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The Habsburg Monarchy and the South-American Question 1815–1842*

*Miriam Gassner***

Abstract

When the Spanish-American colonies successively declared their independence in the first half of the 19th century, the European Powers had to decide on how to deal with these newly formed republics. Already at the Congress of Vienna in 1814/15, the Holy Alliance decided to follow the principle of legitimacy set up by the French diplomate Prince Charles Maurice de Talleyrand. However, the interests of the European Powers that formed the Holy Alliance were too diverse to adhere to the principle of legitimacy for long: While the eastern powers (Austria, Russia and Prussia) adhered to the principle of legitimacy and refused to recognize the newly formed Spanish-American republics, France soon followed the British path and started to recognized the Spanish-American republics as sovereign states. Only the Empire of Brazil, which was ruled by the Portuguese heir to the thron Dom Pedro and his wife the Habsburg Archduchess „Leopoldina", was recognized by the Habsburg Monarchy as early as 1825.

Keywords: *South America; Habsburg Monarchy; Holy Alliance; 19th century; war of independence; diplomatic relations; recognition of new states; Congress of Vienna; Congress of Troppau; Congress of Verona; Brazil; Archduchess Leopoldina; Don Pedro; Metternich; Talleyrand.*

1. Introduction

At the beginning of the 19th century, the invasion of Spain by French troops and the installation of Napoleon's brother José Bonaparte as Spanish king created a power vacuum that provided the ground for the emergence of independence movements throughout South America. Moreover, the fact that from 1797 on the Spanish colonies were allowed to trade with neutral nations such as the United States, significantly strengthened their economic independence from the mother country.[1] The South American independence movement, to which the revolutions in Haiti[2] and in the United States of America served as a role model, began in the viceroyalty of New Granada, which declared its independence from Spain in 1809. It spilled over to the other viceroyalties and soon resulted in wars of independence that hit almost all parts of South America.[3] It can generally be said that the struggle for independence of the Spanish colonies went through two main phases: A first phase beginning with New Granada's declaration of independence in 1809 lasting until 1816, which was marked by bloody battles and a partial reconquest by Spain[4], and a second phase between 1816 and 1830, in which the war of independence in most South American states had already been decided in favor of the former colonies, and in which the main issue was the recognition of independence of the former colonies by the international community of the time.[5] Cuba and Puerto Rico were the only Spanish colonies to remain untouched by independence efforts in the first half of the 19th century.

2. The Congress of Vienna and the Holy Alliance

The Napoleonic Wars and the achievements of the French Revolution made it necessary to reorganize Europe. Thus, the Congress of Vienna[6] convened in October 1814 in the capital

* This paper is based on my unpublished PhD dissertation: „The international relations between the Habsburg Monarchy and South America 1815–1867." PhD diss., University of Vienna 2013. For this paper almost all archival sources were found at the Austrian State Archive, the Haus- Hof und Staatsarchiv (HHStA) located at Minoritenplatz 1 in Vienna, Austria.

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1 KÖNIG, H., *Kleine Geschichte Lateinamerikas*. Stuttgart, 2006, p. 210. See also: STEIN, B., STEIN, St. *Crisis in an Atlantic Empire.* Baltimore, 2014, p. 2; HERZOG, T., *Frontiers of Possession: Spain and Portugal*. Cambridge, 2015, p. 96.

2 For Haiti see among others: GEGGUS, D., *The Impact of the Haitian Revolution.* Columbia, 2001; GHACHEM, M., *The Old Regime and the Haitian Revolution*. Cambridge 2012. For the US- revolution see e.g.: ARMITAGE, D., *The Declaration of Independence: A Global History*. Cambridge, 2007.

3 ADELMAN, J., Independence in Latin America. In: MOYA, J. (Ed.) *Oxford Handbook of Latin American History.* New York, 2011 p. 153–80.

4 In Spain, Ferdinand VII. returned to the throne in 1813, suspended the liberal constitution of 1812, and ruled absolutist until 1820.

5 RINKE, St., *Revolutionen in Lateinamerika.* München, 2010, p. 117; 193.

6 For the Congress of Vienna, see among others: VICK, B., *The Congress of Vienna*. Cambridge, 2014; KWAN, J. Congress of Vienna. In: *The Historical Journal*, vol.60, Nr. 4,2017, p. 1125–46.

of the Habsburg Empire. In the course of the Congress the participating rulers wanted to restore the political conditions of before 1792 and aimed at eliminating all kind of liberal ideas. To secure the results of the Congress of Vienna, the Habsburg Monarchy, Prussia and Russia founded the Holy Alliance on September 26, 1815, to which all European states but the Holy See, Great Britain and the Ottoman Empire were to accede in the course of the 19th century.[7] The rulers aimed at governing their peoples „in accordance with the Holy Scriptures in a Christian patriarchal manner", as they put it.[8] With Tsar Alexander I. as the patron of the Russian Orthodox Christians, Emperor Francis I. of Austria representing Catholic Christianity, and King William III. of Prussia representing Protestant Christianity, the leading figures of all Christianity joined together in the Holy Alliance.[9] Like the German Confederation on a small scale, the Holy Alliance was intended to maintain monarchical legitimacy on a pan-European level. The military component of the Holy Alliance was formed by a defensive Quadruple Alliance to which the major European powers Great Britain, Russia, Austria and Prussia joined, when signing the treaty of Alliance[10], simultaneously with the Second Treaty of Paris on 20 November 1815 following the defeat and second abdication of Napoleon Bonaparte.[11] The formation of the Quadruple Alliance committed the four powers to immediate joint military action in the event of a Bonapartist restoration in France or any other revolutioany upraising in one of its member states. (Art.1 to 4 of the Treaty of Alliance) Furthermore, they placed France under „international supervision." (Art.3 of the Treaty of Alliance) The main idea behind the Quadruple Alliance was reflected in its famous Article VI, which pledged the allies „to consolidate the connexions which at present so closely unite the four sovereigns, for the happiness of the world, […] to renew their meetings at fixed periods for the consideration of the measures which at each of those periods shall be considered the most salutary for the repose and prosperity of nations and for the maintenance of the peace of Europe."[12] As a consequence, the recognition of new states and consequently the decision on their admission to the international community also fell within the competence of the Alliance. When France regained its full sovereignity at the Congress of Aachen in 1818, the Quadruple Alliance turned into a pentarchy. Thus, began the period which is also known as the „Concert of Europe".[13]

3. The South America question and the Concert of Europe

In terms of customary international law, the principle that a state was not considered to have come into being on the international level, until it was recognized by the (at the time Christian-European) community of states, had emerged in the 18th and early 19th century, whereby the act of recognition could be either exercised explicit, e.g. by means of a formal letter of recognition as it was the case for when Austria recognized Brazil, or implied, e.g. by concluding a commercial treaty or establishing diplomatic relations.[14]

Moreover, in the case of a (former) colony, it was necessary that the (former) mother country had waived its sovereignty over its colony, before other states could recognize it as an independent state. This customary principle of legitimacy was first broken by France on the occasion of the U.S. Declaration of Independence. On February 6, 1778, France became the first European power to recognize the U.S. by concluding a treaty of friendship and commerce. At the time the treaty of friendship and commerce was concluded the former mother country Great Britain had not yet waived sovereignty over its American colony. Thus, France paved the way for a new principle entering international law, the so called „principle of effectiveness ". According to it, a state already came into existence, as soon as it was permanently effective and independent. Hence it could also be recognized from this moment on by the international community.[15] As the French representative at the Congress of Vienna, Prince Charles Maurice de Talleyrand, put it on several occasions, a guiding principle, aiming at restoring legitimate sovereignty and guaranteeing it under international law, binding to all European powers, was required.[16] To this end, the newly emerged principle of effectiveness had to be pushed back as quickly as possible and the principle of legitimacy had to be anchored in (positive) international law. This finally happened at the Congress of Troppau (Oct.-Dec.1820) under the protest of Great Britain.[17] According to Talleyrand's principle of legitimacy, not only every acquisition of territory and sovereignty by conquest, but also the revolutionary acquisition of state power in violation of the previous holder was illegitimate.[18]

The tangled relations between Spain and its American colonies had drawn the attention of European powers more than

[7] ZIEGLER, K., *Völkerrechtsgeschichte.* München, 2007, p. 170; KNAPTON, E., The Origins of the Treaty of Holy Alliance. In: *History NEW SERIES,* vol.26, Nr. 102, 1941, p. 132.

[8] Ibid.

[9] However, Pope Pius VII. vehemently rejected the idea that secular powers could form a Holy Alliance in the name of Christianity. He did not join the alliance and imputed to the founding fathers of the Holy Alliance an „encroachment on the jurisdiction of his spiritual power". (WEGNER, A., *Handbuch des Völkerrechts*, vol.1, Stuttgart, 1936, p. 234).

[10] Printed in: STRUPP, K., *Urkunden*: 1; Gotha, 1911, p. 163–166.

[11] BRIDGE, F., BULON, R., *The Great Powers and the European States System 1814-1914.* Hoboken, 2014, p. 34.

[12] STRUPP, *Urkunden:* 1, p. 163–66.

[13] BAUMGART, W., *Vom europäischen Konzert zum Völkerbund.* Darmstadt, 1974, p. 1.

[14] HILLGRUBER, Ch., *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*. Frankfurt, 1998, p. 6–10.

[15] KELSEN, H., *General Theory of Law and State.* Cambridge, 1945, p. 226.

[16] GASSNER, M., Von der Anerkennungsparxis der habsburgermonarchie gegenüber den Südamerikanischen Staaten im 19. Jahrhundert. In: *BRGÖ* vol. 3, Nr. 1, 2013, p. 416.

[17] From the Conference of Troppau on, some historians such as Francis Roy Bridge speak of the formation of a „Neo-Holy Alliance" as the Congress of Troppau marked the end of the Anglo-Austrian domination within the Concert of Europe. (BRIDGE/BULLEN, *Great Powers,* p. 39–46.)

[18] GAULAND, A., *Das Legitimitätsprinzip in der Staatenpraxis seit dem Wiener Kongress*. Berlin, 1971, p. 17.

once in the years following the Congress of Vienna and thus became a constant issue on the agenda of European Congresses. At the 1820 Congress of Troppau, Metternich made clear that the competence of the alliance extended all the way to South America and justified the interference in the affairs of the Spanish-American world by pointing out that „[…]Austria, as one of the leading powers of the Holy Alliance, had to defend the existing social and political order of Europe against all dangers, both internal and external to Europe."[19] Moreover, on occassion of the Congress of Troppau the Concert of Europe also made clear, that maintaining the principle of dynastic legitimacy justified military interventions: Such military intervention was decided only a few months later at the Congress of Ljubljana in 1821 and was actually realized with the subsequent dispatch of an Austrian expeditionary force to Naples and Piedmont.[20] In fact, however, the Concert of Europe was already divided into two camps at the Congress of Troppau: While the three eastern powers Austria, Prussia and Russia invoked the dynastic principle of legitimacy and did not want to recognize illegitimate, revolutionary rule under any circumstances, the colonial powers Great Britain and France reserved the right to recognize effectively won, actual rule regardless of its revolutionary character because of their economic interests overseas.

