Vol. 12 / 2021 No. 2

Journal on European History of Law

9 772042 640001 07

STS Science Centre

The European Society for History of Law

JOURNAL ON EUROPEAN HISTORY OF LAW

Vol. 12 / 2021 No. 2

Editorial staff

JOURNAL ON EUROPEAN HISTORY OF LAW:

Prof. Dr. Christian Baldus
Faculty of Law, Heidelberg University, Germany

JUDr. PhDr. Stanislav Balík, Ph.D.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic

Prof. Dr. Barna Mezey
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary

Prof. JUDr. Jozef Beňa, CSc.
Faculty of Law, Comenius University in Bratislava, Slovak Republic

Doc. JUDr. PhDr. Jiří Bílý, CSc.
Metropolite – University Prague, Czech Republic

dr hab. Piotr Fiedorczyk
Faculty of Law, University of Białystok, Poland

Alberto Iglesias Garzón, Ph.D.
Charles III University of Madrid, Spain

Prof. Dr.iur. Dr.phil. Thomas Gergen, MA
Institut Supérieur de l'Économie, ISEC Université Luxembourg

Prof. Dr. Gábor Hamza
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary

Prof. JUDr. Ignác Antonín Hrdina, DrSc.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic

JUDr. Vilém Knoll, Ph.D.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic

Izv. prof. dr. sc. Ivan Kosnica
Faculty of Law, University of Zagreb, Croatia

izv. prof. dr. sc. Mirela Krešić
Faculty of Law, University of Zagreb, Croatia

Prof. zw. dr hab. Adam Lityński
Faculty of Law, Humanitas University in Sosnowiec, Poland

Doc. Dr. Olga Lysenko
Faculty of Law, Lomonosov Moscow State University, Russia

Tony Murphy
Department of Law & Criminology, Sheffield Hallam University, UK

ao. Univ. Prof. Dr.jur. Christian Neschwara
Faculty of Law, University of Vienna, Austria

Prof. Dr. Dmitry Poldnikov
Faculty of Law, National Research University, Higher School of Economics, Moscow, Russia

Dr Dr Guido Rossi
Edinburgh Law School – University of Edinburgh, UK

Doc. JUDr. Karel Schelle, CSc.
Faculty of Law, Masaryk University, Brno, Czech Republic

Dr. Gábor Schweitzer, Ph.D.
Institute for Legal Studies of the Hungarian Academy of Sciences, Hungary

Adw. Ewa Stawicka
Attorney at Law, Warsaw, Poland

Dr. Magdolna Szűcs, Ph.D.
Faculty of Law, University of Novi Sad, Serbia

Doc. JUDr. Bc. Jaromír Tauchen, Ph.D., LL.M.
Faculty of Law, Masaryk University, Brno, Czech Republic

Dr. Norbert Varga
Faculty of Law, University of Szeged, Hungary

Prof. Dr. Wulf Eckart Voß
Faculty of Law, University of Osnabrück, Germany

TABLE OF CONTENTS

Rainer Nomine: Zur Geschichte des Frankfurter »Entwurfs eines deutschen Gesetzes zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst« 2

Stefano Cattelan: Claims of Dominion and the Freedom of the Sea: Diplomatic Tensions between England and Denmark-Norway in the late Tudor Period 29

Ilya Kotlyar: Authentication and Evidential Force of Last Wills in Late 16th–17th Centuries in Scotland, in the Light of the Ius Commune Doctrine 43

Antonio Manuel Luque Reina: The Collapse of the Polisinodia: Institutional Reforms at the Last Crisis of the Spanish Catholic Monarchy (1834–1836) 58

Tony Murphy: Penal Transportation from Britain to Australia, 1788 to 1868: Four Phases of Penal Administration and Experimentation 70

Fernando Liendo Tagle: A Spanish Legal Journal Defining the Centre and the Periphery: Revista de Legislación y Jurisprudencia de Ultramar (1877–1878) 79

Helena Moreno Galán: The Bishop in the Didascalia Apostolorum 86

Marko Sukačić: Lex commissoria: from a Forbidden Clause in Roman Law to a (Contemporary) Debtor's Welcome Relief 96

Ivan Kosnica: Deprivation of Citizenship Status in Croatia and Yugoslavia in the Aftermath of the Second World War 106

Hadrian Ciechanowski: Public Registers in the Kingdom of Prussia at the Turn of the 19th and 20th Centuries in a Systemic Perspective 114

Jakob Maziarz: Polish-Lithuanian Union and the Declared Equality before the Law in the Polish-Lithuanian Commonwealth 122

Ewa Fabian: Poland: Study of Pre-War Court Cases Related to Freedom of Speech and Formal Logic 129

Adolfo A. Diaz-Bautista Cremades: Actio Publiciana and Mancipatio 138

Alexander Dmitrievich Strunskiy, Anna Pavlovna Kurabtseva: Scientific Heritage of the Russian Jurist, Sociologist and Positivist Sergey Muromtsev 145

František Emmert: German Citizenship versus Protectorate Membership in the Protectorate of Bohemia and Moravia (1939–1945) 154

István Stipta: Cesare Beccaria: Von den Verbrechen und von den Strafen – die Rezeption des Werkes in Ungarn 161

András Biczó: Benedikt Carpzov's Influence on the 18th Century Criminal Practice in Hungary – Analysis of a Legal Case from Debrecen 169

Pál Sáry: Regulation of the Relations between Jews and Christians in Roman Law 181

Engjell Likmeta, Katrin Treska: Crimes Against Jugdes in Albania. Juridical Defense of Justice Officials Provided by the Criminal Law 187

BOOK REVIEWS

Christian Baldus, Giovanni Luchetti, Massimo Miglietta (a cura di): Prolegomena per una palingenesi dei libri 'ad Vitellium' di Paolo 198

András Földi (Hg.): Összehasonlító jogtörténet (Vergleichende Rechtsgeschichte) 201

Wolfgang Bohnen/Lena Haase (Hg.): Kontrolle, Konflikt und Kooperation. Festschrift 200 Jahre Staatsanwaltschaften Koblenz und Trier (1820–2020) 210

Ulrike Andersch: Die Diskussion über den Büchernachdruck in Deutschland um 1700 bis 1815

Julia Dreyer: Die florentinischen Autoren- und Druckerprivilegien während der Herrschaft der Familie Medici . . 211

Gerhard Reinhold: OTTO-Glocken. Familien- und Firmengeschichte der Glockengießerdynastie Otto 216

Jan Lundberg: Der Fußball als Teil des Grundversorgungs- und Funktionsauftrags des öffentlich-rechtlichen Rundfunks 217

Edward Cavanagh (ed.): Empire and Legal Thought. Ideas and Institutions from Antiquity to Modernity 219

Guidelines for authors 221

JOURNAL ON EUROPEAN HISTORY OF LAW

© 2021 STS Science Centre Ltd.

All contributions / papers are subject to a peer-review. The journal is indexed in SCOPUS and ERIH PLUS.
All rights reserved. Neither this publication nor any part of it may be reproduced, stored in a retreival system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of STS Science Centre Ltd.. Published semiannually by STS Science Centre Ltd. „Journal on European History of Law" is a registered trademark of STS Science Centre Ltd.
Issued twice a year.

Printed in the EU.

ISSN 2042-6402

Zur Geschichte des Frankfurter »Entwurfs eines deutschen Gesetzes zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst«*

(On the History of the Frankfurt Draft of a German Law for the Protection of Copyright in Literary Products and Works of Art /»Frankfurter Entwurf«/)

*Rainer Nomine***

Abstract

The fight against pirate printing („Nachdruck") was one of the unresolved issues of the Congress of Vienna in 1815. Even after the founding of the German Confederation, the safeguarding of an intellectual achievement was and remained effectively left to the numerous individual German states, which pursued completely different political and economic interests in this area. With the dissolution of the German Confederation in the summer of 1866, the decades-long effort to create uniform legislation to protect copyrights in Germany also failed. Until the end, it was not possible to replace the more than thirty Land laws against reprinting, some of which differed greatly from one another, with a single standard. Based on the files of the Berlin Secret State Archives Prussian Cultural Heritage Foundation, this article traces the first and last attempt to enact a comprehensive German copyright law in the 1860 s. It describes the voting process on the bill passed in September 1864 for a „law to protect copyrights to literary products and works of art" and names the reasons for its predictable failure.

Keywords: *Frankfurt Draft of a German Law for the Protection of Copyright in Literary Products and Works of Art („Frankfurter Entwurf"); German Confederation (Deutscher Bund); Copyright; (German) Federal decision of 9. 11. 1837 (on account of the establishment of uniform principles against reprinting); Pirate printing; Prussian Copyright Act of 1837; Royal Prussian Literary Experts Association.*

1. Einleitung

Mit der Auflösung des Deutschen Bundes im Sommer 1866 scheiterte auch das jahrzehntelange Bemühen, eine materiell-einheitliche Gesetzgebung zum Schutze der Urheberrechte in Deutschland zu schaffen.[1] Es gelang bis zuletzt nicht, die mehr als dreißig, zum Teil stark voneinander abweichenden Landesgesetze gegen den so genannten „Nachdruck" durch eine einzige Norm zu ersetzen.[2] Die Bundesversammlung, das einzige Organ der Nationengemeinschaft, konnte noch nicht einmal die schon in Artikel 18 der Bundesakte von 1815 gemachte Zusage einlösen, zumindest „gleichförmige Verfügungen über […] die Sicherstellung der Rechte der Schriftsteller und Verleger gegen den Nachdruck" zu erlassen.[3] Der seit November 1816 in Frankfurt am Main tagende ständige Gesandtenkongress kam nie entscheidend über eine am 9. November 1837 erfolgte Verordnung ganz allgemeiner Grundsätze hinaus.[4] Dies verwundert insoweit, als insbesondere Preußen, neben der Präsidialmacht Österreich das bedeutendste Mitglied im Bund, spätestens seit den 1820er Jahren nachdrücklich an einer deutschlandweit einheitlichen Regelung der Materie interessiert war.[5] Auch die sächsische Regierung als Schirmherrin des (Leipziger) Verlagsbuchhandels trat über alle Jahre für ein umfassendes Bundes-

* Schriftliche Fassung eines Beitrags zu dem von Martin Löhnig und Stephan Wagner (Regensburg) veranstalteten Symposium für Hans Jürgen Becker „Deutscher Bund und nationale Rechtseinheit".

** Dr. Rainer Nomine, Richter am Sozialgericht, Lübben/Spreewald, Deutschland.

1 Einen Überblick über die Aktivität des Deutschen Bundes auf dem Gebiet des Urheberrechts gibt Elmar Wadle, Die Abrundung des deutschen Urheberrechts im Jahre 1876, in: ders., Geistiges Eigentum. Bausteine zur Rechtsgeschichte, Weinheim 1996, 327, 328 ff. Siehe auch Ludwig Gieseke, Vom Privileg zum Urheberrecht: Die Entwicklung des Urheberrechts in Deutschland bis 1845, Göttingen 1995, S. 206 ff. Gerhard Köbler, Historisches Lexikon der deutschen Länder, 7. Auflage, München 2007, XXV, zählt die Länder auf, die zu dem von 1815 und 1866 bestehenden Staatenbund gehörten.

2 Zu regeln waren selbstverständlich nicht nur der „Nachdruck" im Wortsinne, also die mechanische Vervielfältigung gedruckter Objekte, sondern auch „analoge" Methoden zur Reproduktion und Nutzung beliebiger Geisteswerke. Die bis 1857 erlassenen Landesgesetze gegen den Nachdruck sind abgedruckt bei Ch. F. M. Eisenlohr (Hrsg.), Sammlung der Gesetze und internationalen Verträge zum Schutze des literarisch-artistischen Eigenthums in Deutschland, Frankreich und England, Heidelberg 1856 und Eisenlohr, Sammlung der Gesetze, Nachtrag, Heidelberg 1857.

3 Soweit hier von Interesse lautet Art. XVIII der Bundesakte: „Die verbündeten Fürsten und freyen Städte kommen überein, den Unterthanen der deutschen Bundesstaaten folgende Rechte zuzusichern: […] d) Die Bundesversammlung wird sich bey ihrer ersten Zusammenkunft mit Abfassung gleichförmiger Verfügungen über die Preßfreyheit und die Sicherstellung der Rechte der Schriftsteller und Verleger gegen den Nachdruck beschäftigen.", abgedruckt in: Deutsche Bundes=Acte. Authentischer Abdruck. Mit Bewilligung der Kaiserlich Oesterreichischen Gesandtschaft am deutschen Bundestage, Frankfurt 1816, S. 21 f.

4 Bundesbeschluss vom 9. 11. 1837, Prot. DBV 1837, S. 846 g–h; Eisenlohr, Sammlung (o. Fn. 2), S. 2 f.

5 Vgl. Wadle, Der Weg zum gesetzlichen Schutz des geistigen und gewerblichen Schaffens, in: ders., Geistiges Eigentum. Bausteine zur Rechtsgeschichte. Band II, München 2003, S. 3, 24 f.

gesetz ein. Daneben forderten grenzüberschreitend organisierte Lobbygruppen von Werkschöpfern und Verlegern regelmäßig den Erlass einer gesamtdeutschen Norm zum Schutz von Geisteswerken. Schon der Wiener Kongress hatte sich die Gravamina der deutschen Buchhändler anhören müssen,[6] ab 1825 trommelte insbesondere der einflussreiche, in der Messestadt Leipzig gegründete Börsenverein der Deutschen Buchhändler für eine einheitliche Gesetzgebung.[7]

Der in den 1860er Jahren unternommene erste und letzte Anlauf zum Erlass einer wirklich umfassenden bundeseinheitlichen Norm allerdings nahm ein klägliches Ende: das Abstimmungsverfahren über die im September 1864 beschlossene Vorlage eines „Gesetz[es] zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst" versandete in den letzten Tagen des Deutschen Bundes. Dieser wegen seines Entstehungsortes alsbald so bezeichnete „Frankfurter Entwurf" wurde nie zum Beschluss erhoben, auch weil Preußen – wie immer wieder betont wird – aus übergeordneten politischen Gründen keine von der Bundesversammlung „vermittelte" Vorschrift (mehr) mittragen wollte, daneben aber auch inhaltliche Einwände gegen die Vorlage hatte.[8] Das Königreich nahm jedenfalls nur als Zaungast am Gesetzgebungsverfahren teil und versagte zuletzt seine Zustimmung. Die aber wäre erforderlich gewesen, weil von Verfassungs wegen das Urheberrecht nur einstimmig zu regeln war.

2. Grundlagen

Der Kampf gegen den so genannten „Nachdruck" zählte – dem vollmundigen Versprechen der Bundesakte zum Trotz – zu den unbewältigten Problembereichen des Wiener Kongresses von 1815. Die Sicherung der geistigen Leistung war und blieb auch nach Gründung des Deutschen Bundes faktisch den deutschen Einzelstaaten überlassen, die auf diesem Gebiet völlig unterschiedliche politische und wirtschaftliche Interessen verfolgten.[9] In einigen deutschen Ländern (etwa in Sachsen, Preußen, aber auch in Baden) war die ungenehmigte Vervielfältigung zumindest von Schriftwerken gesetzlich verboten,[10] andere Staaten (so das Königreich Württemberg) ließen selbst den Nachdruck im Wortsinne zu und gewährten nur demjenigen Schutz, der über ein gnädig erteiltes Privileg verfügte.[11] Süddeutsche Raubkopierer druckten deshalb die Bücher der norddeutschen Autoren und Verleger nach und brachten sie – unbehelligt von der Obrigkeit ihrer Heimatländer und mit gutem Gewinn – gerade auch an den auswärtigen Leser. So vertrieb etwa der Stuttgarter Verlag *Macklot* ungeniert einen Nachdruck des bekannten, bei *Friedrich Arnold Brockhaus* (1772-1823) im sächsischen Leipzig erschienenen „Conversations-Lexikon[s]» (dritte Auflage, ab 1814), ohne dass die zuständige königlich-württembergische Behörde nachhaltig dagegen eingeschritten wäre.[12] Selbst die Bundesstaaten aber, die gesetzliche Regelungen kannten, schützten in erster Linie die (Buch-)Verleger in ihren rein wirtschaftlichen Interessen an einem ungestörten Vertrieb; die eigentlichen Werkschöpfer profitierten allenfalls mittelbar.[13] Entsprechend schmal war die Palette der geschützten Gegenstände: Sie erstreckte sich gewöhnlich nur auf Drucke, so dass Werke der bildenden und der Tonkunst, aber auch rein sprachliche Leistungen regelmäßig keinen Schutz genossen.

---

[6] Die Beschwerden der Verlags-(Buchhändler) waren Gegenstand einer von August von Kotzebue (1761–1819) ausgearbeiteten Denkschrift über den Büchernachdruck. In Wien übereicht wurde das Promemoria von sechs „Deputierten des Deutschen Buchhandels", die auf der Leipziger Ostermesse von 1814 gewählt worden waren; hierzu Rudolf Klostermann, Das geistige Eigenthum an Schriften Kunstwerken und Erfindungen nach Preussischem und internationalem Rechte dargestellt, Allgemeiner Theil, Band 1, Berlin 1867, S. 51; Franz Laufke, Der Deutsche Bund und die Zivilgesetzgebung, in: Festschrift für Hermann Nottarp, Karlsruhe 1961, S. 1, 4. Zu dem (durchaus erfolgreichen) Wirken deutscher Buchhändler im Umfeld des Wiener Kongresses auch Eckhardt Treichel, Einleitung, in: ders. (Hrsg.), Organisation und innere Ausgestaltung des Deutschen Bundes 1815-1819, Berlin 2016, S. IX, CVII m. w. Nw.

[7] Zur Geschichte des Börsenvereins etwa Manfred Erdmann, Die verfassungspolitische Funktion der Wirtschaftsverbände in Deutschland 1815–1871, Berlin 1968, S. 145 ff.

[8] Eingehend zur Geschichte des „Frankfurter Entwurfs" bereits Wadle, Der Frankfurter Entwurf eines deutschen Urheberrechtsgesetzes von 1864, in: Geistiges Eigentum (o. Fn. 1), S. 308 ff. Laufke, Zivilgesetzgebung (o. Fn. 6), S. 49 ff., meint, Preußen habe „von Anfang an [versucht, jede] Betätigung des Bundes, die auf Rechtsvereinheitlichung abzielte, schlechtweg zu unterbinden". Dafür sei – wie er aaO, S. 30 ff. andeutet – ausschlaggebend gewesen insbesondere die bundesfeindliche Haltung von Otto von Bismarck (1815–1898, von 1851–1859 Bundestagsgesandter, ab 1862 preußischer Ministerpräsident).

[9] Näher Vogel, Grundzüge der Geschichte des Urheberrechts in Deutschland, in: Robert Dittrich (Hrsg.), Woher kommt das Urheberrecht und wohin geht es?, Wien 1998, 117, 129. Siehe schon H(einrich) A(lbert) Zachariä, Deutsches Staats- und Bundesrecht, Zweite Abtheilung, Göttingen 1842, S. 297 ff.

[10] In den genannten Ländern bestand das Verbot schon vor 1815 (Sachsen: Mandat den Buchhandel betreffend von 1773, Preußen: ALR für die Preußischen Staaten von 1794, Baden: Landrecht von 1810); dazu Rainer Nomine, Plus valet favor iudicis quam omnes leges codicis? Schelling gegen Paulus: Aktenmäßige Darstellung des Streits um den Nachdruck der in Berlin gehaltenen Vorlesung über die Philosophie der Offenbarung, in: Albrecht Götz von Olenhusen/Thomas Gergen (Hrsg.), Festschrift für Martin Vogel, Hamburg 2017, S. 149, 149 f.

[11] Einen Überblick gibt Wadle, Der langsame Abschied vom Privileg, in: Geistiges Eigentum II (o. Fn. 5), S. 101, 105. Max Lange, Kritik der Grundbegriffe vom geistigen Eigenthum, Schoenebeck 1858, S. 111 ff., nennt die deutschen Kleinstaaten, „welche sich von jeher gegen die Nachdrucksgesetzgebung gesträubt hatten". Zu den in Württemberg herrschenden Zuständen eingehend Thomas Gergen, Die Nachdruckprivilegienpraxis Württembergs im 19. Jahrhundert und ihre Bedeutung für das Urheberrecht im Deutschen Bund, Berlin 2007, S. 55.

[12] Zu dem seinerzeit viel beachteten Fall etwa Nomine, Rezension von Gergen (Nachdruckprivilegienpraxis), in: UFITA, 3/2010, S. 898, 898; siehe auch Anne-Kathrin Reulecke, Täuschend, ähnlich. Fälschung und Plagiat als Figuren des Wissens in Literatur und Wissenschaften, Paderborn 2016, S. 93 Fn. 93.

[13] Dies gilt gerade auch für Sachsen und Preußen: das zur Zeit des Wiener Kongresses geltende Allgemeine Landrecht für die Preußischen Staaten schützte den Inhaber des „Verlagsrechts"; das badische Landrecht allerdings gewährte schon 1810 einen auf den Urheber (von Schriftwerken) bezogenen Schutz; dazu Wadle, Ein Projekt zur Reform des badischen Rechtsschutzes gegen den Nachdruck, in: ders., Beiträge zur Geschichte des Urheberrechts, Berlin 2011, S. 355, 359. Siehe auch Ulrike Andersch, Die Diskussion über den Büchernachdruck in Deutschland um 1700 bis 1815, Tübingen 2018, S. 467.

1819/20 kam es zu einem ersten Versuch einer bundeseinheitlichen Regelung. Der Oldenburger Gesandte *Günther Heinrich von Berg* (1765–1843) legte am 11. Februar 1819 der Bundesversammlung einen 23 Artikel umfassenden „Entwurf einer Verordnung zur Sicherstellung der Rechte der Schriftsteller und Verleger gegen den Nachdruck" vor, der schon in der Eingangsnorm die geistigen „Eigenthumsrechte" der – „Verfasser" genannten – Werkschöpfer anerkannte; unter Schutz gestellt wurden nicht nur „erschienene Druckschriften", sondern auch „musikalische Werke, Landcharten und [allerdings ausschließlich, *R.N.*] topographische Zeichnungen". Die Vorlage wurde nie abschließend behandelt; sie scheiterte insbesondere an der Weigerung Österreichs, von der Verknüpfung der Nachdrucksfrage mit dem Recht der Presse, sprich der Zensur, abzulassen.[14]

Die parallel zu diesen Vorgängen, nämlich von November 1819 bis Mai 1820 abgehaltenen „Wiener Ministerialkonferenzen" bekräftigten immerhin das Recht (und die Pflicht) der Bundesversammlung, auf dem Gebiet des Urheberrechts weiter voranzuschreiten. Die Konferenzen setzten die Karlsbader Versammlungen von August 1819 fort; den etwas mehr als 20 Vertretern (nur) der stimmführenden Staaten im engeren Rat des Bundestages war es darum zu tun, die Grundlagen des Deutschen Bundes genauer zu bestimmen.[15]

In Bezug auf das Urheberrecht regelte die am 15. Mai 1820 von den Teilnehmern beschlossene, 65 Artikel enthaltende „Schlussakte" die (fortdauernde) Zuständigkeit der Bundesversammlung für das Urheberrecht. Artikel 65 des Dokuments lautete nämlich: „Die in den besondern Bestimmungen der Bundes–Acte, Artikel […], 18 […] zur Berathung der Bundes-Versammlung gestellten Gegenstände bleiben derselben, um durch gemeinschaftliche Uebereinkunft zu möglichst gleichförmigen Verfügungen darüber zu gelangen, zur fernern Bearbeitung vorbehalten."

Festgeschrieben wurde aber auch, dass die Beschlussfassung über die Materie nur einstimmig möglich sein sollte. Insoweit schrieb bereits Artikel 64 vor: „Wenn Vorschläge zu gemeinnützigen Anordnungen, deren Zweck nur durch die zusammenwirkende Theilnahme aller Bundesstaaten vollständig erreicht werden kann, von einzelnen Bundes-Gliedern an die Bundes-Versammlung gebracht werden, und diese sich von der Zweckmäßigkeit und Ausführbarkeit solcher Vorschläge im Allgemeinen überzeugt, so liegt ihr ob, die Mittel zur Vollführung derselben in sorgfältige Erwägung zu ziehen, und ihr anhaltendes Bestreben dahin zu richten, die zu dem Ende erforderliche freiwillige Vereinbarung unter den sämmtlichen Bundes-Gliedern zu bewirken."[16]

Die Bundesversammlung erhob die Schlussakte der Wiener Ministerkonferenzen durch Beschluss vom 8. Juni 1820 „zu einem der Bundesacte an Kraft und Gültigkeit gleichen Grundgesetze des Bundes".[17] Jedenfalls seither war der Bund unzweifelhaft berechtigt, das Urheberrecht insgesamt durch (wie gesagt: einstimmigen) Beschluss zu regeln.[18] Eine nach 1848 für das Zivilrecht herrschend werdende Auffassung, der Deutsche Bund sei schon zur Beschlussfassung über diese Materie unzuständig und habe sich auf die Erarbeitung von bloßen Gesetzentwürfen (als Vorlage für entsprechende Landesgesetze) zu beschränken,[19] war damit auf den in Artikel 18 der Bundesakte erwähnten „Schutz der Rechte der Schriftsteller und Verleger gegen Nachdruck" nicht übertragbar. Allerdings stellten nach allgemeiner Ansicht selbst einstimmig ergangene Beschlüsse kein unmittelbar geltendes Bundesrecht dar, Normadressaten waren allein die Bundesstaaten, die die auf dem Gebiet des Urheberrechts ergangenen Normen in innerstaatliches Recht umzusetzen hatten.[20]

Preußen, das seit jeher an einem deutschlandweiten Schutz der einheimischen Geisteswerke interessiert war, behalf sich

---

[14] Eingehend zu den Hintergründen Wadle, Das Scheitern des Frankfurter Entwurfs von 1819, in: Geistiges Eigentum II (o. Fn. 5), S. 221, 221 ff. Der Entwurf in Prot. DBV 1819, S. 74 ff.; siehe auch Gieseke, Günther Heinrich von Berg und der Frankfurter Urheberrechtsentwurf, in: UFITA 138/1999, S. 117, 117 ff., dort ist auch der Text des Entwurfs abgedruckt.
Konsequenterweise war seinerzeit in Österreich nur der Nachdruck eines „von der Censur im Ganzen verworfen[en]« Werkes untersagt, also eines Werkes, das ohnehin nicht gedruckt werden durfte (§ 59 Strafgesetzbuch vom 13. September 1803, § 1171 Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie, vom 1. Juni 1811; vgl. Hermann Theodor Schletter, Handbuch der Deutschen Preß-Gesetzgebung, Leipzig 1846, S. XVI.

[15] Zum Ablauf der Konferenzen in Karlsbad und Wien eingehend Friedrich von Weech, Correspondenzen und Aktenstücke zur Geschichte der Ministerconferenzen von Carlsbad und Wien in den Jahren 1819, 1820 und 1834, Leipzig 1865.

[16] „Schluß-Acte der über Ausbildung und Befestigung des deutschen Bundes zu Wien gehaltenen Ministerial-Conferenzen vom 15. Mai 1820", abgedruckt bei Ernst Rudolf Huber (Hrsg.), Dokumente zur deutschen Verfassungsgeschichte, Band 1, 3. A., Stuttgart 1978, Nr. 31.

[17] Prot. DBV 1820, S. 16.

[18] Vgl. Oscar Wächter, Das Verlagsrecht, mit Einschluss der Lehren von dem Verlagsvertrag und Nachdruck. Nach den geltenden deutschen und internationalen Rechten, Band 1, Stuttgart 1857, S. 22. Wadle, Der Bundesbeschluß vom 9. November 1837 gegen den Nachdruck. Das Ergebnis einer Kontroverse aus preußischer Sicht, in: Geistiges Eigentum (o. Fn. 1), S. 223, 224. Missverständlich meint Haimo Schack, Urheber- und Urhebervertragsrecht, 4. A., Tübingen 2007, Rdnr. 103, der Deutsche Bund habe keine Gesetzgebungskompetenz für das Urheberrecht besessen und nur Empfehlungen aussprechen können.
Allgemein zur Bedeutung der Bundesgrundgesetze etwa Michael Kotulla, Deutsche Verfassungsgeschichte. Vom Alten Reich bis Weimar (1495–1934), Berlin 2008, S. 335. Instruktiv Wadle, Der Weg zum gesetzlichen Schutz des geistlichen und gewerblichen Schaffens, in: Geistiges Eigentum II (o. Fn. 5), S. 3, 15.

[19] Vgl. Laufke, Zivilgesetzgebung (o. Fn. 6), S. 3.

[20] Vgl. Wächter, Das Autorrecht nach dem gemeinen deutschen Recht, Stuttgart 1875, S. 28 Fn. 34. Julius Jolly, Die Lehre vom Nachdruck: Nach den Beschlüssen des deutschen Bundes dargestellt, Heidelberg 1852, S. 303, meinte, ein Bundesbeschluss zum Urheberrecht binde die einzelnen Bundesstaaten nur insoweit, „als sie das Minimum des Schutzes bestimmen, welcher […] gegen den Nachdruck gewährt werden muß: […] Dem entsprechend wird allgemein anerkannt, daß ein Bundesbeschluß zwar unmittelbar […] die verbündeten Regierungen, die Unterthanen der einzelnen deutschen Staaten aber erst dann verpflichte, wenn er von der betreffenden Landesregierung publizirt worden ist.".

zunächst mit einer ausgedehnten Vertragspolitik, die ab 1827 auf den Abschluss von Gegenseitigkeitsabkommen mit möglichst vielen anderen deutschen Staaten zielte.[21] Ein zweiter Anlauf auf Bundesebene, unternommen nach dem Gesuch des umtriebigen Nationaldichters Goethe, seine Ausgabe „letzter Hand" deutschlandweit gegen Nachdruck zu sichern, führte 1832 immerhin zu einem Beschluss über die Gewähr formeller Gegenseitigkeit (nun auch für den Kunsthandel).[22]

Im Herbst 1832 nutzte Preußen übrigens die Gelegenheit, um einen eigenen, 53 Vorschriften umfassenden Gesetzentwurf in Umlauf zu bringen. Allerdings schafften es die von Generalpostmeister *Carl Ferdinand Friedrich von Nagler* (1770–1846) zunächst vertraulich vorgelegten „Grundzüge zu einem Gesetzentwurfe über den Schutz des Eigenthumsrechtes auf Geistesprodukte gegen unbefugte Vervielfältigung in den Staaten des deutschen Bundes" noch nicht einmal bis in die Bundesversammlung.[23]

Schließlich gelang es der Wiener Ministerialkonferenz von 1834, die fruchtlose Verbindung von Autorschutz und Presserecht zu kappen und in Artikel 36 des Schlussprotokolls erstmals ein generelles Verbot des Nachdrucks zumindest von Schriftwerken festzuschreiben. Die (zunächst geheim gehaltene) Abrede vom 7. Juni des Jahres lautete kurz und bündig: „Die Regierungen vereinigen sich dahin, dass der Nachdruck im Umfange des ganzen Bundesgebietes zu verbieten und das schriftstellerische Eigenthum nach gleichförmigen Grundsätzen festzustellen und zu schützen sei."[24] Die Vereinbarung wurde am 2. April 1835 zum Bundesbeschluss erhoben, im November stellte der Bundestag dann (noch einmal) förmlich fest, das im April ausgesprochene Verbot des Nachdrucks bestehe als ein „positives […] und sei in allen Bundesstaaten […] selbst alsdann in Vollzug zu bringen […], wenn wider Vermuthen die Vereinigung sämmtlicher Bundesglieder über die gleichförmigen Grundsätze nicht zu Stande kommt".[25]

Damit war der Weg frei zu dem bereits erwähnten grundlegenden Bundesbeschluss vom 9. November 1837,[26] der allerdings nur einen Minimalkonsens über die Materie verkörperte und in keiner Weise dem entsprach, was zur umfassenden Sicherstellung der Rechte der Werkschöpfer notwendig war und auch seinerzeit schon möglich gewesen wäre.[27] Preußen, das sich damals noch als „Schrittmacher" des Urheberrechts sah, war es nur um den Preis erheblicher inhaltlicher Zugeständnisse und nach dramatischen Sitzungstagen gelungen, den in der Sache liegenden Widerstand Württembergs und den politisch begründeten Argwohn Österreichs zu überwinden. Der aus nur sechs Artikeln bestehende Bundesbeschluss stellte (allein) die ohne Erlaubnis des Urhebers erfolgte „mechanische Vervielfältigung" von „literarische[n] Erzeugnisse[n] aller Art, so wie Werke[n] der Kunst" unter Strafe; die gewährte Schutzfrist betrug magere zehn Jahre.[28] Daneben regelte er den (zivilrechtlichen) Entschädigungsanspruch des Autors und die Wegnahme bzw. Zerstörung der zu der widerrechtlichen Vervielfältigung genutzten Vorrichtungen. Unterlassungs- und Beseitigungssansprüche kannte er nicht, wie übrigens kein Urheberrechtsgesetz vor 1870.[29] Auf Druck einiger Mitgliedstaaten, die – wie Preußen – eine viel detailliertere Norm und vor allem eine weit längere

---

[21] Preußen gelang es schließlich, 32 Staatsverträge abzuschließen; näher Wadle, Bundesbeschluß (o. Fn. 18), S. 223, 223. Wegen des unterschiedlichen Schutzniveaus der verschiedenen Landesgesetze blieb der Nutzen der bloße „Reziprozität" zusichernden Literarkonventionen allerdings überschaubar.

[22] Beschluß die Sicherstellung der Rechte der Schriftsteller und Verleger gegen den Nachdruck betreffend, vom 6. September 1832, Prot. DBV 1832, S. 1176 f.: „Um nach Art. 18 d der deutschen Bundesacte die Rechte der Schriftsteller und Verleger gegen den Nachdruck von Gegenständen des Buch- und Kunsthandels sicher zu stellen, vereinigen sich die souveränen Fürsten und freien Städte vorerst über den Grundsatz, daß bei Anwendung der gesetzlichen Vorschriften und Maßregeln wider den Nachdruck der Unterschied zwischen den eigenen Unterthanen eines Bundesstaates und jenen der übrigen im deutschen Bunde vereinigten Staaten gegenseitig und im ganzen Umfange des Bundes in der Art aufgehoben werden soll, daß die Herausgeber, Verleger und Schriftsteller eines Bundesstaates sich in jedem andern Bundesstaate des dort gesetzlich bestehenden Schutzes gegen den Nachdruck gleichmäßig zu erfreuen haben werden."

[23] Wadle, Die Berliner Grundzüge eines Gesetzentwurfs zum Urheberrecht. Ein gescheiterter Versuch im Deutschen Bund (1833/34), in: Geistiges Eigentum II (o. Fn. 5), S. 257, 276.

[24] Dazu eingehend Wadle, Schutz gegen Nachdruck als Aufgabe einer bundesweiten Organisation des deutschen Buchhandels – Metternichs zweiter Plan einer Bundeszunft und sein Scheitern, in: Bernd-Rüdiger Kern et alt. (Hrsg.), Humaniora. Festschrift für Adolf Laufs zum 70. Geburtstag, Heidelberg 2006, S. 431, 431 ff.; Wadle, Das preußische Urheberrechtsgesetz von 1837 im Spiegel seiner Vorgeschichte, in: Geistiges Eigentum (o. Fn. 1), S. 167, 169 f.; Wadle, Das Junktim zwischen Zensur und Nachdruckschutz und dessen Aufhebung 1834, in: Geistiges Eigentum II (o. Fn. 5), S. 241, 247 ff. Das Schlussprotokoll der Konferenz vom 7. 6. 1834 ist abgedruckt bei Ernst Rudolf Huber (Hrsg.), Dokumente (o. Fn. 16), Nr. 45; zusammen mit einem ätzenden Kommentar auch bei Ferdinand Bernays, Schlussprotokoll der Wiener Ministerial-Konferenz vom 12. Juni 1834, mit dem Einleitungs- und Schluss-Vortrage des Fürsten Metternich, nebst einer rühmlichen Nachrede, in: Arnold Ruge/Karl Marx(Hrsg.), Deutsch-Französische Jahrbücher, Paris 1844, S. 126, 126 ff.

[25] Bundesbeschluss vom 2. 4. 1835, in: Prot. DBV 1835, S. 270; Bundesbeschluss vom 5. 11. 1835, aaO, S. 953 f. Dazu Klostermann, Geistiges Eigenthum (o. Fn. 6), S. 52 f.

[26] Siehe o. bei Fn. 4.

[27] So schon Heinrich Zoepfl, Grundsaetze des allgemeinen und des constitutionell-monarchischen Staatsrechts, 3. Ausgabe, Heidelberg 1846; C. D. von Witzleben (anonym): Zur Frage einer einheitlichen deutschen Nachdrucksgesetzgebung. Mit besonderer Beziehung auf die dem Bundestag vorgelegten Gesetzentwürfe der österreichischen Regierung und des Börsenvereins der deutschen Buchhändler, in: Deutsche Vierteljahrsschrift, 26. Jg. (1863), 1. Heft, S. 219, 219. Siehe auch Wadle, Bundesbeschluß (o. Fn. 18), S. 223.

[28] Die Frage der angemessenen Dauer des Schutzes war über Jahrzehnte umstritten, nachdem insbesondere sächsische Akteure für die Fortgeltung sogar des dortigen „ewigen Verlagsrechts" stritten; vgl. Nomine, Vestigia terrent - Zur Entstehung des sächsischen Gesetzes vom 22. Februar 1844, in: UFITA 2007 (II), 481, 484 und passim.

[29] Vgl. Nomine, Schelling gegen Paulus (o. Fn. 10), S. 166. Siehe aber den in der Anlage abgedruckten Frankfurter Entwurf (dort § 5), der jedenfalls die „Unterdrückung" eines widerrechtlich gebrauchten Titels vorsieht.

Schutzfrist gefordert hatten, enthielt Artikel 6 eine Revisionsklausel, die die Bundesversammlung verpflichtete, spätestens „mit Eintritt des Jahres 1842“ neu zu verhandeln.[30]

In den 1840er Jahren gelang es tatsächlich, die Bundesvorschrift von 1837 in einigen Punkten zu ergänzen: Der ebenfalls (auch) auf preußische Initiative zustande gekommene Bundesbeschluss vom 22. April 1841 verbot die ungenehmigte Aufführung (ungedruckter) musikalischer und dramatischer Schöpfungen für die Dauer von zehn Jahren nach der ersten rechtmäßigen Aufführung;[31] ein Beschluss vom 19. Juni 1845 erweiterte die kurze Schutzfrist für die (im Bundesbeschluss von 1837 genannten) „literarischen Erzeugnisse und Werke der Kunst“ von zehn Jahren nach dem Erscheinen auf 30 Jahre post mortem auctoris und verpflichtete die in Urheberrechtssachen entscheidenden Gerichte zur Anhörung externer, mit der Materie vertrauter Gutachter.[32] Eine noch weitergehende Regelung des Urheberrechts war zunächst nicht möglich. Daran konnten auch die Kampagnen des Börsenvereins nichts ändern, der schon immer die „Nothwendigkeit gleichförmiger Regulirung des literarischen Rechtszustandes in ganz Deutschland“ betonte.[33] Ende der fünfziger Jahre allerdings konnte man sich noch auf eine Verlängerung der Schutzfrist für die so genannten „Klassiker“ verständigen[34] sowie auf die Erweiterung des 1841 gewährten Schutzes gegen unbefugte Aufführung.[35]

Die Uneinheitlichkeit des Deutschen Bundes spiegelte sich wider auf der Ebene der Einzelstaaten: Der Beschluss von 1837 war – wie bereits ausgeführt – kein unmittelbar geltendes Recht und musste in die einzelstaatlichen Normensysteme übernommen werden. Dabei begnügten sich einige (der kleinsten) deutschen Staaten mit der bloßen Publikation der eher anspruchslosen Vorgaben aus Frankfurt und erließen überhaupt keine (neuen) über die Bundesnormen hinausgehenden Vorschriften.[36]

Die Freie Stadt Frankfurt selbst etwa erließ bis zuletzt kein eigenständiges Urheberrechtsgesetz. Ihre „Bekanntmachung vom 3. April 1838 betreffend die Publication des Bundesbeschlusses vom 9. November 1837“ erfolgte allerdings ausdrücklich „mit dem [irreführenden, *R.N.*] Zusatze, daß die noch weiteren Schutz gewährenden Maßregeln, welche die hiesige Gesetzgebung mit sich bringt, neben demselben fortwährend in Anwendung bleiben“ sollten.[37]

Dagegen stand Preußen, das schon Monate vor Erlass des Bundesbeschlusses von November 1837 ein hochmodernes Urheberrechtsgesetz in der Schublade hatte und die Bundesnorm nur mit dem Vorbehalt publizierte, auch (weiterhin) günstigere Bestimmungen zum Recht der geistigen Leistungen aufstellen zu dürfen: Das mit Rücksicht auf die Verhandlungen am Bundestag erst im Dezember 1837 ausgegebene „Gesetz zum Schutze des Eigenthums an Werken der Wissenschaft und Kunst gegen Nachdruck und Nachbildung vom 11. Juni 1837“[38] stellte ausdrücklich den Urheber an die Spitze, dem es ein 30 Jahre den Tod überdauerndes, also vererbliches Recht zur ausschließlichen Verwertung gewährte. Das Gesetz erfasste auch persönlichkeitsrechtliche Tatbestände und stellte selbst Vorlagen ohne eigentlichen Vermögenswert unter Schutz. Daneben wies es dem Urheber die unterschiedlichsten Arten der Verwertung seines Geistesproduktes zu. Als erste deutsche Norm schützte das preußische Gesetz den Autor dramatischer Werke vor ungenehmigten Aufführungen (§ 32) und gewährte einen Schutz gegen die unbefugte Vervielfältigung von musikalischen Kompositionen (§ 18 f.).[39] Auch dem Kunsturheberschutz war ein ganzer Abschnitt gewidmet (§ 21 ff.). Allerdings erlaubte das Gesetz ausdrücklich, entsprechende Werke auf Gewerbeerzeugnissen nachzubilden (§ 25) und entzog damit gerade auch den Erzeugnissen der Kunstindustrie, der „angewandten Kunst“ also, jedweden Schutz.[40] Auf Landesebene ersetzte die Norm die archaischen, auf den Verleger zugeschnittenen Vorschriften des preußischen Allgemeinen Landrechts zum Nachdruck.[41]

---

30 Dazu eingehend Wadle, Bundesbeschluß (o. Fn. 18), S. 223 ff.

31 Bundesbeschluss vom 22. April 1841, den Schutz musikalischer und dramatischer Werke gegen unbefugte Aufführung betr., Prot. DBV 1841, S. 234 f.; abgedruckt bei Eisenlohr, Sammlung (o. Fn. 2), S. 5. Näher Wadle, Die Anfänge des Aufführungsrechts in Preußen und im Deutschen Bund, in: Geistiges Eigentum II (o. Fn. 5), 277, 293 f.

32 Bundesbeschluss vom 19. 6. 1845; Prot. DBV 1845, 538 ff. Abgedruckt bei Eisenlohr, Sammlung (o. Fn. 2), S. 4. Dazu NN, Zur Geschichte des literarischen und artistischen Eigenthums, in: Allgemeine österreichische Gerichts-Zeitung (Wien) 1856, Nrn. 23–28, Nr. 28 vom 4. 3. 1856, 109, S. 110 f.

33 Hierzu sogleich.

34 Bundesbeschluss vom 6. November 1856 zur Erweiterung der Bestimmungen der Bundesbeschlüsse vom 9. November 1837 und 19. Juni 1845 wegen gleichförmiger Grundsätze zum Schutze des schriftstellerischen und künstlerischen Eigenthums gegen Nachdruck und unbefugte Nachbildung, in: Prot. DBV 1856, S. 701, abgedruckt bei Eisenlohr, Nachtrag (o. Fn. 2), S. 2 f.

35 Bundesbeschluss vom 12. 3. 1857; Prot. DBV 1857, 227 f. Abgedruckt bei Eisenlohr, Nachtrag (o. Fn. 2), S. 3. Näher Klostermann, Geistiges Eigenthum (o. Fn. 6), S. 54 f.; Wächter, Verlagsrecht (o. Fn. 18), Bd. 2, Stuttgart 1858, S. 632.

36 Vgl. etwa von Witzleben, Nachdrucksgesetzgebung (o. Fn. 27), S. 220.

37 Mit der „hießigen Gesetzgebung“ war wohl der wenig ergiebige „Rathschluß vom 27. Januar 1657“ bzw. die „Eines Edlen und Hochweisen Raths der Stadt Frankfurt erneuerte Buchdruckerordnung vom 9. Februar 1660 [!]« gemeint; Eisenlohr, Nachtrag (o. Fn. 2), S. 7 ff.

38 Abgedruckt bei Schletter, Handbuch (o. Fn. 14), S. 18 ff.

39 Vgl. Vogel, Deutsche Urheber- und Verlagsrechtsgeschichte zwischen 1450 und 1850, Frankfurt/M., Sp. 165 ff. Zur Geschichte der Norm eingehend Wadle, Urheberrechtsgesetz (o. Fn. 24).

40 § 25 des preußischen Gesetzes von 1837 lautete: „Die Benutzung von Kunstwerken als Muster zu den Erzeugnissen der Manufacturen, Fabriken und Handwerke ist erlaubt.“ Zu diesem „Mangel“ des Gesetzes, den alle anderen deutschen Nachdrucksgesetze teilten – mit Ausnahme wohl des Kurhessischen Gesetzes vom 18. Juli 1846, in: Sammlung von Gesetzen für Kurhessen, Kassel 1847, S. 39 ff. - etwa Paul Schmid, Die Entwicklung des Geschmacksmusterschutzes in Deutschland, Berlin 1896, S. 47 ff. Eingehend Wadle, Der Streit um den Schutz der Kunstindustrie – Notizen zur Geschichte des preußisch-deutschen Urheberrechts im 19. Jahrhundert, in: Geistiges Eigentum (o. Fn. 1), S. 543, 544 ff.

41 ALR für die Preußischen Staaten von 1794, insbesondere § 996 ff., I. Teil, Titel 11.

Das Gesetz konnte – trotz der engen Grenzen des gewährten Kunsturheberrechtsschutzes – zumindest „den wichtigsten Erfordernissen der Praxis über einen gewissen Zeitraum gerecht werden“ [42]. Es wurde deshalb in den Jahren bis 1866 nur zweimal und nur um wenige Vorschriften (insbesondere zur Behandlung der vor 1837 erschienenen Werke und zum Aufführungsrecht) ergänzt.[43]

Von besonderer praktischer Bedeutung war die bereits im Gesetz von 1837 normierte verfahrensrechtliche Pflicht des Richters in Nachdruckssachen, im Zweifel das Gutachten stehender Vereinigungen von Sachkundigen einzuholen (§ 17–31). Die bereits Mitte des Jahres 1838 in Berlin aus der Taufe gehobenen, so genannten „literarischen“, „artistischen“ und „musikalischen“ Sachverständigen-Vereine versammelten von Anfang an bedeutende, zum Teil auch juristisch gebildete Buchhändler, Schriftsteller, Künstler sowie mit der Materie bestens vertraute Rechtspraktiker und Hochschullehrer – allesamt auch in den anderen Staaten des Bundes bestens vernetzte Mitglieder der hauptstädtischen Bildungselite. Die Berliner Korporationen begleiteten zahlreiche Urheberrechtsprozesse in ganz Preußen. Allein der „Königlich Preußische Literarische Sachverständigen-Verein“ gab bis 1866 über 120, zum Teil bahnbrechende, gerade auch zu den materiellen Fragen des Urheberrechts erstellte Gutachten ab. Die Stellungnahmen wurden über die Jahre von den Vereinsvorsitzenden druckweise herausgegeben und damit in ganz Deutschland bekannt;[44] sie trugen im Wechselspiel mit der Rechtsprechung insbesondere auch des Berliner Obertribunals wesentlich dazu bei, dass sich in Preußen jedenfalls unter den Praktikern so etwas wie eine „herrschende Meinung“ zu bestimmten Fragen des Urheberrechts bildete; noch 1880 entwickelte Josef Kohler seine Lehre vom Schutzumfang des Urheberrechts anhand der Spruchpraxis der Vereine.[45] Schon ab 1840 und fortlaufend fungierten die Vereine auf Anforderung des für sie zuständigen Kultusministeriums auch als Berater in Fragen der Rechtspolitik; so war etwa der nachmalige Vorsitzende des Literarischen wie des Musikalischen Sachverständigenvereins, der Rechtsgelehrte *Ludwig Eduard Heydemann* (1805–1874) an der Erarbeitung des (bereits erwähnten) Änderungsgesetzes von 1854 maßgeblich beteiligt, das die Rechte der Bühnenautoren weiter stärkte.[46]

Neben den Staaten des Deutschen Bundes, die auf ein modernes Regelwerk verzichteten, und Preußen, das sich als Motor der Entwicklung des Urheberrechts sah, standen die Länder, die erst nach und nach detaillierte Vorschriften erließen. So etwa verabschiedete etwa Bayern 1840 ein modernes, über die Bundesnorm hinausgehendes Gesetz, Sachsen folgte 1844, Württemberg erließ 1845 eine eher schmale, 1858 nur ganz unwesentlich erweiterte Norm.[47] Österreich, das durchaus Sympathie selbst für den professionellen Nachdruck hegte, kam erst 1846 zu Stuhle.[48] Dabei orientierten sich einige Gesetzeswerke, wie das des Herzogtums Braunschweig, am preußischen Recht, das 1839 erlassene Urheberrechtsgesetz des Herzogtums Sachsen–Weimar–Eisenach stimmte sogar wörtlich mit der Berliner Norm von 1837 überein.[49] Namentlich Österreich und Sachsen erließen ganz eigenständige Normen; das sächsische Urheberrechtsgesetz sah immerhin – zumindest insoweit dem preußischen ähnlich – die Errichtung stehender Sachverständigenkollegien (§ 18) vor.[50] Sie alle gingen formal über die Bundesvorgaben hinaus und stimmten wohl – jedenfalls nach zeitgenössischer Ansicht – zumindest im Grundsätz-

[42] So Wadle, Sonderrecht für Werke der bildenden Kunst? Ein preußisches Reformprojekt von 1842, in: Geistiges Eigentum II (o. Fn. 5), S. 293, 305.

[43] Nämlich durch die „Verordnung, betreffend den Schutz gegen Nachdruck für die vor Publication des Gesetzes vom 11. Juni 1837 erschienenen Werke. Vom 5 Juli 1844.“ und das „Gesetz, betreffend die Abänderung einiger Bestimmungen des Gesetzes vom 11. Juni 1837 über den Schutz des Eigenthums an Werken der Wissenschaft und Kunst gegen Nachdruck und Nachbildung. Vom 20. Februar 1854.“, abgedruckt jeweils bei Eisenlohr, Sammlung (o. Fn. 2), S. 42 f. bzw. 63 f.

[44] Ludwig Erhard Heydemann (Hrsg.), Sammlung der Gutachten des Königlichen Preußischen Literarischen Sachverständigen-Vereins, Berlin 1848; Heydemann/Otto Dammbach (Hrsg.), Die Preußische Nachdrucksgesetzgebung erläutert durch die Praxis des Königlichen Litterarischen Sachverständigen-Vereins, Berlin 1863.

[45] Vgl. Martin Vogel, Grundzüge (o. Fn. 9), S. 133 f.

[46] Eingehend Nomine, Der Königlich Preußisch Literarische Sachverständigen-Verein in den Jahren 1838 bis 1870, Berlin 2001.

[47] Bayern: Königlich Bayerisches Gesetz den Schutz des Eigenthums an Erzeugnissen der Literatur und Kunst gegen Veröffentlichung, Nachbildung und Nachdruck betreffend, vom 15. April 1840; abgedruckt bei Eisenlohr, Sammlung (o. Fn. 2), S. 13 ff. Sachsen: Gesetz, den Schutz der Rechte an literarischen Erzeugnissen und Werken der Kunst betreffend, vom 22. Februar 1844; Eisenlohr, Sammlung (o. Fn. 2), S. 65 ff; zur Geschichte der Norm Nomine, Vestigia terrent (o. Fn. 28). Württemberg: Gesetz in Betreff des Schutzes schriftstellerischer und künstlerischer Erzeugnisse gegen unbefugte Vervielfältigung; vom 24. August 1845 (die Norm besteht nur aus drei Artikeln); Gesetz, betreffend die Erweiterung des Schutzes schriftstellerischer und künstlerischer Erzeugnisse gegen unbefugte Vervielfältigung, vom 21. 8. 1858. Dazu Gergen, Nachdruckprivilegienpraxis (o. Fn. 11), S. 63 ff., der auch beide Gesetze abdruckt.

[48] Gesetz zum Schutze des literarischen und artistischen Eigenthums gegen unbefugte Veröffentlichung, Nachdruck und Nachbildung, vom 19. Oktober 1846; Eisenlohr, Sammlung (o. Fn. 2), S. 10 ff. Dazu Sybille Gerhartl, „Vogelfrei“ – Die österreichische Lösung der Urheberrechtsfrage in der 2. Hälfte des 19. Jahrhunderts oder: Warum es Österreich unterließ, seine Autoren zu schützen, Wien 1995, die (S. 19) von einer „unverhohlenen Nachdruckspolitik“ Österreichs spricht. Das Kaiserreich hatte schon den Beschluss von 1837 nur mit dreijähriger Verspätung (am 26. 11. 1840) publiziert; vgl. Josef Schmidl, Das österreichische Urheberrecht an Werken der Literatur, Kunst und Photographie, Leipzig 1906, S. 10.

[49] Herzogtum Braunschweig: Gesetz zum Schutz des Eigenthums an Werken der Wissenschaft und Kunst, vom 10. Februar 1842; Eisenlohr, Sammlung (o. Fn. 2), S. 16 ff. Herzogtum Sachsen–Weimar–Eisenach: Gesetz zum Schutz des Eigenthums an Werken der Wissenschaft und Kunst gegen Nachdruck und Nachbildung, vom 11. Januar 1839; Eisenlohr, Sammlung (o. Fn. 2), S. 86 ff.

[50] Vgl. etwa Max Friedländer, Der einheimische und ausländische Rechtsschutz gegen Nachdruck und Nachbildung, Leipzig 1857, S. 16: „Die Particulargesetze entwickelten sich unter Beobachtung der Bundesbeschlüsse als Norm in fruchtbarer Weise, und während viele von ihnen ziemlich treu dem preußischen Gesetze, das selbst noch Ergänzungen erhielt, folgten, ging ein größerer Act selbständiger Gesetzgebung von Oesterreich aus.“; ähnlich Witzleben, Nachdrucksgesetzgebung (o. Fn. 27), S. 220.

lichen überein.[51] Es gab aber zahlreiche, gerade auch praktisch bedeutsame Unterschiede, von denen nur einige erwähnt seien:[52] Gewöhnlich obwaltete schon keine einheitliche Terminologie: einige Gesetze handelten von „Werken der Wissenschaft und Kunst", andere von so genannten „literarischen und artistischen Erzeugnissen". Damit verbunden waren Abweichungen bei der Regelung der Schutzgegenstände, was zum Beispiel für die rechtliche Behandlung nachgedruckter Zeitungsartikel,[53] aber auch von Briefen[54] Bedeutung hatte. Auch die Grenzen erlaubter Fremdnutzung zogen die einzelnen Gesetze unterschiedlich weit (was etwa die Behandlung des „Großzitats" betraf), schließlich differierten die Grundsätze des Schadensausgleichs. Nicht zuletzt aber blieb der tiefere Grund des Nachdruckverbotes unklar: Die unterschiedliche Benennung des geschützten Rechts als »(geistiges, artistisches, literarisches) Eigentum" oder aber als „Autorrecht" spiegelte die zuweilen hitzige, bis weit in die 1870er Jahre hin offene Diskussion über die theoretische Begründung des Urheberrechts wider. Auch sie hatte eminent praktische Bedeutung: Das sächsische Gesetz etwa bezeichnete das Urheberrecht ausdrücklich (und insofern abweichend von der preußischen Norm) als reines Vermögensrecht und stellte nur solche Gegenstände unter Schutz, die auch „wirklich zum Gelderwerbe" dienlich und bestimmt waren (§ 1 Absatz 1 Satz 2).[55]

Aber auch an den ursprünglich „modernen" Partikularrechten nagte der Zahn der Zeit. In (fast) allen Gesetzen waren – wie gesagt – das Kunsturheberrecht, aber auch das für den internationalen Verkehr immer wichtiger werdende Übersetzungsrecht nur unzureichend geregelt; neue Fragestellungen (wie etwa der Schutz von telegraphischen Depeschen oder Photographien) wurden überhaupt nicht erfasst.[56]

Diese über die Jahre weiter anwachsende Gemengelage wurde noch verkompliziert durch die Ergebnisse einer Vertragspolitik Frankreichs, das bis 1855 mit mehr als zehn kleineren und mittleren deutschen Staaten Separatabkommen „gegen contrefaçon", also zum gegenseitigen Schutz der Urheberrechte schließen konnte;[57] die Bundesversammlung allerdings beschied im Februar 1853 ein wenige Monate zuvor gemachtes Angebot der französischen Regierung, auch auf Bundesebene über den Abschluss einer Literarkonvention zu verhandeln, hinhaltend abschlägig.[58]

Auch mit Großbritannien bestand Mitte der fünfziger Jahre ein ähnliches Netzwerk aus Staatsverträgen, dessen erster Knoten 1846 von Preußen (mit–)geknüpft worden war.[59] Es versteht sich von selbst, dass unter den geschilderten Verhältnissen insbesondere der – die innerdeutschen Grenzen überschreitende – Handel mit Schriftwerken und Kunst litt, war doch in dem einen Land der Vertrieb bestimmter Geisteswerke erlaubt, die in anderen als Nachdruck oder Nachbildung der Einziehung unterlagen. Entsprechend divergent entschieden die Gerichte der Einzelstaaten. In einer ganzen Anzahl von Aufsehen erregenden Fällen wurden völlig gleiche Sachverhalte je nach Bundesstaat abweichend beschieden. Ein frühes Beispiel ist die in mehreren deutschen Ländern geführte Auseinandersetzung um den Abdruck der – ab 1841 in Berlin gehaltenen – Vorlesungen *Friedrich Wilhelm von Schellings* (1775-1854).[60] 1853 entbrannte dann ein vielfach besprochener Streit zwischen der bekannten Münchner „Lithographischen Anstalt" von Piloty und Löhle und der in Leipzig domizilierten „Englischen Kunstanstalt" von Payne. Die Bayern verdienten ihr Geld mit der Herstellung und dem Vertrieb von Steindrucken, welche mit königlicher Erlaubnis nach Gemälden der Pinakothek angefertigt wurden. Sie wehrten sich gegen den von Sachsen aus betriebenen Verkauf verkleinerter Nachbildungen ihrer (Nach-)Stiche. Während die in Bayern zuständige Polizei-Direktion München den Leipziger wegen der widerrechtlichen Nachbildung artistischer Erzeugnisse mit einer Geldstrafe von 500 Gulden belegte, sprachen sächsische

---

[51] Klostermann, Das Urheberrecht an Schrift- und Kunstwerken, Abbildungen, Compositionen, Photographien, Mustern und Modellen nach deutschem und internationalem Rechte systematisch dargestellt, Berlin 1876, S. 14. Einen 1857 erstellten Überblick über 32 „Partikulargesetze" und die bis dahin ergangenen Bundesbeschlüsse gibt neben Eisenlohr, Sammlung bzw. Nachtrag (o. Fn. 2) auch Friedländer, Rechtsschutz (o. Fn. 50), S. 106 ff.

[52] Dazu eingehend Heydemann, Referat, gehalten am 28. 8. 1861 vor dem 2. Deutschen Juristentag in Dresden, in: Verhandlungen des Zweiten Deutschen Juristentages. Herausgegeben von dem Schriftführer–Amt der ständigen Deputation. 2. Band, Berlin 1862, S. 259 ff.

[53] Hierzu etwa von Witzleben, Zur Frage über die Anwendbarkeit des gesetzlichen Schutzrechts gegen Nachdruck auf Erzeugnisse der Tagespresse, in: Theodor Tauchnitz (Hrsg.), Zeitschrift für Rechtspflege und Verwaltung, N. F., Band 14 (Leipzig 1856), 1 ff. Witzleben, Nachdrucksgesetzgebung (o. Fn. 27), S. 223, weist darauf hin, dass insbesondere die Aufhebung der Zensur mit der Beseitigung des „Concessionssystems" von entscheidender Bedeutung für den so nicht vorausgesehenen Aufschwung der „periodischen Presse" gewesen sei: „Die Einzelgesetzgebungen zum Schutze des literarischen Urheberrechts hatten rücksichtlich dieses Zweiges Censur-Concessionen zur wesentlichen Voraussetzung. Nur so ist das fast gänzliche Stillschweigen über die Rechtsverhältnisse der Tagespresse in ihnen zu erklären."

[54] Kein deutsches Gesetz erwähnte Briefe als Objekte des Rechtsschutzes; vgl. C. W. Hoffmann, Ueber das Urheberrecht an Briefen, St. Gallen 1874, S.29.

[55] Der nur l'art pour l'art gehaltene akademische Vortrag z. B. blieb damit ohne Schutz gegen die unbefugte (selbst druckweise) Veröffentlichung.

[56] Vgl. Barbara Dölemeyer, Urheber- und Verlagsrecht. Kapitel Deutschland, in: Helmut Coing (Hrsg.), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte III/3, München 1986, S. 4010, 4016.

[57] Die Literarkonventionen mit Frankreich sind abgedruckt bei Eisenlohr, Sammlung (o. Fn. 2), S. 156 ff. Zur damaligen französischen Handelspolitik etwa Döhlemeyer, „Geistiges Eigentum" zwischen „Commerzien" und „Informationsgesellschaft". Einzelstaatliche Gesetzgebung und internationaler Standard, in: Louis Pahlow/Jens Eisfeld (Hrsg.), Grundlagen und Grundfragen des Geistigen Eigentums, Tübingen 2008, S. 93, 98.

[58] Das entsprechende „Anerbieten der Kaiserlich Französischen Regierung wegen Abschlusses einer Uebereinkunft mit dem Deutschen Bunde zum gegenseitigen Schutze des litterarischen, artistischen und musikalischen Eigenthums" wurde auf der Sitzung vom 24. 2. 1857 behandelt; Prot. DBV 1857, S. 121 ff.

[59] Eisenlohr, Sammlung (o. Fn. 2), S. 204 ff.

[60] Eine Gesamtdarstellung des Falles gibt Nomine, Schelling gegen Paulus, Leske und Complizen, in: Gergen (Hrsg.), Vom Reichshofrat zur Reichsfilmkammer, Berlin 2019, 141 ff.; siehe auch Nomine, Schelling gegen Paulus (o. Fn. 10).

Gerichte in drei Instanzen frei: die Kopie eines Originals sei in Sachsen nicht geschützt.[61]

3. Vorarbeiten

Diese Zerklüftung des Urheberrechts erregte von Anbeginn die kritische Aufmerksamkeit der deutschen, aber auch ausländischen Urheber, Verleger und Buch–, Musikalien- und Kunsthändler und deren (gerade auch in Leipzig angesiedelten) Interessenvertretungen.[62] Der Börsenverein ging die Bundesversammlung bereits 1834 mit einem eigenen Gesetzentwurf („Vorschläge zur Feststellung des litterarischen Rechtszustandes in den Staaten des deutschen Bundes") an;[63] im Oktober 1841 wiederum erinnerte die rührige Interessenvertretung der deutschen Verlagsbuchhändler nachdrücklich an die in Artikel 6 des Bundesbeschlusses von 1837 versprochene umfassende Revision der Bundes-Nachdrucksgesetzgebung.[64] Der Verein initiierte auch in den Folgejahren mit schöner Regelmäßigkeit Denkschriften zu den Fragen des deutschen wie des internationalen Rechtschutzes, die gewöhnlich an die sächsische Staatsregierung gerichtet waren, über diese aber auch an die Bundesversammlung gelangten. 1842 entwarf der damalige Rechtskonsulent des Börsenvereins, der Leipziger Advokat *Hartmann Schellwitz* ein eigenes, umfangreich motiviertes Urheberrechtsgesetz,[65] im selben Jahr richteten besorgte Schriftsteller und Tonkünstler Eingaben an die sächsische Ständeversammlung.[66] Unstimmigkeiten auf dem Gebiet des Musikurheberrechts wiederum veranlassten im April 1853 den ebenfalls in Leipzig ansässigen „Verein der deutschen Musikalienhändler" bei der Deutschen Bundesversammlung, aber auch in Preußen, Österreich und Sachsen vorstellig zu werden um, im Ergebnis allerdings erfolglos, eine authentischen Erläuterung des (die Schutzfristen verlängernden) Bundesbeschlusses vom 19. Juni 1845 zu bitten.[67]

In Fluss gerieten die Dinge ab Mai 1854, als sich die Hauptversammlung des Börsenvereins kritisch zu dem Abschluss weiterer Literaturabkommen mit Frankreich äußerte. Die Buchhändler sorgten sich um die mögliche Höhe der Zölle auf Bücher, fürchteten aber auch, die Frage der unterschiedlich langen Urheber–Schutzfristen und das Übersetzungsrecht könnten aus dem Blickfeld der Kontrahenten geraten – wie angeblich geschehen bei der Vereinbarung der Literarkonvention zwischen Preußen und Großbritannien.[68] Vorsteher des Börsenvereins war seit 1853 *Moritz Veit*, der Berliner Verleger *Savignys*, Abgeordneter des preußischen Landtags und Mitglied in dem bereits erwähnten Literarischen Sachverständigenverein.[69]

Wenige Monate später, im Oktober 1854, wies das sächsische Innenministerium die ihm unterstehende Kreisdirektion in Leipzig an, sowohl den Börsenverein als auch die ebenfalls in der Messestadt aktive Buchhändler-Deputation um eine „bestimmte Formulierung der Grundsätze" des Urheberrechts zu bitten. Ziel war es, ein für alle Mal die seit Jahren eingehenden Petitio-

---

[61] Krug, Hat der Urheber der Copie eines Kunstwerks oder dessen Rechtsnachfolger nach dem K. S. Ges. v. 22. Febr. 1844 Anspruch auf Schutz gegen unbefugte Nachbildungen dieser Copie?, in: Tauchnitz/Alfred Du Chesne (Hrsg.), Zeitschrift für Rechtspflege und Verwaltung, N.F., 19. Band (Leipzig 1860), S. 308, 308 ff.; Piloty und Löhle (Hrsg.), Die bayerischen Erkenntnisse in der Untersuchung gegen Albert Henry Payne, Besitzer der „Englischen Kunstanstalt" zu Leipzig und Dresden, wegen widerrechtlicher Nachbildung artistischer Erzeugnisse der kgl. bayr. privileg. Kunstanstalt von Piloty und Löhle zu München; Adalbert Wilhelm Volkmann, Die Werke der Kunst in den deutschen Gesetzgebungen zum Schutze des Urheberrechts, München 1856, S. VI ff.; ausführlich auch (Theodor) Goltdammer, Ueber die strafbare Nachbildung von Kunstwerken, Berlin 1864.
Goltdammer, Zwei Nachdrucks–Fälle, in: Archiv für Preußisches Strafrecht, 5. Band (Berlin 1857), S. 618, 618 ff., schildert einen ähnlichen Vorgang in Berlin: 1854 entschied das Preußische Obertribunal in einer Strafsache wegen der unerlaubten photographischen Abbildung eines Kupferstichs, der nach einem Gemälde von Wilhelm von Kaulbach („Die Zerstörung Jerusalems") gefertigt worden war. Vor der Entscheidung war das Gutachten des artistischen Sachverständigen-Vereins eingeholt worden.

[62] Wadle, Entwurf (o. Fn. 8), S. 311 ff. Eingehend zur Rolle des Börsenvereins auch Eugen Ulmer, Börsenverein und Urheberrecht, in: Börsenblatt für den Deutschen Buchhandel (Frankfurt/M.), Sondernummer vom 24. 4. 1975 (150 Jahre Börsenverein des Deutschen Buchhandels 1825–1975), S. 43 ff.

[63] Börsenverein der deutschen Buchhändler (Hrsg.), Vorschläge zur Feststellung des litterarischen Rechtszustandes in den Staaten des deutschen Bundes, s. l., s. d. (Leipzig 1834); abgedruckt in: Prot. DBV 1835, S. 99 ff. Hugo Häpe, Der Einfluß des Bundesbeschlusses vom 9. Nov. 1837 auf die Fortbildung des literarischen Rechts in Deutschland, in: Allgemeine Preßzeitung (Leipzig 1844), Nrn. 97–100, S. 385, 386, nennt die Vorlage des Börsenvereins „unstreitig eins der wichtigsten Actenstücke in der Geschichte des Bundesbeschlusses vom 9. Nov. 1837".

[64] Börsenverein der deutschen Buchhändler (Hrsg.), Denkschrift in Bezug auf die von Einer Hohen Deutschen Bundesversammlung für das Jahr 1842 verheißene Revision der bundesgesetzlichen Bestimmungen über die litterarischen Rechtsverhältnisse in Deutschland gemäß des Beschlusses der Hauptversammlung des Börsenvereins der deutschen Buchhändler am 9 Mai 1841 berathen und abgefaßt von dem dazu statutenmäßig ernannten außerordentlichen Ausschusse. Als Manuscript für die Mitglieder des Börsenvereins, Jena 1841; (Teilweise) abgedruckt bei Fr. J. Frommann, Die Denkschrift des Börsenvereins der deutschen Buchhändler vom 5. October 1841 im Auszuge mitgetheilt und mit einigen Erläuterungen versehen, in: Allg. Press–Zeitung (Leipzig) 1842, Nrn. 6-7, Sp. 65 ff., 81 ff. Ein Exemplar ist in die Akten des sächsischen Gesammt-Ministeriums gelangt: Sächsisches Staatsarchiv, Hauptstaatsarchiv Dresden, Loc. 30, Nr. 8, (Preßgesetzgebung und Censur, ingleichen Bücher=und Zeitungswesen überhaupt betr., 1840–October 1842, Vol. III), Bl. 204 ff.

[65] Hartmann Schellwitz, Gesetzentwurf die Sicherstellung des literarisch–artistischen Eigenthums betreffend, in: Allg. Press–Zeitung 1842, Nrn. 11-14, Sp. 123 ff., 129 ff., 137 ff, 145 ff. Über Schellwitz etwa Nomine, Sachverständigen-Verein (o. Fn. 46), S. 469.

[66] Petition an die hohe Ständeversammlung des Königreichs Sachsen, betreffend den Schutz der Rechte an literarischen Erzeugnissen, Leipzig, s. d. (1842); Petition an die hohe Ständeversammlung des Königreichs Sachsen um Herstellung eines angemessenen und wirksamen Rechtsschutzes für das Eigenthum deutscher dramatischer Autoren und Opern-Componisten an ihren Werken gegenüber den Bühnen-Directionen, Leipzig, s. d. (1842).

[67] Vgl. Eisenlohr, Das literarisch-artistische Eigenthum und Verlagsrecht mit Rücksicht auf die Gesetzgebungen, Schwerin 1855, 23. Laufke, Zivilgesetzgebung (o. Fn. 6), 22 f., gibt eine Übersicht über die (häufig auch gescheiterten) Anträge einzelner Bundesstaaten und die privaten Anregungen seit 1848, die auf eine Abänderung bzw. Ergänzung der Bundesgesetzgebung zum Urheberrecht zielten.

[68] Börsenverein der deutschen Buchhändler (Hrsg.), Denkschriften über den internationalen Rechtsschutz gegen Nachdruck zwischen Deutschland, Frankreich und England auf den Beschluß der Hauptversammlung des Börsenvereins der deutschen Buchhändler vom 14. Mai 1854, beraten und abgefaßt von dem dazu statutenmäßig erwählten Ausschusse. Als Manuskript für die Mitglieder des Börsenvereins, Leipzig, s. d. (1855).

[69] 1808–1864. Veit blieb in dieser Funktion bis 1861, die nach den Statuten längstmögliche Zeitspanne; zu seiner Person etwa Nomine, Sachverständigen-Verein (o. Fn. 46), S. 471.

nen und Beschwerden zu erledigen, die – wie es das Innenministerium seinerzeit zusammenfasste – im Grunde alle auf die „Herbeiführung gleichmäßiger Grundsätze über Behandlung des Nachdrucks durch bundes-gesetzliche Vorschriften“ bzw. auf die „Abänderung und Vervollkommnung der deßfalls bestehenden particular- und bundesgesetzlichen Normen“ gerichtet waren. Entsprechend erhielt der Vorstand des Börsenvereins im Februar 1855 die Mitteilung, die sächsische Regierung sei „nicht abgeneigt, in eine nähere Erwägung dieser Angelegenheit einzutreten und nach Befinden durch das Ministerium der auswärtigen Angelegenheiten, welches seinerseits eben so die Wünsche des Deutschen Buch- und Kunsthandels zu unterstützen bereit sei, bei der Bundesversammlung entsprechende Anträge auf eine durchgreifende Abänderung und Vervollständigung der Nachdrucks–Gesetzgebung zu stellen“.[70] Der im Juli 1855 wieder in Leipzig zusammengekommene Vereinsvorstand aus Moritz Veit, *Wilhelm Engelmann* (1808–1878) und *Bernhard Perthes* (1821–1857), beschloss, sich gleich in umfassender Weise „über die Verbesserungen der das literarische Eigenthum betreffenden Gesetzgebung […] auszusprechen“. Für notwendig hielt er die „Herbeiführung einer klaren, für das ganze Bundesgebiet gültigen Gesetzgebung“, also insbesondere die Harmonisierung des disparaten Partikularrechts, um die „aus dem Konflikte der Gesetzgebungen“ hervorgehenden Übelstände zu beseitigen. Dabei wollte er an die Denkschrift des Jahres 1834 anknüpfen, der er einen „unverkennbaren Einfluss“ auf die ab 1837 ergangenen Bundesbeschlüsse zuschrieb.[71]

Mit ersten Vorarbeiten betraut wurde der Justitiar des Börsenvereins, der Leipziger Advokat *Adalbert Wilhelm Volkmann* (geboren um 1820), der innerhalb weniger Monate die geltenden Bundesnormen und – soweit vorhanden – die Urheberrechtsgesetze der Einzelstaaten, aber auch die entsprechenden englischen und französischen Vorschriften zusammenstellte.[72] Daneben berief der Vorstand des Börsenvereins im Einvernehmen mit der Leipziger Buchhändler–Deputation einen Ausschuss zur Erarbeitung eines Gesetzentwurfes. Ihm gehörten an elf mit der Materie bestens vertraute Verlagsbuchhändler aus den wichtigsten deutschen Bundesstaaten, darunter insbesondere Sachsen wie der schon erwähnte Wahl–Leipziger Heinrich Brockhaus oder *Hermann Härtel* (1803–1875), Jurist und Mitinhaber des bekannten Leipziger Musikverlages Breitkopf & Härtel, aber auch der Wiener Verleger *Rudolf Lechner* (1822–1895), der aus Gotha stammende Perthes und nicht zuletzt der Jenenser Verlagsbuchhändler und Politiker *Friedrich Frommann* (1797–1886). Mit von der Partie waren auch die Berliner *Georg Reimer*[73] und Moritz Veit, beide Mitglieder des Literarischen Sachverständigenvereins, Veit gerade auch in seiner Funktion als Vorsteher des Börsenvereins. Die von Volkmann beratenen Spezialisten taten das Naheliegende: In neun Sitzungen im November 1855 verschafften sie sich einen Überblick über das bestehende (Partikular-)Recht, sichteten „alle bekannt gewordenen Wünsche“ gerade auch des Buchhandels, fassten diese Desiderata in Worte und fügten sie schlicht den Vorschriften der preußischen Norm von 1837 bei, dem ihrer Überzeugung nach am besten zu diesem Zweck geeigneten deutschen Urheberrechtsgesetz.[74]

Daneben veranlassten die Buchhändler eine Denkschrift, die auf den seinerzeit in Österreich, nicht aber anderswo auslaufenden Schutz für Werke der vor 1837 verstorbenen Autoren hinweisen sollte. Das ursprünglich an das sächsische Innenministerium gerichtete Gesuch, das eine in allen Staaten gleich endende Schutzfrist für die überaus gut verkäuflichen Klassiker vorschlug und deshalb forderte, „die hohe königliche sächsische Staatsregierung wolle bei der hohen Bundesversammlung dahin wirken, daß für die Werke derjenigen Autoren, die bei Publication des Bundesbeschlusses vom 9. November 1837 bereits verstorben und deren Werke damals erschienen waren, ein gleichzeitiger Ablauf der Schutzfrist von Bundes wegen festgesetzt, und daß diese Schutzfrist nicht kürzer als auf 10 Jahre vom Tage des zu erlassenden Bundesbeschlusses an bemessen werden möge“, hatte sogar Erfolg: die Bundesversammlung beschloss noch am 6. November 1856 eine deutschlandweite Schutzerweiterung bis ins Jahr 1867.[75]

Kein Erfolg war demgegenüber der im Dezember 1855 bei der Bundesversammlung eingegangenen Vorstellung des Frankfurter Advokaten *Eduard Harnier* (1829-1917) beschieden, der namens des „Frankfurter Journals“ und der „Frankfurter Postzeitung“ die Einführung besonderer Bundesregeln zum Nachdruckschutz telegraphischer Depeschen verlangte – durch eine entsprechende Ausdehnung der älteren Nachdrucksgesetzgebung von 1837 und 1845. Nachdem nicht nur Preußen sich gegen das Petitum des Rechtsanwaltes ausgesprochen hatte – auch aus rein praktischen Erwägungen heraus – wurde die Vorlage nicht mehr abschließend behandelt.[76]

---

[70] Zitiert nach Heydemann/Franz Hinschius/Ludwig von Rönne, Entwurf eines Gesetzes für Deutschland zum Schutze des Eigenthums an Werken der Wissenschaft und Kunst gegen Nachdruck und Nachbildung nebst Motiven. (Als Manuskript gedruckt.), s. l., s. d. (Juli 1857), S. 3 f.

[71] Heydemann/Hinschius/Rönne, Entwurf (o. Fn. 70), S. 4.

[72] Volkmann, Zusammenstellung der gesetzlichen Bestimmungen über das Urheber- und Verlagsrecht. Aus den Bundesbeschlüssen, den deutschen Territorialgesetzgebungen und den französischen und englischen Gesetzen. Im Auftrag des Börsenvereins der Deutschen Buchhändler bearbeitet von Anwalt A. W. Volkmann, Leipzig, 1855.

[73] 1804-1885, näher zu dem Berliner Verleger Nomine, Sachverständigen-Verein (o. Fn. 46), S. 469.

[74] Das preußische Gesetz schien „prägnanter“ als das ebenfalls als Vorlage in Frage gekommene österreichische Gesetz von 1846, das nach der Meinung des Ausschusses weniger systematisch gefasst daher kam, angeblich auch „entbehrliche Spezialitäten“ enthielt; so Volkmann, Urheberrecht und Nachdruck, in: Die Grenzboten. Zeitschrift für Politik und Literatur, 20. Jg. (Leipzig) 1861, 1. Semester, 1. Band, S. 52, 54.

[75] Fr(iedrich) J(ohannes) Frommann, Geschichte des Börsen-Vereins der Deutschen Buchhändler, Leipzig 1875, S. 42 f. Das Gesuch des Börsenvereins ist jedenfalls auf der Sitzung des Bundestages vom 10. 4. 1856) besprochen worden; Prot. DBV 1856, S. 309 f. Zu dem entsprechenden Bundesbeschluss vom 6. 11. 1856 schon o. bei Fn. 34.

[76] So Wadle, Der Schutz telegraphischer Depeschen, in: Geistiges Eigentum II (o. Fn. 5), S. 307, 313, der den Vorgang eingehend darstellt. Erörtert wurde die Sache auf der Sitzung vom 14. 2. 1856 in Anwesenheit (unter anderem) des damaligen Geheimen Legationsraths von Bismarck-Schönhausen; Prot. DBV 1856, S. 97 ff.

Die Früchte der eigentlichen Arbeit überließ der Ausschuss einer Fassungskommission, die aus dem Kammergerichtsrat *Ludwig von Rönne*, dem – häufig mit urheberrechtlichen Fragestellungen befassten – Rechtsanwalt *Franz Hinschius* und dem bereits erwähnten Rechtsgelehrten Heydemann bestand; allesamt in Berlin lebende Preußen; die beiden Letztgenannten waren auch führende Mitglieder im Literarischen Sachverständigen-Verein.[77] Die Herren hatten nichts weniger als die Aufgabe, dem von dem Ausschuss des Börsenvereins erarbeiteten „reichhaltige[n] Material für eine neue Gesetzgebung […] die sachgemäße Form und wünschenswerthe Vervollständigung zu geben".[78]

Die Fachmänner, zu denen sich mitunter auch der Vorsitzende Veit gesellte, sahen allerdings für die Bearbeitung des „künstlerischen Rechtsschutzes" keine ausreichende Arbeitsgrundlage, weswegen sie kurzerhand fünf Berliner Kunstschaffende und –unternehmer wie den Kupferstecher *Karl Friedrich Gustav Lüderitz*[79] oder den Fabrikbesitzer *Geiß*[80] zu ihren Sitzungen hinzuzogen. Die Fassungskommission kam schließlich mit einem umfangreich motivierten, 74 Paragraphen umfassenden Entwurf heraus. Ihr „Gesetz für Deutschland zum Schutze des Eigenthums an Werken der Wissenschaft und Kunst gegen Nachdruck und Nachbildung"[81] lehnte sich zwar, insbesondere was die Einteilung und Anordnung der behandelten Materie betraf, im Wesentlichen an die preußische (allerdings nur halb so umfangreiche) Norm von 1837 an, berücksichtigte aber ausdrücklich auch die Vorschriften der übrigen Landesgesetze, mitunter auch zu Lasten der Gesetzgebung aus Berlin. Die Vorlage setzte allerdings nicht alle durch den Ausschuss gemachten Vorgaben um; abweichend behandelt wurde zum Beispiel das für den Auslandshandel mit Musikalien bedeutsame, so genannte „geteilte Eigentum".[82]

Der Vorstand des Börsenvereins überließ die im Juli 1857 fertig gestellte Arbeit alsbald auch anderen Buchhändler-Korporationen, daneben bat er namhafte Fachgelehrte um ihre Gutachten. Der Aufforderung entsprachen der Heidelberger Ordinarius *Julius Jolly* (1823-1891), der bereits 1852 mit einer „Lehre vom Nachdruck" hervorgetreten war,[83] daneben *Christian Friedrich Eisenlohr*, der sich 1855 über das „literarisch-artistische Eigenthum" in Deutschland verbreitet hatte (1856 und 1857 ließ er die hier bereits mehrfach erwähnten Gesetzessammlungen folgen),[84] schließlich der in Heidelberg und Tübingen ausgebildete Jurist und spätere Kommentator des Bayerischen Urheberrechtsgesetzes von 1865, *Gustav Mandry* (1832–1902). Einen Beitrag leistete selbstverständlich auch der Rechtskonsulent des Börsenvereins Volkmann; daneben meldeten sich einzelne Ausschussmitglieder noch einmal schriftlich zu Wort.[85] Schließlich wollte auch die im Herbst 1857 in Stuttgart zusammengetretene „Versammlung deutscher bildender Künstler" nicht abseits stehen und gab einen Kommentar zu dem (vierten) Abschnitt über die unbefugte Nachbildung von Kunstwerken und bildlichen Darstellungen, dessen Bestimmungen die Kunstschaffenden mit „geringen Modificationen" guthießen.[86]

Angesichts der Fülle des Materials benötigte der 1855 konstituierte Ausschuss des Börsenvereins volle sechs Tage, um zu einer abschließenden Bewertung des von Heydemann redigierten ersten Entwurfs zu gelangen. An den im Oktober 1857 zu Leipzig abgehaltenen Sitzungen nahmen – auf vorgeblich informeller Basis, aber unter lebhafter persönlicher Beteiligung – auch die sächsischen Ministerialbeamten Geheimrat *Christian Albert Weinling* und Regierungsrat *von Witzleben* teil, an einer Vormittagssitzung sogar der Kreisdirektor *von Burgsdorff*.[87]

Zuvor hatte die sächsische Staatsregierung – wiederum über die Kreisdirektion Leipzig – dem Vorstand des Börsenvereins bedeuten lassen, es sei „wünschenswerth […], daß die höheren Verwaltungs-Behörden an dieser Berathung Theil nehmen […]. Es sei aber als selbstverständlich anzusehen, daß den bei dieser

---

[77] Rönne (1804–1891); zur Person Wadle, Entwurf (o. Fn. 8), 312. Hinschius (1810–1877), über ihn Nomine, Sachverständigen–Verein (o. Fn. 46), S. 464.; zu Heydemann schon o., bei Fn. 46.

[78] So Wächter, Das Urheberrecht an Werken der bildenden Künste, Photographien und gewerblichen Mustern. Nach dem gemeinen deutschen Recht systematisch dargestellt, Stuttgart 1877, S. 8.

[79] 1803–1884. Lüderitz wurde 1857 (stellvertretendes) Mitglied des artistischen Sachverständigen-Vereins; vgl. Nomine, Sachverständigen-Verein (o. Fn. 46), S. 467.

[80] Wohl Philipp Konrad Moritz Geiß (1805–1875), Inhaber einer Zinkgusshütte.

[81] Heydemann/Hinschius/Rönne, Entwurf eines Gesetzes (o. Fn. 70). Die umfangreich motivierte Arbeit beschreibt auch eingehend die Tätigkeit der Fassungskommission. Zu deren Tätigkeit auch NN, Preußen. Berlin, 28. Febr., in: Allgemeine Zeitung (München) Nr. 64 vom 5. 3. 1857, S. 1010.

[82] Einzelheiten nennt Gustav Mandry, Der Entwurf eines gemeinsamen deutschen Nachdrucksgesetzes, in: Kritische Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft, Band 7 (München 1865), S. 1 ff., 241 ff., 567 ff., 606. Neudruck in: UFITA 128 (1995), S. 101 ff. und UFITA 129 (1995), S. 83 ff. Weitere Hinweise auf Abweichungen gibt NN, Historische und kritische Bemerkungen über den von der Bundestagscommission vorgelegten Entwurf eines Nachdrucksgesetzes, in: Schletter (Hrsg.), Jahrbücher der deutschen Rechtswissenschaft und Gesetzgebung, Band 11 (Erlangen 1865), S. 161, 161.

[83] Vgl. o. Fn. 20.

[84] Eisenlohr, Eigenthum (o. Fn. 67), S. 855; Eisenlohr, Sammlung bzw. Nachtrag (jeweils o. Fn. 2).

[85] Die Gutachten sind wohl nicht veröffentlicht worden. Möglicherweise befinden sie sich bei den im sächsischen Staatsarchiv/Staatsarchiv Leipzig aufbewahrten Unterlagen des Börsenvereins der Deutschen Buchhändler zu Leipzig (Bestand 21765).

[86] Näher zu diesem Verfahren etwa NN, Bemerkungen (o. Fn. 82), S. 162.

[87] Zu Weinling (1812–1873) etwa Wadle, Entwurf (o. Fn. 8), S. 312. Bei dem Vertreter der Kreisdirektion handelt es sich vermutlich um Caesar Dietrich von Witzleben (1823–1882), der 1856 auch königlicher Kommissar und verantwortlicher Redakteur für die Leipziger Zeitung war. Witzleben hatte sich, wie (o. Fn. 53) bereits erwähnt, schon 1856 zum Schutz von Presseartikeln geäußert. Später berichtete er eingehend über die Entstehung des „Frankfurter Entwurfs" und dessen Fortwirken: Witzleben, Nachdrucksgesetzgebung (o. Fn. 27); Witzleben, Das norddeutsche Bundes-Nachdruckgesetz, in: Deutsche Viertel–Jahrsschrift, 33. Jahrgang (1870), Nr. CXXIX, S. 98 ff.
Freiherr Ludwig von Burgsdorff, Kreisdirektor und Kreishauptmann von Leipzig, lebte von 1812–1875.

Berathung von Seiten der anwesenden Regierungs-Mitglieder etwa fallenden Aeußerungen irgend ein offizieller Charakter nicht beizulegen sei."

Die Versammlung, an der auch Franz Hinschius als juristischer Berater teilnahm, segnete schließlich den Entwurf vom Grundsatz her ab, bekrittelte aber die Fassung zahlreicher Einzelvorschriften mehr oder minder nachdrücklich. Vermutlich, um weitere Eigenmächtigkeiten zu vermeiden, wurde die Redaktion des endgültigen Entwurfs einem Dreiergremium ohne Heydemann und von Rönne übertragen. Hinschius machte weiter, ihm zur Seite standen nun aber der Vorsitzende des Börsenvereins Veit und das Ausschussmitglied Reimer, allesamt Preußen und über die Mitgliedschaft im Literarischen Sachverständigen-Verein vor allem mit dem Berliner Urheberrechtsgesetz vertraut.[88]

Der im Dezember 1857 endredigierte (nunmehr zweite) „Entwurf eines Gesetzes für Deutschland zum Schutze des Urheberrechts an Werken der Literatur und Kunst gegen Nachdruck sowie gegen unbefugte Nachbildung und Aufführung" bestand – wie der erste – aus elf Abschnitten mit insgesamt 74, allerdings in der Mehrzahl (sprachlich) neu gefassten Paragraphen, darunter auch eine dem preußischen Recht fremde Vorschrift über die Führung einer „Eintragungsrolle". Unverändert geblieben waren die § 35 und 36, die die Bildung stehender Sachverständigen-Vereine in allen Bundesstaaten vorsahen.

Er war wie folgt gegliedert:

„Gesetz für Deutschland zum Schutze des Urheberrechts an Werken der Literatur und Kunst gegen Nachdruck sowie gegen unbefugte Nachbildung und Aufführung.

I. Schriften. a) Ausschließendes Recht der Schriftsteller. b) Verbot des Nachdrucks. c) Was dem Nachdruck gleichzuachten. d) Was nicht als Nachdruck anzusehen. e) Dauer des ausschließlichen Rechtes. f) Abtretung desselben. g) Entschädigung und Strafen. h) Verfahren.
II. Geographische, topographische, naturwissenschaftliche, architektonische und ähnliche Zeichnungen.
III. Musikalische Compositionen.
IV. Kunstwerke und bildliche Darstellungen.
V. Oeffentliche Aufführung dramatischer, dramatisch–musikalischer und musikalischer Werke.
VI. Allgemeine Bestimmungen.
VII. Deutsche Eintragsrolle." [89]

Das Elaborat traf jedenfalls den Nerv der Praxis. So schrieb 1859 ein Hamburger Advokat voller Enthusiasmus: „Daß dieser Entwurf […] demnächst den allseitigen Wünschen entsprechend als Bundesgesetz promulgirt werden wird, ist um so weniger zweifellos, als derselbe […] von den namhaftesten Buchhändlern und […] Gelehrten […] beschlossen worden." [90] Nicht ganz zufrieden waren die Vertreter der reinen Lehre. Witzleben etwa bemäkelte noch in seinem 1870 verfassten Aufsatz über das „norddeutsche Bundes=Nachdruckgesetz", der zweite Entwurf des Börsenvereins habe zwar „eingehend und detaillirt […] alle Beziehungen des buchhändlerischen Lebens zu den aus dem literarischen und künstlerischen Urheberrechte erwachsenen Erscheinungen […] ins Auge gefasst", allerdings die „hieraus für den Urheber entspringenden Rechtsverhältnisse [nur] wenig und mangelhaft" geregelt, damit im Grunde alleine den „einseitigen Interessen der Buchhändler" gedient.[91] Der Vorstand des Börsenvereins allerdings war von der Güte der Arbeit so überzeugt, dass er noch am 12. Januar 1858 den damals noch amtierenden preußischen Ministerpräsidenten und Außenminister *Otto von Manteuffel* (1805–1882, Regierungschef von 1850 bis November 1858) mit dem Bemerken aufschreckte, „die königlich sächsische Regierung [werde] wahrscheinlich binnen Kurzem im Sinne [des] Entwurfs gegenüber der preußischen Regierung und der Bundesversammlung hervortreten".[92]

Das tat die sächsische Regierung allerdings mitnichten. Anders als ursprünglich versprochen, gab sie den ihr Ende 1857 zugefertigten Entwurf nicht sofort an die Bundesversammlung weiter, sondern fragte erst einmal bei „mehreren größeren deut-

---

[88] Auf diesen Umstand weist etwa Witzleben, Nachdrucksgesetzgebung (o. Fn. 27), S. 232, ausdrücklich hin: „Die Ausarbeitung des Entwurfs des Börsenvereins erfolgte überdieß vorzugsweise in Preußen und durch Preußen."

[89] Börsenverein der deutschen Buchhändler (Hinschius/Reimer/Veit), Entwurf eines Gesetzes für Deutschland zum Schutze des Urheberrechts an Werken der Literatur und Kunst gegen Nachdruck sowie gegen unbefugte Nachbildung und Aufführung, nebst Motiven. Seitens des Börsen=Vereins der deutschen Buchhändler und der Deputirten des Buchhandels zu Leipzig der Königl. Sächsischen Staats=Regierung überreicht. (Als Manuskript gedruckt.), s. l., s. d. (Berlin 1857).
Zu den Unterschieden zwischen den Entwürfen etwa Oscar Wächter, Der 9. November 1867 und die Verlagsrechte, in: Börsenblatt (Leipzig) 1867, S. 2830 ff., 2882 ff., 2913 ff., 2832, der allerdings meint, es seien in der Schlussberatung nur „einzelne mehr oder minder eingreifende Änderungen beschlossen" worden. Siehe aber auch Mandry, Entwurf (o. Fn. 82), S. 7, der einige der neu gefassten Paragraphen auflistet. NN, Das Recht der Briefe und Photographien, in: Deutsche Vierteljahrsschrift 1863, Heft 2, 2. Abteilung, 173, S. 184, weist darauf hin, dass der ursprünglich vorgesehene positive Schutz von Briefen in dem zweiten Entwurf entfallen sei. Thomas Keiderling, Geist, Recht und Geld: die VG WORT 1958–2008, Berlin 2008, S. 14, macht darauf aufmerksam, dass das Wort „Urheberrecht" erstmals in einem Gesetzesentwurf des Börsenvereins erscheint.

[90] Hamburgische Gerichtspraxis Band 1 (Vollständige Sammlung der vom Ober-Appellations-Gerichte zu Lübeck im Jahre 1856 in hamburgischen Rechtssachen abgegebenen Urtheile sammt Motiven, mit den Vorentscheidungen der verschiedenen Unterinstanzen wörtlich abgedruckt.), Leipzig 1859, S. 274. Der Herausgeber macht die Anmerkung anlässlich der Darstellung des Rechtsstreits des Buchhändlers J. S. Meyer gegen seinen Kollegen Eduard Kittler, der unerlaubt Exemplare des Werkes „Beautés de la litterature française moderne" (deutsche Ausgabe „Blüthen aus dem Gebiete der neuern französischen Literatur") von G. de Castres de Tersac vertrieben hatte.

[91] So Witzleben, Nachdrucksgesetzgebung (o. Fn. 27), S. 106. Man sollte diese erst 1870 gemachte Bemerkung gegen den Entwurf der Preußen Hinschius, Veit und Reimer cum grano salis nehmen: Der Sachse Witzleben war zuvor Mitglied der Kommission, die den späteren, von dem Vorschlag des Börsenvereins durchaus abweichenden Frankfurter Entwurf erarbeitet hatte. Dazu sogleich.

[92] Diesen Umstand erwähnt sein Amtsnachfolger Graf von Schleinitz in einem Schreiben vom 8. 5. 1860 an den damaligen Kultusminister Moritz-August von Bethmann Hollweg, in: Acta generalia des Justizministeriums betreffend: den Nachdruck, 1857–1869, GStA PK (Berlin), HA I, Rep. 84 a (Justizministerium), Nr. 2417, Bl. 293 f. Der Börsenverein hatte seinerzeit auch den preußischen Justizminister mit zwei Druckexemplaren des Entwurfs versehen; Schreiben vom 12. 1. 1858, ebenda, Bl. 227 ff.

schen Regierungen“ nach, ob überhaupt (noch) ein Interesse an dem Erlass einer umfassenden Norm bestehe.[93] Sie zögerte, obwohl auf Bundesebene – wie bereits erwähnt – noch im Februar 1856 Verhandlungen über den Schutz „telegraphischer Depeschen“ stattgefunden hatten und die Bundesbeschlüsse der Jahre 1856 und 1857 einstimmig und damit auch mit Billigung und sogar auf Betreiben Preußens verabschiedet worden waren. Diese Zurückhaltung war wohl auch der Erinnerung an die Vorgänge um das Bundespressgesetz von 1854 geschuldet. Damals war es zu einem Streit über die Frage gekommen, ob die – wie der Nachdruck – in Artikel 18 der Bundesakte sowie Artikel 65 der Wiener Schlussakte aufgeführte Materie auch einer Mehrheitsentscheidung zugäng-lich sei. Die preußische Regierung erklärte seinerzeit, nur eine mit „Stimmeneinhelligkeit“ getroffene Regelung anzuerkennen. Sie fürchtete eine Majorisierung durch Österreich, den selbsternannten „Oberaufseher“ des Bundes. Kurz nach der Rekonstitution des Bundes war sie – wie *Richard Kohnen* meint – nicht bereit, sich ohne Not „über den Umweg der […] Bundesgesetzgebung in die inneren Zustände [des] Landes hineinreden zu lassen“.[94] Diese gerade auch von Bismarck, dem damaligen Gesandten am Bundestag, vorexerzierte Haltung hatte das Pressgesetz erheblich verzögert; die zuletzt doch erfolgte einstimmige Entscheidung war nur nach erheblichen Konzessionen Österreichs und der ihm folgenden Staaten möglich geworden.[95]

Das Zögern der sächsischen Regierung lag aber auch begründet in der Reaktion auf das Schreiben des Börsenvereins. Ministerpräsident von Manteuffel hatte nämlich noch am 26. Januar 1858 der sächsischen Regierung (!) auf diplomatischem Wege mitteilen lassen, es sei „sehr zweifelhaft, ob die Preußische Regierung […] sich würde dafür entscheiden können, auf Verhandlungen beim Bunde über den in Rede stehenden Entwurf […] einzugehen, resp. einem darauf gestellten Antrage ihre Unterstützung zu Theil werden zu lassen“.

In einem Schreiben an seinen Dresdner Gesandten *Heinrich Alexander Graf von Redern* (1804–1888), über dessen Inhalt auch der preußische Vertreter beim Bund unterrichtet wurde, nannte Manteuffel die Gründe für seine eher ablehnende Haltung: Die preußische Regierung habe zwar nie „abgelassen, bei der Bundes=Versammlung für die Erweiterung des den Autoren von Werken der Wissenschaft und Kunst von Bundeswegen zu gewährenden Schutzes […] zu wirken. In der That [seien auch] einzelne, nicht unwichtige Vereinbarungen in diesem Sinne bei dem Bunde zu Stande gekommen.“ Angesichts der sich nunmehr fast vierzig Jahre hinziehenden, überaus zähen Verhandlungen sehe er aber „keine Aussicht […] für ein detailliertes, die Frage wegen des Nachdrucks, der unbefugten Nachbildung und öffentlicher Aufführung nach allen Richtungen hin regelndes Gesetz die [notwendige, *R.N.*] Einhelligkeit aller Stimmen bei dem Bunde zu erlangen“.

Noch bedenklicher erschien dem Minister, dass der in seinen wesentlichen Bestimmungen zwar an das preußische Gesetz angelehnte Entwurf das Urheberrecht nicht nur fortbilden, sondern zum Teil auch abändern wolle: „Es mag hier nur beispielsweise auf die Behandlung der Zeitungsartikel, die Bestimmungen über Privilegien, über die Wirksamkeit von Gutachten der Sachverständigen, […] und an die Führung einer Eintragungsrolle für Zeichnungen, Musikalien und Kunstwerke im Leipzig hingewiesen werden, von denen unter anderem die letzteren Bestimmungen in unmittelbarem Widerspruche mit dem Vertrage stehen, den Preußen, die Thüringenschen und Anhaltinischen Staaten, sowie Braunschweig mit England wegen des Nachdruckes abgeschlossen haben.“ Der Erlass eines entsprechenden Bundesbeschlusses mache also die Anpassung des bewährten eigenen Rechts notwendig, wofür „ein Bedürfnis nicht obwalte“; deshalb sei auch die erforderliche Zustimmung beider Häuser des preußischen Landtages nicht zu erwarten.[96]

Auf der anderen Seite sah die – bis dahin nicht gerade als Vorkämpferin eines modernen Urheberrechts aufgefallene – österreichische Regierung die Chance, Preußen öffentlichkeitswirksam das Heft des Handelns zu entreißen. Sie erteilte einer Expertenkommission unter Leitung des Sektionschefs im Justizministerium *Anton Freiherr Hye von Glunek* (1807-1894) den Auftrag, einen eigenen Gesetzentwurf zu erstellen. Die Männer aus „allen Zweigen der Literatur und Kunst“ erarbeiteten bis August 1860[97] den „Entwurf eines Gesetzes zum Schutze der Autorrechte an Werken der Literatur und Kunst“. Das 54 Paragraphen in elf Abschnitten umfassende Elaborat entsprang zwar ursprünglich den allfälligen Revisionsarbeiten am österreichischen Urheberrechtsgesetz, berücksichtigte aber auch den Entwurf des Börsenvereins, dem es inhaltlich, nicht aber im formalen Aufbau durchaus vergleichbar war.[98]

---

[93] So etwa Witzleben, Nachdrucksgesetzgebung (o. Fn. 27), S. 225 f. Sachsen hatte sich insbesondere auch an die bayerische Regierung gewandt, die die Initiative wohl von Anfang an guthieß; vgl. NN, Deutschland. Frankfurt, in: Süddeutsche Zeitung (München) Nr. 38 vom 21. 1. 1862, ohne Seitenangabe; NN, Deutschland. Frankfurt, 5. Febr. in: Süddeutsche Zeitung Nr. 70 vom 7. 2. 1862, ohne Seitenangabe.

[94] Richard Kohnen, Pressepolitik des Deutschen Bundes: Methoden staatlicher Pressepolitik nach der Revolution nach 1848, Tübingen 1995, S. 38.

[95] Siehe etwa Arnold Oscar Meyer, Bismarcks Kampf mit Österreich am Bundestag zu Frankfurt (1851 bis 1859), Berlin u. a. 1927, S, 105 ff.; Ludwig Bentfeldt, Der deutsche Bund als nationales Band 1815–1866, Zürich 1985, S. 336 ff.

[96] Abschriftlich in: Acta preußisches Justizministerium 1857–1869, (o. Fn. 92), Bl. 299 ff. Diese Bedenken (gerade auch) gegen den Entwurf des Börsenvereins, der allenfalls nach einer eingehenden Prüfung als „Grundlage“ für eine (preußische) Urheberrechtsgesetzgebung dienen könne, wiederholt Schleinitz in einem Schreiben an Bethmann Hollweg vom 1. 1. 1861, eine Abschrift aaO, Bl. 313 ff.

[97] So eine Notiz in der Illustrirte[n] Zeitung (Leipzig), Nr. 949 vom 7. September 1861, S. 175 (Presse und Buchhandel).

[98] Zur Geschichte und Vorgeschichte des österreichischen Entwurfs eingehend Gerhartl, „Vogelfrei“ (o. Fn. 48), S. 19 ff., die auch dessen wichtigste Vorschriften darstellt. Ebenso Moritz von Stubenrauch, Die neuesten Bestrebungen zum Schutze des Urheberrechtes an Erzeugnissen der Kunst, in: Österreichische Vierteljahresschrift für Rechts- und Staatswissenschaft, Bd. 9 (Wien 1862), S. 195, 208 ff. Witzleben, Nachdrucksgesetzgebung (o. Fn. 27), S. 235 ff. gibt einen eingehenden Vergleich zwischen dem Entwurf der österreichischen Regierung und dem des Börsenvereins von 1857 (Entwurf Hinschius/Veit/Reimer). Die Wiener Zeitung schreibt in der Ausgabe vom 19. März vom 23. 3. 1862, 629 f., dass „bei der bezüglichen Commissionsberathung der vom Ausschusse des Börsenvereins deutscher Buchhändler ausgearbeitete Entwurf eines allgemeinen deutschen Gesetzes gegen den Nachdruck benutzt werden soll, welcher auch bei der Bearbeitung des österreichischen Projectes volle Berücksichtigung gefunden“ habe.

Der österreichische Entwurf wies folgende Gliederung auf:

„Gesetze zum Schutze der Autorrechte an Werken der Literatur und Kunst.

I. Von dem ausschließenden Rechte der Autoren aus Veröffentlichung und Vervielfältigung ihrer Werke.
II. Von literarischen Erzeugnissen.
III. Von musikalischen Compositionen.
IV. Von den Werken der bildenden Kunst.
V. Geographische, topographische, naturwissenschaftliche, architektonische und ähnliche Zeichnungen.
VI. Schutzfristen gegen unbefugte Veröffentlichung und Nachbildung.
VII. Von der öffentlichen Aufführung dramatischer, dramatisch=musikalischer und musikalischer Werke.
VIII. Von der Entschädigung und den Strafen.
IX. Allgemeine Bestimmungen.
X. Eintragsrollen für literarische und artistische Werke.
XI. Einführungsbestimmungen."

Die Arbeit wurde noch einmal im österreichischen Kabinett besprochen und dann auch den wichtigsten anderen Bundesregierungen übermittelt. Im April 1860 begann auch die preußische Regierung mit Gesprächen darüber, wie auf die Initiative Sachsens zu reagieren sei. Angestoßen hatte die Diskussion der damalige Kultusminister *Moritz August von Bethmann Hollweg* (1795–1877), der für das Urheberrecht zuständig war – und damit auch für die Sachverständigenvereine unter ihrem Vorsitzenden Heydemann. Er bat den neuen Außenminister *Alexander Graf von Schleinitz* (1807–1885, in dieser Funktion seit November 1858 Nachfolger von Manteuffel) um Mitteilung über den Stand der Angelegenheit in Dresden und Frankfurt:[99]

„Er. Excellenz erlaube ich mir deshalb um eine geneigte Äußerung ganz ergebenst zu ersuchen, ob inzwischen Seitens der gedachten Regierung bei der Bundes=Versammlung oder der diesseitigen Staats=Regierung in der beregten Beziehung weitere Schritte geschehen sind und welchen Erfolg diesselben gehabt haben, event. ob es unter den gegenwärtigen Verhältnissen angemessen sein möchte, die Sache diesseits bei der Bundes=Versammlung in Anregung zu bringen."

Das preußische Außenamt aber sah zunächst keinen Handlungsbedarf, auch weil die sächsische Regierung leugne, im Besitz der Arbeit des Börsenvereins zu sein. Im übrigen habe sich das Verhandlungsklima auf Bundesebene weiter verschlechtert, die bereits 1858 geäußerten Bedenken bestünden fort. Eine eigene „Anregung" beim Bund komme jedenfalls „zur Zeit" überhaupt nicht in Frage.[100]

Im Oktober 1860 fasste der Vorsitzende des Börsenvereins nach. Völlig undiplomatisch erklärte der Preuße Veit gegenüber seinem Kultusminister, der Börsenverein sei „überrascht und betrübt, zu erfahren, daß die […] Preußische Staatsregierung aus materiellen Gründen den Eintritt in die in Rede stehende Berathung [ablehne]«. Der Gesetzentwurf der Buchhändler setze doch (gerade auch) die Spruchpraxis der Sachverständigenvereine um, eine Erhebung zum Bundesgesetz liege deshalb im Interesse Berlins.[101]

Im Dezember 1860 trat auch die österreichische Regierung offiziell auf den Plan: In einer Verbalnote an den preußischen Außenamtschef beschrieb sie ein angeblich dringend gefühltes Bedürfnis bei den deutschen Autoren, Künstlern und Verlegern nach einer Bundesnorm; Österreich sei willens, die „Revision am Bundestage in der Art anzuregen, daß daraus ein für alle […] Länder gültiges Gesetz nach dem Vorbilde des Wechselrechts oder des in der Berathung befindlichen […] Handelsrechts werde".[102] Der preußische Außenminister zeigte sich in einer ersten Reaktion am 10. April 1861 zwar bereit, „gemeinschaftlich […] für die Herbeiführung eines gemeinsamen deutschen Gesetzes zum Schutze der Autoren=Rechte zu wirken", wollte dazu aber einen anderen Weg einschlagen. Statt in Verhandlungen „beim Bunde" einzutreten, schlug von Schleinitz treuherzig vor, „die deutschen Regierungen zur Niedersetzung einer Commission zu freier Vereinbarung eines […] Gesetzes=Entwurfes einzuladen, bei welcher auch die bestehenden Bundesgesetzgebungen über Nachdruck zu berücksichtigen sein würden".[103] Dem allerdings widersprach die österreichische Regierung, welche die Kompetenz zur „Niedersetzung" einer Kommission von Gesetzesmachern ausschließlich bei der Bundesversammlung sah, weil „das Autoren=Recht einmal durch die Bundesgesetzgebung geregelt worden sei, und es sich um Umformung dieser Bundesbeschlüsse handele".

Damit wurde zum ersten Mal offen ausgesprochen, warum es wirklich ging: Der seit langem schwelende Streit zwischen Österreich und Preußen um die Bedeutung der Bundesversammlung und damit des Deutschen Bundes stand auch den Arbeiten an einer einheitlichen Regelung des geistigen Eigentums im Wege, obwohl ein solches Gesetz schon in der Bundesakte versprochen war, eine Vielzahl von (potentiell) Normunterworfenen den Erlass einer deutschlandweiten Norm nachdrücklich forderte und sogar zwischen den wichtigsten Bundesstaaten kein eigentlicher Dissens mehr über die Notwendigkeit einer modernen Urheberrechtsgesetzgebung herrschte. Auf dieser Linie beschloss das preußische Staatsministerium am 25. Juni 1861, die ebenfalls virulente „Herbeiführung einer einheitlichen deutschen Zivilprozeßgesetzgebung" nicht als Bundestags-Sache zu behandeln, sondern nur auf dem Wege zwischenstaatlicher Verhandlungen anzugehen. Der Referent des insoweit federführenden Außenministeriums meinte damals, „die deutsche Politik

[99] Schreiben vom 26. 4. 1860, Acta preußisches Justizministerium 1857-1869 (o. Fn. 92), Bl. 291 ff.

[100] Schreiben vom 8. 5. 1860 (o. Fn. 92).

[101] Acta preußisches Justizministerium 1857-1869 (o. Fn. 92), Bl. 305 ff.; Frommann, Geschichte (o. Fn. 75), S. 43, spricht in diesem Zusammenhang von einer schon damals „von Seiten leitender preußischer Staatsmänner offen ausgesprochenen Abneigung, durch den Bund eine einheitliche Nachdrucksgesetzgebung ins Leben rufen zu helfen". Siehe auch Nomine, Sachverständigen–Verein (o. Fn. 46), S. 323.

[102] Die Verbalnote vom 28. 12. 1860 übergab der damalige österreichische Gesandte in Berlin, Graf Alajos Károlyi von Nagykároly (1825–1889).

[103] Sein Schreiben vom 10. 4. 1861 an die österreichische Regierung erwähnt der preußische Außenminister in einem Rundschreiben vom 10. 7. 1861 an den Kultus-, den Innen- und den Justizminister, in: Acta preußisches Justizministerium 1857-1869 (o. Fn. 92), Bl. 327 ff., dort teilt er auch die Antwort der österreichischen Regierung mit.

Preußens erheische es, die Thätigkeit […] des Bundestages stets auf das engste Maß der ihm verfassungsmäßig beigelegten Kompetenz beschränkt zu halten, [weil] erfahrungsmäßig seine Wirksamkeit nur im Sinne und Interesse Österreichs und der mittleren Staaten und gegen die Interessen der Machtstellung Preußens ausgeübt zu werden pflegen". Das Kaiserreich sei nämlich stets bemüht, „auch diejenigen Fragen, welche verfassungsmäßig nicht in die Bundesversammlung gehören, in diese zu verlegen, wie es […] bestrebt [sei], die Frage über die Maße- und Gewichtsordnung, den Gothaer Vertrag [vom 15. Juli 1851 über die Aufnahme von Ausgewiesenen, *R.N.*], die Nachdrucksgesetzgebung und […] die Prozeßgesetzgebung der Bundesversammlung zu vindizieren". Nach dem Protokoll ergänzte der Finanzminister diese Ausführungen noch um das Bemerken, das Scheitern eines auf falschem Wege eingebrachten Gesetzes müsse in Kauf genommen werden, notfalls auch gegen eine „falsche" öffentliche Meinung.[104]

Schon einen Monat später schlug ausgerechnet der (erst seit Beginn der 1860er Jahren amtierende) Innenminister *Maximilian von Schwerin-Putzar* (1804–1872) vor, eine ähnliche Marschrichtung auch in Bezug auf die Behandlung des Urheberrechts einzuschlagen. In einem ausführlich begründeten Votum für Justizminister *August Moritz von Bernuth* (1808–1889) meinte er jedenfalls: „So wünschenswerth es auch sein mag, daß ein gemeinsames Gesetz zum Schutze der Autoren–Rechte gegen Nachdruck und Nachbildung unter den sämmtlichen deutschen Staaten vereinbart werde, so kann ich doch der Ansicht des Herrn Ministers der auswärtigen Angelegenheiten meinerseits nur beipflichten, dass es sich durchaus nicht empfiehlt, zu diesem Zwecke den von der Kaiserlich=Oesterreichischen Regierung vorgeschlagenen Weg zu betreten, wonach die Vereinbarung durch Vermittlung der Bundesversammlung erfolgen [soll]." [105]

Dem preußischen Außenminister wiederum war klar, dass die Rede von der fehlenden Zuständigkeit nicht ohne weiteres auf das ausdrücklich in Artikel 18 der Bundesakte erwähnte „schriftstellerische Eigentum" zu übertragen war. In seinem bereits erwähnten Rundschreiben an seine Kabinettskollegen vom 10. Juli 1861 gab er deshalb eine weitere Argumentationshilfe:

„Allerdings legte der Art. 18 No. 4 der Bundes=Akte der Bundesversammlung die Verpflichtung auf, sich bei ihrer ersten Zusammenkunft mit der Abfassung gleichförmiger Verfügungen […] zu beschäftigen. Letztlich aber gelang es den instand gesetzten Bemühungen Preußens nicht, diese Bemühungen zu ihrer vollen Ausführung zu bringen. Auch der Bundesbeschluß vom 9. 11. 1837 ging gegen die damaligen Wünsche Preußens nicht weiter, als bis zur Aufstellung einiger allgemeiner Grundsätze, welche nach Artikel 6 von den Regierungen durch spezielle Gesetze oder Verordnungen in Ausführung gebracht werden sollten und welche als das Minimum des zu gewährenden Schutzes bezeichnet werden. Damit überweist die Bundesversammlung selbst die eigentliche Gesetzgebung gegen Nachdruck und Nachbildung den einzelnen deutschen Regierungen für ihre Landesgesetzgebung und es steht daher jetzt der Bundesversammlung kein Recht zu, die Umformung der einzelnen ergangenen Landesgesetze über Nachdruck vor eine von ihr niederzusetzende Commission zu ziehen. Dem Bundesbeschlusse vom 9. 11. 1837, der die Gesetzgebung über Nachdruck vom Bunde ablehnte und den Bundesregierungen zuwies, stimmte Preußen nur unter dem ausdrücklichen, in das Publications=Patent vom 29. 11. 1837 übergegangenen Vorbehalte bei, dass denjenigen deutschen Staaten, welche künftig noch günstigere Bestimmungen zum Schutze des schriftstellerischen und künstlerischen Eigenthums, als ihre bisherige Gesetzgebung und der gegenwärtige Bundesbeschluß dieselben aufstellen, für ihre Unterthanen der sich mit ihnen über gleiche Grundsätze vereinigenden Regierungen treffen wollen, hierin durchaus freie Hand bleibt. Dem Bundesbeschlusse, wie dem Preußischen Vorbehalte entspricht es daher nur, die gewünschten gemeinsamen deutschen Gesetze gegen Nachdruck und Nachbildung der freien Vereinbarung der dazu willigen Regierungen zu überlassen und umsomehr von einer durch den Bund einzusetzenden Commission abzusehen, als der Bundesversammlung ohnehin ein Gesetzgebungsrecht nicht zusteht, und daher nicht ersichtlich ist, welche Vortheile für die Sache selbst aus einer durch den Bund resp. durch eine Majorität der Bundesglieder eingesetzte Commission erwachsen sollen, die nicht auf kürzerem Wege erreicht werden könnten. Das Motiv des Verlangens, eine Commission durch den Bund einzusetzen, ist augenscheinlich nur der Wunsch, der Bundesversammlung den Schein einer Wirksamkeit zu verschaffen und das Gewicht der Mehrheit der Stimmen gegen Preußen, welches dabei nur als einzelnes Bundesmitglied aufträte, wirksam zu machen. Auch dem politischen Standpunkte Preußens würde es daher nicht entsprechen, auf das von Österreich gestellte Verlangen der Behandlung der Sache durch den Bund einzugehen.

Kaiserlich österreichischer Seits ist zugleich derjenige Entwurf eines Gesetzes zum Schutze der Autoren=Rechte mir in drei Exemplaren mitgetheilt worden, von welchen ich zwei Exemplare […] hier ganz ergebenst beifüge. […]. Ich glaube indessen, dass der gedachte Entwurf in seiner allgemeinen Anordnung weit hinter dem Preußischen Gesetze […] nach meinem Dafürhalten zurücksteht, daß einzelne Bestimmungen desselben, wie z. B. in Beziehung auf Kunstwerke […] der preußischen Gesetzgebung entschieden widersprechen, auch dass es sich nicht empfehlen wird, auf die §.§. 46–51 einzugehen, welche den Schutz gegen Nachdruck und Nachbildung von einer in Leipzig stattfindenden Eintragung abhängig machen." [106]

[104] Eine Übersicht über den Inhalt des Protokolls in: Berlin-Brandenburgische Akademie der Wissenschaften (Hrsg.), Acta Borussica, N. F., 1. Reihe (Protokolle des Staatsministeriums 1817—1934/38), Band 5, Hildesheim 2001, Nr. 151. Danach nahmen an der Sitzung teil die Minister Auerswald (als Vertreter des Ministerpräsidenten), von der Heydt (Handel), Schleinitz (Außenminister), Patow (Finanzen), Pückler (Landwirtschaft), Bethmann Hollweg (Kultus), Schwerin-Putzar (Innenminister), Roon (Kriegsminister), Bernuth (Justiz). Die Angelegenheit wurde danach unter Punkt 4 besprochen. Eine Abschrift des vollständigen Protokolls befindet sich in: Acta betr.: die polizeilichen Maßregeln gegen Nachdruck und Nachbildung, vom 27. May 1852–16. Decbr. 1864, GStA PK (Berlin), HA I, Rep. 77 (Innenministerium), Tit. 338, Nr. 1 Band 6, Bl. 148 ff.

[105] Votum/Rundschreiben vom 10. Juli 1861 (o. Fn. 103). Der Liberale Schwerin-Putzar, nach der Regierungsübernahme Bismarcks dessen parlamentarischer Gegenspieler, ist bekannt für seine am 13. 3. 1863 im preußischen Abgeordnetenhaus getane Äußerung: „Recht geht vor Macht".

[106] Votum/Rundschreiben vom 10. Juli 1861 (o. Fn. 103).

Für solche Überlegungen hatte der zweite deutsche Juristentag, der im August 1861 in Dresden zusammentrat, kein Ohr. Im Gegenteil sprach er sich ausdrücklich für eine „baldige Herstellung eines gemeinsamen Deutschen Gesetzes zum Schutze des Urheberrechts“ aus, ausgerechnet auf Antrag des Preußen Heydemann, der zuvor ein engagiertes Referat gehalten hatte.[107] Aber auch der langjährige preußische Handelsminister *August von der Heydt* (1801-1874) war nicht überzeugt. Artikel 18 der Bundesakte, so führte er im Oktober 1861 aus, ermächtige die Bundesversammlung ausdrücklich, auf dem Gebiet des Urheberrechts aktiv zu werden. Diese Kompetenz habe sie auch nicht an die Länder abgegeben, Artikel 6 des Bundesbeschlusses von 1837 spreche im Gegenteil von notwendigen Nachverhandlungen, die schließlich zu den Beschlüssen ab 1841 geführt hätten. Auch die Frage nach der Notwendigkeit einer Bundesnorm bejahte er ausdrücklich: „Der Erlaß gleichförmiger Normen […] ist ein […] anerkanntes Bedürfniß. Wir […] können gewiß nur peinlich berührt sein, daß uns die in dieser Angelegenheit stets behauptete Führerschaft jetzt von Österreich aus der Hand genommen wird“.[108] Der preußische Kultusminister äußerte Sympathie – unter Verweis auch auf Artikel 65 der Wiener Schlussakte.[109] Justizminister von Bernuth aber stellte lapidar fest, eine Zustimmung zu Verhandlungen am Bundestage würde aus politischen Gründen „diametral demjenigen entgegenlaufen“, was das Staatsministerium wegen der Errichtung einer deutschen Prozessgesetzgebung beschlossen habe.[110]

Handelsminister von der Heydt blieb zwar bei seiner Auffassung: In einem abschließenden Votum vom 22. 11. 1861 erklärte er erneut, es sei klar, dass das Prozess- und das Urheberrecht unterschiedlich zu behandeln seien. Für ersteres bestehe unzweifelhaft kein Mandat der Bundesversammlung, während die Fragen um das geistige Eigentum seit jeher dort und mit Zustimmung Preußens geregelt worden seien. Auch dass „politische Gründe dahin führen sollten, das Recht zu beugen“, sei zu bezweifeln, von einer „Majorisierung Preußens in Angelegenheiten, die Einstimmigkeit aller Bundesglieder voraussetzen“, könne nicht die Rede sein, auch „das dem Oesterreichischen Vorschlage unterlegte Motiv, das Ansehn des Bundes zu heben, [sei] bei der Sachlage, welche ausschließt, daß dies auf Kosten Preußens geschehe, ohne Bedeutung“. Weil aber, so schloss er resignierend, sein Ressort „nur in sehr untergeordneter Weise betheiligt“ sei, werde er von weiteren Remonstrationen absehen.[111] Am 7. Februar 1862 schrieben deshalb die anderen beteiligten Ressortchefs an den nunmehrigen Außenminister *Albrecht Graf von Bernstorff* (1809–1873), „so wünschenswert es auch [sei], daß ein gemeinsames Gesetz vereinbart werde, [könne man] nur der Ansicht […] beipflichten, daß es sich nicht empfiehlt, zu diesem Zwecke den von der Kaiserlich Oestereichischen Regierung vorgeschlagenen Weg zu betreten“. Entsprechend bestehe auch kein Bedürfnis, den österreichischen Gesetzentwurf einer näheren Prüfung zu unterziehen; die bis dahin beabsichtigte regierungsinterne, „kommissarische“ Beratung auch der Arbeit des Börsenvereins könne bis auf weiteres zurückgestellt werden.[112]

4. Der Frankfurter Entwurf

Am 23. Januar 1862 stellte Sachsen bei der Bundesversammlung den lange angekündigten Antrag auf Vereinheitlichung des deutschen Urheberrechts. Unter reger Anteilnahme der deutschen Presse behauptete sein langjähriger Gesandter, der wirkliche Geheime Rat *Julius Gottlob von Nostitz und Jänkendorf* (1797–1870),[113] es bestehe das dringende Bedürfnis nach einer umfassenden Regelung des Gegenstandes, der „zu den Lebensfragen des deutschen Buchhandels“ gehöre. Als Beweis legte er den in Leipzig, also am „Hauptsitz des deutschen Buchhandels“ erarbeiteten Entwurf des Börsenvereins vor, der zumindest als „Unterlage“ für die anstehenden Beratungen bestens geeignet erscheine.

Der Antrag lautete:

„Hohe Bundesversammlung wolle,

in Erwägung, dass die Bundesbeschlüsse vom 9. November 1837 und vom 19. Juni 1845 zwar den Grundsatz des gesetzlichen Schutzes von Werken der Literatur und Kunst gegen widerrechtliche Nachbildung festgestellt, auch die Dauer dieses Schutzes bestimmt, dagegen aber in allen übrigen Beziehungen der Specialgesetzgebung über den Nachdruck ganz oder fast ganz freie Hand gelassen haben,

in Erwägung, daß demzufolge die Entwickelung der Specialgesetzgebung und der Praxis in den einzelnen Bundesstaaten einen sehr verschiedenen Gang genommen hat dergestalt, daß über den Begriff des Nachdrucks selbst über den Umfang des unter den Schutz gegen den Nachdruck fallenden Gebietes literarischer und künstlerischer Erzeugnisse über die Beurtheilung der vor dem Jahre 1837 erschienenen Werke rücksichtlich der Dauer des Schutzes und viele andere wichtige Punkte ganz verschiedene Grundsätze Geltung gewonnen haben, so daß der-

[107] Heydemann, Referat (o. Fn. 52); sein Antrag und der Beschluss des Juristentages in: Verhandlungen des Zweiten Deutschen Juristentages (o. Fn. 52), S. 704 f.
Zuvor hatte schon der in Brüssel abgehaltene Kongreß für den internationalen Schutz des literarischen und artistischen Eigenthums festgestellt, dass es „wünschenswerth [sei], daß alle Länder für das literarische und artistische Eigenthum eine aus gleichförmigen Grundlagen beruhende Gesetzgebung annehmen“; zitiert nach L(eopold) A(ugust) Warnkönig, Stand der Gesetzgebung und Literatur über das Autorrecht, in: Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, Band 1 (München 1859), S. 48 ff., 186, 200.

[108] Votum vom 14. 10. 1861, Acta preußisches Justizministerium 1857–1869 (o. Fn. 92), Bl. 341 ff.

[109] Votum vom 14. 11. 1861, Acta preußisches Justizministerium 1857–1869 (o. Fn. 92), Bl. 339 f.

[110] Votum vom 22. 11. 1861, Acta betreffend die Maßregeln zur Sicherstellung des schriftstellerischen und künstlerischen Eigenthums von 1859–1863, GStA PK (Berlin), HA I, Rep. 120 (Handelsministerium), D II, 35, Band 4, Bl. 211.

[111] Votum vom 13. 1. 1862, Acta preußisches Justizministerium 1857–1869 (o. Fn. 92), Bl. 355 ff.

[112] Acta des Innenministeriums 1852–1864 (oben Fn. 104), Bl. 165 ff.

[113] Der Gesandte war Bruder des früheren sächsischen Innenministers Eduard von Nostitz und Jänkendorf (1791–1858, Minister bis 1844), der in dieser Funktion die Aufsicht über den Buchhandel in Sachsen geführt hatte und (deshalb) auch am Gesetzgebungsverfahren zum Urheberrechtsgesetz von 1844 maßgeblich beteiligt war; Nomine, Vestigia terrent (o. Fn. 28), S. 492 ff.

selbe Fall in verschiedenen Bundesstaaten ganz abweichender Behandlung unterliegen kann,

in Erwägung endlich, daß dieser Zustand vom größten Nachtheile für den Buch– und Kunsthandel und rückwirkend auf die literarische und künstlerische Thätigkeit ist, beschließen

1. daß eine derartige Abweichungen ausschließende speciellere Regelung der Nachdrucksfrage durch ein allgemeines deutsches Gesetz gegen den Nachdruck dringend wünschenswerth

2. daß deßhalb zum Behufe der Berathung eines solchen Gesetzes eine Commission aus von den einzelnen Bundesstaaten abzuordnenden Sachverständigen zu bilden und

3. dieser Berathung der von dem Ausschusse des Börsenvereins deutscher Buchhändler ausgearbeitete Entwurf zu Grunde zu legen sei der sich als Ausdruck der Ansichten und Wünsche der zunächst Betheiligten sowohl als wegen seiner Vollständigkeit zu diesem Zwecke wohl eigne und endlich

4. die Commission den aus ihren Berathungen schließlich hervorgehenden Gesetzentwurf der Bundesversammlung zu weiterer Beschlußnahme vorzulegen habe."[114]

Der von Bayern und Württemberg noch in der Sitzung unterstützte Antrag wurde auf Vorschlag Österreichs an einen fünfköpfigen Ausschuss der Bundesversammlung verwiesen.[115] An der folgenden Sitzung vom 30. Januar 1862 zur Bestimmung der Mitglieder des Gremiums nahm der preußische Gesandte zwar noch teil, erklärte aber weisungsgemäß, sich weder an der Wahl noch an den Sitzungen des Ausschusses beteiligen zu wollen. Der Auftrag der Bundesakte sei erledigt, der Bundesversammlung stehe keine „legislatorische Initiative" mehr zu, der zu beratende Entwurf unterliege aber auch inhaltlich erheblichen Bedenken.

„Die Königliche Regierung glaubt sich nämlich von vornherein gegen eine fernere Behandlung dieser Angelegenheit am Bunde erklären zu sollen. Sie geht dabei von der Ansicht aus, daß die Bestimmung des Artikels XVIII, Nummer 4 der Bundesacte durch den Bundesbeschluß vom 9. November 1837 ihre Erledigung gefunden hat. Durch diesen Beschluß, welcher später noch durch einzelne Beschlüsse erweitert worden ist, hat sich die Bundesversammlung darauf beschränkt, allgemeine Grundsätze aufzustellen, welche nach Artikel 6 desselben von den deutschen Regierungen durch specielle Gesetze oder Verordnungen in Ausführung gebracht werden sollten, und welche als Minimum des zu gewährenden Schutzes bezeichnet wurden. Indem die Bundesversammlung durch diesen Beschluß eine eigentliche Bundesgesetzgebung ablehnte, hat sie selbst fortan die eigentliche Gesetzgebung gegen Nachdruck und Nachbildung den einzelnen deutschen Regierungen für ihre Landesgesetzgebung überwiesen. Ausdrücklich hat aber auch noch die Königlich Preussische Regierung ihre Unabhängigkeit bei Publication jenes Bundesbeschlusses gewahrt. Diese Unabhängigkeit muß sich die Königliche Regierung auch fernerhin erhalten, da sie weder in dieser speciellen Angelegenheit noch im Allgemeinen, wie dieß von ihr auch bei anderen Verhandlungen am Bunde neuerdings mehrfach ausgesprochen worden ist, der hohen Bundesversammlung eine legislatorische Initiative zugestehen kann. Mit Rücksicht auf die ihr durch die Landesverfassung gezogenen Schranken würde die Königliche Regierung auf die in Vorschlag gebrachten Verhandlungen am Bunde aber auch um so weniger eingehen können, als ein Bedürfniß zur Abänderung ihrer eigenen Landesgesetzgebung über Nachdruck nicht einmal vorliegt und derjenige Entwurf eines deutschen Nachdrucksgesetzes, welcher in dem Antrage der Königlich Sächsischen Regierung zur Grundlage für weitere Verhandlungen am Bunde empfohlen worden ist, gerade in denjenigen Punkten den erheblichsten Bedenken unterliegt, in welchen er von der Preussischen Landesgesetzgebung über Nachdruck abweicht."[116]

Gewählt wurde trotzdem; in den Ausschuss kamen schließlich die Vertreter Österreichs, Bayerns, Sachsens, Württembergs und der fünfzehnten Stimme. Am 8. März 1862 und damit kurz nach der Wahl legte Österreich seinen eigenen Entwurf vor und machte sich damit auch förmlich zum Vorkämpfer einer bundeseinheitlichen Regelung des Urheberrechts – nicht ohne darauf hinzuweisen, man tue „diesen Schritt zugunsten eines für die geistigen Interessen der deutschen Nation so wichtigen Gegenstandes".[117]

Parallel zu den Vorgängen in Frankfurt brachte übrigens Preußen seine Verhandlungen über eine Literaturkonvention mit Frankreich zum Abschluss, die es über viele Jahre geführt hatte. Die am 2. August 1862 zugleich mit einem Handels– und Schifffahrtsvertrag unterzeichnete, in der Presse lebhaft diskutierte Übereinkunft gewährte aus übergeordneten handelspolitischen Gründen ein – von Frankreich nachdrücklich gewünschtes – befristetes Übersetzungsrecht des Autors; eine überaus umstrittene Klausel, gegen die sich nicht nur der bereits 1858 extra angehörte Literarische Sachverständigen–Verein, sondern auch zahlreiche deutsche (insbesondere auch Berliner) Buchhändler ausgesprochen hatten.[118]

---

[114] Prot. DBV 1862, S. 31 f. (§ 29 Herbeiführung eines allgemeinen deutschen Gesetzes gegen den Nachdruck); der Beschluss, einen Ausschuss zu errichten, ist – soweit erkennbar – ohne Gegenstimmen oder Enthaltungen erfolgt, also auch von Preußen (noch) sanktioniert worden.

[115] Eingehend zum Folgenden schon Wadle, Entwurf (o. Fn. 8), S. 309 ff.; Stubenrauch, Bestrebungen (o. Fn. 98), S. 214. Siehe auch den Bericht in der Süddeutsche[n] Zeitung (München) vom 7. 2. 1862, (Deutschland. Frankfurt, 5. Febr.), ohne Seitenangabe, sowie die „Officielle Mittheilung über die Bundestagssitzung vom 23. Januar", in der Neue[n] Münchener Zeitung vom 28. 1. 1862, 113; dazu auch die Süddeutsche Zeitung (München) vom 7. 2. 1862 (Deutschland. Frankfurt, 5. Febr.), ohne Seitenangabe.

[116] Prot. DBV 1862, S. 53 f. Wadle, Entwurf (o. Fn. 8), S. 314, sieht – wie schon Handelsminister von der Heydt – die hier wiederholte „Erledigungsthese [als] nicht sehr überzeugend" an; dabei bezieht er sich ausdrücklich auf Laufke, Zivilgesetzgebung (o. Fn. 6). Zu den Vorgängen selbst vgl. auch die Berichte in der Süddeutsche[n] Zeitung vom 1. 2. 1862 (Deutschland. Frankfurt, 30. Jan.) und vom 3. 2. 1862 (Deutschland. Frankfurt, 31. Jan.), jeweils ohne Seitenangabe.

[117] Prot. DBV 1862, S. 103 ff.; siehe auch den Bericht in der Wiener Zeitung vom 23. 3. 1862 (Deutschland. Frankfurt, 19. März), S. 629 f. Wadle, Entwurf (o. Fn. 8), S. 314, meint, dass Österreich „diesen Schritt", mit dem es sich auf die Seite der Rechtsvereinheitlichung gestellt und klar gegen die abweisende preußische Haltung Stellung bezogen habe, auch gegangen sei, um die (sonst eher preußenfreundliche) öffentliche Meinung zu beeinflussen. AaO gibt er auch einen ausführlichen Auszug aus den Verlautbarungen des österreichischen Gesandten Alois Freiherr von Kübeck (1818-1873).

[118] Hierzu eingehend Nomine, Sachverständigen-Verein (o. Fn. 46), S. 329; dort, S. 336, auch der Text des deutsch–französischen Vertrages.

Auf der Sitzung vom 24. Juli 1862 erstattete der Ausschuss einen vielseitigen Bericht über den Antrag Sachsens,[119] der von seiner Kernaussage her auch vom preußischen Handelsminister hätte verfasst sein können: Die Beschlüsse ab 1837 stellten nur Schritte auf dem Weg zu der – durch Artikel 18 der Bundesakte verheißenen und Artikel 65 der Wiener Schlussakte bekräftigten – „Gleichförmigkeit" des Urheberrechts dar. Schließlich beweise die gerade auch auf Betreiben Preußens vereinbarte Revisionsklausel in Artikel 6 des Bundesbeschlusses von 1837, „daß die Bundesversammlung ihre Bestrebungen zur Erledigung der Bestimmung des Artikels XVIII a der Bundesacte durch den Bundesbeschluß vom 9. November 1837 nicht als abgeschlossen erachtete, wie denn im Eingange eines Bundesbeschlusses vom 19. Juni 1845 […] ausdrücklich anerkannt wurde, daß der Bundesbeschluß vom 9. November 1837 nur das geringste Maß des Schutzes festgestellt habe." Die Bundesversammlung sei deshalb in der Pflicht, weiter tätig zu werden, „sobald sie sich von der Gemeinnützigkeit weiterer Uebereinkünfte überzeugt habe"; ein entsprechendes Bedürfnis zur Verbesserung der innerdeutschen Verhältnisse wie der Beziehungen zum Ausland bestehe aber unbedingt – wie sich auch an den erfolgreich umgesetzten Gesetzen zum Wechsel- und Handelsrecht sowie den Bemühungen um eine gemeinsame Patentgesetzgebung, Zivilprozessordnung und das Obligationenrecht zeige. Das Gremium beantragte deshalb unter anderem, „Einleitung zu treffen, um ein für sämmtliche Bundesstaaten gemeinsames Gesetz zum Schutze des Urheberrechts […] zu vereinbaren" und eine Sachverständigenkommission zur Ausarbeitung eines entsprechenden Entwurfs auf der Basis der vorliegenden Arbeiten aus Sachsen und Österreich zu berufen. Der Antrag wurde im Oktober 1862 gegen die Stimmen Preußens, aber auch Sachsen–Anhalts und der Niederlande (für Luxemburg und Limburg) angenommen, wobei Württemberg ausdrücklich anregte, auf die richtungweisende preußische Gesetzgebung und „den dortigen Gerichtsgebrauch" Rücksicht zu nehmen.[120]

Der für die geplante Errichtung eines Bundesgerichts zuständige Ausschuss des Bundestages trug übrigens mehrheitlich im Winter 1862 darauf an, die erwähnten (Bundes-)Gesetze zum Zivilprozess– und Obligationenrecht vorab von Delegierten der „einzelnen Landesvertretungen" beraten zu lassen. Damit sollte dem (von der preußischen Regierung auch für das Nachdrucksrecht in Feld geführten) Argument von der mangelnden Vorfeld–Beteiligung der Parlamente entgegen getreten werden. Der Antrag scheiterte allerdings am entschiedenen Widerstand Preußens.[121]

Im Sommer 1863 beschloss die Bundesversammlung noch – ohne Preußen und Anhalt sowie gegen die Stimme der Niederlande – die dazu bereiten Staaten zu bitten, auf eigene Kosten sachverständige „Commissäre" nach Frankfurt zu entsenden, die auf der Grundlage der vorliegenden Arbeiten und unter Berücksichtigung der „bestehenden Bundesbeschlüsse" ein Gesetz entwerfen sollten.[122] Österreich entsandte den hohen Ministerialbeamten und Diplomaten *Vesque von Püttlingen*, einen mit dem (Musik-)Urheberrecht bestens vertrauten Juristen und Musiker. Er übernahm den Vorsitz der Kommission, die im Oktober 1863 zusammentrat. Für Baden kam der bereits bekannte Julius Jolly, Sachsen benannte einen Justizrat *Otto Krug*, der nach kurzer Zeit von Regierungsrat von Witzleben abgelöst wurde. Aus Bayern reiste Ministerialrat *Ludwig Weis* (1813–1880) an, ursprünglich Lehrstuhlinhaber für rheinisch-französisches Recht. Württemberg schickte den Regierungsrat im Innenministerium *Konrad Kölle*, Kurhessen den Oberappellationsgerichtsrat *Martin*, Hannover den früheren Bürgermeister und nunmehrigen Regierungsrat *Schow* (1810–1899), Hessen entsandte den Großherzoglichen Ministerialrat im Justizministerium *Heinrich Franck* (1805–1875), die Stadt Frankfurt den Senator *Dr. Heinrich Emil von Oven* (1817–1903). Die letztgenannten Regierungsbeamten waren bis dahin nicht als Urheberrechtler hervorgetreten und wohl mit der Materie nur mehr oder minder vertraut.[123]

Die im Thurn- und Taxischen Palais tagende Runde machte sich äußerst forsch ans Werk. Von Anfang an war es wohl Konsens, als Richtschnur wesentlich die eigenen (akademisch gebildeten) Vorstellungen von einem modernen Urheberrechtsgesetz zu nehmen. Inhaltliche Streitfragen wurden – einer Vorgabe der Bundesversammlung gemäß – notfalls mit Stimmenmehrheit entschieden. Entsprechend spielte die Frage nach der politischen Durchsetzbarkeit des zu erarbeitenden Entwurfs eine nur untergeordnete Rolle. Selbstbewusst beschloss die Runde, die Verhandlungsprotokolle so ausführlich zu formulieren, dass sie „für die Interpretation des zu erlassenden Gesetzes" dienlich sein könnten. Anschließend sorgte der – auch später das große Wort führende – Vertreter Bayerns mit dafür, dass der Entwurf Österreichs als eigentliche Vorlage für die Arbeit genommen wurde, weil er einen „officiellen Charakter an sich [trage]«, im Unterschied zu der „Privatarbeit" des Börsenvereins.[124] Am Ende von

[119] Prot. DBV 1862, S. 419 ff.

[120] Prot. DBV 1862, S. 515 ff. Der niederländische Gesandte erklärte damals für Luxemburg und Limburg: „Der Gesandte ist angewiesen, sich gegen die in der 29. Sitzung vom 24. Juli d. J. von Seiten des Ausschusses gestellten Anträge wegen Herbeiführung eines allgemeinen deutschen Gesetzes gegen den Nachdruck zu erklären, indem für das Großherzogthum Luxemburg und das Herzogthum Limburg das Bedürfniß einer Revision der bisher bestandenen deßfallsigen Bundesbeschlüsse sich nicht gezeigt hat. Die Königlich Großherzogliche Regierung beabsichtigt daher auch nicht, an den zu diesem Zwecke vorgeschlagenen Maßregeln Theil zu nehmen."

[121] Auf der 42. Sitzung vom 18. 12. 1862; Prot. DBV 1862, S. 591 ff.

[122] Prot. DBV 1863, 365 ff.; vorausgegangen war ein entsprechender Antrag des zuständigen Ausschusses vom 2. 7. 1863; der Text des Antrages bei Wadle, Entwurf (o. Fn. 8), S. 317.

[123] So Wadle, Entwurf (o. Fn. 8), S. 321, der aaO, S. 318 ff. eine eingehende Darstellung der Arbeit der Kommission und auch ausführliche Hinweise zu deren Mitgliedern gibt. Einige Staaten hatten ausdrücklich auf die Entsendung von Sachverständigen verzichtet. Bei dem genannten Oberrichter handelt es sich vermutlich um Heinrich Robert Martin, Oberappellationsgerichtsrat in Kassel (1815–1895); Kölle war wohl vor seiner Tätigkeit im Innenministerium Regierungsrat bei der Kreisregierung Ludwigsburg.

[124] Protokoll der ersten Sitzung vom 27. 10. 1863, in: Protokolle der von der hohen deutschen Bundesversammlung durch Beschluss vom 16. Juli 1863 einberufenen Commission zur Ausarbeitung des Entwurfes eines für sämmtliche deutsche Bundesstaaten gemeinsamen Gesetzes zum Schutze des Urheberrechts an Werken der Literatur und Kunst gegen Nachdruck sowie gegen unbefugte Nachbildung und Aufführung, Frankfurt a. M., s. d. (1864), S. 4.

zwei Lesungen und 24 zum Teil turbulenten Sitzungen bis Dezember 1863 stand deshalb – wie ein Teilnehmer anmerkte – ein (zweiter), „ganz neuer Entwurf, in dem [zu allem Überfluß *R. N.*] Rechtssätze aufgestellt [waren], die der reiflichsten, ruhigen Überlegung bedurften".[125] Gegen den Widerstand des Bayern Weis, der das Werk für vollständig gelungen und vollendet hielt, vertagte sich die Runde bis in den April des Folgejahres, um noch eine dritte Lesung abhalten zu können. In der Zwischenzeit sprachen die Kommissionsmitglieder mit ihren Regierungen. Württemberg gab ein zusätzliches Gutachten bei der Universität Tübingen in Auftrag, das dann Mandry erstellte.[126]

Die Sitzungsprotokolle wurden veröffentlicht, gingen auch an die preußische Regierung und erregten insbesondere die Aufmerksamkeit von Künstlervereinigungen, die vornehmlich die Normen im Grenzbereich der Kunstindustrie bekrittelten. Dazu überreichte die Deutsche Kunstgenossenschaft gleich einen eigenen, von dem Berliner Juristen *Friedrich Julius Kühns* (1830–1869) ausgearbeiteten Gesetzesentwurf.[127]

Unter dem 12. April 1864 fragte Österreich bei dem nunmehrigen Ministerpräsidenten Otto von Bismarck nach, ob Preußen wenigstens an der dritten Lesung teilnehmen wolle; die tags darauf erfolgte Antwort war – möglicherweise den Zeitumständen geschuldet – ungewöhnlich freundlich: Bei der „Reichhaltigkeit des Materials" sei zwar ein sofortiges Mittun nicht möglich, das Ergebnis der dritten Lesung werde aber wohl eine „definitive Einigung der Deutschen Regierungen erleichtern".[128]

Die dritte Lesung fand statt vom 25. April bis zum 19. Mai 1864. Das kaum veränderte, 56 Paragraphen umfassende Ergebnis, das Vesque von Püttlingen am 19. Juli 1864 zusammen mit einem ausführlichen Bericht an den Präsidialgesandten überreichte,[129] befand sich auf der Höhe der Zeit. Der schließlich mit den erläuternden Anlagen veröffentlichte „Entwurf eines Gesetzes zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst", der nach seinem Entstehungsort alsbald so genannte „Frankfurter Entwurf" deckte jedenfalls nach Meinung vieler Zeitgenossen das „ganze schutzbedürftige Gebiet des geistigen Eigenthums ziemlich vollständig" ab,[130] berücksichtigte auch zahlreiche Vorgaben der österreichischen wie der Arbeit des Börsenvereins;[131] regelte erstmals den Schutz von Photographien (§ 26).[132] An dem hochumstrittenen, engen Kunstverständnis des preußischen Urheberrechtsgesetzes von 1837 hielt er allerdings fest (§ 31) – insoweit übereinstimmend mit den Vorarbeiten aus Leipzig und Wien.

Mitunter auch hatten die Experten ohne Not preußische, aber auch sächsische und sogar österreichische Befindlichkeiten missachtet. So stellten sie (wohl) aus rein sprachästhetischen Gründen das altehrwürdige Nachdrucksverbot an die Spitze des Gesetzes und nicht das von Preußen hochgehaltene Verfügungsrecht des Autors.

Die Norm lautete nämlich:

»§. 1. Die mechanische Vervielfältigung literarischer Erzeugnisse ohne Genehmigung ihres Urhebers beziehungsweise seiner Rechtsnachfolger (Nachdruck) ist nach Maßgabe der Bestimmungen dieses Gesetzes verboten."

Der Entwurf des Börsenvereins von 1857 sah demgegenüber vor:

»§. 1. Das Recht, eine bereits herausgegebene Schrift ganz oder theilweise auf mechanischem Wege zu vervielfältigen, steht ausschließlich dem Urheber (Autor) und seinen Rechtsnachfolgern zu."

---

[125] „Entwurf eines gemeinsamen Gesetzes zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst"; abgedruckt als Beilage zum Protokoll der 24. Sitzung vom 10. 12. 1863, in: Protokolle der Commission (o. Fn. 124), S. 195 ff. Ein zuvor erarbeiteter erster „Entwurf eines gemeinsamen Gesetzes zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst" vom 28. 11. 1863 ebenda, S. 125 ff.

[126] Mandry, Entwurf (o. Fn. 82), S. 4.

[127] Kühns, Gesetzentwurf der deutschen Kunstgenossenschaft betreffend das Recht des Urhebers an Werken der bildenden Künste, nebst einer rechtfertigenden Denkschrift von Dr. Friedrich Julius Kühns, Dozenten an der juristischen Fakultät der Berliner Friedrich-Wilhelms-Universität, Berlin 1864. Vier Exemplare sind auch zu den Akten des preußischen Handelsministeriums gelangt, überreicht von dem Maler und Bildhauer Louis Sussmann-Hellborn (1828–1908), in: Acta des Innenministeriums 1852–1864 (oben Fn. 104), Bl. 221; dort auch die Abschriften weiterer Eingaben Berliner Künstler an das dortige Haus der Abgeordneten.

Sr., (Anzeige von) Gesetzentwurf der deutschen Kunstgenossenschaft betreffend das Recht des Urhebers an Werken der bildenden Künste, in: Max Schasler (Hrsg.), Die Dioskuren. Deutsche Kunstzeitung. Hauptorgan der Deutschen Kunstvereine, Nr. 50 vom 13. 12. 1863, 388, empfiehlt die Arbeit von Kühns ausdrücklich einem größerem Publikum, „weil sie […] in durchweg sachgemäßer Weise […] einen kranken Punkt unserer Gesetzgebung berührt, der schon lange der Heilung bedürftig ist". Kühns hatte bereits 1861 eine einschlägige Denkschrift verfasst: Kühns, Der Rechtsschutz an Werken der bildenden Künste. Eine Denkschrift im Namen der Deutschen Kunstgenossenschaft, Berlin 1861. Wadle, Entwurf (o. Fn. 8), S. 323, nennt weitere Eingaben an die Sachverständigen–Kommission (etwa die der Kunstakademie zu Düsseldorf). Mandry, Entwurf (o. Fn. 82), meint übrigens fälschlich, der Kommissionsentwurf sei vor der dritten Lesung nicht an die Öffentlichkeit gelangt (und habe deshalb auch keiner breiteren Diskussion unterlegen).

[128] Die österreichische Verbalnote vom 12. 4. 1864 (abschriftlich) in: Acta des Innenministeriums 1852–1864 (oben Fn. 104), Bl. 305 ff. Die Verbalnote Preußens vom 13. 4. 1864 ebenda.

[129] Näher Wadle, Entwurf (o. Fn. 8), S. 324.

[130] Das meinte etwa Der Bayerische Landbote (München) vom 21. 6. 1865, S. 691 f.

[131] Insbesondere der im dritten Abschnitt geregelte „Nachdruck bei Werken der bildenden Kunst" war an die Vorgaben des Börsenvereins angelehnt. Wächter, Urheberrecht (o. Fn. 82), S. 10, meint jedenfalls, der Börsenvereins-Entwurf habe die „materielle Grundlage" gebildet, jedoch auch „nicht unerhebliche Abweichungen" enthalten.

[132] Dazu Melanie Overbeck, Der Lichtbildschutz gem. § 72 UrhG im Lichte der Digitalfotografie, Berlin 2018, S. 19. Wadle, Photographie und Urheberrecht im 19. Jahrhundert, in: Geistiges Eigentum (o. Fn. 1), S. 343, 351, schreibt, der Frankfurter Entwurf habe „den Bann gebrochen, mit dem man die Photographie lange Zeit belegt hatte".

Der Frankfurter Entwurf ist abgedruckt als Beilage 2 zum Protokoll der Sitzung der Bundesversammlung vom 1. 9. 1864 zu § 238; Prot. DBV 1864, S. 491 ff., aber auch als Anlage 1 zum Protokoll der 36. Sitzung der Kommission vom 19. 5. 1864; Protokolle der Commission (o. Fn. 124), S. 285 ff.; der Bericht der Kommission „An die hohe Bundesversammlung" ebenda, als Anlage 2, S. 297 ff. und im Anhang zu dieser Arbeit. Ein Reprint der Kommissionsprotokolle einschließlich des Entwurfs in UFITA 121 (1993), S. 247 ff.

Eine ähnliche Formulierung gebrauchte schon das preußische Gesetz von 1837:

»§. 1. Das Recht, eine bereits herausgegebene Schrift ganz oder theilweise von neuem abdrucken oder auf irgend einem mechanischen Wege vervielfältigen zu lassen, steht nur dem Autor derselben oder denjenigen zu, welche ihre Befugniß dazu von ihm herleiten.“ [133]

Schließlich nahm der Entwurf keine Rücksicht auf die urheberrechtlichen Regelungen des preußisch-französischen Handels- und Schifffahrtsvertrages, der – wie bereits dargestellt – nach langen Verhandlungen im März 1862 abgeschlossen worden war und an dem ausgerechnet Heydemann mitgearbeitet hatte; die Vorschriften über eine von Sachsen zu führende Eintragungsrolle waren entfallen. Geradezu skandalös war aber, dass jede Regelung über eine mehr oder minder verpflichtende Beteiligung von Sachverständigen am gerichtlichen Verfahren fehlte: Die Kommission wollte unbedingt eine dem Prozessrecht angeblich fremde „Einführung einer Jury in Civilsachen“ verhindern; über die Errichtung stehender Vereine von Sachkundigen wie in Preußen oder Sachsen hatte sie erst gar nicht gesprochen.[134]

Insgesamt entsprach die Arbeit dem bereits angedeuteten, selbstgewählten Programm der Kommission, das sie in ihrem Bericht an die Bundesversammlung noch einmal zusammenfassend erläuterte: „Von diesen beiden Entwürfen [sc.: dem des Börsenvereins und dem österreichischen Entwurfs, *R. N.*] hat man zwar den Oesterreichischen der Berathung zu Grunde gelegt, ist jedoch in nicht unerheblichen Punkten, wo man theils den Bestimmungen des Börsenvereinsentwurfes den Vorzug geben zu sollen glaubte, theils einen ganz selbstständigen Weg eingeschlagen hat, von dem selben abgegangen. Es hat sich hierdurch die Nothwendigkeit herausgestellt, auch in formeller Beziehung die Eintheilung und Ökonomie des Oesterreichischen Entwurfes zu verlassen, so daß die gegenwärtige Arbeit als ein in sich abgeschlossener neuer Entwurf sich darstellt, bei dessen Aufbau sich die Commission von ihr eigenthümlichen Auffassungen hat leiten lassen. Dieß ist namentlich gleich bei den Eingangsbestimmungen der Fall gewesen, wo man es vorziehen zu sollen geglaubt hat, statt der im Wesentlichen nur eine theoretische Bedeutung darbietenden Anerkennung des Rechtes des Urhebers das Verbot der Verletzung dieses Rechtes an die Spitze zu stellen.“ [135]

Der Börsenverein war einer der ersten, der den Frankfurter Entwurf einer kritischen Prüfung unterzog. Die dazu eingesetzte Kommission tagte schon am 10. und 11. August in Nürnberg. Ihr gehörten etwa zehn Verlagsbuchhändler an, darunter etliche Mitglieder des Ausschusses von 1857 (wie z. B. Brockhaus und Frommann), auch „einige Herren aus dem Gelehrtenstande“, auch der Vorsitzende des Literarischen Sachverständigen-Vereins Heydemann.[136] Ihr umfangreicher, von Hinschius und Volkmann redigierter und alsbald an die bedeutendsten Bundesregierungen weitergegebener Schlussbericht äußerte sich – kaum verwunderlich – „nicht günstig“ über den Frankfurter Entwurf und verwarf insbesondere die (nur) ein Nachdrucksverbot aussprechende Eingangsnorm.[137]

Das sah der sächsische Beamte von Witzleben naturgemäß völlig anders. Der Macher des Frankfurter Entwurfs hatte – wie berichtet – 1857 noch den in Leipzig versammelten Buchhändlern zur Hand gehen müssen. Vier Jahre nach Abschluss der dortigen Arbeiten teilte er mit, der Entwurf des Börsenvereins, der Vorschlag der österreichischen Regierung und der „Bundescommissionsentwurf (BCE)« stünden nach „dem sachlichen Werthe [wie *R.N.*] in ihrer relativen Güte […] in einem aufsteigenden Verhältniß zu einander, so zwar, daß der eine Entwurf aus dem andern gewissermaßen herausgewachsen ist, woraus selbstredend folgt, daß der BCE das relativ Beste bietet“ – schon deswegen, weil der Frankfurter Entwurf anders als der Vorschlag des Börsenvereins eine „innewohnende sachliche Objektivität

[133] Vom Grundsatz her hält auch der Frankfurter Entwurf am traditionellen Nachdrucksbegriff fest, unterscheidet sich also in diesem Punkt gar nicht grundlegend von den anderen Entwürfen und auch nicht vom preußischen Urheberrechtsgesetz von 1837. Zu den dadurch ausgelösten (gesetzestechnischen) Schwierigkeiten, die auch im norddeutschen Urheberrechtsgesetz von 1870 nicht überwunden werden konnten, näher Wadle, Abrundung (o. Fn. 1), S. 333. Zum Stand der Diskussion in den 1860er Jahren etwa P[eter] Harum, Zur theoretischen Begründung des Nachdrucksverbotes, in: Allgemeine österreichische Gerichts-Zeitung (Wien) vom 7. 7. 1865, S. 216 f. Erhellend dazu auch der 1871 erschienene Kommentar des damaligen Reichstagsmitgliedes Wilhelm Endemann, Das Gesetz, betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken vom 11. Juni 1870, Berlin 1871, S. 3.

[134] Dazu eingehend (natürlich) Heydemann, Ueber die Bedeutung der Sachverständigen-Vereine in Nachdrucks-Angelegenheiten und die Stellung dieser Vereine zu den Gerichtsbehörden. Nach einem in der Juristischen Gesellschaft zu Berlin am 19. Februar 1870 gehaltenen Vortrage, in: J. Fr. Behrend (Hrsg.), Zeitschrift für Gesetzgebung und Rechtspflege in Preussen, Band 4 (Berlin 1870), S. 1, 5 ff.

[135] Protokolle der Commission (o. Fn. 124), S. 297.

[136] Ausführlich dazu die Bayerische Zeitung Nr. 223 vom 14. 8. 1864 (Nürnberg, 11. Aug.), S. 1734; Wächter, 9. November (o. Fn. 89), S. 2832, der darauf hinweist, dass das Gremium auch einige, dem Börsenverein zwischenzeitlich zugefertigte „Anträge“ des ersten Deutschen Journalistentages vom 22. 5. 1864 diskutierte.

[137] Die Rede von der „ungünstigen Bewertung“ stammt von dem Ausschussmitglied Frommann, Geschichte (o. Fn. 75), S. 44. Wadle, Entwurf (o. Fn. 8), S. 326, allerdings sieht das anders und meint, der Bericht habe im Gegenteil „weitgehende Zustimmung signalisiert“. Das dürfte nach Wächter, Urheberrecht (o. Fn. 80), S. 11 Fn. 19, zumindest für das Kunsturheberrecht gelten, das dort „durchgängige Billigung“ erfahren habe. Zu den ebenfalls nicht immer positiven Reaktionen anderer Betroffener etwa Stefan Ricke, Entwicklung des rechtlichen Schutzes von Fotografien in Deutschland unter besonderer Berücksichtigung der preußischen Gesetzgebung, Münster 1998, S. 73 ff.
Der Bericht ist auch im Druck erschienen: Börsenverein der deutschen Buchhändler (Hrsg.), Bericht des Ausschusses des Börsenvereins der deutschen Buchhändler über den von der Commission der hohen deutschen Bundes-Versammlung ausgearbeiteten Entwurf eines Gesetzes zum Schutze des Urheberrechts an litterarischen Erzeugnissen und Werken der Kunst erstattet auf Grund der Ausschußverhandlungen zu Nürnberg am 10. und 11. August 1864, s. l. (Leipzig), s. d. (27. 9. 1864). Er gelangte selbstverständlich auch an das preußische Justizministerium; Acta preußisches Justizministerium 1857–1869 (o. Fn. 92), Bl. 389.

[besitze *R.N.*], der conditio sine qua non für ein praktisch brauchbares Gesetz".[138]

Am 1. September 1864 erstattete dann der Württembergische Gesandte umfassenden Bericht.[139] Im Namen des Bundestagsausschusses nannte er die Arbeit der Sachverständigen-Kommission einen „in sich abgeschlossenen, neue[n] Entwurf, [mit dem die] sorgsam vorbereitete Möglichkeit" bestehe, eine seit 1815 unerledigte Sache zu einem umfassenden Abschluss zu bringen.

Er beantragte schließlich, den Entwurf nebst Schlussbericht den „höchsten und hohen Regierungen mit dem empfehlenden Ersuchen zur Kenntniß [zu] bringen, sich bis zum Schlusse des laufenden Jahres darüber äußern zu wollen, ob, resp. unter welchen etwaigen Modalitäten sie geneigt wären, dem Gesetzentwurfe beizutreten und ihm gesetzliche Geltung zu verleihen und […] den Mitgliedern besagter Commission für die rasche und ausgezeichnete Erledigung der ihnen übertragenen Arbeit durch Vermittlung ihrer höchsten und hohen Regierungen ihre volle und dankbare Anerkennung aus[zu]sprechen". Der Vorschlag des Präsidiums, in drei Wochen über den Antrag abzustimmen, wurde bei Stimmenthaltung Preußens angenommen. Dem Antrag wurde von der Bundesversammlung am 6. Oktober 1864 – ohne die Stimme Preußens und der Niederlande und gegen die von Anhalt – Folge gegeben; der Wunsch Württembergs, die Äußerungsfrist bis zum 1. Mai 1865 zu verlängern, fand keine Beachtung.[140]

Das allerdings war ein neuer Zungenschlag: Die bloße Umsetzung eines Musterentwurfs durch sämtliche Bundesglieder bedeutete möglicherweise etwas anderes als die ursprünglich beabsichtigte förmliche Erhebung des Entwurfs zu einem Bundesbeschluss. Tatsächlich begann der Abstimmungsprozess erst im Januar 1865 und setzte sich fort bis März 1866, dem Monat, in dem in Frankfurt zum letzten Mal über das Urheberrecht verhandelt wurde. Aber auch zu diesem Zeitpunkt fehlten noch einzelne Voten. Baden, das den Reigen eröffnet hatte, war vorbehaltlos einverstanden, erklärte auch, es sei bereit, dem Entwurf „Geltung in ihrer Landesgesetzgebung zu verleihen", forderte aber ausdrücklich, „daß auch die übrigen Regierungen die Annahme des Entwurfes für ihre Staaten beschließen";[141] diesem Land gleich taten es zahlreiche andere Bundesstaaten.[142]

Sachsen verlangte am 19. Januar 1865 – unter Bezugnahme auf das neueste Votum des Börsenvereins – zahlreiche kleinere und größere Modifikationen wie die Annahme des Systems der Sachverständigenvereine und die (schon immer von Preußen abgelehnte) Errichtung einer deutschen Eintragsrolle. In diesem Zusammenhang regte es eine abermalige Beratung des Entwurfs an.[143] Württemberg schloss sich an. Bayern antwortete erst im Juli 1865, legte aber gleichzeitig ein dem Frankfurter Entwurf fast vollständig entsprechendes eigenes Urheberrechtsgesetz vor.[144] Die Niederlande für Luxemburg und Limburg stimmten mit Nein. Anhalt verwies auf die bis dahin ablehnende Haltung Preußens. Auch der österreichische Gesandte, der sich im Sommer 1865 namens seiner Regierung erklärte, war nicht ganz zufrieden, was etwa das Übersetzungsrecht anging. Dagegen befürwortete er die Streichung der Vorschriften über die Sachverständigenvereine und die Eintragungsrolle. Eine vierte Lesung zur Glättung der zahlreichen „Amendements" schloss er allerdings aus, weil nicht davon auszugehen sei, dass die Experten-Kommission einmal abgelehnte Anträge dann doch befürworten werde. Im übrigen ließ er durchblicken, Österreich rechne nicht mehr mit einem förmlichen Bundesgesetz über das Urheberrecht, sei doch „der dießfallsige Entwurf nicht bestimmt, […] Bundesgesetz zu werden, sondern [werde] in jedem denselben annehmenden Staate Landesgesetz sein".

