. The Presbyters of the place participated in the assembly (*«eius loci Presbyteri». Ibidem*), and they asked to the Anonymous and his co-presbyter (*«compresbytero nostro Zotico Otreno». Ibidem*) to write down the things that had been said in defence of the truth (*«quæ contra veritatis adversarios dicta fuerant, commentarium ipsis scriptum relinquerem». ibidem*).

[33] «*Nam cum fideles qui in Asia erant, sæpius et in plurimis Asiæ locis eius rei causa convenissent* (συνελθόντων)*, novamque illam doctrinam examinassent, et profanam atque impiam iudicassent, damnata hæresi isti ab Ecclesia et fidelium communione expulsi sunt*». Eusebius Cæsariensis Ep., *Historia,* V, 16, in *P. G.*, XX, coll. 467C-470A.

[34] Cf. A. Camplani, *Le trasformazioni del cristianesimo orientale: monoepiscopato e Sinodi (II-IV secolo)*, in *Annali di Storia dell'Esegesi*, XXIII (2006), I, 67-114.

[35] Hippolitus Portuensis Ep., *Contra hæresin Nœti cuiusdam*, I, in *P. G.*, X, col. 803A-B.

erunt agere velle se diceret nec admissus esset, Fortunatum istum sibi pseudæpiscopum dignum collegium suo fecit. Venerat etiam cum illo et Felix quidam quem ipse extra Ecclesia in hæresi pseudæpiscopum olim constituerat. Sed et Iovinus et Maximus comites cum Privato hæretico adfuerunt. Ob nefanda sacrificia et crimina in se probata sententia nomen condemnati et iterato quoque a pluribus nobis anno priore in Concilio abstenti»[36].

Cyprian also describes a reunion of Bishops in an undetermined date, in which they discussed the procedure to reconnect to the Church as many *lapsi* as possible (in particular, they referred to the penitent adulterer):

«Et quidem apud antecessores nostros quidam de Episcopis istic in Provincia nostra dandam pacem mœchis non putaverunt et in totum pœnitentiæ locum contra adulteria cluserunt. Non tamen a Cœpiscoporum suorum collegio recesserunt aut catholicæ Ecclesiæ uniatem vel duritiæ vel censuræ suæ obstinatione ruperunt, ut quia apud alios adulteris pax dabatur, qui non dabat de Ecclesia separaretur. Manente concordiæ vinculo et perseverante catholicæ Ecclesiæ individuo Sacramento, actum suum disponit et dirigit unusquisque Episcopus rationem propositi sui Domino redditurus»[37].

In 251, a Council of sixty bishops was held in Rome, and its aim was to support the legitimate Pontiff Cornelius, who was facing the schismatic attempts of Novatian[38]. The Roman Council was the second Roman Council, after the Council that discussed the problem of the celebration of Easter announced by Victor I in the 2nd century, mentioned by Eusebius of Caesarea: *«Aliam item extat Synodi romanć, cui Victoris Episcopi nomen prćfixum est»*[39].

If we take into account the Councils of the North of Africa during Cyprian's episcopate, we must underline that there were two issues causing disorders and uncertainty in this region. The ecclesiological problem on how the Community should deal with the *lapsi*, meaning the baptised Christians that during Decius persecution had lost their condition of saved. The question was whether those persons should be accepted again in the Community or not. There was also a disciplinary problem: once established that the *lapsi* could be readmitted in the community, which was the penitence they should receive in order to be readmitted? Solving these issues was responsibility of the Bishops, who discussed the topic in the Councils. Furthermore, apart from the ecclesiological and the disciplinary problems, there was also an issue regarding the value that should have been given to the Baptism administered by heretics, which was strictly related to the *lapsi.* Among the Councils that were celebrated during Cyprian's episcopate, particular attention should be given to the one convened to resolve the issue of the Bishops Basilides of Astorga-León and Martial of Mérida[40]. We know the processual vicissitude of the two Spanish Bishops through the letter n. LXVII of Cyprian[41].

Decius, Emperor from 249 to 251, wanted to restore the religious unity in order to grant a greater social cohesion in the Empire. He issued an Edict through which he ordered to all his subjects to offer to the Emperor and to his Gods a public sacrifice. This is how the first systematic persecution against Christians began: those who did not respect the order, indeed, faced detention, torture and death. In order to escape the persecution, Christians could only commit acts of apostasy, flee or buy the *libellus*. In the first case, the faithful, overcome by fear and worn out by tortures, renounced to the Christian faith and carried out the public sacrifice, implementing the Edict. After the persecution, some of them asked to the Christian communities to be admitted again: this caused the problem of the *lapsi,* since not all the Bishops were willing to admit them again. Cyprian of Carthage, for example, was particularly severe with them, as he didn't want to admit them again in the community of the saved after the ferocious persecution. The second option, the escape, is the one that Cyprian himself chose. The Roman Judges conceded a reasonable deadline to those who had been reported or arrested, so that they could organise their defence. During the provisional release, Christians fled: this system was accepted by the Church to avoid the martyrdom. Lastly, the purchase of the *libellus* was an act considered as particularly reprehensible by the Christian communities. It consisted in saving one's own life by purchasing a document that certified the realisation of the public sacrifice to the pagan gods, even if, in fact, the sacrifice had not been realised: the person who purchased the *libellus* was called *libellatico.* The legal position of these faithful was quite controverted: they had not committed acts of apostasy, therefore they were not excommunicated; nevertheless, after the persecution, they had to perform a penitence. Anyway, the fact that the purchase of the *libellus* was considered as something morally deplorable by the Christian Communities is demonstrated by the case of the two Spanish Bishops, Basilides of Astorga-León and Martial of Mérida. In fact, they had purchased the *libellus* in order to avoid the persecution; for this reason, the faithful hated them, and the Bishops of the bordering dioceses thought that they were unsuitable for the episcopate, as we can see in letter n. LXVII of Cyprian: *«legimus litteras vestras […] significantes Basilidem et Martialem libellis idolatrić conmaculatos et nefandorum facinorum conscientia vinctos episcopatum gerere et sacerdotium Dei administrare non oportere»*[42].

[36] Cyprianus Carthaginensis Ep., *Epistula LVIIII*, 10, in *Corpus Scriptorum Ecclesiasticorum Latinorum*, III/I, Vindobonæ, 1868, coll. 677-678 (hereinafter referred to as: *"CSEL").*

[37] Cyprianus Carthaginensis Ep., *Epistula LV*, 21, in *CSEL*, III/I, coll. 638-639.

[38] *«Ob quam rem cum Romæ congregata esset Synodus, in qua sexaginta quidem Episcopi, Presbyteri vero ac Diaconi multo plures convenurunt; cumque in Provinciis antistites quid agendum esset seorsum consultassent, huiusmodi Decretum cunctis promulgatum est: Novatum quidem et eos qui una cum ipso sese insolentius extulerant, et quicunque inhumanissime et a fraterna charitate alienæ eius opinioni consentire præsumpserant, alienos ab Ecclesia habendos esse»*, Eusebius Cæsariensis Ep., *Historia*, VI, 43, in *P. G.*, XX, col. 615B-C.

[39] Eusebius Cæsariensis Ep., *Historia*, V, 23, in *P. G.*, XX, coll. 491-494.

[40] Mansi thinks that the Council has been celebrated in 258; cf. Concilium Africanum II, *In Causa Basilidis*, coll. 905-906.

[41] Cyprianus Carthaginensis Ep., *Epistula LV*, 1, in *CSEL*, III/I, coll. 735 e ss.

[42] Cyprianus Carthaginensis Ep., *Epistula LXVII*, 1, in *CSEL*, III/I, col. 735.

The argument of the Bishop of Carthage regarding the necessary resignation of the *libellatici* bishops and their return to the lay state concerns the ecclesiological principle according to which the sainthood of those who administer the Sacraments must be unquestionable for the faithful: «*videmus de divina auctoritate descendere ut sacerdos plebe prćsente sub omnium oculis deligatur et disgnus atque idoneus publico iudicio a testimonio conprobetur*»[43]. Therefore, the priest who was no longer considered worthy of the Holy Spirit was obliged to return to the lay state[44].

After Cyprian's narration, in compliance with the divine and the apostolic tradition, two new Bishops, Sabinus and Felix, were validly elected in order to substitute the *libellatici* in the two Spanish Dioceses; they were chosen by the Bishops of the bordering Dioceses gathered in a Council, with the presence of the people (*plebe prćsente*), who knew very well the moral life and the doctrine of the Presbyters of the Diocese[45]. However, the *libellatici*, who assessed that the decision of the local Council was too severe, addressed the Bishop of Rome, who replaced the conciliar Sentence and placed the *libellatici* in the respective pulpits of Astorga-León and Mérida. Consequently, Sabinus and Felix, with the support of their communities, addressed the Church of Carthage and contested the decision of the Roman Pontiff. Cyprian, Bishop of Carthage, convoked the Council, which issued a Sentence that was opposed to Stephen's one, thus confirming the removal of the *libellatici* in the first instance. This judicial case is extremely peculiar and it demonstrates that, in the second half of the 3rd century, the process of consolidation of the Petrine primacy was *in itinere*. Also, it proves that the Spanish Church, especially the Asturian one, preserved a very profound connection with the African Church, to such an extent to consider itself as a "branch" of the Mother-Church of Carthage[46].

The *Iure perfecta* Ordination of Sabinus in place of Basilides of Astorga-León – as Cyprian explains in his letter – could not be annulled by the recourse presented by the *libellatici* to the Bishop of Rome «*ut examiret reponi se iniuste in episcopatum de quo fuerat iniuste depositus*»[47], because the appellant had deceived Stephen I, who did not know the truth. Furthermore, says Cyprian, Basilides and Martial had tried in vain to seize the episcopal see by addressing the Bishop of Rome, because it was clear that "men of that kind" – accused of many other Delicts against faith – could not exercise a role of government in the Church. Also, they could not offer sacrifices, as established by all the Bishops and, especially, by Pope Cornelius, who was a martyr during the persecution of Decius. According to Pope Cornelius *eiusmodi homines* could be admitted to some kind of penance, but the clerical Ordination and the honour of the priesthood[48] should be interdicted to them.

For this reason, the Father of the Church exhorts all the recipients of the letter to follow the recommendations of the African Bishops reunited in the Council, meaning he exhorts them to avoid communicating *cum profanis et maculatis sacerdotibus*[49].

The recourse of Basilides and Martial to the Bishop of Rome is one of the first testimonies of the exercise of the *ius Appellationis*, in an historical era in which, as we have already mentioned, the Petrine primacy is not consolidated yet,; in that moment, the Council of Carthage could easily question the decision of Stephen I, who, on the one hand, had been misinformed by the appellants and, on the other hand - according to Cyprianus - had been negligent in the verification of truth before issuing his own sentence. The *libellatici*, removed from the Spanish Councils, requested the help of the successor of Peter: this shows how, in the wake of a tradition that was in process of consolidation, the disciplinary cases regarding the Bishops could have been modified by the first person responsible for the ecclesial communion and the unity of the Church – the Bishop of Rome – and, more in general, that the conciliar decision could be subject to the control of the Roman See. The modification of the Sentence of the Spanish Councils, in other words, promoted by the Roman Pontiff, was headed to the stabilisation of a role of the conciliar

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43 Cyprianus Carthaginensis Ep., *Epistula LXVII*, 4, in *CSEL*, III/I, col. 738.

44 Cf. Cyprianus Carthaginensis Ep., *Epistula LXV*, 4, in *CSEL*, III/I, col. 724-725: «*Si vero apud insanos fuoros insanabilis perseveraverit et recedente Spiritu sancto quæ cæpit cæcitas in sua nocte permaserit, consilium nobis erit singulos fratres ab eorum fallacia separare et, ne quis in laqueos erroris incurrat, ab eorum contagione secernere, quando nec oblatio sanctificari illic possint ubi sanctus Spiritus non sit, nec cuiquam Dominum ipse violavit*». «*Deus peccatorem non audit […] propter quod plena diligentia et exploratione sincera eos oportet ad sacerdotium Dei deligi quos a Deo constet audiri*». Cyprianus Carthaginensis Ep., *Epistula LXV*, 3, in *CSEL*, III/I, col. 737.

45 «*Diligenter de traditione divina et apostolica observatione servandum est et tenendum quod apud nos* quoque et fere per Provincias universas tenetur, ut ad Ordinationes rite celebrandas ad eam plebem cui præpositus ordinatur Episcopi eiusdem Provinciæ proximi quidem conveniant et Episcopus deligatur plebe præsente, quæ singulorum vitam plenissime novit et uniuscuiusque actum de eius conversatione perspexit». Cyprianus Carthaginensis Ep., *Epistula LXVII*, 5, in *CSEL*, III/I, col. 739.

46 About this topic, see the historical reconstructions by J.Mª. Blázquez Martínez, *La carta 67 de Cipriano y el origen africano del cristianismo hispano*, in AA.VV., *Homenaje a Pedro Sainz Rodríguez*, III, Madrid, 1986, 93-102 (also in: J.Mª. Blázquez Martínez, *Religiones en la España antigua*, Madrid, 1991, 361-372) and by J. Orlandis, *Algunas consideraciones en torno a los orígenes cristianos en España*, in A. González Blanco - J.Mª. Blázquez Martínez (edd.), *Cristianismo y aculturación en tiempos del Imperio romano* Coll. *Antigüedad y Cristianismo*, n. VII, Murcia, 1990, 68 e ss.

47 Cyprianus Carthaginensis Ep., *Epistula LXVII*, 5, in *CSEL*, III/I, col. 739. According to Cyprian, the behaviour of Basilides is particularly serious, because he added to the reprehensible behaviour which consisted in the purchase of the *libellus*, the even more abominable behaviour which consisted in the deceit of the Bishop of Rome. On the other hand, the behaviour of the person who, like the Bishop of Rome, negligently allow other to deceive him, is less serious: «*Neque enim tam culpandus est ille cui neglegenter obreptum est quam hic exsecrandus qui fraudulenter obrepsit*» (Cyprianus Carthaginensis Ep., *Epistula LXVII*, 5, in *CSEL*, III/I, col. 740).

48 «*Frustra tales episcopatum conatur, cum manifestius sit eiusmodi homines nec Ecclesiæ Christi præesse nec sacrificia offerre debere, maxime cum iam pridem nobiscum et cum omnibus omnino Episcopis in toto mundo constitutis etiam Cornelius collega noster, sacerdos pacificus ac iustus et martyrio quoque dignatione Domini honoratus, decrevit eiusmodi homines ad pœnitentiam quidem agendam posse admitti, ab Ordinatione autem cleri adque sacerdotalihonore prohiberi*», Cyprianus Carthaginensis Ep., *Epistula LXVII*, 6, in *CSEL*, III/I, col. 741.

49 Cyprianus Carthaginensis Ep., *Epistula LXVII*, 9, in *CSEL*, III/I, col. 743.

Institution that, as we will see, appears clear, ever since Constantinus era, both *ad intra* and *ad extra*.

Cyprian, on the other hand, in the letter to the Spanish faithful, became the spokesman of the position that protected the sanctity of the Sacrament of Order, that was typical of the African Council, and also of his own predecessor, Cornelius I (251-253), saint and martyr. After all, the Father of the Church was not an ardent defender of the Conciliar Sentence itself. He protected the freedom of each Bishop, - in the field of the ecclesial communion; - to adopt the decisions that he considered more adequate regarding the treatment of the *lapsi* and of the *libellatici* [50] and the value that must be given to the Baptism administered by the heretics. In this second case, the controversy with Stephen I becomes stronger, as shown by the words of the letter that Firmilian of Caesarea, Bishop since 230, sent to Cyprian, in which he defended the argument:

> *«atque ego in hac parte iuste indignor ad hanc tam apertam et manifestam Stephani stultitiam, quod qui sic de Episcopatus sui loco gloriatur et se successione Petri tenere contendit, super quem fundamenta Ecclesiæ collata sunt, multas alias petras inducat et multarum nova ædificia constituat, dum esse illic Baptisma sua auctoritate defendit»* [51]

These Synods do not only respond to the concern for a complete representation of the episcopate – with the participation of a great number of participants – but they also show the efforts of the Bishops with a superior authority to assert their influence on the conciliar decisions. The clear inadequacy of the synod procedure to solve the problems does not impede to verify that, in this case, an instrument was used in the ecclesiastical legal system; this instrument, in the ecumenical Council, has ensured the representation of the universal unity of the Church [52].

Furthermore, it began to start an initial synod Legislation and a progressive definition of a hierarchy among the various episcopal sees [53]. The structures of government and the modalities through which the ecclesial communion became a concrete reality were profoundly rooted in the context of the local Church and of the rich pluralism. For this reason, in the 3rd century, no "universal" representative instance had emerged yet. Probably because, in spite of the awareness of a transcendent universality, the human reality in which the members of the Church lived was still very distant from being accepted by the only universal body that was acknowledged at the time (the Empire). The aforementioned process would take more time.

Therefore, even if the imperial control on the Institution became fundamental (the Emperor enjoyed the power to convoke it and he made its decisions binding on a civil level), the celebration of the Synods and Councils – this is the name they acquire ever since the beginning of these ecclesiastical assemblies – starts a lot before the concession of freedom to the Church.

The prosperous experimentation that took place during the 3rd century, with its widely differentiated types of Councils, established some of the necessary requirements for the realisation of the first ecumenical Council. The disciplinary issues became a preferential, or even an exclusive, theme of the Synods. The authentic doctrinal themes were analysed as well: for example, a Council that took place in Carthage during the episcopate of Agrippinus, around 217, in which various African Bishops participated, took care, among other things, of "*de itinerando hćreticorum Baptismate*" [54]. The problem of the repetition of the Baptism was faced also in Asia Minor: in fact, Eusebius [55] and Firmilian, Bishop of Cappadocia [56] referred to a Council held in Iconium between 230 and 235, in which the issues related with the administration of this Sacrament were discussed.

The Council of Antioch of 268-269– in which the Bishop of the city, Paul of Samosata, was condemned because of his Christological theses [57] – had the nature of a doctrinal condemnation as well; the conciliar Institution clearly acquires the nature of a "processual instance". Among the various modalities adopted

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[50] In fact, not all the Bishops of the Catholic world thought that the *lapsi* should be definitely excluded from the ecclesial communion and that the *libellatici* should return to the lay state, and they readmitted them only after a congruous penance, as Cyprian's words demonstrate: «*Quare etsi aliqui de collegis nostris [extiterunt], fratres dilectissimi, qui deificam disciplina negligendam putant, et cum Basilide et Martialem temere communicent, conturbare fidem nostram res ista non debet, cum Spiritus sanctus in psalmis talibus comminetur dicens: "tu autem odisti disciplinamet abicisti sermones meos retro. Si videras furem, concurrebas ei et cum adulteris portionem tuam ponebas" (Sal. 50, 17-18)* », Cyprianus Carthaginensis Ep., *Epistula LXVII*, 9, in *CSEL*, III/I, coll. 742-743.

[51] Firmilianus, *Epistola Cypriano Fratri LXXV*, 17, in *CSEL*, III/I, col. 821. According to Firmilian, the recognition of the Baptism of the heretics by the successor of Peter indirectly implies the recognition of other Churches, which differ from the Catholic one.

[52] As it happens in the Council of Nicaea: «*Etenim ex omnibus Ecclesiis quæ universam Europam, Africam atque Asiam impleverant, ii qui inter Dei ministos principem locum obtinebant, simul convenere, unaque ædes sacra velut Dei nutu dilatata, Syros simul et Cilicas, Phœnices et Arabes et Palæstinos Aegyptios præterea, Thebæos ac Libyas, aliosuque ex Mesopotamia advenientes, ambitu suo complexa est. Quidam etiam ex Perside Episcopus Synodo interfuit. […] Ab ipsa quoque Hispania vir ille multo omnium sermone celebratus [Osio di Cordoba], una cum reliquis aliis consedit. Aberat quidem regiæ urbis antistes [romano Pontefice] ob senilem ætatem: sed præsto erant Presbyteri qui vice eius implerent. Huiusmodi coronam pacis vinculo consertam et connexam, solus ab omni ævo Imperator Contantinus velut divinum grati animi monumentum pro victoriis quas de hostibus et inimicis retulerat, Christo Salvatori suo dedicavit: hoc amplissimo cœtu, tamquam imagine quadam apostolici chori, nostris temporibus convocato*» (Eusebius Cæsariensis Ep., *De vita*, III, 7, in *P. G.*, XX, coll. 1059D-1062B).

[53] At first, a sort of "parental" relation is created between the "Church-mother" and the "Church-brunch" which derives from it, which implies the primacy of the metropolitan and, successively, of the Patriarchs, who preside over the "Apostolic Sees" or Pentarchy: Jerusalem, Antioch, Rome, Alexandria, Constantinople; regarding this topic, see: F. Retamal, *El ejercicio*, 318-352.

[54] Concilium Africanum (Sub Zephyrino Improbatum), *Agrippinum carthaginensis Ecclesiæ Episcopum*, in *MANSI*, I, coll. 733-736.

[55] Eusebius, in turn, cites the narration of Dionysius of Alexandria to Philemon, Presbyter of Rome. Dionysius, by referring to a practice concerning the treatment of the heretics that want to be admitted again in the Catholic Church, says: «*Illud […] præterea didici […] superiorum Episcoporum temporibus, in Ecclesiis populosissimis, et in Conciliis fratrum apud Iconium et Synnada*» (Eusebius Cæsariensis Ep., *Historia*, VII, 7, in *P. G.*, XX, col. 651A).

[56] «*Plurimi simul convenientes in Iconio, diligentissime tractavimus et confirmavimus repudiandum esse omne omnino Baptisma quod sit extra Ecclesia constitutum*». *Epistola Firmiliani Episcopi ad Cyprianum*, XIX, in *P. L.*, III, col. 1170C.

[57] «*Synodus innumerabilium sere Episcoporum congregata est, in qua auctor ille nefariæ apud Antiochiam hæreseos Paulus, convictus et ab omnibus manifestissime deprehensus falsi dogmatis reus, ab universa quæ sub cælo est Ecclesia catholica eliminatus est*», Eusebius Cæsariensis Ep., *Historia,* VII, 29, in *P. G.*, XX, col. 707B-C.

until that moment, this was, indeed, the synod figure used by the ecumenical Council of the Antiquity in their practice. On the one hand, the expression of a doctrinal orientation that is perceived as divergent from tradition and that, consequently, causes a wound in the unity of the Church; on the other hand, a reaction of condemnation and rejection, which is performed through a judgement of the rejected doctrine or even through a Process against its promoters: these are the main elements of the dialectic that characterises the first councils.

Finally, the Council of Elvira [58], celebrated around 300 '- one of the most famous of that era - also analysed disciplinary issues from the regulation of the relations between Catholics and pagans, Jews and heretics, to the regulations regarding the administration of the Baptism.

5. Conclusions

The quick overview of the lively synodal activity in the pre-Constantine era that, without aiming to be exhaustive, has been made in this research work, allows to explain the essential characteristics of an ecclesial institution that has existed during more than two thousand years, thus determining, in various historical times, the destiny of the Church.

The first Christian communities use the institution of the council to give common solutions to the problems they share with the bordering communities, thus demonstrating how the common feeling of belonging to the Universal Church grows, hand in hand with the strengthening of the identity of the groups of faithful gathered around the charismatic figure of the bishop; this implies the debate between the representatives of the other particular Churches and the adoption of shared measures, in order to solve the problems that distress the neighbouring communities.

The search for the *unanimitas*, the consensus of everyone, which goes far beyond the mere unilateral adhesion, is the thing that, together with the transcendent element of the Spirit, marks the originality of the council as compared with the forms of power-sharing known in the Hellenistic kingdoms and in the Rome of the Empire. It is not a case that the ancient Greek name of these gatherings is *synod*, σύνοδος, whose literal translation is "common path", "shared way".

In the end, the way in which the Church lives and acts is synodal. The eastern theologian of the 4th century John Chrysostom makes an admirable summary of this concept when he states that the term "Church" is a synonym of "meeting" and of "synod": «Ἐκκλεσία γὰρ συστήματος καὶ συνόδου ἐστὶν ὄνομα» [59]. Therefore, the Church, her history and, even before, her mission must be accomplished all together; she is common path of the faithful. Borrowing the words of Pope Francis, we can affirm that: «to walk together is the constitutive way of the Church» [60]. In short, the synodality is the modality through which the Church carries out her mission, in the past as well as today.

The dynamic of the process found fertile ground in this new decision-making system in very ancient times. The process, in fact, was the tool that the civil legal systems knew - and that the refined legal Roman culture kept improving - to discuss the truth (of the facts happened in a more or less distant past). The dialogic and participatory dimension in the canonical process, especially the penal one [61], has been preserved throughout long centuries of history. It has its roots, as the place par excellence of the ecclesiastical trial on the truth of faith, in the experience of the synod.

[58] Concilium Elibertanum, *Capitula*, in *MANSI*, II, coll. 5-19.

[59] S. Ioannes Chrysostomus, *Exp. in Psalm. 149*, in PG 55, p. 493 (Latin translation: «Ecclesia enim nomen est conventus et congregationis»).

[60] Pp. Francis, *Opening of the 70th General Assembly of the Italian Episcopal Conference*, Rome, 22 May 2017.

[61] Arroba Conde, M., «Convincimento, certezza e motivazione: l'esperienza canonica», in *Criminalia* (2012), pp. 163-179, part. p. 168; Riondino, M., *Giustizia riparativa e mediazione penale nel diritto canonico*, Roma, 2012[2]; Iaccarino, A., *Nessuno resti escluso. La giustizia oltre i confini*, Città del Vaticano, 2013.

The Origins of Homicide Legislation in Ancient Greece

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Abstract

The term ancient Greek law refers to the legal systems that were valid in Greek areas between 1200-300 B.C., from the Dorian invasion until the Hellenistic era. During this period, the organization of Greek cities thrived and Laws began to develop. Formal recording of the Laws is considered as the apex of city-state organization since written law constitutes a fundamental element in the formation of a state entity. The most important changes during the aforementioned period were the transition from an unwritten theocratic, 'sacred' law to the recording of laws derived from peoples' legislative power, the extension of judicial power beyond the political and religious elites to wider social strata and the replacement of the principle of tautopathia (direct and equivalent revenge) with the principles of eterodikia (a third party issuing the final decision regarding a dispute) and timisis (taking into consideration subjective and objective parameters in the criminal act and of the perpetrator). Although it is unclear whether the administration of justice during ancient Greek times derived from a multitude or a single unified legal system, it has nevertheless marked a significant, democratic shift towards the conceptualization, foundation and evolution of modern moral, ethical and judicial systems.

Key words: *Homicide; Legislation; Ancient Greece; Solon; Draco.*

Introduction

By ancient Greek law we refer to the legal systems that applied from 1200 B.C (Dorian invasion) until the Hellenistic period (323-330 BC). The flourishing of the Greek city-states, especially in the 5th and 4th centuries B.C, is placed within the above chronological frame. It seems that the recording of the laws coincides with the climax of the city-state organization, since most researchers agree that written law constitutes a fundamental element in the organization of a state entity[1].Therefore, one can claim that the Greek law was the law of all the Greek city-states[2]. However, the variations that were observed amongst the socio-cultural organization of these city-states pose the question of whether it is accurate to talk about ancient Greek law or would it be more accurate to talk about ancient Greek laws?

To the aforementioned question scientific views diverge. Some researchers claim that there was a legal mosaic, with each city-state having each own judiciary and legislative system[3], while others support a more homogenized and integrative approach[4]. It seems that despite the differences amongst the various legal systems of the city-states, all of these systems had a common denominator, namely the collective cultural background[5]. This background involves common moral, ethical and socio-religious views, which consequently are reflected in common legal principles.

The Attic law has been primarily utilized for the study of the justice system in the ancient Greek world and particularly with respect to the common legal principles within it[6]. There are two reasons underpinning this choice; historical reasons, related to the political domination of Athens especially during the 5th

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1 Lakin, K. *Legal Pluralism in Archaic Greece.* Princeton/ Stanford Working Papers in Classics No 2, 2005, pp. 1-40. Retrieved from https://www.princeton.edu/~pswpc/pdfs/lakin/120516.pdf [accessed 17 July 2019]

2 Biscardi, A. *Αρχαίο ελληνικό Δίκαιο [Ancient Greek Law]*. Dimakis, P. (Trans.). Athens: Papadima Publications, 2010, pp. 1- 512.

3 Triantafilopoulos, I. K. *Αρχαία Ελληνικά Δίκαια [Ancient Greek Laws]*, vol. 1, no. 1, 1968, pp. 1-12

4 Biscardi, A. *Αρχαίο ελληνικό Δίκαιο [Ancient Greek Law]*. Dimakis, P. (Trans.). Athens: Papadima Publications, 2010, pp. 1- 512; Kourakis, N. *Ποινική καταστολή: Μεταξύ παρελθόντος και μέλλοντος [Penal Suppression: Between past and future].* Athens: Sakkoulas Publications, 2009, pp. 89- 111

5 Herodotus. *Ιστορίαι 8: Ουρανία. [Histories 8: Urania]*. Panetsou, E. (Trans.). Athens: Zacharopoulos Publications (1995), pp. 144.

6 McCannon, B. C. Homicide trials in classical Athens. *International Review of Law and Economics,* vol. 30, no 1, 2010, pp. 46-51.

century B.C and its philosophical, literary and artistic supremacy in the 5th and 4thcentury B.C as well as practical reasons, since the majority of available sources refer to Classical Athens[7]. It is established that archaeological findings, such as signs for state capitularies or decrees of the senate, which may have stemmed from the Spartan law, don't exist[8]. There are only indirect sources of the Spartan law to be found, since the recording of the Lycurgus' laws in tables was forbidden[9]. Amongst them there are some rare literature sources preserved by poets (Terpander, Tyrtaeus, Alcman) of the pre-Hellenistic period (1200-330 BC). The most important reports of the Spartan law however, are found in the accounts of historians from the 5th century onwards (Herodotus, Thucydides, Xenophon) as well as from those of Athenian philosophers (Plato and Aristotle). During the Hellenistic period, the reports of Polybius and Plutarch differ chronologically from the early Spartan period, as they are characterized by subjectivity and are most likely influenced by political beliefs rather than reflecting solely ethical or moral aspects[10].

Legislators

The moral foundations of the archaic perception of justice are to be found into the supervisory gods, in the divine and its mythological personifications. The archaic Greek denies distinguishing Nature from human nature, as the forces that govern the universe also govern the moral universe. Gods not only set the moral and legal rules but also supervised the compliance of their subjects by being the ultimate judges. Any and every unfair deed constitutes a violation of the divine orders, a blasphemous transgression of the cosmic laws, a crimen deitatis, whereas the sentence has a religious and atoning role, mainly in the form of sacrifice[11]. Bloodshed and homicide, perjury, sacrilege and blasphemy constitute misdeeds that are beyond the boundaries of the moral order and thus attract the Gods' rage[12].

Such perceptions were dominant in nearly all archaic societies. In Western European Countries they influenced ethical and legal practices (theodicy) up until the Middle Ages. Justice, in such sociopolitical settings, was administered by the clerical and the patrician classes since they were considered to be holding the exclusive knowledge and privilege of genuinely and correctly interpreting the Divine Laws either by ex officio divino or ex Deo[13].

The following three legislators are the most prominent and important within the ancient Greek world. They are responsible for the shift from the notion of direct revenge as dictated by the customary law, to the administration of justice and punishment according to the written laws of the state. All of them were recognized as persons of universal authority, known wisdom and virtue and were widely accepted by their fellow citizens. In the early years these eupatrids mainly held the role of an arbitrator

Lycurgus

Lycurgus' laws were thought to be of divine origin and are included in the so-called Megali Retra (Great Clause), which is chronologically set around 650 B.C[14]. The name Retra (Clause) is defined as the agreement between the one who sets and the one who accepts the laws, while according to Plutarch it is a verbal declaration of divine origin[15]. There are similarities between this archaic belief and the Biblical depiction of God delivering the Ten Commandments to Moses on Mount Sinai.

Even though Lycurgus' historical existence is doubted[16], it is interesting to look at the etymological root of his name and its semiological relation to his laws. His name sometimes is interpreted as „worker-wolf" and sometimes as the „light-giver God" (from the hindo-european root λυκ → lux=light). Lycurgus, according to Plutarch, received his legislation from Pythia at the Apollo's sanctum in Delphi. Xenophon accentuates the importance of Lycurgus' legislation by reporting that he received the permission of the Delphic oracle in order to apply his laws[17]. In spite of the rather limited historical documentation on Lycurgus actual or symbolic existence, the present thesis maintains that his ideas and moral principles constitute the basis upon which future ethical, moral and judicial systems were conceptualized throughout history and up until present times.

Draco and Solon

In an archaic, „heroic" era, which is vividly depicted in the Homeric poems, the administration of justice in private arguments, and even in homicides, was a case to be resolved between the two conflicting parts. The opposing parties could negotiate and the relatives of the victim could forgive the offender (aedesis) even through the means of a financial compensation (hypophonia). If the perpetrator claimed that he had paid the hy-

[7] Davies, J. K. Deconstructing Gortyn: When is a code a code? In Foxhall, L. & Lewis, A.D., (eds) *Greek law in its political setting: justifications not justice.* Oxford: Oxford University Press, 1996, pp. 33-56; Gagarin, M. The unity of Greek law. In Gagarin, M. & Cohen, D. (Eds.), *The Cambridge companion to ancient Greek law*, Cambridge: Cambridge University Press, 2005, pp. 29-40; Lanni, A. *Law and justice in the courts of classical Athens.* New York: Cambridge University Press, 2006, pp. 1-181.

[8] Forrest, W. G. *A History of Sparta: 950-192 B.C.* London: W.W. Norton & Company, 1968, pp. 1-17.

[9] Kyriakopoulos, P. *Αρχαίο Ελληνικό Δίκαιο. [Ancient Greek Law].* Athens: Sinchroni Ekdotiki, 2002, p. 193.

[10] Papakostantinou, K. *Χαρακτηριστικά στοιχεία δικαίου στην αρχαία Σπάρτη [Characteristics of law elements in ancient Sparta],* Epistimoniki Epitirida DST, vol. 29, 2008, pp. 21-39.

[11] Kourakis, N. *Θεωρία της Ποινής: Μια Εισαγωγή [The theory of penalty: an introduction]* Athens: Sakkula Publications, 2008, pp. 1-215.

[12] Vasmagidis, P. *Υγεία και θεραπεία της ψυχής στην Αρχαιότητα. [Health and Healing of the Soul in Antiquity],* Athens: Kastaniotis Publications, 2008, pp. 70-93.

[13] Kyriakopoulos, P. *Αρχαίο Ελληνικό Δίκαιο. [Ancient Greek Law].* Athens: Sinchroni Ekdotiki, 2002, p. 193.

[14] Nakos, G. P. *Ιστορία Ελληνικού και Ρωμαϊκού Δικαίου [History of Greek and Roman Law].* Thessaloniki: University Studio Press, 1991, p. 94.

[15] Liddell, H. G. & Scott, R. *Μέγα Λεξικόν της Ελληνικής γλώσσης [Great Dictionary of the Greek Language*], Kostantinidis, A. (Trans.) Athens: Elinika Grammata, 2007, pp. 1-804.

[16] Jones A. H. M. *Sparta.* Oxford: Basil Blackwell (1968), p. 6.

[17] Papakostantinou, K. *Χαρακτηριστικά στοιχεία δικαίου στην αρχαία Σπάρτη [Characteristics of law elements in ancient Sparta],* Epistimoniki Epitirida DST (29), 2008, pp. 21-39.

pophonia and the victim or the victim's side questioned it, their disagreement was settled by well respected men. Homer (1954) in Iliad (IH rhapsody, verses 497-508) describes the scene of such a trial[18]. The adverse parties present their arguments in front of the vouliphoros agora (an advisory assembly), i.e. in front of a consultative assembly of the citizens, in which the opinion of the most reputable and renowned elders carried great importance[19]. The scene is engraved on the renowned Achilles' shield, which is part of the hero's famous armor said to be forged in the fires of mountain Olympus by god Hephaestus himself.

The union of settlements into city-states made the status of those reputable men more powerful. For that, they were also named archons (magistrates). Their jurisdiction, apart from being arbitral, became decisive and was upgraded to legislative, judicial and executive. At the same time, the development of a common political consciousness facilitated the establishment of this new role and helped to overcome the narrow-minded perception of factional solidarity and retaliation. In the state of Athens the aristocratic body of Areopagus supervised the implementation of the law and the citizens' morality. It included former archons, whereas the administration of the judicial issues was conducted by the nine archons (especially the six inferior ones, the law-givers). From Draco's period onwards (621 B.C) it was conducted by the Court of Appeal, with the archons in charge[20].

According to tradition and around the end of the 7th century (621 B.C), Draco was the first legislator of Athens although his actual existence again seems to linger between myth and history. He introduced a series of penal provisions, a part of which (those related to „blood crimes") were still in power even until the classical period. Although Draco's laws were particularly severe, hence the term „Draconian laws", we should not forget that Draco's legislation constituted considerable progress in comparison to the previous legal status. Customary, unwritten law and direct retaliation and blood feud were replaced by written, state approved legislation that also controlled and regulated the administration of justice and penalties[21]. Draco's „homicidal law" (phoniko dikaio) was put into effect around 620 B.C. It recognized the importance of negotiations between families or factions of the victim and the perpetrator, in cases of homicides, and it constituted the procedure by which the corresponding cases were resolved in ancient Athens. Draco's criminal law remained inalterable, despite the extensive legislative changes introduced by Solon.

Some years after Draco's rule (594-593 B.C), Solon was elected as an archon with special legislative authorities. He was elected as an archon by the municipality of Athens and not from the Areopagus as was dictated by the Athenian regime of that era. He was given the exceptional authorities of a conciliator, a mediator and a legislator, which he maintained even after the end of his annual ruling[22]. Solon, an open-minded, well-educated aristocrat and a man of action, was the first to separate the concept of law from the concept of religion. He conceptualized the citizen as a subject of the law and he removed the administration of justice from the noblemen, whilst handing it over to the people[23]. The laws of Solon were carved in kyrbeis, double - edged axes that resembled the Cretan axes, where Minos' legislation (Minos was a famous Cretan legislator) was written. The symbolism is obvious: the right and fair law is double-edged, it has the same force for both the incipient and the archons, for the judged and the judging. His reformative work constituted the first step towards the integration of democratic principles in the Athenian constitution[24].

Especially within the fields of legislative and judicial authority the changes that Solon introduced were very important[25], since he transferred the responsibility to elect the archons to the Ecclesia (the assembly of all Athenian citizens), a privilege that was exclusively held by Areopagus until then and he founded a new parliamentary body, the parliament of the 400 citizens. The parliament of the 400 citizens was more democratic compared to the aristocratic body of Areopagus, in which only members of the upper social class who had served a term as archons had the right to participate. On the contrary, the newly found parliament had 400 elected members that represented the lower social classes as well. The service of every member of this parliamentary body was annual and the four Athenian tribes were equally represented in the field of justice, Solon's reformations were also of great significance, as they pointed towards the direction of social democratization and control of aristocrats' arbitrariness. Among other things, he founded Heliaea, a public court of civil and penal responsibility with many members as a means of counterweighing the aristocratic Areopagus[26].

Homicide Courts

In classical Athens there were five different courts that dealt with homicide cases, as summarized in Table 1 below[27].

[18] Homer, *Ιλιάδα [Iliad]* Komninou-Kakridi, O. (Trans.), Athens: Zacharopoulos Publications, 1954, pp. 478-608.

[19] Mireaux, E. *Η καθημερινή ζωή στην εποχή του Ομήρου [The daily life in the time of Homer],* Panayiotou, K. (Trans.). Athens: Okeanis, 1971, p. 170.

[20] Kourakis, N. *Ποινική καταστολή: Μεταξύ παρελθόντος και μέλλοντος [Penal Suppression: Between pastand future].* Athens: Sakkoulas Publications, 2009, pp. 89-111.

[21] Troianos, S. & Velisaropoulou- Karakosta, I. *Ιστορία Δικαίου [Law History].* Athens: Nomiki Vivliothiki, 2010, p. 14.

[22] Aristotle. *Αθηναίων Πολιτεία [Athenian Constitution],* Zervos, I. (Trans.), 2012, pp. 1-99. Retrieved from http://www.gutenberg.org/ebooks/39963 [accessed 1 August 2019]

[23] Kyriakopoulos, P. *Αρχαίο Ελληνικό Δίκαιο. [Ancient Greek Law].* Athens: Sinchroni Ekdotiki, 2002, p. 193.

[24] Biscardi, A. *Αρχαίο ελληνικό Δίκαιο [Ancient Greek Law].* In Dimakis, P. (Trans.). Athens: Papadima Publications, 2010, pp. 1- 512.

[25] Kirtatas, D. I. *Οι μεταρρυθμίσεις του Σόλωνα, ο Αριστοτέλης και η σύγχρονη πολιτική θεωρία [The reforms of Solon, Aristotle and contemporary political theory],* Mnimon, vol. 14, 1992, pp. 205-222. Retrieved from http://dx.doi.org/10.12681/mnimon.495 [accessed 1 August 2019]

[26] Borden, W. A. A history of justice: Origins of law and psychiatry. *American Academy of Psychiatry and the Law,* vol. 24, no. 2, 1999, pp. 12-14.

[27] MacDowell, D. M. The length of trials for public offences in Athens. In Flensted-Jensen, P., Nielsen, T. H. & Rubinstein, L. (eds.), *Polis and politics: Studies in ancient Greek history,* Copenhagen: Museum Tusculanum Press, 2000, pp. 563-568; Sealey, R. The Athenian courts for homicide, *Classical Philology,* vol. 78, no. 4, 1983, pp. 275-296.

Table 1: The division of homicidal cases to Athenian courts (5th B.C.)

Types of Homicide Court	Kind of cases
1. Areopagus	Intentional homicides
2. Epi Palladio	Non- intentional homicides
3. En Freattoi	Homicides committed by exiled criminals
4. Epi Delfinio	Justified homicides
5. Epi Prytaneio	Homicides committed by animals or other unknown offenders

The person who was responsible for the preliminary interrogation of the crime, through the „preliminary proceedings" and for the classification of each case, was the „archon king", an aristocrat with authorities of a religious kind[28]. Due to this religious dimension and due to the fact that murderers were always regarded unholy, the archon king was obliged to guard against blasphemous crimes or homicides. In order to avoid the moral „diseased infection" of the committed murder, homicide trials took place outdoors[29].

In conclusion, it appears that a significant shift within the legislative and jurisdictional bodies took place over time, from the laws and judges of divine inspiration (kings, priests) to the representatives of the social elite (archons, Areopagus) and finally onto public legislative and judicial bodies. A parallel development seems to have taken place in the legal handling of homicide as well as the penal handling of the offender.

Homicidal Legislation

In the first stages of a society, crimes that insulted life, physical integrity, honor, fortune or other personal goods, were primarily considered „private offenses" that were dealt by the ones directly involved either in a dynamic way (forced exile for the offender or direct and equivalent retaliation) or in a conciliatory way with forgiveness and/or financial compensation[30].

The principle of antipeponthos or jus talionis (direct retaliation) was continually in force for many centuries in the Greek world. This gradually started to recede, since the city-state, as an organized legal society, brought the administration of justice and the penal justice in particular, under its control.

Subjective liability didn't matter. The murderer was exposed to the retaliatory acts of the victim's relatives, regardless of the existence or not of a homicidal intention. Patroclus, as he himself narrates (Iliad, rhapsody Ψ, verses 86-88) was forced to abandon his homeland, because he had killed unintentionally one of his opponents during a dice game. Retaliation could be exerted by all members of the victim's house and similarly against all relatives of the offender, in the name of family solidarity[31]. This principle can also be detected in Draco's homicidal law. According to this, it was necessary for all close relatives of the victim to agree in order to replace retaliation with financial conciliation.

Later on, retaliation could be avoided with a compromising agreement to pay an amount of money, which was regarded as a private sentence. In Iliad (rhapsody I, verses 632-636), Ajax urges Achilles to accept the compensation that Agamemnon offers him thus forgiving the insult of the abduction of his mistress Briseis.

In Iliad and in the trial scene before the vouliphoro agora, which was engraved in Achilles' shield (Iliad IH rhapsody, verses 497-508), a significant change is recorded, with decisive implications for the Greek world. The notion of retaliation is detracted from the private initiative and it is being brought under the control of the community. For the first time, Homeric communities had the right to control whether the ones who exerted the antipeponthos, did so with respect to or according to the ancient customary rules or not. At the same time, the avenging act of antipeponthos was done on behalf of these communities. In the absence of any other qualified body, the community acknowledged the right to retaliation to those that were harmed. A century after the completion of the Homeric rhapsodies one more important step towards the genesis of the city's penal legislation took place.

Towards the end the 7th century B.C, the homicidal law of Draco (621 B.C) suggests that the city-state has finally undertaken the task of punishing the murderers. At the same period an intense legislative activity is observed in many Greek cities. It is the first time that laws become written and some of them include rules that refer to the suppression of homicides. The prophecies of the oracles and especially those of the Delphic Sibyl had a significant impact in these laws and in the way they were formed[32]. The infectious (miasmatic) nature of homicide as an act, as well as the regulation of the cathartic rituals that should be followed, are to be attributed to the Delphic Sibyl and to the worship of Apollo[33]. The crime itself is considered to be infectious even in cases where the offender's action is justified, i.e. cases of self-defense[34].

[28] Aristotle. *Αθηναίων Πολιτεία [Athenian Constitution]*, Zervos, I. (Trans.), 2012, pp. 1-99. Retrieved from http://www.gutenberg.org/ebooks/39963 [accessed 1 August 2019]

[29] Antifon Ramnousios. *Άπαντα [Complete Works]*, Filologiki Omada Kaktos (Trans.), Athens: Kaktos, 1996, pp 1- 292.

[30] Kourakis, N. *Ποινική καταστολή: Μεταξύ παρελθόντος και μέλλοντος [Penal Suppression: Between past and future].* Athens: Sakkoulas Publications, 2009, pp. 89- 111.

[31] Glotz, G. *La solidarite de la familledans le droitcriminel en Grèce [The solidarity of the family in the criminal law in Greece],* Paris: Albert Fontemoing, 1904, p. 94.

[32] Guthrie, W. K. C. *The Greeks and Their Gods.* Boston: Beacon Press, 1971, p. 183.

[33] Gardikas K. *Συμβολή εις το φονικό δίκαιο των αρχαίων Ελλήνων [Contribution to the murderous law of the ancient Greeks]*, Plato, vol. 24, no. 7, 1972, pp. 170-172; Glotz, G. *Η ελληνική πόλις [The Greek polis]*, Sakelariou, A. (Trans.), Athens: Morfotiko Idrima Ethnikis Trapezis, 1981, pp. 241-270; Lekatsas, P. *Η καταγωγή των θεσμών, των εθίμων και των δοξασιών [The origin of institutions, customs and beliefs],* Athens: Vivlio Noellikikou Logou, 1951, p. 83; Plato. *Νόμοι [Laws]* Moskovis, V. (Trans.), Athens: Nomiki Vivliothiki, 1988, pp. 864- 934.

[34] Kabitsis, I. *Θρησκεία και δίκαιο στην Αρχαία Αθήνα, Αναζητήσεις 3-4 [Religion and law in ancient Athens, Browse 3-4],* Athens: Elliniki Anthropistiki Etairia, 1982, pp. 159-176.

Draco's Phoniko Dikaio

Draco's law is familiar to us thanks to a marble plate that was found in 1843, during the construction of the Cathedral of Athens[35]. The law refers to unintentional homicides and to the penal procedures that were to be followed in such situations. The sentence that the law suggested was exile, whereas it provided the possibility to suspend the sentence, through „forgiveness" that was given by the victim's relatives. The absence of any reference to the cases of intentional homicides constitutes a point of scientific debate[36]. The law is complete, while others support that part of this law was either not copied in 409 B.C[37] or it has not been saved until today[38].

Draco's Phoniko Dikaio seems to differentiate crime and punishment with regard to both their severity and intentionality. Many ancient texts maintain that Draco's Phoniko Dikaio punished intentional homicide with death. On the other hand, in the case of involuntary homicide (akousios phonos), punishment is less severe in comparison to intentional ones[39].

During the classical era another type of homicide was added: that of the dikaios phonos (justified murder) that is, killing someone under circumstances that justify the action, for example the murder of an adulterer or that of a burglar caught in the act[40]. Table 1 above summarizes the different Courts and their jurisdiction in considering different types of homicide on the basis of their intentionality.

A remnant of the era of unlawful or „private" retaliation can be traced in the Athenian penal law of the classical period. Homicides were persecuted after a private rather than a public lawsuit. This lawsuit could be executed only by members of the family or the faction of the murdered person. The involvement of the state in homicide cases started to increase due to the fact that any citizen had the right to exert a graphę aseveias (lawsuit of disrespect) against those relatives that neglected their dutiful obligations towards the murdered person and didn't proceed to the persecution of the murderer.

Conclusion

In conclusion, it appears that several important changes took place in the historical period between 1200 B.C. and 300 B.C. In ancient Greek societies the legislative and judicial power was a privilege of either a specific person (king, high priest or a prominent member of the city – state) or of the upper social class. Gradually these powers shifted towards a broader social spectrum. The involvement of the state gradually increased whilst the possibility of private settlements between the involved parties decreased. Similarly, the social principle of tautopathia (direct and equivalent revenge) was gradually abandoned in favor of the basic legal principles of eterodikia (a third party issuing the final decision concerning a dispute) and timisis (taking into consideration subjective and objective elements of the criminal act and of the perpetrator), thus laying the foundations of the modern judicial systems.

[35] Gallia, A. B. The republication of Draco's law on homicide, *The Classical Quarterly,* vol. 54, no. 2, 2004, pp. 451-460.
[36] Wallace R. W. *The Areopagus Council.* Baltimore, MD: Johns Hopkins University Press, 1989, p. 252.
[37] Harrison, A. R. W. Drakon's πρώτος άξων [Drakon's First Axon], *The Classical Quarterly* vol. 11, no.1, 1961, pp. 3-5; Köhler, U. AttischeInschriften [Αττικές Επιγραφές], *Hermes,* 2, 1867, pp. 16-36.
[38] Gagarin, M. Drakon and Early Athenian Homicide Law, *Yale Classical Monographs,* no. 3, New Haven: Yale University Press, 1981, pp. 1057-1058; Stroud, R. S. *Drakon's Law on Homicide*. Berkeley, CA: University of California Press, 1968, p. 41
[39] Stroud, R. S. *Drakon's Law on Homicide*. Berkeley, CA: University of California Press, 1968, p. 41; MacDowell, D. M. *Athenian Homicide Law in the Age of the Orators.* Manchester: Manchester University Press, 1999, pp. 15-45
[40] Lanni, A. *Law and justice in the courts of classical Athens.* New York: Cambridge University Press, 2006, pp. 167-181.

The "Protector de Indios" in Early Modern Age America

István Szászdi *

Abstract

After the Discovery of America, the legal Rights of the native Indians were in issue in the Kingdom of Castile. In the universities of Salamanca and Valladolid, as in its most important colleges the obligations of the Spanish Crown with the defendless Indians was discussed, meanwhile their survival was in task. The Dominican friar Bartolomé de las Casas was the first Protector de Indios appointed by the Spanish Crown to spare the natives from the violence of the conquistadors. Almost five hundred years ago, while Spain's deadly enemies developed the Black Legend related with the Spanish conquest of the New World, Spanish Colonial Justice introduced a medieval institution, with Roman origins, dedicated to the poor and outcast of society. Its introduction in Spanish America was because of King Philip II who in a Real Cédula dated January 10th, 1589, ordered that where there had been in the past Protectores in the West Indies should be rectitude and named in his behalf where large numbers of Indian population existed – such like in the mining regions of Peru or Mexico. Their mission was to watch, represent and defend the rights of the most needy, the Indians. The Protectores had tax power, had as well the right of taking judicial declarations and of giving legality to Indian testaments. They could take note of the last will of the Indian vassals with two witnesses. They almost had the category of oidores, that is of judges members of Royal Courts, called in Spanish Reales Audiencias. A Real Cédula of August 20, 1620 ruled out that all the Protectores had to be lawyers – letrados – with a certain experience. The institution proved to be efficient

Keywords: *Protector of Indians; Fray Bartolomé de las Casas; protection of the American Indians; Laws of Burgos; Royal Courthouses; Desiderius Erasmus of Rotterdam; Sir Thomas More; Luis Vives; encomienda; Spanish Catholic Church; Adrianus of Utrecht; Emperor Charles V; Philip II of Spain; heathen; conflict of jurisdictions; Human Rights.*

Almost five hundred years ago, while Spain's deadly foes developed the Black Legend based in the Spanish Conquest of the New World, Spanish Colonial Justice introduced a medieval institution, with Roman origins, dedicated to the poor and outcasts of society.[1] Its generalization in Spanish America was because of King Philip II who ordered, in a *Real Cédula* dated January 10th 1589, to restore the *Protectores de Indios* that once had existed in the West Indies and that they should be chosen with rectitude. The *Protector* had judicial and extrajudicial authority. The King of Spain considered the special need of these royal officers where large numbers of Indian population existed – such like in the mining regions of the viceroyalties of Peru or Mexico. Their mission was to watch, represent and defend the rights of the most pauper, the Indians. These magistrates had to live in heir behalf, protecting them with laws and promoting them in the new society that was being constructed in the New World. Because the Indians were considered as minors they needed of a tutor for their protection, and this was the duty of the *Protector de Indios*. The *"Ordenanzas"* or Rulings of Viceroy Francisco de Toledo in Peru, were considered for its guidance. The institution of *Protector de Indios* was taken to the Philippines, regarding the protection of the natives, called *"indios filipinos"* from the early XVII century onward, though its effects were insufficient for only one Protector was appointed for the whole archipelago.

King Philip II of Spain, had received from his father, Emperor Charles, for his political guidance some Instructions - dated in May 4, 1543 - that let us understand the meaning of justice for him and how important the royal courts or *"Reales Audiencias" meant* for his rule. Charles V wrote: *"Son, you must aim Justice and demand its officers to remain honest and that they may not move because of affection or passion, or corruption because of anything, and never permit that they take illicitly on any occasion, and punish all those that infringe such."*[2].

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1 This is the recent hypothesis of Francisco CUENA BOY, "El protectorado de indios en clave romanista. *Libro Homenaje In memoriam Carlos Díaz de Rementería,* Edit. Gustavo Pinard y Carlos Merchán. Universidad de Huelva. 1998, pp. 219-222. Cuena believes that its use was the result of the Civil Law tradition in the Spanish universities of Salamanca and Valladolid where most of the "*letrados*", officers of the royal administration had studied Law. I would add Alcalá de Henares, as well. That same year Cuena published an article that tried to settle the common grounds of the *Defensor civitatis* and the *Protector de indios* but disregarding the XVI century sources of the first Protectores, and hardly studying the information from the 1620's in reference to such institution in the Spanish West Indies. [Francisco CUENA BOY, "El Defensor Civitatis y el Protector de Indios: Breve ilustración en paralelo", *Ius Fugit*, 7. 1988, pp. 179-195.]

2 *Cómo ser Rey. Instrucciones del emperador Carlos a su hijo Felipe. Mayo de 1543.* Critical Edition by Rachael Ball and Geoffrey Parker. The Hispanic Society of America. Ediciones El Viso, Madrid. 2014, p. 45.

The King of Spain Knew how badly his grandmother Ysabel the Catholic Queen, had demanded in her deathbed in Medina del Campo, in 1504, to her husband and descendants to respect the freedom of her vassals from the otherside of the Ocean, the Indians. Though it may be considered an urgency of a Christian in agony fearing Eternal Justice, a matter of conscience not of State, the worry of the ill mistreatment and abuses done by the Spaniards in the first decades of the XVI century, moved Spanish officers to withdraw from new conquests and to look after the protection of the Indians. We can not forget that the adventageous Bulls of Pope Alexander VI in favour of the King and Queen of Castile over the American continents, and specially the one named *Dudum siquidem* granted them the rights of navigation, trade and land occupation with the condition of missionary action that should lead to the conversion of the heathen to Christianity in the West Indies, and such was an obligation that to be considered as *"conditio sine qua non"* to Spanish rule "*in the isles newly discovered*".[3] Hence if Spain wanted to keep such title of property over American soil, efficient Crown officials had to be found and prepared to such difficult task taking in consideration the different interest of the "*encomenderos*" mostly Conquistadors that had received the grant of Indians as servants from the Spanish Crown – *"Encomiendas"* - to reward their past services in the Conquista.[4] A new form of Feudalism and a local elite, based on what in Spain was called the "*estado señorial"* had developed in the Indies, based in the Indian personal service, limited by the King himself, the Royal Council of Indies and the "*Reales Audiencias*" or Royal Courts of Justice.

The *Protectores* had tax power, had as well the right of taking judicial declarations and giving legality to Indian testaments. They could take note of the last will of the Indian vassals with their scribe. They almost had the category of *Oidores*, that is of judges members of the Royal Courts, called in Spanish *Reales Audiencias*. A *Real Cédula* of August 20th, 1620 ruled out that all the *Protectores* had to be professional lawyers – *letrados* – with a certain experience. The institution proved to be efficient though the historiography has not been generous in its account… It is in favour of this institution the survival of huge numbers of Native American Indians, with the intervention of the *Reales Audiencias* in the territories that belong to Latin America and the Philippines[5] in the present day, something that did not occur in English North America during the Modern Age.

1. How much humanism was responsible of the protectores

It was in 1516 when fray Bartolomé de las Casas commenced his labour as first *Protector de los indios*, in the New Word. With the conformity of the Cardinal-Regent of Spain, Cisneros, the Dominican friar Las Casas proved to be a menace to the discontent encomenderos, going farther than the Laws of Burgos in his aim to protect the American Indians, as his writings shed us light, he looked for the erection of isolated Indian Christian societies protected by a new order of knights that would prevent the Spaniards from spoiling the Indians. King Ferdinand had just passed away - he died shortly after an interview with Las Casas in Plasencia in his way to the Monastery of Guadalupe - and Cardinal Francisco Jiménez de Cisneros, and Adrian of Utrecht, the royal ambassador of Charles, were sincerely trying to heal the wrong doings of the Conquistadors against the natives.[6] While Cardinal Cisneros decided with a group of members of the Royal Council to send three monks of the Order of Saint Jerome or Hieronymites to study *in situ*, the plight of the American Indians in company of Bartolome de las Casas. The Cardinal appointed Las Casas, with the approval of Adrianus of Utrecht[7] (the future Pope Adrian VI) "Procurator and universal Protector of all the Indians of the Indies", with a yearly salary of 100 pesos of gold. Fray Bartolomé, would only depend from the Crown, and it was thought that the interaction of the Hieronymites and Las Casas would be strong enough to impede the "destruction" of the native societies by the Conquistadors. Unhappily the Dominican friar discovered the Hieronymites did not trust him, as when instead of embarking together they preferred a ship for their own in November 16th, 1516.[8] Cardinal Adrian of Utrecht was one of the most prominent men in Castile, before King Charles left Spain in 1520 to be crowned King of Romans in Aachen he was named Governor of Castile in his absence. He was a convinced peacemaker as he proved during the *Comunero* rebellion commenced that same year.[9] In January 1522 he was elected Pope, and was crowned at Rome on August 31. Pope Adrian took up the task of reforming the Catholic Church with great eagerness, starting with the Curia,

3 Francisco MORALES PADRÓN, *Teoría y Leyes de la Conquista.* 2nd Edition. Secretariado de Publicaciones de la Universidad de Sevilla, Sevilla, 2006, pp. 159-185. István SZÁSZDI, "Compostela de Azua y el Comendador gallego, un Contino entre África y las Yndias. "El inicio de la Encomienda indiana", *Iacobus. Revista de estudios jacobeos y medievales*, N° 23-24, 2008, pp. 285-336.

4 Demetrio RAMOS PÉREZ, *Genocidio y conquista: viejos mitos que siguen en pie.* Real Academia de la Historia, Madrid. 1998, pp. 34-51. István SZÁSZDI, "El inicio de la lucha por los derechos de los indígenas del Nuevo Mundo: una reinterpretación política", *Revista Derecho Público Iberoamericano.* N°. 1, 2012, pp. 125-156.

5 The subjects of protection there were called "*indios filipinos*" in Spanish.

6 Manuel GIMÉNEZ FERNÁNDEZ, *Bartolomé de las Casas.* Vol II. *Capellán de S. M. Carlos I. Poblador de Cumaná (1517-1523).* Escuela de Estudios Hispano-Americanos de Sevilla. CSIC. Sevilla, 1960. pp. 40-60. No one has studied better the change of administration in Castile, and specially in the Indies, when Charles I, the future Emperor, inherited the kingdoms of Castile and Aragon, initiating the Habsburg period in Spain.

7 His original name was Adrian Florenszoon Boeyens, born in 1459. He studied at the University of Louvain, where he was ordained priest and became, professor, chancellor and rector. Erasmus of Rotterdam was one of his pupils. In 1507 Emperor Maximillian appointed Adrian tutor of his eldest grandson Charles, the future Charles V. He was named Bishop of Tortosa in 1516 and Grand Inquisitor of Castile in 1518. He was also known as the Cardinal of Tortosa, because he was appointed cardinal in 1517. [https://www.britannica.com/biography/Adrian-VI]

8 Joseph PÉREZ, *Cisneros, el Cardenal de España. Españoles eminentes*. Taurus – Fundación Juan March, Madrid, 2014. pp. 174-175.

9 István SZÁSZDI, "El cardenal Adriano y actuación pacificadora del Licenciado don Pedro de la Gasca en el Perú: la memoria de las Comunidades de Castilla", in *Iglesia, eclesiásticos y la revolución comunera* / Coord. by István Szászdi León-Borja, Centro de Estudios del Camino de Santiago. Sahagún, Valladolid. 2017, pp. 467-491.

but he lacked of sufficient time for his mission, very unpopular in Rome. He died in Rome in September 13, 1523; probably poisoned. If he had outlived his foes Fray Bartolome de las Casas would have had a stronger supporter then the Emperor himself in the defence of the Indians in the New World.

Father Casas had written to Cardinal Cisneros in a "*Memorial*":

"Vuestra Reverendísima mande poner en aquellas islas, en cada una dellas, una persona religiosa, celosa del servicio de Dios y de Su Alteza y de la población de la tierra, y que procure la utilidad y conservación de los indios con mucha vigilancia e cuidado; la cual tenga en justicia los dichos indios porque no se les sea hecha, ninguna sinrazón ni sin justicia, y que castigue rigurosamente a los malhechores y delincuentes, porque esta rigurosidad será gran piedad… A lo qual Vuestra Señoría mande dar buena quitación y salario de aquella comunidad, no en indios porque luego se corrompa, sino en dineros; y allende de esto le haga muchas y muy señaladas mercedes acá… y que con esta tal persona ningún otro juez o justicia tenga que hacer ni mandar ni estorbarle; porque si los otros jueces o justicias tuviesen indios en las comunidades nunca les faltaría de que oviesen algunos cosa para estorbarles su buen celo, porque pensarían augmentar sus ganancias."[10]

Advising the King it was necessary that the Protectors should be religious and honest, in other words, men who would administrate justice with rigour seeking the wellfare of the Indians. Las Casas thought that the wages of the Protectors had to be paid in money and not in Indian servants to avoid their corruption and prevarication, and that their salaries would be well rewarded so that they would be respected by the community. And this vision of fray Bartolomé de las Casas was accepted and appreciated by the Cardinal Regent. Las Casas used as a banner the policy of conversation with the Indians (*política de conversación*). Since the Discovery of America the Catholic Monarchs, followed a policy developed by the Franciscan friars in the Canary Islands, a peaceful approximation to the native Indians through dialogue.[11]

A year later, in 1518, Las Casas had won the trust of the new young king *Don Carlos*, the son of Philip the Handsome and Juana the Mad. King Charles had brought with him a huge number of courtiers, relatives and servants of the House of Burgundy, that because they came from Flanders they were called by the Spaniards *"flamencos"*, which means Flemish. The Spaniards mistrusted them, they thought their presence in Spain was due to their greed and covetness of the riches of the kingdom and its Indies. Part of this claim may have bee true, but fray Bartolome de las Casas was able to continue his mission in the Antilles and the Spanish Mainland because of sharing the pacifist ideals of Erasmus, the Kings tutor and protected friend. Most of the said "*flamencos*" were followers of the humanism of Erasmus and his friends of Leuven and Antwerp.

But theory was once confronted with reality, and the *Conquista* can not be referred as a friendly meeting between civilizations. Its blunders respect the native population were put to an end by the action of the Visitadores de Indios, magistrates of the *Real Audiencias* (Royal Courthouses) in the New World that had the concrete mission of informing the King of the situation of the Indians, and the Protectors, object of our study.

I am convinced that the influence of Erasmus of Rotterdam's thought was very determinant in Las Casas,[12] and most possible in Utopia of Sir Thomas More, first published in 1516 and that has as a *scenario* an island in the Atlantic Ocean. His demands for religious and moral persons who feared God and were willing to look for the good and preservation of the Indians – the poor of Utopia - are likely taken from More's vision.[13]

Erasmus was invited to teach in the University of Alcalá by Cardinal Ximenez de Cisneros in the early months of 1517. In

[10] Constantino BAYLE S. J., *El Protector de Indios*. Publicaciones de la Escuela de Estudios Hispano-Americanos de la Universidad de Sevilla – CSIC., X, Serie 1ª: Anuario, 5. Seville, 1945. pp. 14-15.

[11] Read the *Real Cédula* of King Charles, dated September 20, 1518; which I have transcripted and that figures at the end of this paper in the Appendix. This royal order to the Judge of Rresidence Rodrigo de Figueroa informs him of the powers that las Casas enjoyed in his mission as Protector.

[12] This has been the thesis sustained by Marcel BATAILLON in : *Érasme et l'Espagne, recherches sur l'histoire spirituelle du XVIe siècle* (1937). It was translated and enriched in a Spanish version: *Erasmo en España,* Fondo de Cultura Económica, México. 1950; it is mandatory to mention his latter book: *Études sur Bartolomé de las Casas,* in which he added *Las Casas et la défense des indiens*, which was published as a sole book in 1966.

[13] It is well known the importance of the Spanish merchant community in Bruges since the XVth century, dedicated to wool trade. It was during More's stay in Bruges 1515, when he commenced his book, writing the Introduction and the second part of it. He had the official mission of writing a trade agreement with Charles of Habsburg's ministers. He was lodged in a building near the Dyver Channel (the so called Water Huyse) in a quarter where many Castilian merchants lived, like the rich and *converso* Maluenda family which remains at walking distance from More's house. It was then when he met Luis Vives, the Spanish humanist that had arrived from Paris where he had finished his studies in 1512. In that year Vives settled in Bruges, avoiding the Spanish Inquisition – for his family was in trial in Valencia accused of practicing Judaism in secret – and marrying to the wealthy Margarita of Valldaura, daughter of a merchant from his home town and also coming from a *converso* family. Vives was a talented man protected by the future Emperor Charles V himself. It was in this circle of the Spanish merchants that More was informed of the discoveries in the New World and the native societies of the Antilles that inspired his *Utopia*. The Spaniards were also vassals of Charles, or at least they were close to because King Ferdinand the Catholic died in 1516 leaving Charles all his kingdoms in succession. It is more likely to believe that the Iberian businessmen should have the credit of giving their insights of the New World and its inhabitants to More, than he reading Amerigo Vespucci solely. The Maluendas, a converse family from Burgos, were very aware of the opportunities of the New World, and because of their wealth it was one of their kin that became Bruges' first foreign burgomaster. More's friendship with Vives remained for good until his execution in Tower Hill. Vives had been introduced in the English Court by More where he was appointed as tutor of Princess Mary, fostered by Queen Catherine of Aragon. [For a slight vision of the friendship between the Lord Chancellor of England and the Valencian humanist, see the book of Enrique GARCÍA HERNÁN, *Vives y Moro. La amistad en tiempos difíciles.* Cátedra. Madrid, 2016.] Vives published in 1526 a treaty titled: *De subventione pauperum. Sive de humanis necessitatibus libri II.* It maintained that only labour and education were able to save the poor from crime and mendicancy.

July Erasmus wrote to his close friend Thomas More, from Louvain: *"Non placet Hispania"*. It was the second invitation drawn by Cisneros, who was the Cardinal Regent of Castile, but for the humanist of Rotterdam there were too many *Conversos* (he had in mind the Crypto Jews that in appearance were Christians) in Spain.[14]

The first *Protectores de Indios*, were bishops appointed by the King of Spain, in the coming years of the enthronement of the Habsburgs. Men like the Franciscan Fray Juan de Zumarraga, first Bishop of Mexico and *Protector de Indios*,[15] the first two bishops of Peru, fray Vicente de Valverde, Bishop of Cuzco[16], or Jerónimo de Loayza, Archbishop of Lima from 1575, all were appointed *Protectores de Indios* by the Emperor.[17] In the case of Zumarraga, Charles had met him years before he was consecrated as Bishop and Protector. Thus, when in 1532 he had to return to Spain in order of facing charges from Mexican *Encomenderos* against him in the Council of Indies, King Charles showed him his favour. Zumarraga as Cisneros were well known admirors of the writings of Erasmus of Rotterdam. Cardinal Cisneros wrote to Erasmus inviting him twice to travel to Castile to teach in the University of Alcalá de Henares that he had refounded. In 1524 Erasmus regretted having declined the invitations of Cisneros, due to his success in Spain. As we know today, in great deal thanks to Bataillon, Zumarraga owned books of Erasmus in the New World, books annotated by him that left the bookshelves of the Episcopal Library of Mexico in the early XX century for the United States. Bishop Zumarraga was the founder of the University of Mexico.[18] The influence of Erasmus, in early Spanish colonial life has not been underlined yet as it should.[19] What was considered modern and saintly of Erasmus was the ideal of a peaceful conquest through friendship and non violence, and the obligation of the Christians - and specially of the Church – to take care of the poor, the orphans and the widows as the Gospels demand. Erasmus wrote in his *Quarrel for Peace*: "Almost all the causes of war are originated in pretexts that have nothing to do with the good of the people."

Another famous bishop whose name has lasted in the Mexican people's memory as revered Protector of the Indians, was Vasco Núñez de Quiroga, a clergyman who had practiced as judge in the Royal Chancellery of Valladolid, the High Court of Castile, and that had been sent to Mexico with the appointment of judge of the Real Audiencia, to enforce law and to pacify Michoacan, the land of the fierce Tarascan Indians. He arrived in 1531 and after five years, Emperor Charles V promoted him to the Episcopal state, becoming the first Bishop of Michoacan. His good deeds were that in such a short period he organized the territory and gave Ordenanzas (rulings in Spanish) to organice the Tarascan people in hospital-villages following Thomas More's Utopia. His success proved that utopic Christianity was possible. His long life, he died 95, supported the protection of the Tarascans and their language that has survived until the XXI century.[20] Archbishop Zumarraga wrote about him to the Emperor:

"the example and life, given by this good magistrate who has invested all his possessions in building hospitals and villages

[14] Marcel BATAILLON, *Erasmo y España: estudios sobre la historia espiritual del siglo XVI*. México –Madrid - Buenos Aires: Fondo de Cultura Económica, 2d. ed. 1983, p. 77.

[15] The second convent where Zumarraga lived stood besides the Douro River famous for its orchards, near Valladolid, its name was "*Nuestra Señora del Abrojo*", where he was the Guardian Father of the religious community. It was there where he met Emperor Charles, while the Castilian Courts of 1527 were held in Valladolid. Zumarraga was sixty years of age. Charles V stayed in that monastery in the environs of Valladolid during the Holy Week and Easter of the said year. The Emperor felt impressed because of the piety and wisdom of the friar. Admiration that led him to ask the Pope for the Bishopry of Mexico for Zumarraga, and quoting the Testament of his grandmother the Catholic Queen, dated in Medina del Campo in 1504, which demanded her royal husband and descendants to respect her Indian vassalls. Thus Zumarraga was appointed, by a "*Real Provisión*" of December 12, 1527, "*Protector de los Indios*" of Mexico, where he arrived a year later. In 1530 Pope Clement VII confirmed him as Bishop of Mexico. Ramón Xirau has underlined the influence of Erasmus's *Philosophia Christi* which led him to struggle for a new Christian society where Indians had a place, respect and dignity even if it meant to clash against the encomenderos and governor Nuño de Guzmán who enslaved 15.000 Indians in Panuco. [*Idea y querella de la Nueva España. Las Casas, Sahagún, Zumarraga y otros.* Prólogo, selección y notas de Ramón Xirau. Alianza Editorial, Madrid, 1973. pp. 105-106. Joaquín GARCÍA ICAZBALCETA, *Don Fray Juan de Zumárraga, primer Obispo y Arzobispo de México*. Andrade y Morales Ed. México, 1881.]

[16] He read the "Requerimiento" to the Inka Atahualpa in Cajamarca. He was a rather idle *Protector*, who was slain by the Indians of the Island of Puná in 1541. He belonged to the Dominican Order and had studied in the College of San Gregorio of Valladolid where fray Francisco de Vitoria lectured after his return to Castile from Paris.

[17] Constantino BAYLE S. J., "El Protector de Indios*", Op. cit.* pp. 31-32.

[18] Marcel BATAILLON, *Erasmo y España… Op. cit.* pp. 77-79. Preaching the Word of God in the vernacular languages was also considered by Erasmus, see: Aurora EGIDO, *Erasmo y la Torre de Babel. La búsqueda de la lengua perfecta.* Casa de Velázquez, Madrid. 1998.

[19] As Diego Mendez, servant and close friend of Christopher Columbus and son of a Royal Secretary of King Enrique IV of Castile, in his will in Valladolid in 1536, left his books of Desiderius Erasmus as a treasure to his children, the Colloquia (1518), *Disticha de moribus nomine Catonis* (1513), *Lingua, Sive, De Linguae usu atque abusu Liber utillissimus* (1525), and a Sermon, were sent to his children in Santo Domingo (Hispaniola Island) in order to lead them to a virtuous life. [José ALMOINA, *La Biblioteca Erasmista de Diego Méndez*. Universidad de Santo Domingo, Ciudad Trujillo, 1945. pp. 44-45.] Something similar was the case of the children of Juan de Ampiés, the founder of Venezuela's oldest city, Coro and who tried as lay missionary to evangelize the Caquetío Indians. Inés de Ampiés and her husband Sancho de Argués were owners of several books of Erasmus. Their grandfather Martín Martínez de Ampiés, had served King Ferdinand the Catholic in England in a diplomatic mission in his behalf to King Henry VIII in 1512. Martin Martínez de Ampiés was good translator, publishing in 1498 *Viaje de la Tierra Santa* of Bernard von Breidenbach. He transmited to his children the Joachinist idea that the age of the Holy Spirit was next to come. [http://www.mcnbiografias.com/app-bio/do/show?key=martinez-de-ampies-martin] In reference to Juan de Ampiés, see Demetrio RAMOS, *La fundación de Venezuela. Ampies y Coro: una singularidad histórica*. Valladolid-Coro, 1978. Coro.

[20] The Tarascan or Purepecha, had been a Kingdom enemy of the Aztecs, that was conquered by Cristóbal de Olid in 1522. According to the 2000 census, the adult population of the Mexican state of Michoacan who spoke indigenous languages were 121,849 individuals. Of them 109,361 individuals spoke Purepecha, 4, 706 Nahuatl (the language of the Aztecs), 4, 338 Mazahuan, 732 Otomi, 720 Mixtec and 365 Zapotec. [http://www.indigenouspeople.net/michoacan.htm]

and doing works of mercy in favour of the Indians is cause of shame to many Bishops here, *presertim* to the friars".[21]

So Joachinism, the Franciscan Millenarianism and Erasmism met in the New World to conquer an earthly Kingdom of Christ, preparing his most beloved children – the poor – to receive the Holy Spirit, understanding as "the poorest of the poor" the Indians. A new Christiandom was being built in the New World, it was a laboratory for the Absolute State, before the Inquisition banned Erasmus. But the worry in Spain for those that Erasmus called: *"pauperimus"*, had rooted in many.

2. How King Philip II ordered the institution of the *protectores*

During the reign of King Philip II, the custom of naming bishops *Protectores* became a constant, we must not forget that the *Real Patronato* of the Spanish Church meant the submission of the Spanish Church to the Crown. The first concession that declared the Royal Patronage of the Church of the Indies, was given by Alexander VI, previously Pope Innocent VIII in 1483 had granted the "*Patronato Real*" to King Ferdinand and Queen Ysabella relative to the Church in the Canary Islands and Puerto Real, while the general concession for the Spanish Church was given to Charles V by Pope Adrian VI in 1523. If it is true that the Spanish Church was concerned of keeping heretics away from the Indians, it is also true that they worried for their welfare and the protection of their native languages and organization, at least since the reign of Philip II remains unquestionable. Protectors like Agustin de Coruña, Bishop of Popayan from 1566 to 1589, who was warned harshly by King Philip for abandoning his Christian flock to preach the heathen in their forestlands, were very aware of their responsability with the Indians that had not been submitted and that could be hunted by the Spaniards. Coruña, who was an Agustinian friar who had succeeded as a missionary in Mexico during his first years in the New World, and who had witnessed as a child the Comunero revolt against the Emperor and Absolutism in his homeland of Castile, warned in a letter, that if necessary he would follow the example of Saint "*Tomás Canturiense*", that is of Saint Thomas Becket, Archbishop of Canterbury who was slain in the altar by King Henry's knights, because of his resistance to the King's will. Bishop Coruña preferred martyrdom to wordly success or to live surrounded by commodities, and living comfortably in Cali, instead of Popayan. He had studied in Salamanca and since then he kept a close relation with the Dominican friars of the famous Convent of San Esteban, with whom the Augustinians cooperated in Mexico in defense of the Indians. He was persecuted by the civil authorities of Popayan, and he suffered prison and exile from the province. Accused by the *Encomenderos* to Governor García del Espinar, Coruña had to yield his defense to the King justifying his action as *Protector de Indios*. He never felt intimidated by the *Encomenderos* from Popayan, he knew that his mission was to preach and to protect the most beloved of the Lord, the poor of the poorest. Christ had given them to the Church for spiritual conversion, and physical protection, and to deliver them from error and from the corruption of the European invaders.[22] If Philip II had such enormous patience with Bishop Coruña it was because he knew the man was free from blemish, and that most of the accusations against him were due to his consequent behaviour as *Protector de Indios*.[23] It is possible to argue that many Protectors remained idle or kept a low profile when extreme situations of conflict demanded their intervention, which was the case of fray Vicente de Valverde, a Dominican friar, first Bishop of Cuzco, whose principal merit was being conquistador Francisco Pizarro's close relative. He died slaughtered by the Indians of the Puna Island in the Gulf of Guayaquil in his way to Panama in 1541. Another was Hernando de Luque, a lay priest, who was partner of Pizarro and Almagro in a company for the exploration and conquest of Peru.[24] Luque was appointed Protector of Tumbez, the first episcopal see of Peru meanwhile the Crown negotiated with Pope his appointment as Bishop of Tumbez in Peru. But Luque was not willing to leave his life of comfort in Panama City, so King Charles substitued him in the Protectorship of the Peruvian Indians naming a Dominican friar instead that was to travel with the conquistadors. Luque objected and demanded back his appointment and powers. Though the Emperor agreed, he died in the process. Meanwhile the King had ruled that the Protector of Indians in Tumbez, Peru, could name and send substitutes in his behalf to the land he had been given in protection, where he could not visit and render justice. As well he or his substitute could make enquiries against wrongdoings against the Indians, and if the Spaniard was found guilty and should be condemned to a corporal punishment or loss of his Indians, the Protector should submit his searches to the Governor. When the search proved that the wrongdoing was of less than 25 pesos of gold of penalty fee, the Protector or his assistant. The Protector could ask for aid to other justices, and could accuse magistrates as the *corregidores* if he found them guilty of misdoings against the Indians. They had to inform inmediatly the Governor in such cases.

The Spanish Crown proceeded to appoint jurists for the position of Protector de Indios, their principle mission was to offer

[21] Antonio BASAVE, "Vasco Núñez de Quiroga, en su tiempo y en el nuestro", *Anuario Humanitas*, 1972. Victorino de ARCE GARCÍA, "Don Vasco de Quiroga, educador", *Pulso*, 24, 2001. pp. 89-106.

[22] István SZÁSZDI, "Un obispo de Popayán frente a la Monarquía Absoluta. Fray Agustín de Coruña y el problema de las jurisdicciones episcopales", Boletín de Historia y Antigüedades. XCV – 843, Academia Colombiana de la Historia. Bogotá, 2008, pp. 717-740. The said goals of Coruña were the same of his neighboring friend, the Bishop of Quito, who was the Protector in that territory. Fray Pedro de la Peña, Bishop of Quito, borned in Covarrubias, Old Castile, very close to Coruña del Conde, the home town of the Bishop of Popayán, organized in 1579 the first Synod of Quito dedicating most of the rules to the moral and religious protection of th Indians. Both exercised their duties and commitment with passion defying the authority of the Real Audiencia de Quito. Popayan remained in the territory of the Real Audiencia of Quito until the Independence from Spain. [István SZÁSZDI, "El indio en la diócesis de Quito hasta 1570", Cuadernos Prehispánicos 8, Departamento de Historia de América - Casa Museo Colón, Valladolid. 1980. pp. 1-30.]

[23] Bishop Coruña is in process of beatification by the Roman Catholic Church.

[24] Luque was the economical investor of the expedition.

the Indians with a judicial protection and all had to achieve merits by passing through Law Schools to be considered as candidates for such a post. It was unlikely that a non jurist or an unexperienced magister would be promoted. The same instructions were given to Fray Vicente de Valverde, Bishop and Protector of Cuzco (1536), to Sebastian Ramirez de Fuenleal, Bishop and Protector of Santo Domingo (1527)[25], to Juan de Zarate, Bishop of Antequera (Mexico), or to the Dean of the Cathedral of Cartagena de Indias don Miguel Jeronimo Ballesteros, the same received the Bishop of Buenos Aires, Juan de Barrios.[26]

But the custom of naming the Bishops Protectors of the Indians was abandoned, until Philip II re-established it by a *Real Cédula* signed in January 10, 1589. The son of Charles V was brave enough to order its generalization in the West Indies, where they had existed in the past as everywhere. The King new the conflict between institutions would be a continuous, but for him it was a matter of conscience with the Indians, that the jurist called "*miserables*". The Ordenanzas of Viceroy Mendoza tried to avoid the clash between the Protectors, the Governors and the Royal Courts. Because of such all judicial process were to be seen in the Audiencias. In 1591 King Philip ordered his Viceroys to name in each *Audiencia* a Letrado (Attorney at Law) y Protector de Indios, for each territory where the Courthouses had jurisdiction. With such decree the King bound the institution of the Protectores with his Courthouses for good impeding any clash between jurisdictions.[27]

The need for a legal tutor to protect the Indians was based in the common idea that they were incapable of doing so on their one. The "Alcalde Mayor" or Chief Justice of Jalapa, Constantino Bravo de Laguna, wrote: "All Indians have no more understanding than eight year old Spanish children".[28] The Protector had to deal with prejudices and a reality: Indians were not prepared for the Era of Mercantilism. They had first to be respected by white society, what the Spaniards called "*la república de españoles*", and the Indians *"la república de indios"*. They had to admistrate justice, and comfort that Republic of Indians.

3. One last reflection

Not withstanding the rigors of the Conquista, the Protectors were responsible for the survival of the Native Americans in a greater number than what is generally supposed until the independence from Spain of those territories where they lived. Many perished under a new system based in rights for the whites but where seldom the Indians were considered at all subjects of law. Lacking of the religious motives that drew the institution of the *Protectores de Indios*, the creole liberals invented new mecanisms for facing "white man's burden" of civilizing the savages, in the best of cases, while others defended the extermination of the Indian population as the best method of getting rid of scum, vagabonds and inferior men. That was what happened in Argentina under President Juan Manuel de Rosas (1793-1877)[29] and President Domingo Sarmiento (1811-1888), who looked with admiration the Indian policy of the United States of America. They, like many other politicians of XIX century Latin America, thought that keeping the Indians was against the progress of their nations, pamphlets referring to their racial inferiority was a common place for progressive thinkers. And it was in this state of mind when the first negative appreciations of the Indian Protectors were made by pseudo historians.

The *Protector de Indios* was the last fruit of early Humanism in the Spanish Monarchy, a tasteful fruit cultivated by Desiderius Erasmus, Thomas More, Luis Vives and their Iberian admirors, like Bartolomé de las Casas, Archbishop Zumarraga and Vasco Núñez de Quiroga. They, and many others, proved in the era of Absolutism that peace between nations and the enforcement of law in favour of the poor and weakest was not a folly.

DOCUMENTARY APPENDIX

Real Cédula from Emperor Charles V to the Judge of Residence Rodrigo de Figueroa in Hispaniola Island, relative to the mission of Bartolomé de las Casas and his powers as *Protector de Indios*. Zaragoza, September 20th. 1518.

[Archivo General de Indias, *Indiferente General*, legajo 419. Libro 7, 768r-768v.]

El Rey / Licenciado de Figueroa nuestro Juez de Residençia, sabed que Bartolome de las Casas clerigo / vino aquí y me hiso rrelaçion que los caçiques e yndios naturales / de las Yndias tyenen tanto de capaçidad y abilidad que podran / bivir por sy politica e hordenadamente en pueblos como biven y lo hazen los xpianos españoles que en aquellas partes / rresiden, y que estos nos podran seruir con la cantydad que nos / les señalasemos como vasallos nuestros syn que estouiesen enco/mendados a otras personas y me ha çertificado y por muy / [768v] çierto prometido de que por la grand espiriençia y comunicación / que ha tenido y tyene con los dichos caçiques e yndios e por lo que /

dellos conosçe con la yndustria y orden quel para ello dira / vsandose della para atraer a todos os dichos caçiques e yndios / que biviran en pueblos politica y hordenadamente / e pidan e consigan la entera libertad que a los de su / voluntad la pidieren e biuieran como dicho es se les ha de / dar, e porque fasyendo el esto como aca lo ha prometydo yo / me tengo e terne por seruido. Por ende yo vos mando / y encargo que proveays como el primero, que hables a los dichos / caçiques e yndios sea el dicho Barto-

[25] He studied Law in the University of Valladolid and also was President of the Royal Courthouse (*Audiencia*) of Santo Domingo, and later of the Mexican Audiencia. He was one of the finest magistrates of his time.

[26] BAYLE, *El Protector de Indios…* (1945) Op. cit., pp. 61-63.

[27] Vicenta CORTÉS, PROTECTOR DE INDIOS. *Diccionario de Historia de España.* Dir. by German Bleiberg. 2d Edition, Vol. III, Ediciones de la Revista de Occidente, Madrid. 1969, pp. 358-359.

[28] Francisco PASO Y TRONCOSO, *Papeles de Nueva España*, V. Madrid. 1905, p. 101.

[29] Rosas, instead of inviting the oligarchy of Buenos Aires to fox hunting, invited them to hunt Indians in the Pampas during the weekends.

lome de las Casas, y en todo / lo que para poner en libertad los dichos yndios y atraerlos / a que nos den el dicho serviçio e bivan politicamente en / sus pueblos. Vseys e la yndustria de su persona e le / favorescays e ayudeys a lo que fuere nesçesario para el bien / de la dicha negoçiaçion e la continueys tanto quanto fuese / prouechosa para ello. Fecha en Çaragoça xx de setienbre del / DXVIII. Yo El Rey. Francisco de Covos, señalado del Obispo / y don Garcia e Çapata /
Diosse otra tal como esta al doctor / de la Gama Juez de Residencia / Recebila yo / Casas /

Control of the Press in Croatia 1848 – 1849: From Censorship over Unlimited Freedom of the Press to the First Croatian Press Act*

*Vlasta Švoger***

Abstract

Using a comparative perspective, this paper analyses radical changes in conditions under which the press functioned in Croatia in the revolutionary years 1848-1849. In a time span of more than a year, a rigid system of preventive censorship in Croatia was briefly replaced by unlimited freedom of the press (proclaimed in mid-March 1848), which was restricted by a very stringent Press Act in early May 1849. The paper analyses circumstances under which "The Provisional Press Act" (1849) was adopted. The Act's provisions are considered in the context of press regulations in effect in other European countries of the time, especially in the German speaking area. It has been established that the first Croatian Press Act applied solutions from press regulations of other European countries, although they were modified and adapted to Croatian political and economic circumstances, mainly through the mediation of the Austrian Press Act.

Keywords: *censorship; freedom of the press; the 1849 Croatian Press Act; press legislation in European countries; 1848-1849.*

1. Introduction

The beginnings of censorship are linked to the ecclesial domain. Preventive censorship of works intended for publication was introduced by the 1487 Papal Bull "*contra impressores librorum reprobatorum*".[1] Censorship understood as "*die autoritäre Kontrolle aller menschlichen Äußerungen, die innerhalb eines bestehenden gesellschaftlichen Systems mit der Bemühung um sprachliche Form geschrieben werden*"[2] soon became a universal European phenomenon. After the French Revolution and Napoleon's ensuing rule radically disrupted and partly crushed the European balance of power, by 1848 the governments of most European countries attempted to eradicate any criticism of the existing political situation and prevent the spread of liberal and democratic ideas through censorship.[3] With some exceptions, censorship was used as a means to protect states, rulers and state institutions, religion, civil morality and morals as well as the honour of members of ruling dynasties and private persons.[4] There were two types of control of manuscripts intended for publication. A preventive or policing system (*Präventiv- oder Polizeisystem*) was pre-publication censorship, i.e. review of a manuscript before its publication. The second was a repressive or justice system (*Repressiv- oder Justizsystem*), i.e. post-publication censorship that was carried out after the police, some other state body, a private person, an institution or a foreign government complained about certain printed material. If the responsible authorities felt the complaint was justified, the editorial board of the paper had to publish a denial or the responsible person of the publication had to answer before a court of law.[5] Until the spring of 1848, prior or preventive censorship existed in most European countries, and there was growing discontent and more vocal demands to introduce freedom of the press. In the first half of the 19th century, "freedom of the press did not just mean freedom of journalism, printing books and trade in books from state tutorship, but rather freedom of expressing one's thoughts through the press".[6] Under the pressure of revolutionary movements, censorship was abolished, and freedom of the press was supposed to be guaranteed by the constitution

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1 VOGLER, U., *Die geschichtliche Entwicklung der Medienfreiheit und ihre Einschränkungen durch den Persönlichkeitsschutz*, PhD thesis, Vienna, 1988, p. 58.

2 OTTO, U., *Die literarische Zensur als Problem der Soziologie der Politik*, Stuttgart, 1989, p. 8. "Authoritarian control of all human expressions that were written within an existing social system with an effort to achieve a written form".

3 CLEMENS, G. B., Zensur, Zensoren und Kommunikationskontrolle als europäische Phänomene: Zwischenbilanz und Problemstellung. In: CLEMENS, G. B. (ed.), *Zensur im Vormärz. Pressefreiheit und Informationskontrolle in Europa*. Ostfildern, 2013, pp. 9-22.

4 HOLTZ, B., Zensur und Zensoren im preußischen Vormärz. In: CLEMENS, G. B. (ed.), *Zensur im Vormärz,* pp. 105-119, especially pp. 107-108.

5 BREIL, M., *Die Augsburger „Allgemeine Zeitung" und die Pressepolitik Bayerns. Ein Verlagsunternehmen zwischen 1815-1848.* Tübingen, 1996, pp. 128-132; SCHNEIDER, F., *Pressefreiheit und politische Öffentlichkeit. Studien zur politischen Geschichte Deutschlands bis 1848*. Neuwied am Rhein [u. a.], 1966, pp. 204-217.

6 EISENHARDT, U., Die Garantie der Pressefreiheit in der Bundesakte von 1815. In: *Der Staat*, vol. 10, 1971, pp. 339-356, quotation p. 339.

as one of the major revolutionary attainments.[7] However, unlimited freedom of the press did not last long and preventive control of the press was soon replaced by *a posteriori* control in a court proceeding conducted according to prescribed criteria and following the model of the English repressive system.[8]

During the period of the revolutionary turmoil and especially after its breakdown, the governments of West European countries began to implement an integral active press policy wishing to regain control of the public and the press as its representative and shaper.[9] The procedures and methods of an active press policy were divided into three main groups: regulation, repression and propaganda. The basis of the new press policy constituted press acts, which were adopted during or after the crushing of revolutionary movements, enabling the State to control the press. However, the view prevailed that repressive action should be combined with propaganda. It is with this purpose that state press offices were established. They carried out three tasks of the state press policy: organisation and coordination of state financial subsidies to the press, collection of information on the press in the country and abroad, and propaganda. These were the beginnings of subsequent state press agencies of the 20th century.[10]

2. Censorship in Croatia in the First Half of the 19th Century

Until the spring of 1848, there was preventive, pre-publication censorship for domestic materials and periodical publications and post-publication censorship for foreign publications in Croatia,[11] part of the Habsburg Monarchy. Based on the reforms of Maria Theresa and Joseph II, censorship became the duty of the State in the second half of the 18th century (until then, there was censorship by worldly and ecclesial authorities, with a particularly strong Jesuit influence). In the pre-March period, censorship in the Monarchy and Croatia was based on censorship regulation adopted in the late 18th century (Joseph II personally drafted the resolution *Grund-Regeln zur Bestimmung einer ordentlichen künftigen Bücherzensur* [Basic Rules for Determining a Proper Future Book Censorship], especially on the Regulation on Censorship of 22 February 1795 and subsequent regulations, as well as the 1819 Press Act of the German Confederation,[12] adopted at a conference at Karlsbad.[13] The highest body responsible for censorship was the Court's Supreme Police and Censorship Office (*Oberste Polizei- und Zensurhofstelle*), established in 1801 in Vienna, which was headed by Count Josef Sedlnitzky from 1817 to 1848. The aforementioned 1819 Press Act stipulated that periodical publications and materials shorter than 20 printing sheets (approximately 320 pages of the then usual book format of octavo[14]) were subjected to pre-publication censorship.[15] This provision was applied differently. Whereas its application was not very stringent in Bavaria and some other lands of the German Confederation, in Prussia, materials of larger extension were also subjected to it.[16] The Habsburg Monarchy had the strictest censorship in Europe and materials longer than 20 sheets could also be censored. Moreover, not just books, newspapers and bills were subject to censorship in the Monarchy, but also price lists, visiting-cards, playing-cards, labels, signs on houses and graves, medals etc.[17]

Since Croatia was part of the Kingdom of Hungary, the censorship regulation valid there was in force in the Habsburg Monarchy. Croatia was not directly subject to the Court's Supreme Police and Censorship Office, although its president had a sig-

[7] SCHNEIDER, F., Presse, Pressefreiheit, Zensur. In: BRUNNER, O., CONZE, W. and KOSELLECK, R. (ed.) *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 4. Stuttgart, 1978., pp. 899-927, esp. pp. 913-926.

[8] Richard Kohnen distinguishes between two systems of control of the press. In a policing system (*Polizeisystem*), the government and its bodies (censors) are responsible for licensing the publication of the press and its control and thereby shoulder a major part of the responsibility. In a repressive legal system of control (*Justizsystem*), publishers have the freedom to decide on the contents of a printed work and are liable and answer for the violation of penal law norms before the court of law. KOHNEN, R., *Pressepolitik des Deutschen Bundes. Methoden staatlicher Pressepolitik nach der Revolution von 1848*. Tübingen, 1995, p. 15.

[9] PIERETH, W., Propaganda im 19. Jahrhundert. Die Anfänge aktiver staatlicher Pressepolitik in Deutschland (1800-1871). In: DANIEL, U. and SIEMANN, W. (ed.), *Propaganda, Meinungskampf, Verführung und politische Sinnstiftung (1789-1989)*. Frankfurt am Main, 1994, pp. 21-43.

[10] KOHNEN, R., *Pressepolitik*, pp. 135-149 analyses the work of state press offices in Prussia, the Habsburg Monarchy and in Bavaria.

[11] In the 19th century, Croatia was territorially divided. The Kingdom of Croatia and Slavonia was an integral part of the Kingdom of Hungary, whereas the Kingdom of Dalmatia and Istria (following a brief period of the French rule) and the Military Frontier were under the administration of the Court in Vienna. The Military Frontier was reintegrated in the second half of the 19th century, and Dalmatia and Istria remained parts of the Austrian part of the Austro-Hungarian Monarchy until its disintegration. This paper analyses conditions under which the press functioned in Croatia and Slavonia, since the first Croatian Press Act of 1849 was applied in this area. We use here the expression "Croatia" because at that time the term was used ever more frequently instead of the official name of the (Triune) Kingdom of Dalmatia, Croatia and Slavonia.

[12] A federal press act entitled "Provisorische Bestimmungen hinsichtlich der Freiheit der Presse" [Provisional Provisions with Regard to Freedom of the Press] was published by SZÉCHÉNYI, B., *Rechtliche Grundlagen bayerischer Zensur im 19. Jahrhundert*. Frankfurt am Main etc., 2003, pp. 88-90.

[13] For the influence of the Karlsbad conclusions on the development of the press in German lands cf SCHNEIDER, F., *Pressefreiheit und politische Öffentlichkeit,* pp. 243-274.

[14] An octavo was one eighth of the sheet containing two pages.

[15] The provision whereby materials up to 20 sheets were subject to censorship was first included in the French Press Act of 28 October 1814. OLECHOWSKI, Th., Die österreichische Zensur im Vormärz. In: CLEMENS, G. B. (ed.), *Zensur im Vormärz*, pp. 139-152, I am here referring to p. 144.

[16] PUTZ, H., Konstitutioneller Staat und Zensur im Vormärz – das Königreich Bayern. In: CLEMENS, G. B. (ed.), *Zensur im Vormärz,* pp. 83-103; HOLZ, B., Zensur und Zensoren im preußischen Vormärz, pp. 105-119; HUNDT, M., Die Pressezensur in den Hansestädten im Vormärz. In: CLEMENS, G. B. (ed.), *Zensur im Vormärz,* pp. 153-170; FRANZ, N. and WEBER, J., Zensurpolitik des deutschen Bundes im Dienste monarchischer Machtpolitik: Die Kontrolle von Literatur und Presse im Großherzogtum Luxemburg (1815-1848). In: CLEMENS, G. B. (ed.), *Zensur im Vormärz,* pp.171-195.

[17] OGRIS, W., Die Zensur in der Ära Metternich. In: KERN, B.-R. et al. (ed.), *Humaniora. Medizin – Recht – Geschichte. Festschrift für Adolf Laufs zum 70. Geburtstag*. Berlin etc., 2006, pp. 243-256, especially p. 249. For the implementation of censorship in the Austrian part of the Habsburg Monarchy in the first half of the 19th century cf OLECHOWSKI, Th., Die österreichische Zensur, pp. 139-152.

nificant impact on the implementation of censorship in Croatia (based on the information that he collected through a network of his confidants), thanks to the trust of Chancellor K. L. Metternich. All the decisions made in Vienna that referred to Croatia were transposed via the Hungarian Court Chancellery in Vienna (the same was true of decisions that were directed from Croatia to Vienna), and the Council of Lieutenancy in Buda issued instructions to censors in Croatia (and Hungary) within the framework of Austrian censorship provisions. Censorship in Croatia was directly carried out by the General Commissioner of Education who reviewed scientific papers and was entitled to oversee censors who censored periodicals. The most important role was played by the censor in Zagreb, since the most influential newspapers in Croatia were published there. The office of censorship was carried out by professors of the Royal Academy of Science in Zagreb.[18] How strict censorship in Croatia was depended in the first place on current political circumstances, and especially on the relationship between Vienna and Hungary. Thus, until January 1843 Vienna allowed a relatively moderate practice of censor Stjepan Moyses towards the Zagreb newspapers *Ilirske narodne novine* [The Illyrian People's Newspaper] and *Danica ilirska* [The Illyrian Morning Star] that promoted ideas of the Croatian National Revival (also called the Illyrian Movement). Vienna considered these papers a counterbalance to an ever stronger Hungarian national movement, in spite of the complaints of the Hungarian authorities about the work of the Zagreb censor. However, after pressure by the Hungarian side increased and the Turkish and Russian Ambassadors complained about (pan) Slavic policy promoted by the aforementioned papers, the use of the Illyrian name was banned in January 1843. The Zagreb censor was replaced and much stricter censorship of the Zagreb newspapers was introduced.[19] This situation persisted until the outbreak of the revolutionary turmoil in the Habsburg Monarchy in March of 1848. In other European countries censorship was also directly linked to political developments, and consequently censorship was getting stricter as a response to political crises, riots and similar.[20]

3. Freedom of the Press in Croatia 1848-1849

In the run-up to the outbreak of the revolutionary turmoil in the spring of 1848, there were lively debates in and outside the parliaments of some European countries, such as France, Prussia and Bavaria, as to whether to mitigate or even abolish censorship and introduce freedom of the press. In Luxembourg, censorship was alleviated and well-meaning criticism of the domestic executive and legislative power was allowed in 1847. The 1831 Constitution abolished censorship and introduced freedom of the press in Belgium, and three years later censorship was abolished and (limited) freedom of the press was proclaimed in Spain.[21] Steps in this direction were made in the German Confederation as well where in April 1847 Prussia sent a press bill providing for the abolition of censorship and the introduction of a repressive press act following the English model to members of the Confederation. However, the members of the German Confederation could not agree on this legislative proposal until the outbreak of the 1848 revolution.[22]

Unlike the aforementioned countries, there were no public debates in Croatia about the possibility to loosen control of the press or to introduce freedom of the press. Admittedly, there was a very heated debate on freedom of the press in the Hungarian Diet (which was an assembly of the estates to which the Croatian Diet and Croatian Counties also sent their deputies) in 1839. The result of these debates was that the state authorities allowed newspaper reporting on the sessions of the Diet. As a result, the Zagreb *Ilirske narodne novine*[23] were allowed to report on the sessions of the Diet starting with the following year,[24] however without adding their comments. Nevertheless, one can assume that at least some liberally oriented Croatian intellectuals followed debates on freedom of the press abroad, most probably in the foreign press available in Croatia, e.g. in reading-rooms and coffee-houses. Some private subscribers to foreign newspapers might have existed as well (which should be verified during some future research). The thesis about the transfer of the idea of freedom of the press to Croatia from abroad is supported by the fact that an explicit demand for the

[18] SUPPAN, A., Mjere cenzure protiv ilirskih listova Ljudevita Gaja. In: *Radovi* – Institut za hrvatsku povijest, vol. 3 (1973), pp. 213-239, especially pp. 213-217. It was also customary in other European countries that intellectuals, professors or writers worked as censors as their second line of activity. In some other countries, special civil servants were responsible for it. CLEMENS, G. B., Zensur, Zensoren und Kommunikationskontrolle, p. 16.