Discussions regarding the South American question were overshadowed by the U.S. recognition of Colombia on June 17, 1822, and the loss of the Banda Oriental to Brazil.[21] When the former viceroyalty of New Spain also proclaimed the Empire of Mexico the same year, the fear that the United States might recognize the remaining South American colonies as independent states increased, especially as the latter gradually expanded its sphere of influence by purchasing Florida. Also, the election campaign of presidential candidate James Monroe was based almost exclusively on a positive attitude toward the revolution in Central and South America.[22] Ferdinand VII. had promulgated the *Manifesto de Gobierno espanol a las Potencias extranjeras sobre la Independencia de las Americas* in April 1822, in which he explained his colonial emergency to European governments and appealed to all European powers not to recognize the Spanish-American colonies. The Duke of Wellington, Britain's representative at the Congress of Verona, was instructed to oppose Spain and enforce Britain's desire for *de facto* recognition, (*reconnaissance de fait)* of all South American republics.[23] Austria, as well as Russia and Prussia, rejected Great Britain's request as it contradicted the principle of legitimacy, which had been positively enshrined in law in the Protocol of Troppau.[24]

4. The special case of Brazil

From an economic point of view, the Austrian Empire was until the 19th century a large internal market, which as such represented a closed, self-sufficient area of integration.[25] At the beginning of the 19th century with the onset of industrialization, a shortage of capital arose in Austria, which not only made it necessary to take out loans from the Rothschild banking house, but also awoke the interest in the resources of the New World.[26]

Since the Austrian Empire applied the principle of legitimacy, Brazil was the only country in South America, it could establish commercial relationships with. In 1807, when the Portuguese royal family fled from the French troops, Rio de Janeiro had become the new home of the House of Bragança. On December 16, 1815, the Portuguese King Dom Joâo (John VI.) raised the former colony to the rank of a co-kingdom, making it an equal part of the overall monarchy of the United Kingdoms of Portugal, Brazil and Algarbia.[27]

The first suggestions for a new start of overseas trade came from the Trieste trading circles.[28] However, Austria's interest in South America came at a rather late stage, as other major European powers had already secured favorable trading conditions through privileged trade agreements with colonial powers. The establishment of a *Consulate General* in Rio de Janeiro was advocated by the merchant community of Trieste, because only this way could Austrian shipping and trade be assured the diplomatic and legal support it needed.[29] The establishment of a *Consulate General* for Brazil received imperial confirmation on July 8, 1816.[30]

When the son of the Portuguese King Dom João Dom Pedro reached marriageable age in 1816, the choice of a favorable dynastic connection for the Portuguese crown prince took on special significance due to the stifling connection between Great Britain and Portugal. The choice finally fell on Archduchess Carolina Josepha Leopoldine of Austria, a daughter of Emperor Francis I. and Maria Theresa of Sicily.[31] On May 13, 1817, in

[19] HILLGRUBER, *Aufnahme neuer Staaten,* p. 20.
[20] GAULAND, *Legalitätsprinzip*, p. 34.
[21] ROBERTSON, W., The Recognition of the Hispanic American Nations by the United States. In: *The Hispanic American Historical Review,* vol.1, Nr.3, 1918, p. 251.
[22] ROBERTSON, W., Recognition by the United States, p. 251.
[23] HHStA, St.K Kongressakten, Congress of Verona, box 24 Fz 44, IV, 100 (*Declaration du Cabinet Britanique de* 24 Nov. 1822).
[24] HHStA, St.K Kongressakten, Congress of Verona, box 24, Fz 44, IV, 115 (*Declaration du Cabinet Autrichien en response ŕ celle du Cabinet Britannique de 24 Nov. 1822*)
[25] WANDRUSZKA, A., URBANITSCH, P. (Hrsg.), Die Habsburgermonarchie im System der Internationalen Beziehungen. Die Habsburgermonarchie 1848–1918, volume 6, part 2, Vienna 1993.
[26] FRIM-HANTEN, R., *200 Jahre Außenpolitik Österreich- Brasilien.* PhD diss., University of Vienna 2003.
[27] MANCHESTER, A., The Regocnition of Brazilian Independence. In: *The Hispanic American Historical Review* vol.31, Nr.1, 1951, p. 81.
[28] BLAAS, R., Die Anfänge des österreichischen Brasilienhandels. In. *MÖSTA* vol. 17–18 (1964/65) p. 213.
[29] BLAAS, R., Anfänge des österreichischen Brasilienhandels, p. 213.
[30] Vortrag (Lecture) from 10 May°1816: „Über die Errichtung eines Generalkonsulates in Rio de Janeiro" (printed in: BLAAS, R., Anfänge des österreichischen Brasilienhandels, p. 214.)
[31] GREEN, J., Empress Maria Leopoldina of Brazil. In: GREEN, J., LANGLAND, V. (et al.), *The Brazilian Reader* Durham, 2019, p. 158–62.

the absence of the groom the wedding took place in Vienna per procuram.[32] When Portugal was threatened with a revolution Dom João returned to Portugal in April 1821, leaving his son Dom Pedro as Prince Regent in Brazil. For the *cortes*, however it was not enough that Dom João had returned to Portugal. They demanded that also Dom Pedro would return to Portugal and that all royal authorities and courts that had been established in Brazil since 1808 were dissolved. Ever since Dom João left Brazil, the Brazilians increasingly formed a united national-Brazilian front, especially when they realized that the *cortes*' intention was to put them back in the rank of a colony.[33]

The difficult situation of Brazil had not escaped Metternich's attention. Therefore, in the summer of 1821, Austria for the first time officially dealt with its attitude toward Brazil, should it proclaim independence. As it was made clear in a lecture given by Metternich on August 27, 1821, he regarded the Brazilian independence as a legitimate means of preserving Brazil and Portugal to the House of Bragança. Even the deployment of the Brazilian army against the Portuguese protection force seemed justified to him for this purpose. Austria was thus, at least unofficially, on Brazil's side.[34]

The prelude to Brazil's secession was Dom Pedro's declaration of January 9, 1822 - *„fico*" (I stay), before the Assembly of Rio de Janeiro, by which he rejected the *cortes*' order to return to Lisbon.[35] On June 3, 1822, Dom Pedro convened a National Constituent Assembly (*Assembléia Constituinte do Brasil*), as a counterweight to the *cortes*, to draft a constitution for Brazil.[36] On August 6, 1822 Dom Pedro's most important advisor José Bonifácio de Andrada e Silva transmitted a manifesto[37] in which he explained the motives that had led him to agree to the general desire of Brazil, to become an independent state. When Dom Pedro traveled to São Paulo on an inspection trip in mid-August 1822, his wife Leopoldina was declared regent in his absence. Just a few days after Pedro's departure, the *cortes* attempted a resolution to dissolve the Brazilian governing bodies. Leopoldina immediately convened the Council of State and within a few hours Brazil's independence from the mother country Portugal was decided, written down and signed by Leopoldina on September 2, 1822.[38] It was a mere formality that Pedro also signed and ratified this document later. Don Pedro learned what had happenend in his absence on Sptember 7, 1822 when he was on his way to São Paulo. On the banks of the river Ipiranga came his famous exclamation "*Independencia ou morte*" that became known as "*grito de Ipiranga*". The new Brazilian Foreign Minister José Bonifácio, presented the representatives of the friendly nations with Dom Pedro's declaration, proclaimed Brazil's political independence before the whole world.[39]

Europe initially adopted a wait-and-see attitude. Austria seemed to be well disposed toward Brazilian independence, especially since Don Pedro's declaration of independence had given Austria a queen in South America.

The news of Dom Pedro's proclamation as Constitutional Emperor and Perpetual Defender of Brazil on October 12, 1822 was far less well received by Austria than the proclamation of the Brazilian independence, as the title of emperor was „conferred by the people". To Austria, the proclamation came quite unexpected, so no instructions had arrived from Vienna and the Austrian envoy at the Court of Rio de Janeiro Wenzel Baron von Maréschall, who officially had only the position of an observer (*agent*) in Rio, did not know how to react to it. Baron von Maréschall, who was aware of the aversion of the House of Habsburg to popular decisions - and the acclamation probably had to be qualified as such - saw no other option than to do everything in his power to ensure that Dom Pedro renounced his acclamation as Emperor.[40] Dom Pedro was crowned in Rio de Janeiro with much pomp and ceremony on 1 December 1922.[41] From that moment on, he hoped for support and recognition from the five great European powers, first and foremost Austria.

Earlier that year, Brazil had alraedy sent a diplomat to the Congress in Verona that took place from October 20 to December 14, 1822, with a request that the South American question that was to be discussed there, also included the Brazilian issue. In the run-up to the Verona Congress, the Brazilian envoy Manoel Rodrigues Gameiro Pessoa was sent to Paris, where he attempted to include the recognition of Brazil in the Congress program. Thus, Brazil hoped to obtain a definitive statement on Brazil's independence from the Holy Alliance. On November 29,°1822 Metternich informed the other conferees of Gameiro Pessoa's mission and proposed to deal with the Brazilian question at a separate conference in London.[42] The representatives of Russia, Prussia, and France accepted Metternich's suggestion, and thus Metternich succeeded in separating the recognition of the Empire of Brazil from the question of recognition of the other Spanish-American republics.

5. The negotiations for Brazil's recognition

Firstly, it should be noted that due to the great distance, the transmission of news between South America and Europe was sparse and took up to three months. When Metternich learned of the events in Brazil, he commissioned Baron Maréschal to

[32] BIRKHOLZ, A., Österreich und Brasilien 1816-1831. PhD diss. University of Munich 1970, p. 17.
[33] MANCHESTER, A., The Regocnition of Brazilian Independence, p. 81.
[34] HHStA, St.K., Vorträge 1821, VII-X, box 227, 24 (Lecture from 27 Aug. 1821).
[35] PIMENTA, J., Historiography of the Independence of Brazil. In: *Jouranl of the History of Ideas*, vol. 79, Nr.1, 2018, p. 161.
[36] RINKE, St., *Revolutionen in Lateinamerika*. p. 278.
[37] *„Manifeste de Prince regent du Bresil*" from 6 Aug., 1822.
[38] KAISER, G., *Dona Leopoldina.* Wien, 1998, p. 234.
[39] BAREMAN, R., *Brazil: the foreign nation 1798-1852.* Stanford,1988, p. 78–100.
[40] BIRKHOLZ, A., Österreich und Brasilien, p. 45.
[41] BETHELL, L., The Independence of Brazil, In: BETHELL, L. (Ed.), *The Independence of Latin America*. Cambridge, 1987, p. 185.
[42] WEBSTER, C. (Ed.), *Britain and the Independence of Latin America*. New York, 1938, p. 86 (Doc. no. 338).

draw up a *"Memoire sur la position actuelle de Brésil,"*[43] which was to serve as the basis for a joint approach by the major European powers to the Brazilian question. In this statement of February 13, 1823, Maréschal was lenient with regard to the Brazilian declaration of independence and even tried to gloss over Don Pedro's imperial acclamation in Rio, writing: *"[…] Le titre imperial adopté par le Prince peut-ętre consideré comme un simple accessoire de la declaration d'independance du Brésil"*[44] - which means that the acceptance of the imperial title (emperor) should be regarded as a mere formal act intended to underline Brazil's independence. In his statement, Maréschal emphasized above all that the revolution in Brazil should not be seen from the same point of view as that of the former Spanish-American colonies, because the principle of legitimacy had ultimately been upheld in Brazil. He advised the European community of states to soon decide on whether they were willing to recognize Brazil as an independent state. Great Britain, like Austria, seemed to favor the recognition of Brazil. Thus, as early as January 1823, the Austrian ambassador to London, Prince Paul Anton von Esterhazy, had reported to Vienna that the British foreign minister George Canning considered Dom Pedro's support to be highly desirable and was seeking direct relations with Brazil.[45]

The main problem of the House of Habsburg was how to recognize the independence of Brazil without compromising the King of Portugal. Moreover, Metternich revised his opinion on the conferral of the imperial title only shortly after the dispatch of the memoire prepared by Maréschal, for this question soon seemed to pose more problems than had been assumed in the beginning:[46] Does it not violate the *droit public* based on the order of succession and does it not touch the rights of the King of Portugal to recognize Dom Pedro's new imperial title, Metternich asked in a letter to Esterhazy, whom he instructed to raise these issues with Great Britain.[47] One thing was already clear at that point: without the consent of the Portuguese King, Austria would not dare to come even one step closer to diplomatic recognition of Brazil.