Umgekehrt nahm Preußen den Mitte 1864 verabschiedeten Frankfurter Entwurf zum Anlass, (wieder) ernsthaft über die Einführung einer gesamtdeutschen Norm nachzudenken – vielleicht auch, weil sich kurz zuvor das Verhältnis zu Österreich verändert hatte. Jedenfalls erklärte Bismarck am 8. Oktober 1864 seinen Kollegen, die politische Lage gestatte es, „sich auf die Sache einzulassen, ohne uns mit unseren früheren Erklärungen in direkten Widerspruch zu setzen".[145] Zu diesem Zeitpunkt hatte der seit März 1862 im Amt befindliche Kultusminister *Heinrich von Mühler* (1813–1874) schon die Sachverständigen–Vereine um eine Bewertung des Bundesentwurfs gebeten, und der Innenminister den Erlass einer allgemeinen Norm als wünschenswert bezeichnet.[146] Im Oktober 1864 forderte auch

[138] Witzleben, Nachdrucksgesetz (o. Fn. 27), S. 104 f. Damit verweigerte sich der Sachse noch sechs Jahre nach Vollendung der Arbeiten der Einsicht, dass ohne (positive?) Zustimmung Preußens keine neue Bundesnorm gegen den Nachdruck verabschiedet werden konnte, ohne einen solchen förmlichen Beschluss aber auch die Umsetzung durch die anderen Bundesstaaten nicht zu erwarten war – von der späteren bayerischen Lösung einmal abgesehen. Wächter, 9. November (o. Fn. 89), ging übrigens ohnehin davon aus, dass der neuere Börsenvereins-Entwurf den materiellen Kern des […] gescheiterten Entwurfs der Bundescommission" gebildet habe.

[139] Prot. DBV 1864, S. 453 ff.

[140] Prot. DBV 1864, S. 520 f.

[141] Prot. DBV 1865, S. 17

[142] Die Freie Stadt Frankfurt etwa war ohne weiteres bereit, dem Entwurf beizutreten, regte aber an, dessen Bestimmungen zum Übersetzungsrecht (§ 16) „in Einklang mit dem 1865 von den deutschen Zollvereinsstaaten mit Frankreich […] abgeschlossenen Convention" zu bringen; vgl. eine am 15. 2. 1866 von dem württembergischen Gesandten erstellte inhaltliche Übersicht über die bis dahin eingegangenen (15) Voten; Prot. DBV 1866, S. 44 ff. Vor dem Statement der Stadt Frankfurt hatte sich deren Handelskammer gutachterlich geäußert; Handelskammer zu Frankfurt am Main, Jahresbericht für 1865; Frankfurt/Main 1866, S. 1 ff.

[143] Prot. DBV 1865, S. 25 f.

[144] Auf der 21. Sitzung vom 20. Juli 1865, Prot. DBV 1865, S. 352. Der Gesandte erklärte, das Gesetz sei bestimmt, „den von der Frankfurter Commission ausgearbeiteten und hoher Bundesversammlung vorgelegten Entwurf mit denjenigen Modificationen, welche durch die mit Frankreich abgeschlossene Literarconvention nothwendig geworden sind, in Bayern zur Geltung zu bringen". Über das Gesetzgebungsverfahren etwa Der Bayerische Landbote vom 21. 6. 1865 (o. Fn. 130).

[145] Acta des Innenministeriums 1852–1864 (oben Fn. 104), Bl. 305 ff.

[146] Eingehend zu diesen Vorgängen bereits Nomine, Sachverständigen-Vereine (o. Fn. 46), S. 321 ff.

der Justizminister, die Vereinbarkeit des Entwurfs mit dem preußischen Recht zu prüfen, um die für die Verabschiedung eines Gesetzes notwendige Zustimmung der heimischen Kammern zu sichern. Einig war man sich über eine weitere Beratung der Angelegenheit auf Referentenebene nach Eingang der Vereinsgutachten. Die Voten ließen allerdings auf sich warten. Wohl auch deshalb wies Bismarck im Februar 1865 an, bei der Bundesversammlung keine Fristverlängerung zu beantragen; er begründete seinen Ukas allerdings mit dem jetzt eher unverständlichen Hinweis, bereits eine solche Antragstellung konterkariere den bisherigen Standpunkt.[147] Heydemann legte die leider nicht auf uns gekommenen Gutachten erst im Februar 1866 vor, möglicherweise zu spät für weitere Verhandlungen beim Bund. Der preußische Gesandte in Frankfurt jedenfalls erklärte sich nicht mehr gegenüber der Bundesversammlung. In den folgenden Monaten entfalteten auch die anderen Staaten keine nennenswerten Aktivitäten mehr, die Angelegenheit fand mit der Auflösung des Bundes ihre faktische Erledigung.

5. Fortwirken

Das Fortwirken des Frankfurter Entwurfs kann hier nur noch kurz angedeutet werden: Zum einen wurde er – wie bereits erwähnt – nahezu eins zu eins zum bayerischen Urheberrechtsgesetz von 1865 erhoben.[148] Mandry hat es bereits 1867 umfassend kommentiert, eine Leistung, die der Ökonom und Politikwissenschaftler *Albert Schäffle* (1831-1903) als einen weiteren Beitrag zur (deutschen) Rechtseinheit würdigte: „Bei diesem Versuche halten wir uns an das bairische Nachdrucksgesetz vom 28. Juni 1865. Dieses Gesetz ist die reifste positive Frucht der bisherigen gesetzgeberischen Praxis und juristischen Doktrin in Deutschland, hervorgegangen aus gründlichen in Berlin, Leipzig und Frankfurt gepflogenen Sachverständigenberathungen. Dasselbe bietet zugleich in der von Mandry besorgten Ausgabe den Vortheil eines Commentars, welcher zu jeder Frage genau auf die Streitfragen der Doktrin, namentlich auf die Ansichten von Jolly, Harum, Wächter und Andern, und auf die bisherige Gesetzgebung eingeht.“ [149]

Zum anderen befruchtete der Entwurf nachhaltig die Diskussion um das bereits am 11. Juni 1870 vom Norddeutschen Bund erlassene „Gesetz, betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken“ (und das erst 1876 verabschiedete „Gesetz, betreffend das Urheberrecht an Werken der bildenden Künste. Vom 9. Januar 1876.“),[150] deren Entstehungsgeschichte *Elmar Wadle* eingehend beleuchtet hat. Jedenfalls das erstgenannte Gesetz beruhte wesentlich auf einem durch die preußische Regierung vorgelegten Entwurf von *Otto Dambach* (1831–1899).[151] Der preußische Oberpostrat, seit 1857 auch Mitglied des Literarischen Sachverständigen-Vereins, wiederum konnte auf eine bereits im Oktober 1867 von Bismarck angeregte Arbeit zurückgreifen, die Friedrich Julius Kühns begonnen und nach dessen Erkrankung Heydemann im Mai 1868 vollendet hatte – unter Beachtung auch der zum Frankfurter Entwurf abgegebenen Gutachten der preußischen Vereine.[152]

Der Wiener Hof- und Gerichtsadvokat Josef Schmidl (1852-1916) verstieg sich 1906 zu der – allerdings nicht näher belegten Behauptung – der Frankfurter Entwurf habe nicht nur „als Vorwurf für das bayerische Urheberrechtsgesetz“ von 1865 gedient, das dann „die weitere Entwicklung des Urheberrechts auch in Österreich beeinflußt“ habe. Das bayerische Gesetz (und damit die Frankfurter Arbeit) „bildete [auch] die Hauptgrundlage für die deutschen Reichsgesetze aus den Jahren 1870 und 1876“.[153] Gegen diese Zuschreibung spricht allerdings, dass schon die Eingangsnorm des norddeutschen und späteren Reichsgesetzes von 1870 (»§. 1. Das Recht, ein Schriftwerk auf mechanischem Wege zu vervielfältigen, steht dem Urheber desselben ausschließlich zu.“) dem § 1 des Entwurfs des Börsenvereins – und damit der entsprechenden Vorschrift des preußischen Gesetzes von 1837 – entspricht, die abweichende Fassung des Frankfurter Entwurfs also keine weitere Verwendung fand.

Auffällig ist auch, dass das norddeutsche Urheberrechtsgesetz es dem Richter zumindest gestattete, die Beantwortung bestimmter „technischer Fragen“ von dem Gutachten Sachverständiger abhängig zu machen, zu welchem Zweck in allen

[147] Schreiben vom 5. 2. 1865, Acta preußisches Justizministerium 1857-1869 (o. Fn. 92), Bl. 407.

[148] Bayerisches Gesetz zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst vom 28. Juni 1865, Gesetz-Blatt für das Königreich Bayern 1865, S. 66 ff.

[149] Mandry, Gesetz vom 28 Juni 1865 zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst erläutert von Gustav Mandry, in: Carl Friedrich von Dollmann (Hrsg.), Gesetzgebung des Königreichs Bayern, 1. Theil, Band 5, Erlangen 1867, S. 53 ff. (= ders., Das Urheberrecht an literarischen Erzeugnissen und Werken der Kunst, Erlangen 1867).; dazu Albert Schäffle, Die nationalökonomische Theorie der ausschliessenden Absatzverhältnisse insbesondere des litterarisch–artistischen Urheberrechtes, des Patent-, Muster- und Firmenenschutzes nebst Beiträgen zur Grundrentenlehre, Tübingen 1867, S. 221.

[150] Das Gesetz vom 11. 6. 1870 in: Bundesgesetzblatt des Norddeutschen Bundes 1870, S. 339 ff., das Gesetz vom 9. 1. 1876 in: Reichsgesetzblatt 1876, S. 4 ff.

[151] Wadle, Abrundung (o. Fn. 1).

[152] Kühns/Heydemann, Entwurf eines Gesetzes für den Norddeutschen Bund, betreffend das Urheberrecht an Werken der Literatur und der Kunst, an geographischen, naturwissenschaftlichen, archetektonischen und ähnlichen Abbildungen, sowie an photographischen Aufnahmen nach der Natur, in: Drucksachen zu den Verhandlungen des Bundesrathes des Norddeutschen Bundes. Session 1868, Berlin (s. d.). Kühns war 1866 mit einer weiteren Arbeit zum Urheberrecht hervorgetreten (Kühns, Denkschrift über das geistige Eigenthum: nach Beschluß des Deutschen Schriftstellertages vom 20. Aug. 1865 veröffentlicht, Leipzig 1866; zu den vorausgegangenen Arbeiten o. bei Fn. 127 und passim). Der Rechtsgelehrte hatte sich selbst als Gesetzesmacher ins Gespräch gebracht; 1868 wurde er auch Mitglied des literarischen Sachverständigen-Vereins; vgl. Nomine, Sachverständigen-Verein (o. Fn. 46), S. 327 und passim, dort auch näher zu den hier geschilderten Vorgängen um die Rezeption der verschiedenen Entwürfe. Vgl. auch Overbeck, Lichtbildschutz (o. Fn. 134), S. 21.
Zu dem ausgewiesenen Urheberrechtler Otto Dambach, der 1871 auch Vorsitzender des artistischen und 1874 des literarischen Sachverständigen-Vereins wurde, etwa Nomine, Sachverständigen-Verein (o. Fn. 46), S. 460.

[153] Schmidl (o. Fn. 48), S. 15.

Staaten des Norddeutschen Bundes die altbekannten Sachverständigenvereine „aus Gelehrten, Schriftstellern, Buchhändlern und anderen geeigneten Personen gebildet werden“ sollten (§ 30 f.).[154]

August Hermann Schreck, der „Die deutsche Reichsgesetzgebung über den Schutz des geistigen Eigenthums“ 1877 eingehend beleuchtete, sah umgekehrt zahllose andere Quellen des unzweifelhaft wirkmächtigen (Dambach'schen) Gesetzentwurfs: „Bei der Ausarbeitung desselben dienten als sehr reichhaltiges Material die bisherigen Landesgesetze, die Beschlüsse des ehemaligen Deutschen Bundes von 1845 und 1857 und die Nachdrucksgesetze vom 19. Oct. 1846 in Oesterreich, vom 11. Juni 1837 in Preußen, vom 28. Juni 1865 in Baiern, von 1844 und 1856 in Sachsen und von 1842 in Braunschweig, die bereits vorhandenen legislativen Vorarbeiten zu einem deutschen Nachdrucksgesetze, namentlich die beiden Entwürfe des Börsenvereins der deutschen Buchhändler von 1857 und der von der Commission des vormaligen Deutschen Bundes nach Maßgabe der Beschlüsse von 1857 zusammengestellte, aber ohne Gesetzeskraft gebliebene Entwurf vom Jahre 1864, die gleiche Gesetzgebung von Frankreich und England, Belgien und Amerika, wegen der mit dem Auslande nothwendig zu unterhaltenden wissenschaftlichen, publicistischen und buchhändlerischen Beziehungen und Verträge, und endlich theils die unter dem Titel ›Die preußische Nachdrucksgesetzgebung usw.‹ 1863 von Heydemann und Dambach veröffentlichten Gutachten des berliner königlichen literarischen Sachverständigenvereins, theils die auf diesem besondern Rechtsgebiete erschienenen Schriften von Jolly, Wächter, Mandry und Klostermann.“ [155]

Peter Harum wiederum meinte schon kurz nach dem Scheitern des Deutschen Bundes, es sei ohne weiteres begreiflich, dass die Bundesversammlung nicht „über die empfehlende Mitteilung des [Frankfurter, *R. N.*] Entwurfs an die einzelnen deutschen Regierungen hinauskam“, derselbe gehöre auch „schwerlich zum Bundesinventar, mit dessen Auseinandersetzung eben eine Liquidationscommission beschäftigt ist, [weshalb der Entwurf] vorläufig als ›schätzbares‹ Material seiner künftigen Verwertung harren“ müsse.[156]

Albert Osterrieth schließlich, der 22 Jahre nach Erlass der ersten gesamtdeutschen Norm „Altes und Neues zur Lehre vom Urheberrecht“ zusammentrug, beschrieb den Gang der Dinge nach 1866 weniger freundlich: „Der norddeutsche Bund nahm die Regelung des Urheberrechts in sein Programm auf. Ein vom Bundesrat auf Grund des Börsenvereinsentwurfs und des Frankfurter Entwurfs unter Mitwirkung des Börsenvereins deutscher Buchhändler[157] ausgearbeiteter Entwurf eines Gesetzes betreffend das Urheberrecht […] wurde dem Reichstag des norddeutschen Bundes am 14. Januar 1870 vorgelegt und am 11. Juni 1870 als Gesetz erlassen, unter Ausschluß der Regelung des Urheberrechts an bildenden Künsten. Das Bundesgesetz wurde in die Reichsgesetzgebung übernommen und ist noch heute geltendes Recht. Das künstlerische Urheberrecht wurde endlich im Gesetz vom 9. Januar 1876 geregelt. Die deutsche Gesetzgebung genießt den Ruf, eine der besten zu sein. […]. Fassen wir jedoch ihren materiellen Inhalt ins Auge, so müssen wir zugeben, dass das deutsche Urheberrechtsgesetz dem früheren, besonders dem durch das preußische Gesetz von 1837 geschaffenen Zustand gegenüber nur einen geringen Fortschritt gemacht […].“ [158]

6. Ergebnis

Der von Sachsen beantragte Erlass einer umfassenden Bundesnorm zum Urheberrecht scheiterte ohne Zweifel gerade auch an der deutschlandpolitisch bedingten Weigerung Preußens, bei der Aufstellung und Verabschiedung eines entsprechenden Gesetzes mitzuwirken. Zweifelhaft bleibt allerdings, ob dieses vor allem Bismarck zugeschriebene, aber auch schon seinen Vorgängern ganz und gar nicht abholde Motiv auch zuletzt noch bestimmend war. Der Sachse Witzleben jedenfalls stellte (eher) auf bestimmte Befindlichkeiten der ab 1857/58 beteiligten preußischen Minister ab, als er 1870 der Öffentlichkeit mitteilte, der Widerstand Preußens habe durchaus „nicht in principiellen Bedenken seinen Grund […], sondern [hänge] wesentlich [zusammen] mit der persönlichen Rechtsanschauung der damaligen preußischen Justizminister Simons, von Bernuth und Grafen zur Lippe“.[159]

---

[154] Für die Fortführung der Vereine hatte Heydemann noch im Februar 1870 getrommelt: Heydemann, Ueber die Bedeutung der Sachverständigen-Vereine in Nachdrucks-Angelegenheiten und die Stellung dieser Vereine zu den Gerichtsbehörden. Nach einem in der Juristischen Gesellschaft zu Berlin am 19. Februar 1870 gehaltenen Vortrage, in: Behrend (Hrsg.), Zeitschrift für Gesetzgebung und Rechtspflege in Preussen, Band 4 (Berlin 1870), S. 1 ff.

[155] August Herrmann Schreck, Die deutsche Reichsgesetzgebung über den Schutz des geistigen Eigenthums, in: Unsere Zeit. Deutsche Revue der Gegenwart, N. F, 13. Jg. (Leipzig 1877), S. 511 ff., 621 ff., 511; ähnlich Carl Heinrich Dreyer, Das deutsche Reichscivilrecht: Systematische Darstellung des in den Reichsgesetzen enthaltenen Deutschen Civilrechts. Leipzig 1876, S. 47.
Otto Dambach, Die Gesetzgebung des Norddeutschen Bundes betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken, Berlin 1871, S. 4, wiederum schreibt zu der von ihm verwendeten Kühns'schen Arbeit: „Seinem Inhalte nach beruhte dieser von Entwurf […] formell und materiell im Wesentlichen auf dem Börsenvereins-Entwurfe vom Jahre 1857 unter gelegentlicher Berücksichtigung der Bestimmungen des Frankfurter Entwurfes vom Jahre 1864.“

[156] Harum, Literarische Anzeige (von Mandry, Das Urheberrecht an literarischen Erzeugnissen), in: Allg. österreichische Gerichts–Zeitung (Wien) vom 5. 7. 1867, 220, 220.

[157] Gemeint ist die allfällige Beurteilung des Gesetzentwurfs von Kühns durch eine Deputation des Börsenvereins; Börsenverein der deutschen Buchhändler (Hrsg.), Protokolle über die vom 11.-15 Januar 1869 stattgehabten Verhandlungen des vom Vorstande des Börsenvereins der deutschen Buchhändler nach Leipzig einberufenen Ausschusses zur Berathung des vom Bundeskanzleramte vorgelegten Entwurfes eines Gesetzes für den norddeutschen Bund betreffend das Urheberrecht an Werten der Litteratur und Kunst an geographischen, naturwissenschaftlichen, architektonischen und ähnlichen Abbildungen sowie an photographischen Abbildungen nach der Natur, Leipzig 1869.

[158] Albert Osterrieth, Altes und Neues zur Lehre vom Urheberrecht, Heidelberg 1892, S. 30 f.

[159] Witzleben, Nachdrucksgesetzgebung (o. Fn. 27), S. 103 f.

Preußen jedenfalls scheint zuletzt wenigstens den angesprochenen „Beitritt“ zu einem vom Bund erarbeiteten Mustergesetz ernsthafter in Erwägung gezogen zu haben.[160] Der vorgelegte Frankfurter Entwurf allerdings war Frucht (eher) akademischer Tätigkeit einer mehr oder minder zufällig zusammengekommenen Runde. Der Kommission gehörten neben ausgewiesenen Experten des Urheberrechts auch Juristen an, die mit der Materie nur am Rande vertraut waren, die preußischen Sachverständigen-Vereine waren überhaupt nicht vertreten. Das von einem Bayern dominierte Gremium brauchte auf die politischen Kräfteverhältnisse im Bund wie auf die Befindlichkeiten betroffener Berufsgruppen keine Rücksicht zu nehmen, mitunter wurde sogar der sächsische Vertreter überstimmt. Der Frankfurter Entwurf verwarf deshalb nicht nur in Preußen für bedeutsam erachtete inhaltliche, vor allem aber wesentliche verfahrensrechtliche Vorschriften des preußischen Urheberrechtsgesetzes von 1837. Gleichwohl schien er in Stein gemeißelt, nachdem Österreich eine vierte Lesung für Zeitverschwendung erachtete. Unter diesen Auspizien war die Übernahme des Entwurfs (nur) durch Bayern folgerichtig; Preußen allerdings wäre ihm wohl – auch bei Aufgabe der Vorbehalte gegen die Tätigkeit der Bundesversammlung – nicht beigetreten.[161]

Anlage

Entwurf eines Gesetzes zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst [„Frankfurter Entwurf“].

Erstes Hauptstück. Von dem Verbote des Nachdruckes.

Erster Abschnitt. Nachdruck literarischer Erzeugnisse.

§. 1. Die mechanische Vervielfältigung literarischer Erzeugnisse ohne Genehmigung ihres Urhebers, beziehungsweise seiner Rechtsnachfolger, (Nachdruck) ist nach Maßgabe der Bestimmungen dieses Gesetzes verboten.

Hinsichtlich dieses Verbotes macht es keinen Unterschied, ob das Werk bereits veröffentlicht war oder nicht, ob es niedergeschrieben ist oder nur mündlich vorgetragen wurde, ob es von einem oder mehreren Verfassern herrührt, ob es ganz oder nur theilweise abgedruckt wird.

§. 2. Dem Verbote des §. 1 unterliegt auch der Abdruck von Werken, welchen der Urheber mit Verletzung des von ihm bereits einem anderen eingeräumten oder der Verleger mit Ueberschreitung des ihm zugestandenen Rechtes zur mechanischen Vervielfältigung veranstaltet.

§. 3. Als Nachdruck ist nicht anzusehen der Abdruck von bloßen Notizen, von amtlichen und nichtamtlichen Anzeigen, von Gesetzen und amtlichen Verfügungen weltlicher oder kirchlicher Behörden, von öffentlichen Acten, von Reden, welche bei den Verhandlungen der Gerichte, der Landes– oder Gemeindevertretungen oder bei politischen Versammlungen gehalten wurden, sowie von anderen nicht als literarische zu betrachtenden Erzeugnissen.

Die Herausgabe einer Sammlung von Reden desselben Urhebers ohne seine Genehmigung, deßgleichen der Abdruck von Sammlungen oder Bearbeitungen von Schriften der im Absatz 1 bezeichneten Art gilt als Nachdruck.

Die Bestimmung des Absatzes 1 hindert die einzelnen Staaten nicht, den Abdruck von Gesetzen oder sonstigen amtlichen Schriften aus anderen Rücksichten als denen des Schutzes des Urheberrechtes zu verbieten oder zu beschränken.

§. 4. Der Abdruck von einzelnen Leit- und Correspondenzartikeln aus einer Zeitung in eine andere wird nicht als Nachdruck behandelt, selbst wenn sie literarische Erzeugnisse sind.

Das Abdrucken derartiger Zeitungsartikel, ebenso von Originaltelegrammen einer Zeitung in anderen Zeitungen ohne Angabe der Quelle wird jedoch auf Verlangen des Zeitungseigenthümers mit einer Geldstrafe bis zu 20 Vereinsthalern bestraft.

§. 5. Die Benutzung des unveränderten Titels von einem früher veröffentlichten Werke eines anderen Autors ist nicht Nachdruck.

Wenn jedoch der Titel zur Bezeichnung des behandelten Gegenstandes nicht unumgänglich nothwendig und überdieß zur Irreführung des Publikums über die Identität des Werkes geeignet und dazu wirklich mißbraucht ist, können die an dem früheren Werke Verlagsberechtigten die Unterdrückung des gebrauchten Titels und Ersatz des erlittenen Schadens verlangen.

§. 6. Das Abschreiben literarischer Erzeugnisse, selbst um Lohn und für Mehrere, gilt nicht als Nachdruck.

§. 7. Eben so wenig wird als Nachdruck behandelt die Benutzung eines literarischen Erzeugnisses zur Hervorbringung eines anderen, sofern sie nur der Hauptsache nach nicht in eine Umgehung des im §. 1 ausgesprochenen Verbotes ausartet; so ist namentlich zulässig das wörtliche Anführen einzelner Stellen eines Werkes oder selbst die Aufnahme einzelner kleinerer Aufsätze und Gedichte oder einzelner Abschnitte aus anderen Werken in ein nach seinem Hauptinhalte selbstständiges Werk oder in eine zu einem eigenthümlichen literarischen Zwecke oder zum Kirchen-, Schul- oder Unterrichtsgebrauche veranstaltete Sammlung von Auszügen aus den Werken mehrerer Schriftsteller.

Auf solche Sammlungen findet §. 1. Anwendung.

§. 8. Die Herausgabe der Uebersetzung eines fremden Werkes gilt nicht als Nachdruck.

Wenn jedoch der Urheber sein Werk gleichzeitig in verschiedenen Sprachen herausgegeben, oder wenn er bei Herausgabe desselben in einer Sprache die Befugniß zur Veranstaltung von Uebersetzungen in bestimmte andere Sprachen auf der ersten Lieferung des Originals ausdrücklich sich vorbehalten hat, so ist die Herausgabe einer Uebersetzung in einer der betreffenden Sprachen durch einen Dritten als Nachdruck verboten.

Uebersetzungen dürfen nicht nachgedruckt werden. Die Geltendmachung des aus diesem Verbote entspringenden Rechtes steht dem Uebersetzer und, wenn die Uebersetzung selbst eine unrechtmäßige war (Absatz 2), dem Urheber des Originals zu.

[160] Anders sieht das wohl Laufke, Zivilgesetzgebung (o. Fn. 6), S. 51 und passim, der – wie bereits dargestellt – davon ausgeht, dass jede auf Rechtsvereinheitlichung abzielende Betätigung des Bundes „schlechtweg“ unterbunden werden sollte.

[161] Auch wenn der bekannte Rechtswissenschaftler und Schriftsteller Felix Dahn (1834–1912) anlässlich der Besprechung des norddeutschen Urheberrechtsgesetzes von 1870 lakonisch bemerkt: Frankfurter Entwurf Man hätte füglich den sogenannten Frankfurter Entwurf von 1864 nehmen können und sollen.“; Felix Dahn, Zur neuesten Deutschen Gesetzgebung über Urheberrecht, in: Behrend (Hrsg.), Zeitschrift für Gesetzgebung und Rechtspflege in Preussen, Band 5 (Berlin 1871), S. 1, 1.

Durch den Verlagsvertrag über das Original wird das ausschließliche Uebersetzungsrecht (Absatz 2), vorbehaltlich besonderer Uebereinkunft, nicht mit übertragen.

§. 9. Bei einem Werke, das durch Beiträge mehrerer Mitarbeiter gebildet wird, steht, wenn dasselbe zugleich in sich ein Ganzes ausmacht, wie z. B. ein Conversationslexikon etc., demjenigen, welcher die einzelnen Beiträge zu einem Ganzen verbunden hat, das Urheberrecht am Ganzen zu.

Das Urheberrecht hinsichtlich der einzelnen Beiträge, mögen dieselben zu einem Ganzen verbunden oder nur äußerlich aneinander gereiht sein, verbleibt den Urhebern derselben.

Durch Ueberlassung einzelner Aufsätze, Gedichte etc. zum Abdruck in Zeitschriften, Almanachen, lexikalischen oder anderen Sammelwerken begibt sich deren Urheber zu Gunsten des Verlegers des Sammelwerkes, vorbehaltlich besonderer Uebereinkunft mit demselben, nur der Befugniß, sein Erzeugniß innerhalb zweier Jahre in einem anderen derartigen Werke abdrucken zu lassen.

§. 10. Dem Urheber wird hinsichtlich des Schutzes gegen Nachdruck gleichgeachtet der Herausgeber bisher nicht gedruckter Schriften, deren Urheber bereits gestorben ist und die an sich gegen Nachdruck nicht geschützt sind, mögen sie literarische Erzeugnisse sein oder nicht. Von derartigen Schriften ist jedoch Dritten ein freierer Gebrauch als bei anderen durch dieses Gesetz geschützten Werken gestattet, soweit derselbe durch das Bedürfniß oder die Sitte des literarischen Verkehres gerechtfertigt ist, so namentlich z. B. das wörtliche Abdrucken zusammen mit einem Commentar oder als Beleg der vorgetragenen eigenen Ansichten.

§. 11. Der Nachdruck ist, vorbehaltlich der folgenden besonderen Bestimmungen, verboten während der ganzen Lebenszeit des Urhebers und der ersten 30 Jahre nach seinem Tode.

§. 12. Bei einem von mehreren Personen als Miturhebern verfaßten Werke erstreckt sich die Schutzfrist auf die Dauer von 30 Jahren nach dem Tode des Längstlebenden derselben.

§. 13. Bei anonymen oder pseudonymen, d. h. solchen Werken, in welchen der Urheber nicht genannt oder nicht mit seinem wahren Namen bezeichnet ist, währt das Verbot des Nachdruckes 30 Jahre von der ersten Herausgabe an gerechnet.

Wird aber vor Ablauf dieser Frist der Name des Urhebers durch Eintrag in die Eintragsrolle (§.51) bekannt gemacht, so tritt die gewöhnliche Schutzfrist (§.11) ein.

§. 14. Für literarische Erzeugnisse, welche erst nach dem Tode des Urhebers, jedoch vor Ablauf der im §. 11. bestimmten Schutzfrist zur Veröffentlichung gelangen, dauert die Schutzfrist 30 Jahre von der Veröffentlichung an.

§. 15. Die Schutzfrist von 30 Jahren nach dem Erscheinen gilt auch für die von Akademien, Universitäten, öffentlichen Unterrichtsanstalten, gelehrten und anderen erlaubten Gesellschaften oder Vereinen, sowie von juristischen Personen überhaupt herausgegebenen Werke.

Dem Urheber selbst, sofern er besondere Ausgaben veranstalten darf, kommt die gewöhnliche Schutzfrist (§.11) zu Statten.

§. 16. Das Verbot der Herausgabe von Uebersetzungen (§. 8) dauert bis zum Ablauf von 3 Jahren von dem Zeitpunkte an, in welchem das Originalwerk gleichzeitig in mehreren Sprachen veröffentlicht, beziehungsweise die vorbehaltene Uebersetzung herausgegeben worden ist.

Wenn jedoch der Urheber die vorbehaltene Uebersetzung nicht innerhalb Jahresfrist seit dem Erscheinen des Originals veröffentlicht hat, so erlischt das gedachte Verbot schon mit Ablauf dieses Jahres. Bei umfangreichen Originalien genügt es, wenn mindestens 30 Druckbogen Uebersetzung je innerhalb eines Jahres erscheinen.

§. 17. Der Herausgeber eines bisher nicht gedruckten Werkes der im §. 10 bezeichneten Art wird gegen Nachdruck geschützt während 15 Jahren von der ersten Herausgabe an.

§. 18. Die vom Erscheinen eines Werkes zu berechnende Schutzfrist beginnt bei Werken, welche abtheilungsweise erscheinen, wenn die selben ein Ganzes bilden, wie insbesondere bei allen lexikalischen Werken, erst nach dem Erscheinen der letzten Abtheilung.

Wenn jedoch zwischen dem Erscheinen einzelner Abtheilungei ein Zwischenraum von mehr als 3 Jahren liegt, wird die Schutzfrist für jede einzelne Abtheilung nach der Zeit ihres Erscheinen berechnet.

Diese letztere Berechnungsweise tritt in den Fällen der §. 16 und 17 immer ein, auch wenn die einzelnen Abtheilungen in kürzern Zwischenräumen erscheinen.

§. 19. In die Schutzfrist, desgleichen in die Fristen der §. 9, 10 und 18 Absatz 2 wird das Kalenderjahr, in welchem der Urheber gestorben, beziehungsweise das Werk zuerst erschienen ist, nicht eingerechnet.

§. 20. Eine Verlängerung der in diesem Gesetze bestimmten Schutz fristen durch Privilegien findet nicht statt.

Zweiter Abschnitt. Nachdruck musikalischer Compositionen.

§. 21. Die mechanische Vervielfältigung von musikalischen Compositionen ohne Genehmigung ihres Urhebers, beziehungsweise seiner Rechtsnachfolger, ist als Nachdruck verboten nach Maßgabe der in dem vorhergehenden Abschnitte enthaltenen und der nachfolgenden besonderen Vorschriften.

§. 22. Die Herausgabe eines fremden Tonstuckes mit Einrichtung für ein oder mehrere andere Instrumente oder Stimmen als diejenigen, für welche es ursprünglich gesetzt war (Arrangement), gilt als Nachdruck.

§ 23 Dagegen wird nicht als Nachdruck betrachtet die Benutzung eines Thema's oder eines Tonstückes zu Variationen, Fantasien, Etüden und ähnlichen Tonwerken, vorausgesetzt, daß sie nicht der Hauptsache nach in eine Umgehung der in §. 21 und 22 ausgesprochenen Verbote ausartet.

§. 24. Die Aufnahme einzelner Themata und Auszüge aus musikalischen Compositionen oder ganzer Tonstücke geringeren Umfanges ohne Bearbeitung in ein literarisches Werk oder in eine zum Musikunterricht bestimmte Sammlung wird nicht als Nachdruck behandelt.

§. 25. Das Abdrucken eines bereits veröffentlichten Textes zusammen mit einer dazu gesetzten musikalischen Composition durch den Tonsetzer gilt nicht als Nachdruck.

Dagegen ist der Abdruck nur mit Genehmigung des Dichters gestattet,

a) wenn der Text noch nicht
b) oder nur zum Gebrauche bei Aufführungen (§. 48),
c) oder nur zusammen mit einer musikalischen Composition gedruckt und im letzten Falle auf dem Titelblatte durch den Dichter vorbehalten ist, derselbe dürfe nicht in Verbindung mit einer anderen Composition abgedruckt werden.

Dritter Abschnitt. Nachdruck bei Werken der bildenden Kunst.

§. 26. Nach Maßgabe der im ersten Abschnitte enthaltenen und der folgenden besonderen Vorschriften ist als Nachdruck verboten die ohne Genehmigung des Urhebers, beziehungsweise seiner Rechtsnachfolger, geschehende Vervielfältigung von Werken der zeichnenden oder

plastischen Kunst, sei diese Vervielfältigung eine mechanische wie z. B. durch Benutzung der Originalplatten oder Formen, durch Photographie, Abguß oder werde sie durch Nachbildung vermittelt, vorausgesetzt, daß im letzten Falle ein Verfahren beobachtet wird, durch welches eine Mehrheit nachgebildeter Exemplare mittelst der nämlichen Vorrichtung hergestellt werden kann, z. B. Kupferstiche nach einem Gemälde oder einem anderen Kupferstiche.

Die Anfertigung von Einzelcopien ohne Genehmigung des Urhebers des Originals ist so lange als Nachdruck verboten, als das Original noch ein Eigenthum des Urhebers und noch nicht erlaubter Weise vervielfältigt ist.

§. 27. Dem Verbote des Nachdruckes (§. 26). unterliegt auch die Vervielfältigung der Nachbildung eines Werkes der Kunst, sofern die letztere selbst als ein Werk der Kunst zu betrachten und durch ein anderes als das bei dem Original angewendete Kunstverfahren angefertigt worden ist, wie z. B. ein Kupferstich nach einem Gemälde.

Die Geltendmachung der aus diesem Verbote entspringenden Rechte steht dem Nachbildner als solchem, oder, wenn die Nachbildung selbst eine unrechtmäßige war (§. 26), dem Urheber des Originals zu.

§. 28. Die Verbote der §. 26 und 27 finden auch Anwendung, wenn das zu schützende Werk durch Photographie oder andere ähnliche Mittel hergestellt wurde. Vorausgesetzt. daß dasselbe als Werk der Kunst zu betrachten ist.

§. 29. Den vorstehenden Verboten unterliegt die Vervielfältigung von Werken der Kunst auch dann, wenn sie in anderer Größe als das nachgebildete Werk oder mit sonst unerheblichen Abweichungen von demselben, oder durch Anwendung eines anderen Kunstverfahrens ausgeführt ist, oder wenn sie nur einen Theil des Originalwerkes betrifft.

§. 30. Die Benutzung eines Werkes der Kunst zur Hervorbringung eines anderen ist nicht Nachdruck, insofern sie nicht der Hauptsache nach in eine Umgehung der vorstehenden Verbote ausartet.

Namentlich ist die Abbildung plastischer Werke durch graphische Darstellung oder umgekehrt nicht als Nachdruck zu betrachten.

§. 31. Die Nachahmung von Werken der Kunst in Industrieerzeugnissen sowie die Nachbildung und Vervielfältigung von Industrieerzeugnissen, sollte auch zur Herstellung der letzteren Kunstfertigkeit nothwendig gewesen sein, fallen nicht unter die Bestimmungen dieses Gesetzes.

§. 32. Als Nachdruck wird ferner nicht betrachtet die Aufnahme von Nachbildungen von Werken der Kunst in literarische Arbeiten, sofern letztere als Hauptsache erscheinen und die Nachbildungen bloß zur Erläuterung des Textes dienen.

§. 33. Die Nachbildung öffentlicher Denkmäler, welche auf Straßen oder öffentlichen Plätzen bleibend aufgestellt sind, wird nicht als Nachdruck behandelt.

§. 34. Copien, Nachbildungen, Abbildungen und Nachahmungen von Werken der Kunst, mögen sie als Nachdruck zu betrachten sein oder nicht, dürfen nicht in der Art vervielfältigt werden, daß dadurch die Verbote der §. 26–29 zum Nachtheil des Urhebers des Originals, beziehungsweise im Falle des §. 27 des Nachbildners, umgangen werden.

§. 35. Durch die Erwerbung des Eigenthums an einem Kunstwerke wird das Recht zur Vervielfältigung nicht erlangt; bei Bildnissen (Portraits) geht jedoch dasselbe auf den Besteller über.

Der Erwerber des Kunstwerkes ist nicht verpflichtet, dasselbe dem Urheber zum Zwecke der Vervielfältigung zu überlassen.

In allen diesen Fällen bleibt besondere Uebereinkunft vorbehalten.

§. 36. Die Vorschriften der §. 26–30 und 34 gelten auch für geographische, topographische, naturwissenschaftliche, architektonische und ähnliche Zeichnungen und Abbildungen, wenn sie auch nicht als Werke der Kunst zu betrachten sind.

Vierter Abschnitt. Folgen des Nachdruckes und Verbreitung nachgedruckter Exemplare.

§. 37. Wer einen Nachdruck ausführt ist, wenn er dabei mit Vorsatz handelt oder sich einer Fahrlässigkeit schuldig macht, jeden einzelnen Beeinträchtigten vollständig zu entschädigen verpflichtet. Trifft den Nachdrucker kein Verschulden, so haftet er für den Schaden nur bis zum Belaufe seiner Bereicherung.

Wer einen Nachdruck vorsätzlich ausführt, wird überdieß mit einer Geldstrafe bis zu 600 Vereinsthalern, an deren Stelle im Falle des Zahlungsunvermögens entsprechende Freiheitsstrafe tritt, und mit Confiscation der ihm gehörigen Nachdrucke bestraft.

Im Falle bloß fahrlässiger Ausführung eines Nachdruckes, sowie dann, wenn den Nachdrucker kein Verschulden trifft, werden die dem Nachdrucker gehörigen Nachdrucke mit Beschlag belegt und nach seiner Wahl entweder bis zum Ablaufe der Schutzfrist aufbewahrt oder ihrer gefährdenden Form entkleidet und ihm dann zurückgegeben.

In allen Fällen werden außerdem die zum Nachdrucke ausschließlich bestimmten Vorrichtungen, wie Formen, Platten, Stereotypabgüsse u. dergl., bis zum Ablaufe der Schutzfrist oder bis sie ihrer gefährdenden Form entkleidet sind, mit Beschlag belegt.

Der Nachdruck ist vollendet, sobald einzelne Nachdrucke ganz oder theilweise hergestellt sind.

§. 38. Werke, welche nach den Bestimmungen dieses Gesetzes als Nachdrucke anzusehen sind, dürfen weder innerhalb noch außerhalb derjenigen Staaten, in welchen dieses Gesetz gilt, verbreitet werden.

Der Verbreiter haftet, wenn er vorsätzlich oder fahrlässig gehandelt hat, unbedingt für den durch seine eigene Handlung veranlaßten Schaden, vorbehaltlich seiner solidarischen Haftung für den durch andere an dem Nachdrucke betheiligte Personen veranlaßten Schaden, sofern eine solche nach allgemeinen Rechtsgrundsätzen begründet ist. Trifft ihn kein Verschulden, so haftet er für den Schaden nur bis zum Belaufe seiner Bereicherung.

Wer mit Nachdrucken wissentlich Handel treibt, wird überdieß gleich dem Nachdrucker in der §. 37 Absatz 2 angegebenen Weise bestraft.

Die den Verbreitern gehörigen Nachdrucke werden, insofern sie der Consiscation nicht unterliegen, mit Beschlag belegt und es wird mit denselben in der im §. 37 Absatz 3 angegebenen Weise verfahren.

§. 39. Ist der zur Entschädigung Verurtheilte unvermögend, dieselbe zu zahlen, so sind die ihm confiscirten Nachdrucke zunächst zur Befriedigung des Verletzten nach richterlicher Schätzung zu verwenden.

Die hierzu nicht erforderlichen Exemplare sind zu vernichten oder können durch den Fiscus veräußert werden, aber, so lange ihnen nicht ihre den Verlagsberechtigten gefährdende Form genommen oder die Schutzfrist nicht abgelaufen ist, nur an diesen und, insofern mehrere Personen gleichzeitig an dem Verlagsrechte betheiligt sind, an den einen nur mit Berücksichtigung der Rechte des andern.

§. 40. Den Eigenthümern der nach §. 37 Absatz 3 und 4 und §. 38 Absatz 4 mit Beschlag belegten Nachdrucke und Vorrichtungen steht es frei, dieselben an den Verlagsberechtigten oder, wenn mehre-

re Personen gleichzeitig an dem Verlagsrechte betheiligt sind, an eine derselben, an letztere jedoch nur mit Berücksichtigung der Rechte der übrigen zu veräußern.

§. 41. Ueber die den Beeinträchtigten gebührende Entschädigung hat das zuständige Gericht nach Maßgabe der in jedem Lande bestehenden Gesetze zu erkennen.

Zweites Hauptstück. Von dem Verbote der Aufführung dramatischer, dramatisch–musikalischer und musikalischer Werke.

§. 42. Es ist verboten, dramatische, dramatisch–musikalische oder musikalische Werke ohne Genehmigung ihres Urhebers, beziehungsweise seiner Rechtsnachfolger, ganz oder theilweise öffentlich aufzuführen oder aufführen zu lassen, so lange sie noch nicht im Buch- oder Musikalienhandel veröffentlicht sind.

Selbst nach einer derartigen Veröffentlichung dürfen dramatische oder dramatisch–musikalische Werke im Ganzen, oder einzelne Acte derselben, sei es auch mit Auslassungen oder einzelnen Veränderungen, nur mit Genehmigung des Urhebers, beziehungsweise seiner Rechtsnachfolger, auf der Bühne öffentlich aufgeführt werden, sofern der Urheber sich auf dem Titelblatte das ausschließliche Recht zu Aufführungen ausdrücklich vorbehalten hat.

§. 43. Die Verbote des §. 42. erstrecken sich auf die ganze Lebenszeit des Urhebers und die ersten zehn Jahre nach seinem Tode.

Bei anonymen, pseudonymen und posthumen Werken beträgt die Schutzfrist zehn Jahre. welche von der ersten Aufführung, beziehungsweise, sofern im Falle des §. 42 Absatz 2 das Werk schon früher im Buch– oder Musikalienhandel veröffentlicht war, vom Erscheinen desselben an laufen. Bei anonymen und pseudonymen Werken tritt jedoch, wenn vor Ablauf dieser Frist der Name des Urhebers durch Eintrag in die Eintragsrolle (§. 51) bekannt gemacht wird, die gewöhnliche Schutzfrist (Absatz 1) ein.

Bei Berechnung dieser Fristen kommt §.19 zur Anwendung.

§. 44. Zur Aufführung der Uebersetzung eines dramatischen Werkes ist weder die Genehmigung des Urhebers des Originalwerkes noch die des Uebersetzers erforderlich, wenn die Uebersetzung bereits im Buchhandel herausgegeben ist. Ist sie noch nicht herausgegeben, so ist zur Aufführung die Genehmigung des Uebersetzers dann nöthig, wenn dieser zur Herausgabe der Uebersetzung berechtigt ist.

Entgegengesetzte Vorbehalte haben keine rechtliche Wirkung.

§. 45. Zur Aufführung eines von mehreren Miturhebern verfaßten Werkes ist die Genehmigung aller erforderlich.

Bei musikalischen Compositionen mit Text, einschließlich der dramatisch–musikalischen Werke, genügt jedoch die Einwilligung des Componisten. Sind dagegen nur einzelne Musikstücke zu einem dramatischen Werke gesetzt, so ist zur Aufführung des letzteren die Genehmigung des Dichters erforderlich, und hinsichtlich der Aufführung der Musik, sei es allein, sei es zusammen mit dem Drama, kommt die Vorschrift des §. 42 Absatz 1 zur Anwendung.

§. 46. Derjenige, welchem der Urheber die Aufführung seines Werkes gestattete, darf, vorbehaltlich besonderer Uebereinkunft, dieselbe beliebig wiederholen. Er kann aber das ihm eingeräumte Recht nicht auf Andere übertragen.

§. 47. Wegen unbefugter Aufführung eines dramatischen dramatisch–musikalischen oder musikalischen Werkes ist dem Berechtigten statt Entschädigung die zu ermittelnde Einnahme von jeder Aufführung, und zwar, wenn der Unternehmer der Aufführung mit Verschulden gehandelt hat, ohne – außer diesem Falle nach Abzug der Tageskosten zuzuerkennen.

Ist das Werk in Verbindung mit anderen aufgeführt worden, so ist unter Berücksichtigung der Verhältnisse ein entsprechender Theil der Einnahme als Entschädigung festzusetzen.

Wenn die Einnahme nicht zu ermitteln oder eine solche nicht vorhanden ist, so wird der Betrag der Entschädigung nach richterlichem Ermessen festgestellt.

§. 48. Derjenige, der zur Aufführung eines mit Text verbundenen Musikwerkes berechtigt ist, darf den Text für sich allein zur Benutzung bei der Aufführung drucken lassen.

Drittes Hauptstück. Allgemeine Bestimmungen.

§. 49. Das ausschließliche Recht des Urhebers zur Vervielfältigung oder Aufführung ist veräußerlich und vererblich.

Es unterliegt jedoch gegen den Urheber selbst nicht der Hülfsvollstreckung.

Ein Heimfallsrecht zu Gunsten des Fiscus oder anderer zu herrenlosen Sachen berechtigter Personen findet nicht statt.

§. 50. Bei Werken, welche durch Druck u.s.w. vervielfältigt sind, gilt bis zum Gegenbeweise derjenige als Urheber, welcher in der ersten Ausgabe als solcher genannt ist.

Ist das Werk anonym oder pseudonym erschienen, so wird derjenige als rechtmäßiger Verleger vorbehaltlich des Gegenbeweises betrachtet, in dessen Verlag das Werk zuerst erschienen ist.

§. 51. Der Urheber oder der Verleger eines Werkes der im §. 50 bezeichneten Art kann das Erscheinen desselben in ein öffentliches hierzu bestimmtes Register (Eintragsrolle) eintragen lassen. Der Eintrag darf nur auf Vorzeigung eines Exemplars des einzutragenden Werkes gemacht werden. Er beweist, daß das Werk zur Zeit des Eintrages erschienen war.

In den Fällen der §. 13 Absatz 2 und §. 43 Absatz 2 geschieht der Eintrag auf Verlangen des Urhebers oder eines hierzu legitimirten Rechtsnachfolgers desselben.

Die Einträge in die Eintragsrolle und die von den Beamten derselben daraus gefertigten Auszüge gelten als öffentliche Urkunden.

§. 52. Wegen Zuwiderhandlungen gegen Bestimmungen des gegenwärtigen Gesetzes kann nur auf Verlangen eines Beeinträchtigten eingeschritten werden.

Die Entscheidung gehört in allen Fällen zur Zuständigkeit der Gerichte.

§. 53. In Bezug auf die Verjährung der Entschädigungsklage und der Strafverfolgung kommen die Landesgesetze zur Anwendung. Die Verjährungsfristen dürfen jedoch fünf Jahre von dem Zeitpunkte an, in welchem der zu Belangende die letzte widerrechtliche Handlung vorgenommen hat, nicht übersteigen.

§. 54. Der Schutz dieses Gesetzes erstreckt sich auf das Gebiet des deutschen Bundes, sowie auf diejenigen nicht zum deutschen Bunde gehörigen Gebietstheile deutscher Bundesstaaten, für welche dasselbe Annahme gefunden hat. Insbesondere stehen die innerhalb dieser Gebiete bei daselbst ansässigen Verlegern erschienenen Werke ausländischer Urheber unter dem Schutze dieses Gesetzes. In wie weit anderen Werken der Schutz dieses Gesetzes zukommt, bleibt besonderen Bestimmungen vorbehalten; als solche sind allgemeine landesgesetzliche Bestimmungen über Gegenseitigkeit nicht zu betrachten.

Uebergangsbestimmungen.

§. 55. Das gegenwärtige Gesetz soll hinsichtlich des Nachdruckes auch bei allen vor dem Beginn seiner Wirksamkeit veröffentlichten Werken, mögen deren Urheber noch leben oder bereits gestorben sein, zur Anwendung kommen, sofern diese Werke in allen oder in einzelnen derjenigen Staaten, in welchen dieses Gesetz zur Geltung kommt, bisher kraft Gesetzes gegen Nachdruck geschützt waren.

Bei Werken solcher genannter Schriftsteller oder Künstler, die vor dem 1. Januar 1837 gestorben sind, dauert jedoch der Schutz gegen Nachdruck bis zum 31. December 1867, sofern dieses Gesetz nicht eine noch längere Schutzfrist gewährt.

Die auf Landesgesetzen beruhenden längeren Schutzfristen sind nicht mehr anwendbar.

War an Werken, welche nach den vorstehenden Bestimmungen unter den Schutz dieses Gesetzes fallen, in einzelnen Staaten nach den bisher dort geltenden Gesetzen das Urheberrecht bereits erloschen, so dürfen die beim Beginn der Wirksamkeit dieses Gesetzes bereits vorhandenen Exemplare solcher Werke gleichwohl in denjenigen Gebieten, in denen es bisher gestattet war, unter der Bedingung weiter verkauft werden, daß deren Vorhandensein den durch Landesverordnungen zu bezeichnenden Behörden binnen einer Frist von drei Monaten angezeigt wird. Diese Behörden haben die vorräthigen Exemplare zu verzeichnen und zur Kenntlichmachung mit einem Stempel zu versehen. Wer diese Vorschriften übertritt, wird auf Verlangen des Berechtigten mit einer Geldstrafe bis zu 50 Vereinsthalern bestraft und seine ungestempelten Exemplare werden bis zum Ablauf der Schutzfrist mit Beschlag belegt.

Auch hinsichtlich der Aufführungen soll dieses Gesetz von dem Tage seiner Wirksamkeit an auf alle älteren Werke angewendet werden, gleichgültig ob dieß eine Ausdehnung oder eine Beschränkung des Schutzes bewirkt.

§. 56. Die vor dem Beginn der Wirksamkeit dieses Gesetzes ertheilten Privilegien bleiben für die betreffenden Länder in Kraft.

Claims of Dominion and the Freedom of the Sea: Diplomatic Tensions between England and Denmark-Norway in the late Tudor Period

*Stefano Cattelan**

Abstract

In the second half of the sixteenth century, Queen Elizabeth I of England (1558-1603) became a staunch supporter of the freedom of the seas, vigorously questioning Iberian closed sea (mare clausum) policies over the "Indian" oceans. At the same time, England faced longstanding Dano-Norwegian claims over the sea areas lying between Norway and Iceland. Even though such claims had weakened during the early sixteenth century, Dano-Norwegian royal decrees continued to prohibit foreign navigation north of Bergen. Frederick II of Denmark-Norway (1559-1588) complained multiple times about English trespassing and attempts to establish the Muscovy trade. Dano-Norwegian claims found new vigour with the accession to the throne of Christian IV (1588-1648). In reaction, the English government initiated a diplomatic exchange with Dano-Norwegian authorities, defending the right of its seamen to sail north to trade and fish, albeit under certain conditions. This paper explores the historical context and the legal arguments employed by English and Dano-Norwegian envoys during these negotiations. What was at stake was the changing balance of power between the two kingdoms, access to trade and fisheries.

Keywords: *Diplomatic history; Early Modernity; mare liberum; mare clausum; Elizabeth I; Denmark-Norway; law of the sea; history of international law.*

1. Introduction

This contribution aims to situate the late sixteenth-century diplomatic intercourse between the kingdoms of Denmark-Norway and England on the subject of navigation and fishing in the Northern Sea (*Mare Septentrionalis*). During the Middle Ages succeeding English monarchs had accepted in bilateral treaties Norwegian (later Dano-Norwegian) closed sea pretensions in the pelagic area extending between Norway and Iceland. However, Elizabeth I of England (1558-1603) and her diplomats openly questioned these long-standing claims in the broader context of English efforts to affirm themselves as a leading maritime actor.

This contribution addresses this issue from a contextual legal historical perspective. Firstly, it does so by investigating the medieval roots to the issue at hand. Secondly, it does so by contextualizing it in the broader phenomenon of European seaborne competition characterizing the turn of the sixteenth century. It takes into consideration both the Dano-Norwegian and English perspectives, studying the legal arguments employed by the parties through the analysis of the relevant primary sources. Thus, the following aims to improve our understanding of an important chapter of European history, which saw England under Elizabeth I Tudor begin its transformation in a leading sea power and the zenith of Dano-Norwegian influence in international relations under Christian IV Oldenburg (1588-1648).

The structure is as follows. First, the medieval premises are outlined, notably the complex interplay between the Nordic Kingdoms, the Hanseatic League and England. Thereafter, the core of the contribution tackles the diplomatic intercourse between London and Copenhagen originated by Dano-Norwegian closed sea policies and the changing English attitude towards them under Elizabeth I (Section II). Lastly, the conclusions highlight the broader significance of this conjuncture of Tudor-Oldenburg diplomacy and the radical changes that occurred soon after (Section III).

2. Medieval balance of power in the seafaring North

2.1 The Nordic Kingdoms and the Hanse

Across medieval Europe, two areas became especially relevant with regard to maritime interactions and the development of embryonic law of the sea rules. Firstly, the Mediterranean Sea to the South, where, from the thirteenth century onwards, the revival of Roman law interacted with the state practice of the maritime republic of Venice and Genoa, which sought to exert their control over adjacent seas. Italian jurists soon discussed the feasibility of acquiring exclusive rights over the sea, namely jurisdiction (*iurisdictio*) and protection (*protectio*) [1]. Secondly, the seas of northern Europe, especially those nowadays known as the Baltic Sea, the Norwegian Sea, and the North Sea proper. A distinction must be made: the Baltic Sea is a shallow and

* Dr. Stefano Cattelan, PhD in the History of International Law (2020), Aarhus University - Department of Law, Denmark.

[1] Raestad, A., *La mer territoriale, études historiques et juridiques.* Paris, 1913, p. 12-13; Calafat, G., *Une mer jalousée, Contribution à l'histoire de la souveraineté (Méditerranée, XVIIe siècle)*. Paris, 2019, p. 34-49.

almost landlocked body of water. Several political entities have always surrounded it, equally depending on its waters for communication purposes and resources exploitation. On the other hand, the North Sea is a more open body of water extending between Norway, the British Islands, and the coasts of the continent. The North and Baltic Seas have always formed a unitary geographical region and a "single maritime trading region"[2]. In a broader meaning, the term "northern seas" can also include the waters between the Scandinavian Peninsula, Scotland and Greenland, the so-called *Mare Septentrionalis* (Northern Sea). Indeed, following the Viking colonisation of the Hebrides and the Shetland Islands, Orkney, Iceland, and Greenland, the geographical horizons of the region reached a new scale[3].

Throughout the Middle Ages, Roman legal thought concerning the sea had a far lower influence outside the Mediterranean, especially in the Nordic countries. However, far from being a "lawless" arena, the northern seas witnessed the development of influential sea laws and codes such as the *Laws of Wisbuy* (Visby)[4]. These legal sources focused on commercial interactions and maritime law issues, such as contracts, shipwreck, and jettison. On the other hand, the jurists of the countries bordering the northern seas were not particularly interested in defining the legal status of the seas. As a result, customary and state practices are especially relevant in understanding the legal developments in Northern Europe[5]. These developments were shaped mainly by the precarious balance of power between two majors actors: the Nordic Kingdoms, on the one hand, notably Denmark and Norway, and the Hanseatic League, on the other. Similarly to the Mediterranean, the legal discourse concerning the sea was deeply interrelated with trade and political hegemony.

From the eleventh century onwards, the Nordic Kingdoms became more centralised and effective entities[6]. They improved their legal-political structure and were able to project their authority over the adjacent seas. Norway represents a fascinating case of study because it developed a special bond with the *Mare Septentrionalis* extending westward along its shores. Its economy depended on local fisheries, especially cod and herring, both for self-supply and export. The bond strengthened when Norse settlers colonised the islands as far as Greenland, which later became "tax lands" directly subjected to the Norwegian Crown[7]. Soon the kings of Norway developed a special interest for the sea area stretching between their territories. Some ancient Norwegian laws, such as the *Gulatingslov* and the *Frostatingslov,* outlined the extension of royal authority over the coastal seas[8]. It should be noted that medieval Nordic people did not conceive the *Mare Septentrionalis* as an unlimited body of water, an open ocean. It appears that they considered it an interior sea surrounded by land on all sides, certain already discovered while others were still unknown. Greenland (*Terra Viridis*) was believed to be somehow connected to north-western Russia. Moreover, since Norwegian kings ruled the vast majority of the shores bordering the Northern Sea, they started to see themselves as "Masters of the Sea" and "Lords of Both Shores"[9].

Diplomatic correspondence and treaties of the time suggest a widespread acceptance of the extension of coastal states jurisdiction over adjacent seas. However, it is not simple to define the exact nature of these prerogatives and their limits. For instance, in 1326, Novgorod and Norway reached an agreement to end a border dispute in the region of Finnmark. In the treaty, the Norwegian king's territory is mentioned as comprising both the lands and the seas under his control[10]. Most likely, the first legal concept introduced across the region was the so-called *protectio*. It involves the idea that the coastal state was under the obligation to protect all vessels from pirates within its "coastal waters". Norwegian rulers claimed and exercised *protectio* along their coasts. They also required other states to do the same. In 1247, for example, King Haakon Haakonsson of Norway (1217-1263) wrote to the city council of Lübeck, protesting because pirates had seized Norwegian merchantmen bound to the Baltic in waters close to the Hanseatic city and supposedly under its jurisdiction[11]. King Haakon retaliated, seizing German vessels in Norwegian ports. He claimed that Lübeck was liable for not protecting Norwegian merchants in its home waters. German envoys begged the king not to blame their town

[2] Meier D., *Seafarers, Merchants and Pirates in the Middle Ages*. Woodbridge, 2009, p. 10; Scammel, G., *Preface*. In: Kirby, D. & Hinkkanen, M-L., *The Baltic and the North Seas.* London, 2000, p. IX-X, p. 11; North, M., *The Baltic. A History.* Cambridge, 2015, p. 1.

[3] Sawyer, P., *The Viking Expansion*. In: Helle, K. (Ed.), *The Cambridge History of Scandinavia, Vol. 1, Prehistory to 1520*. Cambridge, 2003, p. 106-107.

[4] Raestad, *La mer territoriale,* cit., p. 44; Preiser, W., *History of International Law, Ancient Times to 1648*, in *The Max Planck Encyclopedia of Public International Law*, vol. IV. Oxford, 2012, p. 884. See also Frankot, E., *"Of Laws of Ships and Shipmen": Medieval Maritime Law and its Practice in Urban Northern Europe,* Scottish Historical Review Monographs, Nr. 20. Edinburgh, 2012; Jahnke, C., *The Maritime Law of the Baltic Sea*. In: Balard, M. (Ed.), *The Sea in History,* vol. II. Suffolk, 2017, p. 576-584.

[5] Raestad, *La mer territoriale,* cit., p 28; Meier, *Seafarers, Merchants and Pirates*, cit., p. 98-104.

[6] North, *The Baltic*, cit., p. 346. For further details, see Riis, T., *The States of Scandinavia, c. 1390-c. 1536*. In: Allmand, C. (Ed.), *The New Cambridge Medieval History, VII, 1415-1500.* Cambridge, 1998, p. 671-706.

[7] Derry, T. K., *A History of Scandinavia*. London, 1979, p. 48-49; Lewis, A. R. & Runyan, T. J., *European Naval and Maritime History, 300-1500*. Bloomigton, 1985, p. 86-110; Larsen, K., *A History of Norway*. Princeton, 1967, p. 33-240.

[8] The first one was developed in the south-west of the country, the second one in the northern regions. See Theutenberg, J., Mare Liberum et Mare Clausum. In *Arctic*, vol. 37, Nr. 4, 1984, p. 482; Lozzi, A., *Codici e consuetudini nella storia del commercio marittimo. Dal Codice di Hammurabi alle repubbliche marinare*. Milano, 2010, p. 215-217; Larsen, *A History of Norway*, cit., p. 117-119. The original text of these ancient laws is available on the website of the Norwegian National Library: https://www.nb.no/items/b419b872fcc894b62c83d3cce5adc488?page=133.

[9] Theutenberg, *Mare Liberum et Mare Clausum*, cit., p. 482.

[10] Raestad, *La mer territoriale,* cit., p. 49.

[11] For further details, see Grohse, I. P., *The Royal Origins of Norwegian Commercial Diplomacy: King Hákon IV Hákonarson and the Council of Lübeck, 1247-1250*. In: Solórzano Telechea, J. Á., Arízaga Bolumburu, B. & Sicking L. (Eds.), *Diplomacia y comercio en la Europa Atlántica medieval*. Logroño, 2015, p. 61-86; Gade, J. A., *The Hanseatic Control of Norwegian Commerce during the late Middle Ages.* Leiden, 1951, p. 28-33; Raestad, *La mer territoriale,* cit., p. 49.

for acts perpetrated by criminals. The king answered, and a correspondence ensued between the parties[12].

The result of the Norwegian-Lübeck negotiations was the signature of a treaty in 1250. It provided freedom of navigation and trade for the merchants of both parties and mutual help in case of shipwreck[13]. The Norwegian government reached the agreement from a position of strength and it believed that the treaty would prove mutually satisfying. German merchants first arrived in Norway at the beginning of the thirteenth century and became increasingly involved in maritime trade. The thirteenth century is usually viewed as the peak of the Norwegian monarchy in the Middle Ages[14]. King Magnus VI the Law-mender (1263-1280) promulgated the Norwegian Code of the Realm in 1274 (known today as *Magnus Lagabøters Landslov*). It replaced previous regional codes. Interestingly, the code did not mention the seas, probably because it did not seem a significant issue at the time since all islands to the west of Norway were subject to the dominion of the King of Norway[15]. Thus, the *Mare Septentrionalis* could be conceived easily as an internal sea.

However, for a series of historical and dynastic reasons, the international position of Norway gradually weakened in the following decades, starting from Erik Praestehader's reign (1280-1299). In 1290s, German and other foreign merchants controlled the bulk of international trade to and from Norway. In the following century, Norway grew dependent on Hanseatic imports, especially grain to feed a growing population. In exchange, Hanseatic merchants received vast quantities of dried fish, which they then distributed via their sophisticated trading network throughout Europe[16]. Indeed, the Hanseatic League had become a major regional player, able for almost three centuries, to influence the policies of surrounding states and dominate the regional trading system[17]. From an earlier stage, the term *Hansa* identified the associations of German merchants active in the northern trade, who used to join their forces to protect their common interests. From the end of the thirteenth century, the term was used to refer to the loose association of merchant cities located along the Baltic and North Seas. In its prime, it gathered more than a hundred cities[18].

In the mid-fourteenth century, German merchants established a trading centre in Bergen, the famous *Kontor*. From there, they were able to oversee Norwegian trade well into the sixteenth century. They outclassed competitors thanks to their sea power and more developed trading network[19]. Their cumbersome presence periodically caused outbursts of hate in the local population. After his official coronation in 1281, King Erik Praestehader tried to restrict those privileges[20]. In response the Hanseatic cities closed their ports to Norwegian subjects and boycotted all export to Norway, imposing a *de facto* embargo on the country. Already in 1285, the Norwegian king capitulated and signed the Kalmar treaty, which restored and enlarged the privileges enjoyed by German merchants[21]. Another treaty was signed in 1294[22]. It comprehensively addressed the issues related to navigation and trade between Norway and the Hanse. Hanseatic merchants were to enjoy vast liberties, legal immunities, and privileges. However, they were officially forbidden from sailing north of Bergen. Only the subjects of the king of Norway could sail towards Iceland or the fishing districts in Helgeland, Finnmark, and around the Lofoten. Indeed, fisheries exploitation represented one of the primary source of income for the kingdom; therefore, local authorities sought to exclude foreign fishermen and impose a Norwegian monopoly over the rich fishing grounds in northern Norway. Bergen became a staple city and the official gateway to Norway[23]. The Hanse accepted the limitation concerning navigation north of Bergen since it was satisfied by the dominant position achieved within and south of the city. Successive Norwegian rulers confirmed

[12] For the original Latin text, dated 1247-1248, see the online version of the *Diplomatarium Norvegicum*, vol. V, no. 1. For an English translation of the document, see Gade, *The Hanseatic Control,* cit. p. 32-33.

[13] Ibid., vol. V, no. 4

[14] Larsen, *A History of Norway*, cit., p. 157-190.

[15] The *Fisheries* case, ICJ 1951, Counter-Memorial submitted by the Government of the Kingdom of Norway, p. 238. King Magnus broke with his father's assertive foreign policy. He began peace negotiations with King Alexander III of Scotland, which led to the treaty of Perth of 1266. King Magnus ceded the Isle of Man and the Hebrides to Scotland for a substantial purchase sum and an annual fee. In return, Alexander III officially recognised Norwegian rule over the Orkney Islands and Shetland. For the Latin text of the treaty, see *Diplomatarium Norvegicum*, vol. VIII, no. 9. Also relevant was the Urban Code of 1276, which introduced regulations for foreign merchants, see *Norges gamle Love*, I-2, p. 185-290. King Magnus also confirmed the privileges of the merchants "of the German tongue" in 1278, see *Diplomatarium Norvegicum*, vol V. 10. Cf. Larsen, *A History of Norway*, cit., p. 171, p. 178.

[16] Larsen, A History of Norway, cit., p. 172-173; North, *The Baltic*, cit., p. 56; Meier, *Seafarers, Merchants and Pirates*, cit., p. 124-125; Gade, *The Hanseatic Control,* cit. p. 37-38.

[17] For an overview, see Wubs-Mrozewicz, J. & Jenks, S., *Introduction* to *The Hanse in Medieval and Modern Europe*. Leiden, 2013, p. 4-25.

[18] Hammel-Kiesow, R., *The Early Hanses*. In: Harreld, D., *A Companion to the Hanseatic League*. Leiden, 2015, p. 38-39; Nedkvitne, A., *The German Hansa and Bergen, 1100-1600.* Köln, 2014, p. 12; Meier, *Seafarers, Merchants and Pirates*, cit., p. 117; Jenks S., A Capital without a State: Lübeck *caput tocius hanze.* In *Historical Research*, vol. 65, 1992, p. 134-149.

[19] Hammel-Kiesow, *The Early Hanses*, cit., p. 33; Raestad, *La mer territoriale,* cit., p. 50; Davis, R., *English Overseas Trade, 1500-1700*. London, 1985, p. 28.

[20] Norge gamle Love, I/3 n. 13.

[21] *Diplomatarium Norvegicum*, vol. V, no. 13.

[22] Ibid., V, no. 21, 23.

[23] Bruns, F., *Die Lübecker Bergenfahrer und ihre Chronistik*. Berlin, 1900, p. IV; Nedkvitne, *The German Hansa and Bergen*, cit., p. 310; Helle, K., *Die Rechtsstellung der Deutschen in Bergen während des Mittelalters*. In: Wernicke, H., & Jörn, N. (Eds.), *Beiträge zur hansischen Kultur, Verfassungs und Schiffahrtsgeschichte*, Weimar, 1998; Raestad, *La mer territoriale,* cit., p. 49; Theutenberg, *Mare Liberum et Mare Clausum*, cit., p. 482; Wubs-Mrozewicz, J., *Traders, Ties and Tensions. The Interaction of Lübeckers, Overijsslers and Hollanders in Late Medieval Bergen*. Hilversum, 2008, p. 40-41.

Hanseatic privileges in 1305-1306, 1343, 1361, 1376, 1398, 1445, 1455, 1471, 1486, 1489 and 1498[24].

The "Bergen limit", renewed in 1313 and 1348, applied to all foreigners. Therefore, it is not surprising to find it mentioned in the diplomatic intercourse between England and Norway (later Denmark-Norway). English rulers repeatedly accepted the limitation on navigation imposed by the Nordic kings. For instance, Henry VI of England, under the pressure of his uncle the King of Norway, promulgated in 1429 a statute forbidding his subjects from navigating north. It officially admitted the validity of Norwegian pretensions, also ensuring trespassers' punishment[25]. In 1432, similar dispositions were included in a treaty between Norway and England[26]. A new treaty signed in 1450 between Henry VI and Christian I, ruler of the Kalmar Union repeated similar dispositions. The treaty aimed at appeasing Norwegian protests against English breaches of their pelagic area of dominion north of Bergen. In the second part of the treaty, Henry banned his subjects from sailing towards *Islandiam, Halgalandiam, & Finnemarchiam,* reiterating the acceptance of Norwegian claims[27]. The same provision is contained in a later treaty of 1465, which nonetheless specified that the English could demand a special licence (*speciali licentia*) to sail north unhindered. Without it, they risked the confiscation of all goods and even death[28].

Only in 1490, King Henry VII of England and John (Hans) of Denmark-Norway signed a treaty that allowed English vessels to sail towards *Tyle* (Iceland) for purposes of trade and fishing[29]. The treaty does not refer to Northern Norway, presumably in the understanding that the area would remain closed to the English. Moreover, even then, the freedom to access Icelandic waters was not granted unconditionally. The authority of the Nordic king over the *Mare Septentrionalis* was still acknowledged in the treaty. English seafarers had to request and obtain licenses from Dano-Norwegian authorities, "Proviso semper quod, lapso septennio post datam præsentium immediate currente, licentiam novam a Nobis & Successoribus nostris petant et obtineant", then renovating them every seven years: "ut sic, de septennio in septennio, mercatores & omnes predicti nos & Successores nostros, in impetratione novæ licentiæ, inperpetuum recognoscant"[30]. The matter of the licences would eventually become an incandescent dossier at the end of the sixteenth century when English merchants and sailors systematically avoided renewing them (see infra section 3.2). In conclusion, medieval Norway developed two different maritime policies. On the one hand, a strict *mare clausum* policy governed the seas north of Bergen, deemed a Norwegian interior sea. On the other, south of Bergen Norwegian kings upheld the freedom of the sea and assured their protection to foreign merchantmen[31].

2.2 The Dano-Norwegian Union and England on the threshold of Modernity

Norwegian claims of *dominium maris septentrionalis* thus became an acknowledged fact in Northern Europe. Other regional powers did not protest against such claims, recognising them in several international treaties[32]. However, it should be noted that Norwegian claims covered a maritime area that was not busily trafficked and thus could be more easily tolerated. Moreover, the effectiveness of such claims was often minimal due to geographical and technological reasons, especially in the distant Icelandic waters[33]. At the end of the fourteenth century, the Crowns of Denmark and Norway entered a personal union under Olaf the Young (1380-1387) and later his mother Margaret I (1387-1412). Norway, being the least populated of the kingdoms, became the junior partner[34]. Indeed, Denmark had emerged as the wealthiest among the Nordic territorial states and posed the greatest threat to the hegemonic position of the *Hansa*[35]. Several factors caused the rise to prominence of the kingdom in European affairs. In particular, the Danish Crown ruled over territories strategically located in order to dominate the narrow waterways connecting the Baltic and the North Seas. From West to East, the Skagerrak, the Kattegat, and then the narrowest segments: the Sound (*Øresund*), the Great and Little Belts[36]. The Sound, lying between the Scandinavian Peninsula and the island of Zealand, was the best suited for navigation.

In the narrowest point, between the Danish town of Helsingør (Elsinore) and Helsingborg (nowadays in Sweden), the

---

[24] 1305-1306: *Diplomatarium Norvegicum*, vol. V, no. 47, 51; 1343: *Diplomatarium Norvegicum*, vol. VIII, no. 151; 1361: *Norge gamle Love*, I/3, no. 92; 1376: *Diplomatarium Norvegicum*, vol. VIII, no. 199; 1398: *Diplomatarium Norvegicum*, vol. V, no. 382; 1445: *Norge gamle Love*, II/1, no. 136; 1455: *Norge gamle Love*, II/2 no. 63; 1471: *Norge gamle Love*, II/2, no. 127; 1486: *Diplomatarium Norvegicum*, vol. VI, no. 601; 1489: *Norge gamle Love*, II/3, no. 45; 1498: *Norge gamle Love*, II/3, no. 123.

[25] The statute is dated 21 September 1429, in *Diplomatarum Norvegicum*, vol. XX, no. 779.

[26] Treaty signed on December 24. The text is reported in *Norges gamle Love*, p. 135.

[27] "Conventio inter Henricum VI, Regem Angliæ, & Christiernum I Regem Daniæ; 9 Avril 1450", in Dumont J., *Corps universel diplomatique du droit des gens…*, Amsterdam, chez Brunel, P. & [etc.], 1726-31, Tome III, Partie I, p. 571. The Kalmar Union was a personal union between the kingdoms of Denmark, Sweden, and Norway between 1397 to 1523, albeit not continuous. See Bagge, S., *Cross and Scepter: The Rise of the Scandinavian Kingdoms from the Vikings to the Reformation*. Princeton, 2014, p. 248-268

[28] "Tractatus Ligæ, Confæderationis & Amicitiae inter Eduardum IV, Regem Anglić, & Christiernum I Regem Daniæ; 20 November 1465". Ibid., p. 586.

[29] "Tractatus Pacis inter Henricum VII, Regem Angliæ, & Johannem Regem Daniæ et Sueciæ; 20 Janvier 1490", Ibid., Tome III, Partie II, cit., p. 245.

[30] Ibidem. See also Raestad, *La mer territoriale*, cit., p. 61.

[31] The *Fisheries* case, ICJ 1951, Counter-Memorial submitted by the Government of the Kingdom of Norway, p. 237.

[32] Raestad, *La mer territoriale,* cit., p. 61.

[33] Lockart, *Denmark*, p. 102.

[34] Larsen, *A History of Norway*, cit., p. 198.

[35] Sarnowsky, *The Golden Age of the Hanseatic League*. In: *A Companion to the Hanseatic League*, cit., p. 64.

[36] See Brüel, E., *International Straits. A Treatise on International Law: The General Legal Position of International Straits* (vol. I). London, 1947, p. 17-35. For a detailed overview of the Danish straits and their political history, see idem, *International Straits. Straits Comprised by Positive Regulations* (vol. II). London, 1947, p. 11-105.

Sound is only four kilometres in width and could easily be closed off by a determined navy and fortifications built on both sides of the strait. Therefore, Denmark could regulate navigation through the Sound, using the channel "as a commercial valve, regulating the ingress and egress of Baltic shipping, as it desired"[37]. King Eric of Pomerania (ruled *de facto* 1412-1439) built the imposing Kronborg Castle in the narrowest point of the Sound and introduced the Sound Dues (*Øresundtolden*) in 1429. All ships passing through the Sound had now to pay dues to the Danish Crown, securing a substantial and stable income for the kingdom of Denmark[38]. However, it also provided a source of never-ending quarrels with the other seafaring nations, especially the Hanse and later England and the Netherlands[39]. The legal status of the Sound was considered close to that of a stream dividing Danish territories, and therefore subject to Danish jurisdiction. Following Danish kings maintained and augmented the tolls; however, at times exemptions from the tolls were granted if external pressures and geopolitics made it unavoidable[40]. In the same historical conjecture, the Hanseatic hold on Baltic trade and navigation started to weaken. The Hanse had always been a loose association of towns. At a certain point, carrying out common policies became increasingly harder, and disunity prevailed[41]. The structure itself of the Hanse was ill-suited for the upcoming challenges of the Modern Age[42]. In other words, as the Baltic-North Sea route became one of the busiest in the world, the relevance of the kingdom of Denmark increased accordingly. The control over the Sound allowed the kings of Denmark to profit hugely from Baltic trade and to exert considerable influence across the region, at times attaining the *dominium maris Baltici*[43]. However, Danish claims in the Baltic remained primarily political in nature, depending on the strength of each Danish ruler and the contingent historical and political conjecture.

Compared to Norway, late medieval England did not develop extensive claims over its coastal waters[44]. Nonetheless, English authorities exercised jurisdiction along their coasts to fight piracy and protect peaceful commerce. Institutions such as the Cinque Ports and the English Admiralty saw the light in those times. Before and during the Hundred Years' War between England and France (1337-1453), the kings of England held extensive dominions in northern and western France, controlling both shores of the English Channel[45]. Although a few Plantagenet kings styled themselves as Lords of the Sea, the title largely remained and was probably intended to be symbolic and related to the personal prestige of the monarch[46]. A series of late medieval international agreements confirms English authorities' inclination towards the freedom of navigation and fishing along their coasts as a cardinal principle. Indeed, the fisheries "were not appropriated" and fishermen from Flanders, Picardy, Normandy and elsewhere took an active part in the fishing activities without paying licenses or being subjects to particular limitations. In 1351 and 1353, for example, King Edward III of England signed two treaties, with the king of Castile and the seafaring towns of Portugal, granting them freedom of fishing around the coasts of his kingdom[47]. The same applies with regard to the so-called "Burgundy treaties", a series of agreements signed between England and the rulers of Flanders during the fifteenth century. In exchange for commercial and political concessions, the English promised not to oppose Flemish herring fishing activities. In particular, the treaty known as *Intercursus Magnus,* signed on 24 February 1496, remained a reference throughout the Tudor period for the relations between England and the Low Countries[48]. Hence, English state practice inclined towards the freedom of the sea; however, a diplomatic tradition saw English kings acknowledging Norwegian *mare clausum* pretensions in the *Mare Septentrionalis*. In section 3.2

[37] Lockart, P. D., *Denmark, 1513–1660, The Rise and Decline of a Renaissance Monarchy.* Oxford, 2007, p. 2; Meier, *Seafarers, Merchants and Pirates*, cit., p. 124.

[38] Brüel, *International Straits*, II, cit., p. 33. For an overview, see Rubin, M., Sundtoldens Afløning. In: *Historisk Tidsskrift*, 7 Række, VI. København, 1906; Degn, O. (Ed.), *The Sound Toll at Elsinore, Politics, Shipping and the Collection of Duties 1429-1857*. Chicago, 2018.

[39] Sarnowsky, *The Golden Age of the Hanseatic League*, cit., p. 90; Lockart, *Denmark,* cit., p. 2. For an overview, see Olesen, J. E., *"The Right Usual Waterway"*. In: *The Sound Toll at Elsinore, Politics, Shipping and the Collection of Duties 1429-1857*", cit., p. 29-36.

[40] Olesen, *"The Right Usual Waterway"*, cit., p. 33-41. Especially Christian I (1448-1481), first ruler of the Oldenburg dynasty, showed interest in the Sound tolls. In 1452, he banned foreign navigation in the Great Belt in order to maximise the Sound tolls' revenues in Elsinore.

[41] Raestad, *La mer territoriale,* cit., p. 61; Pelus-Kaplan, M. L., *De la Hanse aux trois grands ports hanséatiques de Lubeck, Hambourg et Bręme: une mutation dans les rapports de forces maritimes en Baltique et Mer du Nord aux XVIe et XVIIe siĕcles*. In: Buchet, C. & Le Bouëdec, G., (Eds.) *The Sea in History,* vol. III, Woodbridge, 2017, p. 51-63.

[42] North, M., *The Hanseatic League in the Early Modern Period*, in *A Companion to the Hanseatic League,* cit. p. 102; Brüel, *International Straits,* II, cit., p. 19-20; Brand, H., *The Diplomatic Resolution of the Sound Conflicts between the Habsburg Netherlands, Denmark and the German Hanse, 1510-1532*. In: *The Sound Toll at Elsinore*, cit., p. 193-225.

[43] Lockart, *Denmark,* cit., p. 2; Jespersen, K. J. V., *A History of Denmark*. London, 2011, p. 125-127. See also Childs, W., *Commerce and Trade*. In: *The New Cambridge Medieval History*, VII, cit., p. 145-160.

[44] Raestad, *La mer territoriale,* cit., p. 39.

[45] The English maintained the control of the French port of Calais until 1558. See Black, J., *The British Seaborne Empire*. New Haven, 2004, p. 22-23.

[46] See, for instance "Directives by King Edward III of England as Lord of the English Sea, 1336", in Grewe, W. G., *Fontes historiae iuris gentium*, vol. I. Berlin-New York, 1992, I, p. 680; "Ordinance by King John of England relating to the Ceremonial of the Sea, 1201", ibid., p. 679. Cf. Fulton, *The Sovereignty of the Sea.* London-Edinburgh, 1911, p. 6-7; Wade, T. C., The Roll *de Superioritate Maris Angliae*. The Foundation of the Stewart Claim to the Sovereignty of the Sea. In: *British Year Book of International Law*, 1921-1922, p. 99.

[47] "Traitè conclu entre Edouard III. Roi d'Angleterre & les Députés des Villes Maritimes du Royaume de Castille & du Comté de Biscaye, 1351", in Dumont, *Corps universel diplomatique*, Tome I, Partie II, cit., p. 265-267; "Traité de Commerce entre Edouard III Roi d'Angleterre & les Députés des Villes Maritimes du Royaume de Portugal, 1353", ibid., p. 286.

[48] "Tractatus Pacis & Commercii inter Henricum VII Regem Angliae & Philippum Ducem Austria & Burgundiae conclusus, datum Londini 24 Februarii 1495", ibid., Tome III, Partie II, p. 321.

we will assess the consequences that the union between Norway and Denmark, centred on Copenhagen, had on the claims over the distant waters between Iceland and Norway, already difficult *per se* to police.

3. Elizabeth I and the denial of *mare clausum* policies

3.1 Iberian claims over the oceans

During the fifteenth century, the Iberian kingdoms of Portugal and Castile sponsored expeditions that challenged the open waters of the Atlantic Oceans, hoping to reach the Far East. In the process, they established new oceanic sailing routes, which radically changed the course of history. The oceans emerged as a radically new object of legal discussions and political manoeuvres. From the beginning, Portuguese and Castilian monarchs sought to exclude other Europeans from oceangoing navigation and from accessing the East and West Indies. They employed various legal arguments based on pontifical donation, prior discovery, occupation, war, and prescription. Throughout the fifteenth century, popes granted to Portugal and Spain exclusive rights to explore and colonise across the Atlantic Ocean and beyond. In 1494, Castile and Portugal signed the famous treaty of Tordesillas, which normalised their, up until that time, difficult relations. It divided the Atlantic Ocean into two spheres influence and colonial expansion[49].

For almost half a century, the other European countries seemed to acquiescence the Iberian duopoly. Spain and Portugal rigorously enforced their exclusive rights with the might of their navies. Navigation to their new possessions without a royal license was punishable by death and confiscation of goods. Tudor England in particular only slowly entered the arena of oceanic expansion. During the 1550s, a diplomatic intercourse began between England and Portugal concerning navigation towards Brazil and Guinea. Already in 1555, the Portuguese ambassador in London complained with Queen Mary I of England (1553-1558) because some Englishmen had sailed to San Jorge da Mina in Guinea. The envoy claimed that they had not only violated Portuguese maritime monopoly in the region under the pretext of trade, they had also brought havoc to the region[50]. Queen Mary in reaction banned English navigation towards Guinea and Brazil throughout her reign. Nonetheless, many Englishmen continued to sail clandestinely[51].

This state of affairs progressively changed with Elizabeth I's accession to the English throne in 1558. The new Protestant queen later became a vocal supporter of the freedom of the seas during her long rule (1558-1603). In April 1561, a Portuguese envoy lamented widespread English depredations on Portuguese shipping, asking the queen to stop these ventures and to punish the perpetrators. The envoy focused on English trade attempts and depredations across Portuguese West African *mare clausum*, recapitulating the legal arguments in favour of his monarch's exclusive rights[52]. The English government replied that it had not authorised any pillage of Portuguese property, and that it would address the issue. However, the English side lamented the ill treatment given to their traders and their exclusion from trade[53]. Lusitanian envoys insisted, asking the queen to issue a decree, to be announced in all English harbours, banning her subjects from navigating towards Portuguese conquests[54]. Shortly after, Elizabeth I complied. However, for the first time, she stated it was unfair for her subjects to be forbidden to sail freely[55].

In the following years, the diplomatic intercourse went on, Portuguese envoys employing their arsenal of legal arguments to defend their claim of a pacific and uncontested monopoly on navigation along the sea routes they had "discovered" and the right to exclude other nations[56]. The English Privy Council now changed its position: it acknowledged that Englishmen had to respect Portuguese vessels and stay clear of Portuguese colonies. However, they began to question the nature of the ban on navigation towards Guinea and Brazil, especially when Englishmen were sailing towards regions devoid of a significant Portuguese presence[57]. In several cases, the Privy Council complained that the Portuguese treated English traders as pirates. The Portuguese envoys repeatedly restated the validity of their exclusive titles[58].

---

[49] For the text and its English translation, see Davenport, F. G., *European Treaties Bearing on the History of the United States and its Dependencies to 1648*. Washington, 1917, doc. 9, p. 84. For an overview, see Cattelan, S., Iberian Expansion over the Oceans: Law and Politics of *Mare Clausum* on the Threshold of Modernity (XV-XVI Centuries). In: *Historia et ius,* no. 18, December 2020, p. 1-28; Benton, L., *A Search for Sovereignty, Law and Geography in European Empires, 1400-1900.* Cambridge, 2012, p. 104-161.

[50] "Reclamação que dirigio o Embaixador de Portugal em Londres, Diogo Lopes de Souza contra alguns Inglezes que tinhão ido á Costa da Mina, 1555" in de Barros y Sousa, M. F., *Quadro elementar das relações politicas e diplomaticas de Portugal…*, vol. XV. Lisboa, 1865, p. 94-96.

[51] "Carta da Rainha Maria d'Inglaterra…, December 18, 1555", ibid., p. 96; "Ordem da Rainha Maria d'Inglaterra, dada em Conselho, prohibindo aos vassallos Inglezes irem á Guiné e ã Mina por serem estes paizes da Coroa de Portugal, July 1556", ibid., p. 99-100.

[52] "Mensagem d' EIRei de Portugal, á Rainha d'Inglaterra contra os Inglezes que ião á Guiné…, April 1561", Ibid., p. 104-106. See also *Calendar of State Papers Foreign: Elizabeth,* vol. 3, 8 April 1561, n. 97-98, p. 54.

[53] "Resposta do governo Inglez ás reclamações do enviado Portuguez, dada em 8 d'Abril", ibid., p. 106-110.

[54] Ibid., p. 110.

[55] "Salvo-conducto da Rainha Isabel, ordenando aos Inglezes que não perturbassem os Portuguezes…, 24 April 1561", ibid., p. 112; "Ordem da Rainha Isabel expedida ao Lord Almirante d'Inglaterra, 1 May 1561", ibid., p. 114; "Carta da Rainha Isabel a EIRei D. Sebastião…, 22 November 1561", ibid., p. 115; *Calendar of State Papers Foreign: Elizabeth,* vol. 3, 24 April 1561, no. 138, p. 78.

[56] *Calendar of State Papers Foreign: Elizabeth,* vol. 5, 20 May 1562, no. 28, p. 41-42; "Exposição do Embaixador de Portugal em Londres, dirigida á Rainha Isabel…", in *Quadro Elementar*, cit., p. 123; "Que assim o mesmo Rei tinha a faculdade pelo Direito das Gentes (*Ius Gentium*), de prohibir a todos a navegação daquelles paizes por importar isto não só aos rendimentos d'ElRei" in "Replica do Embaixador de Portugal em Londres á resposta dada pelo Conselho Privado da Rainha…, 7 June 1562", ibid., p. 130; *Calendar of State Papers Foreign: Elizabeth,* vol. 5, 7 June 1562, n. 158, p. 76.

[57] "Resposta do Conselho Privado á Memoria apresentada pelo Embaixador de Portugal, 15 June 1562", ibid., p. 135.

[58] For instance, see "Replica á resposta dada em nome da Rainha d' Inglaterra ao Embaixador de Portugal, 19 June 1562", in *Quadro Elementar*, cit., p. 137-150; *Calendar of State Papers Foreign: Elizabeth,* vol. 5, 19 June 1562, n. 222, p. 107.

Only in a reply to a Portuguese envoy dated 1564, Elizabeth I clearly stated that her subjects held the right to sail freely towards all those regions which were not under direct Portuguese control. She would only accept the exclusion of her subjects from Lusitanian overseas bases[59]. The idea that the oceans constituted free highways and lied outside the control of the Iberian powers was growing more influential in Elizabethan diplomatic circles. Although Anglo-Portuguese diplomacy remained tense until the end of the 1570 s, the parties managed to keep alive the official state of peace, albeit constellated by mutual acts of violence on the high seas. Trade embargoes and projects of treaties of amity alternated in rapid succession in the 1560 s and 1570s[60]. Nevertheless, in 1580 this diplomatic entanglement came to an abrupt end when Philip II of Spain succeeded to the last Portuguese king of the House of Aviz in 1581 and the Iberian Union came into being[61]. Immediately, the Anglo-Portuguese relationship was absorbed into the struggle between Elizabeth I and Philip II, and an outright English opposition to Portuguese closed sea policies ensued[62].

Indeed, since the 1560 s, Philip II's Spanish envoys in London complained against English trade-cum-plunder expeditions. The exploits of Francis Drake on the Iberian closed seas in particular constituted a flagrant violation of King Philip II's pretensions in the western Atlantic and Pacific oceans, claims that the queen now refused to recognise[63]. When in 1580, Drake returned from his trip around the world, the queen received him "graciously" in William Camden's words and even knighted him[64]. Bernardino de Mendoza, the Spanish resident ambassador in London (1578-1584), repeatedly complained about Drake's depredations. Elizabeth I replied that the Spaniards had violated the "Law of the Nations" in preventing other nations from sailing towards the Americas and trading there peacefully. In her opinion, the Spaniards had drawn the mischief on themselves doing so. She rejected Iberian titles of possession, especially pontifical donation:

> "The queen does not acknowledge that her subjects and those of other nations may be excluded from the Indies on the claim that these have been donated to the king of Spain by the pope, whose authority to invest the Spanish King with the New World as a fief she does not recognise. The Spaniards have no claim to property there except that they have established a few settlements and named rivers and capes. This donation of what does not belong to the donor and his imaginary right of property ought not to prevent other princes from carrying their commerce in those regions or establishing colonies there in places not inhabited by the Spaniards. Such action would in no way violate the law of nations, since prescription without possession is not valid"[65].

The chronicler William Camden reported that the queen shifted her attention to the ocean after refusing to accept Spanish titles over the Indies. She affirmed that her subjects were entitled to sail the vast ocean freely, "seeing that the use of the Sea and Air is common to all"[66]. In her opinion, nations, as well as privates, could not acquire exclusive titles over the ocean, "forasmuch as neither Nature, nor publick use and custome permitteth any possession thereof"[67]. Thus, the Queen of England invoked the law of nature and alluded to the freedom of the sea, notably to the Roman law notion of the sea as a *res communis omnium* contained in the *Corpus Iuris Civilis*[68].

3.2 Elizabeth I and Dano-Norwegian claims

3.2.1 New English activities in the North

The "Indian" oceans were not the only issue at stake. While questioning Iberian oceanic policies, Elizabeth I also faced the longstanding Dano-Norwegian claims over the *Mare Septrentrionalis*[69]. The latter had never been easily enforceable because of geographical realities, especially the vast distances involved and the indentation of the Norwegian coasts, covered by thousands of inlets and fjords. The many times the ban on foreign navigation North of Bergen was restated points the difficulty encountered by local authorities in enforcing it. To a certain extent, Dano-Norwegian pretensions had grown weaker after the pawn-

---

[59] "Resposta do Conselho da Rainha d'Inglaterra á representação do Enviado de Portugal Ayres Cardoso, 24 November 1564", ibid., p. 161-162; *Calendar of State Papers Foreign: Elizabeth,* vol. 7, 24 November 1564, no. 820, p. 250.

[60] For instance, see the articles of agreement in *Calendar of State Papers Foreign: Elizabeth,* vol. 9, 27 December 1571, n. 2191, p. 579; ibid., vol. 10, 1 January 1572, n. 1, p. 1.

[61] Elliott, J. H., *Imperial Spain, 1469-1716,* London, 2002, p. 268-274; Escamilla, M., *Le siècle d'or de l'Espagne, apogée et déclin, 1492-1598*. Paris, 2015, p. 581-596.

[62] Escamilla, *Le siècle d'or de l'Espagne,* cit., p. 615; Disney, A. R., *A History of Portugal and the Portuguese Empire: From Beginnings to 1807*. Cambridge, 2009, p. 198-220.

[63] Theuthenberg, *Mare Liberum et Mare Clausum*, cit., p. 490.

[64] William Camden, *The history of the most renowned and victorious Princess Elizabeth, late queen of England: containing all the most important and remarkable passages of state, both at home and abroad (…) during her long and prosperous reign,* vol. II. London, 1675, p. 254.

[65] "Queen Elizabeth of England to the Spanish Envoy in London, Mendoza in 1580", in Grewe, *Fontes Historiae Iuris Gentium,* vol. II, cit., p. 151. Cf. Theutenberg, *Mare Liberum et Mare Clausum*, cit., p. 490.

[66] Camden, *The history of the most renowned and victorious Princess Elizabeth*, II, p. 254.

[67] Ibidem. She was referring to the Roman law distinction between private and public property.

[68] The *Institutiones* outlined four categories of things (*res*): *res publicae, res universitatis, res nullius* and *res communes* (Inst., 2, *De rerum divisione*). For the latter category, see Marcian's fragment included both in the *Digest* (D., 1. 8. 2) and in the *Institutiones* (I., 2. 1. 1) which referred to the air, the sea and the shore: "Et quidem naturali iure omnium communia sunt haec: aer, aqua perfluens et mare; et per hoc litora mari". English translation by J. B. Moyle: "Thus, the following things are by natural law common all: the air, running water, the sea, and consequently the sea-shore", in *Institutes of Justinian*. Oxford, 1911, p. 19. It is debated whether or not the list intended to be exhaustive. The category was defined by a "negative" characteristic: their use could not be denied to others. However, their legal status remained nebulous especially concerning the distinction between *res communes* and *res publicae*. See Scherillo, G., *Lezioni di diritto romano, le cose, Parte prima: Concetto di cosa, cose extra patrimonium*. Milano, 1945, p. 87-88

[69] Theutenberg, *Mare Liberum et Mare Clausum*, cit., p. 490.

ing of Orkney and Shetland to Scotland in 1468[70]. Moreover, the centre of power of the Dano-Norwegian monarchy being Copenhagen, the Northern Sea was not the foremost concern of the royal court. The Reformation, civil wars, and dynastic troubles in the 1520s and 1530s made it even more problematic to project effective governance in the northern periphery of the Oldenburg conglomerate[71]. Thus, foreign merchants started to sail North of Bergen to trade and fish, bypassing the staple city of Bergen and its *kontor.*

In 1523, Sweden permanently seceded from its intermittent dynastic union with Denmark and Norway. In reaction, the union between Norway and Denmark became tighter and increasingly dominated by the latter[72]. For the next two centuries, the control of the Sound became pivotal in the "grand strategy" of early modern Dano-Norwegian kings, together with the rivalry for the *dominium maris Baltici* with the rising power of Sweden. At the same time, the Hanseatic League, and especially Lübeck, lost its hegemonic role in Baltic politics and trade[73]. In this context, Englishmen discontinued the payment of the fishing-navigation licences provided for in the fifteenth-century treaties[74]. Nonetheless, Dano-Norwegian royal decrees, for example, in 1524 and 1536, restated the prohibition on foreign navigation north of Bergen[75].

Then in the 1550s, English explorers searching for the North-East Passage discovered the route leading to the White Sea after the circumnavigation of northern Norway, establishing a new maritime link with north-western Russia[76]. In 1553, the expedition lead by Sir Hugh Willoughby and Henry Chancellor reached Moscow with a letter from King Edward VI for the Tzar, containing an invitation to establish diplomatic and trade relations. When they returned to England in 1554 they brought with them the Tzar's invitation to stipulate a treaty[77]. In 1555, the Muscovy Company was founded to pursue trade with Russia and further explore the North. News of these developments reached Christian III (1534-1559) of Denmark-Norway, who gave mandate to the governors of Bergen and Trondheim to acquire more information[78].

The following king of Denmark-Norway, Frederick II (1559-1588), who expanded the Dano-Norwegian Navy and was keen on maritime matters, became increasing wary of English activities in the North[79]. In 1562, Erik Rosenkrantz, governor of Bergenhus wrote to the king asking whether he should exact tolls from the English[80]. In 1564, the king sent an envoy to Elizabeth I complaining about English trade with Russia as well as un-licensed fishing near Iceland. Dano-Norwegian authorities felt threatened by the appearance of Dutch, English and French vessels in the far north, deep into the pelagic area they continued to claim as a *mare clausum*[81]. While engaged in the Seven Years War (1563-1570) against Sweden, Frederik II avoided to raise this question or to take sharper measures, also because of the small scale of English trade in the 1560s. Besides, in 1570, the Tzar temporarily revoked the privileges of the Muscovy Company and ordered the confiscation of English goods. Only in 1573 the Muscovy trade resumed. At the same time, English fishermen appeared in the rich fishing grounds of Finnmark, and in reaction the local Norwegian commander in Vardohus was ordered by the king to arrest trespassers[82].

In 1576, English expeditions to the North increased and soon new Dano-Norwegian complaints reached Elizabeth I. In 1577, she asked Frederick II to appoint commissioners and open direct negotiations on the matter. She also asked that pending the negotiations her subjects should be allowed to trade with Russia, Frederik II conceded it temporarily, "without prejudice to his right"[83]. The instructions laid down to the English envoys stated that no references to old treaties supposedly

---

70 Crawdford, B. E., The Pawning of Orkney and Shetland: A Reconsideration of the Events of 1460-9. In: *The Scottish Historical Review*, vol. 48, Nr. 145, 1969, p. 35-53; Larsen, *A History of Norway*, cit., p. 220.

71 Lauring, *A History of the Kingdom of Denmark*, cit., p. 134-146.

72 In 1536, Norway's status was reduced to that of a province. Ibid., p. 128-133; Lockart, *Denmark*, cit., p. 44-45; Bagge, *Cross and Scepter: The Rise of the Scandinavian Kingdoms from the Vikings to the Reformation*, cit., p. 260-268; Skumsrud Andersen, M. & Neumann, I. B., The Danish Empire and Norway's Place Therein. In: *Scandinavica - International Journal of Scandinavian Studies*, vol. 54, Nr. 1, p. 10-29.

73 Jespersen, *A History of Denmark*, cit., p. 14-17; Lockart, *Denmark,* cit., p. 107-109.

74 See *supra* section 2. 2.

75 For the texts, see *Diplomatarium Norvegicum*, VII, p. 606, p. 749; "Traité fait entre Frederic II. Roi de Danemarc & c., & les Villes Anseatiques, 25 juillet 1560", in Dumont, *Corps universel diplomatique*, Tome V, Partie I, cit., p. 67-76. In 1523, Danish magnates deposed King Christian II (1513-1523) in the wake of domestic rebellions and international tensions. His uncle Frederick I (1523-1533) ascended to the Dano-Norwegian throne and transitioned the Union to Protestantism. Then, in 1534-1536, the Counts' Feud saw different factions within the Oldenburg state fighting for the succession to the late king. See Lockart, *Denmark,* cit., p. 11-28; Lauring P., *A History of the Kingdom of Denmark*. København, 1999, p. 125-144; Grewe, W. G., *The Epochs of International Law*. Berlin-New York, 2000, p. 131.

76 L. Laursen, *Danmark-Norges Traktater 1523-1750. Med dertil hørende Aktstykker*, vol. II. København, 1912, n. 31, p. 612. For an overview, see Gerson, A. J., Vaughn, E. V. & Deardorff, N. R., *Studies in the History of English Commerce in the Tudor Period*. New York, 1912, p. 1-25; Markley, R., *The Far East and the English Imagination, 1600–1730*. Cambridge, 2006, p. 80-81; Baron, S. H., Muscovy and the English Quest for a North East Passage to Cathay (1553-1584). In *Acta Slavica Iaponica*, vol. 3, 1985, p. 1-17; Willan, T. S., *The Early History of the Russia Company, 1553–1603*. Manchester, 1956; Salomon Arel, M., *English Trade and Adventure to Russia in the Early Modern Era: The Muscovy Company, 1603–1649*. Lanham, 2019.

77 Laursen, *Danmark-Norges Traktater 1523-1750*, cit., p. 612.

78 Ibid., p. 613.

79 Lockart, *Denmark,* cit., p. 105-106; Glete, J., *Navies and Nations: Warships, Navies and State-Building in Europe and America, 1500-1860*. Stockolm, 1993, I, p. 130-135; Lind, H. D., *Fra Kong Frederik den Andens Tid: Bidrag til den dansk-norske Sŏrmagts Historie*. Copenhagen, 1902. On Frederik II's biography, see Grinder-Hansen, P., *Frederik 2: Danmarks renæssancekonge*. København, 2013.

80 Laursen, *Danmark-Norges Traktater 1523-1750*, cit., p. 614.

81 Lauring, *A History of Denmark*, cit., p. 150-151.

82 Laursen, *Danmark-Norges Traktater 1523-1750*, cit., p. 615.

83 Ibid., p. 616.

limiting English navigation towards Russia had been found in English archives (especially those dated 1432 and 1465), and thus the Muscovy trade should not be prevented. At the same time, the Privy Council acknowledged the limitations concerning Iceland contained in the 1490 treaty[84]. The envoys were also to underline how these voyages towards Russia had already been going on under the reign of Edward VI and Mary I (1447-1553; 1553-1558) without significant hindrances, representing by then a "trade of long continuance"[85]. The Dano-Norwegian envoys were instead instructed to show the original versions of the treaties of 1432 and 1465 where it was clearly stated that English subjects were to stay clear of Northern Norway if not expressly authorised (*licentia speciali*) by the Dano-Norwegian authorities. From a Dano-Norwegian perspective these treaties included, *a fortiori*, Russia since it stood beyond northern Norway; the English of course disagreed on this point[86].

3.2.2 The Treaty of Handerslev (1583)

In August 1577, the two parties held in Hamburg a series of meetings without reaching an agreement[87]. The Dano-Norwegian commissioners agreed with their English counterparts that the sea was free and common for all humankind as a general principle. However, they stated that such a general principle could be modified or extinguished by treaties, use, and prescription[88]. After reading the text of the old treaties to the counterparts, they demanded the respect of the "old confederations" and thus the end of English expeditions towards Northern Norway and Russia (based on the treaties of 1432 and 1465, among others) and the renewal every 7 years of the fishing licences concerning Iceland (based on the 1490 treaty)[89]. Besides, the Danish envoys highlighted that the new sailing route was detrimental to the Sound tolls levied on the traditional Baltic route, a matter of grave importance for their king. The English replied based on the principle of the freedom of the sea under the law of nations, also questioning the interpretation of those treaties and referring to later agreements. Besides, they insisted that the letter of the treaties read by the Danes did not include Russia, and that English traders wanted to trade only there and not in Norway[90]. Moreover they stated that the English had been forced to open an alternative route because of the constant increase of the Sound tolls[91]. Although the Danes were ready to compromise on Iceland fisheries, they did not do so since the English would not renounce to their Muscovy trade. They also refused to discuss a possible diminution of the Sound tolls because it had not been the object of the previous preliminary correspondence and therefore they had no instructions in that regard[92].

Two years later, the Dano-Norwegian monarch complained about English "piratical activities" in "his own" waters. On two separate occasions some Lubeckers and Norwegians had been captured while on their way to Iceland. Since they had duly paid licences to the king, he considered them under his protection[93]. In the early 1580s the issue of English trade flared up again, once a series of Russian defeats in the Eastern Baltic against Sweden and Poland-Lithuania temporarily closed off the Baltic route to Russia. The Dano-Norwegian government feared that even more English and Dutch merchants would take the northern route and reflected on whether to ban the navigation altogether or to exact tolls[94]. In 1582, Frederick II wrote to Elizabeth I, the King of Scotland, Dutch and German cities reaffirming his exclusive dominion over the sea area between Iceland and Norway and asking them to stop their subjects from sailing north. More concretely, he ordered the equipment of a military fleet under admiral Erik Munk to patrol the *Mare Septentrionalis*[95]. The fleet was eventually composed by only three vessels, and although it captured four Dutch ships, it did not dare to engage the English, which were well armed and sailed in convoy[96].

However, Frederick II had no real interest in escalating the situation and in 1582 he wrote again to Elizabeth I in conciliatory terms, suggesting that her subjects could be allowed to sail to Russia in exchange for a fee in recognition of Dano-Norwegian dominion in the region[97]. In this context, the English diplomat Peregrine Bertie travelled to Denmark to invest Frederick II with the Order of the Garter in 1582. The real purpose of the mission was soothing the king to obtain better treatment for the English merchants. During the Summer of 1583, the two parties opened new negotiations in the Danish town of Haderslev[98]. Once again, the English envoys claimed that Frederick II had no right to exclude their countrymen from the open sea,

---

[84] The Queen asked the Lord Keeper to find the "old treaties" which were relevant to the dispute, see *Calendar of State Papers Foreign: Elizabeth,* vol. 12, 9 July 1577, p. 4.

[85] Ibid., 20 July 1577, n. 28, p. 18-19; Laursen, *Danmark-Norges Traktater 1523-1750*, cit., p. 619.

[86] Laursen, *Danmark-Norges Traktater 1523-1750*, cit., p. 615-616. Traktaten 3 Okt. 1465: "Item mercatores Anglicani, stante illo termino, non debeant versus Islandiam, Halgalandiam et Finnemarchiam (…) navigare".

[87] *Calendar of State Papers Foreign: Elizabeth,* vol. 12, August 1577, n. 171, p. 126; Laursen includes the original Latin text of document resuming the arguments of the two parties, in *Danmark-Norges Traktater 1523-1750*, cit., p. 628-631.

[88] Laursen, *Danmark-Norges Traktater 1523-1750*, cit., p. 618; Raestad, *La mer territoriale*, cit., p. 77-78.

[89] Ibid., p. 620.

[90] Ibidem.

[91] Ibid., p. 621.

[92] Ibidem.

[93] *Calendar of State Papers Foreign: Elizabeth,* vol. 12, 5 February and 22 February 1579, n. 577-578, p. 428-429. The King lamented that these pirates were well connected to members of her court.

[94] Laursen, *Danmark-Norges Traktater 1523-1750*, cit., p. 622.

[95] Ibidem.

[96] Ibid., 624.

[97] Ibidem.

[98] Camden, *The history of the most renowned and victorious Princess Elizabeth*, III, p. 274; Raestad, *La mer territoriale*, cit., p. 78.

which was common to all under natural law. They argued that English ships only wished to cross the sea to Russia and did not visit Norwegian ports. Moreover, the English pointed out that England did not pretend exclusive rights over its own straits and coastal seas[99].

The Dano-Norwegian side instead argued that Norway had long acquired dominion over all the shores of the Northern Sea (for more than 600 years they argued) and could, therefore, claim the sea area between Iceland and Norway. If any rule of natural law prescribed the commonality of the sea, in this particular case it had been superseded by the law of nations practice[100]. Moreover, Roman-imperial law did not apply in the Nordic kingdoms if not incorporated into local laws. The Danes also insisted that the alternative northern route endangered the Sound tolls (essential to the monarchy, which had always held the right to tax goods coming from and to the Baltic)[101]. Eventually the envoys reached a compromise agreement, signing a treaty on 22 June 1583, by which both parties moved away from their principled positions[102]. English ships active on the Muscovy trade could now lawfully sail through:

"the North seas to the port of St. Nicolas (*in Russia*); and if they be compelled by tempest or other violent means, they may safely enter into any port of Norway or Iceland, even those that by former conventions between the Kings of England and Denmark were prohibited, and may there stay and depart at convenient times for their commodity, so as they do not traffic in any of the prohibited parts of Norway or Iceland without the king's special licence nor offer any injury to the inhabitants and abstain from all manner of evil-doing"[103].

Significantly, in the treaty Frederick II referred to the issue at hand as "de navigatione per Oceanum nostrum septentrionalem Moscoviam versus ad sinum seu portum Divi Nicolai"[104]. In exchange for this concession (*in recognitionem prædictæ concessionis*), English merchants accepted to pay an annual fee to the Dano-Norwegian Crown: "100 rose-nobles (*nobiles rosatos*) during the continuance of this grant, the first payment to begin in the spring, 1584 […]. This award shall be duly observed during the lives of both princes, but after the decease of either of them it shall be lawful to leave it, without breach of any former league"[105]. Besides, Elizabeth I agreed on banning the trade of arms to Russia in case of Dano-Russian hostilities[106]. The treaty stated that the payment would occur each year in Elsinore, where the Sound tolls where levied[107]. Hence, even though the Danes compelled Elizabeth I to formally acknowledge Dano-Norwegian pretensions over the *Mare Septentrionalis,* English merchants obtained the right of passage they coveted[108]. However, the agreement was understood to last as long as the respective rulers, Elizabeth I and Frederick II, lived. Unfortunately, the Nordic ruler died soon after, in 1588.

3.2.3 The conference of Bremen (1602)

Dano-Norwegian claims found new vigour with the accession to the throne of the late king's son, Christian IV (1588-1648), especially after he began his personal rule in 1596. In the first decades of his reign he was considered as one most powerful rulers in northern Europe and the standard-bearer of the Protestant cause[109]. He strengthened the Dano-Norwegian navy, personally overseeing shipbuilding processes, the creation of a modern arsenal in Copenhagen and leading his fleet personally into battle[110]. At the same time, he reinforced the Danish grip over the Sound. A substantial portion of his personal wealth originated in the Sound tolls, which he augmented multiple times to exert influence and wage economic warfare. In the first decades of his reign, he actively preserved Danish predominance across the Baltic Sea (*dominium maris Baltici*)[111]. However, his determination to lead a vigorous foreign policies was often impaired by the internal constitutional arrangement of the Dano-Norwegian monarchy[112].

[99] Laursen, *Danmark-Norges Traktater 1523-1750*, cit. p. 625.
[100] Raestad, *La mer territoriale*, cit., p. 78; Laursen, *Danmark-Norges Traktater 1523-1750*, cit. p. 625.
[101] Laursen, *Danmark-Norges Traktater 1523-1750*, cit. p. 626.
[102] For the whole Latin text of the agreement, see Ibid., p. 632-638.
[103] *Calendar of State Papers Foreign: Elizabeth*, vol. 17, 22 June 1583, n. 382, p. 411-412, my italics. Laursen, *Danmark-Norges Traktater 1523-1750*, cit. p. 637.
[104] Laursen, *Danmark-Norges Traktater 1523-1750*, cit. p. 636.
[105] *Calendar of State Papers Foreign: Elizabeth*, vol. 17, 22 June 1583, n. 382, p. 411-412. See also *Fisheries* case, ICJ 1951, Counter-Memorial submitted by the Government of the Kingdom of Norway, cit., p. 240.
[106] Laursen, *Danmark-Norges Traktater 1523-1750*, cit. p. 635.
[107] Ibid., p. 637.
[108] The terms of the agreement were rather general and Queen Elizabeth issued a new document regulating its implementation. See *Calendar of State Papers Foreign: Elizabeth,* vol. 18, 12 October 1583, n. 162, p. 139-140. For the Latin text, see Laursen, *Danmark-Norges Traktater 1523-1750*, cit., p. 642-644.
[109] Lockart, *Denmark,* cit., p. 127-147. For further details, see Mikkelsen, B., *Christian IV: A Pictorial Biography*. Copenhagen, 1988; Lauring, *A History of the Kingdom of Denmark*, cit., p. 151-154; Bering Liisberg, H. C., *Christian IV, Danmarks og Norges konge*. Kjøbenhavn, 1890; Scocozza, B., *Christian 4*. København, 1987.
[110] On the close relationship between Christian IV and his navy, see Bellamy, M., *Christian IV and his Navy*. Leiden, 2006, p. 9-25. See also Glete, J., *Warfare at Sea, 1500-1650: Maritime Conflicts and the Transformation of Europe*. London, 1999, p. 53, p. 126-129; Zickermann, K., *Across the German Sea. Early Modern Scottish Connections with the Wider Elbe-Weser Region*. Leiden, 2013, p. 28-29.
[111] Bellamy, *Christian IV and his Navy*, cit., p. 25-34.
[112] Since the Middle Ages, Danish monarchs had had to share power with the higher aristocracy represented by the state council (*rigsråd*) in a system often defined as a diarchy, which lasted until the establishment of the absolute monarchy in 1660. The state council held veto power on state expenditures and was wary of new taxes and expensive foreign wars. The Sound tolls were instead direct appanage of the Danish monarchs. They could employ them freely to finance their initiatives. Nonetheless, frictions between kings and the state council on financial and political matters occurred, especially in the second half of Christian IV's reign. For a comprehensive overview, see Lockart, *Denmark,* cit., p. 6-123.

In the late 1590s, he reaffirmed Norwegian closed sea policies in the pelagic area between Iceland and Norway as "lord of both shores" and "master of the sea". In 1597, he sent ambassadors to London complaining about English violation of Norwegian *mare clausum* concerning fisheries in Iceland and northern Norway. He demanded that "the fishing should be lawfully and regularly managed according to the ancient Leagues"[113]. Dano-Norwegian diplomats once again referred to the fifteenth-century treaties under which England acknowledged Dano-Norwegian *mare clausum* as the legal regime in the North[114]. In 1599, Christian IV personally led a royal fleet to northern Norway, capturing several Englishmen. Some of them were Muscovy traders, while others were fishing close to Norwegian coasts without royal licences[115].

In 1600, Norwegian authorities were still detaining a group of fishermen from Hull. The Queen of England wrote to his Dano-Norwegian homologue complaining about their mistreatment[116]. She noted that seagoing fishing (*maris piscatione*) was free under the law of nations as well as the customs of all nations, "Jure Gentium omniumque Nationum moribus libera". She also claimed the right of her subjects to visit Norwegian harbours for trade and take refuge from storms[117]. In the same year, Dano-Norwegian and English diplomats convened in Embden to discuss the disputed issue of navigation without achieving significant results[118]. The English noted that previous Dano-Norwegian kings had stopped asking for the payment of licences and that the "fault of the omission was not in the English, but in the Danes"[119]. They also invoked ancient privileges. Moreover, they stated that "the famousest lawyers have given their opinion" in favour of the idea that the sea "is free and common by the Law of Nations, and cannot be engrossed by any prince whatsoever"[120].

On the other hand, Dano-Norwegian commissioners reaffirmed their traditional position. The English chronicler William Camden remarked that Elizabeth's envoys complained that the Danes had left in haste the negotiations because they aimed at the "continuation of things in the same state they then were, that they might every day at their pleasure exact new customs on the English in the straight called *Oresund*, confiscate their ships and goods by new orders and decrees, and wholly prohibited their fishing in the open Northern Ocean, and their navigation by that sea into *Moscovia*"[121]. Therefore, as already under Frederick II, two different maritime issues, the crossing of the Oresund and navigation towards the "Northern Ocean", constituted the primary source of frictions between the two kingdoms. Indeed the two dossiers were deeply connected since the Danish court feared that the new route around Northern Norway could compete with the Oresund, undermining the exaction of tolls in Elsinore[122]. Indeed, it was far easier to exact payments on vessels transiting the Sound than it was in Northern Norway.

After ongoing diplomatic contacts, the parties convened again in the German city of Bremen in the winter of 1602[123]. The level of detail of the instructions laid down by the secretary of state Robert Cecil to the English envoys underlines the relevance of the matter[124]. In the context of the promotion of long-range English trade, the prospects of securing a direct route to Russia remained attractive[125]. Firstly, the commissioners were instructed to convince the Danes not to focus too much on those ancient treaties that were not favourable to England. Secondly, they were told to promote the interests of English merchants crossing the Sound, who were: "verie much abused there, as well by a daily increase of exactions, as also by the uncertainties of the duties required, with taking light occasions to stay them, searching their ships, and confiscating their goods"[126]. Thirdly, English envoys were to negotiate a solution to the issue concerning navigation in the Northern Sea, noting that: "it is a very unreasonable servility to which our merchants (of the Muscovy Company) are tied"[127]. Firstly, they were to underline that some ancient treaties had allowed free navigation to the English across the "King's Seas" (of Norway). Secondly, they should refer to the customs of the other seafaring nations:

"In the Straights of England, Spaine and the Adriatique Gulf, esteem the Sea as common for passage, it being a high strained Soverantie to loke for such a Power over another Monarch in a Sea of such dimension as is between his Countries and Island, when it is well known that none of our ships do ever come within the sight of land"[128].

---

[113] Camden, *The history of the most renowned and victorious Princess Elizabeth*, IV, p. 539.
[114] Ibidem.
[115] Fulton, *The Sovereignty of the Sea*, cit., p. 108-109.
[116] "A Regina ad Regem Daniæ, super piscatione in alto mare, 1600", in *Foedera*, cit., VII, 2, p. 3.
[117] Ibidem. "Cum igitur maris usus ad piscationem littorum vero ac portuum ad negotationem exercendam, ac tempestatum vim declinandam, amicorum principum subditis negari plerumque non solent".
[118] Camden, *The history of the most renowned and victorious Princess Elizabeth*, IV, p. 594-595. Camden suggests that the Queen asked for an arbitration, however, Christian IV refused.
[119] Ibidem.
[120] Ibidem.
[121] Ibid., IV, p. 595-596.
[122] Raestad, *La mer territoriale*, cit., p. 77.
[123] Camden, *The history of the most renowned and victorious Princess Elizabeth*, IV, p. 649.
[124] "Instructions aux Ambassadeurs pour traiter avec ceux du Roi de Danemarc, 1602", in Rymer. T., *Foedera, conventiones, literæ, et cujuscunque generis acta publica, inter reges Angliæ et alios quosvis imperatores, reges, pontifices, principes, vel communitates* (…). Hagæ Comitis, 1742, VII, 2, p. 25-31.
[125] Fusaro, M., *Political Economies of Empire in the Early Modern Mediterranean: The Decline of Venice and the Rise of England 1450-1700*. New York, 2015, p. 183; Baron, "Muscovy and the English Quest for a North East Passage to Cathay (1553-1584)", cit., p. 1-17; Willan, *The Early History of the Russia Company, 1553–1603*, cit.
[126] "Instructions aux Ambassadeurs pour traiter avec ceux du Roi de Danemarc, 1602", in Rymer, *Foedera*, cit., VII, 2, p. 26.
[127] Ibid., p. 27.
[128] Ibidem.

Therefore, the 1602 instructions underlined how vast the area claimed by Denmark-Norway was, viewing it as an open ocean more than an inland sea. Moreover, the text specified that English vessels did not travel in sight of the coast, somehow creating a link between acceptable legal claims and the limit of sight from the coast. The envoys had to point out how excessive it would be to claim "sovereignty" in a way to limit another sovereign's powers on the high seas [129]. The envoys were granted the power to threaten similar obstacles to navigation "upon all ships of his country that shall pass throw anie of our channels, or about our Kingdoms Dominions and Islands" [130]. The instructions made various references to the dynastic troubles of the Danish Crown in the sixteenth century and that it was Dano-Norwegian fault if the payment of the seven-year licences had stopped. The English side also believed that some diplomatic correspondence, "the King's oun Letters of 85", had allowed fishing in the northern waters. Therefore, the predecessors of Christian IV had relinquished their rights [131]. The English complained that Dano-Norwegian authorities were now trying to reassert themselves on the northern seas by brute force, and reference was made to incidents involving English vessels. The law of nations was again referred to as a basis for English argumentation:

"And you shall further declare that the Lawe of Nations alloweth of fishing in the sea every where, as also of using ports and coasts of Princes in amitie for commerce, and avoiding danger of tempests; so that if our men be barred therof, it should be by some contract: We acknowledge none of that nature, but rather of conformity with the Lawe of Nations in these respects, as declaring the same for the removing of all clayme and doubt; so that it is manifest by denying of this fishing and much more, for spoyling our Subjects for this respect, We have been injured against the Lawe of Nations, expreslie declared by contract, as in the aforefaid Treaties, and the King's oun Letters of 85" [132].

Concerning the matter of licences, where it was hard to deny that previous English sovereigns had yielded on the point, the instructions affirmed that:

"If our Predecessors yelded thereunto, it was more than by Law of Nations was due, yelded perhaps upon some special consideration, yet growing out of use it remained due by the Law of Nations, what was otherwise due before all contract; wherefore by omitting licence, it cannot be concluded in any case, that the right of fishing, due by the Lawe of Nations, faileth" [133].

Hence, even if past treaties had limited the English freedom to navigate and fish, they went against the prescribed legal status of the sea under the law of nations. The instructions further noted that "sometimes in speech", Denmark-Norway claimed dominion over the pelagic area between Norway and Iceland, on the basis that it controlled the opposite shores. However, the English government believed that such legal right could not be held over such a vast area [134]. Only oversight (*protectio*) and jurisdiction (*iurisdictio*) could extend over the immediate coastal seas. In any case, navigation (passage) and fishing had to be permitted [135]. The logical conclusion of English argumentation being that Dano-Norwegian authorities should protect Englishmen instead of harassing them.

The English government took as a counter-example its own policies in the seas surrounding the British Islands. Interestingly enough, they also referred to Venetian practice in the Adriatic Sea. The English argued that even the Venetians, who held effective control over the Adriatic, allowed fishing and navigation [136]. The intention was to underline the exceptional degree of limitation of other nations' liberty claimed by Christian IV. At this point, the English government considered excessive those maritime claims that, extending far beyond shores, would make the sea not common anymore. On this, the Elizabeth I could not yield as a matter of principle: "We cannot with our Dignitie yeld that our subjects absolutelie be forbidden those seas ports or coasts for the use of fishing, negotiation and safetie", especially considering that the queen had already opposed similar *mare clausum* claims from the Iberian countries: "neither did We ever yeld anie such right to Spaine and Portugall for the Indian Seas Havens" [137]. Nevertheless, the envoys were still given the room of manoeuvre to reach an agreement with the Danes on lower scale limitations if need be:

"Yet yf our good Brother the King upon speciall reason maie desire diat we yeild to some renuinge of licence, or that some speciall place upon some speciall occasion, be reserved to his particular use in yours disretion, for Amitie sake, you may yeld thereunto; but then to define the manner of seking licence in such sort as it be not prejudiciall to our subjects" [138].

It is worth noting that in the instructions to the English envoys of 1602 we find references both to Venetian state practice in the Adriatic Sea and to Iberian claims over the oceans [139].

[129] Ibidem. Indeed, if for Christian IV it was a matter of royal-dynastic prestige and reputation too see his predecessors' claims recognised, the same applied to Elizabeth I's refusal to do so too overtly.
[130] Ibid., p. 28.
[131] Ibidem: "In this King's Great Grandfather and Grandfather's time there was never made anie mention thereof".
[132] Ibidem.
[133] Ibidem.
[134] Ibidem.
[135] Ibidem.
[136] Ibidem.
[137] Ibid., p. 29.
[138] Ibidem.
[139] For the almost contemporary diatribe concerning Venetian primacy in the Adriatic Sea, see Cattelan, S., Paolo Sarpi and the Defence of Venetian Dominion over the Adriatic Sea, c. 1600-1625. In *Comparative Legal History*, 9(2), 2021, forthcoming; Pezzolo, L., The Groom of the Sea. Venetian Sovereignty Between Power and Myth. In Davies, J. D., James, A., Rommelse, G. (Eds), *Ideologies of Western Naval Power, c. 1500-1815*. London, 2019, p. 23-27; Bin, A., *La Repubblica di Venezia e la questione adriatica 1600-1620*. Roma, 1992; Cessi R., *La Repubblica di Venezia e il problema adriatico*. Napoli, 1953.

Not by chance, this occurred in English legal argumentation. Since the Middle Ages, the geographic location of England prompted the insular kingdom to interact with the Iberian Peninsula, the Nordic countries, but also Mediterranean polities such as Venice and Genoa[140]. In this case, these references served to underpin English legal argumentation in favour of the freedom of the seas, arguing that "even" the Venetians did not deny the freedom of navigation to other nations, and that the queen had already refused to recognise Iberian pretensions over the oceans. Therefore, she could not accept Dano-Norwegian claims of the same nature. Besides, the instructions demonstrate that Roman law arguments also became more prominent among Elizabethan diplomats.

In conclusion, the 1602 document perfectly exemplifies the English line of argumentation at the end of the Tudor dynasty in favour of the freedom of the sea. It also shows the elasticity with which certain limitations of the freedom of navigation were still deemed acceptable to reach a compromise with Christian IV[141]. Indeed, England could not contemplate a full-scale conflict with another prominent protestant ruler while the Anglo-Spanish naval struggle lasted[142]. However, the Bremen conference did not achieve tangible results and the diplomatic manoeuvring went on in the following months[143]. However the death of Elizabeth I in March 1603 ended it abruptly for the time being[144].

4. Concluding observations: *mare liberum* before Hugo Grotius?

During Elizabeth I's eventful reign, the legal argumentation in favour of the freedom of the sea became instrumental in boosting both English maritime trade and international standing. This approach was consistent with traditional English policies concerning the fisheries located along the kingdom's coasts. It became apparent to the English government that trade and overseas-settlements in the Indies could be pursued only if Portuguese and Spanish closed sea policies were set aside. The same applied to the promising Muscovy trade, whaling and fishing across the "Dano-Norwegian Seas". Pelagic spaces needed to become a shared highway if the English (soon British) seafarers were to unleash their full potential as a maritime nation[145]. In the broader context of Elizabethan rejection of closed sea policies should also be read the "letters patent" conceded by the queen from the 1560 s onwards[146]. For instance, in 1578, she instructed Sir Humfrey Jilberte to explore the North Atlantic "to discover, finde, search out, and view such remote, heathen and barbarous lands, countries and territories not actually possessed of any Christian prince or people". Even though he was still required to avoid territories already possessed by other Christian princes (notably Spain), he was instructed to defend himself "as well by sea as by land" if anybody presumed to limit its rights of navigation and discovery[147]. The charter granted to Sir Walter Raleigh in 1584 included similar dispositions[148].

Thus, decades before Hugo Grotius' *Mare liberum* (published in 1609), Elizabeth I's diplomats employed legal arguments based on the freedom of the sea in the diplomatic arena[149]. Firstly, they alluded to the original commonality of the sea under the law of nations and Roman law. Secondly, they denied the value of the symbolic occupation of sea areas non effectively controlled, whether by the Iberians in the Indian seas or by the Dano-Norwegians in the North. However, it is true that at the turn of the seventeenth century the idea of the freedom of the sea remained underdeveloped in doctrine and mostly confined to the world of politics and diplomacy[150]. Undoubtedly only with Grotius's *Mare liberum* the principle reached a resounding doctrinal exposition, immediately followed by a further polarisation of the opposing opinions on the legal status of the sea[151].

It must be noted that already during Elizabeth I's reign another tendency appeared among English seafaring circles. Starting from the 1570s, pamphleteers started to advocate the English Crown's right to extend its sovereignty over the surrounding seas. For instance, in 1577, John Dee published the volume *General and Rare Memorials pertayning to the Perfect Arte of Navigation*, where he proposed a more forceful approach to the

[140] On the other hand, geography made it complicated for states such as Venice and Denmark to maintain stable diplomatic and trade intercourses.

[141] For the report (dated 1 December 1602) given by the English envoys to the Privy Council on the negotiation with the Danish counterpart, see Rymer, *Foedera,* VII, 2, cit., p. 53-58. The envoys also sent a letter to Robert Cecil, ibid., p. 59. For the reply from the Privy Council to the envoys in Bremen, see ibid., p. 60.

[142] The same applied to Christian IV, who had his hands full with Baltic and northern German affairs.

[143] "Regina ad Regem Daniæ", in Rymer, *Foedera,* VII, 2, cit., p. 33, p. 38; "Rex Daniæ ad Reginam", ibid., p. 34-36, p. 44.

[144] The Privy Council immediately informed the English envoys in Bremen of Elizabeth I's death. Ibid., p. 63.

[145] For an overview, see Black, *The British Seaborne Empire*, cit.; Haggerty, S., *Actors of maritime trade in the British Atlantic: from the "Sea Dogs" to a Trading Empire*. In: *The Sea in History,* vol. III, cit., p. 350-359; Engerman, S. L., *The keys to British success: trade as a motor and sea as a centre*, ibid., p. 466-474.

[146] See, for instance, "Commission to Thomas Stucley to command and discipline the crews of five ships upon a voyage of discovery to Terra Florida, 1563", in Marsden, R. G., *Documents Relating to the Law and Custom of the Sea, 1205-1767,* London, 1915-1916, vol. I, p. 175-176.

[147] "Letters patent to Sir Humfrey Gylberte June 11, 1578", ibid., p. 222.

[148] "Charter to Sir Walter Raleigh, 25 March 1584", available online in the collection of the *Avalon Project, Documents in Law, History and Diplomacy*: http://avalon.law.yale.edu/16th_century/raleigh.asp.

[149] Fulton, *The Sovereignty of the Sea*, cit., p. 105.

[150] Potter, P. B., *The Freedom of the Sea in History, Law and Politics.* London, 1924, p. 51-56. The sixteenth-century scholar who came closer to enounce the freedom of the sea was a renown scholar from Spain, Fernando Vázquez y Menchaca (1512-1569). See idem, *Controversiarum illustrium aliarumque usi frequentium libri tres* [1564], edited and translated in Spanish by Rodríguez Alcalde. F., Valladolid, 1931-1934, II, 89.

[151] The most recent edition of Grotius' booklet is Feenstra, R. & Vervliet, J. (Eds.), *Hugo Grotius Mare Liberum, 1609-2009: Original Latin Text and English Translation*. Leiden, 2009. See also van Ittersum M. J., *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615*. Leiden, 2006; Thornton, H., Hugo Grotius and the Freedom of the Seas. In: *International Journal of Maritime History*, vol. 16, Nr. 2, 2004, p. 17-38.

"British Seas", especially with regard to taxing foreign fishermen "within the royal limits and jurisdiction". In Dee's opinion, even though navigation was free, coastal fisheries pertained to England [152]. However, these voices remained a minority until the King of Scotland James VI Stuart inherited the throne of England in 1603 as James I (1603-1625). He immediately made clear his ambition to control the waters surrounding his kingdoms, namely to deal with the Dutch fishermen's omnipresence. As early as 1604 he created the King's Chambers, jurisdictional zones aimed at protecting British neutrality at sea [153]. A few years later, he claimed a preferential title upon coastal fisheries, demanding foreign fishermen to pay licences [154].

However, James VI-I managed to preserve a level of understanding with the Netherlands. His personal ties with Christian IV, who was his brother in law, helped to smooth the persisting frictions in the northern seas with Denmark-Norway [155]. Throughout his reign English and Scottish seafaring circles continued to deplore the Dutch pillaging the halieutic resources of the "British seas" [156]. Pamphleteers vocally called for the exclusion of Dutch fishermen from the seas surrounding the British islands, or at least the taxation of their activities [157]. In the following years, Anglo-Dutch tensions continued to accumulate under Charles I, who in 1635 had his claims of dominion enshrined in John Selden's treatise *Mare Clausum seu de dominio maris libri duo* [158]. The Dutch systematically defended their freedom of navigation and fishing, referring to the freedom of sea as advocated by Grotius' *Mare liberum* [159]. The dispute eventually escalated in the three bitter Anglo-Dutch Wars of the second half of the seventeenth century. What was really at stake was the place of leading European maritime and trading nation of the Modern Age [160].

In the meanwhile, Denmark-Norway continued to lay claim to portions of the *mare septentrionalis*. However, the ambitious Christian IV turned its attention to contain Sweden and imperial politics in Germany. Starting from the 1610s, he engulfed his kingdoms in a series of conflicts that proved ultimately ruinous fro the Oldenburg states. Controlling navigation in the far North became even more difficult for his over stretched navy, which needed to maintain its precarious superiority in the Baltic, while defending the Sound and the core Danish islands [161]. The entry of Denmark in the Thirty Years's War in 1625 undermined the Danish economy and ended abruptly in defeat against the imperial forces at the battle of Lutter. In 1643, Swedish forces invaded Denmark from the South during the Torstenson war, which left the Jutland peninsula in ruins. Later conflicts against Sweden confirmed Dano-Norwegian inferiority vis-à-vis the professional military apparatus built by King Gustavus Adolphus (1611-1632) and his successors [162]. However, the Dano-Norwegian maintained a slight superiority at sea, which nonetheless could not be considered a *dominium maris Baltici* anymore [163].

In this context, Dano-Norwegian claims of *dominium maris septentrionalis* progressively dwindled during the seventeenth century, while the Oldenburg kings were on the defensive on all fronts face to the Swedish Empire. The Dutch and the English disputed among themselves the fisheries of the *Mare Septentrionalis,* which constituted only a minor theatre of their global competition at sea. In the Baltic, they would no more allow Denmark to close the Sound or to hold the flow of Baltic trade in its grip. Thus, they supported at times Denmark or Sweden in order to keep the Sound open to trade and to avoid leaving one of the Nordic kingdom in possession of both shores of the Sound [164]. The balance of power in Northern Europe had decisively turned against Denmark-Norway.

[152] John Dee, *General and Rare Memorials pertaining to the Perfect Arte of Navigation*, London, 1577. Cf. Fulton, *The Sovereignty of the Sea*, cit., p. 99-101.

[153] Declaration of jury of the Trinity House as to the limits of the King's Chambers", Appendix E (State Papers, Domestic, James I, vol. 13, no. 11, 1605), reported in Fulton, *The Sovereignty of the Sea,* cit., p. 754.

[154] "Proclamation of James I for the restraint of foreigners fishing on the British coasts, issued on 6th May 1609", Appendix F, reported in Fulton, *The Sovereignty of the Sea,* cit., p. 756.

[155] For an overview, see Murdoch, S., *Britain, Denmark-Norway and the House of Stuart, 1603-1660*. East Linton, 2000, p. 22-43.

[156] van Ittersum, M. J., *Mare Liberum* versus the Propriety of the Seas? The Debate between Hugo Grotius (1583-1645) and William Welwood (1552-1624) and its Impact on Anglo-Scotto-Dutch Fishery Disputes in the Second Decade of the Seventeenth Century. In *Edinburgh Law Review*, vol. 10, Nr. 2, 2008, p. 239-276, p. 240-243; Fulton, *The Sovereignty of the Sea*, cit., p. 352; Anand, R. P., *Origin and Development of the Law of the Sea, History of International Law Revisited.* The Hague-Boston-London, 1983, p. 100-101.

[157] Davies, G., *The Early Stuarts, 1603-1660*. Oxford, 1959, p. 51-52; Edmundson, G., *Anglo-Dutch Rivalry during the First Half of the Seventeenth Century*. Oxford, 1911.

[158] John Selden, *Mare clausum seu de dominio maris libri duo*, London, 1635. An English translation by Marchamont Nedham appeared in 1652: John Selden, *Of the Dominion, or Ownership of the Sea. Two Books. Translated into English and set forth with some Additional Evidences and Discourses*, London, 1652.

[159] Boxer, C. R., *The Dutch Seaborne Empire*, 1600-1800. London, 1965, p. 90-91; Anand, *Origin and Development of the Law of the Sea,* cit., p. 96; Poot, A., *Anglo-Dutch Relations. A Political and Diplomatic Analysis of the years 1625-1642,* (PhD dissertation). Royal Holloway, University of London, 2013.

[160] Grewe, *The Epochs of International Law,* cit., p. 257-275; Anand, *Origin and Development of the Law of the Sea*, cit., p. 72-115; Jones, J. R., *The Anglo-Dutch Wars of the Seventeenth Century*. London, 1996.

[161] Lisk, J., *The Struggle for Supremacy in the Baltic*, London, 1917, p. 30-38.

[162] Jespersen, *A History of Denmark*, cit. p. 17-18; Lockart, *Denmark*, cit., p. 194-210, p. 233-240.

[163] Lockart, *Denmark*, cit., p. 148-172; idem, *Denmark in the Thirty Years' War, 1618-1648: King Christian IV and the Decline of the Oldenburg State.* Selinsgrove, 1996; idem, Denmark and the Empire: A Reassessment of Danish Foreign Policy under King Christian IV. In: *Scandinavian Studies*, vol. 64, no. 3, 1992, p. 390-416; Frost, R. I, *The Northern Wars: War, State and Society in Northeastern Europe, 1558-1721*. London, 2000; Lauring, *A History of Denmark*, cit., p. 150-151; Seerup, J., *Swedish and Danish rivalry to become great powers seen through the development of naval and merchant fleets*. In: *The Sea in History*, vol. III, cit., p. 496-508; Glete, *Warfare at Sea, 1500-1650*, cit., p. 126-129.

[164] Jespersen, *A History of Denmark*, cit. p. 16; Lockart, *Denmark*, cit., p. 107.

Authentication and Evidential Force of Last Wills in Late 16th – 17th Centuries in Scotland, in the Light of the *Ius Commune* Doctrine*

*Ilya Kotlyar**

Abstract

The article is based on the PhD research of the last wills, preserved in the Scottish archives. The article concentrates on the period immediately following the Reformation of 1560 and into the 17th century. This was a crucial period, when Scottish secular courts took over the jurisdiction over testaments from the pre-Reformation ecclesiastical courts, which was key to the establishment of the rules on authentication and evidential force of writings and especially of the last wills in Scots law. The article looks at these developing rules in the light of the contemporary Continental Ius Commune doctrine, noting both influenced and unique features of the Scottish practice. The method employed is the doctrinal legal historical method.

Keywords: *law of succession; Ius Commune; Scots law; law of proof; Civil law; Canon law; instruments.*

1. Introduction

This article presents the results of the research of a relatively neglected topic – the history of the law of succession in Scotland. For the first time, it uses data from the National Records of Scotland, from published case collections, from Institutional writings and from the literature of Civil and Canon law, to answer the question: to what extent and in what way have the learned Continental doctrines influenced the form and legal status of the Scottish wills and similar documents? This article will be invaluable not only for the scholars of Scots law, widely known as a "mixed legal system", but also for all those interested in comparative legal history, as well as in the historical will-making practice.

The term *Ius Commune* is taken here in the meaning used by, e.g., Manlio Bellomo,[1] designating the system of doctrines based on the rules of the *Corpus juris civilis* and *Corpus juris canonici* and elaborated by Medieval and Early Modern legal authors - the source of common legal discourse for lawyers all over the Continental Europe. National and local legislation, customs and practices in this conceptual system were designated as "*Ius Proprium*"; their status could vary, but they were always supposed to be in some relationship *vis-à-vis* the *Ius Commune*. The topic of the historical and dogmatic relationship of Scots law with the *Ius Commune* has traditionally been the object of significant scholarly interest and generated a huge volume of literature.[2]

The development of the Scottish succession practice specifically in the light of the *Ius Commune* doctrine has not attracted significant attention of scholars. The 2000 *History of the Private Law in Scotland* (edited by K.G.C. Reid and R. Zimmermann) did not contain a chapter on the law of succession. W. David H. Sellar, in his 2007 article, largely viewed the history of the Scots succession law as comparable to the contemporary English succession law, concluding that the *Ius Commune* influence on Scots

* Dr. Ilya Kotlyar, Post-Doctoral Researcher in the University of Ghent, Belgium.

1 BELLOMO, M., *The Common Legal Past of Europe: 1000-1800*. Washington, D.C., 1995.

2 CAIRNS, J.W., *Ius Civile* in Scotland, ca. 1600. In: *Roman Legal Tradition*, vol 2, 2004, p. 139-140; CAREY MILLER, D.L., & ZIMMERMANN, R. (Eds.), *The Civilian Tradition and Scots Law*. Berlin, 1997; DOLEZALEK, G., *Scotland under Ius Commune.* Edinburgh, 2010, p. 1-12; EVANS-JONES, R. (Ed.), *Civil Law Tradition in Scotland*. Edinburgh, 1995; GODFREY, A.M., Arbitration and Dispute Resolution in Sixteenth Century Scotland. In: *Tijdschrift voor Rechtsgeschiedenis,* vol 70, 2002, p. 109-135; GODFREY, A.M., *Ius Commune*, *Practick* and Civil Procedure in the Sixteenth-Century Court of Session. In: *Tijdschrift voor Rechtsgeschiedenis,* vol 72, 2004, p. 283-295; GODFREY, A.M., *Civil justice in Renaissance Scotland,* Leiden, 2009; GORDON, W.M., The Civil Law in Scotland. In: *Edinburgh Law Review*, vol 5, 2001, p. 130-144; GORDON, W.M., *Roman Law, Scots Law and Legal History*. Edinburgh, 2007; MACLEOD, G., The Romanization of Property Law. In: REID, K.G.C., & ZIMMERMANN, R. (Eds.), *A History of Private Law in Scotland*, vol I, 2000, p. 221-242; MACLEOD, J., *Fraud and Voidable Transfer: Scots Law in European Context.* PhD thesis, Edinburgh, 2013; ROBERTSON, J.J., Scottish legal research in the Vatican Archives: a preliminary report. In: *Renaissance Studies*, Vol 2, 1988, nr. 2, p. 339-346; SELLAR, W.D.H., Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions. In: *Edinburgh Law Review,* vol. 4, 2000, p. 14-18; SIMPSON, A.R.C., Legislation and authority in early-modern Scotland. In: GODFREY, M. (Ed.), *Law and Authority in British Legal History, 1200–1900,* 2016, p. 85-89; SMITH, T.B., *Studies Critical and Comparative.* Edinburgh, 1962, p. 46-61; STEIN, P. G., The Influence of Roman Law on the Law of Scotland. In: *Juridical Review*, vol 8 (n.s.), 1963, p. 205-245; STEIN, P. G., Roman Law in Scotland. In: *Ius Romanum Medii Aevi*, pars V 13 b, Milan, 1968; STEIN, P. G., *The Character and Influence of the Roman Civil Law*. London, 1988; STEIN, P. G., *Roman Law in European History*. Cambridge, 1999; WHITTY, N.R., The Civilian Tradition and Debates on Scots Law. In: *Tydskrif vir die Suid-Afrikaanse Reg*, 1996, p. 237-239; WILSON, J.D., Reception of the Roman Law in Scotland. In: *Juridical review*, vol 9, 1897, p. 361-394.

law "was not negligible, but… did not amount to a reception".[3] The only work to elaborate on the Civilian influence on the development of this branch of Scots law was Prof. Peter G. Stein's 1963 article.[4] The main deficiency of Stein's account was that he used only the post-1660 printed precedents, not dealing with the earlier case law or with the archives of the Commissary Courts. The one exception to the lack of interest in the Civilian dimensions of Scots law of succession is, perhaps, the narrow issue of the '*conditio si sine liberis decesserit*' – two rules of the interpretation of wills in Scots law, which have been the subject of quite intensive scholarly attention in recent years. William M. Gordon published research on '*conditio…*' in 1969. He came to a conclusion that both '*conditio si testator…*' and '*conditio si institutus…*' were grounded in both the *Ius Commune* and the development of the *Ius Proprium.*[5] Recently, Roderick R.M. Paisley has elaborated on the origin and the mechanism of the '*conditio si testator…*' rule in much detail, noting the strong familiarity of the 17th century lawyers with the Civilian sources.[6] Other authors also made contributions on this topic.[7]

Some historical context to the Scots law of succession is necessary. Before the landmark enactment of the Succession (Scotland) Act 1964, there existed two main separate systems of the law of succession in Scotland: moveable (*sic!*) and heritable succession. The former applied to movable goods and rights and the latter to land and other heritable (immovable) rights; however, in practice the distinction between heritable and moveable property could be a very complicated issue. Heritable succession was governed by feudal principles, mostly developed in the 13-14th centuries and reminding in many respects the rules that prevailed in neighbouring England. Moveable succession, on the other hand, was the domain of the Catholic Ecclesiastical courts until the 1560 s; hence the strong influence of Canon law on its development.[8] In the 1560 s, Scottish Reformation occurred, whereby the Ecclesiastical courts were suppressed and their business, after a short confusion, was in a wholesale manner taken over by the Commissary courts, subordinate to the Court of Session.[9] Leaving land and other heritable property by a last will was impossible in Scotland until 1868, although there were numerous devices and "tricks" allowing to circumvent the prohibition.[10]

This particular article mainly concerns movable succession. It deals, *inter alia,* with the last wills, confirmed by the Commissary courts and preserved through copies or even originals in the National Records of Scotland. These materials were previously surveyed by various scholars.[11] However, this is the first time that the archival wills are investigated from the point of view of their form.

This article deals with two large subject matters: authentication of wills and evidential force of wills. The 'authentication' here includes formal requirements to wills and solemnities of their making, but also their proof, *post mortem* confirmation and all other issues over establishing whether the document is authentic, i.e. made by the specific person. The 'evidential force of wills' here is a different issue. It concerns the faith given to the information stated in the document: whether we believe the author of the will when he, e.g., recognizes a debt owed to someone or evaluates his own estate, etc. Both of these two subject matters had extensive *Ius Commune* literature dedicated to them.

The main method employed by the present research is the doctrinal legal historical method.[12] The assumption is taken that, at least, a substantial number of the Scots legal authors and practitioners were acquainted with the principles and doctrines of the *Ius Commune.*[13] The task then is to take particular *Ius Commune* doctrines, principles and even simple rules and to see whether Scots practice employed them, in full or in part.

2. A General Overview of the Writs in the Ius Commune Doctrine

The law of what was usually described as '*fides instrumentorum*' in the medieval learned doctrine is a fine example of how the robust and, at times, inconsistent scholastic doctrine had to adapt to the exigencies of common sense and legal practice. Few things were certain and non-controversial. Yet, certain common themes may be identified.

Generally, neither Civil nor Canon law required a written proof in most day-to-day private deeds. One gloss to *Liber*

[3] SELLAR, W.D.H., Succession Law in Scotland - a Historical Perspective. In: REID, K.G.C, WAAL, M.J. de, & ZIMMERMANN, R. (Eds.), *Exploring the Law of Succession*, Edinburgh, 2007, p. 64.

[4] STEIN, P. G., The Influence of Roman Law on the Law of Scotland (supra n.2), p. 233-235.

[5] GORDON, W.M., Roman Law and Scot Law - the *conditiones si sine liberis decesserit.* In: *Juridical Review,* vol 14 (n.s.), 1969, p. 108-127.

[6] PAISLEY, R.R.M., Roman and Civilian Origins of the *Conditio si Testator Sine Liberis Decesserit* in Scots Law. In: *Edinburgh Law Review*, vol 11, 2015, p. 13-16.

[7] REID, K.G.C., Testamentary Formalities in Scotland. In: REID, K.G.C, WAAL, M.J. de, & ZIMMERMANN, R. (Eds.), *Comparative Succession Law,* vol I, Oxford, 2011, p. 404-431; REID, K.G.C., Intestate Succession in Scotland. In: *Comparative Succession Law,* vol II, Oxford, 2015, p. 371-399; GRETTON, G.L., Fideicommissary Substitutions: Scots Law in historical and comparative perspective. REID, K.G.C, WAAL, M.J. de, & ZIMMERMANN, R. (Eds.), *Exploring the Law of Succession*, Edinburgh, 2007, p. 156-176; MACDONALD, D.R., Lapse of Legacies in Scots Law. In: Cooke, E. (Ed.), *Modern Studies in Property Law,* Oxford, 2001, vol. 1, p. 275-287; BARR, A.R., The *conditio si institutus sine liberis decesserit* in Scots and South African Law. In: *Exploring the Law of Succession,* p. 177-192.

[8] KOTLYAR, I., The Evolution of the Scots Law and Practice of Succession: 1300-2000. In: RENZO VILLATA, M.G. di (Ed.), *Succession Law, Practice and Society in Europe across the Centuries*, Milan, 2018, p. 167-206.

[9] GREEN, Th., *The Court of the Commissaries of Edinburgh: consistorial law and litigation, 1559-1576*. PhD thesis, Edinburgh, 2010.

[10] See, e.g.: KOTLYAR, I., The Evolution of the Scots Law and Practice of Succession (supra n.8).

[11] E.g., ASHLEY, A., Property in Relation to Marriage and Family. In: *Juridical Review*, vol 65, 1953, p. 37-68, 150-181. See also: GREEN, Th., *The Court of the Commissaries of Edinburgh* (supra n.9).

[12] See the description of this method in: IBBETSON, D., Historical Research in Law. In: TUSHNET, M., & CANE, P. (Eds.), *The Oxford Handbook of Legal Studies*, Oxford, 2005, p. 872-874.

[13] See references at n. 2 to that effect.

Sextus[14] enumerated 34 cases where the *Ius Commune* required an act to be in writing, most of such cases being quite narrow and specific. Paradoxically, written contracts required stricter solemnities than oral ones, often requiring a larger number of witnesses to be involved.[15] The usual justification for this was the distinction between 'witnesses to the contract' and 'witnesses to the writing' (instrumentary witnesses): the latter were not required to testify to the contract's contents but were considered less reliable because of the 'similarity of all writings'.[16]

From the point of view of the function performed by the writings, a distinction was drawn between: 1) legal acts made in writing as a matter of substance (*in scriptis*), 2) writings made as necessary (indispensable) proof of a legal act, 3) writings made as facilitating proofs.[17] In the first case, the act and the instrument were indistinguishable from each other. In contrast, in the second case, the party to the litigation could willingly confess to having performed the act, even if the writing was lost or lacking. Finally, writings within the third category could be made voluntarily by the party or parties to a transaction; no formal requirements were set by law in respect of such writings.

Another influential distinction, by the criterion of form, was that between public and private instruments. The medieval canonists, specifically, Abbas Panormitanus (1386-1445),[18] added a third category – 'non-public authentic instruments' – which combined the features of public and private instruments.[19]

Public instruments were, more or less, the subject of consensus. They were instruments written by the hand of a notary public. A public instrument had the force of as many witnesses as were mentioned in it by name.[20] However, two contradicting witnesses were usually deemed enough to refute a public instrument. If the writer of the document was doubted, the doubt was to be resolved by the notary-writer himself, or, in case he was dead or unavailable, by *comparatio litterarum* – comparison of the notary's handwriting with that of undoubted specimens (*scripturae ex quibus*).[21]

Jurists extracted the requirements of notarial instruments from various passages of the *Corpus juris.* The undoubted requirements were: invocation of God's name in the beginning of the document, mentioning the names of the ruling emperor, pope or another sovereign, the date and place of making, the subscription and paraph of the notary.[22] The presence of witnesses, at least two, was also deemed necessary. The notary was to be specially empowered by the parties to make the instrument - 'invited' (*rogatus*) to make it. It was controversial whether the 'inviting' of the notary was to be explicitly mentioned in the instrument or could be presumed.[23] The majority opinion was that the witnesses in most public instruments (especially testaments) must be explicitly *'rogati'*.[24] It was expected that the essential steps - mandates to the notary and the witnesses, the writing of the instrument and its final reading aloud by the notary – were all to be performed in the presence of all witnesses, *unico contextu*.

As was mentioned above, a public instrument proved a particular fact with the force of as many witnesses as were mentioned in it. This, however, concerned only a fact that happened in the presence of the notary and witnesses. For example, if the notary testified to the payment of money, the notarial receipt made full faith of that fact. It proved against the receiver, the payer and any third party whatsoever (for example, a privileged creditor).[25] However, if the notary testified just to a recognition of the fact of payment by the receiver, it was just a *'confessio'* by a private party, and the instrument did not by itself fully prove the payment.[26] The exact evidential force of such a recognition will be explored in more detail below.[27]

Private instruments were a much more controversial topic. Every learned jurist made his own attempts at reconciling C.4.19.5, which rejected the probative force of private writings, with C.8.17(18).11, which assumed that private documents could constitute full proof.

If the maker or subscriber of the document recognized it, the document's faith was established. If the document or the subscription was denied, then, the outcome depended on whether the document was: a) *apocha* (or *apodissa, chirographum*), b) a letter missive and c) a book of accounts.

An *apocha* was a document executed in favour of a party who was present. The most solemn form in which an *apocha* could be executed contained the subscriptions of all parties and of three instrumentary witnesses. This requirement was deduced from several diverse passages of the *Corpus juris civilis*, mentioning three witnesses.[28] Such a document, in the opinion of Bar-

[14] Sext.3.20.1, s.v. *'In scriptis'* (*Corpus juris canonici emendatum et notis illustratum*, Rome, 1582).
[15] For example, a contract made by an illiterate person in the city for the amount greater than one pound of gold could be made verbally before two witnesses. However, if it was made in writing, it was to be subscribed by a notary and four witnesses (Nov.73.8).
[16] See, e.g., BARTOLUS, *Commentaria in primam Codicis partem.* Lyon, 1552, C.4.21 Auth. *At Si Contractus*.
[17] BALDUS, *In Quartum & Quintum Codicis Libros Commentaria.* Venice, 1599, C.4.2 Auth. *Sed Novo Jure.*
[18] Real name Nicoló de Tudeschi.
[19] PANORMITANUS, *Commentaria, secundae partis in Secundum Decretalium librum*. Venice, 1591, X.2. 22. 1.
[20] A popular saying by Bartolus (*Commentaria in primam Infortiati partem*. Lyon, 1552, D.28.1.21; *Commentaria in primam Codicis partem* (supra n.16). C.4.21.15). See also: DURANTE, G.D., *De arte testandi et cautelis ultimarum voluntatum.* Lyon, 1556, p. 29-30).
[21] Nov.73.7; BALDUS, *In Quartum & Quintum* (supra n.17). C.4.2 Auth. *Sed Novo Jure.*
[22] C.10.71(69).3, s.v. *'Servituti'* (*Corpus Iuris Civilis,* Lyon, 1558-60).
[23] BARTOLUS, *Commentaria in secundam Digesti Novi partem.* Venice, 1590, D.45.1.30; BALDUS, *In Sextum Codicis Librum Commentaria*. Venice, 1599, C.6.23.21pr.
[24] BALDUS, ibid.; TARTAGNI, Al., *In Codicem Iustinianeum Commentaria.* Lyon, 1567, C.6. 23. 21.
[25] C.8.17(18).11 was an authority for this.
[26] Gloss *ad* C.4.30.3, s.v. *'Probare'*.
[27] Infra.
[28] C.4.2.17, C.4.21.20(19), C.8.17(18).11, Nov.73.1, Nov.73.7.1.

tolus de Saxoferrato (1314-1357), was 'unlikely to be forged'.[29] Despite that, nevertheless, Bartolus deemed it necessary that all three witnesses come to the trial and recognize their signatures.[30] If all three witnesses were available, the instrument was proved.[31] If all three witnesses were dead or unavailable, Bartolus suggested that *comparatio litterarum* alone could decisively establish the document's (non-)authenticity; however, subsequent writers, especially the Canonists, opposed that view, unless the document contained a seal.[32] If only one or two of the witnesses were available, both their testimony and *comparatio* were to agree in approving the document; however, there was an opinion that the judge possessed a discretion in assessing the evidence, if the *comparatio* and witnesses contradicted each other.[33]

An *apocha* that did not contain the subscriptions of all parties and three witnesses was still valid; however, both the testimony of three witnesses (even unsubscribing) and the *comparatio litterarum* were necessary to establish the full faith of the writing. The private writing by itself, even after corroboration by *comparatio*, could only constitute a 'half-proof' (*probatio semiplena*). This made its force equal to that of one witness: for the full probative force, it could be fortified, for example, by witnesses to the fact of payment, etc. Without *comparatio litterarum,* a private writing without witnesses could create, at best, 'some presumption' (*aliqua praesumptio*) – with an even smaller value in the court than 'half-proof'.[34]

After its authenticity was established, the *apocha* constituted a full evidential force against the party who has issued, written or subscribed it. A subscription was deemed a sufficient expression of consent. By 1500, the legal doctrine has concluded that subscribing a document had the same effect as writing it fully by hand.[35] Nevertheless, in order to prove against the third parties, the private writing necessarily had to contain signatures of three witnesses. This rule was aimed to prevent debtors from defrauding their hypothecary creditors by creating simulated debts.[36]

A letter missive (*littera missiva*) was a document sent between distant parties. The predominant opinion was that less formalities for authentication applied to letters missive than to *apochae,* because the letter's receiver had no control over its form. For this reason, *comparatio litterarum* was sufficient to establish full faith in the letter's authenticity.[37]

The evidential force of statements contained in letters missive could constitute full proof depending on whether they concerned an obligation or a discharge of obligation, whether they were expressed directly or incidentally, and on the nature of the facts recognized.[38] An indispensable requirement to constitute full faith was that the document mentioned the *iusta causa* of the underlying obligation, contract, etc.[39] Nevertheless, the letters of private individuals with no seal did not prove against the third parties, unless they were subscribed by three witnesses;[40] this was different in the case of letters with 'authentic seals'.[41]

Books of account (*libri rationum*) received an extremely favourable treatment in the doctrine of Commentators. The main justification for that was that they were 'hard to forge'; the authority of the mercantile custom was another reason.[42] Bartolus considered *comparatio litterarum* sufficient to establish the authenticity of a book of account, if doubtful. There was some disagreement on whether every account in the book was supposed to be written with the merchant's own hand.[43]

The exact evidential force of the books of account was controversial. One fragment in the Digest[44] suggested that an extrajudicial 'confession' of facts was binding only if made in the presence of the other party. Nevertheless, the common opinion was that a book of account always proved against its maker, because the written document 'always speaks' (*scriptura semper loquitur*), whenever the reader gets to read it.[45] Proving in favour of the maker of the book of account, or his successors, was only possible in respect of the acts performable by the mere will of the maker.[46] The book of account belonging to a merchant or another professional guild member, holding

[29] BARTOLUS, *Commentaria in primam Codicis partem* (supra n.16), C.4.21 Auth. *At Si Contractus.*
[30] BARTOLUS, ibid. Cf. his older opinion in the comment to D.12.2.31 (BARTOLUS, *Commentaria in secundam Digesti Veteris partem.* Venice, 1590).
[31] BARTOLUS, *Commentaria in primam Digesti Novi partem,* Venice, 1602, D.39.5.26; PANORMITANUS, *Commentaria, secundae partis…* (supra n.19), X.2.22.2. However, Baldus and Decius disagreed with that opinion, deeming both witnesses and *comparatio* necessary in any case (DECIUS, Ph., *In Decretales Commentaria, necnon in tit. De Privilegiis.* Lyon, 1581, X.2.22.2; BALDUS, *In Quartum & Quintum* (supra n.17), C.4.2 Auth. *Sed Novo Jure*).
[32] Infra.
[33] PANORMITANUS, *Commentaria, secundae partis…* (supra n.19), X.2.22.2.
[34] BARTOLUS, *Commentaria in secundam Digesti Veteris partem* (supra n.30), D.12.2.31.
[35] DECIUS, Ph., *In Decretales Commentaria* (supra n.31), X.2.19.11.
[36] C.8.17(18).11 (Constitution by Emperor Leo, 472 A.D.)
[37] BARTOLUS, *Commentaria in secundam Digesti Veteris partem* (supra n.30), D.12.2.31; BARTOLUS, *Commentaria in primam Digesti Novi partem* (supra n.31), D.39.5.26. Canonist Ph. Decius (1454-1535) reports that this opinion was widely accepted (DECIUS, Ph., *In Decretales Commentaria* (supra n.31), X.2.22.2).
[38] Only statements as to what the parties might have done between themselves made full faith (BARTOLUS, *Commentaria in primam Codicis partem* (supra n.16), C.4.19.13).
[39] BARTOLUS, op. cit., C.4.19.5.
[40] Supra.
[41] Infra.
[42] BALDUS, *In Quartum & Quintum* (supra n.17), C.4.2 Auth. *Sed Novo Jure,* C.4.18 *ad rubr.*
[43] BALDUS, op cit, C.4.21 *ad rubr*.
[44] D.42.2.6.3.
[45] BARTOLUS, *Commentaria in secundam Digesti Veteris partem* (supra n.30), D.12.2.31; DECIUS, Ph., *In Decretales Commentaria* (supra n.31), X.2.22.1.
[46] Acceptance of succession (*aditio hereditatis*) was a generic example.

a public or 'quasi-public' office, could provide 'half-proof' in favour of the third party (e.g., bank account holder or a privileged creditor).[47]

The Canon lawyers strongly contributed to the *Ius Commune* doctrine on the effect of seals. A decretal by Pope Alexander III (1159-1181) provided that a private writing would lose evidential faith when all the instrumentary witnesses had died, unless it contained a seal.[48] The Canonists, on the basis of this and other decretals, developed the concept of a 'non-public authentic instrument'. Under this category fell the letters of bishops and other officials possessing authentic seals. Although not public instruments, such letters constituted full proof in the matters pertaining to the granter's competence.[49] Panormitanus went even further, holding that, in private matters, private ring-seals should also be seen as 'authentic', irrespective of whether the instrument was a letter or an *apocha.*[50] By the early 16th century, the opinion appeared that a document containing an authentic seal and subscribed by witnesses made full faith in all matters, just like a public instrument.[51]

Subscription (signature), as an element of a document, could be either 'special' or 'general'. A short, 'general' subscription was sufficient to sign one's own document. A 'special' subscription was more detailed, referring to all the suspicious or dubious part of the text with a formula, e.g., 'foresaid I have narrated and approved'.[52] Some jurists held that the 'special' subscription was indispensable, for example, in the case of corrections and marginal additions in the text.[53]

If a particular act, made or evidenced in writing, required in law specific formalities for validity, the question arose: must compliance with such formalities be mentioned in the text? The jurists responded by distinguishing between intrinsic formalities (inseparable from the words used, such as offer and acceptance in a stipulation) and extrinsic formalities (such as witnesses). The former were usually presumed, while compliance with the latter was to be specially mentioned in the text.[54]

Comparatio litterarum, as a technique, was itself governed by strict rules. The comparison was committed to 'experienced writers', who took an oath on making a faithful comparison. Indisputable specimens of the person's handwriting were to be acquired for comparison, e.g., writings recognized by the parties in litigation.[55]

3. Special Rules Applied to the Last Wills in the Ius Commune

The *Ius Commune* doctrine recognized two major ways in which an ordinary, unprivileged testament could be made: either in writing or nuncupatively. A nuncupative testament, in its turn, might either be reduced into writing (*redactum in scriptis*) or not reduced into writing. The forms of testament were separate from each other; the choice of form was determined by the testator. A testament could not be written and nuncupative at the same time. The notable point is that the solemn testament made by private writing, which was the main form used by the late Roman law (C.6.23.21, 28-29) was not given particular attention by the medieval jurists. In contrast, the nuncupative testament was the focus of attention, which seems to reflect the peculiarities of the medieval practice.