[19] SUPPAN, A., Mjere cenzure, pp. 231-238.

[20] CLEMENS, G. B., Zensur, Zensoren und Kommunikationskontrolle, p. 14.

[21] HORN, P., Vom autokratischen Kaiserreich zur konstitutionellen Monarchie: Zensur und Emanzipation der französischen Presse im Vormärz (1804-1848). In: CLEMENS, G. B. (ed.), *Zensur im Vormärz,* pp. 23-38; HOLTZ, B., Zensur und Zensoren, pp. 112-116; FRANZ, N. and WEBER, J., Zensurpolitik des Deutschen Bundes in Luxemburg, p. 193; SPÄTH, Der Krieg der Federn: Pressefreiheit und Zensur in der ersten Hälfte des 19. Jahrhunderts. In: CLEMENS, G. B. (ed.), *Zensur im Vormärz,* pp. 197-218, here p. 203. The 1808 Constitution guaranteed (limited) freedom of the press and elevated it to a principle in Bavaria. As such, freedom of the press was codified in subsequent constitutional amendments. Nevertheless, periods of stricter or less strict censorship alternated since in Bavaria until 1848. SZÉCHÉNYI, B., *Rechtliche Grundlagen*, pp. 66-128. Art. 18 of the 1831 Belgian Constitution abolished censorship and proclaimed freedom of the press. SCHNEIDER, F., *Pressefreiheit und politische Öffentlichkeit,* p. 302.

[22] KOHNEN, R., *Pressepolitik*, pp. 16-19. It appears that even Metternich was prepared to cede. A reform of the censorship system in the Habsburg Monarchy that was introduced in early January 1848, when censorship was separated from the police, may speak in favour of it. However, this change could not materialise before the outbreak of the revolution. OLECHOWSKI, Th., Die österreichische Zensur, p. 152.

[23] During 1833 and 1834, the leader of the Croatian National Revival Ljudevit Gaj received repeated opinions from the state authorities that decided on issuing licences for the publication of his newspapers that in the political papers he intended to publish he was allowed to publish exclusively the news that had already been published in some other censored newspapers in the Habsburg Monarchy. Despite it, the *Novine Horvatzke* [The Croatian Newspapers], which began to appear in early 1835, had to obtain the censor's licence for each individual issue. SUPPAN, A., Mjere cenzure, pp. 217-219.

[24] SUPPAN, A., Mjere cenzure, pp. 220-221.

introduction of civil and political rights and freedoms – freedom of the press, religion, learning and speech, equality before the law, universal taxation and others – was expressed for the first time in the most important programmatic document of the Croatian Political Movement 1848-1849, the *Zahtijevanja naroda* [Demands of the Nation]. The Demands were adopted at a major national assembly held on 25 March 1848 in Zagreb and formulated according to the model of the then political programmes in other (Central) European states.[25] Freedom of the press became part of the programme of liberally oriented newspapers that were published in Zagreb during the revolutionary years. At the time, they were the most influential political papers in Croatia and at the same time the most important public media due to their relatively high circulation and readership.[26]

The intellectual circle assembled around these liberally oriented Zagreb newspapers considered freedom of the press the natural right of the people and regularly associated it to freedom of opinion, speech and expression of thought in writing. Freedom of the press was associated to the principle of publicity and interpreted as a protector of liberal constitutional institutions, a guarantor against abuse and infringements of civil and political rights of individuals and peoples, and as a prerequisite for the restructuring of the Habsburg Monarchy into a constitutional and parliamentary state.[27]

Freedom of the press and the phenomenon of publicity associated to it were most coherently dealt with in a series of articles published in the newspaper *Danica horvatska, slavonska i dalmatinska* [The Croatian, Slavonic and Dalmatian Morning Star] in late 1848. They clearly portray the transfer of ideas from the West-European cultural circle. In two articles printed in several consecutive issues of the paper, an anonymous author systematically and argumentatively analysed the function of the public, and public opinion in political and social life, as well as the positive and negative aspects of freedom of the press. He argued referring, *inter alia*, to relevant foreign authors, primarily French and German. He held that freedom of the press is closely connected to freedom of opinion and expression of thought, which are a constituent part of the inalienable natural rights of man as an individual and a member of the community. Analysing arguments of proponents and opponents of freedom of the press, he established that benefits of freedom of the press incomparably surpass potential risks from press abuse. He defined freedom of the press as one of the foundations of constitutional states, as an important tool for enlightening the people, fighting legislative acts of poor quality and various abuses by civil servants as well as an indicator of the mood of the people. Therefore, the author advocated full freedom of the press and opposed its restrictions through censorship or special press acts. He clearly opted for regulating press offences with civil and penal laws, which provided for a public and oral court proceeding and a jury.[28]

The majority of the authors writing for the aforementioned Zagreb newspapers considered freedom of the press the natural and inalienable right of an individual to freely express his views orally and in writing and advocated unlimited freedom of the press. Nevertheless, I will also present some dissenting views. For example, editor of the *Slavenski Jug* Dragutin Kušlan believed that in a civil society there cannot be unlimited freedom of the press, just as unlimited freedom of individuals cannot exist because it is limited by the freedom of other persons. He expressed this view in his commentary on an article by Ferdinand Žerjavić in issue no. 63 that he edited and repeated it in an article written immediately before the proclamation of the Provisional Press Act (for more on the Act, see below). However, he opposed the enactment of a special press act because he believed that freedom of the press was regulated by civil and penal laws and that special press acts in fact limit freedom of the press and reintroduce censorship under a different name. An anonymous author of the article entitled "Političke iskrice" [Political Sparkles] also advocated regulating freedom of the press with civil and penal laws like Bogoslav Šulek, editor of the *Novine dalmatinsko-hčrvatsko-slavonske*. The only Zagreb newspapers which opted for the adoption of a special press act in the spring of 1849 was *Agramer Zeitung*.[29]

[25] ŠIDAK, J. „Narodna zahtijevanja" od 25. ožujka – program hrvatske Četrdesetosme. In: ŠIDAK, J., *Studije iz hrvatske povijesti za revolucije 1848-49*. Zagreb, 1979, pp. 33-76; ČEPULO, D., KREŠIĆ, M., HLAVAČKA, M. and REITER, I. (ed.), *Constitutions of the World from the late 18th Century to the Middle of the 19th Century – Verfassungen der Welt vom späten 18. Jahrhundert bis Mitte des 19. Jahrhunderts*, vol. 9, *Kroatische, slowenische und tschechische Verfassungsdokumente 1818-1849*, Berlin – New York 2010, pp. 39-46.

[26] These were the following newspapers: *Novine dalmatinsko-hèrvatsko-slavonske* [The Dalmatian-Croatian-Slavonic Newspapers], *Saborske novine* [The Parliamentary Newspapers], *Slavenski Jug* [The Slavic South] and *Südslawische Zeitung* [The South Slavic Newspapers]. During 1848, the *Agramer Zeitung* [The Zagreb Newsapers] also followed a liberal orientation. Since early 1849, the last mentioned newspapers began to support a centralist policy of the new Austrian government and advocate the adoption of a press act. For more extensive information on the political and media role of the aforementioned newspapers cf ŠVOGER, V., *Zagrebačko liberalno novinstvo 1848.-1852. i stvaranje moderne Hrvatske*. Zagreb, 2007 and HORVAT, J., *Povijest novinstva Hrvatske 1771-1939*, second edition prepared by Mataušić, M. J. Zagreb, 2003, pp. 75-152.

[27] ŠVOGER, V., Zagrebačko liberalno novinstvo o slobodi tiska i društvenoj ulozi novina od izbijanja revolucije 1848. do uvođenja neoapsolutizma 1851. godine. In: *Povijesni prilozi*, vol. 30 (2006), pp. 204-223. Other newspapers that were published in Croatia from 1848 to 1849 were short-lived, they mainly reported on local events and did not publish articles on various political issues from a theoretical discourse.

[28] Sloboda štampe, *Danica horvatska, slavonska i dalmatinska* (*DHSD*), issue no. 44, October 28, 1848, no. 45, November 4, 1848, no. 46, November 11, 1848 and no. 47, November 18, 1848.; Javnost, *DHSD*, issue no. 49, December 2, 1848, no. 50, December 9, 1848, no. 51, December 16, 1848, no. 52, December 23, 1848 and no. 53, December 30, 1848. KORUNIĆ, P., Osnovice građanskog društva u Hrvatskoj za revolucije 1848-49. godine, wrote about the public and freedom of the press as foundations of a civil society. In: *Radovi* – Zavod za hrvatsku povijest, vol. 32-33 (2001), pp. 69-104.

[29] A. Z., Niekoliko riečih o namienjenom nam štamparskom zakonu, *Slavenski Jug* (*SJ*), issue no. 61, December 23, 1848; F. Žerjavić, Niekoliko riečih o slobodi štampe, *SJ*, no. 63, December 30, 1848; U Zagrebu 22. svibnja, *SJ*, no. 61, May 24, 1849; A. Z., Političke iskrice, *SJ*, no. 58, December 16, 1848; B.[Bogoslav] Š.[Šulek], Najpréčji zakoni, *Novine dalmatinsko-hérvatsko-slavonske* (*NDHS*), no. 56, May 10, 1849; Poziv na pretplatu na *Südslawische Zeitung* od 14. 12. 1848., Nacionalna i sveučilišna knjižnica (NSK) [National and University Library], Zagreb, Zbirka rukopisa i starih knjiga [Manuscripts and Old Books Collection], R VII.-2°-6; Das Preßgesetz, *Agramer Zeitung* (*AZ*), no. 54, May 5, 1849; Stephan Moyses, Agram, 13. Mai, *AZ*, no. 58, May 12, 1849.

Although Croatian intellectuals who wrote about freedom of the press from 1848 to 1849 were aware of possible abuse of the press, the opinion prevailed that positive aspects of freedom of the press are more important. They held that the press has an important role in the enlightenment of the people and in promoting democratic models of behaviour and modern institutions. They considered freedom of the press the most efficient tool in the fight against poor legislative acts and abuses in the civil service and a tool for the establishment of trust between the government and the people.

The understanding of the significance of freedom of the press and argumentation against the introduction of a special press act that prevailed in Croatia from 1848 to 1849 is well illustrated by the following citation from an article by previously mentioned Kušlan: "We have proven therewith, as much as it could be proven with so few words:

(a) that freedom of the press is one of the innate rights, which should not be limited in the State by others than by civil and penal laws, since freedom of speech is not limited otherwise;

(b) that consequently any special press act is not only superfluous, but rather lethal for true freedom of the press;

(c) that the current governments and their supporters; aristocracy, military government, obscurantism and Jesuitism, which have most followers in the estate of priests, do not want true freedom of the press because they fear it; therefore, they introduced the old abolished censorship under a different name of "press acts". It follows therefrom:

(d) that the abolition of all press acts is in the interest of human education, knowledge, erudition and perfection, in the interest of humanity and freedom. It is therefore the sacred duty of every people to fight against those with all legitimate means."[30]

4. The First Croatian Press Act – The Provisional Press Act (1849) in a Comparative Context

4.1 Press Acts in the German Lands and in the Habsburg Monarchy 1848-1850

The news of the outbreak of the revolutionary turmoil in Italian provinces and in Paris may have encouraged authorities of the German Confederation to adopt the following decision. On 3 March 1848, the Federal Assembly reached a conclusion whereby it was up to the member states to decide whether to abolish censorship and introduce freedom of the press and whether to introduce guarantees that would protect other states of the Confederation from possible abuses of the press.[31] In the following days, censorship was abolished and freedom of the press proclaimed in all German states. However, most governments also announced their intention to adopt press acts. Full freedom of the press was included in the Catalogue of Fundamental Rights (*Grundrechtskatalog*) that was adopted by the National Assembly in Frankfurt am Main on 27 December 1848.[32]

In the Habsburg Monarchy, censorship was abolished on 14 March 1848 and it was announced that a press act would be enacted. The Act was proclaimed on the last day of March. It introduced a repressive system, the obligation to print imprint, guarantees, the duty of the editor-in-chief and the obligation to submit one copy of the paper to a security authority. In this respect, the Act followed the tradition of French press legislation. However, unlike French press acts that introduced court proceedings for infringements of press legislation before jury courts following the British model (which was subsequently adopted by press acts of most European countries), the aforementioned Austrian Act provided for court proceedings for such infringements governed by general penal regulations. Fines and prison sentences were prescribed and it was possible to confiscate a manuscript that had not yet been printed. Due to public outcry, the Act never came into force.[33] The first Austrian Constitution, the so-called Pillersdorf's Constitution of April 1848,[34] guaranteed "*Freyheit der Rede und Presse*" [freedom of speech and of the press] and on 18 May 1848 the Council of Ministers approved new, less restrictive provisions against abuses of the press and on the procedure in press matters. They provided for the ban of press activity following a third offence. Guarantees as well as the obligation to submit printed works to the authorities for review were abolished. A jury had to decide on the guilt of the accused in press offences.[35]

The Hungarian Diet proposed a relatively strict press bill in Pozsony (present-day Bratislava) on 20 March 1848, which provided for the transition from a preventive to a repressive system. Due to strong student opposition, the Bill never reached parliamentary procedure. A new, more liberal press bill was drafted, which together with other constitutional acts, was signed by Ferdinand V on 11 April 1848 (the so-called April Acts). The Hungarian Press Act, i.e. the legislative article 1848:18,[36] introduced the imprint for all printed works, the mandatory registration of a new periodical with the responsible

[30] [Dragutin Kušlan], U Zagrebu 22. svibnja, *SJ*, issue no. 61, May 24, 1849.

[31] KOHNEN, R., *Pressepolitik*, p. 20.

[32] KOHNEN, R., *Pressepolitik*, p. 22.

[33] OLECHOWSKI, Th., Das Preßrecht in der Habsburgermonarchie. In: RUMPLER, H. and URBANITSCH, P. (eds.), *Die Habsburgermonarchie 1848-1918. Band VIII, Politische Öffentlichkeit und Zivilgesellschaft, 2. Teilband, Die Presse als Faktor der politischen Mobilisierung*, Vienna, 2006, pp. 1493-1533, here pp. 1496-1499; HORN, P., Vom autokratischen Kaiserreich, pp. 23-38.

[34] For this Constitution cf BRAUNEDER, W., Die Verfassungsentwicklung in Österreich 1848 bis 1918. In: RUMPLER, H. and URBANITSCH, P. (eds.), *Die Habsburgermonarchie 1848-1918, Band VII, Verfassung und Parlamentarismus, 1. Teilband, Verfassungsrecht, Verfassungswirklichkeit, zentrale Repräsentativkörperschaften.* Vienna, 2000, p. 69-237, especially pp. 84-106.

[35] For trials by jury in the Habsburg Monarchy in 1848 and 1849 cf PASTOVIĆ, D., Die Geschworenengerichtsbarkeit in den österreichischen Provinzen Istrien und Dalmatien. In: DOMEIER, N., AUGUSTI, E. and PRUTSCH, M. (eds.), *Inter – Trans – Supra? Legal Relations and Power Structures in History*. Saarbrücken, 2011, p. 194-208, especially pp. 196-198.

[36] The German translation was published by LIENBACHER, G., *Die österreichische Preßgesetzgebung*, vol. I-II. Vienna, 1863 and 1868, in vol. II, pp. 276-281.

state body, a guarantee for periodicals (500-10,000 forints) and a guarantee for the printing-house from 2,000 to 4,000 forints. With the beginning of distribution, the printer was to send one copy of each printed work to the responsible authority and another one to the National Museum. The printing of official notices in the periodicals was obligatory, however for a fee, and there was no obligation to print a denial. The editor-in-chief did not have to fulfil any special conditions. Fines and prison sentences were prescribed for press offences, and the seizure of a publication was possible only by a court decision. Liability was defined according to the system of successivity and exclusivity and subjected to it were the author, the publisher and the printer. Press offences had to be prosecuted in trials by jury. Property qualification was provided for the duty of a juror. The Act regulated different press offences: it was punishable to incite to infringe the unity of the Habsburg Monarchy and the Lands of the Crown of St. Stephen, violate public or religious morality, offend the ruler, state bodies and civil servants or individuals. Reporting from public sessions of the Diet or other legislative bodies was not punishable if truthful. No license was needed to sell printed works and street sales were under police surveillance.[37]

On 29 April 1848, the Hungarian Minister of Justice enacted a regulation on jury courts for press offences. The jury had to decide on the guilt of the accused but also whether charges should be pressed at all. All those involved in a trial for press offences, including the public prosecutor and the investigating judge, had to be elected. The procedure had to be carried out according to the principles of publicity, orality and free evaluation of evidence. According to the aforementioned legislative acts, two trials were held in Pozsony ending in acquittals.[38]

The revolutionary turmoil escalated and the ruler dissolved the Hungarian Diet on 3 October 1848 and introduced martial law that remained in force until 1854. Nevertheless, regulations valid in Hungary were those adopted in the early 1850 s and were also in force in other lands of the Habsburg Monarchy.[39]

In Vienna, centre of the Monarchy, fierce revolutionary riots broke out again in October 1848. The imperial army quickly crushed them and a state of emergency was imposed. A decree by the Minister of Home Affairs of 20 December 1848 banned street sales in the entire Monarchy and introduced the obligation to send one copy of a printed work to the state authorities prior to its distribution.[40] This decree was not implemented in Croatia until the mid-1850s, while Croatia was governed by the Ban's Council as a *de facto* independent government. Its application began after the centre in Vienna took full control over Croatia. By order of the Ban's Government,[41] such a measure was first applied in early November 1851 when the editor of the paper *Südslawische Zeitung* was required to submit a copy of the newspapers he was editing to the Zagreb police. Four months later the editorial board received an order to submit two copies of each issue of the newspapers to the Zagreb police before its distribution. Distribution could begin only after the editorial board received a police licence rendered in the form of a signed copy of the newspapers. If this was not met, the whole printing run of the newspapers was seized.[42]

The Austrian Parliament, which due to the October Revolution moved its sessions to Kroměříž, also championed freedom of expression of thought in a draft Catalogue of Fundamental Rights, banned every form of restriction of freedom of the press and guaranteed trial by jury for press offences.[43] However, the Catalogue of Fundamental Rights was not adopted because the army ousted the Parliament in early March 1849. On 4 March 1849 by a special patent,[44] the ruler proclaimed the Imposed Constitution (*Oktroyierte Verfassung*) as the basic law of all the lands of the Habsburg Monarchy. On 13 March 1849, the ruler proclaimed the Act against Abuse of the Press (*Gesetz gegen den Missbrauch der Presse*), again in the form of a special patent, and the following day the Regulation on the Procedure in Press Offences (*Vorschrift über das Verfahren in Press-Uebertretungsfällen*). The 1849 Austrian Press Act introduced the obligation to register a publication. The registration had to contain the name, place of issue and programme of the newspaper as well as details on the editor-in-chief, printer, publisher and a guarantee. Conditions were also prescribed that had to be fulfilled by the editor of a periodical: he had to be an Austrian national, resident in the place of the issue of the newspaper and without prior convictions. Guarantees were introduced for all the periodicals that appeared at least twice a month and reported, at least partially, on political issues. Depending on the size of the place in which a periodical was published and the frequency of its publication, the guarantee cost between 1,500 and 10,000 florins. It was used to pay fines but in some cases it could be partially or totally seized. The Act introduced the obligation to submit publications to the authorities for review (*Hinterlegungspflicht*) as well as to print a denial. Street sales were prohibited. The Act made a list of many potentially punishable offences and prescribed fines and prison sentences. Provisions on the

[37] OLECHOWSKI, Th., Das Preßrecht, pp. 1517-1519.
[38] Ibidem, p. 1519.
[39] Ibidem.
[40] OLECHOWSKI, Th., Das Preßrecht, p. 1501.
[41] For the structure of the Ban's Council and the Ban's Government cf DOBROVŠAK, Lj., Zakonodavna i izvršna vlast u hrvatskim zemljama od 1790. do 1918. In: ŠVOGER, V. and TURKALJ, J. (eds.), *Temelji moderne Hrvatske. Hrvatske zemlje u „dugom" 19. stoljeću*. Zagreb, 2016, pp. 29-90, especially pp. 42-45, 50-51.
[42] Hrvatski državni arhiv u Zagrebu [The Croatian State Archives in Zagreb], HR-HDA 68 Banska vlada [The Ban's Government], box XXV, document 40/P from 1852. For stringent control of the newspaper *Südslawische Zeitung* cf ŠVOGER, V., *Südslawische Zeitung 1849.-1852. Organ nove epohe kod Južnih Slavena*. Zagreb, 2002, pp. 117-130. By Ban Jelačić's order of mid-February 1849, the editors of all newspapers and magazines published in Croatia were required to send one copy of their newspaper to the Ministry of Home Affairs in Vienna. ŠVOGER, V., *Südslawische Zeitung*, pp. 118-119.
[43] OLECHOWSKI, Th., Das Preßrecht, p. 1501.
[44] BRAUNEDER, W., Die Verfassungsentwicklung, pp. 120-128.

procedure to be applied to press offences were mainly based on the corresponding regulation of 18 May 1848, except for the provisions on drafting jurors' lists, which was regulated by a special act of 11 September 1849. This Act introduced property qualification for jurors and provided for their election by draw. The aforementioned acts, which were a compromise between liberal press legislation and reactionary understandings, did not come into force in the parts of the Monarchy where a state of emergency had been declared.[45]

The Austrian Press Act was much more restrictive than the first Bavarian Press Act that had been enacted after the abolition of censorship (censorship was abolished on 6 March 1848) – *Edikt über die Freiheit der Presse und des Buchhandels* [Edict on Freedom of the Press and Trade in Books] of 4 June 1848. This Act enabled full freedom of the press and trade in all printed works (including pictorial representations) and any control of their contents was explicitly forbidden. The introduction of guarantees, licences and similar measures for the periodicals was not allowed. Jury courts were responsible for press offences that were regulated by penal laws. A possibility was provided for the police to confiscate a publication in cases of infringements of the provisions of the penal law and a trial had to be initiated within eight days. The aforementioned Press Act was given the features of a constitutional act,[46] like the Hungarian Press Act.

The elected German national Parliament that was convened on 18 May 1848 in Frankfurt am Main proclaimed the Fundamental Rights of the German People on 28 March 1849 as part of the Constitution. Article IV § 143 introduced full freedom of the press and oral expression of thought, in writing or in pictorial representations. Freedom of the press and trade in printed works were not to be restricted by any measures, and press offences had to be tried by jury courts. It was announced that a press act would be enacted but it was not adopted before the Parliament's dissolution. The Constitution provided that constitutions and laws of member states should not contravene the federal Constitution (the Austrian Press Act was adopted a few days earlier but was not subsequently adapted to this provision). However, two years later, the National Parliament was dissolved. On 23 August 1851, the German Constitution was abolished and thereby regulation of freedom of the press as well.[47]

Following the crush of the revolutionary turmoil in Bavaria, a debate on a new press act that would prevent abuses of the press began in the Bavarian Parliament in late May 1849. After long-lasting debates, the Act on Protection against Abuses of the Press (*Gesetz zum Schutze gegen den Missbrauch der Presse*) was adopted on 17 March 1850 and was in force three days later. It contained general provisions on the press, police provisions on the press, and regulated in detail offences perpetrated by abuses of the press. Some provisions allowed the possibility of an arbitrary procedure. For example, courts were allowed to ban a manuscript even though it was not found punishable in a court proceeding. Bavarian courts of law could punish responsible persons and ban a paper published outside Bavaria, if such a paper attacked Bavaria and its nationals. Inciting to different offences and crimes, attacks on foreign governments and their representatives, conscious spread of fake news, attacks on religion, morality and customs of religious communities were declared punishable. The Act introduced the obligation to submit to the police two copies of the paper at the beginning of its distribution. As a very important novelty in press legislation, the principle of taking into consideration mitigating circumstances was introduced. Fines and prison sentences were prescribed for press offences and proceedings had to be carried out before jury courts. The 1850 Bavarian Press Act was a special penal act that supplemented the provisions of the 1848 Edict. Although the public assessed it as the introduction of censorship, the punishments prescribed for press offences were significantly less harsh than the punishments for the same type of offences provided for by the Penal Act.[48]

4.2 The Croatian Provisional Press Act (1849): Enactment, Content Analysis and Application

In the spring of 1849, an act was adopted in Croatia that regulated for the first time freedom of the press in Croatia. It was drafted after the model of the Austrian Press Act of March 1849.[49] The Act was enacted at the initiative of Ban Josip Jelačić who was dissatisfied with critical writings of the previously mentioned liberal Zagreb newspapers that opposed the Austrian Government. As early as December 1848, the Croatian Ban requested the Ban's Council to draft a legislative bill on the press. The idea was that, without violating constitutional freedoms, such an act would prevent sharp criticism of the Austrian and Croatian governments in Zagreb newspapers, which Jelačić interpreted as an abuse of freedom of the press.[50] However, in a session held on 16 December 1848, the Education Section of the Ban's Council concluded that it could not draft a press bill under the complex political circumstances of the time, since the

[45] OLECHOWSKI, Th., Das Preßrecht, pp. 1502-1503; PASTOVIĆ, D., Die Geschworenengerichtsbarkeit, p. 197; *Allgemeines Reichs-, Gesetz- und Regierungsblatt für das Kaiserthum Österreich* (*RGBl.*), no. 161 and 164/1849.

[46] SZÉCHÉNYI, B., *Rechtliche Grundlagen*, pp. 129, 134-142, 146-150.

[47] SZÉCHÉNYI, B., *Rechtliche Grundlagen*, pp. 143-146.

[48] SZÉCHÉNYI, B., *Rechtliche Grundlagen*, pp. 150-162.

[49] The 1849 Croatian Press Act and acts on court proceedings in press offences connected with it were published by MARKUS, T., Dokumenti o hrvatskom pokretu iz 1849. godine. In: *Časopis za suvremenu povijest*, vol. 30, no. 3 (1998), pp. 577-595. The model used for drafting the Croatian Press Act was the Austrian Press Act that was in force at the time. In early October 1848, the ruler rescinded the more liberal Hungarian Press Act. For this reason and because of very deteriorated Croatian-Hungarian bilateral relations, the 1848 Hungarian Press Act could not serve as a basis for drafting the Croatian Press Act.

[50] Cf Jelačić's letter to Deputy Ban Mirko Lentulaj of 9 December 1848 published in: MARKUS, T., *Korespondencija bana Jelačića i Banskoga vijeća 1848.-1850*. Zagreb, 1998, pp. 112-113.

Croatian Parliament did not define Croatia's relationship with other lands of the Habsburg Monarchy.[51] The Education Section proposed that the Deputy Ban should warn editors against publishing information that might upset the public or threaten the country's security.[52] Several months later, after the Press Act was adopted in Vienna, in March 1849 and after Austrian Prime Minister Felix Schwarzenberg and the Minister without portfolio in the Austrian Government Franjo Kulmer wrote to Jelačić to express their dissatisfaction with writings of Zagreb newspapers and accused them of separatist and revolutionary anti-Austrian tendencies (which were unfounded accusations, author's remark), Ban Jelačić took more resolute steps. In early May 1849, he briefly returned to Zagreb from the battlefield and ordered the Education Section to draft a Press Bill and a Bill on Court Proceedings in Press Offences. These Bills, i.e. decrees with the force of law, were adopted at a session of the Ban's Council held on 9 May 1849 and were signed by Jelačić as "Ban and dictator".[53]

In principle, "the Provisional Press Act" [*Privrěměni zakon o štampi*] followed provisions of the Austrian Press Act of 13 March 1849. However, the Croatian Press Act was stricter than its Austrian model in some of its provisions. Regularly, it provided for imprisonment in addition to a fine (the Austrian Act prescribed imprisonment only for the most serious offences). It also provided for the mandatory printing of imprint. The publisher and the editor had to be Austrian nationals and the editor older than 24 years of age. A guarantee of 500 to 2,000 florins was envisaged for the papers that appeared more than three times a week and reported on political issues. The guarantee was payable in cash or in state bonds. The existing newspapers had to deposit the guarantee within one month, otherwise their publication would be stopped. New newspapers could not begin their publication without the guarantee being paid. Liability for press offences had to be ascertained on the basis of existing penal laws. Liability referred to the publisher and the editor-in-chief, and in cases when the ruler was offended, or the homeland betrayed, both the author and the printer were liable as well. The *Tabula Banalis*[54] heard the most serious offences. The publisher was given a fine, a possible ban of the newspaper's publication, and the editor was given a prison sentence. The fine could be paid from the guarantee, but the guarantee had to be replenished within eight days. The editor was obliged to print a correction of the published information free of charge (this referred just to denials by the state bodies whereas a fee was envisaged for the denial of a private person). The prescribed punishments for individual offences ranged from 50 to 500 florins for fines, and from one month to ten years' imprisonment. Nominally, fines were reduced in comparison to the Austrian Act, however they remained very high for Croatian circumstances and prison sentences became a rule. If the offence was repeated, the punishment increased. If the offence was repeated a second time, it was possible to ban the newspaper. The ban was mandatory in case of a third recidivism. In such a case, the editor was prohibited from further discharge of his editorial duty.[55]

The Act on the Court of Law and on Court Proceedings with Regard to Printed Works [*O sudištu i sudbenom postupanju glede tiskarskih proizvodah*] provided for a jury trial for press offences. The mayor had to invite 36 citizens at the request of the public prosecutor (no conditions were envisaged for the discharge of the duty of a juror) from whom a 12-member jury would be composed (the public prosecutor and the defence counsel were each entitled to exclude twelve potential jurors). After the indictment was read, and without the defender providing evidence (because he was not allowed to do it!), the jury had to decide on the guilt of the accused by a majority vote. If found guilty, a public and oral court proceeding before a local court of law ensued (jurisdiction was determined according to the domicile of the accused). The Appellate Court was the *Tabula Banalis* that could either reach a verdict or order a re-trial.[56]

Jelačić's Press Act was condemned by all Zagreb newspapers, except the *Agramer Zeitung*. They assessed the Act as too strict, unjust, incomplete and unimplementable.[57] There was also opposition to the Act within the civil service. Minister of Justice Anton Schmerling opposed the Act's implementation because

[51] After the April Constitutional Acts of the Hungarian Parliament provided for an extremely limited autonomy of Croatia, which would be implemented in just three out of six Croatian counties (the Hungarian Parliament considered three Slavonian counties to be integral parts of Hungary!), on 19 April 1848 Ban Jelačić decided to sever all ties between Croatian administrative bodies and Hungarian ones. Two months later, the Croatian Parliament confirmed this decision and held a debate on the relationship between Croatia and revolutionary Hungary, conditions for the reconciliation of the two countries and on Croatia's closer relationship with constitutionally structured Austrian lands. However, the Parliament did not adopt corresponding conclusions since it interrupted its work in early July 1848 expecting results of negotiations with the Hungarians, which ended in failure.

[52] HR-HDA- 67 Bansko vijeće, box XIII, Prosvjetni odsjek (PO), document 28-8 dated 1848.

[53] MARKUS, T., Dokumenti, pp. 577-595, here pp. 579-580, 584-585; ŠVOGER, V., *Zagrebačko liberalno novinstvo,* 177-178.

[54] It was the Croatia's highest court.

[55] MARKUS, T. Dokumenti, pp. 582-584. The original can be found in the National and University Library in Zagreb, Manuscripts and Old Books Collection, Collection of Leaflets, Ban Jelačić, R VIIIa B-2/1849. For the Act cf also ČEPULO, D., Trial by Jury in Croatia 1849-1918: Transfer and the Context. In: POKROVAC, Z. (ed.), *Rechtsprechung in Europa. Studien zum 19. und frühen 20. Jahrhundert. Rechtskulturen des modernen Osteuropa*. Frankfurt am Main, 2012, p. 1-111, especially pp. 20-22.

[56] MARKUS, T., Dokumenti, pp. 584-585. The original is in the National and University Library in Zagreb, Collection of Manuscripts, Collection of Leaflets, Ban Jelačić, R VIIIa B-2/1849.

[57] In Zagreb, 23 May, *SJ*, issue no. 61, 24. 5. 1849; articles without titles, *SJ*, issue no. 62, May 26, 1849 and no. 72, June 19, 1849; *SZ*, no. 63, May 23, 1849; Das Cautionssystem bei der Presse, *SZ*, no. 64, May 25, 1849; *SZ*, no. 80, June 22, 1849; Agram, *SZ*, no. 91, July 10, 1849; Opazke, *NDHS*, no. 62, May 24, 1849; Porota u naše doba, *NDHS*, no. 64, May 29, 1849, no. 66, June 2, 1849, no. 68, June 7, 1849, no. 70, June 12, 1849, no. 72, June 16, 1849; B. Š., Interpellacia na g. dèržavnog odvětnika, *NDHS*, no. 67, June 5, 1849; Das Preßgesetz, *AZ*, no. 54, May 5, 1849; *AZ*, no. 60, May 19, 1849; *AZ*, no. 68, June 7, 1849. During the revolutionary turmoil of 1848-1849 and throughout the 19th century, articles in the Croatian papers were published anonymously or using a code or pseudonym. The situation was similar in other European countries as well. This was the reason for introducing the institution of editor-in-chief and/or publisher.

he would not recognise Jelačić's decrees, which were proclaimed before the Government in Vienna achieved greater influence on the authorities in Croatia. Ivan Mažuranić, chief of the Public Prosecutor's Office in Croatia, felt that the Act contravened the Imperial Patent on the Organisation of Courts of Law, that it was insufficient and incomplete and as such could compromise justice in Croatia. The Minister of Justice authorised Mažuranić to proceed based on his own assessment until a new Press Act is adopted.[58] Therefore, the Croatian Press Act was implemented partially and only the provisions on guarantees were fully implemented.

After the Croatian Press Act came into force, police authorities and state prosecutor's offices strictly controlled the press in Croatia, especially the opposition newspapers in Zagreb. Their editors were admonished several times for publishing some articles, the authorities required that they provide the names of authors of individual contentious articles (which they declined) and individual issues were banned.[59] Two trials were held based on the 1849 Croatian Press Act. The first and the only one held before a jury was conducted against the editor and the publisher of the newspaper *Slavenski Jug* for the paper's critical writing. The trial was held on 6 February 1850 and demonstrated many shortcomings of the aforementioned Act. It was formally suspended because one juror left the jury. Thereafter, in a letter dated 10 February 1850 Ban Jelačić ordered Deputy Ban Mirko Lentulaj to ban the newspaper and he abolished the jury system. Until the adoption of a new Press Act, courts that had territorial jurisdiction would hear press offences instead of a jury. The panel had to consist of at least five judges who would conduct oral proceedings.[60] The second trial based on the 1849 Provisional Press Act was held on 13 January 1852 against the editor of the *Südslawische Zeitung* newspaper who was accused of slander against a minister. The editor was convicted, fined and sentenced to prison.[61]

4.3 The End of Freedom of the Press in the Habsburg Monarchy

On the eve of the introduction of absolutism in the Habsburg Monarchy, the so-called warning system (*Verwarnungsystem*) was introduced by imperial decree on 6 July 1851. The Government in Vienna and governors of the crown lands could ban the publication of periodicals in case of repeated warnings when their writing was hostile to the Crown, the integrity of the Monarchy, religion, morality and similar. Thereafter freedom of the press no longer existed, although it was formally abolished several months later by the 1851 Silvester Patent, together with other civil and political rights and the Imposed Constitution.[62] The Imperial Patent of 27 May 1852 introduced a new Press Ordinance,[63] which was in force in the entire Monarchy. It was based on a decree of 6 July 1851 and on significantly harsher provisions of the 1849 Press Act. To publish a periodical, it was necessary to obtain a licence issued by the Supreme Police Authority in Vienna (*Oberste Polizei-Behörde*). Existing papers were considered to have the licence, but editorial boards had to provide detailed data on the paper (programme, place of publication, circulation, name of the publisher, editor-in-chief and printer). The editor had to be an Austrian national, live in the place where the paper was published, had to be 24 years old, have impeccable morality and a certain education. The amount of guarantee was increased (the lowest was 2,500 florins), and the existing newspapers had to supplement it within three months. Periodicals had to be submitted for review by the security authority at least one hour before their distribution and other printed works three days before the beginning of distribution. The publisher had to send complimentary copies to the Ministry of the Interior, the Supreme Police Authority, the Court's Library and the Library of the Crown Land in which the paper was published. There were elaborated provisions on the printing of a denial. Papers that published advertisements were obliged to print official notices according to the regular price list. Newspapers could just be sold in the shops of authorised sellers who obtained a vendor's licence for a six-months period. Offences could be liable to a fine and imprisonment. Liability was established according to the general provisions of penal law and affected the author, the translator, the publisher and the editor even in cases of "neglect of due attention" (*wegen Vernachlässigung pflichtgemässer Aufmerksamkeit*).[64] Press offences were also stipulated in the Penal Act that was sanctioned on the same day – 27 May 1852 – and that was a supplement to the 1803 Penal Act. Penal press law was reintegrated in universal penal law, however in the form of special provisions.[65]

In fact, the 1852 Press Ordinance was the return of censorship and in many aspects a step backwards in comparison with the pre-March period.[66] From all the lands of the Monarchy,

[58] These were the arguments used by Mažuranić in the autumn of 1850 when he refused to press charges against the editor of *Jugoslavenske novine* [The Yugoslav Newspapers] for some articles printed in it. Cf the correspondence between Jelačić, the Ban's Government, Schmerling and Mažuranić on a possible initiation of a court proceeding against the editor of *Jugoslavenske novine*, HDA-HR- 68 Banska vlada, box II, documents 134/R, 139/R, 165/R, 173/R and 181/R from 1850.

[59] ŠVOGER, V., *Zagrebačko liberalno novinstvo*, pp. 179-193. Other newspapers in Croatia which were published at the turn of the 1840s and the 1850s in most cases did not criticise the policy of the Austrian Government.

[60] MARKUS, T., *Korespondencija*, pp. 417-418.

[61] For the mentioned trials cf MARKUS, T., *Slavenski Jug 1848.-1850. godine i hrvatski politički pokret*. Zagreb, 2001, pp. 199-203; ŠVOGER, V., *Südslawische Zeitung*, pp. 130-144.

[62] OLECHOWSKI, Th., Das Preßrecht, p. 1504.

[63] *RGBl*, no. 122/1852.

[64] OLECHOWSKI, Th., Das Preßrecht, p. 1504.

[65] OLECHOWSKI, Th., Das Preßrecht, pp. 1506-1507; *RGBl*, no. 117/1852.

[66] OLECHOWSKI, Th., Das Preßrecht, p. 1505.

the Ordinance remained in force the longest in Croatia – until the adoption of a new Press Act in 1875.[67]

5. Conclusion

Conditions under which the Croatian press functioned changed significantly during the 1848-1849 revolutionary years. They ranged from censorship, over a brief period of freedom of the press to the enactment of the first Press Act. They are comparable with changes in the status and control of the press in other European countries, both with regard to the dynamics of the changes, their foundations in ideas and their application in legislative press regulations. It seems that at least part of the Croatian intellectuals of the time, especially those liberally oriented, who wrote about the principles of a functioning freedom of the press and participated in drafting corresponding legislative solutions, were acquainted with theoretical discussions on freedom of the press and regulations in West European countries, particularly in German-speaking lands. They strove to implement these ideas (especially liberal ones) and knowledge about their implementation, with some adjustments to local circumstances. It can be concluded that ideas of freedom of the press and their legislative regulation were transferred from West-European countries to Croatia through the mediation of the German language. In the 19th century, German was very widespread as the language of communication of intellectual circles in the Habsburg Monarchy and in Croatia. Consequently, the beginnings of the development of Croatian press legislation were closely connected to corresponding Austrian legislation, with some modifications and additions in terms of their adjustment to Croatian circumstances. The first Croatian Press Act of 1849 was a relatively restrictive act directed against abuses of the press (this is how the ruling circles interpreted opposition and critical judgements about their own policy). It was drafted and adopted within only two days, and its inconsistency and incompleteness, which became prominent during its brief application, could be attributed to these circumstances. As far as its main principles of control of the press and provisions of penal law with certain modifications are concerned, it is comparable to corresponding guidelines formulated in the acts of some other European countries at the time when revolutionary movements were crushed. Therefore, it can be concluded that the Croatian intellectual elite was relatively well acquainted with current trends in the press policies of other European countries, especially German-speaking lands. They endeavoured to apply them in Croatia, with certain modifications and adjustments.

[67] For the 1875 Croatian Press Acts and their implementation cf ČEPULO, D., Trial by Jury in Croatia, pp. 29-31, 38-40; ŠVOGER, V. – TURKALJ, J., Die Pressefreiheit in Kroatien vom Ende der vierziger bis Mitte der achtziger Jahre des 19. Jahrhunderts – Gesetzliche Regelung und Praxis. In: MÁTHÉ, G. – MEZEY, B. (eds.), *Kroatisch-ungarische öffentlich-rechtliche Verhältnisse zur Zeit der Doppelmonarchie*. Budapest, 2015, pp. 293-344, especially pp. 330-344.

An Official in the Polish Political and Legal Thought of the Second Half of the 18th Century on the Example of the Theses of Józef Hieronim Pawlikowski and Józef Puszet de Puget

Paweł Fiktus *

Abstract

In Poland, the second half of the 18th century was a period determining the future fate of the Polish state. A very rich political and legal debate was characterized by topics concerning healing the state, systemic changes or issues that required immediate reform, such as granting peasants personal freedom, increasing the rights of burghers or granting rights to Jews. Although in the Western Europe the movement of cameralists was successfully developing, issues related to the functioning of administration, the position of offices or officials, due to the situation in the country, were not so strongly exposed. However, more and more often there emerged works discussing specific legal solutions and selected offices. This paper presents the views of two political writers of the second half of the 18th century, Józef Herman Pawlikowski and Józef Puszet de Puget, who, in their works, created a theoretical scheme of an official, their position and relations between offices.

Keywords: *four years' Sejm; official; polish political and legal thought of the 18th century; bureaucracy; state reform.*

1. Introduction

In the history of Poland, the second half of the 18th century was a very special period determining the future fate of the Polish state. The internal weakening of Poland, spreading anarchy, and the failure of the state apparatus contributed to the diminishing role of Poland on the political map of Europe at that time. The attempts to reform the state, an example of which is the so-called Four-Year Sejm and the adoption of the first constitution in Europe on May 3, 1791, did not save Poland from the plans of three powerful neighbors – Russia, Prussia and Austria, which in 1772, 1793[1] and 1795, made the so-called three partitions, dividing the lands of Poland among themselves. Consequently, Poland disappeared from the political map of Europe for 123 years[2].

Political and legal discourse which took place then revolved around attempts to reform the state[3]. It is worth noting that the second half of the 18th century was also the time when topics related to the abolition of serfdom, the improvement of the legal position of Jews, and the increase of citizens' rights were raised more and more often. According to the leading researcher of this period, Emanuel Rostworowski, „a broad patriotic and reform journalism was created in this period (...)".[4] The works of two great political writers, Hugo Kołłątaj and Stanisław Staszic, were most prominent. Against the background of this discourse, considerations regarding the legal position of officials seemed to be a secondary issue. Already at the outset, I would like to signal that it is impossible to compare the enormity of works that referred to the legal position of officials, the functioning of offices or the development of bureaucracy, to name a few, with political and legal publications concerning, for example, the abolition of serfdom. Nevertheless, issues related to offices and officials started to enter the general debate more boldly then.

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1 Russia and Prussia were engaged in the so-called second partition of Poland in 1793.

2 See, e.g. M. H. Serejski, *Europa a rozbiory Polski,* Warsaw 2009, passim.

3 In particular, I recommend the work of W. Konopczyński, *Polscy pisarze polityczni XVIII wieku*, Cracow 2012 (contemporary edition). In addition, in the 50 s of the last century, a 6-volume series regarding the journalism of the so-called Four Years' Sejm (1788-1792), during which the Constitution was adopted on May 3, 1791, was issued: *Materiały do dziejów Sejmu Czteroletniego*, vol. 1. (edited by) J. Woliński, J. Michalski, E. Rostworowski, Warsaw 1955; *Materiały do dziejów Sejmu Czteroletniego*, vol. 2. (edited by) J. Woliński, J. Michalski, E. Rostworowski, Warsaw 1959; *Materiały do dziejów Sejmu Czteroletniego*, vol. 3 (edited by) J. Woliński, J. Michalski, E. Rostworowski, Warsaw 1960; *Materiały do dziejów Sejmu Czteroletniego*, vol. 4 (edited by) J. Woliński, J. Michalski, E. Rostworowski, Warsaw 1961; *Materiały do dziejów Sejmu Czteroletniego*, vol. 5 (edited by) J. Woliński, J. Michalski, E. Rostworowski, Warsaw 1964 and *Materiały do dziejów Sejmu Czteroletniego*, vol. 6 (edited by) J. Woliński, J. Michalski, E. Rostworowski, A. Eisenbach, Warsaw 1969. See other works: *Dyskurs polityczny Rzeczpospolitej Obojga Narodów* (edited by) A. Grześkowiak-Krwawicz, P. Spałek, Warsaw 2013; A. Grześkowiak-Krwawicz, *O reformę rządu czy rząd dusz. Publicystyka polityczna Sejmu Czteroletniego*. Warsaw 2000; R. Lis, *W poszukiwaniu prawdziwej Rzeczpospolitej. Główne nurty myśli politycznej Sejmu Czteroletniego*, Cracow 2015 or W. Bernacki, *Myśl polityczna I Rzeczpospolitej*, Cracow 2013, R. Pilta, *O literaturze politycznej Sejmu Czteroletniego (1788-1792),* Cracow 1872, W. Kalinka, *Ostatnie lata panowania Stanisława Augusta*, Cracow 1891, W. Smoleński, *Przewrót umysłowy w Polsce wieku XVIII. Studia Historyczne*. Warsaw 1923 and the literature given in these publications.

4 E. Rostworowski, *Wiek XVIII*, Warsaw 1995, p. 582.

In the then analysis, it was emphasized that the ideas of Austrian and Prussian cameralists influenced the development of the Polish debate on officials. The proponent of this thesis is, for example, a Cracow's law historian, Grzegorz L. Seidler, who defined cameralists as „(…) theoreticians dealing with the internal organization of the state, especially with regard to the possibility of increasing the income of the ruler".[5] Cameralists played a significant role in the creativity of, among others, Wawrzyniec Mitzler de Kolof and Jan Ferdynand Nax regarding the functioning of fiscal offices[6]. The cameralists' achievements, according to Siedler, were visible in the works of Józef Wybicki[7], for instance in his work *Listy patriotyczne do J.W. ex Kanclerza Zamoyskiego prawa układającego pisane*[8].

Besides, another researcher of the history of administration in Poland in the 18th century, Jerzy Malec, specified the so-called police influences. In his opinion, in the 18th century, the classic model of the ways of shaping the administrative apparatus of absolute states, was the science of police (German: polizeilehre, French: science de la police), being part of cameralistics. The term police meant not only matters related to security protection, peace and public order, namely what is currently understood as the police, but also many other areas of the internal administration of the state".[9] The resulting journalism was related to specific institutions as well as specific legal solutions regulating their functioning (e.g. Remigiusz Ładski, *Krótkie zebranie trzech praw początkowych*, Hieronim Stroynowski, *Nauka prawa przyrodzonego,* Franciszek Czapski, *Dom nadwyrężonej Rzeczpospolitej*) [10].

In turn, Maciej Janowski in his work *Narodziny inteligencji 1750-1831*, analyzing Polish political and legal thought, mainly of the 18th century, stated that "Polish thinkers who observed changes taking place in German countries understood the necessity to create efficient bureaucracy"[11], however in the further part, he made a critical remark that „(…) it is easier to find interesting thoughts on the administration reform of Polish political writers of the second half of the 18th century than to track down the implemented postulates of this reform. Nevertheless, state offices were beginning to form."[12]

In this paper, I will focus on bringing closer the views of two Polish political thinkers: Józef Herman Pawlikowski and Józef Puszet de Puget. The choice of their views is caused by the fact that, unlike, for instance, writers related with the functioning of the so-called police and guard, commissions or institutions responsible for maintaining order, they both tried to create a theoretical framework for the profession of an official and offices. In the Polish thought of this period, no treatise or work has been written that would create a theoretical scheme of the profession of an official as well as administration. As I have shown before, the second half of the 18th century was a period when political and legal writing was connected with the presentation and analysis of views on the current reforming of the state as well as the solutions to the most important problems of the time, so the postulates regarding the functioning of internal administration were not exposed to such an extent. It is worth adding that both Pawlikowski and Puszet de Puget created a cohesive argument concerning the said issues (although included in the works in which other issues were also discussed, these works contained views of both authors regarding other fields), and they did not limit themselves to partial sentences or postulates, for example integrated in the analysis or a commentary on existing legal solutions.

Moreover, both Józef Herman Pawlikowski and Józef Puszet de Puget, only for a few decades (mainly due to the aforementioned Władysław Konopczyński and Emanuel Rostworowski) have been of interest to Polish researchers.

2. Józef Herman Pawlikowski and Józef Puszet de Puget – biographical notes

The first of the presented authors, and at the same time the most prominent – Józef Herman Pawlikowski, born 1761 – died 1829, the son of Jan, a master of the blacksmith's guild, and Brygida *de domo* Dudkowiak (or Dudkowska). He was probably educated at the Cracow College of Physics as well as the Moral College. In 1788, he anonymously published the work *O poddanych polskich*, in which he presented the difficult situation of Polish peasants as people who were exploited and lived in terrible conditions. Despite the anonymity of the work, it was highly evaluated and was used during the work of the Four-Year Sejm. It is worth adding that it was only in the 20th century that Emanuel Rostworowski determined that it had been written by Pawlikowski. For several years it had been attributed to other authors.

In the period 1789-90, he published *Myśli polityczne dla Polski*. In this work, he included his views on the functioning of the state, postulating the introduction of a succession to the throne, subordination of the administration to the king, limiting the power of regional councils and sejms as well as a number of reforms in the military or the judiciary. In addition, in 1791,

[5] G. L. Seidler, *W nurcie Oświecenia*, Lublin 2002, p. 138. Seidler divided cameralists into the early and later ones. The first group wrote about feudal and religious issues. In turn, the second wrote in the Enlightenment current. The early cameralists were V. L. Seckendorff with his work Teutsche Furstenstaat, published in Frankfurt in 1700, J. Becher, W. Schroder and W. von Hornigk. In turn, Seidler considered J.H.G. von Justi or J. von Sonnenfel as more confidential cameralists, as he recognized, (…) they wanted the educated administration to be a new, separate elite, mediating between the ruler and society". – Ibidem p. 138-140.

[6] Ibidem p. 140 – 141. See also J. Górski, *Polska myśl ekonomiczna a rozwój gospodarczy*, Warsaw 1963, p. 79 et seq.

[7] He is well-known in Poland as the author of *Pieśni Legionów Polskich we Włoszech* (*Song of the Polish Legions in Italy*), that is *Mazurek Dąbrowskiego* (*Dabrowski's Mazurka*) created in 1797, which has been the Polish national anthem since 1927.

[8] G.L. Seidler, *W nurcie…*, Lublin 2002, p. 141.

[9] J. Malec, *Polska myśl administracyjna XVIII wieku*, Cracow 2009 and the literature given there, see also D. Malec, J. Malec, *Historia administracji i myśli administracyjnej,* Cracow 2000, passim.

[10] J. Malec, *Polska myśl…,* Cracow 2009, passim.

[11] M. Janowski, *Narodziny inteligencji 1750-1831*, Warsaw 2008, p. 67.

[12] Ibidem p. 68.

he published, also anonymously, a booklet *O poddanych polskich*, continuing the subject of the position of Polish peasants. He participated in the uprising under the leadership of Tadeusz Kościuszko in 1794, and after its fall he emigrated to France. In 1800 in Paris he published a booklet titled *Czy Polacy mogą wybić się na niepodległość*. In this work, he claimed that the Polish nation should fight the three partitioners, abandoning their dreams of France's help. A particular issue concerned the peasants. Pawlikowski pointed to the need to grant peasants personal freedom. After 1820, he settled in Poznań, where in 1826 he was arrested and transported to Warsaw. He was imprisoned and interrogated because of his links with secret independence organizations. He died in prison in 1829[13].

The second author – Józef Puszet de Puget (born about 1746 – died 1819) was a priest, the son of Jan – Duninow's mayor and Aleksandra *de domo* Skarbek-Borowska. He was educated at the University of Cracow. In the early 1970 s, he became a Cracow's custodian. In 1788-89 he published in Warsaw his work *O uszczęśliwianiu Ojczyzny*, in which he tried to show that there is the possibility of reconciling religion (understood not only as a Catholic religion) with the legal system. He criticized the ideas that natural law (although he recognized it as the ideal) should be the foundation of the legal system. In the case of the law, he argued that the regulations should be short and commonly understood. Moreover, in this work, he highly valued the cultural policy of King Stanisław August, he proposed that peasants should become free people providing obligatory services to the court. He was an advocate of equal rights for Jews, and he also proclaimed the need to develop trade that would bring nations closer together. He is probably the author of *Przyzwoity i stosowny do szczęśliwego życia myślenia sposób,* published in Warsaw in 1796, (initially attributed to another writer of this period – Marcin Nikucie). Together with his brother Antoni, he participated in the sessions of the Four-Year Sejm, more precisely in the work of the Civil-Military Commission of the Sandomierz and Wiślice districts. In 1794, he bought (with money obtained after the death of his father) earthly goods in Lasomin. At the beginning of the 19th century, due to progressive blindness, he withdrew from public life, including the work of the chapter of Sandomierz. He died on December 5, 1819 in Lasomin[14].

3. Image of an Official in Myśli polityczne dla Polski by Józef Herman Pawlikowski

In the first place, I will quote the theses by Józef Herman Pawlikowski regarding offices and officials, which were mainly included in his work *Myśli polityczne dla Polski* (*Political Thoughts for Poland)*[15]. Specifying the essence of offices, he stated that they are „Government assistance", adding that „(…) each and every one of them deals with something else (…)"[16]. In turn, in another part of the work, it can be read that: „(…) they should watch over the laws, be characterized by seriousness, and strive for good government."[17] He assigned a special role to officials in a situation when the government of the country is not appointed yet. At this point, it can be concluded that Pawlikowski indirectly put forward a thesis on the continuity of the clerical function in a situation where the central executive body does not function for some reason[18]. In addition, in the context of the functioning of offices in the state, Pawlikowski had made an illustrative comparison of the state and the human body, stating that the citizen takes the form of „muscles" in the state, and offices – the most important „membranes"[19].

Pawlikowski spoke about the specific role of offices in more detail, among others, in the part titled *Tron sukcessyonalny (Successive throne)*[20], in which he presented the essence of royal power. Already at the outset of his considerations, he stressed that the pretender to the royal throne, before assuming the throne, should become acquainted with the people with whom he would rule the country and in particular with officials and offices: „(…) but there is a need for him to know the merits, fitness and the role of officials because it is well known how much the government depends on officials, their appointment or removal can do a lot of harm to the King (…)"[21]. Determining the relationship between the ruler and the offices, he first

[13] J. Szczepaniec, *Józef Pawlikowski* (in:) Polski Słownik Bibliograficzny, vol. XXV, Wrocław-Warsaw-Cracow-Gdańsk 1980, p. 446-452. He added that the leading Polish researchers of the 18th century – W. Konopczyński and E. Rostworowski highly valued the political creativity of Józef Pawlikowski, see W. Konopczyński, *Polscy pisarze…*passim, Iden, *Trzeci nauczyciel Sejmu Wielkiego*,Przegląd Powszechny", 1951, nr 232
E. Rostworowski, *Jakobin Józef Pawlikowski anonimowym autorem słynnych pism politycznych,* Kwartalnik Historyczny, 1956, nr 2, p. 75-94; Iden, *Myśli polityczne Józefa Pawlikowskiego*(w:) *Legendy i fakty XVIII w.,* Warsaw 1963, p. 195-264 as well as R. Lis, *W poszukiwaniu prawdziwej Rzeczpospolitej…, p*. 272-288, W. Bernacki, *Myśl polityczna I Rzeczpospolitej…* p. 357-364 or W. Olszewicz, *Jeszcze o Józefie Pawlikowskim*, Kwartalnik Historyczny, 1972, nr 4, p. 914-917.

[14] E. Rabowicz, *Józef Puszet de Puget* (in:) Polski Słownik Bibliograficzny, vol. XXV, Wrocław-Warsaw-Cracow-Gdańsk 1980, p. 443-445. See also Wł. Konopczyńskiego, *Polscy pisarze…*passim.

[15] J. H. Pawlikowski, *Myśli polityczne dla Polski*, Warszawa 1789. In fact, the book was published by the Dominican Printing House in Lutsk. However, as the date of issue, information about 1790 can also be found.

[16] Ibidem p. 234.

[17] Ibidem p. 247.

[18] Ibidem.

[19] Clarifying, Pawlikowski used the term „membranes", adding that „(…) failure of the functioning of one limb in a human makes the whole body feel it and causes some disabilities, similarly as in the case of the government (…)". – Ibidem p. 172. Also in the case of entrusting the highest and unlimited authority to the office, Pawlikowski applied anatomical comparisons, indicating that „(…) if in human intestines, the function of the heart was stopped by some membrane (…)" – Ibidem p. 183.

[20] Ibidem p. 221-222. He mentioned Swedish and English solutions imposing on the heirs to the throne the need to pass the knowledge test on the functioning of the state, while recommending the adoption of a similar solution in Poland. He posed a question: if a foreign lawyer does not know Polish laws, how can a person from abroad who does not know Polish legal solutions take over the throne? – Ibidem p. 225.

[21] Ibidem p. 222.

stated that the king himself is the office („the first magistrature in the government – King")[22]. However, the king's authority, despite his superior function and role in relation to other subjects and offices, is limited by the functioning of other offices. Pawlikowski seems to have been an advocate of the solution assuming royal authority as a superior entity, while executing a certain scope of authority by the offices. This is supported by his statement that the office wielding the supreme power would become the oppression of the nation. Moreover, Pawlikowski, specifying the relations between the king (the highest office) and other offices, indicated that the king is the commanding authority and the magistratures are the „executing" authority. He negatively referred to the connection of both the commanding authority as well as the executing authority in one organism[23]. To support this thesis, he gave an example of the functioning of the Military Commission[24], creating a hypothetical solution in which the Military Commission is separated from royal power. Then a situation may arise in which it would become the only major body devoid of any control acting on the principle of sending soldiers to intervene as a result of a complaint addressed to it. Pawlikowski assumed that leading to this kind of situation is obvious „oppression" and formation of despotism[25]. He further added that in a situation when any office has the highest authority, confrontation takes place, on the level of competence and powers, with, as Pawlikowski put it, Superiority, that is, an entity with supreme authority over other offices[26]. In the case of this „Superiority", that is the highest authority standing above other offices, it is worth noting that in his study, Pawlikowski did not use this term as synonymous with „king" nor indicated that this „Superiority" is to be bound with royal power or court. The role of the „Superiority" over offices is to manifest itself in the fact that „the Superiority, engaging in the activities of the magistrature, can easily apply their actions and protect the country against loss"[27]. In addition, Pawlikowski was an advocate of an unambiguous division of competences and powers that individual offices would be entitled to, stating that one magistrature can not „enter" into the activities of another magistrature, and is also obliged to perform its own activities. Additionally, he proposed writing down a list of activities that could be performed by individual offices[28]. Regardless of determining the competences and powers of individual offices, Pawlikowski put forward the thesis of „one tool to which they must adhere". He did not specify what they would depend on, adding only the idea that „(…) in every home and in every nation, there must be Superiority."[29] In the case of the competences of individual offices, Pawlikowski stated that they can not deal with only one subject. He gave an example of the mutual relations between the Military Commission and the Treasury Commission. In a situation when the Military Commission would decide to enter into military operations, then they would have to involve the Treasury Commission in order to obtain appropriate financial resources. Regardless of the above and the mutual relations between the two bodies, which Pawlikowski stressed with all his firmness, there must be a superior body (that is „Superiority")[30]. It is worth adding that Pawlikowski often used the term „superiorities" without specifying explicitly whether he means royal authority or some other entity or office. At one point, in the chapter titled *King*, he commented on the subject of "superiorities" but in the context of royal authority. He accused the Poles of being afraid to entrust the King with full power, fearing tyranny[31]. He explained that „(…) if we want to have supreme power, the highest protection and the highest government in the Superiority, all of it should be entrusted to the Superiority".[32] Regardless of the above, whether the Superiority in the meaning of Pawlikowski should be treated as the King or other subject, which has already been signaled before „all magistratures and offices in the Nation should be the authorities that help the highest authority (…)"[33]. Pawlikowski did not forget to point out mistakes made in Polish politics when in Poland the magistratures

[22] Ibidem p. 182.

[23] Ibidem p. 183.

[24] Pawlikowski devoted a separate chapter titled *Magistratures*, p. 234 et seq. to the activities of the individual commissions. He described graphically their hierarchical dependence, "I do not mention the lower ones (…), because those always have to be suitable for the higher ones, they are wheels for turning bigger wheels" – Ibidem p. 244.

[25] Ibidem.

[26] Ibidem p. 183-184.

[27] Ibidem p. 184. In the quoted fragment, Pawlikowski used the term „protect the country against the loss". Later in the text, he did not specify what it would mean. I believe that it can be assumed that this „loss" was supposed to be the negative results of the functioning of the state in the event of a dispute over powers between individual offices with broad powers, which could have negative consequences for the state. His two examples, referring to the identical rule of consuls, or the distribution of financial resources to both the Police Commission and the Military Commission, argue for accepting such an interpretation of Pawlikowski's thought – Ibidem.

[28] Ibidem p. 184-185.

[29] Ibidem p. 186. It is difficult to state in this case whether Pawlikowski meant the development of a specific legal act, common to all offices, or pointed to the abovementioned Superiority as the subject determining and affecting the functioning of all magistratures – Ibidem.

[30] In this case, Pawlikowski used a comparison to water channels, which „(…) necessarily must flow somewhere, and this flow must be in the Superiority (…)" – Ibidem.

[31] He specifies that usually fear mixes with confusion „(…) from which it cannot get out (…)". He pointed to the Polish vice, namely the fact that the Poles always complained about kings, limiting their power and then „(…) they became increasingly unhappy (…)" – Ibidem p. 187. In the following part of his work, he calls the king „the father of the Polish nation" – Ibidem p. 219.

[32] Ibidem.

[33] Ibidem. To the aforementioned thesis, Pawlikowski gave an example on the functioning of the justice system. The exercise of justice in the country should belong to the Superiority, and the justice magistratures and offices have to „help" the Superiority in this task. In addition, the Superiority should know about the activities of offices and select officials – Ibidem p. 187-188. This example shows the limited role of the magistratures both in terms of their powers and the organization of the clerical staff.

were separated from royal power, and were not subject to its authority. He referred to them as „arbitrary magistratures", at the same time demonstrating on the example of lengthiness of proceedings that, without proper supervision and control, they did not properly exercise their competences, stating that: „(…) they executed justice when they wanted and as long as they wanted, and sometimes the due time passed, and the Citizen had to dream about the desired justice", adding that „justice does not exist for the magistrature, but the magistrature for justice")[34].

Additionally, in the case of selection of officials, Pawlikowski proposed making a suitable selection, stating that „not always the same kind of people should be appointed to a given office"[35]. He supported this by claiming that in the case of more important activities undertaken by the office, more capable people need to be selected to perform them. He opposed legal solutions specifying who and when can hold a given office, considering them as negation of „good government": „(…) as I always say, capability is needed for the office, if a man has a peculiar fitness for any office, should not be their talent used in such a way? (…)[36]. He was also a supporter of the gradation of functions performed by officials[37].

The selection of officials would only belong to the Superiority. Clarifying the above thesis on the example of the king's competences, Pawlikowski assumed that it is „the greatest mistake" to limit his competences in the selection of officials and to transfer them to magistrature, which would decide on its own who is to hold a given office. He suggested that the highest level officials should be appointed by the Superiority (on this example, the king). In turn, magistrature should appoint auxiliary officials: „(…) the magistrature can manage these officials who contribute to effectiveness of the magistrature's activities, but those officials who are needed for the government should be selected by the highest level government itself (…)"[38]. On the example of selectiveness of offices, he also specified the essence of magistrature and its relation towards the Superiority: „(…) every magistrature is a guardian of the government, but not a government"[39]. Referring to the Polish solutions, he pointed out the terrible consequences that arised as a result of the king (that is, the Superiority) not having any influence on the magistrature. Pawlikowski was opposed to the separation of royal power from magistratures: „if offices are separated from the seriousness and power of the King, they must have arbitrariness, and thus those who want to enter them must do so through arbitrariness and violence"[40]. Furthermore, magistratures should report on their activities to the King „at any time"[41].

Moreover, referring to Polish history (without giving any concrete examples), he indicated that far more obscenities occurred in the situation when magistratures were arbitrary and independent of royal power. Pawlikowski claimed that excessive independence of offices can lead to the state in which magistrature feeling its superiority will strive for gaining advantage over the King, „(…) and there would be two Superiorities in the nation, fighting with each other, scandalizing and harming the Nation (…)"[42].

Determining the hierarchical dependence of offices, Pawlikowski pointed out a voivode as the most important administrative body and, at the same time, the most important official (comparing him to the commander in the army). The major duties of the voivode include taking orders from the king, as well as reporting on the civil voivodeship magistratures (analogous to the commander's reporting on the matters of the army and military offices). Pawlikowski proposed the following division: the nation should elect deputies, and the king the officials. In turn, in the case of voivodes, he suggested that they should present the candidates for the offices to the king, adding that: people cannot expect good government from the king if he cannot select the officials, and somebody else decides on their fitness (…)"[43]. In his considerations, Pawlikowski made a simple division of the most significant officials, namely, into civil and military leaders, who formed the Royal Council. Specifying its competences, he stated that: „the Council constitutes a flow of information and sentences, deliberation on them and their arrangement (…)", which allows for assuming that in Pawlikowski's assessment the Royal Council was supposed to have an advisory role[44]. Moreover, independent of the Council, government consisting of „civil leaders" was supposed to exist. Apart from the so-called „civil leaders", Pawlikowki distinguished „political leaders" or „governmental leaders", that is deputies[45]. In the case of the most important offices, at the head of which officials

[34] Ibidem p. 188. In this case, the influence of the Superiority on the functioning of offices connected with the justice system would be legitimate, and the party to the proceedings would have influence on the functioning of magistratures through the Superiority.
[35] Ibidem p. 189-190.
[36] Ibidem p. 190.
[37] In the case of fitter candidates for the office, Pawlikowski stressed the talents that individual people are endowed with, at the same time stating that every man has some specific talents: "(…) if thay have little talent, they cannot use it properly (…)". As Pawlikowski explained, the offices are for ruling as well as to help the country's community. In turn, every office carries out different tasks ("activity attached to every office"). In turn, society cannot bear the responsibility in a situation when a given person holding an office does not have appropriate talents or they hold a higher level office, while not holding a lower level office.
[38] Ibidem p. 192. He added that all royal offices, both military and civil, should be chosen by the king. Moreover, he claimed that every office encompasses an entrusted part of the government, therefore it should also be selected by the government.
[39] Ibidem p. 193. On the example of the Military Commission, Pawlikowski clarified the above thesis that the Military Commission should meet the needs of the army and ensure its comfort. However, it cannot command an army, start or end a war.
[40] Ibidem p. 196-197.
[41] Ibidem p. 236.
[42] Ibidem p. 197.
[43] Ibidem p. 199.
[44] Ibidem p. 200.
[45] Ibidem.

appointed by the Superiority were supposed to be, he claimed that it should be a reward for their merits. Furthermore, he advised that „(…) the Superiority should be careful while giving rewards, taking into consideration who does what and when".

Regarding the highest level offices, he proposed his own concept of their functioning in relation to the Superiority (in this case, the king). He considered political leaders, that is deputies, as the king's helpers. He defined the rest of the officials as not only the king's helpers but also his servants, which was supposed to provide them respect and dignity[46]. Deputies (political leaders) should be part of Senate, described by Pawlikowski as „the elders, only the highest level officials of either magistratures or civilness". Additionally, the Senate should function near the king in the period when the Sejm would not hold meetings and „no law should be introduced without their joint deliberations"[47]. Government and, as Pawlikowski separately put it, representatives should function near the king. In the case of this category of the highest level officials, Pawlikowski characterized their scope of competences in the following words: „(…) in relation to another part of the government, they have to execute law, without the deliberation of the government itself (…)". Representatives were supposed to gather every two years in order to control the government activities, as well as „constitute law"[48]. What is more, when it comes to their competences, Pawlikowski added that „deciding on what the government has to do, and not applying all the government circumstances, the representatives may fall into indecent insanity"[49] In turn, characterizing the position of the Senate, he claimed that it should be somewhere between the Superiority and the nation „(…) and thus its advice should be respected in terms of legislation"[50].

Specifying the mutual relations between magistratures and the government, he stated that „(…) magistratures have to exist in relation to the government and the laws, whereas the laws cannot be improved rapidly, similarly to magistratures and the government"[51].

Regardless of the above remarks made by Pawlikowski concerning the functioning of the offices, a separate point needs to be devoted to the matter of the share of clergy in the exercising of powers. The above thesis justifies his statement that „since clergy owns land, they should strive to keep it, and thus they should be included in the council and offices, similarly to nobility and bourgeoisie. If they are included in offices, then their income should be allowed since every office needs money to maintain itself"[52]. Another issue is the eligibility of clergy for exercising public functions in offices. In this case, Pawlikowski rejected the fact that belonging to clergy legitimizes holding the office, clarifying that „(…) people appointed to offices are those who are fit for it (…)"[53]. Another issue raised by Pawlikowski concerned mutual relations between spiritual service and the held office, which could not interfere with one another[54].

4. Image of an Official in O uszczęśliwianiu narodów by Józef Puszet de Puget

At around the same time as Józef Pawlikowski's work, a two-piece work entitled *O uszczęśliwianiu narodów* (*On the Happiness of Nations*)[55] by a canon from Cracow, Józef Puszet de Puget, was published. A detailed discussion on offices and officials is contained in Chapter XV titled *O rozdawaniu urzędów krajowych w celu uszczęśliwia Narodów (On the Appointment to National Offices to Make the Nations Happy)*[56].

Specifying the essence of offices, Puszet de Puget stated that „(…) everywhere there are various offices established, so that those to whom their exercise is entrusted, guarding the preservation of rights and good intentions of the Ruling, become help mediating between them and the nation, leading to the successful outcome"[57].

Determining the mutual relations between the monarchy and the officials, Puszet de Puget pointed out that the monarch who is not „proficient in the art of ruling", and his knowledge is modest, in a situation when he has appropriately selected ministers, „(…) on the basis of their virtue and wit, and prudently distributed the offices among subjects, can easily compensate for his ineptitude through their fitness".[58] Apart from the selection of officials presented in the quotation, one more issue should be pointed out, namely, allowing the selection of lower officials by ministers, and restricting the monarch's right to elect the most important officials – ministers[59].

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[46] Ibidem p. 200-201.
[47] Ibidem p. 201.
[48] Ibidem. The presented quote allows for assuming that Pawlikowski, similarly to ministers managing a given department, distinguished a group of officials who, while not fullfiling the role of a minister, performed some activities that were ordered by the Superiority, at the same time having influence on the work of particular ministers.
[49] Ibidem.
[50] Ibidem.
[51] Ibidem p. 245.
[52] Ibidem p. 129-130.
[53] Ibidem p. 130.
[54] Ibidem.
[55] J. Puszet de Puget, *O uszczęśliwianiu narodów*, Warsaw 1788-89.
[56] Ibidem p. 126 et seq.
[57] Illustrating the above thesis, Puszet de Puget mentioned the example of the commander commanding the army: even though he is a perfect soldier, in a situation when the lower rank officials are not able to carry out his orders and fulfill the entrusted duties, he will not gain anything by his prowess. The situation was similar in the case of civil service. Ibidem p. 127.
[58] Ibidem.
[59] Puszet de Puget also divided the monarchs into those who were remembered in history thanks to their deeds, as well as those who did not do great deeds, but were glorified by the works of their ministers.

In the case of the selection of officials, Puszet de Puget points out two features that should be taken into account, that is virtue and fitness, without defining them explicitly[60]. In the case of virtue, he stated that the candidate for an official should be characterized by virtue and honesty. In turn, in the case of „fitness", he included „decent talents" and „extensive knowledge" in it.[61] He added that regardless of the above features, officials should be characterized by confidence. In a situation when they do not have one of the indicated features, they can easily „get lost" in their service.[62] At the same time Puszet de Puget presented solutions in the case when the official would be deprived of „virtue", or would not show due „fitness", that is appropriate talents. The first one is likely to get lost due to their simplicity, while the second, deprived of „virtue", can lead to the oppression of others. In a situation when an official has more talent than virtue, their actions are dangerous for the country, because „(…) deprived of virtue, a wicked and witty man is tempted to take deceitful actions".[63] Puszet de Puget further concludes that even if the candidate for an official is characterized by virtue and fitness, it does not make them the right person for the office. Fitness and talent should be adequate to the office. Consequently, according to Puszet de Puget, even the wisest person, if they are not fit or lack proper talents, should not hold the office[64].

In a situation when the monarch appointing people to offices will not be guided by the abilities and virtues of candidates for officials, then in the opinion of Puszet de Peuget he will be like an architect who, building a magnificent edifice, will distribute the work regardless of the skills of the workers, for instance a glazier will deal with carpentry and carpenter with bricklaying. Consequently, the monarch will do double harm to himself and the nation. Then, the offices will be held by people who are not fit for this and their skills will be wasted because „(…) they could be useful for the country in other decent offices „.[65]

In turn, the biggest mistake for the country is appointing people to offices as a reward. In this matter, Puszet de Puget made his own division of national offices into offices that „honor only dignity" and whose exercise does not require any special abilities and the second type of offices that require having specific knowledge[66]. Although the first group of offices, according to Puszet de Puget's description, qualifies to be treated as honorary offices, the Cracow's canon did not question the sense of their existence. He decided that this was a fair solution for people meritorious for the country. In the second case, the reward in the form of assignment of office would be adequate for the merits and qualities possessed. As an example, Puszet de Puget gave a military man who, due to his bravery, should be moved to a higher military position, but cannot perform higher functions in the civil service.[67]

Puszet de Puget very critically referred to the solution consisting in the appointment to offices on the basis of birth, wealth, „family antiquity" or other similar circumstances. He considered it a „big mistake" as well as a „dangerous" solution for the country. The above topic has been developed in terms of the mentioned „family antiquity". Puszet de Puget did not question the merits of noble families devoted to the country and nation. On the contrary, he claimed that the nation, as well as the ruler, owe them gratitude. However, in a situation when given candidates for a specific office, apart from noble birth and „the nobility of their great-grandfathers", do not have any qualities, then „(…) fair reasons stop immediately (…)".[68] At the same time, he stressed firmly that in this situation, people with lower status who are fitter should hold offices in the first place „because the universal welfare of the nation and the whole country should be taken into account first by the rulers, and then the good of the particular people".[69] Following this principle, according to Puszet de Puget, the ruler does the country a double favor: the offices will be held by suitable persons for the benefit of the country, and the second issue – virtue and fitness, „(…) will be the primary premises for being appointed to the office (…)".[70] The consequence of such a solution would be changes in the nation, which will be eager to undergo training and acquire virtues and abilities in order to be able to exercise the office and „(…) will be willing to render outstanding service to the homeland".[71]

The described solution regarding appointment to offices taking into consideration virtue and talents, while eliminating other attributes (such as noble birth, etc.), also speaks for strengthening the feeling of justice among the nation. This was supposed to be revealed, in Puszet de Puget's opinion, in the advantage of the public good over other separate reasons.[72]

According to Puszet de Puget, the most harmful solution is selling offices for money, which consequently excludes basic attributes such as the aforementioned virtue and abilities from the selection of officials. It can also result in negative solutions among citizens who, having these qualities, will not apply for offices any longer because „Anyone who wants to hold an office guided by

[60] Ibidem.
[61] Ibidem p. 128-129.
[62] Ibidem p. 129.
[63] Ibidem p. 130.
[64] He added that all over the world there is no man who would have all the talents and expertise in all areas, and consequently, (…) who would be able to perform perfectly whatever task they want." – Ibidem.
[65] Ibidem p. 131.
[66] Ibidem p. 132.
[67] Ibidem p. 132. Another example was the author of the work who deserved the prizes for his work, which, however, does not justify him holding any office for the benefit of the nation.
[68] Ibidem p. 134.
[69] Ibidem.
[70] Ibidem p. 135.
[71] Ibidem.
[72] Ibidem p. 135-136.

their virtues, will not want to become fit for the office, but at all costs will try to accumulate the money neccesary for it."[73] In the further part of his work, Puszet de Puget, even more explicitly commented on this kind of the appointment of offices, stating that „buying national offices is so indecent and against the maintenance of the good government that, in every nation and in every circumstance, such suffering should be stopped".[74]

In addition, Puszet de Puget considered the situation when a person who has virtue and ability wants to buy a specific office as „indecent" because it leads to a situation in which respect for the office and its seriousness are undermined. In addition, the poorer citizens will give up any attempt to become an official and at the same time render outstanding service to their homeland.[75]

In his work, Puszet de Puget did not include much advice that officials should follow. He recommended modesty to those who held offices, stating that the „luxury" becomes the basis for neglecting the entrusted duties.[76]

5. Conclusions

Although the second half of the 18th century was characterized by a discourse on systemic issues and the purpose of rich political and legal journalism was to find the best solutions to restore the stabilization of the falling paradise, already then the theoretical foundations of the profession of official and offices began to slowly develop. Polish discourse was far from French, German or Austrian debates. Nevertheless, the presented theses of Józef Pawlikowski or Józef Puszet de Puget indicate that an important role of administration in the functioning of the state was noticed and the offices were no longer treated as an expression of the reward given on the basis of recognition by the monarch. It is noteworthy that the image of the official presented by them resembles the image of a state officer who is tasked with performing certain activities assigned to them by the letter of the law. In this case, the official is not only the title which glorifies the person to whom it has been granted, but requires them to behave appropriately. In addition, the official in their opinion is not a noble-born person, but a person with specific qualities as well as substantively prepared for the role of an official. Furthermore, it is worth adding that the attitude of both political writers seems to be strange and surprising. Although their works were read during the Four Years' Sejm and enjoyed popularity, they decided to remain under the veil of anonymity[77].

[73] Ibidem p. 137. Illustrating the situation, Puszet de Puget mentioned a ship owner who does not recruit the crew but, in somebody's private interest, sells spaces on board.

[74] Ibidem.

[75] Ibidem. It should be added that Puszet de Puget did not allow any exception to the described rule because, as he showed in his work, it could lead, after all, to further sales transactions of offices.

[76] Ibidem p. 193. Importantly, Puszet de Puget did not define what this luxury would depend on, stating that „(…) it weakens the mind, slows down the heart, makes man's violent passions stronger, poisons the greatness of the soul and creates mean ways of thinking" – Ibidem.

[77] The later period, that is after the third partition of Poland, was characterized by more numerous works concerning administration, offices or officials. Only signaling this, I recommend the work of M. Gromadzka-Grzegorzewska, *Narodziny polskich nauk administracyjnych*, Warsaw 1986, in which she presented, among others, theses of Franciszek Kasperek or Antoni Okolski, also constructing the theoretical basis of the profession of an official, P. Cichoń., *Rozwój myśli administracyjnej w Księstwie Warszawskiem*, 1807-1815, Cracow 2006 or M. Gałędka, *Koncepcje i projekty nowego ustroju administracji dla przyszłego Królestwa Polskiego: studium z dziejów myśli administracyjnej*, Sopot 2017.

The Forgotten Anarchist: Political and Legal Aspects of Alexei Borovoy's Anarcho-Humanism

Andrey Bystrov *

Abstract

The article examines the political and legal ideas of Alexei Borovoy, a Russian anarchist thinker of the early 20th century and author of the anarcho-humanism theory, which represents an original anti-state doctrine and rethinks the established positions of classical anarchism. Borovoy was influenced by a broad variety of ideas, and the evolution of his views can be conceptualized with a Hegelian triad: the Marxist thesis, the individualist antithesis, and the blending of personalistic and existentialistic attitudes with syndicalist practice as the synthesis. He presents anarchism as a constant striving towards an individual's self-liberation through the negation of social reality; and this striving shall be seen as a universal condition for the development of all mankind rather than some social utopia project. By revealing the irresolvable antinomy between individual and society, his philosophy predicates the anti-finalist spirit of anarcho-humanism. Determined by the aforementioned beliefs, Borovoy's criticism of the state and other "social fetishes" still deeply rooted in the human mind is followed by an analysis of his critique of anarchism itself and the debate with Kropotkin and other libertarian theorists. Borovoy postulates that the state is historically necessary and describes the range of factors that have brought it about. The criticism of the state system as the quintessence of organized power leads Borovoy to a detailed deconstruction of parliamentarism, the only objective of which is to preserve the status quo that can be summed up in the following six points: (a) the class nature of parliaments and the fictitious power of popular will; (b) the tyranny of the masses; (c) parliament's subordination to the government; (d) the opportunism of political parties; (e) the hypocrisy of election procedures; and (f) non-professionalism of parliamentarians. Borovoy defines the law as actual relations formed in the course of life and originating mainly in the human mind that should be regarded as part of the psychosocial current of legal thought. From his criticism of the law that is made ex parte by those in power and becomes necessarily coercive and precluding voluntary acceptance of social obligations, Borovoy turns to the law based on conventional norms established by common agreement and commonly supported and accepted. However, similarly to the "anarchist ideal", his approach offers an unlimited freedom to exercise human abilities, but fails to suggest any reasoned, specific, and consistent principles to serve as a basis of this law, and sticks to general and abstract formulas.

Keywords: *anarchism; law; individualism; authority; state; revolution; personality; liberty; society.*

Introduction

The very specific, power-centric [1] nature of the Russian state system has provoked various forms of reaction, from practical resistance (Pugachev's rebellion, Stepan Razin's uprising, the October Revolution, etc.) to deep reflections on freedom, self-government and anti-statism, which gave rise to the unique political theories of anarchism.[2] Neither Russian Marxists, nor conservatives (not to mention liberals) were able to demonstrate the same level of originality and novelty, which transformed Russian anarchism into a global trend. "Anarchism has been largely invented by the Russians," [3] summarized the prominent existentialist thinker Nikolai Berdyaev more than half a century ago.

Yet, even for the majority of the educated public the words "a Russian anarchist theorist" are likely to bring to mind two or three names at best: Michael Bakunin, Peter Kropotkin and, perhaps, Leo Tolstoy (though in his case the literary genius would clearly (albeit, rather unfairly) outshine his social influence). Certainly, the above anarchists are well known all around the world, not only in Russia. However, this list does need to be expanded, since the history of Russian thought includes some

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1 [All references are from the sources in Russian, unless indicated otherwise]. FURSOV, A. I., PIVOVAROV, Yu. S., The Russian System: Genesis, Structure, and Functioning: (Theses and Working Hypotheses). In: *The Russian Historical Journal*, 1998, V. 1, № 3.; PIVOVAROV, Yu.S., FURSOV, A.I., The Russian System and Reforms. In: *Pro et Contra*, vol. 4, 1999, № 4.

2 RYABOV, P. V., Philosophy of Postclassical Russian Anarchism – Terra Incognita. In: *Prepodavatel XXI Vek*, 2009, Nr. 3, p. 290.

3 BERDYAEV, N., *The Russian Idea*. St. Petersburg, 2008, p. 182. All translations from Russian are mine (author's), unless indicated otherwise

names which have long remained eclipsed by recognized classics despite their impressive theoretical contribution and civic courage.[4] One such unfairly forgotten name is Alexei Borovoy (1875–1935), philosopher, professor, gifted musician,[5] historian and literary critic. Having blended the national fundamentals with the European political tradition in his teachings, he managed to enrich Russian tradition of law and sociology.[6]

However, despite the existence of sizable archive materials related to Borovoy (the thinker's personal archives in the Russian State Archive of Literature and Arts (RGALI) consist of more than 50,000 pages) [7] Russian researchers have never studied his creative legacy in sufficient detail.

There are several reasons for this lack of attention. During the Soviet era, anarchism was mainly viewed as something that Bolsheviks had to struggle against. Accordingly, the unsuccessful (from a practical point of view) post-classical anarchist tradition to which Borovoy belonged failed to generate widespread interest in the academic community. The same fate befell Borovoy's "anarcho-humanism", which was closer to individualistic anarchism [8] that proved to be just as unsuccessful in the actual revolutionary struggle.

In modern Russia, the situation has been gradually changing, but a systematic overview of the thinker's political and legal views is lacking still. The only study with a historical and legal analysis of Russian anarchism in the post-classical period [9] that examines, among others, the teachings of Alexei Borovoy, is the doctoral thesis by Sergei Udartsev (1992).[10] The paper presents the most complete classification of anarchist theories in Russia to date, including, in particular, a general overview of Borovoy's political and legal views in the context of Russian anarchist teachings.

Besides Udartsev, significant contribution to the study of anarcho-humanism has also been made by Ryabov.[11] His publications are characterized by original interpretations of the fundamentals of Borovoy's doctrine, as well as by a dedicated study of selected archive materials and episodic details of Borovoy's personal and creative biography. These works provide a starting point for a more systematic and profound study of Borovoy's views as they shed more light on his worldview and help to correctly place his philosophy within the anarchist system. Proceeding from the works of Udartsev and Ryabov, we can focus on analyzing the political and legal aspect that is most important for us, i.e., Borovoy's views on the state, the law, and the related categories.

Certain aspects of Borovoy's teachings or a brief overview of his legacy can be found in the works of Tsovma,[12] Talerov,[13]

[4] Many of his contemporaries characterized Borovoy as an outstanding man in their memoirs: his brilliant mind and integrity won him the recognition of the legendary Emma Goldman. GOLDMAN, E., *Living My Life*, vol. 2, NYC, 1931, p. 927, [in English]. Even Nestor Makhno, who was generally quite skeptical about "urban anarchist intellectuals", admired his gift of oratory. MAKHNO, N. I., *Memoirs. Book II. Under the Blows of the Counterrevolution*. Paris, 1936, p. 58, [in English].

[5] In his young years, Borovoy even wanted to become a professional musician, but his interest in social activity put an end to those plans. (For details see *Music in Borovoy's Worldview*, Pryamukhino Readings. 2010, Moscow, 2012, pp. 40-64). "Alas! The man I was in those days thought too lightly of the pursuit that could have been my true vocation, the field in which I could truly find and fulfill myself."RGALI. Fund 1023. Inventory 1. Unit 164. "University". Sheet 107.

[6] Id. The Anarchist Philosophy of Alexei Borovoy (From the History of Russian Bergsonism). In: *Bulletin of the Immanuel Kant Baltic Federal University*, 2010, Nr. 6, p. 23.

[7] Only a fraction of which (~15%) has been published to date.

[8] See, for example: ARVICH, P., *The Russian Anarchists*. Chico, p. 56, [in English]; ALADYSHKIN, I. V., *The Individualist Anarchism Among Russian Intellectuals in the Second Half of the 19th Century – First Decade of 20th Century (based on Moscow and St. Petersburg materials)*. Dissertation for a degree in history. Ivanovo, 2006, p. 95.

[9] Post-classic anarchism or anarchism of the post-classic period is the classification commonly applied to theories and doctrines, which have been emerging since the beginning of the 20th century and focused on re-thinking the core principles of the anarchist theory developed by classic anarchist thinkers (mainly, Kropotkin) in the period between the French Revolution and the October Revolution (See: RYABOV, P. V., Philosophy of Postclassical Russian Anarchism — Terra Incognita. In: *Prepodavatel' XXI Vek*, 2009, Nr. 3; UDARTSEV, S. F., *Political and Legal Theory of Anarchism in Russia: History and Present*. A doctorate thesis for a degree in law. Moscow, 1992.).

[10] Id. *Political and Legal Theory of Anarchism in Russia: History and the Present State*. A doctorate thesis for a degree in law. Moscow, 1992.

[11] RYABOV, P. V., *The philosophy of classical anarchism (problem of personality)*. Moscow, 2007. Id. Philosophy of Postclassical Russian Anarchism — Terra Incognita. In: *Prepodavatel' XXI Vek*, 2009, Nr. 3, pp. 289–297; RUBLEV, D. I., RYABOV, P. V., Alexei Borovoy: The Man, the Thinker, the Anarchist. In: *Russia and the Modern World*, 2011, Nr. 2. Id. Mikhail Bakunin and Alexei Borovoy: Consonance and resonance. In: *Pryamukhino Readings,* 2007, Tver`, 2008. Id. 'My Past and Thoughts' of Alexei Borovoy. In: *Chelovek*, 2010, Nr. 3.Id. Aleksei Alekseevich Borovoy and his book "Anarchism". In: *A. A. Borovoy Anarchism*, Moscow, 2009. Id. Well forgotten old. Overview of archival Fund of the A. A. Borovoy RGALI. In: *Culturalstudies: the Digest*, 2009, Nr. 1 (48). Id. The Anarchist Philosophy of Alexei Borovoy (From the History of Russian Bergsonism). In: *Bulletin of the Immanuel Kant Baltic Federal University*, 2010, Nr. 6.Id. Alexei Borovoy and the Philosophy of Friedrich Nietzsche (From the History of Russian Nietzscheism in the Early 20th Century). In: *Prepodavatel' XXI vek*, 2010, Nr. 2, ch. 2. Id. The Russian Kantianism and neo-Kantianism of the Early 20th Century in Unpublished Memoirs of Alexei Borovoy. In: *The Kantian Collection*, 2010, Nr. 4. Id. The Romantic Anarchism of Alexei Borovoy (from the History of Russian Philosophy of Life). In: *History and Philosophy Yearbook* 2011, Moscow, IF RAN Publ., 2012, Nr. 1. Id. *Alexei Borovoy and Alexander Herzen. Pryamukhino Readings 2012*. Moscow, 2013, pp. 170–191.

[12] TCOVMA, M. A., Alexei Borovoy and Peter Kropotkin. In: *Writings of International scientific conference devoted to the 150 anniversary from the birthday of P. A. Kropotkin*. Nr. 3. P. A. Kropotkin and the revolutionary movement. Moscow, 2001.

[13] TALEROV, P. I., About the life and work of anarchist — humanist Alexei Borovoy. In: *Bulletin of Moscow University*, Ser. 12, Political science, 2008, Nr. 3.

and Oleinikov.[14] Borovoy also figures in the works of Arefyev,[15] Krivenky,[16] Aladyshkin,[17] and Rublev[18] on the history, classification and evolution of Russian anarchism, which include, in addition to political doctrines of Mikhail Bakunin and Peter Kropotkin that have become the mainstream of Soviet historiography, references to the works of foreign classics of anarchism and Russian anti-state theorists of the early 20th century.[19]

The anarcho-humanist theory and Alexei Borovoy himself are still virtually unknown outside Russia. Relevant English publications are limited to several works[20] with episodic references to Borovoy's biography and views. As for his theoretical legacy, the only work translated into English is *Anarchism and Law*, a single chapter from his opus magnum, *Anarchism* (1918).[21]

This article represents the first comprehensive study of anarcho-humanism to be published in English.

In the first paragraph we discuss the background that was instrumental in shaping the distinctive views and beliefs of Alexei Borovoy, the evolution of his philosophy and the main stages thereof, and the existing approaches to the classification of his ideas. The second chapter analyzes the fundamentals of the philosophical paradigm of anarcho-humanism, which explain the unique nature of his political and legal views. Finally, in the third chapter we present the political and legal concepts of Borovoy's doctrine and analyze his views on the state, the law and the associated social institutions and categories. Based on the above, we identify the distinctive features of anarcho--humanism and determine its place in the context of main anarchist strains through comparison with the traditional forms of Russian and foreign anarchism.

1. Background of Borovoy's anarchism

In this chapter, we follow the formation of Borovoy's beliefs, discuss the intellectual origins of his teachings and try to conceptualize his political and legal views. To do so, it will be essential to determine the place of Borovoy in the anarchist system of coordinates in accordance with the current classification of Russian anarchism and find a correct name for his theory.

At present, there is no established opinion on the classification of Borovoy's philosophy and his adherence to any specific strain of anarchism. In fact, the conceptualization of views expressed by an advocate of anti-rationalism and anti-scientism, who postulated the primacy of the individual and personal freedom while simultaneously using the class rhetoric and calling for the widespread application of syndicalist tactics, appears rather challenging.

Udartsev classified Borovoy's philosophy as neoclassical anarchism of the post-classical period and defined it as a separate school of thought: anarcho-humanism.[22] The definition was upheld by Oleinikov in his works.[23] The above classification appears justified, considering that Chapter IX of *Anarchism* is also entitled: *Anarchism as a Social Ideal (Anarcho-Humanism)*. Udartsev also introduced separate categories of individualist anarchists and anarcho-syndicalists and classified them as another (distinctive from Borovoy) branch of post-classical anarchism — neoclassical anarchism. As for Borovoy himself, in addition to numerous references to individualism that are discussed below, in one of his early books he referred to "revolutionary syndicalism" as a concept dear to him[24] and proposed it as an alternative to the bourgeois order. Moreover, his activity was always closely connected with anarcho-syndicalism: in 1918, he published the *Zhizn* (The Life)[25] newspaper together with a prominent anarcho-syndicalist Dmitry Novomirsky, was one of the leaders of the Moscow Union of Ideological Propaganda of Anarchism with a group of other anarcho-syndicalists and worked as editor-in-chief of the anarcho-syndicalist publishing house *Golos Truda* (The Voice of Labor). Considering the above, the classification of Borovoy's philosophy into a separate school of thought and, generally, the segregation of a large number of different anarchist trends may appear debatable in view of the scarcity of anarchist theorists in the early 20th century.

The excessive branching of anarchism types tends to make any generalization unproductive; therefore, the attempt of some researchers to include Borovoy's views into the larger schools of anarcho-syndicalism or individualist anarchism is easily understandable. Aladyshkin classified Borovoy as a representative of

[14] OLEYNIKOV, D. I., The Anarcho-Humanism of A. Borovoy. In: *Obshchina*, 1990, Nr. 47, pp. 4–6.
[15] AREF`EV, M.A., *The philosophy of anarchism: Essays on the history*. Saint Petersburg, 1992.
[16] KRIVEN`KII`, V., Borovoy Alexei Alekseevich. In: *Political parties in Russia. The end of XIX – first third XX century*, Encyclopedia, Moscow, 1996.
[17] ALADYSHKIN, I. V., *The Individualist Anarchism Among Russian Intellectuals in the Second Half of the 19th Century – First Decade of 20th Century (based on Moscow and St. Petersburg materials)*. Dissertation for a degree in history. Ivanovo, 2006.
[18] RUBLYOV, D. I., The issue of "intelligentsia and revolution" in anarchist journalism of the early twentieth century. In: *Russian history*, Nr. 3, 2006. Id. The Moscow anarchists in the middle of the 1920-1930 s (Political struggle in conditions of repression). In: *Pryamukhino Readings 2008*,Tver`, 2010.
[19] RYABOV, P. V., *The Problem of Individual in the Classical Anarchist Philosophy*: dissertation for a degree in philosophy. Moscow, 1996. [online source]. disserCat – electronic dissertation library. URL: http://www.dissercat.com/content/problema-lichnosti-v-filosofii-klassicheskogo-anarkhizma (query date: 15. 05. 2019).
[20] ARVICH, P., *The Russian Anarchists*. Chico, 2006, [in English]; GOODWIN, J., *Confronting Dostoevsky's Demons: Anarchism and the Specter of Bakunin in Twentieth-century Russia by Peter Lang*, 2010, [in English]; DUBROVNIK, A.,Alexei Borovoy (from individualism to the Platform). In: *KSL: Bulletin of the Kate Sharpley Library,* Nr. 55-56, October 2008 [Double issue]; GURYANOVA, N., *The Aesthetics of Anarchy: Art and Ideology in the Early Russian Avant--Garde First Edition*. Oakland, 2012; AMSTER, R., *Anarchism Today*. Praeger, 2012, [in English];Id. *Breaking the Law: Anti-Authoritarian Visions of Crime and Justice.* In: *The New Formulation*, pp. 12-17, [in English].
[21] BOROVOY, A. A., *Anarchism & law.* Buffalo: Friends of Malatesta, *CA. early-1970s*. 8vo, Wraps, 7 p.
[22] UDARTSEV, S. F., *Political and Legal Theory of Anarchism in Russia: History and Present*. A doctorate thesis for a degree in law, Moscow, 1992. p. 164.
[23] OLEYNIKOV, D. I., The Anarcho-Humanism of A. Borovoy. In: *Obshchina*, 1991, Nr. 49, p. 3.
[24] BOROVOY, A. A., *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)*. Moscow, 1917, p. 3.
[25] RUBLEV, D. I., RYABOV, P. V., Alexei Borovoy: The Man, the Thinker, the Anarchist. In: *Russia and the Modern World*, 2011, Nr. 2. p. 225.

an individualist school in his thesis paper and argued that Borovoy made references to syndicalism mainly as a tactical move:

"We must draw a clear line here: revolutionary syndicalism is mainly about tactics, it is a plan of action, while individualist anarchism is a philosophy in the broadest meaning of the word, it defines an individual's beliefs, including general issues of our place and role in the world around us. Accordingly, Borovoy's dalliance with syndicalism does not contradict his anarcho-individualistic beliefs, it simply provides answers to tactical challenges of revolutionary struggle."[26]

This position is also shared by Krivenky.[27]

However, it would be more appropriate to put apart Borovoy's position on the majority of substantial issues[28] rather than to attempt to squeeze it within the strict confines of the traditional classification. For example, philosopher Ryabov, who tried to avoid putting a specific political tag on the thinker's views and did not deny his closeness to the anarcho--individualistic tradition,[29] still segregated his philosophy from major schools of thought and believed that the most appropriate definition would be "romantic anarchism":

"The anarchism of Borovoy, as a philosopher who evolved in the mainstream of neo-romantic culture through the philosophy of life towards existentialism, should be most accurately called romantic anarchism. This definition is much more precise, integral and substantial than any other tag traditionally put on it, because his theory represents a synthesis of individualist anarchism with its apotheosis of an individual and anarcho-syndicalism with its libertarian and socialist program and the apology of a mass self--managing labor movement, whereby syndicalist ideas and methods are expanded and applied to the struggle of "working intelligentsia" for their rights."[30]

Given the above methodological challenges combined with the application of the most popular temporal classification[31] of anarchist theories, the academic community generally agrees on placing Borovoy among representatives of post-classical anarchism.[32] None of the researches question the originality of Borovoy's philosophy, while some even speak of a new worldview paradigm.[33] On our part, we suggest considering Borovoy's teachings as a separate school of thought and applying the self-designation of anarcho-humanism that was coined by Borovoy to describe his philosophy and subsequently taken up by Udartsev. His theory is too distinctive to fit any of the commonly identified large schools of thought. However, the term "humanism" should be essentially seen without any liberal connotations. Borovoy's philosophy is really centered around the individual as an element of society, nation, and mankind. The development of individuality (not to be confused with individualism), creativity, conscience and culture in a broad sense, the rights and freedoms of every human being and their relations with other human beings on the basis thereof, as well as love and cooperativeness are significant elements of his theory. Borovoy was a lawyer; accordingly, he believed that the expansion of human rights and freedoms, "a creative liberation of personality" and the removal of any hindrances thereto were extremely important for the development of each individual. At the same time, Borovoy did not share the traditional associations of humanism with anthropocentrism, rationalism, and finalism.

The formation of Borovoy as a thinker coincided with the end of the 19th century, the period of the most productive cross-influence of different philosophic traditions and political ideologies. In his student years, Borovoy became fascinated by Marxism: later, he himself spoke of it as a kind of "baptism" and noted that he had "a religious belief" in the theory of economic materialism,[34] although piousness had always been foreign to his active and skeptical mind.[35]

At that time, Borovoy began publishing articles, mainly on economics, in Moscow newspapers.[36] Later, political economy would be one of his most successful courses red in the Moscow University where he would remain to teach as one of its best graduates. But his personal biography was going to share

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[26] ALADYSHKIN, I. V., *The Individualist Anarchism Among Russian Intellectuals in the Second Half of the 19th Century – First Decade of 20th Century (based on Moscow and St. Petersburg materials)*. Dissertationfor a degree in history. Ivanovo, 2006, p. 95.