In the meanwhile, in the fall of 1823, the tensions between Portugal and Brazil became stronger, so that even a civil war in Brazil seemed possible. On September 1, 1823, the Brazilian constitutional project was presented by the Assembly and approved by Dom Pedro.[48] On November 6, 1823, Maréschal reported to Vienna that he had had a conversation with Dom Pedro, in which the latter asked proudly if he had not now kept what he had promised the people. In this report, Maréschal stated that Brazil had become a *Republique Impériale*.[49]

Austria observed Brazil's domestic developments with great concern and interpreted Dom Pedro's liberal course as a sign of weakness. When the influence of the assembly seemed to become too great, Dom Pedro finally had it dissolved by force of arms on November 12, 1823. Metternich summarized his view of the situation in Brazil at the end of the year in the following words: „[…]The domestic political situation of the Empire has recently become worse, for the violent dissolution of the Assembly of Deputies did not lead to a turnaround of the system of government in the royal sense - on the contrary, the situation of affairs had become even more critical as a result of this violent step."[50]

The annoyance and skepticism regarding Dom Pedro's way of governing led to the result that Austria approached Portugal. In Rio, however, it had already been realized that a decision on Brazil's fate would not be made in Vienna. Despite the family connection between the two countries, Emperor Francis was not ready to abandon in the New World principles for which he had fought in Europe. Unlike Austria, Great Britain primarely saw the good opportunities for the British economy in Brazil. However, Great Britain was Portugal's oldest ally, and so it still seemed at the London Conference in 1924 that not even Great Britain, despite its economic interests, was thinking about recognizing Brazil without Portugal's consent. Consequently, from early 1824 on, Dom Pedro's struggle for recognition concentrated on the United States of America.

In March 1824, Dom Pedro took the oath on the new Brazilian constitution, which was inspired by the US governmental system. In practice, however, Dom Pedro's liberalism had little effect, as the convening of the new assembly was repeatedly postponed. Even Maréschal did not accuse Dom Pedro of liberalism. In his reports to Vienna, he wrote that Dom Pedro had apparently given his country a constitution in order to violate it.[51]

At the beginning of 1824, the Brazilian government sent Silvestre Rebello to Washington as a *Chargé d'°affaires*. Since the Monroe Doctrine had been issued by President Monroe on December 2, 1823, Brazil's chances of being recognized by the U.S. had increased significantly.[52] For the U.S., the case of Brazil provided an opportunity to show that the Monroe Doctrine was not about preventing the introduction of a particular form of government in the New World, but was solely about independence from Europe. On May 26, 1824, Brazil was recognized by the U.S. as an independent state, to which Portugal protested vehemently.[53] However, Dom Pedro also knew, that this was only a limited success, as the major European powers seemed not be impressed by U.S. recognition.

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43 HHStA., St.K., Dipl. Korr., Brasilien, box 8, Fasz.2, Varia 1823, (fold.1-195), 25–30 (*"Memoire sur la position actuelle du Brésil"* from 13 Feb. 1823 - Letter from Baron von Maréschal to Metternich)

44 Ibid.

45 MANCHESTER, A., Regocnition of Brazilian Independence, p. 86.

46 KOSSAK, M., *Im Schatten der Heiligen Allianz.* Berlin, 1964, p. 199.

47 HHStA., St.K., Dipl. Korr., Brasilien, box 8, Fasz.2, Varia 1823, (fold.1-195), 35-38 (Letter from Metternich to Esterhazy 28 Feb. 1823).

48 BETHELL, L., The Independence of Brazil, p. 190.

49 HHStA. St.K. Dipl. Korr., Brasilien, box 8, Fasz.3, reports 1823 VIII-XII (fold.1-293), 184 (report from 6 Nov.1823).

50 HHStA. St.K. Dipl. Korr., Brasilien, box 8, Fasz.3, reports 1823 VIII-XII (fold.1-293), 192.

51 HHStA., St.K. Dipl. Korr., Brasilien, box 9, Fasz.1, reports 1824 (fold.1-530) 362 (report Maréschal from 23 Aug.1824).

52 CRESSON, W, *The holy alliance and the Monroe doctrine.,* New York, 1922, p. 44.

53 ROBERTSON, W., Recognition of the American Nations, p. 267.

In July and August 1824, on the initiative of Austria and Great Britain, a conference on the Brazilian question was held in London.[54] For Austria, Friedrich von Gentz, Metternich's advisor, took part in the negotiations. As Metternich was aware that Brazil's independence was already a *fait accompli*, Gentz unofficially suggested in London that Great Britain should force Portugal to renounce its sovereignty with all means at its disposal.[55] This time, however, it was Russia that vehemently opposed to the recognition of Brazil.

The unsuccessfulness of the mediation talks meant that Dom Pedro now saw it as the easiest means to force a renunciation of sovereignty in a war with Portugal. Maréschal, who was still at the Rio Court, tried to persuade Dom Pedro to relinquish his imperial title.[56] So did his father-in-law Emperor Francis I.[57]

The already tensed situation was further complicated when Great Britain recognized the states of Mexico, Colombia and Buenos Aires in January 1825.[58] This irritated Brazil because, after all, Great Britain had promised that Brazil would be the first South American state to be recognized. Britain's behaviour showed Brazil that it could not count on the support of the European Powers and that it had to find a solution to its problems by negotiating with Portugal. Finally, on August 29, 1825, Portugal recognized Brasil as an independent state in the *Tratado do Rio de Janeiro* (Treaty of Rio de Janeiro).[59] On the same day, Brazil was recognized by Great Britain as the first European state by concluding a commercial treaty.

Now that the obstacle had been removed, the Barzilian envoy Telles da Silva took up his political activities at the Court of Vienna and presented his credentials to the Austrian Foreign Minister on December 13, 1825.[60] Metternich now advised Emperor Francis I. to recognize Brazil. Austria finally recognized Brazil on December 30, 1825, by handing over a note to the Brazilian envoy.[61] On June 30, 1826, the first commercial treaty ("Preliminary Navigation and Commercial Treaty") between Emperor Francis I. and Emperor Pedro of Brazil was concluded in Rio de Janeiro, but it was not ratified and thus had to be renewed on June 16, 1827.[62]

6. The recognition of the Spanish-American states by the Habsburg Monarchy

In 1825, the wars of independence had largely ended, but a period of "militarization" followed throughout South America, especially since all the new republics had built up a bloated officer corps during the wars of independence and now no longer dared to dispose of it. In addition to the regular armies, local militias often emerged that had entire regions under their control and blackmailed the new states.[63]

In Europe, the foreign policy situation in relation to Spanish-American republics remained tense: Apart from Great Britain, which had secured trading privileges throughout South America with its early recognitions, Prussia and France now also increasingly began to approach the Spanish- American republics. While Austria shifted its interests entirely to Brazil and Russia concentrated economically on North America, from 1825 on France also showed increasing signs of softening its policy on the Spanish-American question: France set up „general inspectorates for trade matters" in the most important ports of Spanish America, where so-called „inspectors" in fact carried out the activities of consuls.[64] Prussia also followed the same path, sending commercial agents to most parts of Spanish America carrying consular patents with them. They had the instructions to use them as soon as France or Prussia decided to recognize one of the former Spanish colonies. On January 20, 1827, a treaty that in fact already was a commercial treaty was signed between Prussia and Mexico. When Spain did not protest, an official commercial treaty with Mexico was finally concluded in the summer of 1827.[65]

On May 5, 1828, when France and Prussia already had established official relations with the former Spanish colonies, the Spanish government addressed a note of protest to them.[66]

While until 1825 it was still possible to speak, at least in basic terms, of a uniform approach on the part of the eastern powers Austria, Russia and Prussia, there no longer was a commun policy of the easte power from 1825 on. By the end of the 1820ies Prussia turned away from the principle of legitimacy. Thus, only Austria and Russia remained attached to the (dynastic) principle of legitimacy, although soon in its broadest and most liberal interpretation.

In the mid-1830s, after the death of Ferdinand VII. and under the regency of Maria Christina, Spain began to seek a normalization in the relations with its former colonies. On June 12, 1834, the Spanish Foreign Minister, Jorge Martinez de la Rosa, announced that it was time to „put an end to the family quarrel" and instructed the Spanish ambassadors in Paris and London to contact the South American delegates and ask them to offer Spain a „[…] just and honorable arrangement."[67]

[54] BETHELL, L., The Independence of Brazil, p. 192.
[55] BIRKHOLZ, A., Österreich und Brasilien, p. 121.
[56] HHStA., St.K. Dipl. Korr., Brasilien, box 9, Fasz.1, repots 1824 (fold.1-530) 384 (report Maréschal from 18 Sept. 1824) (encrypted and therefore quoted after Birkholz)
[57] HHStA., St.K. Dipl. Korr., Brasilien, box 9, Fasz.3 Varia 1824 (fold.1-101) 10 (Emperor Francis to Dom Pedro on 12 April 1824).
[58] KLEINMANN, H., Die österreichische Diplomatie und dieAnerkennung der amerikanischen Staaten. In: *MÖSTA* vol.34, 1981, p. 220.
[59] HHStA, St.K. Dipl. Korr., Brasilien, box 11, Fasz. 1, Bericht 1825 (fold.1-378), 25 (report from Rio, 1 Sept. 1825).
[60] HHStA, St.K, Dipl. Korr., Brasilien, 1825 X-XII, box 11, Fasz.2, Varia 1825 (fold.1-104).
[61] BIRKHOLZ, A., Österreich und Brasilien, p. 150.
[62] BITTNER, L., *Chronologisches Verzeichnis der Staatsverträge 1763-1847*, 2: Wien, 1909, p. 229.
[63] DONGHI, T., *Geschichte Lateinamerikas von der Unabhängigkeit bis zur Gegenwart*. Frankfurt, 1991, p. 158.
[64] KOSSAK, M., *Im Schatten der Heiligen Allianz,* p. 163.
[65] Ibid.
[66] ROBERTSON, A., Recognition by the Motherland, p. 72.
[67] Ibid.

Venezuela became the first former colony to appoint a special ambassador and sent him to the Court of Madrid to negotiate a peace treaty and establish friendly relations with Spain in December 1833. Venezuela even offered Spain to put it on an equal footing with the most favored nation in terms of trade.[68]

On November 7, 1835, the Spanish *cortes* gave their consent to the resumption of relations with the former Spanish colonies and authorized the government to conclude commercial and peace treaties. Negotiations between Venezuela and Spain dragged on due to some unresolved issues regarding war debts. In the meantime, Mexico had already been recognized by Spain as the first South American state on December 28, 1836. The recognition of Mexico and Venezuela was followed by the recognition of Ecuador, Chile, the Argentine Confederation, Peru, Paraguay, Colombia and Uruguay. All recognitions were accomplished by concluding peace and (perpetual) friendship treaties. The structure of the treaties was similar in all cases and essentially followed the pattern of the Spanish-Mexican peace and friendship treaty.

From the mid-1830s on Austrian policy cautiously began to follow the path that a decade earlier Great Britain, France and Prussia had already taken in the interest of their national trade. After Austria had recognized Brazil as the first state in South American by accrediting the Brazilian envoy to Vienna in 1825, the recognition of the Republic of Mexico followed in 1842. By this time, Austria had already largely abandoned Talleyerand's principle of legitimacy, as it recognized Mexico despite its republican form of state.

At the beginning of 1835, L. N. Edler von Herz, Ritter von Neuwall, the authorized representative and associate of the Viennese wholesale house, submitted a petition to the state chancellor suggesting a trade connection with Mexico, stating that Mexico had a rich export market for Austrian industrial and manufacturing products.[69] Metternich seemed to support Ritter von Neuwall's suggestion, especially since he declared to the chamber of commerce that there were no longer any reservations from a political point of view. In a lecture of December 13, 1841, Metternich stated that „[…] since the recognition of the former Spanish colonies on the part of the mother country as well as most European governments, there was no longer any political reason to avoid the conclusion of treaties with these Free States."[70] This was undoubtedly an allusion to Spain's renunciation of sovereignty vis-à-vis Mexico, which had already been made in 1836. The chamber of commerce then contacted the Trieste Stock Exchange Deputation, which welcomed the conclusion of a commercial treaty with Mexico.[71] The main reason for the enthusiasm of the upcoming negotiation of a commercial agreement with Mexico was the fact that in Austria the customs duties were the same for all foreign nations, whereas the Mexican customs sometimes imposed exceptionally high fees on the importation of goods from Austria. Negotiations for the signing of a commercial treaty began at the end of 1841. On July 30, 1842, when Mexico under President Santa Anna was again preparing for war against Texas and the United States, the Austro-Mexican Treaty of Friendship, Commerce and Navigation[72] was concluded in London.[73]

The original document is written in two languages - in French and in Spanish. In Article I, the „perpetual peace" between the two countries is agreed. Article II guarantees free navigation in all places, harbors and rivers of both territories, thus ensuring the mutual freedom of trade. In this context, it is interesting to note that warships of both nations were also granted the right to enter each other's ports without hindrance. This provision was especially advantageous for Austria.