A nuncupative testament reduced into writing was inspired by the form described in Justinian's constitution of 521 A.D. (C.6.22.8), which was originally prescribed for blind testators. The form involved participation of a notary and seven witnesses. The will was fully narrated by the testator to the notary and witnesses or written in advance and read aloud by the notary to the testator before witnesses. Such a will was not seen as made *in scriptis*, but as nuncupative, because the witnesses were expected to hear the contents of the will.[56] The requirements of a public instrument, dealt with above, were applicable to the notarial testament, as well.

A nuncupative testament, evidenced in notarial form, was obviously quite a convenient form, as it allowed illiterate people to make a last will in a secure way. Its advantage also lay in that the document proved itself – there was no need to 'publish' such testaments. The seven witnesses, enumerated in such a testament by name, played quite a passive role – there was no need for them to be literate or to be called after the death of the defunct. At the same time, such witnesses could only be men and could not be among the instituted heirs.[57] If, on the other hand, a nuncupative testament was not reduced into writing, all seven witnesses were to testify to every single statement by the testator.[58]

Papal legislation introduced a new form of testament. Alexander III issued a decretal *Quum esses* (X.3.26.10), referring to the law of Moses (*Deut* 19:15) and recognizing the validity of last wills made in the presence of a priest and two witnesses. Later

[47] C.4.1.3, Gloss s.v. '*Decidi oportet*'; BARTOLUS, *Commentaria in primam Digesti Novi partem* (supra n.31), D.39.5.26. In the commentary to C.4.21 Auth. *At si contractus* (=Nov.73.8-9), Bartolus, however, mentions that even accounts of private individuals constitute a 'half-proof'.
[48] X.2.22.2.
[49] PANORMITANUS, *Commentaria, secundae partis…* (supra n.19), X.2.19.7, X.2.22.1.
[50] PANORMITANUS, *Commentaria, secundae partis…* (supra n.19), X.2.22.2.
[51] DECIUS, Ph., *In Decretales Commentaria* (supra n.31), X.2.19.7.
[52] The distinction originated with the Roman *Lex Cornelia de falsis* (81-79 B.C.). See, e.g., D.48.10.1.8.
[53] BALDUS, *In Primum, Secundum et Terium Codicis Libros Commentaria.* Venice, 1586, C.2.1 Auth. *Si quis in aliquo*.
[54] BARTOLUS, *Commentaria in secundam Digesti Novi partem* (supra n.23), D.45.1.30.
[55] See Gloss and comments *ad* C.4.21.20(19) and C.4.21 Auth. *Ad Haec*.
[56] Gloss *ad* C.6.22.8, s.v. '*Per nuncupationem*'.
[57] Inst.Just.II.10.6, 10.
[58] BARTOLUS, *Commentaria in secundam Codicis partem*. Lyon, 1552, C.6.11.2; DE CASTRO, P., *In Secundam Codicis partem Commentaria.* Lyon, 1585, C.6.11.2.

Canonists interpreted the decretal as admitting only a parish priest, with a universal *cura animarum* over the parish where the will was made, so that his authority was based on a 'jurisdiction' of a sort. The priest's function in the solemnity was to 'exclude fraud'; the jurists agreed that two additional witnesses might be substituted for him, raising the number to four.[59]

Another kind of a last will, besides the testament, was a codicil. This was a document that did not appoint or disinherit heirs, but instead bestowed or cancelled legacies or fideicommisses. There were no formal requirements for codicils, besides the five witnesses to testify their making (C.6.36.8); there was no requirement of their simultaneous presence, and the witnesses could be female.[60] Even 'nuncupative codicils' were seen as possible.[61]

Besides the aforementioned forms of last wills, the *Ius Commune* sources provided for several types of 'privileged' wills, which allowed significant departures from the normal solemnities. The main such forms were the a) soldiers' wills, b) *testamenta inter liberos* (parental testaments, where only the testator's children were appointed heirs and legatees), and c) wills *ad pias causas* ('for pious uses'). These last wills required, strictly speaking, no formality. However, they still needed to be proven by two witnesses, as a matter of proof. Nevertheless, late medieval and early modern Post-Glossators developed a possibility of a purely holographic parental testament. Thus, according to Paulus de Castro (c. 1360 – c. 1441), if a private writing ('*schedula*'), written by the father's own hand, was found among his papers, its authenticity could be fully established by *comparatio litterarum*.[62] And this opinion seems to have been widely accepted among later jurists, e.g., Julius Clarus.[63]

There was a general consensus among the Post-Glossators that a nuncupative testament, reduced into a public instrument, became complete only after the notary read it aloud before the testator and witnesses. This was to ensure the testator's definitive consent to the contents of the instrument.[64] Here the question arose: if the testator narrated his last will before witnesses and the notary, but died before the text was formally recited to him by the notary – could such a will be valid, at least, in respect of children, soldiers or pious uses? After some initial doubt, the later authors (Alessandro Tartagni, Philippus Decius) answered positively to this question, effectually allowing the final solemnization of the will *post mortem*.[65]

English Civilians, such as William Lyndwood (c. 1375-1446) and Henry Swinburne (1551–1624), held that two witnesses were a sufficient proof for any English will, irrespective of form. They justified this by reference to the privileged forms: Lyndwood claimed that any last will is 'for pious uses',[66] while according to Swinburne English testaments 'followed military law'.[67] As to holographic wills without witnesses, Swinburne seems to have eventually admitted the possibility of proving such wills by *comparatio litterarum* together with other "adminicles", such as finding the writing in the testator's papers.[68]

A testament made no faith, unless it passed through the procedure of 'publication' before the local magistrate.[69] Most scholars made an exception for notarial wills, both nuncupative and written with notarial involvement, as they were deemed already 'published' by the notary in his register.[70] The procedure of publication involved summoning of the testamentary witnesses and all the interested parties. In England, there were two form of publication (sometimes called 'confirmation') of the testament: a) the common form, which did not involve the citation of interested parties, was not definitive and could be challenged, and b) the special and solemn form, which involved the citation of the parties and was definitive.[71]

The evidential force of the last wills, in the *Ius Commune* doctrine, tended to be weak. This is not surprising, seeing that the statement of fact or of right, made in a last will, might easily become an instrument of abuse, prejudging the successors of their legal rights and creditors of the debts due to them. The Glossators believed that, if the will directly admitted the discharge of debt by the testator in favour of his debtor, the debtor acquired *exceptio doli* against any claims of the successors.[72] However, this was later denied by Bartolus, who believed that a last will made full faith as to the facts contained in it only if it 1) either concerned the facts which depended on the mere will of the defunct (an acceptance of estate, a ratification of the agent's deeds, etc.), 2) or contained the oath of the testator, 3) or used 'taxative' (restrictive) adjectives as to the sums of debt or property due to him ('just 100', 'only 200', etc.), which created a presumption of the discharge of the debt.[73] The opinion of Bartolus was influential, but some of the later authors granted a greater weight to the statements in last wills. For example, Baldus held that a recognition of the discharge of debt constituted full proof.[74]

[59] DURANTE, G.D., *De arte testandi* (supra n.20), p. 30-34.
[60] DURANTE, ibid.
[61] MANTICA, Fr., *Tractatus de Coniecturis ultimarum voluntatum, in Libros duodecim distinctus.* Geneva, 1669, p. 17.
[62] DE CASTRO, P., *In Secundam Codicis* (supra n.58), C.6.23 Auth *Quod Sine*.
[63] CLARUS, J., *Opera Omnia.* Geneva, 1666, § *Testamentum*, qu.14, p. 19-21.
[64] BALDUS, *In Quartum et Quintum* (supra n.17), C.4.21.17(16).
[65] TARTAGNI, Al., *In Codicem* (supra n.24), C.6.23.21.4; DECIUS, Ph., *In Decretales Commentaria* (supra n.31), X.2.22.1.
[66] LYNDWOOD, W., *Provinciale (seu Constitutiones Angliae)*. Oxford, 1679, III.13, s.v. '*Residuis*', s.v. '*Probatis*'.
[67] SWINBURNE, H., *A Briefe Treatise on Testaments and Last Wills*. London, 1591, p. 19.
[68] SWINBURNE, H., op cit, p. 191-192.
[69] C.6.23.2.
[70] BARTOLUS, *Commentaria in primam Infortiati partem* (supra n.20), D.29.3.2.
[71] SWINBURNE, H., *A Briefe Treatise* (supra n.67), p. 224-225.
[72] Gloss *ad* D.34.3.8(9).4, s.v. '*Debitoris*'.
[73] BARTOLUS, *Commentaria in secundam Infortiati partem.* Lyon, 1552, D.31.77.23, D.32.37.6,; *Commentaria in primam Digesti Novi partem* (supra n.31), D.39.5.16.
[74] BALDUS, *In Quartum et Quintum* (supra n.17), C.4.19.6.

In his commentary to D.12.2.31, Bartolus opines that a verbal extrajudicial confession, made in the absence of the recipient (but, for example, in the presence of a notary who writes it down), constitutes a 'half-proof'.[75] This opinion was later taken up and developed by the Canonist Panormitanus, who extended it to the last wills: a last will expressly and straightforwardly recognizing some facts always constitutes, at least, a 'half-proof' of those facts, and thus may fully prove the issue if aided by additional '*adminicula probationis*'.[76]

4. Authentication of Writs in Scotland: General Legal Background

Scotland has demonstrated a unique development of the law of execution of writs and written evidence in the Early Modern era. It was different from both Continental and English models. Private writings, complying with formal requirements, were fully 'probative' in Scotland, i.e., made full faith against the granters and third parties. However, despite practical dissimilarity, Scots law on written documents does not look really devoid of roots in the *Ius Commune* doctrine.

In the 15-16th centuries, the use of notaries and notarial instruments came to prominence in Scotland. However, there is a scholarly opinion that this process might be more of a regression than a positive development, with Scots notaries often being poorly qualified and their instruments easy to forge.[77] Scottish legal practice took a restrictive approach to notarial instruments, so that by the late 17th century they were considered full proof only in respect of the legal acts which by custom required to be executed as notarial instruments as a matter of substance: transfers of seisin, resignations of the feu (fief), and similar documents.[78] For other acts, such as those evidencing an obligation, notarial instruments made a full proof of their own authenticity, but required summoning of the instrumentary witnesses to prove the act itself.[79]

The *Practicks,* traditionally attributed to James Balfour (c. 1580), tell us about the usual requirements for a private deed in the late 16th century: the seal and the subscription of the granter, *iusta causa*, at least two witnesses, the date and place of making.[80] Although Balfour cites the pre-1500 Scottish sources in support, his list looks very similar to the *Ius Commune*'s requirements for public instruments. The same can be said of Balfour's account of the procedure for 'improbation' (disproval) of the charters: the defendant bore the burden of calling the instrumentary witnesses or initiating the comparison of seals to prove forgery.[81] This makes Scottish sealed and witnessed deeds look quite similar to the public instruments and to the letters under the 'authentic seal' of the *Ius Commune* (*supra*).

The form of Scottish written deeds was regulated partially by statutes, partially by custom. Thus, the 1540 Act of Parliament[82] required a subscription as necessary in addition to the seal for sealed writs. But it was the 1579 Act[83] that had the greatest impact. It provided that all deeds *'of greit importance'* were to make faith only if made in writing, subscribed by the granter or by two notaries before four witnesses. This Act was later supplemented by the 1593 Act, which required the documents to mention the writer.[84] Subsequent Scottish legal practice established that 100 pounds Scots was the mark beyond which the deed was deemed as of 'great importance'. This amount was set by the 1597 Act of Sederunt of the Court of Session, dealing with debt payments;[85] but, besides that, the amount seems to have been set by custom.[86] After the 1707 Union with England, that amount was fixed as an equivalent of Ł 8 6 s 8d sterling.

The 1579 Act, strangely enough, did not mention the necessity of two instrumentary witnesses to the deeds subscribed by the granter. Later Scottish authors, however, had no doubt about this requirement being 'implied' in the Act.[87] The Act also did not abolish the requirement of the seal on the document; nevertheless, private seals gradually went out of use in Scotland as a matter of custom.[88]

The scope of applicability of the 100 pounds rule was controversial in Scots case law of 1579-1660. In an early case, *Auchinleck v Gordon*,[89] a point was made that a gratuitous promise, irrespective of the amount, could only be proved by a writ or an oath. It is possible that the Lords in that case followed the Civil law notion of *nudum pactum.*[90] The subsequent practice,

---

75 BARTOLUS, *Commentaria in secundam Digesti Veteris partem* (supra n.30), D.12.2.31.

76 PANORMITANUS, *Commentaria in Tertium Decretalium Librum.* Venice, 1571, X.3. 27. 3.

77 FINLAY, J., The History of the Notary in Scotland. In: SCHMOECKEL, M. & SCHUBERT, W. (Eds.), *Handbuch zur Geschichte des Notariats der europaischen Traditionen.* Baden-Baden, 2009, p. 394 (with reference to G.W.S. Barrow).

78 Stair, *Inst.*IV.42.9 (STAIR, Viscount of, *The Institutions of the Law of Scotland, Deduced from Its Originals…* Edinburgh, 1693); Bankton, *Inst.*IV.27.4 (BANKTON, Lord, *An Institute of the Laws of Scotland in Civil Rights with Observations…*, Edinburgh, 1751-53).

79 Bankton, *Inst.*IV.27.5.

80 *Balfour's Practicks* (BALFOUR, J., *The Practicks, or a system of the of the more ancient Law of Scotland*. Edinburgh, 1751), ch. *'Of probatioun be writ',* c. 36.

81 *Balfour's Practicks,* ch. *'Of probatioun be writ',* c. 1. See also the 1557 Act of Parliament of Scotland (*RPS (Records of the Parliaments of Scotland)*, A1557/12/4) and the Act of Sederunt of 26/05/1581.

82 *RPS*, 1540/12/92.

83 *RPS*, 1579/10/33.

84 *RPS*, 1593/4/44.

85 8/06/1597 (*The Acts of Sederunt of the Lords of Council and Session*. Edinburgh, 1790, p. 28).

86 See an anonymous 1605 case (Mor 12354).

87 MACKENZIE, G., *Observations on the Acts of Parliament*. Edinburgh, 1687, p. 193; Erskine, *Inst.*III.2.11 (ERSKINE, J., *An Institute of the Law of Scotland, in Four Books.* Edinburgh, 1773); WILSON, W.A., *In modum probationis*. In: *Juridical Review,* vol 13 (n.s.), 1968, p. 195.

88 Erskine, *Inst.*III.2.7; Mackenzie, *Observations on the Acts of Parliament* (supra n.87), p. 146, 452.

89 1580, Mor 12382.

90 I.e., that of an informal agreement, not worthy of full legal protection.

after some hesitation,[91] eventually settled[92] that a gratuitous promise, even the one given by the surety to an obligation, may only be proved by a writ or an oath.

Among the 20th-century scholars it was widely discussed, whether the 17th century Scots law distinguished between acts made substantially *in scriptis* and acts just evidenced by a written document.[93] The consensus in the controversy seems to be that, before 1660, Scots practice did not consistently differentiate between the one and the other; G. Lubbe also seems to hold this opinion.[94]

Subscription of illiterate or disabled persons' deeds by a notary public produced private, not public instruments in Scotland.[95] There was at least one point of quite explicit influence of the *Ius Commune* doctrine on this type of document in Scotland: *unicus contextus*, requiring the subscription to take place in presence of all witnesses.[96] The term itself seems to have been used in a Scots case for the first time in 1633,[97] establishing that all notaries and witnesses were to be present at the subscription. Another field where Scots deeds showed similarity to the *Ius Commune* was that of warrants of notaries: the deeds were required to mention the granter's commission to the notary to subscribe for him, made before witnesses, otherwise the deed was invalid.[98]

Many developments of the 17th century practice were given a statutory basis by the 1681 Act.[99] The Act established the conditions for probativity of the witnessed deeds. The witnesses were now required to put their signatures on the document; they were held to know the granter and see him subscribe or give the warrant to the notary to subscribe for him. Non-compliance entailed nullity of the writ.

A mysterious problem in Scots legal history is the recognition of holographic writs, i.e. the writs written fully or substantially by the granter's own hand. It is unclear how and when such writings started to be recognized as valid, in an exception to the 1579 Act. Robert Spottiswood claimed that holographs were accepted on a customary basis and suggested to give them a statutory grounding.[100] The earliest case involving a holographic writing, *Pursuer v Titill*,[101] concerned a testament. Holographic documents, unlike witnessed deeds, could not prove the date of their making against the third parties.[102] As concerns the granter of the deed himself, the law, as it stood before 1635, also seemed to follow a pattern similar to the *Ius Commune*: if the granter (or his successor) denied that the document was his/her holographic writing, the pursuer was to prove that fact, even if the document bore in the text that it was holograph.[103]

However, the case of *Earl of Rothes v Leslie*[104] confused the law of holographs, as it apparently decreed that a holographic writing was probative if the text stated so, with a burden of proof on the defender to refute authenticity.[105] Although the case law immediately following *Earl of Rothes* suggested that the Lords did not plan to establish a general rule to that extent,[106] this was exactly the effect of *Earl of Rothes* in the long term. This is why Scots Institutional writers considered holographic writings probative;[107] Stair even put holographic writings in the first position in importance, being 'the least imitable' of all writings.[108] One might, yet, draw parallels with the *Ius Commune* rule on the presumption of solemnities mentioned in an instrument.[109]

Comparatio litterarum – both the device and the term itself - was well-known and employed in Scots practice. However, the procedure of *comparatio* in Scotland did not follow the exact *Ius Commune* pattern. There were no qualified experts (*periti*), specially called and sworn. Scottish judges allowed the parties to bring witnesses who 'knew the hand' of the granter and give their personal opinions on authenticity of the text.[110] Sometimes, it seems, the judges themselves performed the comparison.[111] *Comparatio* in Scotland, similarly to the *Ius Commune*, usually constituted a 'half-proof' of the writ's authenticity and could be supplied by one witness to make full faith.[112]

[91] Russel v Paterson (1629, Mor 12383); Ernock v Preston (1636, Mor 12383).
[92] Deuchar v Brown (1672, Mor 12386).
[93] GOW, J.J., The constitution and proof of voluntary obligations. In: *Juridical Review,* vol 6 (n.s.), 1961, p. 1-20; Wilson, *In modum probationis* (supra n.87), p. 197-199.
[94] LUBBE, G., Formation of contract. In: *A History of Private Law in Scotland* (supra n.2), vol.2, p. 1-46.
[95] Stair, *Inst.*IV.42.9.
[96] Supra.
[97] Cow(Coll) v Craig (1633, Mor 16833).
[98] Littlejohn v Hepburn (1608, Mor 16828), Veitch v Horsburgh (1637, Mor 16834).
[99] *RPS,* 1681/7/27.
[100] See: SPOTTISWOODE, R., *Practicks of the Laws of Scotland*. Edinburgh, 1706, p. 363.
[101] 1610, Mor 16959.
[102] Lord Forbes v Marquis of Huntly (1611, Mor 12603). There were later divergent cases, like Lesly v Boquhen & Pitcaple (1629, Mor 12604). However, since Dickie v Montgomery (1662, Mor 12606), the non-probativity of the holographic date has been settled.
[103] See: Kirkwood v Inglis (1627, Mor 16926), Inglis v McCubine (1631, Mor 16962).
[104] 1635, Mor 12605.
[105] WILSON, W.A., *In modum probationis* (supra n.87), p. 196. It should be noted that the type of writing involved in *Earl of Rothes v Leslie* was quite special: it was a holographic arbitral award, written at the back of the arbitral agreement.
[106] See an anonymous 1638 case, I Br Sup 103.
[107] Bankton, *Inst.*I.11.33; Erskine, *Inst.*III.2.22.
[108] Stair, *Inst.*IV.42. 6.
[109] Above.
[110] Vans v Malloch (1675, Mor 16885).
[111] E.g., Colvil v Executors of Lord Colvil (1664, I Stair 215).
[112] Vans v. Malloch (1675, Mor 16885).

Scottish judges showed a strong inclination to accept 'not-so-solemn' writs as valid on the ground of custom, *lex mercatoria* or established practice of the parties.[113] Much of the case law in this vein concerned letters missive used in commercial practice. In one of the early cases, *Pyromon v Ramsay's Executors*,[114] it was established that, for a letter between merchants, a mere subscription was a sufficient authentication. This rule persisted in practice,[115] so that Lord Bankton in the mid-18th century would admit the validity of subscribed letters missive if they were the usual way of communication between the parties.[116] Some commercial documents, like bills of exchange, began to be considered probative if they contained just a subscription.[117]

However, similarly to the *Ius Commune,* probably the most privileged type of writing in Scotland was the book of account (*compt-book*). Not only was subscription enough for an account's validity,[118] but even without subscription it made some faith. In *Brown's Creditors v Baillie*,[119] the Court found that the accounts in the defunct's 'compt-book', subscribed by the defunct though written up by someone else, were enough proof for the debt to compete *pari passu* with other debts against an insolvent estate, while unsubscribed accounts were to be 'adminicled' by additional proofs.[120] The probative force of the granter's subscription of the account seems to have been settled as regards mercantile affairs (*res mercatoria*) by *Stuart v Agnew*.[121]

5. The Form of Last Wills in Post-Reformation Scotland: the Review of Printed Sources

In contrast to other kinds of documents, there is very little reported legislation and litigation on the authentication of last wills in Scotland. However, this does not mean that last wills have never been an object of special regulation. The first ever *Instructions to the Commissaries of Edinburgh* of 12 March 1563[122] provided that all testaments were to be made '*in presence of a Minister… or in presence of an Notar… or subscrivit by the persoun, maker thairof…*', while all that was to be '*befor witnessis*' (c. 24). However, the same article ends with the words: '*or otherwayis as accordis the law*'. The openness of this list of accepted forms does not allow us to establish its sources precisely. However, the reference to clergy as officials eligible for writing testaments on par with notaries is an obvious reference to the Canon law 'a priest and two witnesses' last wills (*supra*). The absence of the requirement of sealing the wills and the sufficiency of the simple subscription, long before the 1579 and 1584 Acts, are also notable.

An obvious change was introduced by the subsequent Instructions of the Lords of Session to the Commissaries of Edinburgh, from 26 March 1567.[123] The very first article reads: '*in all time cuming nomination of executouris be provin by writ allanerlie*'. This text implies that nuncupative testaments were lawful in Scotland before 1567. It will be mentioned below that they appeared in practice before 1567. However, the requirement of writing was well established in later Scots law. In fact, it was so well-established that in *Shaw v Lewis*[124] even nuncupative testaments made abroad were deemed invalid as to nomination of executors for goods in Scotland: writing was considered not just a form but the constitution of the essentials of act!

In *Balfour's Practicks*, only the requirement of two witnesses is mentioned as necessary for a testament; they could not be women.[125] This was similar to the English practice of the time, and grounded in the Canon law rules on the wills *ad pias causas* (*supra*). The legal writings we find after Balfour and before Stair's *Institutions* (Th. Craig's *Jus Feudale*, Th. Hope's *Major* and *Minor Practicks*, R. Spottiswood's *Practicks*) did not deal with the issue of testamentary formalities; neither did the subsequent Instructions to the Commissaries.

However, the issue was not altogether ignored by legislation. The 1584 Act,[126] forbidding ministers of the Kirk (Scottish Church) to get involved with notarial activity, made an exception in favour of testaments. This Act was obviously intended to be of purely disciplinary significance; nevertheless, it was interpreted as actually confirming the ministers' authority to write down last wills in their own right. Thus, when in *Hepburn v Laird of Wauchton*[127] the authority of the ministers to deal with testaments was challenged, the 1584 Act, not the 1563 Instructions, was mentioned as the basis of their authority. In reality, however, the source of the ministers' power seems to have been Canon law. Under Canon law (*supra),* the priest could draft testaments for his own parishioners only, his powers being area-restricted. The Scottish law on the matter was similar, as in the same *Hepburn* case the will was successfully challenged on the ground that the minister was from another parish.

[113] WILSON, W.A., *In modum probationis* (supra n.87), p. 197.
[114] 1627, Mor 16960 = 1629, Mor 16963.
[115] See: Earl of Northesk v Viscount of Stormont (1671, Mor 16967).
[116] Bankton, *Inst.*I.11.33.
[117] Stair, *Inst.*IV.42.6.
[118] Rule v Atton (1628, Mor 16961).
[119] 1631, I Br Sup 319 = Mor 2428 = Mor 12617. The case is also sometimes cited as 'Brown's Creditors Competing'.
[120] This interpretation is apparent in the Spottiswoode's report (*Spottiswoode's Practicks* (supra n.100), p. 77) and implicit in the Auchinleck's report (I Br Sup 319).
[121] 1680, Mor 12624. In this case the account was written by someone else and subscribed by the granter, who was a merchant. The Court found that a mere subscription was sufficiently probative for the books of account.
[122] Instructions given to the Commissaries of Edinburgh, Subscribed by our sovereign Lady, on 12 March 1563(64), In: *Balfour's Practicks* (supra n.80), p. 655-662.
[123] In the National Records of Scotland: CC8/2/1, 430v-431r; published: *Balfour's Practicks* (supra n.80), p. 662-664.
[124] 1665, Mor 4494.
[125] *Balfour's Practicks* (supra n.80), ch. *'Anent testaments',* c. 11.
[126] *RPS*, 1584/5/12.
[127] 1606, Mor 16827

Litigation over authentication of proper testamentary deeds was extremely rare in 1560-1660. However, the few reported cases that we have are revealing as to Scots law's relation to the *Ius Commune*. In *Lady Inverleith v Bishop of Glasgow*[128] the executor to the testament was also mentioned as one of the two witnesses. This was not allowed, and the testament was challenged on this ground. The executor renounced his office before the action for reduction (nullity) of the testament was initiated, and for this reason the testament was found valid as to all points, except for the executor's nomination. This case stands in sharp contrast with Civil law, which provided that, if one of the witnesses was also a heir, the testament was null and void *ipso jure,*[129] not just voidable; and the executor was often referred to as '*heir in moveables*' in Scotland.

It seems obvious that the Scottish distinction between 'testaments' proper, which contained a nomination of executor, and 'codicils', which only contained legacies of the testator's free goods, originated from the *Ius Commune*. The term 'codicil' was still rare in Scots practice before 1660. Nevertheless, in Stair's *Institutes*, the testament/codicil distinction was a part of the established doctrine.[130] The testaments were to be made in writing as a matter of substance, in line with *Shaw v Lewis*,[131] and their formalities were the same as with all 'probative deeds' in general:[132] a subscription before two witnesses or the testator's own handwriting in substantial parts.[133]

Codicils (also called simply 'legacies'), on the other hand, could also be made nuncupatively and proved by witnesses, if they did not exceed the amount of 100 pounds Scots.[134] This rule might sound identical to the rule for the 'writs of importance' (*supra*), and its origin was, probably, the same. Nevertheless, in their developed form, these were two quite different rules. While *inter vivos* bonds and promises bigger than 100 pounds could never be proved by witnesses in any part, nuncupative legacies exceeding that amount were provable by witnesses to the extent of 100 pounds.[135] Moreover, we can see how, around the end of the 17th century, the 100 pound rule for codicils/legacies becomes a requirement of substantial solemnity: a legacy could now be either made nuncupatively, and thus valid up to the value of 100 pounds, or made in writing, *in scriptis*, and thus valid to the amount written. This was reflected in a decision from 1711[136] and was a well-established truth for the 18th century authors Bankton and Erskine.[137] Just like in Civil law (*supra*), Scots wills could not be written and verbal simultaneously – one of the forms was to be chosen. Nevertheless, this was obviously a product of the later developed legal doctrine, with conscious reception of the Civil law categories.

Unlike in the *Ius Commune*, there is no strong evidence to suggest the existence of privileged testaments (soldier's will, parental will, will *ad pias causas*), distinguished from standard testaments, in the Early Modern Scots law. The word 'strong' here is used to point out some evidence that the judges at least were aware of such categories of wills and were considering their application in practice. In *Colonel Henderson's Children v Murray* case,[138] as reported by Haddington, some Lords were of opinion that the testator's status as a soldier, *inter alia*, might allow him to dispone heritable property by will while being abroad. Haddington objected to that opinion, pointing out that soldiers' wills at Civil law only provided a privilege as to solemnities; his opinion prevailed in the narrow majority decision. In a much later case, *Ker v Hay* (1708, Mor 16968), the concept of the soldier's will (litt., '*among soldiers'*) as well as that of the testator's 'lack of legal advice', were invoked (this time – successfully) to recognize a testament made abroad, which lacked the names of the maker and of the writer.

Wills for 'pious uses' were mentioned and bore some special status in Scots practice,[139] but not in respect of authentication. Parental testaments seem to have never been mentioned in Scottish case law.

6. Summary of Archival Evidence on the Form of Last Wills

In the survey of the forms of the last wills of the Post-Reformation Scotland, 163 testaments were surveyed: the entries from the register of the Glasgow Commissary (CC9/7/2) for 1563-1564 and of the Edinburgh Commissary (CC8/8/39-40) for 1605, the original testamentary deeds ('warrants of testaments') of the Edinburgh Commissary for 1575 (CC8/10/1/1, an envelope with 26 deeds), 1586 (CC8/10/3/9, an envelope with 27 deeds) and 1625 (CC8/10/8, an envelope for November 1625 with 9 deeds).

The results of the survey are the following. The majority of wills were made with 'professionals' involved: in at least 75, a notary public was involved, in at least 31, a clergyman ('*minister', 'reader', 'exhortar', 'vicar', 'curate', etc.*). It is notable that clergymen practically disappear in the post-1600 records. 13 wills are identified as witnessed wills – bearing they are written or subscribed by the testator himself before witnesses. At least two wills are clearly holographic.[140] Three instances of purely

[128] 1613, Mor 16876.
[129] Inst.Just.II.10.10.
[130] Stair, *Inst.*III.8.33-34.
[131] Supra.
[132] Supra.
[133] Stair, *Inst.*III.8.33-35.
[134] Stair, *Inst.*III.8.36.
[135] Wallace v Muir (1629, Mor 1350).
[136] Moncrief v Monypenny (1711, Mor 13307), where an invalid written legacy was found ineligible to qualify as several nuncupative legacies.
[137] Bankton, *Inst.*III.8.6; Erskine, *Inst.*III.9.7. See also Mitchel v Wright (1759, Mor 8082).
[138] 1623, Mor 4481.
[139] E.g., Monro v Scot's Executors (1630, Mor 8048).
[140] Infra.

nuncupative wills are found.[141] At least 12 of the entries in the Glasgow 1563-64 register and more than 16 in the Edinburgh 1605 register are on intestate succession.

The boundaries between various forms of wills were quite lax. There are several instances where a notary or a minister, due to whatever reason, subscribed as one of the witnesses.[142] In some wills, the text is composed in the first person of the testator, in others in the person of the notary, but sometimes the handwriting in the original will is inconsistent with the pretended authorship.[143] Sometimes even the subscriptions of different persons, at least from a first glance, look as if made by the same hand.[144]

The internal structure of the wills was more or less uniform; the different forms of wills do not show much variation in that respect. A deed itself was usually entitled an *'inventar, testament and latter will…'* or a combination of these terms. It might be seen as a distinctive feature of Scottish wills that almost all of them contained an inventory of the testator's goods: corporeal goods first, then debits, followed by credits. The inventory is usually followed by the legacies and the nomination of the 'executor and universal intromitter'.

Practically all the wills (with the exception of the few holographs) report the presence of witnesses, and the lists of the witnesses they are providing are usually quite long: 5-6 witnesses on average, often ending the list with *'and uthers divers'*. Only in the minority of cases are the subscriptions of some or all of the witnesses mentioned present. An express mention of specially inviting the witnesses to testify to the will (*'testes vocati', 'testes requisiti'*), akin to the *Ius Commune* practice, was found only in two wills, one from 1564[145] and the other from 1574.[146]

Judging by the contents of the testaments, subscription seems to have been considered the most important formality. Subscriptions to notarial and holographic wills will be dealt with in more detail below. However, it can be generally pointed out here that there were no 'special subscriptions' in the meaning attached to it by the *Ius Commune* writers.[147] A will could be seemingly written by one hand and subscribed by another;[148] it could be expressly written by another person;[149] sometimes the document seems cut in two, with the inventory glued in between afterwards,[150] but the subscriptions do not mention or refer to these doubtful manipulations. Even additions at the margins, adding new legacies to the testament, are not always separately subscribed.[151] Moreover, despite the importance of subscription, only the minority of wills expressly mention that the subscription actually took place before the witnesses;[152] it seems that the witnesses were expected to witness the will as a whole, not just the subscription. Only one of the attested wills found (Robert Monkray, CC8/10/1/1/1) contains the testator's seal besides the subscription, and it is one of the earliest extant warrants of testaments.[153]

Surprisingly, the Scottish registers of testaments contain almost no data on the way the confirmation of testaments – the Scots equivalent for the "publication of testament" - took place. This is particularly notable in respect of the few nuncupative wills found (*infra*).

7. Notarial Wills: 'own mouth' and 'own hand'

The first striking feature of the wills made by notaries and ministers is that some of them were only completed after the death of the defunct. At least 15 such wills were identified. These wills either expressly mention the date of the death of the testator[154] or report that the testament was 'given up' by the executors on a later date and written by the notary. For example, in one register entry from 1563, the testament expressly bore that it was written by the notary 'by relation' of the executor and the spouse of the defunct.[155]

Usually, however, such testamentary deeds report only one structural part to be compiled after the decease – the inventory. The technical term 'given up by the mouth of executor' is often used in notarial wills.[156] The exact way the inventories were 'given up' before notaries is usually not revealed. One testament[157] narrates that the legacies (*'latter willis'*) were made before three witnesses, two of whom, two months later, also witnessed the writing down of the inventory. In another testament, the inventory is reported as given up by the executor and then written down by the vicar in presence of just one witness - with the same first and last name, so it must have been the executor![158] The 1567 Instructions to the Commissaries (c. 2)

[141] Infra.
[142] CC8/10/1/1/13, CC8/10/3/9/27.
[143] E.g., in a testament by 'James Mow' (?), the body text is written in the person of the minister, while the subscription by the same minister below was obviously added afterwards by a different pen and, possibly, different hand (CC8/10/3/9/2).
[144] E.g., Lady of Wedderburn from 1584, CC8/10/3/9/25.
[145] Thomas Mwre, CC9/7/2/51.
[146] Thomas Scott, CC8/10/1/1/14.
[147] Supra.
[148] James Mow, CC8/10/3/9/2.
[149] Like in two wills subscribed by two professionals: CC8/10/3/9/17 and CC8/10/3/9/19.
[150] CC8/10/3/9/1, from 1585, name illegible.
[151] Michael Bartilme, 1585 (CC8/10/3/9/11), where a writing on a margin is just followed by a word 'legaty' below.
[152] E.g.: CC8/10/3/9/6; CC8/10/3/9/25.
[153] The year of this will's original making cannot be known due to damaged text, but no later than 1575.
[154] Sometimes a will states that someone died, e.g., 'in the same month', which might suggest an expectation of the imminent event. However, in other cases the exact date of death, subsequent to the date of the making of testament, is given (Christaine Reid, 1586, CC8/10/3/9/9).
[155] Agness Allyson, CC9/7/2/123.
[156] E.g.: Jhone Aitoune, 1562, CC9/7/2/68; Euphame Weir, 1564, CC9/7/2/65; William Lawson, 1575, CC8/10/1/1/19, etc.
[157] Jhonne Craig, 1564, CC9/7/2/84.
[158] Euphame Weir, 1564, CC9/7/2/65.

expressly forbade the inclusion of any debts (liabilities) owed by the defunct into the inventories, unless by the defunct's "own mouth";[159] yet, practically all of the 'posthumous' inventories contained debts owed by the defunct.

Whatever might have been the real situation, the following interpretation of such wills seems probable. They might have been the instructions made by testators in their life to the executors, before witnesses and, possibly, notaries, and afterwards reduced into writing by the notaries with the executors' involvement. The notary, probably, wrote down a draft of the will within the life of the testator, adding the perfected inventory after the decease.

Such 'posthumous' testaments do not seem to have had much prominence in later Scots law. On the other hand, such documents are compatible with the *Ius Commune* as expressed by late medieval and early modern authors. Reading a testamentary instrument aloud before witnesses has never been explicitly mentioned in Scots wills; neither was it necessary in the *Ius Commune* in respect of the wills *inter liberos* and *ad pias causas* (*supra*). Therefore, the Scottish practice seems logical if we look at all the wills in Scotland as 'privileged' wills, as they were in England.[160]

The second striking feature of the early Scots notarial wills follows from the first one and is quite simple – most of them were actually nuncupative wills, reduced into writing. There seems to be nothing surprising in this fact from the *Ius Commune* perspective, but it sharply disagrees with contemporary and later Scots law and practice of notarial instruments.

In Scotland, a person planning to make a contract, deed or another legally recognized act in writing (unless it was a special solemnized ritual: a transfer of seisin, a resignation, etc.) but unable to write or subscribe it on his own, due to illiteracy or disability, was to have a notary subscribe the document for him, in the presence of witnesses.[161] Moreover, the act of subscribing on behalf of another person was customarily performed by 'leading the pen' – the granter was holding the pen, while the notary was literally 'leading' the granter's hand through the document. This way of subscribing writs was, probably, first provided by the 1555 Act in respect of 'reversions'[162] and had been extended to the other types writs by at least the 1570 s. It was only abolished by statute in 1876.[163]

Scottish writs, subscribed by a notary by 'leading the pen', were considered the deeds of the party, not of the notary. Unlike the *Ius Commune*, where a party could make a statement about some fact to the other party in presence of the notary who would embody that act in the public instrument,[164] Scots law did not recognize such statements as probative writs. The most explicit case on this issue seems to have been *Anstruther v Thomson*.[165] In that case, two notaries reduced into writing and subscribed the statement of the parties about assigning a tack (i.e., a lease). The Lords refused to recognize this document as probative, pointing out that the notaries could not 'make a contract' on behalf of the parties.

What does the archival evidence suggest on this issue? All of the surveyed wills from before 1579 were made as 'nuncupative, reduced into writing'. Obviously, they were considered a sufficient 'proof by writing', required by the 1567 Instructions (c. 1). Only beginning with the 1585 collection (CC8/10/3/9) do we start to find the more or less standard Scottish instruments with 'pen lead': only 3 out of 14 notarial instruments from that collection were made in that way.[166] Of these wills, only one mentions expressly that the subscription with 'touching the pen' took place in presence of the witnesses,[167] which was deemed a necessary solemnity in the later law.[168]

Thus, the data suggests that only after the enactment of the 1579 Act did the understanding start to arrive that a testamentary deed was supposed to be subscribed by the notary before witnesses, not just put by him into writing from the testator's nuncupative statement. And in the post-1600 archival records we find 'leading the pen' as the main form, employed in the majority of notarial wills. However, the nuncupative wills reduced into writing can be found even in the later records.[169]

The third feature of early Scottish notarial wills is that they were inconsistent in following the requirements of the 1579 Act. The Act prescribed that 'obligations of importance' be subscribed by at least two notaries before four witnesses. It might be doubted whether the criterion of 'obligation of importance' had already been well defined in the 1580 s the way it was interpreted in the later law: i.e., 100 pounds Scots (*supra*). Five wills found in the register have two professionals subscribing, obviously following the Act.[170] However, there are at least four more wills in the 1585 collection, where the 'Dead's part'[171] is

[159] Infra.
[160] Supra.
[161] In respect of 'writs of importance', the 1579 Act required two notaries and four witnesses (*supra*).
[162] *RPS*, A1555/6/3. A 'reversion' in Scotland was a right to claim back pledged property after the repayment of the debt.
[163] CURRIE, J.G., *The Confirmation of Executors in Scotland.* Edinburgh, 1890, p. 38.
[164] See Gloss and commentaries *ad* C.4.30.3.
[165] 1611, Mor 12499.
[166] CC8/10/3/9/7, CC8/10/3/9/12, CC8/10/3/9/13.
[167] William Clarksone, 1586, CC8/10/3/9/13.
[168] Laird of Culterallers v Chapman (1667, Mor 16803).
[169] Alesoun Bassendyne (20 July 1604, CC8/8/39/401), David Callendar (16 June 1605, CC8/8/40/382).
[170] E.g.: CC8/10/3/9/17; CC8/8/39/527; CC8/8/40/89.
[171] The 'Dead's part' in Scots law was the part of the estate that the testator was entitled to leave by the last will. It amounted to one third of the testator's free movable goods (excluding debts), if the testator left a surviving wife and children. If the testator left the widow only or the children only, the share was one half of the free goods; a lonely man with no children was unrestricted in his testamentary capacity. A married woman could leave, respectively, one third or one half of the family goods. This law was an immemorial custom.

obviously bigger than 100 pounds, but just one notary/minister was involved.[172] This might suggest that some notaries took heed of the Act's requirements, while others just continued with their old practice, deeming the statute inapplicable to last wills. This seems to be confirmed by the fact that the exception of last wills from the Act's force was established quite early – no later than 1584, in *Buchanan v McArtey*.[173] The point seems to have been finally settled in *Bog v Hepburn,*[174] where one notary was deemed enough for a legacy irrespective of the amount of the latter.

As concerns other solemnities used in notarial wills, they demonstrate inconsistent and only partial compliance with the *Ius Commune* requisites for public instruments. As already mentioned above, Scottish notarial wills did not mention their being read before witnesses. On the other hand, among the earlier deeds, the intention may be discerned at least to comply with as much of the *Ius Commune* formalities as possible. Thus, at least five wills from the 1563-64 Glasgow register and five wills among the 1575 Edinburgh warrants are fully or substantially written in Latin, although the inventory was usually given up in the vernacular. Among the same wills, most say the notary was '*requisit*', which was the standard Scots term for giving warrant to a notary; however, at least one will uses the term '*notarius rogatus*',[175] which was the accepted *Ius Commune* term. Some wills begin with the invocation of God's name, and they also mention the name and the regnal year of the reigning monarch.[176]

However, among the wills made after 1585, one no longer finds extensive inscriptions in Latin, invocations of God's name in the beginning and the king's name in the body of the text. The notarial and priestly subscriptions from this time look more or less uniform ('*notarius publicus requisitus… premissis testo manu propria*'); the term '*requisit*' becomes a routine technical term.

8. Nuncupative Wills

As already mentioned, three cases of purely nuncupative wills were identified in the 1563-1564 Glasgow register. In two of them,[177] the entire last will seems to have been nuncupative: it is reported as made before witnesses, given up and '*exprimit to be of veritie*' by the executor. In one case,[178] after the notarial deed was copied into the register, the executors added one nuncupative legacy ('*left kindness of his maling…*'), allegedly made by the testator before the same (instrumentary) witnesses.

The surprising fact about nuncupative wills, already touched upon above, is the absence from the register of any sign of formal proof. There is no sign that the witnesses to the last will were interrogated, no sign of anything like the 'common'/'special' forms of publication, accepted in England (*supra*). The register only reports about executors relating such last wills, together with inventories.

It might be possible that this practical absence of checking the authenticity of nuncupative wills in the 16-17th century Scotland meant that a confirmed will could be easily challenged by an interested party and put to a stricter proof. However, we do not have sufficient evidence to confirm this.

In any case, the mere existence of nuncupative wills in Scotland before 1567 is a significant discovery by itself. It shows that early Scots testamentary practice was not particularly divergent from the English practice and the Canon law. The reference in the 1563 Instructions (c. 24) to the testaments made 'otherwise as accords the law' seems to imply nuncupative wills, with the Canon law, possibly, being 'the law' referred to there.

9. Holographic Wills

Present research shows that holographic wills were being confirmed by the Commissary courts as early as 1584. Just two holographic wills have been identified so far.[179] One of them, made by David Crechton, expressly bears that it was made 'before no witnesses, but God only'. Both of them contain no inventory, but commit its making to the executor.

Although holographic wills were not mentioned either in the 1563 Instructions (c. 24) or by Balfour,[180] there seems to have been no problem with their confirmation. As with most other wills, there is no data on whether any special procedures were employed to check their authenticity. Considering what has already been said about nuncupative wills, there were, probably, no such procedures. The later practice of the Scottish Commissaries seems to confirm that: according to the Commissary practice of the 19th century, an express mention in the will's text, that the will was written by testator's own hand in its entirety or in substantial parts, was deemed sufficient; otherwise, an oath of the executor or affidavits of two witnesses were required.[181] Only if the will was challenged by an interested party would a full proof be required.

The two holographic wills found so far do not bear that they were holographic as it was accepted in later practice. They only purport to be subscribed by the testator's own hand. Again, as with most wills (*supra*), the subscription was obviously deemed the most important formality.

There was a type of document in Scots law, which was similar to the last will in remaining in the granter's hands until his death, for which a mere subscription without witnesses seems to have been sufficient, beginning from, at least, the early 17th century. This was a book of account. And, as it has already been

[172] E.g.: CC8/10/3/9/2, CC8/10/3/9/20, CC8/10/3/9/23.
[173] Mor 16958. There is no date for this case, but it seems to have been decided in 1579-1584.
[174] 1623, Mor 16960.
[175] Thomas Scott, 1574, CC8/10/1/1/14.
[176] CC8/10/1/1/9, CC8/10/1/1/20.
[177] James Guidwod, 1564, CC9/7/2/55; Gelis Greynheid, 1564, CC9/7/2/83.
[178] Jhone Aitoune, 1564, CC9/7/2/68.
[179] Robert Myller, 1584, CC8/10/3/9/18; David Crechton, 1585, CC8/10/3/9/22.
[180] *Balfour's Practicks* (supra n.80), ch. *'Anent testaments',* c. 11.
[181] CURRIE, JG., *The Confirmation of Executors* (supra n.163), p. 44-45.

established (*above*), an account of a deceased person was considered valid due to the presence of the subscription alone. Could the last wills of that period share a similar 'liberal' approach? In the already mentioned case *Lady Inverleith v Bishop of Glasgow,* a testament, in which one of the witnesses was appointed executor, was found reducible, not null and void *ipso jure*. This means that, before the reduction, such a testament was considered valid *ex facie* and lawfully confirmed by the Commissaries. What if that testament had never had any witnesses at all, but only the testator's subscription? Presumably, it would have been confirmed by the Commissaries, but what if it had been challenged – would a mere subscription have constituted proof with *comparatio litterarum* or another 'adminicle'? One might speculate about that.

However, the similarity of authentication between last wills and accounts is more obvious in the situation opposite to the one already considered: where the body text of the document was written by the granter's hand but lacked subscription. Last wills made in such a way were recognized from quite an early period. In *Pursuer v Titill*,[182] probably the earliest reported Court of Session case on holographic wills, the testament lacked a subscription, as well as the date, but it was, nevertheless, sustained because it was written by the testator's hand. We do not have cases on books of account from the same decade, but in *Brown's Creditors v. Baillie*[183] the absence of subscription in an account was not seen as a ground for invalidity; and since the 1660s, no need for space the Court of Session followed that position even if the granter's successors denied authenticity.[184]

10. Statements of Fact in Last Wills and Books of Account in Scotland

In contrast with the *Ius Commune,* in Scotland, from the early times, debts given up (i.e., acknowledged) by the deceased in the testament seem to have been prejudicial as to successors. The overwhelming majority of testaments contain detailed inventories. They are never confirmed by an express oath of the defunct, as was the *Ius Commune* requirement (*supra*).

Already in 1561 we encounter a piece of evidence of the force of 'taxative' statements contained in last wills. In the case *Executors of Marjoribanks v Wilsone*,[185] the executors were pursuing for an estate debt of 800 pounds. However, as the testament of the defunct creditor stated the amount of the debt as 600 pounds, the remaining 200 pounds were deemed discharged.

The 1567 Instructions (c. 2) were the first document to expressly restrict the debts which could be voluntarily confirmed by the executors. The debts given up by the testator's 'own mouth' were one of these. The restriction seems to have been mainly aimed at preventing the fraud as to 'quots' due to the Commissaries,[186] although the stated intention was to protect the defunct's children and "others having interest". The instruction does not tell us if a recognition by the testator is alone enough to prejudice these interested parties. The restriction was later repeated in the Instructions of 1610[187] and 1666.[188]

The practice embodied in the 1639 Edinburgh act book (CC8/2/62) suggests that a statement in the testament alone was a sufficient proof of the debt against the testator's executors. Most of the executry debt claims in that year were uncontested; some of them were won on the ground of the executor's not showing for trial, which was a ground for the decree *pro confesso* against him. However, in some of the recorded cases the testament is expressly the decisive proof for the victorious creditor. For example, in the suit by James Broun against the executors of the defunct Patrick Wood,[189] the pursuer grounds two of his claims on assigned bonds and one of them on the testator's recognition in his testament, which was 'well-known to the Commissary'. And, although the defendants were absent, the court expressly accepted the confirmed testament as the only proof of pursuer's claim. This is confirmed by the subsequent case law of the Court of Session, specifically by *Tutor of the Children of F.Ross v A.Ross.*[190] Thus, a recognition of debt in the testament in Scotland bore pretty much the same effect against executors, as a recognition with an oath in the *Ius Commune* against heirs (*supra*).

The law was different as regards the interest of third parties. Thus, in the case of *Executors of Edgar v Edgar*,[191] a debt recognized in the testament was paid by the executor without a judicial decree, and the original bond of the debt was not preserved. The executor was then sued by another creditor and pleaded exhaustion of the estate due to the payment of debts. The Lords found it relevant for the executor to verify the first debt by the oath of the creditor to whom he had paid without decree. Here, obviously, the recognition made in the testament does not make full faith as to the creditors of the defunct. Although the term is not used, it makes something akin to a 'half-proof', in that it requires a confirmation by oath.

[182] 1610, Mor 16959.
[183] Supra.
[184] Wardlaw v Gray (1662, Mor 12620).
[185] MAITLAND, R., *The practiques…* Edinburgh, 2007, p. 102. The year of the case is 1559 in some Mss, but 1561 seems to be the correct year.
[186] 'Quots' were tolls paid by the executor to the Commissary for the confirmation of the testament out of the testator's free goods. Before 1641, they amounted to twelve pence per pound (5%) of the testator's 'Dead's part'.
[187] Injunctions and rules set down and appointed by reverend Fathers in God… for the Commissar Clerks…, 12 March 1610. In: *Balfour's Practicks* (supra n.80), p. 664-670.
[188] His Majesty's Instructions to the Commissars, 28 February 1666. In: *The Acts of Sederunt* (supra n.85), p. 94-101.
[189] CC8/2/62, 25 May 1639.
[190] 1668, I Br Sup 573. In that case, the Court rejected the possibility of proving the debt by the acknowledgment in the testament alone, on the ground that the defunct was in error as regards the person of the creditor. The case suggests, *a contrario sensu*, that the testament would have been a sufficient title if there had been no obvious error of the testator.
[191] 1628, Mor 12487.

The idea that the early 17th century Scots law on statements of fact in absence of the recipient might rely on the *Ius Commune* rules seems to receive verification not only from the practice on last wills, but also from the practice on statements made in books of account. In the already mentioned above case, *Brown's Creditors v Baillie,*[192] the accounts subscribed by the defunct's own hand were found to bear enough faith for the creditors in them to compete with others, while the accounts from the same book, which were written down by the defunct's servant and lacked subscription, were found only partial proofs: the respective creditors were required to 'adminicle' (supplement) the accounts by proving the delivery of goods and swearing an oath on their values. The solution provided by this case is similar to the popular *Ius Commune* solution: an account written by the granter's hand 'always speaks' and thus makes full faith against the maker, while an account written by someone else is a nuncupative confession in absence of the recipient, so it makes just 'half-proof'. This 'half-probativity' of the account in respect of the third parties persevered in later cases. For example, the merchant status of the maker and the oath of the party could fortify the account in Scotland so as to make it fully probative.[193]

From the 1670 s on, the view on the evidential force of the last wills in the judicial practice changed. The last wills were no longer deemed fully probative against universal successors in respect of the 'law of deathbed'.[194] Instead, the case law in the late 17th century recognized the testaments and other statements made on deathbed as a 'half-proof' of the respective debts against the heirs-at-law. Thus, a long term of marriage, taken together with the husband's recognition in his testament, was deemed a sufficient proof of payment of dowry by the wife, against the husband's heir-at-law.[195] In another case,[196] a moveable debt on a loan smaller than 100 pounds Scots, acknowledged verbally by the testator on his deathbed, was allowed to be proven by the witnesses to the defunct's taking possession of the borrowed money. Nevertheless, this new legal development obviously undermined the evidential significance of last wills in Scots law.

11. Conclusions

The conclusions of the present article as regards the authentication of writs in the *Ius Commune* and early modern Scotland are the following. Clear influence of the *Ius Commune* on the Scots law of written documents is discernible. However, it existed largely on a theoretical level, in that Scots law adopted roughly the same classes of documents (contracts *in scriptis,* letters missive, books of account) as the *Ius Commune*. The 'probative deed' of the developed Scots law bears some resemblance to the 'non-public authentic instrument' of Canonical origin, but its relation is not conclusive. Some influence in the style of notarial documents is also discernible.

On the other hand, in the field of testamentary writings, we see Scottish last wills to initially follow the formal requirements of Canon law - a priest and two witnesses, - which is unsurprising, given the pre-Reformation ecclesiastical jurisdiction over last wills. The existence of purely nuncupative last wills before 1567 further proves the point. Nevertheless, the gradual impact of the 1567 Instructions to the Commissaries, of the 1579 and, eventually, 1681 Acts of Parliament was to make the written form of the last wills almost exclusive and to bring it to conformity with the general requirements for a 'probative deed'. The will-making practice seems to have reached a standardized 'style' by the 1600s, where the inventory was the most important section of the will. One relict of the Canonical origins of the Scottish will was the use of the 'nuncupative testaments reduced into writing', which continued into the early 17th century. Mid-to-late 17th century was characterized by the deeper reception of the theoretical categories of Civil law, such as the distinction between testaments and codicils and the requirement of writing as a matter of substance for testaments and codicils for large amount.

The research into the evidential force of the last wills reveals strong evidence that Scots practice might have experienced influence of the *Ius Commune*. However, this influence came not from the *Ius Commune* rules on the last wills, but rather from the *Ius Commune* rules on the books of account. Both Scottish books of account and last wills generally followed the principle that a statement of fact proves against the maker of the document and his general successors. The third parties could only be prejudiced if there were additional proofs, ('adminicles'); the document would have the force of a 'half-proof' against them. The similarity to the doctrines of the *Ius Commune* writers, like Bartolus and Panormitanus, is too strong to be a simple coincidence. It further proves that the Civilian and Canonistic teachings on the last wills were not particularly relevant for the Scots practitioners, who preferred to invoke the more general rules on the instruments and to treat Scottish last wills accordingly.

Among the unresolved issues of the present research is the practice of holographic wills. They appear as successfully confirmed in Scottish registers already in the 1580s. Tentative remains their possible connection to the *Ius Commune* doctrine, as well as the comparison with the practice of neighbouring England, seeing that Swinburne was unsure about their legal force as late as 1591. A related unresolved issue is the that of the procedure for the confirmation of testaments in the 16-17th century Scotland and the proofs accepted by the Commissaries, in regard to its comparison to the publication of testament procedure of the *Ius Commune* and the contemporary English practice.

[192] 1631, I Br Sup 319.

[193] E.g.: Skene v Lumsden, 1662, Mor 12618; Lawrie & Drummond v Drummond, 1675, Mor 12622.

[194] According to the classical Scottish rules on 'deathbed dispositions', which solidified by the late 17th century, a person suffering from a mortal illness could not legally constitute an obligation or perform any other deed that might prejudice the heir. Such deeds were voidable at the petition of the heir, even if the party to the deed was *bona fide*.

[195] Dods v Scot (1671, Mor 12584).

[196] Thallane v Orrock (1673, Mor 12585).

The Collapse of the Polisinodia: Institutional Reforms at the Last Crisis of the Spanish Catholic Monarchy (1834–1836)*

*Antonio Manuel Luque Reina***

Abstract

This paper challenges the traditional commonplaces regarding the end of the jurisdictional governance structures of the Spanish Catholic Monarchy in the third decade of the 19th century. The so-called polisinodial regime, composed of the Councils, collegiate bodies several centuries old, apparently collapsed due to the most important political reforms following the death of Fernando VII, the last absolute Spanish King. In this paper, I will first examine how legal historiography has understood these institutional reforms and their actual impact on the dissolution of the former Councils, carrying out a bibliographical review. Second, I will show the role played by the Consejo Real de España e Indias in this process of disintegration of the ancient polisinodia and the emergence of the new Spanish Administration. In order to do so, I will examine and interpret unpublished archival documentation from various archives in Spain, such as the Archivo General de Indias, the Archivo General de Simancas, the Archivo Histórico Nacional, and the Archivo General de Palacio.

Keywords: *Spanish King's Councils; Spanish Modern State; Administrative Law; Constitutional Law; Spanish Public Law; Spanish Administration.*

1. Introduction

1.1 1834 as the starting point

The Reform of the Central Administration, *The first Steps of the Constitutional State* and *The Invention of the Provinces* are all proposals made from the perspectives of different disciplines. However, all of these scholarly approaches agree that there was a distinctly significant turning point for the ultimate collapse of a Monarchy's government structure and perhaps for the first steps of another government framework in Spain.[1] Indeed, the most readily available primary sources show that there is a particularly important moment in time:

"My Secretaries of Affairs (or simply Secretaries or *Secretarios del Despacho*) will also report any reforms implemented in the various branches of government: territorial division, separation and differentiation between the administration and the judiciary, the suppression of old councils (…) and other improvements still in progress. They will show to you my diligent and caring desires whilst giving encouraging hope to the nation".[2]

"Territorial division", "separation and differentiation between the administration and the judiciary", "suppression of old Councils"; at first sight, one could argue that, since the sources appear to be crystal clear and historiography seems abundant, we should not be concerned with such an extensively studied disintegration-

* This work is based on LUQUE REINA, A. M., La disolución de los consejos: entre quiebras, confusiones y continuidad (1834-1836). In: BECK VARELA, L. and SOLLA SASTRE, M. J. (coords.) *Estudios Luso-Hispanos de Historia del Derecho*, Madrid, 2018, p. 339-371. Both are part of the research project granted by the Spanish Ministry of Economy, Industry and Competitiveness "Tradition and Constitution: constituent power issues in contemporary Spain") under reference DER-2014–56291-C3–1–P (2015-2019).

** Antonio Manuel Luque Reina, Assistant Professor at the Legal History Department of the School of Law of Universidad Autónoma de Madrid, Spain.

1 The references are: SÁNCHEZ BELLA, I., La reforma de la administración central en 1834. In: *Actas del III Simposio de Historia de la Administración*, Madrid, 1974, p. 659-688; NIETO, A., *Los primeros pasos del Estado constitucional. Historia administrativa de la Regencia de María Cristina de Borbón*, Barcelona, 1996; BURGUEÑO, J., *La invención de las provincias*, Madrid (Catarata), 2011. These works are extremely heterogeneous in terms of depth and scope. Also, they are only a small sample of the numerous studies that, from the perspectives of different disciplines, have taken 1834 as a starting point or as a distinctly significant date. The first one is a classic work in Spanish legal history. The second reference is a highly cited work in Spanish legal history as well as by historians in general, since it is the only attempt at providing a comprehensive picture of the "State" during the Regency of María Cristina. The third work is a more current and more accessible version of the well-known work by BURGUEÑO, J., *Geografía política de la España constitucional la división provincial*, Madrid, 1996.

2 Extract from the Throne Speech during the opening session of the Legislature (*Cortes Generales del Reino*) dated July 24, 1834; appendix to document no. 3 in page 2 available at <https://app.congreso.es/est_sesiones/>. [Last accessed on April 8, 2021].

reform. Nevertheless, a more careful approach –in response to certain wake-up calls–[3] can change the opinion about these historiographical works and the said sources. This works tries to help shaping this new stance, or at least to get everyone to question or doubt the already well-established and mainstream narrative. To that end, we will first raise the questions that will subsequently help us find the answers to be discussed below.

1.2 Historiographical gap? It is a matter of perspective

Undoubtedly, the measures implemented by the first Governments following the death of *Fernando VII* have drawn attention from many scholars specializing in various fields of knowledge.[4] The decease of the last "absolute" monarch, closely followed by the measures that were announced, has provided historiography with one of those ideal *moments* to draw boundaries or distinctions that are helpful, for the sake of clarity or for explanatory purposes, when trying to define transitions or paradigm shifts. Regarding peninsular or mainland Spain, 1834 has been presented in a twofold manner: it has been depicted as a point of no return to the *Ancien Régime* and, simultaneously, as the gateway to the 19th century liberal state. These are two different identities for the same turning point, allowing to identify a possible split of "competences" or "powers" based on the said turning point.

Indeed, on the basis of this "chronological split" apparently stemming from the implemented measures themselves, during most of the second half of the 20th century, classic legal history and administrative law scholarship have distributed amongst themselves the study of the "history of Government" (or the Administration), placing the aforesaid dates as their respective boundaries.[5] This *tacit covenant* gave rise to a mainstream historiographical narrative. Within this narrative, neither discipline had its own premises and there was a unitary understanding of Government, thereby giving rise to the chronological split of the same reality or historiographical events. Accordingly, legal historians were tasked with studying the dying breath of medieval and modern bodies and officials in the Spring of 1834, whereas administrative law scholars had to deal with Spain's provincial division –which is a clear example of the expansive or far-reaching dynamics of Government ministries– as well as with the allocation of powers. Administrative law scholars were stubbornly keen on rebuilding (or actually building, for that matter) the origins of their discipline.[6]

If we accept at least the core of the above premise, we can draw a set of intertwined consequences therefrom. First, the unitary nature of the subject-matter, *Government* (in the English, broad sense of the word) or the *Administration* (being a narrower and more literal translation), has helped to conceal that the measures had not been linked to each other. The fact that *Government* was the subject-matter has also misleadingly given the appearance that the subject of study was a *continuum*, which has hidden the drastic separation between events and circumstances stemming from the "same" reform process. The explanations regarding the last stage in the life of *polisinodia* and its ultimate collapse show that the mainstream scholarly approach merely wanted to construe them as incompatible with the upcoming government framework, without discussing why they were incompatible or how the transformation occurred.[7] Hence, since the Councils were regarded as an outdated or obsolete product of a defunct world, how could it be relevant to study these Councils for the construction of the emerging liberal state? Moreover, how were these Councils connected with such "unifying" or "systematizing" measures like the provincial division or the reinforcement of ministerial power?[8]

---

[3] LORENTE SARIÑENA, M., La supresión de los Consejos y la creación del Real de España e Indias (Elementos para una discusión). In: TORRES AGUILAR, M. (coord.), *Actas del XV Congreso del Instituto Internacional de Historia del Derecho Indiano*, Vol. 2, Córdoba, 2008, p. 1103-1104; MARTÍNEZ PÉREZ, F., Continuidad y discontinuidad de la historiografía jurídica en España. In: *Zeitshrift für Neuere Rechtsgeschichte*, Nr. 38, 2016, p. 82-101; and PORTILLO, J. M., Del gobierno de la Monarquía al gobierno de la sociedad. In: VALLEJO, J. and Martín, S. (coords.), *En Antidora. Homenaje a Bartolomé Clavero*, Pamplona, 2019, p. 537-553.

[4] So it is, that they are strange exceptions like: PRO, J., *La construcción del Estado en España. Una Historia del siglo XIX*, Madrid, 2019.

[5] For a more comprehensive explanation of this *split*, see MARTÍNEZ PÉREZ, F., La historiografía de las instituciones administrativas en España (siglos XIX-XX). In: *Istor*, Nr. 16, 2004, p. 91-112, specifically, pp. 91-93.

[6] As has been stated before, please note that this quest for their origins in terms of disciplines or fields of knowledge was beyond the strictly historiographical scope (for a relatively recent review of these and many other aspects, see LORENTE SARIÑENA, M., Después de *Hispania*: Algunas reflexiones sobre la historiografía jurídica en España (1989-2013). In: SORDI, B. (ed.), *Storia e Diritto. Esperienze a confronto. Atti dell'incontro internazionale di studi in occasione dei 40 anni dei Quaderni fiorentini*, Milano, 2013, p. 81-120).

[7] DE DIOS, S., Líneas fundamentales de la evolución histórica del Consejo Real. In: *Fuentes para el estudio del Consejo Real de Castilla*, Salamanca, 1986; PUYOL MONTERO, J. M., *El Consejo Real de Castilla en el reinado de Fernando VII*, Madrid, 1992; CABRERA BOSCH, M. I., *El Consejo Real de Castilla y la ley*, Madrid, 1993; PINO ABAD, M., *El recurso de suplicación en Castilla: expresión de la gracia regia*, Madrid, 2006. These are only some of the authors who, covering the breakdown in their studies, share this approach to the process, thus accepting the administrative law assessment on the implications of the said collapse or breakdown. However, in order to free their works from opportunistic criticism, note that none of the cited works focused on the final collapse, and thus failed to provide an in-depth discussion thereof.

[8] Shockingly, the focus seems to be on the alleged inception of these "modern" ministries right on this date, which contrasts with the lack of attention paid to their operation and institutional activity. This is evidenced by the fact that the latest historiographical works on the *Ministerio de Fomento*, *Interior* or *Gobernación* (Ministry of Public Works, of the Interior or of Government), the latter being the favorite topic within this structural review, cite or refer to the classic works on the matter: SUÁREZ VERDAGUER, F., La creación del Ministerio del Interior. In: *Anuario de Historia del Derecho Español*, Nr. 19, 1948-1949, p. 15-56; GARIJO AYESTARÁN, M. J., *El Ministerio de la Gobernación (Materiales para un estudio de su evolución histórica hasta 1937)*, Madrid, 1977; GUAITA, A., La competencia del Ministerio de Fomento, 1832-1931. In: *Actas del IV Simposio de Historia de la Administración,* Madrid, 1983, p. 349-400; and *El Ministerio de Fomento (1832-1931)*, Madrid, 1984. As for the latest historiographical works (not being extremely recent) we are referring to: SANTANA MOLINA, M., *Orígenes, antecedentes y evolución del Ministerio de Fomento*, Alicante, 2002; PÉREZ NÚÑEZ, J., El primer Ministerio de Fomento y sus delegados, 1832-1834. Otra perspectiva desde el caso de Madrid. In *Hispania*, Nr. 217, 2004, p. 637-688; Del Ministerio del Interior al de la Gobernación. El gobernador civil de Madrid en tiempo del Estatuto Real (1834-1836). In: *Anuario de Historia del Derecho Español*, Nr. 77, 2007, p. 255-375, and the monograph entitled *Entre el Ministerio de Fomento y el de la Gobernación: Los delegados gubernativos de Madrid en la transición a la Monarquía constitucional, 1832-1836*, Madrid, 2011; or PÉREZ JUAN, J. A., *El Ministerio de Comercio, Instrucción y Obras Públicas*, 1847-1851, Madrid, 2008.

Scholars on the other side of the boundary were content with certifying the death of a regime and they were ready to rebuild statehood right on the site were the old regime had been torn apart.[9]

As can be inferred, our approach mainly revolves around not embracing, by any means, this shared assessment. Returning to the said intertwined consequences, this can be based on the question about how the transition/transformation occurred.[10] In other words: failing to discuss or reflect on the forms of dissolution and mutation of the councils has contributed the most to separate both "reform" dynamics, which were otherwise strongly linked. Showing this inconsistency is one of the main purposes of this paper. We also put forward a set of key explanatory notes on the transformation process supported on a privileged observer, i.e., the *Consejo Real de España e Indias*, which will be helpful when making our proposals. Prior to that, we will continue to cast doubt on this already con*fusing*[i] landscape with the aim of clarifying a discourse that apparently intended to be clear at first.

2. The confusing discourse on the end of con*fusion*[ii]

2.1 Con*fusion* in the delineation of powers

On March 24, 1834, the President of the Council of Ministers, Martínez de la Rosa, was given six royal decrees providing for "the allocation of the nation's supreme courts including the powers and prerogatives incumbent thereupon".[11] In the "preamble", the Ruling Queen evidenced how the situation was untenable. In her own words, the situation was unbearable because of the "perverse organization [in place] of the main government bodies". In order to reverse the situation and to allow for "the projected reforms, which were giving hope to the nation, to come to fruition", the "harmony and reciprocity between the various administrative branches" was crucial. To that end, it was necessary to delineate "judicial and administrative powers between the bodies and authorities"; according to the Queen, that was the very purpose of the said royal decrees.

The debates held during the opening sessions of the Legislature (*Cortes*), under the recently enacted *Estatuto Real*, contain extensive references to the meaning and implications of the said decrees.[12] Martínez de la Rosa himself also considered that the previous administrative framework was perverse. He addressed this situation by mentioning "the need for delineation of powers to implement a government reform". Amongst other amendments to be made in this regard, he mentioned the "abolition of the old Councils hindering government". In the words of the Secretary of State, the Secretaries of Affairs, or simply Secretaries, were "deep inside convinced that an integral reform was needed, right from the top bodies of the old administration, i.e., from the *Consejo de Castilla* that was the cornerstone, down to every single municipal council".[13] In his

[9] Below, we will more thoroughly examine the reference to Councils and their dissolution in the works of certain administrative law scholars.

[10] This is a very specific question which has barely been dealt with. It falls within a broader framework of interpretations on how the instruments for jurisdictional governance or enforcement (*gobierno jurisdiccional*) were removed whilst non-jurisdictional review mechanisms emerged. As for the first question above, see GARRIGA ACOSTA, C., Gobierno y Justicia: El Gobierno de la Justicia. In: LORENTE SARIÑENA, M. (coord.), *La jurisdicción contencioso-administrativa en España. Una historia de sus orígenes*, Madrid, 2009, p. 45-111; it provides an enlightening summary on the notions and categories of "jurisdictional governance" and the "limits and possibilities" concerning the state-building and "administrativization" of the monarchy still in the 18th century. Along these lines, and regarding the second question, see GARRIGA ACOSTA, C. and LORENTE SARIÑENA, M., Responsabilidad de los empleados públicos y contenciosos de la administración (1812-1845): Una propuesta de revisión. In: PORTILLO VALDÉS, J. M. and IÑURRITEGUI RODRÍGUEZ, J. M. (eds.), *Constitución en España: orígenes y destinos*, Madrid, 1998, p. 215-272. These works had already helped us not to anticipate or pre-date non-jurisdictional administrative autonomy. This broad framework I mentioned could still be extended having regard to two different variables. If it is the chronology that we are extending, in Spain we should go back to the 1970 s to find the first clearly non-state based and non-legalistic approaches to a jurisdictional monarchy in the midst of a crisis; see, amongst other works of his: CLAVERO, B., Institución Política y derecho: acerca del concepto historiográfico de *Estado modern*. In: *Revista de Estudios Políticos*, Nr. 19, 1981, p. 43-57. Rather, if it is the geographical scope of both the author and the matter what we are extending, the following well-known research should most certainly complete the Italian-Spanish-Portuguese triangle. As for the Portuguese case regarding these approaches, see HESPANHA, A. M., *Vísperas del Leviatán. Instituciones y poder político (Portugal, siglo XVII)*, Madrid, 1989; Justiça e administração entre o Antigo Regime e a Revolução. In: CLAVERO, B., GROSSI, P. and TOMÁS Y VALIENTE, F. (eds.), *Hispania: entre derechos propios y derechos nacionales*, Milano, 1990, p. 135-204; and *Guiando a mão invisível. Direito, Estado e lei no liberalismo monárquico português*, Coimbra, 2004. As for Italy, the most significant work for the purposes of this paper is: MANNORI, L. and SORDI, B., *Storia del diritto amministrativo*, Roma-Bari, 2001.

[i] In Spanish, the word is "*confusión*," meaning both literally "confusion" as well as "intermingling," "mixing" or "concentrating," referred to both a misleading situation and to a true concentration of powers by government bodies. Hence the pun in Spanish and the use of italics in English, aimed at conveying the dual sense of the word as both something misleading or strictly confusing and the "*fuse*" (concentration) of functions or powers.

[ii] See note i above.

[11] This is the header in the *Colección de las leyes, reales decretos, ordenes, reglamentos, circulares y resoluciones generales espedidas sobre todos los ramos de la administración y gobierno del estado*, preliminary volume, Madrid, 1840, p. 306-311 (own translation). The remaining literal references used in the same paragraph are taken from the preamble in the same text.

[12] To this date, VILLARROYA, J. T., *El sistema político del Estatuto Real (1834-1836)*, Madrid, 1968, remains an essential comprehensive overview of political history from 1834 to 1836. Most recently, for the same period and "constitutional" experience, see: PRO, J., *El Estatuto Real y la Constitución de 1837*, Madrid, 2010; and MONERRI MOLINA, B., *Las Cortes del Estatuto Real (1834-1836)*, Madrid, 2019.

[13] All quotes by Martínez de la Rosa cited in this paragraph are taken from the Official report of parliamentary proceedings, *Diario de Sesiones de las Cortes*, hereinafter DSC; 1834-1835 term, document no. 10, p. 2; available at < https://app.congreso.es/est_sesiones/> [Last accessed on April 8, 2021] (own translation).

introductory speech in *Cortes* on August 14, the Secretary of State and of Interior Affairs, Moscoso de Altamira, reviewed how his powers were con*fused* or intermingled with those of the "preceding Government". Subsequently, he laid down the fundamental points for the new Government; he highlighted that "they would hardly be successful, even after clearly defining and allocating the powers of municipal councils, mayors, provincial councils and civil governors, if the powers and duties of executive and administrative bodies were not delineated from those of judicial authorities".[14]

In light of these well-known sources, which remain political talk (whether heading a Decree or as a speech in *Cortes*),[15] one could argue that the mainstream narrative did not resist the temptation of depicting this moment in time and these measures as the foundations for the separation between the executive and the judiciary (formerly a dual unit), hinting at the ultimate implementation of the principle of separation of powers.

This widely disseminated approach has already been confronted by scholars opposing the "acritical" reproduction and assessment of this political discourse.[16] This narrative has been subject to a twofold criticism. On the one hand, as for most of the narrative revolving around the standard historiographical approach to Government and Justice –rooted on the executive or administrative/judicial or adjudicating binomial– the criticism comes from the same level; an alternative approach to the "administrativization" of the jurisdictional monarchy has been put forward.[17] On the other, specifically regarding this turning point or transitional milestone, some have lightened the political talk to underline the "procedural rationale" followed to rearrange old files in new institutions that could be underlying the whole arrangement.[18] Rather than the reasoning itself, the point is how this critical view points towards another way (perhaps *the* way) of responding to what actually underlay the famous measures. Only by inquiring about the implications of the reforms in terms of actual functioning of the bodies and officials involved, we can come up with a rough conclusion on what is really behind the claims of delineation and separation of powers. Only a file-based research covering this matter as an autonomous subject of study, seeking to weigh shifts and continuity, is capable of giving rise to standards and conventions allowing to explain the well-known political discourse (or, rather, its purpose).

2.2 Con*fusion* in the allocation of powers

At this point, regardless of what lies at the core of the measures enshrined in the 1834 decrees, there is no doubt that these decrees substantially modified the Monarchy's institutional framework. Indeed, the first decree suspended the Council of State (*Consejo de Estado*);[19] the second one removed the *Consejo de Castilla* and the *Consejo de Indias*, replacing them by the Supreme Court of Spain and the Indies (*Tribunal Supremo de España e Indias*); under the third decree, the Supreme Council of War (*Consejo Supremo de Guerra*) was eliminated, and it was superseded by the *Tribunal Supremo de Guerra y Marina*; pursuant to the fourth decree, the Supreme Court of the Treasury (*Tribunal Supremo de Hacienda*) was established *in lieu* of the *Consejo Supremo de Hacienda*; the fifth decree ordered the Secretary for Justice and Grace (*Secretario del despacho de Gracia y Justicia*) to draft the new organization and structure of the Council of Military Orders (*Consejo de Órdenes*); finally, the sixth decree instituted the so-called *Consejo Real de España e Indias*, which has been translated as the Royal Council of Spain and the Indies.

According to Nieto –who best represents the administrative law approach to these measures– the crux of the reform was the establishment of the Supreme Court, "insofar as it entailed a final separation between administrative and judicial powers, which only remained concentrated at a municipal council level". Although less significant, another key to the reform was

---

[14] Concerning the "preceding Government", the vague and remote description of its duties helped to convey that the new measures had brought along a major remedy or transition: "The main Government bodies' duties were not as well defined and delineated as they should have been. The powers delegated to intermediate authorities by the Monarch often raised doubts. Whereas some of these authorities issued executive orders, others adjudicated cases, published military proclamations or notices and good governance resolutions; there was a time when the President of the *Consejo de Castilla* (Council of Castilla) embraced government and administration duties and decided about national and municipal public property" (own translation). See the DSC, 1834-1835 term, document no. 10, p. 2; available at < https://app.congreso.es/est_sesiones/> [Last accessed on April 8, 2021] (own translation).

[15] According to this majority understanding of the history of government, these political sources (and barely legal or regulatory) amount to the main tool for their reconstruction from the perspective of their own discipline. Alejandro Nieto is crystal clear in this regard: "The *Diario de Sesiones* thus becomes the most important Public Law and Government Treatise in this time period". See NIETO, A., *Los primeros pasos del Estado constitucional. Historia administrativa de la Regencia de María Cristina de Borbón*, p. 7 (own translation).

[16] Broadly, I am referring to the work of HICOES (*HIstoria COnstitucional de ESpaña*). It can be summarized for these topics in most of the chapters of the above cited work by LORENTE SARIÑENA, M. (coord.), *La jurisdicción contencioso-administrativa en España. Una historia de sus orígenes*, Madrid, 2009.

[17] The alternative proposal can be found in the abovementioned collective work; particularly in MARTÍNEZ PÉREZ, F., De la pluralidad de fueros al fuero de la administración. In: LORENTE SARIÑENA, M. (coord.), *La jurisdicción contencioso-administrativa en España. Una historia de sus orígenes*, p. 223-265. A clear example of this approach, particularly in its highly illustrative chapter 3: SOLLA SASTRE, M. J., La construcción del espacio de la justicia del fuero común (1845-1850). In: *La discreta práctica de la disciplina. La construcción de las categorías de la responsabilidad judicial en España (1834-1870)*, Madrid, 2011, p. 231-335.

[18] LORENTE SARIÑENA, M., "La supresión de los Consejos y la creación del Real de España e Indias (Elementos para una discusión)", p. 1108.

[19] Which was replaced by the Council of Government (*Consejo de Gobierno*) pursuant to clause 12 of *Fernando VII*'s will (*Archivo Histórico Nacional*, hereinafter AHN, Estado, leg. 2828, part two, first document).

"the creation of the Royal Council (*Consejo Real*) as a technical advisory body".[20]

There is no need to get into another historiographical-based assessment of the measures at hand. Rather, by examining the wording of the sources related to the approval of these measures we can at least challenge the narrative's simplicity, thereby getting further entangled in this con*fusion*. This complexity does not revolve around the various perspectives on the interpretation of political talk or a political discourse. Indeed, it revolves around the simplified problem-free approaches to the measures and to the reactions thereto, evidenced by some details and nuances found in the sources.

Accordingly, in order to have a better understanding of the sources, one should notice that the transformation entailed by the dissolution of the Councils and the subsequent establishment of a new one was neither peacefully embraced, nor unanimously construed in all *fora* where the measures were addressed. The view of the "reformists" does not allow to infer consequences that greatly differ from those drawn by mainstream historiography. However, the handling and processing of the decrees (prior to their enactment) within the Council of Government (*Consejo de Gobierno*) do allow to clearly identify a different interpretation of this transition.[21]

The projected separation of powers or duties was announced within the Council of Government way differently than we thought. In the Council of Government's ordinary session of February 28, 1834, "a formal written document by the Secretary of State Affairs, attached to a statement by the Ministry of Her Majesty, was disclosed, including six draft Decrees providing for i) the removal of the Council of State whilst the Queen remained underage; ii) the elimination of the *Consejo de Castilla*,[22] *Consejo de Guerra* and *Consejo de Hacienda*; iii) the institution of the Supreme Court of Spain and the Indies, of the *Tribunal Supremo de Guerra y Marina* and of the *Tribunal Supremo de Hacienda*, and iv) the creation of the *Consejo Real de España e Indias* for all executive affairs".[23] The records on the March 4 session lead to the same interpretation. The *Consejo* faced a difficult decision, being "in favor of separating the judicial and executive branches", and it enacted "the six draft Decrees providing for the reform of the current Councils *and for the creation of a new one, concentrating the executive powers formerly entrusted to the old* […]".[24]

Noticeably, those council members that were urged to commit this sort of structural *seppuku* placed a lot more importance on the role to be given to the newly created Council after the institutional reform than other officials in other *fora*, such as the Chamber of Deputies (a new "lower chamber" whose members were elected by census suffrage; in Spanish, *Estamento de Procuradores*). Thus, there is no need to reproduce (since it is very well-known) the famous excerpt of one of the Council Member's dissenting opinion –Francisco Javier Caro's, who was also a member of the *Supremo Consejo de Indias*–. José María Puig, who two years ago had been Dean or Head (*Decano*) and interim Governor of the *Consejo de Castilla*, fully supported and upheld Caro's dissenting opinion. In our view, this apparently contradictory excerpt, claiming that the executive role of Councils was irrelevant yet opposing their dissolution, can be considered consistent if construed as the other side of the reformist discourse. Accordingly, this reasoning aimed at protecting the

[20] NIETO, A., *Los primeros pasos del Estado constitucional. Historia administrativa de la Regencia de María Cristina de Borbón*, p. 209. Nieto does not greatly differ from other administrative law scholars regarding the approach to the implications of the dissolution and of the new Council's establishment, but he certainly places greater importance on the reconstruction thereof. Conversely, in another major administrative law work of the 1990 s, the disintegration of the *Consejos* is far less preeminent: FERNÁNDEZ TORRES, J. R., *La formación histórica de la jurisdicción contencioso-administrativa (1845-1868)*, Madrid, 1998. In p. 111, footnote 138, there is a reference both to the suppressed councils, highlighting that they "retained both executive and judicial powers", and to the newly created Supreme Courts (*Tribunales Supremos*) replacing the said councils concerning "judicial" or "contentious" matters. It is even harder to find references to the institutional amendments overall. Another unavoidable work regarding the abovementioned administrative law approach, SANTAMARÍA PASTOR, J. A., *Sobre la génesis del derecho administrativo español en el siglo XIX (1812-1845)*, Sevilla, 1973, p. 134, includes the only reference to the "four Royal Decrees of March 14, 1834" (and not the six Decrees of March 24) "eliminating the *Consejo de Estado*, the *Consejo de Castilla*, the *Consejo de Indias* (and replacing them with the Supreme Court of Spain and the Indies) and the *Consejo de Hacienda*" (own translation). Notwithstanding the foregoing, it is worth clarifying that the previous reference is not intended to reveal something that the author himself actually acknowledged in the preface to the edition published in Madrid by Iustel in 2006: "It goes without saying that this book could hardly be considered a history essay". Definitely; in fact, the book seeks to underline the shortcomings of historians to aptly fill gaps which, after a few interpretations, have triggered reprints, as the one mentioned before. The need for these reprints and new editions is even doubted by the author: "I am sure some will wonder why an essay published 33 years ago needs to be reprinted. I myself wondered why when the leaders of this young publishing house suggested it. I am still not fully convinced of the reasons they gave me" (own translation).

[21] The most comprehensive and descriptive study on the institutional life of this high government body is still: MONTANOS FERRÍN, E., El consejo de gobierno (1833-1836). In the commemorative volume entitled: *Homenaje al profesor Alfonso García-Gallo*, Vol. 2, 1996, p. 267-318. This Council's role throughout its 3-year institutional lifetime still has a lot to it. Similarly to the *Consejo Real de España e Indias*, the little attention paid to its role following its breakdown has turned this Council into an underrated body. In fact, that *Consejo* was considered to be "the first and foremost Council in the Kingdom", and it had a qualified and authoritative opinion (not only formally or on paper) regarding "complex affairs and particularly those having an impact on the vassals' general interest" (own translation), as provided by the Royal Decree convening the Council on October 4, 1833 (AHN, Estado, leg. 2828, part two, first document).

[22] During the ordinary sessions held on February 11 and 18, the Council of Government (*Consejo de Gobierno*) had already decided on the new structure intended for the *Consejo de Castilla* by the Secretary of State for Justice and Grace, Nicolás M. Garelly. A significant part of this draft's provisions was subsequently included in the second decree of March 24 (AHN, Estado, leg. 906, documents 46 and 48). I have analysed this whole process in LUQUE REINA, A. M., *Gobernar a falta de prestigio, costumbre y antigüedad*: el Consejo Real de España e Indias (1834-1836). In: TORRES AGUILAR, M., PINO ABAD, M. and LOSA CONTRERAS, C. (coords.), *Poder, Sociedad y Administración de Justicia en la América Hispánica (Siglos XVI-XIX)*, Vol. II, Madrid, 2021, p. 743-761.

[23] AHN, Estado, leg. 906. The Royal Order (*Real orden*) containing the formal written resolution or *oficio* by Martínez de la Rosa is dated March 27. Emphasis added.

[24] AHN, Estado, leg. 2828, part two. Emphasis added. The *difficulty* of the decision is expressly stated in the *Consejo*'s records. The Council itself, given "the importance of this affair", "resolved to defer its decision so that council members could gain a deep knowledge of all the specificities regarding the proceedings" (AHN, Estado, leg. 2828, part two).

old institutions (i.e., denying that the *ancien* institutions had an impact, in practice, on political and economic governance) can be raised vis-à-vis those reports which, during the Ominous Decade, advocated the repeal of the Council's executive powers –alongside the creation of a Ministry of the Interior– to improve the deplorable condition of towns.[25] These are both grounds for the same partial assessment which, by the way, is everything but revolutionary: the *ancien* institutions still had a prominent position and they could still be reinforced, which is why their critics/advocates perceived them as the main obstacle/ "road to salvation" for their legal and political projects.[26]

2.3 Executive and/or advisory? The con*fusing* classification of powers and duties

In broad terms, determining the *advisory* or *consultative nature* of the new Council remains a source of confusion that renders the narrative on the subject-matter even more complex. Surprisingly, the powers vested in the Council and the duties entrusted thereto were never clearly defined or classified, not even after the *Consejo* was up and running.

We already had the challenge of historicizing what the sources meant when they referred to the delineation between executive and adjudicating or judicial powers, and whether there was a common understanding in this regard. However, on top of that, we must now assess the extent to which the advisory role fell within the executive role. And not only that; the mainstream narrative has even drawn differences within the advisory role (i.e., it has broken it down into various consultative sub-natures), thereby classifying the new Council –immediately after the transformation– as playing a modern advisory role.[27]

As could not be otherwise, the mainstream historiographical narrative, upon studying the *Consejo Real de España e Indias*' role and position, has necessarily reviewed Arvizu's scholarly article,[28] i.e., the only study of the *Consejo*'s institutional structure published to date.[29] It is a comprehensive study to account for the *provisions* regarding its creation –from the sixth Decree of March 24, up to the two regulations enacted therein–. Its merely descriptive and problem-free approach has further simplified the Council's impact and has relegated it to the background where it has been traditionally placed.

Without getting into a more detailed institutional analysis, it is worth concluding that the discrepancies regarding the Council's role became most clear precisely when the Council (and its departments) drafted the enforcement regulations (*reglamentos de gobierno*) of May 9 and December 20, 1834. Various reports issued by the Council departments (State, Treasury, Justice and Grace, War, Navy, Interior and Indies) had different approaches on how to improve the first enforcement regulation.[30] These reports are stored in a file within the former Archive of the Council's General Secretariat. A mere contrast between what the Interior and Indies departments construed as "powers vested in the Council and its departments" is a clear sign that there was definitely no common understanding on the Council's advisory nature.

In a context of alleged certainty, the Interior Department issued its opinion on the Council's role in the new structural framework:

> "In its capacity as a consultative body, the Council and its departments are in charge of administrative matters, whether executive or judicial-executive. The Council shall be the advisory court, whereas the enforcement or governing powers lie with the Supreme Court. The Council shall also decide (upon a consultation or request submitted thereto) on the powers of executive authorities amongst each other, as well as of executive, judicial, treasury, war and state authorities with respect to each other. The Government holds the final decision-making power in these matters".[31]

---

[25] PRO, J., El Estado Grande de los moderados en la España del siglo XIX. In: *Historia y Política*, Nr. 36, 2016, p. 19-48.

[26] This clash, which I have simplified for the sake of clarity, is aptly depicted in Puyol Montero's chapter on these issues: PUYOL, J. M., La Administración y el Consejo. Proyectos de reforma. Paulatina pérdida de competencias del Consejo Real. In: *El Consejo Real de Castilla en el Reinado de Fernando VII*, p. 434-464.

[27] This modern-day consultative or advisory categorization becomes clear in LOSA CONTRERAS, C., La administración consultiva en los inicios del Estado liberal. El funcionamiento del Consejo Real de España e Indias. Sección Interior (1834-1836). In: *Cuadernos de Historia del Derecho*, Nr. 7, 2000, p. 457-470.

[28] ARVIZU Y GARRALAGA, F., El Consejo Real de España e Indias (1834-1836). In: *Actas del III Simposio de la Administración*, Madrid, 1974, p. 382-408. For a new institutional approach, which is not yet published, see: LUQUE REINA, A. M., *La disolución de los Consejos de la Monarquía española. El Consejo Real de España e Indias en la construcción del Estado administrativo (1834-1836)*, Madrid, 2021.

[29] Note that the study focuses on the Council's structure at the time it was commissioned and, for the sake of our subject of study, it has major omissions. It suffices to examine how it dealt with the nature of the *Consejo*: "Based on the foregoing, it can be inferred that the *Consejo Real de España e Indias* does not have a classic separation of powers (legislative, executive and judicial), since it is an advisory or consultative body" (ARVIZU Y GARRALAGA, F., El Consejo Real de España e Indias (1834-1836), p. 398-399) (own translation).

[30] A mere glance at the ministers' concerns (note that the ministers were classified by Arvizu according to his own interpretation of their areas of responsibility into "staff", "internal affairs", "reports", "votes", "protocol" and "budget") shows how inappropriate it is to qualify as *modern* almost every proposal to improve the Council's activity submitted by the departments; ARVIZU Y GARRALAGA, F., El Consejo Real de España e Indias (1834-1836), p. 391-395. I do not focus on the institutional analysis of the *Consejo* and its departments because, for the purpose of this paper, I refer to the works of Arvizu, Losa and Lorente.

[31] These proposals on the Council's powers can be found in the AGS, Consejo Real de España e Indias (hereinafter, the documentary collection will be referred to as CRE), leg. 2 bis, second folder, alongside the "*Observaciones de las secciones sobre el Reglamento actual del Consejo Real*". It clearly seems like this part of the remarks (*observaciones*) can be attributed to Minister Justo José Banqueri (own translation). The Dean Minister Juan Álvarez Guerra is even bolder. Within the definition of the Council as a court, he added his own administrative outline: "The Council is a Court of Justice, just as the Supreme Court. The only difference is how they act and the matters they hear. Ordinary courts and tribunals have their own proceedings (…). Executive or Government courts have no proceedings or time limits; they should handle each case as may be necessary to ensure a fair adjudication. // In the first, there are district judges, High Courts, Supreme Court; whereas in the latter there are Municipal Councils, Civil Governors, Royal Council if so required by the subject-matter and the Government on top. // The first hear civil and criminal cases, whereas the latter hear administrative and judicial-administrative cases or administrative law cases involving two parties, one of which is often the Government" (own translation).

In contrast, in order to at least challenge the idea that "judicial" and "executive" were distinctly defined notions with clear-cut meanings, see the wording of Article 11 of the May 9 Regulation, which has traditionally been considered as an irrefutable proof that powers were delineated:

"As soon as any matter or affair becomes judicial or contentious, it will be referred to the competent Court, since the Council is only vested with executive powers (*gubernativos* in Spanish)".[32]

With other "concerns", and most certainly different perspectives, the Indies Department was involved in this "sharing" without quite understanding (or accepting) its duties. Not only because the Council's instructions were confusing, but also because this Department refused to rule out the possibility that there could be significant variations within the upcoming institutional framework:

"the indies department (*sección de indias*) is eager to fulfill the duties entrusted thereto by the government. However, we believe that the department's specific powers and prerogatives should be further specified in an appendix to the council's regulation, since these powers and prerogatives will change in case of any variations in the council's nature and powers".[33]

Regardless of the possible substantial changes in the "nature and powers" vested in the Council, the Indies Department considered that at least "all the matters that previously fell within the exclusive jurisdiction of the defunct *Supremo Consejo de Indias*' executive chamber now had to be heard by the Indies Department". Although the said Indies Department, "given its strictly advisory nature, would be unable to perform any duties *other than those absolutely necessary* to gather the *means* and *knowledge* to issue a correct opinion on any affairs submitted to consultation therewith".[34] However, what was the scope of those "absolutely necessary" duties according to the Department? Or, better said, what were those "means"? Undoubtedly, those necessary duties included "the power to request reports, documents and anything else deemed convenient to any sort of mainland and overseas authorities and persons, duly issuing through its Secretariat the relevant formal documents or resolutions (*oficios*)". Furthermore, still within the context of these "absolutely necessary" prerogatives, the Indies Department "is entitled to make any proposals to the Government if deemed convenient for the sake of those provinces' prosperity and development, drafting any files that it may see fit, subsequently submitting them to the competent Secretariat".[35] The Indies Department thus points to the *means* considered essential to carry out the duties deemed *absolutely necessary*, thereby giving us an essential hint in order to subsequently come up with a different interpretation (still at this discursive level). The Indies Department is showing us a version of "advisory role" that, if anything, appears to be very similar to its previous consultative duties. Also, the said Department was extremely keen on retaining a direct channel with the various bodies and authorities.

According to this view, it is unsurprising that the Department concluded its report by stating that, within the consultative nature of the *Consejo* (with the said duties and means) there was room for considering it "a body which, to a large extent, was entitled to execute or enforce the consultations it submitted to the Government".[36]

Summarizing these first explanations, and not being too innovative, we now venture to claim that seeking an unambiguous and plain meaning for such a broad and complex notion like "advisory" or "consultative" necessarily puts us in a context of generality that is neither illustrative nor enriching.[37] Rather, if instead of embracing third party standards we inquire about the actual interpretation of this advisory nature given by each of the aforementioned stakeholders, we will be much closer to understanding the essence of this advisory activity. Not only that, since these understandings also give us significant hints (related to communication, like in the latter case) that can help us clarify significant aspects of this institutional transformation we are trying to unravel.

3. The *Consejo Real de España e Indias:* moving between transition, dissolution and a new beginning

Roughly, my main research question –i.e., what lies behind the "end of con*fusion*" and the "new beginning" to which it gives rise– could be neutralized by gathering the open-ended points and considerations made in the previous sections. Regarding the moment in time of the reforms as an inherent subject of study has unveiled major historiographical shortcomings (which was the first core idea pointed out above). Subsequently, confirming how little we learned about this time period from the historiographical standards and conventions based on political talk has led us to distrust this narrative and to consider necessary coming up with our own historiographical standards, resulting from the combination of this

[32] There are many copies of the *Consejo Real de España e Indias* Internal Regulations of May 9, 1834 in many of the records and batches available in the Council's own documentary collection in the AGS; here, we are following the manuscript one which is located at AGS, CRE, leg. 2 bis, first folder, 1.

[33] AGS, CRE, leg. 2 bis, first folder, 1. These remarks by the Indies Department have been taken from its written statement of June 25, 1834 (own translation).

[34] AGS, CRE, leg. 2 bis, first folder, 1. Emphasis added (own translation).

[35] AGS, CRE, leg. 2 bis, first folder, 1. It did not only require greater decision and enforcement capabilities when adjudicating the cases, but it also considered that "regarding every matter for which the *Consejo de Indias* used to issue Charters and writs for such provinces, it seems like the Department could continue to do so (…)".

[36] AGS, CRE, leg. 2 bis. To our knowledge, the Indies Department continued posing similar problems during most of the Council's lifetime. Thanks to Martínez Navas, we can now follow up on its claims and resolutions, which is quite useful to shape the idea we have been discussing: MARTÍNEZ NAVAS, I., *El Gobierno de las islas de ultramar. Consejos, juntas y comisiones consultivas en el siglo XIX*, Madrid, 2007. Particularly, see chapter three, entitled: La sección de Indias del Consejo Real y las Juntas y comisiones auxiliares en las secretarías del despacho, p. 77-98. It is a great study and a fantastic reconstruction of files which nonetheless leads her to a conclusion that greatly differs from the approach provided herein; indeed, the author even qualifies the Department as "cautious" when defining its own scope of action.

[37] Lorente Sariñena, M., La supresión de los Consejos y la creación del Real de España e Indias (Elementos para una discusión), p. 119.

political talk with actual institutional activity. Due to the many diverse stances on the consequences of the dissolution of old bodies and the establishment of new ones, we have conceived these measures based on a clash of plural opinions, thereby sophisticating the study. Finally, identifying the key aspects that actually enabled or implemented this institutional reform has allowed us to place value on the *Consejo Real de España e Indias*' role when it comes to explaining this non-revolutionary revolution. Below is a more thorough analysis of these conditions of possibility.

3.1 Dissolution and transition from the new *Consejo*

An in-depth study of the *Consejo Real de España e Indias* can help us to fully understand the dissolution and transition process at hand. First, because by further looking into the President's role during its early months we will fully understand some aspects regarding the measures that were fairly unknown to this date. Second, because by clarifying the institution's legacy in terms of files, sources and documentary collections, we will more accurately assess the institutional reform in all its dimensions. Third, because examining the new Council's communication sphere enables us to put forward a general explanation of the aforesaid advisory quandary.

3.1.1 A presidency in between two Councils

Thanks to Moreno Pastor we now know that a week after the enactment of the famous Decrees, i.e., on April 2, 1834, the newly appointed President of the Supreme Court of Spain and the Indies, José Hevia y Noriega, took the "Oath" *before* the President of the *Consejo Real de España e Indias*, Duque de Bailén.[38] This administering of the oath can raise concerns about the institutional rank or preeminence of one and the other, but I would like to focus more on the anecdote in order to underline the *Duque Presidente*'s role in the dissolution and subsequent institutional relocation.[39] Further ratifying these perceptions, there are news brought by Álvarez-Coca underpinning the idea that the president in between councils monitored this transformation or relocation. According to Álvarez-Coca's file-based research, the Secretariat for the President of the defunct *Consejo de Castilla* remained in office during eight months following this institution's dissolution. Thus, most of this 8-month period its role overlapped with that of the General Secretariat of the *Consejo Real de España e Indias*–whose position was analogous to that of the said *Consejo de Castilla*'s Secretariat in the newly created *Consejo Real*–during the institution's shaky beginnings.[40] Together with the already mentioned importance of the institutional presidency for communication purposes, this line of reasoning leads to the following conclusion: the *President in between councils*, and mostly the information obtained from his communications,[41] is thus politically and legally essential to understand most of the restructuring measures implemented during that time period.[42]

3.1.2 Heir and custodian of the documentary collections

Taking a file-based approach to review the legacy allows to draw many conclusions that help us rebuild that *moment in time*. We will refrain from delving into thorough analysis; other specialists and scholars have already done so.[43] For the purposes of this paper, it will suffice to underline some essential aspects. In this regard, within the many significant tips given by Álvarez-Coca when overviewing the itinerary of some of the Chamber of Castilla documentary bases until they reached the National Historical Archive (or *Archivo Histórico Nacional*), we will focus on when the new Council took care of the "file from the defunct *Consejo de Castilla*, including all its documents and records, along with the goods, furniture and funds that belonged to it".[44] If we

[38] MORENO PASTOR, L., *Los orígenes del Tribunal Supremo (1812-1838)*, Madrid, 1989, p. 186 and p. 191-192. Footnote 430 contains a transcript of the Royal Order (*Real Orden*) referred by the Secretary for Justice and Grace, Nicolas María Garelly, to the *Duque Presidente* requiring him to administer the oath of office to the newly appointed (under a Decree from the same date) President of the Supreme Court of Spain and the Indies (*Tribunal Supremo de España e Indias*).

[39] I indulge in using this "*Duque Presidente*" title since it is the most commonly used denomination for the Council's President, General Castaños, in the Departments' records.

[40] See ÁLVAREZ-COCA GONZÁLEZ, M. J., La Cámara de Castilla: Secretaría de Gracia y Justicia. Problemas archivísticos e investigación histórica. In: SCHOLZ, J.-M. (coord.), *El tercer poder: hacia una comprensión histórica de la justicia contemporánea en España*, Frankfurt am Main, 1992, p. 22, for the reference to the Royal Decree of November 19, 1834 which "removed the Secretariat for the President of the defunct *Consejo de Castilla*, whose documents were transferred to the general archive of the *Consejo Real de España e Indias*" (own translation).

[41] The aforesaid importance of communication, examined below, is shown by this author when she emphasizes the importance of studying the records of the *Consejo Real*'s Secretariat for the President. As it should be, since this Secretariat was in charge of the communication between the Council and the King and it managed all consultations referred to the Monarch and the Royal Orders received by the Council. See Álvarez-Coca González, M. J., La Cámara de Castilla: Secretaría de Gracia y Justicia. Problemas archivísticos e investigación histórica, p. 11.

[42] Without even specifically assessing the Presidency's "personal" dimension. It is worth reviewing the family ties between *Duque Presidente* and the *Marqués de las Amarillas* (uncle and nephew, respectively). This aspect has been pointed out by Sánchez Bella (SÁNCHEZ BELLA, I., La reforma de la administración central en 1834, p. 665-667) based on the description of both actors made by Javier de Burgos in his renowned *Anales del Reinado de Doña Isabel II*, Vol. I, Madrid, 1850. Although Sánchez Bella failed to do so, this description allowed to infer the prominent role of the *Marqués de las Amarillas* in the decisive enactment of the 6 decrees of March 24 by the Council of Government, something which was confirmed by himself: GIRÓN, P. A., Marqués de las Amarillas, *Recuerdos (1778-1837)*, III, Pamplona, 1981.

[43] In addition to the above cited ÁLVAREZ-COCA GONZÁLEZ, M. J., La Cámara de Castilla: Secretaría de Gracia y Justicia. Problemas archivísticos e investigación histórica, and PUYOL MONTERO, J. M., *El Consejo Real de Castilla en el reinado de Fernando VII*, p. 1112-1132; MARTÍNEZ BARA, J. A., Vicisitudes del Archivo del Consejo de Castilla en los siglos XVIII y XIX. In: *Actas del III Simposio de Historia de la Administración*, Madrid, 1974, p. 357-382 and PUYOL MONTERO, J. M., El archivo como instrumento de acción del Consejo Real de Castilla. Notas históricas sobre el Archivo del Consejo Real de Castilla en el siglo XIX. In: *Homenaje al Profesor Alfonso García Gallo*, Vol. 2, 1996, p. 521-548.

[44] ÁLVAREZ-COCA GONZÁLEZ, M. J., La Cámara de Castilla: Secretaría de Gracia y Justicia. Problemas archivísticos e investigación histórica, p. 22. The author found the Royal Order reported by the Secretary of State and the Secretary of State Affairs (*Secretaría del Despacho de Estado*) on April 28, 1834 in AHN, Consejos, leg. 17704.

also examine the conclusions reached by Puyol when studying the *Consejo Real de Castilla*'s archive[45] and what I have already found upon reviewing the files processed by the new Council,[46] the bottom line is clear: an institution with such a central role in the complex polisinodial world of files, has a tremendous explanatory power regarding its collapse.

3.1.3 A communication blockade: the key to interpreting advisory quandaries

If anything characterizes the studies on the last years of the old councils (for the sake of this paper, particularly of the *Consejo de Castilla*), it is that the authors agree on their institutional decadence, particularly compared to other more splendid moments.[47] It most certainly seems that they are right regarding the activity and position of the examined councils under a comparative analysis.[48] However, I do believe that the said dissolution and separation had a lot to do with a projected breakdown of certain bodies which, in the legal context within which they still moved, could still claim a more prominent role than the one they actually had.[49]

Accordingly, when the dissolution of the old councils brought along the establishment of a new *Consejo* to handle the *executive* affairs previously entrusted to the old councils, this creation entailed a new specific design for the newly created Council (redundancy intended) that prevented it from claiming the position the old councils once held (and that could have been recovered thereby). In other words: part of the end of con*fusion* was ensured by designing a new institution with certain features aimed at avoiding well-known problems. Apparently, a mere institutional novation (and the subsequent loss of structural preeminence) was not enough to banish the ghosts –that still lingered at that time of civil conflict– and to guarantee the "success" of the whole process.

My hypothesis is that the end of the Government of con*fusion* had a lot to do with the designation of a "successor for executive affairs" that had been subject to a series of "communication blockades".[50] At the risk of over simplifying the matter, we can broadly differentiate two communication levels within the old *Consejo de Castilla* (yet again, I rely on this body for example purposes). At the top tier or level, there are the communications between the *Consejo de Castilla* (by means of its President) with the King either directly –the Friday consultation–[51] or through the relevant State Secretariat or Secretariat of Affairs, the latter being the most commonly used option. I have considered that most of the relationships and interactions between the *Consejo de Castilla* and the numerous authorities, bodies and individuals that had contact therewith should be placed at a lower level. This heterogeneous set of relationships can be broken down (yet

[45] PUYOL MONTERO, J. M., *El Consejo Real de Castilla en el reinado de Fernando VII*, p. 1130. Puyol contends that the new institution's archive "largely fed off the documents from the Council's general archive and from the archive of the *Consejo de Hacienda*". He also makes a claim already made by Álvarez-Coca: the files from the Government clerks' offices and from the chamber of the *Consejo Real*, due to their separate nature from the actual *Consejo*, could not be considered within those general references to the *Consejo*'s archive. Even more so if we consider that, following the removal of the *Consejo de Castilla*, they were allocated to the Supreme Court of Spain and the Indies (PUYOL MONTERO, J. M., *El Consejo Real de Castilla en el reinado de Fernando VII*, p. 1131-1132).

[46] In a file processed by the Indies Department of the *Consejo Real de España e Indias* between September and October 1835, I have verified how the Indies Department was requested to submit certain documents "within the Indies General Accounting Office (*Contaduría general de Indias*) at the time of its extinction". See all the file as processed by the Council's General Secretariat in the Indies General Archive (*Archivo General de Indias* and hereinafter AGI), Indiferente general, leg. 3132. It is shocking that documents coming from the archive of the *Consejo Real de España e Indias* were stored in the AGI. It is possible to find some clues about this in: ÁLVAREZ CASADO, M., Lo no *indiano* del Archivo General de Indias. In: ROJAS GARCÍA, R., (coord.), *Archivo General de Indias. El valor del documento y la escritura en el gobierno de América*, Madrid, 2016, p. 251-260.

[47] I am referring to the above cited, DE DIOS, S., Líneas fundamentales de la evolución histórica del Consejo Real, p. XVI-XCV; PUYOL MONTERO, J. M., *El Consejo Real de Castilla en el reinado de Fernando VII*, p. 384-514 and Cabrera Bosch, M. J., *El Consejo Real de Castilla y la ley*, p. 79-106 and 165-178.

[48] For the two most recent works about the ancient activity and position of the examined councils see: BARRIOS PINTADO, F., *La Gobernación de la Monarquía de España. Consejos, Juntas y Secretarios de la Administración de Corte (1556-1700)*, Madrid, 2016; and POLO MARTÍN, R. M., *Consejos y Consultas. La consulta como instrumento de gobierno en la Monarquía hispánica del Antiguo Régimen. Un estudio jurídico-institucional, con especial referencia al Consejo de Castilla*, Bilbao, 2018.

[49] In order to get a grasp of the *conflicts* that these bodies could pose for the Secretariats, see the consultation submitted by the *Consejo de Castilla* dated February 28, 1825 gathered by Puyol Montero: "This is the Supreme Court for the whole Nation. It is the oldest one, and it is truly the King's Council, *the only body where the universal matters of Justice, Governance, State and War are dealt with and decided on. It is the soul of the King's Government, it is the root of the King's decision-making and the origin of the ordinary royal jurisdiction*. Any other special or privileged jurisdiction has stemmed and stems therefrom, even the jurisdiction of the *Consejo de las Órdenes*. This Supreme Court has always been made up of prelates, wealthy men, gentlemen, nobles of the robe and well-educated men, the most illustrious persons in the whole Kingdom. This has been and still is the office to which all officials aspire; indeed, all Ministers from other councils and bodies have been promoted hereto, to the Supreme Council of them all, the one bringing the greatest merit and dignity to its members. This is why they have all eagerly requested to enjoy the honors and length of service of this Court" (emphasis added). This excerpt can be found in AHN, Consejos, Consultas de Oficio del Consejo de Castilla, leg. 6089. See a transcript in PUYOL MONTERO, J. M., *El Consejo Real de Castilla en el reinado de Fernando VII*, p. 516-517. Although the excerpt, due to its specific context, more clearly shows this *Consejo*'s will to prevail over the remaining councils rather than over the Secretaries of Affairs, take the quote as proof of the *Consejo de Castilla*'s standing and of the legal-historical legitimacy it intended to project.

[50] When putting forward this "communication blockade" stance, I fail to mention the specific duties vested in the Justice and Grace Department of the *Consejo Real de España e Indias* under the Royal Decree of May 29, 1834. To our knowledge, it seems like this Department continued to carry out duties regarding the issuance and reporting of titles for judges, notaries, clerks, ecclesiastical benefits, etc.

[51] Thanks to the AHN contents; Consejos, consultas de oficio del Consejo de Castilla, leg. 6111, we know that these consultations lasted until 1834, when the *Consejo* was removed, more specifically until Friday, March 14. I hereby thank Fernando Martínez for his reference to the specific batches of documents.

again, oversimplifying) into two types: i) those seeking fulfillment, acknowledgement or the enforcement of a given decision, and ii) "petitions" from authorities and, above all, individuals requesting the *Consejo de Castilla* to fulfill their interests by filing requests before the relevant clerks' offices and chambers.[52]

After mapping this whole communication context, we are now ready to pick up where we left off: the design of the new Council disabled the two communication levels, thereby giving rise to various consequences to be discussed. In order to tackle these consequences, we must reverse the order in which we examine both levels or tiers. To that end, we will reconnect with the abovementioned hint from the Indies Department.[53] The blockade faced by the *Consejo*'s communication channels with respect to the various authorities and individuals has a twofold implication: i) as we had already guessed, the Ministers of Indies lost institutional significance; ii) the following consequence we infer at this level allows us to re-interpret the upper communication level. If authorities and individuals could not lodge petitions to the *Consejo*, the latter was unable to produce files which, eventually submitted to the King within a consultation procedure, could give rise to potential conflicts with other measures adopted within the Secretariats of Affairs.[54]

As one could already sense, the solution to end this con*fusion*[iii] was as follows: the Council would receive a file already processed by a ministerial body from the relevant State Secretariat, so that the Council could be consulted in order for the case to be subsequently settled or adjudicated. This consultation procedure (which, in practice, regarding the preparation of reports or resolutions, remained almost unchanged) did not entail "confusion issues", since the State Secretariat would never lose track or control of the matter.[55]

Unsurprisingly, moving on to the next topic to be discussed herein, as long as the Council's activity (usually through its Departments) remained efficient and steady, the Council itself would give rise to a substantial collection of documents, which could become very interesting when it comes to rebuilding the state of affairs underlying this conflictive framework of executive and urgent "administrative" powers and duties.

3.2 A unique vantage point for a dissolution and a new beginning

At this point, it is already fairly clear that truly understanding this turning point entails examining i) the amended institutional framework and ii) the Ministries' expansive trend –above

---

[52] VALLEJO GARCÍA-HEVIA, J.M. (prel. st.), *Práctica del Consejo Real en el despacho de los negocios consultivos, instructivos y contenciosos (1796), de Pedro Escolano de Arrieta*, Madrid, 2020.

[53] The Indies Department's stubbornness to continue communicating with various overseas authorities clearly shows how important it was to have the chance of directly communicating with different authorities. As noted above, the Indies Department persistently tried to maintain this communication throughout the Council's lifetime. In fact, during the Council's early months, the Indies Department even reported "several royal decrees appointing *intendentes*, accountants and other authorities in the Indies, for the issuance of titles," in addition to "(…) royal confirmations, whose internal issuance procedures should comply with the applicable laws and regulations" (own translation). As a result of these overreaching activities, the Justice and Grace Secretariat issued a Royal Order on October 31, 1834 urging the Indies Department to "abide by its nature and powers provided in the March 24 Royal Decree" (MARTÍNEZ NAVAS, I., *El Gobierno de las islas de ultramar. Consejos, juntas y comisiones consultivas en el siglo XIX*, p. 82; this author takes the cited communications from AGS, CRE, leg. 21).

[54] This con*fusion* or intermingling of powers (meant to be eliminated) is particularly well depicted by the dispute arising from a decision in excess of jurisdiction by the *Consejo de Castilla* regarding a tender for supplies, leading to an institutional conflict between the said *Consejo* and the Treasury Secretariat. Although this case was not settled by an administrative decision delivered by the Council, the Treasury Secretariat's reaction aptly illustrates what these con*fusions* entailed. I would like to acknowledge Fernando Martínez for both locating the records as well as for the following transcript: "In connection with the request made on November 11, 1829 by Eugenio Paredes, a resident of Colmenar Viejo (…) the relevant file was initiated within the *Consejo* by the chamber clerk. Having regard to the file, and considering the Attorney's statements (*Fiscal* in Spanish), this court upheld Paredes' claim. However, the acceptance of this claim should be construed *without prejudice to the Royal Resolution to be handed down if the Municipality of Colmenar Viejo filed a petition or consultation to the King by means of the Ministry of the Treasury regarding this case*, as stated in the document submitted on December 3, 1830. To fulfill the Council's instructions, the relevant provisions were duly issued. // Thus, *following a request from the Ministry of the Treasury, His Majesty settled the petition from the Municipality of Colmenar Viejo*. On May 27, 1831, t*he said Ministry reported to the Justice and Grace Ministry (and the latter subsequently passed it on to the Governor)* a Royal Order addressed to this court whereby the King declared that the *Consejo Real* had exceeded its jurisdiction by issuing the said documents and titles, claiming its jurisdiction over the tenders for the meat and oil public sale stands. According to this Royal Order, the *Consejo Real* should have refrained from hearing any claim brought in this regard, and it should have instructed the parties concerned to file the petition to the competent body. This Royal Order was sent to the *Consejo*, along with any remarks by the Attorneys, and became attached to the file, and it is formally enshrined and recorded as law 19, tit 17, lib 7 NoR, alongside the remaining Royal Orders and resolutions subsequently submitted to the *Consejo* regarding supplies, having verified that all files in connection with this case are duly recorded together" (own translation). Emphasis added; the excerpt can be found in AHN, Consejos, leg. 3953, and it amounts to a communication dated July 1831 sent by the chamber clerk Manuel Eugenio Sánchez de Escariche to the government clerk Manuel Abad in compliance with Royal Order of May 27, 1831.

[iii] See note i above.

[55] An indirect consequences resulting from this way of reporting the files is that the matter could not "turn into" a judicial or contentious case as the new *Consejo* processes the file, since the parties concerned did not appear in hearings at the Council's Secretariat and departments to defend their rights. An addition consequences is that the actual Ministers-council members would qualify the affairs as judicial based on how they construed the files submitted thereto. Amongst other examples I have been able to find, see the file headed "On the demolition of the Garfias flour mill located in the agricultural fields of the said city [Murcia], initiated by Mrs. Teresa Miño y Patusi and submitted by Mr. Blas Gambín" ("*Sobre demolición del molino harinero de Garfias en la huerta de dicha ciudad* [Murcia]*, solicitada por DŞ Teresa Miño y Patusi, i remitida por D. Blas Gambín*") dated May 12, 1985. In this case, the intention was for the report or resolution to be issued by the joint Departments of Interior and Justice and Grace. The latter Department worded its resolution on the first Department's report as follows: "it provides well-founded and irrefutable grounds in its report to evidence that this case is judicial in essence under any point of view. Thus, the jurisdiction to hear this case should be granted to the judicial courts (…)" (own translation); all the file as processed by the Council's Interior Department is available at AGI, Indiferente general, leg. 3133.

all, that of the Ministries of Development, the Interior or of the Government–[56] as two sides of the same process. As a result of i) (and, for the purposes of this paper, included within the Ministries' expansion noted in ii)) the review of certain operational aspects of the new Council is tremendously enriching in order to address the defining features of the paradigm shift that was already in place.

Accordingly, it is understandable that this reformist (although non-revolutionary)[57] "new beginning" in terms of institutional framework required instruments aimed at disciplining such a heterogeneous reality of individuals, authorities and territorial and non-territorial bodies that were still entitled to rights and prerogatives belonging to a world much distant from that shown in the political discourse.[58]

A good example of the Council's role in this new institutional understanding is provided by the proceedings involving the *Consulado de Santander* and the *Consulado de Burgos*, settled by the Council's Interior Department. The dispute arose from the *Consulado de Santander*'s obligation to provide funding to establish the *Consulado de Burgos* as required by the *Consulado de Santander*'s Charter of establishment (*cédula de erección*).[59] The Council's Interior Department, welcomed the fact that such a long-lasting dispute could "at last" be settled, and it made the following statement to claim its suitability to adjudicate the case (i.e., that it was the appropriate body to hear the case):

"Once and for all the King's Government has put its own twist on this affair by submitting it to the *Consejo Real*, which was expressly instituted to preserve or make amendments to future or present legislation and resolutions on the basis of universal justice principles and well-balanced public powers (…)".

As for the specific case at hand, the *evident* con*fusion* (in view of the said Council's Department) was due to a misunderstanding by the Burgos court of the principles that should guide government matters:

"The *Consulado de* Burgos mistakenly believed that the former right was a an eternal right to retain the prerogative for its own. This is a common misunderstanding amongst these bodies. The bodies established to carry out public administration duties become the owners of the institution itself, and they bring claims to retain their alleged (and abusive) property right as if it were a possessory dispute between individuals".

Clearly, in spite of the Department's argumentative efforts trying to prove wrong the *Consulado de Burgos*'s claim, the *Consulado de Burgos*' interpretation was the one being "innovative" with respect to the prevailing *statu quo*, particularly because of the jurisdictional background of the case:

"This matter is most certainly administrative in nature and it would never fall within the scope of a private dispute. However, it gave rise to numerous appeals, decisions and rulings within the *Consejo de Hacienda* which, although had jurisdiction over administrative and judicial matters, always sought to be a strict judicial court. This *Consejo* would never call His Majesty's attention to administrative equity, reversing what had been enacted in 1785, as claimed by the *Consulado de Santander* in reasonable statements that were never upheld by the deciding bodies".

Hopefully, this example suffices to illustrate part of the Council's new duties. If this is the case, we can conclude this section by underlining that the Council became –by means of claims, concerns and disputes submitted thereto by the Secretariats– a leading actor in the clash between reformist political action and the reaction of the various bodies, authorities and

[56] Although they have been reproduced many times, some of the key aspects pointed out by Javier de Burgos in 1826 to "free Spain from its evils" remain interesting. Particularly if we consider them in the light of this two-sided relationship between the institutional reform and the ministerial expansion. As noted by Sánchez Bella, one of the main difficulties faced by Burgos when projecting a Ministry of the Interior related to the fact that the establishment of such a Ministry "undermines the executive powers vested by the law in the *Consejo Real*" (own translation) (SÁNCHEZ BELLA, I., La reforma de la administración central en 1834, p. 661).

[57] Right from the outset, within the Chamber of Deputies (in Spanish, *Estamento de Procuradores*) one could tell that the new political regime (in fact, was it really new?) was neither disruptive nor revolutionary. In one of the new lower chamber's opening sessions, Martínez de la Rosa was very clear about it: "It may appear that the aim is to build a new nation, a newly reformed one, but that is not the case; the purpose is to remedy the abuses ultimately enshrined in the law of an old Monarchy, perpetrated by the passage of time and men who once upon a time were responsible for the nation's glory and prosperity"; [Official report of parliamentary proceedings, DSC, term 1834-1835, document no. 11, p. 3, available at: < https://app.congreso.es/est_sesiones/> (own translation) (Last accessed on April 8, 2021)].

[58] In its quest for reducing such a wide array of bodies, rights and interests, the regency Government needed something else other than putting forward the principle of unified action, otherwise constantly mentioned within the reformist *political* discourse. The existing contrast between this imported discourse–from post-revolutionary France–and the existence of many intermediate autonomous bodies (within the Ministries) having special or exclusive jurisdiction over certain matters is, to a certain extent, what lies behind the image of the "Government" or, in a narrower less English sense, the "Administration" that was in the process of being established. With regards to the skepticism concerning the homogeneity and subordination of the territorial bodies, see: CLAVERO, B., Tutela administrativa o Diálogos con Tocqueville. In: *Quaderni fiorentini per la storia del pensiero giuridico moderno*, Nr. 24, 1995, p. 419-468. Yet again, see how MARTÍNEZ PÉREZ, F., De la pluralidad de fueros al fuero de la administración, p. 239-247 draws attention to the myriad of intermediate and autonomous bodies. There is a small hint of these calls for attention in the most recent work by NIETO, A., Organización administrativa del Estado. In: *Mendizábal. Apogeo y crisis del progresismo civil. Historia política de las cortes constituyentes de 1836-1837*, Barcelona, 2011, p. 584: "One cannot deny that the *official* history of Spain (which we know best) has little to do with the *real* Spain" (own translation).

[59] I reconstruct the case based on the documents stored in the Council's General Secretariat as the file was processed by the Council. This part of the case from which I take the references was filed within the documents related to the affairs submitted by the Ministry of the Interior to the Council. The file was first passed on to the Treasury Department, which referred it to the Interior Department. The excerpts cited below have been taken from the Interior Department's report. Everything can be found in AGS, CRE, leg. 2.

individuals.[60] Amongst other duties, the Council was in charge of drafting reports or resolutions to answer petitions. If the reports were greenlighted by the King, they would be included in the Royal Order (*Real orden*). The Council thus provided legal foundations often oriented to put an end to those activities, formal documents or resolutions (*oficios*), rights, gracious decisions and any other prerogatives that were in the process of being eliminated as a result of the said reform measures.

4. Closing Remarks

In a nutshell, as discussed throughout the paper, there are many aspects evidencing that bringing together two subjects of study (apparently separated by a wall of censorship) is a good way to understand and explain how the "new" emerging projects and reforms still had elements from the jurisdictional world that was coming to an end.

Firstly, linking or relating the various reforms of this turning point, either reforms that brought closure (dissolution of councils), openness (provincial division) or rather undefined reforms (establishment of a new Council and separation and delineation of powers) have helped us to overcome the rigid and compartmentalized discipline-related divisions, as well as to challenge those widely spread historiographical conventions and standards that had been the basic instruments to interpret this time period.

Having broken this tacit "explanatory covenant", we managed to identify refreshing (and not refreshing) political discourses, along with major structural modifications, documentary and personal aspects that remained in place, and various institutional practices and activities which we have used to focus on (with new Council being the perfect vantage point to connect these realities) the understanding of the three years that elapsed from the decease of the last "absolute" monarch and the first constituent processes in mainland Spain, i.e., key subjects to understand the foundations of the Spanish liberal State.

[60] The executive-territorial structure including the Public Works deputy delegates, Political Heads or Civil Governors leading an ongoing (yet initial) executive sphere was far less prominent than anticipated by a famous Secretary of State for the Treasury a few years earlier: "Such a preeminent Ministry that any others will be mere subsidiaries thereof" (own translation); this quote is taken from the "Records of a Statement addressed to His Majesty by the Ministry of the Treasury, Mr. Luis López Ballesteros, on October 10, 1830 suggesting to create a Ministry of the Interior along with some major improvements in the Ministry of the Treasury" ("*Minuta de una exposición dirigida a S.M. el Rey por su Ministro de Hacienda Don Luis López Ballesteros en 10 de octubre de 1830, proponiendo la creación de un Ministerio del Interior y algunas importantes mejoras de Hacienda*") available at *Archivo General de Palacio* (hereinafter, AGP), REINADOS, Fernando VII, caja 5, expediente 3.

Penal Transportation from Britain to Australia, 1788 to 1868: Four Phases of Penal Administration and Experimentation*

*Tony Murphy***

Abstract

This paper presents the history of penal transportation from Britain to Australia in relation to four distinct 'phases' of operation, each signifying a different context, and a series of different features of how convictism operated in Australia – the penological thinking, the nature of the colonies, and the conditions and systems of discipline that convicts found themselves within. The first decades of convictism in New South Wales (and Tasmania) have been described in some ways as a relatively benign system, founded upon an early system of convict assignment, and a series of legal, property and wage rights for convicts. That gave way to a tougher form of convictism, as the early assignment system transformed into a tougher form, alongside the rescinding of various convict rights, and a diminution of their status. That was then replaced by a system of probation, in the face of criticism of the assignment system. Probation was in turn halted as Britain looked to end transportation. Yet another chapter in the story of transportation from Britain to Australia emerged as settlers petitioned for the use of convict labour in Western Australia. That soon ended as transportation gave way to the penitentiary as the main mode of punishmen. The purpose of exploring this history is to signal the great complexity within how penal transportation operated in practice, and to set up future work via a natural experiments approach, which will consider such differences in more detail, and crucially, the implications of those differences for the colonies and the convicts.

Keywords: *Assignment system; probation system; convictism; penal transportation; penology.*

1. Introduction

In 1700, England punished felonies – all 'serious' crimes – with death. But for a clever loophole, the country would have been littered with the corpses of criminals. That loophole was 'benefit of clergy' which effectively allowed the guilty to walk free.[1] Within twenty years the repertoire of punishment would transform. Judges could call on two new punishment options: in 1706 legislation created short-term detention of up to two years for clergiable offences (not entirely successful) and from 1717 transportation 'beyond the seas' became the dominating force. Yet, 150 years later not death, nor benefit, nor penal transportation figured significantly. England would have created something then unimaginable: the modern criminal justice matrix we recognise today, with the prison at its core. This was not a simple transition from cruelty to kindness, or from body to mind. It was a complex interplay between law, the structure and practice of punishments (including death, benefit of clergy, transportation, and imprisonment), and experimental colonial practices, with transformations in policing, prosecution and more, above all enabled by serious financial investment in state capacity. This rocky historical terrain affords a series of *natural experiments* which can be exploited to address some of the most important questions facing criminal justice today: what worked, what failed, what reformed, why desist. This paper outlines some of the basic differences (in brief) witnessed over the course of penal transportation to Australia, to argue that it is possible to view Australian convictism in relation to different phases – related to their contexts and characteristics, and the possible implications of such. In doing so, it sets up work which is being undertaken to analyse those differences and their impact in more detail.

Although the complete story of penal transportation from Britain to Australia is a highly complex one, this paper presents it in relation to four distinct phases, which are identified as: the initial experiences in New South Wales (NSW), which might be described as a relatively benign iteration of convictism, in comparison with convict experiences in Britain and what would later come in Australia – the assignment system emerged in this period; the subsequent experiences within NSW following the crucial reforms associated with John Thomas Bigge, which brought a much less liberal approach to convict labouring in Australia, and a toughened assignment system; third, the situation in Tasmania (Van Diemen's Land (VDL) – formerly part of NSW) once transportation to NSW was halted in 1840, when a probation system replaced the system of assignment; and fourth, the

* The conceptualisation of my work owes a great deal to my former Oxford supervisor, Professor Deb Oxley, whose input, and direction (and patience and kindness) were crucial within the framing of my ideas and approach. It is from discussions with her that the framing of the four phases emerged. I must also thank my current lead supervisor, Professor Joanna Innes, who has been incredibly supportive and insightful since taking over as my lead supervisor. I have been truly fortunate to have such immense supervisors.

** Tony Murphy, Staff Tutor at the Department of Social Policy & Criminology, The Open University, and doctoral candidate, University of Oxford, United Kingdom.

[1] See BEATTIE, J M., *Crime and the courts in England 1660-1800*. Oxford, 1986, p. 142.

later exploitation of Western Australia (WA) - which entailed neither assignment nor probation - which came about after the ending of transportation to NSW and close to the end of the VDL episode. Each phase represented a different set of circumstances and approaches to penal policy, offering the opportunity for an examination of how this played out in practice, and the implications of such for the convicts and the colonies.

2. Precursors of penal transportation from Britain to Australia

The practice of sending convicts overseas for the purpose of their punishment – and it must be noted, wider colonial interests - predates the Antipodean experiences by several hundred years. Indeed, the Portuguese first employed convict labour in their capture of the Moroccan city of Ceuta in 1415. From then onwards, empires such as those of Portugal, France, Spain, and Britain forged colonies and attempted to manage criminal justice through sending convicts overseas.[2] The British exploitation of Australia between the late eighteenth century and well in to the second half of the nineteenth century is perhaps the most documented and researched episode within the wider story of penal transportation and convict labour. Well before then, an Act of Parliament in 1597 made provisions for the '*punishment of Rogues, Vagabond, and Sturdy Beggars'*.[3] This ultimately resulted in increasing numbers of convicts being sent to different colonies, predominantly in the Caribbean and the North American colonies. Subsequent Bills and Acts of Parliament contributed to the debate around the use of, and expansion of penal transportation.

Hamish Maxwell-Stewart comments on this, noting how the policy of transporting undesirable members of English society, first proposed in late sixteenth-century, was related to the rationale that '*loyterers and idle vagabonds*' be put to service in the Americas.[4] Early transportees appear to have been both those whose capital sentence had been pardoned and indeed also some petty criminals. There appears to be evidence for some petty offenders (those guilty not of felonies but of misdemeanours) being dealt with through transportation. For example, the London Bridewell ordered the transportation of members of the *nuisance poor* to various American and Caribbean territories; records from the Bridewell contain orders for 1,106 people to be transported between 1617 and 1648 – albeit, not all would have had the order carried out.[5] That period of early British penal transportation was important in demonstrating the value of transportation as a credible punishment. The middle of the seventeenth century *'marks a turning point in the history of the English use of penal transportation as a judicial sentence'*; the use of penal transportation in Barbados demonstrated that penal servitude in the New World was a severe form of punishment.[6]

The early organisation of transportation was haphazard. Some convicts exiled themselves at their own expense. Merchants were used, but rather than being paid to transport convicts, they were given rights over their labour power and allowed to sell them as indentured labourers. A merchant could choose which convicts they would transport, a decision which may have been based on their envisaged labour output and thus market value.[7] Justice was thus dispensed erratically, based on perceived market forces. That initially informal and irregular market for labour, eventually became more regulated. This was further incentivised by processes of demobilisation of the armed forces in 1697 and 1713 which increased the numbers of offenders, creating the setting for an all-important piece of legislation.[8]

The Transportation Act of 1717/18 – technically known as the Piracy Act - proved to be pivotal in the trajectory of penal transportation.[9] It prompted three important provisions: i) death sentences could be commuted to transportation; ii) those found guilty of a felony who claimed benefit of clergy could be transported for 7 years; and iii) those convicted of petty as well as grand larceny could also be transported if a judge determined it suitable. The Act injected proportionality of sentencing, and an emphasis on 'dread'. Crucially, the availability of penal transportation as a punishment significantly extended the capacity needed for the Bloody Code,[10] since so many convicts could be dealt with via transportation with death commuted.[11] The Transportation Act, in despite of there being earlier provisions pertaining to penal transportation, proved to be a particularly important turning point, resulting in greater numbers of convicts being exported. The significance of this is signalled by Ekirch:

> Britain's policy of transporting criminals to her American colonies did not begin in the eighteenth century. As early as 1597, Parliament

[2] For example, see Clare ANDERSON, C., and MAXWELL-STEWART, H., Convict labour and the Western Empires, 1415-1954. In: ALDRICH, R., and MCKENZIE, K., *Routledge History of Western Empires*. London, 2018.

[3] EKIRCH, R., *Bound for America. The transportation of British convicts to the colonies 1718-1775*. Oxford, 1987, p. 7.

[4] MAXWELL-STEWART, H., Transportation from Britain and Ireland, 1615-1875. In: ANDERSON, C. (ed.), *A Global History of Convicts and Penal Colonies.* London, 2018, 183-210, p. 188.

[5] *Ibid*

[6] MAXWELL-STEWART. 2018, p. 191.

[7] MAXWELL-STEWART. 2018, p. 191-2.

[8] MAXWELL-STEWART. 2018, p. 191.

[9] This is often just referred to as the Transportation Act, and it is often dated 1718 rather than 1717. For a good commentary on this see MEREDITH, D., and OXLEY, D. Condemned to the colonies. Penal transportation and the solution to Britain's law and order problem. In: *Leidschrift*, vol. 22 Nr. 1, 2007, 19-39, p. 20-21.

[10] The so-called Bloody Code refers to a series of statutes in operation over the course of the eighteenth and nineteenth centuries which allowed for the application of the death penalty to a range of lesser crimes. This is usually signalled within the literature as an indicator of the brutal and harsh nature of criminal justice over that period, and a context from out of which the use of penitentiary as the main penal strategy eventually emerged. The Waltham Black Act of 1723 was a key component within this, whilst elements of the Bloody Code legislations were gradually withdrawn during the first decades of the nineteenth century, eventually leaving death once again only applicable to a smaller number of (serious) crimes.

[11] MEREDITH., and Oxley, D., The convict economy. In: VILLE, s., and WITHERS, G. (ed.), *The Cambridge Economic History of Australia*. Cambridge, 2014, p. 98.

> gave magistrates the power to exile rogues and vagabonds 'beyond the seas', and in 1615 James I authorized pardons for condemned felons on condition of banishment to the New World. But not until Parliament's passage a century later of the 1718 Transportation Act did Britain systematically adopt foreign exile as a punishment for serious crime.[12]

This was not just for 'dangerous' or 'serious' convicts. The positioning of petty larceny as a transportable offence proved to be significant. Larceny (both petty and grand) counted for a great proportion of those transported. The positioning of petty larceny appears to have shaped Britain's need for capacity *vis-ŕ-vis* the expansion of transportation, and then later pivotal in dealing with a lack of prison capacity in Britain once transportation was no longer an option. When penal transportation was dismantled, the problem then was how to process large numbers of thieves, and the solution was to move petty larceny back to summary jurisdiction via the Criminal Justice Act of 1855. Ekirch estimates that approximately 50,000 British convicts were transported over the course of the eighteenth century, and most of them were sent to Maryland and Virginia, but other colonies were also used - for instance in the Caribbean.[13] For 50 years, penal transportation dominated punishment until 1775 when the War of Independence stopped transportation to America. Soon, Britain's gaols and hulks were overflowing with convicts, and a new solution was required. In the short term, Judges turned to incarceration. Following a brief hiatus, penal transportation resumed, but this time to NSW in Australia, and not before experimentation with sending convicts to other parts of the world.[14]

3. An overview of the Australian experiment

NSW was chosen as Britain's key destination for penal transportation because of its distance from Britain, and the deterrence effect this represented: being sent to a wild and unknown land on the other side of the world, very far away, was something to be dreaded – as the Transportation Act had conveyed. This was contrary to the situation with the Americas, from where some convicts who had served their sentences had returned. Also, by then there was a growing familiarity with America. For NSW there was also a desire to pre-empt the French. Over time, the use of Australia expanded beyond NSW, which was used between 1788-1840 in the main.[15] Eventually this included VDL - now Tasmania, which was formerly part of NSW before becoming a standalone colony in 1825. VDL operated mainly between 1818-1853. Yet convicts had been sent there beforehand, as early as 1803. WA was subsequently also used, mainly between 1850-1868,[16] but as with VDL, a small number of convicts had been sent there previously.[17]

Convict colonies, like all others, also faced the problem of how to deal with those who committed crime whilst in colony. Numerous settlements were established across Australia as places of secondary punishment, to house and to discipline such convicts. Other settlements were forged in other parts of Australia, though with less significance in the overall story of Australian convictism. The complete history of penal transportation to Australia is a complex and messy one. Apart from the matter of shifting geographical boundaries and territorial classification, convicts were sometimes moved between colonies as one colony closed, as well as for the purpose of punishing convicts who reoffended.[18] The reality of how transportation and convict labour operated in Australian, was also rather complex one in terms of the policies and the practices adopted at different points in time. Tuffin and colleagues reflect some of this complexity, for example, declaring how:

> Over 80 years between 1788 and 1868, an array of different and evolving policies were applied to manage…convict men and women transported to the Australian colonies (Maxwell-Stewart, 2011: 17). Driven by a combination of changing local imperatives and critical metropolitan interventions, various schemes were implemented, corrected and disbanded.[19]

Over this period, penal transportation became Britain's key penal strategy in mitigating against the unrealistic implications of the 'Bloody Code' at a time when there was a lack of prison capacity within Britain – heavy investment in building the capacity would eventually happen, but not until the middle decades of the nineteenth century. The Bloody Code was unrealistic in practice because the sentence of death was attached to so many crimes. This had been impacted by the movement of misdemeanours to transportable offences via the 1717 Act. This meant that high numbers of death sentences were meted out, which simply could not be delivered. It was impossible in terms of the logistical feasibility to do so, but more significantly perhaps, the lack of political legitimacy this would have created. Thus, transportation was a way out of this paradox (as 'benefit of clergy' had been) – death sentences commuted to transportation. Over the period of penal transportation to Australia, it operated alongside the use of primary punishment (death), and the slow evolution of incarceration and the birth of the penitentiary – in a form of coalescence. The penitentiary developed

---

12 EKIRCH. 1987, p. 1.

13 EKIRCH. 1987, p. 1. & ch.5.

14 SHAW, A. G. L., *Convicts and the Colonies: a Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire*. London, 1966.

15 There are examples of transportation after the official ending of transportation to NSW e.g., the 'Exiles' of Port Phillip are a notable exception to this, with the penal colony operating there between 1844 and 1859. See WOOD, C., *Great Britain's Exiles sent to Port Phillip, Australia, 1844-1849: Lord Stanley's Experiment,* Ph.D. thesis submitted to University of Melbourne, Oct 2014). SHAW. 1966 also offers a chapter to the matter.

16 MEREDITH and OXLEY. 2014, p. 102.

17 See discussions of the so-called 'Parkhurst apprentices', within GILL, A., *Convict Assignment in Western Australia 1842-1851,* Marylands, 2004.

18 For example, the penal station of Norfolk Island was used for this purpose for NSW convicts.

19 TUFFIN, R., GIBBS, M., ROBERTS, D., MAXWELL-STEWART, H., ROE, D., STEELE, J., HOOD, S., and GODFREY, B., Landscapes of Production and Punishment: Convict labour in the Australian context. In: *Journal of Social Archaeology*, Vol. 18, Nr.1, 2018, 50–76, p. 53. https://doi.org/10.1177/1469605317748387

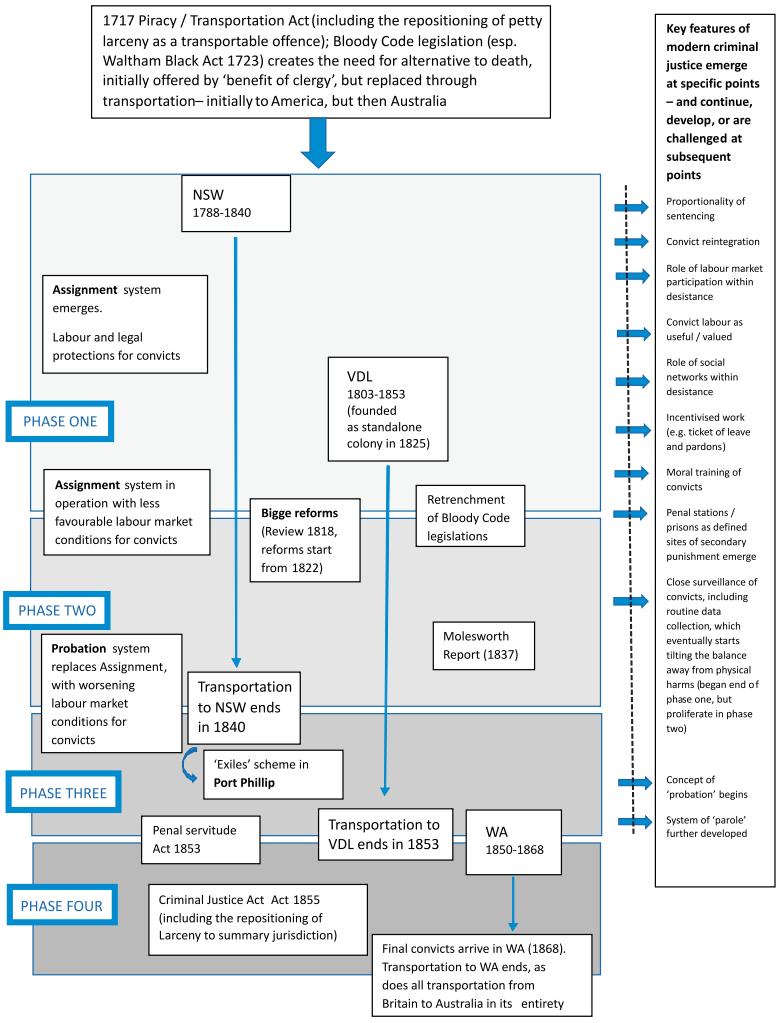
over time, and particularly in response to the various crises in penal transportation from Britain to Australia as transportation became subjected to various waves of scrutiny and ended at various points.[20] However, penal transportation was pivotal within the transitioning nature of penal policies and practices, and the balance between the use of each strategy - death, transportation, and prison - evolved until the eventual dominance of the incarceration as the principle punishment.

The Penitentiary Act of 1779 appears to have influenced early thinking and practices in NSW in terms of aspects of new penal thinking (through Governor Phillip for example at the start), then in turn, penal transportation and the Australian experiences were crucial in forging, or at least significantly influencing, the eventual nature of modern criminal justice. This includes the nature of the modern penitentiary, and indeed, other ideas now central within modern criminal justice philosophy, including:

- ideas of proportionality of sentencing;
- ideas related to reform, and offender reintegration back into society;
- the use of secondary punishment sites in their own right;
- a clear understanding of the importance of labour force / market engagement for both the disciplining of convicts and transformation back into useful members of society;
- the role of social capital and integration within desistance processes;
- the close surveillance of convicts, especially administrative recording keeping and restrictions of movement;
- the incentivisation of convict labour (e.g., pardons for good behaviour, and the 'ticket to leave' scheme);
- and the concept of 'probation'.

It is possible to split up the wider Australian episode into a series of different phases, each different from the others in some crucial respects – whereby the system operated differently within each of these defined phases. *Figure 1.1* offers an overview of all this, in setting out four phases, some key dates, and some key events and circumstances, as well as the nature of the experimentation associated with those phases:

Figure 1.1: an overview of penal transportation from Britain to Australia



[20] Prior to the exploitation of Australia for penal colonies, legislative measures began in 1776, and culminated in the Penitentiary Act 1779, for the development of the penitentiary. Albeit this proved to be quite modest in terms of impact compared with the scheme originally envisaged. For example, See DEVERUX, S., The making of the Penitentiary Act, 1775-1779. In: *Historical Journal,* Vol.42, 1999, p. 405-434. However, it did offer new penological thinking that was subsequently important in both the direction of penal transportation and the eventual development of the penitentiary.

Whilst the first decades of the NSW experiment resulted in relatively small numbers arriving, this increased considerably following the demobilisation at the end of the Napoleonic Wars. Penal transportation peaked in the decades following the rescinding of elements of the Bloody Code legislations in the first half of the nineteenth century, with 1833 representing the highpoint through 7000 convicts transported that year.[21] In total, it is estimated that around 168,000 convicts were transported from Britain to Australia.[22] As the system moved into the 1840 s, the numbers being transported dropped significantly until the final convicts were sent to WA in 1868. Notably, NSW and VDL were the main destinations, with 72,278 and 68,500 convicts respectively.[23] The figure for WA, although still substantial, is significantly lower, but the individual context of the WA experience nevertheless makes it an important site of investigation.

Ward offers a useful overview of the sentences meted out to those sent to Australia.[24] It is apparent that most transportees were required to serve sentences of seven or ten years, although there are notable differences between the three sites here. For example, a simple comparison between NSW and WA suggests that the average sentence in WA was longer than that of NSW, and thus, the offences committed by those in WA were on average more serious. In each site, there appears to be a fairly-sizeable proportion who received long sentences – fourteen years and above, with a significant number of life sentences. The patterns we see across the types of sentences given to convicts in the different colonies must be considered alongside any analysis of the conditions and experiences of convicts, and eventual outcomes for them and the colonies.

The decades following the statistical peak of penal transportation had brought with them opposition from citizens within the colonists - those not dependent upon the convict labour anyway, and opposition from social reformers in Britain, with parallels drawn between such coerced labour and slavery. The discovery of gold in Australia was vitally important too, and it ensured a halt to transporting convicts.[25] Transportation to Australia ended in a series of stages, rather than an abrupt holt – each time because the ways in which convict labouring operated in that phase came under scrutiny – and each one of these phases left an important legacy for the subsequent future of criminal justice.

The dynamic of gender was undoubtedly important within the functioning of convictism. It is a complicated topic, and one beyond the remit of this paper other than the noting of some general points. The great majority of transportees were men – to varying levels at different points, and in WA (phase four) only men were transported. However, some important themes emerge from the literature on women convicts, including early concerns about the morality and influence of female convicts; the efforts to separate genders e.g., through the founding of separate institutions for men and women (Females Factories for instance); the value and desirability of female convicts given that there was fewer of them, and the roles they occupied; and the role they played in terms of marriage and families within the colonies. Oxley's text 'Convict Maids' is a defining one on the subject. Oxley's focus coincides with the period of phase two, and she debunks myths concerning such women being prostitutes and career criminals, to instead demonstrate the vital role they played in terms of the functioning and the development of the colony.[26] It is also worth highlighting Ryan's work, which signals something of the complexity of female convictism, and indeed that of convictism in Australia more generally. Ryan determines three different phases of female convictism - starting with the focus on exile in 1788; then domestic servitude through assignment from 1814, with confinement within the Female Factory for those who offended or became pregnant; and then finally the probation period in VDL from 1843.[27]

4. Phase one: New South Wales and Van Diemen's Land, 1787 to 1822

The first transported convicts, consisting of 11 ships under the command of Captain Arthur Phillip (who would become the first Governor), arrived in modern-day Sydney in 1788.[28] The initial conditions and organisation of the colony have been cited as being chaotic, but things improved. The transportees in NSW were required to serve a specific period, labouring for the benefit of the Crown – initially working on colony infrastructure. In the early days, there was not an existing settlement with landowners requiring cheap labour. Thus, the process of assigning convicts to the private sector employers came along later, as the assignment system emerged during 1790 s. Convicts had a clear term to serve, proportionate to the offence they had been transported for, and once convicts had served their sentence, they could be granted land of their own. Before that point, the time imposed on convicts to labour was limited such that convicts had some time free to labour for their own wages – 'their own time'. Indeed, convicts were encouraged to labour in this way. This early system within NSW operated in stark contrast to what would eventually follow. The labour rights, and the other freedoms of this first phase of the convict scheme were defining characteristics of it.

---

21 MEREDITH, D., and OXLEY, D. 2014, p. 99-100.

22 GODFREY, B., and COX, D., The Last Fleet: Crime, Reformation and Punishment in Western Australia After 1868. In: *The Australian and New Zealand Journal of Criminology,* Vol.41, Nr.2, 2008, p. 236-258.

23 ANDERSON, C., Transnational History of Penal Transportation: Punishment, Labour and Governance in the British Imperial World. In: *Australian Historical Studies,* Vol.47 Nr.3, 2016, 381-397, p. 382. *Within the data transportees are from Britain and Ireland.

24 Taken from WARD, R., The challenge of visualising 100,000 convict lives. In: *The Digital Panopticon,* available at https://blog.digitalpanopticon.org/tag/visualisation-2/

25 E.g., see SHAW. 1966.

26 OXLEY, D., *Convict Maids: The Forced Migration of Women to Australia (Studies in Australian History).* Cambridge, 1996.

27 RYAN, L., The governed: Convict women in Tasmania, 1803-1853, *Bulletin of the Centre for Tasmanian Historical Studies,* Vol.3, 1990-91.

28 SHAW. 1966.

Beyond the encouragement of convicts to earn their own wages, and to eventually hold land, the conditions they faced have been shown in some respects to be removed from what we might expect of a convict labour experience. This can be understood should we compare with the conditions faced by convict labourers in later phases of the Australia experiment. Whilst a comparison with British citizens is also illuminating. For instance, archaeological evidence is said to demonstrate that for those convicts living in the Rocks district of Sydney, a higher standard of living was had than that of working-class Britons – including diet, and possession of personal items.[29] The matter of conditions, including diet, relative to the conditions in Britain is also noted elsewhere, as both Braithwaite and Shaw have demonstrated.[30] Indeed, convict rations were plentiful, and regulated by the government. Well-behaved convicts were incentivised by the ticket of leave scheme – an early form of parole in effect. Such convicts were still under sentence, but not required to labour, and generally enjoyed greater freedoms. Convicts could also hold property, and they had legal rights.

The relatively positive experiences of that early convict system in NSW is reflected within John Braithwaite's landmark paper *Crime in a Convict Republic*, within which Braithwaite signals the crucial role of convict reintegration in operation within NSW, specifically under the control of Governor Macquarie - who served as Governor of NSW between 1809 and 1822.[31] The existence of labour rights and wages for convicts was important, so too were the judicial rights and protections afforded to them – acting as a form of integration, offering convicts a series of safeguards to enable their acquiescence, and to foster a sense of legitimacy within the workings of governance and rule of law for convict settlers.[32] Further processes of social integration were afforded, encouraged, or even demanded of convicts. For instance, convicts who had served their time were required to attend church, but more profoundly perhaps, they were in some cases appointed to government positions to help administer the workings of the colony. Thus, Governor Macquarie has been viewed as having adopted a *reintegrative* approach to the management of convicts during his governorship. He recognised the need to not only foster convict acquiescence through how they were treated – which would better serve offender and convict outcomes – but on some level also, a wider moral responsibility.[33] This reflected the overall direction of travel in the early decades of Australian convictism.

It was always the case that, to substitute for death as the keystone of punishment, transportation had to be dreaded. There were no modern police forces to detect, prosecution was largely private, and the chances of being caught and processed were limited. Instead, British justice functioned based on exemplary punishment. Only a few guilty felons would be processed, so the consequences – if you were caught – had to be severe to deter crime. Macquarie's colony was gaining a reputation as a land where fortunes might be made. To this day, Australia's richest man (measured by probate value/GDP). was Samuel Terry, a convict. Furthermore, a changing political climate in Britain was moving towards retrenchment of the death penalty. To do so, they desperately needed penal transportation to be an effective deterrent against crime.

5. Phase two: New South Wales and Van Diemen's Land, 1822 to 1840

When establishing a Select Committee into the Criminal Laws as relates to Capital Punishment in Felonies, Parliament also commissioned a parallel report, appointing a Commissioner of Inquiry into the State of the Colony of New South Wales - John Thomas Bigge. Bigge had two tasks: to beef up the severity of punishment involved in penal transportation, and to make the colony pay for itself, rather than being such a burden on British coffers. A.G.L. Shaw offers a useful overview of the impacts of Bigge on the Australian transportation experiment – and they were of course profound.[34] The changes witnessed, essentially moved the convict labour experience away the system of reintegration that it had in some ways been. It moved back towards something less liberal. Bigge toured NSW and VDL with a view to toughening up the nature of convict labouring. As Meredith and Oxley have noted, as England moved away from the use of the death penalty via the gradual retrenchment of the Bloody Code, an alternative was required, one which was dreaded and offered a suitable deterrence.[35] Bigge saw what was happening under Governor Macquarie and determined that further control of convicts was required, and the labour and legal rights previously afforded to convicts were too close to those of free men; they needed to be retrenched, and they were.

Convict labour in NSW, and in VDL, developed into a tougher version of the system of assignment that had emerged under Governor Phillip in the early days. In phase two, more

[29] MAXWELL-STEWART. 2018, p. 198; KARSKENS, G., *Inside the Rocks: The Archaeology of a Neighbourhood.* Alexandria, NSW, 1999, p. 48–74.

[30] Braithwaite makes the point in relation to the treatment of convicts elsewhere, whilst Shaw shows this in relation to workers back in England: BRAITHWAITE, J., Crime in a Convict Republic. In: *the Modern Law Review,* Vol.64, Nr.1; SHAW. 1966.

[31] BRAITHWAITE. 2001, p. 11-50.

[32] In many respects, this echoes the arguments of the legal commentator Cesare Beccaria, who famously wrote in 1767 on the imperative that the workings of the law and judicial system should promote a sense of a equality and transparency if it is to be accepted and to foster legitimacy – crucial in managing crime through generating acceptance and buy-in. See BECCARIA, C., *On Crime and Punishment and other writings,* (translated by BELLAMY, R), Cambridge, 1767/1995.

[33] For example, see the detailed discussions of much of this within BRAITHWAITE. 2001.

[34] SHAW. 1966; also see the various reports from Bigge: BIGGE, J T., Report of the Commissioner of Inquiry into the state of the colony, 1822. Available via the State Library of NSW, http://digital.sl. nsw.gov.au/delivery/DeliveryManagerServlet?embedded=true & toolbar=false & dps_pid=IE3735574; : BIGGE, J T., Report of the Commissioner of Inquiry on the judicial establishments of New South Wales, 1823. Available via the House of Lords Sessional papers, 1801-1833 Vol. 152 *https://books.google.com.au/books?id=9rFbAAAAQAAJ & pg=RA3-PA3#v=onepage & q&f=false*; BIGGE, J T., Report of the Commissioner of Inquiry on the state of agriculture and trade in the colony of New South Wales, 1823. Available via the State Library of NSW, *http://digital.sl. nsw.gov.au/delivery/DeliveryManagerServlet?embedded=true&toolbar=false&dps_pid=IE3732195*

[35] MEREDITH and OXLEY. 2014, p. 100.

convicts were handed over to colony farmers to support the development of the colony, and convicts this time had fewer property and wage rights. The colony expanded, and plots of land were offered to attract in new settlers with capital (as had happened in phase one), coupled with the promise of the assignment of convict labour based on the area of the land they would hold. Land grants were tightened up, and eventually stopped for convicts / emancipists. Most of the convict labour was 'assigned' to private landholders and businesses, but some labour was held back for government infrastructure projects. Those private landholders and business owners were then responsible for housing, feeding, and clothing their convict labourers, but under government specified levels. This was then galvanised by The Transportation Act of 1824, which was concerned with furthering private property rights in convict labour, including the right to temporarily or permanently sell assigned labour. The Act was not fully operationalised, given the close parallels with slavery. Yet, the Act did reflect the wider retrenchment of convicts' rights in the third and fourth decades of the nineteenth century in NSW, and that would continue through to the end of the Australian transportation story.

Convict labourers increasingly had more regulation upon their time; and less scope to earn their own money – and they now had to earn the right; they began to be housed in government buildings; convict movements within the colony became more monitored and restricted; and greater attention to policing the behaviours of convicts emerged as the colonies divided in to police districts with their own magistrates' bench.[36] Furthermore, the use of sites of *secondary punishment* to discipline convicts intensified in NSW and VDL. They began to emerge just before the Bigge reforms, but became more established afterwards, as places to house and punish (discipline) troublesome convicts. The proliferation of penal stations reflected a more punitive turn, as Tuffin and colleagues remark:

> the penal station represented the most punitive sphere of convict life and labour. Penal stations became a firm fixture in the apparatus of colonial punishment in New South Wales from the early 1810 s (Roberts and Garland, 2010), their number and role expanded and magnified after the 1819–1820 Commission of Inquiry when new stations were established in New South Wales at Port Macquarie (1821), Moreton Bay (1824) and Norfolk Island (1825), and in Van Diemen's Land at Macquarie Harbour (1822), Maria Island (1825) and Port Arthur (1830). These were remote carceral institutions, populated largely (but not exclusively) by convicts who reoffended while under sentence in the colony. As sites of punitive exile and exemplary punishment, characterised by highly coercive and tightly surveilled labour regimes, they are now recognised as both an exception to the general principle of employing convict labour profitably (Evans and Thorpe, 1992: 102), and as significantly innovative and transformative experiments in secondary punishment (Ford and Roberts, 2014; Maxwell-Stewart, 1997).[37]

Convicts could still benefit from the ticket of leave scheme, although it became tougher to get a ticket of leave during the early part of the phase two, to counter what had almost become an expectation amongst convicts by then.[38] Convict wages were stopped, and indeed property rights, and a series of legal rights were restricted or removed. Thus, the consequences of Bigge's recommendations were deep; they created a fundamentally different philosophy to convict labouring in Australia, and different sets of processes of administration and governance. A series of implications then for colony and convict outcomes must be considered. A shift from the reintegrative and somewhat benign (relative to what followed anyway) philosophy of Macquarie and the preceding governors, to one more concerned with controlling and stigmatising convicts, would surely have had consequences for the behaviours and psyche of convicts, as well as offending and desistance trajectories. A punitive and retributivist mentality - seeking to offer the terrifying alternative to death that was desired - offers a different set of psychological experiences to one concerned with convict reintegration and a chance to start afresh.

In summing up on the nature of the early experiences of transportation, Maxwell-Stewart argues that those transported in the first few decades had a greater chance of long-term economic success that those sent later when the labour markets they faced were more difficult, and access to land became more difficult.[39] That sense of economic success could be viewed as a proxy for reform and reintegration. In short, what Bigge saw in NSW was not punitive enough, but the nature of convict labouring in NSW and VDL soon was; and in fact, to the extent that the eventual demise of the convict colonies in NSW and VDL occurred (in part) because they had moved too far in the opposite direction. The first step towards that was the Molesworth Report in 1837, which was critical of what NSW and VDL had become. That led to the end of NSW, and the reform of VDL.

What is particularly interesting amidst this, is how the convict labour system over that period reflected aspects of the penitentiary system which would eventually overtake transportation as the dominant punishment mode. For instance, although physical punishments continued to play a role (e.g., flogging – which became regulated) there was an increasing emphasis placed upon confinement and disciplinary practices – aided by the rise of the sites of secondary punishment - such as the treadwheel and solitary confinement. Convicts were also subjected to high levels of surveillance that were uncommon at that time in Britain, allowing the ability to track convicts over the course of their lives.[40] The functioning of the convict labour system

[36] MAXWELL-STEWART. 2018. p. 189-90.

[37] TUFFIN *et al*., 2018, p. 53.

[38] In contrast to this being a more general right, and in fact, encouraged prior to the Bigge reforms.

[39] MAXWELL-STEWART, H., Convicts. In: *the Companion to Tasmanian History*, (Centre for Tasmanian Historical Studies), 2006), available at: https://www.utas.edu.au/library/companion_to_tasmanian_history/C/Convicts.htm

[40] MAXWELL-STEWART, H., Convict Labour Extraction and Transportation form Britain and Ireland 1615–1870. In: DE VITO, C., and LICHTNSTEIN, A, (ed.), *Global Convict Labour.* Leiden, 2015, 186–193, p. 190–191; MAXWELL-STEWART, H., Big Data and Australian History. In: *Australian Historical Studies*, Vol.47, Nr.3, 2016, 359-364, p. 359.

more generally by this point is captured neatly by Tuffin and colleagues, who declare:

> …by the early 1830 s, the key elements of a convict 'system' were in place. This was a tiered or graded structure that placed convicts into either private 'assignment', public works or punitive labour in chain gangs and penal stations, before graduating to heavily regulated forms of parole and pardon (Maxwell-Stewart, 2010: 1232).[41]

6. Phase three: Van Diemen's Land, 1840 to 1853

The functioning of the assignment system proved to be problematic, and it was described within the influential Molesworth Report of 1837 as akin to a 'lottery' – some convicts experienced overly punitive masters, whilst others experienced lax masters. Thus, the assignment system was swapped for a system of 'probation' to operate in VDL, and NSW ceased as a transportation destination. The 1837 report directed that all of the convicts in VDL serve a probationary period in 'purpose-built establishments', after which point, they would be then move into the private sector as passholders.[42] The most serious offenders were initially sent to Norfolk Island, to undergo an additional tough form of discipline before entering the probation gangs. In theory this would be a more benign system, involving 'voluntary' labour contracts. This was overseen by state regulation, which stipulated wages, and bearable conditions. The reality of this proved to be harsher than was anticipated. Probation entailed male convicts serving a determined sentence as part of a public labour gang by way of training and discipline.[43] They worked on agriculture and timber-stations. This meant that a series of probation stations were built across VDL, some were unsustainable because of their location, and they closed.

The probation system was expensive because convicts did not pass into the private sector until they had served their probationary period (unless they already arrived in the colony with a ticket-of-leave). It entailed surveillance and classification of convicts, and heavy disciplinary processes. The system was unpopular because of the costs, but also because it did not solve the labour problems of the colony – it also therefore worked in direct operation of the private sector.[44] Convicts who became passholders found that the labour market in VDL was tough, as the economy was hit by disease and competition elsewhere, whilst convicts continued to arrive.[45] As in phase two, convict rights and freedoms were closely curtailed.

By 1853, transportation to VDL was ended – that system of probation had become too problematic, and too synonymous with slavery, and the gold rush proved to be the pivotal final straw. As with America, Australia had begun to lose its deterrence effect as the colonies developed and opportunities grew. The Penal Servitude Act 1853 proved to be crucial in terms of swapping sentences of transportation into imprisonment at home.[46] Thus, in theory that should have been the end to the transportation of convicts to Australia. But it wasn't, as the later WA experience reflects. In any case, another issue emerged; Britain lacked the capacity to house in prison the numbers of convicts it had previously transported.