[27] KRIVEN`KII`, V. V., Anarchists. In: *Political parties in Russia. The end of XIX — first third XX century*. Moscow, 1996, p. 218.

[28] Core philosophical principles, his views on the individual, the state and the law, etc.

[29] RYABOV, P. V., *The Problem of Individual in the Classical Anarchist Philosophy*: dissertation for a degree in philosophy. Moscow, 1996. [online source]. disserCat – electronic dissertation library. URL: http://www.dissercat.com/content/problema-lichnosti-v-filosofii-klassicheskogo-anarkhizma (query date: 15. 05. 2019).

[30] Id. The Romantic Anarchism of Alexei Borovoy (from the History of Russian Philosophy of Life). In: *History and Philosophy Yearbook,* 2011, Moscow, 2012, Nr. 1, p. 422.

[31] The most detailed classification is presented by Udartsev. It is based on the evolutionary principle: different currents within the anarchist movement are structured chronologically by their specific features and divided into two major phases: classic and post-classic. See: UDARTSEV, S. F., *Political and legal theory of anarchism in Russia: history and modernity*. A thesis for a degree in law. Moscow, 1992, p. 166.

[32] RUBLEV, D. I., RYABOV, P. V., Alexei Borovoy: The Man, the Thinker, the Anarchist. In: *Russia and the Modern World*, 2011, Nr. 2. p. 235.Id. *Political and Legal Theory of Anarchism in Russia: History and Present*. A doctorate thesis for a degree in law. Moscow, 1992, p. 275.

[33] Ibid.

[34] BOROVOY, A. A., My Life. Memoirs. In: *Chelovek*, 2010, Nr. 3, p. 141.

[35] Borovoy himself wrote that he had been brought up in an atheist family (RGALI. Fund 1023. Inventory 1.Unit 167. "How I Became an Anarchist". Sheet 13). He actually declared war on religious outlook and described it as "the acceptance of ultimate pessimism", irrespective of whether "pessimism is a free and organic product of our life or a purely external effect of fear." He believed it to be incompatible with anarchist worldview, which is "non-religious in itself." In practice, however, his relationship with religion was much more complex than just a one-dimensional militant atheism. The mystical, the musical, and the irrational – all of these feelings so similar to the religious feeling were close to his view of the world.
RGALI. Fund 1023. Inventory 1. Unit 138. "Arguments about religion". Sheet. 2. In: Id. *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)*. Moscow, 1917, p. 156.

[36] RGALI. Fund 1023. Inventory 1. Units 2–4.

the fate of Marxism in the history of post-revolutionary (after the events of 1848–1849) Europe. The skepticism promoted by philosophical teachings of Karl Marx and Friedrich Engels was now focused on their own works, and the new generation of thinkers, such as Friedrich Nietzsche and Henry Bergson, prompted the society to question the principles of dialectic materialism and class socialism. The ideas of Nietzsche made Borovoy re-examine his Marxist beliefs but Nietzscheanism also failed to provide him with comprehensive answers. It was a very painful period for Borovoy, the only time in his life when he had to struggle with thoughts of suicide.

The young Privatdozent[37] managed to overcome his depression during a scientific business trip to Europe[38] in 1904, where his initial fascination with Marxism and Nietzscheanism was ousted by anarchism. "No one taught anarchism to me, didn't persuade me, didn't infect me," he wrote in his memoirs much later.

> *"Suddenly, out of some unknown depths a great, well-formed, enlightening, united thought was born in me. With unusual clarity, with victorious cogency a feeling of an attitude that was new to me was born in me. […] I stood up from the bench in the Luxembourg Garden as an enlightened, passionate, uncompromising anarchist, and I still remain one."*[39]

Until then, his knowledge of anti-state theories had been limited to *Anarchism*, a recently published book by Paul Eltzbacher.

In the years of the first Russian revolution, Borovoy returned to his homeland. He was involved in the publication of "*Pereval*", a modernist magazine in Moscow and became the head of an anarchist publishing house, "*Logos*". At that time, Borovoy highlighted the connection between his beliefs and the latest movements of European philosophical and political thought. After his "revelation",[40] Max Stirner,[41] an extreme German individualist, became the first thinker with the ideas that were in tune with Borovoy's new aspirations. He saw the "explosive force" of Stirner in the "apotheosis of unrestricted Ego" and "the iron logic of 'egoism'."[42] The two Germans, Nietzsche and Stirner, strongly influenced the style of Borovoy's writings: in his early theoretical works he often quoted[43] or made references to Nietzsche, while his esthetic views followed those of Stirner, from whom he adopted the notion of 'the Unique' (*Der Einzige*).[44]

The most important work of this period written by Borovoy after his conversion to anti-statism and later described by him as "significant for anarchist literature in general"[45] was *The Social Ideals of the Modern Humanity. Liberalism. Socialism. Anarchism* (1906) — his first study of anarchism.[46] Theoretical constructs formulated in his book combine the general critical anarchist tradition (which opposes anarchism to dominant European movements and theories) with the extreme individualistic attitudes within the anti-state platform. According to Borovoy, "the philosophy of liberalism is the philosophy of privileged classes, while socialism is the philosophy of the suffering proletariat." As for anarchism, it is "the philosophy of an awakened individual" with "the ultimate liberation of an individual" as its "core idea".[47] The liberation can be achieved through a gradual elimination of any imposed rules and formal, senseless restrictions related to suprapersonal establishments and institutes: Borovoy criticized "the People" of Rousseau and the capitalist "freedom" of Constant, the objectivism of Comte and the Marxian class theory. In this, he came very close to nominalism in his negation of objectified communes and establishments.[48]

According to Borovoy, the principal condition of personal liberation is the technological progress leading to integrative labor:

> *"The process of functional differentiation and the division of labor will give way to another, colossal process, the process of integration, the process of the new aggregation of functions. Every individual will be able to produce any requisite product, alone and by themselves. No one will need any assistants, any specialists working in different industries. Each individual will become an all-sufficient economic unit."*[49]

His anarcho-humanism refocused the legacy of industrial and progressive ideas of unexorcized Marxism on attaining an opposite goal — the maximum liberation of an individual from any social influence. For a "born individualist",[50] the focus

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[37] He was Privatdozent of the Moscow State University since 1902, Professor in 1919–1922.

[38] In 1903–1905, Borovoy lived in Western Europe and worked on his doctorate thesis, *The History of Individual Freedom in France*. However, he was subsequently forbidden to defend his thesis, because the representatives of the Constitutional Democratic Party found it extremely radical.

[39] BOROVOY, A. A, My Life. Memoirs. In: *Chelovek*, 2010, Nr. 3, p. 137.

[40] It was prepared by Rousseau and Nietzsche, according to Borovoy. RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet. 38.

[41] "On that happy day I fished out a forgotten Eltzbacher from a pile of books. Next day, I asked for Godwin and Stirner in the Bibliothèque Nationale and sat down to study anarchism." In: RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet 38.

[42] BOROVOY, A. A, My Life. *Memoirs*; RGALI. Fund 1023. Inventory 1. Unit 168. Sheet 96.

[43] See, for example: Id. *Revolutionary Worldview*. Moscow, 1907, p. 5, 13 andId. *Revolutionary Creativity and Parliament (Revolutionary Syndicalism*. Moscow, 1917, p. 17.

[44] Id. *Revolutionary Worldview*. Moscow, 1907, p. 9.; RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet 39.

[45] RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet 38.

[46] Initially written as a lecture, it became the first overt declaration of anarchism in Russia. The lecture was given in the Moscow History Museum on 5 April 1906.

[47] BOROVOY, A. A, *Social Ideals of the Modern Humanity. Liberalism. Socialism. Anarchism*. Moscow, 1906, p. 45.

[48] See: Id. *Social Ideals of the Modern Humanity. Liberalism. Socialism. Anarchism*. Moscow, 1906.

[49] Id. *Social Ideals of the Modern Humanity. Liberalism. Socialism. Anarchism*, p. 54.

[50] RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet 12.
Borovoy recognizes that his infatuation with Lassalle in his early student days and the acquaintance with Leibniz's theory of "the harmonious movement of independent, ever active monads" were both instrumental in "strengthening his individualism." RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheets 13–14.

on the individual will always be a *prius*. Later, Borovoy moved away from extreme individualist positions,[51] and his techno--optimism was replaced with anti-scientist and existentialist views.[52] But at that stage, his connection with Nietzscheanism and the works of Stirner was obvious, and before long it was logically developed in Borovoy's next landmark book, *Revolutionary Worldview* (1907), which defined his individualistic habitus ["collective truth is a lie"][53] as a philosopher, but permanently alienated him from liberals. He wrote it as a eulogy of revolutionarism and the creative force of an individual, and throughout the book he denounced "peaceful reformers" and the so-called "real politics" along with external determinism represented by historical necessity and historical laws.[54]

Borovoy's philosophical paradigm was strongly influenced by the romantic pathos of above-mentioned Jean-Jacques Rousseau,[55] in whose works the revolt against civilization and the denial of many traditional liberal values was combined with an "intuitive", natural understanding. Anti-parliamentary rhetoric clearly based on Rousseau's arguments[56] had a special place in Borovoy's teachings. It found expression in his third major book, *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)* (1907). Although Borovoy's general attitude to the works of the French encyclopaedistremained critical,[57] he borrowed from Rousseau certain irrationalistphilosophical premises, further developed and enhanced in Russian and European literature, including Pushkin, Goethe, Dostoevsky[58] and early Russian symbolists.[59]

Speaking of the influence of his compatriots, Borovoy traced his anarchist genealogy mainly to Mikhail Bakunin,[60] "the sublime thinker and leader" whom he saw as "an absolute and indisputable lodestar".[61] In addition to Bakunin's rebellious esthetics, Borovoy adopted his dialectical structure, his glorification of life, his worship of the human being and the critique of scientism, and the romanticisation of the world of politics. "I am, perhaps, the last actual romantic of our time,"[62] Borovoy wrote later in his memoirs. The above assessment first appeared in *Revolutionary Worldview* and reached its climax in *Anarchism* (1918), *Individual and Society in the Anarchist Worldview* (1920) and *The Bakunin Myth* (1925), while his essay *Bakunin* (1926)[63] written for a collection of essays to commemorate the 100th anniversary of the classic has been acclaimed by researchers as the best overview and interpretation of Bakunin's legacy.[64]

The last of the pillars on which Borovoy based his teachings was Bergsonism, his "greatest… philosophical interest" and "the fourth after dialectical materialism, Nietzscheanism and Bakunism".[65] Its influence was felt in his work starting from 1910 s, when he had to flee from the autocratic justice[66] and settled once again in France. There, in Paris, the conceptual backbone of Borovoy's philosophy took its final shape. Borovoy adopted the ideas of freedom and creativity of life, expanded ir-

[51] "I only gave up individualist anarchism in late 1907, under the influence of practical anarcho-syndicalism in France." In: RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet 38.

[52] Later, when Borovoy was working on his own original doctrine and moving away from rigid individualist constructions, he wrote: "Stirnerianism is a fruitless wandering in the wilds of an empty ego, while Nietzscheanism is a doleful cry of heroic pessimism." In: Id. *Anarchism.* Moscow, 2011, pp. 17-18.

[53] BOROVOY, A.A., *Revolutionary Worldview*. Moscow, 1907, p. 12.

[54] Ibid. p. 46.

[55] RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet 22.

[56] See, for example: Id. *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)*. Moscow, 1917. Borovoy negates the exercise of power via representatives. In this he follows Jean-Jacques Rousseau, who advocated direct democracy and believed that only the people should exercise sovereignty (i.e., the power to make the laws): "Every law the people has not ratified in person is null and void — is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing. The use it makes of the short moments of liberty it enjoys shows indeed that it deserves to lose them. The idea of representation is modern; it comes to us from feudal government, from that iniquitous and absurd system which degrades humanity and dishonors the name of man." (ROUSSEAU, J.-J., On *the Social Contract*. Translation from French by G.D.H. Cole. New York, 2003, p. 65).

[57] RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet 22.

[58] RGALI. Fund 1023. Inventory 1. Unit 164. "University". Sheets 94-95. F.M. Dostoevsky had a special place among writers who influenced Borovoy's beliefs. At the end of his creative career, Borovoy wrote a book on Dostoevsky that remained unpublished. The manuscript book is preserved in RGALI archives (Fund 1023, Inventory 1, Unit 113). "An outstanding mind and one of my favorite thinkers" — the high recognition of Dostoevsky by an anarchist required a certain amount of civil courage as Dostoevsky was out of favor with orthodox anarchists. Moreover, the Soviet Union waged a widespread war against "dostoevschina" (Dostoyevskian philosophy) seen as a reactionary outlook (See: RUBLEV, D. I., RYABOV, P. V., Alexei Borovoy: The Man, the Thinker, the Anarchist. In: *Russia and the Modern World*, 2011, Nr. 2, p. 231). Borovoy also argued that the works of Dostoevsky reflected the ideas of Stirner (See: BOROVOY, A. A., OTVERZHENNY, N., *The Bakunin Myth*. Moscow, 1925, pp. 139–140).

[59] RGALI. Fund 1023. Inventory 1. Unit 164. "University'. Sheet 107.

[60] BOROVOY, A. A, My Life. Memoirs. In: *Chelovek*, 2010, Nr. 3, p. 152.

[61] RYABOV, P. V., *Alexei Borovoy and Alexander Herzen*. Pryamukhino Readings 2012. Moscow, 2012, p. 178.

[62] RGALI. Fund 1023. Inventory 1. Unit 173. Sheet 100.

[63] BOROVOY, A. A., *To Michael Bakunin (1876–1926): An Outline of the History of Anarchist Movement in Russia*: Collection of Articles. Moscow, 1926.

[64] Id. *The Problem of Individual in the Classical Anarchist Philosophy*: dissertation for a degree in philosophy. Moscow, 1996. [online source]. disserCat – electronic dissertation library. URL: http://www.dissercat.com/content/problema-lichnosti-v-filosofii-klassicheskogo-anarkhizma (query date: 15. 05. 2019).

[65] Id. *The Anarchist Philosophy of Alexei Borovoy (From the History of Russian Bergsonism)*, p. 1.

[66] "Soon the administration decided to restrict my lecturing. <…> I was arrested twice and banned from reading lectures at open courses and from teaching at commercial colleges. In 1911, I resigned from the University, not from solidarity with liberal professors but in protest against police intrusion. At the same time, I was charged by court for political pamphlets and the ideological leadership of the Logos Publishing House. The pending threat of imprisonment made me emigrate from Russia and settle in Paris." In: RGALI. Fund 1023. Inventory 1. Unit 838. Sheet. 9. (RUBLEV, D. I., RYABOV, P. V., Alexei Borovoy: The Man, the Thinker, the Anarchist. In: *Russia and the Modern World*, 2011, Nr. 2, p. 224).

rationalistic and personalistic motives and combined them with the consistent struggle for the liberation of an individual. He relied on the past achievements of numerous and often conflicting ideologies and constructions, from liberalism to class structure and revolutionary syndicalism. As for the latter, being inspired by variations by Georges Sorel[67] and early Robert Michels[68] (as could already be seen in his 1907 book, *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)*), Borovoy saw an alternative to the rationalistic doctrinism of parliamentary institutes and party bureaucracy in the creative force combining the spontaneity of life with a gradual personal liberation[69].

Thereby, schematically, the evolution of Borovoy's views and the theoretical basis of his philosophy could be presented as a kind of a Hegelian dialectical scheme: having started with a declaration of a Marxist "thesis", Borovoy then moved to its negation in the form of German individualist philosophy and Bakunin's destroying spirit, followed by the evolution to a synthesis blending the ideas of personalists, syndicalist practices and the works of Bergson.

The result was the concept of anarcho-humanism, called so by Borovoy himself in a chapter on the anarchist ideal in *Anarchism* (1918).

2. The philosophical basis of anarcho-humanism

The above synthesis was the origin of his specific philosophical paradigm, which provided a foundation to his political and legal concept and determined both the scope and the compositional structure of his political and legal views. Next, we discuss the mature views of Borovoy, which date mainly to the post--emigration period. However, despite all intellectual influences and metamorphoses, his worldview and, in particular, his philosophical principles were characterized by a certain consistency in his attitude towards individualism, dialectics, existentialism, etc.

From the proposition that the development of an individual's own nature and the external social environment is indefinite and continuous,[70] Borovoy proceeds to the thought that will become the basis of his philosophical paradigm: an individual's worldview is dynamic.[71] Anarchism as a pursuit of self-liberation through the negation of the reality is an intuitive property of all individuals; consequently, Borovoy sees it as a universal horizon of human development rather than a stand--alone social utopia project.

Therefore, for him the objective and mission of anarchist worldview are not limited to the return to nature or some miraculous transformation of human personality. On the contrary, Borovoy believes that "the historical progress is, at the same time, human progress"[72] and describes it as "the struggle of culture for culture"[73], whereby anarchism appears as "the successor of all previous liberation pursuits of the mankind."[74]

"Life is a dialectic process, a consecutive succession of organically joint affirmations and negations. Any affirmation carries elements of its own destruction; and a negation is a prerequisite of affirmation,"[75] said Borovoy. Accordingly, he bases his critique of contemporary political and legal forms and institutes on the principle of negative dialectics: he views the state, the parliament and the constitution as historical phenomena similar to any other social constructs; i.e., as temporary and transitional, as well as containing a potential need of negation in order to affirm a new form of public management.

Borovoy believes that human history as an endless struggle of an individual to become a fully-fledged political subject and enjoy an ever-increasing freedom never stops even after significant successes. He uses the parliament as an example to demonstrate how the fruits of victory would "become fetishistically rigid" and degenerate into enslaving bonds.[76] His vision reminds us of Bernstein's maxim expressed in his famous formula: the end is nothing, but the motion is everything,[77] where "nothing" is understood as a fundamental unattainability of the end rather than its insignificance. The politics can function only if focused on an end; therefore, the motion becomes everything, both the end and the means.

Borovoy uses the above progressist invariability of human development to emphasize humanistic pursuit of personal perfection and liberation of an individual from the external and artificial confines created by an individual's will. In his beliefs, the image of the future is not pre-programmed, and the progress towards this future is non-linear. Consequently, his anarchist theory does not include a detailed program, because Borovoy sees it as inappropriate: "The development of "ultimate" ideals is antinomic to the spirit of anarchism."[78] There is no limit for an individual's ascension towards perfection; similarly, "there will never appear such a positive social order that would put an end to the continuous evolution of human societies," concludes the theorist[79] in his hope for the spontaneous creativity of the political process and solutions prompted by life itself.

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[67] RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became Anarchist" Sheet 34.

[68] Borovoy knew Michels personally and corresponded with him. See: RGALI. Fund 1023. Inventory 1. Unit 519.; Id. *Revolutionary Creativity and Parliament (Revolutionary Syndicalism).* Moscow, 1917.

[69] These ideas will be further developed in the following works: *The Imaginary Crisis of Syndicalism* (1912), *Peace: Declaration of the Moscow Union of Ideological Propaganda of Anarchism* (1918), *The Problem of Individual in Kropotkin's Doctrine* (1922), *Power* (1935).

[70] BOROVOY, A. A., *Anarchism*. Moscow, 2011, p. 154.

[71] Ibid.

[72] Id. *Revolutionary Worldview*. Moscow, 1907, p. 54.

[73] BOROVOY, A. A., *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 65.

[74] Id. *Anarchism.* Moscow, 2011, p. 169.

[75] Id. *To Michael Bakunin (1876–1926): An Outline of the History of Anarchist Movement in Russia: Collection of Articles*. Moscow, 1926, p. 133.

[76] Id. *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)*. Moscow, 1917, p. 32.

[77] BERNSTEIN, E., *Die Voraussetzungen des Sozialismus und die Aufgaben der Sozialdemokratie.* Hamburg, 1984, p. 201, [auf Deutsch].

[78] BOROVOY, A. A, *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 41.

[79] BOROVOY, A.A., *To Michael Bakunin (1876–1926): An Outline of the History of Anarchist Movement in Russia: Collection of Articles*. Moscow, 1926, p. 137.

As opposed to state socialists, Borovoy insists that social evolution shall be only determined by its vector directed at personal liberation, instead of an ultimate program: thus, anarchism is a way but not the final point. This is the manifestation of the "Bergsonian" infinite process in a synthesis with Bakunin's "destroying spirit",[80] which is more important than any specific content, just as life is more important than any schemes.[81]

The latter explains why Borovoy is hostile to rationalism seen as the "supremacy of abstraction", a predetermined, "dead" outcome, a force blocking the diversity and unpredictability of human existence.[82] "An idea is always an abstraction and, consequently, a negation of real life. Science exists as a reflection of life, it has no life of its own; it records the conceptions, the notions of life, but not life itself […] The science thinks of life but does not conceive life,"[83] argues Borovoy, challenging the dogmatic pathos of the Enlightenment philosophy.

The recognition of an insoluble antinomy between the individual and the society that dooms human beings to an eternal strive for the balance of personal and collective interests provides an additional substantiation to Borovoy's position as anti-finalist and serves as the prerequisite for a dynamic concept of anarchism. The above antinomy means that "an individual has to negate, one by one, all of the social forms selected and affirmed thereby while being unable to exist without society."[84]

"Fatally stripped of any choice, a man is naturally rooted in the society that has produced him and left an indelible imprint thereon,"[85] but as social relations do not define the whole of an individual, there remains that ultimate indivisible '"core', which is an eternal rebel against the social."[86]

Having balanced accusations against collectivism and possible justifications thereof, Borovoy concludes that anarchism (as interpreted by syndicalists) is capable of taking into account collective interests and offering a compromise solution to the above antinomy[87]. He logically proceeds with the following theses (Table 1.):

Accusations	*Justifications*
- All known historical social forms has suppressed and restricted an individual. - In practice, social aims are more primitive than personal ones. - The burden of social problems deprives an individual of the ability to fully concentrate on their personal life. - Collectivism restricts the search for truth since truth is measured by social approval. - Within a group, an individual tends to limit personal responsibility. - Society lacks true reality.	- An individual simply cannot exist outside human society. - Relations with others are an inevitable product of a stubborn instinct of self-preservation. - An individual has more opportunities for self-realization in a broad social circle. - Social relations foster meaningful moral ideals. - Even human genius develops through relations with other people.

Borovoy believes that social evolution follows an upward spiral towards a vague ideal in the attempt to resolve the antinomy between an individual and the society and the resulting conflicts between freedom and responsibility, the law and morals, the mind and life, and so on. Should this evolution, i.e., the social progress and the alternation of political forms, stop, it will inevitably trigger a reaction: "The social process […] is the process of continuous personal liberation through the evolution of the society […] Anarchism builds its assertions on a new understanding of an individual based on the eternal and antagonistic motion thereof,"[88] concludes Borovoy. However, anarchism shall not be seen as some static ideal, the attainment of which could be perceived as an imaginary aim of human development, or as an incessant and meaningless "negation for the sake of negation". No, anarchism is a guidance, a path towards personal liberation, a worldview.

[80] The influence of Bakunin is obvious. "I strongly believe that the idea that no ultimate anarchist ideal is possible, the idea of "permanent revolution" should be the only natural conclusion from Bakunin's general philosophical theory," wrote Borovoy. For him, the main idea behind the historiosophy of the prominent revolutionary was the consistent negation of animality and the affirmation of humanity in the individual. In: Id. *To Michael Bakunin (1876–1926): An Outline of the History of Anarchist Movement in Russia: Collection of Articles*. Moscow, 1926, p. 137.

[81] Id. *Power. Anarchy and Power*. Moscow, 1922, p. 164.

[82] Id. *The mind and its contemporary critics. (The issue of new man*). In: *Nov*, 1914, Nr. 6–9, 21–24 January, pp. 2–3.; Id. The mind and its contemporary critics. (The issue of new man). In: *Nov*, 1914, Nr. 7, 22 January, p. 3. Quoted from: RUBLEV, D. I., RYABOV, P. V., Alexei Borovoy: The Man, the Thinker, the Anarchist. In: *Russia and the Modern World*, 2011, Nr. 2. pp. 221-229.

[83] Id. *To Michael Bakunin (1876–1926): An Outline of the History of Anarchist Movement in Russia: Collection of Articles*. Moscow, 1926, p. 145.

[84] Id. *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 23.

[85] Id. *To Michael Bakunin (1876–1926): An Outline of the History of Anarchist Movement in Russia: Collection of Articles*. Moscow, 1926, p. 150.

[86] Id. *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 24.

[87] However, Borovoy does not limit his criticism to "collective psyche" and collective truth that inevitably leads to an artificial enslavement of the individual. In the above theses, we find the critique of the dominant socialist and liberal ideologies: although both socialism and liberalism proclaim the primacy of the human person, in practice they create such forms of the political process and such political institutions that are inevitably brought into conflict with an individual by their statist nature.

[88] BOROVOY, A. A., *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 65.

Summing up the theses discussed above, there are three fundamental concepts underlying the philosophy developed by Borovoy: "anti-rationalism" (an apology of life), individualism (an apology of personal liberation and growth) and "dynamism" (an apology of motion).[89] The three pillars are interconnected, as a dynamic anarchist's view of the world is centered around an individual who can be gradually liberated from "jailers and whipmasters" only through active and consistent self-determination.

3. The issues of state, law and authority in Borovoy's theory

Upon initial examination, the general political principles of anarchism, as presented by Borovoy, appear rather expatiative and even apophetic, focused exclusively on negation. "While there are some irreconcilable differences between separate currents of anarchist thought, there is a certain minimum program," notes Borovoy.

> *"The series of principles include the negation of power, of coercive authority and, consequently, of any organization based on centralization and representation, […] the negation of the law and the state, […] the negation of political struggle, democracy and parliamentarism, […] the negation of capitalism."*[90]

But beyond the minimum program, the negation turns to anarchism itself. Borovoy adopts a critical stance towards representatives of European and American individualist anarchism (from Stirner to Tucker), rethinks the "rebellious" theory of Bakunin, and subjects the teachings of Kropotkin to a skeptical analysis: "Even the works of the most distinguished representatives of the anarchist doctrine surprise us by the weakness of their theoretical argumentation […] These books are written in their hearts' blood but they lack the relentless logic of the facts that can both touch and convince."

We will have a closer look at the self-criticism of anarchism when we pass to the analysis of Borovoy's views on specific social institutions. It should be noted that anarchist self-criticism was the main factor that led to the recognition of a separate, "post-classical" stage (first half of the 20th century) in the chronology of anarchism, being mainly a post-Kropotkin stage. World War I, steady growth of state invasion and other disturbing signs of an emerging new world order forced anarchist theorists, including Borovoy, to revise their modernist, positivist, and naively-progressist views.

At the same time, despite the revolutionary pathos of anarcho-humanism, its negative dialectics focused more on negation than on synthesis does not postulate the total "rejection" of other teachings and ideas. While denouncing the ideologies of liberalism and socialism as suffering from serious flaws, Borovoy is prepared to adapt the liberation themes of these two "social ideals" that "have emerged as a vital protest of an individual against various forms of oppression and coercion typical of previous social formations."[91] The same applies to rationalism: according to Borovoy, initially, these schools of thought used to be seen as "emancipators" but with time they degraded into an instrument of oppression and the "enslavement" of the individual. Starting from this premise in the best Marxist tradition, Borovoy comments: "The kingdom of absolute personal economic independence — and, consecutively, total personal liberation — must be preceded by a socialist regime."[92] Just as it would be impossible for the society to "leapfrog the liberalism and bourgeois forms of economy", the subsequent movement towards anarchism would be impossible without the stage of socialist transformations since many of the said transformations will become the basic elements on which the society of the future will be founded. "Instead of opposing the imminent social regime, all staunch anarchists must look forward to it and facilitate its emergence before fighting against it in the ultimate struggle,"[93] wrote Borovoy. On the one hand, this reasoning reflects the vestiges of Borovoy's Marxist beliefs characterized by a determinism that detracts from personal dignity; on the other hand, the dynamic nature of his philosophy and his acceptance of the logic of political progress represent a serious challenge to common interpretations of anarchism as a reductionist, regressive and purely destructive force.[94]

Borovoy's detailed "negative" ideological criticism can be found in his assessment of "the system of state" and institutional political forms that exist within that system and are engendered and guaranteed whereby.

According to him, the state is the main enemy of an individual, a point of view quite typical of an anarchist:

"The State is the coldest of all monsters (…) The State is always a one-sided, permanently aggressive organization of class interests."[95] Following Nietzsche in his characterization of the state as "the coldest of all monsters", Borovoy puts emphasis on the class nature and the aggressiveness of this social phenomenon.[96]

At the same time, "the State, which is basically evil, automatically carries within itself the cure against the historical evil. The State is doomed to destruction, it must disappear, as its very existence generates the feelings of protest, nurtures rebels

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[89] RYABOV, P. V., The Problem of Individual in the Classical Anarchist Philosophy: dissertation for a degree in philosophy. Moscow, 1996. [online source]. disserCat – electronic dissertation library. URL: http://www.dissercat.com/content/problema-lichnosti-v-filosofii-klassicheskogo-anarkhizma (query date: 15. 05. 2019).
Ryabov suggest replacing "dynamism" with "activism", but we believe that the first term is more relevant in the context of Borovoy's philosophy. In addition to activism, dynamism also includes other important notions, such as dialectics and processuality typical of his philosophic beliefs.

[90] BOROVOY, A. A., *Anarchism*. Moscow, 2011, p. 19.

[91] Id. *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 59.

[92] Id. *Social Ideals of the Modern Humanity. Liberalism. Socialism. Anarchism*. Moscow, 1906, p. 81.

[93] Ibid. p. 88.

[94] See, for example: MAMUT, L. S., *Statism and Anarchism as Types of Political Beliefs. The Pre-Marksist Period*. Moscow, 1989, p. 192.

[95] BOROVOY, A. A., My Life. Memoirs. In: *Chelovek*, 2010, Nr. 3, p. 148.

[96] Ibid.

and prepares the revolution,"[97] wrote Borovoy. Following in the steps of Bakunin, he speaks of the state using the abolitionist (*Aufhebung*) rhetoric borrowed from Hegelianism.

But Borovoy goes on to expand the definition of "statehood" and engages in debates "in absentia" with Kropotkin on several of the latter's positions. He argues that the state is the result of a variety of factors, including conquest, the development of social culture, and the self-identification of people who raise the society to a new level.

The historic concept of Kropotkin, his views on the origins of the state and his idealization of "any communes, even those standing at the lowest step"[98] are the main objects of Borovoy's criticism. He rejects such an interpretation and points out that "in some of the pre-state forms we find the same ability to kill a free individual and free creativity as in the modern state".

> *"And certainly, the reasons behind the emergence of the state described by Kropotkin as the eternal gravedigger of free society, are much deeper than those suggested by Kropotkin. The society of truly free individuals cannot produce slavery; a truly free commune would never develop into a slave state,"*[99]

concludes Borovoy. For him, Kropotkin's almost mechanistic idolization of the masses, seen by the classic as the subject of history as opposed to individual, is associated with the risk of infringement on individuality that is justified by the logic of scientism: "An individual as an independent creative agent of history is openly erased […] before the force that can be called the true center of [Kropotkin's] anarchist worldview, the dominant idea of his sociological thought – the creative role of the masses."[100]

Borovoy also points out that, although necessary historically, the state quickly transforms itself into an institute of power, which strives to overcome and suppress any other forms of self-realization[101]. Similarly to pervious stages of human development, the state has some useful functions ("the State is as necessary, as the primeval brutality of men, their initial narrow-mindedness, as the long theological wondering of mankind")[102] but it does not cease to exist when this utilitarian principle is realized.

Borovoy believes that at a certain point the state begins to reproduce power by psychological, rather than disciplinarian means. Initially power appears as a logical construction, while institutional and normative systems emerge at a later stage. To some extent, this underlying assumption behind Borovoy's anarchism presages ideas developed later by Michel Foucault in his disciplinarian theory of power, as well as Erich Fromm's views on social character types:

> *"The first notion of power is born from spontaneous, non-conscious hypostatization of abstractions, mental dispositions, and instinctively developed relations into self-sufficient, supra-individual substances — the realities that ultimately subject their own creators, dominate and govern their will. Surrounded by unfathomable fetishism, the man who owns absolutely everything in this "reality", whose will has gradually created all attributes of this vibrant and permanently moving "reality" throughout the motley course of history, ultimately becomes the first victim thereof."*[103]

Anarcho-humanism is just as skeptical towards the "natural state" as towards the society in which social relations are governed by norms upheld by the institutes of state coercion. "The microbes of power are scattered across all historic stages of human society. The legends of a "golden age" […] were dispelled long ago,"[104] writes Borovoy, looking back to the origins of human psyche, a psyche which demonstrated willpower while still at an embryonic stage.

Borovoy believes that the anarchist struggle against the state as the quintessence of "organized power" represents the fight against the form of extreme fetishism typical of human society. The deconstruction of "social fetishes" is a theme with clear Stirnerian origins. This theme has determined the system of Borovoy's views from practically the very beginning of his philosophical career. Besides the state, Borovoy sees "social fetishes" in legislation, religion, morals and so on; he sees danger in their claims of being peremptory, absolute and self-sufficient with respect to an individual despite being essentially the products thereof.[105]

From these positions, Borovoy criticizes elements of the contemporary state, such as the intrinsically repressive judicial system and the closely related, biased idea of "justice", both hiding behind the abstract "common good", which is just another contemporary fetish.

> *"There is no vile tyranny, no heavy oppression that cannot be justified with the broad and flexible formula of "common good". It has been taken up as a slogan by all kinds of regimes to cover exceptional means, emergency tribunals, courts-martial, administrative exiles and banishments,"*

writes Borovoy. He argues that courts, the police, prisons and, *a fortiori*, censorship all limit personal and political freedoms, one by one, under the pretext of common benefit for society as a whole (although the said benefit is absolutely unattainable except on anarchist principles), while, in fact, they do it to maintain the political domination of the state. In this, Borovoy's anarchist project is utterly humanistic (he explicitly condemns capital punishment: "if the idea of a court in general is repugnant to a developed human mind, then capital punish-

[97] Ibid. p. 160.
[98] Id. *Anarchism*. Moscow, 2011, pp. 66-67.
[99] Ibid. p. 65.
[100] Id. *The Problems of Individual in Kropotkin's Doctrine. Petr Kropotkin*. Collection of Articles. Eds A. Borovoy, N. Lebedev. Petrograd, Moscow, 1922, p. 33.
[101] Id. *Anarchism*. Moscow, 2011, pp. 136–137.
[102] Id. *To Michael Bakunin (1876–1926): An Outline of the History of Anarchist Movement in Russia: Collection of Articles*, p. 160.
[103] Id. *Power. Anarchy and Power.* Moscow, 1992, p. 154.
[104] Id. *To Michael Bakunin (1876–1926): An Outline of the History of Anarchist Movement in Russia: Collection of Articles*. Moscow, 1926, p. 152.
[105] However, this does not apply to social regulators as such, since Borovoy suggests a completely different basis (other than the state) for them.

ment is definitely beyond everything human")[106] and consistent: he opposes any administration, even in the sphere of cultural and educational regulation, and argues that "the struggle against filth and tastelessness must be left to education instead of censorship."[107]

However, the strength of "our traditional empirical beliefs in the supernatural force of various forms of "power" (the law, legislation, State and so on)" makes it problematic to oppose this domination. Moreover, Borovoy believes that even "the knowledge of mysterious processes which constitute the essence of power cannot provide men with the weapons needed to overcome them psychologically", because its might is founded on three aspects of social reality:

1) the involvement of an indefinite multitude of individual aspirations in the processes which drive the momentum of power;
2) the long-term continuity of these processes; and
3) their inestimable disciplinary importance.[108]

In his opinion, religion also actively promotes the preservation of the above system. In his work *Reflections on Religion* (1920), Borovoy argues that a religious worldview is not necessarily related to any specific confession; however, it always requires "the negation by individuals of their identity and an awareness of themselves only as a part of a common whole" and, consequently, it "dictates passiveness and empty rhetoric."[109]

According to Borovoy, the recognition of the artificial and, in this particular case, the "mind-made" nature of supra-individual institutions is indicative of the dynamic evolution of their forms. This dynamic development retains the potential to satisfy the libertarian needs of an individual. The only constant is the person, who independently determines the nature and types of personal relations on the basis of self-consciousness, technical and economic culture and a sense of justice. Everything else is purely auxiliary. The fundamental issue is the distinction between those social institutions which are truly necessary and those which form "a false need" in the language of the Frankfurt School[110] and under these false pretenses become perceived as necessary: "There are no eternal, natural, and logical categories of relations outside human nature. The development of human nature leads to a constant, ongoing revision, reassessment and shifting of these categories."[111] Thus, the main purpose of the anarchist approach is the correction of collective consciousness[112] to facilitate the emergence of a dynamic legal order which would truly satisfy the demands of an increasingly emancipated individual.

Having recognized that the state is the first enemy of the individual, Borovoy logically proceeds to a critical analysis of the "supporting social structures" of this institution which have acquired a progressive status and "a liberating glory" in the public mind — fetishes that support the fetishism of the state itself. "What is this political struggle against the state?" asks the anarchist and then answers his question himself: "Narrowed down to its true dimensions, it is the struggle against democracy, i.e., against the parliamentarism and political parties.[113]

A qualification is in order: Borovoy does not deny the contribution of the parliamentary idea towards the formation of a free society and the expansion of individual rights. He believes that the concept of equality and the recognition that every human being is "an end in itself" go hand in hand with the successes of contemporary democracy.[114] However, "the time when the bourgeois class led the struggle for human rights is over,"[115] and "their banners and slogans have become outdated."[116] Although liberalism, its political guide, had emerged "as a vibrant protest of an individual against various forms of the oppression and violence typical of preceding social forms",[117] as soon as the bourgeoisie attained political domination, it ceased to see the parliament as a champion of public interests. The parliament was transformed into an instrument used exclusively to preserve the status quo.

Accordingly, the focus is on the issue of the parliamentary system, which Borovoy considered to be an institution that is limited to the rival ambitions of the few most active population groups instead of being a venue for the competition of national or public interests.[118] And the self-restriction of power through a parliamentary system is seen by him as a mere "shop sign" used to disguise the expansion of the coercive powers of constitutional governments to an extent that exceeds even the powers of absolute monarchies.[119]

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[106] RGALI. Fund 1023. Inventory 1. Unit 87. "The vicious circle". Sheet 2. (7 June — 5 July 1918).
[107] RGALI. Fund 1023. Inventory 1. Unit 69. "Truth in art and bourgeois morality (letter from Paris)" (8 August 1911). Sheet 1.
[108] BOROVOY, A. A., *Anarchism*. Moscow, 2011, p. 163.
[109] RGALI. Fund 1023. Inventory 1. Unit 138 "Arguments about religion". 1920. Sheet 9.
[110] See: MARKUZE, H., *One-dimensional man: studies in the ideology of advanced industrial society*. Boston, 1964.
[111] BOROVOY, A. A., *Power. Anarchy and Power.* Moscow, 1992, p. 162.
[112] Id. *Revolutionary Worldview*. Moscow, 1907, p. 25.
[113] Id. *Anarchism*. Moscow, 2011, p. 82.
[114] RGALI. Fund 1023. Inventory 1. Unit 79. Sheet 19.
[115] He means the fight against the rule of the nobility and clergy that were perceived as the concentration of all the defects of society and, quoting Marx, as "the class of manifest subjugation" and the condition for "the positive-general significance" of the bourgeoisie, which was confronting the former. MARX, K., ENGELS, F., *Contribution to the critique of Hegel's Philosophy of Law. Introduction.* Collected Works: 50 volumes, Moscow, 1955, vol. 1, p. 426, [in English].
[116] BOROVOY, A.A., *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)*. Moscow, 1917, p. 15.
[117] Id. *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 59.
[118] It should be noted that Alexei Borovoy was closely familiar with the political systems in Western Europe where he wrote his thesis. His invectives against "the rule of the people" criticized bourgeois outlook in general. Borovoy inherited this attitude from Herzen, who also influenced him in a way. (See: RYABOV, P. V., *Alexei Borovoy and Alexander Herzen.* Pryamukhino Readings 2012, Moscow, 2013.)
[119] BOROVOY, A. A., *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)*. Moscow, 1917, p. 27.

His arguments against parliamentarism can be summed up in the following six points:

(a) the class nature of parliaments and the fictitious power of the people's will

The parliament represents the interests of certain groups and persons instead of public interests (fictitious power of popular will);

(b) the tyranny of the masses

The principle of the majority underlying the parliamentary institution is no more just than any other forms of subordination;

(c) parliament's subordination to the government

The parliament casts off its revolutionary nature and blends with the executive power directly responsible for the operational management of the state, becoming a single state mechanism;

(d) the opportunism of political parties

From a force accumulating revolutionary energy, the party turns into a bureaucratic body that neutralizes any transformational potential and produces "professional representatives" to increase the new ruling class (bureaucracy);

(e) the hypocrisy of election procedures

The election procedure is unable to bring worthy men to power: only demagogues and super rich people have a chance to be elected [120];

(f) the non-professionalism of parliamentarians [121]

Elected parliamentarians include people of all trades and professions that have no relation to lawmaking whatsoever, as if the drafting of laws were a hobby and did not require any special skills and competencies.

The relevance and clear-sightedness of this criticism of representative democracy from an anarchist perspective became particularly significant a few years later, when several European countries saw power being taken over by advocates of totalitarian ideology through purely parliamentarian processes. Borovoy sees the way towards a progressive eradication of the evils of parliamentarism in "the new forms of lawmaking", such as "a constituent convent" and "direct vote" [122].

Borovoy understands that such a transition would be impossible without a radical transformation of the whole system of social relations. He notes that the establishment of a new anarchist order does not necessarily mean that the preceding achievements gained through the political evolution of humanity should be destroyed. "Yes, it is on this soil — the tendency of the State to engulf the individual, to paralyze personal will and acts with sanctions, that the anarchist revolt is born," states Borovoy and continues to elaborate: "We do not know a single human society, even before the birth of the state, that would not have a certain system of rules. Social life requires certain regulation, but the rules can differ." [123]

Therefore, Borovoy's anarchist project does not envisage the elimination of the law as a social phenomenon. Borovoy argues that an anarchist society cannot exist without law *sui generis*; however, it can revise the fundamental principles on which social norms are based.

If we look at his perception of the law from the ontological perspective, Borovoy tends to a socio-psychological interpretation of legal consciousness: "Life is stronger than written law, […] the law is chiefly a social fact and […] the making of the law is not a legal process. It is a social process," [124] and the essence of law "is in the minds of people rather than in legal paperwork." [125]

From this perspective, Borovoy's views can be placed among prominent researchers of the late 19th century and early 20th century, such as Korkunov, Petrazhitsky, Reisner, Yashchenko, Ehrlich and others [126].

Borovoy is one of a handful of anarchists, or, perhaps, the only one to give so much consideration to the law, including an analysis of its functions and origin. This focus is most probably explained by his legal education.[127]

Borovoy defines the law as relations developed in real life and mainly originating in the human mind.

On this issue of the origin and structure of law (the roots of law), his views are especially closely associated with legal sociologists (the Sociological School of Jurisprudence), in particular with the doctrine of Eugen Ehrlich.

Ehrlich, like Borovoy,[128] urged lawyers to pay attention to the so-called "living law", that is, what "the parties adhere to in life". This law "must be sought not in the paragraphs (articles) of legislation, but in prenuptial agreements, sales, lease, credit and mortgage contracts, in wills." [129]

[120] Thus, given the cost of successful election campaigns, the principle of income qualification is actually preserved.

[121] See: BOROVOY, A. A., *Revolutionary Creativity and Parliament (Revolutionary Syndicalism)*. Moscow, 1917.

[122] Ibid. p. 28.

[123] Id. *Anarchism*. Moscow, 2011, p. 140.

[124] Id. *The history of personal freedom in France: Response to reviewers* Mosk. University Professor Tarasov and Prof. Elistratova. Moscow, 1911, p. 10.

[125] Quoted from: UDARTSEV, S. F., Political and Legal Theory of Anarchism in Russia: History and the Present State. A doctorate thesis for a degree in law. Moscow, 1992, p. 468. (Id. The written and unwritten laws. In: *Rassvet*, 1925, 10 Mar, p. 2).

[126] Borovoy maintained long communication with Reisner while staying in Germany during his academic trip, and with Yashchenko they were close friends from their student days.

[127] It's worth noting that Borovoy continued the original encyclopedic tradition of Russian anarchists who used to have interests and influence that went far beyond the political and legal philosophy. Prince Kropotkin was internationally acclaimed as an anarchist theorist, but also as a geographer and an expert in natural sciences; Count Tolstoi won recognition as the classic of both Russian and world literature; Bakunin was one of the leading revolutionary practitioners and was involved in the Paris and Praga uprisings of 1848 and the Dresden uprising of 1849. Similarly, Borovoy's talents could not be fit into the confines of any single field — his activities and interests were broadly diverse.

[128] BOROVOY, A. A., The history of personal freedom in France: Response to reviewers Mosk. University Professor Tarasov and Prof. Elistratova. Moscow, 1911, p. 12.

[129] Ehrlich, E., *Fundamental Principles of the Sociology of Law*, 2003, p. 39.

Erlich's definition of law as the internal order of any association not created by the legislator laid the foundation for legal pluralism. Communities, corporations and associations have their own law, which they themselves create. The norms, charters, regulations of various associations act as law, although they are not created by the state.[130]

But Borovoy interprets this kind of "legal pluralism" and "living law" even more radically than Erlich. Borovoy not only denies the state monopoly to create law, he postulates the exclusively non-state origin of law, as legislation is developed ex parte and has a compulsory nature that precludes the voluntary acceptance of social norms.

Threrefore Borovoy disproves the stereotypes prevalent in the academic community, namely, that anarchism, which negates the state and state law, has an equally negative position concerning the law in general. "I can categorically say that anarchism recognizes and will recognize the "law" – its own, anarchist, "law"." [131]

As can be seen, Borovoy makes a substantial distinction between the law formed mainly by the pressure of legislative acts enforced through state coercion, although not necessarily synonymous with it, and the desired (i.e. anarchist) law, in other words, the proper, genuine law, true to its name, that will be intrinsic to the anarchist order. The dividing line is drawn according to fundamental principles underlying these social regulators. He defines the anarchist law as "conventional norms based on voluntary agreement of individuals abiding by such codes." [132]

> *"It will resemble neither in spirit nor in form the laws of contemporary bourgeois society or the "decrees" of a socialist dictatorship. This "law" will not be inspired by the idea of dissolving an individual in the collective, […] it will not pour down as a flow of blessings […]. It will come organically from the restlessness of the spirit, which feels in itself the force of creation, the thirst for the creative act to realize its desires in real forms accessible to men."* [133]

Borovoy points out the need for social (non-state) regulation by individuals who are free to make decisions without the pressure of coercive state machinery. He even makes references to the idea of Rudolf Stammler, a German jurist and a "conscientious critic" of anarchism, who believes that there is no natural harmony without legal regulation. However, it is people themselves who make the rules, because "any agreement between people already contains a certain modification and a certain regulation of the natural life of every single human being." [134] If such regulation is based on conventions between people, then the law exists within the framework of said conventions and, according to Borovoy, "none of the foremost representatives of anarchist thought negates the law since neither social organization nor its technological progress would be possible without certain regulation of social relations." [135]

Borovoy believes that this "anarchist law" consists of "the responsibility for both individual freedom and the freedom of others". This suggests that it will be "unable to ensure "unlimited" freedom to everyone.[136]

Following his debate *in absentia* with absolute individualists, Borovoy continues:

> *"Anarchism, which is not an imaginary dream, but a reality offering an effective and realistic solution to the revolt of the human spirit against violence, does not have to speak of fictions such as "absolute" freedom "unlimited" by anyone and anything, the negation of duty, a total lack of responsibility, and so on."* [137]

The premise of limited freedom leads to the conclusion that even such desired law will be imperfect. Instead of indulging in dreams of "a super-just heaven on earth" [138] that would exclude "any need for measures of coercion and, generally, of psychological pressure, as well as very possibility of the existence of such law", Borovoy is nevertheless prepared to defend the proposed regulation of social relations: "Like any law, it will have to be defended. The concrete forms of this defense cannot be determined in advance. They will correspond to the specific needs of the anarchist society." [139] In other words, they will inevitably include some means to enforce compliance with the rules established by the social contract. This fails to resolve the fundamental issue of individual freedom and its limits [140], the issue that is raised by Borovoy in his work *Social Ideals of the Modern Humanity. Liberalism. Socialism. Anarchism*:

> *"A society of truly free individuals can and must only be founded on the idea of a free contract. But if a contract is accepted, a man becomes enslaved by it; nothing can release him from the performance of his sacred obligation freely assumed. A breach of contract will be punished cruelly."* [141]

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[130] Ibid. p. 493

[131] BOROVOY, A. A., *Anarchism*. Moscow, 2011, p. 146.

[132] Id. *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 95.

[133] Id. *Anarchism*. Moscow, 2011, p. 146.

[134] Ibid. p. 129.

[135] Id. *Anarchism*. Moscow, 2011, p. 140.

[136] Id. *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 104.

[137] Id. *Anarchism*. Moscow, 2011, p. 146.

[138] Here he criticizes the position of the Lev Petrazhitckii`.

[139] BOROVOY, A. A., *Individual and Society in the Anarchist Worldview.* Moscow, 1920, p. 95.

[140] On the other hand, even major theorists who specialize in issues of fair social order cannot avoid criticism for the lack of convincing arguments regarding the limits of freedom of contract. Mainly for this reason, contract theories have lost popularity in the 20th century. The most influential attempt to restore this tradition was the "Theory of Justice" by John Rawls, who proposed the concept of a hypothetical contract where the parties, in order to be in equal negotiating positions, are placed behind a "veil of ignorance". However, according to Dworkin, "a hypothetical contract is not simply a pale form of an actual contract; it is no contract at all." DWORKIN, R. *Taking Rights Seriously*. Cambridge, 1977. P. 151.
See, for example: RAWLS, J. A., *Theory of Justice. Cambridge, 1999*.

[141] BOROVOY, A. A., *Social Ideals of the Modern Humanity. Liberalism. Socialism. Anarchism*. Moscow, 1906, pp.65–66.

Here, a reasonable question follows: "Can we speak of personal freedom in a social order where this freedom is sacrificed whenever a contract, albeit the most sacred one, is violated?" [142]

His conclusion confirms the above antinomy: social life in its current form is the very antithesis of the anarchist ideal since any social order is an external order that requires "instances of coercion". Being aware that any attempts to resolve the above contradiction would be futile, Borovoy can only propose the direction towards potential solutions: "We need to look for a form of social coexistence that would admit the possibility of human relations but negate the very thought of any external order or regulation." [143]

Conclusion

It would be impossible to fit the philosophy of Alexei Borovoy, a born individualist [144], within the classical anarchist framework. His work is mostly distinctive and individual, characterized by an original interpretation of a large variety of anarchist premises.

Borovoy was influenced by a broad variety of doctrines, which stimulated the development of a unique philosophical paradigm founded on the concept of an individual as the owner of a dynamic worldview. In his system, anarchism is presented as the striving towards self-liberation of an individual through the negation of the reality, and this striving, being an intuitive property of human personality, shall be seen as a universal condition for the development of all mankind rather than some social utopia project. Another distinctive feature of anarcho-humanist philosophy is the recognition by Borovoy of the insoluble contradiction between an individual and society, an antinomy that inevitably leads to the negation of any ultimate social ideal and to the eternal quest for a balance between the individual and the collective.

One of the central places in Borovoy's concept is given to the self-criticism of anarchism; i.e., to theoretical debates with prominent classics on a number of key issues of social thought, including the philosophical basis of anarchism, the origin of the state, historiosophic beliefs, representative democracy, the feasibility of the proposed programs, and so on. Borovoy adopts a critical stance towards representatives of Western individualist anarchism, rethinks the "rebellious" theory of Bakunin, and subjects the teachings of Kropotkin to a skeptical analysis. The "self-criticism" in Borovoy's works is triggered by the propensity of anarchist thinkers for outdated philosophic categories and rhetoric, which has not been properly eradicated from his point of view.

The above beliefs determine Borovoy's approach to the phenomenon of the state, its nature and functions. Notwithstanding predictable criticism, Borovoy postulates that the state is historically necessary and describes the range of factors that have brought it about. The problem of the state is that it quickly transforms itself into a monopolistic institute of power, which strives to overcome and suppress any other forms of self-realization. Borovoy presents the struggle against the state, as the quintessence of organized power, as a specific case of struggle against "social fetishes" with their pretence to an absolute and intrinsically valuable nature. He makes no attempt to define specific forms of a future society. On the one hand, his approach offers an unlimited freedom to exercise human abilities and highlights the endless potential for human development, but on the other hand, it fails to answer the fundamental question of which principles will drive this development, and sticks to general and abstract formulas. As a result, it is virtually impossible to assess the relevance (i.e., conformity to anarchist ideals) of the ongoing changes in the society. Another problem closely linked to anti-finalism is the incremental nature of social liberation. If, according to Borovoy, the state is necessary at a certain stage, then we face the issue of assessing the limits of said necessity and deriving laws or rules that could be used to determine whether any social institution has outlived itself.

Of particular note is the critique of parliamentarism proposed by Borovoy and relevant to this day. [145] Just as 100 years ago, democratic representation is still characterized by significant contradictions between the declared purposes of the political order and the mechanism of their attainment. The class nature of the parliament, the enormous controversies in the society, suppressed (but not eliminated) by the hundredths of percent of votes that make the "majority", the selective approach to the nomination of candidates, and party opportunism are all indicative of the growing chasm between the declared "people's sovereignty" and its practical implementation.

From his criticism of the law that is made ex parte by those in power and becomes necessarily coercive and precluding voluntary acceptance of social obligations, Borovoy turns to the law based on conventional norms established by common agreement and commonly supported and accepted. He believes that this is the type of law that will be characteristic of the anarchist society. If we classify Borovoy's theory in accordance with the criteria commonly applied to legal concepts, we can say that his "anarcho-humanism" is close to the psychosocial concept represented by Korkunov, Petrazhitsky, Reisner, Yashchenko and simultaneously to the emerging programme of legal pluralism. Borovoy defines the law as actual relations formed in the course of life and origi-

[142] Ibid. p. 66.
[143] Ibid. p. 74.
[144] RGALI. Fund 1023. Inventory 1. Unit 167. "How I Became an Anarchist". Sheet 12.
[145] Borovoy sees the way towards the eradication of the evils of parliamentarism in "the new forms of lawmaking", such as "a constituent convent" and "direct vote", (BOROVOY, A.A., *Revolutionary Creativity and Parliament (Revolutionary Syndicalism).* Moscow, 1917, p. 28.), as well as in consolidated syndicalism born though the transformation of working class self-organization forms typical of the capitalist system. (BYSTROV, A. S., Political and legal views of Borovoy A. A. (anarcho-humanism). In: *Pravovedenie.* St. Petersburg, 2016, p. 203.).

nating mainly in the human mind. However, similarly to the "anarchist ideal", Borovoy once again fails to suggest any reasoned, specific and consistent principles to serve as a basis of this law. He speaks of voluntary contract as the fundamental condition for the functioning of the law, but does not address the issues vital for the philosophy of law, such as the limits of contractual freedom, the possibility of external interference, the use of coercion to enforce the agreement, and the problems of territoriality and conflict resolution in overlapping jurisdictions.

Still, any problems of Borovoy's theory are the natural projection of its philosophical core – the idea that both individual conscience and social structures originating from human practice are dynamic in principle. In his criticism of classical anarchism Borovoy never thought that his theory was complete and free from internal contradictions. His views might appear too eclectic and even inconsistent but, quoting Jean-Jacques Rousseau who had a strong influence on Borovoy: "I would rather be a man of paradoxes than a man of prejudices." [146]

[146] ROUSSEAU, J.-J., *Émile, or On Education*, Book II, [translation by Allan Bloom], 1979, p. 93.

Evolution of Financial Law Basics within the Antique States of the North Black Sea Region (Late 7th Century BC – the First Half of the 6th Century AD)

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Abstract

The article deals with the peculiarities of the development of financial law basics within the antique city-states of the North Black Sea region, in particular Olbia, Chersoneses, Tyra and Bosporan Kingdom, on the basis of the analysis of legal monuments, narrative and other sources. The attention is paid to the development of legal regulation of financial relations, namely, strengthening of the role of legal regulations in the management of public (civil) finances, the implementation of financial and managerial functions by non-specialized state apparatus, but by the number of bodies of state, local self-government and individuals; at the same time, it is stated that some organizational and functional separation of certain financial bodies from the administration of general competence occurs over time; the transition from the natural to the mixed (natural and financial) form of collection of taxes; the improvement of tax system, the growth of the proportion of direct taxes from full citizens compared to liturgies, that gradually led to the disappearance of the latter.

Keywords: *antiquity; budgetary law; customs law; eisphora; financial law; liturgy; monetary regulation; polis; sources of law; tax law.*

1. Introduction

Financial relations accompany the state throughout its history, regardless of the stage, typological and ethno-national features. Undoubtedly, they also existed in the antique states of the North Pontic region – Olbia, Chersoneses, Tyra and Bosporan Kingdom. As all around, the basics of financial law, as the institute of law, designed to regulate financial activity of the state were gradually formed [1].

Nowadays, financial law is seen as an independent branch of public law, a set of legal norms that regulates social relations in the process of financial activity, that is, in the area of mobilization, distribution and use of centralized and decentralized funds of states' and local authorities' funds [2] necessary for implementation of their tasks. Naturally, we should not bring up to date legal concepts of the citizens of ancient states [3]. During the antiquity, there was neither financial legal science that could define the relevant definitions, nor even a general understanding of financial legal categories. Although, as follows from the sources, it can be said that there already was a set of rules the authorities of the ancient states of the North Black Sea region governed by "in terms of satisfaction of state needs" [4]. Within the financial legal relations, from the moment of their occurrence, the organizational role of public authorities (civil self-government) has emerged. Therefore, up until now, by their nature, they were power-property. These relations could also arise between the state financial authorities and the citizens, and between the state as a whole and its geographical administrative divisions.

2. The origin and development of budgetary law basics and budgetary system of the North Black Sea states of the antiquity

One of the first in the antique states of the North Black Sea region were elements of budgetary law. Budgetary law is a set of financial legal rules that regulates financial relations arisen in view of budgetary activities. Budget – is a plan for the creation and use of financial resources to ensure the targets and functions carried out by public authorities [5]. Both in ancient

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1 HOLOVKO, O.M., Financial Administration of the Russian Empire in Ukraine (end of XVIII - beginning of XX century). In: *Historical and Legal Research (monograph).* Kharkiv, 2005, p. 9.

2 MUZYKA, O.A., Finance law. In: *Legal Encyclopaedia*, vol. 6. Kyiv, 2004, p. 279.

3 MIROSHNYCHENKO, M.I., Statehood and Law of Ukraine: Genesis in the European Context (from ancient times to the beginning of the XX century), (monograph). Kyiv, 2006, p. 113.

4 KRANICHVELD, A.I., Lectures on Financial Law, Read at the Imperial Saint Petersburg University, 1849, p. 3.

5 Budget Code of Ukraine. In: www.univd.edu.ua/_projects/ezloch_kor/docs/gosp/k_budg.doc.

times and now every state has its own budgetary system, which nowadays means a set of types of budgets that exists on the territory of the country based on economic relations regulated by legal norms. The state establishes principles of its formation in order to have its own budget, the state itself, its parts (in case of federation) and all administrative and territorial divisions, that is, budget structure in the state is determined by the form of the state structure and includes the organization of the budget system, the principles of its formation, powers of legislative and executive bodies of public authority, local authorities and their executive bodies.

Budgetary legal norms define the types of budgets that operate on the territory of the state, their place in budget system, relationship between them and principles of functioning[6].

In antique states of the North Black Sea region, like in other countries of the Greek world, there was no formal budget based on the previous drawing of income and expenses, although certain profits were constantly deducted for some ordinary expenses. In addition, People's Assembly usually established special fund for publication of decisions, honorary wreaths[7], etc.

The budgetary system existed in antique states of the North Black Sea region can be described as a two-tier: the national budget and the budgets of separate cities and colonies, and other administrative divisions that were parts of the states. Budgets of the states consisted of two main parts: profits and expenses. The profits of the state treasury (προσόδοι) were divided into ordinary (permanent) and extraordinary (ad hoc).

Ordinary profits were partly direct, partly indirect[8]. Direct profits belonged to: liturgy; proceeds from state estates and lands; taxes paid by metek and freedmen; duties on imports and exports of goods as well as market payments (for the right of trade) and port duties. Indirect profits included litigation fees, fines (τιμήματα), cash received from confiscation of property[9], etc. Extraordinary profits consisted of voluntary contributions and donations from citizens and foreigners; property tax, which was levied in extraordinary conditions from wealthy citizens; war booties and indemnities.

State expenses were also divided into ordinary and extraordinary. Ordinary (permanent) were: payment of lower government officials (scribes, messengers, supervisors); ad hoc or regular payments and financial aid to citizens, aid to orphans of fallen soldiers (until they reach the age of majority); expenses for military needs: weapons production, shipbuilding, defense structures, shipyards, harbor equipment, etc.; expenses on public buildings and structures (temples, theaters, office buildings, statues, etc.); payment of hired troops (since its emergence); expenses for the construction of public buildings; the cost of chasing on stone plates of people's rulings and other state documents; awards for a diligent service or special merits to individuals (both citizens and non-citizens) and entire colleges (wreaths, statues, cash gifts); expenses on religious celebrations, games on the occasion of holidays[10], etc. However, the coverage of recent expenses largely relied on the richest citizens in the liturgy from a long time ago.

North Black Sea region states, which in the second half of 5th century BC were part of the Athenian Maritime Union[11,12,13,14,15], paid a union tax – foros. Until now, unique documentary evidence of the Athenian expansion in the Bosporus has been preserved – lists of Athenian foros. In the list dated 425/424 years, except for Nympheus, it also included Hermonass, Patriarch, Cimmerius and other cities of the North Black Sea region[16,17].

From the letter of the Roman emperor Marcus Aurelius Commodus to the "Council and People of the Chersonesos" dated end of the 2nd century AD, it is known that considerable expenses of the Chersonesos community were spent on maintenance of the Roman military reservation[18]. E.I. Solomonik, who has researched the document, noted that the serious interference in financial affairs of the city, which follows from the content of the letter, should be regarded as an important step towards the full submission of Chersonese to Rome. At this time, the Romans sent special trustees to monitor the finances of cities[19]. This was not avoided by other North Black Sea region states[20]. At the end of the 2nd century BC the Roman influence in Olbia intensified, and Thira was part of the province of Mozesia[21].

Certain peculiarity had a budgetary system of the Bosporan Kingdom. In particular, during the reign of the dynasty of the Spartockides, first of all, narrative sources, as well as materials on the history of agriculture and bread trade of Bosporus pub-

6 VORONOVA, L.K., Financial law: textbook. Kharkiv, 1998, p. 127.
7 BUZOLT, G., Essay on State and Legal Greek Antiquities. Kharkiv, 1890, p. 244.
8 LATYSHEV, V.V., Essay on Greek Antiquities. Vol. 1: State and Military Antiquities. Saint Petersburg, 1888, p. 276.
9 BUZOLT, G., Essay on State and Legal Greek Antiquities. Kharkiv, 1890, p. 249.
10 LUBKER, F., The Real Dictionary of Classical Antiquities. Saint Petersburg, 1885, p. 711.
11 KARYSHKOVSKY, P. O., Olbia and the Athenian Union. In: *Materials on Archaeology of the Northern Black Sea*, 1959. Nr. 3, p. 57-100.
12 VINOGRADOV, Yu.G., Sinope and Olbia in the 5th century Bc. The problem of the political system. In: *Herald of Ancient History*, 1981. Nr. 2. p. 70, 89.
13 RUSYAEVA, A.S., Olbia Pontius: The City of Happiness and Sadness. Kyiv, 2004, p. 77.
14 SKRZHYNSKAYA, M.V., Scythia through the Eyes of the Hellenes. Saint Petersburg, 2001, p. 141.
15 BLAVATSKAYA, T.V., Essays on the Political History of the Bosporus in the 5th-4th centuries Bc. Moscow, 1959, p. 69.
16 GRAKOV, B.N., Materials on the History of Scythia in the Greek Inscriptions of the Balkan Peninsula and Asia Minor. In: *Herald of Ancient History*, 1939. Nr. 3, p. 238.
17 BERZIN, E., Syndic, Bosporus and Athens in the last quarter of the 5th century Bc. In: *Herald of Ancient History*, 1958, Nr. 1, p. 125.
18 SOLOMONIK, E.I., New Epigraphic Monuments of Chersonese. Kyiv, 1964, p. 44.
19 RANOVICH, A.B., Eastern Provinces of the Roman Empire in the I-III centuries AD. Moscow, 1949, p. 46.
20 SOLOMONIK, E.I., New Epigraphic Monuments of Chersonese. Kyiv, 1964, p. 45-46.
21 FURMANSKAYA, A.I., Ancient City of Tyra. Moscow, 1963, p. 47.

lished by V.D. Blavatsky provide an opportunity to define such budgetary system[22].

According to the sources, significant profits were received by the Bosporus from the grain trade. According to Demosthenes (Demosth, Adv. Lept., 32), King Levkon I (389/8-349/8 BC) sent annually 400,000 medimnas (about 16,700 tons) to Athens. If we take into account the price of millet wheat in the Athens, that in the 4th century BC usually made 3-6 drams, and sometimes it rose much higher than this amount[23], then it turns out that the cost of Bosporan bread, which was sent annually by Levkon I, was at least 333-400 talents. The figure noted creates some image not only of the size of trade in the Bosporus, but also of budget of the Bosporus in the 4th century Bc. However, it should be taken into account that bread in the Bosporus should cost much less than in Attica, because the grain trade, as well as all maritime trade, brought a considerable profit. Demosthenes's testimony in his speech against Lacrit (Demosth., Adv. Lacr. 10) shows that the money for a trading operation carried out by sailing from Athens (via Mendo or the Skion) to the Bosporus and back, were charged at 22,5 or 30%, depending on the duration of the operation. If we consider that the profits were shared between the merchant and his lender approximately equally and the proceeds from the sale of goods brought from the metropolis to Pont were to a certain extent consistent with the revenues of the Bosporus wheat in Athens, then this allows us to assume that the price of bread in Athens was about 22.5-30% higher than in the Bosporus[24]. Under these circumstances, the Bosporan ruler received from 230-266 to 250-300 talents of annual income, that is an average of 260-270 talents. It should be noted that we should deduct from this amount some additional charges related to the grain trade (transport, storage of grain, etc.), the size of which does not seem to be considered.

In addition to the amount mentioned, the Bosporan rulers made profit from the merchants who took bread from the Bosporus harbors (Demosth., Adv. Lept., 32). Probably the same duty was imposed on other items of export. They might include (Strab. XI, 2, 3) slaves, leather and other goods of the nomads. The cattle could be exported from the Bosporus. The considerable development of cattle breeding in the Bosporus is evidenced by the numerous bones of animals found during the excavations of the Bosporan settlements. The removal of cattle from Pontus was reliably certified by Polybius (Polyb. IV, 38, 4). The Bosporan Archons also brought profit and ergasterions, where the roof tiles belonging to them were made[25].

Evidently, there were other sources of treasury reimbursement. However, it should be borne in mind that the inhabitants of Panticapaeum, according to the information provided by Diodorus, exercised the right of atelium (την άτιλειαν), that is, they were exempted from paying customs duties (Diod., XX, 24).

All other means taken together could hardly give an amount that could be compared to the profits from the bread trade. After all, the receipt of Bosporan bread was provided by the work of a huge number of producers, far more than the number of labor hands employed at this time in some other branch of economy of the Bosporus. That is why, obviously, the annual incomes of the Bosporan Kingdom could hardly be much more than 300-350 talents[26].

The biggest expense item was probably the retention of a hired army. According to the Panticapaeum writings[27], mercenaries there were arcadians and synopeans. More detailed information is provided by Diodorus of Sicily (Diod. XX, 22). His story contains information on the composition of the army of Satyrus, son of Perisad, 310/309 Bc. This army consisted of 2,000 Hellenic, as many Thracian mercenaries. There is hardly any doubt that the Hellenic mercenaries were hoplites. As known, hoplites-mercenaries' charge usually ranged from tetrobol to one drachma per day[28]. Based on this calculation, 2000 hoplites were expected to receive from about 80 to 120 talents a year. According to Thucydides (Thucyd. VII, 27, 2), the Thracian peltasts were paid the same way as the hoplites: they received a drachma for the day, although this fee seemed to be significant. As a result, it can be assumed that 2000 Thracian mercenaries in the Bosporus also cost 80 to 120 talents a year. Under such circumstances, the annual expenses of the Bosporan Kingdom for the maintenance of the troops should average about 200 talents.

Another significant expense item, apparently, was the maintenance of naval forces. Athens Decree dated 346 BC in honor of Spartock and Perisad[29], testifies that the Bosporus rulers hired the Athenians to serve as sailors. We do not even know what their salary was, because none of the sources mention the number of ships in the Bosporan navy, and Strabon's testimony (Strab. VII, 4, 4) about the size of the Panticapaeum dockage facilities, scaled to fit 30 ships, gives us too much general view. After all, these docks served for the construction and repair of not only military, but also merchant ships, and, of course, both Bosporus and foreign ones.

As to the composition of the Bosporan navy, we can say that at the time of Levkon II it probably consisted of the triers, as

[22] BLAVATSKY, V.D., Agriculture in the Ancient States of the Northern Black Sea. Moscow, 1953, p. 67.
[23] JARDE, A., Les Cereales dans l'Antiquite Srecque. Paris, 1925, p. 79.
[24] TARN, V., Hellenistic Civilization. Moscow, 1949, p. 226.
[25] GRAKOV, B.N., Epigraphic Documents of the Royal Tile Factory in Panticapaeum. In: *Proceedings of the State Academy of Material Culture History*, Nr. 104, 1934, p. 202 and seq.
[26] HAVRYLENKO, O.A., Ancient States of the Northern Black Sea: near the origins of national law (end of the VII century BC - first half of the VI century AD). Monograph. Kharkiv, 2006, p. 178.
[27] LATYSHEV, V.V., Inscriptiones antiquae orae septentrionalis Ponti Euxini grecae et latinae. Vol. 1. Ed. 2. Petropoli, 1916, p. 482.
[28] LAUNEУ, M., Recherches sur les Armees Hellenistiques. Paris, 1950, p. 758.
[29] GRAKOV, B.N., Materials on the History of Scythia in the Greek Inscriptions of the Balkan Peninsula and Asia Minor. In: *Herald of Ancient History*, 1939, Nr. 3, p. 231-312.

can be predicted from the narration of Polyaen (Polyaen. Strat. VI, 9, 3) about the war against Herakleots. Somewhat simplistic image of such a trier with two ramins was preserved on one of Panticapaeum necropolis plates[30]. The number of Bosporan warships was unlikely to be significant. The maintenance of the crew of the warship (trier) was quite expensive. If we proceed from the assumption that the average salary of the Athenian sailors was triobol per day (Thucyd. VI, 31, 3; VIII, 45, 2), although in Panticapeaum it was likely that the sailors were paid less than in the center of the Hellenic civilization, and the crew of the trier consisted of 200 people, the cost of maintaining the personnel of the ship was 100 drachms, that is, 1 min for a day. With this calculation, it was necessary to spend about 6 talents per year, excluding costs (which were determined in the range from 40 to 60 mins per year for one trier)[31] necessary for the restoration of tackles and the ongoing repair of the ship, say nothing of the ships that ended up inoperative had to be replaced by new ones.

Given all these costs, it can be assumed that the Bosporan naval force is unlikely to have more than 20 triers, and under all circumstances, it was unlikely to be much greater than this figure. According to this assumption there is nothing incredible, because even strong enough at sea (Polyaen. Strat. VI, 9, 4), the Pontic state of Heraclea, apparently, had no more ships. According to Pseudo-Aristotel (Ps.-Arist. Oecon. II, II, 8), the heracletes arranged for the Bosporan tyrants of 40 ships, which, it must be thought, surpassed the naval force of the Bosporus (Polyaen. Strat. VI, 9, 4). In 3rd century AD Heraclea sent Nicodemus I all 30 triers (Memn. 18). At the time of Mitridate of Eupator, there were 30 ships in the Heracleos (Memn. 50). According to Joseph Flavius (Flav. Jos. Iud. Ant. II, 16, 4), the Roman rule on Pontic was provided by forty-eight warships.

In addition, we are aware of another expense item of the Bosporan Kingdom, namely, the attraction to its side by bribing of certain political figures. Thus, according to Deinarchos (Din. Adv. Demosth. 43), the Athenian political figure Demosthenes received from the Bosporan tyrants 1,000 medimnas of bread annually. At a cost of medimna from 5 to 6 drachms, the price of such transfer of bread, probably, should reach 1 talent.

Finally, considerable means were spent on maintaining the courtyard of the Bosporan rulers, on the temples built by them, on statues, as well as on defensive works[32].

Valuable evidence of the means of the Bosporan Kingdom in the 1st century BC one might find with Strabon. He reported that the inhabitants of Chersonese, that is, the Crimean (Tauric) Peninsula, as well as the Asian territories, paid tribute to Mitridate in the amount of 180,000 medimnas of bread and 200 talents of silver (Strab. VII, 4, 6). V.D. Blavatsky assumed that the agricultural population paid taxes in kind; cash contributions were likely to come from merchants and owners of ergasteries[33].

3. Legal regulation of collection of taxes (levying) and non-tax payments

Nowadays, tax law, as one of the main sub-branches of financial law, is a set of legal norms that establishes types and procedures for collecting taxes[34] in a certain state, regulates relations related to the emergence, change and termination of tax liabilities. Tax relations arise when paying taxes by subjects of taxation, where the parties are holders of rights and obligations established by law[35]. The system of tax relations serves certain purpose, namely: the establishment and collection of taxes. Tax relations are provided with public enforcement especially because the state cannot exist without material support, and taxes compose significant part of its budget[36].

The history of taxation and collection of non-tax payments reaches its roots in antiquity, the origins of civilization. The first of now well-known material evidence of taxes dated to 3300-3200 years BC and represent clay tablets with written reports of subjects of the Egyptian kings about the transfer of a tenth part of property in the form of cloth and oil[37]. Taxes, tax law are necessary link of economic relations in society since the appearance of the state. The development and change of forms of the state system are always accompanied by changes in the tax system[38,39].

History has documented a number of direct and indirect evidence of the taxation of the whole or certain categories of population, primarily non-citizens, in antique states of the North Black Sea Region. In the archaic and classical periods, citizens generally did not pay direct taxes in favor of the state. Their property, exclusive of slaves, was not subject to constant taxes (except in cases of emergency, and then only in honorary form). There was the belief among the population of the polis that personal taxes are a sign of slavery and such payment is a humiliation for a full citizen[40]. Even a proposal for tax collection (initially, only property could be subject to tax, and then

[30] MATKOVSKAYA, T.A., Stone Pouring Mute Sorrow (Kerch Lapidarian Collection). Kerch, 2000, p. 56-57.
[31] GUIRAUD, P., La Propriete Fonciere en Grece. Paris, 1893, p. 536.
[32] HAVRYLENKO, O.A., Ancient States of the Northern Black Sea. Kharkiv, 2006, p. 179.
[33] BLAVATSKY, V.D., Agriculture in the Ancient States of the Northern Black Sea. Moscow, 1953, p. 202.
[34] Taxes are obligatory, on a legal form, non-repayable, non-purposeful, irrevocable, unconditional payments of legal entities and individuals established by the legislative body or local authorities for enrolment in state or local budget or the trust fund at a defined amount and in fixed term.
[35] ZYUNKIN, A.G., Finance Law. Kyiv: MAUP, 2001, p. 47.
[36] VORONOVA, L.K., Financial Law. Kharkiv, 1998, p. 226.
[37] CHIBINEV, V.M., The Emergence of Taxes Abroad. In: *History of the State and Law*, Nr. 4, 2002, p. 39.
[38] ZELDINA, O.M., Taxes and Files in the State of Alexander the Great. In: *Scientific Notes of LGPI of Herzen.* Vol. 47, 1971, p. 103-110.
[39] ZELDINA, O.M., Policy Revenues in the Seleucid State. In: *XXVI Herzen Readings of the LGPI of. Herzen. Historical science*, 1973. p. 118-122.
[40] PRYSHA, N.Yu., Historical and Legal Analysis of the Origins and Formation of the Compulsory Payment System. In: *State and Law. Law and Political Science*. Nr. 17. Kyiv, 2002, p. 224.

only in exceptional cases and in honorable form) required prior approval, unless it was considered as somewhat prohibited, and even criminal[41].

The duty to pay taxes was usually varied for the citizens of liturgies and thus included natural duties or by public services (λητουργίαι or λειτουργίαι), whereby the state, in return for money, received directly what it needed. According to Latyshev's definition, in the earliest period the liturgies were "natural consequence of major political rights of the rich", and later, "as a consequence of the principle of equality in a democratic republic, which did not allow the concentration of significant wealth in one's hands"[42].

The liturgy was divided into periodic and extraordinary[43]. The first group included choreigy, gymnasiarhy, ipotrophy, and others; the second – trierarchy, proeisphora and archypheory (the duty to head the holy solemn legation, which the state sent to various sacred sites)[44].

The greater the wealth of the citizen, the financially heavier were liturgies relied on them. According to the authors of the antiquity, sometimes they even brought prosperous people to ruin and poverty. However, the state protected them from such a difficulty. For instance, some decrees adopted in Athens limited the size of the liturgy: it was impossible to appoint the same person for 2 liturgies per year and even one for two years in a row; the trierarchy relieved citizen from all other liturgies (Dem. Adv. Lept. 8, 19). Any citizen to whom one or another liturgy seemed too oppressive or misplaced could offer it to a more prosperous one, and in the event of refusal by the latter, the court was entitled to demand them exchange all the property (αντιδόσις)[45].

At the same time, non-citizens permanently resident on the territory of antique states of the North Black Sea region were obliged to pay small direct (personal) tax (μετοικίον). In the second half of the 1st millennium BC the Chersoneses civil community (civitas), that was the supreme owner of the land, received, at least part of the population, rental tax, probably a grain that was not only assigned to its social elite, but also served to develop the Chersoneses, causing the city prosper[46]. It is also known that after the formation of the Bosporan Kingdom exploitation of its population and neighboring territories inhabited by barbarians, was carried out mainly through taxation. At the end of 5th – in the beginning of 4th century BC the ruling dynasty of the Bosporan Kingdom established a natural (bread) rental tax or tax on the allies – foros (φόρος), which was levied on the dependent population, and perhaps gathered from the Greek population of subordinate cities[47].

Over time, the view on the value of taxation has changed. That is why in the first centuries AD, an important source of treasury reimbursement in ancient city-states of the North Black Sea region was the tax levied on the buyer and the seller in carrying out sales. In most cases, it was paid in an agoranium or other government institution, where large deals were concluded in the presence of witnesses, agorans or other officials or taxpayers[48]. If the conclusion of the sales transaction took place privately in the market or on the street, the seller should declare it agoranium, indicate the amount of the received sum and pay the tax with the buyer[49,50].

Given the importance and scale of fishing in Chersoneses and other ancient city-states, V.I. Kadeyev assumed that public authorities also used non-resident tax on fish (τέλος των ίχθύων), which was well-known in the Greek world, to boost the budget[51]. Obviously, this was a kind of tax on industry. The object of taxation was likely to be the total cost of the harvest at market price, which the owners were going to sell at the markets and elsewhere.

It was long since public authorities of the North Black Sea ancient city-states introduced, by way of exception, extraordinary taxes. As one of the Olbian inscriptions of the second half of the 3rd century BC shows, in order to find a way out of the financial struggles caused by the acute financial crisis, the ruling elite represented by the Council of Seven decided to impose a tax on sacrifice, which was to enter the state treasury: "The members of the Council of Seven took care of the treasury. Irodot, the son of Pantacle, Epikhar, the son of Dionysophana, Posidonius, the son of Eukrate, Adamant, the son of Apatury, Isticon, the son of Mitrodor, the son of Leonthmen, the son of Irosont, the son of Evvius. Those who bring the sacrifice must bring in the treasury: one thousand two hundred (copper coins) for a bull, three hundred for a sheep and a goat, sixty – for leather"[52,53]. There is also evidence of the existence of another type of extraordinary tax – eisphora (εισφόρα) – a direct property tax[54], which was imposed on all categories of permanent

41 CHIBINEV, V.M., The Emergence of Taxes Abroad, 2002, p. 39.
42 LATYSHEV, V.V., Essay on Greek Antiquities. Vol. 1: State and Military Antiquities. Saint Petersburg, 1888, p. 266.
43 BONDAR, L.D., Public Obligations (Liturgies) in Athens, V-IV centuries Bc. In: *Abstract of diss. for the degree of PhD: Speciality 07. 00. 03 (Universal History)*. Saint Petersburg, 1997, p. 5-7.
44 LATYSHEV, V.V., Essay on Greek Antiquities. 1888, p. 283-287.
45 Ibid, p. 282.
46 ZUBAR, V.M., LINOVA, E.A., SON, N.O., The Ancient World of the Northern Black Sea. In: *Essays on Historical and Socio-Economic Development*. Kyiv, 1999, p. 79.
47 Ibid, p. 137.
48 KADEYEV, V.I., SOROCHAN, S.B., Economic Ties of the Ancient States of the Northern Black Sea in the I century. BC - V century AD (based on Chersonese materials). Kharkiv, 1989, p. 92.
49 Ibid, p. 92-93.
50 MOSHYNSKAYA, V.I., About the State of Sindh. In: *Herald of Ancient History*. Nr. 3, 1946, p. 149.
51 KADEYEV, V.I., Chersonese Taurian. Life and Culture (I-III centuries AD). Kharkiv, 1996, p. 100.
52 LATYSHEV, V.V., Inscriptiones Antiquae Orae Septentrionalis Ponti Euxini Grecae et Latinae. Vol. 1, ed. 2. Petropoli, 1916, p. 106.
53 LEVY, E.I., Olbia. Hellenistic Age City. 1985, p. 3.
54 GLUSKINA, L.M., Eisphora in Athens, IV century Bc. In*: Herald of Ancient History*. Nr. 2, 1961, p. 38.

freeman and semi-dependent population of the ancient states of the North Black Sea region during the war, and was aimed at financing defense measures. In view of the fact that wars at that time were a phenomenon quite frequent, it is obvious that the states often collected such a tax. The taxation of eisphora took place every time by a special decision of the People's Assembly, so that the more prosperous people paid more for the poor according to the size of their property. Failure to pay a tax would result in a fine or even confiscation of property. Perhaps, as in Athens, in antique states of the North Black Sea region the practice of paying proeisphors (προεισφορά) had spread over time. The essence of such a kind of payment of the extraordinary tax was that the richest citizen of each deme was obliged to pay the total sum of the eisphora at once that relied on all members of their deme, and then they charge proper fees from each demos. This preliminary contribution was considered to be a liturgy[55]. We can assume that the proeisphor was nothing more than the first historical form of tax redemption. The only difference was that in the Hellenic states the tax-farmer became so in most cases not voluntarily, but by force. It is remarkable that later all medieval Europe (including Ukraine, where ransom was called leasehold) went through such a kind of payment.

Narrative sources make it possible to state that the existence of a tax system in the Bosporus, in particular after about 110 BC King Perisade V was forced to hand over power of Pontic kingdom to Mithridate VI Evpator. The population of Bosporus and the whole Taurid considered the latter as a defender and savior of a barbaric threat and an internal crisis, as evidenced by the well-known Chersoneses Decree in honor of Diophant[56]. Mithridate, who planned to use the Bosporus as a reliable back land in the future war with the Romans (App. Mithr.15; Strab. VII, 4, 3), without wanting to undermine his popularity, imposed a limited soft annual tribute (tax). D.P. Kalistov noted that figures given by Strabon about the amount of this tribute (tax) in 200 talents of silver and 180,000 medimnas of bread (Strab. VII, 4, 6) imposed by Mithridate, did not refer to heavy burden[57]. (Though, if compare the 200-talent silver tribute with Blavatsky's data of the Bosporan kingdom budget of no more than 300-350 talents[58], then it turns out that the tribute amounted to 60-65% of the annual budget). As for the grain tribute, indeed, according to Strabon (Strab. VII, 4, 6), Bosporan king Levkon sent 2,100,000 medimnas to the Athenians. If the size of the annual Bosporan bread export is determined even at minimal size estimated by the researches - 800000 medimnas, even then the above size of the tribute amounts only about to 25%. It should be borne in mind herewith that according to Strabon, the tax of 180,000 medimnas of bread and 200 talents of silver was imposed not only on the European Bosporus, but also on the syndes[59] and the entire Tauric Peninsula. Moreover, there is a reason to assume that here comes the tribute paid to Mithridates and some native rulers[60]. Consequently, the relatively small amount of the tribute was explained by the fact that in conditions of dynamic preparation for the war with Rome, the policy of Mithridate VI Evpator was aimed primarily not at gaining profit, but consolidation of local forces around the local center, which, apparently, was Panticapaeum.

Until now, texts of some legal acts regulating relations in the sphere of tax law of the North Black Sea states in the first centuries AD have been preserved. Perhaps, one of the most interesting monuments of tax law was discovered by the researcher of Chersoneses K.K. Kostsiushko-Valyuzhinich in 1891-1892. It was a marble slab with the text of correspondence on it between the governor (ethnarch) of Lower Mozesia, probably Tertullia, who occupied this position during the days of the Emperor Septimius Sever (193-211 AD)[61], and the officials of Chersoneses and the heads of the Roman garrison located in the city, regarding the prostitution tax (capitulio lenocinii or vectigali, περί τοα τέλους τοα πονικοὰ). This finding attracted the attention of archaeologists V.V. Latyshev, M.I. Rostovtsev, O. Domashevsky, I. Turcevich, E.I. Solomonik V.M. Zubar, who described it in their writings[62,63,64,65]. Three of the six works were written in Greek, two in Latin and one – bilingual.

The complex of documents begins with a letter from the governor of the Roman province of Lower Mozesia to the Tartulian magistrates of Chersoneses. Unfortunately, the text of this document has not completely preserved. Other letters were restored by the archaeologists almost completely. Among them – a letter of the citizens of Chersoneses to the governor of the province; the answer of the governor to the citizens of Chersoneses; the letter of the same governor to the tribune of the Legion commanding the Roman vectsyllation (i.e., the head of the Roman armies in the Crimea and on the entire north coast of the Black Sea) Atilia Primiana; letter of the governor to the centurion of vectsyllation (i.e., the commander of the Chersoneses) Valery Maxim; his same appeal to both military commanders[66].

Analyzing the preliminary circumstances of document making, Rostovtsev expressed the hypothesis that at the time of Roman garrison finally established in Chersoneses, possibly by

[55] LATYSHEV, V.V., Essay on Greek Antiquities. 1888, p. 279, 281.
[56] LATYSHEV, V.V., Inscriptiones Antiquae Orae Septentrionalis Ponti Euxini Grecae et Latinae. Petropoli, 1916, p. 352.
[57] KALLISTOV, D.P., Sketches from the History of the Bosporus in the Roman period. In: *Herald of Ancient History*. Nr. 2(3), 1938, p. 280.
[58] BLAVATSKY, V.D., Agriculture in the Ancient States of the Northern Black Sea. Moscow, 1953, p. 201.
[59] MOSHYNSKAYA, V.I., About the State of Sindh. 1946, p. 203-208.
[60] KALLISTOV, D.P., Sketches from the History of the Bosporus in the Roman period. 1938, p. 280.
[61] TURTSEVICH, I. Appeals to the Emperor of Provincial Seimas, Urban and Other Societies in the First Three Centuries of the Roman Empire. In: *News of East Philol. Institute in Nezhin*. Vol. 19, Nr. 124, 1901, p. 57.
[62] LATYSHEV V. Inscriptiones Antiquae Orae Septentrionalis Ponti Euxini Grecae et Latinae. Petropoli, 1916, p. 404.
[63] ROSTOVTSEV, M.I., The Case on Prostitution Filing in Chersonese. In: *News Imp. Archaeological Commission.* Nr. 60, 1916. p. 63-69.
[64] SOLOMONIK, E.I., Latin Inscriptions of Chersonese Tavrichesky (texts, translation, commentary). Moscow, 1983, p. 20-27.
[65] ZUBAR, V.M., On the Dating of Correspondence Concerning the Prostitution Filing from Chersonese. In: *Problems of Crimean History. Abstracts of reports*. Simferopol, 1991, p. 50–51.
[66] SOLOMONIK, E.I., Latin Inscriptions of Chersonese Tavrichesky (texts, translation, commentary). Moscow, 1983, p. 23.

order of the Emperor Adrian (117-138 AD) or Antonin Pius (138-161 AD), there was a tax imposed on those who visited the city quarter where bawdy-houses and prostitutes[67], as well as probably on prostitutes, as subjects of "entrepreneurial activity". Obviously, the collection of such tax was entrusted to the soldiers of Roman vectsyllation and a certain part of the money was directed to their maintenance. Rostovtsev strongly proved that was the payment of the city for the protection of them by Roman army, perhaps not a one-off contribution of Olbians to the upkeep of the army[68].

So in this case, the subjects of taxation, that is, persons who implemented the legal duty to pay tax, were individuals. The object of taxation, which refers to a separate type of activity, defined by a legislative act and a court decision, was the "financial and economic activity" of prostitutes. The monetary unit of taxation in the law was not determined. But we can assume that it was a local currency.

The existence of such a tax and the order of its collection, according to a fully acceptable hypothesis of Rostovtsev, had to cause a variety of misunderstandings and disputes. Obviously, in order to solve them, the citizens of Chersoneses addressed the emperors-co-rulers Marcus Aurelius and Lucius Aurelius Vera (161-169 AD) or Marcus Aurelius and Lucia Elias Aurelius Commodus (177-178 AD). Considering the factual background, the emperors issued a rescript, which reduced the proportion of the amount received by the soldiers, and increased the amount in favor of the city. Apparently, this was a gift (δωρεά)[69], which is mentioned in the decree. Throughout the case, they referred through the legate to the tribunal Arria Alciviades, who made a decision (verbatim – verdict – ἀπόφασις, sententia), which finally set the amount of tax[70].

However, the leaders of the Roman vectsyllation in Chersoneses did not reconcile with the decision. Contrary to the order of the emperors and the decision of the tribune, according to their order, the collection of tax was continued in previous overestimated amount. In addition, they asked the legate to give them official permission, apparently without informing him of the previous course of the case.

Upon learning of this, citizens of Chersoneses, in response, made a decision-request containing a complaint to self-raising the prostitution tax by Roman legionnaires and it transfer to the legate, enclosing all the previous documents: the rescript of the emperors, commentaries of the legate and the decision of the tribune. For the fair decision of this issue, they attached great importance, noting that it was nothing necessary but it "… for people who understand the (usefulness) of meaningful life and seek to preserve decency"[71]. After all, overstating the amount of the tax led to the "shadowing" of the prostitutes and the release of them from the control of the civil community.

The answer to the treatment of the Chersoneses citizens was the rescript of the legate Tertullius, which is the first letter in the complex of documents. As already noted, the text of this first document has not been completely preserved. It is only known that the letter refers to the response of the emperor and the order of the governor, which is prescribed to put it publicly, "that everyone understands the instructions…" as one of the main features of taxes, in antiquity and now alike, is that they are levied on a legally fixed form and order of receipt[72]. Obviously, having learned of the violations by the soldiers of this principle, the Roman official was on the side of the citizens of Chersoneses. Turning to the magistrates of the city, he assured that no changes "… in these cases" were foreseen[73].

In the rest of his letters, the legate – the governor of Lower Mozesia drawn attention to the duty of Chersoneses to pay to the Treasury in the previously set amount. Thus, it was precisely defined the purpose of the levy – the money was paid to fisk (fisco pariaverit). In addition, the letters clearly indicated the legal nature of the decision made earlier by the tribune Arriy Alciviadus – sententia sub iu [dicii forma], which for the first time drew Rostovtsev's attention[74]. Once again legate persistently offered the elected persons of Chersoneses "to take care that a copy of his decision written in a distinctive handwriting (exemplum aperta manu scriptum) was exhibited near… [this fragment cannot be read – auth.], where it could be read correctly from the flat area"[75]. According to the public opinion of those times, this was to ensure the constancy of legislation.

Obviously, letters with an official interpretation of the previously adopted resolution served as a source of tax law, as evidenced by the fact that they were knocked out on a stone plate and exposed for public awareness so that nobody could refer to ignorance of law.

Thus, having analyzed the texts of the lapidary inscriptions, and taking into account the evidence of narrative sources and the data of archeology, we can draw some conclusions. Firstly, it is possible to state that there was a taxation of population in the Chersoneses and other antique states of the North Black Sea region at the beginning of the era and the fact that the taxes fulfilled of their main functions, first of all, fiscal (lat. fiscus – the state treasury), consisting in saturation of the revenue part of the budget to meet public needs.

Another function is clearly revealed – distributive function, which represents a kind of fiscal reflection: to fill the treasury, then to distribute the received funds[76]. However, the improper implementation of this function became the cause of the con-

[67] ROSTOVTSEV, M.I., The Case on Prostitution Filing in Chersonese. 1916. p. 65.
[68] ROSTOVTSEV, M.I., Roman Garrisons on the Taurus Peninsula and Ai-Todor Fortress. In: *Journal of the Ministry of Education.* 1900, p. 147.
[69] WEISMAN, A.D., Greek-Russian Dictionary: Reprint of the 5th Edition of 1899. Moscow, 1991, p. 358.
[70] ROSTOVTSEV, M.I., The Case on Prostitution Filing in Chersonese. 1916, p. 66.
[71] SOLOMONIK, E.I., Latin Inscriptions of Chersonese Tavrichesky (texts, translation, commentary). Moscow, 1983, p. 23.
[72] VORONOVA, L.K., Financial Law. Kharkiv, 1998, p. 221.
[73] SOLOMONIK, E.I., Latin Inscriptions of Chersonese Tavrichesky (texts, translation, commentary). Moscow, 1983, p. 23.
[74] ROSTOVTSEV, M.I., The Case on Prostitution Filing in Chersonese. 1916, p. 68.
[75] SOLOMONIK, E.I., Latin Inscriptions of Chersonese Tavrichesky (texts, translation, commentary). Moscow, 1983, p. 24.
[76] VORONOVA, L.K., Financial Law. Kharkiv, 1998, p. 218.

flict between the citizens of Chersoneses and the command of Chersoneses vectsyllation. By the arbitrary increase in the prostitution tax, Roman soldiers violated the important principle of taxation, according to which the taxpayer should ultimately benefit from the taxes they pay, when the state implements the needs in which the whole society and each individual is interested in it (in this case, the creation of conditions for observance of the norms of public morality), and in this sense, taxes are supposed to return to the payer[77].

Finally, there was also a third function of taxes – control, which was realized in the process of taxation of the population of Chersoneses in regulation of "financial and economic activity" of prostitutes by the Roman state.

In addition to taxes, non-tax payments were imposed within the North Black Sea ancient region city-states, which, as now, represent an important additional source of state budget revenues[78]. In particular, a significant share was made by customs payments (in the form of duties levied by authorized persons at the borders of the state). The term "customs duty" usually means the type of customs payment levied on goods moving across the customs border of the state (imported, exported or followed by transit)[79].

In antique states of the North Black Sea region, the duty was levied by its special collectors from among citizens who bought up such a right[80,81] or by special state officials[82]. In the Bosporan Kingdom, as it follows from the speeches against Formion attributed to Demosthenes, there was the Hellenistic Institute (ἑλλιμενιστής) – duty collectors in ports. The plaintiff, exposing the defendant's misstatement, said: "After he had to be exposed as lying, on the part of many from the customs list of the Hellenists in the Bosporus and from the part of the people who lived at that time in Emporia, he agreed…" etc. (Dem., XXXIV, 34). There are two conclusions from the given fragment. Firstly, there was a Hellenistic Institute in Bosporus (i.e., in Panticapaeum). Secondly, they kept in the special customs lists (ἀπογραφαί) the inventory of goods (quantity and quality) that were exported through the Panticapaeum port. Positions of the Hellenistic, apparently, existed in other North Black Sea ancient city-states[83]. These officials were most likely to charge ἑλλιμένιον τελος – port duties (customs duties)[84] of all vessels for the right to park at the port and use of port facilities, which depended on the quantity and quality of goods imported or exported[85]. Existence of an extraordinary port duty could not be ruled out. It is likely to be calculated at the ad valorem rate (i.e., the rate set as a percentage of the customs value of the goods being taxed) and stood at 1/20 of the value of all goods imported and exported from the state ('εικοστή)[86].

From 182 AD the functions of collecting duties in favor of Rome in the territories that were included and sometimes even bordering provinces of the Roman Empire, went to officials of the customs district of Illirik, which included not only the territory of the province of Mozesia, but also Tyra[87], and somewhat later, perhaps, Chersoneses. These officials were headed by the Procurator (procurator publici portorii Illyrice)[88,89], who managed and controlled their activities.

Trade duties were levied on all items of import and export both by sea and by land routes. Legal acts, which regulated the imposition of duty on goods imported to the ancient states of the North Black Sea region and exported from there, have no detailed information. But there is indirect evidence and narrative sources, which make it possible to make an overview of this issue. It is known that in Athens, the law of which was the basis of the legal systems of most Greek colonies of the Circumpontic region, usually took 1/50 part (η πενταπεντκόστη) or 2% of the value of goods imported or exported beyond the state; the total annual amount of this duty, according to some testimonies, reached 36 talents. In addition to trading fees, the Athenian State also charged the port (ελλιμένιον) and the market (τέλη αγόρας), the size of which depended on the type and value of goods. Special duties were also taken for the import of goods through the city gate (διαπυλίον). When purchasing goods that were in state ownership, buyers paid a fee επώνιον, the size of which depended on the value of the goods: for instance, in Athens at a cost of 1 to 4 drachms paid 1 shell, from 5 to 50 drachmas – 4 shells, 50 to 100 drachmas – 1 drachma and then from every 100 drachmas to 1 drachma, that is 1%. Evasion of duty was due to εκατόστη punishment in the form of a fine[90].

In the Bosporan kingdom, customs duties were based on similar principles. Thus, the ordinary duty taken by Spartockides during the export of bread outside the state was the so-called "thirtieth" (τριακοστή). According to Demosthenes (Dem. XX, 31), it was charged with those who took the grain from the

[77] Ibid., p. 220.
[78] KALAMBET, S.V., Non-tax Payments as Additional Sources of Filling the Budget. In: *Culture of the peoples of the Black Sea.* Vol. 2, Nr. 56, 2004, p. 71-73.
[79] VORONOVA, L.K., Financial Law. Kharkiv, 1998, p. 270.
[80] ROSTOVTSEV, M.I., History of State Atonement in the Roman Empire (from August to Diocletian). Saint Petersburg, 1899, p. 82.
[81] KADEYEV, V.I., Chersonese Taurian. Life and Culture (I-III centuries AD). Kharkiv, 1996, p. 101.
[82] BRASHYNSKY, I.B., Trade Duties and Duty Free in the Bosporus (4th century BC). In: *Herald of Ancient History*. Nr. 1, 1958, p. 131-132.
[83] KADEYEV, V.I., SOROCHAN, S.B., Economic Ties of the Ancient States of the Northern Black Sea in the I century. BC - V century AD. Kharkiv, 1989, p. 94.
[84] LUBKER, F., The Real Dictionary of Classical Antiquities. Saint Petersburg, 1885, p. 466.
[85] BRASHYNSKY, I.B., Trade Duties and Duty Free in the Bosporus. 1958, p. 132.
[86] KADEYEV, V.I., SOROCHAN, S.B., Economic Ties of the Ancient States of the Northern Black Sea in the I century. BC - V century AD. Kharkiv, 1989, p. 94.
[87] SON, N.A., Tyra of Roman Times. Kyiv, Scientific Thought, 1993, p. 50.
[88] ZLATKOVSKAYA, T.D., Mozesia in the I and II centuries AD. Moscow, Publishing House of the USSR Academy of Sciences, 1951. p. 109.
[89] KOLOSOVSKAYA Yu.K., Pannonia in the I-III Centuries AD. Moscow, 1973, p. 168.
[90] LATYSHEV, V.V., Essay on Greek Antiquities. 1888, p. 224.

possessions of Levkon I. However, according to I.B. Brashynsky, this duty was not the most important in the system of customs duties of the Bosporan kingdom[91]. After all, from the text of the Athenian-Bosporus treaty 346 BC it is known that the "thirtieth" was not charged on the cost of the bulk of bread that was exported beyond the boundaries of the state, namely the grain exported to Athens. In other cases, in order to encourage large-scale buyers, Spartockides resorted to a progressive reduction of this duty. Its dimensions were in reciprocal dependence on the amount of value of the exported bread. Thus, from the Mytilene inscription of the middle of the 4th century BC (a trade agreement between Mytilene and Panticapaeum), it is known that Levkon I lowered the export duty ("thirty") to those who took the bread to Mytilene on Lesbos, by half replacing it with the "sixty" (ἑξακοστή), and from a sum exceeding ten talents, a further lowered duty was charged – the "ninety" part (ἐνενηκοστή)[92]. It is difficult to say whether Levkon I intended to impose a preferential customs tariff on Mytilene, only to encourage a large, and, accordingly, a profitable buyer, or he pursued political goals. Archaeologists discovered during the excavation of antique city-states in the North Black Sea region not only lapidary sources of law, which imposed mandatory payments in favor of the state, but also those that exempted the population from such payments. Among them, in particular, the rescript of the Bosporan king Aspurg (10/11 – 37/8 AD), as the supreme landowner in the state, to the inhabitants of Gorgippi 14/15 AD, by which the Gorgippians were exempted from payment land tax on crop[93]. "... to the Gorgippians (to my friends)," the monarch reported, "I have given a discharge from (paid) from wine, wheat and (barley) one eleventh, from millet (one twentieth?)..."[94]. T.V. Blavatsky noted that the language of the document is extremely reminiscent of the official phraseology of chancellery of the Hellenistic monarchs. Similar wording is known in the documents of Seleucid officials. They were repeatedly used by scribes of Ptolemaic Egypt[95].