While Articles II and III deal with navigation, Articles IV to IX are devoted to the establishment of commercial relationships: Article IV stipulates that all goods may only be imported and exported under the same conditions as those applicable to the most-favored nation. Article V states that agricultural and industrial products may not be subject to import and export restrictions and must also comply with the most-favored-nation rule. All advantages, privileges and immunities granted to the most-favored nation shall also be granted to Austrian or Mexican citizens in the ports of the respective other country. Article VIII grants Austrian nationals in Mexico (and Mexican nationals in Austria) the right to engage independently in trade. Article X is dedicated to the protection of commercial goods, property, personal rights and accommodation in the respective other country and furthermore guarantees the nationals of the respective other state free access to the courts, the free choice of a lawyer and a fair trial. Article XI deals with freedom of religion and guarantees non-Catholic Austrians in Mexico not to be disturbed, harassed, or discriminated against. Article XII provides for an arbitration mechanism in the event that the friendly relationship between Mexico and Austria is disturbed. According to Article XIII even if a state is at war with a third state, trade had to be maintained. Finally, Article XVI establishes the duration of validity of the Navigational Trade and Friendship Treaty at eight years from the date of ratification. An explicit recognition of the state of Mexico is not to be found in this treaty. The case of Mexico can be seen as the prototype of a so-called „implied recognition" as with the conclusion of this treaty, Mexico is implicitly recognized by Austria as an independent state. However, an Austrian diplomatic mission was not sent to Mexico until 1864 - that is, at a time when Mexico was already ruled by the Habsburg Emperor Maximilian I.[74]

In 1835, the Austrian diplomat Leopold Freiherr von Daiser, who from January 1, 1830 to April 12, 1844 was the Austrian

[68] Ibid, p. 73–75.
[69] HHStA, St.K., Notenwechsel, box 39, 292. (Note from the *Staatskanzlei* to the *Hofkammer* from 16 January 1835); See also: Kleinmann, „Anerkennung der amerikanischen Staaten," 223.
[70] HHStA, St.K., Vorträge 1841, box 289, Vorträge X-XII, 54 (Vortrag (Lecture) by Metternich 13. Dec. 1841).
[71] KLEINMANN, H., Anerkennung der amerikanischen Staaten, p. 223.
[72] HHStA, Orginal und Ratifizierungsurkunde des Vertrages: Allgemeine Urkundenreihe 1842, 30 July 1842.
[73] BITTNER, L., *Staatsverträge 1763-1847*, 2.
[74] MATSCH, E. *Der Auswärtige Dienst von Österreich (-Ungarn) 1720-1920.* Graz, 1986, p. 148.

envoy to the Court of Rio de Janeiro,[75] wrote a memorandum[76] arguing for the further expansion of South American trade by concluding commercial treaties with Uruguay, Argentina, Chile, Peru, and Bolivia.

As it can be concluded from Metternich's reply,[77] Metternich supported Daiser's proposal. In 1841, Leopold Freiherr von Daiser was therefore given the allowence to seek "semi-official" contacts with other Latin American governments in Rio.[78] Exploratory talks were held at the Court of Rio. Due to the fact that Spain had so far only waived its sovereignty over Mexico, Metternich advocated the conclusion of a mere „preliminary" agreement. As it became increasingly clear that the South American republics would not be satisfied with a „preliminarily" agreement, Metternich's attitude slowly began to change: In a lecture to Ferdinand I. on February 15, 1842, Metternich made claer that the external conditions had changed by the recognition of the Spanish-American states on the part of the mother country. Moreover he argued that even if the mother country had not yet renounced sovereignty, one could think about recognition, especially as other European powers had already recognized the new South American state before.[79] From that moment on, from the Austrian point of view, the fact that the mother country had not waived sovereignty over its colony could be cured with the preceding recognition by other European powers.[80]

Finally, on February 24, 1842, an imperial resolution was passed authorizing the Chancellor of State to conclude trade and shipping treaties with the republics of Montevideo, Buenos Aires, Chile, Peru and Venezuela.[81]

After issuing the imperial resolution of February 24, 1842, Metternich wrote to Leopold Freiherr von Daiser in Rio that he should now establish official contacts with representatives of the Spanish-American republics accredited in Rio and begin exploratory talks on the exchange of consuls and the conclusion of commercial treaties.[82]

With regard to the recognition of the republics of Montevideo, Buenos Aires, Chile, Peru and Venezuela, the acts by means of which the recognition of the republics was accomplished, can be divided into two large groups:1. By means of responding to the notifications concerning the inauguration of Spanish- American presidents, as it was the case for Chile, and 2. by establishing consular relations.

Chile had been recognized as an independent state by the United States in 1823 and soon thereafter was regognized by Brazil, Mexico, Great Britain, and finally by Spain in 1844. In 1844, an Austrian consulate was opened in Valparaiso, although this was expressly not to be understood as a sign of recognition.[83]

In a letter written in Spanish to State Chancellor Metternich on September 23, 1846,[84] the Chilean President General Manuel Bulnes indicated his re-election as president and indirectly expressed his desire for recognition of the Republic of Chile by Austria with the words, „[…] to enter into closer friendly relations with Austria."

Emperor Ferdinand I., in a letter from July 22, 1847, written in response to Bulne's letter, recognized Chile as an independent state.[85] However, it was to take several years before diplomatic relations were finally established. It was not until December 6, 1902 that the first Austrian ambassador, Leonard Count Starzenski, was sent to Chile.[86] In a similar way, namely also by letter with almost the same content, Paraguay was recognized on July 10 1847,[87] subsequently Peru on August 28, 1851[88] and Venezuela on December 8, 1852.[89] In the course of 1864 Austria also recognized Colombia and Uruguay.[90] For Paraguay, Peru and Colombia, Austrian recognition took place even before Spain had waived sovereignty.

7. Outlook and conclusion

From the 1850s on, the United States of America began to take an increased interest in Cuba and eventually even made an

[75] Ibid. 145.

[76] KLEINMANN, H., Diplomatie und die Anerkennung, p. 224. Unfortunately, Daiser's memorandum could not be found, but its content can be deduced from Metternich's reply letter of Aug. 1, 1835 (HHStA, St.K., Brasilien, box 23, Fasz.6, Varia 1835 (fold.1-46) 14-23, Metternich to Daiser, 1. Aug. 1835) The memorandum was probably written between May and June 1835, but could not be found in the box.

[77] HHStA, St.K., Brasilien, box 23, Fasz.6, Varia 1835 (fold.1-46) 14-23. (Metternich to Daiser, 1. Aug. 1835)

[78] KLEINMANN, H., Diplomatie und die Anerkennung, p. 224.

[79] HHStA, St.K., Vorträge box 290, Vorträge 1842, Vorträge I-II, 94 (Vortrag (Lecture) Metternich from 15 Feb. 1842).

[80] GASSNER, M., Annerkennungspraxis, p. 420.

[81] KLEINMANN, H.Diplomatie und die Anerkennung, p. 225.

[82] HHStA, St.K., Brasilien box 27, Fasz. 2 Varia 1842, Instruktionen 1842 (fol. 206-215) 188 (Metternich to Daiser (Rio) from 13 March 1842).

[83] AGSTNER, R., The Austria (-Hungary) diplomatic missions in Mexico and Gustemala. In: *MÖSTA* vol. 52, 2007, p. 273.

[84] HHStA, PA XXXIII, USA, box 125, Ges. Archiv Washington, Anerkennung der Republiken in Zentral- und Südamerika, (fold. 1-462) 334.

[85] HHStA, PA XXXIII, USA, box 125, Ges. Archiv Washington, Anerkennung der Republiken in Zentral- und Südamerika (fold. 1-462) 360-364 (Letter from Emperor Ferdinand I. to Bulnes from 22 July 1847) Stephan Verosta and Ignaz Seidl erroneously mention June 1, 1847 as the recognition date in: *Die völkerrechtliche Praxis der Donaumonarchie von 1859 bis 1918*, 1: 59.

[86] MATSCH E., *Auswärtige Dienst von Österreich (-Ungarn),* p. 144.

[87] HHStA, PA XXXIII, USA, box 125, Ges. Archiv Washington, Anerkennung der Republiken in Zentral- und Südamerika, (fold. 1-462) 3-4 (Letter from Metternich to the president of Paraguay Carlos Antonio Lopez, on 10 July 1847).

[88] HHStA, PA XXXIII, USA, box 125, Ges. Archiv Washington, Anerkennung der Republiken in Zentral- und Südamerika (fold. 1-462) 304-308 (Emperor Franz Josef to Jose Rufino Echenique on 28 Aug. 1851).

[89] HHStA, PA XXXIII, USA, box 125, Ges. Archiv Washington, Anerkennung der Republiken in Zentral- und Südamerika (fold. 1-462) 388-415 (Emperor Franz Josef to Jose Gregorio Monagas on 8 Dec. 1852).

[90] HHStA, PA XXXIII, USA, box 125, Ges. Archiv Washington, Anerkennung der Republiken in Zentral- und Südamerika (fold. 1-462), 450.

attempt to buy Cuba from Spain. Since the publication of the book *Grito de Yara* in 1868, calling for Cuban independence, an independence movement emerged under the leadership of the writer José Marti, which ultimately ended in a guerrilla war.[91] Large segments of the U.S. population, as well as the U.S. business community, sympathized with Cubas' struggle for independence, and thus U.S. President Grover Cleveland declared in December 1896 that the United States would not show unlimited patience toward Spain.[92] As the ongoing conflict over Cuba increasingly crippled the U.S. economy, in 1897 the new U.S. President William McKinley announced in his Annual Message the willingness of the United States to intervene on behalf of the independence fighters in Cuba. The (former) major European powers of the Holy Alliance united behind Spain, leading to press releases in the U.S. such as the „Revival of the Holy Alliance in Europe" and raising fears of European intervention in Cuba.[93]

When an explosion occurred aboard a US warship sent to Cuba on February 25, 1898, the U.S. government suspected a Spanish attack. Consequently the U.S. president then asked Congress for permission to send troops to Cuba.[94] This marked the beginning of the Spanish-American War. The U.S. Congress and Senate passed a joint resolution calling for Spain's withdrawal from Cuba authorizing the president to use any military means necessary to secure Cuba's independence.[95] Austria attempted in vain to act as a mediator in the Spanish-American conflict.[96] In June 1898, U.S. units landed in Cuba. Austria tried once more to invoke the spirit of solidarity among the European monarchs. However even Austria's former allies in the struggle to maintain dynastic legitimacy, Prussia and Russia seemed afraid of an open conflict with the United States.[97] As early as July 1, 1898, the Spanish troops were defeated. In the Peace of Paris signed on December 10, 1898, Spain finally had to cede Cuba, Puerto Rico, Guam and the Philippines to the United States.

The case of Cuba clearly shows that the political situation of Europe had changed significantly since 1825 and that the United States had become too strong to revive the policy of the European concert.

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[91] PEREZ, L., *The War of 1898,* Chapel Hill, 2000, p. 25.

[92] BEEDE, B., *The War of 1898 and U.S. Interventions 1898-1934.* New York, 1194, p. 34.

[93] Wiener Zeitung June 20, 1898, front page. The articles might refer to newspaper articles such as the one published in the San Diego Union aned Daily Bee on April 16, 1898.

[94] PEREZ, L., *The War of 1998.*

[95] FONER, Ph., *The Spanish-Cuban-American War*, New York, 1972, p. 2.

[96] BRIDGE, F., Concert of Europe on the eve of the Spanish-American war. In: *MÖSTA* 44, 1996, p. 94.

[97] Ibid.

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The Long Struggle to Open Austria's Law Faculties to Women. From the First Woman Doctor of Law to the First Female Law Professor

Kamila Staudigl-Ciechowicz *

Abstract

The article outlines the hard road that led to the admission of women, first of all to the law degree, and then to academic careers at the university level in Austria. It also presents the arguments of those who advocated and opposed their admission. Taking into account contemporary literature and archival sources, the individual steps are shown – from the unsuccessful demands at the beginning of the 20th century, to the founding of a private women's law academy 1917, to admission to law studies in 1919. It would take another few decades until 1958, when the first woman was appointed full professor at the Vienna Faculty of Law.