Investment in state capacity took off over the middle decades of the nineteenth century, but another solution was needed. To get around the problem, the law was changed to return larceny to summary jurisdiction - reversing the provision within the 1718 Transportation Act via the Criminal Justice Act of 1855.[47] Thus, where previously those found guilty of petty larceny would have been transported, which would in theory have then been replaced with imprisonment in Britain for an equivalent period, convicts would instead now face days, weeks, or months in a house of correction. The consequences of this, was a reduction in capacity needed to house criminals, even though the events in the preceding decades had indeed set the course for the utilization of the prison on a scale not seen before.

7. Phase four: Western Australia, 1853 to 1867

Despite the Penal Servitude act of 1853 and the Criminal Justice Act of 1855, penal transportation to Australia continued. Although convicts were no longer sent to VDL, they would continue to be sent to WA until 1868, and only male convicts – mostly arriving at the Freemantle Convict Depot. This episode of transportation - defined as the fourth phase in the context of this paper – was a consequence of pressure from colonists in WA who were desperate for labour.[48] The British government was petitioned to allow convict labour to be sent to WA. The conditions that the near 10,000 convicts who were transported to WA between 1850 and 1868 experienced were harsh, and as Godfrey and Cox argue, convicts within this system would rather have found themselves in the earlier systems of convict labouring in Australia.[49]

A defining feature of transportation to WA was how convicts were initially required to serve a portion of their sentence back home, as standard, before being transported. Convicts arriving in WA were not assigned or put under probation, but instead forced to labour on government infrastructure projects, thus annoying the colonists who wanted their labour immediately. They could eventually find themselves private employers, but only once they had earned a ticket of leave – a transitional step

41 TUFFIN *et al.* 2018, p. 53.
42 BRAND, I., *The Convict Probation System: Van Diemen's Land 1839–1854.* Hobart, 1990; TUFFIN *et al.* 2018, p. 54.
43 MEREDITH and OXLEY. 2014, p. 101.
44 TUFFIN, R., and GIBBS, M., 'Uninformed and impractical'? The convict probation system and its impact upon the landscape of 1840 s Van Diemen's Land. In: *History Australia* Vol.17, Nr.1, p. 87-114., and MAXWELL-STEWART. 2018, p. 201.
45 FELMINGHAM, B., Economy. In: *The Companion to Tasmanian History,* 2006, Available via Economy (utas.edu.au)
46 See Penal Servitude Act 1853.
47 See Criminal Justice Act 1853. Note: 'petty larceny' was no longer labelled as such, hence the focus on Larceny here, compared with petty larceny in the 1717 Transportation Act.
48 GODFREY and COX. 2008.
49 GODFREY and COX. 2008, p. 238.

to their freedom, and without the government regulation of wages and conditions of the probation era. Convicts were put to work in gangs, building the colony. Physical punishments were still used to discipline those who breached the rules;[50] Godfrey and Cox report for instance, on the use flogging at Freemantle. More generally, convicts were controlled through a range of other disciplinary measures, including incarceration. They also faced bans on drinking alcohol, and were subject to police supervision, and indeed curfew. Convicts were generally barred from holding certain jobs.[51] There were also tough labour market conditions faced by convicts once they were able to go into the private sector. WA was a much smaller and less well developed colony than some of the other Australian colonies, including previous convict destinations like NSW.

It has been claimed that those transported to WA were convicted of more serious offences than those of the other penal colonies because convicts were no longer transported for petty larceny. This is despite the initial promises towards settlers that serious offenders would not be sent. Godfrey and Cox dispute that they were more serious offenders overall, but they accept that as the phase wore on, they did become more serious.[52] Over time, and as a consequence of the legal reforms in Britain which meant that many non-serious offences (non-felonies) were now non-transportable, it was indeed only serious offenders who would be transported. The closure of VDL also meant that WA would receive serious offenders. Those arriving in WA had usually already served time in British prisons or prison hulks, and as a result, many already had a ticket of leave of on arrival in the colony. Notably, the British penitentiaries developed out of the penal transportation system. Those institutions were designed to instil discipline into convicts before they would be transported.[53]

Aspects of the nature of the WA episode can be summarised in the following:

> As Kercher noted, the absence of assignment and a prohibition on convicts earning extra money in their own time, or even holding money, meant that these convicts would have envied the freedom of those convicts transported to the other Australian penal colonies 50 years earlier (Kercher, 1995, p. 41). However, if the convicts in Western Australia behaved well, they could apply for a conditional pardon, which restored them to the rank of the other citizens, although not to the position of free man in Britain. Only when the term of the original sentence had expired was a Certificate of Freedom issued and the 'emancipists' were able to return to the motherland (although few did — and lifers were prohibited from so doing). As Braithwaite (2001) states, good behaviour progressed the convicts towards freedom, and infractions of the rules/breaking the law could propel convicts back a stage, or even back to the Fremantle depot to serve an additional period of imprisonment.[54]

8. Conclusion

The ending of penal transportation to WA in 1868 was the final stage of several ends to the Australian penal transportation story. As Meredith and Oxley note, the impact of convict labour on the nature of Australia itself created a paradox, whereby the success of the system - at least in terms of its colonial and economic rationales - created its own demise. Meredith captures this neatly: '*Within the success of penal transportation as an agent for reform and an engine of growth lay the seeds of its own destruction*.'[55] Australia, far from being the uninviting and dangerous landscape which would offer a strong deterrence to convicts, had become an economic success, with attractive labour conditions and high living standards for emigrants, and for convicts once they had completed their sentences. The discovery of gold also proved pivotal. In summarising the wider significance of such convict labour regimes, what Maxwell-Stewart tells us generally about the policy, seems remarkably apt of the Australian context in particular:

> The English (later British) experience of the overseas deployment of convict labour was far from static. Innovation was essential since all successful penal transportation systems sow the seeds of their own demise. The role of convict labour was to catalyse colonial development while simultaneously acting as a deterrent to other would be offenders. As colonial economies developed, alternative sources of labour were either attracted through free migration, or purchased using the profits derived from exploiting convicted labour. As notions of labour exploitation based on race hardened, the range of options for deploying convicts narrowed. Despite these limitations, transportation from Britain and Ireland proved a remarkably durable device.[56]

Indeed, it was – remarkably durable, yet clearly also it was marked by different approaches and practices over time, which gave penal transportation a different flavour at different points in time. The context of the different phases of transportation described within this paper offers scope for a natural experiments approach for exploring the impacts and outcomes of those varying circumstances and systems that convicts faced. It is clear, that convicts who arrived in Australia faced varying disciplinary, economic, and social realities depending on when and where they were sent. The focus of my research moving on from this is to determine the significance of all that.

[50] Indeed, flogging was common to all convict colonies: this was a form of military and naval punishment readily adopted, but its use declined after phase one, and its use became regulated.
[51] GODFREY and COX. 2008, p. 239.
[52] GODFREY and COX. 2008.
[53] MAXWELL-STEWART. 2018, p. 204.
[54] GODFREY and COX. 2008, p. 239.
[55] MEREDITH, D., cited within MEREDITH and OXLEY. 2014, p.101.
[56] MAXWELL-STEWART. 2018, p.203-4.

A Spanish Legal Journal Defining the Centre and the Periphery: *Revista de Legislación y Jurisprudencia de Ultramar* (1877–1878)

Fernando Liendo Tagle *

Abstract

Overseas was present in the general Spanish press, but there was a special press of jurists. Since the Revista de Jurisprudencia was founded in 1856 in La Habana, as the first legal journal from Overseas, until the last ones published in 1898, we have a constellation of legal journals that allow us to see the changes in this domain of Law. The movement of legal journals followed a path of decentralization in three oceans throughout the century that made it possible to connect Madrid, La Habana and Manila. This article focuses on a specific title: The Overseas Journal as a medium in which Spanish jurists reasoned what law should apply in Spanish colonial possessions, which they termed Provincias de Ultramar (Overseas Provinces) or simply colonias (colonies). The consideration of separate legal frameworks for the metropole and its peripheral territories, as evident throughout the pages of The Overseas Journal, demonstrates how distinct legal spaces within the same political entity were articulated. Legal communication within a trioceanic scope was at the service of the creation of this legal space dominated by exceptions. Thus, almost all the contents are aimed at contributing to the analysis and delimitation of this Overseas Law, a series of discussions with peninsular authors, and a certain form of social and legal organization that defended itself through commentary and its discursive reproduction.

Keywords: *Legal Journals; Special Law; Nineteenth Century; Colonialism; Legal Scholarship; Imperial Studies; Spain.*

1. Introduction: journals, distances and exceptions

An account of the Spanish legal press would not be complete if it did not address, at least tentatively, what was the press published outside the Peninsula, in the peripheral Overseas regions (*Provincias de Ultramar*, mainly Cuba, but also Puerto Rico and the Philippines). I consider that this inclusion is justified insofar as in the 19th century these were Spanish territories where Spanish jurists wrote, many of them trained in the Peninsula, and where Spanish law was discussed, as it could not be otherwise and with all the nuances and exceptions that we will see. And on its own merits as well: though a distinction must first be made between the press *on* Overseas and the press *from* Overseas, it can be said that this press contains multiple pieces of information of interest to the historian. By including these materials in a 19th century Spanish legal press portrait, we avoid undervaluing the peripheral contributions. *Ultramar*, within what is available, must be included.

As an overarching starting point, overseas legal journals can tell us many aspects of Overseas statutory and case-law, in their details such as the status of islands under the Principle of Special Legislation,[1] the legal status of the islanders (and the different legal classifications by groups), or others such as the of the odious legal regime of persistent slavery in the West Indies. Legal journals are useful for reporting on what this Special Law Principle was (a new type of *Sonderrecht*). Spanish and international historiography has rightly explored the details of this colonial enterprise but has not examined or considered the role of specific legal journals within this wide historical setting.[2]

Overseas was present in the general Spanish press, but there was a special press of jurists. Since the *Revista de Jurisprudencia* was founded in 1856 in La Habana, as the first legal journal

* Fernando Liendo Tagle, PhD in Law, LL.M. (Madrid). Independent researcher. Part of this paper was prepared and written during a fellowship at the University of Lucerne, Switzerland. I am grateful to the Institute for Interdisciplinary Legal Studies - Lucernaiuris for the research stay.

1 The institutional complexities are developed in: FRADERA, J., *La Nación Imperial. Derechos, representación y ciudadanía en los imperios de Gran Bretaña, Francia, España y Estados Unidos (1750-1918)*. Barcelona, 2015, pp. XV-XXII. An interesting contribution from legal historiography in: SOLLA SASTRE, M.J. Ultramar excepcional. La construcción de un espacio jurídico para España y sus colonias, 1837–1898. In: *Rechtsgeschichte*, vol. 23, 2015, pp. 222-238, though legal journals are absent in the analysis. Also a broad description of the normative speciality developed in a legal journal, in the doctoral thesis: GONZÁLEZ CLAPHAM, J.M., *Hispanoamérica y las Filipinas en la Revista General de Legislación y Jurisprudencia y su Boletín (1853-1899)*, Universidad de Zaragoza (doctoral dissertation), 2019.

2 On the relationship between legal magazines and State and Nation-building processes, KRUPAR, M. *Tschechische juristische Zeitschriften des 19. und 20. Jahrhunderts*, Berlin, 2011. On colonial experiences: VANDENBOGAERDE, S. "Une telle apathie est presque coupable". How in Belgium's *Journal des tribunaux* the interest for the Congo Free State sparked off (1885-1908). In: *Clio@Thémis*, vol. 12, 2017. RETHORE, T., La Rivista di diritto coloniale. Une revue au service de la fondation du droit colonial italien. In: *Clio@Thémis*, vol. 12, 2017; RENUCCI, F. / GONZÁLEZ GONZÁLEZ, I., L'empire des revues. In: Clio@Thémis, vol. 12, 2017; FALCONIERI, S., Un discours juridique pour le fascisme. Politiques impériale et raciale au prisme des revues de droit. In: *Clio@Thémis*, vol. 9, 2015.

from Ultramar, until the last ones published in 1898, we have a constellation of legal journals that allow us to see the changes in this domain of Law. The movement of legal journals followed a path of decentralization in three oceans throughout the century that made it possible to connect Madrid, La Habana and Manila. We can graph this decentralization as the creation of an intercontinental network of normative knowledge[3] through the journals. Legal communication within a trioceanic scope was at the service of the creation of this legal space dominated by exceptions.[4] Thus, almost all the contents are aimed at contributing to the analysis and delimitation of this Overseas Law, a series of discussions with peninsular authors, and a certain form of social and legal organization that defended itself through commentary and its discursive reproduction. Of course, we will not find a criticism or challenge to the foundations of the colonial regime in these journals (the dependence and submission to an external will), but rather the necessary discourses to legitimize social and legal structures, and to enable or limit the action of the Law and the jurists (an operational and "ideological" function). If any particularly severe aspect was problematized, it was to improve the organization of the regime itself.

There is a connection, as well, between the journals that developed the Overseas legislation with the interest in "Law as discipline", i.e., the shaping and development of Law as an intellectual and university tradition. The connection lies in the fact that the application of the Principle of Specialty had the consequence of generating, virtually and for practical purposes, a type of legal discipline on Overseas Law. In fact, an ephemeral curriculum of 1884 included a subject of "Colonial Systems and Legislation" in the period of the doctorate,[5] as well as a requirement for professors to explain "the varieties presented by colonial law in the different branches of Spanish legislation" in their lectures with regard to "the different teachings that constitute the Faculty".[6] From a strict point of view, it could not be considered strictly a type of discipline comparable to Commercial, Administrative or Criminal law, but rather a transposition of the ordinary law of the metropolis into a diverse context, but always with nuances and differences. In fact, the very emergence of publications specializing in this Overseas Law was justified by the growth and complexity of this subject, materialized in a corpus of its own containing royal decrees, administrative resolutions and orders, and judgments of Overseas Courts. Thus, it is not unreasonable to think that the differentiated regime gave rise to several specialists in "Overseas Law". The creation of an Overseas Ministry in 1863 is further evidence of the administrative and legal complexity of this colonial adventure that attempted to persist after independence from mainland America. I reiterate that it was not a discipline with conceptual autonomy and a status comparable to traditional studies. However, it was an area of the Spanish legal system that required private legal institutions, full-time civil servants, specialized jurists and journals restricted to overseas legislation and jurisprudence. In this regard, I consider that it is interesting to review an area of law that, without becoming a formal discipline, had an important gravitation in the nineteenth century, was fed by the other disciplines studied, and generated a series of legal journals of its own.

Among the legal journals considered as part of wider research project, which is dedicated to the reconstruction of Spanish disciplinary traditions and its embodiment in the legal journals of the nineteenth century, *Revista de Legislación y Jurisprudencia de Ultramar* (*The Journal of Legislation and Jurisprudence of Overseas*, hereafter, *The Overseas Journal*) is particularly noteworthy. This journal was founded and edited by the Catalan lawyer and journalist Federico Pons y Montells and was published during a one-year period between 1877 and 1878. While almost completely neglected by the historiography, *The Overseas Journal*[7] stands out from other contemporary legal journals for the academic quality of its articles, the acuity of its book reviews and the sophistication of its responses to subscriber inquiries. The way in which "local" and "global" legal themes are linked in its articles is particularly striking.

The Overseas Journal was, in effect, a space in which Spanish jurists reasoned what law should apply in Spanish colonial possessions, which they termed *Provincias de Ultramar* (Overseas Provinces) or simply *colonias* (colonies). During the period in question, these were the remnants of the formerly extensive Spanish Empire: Puerto Rico, Cuba and the Philippines. The consideration of separate legal frameworks for the metropole and its peripheral territories, as evident throughout the pages of *The Overseas Journal*, demonstrates how distinct legal spaces within the same political entity were articulated and, more fundamentally, thought to exist.

How was the exceptional and unique nature of the Spanish colonies articulated by the law of the metropolis? What cri-

[3] On this notion, DUVE, T. Pragmatic Normative Literature and the Production of Normative Knowledge in the Early Modern Iberian Empires (16th–17th Centuries). In: DUVE, T. / DANWERTH, O. (eds.), *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America*. Leiden / Boston, 2020, p. 1-39, "Legal history in Europe can be interpreted as a huge process of diachronic translation of normative information and thus also as a history of recursive processes of closure and differentiation of bodies of normative knowledge" (p. 3).

[4] The category of 'space', as it is well known, has become central to many debates in recent intellectual history. Its use is so varied that it is impossible to synthesize it. I can only hint at some clues in this direction: it would be interesting to deepen readings of the legal past that connect the notions of space with that of exceptional legal thought. When speaking of the exceptional within the law, it would be almost inevitable to turn to Carl Schmitt and, for example, his notion of the *Ius publicum europaeum*. As it is known, this *ius publicum* was applied within Europe delimited as a space of law and what was outside this space (the colonies) was appropriate for the exceptions. Legal journals can provide abundant evidence of the discursive articulation of these models.

[5] Artículo 8 del Real Decreto del 16 de enero de 1884, firmado por el Marqués de Sardoal.

[6] "Artículo 3.° Las variedades que presenta el derecho colonial en las diferentes ramas de la legislación española, deberán ser expuestas en su lugar oportuno, según el plan libremente adoptado por los Profesores encargados de las distintas enseñanzas que constituyen la Facultad". Real Decreto del 16 de enero de 1884 firmado por el Marqués de Sardoal.

[7] *Revista de Legislación y Jurisprudencia de Ultramar*, Director: Federico Pons y Montells, Madrid, 1877-1878, Imprenta de la Revista de Legislación y Jurisprudencia, Ronda de Atocha 15.

teria did the authorities use to decide which parts of Spanish law should apply directly to them? While such issues are too broad to be adequately addressed by a project of this scope, we can attempt to initially address them by posing the following question: what are the significant features of the legal relationship that existed between Spain and its overseas territories as articulated in *The Overseas Journal*? Thus, this piece aims to provide a detailed analysis of this hemerographic source that can provide relevant data to improve understanding of the relationship between local law in peripheral regions and the peninsular metropolis.

2. The local and the global in nineteenth-century Spain

In a context in which the Spanish Empire, following the loss of continental America (due to wars of independence and the subsequent emergence of the Latin American republics), was considerably reduced and weakened, the administration of what remained of its overseas possessions had to be carefully considered. The time had passed for the traditional style of governance employed by the Spanish monarchy, notwithstanding reforms introduced by the Bourbons. The French invasion of the Iberian Peninsula and ongoing civil strife between Spaniards, brought an end to the *Ancien Regime* and led to the gradual (and at times, interrupted) emergence of the Liberal state. This fundamental change had, of course, significant consequences for relations between Madrid and its overseas possessions. What had been Viceroyalties or regional governments of *Nueva España* became, in Liberal Spain, "Overseas Provinces". In this way, Cuba, Puerto Rico and the Philippines became, in effect, a "laboratory" where the ideas of Liberal Spain were applied, and innovations by Britain and France in the area of colonial governance could be tested.

Our study of connections between the local and the global, in the context of a simultaneously Liberal and colonial Spain of the period 1836 (the year in which Spain saw the first and lasting Liberal reforms) to 1898 (the year of the Spanish-American War), is divided into two parts: the first considers the transformation of the law of Spain's *Ancien Regime* to the that of the Liberal state; the second examines how this impacted what was known as "the law of the Indies" (*Derecho Indiano*) and which became "overseas legislation" (*Derecho de Ultramar*). In relation to both themes, the discourses contained in nineteenth-century legal journals rigorously document these changes. Thus, we can find a double connection between the local and global in the pages of *The Overseas Journal*: on the one hand, the efforts of Spanish jurists to create a jurisprudence befitting a modern, Liberal state by borrowing from the jurisprudence of Continental Europe; and on the other hand, the articulation of distinct legal frameworks for the metropolis and its peripheral territories respectively.

The first connection can be seen in the development of Spanish law itself during the nineteenth century, which saw dramatic changes due to the influence of France and Germany, whose theorists dominated Continental legal discourse. In Spain the most visible manifestation of this was the formation of its Civil Code (an extremely slow and difficult enterprise due to Spain's regional complexities) and the transformation of public law, particularly in administrative and the constitutional matters. In both cases Spanish experience was strongly marked first by the codification of law and the formation of a Napoleonic public administration in France. Later, after Spain's revolutionary years of 1868-1874 (*el Sexenio Democrático* in Spanish), German influence can be seen in the use of Savigny by his followers in the Historical School in Catalonia, who objected to uniform national codification; the work of Krausists (e.g., Sanz del Río, Giner, Azcárate, Posada, *inter alia*) in the *Institución Libre de Enseñanza*; and the dissemination of the works of Heinrich Ahrens. The influence of French and German legal doctrines and methods on the development of Spanish law is an area that has received considerable attention in both the Spanish and, more generally, European historiography.

The second connection is the "principle of legislative specialty", according to which the laws of the metropolis did not apply to the colonial periphery. This was not merely a theoretical matter; rather it was clearly mandated by almost all the nineteenth-century Spanish Constitutions which, indeed, enshrined the "principle of legislative specialty"[8]. This principle was so pervasive that it was present in the Constitutions of the various regimes that were in power in Spain in the nineteenth century: conservative, liberal and even republican! The specialty principle was not an original Spanish creation, of course, but rather was adapted by Spain from Article 91 of Napoleon's Constitution of 1799: "*Le régime des colonies françaises est déterminé par des lois spéciales* [The regime of the French colonies is determined by special laws]".

[8] A review and compilation is indicative (the year of the Constitution and the relevant articles):
1837. "Artículos adicionales. Artículo 2.° Las provincias de Ultramar serán gobernadas por leyes especiales".
1845 "Artículo ochenta. Las provincias de Ultramar serán gobernadas por leyes especiales".
1856. "Título XIV. Del gobierno de las provincias de Ultramar.- Artículo 86. Las provincias de Ultramar serán gobernadas por leyes especiales".
1869. "Título Diez. De las provincias de Ultramar. Artículo 108. Las Cortes Constituyentes reformarán el sistema actual del gobierno de las provincias de Ultramar cuando hayan tomado asiento los Diputados de Cuba o Puerto-Rico, para hacer extensivos a las mismas, con las modificaciones que se creyeren necesarias, los derechos consignados en la Constitución. Artículo 109. El régimen por el que se gobiernan las provincias españolas situadas en el archipiélago filipino será reformado por una ley".
1873. "Artículo 44. En África y en Asia posee la República española territorios en que no se han desarrollado todavía suficientemente los organismos políticos, y que por tanto, se regirán por leyes especiales destinadas a implantar allí los derechos naturales del hombre y a procurar una educación humana y progresiva".
1876. "Título trece. Del gobierno de las provincias de Ultramar. Artículo ochenta y nueve. Las provincias de Ultramar serán gobernadas por leyes especiales; pero el Gobierno queda autorizado para aplicar a las mismas, con las modificaciones que juzgue Convenientes y dando cuenta a las Cortes, las leyes promulgadas o que se promulguen para la Península. Cuba y Puerto-Rico serán representadas en las Cortes del Reino en la forma que determine una ley especial, que podrá ser diversa para cada una de las dos provincias".

This principle, it might be remembered, allowed for the re-establishment of slavery in the French colonies – a practice that had previously been abolished during the Revolution.

3. The principle of legislative specialty and the legal press

It is in this context that publication of *The Overseas Journal* commenced. According to its objectives, as declared in its introductory pages (where it was customary to outline the editorial approach): Responding to a pressing need, we thought that the case had come to publish this journal, especially devoted […] to the esteemed rights of those governed in the Spanish overseas provinces […] In the name of science, legislation, justice and above all, the sacred interests of our brothers beyond our shores, we will always seek patriotic, rational and practical solutions in harmony with the esteemed interests and the profound needs of Cuba and Puerto Rico".[9] The scope of the editorial agenda was expanded to include the Philippine islands, notwithstanding certain qualifications that, it was thought, applied to the archipelago due to geographic considerations, as well as the greater presence of indigenous peoples as opposed to peoples of Spanish mixed-race heritage (who were more prevalent in the Spanish Americas). The latter consideration was the result of a combination of the legal principle of legislative specialty and the project of Christian evangelization as instruments of Spain's "civilizing mission" overseas. The following paragraph summarizes succinctly the prevailing legal concept of the principle of specialty in this period:

> […] Although there is some analogy between the Philippine Islands and the Spanish Antilles, their respective natures differ, their needs often differ, and their interests often differ; the *Audiencia* [Court] of Manila and its senior mayors, empowered with governmental or administrative faculties, are governed by special legislation, due to the need for specific procedures, owing to the difficulties presented by the topography of the country and the diversity of local languages and races, as well as another type of difficulty that emanates, as it were, from custom or from the many antiquated provisions that [together] form a tangled legal labyrinth, that hinder the ministering of the officials in charge of the administration of justice[10].

Religion, as referred to above, played a pivotal role in this long-term project: "Thanks to the Bishops, and especially to the regular parish priests […] a large part of the natives of the Archipelago have been divested of ignorance, and it is owing to their sweetness, kindness and efforts that all these improvements have achieved […] Religion has removed the peoples of the Philippine islands from their primitive barbarism, and the light that it has spread through its ministers […] still preserve the good and healthy customs, seeking, through them, the submission and obedience of the natives to the governance of the mother country"[11].

During the nineteenth century an attempt was made to articulate, in some way, a legal subspecialty corresponding to the principle of legislative specialty; that is to say, legislation designed for the colonized territories and their inhabitants. This paradigm was clearly different from the system of governance of *Ancien Regime* that was deployed by the Spanish monarchy under the idea of "composite monarchy" (J.H. Elliott, Koenigsberger). In fact, this system corresponded to the polysynodial system where the main territories were Viceroyalties (Peru and Mexico, and later La Plata and Nueva Granada) from which what is known as "the law of the Indies" (*Derecho Indiano*) comes. The Spanish Empire attempted to apply new forms of European colonialism of the nineteenth century, developed in particular by Britain and France, to their own territories – something which naturally required a theoretical and practical rethinking.

Fortunately, recent historiography has reconstructed this complex historical process. The historian Josep Fradera has reviewed this area in his probing work, *The Imperial Nation: rights, representation and citizenship in the empires of Great Britain, France, Spain and the United States (1750-1918)*. Written as a global political history, the work synthesizes the principle of legislative specialty as follows:

> […] the idea and practice of the "specialty" or of the "double constitutions", that is, the existence of a different legislative frameworks for metropolises and colonies, can be identified as the backbone of the political development of the liberal empires. […] [these Liberal Empires] imposed a "dual constitution", that is, an organically produced system (rarely formalized in writing either immediately or in its totality) that included a Constitution for the metropolis that was absent in the colonies so that, in this way, the latter would be governed by ordinances, decrees or orders issued directly by the Executive. In general, this formula served to evade the risks that the equality or universalization of rights could pose to the stability of the empire or to the continuity of strongly developed social interests[12].

Fradera adds that the principle of legislative specialty contains and authorizes a broad "principle of discretion"[13], which allowed for extensive experimentation without the constitutional boundaries that were intended to limit the power of governments.

---

[9] PONS Y MONTELS, F., Nuestros propósitos. In: *Revista de Legislación y Jurisprudencia de Ultramar*, vol. 1, 1877, p. 2.

[10] PONS Y MONTELS, F., Nuestros propósitos. Ligeras indicaciones sobre Filipinas. In: *Revista de Legislación y Jurisprudencia de Ultramar*, vol. 1, 1877, p. 33.

[11] Ibidem.

[12] FRADERA J., *La Nación Imperial, Derechos, representación y ciudadanía en los imperios de Gran Bretaña, Francia, España y Estados Unidos (1750-1918),* cit., p. XXIV.

[13] According to Fradera: "The outcome is clear: the breakdown of the respective empires and the problems of affirming the liberal project itself, in the context of long and bloody civil wars, will send things in the direction of the colonial Constitutions, expelling the colonised from the political and institutional framework in place in the metropolis in the second half of the 1830 s, and entering for ever into the territory of the systems of speciality and colonial Constitutions, one and the same in liberal-based empires", Ibidem.

4. Some examples of the discussions generated around the specialty principle.

Once the general context is established, what must be asked is: how did the Spanish jurists of the nineteenth century attempt to articulate the specialty principle? And specifically, how did the legal press – the specific source used in this project – address this issue? A preliminary review of the contents of *The Overseas Journal* provides the following examples, extracted from doctrinal articles and responses to questions from subscribers:

In the article *On the notarial institution in the Antilles*[14], the author Juan Stuyck y Reig traces the history of the Notary in Spain and the difficulties of instituting this office in the Antilles, such as the formation of adequate notarial protocols and archives, the absence of chairs of Notaries, and the holding of public competitions for office.

In *Civil Registry: Some general considerations about the importance and necessity of establishing it overseas*[15], Enrique Santana develops the idea of the Civil Registry as a "compilation of family and kinship relations, and irrefutable proof of human vicissitudes" generated as a consequence of the laws "that regulate the transactions of property, contracts and all other [issues] that fall within the sphere of civil law". He further argues that the institution should be extended beyond Peninsular Spain to contribute data and detailed statistics on populations overseas, noting also that "the different races, the distinct origins, the various customs and the diverse habits of the people who reside there, require that [the Civil Register system] be adopted, as the only means of legally stating the existence of a multitude of individuals, allowed to enjoy the benefits that our current civilization offers to all citizens"[16].

In the extensive *Studies on Mortgage Law in its relations with the Overseas Provinces, and especially with that of Cuba*[17], Enrique Ceńal conducts a detailed examination of Spanish Mortgage Law and how "its creation and application to our overseas possessions is a necessity proclaimed by science and strongly felt in practice"[18]. With this in mind, he evaluates the state of property rights as regards land and buildings in Cuba, pointing out the instability generated by local insurrections, the novelty of the territory, the differences in the administration of land cultivated by slaves – i.e., sugar and tobacco plantations – and private lands respectively, and the difficulties in acquiring and transferring farmland. According to his summary: "the property [in Cuba] is therefore confused and mixed, truncated and undefined, without being protected by an effective and sufficiently robust title to withstand the blows of intrusion and trespass". For that reason, Ceńal considers mortgage reform a potential solution to the unrest and structural problems of the island, and an instrument that would "awaken love and a fondness for the soil" by protecting the individual owner and his attachment to his own land, facilitating mortgage loans, boosting agriculture and encouraging investment in agricultural land by providing security to the creditor in the recovery of debt, and in general "regulating and guaranteeing territorial property making it richer and more valuable"[19].

Answering the question of a subscriber on whether *A creditor can make effective the collection of his debts against the value of braceros or negroes destined to work in sugar plantations, by extracting them from the plantation and auctioning them at public auction?*[20], Eduardo Santana Lopez contends that "attaching the slave to the plantation where he works, in a manner analogous to the serfs, means that he is not movable or subject to transactions separate from the plantation or demesne to that to which he is destined […] the slave cannot not be seized or sold except in unison with the plantation or demesne […] it is not possible to extract him from the latter"[21]. In other words, Santana Lopez advises that the slave is integrally attached to the territorial property.

The writing of Javier Ugarte in *The Seizure [sequestration] of Slaves*[22], is also very illustrative and reinforces the discourse of the relationship between the local and the global in Spanish colonial law: "The ownership of our great Antilla under special conditions, which respond to the special needs of that remote continent", has generated questions of primary interest that "go unnoticed" in "modern jurisprudence". Thus, "the legislation of the Indies […] contains numerous provisions aimed at creating the exceptions – which is essential overseas – with respect to many of the principles enshrined in the laws of the Peninsula". This is a "*sui generis* body of law", created to avoid the "potential dangers" of applying overseas "laws enacted for the metropolis". The author recalls that the factual and legal impossibility of the enslavement of Native Americans by the *conquistadores* resulted in them looking for slaves elsewhere to provide "active and robust arms for the cultivation of land, transporting the children of Africa to the effect most fertile regions of America"[23]. This generated, indeed, a whole body of law "in order to clearly and explicitly determine the legal status of the slaves in relation to the acts they execute and the property they constituted". In the case of the seizures, after an initial authorization of the same

[14] STUYCK Y REIG, J. De la institución notarial en las Antillas. In: *Revista de Legislación y Jurisprudencia de Ultramar*, vol. 1, 1877, p. 9-13, 35-42.
[15] SANTANA, E., El Registro Civil. Algunas consideraciones generales sobre un importancia y necesidad de que se establezca en Ultramar. In: *Revista de Legislación y Jurisprudencia de Ultramar*, vol. 1, 1877, p. 42-45
[16] Ibidem.
[17] CEŃAL, E., Estudios sobre la Ley Hipotecaria en sus relaciones con las Provincias Ultramarinas, y especialmente con la de Cuba. In: *Revista de Legislación y Jurisprudencia de Ultramar*, vol. 1, 1877, pp.74-78, 197-203, 225-232, 257-264, 321-329, 487-493, 513-518, 646-652.
[18] Ibid., p. 74.
[19] Ibid., p. 198.
[20] SANTANA LÓPEZ, E. żPuede un acreedor hacer efectivo el cobro de sus alcances en el valor de los braceros ó negros destinados á los trabajos de un ingenio de azúcar, extrayéndoles de la finca y rematándolos en subasta pública?. In: *Revista de Legislación y Jurisprudencia de Ultramar*, vol. 1, 1877, pp. 237-241.
[21] Ibid., p. 241.
[22] UGARTE, J., Los embargos de esclavos. In: *Revista de Legislación y Jurisprudencia de Ultramar*, vol. 1, 1877, pp. 586-594.
[23] Ibid., p. 587.

to pay important debts, the rules were changed to prevent it, applying the common law of the Peninsula, to the extent that it was found that "the seizure of slaves, tearing them from the plantation they serve, so many and so serious complications arise, we must take care to prevent these seizures, which leave the owner unable to exercise his trade, profession or industry, destroying one of the main elements of production…". Thus, these jurists argued that the seizure of slaves should not permitted because if the law protects the "instruments of an art or trade" by preventing their seizure, they had included the slaves, "who are so necessary for the exploitation of the plantations and much harder to replace"[24].

This is a small sample of an extensive source that has, until now, been rarely studied or cited by historians. There are more articles of interest such as "Appeals Overseas" where equivalency with the Peninsula is called for to allow appeals to the highest courts, or "The administration of justice in the Philippines" where an overview of the islands" courts is presented using sociological and statistical data.

5. Final remarks

This was a small sample of the potential of the source. The journal perished suddenly and without further explanation. It would have deserved better luck to leave a clear picture of the discursive structure on which this very complicated history between the centre and the periphery in the Hispanic transatlantic world was based, which tended to fragment, international war in the middle, into independent political units (although affected by their past of dependence).

The Journal of Overseas" Legislation and Jurisprudence was remarkable because it was essentially designed to link the "local and singular" with the "general and central" in its diversity of discourses. It is of wide interest for the reconstruction of the Spanish disciplinary discourses in their expression in the press. Indeed: the journal was a space where Spanish jurists reasoned with amplitude and meticulousness about which law should govern Spanish possessions outside the metropolis. Reasoning about this separation of legal frameworks meant revealing how different "legal spaces" were articulated within the same nation-state as Spain was in the 19th century.

This exceptional framework, described above, meant that it was necessary to build a type of *special jurisprudence*. The reason for this was that certain institutions that in principle did not exist in the metropolis should continue to be regulated on the islands. Thus, the legal questions arising from the sale of slaves (for example, whether the action for redhibitory action on account of hidden defects of the "thing", insurance and reinsurance contracts on slaves were applicable[25]), the system of justice and administration applicable to overseas[26], or more prominent forensic issues such as disputes over slavery and emancipation, were all dealt with. Among the best pages of this chronicle of overseas courts was the case of the freedom of two twin daughters of a slave who had paid for the emancipation of a daughter while she was pregnant. The owner kept one of the girls because he felt that the payment covered only one of them. Both were finally released on grounds of law and natural justice, after a brilliant and memorable intervention by the lawyer Bernardo Frau y Mesa before the Supreme Court[27]. In any case, it is clear that even Overseas Law was solidifying a unique type of identity, based on its own history and rules[28].

Let us summarize these developments, taking up again the distinction between journals *from* Overseas magazine and journals *on* and *to* Overseas, in the most significant notes. Firstly, the creation of the Ministry of Overseas in 1863 gave rise to an "Overseas Legal Gazette", which was published by the ministry itself, containing all the regulations of this special law. More efforts were made to publish new titles in the field of Overseas Law. In 1874 *El Foro Cubano* was born. It was directed by Manuel Pérez de Molina. The project consisted of supporting the grouping of Cuban lawyers in the face of an unsuccessful installation of a local Bar Association, an initiative that was postponed on several occasions. In general, there is a constant presence of the Supreme Court's case-law, and multiple consultations from subscribers, with some doctrinal sections.

In a similar character, we can find *La Revista Jurídica* of 1882, although it was more of a weekly newspaper. There is also a *Revista de Cuba*, edited by José Antonio Cortina, with legal content, although this was more of an art and culture magazine. Later we find a *Revista General de Derecho* that became the official newspaper of the Havana Bar Association, founded in 1883. It was directed by Ramón Carbonell y Ruiz, a member of the *Société de Législation Comparée* of Paris. In this case, we see an interesting effort to develop doctrinal content, an interest in foreign legislation and own developments on the Cuban reality.

---

[24] Ibid., p. 594.

[25] MATAMOROS, R. Ventas de esclavos con renuncia de la accion redhibitoria. In: *Revista de Jurisprudencia [de la Habana]*, vol. 2, 1857, pp. 267-277. REDACCIÓN, Crónica de Tribunales. Real Audiencia Pretorial. Robo de cierta suma por un esclavo que se liberta con ella. El esclavo nunca tuvo términos hábiles para transferir á su dueño el dominio de esta suma. Se le previene al segundo [dueño] la inmediata devolución. In: *Revista de Jurisprudencia [de la Habana]*, vol. 2, 1857, pp. 340-342. RODRÍGUEZ, J.I, Del daño causado en los animales. In: *Revista de Jurisprudencia [de la Habana]*, vol. 2, 1857, pp. 332-338; ECHEMENDÍA, F., Sociedades de seguros mutuos sobre la vida de los esclavos. In: *Revista de Jurisprudencia [de la Habana], Administración y Comercio*, vol. 3, 1858, pp. 84-86, 186-187.

[26] PRUDENCIO LÓPEZ, A., Recurso de nulidad [en Ultramar]", en *Revista de Jurisprudencia [de la Habana]*, 3, t.1, (1858), pp. 25-33; GÓMEZ DE LA SERNA, P. Sobre la estension de la Ley de Enjuiciamiento Civil á las Provincias de América. In: *Revista General de Legislación y Jurisprudencia*, vol. 28, 1866, pp. 44-51.

[27] REDACCIÓN., Libertad de dos hijas mellizas de una esclava. In: *Revista de Jurisprudencia [de la Habana]*, vol. 2, 1857, pp. 597; FRAU Y MESA, B. Discurso pronunciado por el Dr. Bernardo Frau y Mesa en el Tribunal Supremo, en defensa la morena párvula Valentina. In: *Revista de Jurisprudencia [de la Habana]*, vol. 3, 1858, pp. 87-104. También de interés: REDACCIÓN, Crónica de Tribunales. Real Audiencia Pretorial. Pena de Azotes. In: *Revista de Jurisprudencia [de la Habana], Administración y Comercio*, vol. 3, 1858, pp. 258-260.

[28] A view of this in PETIT, C., Detrimentum rei publicae. Constitución de España en Guinea. In: José Maria IÑURRITEGUI, J.M. / PORTILLO, J.M. (eds.), *Constitución en España. Orígenes y destinos*, Madrid, 1998, pp. 425-494.

Finally, from the Philippines we find *El Faro Jurídico* de Manila, directed by the lawyer José María Pérez Rubio. Perez Rubio was a lawyer and politician born in Seville, a former member of Parliament, and participated in other publishing companies in the archipelago. Its contents covered many legal topics and especially a bulletin of overseas jurisprudence, essentially that produced by the Supreme Court in appeals "on overseas matters". The doctrinal sections were relevant in such publication.

In summary, as I mentioned, legal communication within a trioceanic scope was at the service of the creation of this legal space dominated by exceptions. Thus, almost all the contents are aimed at contributing to the analysis and delimitation of this Overseas Law, a series of discussion with peninsular authors, and a certain form of social and legal organization that defended itself through commentary and its discursive reproduction. Of course, we will not find a criticism or challenge to the foundations of the colonial regime in these journals (the dependence and submission to an external will), but rather the necessary discourses to legitimize social and legal structures, to enable and limit the action of the Law and the jurists.

The Bishop in the Didascalia Apostolorum

*Helena Moreno Galán**

Abstract

The article suggests a legal and historical study about the existence of the judicial activity of the bishops during the Ius Antiquum. This aim is achieved through the analysis and the study of the different ancient sources, which include the Didascalia Apostolorum, the first of the great sources of Canon Law; this book describes with details the modus operandi of the Bishop when serving as a judge. This text says that the main objective was the application of the evangelical justice, which overcomes the simple idea of reparation; on the basis of the sacred texts in which Christ invites us to forgive each other, we can foreshadow a new justice known as Lex Christiana, which combines the evangelical newness with the Roman legal experience.

Keywords: *Didascalia Apostolorum; Ius Antiquum; Lex Christiana; Bishop; Ius Apellationis.*

1. Introduction

The *Didascalia Apostolorum* is the first big source of Canon Law, which dates the procedure to be followed by the Bishop when it comes to making a precise judgement. Like the rest of the sources of canon law, it stands out for its peculiar nature, a nature based on the search for the truth and on the perfection of the human being. The Bishop is selected by God and by the Church since the beginning of time to guide the people towards the final aim, God. An aim that is accompanied by many other purposes including one of the most important ones, such as the love for one's neighbour.

2. History and tradition

The *Didascalia Apostolorum* constitutes, together with the *Didache* and the *Traditio Apostólica,* the legislative basis of the society of that time [1].

At that time, Canon Law benefited from a mixture of different kinds of norms: sacramental norms, disciplinary norms and norms of faith. The issue was to meet the needs of the community, a community composed of all kinds of people, including lay persons, widows, orphans, bishops and deacons. All of whom were adequately examined in the books of the *Didascalia*. Without forgetting that it was a system of justice that stemmed from the Gospel, from the saving message received from our Lord Jesus Christ.

To carry out the task of organising and governing, Christ chooses the Bishop to act as judge and shepherd of the flock of the People of God, and to fulfil the entrusted mission [2]. The first sign of the activity of the Bishop takes place what Jesus Christ appears before the apostles exercising the role of judicial ministry.

> "*Jesus said to them, Amen, I say to you that you who have followed me, in the new age, when the Son of Man is seated on his throne of glory, will yourselves sit on twelve thrones, judging the twelve tribes of Israel*" [3].

From that moment on, an internal system will gradually be perfected, with the bishop as the person in charge, with the help and assistance of the presbyters.

However, the *Didascalia* does not only deal with the modality in which the Bishop acts, but also with the modality to interact with the lay persons and the deacons. Always highlighting the importance of applying an evangelical justice based on the Holy Scriptures, in which mercy and the invitation to forgiveness always come first. These are basic notions to live in communion with the Lord our God, which were already present in the Gospel:

> "*I charged your judges at that time, 'Listen to complaints among your kinsmen, and administer true justice to both parties even if one of them is an alien. In rendering judgment, do not consider who a person is; give ear to the lowly and to the great alike, fearing no man, for judgment is God's. Refer to me any case that is too hard for you and I will hear it*" [4].

* Helena Moreno Galán, assistant professor, Universidad Católica de San Antonio Murcia, Spain.

1 Arroba Conde, M. J., Riondino, M., «Fundamento y evolución histórica del derecho canónico», en *Introduzione al diritto canonico*, Roma 2017, pp. 14-16.

2 Ed. Funk, X., «Didascalia Apostolorum», en *Didascalia et constitutiones Apostolorum*, Paderbornae 1905, p. 144: "*Et scito decere episcopum cum presbyteris iudicare caute, sicut salvator noster dixit nobis ipsum interrogantibus: Quoties, si frater meus in me peccaverit, dimittam eil usque septies? Ipse autem, Dominus noster, docuit nos dixitque nobis: Non septies tantum, dico vobis, sed usque septuagies septies*".

3 Mt. 19, 28

4 Deut. 1, 16-17

They were also considered by personalities such as Polycarp, Bishop of Smyrna:

"And the presbyters also must be compassionate, merciful towards all men, turning back the sheep that are gone astray, visiting all the infirm, not neglecting a widow or an orphan or a poor man: but providing always for that which is honorable in the sight of God and of men, abstaining from all anger, respect of persons, unrighteous judgment, being far from all love of money, not quick to believe anything against any man, not hasty in judgment, knowing that we all are debtors of sin. If then we entreat the Lord that He would forgive us, we also ought to forgive: for we are before the *eyes of our Lord and God, and we must all stand at the judgment-seat of Christ, and each man must give an account of himself"* [5].

A justice that does not forget that the role of the Bishop as Judge should not only be based on judging but also on fostering a closer contact and a reconciliation that is able to prevent the process from taking place.

"Propterea ergo, episcopi, ut munera vestra et orationes accepta sint, cum statis in ecclesia oraturi, diaconus alta voce dicat: Adestne aliquis adversus proximum suum aliquid habens? Si vero reperiuntur, qui iudicium ac litem inter se habent, supplicare debes et pacem facere inter eos. Qui in domum ingrediuntur et dicunt: pax huic domui, et pacem evangelizant et pacem afferunt. Si ergo aliis pacem praedicas, multo magis tibi pacem esse necesse est cum fratribus tuis. Ut filius lucis igitur et pacis omnibus esto lux et pax cum nemine litigans, sed esto benignus erga omnes et pacificus et adiutor Dei, ut multiplicentur, qui salvantur; nam haec est voluntas Domini Dei. Qui autem inimicitiam ac lites et controversias et iudicia amant, hi Dei inimici sunt" [6].

A justice to which Christians resorted to in the apostolic era out of fear that the civil judge would judge them in an unrighteous way and that that trial was going to give rise to a scandal among the rest of persons who had different beliefs, such as the Jews and the Romans [7].

"Omnes vobis invicem subjecti estote, conversationem vestram irreheprensibilem habentes in gentibus, ut ex bonis operibus, vestris et vos laudem accipiatis, et Dominus in vobis non blasphemetur. Vae autem illi, per quem nomen Domini blasphematur. Sobrietatem ergo docete omnes¸ in qua et vos conversamini" [8].

Already in the Old Testament, the testimony of each member of God's people was to be taken into account at the time of judgement, so that the righteous judgement could be implemented.

Over time, the dismemberment of the civil authority takes place, together with the expansion throughout the entire territory of the Ecclesiastical Tribunal and the relevant increase in the numbers of faithful in the State, which will lead to the acceptance of the tribunal in charge of resolving the civil cases that emerged between Christians.

That is when the emperor Constantine, through the Constitution of the year 318 [9], recognises officially the *Episcopalis Audientia* [10]. A court that will clearly be headed by the Bishop as Judge.

The confirmation of the exercise of the *officium iudicii* of the Bishop will cause the dissatisfaction of some of the member of the People of God. Since while he had been occupied with fulfilling those functions relating to his holiness up until that moment, he now also had to attend to judicial cases, which entailed greater obligations and therefore the neglect of the members of the flock.

"(…) that they consider him to be flattering to others, to the extent of reproaching the simplest gestures to him, such as his way of looking, his way of speaking, of laughing or greeting. Despite that, since the worst accuser is one's own conscience, the bishop must bear the external false accusations. The sadness is even greater when it is necessary to remove someone from the congregation of the Church; but the utmost care must be taken in this case to ensure utility and avoid harm, for there is the risk of receiving a punishment, not only for one's own crimes, but also for those of others" [11].

From this moment on, a justice aimed at restoration is glimpsed, by means of the well-known *Lex Christiana*, which combines the novelty of the Gospel with the Roman juridical experience that had been ruling life for centuries [12]. To make it possible to carry out such mission, it will suffice to find support in the *norma missionis* that, according to professor Arroba [13], is a nucleus of normative nature since, despite referring to a transcendent event seen as a liberating object, it is formulated and understood as a mandate: travel the whole world to announce the Gospel and make disciples

---

[5] Lightfoot, J. B., *The Apostolic Fathers. The early Christian writings of Church leaders who followed soon after the apostles of Jesus Christ*, Ohio 2020, p. 78

[6] Ed. Funk, X., «Didascalia Apostolorum», cit. II, p. 54.

[7] Belda Iniesta, J., «El Ministerio Judicial del Obispo hasta el surgimiento de la lex christiana», in *Anuario de Derecho Canónico*. Vol. 4. Murcia 2014, pp. 389-393.

[8] Polycarpus Smyrniensis, *Epistola ad Philippenses*, n. 10, in *PG* 5, pp. 1013-1014.

[9] Ed. Mommsen, Th., Meyer, P. M., *Codex Theodosianus*, Vol. 1. Hildesheim 1990, p. 62 (Const. Sirm. 17). Facsimile reproduction of the Berlin edition, in 1904-05. Nowadays, it is easier to consult the reproduction, in the same format, of the Hildesheim one of 2011.

[10] The origin of the *episcopalis audientia* is based on the Gospel texts. I Cor. 6, 1-8: "*How can any one of you with a case against another dare to bring it to the unjust for judgment instead of to the holy ones? Do you not know that the holy ones will judge the world? If the world is to be judged by you, are you unqualified for the lowest law courts? Do you not know that we will judge angels? Then why not everyday matters? If, therefore, you have courts for everyday matters, do you seat as judges people of no standing in the church? (contemptibiles qui sunt in ecclesia, illos constituitr ad iudicandum). I say this to shame you. Can it be that there is not one among you wise enough to be able to settle a case between brothers? But rather brother goes to court against brother, and that before unbelievers? Now indeed (then) it is, in any case, a failure on your part that you have lawsuits against one another. Why not rather put up with injustice? Why not rather let yourselves be cheated? Instead, you inflict injustice and cheat, and this to brothers*".

[11] [Free Translation] Tejero, E., «Sentido ministerial del gobierno eclesiástico en la antigüedad cristiana», in *IV Simposio del Instituto Martín de Azpilcueta sobre "La dimensión de servicio en el gobierno de la Iglesia"*, Pamplona 1997, p. 48.

[12] Cuena Boy, F. J., «La justicia episcopal en las causas civiles entre laicos», in *La Episcopalis Audientia*, Universidad de Valladolid 1985, pp. 31-37.

[13] Arroba Conde, M. J., «La competenza; art.18-21», in *Il giudizio di nullitŕ matrimoniale dopo l'istruzione Dignitas Connubii, Parte seconda, La parte statica del Processo*, Ciudad del Vaticano 2007, pp. 27-43; Id., Riondino. M., *Introduzione al diritto canonico*. Roma 2015, pp. 1-3.

by baptising them and teaching them to act according to what they have received. This normative nucleus gives meaning to the existence of the Church as the witness of a salvation that, although its peak comes in the eternal life, is built in this world, and to do so it applies a discipline that allows us to be completely faithful to the essential contents of the announcement, to become a community and to deal with the challenges that arouse, throughout time, during the fulfilling of such mission.

3. The text of The Didascalia Apostolorum

The *Didascalia Apostolorum*[14] is subsequent to the *Didache* and prior to the *Traditio Apostólica*, it is known as source[15] of the Catholic teaching of the twelve apostles and of the saint disciples of our Saviour, it is anonymous and it belongs to the liturgical-canonical genre.

We know that the original text, of which only a few fragments remain, such as chapter XV on widows, was written in Greek.

For the moment, the full text is available in Syriac and from it, we were able to obtain a Latin version which lacks approximately three fifths.

Without forgetting to mention two other versions that appeared later than the rest, the Arab and the Ethiopian ones, both composed of scarce fragments in Coptic.

3.1 Greek fragments

The first one to publish the original fragment in Greek was J.V. Barlet[16] in 1917. This fragment coincides with the chapter of the *Didascalia Apostolorum* regarding the prohibitions that applied to widows by virtue of their behaviour both in the public and in the private field. And it was included in 1979 by A. Vööbus[17] in a critical edition of the Syrian version.

It was included in a scroll that belonged to a manuscript of the Gospels in Syriac, which was discovered by J.R.Harris in a Church that was located in Western Armenia. As soon as he found it, he thought that it was a fragment from the *Constitutiones Apostolorum*, but a paleographical study of the fragment caused this option to be discarded and it was chronologically dated to the fifth and sixth centuries approximately.

It is important to highlight the role that the *Constitutiones Apostolorum* play in this issue. At the time, they relied on the *Didascalia* for the development of their first six books, a collection based on the language used in the *Didascalia*, which is based on Syriac-influenced Greek.

Nowadays, these works collaborate to the comprehension of the language of the surviving text of the *Didascalia*.

3.2 Latin fragments

Currently, the Latin version of the *Didascalia* is included in the *Codex Veronensis*, placed in the palimpsest of the Capitular Library of Verona, dated between 486 and 494.

This version is accompanied by the *Canones Ecclesiasticum* and the *Traditio Apostolica*, the three works whose date of origin are the years between 375 and 400.

It is said that the scroll that included the *Didascalia* was cleaned and reused, and that the fragments obtained where published by different persons throughout history. Firts, Hauler[18] made two publications, one in 1896 and another one in 1990. Then, E.Tidner[19] made a third publication in 1963 and we should not forget X.Funk's[20] publication, which resulted from the union of Latin fragments with the Syriac version and the text in Greek of the *Constitutiones Apostolorum*.

3.3 Syriac fragments

As we have pointed out before, the full text of the *Didascalia* can be found in Syriac. Starting from this version, countless publications emerged throughout history.

The most pioneer one was promoted by the author P. de Lagarde[21] in 1854. It is a version in French, which is currently located in the *Codex Sangermanensis*, Ms Syr.62, more specifically in the National Library of France. Starting from this version, different translations arise.

F. Nau was the author who published the first edition, through a first publication in 1902[22] and a second one in 1912. Then M. Gibson made, in 1903[23], a third publication, which was created starting from a manuscript found by Harrys in Mesopotamia. This manuscript, published under the name of *Codex mesopotamicus* or *Harrisianus*, clashed on several points with Lagarde's publication. According to Gibson, his manuscript was more reliable than the one of 1854. However, after many investigations, the opposite conclusion was reached, since apparently it had emerged from the fusion of a manuscript that belonged to the Borgia family to which the author added a series of variations that were included in the appendix of the text, causing it to be unreliable.

Later, in 1904, a German author called Flemming made a new critical publication based on Lagarde's publication, to which he added a study of the author Achelis[24].

---

[14] Ragucci, V., *Didascalia apostolorum: testo siriaco, traduzione italiana, sinossi e commento sulla formazione del testo*, University of Bologna 2013, pp. 2-11.

[15] Erdö, P., *Storia delle fonti del Diritto Canonico*, Venecia 2015, pp. 17-25.

[16] Bartlet, J. V., «Fragments of the Didascalia Apostolorum in Greek», in *JThS* 18, 1917, pp. 301- 309.

[17] Ed. Vööbus, A., *Didascalia Apostolorum* (CSCO. Scriptores Syri 401-407, 402-408), Secrétariat du CSCO, Louvain 1979, p. 159.

[18] Ed. Hauler, E., *Eine lateinische Palimpsestübersetzung der Didascalia apostolorum*, Wien 1896; Id., *Didascaliae Apostolorum fragmenta Veronensia latina: accedunt canonum qui dicuntur apostolorum et aegyptiorum reliquiae*, Leipzig 1900.

[19] Ed., Tidner, E., *Didascaliae apostolorum, Canonum ecclesiasticorum, Traditionis apostolicae versiones latinae,* (Texte und Untersuchungen zur Geschichte der altchristlichen Literatur; Bd. 75,V. Reihe, Bd. 19), Berlin 1963.

[20] Ed. Funk, X., «Didascalia Apostolorum», cit.

[21] Ed. De Lagarde, P., Didascalia Apostolorum syriace, Lipsiae 1854.

[22] Ed. Nau, F., *La Didascalie, c'est-ŕ-dire l'enseignement catholique des douze ApÔtres et des saints de Notre Seigneur*, Paris 1902.

[23] Ed. Gibson, M. D., *The Didascalia Apostolorum in Syriac: edited from a Mesopotamian manuscript with various readings and collations of other mss*, London 1903.

[24] Achelis, H., Flemming. J., *Die syrische Didascalia ubersetzt und erklart*, Leipzig 1904.

In 1905[25], the author X. Funk introduced the innovation of presenting a publication that combined fragments in Latin, translated by A.Socin based on the Syriac version, and fragments of Verona[26] that we mentioned in the previous epigraph.

Through it, the author wants us to make a comparison between the Latin translation of the *Didascalia* and the Syriac one of the *Constitutiones Apostolorum* to demonstrate how dependent they are from one another.

Starting from 1929, the translations based on the original version of the text in Syriac are in English. The first one is of the author R.H. Connolly[27], and is accompanied by the text translated by the author Hauler in Latin. The following one is introduced by the author Vööbus in 1979[28], it is a critical version based on the 18 existing manuscripts, translated into English and considered as the most reliable at the time.

Lastly, it is important to highlight the role of the author A. Stewart-Sykes[29] who introduced, in 2009, the one that we know as the collection *Brepols, Studia Traditionis Theologicae*, the most recent one in English based on the original Syriac version, completed with its own introduction and various notes.

The preface of the text, in which the author aims at making a hypothesis that overcomes Connolly in theory by taking as a reference the version introduced by Vööbus and respecting practice, should also be emphasised.

3.4 Coptic fragments

To conclude this section, it should be noted the existence of two more versions of the DA: the Arabic version and the Ethiopian version. They both derive from a Coptic text of which only a few fragments were published by Depuytd[30] in 1993.

Two texts derive from the Arabic version; a first one called *Vulgata,* from which derives an edition published by Dāwud in 1924 based on the Coptic texts mentioned at the beginning, and two editions derived from two private manuscripts[31].

The second text that emerges based on the Arabic version derives from a manuscript discovered by Baumstark, which was to be found at the museum of the Borgia. It turned out to be the key to find out information regarding the origin of the DA. According to it, the *Didascalia Apostolorum* was translated in 1295 into Arabic language by Abu Ishaq ibn Fadlallah from a Coptic text dated back to 926. Presenting a clear correspondence with the first seven books of the CA.

Lastly, let us talk about the last version, an Ethiopian version that comprises two publications. A publication of the incomplete version, published by Platt[32], which is the English translation of a manuscript he receiver from Jowett and that came from Jerusalem. And a publication of the complete version, emerged from five manuscripts of the oriental collection of the British Museum (752, 793, 797, 798, 799). The author Françon takes the manuscript No. 799 and translates the first thirty chapters and the author Harden[33] uses the manuscript No. 752.

The latter author reaches the conclusion that both in the Arabic version and in the Ethiopian one there is a correspondence in the preface of the CA and throughout its collection of seven books. Following this finding, he deduces an Ethiopian addition from the Arabic version of the DA.

4. Simple and natural law, guide of the Bishop

Man, by virtue of his own nature, is called to comply with natural law[34]. It is a law that serves as a guide to acquire all that knowledge that is necessary for his life and in order to comply with his functions and obligations[35].

Putting into practice the notions of natural law, he selflessly meets the eternal law. A law addressed to all those members of the People of God through which they are allowed to attain eternal life[36].

A law illuminated by our Lord, which lights up men until the end of the path and the ultimate aim.

As it is well specified by the first chapter of the DA, this law is addressed to the faithful to "*God's plantation and holy vineyard*".

> "*Dei plantatio vineae catholica Ecclesia eius, electi qui crediderunt in eam quae sine errore est vera religio, qui aeternum regnum fructuantur perfidem, virtutem acceperunt et participationem sancti eius spiritus, armati per ipsum et succincti timorem eius, aspersionis participes honorificandi et innocentis sanguinis Christi, qui fiduciam acceperunt omnipotentem Deum patrem vocare, coheredes et comparticipes dilecti pueri eius: audite Doctrinam Sacram, qui promisionem eius desideratis ex iussione Salvatoris, consentienter gloriosis sonitiis eius*"[37].

God calls on all men to show them the importance of living in harmony with eternal law, a law whose aim is to teach, not to punish, a law that, if completely complied with, will guide them to the attainment of the ultimate aim.

---

[25] Ed. Funk, X., «Didascalia Apostolorum», cit.
[26] Ed. Hauler, E., *Didascaliae Apostolorum fragmenta Veronensia latina*: *accedunt canonum qui dicuntur apostolorum et aegyptiorum* reliquiae, cit.
[27] Ed. Connolly, R. H., *Didascalia Apostolorum: the Syriac version translated and accompanied by the Verona Latin fragments with an introduction and notes,* Oxford 1929.
[28] Ed. Vööbus, A., *Didascalia Apostolorum*, cit.
[29] Ed. Stewart-Sykes, A., *The Didascalia apostolorum. An English Version wih Introduction and Annotation*, Belgium 2009.
[30] Depuydt, L., *Catalogue of Coptic Manuscripts in the Pierpont Morgan Library* II, Leuven 1993; Camplani, A., «A Coptic Fragment from the Didascalia Apostolorum», in *Augustinianum* 36,1 (1996), pp. 47-51; Schöllgen, G., *Die Anfänge der Professionalisierung des Klerus und das kirchliche Amt in der Syrischen Didaskalie* (Jahrbuch für Antike und Christentum. Ergänzungsband 26), Münster 1998.
[31] Spada, D., Salachas, D., *Costituzioni dei Santi Apostoli per mano di Clemente*, Roma 2001, p. 27.
[32] Platt, T. P., *The Ethiopic Didascalia, or the Ethiopic version of the Apostolical Constitutions received in the Church of Abyssinia,* London 1834.
[33] Ed. Harden, J. M., *The Ethiopic Didascalia*, London 1920.
[34] Wechsung Bilbao, F. G., «La ley natural», in *L'Umanesimo cristiano nel III millennio: prospettiva di Tommaso d'Aquino*, September 2003, pp. 1-10.
[35] Ugarte, G. J. J., «La ley natural», in *Revista Chilena de derecho*, Santiago de Chile 1979, pp. 475-477.
[36] Saint Thomas Aquinas, *Summa Theológica* I-II.q 91,aa.1-2.
[37] Ed. Funk, X., «Didascalia Apostolorum», cit. p. 1.

God lights up men with all those teachings that will make their path easier. It is important for men and for the desire of our Holy Father to live in communion with our neighbour and not to be affected by the bad temptations that make us fall into sin.

Every time that the son of God overcomes that evil force, which tries to drag him towards the condition of sinner and unfaithful, he does not only learn a new lesson, but he also learns to live in communion with God, the Almighty Father. And, more importantly, he advances in leaps in his path towards the only and ultimate aim, the salvation of the souls.

"Let peoples serve you, and nations pay you homage; Be master of your brothers, and may your mother's sons bow down to you. Cursed be those who curse you, and blessed be those who bless you" [38]*."bless those who curse you, pray for those who mistreat you"* [39]*. "But to you who hear I say, love your enemies, do good to those who hate you"* [40]*. "Injure not the poor because they are poor, nor crush the needy at the gate"* [41].

The text reminds us that all men are called to fall in evil temptation at least once in their lifetime, but it also shows us that we are called to eternal life. God acts as a father with his sons, God is merciful, God forgives and it is never too late to resume the path towards the ultimate end of all the faithful.

"While you have the light, believe in the light, so that you may become children of the light" [42].

5. The election of the Bishop

Chapters 1-6 of the second book of the *Didascalia Apostolorum* mainly deal with the Bishop, specifically with the qualities and requirements he had to have to be elected as such.

In general, he had to be a man under 50 years of age, mature, a person with habits and customs free of vanity, defamation and blasphemy [43], with proper training and prepared to transmit the relevant teachings. In case of having any deficiency in any of these fields, he would be eligible, as long as he was able to master oratory and prudence.

"Hunc salvatorem, regem et Deum nostrum, o episcopi, prospectorem vobis habere oportet et eius imitatores esse, mansuetos, quietos, viscera habentes, misericordes, pacificos, sine ira, docibiles, exhortatores, susceptores, obsecratores, non iracundos, non percursores, non contumeliosos, non elatos, non superbos, non vino multo deditos, non ebriosos, (non inflatos, non luxuriosos), non in vano expendentes, non ut alienis, sed sicut propriis his quae a Deo dantur utentes, moderatores sicut bonos dispensatores Dei, qui incipiet rationem ab ea quae in vobis est dispensatione exigere" [44].

However, facing the general norm, exceptions may always arise. There were cases in which certain small communities did not have any individual who had the necessary characteristics. In this case, the community had to take over the election, being allowed to choose a young male who had to make up for the requirements demanded and not met, and necessarily had to be honest, humble, patient and mature.

"Blessed are the meek, for they will inherit the land" [45]
"Blessed are the merciful, for they will be shown mercy" [46]
"Blessed are the peacemakers, for they will be called children of God" [47]
"Blessed are the clean of heart, for they will see God" [48]

It is shocking that a young person with little experience may guide a community towards one of the purposes of men, if not the most important one, such as God. With regard to this case, the *Didascalia* provides three examples that took place in history, the case of Solomon, Josiah and Joás. All three have in common the fact of holding a position of power while being young and they will allow us to understand the exception perfectly.

"Nam et Salomon duodecim annorum constitutus regnavit in Israel, et Iosias in iustitia octo annorum constitutus regnavit, similiter et Ioas, cum esset septem annorum constitutus regnavit" [49].

In the light of the exception, and according to our source of Canon Law, the Bishop should also marry a chaste woman and educate his children in an exemplary way and in line with the mission entrusted by Christ to men. Imposing at home the same obedience he was to impose over the community of the People of God.

Furthermore, the Bishop must pursue a righteous, impartial and merciful judgement. He must be an example [50] for the entire people as Christ was for his disciples. He must be the one who raises the alarm if some toxic factor meddles in the community, he must be on guard to protect the people and restore normalcy; in conclusion, he must carry out the role that the sentinel used to carry out in his army, as is well explained in the text.

---

[38] Gen. 27, 29
[39] Lk. 6, 28.
[40] Lk. 6, 27.
[41] Prov. 20, 22.
[42] Jn. 12, 36.
[43] Mt. 12, 36-37: "*I tell you, on the day of judgment people will render an account for every careless word they speak. By your words you will be acquitted, and by your words you will be condemned*".
[44] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 24.
[45] Mt. 5, 5.
[46] Mt. 5, 7.
[47] Mt. 5, 9.
[48] Mt. 5, 8.
[49] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 17.
[50] Ezek 33, 1-6: „*The bishop is compared to a sentinel; the metaphor delimits a new role of the bishop. He must be alert and watch the horizon to see if the enemy is approaching and, in that case, sound the alarm with the trumpet, the gospel, which must sound to remind the path to follow*", Cattaneo, E., reports [See *I ministeri nella chiesa antica*, p. 609, note 37] that this passage from Ezekiel is generally used in the Latin tradition in connection with episcopal ordination.

6. The Bishop as merciful judge

As we pointed out earlier, the Bishop must be merciful. The *Didascalia* provides a breakdown of the Bishop-judge's actions in terms of the different types of action he takes in the situations that arise in the course of his mission.

6.1 About the judgement

Chapters 7-11 of the second book of the *Didascalia* indicate that when the Bishop judges, he must do so by conveying to men the testimony given to him by Christ as the first heir and witness of salvation, based on the Holy Scriptures, in order to give greater force to the meaning of his words.

He is not only a witness, but also an example among all men. He takes God as an example and the people take him as an example. Therefore, he must be careful in his behaviour when acting, which will create a pure and peaceful atmosphere among the members of the flock.

As the *Didascalia* rightly points out, if a bishop were guilty of having committed evil deeds, he would only infect all the members of the community and make them think that this is the norm. However, if they meet a pastor of impeccable conduct, their conscience will not allow them to enter a community having been sinners. This will make them seek purity in all their actions.

In addition to instilling a good example to the men in the field, the Bishop must show mercy when judging, which will help to maintain a good community in accordance with the ideals of our Lord.

"*Propterea igitur, o episcope, festina, ut mundus sis [ex] operibus, et agnosce[re] locum tuum, quoniam in omnipotentis virtute positus es, observans similitudinem Dei omnipotentis. Et ita in ecclesia sede verbum faciens quasi potestatem habens iudicare pro Deo eos, qui peccaverunt, quoniam vobis episcopis dictum est per Evangelium: Quodcumque ligaveritis super terram, erit ligatum et in caelo*" [51].

When young people come to the Lord after having fallen into sin, they do so because they know that our God is merciful, the Bishop will follow in the footsteps of our God, and consequently, he will forgive all kinds of behaviour as long as there is repentance. This also serves as an example for all those faithful who are part of the community of the People of God. It makes them witnesses to the Salvation of souls, which all members of the flock enjoy.

"*Nemo ergo sine peccatis est. Tu autem, quoad potes, irreprehensibilis esse stude et de unoquoque solicitus esto, n equis propter te offensus pereat. Nam laicus sui tantum curam gerit, tu vero uniuscuiusque onus in te suscepisti, et maius est pondus, quod tu portas; cui enim dominus multum dedit, multum quoque ab eo petit. Quia igitur onus uniuscuiusque in te suscepisti, vigilans esto; nam scriptum est Dominum ad Mosem dixisse: Tu et Aaron portavitis peccata sacerdotii*» [52].

6.2 About offenders

Chapters 12-24 of the second book of the *Didascalia* emphasise once again the mercy with which the Bishop-judge must treat the delinquent or penitent.

The Bishop must act in a severe manner, imposing himself on men as God does, without forgetting the ultimate goal and the salvation of souls, the reward for all those who repent of their sins and misdeeds. And which in turn is accompanied by reintegration into the community of the People of God.

A complicated mission, but an effective one if it is carried out in a continuous and progressive manner, by means of all those teachings that succeed in preventing sins.

In addition to acting with severity, he must show compassion to all those who promise to repent and who demonstrate, in a second phase, that they are worthy of receiving forgiveness for the sins they have committed.

"*Itaque etiam tu, episcope, audi et require cum, qui periit, et sequere cum, qui aberravit, et reduc cum, qui secessit; nam potestatem habes dimittere in remissione, quod quassatum est, Christi vultum portans. Per te salvator dicit his, qui peccaverunt: Remittuntur tibi peccata tua; fides tua salvum te fecit, vade in pace!*" [53].

But in no case must he show fear, since if the sinner discovers him, he will not be able to reprimand or correct him, which will result in the non-fulfilment of the ultimate goal and the non-restoration of the flock. In other words, the failure in his mission as Judge. Mercy is one of the most important keys to keeping God's people alive.

"*You say, "The LORD'S way is not fair!" Hear now, house of Israel: Is it my way that is unfair, or rather, are not your ways unfair? When a virtuous man turns away from virtue to commit iniquity, and dies, it is because of the iniquity he committed that he must die. But if a wicked man, turning from the wickedness he has committed, does what is right and just, he shall preserve his life; since he has turned away from all the sins which he committed, he shall surely live, he shall not die*" [54].

If the Bishop were not to follow in the footsteps of our Lord, if he were not merciful to sinners when judging, he would be creating a feeling among men that would be fed with evil and far removed from the spirit of God, which would not only set a bad example to every single member of the flock, but would also result in the complete disappearance of the flock.

A community built on ideals collapses the moment these ideals disappear.

A Bishop who does not judge according to God's willing cannot be forgiven.

"*Nam et docuit nos incessanter orantes dicere: Remitte nobis debita nostra, sicut et nos remissimus debitoribus nostris. Si ergo non remiseris his, qui peccaverunt, quomodo recipies? Nonne econtra per tuum ipsius os te colligas dicens remisisse, et non remisisti, set interfecisti?*» [55].

[51] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 12.
[52] Ivi, vol. II, p. 18.
[53] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 20.
[54] Ezek 18, 25-29
[55] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 21.

Finally, the *Didascalia* makes a brief reflection on the Bishop's mission as judge for the faithful:

"*Namque episcopum admonitione oportet esse delictorum et mortis propulsatorem et iustiae conciliatorem, castigatione ac doctrina ducem bonorum operum, et praeconem ac exaltatorem bonorum, quae futura atque a Deo promissa sunt in loco vitae aeternae, et similiter praedicatorem irae venientis in iudicio Dei minantem ignem acerbum, qui non exstinguitur nec perferendus est. Et gnarum eum oportet esse operis voluntatis Dei, ne quemquam contemnat; dixit enim salvator noster: videte, ne quemquam contemnatis, nec unum ex his pusillis, qui in me credunt*" [56].

6.3 The Bishop and the Ius apellationis

Throughout history, there have been many occasions when the Church has been confronted with problems of a common nature, noticing the need for a tool able to providing a peaceful and satisfactory solution for the Community.

From the 2nd century onwards, the bishops of the neighbouring areas decided to hold various meetings to discuss and deliberate on the issues raised and to investigate possible solutions.

These meetings [57] were called Synods and Councils [58] and, from the outset, they were distinguished by the subjects that constituted them. The first ones brought together bishops and priests from different nearby regions and communities, while the second ones only brought together Bishops from different areas. The latter, within their typology, range from local, regional and provincial ones to ecumenical ones, which intended to bring together the whole of Christendom [59] and which, in turn, proved to be the most famous and decisive ones in the history of the Church.

Normally the topics to be dealt with in these groups were usually disciplinary and doctrinal, but there are also several known cases, in the second half of the 3rd century, in which the objective was the *Lapsi* [60] and the question of their readmission into the Community.

The aspect that concerns us regarding the Councils is the moment from which the character of Procedural Instance begins to be noticed in them. This can be seen in two clear examples.

The first one refers to the case of the LXVII letter of Cyprian, which took place in the reign of Decius (249-251). In an attempt to restore religious unity, he issued an edict ordering his subjects to offer sacrifice to the emperor and his gods. This initiative was disobeyed and gave rise to the first persecutions of Christians, who had three different

This did not leave the bishops of Astorga-León and Mérida unmoved, who made use of the document, causing their dismissal from their position as they were considered options to avoid them: apostasy [61], flight [62] and the purchase of the *libellus*. The latter was the most recurrent, and was the subject of several Councils, as we have highlighted above [63]. It was based on the purchase of a document, the *libellus*, claiming to have produced the demanded sacrifice, which was false. This action was considered among the citizens of the religious communities as unworthy and shameful.unworthy of it. The decision of dismiss them was taken under the protection of the Council held by the bishops of the neighbouring dioceses.

Not content with the decision taken at the Council of Carthage, the *libellatici* appealed to the Bishop of Rome, who decided to return the bishops to their original position contrary to the decision taken by the Bishop of Carthage.

As we have been able to understand, recourse to the Councils was traditional among the members of a community. They considered it the best method to reach a solution, and they thought that it was appropriate to leave the decision in the

---

[56] Ed. FUNK, X., «Didascalia Apostolorum», cit. vol. II, p. 17.

[57] The simple fact of holding a meeting highlights the interest in a common goal, a common responsibility, in the Universal Church environment. STOCKMEIER, «Edad Antigua», in *Historia De La Iglesia Católica*, eds. LENZENWEGER, J., STOCKNEIER, AMON, K., ZINNHOBLER, R., Barcelona 1989, p. 31.

[58] ORLANDIS ROVIRA, J., «Consideraciones históricas sobre la disciplina de los concilios provinciales», in *Cuadernos de Historia del Derecho*, 2004, pp. 203-210; RETAMAL, F., «El ejercicio del poder en la Iglesia», in *Teología y Vida XLV*, 2004, pp. 318-352; ORLANDIS ROVIRA, J., *Historia de las Instituciones de la Iglesia Católica. Cuestiones fundamentales*, Pamplona 2003, pp. 75-76; GAUDEMET, J., *L'Empire romain. IV-V siècle*, Paris 1958; JONES, A. M., *The later Roman Empire (284-602)*, Oxford 1944.

[59] ORLANDIS ROVIRA, J., *Historia de las instituciones de la Iglesia Católica*, cit. pp. 75- 89.

[60] Specifically, according to historical records, we have evidence of seven meetings in held in the time of Roman Africa, all of which dealt with the problem of the Lapsi. CONCILIUM CARTHAGINENSE PRIMUM, in *causa lapsorum celebratum*, in MANSI, I, coll. 863D-866 A; CONCILIUM CARTHAGINENSE SECUNDUM, in *causa schismaticorum Felicissimi et Novatiani*, in MANSI, I, coll. 867B- 868B; CONCILIUM AFRICANUM I, *Ad collapsam Ecclesiae disciplina reformandam*, in MANSI, I, coll. 899- 900; CONCILIUM AFRICANUM II, in *Causa Basilidis et Martialis*, in MANSI, I, coll. 905-906; CONCILIUM AFRICANUM I vel CARTHAGINENSE I, in *causa baptismatis haereticorum*, in MANSI, I, col. 925; CONCILIUM CARTHAGINENSE III, *sub Cypriano episcopo*, in MANSI, I, coll. 951 ff. The close relationship between the Hispanic and African Churches stemmed from the bond created by the question of the *Lapsi*. BLÁZQUEZ MARTÍNEZ, J. MŞ., *La carta 67 de Cipriano y el origen africano del cristianismo hispano, en Homenaje a Pedro Sainz Rodríguez*, III, Madrid 1986, pp. 93-102, and in ID., *Religiones en la España antigua*, Madrid 1991, pp. 361-372 and of ORLANDIS, J., «Algunas consideraciones en torno a los orígenes cristianos en España», in *cristianismo y aculturación en tiempos del Imperio Romano, Antigüedad y cristianismo VII*, Murcia 1990, p. 69 ff. Cyprian also refers to a meeting, of unclear date, in which the Bishops' main objective was to bring as many *Lapsi* as possible back into the Church. CAECILII CYPRIANII, *Epistula LV*, 21, in *CSEL*, vol. III, pars I, coll. 638-639: Et quidem apud antecessores nostros quidam de episcopis istic in provincia nostra dandam pacem moechis non putaverunt et in totum poenitentiae locum contra adulteria cluserunt. Non tamen a coepiscoporum suorum collegio recesserunt aut catholicae ecclesiae uniatem vel duritiae vel censurae suae obstinatione ruperunt, ut quia apud alios adulteris pax dabatur, qui non dabat de ecclesia separaretur. Manente concordiae vinculo et perseverante catholicae ecclesiae individuo sacramento, actum suum disponit et dirigit unusquisque episcopus rationem propositi sui Domino redditurus.

[61] It occurred when Christians publicly renounced the Christian faith for fear of persecution. Many of them returned to the Community asking to be readmitted. This was known as the *Lapsi* problem.

[62] Those denounced who had been arrested were given time to prepare their defence, during which they were released and took advantage of this time to escape.

[63] *Supra*, p. 1., N. 4.

hands of the Bishops, so that the mission entrusted to them by our Lord would last.

If we transfer this first example to the procedural area, we can appreciate the presence of two phases. The first one, in which we can appreciate the character of first instance of the Council, and the second one, in which we can see small traces of what would later be known as *ius apellationis*, a proof of the importance of the figure of the Bishop through the ages and a warning of the role acquired by his person from the Constitution introduced by Constantine in the year 318 onwards.

The second example comes from the dictatorship of Maxentius, specifically from the year 311 [64], a time when, finally, it was possible to see the end of the persecutions. On this occasion, the Council was called upon to elect the Bishop of Carthage, a position to which Cecilian was appointed, but which did not last long, since he had to abandon his position after the Council held in Carthage, where it was decided to dismiss him and replace him with Majorinus, predecessor of Donatus [65].

Once the process was concluded, Donatus turned to the Bishop of Rome to express his opposition.

This was not the first time that the Councils had been called upon to resolve a conflict, but it was the first time that the secular power insisted on having recourse to the Bishop. Proof of this is the letter dated 311-314, in which the Emperor Constantine addresses Pope Miltiades, requesting that the case be dealt with by the Bishop of Rome:

> "*(…) Placuit mihi ut ídem Caecilianus una cum decem episcopis qui accusare ipsum videantur, et cum decem aliis quos ipse ad suam causam necesarios esse judicaverit, Romam naviget: ut ibi coram vobis et coram Recticio, Materno ac Marino collegis vestris, quo sea causa Romam properare jussi, possit audiri, quemadmodum sanctissimae legi convenire optime nostis (…)*" [66].

According to history, it was with the provision introduced by Constantine in the West, parallel to the edict issued in Nicomedia by Licinius in 313, better known as the Edict of Milan, that the *ius apellationis* became official.

Constantine was aware of the Bishop of Rome's knowledge of the *Lex Sanctissima*, which placed him in an essential position within the conciliar institution, and which would avoid the possible fractures within the Church, being able to definitively heal the African schism.

Such an approach came from long before Constantine's rise to power, specifically from an ecclesiastical norm, prior to the Council of Nicaea, derived from a custom that originated in the Council of Jerusalem.

This initiative introduced what was to be the principle of the Bishop's actions as a judge, put into operation by the legislative intervention of Constantine in the year 318 [67].

7. The Bishop, doctor of the sinners

On the basis of chapters 19-24 of the second book of the *Didascalia*, it is very interesting to make a comparison between the role of the Bishop-judge and the role of the doctor.

> *"Ut medicus ergo super ecclesiam constitutus noli cessare offerendo medicinam his, qui in peccatis aegrotant; sed omni modo cura eos et sana et integros redde ecclesiae, ut non incurras in hoc verbum, quod dicit Dominus: Et in potentia crudievabis illa cum ilusione"* [68].

The doctor tries to cure all his patients; it is a healing process that mainly affects the health of the individual and varies according to the type of ailment he is dealing with.

In the case of the Bishop, we could say that he is a kind of doctor who is in charge of curing the souls of all those who are part of his community.

The doctor cures his patients with the help of different medicines that mitigate the pain or even make it disappear. Although it may seem unbelievable, the Bishop also uses medicinal means to recover not only the soul of the penitent, but also to restore the People of God, to welcome back that individual that had momentarily wandered away from the flock.

Such means are better known in Canon Criminal Law as Medicinal Penalties or Censures [69].

And why is the medicinal meaning used? Because these penalties last until the individual is cured. It is understood that he is cured when he manifests his repentance. This means that his soul is cured. Moreover, their second aim is the reintegration of the culprit.

> "*Propterea tamquam medicus compatiens omnes peccatores cura omnemque prudentiam adhibe et affer sanationem ad vitam eorum sustentandam, neque sis paratus abscindere membra ecclesiae, sed utere verbo ligationum et castigationibus lenitatum et emplastro deprecationes. Si enim ulcus altum fit carne tabescente, cura illud et aequa medicamentis salutaribus; sin autem foetidum fit, purga illud mordaci medicamento, id est verbo correptionis*" [70].

When we make this comparison, we must not forget in any case the manner in which the Bishop must judge. As we have already emphasised, we are talking about a fair judgement in which mercy and the Supreme Law of the Church, the salvation of souls, must prevail.

---

[64] Constantine (312-337) and Licinius (311-324) stipulated the restoration of religious peace. Gallego Blanco, E., *Relaciones entre la Iglesia y el Estado en la Edad Media,* Madrid 1973, pp. 64-67. Agreement perfected by Constantine, by a provision similar to the edict promulgated on 13 June 313 by Licinius, known as the Edict of Milan. Gaudemet, J., «La legislation religieuse de Constantin», in *Revue d'Historie de l'Eglise de France* 33 (1947), pp. 25-61; Homo, L., *De la Rome pad'enne ŕ la Rome chrétienne*, Paris 1950.

[65] Optatus Milevitanus Ep., De schismate Donatistarum, I, 19, in P. L. XI, col. 920.

[66] Eusebius Caesariensis Ep., *Historia Ecclesiastica*, X, 5, *Epistola Costanini imperatoris Miltiadi episcopo urbis Romae*, in P. G. XX, 887°.

[67] C. Th. I, 27,1 (= *Const. Sirm.* 17), ed. Mommsen, Th., Meyer, M., *Codex Theodosianus*, cit. p. 62.

[68] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 20.

[69] Code of Canon Law: 1312 § 1

[70] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 41.

As John Paul II said:

"*I exhort you to consider carefully that the canonical discipline concerning censures, irregularities and other penal or precautionary determinations is not the effect of formalistic legalism. On the contrary, it is an exercise of mercy towards penitents in order to heal them in spirit, and for this reason censures are called medicinal*" [71].

8. The relationship of the Bishop with the laity

From the very beginning they were known as the Church chosen by God, the first people known as the Church.

"*Audite ergo etiam vos, laici, electa Dei ecclesia. Nam et prior populus ecclesia vocabatur; vos autem estis catholica sacrosancta ecclesia, regale sacerdotium, multitudo sancta, plebs adoptata, ecclesia magna, sponsa exornata Domino Deo*" [72].

The first inhabitants of God's people. The first men who suffered the plagues and received the Decalogue and those who will be eternally grateful to Him through their prayers.

In addition, the laity come to represent all the members of the flock; they have a place in the hierarchical step of the pyramid of the ecclesiastical community, which is due to the Bishop as absolute monarch. A monarch who takes the place of God in the world and as such is to be loved and respected.

"*Hic est, qui verbum vobis ministrat et mediator vester est; hic est magister et post Deum per aquam regenerans pater vester; hic prínceps et dux vester, hic est rex vester potens; hic loco Dei regnans sicuti Deus honoretur a vobis, quoniam episcopus in typum Dei praesidet vobis*" [73].

It is important to clarify one point, and that is that the figure of the Bishop is not comparable to that of a king, since the king is reduced to solving those problems that have to do with the town and its inhabitants.

Rather, it has to do with the figure of a God, created in the image and likeness of our Lord, master of the bodies and souls of every single one of his members.

Let us talk now about respect, respect instilled by men for the Bishop and which is similar to that instilled for the Gods. Our Lord speaks of Gods when He refers to the people who represent Him in the world, as we referred to above.

Thus, when a person offends the Bishop he is offending God. As the *Didascalia* says: "*Deis tuis non conviciaberis, et principi populi tui non maledices*" [74].

The relationship established between God and the Bishop is not simply representative, but also a mediating relationship between the Bishop and God who acts as arbiter in matters concerning the faithful. God grants and the Bishop gives what is granted to him. We men should not forget this relationship and of course, we should correspond to our Father with good deeds and actions.

"*But store up treasures in heaven, where neither moth nor decay destroys, nor thieves break in and steal*" [75].

The burden of giving to each one what is due to him according to a concept of Justice that considers the mission received and entails the non-exclusion of any of the members of the Community must not fall on anyone other than the Bishop, since man must love his neighbour as himself.

Otherwise, we would be faced with a very unpleasant situation, in which some brothers would betray the others, creating evil deeds and becoming part of Satan and, of course, abandoning God.

It is the Bishop's task to prevent this from happening by means of his teaching, as we have said before, but it is also his task to act as God would, assessing the conduct of the betrayer. By forgiving the repentant sinner and reintroducing him back into the people of God or by bringing before three witnesses [76] the traitor whose word he finds doubtful. And why does the *Didascalia* speak of three persons as witnesses? Because according to it, the Father and the Son together with the Holy Spirit bear witness to the works of men.

"*Quare autem, fratres, necesse est testimonium in ore duorum vel trium testium niti? Quoniam pater et filius et spiritus sanctus testimonium perhibent operibus hominum. Ubi enim adomonitio doctrina est, ibi etiam disciplina est ac conversio errantium. Propterea in ore duorum vel trium testium stat omne verbum. Si vero non audierit, reprehende cum coram ecclesia universa; sin autem ecclesiam non audierit, a te tanquam ethnicus ac publicanus reputetur*" [77].

The laity owe more than respect to the Bishop. They should be eternally grateful to him and they should convey this to him through their prayers. Grateful for having taught them to live in communion with the Church, for having instilled in them the saving message of the Lord our Father. For having shown them the way to the ultimate goal and fundamental pillar of the eternal Law, the salvation of souls. And also for having shown them the meaning of mercy and the forgiveness of sins in order to achieve a full life thanks to a pure soul.

"*Vos autem honorate episcopos, qui vos solverunt a peccatis, qui per aquam vos regeneraverunt, qui espíritu sancto vos repleverunt, qui verbo tamquam lacte vos nutrierunt, qui doctrina vos confirmarunt, qui admonitione vos estabiliverunt et eucharistiae Dei sanctae participes fecerunt atque promisionis Dei consortes ac coheredes vos constituerunt*" [78].

---

[71] JOHN PAUL PP II, *Address to the Apostolic Penitentiary 1990*, 15 March 1990.

[72] Ed. FUNK, X., «Didascalia Apostolorum», cit. vol. II, p. 26.

[73] Ibid.

[74] Ed. FUNK, X., «Didascalia Apostolorum», cit. vol. II, p. 31.

[75] Mt 6, 20. Lk 13, 33

[76] Mt 18,15-17: „*If your brother sins (against you), go and tell him his fault between you and him alone. If he listens to you, you have won over your brother. If he does not listen, take one or two others along with you, so that 'every fact may be established on the testimony of two or three witnesses'. If he refuses to listen to them, tell the church. If he refuses to listen even to the church, then treat him as you would a Gentile or a tax collector*".
Mt 16,19: „*I will give you the keys to the kingdom of heaven. Whatever you bind on earth shall be bound in heaven; and whatever you loose on earth shall be loosed in heaven*".

[77] Ed. FUNK, X., «Didascalia Apostolorum», cit. vol. II, p. 38.

[78] Ibid.

9. The relationship of the Bishop with the deacons

The deacons, like the Bishops, as we have been saying throughout the text, must be just with the Lord.

"Si mecum recti estis, et ego vobiscum rectus ero, et si cum contentione mecum ambulaveritis, et ego cum contentione vobiscum ambulabo, ait Dominus exercituum» [79].

The relationship that exists between the Bishop and the deacons resembles that of a Father with his children. It is also comparable to the relationship between Christ and his Father.

The deacon acts as if he were the Bishop's ears, he maintains a relationship with men similar to the one discussed above and established between the Bishop and our Lord. He is a kind of receiver of the messages that the children of the People of God want to convey to him. Together they can achieve peace if they become one body and one soul as Father and Son. As the Lord said: «*Beati pacifici"* [80]

In chapters 44-56 of the second book of the *Didascalia*, the Bishop's way of judging is emphasised again, but this time together with the deacons.

They must not forget the importance of a fair trial in which both parties to the dispute must be given a hearing. We are referring to the example of the traitor who betrays his brother within the community of God's people. In such cases, it is key that both parties have the opportunity to defend themselves and to tell their testimony so that it can then be thoroughly investigated by the Bishop and the deacons. Otherwise, we would be facing an unjust situation, and in the eyes of God it would be as if the false testimony was caused by those who had judged, i.e. the bishop and the deacons.

It is of the utmost importance that the deacons and the bishop work together to bring about a rapprochement and reconciliation of those brothers and sisters involved in a dispute. If the anger disappears, the grievance disappears and without grievance, there is no sin. After all, we are all children of God and we must all live in communion as one big family.

"Lord, if my brother sins against me, how often must I forgive him? As many as seven times? Jesus answered, 'I say to you, not seven times but seventy-seven times" [81].

In order to avoid such situations, it is essential that the deacons collaborate in the doctrinal work of the Bishop, in order to make the faithful aware of the importance of being united as brothers. Showing them how easy it is to attain the salvation of souls and eternal life if they live with the Lord's approval, an approval that is impossible to obtain if they betray a brother: *"Therefore, if you bring your gift to the altar, and there recall that your brother has anything against you, leave your gift there at the altar, go first and be reconciled with your brother, and then come and offer your gift"* [82].

Enmity darkens the prayer that man can maintain with God; God turns a deaf ear to the wicked brother. Thus, as the *Didascalia* well enunciates, guilt will grant them eternal death, separation from the Lord on their side.

"Studete igitur, fratres, dignari laudem accipere a Deo neque vituperationem, quia Dei laus est hominibus via aeterna, vituperatio vero Dei eis mors sempiterna" [83].

[79] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 44. The quote comes from CA II, XLIV, 1.
[80] Ivi, Vol. II, p. 46.
[81] Mt 18, 21.
[82] Mt 5, 23.
[83] Ed. Funk, X., «Didascalia Apostolorum», cit. vol. II, p. 32.

Lex commissoria: from a Forbidden Clause in Roman Law to a (Contemporary) Debtor's Welcome Relief*

*Marko Sukačić***

Abstract

The lex commissoria, an agreement under which the creditor assumes ownership of the pledged property if the debtor defaults, was prohibited in the post-classical period of Roman law by the constitution of Constantine in the CTh 3,2,1 (CI 8,34,3). This article explores the possible substance of the lex commissoria in the classical Roman law of pledge as well as Constantine's motive behind its prohibition, and compares it with that in the contract of sale. The impermissibility of the lex commissoria, as inherited from Roman legal tradition, had persisted in the contemporary Croatian legal system until recently. Under Directive 2014/17/EU, Croatia, as well as all other member states of the EU, transposed the permissibility of such a clause, albeit as limited to consumer housing loan agreements. From this canvas, the concluding remarks juxtapose the Roman with the contemporary lex commissoria and discuss the actual purpose and effect of the said prohibition.

Keywords: *lex commissoria; pledge; Roman law; Directive 2014/17/EU; consumer protection.*

1. Introduction

The *lex commissoria*, as generally associated with and primarily found in the Roman law of obligations, is a penalty clause for non-performance that exists within property law, specifically, the law of pledge. It is an agreement between the creditor and the debtor to the effect of which the creditor becomes the owner of the pledged property if the debtor defaults.[1] Being fathomable only from the deficient sources of Roman law, this understanding may never stand as factual.

The *lex commissoria* was abolished by Constantine's constitution as enacted in 320 or 326 AD (interpretations vary).[2] The constitution was compiled in the *Codex Theodosianus* (hereinafter: CTh) 3,2,1 and later transposed by Justinian's compilers to the *Codex Iustinianus* (hereinafter: CI) 8,24,2 in a near-identical form. From that point on, the term *pignorum*, or pledge, is referred to only in *Interpretatio* of the CTh 3,2,1 and inferred from Justinian's compilers' addition of the term *pignorum*. Whether Constantine's constitution originally referred to (original text had referred to) pledges as such remains debatable. Considering the above, the article will examine in detail the probability of the *lex commissoria* having been used in the classical-period law of pledge. Seeing as how the *lex commissoria* thenadays existed as a subsidiary agreement (or clause) to the contract of sale as well, the analogy between the *lex commissoria* in the pledge contract and the contract of sale is probable and will be analysed as such. The paper will also explore Constantine's motive behind abolishing the *lex commissoria* only, and not debtors' other struggles during his reign.

The present-day term for the effect of the *lex commissoria* is forfeiture, which, as a principle inherited from Roman legal tradition, had been absolutely prohibited in the Croatian law of pledge until recently. By way of mandatory transposition of the EU acquis communautaire into Croatian national legislation, an exception to the prohibition was made for consumer housing loan agreements, as presented later in this article.[3] The

* This article has been put forward with the full support of the Faculty of Law Osijek at the J. J. Strossmayer University of Osijek as part of the Faculty's in-house project "Development of the Croatian private law tradition in the context of its integration into the European legal culture".

** Marko Sukačić, PhD, Postdoctoral Researcher, Department of Roman Law, Faculty of Law, J. J. Strossmayer University of Osijek, Osijek, Croatia.

1 LEONARD, R., lex commissoria In: WISSOWA, G. (ed.) *Paulys Realencyclopädie der classischen Altertumswissenschaft Band IV,1*, Stuttgart, 1900, p. 769; BUCKLAND, W.W., *A Textbook of Roman Law from Augustus to Justinian,* Cambridge 1921, p. 474; MANIGK, A., pignus in: WISSOWA, G. *et al* (eds.), *Paulys Realencyclopädie der classischen Altertumswissenschaft Band XX,1*, Stuttgart, 1941, p. 1274; BERGER, A., *Encyclopaedic Dictionary of Roman Law*, Philadelphia, 1991 (reprint), p. 399; LEVY, E., *Weströmisches Vulgarrecht, Das Obligationenrecht,* Weimar, 1956, p. 186–196; PETERS, F., 'Der Erwerb des Pfandrechts durch den Pfandgläubiger', In: MEDICUS, D.; SEILER H. H., (eds.), *Studien im römischen Recht, Max Kaser zum 65. Geburtstag gewidmet von seinen Hamburger Schülern,* Berlin, 1973, p. 162; HONSELL, H., *Römisches Recht*, Heidelberg, 2015, p. 79–80; HORVAT, M., *Rimsko pravo,* Zagreb, 2017, p. 237, ft. 1.

2 Constantine the Great was the emperor of the Roman Empire from 306 to 337 AD. He had carried out various administrative, financial, social and military reforms, and had been the first Roman emperor to convert to Christianity. For more about his life and reign, see BENJAMIN, C., Constantinus in: WISSOWA (ed.) *Band IV,1 ibid*. 1013–1026; CAMERON, A., *The Later Roman Empire AD 284 – 430, London, 1993, p. 47–66; CAMERON, A, The reign of Constantine, A.D. 306–337, in: BOWMAN, A. et al (eds.) The Cambridge Ancient History: Volume 12, The Crisis of Empire, AD 193-337, Cambridge, 2005, p. 90–108. See more on the year in which the constitution was issued in notes 9 and 10.*

3 The EU's ‚acquis' is the body of common rights and obligations that are binding on all EU countries, as EU Members.

conclusion will discuss the *lex commissoria* within the framework of post-classical Roman law under Constantine and the consequences it effected on Justinian, and subsequently the contemporary Croatian law of pledge.

2. *Lex Commissoria* in the Law of Pledge

That the *lex commissoria* was prohibited is patently clear from the CTh 3,2,1 as well as its *Interpretatio*.[4] However, to agree with Sič, it is highly unusual for post-classical legislation to be mentioned in a single place only, especially so given that it was addressed *ad populum*.[5] Prohibition of *lex commissoria* was incorporated later in *Lex Romana Visigothorum* in an identical form, and ultimately in the CI 8,34,3 with slight technical amendments:[6]

> CI 8,34,3 (Imperator Constantinus A. ad populum): *Quoniam inter alias captiones praecipue commissoriae pignorum legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri. Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteritis praesentia quoque depellit et futura prohibet. Creditores enim re amissa iubemus recuperare quod dederunt. D. II k. Febr. Serdicae Constantino A. VII et Constantio C. cons*.[7]

Compelling in this specific excerpt is that the *lex commisssoria* as such is not defined expressly, but rather (only) portrayed negatively, rendering the prohibition thereof indisputable. In contrast to the text of the constitution as found in the CI, the word *pignorum* is absent from the CTh, which could imply that the earlier version bore no express mention of the *pignorum*. Withal, the final part of Constantine's constitution refers to the creditor (*creditor enim*), and the *Interpretatio* unambiguously states that the prohibition applies to the sale of pledged property by the creditor.[8]

Adding to the obscurity of the *lex commissoria* (as understood in Roman times) is the inconclusiveness of the enactment date of Constantine's constitution. Per Mommsen and Meyer, it was enacted in the CTh on 31 January 320 AD (though the authors themselves are not firm in that position, as illustrated by the question mark attached to the date). By contrast, Krüger's edition of the CI dated the enactment to 31 January 326 AD. Mommsen's and Meyer's doubt stems from the subscript of the constitution, which states that the constitution was enacted during the seventh consulship of Constantine and his son Flavius Julius Constantius (who later became Constantius II). However, the exact date could actually be 31 January 320 AD, given that in that year Constantine I was holding his sixth consulship together with his son Flavius Claudius Constantinus (who later became Constantine II).[9] On the other hand, Frier's translation (as referenced above), noting that a subscript may vary, dates the enactment to 326 AD, and instructs to compare it with two other Constantine's constitutions (C. I. 8,57,1 and C. I. 10,19,2).[10]

In discussing the substance of the prohibition, Peters hypothesized that Constantine's intervention did not apply to all types of property acquisition by way of pledge contracts. Namely, it did not impinge on the application of the *datio in solutum*, i.e. the payment for an object different from that which was originally due to the creditor, which terminates the original obligation if the creditor accepts the said payment.[11] Given that the constitution was adopted and enacted by Justinian, it is easily conjecturable that the *datio in solutum* in the law of pledge was allowed. Along that line, Burdese theorized that the *datio in solutum* had existed alongside the *lex commisssoria* during Constantine; moreover, the idea of the *lex commisssoria* having been used in the classical period is presented in Boras and Margetić's textbook as well.[12] Nevertheless, prevailing here

---

[4] CTh, 3,2,1: *Quoniam inter alias captiones praecipue commissoriae legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri. Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteritis praesentia quoque depellit et futura prohibet. Creditores enim, re amissa, iubemus recipere, quod dederunt.* Interpretatio: *Commissoriae cautiones dicuntur, in quibus debitor creditori suo rem, ipsi oppignoratam ad tempus, vendere per necessitatem conscripta cautione promittit: quod factum lex ista revocat et fieri penitus prohibet: ita ut, si quis creditor rem debitoris sub tali occasione visus fuerit comparare, non sibi de instrumentis blandiatur, sed quum primum voluerit ille, qui oppressus debito vendidit, pecuniam reddat et possessionem suam recipiat.*

[5] SIČ, M., Remarks on the Reasons of Commissoria Rescindenda (Cth. 3, 2, 1 /=Brev. Cth. 3, 2, 1 = CJ. 8, 34, 3/), In: *Acta Universitatis Sapientiae: Legal Studies*, vol. 3, Nr. 1, 2014, p. 91.

[6] Namely, the word *pignorum* was added after *commissoriae*, and *recipere* was changed to *recuperare*.

[7] CI 8,34,3 (Emperor Constantine Augustus to the people), Since, among other frauds, the harshness of the forfeiture clause (*lex commissoria*) for pledges has grown conspicuously; it is held that it is void and that all remembrance of it is permanently abolished. If therefore, anyone is burdened with such a contract, he may recover his breath through the present enactment which invalidates both current and past (agreements) and prohibits future ones. For We order that creditors lose the (obligated) property while recovering what they gave. Given January 31, at Serdica, in the consulship of Constantine Augustus, for the seventh time, and Constantius Caesar (326). [*trans. cit.* FRIER, B. W. *et al, The Codex of Justinian, New Annotated Translation, with Parallel Latin and Greek Text,* 3 volume Set, Cambridge, 2016, p. 2127–2129].

[8] The *Interpretatio* uses the term *oppignoratam*, which could indicate that the prohibited agreement was used in pledges. Latin term *oppignero* is translated as *to give as a pledge, to pledge* in LEWIS, C. T.; SHORT, C., *An Elementary Latin Dictionary*, Oxford, 1958, p. 1271 and in GLARE, P. G. W., *Oxford Latin Dictionary*, University Press, Oxford, 1968, p. 1255. German translation of *oppignorare* as *verpfänden* [to pledge] see in HEUMANN H.; SECKEL, E., *Handlexikon zu den Quellen des Römischen Rechts* Graz, 1971, p. 394. *Cf.* SIČ, M., Creditor rem Sibi Oppignoratam a Debitore Emere Non Potest, In: *Journal of European History of Law*, vol. 2, Nr. 2, 2011, p. 69.

[9] KRÜGER, P., *Corpus Iuris Civilis, vol. 2, Codex Iustinianus,* Berlin, 1914, p. 348; MOMMSEN, T.; MEYER, P., *Theodosiani libri XVI cum Constivtionibvs Sirmondianis et Leges novellae ad Theodosianvm pertinentes,* Berlin, 1905, p. CCXV [215]; SIČ, *ibid,* p. 68, ft. 32.

[10] FRIER, *op. cit.,* note 7, p. 2129, ft. 99.

[11] PETERS, *op. cit.,* note 1, p. 162.

[12] BURDESE, A., *Lex commissoria e ius vendendi nella fiducia e nel pignus*, Torino, 1949, p. 126 *et seq.*; BORAS, M.; MARGETIĆ, L., *Rimsko pravo,* Zagreb, 1980, p. 130. On *datio in solutum* see *ibid.* 160 – 161 or ZIMMERMANN, R., *The Law of Obligations. Roman Foundations of the Civilian tradition*, Oxford, 1996, p. 753 – 754.

is Peters' claim that the classical-period *lex commissoria* used in the law of pledge cannot be found in any other sources of classical Roman law. As it is, neither Burdese's nor Boras and Margetić's claims are easily verifiable.[13]

Under the premise that *lex commissoria* was customary in the law of pledge of the classical period, it could have been added to all types of pledges, namely to *fiducia*, *pignus* and *hypotheca*.[14] However, there are no written sources that directly endorse such a statement. In regard to *fiducia,* in Title 3 of *De lege commissoria* of Book 18 of the Digest (hereinafter: D.) that concerns the addition of the *lex commissoria* to the contract of sale, the literature observe its two fragments: *Pomponius* D. 18,3,2 and *Ulpianus* D. 18,3,3.[15] Underpinning this theory is the fact that D. 18,3,2 comes from the *Pomponius libro 35 ad Sabinum*, which (according to Lenel's *Paligenesia juris civilis*) concerned and was titled *De fiducia*, while D. 18,3,3 comes from the *Ulpianus libro 30 ad edictum*, which Lenel titled *Fiduciae vel contra*.[16] Under described hypotheses, the classical *lex commissoria* in the law of pledge did exist and was included in the part of the Digest concerning contracts of sale that contained the *lex commissoria*. However, from the actual content of the two above-mentioned fragments solely it is difficult to discern semblance or traces of *fiducia*, even though fragments from *Pomponius libro 35 ad Sabinum* (e.g. D. 46,3,26) and *Ulpianus libro 30 ad edictum* (e.g. D. 13,7,24,2) manifestly discuss pledges. At any rate, the above-presented hypotheses on *fiducia* are impossible to substantiate with written sources. Another argument in support of the *lex commisssoria* having been added to *fiducia* is the title *De lege commissoria* in *Pauli Sententiae* 2,13,6 that appears in the midst of the consideration on *fiducia*. However, it may well be a simple error: as Noordraven found, fragment titles in *Sententiae* frequently mismatched their respective texts.[17] On the whole, it is unlikely that the *lex commissoria* was added to or even necessary to *fiducia* as it may be viewed as a *lex commissoria* of sorts itself. In the most fundamental terms, the hypothesis that the creditor's assuming of ownership of the pledged property were against *bona fidei* is implausible given that such assuming required the debtor's default (non-payment), i.e. his contradicting *ut inter bonos bene agier oportet* first.[18] By analogy, it would have been irrational to prohibit the creditor from retaining ownership of the pledged property on grounds of exploiting the creditor's position as it would contradict the very concept of *fiducia*.

Pignus, as another type of pledge contract in classical Roman law, is compatible with the *lex commissoria*. In the case of *pignus*, a full transfer of ownership to the creditor in case of the debtor's default under the *lex commissoria* would require *iusta causa*. Burdese has proposed that the *datio pignoris* along with the *lex commissoria* constitutes such *iusta causa*, which was criticized by Kaser and Peters.[19] In the framework of West Roman vulgar law, Levy has concluded that *Pauli Sententiae* 5,26,4 contains the rule that the creditor in possession of the pledge may after the maturity of the debt make himself the owner of the pledged good by his own act.[20] In Levy's view, the said rule is useless in regard to *fiducia*, which was no longer in use in the classical period, but is applicable in *pignus*, which was greatly narrowed by Constantine's constitution prohibiting the *lex commissoria* (as observable in *Interpretatio* to the CTh, but also in *Interpretatio* to *Pauli Sententiae* 2,12,6).[21] The above suggests that Levy holds that Constantine's constitution that addressed the *lex commissoria* was directed towards *pignus*, which in effect translates to it having been possible to add the *lex commissoria* to it.

The use of the *lex commissoria* in the law of pledge may be reasoned by the transition from *fiducia* to *pignus.* While *fiducia* was in use, there was no definite distinction between the different types of real rights, and therefore the creditor was a owner of the pledged property.[22] If the debtor defaulted, the creditor became fully entitled to the pledged property, and as such, the subsidiary *lex commissoria* was not needed, seeing as how *fiducia* already rendered the creditor the owner under *ius civile.*[23] By contrast, with the usage of *pignus,* the position of the creditor came to be perceived as *ius in re aliena*, and ownership of the pledged property did not transfer to the creditor purely as a re-

---

[13] PETERS, *op. cit.* note 1, p. 162.

[14] GAUL, H. F., Lex commissoria und Sicherungsübereignung, In: *Archiv für die civilistische Praxis*, vol. 168, Nr. 4, 1968., p. 351. Author states that *lex commissoria* was used in all three forms of pledges (*pignus, hypotheca,* but also in the case of *fiducia* on p. 368–369).

[15] LEVY, E., Zu den Rücktrittsvorbehalten des römischen Kaufs, In: LEVY, E., *Gesammelte Schriften vol. 2*, Köln, 1963, p. 264 *et seqq.*; TORO, A., *Il divieto del patto commissorio e il patto Marciano nei rapporti assoluti di garanzia*, doctoral dissertation, Palermo, 2012-2013, p. 16 *et seq.*; WIEACKER, F., *Lex Commissoria: Erfüllungszwang und Widerruf im Römischen Kaufrecht,* Berlin, 1932, p. 4.

[16] LENEL, O., *Paligenesia Iuris Civils*, *vol*. 2, Leipzig, 1889, p. 146–147 and 618–619.

[17] NOORDRAVEN, B., *Die Fiduzia im Römischen Recht,* Amsterdam, 1999, p. 239–240. The author attributed the error to copying and editing, as it could have been XVII (*ex empto et vendito*) instead of XIII. He also suggested that since the PS 2,13,4 discusses both *pignus* and *fiducia,* the said title might have been referring to *pignus* only.

[18] *Ibid.* p. 242. Karlović has pointed out that the creditor was owner of the object of *fiducia* and as such he did not need any other property right on the object, but has also concluded that there is no real obstacle to add *lex commissoria* clause to the *fiducia*. KARLOVIĆ, T., Reconsidering the authority to sell as the augmentation or restriction of creditor's rights in fiducia cum creditore, In: *Studia Universitatis Babeş-Bolyai. Iurisprudentia*, vol. 4, Nr. 4, 2020, p. 474. On *ut inter bonos bene agier oporte* see KARLOVIĆ, T., Neka razmatranja o actio fiduciae (Cic. De off. 3, 17, 70), In: *Zbornik Pravnog fakulteta u Zagrebu*, vol. 67, Nr. 3, 2017, p. 479 *et seq.*

[19] BURDESE, *op. cit.*, note 12, p. 112 *et seq.*; KASER, M., Literatur, Burdese, A., Lex commissoria e ius vendendi nella fiducia e nel pignus, In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (ZSS), vol. 67, 1950, p. 557; PETERS, *op. cit.,* note 1, p. 163.

[20] Pauli Sententiae 5,26,4: *Creditor chirographarius si sine iussu praesidis per vim debitoris sui pignora, cum non haberet obligata, ceperit, in legem Iuliam de vi privata committit. Fiduciam vero et pignora apud se deposita persequi et sine auctoritate iudicis vindicare non prohibetur.*

[21] LEVY, E., *West Roman Vulgar Law, The Law of the Property,* Philadelphia, 1951, p. 215.

[22] KASER, M., Studien Zum Römischen Pfandrecht, In: *Tijdschrift voor Rechtsgeschiedenis* (TR), vol. 44, Nr. 3–4, 1976, p. 254 *et seq.*

[23] NOORDRAVEN, *op. cit.,* note 17, p. 239. *Cf.* BUKLAND *op. cit.,* note 1, p. 474.

sult of the debtor's default. Instead, a hybrid state emerged, wherein the creditor was entitled to either keep the pledged property indefinitely or use it to obtain satisfaction.[24] Kaser termed such state *Bewahrungspfand* or *Pressionspfand* or 'the preservation of the pressure deposit'.[25] To prevent such anomalies, parties began adding clauses on non-redemption of the pledge to their *pignus* contracts. Per Zimmermann, parties agreed either to conditional transfer of ownership based on sale or on the *datio in solutum.*[26] Such arrangements are seemingly associative with the terms of *fiducia*, and much like it, they were highly favourable to the creditor. This disproportionate advantage on the side of the creditor might have incentivized Constantine to prohibit the concluding of contracts containing the *lex commissoria.* However, since the debtor could obtain a rescission of the clause only if he were prepared to repay his debt, said rule had made Constantine's prohibition less effective.[27]

Far from any uncertainty, the prohibition brought by Constantine's constitution did succeed in what it was devised for: it provided the debtor with limited protection, wherein the pledge contract remained valid exclusive of the *lex commissoria*. The debtor was entitled to get back the pledged property upon repaying the debt, and the creditor retained the contractual right of pledge, inclusive of the right to sell the pledged property in case of debtor's default. Even though it may appear that Constantine's constitution left the creditor's position intact (considering the creditor's right of pledge), it undeniably protected the debtor as well. Indeed, in case of debtor's default, while the creditor was entitled to sell the pledged property with or without the contractual *lex commissoria*, Constantine's constitution did not provide the creditor more protection than he already enjoyed. However, the debtor's position did improve as Constantine's constitution provided him with a right that he previously did not enjoy. The prohibition certainly did alleviate the position of the debtor, which seems to have been Constantine's guiding principle behind the prohibition.

3. Comparison of the *Lex Commissoria* in Pledge Contracts and Contracts of Sale

The *lex commissoria*, as associated with and primarily used in the law of obligations, was a *pactum adiectum* (subsidiary agreement (also condition or clause)) to *emptio venditio* (contract of sale) to the effect of which the ownership of the sold object was forfeited to the seller if the buyer defaulted.[28] The primary source on the *lex commissoria* is Book 18, Title 3 of the Justinian's Digest, titled *De lege commissoria*; however, it also appears in the Justinian's Codex. In *De lege commissoria*, it is defined as a condition and as a contract of sale annulled by the condition. There are two distinct schools of thought on conditions in Roman law: one claiming that Roman jurists recognised only suspensive conditions, and the other that they recognised both suspensive and resolutive ones.[29] Considering that resolutive conditions as a concept were formulated on subsidiary agreements to *emptio venditio*, Roman jurists must have recognized resolutive conditions, albeit not by referring to them as *conditio resolutiva*, but rather by inference ('*sub condicione resolvi emptio*'), as observable in the reference to the *lex commissoria* in Ulpian's D. 18,3,1. The effects of such agreements, or, perhaps more accurately, resolutive conditions have been dissected by Romanists, although with no consensus in sight yet. Nevertheless, the *lex commissoria* was decisively a condition under both schools of thought, even though its legal nature in the resolutive sense remains dubious.

The similarities between pledge and sale *lex commissoria* are observable from the excerpt from Marcianus' *libro singulari ad formulam hypothecariam* (in D. 20,1,16,9). Therein, Marcianus states that both *pignus* and *hypotheca* may be concluded under the agreement that, if the debtor defaults, the creditor may have the property as a buyer at a fair price that is to be determined in that moment. Marcianus inferred that such a sale is conditional, as confirmed in the rescripts by emperors Severus and Antoninus. Toro has concluded that the Marcianus' source, together with the Constantine's constitution represent historical development of 'the progressive cancellation of debt', which started centuries ago with the *Poetelia Papiria de nexis.*[30] In Peters' view, the excerpt and Marcianus' cautious approach indicate that the sale of pledged property to the creditor was not common at that time, and therefore cannot be taken as proof of prevalence thereof.[31] However, a similar legal solution allowing the creditor to buy the pledged property (*pignus*) regardless of it having been included in the (pledge) contract or added subsidiarily thereto was provided for by (way of) *Fragmenta Vaticana 9* (*Papin. III. Respons.*).[32] The authenticity of the text is confirmed by Try-

[24] ZIMMERMANN *op. cit.,* note 12, p. 223–224.

[25] KASER, M., *Das römische Privatrecht, Erster Abschnitt: Das altrömische, das vorklassische und das klassische Recht*, München, 1955, p. 386–387, ft. 9; *idem, op. cit.,* note 22, p. 235.

[26] ZIMMERMANN *op. cit.,* note 12, p. 224.

[27] *ibid*; LEVY, *op. cit.,* note 1, p. 192.

[28] See VIARD, P. E., *Les pactes adjoints aux contrats en droit romain classique,* Paris, 1929; WIEACKER, *op. cit.,* note 15; FLUME, W., Die Aufhebungsabreden beim Kauf - Lex commissoria, in diem addictio und sogenanntes pactum displicentiae - und die Bedingung nach der Lehre der römischen Klassiker, In: MEDICUS, D.; SEILER, H. H. (eds.), *Festschrift für Max Kaser zum 70. Geburtstag*, München, 1976, p. 309–327; ZIMMERMANN, *op. cit.,* note 12, p. 737–738.

[29] KNELLWOF, M., *Zur Konstruktion des Kaufes auf Probe, Die Gefallensbedingung und ihr Verhältnis zu Wollensbedingung, Resolutivbedingung und Rücktrittsrecht,* Zürick, 1987; PETRANOVIĆ, A., Uvjetovani konsenzus i rimska uvjetna kupoprodaja, In: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 28, Nr. 2, 2007, p. 1227 – 1228; EFFER-UHE, D. O., *Die Wirkung der condicio im römischen Recht*, Köln, 2008; Sukačić, M., Dvojbena pravna narav kupnji na pokus – pregled romanističkih teorija o D. 19,5,2,pr.-1 (Ulpianus libro 32 ad edictum), In: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 40, Nr. 3, 2019, p. 1207–1224.

[30] Toro uses the term *progressiva cancellazione del debito.* TORO, *op. cit.,* note 15, p. 171–172.

[31] PETERS, *op. cit.,* note 1, p. 163.

[32] SIČ, M., Kupovina predmeta zaloge od strane založnog poverioca prema Papinijanu (Fragm. Vat. 9), In: *Zbornik radova Pravnog fakulteta u Novom Sadu*, vol. 2, 2010, p. 160 *et seq.* and 177.

phoninus in D. 20,5,12pr. (*Tryphoninus libro octavo disputationum*) by presenting that Papinian was head of the Office of Petitions, and that the emperor's rescript prescribed that the creditor was allowed to buy the pledged property from the debtor given that he (the debtor) remained the owner. However, unlike Marcianus' excerpt, Papinian's fragmenta was not included in the Digest. Per Verhegen, both types of sale described in the above sources classify as conditional sale serving as a form of forfeiture mechanisms, but Marcianus' sale was allowable due to the fair price of the pledged property being reflective of its market value, in which case the surplus balance or excess in the sale over the value of the debt (*superfluum*) went to the debtor.[33]

In terms of the *lex commissoria* as a subsidiary agreement to the contract of sale, Romanists concur that it was used in classical Roman law.[34] In this context, provided that the subsidiary agreement was standardized, it was labelled *pactum* if it understood a bi- or multilateral declaration of intent, and *lex* if it understood a unilateral declaration of will.[35] This proposition extends to the *lex commissoria* as used both in the pledge and in the contract of sale, given that both legal relationships produce the additional obligation only upon one party (either the debtor or the buyer).

Another similarity is observable in the fact that in both contracts, the debtor's default affects the ownership of the concerned property: the pledged property transfers to the creditor or the sold property is returned to the seller.[36] It is possible that both the creditor and the seller were entitled to choose either to activate the *lex commissoria* in the contract or insist on the original contract and agreement(s), as if the *lex commissoria* had not been added.[37] Peters proposed that the customary contract of sale *lex commissoria* formulation from the D. 18,3,2 (*Pomponius libro 35 ad Sabinum*), namely, '*…Si ad diem pecunia soluta non sit, ut fundus inemptus sit…',* could have been used as a pledge contract *lex commissoria* with slight modifications: '*si ad diem pecunia soluta non sit, ut fundus emptus sit'*.[38] This theory was proposed in earlier literature as well: Dernburg and Burdese, and latter Peters, hypothesized it reasonable to assume that legal practice under Diocletian formulated the prescribed agreement of the pledge contract and assimilated it to the contract of sale *lex commissoria.*[39] In support of the said hypothesis, Peters contended that the verb *committere* in the above-cited sources may be translated as 'to expire' or 'to decay' (*verfallen*, in German), as can be seen in D. 3,3,35,3 (*Ulpianus libro nono ad edictum*), D. 35,2,70 (*Ulpianus libro 16 ad Sabinum*) or D. 30,114,3 (*Marcianus libro octavo institutionum*).[40] In this sense, the verb was also found in syntagms such as '*scelus committere'* and '*delictum committere'*, but Peters' translation holds only in the domain of the *lex commissoria* as used in the law of pledge, seeing as how it may be viewed as a sanction for non-performance of an obligation. The *lex commissoria* as added to the sale contract is different in this regard, given that it seemingly does not presuppose any fault on the part of the buyer aside from his delay.[41]

There exist certain differences between the pledge contract *lex commissoria* and the contract of sale *lex commissoria*. Firstly, if understood as a condition, *lex commissoria* within a contract of sale is more often a form of a resolutive one, whereas under a pledge contract, it is decidedly viewed as a suspensive one.[42] Ownership of the pledged property under *pignus* or *hypotheca* categorically remains with the debtor, and the transfer thereof suspended in the event of the debtor's default. A resolutive condition in such case would be a form of *fiducia cum creditore*, wherein the ownership of the pledged property would transfer to the creditor, which seems implausible.[43] Secondly, the con-

[33] VERHAGEN, HLE, The evolution of pignus in classical Roman law 'Ius honorarium and 'ius novum', In: TR, vol. 81, Nr. 1, 2013, p. 73–78.

[34] ARANGIO-RUIZ, V., *La compravendita in diritto romano,* 2nd edition Napoli, 1963, p. 400 *et seq.*; Levy, *op. cit.*, note 15, p. 261 *et seqq.*; WIEACKER, *op. cit.,* note 15. Widely used classical-period *pacta adiecta* were labelled *lex commissoria*, *in diem addictio* or even *pactum displicentiae*. However, given that the said labels are not of Roman origin, and some of them do not appear under the said exact label in the cited sources, they should be approached with caution. To exemplify, *pactum displicentiae* as a label emerged in the Middle Ages as a result of paraphrasing sentences that were used often in legal instruments, such as "*pactum ut si res si displicuerit intra cerum diem, inempta sit*". *Cf.* DIAZ RODRIGUEZ, E., *De la noción de contrato al pactum displicentiae en derecho romano,* Oviedo, 1998, p. 176; Sukačić, M., Nevaljanost potestativnih uvjeta u korist obveznika i pactum displicentiae, In: *Zbornik Pravnog fakulteta u Zagrebu* vol. 69, Nr. 1, 2019, p. 117, 118.

[35] HOHLWECK, M., *Nebenabreden: Pacta im römischen und im modernen Recht*, Bielefeld, 1996, p. 16–17.

[36] WESEL, U., Zur dinglichen Wirkung der Rücktrittsvorbehalte des römischen Kaufs, In: ZSS, vol. 85, 1968, p. 94–95.

[37] PETERS, *op. cit.,* note 1, p. 166; BURDESE, *op. cit.,* note 12, p. 116; *Cf.* LEVY, *op. cit.,* note 1, p. 188 *et seq.*

[38] PETERS, *ibid*.

[39] *ibid* ft. 105; DERNBURG, H., *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts,* vol. 2, Leipzig, 1864, p. 275; BURDESE, *op. cit.,* note 12, p. 123.

[40] PETERS, *op. cit.,* note 1, p. 166.

[41] PETERS, F., *Die Rücktrittsvorbehalte des Römischen Kaufrechts,* Köln, 1973, p. 73–76. In the contract law, *committere* is usually translated as to forfeit a right or an advantage or to incur a penalty by committing an act that was described in the agreement. Berger, *op. cit.,* note 1, p. 399. Zimmermann states that the term in the case of *lex commissoria* means to forfeit, in a sense that the ownership of the object of the sale, fell back, was forfeited to the seller. ZIMMERMANN, *op. cit.,* note 12, p. 737, n. 147. *Cf.* HEUMAN; SECKEL, *op. cit.,* note, p. 80.

[42] *Cf.* LEVY, *op. cit.,* note 1, p. 189.

[43] Namely, resolutive conditions as such were not in use in the period when *fiducia* become frequently used and received legal protection. It is considered that early classical jurist Julian from the second century AD had connected the term *condicio* with the description of the sale contract as not contracted conditionally but defeasible conditionally, as seen in D. 41,4,2,4 (*Paulus libro 54 ad edictum*)*…procedere iulianus putabat: alii et hanc sub condicione esse contractam, ille non contrahi, sed resolvi dicebat, quae sententia vera est. Cf.* EFFER-UHE, *op. cit.,* note 29, p. 125 *et seq.*; PETERS, *op. cit.* note 41, p. 119 *et seq.* More on Julian see in: HONORÉ, A. M., Julian's Circle, In: TR, vol. 32, Nr. 1, 1964, p. 1–44.; SCHULZ, F., *History of Roman Legal Science,* Oxford, 1964, p. 105 *et seq*. On the other hand, *actio fiduciae* as a legal remedy had emerged during the third or the second century Bc. *Cf.* KARLOVIĆ, *op. cit.,* note 18, p. 466 *et seq.* Frezza, and Kunkel consider it happened in the third century BC, while Noordaven sets it in the second century Bc. See more in: FREZZA, P., *Le garanzie delle obbligazioni, Corso di diritto romano, vol. II*, Padova, 1963, p. 66; KUNKEL, W., Fides als schöpferisches Element im römischen Schuldrecht, In: *Festschrift Paul Koschaker*, *vol*. II, Weimar, 1939, p. 9; NOORDRAVEN, *op. cit.*, note 17, p. 8.

tract of sale *lex commissoria* returns the ownership to the seller, i.e. to the party that had previously held ownership, while the pledge contract *lex commissoria* transfers ownership to the creditor, i.e. to the party that theretofore had not held ownership of the pledged property. Thirdly and lastly, within a contract of sale, the *lex commissoria* is a cancellation clause, whereas under a pledge contract it serves as a form of execution of the creditor's right of pledge.

The above-examined differences demonstrate that the purpose of the clause differs depending on the type of contract, and as such produces differing legal and political import. This is particularly evident from Constantine limiting the prohibition of the *lex commissoria* to pledge contracts only, even though the word *pignus* itself does not appear in the CTh 3,2,1. As previously stated, Constantine's constitution, titled *De commissoria rescindenda* (CTh 3,2), is found under *De contrahende emptione* (CTh 3,1), which was followed by *De patribus, qui filios distraxerunt* (CTh 3,2) and *De aediliciis actionibus* (CTh 3,4). The titles (as they translate to *The annulment of provisions for forfeiture* (CTh 3,2), *Contracts of purchase* (CTh 3,1), *Fathers who have sold their children* (CTh 3,3) and *Aedilican actions* (CTh 3,4)) strongly suggest that Constantine was referring to the *lex commissoria* in contracts of sale as well.[44] This was suggested by Dernburg, but refuted by later Romanists[45] on grounds of the last sentence of Constantine's constitution: *'Creditores enim re amissa iubemus recuperare quod dederunt'*, or *'For we order that creditors lose the (obligated) property while recovering what they gave'*[46]. Such a rule, while it could have been addressed to creditors (pledge contract), would have been illogical if addressed to sellers (contract of sale). The addition of the word *pignorum* by Justinian's compilers could have served as a clarification, to further distance the pledge contract *lex commissoria* from the contract of sale one.

The late-classical texts in the CI differentiate between the creditor buying or assuming ownership of the pledged property and the contract of sale *lex commissoria.* The latter, as stated previously, is regulated in D. 18,3 *De lege commissoria* and in CI 4,54 *De pactis inter emptorem et venditorem compositis*, which provide no indication of pledge rights. Unlike the contract of sale *lex commissoria* that is, as said above, discussed in a single place, mentions of circumstances in which the creditor buys the pledged property are scattered around the Digest, specifically, in the fragments that regulate pledge contracts (such as in D. 13,7,20,3 (*Paulus libro 29 ad edictum*), D. 20,1,16,9 (*Marcianus libro singulari ad formulam hypothecariam*) and D. 20,5,12pr. (*Tryphoninus libro octavo disputationum*)). This may or may not imply that the *lex commissoria* within the law of pledge was perceived as a variation of the contract of sale one. Furthermore, the above-cited sources, especially the previously discussed D. 20,1,16,9 (Marcianus' *libro singulari ad formulam hypothecariam*),[47] appear only to exacerbate the problem. As mentioned previously, Severus' and Antoninus' rescripts (in D. 20,1,16,9) allowed for *pignus* or *hypotheca* to be concluded in such a way that that if the debtor defaults, the creditor may elect to obtain the property as buyer at a fair price to be determined at that point. To the said emperors, such circumstances constituted a conditional sale (*condicionalis esse venditio*), but without labelling it *lex commissoria* or *commissoria rescindenda.*[48] This might be understood as the purchase of the pledged property by the creditor having been perceived as different from the *lex commissoria,* which in turn implies that there are insufficient sources to reconstruct what Constantine's *lex commissoria* actually was.[49]

4. Possible Reasons for Constantine's Prohibition

That the exact substance of the *lex commissoria* under a pledge contract cannot be determined should not prevent attempts to understand the reasons behind Constantine's prohibition thereof. Such reasons have been suggested by many a Romanist, among them Wigmore. He conjectured that the third-century abusive practicing of the *lex commissoria* – one such allowing the creditor, who would assume ownership of the pledged property, to not be obligated to return the instalments already paid theretofore (*superfluum*) back to the debtor – forced Constantine to abolish the *lex commisoria* entirely. In its final stage of transformation, in Justinian's day, the *lex commissoria* – or, rather, the right of pledge in its entirety – was supplanted by mandatory sale of pledged property.[50] Frezza reaffirmed that the said prohibition was to protect the debtor from suffering under the *lex commissoria* that would allow the creditor to withhold the *superfluum* were he (the creditor) to have assumed ownership of the pledged property as collateral.[51] Under such terms, the debtor would have lost both the pledged property and that which he had already paid. As hypothetical as this premise is, it coheres with the economic and monetary difficulties during Constantine's reign.

By contrast, Burdese hypothesized that Constantine's prohibition of the *lex commissoria* correlated with the earlier practice of the pledge by *fiducia cum creditore* (which Constantine endeavoured to prohibit as well) as it existed in the Hellenistic provinces, under which the creditor would assume ownership of the pledged property either way.[52] Similarly, Levy proposed that the *lex commissoria* (as forbidden by Constantine) was in fact the purchase of the pledged property by the creditor that existed

[44] PHARR, C., *The Theodosian Code and Novels and the Sirmondian Constitutions*, Princeton 1952, p. 63 – 65.
[45] DERNBURG, *op. cit.,* note 39, p. 275. *Cf.* VON LÜBTOW, U., *Catos leges venditioni et locationi dictae, (Symbolae R. Taubenschlag dedicatae III, 227—441), vol. 3,* Warsaw, 1958, p. 338 *et seq.*; LEVY, *op. cit.,* note 1, p. 190; PETERS, *op. cit.,* note 1, p. 167, ft. 108.
[46] FRIER, *op. cit.,* note 7, p. 2127–2129.
[47] D. 20,1,16,9: *Potest ita fieri pignoris datio hypothecaeve, ut, si intra certum tempus non sit soluta pecunia, iure emptoris possideat rem iusto pretio tunc aestimandam: hoc enim casu videtur quodammodo condicionalis esse venditio. Et ita divus Severus et Antoninus rescripserunt.*
[48] For a complete translation, see WATSON, A., *The Digest of Justinian, vol.* 2, Philadelphia, 1985, p. 127.
[49] PETERS, *op. cit.,* note 1, p. 168; LEVY, *op. cit.,* note 1, p. 189.
[50] WIGMORE, J. W., The Pledge-Idea: A Study in Comparative Legal Idea, In: *Harvard Law Review*, vol. 11, Nr. 1, 1897, p. 29.
[51] FREZZA, *op. cit.,* note 43, p. 225 *et seq.*
[52] BURDESE, *op. cit.,* note 12, p. 110 – 118. *Cf.* SIČ, *op. cit.,* note 5, p. 96.

in the late-classical and post-classical period.[53] Such practice could be observed as frequent during military anarchy, and consequently a reverberation of concepts of vulgar law.

In hypothesizing the characteristics of the *lex commissoria*, as far as earlier literature goes, Dernburg suggested that Constantine's prohibition of the *lex commissoria* might have applied only where the pledged property was to be sold even if a portion of the debt had already been paid, in which case it is unclear what would have happened with the remainder of the debt.[54] Per Dernburg, such sale of the pledged item in exchange for the final few outstanding debt instalments constituted abuse of the debtor's position. This theory is partially rooted in the closing sentence of the *Interpretatio* of Constantine's constitution in the CTh, which allowed for the pledged property as sold to the creditor to be bought back by the debtor if the creditor received repayment: '*qui oppressus debito vendidit, pecuniam reddat possessionem suam recipiat,*' or, as translated by Pharr, '*who sold when oppressed by debt, the creditor shall recover his money, and the debtor shall receive back his property*.'[55] However, were '*pecuniam reddat possessionem suam recipiat*' to be translated as 'shall recover money, shall receive back his property', which is a possibility, the provision in this segment would concern the debtor. As used this context, the term *pecunia*, or sum of money, might understand previously paid debt instalments rather than the entire debt.[56] This would mean that the *Interpretatio* targeted the refund of the *pecunia* that the debtor gave to the creditor, which interpretation would suggest that Constantine's prohibition of the *lex commissoria* could have been aimed at preventing the exploitation of the debtor who had both paid a certain share of the debt and lost the pledged property.[57] In turn, Constantine's *lex commissoria* might have actually targeted the instalments paid, which – in the case of forfeiture – would have remained with the creditor. As improbable as this theory appears, it is equally labyrinthine.

A compelling interpretation of Constantine's constitution, as offered by Romanists Kaser and Biscardi, suggests that Constantine did not aim to prohibit the agreement (clause) under the law of pledge that was customary to the classical period, but rather the practice that was transplanted from vulgar law and the law of economically and socially uncertain times of third century AD.[58] The importance of such agreements (under which the creditor would buy the pledged property if the debtor defaulted) as a common practice of that time was demonstrated by Rabel over a century ago.[59] The above interpretation of Constantine's constitution – as further supported by his own declaration (namely, '*Since, among other frauds, the harshness of the forfeiture clause (lex commissoria) for pledges has grown conspicuously*'[60]) – was challenged by Peters: why did not the constitution prohibit the *datio in solutum* and the *lex commissoria* in the contract of sale as well?[61] As is clear from Constantine's constitution, no such prohibition was imposed, even though both agreements performed similarly to the *lex commissoria* used in pledges, i.e. both were unfavourable upon the debtor. The question becomes more compelling if one adds to the equation the fact that Constantine's constitution in the CTh is found under the first title of the third book, titled *De contrahende emptione* (CTh 3,1), that concerns the sale contract. However, given that the *datio in solutum* decidedly did exist and was applicable in Justinian's era, it could not have equated with the pledge *lex commissoria*. Given the aforesaid as well as the scarcity of relevant sources, it is not possible to identify the sum of the characteristics of the *lex commissoria* in Constantine's time.

Another Peters' theory suggests that Constantine's prohibition only applied to pledge contracts that vastly disproportioned between the value of the pledged property and the amount of the secured claim.[62] This engaging and sensical theory could even be juxtaposed with the dogma of *leasio enormis* – another post-classical novelty that served to prevent the exploitation of the more exposed and less erudite party to the contract.[63] However, due to the scarcity of further sources, the said theory cannot be verified. Furthermore, it is conceivable that Constantine's intention was to abolish predatory contracts that were imposed on economically weak debtors, as evident from the *Interpretatio*: '*per necessitatem conscripta cautione*', or '(*a debtor*) *through necessity promises in a written acknowledgment* (*of debt*)', as translated by Pharr.[64] Peters also questioned why such agreement is attached with neg-

[53] LEVY, *op. cit.,* note 1, p. 189.
[54] DERNBURG, *op. cit.,* note 39, p. 278.
[55] See the whole *Interpretatio* in Latin in note 4. Pharr has translated it as: Those written acknowledges of debt are called agreement for forfeiture in which a debtor through necessity promises in a written acknowledgment of debt to sell to his own creditor a thing which he had pledged for a time to the creditor. This law cancels any such agreement for forfeiture which has been made and absolutely prohibits one to be made. Thus, if any creditor should appear to have bought property of his debtor under such pretext, he shall not delude himself with written documents, but soon as a debtor wishes, who sold when oppressed by debt, the creditor shall recover his money, and the debtor shall receive back his property. [*trans. cit.* PHARR *op. cit.,* note 44, p. 64 – 65]. *Cf.* SIČ, *op. cit.,* note 8, p. 69.
[56] PETERS, *op. cit.,* note 1, p. 164 – 165, ft. 97.
[57] *ibid*.
[58] KASER, *op. cit.,* note 19, p. 565; Arnaldo Biscardi, 'La lex commissoria nel sistema delle garanzie reali' in *Studi in onore di Emilio Betti, vol. 2*, (1962) 584 [unavailable, quoted by PETERS, *op. cit.,* note 1, p. 163, ft. 90]. *Cf.* VON LÜBTOW, *op. cit.,* note 45, p. 337.
[59] RABEL, E., Nachgeformte Rechtsgeschäfte: (Schluß), In: ZSS, vol. 28, 1907, p. 360–362.
[60] FRIER, *op. cit.,* note 7, p. 2127–2129.
[61] PETERS, *op. cit.,* note 1, p. 163.
[62] *ibid*., p. 164.
[63] *Cf.* TORO, *op. cit.,* note 25, p. 172. On *leasio enormis* see HORVAT, M., Prekomjerno oštećenje (laesio enormis), In: HORVAT, M. *et al* (eds.), *Hrestomatija rimskog prava*, Zagreb 1998., p. 151–193; PETRAK, M.; ŽIHA, N.; JUSZTINGER, J., Universal foundations of local laws – example of 'just price' (iustum pretium), In: DRINOCZI, T.; ŽUPAN, M. (eds.), *Law – Regions – Development*, Pecs – Osijek, 2013, p. 308 *et seq*.; WESTBROOK, R., The Origin of Laesio Enormis, In: *Revue internationale des roits de l'antiquité*, vol. 55, 2008, p. 39–52.
[64] PHARR, *op. cit.,* note 44, p. 65.

ative connotations only, seeing as how it occasionally might have benefited the debtor that the creditor appropriated the pledged property in exchange for outstanding debt.[65] Peters' premises are quite convincing, especially given that in certain cases, e.g. where the pledged property could not be sold for a right and just price, it would have benefited both parties to resolve the debt by creditor's assumption of ownership. At any rate, the theories presented here are largely speculative in nature.

Sič's angle suggests that Constantine's constitution from the CTh 3,2 does not mention pledges (*pignus* or *hypotheca*) because it prohibits both private appropriations of the debtor's (pledged) property on the basis of the private contract and the forfeitures made by public officers in the process of tax collection.[66] This argumentation is supported by another Constantine's constitution from the CTh 12,6,2,1, specifically the syntagm '*legem commissi frustratus incurrat*', or '*to become liable to the law of forfeiture*',[67] which applied to imperial emphyteutic and patrimonial estates that were forfeited if the rental was not promptly paid.[68] In the said constitution Constantine refers to circumstances in which taxpayers wanted to pay the tax, but tax receivers refused to accept the payment, in awaiting the activation of the *legem commissi.* Such fraudulent conduct was sanctioned by obligating tax receivers to pay to the treasury double the amount of the tax due by the taxpayer. Such conduct was also described in Valentinian's and Valens' constitutions from 364 AD as compiled in CTh 5,15,15 (*in commissi fortunam inciderint*), and prohibited in the subsequent constitution from the same year:

> CTh 5,15,16 *Idem aa. ad provinciales Byzacenos: Nequaquam emphyteuticos fundos ante commissi vitium ad alterum transire debere sancimus. Et cetera. Dat. prid. id. sept. Aquileia divo Ioviano et Varroniano conss. (364 sept. 12).*[69]

Valentinian and Valens prohibited the appropriation of imperial lands by tax receivers who were private persons. Sič conjectures that the said texts, coupled with Constantine's constitution from CTh 3,2,1, in fact discuss the abuse of the right of forfeiture of imperial lands by private persons for their own financial gain.[70] This was partially confirmed by Pharr in his footnote on the translation of the CTh Nov. Marc. 2,2: tax collectors often contracted to assume the taxpayer's debt with the sole intention of reaping large profits. By doing so, tax collectors essentially converted the public debt into a private one, by lending money with the usage of the signed note or of the private stipulation.[71] The arguments, as presented, support the observing of the interpretation of Constantine's prohibition of the *lex commissoria* through the lens of fiscal interest. However, although the presented theory is substantiated by several sources, Constantine's constitution in CTh 3,2,1, as later transposed in the C. I. 8,34,3 does not seem to have in any way referred to tax evasion or tax paying scams as committed by tax collectors. While a plausible theory, it lacks evidence that supports it. Rather, it continues to hold that Constantine targeted any type of *lex commissoria* used in pledges, especially so given the opening of the constitution: '*Since, among other frauds, the harshness of the forfeiture clause (lex commissoria) for pledges has grown conspicuous*[72]'. Had he intended to address the issue of tax collection, he would have, and, if not his, Justinian's compilations surely would.

Even though the exact reasons for the prohibition of the *lex commissoria* may never be known, the fact that it placed a great burden on debtors must have attributed to the imposing thereof. While the above theories resist many a challenge, they do not elucidate why the prohibition was limited to pledges, and excluded the *datio in solutum, contracts of sale lex commissoria, and other legal practices that were patently favourable to creditors. If speculating, the practice of contracting the pledge lex commissoria might have been on a constant rise, and damaged debtors to such a degree that the emperor had to intervene.*

5. *Lex Commissoria* in the Contemporary Croatian Law of Pledge

The legal principle behind the prohibition of the forfeiture clause was transposed to the contemporary Croatian law of pledge. *De lege lata,* pledges take several forms in the Croatian law of pledge, the distinguishing feature being the manner of acquiring the right (of pledge) by way of *pignus*, *hypotheca*, and judicial and notarial security of the claim by fiduciary transfer of ownership, usually termed *fiducia*.[73] *Pignus* and *hypotheca* are prescribed in the Act on Ownership and Other Real Rights, the *lex generalis* on real rights in Croatia,[74] while the judicial and notarial security of the claim by fiduciary transfer of ownership is prescribed by the Execution Act.[75] Whereas the judicial and

---

[65] PETERS, *op. cit.,* note 1, p. 165.
[66] SIČ, *op. cit.,* note 5, p. 93.
[67] *ibid*. p. 99.
[68] PHARR, *op. cit.,* note 44, p. 372 ft. 7.
[69] CTh 5,15,16: The same Augustuses to the Provincials of Byazacium: We declare that by no means shall an emphyteutic estate pass to another person before the fault of forfeiture has been incurred. Etc. Given on the day before the ides of September ad Aquileia in the year of the consulship of the sainted Jovian and Varronianus. September 12, 364. [*trans. cit.,* PHARR, *op. cit.,* note 44, p. 114].
[70] SIČ, *op. cit.,* note 5, p. 101; *idem, op. cit.,* note 8, p. 72.
[71] PHARR *op. cit.,* note 44, p. 564, ft. 7 and p. 552, ft. 8.
[72] FRIER, *op. cit.,* note 7, p. 2127 – 2129.
[73] DIKA, M., *Građansko ovršno pravo, vol. 1,* Zagreb, 2007, p. 784 – 822; GAVELLA, N. *et al, Stvarno pravo, vol. 2*, Zagreb, 2007, p. 123 and 496 *et seq.*; JOSIPOVIĆ, T., Nova stvarnopravna osiguranja tražbina u Republici Hrvatskoj, In: JOSIPOVIĆ, T. (ed.), *Stvarnopravna uređenja tranzicijskih zemalja – stanje i perspective*, Zagreb, 2009, p. 431 – 484; KLARIĆ, P.; VEDRIŠ, M., *Građansko pravo,* Zagreb, 2014., p. 341 – 342 and 358 – 361.
[74] In Croatian Zakon o vlasništvu i drugim stvarnim pravima (NN 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14). See part seven named Lien (Založno pravo). Unofficial English translation available on the website of the Croatian Judicial Academy (outdated): <http://pak.hr/cke/propisi,%20zakoni/en/OwnershipandOtherRealRights/EN.pdf> accessed 3 November 2020.
[75] In Croatian Ovršni Zakon (NN 112/12, 25/13, 93/14, 55/16, 73/17). See part thirty titled 'Judicial and notarial security of the claim by fiduciary transfer of ownership'. The unofficial translation in the English is available on the website of the Supreme Court of the Republic of Croatia (outdated): <http://www.vsrh.hr/EasyWeb.asp?pcpid=286> accessed 3 November 2020.

notarial security of the claim by fiduciary transfer of ownership is the latest form of pledges in Croatian law, the exact form of *fiducia* had existed under the Act on Ownership and Other Real Rights and the Civil Obligations Act.[76]

Article 307 of the Act on Ownership and Other Real Rights frames the pledge contract as such and lists the clauses prohibited from being included therein. The inclusion of any prohibited clause into the pledge contract cannot produce any legal effect. Paragraph 4 of the said article explicitly states that any terms of the pledge agreement that would entitle the creditor to assume ownership of the pledged property if the debtor defaulted will be null and void. Gavella as well as Klarić and Vedriš, the eminent authors of property and private law textbooks, respectively, weight it as one of the cardinal rules of the law of pledge, and collocate it with the *lex commissoria*. Gavella hypothesizes that the invalidity of the impermissible clauses, as rooted in the fact that the creditor holds the right of pledge, but not ownership of the pledged property, rests on the notion that any other formula would constitute exploitation of the debtor's burdensome position. By contrast, Klarić and Vedriš view the prohibition as motivated by the need to protect the debtor, given that such a clause would render his position particularly vulnerable.[77]

In a compelling argument for the prohibition of the *lex commissoria,* Klarić and Vedriš observed that the clause would maintain if added subsidiarily, and as such circumvent the respective prohibition.78 An identical reasoning was provided in a 1999 decision of the Supreme Court of the Republic of Croatia, wherein the court confirmed that a subsidiarily added clause under which the debtor would transfer the ownership of the pledged property to the creditor in exchange for debt payment is valid.79 In its chain of argument, the court found that such a formula is permitted as a substitution of performance, as provided for in Article 167 of the Civil Obligations Act.80 The said article accommodates the extinguishing of the debtor's obligation where the creditor accepts an object other than that owed to him, and could be viewed as a contemporary *datio in solutum.* But could (and should) the provision accommodating of the *lex commissoria* cancel the provision prohibiting the *lex commissoria*? While substitution of performance allows satisfaction by way of accepting an object other than was owed, it is debatable whether it can maintain in the domain of the law of pledge (i.e. whether pledged property may be offered as said object) or is simply of a higher legal order than the prohibition of the *lex commissoria*. *Argumentum a contrario,* the prohibition of the *lex commissoria* from Article 307 prescribes the (im)permissible terms of the pledge contract only. As it is, any such legal deliberation seems to be solely aimed at engineering a way to bend the *lex commissoria institute*.

By contrast, in 2007, the Municipal Court of Varaždin confirmed the provisions of Article 307 of the Act on Ownership and Other Real Rights.[81] The case involved a loan secured with the *hypotheca* pledge over immovable property which transferred into ownership of the creditor when the borrower defaulted. Interestingly, in the rationale of its decision, the court used the term *lex commissoria* expressly and declared it contrary to the above-said provisions.

That the outdated principle of the *lex commissoria*, as abandoned in comparative legal systems, should be redefined has been proposed in literature,[82] and, similarly, in recent EU legislation, specifically Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (Mortgage Credit Directive).[83] In its preamble, said directive chronicles how the financial crisis motivated market participants' irresponsible behaviour that resulted in severe social and economic consequences. Further, the directive sets as its purpose the ensuring of 'consistent, flexible and fair credit agreements relating to immovable property, while promoting sustainable lending and borrowing and financial inclusion, and hence providing a high level of consumer protection'. Additionally, under the Mortgage Credit Directive (Article 28, titled Arrears and foreclosure), contracting parties to a credit agreement are allowed to expressly agree that transfer or return of the pledged property (the Directive uses the term 'security') to the creditor be sufficient to repay the credit. Essentially, this provision placed an obligation on member states of the European Union (hereinafter: EU), one such being Croatia, to allow the *lex commissoria* in credit agreements with the aim of protecting the debtors, i.e. to implement the said provision into national legislation,

[76] In Croatian Zakon o obveznim odnosima (NN 35/05, 41/08, 125/11, 78/15, 29/18). See title six, chapter one, section one titled 'Assignment of claim (cession)'. The unofficial translation in the English is available on the website of the Supreme Court of the Republic of Croatia (outdated): <http://www.vsrh.hr/EasyWeb.asp?pcpid=286> accessed 3 November 2020. On this topic see ERNST, H.; MATANOVAC VUČKOVIĆ, R., Prijenos prava radi osiguranja – nedorečenosti i nedovršenosti, In: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci,* vol. 33, Nr. 1, 2012, p. 147–148; KARLOVIĆ, T., Fiducijarni prijenos vlasništva i trust – uvodna razmatranja o mogućnosti primjene Haške konvencije o pravu mjerodavnom za trust i o njegovom priznavanju, In: *Zbornik radova Pravnog fakulteta u Splitu*, vol. 55, Nr. 3, 2018., p. 586–590.

[77] GAVELLA, *op. cit.,* note 73, p. 188, ft. 42 deliberating of *lex commissoria* in Roman law. See also KLARIĆ; VEDRIŠ, *op. cit.,* note 73, p. 359.

[78] *Ibid*.

[79] VSRH Rev 1226/1995-2.

[80] Article 308 of the 1978 Civil Obligations Act in force at that time.

[81] ŽS Vž Gž 560/2006-4. For more examples, see ŽUVELA, M., *Vlasničkopravni odnosi,* Zagreb, 2014, p. 666 – 670.

[82] Mihelčić and Ernst had conducted the comparative research of the French *Code Civil*, the German *Bürgerliches Gesetzbuch*, the Austrian *Allgemeines bürgerliches Gesetzbuch*, the Italian *Codice civile* and the Croatian law approach to *lex commissoria,* with the enumeration of various examples of its permissibility. They conclude that the Croatian law does not forbid the *lex commissoria* agreement concluded after the maturity of the debt. However in the case of the *fiducia* agreement, regular approach is the sale of the pledged property by a public notary, while the creditor's acquiring of the ownership of the pledged property is the alternative, for which in needed either the debtors consent or his passivity, as prescribed by the Execution Act. MIHELČIĆ, G.; ERNST, H., Redefiniranje zabrane legis commissoriae, In: *Pravo i porezi*, vol. 10, 2013, p. 30–36.

[83] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L 60.

specifically by 21 March 2016. Since foreclosure proceedings are usually connected with additional expenses for debtors and consequentially lead to long-term over-indebtedness, it seems that the whole idea is to skip them with the possible transfer or return of the pledged property.

In Croatia, the said obligation produced the Act on Consumer Housing Loans.[84] Its Article 28 provides for a clause to the credit agreement under which the transfer to the credit institution of ownership of immovable property pledged as security (against a consumer housing loan to the credit institution) shall fully satisfy the obligations of the debtor under the consumer housing loan agreement. Thus, the said act *de facto allowed the direct lex commissoria in pledges, but strictly limited to the criteria as described therein*[85] under which the clause will maintain.

While the above legal solution resulted from the obligation to comply with EU legislation, it might have been cleverer to have included the said provision into the Act on Ownership and Other Real Rights as the principal legislative source of fundamental rules of the law of pledge. Specifically, it could have been included either by way of amending paragraph 4 of Article 307 or by supplementing Article 307 with a new paragraph. The amendment to the wording of the original prohibition is a sound proposition, especially given the need to redefine it, as proposed by Mihelčić and Ernst.86 Promulgation of new acts that rescind general rules in fact effects the opposite on the right of the consumer to be informed, such right being a concept endorsed broadly in the EU's consumer-related legislation.87 Nevertheless, while the provision prohibiting the *lex commissoria* indisputably is no longer applicable in contemporary Croatian law, it denotes an improvement in the consumer's, i.e. debtor's position.

6. Conclusion

While the CTh 3,2,1 does not explicate the *lex commissoria*, the *Interpretatio* notes it was a subsidiary clause to the pledge contract, as was more distinctly stated in the CI 8,34,3. Interestingly, while it did not clearly define the *lex commisssoria*, Constantine's constitution inarguably prohibited it. The issue of the *lex commissoria* must be observed from both the historical and economic point of view. Marked by a declining economy as the late-classical period was, the number of credit applicants rose. Given their lack of money and political power, they had no choice but to accept any conditions and terms creditors offered. In all probability, such circumstances bolstered the application of the *lex commissoria*, which was highly favourable upon creditors. Considering that Constantine's constitution does not define the *lex commissoria* expressly, it is conceivable that it was commonly used and understood.

In observing the legal nature of the *lex commissoria* under the law of pledge, Romanists' hypotheses that it could be understood as a condition stand to reason: if the debtor defaults, the creditor will assume ownership of the pledged property. This notion is comparable to the *lex commissoria* in the contract of sale: if the buyer (the debtor) defaults, the seller (the creditor) will assume ownership of the sold (pledged) property. Perhaps this explains the identical names of the clause in both the pledge and the contract of sale.

The reach of Constantine's prohibition of the *lex commissoria* is difficult to estimate with certitude, especially considering the period of the Roman era in which the constitution was enacted. It is conceivable that Constantine was addressing certain aspects of the contract of sale *lex commissoria,* and Justinian's compilers later added the word *pignus* to steer its legal nature as they felt inclined to. Yet, it seems unlikely that they would modulate the constitution to such extent. At any rate, the underlying principle as declared in the opening and the closing of Constantine's constitution is the protection of the debtor. As Peters noted, whether it was helpful at all is debatable, as are the reasons why the debtor was not protected in other situations, such as from the *datio in solutum* or the contract of sale *lex commissoria.*

The current theory of the Croatian law of pledge subscribes to the definition of the *lex commissoria* as offered in the Romanist literature referenced herein. The Act on Ownership and Other Real Rights prohibits the *lex commissoria* expressly, without allowing any exceptions to its automatic voidance if contracted. However, where proven to be in the interest of the debtor, as it is in the case of consumer housing loan agreements, the said prohibition is nulled *de lege lata* by the binding EU consumer protection legislation and the resultingly adopted Croatian act. This translates to the notion that, in certain cases, the *lex commissoria* might well be (and have been) beneficial to both the creditor and the debtor. In effect, given that the legal practice and theory seemingly allow a margin for such cases, i.e. the (narrow) possibility to circumvent it, the prohibition defeats its own purpose – the protection of the debtor. Thus, the actual purpose and effect of the prohibition of the *lex commissoria* both in ancient Roman and contemporary Croatian law of pledge remain inconclusive at the least. As it is, the *lex commissoria* should be reassessed in contemporary Croatian law.

---

[84] In Croatian Zakon o potrošačkom stambenom kreditiranju (NN 101/17). The unofficial translation in the English is available on the web site of the Croatian National Bank: <https://www.hnb.hr/documents/20182/2135754/e-zakon-stambeno-potrosacko-kreditiranje_101-2017.pdf> accessed 3 November 2020.

[85] Article 3 of the Act on Consumer Housing Loans defines all three parties to said agreement, namely, the consumer in paragraph 3, the credit institution in the paragraph 9 and the agreement on a consumer housing loan in paragraph 4.

[86] MIHELČIĆ; ERNST, *op. cit.,* note 82.

[87] HADFIELD, G.; HOWSE, R.; TREBILCOCK, M., Information-Based Principles for Rethinking Consumer Protection Policy, In: *Journal of Consuler Policy*, vol. 21, 1998, p. 131–169; BARETIĆ, M., Zaštita potrošača u Europskoj zajednici, In: GAVELLA, N. *et al., Europsko privatno pravo,* Zagreb, 2002, p. 191 – 192; BENÖHR, I., *EU Consumer Law and Human Rights,* Oxford, 2013, p. 157–159; BUSCH, C., The future of pre-contractual information duties: from behavioural insights to big data, In: TWIGG- FLESNER, C. (ed.), *Research Handbook on EU Consumer and Contract Law,* Cheltenham, 2016, p. 221–241.

Deprivation of Citizenship Status in Croatia and Yugoslavia in the Aftermath of the Second World War

*Ivan Kosnica**

Abstract

The paper deals with deprivation of citizenship status in Croatia and federal Yugoslavia, in which Croatia was one of federal units, in the aftermath of the Second World War. The main questions the author refers to are regulations and practice of deprivations and its implications on the concept of citizenship. The author concludes that in Croatia and Yugoslavia in the aftermath of the Second World War existed and were implemented wide deprivations of citizenship. According to the author, this situation reflected different definition of citizenship which was now defined more in republican and communitarian way.

Keywords: *Croatia; Yugoslavia; citizenship; deprivation; revocation.*

1. Introduction

Deprivation of citizenship, in the literature and regulations also named as deprivation of nationality,[1] denationalization[2] or citizenship revocation,[3] is one of modes of losing citizenship status that often coexists in a specific legal order with other ways such as marriage, dismissal, renunciation, absence and emigration. Specific of this way of losing citizenship status is that the state authority terminates citizenship of a person unilaterally, in principle independently of the will of a citizen.

Historical and comparative analysis indicates that limited normative possibilities of citizenship deprivations existed already during 19th century[4] while large-scale deprivations occurred during 20th century. Notable are examples of mass deprivations after the communist revolution in the Soviet Union in 1921,[5] mass deprivations in Nazi Germany before and during the Second World War,[6] deprivations in Vichy France during the Second World War,[7] and deprivations of citizenship in the aftermath of the Second World War.[8] Mass deprivations of citizenship were often part of totalitarian or authoritarian regimes, but the problem itself does not end within the realm of totalitarian or authoritarian states. This because many states, which we typically perceive as democratic ones like the United Kingdom, Canada and Australia, provide in their legal orders

* Izv. Prof. Dr. sc. Ivan Kosnica, The Chair of Croatian History of Law and State, Faculty of Law, University of Zagreb, Croatia.

1 Cf. GROOT, R., BÜCKEN, L., Deprivation of nationality under article 8 (3) of the 1961 Convention on the reduction of statelessness. In: Maastricht Journal of European and Comparative Law, vol. 25, nr. 1, 2018, p. 38-51; Cf. BRANDVOLL, J., Deprivation of nationality. Limitations on rendering persons stateless under international law. In: EDWARDS, A, WAAS, L., Nationality and Statelessness under International Law. Cambridge University Press, 2014, p. 194-216.

2 Cf. ALEINIKOFF, A. T., Theories of Loss of Citizenship. In: Michigan Law Review. vol. 84, nr. 7, 1986, p. 1471-1503, p. 1473.

3 Cf. PÉLABAY, J., SÉNAC, R., Citizenship revocation: a stress test for liberal democracy. In: Citizenship Studies, vol. 23, no. 4, 2019, p. 388-405.

4 Cf. art. 20 of the German Law on the Acquisition and Loss of Confederative and State Citizenship of 1870 which prescribed possibility of citizenship deprivation in the case of war to Germans residing abroad if they refuse to return home and art. 22 of the same law about possibility of deprivation of German citizenship to a German citizen employed in a service of a foreign state it he refuse to leave the office. Cf. the Law on the Acquisition and Loss of Confederative and State Citizenship of 1870. Cf. the Law in: Gesetz über die Erwerbung und den Verlust der Bundes- und Staatsangehörigkeit<fn>29</fn><E> (ghi-dc.org) (accessed, 27 April 2021).

5 The authorities of the Soviet Union by the decree of 1921 launched mass deprivations of citizenship to Russian emigrants who escaped during the Communist revolution. Cf. RÜRUP, M., Lives in Limbo: Statelessness After Two World Wars. https://www.ghi-dc.org/publication/bulletin-49-fall-2011 (accessed: 19 March 2021), p. 113-134, p. 122; According to some estimations, the Soviet Union deprived of citizenship around one and a half million citizens. Cf. ARENDT, H., The Origins of Totalitarianism. Cleveland and New York, 1962, p. 277.

6 The authorities of Nazi Germany conducted mass deprivations that affected Jews already in 1933. Cf. ARENDT, *op. cit.,* p. 277.

7 Vichy France in 1940 introduced possibilities of deprivation of citizenship to those "who had left France without government authorization between 20 May and 30 June 1940" and, inspired by the Nazi law, reviewed naturalizations given by French authorities since 1927. In addition, they made possible deprivation of citizenship to citizens placed outside the metropolitan territory if "betrayed by his actions, speeches or writings the duties incumbent upon him as a member of the national community". WEIL, P., How to be French: Nationality in the Making since 1789. Durham and London, 2008, p. 87-88.

8 Cf. RÜRUP, *op. cit.*, p. 124.

although limited possibilities of citizenship deprivations.[9] Actuality of the issue nowadays is mostly result of war on terror and efforts of many countries to tackle this problem.[10]

This essay aims to deal with the historical dimension of the concept of citizenship deprivation as defined in Croatia and Yugoslavia[11] in the aftermath of the Second World War. The new regulations but also to some extent practice of deprivations of citizenship status[12] are of central interest in this paper. Therefore normative analysis and to some extent practical repercussions are taken into consideration. The paper however does not end with the normative analysis and practical repercussions but aims to go beyond the legal norm and to provide insights about significance of the regime of citizenship deprivations for the concept of citizenship in Croatia and Yugoslavia in the aftermath of the Second World War.

Therefore, in the first part of the paper we reflect about deprivation of citizenship and its significance for the concept of citizenship. In addition, we analyze deprivation of citizenship in the Kingdom of Serbs, Croats and Slovenes/Yugoslavia in the period from 1918 to 1941. This part represents tradition and to some extent possible point of reference for analysis of the regulations and practices of citizenship deprivations in Croatia and Yugoslavia in the aftermath of the Second World War. Then follows an analysis of regulations and practices of citizenship deprivations in Croatia and Yugoslavia in the aftermath of the Second World War. The normative and to some extent practical dimensions of deprivations are included while at the same time we reflect about deeper implications of the regime of citizenship deprivations on the concept of citizenship in Croatia and Yugoslavia.

2. Deprivation of citizenship and its significance for the concept of citizenship

The issue of citizenship deprivation is of huge importance for political and legal position of an individual. This because a person deprived of his citizenship cease to be a member of political community[13] and becomes a stranger. Sensitivity of the issue reflect the fact that in the case of deprivation the state authority in most cases unilaterally takes away citizenship of a person independently of his will.

The aforementioned observation obviously indicates exclusionary effects of citizenship deprivations. Building his argument on this notion, Ben Herzog concluded that not just naturalization but also denaturalization (deprivation of citizenship) can give us valuable insights about the concept of citizenship in a specific state.[14] In other words, the concept of deprivation of citizenship, its normative but also practical dimensions, indicate which persons the authorities of a specific state do not want to recognize as citizens anymore. Therefore studying the concept of deprivation of citizenship can provide us with valuable insights about ›desirable‹ and ›undesirable‹ citizens, and values that all or some groups of citizens (n.b. naturalized citizens) had to comply with. Beyond the notions about ›desirable‹ and ›undesirable‹ citizens, hidden are conflicts between different visions of the concept of citizenship.