According to Saprikin's opinion, the release of Gorgippi from the land tax was directly dependent on the extension of the rights of polis self-government and the inheritance of land in accordance with the "Evpatorian Law"[96], which resolved a number of important issues in the sphere of inheritance law (the law substantially expanded the rights of city-states, giving civilians the right to inherit the property of deceased citizens in the absence of direct heirs)[97]. If compare the tax rate specified in the legal norm of the asparagus rescript with the size of taxes paid by the Pergamum military colonists, paid to the royal treasury, we can see that they are identical: For the right to use the royal land, the Pergamum katoyks[98] and cleruches[99] were brought from grapes 1/20, from wheat and other fruits – 1/10 part. In this case, in the case of the owner's death, klyr remained a family and returned to the king only in the absence of a direct heir[100].

In the villages – katoyks' villages, adjacent to the fortresses located in the royal lands, the tribute was collected by authorized officials of the king (commanders of the units of Bosporan troops in 1000 people) – chiliarchs (χειλιάρχης)[101,102]. In the Bosporan Kingdom, during the reign of Asander and Aspurg, these posts were combined with the posts of the governors of districts (regions): Feodosia (όρείττης εοδοσίας); the royal regions or royal lands of the Bosporus (όεές της βασιλείας); Gorgippi (όρες της Γοργιππείας); islands (Έπί της νήσου) and aspurgian areas[103].

The above mentioned comparison made it possible for the researchers to conclude that the Aspurg legislation was a purely Hellenistic practice of regulating relations between the king and the polis, and the polis land ownership in the Bosporan Kingdom was mediated by the royal land property[104] and the duties for the use of klyr were in favor of the king, each landowner separately and the entire civilian community as a whole. The regulation of taxation system in Gorgippi during Aspurg concerned liability to the king of the entire polis, reducing the proportion of duties of each individual family of the citizens. Obviously, they made their share of taxes of the polis, after which the polis's authorities paid to the royal treasury through the representatives of the royal administration a tax in the prescribed amount. Exemption of the city from the land tax significantly increased its welfare, contributed to the development of the economy[105].

The exemption from paying the merchant's fee by Chersoneses merchants has also been reported[106,107]. Thanks to publications by P. Becker and V.V. Latyshev the science knows another interesting monument of financial law – the rescript of the Ro-

[91] BRASHYNSKY, I.B., Trade Duties and Duty Free in the Bosporus. 1958, p. 130.
[92] ZHEBELEV, S.A., The Main Lines of Economic Development of the Bosporus State. North Black Sea. Moscow, 1953, p. 133.
[93] SAPRYKIN, S.Yu., The Bosporan Kingdom at the Turn of Two Epochs. Moscow, 2002, p. 166.
[94] BLAVATSKAYA, T.V., Recipes of King Aspurgus. In: *Soviet Archaeology.* Nr. 2, 1965, p. 200.
[95] Ibid., p. 199.
[96] SAPRYKIN, S.Yu., The Bosporan Kingdom at the Turn of Two Epochs. Moscow, 2002, p. 172.
[97] SAPRYKIN, S.Yu., Evpator Law on Inheritance and its Significance in the History of the Pontic Kingdom. In: *Herald of Ancient History.* Nr. 2, 1991, p. 196
[98] Katoyks - military settlers on the horas of Hellenistic states.
[99] Cleruches - military settlers, who combined agriculture with occasional military service in their activity.
[100] SVENCITSKAYA, I.S., Socio-economic Features of Hellenistic States. Moscow, Higher School, 1963, p. 43.
[101] RANOVICH, A.B., Dependent Peasants in Hellenistic Asia Minor. In: *Bulletin of Ancient History*. Nr. 2, 1947, p. 33-35.
[102] SAPRYKIN, S.Yu., The Bosporan Kingdom at the Turn of Two Epochs. Moscow, 2002, p. 178.
[103] Ibid., p. 179, 200.
[104] Ibid., p. 172-173.
[105] ALEKSEEVA, E.M., Gorgypia in the System of the Bosporan Kingdom of the First centuries AD. In: *Herald of Ancient History.* Nr. 2, 1988, p. 80-82.
[106] ANOKHIN, V.A., The Bosporus Mint. Kyiv, Scientific Thought, 1986, p. 177.
[107] KADEYEV, V.I., Economic Ties of the Ancient States of the Northern Black Sea in the I century BC - V century AD. 1989, p. 73.

man emperor to the citizens of Tyra on behalf of Heraclitus in 201, which refers to the exemption from customs duties of citizens of Tyra, who exported some of their goods for trade [108, 109]. According to N.O. Son, the immunity, confirmed by a rescript, concerned only certain categories of goods, and not any duties in general [110]. "… The right to privilege, on any basis, obtained by request or acquired, let remain behind them (the Tyrasites – auth.) and in relation to the objects of trade, however, so that they will remember the need to declare them subordinate to the authorities under the previous custom for distinguishing goods that are subject to customs duty", the document says. At the same time, taking into account that the profits of the Illirik tax district should not have been reduced, the emperor proclaimed in his rescript: "… Let it be known to them (the Tyrasites – auth.) that those who were later taken up as citizens only in this case will have the right to use freedom from customs, if the sinewy legate and friend our special decree proclaim them worthy of the right of citizenship" [111]. It is difficult to determine precisely when the citizens of Tyra were given an exemption from duty, but based on the content of this imperial rescript, it is quite possible to agree with the opinion of N.O. Son that this happened around the first half of the 2nd century and was confirmed during the reign of Emperor Septimius Sever. The liberation of the citizens of Tyra from the duty was an important measure, which ultimately had to lead to the recovery of economy, since it was only agricultural and craft production, as the existing materials indicated, could not play a decisive role in this process. The content of the imperial rescript, which refers to the liberation of citizens from paying customs duties, indicates itself the significant development of trade with the Roman Empire and its certain regulation by the Roman administration.

Exemption from customs duties was practiced in other North Black Sea states. One of the Chersoneses proxenic decrees vested the person with the citizenship of proxenia, the polis at the same time granted "… the right to enter and leave in peace and war time without confiscation and the contract, for them… and their property…" [112]. Similar decrees were also recorded in Olbia and Panticapaeum [113].

The right to atelium (ατελεια) could have its own features in each particular case. Thus, I.B. Brashynsky, who investigated the provision under the treaty of 346 BC the Bosporan atelium to Athenian merchants, drew attention to the fact that it did not exempt them from paying all customs duties, but only from payment of export-import duties and, possibly, from the tax on the conclusion of a contract of sale (trade agreement). In any case, the merchants who carried the bread to Athens using the atelia were not exempted from paying the port dues. In view of relatively high turnovers of the Bosporan ports, first of all, the Panticapaeum and Feodosia, in the 4th century BC port collection, apparently, was an important item of the profits of the Spartockids [114]. In addition, the researcher believes that the Athenians enjoyed the right to duty-free export of grain (not all products) only from royal harbor – Panticapaeum. Moreover, for its removal in each individual case, it was still required to obtain the appropriate permission of the Bosporan magistrates (Dem. XXXIV, 36). Perhaps, this should have been supported by presentation of a certificate that the bread purchased definitely for Athens and exported to the Athens emporium. Such certificates issued to the Athenian magistrates, but, more likely, they could be issued by the Athenian representatives in Bosporus. According to Brashynsky, Hilon – Grandfather of Demosthenes – was such a representative [115].

After the conquest of Feodosia by Levkon I and the redevelopment at his command of the port of Feodosia, the Athenians were entitled to the duty-free export of bread in Feodosia (Dem. XX, 33). This point of view of I.B. Brachynsky finds confirmation that, according to Demosthenes, Bosporan archon king, in this case, Levkon I, distributing the right of duty to a new port, made a special announcement about it. Thus, it can be concluded that the athelium of the Athenians did not extend to the territory of the entire Bosporan state, since in this case it would not be necessary to provide the athelium in a separate place, it would automatically extend to all ports of the state. In cases where the atelium was provided on the territory of the entire Bosporan kingdom, and in addition to all goods, not just bread, this was clearly determined in each individual case in a special royal decree. Until now, proxenic decrees of Perisad I preserved in honor of the inhabitant of the Athenian colony Piraeus (Amisa) and some Khalkedonians [116, 117]. The first of them clearly states that Perisad and his sons gave proxenia and atelium to all products in the entire Bosporus to a certain peasant and his sons and servants (έδοσαν προξενίαν κ [αί άτέλει] αν πάντων χρημάτω [νέν παν] τί Βοσπόρωι).

There were privileges for donating proxenem the right to duty-free entry and exit, that is, the provision of atelium [118], that once again undeniably testifies to the existence of import and export duties in Pontic States, which the Greeks called 'ελλιμένιον, or 'ελλιμενικόν.

[108] BEKKER, P. Tiras and Tiriths. Clarification of an Inscription Representing Two Scripts Given by the Roman Emperors to the Name of the Tiriths. In: *Notes of the Odessa Society of History and Antiquities*. Vol. 2, 1848, p. 416-469.
[109] LATYSHEV, V.V., Inscriptiones Antiquae Orae Septentrionalis Ponti Euxini Grecae et Latinae. Petropolis, 1916, p. 16.
[110] SON, N.A., Tyra of Roman Times. Kyiv, 1993, p. 50.
[111] LATYSHEV, V.V., Inscriptiones Antiquae Orae Septentrionalis Ponti Euxini Grecae et Latinae. Petropoli, 1916, p. 16.
[112] SOLOMONIK, E.I., New Epigraphic Monuments of Chersonese. Lapidary Inscriptions. Kyiv, 1973, p. 45.
[113] LEVY, E.I., Olbia. Hellenistic Age City. 1985, p. 87-88.
[114] BRASHYNSKY, I.B., Trade Duties and Duty Free in the Bosporus. 1958, p. 132-133.
[115] BRASHYNSKY, I.B., On the Question of the Position of Nymph in the Second Half of the 5th century Bc. In: *Herald of Ancient History*. Nr. 2, 1955, p. 37-51.
[116] LATYSCHEV, V.V., Inscriptiones Antiquae Orae Septentrionalis Ponti Euxini Grecae et Latinae. Petropoli, 1916, Nr. 1, 2.
[117] BRASHYNSKY, I.B., Trade Duties and Duty Free in the Bosporus. 1958, p. 133.
[118] PEROGOVSKY, V., About the Beginnings of International Law Concerning Foreigners Among the Peoples of the Ancient World. Kyiv, 1859, p. 28.

Along with the purely fiscal duties, the duty served as a stimulating and protective function already in the ancient times. The protective function of duty, as a rule, involves the formation of barriers that impede the penetration of goods into the territory of the state, more competitive in relation to national ones, or simply those in which the state is not interested.

An important item of polis's profits has long been, among others, court fees [119]. Their significance was due to the fact that the propensity for court disputes and litigation, as known, was one of the distinguishing features of national character of the ancient Greeks and their courts were filled with various affairs.

Thus, the analysis of the texts of legal monuments preserved to our time, as well as the evidence of narrative sources, allow researchers to reach certain conclusions. Firstly, the characteristic feature of the legal system of the ancient states of the North Black Sea region in the first centuries AD was the development of financial and legal relations, their settlement by regulatory legal acts, which were issued by authorized officials and their colleges. A significant level of excellence in working out legal acts preserved in the form of lapidary monuments testifies to a rather high level of legal technique of their writing. All legal norms are clear and understandable; there is no multivariate understanding of their content.

Secondly, in the antique states of the North Black Sea region in the second half of the 1st millennium BC there was a reception of Greek tax law, as well as the norms of ancient international law, taking into account local peculiarities of state-legal development. At the same time, from the beginning of the era, we can state the facts of the use of financial legal norms borrowed from the Roman Empire in everyday legal practice.

Thirdly, the sources surely prove that there was a special apparatus to perform functions of collecting taxes and non-tax payments by citizens and authorized state magistrates. It should also be noted that there was well developed control apparatus to ensure compliance with the law in the sphere of taxation and duties.

3. Legal regulation of monetary circulation, settlements and monetary relations

Historically, commodity-money circulation has begun in the North of the Black Sea ancient city-states, the needs of which eventually led to the necessity of minting their own money. Money "grew out of the commodity world, money is the product of the latter, which separated from the mass of goods as a result of the development of commodity exchange" [120]. The development of commodity production and exchange led to the fact that, after all, the role of money was fixed by metals, and then, over time, with precious metals (gold and silver). At the early stage in the development of money, metals were used in the form of ingots, which was extremely uncomfortable. Later, in order to facilitate the exchange, it was decided to mark the official stamp with certain quantities of those metals that were commonly used in sale and purchase of goods. Thus a coin appeared, and those state institutions eventually became known as "mint". O.M. Bandurka and V.V. Hlushchenko defines a coin as "a certain amount of metal, which has a certain form, state stamp, which certifies the weight of the metal and its standard" [121]. Coins of certain form, weight and dignity became legalized means of circulation and payment. The beginning of coinage was laid in the VIII-VII centuries BC in ancient Greece.

In antique states located in the South of modern Ukraine, the coinage of polis coin began a little later. So, in Tyra, the appearance of first local coins was recorded in the second half of IV – in the beginning of III century BC [122], which is a vivid indicator of the development of not only domestic market, but also an increase in market orientation of the economy. Such a late, compared to other centers of the Northwest Black Sea region, appearance of the coin is explained by reasons of economic order, and natural basis of the economy of the tiritus, as well as the absence of an acute need for a monetary equivalent, through which trade transactions could be made, in the IV century Bc.

The monetary circulation of the early Panticapaeum was based on silver stater, which was minted by the Eugene weighing system. At the initial stage, only diophores and small fractions of obol were issued regularly, which, in a quantitative sense, certainly prevailed. This suggests that small manufacturers prevailed at that time and there was no significant trading network for which a larger denomination would be needed. Early Panticapaeum silver coins have not been found on barbarian sights yet, but found only in ancient settlements. This indicates the circulation of these coins exclusively on the domestic market of Bosporus cities. As an international coin, gold kizikin staters were used at that time [123]. Thus, it can be stated that the beginning of the coinage in Panticapaeum testifies to its faster economic development, compared with other antique centers of the Bosporus.

Based on a number of published sources of law, as well as the works of archaeologists, which, among others, use epigraphical sources, one can make a certain idea of the regulatory framework of currency regulation, which usually refers to the activities of state bodies, aimed at regulating the implementation of exchange operations [124].

As autonomous states Olbia, Chersoneses and Tyra carried out foreign trade and other economic ties with foreign countries. For this purpose, probably, the highest state bodies of the polis – ecclesia – determined currency transactions regime in the state, general principles of currency regulation, powers of state bodies and individual magistrates in the regulation of ex-

[119] LATYSHEV, V.V., Essay on Greek Antiquities. Saint Petersburg, 1888, p. 233.
[120] BANDURKA, A.M., HLUSHCHENKO, V.V., Money and Credit. Kharkiv, 2003, p. 5.
[121] Ibid., p. 29.
[122] ZUBAR, V.M., LINOVA, E.A., SON, N.O., The Ancient World of the Northern Black Sea: Essays on Historical and Socio-Economic Development. Kyiv, 1999, p. 112.
[123] POKRAS, Yu., On the Attribution of Images on Kizik's Coins. In: *The Ancient World*. Nr. 1, Kiev, 2001, p. 50-52.
[124] ZYUNKIN, A.G., Finance Law. Kyiv, MAUP, 2001, p. 107.

change transactions, rights and obligations of subjects of currency relations. Such a regime was established with the help of currency legal rules, which usually serve as the basis for legal regulation of currency relations. Already in ancient times, they allowed some discretion (i.e., the possibility of protecting by procedural means)[125] for subjects of currency legal relations. At the same time, these norms had some features of financial and legal norms: state-imperious character, imperative and categorical requirements. As a rule, this follows directly from the monetary policy of the state.

One of the most prominent monuments of financial law of the North Black Sea ancient city-states of ancient times, which, in particular, contains the norms that establish the legal principles of currency regulation, is already mentioned by us and worked out in the historical and philological aspects by the archaeologist V.V. Latyshev and scientist-numismatist P. O. Karyshkovsky text of the Olbian law on money circulation and currency transactions. The document dates back to the beginning of the 4th century BC and allows us to state confidently the existence, in particular, of the Olbia state system of currency relations – relations that usually take place in the sphere of financial activity of the state and associated with its role in the distribution and redistribution of gross domestic product in order to create and use of currency funds necessary for society.

The law, adopted at the suggestion of Kanob, son of Trasidamant, defined the conditions for entry into Borisphen, which was understood as the city of Olbia or even the entire Olbia polis. On the territory of the latter, all subjects of currency relations – individuals were obliged to use in the process of trading only Olbian coins: "sell and buy all for the money of the city, for Olbian copper and silver"[126]. Consequently, the conditions for the sale and purchase of foreign currency for residents (persons permanently resident on the territory of the state) and non--residents were the same.

It should be noted that similar norms existed in other states of the ancient world. As an example, one can recall the Athenian law of Clearh (about 420 BC), which proclaimed: "… Who [in the cities that were part of the first Athenian Maritime Union – auth.] will… use not the Athenian coins, weights and measures, becomes liable to punishment…"[127,128]. A.V. Buycky, on the basis of the analysis of numismatic data, assumes that this law also acted in Olbia during its membership in the Atanian Maritime Union[129]. Consequently, the law of Kanob once again clearly illustrates the proximity of the Olbian system of law to the legal systems of other states of the Hellenic world, in particular, Athens.

From the text of the Olbian Act one can create an idea of the main elements of currency regulation in the state: the establishment of the procedure for the execution of currency transactions, which include transactions involving the transfer of ownership rights and other rights to currency values, import to the state and export beyond its limits currency values[130], the use of currency values in international circulation as means of payment; definition of some conditions and procedure for forming the currency reserve of the country and currency funds of undertakings; currency control.

Paragraph two of the Law determined the only item of exchange (purchase and sale) of foreign coins in the local ones – "in the stones in ecclesiastes", from which speeches were made during the People's Assembly[131]. Exchange of foreign coins in Olbia according to Art. 5 of the Law was exempted from taxation ("No tax should be imposed for stamped gold or silver, neither on the seller, nor on the buyer…"), and the import and export of any coins was proclaimed open (Art. 1).

The decree also established the exchange rate of the "international currency" - the most prevalent at that time in the North Black Sea region of coins – staters of city Kizik[132], located on the South coast of the Marmara Sea: "The gold must be sold and bought for… [eight] and a half staters for a kizik stater, not cheaper or more expensive, but all other types of stamped gold and silver to buy (thus), convince each other"[133,134].

The exchange functions were carried out by the exchangers – trapezits. M.V. Skrzhynska believes that they "exchanged money from different states for the coin of their polis and checked their quality; they also performed the role of lenders, custodians of deposits and intermediaries when entering into transactions with various types of payments"[135]. The activity of monetary exchanges was probably controlled by agoranomists (αγόρανομοί) – elected officials, who also had to monitor the improvement of the places of trade and to maintain its order by any means. The agoranoms punished for deception, so they examined the goods, measures and weights; they prohibited the sale of persons who did not have the seller's rights (foreigners and metics could only trade by paying a "foreign duty"). Among other things, they registered private contracts, priced some goods, levied market fees[136] and require performance of

[125] LOGINOVA, N., Historical View on the Manifestation of Dispositiveness in the Criminal Process of Ukraine. In: *Law of Ukraine*. Nr. 4, 2007, p. 130.
[126] LATYSCHEV, V.V., Inscriptiones Antiquae Orae Septentrionalis Ponti Euxini Grecae et Latinae. Petropoli, 1916, Nr. 24.
[127] ZHEBELEV, S.A., Ancient Method of Production in Sources. In: *GAIMK News*. Nr. 78. Leningrad, 1933, p. 346.
[128] MEIGGS, R., LEWIS, D., A Selection of Greek Historical Inscriptions. Oxford, 1969. p. 45.
[129] BUISKIKH, A.V., To the Question of the Action in Olbia of the Law of the Clearchus. In: *Olbia-200. Abstracts of the Reports of the International Conference Dedicated to the Two Hundredth Anniversary of the Archaeological Discovery of Olbia*. Nikolayev, 1994, p. 23-25.
[130] KRUTSKIKH, V.E., Legal Encyclopaedic Dictionary. Moscow, INFRA-M, 2000, p. 39.
[131] LATYSHEV, V.V., Studies on the History and Structure of the City of Olbia. Saint Petersburg, 1887, p. 49.
[132] SKRZHYNSKAYA, M.V., Weekdays and Holidays of Olbia in the VI-I centuries Bc. Saint Petersburg, 2000, p. 81.
[133] ZHEBELEV, S.A., Ancient Method of Production in Sources. Leningrad, 1933, p. 348.
[134] KARYSHKOVSKY, P. O., Olbian Coins. An Outline of the Monetary Circulation of the Northwest Black Sea in the Ancient Era. Kyiv, Scientific Thought, 1988, p. 11.
[135] SKRZHYNSKAYA, M.V., Scythia through the Eyes of the Hellenes. Saint Petersburg, 2001, p. 165.
[136] LUBKER, F., The Real Dictionary of Classical Antiquities. Saint Petersburg, 1885, p. 51.

laws that regulated money circulation [137]. The agoranoms also had the right to sue within their competence, and with minor violations of the law, they probably punished by their own authority, while more serious crimes were subject to review by other judicial bodies [138].

Evaluating the general content of the law of Kanob by its essence Karyshkovsky noted that his most important point is an order that obliged to carry out all acts of sale and purchase on local money. It accurately determines the measure of punishment for violators in the form of confiscation and clarifies the procedure for its application (Art. 3) [139]. All other articles of the law only clarified the way of implementation of this main part.

As noted, in cases of detection of violations as punishment confiscation of currency values that were the subject of illegal currency operations took place. This raises the question of the fate of other items of illegal currency transactions, which are not monetary values, that is, the question of whether the property (house, household objects, clothes, etc.) could be confiscated, the cost of which was paid in foreign currency, or Olbian currency, for which the values are bought. It is likely that they also were subject to confiscation: "Who will sell or buy elsewhere will be deprived: the seller – the silver that sold, and the buyer – the price for which they bought" – set by law.

Thus, the law of Kanob defined the status of the Olbian currency as the only legal means of payment in the state, established general principles of currency regulation, such as: the location of "financial institutions" – monetary changers, rights and obligations of subjects of currency relations, liability for violation of currency legislation and functions of currency control bodies in the implementation of currency operations, etc. The adoption of this law by Olbia, apparently, was due to the desire for a significant, clearly aware of their needs and their sovereignty polis to strengthen, streamline the legal regime of domestic trade, monetary circulation and the conduct of currency transactions [140].

So, after analyzing the law and taking into account the evidence of narrative sources and the data of archeology, we can draw some conclusions. Firstly, in the Olbia state in the 4th century BC the sphere of currency relations was, apparently, not only the international monetary relations that manifested in foreign trade, international transportations, etc., but also domestic monetary relations, covering public relations, organized by the state in the development and implementation of state monetary policy and were caused by the formation, distribution and use of centralized and decentralized currency funds, necessary for certain subjects to perform their functions.

Secondly, the polis law has established a general permit for currency operations, but in a strictly limited manner and in the prohibition of certain actions. In accordance with the specified general permission each specific subject had the right to be owner of currency values with all the powers that resulted from it – possession, use and disposal of currency values [141]. At the same time there were certain limitations despite general permission.

Thirdly, the legal regime of currency relations, that is, the regime of currency restrictions, consisting in legislative or administrative prohibition, the limitation or regulation of operations with currency or currency values (in its own currency, foreign currency, monetary metals), in Olbia state had certain characteristics. Restrictions on currency transactions here were: 1) restriction of free sale of foreign currency and the introduction of mandatory sale of foreign currency (kizik stater) in exchange for the Olbian currency at official exchange rate; 2) concentration of currency operations at a specially designated exchange places; 3) control of residents and non-residents – participants in currency operations in the country; 4) prohibition of circulation and use of foreign currency as a means of payment on the territory of state. Typically, the introduction of currency restrictions can be dictated by economic or political reasons [142]. Indeed, archaeological evidence suggests that it was during the classical period (in particular, at the end of the 5th – in the beginning of the 4th century BC) that the main tendencies of Olbia economic development were the decline of great hora and the resulting economic slowdown, as well the increase of intermediary trade share of the state economy [143], which, obviously, caused an acute need for legislative regulation of currency relations in the state.

Fourthly, the functions of currency control, which consisted in controlling the compliance of currency transactions with current legislation, were executed by Ecclesia, agoranoms, procurators (individuals who purchase the right to exercise control over the compliance with the law of Kanob and to bring the offenders to court) in Olbia. In our opinion, such a dispersal of control functions in the sphere of regulating currency relations between different state authorities did not contribute to strengthening the status of the Olbia currency. In addition, we can assume the existence of numerous facts of the implementation of illegal currency transactions associated with the shadow circulation of currency contrary to the requirements of the currency legislation.

Fifthly, the export of Olbia's currency and the repatriation of gold, silver, and currency were carried out free. Obviously, it was also allowed to provide and receive loans in foreign currency by residents, placement of currency values in accounts and deposits outside Olbia. The latter is evidenced by the materials described by Isocrates in the case of the Bosporus citizen

[137] SOROCHAN, S.B., ZUBAR, V.M., MARCHENKO, L.V., The Life and Death of Chersonese. Kharkiv, 2000, p. 796.
[138] LUBKER, F., The Real Dictionary of Classical Antiquities. Saint Petersburg, 1885, p. 51.
[139] KARYSHKOVSKY, P. O., Olbian Coins. Kyiv, 1988, p. 15.
[140] Ibid., p. 15.
[141] HAVRYLENKO, O.A., Ancient States of the Northern Black Sea. Kharkiv, 2006, p. 193.
[142] VORONOVA, L.K., Financial law. Kharkiv, 1998, p. 461.
[143] ZUBAR, V.M., LINOVA, E.A., SON, N.O., The Ancient World of the Northern Black Sea. Kyiv, 1999, p. 48-49.

Sopeid (IV century BC), which placed the currency values of his father in Athens[144,145]. Interpretation of the provisions of law also gives grounds for saying that on the territory of Olbia Olbian and foreign currency and monetary metals, without any restrictions, could be the subject of a pledge.

Thus, we can state the existence of a sufficiently developed, complex and ramified system of monetary regulation in Olbia at the beginning of the 4th century Bc. Despite some primitiveness of financial relations, the level of development of Olbia state authorities, which carried out the functions of monetary regulation, corresponded to the level of economic and legal development of the ancient society, and, despite certain features, legal basis of monetary regulation in Olbia, in its essence, was similar to the foundations of regulation of currency relations in other ancient Greek city-states of that time.

4. Conclusions

Consequently, financial relations have long occupied a significant place in the life of any state, society and individual. Financial law is an important legal regulator of these relations that in the ancient times only began to form.

The analysis of financial legal relations in antique states of the North Black Sea region, which belonged to Greek civilization, gives an opportunity to arrive at certain conclusions. First of all, it should be noted that in the North Pontic states during the entire period under study, to a certain extent, the following laws of the development of legal regulation of financial relations appeared: strengthening the role of legal regulations in the management of public finances; the implementation of financial and administrative functions by unspecialized state apparatus, but by a number of bodies of state, local authorities, individuals.

At the same time, attention is drawn to the fact that in due course some organizational and functional separation of certain financial bodies from the administration of general competence takes place; the transition from the natural to the mixed (natural and financial) form of collection of taxes; the improvement of the tax system, an increase of the percentage of direct taxes from full citizens compared to liturgies, that gradually led to disappearance of the latter; an increase of the dependence degree of the amount of taxation on income and property of the payer.

[144] ZHEBELEV, S.A., Ancient Method of Production in Sources. Leningrad, 1933, p. 313-322.
[145] BLAVATSKAYA, T.V., Essays on the Political History of the Bosporus in the 5th-4th centuries BC. Moscow, 1959, p. 120-125.

Legal and Social Status of the Church in Great Moravia*

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Abstract

The paper describes the position of the Church in Great Moravia, while trying to point out whether the statement of the history of state and law on a strong link between the state and the church in the contemporary period is really true. The author states that the generally accepted opinion (about the strong link between the state and the church in the given period) is only based on the analogy about the development of the state-church relationship in the countries neighboring Great Moravia (on which history we have more written sources), or in the countries that originated after the extinction of Great Moravia (Bohemia and the Kingdom of Hungary). In the next section, the author contemplates whether it is really possible to characterize the relationship between the state and the church in the way it is presented in current works. In the first part of the paper the author presents the opinion that already in 833-863 there were educated clerics at the court of the Great Moravian princes who held high positions in the state administration. This is justified by references in contemporary texts. At the same time, he points out that in the period in question in Great Moravia there was also a church administration at the lower level, controlled by Passau. The second part presents views on the relationship between the state and the church in the years 863-885. In this part, the author points out that the ruler of Great Moravia acted as a judge in church and theological disputes, had competence in appointing bishops, provided them with means of subsistence, etc. He also points out that secular and ecclesiastical affairs also overlapped at the level of foreign relations, as well as in teaching home clergy in clerical schools that were founded by Constantine and Methodius. In the last part of the paper, it is pointed out that the Great Moravian legal texts contained norms with secular and ecclesiastical sanctions. On a concrete example, the author points out a possible contradiction in the practical imposition of these sanctions, trying to explain how this contradiction would be approached from a Christian philosophy perspective.

Keywords: *Great Moravia; church; public power; state.*

The history of Great Moravia has long been a center of interest of not a small number of experts in the field of archeology, history, linguistics, including experts in the field of legal history. Although there are significantly more professional publications about the period of Great Moravia history than about the history of the Czech and Slovak nations during the 10th to 12th centuries, much of the information published in the publications on the given period do not have a support in the original written Great Moravian sources and are only based on analogy of the development in the same period in neighboring countries, or in a later period. The same applies to the description of the relationship between secular power and the Church in Great Moravia.

So far, the works dealing with history of state and law were more or less consistent characterising the relationship between secular power and the church[1] in medieval countries as relatively narrow, where church dignitaries have also been involved in public affairs, and some posts in public administration were often occupied by clerics. The legal-history writings characterize the relationship between secular power and the Church in Great Moravia in a similar vein.[2] However, a problem for such statement to be made in the history of the state and the law

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1 For the purpose of this work we will consider the phrases „secular power" and „governing power" to be synonymous. Instead of the phrase „ governing power," older legal-historical writers prefers to use the phrase „state power." However, because of the ongoing controversy, whether Great Moravia was a state at all, we will use the more general phrase „governing power".

2 On the issue of the relationship between public and ecclesiastical administration, see in more detail: MOSNÝ, P. - LACLAVIKOVÁ, M., *Dejiny štátu a práva na území Slovenska I. od najstarších čias do roku 1848*, Šamorín, p. 15; MOSNÝ, P. - LACLAVIKOVÁ, M., *History of state and law on the territory of Slovakia I. From ancient times till 1848*, Plzeň, 2009, p. 14; MOSNÝ, P. - HUBENÁK, L., *Dejiny štátu a práva na Slovensku*. Košice, 2005, p. 17. ŠVECOVÁ, A. - GÁBRIŠ, T., *Dejiny štátu, správy a súdnictva na Slovensku*, Plzeň, 2009, p. 122; LYSÝ, M., *Moravania, Mojmírovci a Franská ríša. Štúdie k etnogenéze, politickým inštitúciám a ústavnému zriadeniu na území Slovenska vo včasnom stredoveku*, Bratislava, 2014, p. 137; LYSÝ, M., „Veľkomoravský štát". In: *Quid leges sine moribus?* Trnava, 2014, p. 267. Compare with VOJÁČEK, L. - SCHELLE, K. - TAUCHEN, J. (eds.), *Nástin právních dějin. (Czech Legal History)*, Brno, 2011; VOJÁČEK, L. - SCHELLE, K. - TAUCHEN, J. (eds.), *An Introduction to History of Czech Private Law*, Brno, 2011; SCHELLE, K. - TAUCHEN, J., *Vývoj konstitucionalismu v českých zemích (The Development of Constitutionalism in the Czech Lands),* Praha, 2013.

of Great Moravia is that this statement was taken into their subject only by an analogous procedure: since the relationship between secular power and the Church in other countries of the period was similar, „it was also so in Great Moravia". The special investigation of the relationship between state (or government) power and the Church in Great Moravia has not been carried out in the legal history writings. So in this paper we will try to point out whether a statement about the close relationship of the ruling power and the church can also be truly assumed for Great Moravia.

If we want to characterize the relationship between ruling and ecclesiastical power as narrow for the territory of Great Moravia, we should answer positively the following basic questions: 1. Did clerics work in the public administration in Great Moravia? 2. Did the Great Moravian sovereign intervene with church affairs? 3. Did the Great Moravian sovereign have competence in the occupying the posts of church dignitaries? 4. Did the sovereign (or other secular dignitaries of the country) participate in the financing of the church? 5. Was there a link between secular and ecclesiastical matters at the level of foreign relations? 6. Was there a link between secular and church law?

*T*he activity of clerics on the court of the Great Moravian sovereign is expected especially in the period after the arrival of Constantine and Methodius to Great Moravia in 863/4. It did not necessarily have to be so. In the extant texts, we can find indirect evidence of clerics acting on the sovereign's court even before the year 863. It can be a formulation of Rastislav's message, as it has been preserved from the Life of Methodius V: *We are healthy from God's grace. Many teachers came to us - Christians from Italy, Germany and Greece, teaching us differently. But we Slavs (we are) simple people and we have (no one) who would teach us the truth and instruct us properly. So, the good governor, send us a man who will organize all the law for us*.[3]

Marečková, on the basis of a linguistic analysis of this text, notes that the messengers brought to Constantinople a document written in Greek, drawn up in accordance with the rules applied in Byzantium in contact with senior state dignitaries. If the Great Moravian messengers brought the Greek-language documentary, which was written in a cultural literary style, there „had to be" scholars in Great Moravia, who mastered this style and were able to write.[4] Regardless of whether the author was a Slav or a stranger, it was probably a cleric. (In this period, there were practically no secular schools, and "common" / secular / population was most often illiterate.) If the author's of Rastislav's message was a cleric from his court, or from another important center of the country, the participation of educated clerics in the administration of public affairs can be assumed already before 863.

Wiching and John of Venice are people from the ecclesiastical environment who acted on the sovereign's court (and both probably worked in high state positions) and who are known by name. They acted as court chancellors. It was an important post in the public administration: the court office, chaired by the court chancellor, was in charge of drawing up letters and communicating with foreign countries. Likewise, the other members of the court office were probably clerics. The clerical occupation of the court office was purely pragmatic: practically only clerics were literate, and as the court office drafted documents, it made no sense to employ illiterate people.

Thus, the generally accepted statement of the history of state and law that also clerics held posts in the state administration in Great Moravia (probably even before the year 863, and also after this year) seems likely.

In the second question we asked whether the Great Moravian sovereign interfered with church matters? From the legend the Life of Methodius, we learn that Svätopluk sent Methodius and Wiching to the Pope when he was unable to resolve their belief-related dispute. Although this dispute was not resolved by Svätopluk, it is important that both parties submitted a dispute to the ruler of Great Moravia, and only when he was unable to resolve this dispute, he referred it to the Pope.[5]

From the legends the Life of St. Clement X31, and the Life of Methodius X, we learn that immediately after Methodius's death (on 6 April 885) the contradictions between the advocates of the Old Slavonic Church liturgy and the Latin liturgy are escalating. Disputes between these parties resolved by Svätopluk „by the judgment of God" in the form of the oath of „right and true faith".

On the basis of these two references, it can be stated that the ruler of Great Moravia not only intervened with ecclesiastical matters, but could also act as a judge in church disputes. Making judgment in church disputes can be considered a significant right within the scope of the sovereign's powers. Thus, the second question posed in the introduction to this article can also be answered in the affirmative.

Did the Great Moravian sovereign have competence in the occupying the posts of church dignitaries? From the papal letter *Industriae tuae* (incorrectly referred to as a bull in legal-historical writings), it can be learned that the sovereign also had competence in the occupying the posts of bishops: *…Also, the priest named Wiching, whom you sent to us, was sanctified as an elected bishop of the Holy Church of Nitra, and we command him to be obedi-*

[3] *Jako B(o)žijeju m(i)l(o)stiju sъdravi jesmь, i sutь vъ ny vъšьli učitele mnozi krьstijani iz Vlachъ i iz Grьkъ i iz Němьcь, učašte ny različь, a my Slověni prosta čadь i ne imamъ. Iže vy ny nastavilъ na istinu i razumъ sъkazalъ. To dobri vl(a)d(y)ko, posъli takъ mužь, iže ny istpravitь vьsaku pravdu.*

[4] Marečková claims that the message was written either by Greeks living in Moravia or by Byzantine Slavs living in Moravia. MAREČKOVÁ, D., Rastislavovo poselství v Životech Konstantinově a Metodějově ve světle středověkých řeckých listu a listin. In: *Listy filologické*. Praha, No. 91, 1968, p. 410. Compare with STANISLAV, J. *Starosloviensky jazyk/1*, Bratislava, 1978, p. 158. Kučera states that the author of the message could have been one of the priests from the northern Italian coast or Dalmatia, who worked as a counselor in Rastislav's court. Stanislav is more inclined to authorize the written form of the Slavic word controlling Greek. Rastislav's message is so close to not only Greek verbal expression (for example, the phrase „God's grace we are"), but also the Greek way of thinking that it could not have been written by the Slav who would not speak Greek. Even the wording of the message indicates the height of the phraseology of the cultivated form of the Old Slavonic Church language. If the old Slavs used the uncultivated language, they would not be able to formulate Rastislav's message in the Greek language in a cultivated style. KUČERA, M., *Slovenské dejiny I. Od príchodu Slovanov do roku 1526*, Bratislava, 2011, p. 95.

[5] For more details on this issue: VAVŘÍNEK, V., *Cyril a Metoděj – mezi Konstantinopolí a Římem*, Praha, 2013. p. 241.

ent in all his Archbishop. And we wish you would send us, with the permission of the Archbishop himself, another capable priest or deacon at the appropriate time to appoint him to be a bishop in another church, in which you acknowledge the episcopal care necessary…

On the basis of the first sentence, it can be assumed that Wiching was an elected bishop, elected by the people, magnates and monarch.[6] Svätopluk could not appoint a bishop himself, but he could recommend a suitable candidate for the post as well as to take part in the election. Thus, secular sovereign was also involved in the appointment of the highest ecclesiastical dignitaries.[7] (And the supreme ecclesiastical dignitaries were also in the secular functions of his court. Wiching was Svätopluk's counsellor and the „chancellor").

Did the sovereign (or other secular dignitaries of the country) participate in church financing?[8] The ruler appointed a predium to the chosen bishop and allowed him to perform the office. The above mentioned procedure in the conditions of Great Moravia is also indicated in Chapter X of the Life of Methodius, where it says: *And when Prince Svätopluk and all the Moravians accepted him, he was given all the temples and clerics in all the towns*.[9]

Financial supporters of „ordinary" priests and churches could also be wealthy magnates (not only sovereign) on whose property was located so-called „property churches" established for the needs of the family and the circle of people around the magnate.

A similar competence was also held by Kocel' as a ruler in the Blatno (currently Balaton) Principality. After Constantine's death, Kocel' asked Pope Hadrian II to send Methodius as a teacher, and the Pope sent him to Kocel' as a papal legate. Kocel' then sent him back to Rome to be consecrated as Bishop of Pannonia to the seat of Saint Andronicus (originally in Sirmium). Methodius always acted on the basis of the express wish of Slavic monarchs.[10]

Was there a link between secular and ecclesiastical matters at the level of foreign relations? The link between secular power and the church can also be seen at the level of foreign relations. From the papal letter Industriae tuae it can be learned that a delegation came from Great Moravia to John VIII to present Svätopluk's request that Svätopluk, his loyal magnates and the people of his country wish to be under the patronage of Saint Peter and his deputy (Pope). John VIII accepts him as his only son. The delegation was led by Methodius accompanied by the Moravian magnate Zemižizň. The head of the Svätopluk's delegation and Svätopluk's spokesman is Methodius.[11] Svätopluk's and Metodius's interests overlap at that time, and it is not possible to imagine a foreign „diplomatic" mission without co-action of both of them.[12] It is not correct to ignore that Constantine and Methodius already participated in „diplomatic negotiations" abroad during their time in Byzantium. Also here (in Byzantium), it was customary for some secular functions to be held by clerics. It was equally common for secular clerks to retire to a monastery for a „retirement" (also Methodius). So we can also answer this question in the affirmative.

Did clerics take part in the public administration in Great Moravia? The link between the governing power and the church can also be seen to some extent in the education / training of home clergy and the factual performance of some positions in public administration. Part of the preparation of the clergy at the Great Moravian schools founded by Constantine and Methodius was also probably the teaching of church law. This is particularly evidenced by the provisions of the Judicial Code for the People, the norms of which have also included secular and ecclesiastical sanctions. By its content, the most extensive regulation of Great Moravia law was Nomocanon, which consisted largely of norms of church law. The preparation of the future clergy, therefore, took place not only by teaching theology but probably by teaching law.

The interconnection of secular and church law is also evidenced by the factual performance of some administrative professions in Great Moravia. Only clerics could perform the function of „court chancellor" as well as other employees of the court office, not only by virtue of their literacy, but also by virtue of their spiritual authority overseeing the truth of the documents displayed by the office.[13] It is not possible to assume the education of secular officials at that time, so the posts in the administration requiring literacy were held by clerics, part of education of which was probably (as mentioned above) also law.

Clerics' participation in secular affairs may also be presumed by the need for their literacy in judging: In the event that the judging was primarily conducted by a sovereign or representa-

[6] Even before the 4th Council of Constantinople, the princes began to decide on the election of the bishop, and in particular the rulers, who, since the time of Charles the Great, had sent the appointed persons to the Pope for ordination. However, the Council declared bishops appointed only as rulers invalid, and then the bishops had to be elected by the people, the princes and the rulers. Thus, if Wiching was elected bishop and subsequently sent to the Pope for consecration, such a procedure was fine. See close: BARTOŇKOVÁ, D. - HAVLÍK, L. - MASAŘÍK, Z. - VEČERKA, R., *Magnae Magnae Moraviae Fontes Historici. Prameny k dějinám Velké Moravy*, Praha, Brno 2008-2013, p. 169. To further quote this work, we will use the abbreviation MMFH.

[7] It was then a common practice to set up new bishops directly by the Pope, or they were proposed by bishops to ordination and sent by the Pope ad gentes. The establishment of the bishopric required the papal approbation and the present consent of the sovereign.

[8] Using the term „funding", we are aware that there was no developed monetary system in Great Moravia. Funding for the purpose of this work is to provide material goods for the construction of the church, its maintenance and livelihood for the clergy.

[9] *I priimъ i S(vę)topl'kъ knězъ sъ vьsěmi moravlęny i poruči jemu vъsę cr(ь)k(ъ)vi i strižьniky vъ vьsěchъ graděchъ*.

[10] VAVŘÍNEK, V., *Cyril a Metoděj – mezi Konstantinopolí a Římem*, Praha, 2013, p. 175.

[11] MMFH III, p. 164.

[12] *Emperor Michael III kaisar Bardas and Patriarch Ignatios send a message to the Baghdad Caliph Mutawakkil, the ascetic Georgias and perhaps Constantine the Philosopher at the head of the message. Michael III. sends a message to Baghdad to Mutawakkil*. In: MMFH III, p. 110.

[13] Paradoxically, from the time of Great Moravia we have indications that the documents were also falsified by clerical representatives: Wiching made or procured a fake - a letter allegedly sent by Pope to Svätopluk and whose content was in favor of Wiching. See more: MMFH III, p. 176.

tives of local administration units, or heads of families, these were unlikely to be literate. If the normative texts of the Great Moravian period were to be applied in judicial practice, it would require judges to memorize these normative texts. Since the primary task of the country's high dignitaries in the Middle Ages was mainly the exercise of military service, the idea of a military dignitary memorizing legal texts that they do not quite understand (given that they are written in foreign / albeit partially understandable) is too idealistic. More realistic is the hypothesis that the content and interpretation of these texts were learned by Constantine and Methodius's students in the clergy preparation school. The students in the school studied both the script by which these normative texts were written and the Old Slavonic Church language that could not be understood by the ordinary population. We can therefore conclude that the priests (probably the only literate members of the contemporary society) could have played an important role in judging, either as decision-makers deciding based on norms contained in normative texts, or at least those who helped (read or explain) judges the content and meaning of normative texts.

Was there a link between secular and church law? The close relationship between governing power and the church can also be seen in the character of some of the contemporary norms that include the secular sanction and the ecclesiastical sanction. Although the norms of Great Moravia law often include the secular and ecclesiastical norms, we will only mention one example: Article 15 of the *Judicial Code for the People*.[14] This is sanctioning action in which someone burns a residential building due to robbery by the death penalty and at the same time by ecclesiastical repentance. However, it is not clear from the wording of the provision which sanction actually took place in practical life. If the perpetrator of the offence was executed under „secular law", he could not be imposed repentance according to „church law".[15] If the perpetrator was imposed repentance, secular law would remain unrealized.

The showed contradiction between the severity of the sanction imposed under secular law and the moderacy of the sanction imposed under church law gives great scope for assessing all the circumstances of the particular case in which the act was committed and which we would call in the modern law „mitigating" or „aggravating circumstances". Keeping a secular law sanction in most provisions of the *Judicial Code for the People* can be justified by a preventive-deterrent function: the potential perpetrator should be deterred by a strict sanction of secular law, but fasting may ultimately be imposed on him. However, the above considerations of preferring fasting versus a more severe death penalty are merely the author's views, which can be largely influenced by the current concept of law.

If we want to get closer to the contemporary conception of the law and the interpretation of the indicated contradiction, there is no document preserved from the Great Moravian area that could serve us for this task. However, there is a *letter in which Pope Nicholas I answered questions from Bulgarians from 866*, i.e. from the time of the most important normative texts of the Great Moravian period. In the questions addressed to the Pope, the Bulgarian society addressed similar issues that were present in Great Moravia.[16] The Bulgarians also gradually adopted Christianity, and had a number of questions to answer.[17] In this letter the Pope answers them in detail and sensitively, sometimes with a high philosophical and theological commitment. Between the Bulgarian questions and answers from the Pope, the above-mentioned contradiction is not directly addressed, but the following may be abstracted from the spirit of the whole text: the Pope acknowledges the existence of both secular and spiritual laws and recommends only to adhere to „venerable secular laws". Similarly, he repeatedly recommends that penalties be mitigated[18] and he explicitly recommends repentance to be allowd if the criminal wants to do this, no one should prevent him.[19] Although from the times of Great Moravia we do not have a similar „implementing regulation" to the normative texts, the role of the „interpreter" of these texts could be met by the Methodius. And Methodius as a man of church law, as well as Christian philosophy, Christian doctrine, or worldview, would likewise take a similar view to the above-mentioned contradiction as presented in the Pope's letter to the Bulgarians.

Pope's letter to the Bulgarians can also indirectly give us an answer to the above-mentioned question: whether subjugation to the ecclesiastical repentance can replace the punishment under secular law. Pope's answer XLI states that *„every sin is washed away completely by repentance"*.[20] Even more concise is the last

[14] *Iže za jetery vražды li grablenьja dělа iměnija ognьmь vъžagajetъ chramy, ašte vъ gradě, da ognьmь sъžagajǫtъ i, ašte li vъ vьsi ili vъ selě mečetь da usěkajǫtъ i. A po crькъvьnujemu zakonu vъ postъ vi lětъ prědajetъ sę, jako vražьbьnikъ jestъ.* Who burns out of hostility or property robbery with the fire of a residential building, let him burn if it is in the city. If it is in the village or in the settlement, let him be executed by the sword. But according to church law it is passed on to repentance for 12 years because it is an enemy.

[15] We have put the phrase „secular law" and „church law" in quotation marks because we assume that there was no exact distinction between secular and church law at the time of Great Moravia.

[16] The development in Great Moravia was in some aspects at a slightly higher level of development, a few decades ahead of the development in Bulgaria. Nevertheless, the period interpretation and understanding of the norms of the law of the society contained in the Pope's letter is applicable not only to Great Moravia, but also to other countries with evolving Christianity.

[17] Pope Bulgarian's letter consists of 106 (more or less) extensive answers, and each response begins with some sort of „introduction" from which the original Bulgarian question can be abstracted.

[18] *Circa hos, qui quando ad pugnam contra hostes proceditis, fugam arripiunt, si non misericorditer praeveniat compassio, saltem legum temperetur severitas*. As for those who are wasting… let the severity of the law at least be mitigated if merciful compassion does not apply. In: MMFH IV, p. 49.

[19] *Si, quemadmodum assertis, sponte poenitentiam agere volunt, non sunt prohibendi, sed per omnia poenitentiae summittendi, quam episcopus vel presbyter ordinatus ab illo considera verit. Nam non suscipere poenitentes non est catholicorum, sed Novatanorum*. If, as you assure, they want to do voluntary repentance, they should not resist them, but in all things repent, which the bishop or priest consecrated to him as good, because not accepting penitents is not a property of Catholics but novices. In: MMFH IV, p. 77.

[20] *Utique denique omne peccatum paenitentia, quae nonnisi Dei gratia comitante proficit, omnino diluitur*. In: MMFH IV, p. 43.

sentence of answer XXVI: *„I do not want to a sinner's death, but his convincement and being alive"*.[21] If this Pope's answer reflects the general perception of the fact at the time, and we assume at least in the clerics, we would like to support the above statement that Methodius would, in a particular case, commit to a milder „sanction" according to ecclesiastical norms.

However, some of the provisions of Nomocanon may be used to deal with the merging or overlapping of some elements of ecclesiastical and secular administration, which may indicate that there was already a terminological distinction between secular and ecclesiastical affairs: *сьркъвьныја і градьскыја мѣтутьвешти* (in ecclesiastical and secular matters), *strojenije c(ь)rk(ъ)vьnoje* (ecclesiastical administration),[22] *ljudьskaja strojenija* (secular authorities).[23] However, the norms which include the above phrases are more or less just a translation of the Greek model into the Old Slavonic Church language, and do not reflect the situation in Great Moravia, but the situation and understanding of the relationship between secular and ecclesiastical administration in the Byzantine Empire. On the contrary, the development of law in other societies, as was the Great Moravian one, confirms the non-differentiation of ecclesiastical and secular norms. In the period in question, ecclesiastical and secular ordinary legal norms in the minds of the ordinary population intertwined.

Conclusion

At the beginning of this paper we asked whether the relationship between governing power and the Church in Great Moravia was similar to that in other countries of the period. In order to answer it, we asked sub-questions positive answers to which would suggest a close relationship between governing power and the church: 1. Did clerics work in the public administration in Great Moravia? 2. Did the Great Moravian sovereign intervene with church affairs? 3. Did the Great Moravian sovereign have competence in the occupying the posts of church dignitaries? 4. Did the sovereign (or other secular dignitaries of the country) participate in the financing of the church? 5. Was there a link between secular and ecclesiastical matters at the level of foreign relations? 6. Was there a link between secular and church law? We have answered these questions in full or in part in the affirmative. Thus, even for the territory of Great Moravia, the relationship between governing power and the church can be evaluated in a similar way as in other countries of the period, with close links between governing power and ecclesiastical power, wiht overlap between secular and ecclesiastical affairs, and a common approach to developing the country.

It is generally stated that Methodius's students have gone to different places to the southern and eastern Slavs, where, apart from Christianity, they also spread Slovak liturgy, Slavic script (Glagolitic) and made available to the local population the results of the vast work of Sts. Cyril and Methodius. Part of the heritage brought by Methodius's disciples was the knowledge of church law and its supposed teaching at country schools. In the case of an exclusionary statement, the fact that the legal normative texts of the Great Moravian period were preserved from transcripts from the southern and eastern Slavs would not make sense. If the southern and eastern Slavs only adopted the liturgical and linguistic aspects of the Great Moravian heritage, the church law texts of the Great Moravian period would not be rewritten in their territory even after several centuries, but would have been forgotten. It did not happen, and this suggests that the church law texts of the Great Moravian period were also part of the cultural heritage of the southern and eastern Slavs in the period when Great Moravia no longer existed. And maybe this is where these texts were also used in the study country's clergy.

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[21] *„Nolo," inquit Dominus, „mortem peccatoris, sed ut convertatur et vivat".* In: MMFH IV, p. 51.

[22] Titl. V.

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Die böhmische Konföderation von 1619 und ihre Erweiterung um die österreichischen evangelischen Stände

(The Bohemian Confederation of 1619 and its Expansion on Austrian Protestant Estates)

Antonín Lojek *

Abstract

This article is written for the occasion of 400 years since the conclusion of Bohemian Confederation and of the bohemian-austrian confederative arrangements of 1619, i.e. the Bohemia-Upper Austria and Bohemia-Lower Austria confederations. It deals with the period of emergence of confederations in Europe in the beginning of the 17th century, as exemplified by the Czech Confederation. We focus in particular on the Bohemia-Lower Austria and Bohemia-Upper Austria confederations of 1619, as well as the political and historical circumstances that lead to their formation. We analyze the key articles of confederate agreements and some of their legal aspects. The article pays particular attention to the issue of the right of military resistance, i.e. the right of estates to oppose the ruler and even dethrone him in case of failure to observe his duties.

Keywords: *1619 Bohemian Confederation; 1619 Bohemian-Austrian confederations; protestant estates; estates movement; right of resistance.*

Einführung

Anfang des 17. Jahrhunderts taucht die Idee auf, nicht nur die Stände der einzelnen Länder, sondern auch mehrerer Staaten zu vereinigen. Zu diesen Vereinigungen, die man Konföderation nennt, kam es vor allem seitens der evangelischen Stände.

Die Konzeption dieser gemeinsamen Konföderationen fluktuierte zwischen den ausschließlich Abwehr leistenden Vereinigungen, wo die inneren Angelegenheiten selbstständig bleiben würden, und der Konzeption, welche die Vereinigung in einen „tatsächlichen zentralen Ständeausschuss“ [1] transformieren würde, der dann sowohl über die Verteidigung als auch über manche wichtigen inneren Angelegenheiten entscheiden würde.

Zusammenfassend kann man sagen, dass zu dieser Zeit Vereinigungen gegründet wurden, welche die Form dieser Konföderationen hatten, die sich auf die Pfeiler der reziproken Verteidigung sowohl gegen äußere als auch gegen innere Feinde stützten, auf die Pfeiler der gemeinsamen militärischen Hilfe, der Verteidigung der Glaubensfreiheiten oder der Ständeprivilegien.

In den Bestimmungen dieser Konföderationsvereinbarungen, bis auf Ausnahmen, sind dann unmittelbar die Ideen der Monarchomachos verankert, beruhend auf dem Recht der Stände, sich im Falle der Nichteinhaltung oder Verletzung der Konföderationsvereinbarungen gegen den eigenen Herrscher zu stellen.

Zu den ersten gemeinsamen Konföderationen kann die Konföderation aus dem Jahre 1608 gezählt werden. Dieses den Frieden garantierende Konföderationsabkommen wurde zwischen dem Siebenbürger Fürst Bočkaj und den österreichischen und ungarischen Ständen abgeschlossen, zu welchen auch die mährischen Stände beitraten.[2] Im Jahre 1609 wurde dann die Konföderation zwischen den böhmischen und schlesischen Ständen zur Verteidigung der Glaubensfreiheiten abgeschlossen.

Nach dem Aufschwung des Ständeaufstandes im Jahre 1618 wurde dann am 31. Juli des Jahres 1619 zwischen den einzelnen Ländern der Böhmischen Krone die Böhmische Konföderation [3] abgeschlossen. Nachfolgend wurden dann die Böhmisch-

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1 HLEDÍKOVÁ, Z., JANÁK, J., DOBEŠ, J., *Dějiny správy v českých zemích od počátku státu po současnost.* (*Geschichte der Verwaltung in den böhmischen Ländern von Anfang des Staates bis zur Gegenwart*) NLN, Praha, 2005, S. 96.

2 Es ging um den Wiener Frieden aus dem Jahre 1606, der von den ungarischen Ständen auf dem ungarischen Landtag im Jahre 1608 verabschiedet wurde. Diesen Frieden mit den ungarischen Ständen schloss der Erzfürst Matthias ab, der als Oberbefehlshaber der kaiserlichen Armeen sofort allen Forderungen seitens G. Bočkaj entgegenkam, die für die Habsburger jedoch sehr nachteilig waren. Durch diesen Vertrag wurde Ungarn an Siebenbürgen abgetreten bis zum Fluss Tisa, es wurden die wichtigsten Militärfestungen liquidiert und 200.000 Taler an den Sultan ausgezahlt. Vergl. PRIESTEROVÁ, E., *Stručné dějiny Rakouska (Kurzgeschichte Östereichs).* Praha, 1954, S. 133-134.

3 Zur Böhmischen Konföderation sehr ausführlich ADAMOVÁ, K., *První česká federativní ústava z roku 1619 (Erste böhmische Föderationsverfassung aus dem Jahre 1619).* Praha: Ústav státu a práva AV ČR; Aleš Čeněk, 2009. Vergl. auch BAHLCKE, J., *Regionalismus und Staatsintegration im Widerstreit*. München, 1994; VÁLKA, J., Konfederace z roku 1619 ve vývoji teritoriální a náboženské struktury České koruny (Konföderation aus dem Jahre 1619 in der Entwicklung der territorialen und kirchlichen Struktur der Böhmischen Krone). In: MALÝ, K., PÁNEK, J. (eds.)., *Vladislavské zřízení zemské a počátky ústavního zřízení v českých zemích (1500-1619) (Wladislaws Landessordnung und die Anfänge der Verfassungsordnung in den böhmischen Ländern 1500-1619)*. Praha, 2001. Auch MALÝ, K., Der böhmische Beitrag zum Modell des europäischen Absolutismus, Wirkungen eurpäischer Rechtskultur. Festschrift für Karl Kroesshel zum /O. Geburtstag. München, 1997, S. 695-405. Vergl. auch die ältere deutsche Arbeit: STANKA, R., Die Böhmischen Conföderationakte von 1619. In: *Historische Studien*, 1932, Heft 213.

-Niederösterreichische und Böhmisch-Oberösterreichische Konföderation abgeschlossen (August 1619).

Im Januar 1620 folgte dann der Abschluss der Böhmisch--Ungarischen Konföderation. Zu dieser Konföderation trat dann noch Siebenbürgen bei – auf Grund des Vertrags (Siebenbürgische Konföderation), der beim Pressburger Landtag im Jahre 1620 abgeschlossen und seitens Siebenbürgen im Sommer desselben Jahres beim Landtag in Banská Bystrice ratifiziert wurde.

Wie bereits oben erwähnt wurde, Anfang des 17. Jahrhunderts werden die Konföderationen vorwiegend als Verteidigungsvereinigungen aufgefasst. Eine gewisse Änderung in dieser Auffassung stellt die Böhmische Konföderation aus dem Jahre 1619 dar, wo der Gebietscharakter der konföderativen Verbindung stärker überwiegt und - obwohl immer noch vielmehr unbewusst – der Begriff Konföderation mit dem Grundgesetz des Staates (der Verfassung) und der Staatsform verbunden wird.[4]

Die ständische Konföderationsvereinbarung dieser Zeit widerspiegelt auch die Realität der Beziehungen des Herrschers und der Stände in europäischen Bedingungen,[5] als die Stände der einzelnen Länder die Erhöhung ihres politischen Einflusses und die Erweiterung ihrer Rechte[6] erstrebten. Die Ständekonföderation wurde zu einer neuen Regierungsform, die de facto gar keinen Herrscher brauchte.

Andererseits haben wir hier aber auch eine Konföderationsvereinbarung, in der der Herrscher sogar nur als Teilnehmer an der Konföderationsvereinbarung erscheint. Diese Verträge können nicht mehr für rein ständische Verträge gehalten werden, es tritt hier schon als erster Teilnehmer auch der König auf.[7]

1. Politische und historische, zum Abschluss der Böhmisch-Österreichischen Konföderationen führende Meilensteine

Schon Anfang des 17. Jahrhunderts sind die Grundsteine der Konföderationsbewegung in Österreich zu sehen. Am 30. August 1608 wurde die sog. Enns-Konföderation der Oberösterreichischen protestantischen Stände gegründet,[8] die schon (wenn auch verschleiert) gegenhabsburgisch orientiert ist. An dieser Verbindung nahmen neben dem höheren und dem niederen Adel auch die Städte teil. Als Initiator dieser Vereinigung kann der österreichische Politiker und Diplomat G. E. Tschernembl bezeichnet werden. Einige Monate danach (3. 10. 1608) wurde in Horn die Vereinigung der Niederösterreichischen Stände geschaffen. Diese Konföderation beschränkte sich jedoch im Gegenteil zu der Enns-Konföderation lediglich auf die höheren Stände. Hier kommt dann ein ähnlicher Fehler seitens des Adels in Beziehung zu den Städten zu Tage, wie es bei den böhmischen Herren war, die oft durch ihre abwehrende politische Einstellung gegenüber den Forderungen der Städte der Bildung einer einheitlichen breiten gegenhabsburgischen Front im Wege standen, was insbesondere in den Jahren 1618 – 1620 aktuell war.[9] Der Grund zum Abschluss dieser zwei Konföderationsbündnisse in Österreich bestand in der Verteidigung der evangelischen Kirche und dem Schutz vor dem inneren und äußeren Feind (Türkei).

Die Bemühungen um die Herstellung einer Böhmisch--Österreichischen Konföderation sind bereits im Jahre 1615 sichtbar. Anfang 1615 fand in Prag der Generallandtag statt. Auf diesem Landtag sollte unter anderem über die Konföderation verhandelt werden. Es ist ein Paradox, dass zum Schluss die Österreicher als einzige im Verlauf dieses Landtages die Durchsetzung der Konföderationsabmachung verteidigten. Die Verhandlung mit den Österreichern, die ohne ihren Führer J. E. Tschernembl in Prag waren, scheiterte jedoch. Bei der Verhandlung mit den höchsten böhmischen Landesbeamten erschienen die Niederösterreicher infolge der Einstellung des höchsten Burggrafen Adam aus Sternberg und der Gegner der Konföderation in der Position von irgendwelchen Bittstellern bezüglich des Abschlusses der Böhmisch-Österreichischen Konföderation. Die Verhandlungen der niederösterreichischen Stände blieben somit auf einem toten Punkt hängen.

Einen gleichen Misserfolg erlitt auch die Deputation der oberösterreichischen Stände. Wien hat sich zu den Verhandlungen der oberösterreichischen Stände in Prag durch Kardinal Klesl sehr kritisch geäußert. Klesl erklärte, dass der Herrscher zum Abschluss der Vereinigung, die gegen die Habsburger Herrscherdynastie gerichtet ist, niemals seine Zustimmung gibt. Unter dem starken Einfluss seitens Wiens drängten die an der Deputation der oberösterreichischen Stände teilnehmenden Prälaten auf den Abschluss der Gespräche mit den böhmischen Ständen in Prag und auf die Rückkehr der Deputation nach Österreich. Gleich wie die niederösterreichische Deputation verließen die Oberösterreicher Prag schon vor Abschluss des Generallandtags, denn die Idee der Konföderationsbewegung scheiterte und

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4 ADAMOVÁ, K., *K historii evropského federalismu (Zur Geschichte des europäischen Föderalismus).* Praha: Karolinum, 1997, S. 60.

5 Aber auch das Dualsystem der Evangeliken gegen die Katholiken, der Stände gegen die Monarchie. Vergl. EBERHARD, W., Reformatorische Gegensätze – reformatorischer Konsens – reformatorische Formierung in Böhmen, Mähren und Polen. In: Joachim Bahlcke, Hans-Jürgen Bömelburg, Norbert Kersken (Hrsg.). *Ständefreiheit und Staatsgestaltung in Ostmitteleuropa. Übernationale Gemeinsamkeiten in der politichen Kultur vom 16. – 18. Jahrhundert.* Leipzig, 1996, S. 214.

6 Ebendort, S. 61.

7 So ist es im Falle der Böhmisch-Ungarischen Konföderation oder der Siebenbürgischen Konföderation, wo als Teilnehmer der König Friedrich der Pfälzische auftritt. Vergl. JENŠOVSKÝ, B., O stavovských konfederacích v českém povstání (Über die Ständekonföderationen im böhmischen Aufstand). In: *K dějinám československým v období humanismu (Zur tschechoslowakischen Geschichte im Zeitalter des Humanismus).* Sammelwerk J. B. Novákovi, Praha, 1962, S. 505.

8 Vergl. ZÖLLNER, E., *Geschichte Österreichs.* 3. Ausgabe. München, 1966, S. 206.

9 Vergl. ADAMOVÁ, K., K otázce česko-rakouského a česko-uherského konfederačního hnutí v letech 1619-1620. In: *Právněhistorické studie 29 (Zur Frage der böhmisch-österreichischen und böhmisch-ungarischen Konföderationsbewegung in den Jahren 1619-1620. Rechtsgeschichtliche Studie 29).* Praha, 1989, S. 79.

die Österreicher hielten ihre Anwesenheit in Prag für überflüssig.[10]

Ende des Jahres 1618 wurde den österreichischen evangelischen Ständen ein Brief der Seiten der böhmischen Direktoren geschickt, in dem sie sich für den Abschluss der Böhmisch-Österreichischen Konföderation einsetzten. Seitens der niederösterreichischen Stände wurden Sympathien zum Abschluss der Konföderation sichtbar, jedoch mit der Tatsache, dass die Vereinigung nicht das Österreichische Haus, also gegen den Herrscher gerichtet sein wird. Im April des Jahres 1619 finden bereits Verhandlungen der böhmischen Diplomaten statt (Radslav aus Vchynice, Peter Miller) - auch mit den Vertretern der oberösterreichischen Stände.[11]

Auch im Falle der oberösterreichischen Stände begegnet man der Tatsache, dass der Konföderationsplan nicht ausnahmslos genehmigt wurde. Während J. E. Tschernembl bei den Verhandlungen als Fürsprecher der Konföderation auftrat, stellten sich die österreichischen Prälaten zur Konföderation als einer bestimmten Vereinigung, die eine Gefahr für den Frieden darstellen würde, und sie waren gleichzeitig der Meinung, dass sie lediglich mit Zustimmung der Landesfürsten abgeschlossen werden kann. Im Wesentlichen schlugen sie irgendeine neutrale Einstellung vor, zum Schluss waren sie jedoch mit diesem Vorschlag gegenüber der Majorität nicht erfolgreich.[12]

An dem am 8. Juli 1619 stattfindenden Generallandtag der Böhmischen Krone, auf dem die sog. Konföderationsakten verabschiedet wurden, nehmen schon persönlich die Vertreter der niederösterreichischen und oberösterreichischen Stände teil. Diese Akten zielten unter Anderem daraufhin, dass am 19. August 1619 die Wahl Ferdinands II. als böhmischen Königs für ungültig erklärt wurde. So wurden die Nachfolgerechte dieses Herrschers in Ober- und Niederösterreich abgelehnt.

Mitte des Jahres 1619 übergeben die böhmischen Diplomaten den Entwurf des Textes der Konföderationsbewegung in Österreich G. E. Tschernembl mit dem Wunsch, diesen den oberösterreichischen Ständen vorzulegen. Unter seiner Anwesenheit kam es am 16. August 1619 in Prag zum Abschluss der Konföderation zwischen den böhmischen Ständen und den Vertretern der inkorporierten Länder einerseits und den Vertretern der oberösterreichischen und niederösterreichischen Stände andererseits. Es wurden somit zwei Konföderationsverträge abgeschlossen.[13]

„Diese Verträge wurden am 15. und 16. August 1619 abgeschlossen und auch deren Unterzeichnung und Verkündung am 16. August, gleich wie die Unterzeichnung der Ständekonföderationen, erfolgte auf feierliche Art und Weise nach vorgehenden Gebeten, nach der einführenden deutschen Rede des Wenzel Wilhelm aus Roupov zu den gesandten Österreichern und unter Begleitung von Kanonensalven und Salven der Bataillone, die auf dem Schlosshof aufgestellt waren.“ [14]

Die Papieroriginale dieser Verträge wurden später von Kaiser Ferdinand II. beschlagnahmt und vernichtet. Es blieben jedoch die Pergamentoriginale erhalten. Das ursprüngliche Exemplar dieser beiden Verträge und des Verteidigungsvereins mit den oberösterreichischen Ständen wurde zuerst auf einem Papier großen Formats niedergeschrieben, und zwar für jeden von den Verträgen separat. Es geht um den Vertrag mit den sowohl niederösterreichischen als auch oberösterreichischen Ständen vom 16. August 1619, einen weiteren Vertrag mit den Ständen derselben Länder vom 16. August und den Vertrag vom 15. August 1619.[15]

Alle drei Exemplare sind in ein gemeinsames Buch gebunden worden. Jedes von ihnen wurde dann separat unterzeichnet und mit den abgedruckten Siegeln der böhmischen, mährischen und österreichischen Stände versehen. Aus der Unterschrift der Bürgermeister der Prager Städte ist ersichtlich, dass sowohl die Ständekonföderationen als auch die Vereinbarungen mit den Österreichern in ihren definitiven (erhaltenen, also pergamentenen) Exemplaren erst im September unterzeichnet wurden, also nach der Wahl Friedrichs des Pfälzischen, denn die Pergamentexemplare wurden unterzeichnet von den Bürgermeistern der Prager Städte Abraham Engel aus Engelsberg, Lukeš Karban aus Volšany und Jiřík Neher aus Nerlingen, die erst im September ihre Ämter antraten.[16]

2. Böhmisch-Niederösterreichische Konföderation

Der Vertrag mit den Niederösterreichern beinhaltet 9 Artikel. Er ist in zwei Originalexemplaren erhalten, mit je 6 Pergamentblättern, zusammengehalten mit einem rotweißen Faden, an dem gleichzeitig ein Streifen des Siegels von Bohuchval Berka angefügt ist. Zu jedem sind dann 65 Siegel auf Pergamentstreifen angefügt.[17]

Der Text des Vertrags besteht aus der Einführung und den nachfolgenden 9 Artikeln. Im Einführungsteil der Konföderationsvereinbarung wird vor allem betont, dass der Vertrag zum Zweck der gemeinsamen Verteidigung der Konföderationsländer abgeschlossen wird. Diese Verteidigung wird hier nur auf allgemeiner Ebene erwähnt, es werden keine militärischen Kon-

[10] Vergl. ADAMOVÁ, K., K otázce konfederačních snah v českém státě. In: *Právněhistorické studie 27 (*Zur Frage der Konföderationsbemühungen im böhmischen Staat*. Rechtsgeschichtliche Studie 27)*. Praha, 1986, S. 90-91.

[11] Vergl. ADAMOVÁ, K., K otázce česko-rakouského a česko-uherského konfederačního hnutí v letech 1619-1620. In: *Právněhistorické studie 29* (Zur Frage der böhmisch-österreichischen und böhmisch-ungarischen Konfödertionsbewegung in den Jahren 1619-1620. *Rechtsgeschichtliche Studie 29)*. Praha, 1989, S. 79.

[12] Vergl. STROHMEYER, A., *Konfessionskoonflikt und Herrschaftsordnung. Das Widerstandsrecht bei den österreichischen Ständen (1550-1650).* Mainz, 2006, S. 241.

[13] Vergl. STUMBERGER, H., *Georg Erasmus Tschernembl. Zu Geschichte der Gegenreformation*. Linz, 1953, S. 169.

[14] PAVEL SKÁLA ze ZHOŘE, *Historie česká (Böhmische Geschichte)*. Teil III. ed. K.Tieftrunk, Praha, 1867, S. 235.

[15] So führt das JENŠOVSKÝ, B. an., O stavovských konfederacích v českém povstání (Über Ständekonföderationen im böhmischen Aufstand). In: *K dějinám československým v období humanismu* (Zur tschechoslowakischen Geschichte im Zeitalter des Humanismus). Sammelwerk J. B. Novákovi, Praha, 1962, S. 502. Zweifel zur Datation und der Existenz des dritten Vertrags wird in einem unklaren Vermerk unter dem Strich auf derselben Seite entwickelt.

[16] Ebendort, S. 502.

[17] Ebendort, S. 504.

tingente festgelegt oder andere damit zusammenhängende Angelegenheiten. Es wird hier auf die Existenz einer militärischen Gefahr hingewiesen und die Notwendigkeit der Vereinigung und der Sicherung der Verteidigung gegen einen Angriff. Aus dem Vertrag geht weiter hervor, dass mit seinem Abschluss die Herren, Ritter und Bürger beider Parteien einverstanden waren. Die Stände versprachen der Böhmisch-Niederösterreichischen Konföderation Schutz mit allen Mitteln. Die Vereinigung der Länder sollte niemandem Schaden zufügen, sondern zum Schutz der Heimat dienen und zur Verteidigung der Ständerechte und –privilegien und zum „glücklichen Herrschen unserer höchsten Obrigkeit und des Landesfürsten".[18] Wenn auch im Text der Böhmisch-Niederösterreichischen Konföderation kein Termin bezüglich der Verteidigung des Glaubens verwendet wurde, sind die Glaubensmotive im Einführungsteil trotzdem teilweise fühlbar. Beide Parteien werden hier zum konsequenten Einhalten ihres Glaubens aufgefordert.

Dem Einführungsteil sind dann die 9 Artikel beigefügt. Es ist hier die Verteidigung gegenüber gemeinsamen Feinden ersichtlich (Art.1), wobei gleichzeitig betont wird, dass sie nicht gegen die Herrscher gerichtet ist. Es ist hier die Erhaltung der ständischen Privilegien und Freiheiten verankert (Art. 2). In der Konföderationsvereinbarung ist die Möglichkeit der Ablehnung des Gehorsams gegenüber dem Herrscher angedeutet (Art. 3). Ferner wird aufgeführt, dass der Vertrag der Verteidigung und dem Angriff gegenüber dem gemeinsamen Feind dient (Art. 4). Falls manche von den Vertragsparteien oder Stände dieser Vertragsparteien in ihren Rechten eingeschränkt würden, die ihnen durch den Konföderationsvertrag gesichert sind, konnten sie diese Tatsache den übrigen Vertragsparteien zur Kenntnis geben. Diese hatten dann die Pflicht, den Streitfall zu lösen (Art. 5). Der Vertrag geht aus der Priorität der evangelischen Stände gegenüber den Katholiken hervor. Für den Fall, dass diese Katholiken „treu und folgsam sein sollten", wurde festgelegt, dass sie zu dieser Konföderation „zugelassen werden sollen" (Art. 6). Der Konföderationsvertrag gründet die Errichtung eines gemeinsamen Organs für alle Konföderationsländer (Art. 7). Im Vertrag ist weiter die Pflicht des Herrschers festgelegt, sich mit dem Text der Konföderationsurkunde bekannt zu machen (Art. 8), aus der entnommen werden kann, dass die Zustimmung des Herrschers für die Gültigkeit des Konföderationsvertrags nicht notwendig war. Der Grundsatz, dass alle Macht im Lande den evangelischen Ständen zusteht, ist hier klar sichtbar. In der Konföderationsvereinbarung war schließlich noch verankert, dass der böhmisch-niederösterreichische Vertrag weder gegen eine andere Vereinigung, noch gegen die Privilegien der Stände der einzelnen Konföderationsländer gerichtet ist (Art. 9). Der Schluss der Konföderationsurkunde, der zweite Teil des Artikels 9, präsentiert Länder, die diesem Vertrag beigetreten sind und gleichzeitig mit ihren Siegeln und Unterschriften die Vereinbarung bestätigten.

2.1 Zu manchen bedeutenden Rechtsaspekten der Böhmisch-Niederösterreichischen Konföderation

Zu den markanten Aspekten der Böhmisch-Niederösterreichischen Vereinbarung über die Konföderation kann die Frage des Rechts der Stände auf Widerstand gegen den Herrscher gezählt werden, weiter die Glaubensfrage und die Frage der Generallandtage.

In der Konföderationsvereinbarung ist keine eindeutige Verankerung des Rechts der Stände auf Widerstand gegen den Herrscher zu finden, wie es z. B. in der Böhmischen Konföderation aus dem Jahre 1619 (Art. 30) war oder in der Böhmisch--Oberösterreichischen Konföderation (Art. 6). Daraus kann entnommen werden, dass die Stände von Niederösterreich kein Interesse hatten, mit dem König evtl. in Konflikt zu geraten, und dass sie nicht zu den radikalsten Anhängern der monarchomachistischen Ideen zählten, wie es im Falle der böhmischen und oberösterreichischen Stände war.

Die Böhmisch-Niederösterreichische Konföderation ist sehr allgemein konzipiert als Vertrag sowohl zur Verteidigung als auch zum Angriff des gemeinsamen Feinds. Es wird hier ausdrücklich betont, dass sie nicht gegen die Herrscher gerichtet ist „…unserer Obrigkeit und den Landesfürsten" (Einführungsteil). Nichtsdestoweniger aus der Bestimmung Artikel 3 geht hervor, dass die evangelischen Stände den Gehorsam dem Herrscher gegenüber in dort aufgeführten Fällen verweigern konnten, insbesondere in Sachen des Glaubens, der Privilegien, Rechte, Freiheiten und Gepflogenheiten. Das führt uns zur Erwägung, dass auch in dieser Konföderationsvereinbarung das Recht auf Wehrwiderstand[19] „markant formuliert" wird, oder zumindest seine Andeutung.

Ein weiterer ausgeprägter Aspekt war die Glaubensfrage. Die Konföderationsvereinbarung wurde ausschließlich zwischen den evangelischen Ständen abgeschlossen. Ein klarer Zweck dieses Vertrags war der Schutz der Glaubensfreiheiten – des evangelischen Glaubens. Schon in der Einführung tritt der Glaubenscharakter des Vertrags in den Vordergrund. Die Anhänger des evangelischen Glaubens wurden hier nämlich konsequent zur Aufrechthaltung ihrer Normen des christlichen Lebens aufgefordert. Die Autoren meinten mit dem Ausdruck „christliches Leben" die Einhaltung der Normen des evangelischen Glaubens. Derjenige, der die Normen des christlichen (evangelischen) Glaubens verletzen würde, sollte bei den Predigten sorgfältig getadelt und bzw. bestraft werden.

Aus dem Vertrag ist ersichtlich, dass er aus der Priorität der Evangeliken gegenüber den Katholiken entspringt; wie gesagt, er wurde nur zwischen den evangelischen Ständen abgeschlossen, obwohl laut Artikel 6 der Konföderationsvereinbarung die Teilnahme an der Konföderation auch den Ständen des katholischen Glaubens zugelassen war, wenn sie sich verpflichten, diesen Vertrag einzuhalten und sich als treue und ehrliche Patrioten benehmen, wie es einem redlichen Tschechen und Deut-

[18] ADAMOVÁ, K., K otázce česko-rakouského a česko-uherského konfederačního hnutí v letech 1619-1620 (Zur Frage der böhmisch-österreichischen und böhmisch-ungarischen Konföderationsbewegung in den Jahren 1619-1620). In: *Právněhistorické studie 29 (Rechtsgeschichtliche Studie 29)*. Praha, 1989, S. 80.

[19] Vergl. MALÝ, K., Změny státního zřízení v českém stavovském povstání (Veränderungen der Staatsordnung im böhmischen Ständeaufstand). In: *Folia Historica Bohemica*. Praha, 1985, S. 74.

schen zusteht. Dadurch tritt die Wichtigkeit dieses Artikels in den Vordergrund, denn erst durch diese Bestimmung wird aus der Konföderation ein Vertrag zwischen zwei Staaten, nicht nur zwischen den evangelischen Ständen.[20] Als Ergänzung ist aufzuführen, dass hier die Pflicht der Katholiken, dass sie sich verpflichten, die Konföderationsvereinbarung unter Vereidigung einzuhalten, wie es in der Böhmischen Konföderation aus dem Jahre 1619 war, nicht festgelegt wurde.

In der Böhmisch-Niederösterreichischen Konföderation ist eine Reihe von Bestimmungen zu finden, die man als verfassungsrechtliche Bestimmungen bezeichnen kann. Eine davon ist die Bestimmung, die den Generallandtag betrifft – als ein für alle Konföderationsländer gemeinsames Organ (Art. 7). Dieser Generallandtag sollte einmal in fünf Jahren oder im Bedarfsfall zusammentreten.[21] Lediglich der Generallandtag war zu Änderungen im Konföderationsvertrag berechtigt. Es ist hier der Grundsatz festgelegt, dass bei jedem Verfahren des Generallandtags der Text der Konföderationsvereinbarung gelesen werden sollte, damit ständig die Würde dieses Dokuments betont wird, und für die Erben die Tatsache, dass auch sie durch diesen Vertrag gebunden sind. Die Befugnis des Generallandtags wird hier nicht ausführlicher aufgeführt. Man stellt hier auch die Absenz der Bestimmungen fest, die z. B. die Tatsache betreffen, wer am Landtag teilnehmen konnte oder sollte, oder wer den Landtag zusammenrufen sollte.

3. Die Böhmisch-Oberösterreichische Konföderation

Am 16. August 1619 schlossen die Stände der vereinigten Böhmischen Länder eine weitere Vereinigung mit den Oberösterreichischen Ständen ab. Auch dieser Vertrag wurde zuerst auf Papier und erst später in drei übereinstimmenden Originalexemplaren in deutscher Sprache in Form eines Buches mit 8 Pergamentblättern niedergeschrieben. Zu jedem Exemplar wurden auf Pergamentstreifen 62 Siegel angehängt. Der Vertrag trägt die Überschrift „Original-Verbündnis der drei evangelischen böhembischen, mährischen, schlesischen auch ober und neder lausnitzischen Stend mit den oberösterreichischen Stenden“.[22]

Den Inhalt der Böhmisch-Oberösterreichischen Konföderation bildet der Einführungsteil, weiter folgen 6 nicht nummerierte Absätze, der Wortlaut des Defensoreneides und die Schlussklausel.

Die Einführung ist praktisch identisch mit dem Einführungsteil der Böhmisch-Niederösterreichischen Konföderation. Danach folgt unmittelbar der Text des Vertrags selbst. Für diesen Artikel und bessere Übersicht wurde die Methode der Nummerierung der einzelnen Vertragssätze als selbstständige Artikel angewandt.

In dieser Konföderationsvereinbarung wurde festgelegt, dass auch der Herrscher Mitglied der Konföderation sein soll (Art. 1). Der Vertrag untersagt dem Herrscher Beratung mit Jesuiten und fremden Botschaften über Sachen mit Bezug zu den Konföderationsländern. Es wird auch das Verbot ausgesprochen, Fremde mit höchsten Ämtern zu beauftragen (Art. 2). Es ist die Priorität des evangelischen Glaubens verankert (Art. 3). Es sind gegenseitige Beleidigungen unter den Evangeliken untersagt (Art. 4). Es ist erlaubt, lediglich Würdenträger evangelischen Glaubens einzusetzen (Art. 5).

Der König oder Fürst, der diese Vereinbarung besiegelt und daneben eine eigene Armee aufbaut, kann mit Zustimmung aller Konföderationsländer dieses Militär gegen die Feinde auch einsetzen (Art. 6). Es ist das Recht des Widerstandes gegen den Herrscher verankert (Art. 7). Eine markante Einschränkung des Herrschers besteht im Verbot der Kriegserklärung, des Anheuerns, der Genehmigung der Niederlassung von Fremden auf dem Gebiet der Konföderation, in der Vereinbarung des Friedens mit Ausländern, an dem das eine oder das andere Land interessiert ist (Art. 8). Die Konföderationsvereinbarung ermöglichte auch das gegenseitige Erbrecht zwischen den böhmischen und oberösterreichischen Ständen. Das Eigentum aus dem einen Land sollte zu den echten Erben aus dem anderen Land „durchgelassen werden“ ohne Schwierigkeiten seitens des Landes, in dem sich das Eigentum (Erbe) befand (Art. 9).

Es wird eine Körperschaft von Defensoren errichtet, die Grundsätze ihrer Kooperation festgesetzt (Art. 10). Es wird der Eidspruch der Defensoren festgelegt (Art. 11). Die gewählten Defensoren der Konföderationsländer sollen gegenseitig vorgestellt werden (Art. 12). Die Defensoren sollen sich nach den Anweisungen ihrer Länder richten (Art. 13). Man darf sie in der Ausführung ihrer Funktion nicht hindern, mag es versuchen, wer will (Art. 14), was einen anderen Ausdruck der Machteinschränkung des Herrschers darstellt. Die Defensoren sollten einmal pro Jahr zusammentreten oder je nach Bedarf, an einem bezüglich der Zeit und Sicherheit geeignetsten Ort (Art. 15). Den böhmischen Defensoren wird die Kompetenz gegeben, andere Defensoren vorzuladen (Art. 16). Zu Fragen der Verteidigung (Defension) sollten sich alle Defensoren der Konföderationsländer äußern. Sollte die Verteidigung nur von einem Konföderationsland in Gebrauch genommen werden, sollten die Defensoren dieses Landes das Recht haben, die übrigen Defensoren vorzuladen (Art. 17).

Im Vertrag wird ferner die Verpflichtung der militärischen Hilfe festgelegt (Art. 18). Die Vertragsparteien verpflichten sich, dass sie so eine Hilfe leisten und in so einem Umfang, wie im Voraus vereinbart wird (Art. 19). Es ist die gemeinsame Befehlshabung verankert und es werden die Grundsätze der gemeinsamen Verteidigung festgelegt – die Wahl des Oberbefehlshabers (Generals) (Art. 20). Es wird die Funktion des Landesbefehlshabers errichtet – generalleytenambt – der im Notfall die Verteidigung des konkreten Landes führen würde, falls der General als Oberbefehlshaber nicht am Ort eintreffen würde (Art. 21).

Es wird hier die gemeinsame Vorgehensweise der Konföderationsländer bei der Auswertung und Lösung aller wichtigen An-

[20] Ebendort, S. 74.

[21] Artikel 7 ist in engem Zusammenhang mit Art. 5 der Konföderationsvereinbarung auszuwerten.

[22] JENŠOVSKÝ, B., O stavovských konfederacích v českém povstání (Über Ständekonföderationen im böhmischen Aufstand). In: *K dějinám československým v období humanismu (Zur tschechoslowakischen Geschichte im Zeitalter des Humanismus).* Sammelwerk J. B. Novákovi, Praha, 1962, S. 504.

gelegenheiten, welche die Konföderation betreffen, betont (Art. 22). In der Vereinbarung wird die Gleichstellung der Länder festgelegt (Art. 23). So ist die Souverenität der einzelnen Mitglieder (Länder) der Konföderation gesichert und keine Vertragspartei sollte sich in Bezug zu einer anderen Partei weder Überordnung zueigen machen noch in die inneren Angelegenheiten einer anderen Vertragspartei eingreifen. Nichtsdestoweniger wird eine bestimmte Überordnung der böhmischen Stände sichtlich - in der ausschließlichen Kompetenz der böhmischen Defensoren, die Defensoren der übrigen Konföderationsländer vorzuladen (vergl. Art. 16) mit Ausnahme der partikulären Angelegenheiten (vergl. Art. 17). Es wird das Verbot der gegenseitigen Unterdrückung der Stände und Unterdrückung der Länder festgesetzt (Art. 24).

Obwohl durch diese Konföderation die Priorität des Schutzes des evangelischen Glaubens gegeben ist, wird den Katholiken ermöglicht, den gleichen, durch die Konföderation garantierten Schutz zu genießen, wenn sie sich verpflichten, die Konföderation einzuhalten und nichts gegen den evangelischen Glauben zu unternehmen (Art. 25). Die Konföderationsvereinbarung verpflichtet auch die kommenden Generationen (Art. 26). Keines von den Konföderationsländern darf Schritte unternehmen, welche diesem Vertrag Schaden zufügen würden (Art. 27). Im Schlussteil werden die einzelnen der Konföderation beitretenden Länder aufgeführt, die diesen Vertrag mit ihren Siegeln und Unterschriften bestätigten.

3.1 Zu ausgewählten Rechtsaspekten der Böhmisch-Oberösterreichischen Konföderation

Zu den Aspekten der Böhmisch-Oberösterreichischen Konföderation gehörte gleich wie im Falle der Böhmisch--Niederösterreichischen Konföderation die Frage des Rechts der Stände auf Widerstand gegen den Herrscher und die Glaubensfrage. Ein markanter Aspekt war hier die Frage der Defensoren und der militärischen Hilfe.

Das Recht auf Widerstand der Stände gegen den Herrscher ist in Artikel 7 dieser Konföderationsvereinbarung verankert. Ähnlich wie in der Böhmischen Konföderation aus dem Jahre 1619 setzte sich hier markant der Monarchomachismus durch. Das Recht der Stände auf Widerstand gegen den Herrscher konnte angewendet werden, nicht nur wenn der König irgendetwas gegen die Konföderation vorgenommen hätte, sondern auch wenn die Glaubensfreiheit oder die öffentlichen Privilegien verletzt würden. In einem solchen Fall wären die Stände ipso facto von ihren Verpflichtungen dem König gegenüber befreit.

Die Problematik der Glaubensfrage schlängelt sich durch die ganze Konföderationsurkunde, die aus der konsequenten Beschützung des evangelischen Glaubens hervorgeht. Die Priorität des evangelischen Glaubens wird dann insbesondere in Artikel 3 des Konföderationsvertrags berücksichtigt. Wenn auch aus dem Vertrag die Beschützung der Evangeliken klar ersichtlich ist, ist darin auch eine Bestimmung zu finden, die den gleichen Schutz seitens der Konföderation auch den Katholiken garantiert, jedoch nur dann, wenn sie sich verpflichten würden, dass sie die Konföderation einhalten und nichts gegen den evangelischen Glauben unternehmen werden.

Als verfassungsrechtlich kann die Bestimmung bezeichnet werden, welche die Defensoren als gemeinsames Organ der Konföderationsländer betrifft. Jedes Land sollte sich Defensoren auswählen, die dann in den übrigen vereinigten Ländern bekannt gegeben werden sollten. Aus der Konföderationsvereinbarung geht dann hervor, dass die böhmischen Defensoren den vordersten Rang im Defensorenkollegium einnehmen. Diese Priorität der böhmischen Defensoren macht sich auch in dem Recht, die Defensoren der übrigen Länder vorzuladen und zusammenzurufen, bemerkbar. Die einzige Ausnahme war die Situation, wenn eines von den Konföderationsländern angegriffen würde. Dann hatten die Defensoren des angegriffenen Landes das Recht, die Defensoren der Konföderationsländer vorzuladen. Die weitere Bestimmung legt dann die Grundsätze ihrer Kooperation fest und den Eid,[23] den sie zu Händen der evangelischen Stände niederlegen mussten. Die Defensoren hatten auch die Pflicht, sich an die Instruktionen der einzelnen Länder zu halten. Einmal jährlich oder bei Bedarf sollten sie zusammentreten, wobei das Recht der Vorladung, wie erwähnt, die böhmischen Defensoren hatten. In den Bestimmungen werden den Defensoren weitere Verpflichtungen auferlegt, insbesondere, wenn es zu einer Verteidigung-Defension kommen würde.

Die Frage der militärischen Hilfe und mit dieser Frage zusammenhängende weitere Angelegenheiten sind in den Artikeln 18, 19, 20, 21 des Konföderationsvertrags geregelt. Alle Konföderationsländer waren verpflichtet, sich gegenseitig militärisch zu helfen. Zu diesem Zweck sollte jedes Land seine militärische Bereitschaft haben. Die Quoten der militärischen Hilfe waren hier jedoch nicht konkret bestimmt. Auch hier sind verfassungsrechtliche Elemente zu finden, denn es war vorgegeben, dass sich die Konföderationsländer einen gemeinsamen General wählen sollen. Ferner war vereinbart, dass sich die einzelnen Länder einen erfahrenen Oberbefehlshaber wählen - als Sicherung für den Fall, dass mehrere Konföderationsländer gleichzeitig angegriffen würden -– einen generalleytenambt. Also, dass es hier eine Persönlichkeit gibt, die die Befehlshabung für die Zeit übernehmen würde, bis der General persönlich in dem konkreten Land eintreffen würde. Diese Artikel übernehmen im Grunde die Artikel der Böhmischen Konföderation aus dem Jahre 1619, die gleichfalls eine gemeinsame Armee, eine gemeinsame Befehlshabung und Grundsätze schafft, dass zur gemeinsamen Verteidigung zuerst friedliche und erst dann Kriegsmittel angewendet würden.[24]

Schlusswort

Die Konföderation, die zwischen den böhmischen und niederösterreichischen Ständen abgeschlossen wurde, kann für

[23] Der Eid, den die Defensoren ablegen mussten, kopiert im Wesentlichen den Eid der Defensoren, der in den Bestimmungen der Böhmischen Konföderation aus dem Jahre 1619 enthalten ist, konkret in Artikel Nr. 59. Die Defensoren wurden auch hier nicht vom Herrscher vereidigt, sondern von den protestantischen Ständen des zuständigen Landes. Hiermit war der Grundsatz der Unabhängigkeit der Defensoren als Organ der evangelischen Stände ausgedrückt. Es ist ein weiterer Aspekt der Einschränkung des Herrscherwillens auf dem Boden der Konföderation.

[24] Vergl. MALÝ, K., Změny státního zřízení v českém stavovském povstání (Änderungen der Staatsordnung im böhmischen Ständeaufstand). In: *Folia Historica Bohemica*. Praha, 1985, S. 75-76.

einen internationalen Vertrag zwischen den Ländern der Böhmischen Krone und Niederösterreich gehalten werden. Durch ihren Charakter verfolgt sie vor allem Verteidigungsziele, denn die Elemente verfassungsrechtlichen Charakters kommen darin nur selten vor.

Wenn auch der Vertrag Verteidigungsziele verfolgt, sind darin weder die Fragen der gegenseitigen militärischen Hilfe noch die Inhalte der Beziehungen zwischen den einzelnen Ländern konkret geregelt. Auf Grund dieses Vertrags sollte eine freie Vereinigung von souveränen Staaten geschaffen werden, es sollte also um ein Bündnis von Ländern gehen, die ein gewisses gemeinsames Interesse[25] verband, wie es die Verteidigung vor dem Feind, der Schutz der Ständeprivilegien und des evangelischen Glaubens waren.

Dieser Vertrag wurde zwischen den Ständen ohne Zustimmung des Herrschers vereinbart. Die Vorbereitung und Verabschiedung dieser Konföderationsvereinbarung, ohne Berücksichtigung des Standpunktes des Herrschers, ist ein Beispiel der Einführung in die Praxis – des Prinzips, dass jede Macht von den evangelischen Ständen hervorgeht und dass der Herrscher ihnen in keinem Fall überlegen ist. Es erscheint logisch, dass die Durchsetzung dieses Grundsatzes sehr dem Willen sowohl der Habsburgischen Herrscher widersprach, als auch der katholischen Kirche, und von beiden auch heftig kritisiert wurde. Das Recht auf Widerstand der Stände gegen den Herrscher ist hier nicht ausdrücklich verankert, jedoch man kann es dem Text entnehmen.

Den Charakter eines internationalen Vertrags hatte auch die zwischen den böhmischen und oberösterreichischen Ständen abgeschlossene Konföderation. Aus der Böhmisch-Oberösterreichischen Konföderation geht jedoch hervor, dass sie ein ausgeprägt verfassungsrechtliches Dokument darstellt. Dieser Vertrag ist keine abgeschlossene Urkunde, in der Zukunft rechnete man mit seiner Erweiterung. Ergänzungen und Änderungen in den Bestimmungen sollten jedoch nicht im Widerspruch zu den wesentlichen Ideen des Konföderationsvertrags sein.

In dieser Konföderation ist ausdrücklich das Recht der Stände auf Widerstand gegen den Herrscher verankert und gleichzeitig kann man in einer Reihe von Bestimmungen dieses Vertrags die wesentliche Einschränkung der Kompetenzen des Herrschers nachweisen. Es wird hier auch betont, dass die Mitgliedstaaten ihre Rechtsordnung behalten.

Beide Konföderationsverträge unterscheiden sich ziemlich stark durch ihren Inhalt und das Konzept.[26] In keiner von den beiden Konföderationen ist eine Bestimmung darüber zu finden, ob die Konföderationsmitglieder austreten dürfen oder nicht. Für beide ist charakteristisch, dass sie die Notwendigkeit beinhalten, dass die Rechte der übrigen Mitgliedstaaten zu respektieren sind und dass die Vereinbarungen keinem Mitglied Schaden zufügen sollten. Beide Vereinbarungen wurden für „ewige Zeiten" abgeschlossen und man rechnete damit, dass alle fünf Jahre der Text der Konföderationen auf den örtlichen Landestagen vorgelesen wird, damit an die Vereinbarungen stets erinnert wird.

Die Böhmisch-Österreichischen Konföderationsverträge stellen einen interessanten Beleg der Lösung des böhmisch-österreichischen Staatenbundes unter der Regierung irgendwelcher Generalstände dar, in dem ungewöhnlich stark das niederländische Beispiel mitwirkte.[27] Nichtsdestoweniger stellte die eigene Böhmische Konföderation aus dem Jahre 1619 in jeder Hinsicht eine eigenständige Leistung der Stände dar, die sich von den politischen alternativen Konzepten als ein antimonarchistisches und antizentralistisches Modell zeigte, und sich nicht auf die Möglichkeit der niederländischen ständisch-föderative Ordnung beschränkte.[28]

Der Abschluss der böhmisch-österreichischen Verträge vom August 1619 war der Ausdruck des Anschlusses von Ober- und Niederösterreich an den böhmischen Ständeaufstand und der Ausdruck des Entscheides dieser Länder, sich gegen die Habsburger zu stellen.

Beide Konföderationen sind auch ein Ausdruck der Bemühung, die Länder der Böhmischen Krone fester in internationalen Beziehungen zu verankern. Sie stellen einen Versuch dar, die schon früher verabschiedete Böhmische Konföderation breiter zu öffnen und so Verbündete zu finden, die in der Zeit der Entstehung der europäischen Großmächte Garanten dafür sein könnten, dass der Böhmische Staat nicht untergeht, sondern dass er auch weiterhin eine würdevolle Rolle auf der internationalen Ebene spielen wird.[29]

[25] Vergl. ADAMOVÁ, K., *K historii evropského federalismu (Zur Geschichte des europäischen Föderalismus).* Praha: Karolinum, 1997, S. 58.
[26] Ebendort.
[27] Vergl. KAVKA, F., *Bílá hora a české povstání (Der Weiße Berg und der böhmische Aufstand)*. Praha, 2003, S. 204.
[28] Vergl. BAHLCKE, J., Die böhmische Krone zwischen staatsrechtlicher Integrität, monarchischer Union und ständischem Föderalismus. In: Fröschl, T. (Hrsg.). *Föderationsmodelle und Unionsstrukturen.* Wiener Beiträge zur Geschichte der Neuzeit. Band 21, München, 1994, S. 101.
[29] Vergl. MALÝ, K., Změny státního zřízení v českém stavovském povstání (Änderungen der Staatsordnung im böhmischen Ständeaufstand). In: *Folia Historica Bohemica*. Praha, 1985, S. 76.

From the Balfour Declaration to the Creation of the State of Israel: The Issue of Legal Importance of this Declaration, Its Historical Role, and Consequences of the Arab Attack upon the Newly Proclaimed State of Israel on the Plane of Public International Law*

*Tomáš Mach***

Abstract

This article discusses the historical circumstances of the Balfour Declaration and its impact upon the legal framework under which the State of Israel came to existence. Furthermore, this article ventures into the legal development in the subsequent years of the existence of Israel, in particular in relation to the 1967 CE war, including the historic view upon the issue of the West Bank as terra nullius. In doing so institutions of public international law, such as definition of a people and the rights of self-determination are being discussed from a historizing point of view in which the progressive development of public international law in the 20th Century CE is being taken in consideration.