Keywords: *Austria; law faculties; women at universities; higher education; female law professor; women's law academy, Edmund Bernatzik, Marianne Beth; Sibylle Bolla-Kotek.*

1. Introduction

In the summer semester of 2019, 10,106 students were enrolled in the law diploma programme at the University of Vienna: 4,130 male and 5,976 female.[1] This meant that female students made up almost 60 percent of all those studying for the diploma in law. Things looked very different a hundred years ago, when the degree in law and political sciences – as it was then called – first opened its doors to women. This article will outline the hard road that led to the admission of women, first of all to the law degree, and then to academic careers at the university level. It will also present the arguments of those who advocated and opposed their admission. We must not forget that the acceptance of women as law students, and in the legal profession, took several more decades. Women may legally have been permitted to study, but in reality they still had to fight marginalisation. This is succinctly expressed in a statement made by Günther Winkler, former rector of the University of Vienna and professor of law and political sciences, in 1974. In his view, 'law [is] no degree for women […]. The study of law requires a very high degree of abstract thought, a very strong talent for logic and finally, of course, enjoyment in thinking in this way'.[2] Why these particular capacities and preferences should be lacking in female students is a question Winkler does not answer.

2. Women and higher education: an overview

A survey of the European university landscape in the nineteenth century shows that many universities began to admit women as students in the years from 1870 to 1894.[3] There are records of individual women graduating with law degrees from the late 1870s onwards, first of all in Switzerland. From the 1890s, we also see women graduating from Swedish, Norwegian and Dutch universities.[4] Austria and Prussia would join this trend significantly later.[5] In Austria, opening the universities to women – who were only able meet the general conditions for acceptance to degree study once they were admitted to the school leavers' examination in March 1896 – was a gradual process.[6] The philosophy faculties admitted women in 1897;[7] the

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1 Detailed student statistics, 2019S, https://slw.univie.ac.at/wir-ueber-uns/koordination-studienservices/statistische-daten/ (last visited 30/ 04/ 2020).

2 Günther Winkler, ORF recording from 1974 (*Prisma – Die Frau in der Justiz*), in the University of Vienna's short documentary *Wissenschafterinnen: Gestern – Heute – Morgen*.

3 HEINDL, W., Zur Entwicklung des Frauenstudiums in Österreich. In: HEINDL, W., TICHY, M. (Ed.), *„Durch Erkenntnis zu Freiheit und Glück…" Frauen an der Universität Wien (ab 1897).* Wien, [2]1993, p. 17-26, p. 17.

4 ALBISETTI, J.C., Portia ante Portas: Women and the Legal Profession in Europe, ca. 1870–1925. In: *Journal of Social History,* vol. 33, Nr. 4, 2000, p. 825-857, p. 831, 837.

5 EHS. T., (Studium der) Rechte für Frauen? Eine Frage der Kultur! In: *Beiträge zur Rechtsgeschichte Österreichs*, vol. 2, Nr. 2, 2012, p. 250-262, p. 252.

6 BERNATZIK, E., *Die Zulassung der Frauen zu den juristischen Studien. Ein Gutachten.* Wien, 1900, p. 5.

7 Decree of the Minister for Education and Culture regarding the admission of women to the philosophical faculties of the imperial universities as students and auditors, Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder (RGBl) 1897/84.

medical faculties in 1900.[8] Law and political sciences finally followed suit in 1919.[9]

The educational authorities had already faced with the question of women's higher education in the 1870s. The predominant thinking on the topic is accurately expressed by one contemporary witness, Karl Lemayer, in his book *Die Verwaltung der österreichischen Hochschulen von 1868–1877* (The Management of the Austrian Universities from 1868 to 1877). This point of view, which Lemayer considered the 'correct' one, was based on the expert opinions of those who opposed women's academic study:

> 'First of all, if women were to attend lectures, this would necessitate a total change on the academic side. The lecturers would be forced to adapt much material that is suitable for male ears to be heard by women, specifically modest virgins. This, in turn, would render this material unsuited to the masculine character.'[10]

At the same time, the disciplinary code that regulated the students' behaviour and prescribed punishments for rule-breaking would have to be adapted to the changed circumstances and the new 'dangers to […] moral sobriety'. However, there was as yet no willingness to make changes, whether to the way in which academic knowledge was conveyed or to the social order of the university. As one report explicitly stated:

> 'An alteration to the academic and disciplinary character of the university, and one working to the disadvantage of men and the advantage of women – specifically, a few women who are at best merely curious and who, disregarding the sphere of activity allocated to them by nature and tradition, intend to exceed that sphere and make disruptive inroads into the masculine world – can be neither in the interests of scholarship, nor of a progressive social order per se. In substance, the university is today – and, indeed, will be for a long time to come – a training ground for the various masculine professions. So long as society, and may good fortune prevent it, has no need to accept women as priests, judges, advocates, doctors, teachers, commanders and soldiers – that is to say, so long as the male sex remains in charge of the social order – then there is equally no need to concede a space for women at the universities, a space of which the extent would subsequently be impossible to limit.'[11]

The Minister of Education reaffirmed this approach a few years later, in 1878. One principle he invoked was that of sex-segregated higher education, which meant that the universities could not be wholly open to women. Women-only lectures were proposed; but this, too, on an exceptional basis. Individual women would be allowed to attend individual lectures, subject to the agreement of the faculty and lecturer concerned. In general, the Minister of Education explained:

> 'Even in those exceptional cases in which women are allowed to go to lectures, however, these women must neither matriculate as students nor must they be admitted as auditors. Effectively, they must only be permitted to visit (*das Hospitiren*); and that only ever for individual, specifically designated lectures.
>
> It goes without saying, therefore, that no official document of admission to the lecture must be issued, nor any official confirmation of attendance.'[12]

Once the philosophical and medical faculties began to admit women, exceptions of this kind also existed on an individual basis in law and political sciences, specifically in public accounting (*Staatsrechnungswissenschaft*).[13] However, the women who visited these courses (*Hospitantinnen*) could not use this to their professional advantage, since there was no proof of their attendance.

The first women admitted to university had to stand their ground against a wide range of arguments from those who opposed women's higher education. From our modern standpoint, these arguments are thoroughly hair-raising.[14] In particular, medical theories were advanced which supposedly proved that the female body was unsuited to university-level education. According to these theories, the female brain was too little developed[15] to pursue academic study. The physician Theodor von Bischoff's 'brain argument' (*Hirnbeweis*), from the 1870s, achieved especial prominence. Bischoff asserted that women's brains weigh less and that they are therefore intellectually inferior to men.[16] On the basis of his deliberations on female physiology and psychology, Bischoff concluded:

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[8] Decree of the Minister for Education and Culture in agreement with the Ministry of the Interior, regarding the admission of women to the study of medicine and to the Doctor of Medicine degree, RGBl 1900/149.

[9] Executive order of the State Office of the Interior and Education regarding the admission of women to the study of law and political science, to the state theoretical examinations and to the Doctor of Law and Political Sciences degree at the German-Austrian universities, Staatsgesetzblatt für den Staat Deutschösterreich (StGBl) 1919/250.

[10] Cited in LEMAYER, K., *Die Verwaltung der österreichischen Hochschulen von 1868–1877*. Wien, 1878, p. 97.

[11] Cited in LEMAYER, *Verwaltung*, p. 97f.

[12] Directive of the Minister for Education 06/05/1878, reproduced in LEMAYER, *Verwaltung*, p. 103f.

[13] Cf. BECK, L., KELLE, C. (Ed.), *Die österreichischen Universitätsgesetze*. Wien, 1906, p. 562 fn. 1.

[14] For details, see TICHY, M., Die geschlechtliche Un-Ordnung. Facetten des Widerstands gegen das Frauenstudium von 1870 bis zur Jahrhundertwende. In: HEINDL, W., TICHY, M. (Ed.), *„Durch Erkenntnis zu Freiheit und Glück…" Frauen an der Universität Wien (ab 1897)*. Wien, ²1993, p. 27-48; GLASER, E., "Sind Frauen studierfähig?": Vorurteile gegen das Frauenstudium. In: KLEINAU, E., OPITZ, C. (Ed.), *Geschichte der Mädchen- und Frauenbildung II*. Frankfurt aM et al., 1996, p. 299-309.

[15] TICHY, Die geschlechtliche Un-Ordnung, p. 30.

[16] TICHY, M., Zur Geschichte des rechtswissenschaftlichen Studiums von Frauen. In: KARADY, V., MITTER, W. (Ed.), *Bildungswesen und Sozialstruktur in Mitteleuropa im 19. und 20. Jahrhundert*. Köln–Wien, 1990, p. 277-288, p. 277.

> 'This physical and intellectual inequality of the sexes irrefutably proves that the female sex is not suited to the study and pursuit of the sciences, and medicine in particular.'[17]

Other writers also believed that the female body was, by its nature, not made for learning. Ludwig Kleinwächter, for example, was an adherent of the view that menstruation brought about a 'lessening in the powers of understanding and even, and by no means rarely, a suspension of the mental faculties'.[18]

The 'greater suggestibility of women, and [their] natural female modesty'[19] were also invoked as arguments against admitting women to academic study. In fact, these two points played a role in the discussion around the admission of women to study law, since even the presence of women in the courtroom was controversial. For instance, in 1895, the *Neues Wiener Tagblatt* declared that the courtroom was a place 'where women do not belong any more than they do in the anatomy theatre'. The basis of the argument was that women, as sensitive creatures, should not come into contact with the 'naked, vulgar aspects of life'. Moreover, the participation of women in court proceedings went against their modesty.[20] It is striking that modesty also appears in the contemporary literature as an argument in favour of admitting women to study law. However, this line of argument was mainly invoked with regard to the admission of women as medical students: the training of female doctors would allow women to be 'treated by a member of their own sex', in keeping with their sense of shame.[21] Similarly, with regard to law, we see the conviction that 'women can also better understand and represent other women in legal questions'.[22] Leopoldine Kulka, vice president of the General Austrian Women's Association (Allgemeiner Österreichischer Frauenverein) from 1911 to 1918, argued in a 1908 article in *Neues Frauenleben*:

> 'For it will be seen that, just as a sick woman or a sick child has less timidity to overcome when faced with a female doctor, and is more easily understood, this will also often be the case for women and children in search of justice. This, too, is about women's suffering and children's pain.'[23]

The writer Helene Migerka had already presented this argument in detail in 1900:

> 'Perhaps the word "lawyer" will no longer instil terror in some poor female souls if they can, in their misery, seek counsel from a woman. Maybe some women will no longer submit so passively to be exploited if they are accurately informed about their rights and obligations. A woman will open up more easily to another woman, and will find greater understanding there when it comes to marital disputes, and her children. Custody and the management of finances – which currently appear to many women as hostile spectres, and therefore often work in the favour of men – will instil less fear if a woman's voice is able to adjure and command these evil spirits.'[24]

Another, frequent argument invoked by those who opposed admitting women to study and practice law was the belief that women were incapable of thinking logically, and that their emotional nature prevented them from making objective decisions. Such views were widespread across different countries, as James C. Albisetti demonstrates in his overview of the admission of women to the legal professions in Europe before 1925.[25] Migerka also addresses this argument in her article:

> 'Women as lawyers and judges: the very idea gives rise to dismay. Partiality, a lack of logic, garrulousness, feelings in place of justice and judgement – the accusations fly. We do not at all wish to claim – and this we will concede to men – that women would always fulfil these roles well. But the silent observer is very often forced to conclude that men themselves, equally, do not always do so. And those qualities we mentioned above are rather less partial than we humans are; they make their homes in the hearts of men as well as women. […] Wherever human beings to govern, faults and flaws will always creep in. But we sense that there will come a time when we will ask in wonder: can this truly be a constitutional state when only one half of the human race makes laws and enacts judgements, defining and deciding everything, not only for itself but for the other half too?'[26]

Moreover, women who pursued an academic education and completed a degree were frequently portrayed as unnatural. The opponents of female education often saw these women as hermaphrodites and androgynes.[27] The physician Fritz Wittels, a student of Sigmund Freud, viewed all desire to study on the part of women as pathological from a psychiatric perspective:

> 'For the hysterical female has the mysterious ability to detach her sexual urge from the sexual object and di-

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17 BISCHOFF, Th., *Das Studium und die Ausübung der Medicin durch Frauen*. München, 1872, p. 20.