By taking into consideration general interconnections between citizenship deprivations and the concept of citizenship, Pélabay and Sénac went a step further and developed in our opinion useful matrix that can be used for analysis of these relations. Pélabay's and Sénac's argument approaches to the problem of these interconnections in a way that takes into account different dimensions of citizenship. They rely on rich literature about citizenship as multidimensional concept and indicate that citizenship means "legal status with a focus on individual rights", then "political participation as a civic virtue" and lastly focus on "collective identity".[15] According to Pélabay and Sénac each dimension of citizenship reflects different approaches to citizenship. The first approach that underlines citizenship as legal status and focuses on individual rights reflects liberal doctrine about citizenship, the second approach that focuses on "political participation as a civic virtue" reflects republican approach while the third approach, which focuses on "collective identity", reflects communitarian approach to citizenship.[16]

For each approach, there is specific set of arguments that is used for elaboration of the concept of citizenship and answering the question what citizenship should mean and what it has to be like. Prevalence of liberal, republican or communitarian arguments also indicates strengthening one dimension of citizenship be it liberal, republican or communitarian.

On the level of specific regulations about citizenship deprivation one can therefore notice different arguments that are included in or are hidden behind specific legislative solutions. For instance, speaking in the terms of *ideal types,* there are two

[9] Cf. PILLAI, S., WILLIAMS, G., Twenty-first Century Banishment: Citizenship Stripping in Common Law Nations. In: International & Comparative Law Quarterly, vol. 66, nr. 3, 2017, p. 521-555, p. 532-550; Data for the United Kingdom for the period between 2006 and 2015 indicate that there were 81 deprivations of citizenship. Among these, in 36 cases reasons of deprivations were "public good" and in 45 cases deprivation followed because these citizens achieved registration or naturalization based on "fraud, false representation and concealment of a material fact". UK Visas and Immigration, Home Office. https://www.whatdotheyknow.com/request/318785/response/827666/attach/3/CCWD%20FOI%2038734%20Final%20Response.pdf (accessed: 19 March 2021).

[10] Cf. FARGUES, É., WINTER, E., Conditional membership: what revocation does to citizenship. In: Citizenship Studies, vol. 23, no. 4, 2019, p. 295-303, p. 295; Cf. https://www.migrationpolicy.org/article/foreign-fighters-will-revoking-citizenship-mitigate-threat (accessed: 26 April 2021).

[11] Since at that time Croatia was one of federal units in the communist Yugoslavia, the paper relates to Yugoslavia as well.

[12] The paper relates to deprivations of citizenship status and not to deprivations of citizenship rights n. b. deprivations of civil and political rights that played significant role in the Croatian and Yugoslav post-war period as well.

[13] Cf. HERZOG, B., ADAMS, J., Women, Gender, and the Revocation of Citizenship in the United States. In: Social Currents, vol. 5, nr. 1, 2018, p. 15-31., p. 15.

[14] HERZOG, B., Revocation of Citizenship in the United States. In: European Journal of Sociology / Archives Européennes de Sociologie / Europäisches Archiv für Soziologie, vol. 52, no. 1, 2011, p. 77-109, p. 78, 83.

[15] Cf. PÉLABAY, SÉNAC, *op. cit.*, p. 391-392.

[16] Cf. PÉLABAY, SÉNAC, *op. cit.*, p. 391-392.

possible situations, one in which unilateral termination of citizenship by the state authority is not possible at all and the other in which unilateral termination of citizenship by the state authority is always possible. Each of these situations reflects prevalence of liberal, republican or communitarian arguments.

Speaking about the first *ideal type* one can argue that in this situation an individual and his rights are the central point of reference. His conduct, even dangerous one for the interests of a state and of a community would not result in termination of citizenship. Such situation emphasize an individual and his rights while does not take into account possible interests of a state or of a community. Speaking about the concept of citizenship one can argue that this situation reflects liberal dimension of citizenship. As Aleinikoff put it, keywords of liberal theory are freedom, choice and consent.[17] Therefore, deprivation of citizenship taken by the state authorities without citizen's consent would be unacceptable.

On the other end of the spectrum, there is situation when ideally speaking state authorities could always terminate citizenship. This *ideal type* emphasize republican and communal arguments over liberal ones. Prevalence of republican and communal arguments also means prevalence of republican and communitarian dimension of citizenship. As an important aspect of republican argumentation, Pélabay and Sénac point out "the pursuit of the public good over that of private interests, and the fulfilment of duties and responsibilities over that of individual rights and preferences".[18] Together with republican views goes communitarian argumentation that emphasizes collective identity as a central point of reference.[19] As Aleinikoff put it, communitarian doctrine defines citizenship as "an organic relationship between the citizen and the state".[20] Such organicist understanding of citizenship negates individualist position of a citizen in a society and means defining of a citizen primarily as a member of the community. To sum up, while republican and communitarian approach slightly differ, they both "converge" since for the republican and for the communitarian approach bottom line is giving priority "to membership of a body of citizens whose (…) collective identity is shaped by a particular way of life and historical legacy".[21] Such value-defined citizenship also enables much easier justification of citizenship deprivations to specific citizens or groups of citizens.

In sum, the tension between liberal and republican/communitarian arguments manifests as a tension between a right of a citizen to keep its citizenship no matter of his conduct and interests of a state authority and of a community to strip citizenship of a person in a case when citizen's conduct endangers interests of a state or of a community. The statement about right of a citizen to keep its citizenship no matter of his conduct is backbone of liberal doctrine, while the statement about right of the state or of the community to strip citizenship to persons when they infringe interests of that state or of the community is backbone of republican/communitarian doctrines of citizenship law.

3. Deprivation of citizenship in the Kingdom of Serbs, Croats and Slovenes/Yugoslavia – tradition

In the Kingdom of Serbs, Croats and Slovenes after its formation on 1 December of 1918 on each of six legal areas valid were six different regulations about citizenship status.[22] Among these regulations, only the Law on acquisition and loss of Hungarian citizenship of 1879 contained rules about deprivation of citizenship.[23] The law provided one mode of citizenship deprivation by stating that state authority can deprive a citizen of his citizenship if the citizen works in an office of a foreign state without approval of state authority.[24] Before enactment of a decision, administrative authority had to call involved citizen to leave foreign office and an involved citizen had to refuse to leave the office.[25] Aforementioned mode of deprivation was limited on relatively narrow circle of state and other public servants and it was dependent on the will of a citizen. What is more, although the Law on acquisition and loss of Hungarian citizenship of 1879 was formally still valid in Croatian-Slavonian legal area and in the former Hungarian legal area of the Kingdom due to political and constitutional changes application of this law was limited and state authorities could apply the norms of that law only *mutatis mutandis*.[26] Therefore, one could say that the concept of deprivation of citizenship did not play an important role in legal practice after 1918.

Nevertheless, significant changes bring the first Citizenship Law of the Kingdom of Serbs, Croats and Slovenes, enacted on 21 September 1928.[27] The Law defined the citizenship as one for all the Kingdom and prescribed rules for determination, ac-

[17] ALEINIKOFF, *op. cit.*, p. 1494.
[18] PÉLABAY, SÉNAC, *op. cit.*, p. 392.
[19] Cf. PÉLABAY, SÉNAC, *op. cit.*, p. 392.
[20] ALEINIKOFF, *op. cit.*, p. 1494.
[21] PÉLABAY, SÉNAC, *op. cit.*, p. 393.
[22] Cf. KOSNICA, I., Odnos državljanstva i nacionalne pripadnosti u Kraljevini SHS/Jugoslaviji. In: Zbornik Pravnog fakulteta u Zagrebu, vol. 68, no. 1, 2018, p. 61-83, p. 64-67.
[23] Cf. the Law on acquisition and loss of Hungarian citizenship of 1879. In: Sbornik zakonah i naredabah valjanih za kraljevinu Hrvatsku i Slavoniju. Nr. VII, 1880.
[24] According to the letter of the law official state authority was Hungarian minister of internal affairs (for the area of Hungary) and Croatian-Slavonian-Dalmatian Ban for the area of Croatia-Slavonia. Cf. art. 11 and 30 of the Law on acquisition and loss of Hungarian citizenship of 1879.
[25] Cf. art. 30 of the Law on acquisition and loss of Hungarian citizenship of 1879; Cf. KOSNICA, I., Gubitak državljanstva u Hrvatskoj i Slavoniji od Bachovog apsolutizma do raspada Monarhije. In: Pravni vjesnik, vol. 29, Nr. 3-4, 2013, p. 61-79, p. 70.
[26] For the argument about application of that law *mutatis mutandis* cf. elaboration of the Professor Ladislav Polić on the Second conference of lawyers of the Kingdom of Serbs, Croats and Slovenes. POLIĆ, L., Pitanje državljanstva – referat. In: DOLENC, M., SAJOVIC, R. (ed.), Spomenica na drugi kongres pravnika Kraljevine Srba, Hrvata i Slovenaca. Ljubljana, 1927, p. 209-216, p. 212.
[27] For the Law on citizenship of the Kingdom of Serbs, Croats and Slovenes of 21 September 1928 with commentary: cf. PIRKMAJER, O., Zakon o državljanstvu sa tumačenjem. Beograd, 1929, p. 37-135.

quisition and loss of citizenship. As modes of losing citizenship, the law prescribed dismissal, absence, marriage, legitimation, renunciation and deprivation.[28] Related to deprivation of citizenship, the Law defined two possibilities of citizenship deprivations. One possibility that already existed on Croatian-Slavonian and on the former Hungarian legal area was deprivation of citizenship of persons hired in offices of foreign states. The Citizenship Law of 1928 in its article 32 stated that citizenship "lose (…) citizens who without permission of state authority enter foreign military or civil service and who stay in the service no matter of call of the minister of internal affairs to leave the office". For completing the procedure, it was necessary that the minister of internal affairs of the Kingdom of Serbs, Croats and Slovenes call this citizen twice to leave the foreign office.[29] The doctrine of citizenship law of that time considered that issuing a call to a citizen is dependent on the will of state authority. If state authority refused to issue such a call, the doctrine considered that the authorities tolerate such service.[30] However, in case when a minister of internal affairs issued such call and upon the assumption that a citizen did not leave the office of foreign state, the minister was obliged to issue an act about deprivation of citizenship.[31]

The authorities partly changed the aforementioned regime by the Law on the structure of the military and the navy of 6 September of 1929.[32] According to this law, a citizen lost his citizenship if entered foreign military service without prior approval of the Council of Ministers.[33] In such a case, a citizen lost his citizenship *ex lege* and no additional procedure of the minister of internal affairs was necessary.

Comparison of the new regulation about deprivation of citizenship contained in the Citizenship Law of 1928 with the regulation contained in the Hungarian Law on acquisition and loss of Hungarian citizenship of 1879 indicates important similarities in the assumptions and procedures of deprivation of citizenship in cases of hiring a citizen in civil foreign office. This because in both cases deprivation of citizenship happened only if the executive branch of state authority issued an act about deprivation. What is more, in both regimes competent authority could deprive of citizenship only those citizens who refused to leave an office of a foreign state.[34] Therefore, one can argue that in both cases authorities had to take into account the will of a citizen. On the other hand, difference between two regimes was in more strict position of the minister of internal administration of the Kingdom of Serbs, Croats and Slovenes. Specifically, the minister of internal affairs of the Kingdom of Serbs, Croats and Slovenes had to issue an act on deprivation of citizenship if officially asked citizens to leave the office. On the other hand, according to the Hungarian Law on acquisition and loss of Hungarian citizenship of 1879 even after the official call had been made the state authority could but was not obliged to issue an act on deprivation. Differences were also significant in the matters of foreign military service. After 1929, as already elaborated above, a citizen lost his citizenship *ex lege* so no decision of minister of internal affairs was necessary in this case. In sum, we can conclude that the new regulation that provided possibility of citizenship deprivation in case of service in an office of a foreign state was more authoritarian in comparison to earlier model. Nevertheless, an important feature about consent of a citizen for deprivation of citizenship still played important role in the new regime.

Another possibility of deprivation of citizenship, regulated by the article 33 of the Citizenship Law of the Kingdom of Serbs, Croats and Slovenes of 1928, was denaturalization in case of war. According to the rule, the authorities could deprive of citizenship citizens who were before the naturalization citizens of the state with which the Kingdom of Serbs, Croats and Slovenes is in war. Denaturalization was possible in three cases. The first case was when a citizen "committed a deed that violated legal order and infringed internal or external security of the Kingdom". The second case was when a citizen had "left the state with an intention of avoiding military service or some other public duty in the Kingdom" and the third was when a citizen "spied for interest of foreign state or if helped efforts directed against rights and national interests of the state".[35] Decision about deprivation of citizenship enacted the minister of internal affairs, based on the decision of the Council of Ministers.[36] In addition, altogether with three aforementioned cases of denaturalization, there existed the concept of annulment of naturalization in cases when a person achieved naturalization based on false presentation of facts.[37]

Introduction of the possibility of denaturalization in the Yugoslav legal order to some extent correlated with comparative developments in citizenship law of many states during and after the First World War. For instance, French authorities already during the First World War introduced similar possibility of deprivation of citizenship to naturalized French who were before the naturalization citizens of enemy states.[38] Moreover, the concept of denaturalization introduced England, Belgium,

[28] Cf. art. 21 of The Law on citizenship of the Kingdom of Serbs, Croats and Slovenes of 1928.
[29] Cf. art. 32 para. 2 of The Law on citizenship of the Kingdom of Serbs, Croats and Slovenes of 1928.
[30] Cf. PIRKMAJER, *op. cit.,* p. 90.
[31] Cf. art. 32 par. 2 which states: „If during next two months a citizen does not respond, the minister of internal affairs will enact a decision on deprivation of citizenship".
[32] Some rules of the Law related to citizenship had been published in: FLOURNOY, R. W., HUDSON, M. O., A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties. New York, 1929, p. 402-404.
[33] Cf. KAVALJERI, C., Komentar Zakona o državljanstvu Kraljevine Jugoslavije. Zagreb, 1935, p. 97.
[34] Cf. art. 32 par. 1 and 2 of the Law on citizenship of the Kingdom of Serbs, Croats and Slovenes.
[35] Cf. art. 33 of The Law on citizenship of the Kingdom of Serbs, Croats and Slovenes of 1928.
[36] Cf. art. 33 of The Law on citizenship of the Kingdom of Serbs, Croats and Slovenes of 1928.
[37] In such cases the minister of internal affairs issued an act about annulment of naturalization. Cf. art. 62 of the Decree of minister of internal affairs for implementation of the Law on citizenship of the Kingdom of Serbs, Croats and Slovenes. For the Decree cf. PIRKMAJER, *op. cit.*, p. 137-211.
[38] WEIL, *op. cit,* p. 61, 107; ARENDT, *op. cit.*, p. 279.

United States of America and Romania. The later one served as a role model for regulation of denaturalization in the Citizenship Law of the Kingdom of Serbs, Croats and Slovenes in 1928.[39]

Introduction of the concept of denaturalization in the Yugoslav legal order meant significant departure from previously established patterns. The fact that the state authorities could unilaterally deprive a naturalized citizen of his citizenship indicated different balances within the citizenship relationship in favor of state authority. The new regime obviously had significant implications for the position of naturalized citizens whose citizenship status was kind of "conditional membership".[40] In addition, the new regulations about denaturalization incriminate "violation of legal order", "infringement of internal or external security of the Kingdom", "avoidance of military service or some other public duty", "espionage" and "helping efforts directed against right and national interest of the state" as behaviors that could result in citizenship deprivation. Aforementioned incriminations indicate at the same time core values that naturalized citizens had to comply. What is more, the values also indicate departure from liberal argumentation related to the concept of citizenship and inclination towards republican and communitarian arguments. Emphasizing duties towards the state and "civic virtues" that mean compliance of ones behavior with the legal order reflect republican argumentation. On the other hand emphasizing "national interests of the state" as a reason for citizenship deprivation indicates communitarian arguments. The shift and inclination towards different understanding of citizenship affected some legal practitioners of that time too. One of them, Celso Kavaljeri, the very prominent one that was dealing with the issue of citizenship, in mid-thirties in his commentary on the Citizenship Law of the Kingdom of Yugoslavia despite mentioning some criticism about the concept of denaturalization, strongly argued for the concept. In doing so, he used typical republican argument in favor of denaturalization by arguing that *salus rei publicae maxima lex esto*.[41]

4. Citizenship in Croatia and Yugoslavia in the aftermath of the Second World War

Development of the concept of citizenship in Croatia and Yugoslavia in the aftermath of the Second World War characterizes the shift from unitarian towards federal model. The first citizenship law, officially called the Citizenship Law of Democratic Federal Yugoslavia of 1945, clearly pointed that by providing a rule on federal and republican citizenship.[42] The federal model affirmed the Citizenship Law of Federal People's Republic of Yugoslavia of 1946 (hereinafter: Citizenship Law of FPRY)[43] and republican legislation about Croatian citizenship as well.[44]

In parallel with conceptual transformation of citizenship from unitarian towards federal, Yugoslav authorities enacted important rules about determination, acquisition and loss of citizenship. The rules about determination of citizenship indicated to some extent continuity of citizenry with that of pre-war Yugoslavia. For instance, the Citizenship Law of FPRY stated that citizens of FPRY are all persons who were citizens of FPRY on 28 August 1945 according to "valid regulations".[45] In addition, the rule of the Citizenship Law of FPRY about presumption of Yugoslav citizenship to "all persons who belong to one of nations of FPRY if born or raised in FPRY and reside in the state" eased the process of determination of citizenship significantly.[46]

What is more, the authorities eased acquisition of Yugoslav and republican citizenships to specific categories of persons. Example is policy of giving citizenship to "Istrian emigrants", mostly Croats and Slovenes, who immigrated into the Kingdom of Yugoslavia, mostly on Croatian and Slovenian territories, during the interwar period. The Law on amendments of Citizenship Law of FPRY of 6 December 1947 enabled those settlers to acquire Yugoslav citizenship and citizenship in one of Yugoslav republics by giving simple statement in front of authorities.[47]

Previously indicated inclusiveness and openness of the concept of Yugoslav citizenship and consequently of republican citizenships contaminated other citizenship rules, which indicated possible restrictions and closure. First, determination of Yugoslav citizenship based on "valid regulations" was unspecified and left room for interpretation. Therefore, one needed to consult some other rules for determination of citizenship status. Specifically, the most important were a rule that determined citizenry of FPRY based on republican citizenship and a rule that determined republican citizenship based on local citizenship

[39] KAVALJERI, *op. cit.,* p. 102; Cf. the art. 41 of the Rumanian Law of February 23, 1924. The english version of the Law had been published in: FLOURNOY, HUDSON, *op. cit.,* p. 497-508.

[40] Cf. FARGUES, WINTER, *op. cit.*, p. 295-303.

[41] KAVALJERI, *op. cit.,* p. 102.

[42] Cf. KRBEK, I., OCOKOLJIĆ, N., Zakon o državljanstvu s komentarom. Beograd, 1948, p. 7.; Cf. the Citizenship Law of Democratic Federal Yugoslavia. In: Službeni list DFJ, 64/1945.

[43] Cf. The Law on citizenship of the Federal People's Republic of Yugoslavia. In: Službeni list FNRJ, 54/1946; Cf. the Law on amendments of the Law on citizenship of the Federal People's Republic of Yugoslavia. In: Službeni list FNRJ, 104/1947; The Law on amendment of the art. 37 par. 2 of the Law on citizenship of the Federal People's Republic of Yugoslavia. In: Službeni list FNRJ, 88/1948; The Law on amendments of the Law on citizenship of the Federal People's Republic of Yugoslavia. In: Službeni list FNRJ, 105/1948.

[44] Cf. The Law on citizenship of People's Republic of Croatia. In: Narodne novine, Službeni list Narodne Republike Hrvatske, Vol. 6. (1950), nr. 23.

[45] Cf. art. 35 par. 1 of the Citizenship Law of FPRY.

[46] Cf. MEDVEDOVIĆ, D., Federal and republican citizenship in the former SFR Yugoslavia at the time of its dissolution. In: Croatian Critical Law Review, vol. 3, nr. 1-2, 1998, p. 21-56, p. 26; Art. 25 par. 1 of the Citizenship Law of FPRY.

[47] Similar mode of acquistion of citizenship based on the new regulations of citizenship existed for members of Yugoslav nations who before 10 June 1940 emigrated from Italy (from the territories that after the Second World War became part of the FPRY) to other countries. Cf. KRBEK, OCOKOLJIĆ, *op. cit.,* p. 51-52; Cf. ĐERĐA, D., Problematika državljanstva na području tzv. Slobodnog Teritorija Trsta. In: Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 24, Nr. 3, 2003, p. 423-444, p. 436-437.

(*zavičajnost, općinska pripadnost*).[48] The criteria of local citizenship was however interpreted very restrictively in a way that according to the mandatory interpretation given by the Presidium of the People's Assembly of FPRY of 1946 only local citizenship of a person on 6 April 1941 was relevant. This consequently meant that all changes in local citizenship of a person emerged after that date were of no importance.[49] In addition, the authorities made difficult acquisition of citizenship to some categories of foreigners, including Russian emigrants that came on Yugoslav territory during the interwar period.[50] What is more, Yugoslav authorities enacted significant rules and implemented practice of deprivations to a great number of citizens, the issue we elaborate further in the paper.

5. Regulations on deprivation of citizenship in Croatia and Yugoslavia in the aftermath of the Second World War

Citizenship Law of FPRY defined deprivation of citizenship together with absence, dismissal, renunciation and rules of international agreements as modes of losing federal citizenship.[51] These modes functioned as well as modes of losing republican citizenship since a person when lost federal citizenship also lost republican citizenship.[52]

Analysis of the Citizenship Law of FPRY indicates that the Law prescribed three possibilities of deprivations. The first possibility was deprivation of citizenship to „members of those nations whose states were in war against peoples of the FPRY".[53] Basic assumption for deprivation was citizen's conduct. According to the letter of the law the federal ministry of internal affairs could deprive of citizenship those citizens „who during the war or who before the war, acted disloyal towards national and state interests of the people of FPRY and in this way failed to fulfil citizen's duties".[54]

Another possibility of citizenship deprivation was denaturalization. There were two types of denaturalization. The first type was annulment of naturalization of a citizen "who had been naturalized based on false statements or who consciously had not mention important circumstances".[55] The second type of denaturalization related to citizens who were „during five years from naturalization judged for dishonorable act or an act against national and state interests".[56]

Third way of citizenship deprivation affected citizens living abroad who "work, or had been working during the war against national and state interests of the FPRY, or did not fulfil civic duties".[57] Based on this rule the authorities n.b. courts or the Presidium of the People's Assembly of the FPRY could deprive of Yugoslav citizenship all citizens no matter of their ethnic origin and no matter of the way in which they acquired citizenship.[58]

In addition, to some extent specific legal basis for deprivation of citizenship, which represented further elaboration of the third way of deprivation, was deprivation of citizenship to military personnel and citizens who at the end of the Second World War emigrated from Yugoslavia. For the purposes of striping citizenship to these persons, the authorities enacted the Law on deprivation of citizenship to officers and sub-officers of former Yugoslav army who do not want to come back in the homeland and to members of military formations who served to occupiers and emigrated abroad. The aforementioned law entered into force already on 28 August 1945[59] and had been approved with minor modifications after enactment of the Constitution of FPRY of 1946 on 23 October 1946. Official name of the new law was the Law on deprivation of citizenship to officers and sub-officers of former Yugoslav army who do not want to come back in the homeland and to members of military formations who served to occupiers and emigrated abroad as well as to persons emigrated abroad after liberation (hereafter: The Law on deprivation of citizenship).[60] As members of military formations that served to occupiers the Law on deprivation of citizenship specifically mentioned the Yugoslav army in the homeland, chetniks, ustasha and Croatian home guards (military formation of the Independent State of Croatia).[61]

In addition, a citizen could had been deprived of his citizenship based on the rules contained in the Law about criminal offenses against people and the state if committed a crime against people and the state and if resided abroad.[62] The Law on types of penalties of 5 July 1945 followed this rule and in addition prescribed a ban to those deprived of citizenship to come back

[48] Cf. art. 37 par. 1 of the Citizenship Law of FPRY.
[49] For the mandatory interpretation given by the Presidium of the People's Assembly of FPRY Cf. KRBEK, OCOKOLJIĆ, *op. cit.,* p. 54-55.
[50] Cf. HR Hrvatski državni arhiv, Predsjedništvo vlade Narodne Republike Hrvatske [Presidency of the government of the People's Republic of Croatia], opći odjel-opći spisi, the box 87, nr. 18515/1948, Lihterov, Olga, citizenship, and the box 96, nr. 5953/1949, Omeljčenko, Fedot, citizenship.
[51] Cf. art. 14 of the Citizenship Law of FPRY.
[52] Cf. art. 21 para. 1 The Law on citizenship of People's Republic of Croatia.
[53] Cf. art. 16 par. 1 of the Citizenship Law of FPRY.
[54] Cf. art. 16 par. 1 of the Citizenship Law of FPRY; Cf. art. 17 par. 1 of the Citizenship Law of FPRY.
[55] Cf. art. 16 par. 2 of the Citizenship Law of FPRY.
[56] Cf. art. 16 par. 2 of the Citizenship Law of FPRY.
[57] Cf. art. 16. par. 3 of the Citizenship Law of FPRY.
[58] Cf. art. 17 par. 3 of the Citizenship Law of FPRY; According to the article 44 of the Order on enforcement of the Citizenship Law of FPRY, a court which enacted a judgment about deprivation of citizenship had to send a copy of this judgement to the ministry of internal affairs of people's republic for further enforcement. Cf. the Order on enforcement of the Citizenship Law of FPRY. In: Službeni list FNRJ, 98/46.
[59] Cf. Službeni list DFJ, 64/1945.
[60] Cf. Službeni list FNRJ, 86/1946.
[61] Cf. art. 1 par. 2 The Law on deprivation of citizenship.
[62] Cf. art. 5 of the Law on confirmation and amendments of the Law on criminal offenses against people and the state of 15 August 1945, In: Službeni list 59/1946.

in their former homeland.[63] The possibility of deprivation of citizenship to emigrants followed the first Criminal code of 1947 too.[64] Bottom line of all aforementioned regulations was emigration and commitment of an act against people and the state. Therefore, based on these provisions the authorities could not deprive of citizenship citizens who stayed in the country. Instead, for these cases they provided possibility of deprivation of political and civil rights.[65]

Aforementioned elaborations indicate that in the legal order of the FPRY existed much wider possibilities of citizenship deprivations. These possibilities, as Igor Štiks noted reflected intentions of state authorities to „revoke citizenship from internal ideological wartime enemies who either collaborated with occupiers or had emigrated abroad".[66] Beyond these intensions however, more complex shift was happening in relations between state authority and a citizen in a way that position of state organs in this relation had been strengthened significantly. The changes indicated deeper restructuring of the concept of citizenship. Specifically, mentioning of non-fulfilment of civic duties as a reason for citizenship deprivation reflected strengthening of republican dimension of the concept. In addition, using phrases "national interests of the people", "state interests of the people" as a reason for citizenship deprivation reflected strengthening of communitarian dimension of citizenship. One could see the shift in the legal doctrine as well. Krbek and Ocokoljić, in the commentary of the Citizenship Law of FPRY published in 1948 strongly approved legislative solutions related to citizenship deprivation by arguing about the right of the state authority to "deprive of citizenship persons who acted hostile or treacherous against the state".[67]

6. Deprivation of citizenship in Croatia and Yugoslavia in the aftermath of the Second World War in legal practice

Normative possibilities of citizenship deprivations were in significant measure realized in the legal practice of the post-war period. As part of this, the Presidium of the National Assembly deprived of citizenship the king Petar II Karađorđević and the members of the royal family on 8 March of 1947.[68] In the case, the decision was done based on the rule of the Citizenship Law of FPRY about deprivation of citizenship to citizens living abroad who "work, or had been working during the war against national and state interests of the FPRY, or did not fulfil civic duties".[69]

Furthermore, many Yugoslav citizens lost Yugoslav and republican citizenship because they did

not return in the homeland during the process of repatriation. Reasons for not coming back were of ideological nature. Some citizens also feared of repression, since the process of repatriation included check of returnees by the Yugoslav secret service.[70] Legal perquisite for formal deprivation of citizenship in the process of repatriation was an official act of the state authorities on the end of repatriation. The federal ministry of internal affairs issued such acts for Germany, Sweden, Norway and Denmark, on 11 January 1946, although due to transport and material difficulties prolonged the repatriation for Germany and Norway until 20 April 1946.[71] Furthermore, the federal ministry of internal affairs proclaimed end of repatriation for Poland on 14 February 1946,[72] for Hungary on 28 February 1946,[73] for Switzerland on 29 March 1946[74] and for Egypt on 29 May 1946.[75] Repatriation for Portugal ended on 12 November 1946[76] and for Italy on 18 January 1947.[77] After decision about the end of the repatriation, the federal minister of internal affairs instructed Yugoslav diplomatic missions to announce the end of repatriation. After this, two months term started to run. During this term, Yugoslav citizens who remained abroad had to declare an intent about retaining Yugoslav citizenship to diplomatic mission. In case they did not declare such intent, they ceased to be Yugoslav citizens and citizens of one of republics based on the rule of the Law on deprivation of citizenship.[78] According to views of some legal scholars of the period, these emigrants lost citizenship *ex lege* and therefore no specific

[63] Cf. art. 4. of the Law on confirmation and amendments of the Law on types of penalties of 5 July 1945. In: Službeni list: 66/1946.
[64] Cf. art. 35 para. 1 of the Criminal code of 1947. In: Službeni list: 106/1947.
[65] Cf. art. 4. of the Law on confirmation and amendments of the Law on criminal offenses against people and the state of 15 August 1945; art. 8 and 9 of the Law on confirmation and amendments of the Law on types of penalties of 5 July 1945; art. 37 of the Criminal code of 1947. A specific case of deprivation of political and civil rights see in: HR Hrvatski državni arhiv-306 Zemaljska komisija za utvrđivanje zločina okupatora i njihovih pomagača Narodne republike Hrvatske [the Republican commission of Peoples Republic of Croatia for determination of crimes committed by occupiers and their supporters], GUZ 2611/45, the box 23, Okružni sud Daruvar KZ 164/45.
[66] ŠTIKS, I., Nations and Citizens in Yugoslavia and the Post-Yugoslav States: One Hundred Years of Citizenship, London – New York, 2015, p. 62.
[67] Cf. KRBEK, OCOKOLJIĆ, *op. cit.,* p. 150.
[68] Cf. Službeni list FNRJ 64/1947.
[69] Cf. art. 16. par. 3 of the Citizenship Law of FPRY.
[70] The returnees were officially sent to secret service centers for interrogations. Cf. HR-Hrvatski državni arhiv-1522 Zemaljska komisija za repatrijaciju Hrvatske [The republican commission for repatriation of Croatia], box 4, document nr. 98/1947.
[71] Cf. Official announcement on the end of repatriation from Germany, Sweden, Norway and Denmark. In: Službeni list, 6/1946; Cf. A decision about end of repatriation from Germany and Norway, In: Službeni list, 34/1946.
[72] Cf. An order about end of repatriation from Poland, In: Službeni list, 16/1946.
[73] Cf. An order about end of repatriation from Hungary, In: Službeni list, 19/1946.
[74] Cf. An order about end of repatriation from Switzerland, In: Službeni list, 29/1946.
[75] Cf. A decision about end of repatriation of Yugoslav citizens from Egypt, In: Službeni list, 46/1946.
[76] Cf. An act about end of repatriation of citizens of FPRY from Portugal, In: Službeni list, 92/1946.
[77] Cf. A decision about end of repatriation of citizens of Federal People's Republic of Yugoslavia from Italy, In: Službeni list, 9/1947.
[78] Cf. art. 3 par. 1 The Law on deprivation of citizenship.

decision of state authority on the issue was necessary.[79] Consequence of such deprivations of citizenship was statelessness of these emigrants that were at that time part of large community of stateless persons that grew significantly after the Second World War.

Finally, the authorities deprived of their Yugoslav citizenship significant number of Yugoslav citizens of German nationality. Strictly legally speaking, legal basis for deprivation of citizenship to these persons was a rule of the Citizenship Law of the FPRY on deprivation of citizenship to „members of those nations whose states were in war against peoples of the FPRY".[80] Based on this rule deprived of citizenship could had been Yugoslav citizens of German nationality if „during the war or before the war, acted disloyal against national and state interests of the people of FPRY and in this way failed to fulfil citizen's duties".[81] Following this rule, the authorities enacted an amendment of the Citizenship Law of the FPRY in 1948. The amendment denied Yugoslav citizenship to citizens of German nationality who were at that time abroad and who during the war acted disloyally and offended duties of Yugoslav citizens.[82] According to the rule, these citizens were deprived of Yugoslav citizenship and were not recognized as citizens by Yugoslav authorities anymore. What is more, Zoran Janjetović argues that except providing legal deprivations of citizenship, Yugoslav authorities applied policy that blocked return of Yugoslav citizens of German nationality to Yugoslavia on the one hand and eased emigration of remained Germans abroad on the other.[83] To support this policy the Yugoslav authorities in the beginning of 1950-ties reached agreements with Germany and Austria that eased dismissal from Yugoslav citizenship and possibility of acquisition of German and Austrian citizenships.[84] Therefore, one should not that some Yugoslav citizens of German nationality lost Yugoslav citizenship in the procedure of dismissal based on these agreements and not because of formal citizenship deprivation.

7. Conclusion

The possibility of citizenship deprivation existed on Croatian territories already in the second half of 19th century. The possibility regulated the Law on acquisition and loss of Hungarian citizenship of 1879, which provided deprivation of citizenship to a person hired in an office of a foreign state without approval of state authority. This possibility was however very limited since it could affect only citizens hired in offices of foreign states and what is more, could affect only citizens who refused to leave this office after formally asked to do so. The concept of deprivation, which was dependent of the will of a citizen, reflected liberal values and emphasized strong position of a citizen in the citizenship relationship.

Significant changes related to regulation of citizenship deprivation happened in the interwar period. At first, on Croatian-Slavonian legal area and on the former Hungarian legal area still partly valid the Law on acquisition and loss of Hungarian citizenship of 1879 replaced the Citizenship Law of the Kingdom of Serbs, Croats, and Slovenes of 1928. This new regulation about citizenship status reflected different values and partly stepped away from liberal model. This Law and the Law on the structure of the military and the navy of 6 September of 1929 regulated deprivation of citizenship to a person hired in an office of a foreign state more authoritatively. What is more, the Citizenship Law of the Kingdom of Serbs, Croats, and Slovenes of 1928 provided possibility of denaturalization, which was not dependent on the will of a naturalized citizen. This argument as well as definition of assumptions for denaturalization support an argument about strengthening of republican and communitarian dimensions in the concept of citizenship.

Furthermore, important changes related to possibility of citizenship deprivations happened in the Croatian and in the Yugoslav legal order in the aftermath of the Second World War. The new regulations of citizenship law and of criminal law prescribed various possibilities of citizenship deprivations that could affect wide range of citizens. These regulations made possible deprivation of citizenship to naturalized citizens but also to citizens who acquired citizenship in other ways, including origin. They also made possible deprivation of citizenship to members of national minorities but also to members of Yugoslav nations. As a reason for deprivation, the rules often prescribed acts against national and state interests together with non-fulfilment of citizen's/civic duties.

In our opinion, defining reasons for citizenship deprivation that in considerable measure takes into account republican and communitarian arguments means strengthening of republican and communitarian dimension in the concept of citizenship. What is more, the new regulations and practices of citizenship deprivations after the Second World War indicate that Yugoslav authorities in the aftermath of the Second World War defined citizenship as "conditional membership" and to some extent not as a permanent bond but as a kind of precarious relationship.

---

[79] Such oppinion advocated Ivo Krbek, a professor of administrative law at the Faculty of Law in Zagreb. For his views cf. MEDVEDOVIĆ, *op. cit.*, p. 34; Later on similar opinion advocated Ivo Borković, a professor of administrative law at the Faculty of Law in Split. Cf. BORKOVIĆ, I., Prestanak državljanstva oduzimanjem u jugoslavenskom pravu. In: Pravna misao, Nr. 7-8, 1976, p. 44-52, p. 46.
Cf. p. 46.

[80] Cf. art. 16 par. 1 of the Citizenship Law of FPRY.

[81] Cf. art. 16 par. 1 of the Citizenship Law of FPRY.

[82] Cf. art. 1. of The amendment of the Law on citizenship of FPRY of 1948. In: Službeni list Federativne Narodne Republike Jugoslavije, 105/1948.

[83] Cf. JANJETOVIĆ, Z., O državljanstvu jugoslovenskih Nemaca. In: Tokovi istorije, vol. 1-2, 2002, p. 25-35, p. 33-34.

[84] Cf. JANJETOVIĆ, *op. cit.*, p. 34; Cf. GEIGER, V., Nijemci u Đakovu i Đakovštini, Zagreb, 2001, p. 191-192.

Public Registers in the Kingdom of Prussia at the Turn of the 19th and 20th Centuries in a Systemic Perspective*

*Hadrian Ciechanowski***

Abstract

The advancement of legal relations between citizens alone, as well as between citizens and the state, has forced the registration of specific facts. In the light of this, a variety of public registers have evolved. Although these registers often complemented one another and there was a flow of information between them, all in all, the literature does not recognize their systemic nature. A certain exception in this matter is solely represented by land registers and cadastre. That said, at present Poland is one good example that thanks to the use of data and computer technology there is an increasing integration of these formally dispersed registers. But it appears that even solutions from the nineteenth century can be seen and understood as a contemporary system. This claim shall be proven on the example of public registers kept in the territory of the Kingdom of Prussia from the second half of the 19th century.

The research presented in the article was based on the system analysis method. On the other hand, the study was conducted with use of legal acts, literature and archival materials collected in Polish and German archives.

Keywords: *Public registers; Kingdom of Prussia; Administration; System; Information flow.*

One particular manifestation of actions of the state is to record the most important facts affecting the relations between citizens, as well as between the state and its inhabitants. Public registers, which are kept by courts and/or state administration bodies, are created to serve this purpose. Traditionally, these registers were maintained in a dispersed manner, i.e., a part of them kept by a given authority constituted an independent portion of a larger whole. That said, the example of Poland shows that the development of computer technology and its more and more widespread use by the administration also affects how registers are kept. In fact, databases are making registers an increasingly integrated and coordinated system. It seems, however, that the system can also be seen in public registers that currently have only historical importance.

One of the most developed systems of public registers at the turn of the 19th and 20th centuries was actually in place in the Kingdom of Prussia and, more broadly, in the German Empire. In the wake of this fact, the article represents an attempt to perform a systemic analysis of the indicated registers. It is significant to have knowledge of such registers due to their importance as a model for legal solutions employed in a number of modern countries, as well as due to historical research, which must often draw from indirect or substitute sources. Nonetheless, such sources can be public registers.

1. The system

Because the purpose of this article is to shine light on Prussian public registers as a system, it is necessary to begin these considerations with the definition of what the system is. Information sciences define the system as follows: "System S is a given set of elements and their constant behavior and a set of linkages between elements, as well as between elements and the environment[1]" or "a set of component elements called objects, related to each other and performing particular functions in a certain way."[2] In the humanistic trend, a system can be defined as "any internally coordinated set of elements with a specific function and showing a specific structure[3]" or "a deliberately defined set of elements and a set of interconnections between them, which together define the properties of the whole[4]".

The system can be distinguished by both individual elements thereof and relations that occur between them. Particular elements of the system of public registers in the kingdom of Prussia were, of course, individual registers. The linkages between them were realized mainly through the flow of information between individual registers.

* This article was supported by the National Science Centre, Poland, grant number 2019/32/C/HS3/00121.

** Hadrian Ciechanowski, Ph.D., assistant professor, Faculty of History, Nicolaus Copernicus University Toruń, Poland.

1 ORCHARD, R.A., O pewnym ujęciu ogólnej teorii systemów. In: KLIR, G.J. (ed.), *Ogólna teoria systemów. Tendencje rozwojowe*. Warsaw, 1976, p. 217.

2 GAŁKOWSKI, K., Szlachcic, E., Podstawowe pojęcia i definicje teorii systemów. In: STANICKI, T. (ed.), *Teoria systemów*. Wroclaw, 1975, p. 4.

3 POGORZELSKI, W., *Teoria systemów i metody optymalizacji.* Warsaw, 1996, p. 51.

4 RYSZEWSKI, B., *Problemy i metody badawcze archiwistyki*. Torun, 1985, p. 76.

2. Elements of the system

In seeking to present public registers in a systemic perspective, it is only appropriate to begin with characterizing a system's individual elements. However, it would not be possible to indicate these elements without first defining the public register. For the purposes of these considerations, it has been assumed that the public register is such a set of information about persons, things or rights that meets the following conditions:

a) it is formed in accordance with the provisions of applicable law,
b) it is kept by a registry authority of a public nature,
c) acceptance, recording and then disclosure of specific information takes place, as a rule, as a result of a decision made by the registration authority,
d) keeping a register and the disclosure of certain information therein has legal consequences,
e) it is public[5].

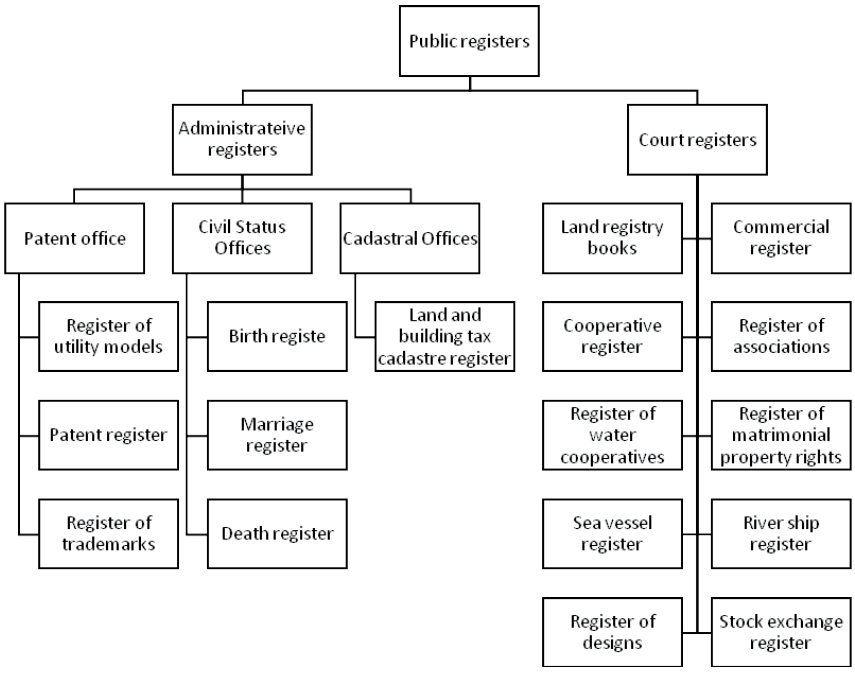
While bearing in mind the adopted definition, basing on the analysis of archives as well as legal acts and literature, it was possible to identify a number of public registers in the Kingdom of Prussia, which can be divided into two main groups: court registers (kept by courts) and administrative registers (kept by public administration bodies).

The administrative registers kept in the Kingdom of Prussia concern: utility models, patents, trademarks (kept by the Patent Office in Berlin), marital status, i.e., births, marriages and deaths (kept by civil registry offices) and the land and building tax cadastre (run by cadastral offices).

On the other hand, the courts kept registers of: trade, cooperatives, associations, water cooperatives, matrimonial property rights, sea ships, inland waterway ships, patterns and stock exchange. Seen from today's perspective, among these registers we also include land books. Interestingly, Prussian legislation treated land books as a separate category[6].

The diagram below presents the division and list of public registers kept in the Kingdom of Prussia at the turn of the 19th and 20th centuries.

Diagram1. Public registers in the Kingdom of Prussia



Source: prepared by the authors

3.1 Types of linkage between registers

Prussian registers include several types of linkage, among which three basic types can be indicated:

1. Information flow between registers,
2. Mutual complementation of registers from the point of view of the goal they were to pursue,
3. A common legal basis determining the manner of their conduct.

The first type of linkage between registers was the flow of information between them. This cycle was usually carried out in two different ways. In the first variant, the person interested in submitting an entry in one register would provide a certifi-

[5] STAWECKI, T., *Rejestry publiczne. Funkcje instytucji*, Warsaw, 2005, p. 28-30.

[6] The instructions for courts of first instance regarding the conduct of secretarial cases list land registers and public registers separately, see e.g., Geschäftsordnung für die Gerichtsschreibereien der Amtsgerichte vom 26. November 1899. In: *Justiz-Ministerial-Blatt für die Preußische Gesetzgebung und Rechtspflege*, year 1899, No. 45, p. 395-3471 and Geschäftsordnung für die Gerichtsschreibereien der Amtsgerichte vom 11. Oktober 1906. In: *Justiz-Ministerial-Blatt für die Preußische Gesetzgebung und Rechtspflege*, year 1906, No. 40, p. 305-385.

cate issued by the court maintaining another register. In the other variant, it would lie with one court to keep both registers, i.e., the register in which the entry was made and the register from which certain information were obtained. In such a case, the court was merely obliged to read the entry made in the second register, but there was no need to provide extracts or other documents.

The second type of linkage was based on the assumption that the registers kept either by the same authority or by other institutions served a similar purpose. In the case of Prussian registers, this purpose consisted in the protection of property rights and of creditors' rights.

As for the third type of linkage, the provisions on keeping one of the registers served as a model and basis for registration activity also in the case of other registers. In such an event, an altered functioning of the "mother" register also entailed a shift in the derivative registers.

Examples illustrating individual types of linkage will be presented below.

3.2 Information flow between registers

The first type of linkage occurred on two planes. First comes the internal plane consisting in the flow of information between individual parts of the same register. Such linkage can be indicated, inter alia, in registers of marital status and land registers. In the case of the CSO, the flow of information was most intensified in the case of birth and marriage registers. The condition for contracting a marriage was the provision of relevant documents, which included announcement protocols and copies of birth certificates of future spouses. The most obvious expression is the preserved attachment files, which constituted collections of documents submitted to the registers as the basis for making entries in them.

In the case of land books, in accordance with the applicable regulations, when the keeping of land books for a particular property was transferred to another court, the land book files for the transferred property were obligatorily sent to that court[7]. Such a situation could take place, for example, if there was a change in district boundaries or a possible merger of real estate belonging to one person in a single land register.

Similarly, when the port or place of registration was transferred outside the registry district, the ship registry files were sent to the court in whose district the ship was to be re-registered. The only exceptions were the ship certificate or letter and certified copies of the register contents, which were not sent between the courts. Importantly, if the transfer was related to a change of the ship owner, before sending the files, the previous court would still be obliged to register these facts[8].

Information was to be sent also in the case of the commercial register. It was necessary to register an established branch of a given enterprise in the commercial register competent for the place of founding. This registration had to be independent of that of the main company. However, when the entry concerning the company's headquarters was changed, it was also necessary to record this fact in the register for the branch. An important practice in this regard was that entry in the register storing information about the branch could only take place after registration with the court competent for the main enterprise. The necessary condition was to provide proof that the registration had actually taken place. It was therefore necessary to transfer information between the commercial registers kept by individual courts[9].

Circulation of information between individual branches of a given register was necessary for the proper and reliable keeping of individual registers. Without sending information between branches of a given register kept by different courts or offices, it would not be possible to achieve the goals set for them, at the same time it would lead to information chaos and bring forward a major field for abuse, e.g., by allowing marriage in several Registry Offices through falsifying information about one's origin. This problem was actually noticed by the German authorities, for example in the case of the commercial register, where it was necessary to provide proof of registration in the register of the main enterprise prior to entry in the register of the branch.

The second type of information flow occurred between individual registers in this case treated as a whole. With such an approach, we can distinguish a series of linkages between registers. However, these linkages cannot be demonstrated for all identified registers.

In the case of marital status registers, communication occurred mainly with the register of marital property rights and land registers. In the case of the former, entry was possible only after marriage. This resulted in the necessity to provide the official with a proof of marriage[10].

On the other hand, in the case of land registers, there are multiple extracts from the registers of marital status that could be found in land files. These documents were placed in the register most often in connection with inheritance proceedings. They constituted evidence of inheritance of property by individuals and were often attached to court files sent in connection with decisions made during hearings.

Land registers were also connected with the registers of marital property rights, the commercial register and the register of cooperatives. In the case of the former, communication took place when the spouses wanted to include information on the separation of property in the land register, because in such case it was necessary to provide a certificate of entry of this right in the register of property rights, which comprised excluded evidence for the land register office. This was the case with adding new rights and removing them from the register[11].

---

[7] Allgemeine Verfügung vom 20. November 1899 zur Ausführung der Grundbuchordnung. In: *Justiz-Ministerial-Blatt für die Preußische Gesetzgebung und Rechtspflege*, year 1899, No. 43, par. 18.

[8] Allgemeine Verfügung (des Justizministers) vom 11. Dezember 1899 über die Führung des Schiffsregisters. In: *Justiz-Ministerial-Blatt für die Preußische Gesetzgebung und Rechtspflege,* year 1899, No. 46, par. 11.

[9] Handelsgesetzbuch vom 10. Mai 1897. Erstes Buch. Handelsstand. In: *Deutsches Reichsgesetzblatt,* year 1897, No. 23, par. 13.

[10] SIMÉON, P., *Handbuch zur Einführung in das Bürgerliche Gesetzbuch und seine Nebengesetze. Zweiter Band.* Berlin, 1904, p. 215.

[11] PAUWELS, V., *Grundbuchordnung für das Deutsche Reich vom 24. März 1897 erläutert durch die Rechtsprechung.* Lepizig, 1907, p. 54-55.

In the case of the commercial register and the register of cooperatives, it was necessary to provide the relevant information when registering property. Under German law, legal persons could also own real estate. In the case of these entities, the company name and seat constituted were recorded in the land books. The existence of the company and its seat were confirmed by the aforementioned registers and the extracts and certificates issued from them [12]. Submission of an appropriate certificate issued by the court was necessary to make the entry [13]. At the same time, in the case of companies, it was necessary to provide a court certificate confirming who could represent the company [14].

Concurrently, communication progressed in the opposite direction. Pursuant to the provisions in force in Germany, a company was established by way of an agreement between the shareholders, which could be of an oral nature. Written form, i.e., a court or notary agreement, was required only in the case of transferring land real estate belonging to one of the partners. Writing down such a contract could, however, be replaced by an entry in the land book [15]. Thanks to this, it was also possible to register information on the capital in the form of land owned by a given company in the commercial register.

However, it is necessary to emphasize that not all of these documents were attached to the land register files. The German law allowed the possibility of withdrawing from their collection if the Land Registry Office was at the same time the court responsible for keeping the commercial register (and thus also other registers). In such a situation, it was sufficient to refer to the register itself instead of referring to the collected documents [16].

However, among all Prussian registers, the deepest connection was visible between the land registers and the cadastre. First of all, changes to the ownership data in the land books always required an update in the cadastre. Similarly, change of real estate data in the cadastre required an update of land registers. In the case of a change of ownership, it even depended on an earlier change in the land register [17]. Therefore, the law required full compliance of the information contained in both registers and the possibly immediate transmission of information between the offices keeping the registers [18].

This was associated with a number of consequences. For example, in connection with the requirement for land books to comply with the land tax books, it was ordered in 1870 that the area measures included in the land tax books were to be transferred to a metric measure, in accordance with the provisions on measures and weights for the North German Union. Therefore, an update of land books was required as well. For this purpose, the courts received copies of the new land tax cadastral registers converted into metric measures. Interestingly, prior to the full adoption of metric measures in land books, old and new measures would be used in cadastral extracts intended for courts [19].

Moreover, with each new regulation of the land register, the owner was obliged to indicate the real estate subject to entry according to the cadastral designation and to submit an excerpt from the land tax, including all real estates and indicating the border neighbor. In case of doubts as to the exact property border, in addition to local witnesses or local authorities, it was possible to refer to cadastral maps [20].

On the other hand, the land register office was obliged to immediately notify the competent cadastral inspectors of changes in ownership registered in the land register. Cadastral controllers would introduce changes to the update protocols (Fortschreibung Protokolle). If, however, the article number of the land or building tax was changed, the land registry office found out about it from the cadastral office and corrected entries in the land book. The list on the basis of which this administrative act was made was then stored in the updating files (Fortschreibungsunterlagen) of the cadastral office [21].

Similar procedures were carried out when reconciling land and tax records for buildings. The lists of the tax on buildings, revised after the amount of that tax was redetermined, was sent in the form of a copy to the district court. Likewise, the courts were to be informed about updated land registry maps and measurement records [22].

Procedurally, the cadastral office had to take into account information which it received from the court without undue delay in order to obtain the possibly necessary information from the court and provide it with all the updates. If the cadastral office has been notified by the court that properties previously entered in the land register on different sheets have been combined on one sheet, it should, if these properties were also shown on different articles of the matrix, combine them on one article [23].

Since the ruling of the Reichs Court in 1910, the land cadastre formed a formal and material community with the land register. By referring to the real estate cadastre as a geometric

[12] Allgemeine Verfügung vom 20. November 1899 zur Ausführung der Grundbuchordnung, In: *Justiz-Ministerial-Blatt für die Preußische Gesetzgebung und Rechtspflege*, year 1899, No. 43, par. 4. 2.

[13] TURNAU, W., FÖRSTER, R., *Das Liegenschaftsrecht nach den Deutsche Reichsgesetzen und den Preußischen Ausführingsbestimmungen*. Padeborn, 1903, p. 218-219.

[14] Grundbuchordnung vom 24. März 1897, In: *Deutsches Reichsgesetzblatt*, year 1897, No. 15, par. 33.

[15] KORN, A., *Das Neue Handelsgesetzbuch für das Deutsche Reich im Originaltext mit den preisgekrönten gemeinverständlichen Erläuterungen*. Berlin and Liepzig, 1901, p. 66.

[16] Bekanntmachung vom 20. Mai 1898 des Textes der Grundbuchordnung in der vom 1. Januar 1900 an geltenden Fassung, In: *Deutsches Reichsgesetzblatt*, year 1898, No. 25, par. 35.

[17] HENNING, H., *Kataster und Grundbuch*. Berlin, 1961, p. 90.

[18] RICHTER, D.H., *Das materielle und formelle Deutsche Grundbuchrecht in seiner Beziehung zum Liegenschaftskatasterdienst mit besonderer Berücksichtigung der bayerischen und rheinpfälzichen Verhältnisse.* Berlin-München, 1950, p. 10-11.

[19] AUSCHRAT, P., *Probleme der Archivierung von Katasterunterlagen in Brandenburg.* Potsdam, 1997, p. 22.

[20] AUSCHRAT, P., *Probleme der Archivierung von Katasterunterlagen in Brandenburg*. Potsdam, 1997, p. 21-22.

[21] AUSCHRAT, P., *Probleme der Archivierung von Katasterunterlagen in Brandenburg*. Potsdam, 1997, p. 23.

[22] AUSCHRAT, P., *Probleme der Archivierung von Katasterunterlagen in Brandenburg*. Potsdam, 1997, p. 23.

[23] SCHÜTTE, H., *Kataster und Grundbuch in Preußen, ihre Verbindung und gegenseitige Berichtigung.* Ziegenhain, 1936, p. 31-32.

and legal reference system, the civil law on land registers and the public law geodesic and cadastral law were related with one another. Inventory data and owners' data were subject to double registration in the real estate cadastre and the land book. For reasons of clarity and legal certainty, it was necessary to ensure that the redundant data was consistent. Their compliance comprised a relationship between the original cadastral and the original land and mortgage accounting duties and competences[24].

In order to minimize the administrative burden and costs, the cadastre and land registers were to be kept in a thorough manner. Possible errors could result from the fact that the cadastre was defective or that the reconciliation of the land register with the cadastre was incorrect. Both the cadastral office and the land registry were obliged, upon detecting such an error, to take the necessary actions ex officio to amend it[25].

The rectification procedure was also undertaken if the cadastral office sent the court a copy of the notification of the change of ownership entered in the tax books. The excerpt itself was placed in the land register files for information purposes. On the other hand, the judge examined whether the notification from the cadastral office provided grounds for pursuing actions aimed at correcting the land register by entering a new owner. If, on the other hand, the cadastral office sent a copy of the amendment notice to the district court to merge several parent parcels from one and the same owner into one item or to split one item into several items, the land register entry number had to be revised accordingly[26].

If, as a result of an error regarding the ownership right, someone was entered in the tax books and, accordingly, in the land book as the owner of the entire cadastral plot, who did not in fact hold the ownership title, it was not possible to correct the tax books without revising the land book. The registration judge, having learned about the error, was obliged to act for its removal, taking into account the impact on public faith and the correctness of the land book. The land register office was informed about the corrections made in the land register by means of lists of ownership changes[27].

In case of doubts as to the correctness of the plot boundary, e.g., when the plots or their parts were changed by verbal agreements without their rewriting by the court or notary public, then entry of the border change to the cadastre had to be made on the basis of an entry of the change of ownership in the land register. As changes in the ownership law always involve the transfer of ownership and entry in the land register, it could be assumed that the information contained therein was correct[28].

The update also concerned land books and the so-called "Wertkataster". Valuation sheets were prepared for each plot of land that constituted an economic unit. In order to keep the valuation forms up-to-date, they were updated following the updating of the cadastral registers. After submitting to the cadastral office, the lists of ownership changes provided by the land register office, it was checked whether the purchase prices contained in the lists were up-to-date. The entry of purchase prices in the original lists could only take place after the lists of ownership changes were updated[29].

The connection between the land registers and the cadastre was therefore very profound, as both registers complemented one another to form a land and building register, which would give the maximum guarantee of credibility.

There were also numerous flows of information between the commercial and cooperative registers and other court registers and registers kept by the Patent Office. This communication consisted primarily in the provision of information on whether a given legal person could acquire specific rights resulting from an entry in a specific register. Companies could own ships[30] as well as designs and patents[31]. In particular, the implementing rules indicated that any changes concerning a person or a representative entered in the register of utility models or a patent had to be reported in a form that could prove this fact, and therefore primarily in the form of an extract from the relevant register[32]. On the other hand, the provisions on the court register of designs specified that the application was filed with the court competent for the principal place of business or the authority competent for the place of residence[33].

The provisions on the trademark register of 1894 required that the applicant for the entry attach the name of the company in which the mark was to be used to the application. It was therefore necessary to register the activity in advance[34]. It was even more explicitly expressed in the Act of 1874, which specified that only an entrepreneur whose company was entered in the commercial register could apply to the competent court to enter in the commercial register of its headquarters signs which were to be affixed to their goods or packaging[35].

---

[24] KREMER, H., Die Verzahnung von Liegenschaftskataster, Vermögenszuordnung und Grundbuch. In: *Vermesung Brandenburg*, No. 1, 1999, p. 22.

[25] AUSCHRAT, P., *Probleme der Archivierung von Katasterunterlagen in Brandenburg*. Potsdam, 1997, p. 24.

[26] SCHÜTTE, H., *Kataster und Grundbuch in Preußen, ihre Verbindung und gegenseitige Berichtigung.* Ziegenhain, 1936, p. 34.

[27] AUSCHRAT, P., *Probleme der Archivierung von Katasterunterlagen in Brandenburg*. Potsdam, 1997, p. 25.

[28] AUSCHRAT, P., *Probleme der Archivierung von Katasterunterlagen in Brandenburg*. Potsdam, 1997, p. 25-26.

[29] AUSCHRAT, P., *Probleme der Archivierung von Katasterunterlagen in Brandenburg*. Potsdam, 1997, p. 50.

[30] Bekanntmachung des Textes des Gesetzes, betreffend die privatrechtlichen Verhälltnisse der Binnenschifffahrt, in der vom 1. Januar 1900 an geltende Fassung, vom 20. Mai 1898. In: *Deutsches Reichsgesetzblatt*, year 1898, No. 25, par. 123 and Gesetz vom 22. Juni 1899 betreffend das Flaggenrecht der Kauffahrteischiffe. In: *Deutsches Reichsgesetzblatt*, year 1899, No. 24, par. 2.

[31] Patentgesetz vom 25. Mai 1877. In: *Deutsches Reichsgesetzblatt*, year 1877, No. 23, par. 19; Patentgesetz vom 7. April 1891. In: *Deutsches Reichsgesetzblatt,* year 1891, No. 12, par. 19; Gesetz vom 1. Juni 1891 betreffend den Schutz von Gebrauchsmustern. In: *Deutsches Reichsgesetzblatt*, year 1891, No. 18, par. 3; Verordnung vom 11. Juli 1891 zur Ausführung des Patentgesetzes vom 7. April 1891 und des Gesetzes, betreffend den Schutz von Gebrauchsmustern, vom 1. Juni 1891. In: *Deutsches Reichsgesetzblatt*, year 1891, No. 23, par. 12 and 22.

[32] Verordnung vom 11. Juli 1891 zur Ausführung des Patentgesetzes vom 7. April 1891 und des Gesetzes, betreffend den Schutz von Gebrauchsmustern, vom 1. Juni 1891. In: *Deutsches Reichsgesetzblatt*, year 1891, No. 23, par. 22.

[33] Gesetz vom 11. Januar 1876, betreffend das Urheberrecht an Muster und Modellen. In: *Deutsches Reichsgesetzblatt*, year 1876, No. 2, par. 9.

[34] Gesetz zum Schutz der Waarenbezeichnungen vom 12. Mai 1894. In: *Deutsches Reichsgesetzblatt*, year 1894, No. 22, par. 2.

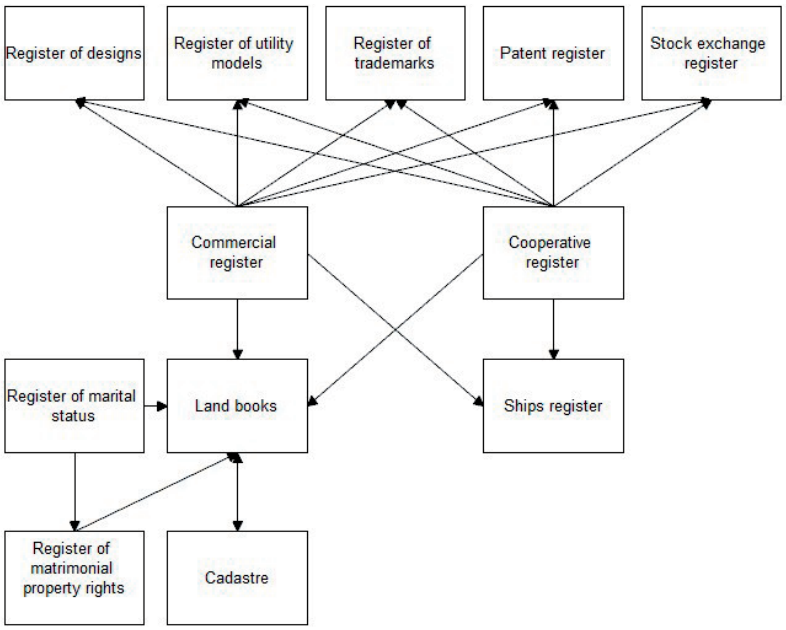
[35] Gesetz über Markenschutz vom 30. November 1874. In: *Deutsches Reichsgesetzblatt*, year 1874, No. 28, par. 1.

A similar situation occurred in the case of the stock exchange register, in which companies could also be entered[36]. However, these provisions contained one more rule, which resulted in the flow of information from the commercial register. The admission to trading of shares of a company transformed into a joint-stock company or a limited partnership with shares could not take place earlier than one year after it had been entered in the commercial register[37]. It was therefore necessary to provide relevant information confirming this fact.

The circulation of information between the Prussian and, more broadly, German registers was based mainly on the need to provide information confirming the fact of acquiring certain rights resulting from entry in another register. The central place here was played by commercial and cooperative registers, the entry of which allowed the enterprise to acquire a company and legal personality. However, it was impossible to provide information about the company without its prior establishment. That said, the peculiarity of the German registers lies in the fact that, in many cases, the evidence provided was not attached to the registration files. This is due to two facts. First of all, German law allowed for an oral application to be entered in the protocol. Secondly, if the same authority was responsible for keeping individual registers, it was not obliged to collect documents, which could be replaced by a reference to a specific register. In such a situation, the flow of information took place by reading the appropriate entry.

The flow of information between public registers is presented in the following diagram:

Diagram 2. Information flow between public registers



Source: prepared by the authors

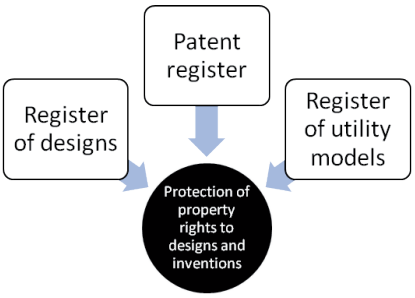
3.3 Complementary from the perspective of the objective

The second type of communication between registers was based on the fact that they served similar purposes and thus complemented one another. Although there was no circulation of information in this instance or no common legal basis was present, they constituted a system allowing for the acquisition and protection of relevant rights.

This is particularly true for the register of designs, the register of utility models and the register of patents. The purpose of these registers was to guarantee the owner of submitted images or models protection of his rights to use the reported goods and to derive certain benefits from them. Both design registries complemented one another in that the courts registered designs of an artistic nature, while the patent office registered designs of a technical nature[38]. The utility model register, on the other hand, supplemented the patent register in such a way that it allowed for obtaining similar rights, as it also related to utility items, but without the need to apply a relatively complicated procedure for obtaining a patent. At the same time, the protection resulting from the registration of a patent, and not a design, lasted much longer, i.e., 15[39] and 3[40] years, accordingly. It should be emphasized that a slightly different purpose was pursued by the trademark register, which was to guarantee the protection of only the signs used by a given buyer or producer[41], and not the technology used by him. Thus, from the point of view of the objective, it served a models' similar purpose, but differed in terms of the subject of registration.

[36] Börsengesetz vom 22. Juni 1896. In: *Deutsches Reichsgesetzblatt*, year 1896, No. 15, par. 55.
[37] Börsengesetz vom 22. Juni 1896. In: *Deutsches Reichsgesetzblatt*, year 1896, No. 15, par. 39.
[38] SIMÉON, P., *Handbuch zur Einführung in das Bürgerliche Gesetzbuch und seine Nebengesetze. Zweiter Band.* Berlin, 1904, p. 212-213.
[39] Patentgesetz vom 7. April 1891. In: *Deutsches Reichsgesetzblatt*, year 1891, No. 12, par. 7.
[40] Gesetz vom 1. Juni 1891 betreffend den Schutz von Gebrauchsmustern. In: *Deutsches Reichsgesetzblatt*, year 1891, No. 18, par. 8.
[41] Gesetz zum Schutz der Waarenbezeichnungen vom 12. Mai 1894. In: *Deutsches Reichsgesetzblatt*, year 1894, No. 22, p. 441-448.

Diagram 3. Public registers for the purpose of protecting property



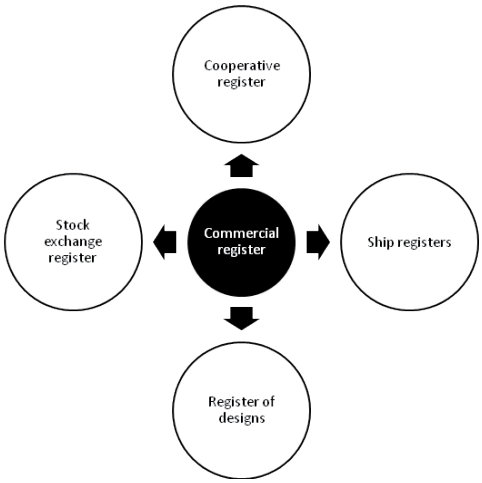
Source: prepared by the authors

Land books and ship registers also served a partially common purpose. Both, apart from disclosing information about the ownership of a given item, also served to disclose and secure the rights of creditors by entering a mortgage on real estate or a ship, treated in this case on an equal footing with land or building[42]. Importantly, some of the same provisions were applied to these registers. In particular, these rules concerned applications and calls relating to registry of a lien[43]. It is also connected with the third means of communication between the elements of the system of public registers in Prussia.

3.4 Common legal basis

The third type of linkage between registers was based on common legal norms. This applied in particular to the commercial register and other registers kept by courts. These registers, especially when it comes to how they are kept, the duties of the registration authority and the proceedings by the registration authority, were based on the provisions on the commercial register. Hence, this community concerned cooperative registers[44], ship registers[45], stock exchange registers[46] and the register of designs[47]. This community was generally emphasized in the literature and included in the relevant legal provisions[48]. However, this is not the right place for opening a detailed debate on the registration procedure, which was an expression of common law. Importantly, the registers connected by means of a legal basis were also compulsorily maintained by the courts responsible for keeping the commercial register.

Diagram 4. Public registers based on a commercial register



Source: prepared by the authors

[42] STAWECKI, T., *Rejestry publiczne. Funkcje instytucji*. Warsaw, 2005, p. 195.

[43] *Instrukcje dla sekretariatów sądów powiatowych, okręgowych i apelacyjnych*. ZAJĄCZKOWSKI, T. (ed.), Poznań, 1921, p. 10.

[44] Bekanntmachung vom 11. Juli 1889, betreffend die Führung des Genossenschaftsregisters und die Anmeldungen zu demselben. In: *Reichsgesetzblatt*, year 1889, No. 15, par. 3, 5, 10; Gesetz vom 1. April 1879 betreffend die Bildung von Wassergenossenschaften. In: *Gesetz-Sammlung für die Preußischen Staaten*, year 1879, No. 19, par. 13.

[45] Allgemeine Verfügung (des Justizministers) vom 11. Dezember 1899 über die Führung des Schiffsregisters. In: *Justiz-Ministerial-Blatt für die Preußische Gesetzgebung und Rechtspflege*, year 1899, No. 46, par. 3.

[46] Bekanntmachung des Reichskanzlers vom 9. Oktober 1896 und Allgemeine Verfügung des Justizministers vom 17. Oktober 1896 betreffend die Führung der Börsenregister und die Aufstellung der Gesammtliche. In: *Justiz-Ministerial-Blatt für die Preußische Gesetzgebung und Rechtspflege*, year 1896, No. 40, par. 2.

[47] Bestimmungen vom 29. Februar 1876 über die Führung des Musterregister. In: *Justiz-Ministerial-Blatt für die Preußische Gesetzgebung und Rechtspflege*, year 1876, No. 36, par. 1.

[48] NUßBAUM, A., *Die freiwillige Gerichtsbarkeit im Reiche und in Preußen*. Berlin, 1900, p. 160-161; Börsengesetz vom 22. Juni 1896. In: *Deutsches Reichsgesetzblatt*, year 1896, No. 15, pp. 157-176, par. 56 and 62; SIMÉON, P., *Handbuch zur Einführung in das Bürgerliche Gesetzbuch und seine Nebengesetze. Zweiter Band.* Berlin, 1904, p. 216; WRZOŁEK-ROMAŃCZUK, M., *Rejestr spółdzielni. Zagadnienia materialnoprawne i procesowe*. Warsaw, 1986, p. 13.

4. Summary

To conclude the considerations raised in this article, it must be stressed that there is a certain systemic approach to Prussian/German public registers. That said, it remains a rather primitive system based mainly on the transfer of information between registers by persons interested in the entry. Nonetheless, one cannot easily hide the fact that it exhibited the nature of a modern system of public registers, as obtaining rights resulting from entry in one register required the acquisition of rights resulting from entry in another register. At the same time, it ensured a much greater credibility of the data collected in the registers, as the information entered was subject to multiple verification.

The mere fact of the circulation of information between registers, which is a condition for obtaining certain rights, is enough to prove the thesis put forward at the beginning of this article. Still, it must be stressed that lower-level systems must also be indicated as part of the system of public registers in Prussia. These subsystems were established as a result of interactions resulting from the implementation of a similar goal and being based on common legal provisions. These two types of interactions, occurring only between part of the registers constituting systemic elements, allow to indicate two areas with independent properties, but ones which also interfered with the other registers. The presence of subsystems is therefore another argument supporting the thesis which constitutes the core idea behind the article.

It should also be stressed that the "heart" of the system was the commercial register, which, by registering facts about the company, granted it the rights of a legal entity and allowed it to acquire rights resulting from other registers. At the same time, this register, and in fact the regulations concerning it, constituted the grounds for proceedings in registration cases also as regards other registers. Therefore, it was, to the greatest extent, the axis of linkage between the elements of the researched system.

Polish-Lithuanian Union and the Declared Equality before the Law in the Polish-Lithuanian Commonwealth

*Jakob Maziarz**

Abstract

One of the cornerstone principles of the socio-political system of the Polish-Lithuanian Commonwealth was the principle of the nobility equality. Each nobleman – regardless of his wealth, religion and background – was vested with equal political rights. The nobility would often stress the importance of this rudimentary rule - an oddity when set against the background of contemporary Europe, where starkly hierarchized pyramids of aristocratic titles, both inherited and granted, were being formed. In the Commonwealth such titles never came to be and, as a rule, had never become well-entrenched. In the article, the author describes the legal status and its changes to the extent to which it concerned the admissibility of applying noble titles in the Republic of Poland. Although the principle of equality of the nobility existed until the end of this state, with time it had more and more exceptions, but still, it was an exception on the map of Europe at that time.

Keywords: *equality of citizens; aristocratic titles; nobility; Polish-Lithuanian Commonwealth.*

1. Introduction

One of the cornerstone principles of the socio-political system of the Polish-Lithuanian Commonwealth (hereinafter: 'the Commonwealth') was the principle of *szlachta* equality (the equality of the nobility).[1] It was upon it that the whole system of government of the Commonwealth was based, hence it was reflected not only in declarations included in the *Sejm* constitutions (acts of parliament), but also in pieces of legislation of paramount importance, essentially until the end of the Commonwealth.[2] Also, the equality of all members of the noble nation was widely-held to be an axiom and a principle which – at least in theory – allowed no exceptions.[3]

Imaginably, it could not mean that all members of the Polish nobility could boast identical significance and influence on public affairs. In theory, each nobleman – regardless of his wealth, religion and background – was vested with equal political rights. The nobility would often stress the importance of this rudimentary rule – an oddity when set against the background of contemporary Europe, where starkly hierarchized pyramids of aristocratic titles, both inherited and granted, were being formed. In the Commonwealth such titles never came to be and, as a rule, had never become well-entrenched.

It is beyond all doubt, that the principle of *szlachta* equality, however initially finding its reflection in a certain range of socio-political relations within the Commonwealth, gradually began to be only paid lip service, even though it was supposedly indicative of the uniqueness of the Commonwealth's polity. Absolute substantive equality of the nobility was out of the question at all times – even at the peak of Polish parliamentary democracy. A closer look at the evolution of *Sejm* legislation on *szlachta* equality in the context of certain noble families making claims to aristocracy makes one pose a question as to whether *de iure* equality of the nobility (albeit in its symbolic aspect) had been ruled out of the Polish legal system long before the advent of the Constitution of 3rd May 1791.

Since the Jagiellonian period until the beginning of the 20th century it was not an uncommon practice for the noblemen to be granted aristocratic titles by foreign rulers, in particular from the Emperor or the Pope. Such grants would not, as a rule, result in the titles' recognition in the Commonwealth. It was not considered controversial for the notable noble families of Lithuanian descent – such as the Czartoryski, Sanguszko, Słucki and Wiśnowiecki families, tracing their heritage back to the Gyedyminovitch family; or of Ruthenian descent – such as the Ostrogski family and their collateral line, the Zasławski family, or the Czetwertyński family; or even of Crimean Tatar descent

* Jakob Maziarz, PhD, Chair of Polish Legal History, Faculty of Law and Administration, Jagiellonian University, Kraków, Poland. Translated by Bartosz Gałucha.

1 URUSZCZAK, W., Zasady ustrojowe Rzeczpospolitej Obojga Narodów. In: *Czasopismo Prawno-Historyczne*, vol. 60, 2008, p. 130.

2 The Cardinal Laws, adopted by the Grodno *Sejm* in 1793, read in Article XI: „The laws of equality within the noble rank shall not be infringed, so that it shall not be outshadowed nor belittled by any title". Cf. OHRYZKO, J. (ed.), *Volumina Legum. Przedruk zbioru praw staraniem XX. Pijarów w Warszawie od roku 1732 do roku 1782 wydanego.* Petersburg, 1859-1860. Hereafter VL.

3 It would appear that one of such exceptions was the institution of *skartabellat*. For more details, cf. BALZER, O., *Skartabelat w ustroju szlachectwa polskiego.* Kraków 1911.

(*i.e.* tracing back to Khan Mamai, ruling in 1361-1380), such as the Gliński family,[4] settled in Lithuania by the Great Duke Witold – to bear the title of princes.

In spite of the *szlachta* equality principle, there was no scarcity of princes in the Commonwealth (often referred to – after the Ruthenian fashion – as knyaz [pol. *kniaź*][5]), whose titles were initially tolerated due to the anticipation of their dying out along with the families who bore them[6]. Later, however, as the power of the central government weakened, the Ruthenian and Lithuanian princes (knyazes) gained enough significance to be able to secure the recognition of their titles as something obvious in the Commonwealth. Owing to the "immemorial" character of titles possessed by the Lithuanian-Ruthenian families, their members were called ancient princes.[7]

One of such *Kresy* (the Eastern borderlands or marches) knyazes, Michał Tomasz Wiśniowiecki, who traced his heritage back to Prince Korybut Dymitr Olgierdowicz,[8] *i.e.* King Władysław Jagiełło's brother, was even elected King of the Commonwealth (*nota bene* as a *Piast* (a compatriot, as opposed to foreign candidates, as the Piasts were the first Polish royal dynasty).

One of the first of the Polish nobles to be granted an aristocratic title at the hands of a foreign monarch was Rafał Leszczyński, Castellan of Przemęt (King Stanisław Leszczyński's 9th degree ancestor[9]), who in 1476 received the title of Count of Leszno[10] from Emperor Frederick III. The Emperor thus disposed of the title attached to the land outside of the Empire, which he did not hold sovereignly – which, as indicated by the subsequent practice, was a good (as it was so inexpensive) method of winning over supporters in foreign countries. Another of the first magnates to be granted a princely title from a foreign monarch was Mikołaj Radziwiłł, sent with an emissariship to Vienna in 1515, which brought him the title of Prince of Godziądz and Medele at the hands of Emperor Maximilian I[11]. His line of the Radziwiłł family expired by the next generation, however.[12] In 1547 members of two other lines of the Radziwiłł family: Mikołaj the Black and Mikołaj the Red were awarded titles of Princes of the Holy Roman Empire: of Nieśwież and Ołyka and of Birże and Dubinki, respectively.[13] Along with the sheer splendor, the holding of such titles brought them the right to buy land within the Empire and establish fee tails therein.[14] It should be noted that under the influence from the middle nobility, who were alert to their rights during the Executionist movement era, the Radziwiłł family refrained from flaunting their newly obtained foreign title,[15] taking into account the traces left in the collective memory by their then recent attempt at royalty – *i.e.* the marriage between Zygmunt August and Barbara Radziwiłłówna. In spite of the nobility's antipathy against the Radziwiłł family and their princehood, they were officially referred to as princes in many a *Sejm* constituion.[16]

What is more, there was no lack of families who could boast the lower-ranking title of count – as did the Chodkiewicz, the Leszczyński and the Tyszkiewicz families. However, those who were better oriented in the relations within the Commonwealth never (or hardly ever) used their titles in the country.[17] Nevertheless, the *Sejm* constitutions dating back to as early as the 15th c. mention families using such titles.[18]

Instances have been recorded on which members of prominent noble families refused to accept foreign dignities. For example, Chancellor and Hetman Jan Zamoyski was offered princehood and the Order of the Golden Fleece by the envoy of the Spanish king. Zamoyski, however, realised that his position relied on the middle nobility, who frowned upon the titles and dignities of foreign provenance[19] (although his anti-Hapsburg sentiment may have also come into play). Similarly, Mikołaj Firlej, the Great Crown Hetman, declined countship at the hands of the Spanish Hapsburgs.[20]

The increasing number of foreign aristocratic titles being granted called for regulation in the Commonwealth. The equality of the nobility during the Jagiellonian reign was not yet an

[4] As far back as in 1501 Michał Gliński was mentioned in King Alexander I's privilege (as *Michaele Duce Hlinen*). Cf. VL, vol. 1, 133.

[5] Aleksander Brückner proposed an alternative thesis, distinguishing between princes (*książęta*) and knyazes (*kniaziowie*); the latter were supposedly „not much (…) grander than a rich yokel", and at that an object of ridicule on part of the society. Cf. BRÜCKNER, A., Hirschberg Aleksander. Maryna Mniszchówna. Z illustracyami. We Lwowie 1906. VII., 339 i III str. 8° [review]. In: *Kwartalnik Historyczny*, vol. 21, 1907, p. 697-698. For more details, cf. RADZIMIŃSKI, Z.L., *O tożsamości tytułów kniaź i książę*, Lwów, 1908.

[6] TOMKIEWICZ, W., Z dziejów walki o tytuły książęce. In: *Miesięcznik Heraldyczny*, vol. 1, 1931, p. 2.

[7] Cf. SZAJNOCHA, K., Walka książąt starożytnych z nowoczesnymi za Władysława IV. In: *Czas*, vol. 93, 1865.

[8] Wiśniowiecki family's descent from Prince Dymitr, also known as Korybut, aroused no controversy up to the 19th c. and was not a subject of much deliberation. It was only in the second half of the 19th c. that K. Stadnicki questioned their Lithuanian ancestry. Similarly today, descending from Grand Dukes or Varangians of other families is being put into question.

[9] KARWOWSKI, S., *Leszczyńscy herbu Wieniawa*. Lwów, 1916, p. 47-48.

[10] GLOGER, Z., Tytuły. In: *Encyklopedia staropolska.* Warszawa, 1903, p. 398.

[11] OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 44; BACZKOWSKI, K., *Kongres wiedeński 1515 roku*. Oświęcim, 2015, p. 135-168.

[12] One of Mikołaj Radziwiłł's sons, his namesake, became Bishop of Samogitia, whereas the other one, Jan, had three daughters.

[13] WOLFF, J., *Kniaziowie litewsko-ruscy*. Warszawa, 1895, p. 675.

[14] TOMKIEWICZ, W., Z dziejów walki o tytuły książęce. In: *Miesięcznik Heraldyczny*, vol. 1, 1931, p. 2.

[15] Z. Gloger even states that even though the Polish magnates strived to receive aristocratic titles from the Emperor, they would later hide „their countship parchments" in family treasuries for fear of the nobility's reaction, and even when they dared use their titles, it was always with noting that they were aristocrats of *sacri Romani imperii*, and not of the Commonwealth. Cf. GLOGER, Z., Tytuły. In: *Encyklopedia staropolska.* Warszawa, 1903, p. 397-398.

[16] OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 44.

[17] KUBALA, L., *Jerzy Ossoliński*. Lwów, 1883, vol. 1, p. 105.

[18] Cf. OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 46-47.

[19] GLOGER, Z., Tytuły. In: *Encyklopedia staropolska.* Warszawa, 1903, p. 400.

[20] NIESIECKI, K., *Herbarz polski*. Lipsk, 1839-1846, vol. 1, p. 437.

absolute rule. It was not until the half of the 15th century that, as a result of numerous universal privileges granted by the Polish monarchs, the legal discrimination between the members of the noble rank vanished. Equality as a constitutional principle should be associated with the Commonwealth period, bearing in mind that its foundations were laid in the early Jagiellonian period[21].

Foreign ennoblement brought about the institution of foreign title sanctioning. It was an exclusive royal prerogative, beyond the purview of the *Sejm*; thus, none of such sanctions was ever entered into *Metrica Regni Poloniae* or into *Acta Magni Ducatus Lithuaniae*, and were never the matter of *Sejm* resolutions.[22] Royal sanction entitled to the official use of artistocratic title, also in the public records.

An important provision concerning aristocratic titles, laying the foundation for all of the subsequent regulations for over a hundred years, was expressed in the act of the Union of Lublin and four acts of incorporation, passed alongside with it: *o ziemi podlaskiey* [on the Podlasie district],[23] *o ziemi wołyńskiey* [on the Volhynia district],[24] *o xięstwie kijowskim* [on the Duchy of Kiev][25] and *o xięstwie litewskim* [on the Duchy of Lithuania][26], which confirmed the binding power of all of the privileges and dignities held by the citizens of the Grand Duchy and the lands newly incorporated into the Kingdom of Poland. The penultimate of the aforementioned acts read:

> "we promise and shall be obliged to preserve all of the aforesaid Princes, the citizens of the Kiev District, and their descendants, both Roman Catholics and the Orthodox, in their ancient veneration and eminence – as had been so far their ancestors – according to their virtue and dignity, and our liking."

The privileges for the remaining districts were analogous.

2. Constitutions of 1638 and 1641

The dispute over aristocratic titles resumed after almost 70 years, not only to become one of the main problems to be addressed during the regular session of the *Sejm* in 1638, but also to amount to one of the main political points at issue in the peak of the Commonwealth's prime (which is said to have encompassed the period of 1638-1648).

The origin of two of the *Sejm* constitutions on aristocratic titles – of 1638 and of 1641 – may be found as early as in 1633, when Jerzy Ossoliński – then Court Treasurer, later Vice Chancellor and Great Chancellor of the Crown – was sent as an emissary to Pope Urban VIII. The official purpose of the mission was the courteous notification of Władysław IV's ascension to the throne, although there was no doubt that the envoy was charged with other tasks – it was of particular interest to raise the issues of: abolition of the ecclesiastical courts' right to appeal to Rome, tithe regulation, the Jesuits of Cracow being forbidden to lecture in subjects taught at the Cracow Academy, approval for the king's concessions to the Orthodox Church, as well as the issue of banning the clergy from procuring land.[27]

The mission's success was very limited, and the history records it mainly for the Polish horses' purposeful losing of the golden horseshoes, so as to show the people of Rome the power and riches of the Commonwealth. Ossoliński, however, managed to win the Pope's favour, who, on the former's departure from Rome, awarded him dukedom (*dux in Ossolin*). While on his way back to the Commonwealth, Ossoliński sojourned in Graz, where Emperor Ferdinand II Hapsburg, whom Ossoliński had known since childhood, honoured him with princehood (*princeps*)[28]. Undoubtedly, it did little to improve the spirits that accompanied his return to Poland.

The mission's results caused great commotion at home. The ultimately unresolved issue of the ban on procurement of land by the clergy was deemed to be of the highest priority, meanwhile the only tangible result of the very costly mission was the splendor gained by the universally disliked Vice Chancellor. Moreover, unlike the members of other noble families, Ossoliński began to use his title of *dux et princeps* publicly. He was openly accused of abandoning the mission's objectives in favour of foreign dignities and his own personal gain. The case was temporarily hushed up by the King, but it came back under scrutiny during the session of the *Sejm* of 1638. The princely titles affair coincided with King Władysław IV's plans – whose actual architect was thought to be Ossoliński himself – to found the Order of Immaculate Conception, whose knights were to form a loyalist faction.

Not unlike the use of aristocratic titles by some families, this met with considerable opposition on part of the nobility. The concept of the first Polish order establishment – not only a slight to the equality of the nobility,[29] but also an act of discrimination against the protestants and the members of the Or-

---

21 URUSZCZAK, W., *Historia państwa i prawa polskiego.* Warszawa, 2010, vol. 1, p. 122.

22 OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 53.

23 VL, vol. 2, 77.

24 VL, vol. 2, 80.

25 VL, vol. 2, 84.

26 VL, vol. 2, 87.

27 KUBALA, L., *Jerzy Ossoliński*. Lwów, 1883, vol. 1, p. 71-98.

28 KUBALA, L., *Jerzy Ossoliński*. Lwów, 1883, vol. 1, p. 98. After Jan Magnus Tęczyński's death in 1637, with whom the Tęczyński family of the Topór coat of arms died out, Ossoliński, invoking his kinship, began to additionally use the title of "Count of Tęczyn". Blind eye was not turned to that – after his death in 1650 there was an anonymous pasquil going around, which read:
Poległ Hrabia z Tęczyna, Xiąże z Ossolina / Died Count of Tęczyn, Prince of Ossolin
Czy żałujesz Ojczyzno tak zacnego syna? / Do you mourn such a worthy son, oh Fatherland?

29 The Order's Statute, approved even by Pope Urban VIII, determined that the Order would consist of 72 knights from the Commonwealth and 24 knights from abroad, and that the Polish king would be its master. According to the plans, the founder knights were supposed to recruit from the most influential contemporary magnates, i.a. Great Chancellor of Lithuania – Albrycht Radziwiłł, Great Crown Hetman and Castellan of Cracow – Stanisław Koniecpolski, Voivod of Bełż – Jakub Sobieski, Voivod of Ruthenia – Stanisław Lubomirski, infant prince Jan Kazimierz and Ossoliński himself.

thodox Church,[30] amongst whom there were many influential senators – was quickly associated with the (already somewhat quietened down) case of mission to Rome and its substantial, though only for Ossoliński, benefits. Ultimately Władysław IV was forced to abandon the idea of order foundation and pledged that he would not found any order without the *Sejm*'s assent. The opportunity was taken advantage of, and the dispute over foreign titles resumed, which in turn caused such turmoil in the *Sejm*'s lower house, that even Albrycht Radziwiłł, the generally esteemed Lithuanian Great Chancellor, had to be reprimanded by the king, whereas Jan Szczawiński, Voivod of Brześć and Kujawy, was ordered by the king, through his marshal, to leave the house floor[31].

During the *Sejm*'s session, Ossoliński was threatened with the passing of a constitution which would deprive him of the newly granted dignities. To avoid that, Ossoliński – already Vice Chancellor – renounced his titles himself. At the same time he demanded that all the other families be stripped of their titles, too.[32] Ossoliński's proposition gathered support amongst the nobles from Greater and Lesser Poland, as well as from Masovia, where princes were scarce and the middle noblity – still dominant. The Lithuanian-Ruthenian nobles, however, who were, to a large extent, subservient to the princely houses, were in favour of keeping the princehoods intact. Albrycht Radziwiłł, the Great Chancellor of Lithuania, invoked that it was pursuant to the act of the Lublin Union (thus not only by imperial patent) that his family was given the right to bear the title.[33] The *Sejm*'s members divided into three factions: the first one, the smallest in number, albeit very influential, embracing the princes with titles of foreign provenance bestowed only after the Union, was led by Ossoliński; the second one comprised of the so called 'ancient princes', *i.e.* tracing their ancestry back to the Lithuanian-Ruthenian rulers; and the third one, dodging between the first two, which embraced those who were, admittedly, granted princehood by foreign rulers, but prior to the Union (for the most part led by the Radziwiłłs).[34]

Eventually the *Sejm* of 1638 passed the constitution on foreign titles which generally abolished all titles – that is, not only the princely ones – of foreign provenance.[35] The constitution stated that: „no title, neither new nor old, shall be used by or bestowed upon anyone"[36]. The *Sejm*, however, pronounced so not only on stipulation that the pre-Union titles were to be preserved ("except those which are in the Union allowed"[37]), but also with the proviso that despite bearing the titles, their holders' legal and political situation was to remain unaltered. The act of the Union itself did not differentiate between titles based on their origin, treating the Lithuanian-Ruthenian (or Tatar) knyazes in the same way as papal or imperial princes who received royal sanction (the act of the Union read: „by whatever writ granted privileges and rights… [both] from olden days and since the Union's conception, to each and every one, by whatever means be they granted"[38]). Thus, the victory belonged to the faction of the ancient princes, led by young Jeremi Wiśniowiecki, then a member of the *Sejm*'s lower house. Not only did they keep their titles, but also became, at least in theory, their exclusive holders. The consequence of such a solution was a ban on use and recognition of other titles, addressed to the public administration. In practice it seems to have gone even further, as in 1640 failure to use the proper appellations in outbound letters, even when addressing "the ancient princes", was imputed to the Ossoliński-led Lesser Office of Crown Chancery.[39]

As the contemporary custom dictated, the provisions of the *Sejm* constitutions were preceded by a preamble, which was supposed to explain the aim of and the grounds for the new law[40]. There it was argued that the highest prerogative, far greater than any „title and preeminence", is freedom, bestowed upon every nobleman in the Commonwealth. The constitution emphasised that all of the princely families should realise the importance of the nobleman's liberty (*wolność szlachecka*) and hold that very liberty, rather than aristocratic titles, as their greatest honour. The *Sejm* reaffirmed that all people of noble birth were equal to one another and the noble rank would not suffer any additional titles and dignities.[41]

However, the case was not closed yet. Through Ossoliński's own efforts, whose motion suffered defeat, it was decided that the matter should be subject to discussion during the next session of the *Sejm*, during which amendments to the constitution could be made.[42] The *Sejm* was summoned for 5th October 1639, that is almost one and a half years after the conclusion of the previous session. The case of aristocratic titles was merely an episode at that session, discussed amongst other affairs of the state, such as: the ultimate establishment of the Polish-Russian border, the fiefdom of Courland, the Danzig

[30] Officially, the main purpose of the Order was supposed to be „the defense of God's glory, of Our Lady and of the Roman Church". Cf. KUBALA, L., *Jerzy Ossoliński*. Lwów, 1883, vol. 1, p. 163-164.
[31] ROMAŃSKI, R., *Książe Jeremi Wiśniowiecki*. Warszawa, 2009, p. 152.
[32] KUBALA, L., *Jerzy Ossoliński*. Lwów, 1883, vol. 1, p. 190.
[33] RADZIWIŁŁ, A., *Pamiętnik*. Warszawa, 1980, vol. 2, p. 90.
[34] SZAJNOCHA, K., Walka książąt starożytnych z nowoczesnymi za Władysława IV. In: *Czas*, vol. 93, 1865, p. 1.
[35] VL, vol. 3, p. 441-442.
[36] VL, vol. 3, p. 441-442.
[37] VL, vol. 3, p. 441-442.
[38] VL, vol. 2, p. 90.
[39] OBUCHOWICZ M., Dyaryusz. In: BALIŃSKI, M. (ed.), *Pamiętniki historyczne do wyjaśnienia spraw publicznych w Polsce XVII wieku posługujące, w dziennikach domowych Obuchowiczów i Cedrowskiego pozostałe wydał z rękopisu*, Wilno, 1859, p. 7-8.
[40] LEWANDOWSKA-MALEC, I., *Sejm walny koronny Rzeczypospolitej Obojga Narodów i jego dorobek ustawodawczy (1587-1632)*. Kraków, 2009, p. 554.
[41] VL, vol. 3, 441-442. Jan Widacki wrongly states that, against the tenor of the constitution, it abolished all foreign titles; cf. WIDACKI J., *Kniaź Jarema*. Katowice, 1988, p. 70.
[42] KUBALA, L., *Jerzy Ossoliński*. Lwów, 1883, vol. 1, p. 191.

tariffs, the marriage of the king's sister, Anna Katarzyna, the Treasury's accounts, and others. The matter was not resumed until the session's penultimate day, *i.e.* 15th November, when the king summoned the majority of the Lithuanian senators and it was jointly resolved, that the latter – together with the Polish senators – would decide on revision of the 1638 constitution the following day.

Despite that, the *Sejm* took no measures in this regard as a result of the next day's events: instead of the constitution's revision, it was the brawl caused by Vice Chancellor Ossoliński that was in the centre of attention; Ossoliński reportedly said to lower house member Stanisław Baranowski, Vice Chamberlain of Drohiczyn: "remember you ram (in Polish: *baran*, as in Baranowski's surname – also meaning "moron"), I will get under your sheepskin"[43], and promised that he „will give him the caning".[44] Presumably, Ossoliński's behaviour led to the the lower house members' demanding that he be fittingly punished (rather than seeing to conclude the session)[45]. To save his minister and quickly put the matter to rest, Władysław IV chose to close the session of the *Sejm*, which meant it ended without passing a constitution. Just after that, on 18th November, a large group of Lithuanian princes gathered at the Great Marshall of Lithuania Aleksander Radziwiłł's mansion to discuss a mutual position against the constitution which had been passed a year before.[46]

The issue of titles was not taken up by the next *Sejm* of 1640 in Warsaw, either; besides, the legislative accomplishments of that session were referred to as *uchwała* (resolution) and not *konstytucja* (constitution),[47] which in the Vasa period was practised to accentuate the extraordinary character of the session and its works.[48]

It was only a year later, that the debate was resumed during the *Sejm*'s regular session and another constitution on titles was passed[49] The passing of the law was preceded not only by a discussion at the *Sejm*, but also a whole campaign, which took place before the session, in the course of which both sides were able to present their points. One of the remnants of that campaign is the work by Jeremiasz Bielejowski – „The case for princely titles, by the Commonwealth, by means of *Sejm* resolution, allowed",[50] in which the author, addressing Jeremi Wiśniowiecki, submits, that "The Commonwealth (…) aware, that Your Highness' most prominent family has its origin in mighty princes, thus with deeper insight does it see and realise that these magnificent Titles (…) not only do not derogate from the Nobleman's Liberty, but indeed they are its great ornament[51].

However the Radziwiłł family (who received their titles in a similar way as the Vice Chancellor, only nearly 100 years prior)[52] were previously Ossoliński's allies, they became, in the later part of the debate, keen proponents of maintaining the *status quo*, demonstrating at the same time that depriving them of their titles was "cruel and inhumane".[53] He, who does not see the great harm done to the Radziwiłł family, who fell victims of attempt to strip them of their titles "without their fault, without suit in law, without a judge, without a sentencing decree, without their consent" – thus spoke Chancellor Albrycht Radziwiłł – was not only blind, but also in breach of the Union's provisions[54].

The eventually adopted constitution stated that the previous one of 1638 „is not subject to any doubt" and should remain in force „in perpetuity".[55] At that, it reaffirmed the rule that the titles which were granted (or were in existence) before the Lublin Union – strictly speaking those, which were confirmed in the act of the Union and the accompanying acts of incorporation – were to be held confirmed. And even this time, pledges of such titles being solely of symbolic value, serving only to preserve the old traditions, as princes themselves were equal to any other member of the noble rank (to which they did not oppose and which they officially acknowledged), could not be avoided.

Thus, the constitution of 1641 did indeed, to the fullest extent, confirm the provisions of the 1638 act, allowing the use of all princely titles which were held before the Lublin Union. However, the law provided for no sanction. Therefore, it is hardly surprising that its provisions were not abided by – even in the *Sejm* constitutions. A comprehensive record of constitutions issued after 1638, in which titles granted after 1569 were used, was drawn up by J. Ostroróg-Sadowski;[56] amongst people adressed by their appellations were: Bishops of Cracow (Princes of Siewierz), counts from Lubomirski, Ostroróg, Tarnowski, Leszczyński, Krasicki, Sapieha, Sieniawski and Opaliński

[43] RADZIWIŁŁ, A., *Pamiętnik*. Warszawa, 1980, vol. 2, p. 176; WIDACKI J., *Kniaź Jarema*. Katowice, 1988, p. 71. Ossoliński is thought to be one of the most prominent Polish diplomats of the 17th c. – nevertheless, he apparently lacked the talent of winning over the nobles. Cf. KUBALA, L., *Jerzy Ossoliński*. Lwów, 1883, vol. 1, p. 191.

[44] KUBALA, L., *Jerzy Ossoliński*. Lwów, 1883, vol. 1, p. 191.

[45] Even King Stefan Batory was not able to afford to make such remarks towards the delegates. When he yelled: „Tace nebulo!" („Silence, you fool!") at delegate Mikołaj Kazimirski, he heard in response: „I am no fool, but a citizen, who elects kings and overthrows tyrants.". Cf. NIESIECKI K., *Polska przy złotey wolności*. Lwów 1733, vol. 2, p. 501.

[46] RADZIWIŁŁ, A., *Pamiętnik*. Warszawa, 1980, vol. 2, p. 178.

[47] VL, vol. 3, 464.

[48] LEWANDOWSKA-MALEC, I., *Sejm walny koronny Rzeczypospolitej Obojga Narodów i jego dorobek ustawodawczy (1587-1632)*. Kraków, 2009, p. 549.

[49] VL, vol. 4, 8-9.

[50] BIELEJOWSKI, J., *Obrona tytułów książęcych od Rzeczypospolitej uchwałą sejmową pozwolonych*. N.p., 1640.

[51] BIELEJOWSKI, J., *Obrona tytułów książęcych od Rzeczypospolitej uchwałą sejmową pozwolonych*. N.p., 1640.

[52] A. Radziwiłł, citing patent from emperor Maximilian, concludes that it had been in fact over 120 years prior. Cf. RADZIWIŁŁ, A., *Pamiętnik*. Warszawa, 1980, vol. 2, p. 90.

[53] RADZIWIŁŁ, A., *Pamiętnik*. Warszawa, 1980, vol. 2, p. 254.

[54] RADZIWIŁŁ, A., *Pamiętnik*. Warszawa, 1980, vol. 2, p. 254.

[55] VL, vol. 4, 8-9.

[56] OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 62.

families, the Margraves of Myszków, and finally Prince Jerzy Ossoliński[57].

3. The case of aristocratic titles after 1641

Another constitution concerning aristocratic titles (*Cudzoziemskich tytułów abrogatio*) was passed during the reign of King Michał Korybut Wiśniowiecki, during the 1673 *Sejm*.[58] The nobility, recognising the futility of the past regulation, went a step further this time – and even though the titles confirmed in the act of the Union and acts of incorporation of Kiev, Bratslav and Volhynia voivodships were, once again, guaranteed to be left intact, all the other foreign titles were abolished and a sanction was imposed for using titles, coats of arms and seals, which would make their holders seem exempt from the principle of equality of the nobility. Any person in breach of that law was to be sentenced to infamy (*perpetuae infamiae*) by the Crown Tribunal.[59]

In the later constitutions which granted the privileges of *indygenat* (naturalisation of nobility)– to outlanders who held foreign aristocratic titles or were of noble rank in another country – there is no indication that the *Sejm* provided those titles with confirmation or sanction and allowed their use in the Commonwealth.[60] The *Sejm* has admitted many foreign aristocrats into the nobility, amongst them Prince of Sachsen-Lauenburg Franz Erdman (in 1652),[61] as well as Baron of Brandenburg Otto de Schwerin[62] and Henry Gordon de Huntly, a Scottish margrave[63] (both in 1658); in doing so with the latter two, the *Sejm* stated, that they deserved "a high prerogative of unequalled liberty, which in the Commonwealth is conferred upon all members of the noble rank" as equals, not as betters – both in rights and in community.[64]

With the passing of time, as individual Lithuanian-Ruthenian families, entitled (pursuant to the act of the Lublin Union) to use their princely appellations[65] – even those of the families who previously had not used their titles (which were *de iure* due to them) – reverted to doing so. In the *Sejm* constitutions, addressed as princes, appeared the Puzyna[66] (tracing back to the Rurik dynasty) and the Woroniecki families (who traced their heritage, as did the Zbaraski and Wiśniowiecki[67] families, back to Korybut Dymitr, Władysław Jagiełło's brother), of whom there is little to be found in historical documents which would support the statement that they had used their "ancient dignities" before the end of the 17th c.[68]

There are no extant documents which would allow to settle beyond ambiguity, whether the Polish kings granted aristocratic titles to Polish citizens after the passing of the 1641 constitution. Taking into account the tenor of the passed laws and the weakening of the royal power, it seems unlikely, however J. Ostroróg-Sadowski was convinced that such grants took place – citing contemporaty (*i.e.* from the second half of the 19th c.) ukazes of tzar's departments, confirming baronial titles, supposedly bestowed by Kings Jan III Sobieski, August II the Strong and August III.[69] Undoubtedly, the rulers did so with regard to foreigners.[70]

The *Sejm* itself, departing from the provisions of almost a century old constitution, granted princehood to brothers of the newly elected King Stanisław August in 1764,[71] making a reservation, of course, that the principle of equality of the noble nation shall remain intact. That constitution began a new phase: one of complete derogation of the law passed during the reign of Władysław IV and one of the spread not only of the previously combatted holding of aristocratic titles, but also – and, in fact, for the first time in history – of the granting of such titles by the Polish authorities. The reign of Stanisław August was already a time of the *Sejm*'s disposing of titles quite freely. In 1768 the Sapieha family were endowed with princehood, invoking Zygmunt the Old's privilege of 1512 – of course, otherwise unheard of – which the Sapieha family did not submit into *Acta Magni Ducatus Lithuaniae* until 1744.[72] In 1775 the *Sejm* bestowed princehood upon notorious Adam Poniński, Marshal of the Partition *Sejm*, along with his brother and both of his children.[73] In the same year, the Massalski family had their princehood confirmed; they, however, traced back to Rurik – strictly speaking, as the constitution read, to Rurik's descendant, Timotei, married in the 15th c. to a Lithuanian princess.[74] The *Sejm*'s activity in terms of princely titles was not limited strictly to individual acts. During the very same session of 1775 – that is, during the Partition *Sejm* – it was for the last in time in the Commonwealth's history that the *Sejm* passed

[57] Under Jan Kazimierz's general confirmation of rights a signature may be found, which reads: *Georgio a Tęczyn, Duce in Ossolin, Sancti Romani Imperii Principe*. Cf. VL, vol. 4, p. 119.
[58] VL, vol. 5, p. 73.
[59] VL, vol. 5, p. 73.
[60] Differently: OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 65.
[61] *Indygenat Xięcia Saksońskiego*, VL, vol. 4, p. 176.
[62] *Indygenaty Konsyliarzow Kurfirsta IMci Brandenburskiego, Urodzonych, Ottona Barona de Schuerin, Iana z Howerbeka, y Wawrzynca Krzysztofa Somnicza*, VL, vol. 4, p. 263.
[63] *Indygenat urodzonego Henryka de Gordon, Margrabie Huntilaeum*, VL, vol. 4, p. 263.
[64] VL, vol. 4, p. 176.
[65] The Ostrogski family died out in 1620, the Zbaraski family – in 1631, the Zasławski family – in 1682, the Wiśniowiecki family – in 1744.
[66] Their first recorded appearance as princes dates back to 1697. Cf. VL, vol. 6, p. 9.
[67] Their first recorded appearance as princes dates back to 1733. Cf. VL, vol. 6, p. 593.
[68] OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 61.
[69] OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 61-66.
[70] OSTRORÓG-SADOWSKI, J., *Tytuły dziedziczne w oświetleniu obowiązującego prawodawstwa*. Warszawa, 1899, p. 66, citing BENTKOWSKI, F., *Biblioteka warszawska*. Warszawa, 1851, vol. 3, p. 413.
[71] *Dom nasz królewski*, VL, vol. 7, p. 160.
[72] *Potwierdzenie Xiążęcego tytułu Wielmożnym y Urodzonym Sapiehom*, VL, vol. 7, p. 377.
[73] *Nadanie tytułu Xiążąt Polskich Urodzonym Ponińskim*, VL, vol. 8, p. 127-128.
[74] *Wydanie diplomatis książętom Massalskim na ich dokumenta y wyprowadzoną linią potomkow Michała Hetmana Wielkiego Litewskiego,* VL, vol. 8, p. 407.

a constitution on princehoods – this time concerning solely foreign titles. In the constitution titled *Deklaracya względem Xiążąt Sw. Państwa Rzymskiego* [„Declaration with regard to Princes of the Holy Roman State"] it was established that:

> On account of Honourable Baron de Rewiczky[75], Minister of the Vienna Court, who is hereby making this plea to the Estates of the Commonwealth on behalf of the said Court, and at the same time warranting, that reciprocity shall be ensured, that the Princes of the Holy Roman State be granted princehood in the Commonwealth; thus We, approving of such a plea, declare that Princes *Sacri Romani Imperii* in Poland as in other European countries shall always hold titles of princes, [although] without usurpation of any prerogative from such titles.[76]

Thus, the *Sejm* confirmed all princely titles of imperial origin – not only those granted before 1569, but also even after 1638, *i.a.* to the Lubomirski (1647 – the Wiśnicz and Jarosław branch)[77], Jabłonowski (1743)[78] and Sułkowski families (1752 i 1754)[79]. One cannot help but conclude that the equality of the nobility was concurrent with the fortuity of the political situation in the Commonwealth, whereas the concessions to the holders of foreign titles became precipitated as the Commonwealth's predicament deteriorated. Twenty years from then the rulers of partitioning monarchies were to become the sole disponents of not only aristocratic titles, but also of the noble rank.

4. Conclusion

When compared to the rest of contemporaneous Europe, the Polish-Lithuanian model, which, as a rule, forbade the use of aristocratic titles, must have been a peculiarity. The model was never allowed to fully develop, but as long as the system of government in the Polish-Lithuanian Commonwealth was efficient, the ban's execution was successful more often than not. It was only in time of political demise that the definitive reception of foreign standards could take place. In this regard, it should be conceded that the defenders of the old order were right to point out that the foreign forms of government permeating the Commonwealth would become its doom.

On the one hand, the Commonwealth was a democracy, whose electorate was limited only to the members of the nobility; on the other hand, however, the Commonwealth was still largely egalitarian, more so than any other part of Europe. Such great an influence on the public affairs as enjoyed by the Polish nobility, was nowhere to be found among the similarly situated social orders in other lands – and it was that influence which allowed for combating the privileges of the richest and most influential aristocratic houses, who held princehoods *Sancti Romani Imperii* or *Sancti Romani Ecclesiae*. In other European countries, those who held such titles would be sovereign rulers, but in Poland they had to acknowledge their own parity not only with the middle nobility, but also with the non-possessionate members of the political nation. Of course, said parity was, in the practical aspect, illusory, which goes to show how limited the law's power is, when it comes to altering reality, as some phenomena cannot be decreed. Notwithstanding, it would be wrong to presuppose that the actions against princely titles were solely theoretical, without tangible repercussions to the society's factual political conditions. The Commonwealth was not a democracy in the contemporary meaning of the word, but, if one takes into account that the nobility made up as much as 8[80]-10%[81] of its inhabitants (in some areas even as much as 25%[82]), then it becomes clear that their influence on the public matters was by far greater than anywhere else in Europe. Such state of affairs in many countries could only be achieved as late as in the 18th c. (France), 19th c. (the United Kingdom) or even as late as in the 20th c. (many Eastern and Southern European countries).

After Poland had regained its independence in 1918, the matter of aristocratic titles was brought up only once more – and in passing. Article 96 (2) of the 1921 Constitution provided that:

> The Republic of Poland does not recognize privileges of birth or of estate, or any coats of arms, family or other titles, with the exception of those of learning, office, or profession.[83]

This provision was not introduced in reference to the pre-existing model from the Commonwealth period. On the contrary – it was an effect of assuming a strictly republican model of government, in which there was no place for aristocratic titles or noble rank. Nowadays, it is widely held that it was under that provision this the Constitution abolished all noble titles, existing thitherto (including the noble rank itself),[84] although such interpretation is unjustified, as distinction should be made between the state „not recognizing" a certain institution and the institution's abolition, prohibition or derogation. The wording of the Constitution does not imply that the use of nobility, coats of arms or family titles was forbidden – even if only in private – since it only prohibits the state authorities to do so.

---

75 Carl Emmerich Alexander, Baron Reviczky von Revisnye – Austrian diplomat and ambassador to Warsaw.

76 *Deklaracya względem Xiążąt Sw. Państwa Rzymskiego*, VL, vol. 8, p. 112.

77 OSTRÓWSKI, J., *Księga herbowa rodów polskich*. Warszawa, 1897, vol. 2, p. 189.

78 NIESIECKI, K., *Herbarz polski*. Lipsk, 1839-1846, vol. 1, p. 444.

79 ŻYCHLIŃSKI, T., *Złota księga szlachty polskiej*. Poznań, 1882, p. 314.

80 KACZMARCZYK, Z., LEŚNODORSKI, B., Historia państwa i prawa Polski. Tom II. Od połowy XV wieku do r. 1795. Warszawa, 1966, p. 75.

81 URUSZCZAK, W., *Historia państwa i prawa polskiego. Tom I (966-1795)*. Warszawa, 2015, p. 194.

82 KACZMARCZYK, Z., LEŚNODORSKI, B., Historia państwa i prawa Polski. Tom II. Od połowy XV wieku do r. 1795. Warszawa, 1966, p. 75.

83 McBAIN, L., ROGERS, L., *The new constitutions of Europe*. Garden City, 1922, p. 364.

84 The misinterpretation of this provision is sometimes used even in the contemporary case law of Polish courts. The Voivodship Administrative Court in Łódź stated in the judgment of 12th April 2007 (file no. III SA/Łd 554/06): "Under this provision [of art. 96 (2) of the 1921 Constitution] family and estate privileges were abolished and the use of coats of arms, family titles, barring academic titles, was forbidden". Błędna interpretacja tego przepisu konstytucji bywa przywoływana nawet w we współczesnym orzecznictwie sądowym. Wojewódzki Sąd Administracyjny w Łodzi w wyroku z 12 kwietnia 2007 r., III SA/Łd 554/06 stwierdził: „Mocą tego przepisu [art. 96 ust. 2 konstytucji z 1921 r.] zniesione zostały przywileje rodowe, stanowe, a także zakazane zostało używanie herbów, tytułów rodowych z wyjątkiem tytułów naukowych".

Poland: Study of Pre-War Court Cases Related to Freedom of Speech and Formal Logic*

*Ewa Fabian***

Abstract

This article discusses a political and social scandal of 1936-1938 which included a trial for defamation (Polish: zniesławienie) based on an accusation of spreading Soviet propaganda in a Polish magazine for children ("Płomyk"). The judgments issued in 1936 and 1937 concerned freedom of the press and the right to formulate critical opinions in the public interest. The case is well preserved and as such could be analyzed in light of Polish jurisprudence of that era related to the concept of "proof of truth". The issues identified in the judgments led to an analysis whether opinions can be assessed as true or false. Pre-war and modern jurisprudence related to freedom of speech was invoked to show how the matter of critical opinions evolved with relation to human rights. The pre-war Poland was also home to the Warsaw-Lwów School of thought, including A.Tarski and his semantic conception of truth. Logical concepts related to the problem of truth (invoking also G. Frege and Z.Ziembiński) are used in the article in an attempt at formulating a basic matrix for distinguishing opinions from non-opinions (the Value-Judgments Matrix). These may be used by judges and possibly in modern dispute resolution technology.

Keywords: *defamation; false information; Jan Brzechwa (Lesman); Płomyk; Polish pre-war jurisprudence; Soviet propaganda; Antoni Kwiatkowski; Alfred Tarski; Zygmunt Ziembiński; logic.*

1. The Flame Gate

The court case discussed in this article concerns the freedom of speech. Two judgments analyzed below in what is referred to as the Flame Gate were issued in pre-war Poland, in 1936 and 1937. The case became a forum for a number of important political and legal issues. It concerned the accusation of spreading Soviet propaganda. As such, the case was an inspiration to look at the shape of the pre-war Polish judiciary and at the subsequent development of the doctrine of freedom of expression in the context of formulating critical opinions. We will see that there were arguments against assessing opinions in terms of truth as well as examples of that position in judgments issued by the Polish Supreme Court. We will also look at logic and how it supports legal reasoning, attempting to formulate a matrix which could help distinguish opinions from non-opinions.

1.1 Accusation of spreading Soviet propaganda

Both judgments analyzed below ruled in favor of the freedom of expression. On February 3, 1937, the Warsaw Court of Appeal confirmed the acquittal of Jan Stankiewicz,[1] a journalist acting as the responsible editor (Polish *redaktor odpowiedzialny*)[2] for "Ilustrowany Kuryer Codzienny" (IKC) - a top daily newspaper in inter-war Poland, printed in Cracow.

IKC (1910-1939) was founded and owned by Marian Dąbrowski. It was a success story of an independent and generally patriotic press title in the difficult early XXth century capitalist economy. The newspaper had to face changeable and complicated laws related to freedom of the press in the Second Polish Republic. The political setting it dealt with was increasingly difficult.[3]

Jan Stankiewicz was accused of defamation in a private prosecution case brought by persons associated with "Związek

* This publication is prepared as a part of a project funded by Narodowe Centrum Nauki in Poland titled *"The second life of poet Jan Brzechwa: Advocate Jan Wiktor Lesman as a pioneer of Polish and international copyright law"*, financed by the Polish National Science Centre 2018/29/B/HS5/02729.

** Ewa Fabian, Ewa Fabian, PhD Candidate, Faculty of Law, Kozminski University, Poland.

1 Sąd Apelacyjny w Warszawie, judgment (*wyrok*), 03.02.1937, II KA. 1103/36 confirming acquittal by Sąd Okręgowy w Warszawie, judgment (*wyrok*), 4.11.1936, III 4K. 36/36. In: Archiwum Akt Nowych (archive), Warsaw, Nr. 9, vol. 829.

2 Please note that "responsible editor" is used here specifically, to create a different expression from editor-in-chief (Polish: *redaktor naczelny*). Responsible editor was a legal role in pre-war Poland, indicating the person individually responsible in a newspaper for the content of articles. It was not the same as the editor-in-chief.

3 BAŃDO, A., *Ilustrowany Kurier Codzienny w dziewięćdziesiątą rocznicę powstania (1910–2000).* In: *Annales Academiae Paedagogicae Cracoviensis*, vol. 2, Nr. 9, 2003; BAŃDO, A., *Pamiętnik Jana Stankiewicza, redaktora Ilustrowanego Kuriera Codziennego.* In: *Rocznik Historii Prasy Polskiej*, vol. 21, Nr. 4, 2018, p. 153-160; BAŃDO, A., *Marian Dąbrowski i legenda Ilustrowanego Kuriera Codziennego.* In: *Kraków – Lwów*, vol. 6, Nr. 2, 2003, p. 197; TODOS, K., *Polskie prawo prasowe w latach 1919—1939. In: Z Dziejów Prawa*, vol. 10, Nr. 18, 2017, p. 128; ZIELENIEWSKI, L., *Ustawodawstwo prasowe. Zbiór ustaw, rozporządzeń i okólników oraz orzecznictwo sądów.* Warszawa 1933.

Nauczycielstwa Polskiego" (the Union of Polish Teachers). The case brought to the criminal court concerned an unsigned article published in IKC. The article claimed that the Union of Polish Teachers published Soviet propaganda in its magazine for school pupils called "Płomyk" (in translation, the "Flame", hence the Flame Gate). Private prosecution in this case meant that no prosecutor was present. The accusing party was represented in the criminal court by advocates.

The Union of Polish Teachers was represented by Mieczysław Jarosz (1886-1972), famous for his defence work in Brest trials (1931-1932)[4] and Jan Brzechwa (1898-1966), then known as Jan Lesman. Jan Brzechwa was at the time deemed a national[5] and international[6] expert in copyright law. He was also known for providing representation for politically involved individuals in difficult legal matters (such as the famous dispute between Zenon Przesmycki aka. Miriam against professor Tadeusz Pini).[7] After the Second World War, Jan Brzechwa continued his pre-war work for the Society of Authors ZAIKS and worked as a lawyer for the "Czytelnik" Publishing House. He discontinued his work at the Warsaw Bar of Advocates soon after rejoining after the Second World War.[8] Brzechwa is remembered today for being an author of literary works for children.

Polish government before the Second World War opposed Communism. At the time of the Flame Gate, the Republic of Poland was fighting an economic crisis, the need to minimize analfabetism,[9] poverty, crime and social revolt.[10] It all happened in a freshly independent state, established after over a hundred years of non-existence - and after a successful push back of the Bolshevik Red Army in 1920. After the Second World War, however, Poland became a part of the Communist Bloc.

---

[4] SADURSKI, F., *Adwokaci krasomówcy.* In: *Palestra*, vol. 40, Nr. 11-12(467-468), 1996, p. 125-129; ALBRECHT, Z., TROMBSKI, H., SADURSKI, F., PIETRUSZKA, S., RYBICKI, M., KAŹMIERCZAK, E., JAROSZ, M., *Jubileusz Mieczysława Jarosza*. In: *Palestra,* vol. 6, Nr. 7(55), 1962, p. 3-16; JAROSZ, M., *Sylwetki wybitnych obrońców warszawskich w okresie międzywojennym.* In: *Palestra,* vol. 1, Nr. 3, 1957, p. 57-66; JAROSZ, M., *Trzy po trzy. Wspomnienia obron w różnych sprawach karnych. Ciekawsze sylwetki sędziów warszawskich w okresie międzywojennym*. In: *Palestra,* vol. 2, Nr. 10-11(11), 1958, p. 42-59.

[5] LESMAN, J. (BRZECHWA, J.), *Prawo autorskie w kinematografji dźwiękowej*. Warszawa, 1931 and In: *Palestra,* 1931, p. 179-190, p. 307-317; LESMAN, J. (BRZECHWA, J.), *Droit de suite w prawie autorskiem.* Warszawa, 1933 and In: *Palestra,* 1933, p. 191-203; LESMAN, J. (BRZECHWA, J.), *Prawo autorskie w ZSRR*. In: *Palestra,* 1934, p. 286-292, p. 399-413, p. 493-507; LESMAN, J. (BRZECHWA, J.), *Nowelizacja prawa autorskiego.* Warszawa, 1935 and In: *Palestra*, 1935, p. 489-501; LESMAN, J. (BRZECHWA, J.), various articles on copyright law. In: *Wiadomości Literackie*, Nr. 273, Nr. 280, Nr. 283, 1929; Nr. 398, 1931; Nr. 487, Nr. 493, Nr. 497, Nr. 501, Nr. 505, Nr. 514, 1933; Nr. 534, Nr. 535, Nr. 538, Nr. 546, Nr. 560, 1934; Nr. 596, Nr. 609, Nr. 612, 1935; LESMAN, J. (BRZECHWA, J.), *Logika czy humorystyka?* In: *Wiadomości Filmowe,* vol. 3, Nr. 44, 1935, p. 3; LESMAN, J. (BRZECHWA, J.), *Twórczość artystyczna i jej ochrona*. In: *Scena i Sztuka*, Nr. 1, 1936, p. 11-12; LESMAN, J. (BRZECHWA, J.), *Wypożyczanie książek wobec prawa autorskiego.* In: *Przegląd księgarski. Organ Związku Księgarzy Polskich,* Nr. 13, 1936, p. 110-111; BRZECHWA, J., *Ochrona prawna tytułu.* In: *Kuźnica*, Nr. 38, 1946; BRZECHWA, J., *Konwencja Berneńska i jej dzieje.* Warszawa, 1947; BRZECHWA, J., *Pechowy kongres.* In: *Stolica*, vol. 23, Nr. 913, 1965, p. 16. Jan Brzechwa was a member of Polish Society for the Protection of Copyright (PTOPA), held several important roles in *Związek Autorów i Kompozytorów Scenicznych* ZAiKS (including the role of president) and *Confédération Internationale des Sociétés d'Auteurs et Compositeurs* CISAC (member of the legislation committee) and authored Polish provisions for *droit de suite*, an amendment to the Polish Copyright Act of 1926 in 1935 (*Dz.U. R. P. 1935 r., nr 36, poz. 260*).

[6] He published in several issues of *Le Droit d'Auteur. Revue Du Bureau De L'union Internationale Pour La Protection Des Śuvres Littéraires Et Artistiques* (Nr. 10, 1931, p. 119-120; Nr. 6, 1932; Nr. 8, 1934, p. 91-94; Nr. 4, 1937, p. 42-47; Nr. 8, 1938, p. 97); and *Inter auteurs (Paris) Confédération internationale des sociétés d'auteurs et compositeurs* (CISAC) (Nr. 31, 1933, p. 466-470; Nr. 51, 1935, p. 7-8; Nr. 59, 1936, p. 184-185; Nr. 62, 1936, p. 222-225; Nr. 63, 1936, p. 251-255; Nr. 76, 1937, p. 538-543; Nr. 86, 1938, p. 751-754; Nr. 90, 1939, p. 823-826) and in the Italian *Il diritto di autore* (*IDA*, 1939, p. 344-350; 1935, p. 245-258; 1937, p. 209-221).

[7] ZANIEWICKI, Z., *Wspomnienie o wielkim odkrywcy.* In: *Poezja,* vol. 6-7, Nr. 220-221, 1984; OKRĘT, L., *Między życiem a sądem*. Warszawa 1938; BĄBIAK, G. P., *Ludzie osobni polskiej kultury. Ludzie osobni. Korespondencja Jana Lorentowicza i Zenona Przesmyckiego-Miriama z lat 1899-1939*. Warszawa, 2014; MISSUNA, O., *Warszawski pitaval literacki*. Warszawa, 1960; GOMULICKI, J. W., *Sędzia Stanisław Aleksander Rybiński - nieznany bohater norwidowskiego procesu Zenona Przesmyckiego z Tadeuszem Pinim: 1934-1938.* In: *Palestra*, vol. 46, Nr. 3-4(531-532), 2002, p. 138-158; GELERTNER, S. (ed.), *Mowy* sądowe. vol. 3, Warszawa, 1936, p. 231-242; BREITER, E., *Sensacyjny proces o prawa autorskie. Czy Miriam jest właścicielem poezyj Norwida? Przemówienie adwokata Emila Breitera*. In: *Wiadomości Literackie,* Nr. 621, 1935; PINI, T., *O dzieła C. Norwida*. In: *Przegląd Literacki: miesięcznik informacyjny*, Nr. 5, 1931; *Proces o puściznę po Norwidzie.* In: *Wiadomości Literackie,* Nr. 589, 1935; GOMULICKI, J. W., preface to NORWID, C., *Wiersze.* Warszawa, 1966; GRZYBOWSKI, St. M., *Sprawa Mirjam – Pini*. In: *Czas,* Nr. 267, 1934; *Przegląd Artystyczny,* Nr. 34, 1934; CZARTKOWSKI, A., *Nareszcie cały Norwid!* In: *Wiadomości Literackie,* Nr. 565, 1934; SŁONIMSKI, A., *Kronika tygodniowa.* In: *Wiadomości Literackie* Nr. 565, 1934; PINI, T., *Pan Miriam kupił prawa autorskie Norwida za sto rubli! "Sztuka i kultura" czy „przemysł i handel"?* In: *Wiadomości Literackie,* Nr. 571, 1934; *Proces o prawa do dzieł Norwida.* In: *Czas,* Nr. 267, 1935; *Kurjer Warszawski, wydanie wieczorne,* Nr. 138, 1935; MORSTIN, L. H., *Zbiorowe wydanie dzieł Norwida*. In: *Czas*, Nr. 267, 1934; *Przegląd Artystyczny*, Nr. 34, 1934; *Miriam przegrywa proces o Norwida. «Dzieła Norwida są własnością Narodu». Druzgocące orzeczenia sądu okręgowego pod przewodnictwem wiceprezesa Szczepańskiego*. In: *Wiadomości Literackie*, Nr. 630, 1935; *Kurier Warszawski,* Nr. 178, 1937; *Dlaczego Miriam nie ma praw do Norwida. Motywy wyroku sądu apelacyjnego*. In: Wiadomości Literackie, Nr. 660, 1936; *Biuletyn ZAIKS,* Nr. 5, 1948; *Ilustrowany Kuryer Codzienny*, Nr. 52, 1937.

[8] Jan Brzechwa practiced law after the Second World War between 1945 and 1948 (established *via* Archives of the Warsaw Bar of Advocates, personal file of Jan Brzechwa (digital version) and URBANEK, M., *Brzechwa nie dla dzieci*. Warszawa, 2013, p. 228-229). A particularly difficult part of Brzechwa's story as a lawyer lies in the fact that, in 1939, his practical commentary to the Copyright Act of 1926 and the Berne Convention was ready for print. The publishing process was disrupted by the Second World War. One draft print survived (a copy provided to prof. Jan Namitkiewicz for corrections) and was given back to the author. It was read by lawyers even after Brzechwa's demise in 1966 and exists to this day, with a notable publication by Bogdan Michalski in Warsaw in 1968 - but it was never published. Parts of it, such as a collection of pre-war case law and several expertises developed by Jan Brzechwa, can be found in print in fragments in several pre-war and post-war publications, in ZAiKS Bulletins and in the ZAiKS library (remarks about the Berne Convention, in a single copy) (MICHALSKI, B., *Prawo autorskie Jana Brzechwy.* In: *Prawo i Życie,* vol. 8, Nr. IX, 1968; *Biuletyn ZAIKS*, Nr. 5, 1948). Jan Brzechwa is known in Poland mostly for his poems and books for children, while his legal career and his involvement in the shaping of copyright laws are now largely forgotten.

[9] STANCZYK, P., *Wykształcenie ludności II Rzeczypospolitej w świetle badań GUS.* In: *Społeczeństwo i Ekonomia*, Nr. 5, 2016, p. 7-26.

[10] CICHORACKI, P., DUFRAT, J., MIERZWA, J., *Oblicza buntu społecznego w II Rzeczypospolitej doby Wielkiego Kryzysu (1930-1935), Uwarunkowania, skala, konsekwencje.* Kraków, 2019, p. 393.

IKC's article was published under the title: "Madness or crime? Schoolchildren in Poland are poisoned by the venom of Bolshevism" on March 7, 1936[11]. The criticized magazine ("Płomyk" no. 25) was, in that particular month, written entirely about the Soviet Union. The magazine was published on March 2, 1936 and its contents were known to the public.[12] The magazine, belonging to the Union of Polish Teachers, contained a number of photographs and illustrations of the Soviet Union and its children, and a number of articles. Some of the texts were favorable to the Soviets. Others - not as much - being some older texts and poems, mainly by Polish authors.

The courts of both instances were going to carefully analyze the contents of the magazine. Eventually, they found out not only that some of the texts were of a propaganda nature, but also that one of the poems lost its most religious part somewhere along the printing process. The judges were given so much evidence that they even analyzed what was on the covers of the magazine the previous month and how it presented Poland by contrast (Polish workers on strike versus smiling Soviet girls). As will be discussed below, such analysis was most probably not called for, especially in the light of the growing social unrest.

The court used evidence provided by Antoni Kwiatkowski (1890-1970). He was an internationally recognized expert on Soviet propaganda techniques. He organized a Communism Research Institute in Warsaw in 1930. He analyzed and brought to light various Soviet sources, including a description of a theory of propaganda called "psychosphere". There, printed words were compared to electrons working in the "organomechanism" connecting people together.[13] He used innovative memory techniques, observed by journalists reporting his witness statement for the Flame Gate case when he showed his clever, strange-looking notebook. His major works, including his biography and works on Soviet propaganda and psychosphere, are stored in Hoover Institution Archives, Stanford University. His accomplishments in uncovering historical facts about the Soviet Union and his understanding of methods of direct and indirect propaganda were remarkable. He was also a Roman Catholic priest. He was born in Lithuania, studied in Petersburg and died in Nottingham. His witness statement was used by the courts in the Flame Gate. It was probably the only piece of evidence directly influencing the reasoning of judges.

The courts concentrated on the propaganda contents of the magazine. None of the courts found out, however, that the pictures in the Soviet issue came from the Soviet embassy in Warsaw. They were obtained through the connections of Wanda Wasilewska (1905-1964), not from the Keystone Press Agency, as claimed strongly in court.[14] This fact, which could easily lead to serious consequences in 1936-37, was admitted by Wanda Wasilewska in 1964 for the historical archives of the Communist Party, as uncovered by Polish scholars. Wasilewska, later the famous communist colonel, Stalin's writer and a politician, admitted that she feared jail in connection with that issue of the "Flame". She said in 1964 that she organized the editing process without disclosing her name in the editorial note. She admitted that she obtained the pictures from the Soviet embassy. She even refused to write an article for a Communist newspaper about the allegedly "politicised" trial. Living already under the Communist regime, she felt that the articles written for children indeed sounded like propaganda. These details confirm that the judgments issued in this case were fair - even if the courts did not see the entire picture.

There were a number of politicians involved in the Flame Gate. Notably, on the side of the Union of Polish Teachers, there was Wincenty Rzymowski (1883-1950). He provided a substantial witness statement. During that time, Rzymowski was said to be publishing texts supporting the case for the Union, in one instance for a large fee, in "Kurjer Poranny" where he presided as editor-in-chief.[15] At the time of the Flame Gate trials, he was also accused of committing plagiarism of Bertrand Russell and Jean Prčvost. The latter accusation was followed by him leaving "Kurjer Poranny" on February 2, 1937 and the Polish Academy of Literature on February 27, 1937.[16] He became one of the ministers of the Polish Communist government after the Second World War, the position he held until the end of his life.

1.2 The court proceedings and judgments in the Flame Gate case

The proceedings in the Flame Gate case are richly documented among pre-war court cases. Most such files were lost during the War of 1939-1945 and some - as many case files kept in Warsaw courts - in the Warsaw Uprising of 1944. Two out of three of the Flame Gate court judgments were saved in archives.[17] These files are related to the suspension of the

[11] *Szaleństwo, czy zbrodnia? Młodzież szkolną w Polsce truje się jadem bolszewizmu*. In: *Ilustrowany Kuryer Codzienny*, Nr. 67, 1936, p. 3.

[12] *Płomyk: tygodnik dla dzieci i młodzieży*, vol. 2, Nr. 25, 1936.

[13] MARSZAŁ, M., *Komunizm w poglądach Antoniego Kwiatkowskiego (1920-1939).* In: *Acta Universitatis Wratislaviensis (ISSN 0239-6661, Nr. 3625). Studia nad Autorytaryzmem i Totalitaryzmem.* vol. 36, Nr. 2, 2014, p. 87-88; PUCHALSKI, J., *"A book is not an inanimated object, but a question of life" – a book culture in the USSR in the 20-30s of the 20th century in the light of the "Theory of psychosphere and its bibliological method" by Antoni Wincenty Kwiatkowski (1890-1970).* In: *Z Badań nad Książką i Księgozbiorami Historycznymi,* Nr. 12, 2018, p. 194, with fragments from KWIATKOWSKI, A. W., *Biografia,* 71013, Hoover Institution Archives Stanford, California 94305-6010*;* and KWIATKOWSKI, A. W., *Na froncie intelektualnej ofensywy Bolszewizmu.* Warszawa, 1932.

[14] CIEŚLIKOWA, A. J., *Wielki skandal polityczny Płomyka*. In: *Zeszyty Prasoznawcze*, Kraków, vol. 1-2, Nr. 177-178, 2004, p. 108-109, with fragments from WASILEWSKA, W., *O zabronieniu Płomyka*. Archive of the Museum of Culture and Art (AMLIM), Kyiv, fond 73, coll. 151; WENKLAR, M., *Między obroną wolności a drogą do rewolucji. Strajk nauczycielski 1937 roku*. In: *Folia Historica Cracoviensia*, Nr. 23, 2017, p. 491-517.

[15] *Kurjer Poranny*, Nr. 76, 1936.

[16] KOFIN, K., *Historia plagiatów Wincentego Rzymowskiego odkrytych na łamach tygodnika „Prosto z Mostu".* In: OCHMAŃSKI, M., PIETRZKIEWICZ, D., PUCHALSKI, J. (ed.), *Z Badań nad Książką i Księgozbiorami Historycznymi 2019. Tom specjalny: Dla Niepodległej.* Warszawa, 2019; MISSUNA, O., *Warszawski pitaval literacki.* Warszawa, 1960, p. 155-157.

[17] Archiwum Akt Nowych (archive), Warsaw, Nr. 9, vol. 829 - the file does not contain the judgment of the Supreme Court issued in this dispute, which also upheld the acquittal.

Union of Polish Teachers board members in 1937.[18] Indeed, the court case led to serious administrative investigations, suspension of the board of the Union of Polish Teachers and a subsequent powerful national strike (1937-1938) of Polish Teachers organized mostly by Wanda Wasilewska, mentioned earlier, and Janina Broniewska. The crisis was resolved peacefully. The Communist regime which took power during the war, made use of the national strike of 1937-38, presenting it as a proof of pre-war support for various communist causes. Still, the Flame Gate was widely reported in various pre-war press titles as a national scandal and a clash between two press giants, both of which existed for approximately 20 years.[19] Given such demand from the public, detailed descriptions of witness statements and the hearings were provided in newspapers of various political associations and exist to this day.[20]

The court proceedings in the Flame Gate were rather extraordinary, given today's standards. It took only one long day (9 a.m. to 10.50 p. m.)[21] to hear all witness statements. Over 20 witnesses were heard in just one day, on October 29, 1936. The final submissions for the court of first instance took place on November 4, 1936. Warsaw Court of Appeal heard the matter on February 3, 1937, also in one hearing. For a complex criminal matter, it was resolved rather quickly. However, the proceedings were also thorough, given that most of the witness statements were not necessary for the case to be resolved. The reasoning of the judgment of the court of first instance stated that most witness statements that were taken were not needed to resolve the matter. The justice system in pre-war Poland is often criticized as one that was not fully independent after the May Coup in 1926 and, in particular, under the Constitution of April 23rd, 1935.[22] Indeed, the courts were, *inter alia*, instructed - administratively - by the Minister of Justice.[23] In such instructions, judges were expected to avoid too many pretrial detentions, to strive to hear cases in one day and to take only the most essential evidence, all of that for financial reasons (the instructions also underlined that judges solved cases independently). The Flame Gate matter was resolved in such a swift way, save maybe for the large number of witnesses. However, court bias was not apparent in the matter. In fact, as reported by the press, the presiding judge presented confidence, objectivity and sophistication.

The Flame Gate proceedings ended with two judgments upholding journalists' right to express criticism in the public interest. The courts were also critical of the "Płomyk" magazine. The judgment by the Court of Appeal criticized the propaganda articles for children even more strongly than the District Court in Warsaw. There were certain political consequences of the trial (such as the suspension of the board of the Union of Polish Teachers, the subsequent national strike (1937-1938) and, fortunately, a peaceful resolution of the crisis). The trial was, however, not entirely political.

It could not be political, first of all, as the case was initiated by the Union of the Polish Teachers - not by the prosecutor representing the Republic of Poland. IKC was a financially and intellectually independent news title, even if it had supported the government from time to time. Administrative bodies could seize an issue of a newspaper (then subject to confirmation by court) which was at the time rather common practice. During the trial, however, the Union of Polish Teachers was free to publish its reports and opinions, some even agitating the teachers for support. Such reports exist to this day and, therefore, were not subjected to an administrative action. Indeed, several elements of the Flame Gate trial point to a judiciary and administrative bodies working quite well. This holds true in particular with respect to the number of witnesses admitted by the court equally for both sides, the unbiased way the presiding judge handled the hearings and in the way the reasons of both judgments were phrased. The court took care to find convincing, matter of fact arguments to explain why the contents of "Płomyk" no. 25 could and should have been regarded as Soviet propaganda addressed directly to Polish children. The matter was of great importance for the public interest.

There were methods, however, the court could use to make the trial appear less political. Firstly, the reasoning could be drafted in a manner less involved in politics and in religious faith. Given that the judgments were issued in troubled times, it is easy to understand why the first improvement would be difficult to achieve. Secondly, references to the Polish Criminal Code of 1932[24] and the legal theory behind it could be more present, especially references that could possibly explain that there were no grounds for the "proof of truth" with respect to opinions. An attempt at the second improvement is visible in the judgment of the court of first instance (it will be discussed below in more detail). Thirdly, on a deeper level, both judgments could be more logically coherent. We will see that there were elements of such an approach in the jurisprudence of the Polish Supreme Court and in the works of Polish logicians from that era.

---

[18] WASILEWSKA, W., *Historia jednego strajku.* Warszawa, 1950; BRONIEWSKA, J., *Tamten brzeg mych lat.* Warszawa, 1973; ŚWIECIK, J., *Strajk nauczycielski w Płocku w dniu 15 października 1937 roku.* In: *Notatki Płockie*, 1977, Nr. 1, p. 32-36; *"Płomyk" contra Ciemnogród.* In: *Prawo i Życie*, Nr. 4, 1956, p. 5.

[19] BAŃDO, A., *Ilustrowany…*, p. 142; CIEŚLIKOWA, A. J., *Wielki skandal polityczny...*, p. 102, with fragments from PACZKOWSKI, A., *Prasa polska 1918-1939.* Warszawa, 1980, s. 253.

[20] In particular in *Ilustrowany Kuryer Codzienny*, *Kurjer Poranny*, *Głos Nauczycielski,* but also in other titles such as: *Robotnik, Nasz Głos, Słowo Pomorskie, Dziennik Bałtycki, Kurier Polski, Dziennik Bydgoski, Słowo wileńskie, Mały Gość Niedzielny, Gazeta Robotnicza, Mały Dziennik, Gazeta Polska, Wieczorna Gazeta Wileńska, Dzień Dobry, Dobry wieczór, ABC, Czas, Siedem groszy, Naprzód, Kurjer Poznański, Wiadomości Literackie* and others.

[21] *Ilustrowany Kuryer Codzienny,* Nr. 304, 1936, p. 16; *I.K.C. na ławie oskarżonych*. In: *Głos Nauczycielski*, Nr. 10, 1936, p. 155; *„I.K.C." na ławie oskarżonych.* In: *Kurjer Poranny*, Nr. 302, 1936, p. 7.

[22] JAKIMKO, W., *Pozycja prawna sądów i sędziów na gruncie regulacji konstytucyjnych od początku II Rzeczypospolitej do Konstytucji z 1997 r. w kontekście nadzoru administracyjnego nad sądami*. In: *Palestra*, Nr. 9, 2017, p. 64; MATERNIAK-PAWŁOWSKA, M., *Zawód sędziego w Polsce w latach 1918-1939.* In: *Czasopismo Prawno-Historyczne,* vol. LXIII, Nr. 1, 2011, p. 109-110.

[23] Instruction of the Polish Minister of Justice Nr. 1548/II.A/30 concerning limitation of court expenses (*Dz.U.M.S.*, Nr. 11, 1930, p. 304).

[24] *Rozporządzenie Prezydenta Rzeczypospolitej 11.07.1932 - Kodeks karny* (*Dz.U. 1932 Nr 60, poz. 571*), a.k.a. *the Makarewicz Code*.

2. Defamation - can opinions be true or false?

The Union of the Polish Teachers lost the Flame Gate trial. Judgments issued in this case protected free speech, in the form of the right of the press to formulate critical opinions in the public interest. However, from the perspective of a contemporary lawyer, it is visible that something about the judgments is not right.

2.1 Jurisprudence regarding truth and opinions before the Second World War

In Art. 255 § 1 and § 2 of the Polish Criminal Code (1932), the central part of the defence against a defamation action was the "proof of truth" (Polish: "*dowód prawdy*"):

> *Art. 255 § 1 Who slanders another person, institution or association, even without legal personality, for such conduct or properties that may degrade them in the public opinion or expose them to the loss of trust needed for a given position, profession or type of activity, shall be punished by imprisonment for up to 2 years and a fine. § 2 There is no crime if the allegation was true. If the allegation was made in public, the proof of truth may be carried out only if the perpetrator acted in defense of a legitimate public or private interest, his own or someone else's, and the evidence does not concern the circumstances of private or family life*.[25]

As regards Polish pre-war jurisprudence (as described by W. Makowski in 1937), it was claimed that only facts, not opinions, could be defamatory. Critique of public activities related to politics, science, art etc. should generally be allowed, unless it was made in order to undermine trust.[26] Professor Makowski proposed to put such provisions in the Polish Criminal Code explicitly. The internal motion was rejected by the Codification Committee before the Code was enacted (1932).[27]

Judgments of the Polish Supreme Court of that era issued in the context of defamation do not show much acceptance of this interpretation either. Art. 255 § 1 and § 2 of the Criminal Code stated that defamation may be committed both by claiming that someone committed an act (Polish: "*postępowanie*") or has certain properties (Polish: "*właściwości*"). As research among pre-war Polish Supreme Court cases shows, defamation could be committed by claiming someone had sinister motives for action because of their mind, character or mentality.[28] It could be committed by calling someone a Bolshevik,[29] by expressing a value-judgment of an act committed by someone in a way that "*casts a shadow on that person's worth*".[30] Even more absurd, defamation could be committed by clapping hands in reaction to a defamatory statement or by showing an ironic facial expression when hearing praise about someone.[31] The distinction between opinion and fact was visibly absent in most judgments related to defamation.

The view of jurisprudence regarding crimes pursued against critical opinions expressed in press titles by the prosecutors (i.e., not in private accusation matters) was, however, different. These concerned different legal provisions (Art. 170 of the Criminal Code) and were not private, but public, prosecutions. With regard to the interpretation of Art. 170 of the Criminal Code, concerning the spread of false information which could lead to unrest,[32] the Supreme Court stated the following:

> *"too broad an interpretation which goes beyond its aims is also unacceptable. Thus, the word "piece of news" cannot include own views, opinions and considerations of the person who disseminates them. Such an interpretation would be incompatible with even a minimal degree of freedom of thought, which, although it may be restricted by law, cannot be completely abolished. All constitutions, and in their number ours (Art. 104), to a greater or lesser extent, with these or other limitations, guarantee this freedom not only in the name of civil liberties, but also in the public interest. The punishment of disseminating one's own personal views and views could expose the liability under Art. 170 of the Criminal Code any criticism, even the most loyal and not publishing any news inciting unrest under its guise. After all, every expression of concern, every indication of undesirable effects, every negative assessment, especially when it concerns new obligations or restrictions, can always cause some anxiety in the circles of interested persons. (…) Such an interpretation is unacceptable because every view, opinion or opinion, unless it is obviously absurd, always has its basis. Therefore, there is no objective criterion for assessing whether, for example, a given social, economic or political view is right or wrong. In the absence of such a criterion, the judge would have to take his own views as a starting point and consider as false what does not agree with his views. But even then (…) the judge would also have to establish (…) that in fact the accused had a different view and thought differently."*[33]

The above paragraph was contained in the reasoning behind the Decision of the Polish Supreme Court of November 4, 1933. It stated, i.a., that critical opinions are not pieces of news referred to in Art. 170 of the Criminal Code. It was issued as a legal rule (written into "*księga zasad prawnych*" - the Book of Legal Rules). It referred to the Polish Constitution which was not in force any more at the time of the Flame Gate trial (Constitution of March 17, 1921[34]). The Supreme Court explicitly accepted and quoted the views of prof. W. Makowski, invoked above.

---

[25] Translation by Author.
[26] MAKOWSKI, W., *Kodeks karny. Komentarz.* Warszawa,1937, p. 724-739.
[27] NOWIKOWSKA, M., *Geneza i rozwój prawa do krytyki prasowej.* In: *Media – Kultura – Komunikacja Społeczna,* Nr. 7, 2011, p. 255.
[28] Sąd Najwyższy, judgment (*wyrok*), 3.11.1936, I K. 688/36. In: *Orzecznictwo do Kodeksu Karnego i prawa o wykroczeniach*, Kraków – Warszawa, vol. XXXVIII, 1939, p. 24(401).
[29] Sąd Najwyższy, judgment (*wyrok*), 28.01.1937, I K. 932/36. In: *Orzecznictwo do Kodeksu Karnego...*, p. 26(403).
[30] Sąd Najwyższy, judgment (*wyrok*), 8.05.1934, 3 K. 372/34. In: *Orzecznictwo do Kodeksu Karnego...*, p. 6(383).
[31] Sąd Najwyższy, judgment (*wyrok*), 20.10.1933, 3 K. 1037/33. In: *Orzecznictwo do Kodeksu Karnego...*, p. 3(380).
[32] Art. 170 Who publicly disseminates false news that may cause public concern, is punishable by imprisonment for up to 2 years and a fine.
[33] Sąd Najwyższy, decision by seven judges (*postanowienie składu siedmiu sędziów Izby Karnej*), 4.11.1933, 1 K. 457/33. In: *Zbiór Orzeczeń Sądu Najwyższego. Orzeczenia Izby Karnej.* vol. 1, 1934, p. 4-7, emphasis added by Author.
[34] *Dz.U. 1921 Nr 44, poz. 267*.

2.2 After the Second World War - more jurisprudence regarding truth and opinions

It took many years for the national and international courts to realize that distinguishing opinions from facts serves a vital role in the protection of free speech. To name only a few of such judgments, the European Court of Human Rights confirmed the distinction in Lingens vs. Austria (1986)[35] and Oberschlick vs. Austria (1991)[36]:

> *„The Austrian courts held (…) that he had to prove the truth of his allegations. As regards value-judgments this requirement is impossible of fulfilment and is itself an infringement of freedom of opinion (…).*"

There are also judgments, however, which point to the problem of basing opinions on facts which may be true or false (Jerusalem v. Austria (2001),[37] Pedersen and Baadsgaard v. Denmark (2003)[38]). This relationship between underlying facts and the opinions formulated on the basis of facts was noticed by the Polish Supreme Court in 2008[39] and - as observed by K. Święcka - in the Judgment by the Federal Court 26 November 1996-VI ZR 323/95 in Germany.[40]

2.3 The courts deciding the Flame Gate performed the proof of truth with respect to opinions

With these remarks in mind, we can see that the court deciding the Flame Gate case had certain legal tools to work with. It was more difficult with a defamation case than in the so-called false information case - but it was still possible.

The District Court analyzed in detail if "Płomyk" contained Soviet propaganda. The first-instance judgment in the Flame Gate trial was ended with the following sentence: "*As a result of all the above findings, taking into account the overall circumstances of the case, the District Court came to the conclusion that the defendant's action consisting in fact of allowing the responsible editor of "Ilustrowany Kurier Codzienny" to print an article entitled "Madness, or crime" is devoid of any features of a crime, because the accused undoubtedly acted in the public interest, and therefore, despite the public nature of the action, he was allowed to prove the truth, which was also based on the content of the criticized "Płomyk" No. 25*".[41]

In short, the court decided to accept evidence provided by defence to assess the truth of an opinion. The proof related to statements provided in the indictment. The indictment listed a number of phrases found in the IKC article of March 7, 1936. Among them, there were cries such as "*It's hard to call it a scandal. The only name that comes across is: crime! A crime legally committed on the souls of the younger generation*"[42] and similar exclamations. The contents of "Płomyk", similarly to the text published in IKC, were known to the public. Anyone could read them and formulate their own opinions.

The indictment accusing Jan Stankiewicz contained only one fact which could be proven right or wrong. That fact concerned whether the pupil's magazine was recommended or required by the Polish Ministry in schools. However, that allegation was not contested by the Union of Polish Teachers. Contrary, it was admitted explicitly in the indictment. This was part of the strategy. The Union of Polish Teachers claimed that the contents of the magazine were required to support the teaching of geography under the public curriculum. The fact that the government recommended the use of "Płomyk" in schools was also clearly true. The controversial articles about the Soviet Union, however, contained information unrelated to geography at all.

Therefore, we can safely assume that all expressions quoted in the indictment as defamatory were only opinions based on an unquestioned fact. This unquestioned fact was, in short, the content of "Płomyk" no. 25 that everyone could read. That content was not misrepresented (for example, by inaccurate, misleading quoting of that text).

Therefore, the indictment put forth by the Union of Polish Teachers was based on a claim that critical opinions (and not false facts) were defamatory. The Union of Polish Teachers was in this attempt actually asking the court to provide another opinion on the matter, hoping for whitewashing. To avoid all of the political struggle that followed, it would have been well-advised for the court to dismiss such an indictment as baseless - without providing an opinion.

This reminds of the problems underlying modern American anti-SLAPP[43] laws (SLAPP litigation defined as "*suits that "(1) involve communications made to influence a government action or outcome, (2) which result in civil lawsuits (complaints, counterclaims, or cross-claims) (3) filed against nongovernmental individuals or groups (4) on a substantive issue of some public interest or social significance" - to intimidate individuals and organizations that speak out against corporate decisions, development projects, government actions or operations, or other activities that affect their financial interests*").[44]

It can be said about the Flame Gate trial that it was an early SLAPP litigation which span out of control and backfired. In this light, the final resolution served a certain purpose. But the escalation of social tension could also have been avoided.

The oral justification of acquittal, as reported by the press,[45] was opened with a statement that, according to a Supreme

---

35 ECHR, judgment 8.07.1986 – 9815/82 (Lingens/Austria), Serie A Nr. 103; ŚWIĘCKA, K., *Kryterium prawdziwości wypowiedzi a ochrona dóbr osobistych.* In: *RPEiS*, vol. LXXIII, Nr. 4, 2011, p. 53-69.

36 ECHR, judgment 23.05.1991 – 11662/85 (Oberschlick/Austria), Serie A Nr. 204.

37 ECHR, judgment 27.02.2001 – 26958/95 (Jerusalem/Austria).

38 ECHR, judgment 19.06.2003 – 49017/99 (Pedersen and Baadsgaard/Denmark).

39 Sąd Najwyższy, decision (*postanowienie*), 7.01.2008, V KK 155/07. In: *OSNwSK*, Nr. 1, 2008, item 17; *Prok. i Pr.*, Nr. 11, 2008, item 8, p. 9; KZS, Nr. 11, 2008, item 27; *Biul. SN Pr. Kar.*i, Nr. 2, 2008.

40 ŚWIĘCKA, K., *Kryterium...*, p. 61-62.

41 Sąd Okręgowy w Warszawie, judgment (*wyrok*), 4.11.1936, III 4K. 36/36. In: Archiwum Akt Nowych (archive), Warsaw, Nr. 9, vol. 829

42 Translation by Author.

43 Strategic Lawsuits Against Public Participation.

44 BARYLAK, C. H., *Reducing uncertainty in anti-SLAPP protection*. In: *Ohio St. LJ*, Nr. 71, 2010, p. 845.

45 *Ilustrowany Kuryer Codzienny*, Nr. 310, 1936, p. 13; *Gazeta Polska: pismo codzienne*, Nr. 309, 1936, p. 8.

Court judgment (Judgment of the Supreme Court of May 8, 1934, 3K. 372/34),[46] opinions, as a rule, were not defamatory. They could be defamatory, the judge said, only if the allegations were slanderous. However, this thesis is difficult to find in the judgment of the Supreme Court invoked and it somewhat lacked refinement. The written grounds of the judgment of the court of the first instance in the Flame Gate did not repeat this statement. Eventually, the court invoked this Supreme Court judgment and still went on to analyse in detail whether the contents of "Płomyk" no. 25 were, in fact, Soviet propaganda. In the judgment of the Warsaw Court of Appeals, this was done even more strongly. The deletion of the most religious part from a Polish poem about exile in Siberia was expressly condemned.

The Judgment of the Supreme Court of November 4, 1933 related to false information supported the view that critique and opinions could not be assessed as true or false. It concerned a different provision of the Criminal Code. For that reason, it is understandable that it was not used in the Flame Gate case. It existed, however, and the initial reasoning of the court of first instance in the Frame Gate case pointed to the similar outcome. We can consider the possibility of supporting both of these views with logic. In modern logic, it is established that an assessment of truth does not validly relate to opinions. This view was discussed by mathematicians and philosophers of the inter-war period.

3. Possible Use of Logic in the Flame Gate Case

3.1 Truth in logic – a few remarks

The inter-war period was the time when the development of logic and mathematics was particularly fruitful. The parallels between the problems described above and the scope of analyses seen in science, in particular - in philosophy, logic and mathematics, are striking.

In 1936, Alfred Tarski of the Lwów–Warsaw School of Thought published in Warsaw his "Introduction to Logic and to the Methodology of Deductive Sciences". In it, he said that "*hardly any field of knowledge is currently experiencing such an intensive development as mathematics*"[47] and "*logic is rightly considered the basis of all other sciences, if only because in each reasoning we apply concepts belonging to logic, and that all correct reasoning is carried out in accordance with its laws*".[48] Alfred Tarski stressed that knowing formal logic is not a necessary precondition to engaging in science. He believed, however, that it can allow to develop the disposition to think and to reason correctly, and thus help avoiding errors. From today's perspective, as mentioned in the afterword of the 1994 Polish edition of the "Introduction…", logic is not only useful for lawyers; it can be applied not only in computer and cognitive sciences, but also touches upon the general human effort to achieve Pascal's *esprit de finesse*.[49] These remarks are relevant to the Flame Gate case, especially as Tarski's main field of study at the time was the concept of truth.

The fact that certain kinds of statements, especially in art, cannot be analyzed in terms of truth were expressed by other logicians too. Gottlob Frege put it this way: "*In poetry we have the case of thoughts being expressed without being actually put forward as true in spite of the form of the indicative sentence, although it may be suggested to the hearer to make an assenting judgment himself*".[50] He believed that such expressions should not be treated as assertions when "*the requisite seriousness*" was lacking. The notion of the requisite seriousness may be useful for courts in assessing liability for defamation. Yet for Frege, truth was still quite independent of it:

> "*What I recognize as true I judge to be true quite independently of my recognition of its truth and of my thinking about it. That someone thinks it has nothing to do with the truth of a thought. 'Facts, facts, facts' cries the scientist if he wants to emphasise the necessity of a firm foundation for science. What is a fact? A fact is a thought that is true. But the scientist will surely not recognise something which depends on men's varying states of mind to be the firm foundation of science.*".[51]

Alfred Tarski rejected judgments and beliefs at the very beginning of his "Semantic Conception of Truth and the Foundations Of Semantics": "*The predicate "true" is sometimes used to refer to psychological phenomena such as judgments or beliefs,* (…) *By "sentence" we understand here what is usually meant in grammar by "declarative sentence"; as regards the term "proposition," its meaning is notoriously a subject of lengthy disputations by various philosophers and logicians, and it seems never to have been made quite clear and unambiguous. For several reasons it appears most convenient to apply the term "true" to sentences, and we shall follow this course*".[52] Tarski rejected the notion that judgments or beliefs may be assessed in terms of truth. He made this distinction on a much deeper level than what we discuss in relation to press critique and application of law. The same notion was, however, present in his work.

The psychological approach was criticized by other Polish logicians too (notably, by Jan Łukasiewicz and Tadeusz Kotarbiński in their separate works published in 1929).[53] In 1933, while tackling the paradoxes of truth, having rejected the psychological approach, Tarski focused on formal languages. He explained that engaging in analysis requires one to see the lan-

[46] Sąd Najwyższy, judgment (*wyrok*), 8.05.1934, 3 K. 372/34. In: *Orzecznictwo do Kodeksu Karnego i prawa o wykroczeniach.* Kraków – Warszawa, 1939, p. 379-417.

[47] TARSKI, A., *Wprowadzenie do logiki i do metodologii nauk dedukcyjnych.* Warszawa 1936; also as *Introduction to Logic and to the Methodology of Deductive Sciences.* Dover Publications, 1941; *Wprowadzenie...* Warszawa, 1994, p. IX, translations from Polish (1994) by Author.

[48] TARSKI, A., *Wprowadzenie...*, p. 113-114.

[49] TARSKI, A., *Wprowadzenie..., p.* 245-248.

[50] FREGE, G., *The Thought: A Logical Inquiry*. In: *Mind, New Series*, vol. 65, Nr. 259, 1956, p. 294-295.

[51] FREGE, G., *The Thought...*, p. 307.

[52] TARSKI, A., *The Semantic Conception of Truth and the Foundations Of Semantics.* In: *Philosophy and Phenomenological Research,* Nr. 4, 1944, accessed *via* http://www.ditext.com/tarski/tarski.html 11.2020.

[53] PACEWICZ, G., *Wartości i normy jako zdanie w logice. Z historii logiki w Polsce.* In: *Humanistyka i Przyrodoznawstwo,* Nr. 22, 2018, p. 295-296.

guage which is "talked about" and which is the subject matter of the whole discussion apart from the language in which we "talk about" the first language. He approached the relationship between the two languages with the terms "meta-language" and "meta-science".[54] In simple words, without diving into the hard mathematical arguments presented by Tarski after this introduction, the distinction between object-language and meta-language allowed formulating a solution to the Liar Paradox.[55]

3.2 Use of logic in a defamation case

What may be useful from these remarks for deciding on matters related to free speech is, firstly, that we may find it useful to see that analyzing opinions related to facts, especially when they circulate among various kinds of media outlets, requires the use of the concept of meta-languages. The concept of meta-languages is often taught to future lawyers, so this idea is not new.[56] Meta-languages make it necessary to see statements subjected to analysis as located on more than one level. Every such level should be considered separately.

For example, when analyzing the Flame Gate case, we see that on one level, there were contents of the "Płomyk" magazine (in their true form). The article in IKC quoted certain contents of the "Płomyk" magazine, on another level (there could be, potentially, false quotations - there were, in fact, no such false quotations or false claims related to contents of the magazine, but we can still imagine them). On yet another level, the IKC article criticized the contents of "Płomyk" magazine, formulating critical opinions. The opinion was connected not only to the contents of the "Płomyk" magazine but also to the author of these opinions. The idea of clear separation of different levels of language used in logic and mathematics may be an inspiration to see levels of communication in a more structured manner.

Secondly, logic leads us to accept that analyzing opinions (value-judgments) in terms of their "truth" will result in just another opinion. Engaging in the "proof of truth" in relation to opinions will generally not be regarded as a logically coherent solution where legal provisions were used as an objective tool.

It will be discussed below with a use of a simplified "matrix" categorizing possible statements (the "Value-Judgments Matrix"):

(1) "A" made an allegation that fact "X" is true (Statement (1)).
(2) In reference to fact "X", "A" presented a value-judgment "Z" (Statement (2)).
(3) "A" presented a value-judgment "Z" (Statement (3)).[57]

It should be noted that, based on semiotics, a further distinction of value-judgments can be made. Value-judgments can be merely an expression of emotions or a position taken in a particular situation - but not a "serious" opinion.[58] Frege's concept of "*the requisite seriousness*" may be useful here.

Referring to the Matrix above, Statement (1) contains in it a sentence (a sentence as defined in logic) which may be proved or disproved.

Statement (2) contains in it a sentence (the first part) which may be proved or disproved, while the second part - the opinion - cannot. The opinion based on fact can be assessed by the court in terms of its connection with the preceding true-false sentence, its objectivity, the accuracy of the presented fact and so on. Whether such an assessment should be allowed varies from case to case and depends on the laws applied. This kind of statement is generally difficult to describe in terms of logic, especially given that sometimes facts (descriptions) disguise themselves as opinions, and opinions as facts (descriptions) - but it is not overlooked in this discussion.[59] It may be sometimes necessary to categorize (or tag) a statement of an opinion as a disguised fact or a fact-like statement disguised as an opinion. It is useful to take Statement (2) apart and see which part is a sentence, and which is a value-judgment.

Statement (3) is purely an opinion and cannot be true or false with relation to the subject matter of the opinion. As a side note, it is interesting in terms of analyzing perjury. It may be correct in relation to the person stating it (does that person really believe it or not, is the person lying or not). Professor Ziembiński points out that judgments (Polish: *sądy*) appear when what is said by a person is also what that person believes to be true (their judgment consists in feeling, it is psychological).[60]

We can agree that applying "the proof of truth" to Statement (2) from the Value-Judgments Matrix is not logically correct if the underlying sentence (true-false sentence preceding it) is not challenged. It can be observed that, in case of Statement (2), if no facts are challenged, assessing opinions (value-judgments) based on them in terms of their truth should not be allowed in the court of law.