Keywords: *Balfour Declaration; self-determination; terra nullius; war; Palestine; mandate.*

1. Introduction – The Times of the Balfour Declaration

A hundred years ago, on 2 November 2017, the British Minister of Foreign Affairs sent a letter to Lord Rothschild. In the subsequent days, this letter "leaks out to the media" and then, on 9 November 1917 it is published in the *London Times*. According to this letter, 'His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people'. This letter was sent in times, during the Great War, when the British troops were advancing against their Ottoman Turkish counterparts through these Turkish territories of the Middle East. After all, the First Battle of Gaza had started on 26 March 1917 and on 9 December 1917 British Troops entered Jerusalem.[1]

This letter was also sent to Lord Rothschild during the time in which the British secret service was organizing (in between the years 1916 through 1918) the so-called Arab Uprising in the area of Ottoman Arabia of the time. The secret service, was, on the wave of nationalism, inciting local Arab tribes into an uprising against the Ottoman rule. In the so-called McMahon–Hussein Correspondence,[2] the British secret services were promising the Arabs support in their aspirations for self-determination once the Great War would be over in exchange for an Arab uprising against the Turks.

Amongst the British Intelligence officers sent to the region was also T. E. Lawrence, known by virtue of Hollywood movies as *Lawrence of Arabia*. As we also know from history, Lawrence subsequently, in 1918, refused Knighthood referring to his subjective understanding of the British Foreign Policy after the Great War as breach of promises he had given the local population on behalf of the British Empire.[3] The reason is that, Besides the Balfour Declaration, on the plane of practical diplomacy, the UK entered into treaties with France and Italy about the division of spheres of influence in the region, namely: the Saint Jean of Maurienne Agreement of April 1917 (regarding to the area of the coast belonging to the today's Turkey), but primarily the secret Sykes-Picot Agreement of 1916 (between France, Great Britain, afterwards also joint by pre-revolutionary Russia), according to which the United Kingdom was to receive the area of today's Mediterranean coast in the area of Near East, the river Jordan, the State of Jordan, southern Iraq and ports of Haifa (today's Israel) and Acre, while France was to receive a part of southern Turkey and (today's) northern Iraq, Syria, and Lebanon.[4]

The Balfour Declaration, as this letter written on 2 November 1917 became to be known, expressed the position that '*His Majesty's Government view*[ed] *with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly*

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1 ERICKSON, E.J. *Ottoman Army Effectiveness in World War I: A Comparative Study. Cass Military History and Policy Series*. Oxford, 2007, p. 128.

2 Parliamentary Papers. Cmd. 5957, (1939): *Correspondence between Sir Henry McMahon, G. C. M. G., G. C. V. O., K. C. I. E., C. S. I., His Majesty's High Commissioner at Cairo, and the Sherif Hussein of Mecca, July 1915 – March 1916.*

3 ORLANS, H. *T.E. Lawrence: Biography of a Broken Hero.* London, 2002, p. 7.

4 Department of State. *Mandate for Palestine*. Washington, DC.1927, pp. 8–9.

understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine… '.[5] The text *prima facie* implicates the constitution of a Jewish national state in the area of Palestine while preserving the current civil and religious rights of Muslim and Christian, mainly Aran and Armenian inhabitants, despite the fact that the Jewish population inhabiting this area was at the time substantially a mere minority.[6]

2. Social and Political Connotations of the Creation of Balfour Declaration in Great Britain

The Balfour declaration, being in sharp contrast to the promises that were given to Arab leaders by the British secret intelligence service (by Lawrence of Arabia) in the area of today's Palestine, came into existence during the times of popular support to the Zionist movement in English speaking countries. It was a popular support that was paradoxically fading out on the side of the British government in 1930's and 1940's; this support was disappearing in particular on the side of the British Mandatory administration of Palestine, which was preventing the massive immigration of Jewish inhabitants trying to escape from the Third Reich and from territories occupied by the latter.

The most appropriate illustration of the atmosphere at that times among British society, at least among the well-educated classes of the society of that times, is the article written by Gol Kaleva in Jerusalem Post[7] from 2017, that states:

'British prime minister David Lloyd George and Balfour were part of a British generation that was inspired by romantic notions of the Jews' return to their ancestral homeland.

Lord Roderick Balfour, the great-grandson of Arthur's brother Gerald William Balfour, recently spoke with The Jerusalem Post Magazine *about how these statesmen wholeheartedly adopted such notions:*

'They were brought up singing the songs of David, and reading the Old Testament. It was completely natural that Christians should support the return of the Jews to the Holy Land."

Indeed, Lloyd George said he was taught far more about the history of the Jews than about that of his own people. In 1917, as British forces were advancing through Palestine, he stated that he wished to give Jerusalem as "a Christmas present for the British people."

But Lloyd George's great-granddaughter, the renowned historian Prof. Margaret MacMillan of Oxford University, warns not to overestimate the religious motivations.

No doubt they were lovers of Zion, but the declaration was about geopolitical considerations.'

3. The Balfour Declaration and the World Order after the Great War

Despite the optimistic language of the Balfour Declaration – from the Zionist movement's point of view - one which presumed creation of the National home state of the Jewish nation, the post-Great-War reality in the area of Palestine in fact rather corresponded to the Sykes-Picot Agreement (only under the disguise of a caring face under the aftermath of the doctrine of „*white man's burden*", under the term of so-called mandatory administration).

The institution of mandatory administration was an invention of the time. The bottom line there was to divide colonies and territories of the losing parties of the Great War (that is those of Germany and Turkey in particular) between the winners of the Great War whilst pretending that it was being done for the good of the local populations. Mandatory administration was embodied in Art. 22 Covenant of the League of Nations and was divided into three categories /A, B, C/ according to the „level of development" of each individual nation. Category A was defined as:

'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.'[8]

Category A were in fact of Palestine (and Transjordan) under the British Mandate[9] Syria and Lebanon under the French Mandate. British mandatory administration remained in Palestine during the whole era between the two world wars, during the Second World War, and afterwards until 1948.[10]

During the Second World War, on 10 June 1940, Italy declared war on Britain and during the years 1940 and 1941 Tel Aviv and Haifa were repeatedly aerial bombarded by Italian troops.[11] As a direct result of military threat to mandatory Palestine, with the support by British administration, there comes into existence the so-called ח"מלפ, that is *Palmach*, abbreviation for *Plugot Maḥatz (*יחמ תוגולפ) – strike forces. This was a paramilitary group that, in a wider context was, de facto, part

[5] Imperial War Museum, Photograph Archive Collection, Catallogue Number Q 65830, available at http://www.iwm.org.uk/collections/item/object/205133261 [last visited 30 Jul 2019]

[6] In 1968 Prof. Wright referring to the Churchill Memorandum from 1922 states, that in 1920 comprised the Jewish population in Palestine 10% of the whole population.
See: WRIGHT, Q. Legal Aspects of the Middle East Situation. In: Law and Contemporary Problems, Voll. 33, Nr. 1y, 1968, p. 6 (Available at: http://www.jstor.org/stable/1190839)

[7] Available at: http://www.jpost.com/Magazine/100-years-on-Balfour-awakened-508491 [Last visited: 7 Feb 2018]

[8] Art. 22 Covenant of the League of Nations: Available at: http://avalon.law.yale.edu/20th_century/leagcov.asp [Last visited: 7 Feb 2018]

[9] Decision of the Council of the League of Nations, British Mandate for Palestine of 24 July 1922., UN Doc LON/BPC/MAN/15. Available online> https://treaties.un.org/doc/publication/unts/lon/volume%2028/v28.pdf [last visited: 30 Jul 2019].

[10] Despite the quasi-colonial administration of the Mandate Territory, the British Mandate for Palestine of 24 July 1922 did pay lip service to the promises given in the Balfour Declaration. Thus, Article 2 of the British Mandate for Palestine reads:
'The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.'

[11] Available at: http://www.isracast.com/article.aspx?ID=470 & t=Why-Italian-Planes-Bombed-Tel-Aviv? [Last visited: 7 Feb 2018]

of the *Haganah* troops (הָגָנָה, which means Defence), paramilitary Jewish troops during the period of the years 1921 – 1948 in the mandatory Palestine. *Haganah* including *Palmach,* subsequently played a key role in armed resistance against the British mandatory administration and in struggles against local Arab militias.

4. The Arrangement of the (two) States after Second World War

Escalation of violence between Jewish and Arab inhabitants after the Second World War grew. During this time, the *Palmach* was also committing paramilitary activities aimed at destabilizing the British mandatory administration (from today's point of view acts of terrorism), such as sinking of two patrol ships [12] belonging to the British army and 153 bomb attacks aimed at bridges and railway passes; in 1946 *Irgu*n commits a bomb attack on the British administrative centre of the Mandate Administration in the King David Hotel.[13] As a result of the escalation of violence between the two ethnic camps and against the already logistically and politically unsustainable British Mandate, the UN General Assembly Resolution No. 181 of 29 October 1947 introduced a solution [14] towards ending the unsustainable situation by constituting two states (State of Israel and Palestine) no later than 1 August 1948.[15]

The UN General Assembly Resolution No. 181 does not explicitly refer to the Balfour Declaration. After all, the Balfour Declaration talks exclusively about Palestine as the home for the Jewish nation /and about the protection of rights of other ethnic groups/. It does not suppose splitting of the area up. The Resolution UN General Assembly Resolution No. 181 nevertheless takes into consideration the Report of the Special Committee on Palestine /UN Document No. A/364/, in which is the Balfour Declaration is repeatedly mentioned in relation to the diplomatic and political undertakings of the Allies after WWI. The Special Committee states in its report as follows:

> *'68. On 25 April 1920, the Supreme Council of the Allied Powers agreed to assign the Mandate for Palestine to Great Britain on the understanding that the Balfour Declaration54/ would be put into effect. The draft mandate was confirmed by the Council of the League of Nations on 24 July 1922, and entered into force formally on 29 September 1923. Following its occupation by British troops in 1917-1918, Palestine had been controlled by the Occupied Enemy Territory Administration of the United Kingdom Government. Anticipating the establishment of the Mandate, the United Kingdom Government, as from 1 July 1920, replaced the military with a civilian administration,[…]'.*[16]

The Balfour Declaration is thus *de facto*, 30 years after it came to existence, an actual instrument of diplomacy leading to constitution of the Jewish State, despite within limited borders for the time being. That does not change anything on the legal status of the Balfour Declaration – that is that it does not have any legal relevance *per se.*

As a result of the fact that the British administration left and the State of Israel was declared in correspondence to the UN General Assembly Resolution No. 181, an attack occurred from the neighbouring Arab states against the new Jewish State. It is well known from history that the small David defeated the Goliath who had taken the form of assaulting armies of already existing Arab states. David thus safeguards his independence and during 1949, ceasefire agreements between Israel on the one hand and Egypt, Lebanon, Jordan, and Syria on the other were gradually concluded.

5. Non-existence of Palestine, Six- Day War (1967)

The prognosis of the development pursuant to the UN GA Resolution No. 181 (in that two states were to emerge) was fulfilled in Palestine by the Jewish population which was systematically building (public) administration necessary for the creation of an independent state and which had paramilitary units at its disposal /in particular the *Haganah*/ that were transferable (with foreign help for instance form Czechoslovakia [17] and help of the diaspora) [18] into a regular army cable of defending the newly created state at its dawn against the coordinated attack of neighbouring Arab countries. On the other hand, the local Arab population was never politically and logistically capable of forming state administration that would be capable of fulfilling the attributes of statehood pursuant to the Montevideo Convention on the Rights and Duties of States.[19] The State of Palestine thus never came to existence in 1948. The result of the war of 1948 was that the Arab territories, which from today's point of view are under Arab autonomous administration, were in between 1948 – 1967 under occupation by the Kingdom of Jordan.

From the point of view of international law, these territories were under factual administration of an occupying power (Jordan) on one hand, on the other hand, however, the defeated (occupied) subject of international law was missing. There was no state occupied there whose territory and population would be under the occupying power's administration. Turkey was not raising any territorial claims in regard to the territory occupied

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[12] SILVER, E. *Begin, A Biography*. London, 1984, p. 64.

[13] CHALK, P. *Encyclopaedia of World Terrorism.* Santa Barbara, 2013, p. 394.

[14] Resolutions of General Assembly UN do not have any legal relevance within the meaning of legal norms and formally it isn't a part of binding public international law

[15] Resolution No. 181 (II) on Future Government of Palestine, UN Doc A/RES/181(II) Available at: https://unispal.un.org/DPA/DPR/unispal.nsf/0/7-F0AF2BD897689B785256C330061D253 [Last visited: 7 Feb 2018]

[16] Available at: https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/07175de9fa2de563852568d3006e10f3?OpenDocument [Last visited 7 Feb 2018]

[17] AMITZUR, I. *The Origin of the Arab-Israeli Arms Race. Arms Embargo, Military Power and Decision in the 1948 Palestine War*. London, 1996, p. 173.

[18] Ibid, p. 92.

[19] The content of Art. 1 of this Convention is currently deemed to be customary international norm, that means determining the statehood. Available at: http://avalon.law.yale.edu/20th_century/intam03.asp [Last visited 7 Feb 2018]

by the Kingdom of Jordan.[20] Israel, for the time being, did not either. The Mandate Administration was a chapter of the past. The local population did not constitute a unitary nation[21] since the local population (at the time) could merely be viewed as a combination of local Arab (both Muslim and Cristian), Bedouin, Druids, and Samaritan ethnicities, all of which were somewhat culturally anchored in the territory of the Middle East. Moreover, from the point of view of the 1940's public international law, nations did not possess even partial legal personality. Also, the right for self-determination, if it came to existence[22] as an institution of public international law at all by then, made and still makes a distinction between *internal* and *external* self-determination (as discussed below). The inevitable conclusion thus is that during the times of the occupation of the Palestinian territories in the West Bank by Jordan in 1948, after the British (mandate administration had left) the territory was a *terra nullius*[23] - that is a territory without an owner (as subject of law) under public international law.

The institution that needs to be discussed in detail in context of the legal position of the territory occupied by Jordan is the institution of the right of self-determination of nations, which is *inter alia* embodied in the Charter of the UN of 1945 (Article II(2) UN Charter). On a legally non-binding plane, there also exists the Universal Declaration of Human Rights of December 1948.[24] This is however a mere declaration of the General Assembly of the UN of political and declaratory nature (and does not constitute a source of public international law).

During the Six-Days War in 1967, the Israeli army entered both the West Bank (June 7, 1967) and Gaza (June 11, 1967), thus driving out the 1948 Jordanian presence in the West Bank. Israeli expectations of a victory in 3-4 days were not fully confirmed, the war lasted for „whole" six days. However, Israel unequivocally confirmed its superiority over the set of its Arab neighbours and fulfilled the prediction of The New York Times[25] of May 24, 1967, where MR. James Reston, correspondent for the New York Times, at the outbreak of war observed as follows: *'In discipline, training, morale, equipment and general competence his (Nasser's) army and the other Arab forces, without the direct assistance of the Soviet Union, are no match for the Israelis.'*

The Israeli presence in the so-called Palestinian territories, within the exception of the Gaza Strip, continues to this day. The question of law that the International Court of Justice answered in the case of the *Wall Opinion* is the legal form in which the current Israeli presence in the West Bank exists. The International Court of Justice, via a rather complicated construction, did not favour Israel's view that the territories that had been acquired in 1967 from the Jordan, would before the Jordanian invasion 1948 be *terra nullius* and that since Jordan did not incorporate them into its statehood, they would remain *terra nullius* when acquired by Israel in 1967 (including East Jerusalem). In its Advisory Opinion in the *Wall Opinion*,[26] the ICJ constructed a rather complicated and hard to follow view that, since both Israel and the Kingdom of Jordan were in 1967 contracting parties to the Geneva Conventions on the Law of the War (namely the Fourth Geneva Convention), the occupation of these territories took place under the legal regime of these conventions (armed conflict between the parties to the conventions) and Israel must therefore act as the occupying power in the sense of the adhering to these rules of public international law, *ius in bello*, i.e. in the sense of administering the territories for the good of the local population as stipulated in these conventions.[27] In this context, the ICJ concluded that the preparatory work of the Geneva Conventions (after 1945) should allegedly include evidence of the existence rights on the part of the populations, not on part of states, as it had been the case in the times when the Hague Conventions were being drafted.

This conclusion of the ICJ, which does not possess the quality of a precedent, is indeed authoritative due to its author, namely the ICJ. However, it is logically highly problematic in the context that it construes a link in between duties of an occupying power on one hand and the right of the local population to invoke *de facto* rights amounting to *external self-determination*. The reason is that it retroactively presumes the existence of a le-

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[20] See Treaty of Ankara of 20 October 1921 between France and the Grand National Assembly of Turkey which ended the Franco-Turkish war.

[21] Dinstein attempts to define a nation from the point of view of international law in the times of the end of decolonization (1970's), naturally under the influence existence of the diaspora as follows:
'Peoplehood must be seen as contingent on two separate elements, one objective and the other subjective. The objective element is that there has to exist an ethnic group linked by common history. The strength of the ethnic-historical link is admittedly a matter of contention. Frequently it is suggested that the link must express itself, inter alia, in a common territory, religion or language, but these requirements are unduly harsh. The vicissitudes of history are such that an ethic group may lose its territory, split up into various religious factions and speak in many different tongues. […] Side by side with the objective element, there is also a subjective basis to peoplehood. It is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind. […] It follows that a people must itself delineate the purview of its common existence and settle criteria for belonging to the group.'
DINSTEIN, Y. Collective Human Rights of Peoples and Minorities. In: *The International and Comparative Law Quarterly,* vol. 25, no. 1, 1976, pp. 104-105.

[22] From the point of view of the 1970's - the times of the decolonization of the last colonies (Portugal) -originate voices that argue that: *"The generally accepted view today* [1976] *is that the right of self-determination has become, in the last generation, an integral part of customary international law."* DINSTEIN, Y. Collective Human Rights of Peoples and Minorities. In: *The International and Comparative Law Quarterly*, vol. 25, no. 1, 1976, p. 106.

[23] On *terra nullius* see: BENTON, L. – STRAUSMANN, B. Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice. In: *Law and History Review*, vol. 28, Nr. 1.,2010, pp. 1-38; CAVANAGH, E. Possession and Dispossession in Corporate New France, 1660-1663 Debunking a „Juridical History" and Revisiting „Terra Nullius". In: *Law and History Review,* vol. 32, no. 1, 2014, pp. 97-125.

[24] Available at: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf [Last visited 7 Feb 2018]

[25] Available at: http://query.nytimes.com/gst/abstract.html?res=9E07EFD71531E73BBC4C51DFB366838C679EDE & legacy=true# [Last visited 7 Feb 2018]

[26] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion of 9 July 2004. I.C.J. Reports 2004, p. 136 ff, online: http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf [Last visited 7 Feb 2018]

[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion of 9 July 2004. I.C.J. Reports 2004, p. 136 at p. 173.

gal personality of a people (if it is theoretically possible to speak of the Palestinian nation in the first place) at the time (that is already in the 1960's) as a norm of established international law and does so also without considering the distinction between *internal* and *external* self-determination. Moreover, all of this, as was also the case of *Aaland Island*, takes place beyond the process of decolonization, as neither Jordan, nor Israel, were ever colonial masters of the Territory of Palestine.

From the point of view of pure legal theory of public international law, it seems rather more logical to accept the view of Israel in the sense that these territories were *terra nullius* in the period of 1967, that is, legal occupation of the territory by the State of Israel (*occupatio*) incorporated these territories into Israel and the only the question that remains to be answered is whether the local Arab population enjoys the right to of the so-called internal self-determination, that is, minority rights within the State of Israel in terms of right to language, culture, religion, etc. If this were the case, the local non-Jewish population would have no rights to seek external self-determination (independence) as we shall briefly discuss below.

6. Balfour Declaration, Aaland Islands and Self-Determination

The answer to the above-mentioned rhetorical question is beyond the subject matter of this article. It is not, however, without interest to compare the content of the Balfour Declaration of 1917 with the principles of so-called internal self-determination, articulated in 1920-21 under the so-called *Aaland Islands* case by the League of Nations, whereby theory of international law currently claims that the customary institution of self-determination in its form of two-tier institution (primarily internal and only secondarily external).

This theoretical view is best summarized by Finland's *amicus curiae* submission[28] in the ICJ's advisory opinion proceeding on the legality of Kosovo's[29] declaration of independence. In this submission, Finland concludes that the right to self-determination was perceived as part of public international law already in the first half of the 20th century; however, only in the context of the decolonization it actually acquired the dimensions of the right to claim statehood (i.e. external self-determination). The current writer adds that merely in this particular context can one indeed talk of *ipso facto* partial legal personality of a nation on the plane of international law. Such legal personality is only acquired in limited manner and merely in order to provide for the right of cessation if the right of internal self-determination had been breached (i.e. right to culture, language and education in the mother-tongue) as only in this context the right for external self-determination (secession) emerges on the plane of public international law. However, it must first be concluded that there does exist a nation, an ethnic group possessing the attributes of a nation to have such limited legal personality in the first place. The Finnish submission quotes the well-known observation of the Aaland Islands League of Nation's Committee of Jurists and the Supreme Court of Canada in Re Secession of Quebec (1998), with the following conclusions:

> *'Thus in 1920, the Committee of Jurists affirmed the legal relevance of self-determination as a criterion of territorial settlement in situations where legal normality had been disturbed by "revolutions or wars". In the following year, the Council established a Commission of Rapporteurs (1921) to give effect to the legal principles laid out by the Committee of Jurists. According to the Commission, self-determination may be realized though secession when the prospects of its credible internal realization are no longer present:*
>
> *"The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State / acks either the will or the power to enact and apply just and effective guarantees.'*
>
> [Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. 8. 7. 21/68/106 (1921), at 28]

The principle that in certain exceptional situations self-determination may be realized through secession has thus been a part of international law throughout the 20th century. The practice of realization of self-determination through independence during the decolonization period did net emerge as exception to the existing law. It arose as an application of the principle set out in the Aaland Islands case. The most recent authoritative pronouncement of this principle is that by the Supreme Court of Canada in Re: Secession of Quebec (1998) where the Court summarized its argument that external self-determination (i.e. secession) was applicable in three situations, as follows:

> *'In summary, the international aw right to self-determination only generates, at best, a right to external self-determination in situations of former colonies;*
>
> *where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In ail three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.'*
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> [Re Secession of Quebec, [1998] 2 S.C.R. 217, para 138.]

7. In Lieu of Conclusion

The Balfour Declaration stipulates in relation to the right of internal self-determination in a rather timeless manner that:

> *"His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object,* ***it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine****, or the rights and political status enjoyed by Jews in any other country."*[30]

[28] Available at: http://www.icj-cij.org/files/case-related/141/17888.pdf [Last visited 7 Feb 2018]

[29] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo.* Advisory Opinion of 22 July 2010. I.C.J. Reports, p. 403 ff, Available at: http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf [Last visited 7 Feb 2018]

[30] Available at: http://avalon.law.yale.edu/20th_century/balfour.asp [Last visited 7 Feb 2018]

Comments on the Concept of Arbiter in Roman Law

Adam Boóc *

Abstract

This paper analyzes the notion of arbiter in Roman law. Based on the legal and literary sources of Roman law, the essay briefly describes the most important features of the legal institution of arbiter. The study emphasises that the notion of arbiter has at least two different meanings in Roman law. On the one hand, an arbiter could describe an expert judge who had special knowledge in a particular field and was entitled to decide the special debate of the parties, wherein the debate did not have a purely legal nature but could concern other issues as well. On the second hand, an arbiter as arbiter ex compromisso could mean a person chosen by the parties in the form of a settlement to decide their legal dispute as an arbitrator. The study also references some important elements of the subsequent fate of the Roman notion of arbiter.

Keywords: *arbitration; arbiter; historical-comparative; civil law; Roman law; history of law.*

Commercial arbitration as an increasingly used dispute settlement method (Tamás Sárközy) gains a relevant role nowadays in the world of big business. The arbitration clauses often play very relevant roles in the commercial agreements and contracts. Sometimes the appointment of the arbitration forum (*forum arbitrii*), which might be seated in a different country than the nationality of contracting parties, is the result of a multiple-round negotiation series in the presence of the legal representatives of contracting parties, and the clause usually contains the order of the nomination, appointment of the arbitrators, the number of the arbitrators, and also the language and the place of the arbitration procedure.[1] By comparison, we may recall the *prima faciae* surprising but still undisputedly true explanation of László Újlaki, which says: "*The cradle of the arbitration – as of many other legal institutions – rooted in Rome. Even in the early period of the evolution it was possible for the parties to submit their legal dispute under the decision of arbitration or arbitrators, avoiding the state courts, unless the nature of the dispute was a state matter or popularis actio."*[2] We would like to draw up some comments on the legal institution of the *arbiter* as it existed under Roman Law, which can be considered to include but not limited to a preview of the arbitration.

I.

Although among the sources of the Roman Law we can find several rules on the *arbiter*, which are presented below, and that verify that the connection between *arbiter* and *arbitration* is not only etymological, we have to highlight that the antecedent of arbitration can be found in Greek law and in Greek literature.[3] The literature refers to Homer's Iliad as the classic

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1 See especially: REDFERN, A. – HUNTER, M., *Law and Practice of International Commercial Arbitration*. London, 2004[4] p. 156. Summary on the international commercial arbitration in Hungarian see: BOÓC, Á., *Nemzetközi kereskedelmi választottbíráskodás. A választottbíró megválasztása és kizárása.* (*The international arbitration. The appointment and the challenge of the arbitrator.)* Budapest, 2009.; On the history of the Hungarian arbitration in the newer Hungarian literature see: KECSKÉS, L., *A választottbíráskodás vallástörténeti és gazdaságtörténeti gyökereiről*. (On the roots of the religious history and economic history of the arbitration.) In: *A választottbíráskodás és más alternatív vitarendezési eljárások jogi szabályozásának alapjai.* (*The fundaments of the arbitration and other alternative dispute settlement procedures.*) (edited by: KECSKÉS, L. – TILK, P.) Pécs, 2018. p. 5-14. See especially on the roots of arbitration in Roman Law in the Hungarian literature: KECSKÉS, L., *A választottbíráskodás történeti alapjai. (The historical fundaments of the arbitration.)* In: KECSKÉS, L. – LUKÁCS, J.(edited): *Választottbírók könyve.* (*Book of the arbitrators)*. Budapest, 2012. p. 33-70.; KECSKÉS, L., Választottbíráskodás a római jogban. (Arbitration in the Roman Law.) In: Magyar Jog 60 (2013) p. 193-204. See especially on the antecedents of the Hungarian arbitration: FABINYI, T., *Választottbíráskodás (The arbitration)* Budapest, 1926.; BOÓC, Á., A Brief Introduction to Hungarian Arbitration Law. In: *Acta Juridica Hungarica* 43 (2008). p. 351-358. KECSKÉS, L., *A kezdeteknél a választottbíráskodás az állami igazságszolgáltatással vegyes rendszerben jelent meg Magyarországon.(In the beginning the arbitration appeared in Hungary as a mix with the state jurisdiction.*) In: A Kereskedelmi Választottbíróság évkönyve 2018. (Annales of the commercial arbitration 2018.) (edited by: BURAI – KOVÁCS, J.) Budapest, 2019. p. 15-19.

2 See: UJLAKI, L., A választottbírósági szerződés jogági elhelyezettsége és tipológiája (The position of the arbitration agreement in the branches of law and its typology.) In: *Jogtudományi Közlöny*. 46 (1991). p. 217.

3 See summary on this topic: ROEBUCK, D., *Ancient Greek Arbitration*. Oxford, 2001.

example of arbitration. Miroslav Bohácek considers the 186th line of the 23rd song as a real arbitrator nomination.[4] According to Bohácek, the word *istor* can mean the arbitrator. Examining the etymology of the Greek word, Bohácek takes the view that *istor* is a person who decides the case with his experience and knowledge, based on rational consideration, which is – as it is known – a specialty of the arbitration as well.[5] According to the ascertainment of Derek Roebuck, in the Eumenides, which can be considered as the third part of the Oresteia, written by Aeschylus, the father of the Greek drama as genre, the homicide – killing Clytemenestra – committed by Orestes, shows the possibility of the application of an intermediary-like, "mediatory" procedure, which Roebuck sees as the antecedent of arbitration.[6] Although the case of Orestes is obviously very far from the essence of the modern arbitration, we can agree with Roebuck that arbitration was a specific, natural, dispute--settlement procedure in ancient Greek culture, which could prelude or replace the court procedure, or even the ancient self--enforcement.[7] Bohácek – in his prior-referred work – mentions that, of course, the *istor* did not have the legal possibility to prevent the self-enforcement, in case the parties wanted to use it.[8] According to the prestigious British professor, Peter Stein, we can also see in the ancient law that the primary task of the arbitrator is to make a mutually beneficial, or at least mutually acceptable decision for both parties.[9]

In connection with the *arbiter* known and regulated by the Roman Law, we can find important standpoints in not only legal but especially literary sources. The first relevant meaning of the concept of the arbiter appears in the Roman Law sources, mentioned as *bonus vir*. According to this wording, *arbiter* is a person who is well-trusted to judge disputes without any state force.

In the paper *De officiis*, by Cicero, we can read the following thought: "*Homo autem iustus isque, quem sentimus virum bonum, nihil cuicquam, quod in se transferat, detrahet.*"[10] In this source, in the moral category of the *bonus vir*, Cicero illustrated a person who is fair, trustworthy, and obviously does not steal anything from anybody. According to Cicero, the *bonus vir* who is appropriate to help others even to decide disputes is a person led by correct moral norms, and this is what enables him to carry out the tasks of a judge.

In *De agricultura*, Cato highlights that a *bonus vir* is able to decide the quality of a wine entered into a wine competition, whether it is good or bad[11]. In our point of view, this quotation is especially important because it refers to a very relevant legal aspect of the *arbiter*, namely the expert arbiter, which will be clarified below.

In the literary sources, Quintus Horatius Flaccus sums up the attributes of a *bonus vir* in one of his epistles: „*Vir bonus et quis?/Qui consulti patrum, qui leges iuraque servet,/Qui multae magnaeque servantur iudice lites,/Quo res sponsore et quo causae teste tenentur* (I.16.40)". According to this citation, a bonus vir follows the guidance of the senate, keeps the law, the name of the bonus vir appears on the list of the arbitrators, and the warranty of the bonus vir guarantees the success of civil cases or witnesses in criminal cases.

If we sum up the standpoint of Cicero and Horatius, we can assume that the *bonus vir* – who acts as an arbiter – is esteemed as a person with high moral character and as an outstanding member of the society. This arbiter overall frequently does not decide according to the written law, but more to the *bona fides* and the *aequitas*. (All this is connected to the secondary meaning of the arbiter; see below.)

II.

Taking into consideration the sources in Roman Law, we can assume that there are at least two meanings of the *arbiter*, different from each other. According to the etymology of the arbiter, the expression comes from the deponent *arbitror*, and may originate from the word *adbito* – meaning "goes" – which we can translate as assume, think, decide, state.

If we want to solve the first meaning of the arbiter, the examination of the second form of the ancient civil procedure *legis actio*, the *legis action per iudicis seu arbitri postulationem* may bring us closer to the solution.[12] We can read the specifics of the *legis action per iudicis seu arbitri postulationem* in the Institutions of Gaius as follows:

Little of the Judicis Postulatio is known to us but the name, which has reference to an application to the magistrate to appoint a judge or arbiter to hear the case, after joinder of issue; and therefore, that it made provision for arbitration.[13]

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[4] In the third song of the Ilion we can read to following text: *Come now, let us wager a tripod or a cauldron, and as umpire betwixt us twain let us choose Atreus' son Agamemnon, as to which mares are in the lead—that thou may learn by paying the price." See: https://www.theoi.com/Text/HomerIliad23.html time of downloading: 23. 06. 2019, 21:46*

[5] See: BOHÁČEK, M: Arbitration and State – Organized Tribunal in the Ancient Procedure of the Greeks and Romans. In: *Iura* 3 (1952). p. 196.

[6] See: ROEBUCK, D., 'Best to Reconcile': Mediation and Arbitration in the Ancient Greek World. *Arbitration. The Journal of the Chartered Institute of Arbitrators*. November, 2000. p. 278-279.

[7] See: ROEBUCK: Op. cit. p. 286.

[8] See: BOHÁČEK: Op. cit. p. 201.

[9] See: STEIN, P., *Legal Institutions. The Development of Dispute Settlement*. London, 1984. p. 5.

[10] See the text of Cicero's *De officiis*: http://www.thelatinlibrary.com/cicero *time of downloading: 24. 06. 2019, 11:46.*

[11] See in connection: ROEBUCK, D. – DE LOYNES DE FUMICHON, B., *Roman Arbitration*. Oxford, 2004. p. 52.

[12] On the concept of the *legis actio* see a summary from the Hungarian literature: FÖLDI, A., Megjegyzések a legis actiók kérdéséhez. (Comments of the question of the legis actio.) In: *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae* 29 (1987). p. 47-64. On the concept of the legis actio sacramento in rem see especially: NÓTÁRI, T., Duellum sacrum — gondolatok a legis actio sacramento in rem kapcsán. (Duellum sacrum — Thoughts on the legis actio sacramento in rem.) In: *Állam- és Jogtudomány* 47 (2006). p. 87-113.

[13] See: http://legalhistorysources.com/Law508/Roman%20Law/GaiusInstitutesEnglish.htm#FOURTH%20BOOK Time of downloading: 23. 06. 2019. 22:00

If we study the source text, it is obvious that this meaning of the arbitrator is a person who has any – not necessarily legal – expertise that is essential to solve the procedure. This is confirmed by a source from Cicero, which can be read in Cicero's important state theory work, De re publica: *„Admiror, nec rerum solum, sed verborum etiam elegantiam. si iurgant, inquit. benivolorum concertatio, non lis inimicorum, iurgum dicitur… iurgare igitur lex putat inter se vicinos, non litigare."*

This citation talks about the *actio finium regundorum,* which shows a legal dispute between neighbours in which three arbiters acted who were proficient in surveying, and their task was to fix the property lines.[14]

In this source the word *iurgum* is used for the dispute, which also means that the dispute between the parties is often not of a legal nature – this is why no Latin synonym of lawsuit is used – and to solve the dispute a legal expertise is not necessarily required, but rather another kind of expertise, surveying for example.

From Gaius we can also read about the concept of *actiones arbitrariae*, that the *arbiter* also has a lawsuit-preventing and lawsuit-avoiding function:

*(163) For, if he against whom the case is brought should demand an arbiter, he receives the formula which is called "arbitrary," and if, by the award of the judge, he is required to restore or produce any property, he either produces or restores it without any penalty, and thus is discharged from liability; or if he does not restore or produce it, he is compelled to indemnify the plaintiff for the loss sustained through his disobedience. The plaintiff, however, can, without incurring a penalty, bring an action against one who is not required to produce or restore any property, unless an action for vexatious litigation is brought against him to recover the tenth part of the property in question; although it is said to have been held by Proculus that an action for vexatious litigation should be refused to him who demands arbitration, because he is considered to have, as it were, admitted that he ought to restore or produce the property. We, however, make use of another rule, and very properly; for anyone who demands an arbiter rather shows his intention to litigate in a more moderate manner, than for the reason that he admits the validity of the claim of his adversary. (*Inst. 4, 163 – 165)"[15]

The essence of the lawsuit-preventing function is that by his/her decision, the arbiter is able to redound the agreement of the parties. The acting arbiter does not make a judgment (final decision) by the way, but more a decision based on a fair moral position. And, if the person does not fulfil the obligation coming from the decision, then the decision-maker might act as a *iudex* in the further dispute and make a judgment (final decision).[16] In the Latin source text the word *calumnia* means the unnecessary litigation, which, in the Gaius-translation of Lajos Bozóky, was translated to Hungarian as "patvarkodás" (a word which means a reasonless litigation without any rational arguments), illustrating the difference between the two words.[17] Apart from the especially legal sources, it is worth mentioning another source in the literature, the work of Gellius, *Noctes Atticae*. The author, who lived in the 2nd century B.C, writes about a procedure where he had to act as a *iudex* (judge jury) and make a decision in which one of the parties met the moral requirements of the *bonus vir* him/herself. According to the Roebuck – Loynes de Fumichon's book which recounts the story in detail – using *actiones arbitrariae* – instead of the iudex, designated by the praetor, the parties were allowed to agree about the action of a *bonus vir*, acting as an *arbiter*.[18]

III.

The secondary meaning of the arbiter, in a sense, is closer to the modern concept of the arbitrator. According to this meaning, it is applicable as an alternative of the state jurisdiction, where the designation of the arbitrator is based on the agreement of the parties (*compromissum*), in order to decide the dispute of the parties.[19] Bearing this in mind, Max Kaser, in his monumental work on Roman civil procedure stresses that the arbitral dispute settlement is a civil law nature, and not part of the state jurisdiction. For this reason, he only briefly mentions it.[20]

According to this meaning of the word *arbiter* in case of a dispute, parties make a *compromissum*, in which they also agree that they will subject themselves to the decision of the arbitrator.[21] It is very important that before the *compromissum*, meaning prior to the designation and the statement of acceptance of the arbitrator, the arbitrator is not entitled to act. This is confirmed by the following source fragment as well: *„Arbiter ex compromisso sumptus cum ante diem, qui constitutus compromisso erat, sententiam dicere non potest"* (Alf. D. 4, 8, 50.). This fragment *expressis verbis* declares that the arbitrator cannot act – so obviously he/she is not entitled to make a decision – until the litigants fail to conclude the arbitration agreement in the form of *compromissum*.[22] According to Reinhard Zimmermann, the *compromissum* is basically an offer to a third person to act in the dispute of

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[14] In Hungarian see: Cicero: *Az Állam.The State.* (trans., HAMZA, G.) Budapest, 1995. p. 178.

[15] See: http://legalhistorysources.com/Law508/Roman%20Law/GaiusInstitutesEnglish.htm#FOURTH%20BOOK Time of downloading: 23. 06. 2019. 22:02

[16] On the concept of *actiones arbitrariae* see especially: LEVY, E., *Zur Lehre von den sog. actiones arbitrariae.* Weimar, 1915.

[17] See: *Gaius Római jogi Institutióinak négy könyve latinul és magyarul. (Four books of the Institutes of the Roman Law of Gaius in Latin and Hungarian.)*(trans., BOZÓKY, L.) Budapest, 1886. p. 421.

[18] See: ROEBUCK – DE LOYNES DE FUMICHON: *Op. cit.* p. 67-69.

[19] See: ZIMMERMANN, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition.* Oxford, 1996. p. 514.

[20] *„Da dieses Verfahren* [sc. die private Schiedsgerichtsbarkeit] *kein gerichtliches ist, liegt es außerhalb des Gegenstandes dieser Darstellung."* See: KASER, M – HACKEL, K., *Das römische Zivilprozessrecht.* München, 1996[2]. p. 639.

[21] See: KASER, M., *Römisches Privatrecht. Ein Studienbuch.* München, 1968[4]. p. 180.

[22] See also: BOÓC, Á., Megjegyzések a választottbírónak az eljárásból való kizárásáról (Comments on the challenge of the arbitrator.) In: *Állam- és Jogtudomány* 47 (2006) p. 451. Regarding the procedural guarantees of arbitration see from the recent Hungarian literature: NOCHTA, T., *About guarantees of a fair trial in arbitration proceedings*. In: A Kereskedelmi Választottbíróság évkönyve 2018. (Annales of the commercial arbitration 2018.) (edited by: BURAI – KOVÁCS, J.) Budapest, 2019. p. 381-386.

the parties as an arbitrator. In the source of Paulus, which we can find in the Digesta, those people can make *compromissum* who are entitled to conclude *contractus*, but at the same time, if the arbitration clause is concluded through *procurator*, the *arbiter* can oblige the principal of the *procurator* to personal presence.[23] J.A.C. Thomas stresses that if the parties have not fixed their agreement on the arbitration in *compromissum*, then the decision made by the arbitrator cannot be binding.[24]

Regarding the *compromissum*, parties had relatively free options for the agreement and the selection of the arbiter, and determined their number. The Roman Law sources say, ordinarily two *arbiters* were designated. According to the conceptions of arbitration of our age, this is at least strange, but even stranger, the following source in the Digesta: „*Si in duos fuerit sic compromissum, ut si dissentirent, tertium adsumant, puto tale compromissum non valere; nam in adsumendo possunt dissentire. Sed si ita sit, ut eis tertius adsumeretur Sempronius, valet compromissum, quoniam in adsumendo dissentire non possunt*" (Ulp. D. 4, 8, 17, 5.). According to this source, if the parties agree that they designate two *arbiters*, and if the *arbiters* cannot make a decision in the case, then they have to nominate a third one, which is invalid because they cannot know who the third one will be (by name). This can only be valid if the *compromissum* includes the name of the third *arbiter* as well.[25]

It is a very important feature of the *compromissum* that the *arbiter* is only entitled to act in the dispute that already existed at the time, when the *compromissum* has been concluded, but not in disputes arising thereafter.[26]

Regarding the survival of the *compromissum* – primarily in South-American countries – we would like to refer to the opinion of Bernando Cremades. According to the Spanish Cremades, the most relevant problem, which makes the arbitration procedure more difficult or sometimes impossible, is the problem of the *cláusula compromisoria*. According to this clause, an arbitration procedure can be initiated based on a previously concluded arbitration agreement, only if the parties confirmed the agreement in form of the *compromiso* (in Portugal: *compromisso*), which often had to be approved by the ordinary court.[27] This could be problematic, especially if any party does not wish to sign the *compromiso* after the emergence of the dispute. The refusal or the prevention of the signature of the *compromiso* – which often includes relevant information in connection with the designation of the acting arbitrators – can be an obstacle to the arbitration procedure. In some South-American countries, there is a possibility to have the *compromiso* signed using the ordinary courts. In other cases, the arbitrator procedure cannot be done. It is important that the origin of the *compromiso* is the concept of the *compromissum*, also involved in the designation of the arbitrators.[28]

The *compromissum* could determine the deadline before which the arbitrator had to make the decision, but according to the Digesta, the best way is to give an opportunity to the arbitrator to extend the deadline of the procedure.[29] Basically, the *compromissum* defines the fundamental rules and frameworks of the procedure. This is also related to the fact that the arbiter does not – or not exclusively – decide only on the rules of the law, but also on his/her sense of equity, morals, and general principles of the law. In *Pro Roscio Comoedo*, Cicero says that if the *iudex* decides, then he/she has to make a decision based on the formula issued by the praetor, while the *arbiter* is much more flexible in the decision.[30]

For the arbiter, not only the conclusion of the *compromissum*, but the quasi acceptance-declaration of the arbitrator procedure (*receptum arbitrii*) also plays a very important role in the procedure. In the civil law system of Roman Law, the *receptum arbitrii* is among the *pactums*.[31] The essence of the *receptum arbitrii* is that the arbitrator accepts the arbitrator position, and thereby commits to decide the dispute as an *arbiter* according to the referral of the parties. In a certain point of view, the *receptum arbitrii* can be considered the prefiguration of the acceptance declaration of the modern arbitrator. Regarding this perspective, Zimmermann comments that the continuation of the *receptum arbitrii* is relevant. Despite the example that the BGB does not include it as a contract, Zimmermann still stresses that it is widely accepted that the arbitrator is entitled to act in the dispute based on a legal relationship between him/her and the parties, and of which a fundamental element is the *receptum arbitrii*.[32]

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[23] See: „*Si domini, qui invicem stipulati sint, procuratores suos agere apud arbitrium velint, potest iubere ipsos etiam adesse.*" (Paul. D. 4, 8, 32, 18.)

[24] See: THOMAS, J. A. C., *Textbook of Roman Law.* Amsterdam – New York – Oxford, 1976. p. 320.

[25] See especially related to this: ROEBUCK – DE LOYNES DE FUMICHON: *Op. cit.* p. 114.

[26] See: „*De his rebus et rationibus et controversiis iudicare arbiter potest, quae ab initio fuissent inter eos qui compromiserunt, non quae postea supervenerunt*" (Paul. D. 4, 8, 46.).

[27] See especially on this: CREMADES, B.M., Resurgence of the Calvo Doctrine in Latin America. In: *Business Law International* 7 (2006). p. 53-72.

[28] See summary on the law of the arbitration of South-America: KLEINHEISTERKAMP, J., *International Commercial Arbitration in Latin America. Regulation and Practice in the MERCOSUR and the Associated Countries.* New York, 2005. From the Hungarian literature see especially: BOÓC, Á., A kereskedelmi választottbíráskodás egyes sajátosságai Dél – Amerikában.(Specific features of the commercial arbitration in South-America.) In: *Állam- és Jogtudomány* 48 (2007) p. 289-332.

[29] See: D. 4, 8, 32, 21.

[30] „*Iudicium est pecuniae certae, arbitrium incertae; ad iudicium hoc modo venimus ut totam litem aut obtineamus aut amittamus; ad arbitrium hoc animo adimus ut neque nihil neque tantum quantum postulavimus consequamur.*" According to the citation, the judgement – the iudicion – is about a certain amount of money, the arbitration procedure is about an uncertain. According to the citatum we initiate the court procedure with the expectation of gaining or losing the whole sum, and the arbitration procedure with the expectation of not gaining nor losing the whole sum. Cites and comments the work of Cicero: ROEBUCK – DE LOYNES DE FUMICHON: *Op. cit.* p. 161. The content of this quotation is reminiscent of modern arbitration, that also one of the specialties of the modern arbitration is to strive for the settlement of the litigants with a deal. See also., REDFERN – HUNTER: *Op cit.* p. 1.

[31] See also on this: FÖLDI, A. – HAMZA, G., *A római jog története és Institúciói. (History and Institutes of Roman Law).* Budapest, 2012[17] p. 542.

[32] See: ZIMMERMANN: *Op. cit.* p. 514.

Although based on the sources of the Romal Law, in theory, it was not out of the question that somebody decided in his/her own case as arbitrator, but – mostly in cases of *bonus vir* – there was a fundamental interest that the arbitrator should be unbiased. Peter Stein diagnoses during the examination of the antic laws that the essence of the arbitration – mediation dispute settlement procedures that the decider person should be regarded as unbiased.[33] According to emperor Antonius in the cases, if it turned out that the acting arbitrator was obviously biased, hostile, and/or he/she made a decision in the dispute despite the explicit request of the parties, the *exceptio doli mali* could have been used.

The above-mentioned points obviously raise the possibility of an appeal against the decision of the arbitrator. According to the sources, it is usually not possible to appeal against the decision of the *arbiter*.[34] The text of the source even foresees the payment of a penalty amount, stating that there is no appeal against the arbitration decision nor initiation of an ordinary judicial procedure.

Regarding the purpose of the arbitration procedure, we refer to the standpoint of professor László Kecskés, the former president of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry:

The basic purpose of the arbitrium was the final termination of the legal disputes. It was based on the fact that the parties to this procedure, by agreement (compromissum) voluntarily submitted themselves to the arbitrator's decision, whatever it would be. To this refers the fragment (D. 4,8,1) of an edictum from the Digest of Justinian, but probably interpolated – so it is from after the VI. century – according to which the goal of the compromissum is to get the dispute to „ad finiendas lites". This means that the decision of the arbiter had to settle all the rights and obligations of the parties permanently and fully, so there shall be no possible way of any appeal or legal remedy, the implementation and the acknowledgement of the decision is the obligation of the parties, arising from the moral (mos) of Rome, which meant a very serious obligation.[35]

We have to mention the role of the *praetor* in connection with the validation of the arbitration agreement. The *praetor* decided if it is possible to initiate an arbitration procedure based on the arbitration agreement. And, if it is, then the *praetor* allowed the procedure for the arbitrator designated by the parties, if the arbitrator accepted the referral. The *praetor* did not force anybody to accept the arbitrator referral, but if he/she accepted it, then he/she had to do the procedure. The *praetor* was even entitled to enforce that the arbitrator does the procedure.[36] According to Max Kaser, the Praetor may have used compulsion against the arbitrator in order to make a judgment on his duty.[37]

Regarding the continuation in the Middle Ages of arbitration, the concept of the *arbiter ex compromisso*, and the rule that the *arbiter ex compromisso* is not bound to the explicit rules of the law, have very important roles. The arbitration in the Middle Ages, especially the ecclesiastical arbitration, was not consistent with the rules of Roman Law. For this reason, in the Middle Ages, two different kind of arbitrators have been formed, different from each other, the *arbitrator* who did not necessarily act based on the rules of the law, and the *arbiter*, who was obliged to apply the rules of civil procedure and follow them in his/her final decision as well.[38] This is confirmed by Durantis, in his work *Speculum Iuduciale*, in which we can find this relevant distinction: *„Arbitrator vero est amicabilis compositor, nec sumitur super re litigiosa, vel ut cognoscat: sed ut pacificet, et quod certam est, dividat. Nec tenetur iuris ordinem servare: nec statur eius sententiae, si sit iniqua: sed reducitur ad arbitrium boni viri…Nam arbiter est, quam partes eligunt ad cognoscendum de quaestione, vel lite."*[39] It is very important to examine if the activity of *consiliator*s of the Italian city-states, the advisory activity of the commentators, is considered as arbitration or arbitration-like activity.[40]

Regarding the arbitrator, as a person who decides based on moral principles of equity, the above-cited source mentions the concept of the canonical *amicabilis compositor* and also refers to the institution of the *bonus vir* as well. But at the same time, the arbiter is not obliged to follow the rules of the explicit law in the final decision, but – coming from the Roman Law – has to uphold the procedural rules as well. From the difference between the arbitrator and arbiter originates the concept of the *arbiter ex aequo et bono*, also known as *ius commune*, evolving in the later law evolution. Helmut Coing refers to the fact that the concept of the *arbiter ex aequo* et bono, defined by the *ius commune*, was influenced by the institution of *amiable compositeur*, known under the French law.[41] As is known, the *arbitrator ex aequo et bono* procedure still plays an important role in arbitration procedure in some South-American states.[42] We highlight Zimmermann's opinion, which states that in German law it is also known that the *Schiedsrichter*, who decides on honesty and equity and not on the explicit rules of the law based on the

[33] *„Whatever the form of mediator, he must be accepted as impartial."* See: STEIN: *Op. cit.* p. 5.

[34] See: C. 2, 55, 1.

[35] See: KECSKÉS, L., *A választottbíráskodás római jogi gyökereiről. On the Roman Law roots of the arbitration.* In: *Studia in honorem Gábor Hamza: Ünnepi tanulmányok Hamza Gábor 70. születésnapja tiszteletére. (Celebrating studies in honor of the 70th birthday of Gábor Hamza.)* (edited: BOÓC, Á. – SÁNDOR, I.) Budapest, 2019. p. 171.

[36] See also: HUMBERT, M., Arbitrage et judgement à Rome. In: *Droit et cultures* 28 (1994). p. 59 – 60.

[37] See: KASER – HACKEL: *Op. cit.* p. 639.

[38] See also on the difference between *arbiter* and *arbitrator*: COING, H., *Zur Entwicklung des Schiedsvertrages im Ius Commune. Die amicabilis compositio und der Schiedsspruch ex aequo et bono.* In: Festschrift für Heinz Hübner zum 70. Geburtstag am 7. November, 1984. (hrsg., BAUMGÄRTEL, G. – KLINGMÜLLER, E. – BECKER, H.J. – WACKE, A.) Berlin – New York, 1984. p. 35 – 36.

[39] *Speculum Iudiciale* of Durantis (Pars I. Lib. I. Partic. I., § 1,3. és § 1,2.) cites: ZIMMERMANN: *Op. cit.* p. 529.

[40] See especially: KECSKÉS, L., *A polgári jog fejlődése a kontinentális Európa nagy jogrendszereiben*. (*The evolution of the civil law in the major jurisdictions of the continental Europe*.) Budapest – Pécs, 2004. p. 114 – 121.

[41] See: COING: *Op. cit.* page 37.

[42] See on this: BOÓC: *International Commercial arbitration…* p. 305.

parties consent, which comes from the concept of the *arbiter ex aequo et bono.*[43]

The schematic presentation of the Roman Law's *arbiter* also demonstrates, in my view, that there are many similarities and links between modern arbitration and each meaning of the Roman *arbiter*, confirming the universality of the survival of Roman Law, and the influence of Roman law as the *ius commune* to the legal system of modern times.[44] Accordingly, bearing in mind the rules and perceptions of the Roman Law's *arbiter* might be useful in the 21st century, for the modern arbitrators as well, and it can also contribute to the further development of a procedure aimed at successful settlement of disputes between parties.

[43] See: ZIMMERMANN: *Op.cit.* p. 530.

[44] See also: HAMZA, G., *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján (The evolution of the European civil law. The emergence of the modern civil law systems based on the Roman Law traditions.)* Budapest, 2002. p. 44-45. From the recent Hungarian literature see: BOÓC, Á. – FÁBIÁN, F. – SÁNDOR, I. – TÖRÖK, G., *A civilisztika dogmatikája. (Dogmatical questions of Civil Law.)* Budapest, 2009. p. 35.

On Stateform of Hungary between 1920 and 1944: Applicability of the Term „Monarchy without a King"

Peter Takács *

Abstract

The official stateform of Hungary between 1920 and 1944 was „monarchy". Since she did not have a king for a long time, however, it is often interpreted, even in academic analyses, in a way that it was, in fact, a kingdom with an unspecified monarch, viz without a king that could have been determined. At the level of stateforms, this ambivalent situation of a „kingless kingdom" is expressed by the category „monarchy without a king". Some legal scholars consider this category to be one of the particular variants of monarchy, while others argue that it might be conceived at a certain point on the scale between the two main types of stateforms, namely between monarchy and republic. This paper analyzes the origin of the term „monarchy without a king", its meaning in public law and its interpretation within the framework of Hungarian legal history. In the latter respect, it raises the questions whether the term can be used to define and characterize the Hungarian stateform in the Horthy era, and if so, what specific meaning it conveys.

Keywords: *Stateform; constitutional history of Hungary; claim of Charles I of Austria (Karl I from the Dynasty Habsburg-Lothringen as emperor of Austria; Karl III as king of Bohemia; and Karl IV as king of Hungary) to the Hungarian throne; legal regulation of powers and competencies of the regent of Hungary between 1920 and 1944; the political meaning of stateform.*

The term „monarchy without a king" is a denomination of a special stateform.[1] As it suggests something incompatible with the nature of monarchy, some scholars consider it to be a problematic category. Thus, the stateform and form of government of Hungary between 1920 and 1944 are called „regency" in the English literature,[2] even at the price that the actual Hungarian situation did not correspond to the traditional concept of *regency*. It can be argued that a monarchy without a king is neither a real monarchy nor a (real) republic. Therefore, some do not employ this term arguing that it is semantically incorrect and even misleading. Others only use it between quotation marks in order to emphasize its unreal, fictional or even illusionary character. Those who employ the term face difficulties in establishing its precise meaning for a specific state. Furthermore, many argue that it has a pejorative and malicious connotation, which indicates some criticism already at the terminological level. The criticism lays in the assertion that the term „monarchy without a king" cannot be used to define stateform. I discuss this view below.

1. General Meaning and Origin of the Term „Monarchy without a King"

As for stateform, the term „monarchy without a king" carries in itself the sole implication that the throne remains unfilled in a particular state in the longer term. This, namely the unfilled nature of the throne refers to some sort of anomaly in the case of monarchy as a stateform suggesting continuity and perpetuity (cf. *Le roi est mort, vive le roi*). An unfilled throne in a monarchy is an exceptional situation which – in case the person to fill the throne is known but cannot exercise his/her power – can be remedied by public law in various ways.

In the Middle Ages and in the Late Middle Ages such remedies included *regency* with a *regent*, or in some cases with a *regency council.* Regency as an institution allowed someone else to

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1 Throughout this paper, the terms „stateform" and „form of state" (Germ.: *Staatsform*, Czech: *forma státu*) are used to designate the public law structures that reflect and reinforce the most significant elements of political relations. In this general sense, these forms – although they have several classifications and typologies – have usually been categorized into two main classes („monarchy" and „republic") since the 16th century. In the English literature this general meaning is sometimes also referred to as „form of government" (Germ.: *Regierungsform*, Czech: *forma vlády*).

2 This usage was established in the 1930 s (see Rutter, Owen, *Regent of Hungary. The Authorized Life of Admiral Nicholas Horthy.* London: Rich and Cowan, 1939) and is still common today. For the latter see, e.g., Romsics, Ignác: Changing Image of Miklós Horthy, in: Vít, Michal – Baran, Magdalena M. (eds.), *Transregional versus National Perspectives on Contemporary Central European History. Studies on the Building of Nation-States and Their Cooperation in the 20th and 21st Century.* Stuttgart: Ibidem Press, 2017. pp. 253–268. Different authors draw attention to the contradiction differently. Helmut David Baer, for example, puts it in this way: „Thus Horthy was regent for the king – only Hungary had no king… Hungary in the Horthy period was technically a monarchy. It was a monarchy without a king, governed by a temporary regent whose position was permanent." See Baer, Helmut David, *The Struggle of Hungarian Lutherans under Communism* (Texas: A & M University Press, 2006) ch. 1. 10.

exercise the power of the ruler in the case of his/her minority, illness or longer absence.[3] The regent was, in fact, the „proxy" or „deputy" but not the „substitute" or „vice" of the ruler. In the Hungarian official usage during the Middle Ages, the *regent* was denominated by the word *gubernator* of Latin origin (cf. governor, Hung.: *kormányzó)* which was used to emphasize his strong military and political-administrative role. A well-known *gubernator* was, for example, János Hunyadi (1446-1453; during the minority of Ladislaus V; as King of Bohemia: Ladislaus I Posthumous, or Ladislav Pohrobek), and Mihály Szilágyi (in 1458, during the time between the death of Ladislaus and the crowning of Matthias I).

Occasionally, the ruler had to be substituted and represented for different reasons: the *procurator*, or in some cases *locum-tenens*, represented the ruler only in a specific area – owing to its territorial size or distance from the centre. This office had several equivalents and variants: in the case of old Franks, it corresponded for instance with *marquis* (or margrave, in German: *Markgraf*). In Hungary between 1000 and 1848 well-known variants included *palatine*, *a deputy and substitute of the king*; however, this office was left unfilled in tragic circumstances in 1848 (when it was intended to be made part of the constitutional monarchy). Since this office and institution was incompatible with the government accountable to the parliament, it ceased to legally exist after 1867. In specific cases, more modern, non-medieval political communities elect or „create" *governors* (in some cases: *protectors* or *vicegerents*) in order for the state to have at least a kind of emergency president. Thus, the office of the governor is sometimes argued to have the feature of emergency state presidency.[4] Finally, in the practice of Hungarian public law, *homo regius* (the „man of the king") was some sort of trustee and representative (in modern usage: proxy) of the king which can be regarded as a special 20th-century mixture of the governor (*gubernator*) and procurator. The *homo regius* was a confidential person of the king entrusted with resolving complicated issues.[5]

The term „monarchy without a king" is used when the throne is left vacant in the longer period because it is unknown – *viz,* undecided – who should or could fill it. It is not exceptional but irregular, not unusual but abnormal, and not paradoxical but contradictory if this situation lasts too long.

The term of „monarchy" or „kingdom" „without a king" was first used for describing the contradictory nature of a certain political situation, and not as a stateform yet, by an Austrian historian, Adolf Beer. In his book on the first partition of Poland Adolf Beer, who was otherwise the representative of Moravian towns in the Imperial Council (*Reichsrat, Říšská rada)* in Vienna between 1873 and 1897, employed this term to describe „the orphaned political situation". According to him, this situation is like „a motherland without a mother, a *kingdom without a king*, a senate without a leader, a sceptre without a hand, a subject without a lord, a republic without a soul".[6] Beer's words recall an old French saying, according to which „a *monarchy without a king* is like imagining a hand without fingers, a singer without voice, a country without laws, or a life without joy".[7] The term has been employed relatively often in the recent academic literature; however, not as a stateform but due to its awareness--raising nature. For instance, a German historian, Maria Rhode used the term to describe seven actual but short *interregnums* in Poland,[8] while an English historian, Robert Beddard employed the term in the title of his collection of the 1688 *interim government*'s documents and minutes.[9]

It was first used as a denomination of stateform in the case of Hungary to describe the post-1921 situation in an anecdotal or even ironic way. According to the alleged anecdote, the Hungarian state is a „monarchy without a king governed by an admiral without a fleet in a country without a coast."[10] Aside

[3] One of the best-known regent in history was Marie de' Medici who held this office three times: first, when her husband, Henry II, temporarily left the kingdom for the campaign of Metz (1552); second, when his second son, Charles IX, was still a minor (1560–1563); and third, when his third son, Henry III, went to Poland. The person of the king was known in all three cases. The case of Prince George, *Prince Regent* of Great Bitain during the incapacity of his father, George III (1811–1820), is another well-known example of regents. In Bohemia – after the emperor Frederick III as guardian of the young king Ladislaus entrusted him with the administration of the country –, the diet assembled in 1451 in Prague conferred the regency on George of Poděbrad, namely Jiři z Kunštátu a Poděbrad.

[4] To that effect was Lajos Kossuth regarded a governor who was elected „governor-president" on 14 April 1849, the day of the adoption of the Hungarian Declaration of Independence and the dethronement of the House of Habsburg.

[5] For example, Archduke and Field Marshal Joseph August von Habsburg-Lothringen who became „full-fledged Hungarian commissioner" (Germ.: *Reichsverweser*) of Charles I of Austria on 26 October 1918. He appointed Mihály Károlyi to the office of Prime Minister and – after he had declared himself governor (*Reichsverweser*) of Hungary on 7 August 1919 – István Friedrich as well who had overthrown the Peidl government in a coup d'état-like event. A couple of days later he resigned and supported Miklós Horthy ex „imperial and royal rear-admiral" (Germ. *ehem. „k. und k. Konteradmiral"*) who was elected regent on 1 March 1920 by the Hungarian National Assembly.

[6] Cf. „das Vaterland ist ohne Vater, *das Königreich ohne König,* der Senat ohne Oberhaupt, das Scepter ohne Hand, die Unterthanen ohne Herrn, die Republik ohne Seele" (emphasis added); see Adolf Beer, *Die Erste Teilung Polens* (Vienna: Carl Gerold's Sohn, 1873), Vol. 1, p. 106.

[7] Cf. *Imagine un royaume sans roi, une main sans doigts, un chanteur sans voix, un pays sans lois, une vie sans joie c'est surement moi loin de toi.*

[8] Cf. Maria Rhode, *Ein Königreich ohne König. Der kleinpolnische Adel in sieben Interregna* (Wiesbaden: Harrassowitz Verlag – Deutsches Historisches Institut Warschau, Quellen und Studien 5, 1997).

[9] Robert Beddard, *A Kingdom without a King. The Journal of the Provisional Government in the Revolution of 1688* (Oxford: Phaidon, 1988). As to the literature of the nearly same period from recent years, see Benjamin Woodford, *Perceptions of a Monarchy Without a King: Reactions to Oliver Cromwell's Power* (Montreal: McGill–Queen's Press, 2013).

[10] It can be found in many publications, always in an anecdotal sense. From the recents years see for example Francis Tapon, *The Hidden Europe. What Eastern Europeans can teach us.* (s.l., Thomson Press, 2012. p. 224) and Dawn Kazmierzak, *Time to Chose. Growing up under Hitler and watching history repeat itself* (Bloomington, Ind.: West Bow Press, 2014.) p. 4.

from a French rarity[11], the throne was left unfilled for a longer period of time in two instances in the 20th century, mostly due to the movement or even will of political forces: first, in Hungary between 1920 and 1944; and second, in Spain between 1947 and 1975. The first became known as the Horthy era while the second is remembered as the Franco era. Both were associated with specific but similar political structures.[12]

According to the official view, the stateform of Hungary between 1920 and 1946 was monarchy,[13] where most of the prerogatives of the king were exercised by the regent (who could be substituted by a vice regent after 1942). Since the throne was left *de facto* unfilled for two and a half decades, several authors called the public law relations at that time – sympathetically but slightly contradictorily – „provisorium".[14] However, this is a contradictory term here since monarchy is the stateform of *continuity* while provisorium implies a *temporary* or *interim* condition. Hungarian international lawyer László Buza argued in his public law lecture in the academic year 1939/40 that „the terms monarchy and provisorium are necessarily mutually exclusive. A monarchy can on no account be a provisional monarchy."[15] This contradiction is reflected in the often-raised argument that the real stateform of Hungary was „monarchy without a king" adding – as if it was a source of shame – that it is a sort of unofficial category.

In the context of the Hungarian state, the term was first used by German literary historian Klabund, or Alfred Henschke, although it is highly likely that he had borrowed it from the common talk. In the chapter on Hungary of a 1923 publication of the history of world literature he argued as follows: „Now even mentioning the name of [Endre Ady, poet of the 1918 revolution] is forbidden in Hungary. The intellectual life is paralyzed by strict censorship. The republic without republicans was followed by a monarchy without a king."[16] In 1932, a Hungarian sectoral gazette drew attention to the fact that an article on Hungary in the American edition of National Geographic published a few years prior had mentioned the following two hungaricums: „twin city" (Budapest) and „monarchy without a king" (Hungary itself).[17] From 1945 on, the term became more widespread in Hungary and was mainly used with a critical connotation.[18]

Before 1945 the term „Hungarian Monarchical Republic" was more widespread in Hungary which, on the one hand, recalled the Polish *Rzeczpospolita Polska* and, on the other, had some sort of sarcastic connotation. Sándor Propper, a social democratic representative in the Hungarian National Assembly, argued the following way in his speech on 10. January 1924: „I am seeking consolidation regarding constitutional law – since, at last, it has also gained importance – and what conclusion do I reach? We do not have a stateform; we are a monarchy, without a king. Recently, I have read in a foreign journal that Hungary is playfully called »Royal Republic of Hungary«. There is no king; it is not allowed to create propaganda for the sake of the republic since one gets convicted for that…"[19]

2. Some Issues and Problems about Stateform of Hungary

The difference, or even conflict, between *de jure* and *de facto* stateforms – beyond the unique and paradoxical nature of the

[11] With this term *(un royaume sans roi)*, the French refer to the special legal status of one of their overseas territories, the Wallis and Futuna Islands. Under an 1887 international treaty, the French Republic recognizes the three local kingdoms existing on the territory (Uvea, Sigave és Tu'a) and that the traditional monarchical institutions have the power to decide in civil matters. It, however, does not recognize the kings even though the local public takes them into consideration. This system – in case one wished to denominate it – would in fact correspond to a „monarchy without a king" instead of a „republican monarchy" or „monarchical republic".

[12] Political science considers authoritarian regimes; for reasons of space, however, it cannot be discussed here.

[13] At the level of legal provisions, monarchy was declared by a prime ministerial decree on 18 March 1920 and a law on 6 November 1921 (not by Law I of 1920). The end of the so-called Horthy era (the *coup d'état* by the Arrow Cross Party on 15 October 1944 and the resignation of the regent on 16 October 1944) did not bring about a change in stateform. It has only meant that not only the throne but also the office of the regent were left unfilled. After „4 April" 1945 there arose a unique public legal situation in which until 1 February 1946 the power of the head of state was officially exercised by the three-member High National Council established on 17 April 1945. At the same time, Joseph Mindszenty – appointed by the Pope as Archbishop of Esztergom on 8 September 1945 and inaugurated on 7 October – considered himself regent of Otto Habsburg, son of Charles I.

[14] See for instance Kálmán Molnár, *Alkotmányos jogrendünk és a közjogi provizórium* [*Our Constitutional Legal Order and the Public Law Provisorium*] (Pécs: Dunántúl Rt. Egyetemi Nyomdája, 1926) and *A két világháború közötti provizórium közjogi mérlege* [*The Public Law Balance Sheet of the Provisorium in the Interwar Period*] (Pécs: Karl L., 1945); as well as Béla Túri, *Mai közjogi berendezkedésünk természete* [*The Nature of Our Current Public Legal Framework*] (Budapest: Stephaneum, 1928), pp. 49–63: „Az 1920:I. tc. és a közjogi provizórium [Law I of 1920 and the Public Law Provisorium"]. (In the context of Hungary, only authors loyal to the House of Habsburg applied the term „provisorium" for the following two eras: the *Bach era* (1850–1859) – in order to avoid calling it autocracy – as well as the temporary restoration of absolutism by Anton von *Schmerling* (1861–1865) – for roughly the same reasons.)

[15] László Buza, *Magyar közjog* (Buza László előadásai alapján összeállította Beller István) [*Hungarian Public Law* (edited by István Beller on the basis of the lectures of László Buza)] (Szeged, 1939). Manuscript. Cited in: Gábor Schweitzer, „Közjogi provizórium, jogfolytonosság, új közjogi irány. Az 1919/1920–1944 közötti magyarországi alkotmányjog-tudomány vázlata" [Public Law Provisorium, Legal Continuity, New Public Law Orientation. Outline of the Constitutional Legal Science of Hungary between 1919/20–1944]. Parts 1-2, *Közjogi Szemle,* Vol. 7, Issue 2014/1–2 (pp. 8–16 and 9–20), p. 15. On this issue, see also László Buza, *A királykérdés nemzetközi jogi vonatkozásai* [*The International Legal Aspects of the Issue of the King*] (Budapest: Pallas Ny., 1928) (Offprint from Issue 1928/10 of *Magyar Jogi Szemle*).

[16] See *Geschichte der Weltliteratur in einer Stunde* (Padeborn, Salzwasser Verlag, 1923), cf. pp. 100–103., written by the German writer, Alfred Henschke, better known by his pseudonym Klabund. Moreover, the book refers to Horthy as *Reichsverweser*. The parts referring to Hungarian literature was published in Hungary in 1929 in a journal, see *Irodalomtörténet,* Vol. 17 (1929), p. 142. For international journalism, see István Csekey, „Das Königreich ohne König", *Reichspost* [Vienna] (25 February 1925).

[17] *Vasúti és Közlekedési Közlöny,* Issue 51 (1932), p. 488.

[18] Cf. József Kardos, „A király nélküli királyság a szent korona jegyében" [Monarchy without King in the Spirit of the Holy Crown] in *A magyarországi polgári államrendszerek* [*Hungarian Civil State Systems*], ed. Ferenc Pölöskei and György Ránki (Budapest: Tankönyvkiadó, 1981), pp. 438–469.

[19] *Nemzetgyűlési napló* [*Diary of the Hungarian National Assembly*], Volume XIX (Budapest: Athenaeum, 1924), p. 90.

issue – raised difficulties in three aspects: first, because of the claim of Charles I to the Hungarian throne; second, because of the expansive legal regulation of powers and competencies of the regent acting in the function of the head of state; and third, for political reasons. In the given period, such contradictions were tolerable in the eyes of many as they considered the situation to be temporary. However, the situation remained „temporary" for two and a half decades – the same way it happened later on a few more occasions in this historical landscape. The paradoxical nature of this issue can well be illustrated by the argument of the late legitimist lawyer, Tibor Farkas (1883–1940) who claimed that in the case of monarchy, institution and person, *by its nature*, belong together. He argued that a monarchy without a king is as inconceivable as a „gold pengő" (a special currency of the time) without gold, or „national unity without the unity of spirits".[20]

2.1 The Claim of Charles I to the Hungarian Throne and Related Problems

The first difficulty, namely the claim of Charles I to the Hungarian throne, can only be evaluated in a specific historical context which needs to be discussed in detail. The difficulty in this regard was triggered by the defeat and dissolution of the Austro-Hungarian Empire in and in the wake of the First World War and the wave of revolutions that evolved simultaneously. Although in a proclamation on 16 October 1918[21] Charles I claimed that he wants to transform the monarchy into a federal state, the political communities of stronger nations such as the Czechs, Slovaks and Croats seceded from the monarchy in late October, and independent Austria was also established. In late October 1918, the so-called Aster Revolution broke out in Budapest.[22] The *homo regius* (governor) substituting the king with omnipotence revoked János Hadik's appointment as Prime Minister from three days prior and appointed Mihály Károlyi as Prime Minister who formed a „people's government" with the representatives of the three parties of the Hungarian National Council and solemnly swore in as head of government on 31 October. On the same day a military unit, in circumstances still unclear, murdered former Hungarian Prime Minister István Tisza, the main political opponent of Károlyi.

A revolution took place in Vienna as well where the Austrian National Assembly – after Charles I had, at the persuasion of his confessor, renounced „all kinds of participation in the Austrian state affairs" in a declaration on 11 November 1918 declaring that „[he] recognize[s] in advance the decisions the Austrian people make about its future stateform"[23] – proclaimed the Republic of Austria on 12 November 1918. The day after, a Hungarian delegation paid a visit to the emperor in his hunting lodge in Eckartsau who made a declaration in the presence of the delegation as well. According to the declaration, „[e]ver since I took the throne, I have sought to liberate my peoples from the horrors of war, in the outbreak of which I had no share. I do not want my person to hinder the development of the Hungarian nation, towards which I remain to feel a deep affection. Therefore, I withdraw from any participation in state affairs and recognize in advance the decision of Hungary to establish her future stateform."[24]

Three days later, on 16 November 1918, the National Assembly decided upon a „people's resolution" (law) which was proclaimed on the square in front of the Hungarian Parliament and published in the Hungarian *corpus juris*.[25] It declared that „Hungary is independent of every other country and is an autonomous people's republic". Four months later (on 21 March 1919), this republic – with Mihály Károlyi appointed as interim president on 11 January 1919 – was transformed into a coun-

[20] *Zalamegyei Újság* (13 March 1935). As cited in Zoltán Paksy, „Nagypolitika kicsiben: parlamenti választás és társadalmi háttere Zalaegerszegen 1935-ben" [High Politics in Small: Parliamentary Election and Its Social Background in Zalaegerszeg in 1935], *Korall. Társadalomtörténeti folyóirat.* Issue 17 (2004), p. 93.

[21] This proclamation of 16 October 1918 – declaring that Austria would be a „federal state […] in which every people forms a separate state community on its territory of settlement" – called upon the different national communities to establish their own national assemblies. Accordingly, the Hungarian National Assembly was established on 24 October in Budapest with the chairing of Mihály Károlyi. For an evaluation of the role of high politics and the issue of nationality in the dissolution of the Austro-Hungarian Empire see Ferenc Fejtő, *Rekviem egy hajdanvolt birodalomért. Ausztria-Magyarország szétrombolása* [*Requiem for a Late Empire. The Disruption of Austria-Hungary*] (Budapest, Atlantisz Könyvkiadó, 1990); and Oszkár Jászi, *A Habsburg-Monarchia felbomlása* [*The Dissolution of the Habsburg Monarchy*]. trans.: Judit Zinner (Budapest, Gondolat Könyvkiadó, 1982).

[22] In essence, this meant the following at that time: soldiers who gathered in the streets waiting to be transported (replacing their cap buttons with asters) prevented – along with the revolutionary masses who had been protesting for days – the launching of march companies, seized some of the strategically important locations of the city and freed the political prisoners. The revolution of high politics – which sought to comply with the forms of legality until 20 March 1919 (today we would put it the follow way: it was „ruled by the rule of law") – took place in palaces in the downtown and in the Parliament. At the same time, revolutions broke out in several German constituent states (in early November 1918 the republic was proclaimed in Bavaria and then in Berlin).

[23] As a matter of fact, the text of the Austrian declaration was the result of a carefully crafted compromise as the Austrian government had discussed the issue for almost a day. Since the majority of ministers did not agree with dethronement, the view was adopted that the ruler should not give up the throne but only his participation in state affairs.

[24] Secondary sources sometimes publish the text of the declaration with different wording. The main variation in text is the presence of the phrase „I resign" instead of „I withdraw" in some of the sources. (The most comical source in this regard is a Wikipedia page, cf. https://hu.wikipedia.org/wiki/Eckartsaui _nyilatkozat, where „I withdraw" stands in the html text while the attached jpg file says „I withdraw".) Later on, Charles I argued that the declaration shall be deemed invalid since he signed it under coercion.

[25] It was published in Issue 16 of the Hungarian *Corpus Juris* (Országos Törvénytár) on 22 November 1918. The law is not published by several contemporary legal collections – for instance the online database *Laws of 1000 Years* (Wolters Kluwer, 2015) whose material between 1918 and 1929 starts with the year 1920.

cil republic,[26] mainly because of the political weakness of its founders (which was closely linked to international relations as well). The Council Republic, however, failed after 133 days.

In autumn and winter 1919, under consolidated power relations, the first and second law of the National Assembly – which convened on the grounds of the January 1920 elections – laid the foundation for the public legal order that was unequivocally defined by Prime Ministerial Decree No. 2394.

Law I of 1920 – as its title suggests, *temporarily* – „settled" „the exercise of the competence of the public authorities" and – according to its own interpretation – „restored" constitutionalism. Its Preamble declared that „the exercise of royal power" ceased to exist on 13 November 1918, while the „functioning" of the parliament summoned in 1910 was „terminated" on 16 November 1918. The legislator interpreted this situation – recalling the constructive methods of cunning lawyers – in a way that, for these reasons, „the exercise of the competence of the public authorities became impossible under the ordinary arrangements of the constitution",[27] which ruled out the question whether it was the ordinary arrangements of the constitution that failed. Although in a slightly circumstantial way, he established that what had been hitherto bound „in an indivisible and inseparable way" (*indivisibiliter ac inseparabiliter*), namely the Austro-Hungarian Empire, dissolved; thus, Hungary became independent and the elected representatives formed a national assembly. Later on, „the National Assembly" declared itself the „legitimate representation of Hungarian state sovereignty" which – as he put it – is entitled to arrange for „the additional methods of the exercise of state power" „pursuant to our constitution". On these grounds, it contained a nullity provision as well. According to its Section 9, „any provision issued by bodies of the so-called people's republic or Soviet republic by way of people's acts, decrees or any other form of legislation is invalid", therefore it needs to be deleted from the Hungarian *corpus juris*.

The most significant problem of the text was that „under our constitution" at that time, *this law could not be regarded valid law of the legal system* – in case we consider „our constitution" to be the historical constitution. This, according to any interpretation of the historical constitution, would have necessitated an approval of the upper house as well as a royal assent. As legitimist constitutional lawyer Kálmán Molnár formulated a few years later, „according to the Doctrine of the Holy Crown, the king and the representatives are equally indispensable elements of the highest manifestations of the public authorities."[28] Not only legitimists but also social-democrats emphasized the fact that Law I of 1920 had essentially created an *unconstitutional situation*. For instance, Sándor Propper based his view on this fact in his above-mentioned speech in 1924 when he questioned the legitimacy of the National Assembly.[29]

The Preamble of Law II of 1920 set out that the National Assembly had „elected" Miklós Horthy as „regent of Hungary on its session on 1 March 1920", and since he had sworn in as regent „before the National Assembly" it inducted him into office. The so-called operative part of the law set out the following: „The National Assembly hereby enacts the election of Miklós Horthy de Nagybánya as regent of Hungary" (Section 1), then it determined his remuneration. In other words, this law was not too wordy. It remains an open question whether this regent was an „emergency president", „representative of the king" or perhaps deputy of the king (and if so, of which king). This law was also not „approved" by the ruler but signed and provided with a promulgating clause by the regent himself authorized by the National Assembly.

The text of Law I of 1920 did not deal with the nature of stateform; in fact, it did not even mention it. It only contained

[26] For an evaluation of the aspects of stateform of the Hungarian Council Republic, see Imre Takács, „Az államforma változásai a polgári demokratikus és proletárforradalom államában" [Changes in Stateform of the Civil Democratic State and the State of Proletarian Revolution], in *A tanácshatalom jogpolitikája 1919-ben* [*The Legal Policy of Council Power in 1919*], *ed.* Kálmán Kovács (Budapest: Magyar Jogász Szövetség. Jogtörténeti Értekezések, 1979), pp. 16–32.

[27] On an evaluation of the fine details emerging during the drafting of the law – for instance, the difference between the terms „its exercise is suspended", „is terminated" and „is not being exercised" –, see István Szabó „Az államforma kérdése 1919/1920 fordulóján" [The Issue of Stateform at the Turn of 1919/1920], in *Ünnepi tanulmányok Máthé Gábor 65. születésnapja tiszteletére* [*Anniversary Studies in Honour of the 65. Birthday of Gábor Máthé*] (Budapest, Gondolat, Bibliotheca iuridica, 2006), pp. 585–597. See also I. Szabó, „Az alkotmányosság helyreállítása 1920-ban" [The Restoration of Constitutionalism in 1920], *Győri Tanulmányok,* Issue 20 (1998), pp. 90–96.

[28] Kálmán Molnár, *A szent korona-tan kifejlődése és mai jelentősége* [*The Evolution of the Doctrine of the Holy Crown and Its Significance Today*] (Pécs, Dunántúl Egyetemi Nyomda, 1927), p. 10. For an evaluation of Kálmán Molnár and the moral difficulties of university education in public law, see Gábor Schweitzer: „Molnár Kálmán és a két világháború közötti alkotmányjogtudomány dilemma" [Kálmán Molnár and the Dilemmas of Consitutional Legal Science in the Interwar Period], *MTA Law Working Papers,* Issue 2015/33.

[29] See Nemzetgyűlési napló [Diary of the Hungarian National Assembly], *op. cit*. (1924), *ibid*. (Social-democrats questioned the legality of the first National Assembly as well, arguing that the Hungarian public law at that time did not recognize such an institution and that it had no right to regard itself a depository of sovereignty.) On this issue, see also György Wiener, „Jogfolytonosság és megszakítottság a történeti alkotmányosság rendjében" [Legal Continuity and Discontinuity in the Order of Historical Constitutionalism], in *A szabadságszerető embernek – Liber Amicorum István Kukorelli* [*To the Freedom-Loving Man – Liber Amicorum István Kukorelli*], ed. Nóra Chronowski – Zoltán Pozsár-Szentmiklósy – Zsolt Szabó – Péter Smuk (Budapest: Gondolat Kiadó, 2017), pp. 391–403, in which the author regards the law as the first significant departure from the historical constitution. A further view – which I myself share – emphasizes the other side and supplement of the interruption of legal continuity. According to this view, this law constituted the first step toward the establishment of the public law construction of a new Hungarian state – „Hungary after the Trianon Treaty" (small Hungary) –, namely toward the *foundation of a new state*. As a starting point for this issue, see Ákos Szilágyi, „A sivatag törvénye. Auschwitz és Trianon" [The Law of the Desert. Auschwitz and Trianon], *2000* [*Kétezer*]. Vol. 27, Issue 2015/1–2, pp. 3–8.If this is a defensible view, it can be argued – in a slightly ironic way – that the „new state founders" attempted to re-establish the monarchy as well, even though they „did not let anyone know", therefore they failed. For an evaluation of the more serious historical and international implications of this issue (with content different from that discussed here) see Iván Halász, *Az állam összeomlása és újjáépítése* [*The Collapse and Reconstruction of the State*] (Budapest, NKE, 2014), pp. 140–177 (esp. p. 162).

the quoted nullity provision and determined the rights of the regent (Sections 12–18). It was Decree No. 2394/1920. M. E. that declared (and partly „explained" – in an unusual way for a legal norm) that the stateform of Hungary is kingdom.

It should be noted that some scholar argue that Law I of 1920 – in contrast to my above-mentioned view – took a stand on the issue of stateform[30] since, on the one hand, it restored constitutionalism „in line with the historical constitution" (and accordingly, Hungary was monarchy until 1918) and, on the other hand, both its justification (explanatory memorandum aimed to persuade members of national assembly) and parliamentary debate referred to the stateform. Regarding the former aspect, my counterargument is as follows: this law cannot amount to the restoration of historical constitutionalism but to its breach as well as to the first step toward the establishment of *a new constitutionalism*. That is why it should have taken an open stand on the issue of stateform. The evaluation of the latter argument would raise problems of legal interpretation that I cannot discuss in detail here; however, it might only be required to raise the following question: what kind of a legal standpoint is one that is not included in the text of the law but is hidden in the justification?[31]

The decree in question was signed on 18 March 1920 by Sándor Simonyi-Semadam as „Hungarian Royal Prime Minister" who had been appointed by Horthy. According to the decree, Law I of 1920 „provide[d] for the temporary exercise of the duties of the head of state only in the case of an actual cessation of the exercise of royal power for the period until the manner of exercising the powers of the head of state becomes definitively regulated, and for this period of time the National Assembly transferred the exercise of rights embodied in royal power to the regent within the constraints set out in Section 13 [of Law]". The decree – following a period of nearly nine months of hesitation[32] – took the following unequivocal stand on the issue of stateform: „The legal stateform of Hungary remains monarchy".[33]

However, Charles I – who emphasized that the Eckartsau Declaration was made under coercion and is thus invalid – was not invited to Hungary. The entente played the biggest role in this which – not wanting to see a serious great power emerging in Central Europe – observed in approval how nations striving for independence are tearing the Austro-Hungarian Empire apart but only savoured the effects of the breakup of the centuries-old Habsburg power. In such circumstances, Charles I attempted to return at least to the Hungarian throne in 1921 on two occasions,[34] and – depending on the concept – sought to occupy the throne of Hungary (after the Treaty of Trianon): the first time in Spring, with negotiations; the second time by forming an opposition government and leading armed groups which were easily defeated by a battalion consisting of a few hundred university students in the so-called Battle of Budaörs (23 October). Subsequently, the Hungarian National Assembly declared the termination of his rights as ruler on 6 November 1921.[35] Thus, Hungary became an elective monarchy at the legislative level as well: as the Dethronement Law set out, „the prerogative of electing a king reverted to the nation". However, the nation was unable to exercise this right for two and a half decades. Admittedly, it did not even try to. Probably because it did not even want to.

[30] See for example J. C. Swanson's position, who stated – in my view a bit hastily – that this law „restored the kingdom"; cf. John C. Swanson, *The Remnants of the Habsburg Monarchy. The Shaping of Modern Austria and Hungary, 1918-1922.* (s.l., Boulder, East European Monographs, 568, 2001.) p. 194.

[31] Interestingly, it resembles the stand taken on the state name in Article A of the Foundation of the Hungarian Fundamental Law of 2011 which calls Hungary „our country" and not the state, and only indicates in its "explanatory memorandum" aimed to to persuade members of national assembly that „our country" stands for the Hungarian „state", arguing that Article A, ultimately, renamed the state. See Péter Takács, *A rózsa neve: Magyar Köztársaság. Az államok nevéről és a magyar állam átnevezéséről* [*The Name of the Rose: Republic of Hungary. On the Names of States and the Renaming of the Hungarian State*] (Budapest, Gondolat, 2015), pp. 94–109.

[32] Here I mean that at the very beginning of the era governments – by way of decrees – often „tampered" with the stateform; and „smudged" the name of the state. On 2 August 1918, only a day after the collapse of the Hungarian Soviet Republic, the government of Gyula Peidl declared the stateform prior to communism (*People's Republic of Hungary*) which was „renamed" *Republic of Hungary* by the government of Stephen Friedrich on 8 August 1918.

[33] See *Magyarországi Rendeletek Tára,* Vol. 54 (1920), pp. 140–142. According to the decree, state authorities, agencies and institutions shall appear as „authorities, agencies and institutions of the Kingdom of Hungary", therefore, „they shall indicate the prevailing stateform of Hungary in their denomination" and „thus shall be supplemented with the attributes »royal« or »Hungarian royal«". Furthermore, it set out that „the Holy Crown as the symbol of Hungarian public authorities shall be applied in the coats of arms of the Hungarian state". The act of „smudging" remained subsequently present in a particular area: court judgements – which were made until 1918 *in the name of His Majesty*, and in 1918/19 *in the name of the Republic* – were delivered after 1920 not *in the name of the king* but *in the name of the Hungarian State*. It was replaced in 1930 with the phrase *in the name of the Hungarian Holy Crown*. (In 1945 – in line with Decree No. 539/1945. M. E. – state courts returned to the use of the phrase *in the name of the Hungarian State*, while people's courts – in accordance with Annex 1 of Law VII of 1945 – adjudicated *in the name of the Hungarian people*. Law I of 1946 required the use of the phrase *in the name of the Republic of Hungary* in both cases.)

[34] According to the antilegitimist argumentation, it did not have such a right since the Pragmatica Sanctio – at least, in their view – was repealed at the dissolution of the Austro-Hungarian Empire. (An examination of this issue in the context of state succession could provide an answer to the question whether it happened this way; however, for reasons of space such an analysis cannot be undertaken here. See Ferenc Szávai, *Az Osztrák-Magyar Monarchia felbomlásának következményei. Az államutódlás kérdései* [*The Consequences of the Dissolution of the Austro-Hungarian Empire. Issues of State Succession*] (Pécs: Pro Pannónia, Pannónia Könyvek, 2004); with a general scope: Mónika Ganczer, *Állampolgárság és államutódlás* [*Citizenship and State Succession*] (Budapest – Pécs: Dialóg Campus Kiadó, 2013.)

[35] According to Law XLVII of 1921, „the royal prerogatives of Charles I were terminated" (Section 1), the 1723 Pragmatica Sanctio was repealed „and thus the prerogative of electing a king reverted to the nation" (Section 2), and the „nation upholds the ancient stateform of kingdom and postpones the filling of the royal throne" (Section 3). According to legitimists, the Dethronement Law was invalid as well since, among others, it was proclaimed by Miklós Horthy acting as „regent of the king". (Moreover, Law I of 1920 – in contrast with the historical constitution – contained provisions on the promulgation of laws without a royal assent.)

2.2 The Legal Regulation of Powers and Competencies of the Regent

Another difficulty concerned the legal powers and competencies of the regent which – because of the *mixed* nature of the office – were impossible to regulate homogeneously, while the regulation – which otherwise appeared to be spontaneous – was exclusively dominated by the power considerations that aimed at building up an authoritarian system.

The regent – as the throne was left unfilled – did not substitute for the person of the king but „represented" the royal institution (acting as someone who is head of state in his own right). Employing the term used by contemporary constitutional lawyers, he was conferred with rights of the head of state implying at first „soft" and then „medium" power. His legal status did not, in turn, resemble the legal status of presidents: his assignment was not restricted to a definite period of time, and – at least after 1937 – he could not be held liable for any breach of the constitution or laws.[36]

Pursuant to Law I of 1920, those elements of the powers and competencies of the regent were characteristic that distinguished him from a king: he could not grant nobility (although he could grant „titles", awards and ribbons), he did not have the right to assent laws, only the right to promulgate laws (a right known from the public law of the Republic), he could not act on the supreme patronal right of the king to grant Catholic ecclesiastic offices (*ius supremae patronatus*), he could exercise the right to declare war only with the consent of the National Assembly,[37] and – on top of that – he was not entitled to the form of address „His Majesty". His person was, however, inviolable and was under the same criminal legal protection as the king. Later on, elements invoking the powers and competencies of a king came to the fore. After the restoration of the upper house (1926), he as head of state could appoint 40, later 87, people to it for a lifelong period of time influencing the composition of the parliament. He had veto right in the legislation, which was further extended in 1937. Under certain conditions, he could postpone or dissolve the parliament, and his relevant restrictions were terminated in 1933. After 1937 he acquired the „right to recommend a successor" while in 1942 the office of the vice regent was created who could act as acting regent. The vice regent – who was elected in the person of the regent's son, István (Stephen) Horthy, in 1942 – could, under the law – although with certain restrictions, e.g. the right to appoint a successor – exercise the powers and competencies of the regent in case the office of the regent is left unfilled.[38]

This might suggest that some preparations were made to fill the throne with a national king, where the names of Miklós Horthy, one of his sons or eventually his grandsons arose.[39] However, this is an unfounded conclusion. Horthy as a Calvinist did not have a real chance to ascend the throne of an „Apostolic Kingdom" which – according to the public perception of the period – could only be filled by Catholics. (Therefore, some argued that the office of the governor should be denominated as *duke*). Regarding the person of the new king, several people at the time „came into play" or directly „made themselves part of the play". One of them was Archduke Karl Albrecht of Austria-Teschen who – beyond his involvement in counterfeiting French francs (1925), his divorce and his *mésalliance* second marriage – did not have a real chance for the Hungarian throne as he could not have been a national ruler – the way the majority of electors wished. Another possibility was a, *horrible dictu,* Romanian-Hungarian personal union with the reign of one of the traditional dynasties, for instance with the members of the House of Savoy or an Italian prince, but these had no reality even if they left their marks in diplomatic correspondence or in any other way. A Prince of Teck was also mentioned who was, to a certain extent, of Hungarian blood, namely because he was a descendant of Rédey and had family ties to the British royal

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[36] On the scope of powers of the regent, with a general scope as well, see Gábor Gyula, *A kormányzói méltóság a magyar alkotmányjogban* [*The Dignity of the Regent in the Hungarian Constitutional Law*] (Budapest: Athenaeum, 1932), Egyed István, „A király helyettesítése és a nádori intézmény felújítása" [Substitution of the King and the Restoration of the Office of the Palatine], *Jogállam,* Vol. 20, Issue 1921/8, pp. 281–291 and Barna Mezey, „Staatspräsident und Reichsverweser. Republik oder Monarchie? Der Weg der Staatsform in Ungarn 1919–1920", in *Das Staatsoberhaupt in der Zwischenkriegszeit,* ed. Wilhelm Brauneder – István Szabó (Budapest: Pázmány Press, 2011), pp. 11–22.

[37] For an evaluation of the rights of the regent in respect of the military organization and within, see Roland Kelemen *A katonai igazságszolgáltatás Magyarországon 1867–1949* [*Military Jurisdiction in Hungary 1867–1949*] (Budapest: Gondolat, 2017), pp. 180–181.

[38] The extension of the scope of powers of the regent had an extensive literature at that time too. See, among others, József Bölöny, *A kormányzói jogkör kiterjesztésének kérdéséhez* [*On the Issue of the Extension of the Scope of Powers of the Regent*] (Budapest: Gergely, 1936) and *Az 1937: XIX. t.-c. a kormányzói jogkör kiterjesztéséről és a kormányzóválasztásról* [*Law XIX of 1937 on the Extension of the Scope of Powers of the Regent and his Election*] (Budapest: Gergely, 1937); László Buza, „A kormányzói jogkör kiterjesztése" [The Extension of the Scope of Powers of the Regent], *Jogállam,* Vol. 36, Issue 1937/3–4, pp. 109–115; András Téglássy, *Utóhang a kormányzói jogkör kiterjesztésének kérdéséhez* [*Epilogue to the Issue of the Extension of the Scope of Powers of the Regent*] (Szerencs: Farkas E., 1937); István Csekey, „A kormányzói jogkör reformja" [The Reform of the Scope of Powers of the Regent], in *Acta Litterarum c Scientiarum Reg. Universitaiis Hung. Francisco-Iosephinae* [Szeged]. Sectio Jur.-Pol. Tom. X. Fasc. 5, pp. 105–161; Béla Zsedényi, „A kormányzói jogkör kiterjesztése" [The Extension of the Scope of Powers of the Regent], *Magyar Jogi Szemle.* Vol. 18, Issue 1937/3, pp. 81–101; Lajos Tihanyi, „A kormányzói jogkör kiterjesztése és a királykérdés" [The Extension of the Scope of Powers of the Regent and the Issue of the King], *Magyar Jogi Szemle,* Vol. 18, Issue 1937/2, pp. 3–77; László Ottlik, „A kormányzói intézmény reformja" [The Reform of Regency], *Magyar Szemle,* Issue 1937/3, pp. 215–230. For an evaluation of the vice regent, see István Egyed, „A kormányzóhelyettes" [The Vice Regent], *Magyar Szemle,* Issue 1942/6. (178), pp. 281–283. From the more recent literature see István Szabó, „A kormányzó jogállása 1920–1944" [The Legal Status of the Regent 1920–1944], in *Publicationes Universitatis Miskolciensis Sectio Juridica et Politica* (Miskolc, 1996), pp. 117–172.

[39] Today it is impossible to decide whether Horthy really had dynastic plans. Nevertheless, it is highly likely that it was not his „idea to found a dynasty", he only did not object it. For an evaluation of the issues pertaining to the possibilities to fill the throne, see Zoltán Speidl, *Végállomás: Madeira. Királykérdés Magyarországon (1919–1921)* [*Final Destination: Madeira. The Issue of the King in Hungary (1919–1921)*] (Budapest: Kairosz Kiadó, 2012). See further *Serédi Jusztinián, hercegprímás, feljegyzései 1941–1944* [*Notes of Prince-Archbishop Jusztinián Serédi, 1941–1944*], ed. Sándor Orbán and István Vida (Budapest: Zrínyi Kiadó, 1990), in particular pp. 29, 91 and 115.

family as well; however, it is likely that these ties were backed by the *spin doctors* of the time instead of serious politicians. In the 1930s the possibility of a royal election was, nevertheless, on the agenda in some political groups, especially in the extreme right,[40] the authoritative political forces of the country, however, was not serious about it.

2.3 Political Problems

Thirdly, the situation between 1920 and 1944 brought about political difficulties. Partly, they related to the already complex political spectrum of the era which was further complicated by the conflict between legitimists and free electors. Those who would otherwise agree on most of the issues joined different political groups.

More importantly, the unsettled nature of the stateform did not enable the constitutional legal consolidation of the system, and – given the ideological emphasis on the interrelation of authority and order, the Doctrine of the Holy Crown, as well as the significance of the monarchical principle – even led to difficulties of *delegitimisation*. For what kind of a kingdom is one that – while the thousands-year-old legitimisation potential of the monarchy is being attempted to be utilized – literally chases away a king! It is possible to argue that it is not simply a „monarchy without a king" but uprightly an „anti-monarchical" kingdom. And what is possible to argue is surely argued somewhere by someone.[41]

There were, and still are, two characteristic views on the *nature* of stateform between 1920 and 1944.

According to one view, the Hungarian state *„remained" monarchy* in the given period. This view was formulated by the laws and suggested by state agencies and institutions. Most of the period's public lawyers characterized Hungary as a kingdom, and it is still considered to be the majority view. In order to reveal the legal truth within this view, there was a need for the legal fiction contained in the so-called nullity law. Moreover, the historical-sociological treatment of this view necessitated the acceptance that this fictional assumption is true: „let us act as if nothing happened between 15 October 1918 and January 1920!" A slightly modified version of this view would have been that the stateform *„became" monarchy again* in 1920 – and at the legislative level in 1921 –, provided that the dethronement law is undoubtedly committed to the monarchy. This latter view – in my opinion – could have been reasonable and sustainable for some time; however, I think it says a lot that – at least to my knowledge – this view was not held by anyone at that time.

To decide whether the stateform of Hungary „remained" or „became" monarchy in 1920/21 depends on one's approach to the issue of *legal continuity*. The public law literature of the period intensively discussed this issue, though with a distinction between the formal and material legal continuity – which, in my view, rests on false criteria. According to the former – held by Kálmán Molnár, among others –, the public law relations of the country can only be modified „by the relevant factors set out in the constitution", *as provided for under the constitution*. According to the latter – majority but fragile – view (which was emphasized by István Egyed and Móricz Tomcsányi), the changes need to correspond to the *spirit* of the historical constitution while formalities are unimportant.[42] Since the argument of legal continuity favoured Charles I in 1920/21, the latter argumentators – explicitly or implicitly – accused the former ones of being pro-Habsburgs. This was clearly an exaggeration since the former argued that on the grounds of formal legal continuity one can reach any royal house, or even the republic, though only with the observation of formal requirements. Revolutions, as is known, do not show much respect for the formalities of law. The debate was – at that time – centred upon the validity of the Eckartsau Declaration. According to legitimists, it could not be considered the abolition of the monarchy, consent to that or even a valid abdication since these would have required – beyond the formal requisites (such as counter-signature) – the consent of the Hungarian Parliament. (It should be noted that the date of the interruption of legal continuity – in light of the still pending nature of the issue of discontinuity-continuity in 1918/19 – has gained renewed constitutional significance through the declaration of the Hungarian Fundamental Law; cf. the loss and „restoration" of state sovereignty on 19 March 1944 and 2 May 1990, respectively.)[43]

Whether the Hungarian state became or remained monarchy in 1920/21, it is a fact that (following the dethronement) there was no king in sight. Moreover, there was no real chance that

[40] About one of these attempts see Róbert Kerepeszki, „'Éljen I. Miklós, Magyarország Királya!' Egy politikai gyűlés háttere és körülményei" [„Long Live Miklós I, the King of Hungary!" Background and circumstances of a political meeting], in *Emlékkönyv L. Nagy Zsuzsa 80. születésnapjára* [Festschrift for Zsuzsa L. Nagy, for her 80th Birthday], eds. Zoltán Kovács and Levente. (Püski. Debrecen: s.n., 2010.) pp. 135–152.

[41] Cf. Krisztián Orbán, „Száz év szorongás" [Hundred Years of Anxiety], in *Hegymenet* [*Uphill*], ed. András Jakab and László Urbán (Budapest: Osiris, 2017), p. 78.

[42] See Schweitzer, *op. cit.* (2014) and Wiener, *op. cit.* (2017). See further István Szabó, „A királyi trón betöltése körüli viták a két világháború közötti Magyarországon" [Debates around Filling the Royal Throne in Interwar Hungary], *Iustum Aequum Salutare, Vol.* 2, Issue 2006/1–2, pp. 171–189.