18 KLEINWÄCHTER, L., *Zur Frage des Studiums der Medizin des Weibes*. Berlin–Leipzig–Neuwald am Rhein, 1896, p. 10 cited in TICHY, Die geschlechtliche Un-Ordnung, p. 34.

19 TICHY, Zur Geschichte des rechtswissenschaftlichen Studiums, p. 277.

20 *Neues Wiener Tagblatt* Nr. 112, 25/04/1895, p. 1.

21 Petition submitted to the Imperial Council for the admission of women to medical practice, reproduced in *Das Recht der Frau* 1896/205, p. 6.

22 BANDHAUER-SCHÖFFMANN, I., Zum Engagement der österreichischen Frauenvereine für das Frauenstudium. In: HEINDL, W., TICHY, M. (Ed.), *„Durch Erkenntnis zu Freiheit und Glück…" Frauen an der Universität Wien (ab 1897).* Wien, [2]1993, p. 49-78, p. 68.

23 KULKA, L., Wozu brauchen wir weibliche Juristen? In: *Neues Frauenleben*, vol. 20, Nr. 8, 1908, p. 193-195, p. 193.

24 MIGERKA, H., Die Zulassung der Frau zum Rechtstudium. In: *Frauenleben*, vol. 12, Nr. 5, 1900, p. 1f., p. 1.

25 ALBISETTI, Portia ante Portas: Women and the Legal Profession, p. 842f. See also BERGER, E., "Scharfes Denken, also juristisches Denken ist weniger Sache der Frau". Der Weg der Frauen in die Anwaltschaft. In: *Österreichisches Anwaltsblatt* 2013/03, p. 113-121.

26 MIGERKA, Die Zulassung der Frau, p. 1f.

27 TICHY, Die geschlechtliche Un-Ordnung, p. 38.

rect it to the activity on which she has fixated. The object is forgotten, and the urge for that object becomes an end in itself, a hedonistic drive. The inimitable and voluptuous diligence of certain female students can be explained by means of this hysterical perversion. This diligence is lustful and indecent, both in the bourgeois and in the metaphysical sense. The woman performs her sexual life for all the world to see in the form of academic study: a self-indulgent, bacchanalian acting-out, because the fear and shame that inhibit normal women fall away here. This is a public love affair, and nobody knows about it.'[28]

Wittels also gave another reason why women should continue to be excluded from university study – namely, for the protection of young, male students:

'But even those who take the most liberal view must perforce call it unnatural that the presence of a few women, most likely not the worthiest of their sex, should be imposed on these foolish young men. There is a great danger that the male student will, with all the obstinacy of first love, become smitten with a monster simply because she flatters and fondles him, and because, still secluded from the world, he can find no better sustenance. A young man is feeble-minded; he does not dare conquer a diffident woman. He must rely on those who pursue him. The more timid lover, too, will receive the intrusion of women into the laboratory setting as an overture. He will thrash plenty once caught in the net.'[29]

It is striking that one key element is scarcely mentioned in the assessments of those who oppose women's higher education: the real – and often economically founded – need for women to earn an income, and to complete an academic degree for this purpose. Rather, undertaking a degree is represented as pure caprice, as a whim of bored women who would be better off pursuing their 'natural calling' as wives and mothers. However, the advocates of women's education did deploy the economic argument, and they underpinned it with figures. According to them, 'in the years 1875, 1880 and 1890 […] out of 1,000 marriageable women, only 505, 498 and 496 respectively [were] married'.[30] The aim was to give middle-class women the opportunity to achieve gainful employment befitting their social standing,[31] regardless of their 'individual need for emancipation'.[32] Again and again, the Austrian women's associations petitioned parliament on this topic.[33]

3. The long struggle for admission to study law and political sciences

As early as 1899, Edmund Bernatzik, constitutional law expert and professor at the University of Vienna, championed the admission of women to study law.[34] In 1900, at the request of the Viennese law and political sciences faculty, he wrote an expert opinion in which he invoked (among other things) constitutional arguments against excluding women from legal studies.[35] He perceived this exclusion as an infringement of Article 18 of the basic law on the general rights of citizens (*Staatsgrundgesetz*: StGG),[36] which standardised the free choice of profession.

Bernatzik's expert opinion also provides insight into contemporary thinking in opposition to the admission of women to study law – the very thinking he set out to refute. In his view, the issues here were not to do with the law degree per se, but with the inevitable opening-up of the legal job market. In addressing this, he spoke out on the question of women's suitability for legal careers, the thinking around the socio-political effects of opening the job market, and the objection of his contemporaries to the effect that women would be drawn away from their 'natural careers' as mothers and wives.

Despite his progressive views, Bernatzik also believed that there were areas of legal practice for which women were less suitable: 'Specifically, those offices that deal directly with the public and which, moreover, involve the enforcement of state authority […]. This means the judgeship, as well as political service in the usual sense of the term.'[37] However, he pleaded that 'women [should be] admitted to all professions for which they are competent'[38] – naming a number of possibilities in the legal field. His proposal in favour of allowing women to study passed before the faculty at Vienna with a majority in February 1900, and a motion was drawn up for submission to the Ministry of Education.[39] The Ministry, in turn, asked other law and political sciences faculties – such as the one at Graz – for their opinions on the motion from Vienna. The faculty at Graz was split in its views, but here the opponents of admitting women were

[28] WITTELS (pseud. Avicenna), F., Weibliche Ärzte. In: *Die Fackel*, vol. 9, Nr. 225, 1907, p. 10-24, p. 11f.
[29] WITTELS, Weibliche Ärzte, p. 13.
[30] TEIFEN, T. W., *Ein Wort zur Frauenfrage*. In: *Dokumente der Frauen* 1899/4, p. 81-86, p. 84.
[31] BANDHAUER-SCHÖFFMANN, Zum Engagement der österreichischen Frauenvereine, p. 55.
[32] TICHY, Zur Geschichte des rechtswissenschaftlichen Studiums, p. 277.
[33] BANDHAUER-SCHÖFFMANN, Zum Engagement der österreichischen Frauenvereine.
[34] KOFFMAHN, E., Die ersten Frauen an den rechts- und staatswissenschaftlichen Fakultäten und die gegenwärtige Situation. In: FORKL, M., KOFFMAHN, E. (Ed.), *Frauenstudium und akademische Frauenarbeit in Österreich*. Wien–Stuttgart, 1968, p. 29-36, p. 30f.
[35] BERNATZIK, *Zulassung*, p. 5f.
[36] Article 18 of StGG RGBl 1867/142 declares: 'Everyone is free to choose his own profession, and to train for said profession however and wherever he wishes'.
[37] BERNATZIK, *Zulassung*, p. 8.
[38] BERNATZIK, *Zulassung*, p. 16.
[39] In her article, Koffmahn describes Bernatzik's proposal to the faculty as having failed, but does not provide any evidence for this. KOFFMAHN, Die ersten Frauen an den rechts- und staatswissenschaftlichen Fakultäten, p. 31.

in the majority.[40] However, Ernst Mischler drew up his own dissenting opinion in favour of their admission. His argument was similar to that deployed by Bernatzik. Ultimately, the Viennese motion was not successful at the Ministry of Education.[41]

During the First World War, wartime conditions created greater demand for women in legal and political fields,[42] especially in the welfare system. Meanwhile, women were not allowed to study these subjects, which made it harder to train the required personnel. It is in this period that we see renewed efforts to allow women to study law. Women's associations in particular fought for this situation to change. In 1913, Edmund Bernatzik's daughter Marie Hafferl-Bernatzik discussed the problems of the lack of access to law degrees at the Women's Further Education Union (Verein für erweiterte Frauenbildung). In particular, Hafferl-Bernatzik made a cultural argument, presenting women's admission to higher education as a question of culture. She based her approach on Austria's self-representation as a cultural state (*Kulturstaat*) in contrast to the power state (*Machtstaat*) of Prussia.[43] The petition Hafferl-Bernatzik and Editha Mautner von Markhof submitted to the Ministry of Education in 1914 also followed this line of argument. In 1916 there followed a position paper by the Association for the Secondary Education of Girls (Verein für realgymnasialen Mädchenunterricht), written by Walter Schiff, adjunct professor (*Privatdozent*) at the law and political sciences faculty, Vienna, and association president Anna Postelberg.[44] The law and political sciences faculty at Graz – which in the meantime, under dean Josef Schumpeter, had changed its mind about admitting women – also sent its own initiative to the ministry.[45] The National Council of Women (Bund Österreichischer Frauenvereine) also acted in favour of admitting women to study law; however, it addressed its efforts to the Academic Senate of the University of Vienna. None of these attempts were successful. The Academic Senate, for example, declared that it was an 'extremely unsuitable' time to admit women, since this 'would disadvantage the male students currently under arms'.[46]

In the autumn of 1916, a group of women brought an appeal to the Academic Senate of the University of Vienna because they had not been admitted to study law. The files held in the University Archive only shed light on individual aspects of the case.[47] Marie Benies, Dr Hedwig Kuranda, Dr Helene Kolischer-Sperber and Dr Grete Blatt-Tschiassny had applied to study law and political sciences. In support of their application, they argued 'that there was no legal provision forbidding women to enrol at the law faculties, and that the existing provisions regarding the study of and state examinations in law and political sciences merely mention "law students" [*Studierende der Rechte*] without limiting this term to the male sex'.[48] The four applicants added that the allocation of rights and duties in the December constitution of 1867 located university legislation within the remit of the Imperial Assembly, meaning that 'an Imperial Act [would be] necessary […] to reserve the study of law and political sciences exclusively to men, and that any provision opposing the study of law by women would be invalid and ought to be ignored'.[49]

The applications were declined, first by dean Hans Voltelini and then by the council of professors, at which point the women lodged an appeal with the Academic Senate. In the draft of the report prepared for the relevant Senate meeting, the university administration concluded that the complainants' argument was not valid insofar as 'the courts may have the right to decide on the validity of provisions within a legal process of appeal […] but the administrative authorities do not'.[50] Unlike the decision of the council of professors, where – and this was one of the reproaches the four women presented in their appeal – no justification was made for declining the request for admission, the decision of the Academic Senate did, at least, engage briefly with the substance of the application; although this did not alter the negative outcome.[51] In early 1917, the four women lodged a final complaint with the Ministry of Education.[52] This complaint was never settled. However, in mid-June 1919 – two and a half years later – the German-Austrian State Secretariat of Education informed the rector's office of the University of Vienna that the complaint had been 'rendered moot' by the admission of women to study law and political sciences.[53] One of the four women appears as a Doctor of Law in the list of female doctoral graduates at the University of Vienna that was main-

[40] For detail, see ZIEGERHOFER, A., Die Zulassung der Frauen zum rechts- und staatswissenschaftlichen Studium an der Karl Franzens-Universität Graz. In: KERNBAUER, A., ZIEGERHOFER, A., *Frauen in den Rechts- und Staatswissenschaften der Universität Graz. Der Weg zur Zulassung und die ersten Doktorinnen von 1919 bis 1945*. Graz, 2019, p. 1-34, p. 10.

[41] EHS, T., Frauenstudium und Rechtsakademie für Frauen. In: OLECHOWSKI, Th., EHS, T., STAUDIGL-CIECHOWICZ, K., *Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938*. Göttingen, 2014, p. 159-172, p. 162.

[42] EHS, Frauenstudium und Rechtsakademie, p. 159.

[43] ibid.

[44] ibid., 163.

[45] ZIEGERHOFER, Die Zulassung der Frauen, p. 23.

[46] EHS, Frauenstudium und Rechtsakademie, p. 164.

[47] The files do not contain the applicants' original submission or the dean's rejection. We can only reconstruct the case using the short appeal submitted by the complainants and the dean's report on the matter before the Academic Senate. Universitätsarchiv Wien, Kurrentakten des Akademischen Senats GZ 356 ex 1916/17.