These remarks are in essence present in the Judgment of the Polish Supreme Court of November 4, 1933, quoted above. In the case of the Flame Gate, we may generalize that only Statement (2) described above based on unchallenged facts was present. The only fact provided was that the Ministry recommended "Płomyk" for schools - and that was not challenged. The Union of Polish Teachers challenged only the opinions (value-judgments) based on unchallenged facts (the contents of "Płomyk" magazine quoted accurately). The critique was clearly an expression of emotions felt by the author and shared by a large proportion of readers. The Flame Gate case could, therefore, have been dismissed with reference to logic, as the "proof of truth" cannot be performed with respect to value-judgments. With a simple, formal dismissal, based on this ob-

[54] TARSKI, A., *Pojęcie prawdy w naukach dedukcyjnych.* Warszawa, 1933, p. 18.
[55] ZIEMBIŃSKI, Z., *Logika praktyczna.* Warszawa, 2014 (script ed. in 1956, 1st ed. in 1959), p. 18.
[56] ZIEMBIŃSKI, Z., *Logika...*
[57] All of these statements are "about B" and the term value-judgments used by ECHR will be used in relation to opinions and judgments.
[58] ZIEMBIŃSKI, Z., *Logika...,* p. 104.
[59] ZIEMBIŃSKI, Z., *Logika...,* p. 102-106.
[60] ZIEMBIŃSKI, Z., *Logika...,* p. 74-75.

servation, the judgments would not be used later by politicians to heat up emotions against the teachers and their political circles. We may safely assume that plunging into ideological (in this case, patriotic and religious) aspects of the case added to the existing escalation of the ongoing conflict. The judiciary may avoid being pushed into politics by using reference to formal logic in such circumstances. It should be stressed that these remarks are made here only in relation to the described use case scenario, keeping in mind that wider philosophical discussion about use of logic in judicial reasoning, including the position of rule skeptic by H.L.A. Hart and other philosophers and legal scholars,[61] may lead to different conclusions.

4. Observations

It becomes easier with the development of science and technology to verify truth. However, people's reactions to pieces of information circulating in mass media which are often false (a.k.a. "fake news") present a growing problem. There is also a question whether democratically elected officials should be allowed to mislead or not. The analysis of an article in a daily newspaper published in 1936 in Poland shows the relationships between facts and opinions seen to this day. We may use analysis related to these problems still today with respect to behaviors taking place in the media, in art and in communication, especially online. It is necessary to draw the line between a statement (sentence) that may be assessed in terms of truth and an opinion (value-judgment) which cannot. An opinion can be formulated based on a false piece of information but also on any number of facts (true or not), accumulated emotions, intuitions, a rebellious soul and various kinds of other factors, characteristics, agendas and intents. These statements have a varying degree of seriousness, operate on different levels of communication and should be distinguished as such.

In the era of the internet, we discuss the need to quickly adjudicate disputes related to the spread of information. The notion of online courts, using machine learning, artificial intelligence, powerful hardware and complex algorithms, turns from fantasy, into a possibility and eventually into actual working solutions. The proposed Value-Judgments Matrix based on formal logic may prove useful in supporting such efforts. It is necessary to be able to efficiently distinguish between facts, opinions related to facts and pure opinions, since different laws are applied to these kinds of statements. Research performed in preparation of this article also confirmed that Polish pre-war jurisprudence opposed assessment of opinions in terms of their truth (Judgment of the Supreme Court (7 Judges) of November 4, 1933 (case file no. 1 K. 457/33)), a notion confirmed later in the context of human rights. Further empirical research is called for in order to verify how the proposed Value-Judgments Martix performs when analysing contents spreading online and whether is it possible to apply it to the issue of facts disguised as opinions and opinions disguised as facts.

[61] HALPER, T., *Logic in Judicial Reasoning.* In: *Ind. LJ,* Nr. 44, 1968, p. 33.

Actio Publiciana and Mancipatio

*Adolfo A. Diaz-Bautista Cremades**

Abstract

Mancipatio was the established way to trade res mancipi (slaves, italic soil and big animals), so if these things were delivered by traditio the transmission was invalid. This distinction disappeared before Justinian's compilation, generalizing the traditio as a mechanism for the transmission of all goods. This work discusses the possibility that the mechanisms for protecting the Praetorian owner (especially the actio publiciana) could have determined the disappearance of mancipatio.

Keywords: *Roman law; mancipatio; res mancipi; tradition; property; trade.*

1. Res mancipi y res nec mancipi

The oldest classification of things in Rome separates res mancipi or nec mancipi [1] in view of their social function. Gaius shows that res mancipi were the *servi*, *animalia quae collo dorsove domantur*, *fundi in soli italico* and the rustic easements (iter, via, actus and aquaeductus)

Gai 2

14th. Res praeterea aut mancipi sunt aut nec mancipi. […. vv. 5. seruitutes praediorum urbanorum nec mancipi sunt. item stipendiaria praedia et tributaria nec mancipi sunt. 15. Sed quod diximus ea animalia, quae domari solent, mancipi esse, n[…. vv. 1 3/4. statim ut nata sunt, mancipi esse putant; Nerua uero et Proculus et ceteri diuersae scholae auctores non aliter ea mancipi esse putant quam si domita sunt; et si propter nimiam feritatem domari non possunt, tunc uideri mancipi esse incipere, cum ad eam aetatem peruenerint, in qua domari solent. 16. At ferae bestiae nec mancipi sunt, uelut ursi, lions, item ea animalia, quae ferarum bestiarum numero sunt, uelut elefanti et cameli, et ideo ad rem non pertinet, quod haec animalia etiam collo dorsoue domari solent; nam ne notitia quidem eorum animalium illo tempore fuit, quo constituebatur quasdam res mancipi esse, quasdam nec mancipi. 17. Sed item fere omnia, quae incorporalia sunt, nec mancipi sunt, exceptis seruitutibus praediorum rusticorum; nam eas mancipi esse constat, quamuis sint ex numero rerum incorporalium.

The origin of the distinction is not peaceful between the doctrine [2], but the authors seem to agree that, in the early Roman society, the so-called res mancipi were capital goods whose acquisition required extraordinary formalities containing an effect of formal advertising [3], while the nec mancipi could be assimilated to consumer goods, for which mere traditio was sufficient.

2. Transmission of res mancipi

The res mancipi had to be transmitted solemnly: by mancipatio, in iure cessio, will or *addictio* of the praetor. Mancipatio was a ceremony [4] in which *accipiens*, in the presence of at least

* Adolfo A. Díaz-Bautista Cremades, PhD, Professor of Roman Law, Universidad de Murcia, Spain.

1 The etymological origin of the name is debatable. D'ORS refers the term mancipi to an archaic gentile of *mancipium* with reference to Seneca. D'ORS, A.: *Derecho Privado Romano*, Eunsa, Pamplona, 1989, pp. 179.

2 TORRENT RUIZ cites the views of BONFANTE and VISSCHER in this regard and suggests that the distinction between res mancipi and nec mancipi could entail a different ownership regime. However, it warns, the distinction that might make sense in the primitive archaic society was declining for the classification between movable and immovable property, as can be seen, for example, in the order to proceed in the embargoes set out in the pignus in causa iudicati captum. TORRENT RUIZ, A.*: Diccionario de Derecho Romano, v. res mancipi*, Edisofer, Madrid, 2005, pp. 1078. BONFANTE, P., "Forme primitive ed evoluzione della proprietŕ romana", *Scritti giuridici vari*, vol. II, Roma, 1916, pp. 1-326; GALLO, F., *Studi sulla distinzione fra res mancipi e res nec mancipi,* Giappichelli, Torino, 1958, DE VISSCHER, F., "Mancipium et res mancipi", *Nouvelles Etudes de Droit romain public et privč*, Giuffrč, Milano, 1949, pp. 193-261. DÍAZ-BAUTISTA CREMADES, A.: *El embargo ejecutivo en el proceso cognitorio romano. Pignus in causa iudicati captum*, Marcial Pons, Madrid, 2013, pp. 106 ss. A detailed analysis of the institution's origin in archaic law can be found in AMUNÁTEGUI PERELLÓ, C.: Problems concerning mancipatio, en *Revue d'Histoire du Droit* 80 (2012) 329-352.

3 VARELA GIL, C.: El origen de la mancipatio: de medio de publicidad dominical a modo de adquirir la propiedad, en *RGDR*, 9(2007) pp. 4.

4 BONFANTE, P., "Forme primitive ed evoluzione della proprietŕ romana", *Scritti giuridici vari*, vol. II, cit., pp. 1-326; BREZZO, C., *La mancipatio*, L'erma, Roma, 1972 (reimpresión de la edición de 1891); SCHLOSSMANN, S., *In iure cessio und mancipatio*, Berlin, 1904; ARANGIO-RUIZ, V., *La compravendita in diritto romano,* 2 vols., Jovene, Napoli, 1954; FUENTESECA, P., "Mancipium, mancipatio, dominium", *Labeo*, n.° 4, 1958, pp. 135-149; WOLF, J. G., "Funktion und struktur der mancipatio", *Mélanges Magdelain*, 1998, pp. 501 y ss, FERNÁNDEZ DE BUJÁN, A., *El precio como elemento comercial en la compraventa romana,* 3.Ş ed., Reus, Madrid, 1993.

five witnesses and a *libripens*, taking on the subject of the acquisition, claimed, by solemn words, that it was his own, according to the right of the Quirites while hitting the scales with a piece of bronze that was delivered, as a symbolic price, to the transmitter[5].

Gai. 1.119

Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam uenditio: quod et ipsum ius proprium ciuium Romanorum est; eaque res ita agitur: adhibitis non minus quam quinque testibus ciuibus Romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is, qui mancipio accipit, rem tenens ita dicit: HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO ISQVE MIHI EMPTVS ESTO HOC AERE AENEAQVE LIBRA; deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco.

In iure cessio, consisted in the use of the *principium dispositivuum*, typical of the civil process, to formalize a legal business. The acquirer sued the seller by means of the *legis actio per sacramentum in rem*, reciting the ritual of *vindicatio*, before which the seller was silent, being dictated by the Praetor or president of the province an addict in favour of the actor[6].

Gai. 2.24

24. In iure cessio autem hoc modo fit: apud magistratum populi Romani uelut praetorem urbanum [aut praesides prouinciae] is, cui res in iure ceditur, rem tenens ita dicit: HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO; deinde postquam hic uindicauerit, praetor interrogat eum, qui cedit, an contra uindicet; quo negante aut tacente tunc ei, qui uindicauerit, eam rem addicit; idque legis actio uocatur. hoc fieri potest etiam in prouinciis apud praesides earum.

3. Acquisition of res mancipi by traditio

As is said, under civil law, these mancipi things, fundamental to the Roman economy, can only be transmitted by solemn means: mancipatio, in iure cessio, magistrate's addict, inheritance or legacy. However, the reality of legal traffic, as is often the case, was imposed on the rule and at one point, the transmission of *res mancipi* through *traditio* was generalized, with omission of established forms[7].

In purity, the transmission of a *res mancipi* without observing the essential forms caused the ineffectiveness of the business, so that the acquirer did not become owner of the good, which remained in the tradens' heritage. However, despite is it correct in legal technique, it caused in practice a serious injustice, since compliance with legal forms depended on the will of the seller, so that the seller, deliberately or negligently, benefited from his own unlawful action, in breach of the principle *nemo auditor propiam turpitudinem allegans*.

For this reason, the Praetorian law established specific protection mechanisms for those who had acquired a *res mancipi* by *traditio*, which, in our view, led to the disappearance of *mancipatio*, and the distinction between *res mancipi* and *res nec mancipi*.

3.1 Mechanisms for the protection of the acquirer of res mancipi by traditio[8]

As we will see, although according to the *ius civile* the "Praetorian owners"[9] lacked rights in the acquired thing, honorary law created mechanisms of protection that brought them, in many cases, closer to true property, which ended up blurring, in postclassic and Justinian law, the differences between possession and property.

Injunctions

The first remedy available to an "*a non domino* acquirer" or defect of form is possessive injunctions, provided even the actor retains possession or has been forced in the year immediately before. This protection extended to any holder, *natural* or *civil*[10], both in good and bad faith - except of "*detentatores*". For the most part, it was granted to those who had entered into possession under a title of those who generally confer ownership[11].

This effective Praetorian protection, both on the preventive side[12] of the injunction to retain and in the reparation, of recovering[13], protected the possessor from *facta spoliandi*, because it is based, as we said, on the need to preserve social peace. However, it was - and proves - ineffective in the face of the

[5] Remember D'ORS that mancipatio is heir to older business procedures, such as nexum or testament per aes et libram. D'ORS, Op. Cit. pp. 213 and points out that throughout classical times it became an abstract mode of transmission of dominance whatever its cause (pp. 215)

[6] Vid. art. 21.1 LEC (Spanish Procedural Civil Law): *Cuando el demandado se allane a todas las pretensiones del actor, el tribunal dictará sentencia condenatoria de acuerdo con lo solicitado por éste*.

[7] Alongside this, D'ORS warns, in some cases, although the sale was lawful, mancipatio could not be granted, as was the case, for example, in the sale of the creditor pignoratitium. Vid. D'ORS, op. cit, pp. 233

[8] On actions for the protection of property Vid. FERNANDEZ DE BUJÁN, A.: Derecho privado romano, 10Ş edic., Madrid, Ed. Iustel, 2017, pp. 399 y ss.

[9] We call a qualified set of civilian holders "Praetorian owners" who, despite having acquired possession through a translational title of the domain, are not true owners either because the transferor did not own (acquisition to non-domino) or because formalities in the transmission of the res mancipi.

[10] We follow in this work the classification of the different holders in: detentatores, natural holders and civil holders, maintained by DÍAZ BAUTISTA Y DÍAZ-BAUTISTA CREMADES, A.: *El Derecho romano como introducción al Derecho* 3Ş ed., Diego Marín, Murcia, 2019, pp. 140 y ss. In a different sense, vid. D'ORS, Op. cit, pp. 185 ss.

[11] Justinian warns in Inst. 4.15.8 that the injunctions had fallen into disuse at the time, being brought back to jurisdiction, as the Civil Procedure Act does today, in article 250.4. De ordine et veteri exitu interdictorum supervacuum est hodie dicere: nam quotiens extra ordinem ius dicitur, qualia sunt hodie omnia iudicia, non est necesse reddi interdictum, sed perinde iudicatur sine interdictis atque si utilis actio ex causa interdicti reddita fuisset.

[12] D. 43.17.1 Ulpianus libro 69 ad edictum Ait praetor: „Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quo minus ita possideatis, vim fieri veto.

[13] D. 43.16.1 Ulpianus libro 69 ad edictum: Praetor ait: „Unde tu illum vi deiecisti aut familia tua deiecit, de eo quaeque ille tunc ibi habuit tantummodo intra annum, post annum de eo, quod ad eum qui vi deiecit pervenerit, iudicium dabo".

exercise of procedural actions aimed at stripping the "Praetorian owner" of possession, which must therefore seek other safeguarding mechanisms.

Possessive injunctions are mentioned in Justinian Institutions

Inst. 4.15.4

Retinendae possessionis causa comparata sunt interdicta uti possidetis et utrubi, cum ab utraque parte de proprietate alicuius rei controversia sit et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat. namque nisi ante exploratum fuerit, utrius eorum possessio sit, non potest petitoria actio institui, quia et civilis et naturalis ratio facit ut alius possideat, alius a possidente petat. et quia longe commodius est possidere potius quam petere, ideo plerumque et fere semper ingens existit contentio de ipsa possessione. commodum autem possidendi in eo est, quod, etiamsi eius res non sit qui possidet, si modo actor non potuerit suam esse probare, remanet suo loco possessio: propter quam causam, cum obscura sint utriusque iura, contra petitorem iudicari solet.

Justinian's institutions, in describing the injunction to keep property (uti possidetis) refer only to the holding of the thing, not to mention the disturbance of possession by *inmissiones*. Likewise, Gaius's institutions:

Gai 4.148 ss:

148. Retinendae possessionis causa solet interdictum reddi, cum ab utraque parte de proprietate alicuius rei controuersia est et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat. cuius rei gratia comparata sunt VTI POSSIDETIS et VTRVBI. 149. Et quidem VTI POSSIDETIS interdictum de fundi uel aedium possessione redditur, VTRVBI uero de rerum mobilium possessione. 150. Et si quidem de fundo uel aedibus interdicitur, eum potiorem esse

Ulpiano ad Ed., in D.43.17.3, and the following, defines the material scope of the *interdictum uti posidetis*, clarifying in which cases interdictal protection will proceed and they will refuse it:

D. 43.17.3

Ulpianus libro 69 ad edictum

pr. Si duo possideant in solidum, videamus, quid sit dicendum. Quod qualiter procedat, tractemus, si quis proponeret possessionem iustam et iniustam. Ego possideo ex iusta causa, tu vi aut clam: si a me possides, superior sum interdicto, si vero non a me, neuter nostrum vincetur: nam et tu possides et ego.

1. Hoc interdictum duplex est et hi, quibus competit, et actores et rei sunt.

2. Hoc interdictum sufficit ei, qui aedificare in suo prohibetur: etenim videris mihi possessionis controversiam facere, qui prohibes me uti mea possessione.

3. Cum inquilinus dominum aedes reficere volentem prohiberet, aeque competere interdictum uti possidetis placuit testarique dominum non prohibere inquilinum, ne habitaret, sed ne possideret.

4. Item videamus, si auctor vicini tui ex fundo tuo vites in suas arbores transduxit, quid iuris sit. Et ait Pomponius posse te ei denuntiare et vites praecidere, idque et Labeo scribit, aut uti eum debere interdicto uti possidetis de eo loco, quo radices continentur vitium: nam si tibi vim fecerit, quo minus eas vites vel praecidas vel transducas, vim tibi facere videtur, quo minus possideas: etenim qui colere fundum prohibetur, possidere prohibetur, inquit Pomponius.

5. Item videamus, si proiectio supra vicini solum non iure haberi dicatur, an interdictum uti possidetis sit utile alteri adversus alterum. Et est apud Cassium relatum utrique esse inutile, quia alter solum possidet, alter cum aedibus superficiem.

6. Labeo quoque scribit: ex aedibus meis in aedes tuas proiectum habeo: interdicis mecum, si eum locum possideamus, qui proiecto tegetur. An, quo facilius possim retinere possessionem eius proiectionis, interdico tecum sic "uti nunc possidetis eas aedes, ex quibus proiectus est?"

7. Sed si supra aedes, quas possideo, cenaculum sit, in quo alius quasi dominus moretur, interdicto uti possidetis me uti posse Labeo ait, non eum qui in cenaculo moretur: semper enim superficiem solo cedere. Plane si cenaculum ex publico aditum habeat, ait Labeo videri non ab eo aedes possideri, qui kruptas possideret, sed ab eo, cuius aedes supra kruptas essententiarum verum est hoc in eo, qui aditum ex publico habuit: ceterum superficiarii proprio interdicto et actionibus a praetore utetur. Dominus autem soli tam adversus alium quam adversus superficiarium potior erit interdicto uti possidetis: sed praetor superficiarium tuebitur secundum legem locationis: et ita Pomponius quoque probat.

8. Creditores missos in possessionem rei servandae causa interdicto uti possidetis uti non posse, et merito, quia non possident: idemque et in ceteris omnibus, qui custodiae causa missi sunt in possessionem, dicendum est.

9. Si vicinus meus in parte in pariete meo tectoria habeat et in parte sua, "uti possidetis" mihi efficax est ut ea tollere compellatur.

10. Non videor vi possidere, qui ab eo, quem scirem vi in possessionem esse, fundum accipiam.

11. In hoc interdicto condemnationis summa refertur ad rei ipsius aestimationem. "Quanti res est" sic accipimus "quanti uniuscuiusque interest possessionem retinere". Servii autem sententia est existimantis tanti possessionem aestimandam, quanti ipsa res est: sed hoc nequaquam opinandum est: longe enim aliud est rei pretium, aliud possessionis.

The possessive injunctions had in Rome a "vicious possession clause" which can be recognized in the text collected by Ulpiano (see note above) with the expression *nec vi, nec clam, nec precario ab altero*[14] which is interpreted as an exception to interdictal guardianship, which would be refused if the disrup-

[14] Note this 'relative character' of the exception: the injunction was not denied to any illegitimate holder but only when the applicant for protection had acquired possession by violence, deception or precarious in respect of the one who now unsettled his possession. If the usurped was disturbed by a third party, he would have full standing to impetrate the injunction.

tor demonstrated that the plaintiff had acquired possession by violence, fraud or precarious in respect of the defendant. This legitimized the recoverive violence of the peaceful holder who, for a year from the stripping, could go to interdict protection or regain possession on his own without the usurping person being able to apply for injunctions. This legitimate violence ceased when the holder who sought to recover the good that had been stripped of him used excessive violence, concrete in the employment of armed persons (even if it were with sticks). In that case, the usurped stripped with such violence, could regain possession with the *interdictum unde vi armata*, which lacked the vicious possession clause [15].

Prescription [16]

In the case of the "aberrant" situation of a different civil owners extends over time, the law chooses to consolidate the appearance, making owner the person exercising the domain in fact, therefore expropriating the *verus dominus* [17].

D. 41.3.3
Modestinus libro quinto pandectarum
Usucapio est adiectio dominii per continuationem possessionis temporis lege definiti.

Traditionally, there is a double basis for an institution that entails expropriation of the rightful owner and the empowerment of those who possess illegitimately: On the one hand, the need for legal certainty that leads to the consolidation of a peaceful situation that continues over time is emphasized, thus giving confidence to those who rely on the appearance of ownership involved in public possession of a good. On the other hand, following Ihering's theories, it is argued that subjective rights (in this case, property) are conferred on subjects to be exercised and the inaction of *verus dominus* for an extended period of time reflects some "negligence" or a kind of abandonment that would legitimize the dispossession [18].

For this it is necessary, except in cases of *extraordinaria praescriptio*, for the civil holder to hold a valid but ineffective title according to which he has entered, in good faith, in possession of the good as owner, that is, that he is a "Praetorian owner" [19].

D. 41.3.10
Ulpianus libro 16 ad edictum
pr. Si aliena res bona fide empta sit, quaeritur, ut usucapio currat, utrum emptionis initium ut bonam fidem habeat exigimus, an traditionis. Et optinuit Sabini et Cassii sententia traditionis initium spectandum.

The terms of usucapion in classical law were very short (one year for movable property and two for real estate) suggesting that the need to validate defective acquisitions could be very high and that the regulatory system preferred to ensure legal certainty over the right of *verus dominus*. In the provinces a special form of usucapion called *longi temporis praescriptio* was applied, in which *bona fides* and *iustus titulus* were recast into a single requirement called *iustum initium possessionis* and required longer periods (ten years between present and twenty among absentees) [20]. It did not produce the acquisition of the domain (positive effect) such as the *usucapio* (and therefore the prescriber, if he lost possession of the prescribed thing could not claim it), but an *exceptio* of the prescriber against a possible claim of the owner (negative effect). In postclassic law an extraordinary system of acquisition of the property was established, called *longissimi temporis praescriptio*, over time (thirty or forty years, depending on the historical moment) without the need for *iustum initium possessionis* (good faith and just cause) [21].

In Justinian law, the previous three institutions were recast, admitting, for the calculation of time, both *successio possessionis* and *accessio possessionis*. The same requirements were required as classical *usucapio*, although the things of the Fisco and those of the Church were not considered usucapible. For movable goods a period of three years was established; for real estate required a period of ten years between present and twenty years between absentees. Next to them was established an extraordinary form in which the initial good faith was demanded but not the just cause and required that possession last thirty years in general.

A this time, the basis of usucapion is twofold: on the one hand, the need to protect the legal appearance on which legal and commercial trafficking rests. On the other hand, it is held that the law grants rights and powers to be exercised and, in

[15] D. 43. 16. 1 Ulpianus libro 69 ad edictum: Praetor ait: „Unde tu illum vi deiecisti aut familia tua deiecit, de eo quaeque ille tunc ibi habuit tantummodo intra annum, post annum de eo, quod ad eum qui vi deiecit pervenerit, iudicium dabo".

[16] D.41.3

[17] The usucapion is considered by the doctrine as a way to acquire the property through possession with certain requirements. It is an original mode even though the thing had a previous owner because the user's domain does not derive from the ownership of the owner, so that the burdens and limitations of the previous owner are not transferred to the new. VERDA Y BEAMONTE, JR.: La usucapión, en SERRA RODRÍGUEZ, A.: *Derecho Civil III Derechos Reales* 5Ş Edición, Tirant, 2019, Pp. 118

[18] VERDA Y BEAMONTE, op. cit pp. 118, disagrees with this basis and refers exclusively to the need to consolidate the legal appearance for the sake of traffic security. For its part, DIEZ PICAZO maintains that position by stating that, if the basis of the usucapion were a certain "presumption of abandonment", it would suffice to establish that it was not possible to defend the domain for the previous owner to challenge the user's acquisition. DIEZ PICAZO, L.: *Sistema de Derecho Civil* III, Tecnos, Madrid, 2005, pp. 126.

[19] FUENTESECA DEGEFFE considers, however, that the usucapio never validated the acquisition to non-domino, since the acquirer did not exercise usus because he had not received the verus dominus thing. In the author's view, the role of the usucapio was to exempt from proof who had acquired a good beyond the prescribed deadlines, ruling out the opinion of CASINOS MORA, according to which the prohibition on the usucapire of other people was established by the lex Atinia (197 BC). In our view, this Lex Atinia banned the usucapion of res furtivae, not anything else. FUENTESECA DEGENEFFE, M.: la exclusión del comprador a non domino de la usucapio, en *RIDROM, Revista Internacional de Derecho Romano,* 15(2015) pp. 10.

[20] Art. 1957 CC (Spanish Civil Code)

[21] Art. 1959 CC

some way, the owner who does not diligently claim his mastery, is abdicating his right and consenting to him being transferred to another.

Once the period of usucapion has elapsed, with the concurrence of the other requirements, the acquisition to non-domino or with defect form, is validated, and the acquirer is, in full, a civil owner. The specific remedies we will see below were effective, therefore, during the term of the usucapion or in cases where it was not possible.

Not all goods were suitable for usucapion. In addition to the res communes and res sacrae, which are inability to trade, the acquisition by usucapion of stolen furniture (res futivae) and properties acquired by violence was prohibited[22].

Exceptio rei vendita et tradita

When the Praetorian owner was sued with the claimant act, he could not oppose the domain because, under civil law, he did not own it until the term of the usucapion elapsed. However, the Praetor awarded the defendant an *exceptio* for which he claimed to have acquired by *traditio* possession of the thing (*exceptio rei vendita et tradita*).

Such an exception would be sufficient to neutralize the intent of anyone who could not prove to have acquired the good or did not have a title invalidating the acquisition of the Praetorian owner. However, if the plaintiff has a title of ownership, he may seek to invalidate the *exceptio* with a *replicatio iusti dominii* that would destroy the arguments of the Praetorian owner, unless the defendant's title of acquisition is precisely a sale by *traditio* of a *res mancipi* in which, since the formalities (*mancipatio, in iure cessio*) the seller-claimant remains a civil owner, have not been respected. In that case, the *replicatio iusti dominii* would be invalidated by a duplicate doli that would leave the actor without arguments.

On the contrary, in the case of non-domino acquisition, the defendant cannot claim his acquisition against the plaintiff's civil property, since the title of acquisition of the Praetorian owner is inoponable when *verus dominus*, who acts here as a plaintiff.

Actio Publiciana[23]

If the default owner lost possession, he could not exercise the *vindicatio* to claim it, as he was not a true civil owner. As we have already pointed out, the precarious owner, as the holder, could use the injunctions to retain and recover. However, if a year had passed since the stripping or if the usurper claimed some kind of possessive title, the acquirer was deprived of a procedural remedy that would allow him to regain possession[24].

For this reason, a fictitious utilis in rem actio was granted that protected the Praetorian owners if he were already the owner[25]. The action is presented as a vindicatio utilis, that is, as a variant of the claim in which it was claimed that the plaintiff already owned it for the course of the term of the usucapion. In this way, the Praetorian owner who was stripped of the thing could recover it from the current holder, provided that the thing was identifiable.

Actio Publiciana was born as a form of protection to so-called Praetorian owners or "bonitarios"[26], that is, those who had not yet acquired the property, but who possessed as if they were authentic owners[27]. They were therefore ad usucapionem holders who, once the deadline had been met, would become civil owners by the effect of the usucapio[28]. It should be recalled here that in Roman law the good faith necessary for usucapion is only taken into account at the time of acquisition, so - unlike modern civil law - the ad usucapionem holder could be perfectly aware of the defect of his acquisition title.

The action triumphed against any holder who did not have a legitimate title of possession, even in front of the true owner if it was a sale by *traditio* of *res mancipi*, since the *exceptio iusti dominii* of the defendant (civil owner, at the end of the day) could be neutralized with a *replicatio rei venditae et traditae*, against which the seller could not oppose anything. On the contrary, if the plaintiff had acquired *a non-domino* and the current holder

---

[22] Where civilist doctrine probably takes the interpretation of Article 441(CC) set out above

[23] Publicist action is a classic theme in Roman law, covered by the greatest authors. Vid., among others, BURDESE, A.: "Editto publiciano e funzioni della compravendita romana", *Estudios en homenaje al profesor Francisco Hernández-Tejero*, v.II, Madrid, 1992, pp. 81-89; WUBBE, FJ. "Quelques remarques sur la fonction et l'origine de l'action Publicienne", *RIDA*, 8 (1961), pp. 417-440; GALLO, F.: s.v. Actio Publiciana in rem, NNDI, T. I, Torino, 1957, pp. 267-270; BONFANTE, P.: "L'azione Publiciana nel diritto civile", *Scritti giuridici varii, II. Proprietŕ e servitů*, Torino, 1918, pp. 389-438; BONFANTE, P.: "L'Editto publiciano", *Scritti giuridici varii*, II. *Proprietŕ e servitů*, Torino, 1918, pp. 439-449; FEENSTRA, R.: "Action Publicienne et preuve de la propriété. Principalement d'apres quelques romaines du moyen âge", *Mélanges Philippe Meylan*, v. I, Lausanne, Imprimerie Central, 1963, pp. 91-110; DI LELLA, L.: *Formulae ficticiae. Contributo allo studio di la reforma giudiziaria di Augusto,* Napoli, Ed. Jovene, 1984, pp. 67-127; VACCA, L.: "Osservazioni in tema di actio Publiciana e acquisto a non domino", *Scritti per Alessandro Corbino*, v. 7, a cura di Isabella Piro, 2016, pp. 317-337; SANSÓN RODRÍGUEZ, MV.: "Algunas observaciones sobre la función originaria de la acción publiciana", *Anales de la Facultad de Derecho*. Universidad de La Laguna, 14 (1997), pp. 135-154; FUENTESECA DEGENEFEE, M.: "Proprietas, possessio y Actio Publiciana", *Actas del II Congreso Internacional y V Iberoamericano de Derecho Romano: Los derechos reales,* Coord. Armando Torrent Ruíz, Madrid, Edisofer, 2001, pp. 415-436.

[24] D'ORS, op. cit. Pp. 233

[25] This is the thesis supported mostly by The romanesque. Vid. BONFANTE, P.: «L Editto publiciano», en Scritti giuridici varii, II, U.T.E.T, Torino, 1926, pp. 399. En sentido contrario, vid. WUBBE, FBJ.: «Quelques remarques sur la fonction et l'origine de l'action Publicienne», en *RIDA* 8 (1961), pp. 422 ss, defending a broader definition of the active subject of public action.

[26] The genesis of public action on cases initially protected by it has provoked a strong doctrinal debate, which can be examined in detail in SANSÓN RODRÍGUEZ, op. cit. 142 ss.

[27] They were therefore required to have the same budgets as usucapion (res habilis, iustus titulus, possessio and fides), although, as required PÉREZ ÁLVAREZ, good faith was demanded not only at the time of the contract but also in that of the traditio. PÉREZ ÁLVAREZ, MP.: la acción publiciana y la protección del "mejor derecho a poseer" *Revista General de Derecho Romano* 30 (2018), pp. 10

[28] This is considered by most doctrine. Vid. SANSÓN RODRÍGUEZ, op. cit. pp. 146.

was the civil owner, the intent would be neutralized with an exception iusti dominii from the true owner, against which the actor could not oppose anything, since the defendant had not sold him the good and his acquisition title was inoponable to him.

We know the Actio publiciana, through the Digest [29], by the references of the main classical jurists, particularly Ulpianus:

D. 6.2.1
Ulpianus libro 16 ad edictum
pr. Ait praetor: "Si quis id quod traditur ex iusta causa non a domino et nondum usucaptum petet, iudicium dabo. " [30]
1. Merito praetor ait "nondum usucaptum": nam si usucaptum est, habet civilem actionem nec desiderat honorariam.
2. Sed cur traditionis dumtaxat et usucapionis fecit mentionem, cum satis multae sunt iuris partes, quibus dominium quis nancisceretur? Ut puta legatum.

Actio publiciana in Gai Institutions is also described
Gai. 4.36
36. (Eiusdem generis est Publiciana actio). Datur autem haec actio ei, qui ex iusta causa traditam sibi rem nondum usucepit: eamque amissa possessione petit. nam quia non potest eam ex iure Quiritium suam esse intendere, fingitur rem usucepisse, et ita quasi ex iure Quiritium dominus factus esset, intendit hoc modo: IVDEX ESTO. SI QVEM HOMINEM AVLVS AGERIVS EMIT ** EI TRADITVS EST, ANNO POSSEDISSIT TVM SI EVM HOMINEM, DE QVO AGITVR EIVS EX IVRE QVIRITIVM ESSE OPORTERET et reliqua.

We can find the origin of the actio publiciana in the Praetor Quinto Publicius [31], although we do not know references to it before to Neratius [32] (D. 6.2.9.3 and 6.2.17), which has led some authors to place their origin in the first century of our Age [33].

D. 6.2.9
Ulpianus libro 16 ad edictum
1. Item si hereditatem emero et traditam mihi rem hereditariam petere velim, Neratius scribit esse publicianam.
D. 6.2.17
Neratius libro tertio membranarum
Publiciana actio non ideo comparata est, ut res domino auferatur: eiusque rei argumentum est primo aequitas, deinde exceptio "si ea res possessoris non sit": sed ut is, qui bona fide emit possessionemque eius ex ea causa nactus est, potius rem habeat.

It warns, however, Ulpianus, in D.6.2.9.5 that there is no action on things that cannot be alienated, since it shows that in such cases the Praetor does not protect anyone.

D. 6.2.9
Ulpianus libro 16 ad edictum
5. Haec actio in his quae usucapi non possunt, puta furtivis vel in servo fugitivo, locum non habet.

The claimant of the public action must have gained possession by a valid title for transferring the domain:

D. 6.2.3
Ulpianus libro 16 ad edictum
pr. Sunt et aliae pleraeque.
1. Ait praetor: "Ex iusta causa petet." Qui igitur iustam causam traditionis habet, utitur publiciana: et non solum emptori bonae fidei competit publiciana, sed et aliis, ut puta ei cui dotis nomine tradita res est necdum usucapta: est enim iustissima causa, sive aestimata res in dotem data sit sive non. Item si res ex causa iudicati sit tradita.
D. 6.2.4
Paulus libro 19 ad edictum
Vel solvendi causa.

Including, of course, the award of the thing in judgment:

D. 6.2.7
Ulpianus libro 16 ad edictum
pr. Sed et si res adiudicata sit, publiciana actio competit.

With an "advance" of the usucapion, the applicant for the action had to prove - as in that one - his good faith at the time of the acquisition of possession

D. 6.2.7
Ulpianus libro 16 ad edictum
11. Praetor ait: "Qui bona fide emit." Non igitur omnis emptio proderit, sed ea, quae bonam fidem habet: proinde hoc sufficit me bonae fidei emptorem fuisse, quamvis non a domino emerim, licet ille callido consilio vendiderit: neque enim dolus venditoris mihi nocebit.

It was ultimately a fictitious claim in which, the acquirer in good faith who had not yet covered the term of the usucapion, could claim possession as if he had already usucapited against anyone but the verus dominus

D. 6.2.16
Paulus notum ad Papiniani libro decimo quaestionum
Exceptio iusti dominii publicianae obicienda est.

[29] PÉREZ Alvarez warns, *La acción Publiciana*… pp. 8 that, according to most doctrine, the entire 6.2 of the Digest was interpolated by the Justinian commission.

[30] It is surprising that the regulation contained in D.6.2 on public action does not mention the assumption of the acquisition of res mancipi with a defect of form. The traditional explanation is that the Justinian commission erased all traces of the distinction between res mancipi and nec mancipi, and therefore on mancipatio, as this institution was already deprecated in its time. However, in our view, the hypothesis that such a distinction was no longer in force in Ulpiano's time would be defensible, so that the jurist did not deal with that assumption. On the contrary, the reference of Gaius (Gai. 4.36, vine. below) to the actio publiciana, which could contain a case of traditio of a res mancipi, can be cited.

[31] Año 67 aC

[32] Siglo I dC

[33] Vid. CUESTA SAENZ JM. *La acción publiciana*. Montecorvo, Madrid, 1984. Pp. 57. D'ORS adds that Cicero does not talk about this action. D'ORS op. cit. Pp. 233

4. Mancipatio's disappearance

The distinction between *res mancipi* and *nec mancipi*, and its corresponding need for *mancipatio* for the transmission of the former, is not present in the compilation of Justinian, being unanimous the doctrine in considering that, by the 6th century it had fallen into disuse. The discrepancy instead arises in determining when and why this category disappeared. D'ORS claims that this classification had disappeared long before the compilation [34].

We do not know at what point the decline of the distinction between *res mancipi* and *nec mancipi* and its correlative demand for *mancipatio* occurred, although we have as a certain date the compilation of Justinian who, with his manipulative work of texts prevents us from knowing if classical jurists spoke of it in his rewrites. However, we can venture that the establishment of an effective protection mechanism for the acquirer of *res mancipi* by *traditio*, as is the actio publicana, it could act as a catalyst for this process of disappearance of mancipatio, because in the end the accipiens was equally protected in its "domain", whether it acquired by mancipatio or if it did not, going well to the vindicatio well to the actio publiciana that would be configured as a real *vindicatio utilis* [35]. Even if the distinction between *res mancipi* and *nec mancipi* and the need for *mancipatio* occurred sometime between the 1st century BC (probable date of promulgation of the actio publiciana) and the coding of corpus iuris civilis, it was likely to be a slow process [36].

[34] D'ORS, op. cit. Pp. 178. However, he also claims that mancipatio endures throughout the classical era. Pp. 215.

[35] VARELA GIL, despite recognizing the influence that the protection of the acquirer by traditio could have on the decline of mancipatio, points out as main causes the extension of citizenship to all the inhabitants of the empire operated by Caracalla in 212 and the administrative reorganization carried out by Diocletian in the early 4th century, along with the appearance of the written document. VARELA GIL, C.: Reflexiones acerca de la decadencia de la mancipatio, Revista General de Derecho Romano 23(2014) pp. 13.

[36] Mancipatio is mentioned not only in legal sources - despite the clean made by Justinian's compilation of classical sources - but also in literary texts. Vid. CARRASCO GARCÍA, C.: Una compraventa poética, Horacio, Epistola 2.2, en Revue d'Histoire du Droit 85 (2017) 79-114.

Scientific Heritage of the Russian Jurist, Sociologist and Positivist Sergey Muromtsev

Alexander Dmitrievich Strunskiy[*], *Anna Pavlovna Kurabtseva*[**]

Abstract

The article is devoted to the analysis of the scientific and legal views of Sergey A. Muromtsev, who is the founder of the sociological approach in the Russian legal science. The influence of the philosophy of positivism and sociology, in particular the ideas of Auguste Comte, as well as ideas of Rudolf von Jhering on the legal theory of Sergey A. Muromtsev is revealed. The distinctive characteristics of Muromtsev's sociological legal understanding are outlined. The major criticism of Muromtsev that is related to the legal doctrines of the school of the natural law and the German historical school of the law, as well as his proposals for the modernization of the legal science and practice are also highlighted. Particular ideas of Sergey A. Muromtsev are considered in the context of their comparison with the ideas of representatives of Social Legal Thought in Europe: François Gény, Emmanuel Lévy, Phillip Heck and Eugen Ehrlich. Main ideas of Muromtsev about the judicial activism as an integral phenomenon of the justice, and the creativity of jurists as a huge driving force in the development of the law are considered. The article also provides Muromtsev's positions on certain issues of the legal practice that has made possible to understand more clearly how judges should take into account specific interests in the process of adjudication, in Muromtsev's opinion. The great importance of Muromtsev's ideas for the development of the Russian jurisprudence is noted. The authors indicate the relevance of some Muromtsev's ideas for the modern jurisprudence and point at the advantages of teaching his sociological theory of the law at the law faculties.

Keywords: *Sergey Muromtsev; Sociological Jurisprudence; Social Legal Thought; Russian Legal Science; Judicial Activism; Philosophy of Positivism.*

1. Introduction

The Russian legal science for a long time had been under the direct influence of the European jurisprudence, especially the German one. That state of affairs took place since the reign of Peter the Great, to whom the main merit in the formation of the Russian legal science and the systematic legal education belonged. Before the time of Peter the Great, the jurisprudence had not been taught at the educational institutions [1] and the legal knowledge had existed only in the framework of *dyak* (clerk) practice [2].

The first lecturers of the jurisprudence in Russia in the first half of the 18th century were Germans, and students were offered the courses in the natural, Roman and feudal (European) law, but not in the Russian law.[3] Even when the first Russian professors of the law, for instance, Semën E. Desnitskiy and Ivan A. Tret'yakov, emerged in the second half of the 18th century, and the first works on the Russian law began to appear, this did not weaken the impact of the German scientific thought in Russia: in the 18th century Russian jurists read the treatises of Samuel F. von Pufendorf [4] and Gottfried W. Leibniz, and in the 19th century – works of Friedrich C. von Savigny, Georg F. Puchta and other representatives of the historical school of law.

However, the situation began to change in the second half of the 19th century, when a new sociological approach emerged within the Russian jurisprudence. Bogdan A. Kistyakovskiy,

* Alexander Dmitrievich Strunskiy, LL.M, Taurida Academy of V. I. Vernadsky Crimean Federal University, Faculty of Law, Department of History and Theory of the State and Law, Simferopol, Russian Federation.

** Anna Pavlovna Kurabtseva, Ph.D., Taurida Academy of V. I. Vernadsky Crimean Federal University, Faculty of Law, Department of History and Theory of the State and Law, Simferopol, Russian Federation.

1 KORKUNOV, N. M., S. E. Desnitskiy. Pervyy russkiy professor prava [Semën E.Desnitskiy, the First Russian Law Professor]. In: *Zhurnal Ministerstva Yustitsii* [Journal of the Ministry of Justice], Nr. 2, 1894, p. 114.

2 MOROSHKIN, F., Ob uchastii Moskovskogo Universiteta v obrazovanii otechestvennoy yurisprudentsii [On the Participation of the Moscow University in the Formation of Russian Jurisprudence]. In: *Uchenyye zapiski Imperatorskogo Moskovskogo universiteta* [Scientific Notes of the Imperial Moscow University], Nr. 8, 1834, p. 214.

3 KORKUNOV, N. M., *S. E. Desnitskiy*, p. 116.

4 It should be noted that Peter the Great personally ordered that Pufendorf's work "*De officio hominis et civis juxta legem naturalem libri duo*" [On The Duty of Man and Citizen According to the Natural Law] should be translated into Russian, which was done by 1728. In more detail see: DEGAY, P. I. *Posobiya i pravila izucheniya rossiyskikh zakonov, ili Materialy k entsiklopedii metodologii i istorii literatury rossiyskogo prava* [Manuals and Rules for Studying Russian Laws, or Materials for the Encyclopedia of Methodology and History of Literature of Russian Law]. Moscow, 1831, p. 120.

a Russian jurist and sociologist, wrote in this regard, "The Russian scholarly world can be proud that in the Russian scientific and legal literature the demand to study the law as a social phenomenon was put forward much earlier than in the others".[5]

Sergey A. Muromtsev, an outstanding Russian jurist, sociologist and positivist, public figure, is rightfully considered to be the founder of a new sociological approach in the jurisprudence. Probably, it is precisely in the treatises of Muromtsev the independent character of the Russian legal science is fully manifested for the first time. In support of this idea, the words of another well-known Russian jurist, Gabriel F. Shershenevich, can be cited, "At the time when Muromtsev put forward the idea of rapprochement of the legal science with the sociology; in Germany, in this scientific nursery, there was no talk of this; and only now more and more firmly voices are heard in the West in favour of the sociological approach in the civil law".[6]

2. The Methodological Foundation of Muromtsev's Legal Doctrine

The methodological foundation of Muromtsev's scientific activity has consistently been the research of the philosophy of positivism. However, the views of Muromtsev on the application of the principles of the positivism in the jurisprudence have undergone a certain transformation throughout his life. This is most likely due to the progress of his knowledge in the field of the English and French positivism and sociology.

As it is well known, Auguste Comte, the founder of the philosophy of positivism and sociology, argued that "the first characteristic of the Positive Philosophy is that it regards all phenomena as subjected to the invariable natural *Laws*".[7] The formulation of the laws is the main task of the science; for which facts in the true sense, no matter how accurate and numerous they may be, are always only the necessary raw material.[8]

The references to the necessity of the exploring "the laws of the historical development", as well as the "the laws of the interaction" can already be found in the early works of Muromtsev.[9] He set out his views on the methodology of the historical and legal study of the law in more detail in his dissertation research published later as the book "Essays on the General Theory of the Civil Law", and then, in a slightly revised form, in the works "The Definition and Basic Division of the Law" and "What is the Legal Dogma?".

It should be noted that the separation of the legal principles and laws of historical development of the law is essential in Muromtsev's methodology of legal science. If the former are the social phenomena, the latter are the social laws. "The science distinguishes strictly between the phenomena and their laws. The phenomena generally mean changes in the position or state of the objects, and the laws mean the regularities that exist between the phenomena. The phenomena are the essence of the manifestation of the law, which is unchangeable and constant…", Muromtsev stated in his treatise "Essays on the General Theory of the Civil Law" and clarified, "The legal principle indicates what should be in the opinion of people; the law indicates what is due to the nature of a man, a society and the world. The legal principle is a product of the human activity, the law stands above it".[10] He repeated the same idea in almost unchanged form in the works "The Definition and Basic Division of the Law"[11] and "What is the Legal Dogma?".[12]

In accordance with the scientific-based approach, Muromtsev proposed to introduce a philosophical and historical research method into the legal science in "Essays on the General Theory of the Civil Law". In his opinion, the best path to formulate the laws of the social development "should be sought generally on the basis of the comparative history, supported by the philosophy of the law".[13] He stated, "The separation of the historical jurisprudence and the philosophy of the law is also untenable. The goals of the history of the law are the same, or at least should be the same with the goals of its philosophy. The philosophy aims to find the "last foundations" of the law and indicates its ideals; if by the history we understand something that goes beyond the boundaries of simple gathering of the material, afterwards the same aims should be attributed to it. The difference between the philosophy and the history is now based not on the difference between the aims, but on the difference in the methods applied to their solution. The history prefers the inductive method; the philosophy, on the other hand, follows the deductive method that explains the law and gives it a clue based on the basic properties of the human nature. It would be more useful to merge both the research techniques together. The science formed in this way would present the history as a result of the characteristics and forces of the human nature, and a priori would check the construction of the foundations of the law on the positive material of the history".[14]

---

[5] KISTYAKOVSKIY, B.A., Pravo kak sotsial'noye yavleniye [Law as a Social Phenomenon]. In: *Sotsial'nyye nauki i pravo. Ocherki po metodologii sotsial'nykh nauk i obshchey teorii prava* [Social Sciences and Law. Essays on the Methodology of Social Sciences and General Theory of Law]. Moscow, 2014, p. 300.

[6] SHERSHENEVICH, G. F., S. A. Muromtsev, kak uchenyi [Sergey A. Muromtsev as a Scholar]. In: Shakhovskoy, D. I. (ed.), *Sergey Andreyevich Muromtsev: Sbornik statey* [Sergey Andreyevich Muromtsev: The Collection of Articles]. Moscow, 1911, p. 84.

[7] COMTE, A., *The Positive Philosophy of Auguste Comte*. Translated by H. Martineau. New York, 1858, p. 28.

[8] COMTE, A., *Discours sur l'esprit positif* [A General View of Positivism]. Paris, 1995, p. 72–73.

[9] MUROMTSEV, S. A., *O konservatizme rimskoy yurisprudentsii. Opyt po istorii rimskogo prava* [On the Conservatism of Roman Jurisprudence. Essays on the History of Roman Law]. Moscow, 1875, p. 4.

[10] MUROMTSEV, S. A., Ocherki obshchey teorii grazhdanskogo prava (chast' pervaya) [Essays on the General Theory of the Civil Law (the First Section)]. In: *Izbrannoye* [Selected Works]. Moscow, 2015, p. 81–82.

[11] See: MUROMTSEV, S. A., Opredeleniye i osnovnoye razdeleniye prava [The Definition and Basic Division of the Law]. In: *Izbrannoye* [Selected Works]. Moscow, 2015, p. 271–274.

[12] See: MUROMTSEV, S. A., *Chto takoye dogma prava?* [What is the Legal Dogma?]. Moscow, 1885, p. 23–27.

[13] MUROMTSEV, S. A., *Ocherki*, p. 162.

[14] Ibid., p. 163–164.

Subsequently, as Shershenevich correctly pointed out, a gradual transition from the historical and philosophical approach to the sociological one within the treatises of Muromtsev can be observed.[15] In his "The Definition and Basic Division of the Law" he increasingly turned to the objective scientific method of studying the law, although the substance of this method still coincided with the historical and philosophical method he had proposed earlier.[16]

However, already in "What is the Legal Dogma?" Muromtsev drew a clear line between the historical and comparative, and the sociological research, "Nowadays it is often said that the aim of the history is to discover the laws of the human development; this not accurate figure of speech should not be understood in the sense that history absorbs social dynamics. Quite not. If we dwell on the history of a separate nation, then such a history is generally not capable of leading to the discovery of the laws; usually it can only serve to test the laws discovered in other ways. The history taken as a whole and the historical and comparative research in particular, leads to the discovery of the laws. But the laws discovered in this case are only those "historical" laws that are based on the method of simple enumeration (*per enumerationem simplicem*); among them, there can equally be the laws of sequence and the laws of coexistence. Further, it is required to bring these laws to the highest generalizations of the psychology and the sociology, or, in other words, to combine them into one whole with the help of the deduction from the psychological and sociological laws. This aim is intended to be fulfilled by the social dynamics and statics".[17]

Thus, the historical and comparative, and the historical and philosophical research of the law becomes only a preparatory stage of its sociological research. From this perspective, the jurisprudence as a science should become a part of the sociology. In 1913, Eugen Ehrlich expressed a similar idea, "The term *Jurisprudenz* hitherto has comprised both the theoretical and the practical science of law; and it is likely that this customary terminology will be retained, but it will be necessary to distinguish between the theory of law in the proper sense of the term, the science of law, on the one hand, and the practical juristic science (*Jurisprudenz*) and, where there is no danger of misunderstanding, juristic science (*Jurisprudenz*) simply, on the other. Since the law is a social phenomenon, every kind o f legal science (*Jurisprudenz*) is a social science; but legal science in the proper sense of the term is a part of the theoretical science of society, of sociology. The sociology of law is the theoretical science of law (*die wissenschaftliche Lehre vom Recht*)".[18]

It is also important to note that based on the methodology of positivism, Muromtsev criticized the existing doctrines of the law, revealing their inconsistency with the requirements of the scientific knowledge.

3. Muromtsev's Criticism of the School of the Natural Law and the German Historical School of the Law

The main object of the criticism of the school of the natural law and the German historical school of the law by Muromtsev was their aptitude for the objectivism. It expressed itself in the inclination to ascribe an independent existence to the order, which has been developed by the mental and moral activity of people.

According to Muromtsev, the tendency towards the objectivism developed in the European legal tradition in the Middle Ages was closely related to the reception of the Roman law. Taking into account the underdevelopment of medieval jurisprudence, the relative applicability of Roman law to the conditions of medieval society was interpreted by the medieval jurists in the sense of its unconditional value. The Roman law was recognized as the unquestionable authority, *ratio scripta*.[19]

Muromtsev rejected the idea of the existence of the eternal and immutable natural law, which was opposed to the positive law. He saw the reason for this division, firstly, in a wrong understanding of the philosophical objectivism and, secondly, in the insufficient exploring of the law, covering a relatively short period of time.[20]

"In terms of philosophical objectivism, such division of the field of the law into two substantially different parts is inconsistent in the sense that it separates a wide range of legal definitions assigned to the historical [temporary] category from the scope of the objective legal awareness, and, thus, destroys the connection that exists, according to the school [of the natural law], between the objectivity of the legal order and the process of its gradual expression in the history", Muromtsev stated.[21] He noted that the natural law doctrine did not take into account the phenomenon of the historical development of the law. Furthermore, the assignment of the certain legal provisions to the category of the eternal, immutable and universal was not based on the reasonable evidence.

Firstly, the legal principles themselves, which are recognized by the representatives of the natural law theory as an objective one, are not a real value, until they are realized. The legal principle, according to Muromtsev, "is a product of the abstraction we have made from a number of historical legal determinations, and which contains their common features".[22] As a result, the legal principle exists as long as it corresponds to the needs of the society and the historical conditions of its origin.

Secondly, in order to assert the immutability of a legal principle, it is necessary to know the entire history of the origin and development of the law.[23] The universality of some legal principles in itself is not a proof of their eternity and immuta-

[15] SHERSHENEVICH, G. F., *S. A. Muromtsev, kak uchenyi*, p. 84.
[16] MUROMTSEV, S. A., *Opredeleniye*, p. 266–271.
[17] MUROMTSEV, S. A., *Chto takoye dogma prava?*, p. 7–8.
[18] EHRLICH, E., *Fundamental Principles of the Sociology of Law.* Translated by W. L. Moll. Cambridge, Massachusetts, 1936, p. 25.
[19] MUROMTSEV, S. A., *Opredeleniye*, p. 262–264.
[20] MUROMTSEV, S. A., *Ocherki*, p. 203–204.
[21] Ibid., p. 204.
[22] Ibid., p. 205.
[23] Ibid.

bility, "If observations confirm the presence of one or another institution among many or even all nations, then it should be assumed that in the history of these nations the same historical conditions processed, and that led to the same consequences. But that does not mean that the universal, rather than the local or national conditions, led to the formation of the law".[24]

The German historical school of law was also criticized by Muromtsev. As it is well known, the German jurist Savigny is considered the founder of the historical school of the law. He believed that the law, like a language, morals and the polity, was an integral part of each nation. The law, according to Savigny, like other inalienable attributes of the nation, was constantly moving and developing, obeying the law of the inner necessity.[25]

As Muromtsev correctly pointed out, Savigny's ideas could not be called unique, but it was he who introduced them into the civil law. The main disadvantage of Savigny's works is that he only adopted the ideas that had already been developed by the historical philosophy but, as Muromtsev stated, "we do not find the proper *scientific* implementation of Savigny's main ideas".[26]

An important contribution to the development of the Savigny's doctrine was made by his adherent Puchta. Nevertheless, Muromtsev was inclined to critically evaluate his philosophical and legal views. "The root that caused Puchta's failure lies in the special flavour, which he gave to the Savigny's works. This flavour strengthened a positive attitude towards the historical material of the law, but at the same time threatened the idea of the progress", Muromtsev stated and added, "The latter was not noticed either by Puchta himself, or Savigny, who joined to his work, or by the literature followed".[27]

The point is that Puchta introduced the concept of "*der Volksgeist*" (National spirit) in the scientific usage, which was understood as a historically conditioned legal ideological tradition and which was recognized as the creator of the law. Later, this concept was also adopted by Savigny and used by him in his famous work "The System of the Modern Roman Law".[28]

Muromtsev criticized Puchta for objectifying the national and legal conviction, "… the legal reality, which had developed due to the historical necessity, conditioned by the properties of the national spirit, became outside the influence of the personal will".[29] The process of formation of the law was also objectified, as it took place "outside the individuals, in the inaccessible area of the embodied national spirit".[30]

However, Muromtsev did not limit himself to criticizing the existing legal approaches, but offered his own view on the modernization of the jurisprudence. In addition, he pointed out the importance of his doctrinal developments for the legal practice.

4. The Law as a Social Phenomenon

One of Sergey A. Muromtsev contemporaries, Nikolay M. Korkunov, stated, "Muromtsev made an interesting effort to combine Jhering's views on the law with the doctrine of the positivism".[31] Indeed, as shown in the paragraphs above, Muromtsev's legal doctrine was based on the philosophy of the positivism. It is also true that Rudolf von Jhering had a huge influence on Muromtsev, whom he knew personally.[32] Nevertheless, Muromtsev stepped much further than his German preceptor in the scientific developments.

If for Jhering the basis of law was the interest, then for Muromtsev it was all public life. As an explanation, one remarkable quote from the "Essays on the General Theory of the Civil Law" can be cited, "…all civil law is natural in the sense that each definition of it is formed as a historical phenomenon through the natural interaction of the conditions for the formation of the civil law – the characteristics of the humans (their needs and abilities), the public organism and the external environment of their activities".[33] Muromtsev considered the law as a part of culture and saw its formation as the result of the interaction of the law with other elements of the culture, "Leaving aside other areas of the social phenomena and focusing on the civil law, we find that it constitutes the product of all cultural factors in general; and it is conditioned by the development of other areas of the culture in its development".[34] Although these fragments relate only to the civil law, the general nature of Muromtsev's works undoubtedly indicates that he considered the development of the whole legal order along the same lines.

5. The Main Lines of Modernization of the Jurisprudence and the Legal Practice

5.1 Basic Theoretical Provisions

The necessity to reform the legal science is stressed throughout all the treatises of Muromtsev. He criticized the contemporary jurisprudence for being closed within itself and believed that "the time has come to accelerate with a decisive rejection of the former isolation and take an active part in the general scientific movement".[35] In practice, this requirement should be

[24] Ibid., p. 206.
[25] See: von SAVIGNY, F. C., *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* [Of the Vocation of our Age for Legislation and Legal Science]. Heidelberg, 1814, S. 8–15.
[26] MUROMTSEV, S. A., *Ocherki*, p. 180–181.
[27] Ibid., p. 182.
[28] ANNERS, E., *Istoriya evropeyskogo prava* [The History of European law]. Translated by R. L Valinskiy et al. Moscow, 1994, p. 300.
[29] MUROMTSEV, S. A., *Ocherki*, p. 184.
[30] Ibid.
[31] KORKUNOV, N. M., *Istoriya filosofii prava* [The History of Legal Philosophy]. Moscow, 2011, p. 418.
[32] TOMSINOV, V. A., Sergey Andreyevich Muromtsev (1850–1910) [Sergey Andreyevich Muromtsev (1850–1910)]. In: *Rossiyskiye pravovedy XVIII–XX vekov: Ocherki zhizni i tvorchestva. T. 2* [Russian Jurists of the 18th–20th Centuries: Essays on Life and Work. Vol. 2]. Moscow, 2007, p. 29.
[33] MUROMTSEV, S. A., *Ocherki*, p. 257.
[34] MUROMTSEV, S. A., *Opredeleniye*, p. 287.
[35] MUROMTSEV, S. A., *Ocherki*, p. 22.

embodied both in the revision of the scientific aims and issues of the jurisprudence, as well as in improving the methods of the scientific research.

Based on the achievements of the positive philosophy, Muromtsev defined the jurisprudence as a science that "must determine the relationship which legal phenomena practice among themselves, as well as relationship between legal phenomena and phenomena of other groups and other conditions and factors of the social development".[36] In this regard, the jurisprudence performs a purely objective, observational function. The jurisprudence as a science should be distinguished from the jurisprudence as a legal policy, which is the art; and determines what it should be, what it should be strived for. Based on the requirements of the legal policy, a legal dogma (or legal dogmatics), which in its own sense is not a science, should be developed.[37]

Muromtsev was critical to the reducing of the entire jurisprudence to the study of "one technical aspect of jurisprudence, embracing the entire wherewithal for the correct application of the law".[38] Nevertheless, he highly regarded the role of the dogma in the legal practice. Firstly, the legal dogma, in the strict sense of the term, "represents the legal order, in a due form, that a practising lawyer *must* carry out in his activities".[39] Secondly, the gradual transformation of the legal dogma in the second half of the 19th century led to the expansion of its aims, which began to include criticism of the existing legal order. "The subject of the critics is the expediency of the legal definitions in two respects. With the help of criticism, the degree of compliance between the definitions and their motives, or in other words, the degree of success achieved by the legislator in formulating the norm in accordance with his aspirations, is assessed; the expediency of these aspirations themselves from the point of view of the general cultural aims of a given time is also assessed", Muromtsev wrote.[40]

Criticism of the positive law is definitely a manifestation of the creative side of the legal science, and is of great importance for the development of the legal order. In this matter, Muromtsev fully embraced Jhering's idea about a personal creative element in the process of the development of the law, "The basis of each legal research – no matter whether it is undertaken with practical or theoretical goals, whether it is the work of a judge, a legal adviser, a legislator or a dogmatic scientist – is the process of the direct legal creativity".[41] Muromtsev also believed that only with the correct organization of the legal science it is possible to achieve auspicious results in the legal practice, both the legislative and the judicial ones.[42]

As Muromtsev pointed out, the conscious creation of the law presupposed a full understanding of the area of the public life that was the subject to legal regulation.[43] Consequently, legislative transformations should be carried out only on the basis of a preparatory study of the relevant sphere of public relations.[44] The same remark can be fully applied to the judicial activities of the court, "…to understand the statute means to understand it as a moment of its historical development; to apply it means to know the historical correlation of the principles that form its content and to promote the implementation of progressive principles, restraining the excessive manifestation of obsolete reasons".[45] It should be noted that the judicial activism is one of the most important topic in the writings of Muromtsev, so it is worth dwelling on it in more detail.

Muromtsev was critical of the dominant teaching on the application of laws, which "from the beginning to the end is built on the principle of a passive attitude of the court to the law".[46] In his opinion, this teaching does not correspond to reality, at least in the field of civil (private) law, "I contend that the main engine of the development of the law in peacetime is the court. The independence of the court, its active and not passive position in front of the law, is the *normal* form of its activity".[47]

Firstly, the creativity is somehow presented in any court decision, since the individualization (concretization) of a legal norm is always necessary, "To individualize means to bring the judgment in the harmony with all the characteristics of each individual case; and since no case is similar to others, no court decision is possible without at least a drop of creativity".[48]

Secondly, the creative work of a judge is especially necessary in case of contradictions and gaps in the law. Muromtsev was critical of the subjective theory of legal interpretation and argued that "any conclusion about *what the legislator must have wanted to say, but for some reason did not say*, any such conclusion is distinguished by the fictitious nature".[49]

Muromtsev was well aware that adjudication was based not only on the letter of the law, but also on a number of extra-legal factors, "Statute, custom, science ("the law of jurists"), public views on the equity and the morality – all these are the

[36] MUROMTSEV, S. A., *Opredeleniye*, p. 270.
[37] Ibid., p. 270–271.
[38] MUROMTSEV, S. A., *Ocherki*, p. 173.
[39] MUROMTSEV, S. A., *Chto takoye dogma prava?*, p. 8.
[40] MUROMTSEV, S. A., *Ocherki*, p. 51–52.
[41] MUROMTSEV, S. A., *Chto takoye dogma prava?*, p. 30.
[42] MUROMTSEV, S. A., *Opredeleniye*, p. 271.
[43] MUROMTSEV, S. A., *Ocherki*, p. 168.
[44] MUROMTSEV, S. A., K voprosam zakonodatel'noy tekhniki [The Issues of Legislative Technique]. In: *Pravo. Ezhenedel'naya yuridicheskaya gazeta* [Law. Weekly Legal Newspaper], Nr. 39, 1907, col. 2524.
[45] MUROMTSEV, S. A., *Ocherki*, p. 174.
[46] MUROMTSEV, S. A., Sud i zakon v grazhdanskom prave [The Court and Statute in the Civil Law]. In: *Yuridicheskiy vestnik* [Law Gazette], vol. 5, Nr. 11, 1880, p. 377.
[47] Ibid., p. 391.
[48] Ibid., p. 388.
[49] Ibid., p. 386.

authorities that inevitably lead the judge, but he is not passively subordinated to these".[50]

However, two further points should be clarified in relation to above quoted. Firstly, according to Muromtsev, "the opposition of the equity and the law is the form in which the struggle of legal ideas is expressed".[51] Through this dualism, public consciousness paves the way for the new ideas in the field of the legislation and the justice. Therefore, the equity always expresses the desired order. As an idea, the equity always exists, nevertheless, its content can change with changes in public life.[52] Secondly, it is especially important to emphasize the active role of the court in the development of the law. Muromtsev did not demand the unconditional subordination of judges and legislator to the views that prevailed in the society. The current legal order always represented for him "the middle between the extreme desires of the most backward sections of the society and the lofty aspirations of the most developed and advanced sections".[53]

In this respect, one of his speeches at the first Congress of the Russian jurists in 1875, delivered on the issue of legal recognizing children born out of wedlock, is particularly notable, "The nation is not only the common folk. Yesterday and the day before yesterday, we talked a lot about the relationship of the statute to the life of the people and agreed that the statute ought not to go against the social consciousness, for it is powerless to change it. This position should not be taken absolutely; it is the subject to the limitation. When the nation is composed of several sections, different in their culture, when these sections are connected with each other by a certain community of interests, then their engagement is inevitable. It is evident that in the end the preponderance should be on the side of the greatest culture. And I do not think that the most educated part of the Russian nation will understand their purpose properly if they indulge in rude instincts. The task of the educated class is to civilize the mass of the people".[54]

The idea that the prevailing social attitudes should not always be of the primary importance in the adoption of a judicial decision was expressed by many representatives of Social Legal Thought[55] in Europe. For example, François Gény considered that "the idea that public opinion, representing the general feeling, more or less conscious, of the people interested, can legitimately suggest [adjudication] to the Court" ought to be entirely excluded from the method of the legal interpretation.[56] The opposite opinion was expressed by Emmanuel Lévy, for instance. He considered that the law is based on the collective belief ("*la croyance crée le droit*") and a judge, acting as a legitimate interpreter of the law, in the event of inconsistency of the law with the collective belief, may break the law[57].

5.2 Critical Analysis of the Judicial Practice

Muromtsev did not only formulate methodological directives aimed at bringing the judicial activity on the interpretation and application of the law in line with the needs of the society. He also repeatedly proved their practical viability through a critical analysis of the current judicial practice.

On September 27, 1893, Muromtsev spoke at a meeting of the Moscow Law Society with a report on teleological considerations in decisions of the Civil Cassation Department of the Governing Senate (the highest judicial body of the Russian Empire).[58] On the basis of numerous instances, Muromtsev concluded: "…[the Civil Cassation Department of the Governing] Senate in its decisions is guided by teleological considerations, bringing the interpretation of laws in harmony with the moments that lie outside the purely legal understanding of this relationship and its dogmatic and legal structure. That implies the achievement of a certain goal, a certain benefit, which can be very diverse in meaning: to protect the interests of the family morality, the state order, to bring a specific [legal] institution into harmony with ideal requirements".[59]

---

[50] Ibid., p. 392–393.

[51] MUROMTSEV, S. A., Pravo i spravedlivost' (Otryvok iz publichnoy lektsii) [Law and Equity (The Fragment from a Public Lecture)]. In: *Sbornik pravovedeniya i obshchestvennykh znaniy. Trudy Yuridicheskogo Obshchestva, sostoyashchego pri Imperatorskom Moskovskom Universitete, i ego Statisticheskogo otdeleniya* [The Collection on Jurisprudence and Social Science. Treatises of the Legal Association of Imperial Moscow University and its Statistical Division], vol. 2, 1893, p. 10.

[52] For more details see: ibid., p. 1–12.

[53] MUROMTSEV, S. A., *Opredeleniye*, p. 380.

[54] MUROMTSEV, S. A., Rech' na pervom s"yezde russkikh yuristov po dokladu N. P. Lapidevskogo: "O dopolnenii deystvuyushchego zakonodatel'stva postanovleniyami ob uzakonenii i priznanii detey, rozhdennykh vne braka" [Speech at the First Congress of Russian Jurists on the Report of N. P. Lyapidevsky: "On Amendments to the Current Legislation for the Legalization and Recognition of Children Born out of Wedlock"]. In: *Stat'i i rechi. Vyp. 2* [Articles and Speeches. Iss. 2]. Moscow, 1910, p. 7.

[55] The term Social Legal Thought was introduced into scientific parlance by Duncan Kennedy to denote a new doctrinal movement that emerged in the last quarter of the 19th century. Representatives of this movement, following Jhering, began to look for the basis of the law in the human nature and society, opposed formalism in the law and the subjective-teleological method of the legal interpretation. In more detail see: KENNEDY, D., A Transnational Genealogy of Proportionality in Private Law. In: Brownsword, R. et al. (eds.), The Foundations of European Private Law. London, 2011, p. 194–195.

[56] GÉNY, F., Judicial Freedom of Decision: Ins Necessity and Method. In: Association of American Law Schools, *Science of Legal Method : Select Essays by Various Authors*. Boston, 1917, p. 7.

[57] For more details see: COTTERRELL, R., Emmanuel Lévy and Legal Studies : A View from Abroad. In: *Droit et société* [Law and Society], vol. 56–57, iss. 1–2, 2004, p. 132–136: PUZHAEV, V. V., Zakon i sudebnaya praktika kak istochniki prava v uchenii Emmanuelya Levi [Law and Judicial Practice as Sources of Law in the Doctrine of Emmanuel Levy]. In: *Vestnik Nizhegorodskoy akademii MVD Rossii* [Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of the Russia], Nr. 4 (44), 2018, p. 416–418.

[58] Zasedaniye 27 sentyabrya 1893 g. [The meeting of September 27, 1893]. In: *Sbornik pravovedeniya i obshchestvennykh znaniy. Trudy Yuridicheskogo Obshchestva, sostoyashchego pri Imperatorskom Moskovskom Universitete, i ego Statisticheskogo otdeleniya* [The Collection on Jurisprudence and Social Science. Treatises of the Legal Association of Imperial Moscow University and its Statistical Division], vol. 3, 1894, p. 99–104.

[59] Ibid., p. 101.

For example, among the decisions of the Civil Cassation Department of the Governing Senate, cited by Muromtsev, decision №106 of December 16, 1887 deserves the attention.[60] In this decision, the court changed its own well-established practice regarding the inheritance by the law of the self-acquired immovable property[61], when, firstly, the testator had no children; secondly, the testator did not leave a testament; thirdly, of the closest relatives a full sister and nephew, who was the son of a brother from the same father, remained. According to the established jurisprudence, the Civil Cassation Department always gave priority to the nephew, but in this case, the Civil Cassation Department not only took into account the magnificent historical interpretation of Articles 1138 and 1140 of Volume 10 of the Digest of Laws of the Russian Empire, given by the Kharkov Judicial Chamber (whose decision the plaintiff wanted to appeal), but also indicated: "Undoubtedly, that brothers and sisters, descended from the same father and mother, are incomparably closer to each other than children from different marriages. The inheritance law should generally correspond to the moral connection between those seeking the inheritance and the testator".[62]

Also noteworthy is the Muromtsev's article "Lease agreements for immovable properties encumbered with a pledge".[63] Russian legislation of the 19th century did not prohibit the owner of the pledged property from leasing it for any period (the maximum term by the law was twelve years), did not establish the principle of precedence of rights to the property (*prior tempore – potior jure*), and the legislation did not contain a general prohibition to abuse the rights. This led to the widespread practice of concluding lease agreements aimed at causing harm to creditors (pledgees). Muromtsev described a typical case from judicial practice, when a person borrowed money for a year under pledge of his property. Then, shortly before the expiration of the loan agreement, he leased the pledged property for ten years. The debt was not returned, and after unsuccessful public auction, the property became the possession of the pledgee. The new owner filed a lawsuit to avoid the lease. The court upheld the plaintiff's claim, nevertheless, as Muromtsev pointed out, there were no legal grounds for satisfying the new owner's claim: "Carried away by the goal of protecting the interests of the creditor, the court, perhaps without noticing it, interpreted the law falsely. But this is what makes his decision important: the need for reform was expressed in it".[64]

On the other hand, Muromtsev criticized the court's decisions that violate the requirements of the law, but did not pursue any socially useful goal and were not aimed at establishing equity. As an example, Muromtsev cited the decision of the Ust'-Medveditsk District Court. From the case file it appeared that the plaintiffs acquired the land plot at a public auction, the trade list included the encumbrance imposed on the land plot by the lease agreement. However, after the purchase of the land, the new owners filed a lawsuit to avoid the lease. The court upheld the claim[65]. However, Muromtsev asked: "The question is, whose interests are protected in this case by the court? […] The acquirers knew about the existence of a lease contract and bought the property with it. Their interests should not have suffered".[66] He believed that in this case, the court simply supported the emerging practice of avoiding lease agreements concluded for the pledged property. At the same time, the court did not take into account whether someone's interests were violated and whether there was a fair reason to deviate from the letter of the law[67].

As we can see, Muromtsev did not consider the practice of transforming the provisions of the law by *contra legem* (against the law) interpretation as an undesirable phenomenon if it is aimed at bringing the law in line with the equity, moral values of society, etc. However, on the issue discussed above, Muromtsev made a reservation that "the relationship on the immovable property is too important to be left to the exclusive discretion of the courts".[68]

If we compare the views of Muromtsev and representatives of Social Legal Thought in Europe on the issue of the permissibility of *contra legem* interpretation, then it should be admitted that Muromtsev held a middle position. Muromtsev attitudes are quite radical as opposed to the views of François Gény or Phillip Heck, who did not allow *contra legem* interpretation[69]. Nevertheless, Muromtsev's views are more balanced than those of Lévy, as we have already indicated above.

Thus, Muromtsev assigned a huge role in the development of law and society to the creativity of jurists. Nevertheless, such creative activity should not be intuitive. On the contrary, it should be clearly understood and built on the basis of the scientific knowledge and the real needs of society.

6. Assessment of views of Muromtsev in Russian Legal Science

The scientific and legal views of Sergey A. Muromtsev were indeed a challenge to the old legal science and initially "the new approach was cutting a path with difficulty", as Valeriy D. Zorkin pointed out.[70] The beginning of teaching activity, according

[60] Muromtsev does not give the exact requisites of the judgment; however, we can confidently assert that he refers to this one: Judgement №106 of the Civil Cassation Department of the Governing Senate of December 16, 1887.
[61] Russian pre-revolutionary legislation divided the immovable property into self-acquired and ancestral property.
[62] Judgement №106 of the Civil Cassation Department of the Governing Senate of December 16, 1887.
[63] [MUROMTSEV, S. A.], Arendnyye dogovory otnositel'no nedvizhimostey, sostoyashchikh v zaloge [Lease agreements for immovable properties encumbered with a pledge]. In: *Yuridicheskiy vestnik* [Law Gazette], vol. 2, Nr. 11, 1879, p. 842–856.
[64] Ibid., p. 845.
[65] Ibid., 852–853.
[66] Ibid., 853.
[67] Ibid.
[68] Ibid., p. 849.
[69] For more details see: GÉNY, F., *Judicial Freedom of Decision*, p. 17; HECK, P., Interessenjurisprudenz und Gesetzestreue [The Jurisprudence of Interests and Compliance with the Law]. In: *Deutsche Juristen-Zeitung* [Gazette of German Lawyers], vol 10, 1905, S. 1142.
[70] ZORKIN, V. D., *Muromtsev* [Muromtsev]. Edited by V. S. Nersesyants. Moscow, 1979, p. 32.

to Muromtsev own words, was a real test, which was accompanied by constant opposition from the professors.[71] Nevertheless, Muromtsev had support from both a number of associate professors and from his teacher – Jhering, who wrote him on the occasion of acceptance the chair, "You have gained the chair of the Roman law and I can be glad equally for science and for you, because for the first time "opposition" comes in Russia in your person – a doctrine that I raised in Germany against the romanticism of the historical school; and you represent such a large force that I have no doubt of success".[72]

Criticism from the academic community against Muromtsev was directed both at the treatises devoted to the particular legal issues[73] and at the sociological approach to the law in general. It should be noted that this criticism was largely caused by a misunderstanding of views by Muromtsev. For example, the statement by Porfiriy L. Karasevich directed at Sergey A. Muromtsev and other new trends in the jurisprudence was indicative enough in this respect, "Therefore, we can in no way agree with Mr. Muromtsev, who, analysing work by Mr. Lyubavskiy, throws overboard all the teachings of the historical school with one handwriting of the pen. […] It seems to me that this rag must still be reckoned with. The historical school, even on its homeland, is hardly a curiosity. On the contrary, in Germany, all new views on the origin of the law, which have not yet been proven and have not yet got firm foundations, are rather a curiosity".[74] As mentioned above, Sergey A. Muromtsev never denied the merits of the historical school of the law. In the case of his analysis of the work by Alexander D. Lyubavskiy, Sergey A. Muromtsev only pointed out the inconsistency of the doctrine of the national nature of the law.[75]

Despite on the criticism, legal ideas of Muromtsev were adopted to a greater or lesser extent by a number of the Russian legal scholars in pre-revolutionary Russia, mainly by the representatives of the sociological approach in the jurisprudence. The list of the most prominent jurist, who were under the influence of sociological and legal ideas by Sergey A. Muromtsev, includes: Nikolay M. Korkunov, Bogdan A. Kistyakovskiy, Nikolay A. Gredeskul, Yuriy S. Gambarov, to a lesser extent Gabriel F. Shershenevich and Leon I.Petrażycki.

It is noteworthy that the merits of Muromtsev were also highly appreciated by the Soviet legal scholars, despite the obvious ideological contradictions between Muromtsev's liberal views and the ideology of the Communist Party. For example, Pëtr I. Stuchka, one of the founders of Soviet legal science, called Sergey A. Muromtsev "the largest representative of the Russian sociological school". He considered that the understanding of the law as an order of social relations, introduced by Muromtsev, was essential to the development of legal science. Nevertheless, through the prism of ideology of the Marxism-Leninism, Stuchka believed that it would be correct to understand the law as "a system (or order) of social relations that corresponds to the interests of the ruling class and is protected by its organized power".[76]

Under the influence of Sergey A. Muromtsev and Leon I. Petrażycki, another Soviet legal scholar, Mikhail A. Reysner, also took law as a "general legal order", pluralistic in nature. Subsequently, the approach to the law as a system of not only legal norms, but also of legal relations was defended by a number of prominent Soviet legal theorists, including: Stepan F. Kechek'yan, Andrey A. Piontkovskiy and Alfred K. Stal'gevich. As a result, this led to a wide spread of this approach in the Soviet legal science and helped to overcome the dominance of the "narrow positivism" in the jurisprudence.[77]

At present, in the Russian legal science there is a new resurgence of interest to the treatises of Muromtsev, especially taking into account the rejection of the ideology of the Marxism-Leninism and the class-based legal understanding. Among the recent scientific publications, it is worth noting, for example, a collection of articles "Sergey Andreyevich Muromtsev – the Chairman of the First State Duma. Politician, Scholar, Educator".[78]

7. Conclusion

It is difficult to overestimate the contribution made by Muromtsev to the development of Russian legal science, as well as the innovative nature of his ideas. It is also significant that a number of ideas were expressed by him much earlier than by his European colleagues, representatives of Social Legal Thought.

Some of Muromtsev's ideas are still relevant and correspond to the needs of the modern legal science and practice. Understanding the law as a part of culture, a product of the social development allows for a more objective study and research of various legal phenomena. The sociological study of the law and the rejection of the extreme manifestations of legal positivism

---

[71] MILYUKOV, P. N., Sergey Andreyevich Muromtsev. Biograficheskiy ocherk [Sergey Andreyevich Muromtsev. Biographical Essay]. In: Shakhovskoy, D. I. (ed.), *Sergey Andreyevich Muromtsev: Sbornik statey* [Sergey Andreyevich Muromtsev: The Collection of Articles]. Moscow, 1911, p. 26.

[72] Quoted in: ibid., p. 27.

[73] See for example: MITYUKOV, K. A., *Po povodu stat'i g. Muromtseva "O vladenii po rimskomu pravu"* [Regarding the article by Mr. Muromtsev "On possession under Roman law"]. Kyiv, 1877.

[74] This remark was made in response to the following statement by Muromtsev: "Mr. Lyubavskiy is obviously under the influence of the notorious doctrine of national character as a necessary quality of every legal order and forgetting that this doctrine, even on its homeland, has now become a historical rag, which is mentioned as a historical curiosity and by the whim of fate is associated with the name of the great scholar". In more detail see: KARASEVICH, P. L., Obozreniye inostrannoy filosofsko-yuridicheskoy literatury [Review of Foreign Philosophical and Legal Literature]. In: *Yuridicheskiy vestnik* [Law Gazette], Nr. 1–2, pt. 2, 1877, p. 7-8.

[75] See answer by Muromtsev: MUROMTSEV, S. A., *Ocherki*, p. 179, fn. 1.

[76] ZORKIN, V. D., *Muromtsev,* p. 68–69.

[77] Ibid., p. 70.

[78] See: [SHELOKHAYEV, V. V. (Ed.)?], *Sergey Andreyevich Muromtsev - predsedatel' Pervoy Gosudarstvennoy Dumy: politik, uchenyy, pedagog* [Sergey Andreyevich Muromtsev – the Chairman of the First State Duma. Politician, Scholar, Educator]. Orel, 2010.

make it possible to prepare legal practitioners to deal with the issues that are not directly regulated by the legal norms. In addition, the awareness of jurists of their active role in the development of the law should increase the level of their responsibility to the society. It was Muromtsev who noted that the adoption of the idea of the judicial activism should be accompanied by the increased requirements for the level of the education and the ethical qualities of a judge.[79]

In our opinion, the main ideas of Muromtsev should be the subject of the study at the law faculties, not only in Russia, but also in other countries. Despite the fact that in many issues the sociological jurisprudence has stepped far forward enough, the study of the main provisions of Muromtsev's sociological concept of the law reflects an important stage in the development of the sociological jurisprudence and is the useful knowledge for the future legal practitioners.

[79] MUROMTSEV, S. A., *Sud i zakon*, p. 392.

German Citizenship versus Protectorate Membership in the Protectorate of Bohemia and Moravia (1939–1945)

*František Emmert**

Abstract

As a direct consequence of the Nazi occupation of the Czech lands in 1938–48, the institution of German citizenship (i.e., Reich citizenship as established by the Nuremburg Race Laws) was introduced in the Czech lands. Pursuant to newly promulgated German laws, ethnic German inhabitants of the Czech lands became citizens of the territorially expanding Reich in two phases, in 1938 and 1939. In the occupied Czech lands, ethnic Germans acquired the status of privileged citizens, but nonetheless their rights were significantly restricted by the totalitarian power of the Nazi state. In autumn 1939 more than three million people living in the Sudetenland, including come Czechs, became German citizens. After the establishment of the Protectorate of Bohemia and Moravia on 15 March 1939 the institution of German citizenship penetrated the Czech interior, where ethnic Germans comprised only 2 % of the population. For the Czech inhabitants of the Protectorate, the occupiers created a citizenship status known as Protectorate membership because, in the eyes of the Germans, the Czechoslovak state, and hence Czechoslovak citizenship, had ceased to exist. Czechs, who became Protectorate members, were denied »political rights« and the right to govern their own country. They became mere inhabitants of a territory. In 1939–45 two legal systems, one for Germans and one for Czechs, and two analogous administrative and judicial systems existed side by side in the Protectorate. Legal historians refer to this unusual situation as legal dualism.

Keywords: *Protectorate Bohemia and Moravia; Third Reich; citizenship; political rights.*

1. Introduction

Nazi Germany's expansionism at the expense of Czechoslovakia in 1938 and 1939 resulted in the introduction of the institution of Reich citizenship throughout the entire territory of the Czech lands. More than 3,400,000 Czechoslovak citizens became Reich citizens.[1] The vast majority were ethnic Germans from the Czechoslovak borderlands [the Sudetenland], which were annexed by Germany on the basis of the Munich Agreement in autumn 1938. To a lesser extent, members of the German minority from the Czech interior also became Reich citizens after the establishment of the Protectorate of Bohemia and Moravia in spring 1939.

The occupying Germans introduced in the newly founded Protectorate the institution of Protectorate membership for former Czechoslovak citizens who did not acquire German citizenship. Protectorate membership, which was primarily intended for Czechs as well as people of Jewish descent persecuted under Nazi racial laws, was an important part of the highly complicated mechanism of legal dualism that the Nazis established in the Protectorate. From spring 1939 onward, two legal systems existed side by side in the occupied Czech interior, a German one and a Protectorate one, the latter of which was based on Czechoslovakia's prewar legal system. Analogously, there were also two administrative systems in place.[2]

Citizenship, whether in the form of German citizenship or Protectorate membership, in the occupied Czech lands governed "political rights", and it also determined the career opportunities and social status of different members of Protectorate society. Citizenship status determined which inhabitants of the Czech lands had to perform military duty,[3] it dictated in which state enterprises or public administration systems the inhabitants of the Protectorate could work (Reich or Protectorate), it defined to whom certain laws applied (German or Protectorate legislation), and it delineated the authority of administrative bodies and courts (again Reich or Protectorate) over different groups of inhabitants. Citizenship status also played a major role in the rationing system.

In contrast, all inhabitants of the Protectorate regardless of their citizenship status were required to work, were subject to the jurisdiction of Reich security forces in matters of political offenses and were represented internationally by the Reich's diplomatic missions. There were exceptions for citizens of other states that Germany recognized as subjects of international law, that is, Slovakia and Hungary.

* JUDr. František Emmert, Ph.D., Department of the History of the State and Law, Masaryk University, Brno, Czech Republic.

1 GRONSKÝ, J., *Komentované dokumenty k ústavním dějinám Československa*. Praha, 2005, p. 293-297.

2 About the law in the Protectorate, see e.g. SCHELLE, K., TAUCHEN, J., *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München, 2009.

3 This duty applied only to Reich citizens.

2. A Protectorate without International Subjectivity

Article 6 of the decree establishing the Protectorate of Bohemia and Moravia, issued on 16 March 1939,[4] denied this territory any international subjectivity. Nazi Germany fully took over the Protectorate's foreign affairs, and inhabitants of the Protectorate fell under the Reich's "protection". Thus, Protectorate membership could clearly not be classified as a type of full-fledged citizenship; contemporary German legislation certainly did not consider it to be so.

The idea that the Protectorate was not a subject of international law was repeated at a meeting of state secretaries of the Reich Ministry of the Interior held on 25 March 1939 in Berlin.[5] Nonetheless, the Nazis were not averse to maintaining certain external attributes of statehood for the Protectorate, including preserving the office of the president, the national currency, and the judicial system. This followed mainly from Article 3 of the decree, which declared that the Protectorate would be self-governing as an autonomous part of the German Reich. President Emil Hácha did not even have to swear an oath of allegiance to Adolf Hitler, and he enjoyed the title of state president throughout the entire occupation, whereas other former state institutions had been renamed Protectorate institutions in 1939.

According to the decree, Reich and Protectorate agencies and authorities were supposed to coexist side by side in the Protectorate, of course with Reich agencies taking precedence. Some important matters, however, were fully in the hands of the Reich and its agencies and organizations, foreign policy, the military and defense, combating political offenses, etc. In the Protectorate, German and Protectorate law existed in parallel.[6] The second was based on Czechoslovak law, a large part of which was received from the Austrian legal system. German law applied to Reich citizens in the Protectorate, and Protectorate law to other inhabitants. For example, in the Protectorate of Bohemia and Moravia, German family and inheritance law went into force for Reich citizens on 20 July 1939. Any rights that were afforded to Protectorate members were also given to Reich citizens.[7]

3. A Basic Classification of Protectorate Inhabitants by Nationality

Article 2 of the decree of 16 March 1939 assumed the existence of two basic nationalities in the Protectorate.[8]

People of German descent were to become citizens of the Reich, whereas other inhabitants of the Protectorate were to become mere members of the Protectorate[9] without Reich citizenship but who would "enjoy the protection" of the German state. In this regard the decree applied a strategy that colonial powers commonly used to rule the indigenous inhabitants of non-European colonies. In accordance with the decree, the Protectorate would be incorporated into the German Reich and its ethnic German inhabitants become Reich citizens with "full political rights",[10] whereas Czechs would remain mere inhabitants without political rights and also without the possibility to work outside the Protectorate or in Reich offices and agencies or in German public administrative bodies within the Protectorate.[11]

During the Protectorate, Emil Sobota, a former ministerial assistant to the Office of the President of Czechoslovakia who was active in the Czech resistance movement and was eventually executed right before the end of the war, compared the status of Protectorate members within the Reich with the status of the indigenous inhabitants of European colonies and the United States.[12] In his comparative study, which was published posthumously after the war, he focused primarily on the fact that although indigenous people could, under certain circumstances, become naturalized without changing their national or cultural identity, Czechs were permanently denied the opportunity to acquire citizenship unless they were willing to undergo thorough Germanization and declare themselves to be of German nationality.[13]

The position of Protectorate members, who were practically deprived of political rights[14] but were obliged to the Germans for allegedly providing them with protection, bore a certain resemblance to the legal status of "state subjects" without Reich citizenship (that is, people of Jewish descent) in Nazi Germany after 15 September 1935 when the Nuremburg Race Laws were imposed.

Some scholars have even claimed that Protectorate members were essentially classified as foreigners within the Reich. However, considering the above-presented facts and the comparison with the status of indigenous peoples in European colonies, it seems most likely that the Nazis considered Protectorate members to comprise the "native population" but deprived them of political rights and any chance of holding political office or government jobs in the German administrative system without first changing their nationality to German. For example, Nazi Germany's legal system provided no grounds for deporting Protectorate members, unlike Jews, from the territory of the Reich. The Nazi occupying administration was led to this approach by

[4] Pursuant to Erlaß des Führers und Reichskanzlers über das Protektorat Böhmen und Mähren. Reichsgesetzblatt I, 1939, S. 485–488.
[5] BRANDES, D., *Die Tschechen unter deutschem Protektorat.* München, 1969, p. 48–49.
[6] JAKOBY, G., *Racial State: The German Nationalities Policy in the Protectorate of Bohemia-Moravia*. New York, 1944, p. 27–33.
[7] Pursuant to Section 3 of the Regulation on Acquiring German Citizenship for Former Czechoslovak Citizens of German Nationality of 20. 4. 1939.
[8] About the law in the Protectorate, see e.g. TAUCHEN, J., Das Protektorat Böhmen und Mähren und seine Rechtsordnung (1939–1945). In: *Beiträge zur Rechtsgeschichte Österreichs,* Vol. 10, Nr. 2, 2020, S. 260-268.
[9] Nazi legislation used the term *Protektoratsangehörige* and avoided referring to them as citizens.
[10] Pursuant to the Reich Citizenship Law of 15. 9. 1935. Reichsbürgergesetz. Reichsgesetzblatt I, 1935, S. 1146.
[11] JAKOBY, G., *Racial State: The German Nationalities Policy in the Protectorate of Bohemia-Moravia*. New York, 1944, p. 55–64.
[12] SOBOTA, E., *Co to byl protektorát*. Praha, 1946, p. 21-34.
[13] SOBOTA, E., *Co to byl protektorát*. Praha, 1946, p. 106.
[14] Membership in the National Partnership party [Národní souručenství] or other pro-German puppet organizations cannot be considered to be an exercising of political rights.

pragmatism, which occasionally took priority over the ideology dictated from Berlin, mainly by Adolf Hitler, especially in matters concerning Reich citizenship.[15]

In comparison with the Jews, the Czechs faced only marginal racial persecution. The Nuremburg Race Laws of 1935, which were later expanded with supplementary regulations, focused exclusively on Jews and so-called mixlings [Mischlinge], and from 1939 onward Gypsies. These race laws created a third category of Protectorate inhabitants who were fully deprived of rights and subject to harsh racial persecution.

During the occupation, citizenship determined people's professional and social status and even their material claims as part of the rationing system implemented during the war.

A food rationing system was put in place in the Czech lands on 2 October 1939, shortly after the start of World War II. Clothing and footwear began being rationed in December 1939. Reich citizens received ration stamps marked with a D, which were valued higher than the T-marked stamps provided to Czechs. The persecuted Jews received ration stamps of the lowest value marked with a J.

After Reich Protector Reinhard Heydrich's arrival in Prague in September 1941, Germans and Czechs received equal food rations, even though members of these two groups still received food and clothing and footwear ration cards with different markings. In practice, it was often food ration stamps that revealed one's nationality, especially in contentious cases. For example, in May 1945 authorities in the newly restored Czechoslovakia automatically considered all recipients of D-type food ration tickets to be Germans. In contrast, other people, who may have been considered Germans by those around them but still received ration tickets marked with a T or even a J had to prove that they were never registered by the occupying administration as Germans.

4. Protectorate Membership for Czechs

According to the decree of 16 March 1939 people of Czech nationality living on the territory of the Protectorate were to become Protectorate members. Everyone who had the right of domicile on the territory of the Protectorate and who held Czechoslovak citizenship as of 15 March 1939 first became a Protectorate member. Ethnic Germans were recognized the right to change their citizenship status from Protectorate member to Reich citizen. As a result, Protectorate members were exclusively Czechs.[16]

All ethnic Czechs who had Czechoslovak citizenship living in the annexed borderlands, that is, the broadly defined Sudetenland, also became Protectorate members, which amounted to about 290,000 people. This status was also extended to Czechs living in Slovakia, which had declared its independence on 14 March 1939, and on former Czechoslovak territory that had been annexed by Hungary in 1938–39, southern and eastern Slovakia, Transcarpathian Rus.

Thus, after 15 March 1939 Protectorate members resided not only in the Protectorate, but they also formed a substantial minority in the *Reichsgau Sudetenland* and in other *Reichsgaue* that included former Czechoslovak territory. In some regions and towns in the annexed borderlands, Protectorate members comprised the majority, for example, in the Most district and in Böhmisch Krumau [Český Krumlov]. These were Czechs who, based on the Agreement between the Czecho-Slovak Republic and the German Reich on Issues of Citizenship and the Right of Option of 20 November 1938, did not acquire German citizenship or who by the deadline of 29 March 1939 had opted for keeping their Czechoslovak citizenship, which after 15 March 1939 became Protectorate membership. Understandably, they were not granted minority rights in the Reich outside of the Protectorate, although in some places Czech schools were preserved and people could still officially register their nationality as Czech.

Determining the rights and status of Protectorate members in the Protectorate of Bohemia and Moravia was first discussed at a meeting of state secretaries of the Reich Ministry of the Interior on 25 March 1939, ten days after the establishment of the Protectorate. State Secretary Wilhelm Stuckart essentially relayed Adolf Hitler's instructions, which the meeting attendees were expected to adopt and carry out. According to these orders, although Protectorate members were not to be considered foreigners, they were not allowed to work in Reich government offices or join the German army or security services. "In keeping with the Fuehrer's wishes, Protectorate members should be treated courteously, objectively, but otherwise with uncompromising strictness," State Secretary Stuckart declared at the meeting.[17]

One attendee proposed that marriages between Reich citizens and Protectorate members require official approval. Such unions, however, were not strictly prohibited. In contrast, mixed marriages in which one of the spouses was subject to race laws were completely forbidden, and interracial sexual relations were criminalized by the Nuremburg Race Laws and their supplementary regulations. Although such harsh discriminatory measures were considered for Czechs, they were never adopted. On 16 November 1940 Reich Protector Konstantin von Neurath issued a regulation, confirmed on 3 April 1941 by the Reich Ministry of the Interior, permitting Czech-German marriages under the condition that the non-German spouse regardless of sex would be subject to a special review and that the married couple would promise to educate their children in German schools.[18]

It was in the spirit of Article 2 of the Decree on the Establishment of the Protectorate of Bohemia and Moravia of 16 March 1939 that Protectorate Government Regulation No. 19/1940 Coll., of 18 January 1940,[19] on Protectorate Membership, was drafted. Pursuant to this regulation, on 15 March 1939 Protec-

[15] About the Nazi law system in the Protectorate, see e.g. GEBHART, J., Proměny a interakce okupační a protektorátní správy v letech 1939-1945. In: *Československo a krize demokracie ve střední Evropě ve 30. a 40. letech XX. století. Hledání východisek*, s. 209. Praha. (2010).

[16] BRYAND, CH., *Prague in black: Nazi rule and Czech nacionalism*. Cambridge, 2009, p. 72–80.

[17] BRANDES, D., *Die Tschechen unter deutschem Protektorat*. München, 1969, p. 48-49.

[18] ŠIMŮNEK, M., *Race, Heredity and Nationality: Children in Bohemia and Moravia.* New York, 2005, p. 190-197.

[19] According to some sources, this regulation was issued on 11. 1. 1940.

torate membership was granted to approximately 7.25 million people living in the Protectorate, 290,000 people living in other areas of the Reich, particularly in the annexed borderlands, and several thousand people in Slovakia and Hungary.

In many areas of life, Protectorate members were subject to German law and the jurisdiction of Reich offices. In matters of political offenses, they were subject to the authority of German police and German courts. All inhabitants of the Protectorate were issued special personal identification documents in the German language known as *Kennkarten*. They were required to carry these cards at all times and produce them during random police checks, where were quite frequent. This document, however, did not permit inhabitants of the Protectorate to travel to other parts of the Reich. The borders between the Protectorate and other parts of the Reich were guarded and Protectorate members were not allowed to cross them. To travel to other parts of the Reich, Protectorate members needed to have a *Durchlaßschein*. To travel outside of the Reich, they needed German passports, which were issued to inhabitants of the Protectorate in only exceptional cases. People of Jewish descent were, however, issued special emigration passports marked with the letter J as part of the Nazis' plan to expel Jews.

5. Jews and Mischlinge with Protectorate Membership

Besides ethnic Czechs, Jews, no matter what nationality they ascribed to before the occupation, became Protectorate members. According to German law, Jews and Mischlinge could not become Reich citizens even if they had earlier identified as German.[20]

In the Protectorate, Nazi race laws went into effect, particularly the Reich Citizenship Law[21] and the Law for Protection of German Blood and German Honor[22] of 15 September 1935. The first law recognized Reich citizenship with "full political rights" only to people of "German blood"; the second prohibited marriages and sexual relationships between Reich citizens and people of Jewish heritage.[23] Later, supplementary regulations defined Jews and Mischlinge of the first and second degrees. The basic criterion for determining Jewishness was whether one's grandparents were members of the Jewish religious community. Thus, people who had never been members of the Jewish religious community, and even those who had been baptized, could legally be considered not only Mischlinge but also full Jews.[24]

These race laws eventually pushed Jews and Mischlinge fully out of public and social life, subjected them to strict segregation, and even deprived them of private property. But this was all just a harbinger of the even more drastic treatment of Jews that was to come. Jews and Mischlinge who were Protectorate members were, in many cases, subjects of German law and the jurisdiction of German authorities and not of Protectorate law and authorities as were Czechs. For example, beginning in 1943 German criminal law was applied to them, and they were subject to the jurisdiction of the German criminal police for all types of offenses, not just political delicts.[25]

Later, Jews and "Mischlinge of the first degree" would lose their status as Protectorate members in preparation for deportation to ghettos and extermination camps. On 2 November 1942 the Reich Ministry of the Interior issued a Regulation on the Loss of Protectorate Membership,[26] pursuant to which Jews deported outside of the Protectorate lost their status of Protectorate members due to the fact that their "usual place of residence" was abroad. Article 1 of the regulation specified the conditions for stripping the deported of Protectorate membership: "A usual place of residence is considered to be located abroad if a Jew stays abroad under circumstances from which it can be assessed that he is not staying there only temporarily." The Nazi bureaucracy worked so precisely that Czech Jews deported to the Terezín Ghetto, which was located in the Protectorate, did not lose their status as Protectorate members, although they did lose it if they were deported to the eastern ghettos and extermination camps outside the Protectorate. This provision did not apply to Czech prisoners in German concentration camps who were not subject to racial laws, an in the eyes of German law they remained Protectorate members. Imprisoned Germans from the Protectorate also kept their status of Reich citizens.

6. Reich Citizenship for Germans and Germanized Czechs

The German laws regulating the granting of Reich citizenship in the Protectorate of Bohemia and Moravia differed significantly form the laws governing issues of citizenship implemented in the annexed Czechoslovak borderlands, that is, in the Sudetenland after the Munich Agreement. Germans in the Sudetenland gained German citizenship based on the Agreement between Czecho-Slovakia and the German Reich on Issues of Citizenship and the Right of Option of November 1938 ipso facto without any declaration of will. German citizenship was even given to Czechs who were born or had lived in the Sudetenland before 1 January 1910 and after the Munich Agreement did not opt to keep their Czechoslovak citizenship.

Legislation regulating the acquisition of German citizenship in the Protectorate of Bohemia and Moravia differed fundamentally. The Decree on the Establishment of the Protectorate of 16 March 1939, as well as supplementary legislation, guaranteed Reich citizenship to all individuals who were "members of the German *Volk*";[27] in the Protectorate, however, "member-

[20] About the status of Jews in the Protectorate TAUCHEN, J. The Status of Jews in Labor Relationships in the Protectorate of Bohemia and Moravia. *Miscellanea Historico-Iuridica*. Białystok: Uniwersytet w Białymstoku, 2011, Vol. 10, Nr. 1, s. 183-190.
[21] Pursuant to Reichsbürgergesetz. Reichsgesetzblatt I, 1935, S. 1146.
[22] Pursuant to Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre. Also Reichsgesetzblatt I, 1935, S. 1146.
[23] KÁRNÝ, M., *„Konečné řešení": Genocida českých židů v německé protektorátní politice*. Praha, 1991, p. 77-81.
[24] PETRŮV, H., *Zákonné bezpráví: Židé v Protektorátu Čechy a Morava*. Praha, 2012, p. 60–71.
[25] ROTHKIRCHNENOVÁ, L., *Osud Židů v protektorátu 1939-1945*. Praha, 1991, p. 178-190.
[26] Pursuant to Verordnung über den Verlust der Protektoratsangehörigkeit. Reichsgesetzblatt I, 1942, S. 637–638.
[27] *Volkszugehörigkeit* in German.

ship in the German *Volk*" needed to be proven first unlike in the annexed Czechoslovak borderlands. Therefore, inhabitants of the Protectorate were granted Reich citizenship only if they self-identified as oath of allegiance members of the German *Volk*".[28] This act was essentially an application for Reich citizenship. Only members of the former Sudeten German Party were granted Reich citizenship *ipso facto* after 15 March 1939.[29]

Whereas at least some points of the international agreement of 20 November 1938 conformed with the international standards and customs of the time, citizenship law in the Protectorate was dictated solely by Nazi ideology.

Primarily ethnic Germans were to become privileged Reich citizens. German nationality was defined in a confidential directive issued by the Reich Ministry of the Interior on 29 March 1939: "A German national is he who declares himself to be a member of the German *Volk* if this declaration can be confirmed by certain facts, such as language, education, culture, and so forth."[30] This understanding of nationality essentially corresponded with that current in interwar Czechoslovakia, where the subjective choice of nationality required objective confirmation through certain facts, such as mother tongue, the nationality of one's parents, and so forth—hence, just declaring oneself to be the member of a certain nation was not enough. The Nazi directive also stated that "individuals of foreign blood type, especially Jews, are never members of the German *Volk*, even if they have considered themselves to be so up to this point…" This principle was adopted from Nazi racial laws.

The directive also opened the door for Czechs that were inclined to undergo deliberate Germanization: "Because such fundamental significance is inherent in the act of declaring oneself to be a member of the German *Volk*, someone may be considered a member of the German nation who… is partly or fully from another tribe, for example, a Czech, Slovak, Ukrainian, Hungarian, or Pole."[31]

Thus, someone with distant German ancestors or even without any at all could be recognized as a "member of the German *Volk*" with a claim to Reich citizenship. Such a person, however, could not be of Jewish descent. People without German ancestors who actively sought out Germanization had to be examined by a doctor who would determine their racial characteristics. If they were granted Reich citizenship, they were not allowed to ever declare themselves to be Czech. They were even forbidden from having personal relationships with Czechs—for example, they could not send their children to Czech schools.[32]

7. Two Regulations on German Citizenship

On 20 April 1939 the Regulation on Acquiring German Citizenship for Former Czechoslovak Citizens of German Nationality (lit. "who are Members of the *Volk*") was issued.[33] This regulation retroactively, as of 16 March 1939, granted Reich citizenship to all individuals of German nationality with the right of domicile on the territory of the Protectorate who had not earlier acquired this citizenship based on the international agreement of 20 November 1938 or by applying the right to choose a citizenship stemming from this agreement. Pursuant to the agreement, people of German nationality living in the Czech interior after the Munich Agreement, i.e., between October 1938 and March 1939, could choose German citizenship under the condition that they move out of rump Czechoslovakia.[34]

But these people did not of course acquire Reich citizenship ipso facto merely through this regulation. First, they had to go to a German office and fill out a document titled A Questionnaire for Determining Membership in the German *Volk* [Fragebogen zur Feststellung der deutschen Volkszugehörigkeit], in which they had to declare themselves to be members of the German *Volk*. In this regard, it is interesting to note that some regional and district administrative offices in the modern Czech Republic have considered such people to not have lost Czechoslovak citizenship as of 16 March 1939, when they acquired German citizenship, but on the date when the application was approved by the local German *Oberlandrat*, a district government office in the Protectorate that was only for German inhabitants and their citizenship status was confirmed and a certificate of German citizenship issued.[35]

Oberlandräte, which were responsible for German citizenship issues in the Protectorate, could deny the applications of people of German descent or with German ancestors only if they also had Jewish ancestors or if during the existence of Czechoslovakia they had publicly declared themselves to be of another nationality and were politically active as a member of that nation. Listing one's nationality as Czechoslovakian (or any other nationality) in the 1921 and 1930 censuses did not matter. The key factor was political activism. In practice, this meant that, for example, former members of the Czechoslovak Legion during World War I; officials from Sokol, a Czech nationalist-oriented gymnastics organization; and former members of the State Defense Guard could be turned down. But such people principally did not apply for German citizenship.

---

[28] About the Nazi law terminology, see e.g. GÖRNER, J., Německá terminologie z doby nacistické okupace. In: *Sborník archivních prací*, 1965, Vol. 15, Nr. 1, p. 173.

[29] BRYAND, CH., *Prague in black: Nazi rule and Czech nacionalism*. Cambridge, 2009, p. 56.

[30] BRANDES, D., *Die Tschechen unter deutschem Protektorat*. München, 1969, p. 191.

[31] BRANDES, D., *Die Tschechen unter deutschem Protektorat*. München, 1969, p. 190–191.

[32] ŠIMŮNEK, M., *Race, Heredity and Nationality: Children in Bohemia and Moravia*. New York, 2005, p. 190-197.

[33] Pursuant to Verordnung über den Erwerb der deutschen Staatsangehörigkeit durch frühere tschecho-slowakische Staatsangehörige deutscher Volkszugehörigkeit. Reichsgesetzblatt I, 1939, S. 815.

[34] About the Munich Agreement, see e.g. GLETTLER, M., LIPTÁK, L. MISKOVÁ, A. (eds.), *Nacionálno-socialistický systém vlády. Říšská župa Sudety, Protektorát Čechy a Morava, Slovensko*. Bratislava. (2002).

[35] About the Nazi law terminology, see e.g. GÖRNER, J., Německá terminologie z doby nacistické okupace. In: *Sborník archivních prací*, roč. 15, č. 1, s. 173. (1965).

Pursuant to the regulation of 20 April 1939, German citizenship was determined exclusively by the husband in a marriage. German women that married Czech men did not acquire citizenship. Pursuant to Section 2, ethnic Germans living in Slovakia and Transcarpathian Rus who as of 16 March 1939 had not exercised their right to choose German citizenship established in the Agreement between the Czecho-Slovak Republic and the German Reich on Issues of Citizenship and the Right of Option of 20 November 1938 were not entitled to citizenship.[36]

Interestingly, Section 3 recognized the same rights to new Reich citizens from the Protectorate of Bohemia and Moravia as it did to Protectorate members. Protectorate members, however, were not afforded any rights exceeding those possessed by Reich citizens.

After the regulation was issued, a campaign was launched in the Protectorate to recruit people for Germandom. Local Oberlandräte persuaded not only ethnic Germans but also people with distant German ancestors to fill out and submit the questionnaire. As of 15 March 1939 about 150,000 people in the Protectorate of Bohemia and Moravia declared themselves to be German (i.e., 2 % of the population). By March 1940, 189,000 people in the Protectorate had filled in the questionnaire. By June 1940 this number had risen to 235,000 and by October 1940, to 245,000. In December 1941 a record 270,000 Reich citizens lived in the Protectorate.[37]

From these numbers, it is clear that nearly two times as many people registered as "members of the German *Volk*" than people who had identified as ethnic Germans during the interwar period. They were primarily people who gave their nationality as German during the 1910 census and people with German ancestors. But we also encounter exceptional cases in which people without any German ancestors sought to be Germanized. They mostly began applying for citizenship after 1941, when the German occupying administration definitively rejected the participation of Czech fascists in governing the Protectorate. Therefore, some Czech fascists attempted to be Germanized as a solution to this problem.[38]

On 6 June 1941 the Regulation Governing Citizenship Issues in the Protectorate of Bohemia and Moravia[39] was issued. It went into effect on 1 July 1941 and extended the opportunity to acquire Reich citizenship to female ethnic Germans married to Czechs and their offspring. Article 1, in line with Nazi ideology, clearly proclaimed that Germans were superior: "A member of the German *Volk* cannot be a member of the Protectorate."

Pursuant to the other articles of this regulation, Reich citizenship was acquired by female ethnic Germans who had married Protectorate members before the regulation came into force. Moreover, even women who married a Protectorate member after the regulation came into force could maintain Reich citizenship if they received approval from the local *Oberlandrat*. Children born of mixed marriages acquired Reich citizenship through their mothers. Children born out of wedlock to mixed couples could also acquire Reich citizenship if the parents were later wed and their marriage was officially approved.[40]

Besides extending the possibilities for acquiring German citizenship, at the same time and for the same reasons Heydrich proposed the review of some cases in which inhabitants of the Protectorate were granted German citizenship for which they applied in 1939 and 1940.[41]

8. Conclusion

The expansion of German citizenship onto the territory of the occupied Czech lands in 1938–45 had severely grave consequences for millions of ethnic Germans in the postwar years when the Czechoslovak state was restored. Postwar Czechoslovak legislation took an uncompromising approach to dealing with the spread of German citizenship (i.e., the citizenship of an enemy country).

Immediately after the Allies definitively approved of the Czechoslovak government's plan to collectively expel the German minority from the restored Czechoslovak state[42] at the Potsdam Conference, Constitutional Decree No. 33/1945 Coll., Concerning the Czechoslovak Citizenship of Peoples of German and Hungarian Nationality, was issued on 2 August 1945 and went into force on 10 August 1945.[43]

Pursuant to the decree, all ethnic Germans would lose Czechoslovak citizenship retroactively to the day they acquired German citizenship pursuant to Nazi laws, with the exception of those who were involved in the resistance movement, particularly those who fought in the Czechoslovak units formed under the armies of the Allies; political prisoners; and others who had suffered from Nazi terror.

Ethnic Germans in the Sudetenland who had acquired German citizenship on the basis of the international agreement of November 1938 lost Czechoslovak citizenship retroactively to 10 October 1938. Ethnic Germans in the Protectorate who acquired German citizenship by filling in the Questionnaire Determining Membership in the German *Volk* were deprived of Czechoslovak citizenship as of 16 March 1939.

German nationality was defined in the earlier Constitutional Decree No. 12/1945 Coll., of 21 June 1945, on the Confiscation and Expedited Allotment of the Agricultural Property of Germans and Hungarians, as well as of Traitors and Enemies of the Czech and Slovak Nation. The decree defined Germans as

[36] BRANDES, D., *Die Tschechen unter deutschem Protektorat*. München, 1969, p. 190–191.
[37] BRANDES, D., *Die Tschechen unter deutschem Protektorat*. München, 1969, p. 190–191.
[38] MARŠÁLEK, P., *Pod ochranou hákového kříže: Nacistický okupační režim v českých zemích 1939–1945*. Praha, 1999, p. 64–67.
[39] Pursuant to Verordnung zur Regelung von Staatsangehörigkeitsfragen gegenüber dem Protektorat Böhmen und Mähren. Reichsgesetzblatt I, 1941, S. 308.
[40] ŠIMŮNEK, M., *Race, Heredity and Nationality: Children in Bohemia and Moravia.* New York, 2005, p. 198-199.
[41] BRYAND, CH., *Prague in black: Nazi rule and Czech nacionalism*. Cambridge, 2009, p. 154–155.
[42] Pursuant to The Protocol of the Proceedings of the Potsdam Conference of 2. 8. 1945.
[43] KUKLÍK, J., *Mýty a realita tzv. Benešových dekretů*. Praha, 2002, p. 339–341.

those who had given their nationality as German in any census conducted any time after 1929 (i.e., in 1930 and 1939; Czechs with German citizenship were allowed to list their nationality as Czech in the German census that was taken in the annexed borderlands) as well as those who had joined social organizations or political parties comprised mostly of ethnic Germans and which represented the interests of Germans.

Loss of Czechoslovak citizenship went hand in hand with the confiscation of nearly all German property, in keeping with the provisions of above-mentioned Constitutional Decree No. 12/1945 Coll. and Constitutional Decree No. 108/1945 Coll., of 25 October 1945, on the Confiscation of Enemy Property and on the Fond for National Restoration. Those stripped of Czechoslovak citizenship were prescribed work duty. They were later expelled from Czechoslovakia with no right to return.[44]

Section 1 (2) of Constitutional Decree No. 33/1945 Coll. enabled the state to remove Czechoslovak citizenship from Germans who did not acquire German citizenship during the Nazi occupation, for example, those who had emigrated after the Munich Agreement. This provision also applied to Slovak Germans as well as well as to some female Germans married to Czechs. These people lost Czechoslovak citizenship on the day the decree went into force, that is, 10 August 1945. This measure was a clear injustice to the individuals it affected that had no connection with Germany, an "enemy state". Section 1 (2) offers the clearest example of blatant efforts at nationalizing the population in post-1945 citizenship law. The objective was to deprive primarily ethnic Germans of Czechoslovak citizenship and in contrast to allow Czechs to remain Czechoslovak citizens even if they acquired German citizenship during the occupation.[45]

Whereas Czechoslovakia's postwar legal system did not recognize Nazi-era German laws governing the acquisition of German citizenship by some prewar citizens of Czechoslovakia, the postwar, post-1949 German legal system received some aspects of laws concerning the acquisition of German citizenship. A verdict issued by the Federal Constitutional Court in Karlsruhe was the first to address this issue.[46]

Subsequently, on 22 February 1955 West German legislators passed the Act on Regulating Citizenship Issues,[48] which in Section 1 confirmed the validity of German citizenship acquired pursuant to these norms in the Czech lands during the Nazi occupation.

[44] About the Nazi law system in the Protectorate, see e.g. KUKLÍK, J., *Mýty a realita tzv. Benešových dekretů*. Praha, 2002.
[45] ČERNÝ J., VALÁŠEK, M., *České státní občanství.* Praha, 2009, p. 69-70.
[46] PETRÁŠ, R., *Cizinci ve vlastní zemi*. Praha, 2012, p. 155–156.
[47] Pursuant to Gesetz zur Regelung von Fragen der Staatsangehörigkeit. Bundesgesetzblatt I, 1955, S. 65.

Cesare Beccaria: Von den Verbrechen und von den Strafen – die Rezeption des Werkes in Ungarn

(Cesare Beccaria: On Crimes and Punishments – the Reception of this Work in Hungary)

*István Stipta**

Abstract

The work of Cesare Beccaria Dei delitti e delle pene („On Crimes and Punishments") has become one of the most influential and canonized opuses of the world history of law. It opened a new era in the history of the European criminal law. Its basic theories possess great prestige in the professional debates of our days in criminal law, as well. In a sense, it has become a sort of fashion, thus, the eventual interpretations of its cited thoughts diverge from the text of the original work and the former content to be mediated. To a certain extent, every significant intellectual work has a similar destiny. That is why it is to be considered to return to the original source and to recall the circumstances of the development of the opus and its contemporary assessment. That is our endeavour to tackle that briefly when we review the response of Beccaria's most important work in Hungary. In this essay we tackle the most important stages of the publication of the work, the Hungarian translations and the career history of the work in Hungary. Furthermore, the essay outlines the statements of the Hungarian science of legal history. It refers to the further possibilities of the scientific elaboration of the oeuvre, as well.

Keywords: *Cesare Beccaria; On Crimes and Punishments; social contract; criminal justice; death penalty; utilitarism; André Morelle.*

1. Die ungarischen Übersetzungen des Werkes: Von den Verbrechen und von den Strafen

Das Werk Dei delitti e delle pene ist bisher in vier vollständigen ungarischen Übersetzungen erschienen. Nach Kosáry Domonkos war der erste ungarische Übersetzer im Jahre 1793 Kazinczy Ferenc. Die Behauptung ist nicht ganz genau, denn Kazinczy hat in seiner Abgeschiedenheit in Alsóregmec drei Kapitel des ursprünglichen Werkes übersetzt. Die erste vollständige Übersetzung stammt von dem Jurist-Literaten, Császár Ferenc, dem damaligen Schreibers des Regierungsamtes in Fiume (1834).[1] Als Begründung der Veröffentlichung verweist der Autor in seiner Widmung: Zu dieser Zeit liefen die Parlamentsdebatten, an denen – unter anderen – auch die Strafgesetzreformen auf der Tagesordnung standen. Charakteristisch für die damaligen Verhältnisse des Landes war, dass der Übersetzer sein Buch mit einer klugen Servilität dem Palatin Josef gewidmet hat. Fast als Entschuldigung anmutend schrieb er, dass dieses Meisterwerk außer den Sprachen Ungarisch, Dänisch, Schwedisch und Türkisch in allen anderen europäischen Sprachen bereits erschienen ist, so ist das Erscheinen des Werks für das heimatliche Publikum dringend notwendig geworden. Die Übersetzung von Császár wird als korrekt gehalten, doch wegen der damaligen Unterentwickeltheit der juristischen Terminologie ist der Text heute nur noch schwer zu interpretieren, im Vergleich zu anderen Übersetzungen ist er stellenweise „unvergleichbar archaisch."[2]

Die zweite vollständige Übersetzung erlebte zwei Auflagen (1887, 1906).[3] Der Übersetzer war Tarnai János, Richter der Kurie, hervorragender Rechtswissenschaftler, juristischer Fachschreiber. Die den Zeitgeist und die juristischen Tendenzen analysierende einleitende Studie verfolgt die Wirkung von Beccaria auf die Rechtswissenschaft und auf die europäische Gesetzgebung.

Die dritte Übersetzung ist die Arbeit des Diplomaten und internationalen Juristen, Sebestyén Pál (1967).[4] Die den übersetzten Beccaria Text begleitende Einleitung enthält jedoch zalhreiche sachliche Irrtümer. Diese wurden zum Großteil in der neueren Fachliteratur behoben.[5]

* Prof. Dr. István Stipta, Károli Gáspár Universität der Reformierten Kirche in Ungarn, Budapest.

1 *„Über Straftat und die Strafen. Beccaria."* Übersetzt von Császár, F., Gedruckt: Suppan F. Zagreb, 1834. S. 9-202.

2 Gángó, G., Beccaria in Ungarn [Cesare Beccaria: Über das Buch: Von den Verbrechen und von den Strafen.] In: *Holmi,* vol. 5, Nr. 7, 1993, (im Weiteren: Gángó, G. 1993.) S. 1049.

3 *Von den Verbrechen und von den Strafen.* Übersetzt und eingeleitet von Dr. Tarnai, J., Révai Leó kiadása, 1887. S. 120.; *Von den Verbrechen und von den Strafen.* Übersetzt und eingeleitet von Dr. Tarnai, J., Zweite, überarbeitete Auflage. Olcsó Könyvtár, Nr. 1805. Franklin, 1916. S. 191.

4 *Von den Verbrechen und von den Strafen*. Übersetzt von Sebestyén, P. Einleitung von Kádár, M., Akadémiai Kiadó, 1967. (*Az állam- és jogtudomány úttörői*, Band 6.). S. 140.

5 Mucsi, E., Ein Buch aus der Perspektive von zweihundert Jahren. In: *Világtörténet*, vol. 23, Nr. 1, 1987, (im Weiteren: Mucsi, E. 1987.) S. 67-69.

Zu guter Letzt erschien die vierte Übersetzung im Jahre 1989, die als erste die italienische Originalfassung von Beccaria dem ungarischsprachigen Leser darbietet. (Madarász Imre). Von den vier Übersetzungen wurde also nur bei der letzten das Originalwerk von Beccaria als Grundlage herangezogen.

Den Wissenstransfer in den Blick genommen, taucht außer den ungarischen Übesetzungen noch die Frage der Identifizierung des Originaltextes auf. Das Originalwerk erschien zwischen 1764 und 1765 in drei italienischen Auflagen. Die vierte Auflage erschien in französischer Sprache 1766, gelangte dann mithilfe einer gründlichen Überarbeitung von Abbe André Morellet an die Öffentlichkeit. Später wurde diese Textversion in Europa bekannt, bis zum Jahr 1989 bildete diese Textversion die Grundlage der ungarischen Übersetzungen.

Der letzte Übersetzer, Mészáros Imre, ein Italienist, weist darauf hin, dass er den damaligen Geist befolgt, der „das Werk nicht als eine juristische Facharbeit, sondern als ein strafrechtliches Manifest der Aufklärung" betrachtet hat und dass „es fruchtbarer ist, dieses Werk von einer allgemeinen Ideentheorie, konkret von dem ideentheoretischen System der Aufklärung anzunähern." [6]

Die Übersetzungen weichen hinsichtlich ihres Interpretationsrahmens, des Ziels und der Umstände ihrer Übersetzung, hinsichtlich ihres Verhältnisses zur Originalquelle radikal voneinander ab. Sie unterscheiden sich auch in der Sichtweise, nämlich darin, inwieweit sie das Grundwerk als eine juristische Facharbeit betrachten, ob die darin auftauchenden Schlüsselkategorien als philosophische oder im engeren Sinne als fachjuristische Termini aufzufassen sind. Selbst die Übersetzungen des Titels widerspiegeln diese Unterschiede, denn der Ausdruck „Verbrechen" suggeriert einen allgemeineren Sinn, der Ausdruck „Straftat" vermittelt einen konkreten strafrechtlichen Sinn. Balogh Jenő, der hervorragende Strafrechtler in der Zeit des Dualismus gebrauchte in einer seiner Abhandlungen den aus juristischer Sicht genaueren Begriff der „Straftat." [7] Wir haben auch gesehen, dass es „keinen" Beccaria opus gibt, deshalb müssen wir bei unserer Bezugnahme und bei der Untersuchung der zeitgenössischen Wirkung des Werkes die wichtigen Unterschiede zwischen den originalen und überarbeiteten Fassungen des Werkes berücksichtigen. Es ist anzunehmen, dass die Zeit gekommen ist, dass ein Rechtswissenschaftler mit ausgezeichneten italienischen Sprachkenntnissen die vergleichende Analyse der beiden Beccaria-Versionen erstelle, und die zeitgenössische juristische Terminologie berücksichtigend, diese mit den aktuellen Kategorien der Gegenwart ergänzend, eine verlässliche ungarische Übersetzung erstelle.

2. Diskussion über den Charakter des Werkes: ein philosophisches Werk oder eine juristische Facharbeit?

Laut einer markanten Meinung in der ungarischen philologischen Fachliteratur ist das Werk keine rechtswissenschaftliche Abhandlung, sondern eine Arbeit, die den geistigen Strömungen der Zeit folgend über den Begriff des Verbrechens Betrachtungen anstellt. Beccaria kommt – die religiöse, die natürliche und die menschliche Tugend und Verbrechen unterscheidend –, zur Schlussfolgerung, dass nur der Begriff der religiösen Tugend und des Verbrechens eins und unveränderlich ist, die menschliche Tugend und das Verbrechen sind begrifflich betrachtet relative Begriffe, die sich gemeinsam mit den menschlichen Verhältnissen ändern. Diese Kategorien werden in den Gesetzen getrennt verfasst und auf diese Weise muss auch zur Berechtigung und Nützlichkeit der weltlichen Bestrafung Stellung genommen werden. Das Buch verlangt – in dieser Interpretation – aufgrund philosophischer Anforderungen und nicht aufgrund juristischer Schlussfolgerungen die dringende Reformierung der strafrechtlichen Verhältnisse.[8]

Darauf hat bereits Hajdu Lajos, ein anerkannter ungarischer Strafrechtswissenschaftler und Historiker hingewiesen, dass nämlich die strafrechtlichen Anschauungen der Aufklärung primär nicht von Kriminalisten, sondern von Vertretern von allgemeinen Anschauungen, wie er es nannte, von Laien, ausgearbeitet wurden. Sie suchten nach dem tieferen Sinn der Zusammenhänge, sie wurden nicht durch die vielen, in der Denkweise der Juristen gefestigten und verkrusteten wissenschaftlichen Vorurteile, durch ein Autoritätsdenken beeinflusst und gehindert. Die Aufklärer entfalteten ihre strafrechtlichen Konzeptionen nicht in wissenschaftlichen Werken, deshalb wurde ihnen auch häufig vorgeworfen, dass sie unwissenschaftlich seien, wie es auch bei Eugéne Lerminiére – in einem Epigramm des bekannten französischen Strafrechtlers heißt – „wir schätzen Beccaria sehr, der die Menschheit liebt, aber das Strafrecht und auch die Geschichte nicht kennt." [9] Trotzdem sieht der Autor ganz klar, dass Beccaria eine eigenartige Rolle übernommen hat: während die Illuministen jeweils ein einziges Teilgebiet behandelten, hat er diese modernisierenden Tendenzen zusammengefasst und in ein System geordnet. Aus diesem Grunde konnte er einen bedeutenderen Einfluss erreichen als seine französischen Meister, trotz der Tatsache, dass sein Werk nicht auf einer ursprünglichen Konzeption beruht, denn die Grundlage seiner Thesen bildeten eigentlich die Lehren der Französischen Revolution (die Enzyklopädisten und andere).[10]

---

[6] MADARÁSZ, I., Verbrechen und Aufklärung. Vor ein großes kleines Buch. In: *Cesare Beccaria: Von den Verbrechen und von den Strafen.* Übersetzt und Einleitung von MADARÁSZ I., Országos Pedagógiai Könyvtár és Múzeum. Budapest, 1989.; MADARÁSZ, I., (Überzetzt); *Von den Verbrechen und von den Strafen*. Gödöllő: Attraktor Kiadó, 2012. S. 112. Vgl. GÁNGÓ, G. 1993. S. 1049.

[7] BALOGH, J., Gedenkrede zum Tod von Fayer László korr. Mitglied der Ung. Akademie. In: *Az MTA Elhunyt Tagjai Fölött Tartott Emlékbeszédek,* vol. 13, Nr. 6, 1907, (im Weiteren: BALOGH, J., 1907.) S. 177.; MÁTHÉ, A., Das rumänische Strafrecht. In seiner Studie Historisches Tableau gebraucht er den Titel. Vergehen und Strafen. In: *Korunk*, vol. 21, Nr. 7, 2010. július, S. 35.

[8] MUCSI, E. 1987. S. 68.; Beccaria, Cesare, Marchese. In: LAMM, V., und PESCHKA, V. (Hrsg.) *Jogi Lexikon,* KJK-KERSZÖV Jogi és Üzleti Kiadó, Budapest, 1999. S. 67.

[9] HAJDU, L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. [Der erste (1795) ungarische Gesetzesentwurf des Strafsrechts]. Közgazdasági és Jogi Könyvkiadó. Budapest, 1971. (im Weiteren: HAJDU, L. 1971.) S. 145.

[10] HAJDU, L. 1971. S. 142-143.; Beccaria hatte das Strafrecht nicht als öffentliche Angelegenheit der Fachleute, der Juristen, sondern als eine öffentliche Angelegenheit jedes Staatsbürgers, jedes denkenden Menschen betrachtet, denn er meinte: „Glüklich ist jene Nation, wo das Gesetz keine Fachwissenschaft ist." MADARÁSZ, I., 1989. S. 6.

In dieser Frage wäre vielleicht jene Annäherung entsprechender, dass das Originalwerk von Beccaria die rechtsphilosophischen Gedanken eines ausgezeichneten Juristen widerspiegeln. Es ist ein Werk, in welchem die Gedanken der Sozialphilosophie der Zeit zusammengefasst werden, und nicht nur die im engeren Sinne des Wortes verstandenen Grundfragen des Rechts thematisiert werden, sondern der Autor richtet sein Augenmerk auch auf die staatsphilosophischen Grundlagen der Machtentstehung. Gabriel Tarde, einer der hervorragendsten französischen Kriminologen kritisierte Beccaria, weil er die „sentimentale Menschenliebe, den naiven Optimismus und den übermäßigen Individualismus" der zeitgenössischen Philosophen und Dilettanten spiegelte. Doch auch Tarde, der die klasssiche strafrechtliche Richtung angefochten hat, hatte keine Zweifel daran, dass diese Anschauungen im weiteren Sinne des Wortes die Sphäre des Rechts tangierten und jene Garantien in Schrift gefasst haben, die entweder im Bereich der Verfahren oder im Bereich des materiellen Strafrechts gegenüber der Willkür der Macht die individuelle Freiheit und die Freiheitsrechte der Bürger garantieren.[11]

2.1 Der geistige Ursprung des Werks „Von den Verbrechen und von den Strafen" und seine Wirkung in Ungarn

Auf das Titelblatt des Dei delitti e delle pene wählte Beccaria ein Zitat aus dem zahlreiche Auflagen erlebten Werk von Francis Bacon „Sermones fideles, ethici, politici, oeconomici, sive, Interiora rerum". Der Text des Zitats lautet: „in allen Angelegenheiten, besonders in den schwerwiegenderen ist nicht zu erwarten, dass man gleichzeitig säen und ernten kann, sondern es braucht eine Wartezeit, dass alles, die Dinge, die Angelegenheiten allmählich heranreifen können."[12] Diese Zitat ist der letzte Satz des auf die Rechtsprechung bezogenen Kapitels bei Bacon. Die Auswahl des Autors war kein Zufall: Die französischen Enzyklopädisten schätzten ihn sehr und haben ihr Werk ihm gewidmet. „Das meiste verdanken wir dem Kanzler Bacon, der die Idee des allgemeinen Lexikons der Wissenschaften und des Gewerbes aufgeworfen hat" - schrieb Diderot. Selbst dem Text des Mottos würde auch eine Analyse gebühren, genauso wie der Frage, welch sonstige Wirkungen in dem zitierten und in den sonstigen Werken (bzgl. der Rechtsauffassung) des englischen Denkers nachzuweisen sind. Auf jeden Fall stimmt es nachdenklich, dass Beccaria den utopischen Atlantis von Bacon heraufbeschwörend auf die Wichtigkeit der Justizreformen hinwiest, doch gleichzeitig auf die notwendige Gradualität der Verwirklichung dieser hinweist. Er kannte die zähen Traditionen seiner Zeit sehr gut, und wusste auch, dass mehrere seiner Reformbestrebungen, besonders die Abschaffung der Folter und der Todesstrafe in kurzer Zeit nicht verwirklicht werden können.[13]

Die geistige Verbindung von Beccaria zu Bacon und den Enzyklopädisten ist im Werk auch auf der Textebene nachzuweisen. Darauf weist auch Tarnai János hin, wenn er meint, „die Rechtsphilosophie der Enzyklopädisten hat in diesem Werk den klarsten Ausdruck gefunden, aber in einer Form, die nicht nur überzeugt hat, sondern auch bewogen und begeistert hat". Die Ideen waren schon früher präsent: Seine seelische Verwandtschaft mit Bacon war eine allgemein bekannte literarische Tatsache, denn er erwähnte ja selbst, dass er auf dem „leuchtenden Pfad" von Montesquieu voranschreitet, und auch die Gedanken von Rousseau übernimmt.[14] „Er hat sich jene Ideen zu eigen gemacht, die seit Jahrhunderten" das progressive menschliche Denken „leiteten". „Jene Ideen, die knapp fünfundzwanzig Jahre nach Erscheinen das Buches zur französischen Revolution geführt haben."[15]

Gángó Gábor hat unlängst den Gedanken aufgeworfen, dass die Wirkung von Beccaria auf das ungarische Naturrecht analysiert werden müsste. Seiner Meinung nach „erschienen im Laufe der strafrechtlichen Diskussionen in Ungarn die einander abwechselnden Ideenströmungen des Naturrechts und die des juristischen Positivismus gleichzeitig und wirkten nebeneinander"."[16] Den heimischen Transfermechanismus der europäischen Ideenströmungen ausgezeichnet kennende Autor hat auch darauf hingewiesen, dass es lohnenswert wäre, der Wirkung der Kontraktualismuslehre von Beccaria zu folgen. Das sind zu beherzigende Gedanken, trotz der Tatsache, dass die rechtshistorische und vor allem institutshistorische Untersuchung der heimischen Wirkungen teilweise bereits erfolgte.[17]

Auf den naturrechtlichen Charakter des Werkes hat bereits Tarnai János hingewiesen. Danach hat bei Beccaria „Die gewordene Sache, die historische Entwicklung, das thesenhafte oder gewohn-

---

[11] Balogh, J., 1907. S. 177. zitiert Tarde, G., *La philosophie pénale*. Éditions Cujas, Paris. 1890. (Kapitel II., S. 44.). Neuestens: Madarász I., Der Rechtsreformer und die Philosophen des „Lichtes": Die Wirkung der Staatsphilosophie der Aufklärung auf die Abhandlung von C. Beccaria. Von den Verbrechen und von der Strafe, In: *Italianistica Debreceniensis,* vol. 16, Nr. 16, 2009, (im Weiteren: Madarász, I. 2009.) S. 96-97. Über den Optimismus von Beccaria: Friedmann, E., Bemerkungen. In: *Jogtudományi Közlöny*, vol. 64, Nr. 12, 1910, S. 101.

[12] In rebus quibuscumque non exspectandum, ut quis simul et serat et metat, sed praeparatione opus est, ut per gradus maturescant. In: Verulamio, Fr. Baconi de: *Sermones fideles, ethici, politici, oeconomide ci, sive, Interiora rerum.* Accedunt Faber fortunae, Colores boni et mali, &c. Aufl. 1628., 1644. 1764. S. 104.

[13] Eser, A., Gedanken über die „menschenzentrierte" Strafrechtssprechung. (Übersetzt von Györgyi, K.) In: *Magyar Tudomány,* vol. 102, (neue vol. 40), Nr. 11, 1995, S. 1343.

[14] Madarász, I., 2009. S. 99. Vgl. Tarnai, J., (Szemle). In: *Jogtudományi Közlöny,* vol. 64, Nr. 8, 1930, S.78.

[15] Beccaria és kora. In: *Von den Verbrechen und von den Strafen schrieb Beccaria Caesar.* Übersetzung und Einleitung: Dr. Tarnai J., Révai Leo Kiadása. Budapest, 1887. S. V.

[16] Gángó, G. 1993. S. 1053.; Csabay, I., A nyilvánosság politikai ereje a XVIII. századi Lombardiában. Az Il Caffč folyóirat politikai programja és hatalomgyakorlási stratégiái. In: *Annona Nova XI. A Kerényi Károly Szakkollégium évkönyve.* Pécsi Tudományegyetem Bölcsészet- és Társadalomtudományi Kar Kerényi Károly Szakkollégium. Pécs, 2020. S. 45.

[17] Balogh, E., Die ungarische Strafrechtskodifikation im 19. Jahrhundert. In: Vormbaum, Th. (Hrsg.) *Rechtsgeschichte und Rechtsgeschehen*. Band 12. LIT Verlag, Wien, Zürich, 2010. S. 37-38.; Gönczi, K.,: „Wissenstransfer bei den Kodifikationsarbeiten im ungarischen Vormärz." In: *Ius commune*. (Hrsg. von Dieter Simon und Michael Stolleis) Frankfurt am Main, vol 25, 1998. S. 266.

heitsmäßige Strafrecht keinen Respekt." Nach Beccaria müssen bei der Würdigung und Bewertung der Institutionen die historischen Traditionen vergessen werden, weil die Grundlagen der richtigen Rechtspolitik in der Vernunft, in der Natur und in den unvergänglichen Gefühlen des Menschen gesucht werden müssen. Was auf dieser Grundlage notwendig ist, das ist zweckmäßig (angebracht) und gerecht, was überflüssig ist, ist willkürlich und ungerecht.[18]

In unserer Land hatte die epochale Arbeit von Beccaria auf die naturrechtlich begründete Denkweise von Deák Ferenc eine sehr große Wirkung ausgeübt. Der Weise von Zala hat die Arbeit des Autors aus Mailand in deutscher Sprache gelesen, aus welchem dann – in erster Linie – die Teile über die Freiheits-Garantien des Strafrechts, über das Zubehör der menschlich akzeptierbaren Strafe, über die Notwendigkeit der Aufhebung der Todesstrafe und über die Einschränkung der körperlichen Strafe in seinen Reden vor dem Komitatsgericht oder in den Reden der Konferenz der Gesandten vieles eingebaut wurde. In seiner ersten bekannt gewordenen Ansprache der Gesetzgebung sprach er sich gegen die Todesstrafe aus, in welcher er den Thesen des Rechtsphilosophen folgte. Später argumentierte er häufig für die richterliche Gerechtigkeit/Fairness, er berief sich auf die Wichtigkeit der das Leben erhaltenden Gnade und verwies auf die Unsinnigkeit der strafrechtlichen Vergeltung. In seinen im Jahre 1832 verfassten Bemerkungen zum Strafgesetzesentwurf schrieb er über die Gebundenheit der Rechtsprechung an das Gesetz über die Unschuldsvermutung, über die materielle und moralische Rehabilitation, über die Zurückdrängung der außerordentlichen Gerichtbarkeit. Auch er hat die damaligen inquisitionsartigen Verfahren entschieden zurückgewiesen. „Die Schuld bleibe lieber unbestraft, – bekennt er – als das einem, vielleicht unschuldigen Bürger ungerechtes Leid geschehe." Seine Parlamentsrede über die Auslegung der Gesetze im Jahre 1834 beruhte auf dem naturrechtlichen Gedankengang von Beccaria.[19]

Auf die Untersuchung des Kontraktualismus müsste unsere juristische Forschung ein größeres Augenmerk richten.[20] Tatsache ist, dass dazu ein Versuch geschehen ist. In der Studie von Notter Antal wurde bereits 1905 die Parallele, gleichzeitig auch die Akzentverschiebungen zwischen den Vertragstheorien von Blackstone und Beccaria. Während nach Meinung des englischen Philosoph-Juristen die Menschen in der Zeit vor den Staatsgründungen unbedingt frei waren, doch in die bürgerliche Gesellschaft tretend, „als Preis für diesen teuren Kauf" einen Teil ihrer Freiheit endgültig aufgeopfert haben. Die Vertragspartner haben nach Beccaria auf einen Teil ihrer Freiheit verzichtet, aber nur aus dem Grunde, dass sie den anderen, verbliebenen Teil noch sicherer genießen können. Unser Autor führt die strafrechtliche Legitimität auf diesen Vertrag zurück, auf das jus puniendi, die strafrechtliche und herrschaftliche Gewalt des Staates. Seine Kontraktualismuslehre vereint in sich die Forderung, dass die, durch die freiwillig übergebenen Freiheitsteile entstandene Macht vom Herrscher im Interesse der ganzen Gesellschaft und des Einzelnen ausgeübt werden muss.[21]

Beccaria folgte einer neuartigen, nach der strafrechtlichen Dogmatik auch als utilitaristisch interpretierbaren Auffassung. Das Postulat seiner utilitaristischen Theorie lautete, dass „möglichst viele Menschen eines je größeren Glücks zuteil werden sollen". Beispielsweise stellt er eine überraschende Parallele zwischen dem Selbstmord und der Auswanderung auf, und kommt zum Schluss, dass der Mensch, der Selbstmord begeht, der Gesellschaft einen kleineren Schaden zufügt, als der Mensch, der mitsamt seines Vermögens auswandert. Ein späterer Experte seiner Theorien ist Diamant József, der eine enge Parallele in den Auffassungen zwischen Beccaria und Jeremy Bentham aufzeigte. In seiner im Jahre 1916 erschienenen Studie heißt es: „Beccaria hat im Bereich des Strafrechts, Bentham auf dem gesamten Gebiet des Rechts die Grundlagen der Wissenschaft der Rechtsprechung gelegt und die politische Grundthese, dass das Ziel, das Ideal dieser Wissenschaft das höchste Glücklichsein der größten Zahl ist. Diese These bedeutet aus dem Grunde eine Revolution, weil gegenüber der Aristokratie die Demokratie, noch mehr, in einer modifizierten Form auch das Ideal des Sozialismus und dessen Ansprüche bestrebt sind, damit zu einer Genugtuung im Bereich des Rechts zu gelangen."[22]

2.2 Die möglichen Erklärungen der Wirkung des Werks

Das Werk übte eine sehr große Wirkung auf die Juristen, die aufgeklärten Philantropen, auf die Monarchen, die republikanischen Staatsmänner und auch auf die Literaten aus.[23] Die

---

[18] Beccaria és kora. In: *Von den Verbrechen und von den Strafen schrieb Beccaria Caesar.* Übersetzt und eingeleitet Dr. TARNAI, J., Révai Leo Kiadása. Budapest, 1887. S. VII.

[19] STIPTA, I., Deák Ferenc nézetei a jogról, igazságról és a hatalomról. (Die Anschauungen von Ferenc Deák über die Justiz, die Wahrheit und die Macht.) In: *Jogtörténeti szemle*, vol. 17, Nr. 3, 2003, S. 1-2.; TÓTH, J. Z., *Die universelle und ungarische Rechtsgeschichte der Todesstrafe.* Századvég Kiadó. Budapest, 2010. S. 238.; BALOGH, J., Beccaria. In: *Jogtudományi Közlöny*, vol. 20, Nr. 41, 1886, S. 330-331.; KENEDI, G., Die Erinnerungen von Ferencz Deák. In: *Jogtudományi Közlöny,* vol. 37, Nr. 43, 1903, S. 386.; In: *Jogtudományi Közlöny*, vol. 37, Nr. 46, 1903, S. 382.

[20] In dieser Frage entstand unlängst ein ausgezeichneter Konferenzbeitrag: MADARÁSZ, I., Cesare Beccaria és a társadalmi szerződés felvilágosodás-kori elmélete. [C. Beccaria und die Theorie des Gesellschaftlichen Vertrags in der Aufklärung]. In: VARGA, N., (Hrsg.) *Jog és irodalom*. (Segedi Jogász Doktorandusz konferenciák 1.) Szegedi Egyetemi Kiadó - Juhász Gyula Felsőoktatási Kiadó. Szeged, 2011. S. 107-125.

[21] NOTTER, A., Das Naturrecht. In: *Bölcseleti Folyóirat*, vol. 20., 1905, S. 566.; *Ügyvédek Lapja.* vol. 23, Nr. 25, 1916. június 17, S. 5.; TÓTH, J. Z., Die Todesstrafe im Naturrecht des XVII. Jahrhunderts und in der philosophischen Denkweise der Aufklärung. In: *Magyar Filozófiai Szemle*, vol. 126, Nr. 1-2, 2008, S. 169.; MADARÁSZ, I., 2009. S. 107. Nach Beccaria ist „jedes Gesetz ein neuer Vertrag, oder es müsste mindestens einer sein" WITTMANN, E., Über die Rückwirkung der Strafgesetze. In: *Jogtudományi Közlöny,* vol. 38, Nr. 47, 1904, S. 385.

[22] DIAMANT, J., Beccaria und Bentham. Reflexionen zur neuen Beccaria Auflage von Tarnai. In: *Jogtudományi Közlöny*, vol. 51, Nr. 31, 1916, S. 274.; Beccaria és kora. In*: Bűntett és büntetés írta Beccaria Caesar.* Übersetzt und Einleitung von Dr. TARNAI J., Révai Leo Kiadása. Budapest, 1887. S. VIII.; HORVÁTH, N., Der unbekannte Jeremy Bentham. Die Bedeutung des Prinzips der Antipathie in den Schriften von Bentham. In: *Világosság*, vol. 48, Nr. 9-10, 2008, S. 55.; BÁRD, J., Theorei und Praxis im Recht. In: *Jogtudományi Közlöny,* vol. 54, Nr. 18, 1920, S. 143.

[23] DEIMLING, G., Cesare Beccaria. Die Anfänge moderner Strafrechtspflege. In: *Europa.* Heidelberg, 1989. Kriminalistik, 1989. VIII. S. 223. (Kriminologische Schriftenreihe der Deutschen Kriminologischen Gesellschaft. 100.) Werk und Wirkung. Einleitung, S. V.; SZEMERE, B., *Über die Strafe, besonders über die Todesstrafe.* Koszorúzott pályamunka. Budán, a' Magyar Kir. Egyetem betűivel. 1841. S. 52-53., 61., 66. 85.

Ursachen der Wirkung dieses Werks untersuchend muss zunächst darauf hingewiesen werden, dass Beccaraia keine neuen Gedanken formuliert hat. Seine Grundideen waren in sporadischer Form schon früher vorhanden. Seine Verwandtschaft mit Bacon ist eine allgemein bekannte literarische Tatsache, denn er selbst erwähnt es, dass er in den ausgewählten Theorien mit Montesquieu voranschreitet und sein eingestandener prinzipieller Ausgangspunkt der Rousseau'sche Gesellschftsvertrag ist. Gerhard Deimling, einer der zeitgenössischen Strafrechtsexperten schreibt, dass sich Beccaria solche Ideale zu eigen machte, die schon seit Jahrhunderten die progressive Denkweise der Menschheit leiteten. Jene Ideale, die bald fünfundzwanzig Jahre nach Erscheinen des Werks zur französischen Revolution geführt haben.[24]

Bereits den ungarischen Zeitgenossen ist die komplexe Annäherungsweise von Beccaria aufgefallen. Er selbst schrieb: „Die Grausamkeit der Strafen, die Mangelhaftigkeit der Strafverfahren, jene Teile der Rechtsprechung, die wie wichtig sie auch sein mögen, werden sie in gleichem Maße in Europa vernachlässigt" diese von sehr wenigen untersucht wurden. Die Urschen der Popularität seines Werks und dessen schnelle Rezeption erforschend können wir die eigenartige Methodik erwähnen, denn „nur wenige unternehmen es, dass sie auf die Grundprinzipien zurückgehend, die gesammelten Irrtümer der Jahrhunderte zerstören; dass sie mindenstens mit der Kraft, die von der Kenntnis der Wahrheit entsteht, den uneingeschränkten Lauf der gefährlichen Richtung der Macht mäßigen, die bisher das legalisierte Musterbild der kalten Grausamkeit war." [25]

Die mutigste rechtsprinzipielle Neuerung von Beccaria war, dass er die das frühere Strafrecht beherrschenden absoluten Theorien und das Prinzip der Vergeltung (expiatio) ablehnte. Er focht die auf religiöse Grundlagen sich stützende Auffassung in ihren Wurzeln an und verbannte die religiösen Begriffe aus seiner Theorie. Nach seinem Standpunkt haben die moralischen Handlungen genauso wie die natürgeschaffenen einen abgrenzbaren Kreis und wie die naturgeschaffenen, so sind auch diese in mehrfacher Hinsicht durch die Zeit und den Raum eingeschränkt. Er musste zu diesem Ergebnis kommen, als er die Proportion zwischen Strafe und Sühne gesucht hat, als er die Milderung der Strafe forderte und die Einschränkung der inquisitorischen Schuldsuche wünschte. Die strafrechtliche Auffassung der Zeit beruhte auf der Vergeltung. Deren Ziel war es, die Versöhnung zwischen Gott und dem Menschen wegen dessen inneren Schlechtheit zu erreichen, das mit einer möglichst strengen Bestrafung erreicht werden konnte. Daraus ergab sich die Auffassung, dass es keine körperliche Qual gibt, deren Gewicht mit der inneren Schlechtigkeit gleichgesetzt werden könnte und es gibt kein Mittel, dass nicht zur Aufdekkung der Schuld verwendet werden könnte. In dem materiellen Strafrecht hat diese Auffassung zu grausamen Strafen geführt, besonders zu den Todesstrafen, im Verfahren wurde durch diese Sicht die Folter legitimiert.[26]

Im Laufe dieses erfolgreichen Kampfes gegen diese Auffassung entstand das übliche Beccaria-Bild über den aufgeklärten jungen Humanisten, der gegen die Brutalität der Strafen ankämpfte und zugleich auch der Vorkämpfer der Werte innerhalb des Strafrechtes der zeitgenössischen Rechtsstaatlichkeit wurde. Die ungarische Nachwelt hat in ihm einen Kriminalpolitiker gesehen, der eine säkularisierte, von der Metaphysik befreite, rationale staatliche Strafpolitik forderte.

Die ungarische Wirkung des Werkes untersuchend ist zu erwähnen, dass seine Gedanken einfach und leicht rezipierbar waren. Der Autor hat darüber hinaus nicht nur auf der intellektuellen Ebene eine Wirkung ausgeübt, sondern hat auch herzergreifend bewogen und begeistert. Es kann mit Recht behauptet werden, dass Beccaria im wissenschaftlichen Sinne ein neues Kapitel im Bereich der Stillehre eröffnet hat. Es ist wohl weniger bekannt, dass er auch der Autor des Werkes „Ricerche intorno alla natura dello stilet" (Forschungen über das Naturell des Stils) ist.[27] Seine Grundthese war, dass die talentierten Schriftsteller durch neue Dinge gezwungen werden, einen neuen Stil und auch neue Wörter zu kreieren. Beccaria hat die Stilfrage aus dem Aspekt der Ganzheitlichkeit der Aussage beurteilt. Er entdeckte die Funktion der Metapher und des Vergleichs, und hat darauf hingewiesen, dass ihre Struktur und Gestalt von der gegebenen Zeit abhängt, doch die lebendigen Metaphern und Vergleiche solche notwendigen fachliterarische Mittel sind, die auch in einer späteren, veränderten Epoche wieder an Kraft gewinnen.[28]

Die Geschichte der ungarischen Wirkung, die Art und Weise der Verbreitung der strafrechtlichen Reformgedanken ist zum großen Teil bekannt.[29] Auf die zeitgenössischen Schranken der Verbreitung der fortschrittlichen Ideen verwies Kazinczy Ferenc, in einem Brief aus dem Jahre 1825, in welchem er einen Gesandtenwahlkampf kommentiert und an Josef Dessewfy schreibt: „Ich mag die, die Montesquieu, Filangieri, Beccaria, Sonnenfels gelernt haben: aber meiner Meinung nach ist von einem Gesandten am meisten zu erwarten, eine freie Seele ohne

[24] Voltaires Einfluss auf die Rehtsprechung. In: *Jogtudományi Közlöny,* vol. 12, Nr. 32, 1878, S. 261. Vgl. *Nicolosi,* S., Il mistero della prima traduzione ungherese del Dei delitti e delle pene di Cesare Beccaria. In: *Neohelicon,* vol. 47, Nr. 1, 2020, S. 147-157.

[25] Halmágyi, S., *Beccaria. Ungarisches Rechtswesen* 1887. (Band 27.) S. 17. Vgl. Tóth, L., Die Frage der Reform des Strafrechts. In: *Jogtudományi Közlöny,* vol. 25, Nr. 17, 1891, S. 129.; Fayer, L., Für welche Straftaten gibt es im ungarischen Strafgesetzbuch keine Strafsanktionen? In: *Jogtudományi Közlöny*, vol. 25, Nr. 35, 1891, S. 278.

[26] Beccaria und seine Zeit. In: *Von den Verbrechen und von den Strafen von Beccaria Caesar.* Übersetzt und eingeleitet von Dr. Tarnai J., Révai Leo Kiadása. Budapest, 1887. S. IX. Beccaria lehnt nach Imre Madarász die doppelte Verweisgrundlage der damaligen Strafrechts, den Respekt der mosaischen Gesetze und des Corpus Juris ab. Madarász, I., 1989. S. 7.

[27] Golino, E., Die militante Kritik. In: *Helikon*. Világirodalmi Figyelő vol. 31, Nr. 2-4, 1985, S. 253.

[28] Herczeg, Gy., Der gesellschaftliche Hintergrund der Stildebatten der Illuministen. In: *Filológiai Közlöny* vol. 7, Nr. 1-2, S. 21.; Galicz, K., A felvilágosodás elfeledett polihisztora: Pietro Verri. In: Drinóczy Tímea (Hrsg.) *Studia Iuvenum Iurisperitorum 9*, A Pécsi Tudományegyetem, Állam- és Jogtudományi Kara Hallgatóinak Tanulmányai 43, Pécs, 2018. S. 48.

[29] Penke, O., Der offene und verborgene Weg der Verbreitung der Gedanken: Bayle, Beccaria, Pascal és Voltaire Péczeli József könyvtárában. In: *Magyar Könyvszemle*, vol. 130, Nr. 3, 2014, S. 336-352.

Angst zu besitzen, und ich kenne Szemere als so einen Menschen."[30] Wir sehen also, dass in der frühen ungarischen Reformzeit nicht das ausgezeichnete Wissen zählte, sondern das mutige Auftreten gegenüber der fremden Macht als das wichtigste Kriterium eines öffentlichen Berufs betrachtet wurde.

2.3 Beccarias Straflehre und sein praktisches Strafrecht

Für die Nachwelt in Ungarn wurde ein zweifaches Beaccarai-Bild weitertradiert. Das eine Bild beschwört einen jungen aufgeklärten Denker herauf, der mit einer außerordentlichen theoretischen Bereitschaft gegen die Brutalität der Strafen kämpfte, und kämpferisch die strafrechtlichen Grundwerte der zeitgenössischen Rechtsstaatlichkeit vertrat. Damit parallel wurde mit ihm das Bild eines praktizierenden Strafrechtlers verbunden, der für eine effektive, durchsetzbare staatliche Strafpolitik eingetreten war.[31]

Vuchetich Mátyás, Professor für Naturrecht an der Rechtsakademie in Kaschau, hat im Jahre 1802 sein Werk „De origine civitatis" herausgegeben, in dem er die Arbeit der bedeutendsten ausländischen Rechtsphilosophen analysierte. Hierher zählen Eberhard, Sonnenfels, Hobbes és Grotius. Mit einer großen Sympathie spricht er auch über Beccaria, dem er besonders wegen der Vereinheitlichung der Theorie und des praktischen Strafrechts einen großen Lob und Respekt aussprach.

In der ungarischen Rechtsliteratur gibt es hinsichtlich der modernen theoretischen Grundlegung des Strafrechtes auch „Diskussionen über die Autorenschaft". Bónis György nannte Montesquieu als den Vater der „Kriminalpolitik", dessen Auffassung über die Beziehung zwischen den Garantien von Freiheit und Strafrecht „die Vorstellung der späteren Ideologen der Bourgeoisie ergriffen hat." Die Vertreter der Mailänder Schule folgten ihm einfach. Auf das praktische Strafrecht hatte aber Beaccaria die größte Wirkung, der seinen Weltruf der Tatsache zu verdanken hat, ˇdass er das grausame und willkürliche feudale Strafrecht als erster „mit einer Leidenschaft und Gründlichkeit angegriffen hat, die aus den Werken von Montesquieu und den Aufklärern gefehlt hat."[32]

Die theoretischen Verdienste von Beccaria sind undiskutabel. Er hat eine strafrechtliche Schule gegründet, dessen grundlegende Forderung die Geltendmachung des Prinzips der Rechtsgleichheit, die Humanisierung und Gerechtigkeit der strafrechtlichen Rechtsprechung. war. Die neue Richtung hat der verfassungsrechtlichen Fundierung des Strafrechts, den materiellen und verfahrensrechtlichen Freiheitsgarantien eine entsprechende Bedeutung beigemessen. Sie forderte die Aufhebung der irrationalen Regelungen und die Abschaffung der mittelalterlichen Gewohnheitsregelung. Das gesamte Strafsystem wurde auf ein neues Fundament gelegt. Der Gründer der Schule und seine Nachfolger hofften in einem naiven Glauben, dasss der Freiheitsentzug die meisten Verbrecher auf einen besseren Weg führt, also kann die Prevention ein wirksames strafrechtliches Mittel werden.[33]

Nach Beccaria beruhte das Strafsystem des Mittelalters auf falschen prinzipiellen Grundlagen. Die Grausamkeit der Strafen, die Anwendung der Folter, die brutalen Sanktionen wegen des Sakrilegs/der Blasphemie seien die Folgen der Verwirrung der religiösen und gesellschaftlichen Sphären. Beccaria hat mit einer ausgezeichneten juristischen Logik das Verbrechen und die Straftat voneinander getrennt, letzteres nannte er eine Aggression gegen die gesellschaftliche Ordnung, und bedachte den dadurch entstandenen Schaden mit einer wohlproportionierten Strafe. „Wenn wir die verschiedenen Grundprinzipien aufgrund ihres Wesens durcheinander bringen – behauptet er in der Einleitung –, besteht keine Hoffnung mehr, dass wir über politische Sachen richtig denken können. Die Aufgabe der Theologen ist es, die Grenzlinie zwischen richtig und falsch im Zusammenhang damit festzustellen, ob eine Tat innerlich gut oder böse gemeint ist; in der Politik ist die Bestimmung der Beziehung zwischen richtig und falsch – d.h. die Bestimmung dessen, was für eine Gesellschaft nützlich oder schädlich ist – Aufgabe des Publizisten."[34]

Auf dieser prinzipiellen Grundlage lehnte Beccaria die Berechtigung der Folter ab. Der Schmerz kann nicht das Kriterium der Wahrheit sein, und wer dessen Gegenteil glaubt – argumentiert er weiter – benimmt sich so, als wäre er ein Kannibale oder ein Barbar (auch wenn er selbst ein Römer ist). Beccaria hat darauf hingewiesen, dass mit dem religiösen und mythischen Anspruch „auf die Vertreibung des Bösen" und durch dessen strafrechtliche Unterstützung ein Begriff religiösen Ursprungs die bürgerlichen Gesetze beherrscht. Er missbilligt das Durcheinanderbringen des Heiligen und des Profanen, der religiösen und der laienhaften Elemente, aber auch die Institution, den vor dem Gericht verbindlich abzulegenden Eid. „Warum muss ein Mensch vor so eine schreckliche Wahl gestellt werden, dass er weder Gott beleidigt oder zu seinem eigenen Verderben beiträgt? Wenn das Gesetz den Eid verlangt, zwingt es uns, dass wir schlechte Christen oder Märthyrer werden."[35]

Auf dieser prinzipiellen Grundlage focht Beccaria auch die Todesstrafe an. Nach seinem Standpunkt ist das nichts anderes, als „die Kriegsführung einer Nation gegen ihre Bürger, deren Un-

---

[30] Kazinczy, F., *Levelek* [Briefe] Band XIX. Szépirodalmi Kiadó. Budapest, 1979. S. 399.

[31] Naucke, W., Die Modernisierung des Strafrechts durch Beccaria. In: *Über die Zerbrechlichkeit des rechtsstaatlichen Strafrechts.* Materialien zur neueren Strafrechtsgeschichte. Baden-Baden. Nomos (Juristische Zeitgeschichte, Abteilung 1, Band 4.) S. 37.; Vgl. Antalffy, Gy., Über die staats-und rechtstheoretischen Bezüge der Rechtsprechung und der Rechstanwendung. In: *Jogtudományi Közlöny* vol. 103, Nr. 10, 1969, S. 501.

[32] Bónis, Gy., Die rechtswissenschaftlichen und politischen Ansichten von Montesquieu. In: *Az MTA Filozófiai és Történettudományok Osztályának Közleményei,* vol. 7, Nr. 3, 1955-1956, S. 236.; Vámbéry, R., Die eingefleischten Verbrecher. In: *Jogtudományi Közlöny,* vol. 61, Nr. 22, 1927, S. 197.

[33] Laut Balogh Jenő war Fayer László die Verkörperung von Beccarias Ideen im 19. Jahrhundert. Balogh, J., 1907. S. 178.; Vgl. Mezey, B., Das Gefängniswesen in der Zeit von Beccaria. In: Tóth, J.Z. (Hrsg.) *250 éves a Dei delitti e delle pene: Tanulmányok Cesare Beccariaról.* Budapest: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar, 2015. S. 133-143.

[34] Mortier, R., *Az európai felvilágosodás fényei és árnyai.* [Lichter und Schatten der europäischen Aufklärung.] Gondolat Verlag, Budapest, 1983. (im Weiteren: Mortier, R. 1984.) S. 11.