[43] See on these questions Zoltán Szente, „A historizáló alkotmányozás problémái – a történeti alkotmány és a Szentkorona az új Alaptörvényben" [The Problems of Historicizing Constructionism – The Historical Constitution and the Holy Crown in the New Hungarian Fundamental Law], *Közjogi Szemle,* Issue 2011/3, pp. 1–13; and Endre Orbán, „Az alaptörvény paradoxonjai – átmenetből? átmenetbe!" [Paradoxes in the Hungarian Fundamental Law – From Transition? To Transition!], *Közjogi Szemle, Issue* 2013/2, pp. 51–58. To my knowledge, the date 19 March 1944 was first formulated by Joseph Mindszenty in his letter to the United States Deputy Secretary of State on 10 January 1958: „On the grounds of legal continuity, we have to return to this date [*viz 19*. March 1944]. Only 1944 can be regarded a »normal« year." As cited in Margit Balogh, „Mindszenty József prímás-érsek és az államforma kérdése 1945–1946-ban" [Archbishop Joseph Mindszenty and the Issue of Stateform in 1945–1946], *Magyar Egyháztörténeti Vázlatok, Issue* 2010/3–4, p. 119.

the throne – in case it still existed[44] – „would be filled without serious political conflicts, by wide social consensus".[45] Therefore, this view needed to be differentiated. This differentiation involved the distinction between *de jure* and *de facto* stateforms as well as the distinction between stateforms on a „legal" and „political basis", the usage of the terms „quasi-monarchy" and „quasi-republic", and the odd view that the legal status of the governor can be deduced from that of the „unthroned king".[46] The theoretical tampering of the issue also occurred often; for instance when the question of stateform was answered by the denomination of the form of government, or not answered at all.[47]

According to the latter view, Hungary was, in fact, a *republic* in the period between 1920 and 1944. This is, and was, undoubtedly a radical position. No Hungarian author has ever taken it. However, foreign authors did not show much politeness, if I could call this way the acceptance of the existing situation. The well-known Austrian public and administrative lawyer, Adolf Merkl unequivocally stated in his analysis of the *legal status of the head of state*, in 1925 that „on the grounds of the legal regulation of the legal status of the head of state, Hungary of today must be classified as a republic". Later, he formulated this view in general terms as follows: „Today [*viz* in 1925] Hungary – irrespective of her monarchic past and perhaps monarchic future – is a clear cut and genuine republic."[48] Merkl – who, as a pupil of Hans Kelsen, differentiated between the sociological and legal concepts of the state – obviously based his argument on the sociological understanding of state as laws since 1921 suggested differently.

This view is supported by contemporary authors as well. Péter Kende – an analyst who can be regarded, in part, as a foreigner since he lived in exile for a long time – argued in 2003 that the „realist approach" „considers Horthy to be president with no temporal limitations". Accordingly, „the facts that Hungary in this period had no royal courts, Hungarian royal railways and [royal] mail cannot be considered to provide conclusive proof against the substantial circumstance that the position of the king was occupied by an elected head of state from an ordinary background."[49]

Some attempted to find a solution that mediates between and brides these two views. The use of the above-mentioned distinctions *quasi* this / *quasi* that and *de jure* this / *de facto* that also imply this ambition. Béla Zsedényi, the later ill-fated professor of law from Miskolc, found a more ingenious solution to the problem arguing – by way of a kind of auxiliary theory – that the revolutions created a legal vacuum, *vacuum iuris*. This *vacuum iuris* – in my view (although Zsedényi would perhaps not agree with me) – can be regarded as a *legal gap* in public law and lasts until the strongest powers of the new order, practically in an illegitimate way, establish a new law that would constitute the basis of the new legal system.[50] This argument – recalling the theories of Georg Jellinek and Bódog Somló – emphasizes that there are situations where the drafting of the constitution as well as the constitutional legislation create *new legality*. However, Zsedényi did not express the view – which I myself am tending towards – that this could mean the legality of a *new state* – re-established in the wake of wartime and revolutionary collapse. In order for it to mean the legality of a new state, this new state authority needs to be *legitimate* as well – in line with its historical tendency, thus in the long term – since in this regard only legitimity can establish legality.

3. Concluding Suggestion

In my view, the category of *monarchy without a king* as a denomination of stateform can be used – even in an official context – until we decide whether the state authority of the period

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[44] There was naturally a throne room at the Buda Castle (as a matter of fact, two throne rooms: one for the king and one for the queen) even though photographs from the 1920 s suggest that the chair looked more like a comfortable armchair of a ballroom than a canopy throne.

[45] Levente Püski, *A Horthy-korszak 1920–1941* [*The Horthy Era 1920-1941*] (Budapest: Kossuth Kiadó, 2013), p. 261.

[46] See Ferenc Faluhelyi, *Magyarország közjoga* [*Hungarian Public Law*] (Pécs: Karl Könyvesbolt, 1926), Vol. 2, p. 6. Regarding this issue, Gábor Schweitzer argued as follows: among university public lawyers, „it was only Ferenc Faluhelyi who – even though in a very moderate way – expressed his support for the quasi-republic stateform of Hungary" claiming that the stateform of Hungary „*today* [in 1926] *actually resembles* the stateform of republics". On the other hand, István Egyed „did not consider it fortunate to emphasize that the stateform of our country resembles the stateform of republic. In his view, the legal status of the regent can be deducted from that of the [yet] »unthroned king«", Schweitzer, *op. cit.* (2014), p. 13. See further Gábor Schweitzer: „A „magyar királyi köztársaságtól" a magyar köztársaságig" [From the „Royal Republic of Hungary" to the Republic of Hungary], *Acta Humana. Emberi jogi közlemények.* Vol. 5, Issue 2017/1, pp. 27–38.

[47] According to Béla Zsedényi, „our stateform is still a constitutional, parliamentary monarchy"; c.f. Béla Zsedényi, *A magyar alkotmányjog fejlődése 1918-től 1938-ig* [*The Developement of Hungarian Constitutional Law from 1918 to 1938*] (Miskolc: Ludvig, 1939), p. 3. In his booklet *A kormányformák értelme és tartalma* [*The Meaning and Content of Stateforms*] (Budapest, Pfeifer, 1928), Rezső Ruzsnák, on the other hand, does not mention whether Hungary has (any) stateform – even though he analyzes the Hungarian constitution as well.

[48] Adolf Merkl, „A mai Magyarország államformájának kérdéséhez" [On the Issue of the Stateform of Today's Hungary], *Jogtudományi Közlöny,* Vol. 60, Issue 1925/1 (33–35.), p. 34. Furthermore, Merkl argued that the issue of stateform is connected with the issue of state succession as well: „Thus, with the change in stateform state identity has also ceased to exist legally on Hungarian soil three times since 1918. Monarchy was followed by three different republics: democratic republic, Bolshevist republic and the current aristocratic republic with royalist features"; cf. *ibid*.

[49] Péter Kende, „A respublika a magyar történeti tudatban" [Respublica in the Hungarian Historical Consciousness], in *Még egyszer a párizsi toronyból* [*Once Again from the Paris Tower*] (Budapest: Új Mandátum Könyvkiadó, 2003), p. 217.

[50] Béla Zsedényi, *A vacuum iuris* [*Vacuum Iuris*] (Miskolc: Magyar Jövő, Miskolci Jogászélet Könyvtára, 1928), p. 34 and *A magyar alkotmányjog fejlődése 1918-tól 1938-ig* [*The Developement of Hungarian Constitutional Law between 1918 and 1938*] (Miskolc: Miskolci Jogászélet Könyvtára, 1939). See also József Ruszoly, *Három borsodi örökhagyó* [*Three Testators from Borsod*] (Miskolc: Felsőmagyarországi Kiadó, 1992), pp. 117–171 and István Stipta, „Zsedényi Béla alkotmányjogi nézetei" [The Views of Béla Zsedényi on Constitutional Law], in *Tanulmányok Zsedényi Béla születésének 100. évfordulója tiszteletére* [*Studies in Honour of the Anniversary of Béla Zsedényi's 100th Birthday*], ed. Tamás Csíki (Miskolc: Hermann Ottó Múzeum, 1995), pp. 17–23.

in question was legitimate or not. There is no wide consensus in this question for the time being[51]. This cathegory needs to be understood as „monarchy with a governor in the position of the king" instead of „monarchy with a governor (regent) as head". Monarchy without a king interpreted this way is indeed a unique phenomenon; something that had come to the mind of no other people before. In the sense described above, this special stateform has only developed and become accepted in Hungary (1920–1944) and Spain (1947–1975). In this regard, I share the view of Gyula Gábor (1868–1936), today partly forgotten lawyer, military judge and legal historian. Gábor argued that „the anomalous public legal situation regarding the issue of head of state that characterizes Hungary today [*viz* in 1932] does not have a precedent in the history of either our own country or anywhere else in the world."[52] By employing the term „monarchy without a king" as stateform we naturally recognize the *fact* that Hungarians were unable – and perhaps unwilling – to elect a king for two and a half decades. As a matter of fact, this is the unclear ambivalence – or to put it differently: the struggling between principles as firm as granite and wallowing pragmatism[53] – that I explained elsewhere.[54]

[51] For a comprehensive evaluation of the Horthy era from the recent academic literature see Dávid Turbucz, *Horthy Miklós* (Budapest: Napvilág Kiadó, 2011); Levente Püski, „Demokrácia és diktatúra között. A Horthy-rendszer jellegéről" [Between Democracy and Dictatorship. On the Nature of the Horthy Era], in *Mítoszok, legendák, tévhitek a XX. szazadi magyar történelemről* [*Myths, Legends and Misconceptions about Hungary's 20th Century History*], ed. Ignác Romsics (Budapest: Osiris Kiadó, 2002), pp. 206–233; Krisztián Ungváry, *A Horthy-rendszer mérlege. Diszkrimináció, szociálpolitika és antiszemitizmus Magyarországon* [*The Balance Sheet of the Horthy-System. Discrimination, Social Policy and Antisemitism in Hungary*] (Pécs: Jelenkor, 2012); Ferenc Zeényi Csukás, *Horthy* (Budapest: HK Hermanos Kiadó, 2014); István Nemeskürty, *Búcsúpillantás*. *A Magyar Királyság és kormányzója 1920–1944* [*Farewell Glance. The Kingdom of Hungary and its Regent 1920–1944*] (Budapest: Szent István Társulat, 2014); Catherine Horel, *Horthy* (Budapest, 2017) and Ignác Romsics, *A Horthy-korszak* [*The Horthy Era*] (Budapest: Helikon Kiadó, 2017).

[52] Gyula Gábor, *op. cit.* (1932), p. 185.

[53] In one of the „stories of his grandfather", László András Magyar illustrates in a concrete context very well what I mean by „wallowing pragmatism", see László András Magyar, „Nagyapám történeteiből. Hogyan lett Horthy Miklós Magyarország kormányzója?" [From the Stories of My Grandfather. How did Miklós Horthy become Regent of Hungary?], *Holmi,* Vol. 24, Issue 2012/1, pp. 72–73.

[54] See Peter Takács, *A rózsa neve: Magyar Köztársaság. Az államok nevéről és a magyar állam átnevezéséről.* [*The Name of the Rose: Hungarian Republic. On Names of States and on Renaming Hangarian State* (in 2011)] (Budapest: Gondolat Kiadó, 2015) pp. 121–122.

The Development of Complaint and Public Interest Disclosure Regulation in Hungary*

*István Ambrus***

Abstract

In this study, I aimed to provide a legal historical overview of the right to petition and the right to public interest disclosure in Hungary. My goals were to cover a large period of time and to offer sufficient detail. After reviewing the curiosities of the distant past, I demonstrated that, during the period of dualism and at the beginning of the socialist era, complaints were understood to be a form of legal remedy within existing legal procedures; subsidiary complaints falling outside of other procedure were introduced by the old Complaints Law. Though this legislation would not be appropriately harmonised with constitutional rights after the democratic transition, among its merits we may list its comprehensive nature vis-ŕ-vis all previous efforts, the suitable separation of complaints and public interest disclosures, and the generalisation of the right to their submission. The effective Complaints Law's 2013 creation provided a viable and compromise-driven solution, although, the new EU directive may raise the necessity of rethinking the rules once again.

Keywords: *complaint; Complaints Law; European Law; history of law; Hungary; petition; proposal; public interest disclosure; whistleblowing.*

Introduction

In Hungary, the general framework for the legal regulation of complaints and public interest disclosures has been defined, since 1 January 2014, by Act CLXV of 2013 on Complaints and Public Interest Disclosures (hereinafter referred to as the "effective Complaints Law"). The institutions covered by this legislation, which show overlaps with activities increasingly often described even in Hungarian academic literature as *"whistleblowing"* [1], however, are not without precedent in Hungarian law. Therefore, in this study, I will offer an academic literature-based review of the history of the development of complaints and public interest disclosures (and, in certain periods, public interest *proposals* – or, with the oft-used, collective terminology: *the right to petition*).

The fact that the European Union passed a resolution on 14 February 2017 on the role of whistleblowers in the protection of the EU's financial interests [2] – a step which marked the beginning of the comprehensive and EU-level regulation of whistleblowing – gives an in-depth analysis a special degree of currency. Then, on 23 April 2018, as the starting point for so-called ordinary legislative procedure, the European Commission submitted a directive proposal on the protection of persons disclosing a violation of EU law,[3] which the European Parliament, after a number of amendments, unanimously passed on 20 November 2018.[4] On 25 January 2019, the European Council also put forth its position on the matter.[5] The acceptance of this EU directive is therefore imminent, and thus a complete overview of the regulatory history will presumably be useful for domestic legal harmonisation, though a detailed portrait of that issue is beyond the scope this work, given its focus on legal history.

1. The Definitions, Legal Frameworks, and Classifications of Complaints and Public Interest Disclosures

Before sketching the historical arc of the regulation in question, it is necessary to provide a definition of these institutions and to identify their place in the Hungarian legal system.

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1 In 2014, a cross-continental group of researchers released the *International Handbook on Whistleblowing Research.* It defines a whistleblower as "an organizational or institutional 'insider' who reveals wrongdoing within or by that organization or institution, to someone else, with the intention or effect that action should then be taken to address it". See LEWIS, D., BROWN, A. J., MOBERLY, R., Whistleblowing, its Importance, and the State of Research. In: BROWN, A. J., LEWIS, D., MOBERLY, R., VANDEKERCKHOVE, W. (ed.), *International Handbook on Whistleblowing Research*. Cheltenham, 2014, p. 33.

2 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0022+0+DOC+XML+V0//HU (2019. 02. 17.)

3 https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:52018PC0218 & from=EN (2019. 02. 17.)

4 http://www.europarl.europa.eu/news/en/press-room/20181120IPR19504/eu-wide-protection-and-support-for-whistle-blowers (2019. 02. 17.)

5 https://www.consilium.europa.eu/en/press/press-releases/2019/01/25/better-protection-of-whistleblowers-council-adopts-its-position/?utm_source=dsms-auto & utm_medium=email & utm_campaign=Better+protection+of+whistleblowers%3a+Council+adopts+its+position (2019. 02. 17.)

Based on section 1(2) of the effective Complaints Law a *complaint* is "is a request for putting an end to a violation of individual rights or interests the fulfilment of which does not fall under the scope of any other proceedings, in particular judicial or administrative proceedings." Simultaneously, s. 1(3) of the same Act notes that a public interest disclosure "calls attention to a circumstance the remedying or discontinuation of which is in the interest of the community or the whole society." Here, it may be pointed out that previous regulation (to be discussed in detail below) mentioned the public interest *proposal* as a distinct category in addition to complaints and public interest disclosures. According to s. 4(2) of Act I of 1977 on Public Interest Disclosures, Proposals, and Complaints (hereinafter referred to as "old Complaints Law"), a public interest proposal is an "initiative directed at the achievement of a socially beneficial goal." While this latter category is not maintained by the effective Complaints Law, it must be emphasised that the legal definitions of both complaint and public interest disclosure are followed by a clause stating that these *can include a proposal*. As a result, the right to propose did not vanish from the effective rules; the position is now that the legislation views public interest proposals not as a standalone right but as a segment of complaints and public interest disclosures. In my view, this current legislative solution is supportable, because, as I will suggest later, in practice it was barely possible to differentiate between the individual legal institutions, and some overlap was almost always evident.

Concerning the *constitutional framework* for the aforementioned institutions, it is necessary to point to Article XXV of the Fundamental Law of Hungary, in force since 1 January 2012, according to which "[e]veryone shall have the right to submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power." As the ministerial Justification of the effective Complaints Law indicates, the above passage from the Fundamental Law necessitated the harmonisation of the fragmented rules relating to complaints and public interest disclosures most recently.

In the dimension of the *European Union*, in addition to the directive highlighted in the introduction, Article 44 of the EU Charter of Fundamental Rights may be cited. This records that "[a]ny citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament." A similarly relevant decree can be found in Treaty on the Functioning of the European Union (TFEU) in its Article 20(2)(d): European Union citizens have the right, among others, "to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language." Article 227 TFEU, based on the contents of Article 24, determines the rules for enforcing the right to petition.

While the Council of Europe is not an EU body, due to an overlap between its membership and the EU's, it should not be neglected that its Committee of Ministers adopted a recommendation and a resolution to protect whistleblowers in 2010. This was followed by Recommendation CM/Rec(2014)7 on 30 April 2014, which encouraged member states to create domestic regimes while keeping in mind human rights considerations. Pinpointing this recommendation is pertinent, because the above-mentioned European Commission directive proposal explicitly identifies the recommendation's basic principles as the starting point in the creation of the EU directive in paragraph (23).

The institutions regulated in the effective Complaints Law and the related provisions are difficult to *categorise within the legal system*. What can be said is that the regulation can be described as *public law*, though there is a counterexample for this statement as well: Disclosures made through the employer whistleblowing systems of Part 4 (ss. 13-16) of the effective Complaints Law can often be handled without the involvement of authorities, a circumstance which spotlights a *private law* feature of the institution.

Based on the most important characteristics of the regulation, the most accurate classification may relate to *administrative law*, though even this is not completely precise. This is because, as we have seen in relation to the effective definition of a complaint, the legislation only allows complaints if these are not to be dealt with by other – especially judicial or administrative – proceedings. The rules of the effective Complaints Law, therefore, are explicitly *subsidiary*. That being the case, if, for example, there is a legal remedy on the basis of Chapter IX of Act CL of 2016 on General Public Administration Procedures, then the application of a complaint or a public interest disclosure is legally precluded.

The legislation also points to strong *employment law* aspects, too. This is not only evident in s. 13 of the effective Complaints Law, which explicitly references Act I of 2012 on the Labour Code (hereinafter referred to as "Labour Code"), but also in the fact that instances within the framework of *whistleblowing* almost exclusively arose during the course of employment litigation. The situation is further complicated by the notion that compensation for employment law damages must be governed by sections 6:518-534 of Act V of 2013 on the Civil Code (hereinafter referred to as "Civil Code"). In relation to torts, primarily in questions of proof, the use of the Civil Code as background law ensures that the provisions of *civil law* are of considerable relevance.

The area of *criminal law* is also not of secondary importance, as an offence arising in relation to a complaint or public interest disclosure often corresponds to some special part offence listed in Act C of 2012 on the Criminal Code (hereinafter referred to as "Criminal Code"). Consequently, as I previously demonstrated this in detail in a study with a co-author[6], whether we speak of state or nonstate institutions, the act which the disclosure concerns may often relate to a financial, economic, or similarly-categorised offence, or to corruption. Lawmakers were alert to this aspect, and consequently s. 16(3) of the effective Complaints Law holds that if a conduct reported through an

[6] See AMBRUS, I., FARKAS, Á., Compliance Activites Against Fraud and Corruption in Hungary. In: *Annals of the Timisoara West University Law Series*, vol. 11, Nr 2, 2018, p. 35-47.

employer disclosure system "warrants the initiation of criminal proceedings, arrangements shall be taken to ensure that the case is reported to the police." In turn, the reporting obligation raises problems mostly in relation to proving the offences, but these will not be discussed in this study.

Finally, it cannot be ruled out that a disclosed matter may have *a range of consequences from a number of different areas of law*, e.g. both from the field of employment and criminal law.

Based on the fairly complex picture painted above, it may be stated that *the right to complaints and public interest disclosures rests on constitutional foundations. It is primarily a public law affair, and, more specifically, it relates to a cluster of rights in administrative law, which is weaved through with elements of both employment and criminal law. Therefore, this topic straddles a number of legal fields, and therefore it can and must be examined in an interdisciplinary manner.*

2. The Right to Petition in Hungarian Legal History

In the introduction of the historical review, we must underscore that the *comprehensive regulation of the right to complaints and public interest disclosures did not occur until the 1977 passing of the old Complaints Law.* Then again, as one academic candidly noted, "it is well-known that we are a litigious, complaining, verbose, people."[7] Therefore, it may not come as much of a surprise that already halfway through the middle ages – well before the great codifications of the 19th and 20th centuries – we may come across in legal texts a fragmentary set of rules and, later, a concrete official complaints procedure.

The relevant article of the Internet Encyclopaedia of Law [Internetes Jogtudományi Enciklopédia in Hungarian – *trans.*], we may find that "[t]he first instance of the right to petition can be found in the Golden Bull (1222), according to which the king must appear each year on St. Stephen's Day in Székesfehérvár to receive petitions and hear complainers. If the king is unable to attend, the palatine shall attend in his stead."[8] If we review the legal texts left to us by Hungarian rulers, we may conclude that they have already known a form of complaint, albeit today's observer would surely consider it rudimentary.

As such, in the 18th chapter of the first book of *Saint Ladislaus's* decrees, one can find a special provision, according to which "[i]f any clergyman, a foreigner in this country, shall subject himself to a bishop or a count, and his lord shall treat him well and in accordance with the feudal agreement, he shall not leave him under any circumstance, *unless the king has heard his complaint about the injustice suffered*" [emphasis mine]. A considerably more comprehensive regulation appeared in the first book of the decrees of *Coloman the Learned*. Regarding the king's administration of the law in the counties, chapter 37 notes: "[w]hichever count's county should the king visit, he should be accompanied there by two county judges, and *they shall humanely remedy the irregularities between the people; and they, should the people's complaint be directed against them, shall be adjudged by the palatine*" [emphasis mine]. This decree delegated the king's judicial prerogative to county judges. Insofar as complaints were raised regarding their activities, their conduct was to be weighed by the palatine. Though this solution precluded conflicts of interest, but, naturally, it could not realise the Enlightenment ideal of separation of powers. Nonetheless, an interesting rule appears in chapter 64 of this codex, which contained a provision on a time bar for the investigation of complaints: "The complaint of one, who does not want his case to be dealt with over the course of three synods, does not need to be heard." It seems that just as today we have "litigation mania," so could medieval man come across "complaint mania."

The decrees of *Charles I* are from the era postdating the previously-mentioned Golden Bull. In s. 43, he ordered that "all servants, officers, and coiners, shall be judged by our chamber count,[9] and no one else. And, if for his part, he refuses to deliver justice, justice shall be administered to complainers by our aforementioned master of the treasury." This rule is already increasingly susceptible to conclusions as to the institutionalisation and formalisation of complaints.

S. 8 of the first decree of Sigismund of Luxembourg states that "[w]e, due to our undertaken kingly duties, must surely adjudicate for any oppressed and complainer, as this is the way to justice. The presented wishes we shall hear and understand completely; on the subject of […] the aforementioned complainers' […] complaints, presented to us and our chief clergy and barons, with our faithful chief clergy and barons we shall discourse in a mature manner and, together with them, settle." Then, s. 3 of the second decree refers to the following: "after we have summoned delegates from each county and district of our country, as well as the delegates from the cities, market towns, and free villages under our jurisdiction, and we have listened to and understood fully the requests, wishes, and presentations of each and every one of them." Based on s. 1 of the third decree, if "one commits an evil act, and in this respect someone wishes to submit a complaint to our Majesty or another ordinary justice, and if such a complainer can show the truth of his complaint with obvious proof, then the perpetrators of the aforementioned abuse shall immediately address the abuse." Here, too, the increasingly high-level treatment of complaints is visible. Article 9 of Sigismund's fifth decree deals with the remedying of damages caused by soldiers. It held that if soldiers "are lodging [in a given municipality] and should dare to confiscate any foodstuff without payment of a predetermined price, then the injured people […] shall go […] in front of […] the lord-lieutenant of the county, and they shall […] testify to the measure of harm suffered by them." Article 4 of his sixth decree discussed the requirements and modes of similar complaints.

In article 29 of his decrees, in which he reintroduced the royal assemblies of Sigismund, *Albert II of Germany*, defined the characteristics of *actus majoris potentiae*, or "significant abuse," and he allowed the issuance of complaint letters in relation to them. Actus majoris potentiae materialised when "someone should, at anytime and anywhere, conquer or force a collateral for estates and lands, or rob things and goods, cut down trees,

[7] KONDOROSI, F., A panaszjog szabályozásának társadalmi összefüggései. In: *Acta Humana. Emberi jogi közlemények,* vol. 5, Nr. 14, 1994. p. 10.
[8] BÓDI, S., Petíciós jog. In: JAKAB, A., FEKETE, B. (ed), *Internetes Jogtudományi Enciklopédia* http://ijoten.hu/szocikk/peticios-jog (2019. 02. 17.)
[9] "Kamaraispán" in Hungarian. A high-level official responsible for the fiscal organisation of the realm. [*trans.*]

kill, injure, or beat men, shall storm or destroy houses or estates, or commit similar" acts. As a result, "the injured, the aggrieved, and those who suffered an injustice, after receiving our royal letters of complaint and instruction, shall go and turn to that county's counts and magistrates,[10] where these things have occurred." (ss. 2-3).

The legal evolution that followed increasingly viewed complaints as submissions in regulated proceedings (i.e. litigation). These cannot exactly be viewed as the progenitor of the effective Complaints Law's ideas of complaint and public interest disclosure, because these, as we have seen, are subsidiary and exist outside of official proceedings. Accordingly, István Werbőczy's 1514 codex, the *Tripartitum*, uses complaint as a synonym for action, the filing of charges, and appeal.

The classic, grand, and primarily procedural codices likewise placed and interpreted the institution of complaint within a given procedure, giving it various degrees of autonomy. Thus, s. 113 of *Act XXXIII of 1896 on Criminal Procedure* (hereinafter referred to as "1896 Act") made it a general right for the plaintiff, the defendant, and the claimant to raise a verbal or written complaint with the prosecutorial council against any act or omission by the judge. *Act LX of 1907 on the Expansion of the Jurisdiction of the Hungarian Royal Administrative Court* created a unique complaint in its s. 5: The so-called *guarantee complaint*, which allowed judicial protection for rights enjoyed by municipalities. After, a completely fixed appeal process was created by *Act XXX of 1929 on the Organisation of Public Administration*, which created a complaint option for a range of procedures. Though *Act III of 1952 on Civil Procedure* (hereinafter referred to as "1952 Act") did not cover complaints specifically, its s. 18(4) included the right to make a complaint. Finally, we may highlight that current laws also contain forms of disclosure that bear only a minimal resemblance to the type of complaint (and public interest disclosure) under discussion in this study. One example of this relates to Article 24(2)(c) of the Fundamental Law: The regulated constitutional complaint recorded in *s. 26 of Act CL of 2011 on the Constitutional Court*.[11]

3. Act I of 1954 on Disclosures by Members of the Public

The Rákosi-regime, which was consolidated with the communist takeover between 1947 and 1949 (after but a few years of post-World War II coalitionalism), can justifiably be called one of the darkest periods of Hungarian history. But, since one of the first more comprehensive regulations relating to our topic comes from this era, naturally, we must include *Act I of 1954 on Disclosures by Members of the Public* (hereinafter referred to as "1954 Act"). The law – in part due to the effects of the 1956 revolution and uprising – proved to be short-lived, as it was only in force between 24 January 1954 and 30 September 1957.[12]

Not unusually for the period, the law begins with a long-winded preamble: "The interest of the Hungarian people's state demands its laws be followed, the economical management of the people's wealth, a bureaucracy-free and conscientious administration, the constant perfection of state and economic institutions, and the improved satisfaction of residents' needs. To promote this, it is necessary for the population's criticism from below to unfold as best as possible. Every citizen may raise a complaint against grievances he has suffered. […] State and economic institutions are obligated to provide all preconditions for citizens to exercise this right; they must investigate disclosures from the public quickly and thoroughly, and, should they conclude that an error or grievance has taken place, they must eliminate these immediately. […] The goal of this Act is to protect the aforementioned interests of the Hungarian people's state and the rights of the citizenry through the force of law." The ministerial Justification, published simultaneously with the meticulous preamble, only added an emphasis on "socialist legality."

According to s. 1(1) of the 1954 Act, "[l]eaders of organs of public administration, local organs of state power, and economic organs (hereinafter "organs") are personally responsible for ensuring that the handling of disclosures from the public is included amongst the general tasks of the institutions they lead and control, and that this is monitored regularly." As such – similarly to the current situation to be detailed below – both state and non-state bodies were objects of the law, though it goes without saying that there was virtually no private sector in the planned economy that followed nationalisation.

S. 2 recorded the duties of the organs' managers. Their primary task was to monitor disclosures, to identify the person undertaking the investigation and the timeframe, as well as the maintenance of records. These records had to "provide transparency for disclosures arriving at any department of the institution and allow for disclosures relating to several cases with identical or similar subject matters to be considered beyond the individual cases and yield conclusions to the irregularities' common cause" [1954 Act, s. 2(c)].

S. 3 mandated ministries and councils of various levels to establish relatively independent *offices for the handling of disclosures from the public*. The detailed operational rules for these could be settled in lower-level legislation by the institutions' leaders.

The 1954 Act prescribed the ex officio review of institutions' powers, and it ordered a three-day transfer requirement if a given case belonged to the jurisdiction or competence of another body. It excluded a person with an interest in a particular case from handling it (s. 4). Interestingly, according to the main rule, the substantive appraisal of a case had to take place within 30 days, as was the case later and, indeed, today, which could be extended once in exceptional instances [s. 5(4)].

S. 6(1) had an air of idealism about it even at its inception. It stated that "[i]f a discloser initiates a measure to improve work activities, simplify bureaucracy, or promote efficient management, the institution meant to act must ensure its practical implementation immediately."

[10] The Latin equivalent of "szolgabíró," the Hungarian word used, is "iudex nobelium." [*trans.*]
[11] See CHRONOWSKI, N., Alkotmányjogi panasz és alkotmányvédelem. In: *Fundamentum*, vol. 18, Nr. 1-2, 2014, p. 91-96.
[12] See HAJDU, M., PALITZ, M., A lakosság bejelentéseinek intézése állami szerveinknél. In: *Állam és Igazgatás*, vol. 5, Nr. 3-4, 1955. p. 205-214.

In principle, s. 8(1) provided for anonymous disclosures: "At the request of the discloser or in the interest of the matter, the investigating institution shall not reveal the identity of the discloser." The wording also suggests, however, that, at the end of the day, anonymity was at the discretion of the acting institution (office). S. 8(2) recorded that "[i]f disadvantageous measures are taken against the discloser because he called the attention of the relevant institutions to an error, an irregularity, or a shortcoming, either in the course of employment or otherwise, the disciplinary body of the acting organ must restore the legal situation immediately. Furthermore, it must ensure that the disadvantaged party receives appropriate moral vindication and damages for any financial loss resulting from the matter. The leader of the disciplinary body must hold the person responsible for such a measure to both disciplinary and financial account in accordance with effective legislation." The legal consequences for measures disadvantaging the discloser are, therefore, *a)* restitution to the original position (restitutio), *b)* moral vindication, *c)* damages, and *d)* disciplinary and financial accountability.

Finally, the provision in s. 9 unequivocally deserves mention. This *creates criminal liability* for the individual who carried out the disadvantageous act against the discloser. According to the offence's definition, "A person who undertakes any of the disadvantaging measures in s. 8(2) commits an offence, and he shall be punished with up to six months' imprisonment or a maximum fine of five thousand forints." The legislation therefore thought it a crime to persecute a person disclosing in the public interest. By today's standards (and using the terminology quoted previously), it imposed a fairly harsh sanction.

4. Act IV of 1957 on the General Rules of Administrative Procedure

After the legislative antecedents of *Act I of 1950 on Local Councils* and *Act X of 1954 on Councils*, the legislature acted on a need to create a comprehensive rulebook on administrative procedure. The result was *Act IV of 1957 on the General Rules of Administrative Procedure*, which became effective on 1 October 1957. Even a skeletal review of this law would be beyond the scope of this writing, and, as such, I have only examined its provisions on complaints and public interest disclosures. It was at this junction that lawmakers, breaking with the ineffective and unrefined solution of the 1954 Act, decided to integrate the rules of the right to complaints and public interest disclosures into the provisions of the 1957 Act, instead of creating a standalone legislation.

The 1957 Act was the first to create terminology akin to today's, when its ss. 64-66 introduced rules on complaints, and its ss. 67-68 spoke of public interest disclosures. Nonetheless, the right to complaint contained in s. 64(1) of the 1957 Act *did not include one of the most important features of the effective Complaints Law's definition. Namely, complaints could be submitted as part of administrative procedure* – and, in fact, this became the main rule. *The characteristic of subsidiarity, which required that a complaint be realised outside judicial or other proceedings, was absent*. The aforementioned law held that "one may submit a complaint against an administrative decision brought and any measure taken in the instance, if his right or legal interest is violated by the decision or measure. The relevant person may also submit a complaint if the public administration institution omits to adhere to its obligation for decision-making or acting." This solution was much more in line with the previously-quoted laws – e.g. the 1896 or 1952 Acts – in that they offered a complaints mechanism within the framework of administrative procedure and not outside of it.

Simultaneously, it must be emphasised that, in practice, *certain authorities extended the right to petition to proceedings beyond strictly-interpreted administrative procedure*. As Imre Bartus wrote at the time, "[t]he laws determining the rules of regulatory offences proceedings do not include a separate provision on whether the possibility of a complaint exists in decisions made in misdemeanour proceeding." Nonetheless, "despite incomplete legal regulation, it is not impossible for affected persons to complain against decisions in regulatory offences proceedings, nor for these complaints to be adjudicated by state administrative bodies."[13] Therefore, the right to petition could be realised in the law of regulatory offences.

S. 67(1) of the 1957 Act states "it is each citizen's right and duty to uncover those errors and shortcomings, which he detects in any area of state and economic life (public interest disclosure) and to offer a proposal for the rectification of the said state and economic activity, to correct errors and shortcoming." This passage is a considerably better-positioned candidate for an antecedent for the current definition of a public interest disclosure.

Furthermore, s. 68 of the 1957 Act provided for the legal protection of disclosers. Interestingly, at the same time, after the 1954 Act expired, criminal law protections vanished from Hungarian criminal law for a lengthier period. Consequently, the original text of *Act V of 1961 on the Criminal Code of the People's Republic of Hungary* did not mandate the punishment of those taking measures against public interest disclosers either. This position was altered by the only variation of the aforementioned criminal code, *Decree-Law 28 of 1971 on the Amendment of the Criminal Code*. This, for the period between 1 January 1972 and 30 June 1979, created the offence of *misleading organs of national economy*, which criminalised all who took disadvantaging steps against a worker who provided accurate information to a competent body of national economy. The sanction was imprisonment for up to a year or correctional work.

As the 1957 Act did not address procedural rules in relation to public interest disclosures (and proposals), the issuance of an implementing statute was necessary. This was achieved by *Government Decree 1013/1959 (IV. 8.) on the Handling of Workers' Complaints*, the first point of which required ministries, institutions with a national remit, and councils to specifically address any submissions received. Additionally, it decreed that "[the] disclosure or complaint must be addressed within 30 days, while a public interest disclosure must be prioritised. A complaint submitted to the executive committee of a county council

[13] BARTUS, I., Panasz és közérdekű bejelentés a szabálysértési eljárásban. In: *Állam és Igazgatás*, vol. 13, Nr. 9, 1965. p. 822.

(s. 65 of Act IV of 1957) must be decided upon by the executive committee on its first meeting following the 30-day period after the complaint's submission. Complaints falling outside the state body's competency must be forwarded to the relevant institution immediately." The wording of the government decree already anticipates the most important criticism of the 1957 Act: *the meanings of complaint, public interest disclosure, and proposal have become relative and therefore indistinguishable from one another.* In practice, however, the relevant provisions of the 1957 Act were employed for a quarter century, and the number of disclosures continued to show a constant increase in the 1970 s. For example, in 1975, a total of 138,385 public interest proposals were submitted, out of which 113,769 were handled or found actionable by the authorities. A considerably smaller number of public interest disclosures (and not administrative complaints) were tendered in the same year: 6,758.[14] During this lengthy period, naturally, a respectable amount of practical administrative experience was obtained. I do not wish to discuss this in the present work in detail, but I will briefly highlight the results of a contemporaneous study, which I find notable.

The work, which appeared in 1968 on the pages of Home Affairs Review [Belügyi Szemle in Hungarian – *trans.*], reports that a survey was carried out by the Budapest Police Headquarters among those who made a public interest disclosure in relation to public property. Though the group was explicitly active in exercising its civil rights – as its members have made a public interest disclosure previously – still only 15% of them were willing to provide substantive answers to the police's questions. The study's author concluded that the passivity of the surveyed public interest disclosers could be explained with three causes: *fear of retribution, comfort,* and *indifference.*[15] I believe these assertions are important to highlight in this writing, because the situation in Hungary, despite the democratic transition and the passage of over half a century, has not changed significantly. In the future, therefore, maybe we should revise not simply the regulatory environment upon the prospective acceptance of the EU directive mentioned in the introduction, but also the human perspective that accompanies public interest disclosures.

5. The Old Complaints Law

Though adopted during the socialist era, the old Complaints Law expressed a comprehensive and reasonably progressive-minded legislative idea on the regulation of complaints and public interest disclosures. It was effective from 30 March 1977 until Hungary's EU accession of 1 May 2004, though it was amended a number of times. As suggested by György Antalffy during the National Assembly's debate on the bill, the Legal, Administrative, and Judicial Committee reviewed the legislative proposal in detail on 11 March 1977, and a number of amendments were raised. He noted that social consultation was also carried out prior to parliamentary introduction, and this included the contributions of some 2500 individuals.

According to the preamble of the old Complaints Law, "[c]itizens, through their public interest disclosures and proposals, promote the development of social relations, the strengthening of socialist legality, the protection of public property, and the purity of public life. The legal handling of complaints aids the assertion of legitimate individual interests. The submission of public interest disclosures, proposals, and complaints is part of socialist democratism." What is perhaps more remarkable in this wording than the mention of socialist legality and democratism (which were clearly obligatory), is the reference to *the purity of public life*. The purity of public life is, even today, the direct protected legal interest of *crimes of corruption* (Chapter XXVII of the Criminal Code). From this, it may be deduced directly that lawmakers of the era wished to utilise complaints, along with public interest disclosures and proposals against active corruption, abuse of authority, and other offences of corruption. This is still the case today, both in the effective Complaints Law and in international regulations.

It is necessary to showcase part of the ministerial Justification for the law as well: "In the People's Republic of Hungary, it is the constitutional right of each citizen to participate in the administration of public affairs; simultaneously, it is his duty to fulfil a public appointment conscientiously. Citizens may make public interest proposals to state and social organs, which must be adjudicated substantively. To protect state and social order, as well as to promote social interests and the legitimate individual interests of the citizen, citizens may also submit a public interest disclosure or complaint in addition to public interest proposals." Thus, the justification held complaints and public interest disclosures (as well as proposals) to be constitutional rights, and it wished to make these available for all citizens.

S. 1 of the old Complaints Law provided the legislation's goal on a legal definitional basis as well: It was "the uniform regulation of the submission, investigation, and substantive handling of citizens' public interest disclosures, proposals, and complaints." In contrast with the solution of the 1957 Act, the old Complaints Law stood on the ground of independent and unified legal regulation.

In s. 2, the law was stated to have effect over the following institutions:

"a) state organs, companies, institutes, institutions,
b) cooperatives and their advocacy bodies (hereinafter: cooperatives),
c) associations,
d) advocacy and regulatory organs for craftsmen and sole traders,
e) regulatory organs for persons conducting other authorised activities."

It is therefore clear that the public and private sectors were present once again, and the latter, contrary to the experience of the 1950 s, was likely gaining increased practical relevance.

Concerning the definitions of the old Complaints Law, s. 4(1) stated that a "public interest disclosure calls attention to a circumstance, error, or shortcoming, the abolition of which is in the interest of the community or the whole of society. It may also call attention to a conduct or fact that is contrary to

[14] See FONYÓ, GY., Közérdekű bejelentések, javaslatok és panaszok intézése a tanácsoknál I. rész. In: *Állam és Igazgatás* vol. 25, Nr. 7, 1977, p. 578.
[15] PINTÉR, M., Közérdekű bejelentések a társadalmi tulajdon védelmében. In: *Belügyi Szemle* vol. 6, Nr. 12, 1968, p. 46-47.

law, socialist morality, or the principles of socialist economic management, or it violates or endangers the interest of society." Paragraph (2), as already suggested above, defined a *public interest proposal* as "an initiative for the achievement of a socially useful goal." Then, paragraph (3), similarly to the effective Complaints Law's solution described above, allowed for a public interest disclosure to contain a public interest proposal as well.

S. 5(4) stands out from amongst the rules for acting institutions: "The investigation and handling of a public interest disclosure or proposal can be taken over from the acting institution by the regulatory body, the People's Control Commission, or the Prosecutor's Office according to the laws applicable to them." Thus, this rule created the possibility of prosecutorial tasks for the protection of the public interest in relation to public interest disclosures and proposals. This a familiar motif today, too.

S. 6 provided an eight-day deadline for the appropriate transfer of a complaint submitted to an incorrect institution. S. 8 worded a conflict of interest rule in a modern manner: "A person, of whom the impartial handling of the matter cannot be expected, cannot participate in the substantive handling of a public interest disclosure or proposal."

The old Complaints Law's s. 9(1) was an important provision of guarantee, as it made the handling of public interest disclosures (and proposals) the *duty* of the competent organ. The only exceptions to this were repeated and anonymous complaints [s. 9(2) of the old Complaints Law]. The administrative timeframe was, as in the past and today, set at thirty days [s. 10(2)].

S. 12 regulated the *decisions* to be made in connection with public interest disclosures proven to be well-founded. Its elements were:

a) The restoration of the situation corresponding to the public interest or the undertaking of measures otherwise required;
b) the termination of the causes of the uncovered errors;
c) the remedying of harm caused; and
d) the initiation of prosecution in appropriate instances.

In the old Complaints Law, legislators devised a solution for the *protection of disclosers* similar to but more intricate than that contained in Act I of 1954. "If the discloser (proposer) is disadvantaged in his employment, cooperative or other membership, or in any other way due to his calling attention to conduct (or omission) contrary to the public interest," decreed s. 14(1), "the institution causing the disadvantage must restore the legal position immediately. The disadvantaged person must receive vindication and compensation for any damages arising from the matter. If necessary, this will be the duty of the supervisory (regulatory) organ."

Paragraph (2) recorded the supervisory (regulatory) organ's duty to report its findings to the appropriate authority in relation to a disciplinary infraction or criminal offence, and it also raised the possibility of action for damages. A sense of lack is caused by the fact, however, that the reporting obligation only arose in disciplinary and criminal instances, but the law was silent when it came to *misdemeanours. In abstracto*, criminal offences represent a greater degree of danger to society than misdemeanours. As such, we cannot utilise the relevant principles of logical interpretation (*argumentum a maiore ad minus* and *a minore ad maius*) to suggest that misdemeanours were included in the reporting obligation associated with criminal offences. The wording of the law may be regarded as incomplete in this respect.

Academic literature at the time pointed out that the discloser's protection could not be regarded as a prerogative. The discloser "can only be entitled to legal protection if there is a *causal* relationship between his position of disadvantage and disclosure, and thus his rights were violated *due to* his disclosure. Legal protection is not due if he was rightly held accountable for a miscellaneous disciplinary infraction, partaking in malpractice himself, or enjoying the benefit thereof for a period and disclosing it only later. This type of conduct, however, is to be assessed during the accountability phase. Nonetheless, if during the proceedings it is determined that the otherwise liable discloser *received a sanction disproportionate to the disciplinary infraction committed* because of his disclosure, due the spirit of the law, he should be afforded *partial* protection."[16]

Regarding the *criminal law protection* of disclosers, I have already highlighted above that the old Criminal Code recognised the offence of persecuting a public interest discloser in s. 257 from 1 July 1979, when it entered into force. The offence was realised by one who took disadvantageous measures against a discloser due to his public interest disclosure. The original sanctions were up to a years' imprisonment, correctional work, or a fine. These rules survived the old Complaints Law, and although the punishment changed, the offence's definition did not. Most recently, the law sought to penalise the perpetrator with a custodial sentence of up to two years. The offence's decriminalisation – or, rather, its reduction to a misdemeanour – was effected by s. 39 of *Act CCXXIII of 2012 on the Amendment of the Temporary Provisions Related to Act C of 2012 on the Criminal Code and Other Acts*. Since then, as mentioned in the introduction, this conduct is simply considered a misdemeanour.

Remarkably, the main rule of s. 15(1) allowed for anonymous disclosures. Still, here too, the acting authority retained the discretionary power to reveal the identity of the discloser. This could occur not only with the consent of the discloser, but also if it served the interests of the investigation [s. 15(2) of the old Complaints Law]. Furthermore, the discloser could be named if it transpired that he acted in bad faith [s. 15(3)].

The law contained a separate definition of complaints, according to which these were "requests aimed at the cessation of the violation of the individual's rights or interests, and the handling of which does not belong within the purview of another, legally regulated procedure – especially one conducted by a judicial, administrative, or employment (cooperative) decision-making committee." [s. 17(1) of the old Complaints Law]. Here, we are now clearly dealing with the subsidiary complaint known from the effective Complaints Law, which may only be submitted if it cannot be resolved in another procedure.

[16] ACZÉL, GY., A közérdekű bejelentésekről, javaslatokról és panaszokról szóló 1977. évi I. törvényről. In: *Magyar Jog*, vol. 24, Nr. 5, 1977, p. 385.

Of the law's legacy we may say that academic literature until the democratic transition, understandably, produced mostly positive assessments,[17] though subtle criticisms were delivered by some authors in the second half of the 1980s, mostly in relation to the legislation's effectiveness.[18] In the academic literature of the post-democratic transition period, primarily after the near-complete substantive modification of the Constitution in 1989, the dominant view was that the old Complaints Law was tailored to the needs of the socialist state, and it did not fulfil the requirements of modern constitutionalism. Accordingly, its abolition was justified.

Already in 1994, Ferenc Kondorosi argued that "the institutional operation of public interest disclosures and proposals set out in the Act is made intrinsically obsolete by political pluralism." Complaints and public interest disclosures – nicknamed the "right to grumble" by the author – could be exchanged for basic principles such as the separation of powers and a catalogue of fundamental rights, like that of assembly, referendum, popular initiative, and freedom of speech. Furthermore, "compelling companies, cooperatives, associations, and sole traders to make such submissions was unconstitutional," as these organisations now had to comply with the rules of civil, economic, and competition law. Finally, the institution of the ombudsman introduced by Act LIX of 1993 was also thought to have made the distinct regulation of complaints and public interest disclosures redundant.[19]

A similar conclusion was reached by György Vass in 1997, who also made reference to the facts that the number of complaints and public interest disclosures submitted following the democratic transition dropped sharply, that the legal obligations in the private sphere were *de facto* ignored, and that public administration employees asked about this topic agreed that the law should be withdrawn. On this basis, he recommended a new law regulating the submission of complaints and public interest disclosures under the umbrella of the right to petition. This legislation, among other things, would re-regulate the circle of institutions that could be petitioned, establish the institution of the petition itself, determine the petitioned organs' duties, allow for local regulation, and offer appropriate legal protection for the discloser.[20]

At the conclusion of this point, we may state, after the brief assessment of the cited literature, that these academic efforts included a range of justifiable viewpoints in connection with constitutionality and practicality. At the same time, we may register as a shortcoming that they did not pay sufficient attention to the whistleblowing phenomenon, which already started to take shape decades ago, primarily in the English-speaking world. As a result, they did not have the chance to articulate the notion that disclosing illegal or unethical behaviour will grow increasingly important not just in the public, but also in the private sector, and that the creation of a legal framework for such disclosures was necessary. Hungarian legislators only addressed the latter point five years after the 2004 repeal of the old Complaints Law.

6. The Regime of Act CLXIII of 2009

The next stop was *Act CLXIII of 2009 on the Protection of Fair Procedure and Related Amendments*. This was not at all akin to the previous regulation, but it utilized certain solutions from the US. It an be emphasized, that the law's general Explanatory Memorandum referred to, on the one hand, the Hungarian Constitutional Court's position on fair trial [primarily to decisions 6/1988. (III. 11.) and 14/2004. (V. 7.)]. On the other, it mentioned *expressis verbis* the *whistleblowing phenomenon*, which it defined as "an employee of an organization, who sets aside his/her personal interests, acts to avert harm (prevention) threatening others (the community in a narrow or broad sense) by revealing an irregularity (misconduct) detected at his/her place of employment." The law prescribed a procedural fine ranging from 50,000 to 500,000 HUF for offenders (or, in the case of legal persons, from 100,000 to 5 million HUF) [Act CLXIII of 2009 § 11(1)]. For a person making an unfounded claim, the sanction may be between 50,000 and 300,000 HUF (a falsely disclosing organization can receive a charge stretching from 200,000 to 1 million HUF). Furthermore, echoing its American forerunner, § 16(1) of the 2009 Act states that "if the Authority imposed a fine due to a failure to fulfill the requirement of fair procedure, the Authority's president may award the discloser 10% of the fine." As it can be discerned from the quote above, § 4 of the law intended to establish a Public Procurement and Advocacy Authority (according to the preamble to increase efficiency in combating corruption), but this never materialized.

7. The new Hungarian rules

Primarily because of the legal guarantee it offers, it is necessary to highlight Article XXV of the Fundamental Law of Hungary, according to which "[e]veryone shall have the right to submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power."

The current legal environment was created by *Act CLXV of 2013 on Complaints and Public Interest Disclosures* ("the complaint law"), which came into force on 1 January 2014. This law can be described as one enabling disclosures in both the state and private sectors.

According to the definition in § 1(3), a disclosure "calls attention to a circumstance the remedying or discontinuation of which is in the interest of the community or the whole society. A public interest disclosure may also contain a proposal." The public interest disclosure must be evaluated within thirty days [complaint law, § 2(1)].

Moreover, the general Explanatory Memorandum – in addition to referring to the above-quoted passage from the Fundamental Law – also notes that "[a] characteristic of the new

[17] See for instance MÉSZÁROS, J., A közérdekű bejelentések, javaslatok és panaszok intézésének tapasztalatai. In: *Állam és Igazgatás*, vol. 34, Nr. 6, 1986, p. 533-539.
[18] KERÉNYI, GY., Miért sok a névtelen bejelentés? In: *Népi Ellenőrzés*, vol. 29, Nr. 2, 1987, p. 16-17.
[19] KONDOROSI (n 7) p. 12-16.
[20] VASS, GY., Panasz, törvény; panasztörvény, avagy úton a petíciós jog kiteljesedése felé. In: *Magyar Közigazgatás,* vol 7, Nr 1, 1997, p. 24-25.

regulation is that it supports anti-corruption measures in the private sector in addition to those in the public sector, and thus it allows organizations to formulate distinct procedures for handling disclosures and to enter into agency contracts with lawyers for the receipt of disclosures (discloser protection lawyer)." The goal of this legal institution is for "the principal (typically a business organization) to engage the discloser protection lawyer within a tripartite legal relationship to receive in its name disclosures relating to the principal either from its employees or external partners" (detailed Explanatory Memorandum).

A similarly novel solution is the creation of w*histleblowing systems* sketched out in § 13-16, in connection with which the law "records the most important guarantees for the operation of the system (finality, entry into a data protection register, the prohibition on processing of special personal data, the requirements for terminating data handling, notification of employees, and containment of misuse). That legal persons in a contractual relationship with the employer (subcontractors, suppliers) can also make reports in the whistleblowing system is an important requirement, as this aids the more comprehensive information of management" (detailed Explanatory Memorandum). What is more, § 14(6) decrees that "persons having a legitimate interest in making a whistleblower report or in remedying the conduct concerned" may also make reports.

Development of the Structural Independence of the Hungarian Judiciary from the Beginning until the End of the 19th Century

György Képes *

Abstract

Independence of the judiciary is one of the most important guarantees of rule of law, the guiding legal principle of the modern constitutional state: "Judicial independence and judicial supremacy work together in an attempt to guarantee that the rule of law will not be eroded by the political pressures in existence at any particular point in time".[1] *This independence has many elements, recognised during several centuries of state formation in the European (and North American) legal culture. This study focuses on the Hungarian evolution of one aspect: the independence of the courts in the sense of organisational independence,*[2] *manifested in the establishment of the judiciary as a separate branch of the government. In addition to this, the judicial independence in terms of the personal discretion of the judges in their decision making ("decisional independence"),*[3] *free of any external – and primarily: political – influences, has an enormous importance as well.*[4]

Keywords: *Hungarian constitutional history; separation of powers; judicial power; court system; judicial independence; organisational independence; structural independence; functional separation.*

1. Judicial power in Hungary until the 15th century

According to Montesquieu, "in despotic governments, the prince himself may be judge. But in monarchies this cannot be; the constitution by such means would be subverted, and the dependent intermediate powers annihilated; all set forms of judgment would cease; fear would take possession of the people's minds, and paleness spread itself over every countenance: the more confidence, honour, affection, and security in the subject, the more extended is the power of the monarch".[5]

In the first period of the history of the Hungarian state that lasted until the 13th century, the judicial power was concentrated in the hands of (and actually exercised by) the king himself.[6] An early functional separation of the judicial power is due to the need of substitution: "the ruler's many other responsibilities increasingly prevented him from being personally engaged in judicial acts".[7] The *Comes palatinus* (*nádor*, "Palatine") and the second ranked dignitary, the *Curialis comes* were authorised to hear the parties in the name and on behalf of the ruler, in his absence.[8] In this early period, these officials, as the other persons throughout the country exercising the local jurisdiction in the name of the king as well, were no more than "private employees" of the king. According to *Alajos Degré*'s excellent metaphor, their relationship with the king can be described as a modern-time relationship between a judge and her/his secretary.[9]

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1 BOIES, D., Judicial Independence and the Rule of Law. In: *Washington University Journal of Law & Policy*, vol. 22, Nr. 57, 2006, 57–70, p. 58.; see also: FLECK, Z., A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts. In: BADÓ, A. (Ed.), *Fair Trial and Judicial Independence. Hungarian Perspectives*. Cham–Heidelberg–New York–Dordrecht–London, 2014, 3–25, p. 4.

2 FÜRÉSZ, K., *Bírói függetlenség*. [Judicial Independence.] Budapest, 1989, p. 39.

3 McNOLLGAST [McCUBBINS, M. – NOLL, R. – WEINGAST, B.], Conditions for Judicial Independence. In: *Journal of Contemporary Legal Issues*, vol. 15, Nr. 1, 2006, 105–127, p. 106.; PLANK, T., The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia. In: *William & Mary Bill of Rights Journal*, vol. 5, Nr. 1, 1996, 1–74, p. 6.

4 For reasons of space, in this study we will only refer to this second interpretation. According to the author's plans, the history of the political independence of the judges in Hungary will be described in a later study.

5 MONTESQUIEU, *The Spirit of the Laws* [1748, translated by Thomas Nugent, 1752]. Kitchener, 2001, p. 96.

6 HAJNIK, I., *A király bírósági személyes jelenléte és ennek helytartója a vegyesházakbeli királyok korszakában*. [Personal Presence of the King in the Judiciary and the Lieutenant thereof in the Period of Kings from Mixed Dynasties.] Budapest, 1892, p. 3.; SZABÓ, B., Das System der Rechtspflege. [The Judicial System.] In: MÁTHÉ, G. (Ed.), *Die Entwicklung der Verfassung und des Rechts in Ungarn*. [Development of the Constitution and Law in Hungary.] Budapest, 2017, 271–320, p. 271.

7 SZABÓ, B., Development of Law in Hungary. The First Eight Centuries. In: GERGELY, A. – MÁTHÉ, G. (Eds.), *The Hungarian State, 1000–2000. Thousand Years in Europe.* Budapest, 2000, 138–167, p. 149.

8 RADY, M., *Customary Law in Hungary: Courts, Texts, and the Tripartitum*. Oxford, 2015, p. 52.; STIPTA, I., *A magyar bírósági rendszer története*. [History of the Hungarian Judicial System.] Debrecen, 1998, pp. 16–18. and 26.

9 DEGRÉ, A., Adatok a magyar bírói függetlenség múltjához. [Data to the History of the Judicial Independence in Hungary.] In: DEGRÉ, A., *Válogatott jogtörténeti tanulmányok.* [Selected Studies of Legal History.] MEZEY, B. (Ed.), Budapest, 2004 [Original date of publication: 1937], 87–94, pp. 88–89.

In the last century of the Árpád dynasty (13th century), the Palatine was granted with the power to make judgments in his own name, outside the royal court, therefore he left the court for providing justice at his own judicial assemblies.[10] Consequently, when someone was cited before the king, it the Palatine's substitute, the second ranked dignitary already called *Iudex curiae regiae* (Justice of the Realm) [11] had to hold the hearing.[12] According to *Károly Szladits*, the Justice of the Realm was "a dignitary of similar rank to the [English] Lord Chancellor".[13] The expression "Royal Presence" (*Praesentia regia*) meant the occasion when it was actually him to hear the case.[14] Until the end of the 14th century, according to the general rule, he was the ordinary judge of the legal procedures within the royal court.[15]

A further development of this period is the emergence of the privilege of the nobles to decide in their own cases in their county, and to pass judgments on their peasants. Consequently, from the 13th century the judicial function was vertically divided between the king's court (*Curia*) and the estates (at county and manorial levels). Landlords had the power to decide in all criminal cases and private disputes of their peasants (serfs) at the seigneurial courts called *úriszék* ("court of the landlord"). A scaffold erected at the frontier of a manor testified that the landlord had the power to impose a death sentence on his serfs. In the late middle ages, this power of the landlords (called *ius gladii*) was already widely recognised throughout the country.[16]

On the other hand, since the 1230's, the right of the noblemen to elect their own judges in order to decide in their legal disputes was also accepted by the king.[17] This change led to the formation of the second territorial level of jurisdiction: the courts of the county (*vármegye*), with a more and more sophisticated internal organisation from the late middle ages: the *sedes iudiciaria* (in abbreviated form: *sedria*).[18] The *sedria* was the forum of the peasants' cases as well, whereas the landlord had no right to impose death, or for financial reasons he was unable to maintain an own seigneurial court. The jurisdiction of the noble county never extended to the cases of high treason, and to other significant cases, such as those of the high nobility, either.[19] The increasing number of such special cases made necessary the establishment of a new, more professionally organised royal court in the *Curia*.[20]

In the middle of the 14th century, the first Angevin king of Hungary, Charles I (1308–1342), transferred the seat of courts of the Palatine and the place of the Royal Presence to his residence in Visegrád.[21] During the reign of his son, Louis I (1342–1382), the above mentioned new and more professional royal court was organised, called the "Special Royal Presence" (*Specialis praesentia regia*), in order to deal with the cases falling under the *specialis protectio* of the king.[22] This court would have been presided theoretically by the ruler himself, but in fact the procedures were controlled by the Chief Chancellor, who was not only responsible for incorporating the procedural documents in a duly written legal form, but also represented the king at the hearings.[23] After the Palatine and the Justice of the Realm, he became the third ordinary high judge of country.[24]

2. Establishment of the Royal Table, the first real central court of justice in Hungary

During the long reign of Sigismund of Luxembourg (1387–1437), the cases heard by the court of Special Royal Presence grew so much in number and in significance as well, that not even the Chief Chancellor was able to deal with all of them personally. From 1395 until his death in 1428, this royal court was led by a certain "Master James" as the *Specialis praesentiae Majestatis vicegerens*.[25] According to Pál Engel, he was probably not a nobleman but came from the burghers' estate, that is why his full name remained unknown.[26] After his death, for more than two decades on, there is no sign that the court of Special Royal Presence even functioned. It was restored in function only in 1453, as we will see, just for a very short period of time.[27]

In the late 14th and early 15th centuries, especially at the time of Sigismund, the cases of high treason were dealt with by the king again, together with the prelates and barons sit-

[10] SZABÓ, 2000, p. 149.
[11] In *Pál Engel*'s translation the "Judge Royal", see ENGEL, P., *The Realm of St. Stephen. A History of Medieval Hungary, 895–1526*. London–New York, 2001, p. 92.; in Martyn Rady's translation: "High Judge", see RADY, M., Judicial Organization and Decision Making in Old Hungary. In: *The Slavonic and East European Review*, vol. 90, Nr. 3, 2012, 450–481, p. 465. Actually, the Hungarian word *országbíró* means "Justice of the Realm".
[12] HAJNIK, 1892, p. 4.; STIPTA, 1998, p. 26.
[13] SZLADITS, K., A Comparison of Hungarian Customary Law with English Case Law. In: *Journal of Comparative Legislation and International Law*, vol. 19, Nr. 4, 1937, 165–178, pp. 165–166.
[14] ENGEL, 2001, p. 122.; SZABÓ, 2000, p. 150.; SZABÓ, 2017, p. 272.
[15] STIPTA, 1998, pp. 26–27.
[16] BÓNIS, G. – DEGRÉ, A. – VARGA, E., *A magyar bírósági szervezet és perjog története* [A History of the Hungarian Judiciary and Procedural Law.] Budapest, 1961, pp. 9. and 59.; SZABÓ, 2000, pp. 150–151.; SZABÓ, 2017, pp. 273–274.
[17] The first document evidencing this privilege is the famous "Charter of Kehida" of 1232, regarding a legal dispute on a noble possession. For the English translation of this document (with commentaries) see: RADY, M., *Kehida (1232)*. https://www.academia.edu/2928002/Kehida_1232_ (Access date: 07/02/2019)
[18] BÓNIS–DEGRÉ–VARGA, 1961, pp. 10–11.; SZABÓ. 2000, p. 151.; SZABÓ, 2017, p. 276.
[19] BÓNIS–DEGRÉ–VARGA, 1961, p. 46.
[20] SZABÓ, 2000, p. 150.
[21] ENGEL, 2001, p. 191.
[22] HAJNIK, 1892, pp. 6–7.; RADY, 2015, p. 52.; STIPTA, 1998, p. 28.
[23] ENGEL, 2001, p. 221.; HAJNIK, 1892, p. 7.; SZABÓ, 2017, p. 274.
[24] KITONICH, J., *Directio Methodica. Processus Iudiciarii Iuris Consuetudinarii Inclyti Regni Hungariae*. Editio IV. Tyrnavia, 1724, p. 120.
[25] HAJNIK, 1892, pp. 8–9.
[26] ENGEL, 2001, p. 221.
[27] BÓNIS–DEGRÉ–VARGA, 1961, 18.; RADY, 2015, 52.

ting in his council. This way of exceptional royal jurisdiction was called the "Personal Royal Presence" (*Personalis praesentia regia*).[28] In 1435, Sigismund ordered that the acts of "major cases of violence"[29] (*actus maioris potentiae*) – enforcing private justice against noblemen – should also be heard in the royal court. Consequently, this forum also became very occupied, and a substitute of the king had to be urgently found.[30] From 1453, the Privy Chancellor (a confidential advisor of the king) was engaged with this task.[31]

In 1464, after the long-awaited coronation of Matthias I Corvinus (1458–1490), the dignities of the Chief Chancellor and the Privy Chancellor were merged into each other, and consequently, the court of Special Royal Presence restored in 1453 ceased to exist after 11 years. From 1464 only the name of the Personal Royal Presence can be seen in authentic documents.[32] According to *István Stipta*, the merger of these two royal courts, and the fact that a dedicated official called the "Lieutenant of the Personal Presence of the King in the Judiciary" (*Personalis praesentiae regiae in judiciis locumtenens*, in abbreviated form: *Personalis*) became the chairman of this merged court, can be considered as "the first attempt in the Hungarian history for a separation between the royal public administration and the judiciary".[33]

As the court of the Special Royal Presence merged into the Personal Royal Presence, and the later became a permanent judicial forum where the king was not necessarily present any more, from the last years of reign of Matthias Corvinus a new name began to be used: the Royal Table (*Tabula regia iudiciaria*).[34] The organisation and function of the Royal Table was regulated in written laws, first in 1486 in the so called *Decretum maius* of Matthias, and then several times during the reign of Vladislaus II Jagiellon (1490–1516) as well,[35] when the Diet was very active and the king was co-operative. As the consequence of these reforms, the Royal Table became "the first royal court in Hungary to be in continuous session, with the minor chancellery as its judicial office".[36] Until 1526, the Royal Table can be considered as the most prestigious judicial forum in the *Curia*,[37] although its judgment could be appealed to the king and his council.[38]

3. Challenges in the judicial system after the defeat of Mohács in 1526

After the disastrous defeat against the Ottomans at Mohács in 1526, in that part of the country that came under the rule of the Habsburg kings, the organisation of a more modern public administration (in the terms of fiscal and military) was an important objective of the rulers. However, the modernisation of the Hungarian court system fell out of this scope.[39] As *Béla Szabó* remarks: "though the fundamental principles of the judicial organization as had been formulated and laid down by 1526 persisted, the central judicature was almost completely discontinued throughout the 17th century".[40]

One of the challenges the Hungarian judiciary had to face was that the (foreign) kings, who were at the same time rulers of several other countries in dynastic union under the Habsburg rule, completely withdrew from personal jurisdiction.[41] Nevertheless, they reserved the right of granting pardon, and they also retained the royal prerogative of passing judgment in the criminal cases of *lese-majesté* that was considered by the Habsburg rulers as an offence "directed at them personally, on account of which they might refer judgment to a court of their own choosing, even one that was located outside the kingdom".[42]

In 1528, King Ferdinand appointed Palatine *István Báthori* to the position of *locumtenens regius* (Royal Lieutenant)[43] of Hungary, and established a council called *Locumtenentia regia* in order to provide assistance for his activity.[44] After Báthori's death, a new Palatine was not nominated, however Ferdinand appointed new Royal Lieutenants.[45] In 1536 the Lieutenancy Council was set up again, with seven members. According to *Imre Hajnik*, the king's earlier personal jurisdiction in the *Curia* was, "to a certain extent", replaced with the judicial activity of the Royal Lieutenants.[46] Against the decisions of the Royal

[28] HAJNIK, 1892, pp. 11–12.; STIPTA, 1998, p. 29.; SZABÓ, 2000, p. 150.
[29] RADY, 2015, p. 57.
[30] BÉLI, G., *Magyar jogtörténet. A tradicionális jog*. [Hungarian Legal History. The Traditional Law.] Budapest, 2000, p. 229.; HAJNIK, 1892, pp. 12–13.
[31] HAJNIK, 1892, p. 15.; STIPTA, 1998, p. 29.
[32] HAJNIK, 1892, pp. 17–18.
[33] STIPTA, 1998, pp. 24–25.
[34] BÉLI, 2000, p. 230.; RADY, 2012, p. 464.; RADY, 2015, p. 58.; SZABÓ, 2000, p. 150.; SZABÓ, 2017, p. 275.
[35] HAJNIK, 1892, p. 21.; STIPTA, 1998, p. 31. See Acts LXVIII of 1486, XLII of 1492, VIII of 1495, II of 1498, and X of 1500.
[36] RÁCZ, L., A Historical Insight in the Theory and Organization of the Hungarian State. In: GERGELY, A. – MÁTHÉ, G. (Eds.), *The Hungarian State, 1000–2000. Thousand Years in Europe.* Budapest, 2000, 17–67, p. 36.
[37] BÓNIS–DEGRÉ–VARGA, 1961, 47. p.
[38] RADY, 2015, p. 59.
[39] BÓNIS–DEGRÉ–VARGA, 1961, p. 45.
[40] SZABÓ, 2000, p. 152.
[41] BÉLI, 2000, p. 231.; RÁCZ, 2000, p. 63.; SZABÓ, 2017, pp. 280–281.
[42] RADY, 2015, p. 144.
[43] For this translation (Royal Lieutenant) of the position of *Locumtenens regius* see KANN, R. – DAVID, Z., *The Peoples of the Eastern Habsburg Lands, 1526–1918*. A History of East Central Europe, Vol. VI. Seattle–London, 2007, p. 60., in *Martyn Rady*'s translation: "Royal Regent", see RADY, 2015, p. 60.
[44] PÁLFFY, G., The Origins and Development of the Border Defence System against the Ottoman Empire in Hungary (up to the Early Eighteenth Century). In: DÁVID, G. – FODOR, P. (Eds.), *Ottomans, Hungarians, and Habsburgs in Central Europe. The Military Confines in the Era of Ottoman Conquest*. Leiden–Boston–Köln, 2000, 3–70, p. 18.
[45] PÁLFFY, G., *The Kingdom of Hungary and the Habsburg Monarchy in the Sixteenth Century*. New York, 2009, pp. 173. and 247.
[46] HAJNIK, 1892, p. 25.

Table, appeals could be lodged to the Royal Lieutenant.[47] Very probably, from these developments emerged a new, supreme court within the *Curia*, presided by the Royal Lieutenant or, from 1608 on, when this dignitary was finally restored, by the Palatine.[48] This forum began to be called in the documentary sources as the "Table of Seven" (*Tabula septemviralis*).[49]

The second challenge in the Hungarian judiciary after 1526 was that, at times of permanent war of defence against the Ottoman expansion, the normal operation of the central judiciary was hardly manageable. According to the old customary law, the royal courts of the *Curia* could hear and decide cases at *octava*s[50] that meant a period of several weeks beginning on the eighth day from a prominent religious holiday.[51] A "major" *octava* lasted for fourty days, while a "brief" *octava* usually for twenty days, with limited competence of jurisdiction.[52] In the second half of the 17th century, major *octava*s were not held at all,[53] only brief *octava*s could be organised, and also these only in some regions of the kingdom.[54]

The everyday work of the high judges was assisted by educated persons called "Protonotaries". At the end of the 15th century, four Protonotaries were working at the *Curia*, who were not necessarily magnates, but were sometimes talented members of the lesser nobility.[55] When, after the defeat of Mohács, the ordinary operation of the *Curia* courts was interrupted, these Protonotaries began wandering throughout the country, offering justice for plaintiffs. As their compensation was paid from the fines imposed on the defendants, they were interested in the victory of the plaintiffs. Therefore, their jurisdiction was far from being fair, it was rather expensive and corrupt.[56]

According to contemporary sources, the problem with the protonotarial jurisdiction was not only its corrupt nature, but their almost continuous absence from the *Curia* as well. Indeed, their lack of presence had a considerable contribution to the functional disorder thereof, and, thirdly, their judicial authority and spheres of competence were undefined as well. In 1715, at the very end of this challenging period of more than two hundred years, the Diet finally adopted a law determining the cases in which the Protonotaries were entitled to pass verdicts. The fact that they were explicitly prohibited to proceed in criminal cases speaks for itself.

4. Reorganisation plans after the reconquest of Buda

In the 17th century, two compromises were reached between the Hungarian elite and the Habsburgs. The first one in 1608, at the occasion of the coronation of Matthias II (1608–1619), has great importance in the history of Hungarian parliamentarism, because the bicameral system of the Hungarian legislative body effective until 1944 was set up then. *Géza Pálffy* compares the significance of this compromise to the *Ausgleich* of 1867 establishing the Austro-Hungarian Monarchy.[57] The second compromise was reached in 1687, a year after the reconquest of Buda from the Ottomans, but this was way more unilaterally advantageous to Leopold I (1657–1705): the Hungarian estates accepted the agnatic hereditary succession of the Habsburg dynasty to the throne of Hungary, and renounced their right of resistance guaranteed in Andrew II's Golden Bull of 1222.[58]

Thereinafter, Leopold I engaged his right-hand man in Hungary, Cardinal *Leopold Kollonich* to prepare a plan for reorganisation of the government of Hungary.[59] Kollonich had been a *kaisertreu* politician even at the hardest times when the Hungarian constitution was suspended by Leopold I because of an aristocratic conspiracy, and he was also a member of the infamous regency council called *Gubernium* (1673–1681). He was committed to the modernisation of the government in line with the absolutistic principles, "paying little heed to pre-existing rights and institutions".[60] The analysis of the malfunctions of the Hungarian legal system constituted an important part of the report of his committee, titled *Einrichtungswerk*[61] (in *Martyn Rady*'s illustrative translation: "Work of Instauration").[62]

The first chapter titled *Iustitiarium* contained a thorough reorganisation plan of the Hungarian public administration and judiciary.[63] Kollonich emphasised the deep structural problems

[47] BÉLI, 2000, p. 231.; SZABÓ, 2000, p. 153.
[48] BÓNIS–DEGRÉ–VARGA, 1961, pp. 47. and 70.; STIPTA, 1998, p. 61.
[49] BÓNIS, G., *A bírósági szervezet megújítása III. Károly korában. Systematica Commissio*. [The Renewal of the Judicial Organization in the Age of Charles III. (The Systematica Commissio)] Budapest, 1935, p. 13.; RADY, 2015, p. 200.; SZABÓ, 2017, 281; SZLADITS, 1937, p. 168. According to *Gábor Béli*'s opinion, when this court was finally named *septemviralis*, it already had considerably more than seven members. See: BÉLI, 2000, p. 231.
[50] BÓNIS–DEGRÉ–VARGA, 1961, p. 71.
[51] BÉLI, 2000, p. 230.; BÓNIS, 1935, p. 18.; ENGEL, 2001, p. 20.; SZABÓ, 2017, 281.
[52] BÉLI, 2000, p. 230.; STIPTA, 1998, p. 68.; VARGA, J., Berendezési tervek Magyarországon a török kiűzésének időszakában. Az "Einrichtungswerk". [Organisational Plans in Hungary at the Time of the Liberation from the Ottoman Occupation. The "Einrichtungswerk".] In: *Századok*, vol. 125, Nr. 5–6, 1991, 449–488, p. 462.
[53] BÓNIS, 1935, p. 18.; SZABÓ, 2017, 282.; VARGA J., 1991, p. 462.
[54] BÉLI, 2000, p. 229.; SZABÓ, 2017, p. 282.; VARGA, E., *A királyi curia, 1780–1850*. [The Royal Curia, 1780–1850.] Budapest, 1974, p. 15.
[55] SZABÓ, 2000, p. 150.
[56] BÓNIS, 1935, pp. 34–35.; BÓNIS–DEGRÉ–VARGA, 1961, p. 48.; RADY, 2015, p. 150.; SZABÓ, 2017, p. 282.
[57] PÁLFFY, 2009, p. 229.
[58] BARTA, J., Habsburg Rule in Hungary in the Eighteenth Century. In: *Hungarian Studies Review*, vol. 28, Nr. 1–2, 2001, 133–161, p. 148.
[59] VARGA, J., Kísérlet az "Einrichtungswerk des Königreichs Hungarn" című reformtervezet megvalósítására, 1689–1723. [An Attempt to the Implementation of the Reform Plan "Einrichtungswerk des Königreichs Hungarn", 1689–1723.] In: *Levéltári Szemle*, vol. 42, Nr. 2, 1992, 3–17, p. 3.
[60] RADY, 2015, p. 178.
[61] KALMÁR, J. – VARGA, J. (Eds.), *Einrichtungswerk des Königreichs Hungarn* (1688-1690). Forschungen zur Geschichte und Kultur des östlichen Mitteleuropa, Band 39. Quellen – Band 1. Stuttgart, 2010.
[62] RADY, 2015, p. 178.
[63] VARGA J., 1991, p. 461.; VARGA J., 1992, pp. 3–4.

of the Hungarian judiciary calling the corrupt activity of the Protonotaries the "plague of justice" (*pestes Iustitiae*),[64] and he urged to terminate all their judicial activities performed outside the *Curia*, and to order them back to the ordinary courts as simple "subordinate judges".[65] He also proposed to break with the customary practice of the *octava*s, and to set up permanent courts of justice. According to his plan, three territorial high courts should be established, one in Buda or in Pozsony (Bratislava) presided by the Palatine, a second one in Kassa (Košice), led by the Justice of the Realm, and a third one in Zagreb under the presidency of the Ban of Croatia.[66]

Finally, the *Einrichtungswerk* was not implemented, because Leopold I was aware that it was too radical even in the eyes of the Hungarian political elite loyal to the Habsburgs. One of their prominents, Palatine *Pál Esterházy*, had already given an opinion at Kollonich's request in April 1688, in a document titled *Informatio*,[67] in which he recommended the revival of the position of Royal Lieutenant, and the setting up of a new *Gubernium* under the leadership of the Palatine (*ex officio* serving as Royal Lieutenant), which could also serve as the supreme court of appeal of the realm, assembling twice in each calendar year.[68] Based on Esterházy's *Informatio*, in September 1688 a committee of barons and high priests prepared a counter-proposal, later referred to as "the Hungarian *Einrichtungswerk*" in the historiography.[69] Regarding the judiciary, they had a different view than Esterházy, expressing their satisfaction with the original system of judiciary in Hungary, recommending only that the Diet should decide on how to reinforce its normal operation, without the necessity of setting up any new court in the *Curia*.[70]

As we mentioned above, Leopold I was well aware of the counter-opinion of the Hungarian magnates regarding Kollonich's plan, and the latter was not implemented. In the repeated crisis period beginning at the end of the 17th century and lasting until as long as the Peace of Szatmár 1711, there was no chance to go on with any work of reorganisation. After the fall of *Ferenc Rákóczi II*'s war of independence (1703–1711), under the reign of the talented and conciliatory new king, Charles III, the Diet could finally continue with the work of consolidation.[71] At the coronation Diet of 1712, a new draft plan was presented, the second part thereof dealing with the judiciary was called *Systema Iuridicum*.[72] This draft went back to Kollonich's recommendations, and proposed the protonotarial jurisdiction to be replaced with standing regional courts.[73] Therefore, it was finally successfully sabotaged in the Lower Chamber, where the counter-interested Protonotaries themselves performed an important secretarial activity.[74] Due to their very effective resistance, the *Systema Iuridicum* of 1712 was quickly discarded.[75]

The issue of the reorganisation of the government, including the judiciary, was put back on the agenda of the Diet only in 1715. The estates decided then to set up new committees in order to continue the preparatory works, including a legal committee "to improve the laws and the courts of justice of the kingdom" (see Article 3 of Act XXIV of 1715).[76] In another law, another committee was established, in order to review the "military, political and economic system" (Act LIX of 1715). Thus the work concerning the judicial and legal system was separated from the other, wider reorganisation project, and two separate plans were prepared for the next Diet convened by the king in 1722, a new *Systema Iuridicum* and a *Systema Politico-Oeconomico-Militare*.[77]

5. The great judicial reform of 1723

The new *Systema Iuridicum* was presented to the Diet in 1722. According to the new proposal that was the result of a five-year work between 1717–1722,[78] the judicial activity of the Protonotaries would be replaced with four regional courts, while the Protonotaries themselves would be called back to the *Curia* to exercise their profession. Interestingly, this time the Diet accepted all these proposals. This change in the approach of the

64 RADY, 2015, p. 179.; VARGA J., 1991, p. 462.
65 VARGA J., 1991, p. 462.
66 RADY, 2015, p. 179.; VARGA J., 1991, p. 463.
67 Full title of Palatine Esterházy's opinion is *Informatio ratione commissionis quoad politica, iuridica, militaria, cameralia et spiritualia*, see VARGA J., 1991, p. 455.
68 KÓNYI, M., *Az 1715–22. évi Rendszeres Bizottság javaslatai (Systema politico oeconomico-militare)*. [Proposals of the Systematic Commission of 1715–22 (Systema politico oeconomico-militare).] In: *A Bécsi Magyar Történeti Intézet Évkönyve* [Annal of the Istitute of Hungarian History in Vienna], Vol 2. Budapest, 1932, 137–182, pp. 139–140. VARGA J., 1991, pp. 455–456.
69 VARGA J., 1991, p. 457. Emma Iványi mentions that probably the original, contemporary meaning of "Hungarian *Einrichtungswerk*" covered the *Opinio* of the Hungarian committee and the Palatine's *Informatio* together. See IVÁNYI, E., A "magyar Einrichtungswerk". [The Hungarian Einrichtungswerk.] In: *Gazdaság és mentalitás Magyarországon a török kiűzésének idején*. [Economy and Mentality at the Time of Reconquest of Hungary from the Ottomans.] Discussiones Neogradienses 4, Szécsény, 1987, p. 170.
70 IVÁNYI, 1987, p. 168.; VARGA J., 1991, p. 458.
71 BARTA, 2001, pp. 149–150.
72 BÓNIS, 1935, p. 59.; SZABÓ, 2000, p. 152.; SZABÓ, 2017, p. 283.
73 BÓNIS, 1935, pp. 59–61.; KÓNYI, 1932, pp. 145–147.
74 SZIJÁRTÓ, I., The Diet: The Estates and the Parliament of Hungary, 1708–1792. In: AMMERER, G. – GODSEY, W. – SCHEUTZ, M. – URBANITSCH, P. – WEISS, A. (Eds.), *Bündnispartner und Konkurrenten des Landesfürsten? Die Stände in der Habsburgermonarchie*. Wien–München, 2007, 151–171, pp. 156. and 161–163.
75 BÓNIS, 1935, pp. 61–64.
76 BÉLI, 2000, p. 231.; BÓNIS, 1935, p. 67.; BÓNIS–DEGRÉ–VARGA, 1961, 52. p.; RADY, 2015, p. 181.; SZABÓ, 2000, p. 152.; SZABÓ, 2017, p. 283.; VARGA J., 1992, p. 12.
77 Kónyi (1932), p. 163.
78 For a detailed description of the work of the committee see: BÓNIS, 1935, pp. 68–110.

estates was mainly due to the personal involvement of Charles III on the reformers' side.[79] It is worth to mention that this again was a Diet of great compromises: the *Sanctio Pragmatica* of 1713 (guaranteeing the succession of the female line of the dynasty) was also enacted there, at the very first day of the meeting (30 June 1722).[80]

The judicial reform was incorporated in several laws. Act XXIV of 1723 confirmed the position of the Table of Seven as the supreme court of the Kingdom of Hungary, exclusively dealing with appeals, not proceeding at first instance at all.[81] The law also referred to the necessity of the permanent operation of this royal court, however did not transform it into a continuously working forum of justice (in practice it would continue to assemble twice a year, at both occasions for forty days).[82] By virtue of the same law, the number of the members of the Table of Seven was officially supplemented with "eight persons: two high priests, two magnates, and furthermore four members from the lesser nobility, from all parts of the realm", thus the headcount was increased to fifteen.[83]

The reform of the Royal Table was more thorough. Article 2 of Act XXV of 1723 "reinforced it in its power and integrity", and Article 3 of the same law ordered it to work "continuously", with the attendance of at least nine judges. The most important measure was that the Protonotaries were called back to the *Curia*, as they would be the referents of the cases in both tables, i.e. on both instances of the same procedure.[84] In line with the *Systema Iuridicum*, their jurisdiction in the countryside was replaced by Act XXX of 1723 with four affiliate courts of the Royal Table called "District High Courts". In order to avoid any confusion with the modern, local-level district courts, we will call them "Regional High Courts" in this study. These new deconcentrated royal courts[85] started their work in 1724, in four large regions of the country called "Districts", with seats in Nagyszombat (Trnava), Kőszeg, Eperjes (Prešov) and Nagyvárad (Oradea).[86] In March 1725 the Regional High Court of Nagyvárad was moved to Debrecen,[87] while a year later a fifth Regional High Court was set up in Zagreb, for Croatia and Slavonia.[88]

It is hard to overestimate the significance of Charles III's judicial reform of 1723. *Gábor Béli* and *Barna Mezey* both emphasise that, with the establishment of the new seat of the *Curia* courts in Pest instead of the royal capital in Pozsony, the Table of Seven and the Royal Table were both physically separated from the royal court the first time in Hungarian history.[89] Furthermore, with the creation of the new Regional High Courts an even more important step was made: "on this regional level there was no executive power at all", thus the legislators "went beyond the traditional method of making the leader of the public administration be at the same time responsible for the same level of jurisdiction as well", so this is where "the separation of the judiciary from the public administration actually happened".[90]

Of course, this physical separation of the *Curia* courts from the royal administration did not mean the victory of the principle of separation of powers in the modern sense. The Palatine (president of the Table of Seven) and the Personalis (chairman of the Royal Table) had important functions in the other branches of the constitution as well: the former was the president of the Upper House of the Parliament, and in 1723 he became the president of the newly established Royal Council of Lieutenancy of Hungary (*Consilium Regium Locumtenentiale Hungaricum*), while the latter was kept in the position of the president of the Lower House.[91] Last but not least, according to *Gyula Gábor*'s researches based on primary sources, the courts of the Curia (especially the continuously working Royal Table) in fact remained under "almost paternal control" of the Royal Chancellery.[92]

6. Joseph II and his Novus Ordo Judiciarius

As we have seen, the reform of 1723 has great importance in the history of the independent judicial system in Hungary, however in practice it did not create an effective and professional judiciary. The headcount was very low, especially compared to how much the number of cases grew, primarily at the Royal Table. The membership of the Table of Seven was slightly increased, from 15 to 19, until the end of the reign of Maria Theresa (1740–1780), while the headcount of the Royal Table remained unchanged (16 persons),[93] as was kept the rule as well that the Protonotaries had to present the cases to both

[79] BÓNIS, 1935, p. 111.; SZIJÁRTÓ, 2007, p. 163.
[80] BÓNIS, 1935, p. 111.
[81] BÉLI, 2000, p. 232.; SEBŐK, R., Hivatali pályafutások a 18. századi Királyi Kúrián. [Professional Careers at the Royal Curia in the 18th Century.] In: SZIJÁRTÓ, I. – SZŰCS, Z. (Eds.), *Politikai elit és politikai kultúra a 18. század végi Magyarországon*. [Political Elite and Political Culture in Hungary at the End of the 18th Century.] Budapest, 2012, 15–50, p. 19.; VARGA, 1974, p. 188.
[82] BÉLI, 2000, p. 232.
[83] BÓNIS, 1935, p. 149.; SEBŐK, 2012, p. 19.; VARGA J., 1992, 13. p.
[84] RADY, 2015, p. 200.
[85] Deconcentrated "but not decentralised", see BÓNIS, 1935, p. 151. (Footnote Nr. 109)
[86] BÓNIS–DEGRÉ–VARGA, 1961, pp. 52. and 66.; JUHÁSZ, L., A bírói határozatok írásba foglalásának kialakulása a magyar jogban. [Development of publication of judicial decisions in writing in the Hungarian Law.] In: *Jura*, vol. 12, Nr. 1, 2006, 33–44, p. 34.; RADY, 2012, p. 466.; RADY, 2015, p. 201.
[87] BÓNIS, 1935, p. 157.; BÓNIS–DEGRÉ–VARGA, 1961, p. 66.; RADY, 2012, p. 466.; RADY, 2015, p. 201.; STIPTA, 1998, p. 69.
[88] BÓNIS–DEGRÉ–VARGA, 1961, pp. 52. and 95.
[89] BÉLI, 2000, p. 231.; MEZEY, B., „Törvények s törvényszékek javításának gondja" (A felsőbíráskodás szervezetének átalakítása a 18. században). ["Matter of Reparation of the Laws and Tribunals" (Restructuration of the Organisation of the High Courts of Justice in the 18th Century.] In: *Jogtörténeti Szemle*, Nr. 1–2, 2017, 10–20, p. 17.
[90] MEZEY, 2017, p. 18.
[91] RADY, 2015, p. 202.
[92] GÁBOR, G., A régi magyar igazságszolgáltatás. [The old Hungarian judiciary.] In: *Jogtudományi Közlöny*, vol. 62, Nr. 20, 1927, 184–186, p. 185.
[93] SEBŐK, 2012, p. 19.; VARGA, 1974, p. 17.

Tables, while their number (4) also remained unaltered.[94] An even more important problem was that the reform did not go beyond the Regional High Courts, keeping intact the medieval forms of jurisdiction at the lowest levels of the judiciary (the county and manorial courts).[95]

Not surprisingly for anyone who is familiar with the history of Central Europe in the 18th century, the first real attempt to create a court system completely separated from the public administration with the monopoly of jurisdiction was made by the "enlightened despot", Joseph II (1780–1790) in his famous decree titled *Novus Ordo Judiciarius* (New Order of the Judiciary) issued on 12 December 1785.[96] This regulation entered into force almost immediately (being effective from 1 January 1786), and it fundamentally changed the structure and the logic of this whole branch of government, at all levels, in each segment of the country (and of the society) – however, similarly to the other reforms of the Emperor, only for a very brief period of time.

The decree abolished all judiciary related privileges of the estates, terminated the operation of the county and municipal courts, and repealed the *ius gladii* from the landlords.[97] Joseph II introduced a universal right of appeal, irrespective of social status, thus from now on not just the noblemen, but also the peasants were granted with the right of judicial remedy against the first instance judgments.[98] With Martyn Rady's words, "Joseph II, by breaking the arbitrary power of the county and seigneurial courts and by centralizing the judicial administration, sought to reform the law for the benefit of ordinary Hungarians and to render them citizens with equal access to the courts".[99]

The system of the highest central courts was also modified, less radically but still fundamentally. The Table of Seven was transformed into a court of extraordinary review of lower instance judgments, a forum resembling to the *Oberste Justizstelle* of Austria.[100] The Royal Table was defined as the highest ordinary court of appeal, and its staff was filled with loyal public servants coming from the royal central administration, except for the president whose position was kept for the Personalis. The competence of the Regional High Courts was extended, on one hand with those case that had formerly been judged by the Royal Table at first instance, and on the other hand with the new cases appealed from the county and municipal courts.[101]

As the final (and most radical) step of the judiciary reform, in September 1787 new first instance courts were established. These 38 courts (called *judicia subalterna*)[102] had to take over the judicial function of the noble counties and other privileged communities, breaking the centuries-old tradition of the *sedria*, thus separating the judicial power completely from public administration.[103] With this development, the chaotic and malfunctioning judiciary inherited from the high and late Middle Ages was replaced with a uniform and centralised system of state courts.[104] Of course, this judiciary organised in line with the modern principles from the point of view of "structural independence", was not independent of the royal power: through his officials working at the Royal Table the Emperor was able to exercise political supervision over its activity.[105]

As we know, Joseph II's were short-lived instructions. Due to the unfortunate internal and external political events, after a meeting held on 26 January 1790 with his counsellors,[106] the Emperor decided to withdraw all his edicts concerning Hungary and Transylvania, except for the Edict of Tolerance of 1781, the Edict on the Peasants of 1785[107] and a third decree regarding the remuneration of the lower clergy to be paid from the state treasury. The system of the *Novus Ordo Judiciarius*, as one of the important decrees withdrawn, was liquidated by the Hungarian authorities "with great zeal", and the judiciary of the country was restored to its condition it had been in before 1786, for a further half century. From 1 May 1790, the Hungarian judiciary continued to operate in the form it had been working before the times of the *Novus Ordo*.[108]

7. The Hungarian judiciary in the Age of Reforms, until 1848

After Joseph II's death, the Hungarian Diet was convened again, the first time after 1765, by his successor Leopold II (1790–1792), who was crowned in accordance with the old traditions. This Diet adopted some very important laws regarding the sovereignty of Hungary. Act X of 1790/91 reaffirmed Hungary as a "free and independent" country, "to be administered and governed in accordance with its own laws and customs, not as a subordinate province". Act XII of 1790/91, as *László Péter* emphasises: "under the direct and indirect influence of Montesquieu",[109] separated the royal executive power from the

[94] VARGA, 1974, p. 17.
[95] BÓNIS–DEGRÉ–VARGA, 1961, p. 53.
[96] BÓNIS–DEGRÉ–VARGA, 1961, pp. 53–54.; MEZEY, 2017, p. 18.; VARGA, 1974, p. 50.
[97] MEZEY, 2017, pp. 18–19.; VARGA, 1974, p. 51.
[98] VARGA, 1974, p. 57.
[99] RADY, 2012, p. 452.
[100] VARGA, 1974, p. 51.
[101] BÓNIS–DEGRÉ–VARGA, 1961, p. 67.
[102] RADY, 2012, p. 467.
[103] MEZEY, 2017, p. 19.; VARGA, 1974, p. 61.
[104] BÓNIS–DEGRÉ–VARGA, 1961, p. 55.
[105] BÓNIS–DEGRÉ–VARGA, 1961, p. 54.
[106] KULCSÁR, K., II. József visszavonja rendeleteit. [Joseph II withdraws his edicts.] *Hungarian National Archive*, http://mnl.gov.hu/mnl/ol/hirek/ii_jozsef_visszavonja_rendeleteit (Access date: 14/02/2019).
[107] BARTA, 2001, p. 156.
[108] BÓNIS–DEGRÉ–VARGA, 1961, p. 55.; VARGA, 1974, p. 73.
[109] PÉTER, L., Montesquieu's Paradox on Freedom and Hungary's Constitutions, 1790–1990. In: *History of Political Thought*, vol. 16, Nr. 1, 1995, 77–104, p. 82.

legislative power of the parliament, and expressly prohibited the king to govern his realm by royal decrees or "so-called patents", obviously referring to Joseph II's edicts. The same law affected the question of the judiciary as well, declaring that the structure of the courts "already established, or to be established in further laws" could not be changed "by royal power" any more.

Because of the application of Joseph II's *Novus Ordo* for several years and the restoration of the old court system, a whole series of laws adopted at the same Diet had to deal with some details of the judiciary, and important procedural law questions as well. As *Endre Varga* points out, "although the major part of such laws sought to override the instructions of the *Novus Ordo* to the greatest extent possible, some of them can still be considered as the continuation of Joseph II's reforms".[110] From the point of view of the development of equality before the law, Act XLIII of 1790/91 has the greatest significance. It retained the possibility of appealing to the Royal Table in all criminal cases, however for non-nobles only in the cases of capital punishment, at least three years of imprisonment, or 100 strokes of beating with stick.[111]

The direct political influence of the king in the cases of *lese-majesté* exercised from the 16th century through the so-called "delegated courts" (consisting of foreign and military judges unconstitutionally appointed by the Habsburg rulers)[112] was also cancelled (by Act LVI of 1790/91), however the situation between 1790 and 1848 was far from a constitutionally independent judiciary, because the courts were kept under control of the Royal Chancellery, and, according to *Szilvia Bató*'s recent researches, the Royal Council of Lieutenancy exercised supervision as well, at least over the first instance courts.[113] The supervisory power of the Chancellery was mentioned in a speech of *Ferenc Deák* as well, held at a preparatory session of the representatives of the estates in 1834, saying that "this problem had not been solved by Act XII of 1790/91, the law adopted in order to guarantee the independence of the judiciary but never respected".[114]

Neither the revolutionary events of 1848 could make a fundamental change. The so-called „April laws"[115] transformed the form of government of Hungary into a Belgian-type constitutional monarchy, but the task of establishment of a modern, independent judiciary was not yet fulfilled.[116] According to Article 27 of Act III of 1848, "the integrity of the courts and tribunals set up by the laws must be preserved also for the future".[117] The seigneurial courts were abolished (Act IX of 1848), and the supervision over the courts were passed from the (also abolished) Chancellery to its successor, the newly established Ministry of Justice.[118]

The new Minister of Justice, Ferenc Deák issued a decree on 5 May 1848 in which he informed the *Curia* that his ministry had taken over the supervision over the jurisdiction. Thereinafter, Deák started immediately the works of reorganisation, preparing the appointment of several new judges. According to Endre Varga, Deák's aim with the increase of the membership of both Tables of the *Curia* to 33 judges, was to promote a quicker and more effective operation of the *Curia*.[119] As we know, in September 1848 a civil war broke out, and after the final defeat of the Austrian revolution of 1848, the Hungarian party had to fight for the independence of the country against Vienna. The judicial reform had to be postponed until a more peaceful time.

8. The judicial system of the Neo-Absolutism, and the Hungarian courts before 1868

After the fall of the Hungarian war of independence in 1849, the new Emperor of Austria, Francis Joseph I (1848–1916) introduced a new form of absolutistic government in his realm, the so-called Neo-Absolutism. The militarily occupied Hungary was governed from Vienna as a subordinate province until January 1861. From the point of view of the judiciary, it meant the introduction of the Austrian-style centralised judicial system. According to *Judit Balogh*, the Emperor's patents concerning the judiciary "represented a much bigger step toward the establishment of a modern judicial system than the previous three centuries".[120] *István Stipta* also emphasises the endeavour of the imperial authorities to "a consistent separation of the public administration from the judiciary".[121]

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[110] VARGA, 1974, p. 88.

[111] BÓNIS–DEGRÉ–VARGA, 1961, p. 56.; STIPTA, 1998, p. 103.; VARGA, 1974, p. 89. [See Articles 2–3 of Act XLIII of 1790/91.]

[112] STIPTA, 1998, p. 104.

[113] BATÓ, S., A Helytartótanács bírósági igazgatási tevékenysége a 18–19. század fordulóján. [Activity of the Lieutenancy Council in the Administration of the Courts at the Turn of the 18th and 19th Centuries.] In: *Acta Universitatis Szegediensis: Forum. Acta Juridica et Politica*, vol. 1, Nr. 1, 2011, 55–88, pp. 64. and 66.

[114] For the citation see: BÓDINÉ BELIZNAI, K., A bírói függetlenség a Hármaskönyvben. [Judicial Independence in the Tripartitum.] In: *Jogtörténeti Szemle*, Nr. 4, 2014 – Nr. 1, 2015, 19–23, p. 20.

[115] The famous laws adopted by the Diet concerning the establishment of the constitutional monarchy in Hungary, in line with the principles of the Belgian constitution of 1831, were sanctioned by King Ferdinand V (1835–1848) on 11 April 1848, that is where their popular name "April Laws" comes from.

[116] HOMOKI-NAGY, M., A bírói felelősség az 1869:IV. tc. alapján. [Judicial Responsiblity by Virtue of Act IV of 1869.] In: *Acta Universitatis Szegediensis: Acta Juridica et Politica*, vol. 80, 2017, 45–68, p. 45.

[117] KAJTÁR, I., *A 19. századi modern magyar állam- és jogrendszer alapjai*. [Fundaments of the modern Hungarian state and legal system in 19th century.] Budapest–Pécs, 2003, p. 87.; STIPTA, 1998, p. 108.

[118] BÓNIS–DEGRÉ–VARGA, 1961, p. 57.; VARGA, 1974, p. 132.; STIPTA, 1998, p. 108.

[119] VARGA, 1974, p. 133.

[120] BALOGH, J., A felsőbíráskodás megszervezése Debrecenben. [Organisation of the High Court Jurisdiction in Debrecen.] In: *Jogtörténeti Szemle*, Nr. 1–2., 2017, 57–63, p. 58.

[121] STIPTA, 1998, p. 113.

The reorganisation of the Hungarian judiciary was started in November 1849, when the Emperor ordered to integrate the occupied territories into the Austrian imperial system. The supreme court of the empire was the Highest Tribunal of Justice and Cassation (*Oberster Gerichts- und Cassationshof*) in Vienna.[122] One level lower we could find the territorial high courts called *Districtual Obergericht* that was in fact the replacement of the Royal Table and the Regional High Courts as well. The county and municipal courts were replaced with courts called *Landesgericht*, while at the lowest, local level courts of first instance called *Bezirksgericht* were set up.[123] By this reform, similarly to the instructions of Joseph II in 1785–87, a modern and highly centralised four-level judicial system was established. The courts were structurally separated from the public administration, however, due to the characteristics of the absolutistic government, they were considered as state organs with no independence from the central political power.[124]

Francis Joseph gave up his absolutistic plans in the autumn of 1860. On 20 October 1860, he issued a document called "*the October Diploma*" in which he promised to restore the constitutional integrity of Hungary within the Empire.[125] He convened a legal conference in order to make proposals regarding the details how the Hungarian jurisdiction should be reinstated. The meeting, chaired by the Justice of the Realm *György Apponyi*, and therefore usually referred to as the "Conference of the Justice of the Realm" (*Országbírói Értekezlet*), began its work in January 1861. The result of the Conference was manifested in a document called "Provisional Judicial Regulations" (*Ideiglenes Törvénykezési Szabályok*, in abbreviated form: *ITSz*").[126]

By virtue of the ITSz, the Hungarian constitutional and legal system was to be considered restored as it had been before 1848/49, with the adjustments necessary in order to reflect the irreversible changes taken place in the meantime, especially the abolishment of serfdom. Consequently, the old judicial system was reinstated, except for the seigneurial courts, i.e. the Table of Seven, the Royal Table, and the four Regional High Courts were reactivated at the central levels of the judiciary, while at the lower, territorial levels the county, municipal and other traditional courts were restored.[127] We agree with Judit Balogh when she emphasises that "the restitution of the courts as they had been before 1848 rather represented a step backwards",[128] we would just like to add: it was a similar step backwards as the one in 1790, when Joseph II's *Novus Ordo* was abolished.

9. Establishment of the independent Hungarian judiciary after the Austro-Hungarian Compromise of 1867

After the settlement of the constitutional dispute between Austria and Hungary in the Austro-Hungarian Compromise of 1867, it was obvious that the links between the territorial administration and the lower courts deriving from medieval privileges could not be maintained. The introduction of a modern centralised judiciary, independent from the other branches of the government not only in the sense of organisational separation but politically as well, was indispensable.[129] The parliament convened by the Emperor (from 1867 also King of Hungary) already in 1865, adopted a new law on the rules of court procedures in 1868 (Act LIV of 1868).