[48] Draft report for the meeting of the Academic Senate, Universitätsarchiv Wien, Kurrentakten des Akademischen Senats GZ 356 ex 1916/17, 2.

[49] ibid.

[50] ibid.

[51] Letter from the rector to the four applicants 23/12/1916, Universitätsarchiv Wien, Kurrentakten des Akademischen Senats GZ 356 ex 1916/17, 5.

[52] ibid., 6.

[53] Letter 12/06/1919, Universitätsarchiv Wien, Kurrentakten des Akademischen Senats GZ 356 ex 1916/17, 7.

tained up to the summer semester of 1932:[54] Hedwig Kuranda, graduating in 1931.

Some Vienna professors, including Bernatzik, took another path. In 1917, they encouraged the Ministry of Education to create a degree in political sciences.[55] This was not a new idea: it originated at the German Charles-Ferdinand University in Prague. However, it had been rejected by the Ministry of Education in 1912. The new degree was targeted at women and foreigners. However, the women's associations showed little enthusiasm for this idea. Rather, they feared that the new degree would hinder the admission of women to study law, which offered far better career opportunities.[56]

3.1 The women's law academy

In the meantime, in late 1917, a law academy for women was founded in Vienna to train female students in law and political science. This was explicitly framed 'as a protest measure against the inaction of the Ministry of Education'.[57] No wonder, then, that Edmund Bernatzik appears as one of the main actors. The Vienna university lecturers Josef Hupka, Wenzel Gleispach, Hans Kelsen and Othmar Spann were also elected to the executive committee.[58]

Eugenie Schwarzwald, who founded girls' schools in her capacity as a campaigner for women's rights, also played a key role in bringing the project into being, supplying premises for the new law academy. Individual law courses were already on offer, for example at the Athenäum (the 'women's university');[59] 'but the law academy professionalised its educational programme by creating a curriculum resembling that of a university'.[60]

The law academy had several aims, as a newspaper article explained at the time:

> 'The concept behind the establishment of the academy was threefold. It was intended to bring women to their political maturity, to instil a full understanding of public life and the ability properly to manage their own legal and financial affairs. It was also intended to help those women who, in rising numbers, are turning to gainful employment to become fit for more skilled work, preparing them especially for deployment in the areas of social welfare and insurance. Finally, it was meant to test the assertion that women are not suited to study law and political science and, at the same time, visibly to demonstrate the expediency of reforming the study of the law: something for which legal professionals have already repeatedly called, but always in vain.'[61]

The curriculum was organised as follows:

> 'In accordance with the teaching plan decided in the inaugural meeting, the subjects are distributed across four semesters as follows. Semester 1: civil law (4 hours), economics (5 hours), criminal law (5 hours). Semester 2: civil law (5 hours), political economy (4 hours), criminal proceedings (4 hours), social policy (2 hours). Semester 3: trade and exchange law (4 hours), constitutional law (4 hours), international law (1 hour), civil procedure (5 hours), statistics (1 hour). Semester 4: trade and exchange law (4 hours), administrative law (4 hours), insurance law (3 hours).'[62]

Regarding the lack of legal history subjects, Marie Hafferl-Bernatzik explained that these had been omitted 'because the academy is not meant to compete with the universities. Above all, it is meant to be a training ground for practical work'.[63]

Compared to the 1893 study regulations for law and political sciences, which were then in force, the academy curriculum allocated fewer hours per topic and there were no legal history or canon law subjects. However, in contrast to the mandatory core subjects specified in the regulations, the academy included subject areas such as social policy, international law and insurance law.[64]

The academy's teaching team was primarily drawn from among the lecturers of the Vienna law and political sciences faculty. The following names appear in contemporary reports: Hugo Forcher (statistics), Wenzel Gleispach (criminal law and criminal proceedings), Fritz Hawelka (constitutional and administrative law), Arthur Lenhoff (civil law), Oskar Pisko (trade and exchange law) and Hans Sperl (civil procedure). It is noteworthy that Marie Hafferl-Bernatzik appears as lecturer in civil law for the winter semester of 1918.[65]

Some of the misgivings about the law academy came from the proponents of women's higher education, who feared that it would delay or even block their own aim of opening law studies

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[54] After this point, women graduates were no longer recorded in a supplementary list, but they appear in the graduation records.

[55] EHS, Frauenstudium und Rechtsakademie, p. 165. For details of the political sciences degree, see EHS, T., Das Studium der Staatswissenschaften. In: OLECHOWSKI, Th., EHS, T., STAUDIGL-CIECHOWICZ, K., *Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938*. Göttingen, 2014, p. 173-256.

[56] EHS, Frauenstudium und Rechtsakademie, p. 165f.

[57] EHS, Frauenstudium und Rechtsakademie, p. 167.

[58] *Neue Freie Presse* Nr. 19125, 18/11/1917, p. 11.

[59] FELLNER, G., Athenäum. Die Geschichte einer Frauenhochschule in Wien. In: *zeitgeschichte*, vol. 14, Nr. 3, 1986, p. 99-115, p. 99.

[60] EHS, Frauenstudium und Rechtsakademie, p. 168.

[61] HAWELKA, F., Die Rechtsakademie für Frauen. In: *Die Frau,* vol. 1, Nr. 15, 19/02/1919, p. 4.

[62] *Neue Freie Presse* Nr. 19125, 18/11/1917, p. 12.

[63] HAFFERL-BERNATZIK, M., Das juristische Frauenstudium. In: *Zeitschrift für Frauen-Stimmrecht*, vol. 7, Nr. 9-10, 1917, p. 5-6, p. 6.

[64] On the study regulations, see STAUDIGL-CIECHOWICZ, K., Das Studium der Rechtswissenschaften. In: OLECHOWSKI, Th., EHS, T., STAUDIGL-CIECHOWICZ, K., *Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938*. Göttingen, 2014, p. 129-158.

[65] *Neues Wiener Abendblatt* (evening edition) Nr. 278, 12/10/1918, p. 5. The newspaper report names adjunct professor Dr. Forscher as teaching statistics at the academy. This probably refers to Hugo Forcher, who taught statistics as an adjunct professor at the Vienna law faculty.

to women.[66] The opposition of the lawyer Hermann Reitzer, who worked at the Ministry of Justice, was motivated by other concerns. His critical response to the opening of a law academy for women appeared prominently on the first page of the third 1918 issue of the journal *Juristische Blätter*:

> 'And downright unbelievable [to the combatants] is the idea that there are academic lecturers, professors of the University of Vienna, who think that wartime is the right moment to set out on undertakings that, in any event, pose a serious danger to students in uniform. This is why the newspaper reports about the founding and opening of the "women's law academy" in Vienna have had an extremely embittering, depressing effect on those law students currently in military service. It seems inconceivable to them that the only thing being prepared for students returning home from the battlefield is a nursery for female semi-lawyers'.[67]

Without sparing a thought for the motivations of women seeking a post in the legal sector, Reitzer concluded dismissively: 'In this competitive struggle it will be [the lawyers] who often draw the short straw. The female semi-lawyers will be able to present more modest demands, both by their nature and because they often just want to earn pin money.'[68] Overall, Reitzer stated: 'The men's question is more important now, and more current, than the women's question.'[69]

Reitzer also commented derisively on the ambitious programme of the law academy:

> 'And here the "law academy" aspires to train up its poorly prepared student stock into viable lawyer material in two years! Either the academy will breed arrant legal dilettantism, throwing open the profession to a dangerous barrack-room lawyerdom – or else we will have to accept that it disposes of far better and more effective teaching methods than our universities.'[70]

The women's rights campaigner Marianne Zycha published a response to Reiter's article in the journal *Neues Frauenleben*. In her article, she drew attention to 'the army of women and girls who lost their jobs on account of those returning [from war] and who could not work for "pin money", or who had to live on this "pin money"'.[71] She deftly parried Reitzer's criticisms:

> 'Neither am I in favour of breeding "semi-lawyers". The only remedy, of course, would be allowing them to become whole lawyers. And the way to prevent them competing for pin-money is to organise them in the struggle: something their male coevals often also lack.'[72]

Zycha herself was critical of the opening of the women's law academy, but she defended the idea behind it:

> 'The opening of the "law academy", although perhaps not a happy one, was a defensive act and one born of need. After all the hard-won achievements of women – achievements of which the battle-scarred lawyer is, perhaps, unaware – they were once again barred from the faculty they strove to enter: and that at a time in which the social welfare field, invoked by Dr Reitzer himself, is crying out for women.'[73]

In the end, the women's law academy lasted only a few semesters. Once the law degree was open to women, the academy had achieved its aim.

3.2 The admission of women as visiting students

As outlined above, women had the opportunity to attend specific, individual courses on an occasional basis. The practice of allowing de facto attendance at individual lecture courses, but without admitting the person concerned to study at the university, was called visiting (*Hospitiren*).[74] Visitor status was specifically subject to the agreement of the faculty and lecturers. In a survey conducted by *Neues Frauenleben* in 1904, a number of university lecturers in law and political science – including the constitutional law specialist Edmund Bernatzik, the economists Carl Grünberg and Karl Menger, and Gustav Seidler, who taught public accounting – commented positively about the individual female visitors who had attended their courses.[75]

A look at the number of female visitors across all the Cisleithanian law and political sciences faculties shows that this opportunity to access legal knowledge – an opportunity that presented little advantage – was rarely taken up.[76] In July 1913, the *Wiener Zeitung* reported that a total of 40 female visitors had attended law and political sciences courses in Cisleithania that year.[77] At the faculty in Vienna, too, the number of visitors was very small compared to the number of enrolled students. In the

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66 ZIEGERHOFER, Die Zulassung der Frauen, p. 24.
67 REITZER, H., Die Rechtsakademie für Frauen und die Juristen im Felde. In: *Juristische Blätter*, vol. 47, Nr. 3, 1918, p. 25-27, p. 27.
68 REITZER, Die Rechtsakademie für Frauen, p. 27.
69 ibid.
70 ibid.
71 ZYCHA, M., Die Rechtsakademie für Frauen und die Juristen im Felde. In: *Neues Frauenleben*, vol. 20, Nr. 1-2, 1918, p. 15-17, p. 15. In the original, blocking was used for highlighting.
72 ZYCHA, Die Rechtsakademie für Frauen, p. 16.
73 ibid.
74 LEMAYER, *Verwaltung*, p. 96.
75 *Neues Frauenleben*, vol. 16, Nr. 2, 1904, p. 1-4.
76 Only the University of Graz is likely to have had a relatively large number of visitors. These were public accounting students, who, according to List-Ganser's breakdown, were counted as auditors (*außerordentlichen Hörerinnen*) in Vienna. LIST-GANSER, B., Überblick über die Entwicklung des akademischen Frauenstudiums in Österreich. In: Festausschuß anläßlich des dreißigjährigen Frauenstudiumjubiläums (Ed.), *30 Jahre Frauenstudium in Österreich.* Wien 1927, p. 26-38, p. 27.
77 *Wiener Zeitung* Nr. 175, 30/07/1913, p. 1.

summer semester of 1918 – one year before women would be admitted to study law – the law faculty had 2,376 students but only 28 visitors.[78]

4. The admission of women to study law in 1919, and the introduction of the political sciences degree

The long-awaited admission of women to study law and political sciences came about with the executive order of 22 April 1919. From an academic administration point of view, the moment was not particularly well chosen. The enrolment period at the University of Vienna ran from 17 April to 1 May 1919 inclusive.[79] However, the executive order was not published in the state law gazette for Germany-Austria (*Staatsgesetzblatt*: StGBl) until 7 May 1919.[80] This is all the more striking because, between the date on which the executive order was issued (22 April) and its publication on 7 May, several editions of the state law gazette had appeared: on 24, 25, 26, 27 and 30 April 1919. If we look at timespan from adoption to publication in April 1919, we can see that most documents were published quickly, within a week.[81] In total, 55 legal acts were adopted and then published in the state law gazette in April 1919. For 36 of these (65%) the maximum interval was one week. Nine acts had to wait more than a week, and another 10 over two weeks before they appeared in the state law gazette.