[35] Mortier, R. 1984. S. 16-17., 199.; Vuchetich, M., *Das System des ungarischen Strafrechts.* Repr. (Überzetzt Király T.) Band 2. Praktisches Strafrecht für die Oberen Schulen in Ungarn. (A magyar jogtudomány klasszikusai) [Budapest], Magyar Közlöny Lap- és Kvk. [2008]. S. 199.

terdrückung sie als nützlch oder notwendig erachtet." Darüber hinaus ist es auch noch schädlich, weil dadurch „ein Beispiel der Grausamkeit" gegeben wird. Die Todesstrafe ist weder nützlich noch notwendig, da „nicht die Strenge der Strafe, sondern die Dauerhaftigkeit dieser die tiefste Wirkung auf die Seele der Menschen ausübt." Seiner Meinung nach wird die frühere Todesstrafe auch nicht durch ihre frühere Praxis legitimiert, da die Menschheitsgeschichte (und in dieser Hinsicht identifiziert er sich mit den Anschauungen Voltaires) „der mächtige Ozean der Irrtümer, aus dem nur einige Wahrheiten herausragen, ist."[36]

Organischer Teil der Strafphilosophie aus Mailand war die neuartige Bestimmung des Ziels der Strafe. Ein bekannter Faktor der Kulturgeschichte ist, dass keine einzige Epoche der universellen Kultur der Erziehung so eine große Bedeutung beigemessen hat, wie die Aufklärung; das Jahrhundert des Lichts, war auch die Zeit des „Panpädagogismus".[37] Von dieser Sicht konnte sich auch die Ziel-Auffassung der Strafe nicht entfernen. Laut Meinung des ungarischen Strafrechtlers, KirályTibor, glaubte Beccaria daran, dass die Gesellschaft mit Gesetzen geheilt und erlöst werden kann, wie das in der Zeit der Aufklärung von vielen so geglaubt wurde. Solche Ideen waren auch der zeitgenössischen politischen Denkweise nicht fremd, dessen Nachweis auch in der im Jahre 1791 begonnenen strafrechtlichen Kodifikation schon aufzufinden sind. Doch nebst seinem großen Vertrauen auf die guten Gesetze vergaß Beccaria auch die Wichtigkeit des Erziehens nicht. Er verkündete, dass „das sicherste, aber auch schwierigste Mittel der Vorbeugung von Straftaten die Vervollkommnung der Erziehung ist". Das wichtigste Ziel der Bestrafung ist das Abschrecken, mit einem heutigen Begriff ausgedrückt, die generelle Prävention, die, „je stärker und anhaltender auf die Seele der Menschen wirken muss und je weniger grausam auf das Physikum des Schuldigers". Er begründete jenen modernen Standpunkt, welcher die Wichtigkeit der Prävention gegenüber der Repressalien betonte.,Es ist besser den Straftaten vorzubeugen als diese zu bestrafen. Wollt ihr die Straftaten verhüten? Dann müsst ihr dafür Sorge tragen, dass die Gesetze klar und einfach formuliert werden."[38]

3. Das Urteil der Nachwelt

Das Buch Dei delitti e delle pene ist eines der bedeutendsten rechtswissenschaftlichen Grundwerke, die von Franco Venturi zu guter Recht als das „am meisten bedeutendste Buch des gesamten XVIII. Jahrhunderts bezeichnet wurde."[39] Der Autor wurde von vielen seiner Kollegen ermutigt, seine Arbeit fortzusetzen. Doch Beccaria philosophierte lieber über die allgemeinen Fragen der Zivilisation, nach dem übertriebenen Urteil von Lajos Hajdu schrieb er (Beccaria) später schwächere Werke über die Entwicklung des menschlichen Geschlechts, über den Stil und weniger wichtige Epochen der politischen Wirtschaftslehre. 1771 wurde er Rat des Mailander österreichischen Regierungsamtes, von dieser Zeit an bis zum Ende seines Lebens blieb er „ein grauer Bemater ohne Funken, über dessen Buch stängig Disskussionen geführt wurden - doch ohne ihn - […] seine Schüler, die Fortsetzer seines Werkes haben ihn ständig angegriffen - doch ohne sein Wissen."[40]

Wenn auch nicht er selbst, doch sein Werk hatte schon zu seinen Lebzeiten eine außerordentlich große Wirkung hervorgerufen. Dabei konnte auch die Tatsche eine Rolle gespielt haben, dass er vor zwei Jahrhunderten eine außerodrentlich moderne (und gleichzeitig differenzierte und überlegte) Auffassung vertrat anhand solcher Probleme, die heute die allgemeine öffentliche Meinung spalten. Es haben wenig rechtswissenschaftliche Arbeiten so ein großes Echo bekommen, wie das Werk von Beccaria. Europaweit erstarkten die Stimmen „aus dem Dunkel der Unweissenheit", die die Abschaffung des noch erhaltenen früheren Strafverfahrens gefordert haben. Aufgrund seiner Anschauungen nahmen die radikalen Reformen des Richterwesens und des Zuchthaussystems ihren Anfang. Die Rehabilitationsprozesse begannen und endeten mehrheitlich erfolgreich. Der Großherzog der Toscana, als erster unter den europäischen Fürsten, hat die Todesstrafe abgeschafft.[41]

Infolge der Wirkung von Beccaria entstanden neue Wissenschaftszweige, Wissenschaftsbereiche und Disziplinen. In der das ungarische Kriminalwesen zusammenfassenden Monographie ist der erste Name der von Cesare Beccaria.[42] Auch die Kriminalistik hat ihre theoretische Grundlegung ihm zu verdanken. Mit der Zeit hat sich natürlich herausgestellt, dass der Kampf gegen die Kriminalität erfolgreich alleine nur durch strafrechtliche Mittel nicht gewonnen werden kann. Es erschienen soziologisch inspirierte neue strafrechtliche Schulen, die nicht mehr mit Strafen, Bestrafungen operierten, sondern mit „gesellschaftlichen Schutzmaßnahmen", und es begann sowohl in der Alltagspraxis als auch in der Theorie die Erforschung der Zusammenhänge zwischen den Verbrechen und der gesellschaftichen Phänomene,

[36] Mortier, R. 1984. S. 17.; Tóth, J. Z., Die Todesstrafe in der deutschen philosophischen Denkweise des XVIII-XIX. Jahrhunderts. In: *De Iurisprudentia et iure publico*, vol. 3, Nr. 3-4, 2009, S. 28.; Finkey, F., Die Todesstrafe und die Revision des Strafgesetzbuches. In: *Jogtudományi Közlöny,* vol. 43, Nr. 5, 1909, S. 37. „Beccaria Caesar stand ganz alleine gegenüber der ganzen Welt, als er die Unrechtsmäßigkeit der Todesstrafe verkündete!" Végh, Ö., In: *Jogtudományi Közlöny,* vol. 23, Nr. 12, 1889, S. 99.

[37] Madarász, I., 1989. S. 105.; Tóth, J. Z., Die Todesstrafe im Naturrecht des XVII. Jahrhunderts und in der philosophischen Denkweise der Aufklärung. In: *Magyar Filozófiai Szemle*, vol. 126, Nr. 1-2, 2008, S. 170.

[38] Király, T., Vorbeugung der Verbrechen. *Magyar Tudomány*. Az MTA Értesítője, vol. 92, neue vol. 30, Nr. 1, 1985, (im Weiteren: Király, T., 1985.) S. 329.; Mortier, R., 1984. S. 16.; Kenedi G., Biró és Kodex. In: *Jogtudományi Közlöny,* vol. 39, Nr. 51, 1905, S. 413.

[39] Venturi, F., *Settecento riformatore I: Da Muratori a Beccaria, Einaudi*. Torino, 1969. S. 5.; Mortier, R., 1984. S. 16.; Lévay, M., Charakteristika der ungarischen Kriminologie von der Reformzeit bis in unsere Tage. In: Borbíró, A. - Gönczöl K. - Kerezsi K. - Lévay M. (Hrsg.) *Kriminologie.* Wolters Kluwer, 2017. S. 255, 305.

[40] Hajdu, L. 1971. S. 142.

[41] Mortier, R. 1984. S. 17.

[42] Korinek, L., *Theorie der Verbrechen*. Duna Palota és Kiadó. Budapest, 2006. S. 14. Vgl. Štenpien, E., Crimen magiae v Uhorsku s osobitným zreteľom na prax košických a abovských súdov. In: *Právo v priestore a čase: zborník venovaný jubileu prof. JUDr. Jozefa Beňu, CSc.* Atticum. Bratislava, 2014. S. 294-308.

die Erforschung ihrer ursächlichen Zusammenhänge, die Suche nach neuen Methoden und deren Anwendung.[43]

Die Vertreter der neuen Doktrinen haben beteuert, dass die von Beccaria vertretene menschenfreundliche Richtung falsch war, weil er die Menschen als besser hielt, als welche sie in Wirklichkeit sind. Ihrer Ansicht nach hat man sich geirrt, als alle Menschen, die ein Verbrechen verübt haben, infolge der Ideen der französischen Revolution einer Gleichbehandlung unterzogen wurden und gleiche Strafmittel gegen die Gelegenheitsverbrecher und gegen eingefleischte Verbrecher empfohlen haben. „Obwohl wir bereits bei Aristoteles das große Prinzip hätten lernen können, dass mit den Gleichen auf gleiche Weise umzugehen, die größte Ungerechtigkeit ist." [44] Im 19. Jahrhundert wurde der Gedanke hervorgehoben, dass (im Gegensatz zu Beccarias Straf-Lehre) nicht die Milderung der Strafen vorangetrieben werden muss, sondern es soll mit präventiven Mitteln danach gestrebt werden, dass die Zahl der Verbrechen geringer wird.[45] In der heimischen Literatur hat neuerdings Pokol Béla die Modernität des strafrechtlichen Dogmas von Beccaria hinterfragt. Nach seiner zur Diskussion würdigen These ist in den rechtsdogmatischen Teilen einer Straftatlehre „im Vergleich zu den Einsichten der damaligen Zeit eine völlige Naivität für das gesamte Werk von Beccaria charakteristisch." [46]

Die strafrechtlichen Ansichten des Mailänder Autors haben auch auf die allerneueste ungarische Straflehre eine wichtige und ernste Anschauung prägenden Einfluss geübt. So hat Lévay Miklós an einer internationalen strafrechtlichen Konferenz im Jahre 1988 sich auf Beccaria berufen und den Vorschlag unterbreitet, die Zurückdrängung der unbegründeten Kriminalisierung, die Pönalisierung des Missbrauchs der Macht[!], die Humanisierung der Strafen und die Abschaffung der Todesstrafe anzustreben.[47]

* * *

Cesare Beccaria veranlasst heute noch zu einem kontinuierlichen wissenschaftlichen Denken. Es scheint die Zeit gekommen zu sein, dass auch die kritische Ausgabe des Werks endlich erscheine und – die damalige rechtswissenschaftliche Terminologie auch in den heutigen Kategorien zu interpretieren – und eine authentische Übersetzung zu schaffen. Es wäre auch notwendig, die geistige Quellenlandschaft des Werkes aufzudecken, die Gedanken der „Mitautoren" (Bacon, Locke, Montesquieu, a Verri Gebrüder etc.) quellenmäßig zu identifizieren. Eine textwissenschaftliche Analyse wäre auch notwendig um festzustellen, inwieweit es Unterschiede zwischen der Originalfassung und der Morelle-Adaption gibt. Darauf könnte die detaillierte Untersuchung und Aufdeckung der Wirkungsgeschichte des Werkes folgen, wie sich die Gedanken von Beccaria im Geistesleben von Ungarn, in der Juristenausbildung und im Unterricht der Rechtswissenschaft widerspiegeln. Wir müssten die einzelnen Stadien der ungarischen strafrechtlichen Kodifikation verfolgen und jene Umstände aufdecken, die die Ideen der klassischen Schule der Strafrechtslehre, die Verwirklichung der Lehren von Beccaria in Ungarn unterstützten oder eben gehemmt haben.

[43] Király, T., 1985. S. 329.

[44] Balogh, J., 1907. S. 177-178.

[45] Brusa Emil k. tag Erinnerungen an Balogh, Jenő l. tag Akademie-Mitglied. In: *Az MTA Elhunyt Tagjai Fölött Tartott Emlékbeszédek*, vol. 14, Nr. 8, 1909, S. 198.

[46] Pokol, B., Analysen zur Geschichte der Strafrechtsdogmatik. In: *Jogelméleti Szemle*. Journal of Legal Theory, vol. 8, Nr. 3, 2007, S. 15-45.

[47] Lévay, M., Die Zeitmäßigkeit von Beccaria. In: Vígh J., - Polt., P., (Hrsg.) *Verantwortung und Gesellschaft.* Schriftliche Materialien der internationalen Konferenz am 19-24. September 1988. in Siófok. ELTE Kriminológiai tanszék. Budapest, 1989. S. 441-443.

Benedikt Carpzov's Influence on the 18th Century Criminal Practice in Hungary – Analysis of a Legal Case from Debrecen*

*András Biczó***

Abstract

This paper is essentially founded on two observations regarding early modern periodical criminal law. On the one hand, according to the apparent consensus, the German (Austrian) law had a significant impact on the legal development of the Central-Eastern European region and the marks of these effects can be detected in Hungarian criminal practice as well. On the other hand, the minority age as a relevant circumstance in criminal litigation was a momentous factor concerning the improvement of modern criminal justice.

Due to these assertions, my reseach is based on the "arsenal" of classical and text-related jurisprudential methodology (especially using interpretatio grammatica and systematica) is confined to provide insight into Benedikt Carpzov's influence on the criminal case law of one crucially important city located in the eastern part of Hungary (Debrecen) in the middle of the 18th century.

"Carpzovian-effect" is going to be descriptively illustrated through the analysis of minority age. One legal case chosen among the criminal praxis of Magistrates of Debrecen is going to be dissected with regard to presenting a few contemporary aspects of minority age. This is not an overall case note, since certain procedural parts of the criminal proceedings picked out of the archival file of the legal case on the strength of the research goals are going to be elaborated. The paper aims to demonstrate the noted Saxon legal scholar's emergence in the criminal case law of Debrecen as well as to scrutinize minority age with particular respect to the mitigation of punishment.

Keywords: *Benedikt Carpzov; minority age; mitigating circumstance; incendiarism; criminal case law; criminal jurisprudence; doli capax; poena extraordinaria; arbitrium judicis; Hungary.*

"Juvenilis ardor impetu primo furit:
Languescit idem facile, nec durat diu,
In venere turpi, ceu levis flamma vapor." [1]

Introduction

When a researcher scrutinizes the history of Hungarian criminal law in the 18th century one must always pay attention to those foreign – principally German (Austrian) – sources which had a decisive impact on Hungarian criminal jurisprudence and practice. One of the most important German (Austrian) legal "impulses" could be related to Benedikt Carpzov. The significant authority of the renowned Saxon legal scholar was widely accepted in recent foreign literature, since he exerted crucial influence regarding both European criminal legal scholarship as well as criminal case law in the 17th and 18th centuries.[2] The native legal historians have also generally acknowledged that the German (Austrian) sources had a notable effect on the improvement of Hungarian – especially but not exclusively criminal – law in the different periods of legal history because of geographical, cultural and historical reasons, and also the defi-

* The study was made under the scope of the Ministry of Justice's program on strengthening the quality of legal education

** András Biczó, Géza Marton Doctoral School of Legal Studies, University of Debrecen, Hungary.

1 CARPZOV, B., *Practicae Novae Imperialis Saxonicae Rerum Criminalium Pars III.* Francofurti, 1677, (referred to as CARPZOV *Op. cit.* [1677a] with marking page number below) p. 356. This quotation was from *Octavia* (on lines 189-191) traditionally attributed to one of Lucius Annaeus Seneca's dramas, consequently Carpzov cited the text of the tragedy with conformity of this common supposition. However, the modern classical philological scholarship has already greatly discredited Seneca's authorship. See the English translation of the quoted text. *"Juvenile ardour, thou must remember, burns only as long as the early impressions operate, which called it forth, nor does it last long, ever, with these unlawful amours, it passes oflflike some flickering flame (…)"* BRADSHAW, W., *The ten tragedies of Seneca with notes rendered into english prose as equivalently as the idioms of both languages permit.* London, 1902, p. 660.

2 PADOA-SCHIOPPA, A., *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century.* Cambridge, 2017, p. 280. PIHLAJAMÄKI, H., Practica nova imperialis Saxonica rerum criminalium I-III (New Imperial Saxon Practice of Criminal Law) 1635 Benedikt Carzpov. (1595-1666). In: DAUCHY, S. et al. (ed.), *The Formation and Transmission of Western Legal Culture: 150 Books that Made the Law in the Age of Printing.* Switzerland, 2016, p. 187-190. especially p. 188. VORMBAUM, T.-BOHLANDER, M., *A Modern History of German Criminal Law*, Berlin-Heidelberg, 2014, p. 19. BAR, C. L. von, *A History of Continental Criminal Law.* Boston, 1916, p. 236-237.

ciencies of domestic (criminal) legal regulation.[3] The assertion is also conceded that Benedikt Carpzov's significance must not be neglected from the point of view of neither *jurisprudentia* nor *praxis* in connection with the research of Hungarian criminal legal history in the 18th century.[4]

Given the above, my research goals are as follows: first of all, to expose Carpzov's appearance on the criminal case law of judicial body of a Hungarian city (Debrecen) in the 18th century, secondly to analyze two potential aspects of the minority age – examining it as a mitigating circumstance of punishment and an obstacle of becoming witness in criminal procedures – mainly focusing on Carpzov's conception.[5] To be able to justify the phenomena outlined above, I will strive to detail a litigation of criminal case law of Debrecen wherein German (Austrian) sources appeared.

Consequently, the primary source of this research is the file of a criminal litigation from the criminal practice of the Debrecen Magistrates where the main participants in the criminal procedure – prosecutor, attorney and the Magistrates of the city – referred to the loci of one of the Carpzov's most remarkable works *(Practica Nova Imperialis Saxonica Rerum Criminalium)* concerning the issue of minority age.[6] In the latter parts in this paper, I intend to scrutinize and interpret these adduced loci, particularly applying the methods of *interpretatio grammatica* and *systematica*, and where it is required mostly by latin texts, I will consider the philological scrupulosity during the textual scrutiny.

On the one hand, I am going to have an opportunity in this research to elaborate upon a couple of substantive criminal features of minority age: as a mitigating circumstance of punishment and the legal principle of *malitia supplet aetatem* as an exception under the general mitigating rule of minority age (Chapter 2, Subchapter 2.1 and Chapter 5]. Furhermore, one procedural characteristic of minority age is also going to be presented as an obstacle of becoming witness in criminal procedure (Chapter 4].

On the other hand, for the purpose of illustrating the Saxon author's importance, I will provide a blow by blow examination of a criminal litigation where Carpzov's opinions could really influence the practice of the Magistrate. Since the analyzed final sentence was in fact founded on German and Austrian sources, partly the conception of the prestigous Saxon jurisprudent and partly the *Praxis Criminalis* detailed below (Chapter 5]. Ultimately, fusing the touched on facets of minority age with "Carpzovian impression", during the entire elaboration of this topic, I endeavour to cast light on those questions and theoretic dilemmas in connection with the minority age which prompted the main participants in the criminal proceedings to invoke Carpzov's ideas.

In the middle of the 18th century, a few (criminal) jurisprudential works had already been prepared in the Kingdom of Hungary, albeit these books presumably could not have a huge impact on the criminal case law of Debrecen.[7] Neverthless, I attempt to compare the revealed Carpzov's conceptions to the approaches of contemporary Hungarian (criminal) legal scholarship demonstrating the similarity between the ideas of Saxon legal scholar and Hungarian jurisprudent in the course of the analysis.

---

[3] In a general sense BALOGH, E., Előszó. In: BALOGH, E.-HOMOKI-NAGY, M. (ed.), *Tripartitum trium professorum, Három szegedi jogtörténész Drei Szegediner Rechtshistoriker, Tudományos emlékülés Bónis György születésének 100., Both Ödön születésének 90. és Iványi Béla halálának 50. évfordulóján,* Szeged, 2017, p. 9. With special regard to criminal law BÓNIS, Gy., A magyar feudális és burzsoá magánjog és büntetőjog elemei. In: *Levéltári Szakmai Továbbképzés (Felsőfok) 12.* Budapest, 1959, p. 47. ECKHART, F., *Magyar alkotmány- és jogtörténet,* Budapest, 1946, p. 386. BALOGH, E., Deák Ferenc és az anyagi büntetőjog kodifikációja. In: MOLNÁR, A. (ed.), *A Batthyány-kormány igazságügyminisztere.* Zalaegerszeg, 1998, p. 129. considering the footnote 2nd. For instance, depicts more thoroughly the effect of Austrian civil procedural law on the Hungarian civil procedural development as the result of codification efforts and judicial reforms of Kaiser Joseph II. PAPP, L., Az Ordo judiciarius pro omnibus tribunalibus et foris judiciariis Regni Hungariae praescriptus. In: *Miskolci Jogi Szemle,* vol. 12, Nr. 1, 2017, p. 87-99.

[4] In a general sense VÁMBÉRY, R., *A házasság védelem a büntetőjogban I. Kötet.* Budapest, 1901, p. 150. FINKEY, F., *A magyar büntetőjog tankönyve,* Budapest, 1914, p. 62. About Carpzov's effect on Hungarian criminal case law, see *inter alia* PAULER, T., *Büntetőjogtan, I. Kötet. Bevezetés. Anyagi Büntetőjog Általános Rész.* Pest, 1869, p. 25-26. BALOGH, J., *A büntető perjog tankönyve*. Budapest, 1906, p. 53. and 86. FINKEY, F., *A magyar büntetőperjogi tudomány háromszázados fejlődéstörténete 1619-1914.* Sárospatak, 1948/2000, p. 33-34. PALUGYAY, I., *Magyarország történeti, földirati s állami legújabb leírása.* Pest, 1853, p. 197. and 210. FAYER, L., *A magyar büntetőjog kézikönyve I. Kötet.* Budapest, 1905, p. 33. MÁRKUS, D. (ed.), *Magyar Jogi Lexikon II. Kötet (Bíró–Dézsma).* Budapest, 1899, p. 500. KÁLLAY, I., *Úriszéki bíráskodás a XVIII-XIX. században.* Budapest, 1985, p. 200. WLASSICS, Gy., Ungarn. In: INTERNATIONALEN KRIMINALISTISCHEN VEREINIGUNG (ed.), *Die Strafgesetzgebung Der Gegenwart in Rechtsvergleichender Darstellung,* [LISZT, F. von, (ed.)] *I. Band: Das Strafrecht der Staaten Europa.* Berlin, 1894, p. 163. BÓNIS Gy., *Buda és Pest bírósági gyakorlata a török kiűzése után 1686-1708.* Budapest, p. 316-317. BÉLI, G., *Magyar jogtörténet. A tradicionális jog.* Budapest-Pécs, 2014, p. 91-92. BRANDL, G.-Tóth, G. P. (ed.), *Szegedi boszorkányperek 1726-1744, [A magyarországi boszorkányság forrásai, Várostörténeti források 5.].* Budapest–Szeged, 2016, p. 38. NAGY, S., Fejezetek a hajdúvárosok és a Hajdúkerület büntetőbíráskodásából I. A városi tanácsok eljárásjogi gyakorlata a hajdúk letelepítésétől a pallosjog megvonásáig (1606-1757). In: NYAKAS, M. (ed.), *A Hajdúsági Múzeum Évkönyve VI.* Hajdúböszörmény, 1987, p. 89. KÁLLAY, I., *Városi bíráskodás Magyarországon 1686-1848.* Budapest, 1996, p. 138. About Carpzov's effect on Hungarian jurisprudential works, see *inter alia* FINKEY *Op. cit.* [1948/2000] p. 79. 81. and 83. KOVÁCS, K., A büntetőjog oktatása a nagyszombati egyetem jogi karán 1667-1777. In: *Jogtudományi Közlöny,* (new) vol. 22, Nr. 5, 1967, p. 281. and p. 283-284. NAGY, F., A büntetőjog tudománya. In: JAKAB, A.-MENYHÁRD, A. (ed.), *A jog tudománya tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal.* Budapest, 2015, p. 272-273. SCHWARTNER, M. von, *Statistik des Königreichs Ungern Zweyter u. Dritter Theil.* Ofen, 1811, p. 266.

[5] Regarding Carpzov's influence on the criminal case law of the Debrecen Magistrates, see also M. ANTALÓCZY, I., *Bűnözés és büntetés Debrecenben a XVIII. század közepén,* Debrecen, 2001, p. 88-89. considering the footnote 129th. M. ANTALÓCZY, I., A blaszfémia és más vallásellenes bűncselekmények Debrecenben a XVIII. század közepén I. rész, In: RADICS, K., (ed.), *A Hajdú-Bihar Megyei Levéltár Évkönyve XXIII.* Debrecen, 1996, p. 70.

[6] The complete title of the work: *"Practicae Novae Imperialis Saxonicae Rerum Criminalium pars I. (…III.) ex jure civili romano, imperiali, saxonico, ordinat. & Constitut. electoral. decisiones absolutas, responsis Scabinorum Lipsiensum approbatas, & usu ac observantia Fori Saxonici confirmatas, exhibens. Folio."* (referred to as *Practica* below) This book was published seventeen times, first in 1635 and last in 1758. SCHILD, W., (ed.), *Benedikt Carpzov 1595-1666 Werk & Wirken (Band I. 1667-1927).* Goldbach, 1997, p. X-XI.

[7] The most significant works were as follows; HUSZTY, I., *Jurisprudentia Practica seu Commentarius Novus in Jus Hungaricum.* Budae, 1745. I am going to use one of the later editions which was published in 1766. TARNÓI GOCHETZ, G., *Systema Praxis Criminalis Inclyti Regni Hungariae, patriumque eidem adnexarum,* Budae, 1746, BODÓ, M., *Jurisprudentia criminalis secundum praxim & constitutiones Hungaricas in partes duas divisia,* Posonii, 1751.

1. The analyzed parts of the legal case and the significance of minority age

As mentioned above, I examine the archival documents of one criminal procedure initiated against more arsonists before the Magistrates of Debrecen in 1755.[8] The files of this criminal litigation have been preserved in quite good condition. This statement specifically concerns the legibility of the texts, especially the sheets of procedural phase of *allegationes* normally considered as one of the most crucial part of criminal proceedings. As a result, these preconditions provide me an excellent opportunity to make a deeper analysis combining the dissection of Carpzovian impact and minority age with each other. The research solely focuses on two phases – *allegationes* and *"deliberatum est"* – of the criminal procedure. Before the scrutiny of the referred loci of *Practica*, both procedural parts must be shortly circumscribed.

The phase of *allegationes* generally meant the "merits" of a legal case (*"meritum causae"* or *"pars meritoria"*) where legal arguments and allegations or, according to contemporary terminology, "backchats" and "hassels" were presented by the prosecutor (*fiscalis procurator* i. e. *actor*) and the delinquent's attorney (*incattus procurator* or *procator*) concerning the previously submitted accusation *(actio fiscalis)*.[9] The initiating of the *allegationes* happened when the attorney answered the *actio fiscalis* on the merits, hence this procedural act he took to constitute the *litis contestatio*, viz that, the defendant enters effectively into the criminal action. In the phase of *allegationes* the parties debated the merits of legal case and attempted to weaken and refute reasons to each other, actually, the case had already been decided in this part of the procedure.[10] In their *allegationes*, the prosecutor and the defence often referred to chiefly Hungarian acts or kings' decrees, the two prominent sources of contemporary native *consuetudo*: *Tripartitum* and *Directio Methodica,* moreover the *Praxis Criminalis* of Austrian origin and Carpzov's *Practica* in order to confirm and support their arguments.[11]

The second examined phase of the criminal litigation is *"deliberatum est"* (*sententia definitiva* or *finalis*), this category signified the final sentence directly followed *allegationes* in criminal procedure. In this part of the proceedings, the judicial body decided the criminal legal dispute, moreover it could inflict an appropriate penalty if the accused person had been found guilty of a crime. Not always but often, the court also alluded to the Bible, Hungarian acts or kings' decrees, *Tripartitum*, *Directio Methodica* and, in addition, *Praxis Criminalis*, Carpzov's *Practica* aiming to give reasons for its decision.

As for the analyzed legal case whose matter was arson, the criminal litigation proceeded against more delinquents (arsonists), although in this paper, I am going to concentrate on only one of the perpetrators who succesfully referred to minority age as a mitigating cause of punishment. As a result, I solely focus on the *allegatio* of the attorney and the final sentence of the Magistrates wherein references occured to Carpzov's *Practica* regarding minority age as a mitigating circumstance of punishment.

It does not seem to be too novel observation that age was generally considered a crucial factor in the early modern era referring to European legal scholarship and practice, as well. The consequences of age – particularly but not exclusively of the minority age in criminal substantive and procedural context – were valued in the different fields of law, e. g. as the requirement of acting capacity or the impediment of marriage.[12] As a consequence of prosperous later medieval Italian legal scholarship, as well as the reception of the Roman law in the Holy Roman Empire, there was the fairly complex system of mitigating and aggravating circumstances of penalty in the 17th and 18th centuries.[13] In this period, for instance, more contemporary German and Austrian *Landgerichtsordnungen* or *Halsgerichtsordnungen* (Ter-

[8] Magyar Nemzeti Levéltár Hajdú-Bihar Megyei Levéltára (MNL-HBML.) (National Archives of Hungary-Archives of Hajdú-Bihar County) IV. A. 1018/g. *Acta Miscellanae,* (Miscellaneous juridical documents) 1751:1-1755:10. 34. d. B4/1755.

[9] HAJNIK, I., *A magyar bírósági szervezet és perjog az Árpád és a vegyes-házi királyok alatt.* 1899, p. 234. Magyar Tudós Társaság (pub.), *Törvénytudományi műszótár.* Pest, 1843, p. 19. Trattner-Károlyi Könyvnyomtató-Intézete (pub.) *A Fő Méltóságu Magyar Kir. Kuriának törvénykezési mesterszavait egybefoglaló szótár.* Pest, 1837, 8. VARGA, E., Polgári peres eljárás a Királyi Curián 1724-1848/49. In: *Levéltári Közlemények,* vol. 39, Nr. 1, Budapest, 1968, p. 286.

[10] BÓNIS, Gy.-DEGRÉ, A.-VARGA, E., A magyar bírósági szervezet és perjog története. In: *Levéltári Szakmai Továbbképzés, Felsőfok 13.* Budapest, 1961, p. 126-127. BÉLI *Op. cit.* p. 189.

[11] The complete titles and the years of first editions of *Tripartitum* and *Directio Methodica*: *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae,* 1517., *Directio Methodica Processus Iudiciarii Iuris Consuetudinarii Inclyti Regni Hungriae,* 1619. The complete title and bibliographical details of the first edition of *Praxis Criminalis*: Forma Processus Judicij Criminalis seu Praxis Criminalis Serenissimo, Neo-Regi Apostolico Hungariae Josepho I. dicata, Per Joannem Nicolaum Martium, Tyrnaviae Typis Academicis, 1687. During the analysis, I am going to use the text of the second edition published in 1697: Forma Processus Judicij Criminalis, seu Praxis Criminalis Serenissimo, Regi Apostolico Hungariae Josepho I. dicata, Editio II., per Joannem Andream Hörmann, Tyrnaviae Typis Academicis, 1697, (referred to as Pr. C. [1697] with marking page number below). Praxis Criminalis was the Latin translation of the *Landgerichtsordnung für Österreich unter der Enns von 1656* (Neue Peinliche Land-Gerichts-Ordnung In Oesterreich unter der Enns. Erster und Anderter Theil. Gedruckt und zu finden bey Leopold Joh. Kaliwoda, auf dem Dominicaner-Platz, in seinem Buch-Gewölb. Wien, [without marking the year of publishing, referred to as LGO. [1656] with marking page number below]) issued for Lower Austria in 1656 by Kaiser Ferdinand III. This Austrian criminal regulation for Land was translated from German into Latin in 1687 so that it could be passed as a Hungarian act. The endeavours of this reception failed several times, consequently the Praxis Criminalis never became the part of Hungarian criminal law in a formal-legal sense. However, thanks to the widespread Hungarian practical application, this regulation still turned into one of the most significant legal sources for the native Hungarian criminal jurisdiction and legal scholarship in the 18th century.

[12] Regarding old age as a mitigating circumstance, see *inter alia* Pr. C. [1697] p. 22. *"Valde provecta aetas."*. RÉTI ILLÉS, E., A büntetőjog kodifikációjának első kísérletei Magyarországon, Kollonics javaslata és a Novum Tripartitum. In: BOGSCH, Á. (ed.), *Angyal-szeminárium kiadványai 2.* Budapest, 1916, p. 13. BODÓ, M., *Jurisprudentia Criminalis secundum praxim & constitutiones Hungaricas in partes duas divis.* Posonii, 1751, p. 90. *"Tales porro circumstantiae poenam ordinariam mitigari exigentes passim recensentur fequentes: (…) Aetas Senilis, (…)"*.

[13] LANGBEIN, J. H., *Torture and the Law of Proof: Europe and England in the Ancien Régime.* Chicago and London, 2006, p. 45-47. According to Carl Ludwig von Bar, the alleviating circumstances, namely the recognition of mitigating punishment indicated the first evasion of severe penalty system of Constitutio Criminalis Carolina *(Peinliche Halsgerichtsordnung Kaiser Karls V.*, referred to as CCC. below). However, he noted that the theoretical background of applying alleviation and judicial discretion *(*arbitrium judicis) had been already appearing in Italian case law at the end of the 15th century and in the 16th century. BAR *Op. cit.* p. 237. Cf. with this footnote.

ritorial Courts Ordinances) included the list of those circumstances which could either lighten or increase retribution.[14]

The alleviating causes had an extenuating effect on the sentence: this approach is conceptualized from criminal substantive law. The creation of an intricate system of mitigating and also aggravating circumstances was a progressive recognition in the European legal development because the appraisal of these facts allowed a possibility for penal jurisdiction to judge committed acts more differentially. This distinguished judgement denoted that the mentioned factors could modify in the directions of the two opposite sides in criminal sentencing, namely these circumstances were able to alleviate or aggravate those sanctions ordinarily determined by law. Moreover, the spreading of these circumstances – specifically mitigating causes – was also a notable improvement with a particular regard to the humanizing process of European criminal justice, as well as the alteration of the previous system of sanctions. In course of penal judgement, the court had to take certain investigated causes into consideration and appraise those at the imposition of punishment. However, the alleviating factors could not entirely preclude sanctions established originally for crimes, notwithstanding that those were able to mollify retributions.[15]

The aforementioned *Praxis Criminalis* comprised a possible classification of alleviating as well as aggravating circumstances concerning the question of where these causes originated from or more precisely what sort of facts of the committed crime these causes could be connected with. As a result of this conscious categorization, seven groups could be found in *Praxis Criminalis*: delict, the person of offender, the person of victim, the state of sinner's mind and preparation, the place of perpetrating, the time of committing and the mode of executing of delict.[16] The minority age or rather youth – with respect to the phrase of *Praxis Criminalis* – can be interpreted as a mitigating circumstance that belonged to the second enumerated category, the person of perpetrator.[17]

Although the research places emphasis on the presentation of minority age as a mitigating circumstance of punishment, the fact cannot be overlooked that in this era, the valuation of minority age had a ponderosity not only in the criminal substantive, but also in the criminal procedural law. The latter approach regarded minority age as an obstacle of becoming witness in criminal proceedings and this procedural aspect is going to be elaborated on in Chapter 3.

2. A substantive approach: Minority age as a mitigating circumstance of punishment

After I attempted to sketch out the significance and essence of minority age as an alleviating circumstance of punishment, in this chapter I am going to scrutinize the *allegatio* of the defence wherein the argument of minority age was referred to. Since this analysis is going to be confined to those reasons concerned minority age as a mitigating factor of penalty, therefore this substantive feature of minority age is going to be focused on.

In one of *allegationes*, one defendant's attorney argued that this arsonist seemed an *impuber* person regarding her age, and due to this fact, the Magistrates should impose a lightened punishment on her. The attorney endevored to support his assertion referring to the above mentioned Benedikt Carpzov's memorable *opus*: *Practica Nova Imperialis Saxonica Rerum Criminalium*. Actually, the reasoning of the defence was almost completely based on the illustrious Saxon author's work concerning minority age. As a result, I am going to present minority age as a mitigating circumstance of punishment following the argumentation of the defence, therefore mainly concentrating on the presentation of the Carpzov-opinions referred to by the attorney hereinafter. During this analysis I will strive to touch upon the conceptions of Hungarian jurisprudence regarding minority age as an alleviating factor.[18]

In the locus of *Practica* firstly referred to by the attorney, Carpzov alleged that girls who had already reached 12 years of age could be regarded as *puberes* on the strength of Justinian law, nevertheless, according to Carpzov, there was not such differentiation between girls and boys in respect of deliberation of their age in his era. Since both of them were considered *impuberes* before completing 14 years, consequently they were exculpated under all ordinary punishments *(poena ordinaria)* originally specified by

[14] Such lists can be detected in the texts of the following legal regulations. LGO. [1656] p. 42-45. *Neue Landtgerichts Ordnung/Deß Ertzhertzogthumbs Oesterreich od der Ennß, Erster/Anderter/und Dritter Theil.* (referred to as LGO. [1675] with marking page number below) Linz, 1677, p. 70-73. *Neue Peinliche Hals-Gerichts-Ordnung/vor das Königreich Böhaimb/Marggrafftumb Mähren/und Hertzogthumb Schlesien.* Alt-Stadt Prag, 1708, p. 58-62. *Constitutio Criminalis Theresiana oder der Römisch-Kaiserl. zu Hungarn und Böheim Königl. Apost. Maiestät Mariä Theresiä Erzherzogin zu Oesterreich, Peinliche Gerichtsordnung.* (referred to as CCT. [1769] with marking page number below) Wien, 1769, p. 20-25.

[15] Pr. C. [1697] p. 22. *"Circumitantiae, quae unius, alteriusve delicti poenam, non quidem omnino tollunt, sed tamen juxta qualitatem rei, aliquantulum alleviant, (…)"*. RÉTI ILLÉS *Op. cit.* p. 12.

[16] Pr. C. [1697] p. 23. *"Breviter, atq; uno verbo, alleviatio, aut aggravatio poenarum. 1° Ex delicto. 2° Ex delinquentis persona. 3° Ex pesona laesi. 4° Ex animo,* & *praeparatione. 5° Ex loco. 6° Ex tempore. 7° Ex modo patrati delicti, colligenda est."*. RÉTI ILLÉS *Op. cit.* p. 15. This categorization emerged almost verbatim in LGO. [1675] and Bodó Mátyás' *Jurisprudentia Criminalis*. LGO. [1675] p. 73. BODÓ *Op. cit.* p. 135.

[17] Pr. C. [1697] p. 22. *"Juventus delinquentis,* & *notata in eo imprudentia."* RÉTI ILLÉS *Op. cit.* p. 13.

[18] Out of the Hungarian reputable authors, Bodó Mátyás and Huszty István also listed minority age among the mitigating circumstances of arson crime. Both of them professed similar opinions about minority age as Carpzov. They connected the extenuation of penalty concerning minority age with subcategories of *(impuberes) pubertati proximi* (see below). BODÓ *Op. cit.* p. 276. *"Si tamen Reus minorennis,* & *Pubertati proximus fuerit; quia in tali minor est militia* & *judicium adhuc infirmum: aetas pubertati proxima, tametsi Delinquentem non excusat; attamen, quoad poeam mitigandam multum juvat; efficitque, ut mitius* & *extraordinarie puniatur nisi observetur notabilis malitia."* The phrasing of *"nisi observetur notabilis malitia"* probably alluded to the legal principle of *malitia supplet aetatem* (See in more detail in the Chapter 3.). HUSZTY, I., *Jurisprudentia Practica seu commentarius novus in jus hungaricum, (Libri Tres).* Tyrnaviae, 1766, p. 98. *"Et quidem in specie locum non esse poena ordinaria, sed mitiori arbitrariae. Imo. Si reus pubertati proximus fuerit, tam in hoc quam aliorum delictorum casibus; quia in tali minor est malitia* & *judicium adhuc infirmum. Tametsi enim aetas pubertati proxima delinquentem in totum in totum non excuset, sicut eximit aetas infantiae, quae est ad annos septem, propter absentiam malitiae* &, *judicii, attamen quoad poenam mitigandam multum juvat, efficitque, ut mitius puniatur."* The phrasing of *"sicut eximit aetas infantiae, quae est ad annos septem, propter absentiam malitiae* &, *judicii,"* was concerned *infantes*.

law. The Saxon legal scholar traced this conclusion back to Article 164 of CCC. *("Vom jungen Dieb")* where the age of 14 years had been already accepted in case of girls as well.[19] Since the attorney argued on a young female defendant's behalf, thus he could adduce this Carpzov-opinion in order to confirm his reasoning. Namely, he asserted that the court should apply a lower age limit in case of girls in the process of imposing punishment. According to Carpzov, if the *impuberes* persons completed the 14th year and entered 15th from then on they were named *puberes* or *minores* as long as they completed their 25th year.[20] In contrast, the category of *minorennitas* lasted until the age of 21 and who completed the age of 21 were regarded as *majores* in the Saxon law.[21]

The attorney recognized that the young female delinquent was far from the age of *infantia*, since she could exculpate under all sanctions in this case, for his part he considered the defendant as only a 12-year old person. The main point of the attorney's argumentation was that the defendant *(incattus)* seemed to be only an *impuber* person, therefore the Magistrates should inflict only a mitigated *poena extraordinaria* or *arbitraria* on her instead of more severe *poena ordinaria*.

In the attorney's *allegatio* adduced, the hitherto and also further analyzed loci of Carpzov's book essentially served as confirmation as well as corroboration of one significant substantive legal principle. Although, this regula was not explicitly referred to by the defence, notwithstanding the loci of *Practica* adduced by the attorney intrinsically expounded and explained this doctrina, due to these facts, I must also allow for this regula. This principle declared who was *impuber* had *doli capax*, hence this circumstance, the court had to impose punishment on them, even though not *poena ordinaria* in this case. It was permitted of inflicting extraordinary penalty for a judge on the strength of his discretion *(arbitrium judicis)*.[22] Before I would give further details on the analysation of the Carpzov-opinions referred to by the attorney, the three main elements of this legal principle must be presented.

The first and perhaps most notable one of the three was considered to be the concept of *doli capax*. This notion could draw a clear line between the age categories of *infantia* as well as *impuberitas*. This component of the legal principle can actually be interpreted as the earlier form of modern guilt.[23] *Doli capax* had an inverse concept-couple, the *doli incapax* and *doli capax*

---

[19] CARPZOV *Op. cit.* [1677a] p. 356. *"Licet enim jure communi Justinianeo foeminae sint puberes, quae duodecimum expleverunt aetatis annum, (…). Attamen hodiernis moribus in poenalibus, ceu odiosis, haec differentia non observatur, sed foeminae aeque, ac masculi, ante annum decimum quartum completum, pro impuberis habentur, atque a poena ordinaria liberantur. Tum ob text. in art. 164. Ordin Crimin. In. verb. So der Dieb oder Diebin ihres Alters unter 14. Jahren wären/die sollen nicht vom Leben zum Tode gerichtet werden. Quae sane verba quoad supplicii irrogationem impuberitatem etiam puellarum ad annum 14. extendunt."*.

[20] CARPZOV *Op. cit.* [1677a] p. 359. *"Postquam Impuberes annum decimum quartum compleverunt, & decimum quintum annum ingressi fuere, puberes sive minores dicuntur, usque ad annum vigesimum quintum: quo completo, de jure communi majores habentur in negotiis peragendis, ac etiam in delictis, (…)."* Carpzov wrote down in this locus that those could be regarded as *majores* who were in this age concerning striking a deal as well as committing crimes based on *ius commune*. Cf. CARPZOV *Op. cit.* [1677a] p. 354.

[21] CARPZOV *Op. cit.* [1677a] p. 359. *"Sed de jure Saxonico minnorenitas durat saltem usque ad annum vicesimum primum inclusive. Quia enim in terris Saxonicis maturius aliquanto sapiunt homines, ideo majores statim dicuntur completo vigesimo primo anno, per textum (…)."*.

[22] The inverse of this legal principle belonged to *infantes*. These persons were considered *doli incapax*, therefore they could not be punished. CARPZOV *Op. cit.* [1677a] p. 355. *"Prima sit Regula: Infans ex delicto non obligatur nec aliquam incurrit."* STUMP, B., *„Adult time for adult crime" - Jugendliche zwischen Jugend- und Erwachsenenstrafrecht.* Mönchengladbach, 2003, p. 26. The conclusion was similar as a result of interpreting Article 164 of CCC. REMUS, G., *Nemesis Karulina: Divi Karuli V. Imp. Caes. PP. Augusti, invictiss. & gloriosiss. Principis, Sacriq. Rom. Imperii Ordinum, Leges rerum capitalium.* Francofurti ad Moenum, 1618, p. 103. *"Infantem, quia doli capax non est, furtum non cadit."*.

[23] It seems to be quite effortful task to exactly define the concept of doli capax. In the current German literature, doli capax has been considered one of the first early forms of recent Schuldfähigkeit or Schuldbegriff. Doli capacitas (the nounal mode of doli capax) has been closely connected with the definition of Schuldfähigkeit. GÜNZEL, S., *Die geschichtliche Entwicklung des Jugendstrafrechts und des Erziehungsgedankens.* Marburg, 2001, p. 10. PETERS, J., *Kindheit im Strafrecht: Eine Untersuchung des materiellen Strafrechts mit besonderem Schwerpunkt auf dem Kind als Opfer und Täter.* München, 2014, p. 28. HAUER, G., *Hexenprozesse an der Ludoviciana: Die Spruchpraxis der juristischen Fakultät Gießen in Hexensachen (1612-1723). Hildesheim, 2016, p.* 151. SCHNYDER, S., *Tötung und Diebstahl Delikt und Strafe in der gelehrten Strafrechtsliteratur des 16. Jahrhunderts.* Köln, 2010, p. 169. GUTBRODT, T., *Jugendstrafrecht in Kolumbien.* Mönchengladbach, 2010, p. 78. The concept of *doli capax* derived originally from Canon law and later medieval Italian legal scholarship, moreover beyond Roman law. GÜNZEL *Op. cit.* p. 10. DAHM, G., *Das Strafrecht Italiens im ausgehenden Mittelalter: Untersuchungen über die Beziehungen zwischen Theorie und Praxis im Strafrecht des Spätmittelalters, nahmentlich im XIV. Jahundert,* Berlin und Leipzig, 1931, p. 249. GUTBRODT *Op. cit.* p. 78. STUMP *Op. cit.* p. 26. CIPRIANI, D., *Children's Rights and the Minimum Age of Criminal Responsibility A Global Perspective.* London and New York, 2016, p. 72. In Hungarian literature, the concept of *doli capax* has a close connection to the term of culpability (guilt). Since *doli capax* denoted a capacity of persons to grasp the impropriety of their acts, viz that, "they were able to comprehend their sinning". According to Molnár Imre, *doli capax* and *inuriae capax* (also originated from Roman law) were two sides of the same issue. The *inuriae capax* signified the capacity of persons to grasp the illegitimacy of their acts, whereas the concept of *doli capax* indicated the comprehension of intention. Owing to this meaning, *doli capax* essentially implied the conceptual nub of culpability. MOLNÁR, I., Büntető- és büntetőeljárási alapelvek római jogi előzményei. In: TÓTH, K. (ed.), *Emlékkönyv Dr. Tokaji Géza c. egyetemi tanár születésnek 70. évfordulójára, Acta Universitatis Szegediensis de Attila József Nominatae, Acta Juridica et Politica.* Szeged, 1996, p. 175-177. MOLNÁR, I., Az ókori római jogi bűncselekmény-fogalom ismérvei. In: HOMOKI-NAGY, M. (ed.), *Acta Universitatis Szegediensis de Attila József Nominatae, Acta Juridica et Politica.* Szeged, 2010, p. 583-584. The phrasing of *"intelligere se delinquere;"* presumably expressed the conceptual essence of *doli capax* the most of all potential defintions. These words were found with a few marginal differences in the works of more authors. CARPZOV, *Op. cit.* [1677a] p. 356. *"delinquere intelligitur"*, BODÓ *Op. cit.* p. 91. *"intelligere se delinquere;"*. This couple of words probably stemmed from Roman law, from Gaius' Institutes. GAIUS, *Institutionum commentarii IV.* Lipsiae, 1825, p. 120. *"et ob id intellegat, se delinquere"* MOLNÁR *Op. cit.* [1996] p. 176. GAIUS, *Die Gaianischen Institutionen-Commentarien.* Bonn, 1857, p. 188. *"und deshalb einsehen kann, daß er delinquire"*. Nevertheless, *doli capax* can be defined by means of analysing of its opposite as well. Applying *argumentum a contrario*, *doli capax* can be deduced from *doli incapax* regarding Article 179 of CCC *("Von übelhättern die jugent oder anderer sachen halb, jre sinn nit haben")*. ZOEPFL, H. (ed.), *Die Peinliche Gerichtsordnung Kaiser Karl's V. nebst der Bamberger und der Brandenburger Halsgerichtsordnung sämmtlich nach den ältesten Drucken und mit den Projecten der peinlichen Gerichtsordnung Kaiser Karl's V. von den Jahren 1521 und 1529 beide zum erstenmale vollständig nach Handschriften.* Heidelberg, 1842, p. 250. The text of *"Item wirt von jemandt, der jugent oder anderer gebrechlicheyt halben, wissentlich seiner synn nit hett,"* can clearly reflect the essence of *doli inpcapax*. Cf. REMUS *Op. cit.* p. 111. *"Si quis per aetatem (…) doli fraudisque incapacem, (…)"*.

composed together a rebuttable presumption-couple in certain cases.[24] The second crucial factor was deemed *poena extraordinaria* or *arbitraria* wherein the extenuating effect could be effectively manifested itself at sentencing. The *poena extraordinaria* or *arbitraria* was based on the third element, on the discretion or more precisely the discretion (deliberation) of judge *(arbitrium judicis)*. Consequently, this principle denoted that the age of *impuberitas* was an alleviating circumstance of penalty, since who was in this age had to be inflicted a punishment on the strength of judge's *arbitrium*: a lighter *poena extraordinaria* or *arbitraria* instead of applying more severe *poena ordinaria* ordinarily specified for the given crime by law.

If this regula is meticulously denuded, the general theoretical process of mitigation will become distinct all at once. The first step on this path meant for the judge to investigate and identify the cause(s) which possessed an alleviating impact, albeit the judge did not only have to explore mitigating circumstances, but he also had to take account of aggravating factors as well, moreover these two groups of circumstances had to be appraised altogether in the course of sentencing. The second momentum was the use of judicial *arbitrium* creating a real connection between the detected alleviating (and aggravating) circumstance(s) and the imposed sanction. Finally, the judge had to inflict such a punishment wherein the comparsion and valuation of mitigating as well as exacerbating causes was able to manifest themselves.

With some margin, the legal principle explained above also appeared in a few Hungarian jurisprudential works in the 18th century. According to Bodó Mátyás, if the delinquents were in the age of *infantia* they hardly ever had *culpa (culpae capax)* in general, even less *doli capax*. Nevertheless, those who were in the age of *puerillis aetas* also known as *pubertati proximi*, it could be supposed that when these persons perpetrated crimes, they had already comprehended their acts. Therefore, these people had *doli capax* and thus they deserved lightened penalty.[25]

Another famous Hungarian legal scholar, Huszty István used a more general approach, taking the category of *objecta juris* purported the conceptual trichotomy of *personae*, *res* and *actiones* as his starting point. Those people belonged to the category of *personae* – which appears to be just relevant one of the three with particular regard to the analysis – who possessed *rationis* as well as *doli capax*, since according to Huszty, these two abilities were necessary so that people could be subjected to law *(legis)*. As a result, the *legis* could not obligate *infantes* and insanes *(amentes)*, namely these persons had neither *rationis* nor *doli capax*. Both boys and girls who had not completed 7 years yet were not culpable and when they completed 7 years they could be penalized, although *poena ordiaria* could not be inflicted on.

In Huszty's opinion, the *pupilli* persons as far as their 12th year were absolutely exempted from the constraint of *legis*. In case of the persons under 7 years, they were not allowed to regard them as *doli* and *rationis capax* people, nonetheless it was permitted to presume about them to use comprehension after they completed 7 years. Huszty also underlined that the *impuberes* were not punished with *poena ordinaria*, but the applying of mollified sanction seemed to be appropriate.[26]

The attorney adduced further loci of *Practica* in order to support the legal principle elaborated on above. In addition, in the text of *Practica* referred to, Carpzov principally cogitated on the *impuberes* could be penalised, however they had to be acquitted under *poena ordinaria*. In this context, the Saxon legal scholar brought more reasons but perhaps the most interesting one of these arguments was that the judge had to impose alleviated punishment on *impuberes* because in these cases there was still some hope for return to honest life *(emendatio vitae)*, namely it was possible – as Carpzov explained – if such young sinners became older they would amend their way of life.[27]

During the review of the Carpzov-opinios referred to by the attorney, it needs to be explored one of these loci of *Practica* wherein Carpzov cited and interpreted Article 164 of CCC. Ac-

[24] The *doli capax-doli incapax* as a conceptual pair could be interpreted as two rebuttable presumptions with respect to certain age categories. Regarding the age subcategories of *impuberes infantia proximi* as well as *impuberes pubertati proximi* it was possible to create a couple of rebuttable presumptions opposed to each other. Who belonged to the age subcategory of *impuberes infantia proximi*, they could be considered *doli incapax*, consequently these persons had not had *doli capax* yet. In contrast, who were in the age of *impuberes pubertati proximi*, it could suppose that they had already possessed *doli capax*. The significance of accurately analysing these presumptions concerning these age subcategories, see below in more detail. STUMP *Op. cit.* p. 23. considering the footnote 73rd. The approach of *doli capax* presented above had already been in ancient Roman law as well. CIPRIANI *Op. cit.* p. 72.

[25] BODÓ *Op. cit.* p. 91. *"Minor aetas praecipua est Circumstantia, Reum excusans. Quo nomine, non venit Infantia; in hanc enim utpote vix culpae nedum doli capacem, Poena nulla cadit; eamque secundum etiam Jus Civile innocentia consilii tuetur: sed aetas Puerillis aut Puberati proxima, eamque quadantenus excedens. Hanc enim assecuti, jam supponuntur intelligere se delinquere; hujusmodique aetas cadit sub considerationem hujus Circumstanitae."* The concept of *pueritia aetas* used by Bodó intrinsically correspond with the definition of *impuberitas* of Carpzov. BODÓ *Op. cit.* p. 92. *"Jure Imperiali (…) Pueritia ad annos 14. (…) restricta habetur."* CARPZOV *Op. cit.* [1677a] p. 354. *"Impubes dicitur masculus infra 14. foemina vero infra 12. aetatis annum completum,"*. The phrasing of *"jam supponuntur"* written down by Bodó can provide a chance to interpret the concept of *doli capax* as a rebuttable presumption, namely these words can also confirm the approach that the concepts of *doli capax-doli incapax* could be regarded as a pair of rebuttable presumptions (See in more detail in the footnote 27th.). The phrasing *"eamque secundum etiam Jus Civile innocentia consilii tuetur"* was originated in one of Modestinus' regulas (D.48. 8. 12.). DÜLL, R., *Corpus iuris: Eine Auswahl der Rechtsgrundsätze der Antike (Sammlung Tusculum). Berlin, Boston,* 2014, p. 240. MOLNÁR *Op. Cit.* [2010] p. 584.

[26] HUSZTY *Op. cit.* p. 31-32. *"Objecta Juris, de quo hactenus egi, sunt tria: Persona, quibus; Res, super quibus; & Actiones per quas Jus dicitur. Ita (…) Personas autem, seu homines subjectum esse Legis intellige illos, qui rationis & doli sunt capaces: unde infantes, & amentes non obligantur Legibus. (…) Nec pueri, & puellae ante 7. aetatis annum completum sub culpa; bene tamen post illum completum, licet non statim sub poena saltim ordinaria. Ita communis sententia. Secundat (…) qui immunitatem pupillorum ab obligatione Legis usque plane legitimam 12. annorum aetatem extendere videtur. Pars prima fundatur in eo, quod ante 7. aetatis annum ordinarie non censeantur esse capaces doli, & rationis; Leges autem humanae non attendant ea, quae per accidens, & raro contingunt; licet Jus Naturale, & Divinum obligent, quando citius per accidens sufficiens usus rationis adest. Pars secunda pariter in eodem principio, quod post septennium praesumatur adesse usus rationis, & Jura attendant ea, quae communiter evenire solent. Pars terita in (…) & etiam in Jure Patrio consuetudinario, quo poenis Jure humano civili statutis ordinariis impuberes non subjiciuntur; sed mitigatur poena."*.

[27] CARPZOV *Op. cit.* [1677a] p. 356. *"Quare haud immerito mitius puniendi sunt, praesertim quia in iis spes est emendationis vitae. Nam si ad maturiorem aetatem pervenerint, saepius ad meliorem quoq; frugem redire solent,"*.

tually, Carpzov used an analogy placing this Article in a more general context, because he supposed that the penalties implied in Article 164 of CCC. were not allowed to apply merely on theft but also on other delicts. The more precise analysis of Article 164 of CCC. is not neglected concerning the presentation of minority age as a mitigating circumstance of punishment. Since out of the text of this Article, Carpzov deduced *inter alia* the legal principle of *malitia supplet aetatem* in addition to the upper age limit of *impuberitas* had needed to be 14 years in case of girls as well as boys. Article 164 of CCC. declared that if thefts had not been over the age of 14 it was not allowed to inflict capital punishment *(poena ordinaria)* on them, although courts could impose a mitigated, corporal retribution in combination with taking of an eternal peace oath *(ewiger Urphede)*.

Furthermore, this Article enabled the judge to use judicial discretion *(arbitrium judicis)* – if certain conjunctive requirements had been present. The presentation of these preconditions is going to detail during the analysis of *malitia supplet aetatem*, in this chapter I intend to shed light solely on the essence of *arbitrium*. The *arbitrium* practically signified that the judges had to deliberate and confer with their judgemental associates *(Urteiler)* about punishment. Actually, if the thief was a young person under 14 years of age, the court was allowed to optionally inflict material (pecuniary), corporal or capital punishment on the delinquent with special regard to the revealed facts of the given legal case.[28] After the analysation of the CCC., Carpzov cited the text of another noteworthy legal source, *Sachsenspiegel* and his conclusion was the same as the result of the interpretion of CCC., viz that Saxon law did not also permit to impose capital punishment on an *impuber* perpetrator.[29]

The attorney referred to Carpzov's further opinions regarding the age of *impuberes pubertati proximi*. Up to this point of the presentation of the Saxon legal scholar's ideas, I have generally zeroed in on the age category of *impuberitas*, which had an alleviating impact, but now a distinction must be made within this age category. Namely the *impuberitas* was determined between 7-14 years, nonetheless one could distinguish two subcategories, as well. The first subgroup named *impuberes infantia proximi*, the persons in this age had been even near the age limit of *infantia*, therefore they had not had *dolus* yet and were exempted from almost all punishments.[30] As a result, those who were in the age of *impuberes infantia proximi* were appraised in accordance with similar criterias as *infantes*. Consequently, *impuberes infantia proximi* could be regarded as if they had been *infantes* because the rebuttable praesumption of *doli incapax* appeared in case of them. The second subgroup was called *impuberes pubertati proximi* considered as the opposite of *impuberes infantia proximi*, since the rebuttable presumption of *doli capax* applied

[28] CARPZOV *Op. cit.* [1677a] p. 356. *"Tum, ob Sanctionem Carolinam in. artic. 164. Ordin. Crim. In verb. So der Dieb oder Diebin ihres Alters unter 14. Jahren wären/die sollen numb Diebstal ohne sondere Ursach auch nicht vom Leben zum Tode gerichtet/sondern der obgemeldeten Leibesstraffe gemäß/mit samt ewiger Urphede gestraffet werden. Et in sin. So sollen Richter und Urtheiler deshalben auch Rats pflegen/wie ein solcher junger Dieb an Gut/Leib oder Leben zu straffen sen."* Regarding Article 164 of CCC. see also *inter alia* GÖBLER, J.-REMUS, G., *J. Gobleri Interpretationem Constitutionis Criminalis Carolinae ex unica,* Heidelbergae, 1543, 1660/1837, p. 182. REMUS *Op. cit.* p. 103-104. Furthermore, see also two renowned commentaries of CCC. which meticulously analyzed Article 164. BÖHMER, J. S. F. von, *Meditationes in Constitutionem Criminalem Carolinam,* Halae Magdeburgicae, 1776, p. 789-790. KRESS, J. P., *Commentatio succincta in constitutionem criminalem Caroli V. imperatoris,* Hannoverae, 1744, p. 590-593. The CCC. had not contained the dissevered and unified enumeration of alleviating and aggravating circumstances yet. Although, it had already sporadically mentioned such circumstances which had mitigating or exacerbating effect on sentence, e. g. Article 124, 137, 164, 175 and 179. Moreover certain facts could exclude culpability, see in more detail Article 166. These phenomena are interpreted as an "individualization (or rather subjectivisation) process" closely linked with the emergence of personal liability as well as *Schuldprinzip (Schuldhaftung)*. Furthermore, these tendencies can considered as a momentous advancement from the perspecitve of progression of criminal law, eroding the domination of *Erfolgshaftung* and collective liability. LAUFS, A., *Rechtsentwicklungen in Deutschland.* Berlin, 2006, p. 145. SCHMIDT, E., *Einführung in die Geschichte der deutschen Strafrechtsplege [Zweiter, unveränderter Nachdruck der dritten Auflage].* 1995, p. 117. In John H. Langbein's opinion, the CCC. was fundamentally regarded as a particularly procedural regulation. Nevertheless, this procedural trait was not exclusive, since CCC. also included several substantive-featured contents, for example the mitigation of punishment. LANGBEIN, J. H., *Prosecuting Crime in the Renaissance: England, Germany, France.* Clark, New Jersey, 2005, 259. BERMAN, H. J., *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition.* Cambridge, Massachusetts – London, 2003, p. 140. and 144. The concept of *arbitrium* = appeared in the text of Article 164 of CCC. – did not mean that judge did not have an opportunity to inflict capital punishment on person who had not completed 14th year yet. ROYAARDS, A. G. G., *Dissertatio juridica inauguralis, de poenarum mitigatione.* Trajecti Batavorum, 1803, p. 21. *"(…) unde patet, judicem iis, qui annum decimum quartum jam egressi sunt mortis supplicium remittere haud cogi."* The *arbitrium judicis* (judicial discretion) was implicitely declared in Article 164 of CCC. and "the effective appearance" of using this discretion signified a permission for judge regarding sentence. This authorization could practically manifest itself in the choosing among diverse punishments. This regulation can provide a chance to link the notion of *arbitrium judicis* with an possible interpretation of *poena extraordinaria*. According to John H. Langbein, this potential approach of *poena extraordinaria* denoted an option among sanctions which choice proved to be an essential component of the general concept of *poena extraordinaria*, namely judge were directly empowered to choose among penalities by law. Langbein brought also an example in order to prove this conception. The instance derived from Article 131 of CCC. *("Straff der weiber so jre kinder tödten.")* which stated that the mother – who killed her own child – had to be buried alive and be impaled or be drowned for her sin. ZOEPFL *Op. cit.* p. 239. *"Item welches weib jre kind, das leben vnd glidmass empfangen hett, heymlicher bosshafftiger williger weiß ertödtet, die werden gewonlich lebendig bergraben vnd gepfelt, (…) ertrenckt werden."* LANGBEIN 2006 *Op. cit.* p. 46. BERMAN *Op. cit.* p. 149. However, thanks to the respect of age as a mitigating circumstance, Article 164 of CCC. did not merely include the authorization of a "simple" choosing among punishments, since it involved the possibility of "effective" mitigation by choosing between two different types of penalties. The part of Article 131 of CCC. referred to by Langbein only permitted to opt for either of the capital punishments. Therefore Article 131 can be interpreted in compliance with the phrasing of *"Aber darinnen verzweiffelung zuuerhüten,"* that Article 131 provided an opportunity for judges to impose drowing – which supposedly issued in less suffering – instead of applying crueler, buried alive and impalement. BRAMBRING, A., *Kindestötung (§ 217 a.F. StGB): Reformdiskussion und Gesetzgebung seit 1870.* Berlin/New York, 2010, p. 11-12. CLOSMANN, K., *Kindstötung historisch-dogmatisch dargestellt.* Erlangen, 1889, p. 15. JORDAN, L., *Ueber den Begriff und die Strafe des Kindsmordes nach der peinlichen Gerichtsordnung Karls V.* Heidelberg, 1844, p. 104-105.

[29] The Hungarian translation of the quoted part of the Sachsenspiegel comes from REPGOW, E. von, *A Szász tükör,* (transleted by BLAZOVICH, L.) Szeged, 2005, p. 198.

[30] Carpzov did not exactly define the upper age limit of *impuberes infantia proximi*.

to this age category. Those who were *impuberes pubertati proximi* had already had *dolus*, though the judge had to inflict only alleviated punishment on them.[31] These two subcategories allowed the judges to differentiate within the age of *impuberitas* in the course of sentencing. The age of *impuberes pubertati proximi* is going to be touched upon in more detail during the elaboration of *malitia supplet aetatem*.

To sum up, the substance of the attorney's reasoning presented above was fundamentally based on the train of Carpzov's thought, the young female defendant by virtue of her age had to be inflicted a mildered penalty (*poena extraordinaria* or *arbitraria*) in lieu of more rigorous death by fire prescribed as *poena ordinaria* for arson by law. The attorney's arguments were essentially anchored in Carpzov's opinions and the analysis of these thoughts opens the door to getting an almost complete image the contemporary judgement of minority age as a mitigating circumstance of punishment.

2.1 *Malitia supplet aetatem* as an exceptional rule

In the previous chapter, the alleviating effect of minority age as a substantive character was presented with the help of analysing the reasons adduced by the defence. Hereinafter, I intend to briefly expose the essence of the legal principle of *malitia supplet aetatem* closely connected with the age category of *impuberitas*.[32] This doctrine actually denoted an exception under the age of *impuberitas* regarded as a general mitigating circumstance within the overall category of minority age.[33] The substance of this principle signified that *"the malice of perpetrator could supply the (lack of) expected age" (malitia supplet aetatem)*.[34] This special legal regula provided judge an opportunity to pronounce death sentence *(poena ordinaria)* on *impuberes* before they completed the required age of punishability with *poena ordinaria*.[35]

However, this ancient legal maxim did not explicitly appear in the scrutinized criminal litigation, in spite of this fact I suppose I must dwell on this principle in a couple of words, because *malitia supplet aetatem* appear to be an integral part of legal thought about minority age, moreover it can assist in understanding more clearly how minority age was appraised in connection to criminal law in the early modern period. Furthermore, this legal principle has had a long history which goes as far back as the Roman law. Additionally, it proves currently to be a living idea with particular regard to the conception of *"adult time for adult crime"*.[36] In this part, I am still going to concentrate mostly on Carpzov's approach during the fairly concise presentation of *malitia supplet aetatem*.

In his *Practica*, Carpzov conceptualized the aforesaid legal principle as one of three conjunctive prerequisites, if *malitia supplet aetatem* had been proven together with two other elements in criminal proceedings, the judge would have been authorized to punish *impuberes* with death penalty. Carpzov deduced these postulates from the text of Article 164 of CCC. and, in addition he emphasised that if only one of the three had not been proven, the judge could not have imposed such a serious sanction.

According to the first precondition, the *impuber* defendant had to be close to 14 years, viz, to be *impuberes pubertati proximi ("Wo der Dieb nahe bey vierzehn Jahren alt wäre/")*. This requirement can be interpreted as the appearance of the rebuttable presumption of *doli capax* detailed above. The next circumstance was *malitia supplet aetatem ("Also daß die Boßheit das Alter erfüllen möchte/")*, namely the delinquent's *malitia* had to supply the shortage of the age required. Finally it was demanded that the act perpetrated had to be one of the cruelest crimes or such additional circumstances had to emerge during the criminal procedure which could exacerbate delict *("oder beschwerliche Umstände so gefährlich darbei gefunden würden/")*.[37]

---

[31] According to Carpzov, there were three definitions concerning the question who belonged to this age category. Someone would have been regarded as *impuberes pubertati proximi*; if the person had already completed 10 and half years (the first definiton of *impuberes pubertati proximi*), or if the person had already been even near the age limit of *pubertatis* and had been completed the age limit in 1 and half years (the second definiton of *impuberes pubertati proximi*). As stated by third definiton, delinquent would have been considered *impuberes pubertati proximi*, if the person had been completed for a lack of 6 months the age limit of *impuberes pubertati proximi*. CARPZOV *Op. cit.* [1677a] p. 356-357. *"Etsi vero alii aliter hosve definiant, ut scilicet pubertati dicantur proximi, vel, qui decimum annum & dimidium compleverunt, (…). Aut, qui probe ad pubertatem accesserunt, & intra annum & semester eam assequntur, (…). Aut cui ad puberem aetatem menses tantummodo sex desunt,"*.

[32] The *malitia supplet aetatem* was also known in the Hungarian legal scholarship in the middle of the 18th century. According to Bodó Mátyás and Tarnói Gochetz Gábor, this legal principle was deemed an exception under the mitigating rule of minority age. Furthermore, both of them emphasized that the exploration as well as the consideration of perpetrator's *malitia* were left to judge's "prudent discretion" *(arbitrium judicis)*. BODÓ *Op. cit.* p. 92. *"In Delinquentibus tamen, non tam numerus annorum, quam temperamentum, judicium, capacitas, malitia, quae aetatem supplet, vel etiam superat aliaeque qualitates, considerari debeant."* TARNÓI GOCHETZ, G., *Systema Praxis Criminalis Inclyti Regni Hungariae, patriumque eidem adnexarum,* Typis Veronica Nottensteinin Viduae, Budae, 1746, p. 33. *"Porro circumstanitae poenam etiam capitalem in temporaneam commutabunt: Si delictum ab impuberi, (nisi malitia suppleri aetatem, Jdex pro prudenti discretione comperiat)"*. PAULER *Op. cit.* [1869] p. 232-233.

[33] MONBALLYU, J., *Six Centuries of Criminal Law.* Leiden, 2014, p. 108. CARPZOV *Op. cit.* [1677a] p. 358. *"Quinto: Denique notandum, licet impubes poena regulariter exemptus sit, fieri tamen quandoque posse ut ob insignem & supinam malitiam, supplicium mortis ipsi jure infligatur. Et sic exceptio a Regula antea posita hoc casu facienda est,"* MALDONER, J. F., *Synopsis Militaris Oder Kurtzer Begriff Uber Die Kayserliche Kriegs-Articul.* Nürnberg und Franckfurth, 1724, p. 285. HENKE, H. W. E., *Lehrbuch der Strafrechtswissenschaft.* Zürich, 1815, p. 97-98. especially regarding the footnote 1st on the page 98.

[34] KLEINSCHROD, G. A., *Systematische Entwickelung der Grundbegriffe und Grundwahrheiten des peinlichen Rechts.* 1794, p. 138. SCOPP, J. G., *Der in peinlichen Fällen wohl Instruirte Richter, oder Theoretisch-practischer Criminal-Tractat, aus denen Kayserlich-Carolingisch- und Churfürstlich-Sächsischen Rechten genommen, und zum heutigen Gebrauch verordnet.* Nürnberg, 1758, p. 217.

[35] STUMP *Op. cit.* p. 26. Cf. the legal regulation of *Constitutio Criminalis Theresiana.* CCT. [1769] p. 21.

[36] AEBERSOLD, P., *Schweizerisches Jugendstrafrecht [3. Auflage].* Bern, 2017, p. 54.

[37] CARPZOV *Op. cit.* [1677a] p. 358. *"Quare, priusquam poena mortis Reo impuberi irrogetur, haec tria concurrant, necesse est. Nempe, ut impubes prope egressus annum aetatis 14. ex supina malitia delictum commiserit atrocissimum, vel cum ejusmodi qualitatibus, quae crimen atrox multum aggravant. Quorum uno deficiente, haudquaquam ad mortis supplicium deveniri poterit."* There was a crucial point that perpetrator's *malitia* had to be intense (to such a degree) that it could have a "supply-effect" on the lack of the required age. This "quality-requirement" of *malitia* was highlighted by a lot of authors. CARPZOV *Op. cit.* [1677a] p. 358. *"insignem & supinam malitiam"* BODÓ *Op. cit.* p. 276. *"notabilis malitia"* REMUS *Op. cit.* p. 104. *"manifesto malitia"*.

If these three preconditions had been proven, then judicial *arbitrium* could have been applied concerning infliction, although the second and third conditions had already required the judge to deliberate the extent (degree) of defendant's *malitia* as well as the existence of a cruelest crime or aggravating circumstances. The judge's *arbitrium* also appeared in the text of Article 164 of CCC. as a possibility of choosing among sanctions which aspect has already been more thoroughly detailed in Chapter 2. During the previous analysis of Article 164 I strived to accentuate the option of inflicting a milder retribution than the death penalty, since the court could decide on material or corporal instead of capital punishments during the course of the sentencing. In contrast, in this subsection, I sought to highlight the opportunity of pronouncing death sentence because the essence was the use of judicial discretion in both cases of applying mortal and non-mortal sanctions.

To summarise this short part, Article 164 of CCC. empowered the judge to mete out death penalty, as well, in cases where the legal principle of *malitia supplet aetatem* along with two other detailed conditions had been proven. Nonetheless, the imposition of capital punishment meant only an option but not an obligation for the judge also in this case, since the judge always had to take special account of prudent exploring and deliberating particular facts as well as the circumstances of diverse legal cases.

3. A procedural approach: The minority age as an obstacle of being witness

In this part, I attempt to outline a procedural approach before I start to analyse the final decision of the Debrecen Magistrates. So far, during this scrutiny, the substantive-featured loci of *Practica* have merely been elaborated as well as presented, even though the criminal litigation researched also included two Carpzovian opinions with procedural content regarding minority age. Neverthless, I must note anyway that the substantive law had not obviously been differentiated from procedural (criminal) law in a current conceptual sense neither at the age of Carpzov, videlicet in the first half of the 17th century nor in the middle of the 18th century yet.

As it was formerly described, the elaborated criminal proceedings were initated against more offenders. The most juvenile female perpetrator of them made a confession about the committed crime, thereby providing a crucial evidence for other arsonists, as well. This deposition was proved to be significant concerning the production of evidence, thus the defence argued in his another *allegatio* that this proof should not be useable in the criminal procedure because the defendant was too young to be a witness.

In order to bear out his allegation, the attorney reasoned invoking the text of *Practica* again, he alleged that the *impuber* defendant could not testify against other two arsonists. According to Carpzov, witnesses whose testimonies were refused because of certain causes were rejected in criminal cases, moreover he gave some instances – consanguines, affinities, orphans and *impuberes* – in order to confirm his statement. The Saxon author also mentioned two arguments regarding the question why *impuberes*' depositions had to be nixed. As stated by the first factor, the *impuberes*' intentions seemed to be uncertain and secondly *impuberes* were apt to lie by virtue of their age: actually, they were more easiliy predisposed to tell an untruth. In his opinion, it was not permitted for these persons to be witnesses in criminal procedures, unless they already turned 20 years of age. Consequently, the attorney chimed in with Carpzov's reasoning, he asserted that the *impuber* defendant had not been able to produce evidence for other delinquents in the criminal litigation because she was under 20. In contrast with criminal litigations, – as Carpzov wrote – it was a sufficient expectation in any civil case that witnesses had to be *puberes,* viz, to be older than the age of 14 years for males and 12 years for females. Therefore, the age of 20 years as one of prerequisites of testifying in criminal procedures appeared to be stricter compared to the age demanded in civil proceedings.

Beyond *Practica*, in connection with the matter of becoming witness in criminal litigation, the *Praxis Criminalis* was also adduced by the defence. According to its Article XIV, testifying was the most appropriate way to prove the perpetration of a delict, even though potential witnesses were required to be "eligible and without any exceptions" so that they could appear as witnesses in criminal proceedings. The one component of these expectations was adequate age determined by reaching 20 years in Section 4 Article XIV in accordance with Carpzov's opinion. However, the *Praxis Criminalis* took note of younger people, because they could be summoned in advance of reaching the age required to appear as witnesses in criminal litigations if the delict had shortly occurred before turning 20 years of age. The *Praxis Criminalis* gave the explanation of this regulation that persons in this age already had certain knowledge about the committed crime which could be also presented by them before the court.[38]

The minority age as an obstacle of becoming a witness in criminal proceedings also emerged in Hungarian jurisprudential works in the 18th century. According to Bodó Mátyás, *impuberes* were considered as being incapable of testifying in criminal cases pursuant to *ius commune*. The minimum age of becoming witness was 18, even though he underlined that this was either 16 or 12 as maintained by other authors' opinions. The persons who were younger than these age limits were not allowed to be witnesses because *impuberes* had weak discernment and were prone to lie, moreover they proved to be impressionable.

It was not commonly permitted to give credence to those people in legal actions who could not take an oath and the *im-*

[38] Pr. C. [1697] p. 5. *"Cum delictorum probationes potissimum per testes fiant, ad hoc autem idonei, & exceptione majores testes requirantur, in his sequentes Regulae observandae sunt: (…) In Criminalibus testes sint saltem viginti annorum completorum, quamvis de ijs rebus, quae in minori sua aetate, non multo ante contigerunt & de eorum notitia, causas afferre potest, citari possit."* CARPZOV *Op. cit.* [1677a] p. 130. *"Quare causis criminalibus ii demum testes rejiciuntur, qui certis ex causis a testimonio repelluntur; quales sunt Consanguinei & Affines, Pupillus, Impubes, (…) ob lubricum consilium (…) & quia aetas illa ad mentiendum est facilis, (…)."* CARPZOV *Op. cit.* [1677a] p. 130. *"Notandum porro & hoc, quod in causis criminalibus testes non admittantur, nisi annum vigesimum excesserint In civilibus equidem causis sufficit testes esse puberes & masculos 14. annis, foeminas vero 12. annis majores, (…) Attamen in testificationibus criminalibus requiritur aetas annorum 20. (…) Eaq; opinio ceu verior & communior in foro est recepta."*.

puberes could not swear an oath in accordance with the rules of civil law, since these people had weak (uncertain) of sound mind as well as discernment. As a result, their testimonies could not carry such a ponderosity which could have resulted in the condemnation of offenders in criminal proceedings. However, Bodó touched on an exception, the age of being witness was also accepted under the age of 16th year in case of a defendant's exculpation. The reason of this exception stemmed from the ancient procedural maxim of Roman origin denoted that *"The condition of the defendant must be favoured, rather than of the plantiff"*. If this doctrine is limited to criminal law, it will signify that the position of the *reus* (the synonym of the *incattus*' concept) always had to be more favourable in criminal legal action than of the accuser *(actor)*. Due to this principle, which was closely connected with *in dubio pro reo*, those witnesses who were younger than the expected age had to be accepted in order that the defendants could attempt to exculpate themselves by dint of these persons' testimonies. Nevertheless, in these situations, the judge had to examine the quality as well as capacity of such youthful witnesses' discernment. Consequently, the judgements of these issues were left to the distinguised and prudential discretion of the judge *(arbitrium judicis)*, therefore the qualities and capacities of younger witnesses had to be thoroughly deliberated by court in order that these persons' testimonies could be used in criminal litigations in favour of the defendant's exculpation.[39]

I presume that the real debate was between parties in the analyzed criminal litigation concerning the above presented procedural approach of minority age how the deposition of the young defendant could be regarded; it could be considered the testimony of a witness or rather the confession of an accessory *(complex)*. This question seemed to be of crucial importance because the argumentation of the defence held the young female arsonist a witness against the approach of the prosecution, which deemed her an accessory. Regarding the evidence adduced by the young female defendant, the parts of both *Practica* and *Praxis Criminalis* referred to by the attorney were premised on the supposition that the young defendant could be considered as a witness in the criminal procedure, consequently the postulate of being in the adequate age could be requirable from her with regard to testifying.

The Magistrates of Debrecen essentialy resolved this theoretical dilemma in the final sentence, when it regarded the juvenile perpetrator's confession as an alleviating circumstance, since she was one of the defendants who firstly and spontaneously made a confession about the committed incendiarism in the investigation of the criminal procedure *(benevolum examen)*. Nevetheless, it becomes clear that minority age did not merely carry a substantive feature, but also a procedural trait, because the latter one could function as a potential impediment, with respect to deposition in criminal litigations.

4. Analysis of the final sentence: The imposed punishment as a *poena extraordinaria*

In the last main chapter of the elaboration, I intend to scrutinize the final sentence of the Debrecen Magistrates *("deliberatum est")*. The principal points are as follows; how the judicial body appraised the minority age, to what extent it conceded the attorney's argumentation and relied on the loci of Carpzov's *Practica*. In this part of the paper, the analysis primarily focuses on the imposed penalty and the locus of *Practica* referred to by the Magistrates in the final sentence.

The judicial body inflicted decapitation on the young female defendant as well as ordered that the offender's cadaver had to be burned afterwards. When the court passed the final sentence, it took two mitigating circumstances into consideration. On the one hand, it sized up the commited act rested on the explored circumstances and established that the delinquent seemed to be only in her 16th year, thus she had not been in the required age *("perfecta aetas")* yet. On the other hand, this defendant was the first who made a confession about arson in the interrogation of the criminal proceedings *("in benignum examen")* as it was already mentioned in the end of the previous chapter. The court adduced one locus of *Practica* in the final sentence regarding the lack of expected age and this Carpzov-opinion is going to be exhaustively dissected hereinafter.

In a taxonomical approaching, this referred locus of *Practica* differed from those which have been analyzed in the former chapters of the paper. Nevertheless, at this point of the scrutiny, the topic structure of *Practica* needs to be slightly touched upon. This book was divided into three same parts *(pars)*, each one of them comprised 50 questions *(quaestio)* including numbered paragraphs *(numerus)* in the diverse matter of criminal law. The referred locus in the final sentence is founded in the *quaestio* concerning arson whereas the loci referred to by the attorney in

[39] BODÓ *Op. cit.* p. 23. *"Jure communi, in Criminalibus, pro inhabilibus reputantur Impuberes, etiam minores 18. secundum nonnullos vero 16. aut 12. annis ob judicii imbecilitatem: tum ex eo; quod tales ad mendacium sint proclives; tum vero, quod facile corrumpi possunt; tum denique, quia Testi non creditur nisi adjurato. Jam vero Impuberi, secundum Constitutiones Juris Civilis, Juramentum deferri non potest. Ratio: Quia minorennium lubricum est judicium, & consilium. Ergo ipsorum testimonia, non habent tantum ponderis; ut ad condemnationem urgeant. In exculpationem tamen Rei admitti videntur etiam 16. Annis inferiores; & quidem ex ea ratione: quod Rei semper favorabiliores sint quam Actores. Quod ipsum, discreti Judicis prudenti arbitrio relinquendum esse, quos, & quales Testes, secundum judicii eorum qualitatem & capacitatem, admittere debeat; id ipsum Jure communi quoque dictante."* The legal principle of *"quod Rei semper favorabiliores sint quam Actores"* stemmed from a phrasing of Digest. *"Gaius libro quinto ad edictum provinciale Favorabiliores rei potius, quam actores habentur."* (D.50. 17. 125.). HALKERSTON, P., *A collection of Latin maxims & rules, in law and equity.* London, Edinburgh, 1823, p. 47. CAMPBELL BLACK, H., *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (Second Edition).* Union New Jersey, 1995, p. 485. BALLENTINE, J. A., *A Law Dictionary of Words, Terms, Abbreviations, and Phrases Which Are Peculiar to the Law and of Those Which Have a Peculiar Meaning in the Law.* Clark, New Jersey, 2005, p. 169. Both arguments of *"lubricum est (…) consilium"* as well as *"ad mendacium sint proclives"* emerged also in Carpzov's *Practica*, moreover these reasons appeared in other scholars' works. AYRER, J.-FRITSCH, A., *Historischer Processus Iuris.* Nürnberg-Frankfurt, 1737. p. 179. *"Et constat, quod talis impubes regulariter testis esse non possit, (…). Tum propter lubricum consilium, (…). Tum, quod aetas illa sit mentiendum facilis, (…)."* BLUMBLACHER, C., *Commentarius in Kayser Carl deß V. und deß heiligen Römischen Reichs peinliche Halß-Gerichts Ordnung.* Salzburg, 1752, p. 75. *"Ratio est, quia lubricum est ejusmodi personarum consilium. (…) Et censentur ad mentiendum faciles."*.

his *allegatio* belonged to the *quaestio* wherein Carpzov dealt with minority age as a possible alleviating cause of penalty in a more general approach.[40] In Q. 143., the author presented minority age as a common mitigating circumstance of punishment in contrast to Q. 39. In this latter *quaestio*, the minority age was elaborated as one of potential mollifying causes of an arsonists's penalty, and wherein the Saxon legal scholar exclusively zeroed in on the extenuation of arson. The "special" locus in Q. 39. diverged from the "general" loci in Q. 143. concerning the determination of age limits. Namely, those arsonists – who stepped across the age limit of *pubertatis* by a few years – could be penalized with decapitation instead of the burning alive functioned as *poena ordinaria* of incendiarism. These perpetrators had already completed their 14th year, though they had not completed the age of 16 or 17 yet.[41]

In this sentence, the mitigation of retribution manifested itself in the imposition of beheading in lieu of burning alive, since the penalty of sword presumably brought about less suffering than destruction by fire. Although the Magistrates did not want to forego the "reflective element" of arsonists' sanction in this case, therefore they linked beheading with the burning of the dead body. The consumption of a sinner's corpse by fire can be interpreted as such an element of the imposed sanction which could mirror the essence of the perpetrated act, consequently this component proved to be the part of the applied punishment similarly as the decapitation serving as the target of general prevention by deterrence.[42]

The beheading can be regarded as a lightened punishment, a *poena extraordinaria* concerning the analyzed legal case.[43] In respect of the interpretation of the decapitation, I must spare a few words about the Hungarian legal regulations of arson with special regard to the sanction of this crime. Perhaps the most significant one of domestic rules was Act XI of 1723, which made a conceptual distinction between the categories of *incendiarius publicus* as well as *privatus* as two possible categories of perpetrators in the 13th of its Sections.[44] The latter Section prescribed that *poena ordinaria* for incendiarism had to be burning alive in case of both *incendiarius publicus* and *privatus*.[45] This legal regulation included a clause which gave the judge permission to impose a milder sanction than burning alive if alleviating circumstance(s) had been proven in a criminal procedure.[46] Nevertheless, according to this provision, the delict of incendiarism had to be punished with death in each case.[47] Therefore, inflicted punishment could never be lighter than death, the native law excluded the "real" possibility of mitigation. Nonetheless, decapitation could be regarded as an alleviated *poena extraordinaria* in the Hungarian legal regulation of the early modern period, as well.

The Magistrates did not only invoke *Practica*, but made a reference to Article LXXXVIII of *Praxis Criminalis* in the final sentence, as well. The text of *Praxis Criminalis* also corroborated the interpretion of the imposed sanction detailed above, namely the beheading combined with the burning of a dead body seemed to be an alleviated penalty, a *poena extraordinaria*. Article LXXXVIII Section 7 of *Praxis Criminalis* declared that the judge had to punish with decapitation or other milder punishment in lieu of inflicting burning alive, provided that mitigating circumstance(s) had been proven. Therefore, if the delinquent appeared to be a young person and his malice was not deemed so large (to such a degree) compared to adults, the arsonist avoided suffering death by fire, however, he had to be inflicted decapitation with the burning of his cadaver.[48]

With reference to the analysis of the final sentence, I must additionally mention some other loci of *Practica* referred to in his *allegatio* by the attorney. These texts were adduced concerning minority age as a mitigating circumstance of penalty, but were not previously elaborated in Chapter 2 of the paper. These Carpzov-opinions were closely connected with the locus of *Practica* that appeared in the final sentence, albeit

---

[40] *"Quaestio XXXIX. "Quibusnam in Casibus Poena Incendii Ordinaria sit mitiganda? (…) Quaestio CXLIII. "An & quando propter Aetatem tenellam Infantum, Impuberum, atque Minorum, Poena sit remittenda, vel mitiganda?"* (referred to as Q. 39. and Q. 143. below).

[41] CARPZOV, B., *Practicae Novae Imperialis Saxonicae Rerum Criminalium, Pars I.* Francofurti, Wittebergae, 1677, (referred to as CARPZOV *Op. cit.* [1677b] with marking page number below) p. 234. *"Tertio: A poena incendii ordinaria rigorosa quae est ignis, eximuntur quoque Rei ob minorennitatem, qui puberes quidem sunt, paucos tamen annos post inchoatam pubertatem excesserunt, quales sunt, qui anno decimo sexto vel septimo nondum complete hoc delicti genere se contaminant, in quibus minor est malitia & perversitas judiciumque adhuc infirmum. Quos propterea in crimine hoc gladii poena affici, sufficere visum fuit multoties Scabinis."*.

[42] The Magistrates applied this retribution in other cases, as well. M. ANTALÓCZY *Op. cit.* p. 157. Regarding the "reflective element" of the penalty imposed cf. BODÓ *Op. cit.* p. 274. *"Per quod quis peccat, per idem punitur et idem."* This concept can be considered as the manifestation of *lex talionis*.

[43] In his indictment, the prosecutor made a motion that the offenders should be punished by burning them alive. He adduced Carpzov's *Practica* (*Pars* I *Quaestio* 38), *Praxis Criminalis* (*Pars* II *Articulus* LXXXIII) and Act of XI and CIX of 1723 in order to support his proposal for this penalty.

[44] BODÓ *Op. cit.* p. 273. *"Incendiarii, juxta Art. 11. 1723. alii sunt publici, alii privati. Publici dicuntur illi, qui studio, manifeste & non occulte, ignem, tectis, aedibus, acervis, aut segetibus, & id genus aliis, supponunt. Privati, vero, qui occulte, in utroque tamen casu, malitiose & deliberate, id faciunt."*.

[45] BODÓ *Op. cit.* p. 274. *"Hujusmodi autem dolosi Incendiarii, non tantum Jure Patriae, verum & ex Ordinatione Carolina & Josephina Criminali, flammarum supplicio afficiuntur."* See in more detail the the texts of two legal regulations (*Praxis Criminalis* and Article 125 of CCC.) mentioned by Bodó. Act XI of 1723 Section 13 *"Incendiarii autem publici; vivi cremabuntur; pariter et privati,"* BODÓ *Op. cit.* p. 274. *"Poena hujus voluntarii, & malitiosi Criminis, est ignis, de praescripto etiam Art. 11. 1723. juxta illud: Per quod quis peccat, per idem punitur & idem."* Pr. C. [1697] p. 69. *"(…) hujusmodi incendiarius, ignis supplicio puniatur."*. ZOEPFL *Op. cit.* p. 238. *"Straff der brenner. (…) Item die boßhafftigen überwunden brenner sollen mit dem fewer vom leben zum todt gericht werden."*.

[46] Act XI of 1723 Section 13 *"(…) pro rerum circumstantiis gravioribus, pari poena: in levioribus vero mitiori (…)"* BODÓ *Op. cit.* p. 274. *"Qualis poena, non solum publicis sed & privatis Incendiariis, in gravioribus Circumstantiis, iroganda eodem Articulo praescribitur; in levioribus vero, mitior, pro rerum circumstantiis, (…)"*.

[47] Act XI of 1723 Section 13 *"(…) attamen amissione vitae plectendi venient."* BODÓ *Op. cit.* p. 274. *"(…) semper tamen capitalis,"*.

[48] Pr. C. [1697] p. 69. *"Circumstantiae alleviantes. §. 7. E contra poena de vivo comburendo condonatur, & ejus loco Reus antea gladio plectitur aut juxta circumstantiarum qualitatem extraordinarie & adhuc levius punitur, (…) Similiter si Reus adhuc juvenis esset, & in eo Judex tantam malitiam, quam forte in alio, non deprehenderet, talis incendiarius gladio plectatur, ejusque corpus nihilominus comburatur igne."*. Cf. Pr. C. [1697] p. 24. *"Vel etiam quando circumstantione aliquam poenae alleviationem admittunt, potest prius decapitari, deinde corpus in pyram poni, igne consumi, & cineres. &c."*.

these loci exclusively mentioned in the *allegatio* of the defence. Invoking a taxonomical approach, these texts need to be presented at this point of the paper in order to confirm the conception, namely the sanction applied by the Magistrates was considered as an alleviated penalty. The analysis of these Carpzov-opinions can assist in a clearer understanding of the question what the theoretical ground of the final sentence was. Moreover, these loci can justify the supposition that the court actually conceded the attorney's arguing, furthermore the passed sentence was really based on *Practica* as well as *Praxis Criminalis*.

In these loci of *Practica*, Carpzov reasserted that the minority age was considered a mitigating circumstance, which could particularly alleviate punishments of minors who had already been nearest the inchoation of *pubertati proximi*, although this alleviating cause could not entirely acquit delinquents. Through this assertion, Carpzov essentially alluded back to the locus adduced by the Magistrates, and if the structure of *Practica* is more meticulously scrutinized, it will become obvious that the referred locus in the final sentence preceded – in a taxonomical sense – those loci in the *Practica* appeared in the *allegatio* of the defence. Returning to the review of Carpzov's opinions, it seemed to be a fairly difficult task to define precisely who was nearest to the inchoation of *pubertati proximi*. According to Carpzov and also the several other authors mentioned by the answer to this question could be less doubtful in those cases when perpetrators had not completed the age of 16 yet.

Carpzov thought the extenuative impact of minority age as an adaptable conception for the graver delicts, therefore, in his opinion, the penalty of minors should be mitigated in case of not only arson but also other, more atrocious delicts. Since these juvenile persons' perversity or rather depravity in the perpetrated acts by virtue of their younger age appeared to pale in comparison with the crimes committed by seniors (adults). Carpzov clarified this concept with a short example as well. According to one instance, one certain noble lad, who had not completed the age of 18 yet, murdered his father with poison. The court infilcted the retribution of sword on him because his age was regarded as an alleviating cause, which was able to lighten the rigor of law.[49]

Conclusion

In conclusion, I hope that the scrutinized procedural parts of the criminal litigation could expressively illustrate Carpzov's appearance or rather emergence in the criminal case law of Debrecen, however the facts cannot be denied that the paper merely analyzed certain procedural phases of one criminal action in point of only a few various aspects of minority age, chiefly concentrating on Carpzov's approach. Thus I am not able to provide overall consequences and deep connections at the end of my scrutiny. Nevertheless, neither did such intentions originally constitute a part of my research targets.

This paper just endeavours to highlight the potential of criminal legal historical research in the early modern period, furthermore the possibilities of analyzing foreign legal effects in native legal "environment". In addition to all these purposes, it makes an effort to take "a snapshot" of a tangle of different age categories belonging to the period of the 17th and 18th centuries by means of Carpzov's ideas. This analysis simply attempted to be awareness-raising with particular respect to mitigating circumstances, *doli capax*, *arbitrium judicis*, *malitia supplet aetatem* and *poena extraordinaria* which concepts that have basically been proven to be worthy of attention from the point of view of modern criminal law.

The law – implying legal regulation, practice and scholarship – has not only progressed *per se*, solely within a purely and hermetically separated national legal framework, but it has also been permanently changing and developing in an international context. Through making use of this approach, legal historical "investigations" could be even more enriched if these analyses took a more particular note scrutinizing external legal effects. I believe that one of the main missions of recent legal historical reseach is to explore and explain different actions and interactions among diverse legal cultures and systems. In my opinion, Saxon Benedikt Carpzov's influence or "Carpzovian authority" can be interpreted as such a potential action referring to the history of Hungarian criminal law in the 18th century. Therefore, this paper is considered as an introductory research which is able to provide a short glimpse of this phenomenon in a descriptive way, moreover it can involve the possibility of a further and more extensive analysis concerning Carpzov's impact on domestic criminal legal development.

[49] CARPZOV *Op. cit.* [1677 b] p. 234. *"Equidem non ignoro, quod minor aetas delinquentem in totum neutiquam excuset, ut post alios communiter docet (…). Attamen quoad poenam mitigandam multum juvat, efficitque, ut minores inchoatae pubertati adhuc proximi, mitius puniantur, (…) ubi dicit, hoc minus dubium habere, si delinquens nondum sit major sedecim annorum. Neque aliter sese res habet in criminibus gravioribus & atrocibus, (…). Quin & in atrocissiumis delictis ob minorem aetatem poenam ordinariam mitigandam esse, tradit (…). Licet namq; dolosum sit judicium minoris est, tamen infirmius propter naturae infirmitatem, ut ita minor perversitas in hoc, quam in majore appareat. Praeterea & aetas haec suapte natura vitiorum incitamentum est, quare minorum delicta ipsorum potius fragilitati adscribuntur, juxta illud D. Ambrosii: Vicina est lapsibus adolescentia, qua variarum aestus cupiditatum sevore calentis inflammatur aetatis. (…). Hinc Nobilem quendam juvenem nondum habentem 18. annos, eo, quod patrem veneno necaverat, juris rigore mitigatio, capite fuisse obtruncatum, meminit (…) Vid. quoque (…)."* Regarding Carpzov's example see also in more detail FRANCHIS, V. de, *Decisiones Sacri Regii Consilii Neapolitani (Tomus Secundus).* Venetiis, 1620, p. 6-7.

Regulation of the Relations between Jews and Christians in Roman Law

*Pál Sáry**

Abstract

Even the pagan Roman emperors issued a number of decrees concerning Jews and Christians. However, the regulation of the relationship between Jews and Christians did not begin until after the Constantinian change. The Christian emperors ruling in the fourth to sixth centuries sought to achieve the following three main goals in this area: (1) promoting the conversion of Jews to Christianity; (2) hindering the conversion of Christians to the Jewish religion; (3) elimination of hostility between Jews and Christians. For the first purpose, the rights of Jews were restricted (for example, they were excluded from public offices). Jews who converted to the Christian faith received special legal protection. For the second purpose, the conversion of Christians to the Jewish faith was declared a crime. Jews were forbidden to keep Christian slaves. Mixed marriages between Jews and Christians were prohibited. For the third purpose, Christians were forbidden to abuse Jews; attacking, looting and setting fire to synagogues was severely punished. Jews were also strictly forbidden to violate the Christian religion.

Keywords: *Roman law; Late Roman Empire; Imperial legislation; Religious policy; Christianization; Jews; Proselytism; Christian slaves; Synagogues; Religious violence; Protection of public order.*

1. Promoting the conversion of Jews to Christianity

The main religious policy goal of the Christian Roman emperors was to Christianize and Catholicize the population of the empire: the rulers sought to get as many people as possible to be baptized and to join the Catholic trend within Christianity.[1] To this end, they have put pressure on non-Christians (pagans, Jews and Samaritans) and Christian heretics through religious discrimination. It was stated, for example, that a lawyer and a civil servant can only be a Catholic Christian.[2] Therefore, persons of pagan, Jewish, Samaritan, or heretical religion who wished to be lawyers or civil servants, or who wished to remain in such positions, were forced to convert to the Catholic faith. Such regulations are likely to have resulted in mass formal, apparent conversions.

Otherwise, we do not know how rigorously such regulations were enforced in different parts of the empire. We should never confuse the level of legislation with the level of implementation. For example, there are many indications that the anti-pagan decrees at the local level were often not enforced: these decrees therefore had to be repeated several times, and the local officers responsible for law enforcement had to be threatened with increasingly severe sanctions.[3] It is quite certain that the decrees concerning the Jews were not always enforced either.[4] In the first half of the fifth century, several edicts were issued prohibiting Jews from building new synagogues.[5] Nevertheless, accord-

* Prof. Dr. Pál Sáry, Department of Roman Law, Faculty of Law, University of Miskolc, Hungary.

1 In the field of Catholicization, of course, the Arian emperors (Constantius II and Valens) were an exception.

2 Between 395 and 428, a number of decrees were passed restricting the right of heretics to hold office (CTh 16,5,25. 29. 42. 48. 58. 61. 65). In 416, Theodosius II excluded from public office those who performed pagan rites (CTh 16,10,21). In 418, Honorius forbade the admission of Jews to any public service: he allowed those who had already served in the civil service (*militia officialis*) to complete their full service, but immediately dismissed the Jews serving in the military administration (*militia armata*). This edict expressly allowed Jews to practice law (*advocatio*) and to hold curial office which involved heavy burdens (CTh 16,8,24). In 468, Leo I forbade the non-Catholics to practice law in the courts (C. 1,4,15). In 527, during the joint reign of Justin and Justinian, an edict stated that pagans, heretics, Jews and Samaritans could not hold either civilian or military office, could only be *cohortalini*, and if they were obliged to perform such office, they could not get rid of this burden. This edict strictly prohibited the non-Catholics from practicing as lawyers (C. 1,5,12).

3 Around 346, Constantius II ordered the performers of pagan sacrifices to be punished by death and confiscation of property; according to this edict, the provincial governors who neglected to avenge such crimes had to be similarly punished (CTh 16,10,4). In 395, Arcadius also forbade sacrifices, and threatened with punishment the governors, apparitors, decurions, defenders of the municipalities, and procurators of the imperial possessions who tolerated such ceremonies (CTh 16,10,13).

4 This is pointed out by Feldman, among others. See FELDMAN, L. H., Proselytism by Jews in the Third, Fourth, and Fifth Centuries. In: *Journal for the Study of Judaism in the Persian, Hellenistic, and Roman Period*, vol. 24, 1993, p. 13, 19.

5 See CTh 16,8,25. 27.

ing to archaeological finds, several new synagogues were built in the empire during the fifth and sixth centuries.[6]

The state granted special protection to Jews who converted to Christianity. In 315, Constantine ordered the Jews who attacked with stones or some other form of insanity Jewish converts to Christianity to be sentenced to death by fire.[7] Twenty years later, the emperor repeatedly forbade Jews to disturb and abuse those who had left the Jewish religion and converted to the Christian faith: under this edict, offenders were to be punished in proportion to their actions.[8]

In 426, Valentinian III issued an edict to protect the inheritance rights of Jews who had converted to the Christian faith. This edict forbade Jewish (and Samaritan) parents and grandparents to disinherit or to pass over in their will their children or grandchildren for conversion to Christianity. Such descendants could not receive less than their intestate portion. The unlawful will was declared invalid, except for the manumission of slaves. The converted descendant was entitled to the Falcidian portion even if it was clearly proved in a lawsuit that he had committed a very grave crime against his ancestor.[9]

It is important to emphasize that the Catholic state power did not put as much pressure on the Jews as it did on the pagans, heretics and Samaritans. Several Justinianic decrees stated that the property of pagans, heretics and Samaritans could only be transferred to Catholics by gift or inheritance: in the absence of a Catholic heir, the state could claim the estate of the said persons.[10] In this way, the pagan, heretic and Samaritan fathers, in order to preserve the property of the family, were forced by the state to convert their children, their future heirs, to the Catholic faith. Such decrees did not apply to the Jews.

It is also worth noting that the famous Edict of Thessalonica of 380 applied only to Christians: the emperor Theodosius I obliged by this anti-Arian edict his Christian subjects to follow the Nicene faith.[11] This law therefore did not apply to the Jews (nor to the pagans or Samaritans).[12] Theodosius did not obliged the Jews to convert to the Catholic Christian faith. It appears clearly from the decrees issued by him during the following years. In 393, for example, the emperor was gravely disturbed that the Jewish assemblies had been forbidden in certain places. For this reason, he stated with emphasis that the sect of the Jews was forbidden by no law.[13]

In 529, Justinian ordered all pagans within the empire to be baptized: those who disobeyed the imperial order were to be punished by confiscation of property and exil.[14] The Jews were not covered by this edict either. The Jews, therefore, were not compelled by the Christian Roman emperors to abandon their ancient religion.[15]

There were two reasons for this. On the one hand, the Catholic emperors respected many elements of the Jewish religion, in contrast to the pagan religion and the heretical Christian tendencies: they honored the Old Testament, Moses, and the prophets.[16] On the other hand, the Jews in both pagan and Christian ages paid a separate tax each year to the imperial treasury.[17] In return for this special tax, they could keep their ancient religious precepts and could not be compelled to behave in a way that would have been contrary

[6] Cf. EVANS, J. A. S., *The Age of Justinian. The Circumstances of Imperial Power*. London, New York, 1996, p. 242: „Yet there was a great gap between issuing an edict and enforcing it. New synagogues were constructed, no matter what the law stated. In the fourth and fifth centuries, there was a building boom of synagogues in Galilee and on the Golan Heights that continued into Justinian's reign…"; p. 245: „Justinian may not have enforced the laws against Jews much more rigorously than his predecessors. […] He did not prevent the building of synagogues: recently the remains of a large synagogue with a basilical plan have been discovered at Nabratein in Galilee, which the Jewish community there completed the year before Justinian's death, unworried by his legislation, and the evidence of archaeology shows that there was, if anything, a synagogue-building boom in Palestine in the sixth century."

[7] CTh 16,8,1.

[8] CTh 16,8,5 = 16,9,1.

[9] CTh 16,8,28.

[10] Cf. C. 1,5,17. 18. 19.

[11] CTh 16,1,2 = C. 1,1,1.

[12] Cf. SÁRY, P., Remarks on the Edict of Thessalonica of 380. In: VLADÁR, V. (ed.), *Perpauca terrena blande honori dedicata. Pocta Petrovi Blahovi k nedožitým 80. narodeninám*. Trnava, 2019, p. 72-73.

[13] CTh 16,8,9.

[14] C. 1,11,10.

[15] As De Lange writes, „forcible conversion of Jews remained exceptional in the time of Justinian" (DE LANGE, N., Jews in the Age of Justinian. In: MAAS, M. (ed.), *The Cambridge Companion to the Age of Justinian*. Cambridge, 2005, p. 420). Irmscher erroneously claims that the Jewish religion lost its status of *religio licita* after the promulgation of the Codex Iustinianus (IRMSCHER, J., The Jews under the reign of Justinian. In: *Eos*, vol. 78, 1990, p. 156). The Jews remained free to practice their religion also in the age of Justinian. In 535, Justinian issued a separate novel in connection with the practice of the Jewish religion (Nov. 146). About this novel, see RABELLO, A. M., The Legal Condition of the Jews in the Roman Empire. In: TEMPORINI, H. (ed.), *Aufstieg und Niedergang der römischen Welt*. Vol. II.13, Berlin, New York, 1980, p. 710-711.

[16] Justinian sometimes referred in his decrees to the teachings, figures, and events of the Old Testament. Acting against homosexual behavior, for example, referred to the fate of Sodom and Gomorrah (Nov. 77,1; 141,1), and in the cursing clause of the oath of office which he prescribed, he referred not only to the fate of the traitor Judas, but also to the fate of the leper Gehazi and the dreading Cain (Nov. 8, App.).

[17] The Jews paid an annual tax for the upkeep of the Temple of Jerusalem. After the destruction of Jerusalem and its Temple in 70, Vespasian imposed upon the Jews a new tax (*fiscus Iudaicus*) in favour of the temple of Jupiter Capitolinus in Rome (cf. Jos. *Bell.* 7,6,6). This humiliating tax burden was probably abolished by the philo-Semite emperor Julian in about 361 or 362 (cf. Iul. *Ep*. 51). The chief leader of the Jews from the second century was the patriarch appointed by the emperor, who resided in Tiberias. This office could only be filled by the descendants of the famous rabbi Hillel. One of the most important privileges of the Jewish patriarchs was to be able to levy a tax of a certain amount each year on the Jews living in the diaspora. In 429, when the House of Hillel became extinct, the office of patriarch lapsed. Taking this opportunity, the emperor Theodosius II immediately introduced a new state tax, ordering that the amount that the Jews had previously paid to their patriarch, called *aurum coronarium*, be paid to the imperial treasury in the future (CTh 16,8,29). This regulation certainly remained in force during the Justinianic era, as it was included in the Codex Iustinianus (C. 1,9,17). Cf. JUSTER, J., *Les Juifs dans l'Empire Romain. Leur condition juridique, économique et sociale*. Paris, 1914, vol. II, p. 282-287.

to their religious rules. The abolition of the Jewish religion would therefore have deprived the emperors of significant income. Thus, fiscal interests were also behind the greater tolerance for the Jews.

2. Hindering the conversion of Christians to the Jewish religion

Christian emperors severely punished abandonment of the Christian faith. Most of the apostates converted to (or returned to) the pagan religion, but there were also Christians who converted to (or returned to) the Jewish religion. In 315, Constantine decreed that anyone of the people (*quis ex populo*) who joins the nefarious sect (*nefaria secta*) of the Jews should be given a deserved punishment (*poena merita*).[18] In 352, Constantius II instructed the eastern *praefectus praetorio* to confiscate the property of those who had converted from the Christian faith to the Jewish religion for the benefit of the treasury.[19]

Theodosius I deprived Christians returning to the pagan religion of their right to make testaments and annulled the wills of such persons previously made.[20] In 383, Gratian imposed a similar punishment on those who left their Christian faith and converted to Judaism: this edict declared the will of such persons avoidable in a lawsuit.[21]

It is worth mentioning that Jews who were baptized for merely gaining benefits could return to their former religion with impunity. In 416, in a decree addressed to Jewish leaders, Honorius stated that the Jews who joined the Church in order to avoid prosecution for crimes or compulsory public services were not guided by faith but merely pretended their conversion; therefore, these persons, who did not have a firm creed and who were not filled with faith by baptism, should be allowed by the provincial governors to return to the Jewish faith.[22]

The missionary activity of the Jews was restricted by the pagan emperors as early as the second century: Antoninus Pius, for example, ordered the punishment of those who circumcised persons of non-Jewish descent.[23] Christian emperors also opposed the spread of the Jewish religion. Most decrees in this area were made to protect the faith of Christian slaves.[24] Clearly, the faith of the Christian slaves owned by Jews was in greatest danger: for the Jewish owners forced their slaves to follow the Jewish religious customs.[25]

In 335, Constantine decreed that if a Jew purchased and circumcised a Christian slave or a slave of any other (non-Jewish) sect (*Christianum mancipium vel cuiuslibet alterius sectae*), the slave *ipso facto* became free.[26] The emperor later tightened these rules for Christian slaves. According to Eusebius, Constantine „passed a law to the effect that no Christian should remain in servitude to a Jewish master, on the ground that it could not be right that those whom the Saviour had ransomed should be subjected to the yoke of slavery by a people who had slain the prophets and the Lord himself. If any were found hereafter in these circumstances, the slave was to be set at liberty, and the master punished by a fine."[27]

Some years later, in 339, Constantius II ordered that if a Jew bought a slave of another religion or people (*mancipium sectae alterius seu nationis*), he lost ownership of the slave for the benefit of the treasury; if he circumcised the slave, in addition to losing the slave, he was also liable to capital punishment; if he dared to buy slaves who were known adherents of the venerable (i.e. Christian) faith (*venerandae fidei conscia mancipia*), all his slaves were immediately confiscated.[28] The emperor therefore further tightened the rules laid down by his father and amended them in favour of the treasury.

In 384, Theodosius the Great also decreed that Jews could not buy a Christian slave: if they did, in addition to losing their ownership of the slave, they were to be punished appropriately. The Jews had to sell their slaves who were either still Christians or ex-Christian Jews to Christians at a suitable price, so that these slaves could be freed from their unworthy servitude.[29]

In 409, Honorius forbade Christian slaves to be forced to adopt the „Jewish perversity" (*perversitas Iudaica*), and ordered that the perpetrators of such crimes be punished by the laws of the former emperors. The decree states that it is more grievous than death and more cruel than murder if any person of the Christian faith is polluted by Jewish disbelief: *„quippe cum gravius morte sit et inmitius caede, si quis ex Christiana fide incredulitate Iudaica polluatur."*[30] In 415, the same emperor gave permission to the Jews to keep Christian slaves, but only on the condition that they let the slaves retain their own religion. Violators of the decree were to be punished as guilty of sacrilege.[31]

In the same year, in the eastern part of the empire Theodosius II gave the order to the *praefectus praetorio* Aurelianus to apply the strictness of the law to a Jew, whether the patriarch

[18] CTh 16,8,1. Here, I think the people (*populus*) are to be understood only as Christians: the decree, therefore, did not apply to those who converted from the pagan religion to the Jewish faith. For this narrower meaning of the word *populus*, see SÁRY, *op. cit*., p. 73.
[19] CTh 16,8,7.
[20] CTh 16,7,1-2.
[21] CTh 16,7,3.
[22] CTh 16,8,23.
[23] D. 48,8,11 pr.
[24] Cf. LANGENFELD, H., *Christianisirungspolitik und Sklavengesetzgebung der römischen Kaiser von Konstantin bis Theodosius II.* Bonn, 1977, p. 59-105; DE GIOVANNI, L., *Il libro XVI del Codice Teodosiano. Alle origini della codificazione in tema di rapporti chiesa-stato*. Napoli, 1985, 120-125.
[25] According to the rules of the Jewish religion, Jews had to circumcise their foreign slaves (Gen. 17,12-13). Cf. FELDMAN, *op. cit*., p. 15.
[26] CTh 16,9,1.
[27] Eus. *V. Const*. 4,27 (tr. E. C. Richardson).
[28] CTh 16,9,2. Cf. LUCREZI, F., CTh. 16,9,2: Diritto romano cristiano e antisemitismo. In: *Labeo*, vol. 40, 1994, p. 220-234.
[29] CTh 3,1,5. Cf. DE BONFILS, G., CTh. 3,1,5 e la politica ebraica di Teodosio I. In: *Bullettino dell'Istituto di Diritto Romano*, vol. 31-32, 1989-1990, p. 47-72.
[30] CTh 16,8,19.
[31] CTh 16,9,3.

Gamaliel himself or any other of the Jews, who attempted to pollute a Christian or a man of any other (non-Jewish) religion, freeborn or slave, with the Jewish mark (*Iudaica nota*, i.e. circumcision). The emperor, referring to a law of Constantine, also ordered that the Christian slaves held by the Jewish patriarch would be delivered to the Church (*ecclesiae mancipentur*).[32]

In 417, Theodosius II issued another edict ordering that Jews were not allowed to buy a Christian slave or acquire one by title of gift; in case of violation of this prohibition, their property rights over the slave were lost and the slave in this way was given freedom; slaves belonging to the true religion (*recta religio*, i.e. Christianity) might otherwise be owned by Jews if they had been acquired earlier, and Jews might continue to acquire Christian slaves by inheritance or *fideicommissum*, but only if they did not unite them, either unwilling or willing, with the pollution of their own sect, because if they did so, they received capital punishment with confiscation of property.[33]

Six years later, the same emperor decreed that a Jew who circumcised a Christian or ordered him to be circumcised was to be punished by confiscation of property (*proscriptio bonorum*) and perpetual exile (*exilium perpetuum*).[34] At the same time, he repeatedly forbade Jews from daring to buy a Christian slave: „*Christiana mancipia Iudaeorum nemo audeat comparare*." Violators of the ban had to be subject to the statutory punishment without any delay.[35]

In addition to the Jews, Justinian forbade the pagans, heretics, and Samaritans to keep Christian slaves. It was probably in 534 that the emperor issued his edicts under which Christian slaves owned by pagans, Jews, Samaritans, and heretics became free.[36] It also applied to slaves who were baptized after the promulgation of the edict, but only if the orthodox faith was chosen. For the sake of slaves who had become *ex lege* free, if they were *de facto* still treated as slaves, it was possible to turn to the governors, the defensors of the church, and the bishops. In such a case, the former owners had to be fined. If the former owner himself later converted to the orthodox Christian faith, he could not call his former slave back into slavery; who, against the law, forced his former slave back into the state of slavery was to be sentenced to capital punishment.[37] Finally, it is worth mentioning that in 535 Justinian, after his armies recaptured North Africa, issued an edict on the position of the African Church: this novel repeatedly stated that Jews could not keep Christian slaves.[38]

In 388, Theodosius the Great forbade a Jewish man to marry a Christian woman or a Christian man to marry a Jewish woman.[39] Under this edict, the mixed marriages were declared invalid, and the parties were to be punished as adulterers, which at this age, probably just following the laws of Moses,[40] meant the death penalty.[41] The perpetrators, unlike the rules on adultery,[42] could be prosecuted by anyone. This edict also was made in defense of the Christian religion: it wanted to prevent the Christian party from converting to the Jewish religion. It is important to add that this prohibition also existed from the other side: mixed marriages between Jews and non-Jews were strictly forbidden by the laws of Moses.[43] It is also worth mentioning that the barrier to marriage between Jews and Christians appeared in canon law much earlier than in Roman law: a canon of the Council of Elvira, held around 300, forbade Christian fathers to marry their daughters to Jewish men.[44]

3. Elimination of hostility between Jews and Christians

There have been tensions between Jews and Christians since the birth of Christianity. According to the Gospel of Matthew, Jesus had already sent out his disciples with this warning: „Beware of men; for they will deliver you up to councils, and flog you in their synagogues."[45] As we know, Saul, the later apostle Paul, set our for Damascus to arrest the Christians living there.[46] The first persecutors of Christians were the Jews.[47]

---

[32] CTh 16,8,22.
[33] CTh 16,9,4.
[34] CTh 16,8,26.
[35] CTh 16,9,5.
[36] C. 1,3,54; 1,10,2.
[37] A freedman could otherwise be called back into slavery (*revocatio in servitutem*) if he was ungrateful to his patron (cf. Suet. *Claud*. 25; D. 25,3,6,1; 37,14,5 pr.).
[38] Nov. 37,7.
[39] CTh 3,7,2. It is worth noting that the first imperial edict prohibiting the marriage of Jews and Christians was not for religious but for economic reasons. In 339, Constantius II ordered weavers who married Jews to return to the imperial weaving establishment (*gynaeceum*). The emperor added that Jewish men should not look for wives among Christian women, because if they did, they would receive a capital punishment (CTh 16,8,6). Cf. FALCHI, G. L., La legislazione imperiale circa i matrimoni misti fra cristiani ed ebrei nel IV secolo. In: *Atti dell'Accademia Romanistica Costantiniana*, vol. 7, 1988, p. 203-211; RABELLO, A. M., Il problema dei matrimoni tra ebrei e cristiani. In: *Atti dell'Accademia Romanistica Costantiniana*, vol. 7, 1988, p. 213-224; SIVAN, H. S., Why not Marry a Jew? Jewish-Christian Marital Frontiers in Late Antiquity. In: MATHISEN, R. W. (ed.), *Law, Society, and Authority in Late Antiquity*. Oxford, 1999, p. 208-219.
[40] Cf. Deut. 22,22; Ezra 16,40; John 8,5.
[41] In 339, Constans provided for adulterers to be put to death with the terrible *poena cullei* (CTh 11,36,4), which was originally a punishment for *parricidium* (cf. D. 48,9,9 pr.).
[42] In 326, Constantine granted the right to accuse a woman of adultery only to her nearest relatives (CTh 9,7,2).
[43] See Deut. 7,3. Cf. FELDMAN, *op. cit*., p. 10-11.
[44] Conc. Elib. can. 16.
[45] Matt. 10,17.
[46] Cf. Acts 9,1-2.
[47] Plescia summarizes the first phase of the persecution of Christians as follows: „In the first stage (c. 30-54) the Christians were confused with the Jews by the pagans and were persecuted by the Jews" (PLESCIA, J., On the Persecution of the Christians in the Roman Empire. In: *Latomus*, vol. 30, 1971, p. 127).

Jews also played an important role in the Roman persecution of Christians.[48] In the middle of the second century, Justin Martyr the Christian apologist accused the Jews of spreading their anti-Christian propaganda throughout the empire.[49] Tertullian called synagogues of the Jews sources of the persecutions of Christians: *„synagogas Iudaeorum fontes persecutionum"*.[50] Origen also wrote to the pagan Celsus that slanders against Christians came from the Jews.[51] According to these sources, therefore, the Jews engaged in defamatory propaganda activities, thus inciting the pagan Romans against the Christians.

This activity came to an end at the Constantinian change, but when Julian ascended the throne in 361, the Jews resumed their anti-Christian actions. As we know, Julian, abandoning his Christian faith, returned to the pagan religion and pursued a firmly anti-Christian policy. In addition to the pagans, he also allied with the Jews against the Christians.[52] Encouraged by this, the Jews launched attacks on Christians and set fire to many churches: according to St. Ambrose, this was the case in Damascus, Gaza, Ascalon, Berytus, and Alexandria, among others.[53]

The death of Julian, who ruled for only two and a half years, was followed by another turn: state power once again, and this time permanently, sided with Christians. This encouraged Christians to take revenge instead of forgiving their previous grievances. They attacked synagogues, looted them, and set them on fire.[54]

Rulers seeking to consolidate public order therefore had to issue edicts to protect the Jews. These decrees strictly forbade Christians from abusing Jews and attacking synagogues, criminalizing all form of agression against Jews.[55]

In 393, Theodosius the Great instructed the *comes et magister utriusque militiae per Orientem* to strictly restrain those persons who, in the name of the Christian religion (*sub Christianae religionis nomine*), presumed to commit illegal acts and tried to demolish and despoil synagogues.[56] In 396, Arcadius directed the *comes Orientis* to punish those who dared to make an insulting mention of the illustrious Jewish patriarchs.[57] A year later, the Eastern Roman ruler instructed the praetorian prefect of Illyricum to let the governors know that the abuse of the Jews should be prevented, and that the usual tranquility of the synagogues should be maintained.[58]

In 412, Honorius also forbade anyone to attack or occupy synagogues, saying that everyone, regardless of religion and cult (*sine intentione religionis et cultus*), had the right to keep their property undisturbed.[59] A month later, Theodosius II gave instructions to the praetorian prefect of Illyricum that no one should be oppressed for being a Jew, and that synagogues and Jewish homes should not be burned down or damaged. However, the Jews were also warned by the emperor not to become insolent and not to dare to violate the Christian religion in the knowledge of their security (abusing their protected position).[60]

In connection with the violation of the Christian religion, the following are worth noting. To this day, the Jews consider the feast of Purim to be one of their main feasts, commemorating that their ancestors in the Persian Empire were freed from mortal danger when their enemy, Haman, who planned to exterminate their people, was crucified by the Persian king.[61] In memory of this execution, the Jews burned crosses. As this ceremonial custom severely offended the religious feelings of Christians, Theodosius II ordered in 408 the provincial governors to

[48] Plescia thus sums up the second phase of the persecution of Christians: „In the second stage (54-211) the pagans distinguished the Christians from the Jews and joined the Jews in persecuting the Christians" (PLESCIA, *op. cit*., p. 127). Harnack writes the following about the role of Jews in the persecution of Christians: „they instigated the Neronic outburst against the Christians; and as a rule whenever bloody persecutions are afoot in later days, the Jews are either in the background or the foreground" (HARNACK, A., *The Expansion of Christianity in the First Three Centuries*. Trans. J. Moffatt. London, New York, 1904, vol. I, p. 66). On the important role of Jews in the Neronian persecution of the Christians, see, in particular, KERESZTES, P., Nero, the Christians and the Jews in Tacitus and Clement of Rome. In: *Latomus*, vol. 43, 1984, p. 404-413.

[49] Justin, *Dial*. 17,1.

[50] Tert. *Scorp*. 10,10.

[51] Origen, *C. Cels*. 6,27.

[52] Gibbon writes the following about the Jews: „they deserved the friendship of Julian, by their implacable hatred of the Christian name" (GIBBON, E., *The History of the Decline and Fall of the Roman Empire*. Vol. IV. Dublin, 1781, p. 87).

[53] Amb. *Ep*. 40,15.

[54] The most famous of these atrocities occurred in 388 in Callinicum, Syria, where Christians set fire to the synagogue at the instigation of their bishop. The governor sent a report on the incident to the emperor Theodosius, who ordered that the synagogue be rebuilt at the expense of the local bishop responsible for what had happened. When St. Ambrose became aware of this decision, he immediately wrote a letter to the emperor asking him to revoke his decision. In his request, the bishop of Mediolanum pointed out that during the reign of Julian, the Jews set fire to many Christian churches, for which the Church received no compensation. Although this letter did not achieve its purpose, shortly afterwards, in a public sermon, Ambrose still succeeded in convincing the ruler, who thus eventually reversed his decision (cf. Paul. *V. Amb.* 22-23; Amb. *Ep*. 40-41).

[55] Cf. ABEL, E. L., *The Roots of Anti-Semitism*. London, 1975, p. 173-174.

[56] CTh 16,8,9.

[57] CTh 16,8,11.

[58] CTh 16,8,12.

[59] CTh 2,8,26 = 8,8,8 = 16,8,20. According to Linder, this edict „might represent the government's reaction to the seizure of a Jewish synagogue in Edessa and its conversion to a church in 411/412" (LINDER, A., *The Jews in Roman Imperial Legislation*. Detroit, 1987, p. 263). I think Linder's comment is wrong. According to the sixth-century Syriac Chronicle of Edessa (§ 51), Rabbula, who was elected bishop of Edessa in 412, converted a former synagogue into a church by imperial order. The bishop's conduct was therefore not illegal. The emperor probably ordered the conversion of the synagogue because most of the local Jews had been baptized.

[60] CTh 16,8,21.

[61] Cf. Est. 9,25; Jos. *Ant.* 11,6,11.

forbid Jews from burning an object similar to the Holy Cross (*sanctae crucis adsimulatam speciem*), in violation of the Christian faith (*in contemptum Christianae fidei*) and with sacrilegious mind (*sacrilega mente*). The edict obliged the Jews to perform their rites without prejudice to the Christian religion (*citra contemptum Christianae legis*), and warned them to lose their privileges if they did not refrain from unlawful conduct.[62]

Socrates of Constantinople in his Ecclesiastical History repeatedly refers to the fact that in some places Jews deliberately mocked the Christian religion and committed serious crimes to the detriment of Christians. He writes of the Jews that „they are always hostile to Christians".[63] In 400, the Jews of Alexandria organized an assassination attempt on the Christians and killed many of them. The next day, the bishop of the city, Cyril, accompanied by a huge crowd, occupied the synagogues, drove the Jews out of the city, and allowed the people to kidnap the property of the Jews.[64] Socrates also tells us that around 415 in the Syrian Inmestar „the Jews were amusing themselves in their usual way with a variety of sports. In this way they indulged in many absurdities, and at length impelled by drunkenness they were guilt of scoffing at Christians and even Christ himself; and in derision of the cross and those who put their trust in the Crucified One, they seized a Christian boy, and having bound him to a cross, began to laugh and sneer at him. But in a little while becoming so transported so transported with fury, they scourged the child until he died under their hands. This conduct occasioned a sharp conflict between them and the Christians; and as soon as the emperors were informed of the circumstance, they issued orders to the governor of the province to find out and punish the delinquents."[65]

We can see, therefore, that the conflicts between Jews and Christians were a serious violation of public order, necessitating state intervention. In 423, Theodosius II issued another edict forbidding Christians to take away Jewish synagogues or set them on fire. If a synagogue was forcibly seized and consecrated as a Christian church, the Jews had to be given a plot of land so that they could build a new synagogue of a similar size to the previous one. Votive gifts removed from synagogues had to be returned, but if these objects had already been consecrated and thus could no longer be returned, their value had to be reimbursed. Otherwise, new synagogues were not allowed to be built, and the old ones were to be left in their condition.[66]

Two months later, after the Jews had complained about the conduct of the Christians, Theodosius II instructed his praetorian prefect to let the Jews know that their violation and persecution, for which some used the Christian religion as an excuse, was forbidden, and therefore no one should occupy or set fire to the synagogues.[67] Than, two more months later (June 423), the emperor again forbade Christians to raise their hands to Jews and pagans who lived in peace, did not disturbe others, and did not break the law. Under the edict, perpetrators of violence against those living in peace had to be brought to court, and in the case of a robbery, not only the taken property, but three and four times its value had to be returned.[68]

Similar decrees were not issued later, suggesting that after 423 the number of attacks on synagogues had decreased. However, hostility between Jews and Christians did not end.[69] This is clear from the story of Sergius of Amida, which John of Ephesus recorded in his Lives of the Eastern Saints.[70] Sergius, a famous, fanatical hermit from the Justinianic era, often made anti-Judaic statements, and than one night he and his companions went into the city of Amida and set fire to the synagogue there. The Jews mourned their synagogue, the books and furniture that were destroyed with it. Local Christians also deplored the events because their congregation lost significant revenue due to Sergius' action.[71] The Jews later retaliated against their grievance by setting fire to the hermitages of Sergius and his followers. The hermits quickly rebuilt their burned-out huts. The Jews also tried to rebuild their synagogue, making several attempts to do so, but the completed building was set on fire each time by Sergius and his companions.

Hostility between Jews and Christians, therefore, did not cease until the end of the period we studied (the death of Justinian). Neither side could stop, neither side could forgive. Both sides were fueled by hatred and a desire for revenge. Yet they could have easily recognized that only forgiveness could bring a solution and peace.

---

62 CTh 16,8,18. Cf. RABELLO, A. M., La premičre loi de Theodosius II (C. Th. 16. 8. 18) et la fęte de Pourim. In: *Revue historique de droit français et étranger*, vol. 55, 1977, p. 545-558.

63 Soc. *HE* 7,13.

64 Soc. *HE* 7,13.

65 Soc. *HE* 7,16 (trans. A. C. Zenos). From the report, I think we can conclude that the intent of the Jews was to mock and torture the Christian child, not to kill him. What happened, therefore, cannot be classified as a ritual murder, as Seaver emphasizes. See SEAVER, J. E., *Persecution of the Jews in the Roman Empire (300–438)*. Lawrence, 1952, p. 69.

66 CTh 16,8,25. These orders were later confirmed by the emperor in another decree (CTh 16,8,27).

67 CTh 16,8,26.

68 CTh 16,10,24.

69 Cf. GRAYZEL, S., The Jews and Roman Law. In: *Jewish Quarterly Review*, vol. 59, 1968, p. 100: „Attacks on and burning of synagogues did not stop. Theodoric the Ostrogoth had to contend with a number of such violations of public order in Italy at the beginning of the 6th century."

70 PO 17.1 (1923), p. 91-93.

71 There is no mention in the text of what income Christians have lost. According to Parkes, „This sum may have been a kind of blackmail paid by the Jews to be left in peace" (PARKES, J., *The Conflict of the Church and the Synagogue. A Study in the Origins of Antisemitism*. Cleveland, New York, 1961, p. 263, n. 3). I do not think that is likely. I find it much more conceivable that the Jews built their synagogue on property owned by the Christian congregation and, as *superficiarii*, paid an annual wage (*solarium*) to the church. With the destruction of the synagogue, the local church fell from this annual income.

Crimes Against Jugdes in Albania. Juridical Defense of Justice Officials Provided by the Criminal Law

Engjell Likmeta, Katrin Treska***

Abstract

In this paper, the authors aim to make a historical overview at the provisions of criminal legislation in Albania, in defense of officials of the justice system, and in particular judges.

The authors in this paper will focus firstly on the regulations made by the Albanian customary law, on the legal protection offered to the officials of the judicial system during the monarchy, during the period of communism in Albania, to look closer, provisions of the current legislation in force. Also, in this paper the authors will focues on a general overview of official statistical data, which highlight the number of cases of criminal prosecution and persons convicted of criminal offenses against judges and the justice system in Albania.

Keywords: *Judge; Justice System; Criminal Code; Albania.*

1. Introduction

The justice system and the administration of justice cannot function properly if the officials of this system do not enjoy the necessary protection to exercise their duty peacefully, indipendently, and feeling safe for their life and health, as well as for the life and health of their families.

Also, part of an effective justice system is the respectful perception of the figure of judges and other justice officials. Their dignified and inviolable image strengthens the public's trust in the justice system and in the served justice. In Albania, after 2016, when a deep reform of the justice system began to be implemented, one of the main goals was the dignified treatment of magistrates (a term that includes not only judges, but also prosecutors in Albania). And yet, justice reform measures focused on this goal, more in terms of dignified financial treatment, as a tool that prevents corruption among judges. While due to the duty they exercise, to fully understand the special treatment the legislator offers for judges, it is of interest to take into analysis the criminal protection provided by the legislation to the figure of the judge and other officials of the justice system. Therefore, in this paper, we will focus firstly on a historical overview to understand how starting from the Albanian customary law, the figure of the judge was seen as inviolable; to then arrive at the provisions of current legislation in force and statistical data that show how the figure of the judge and of other officials of the justice system is protected by criminal law. The review on statistical data is considered necessary to understand (as far as the methodology used by Albanian institutions to collect statistical data in this regard allows) not only the *de jure* protection of their figure from criminal legislation, but also the *de facto* effectiveness of these provisions, based on the data provided by the numbers and figures of cases registered, investigated, or of convicted persons for crimes against judges. These data extracted for this paper, aim only to create a general overview of the criminal protection provided for judges exercising their duties, and not to achieve an in-depth analysis of the level of real protection given nowadays in Albania to an official of the justice system, by the norms of criminal law.

2. The role and position of the judge in terms of Albanian customary law

Albanian customary law had provided the principles and canonical mechanisms in order to protect human life.[1] The obligation to respect the life of every person was applied in the Albanian territories, regardless of the social, economic, or religious status that the individual enjoyed in society. In the Canon of Lekë Dukagjini it was sanctioned: "The price of a man's life is same, both for the good and for the bad".[2] In their entirety, the norms of Albanian customary law[3] did not reserve a special protection for the judge.

* Engjell Likmeta, Associate Professor, Department of Criminal Law, Faculty of Law, University of Tirana, Albania.

** Katrin Treska, Ph.D. Candidate in Civil Law, General Director of Legal Services, Institution of the President of the Republic of Albania, Part – time lecturer, Department of Civil Law, Faculty of Law, University of Tirana, Albania.

1 LIKMETA, E., & TRESKA, K., Legal overview of crimes against the person in the Canon of Lek Dukagjini, In: *Regional Journal of Social Science*, No. 2, Gjilan, 2015, p. 103-108.

2 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 84.

3 TRESKA, K., & LIKMETA, E., The Funds for the Execution of Obligations (Contract) according to the Albanian Customary Law. In: *Journal on European History of Law*, Vol. 6, No. 2, 2015, p. 90.

However, in the Canon of the Luma Province, unlike many other Albanian canons, the public function of the judge received special protection from the authority.

The canonical norm of the Luma Province provided for the violation of the dignity of the judge as a criminal offense.[4] According to the legislator of the time, the insult to the judge qualified as one of the first canonical acts against the social order.[5]

The early Canon law of the Luma region strongly defended the position of the judge in the administration of justice.[6] The Canon punished any person who insulted, trampled on a judge, or treated his public personality with contempt and suspicion.[7] The perpetrator of such an anti-canonical action was fined.[8] The sentence was always binding. The forms of execution of the obligation were in cash or in kind.[9] The fine always went in favor of the society in direct proportion to the number of representatives of its members.[10]

The canonical norms[11] provided protection not only for the life and health of the person exercising the function of a judge, but especially for his authority. Therefore, anyone who casted doubt on his decision-making was considered to be committing a punishable offense.

With full prudence and delicacy, the figure of the judge stood out even in the norms of the Canon of the Province of Dibra. Dibra's art of expressing the norm testified to the culture and subtle judgment, as it affirmed that: "The elder man[12] does not fall in blood feud, because he does not kill or kill".[13]

Whereas, in the Canon of the Province of Benda it was said that: "Whoever kills an old man, whether of tribe, village, or region, he falls in blood feud only with the home of the old man and not with others".[14]

What attracts attention in the territorial units of Albania where the norms of customary law operated is the fact that the duty of a judge to administer justice was an honorary[15] and temporary activity.[16] It had a voluntary character.[17] Often, it could even be done for free.[18] The judge exercised his functions based on canon law.[19] Being a judge was not a reason for exclusion from other social activities or recognized customary obligations.[20] In this sense, the canonical norms of Skanderbeg[21] considered that: "The elders of the tribes, of the villages and of the Bajrak (term used to name regions), like any minor, are not excluded from the common duties in the tribe, the village and the region, nor from the army".[22]

3. Legal protection of the figure of the judge according to the Statutes of Shkodra

To date, the Statutes of Shkodra turn out to be the first codified and written legislation in Albanian lands.[23,24] About 1/3 or 32% of statutory norms were of penal nature.[25] The Statutes of Shkodra as a living witness of our legal culture during the Middle Ages,[26] also regulated the legal protection of the figure of the judge.

Judges had unquestionable authority in the public life of the city of Shkodra.[27] They were senior local officials[28] who enjoyed a favorable position in the medieval governing structure of the Municipality of Shkodra.[29] In this sense, the judge, as an elected public official who had the specific task of administering justice, preserving one of the copies of the

4 HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 363.
5 HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 363.
6 HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 363.
7 HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 363.
8 HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 363.
9 HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 363.
10 HOXHA, SH., *Canon of Luma*, Tirana, 2013, p. 363.
11 ISLAMAJ, F., & LIKMETA, E., Historical Aspects of Sale Contract according to Albanian Customary Law. In: *Journal on European History of Law*, Vol.10, No. 2, 2019, p. 168-169.
12 The elders exercised judicial activity. They were representatives of the judiciary in areas of the population where the norms of Albanian medical law extended their influence. Furthermore: AUTHORS' GROUP, *History of State and Law in Albania*, Tirana, 1997, p. 57-71.
13 MARTINI, XH., *Canon of Dibra*, Tirana, 2007, p. 440.
14 GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 169.
15 According to the norms of Skanderbeg's Kanun, the community had the obligation to respect the judge's decision and to recognize his position of honor in society, which meant the judge always sat at the center of the table and had the best food on the table, a kind of primus inter pares related with the benefits of behaving in the community. Furthermore: ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 121.
16 ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 66.
17 ELEZI, I., *Canon of Labëria*, Tirana, 2006, p. 68.
18 GOCI, H., *Canon of Benda's Province*, Tirana, 2010, p. 171.
19 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 93.
20 GJEÇOVI, SH., *Canon of Lekë Dukagjini,* Tirana, 1999, p. 103.
21 LIKMETA, E., Scanderbeg's Canon and Crimes against the Person, In: "*Journal on European History of Law*", Vol.5, No. 1, 2014, p. 177-181.
22 ILIA, F., *Canon of Scanderbeg,* Milot, 1993, p. 123.
23 KRUJA, K., & LIKMETA, E., Historical and Legal Aspects of Heritage Law in Albania, In: "*Journal on European History of Law*", Vol.11, No. 2, 2020, p. 149.
24 ORTALLI, G., "Statutes between Shkodra and Venice". In: NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 12.
25 JANÇE, K. *Aspects of Albanian cities in the Middle Ages and Statutes of Scutari (Shkodra) as real monuments of medieval Albania. (In the History of State and Law History, Comparative Overview),* Department of Public Law, Faculty of Law, Tirana, 2011, p. 162.
26 ELEZI, I., "Penal norms in the statutes of Shkodra", In: NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 410.
27 BAZE, E., The Statutes of Scutari: A symbol of medieval Western civilization in Albania. In: *Journal "Thought"*, No. 4, 2016, Tirana, p. 65.
28 MALLTEZI, L., Overview of Municipalities in Albania in XIII-XV Centuries. In: *Journal "Thought"*, No. 4, 2016, Tirana, p. 15.
29 BAZE, E., The Statutes of Scutari: A symbol of medieval Western civilization in Albania. In: *Journal "Thought"*, No. 4, 2016, Tirana, p. 65.

Statute,[30] but also the good administration of the public interest in the representative bodies of the city, was able to compensate the damage suffered by illegal actions for this reason.[31]

The municipality of the city of Shkodra was the law enforcement body that had to answer and was obliged to ensure the compensation of the judge for the damage suffered due to the exercise of his duty honestly and correctly.[32]

The financial treatment of judges in proportion to their economic interests in civil disputes or depending on the 'specific weight' of cases in criminal proceedings, were a promising element for preventing corrupt behavior in the administration of justice on their part, but also a more legal guarantee in terms of the rights that judges enjoyed.[33]

Judges, as an important figure in the municipality, were elected and sworn in according to a procedure set out in the statute.[34] The selection criteria for appointment to the position of judge were ability and dedication.[35]

The function of a judge was exercised for a certain period of time.[36] Their term of office was one year.[37]

The criminal offenses against judges expressly provided for in the Shkodra's Statutes were another positive factor and measure that guaranteed the normal functioning of the administration of justice by judges.[38]

The health, honor and dignity of the figure of the judge, but also the activity exercised by him, were defined as a concrete object that had to be protected by the statutory norms of the city of Shkodra. In addition, the judge was guaranteed life, property, and any other legal-statutory property.[39]

In Chapter 230 of the Statute entitled "When judges are hit" the judicial activity, mental and physical health of the judge were the concrete objects protected from criminal behavior.[40]

The place of commission of the criminal offense was an important element in determining the sentence for this offense.[41] Thus, when the anti-statutory act of hitting the judge was committed during the trial or in the courtroom, the perpetrator was punished with a fine in the amount of 30 "hyperperë" (term used for the "currency") and the loss of the case.[42] Whereas when the judge was hit outside the courtroom, the perpetrator was punished only with a fine in the amount of 15 "hyperperë".[43] The fine was the main punishment applied to the perpetrator of the criminal offense in question. The judge, as a victim of this crime, was the beneficiary of half its value.[44]

The Statutes of Shkodra reserved legal protection from illegal actions also for the administrative staff of the court and for the court clerks.[45] The only difference in relation to the penal-legal protection that was given to judges, was precisely the extent of the sentence given to the perpetrator of the criminal offense.[46] The perpetrator was sentenced to 25 and 12 "hyperperë"[47], for the crime committed against the court clerk, in or out of the courtroom.[48]

"On the insults of the defendant" was another criminal offense provided by the statutory norm of the city of Shkodra.[49] From the study of this statutory provision, it is easily understood that insulting the dignity and honor of the judge by the defendant, constituted a criminal offense.[50] The perpetrator was fined, and he immediately lost the trial. The fine went to the benefit (interest, favor) of the judge and the Count, equally shared.[51]

4. Penal provisions that aimed the protection of the judge during the Albanian Monarchy

All efforts for the first contemporary codification of the criminal legislation of our country have been concretized with the decree of 1927 of the President of the Republic of Albania.[52] The Criminal Code entered into force only a few (nine) months before the establishment of the Albanian Monarchy in

[30] KALIA, A., "Organization of the judiciary according to the Statutes of Shkodra". In: *Journal "Thought"*, No. 4, 2016, Tirana, p. 109.
[31] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 328.
[32] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 328.
[33] KALIA, A., "Organization of the judiciary according to the Statutes of Shkodra". In: *Journal "Thought"*, No. 4, 2016, Tirana, p. 108-109.
[34] MALLTEZI, L., Overview of Municipalities in Albania in XIII-XV Centuries. In: *Journal "Thought"*, No. 4, 2016, Tirana, p. 15-16.
[35] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 325.
[36] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 325.
[37] BAZE, E., The Statutes of Scutari: A symbol of medieval Western civilization in Albania. In: *Journal "Thought"*, No. 4, 2016, Tirana, p. 64.
[38] KALIA, A., "Organization of the judiciary according to the Statutes of Shkodra", In: *Journal "Thought"*, No. 4, 2016, Tirana, p. 109.
[39] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 328.
[40] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 328.
[41] LIKMETA, E., TRESKA, K., A short insight in the Statute: Criminal provisions in the Scutari Statute. In: *Journal "Science Bulletin"*, Year VIII, Scutari, 2014, p. 111-123.
[42] LIKMETA, E., & TRESKA, K., A short insight in the Statute: Criminal provisions in the Scutari Statute. In: *Journal "Science Bulletin"*, Year VIII, Scutari, 2014, p. 111-123.
[43] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 365.
[44] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 365.
[45] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 365.
[46] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 365.
[47] "Hyperperë" was a monetary unit of the time.
[48] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 365.
[49] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 372.
[50] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 372.
[51] NADIN, L., *Statutes of Scutari*, Tirana, 2010, p. 372.
[52] LIKMETA, E., Some Reflections on the Delicts of the First Criminal Code of the Republic of Albania. In: *Journal on European History of Law*, Vol. 7, No. 1, 2016, p. 178.

1928.[53] It embodied the spirit of advanced European legislation. The criminal law qualified criminal offenses into two main categories: offenses and contraventions.[54]

The Criminal Code of 1927 provided for a separate section on criminal offenses against justice. However, the criminal offenses that aimed at the legal protection of the life, health, honor of the judge or his judicial activity, were distributed in different chapters of the special part of the Criminal Code.[55] Thus, in the third chapter of the Criminal Code, in crimes against public administration, more precisely, in the seventh chapter "Violence and opposition of the Authority" the legislator had provided for the protection of the regular exercise of the functions of the Judicial Bodies.[56]

From the objective point of view, this crime was committed only through the exercise of violence, or intimidation.[57] The legislator did not require nor provided for the effect of legal qualification of this criminal offence, the type of violence exercised.[58]

The special purpose while committing the act was an element that served to qualify the offense "Violence and opposition to Authority" provided by Article 216 et seq. of the Code.[59] According to this legal-penal norm, the perpetrator of the crime should have aimed - to stop or disrupt the judicial process.[60] In addition, the provision protected the principle of solemnity of the court session. This principle was very valuable for the smooth running of the trial.[61] Also, the principle greatly influenced to increase public confidence in the judiciary.[62] The offense in question was formal. It did not necessarily require the coming of a criminal consequence.

Generally, the perpetrator was sentenced to severe imprisonment.[63] However, we take into account the fact that the measure of punishment of the perpetrator was also influenced by other elements such as: the means of committing the criminal offense (weapon), cooperation or premeditation. Also, heavy fines were applied as main punitive measure against this crime.[64]

The Criminal Code of 1927, at the outset, had provided crimes against the person as a serious criminal act endangering the life of public servants.[65] According to the criminal provisions, the elements of the subjective side of the criminal offense were required for the purpose of legal qualification, such as: special purpose - murder of a person; as well as the motive - because of its function.[66] Thus, indirectly, the law, without specifying, also protected the life of the judge, as a senior public servant.[67] The perpetrator of such a crime was sentenced to life imprisonment.[68]

At the same time, the criminal norms protected the honor, morals, image and position of every person exercising a public service, by providing as a criminal offense the acts of insult and defamation.[69] It is easy to understand that the judge was included in this category of specially protected subjects. The motive was a necessary element for the legal qualification of the criminal offense.[70] Imprisonment and heavy fines were applied to the perpetrator of this crime.[71] The measure of punishment applied to the perpetrator was determined by the form of manifestation of criminal behavior in society.[72]

5. The legal guarantees in defense of the figure of the judge in the years 1945–1990

During 1945-1990, the penal legislation sanctioned crimes against justice. Just like today, the legislation approved the strengthening of the legal-penal protection of the regular functioning of the justice system.

However, the systematic summary of penal law norms of 1952 and 1977,[73] in the chapter where crimes against justice were sanctioned, did not provide for an express provision regarding the protection of the image, life, health of the judge or of other senior officials of the justice system.

According to the Criminal Code of 1952, crimes against justice in Article 236 provided for the protection of the exercise of

---

53 TURKESHI, E., "*Juridical defense provided for crimes against environment*", University of Tirana, Faculty of Law, Department of Criminal Law, "Doctor" scientific degree topic, Tirana, 2014, p. 61.

54 LIKMETA, E., "*Juridical defense provided for crimes against property. An historical and juridical overiew*", "ASD-Studio" Publishing Hous, Tirana, 2016, p. 137.

55 LIKMETA, E., & DIMNI, E., Historical – Legal View of the Freedom of Religion in Republic of Albania. In: *Journal on European History of Law*, Vol. 7, No. 2, 2016, p. 145.

56 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 11-12.

57 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 11-12.

58 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 11-12.

59 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 11-12.

60 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 11-12.

61 LIKMETA, E., *Professional Ethics in Criminal Justice,* Tirana, 2016, p. 51.

62 LIKMETA, E., *Professional Ethics in Criminal Justice,* Tirana, 2016, p. 51.

63 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 11-12.

64 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 11-12.

65 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 198.

66 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 198.

67 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 198.

68 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 198.

69 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 216.

70 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 218.

71 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 218.

72 ALBANIAN MONARCHY, the Ministry of Justice, *Albanian Criminal Code*, Tirana, 1929, p. 218.

73 LIKMETA, E., Historical and Criminal Law Aspects of Safeguarding Road Safety in Albania, In: *Journal on European History of Law*, Vol. 9, No. 1, 2018, p. 191.

regular activity by assistant judge.[74] This criminal offense was punished with a fine up to a certain amount (3000 ALL).[75] The subject of this criminal offense was specialy identified, as the person who had the assistant judge upon his hierarchy because of his functions or service.[76]

The law[77] provided legal protection to officials or representatives of the public authority.[78]

Of course, the question of whether the judges were included in this category, will rightly arise. Did the judges enjoy adequate legal protection? The legal doctrine of this period has given the deserved answer to this question, as it was explicitly stated that: by state representatives is meant the category of subjects that were specially protected by legislation due to the nature of the state activity that they exercised.[79] This category included, among others, judges.[80]

Criminal behaviors directed against the representatives of the justice system or their activity were mainly foreseen in the criminal offenses against administrative order, respectively, in the sections of the activity of the bodies of power[81] or the state or social activity.[82] The activity during the trial, life, health, honor, morals as well as the dignity of the judge as an integral part of the judiciary were protected from criminal acts that could affect them. Thus, according to the penal legislation of those years, even the mere fact of the opposition of the representative of the government constituted a crime.[83] The social danger of this crime figure lay in preventing the representative of the state - including judges - from performing the duties assigned by law.[84] Physical violence[85] and cooperation were the two necessary elements for the effect of the legal qualification of the criminal offense provided by Article 118 of the Criminal Code. The perpetrator would be sentenced to re-education through work or imprisonment for up to five years.[86]

The legislator of the time had taken care that every official (and not only the judge in particular) was given the necessary legal-penal guarantee in order to exercise their activity in accordance with the law. In connection with his activity, the judge was legaly protected from any act such as beatings and any other kind of violent action. According to the theorists of penal law of this time, beating meant punching, while other acts of violence meant pushing, dragging, or slightly injuring, those acts of violence that by their nature did not constitute beatings.[87] The perpetrator would be sentenced to up to three years in prison.[88] According to the penal norms of 1977, the perpetrator could also be sentenced to re-education through work.[89]

The honor, morals and dignity of the state representative, including the judge, were also taken into protection by criminal law norms. Thus, the Criminal Code sanctioned that: Insulting a person due to his state or social activity or in production, committed worldwide to the detriment of several persons or more than once, is punishable by: re-education through work or deprivation of freedom for up to five years.[90] The motive was an important element for the effect of the legal qualification of

---

[74] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, p. 117.

[75] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, p. 117.

[76] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, p. 117.

[77] The legislator had defined the meaning of "official" or representatives of the public authority, in the provisions of the Criminal Code of 1952. Thus, according to this code, "officials" included the persons appointed or elected to a permanent or temporary position in an institute, state or social enterprises, or those of social organizations which were assigned by law certain duties, rights and competencies in the realization of economic, administrative, professional or other social tasks. Thus, the legal-criminal norm of 1952 itself protected the judges.
THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, article 206, p. 103-104.

[78] ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 288.

[79] ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 289.

[80] ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 289.

[81] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, p. 119-126.

[82] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1977, p. 57-58.

[83] ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 288.

[84] ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 288-289.

[85] According to the jurisprudence of this time, with "physical violence" was understood an act of pushing, beating, light injury or deprivation of liberty. For more, see: Instruction of the Plenum of the High Court no. 4, dated 16. 12. 1980. ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 289.

[86] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1977, p. 57.

[87] ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 294-295.

[88] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, p. 122.

[89] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1977, p. 57.

[90] ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 289.

the criminal offense "Insult of the representative of power".[91] The criminal offense was consumed through the use of insulting words during or after the exercise of judicial or state activity, but always because of it. Thus, the peculiarity of this crime figure lay in the fact that the insult had to be done to the judge or state official because of his public function and activity.[92]

Insult, as an aggravating circumstance, could be consumed through various criminal behaviors, through the press but also worldwide.[93]

In contrast to the penal law of 1952, the Criminal Code of 1977, in addition to the punishable act of "insult committed worldwide", provided as a way of committing the action of insult also by insulting to the detriment of several persons or more than once.[94]

The sentences applied to the perpetrator of the criminal offense of "Insulting the representatives of the government" were fines, correctional labor or imprisonment - which at the time was referred as deprivation of liberty.[95] Whereas, according to the penal legislation of 1977, the sentences applied to the perpetrator of the criminal offense were re-education through work or imprisonment (up to five years).[96]

6. Criminal legal protection of the judge according to the contemporary Criminal Code

Our legislator has tried to set precise norms in order to ensure the legal-penal protection of judges, other actors of the justice system and other public officials.

With the adoption of the new contemporary Criminal Code of 1995, endangering the life of a judge is considered a serious crime.[97]

Our legislator defended the life of the judge in the framework of the criminal offense provided by Article 79 "Intentional homicide due to the special qualities of the victim".[98] For the effect of the legal qualification of an act as the crime provided by Article 79 of the Criminal Code, the law requires the murder to be committed intentionally but also because of the special qualities of the victim, and that these qualities must be known or visible.[99] The perpetrator would be sentenced to life imprisonment or capital punishment - to death (death sentence was provided when the Code was initially approved, bur it was leter abolished in Albania).[100]

With the legal changes of 2001, this provision changes the name from "Intentional homicide due to the special qualities of the victim" to "Homicide in other qualifying circumstances".[101] Given the content of this provision, it is easy to understand that among the "qualifying circumstances" the legislator has considered even the killing of a judge "during the exercise of duty or because of it".[102] The same idea is held by Professor Elezi in his book: "Criminal Law - special part" as he states that: "This murder is considered by the circumstances that characterize the object of the crime, during the performance of duty or because of it".[103]

After the legal changes of 2013, the legislator has shown increased care in terms specifically protecting the life of the justice system's officials (including judges and prosecutors) in the Republic of Albania. Thus, Article 79/a has been added to our Criminal Code, entitled "Murder of public officials" with the following content: "*Intentional killing of a deputy, judge, prosecutor, lawyer, military or other public officials, while on duty or because of it, when the qualities of the victim are obvious or known, shall be punished by imprisonment of not less than thirty years or by life imprisonment*".[104] From reading this penal provision we understand that the penal law explicitly protects the life of the judge (magistrates in general, including prosecutors) from the criminal act of murder. From the objective point of view, time - during the exercise of duty - is a necessary element of this crime figure.

Intent and motive in terms of the subjective side are essential elements for the effect of the legal qualification of the figure of this criminal offense. The legislator also requires that the qualities of the victim must be clear and visible.[105]

The penal punishment for the perpetrator of the crime "Murder of public officials" sanctioned in Article 79/a, of our Criminal Code, is very severe but always in direct proportion to the illegal action committed. Thus, the law has set as a minimum sentence, the imprisonment of the perpetrator in any case not less than thirty years. While the maximum sentence is life imprisonment.[106] It is important to mention that the Criminal

[91] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, p. 120.
[92] ELEZI, I., The *Criminal Law of The Popular Socialist Republic of Albania,* Tirana University, Faculty of Law and Political Sciences, Tirana, 1983, p. 298.
[93] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, p. 120.
[94] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1977, p. 57-58.
[95] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1952, p. 120.
[96] THE MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, The *Criminal Code of the Popular Socialist Republic of Albania,* Tirana, 1977, p. 57-58.
[97] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[98] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[99] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[100] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[101] LAW No.8733, Date of Act: 24. 01. 2001, Adoption date: 24. 01. 2001, Official Journal No. 4, Page 100.
[102] LAW No.8733, Date of Act: 24. 01. 2001, Adoption date: 24. 01. 2001, Official Journal No. 4, Page 100.
[103] ELEZI, I., *Criminal Law (Special Part)*, Tirana, 2009, p. 56.
[104] LAW No., 144/2013, Date of Act: 02. 05. 2013, Adoption date: 02. 05. 2013, Official Journal No. 83, Page 3526.
[105] ELEZI, I., *Criminal Law (Special Part)*, Tirana, 2009, p. 56.
[106] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.

Code, provides in general the minimum and maximum of imprisonment sentence, from five days, to thirty five years.[107] So stint the minimum of the sentence for this crime figure to thirty years, shows the importance given from the legislator to the protection of the public officials exercising their duty. While life imprisonment is a sentence that according to the Criminal Code itself, is given only for the comittion of severe crimes. But it can not be given to minors (under 18 years old) or women.[108]

Conditional release as one of the alternatives to imprisonment may never be applicable to the perpetrator of the criminal offense of premeditated murder of a judge or other public official. It is also important to stress out that, the current legislation in force in Albania, has no legal definition of the circle of persons involved among "public officials".

Statistical data of the Ministry of Justice do not make it possible to identify the real number of judges whose lives have been intentionally violated during or due to the exercise of their duties. In addition, the number of concrete perpetrators convicted for violating the life of a judge cannot be objectively distinguished. Perhaps this is because the object of Article 79 / a of the Code is not only the life of the judge, but also the life of the legislator, prosecutor, lawyer, military and any other public official.

Thus, it is not clear the number of judges - whose lives have been affected by criminal behavior - but also the number of perpetrators of this crime figure. Beyond this fact, which deserves due attention from the compilers of judicial statistics, in the span of six years, in our country, there is a low number of cases and convicts related to the criminal offense of "Murder of public officials".

More precisely, in the years 2013-2018, there have been only 12 cases and 11 convicts.[109] And there were no female or juvenile convicts for this crime figure. The convicts are all adult males.[110]

Imprisonment from 10-25 years is the main type of sentence given for the crime of "Murder of public officials" for the period 2013-2018.[111] This type of punishment was applied to 6 perpetrators or 54.54% of them. For this criminal offense, there was only one sentence given with life imprisonment by a first instance court. In addition, the perpetrators of this criminal offense were sentenced to a fine and imprisonment of 2-5 years in only one case. And only two perpetrators were sentenced to prison from 0-2 years.[112]

6.1 Opposing and beating of the judge

Article 316, of the Criminal Code, provides the norm of "Opposing and assaulting a judge". This article, provides that: "*Violently opposing, assaulting or committing other violent acts against a judge or other members of the judicial panel, a prosecutor, defense lawyer, experts, any arbitrator assigned to a case, with the intent to prevent him from carrying out his duty or because of it, is punishable by a fine or up to seven years of imprisonment*."

We share the opinion that based on the rules of legislative technique, this provision is not clear, coherent and understandable for all. The title of the article creates the idea that this offense is dedicated only to the legal-penal protection of judges and their activity. Meanwhile, the provision is broader in terms of the subjects it takes under protection. In this regard, it also protects the prosecutor, lawyer, expert, as well as any arbitrator appointed to resolve cases and their activity.

If we carefully read this article, we come to understand that we are dealing with two different criminal offenses. First, we are dealing with the criminal offense of opposing a judge, prosecutor, lawyer, experts, any arbitrator assigned to a case. And secondly, with the criminal offense of assaulting the same special entities engaged in the justice system.

The question rightly arises whether it would be better for these two crime figures to be structured on their own? Should the law be clearer, more understandable and more accessible to all? Would it be more appropriate for our legislator to apply the same attitude to all criminal offenses reserving legal-penal protection to judges or other officials of the justice system, as he has rightly acted in drafting legal norms that protect the life, health, regular activity of state police officers? What is the position of the theorists of our criminal law and judicial practice when the judge's, or justice functionary's property would be infringed because of his duty or for the purpose of exercising it regularly? Does the criminal law provide special protection to judges as victims of property crimes?

Is it necessary for judges, justice officials or state police officers to be provided with adequate protection for their property from a legal-penal point of view. Of course, that such a protection is prominent for their life, health, honor and dignity.

Returning to the legal analysis of this provision, we must accept that the object of the crime provided by Article 316 is twofold. First, it is the normal functioning of the judiciary as well as the health of the judge.[113] From the objective point of view, this criminal offense is committed with active actions that consist of violent opposition of the judge, his beating or other criminal acts accompanied by elements of violence. The type of violence against the judge is not important for the effect of legal qualification. It (violence, its type and proportion) can be considered only to determine the punishment of the perpetrator of this criminal offense.

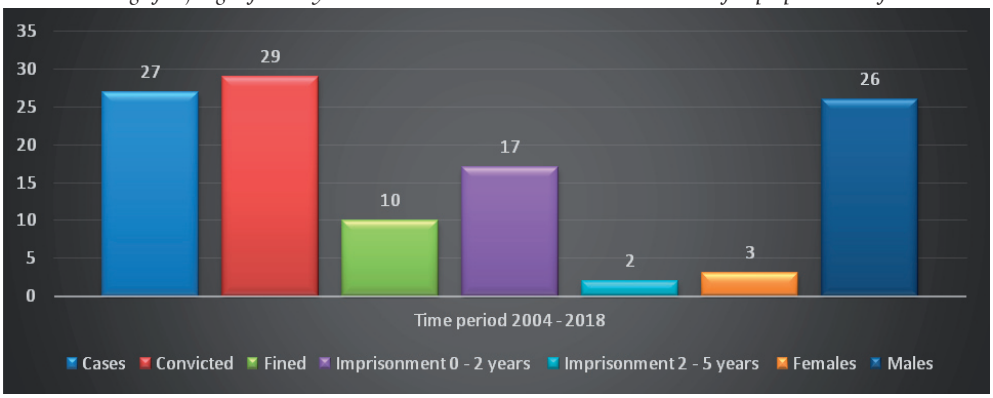
[107] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Article 32, Official Journal No. 2, Page 23: amended.
[108] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Article 31, Official Journal No. 2, Page 23: amended.
[109] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2013-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 10. 3. 2021.
[110] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2013-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 10. 3. 2021.
[111] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2013-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 10. 3. 2021.
[112] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2013-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 10. 3. 2021.
[113] This does not mean that the object of this provision is not the regular activity of the bodies of the justice system and the health of these representatives, but due to the topic of this paper, the object of our study is focused mainly only on the judge and the judiciary.

But what will we understand by "other acts of violence"? As we see, in this case, the legislator has left a broad provision, in order to be able to classify any act of violence, except assault, of opposal, toward a judge or other members of the judiciary, according to this article of the Criminal Code. And the onlyu requirement is "to be committed with violence". Purpose and motive are two elements of the subjective side of this crime figure that are important for the effect of its legal qualification. Fine and imprisonment are the only two sentences applicable to the perpetrators of this crime.

Regarding other criminal offenses against the judge, "Objection and beating of a judge" provided in Article 316 of the Criminal Code is the second offense with the highest number of convicts. It occupies about 30% of their total volume.[114] From our research it results that there are no juvenile convicts.[115] Imprisonment for up to two years is the main sentence, given the most, in addition to the fine and imprisonment for two to five years.[116]

Figure 1

Dynamics of the institutional activity of the judiciary (Courts of First Instance) in the Republic of Albania for the criminal offense "Opposition and beating of a judge" for the years 2004-2018 and statistical indicators for perpetrators of this criminal offense



6.2 Threatening to the judge

The threat to a judge, provided in Article 317 of our Criminal Code, is another criminal offense dedicated to his legal protection. It provide that: "*A threat to a judge, other members of a judicial panel, prosecutor, defense lawyer, experts, or every arbitrator assigned to a case because of their activity, is punishable by a fine or up to three years of imprisonment.*"

This is a formal criminal offense, which does not require the arrival of consequence.[117] The criminal offense will be considered committed with the commission of the threat, regardless of the form and manner of its realization.[118]

Of course, the object of this crime figure is first of all the regular exercise of duty by the organs of the justice system, including the criminal justice system, as well as the protection of the judge.[119] The subject of this crime is general, the person who has reached the age of criminal responsibility and is responsible.[120]

Motive is a necessary element for this figure.[121] This is because the crime of threatening to the judge is done precisely because of the exercise of his judicial activity.[122] Fines and imprisonment are the two sentences that can be applied to the perpetrator of this criminal offense. Three years imprisonment is the maximum sentence.[123]

The criminal offense of "Threatening to a judge" accounts for about 20% of the total volume of other criminal offenses against judges.[124] A fine is the main type of punishment applied to perpetrators.[125] From the study of statistical data it results that, we have no juvenile convicts for this criminal offense.[126]

[114] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 10. 3. 2021.
[115] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 10. 3. 2021.
[116] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 10. 3. 2021.
[117] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[118] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[119] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[120] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[121] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[122] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[123] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[124] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[125] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[126] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.