This new law abolished the Regional High Courts established in 1724, and introduced a two-level system of high courts. The supreme court of the country was invariably called *Curia*, but its old internal structure of "tables" was replaced with two modern departments, the "Court of Cassation" (only dealing with breaches of procedural law), and the "Supreme Court of Justice" (proceeding as a normal forum of appeal).[130] On one level lower, basically in the place of the old Regional High Courts, two Royal High Courts were established, one in Budapest, and another in Marosvásárhely (Târgu Mureş) for the territories of Transylvania.[131]

After this temporary and incomplete regulation of a "fire fighting" kind, the parliament dissolved, and in March 1869 the first elections after the Austro-Hungarian Compromise were held. On 24 April 1869, in his opening address to the newly elected parliament, King Francis Joseph highlighted – referring to an important point of the program of the government of Prime Minister *Gyula Andrássy*[132] – that "a good, quick and impartial jurisdiction is the prerequisite of a well-arranged state", and that it is necessary that "those who are assigned with this power of great importance be provided with all guarantees of independence", and on the other hand, "everyone be guaranteed against the super-expansions of the judiciary as well".[133]

The bill, accepted by the two houses in less than three

[122] STIPTA, 1998, p. 113.
[123] BÉLI, 2000, p. 343.; KAJTÁR, 2003, p. 201. For a detailed description of the judicial system of the Neo-Absolutism see: PAPP, L., A rendes bírósági szervezet változásai Magyarországon 1849–1861között. [Changes in the ordinary judiciary structure in Hungary between 1849 and 1861.] In: *Acta Universitatis Szegediensis: Forum. Acta Juridica et Politica*, vol. 4, Nr. 1, 2014, pp. 157–167. and STIPTA, 1998, pp. 114–117.
[124] HOMOKI-NAGY, 2017, p. 45.; KAJTÁR, 2003, p. 201.
[125] RADY, 2015, p. 224.
[126] KÉPES, G., The Birth and Youth of the Modern Hungarian Private Law. In: *Journal on European History of Law*, vol. 7, Nr. 2, 2016, 102–113, pp. 106–107.; RADY, 2015, p. 228.; STIPTA, 1998, p. 119.
[127] BÉLI, 2000, p. 344.; HOMOKI-NAGY, 2017, p. 46.; STIPTA, 1998, pp. 119–121.
[128] BALOGH, 2017, p. 58.
[129] HOMOKI-NAGY, 2017, p. 47.
[130] BÉLI, 2000, p. 345.; MÁTHÉ, G., *A magyar burzsoá igazságszolgáltatási szervezet kialakulása, 1867–1875*. [Formation of the Bourgeois System of Judiciary in Hungary, 1867–1875.] Budapest, 1982, p. 31.
[131] MÁTHÉ, 1982, p. 30.
[132] The government adopted the draft of the law on the exercise of the judicial power at its meeting held on 13 April 1869. See MÁTHÉ, 1982, p. 35.
[133] *Az 1869. április 30-ára hirdetett Országgyűlés Főrendiházának irományai, I. kötet*. [Documents of the Upper House of the Parliament convened to 30 April 1869, Vol. 1.] Pest, 1870, 2–5, p. 3. Also cited by BÓDINÉ BELIZNAI, 2015, p. 19. and MÁTHÉ, 1982, p. 32.

months, was sanctioned by the king on 14 July 1869.[134] According to the common position of the Hungarian historiography (including the legal historians as well), this law, published as Act IV of 1869, is the first document of legal relevance in the Hungarian history that expressly proclaimed the separation of the judiciary from the public administration.[135] According to the comparison made by Alajos Degré, "the provision of the Hungarian Act IV of 1869 relating to the judicial independence[136] is an almost literal translation of the relating parts of the Belgian constitution".[137] Further to this declaration, Act IV of 1869 also contained the requirements of the appointment of judges, their employment, transfer and termination of their mandate, and regulated the cases of conflict of interest as well, in order to guarantee the judges' integrity.[138]

Act IV of 1869 became the fundament of the establishment of the new, modern, constitutionally independent Hungarian judiciary system.[139] Based on this law, the Hungarian parliament could finally reform the whole system of courts according to the modern principles. The first, decisive steps were made by the legislators within less than two years, thanks to the high quality preparatory works of the Ministry of Justice led by *Boldizsár Horvát*. These laws adopted in 1871 went back to the four-level structure of the judiciary of the 1850's (the above mentioned Austrian system of courts introduced by the neo-absolutistic government of Emperor Francis Joseph).

Three courts of first instance were defined: the local courts called District Courts (in Hungarian called *járásbíróság*, the equivalent of *Bezirksgericht*), and county courts called Tribunals (in Hungarian: *törvényszék*, the replacement of the old county *sedria* and the municipal courts at the same time), and furthermore a special court for commercial law cases as well. The two Royal High Courts (*Királyi Ítélőtábla*) established by the above mentioned Act LIV of 1868 were kept as courts of appeals (lodged against the decisions of the Tribunals), while on the top the Royal *Curia* was also kept in its position as the supreme court of Hungary.

The number of the Tribunals was "provisionally" determined in 102, while that of the (lowest level) District Courts in 360. The number of the Tribunals was decreased a few years later to 64. In 1881 the two divisions of the *Curia* were merged, and this way the supreme court of Hungary was transformed into a single body of the highest level of jurisdiction. And finally, as the last step of the judicial reform, in 1890 a significant decentralisation was carried out at the second level of the judiciary.[140] The excessively burdened Royal High Court of Budapest was freed from its burdens by the increase of the number of the royal high courts from 2 to 11, with a proportionate territorial distribution among the largest cities of the country.[141]

10. Outlook: the independent judiciary as an achievement of constitutional history

The four level structure of the courts determined at the beginning of the 1870's – (1) *járásbíróság*, (2) *törvényszék*, (3) *ítélőtábla*, (4) *Curia* – remained intact until the communist constitution of 1949, and has been re-established with Act XXII of 2002, reinstating the third level courts called *ítélőtábla* with effect from 1 January 2003. According to the new Fundamental Law of Hungary, since 1 January 2012 the two low-level (first instance) courts are called *járásbíróság* and *törvényszék* again, thus the current system of the ordinary courts of Hungary is conform with the late 19th century situation.

At the end, we would like to refer to a recent resolution of the Constitutional Court of Hungary about the intention of the government concerning the decrease of the retirement age of the supreme court judges from 70 to the general age of retirement (65). The Constitutional Court declared this regulation unconstitutional, with reference to the rules of Act IV of 1869 as one of the "achievements of our historical constitution" mentioned in the Fundamental Law.[142] With this decision, the importance of constitutional history is clearly emphasised. We can fully agree with this approach. In order to find the response to the challenges of today, it is always helpful to be aware with the solutions found in the past.

[134] MÁTHÉ, 1982, p. 35.

[135] Just some examples from the recent works of contemporary legal historians: BALOGH, 2017, p. 59.; BÉLI, 2000, p. 344.; BÓDINÉ BELIZNAI, 2015, p. 20.; HOMOKI-NAGY, 2017, p. 48.; KONCZ, I., A Hatásköri Bíróság Magyarországon. [The Competence Court in Hungary.] In: *Jogtörténeti Szemle*, Nr. 1–2, 2017, 96–103, p. 96.

[136] Article 1 of Act IV of 1869: "The judiciary shall be separated from the public administration. Neither the public administration, nor the judiciary authorities may interfere with the competence of each other".

[137] DEGRÉ, 2004, p. 373.

[138] BALOGH, 2017, p. 59.

[139] HOMOKI-NAGY, 2017, p. 48.

[140] BALOGH, 2017, p. 60.; BÉLI, 2000, p. 345.; NAVRATIL, S., *A jogászi hivatásrendek története Magyarországon, 1868/1869–1937*. [History of the Legal Professions in Hungary, 1868/1869–1937.] Budapest, 2014, pp. 49. and 52–53.

[141] JUHÁSZ, 2006, p. 37. For a detailed overview of the structure of the Hungarian judiciary after 1869 see: BÓNIS–DEGRÉ–VARGA, 1961, pp. 153–163. and MÁTHÉ, 1982, pp. 148–155.; STIPTA, 1998, pp. 126–133.

[142] Decision 33/2012.(VII. 17.) AB on the retirement age of the judges, in English translation see at the official website of the Constitution Court: https://hunconcourt.hu/uploads/sites/3/2017/11/en_0033_2012.pdf (Access date: 06/02/2019)

Historical Aspects of Sale Contract according to Albanian Customary Law

Fatri Islamaj[*]*, Engjëll Likmeta*[**]

Abstract

Albanian customary law is an important characteristic of Albanian legal culture, which has regulated civil legal relations in Albanian territories for a long period of time.

Any regulation or provision, including the main institutes of contract law provisions, especially of the sale agreement, was regulated in detail by customary law.

The authors of this paper intend to provide a comparative and historical overview of how a sale agreement was executed according to customary law.

The characteristics of this institute according to the canons of various regions, the subjects who were entitled to enter into this type of contract, the objects of this type of contract and the procedures that customary law provided for the materialization of the sale process have been especially addressed in detail.

Keywords: *Albania; customary law; canon.*

1. Introduction

Albanian society is undergoing a period of rapid changes. It is natural for traditional values to weaken, while new values are yet to take the place they deserve in society.[1] Customary law is not a feature only present in the Albanian legal culture.[2] In general, customary law endured among all Balkan peoples, particularly in rural environments, with features and elements of this law still present today.[3] Albanian customary law was a complete legal document.[4] It regulated social relations in the country.[5]

The main sources of Albanian customary law were the canons. They covered and regulated various Albanian territories and had local distinctions among them.[6] Some of the main canons were: The Canon of Lekë Dukagjini, the Canon of Scanderbeg, the Canon of Luma, the Canon of Dibra, the Canon of Benda, and the Canon of Labëria.

We will be considering some of these canons for the purposes of this study, and will see how elements of sale contract execution were addressed.

2. The scope of the Albanian customary law

The Canon of Lekë Dukagjini or known as the Canon of the Mountains, because it was applicable in the Albanian Alps (the territories above Shkodra and Gjakova and the broader northern Albania), was under the rule of the Dukagjini House.[7] The Canon of Lekë Dukagjini had a special place in these territories and was considered a culture.[8] The law of the mountains comprised all the customary norms of the population in these territories, and regulated aspects of social relations. These norms were passed down generation to generation in the Albanian national memory.[9] Customary law in this territory of

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1 ARSOVSKA, J., VERDUYN, P., Globalization, conduct norms and "culture conflict", Perceptions of Violence and Crime in an Ethnic Albanian Context. In: *British Journal of Criminology, Volume 48, Issue 2*, 2008, p. 226-246.

2 VALENTINI, G., *Studies and legal texts*, Tirana, 2009, p. 24.

3 BARROLLI, B., The Impact of Canon of Leke Dukagjini on the Rule of Law in Albania: A brief Overview. In: *Journal of the International Association for Japan Studies*, No.10, 2014, p. 4.

4 AUTHORS' GROUP, *History of State and Law in Albania*, Tirana, 1997, p. 5.

5 AUTHORS'S GROUP, *History of State and Law in Albania*, Tirana, 1997, p. 5.

6 ELEZI, I., *The Customary Criminal Law of Albanians*, Tirana, 1983, p. 32.

7 VILARI, S., *Albanian Customary Law Norms, - Canon of Lek Dukagjini,* Tirana, 2012, p. 15.

8 VATA, R., The Myth of the Mountain in the Code of Lekë Dukagjini. In: *Albanological Tracing Journal*: *Folclore and Ethnology*, Issue 41/42, Prishtina, 2012, p. 43-57.

9 VILARI, S., *Albanian Customary Law Norms, - Canon of Lek Dukagjini,* Tirana, 2012, p. 16.

Albania was codified by Aleksandër Dukagjini, from which it also took its name.[10]

The Canon of Labëria was a customary law code that regulated the social order in the tribal society of the Labëria region.[11] This canon was used in the Labëria region from which it took its name, but also outside its borders in the territories on the right of the Vjosa River midstream, in the towns of Vlora, Tepelena, Delvina, Saranda, Gjirokastra, and everywhere else the Labëria community members lived.[12]

The Canon of Scanderbeg was mainly used in the territories ruled by the House of Kastriot,[13] along the Mat River valley.[14] The borders of its application extended to the territories of Elbasan and Librazhd.[15]

An important element of our customary law is also the Canon of Dibra.[16] It was used in the region of the same name from an ethnic and cultural perspective, the Region of Dibra was composed of nine self-governing units,[17] including Gryka e vogël, Gryka e madhe, Bulqiza, Reçi, Dardha, Çidhna, Muhurri, Luznia, and Topalltia. This region was governed by the normative traditions of the Canon of Dibra.[18]

The Canon of the region of Benda, collected with the utmost care by Kruja professor and historian Mr. Haxhi Goci, is a treasure of the tradition of Albanian people.[19] The Region of Benda where this canon is used includes the villages of the Tirana and Martanesh Highlands.[20] Actually, according to references in reports of Vatican emissaries, who have visited and mentioned the episcopate of Benda since the 16th and 17th centuries, the region of Benda was centered around Moisi and included the villages of Shëngjergj, Shënmëri, Shëngjin, Façesh, Mëner, Bruz, Shënpal, Derje, Kumardh, Xibër, Guri Bardh, Martanesh, Bastar.[21]

Canon of Luma is considered by Albanian researchers like more modern then others canons.[22]

Canon of Luma was applicable in north-east territories of Albania,[23] in the territory of Luma region, extended on both sides of Black Drin River till the cross point with White Drin River.[24]

3. The relevance of the Albanian customary law application

The relevance of the Albanian customary law may be considered from a series of perspectives.

Professor Leonard Fox wrote: "*For centuries, the canon was the foundation of Albanian society and as such, it was an expression and reflection of the character of Albanian people*".[25]

Albanian customary law, which was often incarnated in the Canon of LekëDukagjini and others, was at the same time legal and historic heritage,[26] which was of great help as a national law system competing with the law systems of the invaders of Albania, thus helping to preserve and affirm the Albanian national identity.[27]

The law reflected the will of Albanian people to live in compliance with basicsocial behavior norms,[28] which had been defined well through the centuries.[29]

The fundamental relevance of the Canon, as Professor Vilari rightly said many years ago, lies in the organic character and its endurance in time, and also because at its core, the Canon carries the collective knowledge and makes up the legal legacy handed down by the ancestors.[30] *Its significance does not lie in the sanctity of its norms, but in like-minded conscious determination of the*

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[10] VILARI, S., *Albanian Customary Law Norms, - Canon of Lek Dukagjini,* Tirana, 2012, p. 16.
[11] (METAJ) ALIMEMAJ, Z., The Albanian Canon of Labëria and Its Cultural Implications. In: *The 4th Electronic International Interdisciplinary Conference August*, 10. - 14. 2015.
[12] CANA, J., *Assembly Institution Under Customary Laberia Law*, University of Tirana, Faculty of History and Philology, Department of History, "Doctor" scientific degree topic, Tirana, 2012, p. 67.
[13] LIKMETA, E., "*Juridical Defense Provided for Crimes Committed Against Property*", Tirana University, Faculty of Law, Department of Criminal Law, "Doctor" scientific degree topic, Tirana, 2014, p. 63.
[14] GODO, S., *Scanderbeg*, Tirana, 2010, p. 5-495.
[15] AUTHORS'S GROUP, *History of state and law in Albania*, Tirana, 1997, p. 8.
[16] LIKMETA, E., &TRESKA, K., Una Visión Histórica Sobreel Instituto De La Herencia (Canon De Dibra). In: *European Scientific Journal,* Vol. 11, No. 17, 2015, p. 350-359.
[17] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 23.
[18] LIKMETA, E., &TRESKA, K., Una Visión Histórica Sobreel Instituto De La Herencia (Canon De Dibra). In: *European Scientific Journal,* Vol. 11, No. 17, 2015, p. 350-359.
[19] MEKSI, A., Clear canons left no room for interpretation. In: *Albanian Newspaper*, March 2013.
[20] MEKSI, A., Clear canons left no room for interpretation. In: *Albanian Newspaper*, March 2013.
[21] MEKSI, A., Clear canons left no room for interpretation. In: *Albanian Newspaper*, March 2013.
[22] HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 63.
[23] HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 47-50.
[24] HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 47-50.
[25] DIOGUARDI, SH., Jewish Survival in Albania & the Ethics of Besa. In: the magazine of the American Jewish Congress", issue of Congress Monthly, January/February 2006.
[26] BIÇOKU, K., *Scanderbeg,* Tirana, 2005, p. 159.
[27] CARA, A., & MARGJEKA, M., Canon of Lekë Dukagjni, Customary Law of Northern Albania. In: *European Scientific Journal,* October 2015, edition, vol. 11, No. 28, p. 12.
[28] KUMBULLA, V., & STAFA, F., The Status of the Albanian Society According to Lekë Dukagjini's Canon. In: *Academic Journal of Interdisciplinary Studies*, Vol. 2, No. 8, October 2013, Rome, p. 642.
[29] CARA, A., & MARGJEKA, M., Canon of Lekë Dukagjni, Customary Law of Northern Albania. In: *European Scientific Journal,* October 2015, edition, vol. 11, No. 28, p. 12.
[30] VILARI, S., *Albanian Customary Law Norms, - Canon of Lek Dukagjini,* Tirana, 2012, p. 59.

tribal groups that place much high relevance on the authority of the leader, in which they saw their lawmaker of legal principles.[31]

According to the Albanian renowned professor of sociology Mr. Zyhdi Dervishi, the canons, being monumental studies of the albaninan juridical culture, are characterized from its unique originality and special resonance in the mosaic of the world culture.[32] They are available and accessible to us today thanks to the systemic efforts for enhancing the feeling for the motherland.[33]

The canons, these corpora of rules, are integral part of the pantheon of the Albanian juridical culture thanks also to the tireless efforts and the golden pen of the Albanian researchers.[34] A particular contribution is to be accredited to the clergy, especially the Catholic one who assisted the process of collecting and codifying the Canons of Lek Dukagjini and of Scanderbeg.[35]

The importance of canon norms is relevant not only in research in many scientific disciplines, but also in studying the Albanian civil law.[36]

4. Understanding commerce according to customary law

A series of legal traditions that preserve and at the same time explain the fundamental principles of the law are found in the Albanian customary law, while also presenting a number of concepts, true and special legal elements that are connected to civil and commercial law.[37]

The Canon of Lekë Dukagjini defined the status of the merchant and of commerce. The master of the house was the person that enjoyed such right. He or a person appointed by him could be party in a sale and purchase contract. Generally, a male such as the son or a representative of the master of the house was the representative in the sale and purchase contract, and in some cases even the wife of the latter, which in any case had to seek the permission of the master of the house to act as such.

Even in the territories ruled in accordance with the Canon of Labëria, commerce implied a sale and purchase contract. Thus, this institution of the civil law was executed in case of the sale and purchase of objects or movable and immovable property between two or more persons. The latter, needed to be in full capacity to act, which meant the fact that they should enjoy complete capacity to sell or purchase objects, or movable and immovable property independently of its type.[38]

According to the canon norm in the region of Labëria, for the sale and purchase contract to be considered valid and for the process of commerce to be considered successful, the presence of the owner of the merchandise or his representative was required, and in any case this person had to be male of adult age and should be considered a man according to canon norms.[39] A man was any person able to bear arms and had reached an age between 14 and 15 years, and who was able to complete a series of duties concerning the functioning, respect and protection of the household.[40]

Similarly, with the canon norms considered above, the Canon of Scanderbeg provided that commerce was and implied the process of selling and purchasing movable or immovable property.[41]

The Canon of Dibra places special importance on the types and commerce and the way commerce was conducted, thus indirectly providing its meaning.[42]

The Canon of Benda provides the meaning of the institute of commerce in its civil legal norms.[43] According to these norms, commerce meant *the right of any person to sell or purchase, to give and take based on given needs.*[44]

In the time period during which the canon norms were used in our country, the main areas of commerce were immovable property such as land, movable property such as arms and livestock that was used in various fields of life and commerce, agriculture, and transport.[45]

5. The meaning of types of commerce according to customary law

Commerce was done in various forms and ways in the Albanian territories and regions. Thus, the main commerce types used in the areas under the norms of Lekë were: with or without stipulations, with witnesses, and with a deposit.[46] Such a provision is found sanctioned in the fifteenth chapter of the Canon of Lekë Dukagjini.

In the region of Labëria, commercial law implied the sale and purchase contract. It was executed in various forms and ways.

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31 VILARI, S., *Albanian Customary Law Norms, - Canon of Lek Dukagjini,* Tirana, 2012, p. 59.
32 DERVISHI, Z., *Visionary Beginnings in Traumatic Times: Sociology of Science 1*, Tirana, 2019, p. 294-295.
33 DERVISHI, Z., *Visionary Beginnings in Traumatic Times: Sociology of Science 1*, Tirana, 2019, p. 294-295.
34 DERVISHI, Z., *Visionary Beginnings in Traumatic Times: Sociology of Science 1*, Tirana, 2019, p. 294-295.
35 DERVISHI, Z., *Visionary Beginnings in Traumatic Times: Sociology of Science 1*, Tirana, 2019, p. 294-295.
36 TRNAVCI, G., *THE ALBANIAN CUSTOMARY LAW AND THE CANON OF LEKË DUKAGJINI: A CLASH OR SYNERGY WITH MODERN LAW,* 2008, p. 3.
37 VALENTINI, G., *Studies and legal texts*, Tirana, 2009, p. 24.
38 ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 170.
39 ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 170.
40 ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 80.
41 ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 108.
42 MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 491.
43 TRESKA, K., & LIKMETA, E., The Funds for the Execution of Obligations (Contract) according to the Albanian Customary Law. In: *Journal of European History of Law*, 2015, No. 2, p. 90-96.
44 GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 89.
45 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 51.
46 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 51.

The main were: in kind payment commerce, with or without money exchanging hands, with a deposit, and on a trial basis.[47] In addition, in special cases the canon of Labëria norms recognized the execution of a movable or immovable property sale contract through an exchange of property or payment in installments.[48]

Scanderbeg's canon norms were characterized by their variety concerning the commercial process. In this context, it also recognized other forms of commerce such as commerce with a notice or payment deadline, commerce with a guarantor, commerce with in kind exchanges without determination of type of exchange, commerce based on oral agreement, or written and sealed agreement.[49]

In addition to the traditional types of commerce of the time such as commerce based on exchange, conditional purchases, purchases with a deposit the Canon of Dibra also recognized commerce on condition to pay at a later time. The latter meant a type of commerce where the commercial process was not considered concluded with the delivery of the product, or goods being traded, because the payment was executed at a later time at the same price of the moment when the sale of the movable/immovable property, agricultural or livestock and animal husbandry produce was made.[50] Commerce on condition to pay at a later time was characteristics even for Canon of Luma.[51]

Exchange commerce implied the exchange of in-kind goods, where one good was traded for another.[52]

While categorizing the commercial process into types, the canon norms also provided the meaning of deposit as an instrument used for the execution of dues resulting from the commercial process. The deposit implied a given part of the amount which had been agreed upon by the parties in the sale contract.[53]

In general, the Canon of Dibra was in line with the Albanian customary law with regard to the deposit as means of exercising the commercial process.

At the time, the Canon of the Mountains regulated the entire institute of deposit. According to this canon, the deposit was the amount of money that was paid in advance with the purpose of securing the object that was to be purchased by the buyer.[54] The deposit was also paid before the object was purchased. The deposit could be provided for an object, a product that was not yet made, or a good for which the seller was not provided the amount requested for its sale.[55] The deposit could be provided with or without the presence of a witness based on a given procedure,[56] which did in itself imply taking an oath according to canon norms.[57]

In all cases the rule was that the deposit paid once was not returned.[58] In addition, any deposit paid in the amount of one hundred grosh implied that the object was bought outright and ownership over it had been gained.[59] At this moment, the seller had the obligation not to sell the object in question in any case or at any price. Thus, the object was considered sold upon receiving the 100 hundred grosh - monetary currency of the time, gold coins.[60] One case in which the deposit could be considered lost was when the buyer changed his mind and no longer wished to buy the object for which the deposit had been paid,[61] or when he could not pay the remaining price difference within the time agreed.[62] The canon norms provided that the benefits of the object for which the deposit had been paid went in favor of the seller, unless it was otherwise agreed in the sale contract.[63]

However, in the case of a contract of ordering, the canon provided that: […] when the producer was not able to produce the goods subject to the contract of ordering and for which the deposit was paid, the ordering party has the right to have his deposit returned".[64]

According to the canon norms in the region of Dibra, conditional purchasing was a main feature in contracts for livestock, whether household animals, animal husbandry or work animals.[65]

The Canon of Benda provided in its civil and commercial provisions the five main forms for sale and purchase contracts, as the fundamental institute of the contractual obligations in Albanian customary law.[66] The five forms were the sale and purchase with a witness, with a deposit, conditional and unconditional offer, and sale and purchase with a guarantor. Condi-

[47] ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 170.
[48] ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 170.
[49] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 108.
[50] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 491.
[51] HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 326.
[52] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 491.
[53] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 109.
[54] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 51-52.
[55] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 491.
[56] GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 90.
[57] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 109.
[58] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[59] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52
[60] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[61] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[62] ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 170.
[63] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 109.
[64] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 492.
[65] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 492.
[66] TRESKA, K., & LIKMETA, E., The Funds for the Execution of Obligations (Contract) according to the Albanian Customary Law. In: *Journal of European History of Law*, 2015, No. 2, p. 90-96.

tional sales (also known in the Albanian of the time as *kaull*) implied the execution of the sale contract the conditions of which were agreed verbally. In general, this contract was focused on objects and livestock.[67] In addition, the canon norms of the Benda region also recognized "tramta" when trading, which implied the exchange of two movable of immovable objects based on the free will of the owners of said objects.[68]

6. The institute of pre-emption

The institute of pre-emption was provided for in the Albanian civil customary law. The Canon of Lekë Dukagjini provided for the institute of pre-emption for immovable assets, such as land, mills, and irrigation and drainage channels. The entities that enjoyed the right to pre-emption were cousins, brothers, kin[69] and the person owning the land bordering the plot that was for sale. The latter enjoyed the right to purchase the land only if it was not purchased by the brothers, kin and cousins.[70] According to canon norms other entities enjoying the right to pre-emption were all members of the community to which the seller belonged.[71] Only if none of the above mentioned entities elected to exercise the right of pre-emption, did the owner have the right to sell the object on a first come first serve basis. This meant, to any person that met the conditions set by the seller for the sale.[72]

Albanian civil and commercial customary law provided for the right of purchasing an immovable property at a lower price depending on the level of relation the person had with the seller. Thus, the canon norms of Leka, Benda,[73] and Labëria[74] provided that: "[...] the brother in a separate home from the household and cousins had the right to buy the object (land) at 100 grosh (currency of the time) cheaper than the remote kin".[75]

The Canon of Scanderbeg did not define the discount in monetary value for sales to kin. In more concrete terms it provided that: *"land sold to brethren or kin has a slightly lower price than that charged to others"*.[76] The Canon of Dibra had the same approach as it provided the following: "The price of land for brethren is lower... and the land is sold at much higher price to strangers".[77] However, in other regions governed by the Canon of Leka such as Dukagjin, Shala, Shosh, etc., the price was 500 *grosh* cheaper for close kin compared to far removed kin.[78]

According to Albanian commercial customary law, immovable objects were in almost any case sold within the community where the property being sold was located. Furthermore, this fact is even clearer when considering the fact that the Dibra canon norms provided that the land must not be sold to a person who was not of Albanian nationality.[79]

7. Prices and sale procedure

7.1 Prices

Canon norms had also provided for concrete prices for immovable objects.

The prices and fees for immovable property were well--defined. The prices implied a certain value for the product that was being sold.

The price was set by three different entities, which were the owner of the goods, the men that were called or appointed to set prices, and the canon.[80] In the region of Dibra, the land price was set by three to four men that were recognized by both the seller and the buyer. In addition, in order to avoid any potential conflict that could arise at any time, the individuals setting the land price were not allowed to be parties in the sale contract, or potential beneficiaries of the contract.[81]

Generally, during this time period the land prices were set based on the potential yield of the land. The quality of land played a major role in determining its price. Thus, according to the Canon of Lekë Dukagjini, the land that had a yield equal to 100 *grosh* was sold at a price 5 times higher than the yield that it provided.[82] On the other hand, according to the Canon of Skanderbeg, land that could be irrigated or that had water or a water system nearby had a price up to twice or thrice as high as land that did not have this possibility.[83]

Again, according to the Canon of Lekë, the land sold for the construction of a house had a set price of 500 *grosh*, the same price as the dwelling.[84] According to the same canon, prices for movable objects varied from 1 to 500 *grosh*. This included such objects as tools used in agricultural work, house furniture, etc. At the same time, the canon set a price varying from 200 to 1,500 *grosh* for domestic and transport animals and self defense arms, such as pistols. Prices were also set for agricultural and

67 GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 91.
68 GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 91.
69 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
70 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
71 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
72 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
73 GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 91.
74 ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 171.
75 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
76 ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 110.
77 MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 503.
78 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
79 MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 503.
80 ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 112.
81 MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 504.
82 GJEÇOVI, SH. *Canon of Lekë Dukagjini,* Tirana, 1999, p. 53.
83 ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 112.
84 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 53.

animal husbandry products, fruit, meat products, and honey. An olive tree had a set price no lower than 100 grosh.[85]

Even though the Canon of Lekë provided and made public prices for the main objects and products used to meet living needs of the society, the canon practice and rules also provided that civil or canon obligations could also be settled with in-kind exchanges or as the canon called it "*everything for everything*".[86] In such cases the canon implied and provided for the fact that civil or criminal damages or obligations were not necessarily settled only with monetary means. They could also be settled in-kind. The means used for this exchange were the objects and animals that were the main subject of trade, which could be livestock, land, arms, or land.[87]

In conclusion we could say that the Canon of Lekë and the Canon of Scanderbeg, in contrast from the Canon of Luma, Labëria, Benda, and Dibra provided well-defined monetary values for the sale of movable and immovable objects, animals and animal husbandry and agricultural products.

7.2 Procedure

The Albanian canon procedure for the sale of immovable objects (land) was considered completed and closed only when the land purchaser offered *raki* (Albanian spirit) or coffee to those present for the purchase. Actually, in such a case failing to respect this norm would result in the absolute invalidity of the sale contract.

The canon sale procedure was considered completed and closed when the immovable object purchaser served *raki* to those present for the purchase. In this respect, the Canon of Lekë required that *raki* should be consumed for the land, mill and water line when they were purchased.[88]

When purchasing an immovable object (land), the canon provided for the procedure of having a coffee to symbolize the successful conclusion of the trade.[89] The canon provided for the golden rule: *"No land is sold without coffee"*.[90]

According to the Canon of Scanderbeg, the land is sold after the coffee of the sale is consumed.[91] The sale contract was characterized by a specific verbal procedure. In this context, the Canon norms of Scanderbeg provided the following: *"Coffee is consumed with the following words:-May you enjoy the land"*.[92]

Not only were the parties in the contract, but any other individual participating in the successful conclusion of the transaction subject to this procedure. Generally, the following were subject to this procedure: the seller, the elders and the men of his kin.[93] Generally, when the land was sold within the household circle, the buyer had the obligation to serve one coffee for his kin and the seller, and to provide one kilogram of coffee for the elder of the kinship.[94] However, when land was sold outside the household circle, the obligation of the buyer was to serve a lunch or a dinner to the seller and the men of his kin. The elder of the kinship, in addition to the above would also be offered a ram with the reasoning that the buyer made the purchased land his.[95]

In contrast with the Canon of Scanderbeg, the Canon of Benda required the enforcement of this formal coffee serving procedure when the party of the sale contract was a person outside the household circle.[96]

With regard to the sale of land as an immovable object, the Canon of Labëria always required the presence of witnesses, regardless of the land being sold within of outside the household circle.[97] In addition, it provided that when the immovable object, such as land or house was sold outside the kinship of the seller, the parties in the sale contract had the obligation to consume a coffee with the witnesses as well.[98]

In contrast to the other Albanian canon norms, the Canon of Dibra provided that in addition to serving coffee and a formal lunch or dinner, the land sale ceremony should be followed by a great dance of men of all ages. The latter would serve at any time as living proof, which showed that the parties had respected the canon procedure in selling and purchasing the immovable object – land.[99]

According to Albanian customary law, the sale of arms was only legitimated in specific cases, and even more so when it served to meet the livelihood needs of the household.

The Albanian canons included the following statement: *"A man sells his weapon when he has no other choice, when the people of his house ore starving, or when important debt must be paid"*.[100] This was true because of the special value this object had for defense in the context of the war to defend the household, which was considered as the most important and vital part of the society. Since arms were part of the personal belongings could be sold without the need to ask for the permission of the head of the house.[101] Beyond this, the Albanian canon procedure for the sale of arms was characterized by strict rules and procedures.

[85] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 53.
[86] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 54.
[87] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 54.
[88] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 54.
[89] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 492.
[90] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 500.
[91] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 110.
[92] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 110.
[93] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 110.
[94] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 110.
[95] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 110.
[96] GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 92.
[97] ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 171.
[98] ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 171.
[99] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 501.
[100] GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 93.
[101] ELEZI, I., *Labëria Customary Law*, Tirana, 2002, p. 137.

Thus, arms were always sold[102] and purchased loaded[103] and the bullet belt[104] always went with the weapon.[105] The weapon could not be sold and purchased without these components.[106] Generally, when the weapon was bought after having tested it,[107] it could no longer be returned to the owner even if a defect or a problem was noted. This could in contrast be done when making a conditional purchase.

The same rule was valid when concluding a sale contract for a horse. Only if the object or domestic animals such as an ox or cow were purchased on condition, was the seller obligated to take the sold object or animal back and to pay the purchaser double the sale price as compensation. On the other hand, the following rule was in place for other conditional purchases: if the object purchased on condition results faulty it is returned to the owner.[108] However, another principle was observed for anything that could have possibly been stolen: The owner of the goods has the right to take his belongings wherever found".[109] The seller of stolen goods always had the obligation to compensate the purchaser for the monetary amount paid for the object.[110]

Under the Canon of Benda, the sale of arms was done according to a verbal procedure, which noted that: *"I am selling you my rifle or pistol on condition that they are not sold to another without informing me".*[111] The purchaser of the arms did not only have the obligation to inform the seller of his intent to sell them, but to also give the seller the opportunity to purchase them back at the same price.[112]

Horses were always sold with the bridle on,[113] oxen were sold along with the rope,[114] while small livestock and animals used for house work or transport and agriculture were sold without bridle.[115] Pack saddles, saddles and reins were not included in the sale contract. Generally, they were sold separately.[116]

Under the Canon of Benda, horses were purchased with a conditional sale or with a verbal contract.[117]

On the other hand, under the canon norms of the region of Labëria the conditional sale of animals was also employed to ensure that the animals were not sick up to a certain point in time. The sale contract was considered completely executed only when this point in time had been reached.[118] The exceptions to this rule were horses, the sale contract which was executed at the moment of purchase and the sale was unconditional[119].

8. Forbidden trade

Forbidden trade was considered a case in which the seller would sell the object for which a deposit had been paid to someone else who offered a better price than the initial price.[120] In addition, a commercial process was considered illegal when the requirements stemming from canon norms related to the institute of pre-emption during the sale of immovable objects, such as land, mill or irrigation channels were not respected.[121]

When the canon sale procedure for immovable property was not respected, the canon norms provided for the return of the object by the seller upon compensation of the amount paid for it.[122] Even if the buyer was not aware of the sale procedure not being in line with the canon norms, he was obligated to return the object and was not legitimated as its owner. In such a case, canon norms provided for penalty by fine for the seller, depending on the damages caused.[123]

9. Conclusions

Albanian customary law was characterized by its unwritten form. As a result the main obligations and more concretely legal and civil obligations, which included sale and purchase contracts, were defined verbally providing their contractual conditions.[124] Canon norms provided for the sale contract in the framework of commercial regulations of the time. The execution methods were varied. Some of the main ways to settle a sale contract were: cash on hand, on the spot, payment with a deposit, payment after testing the goods, conditional purchase, or with an in-kind exchange of goods.[125]

They all required that a specific canon norm was respected in order for the trade, or sale contract, to be valid.

[102] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 108.
[103] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 53.
[104] ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 172.
[105] GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 93.
[106] ELEZI, I., *Labëria Customary Law*, Tirana, 2002, p. 137.
[107] MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 505.
[108] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[109] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[110] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[111] GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 93.
[112] GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 93.
[113] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 53.
[114] GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 93.
[115] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 108.
[116] ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 108.
[117] GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 93.
[118] ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 172.
[119] ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 172.
[120] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[121] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[122] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[123] GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 52.
[124] ELEZI, I., *Labëria Customary Law*, Tirana, 2002, p.129-135.
[125] ELEZI, I., *Labëria Customary Law*, Tirana, 2002, p.129-135.

Die Überdehnung des Raumes – Globalisierung im 16. Jahrhundert

(The Overexpansion of Space – Globalization in the Sixteenth Century)

Dominik Terstriep *

Abstract

Globalization is one of today's most challenging topics. It seems that there are – through technical progress – no longer any distances neither when it comes to space nor time; everything is close and simultaneous. Meanwhile the human species has not changed in a biological sense and seems outmoded. In this article I consider how much globalization humans can endure and how they react on it. This consideration, however, is moved to the sixteenth century that was also a time of globalization. This remote time can be compared to a laboratory for our situation today. I argue that we – from a European perspective – can perceive two simultaneous movements: on the one hand an incredible extension of the world (discovery of the so called New World) and of power (a world monarch) and influence (Christian mission), on the other hand a dissolution of political (the Holy Roman Empire) and religious (Reformation) unities and a retreat to the manageable (new ways of governing) and to inner life (mysticism). Is globalization too big for us little humans? Or does it need counterweights so that we do not get lost in its immensity?

Keywords: *Globalization; the 16th century; the New World; Charles V.; Philipp II.; communication; mission; human rights; reformation; mysticism; Ignatius of Loyola; Theresa of Avila.*

Prolog

Überdehnung des Raumes, ein Zuviel an Größe, unauslotbare Dimensionen – das könnten Stichworte unserer Tage sein, in der es technisch keine Entfernungen mehr gibt, weder räumlich noch zeitlich. Demgegenüber erscheint der Mensch reichlich antiquiert, eigentlich zu langsam für das, was er kann und erobert hat. Er hechelt seinem eigenen Fortschritt hinterher. Wie viel Globalisierung verträgt der Mensch? Wie kann er mit ihr umgehen? Das 16. Jahrhundert könnte eine Versuchsanordnung sein, das Phänomen der Globalisierung im Rückspiegel zu sehen, denn auch diese Zeit sah sich vor bis dato unvorstellbare Weiten gestellt. Die Globalisierung im 16. Jahrhundert veränderte Europa tiefgreifend und stellte viele Weichen, die bis heute bedeutsam sind. Es ist eine Zeit, die von gegenläufigen Bewegungen geprägt ist, die die Überdehnung zurückzubiegen scheinen: der Blick über Europa hinaus in die neuentdeckte Welt und zugleich der Zerfall der großen Einheit des Reiches in kleinere Einheiten; die Mission mit einer nie für möglich gehaltenen Ausdehnung des christlichen Glaubens in alle Welt und zugleich die westliche Glaubensspaltung; vom Weg nach außen (Eroberung und Mission) und zugleich vom Rückzug in das überschaubare Innen (Staatenbildung und Mystik).

1. „Plus ultra" – Karl V. als Universalmonarch?

a. Herr der Welt. Eine Gedenkmünze, die Karl V. 1548 prägen ließ, trägt folgende Inschrift: „Quod in celis sol / hoc in terra Caesar est – Was die Sonne am Himmel, ist der Kaiser auf Erden". Nach der Entdeckung der Neuen Welt durch Kolumbus 1492 – ein Fanal wie in unserer Epoche die Mondlandung 1969 – war Karls Reich tatsächlich ein Imperium, in dem die Sonne nie unterging: Deutschland und Spanien auf der einen, seine neue Herrschaft (Westindien) auf der anderen Seite der Weltkugel. Die kaiserliche Münze zeigt den kaiserlichen Doppeladler zwischen den beiden Säulen des Herkules, dem griechischen Symbol für die Grenzen der Welt. Damit ist Karl in die Nachfolge des antiken Heros gerückt, er ist der Held, der die ganze Welt bezwang. Sein Adler hält die östliche und westliche Welthälfte in seinen Fängen und breitet die Schwingen über den Atlantik. Seine Herrschaft hat eine jede Vorstellung übersteigende Größenordnung erreicht: zum Herzog von Burgund (größter Teil des westlichen Mitteleuropas) in Gent im Jahr 1500 geboren, 1516 durch Erbfolge König von Spanien und damit Herr über bedeutende Teile Italiens (Mailand, Sizilien, Neapel) und der Neuen Welt, als Neunzehnjähriger zum Kaiser gewählt. „Plus ultra – über alles hinaus" – Karls Wahlspruch auf der Rückseite der Münze war für den noch nicht einmal Zwanzigjährigen ersonnen und dem fast Fünfzigjährigen beinahe zur erfüllten Prophetie geworden. 1548 steht er auf dem Höhepunkt seiner Macht: „Während seine Vizekönige aus dem fernen Amerika eine Eroberung nach der anderen meldeten, […] hatte er selbst in Europa alle besiegt, die dem kaiserlichen Anspruch, den machtpolitischen Träumen der Habsburger im Wege standen" (Seibt 10): Franzosen, Protestanten (Schlacht

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bei Mühlberg 1547) und Türken (Tunis 1535). Nicht der Papst ist die Sonne, sondern der Kaiser, von dem jeder Glanz ausgeht. Karl ist Herrscher der Welt wie keiner vor ihm und keiner nach ihm. Zehn Jahre später wird er all dieser Macht entsagt haben durch Verzicht auf seine Herrschaften: Burgund, Spanien, Amerika und das römisch-deutsche Kaisertum. Als müder kranker Mann beendet er sein Leben Wand an Wand mit den Mönchen des Hieronymitenklosters – zwar nicht als Mönch, wohl aber als nachdenklicher und der Welt ferner Mann in Yuste/Spanien. Einer der angesichts der Größe seiner Herrschaft resigniert hat?

b. Universalmonarchie. Wo so viel Macht in einer Hand konzentriert war, legte sich der Gedanke einer Universalherrschaft nahe. Ein Weltkaiser, der allein die Ordnung und den Frieden sichern kann, der universale Gesetzgeber, der Ost und West zusammenhält, Garant menschlicher Gemeinschaft, *protector et defensor ecclesiae*, Herrscher über alle Herrscher – eine Vorstellung, die nicht neu war, aber jetzt in einer Person zum Greifen nah zu sein schien. Karls Großkanzler Mercurino di Gattinara (+ 1530) war der größte Propagandist dieser Weltreichsvorstellung. Nicht nur die Größe von Karls Herrschaftsraum begünstigte derartige Ideen, sondern auch die Bedrohung von außen und innen, die ein konzentriertes Handeln nötig machte: die Türkengefahr, die Reformation und Frankreich.

Schon damals traten allerdings Kritiker gegen eine solche Vorstellung auf den Plan. Neben der praktischen Unmöglichkeit wurden auch geistige Vorbehalte gemacht. Für die sieben Päpste, die Karl überlebte, war die Idee inakzeptabel, da sie sich in der höheren Position wähnten, ebenso wenig für Erasmus von Rotterdam (+ 1536), der Christus als einzigen Weltmonarchen sah. Zudem stieß bei vielen Theologen eine auf Eroberung gerichtete Weltmonarchie auf Widerstand.

c. Kommunikation. Wie präsent sein inmitten dieses Riesenreiches? Karl versuchte es zumindest in Europa mit einer rastlosen Reisetätigkeit, die an heutige Politiker erinnert. Er war der letzte Reisekaiser und das bis in alle selbstzerstörerischen Konsequenzen hinein. Das Heilige Römische Reich kannte keine Hauptstadt, sondern nur Krönungs- und Tagungsstädte. Auch die spanischen Reiche verpflichteten ihn zur Wanderschaft. Es wurde erwartet, dass er vor Ort Recht sprach. Karl führte das Amt eines reisenden Richters, dessen Zuständigkeit von der Nordküste Afrikas über Spanien, Italien, ganz Mitteleuropa bis an die Nordseeküste der Niederlande reichte! Anlässlich seiner Resignation zog er 1555 in Brüssel Bilanz seiner Reisen: neunmal nach Deutschland, sechsmal nach Spanien, siebenmal nach Italien, zehnmal in die Niederlande, viermal nach Frankreich, zweimal nach Afrika und England, die Reisepflichten innerhalb der einzelnen Herrschaftsgebiete unbenommen – das alles zu Schiff, reitend, als Gichtkranker (seit seinem 27. Lebensjahr) auch in der Sänfte. Die Reisegeschwindigkeit betrug auf dem Landweg im Durchschnitt 30 km pro Tag.

Präsent und universal wirksam sein konnte er auch durch die Kommunikation. Karl war ein großer Briefschreiber, der viel Vertrauen in die Schrift legte. Darin ist er seinem Zeitgenossen Ignatius ähnlich. Der Brief jener Zeit ist vergleichbar mit der eMail heute, das Medium, um Kontakt zu halten und sein Riesenreich durch Kommunikation zusammenzuhalten. „Karl, der soviel schrieb, der die Welt zu ordnen suchte im Gang seiner Akten und der mit einem Federstrich seiner Sekretäre die Gewichte der Macht verschob, war sein Leben lang damit befasst, in immer neuen Verfügungen, Heirats- und Erbdispositionen auch die künftige Ordnung festzulegen. Dass er auf diese Weise die Fülle der Gewalt zu bändigen suchte in das geschriebene, das leise, nur in Kurven anvertraute Wort, ist nicht nur eine Konsequenz der politischen Geographie. Es spricht auch für sein Herrschaftsverständnis“ (Seibt 178). Weltherrschaft war für ihn zunächst ein Ordnungsproblem.

Und dabei half ihm der junge, relativ gut organisierte Postdienst, der eine wesentliche Voraussetzung für die organisatorische, politische und militärische Schlagkraft der Regierung und Herrschaft Karls war. Allerdings setzten die Verhältnisse der Kommunikation des 16. Jahrhunderts auch deutliche Grenzen. Die große räumliche Distanz der Herrschaftsgebiete und der Kompetenzvorbehalt des Kaisers in allen wichtigen politischen Entscheidungen führten oft zu langen Verzögerungen bei Entscheidungen. Die gut organisierte Taxis'sche Post beförderte Briefe aus den Niederlanden, etwa aus Brüssel, über Paris und Lyon nach Toledo im Sommer in 12-14 Tagen; im Winter dauerte die Beförderung länger, in Kriegszeiten konnte man für diese Strecke auch über einen Monat brauchen; gar nicht zu denken an Briefe in die Neue Welt.

d. Die Neue Welt war gemessen an ihrer Größe und dem Einschnitt, den ihre Entdeckung und Eroberung anging, erstaunlich wenig präsent in Karls Denken. Er blieb, obschon Herr auch über Amerika, ein europäischer Herrscher. Zwar befasste er sich mit den neuen Kolonien, setzte Vizekönige ein, empfing Gesandtschaften, hörte Berichte, traf Bartolomé de las Casas, konnte letztlich aber nur über die Korrespondenz in der Neuen Welt regieren. Als reisender Richter einmal nach dem Rechten sehen, war unmöglich. Karl verschliss seine Kräfte weitgehend in Europa mit der Türkenabwehr, den Protestanten und Frankreich. Die Neue Welt war dagegen massiv präsent durch den riesigen Reichtum. Eine Globalisierung im Sinne eines Werttransfers zulasten Amerikas setzte mit der Kolonisierung ein. Die amerikanischen Edelmetalle wurden zum *nervus rerum* der kaiserlichen Finanzpolitik. Die Reichtümer konnten indes das klaffende Loch in Karls Kasse nie füllen, sondern waren schon vor Eintreffen in den Häfen verpfändet für neue Schulden, die sich in schier unendlicher Höhe türmten, um seine Kriegszüge und Regierungsunternehmen zu finanzieren. Ökonomisch war sein Herrschaftsbereich seinem Anspruch nicht gewachsen. Vielleicht fällt sein Rückzug 1556 nicht zufällig mit dem kurze Zeit später eintretenden Staatsbankrott zusammen, dessen Folgen sein Sohn Philipp II. schultern musste.

e. Der Einsame. Karls politisches Handeln hatte Konsequenzen für Millionen von Menschen in Europa und Übersee. Über Gesetze und Verordnungen, Reichs- und Gerichtstage, Reisen und Briefe, schließlich durch sein großes Gefolge war er ständig in Kontakt mit Menschen. Er war – wie man heute sagt – ein global player. Schaut man indes die Bilder seines Hofmalers Tizian (seit 1532) an, entdeckt man einen anderen Karl. Der Weltenherrscher ist auf ihnen stets allein abgebildet: Karl V. in der Alten Pinakothek in München, allein sitzend am Fenster in schlichter Kleidung, Ausdruck allein in Händen und Augen. Das Reiterstandbild nach dem Sieg von Mühlberg über die

Protestanten zeigt keinen Triumphator, sondern einen über die Welt blickenden Monarchen. Es fehlt bei beiden jeder Hinweis auf die Existenz anderer Menschen. „Folgt man Tizians Porträtgalerie, lebte und handelte Karl einsam auf dieser Welt“ (Seibt 37). Ein Einsamer, der zugleich mit der ganzen Welt in Kontakt stand. Der einzige Hinweis auf menschliche Gemeinschaft, zu der Karl sich auf Bildern bekennt, ist der Orden vom Heiligen Vlies, dessen Zeichen er um den Hals trägt. Menschen, die ihm persönlich nahestanden, waren seine Tante und Statthalterin der Niederlande, Margarethe von Österreich (+ 1530), sowie seine früh verstorbene Frau Isabella von Portugal (+ 1539).

Ein einziges Bild, das er in Auftrag gegeben hat, gesellt ihn anderen zu, und zwar der universalen Gemeinschaft des Himmels. Das letzte Gemälde Tizians, die *Gloria*, Karls Totenbild, zeigt ihn, wie er im Kreis der Himmlischen zum Gericht vor der Dreifaltigkeit antreten muss. Er legt die Krone des Abendlandes vor die göttliche Majestät, kniet demütig im Totenhemd in Verbindung mit den beiden Frauen seines Lebens und eingereiht in den Kreis der ganz Großen des göttlichen Bundes. Globalisierung auf katholisch. Einer, der allem eines höheren Zieles willen entsagt? Plus ultra! Oder der Griff nach dem Unbedingten, der dialektische Sprung über seine gescheiterte Politik hinaus? Während sein äußeres Kaisertum im Sinken war, blieb ihm das Kaisertum seiner Innerlichkeit in streng religiös gebundener Form – Karl der Beter. Der Haltepunkt angesichts einer Welt, die ihm immer mehr entglitt.

Mit der Abdankung in seinen Herrschaftsgebieten und im Reich endet faktisch das habsburgische Weltreich bzw. die supranationale Herrschaft des Kaisers, ebenso die Idee einer politischen und kirchlichen Einheit der Christenheit. Die nächsten Jahrhunderte werden von den Nationen und Staaten bestimmt. Was Karl mit ungeheurer Anstrengung in seiner Person vereinigt hatte, zerfällt nun. Ihm, der schon auf Erden die Krone abgelegt hat, bleibt nur die Zuflucht zum Herrn aller Herren. Entsagung, um in eine größere Gemeinschaft einzutreten, die keine Grenze mehr kennt.

2. Mission und Reformation

a. Wiederentdeckung der Mission. Die Entdeckung der Neuen Welt stellte die europäische Christenheit mit einem Schlag vor das Faktum, dass es unzählige Menschen geben muss, die von der Existenz der christlichen Botschaft nicht das Geringste wussten, geschweige denn davon gehört hätten. Muslime, so konnte man annehmen, wussten zumindest um das Christentum. Aber die Indios? Mit der einsetzenden Kolonisierung stand der Kirche das in ihrer Geschichte vielleicht größte Wachstum bevor, ein sehr ambivalentes. Die Entdeckungen stellten jedenfalls neu die Frage nach der Mission, die für Europa spätestens mit dem Sieg der *katholischen Könige* über die Mauren 1492 in Granada obsolet geworden war, denn Europa galt als christlich.

Mission ist allerdings kein Phänomen der Neuzeit. Franz von Assisi war der Erste, der ihr in seiner ersten Regel ein eigenes Kapitel gewidmet hatte. Anstelle der Kreuzzugsidee setzte er das Anliegen, das Christentum durch Predigt und Liebe zu verbreiten. Schon 1289 kamen Missionare bis nach China und gründeten dort Gemeinden. Im ausgehenden 13. Jahrhundert soll es China 30.000 Christen gegeben haben, die sich mit der wechselnden politischen Konstellation (1368 Sturz der Mongolendynastie) allerdings nicht halten konnten. 1473 fand der Venezianer Contarini in China weder Christen noch Kirchen vor. Dass ein weiterer Ordensstifter, Ignatius von Loyola, Mission als explizites Ziel seiner *Gesellschaft Jesu* formulierte, macht deutlich, dass man die Herausforderung der Neuen Welt sah und annehmen wollte.

b. Tabula rasa versus Akkommodation. Mission war nach dem Vertrag von Tordesillas, den Alexander VI. zwischen Portugal und Spanien 1494 vermittelt hatte, eine Staatsangelegenheit. Die über Europa ausgreifenden Mächte erhielten das Patronat und hatten für die Ausbreitung des Glaubens zu sorgen. Das bedeutete konkret Unterhaltspflicht für Klerus, Kirchen und Diözesen; Errichtung von Diözesen und Bischofsernennungen – ein Staatskirchentum wie später in den Ländern der Reformation. Aus dem Missionsauftrag wurde allerdings auch in aus heutiger Sicht fragwürdiger Weise das Recht zur Eroberung und Landnahme abgeleitet. Die *conquista* wurde ideologisch zu einem Glaubenskampf gegen das Heidentum aufgerüstet, wie die *reconquista* ein Kampf gegen den Islam gewesen war.

Zwar begleiteten Kolumbus keine Missionare auf seiner ersten Expeditionsreise, doch ab 1500 sind regelmäßig Priester und Ordensleute im Gefolge der Eroberer. Allerdings waren weder die Konquistadoren noch die Missionare auf die Begegnung mit der Neuen Welt vorbereitet. Wie auch? Kenntnisse über außereuropäische Kulturen waren kaum und im Fall von Amerika überhaupt nicht vorhanden. In Amerika stieß man auf die Religionen der Inka, Azteken und Maya, in Südindien auf den Hinduismus, in Indonesien auf den dortigen Islam und in Japan auf Schulen des Buddhismus, in Indien ebenso auf uralte christliche Kirchen, die den Missionaren kaum weniger fremd schienen als die anderen Religionen. Sprachlich und kulturell waren zunächst kaum Anknüpfungspunkte auszumachen. Diese Ausweitung des Raumes überstieg die Fähigkeiten der Europäer.

Die Antworten auf diese Unfähigkeit fielen sehr verschieden aus. In einer ersten Phase ging man nach der tabula-rasa--Methode vor. Kaum jemand hatte einen Blick für die hochentwickelten amerikanischen Völker. Man zerstörte deren Bräuche, Kulturen und Traditionen und meinte, erst dann könnten sie richtige Christen werden. Im spanischen Patronat erließen die Eroberungstruppen Proklamationen, in denen die Bewohner unter Androhung schwerster Strafen aufgefordert wurden, das Christentum anzunehmen und die Herrschaft des Königs anzuerkennen. Wer sich weigerte, verlor seine Freiheit oder das Leben.

Die Missionare billigten anfänglich dieses Vorgehen. Hernán Cortés (+ 1546), der das Aztekenreich eroberte, ist ein typischer Vertreter dieser Methode. Er ließ überall Kreuze errichten, verbot Menschenopfer, zerstörte Götterbilder und hatte Priester in seinem Gefolge, die den Glauben predigen sollten. Das Wesen der Missionsarbeit wurde vor allem in der Taufspendung gesehen. Von Unterweisung im Glauben konnte in den meisten Fällen nicht ansatzweise die Rede sein. Spektakuläre Massentaufen, die nach Europa gemeldet wurden, vermochten kaum, für eine christliche Durchdringung der Menschen zu sorgen.

Um dieses Phänomen besser aus der Zeit heraus verstehen und ihm etwas gerechter werden zu können, muss man den

theologischen Hintergrund bedenken. Ein Nichtgetaufter ging der vorherrschenden theologischen Lehrmeinung nach schnurstracks in die Hölle, d.h., er war verloren. Nur daher lassen sich die Rastlosigkeit von Missionaren wie Franz Xaver (+ 1552) begreifen. Es ging um die Rettung von Seelen, die sie antrieb. Die Globalisierung stellte die Theologen vor die große Frage, was mit denen sein wird, die ohne eigene Schuld das Evangelium und damit das Angebot zum Heil nicht kennen.

Ein Jesuit der ersten Stunde, Franz Xaver, steht stellvertretend für eine neue Nachdenklichkeit im Missionsprozess. Er sah nicht nur ein, dass Zwangsbekehrungen dem inneren Sinn des Christwerdens entgegenstanden – im portugiesischen Patronat war das ohnehin kaum möglich –, sondern suchte nach neuen Anknüpfungspunkten, die im Stichwort der Akkommodation, der Anpassung zusammengefasst werden können. Die Notwendigkeit, Kultur und Sprachen der Völker zu lernen, drängte sich ihm immer mehr auf; den Glauben, wie wir heute sagen, zu inkulturieren. Das führte auf der anderen Seite wegen mangelnder Kenntnisse nicht selten zu großen Missverständnissen. Wie übersetzt man etwa das Wort Gott ins Japanische, ohne den Aspekt eines persönlichen Gegenübers, das Christen wichtig ist, zu verlieren? Franz Xaver stieß mit seinen Übersetzungsexperimenten immer wieder an Grenzen. Seine Katechese bestand hauptsächlich darin, die Eingeborenen einige wenige Grundtexte in ihrer Muttersprache auswendig und / oder singen zu lehren: das Credo, die Zehn Gebote, das Vaterunser, Ave Maria, Salve Regina und das Confiteor. Mühsame Versuche, den neuen Verhältnissen Rechnung zu tragen.

Obschon es auch in Amerika ähnliche Anstrengungen gab, die immerhin dazu führten, dass letztlich dank einiger Missionare Sprache, Geschichte und Kultur der Ureinwohner in einigen Gegenden erhalten blieben (z.B. die der Guaraní in Paraguay), trotz all dieser Anstrengungen also übertrug man doch in den meisten Fällen die heimischen Verhältnisse auf die fremden Kulturen und schuf so geschlossene, ausschließlich latein-europäische Reiche. Über die Möglichkeit des Kommunionempfanges für Indios bestanden jahrzehntelang ernste Bedenken, gar nicht zu reden von der Zulassung zur Priesterweihe. Die Kirche bewahrte zumindest in Amerika bis ins 19. Jahrhundert hinein den Charakter einer ausländischen Institution. Globalisierung aus Sicht der Völker Amerikas und Asiens war fast durchweg Imperialismus.

c. Menschenrechte. Die Begegnung mit der unbekannten Welt warf über den Glauben hinaus und doch eigentlich eng mit ihm verbunden die Frage nach den Menschenrechten auf. Nachdenklichkeit, ja, Bestürzung stellte sich nicht nur angesichts der Missionsmethoden ein, sondern vor allem wegen der Art und Weise, wie die Europäer die Eingeborenen behandelten, die massenhaft dezimiert wurden. Klagen über das menschenverachtende Verhalten vieler Kolonialbeamter kehren refrainartig in jedem Brief Franz Xavers an den portugiesischen König Johann III. (+ 1557) wieder. Nicht zuletzt auf das beharrliche Drängen eines Bartolomé de Las Casas (+ 1566) verbot Karl V. die Versklavung der Indios. Sein leidenschaftliches Eintreten für die indigene Bevölkerung warf allerdings einen langen Schatten, da er den Import von Sklaven aus Schwarzafrika befürwortete – ein Argument, das er später bereuen sollte. Auf Haiti z.B., wo mehr als 70 % der Urbevölkerung ausgerottet worden waren, wurden die „Lücken" durch Afrikaner gefüllt. Eine gigantische Zwangsumsiedelung, die zusammen mit der europäischen Besiedelung ein globales Vielvölkergemisch in der neuen Welt erzeugte.

Das Erschrecken über die eigenen Greueltaten setzte bei Theologen neue Gedanken über Völker- und Menschenrechte in Gang. Der Dominikaner Francisco de Vitoria (+ 1546) entwickelte auf Basis naturrechtlicher Überlegungen eine Kolonialethik, „die der Sache nach echte Menschenrechte herausarbeitete" (LThK^2 10, 824) und die spanische Politik zumindest legislativ beeinflusste. Die Weitung des Raumes führte in seinem Fall auch zu einer Globalisierung des Rechtsbewusstseins bzw. zur Einsicht in die Notwendigkeit eines allgemein verbindlichen Völkerrechts.

d. Reformation oder die Globalisierung der Wahrheit. Während die Mission in der *Neuen Welt* im Aufschwung war und der Kirche einen teuer erkauften Zuwachs ungeahnten Ausmaßes bescherte, begann mit der Veröffentlichung der Thesen Martin Luthers 1517 die Kirchenspaltung der westlichen Christenheit. Während vielleicht mancher Missionar vom Ziel einer vollständig katholischen Welt träumte, zerbrach die Klammer des gemeinsamen Glaubens im Heiligen Römischen Reich. Als ob die Welt eine tatsächlich alles umfassende Katholizität nicht ertragen könnte. Manch einem mag das überinterpretiert scheinen, liegen doch die Gründe für die Reformation eher in einem Reformstau innerhalb der Kirche. Bemerkenswert bleibt aber doch das Zugleich beider Phänomene: die Ausweitung der alten Kirche in alle Welt und die allmähliche Bildung neuer reformatorischer Gemeinschaften ausgehend von Deutschland. Wie viel Globalität und Einheit vertragen die Kirche und ihr Glaube?

Die Reformation konterkarierte auf der einen Seite die universale Herrschaftsidee Karls V., der sich mit seiner Verhandlungspraxis auf dem Reichstag zu Worms 1521 zum Richter in kirchlichen Fragen machte, um alles ihm Mögliche zur Wahrung der Glaubenseinheit zu tun. Während seiner Herrschaft entwanden die Protestanten ihm tatsächlich einen nicht unerheblichen Teil seiner Macht. Auf der anderen Seite erbrachte die Reformation eine neue Art von Globalisierung. Zunächst durch die Berufung auf das eigene Gewissen, das herkömmliche Verbindlichkeiten, Gehorsams- und Loyalitätspflichten sprengte.

Nicht nur Luther berief sich darauf während des Wormser Reichstages mit dem berühmten „Hier stehe ich und kann nicht anders", auch viele Fürsten und Reichsstädte übernahmen mit der Berufung auf das eigene Gewissen in Glaubensdingen das Luthertum und stellten es über die kirchliche und kaiserliche Autorität. Das Nebeneinander der verschiedenen Konfessionen führte des Weiteren auf lange Sicht zur Idee der Universalität, zum berechtigten Nebeneinander verschiedener Überzeugungen. „Mit gleichem Recht und Unrecht treten für uns alle Gedanken und Religionen auf; alle haben, worüber wir längst übereingekommen sind, nicht ganz recht. Aber die Vielfalt der geistigen Welt und die Fruchtbarkeit der Konflikte zwischen gleichwertigen Vertretern haben wir uns längst stillschweigend entschlossen mit der Wahrheit zu bezahlen" (Schneider 55). Der Augsburger Religionsfriede von 1555 schuf die gesetzlichen Voraussetzungen für dieses Nebeneinander – eine pragmatisch-

-politische Lösung, die Glaubensdinge in den Bereich der Politik wandern ließ. Kirchliche Wahrheit in Gestalt päpstlicher oder konziliarer Autorität war kein bestimmendes Paradigma mehr.

3. „Non coerceri maximo, contineri tamen a minimo, divinum est – Nicht umschlossen werden vom Größten, sich umschließen lassen vom Kleinsten, das ist göttlich" (Hölderlin, Grabschrift des Loyola)[1]

Das 16. Jahrhundert ist geprägt von zwei gegenläufigen Bewegungen: vom Vorstoß in unüberschaubare Räume und zugleich vom Rückzug auf das Überschaubare. Drei Personen, die brieflich alle miteinander in Kontakt standen, bündeln noch einmal wie unter einem Brennglas, wie es gelingen oder misslingen kann, diese Spannung von Großem und Kleinem zu leben. Mystisch holen Ignatius von Loyola und Theresa von Avila sie ein und finden zu einer bis heute wirkmächtigen Form; politisch versucht es der Nachfolger Karls V. auf dem spanischen Königsthron, Philipp II., noch einmal mit aller Anstrengung und wird gegen Ende seines Lebens die Unmöglichkeit geahnt haben.

a. Ignatius von Loyola (1491-1556). Als 1521 durch die folgenreiche Kriegsverletzung im Dienst Karls V. Ignatius Lebenswende beginnt, wird der Wittenberger Mönch Martin Luther exkommuniziert. Es ist ein zufälliges Zusammentreffen. Doch ohne je Kontakt miteinander gehabt zu haben, sind Ignatius (auch Theresa) und Luther grundsätzlich einander zugeordnet. Sie standen vor den gleichen Herausforderungen, machten ähnliche Erfahrungen im Glauben, gelangten aber zu unterschiedlichen Konsequenzen.

Der Mensch als einzelner – dieser neuzeitliche Blick ist typisch für Ignatius. So beginnen die Exerzitien nach den Anweisungen für den Begleiter: „Der Mensch ist geschaffen […]" (EB 23). Alles andere ist für ihn geschaffen, nur Mittel und Gelegenheit zum Dienst für Gott. Bekommt da, wo menschliche Gemeinschaft unübersichtlich wird, der Einzelne ein solch starkes Gewicht? Immer wieder der Einzelne: Schon bei Ignatius Bekehrungsweg selbst: Wie bekomme ich einen gnädigen Gott? Luthers Frage. Und dann ein ähnliches Ergebnis: Ich selbst kann Gemeinschaft mit Gott nicht durch mein Tun herstellen. In den Bemerkungen für den Exerzitienbegleiter gibt es Hinweise auf das unmittelbare Wirken von Schöpfer und Geschöpf, dem dieser nicht im Wege zu stehen habe. Gottunmittelbarkeit ohne sichtbare Vermittlung – das war für die damalige katholische Kirche eine Idee, die arg nach Häresie roch. Es geht darum, dass der Schöpfer und Herr selber sich seiner ihm hingegebenen Seele mitteilt. Der einzige Vermittler ist Jesus Christus. Der Einzelne vor Gott ist in seiner unverwechselbaren Freiheit gerufen. Es ist klar, dass die Inquisitoren jener Zeit hellhörig wurden. Nicht zufällig war Ignatius insgesamt neun Inquisitionsprozessen ausgesetzt, die er alle mit Freispruch überlebte. Im Exerzitienbuch stößt man immer wieder das *pro me*: Der Übende wird aufgefordert zu erwägen, was Christus *für ihn* getan hat, um dann *seine* Antwort zu finden. Diese starke Betonung des subjektiven Pols erscheint wie ein Gegengewicht zu einer nach allgemeinem Eindruck veräußerlichten Religiosität und Kirche, deren Expansion sie nicht in die Tiefe, sondern nur in die Breite führte.

Doch belässt Ignatius es nicht dabei. Er weiß, dass das Subjekt das Gegenüber braucht. Geist will Leib! Und so betont er die Bedeutung der Kirche, obschon er in ihr gelitten hat. Die Berufung des Einzelnen hat sich innerhalb der sichtbaren Kirche zu vollziehen, die für ihn Ort des Geistes ist. Sie reißt den Menschen aus seiner subjektiven Vereinzelung und Verfangenheit heraus; sie gewährleistet, dass er nicht in seiner Subjektivität gefangen bleibt und sich Gottes Wort subjektivistisch zurechtlegt. Für seinen Orden bildet neben dem „Fühlen mit der Kirche" (EB 352-370) der Gehorsam den objektiven Gegenpol zum einzelnen Subjekt.

Die Bewegung der Exerzitien, das notwendige Miteinander von innen und außen, zeigt sich auch im Verhältnis von mystischer Erfahrung und Dienst. Alle Visionen und geistlichen Erfahrungen führten Ignatius immer tiefer in den Dienst für die Menschen zur Ehre Gottes. Die Erfahrung am Fluss Cardoner (Manresa), alles im Licht Gottes neu geschaut zu haben, führte ihn in die Welt, wo er in allen Dingen Gott suchen und finden wollte. Kein Rückzug in die Klosterzelle, sondern Weitung der Klosterzelle in die Welt, die nun zum Ort der Gottesbegegnung wird (Gott suchen und finden in allem, *contemplativus in actione*). Die Unterschiede zwischen profanem und religiösem Raum sind aufgehoben. Bestimmte Frömmigkeitsformen gelten nicht mehr als absolut. Entscheidend ist allein, wo Gott mehr gefunden wird.

Es ist eine Mystik des Dienstes, die Ignatius aus tiefer Gottergriffenheit lebt. Seit 1538 hat er Rom kaum mehr verlassen. Er lebte auf ein paar Quadratmetern und war dennoch mit Gott und der ganzen Welt verbunden – Franz Xaver wurde von dort 1540 nach Asien gesandt. Im Kleinsten sich einschließend und mit dem je Größeren in Verbindung. In Ignatius vereinen sich mystische Erfahrung und das Ausgreifen auf die globalisierte Welt, die am sichtbarsten in den nahezu 7000 Briefen wurde, die seine Räume verließen, gar nicht zu reden von den vielen, die bei ihm einliefen.

b. Theresa von Avila (1515-1582). Ihre eigene Familie spiegelt die gegenläufigen Bewegungen ihrer Zeit wider. Sie und ihr Bruder Antonio wählten das Koster, die sechs anderen Brüder schifften sich in die Neue Welt ein, von der nur zwei zurückkehren sollten. Ihre erste Motivation fürs Kloster war noch eher von persönlicher Heilsangst geprägt, die eigene Seele zu retten. Nach 18 Klosterjahren tritt für sie die Wende ein. Während im Norden die Bilderstürmer am Werk sind, wurde für sie ein Bild des Schmerzensmannes zum letzten Auslöser für ihre Lebenswende. Sie entdeckte, was Gott für sie getan hat, wieder das *pro me*. Seelen zu retten, wurde für Theresa zum wichtigsten Beweggrund. Seelen retten, dabei hatte sie die Länder der Reformation und der Neuen Welt vor Augen. Ziehen alle in die Welt hinaus, zieht sie sich mit ihren Schwestern in strengste Klausur zurück, setzt dem Eroberungsdrang der Neuentdeckung die *vita passiva* der Entdeckung des Inneren entgegen. Innere Sammlung statt

[1] Der Spruch stammt aus dem Werk „Imago primi saeculi Societatis Jesu a Provincia Flandro-Belgica eiusdem Societatis repraesentata", Antwerpen 1640. Dort findet sich ein Lob auf das Grab des heiligen Ignatius, das von einem ungenannten jungen flandrischen Jesuiten verfasst wurde (vgl. Rahner 1964:423ff). Hölderlin zitiert ihn am Beginn seines *Hyperion.*

Zerstreuung, Konzentration statt Expansion. Sie gründete den Karmel neu mit dem Ziel, die Kirche von innen her geistlich zu erneuern und wurde darin tatkräftig von Philipp II. unterstützt. In die Zeit größter Umbrüche setzte sie ihr „solo Dios basta – Gott allein genügt", das an Luthers sola-Formeln erinnert (*sola fide, gratia, sola scriptura, solus Christus*). Gott und sein Wirken sind der einzig verlässliche Grund, auf dem alle Unsicherheit des Menschen Halt findet.

Auch in ihrer Spiritualität findet sich wie bei Ignatius die Dialektik von innen und außen, subjektivem und objektivem Pol. Eine entscheidende Entdeckung war für Theresa das innere Gebet als aufmerksames Gespräch der Freundschaft. Ihr Bezugs- und Ruhepunkt war die Freundschaft mit Gott, den sie im eigenen Innern, von Angesicht zu Angesicht findet. Damit ist nicht eine grundsätzliche Abkehr vom äußerlich-vorformulierten Gebet gemeint, sondern von dessen routinemäßigem Vollzug. Das innere Gebet wurde ihr zur Pforte und Grundlegung alles Weiteren. In der *Seelenburg* beschreibt Theresa den Weg nach Innen, wo der Glaubende dem Geheimnis des Dreifaltigen Gottes begegnen und sich mit ihm vereinen kann. Ziel des Weges ist das Einswerden mit dem Willen Gottes.

Allerdings lehnte sie es leidenschaftlich ab, im mystischen Durchbruch auf alles Bildhafte zu verzichten und allein dem bildlosen Geheimnis des Göttlichen zu begegnen, wo doch Christus in alle Ewigkeit Mensch, d.h. gestalthaft und damit bildhaft bleibt[2]. Das Innen ist bleibend auf das Außen angewiesen. Es ist wie bei Ignatius auch eine Mystik der christologischen Zuspitzung: kein Zugang zum Geheimnis Gottes, es sei denn durch Christus. Und schließlich wie bei dem Basken die Bindung an die sichtbare Kirche: „Trotz aller Unmittelbarkeit des Glaubens hat sich der Gehorsam zu Gott im Gehorsam gegenüber der Kirche zu konkretisieren" (Greshake 78).

c. Philipp II. (1527-1598). War sein Vater Karl V. ein europäischer Herrscher, ist Philipp II. keine europäische Figur mehr, sondern eine spanische. Mit 32 Jahren kehrte er nach seinem grandiosen Sieg über die Franzosen bei St. Quentin nach Spanien zurück, ohne es jemals wieder zu verlassen. All seine Energie war von nun an darauf gerichtet, die Einheit Spaniens zu wahren, und zwar politisch wie religiös. In seiner Selbstabschließung wird deutlich, dass die Herrscher Europas keinen gemeinsamen Himmel mehr über sich wissen.

Auf der einen Seite steht die Beschränkung, auf der anderen die Weitung. Philipp verstand sich nicht nur als König, sondern gerade in seinem Amt auch als Apostel, der sich verantwortlich für die Seelen weiß. Sein Universalismus bestand darin, Seelen zu retten. Er war von namenloser Angst gepeinigt, wenn Seelen seines Volkes, das er dem Herrn entgegenführen sollte, verloren gehen könnten. Kein Aufwand war ihm zu groß, keine Ausgabe zu kostspielig, um Menschen in den Missionen für Christus zu gewinnen.

Der *Escorial* ist das Gebäude, das seine Geisteshaltung am besten symbolisiert. Es steht für den Rückzug nach innen, in dem doch die ganze Welt präsent ist, die gegenwärtige, die vergangene und die zukünftig-himmlische. Der *Escorial* war von Beginn an geplant als ein immenses Kloster mit Platz für 100 Mönche, im Zentrum die Kirche, als Grundriss ein Bratrost in Erinnerung an das Martyrium des heiligen Laurentius. Es ist ein Gelöbnisbau. Während der Schlacht von St. Quentin musste ein Laurentiuskloster zugunsten der Erstürmung der Stadt zerstört werden. Philipp gelobte einen Neubau zu Ehren des Heiligen, dessen Grundstein er 1563 legte und dessen Vollendung 20 Jahre währte. Hier versammelte er das, was er vor den Bilderstürmen im Norden zu retten vermochte: Bilder von Bosch, Breughel, van der Weyden und Reliquien in unermesslicher Zahl. Die Kirche wurde zur Ruhestätte seiner Vorfahren, die ihm besonders in der Person seines Vaters Karls V. Vorbild und Verpflichtung waren. Sein Bauwerk sollte inmitten einer Zeit der Verwirrung ein Gefäß der Wahrheit sein. Und auch der Allerhöchste sollte dort wohnen. Philipp untersteht ihm, der ihm sein Reich als Lehen anvertraut hat. Er lebt Wand an Wand mit Gott, dem er sich durch den Blick von seinem Schlafzimmer aus auf den Hochaltar der Kirche nah und verantwortlich weiß. Philipp hat sich eingeschlossen wie ein Mönch und weiß sich doch mit dem alles Umfassenden verbunden.

Aber auch die Welt drängte sich in den *Escorial* in Form von Gesandten und Tausenden von Briefen. Philipp, wie Ignatius auf die wenigen Quadratmeter seiner Zimmer beschränkt, stand mit einem riesigen Reich in Verbindung. Und er regiert es wie ein Schreibtischkönig. „Das ganze leidenschaftliche Geschehen der Welt schlägt sich für ihn auf knisternde Blätter nieder, die er unter seiner Lampe sammelt, sorgfältig mit Kommentaren versieht. Aus Peru und Mexiko, aus Neu-Mexiko, das man vor kurzem entdeckte und eroberte, aus Südafrika, Indien und von der Grenze des chinesischen Reichen, den Molukken und Philippinen finden die Papiere den Weg zu diesem einfachen Tischen" (Schneider 165). Ob er glaubte, so die Welt beherrschen zu können? Oder ist es die einzig ihm mögliche Weise, überhaupt angesichts dieses unvorstellbaren Raumes, der ihm anvertraut war, überleben zu können?

Die Bilanz seines Lebens nimmt sich durchwachsen aus. Religiös hat er einiges bewegt: die Kirchenreform gefördert und so dafür gesorgt, dass die Glaubenseinheit in Spanien gewahrt werden konnte. Auch politisch war er erfolgreich. Immerhin vermochte er sein Heimatland vor Krieg zu bewahren. Grandiose Siege wie die Seeschlacht von Lepanto 1571 gegen die Türken fielen in seine Regierungszeit. 1580/81 erlangte er die portugiesische Königswürde und war damit der König der gesamten Neuen Welt, der iberischen Halbinsel und Burgunds. Doch die Klammer des Glaubens, für die er lebte und in deren Dienst er seine Herrschaft sah, ließ sich nur auf der iberischen Halbinsel schließen. Und mit dem Besitz des Riesenreiches fielen ihm auch die Feinde zu. Die vier Ehen, die er aus politischen Gründen einging, waren meist kurz und erfüllten kaum die intendierten Zwecke: gesunder Nachwuchs um eines Thronfolgers willen, die Rekatholisierung Englands (Ehe mit Mary Tudor), Frieden mit Frankreich (Isabel) und innerhalb der Habsburger (Anna d'Austria). England steig zur rivalisierenden Macht auf den Weltmeeren auf und wurde zur veritablen Bedrohung der

[2] „Ich möchte vor meinen Augen immer sein Bild haben, wenn ich es schon nicht so, wie ich es wünschte, meiner Seele einprägen kann" (*Das Buch meines Lebens*, 22:1-12).

Kolonien, desgleichen die Nördlichen Niederlande, nachdem sie sich von Spanien 1581 losgesagt hatten und Philipp sein Land in einen jahrzehntelang währenden Krieg um seiner nördlichen Provinzen wegen verstrickte.

Epilog

Politisch und wirtschaftlich, kirchlich und religiös, gesellschaftlich und persönlich standen die Menschen des 16. Jahrhunderts vor gewaltigen Herausforderungen, die die Erweiterung der Welt mit sich brachten. In vielen Belangen war diese Zeit der Dehnung des Raumes nicht gewachsen, sie wurde zur Überdehnung. Doch haben sie ihre Antworten gesucht und gefunden, geglückte und gescheiterte Versuche, deren Konsequenzen zum Teil bis heute nachwirken. Viele Fragen, Ideen und Konstellationen, in denen sie standen, könnten solche auch unserer Zeit sein, der Zeit einer im Vergleich mit dem 16. Jahrhundert unglaublich gesteigerten Globalisierung.

Muss oder kann es eine Weltregierung geben? Wie sähe sie aus? Was braucht es um in Kommunikation zu bleiben? Wo sind umgekehrt Grenzen der Aufnahme von Informationen? Wie viel Gleichzeitigkeit hält der Mensch aus? Wie sich verhalten zu fremden Kulturen? Wie einen „clash of civilizations" vermeiden oder ihn gestalten? Suprematie einer Kultur oder gleichberechtigt-dialogisches Nebeneinander? Wie viel Verschiedenheit ist erträglich? Der Güter- und Wertetransfer zulasten der außereuropäischen Länder. Die Begegnung und Konfrontation verschiedener Religionen. Die Neuentdeckung des Inneren, der Mystik. Der Rückzug ins Überschaubare und die Suche nach Haltepunkten. Vereinzelung inmitten einer Flut von Kontakten… Das 16. Jahrhundert bleibt unserer Zeit in vielem unähnlich und fremd, doch es ist eine Versuchsanordnung, die mit vielen Problemlagen experimentiert hat, in denen wir heute in ähnlicher Weise stehen, und es hat die Welt innerhalb weniger Jahrzehnte bleibend verändert.

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Simplified Procedures in Criminal Matters and the Risk of Judicial Errors: The Case of Penal Orders in Germany

Raluca Enescu *

Abstract

The rise in simplified criminal procedures has been important over the last thirty years. While they certainly produce judicial decisions at a reduced cost, recent findings hint at their higher risk of judicial errors. This contribution sheds light on the birth of penal orders, first used by the police in Prussia as mandate orders. They were then included in the Code of Criminal Procedure of the German Empire. Nowadays numerous countries use penal orders to address minor offences and impose a penalty that became harsher over the decades. The shortcuts of this simplified procedure entails considerable risks of erroneous judicial decisions, precisely because of the features that made it successful in the first place. Courts are able to render justice more swiftly, but at what cost? The conversion of a prosecutorial investigation into a judicial decision requires safeguards to prevent erroneous judgments, especially wrongful convictions.

Keywords: *Criminal law; judicial errors; simplified procedure; penal orders; official statistics; Germany.*

1. Introduction

The first exoneration obtained by DNA evidence took place in Chicago on the 14th of August 1989. To this day, 362 wrongful convictions were overturned by DNA in the United States and many more judicial errors are uncovered by different means like cell phone evidence and new testimonies supporting the innocence of the convicted person. Since 1989, 2'497 exonerations were pronounced and 22'010 years of imprisonment were wrongfully served over the last thirty years. The National Registry of Exonerations offers detailed information about each case and represents an invaluable tool for the study of judicial errors [1]. The causes of wrongful convictions are known and apply beyond the United States: biased police investigation, prosecutorial misconduct, informant testimony, mistaken eyewitness identification, erroneous testimonies, false confession, faulty forensic evidence, and inadequate legal counsel [2].

Far from being limited to an adversarial justice system and especially to the United States, wrongful convictions are also observed in countries with an inquisitorial procedure, such as the Netherlands, Norway, France, Italy, Spain, Sweden, Finland, and Germany to name just a few [3]. Unfortunately the absence of national registries makes it difficult to provide a figure and the few available estimates of wrongful convictions concern serious crimes punished by years of imprisonment [4]. In 2015, Ralf Eschelbach, judge at the Federal Court of Justice, the highest court of Germany, estimated that every fourth conviction was erroneous [5]. Janisch describes accurately the situation not only in Germany, but throughout Europe: « [This ratio of wrongful convictions] would be a horrendous finding, however there is no solid proof for this number. The absence of statistics in itself is already a small scandal. In 2013, 1'682 requests for a new trial were filed. Their success rate would hint at the error rate of the justice - unfortunately there are no numbers » [6]. Indeed, courts and the Federal Statistical Office of Germany register merely the requests for new trial or Wiederaufnahmeanträge, but not their outcome [7]. It is therefore not possible to discover if a new trial was granted and led to an exoneration, or if it confirmed the conviction. Knowing if the final verdict has been overturned or not would allow to estimate the number of ju-

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1 THE NATIONAL REGISTRY OF EXONERATIONS. Available at: https://www.law.umich.edu/special/exoneration/Pages/about.aspx (Accessed: 28 September 2019).

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6 JANISCH, ibid.

7 STATISTISCHES BUNDESAMT (DESTATIS), Rechtspflege 2017, *Strafgerichte*, Fachserie 10, Reihe 2. 3. Wiesbaden, 2018.

dicial errors. For now, it is sadly not possible to observe how many retried convictions were wrong and wrongful convictions remain a black hole in the criminal justice data. This situation has severe consequences on the study of this phenomenon as well as on solutions to improve the current state of affairs.

2. Judicial errors in Germany - A closer look at new trials in Hamburg

While the estimate of Eschelbach is very high, there is no reason to assume that the German criminal justice system causes more wrongful convictions than the one of another European country. The most recent attempt to estimate wrongful convictions in Germany shed light once again on the limits of this task, but went one step further in focusing on new trials and penal orders [8]. Requests for new trial ask to vacate the final judgment after all appeals remained unsuccessful, and aim at opening a new trial. These requests are filed only when an error is assumed or at least a serious doubt concerning the verdict exists in the opinion of the defense or of the prosecution. They are good indicators of potential judicial errors in favor of the accused, but also to his disadvantage, in which case the prosecutor files the request. In 2015, 1'609 requests for new trial were sent to German courts, out of which 459 requests to the disadvantage of the defendant and 1'150 to his advantage [9].

In her doctoral dissertation, Dunkel sets herself the challenging task to access all requests for new trial treated by to the courts in Hamburg [10]. Her valuable contribution sheds light on the unexpected hurdles encountered in the study of judicial errors. After three attempts coupled with official letters with different institutional partners, she was granted the permission to access the requests of new trial [11]. A second hurdle emerged shortly afterwards: requests for new trial did not have a specific sign that could sort them out from any other type of judgment. This problem had been raised as early as 1965 by authors investigating wrongful convictions and has not been solved until nowadays [12]. Judges and prosecutors were put to contribution and asked to remember any new trial that could help identify its reference number in the digital register of cases. Two court databases, MEGA and ForumStar, were additionally used to identify new trials, even if one court registered wrongfully its data in MEGA. Last but not least, it was not clear if the databases were showing new trials or merely the request for new trial sent to a court. Interviews with prosecutors in Hamburg clarified that only the requests were registered, even if a new trial was later denied by the court [13]. Due to limited human resources at the prosecutor's office, the material of 115 requests for new trial could be gathered after a time-consuming procedure: the prosecutor in charge had to produce an approval letter for the viewing of the documents, then the volumes with the documents were sent from their storage location to the prosecutor's office, finally the prosecutor had to view the material and deliver his final approval. The files could then be studied at the location of the prosecutor's office, in a room reserved for this task. Unfortunately, as a matter of principle, special volumes addressing DNA cases could not be accessed, which represents a major impediment to the study of wrongful convictions [14].

Out of 115 cases, 67 were mistakenly registered as new trials by the courts. Dunkel expected an error rate of classification but this figure went beyond her expectations. The courts could not provide an explanation for the mistakes and suggested that the new databases might have led to many errors until they could be mastered by the clerks [15]. After this drastic selection, the material consisted of 48 requests for new trials over thirteen years. Unfortunately, the number of requests for new trial does not correspond to the figure of ca. 40 per year that the department of justice in Hamburg transmits to the Federal Statistical Office [16]. According to the Federal Statistical Office, the overall number of requests for new trial in Hamburg amounts to 493 for these years, which means that the sample represents 10.3% of all requests. How this substantial difference between announced requests for new trials and retrieved ones could happen remains a mystery. In conclusion, 48 requests for new trials between 2003 and 2015 is the maximum number that could be gathered in Hamburg after major efforts. Eight Local Courts or Amtsgerichte received 39 requests for new trial and the Regional Court or Landgericht dealt with 9 requests. The files showed that the requests for new trial concerned 44 suspected errors to the disadvantage of the defendant and 4 to his advantage [17]. Out of these 48 erroneous decisions, 2 convictions were sent as court orders or Beschlüsse, 19 convictions were wrongfully obtained under a complete procedure with a trial resulting in a judgment or Urteil, and 27 were sent as penal orders or Strafbefehle. The infractions tried were robbery, blackmail, fraud for the most common ones, then dangerous disruption of rail, ship,

[8] MARXEN, K. & TIEMANN, F., *Die Wiederaufnahme in Strafsachen*. Heidelberg, 2014.
[9] STATISTISCHES BUNDESAMT (DESTATIS), Rechtspflege 2015, *Strafgerichte*, Fachserie 10, Reihe 2. 3. Wiesbaden, 2016.
[10] DUNKEL, B., *Fehlentscheidungen in der Justiz – Systematische Analyse von Wiederaufnahmeverfahren in Strafverfahren im Hinblick auf Häufigkeit und Risikofaktoren*. Baden-Baden, 2018.
[11] DUNKEL, ibid., p. 170-171.
[12] KIWIT, W., *Fehlurteile im Strafrecht – Entstehung, Gesetzmässigkeiten und Möglichkeiten zur Vermeidung untersucht an Wiederaufnahmeverfahren im Oberlandesgerichtsbezirk Hamm aus der Zeit von 1950 bis 1958*. Münster, 1965; PETERS, K., *Fehlerquellen im Strafprozess – Eine Untersuchung der Wiederaufnahmeverfahren in der Bundesrepublik Deutschland*. Karlsruhe, 1970; SCHÖNEBORN, C., *Strafprozessuale Wiederaufnahmeproblematik – Eine funktionalistisch angelegte Aktenanalyse gescheiterter Wiederaufnahmeverfahren*. Tübingen, 1980.
[13] DUNKEL, ibid., p. 173.
[14] DUNKEL, ibid., p. 175.
[15] DUNKEL, ibid., p. 176.
[16] STATISTISCHES BUNDESAMT (DESTATIS), Rechtspflege 2015, *Strafgerichte*, Fachserie 10, Reihe 2. 3. Wiesbaden, 2016.
[17] Due to the high proportion of erroneous decisions to the disadvantage of the defendant, the contribution focuses on wrongful convictions while reporting also the findings about erroneous decisions in favor of the defendant. Out of four cases retried for a harsher sentence, three were caused by a confession to the offense after the verdict and one was caused by an inaccurate statement of a witness or an expert.

air or road traffic, leaving the scene of an accident without cause, cultivating, producing or trading narcotic drugs, bodily harm, and possessing or transferring guns[18]. 32 sentences imposed a fine, 6 consisted in suspended imprisonment time, 8 in imprisonment and 2 decisions were acquittals. The success rate of the requests for new trial shows that 25 requests were successful and led to an acquittal in 15 cases, a closing of the proceedings in 4 cases, a milder sentence in 3 cases, and a more serious sentence in 3 cases. Given the fact that the majority of suspected judicial errors follows a speedy track at Local Courts and that their correction is far from being easy, these findings suggest that penal orders are at higher risk of producing judicial errors.

3. The emergence of penal orders in modern criminal law

In 1830, Prussia faced an uprising in Polish territories and the police could not effectively deal with the amount of minor criminal cases. A new procedure called mandate procedure or Mandatsverfahren was created and codified fifteen years later in the Prussian procedural law. This procedure was used in police courts across the empire and allowed to answer quickly to minor infractions[19]. The mandate procedure was reserved first to cases without imprisonment, but it was quickly extended to more serious offences bearing up to six weeks of imprisonment. If the defendant opposed the sentence, the judge could not change it, only the prosecutor was able to do so, in which case he would threaten the defendant with a harsher punishment. In 1877, the Prussian procedure became part of the Code of Criminal Procedure of the newly formed German Empire and gained a new name, the penal order procedure or Strafbefehlsverfahren[20]. At that time, penal orders were mostly based on a police report of an arrest in flagrante. During World War I, the police procedure was transformed into a normal criminal procedure that could be used alternatively to a complete trial and soon it became used in one-third of criminal cases. After the end of the war, criminality rose due to unfavorable social conditions like unemployment and the depression, and courts were overwhelmed by new cases. This social environment led to the first increase of imprisonment time from six weeks to three months[21]. By 1936, the sentence rose to six months and penal orders were used in a bit more than two-thirds of cases. At the end of World War II, the maximum imprisonment differed according to the occupation zone: in the American and French zones three months, and in the British and Russian zones six months. Once the laws of criminal procedure were unified in West Germany, three months of maximum imprisonment were retained, while in East Germany six months were applied[22]. It is only in 1970 that the punishment changed drastically and imprisonment became not possible anymore for a reason based on the respect of a fundamental right of the accused: a judge who did not see or hear the defendant and who had merely a written file should sentence only to fines. Unfortunately this element changed in 1993 when penal orders were extended to suspended prison sentences of maximum one year[23].

Penal orders are written only procedures that bypass the court in qualifying the criminal act and determining the appropriate sentence. Although Germany was the first country to introduced this simplified procedure during the first half of the 19th century, the frequency of its application raised in the last thirty years[24]. In 1987, the Council of Europe encouraged its member states to introduce and increase the use of penal orders, presented as « out of court settlements »[25]. Apart from European countries like Italy, France, Croatia, Finland, the Netherlands, and Scotland, Switzerland also introduced penal orders in 2011[26]. Taking model on *Strafbefehle*, Greece is the last country to have introduced penal orders on the 1st of July 2019[27]. The objective of simplified procedures has always been to deliver a speedy justice in simple cases with minor punishment. In this way, the time needed to close a case is reduced, which would in turn decongest the courts[28]. Clearly, what is meant by minor punishment has been subject to an increase since the first application of mandate orders in Prussia.

At the time of their appearance as a mandate procedure, imprisonment sentences were excluded but this changed quickly and steadily over time: since 1993, the maximum sentence reaches one year of suspended prison term in Germany, and even six months of imprisonment in Switzerland. The main characteristics of penal orders is the absence of contradictory elements: the public prosecutor directs the investigation, which is carried out against the defendant, the police do not interrogate the defendant, there are no court hearings or public debate, and the whole procedure is written only. The penal order is issued, in theory, only after a preliminary investigation has been completed. By then, the prosecutor has decided that there is sufficient cause to charge, which means that a trial would not help to clarify the facts of the case[29]. The defendant has the right to access all files of the preliminary investigation and thus he can estimate the strength of the case against him before deciding to accept or op-

18 DUNKEL, ibid., p. 180-181.
19 VIVELL, A., *Die Strafbefehlsverfahren nach Eröffnung des Hauptverfahrens – Eine kritische Untersuchung*. Frankfurt, 2006, p. 26.
20 VIVELL, ibid., p. 28-31.
21 VIVELL, ibid., p. 33.
22 VIVELL, ibid., p. 37.
23 VIVELL, ibid., p. 42-43.
24 STATISTISCHES BUNDESAMT (DESTATIS), Rechtspflege 2017, *Strafgerichte*, Fachserie 10, Reihe 2. 3. Wiesbaden, 2018.
25 COUNCIL OF EUROPE, Committee of Ministers. Recommendation R(87) 18, *Concerning the Simplification of Criminal Justice*. Strasbourg: September 18, 1987.
26 MELUNOVIC MARINI, K., Strafbefehl erhalten – was tun? In: *Neue Zürcher Zeitung*, 2018.
27 ALVANOU, M. C., Penal Order in Greece: A new Era for the Rights of the Defendant? In: *JURIST – Professional Commentary*, 2019.
28 THAMAN, S. C., The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform? In: LUNA, E. & WADE, M. (Eds.), *The Prosecutor in Transnational Perspective*. Oxford, 2012, p. 156.
29 VIVELL, ibid., p. 76.

pose the penal order. In reality, prosecutors reply with an offer of a slightly shorter sanction or a fine, before granting the access of the investigation files, so that the defendant is pushed to accept the bargain. It is important to remember that at this stage, the defendant has no legal counsel yet and moreover he ignores the facts of the charge that he will receive [30]. In Italy, the Code of Criminal Procedure goes further: since 1988, the procedure for penal orders does not require anymore a complete investigation of the facts, but can merely gather the necessary evidence in order to determine if there is *probable cause* to charge [31]. In other words, a penal order can be issued even if a complete investigation might have pointed at a failure to charge [32]. Thaman writes that prosecutors issue penal orders solely on the base of police reports in the absence of an investigation to check the accusation. The judge who is asked by a prosecutor to accept the penal order will have only a police report, the birth certificate and basic information about the defendant [33].

The primacy of penal orders over a complete procedure has been promulgated in the German Code of Criminal Procedure (Strafprozeßordnung, StPO) in 1987: if the prosecution deems a complete procedure as unreasonably expensive and unnecessary after the preliminary investigation, a penal order and not a complete procedure has to be chosen [34]. The judge who receives a request for a penal order from the prosecutor decides to sign it or not, after determining from the evidence in the prosecution file if there is a probability of conviction [35]. In practice, the judge accepts the penal order – rarely he rejects it and sets the case for trial – and the defendant receives the decision by mail informing him of the infraction, the sentence and the delay of fourteen days to object by sending a letter to the court that delivered the penal order [36]. An opposition automatically sets up a trial at the local court and a complete procedure starts: a two-sided investigation takes place, followed by court hearings and a public debate. If there is no opposition, the decision equals a conviction rendered by a court at the end of a trial and the sentence has to be executed. Penal orders represent thus the shortest and fastest way for judges to impose a sentence.

4. Erroneous penal orders

Apart from not registering the outcome of requests for new trial, the Federal Statistical Office of Germany lists convictions emanating from penal orders together with convictions after a complete trial. Therefore there is no possibility to distinguish convictions emanating from simplified or complete criminal procedures. Statistics show merely the number of convictions without making a difference between penal orders and full trials [37]. While we can't access the number of convictions obtained with penal orders, it is possible to observe the number of penal orders requested by public prosecutors. The only report that informs about the amount of penal orders in Germany is carried out by the University of Konstanz as the Konstanz Repository on Sanctioning [38]. The last report published in 2017 with data from 2015 shows that prosecutors requested 542'643 penal orders during that year, which represents more than half of the 997'375 decisions to prosecute a case. The categories of infractions were in descending order road traffic offences, fraud and embezzlement, white-collar offences, theft and unlawful appropriation, infractions punished by the Narcotics Law, intentional bodily harm, offences against sexual self-determination. In 2001, Heinz found that two-thirds of convictions in criminal cases were obtained with a simplified procedure of penal order [39], a ratio that is confirmed with data from 2015 in the Konstanz Repository. In Baden-Württemberg penal orders represented 79% of all convictions, out of which 90% for fines, whereas in Nordrhein-Westfalen penal orders amounted to 64% of all convictions with 76% of fines. The remaining sanctions of 990 for Baden-Württemberg and 862 for Nordrhein-Westfalen were suspended imprisonment terms. Far from constituting an exception, it is obvious that penal orders became the rule for judging defendants. Due to the suspected error rate as shown with requests for new trial in Hamburg, penal orders should be placed under particular scrutiny. This finding alone raises serious concerns about the defendant's right to a fair trial as guaranteed by the European Convention of Human Rights, which will be discussed in the next section. Meanwhile, until a wrongful decision is overturned, the penalty – as each final verdict – is written in the Central Criminal Register with heavy consequences for the accused [40]. Whenever a police clearance certificate called Certificate of Good Conduct is required, the conviction will appear and the person will not be able to work as a teacher, a parcel service driver or a cleaner among others [41].

5. Discussion

Although penal orders are reserved for minor offences, their maximal sentence has become steadily but surely harsher: from fines only, sanctions comprise nowadays suspended prison sentences up to one year. This tendency will certainly continue in

[30] DAHS, H., Absprachen im Strafprozess – Wirksamkeit eines Rechtsmittelverzichts. In: *Neue Zeitschrift für Strafrecht*, vol. 10, 2005, p. 581.
[31] THAMAN, S. C., *Comparative Criminal Procedure – A Casebook Approach*. Durham, 2008, p. 41-42.
[32] NICOLUCCI, G., Il Procedimento per Decreto Penale. Milan, 2008, p. 27-29.
[33] THAMAN, ibid., p. 67-68.
[34] StPO § 407. In proceedings before the criminal court judge and in proceedings within the jurisdiction of a court with lay judges, the legal consequences of the offense may, in the case of misdemeanours, be imposed, upon written application by the public prosecution office, in a written penal order without a main hearing. The public prosecution office shall file such application if it does not consider a main hearing to be necessary given the outcome of the investigations.
[35] StPO § 408. If the judge does not consider that there are sufficient grounds for suspecting the indicted accused, he shall refuse to issue a penal order.
[36] GEIS, M., *Überzeugung beim Strafbefehlserlass*. Frankfurt, 2000, p. 27.
[37] STATISTISCHES BUNDESAMT (DESTATIS), *Rechtskräftig verurteilte Personen in Deutschland*. Wiesbaden, 2017.
[38] HEINZ, W., *Kriminalität und Kriminalitätskontrolle in Deutschland – Überblick 2015*, Konstanzer Inventar Sanktionsforschung. Konstanz, 2017.
[39] HEINZ, W., Der Strafbefehl in der Rechtswirklichkeit. In: BRITZ G. et al. (Eds.), *Grundfragen staatlichen Strafens*. Munich, 2001, p. 272-313.
[40] DAHS, H., *Handbuch des Strafverteidigers*. Köln, 2015. p. 614.
[41] See the Certificate of Good Conduct required by the website providing freelance cleaners *helpling* in Germany, France, Italy, Ireland, the Netherlands, the UK, and Switzerland. Available at: https://www.helpling.de/infoportal/certificate-good-conduct (Accessed: 27 September 2019).

the future and more serious infractions will be tried with simplified procedures. The short delay to oppose a penal order[42] makes it extremely difficult for the accused to defend himself, after the decision is understood, which might not be the case in many instances. Moreover, penal orders might be accepted instead of risking a harsher sentence in a trial[43]. Empirical data should investigate the understanding of penal orders and the factors that influence the absence of opposition.

Once the penal order enters in force, the decision is filed in the Central Criminal Register and the penalty has to be executed. The Register has entries on 6.3 million individuals, which will be deleted "in the interest of resocialisation"[44] after the expiry of time limits as found in § 34 and § 46 of the Federal Central Criminal Register Act[45]. The convictions are suppressed first from the Certificate of Good Conduct after a minimum of three years, and are then removed from the Register after a minimum of five years, depending on the type of sanction. With a wrongful conviction, the consequences for a job search are therefore spanning over a long period of time during which the so-called resocialisation will be made difficult if not impossible.