Figure 2
Dynamics of the institutional activity of the judiciary (Courts of First Instance)) in the Republic of Albania for the criminal offense "Threat to a judge" for the years 2004-2018 and statistical indicators for perpetrators of this criminal offense

6.3 Insulting a judge

Insulting a judge is another criminal offense sanctioned in the context of strengthening the functional integrity of the judge.[127]

This offense is also provided as a formal criminal offense. So, insulting the judge is enough for the offense to be considered committed. And in this sense, the arrival of any particular consequences is not required. This crime figure is committed through the use of insulting words that are intended to touch the sense of dignity of the person being insulted.[128]

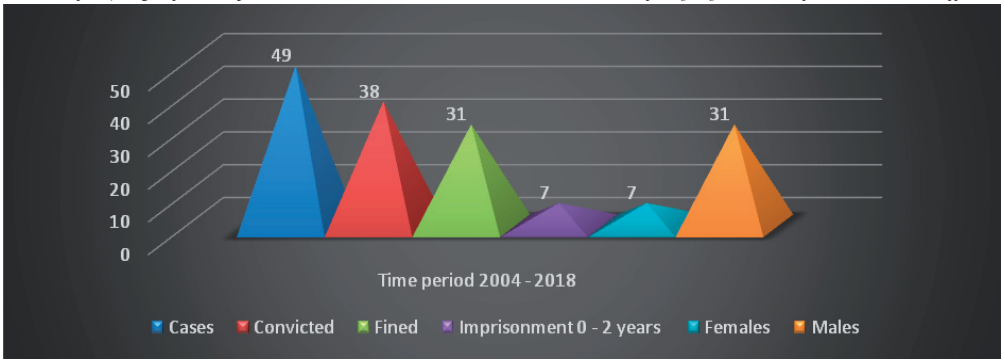
Fines and imprisonment are the only punishments that can be applied to the perpetrator of this criminal offense "Insulting a judge" provided by Article 318 of the Criminal Code, as follows: "*Insulting a judge or members of a judicial panel, prosecutor, defense lawyer or member of the arbitration, because of their activity in a case, constitutes criminal offence and is punishable by a fine or imprisonment of up to three months*."[129]

This specific article of the Criminal Code was amended in 2012, and the legislator changed the limit of the maximum sentence.[130] Currently, the offender can be sentenced to imprisonment for up to three months and not to imprisonment for up to two years, as was previously sanctioned.[131]

From our research during the work for this article, it did not resulted any clear reasoning that justified this intervention.

The criminal offense "Insulting a judge" is an offense with the highest density compared to other criminal offenses committed against a judge.[132] Respectively, this criminal offense occupies about 39% of the total volume of these criminal offenses.[133] The study of statistical indicators shows that we have no juvenile convicts.[134]

Figure 3
Dynamics of the institutional activity of the judiciary (Courts of First Instance)) in the Republic of Albania for the criminal offense "Insult of a judge" for the years 2004-2018 and statistical indicators for perpetrators of this criminal offense



[127] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[128] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[129] LAW No.7895, Date of Act: 27. 01. 1995, Adoption date: 27. 01. 1995, Official Journal No. 2, Page 23: amended.
[130] LAW No.23/2012, Date of Act: 01. 03. 2012, Adoption date: 01. 03. 2012, Official Journal No. 26, Page 1299.
[131] LAW No.23/2012, Date of Act: 01. 03. 2012, Adoption date: 01. 03. 2012, Official Journal No. 26, Page 1299.
[132] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[133] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[134] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.

7. Conclusions

Giving justice and trust in the justice system are one of the most important pillars for the functioning of a state.[135] Analysing different parts of the rules and legislation at different times in Albania, shows exactly the importance given to the inviolability of the figure of the judge and other officials of the justice system, regardless of the level of development of the justice system itself over the years. Beginning from customary law, not only health and life, but also honor, dignity and authority of the judge were specially protected, through sanctions for anyone who by his actions risked violating them. These predictions are to be appreciated, precisely for the fact that they prove the importance that the Albanian people gave to the justice system. Whereas nowadays, as we mentioned in the introduction to this paper, changes in legislation and reforms in the justice system in Albania, have aimed more at guaranteeing the position of the judge, his impartiality, and taking effective measures to punish corruption in the justice system. While, the criminal norms that protect the life and health of the judge, have not changed much in time, although they guarantee the necessary protection.

Form the other side, the statistical data gatherd from the responsible institutions does not offer a clear overview regarding the number of judges who have been harmed by criminal offenses against them. It is difficult to discern how the life, health, dignity and activity of judges has been harmed by the criminal conduct of killing, hitting, threatening or insulting them, in order to fully understand not only the criminogenic factors, but also the impact of the legislation in force protecting the officials of the justice system. In this context, we find it almost impossible to determine the number of perpetrators of those crimes. This is because the statistical indicators of the Ministry of Justice show only the total number of the perpetrators of each of the provisions of the Criminal Code. They do not provide specific data about the victims and their concrete profession (judge, prosecutor, lawyer, expert, legal arbitrator), nor for the convicts.

Statistical yearbooks simply show the total number of criminal cases judged by the Albanian courts of first instance, the number of convicts and the types of punishment for these criminal offenses.

Of course, this is also because the linguistic stylistics in respect of the legislative technique in drafting the norms of the Criminal Code by our legislator does not distinguish the concrete object protected by the criminal offenses provided by article 79 / a; 316; 317; 318 of our Criminal Code.

In this regard, it would be appropriate for the legislator to attempt to recompose these legal norms by using a simpler, more accurate language and by well-defining the concrete object protected by each norm, as it has done with criminal offenses against police officers of the state.

We recommend undertaking a profound legislative reform aimed at redesigning these norms. Legal reform should also aim at building a new contemporean Criminal Code, by providing for each criminal offense proportional sentences.

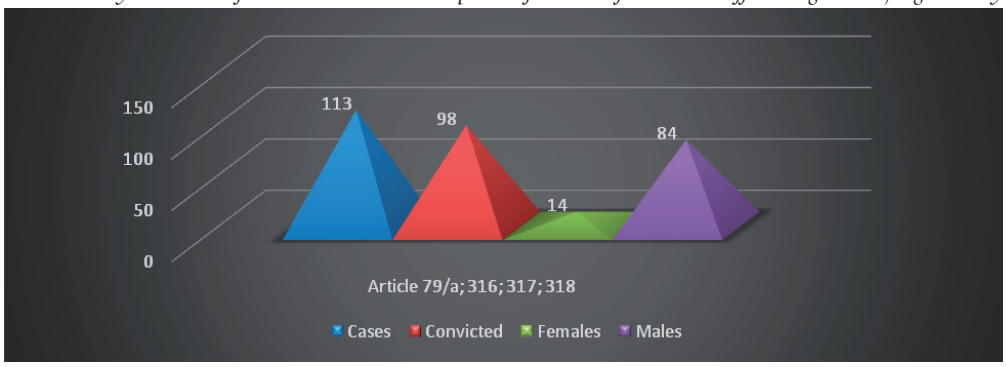
However, the murder of public officials, opposition and beating of a judge, intimidation and insult are the four criminal offenses that include in their entirety the legal-penal protection of the judge against criminal acts committed towards him. The focus of criminal offenses against the judge are: life, health, honor, dignity of the judge and regular judicial activity.

The study of statistical data for the years 2004-2018 shows that we have 2262 criminal cases and 3541 convicts for crimes against officials of the justice system.[136] Criminal offenses against the judge occupy a small place in the totality of criminal offenses against the justice system.

Thus, for the period of 15 years that has been object of our study, criminal offenses against the judge occupy about 5% of the total volume of cases (113) against the justice system.[137] Whereas, the convicts (98) for these criminal offenses occupy an even smaller number.[138] They account for about 2.7% of the total volume of criminal offenses against justice. system.[139]

Figure 4

Number of cases and convicts by the Court of First Instance in the Republic of Albania for criminal offenses against a judge in the years 2004-2018



[135] LIKMETA, E., Albanian Assembly (Parliament) between Tradition and Development. A Historical-Legal Approach. In: *Journal on European History of Law*, Vol.8, No. 2, 2017, p. 69.

[136] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.

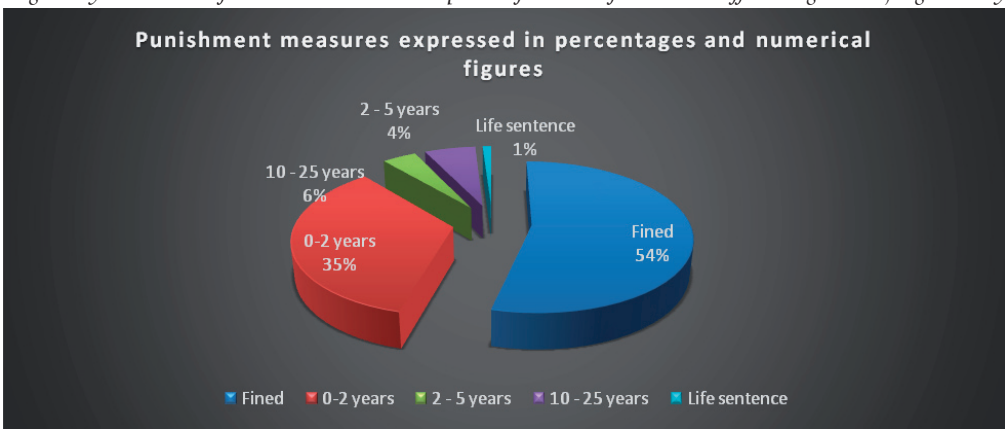
[137] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.

[138] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.

[139] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.

The subject of these criminal offenses are adults, to the extent of 100%.[140] There are no juvenile convicts. Also, from the collection of statistical data of the Ministry of Justice, it results that male perpetrator of criminal offenses against the judge occupy the largest number of convicts. They account for about 86% of the total volume of convicts for this group of criminal offenses.[141] Whereas, female perpetrators of criminal offenses against the judge occupy only 14% of their total volume.[142] Imprisonments of 5-10 years and 25-35 years have never been applied for criminal offenses against a judge.[143] The sentence of life imprisonment was applied only to one convict in a decision (case).[144]

Figure 5
Types of punishment given by the Courts of First Instance in the Republic of Albania for criminal offenses against a judge in the years 2004-2018



There are no juvenile or female convicts for the criminal offense of "Murder of public officials" provided by Article 79 /a of the Criminal Code. They are all adult males.[145]

Also, the executive power should increase institutional efforts in the near future by positively influencing the taking of appropriate measures such as increasing institutional capacity in collecting and analyzing statistical data. Especially, for this category of criminal offenses, among the statistical indicators collected must be included the number of people injured, sorted by professional sphere and not in their entirety as "public" or "state" officials. This would help not only in reflecting in the statistical yearbooks the real number of convicted persons for each crime figure provided by Article 79 / a; 316; 317; 318 of our Criminal Code, but for all the crimes provided by the Criminal Code. This is one of the secure ways in understanding the crime situation in Albania and correctly orienting the state policy in this field.

[140] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[141] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[142] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[143] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[144] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on date 11. 3. 2021.
[145] REPUBLIC OF ALBANIA, the Ministry of Justice, Tirana, *Annual Statistics 2004-2018.* Furthermore: https://drejtesia.gov.al › statistika, accessed online on 11.3.2021.

Christian Baldus, Giovanni Luchetti, Massimo Miglietta (a cura di)

Prolegomena per una palingenesi dei libri 'ad Vitellium' di Paolo

Alessandria: Edizioni dell'Orso, 2020, viii+420 p.

The reviewed book *Prolegomena per una palingenesi dei libri 'ad Vitellium' di Paolo* [Opening Studies for Reconstruction of Paulus' Books "On Vitellius"] is a collective monograph, which deals with a very specialized topic within the law of succession in the Justinian's Digests or Pandects. Sometimes, such collective monographs tend to resemble rather a conference proceeding on various topics; however, this is not the case, as the book provides detailed analyses of their common topic in a manner comparable with books which are written by a single author (we might say that the co-authorship of more people is most transparent from the uncoordinated quotation marks, as the principal term of the book is sometimes written as " *libri 'ad Vitellium'* " and sometimes as "*'libri ad Vitellium'* "). Already the title of the book reflects the complexity of the work by using the Greek expressions which have specific meaning and which can not be translated easily into any language – if we translate "*prolegomena*" as "*opening studies*", it does not mean that the book is just a brief introduction to the topic, because it is exactly the opposite as the respective chapters provide as detailed information as possible. Thus, the title represents rather *topos modestiae* in combination with awareness that most of the conclusions can be – due to the lack of reliable (and mostly even preserved) sources –always questioned or interpreted in a slightly different way.

Following the introduction, the book contains fourteen chapters written by sixteen authors – both renowned professor and young scholars, some of them even, Ph.D. students at the time of the text submission. This however does not affect the quality of the book. The text is accompanied by a very practical registers of things (p. 391) and names (p. 401), as well as by a list of sources (p. 405), among which are listed not only the most usual juridical ones, but also epigraphic, papyrological, etc. sources).

Giovanni Luchetti in *Introduzione* [Introduction] (p. v–vi) briefly describes the scope of the book, which deals with Vitellius' relation to other famous lawyers: Sabinus, Paulus, and many others. The topic of the books "*ad Vitellium*" is the law of succession – but the reviewed book is in principle not examining the legal regulation itself (although some chapters do it), as it rather analyses the history of the text – which can in turn be a basis for further analyses of its meaning.

Gloria Viarengo in *I commentari di giuristi romani intitolati a persone con particolare riferimento all'opera di Paolo* [The Comments of Roman Jurists Addressed to a Person with Particular Reference to the Work of Paulus] (p. 1–30) opens the book by overview of works addressed to a jurist (p. 4) – apart from the ones titled "*ad [aliquem]*" (such as "*ad Vitellium*"), the works titled "*ex [aliquo]*" (such as "*ex Cassio*") are listed. She examines the relationships between/among respective lawyers; most attention is paid to the works "*ex Plautio/ad Plautium*".

Tommaso Beggio in *Vitellius: lo 'status quaestionis' e prospettive* [Vitellius: the "State of Research" and Perspective] (p. 31–56) examines the personality of Vitellius – a lawyer, about whom we have only indirect mentions in the works of other authors (mainly Sabinus and Paulus). Already Ferrini mentions him as a lawyer who is author of collection of responses, whereas Baviera suggests, that Vitellius might not been an author of responses (*giureconsulto*), but just a summarizer of others (*semplice referente*).

Pietrangelo Buongiorno in *Ipotesi su Vitellio* [Hypotheses on Vitellius] (p. 57–79) searches with whom we can identify the Vitellius who is mentioned in the Digests, as there are more possibilities. First possible identification could be P. Vitellius, who worked in imperial administration (*procurator rerum Augusti*) and was a grandfather of A. Vitellius (the third of short-living emperors after Galba and Otho). However, it seems rather unlikely, although we can not exclude him for sure. But there is also other possibility: L. Vitellius, a consul three times, who participated in the legislation when he was in the office (if he did not elaborate the proposals etc. himself, he was surely in touch with their application).

Fabiana Mattioli in *I libri di Sabino 'ad Vitellium': un primo approccio ai contenuti, alle caratteristiche dell'opera e agli aspetti problematici* [The Sabinus' Books "On Vitellius": a First Approach to the Contents, to the Characteristics of the Work and to the Problematical Aspects] (p. 81–112) examines mainly the fragments from Paulus' books On Vitellius from 20th and 22nd Ulpianus' book On Sabinus. She further deals with the question (which is dealt with in several other chapters of the book reviewed as well) whether the title "On Vitellius" means that Sabinus commented the juridical work of Vitellius, or whether the former dedicated his work to the latter; another possibility could be also that Vitellius was an addressee of the text (as is suggested in the previous chapter by Buongiorno).

Enrico Sciandrello in *I libri XX–XXII del commentario ulpianeo 'ad Sabinum': per un confronto con la struttura dei 'libri ad Vitellium' di Paolo.* [The Books XX–XXII of the Ulpianus' Commentary "On Sabinus": In Confrontation with the Structure of the "Books On Vitellius" by Paulus] (p. 113–130) further develops the analysis of Ulpianus' work On Sabinus from the previous chapter. He notices that Vitellius is mentioned in 20th and 22nd of Ulpianus' books On Sabinus, but not in its 21st book. The book 20 deals

with legacy of gold and silver, and of land with equipment, while the book 22 deals with legacy of things which were prepared for wife, and of alimentation (*penus*). Parallels can be seen with the works of Pomponius and Paulus. These parallels might lead us to reconsider the order of topics in On Vitellius by moving legacy of gold and silver behind the legacy of equipment.

Paola Biavaschi in *Cassio Longino, Aristone e le 'Notae apud Vitellium': ipotesi su D. 33. 7. 12.27 e D. 33. 9. 3.1* [Cassius Longinus, Aristo, and the "Notes at Vitellius": Hypotheses on D. 33. 7. 12.27 and D. 33. 9. 3.1] (p. 131–151) analyses the bequest of land with equipment (which was already mentioned in the previous chapter), or to be more precise, the problematics is the distinction between the land with equipment (*cum instrumento*) and equipped (*ut instructus*). The key point of her chapter is the meaning of the word "*notat*". While it seems likely in the first case (D 33. 7. 12.27), that Cassius really wrote the work named "*Notae*", it can be concluded on the contrary in the second case (D 33. 9. 3.1), that Aristo did not wrote such a work and "*notat*" is in this case used as a general word for giving opinion.

Ivano Pontoriero in *L'uso delle opere di Sabino nella giurisprudenza antoniniana* [The Use of the Sabinus' Works in the Antoninian Jurisprudence] (p. 153–221) examines the ways how the contents of Sabinus' was accessible for later lawyers. His thoughts were also preserved in works of his pupils Cassius Longinus, Minicius, Fufidius, and Urseius Ferox. Thus, it might seem that further authors knew Sabinus' work only indirectly, as illustrated e.g. by Iulianus' fragments D 19. 1. 24.1 and D 12. 1. 22, where Sabinus' opinion is reproduced by Cassius, and Minicius, respectively. Sometimes, the citation chain is even more complicated, as is the Ulpianus' case D 17. 2. 63.9, in which it is Iulianus, who says, that it was Sextus Pompeius who referred what the meaning of Sabinus was. But there are also cases, where Sabinus is mentioned directly, such as Venuleius' D 21. 2. 75, D 45. 1. 137.5, D 45. 1. 138 pr., and D 46. 8. 8 pr., which most likely stem from Sabinus' books on civil law and on edict.

Philipp Bosch in *Die Chronologie der Werke des Cervidius Scaevola* [The Chronology of the Works of Cervidius Scaevola] (p. 223–244) deals with the work of Q. Cervidius Scaevola, a famous lawyer of the imperial period (not to be confused with Q. Mucius Scaevola from the republican period, who was also several times mentioned in the book reviewed), who was a teacher of Paulus. Thus, Paulus work on Vitellius was influenced by him and Bosch examines the possible importance of Scaevola's Responses for interpretation of the text On Vitellius. He analyses the parallels between Scaevola's Digests and Responses (e.g. D 15. 1. 58 and D 15. 1. 54, which are almost identical, but the former are a little bit more detailed; still, we can not say that the latter are just an epitome, because there are also some extra information, which are not present in the former). Consequently, there might be their common predecessor (as suggests Schulz and Guarino). Similarly, he examines the parallels between the work of Scaevola and Paulus. Considering official proclamations, it might be surprising to found such similar (sometimes practically identical) fragments in the Digests – however it can be explained via Bluhme's "theory of masses" as On Vitellius stems from the edictal mass (but Krüger attributes it into Sabinus' mass, see p. 311), Responses from the Papinianus's mass and Scaevola's Digests from the appendix mass.

Antonio Leo de Petris in *La cronologia dei libri 'ad Vitellium'* [The Chronology of the Books "On Vitellius"] (p. 245–251) deals with the difficult topic of dating – which is difficult because of the scarce relevant information. There are basically two fragments, which enable to date the text. D 4. 4. 47.1 gives us *terminum ante quem*, as it does not reflect the decree of the Senate prohibiting the sale of land of a minor without authorisation of a magistrate (195 AD). D 26. 7. 47.4 renders the time of origin to be in the first years of the reign of Septimius Severus as the testator mentioned in the fragment would not be otherwise *praefectus legionis*, but *praefectus castrorum*. Further specifications are rather uncertain, such as the assumption that "On Vitellius" was written after the death of Q. Cervidius Scaevola, which arise merely from the fact that he is not called "*noster*".

Sebastian Stepan and Matthias Wolter in *Das Archiv des Q. Cervidius Scaevola* [The Archive of Q. Cervidius Scaevola] (p. 253–276) examine the possible existence and impact of Scaevola's archive. Due to the lack of sources, there can not be a clear conclusion even concerning its existence. However, the authors suppose Scaevola's archive might have been similar as the general way of answering and archiving responses (as examined mainly by Talamanca) and the archival practice in Roman province of Egypt. An existing archive could be according to Schulz a source for another work, from which stem both Scaevola's Digests and Responses (see the chapter by Bosch). The authors provide also deep textual analyses of problematical fragments, such as unusual usage of conjunctives with double "*cum*" in D 12. 1. 17 or the precise meaning of "*in disputando adiciebat*" in D 28. 2. 19 pr.

Filippo Bonin in *Tratti formali e stratificazioni testuali nei libri paolini 'ad Vitellium'* [Formal Traits and Textual Stratifications in Paulus' Books "On Vitellius"] (p. 277–305) analyzes various layers of the text. He deals with various fragments – in the beginning it is D 7. 1. 1 (see below the chapter by di Maria) and then D 28. 5. 18 with the unusual word "*tolerabilissimam*": such superlative can not be found in any other place of the Digests (and we may add that it is unknown also for the database Bibliotheca Teubneriana Latina), which might (and might not) be an indication that the case originates from the Scaevola's archive (see the previous chapter by Stepan and Wolter). D 33. 4. 16 examines whether a bequeathed dowry shall be returned twice: it is denied by Scaevola, unless there is a manifest contrary will of the testator – such wording seemed to be unusual to Gradenwitz and Beseler and led them to deem this text to be interpolated. But we can find corresponding conclusion also in D 31.14 pr., where also the will of the testator prevails (in this fragment, *favor libertatis* is mentioned, which again rendered some scholars to deem the text to be interpolated). But Bonin concludes that even though the wording of On Vitellius was modified, it was not substantially changed. Another interesting case is D 34. 2. 32.1, which answers the question whether golden jewels are bequeathed if there is a bequest of gold by quoting the meaning of other lawyers: Gallus, Labeo, and Tubero (we might add, that § 678 and § 679 of Austrian ABGB seems to be just another step in this discussion). Ferrini mentions the possibility of existence of several layers of the text there and that the chain

of citations may (due to its chronological order) originate not from Paulus, but already from Vitellius. On the other hand, the word "*improbat*" (although in positive form "*probat*") and mentioning also the contrary meaning of Labeo might be rather typical for Paulus: we can assume that the text – provided he was not its author – was at least stylistically modified by him.

Robin Repnow and Aaron Stumpf in *Themen in, ad Vitellium' und die aüßeren Systeme der klassischen Jurisprudenz* [Topics in "On Vitellius" and the Exterior Systems of Classical Jurisprudence] (p. 307–352) try to asses, which system of jurisprudence is followed in the books On Vitellius – this would be potentially useful for filling the gaps in the text. It is quite difficult, however, because only 3–6% of On Vitellius are preserved in Justinian's Digests. Another complication consists in the fact that the systematics of the works is partially natural, e.g. the testaments are dealt with prior to legacies. We must also consider that the works tend to follow the prior works and the text of the law. Three systems may be considered – the system of the edict, the system of digests, and the civil law system. The system of edict follows the *edictum perpetuum* (despite its existence as a one-time redacted act can be problematic, see p. 317), the system of digests (not in the sense Justinian, but as a general title of lawyer's systematic work) follows the edict as well, but its other part adds what is not in the edict, the civil law system is based primarily on the work of Sabinus. While attribution of some parts of On Vitellius into the respective systems is relatively easy, it is rather problematical in other cases. Considering the similarities between the system of the edict and the system of digest, as well as the heterogeneity of civil law system, the conclusion can not be clear. Still, the authors' effort to identify the systematics of On Vitellius was outstanding, and the results, which are clearly arranged in tables on p. 348–351 (there is listed only attribution of respective parts to the system of edict and of civil law – the system of digests is omitted probably due to its similarities to the former one), are very interesting.

Sabrina di Maria in *I 'libri ad Vitellium' di Paolo: trattamento e inquadramento de parte dei Compilatori* [The "Books On Vitellius" by Paulus: the Treatment and Incorporation by the Compilers] (p. 353–373) points out that the citations of On Vitellius are (apart form two fragments by Paulus and one by Ulpianus) only indirect. She further examines the systematics of the work (see chapter by Bosch). Subsequently, she examines the relation of On Vitellius and the Fifty Decisions (*Quinquaginta decisiones*) – as an example for this comparison she chose i.a. D 7. 1. 1 on usufruct (which contains the rule "*salva rerum substantia*") and concludes (p. 364) that the authors of the Fifty Decisions read On Vitellius. She also examines C 3. 33. 17 (p. 368), where we can find one of the rare typographic mistakes in the book as its first paragraph ends "*relinqua*" instead of "*relinquatur*".

The chapter *Fra 'prolegomena' e studi ulteriori: l'impatto di alcune tradizioni novecentesche sulla ricerca 'ad Vitellium'* [Between "Opening" and Further Studies: Impact of Some Traditions from the Twentieth Century on the Research of "On Vitellius"] (p. 375–381) by Christian Baldus partially represent conclusion of the book, but it does not only summarizes the previous thoughts about "On Vitellius", but rather provides deep understanding of these. Baldus mentions "enigmatic" nature of the text, which rendered it to stay rather out of attention of the scholars. The principal change of approach there was presented by Schulz with his Types of Work (*Werktypen*) – this approach to reading the juridical text as a literary work enables to understand its lemmatic structure (which is, unfortunately, to large extent lost) and the stratification of the text. Different approach is presented by Wieacker, whose textual grades (*gradini testuali*) deal with the steps of development of the text, which is interconnected with the problematics of the interpolations. Whereas Schulz understand the post-classical period as the time of integration of the text (and he deals with it from the point of view of textual criticism), it is period of simplification and reduction for Wieacker (which is represented by post-classical and byzantine layers of the text). The current prevalence of Wieacker's approach does not mean total negation of Schulz's one, which can be still useful provided it is accommodated according to standards of the modern textual criticism, sc. accepting the existence of intra-classical layers as each "mistake" from the dogmatic point of view does not automatically render the text non-classical – we must always consider the overall context of the work and if the primary aim of the text is obvious, there might be some unimportant inadequacy in its *obiter dictum*. Thus we shall interpret the text in its mutual context (*im Zusammenhang durchinterpretieren*) – such approach can bring new and better understanding of the context, but on the other hand, there is a danger of circularity. The books On Vitellius are a suitable example which shows both advantages of this approach, but also its limits.

Massimo Miglietta in *Zusammenfassende Skizze («Vitellio! Chi era costui?»)* [Summarizing Outlines ("Vitellius! Who Was He?")] (p. 383–387) mentions the circumstances of working on the book reviewed and summarizes its contents, but also briefly explains the position of Vitellius among Roman jurists.

As can be inferred from the previous lines, the reviewed book is not an easy one to read, because its topic is not an easy one to analyse. Still, it contains many inspiring ideas concerning the fragments, which directly or indirectly mention or derive from writings of Roman jurist Vitellius. The book connects fragments, which are otherwise disconnected in the systematics of the Digests, in order to reach better understandings and interpretation of their texts. The editors of the book wanted the book to be as easy to understand as possible for various readers – that is why the respective chapters (apart from the introduction and the two rather concluding ones) are also accompanied by a German or Italian abstracts (the language of abstract being always the opposite of the language of the chapter). Despite this, the book remains rather a difficult one to read due to the complexity of its subject matter. A novice reader in the are of Roman law might be at first glance surprised, that many conclusions are rather hypothetic than really undisputable – however, it perfectly demonstrates one of the typical features of Roman law science: detailed analysis and solution of one problem usually opens further questions to be examined and more opacities to be enlightened.

***Radek Černoch** **

** JUDr. Mgr. Radek Černoch, Ph.D. et, Ph.D., Department of the History of the State and Law, Masaryk University, Brno, Czech Republic.

András Földi (Hg.)

Összehasonlító jogtörténet (Vergleichende Rechtsgeschichte)

4., verb. Aufl. Budapest: ELTE Eötvös Kiadó, 2018, 683 S.

„Und wenn Du ganz dich zu verlieren scheinst,
Vergleiche Dich! Erkenne, was Du bist!"
J. W. von Goethe: *Torquato Tasso* (1790)
[Antonio zu Tasso; Aufzug V, Auftritt 5].

1. Einleitung, Angaben, Methodik und Methodenkritik

I. Die als Sinnspruch dieser Buchbesprechung ausgewählte Wendung von Goethes *Antonio* aus seinem Schauspiel „*Torquato Tasso*" zeigt uns nicht nur eine der ewigen Wahrheiten alltäglichen menschlichen Lebens, sondern auch der eminente Ansatz oder Ausgangspunkt ubiquitärer wissenschaftlicher Forschung, der mir in der geschichtlich rechtswissenschaftlichen Komparatistik eine besondere Geltung zu haben scheint.

Vergleichende Rechtsgeschichte ist schon seit mehr als zweihundert Jahren *nicht* als eine schlichte *Kombination von Rechtsgeschichte und Rechtsvergleichung* betrachtet worden (siehe Feuerbachs Konzept, unten IV). Dieses Konzept befasst sich mit einem Ziel, eine sog. *universelle Rechtswissenschaft* – mit einem halben Jahrhundert später die „*allgemeine Rechtslehre*" („*General Jurisprudence*" [1]) – durch die neue Methodik erreichen zu können. Die bekannten und mengenmäßig riesengroß scheinenden Ergebnisse dieses fast unmöglichen Denkansatzes, die in der Tiefe in einigen Fällen für zweifelhaft gehalten werden können, wurden bereits im 19. Jahrhundert herausgebracht. Nach und neben der Richtung von *Rechtsethnologie*, ging die sog. „westliche" Jurisprudenz des frühen 20. Jahrhunderts dann zur *Vertiefung*, *nicht* zur *Verbreiterung* dieser Konzeption über (siehe z. B. die *scienza del diritto universale comparato* [2] und die Wendung von *législation comparée* zur anwendungsbezogenen Rechtsvergleichung [3]), dann verstärkte sich der Anspruch der *Funktionalität*, d.h. die *per se* juristischen Nützlichkeiten in diesem harten Forschungsgebiet übertreffen zu können. In den letzten Jahrzehnten unseres „kurzen Jahrhunderts" [4] und um die Jahrhundertwende wurde dann der Begriff von vergleichender Rechtsgeschichte in einer wieder abgetrennten Form Rechtsgeschichte und Rechtsvergleichung, die laut *Hein Kötz* als Zwillingsschwestern und Hölzer gleichen Stammes betrachtet werden sollen [5], neben der Rechtsdogmatik als zwei verschiedene Zwangselemente der juristischen Wissenschaftlichkeit transformiert, wie es *Reinhard Zimmermann* feststellte [6].

---

1 *Henry James Sumner Maines* (1822–1888) Lehrstuhlnachfolger, *Frederick Pollock* (1845-1937) unterstrich in seiner Abschiedsvorlesung von *Corpus Chair of General Jurisprudence, Oxford* im Jahr 1903: "If there is anything we have learnt from Sir Henry Maine, it is that intimate alliance between comparative and historical research is not only natural and desirable, but necessary for either branch of work being efficiently done." Siehe F. Pollock: *The History of Comparative Jurisprudence*, in: Ders.: Essays in the Law, London 1922, 1–30, 4.

2 Siehe dazu G. Del Vecchio: *Sull'idea di una Scienza del Diritto universale comparato* [Comunicazione letta al Congresso filosofico di Heidelberg il 4 settembre 1908], 2. Aufl., Torino 1909, *passim*.

3 Siehe dazu kürzlich S. Vogenauer: *Rechtsgeschichte und Rechtsvergleichung um 1900. Die Geschichte einer anderen »Emanzipation durch Auseinanderdenken«*, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht 76/4 (2012) [Reinhard Zimmermann zum 60. Geburtstag], 1122–1154, 1130–1133.

4 Der Historiker *Iván T. Berend* [von 1990 bis 2015 *Distinguished Professor* am *Department of History* der UCLA, von 1993 bis 2005 Leiter des *Center for European and Eurasian Studies*] hielt unser letztes Jahrhundert fürs „kurze 20. Jahrhundert": Jahrhunderte seien als Einteilung historischer Epochen denkbar ungeeignet, da sich geschichtliche Ereignisse nicht an Jahreszahlen halten. Sein Konzept wurde dann von *Eric Hobsbawm* (1917–2012), ein marxistisch orientierter britischer Historiker mit sozial- und wirtschaftshistorischen Schwerpunkten, weltweit verbreitet, wer die Phrase in seinem populären, jedoch wissenschaftlich viel umstrittenen Buch *The Age of Extremes: The Short Twentieth Century, 1914–1991*, New York 1994 verwendet hatte. Siehe dazu die stark kritische Besprechung von J. B. De Long: *Low Marx: Eric Hobsbawm's Age of Extremes*, in: J. Bradford De Long's Working Papers 131 (1995) University of California at Berkeley, Economics Department.

5 Siehe H. Kötz: *Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?* In: Juristenzeitung 47/1 (10. Januar 1992) 20–22, 20. Vogenauer bestreitet jedoch die erstere Feststellung über Zwillingsschwesternschaft von Kötz siehe Vogenauer, *Rechtsgeschichte und Rechtsvergleichung* (Fn. 3), S. 1154 Fn. 157.

6 *Stefan Vogenauer* schrieb in seinem *Reinhard Zimmermann* gewidmeten Aufsatz, der im Festheft der Rabels Zeitschrift im Jahr 2012 anlässlich des sechzigsten Geburtsages des Jubilars veröffentlicht wurde, dass Zimmermann „*gelungene Rechtswissenschaft*" als Einheit von Rechtsdogmatik, Rechtsgeschichte und Rechtsvergleichung verstehe. Siehe Vogenauer, *Rechtsgeschichte und Rechtsvergleichung* (Fn. 3), 1122f.

Diese eine Art irrwitzig kurz gefasste Umwandlungsgeschichte dieses Gebiets der Rechtswissenschaft, wenn vergleichende Rechtsgeschichte entweder in ihrer einheitlichen Form oder in ihrer verschiedenartig[7] kombinierten Gestalt von abgesondert berücksichtigender Rechtsgeschichte und Rechtsvergleichung überhaupt als selbständiger Bereich unserer Disziplin betrachtet werden kann, sollte zeigen, dass es übermenschlicher Kräfte bedarf, um dieses Gebiet in einem einzigen Band komprimieren zu können, insbesondere, wenn dieses Werk als Universitätslehrbuch eines Wissenschaftsgebiets dienen soll, das einigen Ansichten nach als systematische Zusammenstellung aller wissenschaftlichen Erkenntnisse einer Disziplin betrachtet werden muss. Herausgeber und Verfasser des ungarischen Lehrbuchs waren sich dessen in deklarierter Weise bewusst.

II. Das Lehrbuch wurde als zwölftes Stück der Reihe von „*ELTE Jogi Kari Tankönyvek*" [„Lehrbücher der Juristischen Fakultät der Eötvös-Loránd-Universität (kurz ELTE), Budapest, hrsg. von *István Varga*] veröffentlicht.

Der Herausgeber des Lehrbuchs war *András Földi*, berühmter ungarischer Romanist, der auch als Mitglied (34%) der Autorenarbeitsgruppe neben *Miklós Kelemen* (23%), *Károly Kisteleki* (16%), *Eszter Márkus* (9%), *Balázs Rigó* (10%) und *Iván Siklósi* (8%) aktiv an der Erstellung des Bandes mitgewirkt hat. Hinsichtlich aller Kapitel oder größerer zusammenhängender Themenbereiche, die in verschiedenen Abschnitten erörtert wurden, wurden eine Bibliografie mit einem Gesamtumfang von 65 Seiten zusammengestellt. Der Band beinhaltet auch eine umfängliche, didaktisch gut hergestellte Sammlung von staatsgeschichtlichen Organogrammen (S. 655–675), die von *Szilvia Nemes* und *Balázs Rigó* unter fachlicher Anleitung von *Miklós Kelemen* und *Károly Kisteleki* erstellt wurden. Ohne Hinsicht auf die Anzahl dieser Seiten beträgt die Seitenzahl des Lehrbuchs etwa 550 aktive Seiten, wovon die Verfasser die oben eingeklammert erwähnte Proportion schrieben.

Da der Band in erster Linie als Lehrbuch gedacht ist, wurde die Typografie seines Textes klar entwickelt: Grundbegriffe und ihre Definitionen sind fett, Begriffe und Ausdrücke in Fremdsprachen kursiv gesetzt.

Im Zusammenhang mit den Auflagen des Buches ist darauf hinzuweisen, dass die zweite Auflage (2014) laut Vorwort neben allgemeinen, kleineren Verbesserungen durch die erhebliche Vermehrung der Kapitel zur Geschichte der öffentlichen Verwaltung gerechtfertigt war, während die vierte Auflage (2018) neben der weiteren Verfeinerung des Textes auf die Reform des französischen *Code civil* im Jahr 2016 hinweist.

III. Der von der Autorenarbeitsgemeinschaft vertretende Leitspruch („*Mission Statement*") des Lehrbuchs wurde im Vorwort der ersten Auflage des Bandes (2012, S. 15–19) von dem Herausgeber wie folgt zusammengefasst.

Ein Rechtshistoriker solle sowohl ein ausgezeichneter Historiker als auch ein hervorragender Jurist sein: Er oder sie solle über eine gründliche Kenntnis der rechtshistorischen Primärquellen und, soweit möglich, der diese Quellen analysierenden Sekundärliteratur verfügen, daneben müsse auch mit den wichtigsten wirtschaftlichen, sozialen und kulturellen Faktoren und Fakten jeder historischen Periode vertraut sein, die die Entwicklung des Rechts beeinflusst haben.

Die grundsätzliche Frage sei, welche Art von zusätzlicher fachlicher Arbeit die aufeinanderfolgenden Beschreibungen der Rechtsgeschichte verschiedener Staaten und Völker zu einer vergleichenden Rechtsgeschichte macht. Die vergleichende Rechtsgeschichte, als Teil der rechtlichen Komparatistik im weiteren Sinne, solle die Identitäten, Ähnlichkeiten, Unterschiede und unermesslichen Divergenzen zwischen verschiedenen Rechtssystemen und sozialen Normen erforschen, und deren historische Ursachen aufzeigen, insbesondere ob die Ähnlichkeiten und Übereinstimmungen zufällige Parallelismen oder das Ergebnis von einigen Arten der sog. Derivation – wie die Rezeption, der Modellumlauf oder die Konvergenz) seien.

Der Hauptzweck des Buches sei es, einen Kursstoff den Jurastudenten hinsichtlich des erst im Jahr 2010 eingeführten neuen zweisemestrigen Pflichtfachs „*Vergleichende Rechtsgeschichte*" an der Staats- und Rechtswissenschaftliche Fakultät der Eötvös-Loránd-Universität (ELTE, Budapest), welches das frühere Fach von „Universeller Staats- und Rechtsgeschichte" ersetzt habe, zur Verfügung zu stellen. Im bisherigen Fach sei den Studenten ein primär chronologischer Lehrplan vermittelt worden, der sich auf die sog. „äußere Geschichte" der großen antiken, mittelalterlichen und neuzeitlichen Staaten und Rechtsordnungen konzentriert habe. Dieses Fach habe sich nur in geringem Maße mit der Geschichte der Institutionen und Dogmatik des Rechts („innere Rechtsgeschichte") beschäftigt. Das Lehrbuch, das meines Erachtens auch als Handbüchlein betrachtet werden kann, setze den Akzent jedoch auf die innere Rechtsgeschichte. Dementsprechend sei der Aufbau des Bandes dogmatisch gegliedert: Er behandle zunächst die Geschichte des öffentlichen Rechts, dann die Geschichte des Strafrechts und des Strafverfahrens, dann das Privatrecht und schließlich die Geschichte des Zivilverfahrens.

Als Vorbild habe den Autoren vor allem *Helmut Coings* zweibändiges Werk „*Europäisches Privatrecht*" gedient. Im Gegensatz zur Tradition der vorherigen Ausbildung konzentriere sich das Buch auf die deutsche, französische und englische Staats- und Rechtsentwicklung in der Neuzeit, wobei die antike und mittelalterliche Rechtsgeschichte mit Schwerpunkt auf die für das moderne Recht relevante Dogmengeschichte im Vordergrund stehe.

Die Autoren nahmen in noch geringerem Umfang die historische Darstellung anderer Rechtskulturen vor (wie zum Beispiel die ost- oder außereuropäischen Rechtsordnungen), und klammerten ganze Rechtsgebiete aus, während einige bevorzugte Themen auf

[7] „Die Universalrechtsgeschichte, die man auch vergleichende Rechtswissenschaft zu nennen pflegt, hat die Aufgabe, womöglich die Rechte aller Völker zu erforschen, der lebenden wie der toten." Zitat von J. Kohler: *Rechtsphilosophie und Universalrechtsgeschichte*, in: Ders. (Hg.): Holtzendorffs Enzyklopädie der Rechtswissenschaft in systematischer Bearbeitung, 7. Aufl. Bd. I, Leipzig/Berlin 1915, 1–63, 16. Siehe dazu Pollocks Meinung, wonach: „No doubt the method is important and not the name. It makes no great difference whether we speak of historical jurisprudence or of comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law." Siehe Pollock, *The History of Comparative Jurisprudence* (Fn. 1), 4.

theoriegeschichtlichem Niveau, sehr detailliert behandelt werden. Selbst die Autorenarbeitsgemeinschaft sehe die thematischen Proportionen des Buches als diskutabel an. Die Autoren verstehen das Lehrbuch als ein ständig zu entwickelndes Werk, ähnlich wie die Autoren mittelalterlicher Sammlungen des kanonischen Rechts.

Bei der Entwicklung der Themen sei es auch notwendig gewesen, die bisherigen Forschungsergebnisse der Autoren zu berücksichtigen. Der Herausgeber bezieht sich endlich auf die Idee von *Wilhelm von Humboldt* und *Loránd Eötvös*, die er auch heute noch für aktuell hält: Es sei eine lange und edle Tradition, dass das Curriculum der universitären Lehre durch die akademischen Leistungen der Universitätsdozenten selbst geprägt wird.

IV. „Die reichste Quelle aller Entdeckungen in jeder Erfahrungswissenschaft ist Vergleichung und Combination. […] aus der Vergleichung der Geseze (*sic*!) und Rechtsgewohnheiten der verwandtesten, wie der fremdartigsten Nationen aller Zeiten und Länder, die Universal-Jurisprudenz, die Gesezwissenschaft (*sic*!) ohne Beinamen, welche aber jeder besonders benannten Gesezwissenschaft erst ihr wahres kräftiges Leben verleiht." – schrieb *Paul Johann Anselm von Feuerbach*[8] im Jahr 1810. Sein Konzept über eine Universaljurisprudenz hatte schon zwei anverwandte geistesgeschichtliche Grundlagen, schrieb *Heinz Mohnhaupt*[9]: die eine sei die vergleichende „universalgeschichtliche" Annäherung gewesen, welche sich in den Geschichtswissenschaften am Ende des 18. Jahrhundert schon verbreitet habe, die andere sei aber die Universaljurisprudenz gewesen, die in der Tradition der Aufklärung als Erfahrungswissenschaft in Begriffe gekleidet worden sei.

Das Ziel der damaligen *Universalgeschichte* war nicht nur die Darstellung der Entwicklung der Menschheit, sondern auch die Erläuterung der Gesetzlichkeiten dieser Entwicklung: „Universalrechtsgeschichte" als Teil der „Universalgeschichte" betrachtet wurde. Schon *Christian Friedrich Mühlenbruch* (1785–1843) zeigte, dass das Konzept dieser „Universalität" hinsichtlich menschlicher Geschichte nicht nur chronologisch und im geografischen Sinne zu nehmen sei, sondern sie die „Geschichte der politischen Verhältnisse, der Verfassung, der Gesetzgebung und der Cultur, aller Zeiten und Völker" umfasse[10].

Andernteils brach die *Universaljurisprudenz* mit der abstrahierend metaphysischen Methodik des Naturrechts, und konzentrierte sich auf die empirischen und positiven Quellen allgemeiner rechtlicher Strukturen. Diese Informationsträger waren die weitestgehenden Angaben sowohl geltender Rechte als auch historischer Erfahrungen deren Entwicklung. In der Universaljurisprudenz wurde denn eine eigenartige „experimentalwissenschaftliche" Kombination von Rechtsvergleichung und Rechtsgeschichte konzipiert.

Diese Überlegungen sind dem hier vorgestellten Lehrbuch nicht fremd. Die methodische und doktrinäre Einführung (S. 21–36), die vom Herausgeber *Földi* verfasst und mit Angaben reich dokumentiert wurde, macht auf eine Reihe von Problemen der Methodik aufmerksam. Eine davon ist, dass es sehr kompliziert und aufwändig zu sein scheint, in diesem Bereich etwas Neues anzubieten, insbesondere auf Lehrbuchniveau[11].

Als ob die unvergänglichen Verse von *János Arany* (1817–1882)[12], die in Ungarn auch in wissenschaftlichen Fragen oft zitiert sind, zum Leben erwacht wären:

„Das menschliche Leben folgt einem Doppelweg:
Praxis ist sein eine, Theorie sein andrer Steg.
Scheint die Theorie diesmal irgendwie schlammig,
wollen wir mal seh'n das Reiseziel der Praxis."[13]

Das janusköpfige Wesen dieser eigenartigen Kombination von Geschichte und Vergleichung der Rechte werden sowohl in deren Ergebnissen als auch in der Methodik der Vergleichenden Rechtsgeschichte widerspiegelt. Die doppelgesichtigen Besonderheiten dieses Gebiets der Rechtswissenschaften, dessen Selbständigkeit manchmal auch bezweifelt wurde, macht nicht nur nötig, sondern, meines Erachtens, unerlässlich, dass Komparatisten einen Anlass zur tieferen Untersuchung der Methodenlehre ihrer Wissenschaften finden zu können.

Vielleicht irrte sich *Gustav Radbruch* (1878–1949) in diesem Zusammenhang, als feststellte: „Wissenschaften, die sich mit ihrer eigenen Methodenlehre zu beschäftigen Anlaß haben, kranke Wissenschaften sind."[14]

---

[8] Siehe P. J. A. von Feuerbach: *Blick auf die teutsche Rechtswissenschaft* (1810), in: Ders., Kleine Schriften vermischten Inhalts, Nürnberg 1833, 152–177, Zitat aus S. 163. Die positive Kritik an Feuerbachs Konzept siehe bei Vogenauer: *Rechtsgeschichte und Rechtsvergleichung* (Fn. 3) 1125–27.

[9] Siehe H. Mohnhaupt: *Universalgeschichte, Universal-Jurisprudenz und rechtsvergleichende Methode im Werk P. J. A. Feuerbachs* (1991), in: Ders., Historische Vergleichung im Bereich von Staat und Recht, Gesammelte Aufsätze, Frankfurt am Main 2000, [=Ius Commune Sonderheft 134] 437–470, 440–459.

[10] Siehe Zitat von C. F. Mühlenbruch: *Lehrbuch der Encyclopädie und Methodologie des positiven in Deutschland geltenden Rechts, Zum Gebrauch academischer Vorlesungen*, Rostock/Leipzig 1807, § 291, S. 485.

[11] Siehe jüngstens H. Mohnhaupt: *Historische Vergleichung als Erkenntnismethode. Die vergleichende Beobachtung von Recht und Staat im 18. Jahrhundert*, in: Právněhistorické Studie 51/1 (2021) 31–50.

[12] *Arany* war ein der allergrößten Dichter Ungarns, und dazu Mitglied und Generalsekretär der Ungarischen Akademie der Wissenschaften. Seine Übersetzungen aus dem Lateinischen, Griechischen und Deutschen sind unsterblich und er war vielleicht der wichtigste ungarische Shakespeare-Interpret dazu.

[13] Die angeführten Verse kommen aus dem Zweiten Gesang seines Gedichts *„Die Zigeuner von Nagyida"* (1851). Diese schlichte Übersetzung ist mein eigener Versuch.

[14] Siehe G. Radbruch: *Einführung in die Rechtswissenschaft*, 12. Aufl., Stuttgart 1969, 253.

2. Inhaltliche Übersicht und kritische Besprechung

I. Zuerst wird der Inhalt jedes Abschnittes dieses umfangreichen Bandes kapitelweise mit Angaben des Autors und der Seitenzahlen des jeweiligen Kapitels vorgestellt. Im zweiten Teil dieses Abschnittes werden dann einige der zahllosen interessanten vergleichend-rechtsgeschichtlichen Fragen, die im Buch diskutiert werden, kritisch kommentiert. Bei Auswahl der kommentierten Themen soll berücksichtigt werden, dass der Autor dieser Rezension ein Zivilist mit zusätzlichen Schwerpunkten in Romanistik, Gräzistik und Privatrechtsgeschichte ist.

1. In der umfangreichen Einleitung[15] gibt *András Földi* einen Überblick über die Geschichte der Disziplin der vergleichenden Rechtsgeschichte. In Kapitel 1 über *Epochen und Rechtsfamilien*[16] untersucht er neben den Epochen der Rechtsgeschichte und der Einteilung der Epochen auch die historische Retrospektivität des modernen Staats- und Rechtsbegriffs, und stellt dann die Ordnung der vorstaatlichen und vorrechtlichen Gesellschaften sowie einige Aspekte der Entwicklung von Staat und Recht in der Antike und im Mittelalter dar. Das Thema der Staats- und Rechtsentwicklung in der Neuzeit wird in zwei Teilen behandelt: die Zeit bis zu den Kodifikationen und die Zeit nach dem 19. Jahrhundert. Der zweite Teil des Kapitels befasst sich mit der Einteilung der Rechtsfamilien und geht, im Rahmen des Lehrbuchs bleibend, von einer romanischen (*civil law*) und einer angelsächsischen (*common law*) Rechtsfamilie aus und verweist kurz auf andere Rechtssysteme außerhalb dieser Klassifizierung.

2. Kapitel 2 des Bandes ist ein zweiteiliges Werk von *Miklós Kelemen* über *Grundlagen und Auslegung des europäischen öffentlichen Rechts*[17]. Im ersten Teil werden die Charakteristika des öffentlichen Rechts des Römischen Reiches dargestellt, wobei die Begriffe von Staat und *ius publicum*, der Prinzipat und schließlich das sog. Spätrömische und Byzantinische Reich untersucht werden. Der zweite Teil analysiert den Staat des mittelalterlichen Europas, der nicht auf einer öffentlich-rechtlichen Grundlage aufgebaut wurde, und erörtert die historischen Grundlagen und das Wesen der feudalistischen Staatsregierung bzw. deren „öffentlich-rechtliche" Elementen, und auch die Wurzeln der öffentlich-rechtlichen Hoheitsgewalt.

3–6. Die Kapitel von 3 bis 6 wurden von *Károly Kisteleki* verfasst. Diese Kapitel folgen die Logik der *Drei-Elemente-Lehre* von *Georg Jellinek* (1851–1911), wonach der Staat ein soziales Gebilde sei, dessen konstituierende Merkmale ein von Grenzen umgebenes Territorium (*Staatsgebiet*), eine darauf als Kernbevölkerung ansässige Gruppe von Menschen (*Staatsvolk*) sowie eine auf diesem Gebiet herrschende *Staatsgewalt* kennzeichnen.

Das dritte Kapitel über *Geschichtliche Typen und Theorien des Staates und der Staatsorganisation*[18] wurde in vier Untertiteln gegliedert. Zunächst werden die Entstehung und Entwicklung der sog. Korporationsidee untersucht. Aus seiner Sicht die Ständeordnung solle als Verwirklichung der Korporationsidee angesehen werden. Im Anschluss an die Entwicklung des modernen Staatsbegriffs wird die Entwicklung des Staatbegriffs im Mittelalter und in der Neuzeit zusammengefasst. Er diskutiert den „Europabegriff" im Zusammenhang mit den territorial-regionalen Aspekten der modernen europäischen Staatsgeschichte, dem Kontext der Kategorien von West- und Osteuropa sowie dem System von Mittel-Osteuropa, Russland und Balkan. Schließlich wird auf die west- und osteuropäische Ideengeschichte zur Entwicklung von Staatskonzepten eingegangen.

Im Kapitel 4 werden *die Grundbegriffe der menschlichen Gemeinschaft* vorgestellt, die den modernen Staat ausmachen*: die Nation und die Bürger*[19]. Unter den Konzeptionen der Nation untersucht er die Ursprünge der politischen und kulturellen Nation, das Konzept der Nation vor der Französischen Revolution und die wissenschaftlichen Theorien über Wesen und Natur der Nationen. Der zweite Teil des Kapitels fasst die Modelle der Staatsbürgerschaft zusammen, die historisch gesehen Europa dominiert haben: das französische, das deutsche und das britische Modell.

Die *Entwicklung der staatlichen Souveränität und die frühen und reifen Typen des modernen Staates* sind die Themen von Kapitel 5 des Bandes[20]. Es beginnt mit der Entwicklung der mittelalterlichen Machtvorstellungen, gefolgt von der Ausgestaltung der verschiedenen Souveränitätstheorien. Anschließend werden die frühen und reifen Typen des modernen Staates zusammengefasst, indem die institutionengeschichtlichen Prämissen und historischen Modelle der frühneuzeitlichen Staatstypen vorgestellt werden.

In drei Untertiteln befasst sich Kapitel 6[21] mit der *Entwicklungsgeschichte des Verfassungsdenkens*. Zuerst werden die ersten Erscheinungsformen des verfassungsrechtlichen Denkens behandelt (die Entwicklung der Verfassungsterminologie, die ersten Spuren des verfassungsrechtlichen Denkens, die frühesten verfassungsrechtlichen Regeln). Danach beschäftigt sich der Verfasser mit den verschiedenen Typen klassischen Verfassungsprozesses (Entwicklung des US-amerikanischen, französischen, englischen und deutschen Verfassungssystems). Der letzte Paragraf geht mit Konstitutionalismus und Rechtsstaatlichkeit um (das deutsche Konzept des Rechtsstaats, der Wohlfahrtsstaat und die angelsächsische *„Rule of Law"*).

7–11. Der Verfasser der folgenden fünf Kapitel war *Miklós Kelemen*. In Kapitel 7[22] fasst der Autor den thematischen Zusammenhang zwischen *Regierung und öffentlicher Verwaltung* sowie die Entwicklung und die Begriffselemente der öffentlichen Verwaltung

[15] Siehe A. Földi (Hg.): *Összehasonlító jogtörténet* (Vergleichende Rechtsgeschichte), 4., verb. Aufl., Budapest 2018, 21–36.
[16] Siehe Földi (Fn. 15), 37–61.
[17] Siehe Földi (Fn. 15), 67–82.
[18] Siehe Földi (Fn. 15), 85–105.
[19] Siehe Földi (Fn. 15), 107–132.
[20] Siehe Földi (Fn. 15), 133–148.
[21] Siehe Földi (Fn. 15), 155–185.
[22] Siehe Földi (Fn. 15), 191–208.

zusammen. In letzterem wird das Verhältnis zwischen der öffentlichen Verwaltung und dem modernen Staatsverständnis, die Voraussetzungen und Rahmenbedingungen der öffentlichen Verwaltung sowie das Verhältnis zwischen öffentlicher Verwaltung und Machtausübung erörtert. Das zweite Unterkapitel führt den Leser in die Geschichte der Entwicklung moderner öffentlicher Verwaltung ein. Er sieht den Absolutismus als historische Vorgeschichte, dann zeichnet er die Rolle der öffentlichen Verwaltung im System der Gewaltszweige nach, und danach wird aufgezeigt, wie sich die Rolle der öffentlichen Verwaltung wandelte, und wie sich die sog. „leistende Verwaltung" entwickelte. Im letzten Unterabschnitt diskutiert der Autor die öffentliche Verwaltung als Organisation und spricht über neue Interpretationen traditioneller Methoden der Regierung und Organisationsmethoden moderner öffentlicher Verwaltung.

Kapitel 8 fasst die Entwicklungsgeschichte und die grundlegenden Modelle der *kommunalen Selbstverwaltung*[23] mit Hinsicht auf ihren Beziehungen mit der öffentlichen Verwaltung zusammen. Im zweiten Untertitel beschäftigt sich der Verfasser mit den grundsätzlichen Fragen der lokalen und regionalen Selbstverwaltung (Gemeinde, Stadt, Bezirk, Land).

Das *Verwaltungspersonal und die Entwicklung des Beamtenrechts* wurden im Kapitel 9[24] erörtert. Die ersten beiden Unterabschnitte befassen sich mit den allgemeinen Merkmalen des öffentlichen Dienstes, seinen Begriffen und dem Wesen des Dienstes bei der Wahrnehmung öffentlicher Aufgaben, während in den Abschnitten 3 und 4 die für den öffentlichen Dienst geltenden spezifizierten Rechtsvorschriften und einige besondere Merkmale des öffentlichen Dienstes (Status, Ernennung, Beförderung, Vergütung) vorgestellt werden.

Kapitel 10[25] erörtert *die historischen Elemente der Regulierung öffentlicher Finanzen*. Unter den Merkmalen von traditioneller Finanzverwaltung und Staatsfinanzierung erklärt der Autor die dominante Rolle vom *fiscus* und Einnahmen sowie die außerstaatlichen Lösungen für die Verwaltungsfinanzierung. Anschließend werden die Systeme der direkten Verwaltungsfinanzierung anhand der Grundelemente der spätrömischen Steuerverwaltung und der lehensähnlichen Finanzierung der Verwaltung beschrieben. Dann wird die Entwicklung des Rechts zur Geldablösung von Lehnleistungen (d.h. *adiutorium*, *subsidy* oder *aide*) sowie des Staatshaushalts und des Haushaltsrechts im Kontext der öffentlich-rechtlichen Finanzverwaltung und Verwaltungsfinanzierung untersucht.

In diesem Themenkreis bildet Kapitel 11[26] den letzten Abschnitt *Kelemens*, worin der Verfasser die Verwaltungsgeschichte von öffentlichen Wohlfahrtsdienstleistungen analysiert. Nach einer Beschreibung der allgemeinen Charakteristika der öffentlichen Dienstleistungen wird in diesem Kapitel die Geschichte der Sozial- und Armenverwaltung über die vorwiegend kirchliche Ära traditioneller Armenverwaltung bis hin zu deren behördlichen Phase skizziert. Das Kapitel schließt mit einer Zusammenfassung des historischen Hintergrunds der Gesundheitsverwaltung (Entwicklung des öffentlichen Gesundheitswesens bzw. dessen Organisation und Finanzierung des Gesundheitswesens).

12–13. Kapitel 12–13, die von *Balázs Rigó* verfasst wurden, fassen *die Geschichte des Strafrechts* von Altertum durch Mittelalter (Kap. 12) bis zu Frühmoderne und Neuzeit (Kap. 13) zusammen.

Als Einleitung des Kapitels 12[27] systematisiert der Abschnitt die Fragen von Zweck und Rolle des Strafrechts unter den Rechtszweigen bzw. die Epochen dessen. Innerhalb der altertümlichen Themen skizziert der Verfasser das Konzept des Codex des Hammurapi I, die strafrechtlichen Gesetze des griechischen bzw. römischen Altertums. In einer allgemeinen Charakterisierung des mittelalterlichen Strafrechts erörtert das Kapitel die Dichotomie zwischen öffentlichem und nicht-öffentlichem Strafrecht, die Instrumente des Privatstrafrechts, die barbarische Volksrechte sowie aus dem Kreis nationaler Strafrechte das französische, deutsche und englische Strafrecht und schließt mit einer Einschätzung der Rolle der Kirche bei der Entwicklung des Staatsstrafrechts.

Im Rahmen des *Strafrechts der Frühmoderne und Neuzeit* handelt Kapitel 13[28] sich um deutsches (die *Carolina*), englisches und französisches Strafrecht der frühen Neuzeit und sowohl die Richtungen (*Beccaria* und die klassische Schule, die deterministische Auffassung, die Marburger Schule von *Liszt* bzw. die modernen Richtungen wie *défense sociale nouvelle*) und Kodizes des neuzeitlichen Strafrechts (der *Code pénal*, die Gesetzbücher in Österreich, das bayerische StGB von 1813, das preußische StGB von 1851 sowie der *Codice Zanardelli* von 1890).

14–18. Die folgenden fünf *privatrechtlichen* Kapitel, die sich ums *System des Privatrechts* (Kap. 14), um die *Geschichte der Generalklauseln* (Kap. 15) und ums *Sachenrecht* in drei thematisch getrennten Kapiteln (Kap. 16–18) handeln, wurden vom Herausgeber *András Földi* vervollkommnet.

Im Rahmen der *Privatrechtssystematisierung* (Kapitel 14[29]) fasst Földi die Trennung der Klassen von Handels- und Privatrecht, Institutions- und Pandektensystem sowie monistischen und dualistischen Kodizes in einer weiten Einleitung zusammen, die auch einige Erörterungen über die systematisierenden Kategorien des englischen Rechts beinhalten. Dieses Kapitel umreißt in detaillierter Weise die Entwicklungsgeschichte des Institutionssystems vom römischen Recht bis dessen mittelalterlichen und neuzeitlichen Herausbildung, und macht einen Exkurs über das ABGB, wonach der Abschnitt mit der Zusammenfassung der Entwicklung des Pandektensystems und der Entstehung und Entwicklung vom allgemeiner Teil des Obligationenrechts abgeschlossen wurde.

[23] Siehe Földi (Fn. 15), 211–228.
[24] Siehe Földi (Fn. 15), 231–251.
[25] Siehe Földi (Fn. 15), 255–274.
[26] Siehe Földi (Fn. 15), 277–291.
[27] Siehe Földi (Fn. 15), 295–324.
[28] Siehe Földi (Fn. 15), 325–351.
[29] Siehe Földi (Fn. 15), 355–375.

Kapitel 15[30] beinhaltet Abschnitte aus der Geschichte der *privatrechtlichen Generalklauseln*: die Zusammenfassung über die Generalklauseln im Allgemeinen folgt eine detailliertere Auffassung sowohl von Treu und Glauben als auch vom Verbot sittenwidriger Rechtsgeschäfte.

Der erste *sachenrechtliche* Teil (Kap. 16[31]) befasst sich mit der Ausbildung des Sachenrechts als systematisch selbständige Teil des Vermögensrechts, dann verdichtet die Entwicklung des Begriffs der Sache und des Eigentums.

Der zweite Teil über Sachenrecht (Kap. 17[32]) stellt die geschichtliche Entwicklung der sog. Triade der Eigentümerbefugnisse von Besitz, Nutzung und Verfügung von den römischrechtlichen Wurzeln in der *lex agraria* durch ihre Entwicklung im *ius commune* und in der Pandektistik bis zu ihrem Bild in den modernen kontinental-europäischen Rechtssystemen und in der neuzeitlichen ungarischen Dogmengeschichte dar. Neben dieser Auffassung der sog. positiven Seite des Eigentums behandelt der Abschnitt auch die Entwicklungsgeschichte von Begriff und Schutz des Besitzes.

Im letzten Teil des Sachenrechts (Kap. 18[33]) stellt Földi die Entwicklung der systematischen Einordnung von Modellen der Eigentumsübertragung vor: Beginnt mit einem Ausblick zu antiken Rechten, setzt dann mit den Änderungen des sog. traditionellen Modells im älteren *ius commune* und in der Neuzeit fort, und beendet den Untertitel mit der Darstellung der französischen Variante von Übereignung. Die Unterabschnitte über dogmengeschichtliche Fragen der Ersitzung und eigentumsrechtliche Begriffe nach *common law* schließt Kapitel 18 ab.

19–20. In den folgenden zwei Kapiteln beschäftigt sich *Iván Siklósi* mit einigen Problemen der *Lehre des Rechtsgeschäfts*.

Kapitel 19[34] zeigt einige Bilder aus der Begriffs- und Dogmengeschichte von Rechtsgeschäft und Vertrag vor. Der Verfasser erörtert die *causa* als wesentliche Bedingung beim Vertragsabschluss in Vertragsrechten von „französischem Typ". Er versäumte es nicht, darauf hinzuweisen, dass die französische Vertragsrechtsreform von 2016 die Bedeutung des Themas in Bezug auf die „*cause*" wesentlich verringert hat. Das Kapitel schließt mit einer Einführung in den Vertragsbegriff und die Lehre der *consideration* im englischen Recht.

Im Kapitel 20[35] stellt der Verfasser Abschnitte aus der Dogmengeschichte der Unwirksamkeit der Rechtgeschäfte dar. Der Abschnitt fängt mit der Abgrenzung von nichtexistierenden, unwirksamen (ungültigen: nichtigen und anfechtbaren) und wirkungslosen Rechtsgeschäften an. Danach erörtert die Begriffs- und Dogmenentwicklung von Ungültigkeit (Unwirksamkeit) des Rechtsgeschäfts aufgrund sowohl römischen Rechts bzw. *ius commune* und „prä-pandektistischer" Literatur als auch der Pandektistik bzw. deutschen bürgerlichen Rechts und der Lehre des *Code civil*. Der dritte Untertitel bietet Auszug aus der Geschichte der Verkürzung über die Hälfte an. Viertens erklärt Siklósi die Begriffsgeschichte von rechtsgeschäftlicher Wirksamkeit.

21. Im Kapitel 21[36] untersucht *András Földi* die *Entwicklungsgeschichte der zivilrechtlichen Verantwortlichkeit*. Zunächst werden die Vorläufer des modernen Begriffs im antiken griechischen Denken, um dann die Wurzeln des heutigen Konzepts im römischen Recht zu beschreiben. Nach den mittelalterlichen Ursprüngen des Verantwortungsbegriffs geht er auf dessen Entstehung und Entwicklung in der Neuzeit ein und erörtert dann den Prozess des, wie er es nennt, „Denaturalisierens" des Verantwortlichkeitsbegriffs, der zu seiner extremen Abstraktion und dem Verlust seines ethischen Hintergrunds geführt hat. Der erste Teil schließt mit einer Erörterung moderner, auf anderen Ideen basierender Konzepte der Verantwortlichkeit, wie Haftung oder *liability*. Im zweiten Teil des Kapitels werden die Hintergründe der objektiven und subjektiven Haftung und im letzten Teil die Grundlagen der Vertrags- und Deliktshaftung behandelt.

22–25. Die folgenden vier Kapitel über das *Handelsrecht* wurde von *András Földi* (Kap. 22 und Kap. 23 Teil I) und *Eszter Márkus* (Kap. 23 Teil II und Kap. 24–25) verfasst.

Kapitel 22[37], das in die *Entstehung des Handelsrechts* einführt, erörtert nach einer Einführung in den Begriff und das heutige System des Handelsrechts und seine antiken Vorläufer die Entwicklung des Handelsrechts im Mittelalter. Nach den Umständen seiner Entstehung stellt Földi die Begriffe *ius mercatorum* und *lex mercatoria* vor, dann das Verhältnis zwischen Handelsrecht und *ius commune*. Nach einer Erläuterung der Korporationen und der Handels- und Messegerichtsbarkeit fasst er die Haltung der Legisten und Kanonisten zum Handelsrecht zusammen. Schließlich wird ein historischer Bogen vom Partikularismus zum Universalismus gespannt, der den institutionellen Lösungen mittelalterlichen Handelsrechts folgt.

Im ersten Teil des Kapitels 23[38] über die *Entwicklung des modernen Handelsrechts*, über *die Kodifizierung des Handelsrechts*, erörtert Földi die Vorgeschichte und die Notwendigkeit der Kodifizierung des Handelsrechts. Er geht dann zum Problem des einheitlichen Handelsrechts versus Sonderprivatrecht über, das er mit den Widersprüchen zwischen den sog. subjektiven und objektiven Systemen des Handelsrechts fortsetzt, um zum dritten Problem zu gelangen, das man als Dualismus versus Monismus bezeichnen kann und das sich mit der Frage der Autonomie des Handelsrechts beschäftigt. Abschließend wird ein Überblick über die Entwicklung des

[30] Siehe Földi (Fn. 15), 379–395.
[31] Siehe Földi (Fn. 15), 399–412.
[32] Siehe Földi (Fn. 15), 415–431.
[33] Siehe Földi (Fn. 15), 435–451.
[34] Siehe Földi (Fn. 15), 455–474.
[35] Siehe Földi (Fn. 15), 479–502.
[36] Siehe Földi (Fn. 15), 507–529.
[37] Siehe Földi (Fn. 15), 533–555.
[38] Siehe Földi (Fn. 15), 559–576.

Handelsrechts in England gegeben. Im zweiten Teil des Kapitels schreibt *Eszter Márkus* über die *klassischen Handelsgesetzbücher*. Sie skizziert die Kodifizierung des Handelsrechts im Allgemeinen und analysiert dann den Prozess der französischen und deutschen Handelsrechtskodifizierung (ADHGB, HGB).

In Kapitel 24[39] über die *Handelsgesellschaften* fasst *Eszter Márkus* zunächst den Begriff der Handelsgesellschaften, die Abgrenzungsfragen, die Typen und die Grundsätze ihrer Regelung zusammen und untersucht dann die mittelalterlichen Handelsgesellschaften. Sie beschreibt Handelsgesellschaften detailliert und nach Typ entsprechend den jüngsten Kodifizierungen. In diesem Zusammenhang werden die begrifflichen Elemente, die Haftung der Gesellschafter und die Art der Gründung im Hinblick auf die offene Handelsgesellschaft, die Kommanditgesellschaft und die Aktiengesellschaft zusammengefasst und schließlich das englische Gesellschaftsrecht betrachtet.

Kapitel 25[40] gibt einen Überblick über die *Geschichte des Wechsel- und Konkursrechts*. Nach einer Erörterung der antiken institutionellen Vorläufer, die sich auf den Wechsel beziehen, beschreibt *Eszter Márkus* die Entwicklung und Evolution des Wechsels und fasst dann die Regeln des Wechsels in modernen Gesetzbüchern zusammen. Das Kapitel über das Wechselrecht schließt mit einer Diskussion über die internationale Vereinheitlichung des Gebietes ab. Im Abschnitt über das Konkursrecht führt der Autor den Leser in die römischen, mittelalterlichen und neuzeitlichen Grundlagen des Insolvenzrechts ein und nimmt dann Bezug auf den Prozess der europäischen Vereinheitlichung des Konkursrechts.

26. Das letzte Kapitel[41] über *die historischen Modelle des Zivilprozessrechts und der Justiz* wurde von *Miklós Kelemen* verfasst. Der Autor erörtert die Abgrenzung zwischen materiellem und prozessualem Recht aus historischer Sicht und skizziert dann die historischen Elemente der traditionellen Rechtspflege. In diesem Zusammenhang werden die Charakteristika der Justiz als kommunale Rechtspflege, die öffentlich-rechtliche Rechtspflege und die Entwicklung des Verfahrensrechts untersucht. Im letzten Unterkapitel gibt der Autor einen Überblick über die Haupttypen des Prozessrechts in der Neuzeit, einschließlich der Merkmale des sog. „ermittlungszentrierten" und der Modelle des sog. „liberalen Zivilprozesses" und schließlich des englischen Verfahrens, das er als das traditionalistische kontradiktorische System ansieht.

II. Im zweiten Teil des Kapitels, der kritische Anmerkungen enthält, folgt eine vertiefte Betrachtung einiger *allgemeiner Fragen*, gefolgt von einer stichprobenartigen Analyse einiger allgemeiner privatrechtlicher *Institutionen* sowie von Institutionen des Vertragsrechts, des Sachenrechts und des Konkursrechts.

In diesem Abschnitt wird die *Lehrgeschichte* des Universitätspflichtfaches und seines Vorgängers („Universelle Staats- und Rechtsgeschichte") weder in Ungarn noch in der Eötvös-Loránd-Universität bzw. ihren Rechtsvorgängern behandelt. Jedoch wäre eine kürzere Lehrgeschichte erheblich, insofern sie interessante Diskrepanzen und Selbstwidersprüche[42] sowohl im 19. als auch im 20. Jahrhundert zeigen kann, die eine tiefere Analyse erfordern.

1. *a)* Zu den Stärken des neuen Lehrbuchs gehören die Betonung der Begriffsgeschichte und die stärker als üblich ausgeprägte Darstellung der Zusammenhänge zwischen römischem Recht und Rechtsgeschichte, die ein Novum in der heimischen Lehrbuchliteratur zu sein scheinen. Die Geschichte des Verwaltungsrechts, Staatsbürgerschaftsrechts und Handelsrechts wird aufgrund der Forschungsschwerpunkte der Autoren stärker als sonst im Lehrbuch berücksichtigt.

Es wäre nützlich, wenn das Lehrbuch den wirtschaftlichen und sozialen Kontext der institutionellen Rechtsentwicklung eingehender untersucht, wie man es z. B. im Thema der Gründung einer Aktiengesellschaft sehen kann. *Márkus* setzt dort die Frage in den Kontext (nach *Coing*) korrekt, dass das Konzessionssystem der Begründung in Frankreich abgeschafft und das normative Gründungssystem nach britischem Vorbild zugelassen wurde, um die Wettbewerbsfähigkeit zu erhöhen[43]. Die systematische und konsequente Anwendung eines solchen Ansatzes scheint bisher außerhalb der Möglichkeiten und Kräften der Autoren zu liegen.

Vorteilhaft ist es, dass ein erheblicher Anteil an fremdsprachiger Literatur in Französisch, Italienisch und gelegentlich auch in anderen Fremdsprachen neben der herkömmlich zitierten deutschen und englischen Literatur im Buch verarbeitet wurde. Gleichzeitig werden im Text nur gelegentlich Quellenaussage angegeben. Es erscheint daher notwendig, in naher Zukunft eine Quellensammlung zu veröffentlichen.

Einige Co-Autoren haben die historische und andere die dogmatische Linie mit größerem Nachdruck gezogen, aber über diesen grundlegenden Unterschied hinaus gibt es signifikante methodische Unterschiede zwischen den Kapiteln. Der Grad des Historismus und Dogmatismus hängt natürlich nicht nur von der Individualität des jeweiligen Autors ab, sondern auch von der Thematik. Die Geschichte des öffentlichen Rechts und des Strafrechts erfordert mehr historische Erörterung, weil die Institutionen dieser Rechtszweige enger mit einem bestimmten Staat und einer bestimmten historischen Periode verbunden sind. Im Vergleich dazu kann bei privatrechtlichen Institutionen mehr Gewicht auf die dogmatischen Aspekte gelegt werden.

Ich halte es nicht für ein Defizit, dass der Band der gerichtlichen und transaktionalen Praxis im Vergleich zu dem großen Gewicht der Theoriegeschichte wenig Aufmerksamkeit schenkt. Auch ist es meines Erachtens kein Mangel, dass im Lehrbuch nur gelegentlich konkrete Fälle erwähnt werden. Obwohl bekannt ist, dass die Praxis der Obergerichte, z. B. des deutschen Reichsgerichts

[39] Siehe Földi (Fn. 15), 579–603.
[40] Siehe Földi (Fn. 15), 607–628.
[41] Siehe Földi (Fn. 15), 631–651.
[42] Zum Beispiel wurde das Bedürfnis nach vergleichender Rechtsgeschichte ab den frühen 1960er Jahren immer ausgeprägter, obschon in den sozialistischen Ländern viele die Rechtsvergleichung für eine „bourgeoise Pseudowissenschaft" hielten.
[43] Siehe Földi (Fn. 15), 601f.

oder der französischen *Cour de Cassation*, die Rechtsentwicklung in Deutschland und Frankreich maßgeblich beeinflusst hat, hätte eine umfassende Darstellung dieser Fälle den Umfang des Lehrbuchs überfordert.

b) Die Autoren und der Herausgeber haben natürlich das unveräußerliche Recht, über die Zusammensetzung und Proportionen des Curriculums zu entscheiden bzw. auf die Kapazität der Studenten und den Semesterfahrplan zu achten. Eine umfassende und gesonderte Darstellung der folgenden Rechtsgebiete und Rechtsinstitutionen wäre meines Erachtens jedoch äußerst sinnvoll gewesen, da es sich bei den genannten Themen um die „Perlen" der vergleichenden Rechtsgeschichte im Bereich angelsächsischen und kontinentalen Rechts handelt.

Im Bereich des *öffentlichen Rechts* hätte die analysierende Darstellung der vergleichenden Geschichte z. B. von Grund- und Menschenrechten meines Erachtens ein eigenes Kapitel bekommen können.

Im Bereich jedoch des *„reinen" Privatrechts* soll meines Erachtens die Folgenden hervorgehoben werden. Nicht die Proportion der Anzahl von Kapiteln reinen Privatrechts (31%, d.h. Kap. 14–21), sondern der thematische und quantitative Anteil dieses Rechtszweiges (27%; ca. 150 Seiten) sind im Vergleich sowohl zum Rest des Lehrbuchs (26 Kap., 550 Seiten) als auch zur Thematik und inneren Proportion der privatrechtlichen Kapitel etwas gering zu sein. Das Buch verzichtete nämlich bewusst, einige Grundinstitutionen und gründliche Gebiete des Privatrechts kohärent und umfassend darzustellen. Zum Beispiel die vergleichende Rechtsgeschichte von *zivilrechtlichen Fähigkeiten*, *Persönlichkeitsrechten* und deren *Schutz*, *Familienrecht* und *Ehegüterrecht*, *Erfüllung* der Obligationen bzw. Verträge, *Lehre der Vertragsverletzungen*, *Bereicherungsrecht*, grundlegenden Normen der *wichtigsten Vertragstypen* und *Erbrecht* fehlen, oder sie sind in den Bereichen der Grundbegriffe vergleichender Rechtsgeschichte, der Privatrechtssystematisierung, des Haftungsrechts, der Dogmengeschichte des Vertrags, der Systeme des Eigentumsübergangs nur tangential darstellt.

2. In den folgenden Paragrafen werden einige *Detailfragen* aus dem Bereich des *Privatrechts* berührt, die erst als Ergebnisse vergleichender privatrechtlicher Forschung herausgestellt werden können.

a) Im Bereich der *allgemeinen Bemerkungen über privatrechtliche Generalklauseln* von *András Földi*[44] scheint mir bemerkenswert, dass diese offene privatrechtliche Norm das Ergebnis einer spezifischen Gesetzgebungsmethode ist, die die Anpassungsfähigkeit (*André Tunc*: *adaptation*[45]) der statischen, kodifizierten Privatrechtsordnung an die sich dynamisch verändernden Lebensverhältnisse gewährleistet, und da die Richter zur Adaptation vom Gesetzgeber durch die Schaffung einer Generalklausel ermächtigt werden, Generalklauseln eigentlich *dienen* der Rechtssicherheit, obwohl eine ständige rechtshistorische Kritik gegen offene Normen die Risikoerhöhung der Rechtsunsicherheit war. Die *wahre* Gefahr besteht in der *gegenstandslosen Wucherung* von Generalklauseln. Der durch ihre angemessene Anwendung erreichbare Vorteil, d. h. die Vermeidung von *rigor iuris* und *summum ius*, ist daher größer als die Nachteile einer unsachgemäßen Anwendung, nämlich die richterliche Willkür. Korrekt meinte *Helmut Coing*[46], dass diejenigen, die sich auf die Gefährdung der Rechtssicherheit berufen, überschätzen die Schwierigkeiten bei der Anwendung von Begriffen ethischen Ursprungs.

b) András Földi weist in dem nach seiner eleganten Erudition verfassten rechtshistorisch vergleichenden Kapitel über *Treu und Glauben*[47] ganz offen darauf hin, dass der Inhalt dieses Grundsatzes als ein Rechtsbegriff mit ethischer Grundlage ungewiss sei. Meines Erachtens kann der Grundsatz gerade nach seinen rechtshistorischen Vorgängern, die vom Verfasser durchaus dargestellt wurden, einen wohldefinierten Inhalt bekommen[48].

Auch als eine wichtige Frage taucht auf, ob der Grundsatz ohne ausdrückliche Sanktion eine *lex imperfecta* wäre. Ebenfalls durch Widerspruchsbeweis (*reductio ad absurdum*) kann erklärt werden, dass es Unsinn wäre, wenn ein Gesetzbuch eine generelle privatrechtliche Pflicht den Personen ohne Rechtsfolge auferlegt hätte. Worin kann diese genannte Rechtsfolge bestehen? Die allgemeine immanente Rechtsfolge eines grundsatzwidrigen Verhaltens gilt hier auch, wonach die Unterstützung des Verfahrensrechts aufgehoben ist. Kodifizierte Rechte regeln die *Sanktion* des Verstoßes gegen diesen Grundsatz ausdrücklich nicht, kann jedoch eine allgemeine Rechtsfolge nach dem Sprichwort von „*ex injuria jus non oritur*" (d.h. „aus Unrecht kein Recht hervorgeht")[49] angenommen werden. Die Rechtsfolge besteht nämlich darin, dass das Rechtssubjekt durch sein gegen den Grundsatz verstoßendes Verhalten *ihr Ziel nicht erreichen kann*. Diese strenge Sanktion wird im Allgemeinen durch die Aufhebung der Unterstützung des Verfahrensrechts durchgesetzt. Wenn also die Prozesspartei ihre Klage oder Verteidigung auf einem grundsatzverstoßenden Verhalten stützt, oder wenn das grundsatzverstoßende Verhalten während des Prozesses geleitet wird, entscheidet das Gericht den Rechtsstreit ohne

---

[44] Siehe Földi (Fn. 15), 379–382.

[45] „[…] le juge, pour gagner sa liberté, recourait ŕ des fictions ou ŕ une interprétation qui déformait les rčgles. C'était lŕ des pratiques regrettables. Il n'appartient pas au juge de fausser la loi, fût-ce pour moderniser le droit: c'est au législateur qu'il appartient de donner au juge un instrument qui permette que le droit, de lui-męme, s'adapte constamment aux circonstances sociales variables." Zitat von A. Tunc: *Standards juridiques et unification du droit*, in: Revue internationale de droit comparé 22/2 (1970) 247–261, 249.

[46] Siehe H. Coing: *A jogfilozófia alapjai* [=ung. Ausg. von Coings „*Grundzüge der Rechtsphilosophie*" 5. Aufl. Berlin et al. 1993; übersetzt von Béla Szabó], Budapest 1996, S. 214 Fn. 40.

[47] Neben seine zahlreichen älteren und neueren Publikationen in diesem Thema siehe Földi (Fn. 15), 382–391. Die Frage der Sanktion und Sanktionsfähigkeit grundsatzwidrigen Verhaltens sind in diesen Werken meines Wissens nach nicht berührt.

[48] Siehe dazu detailliert J. Benke: *Bevezetés a magyar magánjog általános elveibe. Ötéves az új magyar Polgári Törvénykönyv* [Einführung in die allgemeinen Prinzipien des ungarischen Privatrechts. Das neue ungarische BGB ist fünf Jahre alt], Budapest 2019, 110–119.

[49] Die Wurzeln des sprachlich anspruchslosen und uneleganten jedoch üblich benutzten Adagiums sind kaum aufdeckbar. Ich konnte nur auffinden, dass *Cicero* im ersten Buch seines *de legibus* (I, 44) die folgende Frage aufwirft: *„An vero* [oder: *aut cur*] *ius ex iniuria lex facere possit, bonum eadem facere non possit ex malo?*" [= „Wenn ein Gesetz Recht aus Unrecht machen kann, kann es nicht auch Böses in Gutes verwandeln?"].

Rücksicht auf diejenigen Fakten oder Beweismaterialien, die sich auf das gegen einen grundsätzlichen Bestimmung verstoßende Verhalten stützen. Diese Nichtberücksichtigung vermag sowohl die Geltendmachung des Anspruchs als auch die Verteidigung dagegen erschweren oder sogar verunmöglichen. Außergerichtlich, also im rein materiellrechtlichen Sinne kann jedoch ein grundsatzverstoßendes Verhalten kein Rechtsverhältnis, Einstehen, Verantwortlichkeit, Recht oder Pflicht begründen oder erheben, diese aufheben oder ändern, soweit eine solche Rechtsfolge (z. B. sachenrechtliche Pflichte; Ungültigkeit, Unwirksamkeit, Sanktionen der Vertragsverletzungen, Schadensersatz, Schmerzensgeld) durch eine konkrete Rechtsvorschrift neben weiteren Sachverhaltselementen nicht bestimmt wird. Wird sich dagegen in einer Klage oder in einem Prozessmittel der Verteidigung auf das gegen den Grundsatz verstoßende Verhalten bezogen oder wird es im Laufe des Verfahrens bezeugt, wird der Rechtsstreit vom Gericht beurteilt, indem die auf diese Weise beanstandeten Tatsachen, Rechte, Beweismittel nicht berücksichtigt werden, wodurch die Geltendmachung des Antrags bzw. die Verteidigung verhindert wird: Ein solcher Prozessausgang kann also den materiellrechtlichen Stand der Partei in indirekter, prozessualer Weise berühren [50].

c) Obwohl *András Földi* sich mit den Eigentumsübertragungsmodellen und der Ersitzung in einem selbständigen und umfangreichen Kapitel [51] beschäftigt, geht der Band nicht einmal auf den historischen Hintergrund der Unterscheidung und Klassifizierung zwischen originären und derivativen Modi des Eigentumserwerbs ein. Diese Studien wären meines Erachtens ein geeigneter Weg für das Lehrbuch gewesen, um zu zeigen, wie die im Mittelalter zu didaktischen Zwecken entwickelte, etwas forcierte Klassifizierung heute für begriffliche Verwirrung bei der theoretischen Einordnung der einzelnen kodifizierten Erwerbsmoden sorgt. Es gibt nämlich mehrere Fälle (siehe z. B. Verarbeitung, Umgestaltung, Verbindung, Vermischung, Anbau, Überbau, Einbau, Bebauen, Zuwachs, Eigentumserwerb an Produkten, Naturalien und Züchtungen), in denen die gegebene Erfassungsmethode entweder unter die originäre oder unter die derivative Kategorie eingeordnet werden kann: Die begriffliche Grundlage der Einordnung ist aufgrund der originell didaktischen Zwecke unsicher. Wenn eine neue Sache als Folge einer rechtlichen Tatsache (Naturereignis, Realakt, Rechtsakt) entsteht, ist es nur eine Frage der privatrechtlichen Regelung, in welche Kategorie deren Erwerb einzuordnen ist. Die didaktische Sichtweise des Phänomens klassifiziert meines Erachtens den Erwerb durch die Schaffung eines neuen Dings, das vorher nicht existierte, als originär und die Schaffung durch den Eingriff einer Fremdsache als derivativ.

d) Als Element des Gesamtvergleichs hätte es sich gelohnt, neben der Begriffsgeschichte von Besitz und Detention im französischen, deutschen und englischen Recht, die *András Földi* verfasste [52], auch die Entwicklung der heimischen Kodifikation auf diesem Gebiet zu behandeln, da die Vereinfachungsbemühungen des sozialistischen Sachenrechts (Eigentumsrechts) nicht politisch-ideologisch, sondern vielmehr vermögensrechtlich von Interesse waren. Ein rechtsvergleichender Beitrag nämlich von *Miklós Világhy* (1916–1980) aus 1958 [53] handelt sich um die Grundlagen der Lehre des Besitzes und Besitzschutzes bei der Vorbereitung der ungarischen BGB-Kodifizierung in den 1950er Jahren. Világhy stellt die Stärkung des faktischen, normativ geschützten Machtcharakters des Besitzes dar, und daraus folgend zeigt die Objektivierung des Besitzbegriffs durch die Absorption mannigfaltiger Herrschaftsformen über Sachen, wodurch die Institution der Detention abgelehnt wurde.

e) Zur sog. *Paulianische Anfechtungsklage* (*actio Pauliana*), die im Kapitel von *Eszter Márkus* dargestellt wurde [54], soll meines Erachtens die Folgenden hervorgehoben werden. Diese berühmte Klage nimmt auch in heutigen europäischen Privat- und Insolvenzrechtsordnungen eine wichtige Rolle ein, und ist der hauptsächliche Rechtsbehelf des Gläubigerschutzrechts gegen betrügerischen Deckungsentzug. Die Fundamente der Institution tief in dem Recht der römischen Republik und Kaiserzeit wurzeln. Es konnte auch aufgezeigt werden, dass der Zwölfkolumnentext des Stadtrechts von Gortyn als Zeitgenosse des römischen Zwölftafelgesetzes (!) schon einen Institutionsvorgänger bietet. In Anbetracht der ausgedehnten und bunten Kasuistik der Generalklausel [55] des Paulianischen Edikts erwies sich die *actio Pauliana* als ein außergewöhnlich wirkungsvolles und überlebensfähiges Rechtsmittel, da die paulianische Klage nicht nur im Falle von betrügerischen gläubigerschädigenden privatrechtlichen Geschäften [56] und öffentlichrechtlichen Rechtsakten [57], sondern auch bei fraudulösen Realakten [58] griff. Die in den Digestentitel 42,8 aufgenommene reiche kaiserzeitliche Kasuistik des Paulianedikts kann heutzutage von drei verschiedenen Rechtsgebieten bedeckt werden. Das heißt, dass die modernen Fälle des gläubigerwidrigen betrügerischen Schuldnerverhaltens unter Tatbestände sowohl des geltenden Privat- und Insolvenzrechts als auch des Strafrechts subsumiert werden können. In Bezug auf das zwischen der zwanzigsten und fünfund-

[50] Siehe ausführlich Benke (Fn. 48), 90–95.
[51] Siehe Földi (Fn. 15), 435–447.
[52] Siehe Földi (Fn. 15), 424–427.
[53] Siehe M. Világhy: *A birtokvédelem problémája* [Problematik des Besitzschutzes], in: Állam- és Jogtudományi Intézet Értesítője [Bulletin des Instituts für Staats- und Rechtswissenschaft] 1, 143–175.
[54] Siehe Földi (Fn. 15), 622.
[55] Ulp. D. 42,8,1 *pr.* (66 ed.): *Ait praetor: »Quae fraudationis causa gesta erunt cum eo, qui fraudem non ignoraverit, de his curatori bonorum vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo«.*
[56] Einerseits durch Erlass einiger Vorteile (vgl. zum Beispiel D. 42,8: Ulpian 1,1–2; 2; 6,5; 6,11; 10,15; 13; Paulus 7; 16; Venuleius 8; Julian 15; 17; Papinian 18–19; Callistratus 20; Scaevola 21–23.), andererseits durch Selbstverpflichtung oder Übernehmen einiger Nachteile (siehe zum Beispiel D. 42,8: Ulpian 2; 3 *pr.*; 14).
[57] Zum Beispiel Prozesse oder Vollstreckungen verlorengehen zu machen (siehe Ulpian D. 42,8,3,1).
[58] Durch das absichtliche Ausbleiben vor dem Gericht, oder durch eine Klage nicht zu erheben, oder aber durch die Nichtberücksichtigung der Verjährungs- oder Ersitzungszeit, durch die Nichtbenutzung Grundgerechtigkeiten und durch Dereliktion eigener Sachen, sie einem anderen zueignen zu lassen (vgl. D. 42,8: Ulpian 3,1–2; Paulus 4; Gaius 5).

zwanzigsten Zeile der zehnten Kolumne stehende Fragment (X, 20–25) der großen Inschrift von Gortyn war die dorisch-kretische Stadt schon im 5. Jahrhundert v. Chr. im Stande, ein durch Schenkungsverbot wirkendes Gläubigerschutzrecht von solcher Qualität auszubilden, dass es einen Vergleich mit den in allgemeiner Weise formulierten Regeln der Paulianischen Anfechtungsklage heutiger Rechtssysteme von Europa gut bestehen kann. Eine andere vergleichend rechtsgeschichtliche Seite dieses Thema kann eine fruchtbare Analyse bieten: In der sog. Post-Lehman-Krise Ungarns gab es eine Zunahme von trickreichen Praktiken, die den Gläubigern geschadet haben, wobei Schuldner die Vermögensdeckung der Ansprüche ihrer Gläubiger nicht durch Vertrag oder einseitiges Rechtsgeschäft weggenommen haben. Diese neuen Methoden waren den Tricks der Römer ähnlich, und die Probleme, die durch die alte römische Anfechtungsklage leicht beseitigt werden konnten, machten die „Räder" der ungarischen Justiz des 21. Jahrhunderts in einigen Fällen zum Stillstand gekommen[59].

3. Schlusswort

In der Jura-Fakultät der Eötvös-Universität wurde das Pflichtfach von „*Vergleichender Rechtsgeschichte*" ins fünften und sechsten Semester verlegt. Es bot eine günstige Gelegenheit, das Fach von den Aufgaben der Propädeutik zu befreien. Diese Änderung ermöglicht es den Jurastudenten des dritten Jahres, auf die in den ersten vier Semestern der ungarischen Rechtsgeschichte, des römischen Rechts und auch in den ersten vier Semestern der Studien positiver Rechte erworbenen Kenntnisse aufzubauen und von der vergleichenden Rechtsgeschichte auf einem höheren Niveau zu profitieren.

Daneben scheint das besprochene Lehrbuch mir ein ausgezeichnetes Sprungbrett oder ein stabiler erster Schritt für zukünftige Forscher zu sein, um die Grundlagen dieses hoch wertvollen Wissenschaftszweigs zu erlernen und dadurch einen Geschmack für die besondere Lebensweise zu entwickeln, die Wissenschaftler in diesem Gebiet führen.

Zusätzlich zu den erfahrungswissenschaftlichen Moralen der *magistra vitae* ist die Methodik der Vergleichung das andere Instrument, dessen Ausbeutung die Forscher unseres Jahrhunderts in der Welt des Rechts zu richtigen Ergebnissen allein leiten kann.

Zuzüglich des als Sinnspruch angeführten Zitats von *Goethe* vermag uns das Alpha und Omega vom Vergleichungsverfahren auch die unsterblichen Verse des großen ungarischen Dichters, *Attila József* (1905–1937) erhellen, wonach:

„Fruchtlos badest du es in dich selbst,
dein Gesicht kannst du erst in einem and'ren waschen."[60]

József Benke*

[59] Dazu siehe detailliert J. Benke: *Krízis és fedezetelvonás. A csalárd fedezetelvonás elleni hitelezővédelmi jog történeti alapjai és azok mai jelentősége az új magyar Polgári Törvénykönyv tükrében* [Krise und Deckungsentzug. Historischen Grundlagen und heutige Bedeutung des Rechts für Gläubigerschutz gegen betrügerische Schädigungen durch die Schuldner im Lichte des neuen ungarischen BGB], Budapest 2016, *passim*.

[60] Zitat aus dem Gedicht „*Nicht ich bin es, der schreit*" („Nem én kiáltok" 1924; eigener Übersetzungsversuch).

* József Benke, Habilitierter ao. Univ.-Prof. an der Universität zu Pécs, Staats- und Rechtswissenschaftliche Fakultät, Lehrstuhl für Bürgerliches Recht; Hilfsrichter beim Oberberufungsgericht zu Pécs, Ungarn.

Wolfgang Bohnen/Lena Haase (Hg.)

Kontrolle, Konflikt und Kooperation. Festschrift 200 Jahre Staatsanwaltschaften Koblenz und Trier (1820–2020)

München: C.H. Beck, 2020, XVI+450 S.

25 Autoren tragen unter dem Stabreim von Kontrolle, Konflikt, Kooperation in 23 Aufsätzen dazu bei, dass die 200jährige Historie zweier Staatsanwaltschaften unter verschiedenen Aspekten sichtbar wird.

Die Einrichtung der Staatsanwaltschaften als „öffentliche Ministerien" am 1. August 1820 bildet dabei den Auftakt in der damals preußischen Rheinprovinz. Viele Attribute werden der Staatsanwaltschaft seit jeher zugeschrieben: „Wächter des Gesetzes", „Durchsetzer staatlicher Interessen", „Herrin des Ermittlungsverfahrens", wirkt sie doch machtbeschränkend gegenüber Polizei und Gerichten.

Gegliedert in fünf Teile skizziert der vorliegende Band nicht nur die Geschichte der beiden Behörden in Koblenz und Trier bis in die Anfänge der Bundesrepublik hinein. Über diesen ersten großen Teil hinaus begegnet der Leser geographischen und thematischen Perspektiverweiterungen, worunter zwei Beiträge zur Staatsanwaltschaft Luxemburg und der internationalen Rechtshilfe in Strafsachen zwischen Luxemburg und Rheinland-Pfalz herausragen (Beiträge von Robert Biever und Georges Oswald). Im dritten Teil wagen andere Autoren einen Blick in die behördliche Zukunft, d.h. konkret vor allem Europäische Staatsanwaltschaft und eAkte in Strafsachen.

Ein vierter Teil leuchtet die beiden Staatsanwaltschaften Trier und Koblenz unter der Überschrift „Herrin des Ermittlungsverfahrens" aus, dem sich ein eigener (fünfter) Teil „Berichte aus den Quellen" anschließt. Über die gewählte Aufteilung der Beiträge in die fünf genannten Abschnitte kann man sicherlich diskutieren, etwa dass auch andere Beiträge quellennah erwachsen sind und die Überschrift des fünften Teils daher etwas irreführend ist. Allerdings stechen dadurch zwei Beiträge am Schluss heraus, ehe der

Anhang die Liste der Behördenleiter der beiden Staatsanwaltschaften seit dem 1. August 1820 anfügt (S. 443-444): Einmal widmet sich Daniel Heimes den „furchtbaren Juristen“ und der Strafverfolgung des Links- und Rechtsextremismus von Seiten der Staatsanwaltschaft Neuwied. Zum zweiten bespricht Adalbert Rosenbaum die Aufsehenerregenden Ermittlungen der Staatsanwaltschaft Koblenz der Jahre 1962 zu einem damals bundesweit erregenden „Raubmord und seine Folgen“.

Der rechtshistorische Hauptteil ist der erste Abschnitt des Buches, welchen Franz Dorn (Trier) mit dem bekannten „Kampf um das Rheinische Recht“ einläutet. Sein Beitrag verdeutlicht, dass trotz eines vollumfänglichen Systemwechsels eine kontinuierliche Strafrechtspflege bereits im modernen Sinne betrieben wurde. Die Ausprägung des Anklageverfahrens und der Mündlichkeit bildeten zentrale Bestandteile des Strafverfahrens. Im Vormärz und parallel zu den gescheiterten Revolutionsvorhaben kam es zur Teilung des Trierer Landgerichtsbezirks 1835 und der Neugründung des Landgerichts Saarbrücken. Nunmehr brachten sich Juristen in parlamentarischen Debatten ein und schlugen Reformen vor. Der Übergang vom 19. ins 20. Jahrhundert und zum Nationalsozialismus gelingt via Betrachtung der Richter und Staatsanwälte jüdischer Herkunft, verbunden mit der Beleuchtung der Staatsanwaltschaft in Kaiserreich und Republik bis ins III. Reich.

Lena Haase thematisiert „Die Staatsanwaltschaft auf dem Abstellgleis? – Behördliches Selbstverständnis der Staatsanwaltschaft Trier im Nationalsozialismus“ und fächert zahlreiche Personalakten auf. Halten wir mit ihr fest (S. 113): Während die NS-Zeit von einem einheitlichen Juristenstand mit gleichen Karriereverläufen, einem Berufsethos und sozialem Prestige weit entfernt zu sein schien, wurde mit BNSDJ (Bund Nationalsozialistischer Deutscher Juristen) und NSRB (Nationalsozialistischer Rechtswahrerbund) der bis dahin ungekannte Versuch unternommen, diese so diversen Berufsfelder unter der Bezeichnung des Rechtswahrertums zu vereinen und trotz vielleicht sogar gegenläufiger behördlicher Absichten im Gemeinschaftsgefühl zusammenbringen.

Wichtig ist m.E. die Analyse von Thomas Grotum zu Jugend und Justiz im Landgerichtsbezirk Trier bzw. dem Jugendstrafrecht seit dem 19. Jahrhundert bis in das von der NS-Zeit geprägte Jugendstrafrecht. Der Kontinuität des materiellen Rechts wie auch des Personals in den Justizbehörden entgegen stand der Versuch, den Neubau der Justizgebäude in Koblenz und Trier als Aufbruch in eine neue Zeit auch architektonisch sichtbar werden zu lassen. Stephan Heinz zeigt dies nicht zuletzt anhand des Landgerichtsgebäudes Trier, dessen Grundstein am 29. April 1953 gelegt wurde. Der neue Grundstein erhielt eine Kupferplombe samt Urkunde, deren Text Landgerichtspräsident Dr. Joseph Dressler verfasst hatte. Dr. Dressler, Gegner des NS-Regimes, promovierter Jurist, Frankreich erfahren und frankophon sowie Autor der bis heute rezipierten und forschungsstarken Monographie „Geschichte der Trierer Gerichte 1794-1813“ (Trier 1957) war es, der sich dafür eingesetzt hatte, das im Schutt geborgene Barockrelief ‚Student‘ in den Neubau zu integrieren. Trierer Meinungsverschiedenheiten glättend schrieb er mit einem großen Lob für das moderne Gebäude, „das nach seiner Fertigstellung auch bei denen Anerkennung findet, denen es im Rohbau nicht gefallen wollte.“ (S. 155/156)

Zahlreiche weitere Einzelheiten werden und sollen die Leser in diesem Buch entdecken, das mit seinen wertvollen Studien eine Lücke in der 200jährigen Geschichte der Staatsanwaltschaften Trier und Koblenz mit Bezügen zur Nachbarschaft, wie vor allem Luxemburg, zu schließen vermag.

Thomas Gergen*

* Prof. Dr.iur. Dr.phil. Thomas Gergen, Maître en droit, Institut Supérieur de l’Économie, ISEC Université Luxembourg.

Ulrike Andersch

Die Diskussion über den Büchernachdruck in Deutschland um 1700 bis 1815

Tübingen: Mohr Siebeck, 2018, 582 S.

Julia Dreyer

Die florentinischen Autoren- und Druckerprivilegien während der Herrschaft der Familie Medici

Baden-Baden: Nomos Verlag, 2020, 1494 S.

Die schon seit Jahrzehnten immer wieder aufflammende Kontroverse um die Entstehung des modernen Urheberrechts ist durch eine Reihe von neueren Forschungen zum Privilegienwesen, zur Ideen-, Sozial- und Wirtschaftsgeschichte des „geistigen Eigentums“ erweitert, vertieft, in Teilbereichen und durch Querschnittstudien ungemein bereichert worden. Seit den bekannten Thesen in der Auseinandersetzung zwischen *Hansjörg Pohlmann* und *Walter Bappert* hat nach der Vielzahl von Forschungen, Stimmen und Meinungsverschiedenheiten *Elmar Wadle* die Probleme so bündig wie differenziert auf den Begriff gebracht:

„Nicht nur die Interessen von Verlegern/Druckern oder Autoren bestimmen die Privilegierung in concreto, sondern viele andere Interessen können zusätzlich und entscheidend ins Gewicht fallen, politisch-weltanschauliche Motive ebenso wie merkantilistische oder volkserzieherische Ziele. Diese mögliche Vielfalt sollte man nicht vorschnell verkürzen.“ [1]

[1] Elmar Wadle, Beiträge zur Geschichte des Urheberrechts. Berlin 2012, S.76.

Wadles Votum für zeitlich und räumlich enger begrenzte Studien zu Segmenten der Privilegienpraxis und entsprechende Forschungsprogramme für den immerhin erheblichen Zeitraum von rund 350 Jahren gilt nach wie vor.

Die beiden Arbeiten, die sich mit unterschiedlichen Ansätzen und für differierende Zeiträume dem deutschsprachigen Diskurs um den Nachdruck und dem toskanischen Privilegiensystem widmen, versuchen auf je eigenen Wegen auf grundsätzliche Fragestellungen neue Antworten in einem weiten, abgegrenzten Forschungsfeld zu geben.

Ulrike Andersch analysiert die Diskussion um den Büchernachdruck zwischen 1700 und 1815 im zeitgeschichtlichen Kontext. Wie werden die Rechtspositionen legitimiert, welche Gegenpositionen manifestieren sich, welche Schutzmittel werden als geeignet ins geltende Rechtssystem eingeordnet? Methodisch der „Neueren Ideengeschichte" folgend fußt die Verf. auf einer sehr breiten Quellenbasis, die von naturrechtlich-rechtsphilosophischen, privat- und polizeirechtlichen bis hin zu kameralistischen und ökonomischen Publikationen reicht. Sie schließt eine Forschungslücke. Mit dem Ziel, trotz eines nicht gerade dürftigen Forschungsstandes über viele Einzelstudien, über Gesetzgebungsgeschichte und die Privilegiengeschichte im Zusammenhang mit Nachdruck und Zensur hinauszugelangen, die Veränderungen des literarischen Marktes mit zu berücksichtigen, wird an den bisherigen Forschungsstand auf eigenständige Art und Weise angeknüpft (Betreuer: *Diethelm Klippel*).

Nachdruck und Verlegerschutz bis etwa 1780 bilden den Kern des ersten Abschnitts. Druckprivilegien und Nachdruckverbote charakterisieren eine Entwicklung zum umfassenden Eigentumsschutz der Verleger bis zu der spezifisch theoretisch untermauerten Stufe eines „derivativen Verlegereigentums". Dem entspricht die unterschiedlich begründete rechtswissenschaftliche Meinungslage, mag auch der Begriff des befristeten Privilegs mit seinen erweiterten Regelungsmaterien als herrschaftlicher Gnadenakt an Konturen verlieren. Der permanente nachhaltige Zusammenhang mit der Zensur ist augenfällig.

Neben einer detaillierten, an den Forschungsstand anknüpfenden Darstellung der Entwicklungsgeschichte vor allem bis zur Mitte des 18. Jahrhunderts wird auch der Forschungsstand zur urheberrechtlichen Bedeutung der Druckprivilegien präsentiert. Letztlich entscheidet sich die Arbeit abwägend und differenzierend in der Tendenz für die traditionellere Ansicht zur Bedeutung und Funktion von Privilegien und misst der Quantität von Autorenprivilegien geringere Bedeutung zu.

Für den Gedanken der Verlagseigentumslehre wird ein anderer Zugriff entwickelt. Die Verleger hätten den Gedanken des Investitions- und Konkurrenzschutzes als Grundlage der Privilegien allmählich als plausible Begründung ihres Schutzes auch auf unprivilegierte Werke übertragen. Diese von der bisherigen Forschung abweichende These, dass an die Stelle des Privilegs als Ausnahme von der Vervielfältigungsfreiheit die verlegerische „Überzeugung" oder ein „Modell" von Verlagseigentum getreten sei, setzt sich freilich dem Einwand aus, dass dieses Konzept möglicherweise als Wunschvorstellung interessengeleiteter Verlegerkreise eine Vorstufe für Entwicklungsschritte im 18. Jahrhundert gelten könnte, dass jedoch weder normativ noch in der juristischen Rechtsüberzeugung ein Verlagseigentum allgemein anerkannt war oder sich in dieser Form praktisch-rechtlich oder normativ durchzusetzen vermochte.

Jedenfalls lässt die vergleichsweise schmale Quellengrundlage dieses Ergebnis als das wahrscheinlichste zu. Der schon von *Thomas Eichacker* für Nürnberg entwickelten These von ungeschriebenen urheberrechtlichen Schutzrechten - mit dem Argument der schmalen Quellenlage angezweifelt - mag sich Andersch nicht zu befreunden.[2] Andererseits ist der Ansatz Wadles, dass die Analyse vergleichbarer Segmente solche Annahmen verdichten könnten, nicht von der Hand zu weisen.

Im Übrigen verlagerten sich „die tragenden Pfeiler in der Argumentation der Nachdruckgegner" auf naturrechtliche Begründungsmuster (S.65). Auch zu Beginn des 18. Jahrhunderts bleibt das Privileg als Nachdruckschutz das dominante Mittel der Rechtsdurchsetzung. In der ersten Hälfte des 18. Jahrhunderts wird neben der sog. Verlagseigentumslehre auch der Rechtserwerb vom Autor zunehmend diskutiert.

Hier manifestiert sich eine Art Pluralismus historischer, ökonomischer und juristischer Argumente für die Unrechtmäßigkeit des Nachdrucks. Das „derivative Verlagseigentum" tritt jetzt als eigene Entwicklungsstufe der dogmatischen Entwicklung in Erscheinung. Die Idee eines „geistigen Eigentums" ist damit jedoch nicht verknüpft (S.120ff.).

Zwischen 1740 und 1770 ebbt die Debatte sichtlich stark ab. Zwar blieb die Rechtswidrigkeit des Büchernachdrucks ein Streitpunkt. Unabhängig davon, welche Gründe letztlich für die Unterbrechung der Debatte maßgeblich waren, überzeugt die Ansicht, dass ein eigenes Verlegerrecht mit der landesherrlichen merkantilistischen Wirtschaftspolitik, Grundlage der herrscherlichen Kompetenzen in der Privilegienerteilung in diametralem Widerspruch stand.

Wenn sich die Diskussion um die Lage des Buchhandels und seine Reform um die Mitte des 18. Jahrhunderts mehrten, wenn sich auch die ökonomischen Verhältnisse wie bekannt wandelten, so war der Nachdruck in Österreich, in süddeutschen Ländern und anderwärts Produkt einer Wirtschaftspolitik. Hier vermag Andersch an die reichen Forschungsergebnisse für die Habsburgischen Lande und für Baden anzuknüpfen und nimmt auch die Lage etwa in Kursachsen in den Blick. Womöglich hätte sich der Zusammenhang des verselbständigt abgehobenen Diskurses mit realen Veränderungen der wirtschaftlichen Verhältnisse näher klären können. Doch sieht die Verf. ein Haupthindernis darin, dass die dafür erforderliche Basis vor allem bei der quantitativ aussagefähigen Buchpreisentwicklung fehle.

Die Veränderungen im literarischen Leben, die Veränderungen des Buchmarkts, der Produktion, das Gefälle zwischen Mittel- und Norddeutschland und Süddeutschland hatten zur Folge, dass der Nutzen des Nachdrucks sich auch argumentativ niederschlug: Die bekannten Argumente pro und contra Nachdruck, die unterschiedlichen Haltungen der Autoren selbst, je nachdem wie

[2] Thomas Eichacker, Die rechtliche Behandlung des Büchernachdrucks in Nürnberg des 17. Jahrhunderts. Berlin 2013.

sich die fragile Beziehung zum Verleger, zum Mäzenatentum, zur Grundlage ihrer Existenz gestaltete; allmählich differenzierte sich auch hier die Debatte in verschiedene Richtungen.

Dass der Diskurs um den Büchernachdruck in den 1770er Jahren einen neuen dramatischen Höhepunkt mit allen seinen Verästelungen und Schattierungen erreichte, wird vorgestellt. Hier scheint die Schrift Johann Stephan Pütters von 1774 eine Zäsur einzuläuten. Die Perspektive erweitert sich durch die Reihe weiterer, ausführlich vorgestellter Diskussionsbeiträge. Es sind vor allem Autoren und Verleger, die das Wort führen. Pütters grundlegende juristische Abhandlung wird in ihrer Bedeutung womöglich als inhaltlich weniger bedeutsam, weil zu wenig innovativ eingeschätzt. Die neue tiefgründige Analyse von *Christoph Sorge*[3], die noch nicht einbezogen werden konnte, kommt zu weiter reichenden Schlussfolgerungen. Pütters empirische materielle Bedeutung, die exzeptionelle Qualität in der Verschränkung von Jurisprudenz, Ökonomie und Soziologie, der Normativität des Faktischen und die Wirkung durch Rezeption kann danach nicht überschätzt werden.

Ein differenziertes Bild vermittelt die Sicht auf Kursachsen, Preußen, Hannover und Braunschweig. Hier sollten die Nachdruckverbote, zum Teil unter Einbeziehung von Autoren, gegen die Befürworter der Nachdruck-Länder wie Baden, Österreich, Hessen-Kassel etc. in Stellung gebracht werden. Die Diskussionslage wird ersichtlich durch jene Zweiteilung - den süddeutschen Reichsbuchhandel und die nord- und mitteldeutschen Verleger - geprägt.

Ein besonderer Schwerpunkt und Ertrag der Studie ist mit der enormen Breite und Tiefe der Diskussion um den Büchernachdruck zwischen 1780 und 1815 verbunden. Noch immer steht das Privilegienwesen als Rechtsquelle im Vordergrund.

Interessanterweise differenziert Andersch die Position *Diethelm Klippels*. Nach seiner Quellenanalyse wird zwar das Privileg naturrechtlich attackiert, aber gleichwohl mehrheitlich als Rechtsform akzeptiert. Die Ansicht der Nachdrucksgegner, die Druckprivilegien jetzt vor allem als Erleichterung des Rechtsschutzes sahen, verlor in der Folge wohl quantitativ in der Diskussion an Gewicht. Gegen Klippel wendet sich hier die These, dass den Nachdrucksgegnern das ausschließliche Verleger- bzw. später Autorenrecht Legitimation genug gewesen sei, so dass es einer Auseinandersetzung mit dem Privileg nicht mehr bedurft hätte. Dagegen lässt sich einwenden, dass der Grund, dass die zeitgenössische Diskussion sich mit dem Druckprivileg dann nicht mehr befasste, sich einfacher damit erklärt, dass es weiterhin in großen Teilen Deutschlands noch als Schutzinstrument bis ins 19. Jahrhundert allenfalls theoretisch-ideologisch angefochten weiter galt und erst in einem komplexen, stufenweisen Prozess durch Urheberrechtsgesetze abgelöst wurde.[4]

Die subtilen Debatten im Kontext von wirtschaftlicher Entwicklung im Buchhandel und Verlagswesen, um die Reformdiskussion, um Preisentwicklungen, Handelsbräuche und Absatzgebiete werden eingehend und aufschlussreich nachgezeichnet. Es prägt die Studie aus, dass sich die auseinanderstrebenden, sich überlagernden, gleichzeitig wie ungleichzeitig aufscheinenden Diskurse und faktischen Entwicklungen in ihrem schwer auflösbaren, systematisch schwer auf einheitlichen Begriff zu bringenden Zusammenhang deutlicher erkennen lassen. Das beweisen auch die Reflexe in der Belletristik. Die charakteristische Auswahl orientiert sich an den herausragenden Autorenstimmen, welche die Nachteile des Nachdrucks für Publikum, Staat und die Teilnehmer am literarischen Markt vor Augen stellen. Wielands ironische Persiflage traf zwar auf bestens informierter Basis den Kern des Diskurses, wurde jedoch gerade wegen seines unnachahmlich hohen literarischen Niveaus von den Lesern weithin als engagiertes Plädoyer für die Nachdruckszene gründlich missverstanden.

Die fast unüberschaubare Fülle und Vielfalt der Argumente „Für und Wider den Büchernachdruck" spiegelt auch den Widerhall moderner Momente von Aufklärung und Gegenaufklärung wider, in denen, wie *Reinhard Wittmann* herausgearbeitet hat, die Funktionen des Nachdrucks in der immanenten Verbindung der Ideen von optimistischer Aufklärung und krudem Merkantilismus ihren prägnanten Ausdruck fanden. Wenn die nicht immer zeitgleichen Entwicklungen der rechtsdogmatischen mit den anderen Diskursen sich dann mit Entwicklungen überlappten, bei denen sich die traditionelle Vorstellung vom „derivativen Verlagseigentum" zunehmend von der Idee vom geistigen Eigentum wenn nicht abgelöst wurde, so doch in Widerspruch geriet, dann rückt als *ein* herausragendes Beispiel der Prozess zwischen der Weidmannschen Buchhandlung und Göschen wiederum in den Blickpunkt. Die Differenzierungen der theoretischen Positionen bei der Theorie vom geistigen Eigentum reflektieren wiederum die Einstellungen von Gegnern und Befürwortern. Die Debatte erreicht einen jetzt auch noch pragmatischeren, rechtspolitischen Höhepunkt, als sich die Nachdruckanhänger gegen ein Reichsgesetz gegen den Büchernachdruck aussprachen.

Die Debatte in exklusiveren Zirkeln der sich verbürgerlichenden Gesellschaft als komplex vermittelter Ausdruck sich in nun schnellerer Wandlung befindlicher Markt- und Produktionsverhältnisse charakterisiert verkürzt gesagt die Signaturen der Epoche vor und nach der Jahrhundertwende um 1800.

Wie immer man die farbenfrohe Polyphonie generell oder im Detail einschätzen mag, gilt auch in dieser glänzend herausgearbeiteten Analyse der Abläufe, der Widersprüche, des Pluralismus der schriftstellerisch, dogmatisch, rechtspraktischen Argumentationsmuster jedenfalls für mich die Einsicht, dass eine denkbare systematische Einschätzung auch mit dem selten völlig offen gelegten Interessentenstandpunkt mehr zu tun hatte als mit der Kraft oder Schwäche unverstellter ausgebreiteter Argumente. Gegenüber den öffentlich teils namentlich, vielfach anonym ausgetragenen Kontroversen könnte ein größeres Gewicht haben, dass

[3] Christoph Sorge, Die „selbstredende Natur der Sache" - Verlagsrecht aus Produktionsverhältnissen bei Johann Stephan Pütter (1725-1807). In: Stephan Meder (Hrsg.), Geschichte und Zukunft des Urheberrechts. Göttingen 2018, S.147-177.

[4] Vgl. Thomas Gergen, Die Nachdruckprivilegienpraxis Württembergs im 19. Jahrhundert und ihre Bedeutung für das Urheberrecht im Deutschen Bund. Berlin 20007; ders., Zwischen französischem droit d'auteur und deutscher Privilegientradition: Praxis und Entwicklung des badischen Urheberrechts im 19. Jahrhundert. In: UFITA 2011, I, S.131-158.

manche der Schriften als implizit und insgeheim sehr parteiliche, staatlich in Auftrag gegebene oder von Seiten der Politik geförderte Denkschriften etwa aus dem österreichischen oder württembergischen Nachdrucker-Lager waren.

Die verbreitete Anonymität vieler solcher Schriften und Diskussionsbeiträge erklärt sich womöglich am leichtesten mit der Annahme, dass einerseits die Furcht vor diskriminierenden persönlichen Angriffen, andererseits aber vorwiegend die strategische Verschleierung der zugrundeliegenden Auftrags- und Interessenpositionen der Grund waren, sich als Person im sicheren Dämmerlicht zu halten. Das wird z.B. durch die Vermutung erhärtet, dass hinter einer für Nachdruckfreiheit plädierenden Stellungnahme der berüchtigte Karlsruher Nachdrucker Schmieder sich verbarg. Die Standpunkte und Interessen der belletristischen Autoren, die sich moralisierend-satirisch, im Roman, Lyrik oder Pamphleten dem aktuellen Thema widmeten, konnten eindeutiger zutage treten. Wurde nur scheinbar das Hohelied *für* den Nachdruck gesungen, exponierte sich damit primär die jetzt deutlich hervortretende Perspektive der Schriftsteller als selbstbewusster auftretender Akteure für ihre proprietäre Sicht in satirisch-literarischen Brechungen.

Die Nachdruckdebatte sollte durch die politischen Rahmenbedingungen zwischen 1792 und 1806 erheblich an Gewicht, Dynamik und Substanz verlieren. Auf der politischen Agenda stehen in der folgenden Ära der Stabilisierung und Normalisierung partikuläre normative Regelungen zu Privileg, Zensur und Nachdruck.

Die luzide Studie konzentriert sich auf die Debatten und Entwicklungen bis 1815. Der Ausblick auf die vielfältigen, jetzt unter anderen Bedingungen und politischen wie wirtschaftlichen Voraussetzungen stehenden Entwicklungen bis zur Anerkennung von Ausschließlichkeitsrechten von Schriftstellern und Verlegern wird angedeutet. Der Wiener Kongress bringt keine einheitliche Lösung für die weiterhin bestehenden widerstreitenden Interessen. Der Schutz des landesherrschaftlichen Buchgewerbes und Buchmarkts hat weiterhin Vorrang (S.515).

Fragen von legislatorischen Teilregelungen geraten in den Vordergrund. Dennoch bleibt auf der jetzt anderen politisch-ökonomischen Folie der fragmentarischen Normen und noch deutlicher durch den Einfluss von Interessentenkreisen und organisierten Einwirkungen auf die Rechts- und Wirtschaftspolitik im 19. Jahrhundert der Widerstreit zwischen Nachdruck, Nutzungs- und Nachdruckfreiheit, staatlicher Zensur und partieller Ordnung der Bestrebungen zwischen Propertisation (*Hannes Siegrist*) und De-Propertisation virulent - komplexe gesellschaftliche Projekte bestimmter Gruppen von Akteuren zur Regelung der Beziehungen von Kultur und Gesellschaft durch eigentumsartige Rechte, auf neu strukturierte Weise.[5] Der Diskurs könnte sich auch als mehr oder weniger abgehobene und nicht durchweg wirkungsmächtige Orchestrierung der offenen oder versteckten Handelskriege um die Dominanz in der Vielfalt deutschsprachiger, feudal organisierter Teilmärkte interpretieren lassen. Doch hätte es Ansatz und Fragestellung überschritten, wären weitere sozialgeschichtliche, länderübergreifende, vergleichende Perspektiven auf langfristige europäische und außereuropäische Entwicklungsschritte einbezogen worden.[6]

Einer früheren Periode ist die zweite Studie gewidmet.

Mit der Konzentration auf das toskanische Privilegienwesen unter den Herzögen der Medici im Kontext des Zeitalters ihrer Regierungen (1558 bis 1737) werden von *Julia Dreyer* die Legislativakte zudem mit den venezianischen verglichen. Die Herrschaft der Medici ist neben der kirchlichen und politischen Zensur durch ihr Mäzenatentum geprägt. Die florentinischen Druckereien, oft exklusiv für die Medici tätig, geraten damit zugleich mit den wirtschaftlichen, den technischen und anderen Voraussetzungen der Landesherren schärfer ins Blickfeld.

Nach einer Darstellung der Forschung zu den ersten deutschen und italienischen Privilegien und der Funktion und Rechtsnatur der Druckprivilegien generell liegt der ungemein aufschlussreiche und eindringliche Schwerpunkt in der Auswertung der toskanischen Privilegien gegen den Nachdruck aus den Privilegienbüchern, auf den Zuständigkeiten und dem Antragsverfahren mit seinen Grundsätzen und variablen Inhalten der Privilegien, dem Geltungsbereich, den Sanktionen, der Dauer und der Vererblichkeit.

Das Sample umfasst 300 Antragsverfahren. Die Fragen nach den Motivationen der Herrscherfamilie, die Anknüpfungspunkte der Privilegien, die Argumentationsmuster und die Faktoren für Erfolg oder Misserfolg von Anträgen stehen im Mittelpunkt einer fulminanten Analyse, die exemplarisch die Mikro-Perspektiven mit der Einbettung in die ökonomisch-technisch-gesellschaftliche Situation zweier Jahrhunderte materialreich, detailfreudig und systematisch mit übergeordneten Kriterien verknüpft.

Neben dem reichen, hier erstmals profund ausgewertetem Archivmaterial werden auch die Vorworte von Autoren und Druckern herangezogen. Der von der Verf. aufgezeigte Forschungsbedarf für die Zeit vor und nach den Medici verweist die hier ansatzweise tangierten Dispute zwischen Druckern selbst oder Druckern und Autoren im Staatsarchiv von Florenz. Der Ertrag dieser so gewichtigen wie vorbildlichen, archivalisch auf völlig neuer Grundlage vorgestellten Studie (Betreuer: *Thomas Hoeren*) kann hier nur skizziert werden.

In der strittigen Frage nach der Bedeutung von Autoren- und Druckerprivilegien spricht nach Dreyer der Befund gegen die Annahme eines obrigkeitlich anerkannten natürlichen Rechts der Autoren (S.155-184). In der Toskana blieben Werke ohne Privileg nachdruckfrei.

Drucker und Autoren begründen ihre Anträge mit finanziellen Motiven, dem Verlust von Aufwendungen. Es sind die üblichen Argumente wie Kosten der Drucklegung, Mühen und Kosten der Werkerstellung. Dass dabei auch Anzeichen eines Gespürs für vermögens- und verwertungsrechtliche Aspekte eines heute als Urheberpersönlichkeitsrecht genannten Moments hervortraten, charakterisiert Argumente für die Begründung von Geldzahlungen im Fall eines Verstoßes (S.1076).

[5] Hannes Siegrist, Geschichte und aktuelle Probleme des geistigen Eigentums (1600-2000), In: Axel Zerdick/Arnold Picot u.a. (Hrsg.), E-merging Medien. Berlin 2004, S.313-332.

[6] Dazu Peter Baldwin: The Copyright Wars: Three Centuries of Trans-Atlantic Battle. Princeton 20214K; Adrian Johns: Piracy. Chicago 2010.

Mit dem vorzugsweisen bzw. ausdrücklich verlangten Druck in der Toskana wird das Motiv der Herzöge deutlich, das kulturelle Leben ihres Herrschaftsgebiets maximal zu fördern. Für Privilegienanträge für Drucke außerhalb dieses Gebiets standen die Auspizien schlecht. Die Gründe für erfolglose Anträge im Gebiet sind allerdings vielfältig, richteten sich wohl überwiegend gegen monopolistische Tendenzen, gegen Generalprivilegien oder unübliche Schutzfristen. Nicht unerwartet hatten Anträge einflussreicher Persönlichkeiten bessere Chancen. Anträge für Drucke außerhalb der Toskana konnten erfolgreicher sein, wenn sie sich auf ein Werk bezogen, das für Kirche, Forschung, Bildung, Rechtswissenschaft und Medizin wichtig und in der protegierten *lingua volgare* verfasst worden war.

In der Antragspraxis wird auch auf die Leistung des Verfassers, auf Erfinden, Zusammenstellen, Übersetzen und Drucklegung abgestellt. Die mit Drucklegung zusammenhängende Autorenleistung taucht in den Dokumenten, offenbar im Verlauf sprachlich zunehmend, deutlicher auf (S.1099ff.). Eindeutige Schlussfolgerungen, wie sie etwa Pohlmann für seine Forschungsergebnisse in Anspruch nahm, lassen sich aus dem Archivmaterial nicht ziehen. Für die Privilegienerteilung war vielmehr entscheidend nicht die Abgrenzung des Drucks vom Geisteswerk, sondern die Förderung von Papierindustrie und Buchmarkt. Das gilt für florentinische wie toskanische Autorenprivilegien (Sh. Fazit S.1131ff.).

Eine Schutzfrist von zumeist zehn Jahren verfestigte sich als übliche Verwaltungspraxis. Auch die Neuheit oder Originalität eines Werkes konnten ansatzweise eine Rolle spielen. Der inhaltliche Umfang der Motivationen und relevanten Momente lässt sich jedoch nicht auf wenige entscheidende reduzieren. Die Steigerung von Macht und Ansehen, die Begünstigung von nahestehenden Antragstellern, ihr Bekanntheitsgrad, die Bedeutung der Widmungen an den Herrscher, die Förderung der toskanischen Volkssprache, des *volgare,* spielten eine Rolle. Wirtschaftsförderung verband sich mit Qualitäts- und Inhaltskontrolle. Die womöglich verstärktere Autorenstellung war vermutlich eher eine zufällige Nebenwirkung Staatsräson zugewandter Wirtschaftsförderung. Wie sich die Gewichtungen darstellten, wie vielfältig die Motivationen sich erwiesen, lässt sich den punktuellen und übergreifend plastisch vorgestellten Archivbefunden in ihrer erstaunlichen Vielfalt und Differenzierung entnehmen, die wo immer möglich auch Generalisierungen zulassen.

Privilegien für den Buchdruck unterschieden sich *in nuce* nicht wesentlich von denen für andere Handelsprodukte in Wirtschaftszweigen. Es zeichnet diese bedeutende Studie aus, dass sie neben der minutiösen Analyse der einschlägigen speziellen Archivalien sich auch dem Vergleich mit anderen Bereichen und deren Forschungsergebnissen gewidmet hat. Die Steigerung der Staatseinnahmen war ein wichtiges Element. In der Rechts- und Verwaltungspraxis lassen sich neben gleichzeitig auftretenden Mustern auch Entwicklungen konstatieren, die auf ein zunehmendes *Verständnis* für ein Rechtsschutzbedürfnis für Autoren hindeuten können. Deren Anerkennung und Akzeptanz dürften allerdings gegenüber den entscheidenden Zielen dieses Herrschaftssystems nicht dominant gewesen sein. Eine wie auch immer denkbare Vorstufe zu verankerten Autorenrechten als solche lässt sich aus dem Material nicht herausdestillieren.

Die toskanische Verwaltungspraxis bildet für die Privilegien eine klare Struktur mit konkretisierter örtlicher Drucklegung und Akzentbildung auf Aufwand, Mühen, Neuheit und Nützlichkeit aus, welche Drucker wie Autoren unter den zeitgebundenen Vorstellungen und Voraussetzungen einen spezifisch rechtlich-technisch und nach bezeichnender Wortwahl einen durchsetzungsfähigen konstitutiven Schutz gewährte, der mittels vollstreckbarer Urkunde sanktionsfähig wurde. Gewisse persönlichkeitsrechtlich zu wertende Anklänge zeigt der Umstand, dass man für Autorenprivilegien keine Druckpflicht aufbürdete, Autoren also über die Veröffentlichung die Entscheidung behielten.

Für Dreyer stellt das Privilegienzeitalter eine Übergangsphase dar, in der die Ausformung und Anerkennung von Rechtsschutzbedürfnissen Autorenrechte nicht allgemein-legislatorisch schützte. Wenn angesichts der grundsätzlichen Nachdruckfreiheit sich eine gewissen Regeln folgende Verwaltungspraxis für Privilegienerteilung ohne Rechtsanspruch entwickelte, so läuft die von den Großherzögen entwickelte und vom Nachfolger übernommene Systematik darauf hinaus, dass sich zwar kein Gewohnheitsrecht, aber eine gewisse der feudalen Herrschaftsausübung entsprechende Verwaltungsmethodik festhalten lässt. Innerhalb dieses nicht willkürlichen, aber variationsbreiten „Feudal-Systems" konnten Antragsteller, Drucker wie Autoren, mit einem Privileg wohl bei Erfüllung bestimmter Voraussetzungen rechnen. So liegt es auch nahe, dass sich das Momentum der Autorenehre zu einer zeitgenössischen Auffassung von Respektierung der Persönlichkeit und des Autorenschaffens wandeln konnte. Deutlich ist aber auch, dass die spezielle Gesamtsicht auf das Buch als vornehmlich Handelsware wie jede andere, den Autoren einen den Druckern entsprechenden Schutz zu gewähren vermochte. Innerhalb eines komplexer sich darstellenden Systems von Motivationen und Regelungen stand aber primär die Sicherung finanzieller Investitionen und gewerblicher Interessen der herrscherlich protegierten Industrieentwicklung ganz im Vordergrund.

Die differenzierten subtilen Ergebnisse werden nicht dadurch infrage gestellt, dass sich auch Drucke ohne Privilegierung gegen Nachdruck und Privilegien außerhalb der *Pratica Segreta* und des *Autitore delle Riformagionie* finden. Autoren wie Savonarola oder Giordano Bruno konnten als Systemkritiker kein Privileg erlangen. Werke verstorbener Autoren – Beispiele etwa: Giorgio Vasari, Petrarca, Leonardo da Vinci, Lorenzo di Medici - werden auffallenderweise nicht Gegenstand von Privilegien. Das ist auch bei anderen florentinischen Dichtern oder den Hofmusikern der Fall. Eine Erklärung für das hier fehlende oder nicht realisierte Schutzbedürfnis liegt sicherlich vornehmlich im System des Mäzenatentums. Andere Forschungen bestätigen insoweit wohl die Annahme, dass sich ein wie auch immer entwickeltes, jedenfalls kaum modernerem Urheberrechtsverständnis vergleichbares Bewusstsein schwerlich in einem literarisch-gewerblichen Feld entwickeln konnte oder musste, in dem sich finanzielle Sicherungen entweder durch Privilegien oder durch die verbreitete Existenz von Autoren und Künstlern als besoldete und damit hinreichend alimentierte Staatsdiener erreichen ließen.

Der neben der umfänglichen Verarbeitung von neuen Quellenbeständen und des immensen Forschungsstandes, auch im Vergleich zum Stand der Privilegienforschung vorzugsweise in Deutschland und Italien, beträchtliche Anhang ermöglicht gleichfalls genauen Einblick in die nach ihren relevanten Differenzen systematisierten Privilegientexte, die Archivbestände der untersuchten Epoche, der Anträge auf Privileg bzw. Druck und - für künftige Forschung – sogar ein Verzeichnis der Dispute von Buchhändlern und Druckern in der *Biblioteca Marucelliana*.

Die eingangs genannten Überlegungen Wadles zu Methoden, Nutzen und Vorteilen exemplarischer, örtlicher, regionaler oder sonst sinnvoll eingegrenzter Forschungsfelder und Fragestellungen werden in beiden vorgestellten, weiterführenden und die Forschung bereichernden Analysen aufs Ertragsreichste eingelöst.

Albrecht Götz von Olenhusen*

* Prof. Dr. jur. Albrecht Götz von Olenhusen, Heinrich-Heine-Universität Düsseldorf, Deutschland.

Gerhard Reinhold

OTTO-Glocken. Familien- und Firmengeschichte der Glockengießerdynastie Otto

Essen: artkonzeptkörner, 2020, 588 S.

Das „Glocken schwere“ Großwerk zur Firmen- und Dynastiegeschichte von Otto-Glocken liegt nunmehr vor. Der Hauptsitz lag in Hemelingen bei Bremen. Doch verrät schon das Inhaltsverzeichnis, dass der Autor einen bedeutenden Textanteil der Produktionsstätte der Otto-Niederlassung im saarländischen Saarlouis-Fraulautern und in Schlesien gewidmet hat.

Der Titel der zuerst bei Professorin Daniela Müller als Dissertation an der Radboud Universiteit Nijmegen im Jahre 2019 erschienenen Studie namens „Kirchenglocken – christliches Weltkulturerbe, dargestellt am Beispiel der Glockengießer Otto, Hemelingen/Bremen“ bildet die sehr lang erwartete Familien- und Unternehmensgeschichte ab, die sich neben Hemelingen und Saarlouis obendrein mit der Niederlassung in Schlesien befasst. Insgesamt 8600 Glocken wurden von 1874 bis in die 1970er Jahre gegossen.

In seinem mit 640 Bildern versehenen Buch beschreibt Gerhard Reinhold den „Otto-spezifischen“ Glockenguss, unterscheidet zwischen Glockenstühlen aus Holz und aus Stahl und bietet eine lesenswerte Charakterisierung von Otto-Glocken auf der Grundlage von mehr als 500 Klanganalysen. Ferner beschreibt und kommentiert er anschaulich über 300 Inschriften, um den Beitrag von Glockengeläut zur Geschichte der Kirchen und nicht zuletzt der Religion aufzuzeigen. Von wem hatte der katholische Priester Carl Otto die Gießerkunst erworben, lautet etwa eine Anfangsfrage, neben zahllosen anderen, die der interessierte Leser stellen und worauf er in Reinholds gründlich erforschtem Werk Antworten finden kann.

An saarländischen Glocken ragen die Engelsglocken von St. Michael in Saarbrücken-St. Johann oder die Glocken für den Schutzpatron der Pfarrkirche und Hüttenstadt Völklingen heraus, wozu sich die St. Ingberter Glocken gesellen, die alle aufeinander abgestimmt wurden. Überdies sind zu erwähnen die Glocken der Kirchen St. Ludwig in Saarlouis, Dreifaltigkeit in Fraulautern und die von Mariä Himmelfahrt in Roden mit dem schwersten Geläut des Saarlandes und der schwersten Glocke St. Michael; dort war der 28. März 1954 Tag der Glockenweihe [1].

Die Glocken des Benediktinerklosters St. Mauritius zu Tholey entstammen ebenfalls der Gießerei Otto in Saarlouis, nicht aber diejenigen des Redemptoristenklosters Bous. Die Edition der Chronik des Redemptoristenklosters hat gezeigt, dass das Kloster sein Vollgeläut erst 1960 bestellen und am 2. Oktober 1960 einweihen konnte, also zu einer Zeit, als der Betrieb in Saarlouis schon dem Ende entgegenging; die Bouser Patres bestellten aufgrund guter Kontakte schließlich bei Mabilon in Saarburg [2].

Der hohe Marktanteil von Otto-Glocken im Saarland hatte mit der Präsenz der Glockengießerei Otto vor Ort zu tun. Otto war aber auch schon vor dem II. Weltkrieg im Saarland bekannt. Die ersten Otto-Geläute wurden 1910 nach Püttlingen und Saarbrücken geliefert. In der Zwischenkriegszeit seit 1918, als die nach der Glockenabnahme von 1917 verwaisten Türme wieder mit neuen Glocken versehen wurden und der Landkreis Saarlouis unter Völkerbundmandat stand und zum französischen Wirtschaftsgebiet gehörte, wurden (zwar) auch französische Gießereien wie Causard in Colmar und Paccard in Annecy berücksichtigt, die meisten Glocken aber wurden damals schon von Mabilon, Otto, Petit & Gebr. Edelbrock sowie von Schilling geliefert.

---

[1] Zur Vorgeschichte und Bedeutung der Glocken siehe: Thomas Gergen, Die schwerste Glocke des Saarlandes: Die Michaels-Glocke in Roden und das dortige „Griesbachersche Idealsextett“, in: Unsere Heimat (Mitteilungsblatt des Landkreises Saarlouis für Kultur und Landschaft) Jg. 37, Heft 1 (2012), S. 35-38; abgedruckt ist bei Reinhold das eindrucksvolle Foto vom Vorabend der Glockenweihe. Das Foto stammt aus dem Archiv von Karl Hans, Saarlouis-Steinrausch.
Karl Hans hielt die Geschichte der Rodener Glocken ausgehend vom Guss bei der Firma Otto in Fraulautern bis zum Tag der Glockenweihe als Doppel8-Film (8mm Schmalfilm) fest. Damit schuf er das hierzu wichtigste zeitgenössische Dokument. Der Film dauert etwas über eine halbe Stunde. Die Glockenstühle wurden im Übrigen gefertigt von der Firma Konstroffer & Sohn (Peter und Werner) in Saarlouis-Roden. Das Gesamtgewicht der Michaelsglocke wird von Reinhold mit 4840 kg angegeben.

[2] Thomas Gergen, Europa-Kloster Bous (1949-2009), in: Ders. (Hg.), 60 Jahre Redemptoristenklöster Bous und Püttlingen, St. Ingbert 2020, S. 302-312.

Am 31.12.1960 musste die Saarlouiser Glockengießerei infolge eines Todesfalles innerhalb der Firma die Produktion in Saarlouis kurzfristig einstellen. Gemeint ist der Tod von Karl (III) Otto am 21. Juli 1960. Den Geschäftsanteil übernahm sein Sohn Dieter, der später auch den Anteil von Alois Riewer übernahm. Als sein Vater Karl (III) starb, war Dieter Otto 25 Jahre alt. Er übernahm in diesem Alter sowohl die Verantwortung für die Glockengießerei in Hemelingen wie auch in Saarlouis. Im Alter von 18 Jahren war er mit Johannes und Friedrich Otto nach Saarlouis gekommen, wo er in der neuen Gießerei seine Lehre und seine Ausbildung zum Glockengießermeister machte. Nur acht Jahre hat die Saarlouiser Glockengießerei aktiv gearbeitet und in dieser Zeit 535 Glocken mit einem Gesamtgewicht von knapp 400 Tonnen gegossen.

Bei der der auf dem Gelände der kriegszerstörten Gasanstalt errichteten Otto-Filiale in Saarlouis gibt es indes Anlass zur Klarstellung beim Thema der eigenen Rechtspersönlichkeit der „Saarlouiser Glockengießerei G.m.b.H." Zu jener Zeit galt im „Saarstaat" zwar deutsches Recht mit französischem Sonderrecht hinsichtlich der Wirtschafts- und Währungsunion; doch bestand eine saarländische Besonderheit dergestalt, dass die Mehrheit der Kapitalträger in saarländischer Hand sein musste, was die herausragende Erwähnung des Unternehmers Riewer aus Völklingen erklärt.

Die Behauptung, Friedrich Otto habe Saarlouis nicht (zumindest mit-)gegründet, ist in dieser schroffen Form zurückzuweisen. Zwar erscheint er im Handelsregister (HRS Saarlouis 103) nicht explizit als Gesellschafter/Mitgesellschafter, jedoch als Geschäftsführer und Glockengießer. Das Handelsregister, das nach § 15 Handelsgesetzbuch damals wie heute öffentlichen Glauben genießt und dessen Eintrag bis zum erschütternden Beweis als wahr gilt, weist Friedrich Otto somit als dritten Eingetragenen aus (positive Publizität). Zudem sind bei einer GmbH die Geschäftsführer zumeist auch Gesellschafter nach Gesellschafterliste (§§ 6, 40 GmbHG); daher kann er gesellschaftsrechtlich von Anfang an als zumindest einer der Mitbegründer der Zweiggießerei Saarlouis eingestuft werden.

Die Saarlouiser Glockengießerei G.m.b.H. wurde mit Datum vom 15. Mai 1961 in die Firma F. Otto KG in Bremen-Hemelingen überführt. Aus heutiger Sicht ist nach Ansicht Reinholds diese radikale Entscheidung falsch gewesen. Wenn auch der Weiterbetrieb der Gießerei an der Saar auf Dauer wenig sinnvoll gewesen wäre –wegen der Tatsache, dass nahezu alle Kirchen des Saarlandes mit Glocken ausgestattet waren und wegen der Nähe zur Glockengießerei Mabilon in Saarburg –, so wäre es sicher gut gewesen, einen Wartungsbetrieb zur Pflege und Reparatur der vielen Otto-Geläute an der Saar aufrechtzuerhalten; hier kann man Gerhard Reinhold sicherlich zustimmen und ihm uneingeschränkt für die sorgfältige Herausarbeitung der Tätigkeit der Glockengießerei Otto in ihrer nahezu 100jährigen Firmengeschichte danken.

Thomas Gergen*

* Prof. Dr.iur. Dr.phil. Thomas Gergen, Maître en droit, Institut Supérieur de l'Économie, ISEC Université Luxembourg.

Jan Lundberg

Der Fußball als Teil des Grundversorgungs- und Funktionsauftrags des öffentlich-rechtlichen Rundfunks

Hamburg: Kovac, 2020, 229 S.

Sportsendungen zählen nach gesicherter Ansicht zur sog. Grundversorgung des öffentlich-rechtlichen Rundfunks und besitzen bereits medien- und rechtshistorische Bedeutung.

Die präzise Fragestellung der Studie: Ob und in welchem Umfange dürfen die öffentlich-rechtlichen Sender immer kostspieligere Fußball-Berichterstattung durch Rundfunkbeiträge finanzieren? Überschreiten derart hohe Kosten die Grenzen der Verfassung? Das gesellschaftliche Interesse an diesem Sport könnte außer Verhältnis zum klassischen Rundfunkauftrag und zur Sicherung von gebührenabhängiger medialer Vielfalt und inhaltlicher Ausgewogenheit geraten sein oder künftig gelangen.

Die von den krassen ökonomischen Voraussetzungen und dem enormen exponentiellen Anstieg der Kosten für Verwertungsrechte ausgehende Untersuchung wurde von Christine Langenfeld, Göttingen, Bundesverfassungsrichterin, betreut. Die eingangs instruktiv präsentierten, veränderten finanziellen Grundausstattungen und ihren aktuellen Veränderungen sind für die anschließende verfassungsrechtliche Analyse unentbehrlich.

In gebotener Präzision und Kürze werden als Hintergrundinformationen wesentliche Akteure sowie Gründe für die Kostenexplosionen der „Rechtepakete" ausgebreitet. Hier wirkt sich das preissteigernde Verhalten von Sportrechte-Agenturen aus. Die monopolistischen Lizenzgeber haben es in der Hand, angesichts der Konkurrenz der vermehrten Rundfunkanbieter und steigender Verbreitungsmöglichkeiten steigende Paketpreise zu diktieren. Zu den hier vorgestellten multiplen Faktoren zählt auch die preistreibende Etablierung des Pay-TV und die internationale Verbreitung von Sportformaten.

Mit dem Rundfunkbegriff und den verfassungsgerichtlichen Grundlagen der Rundfunkberichterstattung nach Art. 5 Abs.1 Satz 1 GG bewegt sich der Verfassungsrechtler auf einem vertrauten Spielfeld nationaler Gefühlsaufwallungen. Es wird durch den Rundfunk- bzw. Medienstaatsvertrag ausgefüllt. Was sich hier als notwendige „positive Ordnung" (S.54) versteht, ist durch vierzehn Rundfunkentscheidungen des BVerfG differenziert entwickelt worden. Sie bilden seit dem Urteil zum Deutschland-Fernsehen bis

zum ZDF-Staatsvertrags-Entscheid das Rückgrat der Rundfunkverfassung. Komplexe internationale Austausch-Regeln vervollständigen das Bild eines sich permanent global erweiternden Marktes.

Im dualen Rundfunksystem stehen nach wie vor der Begriff der „Grundversorgung" mit seinen komplexen Elementen und die Bestands- und Entwicklungsgarantie zur Diskussion. Sie orientiert sich am weiter gefassten Funktionsauftrag der öffentlich-rechtlichen Sender. Lundberg sieht Fußballberichterstattung als integralen Teil des Auftrags der öffentlich-rechtlichen Sender. Dabei bleibt im Zentrum der Konflikt, ob eine so gewichtige prozentuale und finanzielle Programmausdehnung der Sportberichterstattung mit verfassungsrechtlich verpflichtender Grundversorgung und zudem mit dem umfassender definierten Funktionsauftrag noch vereinbar ist. Die Frage nach der rechtlichen Fundierung der Steigerung der Verwertungskosten in 50 Jahren von 0,33 Mio auf 628 Mio – dieser Zahlenausschnitt bezieht sich auf die Jahre zwischen 1965 und 2013 – ist mehr als berechtigt.

Die Untersuchung, ob der Privatfunk eine „Grundversorgung" mit übernehmen könne, endet mit dem erwartbaren Ergebnis, dass mangels materieller Regelungen der öffentlich-rechtliche Rundfunk insoweit "alternativlos" sei. Fußball als Sportbericht gehört zur normativ gefassten „Information", auch in Form der Grundversorgung durch Live-Berichterstattung.

Eine Kernfrage richtet sich auf das Verhältnis von so praktiziertem Finanzbedarf zum tragenden Rechtsprinzip der „öffentlichen Hände" von Wirtschaftlichkeit, Sparsamkeit und entsprechender Kosten-Nutzen-Relation. Können diese Maßstäbe generell oder speziell gelten, wenn der spendable Ankauf von extrem teuer gewordenen Erstverwertungs-Rechten ein „Zuschussgeschäft" ist? Wie lässt sich der Finanzbedarf wirtschaftlich und sparsam gegenüber der KEF überhaupt mittels auch solch profitorientierter Faktoren legitimierend berechnen, wenn die in politisch bestimmter Gebührenabhängigkeit Sender selbst die Fußballsendungen gar nicht zu refinanzieren vermögen?

Für Privatsender rechnen sich die Erwerbskosten durch die wegen Maximierung von Einschaltquoten erhöhten Einnahmen aus der Werbewirtschaft. In dem Maße, in welchem sich ARD und ZDF innerhalb des dualen Systems zunehmend dem vielfach kritisierten „Einschaltquotendruck" unterwerfen, meinen sie auch, sich oftmals leichthin befreit von hinderlichen marktwirtschaftlichen Erwägungen in die Verhandlungs- und Erwerbsgeschäfte ihnen wertvoller Erst- und Live-Sendungen stürzen zu müssen.

Ist verfassungsrechtliche Garantie der Rundfunkfreiheit als „dienende" Freiheit in einer dualen Rundfunkordnung schon puristisches Argument genug, um hohe, überproportional ansteigende Erwerbskosten für Rechte, Produktion und Technik als „nachrangig" zu bewerten: als „gesellschaftlicher Preis" für die Erhaltung eines „freien und autonomen Rundfunks"? Liegt die kaum präzise zu beschreibende, vieldeutige Grenze bei der Missachtung der Funktion und Aufrechterhaltung von Rundfunkfreiheit? (S.137)

Diese Grenze sieht Lundberg allein dort überschritten, wo solche Kosten zu Lasten der erforderlichen Vielfalt gehen würden. Solchen Missstand konstatiert er nicht. Sozial- und medienwissenschaftliche Forschung möchte derartige Belastungen bereits als gegeben erachten.

Vielfalt, inhaltliche Breite, Ausgewogenheit als Maßstäbe des Medienrechts können dann gefährdet sein, wenn Fußball-Livesendungen etwa im Hauptprogramm „Das Erste" einen Anteil von 22 Prozent erreichen. Das Moment der verlangten programmlichen Ausgewogenheit wird kaum erreicht, wenn Fußballsendungen (allenfalls relativiert durch saisonal vergleichsweise hohe Anteile von Wintersport-Live-Sendungen) überproportional privilegiert werden – auch innerhalb der Gesamtheit von Sportformaten.

Das bei kritischen politischen Sendungen oder Magazinen gerne wie ein Mantra genutzte Ausgewogenheits-Postulat gerät zur Farce: das gesellschaftlich begründete erhöhte Interesse am Fußballsport wird auf diese Weise gegen sonst normativ eingesetzte Begründungs-Topoi ausgespielt. Das Überangebot von nationalem Lieblings-Spiel gewinnt gegen das Gebot der informationellen und kulturellen Vielfalt.

Wie vertragen sich die (auch) normativ festgelegten Programmaufträge plus Wirtschaftlichkeit und Sparsamkeit mit dem Postulat, ein Programmauftrag sei nach dem GG unabhängig von den Gesetzmäßigkeiten des Marktes zu erfüllen? (S.138f) Wie kann das mit Haushalts- und Bilanzausgleichsgeboten noch zusammenpassen?

Mag auch der prozentuale Sendezeitanteil der Fußballberichterstattung sich in Grenzen halten – die Forschungsfrage der Arbeit geht dahin, ob der damit relevante **ökonomisch** bedeutendste Programmanteil der Sender noch der Verfassung entspricht. Die Studie mündet in der diskussionswürdigen Wertung, dass ein verfassungsrechtlich zu beanstandendes Ausmaß von Live-Fußball *de lege lata* noch nicht erreicht sei (S.140).

Auffallend ist, dass nach dieser Analyse eine präzisierende Kontur von Grundversorgung und Funktionsauftrag zur Bestimmung von Ausmaß und Umfang von Fußballberichterstattung fehlt. Dass Live-Übertragungen als Angebotsform innerhalb des Rundfunkauftrags liegen, erscheint als eine eher banal zutreffende Einsicht zugunsten gesellschaftlich und rechtlich akzeptierter Daseinsberechtigung und Zuschauerwünschen. Das weite Ermessen der Sender wird jedenfalls durch das hier präsentierte Verfassungsverständnis zu Art. 5 GG nicht wesentlich tangiert oder eingehegt. Die Ergebnisse werden am Ende in zwanzig Thesen komprimiert.

Es bleibt die Frage, ob die notwendige Widerspiegelung der „gesamten Bandbreite an Unterhaltung, Information und Kultur" in Vielfalt und Ausgewogenheit - weitgehend ungehemmt durch die in der Arbeit herangezogenen Normen des Verfassungs- und Medienstaatsvertragsrecht und der Normen zur Kurzberichterstattung - primär den publizistischen Entscheidungen der Sender überantwortet werden dürften.

Wenn, wie in den Thesen Lundbergs, die Erwerbs- und sonstigen Kosten kein entscheidendes Kriterium sein sollen, sondern eben der unausweichliche hohe „Preis", den die Gesellschaft für einen „freien und autonomen" Rundfunk zu entrichten habe, dann entzieht solche rechtliche Reduktion von komplexen Prinzipien wirtschaftlicher und sparsamer öffentlich-rechtlicher Medientätig-

keit, die sich aus haushaltsbezogenen Pflichtgebühren speist, jeglicher inhaltlich-sachlichen Überprüfung der Folgen eines ungemein weit gespannten Programmermessens.

Folgen wir dem Autor, dürfen wir scheinbar das weitgehend entscheidungs- und sanktionsfreie Spielfeld mit relativ freien Akteuren im ungleich strukturierten Wettstreit besichtigen – quasi ohne Aufsicht von Schiedsrichtern. Und doch lehrt der Befund, dass es eine allerdings eingeschränkte Rechts- und Fachaufsicht der Länderinstanzen, eine gewisse Grenzziehung durch die KEF jedenfalls im Rundfunkaufwands- und Gebührenrecht und durch kompetente Maßstäbe der Rechnungshöfe von Bund und Ländern gibt – immerhin markante Grenzpfähle und Korrekturmittel mit grundgesetzlicher und föderaler Basis.

Diese Konturen kommen in der stringent durchgehaltenen und scharfsinnig entwickelten Studie zu den normativen Eckpfeilern weniger zum Tragen. Mit der gerne und vielfach herangezogenen Begrifflichkeit der rundfunkrechtlichen „regulierten Selbstregulierung“ wird sich die Berechtigung und Notwendigkeit einer verfassungsrechtlich enger begrenzbaren Rundfunkordnung nicht ersetzen lassen. Mit Art. 5 GG allein lässt sich eine Waffe gegen die Marktverhältnisse nicht schmieden.

Die gegen eine Kritik an überbordender Sportrechts-Erwerbskosten eingesetzten bisherigen „Selbstverpflichtungen“ der Sender, Produkte hausgemachter Interessen, bleiben, wie man weiß, freilich angesichts der Tendenz, als gebührenfinanzierte Marktteilnehmer im opulenten Quoten-Wettbewerb zu obsiegen, auf der Strecke.

Im Kampf um die Gunst des Zuschauers wirkt - wie im sich immens steigernden Kreislauf von Ablösemillionen für Spieler und Trainer – das Verfassungsrecht schwerlich als schützende Bandage. Hier regieren die „Gesetze“ der Quantitäten des Aufwands nebst dem „symbolischen Kapital“ der Einschaltquoten als erwünschter „Profit“ im Wettlauf um mediale Aufmerksamkeiten.

Albrecht Götz von Olenhusen*

* Prof. Dr. jur. Albrecht Götz von Olenhusen, Heinrich-Heine-Universität Düsseldorf, Deutschland.

Edward Cavanagh (ed.):

Empire and Legal Thought. Ideas and Institutions from Antiquity to Modernity

Leiden – Boston: Brill Nijhoff, 2020, XVI+617 p.

This volume of essays and studies edited by Edward Cavanagh moves across the frontiers of legal theory, legal history, and international law. The selection promises an exciting journey in terms of both authors and themes - both in space and time. The authors of the book comprise not only scholars of law, but also historians and experts of other fields of humanities who have studied and taught in different continents and regions, and they even belong to different generations. The topics are also diverse. The common base for the research is the exploration and presentation of the relationship between realms and legal thinking, but in the course of reading we can also learn many political, cultural and legal-historical curiosities about each state and empire.

The book simultaneously summarizes our current knowledge and identifies new research directions. It is a great advantage that it can re-position known facts into new contexts, and reshape old questions, or link previously separate topics. One of the reasons for the novelty lies in the well-selected team of authors, who have successfully combined their own research findings with the impressive amount of bibliography they collected, thus allowing the curious readers to further explore each issue from their own perspective.

Dr. Cavanagh mentioned in the foreword that it took four years from the formulation of the idea to the completion of the volume. The work of the editor and the authors clearly paid off, resulting in a new approach as well as revealing new research directions. It is a synthesizing and thought-provoking work at the same time, that could be useful material not only in the field of research but also in university education, both for the faculties of law and humanities.

However, in the columns of this journal, we cannot avoid the question of what message this book has for legal historians living and working in Central or Eastern Europe. Could such an interdisciplinary volume be produced at all here, where research of legal history is conceptually much stronger connected to the legal sciences than in the Anglo-Saxon countries? One of the messages of the book is, that there is a great need for interdisciplinary cooperation on Central European topics and on the history of our own legal institutions. The circle of legal historians would definitely be worth “opening up,” but for this, general legal knowledge should appear in the training of historians and humanities, or should gain a better position, because this prior legal knowledge is absolutely necessary for scholars dealing with legal history. Further expansion of this circle, cooperation with scholars of other fields of the humanities in general, and even involving classical philologists could also be beneficial. The often boring monologues of practitioners of the same profession could become one dialogue this way, which could be useful for both scholars of law and humanities.

Reflecting on the subject itself - empire and legal thinking - can also bring many lessons, as this (Central and Eastern European) region, although it has repeatedly tried to organize itself over time, has been a frontier between different empires for the greater part of the last two thousand years. Even the common European basic experience, the Roman conquest and Romanization itself

was only partial, as the Romans could only partially assimilate the people of this region, and their linguistic, cultural, and legal foundations and innovations were washed away by the waves of the great migrations.

Even in the later history of the region, it usually belonged to one or more empires. Despite repeated attempts to homogenize the region for more than a hundred years, it remains ethnically diverse to this day, where linguistic and state boundaries — similarly to the former African colonies of the Western European states — do not always coincide. Yet, the nations and minorities of this region are bound together by a number of threads, and these are due in part to similarities in legal customs and legal thinking.

Of course, we had common kings and states in the past, but the beginnings of the formation of the modern state happened in this region mostly within the framework of German-speaking states. Thus, our first modern legislation, legal education and training, the basic schemes of legal thinking are similar. How long can the influence of a great empire operating with the help of a common state apparatus and army be demonstrated in the thinking of the people? Is the survival of former common customs similar to that of language families, in which the kinship gradually fades away and it can be demonstrated even for hundreds of years? To what extent can the political orientation of a region on the periphery of empires be influenced by common legal customs and legal culture? To what extent could a common state organization or alliance be built on common legal customs and legal thinking?

We would need to look for answers to these questions in Central and Eastern Europe, because it is becoming increasingly clear that the characteristics and legislative products of our own statehood, which is sometimes short-lived, cannot in themselves be of major interest even within the European continent. However, due to its common history, the region has a number of similar legal institutions and acquis, which would need to be presented in a European and global context. To refer only to a close "full" anniversary: the Hungarian Golden Bull alone would not arouse interest even in connection with its 800th anniversary, but as a parallel process taking place in areas far from the center (which happened to be in Hungary within the region), it is more important because - in a broad sense - it was one of the earliest declarations of liberties. The situation is similar with the early legal incorporation of freedom of religion in the states of Central Europe. Finally, did the legal culture of the states in the northern and central part of the region influence the legal development of the southern states of the region (in the Balkan)? If so, to what extent and in what areas? Issues and topics related to the Central European region could be listed at length.

From the point of view of a Central European legal historian, it would be necessary to compile a volume of studies that can focus on exploring and presenting the common legal heritage of cultures and states lying in the frontiers of these empires. Although, such an analysis would not be able to completely remove all the problems we have accumulated over the centuries, it could be a huge step towards solving them.

The volume of studies edited by Edward Cavanagh is therefore not only an exciting work with new results, but also a thought-provoking read for Central European legal historians from whom we can draw many ideas.

Endre Domaniczky

Guidelines for authors

The **Journal on European History of Law** publishes posts from the field of history of law, history of legal thought and Roman law. An ideal lenght of a post should be 50,000 to 60,000 characters. However, it cannot exceed 90,000 characters. It must be written in English or in German languages. All the works are reviewed. The executive editor decides on whether to publish the materials and in which order. After the review, the decision will be sent to the author by email.

The authors are responsible for the lingual and formal level of submitted papers. These levels are checked by the editorial office and some small necessary changes can be done by the editor. Corrections are possible only upon prior request.

Corrections done by the author must be returned within 4 days and no significant changes are permitted.

The papers must be sent to the email address of editor's office: info@historyoflaw.eu

The papers must be in the formats DOCX, DOC or RTF (MS Word). In the Word editor, use the font Times New Roman, font size 12, spacing 1,5.

If your text contains pictures or tables (only black and white), mention their meaning in the text. If the pictures are sent by electronic mail, they must be in JPG, TIFF or EPS format. All the tables, pictures and graphs must be placed somewhere in the text and also sent separately.

Since the European Society for History of Law is a non-profit organisation and there is no payment for the papers published in the Journal on European History of Law, the society cannot provide the authors with free prints of the Journal. Nevertheless, each author receives an electronic version (via email) of the issue in which his or her paper was published.

Each work must contain:

1. **Title**. It contains (in this order, always in a new row):
Short and understandable title;
If the Title is in German, please provide us with English translation, too.
The full name and last-name of the author/s including academic titles and working-place;
Address of the author/s, including the code of the country before the postal code (for example CZ). Afterwards write down your email address.
2. **Abstract.** Summarizes the content of the work. Usually up to 10 rows. It should describe clearly the main question of the research, solution, sources and methodology (according to the type of research).
3. **Keywords.** Several terms (not more than 20 words) that characterize the work. Words from the title can be repeated.
4. **Division of the proper text.** For better orientation in the text, it should contain headings. The headings should be numbered (f.e. 1., 1.1, 1.1.1). Please, use footnotes, not endnotes. Footnotes should be placed after punctuation. Each note should have a dot in the end. Do not include bibliography at the end of the paper.

An example of a paper may be found on http://historyoflaw.eu/english/Example_JEHL.pdf.

Quotation from publications in English language – write down in the underlined comments in such a way:
BRAUN, A., *Kirchenrecht.* Wien, 2005, p. 151-152.
BRAUN, A., Zur Entwicklung des Kirchenrechts. In: *Journal on European History of Law,* vol. 6, Nr. 1, 2016, p. 25-34.
BRAUN, A., Zur Entwicklung des Kirchenrechts. In: KLEIN, O. (ed.), *Enzyklopädie der österreichischen Rechtsgeschichte.* Wien, 2016, p. 25-34.

Quotation from publications in German language – write down in the underlined comments in such a way:
BRAUN, A., *Kirchenrecht.* Wien, 2005, S. 151-152.
BRAUN, A., Zur Entwicklung des Kirchenrechts. In: *Journal on European History of Law,* vol. 6, Nr. 1, 2016, S. 25-34.
BRAUN, A., Zur Entwicklung des Kirchenrechts. In: KLEIN, O. (Hrsg.), *Enzyklopädie der österreichischen Rechtsgeschichte.* Wien, 2016, S. 25-34.

If the requirments on the papers are not complied with (mainly the prescribed form of quotation from publications), the paper will not be accepted and presented to reviewers.

Peer review process

- Submitted manuscripts first undergo an in-house review by the Editors who decide on acceptance or rejection for the full review procedure, on the grounds of conformity to the formal and substantive requirements of the journal.
- If accepted, the article is then sent to two reviewers, experts in the given area of research.

Every effort is made to maintain both professional and personal independence between the author and the reviewers; however, we ask the authors to indicate the persons who have read the paper, and/or have cooperated in its completion before its submission. Also, the author may state in a separate letter the reasons why he wishes specific person should not be contacted for reviewing purposes; the Editors however reserve the right of final decision on the reviewers.

Please allow usually six months for the completion of the review process. Based on the verdicts, we will either:

- publish the article as it is or after minor revisions (specified and subsequently reviewed by the Editors), or
- ask the author for a major revision and resubmission, after which another round of external reviewing will take place, or
- decline the text for further consideration.

Although the opponents' reviews are of crucial importance, the final decision on acceptance of the article for publishing, or its rejection, is solely the right and responsibility of the Editorial team and the Editor-in-Chief. In case of contradictory or otherwise conflicting reviews, a third one will be solicited.