The efficiency of the criminal justice to deal with minor offences is based on bypassing the court. The costs incurred by the judiciary for judges, audience rooms, court clerks among other are minimized at the expense of the right to a fair trial. Apart from the entitlement to a « fair and public hearing within a reasonable time by an independent and impartial tribunal established by law », article 6 of the European Convention of Human Rights states that the minimum rights of a person charged with a criminal offence are:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defense;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court[46].

Penal orders hardly follow the main right to a fair trial, the public hearing. It should not come as a surprise that the minimum rights seem difficult to be respected by the simplified procedure of penal orders. The language used to communicate the accusation is often not understood by the individuals who receive the letter informing them of the decision of the judge and the penalty requested by the public prosecutor. The period of time granted to oppose the court's decision is rather short, fourteen days, and does not allow the accused to act accordingly, even if the opposition does not require a motivation. Nevertheless in order to oppose, one must have an idea about his line of defense, which could be developed only if more time would be granted by the procedure. It would be interesting to gather evidence from the situation in France where the period is the longest among European countries: do people object more often to penal orders? The access to legal assistance is also limited since the only case in which the costs are covered by the state is when an imprisonment sentence is recommended by the public prosecutor. In all other cases, legal assistance has to be covered by the accused, which of course refrains many persons from opposing penal orders even when they are deemed erroneous. Moreover, the lack of examination of witnesses testifying on his behalf and the absence of information regarding incriminating evidence is very problematic. From the perspective of the accused, the lack of transparency of a penal order, sometimes until its postal delivery, is very disturbing for whomever wishes to prepare his defense. Lastly, given that there is no court audience, at least until a penal order is opposed, the right to have the free assistance of an interpreter should be transposed into the right of a free translation of the penal order in a language that the defendant can speak or at least understand fully.

When fundamental rights are not respected, the risk of wrongful convictions grows higher. Judicial errors in trials with a complete procedure show that these rights have been violated: non-disclosure of evidence by police forces or by the public prosecutor and absence of or inadequate legal assistance[47]. The simplified procedure of penal orders institutes their almost certain violation and in doing so, opens the door to numerous potential judicial errors. Kühne goes further in writing that the current procedure of penal orders manifests an anti-constitutional procedure[48]. The violation of the right to a fair trial is even more problematic, since it is extremely difficult - almost impossible - to correct a wrongful decision due to the rigidity of the justice system. After all, the resistance to correct judicial errors reflects the protection of the final judgment rendered by courts and secures the stability of the law[49]. In the best case, when a wrongful conviction is overturned after a lengthy new trial, the com-

[42] Fourteen days in Germany and the Netherlands, fifteen days in Italy, thirty to fourty-five days in France, which is the only country to offer sufficient time, but even seven days in Lithuania, eight days in Croatia, three to ten days in Norway, ten days in Estonia and Switzerland.

[43] RENNERT, C., Rechtsberatung in Strafbefehlsverfahren. In: *freispruch – Mitgliederzeitung der Strafverteidiger Vereinigungen*, vol. 14, 2019, p. 39-40.

[44] FEDERAL OFFICE OF JUSTICE, The Federal Central Criminal Register. Available at: https://www.bundesjustizamt.de/EN/Topics/citizen_services/BZR/BZR_node.html (Accessed: 28 September 2019).

[45] See the Federal Central Criminal Register Act as published on 21 September 1984, last amended by Article 1 of the Act of 18 July 2017. Available at: https://www.gesetze-im-internet.de/englisch_bzrg/englisch_bzrg.html (Accessed: 28 September 2019).

[46] COUNCIL OF EUROPE, European Court of Human Rights. *European Convention on Human Rights*. Strasbourg: September 21, 1970.

[47] RAMSEY, R. J. & FRANK, J., Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors. In: *Crime & Delinquency*, vol. 53, Nr. 3, 20017, p. 436-470.

[48] KÜHNE, H.-H., *Strafprozessrecht – Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts*. Heidelberg, 2015, p. 702.

[49] GRECO, L., *Strafprozesstheorie und materielle Rechtskraft – Grundlagen und Dogmatik des Tatbegriffs, des Strafklageverbrauchs und der Wiederaufnahme im Strafverfahrensrecht*. Berlin, 2018, p. 330.

pensation reflects a second resistance of the criminal justice system to admit its own mistakes. The law for compensation in criminal matters or Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen was promulgated in 1972. This code sets the compensation for financial losses and per day of imprisonment granted if the person makes an official request to the public prosecutor who was responsible for the initial wrongful charge. Financial losses are subject to taxation while compensation for imprisonment days is tax-free. Nowadays the amount per day deprived of liberty is 25 Euros, until 2009 it was 11 Euros, a shameful amount. Wolfgang Neskovic, former judge at the Federal Court of Justice, calls the response of the state to victims of wrongful convictions a « sad and shameful chapter in justice policy » and « does not understand why legislators have so little empathy towards innocent convicted people »[50]. The president of the German Association of Judges, Jens Gnisa, supports a modest increase of the rate per day[51]. At the conference for Justice Ministers in 2017, a statement requested the Federal Minister of Justice to draft a new law that would increase this amount, as agreed by Berlin, Hamburg and Thuringia[52]. In a study investigating 29 exonerations for which the person requested compensation, the decision came after an average time of fifteen months, with a compensation time ranging from one month to seven years and five months. The wrongfully convicted people expressed in interviews that the state authorities used artificial tactics as a rule to delay their decision; they felt that this time had no end in sight[53]. This return of experience bears resemblance to victims of crimes who suffered in their contacts with the police or with judicial authorities a treatment that gained the name of double victimization[54].

6. Conclusion

A penal order is a simplified criminal procedure without a trial. In place of the verdict, a penal order is issued by the judge upon request of the public prosecutor. The preliminary investigation is only sufficient to charge a person, but not to prove his guilt. When the judge signs it, the accusation becomes a judgment of guilt in what is called prosecutorial sentencing[55]. A penal order is, therefore, equal to a verdict, if the recipient doesn't object within two weeks. If he does object, an additional problem arises: the trial judge will be the judge who approved the penal order and was initially convinced of the probability of conviction[56]. Violent crimes such as rape and homicide are punished by severe sanctions and draw a great deal of public attention. For this reason, we hear more often about wrongful convictions for these crimes, whereas those wrongfully convicted for a minor offense are neither interesting for the media nor are the defendants likely to try to have their penalty quashed. But fines and short sentences that are wrongfully decided can cause severe limitations in the daily life and should not be a reason to excuse wrongful convictions. In this regard, the Criminal Cases Review Commission in the United Kingdom looks into potential wrongful convictions without any criteria as to the seriousness of the case. The result shows that serious crimes constitute the majority of cases, but the CCRC also reviews plenty of less serious offenses[57].

Because of penal orders use in two-thirds of criminal cases and their risk to produce wrongful convictions, it is of paramount importance to advocate for better data delivered by the courts and the Federal Statistical Office. There is a necessity more than ever to distinguish convictions with penal orders from other types of convictions, and to record the requests for new trial, their outcome and exonerations by procedure, simplified or complete. Until such an improvement takes place, the investigation of penal orders and their risk of wrongful conviction should be pursued in order mainly to prevent the occurrence of such a conviction. Interestingly, some scholars state that penal orders are not really judgments of guilt, but merely a confirmation of probable cause. In other words, penal orders allow punishment on suspicion because the required burden of proof is sufficient suspicion[58] leading to a « probability of conviction »[59]. To shed light on this matter, our forthcoming project will investigate a corpus of penal orders and explore solutions to detect a potential wrongful conviction, so that the decision can be opposed in time, before damageable consequences take place for the defendant.

Lastly, an interdisciplinary center dedicated to the examination of wrongful convictions is long overdue in Germany. For optimal results, the work of such a center should be divided in three sections: the first section would investigate empirically wrongful convictions, and maintain a database of successful new trials, *Wiederaufnahmeverfahren*, aiming at a national registry of exonerations. The second section would offer legal counseling in cases selected as potential wrongful convictions regardless of their penalty, with the help of students supervised by experienced scholars[60]. The third section would transfer knowledge and offer valuable training to professionals regarding the causes of wrongful convictions in complete and simplified procedures as well as recommended solutions to prevent judicial errors.

[50] BANSE, D., LUTZ, M. & MÜLLER, U., Fehlurteil-Opfer sollen besser entschädigt werden. In: *Welt*, 2017.
[51] MÜLLER, R., Was ein Tag in Freiheit wert ist. In: *Frankfurter Allgemeine Zeitung*, 2017.
[52] See 88. Konferenz der Justizministerinnen & Justizminister, Beschluss Top II.18, *Entschädigung für Strafverfolgungsmaßnahmen*, November 9, 2017.
[53] HOFFMANN, A. & LEUSCHNER, F., *Rehabilitation und Entschädigung nach Vollstreckung einer Freiheitsstrafe und erfolgreicher Wiederaufnahmeverfahren*, Elektronische Schriftreihe der Kriminologischen Zentralstelle e.V. (KrimZ), Band 11. Wiesbaden, 2017.
[54] ENESCU, R., L'absence de dénonciation des agressions ŕ caractčre sexuel. In: *Bulletin de Criminologie*, vol. 25, 1999, p. 41-54.
[55] THAMAN, S. C., The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform? In: LUNA, E. & WADE, M. (Eds.), *The Prosecutor in Transnational Perspective*, Oxford, 2012, P. 156-175.
[56] GEIS, ibid., p. 48-49.
[57] CRIMINAL CASES REVIEW COMMISSION. Available at: www.ccrc.gov.uk (Accessed: 30 September 2019).
[58] StPO § 408. If the judge does not consider that there are sufficient grounds for suspecting the indicted accused, he shall refuse to issue a penal order.
[59] GEIS, ibid., p. 24-25.
[60] See the project of Prof. Momsen at the Free University Berlin, started in April 2019 and offering pro bono counseling in penal order proceedings. Available at: https://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/momsenc/Aktuelles_Ordner_Box/projektstart.html (Accessed: 30 September 2019).

Heike Stopp

Hans Welzel und der Nationalsozialismus

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Die überragende Bedeutung des Göttinger und Bonner Strafrechtslehrers Hans Welzel (1904-1977) für Dogmatik und Praxis des Strafrechts wurde einmal mehr deutlich, als der Große Senat des Bundesgerichtshofs (BGH) im Jahre 1952 an einem wohl bewusst gewählten, eher marginalen, ganz unpolitischen Fall von der reichsgerichtlichen Vorsatztheorie abweichend sich zur Schuldtheorie und Welzels finaler Handlungslehre beim Verbotsirrtum bekannte (BGHSt 2, 194).

Welche eminent politische Bedeutung Welzels schon vor dem Zweiten Weltkrieg entwickelten Lehren während des „Dritten Reichs", aber vor allem in der Nachkriegszeit in den NS-Prozessen zukam, wird in der Regensburger Diss. der Verf. (Betreuer: Tonio Walter) im Kontext der strafrechtlichen Dogmatik seit 1933 und der Rechtspraxis und Wissenschaft nach 1945 aufs eindringlichste analytisch beleuchtet.

Hans Welzels Biographie weist ihn im ersten Teil zwar als einen Gelehrten aus, der der sog. Kieler Schule (Dahm, Schaffstein, Kohlrausch u.a.) sehr nahe stand, jedoch nicht als einer der herausragenden „Strafrechtsideologen der Hitler-Diktatur" (Ingo Müller) angesehen werden kann. Allerdings zeigen seine strafrechtlichen Veröffentlichungen (Teil 2), dass er sich nicht nur deutlich bewogen durch Karrieregründe in mehreren Veröffentlichungen Ende der 1930er Jahre klar zur nationalsozialistischen Ideologie, zum „konkreten Ordnungsdenken" Carl Schmitts und zur völkisch konnotierten geschichtlichen Volksgemeinschaft bekannte. Mit seiner Lehre von der Sozialadäquanz entwickelte er zudem eine für Einbrüche der Ideologie handliche Theorie für Willkür-Entscheidungen und legitimierte noch bis 1944 in diversen Abhandlungen unbestimmte Tat- und Normbestände mit hohen Strafdrohungen.

Wenn er auch nicht zu den führenden Strafrechtlern der NS-Zeit zählte, so war er dennoch keineswegs vor 1945 ein randständiger Unbekannter und in einer „schier hoffnungslosen Minderheitenposition" (S.17). Der langen apologetischen Historisierung Welzels (sh. dazu Michael Kubiciel, „Welzel und die Anderen". In: Wolfgang Frisch u.a. (Hg.), Lebendiges und Totes in der Verbrechenslehre Hans Welzels. Tübingen 2015, S.135-155) wird eine konzise Darstellung seiner durchaus linientreuen Identität mit grundlegenden Anschauungen des Nationalsozialismus wie der völkisch-rassischen Ausrichtung, der maßgeblichen ideologisch aufgeladenen Volksgemeinschaft, der Eugenik, der Rassenforschung und einer explizit politischen Strafrechtswissenschaft belegt. Mit seiner Arbeit über die Ehre von Gemeinschaften (1937) verband Welzel geschickt ihr „Moment der Geschichtlichkeit" mit zentralen Positionen des NS-Weltbildes. Nicht Hegels „Substanz", sondern das Volk in naturhaft-geschichtlicher Existenz wird bei ihm als grundlegende „Substanz" postuliert (Über die Grundlagen der Staatsphilosophie Hegels, 1937). Mit biologischen Grundlagen des Volkes und der Geschichte wird der finale Handlungsbegriff entwickelt. Die finalistische Grundhaltung kulminiert in einer primär Zweck-bezogenen Handhabung des Rechts im Sinne der herrschenden Regelungsmacht des Staates, an Kraft und Bestand der „Rechtserneuerung" und insbesondere in Kriegs- und Ausnahmezeiten durch die nahezu völlige Befreiung von Normgrundlagen, wie sich etwa an der sog. VolksschädlingsVO 1939 oder an der PolenstrafrechtsVO von 1941 zeigte wie auch in der Billigung von krassen Strafschärfungen im Kriegssonderstrafrecht.

Welzels Verbrechenslehre prägte eine prinzipielle Offenheit für die gegenwärtigen politischen Einflüsse bis hin zum „gesunden Volksempfinden". Indem sozialadäquate Handlungen bei ihm von vornherein aus einem Tatbestand herausfielen, diente die Leerformel über den Rahmen der „geschichtlich gewordenen sozialethischen Ordnung des Gemeinschaftslebens" der Anpassung ans politische Strafrecht und die weitgehend durch unbestimmte Rechtsbegriffe und Generalklauseln radikalisierten Rechtsformen, in welchem –mit ausdrücklicher Zustimmung Welzels- das „gesunde Volksempfinden" zur eigenständigen Rechtsquelle erstarkte. Mit seiner Ausformung des personalen Verbrechensbegriffs arbeitete er zugleich mit an der Wende zu einen nahezu uferlos instrumentablen Gesinnungsstrafrecht.

Im Übrigen fällt Welzel, der alsbald nach 1945 seine Lehren geringfügig modifizierte und sie nun als „unpolitisch" charakterisierte, nicht aus der Riege der Reaktionen der Strafrechtswissenschaft auf die NS-Vergangenheit heraus (Joachim Vogel, Einflüsse des Nationalsozialismus auf das Strafrecht, 2004). Wie Welzels durchgehend scharfe Polemik gegen Naturalismus und Positivismus, den „Feinden" der NS-Ideologie, mit dem Kampf gegen das „Kausaldogma" und der weitgehenden Identität mit der herrschenden Zeitströmung bis hin zur Legitimierung der Willkürherrschaft im Kriegsstrafrecht sich verknüpfte, ist in dieser souveränen Studie bis in feinste Verästelungen nachzulesen.

Dass Welzel, nach 1945 allen Problemen der Entnazifizierungsära sogleich günstig entronnen, anders als etwa Schaffstein nie zu seinen früheren Positionen auf Distanz ging, sondern sie in seinen Lehren geschickt und leichthin modifizierte, gehört zu den bekannten Erfahrungen mit der Mehrzahl der Hochschullehrer vieler Disziplinen der Nachkriegszeit.

Bemerkenswert ist jedoch die entscheidende Bedeutung von Welzels bisheriger Handlungs- und Verbrechenslehre für den Beschluss des Großen Senats des BGH und die Bestrafung oder Freisprechung von NS-Tätern. Sie wird die maßgebliche Basis für eine

jetzt auf andere Weise brauchbare Variante eines gleichfalls politisch zu nennenden Strafrechts der Jahrzehnte nach 1950. Hier steht die Dogmatik des Verbotsirrtums im Zentrum (Teil 3).

In ihrer vorbildlichen Studie hat die Verf. als Korpus alle Urteile nach 1945, in denen Angeklagte sich auf einen angeblich unvermeidbaren Verbotsirrtum beriefen, systematisch und an plastischen Exempeln untersucht. Dabei geht es ihr um drei spezielle, wichtige Verfahrenskomplexe: die Euthanasie-Prozesse, die Prozesse wegen der Ermordung von Juden und um den kleineren Bestand von Fällen meist aus der Zeit kurz vor Kriegsende, die nicht in die beiden erstgenannten Kategorien fallen.

„Verbotsirrtum und Schuldtheorie fügen sich damit in eine Reihe strafrechtlicher Konstruktionen der Nachkriegsjustiz, die milde Urteile gegen NS-Täter ermöglichten." (S.167). Die fatalen Auswirkungen von Welzels Dogmatik und der des BGH in den Jahren zwischen 1952 und 1985 waren durchgreifend: das Konstrukt des vermeidbaren oder unvermeidbaren Verbotsirrtums stand über Jahre im Dienst für skandalöse Freisprüche und für den „Mengenrabatt bei Massenverbrechen".

Welzel ist nach einem treffenden Wort von Monika Frommel repräsentativ für die seit 1951 einsetzende „Phase der Selbstentlastung" (JZ 2016,913ff.). Während in der unmittelbaren Nachkriegszeit viele Gerichte in der Folge der sog. eingeschränkten Vorsatztheorie den Einwand des fehlenden Unrechtsbewusstseins noch als ganz unbeachtlich einstuften, zeigt die luzide Analyse der Urteile nach 1952 die völlig veränderten, gravierenden Auswirkungen auf Schuld- und Strafaussprüche bei der justiziellen Aufarbeitung der Vergangenheit.

Welzels finalistische Dogmatik, vor 1945 mehr als nur opportunistische Anpassung an herrschenden Zeitgeist und Legitimation einer sich schnell und dynamisch radikalisierenden Strafrechtslehre, Normgebung und totalitärer Praxis, realisiert sich, mit Welzels begeisterter Zustimmung für den Großen Senat, keineswegs unversehens als willkommenes Instrumentarium für partielle oder totale Exkulpation.

Die Rechtsprechung gleich nach 1945 legte zunächst -zuständig waren vorerst die Maßstäbe der Oberlandesgerichte– die Rechtsprechung des Reichsgerichts (RG) zum Verbotsirrtum, allerdings mit unterschiedlichen Konsequenzen auf der Basis der Vorsatz- oder eingeschränkten Vorsatztheorie zugrunde. Vereinzelt wurde die von Welzel nach 1945 entwickelte Schuldtheorie zum dogmatischen Ausgangspunkt (siehe z.B. OLG Oldenburg, NJW 1950, 795). Der Vorsatz umfasste danach nur die Kenntnis der gesetzlichen Tatbestandsmerkmale, nicht die Rechtswidrigkeit (vgl. dazu Stopp, S. 69ff. zur Entwicklung der Irrtumslehre bis 1952).

Wie der BGH sich dann gegen das RG 1952 positionierte, indem er die Vor- und Nachteile von Vorsatz- und Schuldtheorie feinsinnig abwog und sich für Welzels Schuldtheorie entschied, wird aufgeschlüsselt. Dahinter standen, so jedenfalls kann man die Gründe lesen, dogmatische wie kriminalpolitische Gründe, weil die reichsgerichtliche Vorsatztheorie zu „unerträglichen" Freisprüchen führen könne, auch der Grad der Schuld bei verschuldetem Verbotsirrtum nicht hinreichend berücksichtigt werden könne. Ob den Angehörigen des Großen Senates die schwerwiegenden Konsequenzen bewusst oder gar von ihnen intendiert waren, wird schwerlich eine offene Frage bleiben können.

Wie sich diese vordergründig dogmatischen Erwägungen und deren wissenschaftlich kontroverse Diskussion konkret in den folgenden NS-Verfahren auswirkten, zeigen die in der Gesamtsicht und in zahlreichen Beispielsfällen aufgezeigten Argumentationsmuster, bei denen die „unerträglichen" Freisprüche oder Stafmilderungen dominierten. Hatten die Gerichte der frühen Euthanasie--Urteile noch die Tötung Behinderter für strafwürdig und den angeblichen oder tatsächlichen Verbotsirrtum als unbeachtlich angesehen, weil Kernbereiche des Rechts nicht angetastet werden dürften, konnten nunmehr mit dem Instrumentarium unvermeidbarer Verbotsirrtümer Schuldsprüche verneint oder die Strafen gewichtig verringert werden. Die Rechtsprechung verlief allerdings nicht ganz einheitlich. Wie stark sich freilich dann die neuen Verbots- und Irrtumslehren des BGH in der Masse der Prozesse auswirkten, und zwar zugunsten eines Verbotsirrtums, in der Folge wiederum vom BGH fast durchgehend abgesegnet, wird aus der Studie eindrücklich sichtbar (S.122-151ff.). Bei vermeidbarem Verbotsirrtum wurden zumeist extreme Strafmilderungen ausgesprochen, nur in seltenen Fällen wird davon abgesehen (S.155). Seit 1975 ermöglichte überdies die doppelte Strafmilderung vor allem in den Fällen der Ermordung von Juden noch weitergehende Strafmaßreduktionen- nach einem fast resignativen Wort von Fritz Bauer eine Verhöhnung der Opfer.

Wie sich auf diese komplexe Art und Weise das Strafrecht zwischen Dogmatik des Staats- und Einzelunrechts und raffiniert begründeter, rechtspolitisch erwünschter Handlungslehre mit kriminologisch wie rechtlich und rechtsphilosophisch unterfütterter Grundlegung bei den Problemen von Staatsverbrechen, Rechtsfeindschaft, „Rechtsblindheit", Überzeugungstätern und „Lebensführungschuld" in fragwürdige Bahnen bewegte, ist hier en détail mit allen seinen krassen und erschreckenden Dimensionen abzulesen. Ihr besonderes Verdienst liegt –neben der fast allzu nüchtern-distanzierten Darstellung des „Bestandes" - insgesamt gesehen trotz der einleuchtenden Begrenzung auf Hans Welzel weniger in den Erkenntnissen über die auch aus anderen prominenten Fällen bekannten „Verstrickungen" universitärer und andere Eliten, sondern in der Analyse der dank der dogmatischen Kehrtwendung des BGH flächenartig wirksamen „Gnade" des Verbotsirrtums bei NS-Verbrechen.

Der Verf. erscheint es als „erstaunlich", wie viele der an Morden beteiligten Täter mit Erfolg sich darauf berufen durften, sie hätten das Unrecht ihrer Taten nicht erkannt (S.165). Mit analytischer Schärfe werden die Auswirkungen der BGH-Entscheidung von 1952 analysiert. Sie etablierte – wie ein „trojanisches Pferd" (Martin Heger) - ganz bewusst eine zugunsten von NS-Tätern zu nutzende Rechtsfigur. Der BGH änderte mit seiner Schuldtheorie die vorher kaum oder gar nicht mögliche Berufung auf Verbotsirrtümer. Der Große Senat bewies mit solcher Öffnung einer Büchse der Pandora – wie der jetzt herrschende neue Zeitgeist – wenig Interesse an einer anders gewichteten Aufarbeitung der NS-Vergangenheit, indem die Täter von nun an nicht oder nurmehr äußerst milde bestraft werden konnten.

Die Konzentration auf Biographie und Lehren Hans Welzels und die Auswirkungen der BGH-Judikatur als Fragestellung reduziert die weiteren Perspektiven, die sich an das von der Verf. als erstaunlich bezeichnete Faktum der strafrechtlichen Ergebnisse anschließen könnten. Sie lagen verständlicherweise außerhalb des engeren, aber doch immens ertragreichen Forschungsprogramms der Arbeit. Das erklärt zu einem gewissen Maße, dass denkbare Erklärungen für diese Rezeption Welzels Lehre und für die rechtspolitischen und strafrechtlichen Folgen in der Judikatur dieser strafrechtlichen Segmente und die Deutungen für die verblüffenden oder auch erschreckenden Volten weniger in den Blick geraten. Gewiss hätte es den Rahmen gesprengt, auch personalpolitische, zeit- und rechtsgeschichtliche Untersuchungen einzubeziehen, die sich der Elitenforschung, der Kontinuitäten und der personellen Entwicklung der Justiz bis hinauf zum BGH gewidmet haben (sh. dazu u.a. K.-D. Godau-Schüttke in: forum historiae juris, htpps://forhistiur.de/2001-06-godau-schttke/mit weit. Nachw.; ders: Der Bundesgerichtshof. 2.Aufl. 2006). Implizit wird jedoch ein weiter Ausblick auf erweiterte Studien dieser Art über ähnliche „kausale" oder „finale" Zusammenhänge von Biografie-, Wissenschafts-, Rechts- und Zeitgeschichte ermöglicht.

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*Tamar Herzog**

A Short History of European Law: The Last Two and a Half Millennia

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The creation of Europe under a unifying law has been one of the most important human achievements. This law set out a number of man-made rules, devised to ensure peaceful relations, with the purpose of holding the continent together, albeit not entirely successfully as the history of decades of internal political conflicts demonstrate. Nevertheless, the fragile malleability of this law has meant the endurance of the unity despite conflicts, and its evolution means that it influences what is known today as European law. In *A Short History of European Law*, Tamar Herzog beautifully and succinctly tells the story of European law in six parts, exploring its journey across different phases of history, from the ancient times to the twentieth century.

To navigate this history effectively, Herzog masterfully questions the two claims that the law is static, and English common law has been entirely distinct from civil law. Herzog explains that the special appeal of European law arose from the development of a number of ideas to make and implement justice; for instance, the application of due process.[1] These ideas have evolved in different contexts to differing degrees, partially explaining their selection as opposed to their impartial implementation. For example, Herzog contends, with European colonisation in mind, that 'engagement with the past would…enable us to comprehend how European law came to refashion itself both as the epitome of reason and as a system with potentially universal applicability'.[2] She traces this to Ancient Rome and the propagation of Christianity, and elaborates on this by saying 'new explanations were adopted to justify the imposition of European law on non-European territories and people'.[3] This process was repeated in the eighteenth and nineteenth centuries, and it illuminates, in part, scholars' criticism of modern international law as 'a European rather than a truly global human heritage'.[4]

The historical expansive notion of European law as disseminated by the colonising powers, has been limited and reduced by necessity to a primarily economic role today. Originally, economic union assisted the European states' collaborative efforts after the devastating World Wars, clearly demonstrating Herzog's point concerning the evolving nature of law in different contexts. She rightly says, 'Over the course of history, law was elaborated, re-elaborated, and reworked once again, as different individuals, communities, and institutions sought to manage, and re-manage different rules to regulate their activities.'[5]

With regard to the second claim, Herzog illustrates how the common law and civil law systems differ as well as sharing commonalities. She discusses 'the formative period of continental *ius commune* alongside common law', and Roman law 'because of its continuing presence throughout European history'.[6] Herzog argues, 'English common law and Continental civil law formed part of a single tradition from which they both drew and were enriched'.[7] The primary source of *ius commune* was the Roman law,

1 Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Harvard University Press 2019) 2.
2 Ibid 2.
3 Ibid 3.
4 Ibid.
5 Ibid 5.
6 Ibid 6.
7 Ibid.

which 'supplied the backbone for a common European legal tradition'.[8] Herzog elucidates that *ius commune*, 'the unifying common law' was created as a European solution to 'the constant tensions between local and global, individual solutions and overreaching principles'.[9] One of the key roles *ius commune* served was 'to cement and give coherence to a legal world that in reality comprised hundreds of thousands of local arrangements'.[10] It details the story of how *ius commune* has survived and evolved over the centuries, moving from church authority to modernity, while always being an instrument of colonization; thereby illustrating the depth of Herzog's book.

Since Europe's inception before the majority of the populace converted to Christianity, Roman law has been a secular law supporting conflict resolution and later evolving into a judicial system of law and order.[11] However, two transformative factors, which naturally led to the spread of Roman law were the development of the notion of *ius gentium* (the law of nations), and widespread conversion to and propagation of Christianity.[12] According to Herzog, 'a combination of local, Germanic, Roman and canon law [made by Church leadership] crystallized' in the 9th century giving rise to 'common notions regarding what law was and where it came from'.[13] Nonetheless, this combination of laws could not settle the conflicts in the Early Middle Ages between the Church and the State.[14] However, the culmination of the 50 years of the Investiture conflict was followed by the rise of a centralised church system with a single Pope, free from feudalism's control, and 'the rebirth of Roman law in Italian universities'.[15]

It was around the 12th century that *ius commune* emerged as a normative European system of law common to all; it was derived from Roman, canon and feudal laws.[16] From 12th century onwards, *ius commune* struggled to survive as it constantly faced attack from religious and political factions, and their different conceptions of justice.[17] Nonetheless, *ius commune* was defended by some European jurists, and refined by humanist intellectuals of the Renaissance.[18] Another major milestone was the transformation of *ius gentium* to a certain conception of natural law, providing justification and regulation of European colonisation.[19] However, it was after the French Revolution of 1799 that the European legal system broke away from *ius commune,* replacing 'commonness with distinctiveness, creating separate legal systems.'[20]

It was not until the mid-twentieth century, 150 years later, that European jurists and judges returned to a common law of Europe. This return was instigated by Europeans' recollection of 'a period when not only they had shared a common law (*ius commune*) but also a common religious creed and a belief in the primacy of natural law'.[21] The logic dictated: 'If, once upon a time, a shared *ius commune* could bring together thousands of distinct local arrangements by offering overreaching principles, conceptual categories, methods of analysis, and shared norms, why could the same not happen now?'.[22] Moreover, awareness of the function of law in creating a shared vision and purpose, led jurists to enquire 'cannot a contemporary European juridical science provide mechanisms to structure a legal system that admits of both divergence and convergence?'.[23]

However, one of the questions this seminal book addresses is: 'To what degree can Europe today have a common law, and who are the agents and interests propelling such a legal unification?'.[24] In a concise and perceptive epilogue, Herzog answers this question by recalling the European interstate collaboration that has started in 1951 with the creation of the European Coal and Steel Community (ECSC), which has since continued with diverse levels of 'economic collaboration, political integration, and the development of central institutions that led to the emergence of a new European law'.[25] This history in particular shows one of the best examples, if not the best on international cooperation; one born out of individual European states' economic needs after the Second World War.

The new European law was cultivated by member-states-led deliberative processes within their own run institutions starting with the ECSC, then the European Economic Community (EEC) and European Atomic Energy Community (founded in 1957), and later under 'a single institutional configuration' of the European Community (EC) in 1967 which was renamed as the European Union (EU) in 1993. In terms of law-making, a number of treaties were adopted to facilitate cooperation, accommodate changes,

[8] Ibid 7.
[9] Ibid.
[10] Ibid 7-8.
[11] Ibid 14.
[12] Ibid 27, 34.
[13] Ibid 47-48.
[14] Ibid 71.
[15] Ibid 71-71.
[16] Ibid 87.
[17] Ibid 119.
[18] Ibid 120-121.
[19] Ibid 158.
[20] Ibid 238.
[21] Ibid 239.
[22] Ibid.
[23] Ibid 239.
[24] Ibid 8.
[25] Ibid 233.

and address member states' grievances. Chief amongst these were: The Treaty of Rome of 1957 which led to the creation of the EEC; the Single European Act of 1986 which founded the single European market; The Maastricht Treaty of 1992, which stipulated the principles of the substantive law of the EU: the four freedoms of movement of capital, labour, services and goods; and the Treaty of Lisbon of 2007, which amended the Rome and Maastricht treaties and formed the constitutional basis of the EU.[26]

Herzog acknowledges the instrumental roles of the EC's branches of governance, especially the European Court of Justice (ECJ). Herzog argues that these branches moved the EC (especially in the 1980 s) 'from its initial design as an international organization that promoted international collaboration to a new structure that…constitutes a state or a quasi-state'.[27] Notwithstanding disagreements amongst member states over the perceived erosion of national sovereignty, economic instability and migration, Herzog claims 'from a legal point of view the formation of the European Union was incredibly important, as it was responsible for the rebirth of a new, modern *ius commune*'.[28] The normative sources of the new European law were the 'treaties among states and legislation [and] no less vital was the jurisprudence of the European Court of Justice'.[29] Since its inception in 1958, the ECJ has become 'a principle promoter of European law and European integration', and Herzog cited two ECJ landmark cases: 1963 decision on the direct effect of European law (*Van Gen den Loos v. Nederlandse Administratie Belastingen*), and the 1964 outcome on the European law supremacy over national law (*Costa v. ENEL*).[30] Although these decisions were criticised, Herzog argues, 'over time member states' national courts acquiesced and adhered to these doctrines. Their acceptance…truly revolutionized European law'.[31]

Herzog reflects on the genealogy of new European law, stating the usage of legal language to regulate politics has 'allowed the creation of a European legal system that…came to penetrate into national spaces and depend heavily on judge-made law'.[32] The lawyers who founded European institutions had envisaged the roles of the political and judicial deliberative processes in supporting European integration, filling 'important voids in the 1957 Treaties of Rome' and 'forcing compliance on national governments by recruiting the help of their citizens'.[33] Herzog elaborates by saying that:

> What made European law authoritative…was a practical mechanism, proposed by the European court, that pushed European law into primacy by allowing different actors to call upon it to protect their own interests and desires…Perceived as a system propelling "integration through law" it gradually transformed what was initially an international organization into a quasi-state with a quasi-constitution.[34]

Furthermore, Herzog argues the best proof of a peaceful co-existence of systems under European law is the relationship between English common law and Continental civil law. She explains, 'in the case of European law, these distinct normative sources (legislation and judge-made law) together have created a new order that is…constantly reinventing itself as it adapts to new circumstances, conditions, and constraints'.[35] Finally, Herzog highlights the challenges that EU jurists will have to address namely 'the delegation of lawmaking from legislatures to state bureaucracies [and] the demise of state monopolies over regulation because of norm-making by transnational bodies'.[36] Before concluding by asking 'in this new reality of extreme legal pluralism, where the juridical order of the nation-state coincides with a multiplicity of other normative orders, should not jurists centre their efforts on proposing methods to imagine a new legal universe for a new society'.[37]

This paper has tried to demonstrate how Herzog has managed to capture the essence of European law by skilfully and carefully summarising its history. However, the book's principal weakness is the lack of elaboration on the schools of jurisprudence, individual politicians and jurists who made and fostered a common law for Europe. For example, it is unwarranted for a history book on European law to not expound on the 16th century School of Salamanca, or on the work of lawyers who founded the 20th century European institutions. It is equally unusual not to mention the Peace of Westphalia of 1648 that arguably marked the end of the European Wars of Religion. Overall, however, this book is a fascinating and highly readable resource for use as reference by scholars and students of international law.

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[26] Ibid 231-233.
[27] Ibid 232.
[28] Ibid 233.
[29] Ibid 234.
[30] Ibid 235.
[31] Ibid.
[32] Ibid 236-237.
[33] Ibid 237.
[34] Ibid 238.
[35] Ibid 241.
[36] Ibid 242.
[37] Ibid 243.

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Dirk Reitz, Hendrik Thoß (Hg.)

Sachsen, Deutschland und Europa im Zeitalter der Weltkriege

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Der vorliegende Band ist den Auswirkungen der beiden Weltkriege auf die regionale Ebene, hier auf das Land Sachsen gewidmet. Er umfasst sechzehn Beiträge, verfasst von renommierten Historikern, die die „großen" Ereignisse mit dem Alltag auf territorialer Ebene verknüpfen. Gleichzeitig enthält der Band aber auch allgemeine Beiträge, die als Rahmen für die Betrachtung der regionalen Ebene dienen. Diese Beiträge behandeln unter anderem: Ludendorffs Ostpolitik im Ersten Weltkrieg, Versailles und die Folgen (D. Reitz), ferner die Stellung Stalins und der Roten Armee im Vorfeld des Unternehmens „Barbarossa" im Frühjahr 1941, Kriegsherrschaft und Zwangsarbeit, die Situation der Zivilbevölkerung im Osten, sowie Flucht und Vertreibung in Mitteleuropa als Folge des Zweiten Weltkriegs.

Die rein sächsischen Verhältnisse beleuchten u.a. folgende Themenfelder: Das Ende der Monarchie in Sachsen, die Rezeption des Ersten Weltkriegs in Sachsen in Presse und Publizistik, die eine große Begeisterung für den Krieg zeigten und kritische Wortmeldungen kaum zu Worte kommen ließen (H. Thoß). Ein weiterer Beitrag betrifft Sachsens Kriegsziele im Ersten Weltkrieg. So merkwürdig es heute klingt, sollten Kurland und Litauen damals nach Dresdner Vorstellung sächsisch werden. Diese Bestrebungen waren eine Folge des zermürbenden Stellungskriegs seit Ende 1914, in dessen Verlauf man sich in Deutschland zu fragen begann, was der eigentliche Sinn dieses Krieges sein sollte; d.h. man begann erst nach Kriegsausbruch damit, Kriegsziele auszuarbeiten (im Gegensatz zu Frankreich und Russland, wo von Anbeginn an klare Kriegsziele, Rückgewinnung des Elsass bzw. Zugang zum Bosporus, vorgegeben waren, Anmerkung der Rezensentin).

Erschütternd ist das Kapitel über die Judenverfolgung im Nationalsozialismus in Chemnitz, in dem das Schicksal einzelner Personen ausführlich geschildert wird. In dem Beitrag über die Auto-Union-AG Chemnitz im Zweiten Weltkrieg wird beispielhaft die Unternehmensführung eines Großbetriebs im Nationalsozialismus gezeigt, der durch sein Expansionsstreben im Krieg und durch Profitdenken gekennzeichnet war, was wiederum den Einsatz von sog. Fremdarbeitern (d.h. aus den besetzen Gebieten zwangsweise rekrutierte Arbeitskräfte) bedingte.

Eine Untersuchung zu dem Codenamen „Blackfinn" zeigt Chemnitz als wichtiges Ziel der westalliierten Luftkriegsstrategie. Die Angriffe waren, wie im Fall anderer Großstädte, minutiös vorbereitet und sie konzentrierten sich auf die Industrieanlagen, betrafen aber auch die Wohngebiete, um die Bevölkerung einzuschüchtern und zu demoralisieren.

Abschließend wird das Kriegsende in Sachsen 1945 beschreiben. Der Autor schildert das Zusammentreffen der US-Truppen mit der Roten Armee an der Elbe und wirft die Frage auf, ob man tatsächlich von „Befreiung" (vom Nationalsozialismus) sprechen sollte, ohne zugleich auch die „Nichtbefreiung" zu schildern, die Sachsen am Kriegsende und danach zu erdulden hatte: Flucht und Vertreibung, Demontagen, Verbrechen der Roten Armee an der deutschen Zivilbevölkerung während der sowjetischen Besatzung, ferner die Einbeziehung Sachsens in den kommunistischen Machtbereich. Ohnehin erschien den meisten Deutschen bis in die 1980er Jahre hinein sowohl in Ost- und Westdeutschland die Vorstellung einer Befreiung durch die Alliierten als nicht gerechtfertigt. Erst Bundespräsident Richard von Weizsäcker regte 1985 in einer vielbeachteten Rede zum 8. Mai an, dass man bezüglich 1945 tatsächlich von einer „Befreiung" sprechen müsse.

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Markus Apostolow

Der „immerwährende Staatssekretär". Walter Strauß und die Personalpolitik im Bundesministerium der Justiz 1949 – 1963

Göttingen: V & R 2018, 396 S., ISBN 978-3-647-35694-5

Das Buch kann als Pendant zu Manfred Görtemaker / Christoph Safferling (Hg.) *Die Rosenburg, das Bundesjustizministerium und die NS-Vergangenheit*, München 2016, angesehen werden. In diesem Werk wurden die Karrieren früherer NS-Juristen im Bundesjustizministerium (BMJ) beschrieben, die in der NS-Zeit im Geschäftsbereich des Reichsjustizministeriums (RMJ) tätig gewesen waren und nach 1945 in das BMJ überwechselten. Viele von ihnen stiegen bis in die Führungsetagen, d.h. bis zur Abteilungsleiterebene auf. Man

konnte nach diesen Karrieren den Eindruck gewinnen, dass NS-Gedankengut, wie es vor 1945 im RMJ vertreten wurde, nach 1945 überlebt und seine Fortsetzung im BMJ gefunden habe. Die Annahme, NS-belastetes Personal habe nach 1945 die NS-Ideologie auch in die Sacharbeit der neuen Bundesjustizverwaltung hineingetragen, erscheint jedoch keineswegs sicher. Das vorliegende Buch zeigt eher das Gegenteil. Es zeigt das Ministerium unter Führung eines hochkompetenten Staatssekretärs (Staatssekretär in einem Ministerium ist der Vertreter des Ministers), dessen Werdegang, so der Autor, Gewähr für eine exzellente Sacharbeit geboten habe.

Der Autor ist Historiker, Parlamentsredakteur bei der Verwaltung des Abgeordnetenhauses von Berlin. Anhand der Akten des BMJ und des Bundesarchivs zeichnet er ein Detail gesättigtes Ensemble zur Geschichte des BMJ nach, in deren Mitte Walter Strauß steht. Strauß stammte aus einer jüdischen Familie. 1900 in Berlin geboren, war er Assessor bei verschiedenen preußischen Gerichten, dann Hilfsarbeiter (wissenschaftliche Hilfskraft) im Reichswirtschaftsministerium. Nach 1933 verlor er diese Stellung und wurde 1935 in den Ruhestand versetzt. Danach war er in der Auswandererhilfe für jüdische Auswanderer tätig. 1939 erfolgte sein Übertritt zum Protestantismus.

Strauß wurde „rassisch" verfolgt, wie dieser Werdegang zeigt. Er lebte mit seiner arischen Ehefrau in einer sog. Mischehe und galt daher als „Halbjude" im NS-Sinne. Seine Eltern starben im Ghetto Theresienstadt (1944 der Vater, die Mutter nach der Befreiung). Strauß wurde in den letzten Kriegsjahren zur Zwangsarbeit in der Rüstungsindustrie eingezogen. Nach 1945 wurde er CDU-Mitglied. Justizminister Thomas Dehler (FDP) berief Strauß als Staatssekretär 1949 in das BMJ. 1963 wurde er pensioniert und wechselte zum Europäischen Gerichtshof (EuGH), weil dort ein deutscher Richterposten 1962 frei geworden war, den Deutschland zu besetzen hatte.

Walter Strauß war nicht nur hinsichtlich der Sacharbeit prägend, sondern auch in der Personalpolitik. Hierbei arbeitete er eng mit dem jeweiligen Personalreferenten des Hauses zusammen, d.h. er wollte die Dinge „im Griff" behalten. Obwohl selbst rassisch in der NS-Zeit verfolgt, griff er auch auf Personen zurück, die bereits im NS aktiv gewesen und in unterschiedlichem Ausmaß belastet waren. Die Kritik, die in der Nachkriegszeit allgemein den Wiederaufstieg ehemaligen NS-Personals bemängelte, erstreckte sich auch auf die Personalpolitik im BMJ. Allerdings gab es damals keine Alternativen, der Alltag forderte seinen Tribut. Solche Übernahmen waren in der gesamten Verwaltung üblich. Ein allerdings extremes Beispiel ist der Staatssekretär im Kanzleramt Hans Globke, der Mitglied der Partei Katholisches Zentrum der Weimarer Republik war und seit 1933 als Oberregierungsrat im Reichsministerium des Inneren wirkte. 1938 wurde er zum Ministerialrat befördert. Globke war Mitkommentator (faktisch Alleinkommentator) des Kommentars der berüchtigten Nürnberger Rassengesetze 1935, den sein damaliger Chef, Staatssekretär Wilhelm Stuckart herausgegeben hatte (W. Stuckart / H. Globke – Reichsbürgergesetz vom 15. 9. 1935. Reichsbürgergesetz und Kommentare zur deutschen Rassengesetzgebung… Band 1, München 1936).

Strauß war bemüht, den Anteil der NS-Belasteten niedrig zu halten und ging mit den Belasteten sehr milde um. Da das Bundesverfassungsgericht alle vor 1945 begründeten Beamtenverhältnisse für nichtig erklärt hatte, gewährte das sog. Gesetz 131 aus dem Jahr 1951 früheren „minderbelasteten" Amtsträgern ein Recht auf Wiedereinstellung in den Rang, den der Betroffene beim mutmaßlichen Verlauf der Dinge erreicht hätte. So gelang es manchen Belasteten, ihre Karriere fortzusetzen. So z.B. im Falle eines höheren Beamten, der vor 1945 Beisitzer beim Volksgerichtshof war, der damals für Hoch- und Landesverrat zuständig war. Offensichtlich herrschten damals andere Bewertungsmaßstäbe als in heutigen Zeiten (Anm. d. Rez.). Historisch mag diese Milde gegenüber NS-Belasteten damit zusammenhängen, dass die damaligen Bundesjustizminister (Dehler, Bucher, Stammberger) durchweg der FDP angehörten, in deren Landesverbänden frühere NS-Funktionäre vielfach Zuflucht gefunden hatten.

Als Staatssekretär prägte Walter Strauß mehr als 13 Jahre lang die Arbeit im BMJ. Dies galt, wie erwähnt, auch und besonders für die Personalpolitik, in der sein Einfluss ganz erheblich war. Dies schildert der Autor sehr detailreich. Durch persönliche Verbindungen zu Kollegen, die in den Jahren unmittelbar nach 1945 in den Länderverwaltungen der Besatzungszonen tätig waren, habe er ein Netzwerk geschaffen, dass sich in den kommenden Jahren bewähren sollte. Strauß selbst war nach 1945 Leiter des Rechtsamts im Vereinigten Wirtschaftsgebiet gewesen, und hatte 1949 viele Beamte von dort mit nach Bonn genommen. Diese Personengruppe stellte gewissermaßen seine Hausmacht im Ministerium dar. Sie bestand aus Beamten, denen Strauß vertraute und auf deren Loyalität er sich aus Erfahrung verlassen konnte. Mit Günther Joël, bis dahin stellvertretender Chef des Rechtsamts, wurde einer von ihnen sogar zum Abteilungsleiter im BMJ bestimmt. Der Autor legt dar, dass die personalpolitischen Vorstellungen von Bundesjustizminister Thomas Dehler und Strauß erstaunliche Übereinstimmungen aufgewiesen hätten. So zielten beide darauf ab, hochqualifizierte wie verwaltungserfahrene, integre Persönlichkeiten für das Justizministerium der Bundesrepublik zu gewinnen. Unter dem Einfluss von Strauß konnten auch die Abteilungsleiter als „eigentliche" Fachinstanz in einem gehörigen Maße Einfluss auf Einstellungen in ihrem Sachgebiet nehmen. Ohnehin ist durch die hierarchische Struktur gewissermaßen automatisch ein großer Teil personalpolitischer Kriterien in die Sacharbeit miteinbezogen. Wie die Reden anlässlich der Verabschiedung von Strauß im Februar 1963 zeigten, war die Verbindung zwischen Sach- und Personalpolitik stets verfolgt worden. Seinen engsten Mitarbeitern ließ er viel Freiraum, weil er ihnen vertraute und sich ihrer Loyalität sicher war. Nur in Einzelfällen kam es zu offenen Differenzen. Letztendlich erlangte Walter Strauß im Laufe der Jahre diejenige Stellung, die den Spiegel zu Beginn des Jahres 1962 dazu veranlasste, den „immerwährenden Staatssekretär" als eigentlichen Herrscher der Rosenburg (der Sitz des BMJ) zu bezeichnen. Walter Strauß konnte also nach Ansicht des Autors als Glücksfall für das BMJ bezeichnet werden, weil er Sachkompetenz mit Kontinuität verband, d.h. man kannte sich, Außenstehende hatten wenig Erfolg, z.B. Selbstbewerber. Doch griff man gerne auf Abordnungen aus den Länderverwaltungen zurück, um den Kurs des Ministeriums deutlich zu machen. Dieses hatte in dem Bereich der Gesetzgebung im materiellen und formellen Recht (Strafrecht, Zivilrecht etc.) umfassende Kompetenzen.

Bisher ungekannte Anforderungen stellte der Prozess der europäischen Einigung an die Personalpolitik im Bonner Justizministerium. In zunehmendem Maße wurden Beamte zu den im Entstehen begriffenen europäischen Einrichtungen nach Brüssel oder Luxemburg entsandt. Dadurch entstanden - zuweilen in den Reihen ganzer Abteilungen - personelle Lücken, die es zu schließen galt. Dass Walter Strauß nach seiner Zeit als Justizstaatssekretär selbst zum Gerichtshof der Europäischen Gemeinschaften wechselte, verdeutlicht, dass er der europäischen Einigung wohlwollend gegenüberstand und sie auch persönlich zu fördern gedachte. Das Ende der dritten Wahlperiode im Herbst 1961 nahm Staatssekretär Strauß als einen gewissen Einschnitt wahr. Die 1949 begonnenen Arbeiten waren im Wesentlichen abgeschlossen, im Ministerium hatte sich längst Routine eingestellt. Vor diesem Hintergrund erwachte in dem obersten Beamten das Bestreben, noch einmal etwas Neues zu wagen. Die Gelegenheit dazu ergab sich im Frühjahr 1962, als klar wurde, dass im kommenden Jahr der deutsche Richterposten in Luxemburg neu zu besetzen sei. Der Abschied wurde ihm allerdings leicht gemacht. Ohnehin machten sich mehr und mehr Spannungen zwischen dem System Strauß, dass als unbeweglich kritisiert wurde, und den einzelnen Abteilungen bemerkbar.

Den Zenit seiner Amtszeit hatte Strauß also bereits überschritten. Allerdings fiel ihm der Abschied auch leicht. Die Tatsache, dass der Abgang von Strauß von der Spiegel-Affäre 1962 überschattet wurde, führte aber auch dazu, dass sich der Justizstaatssekretär vor Solidaritätsbekundungen kaum retten konnte. Seine Freunde und Weggefährten sowie anderweitig ihm verbundene Persönlichkeiten des öffentlichen Lebens würdigten dabei einen Mann, der die Personalpolitik im Bundesministerium der Justiz seit Gründung des Hauses dominiert und bis zuletzt kontrolliert hatte. Mit dieser Einstellung hat Staatssekretär Strauß, so der Autor, den Geist der „Rosenburg" entscheidend mitgeprägt.

Abschließend fragt es sich, welchen Zweck das Buch verfolgt. Soll es eine Hommage an Walter Strauß sein? Dazu fehlt es an genügend persönlichen Elementen, die eine Biographie gemeinhin ausmachen. Das Buch deutet eher auf eine bürokratiegeschichtliche Studie hin; diese ist jedoch nur für Insider von Interesse, d.h. für Leser, die sich in den komplizierten Wirrungen und Irrungen der Personalpolitik der Bonner Justizbehörde der frühen Nachkriegszeit zurechtfinden „wollen". Hier hat das Buch jedoch ein Manko: Es fehlt eine Einbettung in den historischen *Gesamtzusammenhang*, die eine Einordnung und Bewertung der Vorgänge erlaubt – eine in der jüngeren zeitgeschichtlichen Forschung sehr häufige Erscheinung. So bleibt es bei einer Dokumentation der Verwaltungsgeschichte des BMJ – allerdings ohne historische Gesamtbewertung. Es zeigt das Bild einer rechtsstaatlich geführten Behörde, die unter der Leitung von Walter Strauß versuchte, das Beste aus der Situation zu machen. Das wird aber nicht deutlich genug herausgearbeitet, sondern die Darstellung erschöpft sich weitgehend in endlosen personalpolitischen Entwicklungen. So ist das Buch allenfalls von bürokratiegeschichtlichem Interesse. Ein Quellen- und Literaturverzeichnis sowie ein Personenregister schließen das Buch ab.

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Urs Marti-Brander

Rousseaus Schuld. Essays über die Entstehung philosophischer Feindbilder

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Jean-Jacques Rousseau, der in Genf geborene Staatsphilosoph (1712-1778), gilt als einer der geistigen Wegbereiter der Französischen Revolution. Er entwickelte die Theorie des Gesellschaftsvertrags zwischen freien und gleichen Bürgern, die sich zusammenschließen und den Willen der Allgemeinheit (volonté génerale) verkörpern, der auf das Wohl aller (Gemeinwohl) abzielt.

Mit seiner Gesellschaftstheorie hatte er im vorrevolutionären Frankreich ungeheures Aufsehen erregt. Man kann ihn als Vater der Revolution bezeichnen, da nach seinen Vorstellungen der Gesellschaftsvertrag die Grundlage staatlicher Zusammenschlüsse ist. Diese sind nach Rousseau eine Versammlung gleicher und freier Bürger. Diese Versammlung ist in den nationalen Parlamenten verkörpert, wo die volonté génerale herrscht, der sich der Einzelne unterordnen muss (Mehrheitsprinzip). Diese nationalen Parlamente sind Repräsentativorgane, da Versammlungen in Gestalt der unmittelbaren Demokratie, nach Ansicht des Autors nur in kleinen Gemeinwesen (wie in der Schweiz), nicht aber in größeren Staaten möglich sind.

Rousseau wollte in seiner berühmtesten Schrift (contrat social 1762) eine menschenwürdige Regelung der politischen Verhältnisse, eine Demokratie nach dem Mehrheitsprinzip erreichen. Freiheit war für ihn nur möglich durch den Zusammenschluss aller, der die Gemeinschaft begründet. Rousseau entlarvt die Gesellschaft seiner Zeit als Reich der Vorurteile; damals war die soziale Ungleichheit und die Systeme der einseitigen Privilegien (Adel, Klerus) das herrschende Staatsprinzip. Die Liste der Kritiker war dementsprechend lang. Es waren diejenigen, die die Gleichheitsforderungen der Französischen Revolution ablehnten (wie z.B. Edmund Burke in seinem Werk: „Reflection on the Revolution in France", 1790.). England habe Sittlichkeit und Religion, in Frankreich herrsche Anarchie und Chaos. Die Ablehnung zog sich in der herrschenden Staats- und Sozialphilosophie, aber auch

in der ökonomischen Theorie im 18. und 19., ja, bis ins 20. Jahrhundert hinein hin. Das Buch des in Zürich lehrenden Historikers zeichnet diese Entwicklung in Hinblick auf Rousseau nach. Warum gerade Rousseau?

Rousseau war politischer Utopist. Ihm schwebte eine Gesellschaft der Gleichheit und Freiheit vor. Hintergrund war, wie erwähnt, die Zeit der absoluten Monarchie, in der ständisches Recht (d.h. soziale Ungleichheit) und die Exekutivgewalt der Krone allgegenwärtig waren. Die Ursache der Ungleichheit ist für Rousseau das Privateigentum. Dadurch rief er vor allem liberale Kritiker auf den Plan, wie z.B. den (Neo-)Liberalismus, die ein gespaltenes Verhältnis zu Rousseau hat. Die Grundlage des Liberalismus ist das Privateigentum, das, so der Autor, gegen die Gleichheit aller im Sinne des Rousseau'schen Gesellschaftsvertrags verteidigt wird. Jesaiah Berlin (Kommunitarismus) kritisiert Rousseau gar als unsozial und egozentrisch.

Die Zeitgenossen, so der Autor, sahen in Rousseau „einen subversiven Denker, dessen Ideen Moral, Gesetz und Religion zu zerstören drohten und sämtliche für den Bestand der Gesellschaft unerlässlichen Institutionen, von der Familie über das Privateigentum bis zur staatlichen Ordnung, in Frage stellten." Später wurde ihm die Verantwortung für den gewaltsamen Verlauf der Französische Revolution zur Last gelegt. Aus seinen Schriften hat man darüber hinaus eine radikale Zivilisationskritik herausgelesen, darin aber ebenso den Schlüssel zum Verständnis aller Übel, welche die moderne Zivilisation mit sich bringt, zu entdecken vermeint. Wie erklärt sich ein so umfangreiches „Sündenregister"? Wird nicht die Wirkung von Ideen überschätzt in einer Welt, die eher von Interessen bestimmt zu sein scheint?

Die Thesen von Rousseau standen in Kontrast zu den herrschenden Überzeugungen seiner Zeit. Wie ausgeführt, wurde er mit Anarchie und Chaos gleichgesetzt, die die Französische Revolution verkörperten. So argumentierte z.B. der Ökonomen Friedrich August von Hayek, der Rousseau als Störenfried bezeichnete der die Grundlagen der Gesellschaft gefährde (S.198, 202). Rousseau galt in seinen Augen als Gegner einer liberalen Wirtschaftsordnung.

Das Werk ist offenbar für Kenner der Theorien Rousseaus gedacht, die diesen Theorien in der Staats- und Gesellschaftsphilosophie des 18. und 19. Jh. nachgehen. Das Buch wechselt allerdings ständig die „Denkebenen": einmal die Ansichten Rousseaus, ferner die Interpretation Rousseaus durch den Autor, schließlich die die Interpretation Rousseaus durch seine damaligen Kritiker. Im Grunde will der Autor eine in seiner Sicht prinzipielle Auseinandersetzung zwischen dem Freiheitsgedanken, wie ihn Rousseau vertritt, und zwischen dem am Privateigentum orientierten egoistischen Freiheitsgedanken schildern, den der Liberalismus und seine Gefolgsleute vertreten. Der Autor macht diesen Gegensatz sehr deutlich, wenn er am Schluss als Kritik an der herrschenden „Philosophie" äußert: „Rousseau, der Schriftsteller und der Mensch, der Außenseiter, der sich dem Wettbewerb um Gunst und Gewinn verweigert hat, muss eine Provokation darstellen für eine Zivilisation, die ihre Daseinsberechtigung und ihren Sinn in einem nie endenden Wettbewerb zu finden glaubt" (S.202).

Dass politische Denker durch nachfolgende Generationen vereinmahmt und „uminterpretiert" werden, ist an sich nichts Neues. Das gilt für die Lehren Platons über die der Aufklärung bis hin zu den Lehren der modernen Staats- und Sozialpholosophie. Jedes Denken ist zeitbestimmt, wird aber von den nachfolgenden Generationen nach den bei ihnen herrschenden Maßstäben beurteilt, oft, ohne die damaligen Zeitläufte ausreichend zu berücksichtigen (so werden heute an die Politik des 19. Jh. heutige Maßstäbe angelegt, ohne auf die Vergangenheit zu sehen, Anm d. Rez.). Auch Karl Marx und seine Theorien, der als Soziologe und Ökonom schrieb, wurde für die Folgen seiner Theorien in Haftung genommen, d.h. für die Etablierung der kommunistische bzw. sozialistischen Gesellschaft verantwortlich gemacht, die sich ab 1917 in Russland etablierte und die gleichgesetzt wurde mit der Zerstörung des Privateigentums und der gesellschaftlichen Ordnung. Ein weiteres Beispiel ist auch Richard Wagner, der in Hinblick auf seine antisemitischen Äußerungen lange verantwortlich für die späteren NS-Verbrechen gemacht wurde, indem seine Musik auf den Index gesetzt wurde (z.B. in Israel).

Der Autor hat eine interessante Studie über Rousseau im Spiegel seiner Kritiker vorgelegt. Es wäre wünschenswert gewesen, wenn er die oben angedeutete Problematik der zeitbestimmten Interpretation stärker hervorgehoben hätte, weil dadurch deutlich geworden wäre, warum Rousseau vor zweihundert Jahren so provozierend und revolutionär wirkte.

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Joachim Rückert

Abschiede vom Unrecht. Zur Rechtsgeschichte nach 1945

Tübingen: Verlag Mohr Siebeck, 2015, 563 S., ISBN 978-3-16-154136-0

Der vorliegende Band des Frankfurter Emeritus für juristische Zeitgeschichte vereint neunzehn Beiträge aus seiner Feder zur Rechtsgeschichte nach 1945. Sie umfassen eine große Spannweite und reichen von Beiträgen zum Sozialstaatsprinzip und zu Me-

thodenfragen des Zivilrechts bis hin zur Schilderung der Bewältigung des NS-Unrechts nach 1945. Die Aufsätze sind bereits zuvor in Zeitschriften bzw. Monographien veröffentlich worden und datieren von den 1960er-1970er Jahren bis in das Jahr 2014. Die Aufsätze sind in die Gliederungspunkte des Autors „Bilanzen" (I.), „Methoden und Verfassungswandel" (II.) sowie „Alternativen" (III.) eingeordnet.

Die Detailgenauigkeit der Aufsätze ist beeindruckend; die behandelten Themen sie sind jedoch inzwischen durch die neuere Literatur vielfach überholt oder präzisiert und ergänzt worden, was für den Leser aber nicht erkennbar ist. Das relativiert die Aussagen des Autors, wenn man die Aufsätze nach dem heutigen Erkenntnisstand beurteilt.

Als Beispiele sollen einige Aufsätze zur Problematik Rechtsgeschichte und Bewältigung des NS-Unrechts nach 1945 herausgegriffen werden: In dem „Aufsatz Aufbau der Rechtswissenschaft nach 1945" stellt der Autor fest, dass kein „geistiger Wiederaufbau" stattgefunden habe, Kontinuitäten und Diskontinuitäten seien aufgezählt, aber nicht überwunden worden. Dies ist kein Wunder, da die meisten Vertreter der Wissenschaft auch schon vor 1945 tätig waren, wie der Autor präzise für die einzelnen Universitäten darlegt. In dem Beitrag „Justiz und Nationalsozialismus nach 1945" unterzieht der Autor die ältere Literatur (Wagner, Weinkauff, Gruchmann u.a.) einer harschen Kritik. Ein präzises Verständnis des NS-Systems sei in dieser Literatur nicht erkennbar, die Forschungsergebnisse seien viel zu abstrakt, es fehle auch eine Erörterung individueller Verantwortlichkeiten der Akteure.

In dem Aufsatz „Mitläufer, Weiterläufer und andere Läufer im Bundesministerium der Justiz" (BMJ.) (Grundlage sind Notizen des Autors aus dem Jahr 2012) stellt der Autor fest, dass eine professionelle Elite mit hohem Anteil an NSDAP-Mitgliedern (60%) in den höheren Funktionen im BMJ der früheren Nachkriegszeit gewirkt habe. Es habe keine Alternative gegeben, man habe qualifiziertes Personal gebraucht. Gemessen am Nürnberger Urteil seien jedoch keine kritisch Belasteten im BMJ tätig gewesen.

In seinem Beitrag „Die ausgestellte Justiz – eine misslungene Bewältigung – zur Justiz im SED-Staat" (Stand 1996), äußert der Autor zusammenfassend: Die DDR sei kein Unrechtsstaat, aber auch kein Rechtsstaat im herkömmlichen Sinne gewesen. Es habe der Primat der Politik geherrscht, eine Selbständigkeit des Rechts habe es nach der herrschenden kommunistischen Ideologie nicht gegeben (jüngere Forschungen zeigen indes, dass in der Straf- und Zivilrechtspraxis alte Traditionen von vor 1945 fortlebten, das Recht also kein „bloßer Abklatsch" der ökonomischen Verhältnisse war, Anm. d. Rez.).

In dem Beitrag „Abrechnen, aber wie – die rechtliche Transformation Europäischer Diktaturen nach 1945" (Stand 2006) legt der Autor eine vergleichende Betrachtung der Transformation des Rechts in den sog. Reformstaaten seit 1945 vor (Österreich, Italien, Spanien usw.). Die Transformation des Rechts nach 1945 sei besonders deutlich in der Bundesrepublik gewesen; dies sei aber nur punktuell geschehen, weil die wesentlichen Grundlagen (das überkommene Rechtssystem und die alte Gerichtsorganisation) aus der Kaiserzeit bzw. der Weimarer Republik übernommen worden seien.

Die zusammenfassende Kritik des Autors geht dahin, dass keines der Bücher zur juristischen Zeitgeschichte den westlichen Verfassungsstaat der Neuzeit ins Zentrum gestellt habe; auch die Wandlung vom Gesetzesrecht zum Richterrecht werde stiefmütterlich behandelt, ebenso werde die Verknüpfung von Freiheit und Sozialstaat kaum berührt. Die neuen Veröffentlichungen zu diesen Themen seien „so zögerlich".

Alle diese Kritikpunkte sind längst Allgemeingut bzw. durch die neuere Forschung vertieft und ergänzt worden. Es wäre wünschenswert gewesen, wenn der Autor auf diese Entwicklung hingewiesen hätte. Vorbildlich hierfür ist das Werk von Peter Landau, „Deutsche Rechtsgeschichte im Kontext Europas" (2016), das eine Aufsatzsammlung aus seiner Feder enthält, denen am Schluss jeweils sog. Zusätze (sog. „Addenda") angefügt sind, in denen der Autor den neuesten Forschungsstand skizziert. Damit ist ein guter Überblick zwischen dem früheren und dem aktuellen Kenntnisstand möglich. An solchen Hinweisen fehlt es im vorliegenden Falle. Der vorliegende Band ist somit weniger hinsichtlich der behandelten Themen, sondern hinsichtlich der Person des Autors von Interesse, der damit selbst zum Objekt, ja z.T. auch zum Subjekt der juristischen Zeitgeschichte wird. Dies wird besonders deutlich in seinen Beiträgen zur juristischen Zeitgeschichte, die von ihm in Frankfurt begründet und später in Hannover fortgeführt wurde. Seine These lautet dahingehend, dass die juristische Zeitgeschichte ein eigenes Fach gegenüber der „normalen" Rechtsgeschichte und Zeitgeschichte sei.

Der vorliegende Band zeigt die Problematik von Aufsatzsammlungen auf. Ohne auf Details einzugehen, stellt sich dabei immer die Frage, ob Vollständigkeit erreicht, d.h. das gesamte Schaffen des Autors vorgestellt werden soll, oder ob eine Auswahl zu treffen ist, und falls ja, unter welchen Gesichtspunkten. Im vorliegenden Fall enthält der Band zwar eine Auswahl von Aufsätzen, die Kriterien der Auswahl sind jedoch für den Leser nicht deutlich. Der Verfasser hat sich hier gewissermaßen selbst eine Festschrift geschrieben, obwohl der Titel des Werks an sich eine Monographie zur allgemeinen Rechtsgeschichte nach 1945 vermuten lässt. Es hätte dem Band gut getan, wenn die Beiträge entweder zeitlich oder systematisch, d.h. nach Sachgesichtspunkten, aufgelistet worden wären. Die Einpassung der Aufsätze in das eigenwillige Gliederungsschema des Autors erschwert allerdings dem Leser die Orientierung.

Der Band enthält zum Schluss ein Verzeichnis der Erstveröffentlichungen sowie ein Sachregister.

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Reiner Haehling von Lanzenauer

Der badische Jurist Reichlin von Meldegg und seine Zeit

Karlsruhe: Verlag der Gesellschaft für Kulturhistorische Dokumentation e.V., 2019, 141 S., ISBN 978-3-922596-28-8

Reiner Haehling von Lanzenauer hat das Rechtshistorische Museum in Karlsruhe seit dessen Gründung mit vielen Vorträgen und drei Heften geprägt: Heft 4 zu Recht und Gericht in Baden-Baden, 1987, Heft 6 über den Dichterjuristen Scheffel, 1988 sowie Heft 14 betreffend den Mord an Matthias Erzberger, 2008. Im Jahre 2019 legt er nun seine Biographie über Joseph Reichlin von Meldegg (1806-1876) vor, die eine wesentliche Bereicherung für die badische Landes- und Rechtsgeschichte darstellt. Sie bietet überdies Gelegenheit, die Juristenbiographien der Schriftenreihe in ihrer Gesamtheit Revue passieren zu lassen.

(I) Juristenbiographien in der Schriftenreihe

Die Schriftenreihe des Rechtshistorischen Museums weist bereits zahlreiche Porträts bekannter und weniger bekannter Juristenleben auf. So zeichnete Hildebert Kirchner die Vita Eduard von Simsons nach (Heft 3, 1985), Reiner Haehling von Lanzenauer, wie bereits angedklungen, den Dichterjuristen Scheffel (Heft 6, 1988) und Detlev Fischer bearbeitete die Karlsruher Juristenportraits aus der Vorzeit der Residenz des Rechts (Heft 9, 2004). Fischer verantwortet ferner die Karlsruher rechtshistorischen Blätter (vgl. https://www.rechtshistorisches-museum.de/juristenportraits.html abgerufen 17.04.2019).

Aufmerksam gemacht sei auf „Theodor Mommsen – Gedanken zu Leben und Werk des großen deutschen Rechtshistorikers" von Fritz Sturm (Heft 11, 2006), auf „Julius Federer (1911-1984), Rechtshistoriker und Verfassungsrichter" von Alexander Hollerbach (Heft 13, 2007) sowie „Eduard Dietz (1866-1940), Vater der badischen Landesverfassung von 1919" von Detlev Fischer (Heft 16, 2008; 2. Aufl. 2012), dem just 2019, im Jubeljahr der badischen Verfassung gedacht wurde, so im Vortrag von Detlev Fischer in den „Karlsruher Begegnungen zu Wissenschaft, Politik und Kultur – Gespräche am Tor 2019" am 20. März 2019 mit dem Vortragstitel „Erinnerung an die badische Revolution 1918/19: Der Karlsruher Jurist Eduard Dietz als Vater der badischen Verfassung vom 21. März 1919".

Erwähnt werden soll des Weiteren die Hommage an Guido Kisch von Wilhelm Güde (Heft 18, 2010). Heft 17 der Schriftenreihe des Rechtshistorischen Museums Karlsruhe war dem badischen Universaljuristen Josef Kohler gewidmet (Heft 17, 2009). Diese Widmung und auch diejenige an Ernst von Simson mit dem Beititel „im Dienste Deutschlands: von Versailles nach Rapallo (1918-1922) in Heft 28 erschienen 2013 oder die (Heft 33, 2016) an den Karlsruher Rechtsanwalt Reinhold Frank (1896-1945) entstammen allesamt der Feder von Norbert Gross.

Und weitere Biographien sind in der Schriftenreihe publiziert worden: Christian Würtz zu Reichskanzler Constantin Fehrenbach (Heft 27, 2013), Alexander Hollerbach über „Anton Christ (1800-1880); Vormärz, Revolution und Nachmärz im Spiegel des Wirkens eines badischen Juristen" (Heft 26, 2013) sowie von Karl Zippelius zu „Arnold Horn (1844-1938), Karlsruher Rechtsanwalt und Privatgelehrter" (Heft 24, 2012). Heft 29 erinnert schließlich an Hildebert Kirchner (1920-2012), herausgegeben von Detlev Fischer im Jahre 2013.

Nunmehr erschien auch Reiner Haehling von Lanzenauers Abhandlung zum badischen Juristen Reichlin von Meldegg (Heft 35, 2019). Bereits angekündigt ist ein Vortrag von Christoph Klaas zu „Professor Dr. Gerd Pfeiffer (1919-2007), Präsident des Bundesgerichtshofs".

(II) Autor und Studie

Der Autor, Jahrgang 1928, studierte Rechtswissenschaft in Freiburg/Br. und schloss seine Staatsexamina 1954 und 1958 ab. Nach Eintritt in den baden-württembergischen Justizdienst war er zuerst als Richter, dann als Staatsanwalt tätig, zuletzt leitete er die Staatsanwaltschaft Baden-Baden. Wissenswert ist, dass sich Reiner Haehling von Lanzenauer ehrenamtlich in der Straffälligenhilfe engagiert. Ferner ist er Mitglied in landesgeschichtlichen und literarischen Vereinigungen, Mitgründer der Deutsch-französischen Gesellschaft Baden-Baden sowie Ehrenmitglied im Verein des Rechtshistorischen Museums e.V. Karlsruhe. Das Schrifttum verdankt ihm Monographien wie Entstehung und Ausbau des badischen Enteignungsrechts im 19. Jahrhundert (Dissertation 1957), Jugendselbstmord (1970), Der Eisenbahnattentäter Monsieur X (1980), Reinhold Schneider aus Baden-Baden (1991), Das Baden-Badener Attentat (1995), Düstere Nacht, hellichter Tag. Erinnerungen aus dem 20. Jahrhundert (1996) sowie zahllose Aufsätze in Sammelwerken und Fachzeitschriften.

(III) Quellen und ihre Auswertung

Reiner Haehling von Lanzenauer führt dem Leser ein Stück Rechtsgeschichte „von innen" vor (S. 9), nämlich anhand der Gestalt des schlichten Beamten Joseph Reichlin von Meldegg. Er kann dabei auf Reichlins Erinnerungen eines badischen Beamten

in zwei Bänden (1872 und 1874) und auf einschlägiges Archivmaterial zurückgreifen (Staatsarchiv sowie Stadtarchiv Freiburg, Generallandesarchiv Karlsruhe sowie die Stadtarchive Achern, Baden-Baden, Breisach, Bühl, Gaggenau und Weil). Die sorgfältig gearbeiteten Anmerkungen weisen die Primärquellen auf, ergänzt um weiteres Schrifttum aus Landes- und Rechtsgeschichte.

Der Autor geht zurück auf die Wurzeln der Familie Reichlins und dessen Jugend- und Studienzeit in Freiburg/Br. Im Jurastudium hörte Reichlin bei Rotteck und Welcker. Sein Vorlesungsbelegungsverzeichnis weisen natürlich auch Studien zum französischen Zivilrecht auf (Code Napoléon). Nach dem ersten Staatsexamen 1829 kam Reichlin als Aktuar nach Lörrach, sodann nach Rheinbischofsheim und 1832 als Sekretär an das Hofgericht des Mittelrheinkreises in Rastatt. Über den dortigen Gesandtenmord 1799 schrieb Reichlin im Jahre 1869 eine Abhandlung (S. 52). Weitere Stationen bildeten Freiburg und Müllheim (1836), wo er beim Bezirksamt zum Assessor ernannt wurde (S. 65), 1839 kam er zum Bezirksamt Lörrach (S. 75). Anfang Oktober 1841 wurde der Beamte befördert und zum Vorstand des Bezirksamtes Bonndorf ernannt (S. 79). Nächste Stationen waren Philippsburg und Staufen sowie Bühl und Breisach (1849). Am 14. April 1859 wurde Reichlin zum Regierungsrat und Kollegialmitglied bei der Regierung des Seekreises in Konstanz befördert (S. 113). Nach seinem Tod 1876 erklärte sein 1872 niedergeschriebenes Testament die Todesursache, denn er litt schon früh an einem „zunehmenden Herzleiden“ (S. 117, 123).

(IV) Einordnung

Es gelingt Haehling von Lanzenauer meisterlich, den Juristen, Beamten wie Menschen Reichlin von Meldegg zu porträtieren sowie in das allgemeine politische Geschehen im Deutschen Bund und Baden einzuordnen: in die französisch geprägte Zeit mit Code civil und Badischem Landrecht sowie in die politischen Umstürze insbesondere in den Jahren 1832 und später 1848/9. Damit hat der Verfasser eine eng auf die Primärquellen gestützte, an die Lebensstationen Reichlins gekoppelte und zugleich flüssig lesbare Biographie geschrieben.

Thomas Gergen*

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Ulrich Falk / Markus Gehrlein / Gerhart Kreft / Marcus Obert (Hg.)

Rechtshistorische und andere Rundgänge – Festschrift für Detlev Fischer

Karlsruhe: Gesellschaft für Kulturhistorische Dokumentation e.V., 2018, 702 Seiten, ISBN 978-3-922596-25-7

„Verpflichtet in der Pflicht, verantwortet im Wort“ (Elazar Benyoëtz) umschreibt wohl am treffendsten Detlev Fischer - Doyen des Rechtsberaterhaftungs- resp. Maklerrechts und Nestor der badischen Rechtsgeschichte - der mit diesem voluminösen Opus Magnum geehrt wird. Als Richter am IX. Zivilsenat des Bundesgerichtshofs (2005-2015) prägte er die Rechtsprechung im Insolvenzrecht sowie im Anwalts- und Steuerberaterhaftungsrecht maßgeblich. Neben seiner Lehr- und Prüfertätigkeit sowie großem Engagement bei der Referendarausbildung publizierte Fischer eine beeindruckende Fülle rechtsdogmatischer Abhandlungen. Seine große Leidenschaft galt indes seit langem der Geschichte des Rechts. Dieser widmete er sich nicht nur mit der Feder. Als Hauptverantwortlicher des Rechtshistorischen Museums in Karlsruhe führte er die Mehrzahl der jährlich rund 4000 Besucher durch die Ausstellung und konzipierte Sonderausstellungen. Das an der Residenz des Rechts angesiedelte Museum ressortiert neben dem Mittelalterlichen Kriminalmuseum in Rothenburg ob der Tauber bei den ganz wenigen Spartenmuseen in Europa, die sich noch der Geschichte des Rechts annehmen. Diese Exilierung der Rechtskundemuseen an die Peripherie des Kultur-Pluriversums mutet paradox an, avanciert doch die breitenwirksame museale Vermittlung der historischen Wurzeln unserer Rechtsordnung - eingedenk zunehmender Bedrängung der Rechtsstaatlichkeit in Europa - vom officium nobile zum Desiderat. So ist es geradezu ein Glücksfall für das Rechtshistorische Museum in Karlsruhe, dass in ihrem Vorsitzenden Detlev Fischer rechtshistorische Brillanz und Justizexpertise konfusionieren. Seine „Rechtshistorischen Rundgänge durch Karlsruhe – Residenz des Rechts“ (3. Auflage 2017) können fraglos als Krönung seines literarischen Werks gelten und stehen deshalb auch terminologisch Pate für den Titel der Festschrift.

Die opulente Festschrift mit 49 sorgsam ausgewählten Beiträgen aus den Bereichen Insolvenzrecht, allgemeines Zivil- und Zivilprozessrecht sowie Anwaltshaftungsrecht besticht durch eine beeindruckende Themenvielfalt und Detailtiefe, wobei die rechtshistorische Akzentuierung prävaliert. Diese Dichotomie von Beiträgen zum aktuellen Recht und zur Rechtsgeschichte ist vor allem für letztere ein Segen, erscheint sie doch im universitären Forschungs- und Publikationskanon zunehmend marginalisiert. Die publizistische Sekundierung der rechtsgeschichtlichen Forschung durch Festschriften zur Vermeidung eines „hic sunt leones“ ist deshalb umso verdienstvoller.

Die folgende Rezension der Festschrift für Detlev Fischer beschränkt sich - ob des Umfangs des Werkes - auf das Konspektieren der einzelnen Beiträge.

Der erste Beitrag „Kenntnisabhängiger Verjährungsbeginn im Anwaltshaftpflichtrecht“ von Michael Artner setzt sich kritisch mit BGHZ 200, 172 ff. auseinander. Er dekuvriert Inkonsistenzen bei der Übertragung der Figur des Behandlungsstandards aus dem Arzthaftungsrecht auf die Anwaltshaftung und identifiziert Alternativen.

Sodann widmet sich Gerhard Athing „Iweins Kampf mit dem Brunnenherrn Askalon“. Er prüft die Brunnenaventiure nach dem (vermutlich) geltenden Recht zur Abfassung des Werkes (ca. 1200 n.Chr.), wobei er zu Recht auf die Vielschichtigkeit des zeitgenössischen Rechts und die Fiktionalität des Romans hinweist. Anschließend fragt Athing, wieweit sich der Protagonist nach den Maßstäben der Erzählwelt schuldig gemacht habe. Für die strafrechtsgeschichtliche Forschung sind solche Arbeiten von großem Wert, werfen sie doch wertvolle Schlaglichter auf den Einbruch des Schuldgedankens in das Strafrecht des Mittelalters.

Anschließend diskutiert Georg Bitter in „Insolvenzanfechtung von Umwandlungsmaßnahmen“ einen Schnittbereich von Insolvenz- und Umwandlungsrecht vor dem Hintergrund von BGH IX ZR 126/98. Für die gesellschaftsrechtliche Praxis hilfreich induziert er, warum der BGH wohl auch künftig von einem abschließenden und damit vorrangigen Charakter der umwandlungsrechtlichen Regelungen ausgehen dürfte.

Es folgt Angela Borgstedt mit einer juristischen Aufarbeitung der sog. „Euthanasie“ im Freiburger „Grafeneck-Prozess“. Sie bilanziert, dass die Angeklagten keineswegs zur „Dritten Garnitur der Schuldigen“ gehörten und konfrontiert mit einer bedrückenden vergangenheitspolitischen Zeittendenz der Nachkriegsjahre, vermeintlich zu hohen Strafen mit Amnestien zu begegnen.

Danach betritt Peter Depré mit „Kunst hat ihren Preis – trotz § 138 BGB“ ein für den Museumsbetrieb im Umfeld des derzeit massiv überkauften Kunstmarktes hochaktuelles Terrain, tangiert doch die (zivilrechtliche) Bewertung von Kunst neben Kauf und Verkauf auch den musealen Leih- und Versicherungsverkehr. Im Spannungsfeld von Privatautonomie und Sittenwidrigkeit erweist sich § 138 BGB auf dem Kunstmarkt als anämisch, was – wie Depré aufzeigt – auch pikante Implikationen im Insolvenzrecht zeitigt.

Ulrich Falk und Falk gemeinsam mit Karen Klein fokussieren sich hiernach in gleich zwei Beiträgen auf Rückschauverzerrungen (Hindsight Bias, vulgo „Hinterher ist man immer schlauer“), bislang eine Domäne von Psychologie und Verhaltensökonomik. Falk wird der menschlichen Neigung, in der Rückschau die Eintrittswahrscheinlichkeit eines bestimmten Ereignisses zu überschätzen, in seinem ersten Beitrag auch in Sportberichterstattung, Turnierschach und bei der Bewertung juristischer Prüfungsaufgaben fündig und - gemeinsam mit Klein - im zweiten Beitrag auch bei der Aburteilung von Anwalts- und Organhaftungsfällen. Beide mahnen akribisch unternehmerische (Fehl-)Entscheidungen prüfende Spruchkörper zur kritischeren Reflexion deren eigener Fehlerquelle Hindsight Bias an.

Michael Fischer möchte hybride Rechtsordnungen (etwa jene der kanadischen Provinz Québec) nutzbar machen, wenn es gilt „fremde“ Rechtsinstituten ins „eigene“ Recht zu implementieren. An „dommages-intérẹts punitifs“ angelehnte „punitive damages“ dürften zwar in Deutschland (noch?) nicht konsensfähig sein. Dafür ist Fischers bewegtes Monitum einer stärkeren Beachtung hybrider Rechtsordnungen in der Juristenausbildung um die (Straf-)Rechtsgeschichte zu erweitern.

Daraufhin entführt Eberhard Foth den Leser in die Frühzeit des 1871 errichteten Reichsgerichts mit einem Schwerpunkt auf Institution, Spruchkörper und Judikatur und reminisziert dessen bereits von Zeitgenossen in aller Welt höchstgeschätztes Wirken.

„Die gesellschaftliche Ächtung des Bankrotts in historischen deutschen Rechtsordnungen“ sowie den seinerzeitigen Strafenkanon für „Bankerotierer“ zeichnet nunmehr Hans Gerhard Ganter nach. Möglicherweise auch historisch bedingt hypostasiert die atavistische Brandmarkung wirtschaftlichen Scheiterns noch heute eher in Deutschland, denn im angloamerikanischen Rechtskreis.

Markus Gehrlein eruiert in seinem Beitrag die Bindung des Regressgerichts durch Streitverkündung zu Lasten des Anwalts im Vorprozess. Er verwirft die prima facie naheliegende weitgehende Erleichterung der Regressklage des Mandanten. Eine Streitverkündung an den Anwalt des Vorprozesses könne allenfalls dessen Pflichtwidrigkeit betreffen, da der normative Schaden des Mandanten gegen den Anwalt nicht Gegenstand des Vorprozesses sei.

In „Gibt es zwischen Deutschland und Frankreich ein Niemandsland?“ folgt Herbert Geisler mit detektivischem Spürsinn der Fährte eines 2,5 km langen und von Doppelmarkierungssteinen gesäumten Grenzverlaufs im Pfälzer Wald durch die Jahrhunderte. Dieses inzwischen in Vergessenheit geratene Stück „Niemandsland“ dürfte nach Geislers Auslegung des Vertrags vom 14. 8. 1925 zwischen Deutschland und Frankreich jedoch kein hoheitsfreier Raum mehr sein.

Um die wechselvolle „deutsch-französische“ Rechtsgeschichte macht sich Thomas Gergen in seinem Beitrag „Saarlouis – Sičge présidial und Oberster Gerichtshof“ verdient. Mit der Darstellung von Saarlouis als Sitz von Ober- und Höchstgerichtsbarkeit schließt Gergen eine Lücke in der saarländischen Rechtsgeschichte.

Stefan Geyer analysiert in „Hierzu hat schon das Reichsgericht entschieden…“ die BGH-Rechtsprechung seit dem Jahr 2000 auf dieses Begründungsnarrativ und vermag Kontinuitäten sowie Brüche aufzuzeigen, welche beredtes Zeugnis ablegen von der gleichsam zeitlosen Bedeutung des Reichsgerichts.

Sehr einfühlsam beleuchtet hernach Norbert Gross in „Reinhold Frank – Die letzten Besucher“ vermittels einer bislang unbekannten Quelle die letzten Monate eines prominenten Karlsruher Vertreters des Widerstands im Jahrdutzend der Hitlerei. Das Berufsethos des απολογητής Reinhold Frank, sich noch in der Haft um seine Mandate zu bemühen, nötigt nicht nur Standesgenossen höchste Anerkennung ab.

In den frühen Jahren der Weimarer Republik angesiedelt ist der Aufsatz von Wilhelm Güde zum Disziplinarverfahren an der Universität Heidelberg gegen Carlo Mierendorff wegen dessen Beteiligung an der Erstürmung des Physikalischen Instituts der Uni-

versität. Konkreter Auslöser des Haus-/Landfriedensbruchs war indes der Verstoß des nationalistischen Professors Philipp Lenard gegen die reichsweit angeordnete Staatstrauer nach der Ermordung des Außenministers Walther Rathenau und Lenards Begründung „Wegen eines toten Juden lasse ich nicht meine Studenten müßig gehen."

Das Gottesurteil in den Werken Victor von Scheffels ist das Sujet von Reiner Haehling von Lanzenauers Beitrag, der sich – reputierlich aus der Masse vergleichbarer Arbeiten hervorstechend – nicht lediglich fragmentarisch im „Ekkehard" restringiert. So altertümlich irrational sich die von Lanzenauer beschriebenen Residuen einer amorphen Traditionsmasse auch heute präsentieren, sei doch zu bedenken gegeben, ob sie nicht – cum grano salis – bereits als erster Einbruch der „freien richterlichen Beweiswürdigung" ins Formalbeweisverfahren des Mittelalters zu würdigen sind, war doch der Ausgang einer Probe, etwa ein Heilungsverlauf einer Brandwunde, in vielen Fällen interpretationsbedürftig.

Alexander Hollerbachs biographische Studie „Im Strom von Verwaltung, Verfassung und Wissenschaft" unterrichtet den Leser zu einem großen gelehrten Praktiker des Südwestens, Paul Feuchte (1919-2013), dessen Hauptwerke: „Verfassungsgeschichte von Baden-Württemberg", „Quellen zur Entstehung des Landes Baden-Württemberg" sowie der Kommentar zur Landesverfassung wegweisend sind.

Bernd Kannowski überrascht darnach in seinem Beitrag „Von Schrifteigentum und natürlichen Kindern" mit teilweise verblüffend progressiven Regelungen des Badischen Landrechts von 1810. Auch mit dem Ziel erlassen, Baden Gestaltungsspielräume zu sichern, bevor Napoleon seinen Wunsch umsetzen konnte, den „Code civil de Français" auch hier einzuführen, geht das Landrecht etwa beim Vertrags- und Familienrecht teilweise deutlich über den Code Napoléon hinaus. Für das Geistige Eigentum kommt das Badische Landrecht gar einem Prometheus gleich.

Informativ bemüht Andreas Kappus in „Klarheitsanforderungen im Rechtsraum: Quelques trouvailles 1598-2017" den Steinbruch der Geschichte zur Frage der Rechtsklarheit und resümiert auf die Frage „1598-2017 – Ward wirklich Licht?" ein „Unbedingt", aber „Wo Licht ist, ist auch Schatten" sowie „Mehr Licht!".

Prägnant exzerpiert Godehard Kayser in „Vorinsolvenzliche Sanierung in Europa – Bestandsaufnahme und Ausblick" die Entwicklungen hin zu einem europaweiten präventiven Restrukturierungsrahmen. Er warnt vor Komplikationen bei der Implementierung der aktuell angestrebten Teilharmonisierung und votiert für die Schaffung eines schlanken rechtlichen Rahmens für Restrukturierungen („Sanierung light").

Einer paradox anmutenden asymetrischen Haftungsverteilung bei Fehlern sowohl des Anwalts als auch des Gerichts wird man in Christian Kirchbergs Abhandlung habhaft. Zwar postulierte das BVerfG im Jahr 2002, Rechtsanwälte dürften - trotz Spruchrichterprivileg - nicht ersatzweise für Fehler der Rechtsprechung haften. Nonchalant konterkariert der BGH dieses Verdikt, indem er vom Anwalt zur Vermeidung einer Haftung nunmehr fast schon euphemistisch fordert, dass er sich „nach Kräften" darum bemüht habe, dem Aufkommen von Irrtümern und Versehen des Gerichts entgegenzuwirken. Mit Medicus und Kirchberg lassen sich die Rechte des Mandanten in solchen Fällen über die Grundsätze des gestörten Gesamtschuldnerausgleichs hingegen kunstvoll salvieren.

In die Frühzeit des BGH übersiedelt der Beitrag „Nochmals: Bundesgerichtshöfliche Nebenstunden" des 2012 verstorbenen früheren Direktors der Bibliothek des BGH Hildebert Kirchner mit zahlreichen piktoralen Begebenheiten wohingegen das anschließende biographische Essay von Christoph Klaas „Die Eiche" an den früheren BGH-Richter und Weggefährten des Jubilars Gerd Pfeiffer erinnert, der sich ebenfalls in großem Engagement dem Rechtshistorischen Museum Karlsruhe verschrieben hatte.

Hans Hugo Klein skizziert „Goethes Besuch in Karlsruhe" im Oktober 1815. Die vom Weimarer Dichterfürsten in der badischen Residenz aufgesuchten Schauplätze - Kirchen, Theater, Botanischer Garten, Museum, Naturalienkabinett – reflektieren verblüffend topographisch das breite Interessenspektrum des Universalgelehrten.

Ein Zwischenfazit zum Mammutprojekt einer ca. 700.000 (digitalisierte) Seiten des Deutschen Reichsanzeigers umfassenden konkurshistorischen Datenbank bilanziert der Beitrag von Christoph Kling. Eingedenk der mehr als 360.000 Konkursverfahren zwischen 1879 und 1945 restriktiert sich das Forschungsprojekt am Lehrstuhl Prof. Dr. Ulrich Falk (Universität Mannheim) unter Leitung des Autors zunächst auf den Zeitraum 1879 bis 1914. Für künftige Untersuchungen zur frühen Praxis der Konkursordnung wird die Datenbank unschätzbare Dienste leisten.

Als historische Zufälligkeit entlarvt Gerhart Kreft die 1902 zur Finanzierung der kaiserlichen Kriegsflotte eingeführte Schaumweinsteuer und vollzieht die Entscheidung des BVerfG vom 9. 6. 1973 zur Besteuerung von Schaumwein anhand der damaligen Rechtslage nach.

Ilse Lohmann steuert sodann eine sehr lesenswerte Biographie bei zum hochverdienten badischen Juristen, Richter, Hochschullehrer, Rektor der Universität Freiburg und Wissenschaftsminister Helmut Engler, den neben der Richtertätigkeit auch die Liebe zur badischen Rechtsgeschichte mit dem Jubilar verband.

Den aktuellen Diskussionsstand zur Kausalität bei der Verletzung von Aufklärungspflichten arbeitet Bernd Müller-Christmann in seiner Abhandlung klar und präzise auf. Mit dem Jubilar scheinen ihm weder die Wege über § 287 ZPO noch eine Beweislastumkehr, sondern nur die Grundsätze des Anscheinsbeweises eine angemessene Risikoverteilung zwischen rechtlichem Berater und Mandanten zu gewährleisten.

Drei – teilweise wikingerwild wütende - Stellungnahmen des Präsidenten des Landesarbeitsgerichts a.D. Otto Rappenecker aus den Jahren 1978 und 1979 zu den Urteilen des LG Stuttgarts vom 23. 5. und 13. 7. 1978 im Fall Filbinger gewärtigen den Leser in Eberhard Natters Beitrag. Für Natter figurieren Rappeneckers perhorreszierende Urteilschelten als einseitige Verteidigungsschriften eines ab 1944 bis Kriegsende im Rang eines Kriegsgerichtsrats der Luftwaffe judizierenden Militärrichters.

In „Hildebert Kirchner (1920-2012) - Bibliothekar und Rechtshistoriker“ gedenkt Marcus Obert einem charismatischen Bibliophilen und seinem Oeuvre, dem Auf- und Ausbau der Bibliothek des BGH.

Vom Hort des gedruckten Wissens zum Spruchsaal schwenkt hernach Gerhard Pape, wenn er Insolvenz- und Beschwerdegerichte mahnt, keine § 295 Abs. 2 InsO übersteigende Auskunftspflichten des selbstständig tätigen Schuldners zu kreieren. Noch bedenklicher nimmt sich die Indolenz des LG Schwerin im zitierten Rechtsstreit gegenüber Art. 101 Abs. 1 S. 2 GG aus, wenn es die Rechtsbeschwerde trotz offensichtlicher Abweichung von der BGH-Rechtsprechung ausschließt.

Die Korrelation zwischen der Idee der sozialen Gerechtigkeit als gesellschaftspolitische Aufgabe und dem Instrumentarium des Rechts exemplifiziert Guido Pfeifer in „Nachdem der König die Fackel aus Gold erhoben hatte“ an einem gut 4000 Jahre alten Darlehensvertrag und der Praxis der altmesopotamischen Gerechtigkeitserlasse. Etwas unglücklich gewählt erscheint die Referenz auf „Auge um Auge“ (§ 196 ff. CH) als archaischer Rechtszustand (S. 411); imponiert doch die Talion als Begrenzung seinerzeitiger (Fehde-) Gewaltexzesse als geradezu progressiv.

Die Bedeutung des Rechts im späteren römischen Imperium kristallisiert auch architektonisch in der Basilica Julia, wie Karl-Heinz Pieper zu berichten weiß. Sie prädominierte als monumentale Gerichtsstätte die anderen Basiliken des Forum Romanum, von dem über 500 Jahre hinweg das antike Weltreich regiert wurde.

Vom Caput mundi zur nördlichen Peripherie wechselt Bernd Raebel in „Baubeschränkungen an niedersächsischen Deichen im Lichte ihrer rechtshistorischen Wurzeln und anderer Landesrechte“. Er admoniert in der aktuellen Debatte um das niedersächsische Deichrecht eine weniger pauschale und deutlich differenzierte Inanspruchnahme der Rechtsgeschichte (in Gestalt älterer deichrechtlicher Regelungen) sowie einen rechtsvergleichenden Blick über die Landesgrenze.

Im Incipit von „Privatrechtstheorie des Libertarismus“ postuliert Frank L. Schäfer bedenklich reduktionistisch „Rechtsgeschichte ist Privatrechtsgeschichte“. Die den Volksrechten inhärente mehrspurige Konfliktlösung nebst peinlichen Strafen für Sakralverbrechen und Hochverrat lässt sich damit nur schwer vereinbaren. Auch mutet eine solche Beweisführung vermittels einer der (Wieder-)Differenzierung von Privatrecht und öffentlichem Recht vorgehenden Epoche seltsam ergebnisgetragen. Schließlich bergen derartige Retrospektiven begriffsgeschichtlich Gefahren, etwa beim Terminus „Freiheit“, der im germanischen Rechtsdenken eine bedeutende Rolle spielte. Nur umschrieb er etymologisch die Einbindung in einen Verwandtschaftsverband – ein gänzlich anderer Bedeutungsinhalt als „Freiheit“ im Libertarismus.

Weitere Untiefen der BGH-Judikatur heutiger Provenienz spürt Wolfgang Schlick auf. So verfängt es sich für ihn reichlich disparat, den bereicherungsrechtlichen Wertersatzanspruch des Maklers in den Bereich der Theorie zu verabsentieren, dem erfolgreichen Makler die Provision indes - unter bestimmten Voraussetzungen - beim Verbraucherwiderruf als Wertersatz zuzustehen.

Auch Birgit Schneider animiert in „Das Phantom der Nicht-Klage – Überlegungen zum Bestimmtheitserfordernis des § 253 Abs. 2 Nr. 2 ZPO“ zum Nachdenken. Sie bezweifelt die Raison d’ętre der vom Reichsgericht kreierten Figur der „Nicht-Klage“, wonach eine unbestimmte Klage keine Klage im Sinne des Gesetzes ist.

Detail- und kenntnisreich portraitiert Udo Scholl mit Adolf Hermann Freiherr Marschall von Bieberstein einen der Altvorderen der modernen Diplomatie. Der „schärfste Geist nach Bismarck“ ist ein beredtes Beispiel gegen die Hindsight Bias, das beginnende 20. Jh. musste in einen Ersten Weltkrieg münden. Das symbiotische Wechselspiel zwischen Wirtschaft und Wissenschaft während dieser Zeit an der Ruperto Carola vergegenständlicht Klaus-Peter Schroeder an den Ehrenpromotionen für Leopold Netter und Rudolf Mosse.

Eher sachenrechtliche Kuriositäten aus dem 16. – 19. Jh. sind das Faszinosum in Pirmin Spiess‘ „Eigentümliches Nebeneinander“, etwa die sprichwörtliche Einmauerung einer Villa vom Nachbargrundstück oder die sog. Wechselhäuser in Neupotz/Pfalz mit ausschließlicher Nutzung auf Zeit (2-3 bzw. 6 Jahre).

Ein prominentes Konkursverfahren in den Wirren der Napoleonischen Zeit steuert Stefan Andreas Stodolkowitz der Festschrift bei mit seinem Beitrag „Mit silbernem Pferdegeschirr in die Insolvenz - der Konkurs des Gutbesitzers Schickedanz zu Beginn des 19. Jahrhunderts.“

Aviatischer wird es in „Ein Rundflug im Lufttaxi – Rechtshistorische Anmerkungen zu BGHZ 31, 258“. Jan Thiessen rekonstruiert das mit diesem Verfahren final etablierte Institut des Eigenkapitalersatzrechts off the beaten track auch über die Senatshefte des BGH und die Akten des BVerfG.

Besonders hervorzuheben ist die gehaltvolle Grundlagenarbeit von Hans-Wolf Thümmel zu den Vorlagen der strafrechtlichen Bestimmungen des Landrechts und der Landesordnung der Markgrafschaft Baden-Baden von 1588, ebnet er doch damit verdienstvoll den Weg für weitere Studien.

Geschichtliche Retrospektiven der Materie des IX. Zivilsenats umfasst der Beitrag „Rückblicke in die Geschichte – Codex Hammurabi, Freie Reichsstadt Nürnberg, Bayern“ von Gerhard Vill mit einem besonderen Schwerpunkt auf Zwangsvollstreckung und Konkurs.

Ein außergewöhnliches Juristenleben, durch das sich die Beschäftigung mit dem Konkursrecht wie ein Ariadnefaden zieht, verfolgt Alexander Weinland in „Bankruptcy was always around – Auf den Spuren von Kurt Hans Nadelmann“. Der Autor erhellt das Wirken des Altmeisters des Internationalen Insolvenzrechts um die Veröffentlichung von Sondervoten.

Dreh- und Angelpunkt des Beitrags von Markus Würdinger ist die Gläubigergleichbehandlung, Goldene Regel und Zankapfel des Insolvenzrechts. Er erkennt deren Legitimation im Solidaritätsprinzip, votiert gegen ein Fiskusprivileg und regt an, den Arbeit-

nehmerschutz eher über eine „sozialrechtliche Lösung“ im SGB III zu verwirklichen, als über ein arbeitsrechtliches Sonderinsolvenzanfechtungsrecht.

Einen für den Parlamentarismus in Baden wesentlichen Juristen und Staatsmann hat der instruktive biographische Aufsatz „Ludwig Georg Winter (1778 – 1838)“ von Christian Würtz zum Gegenstand.

Der Beitragsteil der Festschrift schließt mit Karl Zippelius‘ Skizze „Vorderösterreich in Baden“ und einem Fokus auf den Rechtsverhältnissen der vorderösterreichischen Territorien (der sog. Schwanzfeder des Kaiseradlers), soweit sie infolge des französisch-österreichischen Friedens von Preßburg 1805 badisch wurden.

Die Festschrift für Detlev Fischer vereint akribisch recherchierte rechtshistorische (Quellen-)Arbeiten und wegweisende höchst praxisrelevante Beiträge zum aktuellen Recht. Sie ist deshalb nicht nur Universitäten und Bibliotheken zum Erwerb empfohlen, sondern auch Justiz, Anwaltschaft und dem geneigten Fachpublikum. Non refert quam multos libros sed quam bonos habeas. Die Festschrift Fischer gehört zweifelsohne zu letzteren.

Markus Hirte*

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