Likewise, the *Wiener Zeitung* did not print the executive order until 7 May 1919.[82] Subsequently, we find reports of the admission of women to study law and political sciences in the newspapers in the first days of May. On 1 May 1919, *Der neue Tag* reported that the State Office of the Interior and Education would print an executive order to this effect 'in the next days'.[83] It follows that the existence of the executive order was known before 1 May 1919, but it was not published on the rector's bulletin board – that is to say, at the University of Vienna itself – until 9 May 1919. However, at the same time, an additional enrolment period for the summer semester was announced, running from 10 to 17 May 1919.[84] But it is unclear how this situation affected the enrolment and matriculation of women at the law and political sciences faculty in the summer semester of 1919.

The text of the executive order declared that women would be admitted to study law subject to the same requirements as men. They also had the right to sit the state and viva voce examinations if the 'established conditions' were met.[85]

In addition, a new course was created at the law and political sciences faculty: the political sciences degree,[86] for which women could also enrol. At six semesters, it was initially shorter than the eight-semester degree in law and political sciences; but the degree of Doctor of Political Sciences did not entitle its holders either to enter public service or to practice the classical legal professions.[87] This was a purely academic university degree.[88] Unlike the law degree, completing the Doctor of Political Sciences degree required students to write an academic thesis (dissertation).

A few days after the executive order was adopted, the admission of women to study law was discussed by the government in cabinet. To justify their admission, it was argued that 'the equal status of the two sexes in public life has become a fact' and, at the same time, that 'the cooperation of women [was needed] to solve the social and economic problems' afflicting post-war Austria.[89] The extension of active and passive suffrage to women in 1918 had been a key step in their admission to study law. Compared to the decades of discussion that preceded it, opening law studies to women in the First Republic was a quick, smooth process. Tamara Ehs cites social-democratic participation in government, which had a positive effect in this regard, as a key factor.[90]

On the thirty-year anniversary of the admission of women, Wenzel Gleispach, full professor of the Vienna law and political sciences faculty and a longstanding member of the academic administration, looked back on the history of women in law studies. Gleispach's assessment of the experience so far was highly positive:

'[Women] pursue their studies earnestly and with zeal. They take lively part in the lessons and especially in the academic seminars, where they often show splendid successes. Their examination results are above average and it is very rare that they fail. […] [W]omen have certainly proven that they are capable of studying law. They have refuted the view that they are no good as lawyers.'[91]

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78 *Öffentliche Vorlesungen an der k.k. Universität zu Wien im Winter-Semester 1918/19.* Wien, 1918, p. 67.

79 According to the lecture timetable for the University of Vienna, summer semester 1919. *Öffentliche Vorlesungen an der Universität zu Wien im Sommer-Semester 1919.* Wien, 1919, p. 69.

80 StGBl 07/05/1919, item 87.

81 All legal acts adopted in April 1919 and published in the state law gazette were retrieved. These were checked using the Chronological Register and the individual printed issues of the StGBl.

82 *Wiener Zeitung* Nr. 104, 07/05/1919, p. 2.

83 *Der neue Tag* Nr. 39, 01/05/1919, p. 8.

84 Rector's announcement 09/05/1919, Universitätsarchiv Wien, Kurrentakten des Akademischen Senats GZ 802 ex 1918/19, fol. 2.

85 Executive order 22/04/1919, StGBl. 1919/250.

86 On this see EHS, T., Die Staatswissenschaften. Historische Fakten zum Thema "Billigdoktorate" und "Frauen- und Ausländerstudien". In: *zeitgeschichte*, vol. 37, Nr. 4, 2010, p. 238-256.

87 BERGER, Der Weg der Frauen in die Anwaltschaft, p. 115.

88 For details of the political sciences degree: EHS, Das Studium der Staatswissenschaften.

89 Cited in BERGER, E., "Fräulein Juristin" Das Frauenstudium an den juristischen Fakultäten Österreichs. In: *Juristische Blätter*, vol. 122, 2000, p. 634-640, p. 638.

90 EHS, Frauenstudium und Rechtsakademie, p. 166.

91 GLEISPACH, W., Das Rechtsstudium der Frauen. In: Festausschuß anläßlich des dreißigjährigen Frauenstudiumjubiläums (Ed.), *30 Jahre Frauenstudium in Österreich.* Wien 1927, p. 9-11, p 10.

If we look at the students of law and political science between 1919 and 1938, we see that the proportion of female students '[was] consistently between 5 and 6 percent in the 1920s and […] rose continually from the end of the 1920s to 9–10 percent'.[92] While 58 female students were recorded at the Vienna faculty in the summer semester of 1919 – the first semester in which women could enrol to study law and political sciences – by the winter semester of 1925–1926, the number was 156.[93] By the winter of 1927–1928, it was 190.[94] If we look at the total number of all students in law and political sciences, we can see that, in the summer semester of 1919, around 2 percent were women: 58 of 2,793.[95] But in the winter semester of 1927–1928, with 190 female students, this rose to 6.6 percent.[96] The high proportion of Jewish women students is remarkable: around half of all female students in the summer semester of 1919 were Jewish.[97]

5. Scholarships for women

The opportunity of pursuing a degree ultimately depended on each student's financial situation. Students had to pay university fees for the courses they attended. The amount of fees depended on the number of courses undertaken. There was also a general fee for the use of academic facilities.[98] Taxes also had to be paid for each examination.[99]

It is noteworthy that, in 1918, there was a scholarship specifically for women visitors in law and political sciences: the Dr. Else Cronbach-Stipendium. According to the advertisement published in October 1918, the scholarship was 'intended for women studying law and political sciences at the University of Vienna; or – so long as women are not admitted to the law and political sciences faculty of the University of Vienna as students – for female visitors of this faculty as well as any female students who began their studies as visitors in law and political sciences at Vienna and who subsequently intend to continue their studies and obtain the Doctor of Law degree at a German or Swiss university'.[100] The scholarship was endowed with 300 crowns per year. As a rule, it was awarded for one year, but it could also be conferred for several years, until the completion of the doctoral degree. Financial need was not a requirement, but applicants in need would be given priority in the case of equal qualification. The scholarship was named after a woman pioneer in political sciences in Austria.[101] Born in 1876,[102] in the early twentieth century Else Cronbach had 'most assiduously [attended] the lectures [a]nd tutorials of professors Böhm-Bawerk, Wieser, Philippovich and Grünberg, and, during these years of study, proved her ability in numerous shorter essays'.[103] In 1907, she wrote a longer academic paper on Austrial artisanal lace production. Since admission to the Doctor of Law degree at the University of Vienna was not open to women, Cronbach graduated from the political sciences faculty of the University at Freiburg im Breisgau, earning the title 'of the first woman doctor of political sciences in Austria'.[104] Until her sudden death in 1913, Cronbach worked as an expert in social security and legislation as well as commercial policy in research and practice. She was also active in the education of girls.[105]

Another scholarship aimed at women was the Dr Edmund Weissel Endowment for Women Studying Law (Dr. Edmund Weissel-Stiftung für Jus-studierende Frauen). This endowment was created in the famous lawyer's memory after his death in 1917, and it supported 'worthy and financially needy' female students.[106]

6. The first female graduates and their career prospects

Marianne Beth, the first woman to complete a degree in law, graduated in June 1921. Helene Lieser had already completed the new political sciences degree in 1920. Both women had attended individual courses as auditors before beginning their degrees, and these were counted towards their progress.[107] The first female law graduates from the Vienna faculty included He-

[92] EHS, Die Staatswissenschaften, p. 243. See especially here the detailed statistics regarding women students at the Vienna law faculty from 1919 to 1938.
[93] LIST-GANSER, Überblick, p. 29.
[94] *Öffentliche Vorlesungen an der Universität zu Wien im Sommersemester 1928.* Wien, 1928, p. 61.
[95] *Öffentliche Vorlesungen an der Universität zu Wien im Winter-Semester 1919/20.* Wien, 1919, p. 75.
[96] *Öffentliche Vorlesungen an der Universität zu Wien im Sommersemester 1928*. Wien, 1928, p. 61.
[97] TICHY, Zur Geschichte des rechtswissenschaftlichen Studiums, p. 284.
[98] STAUDIGL-CIECHOWICZ, K., Studienrecht und Studienbedingungen. In: OLECHOWSKI, Th., EHS, T., STAUDIGL-CIECHOWICZ, K., *Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938*. Göttingen, 2014, p. 103-113, p. 105.
[99] STAUDIGL-CIECHOWICZ, K., *Das Dienst-, Habilitations- und Disziplinarrecht der Universität Wien 1848–1938*. Göttingen, 2017, p. 149f.
[100] *Amtsblatt zur Wiener Zeitung* Nr. 243, 20/10/1918, p. 691.
[101] On Else Cronbach, see NAUTZ, J., Cronbach, Else. In: KEINTZEL, B., KOROTIN, I. (Ed.), *Wissenschafterinnen in und aus Österreich. Leben–Werk–Wirken*. Wien et al., 2002, p. 125.
[102] Certificate of registration 30/09/1905, Wiener Stadt- und Landesarchiv, 2. 5. 1. 4. K11.Cronbach Else.1876. NAUTZ, Cronbach, Else, p. 125 gives her birth year as 1879.
[103] PRIBRAM, K., Dr. Else Cronbach. In: *Zeitschrift für Frauen-Stimmrecht*, vol. 3, Nr. 5, 1913, 5.
[104] NAUTZ, Cronbach, Else, p. 125.
[105] SCHWARZ, O., Dr. Else Cronbach. In: *Der Morgen,* vol. 4, Nr. 16, 21/04/1913, p. 8.
[106] EHS, T., Stipendien. In: OLECHOWSKI, Th., EHS, T., STAUDIGL-CIECHOWICZ, K., *Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938*. Göttingen, 2014, p. 113-122, p. 114.
[107] EHS, T., Die Vertreibung der ersten Staatswissenschafter. Helene Lieser und Johann Sauter. In: MEISSEL, F-S., OLECHOWSKI, Th., REITER-ZATLOUKAL, I., SCHIMA, S. (Ed.), *Vertriebenes Recht – Vertreibendes Recht. Zur Geschichte der Wiener Rechts- und Staatswissenschaftlichen Fakultät zwischen 1938 und 1945*. Wien, 2012, p. 233-259, p. 240.

lene Mayer (1922), Marie Hafferl née Bernatzik (1922), Magda Prelinger née Jäger (1922), Elisabeth Ephrussi[108] (1923), Stella Fröhlich (1923), Marie Kapinus (1923), Marie Postelberg[109] (1923), Julie Adler (1923) and Eleonora Angela Danesch (1923).[110] A greater number of women graduated from the political sciences degree.[111] Specifically, by the end of the summer semester of 1923, 10 women graduated from the University of Vienna with the Doctor of Law degree, and 14 in political sciences. By the end of the 1932 summer semester, the faculty of law and political sciences recorded a total of 254 graduations by women, of which 158 were in law and 96 in political sciences.[112]

Tamara Ehs attributes the initially greater number of female graduates in political science to the possibility of transferring credit, which meant that the degree could be completed faster by including examinations previously taken.[113] In addition, until 1926, the political sciences degree was only six semesters long: two less than the degree in law and political sciences. The 1926 amendment of the study regulations governing political sciences tightened the requirements for the doctoral degree. The course duration was lengthened to eight semesters and the requirement to publish a dissertation was added, which brought with it a significant financial outlay.[114] At the same time, the Doctor of Political Sciences degree remained a purely academic qualification. This meant that it could no longer offer any kind of advantage compared to the law and political sciences degree.

Of course, immediately after the war, female students had to overcome a number of hostile factors. There were few available spaces at the University of Vienna. Many students were returning to the universities from war and, in some courses, women were unwelcome. That the law faculty had opened its doors to them did not mean by a long way that women were welcome in the legal professions. From a contemporary perspective, it was regarded as perfectly obvious that graduating with a law degree would 'give women many advantages in finding employment for life', but that, at the same time, 'the [public] hiring authorities would still be entitled […] to continue as before to fill roles that seem to require a male occupant'.[115] The newspaper article quoted here did not specify which roles in particular were meant. Evidently, this was already clear to the readers.

In 1927, Gleispach outlined the career prospects of women who study law. He found that 'the majority of female law students' strove 'to become lawyers'; 'a few of them have already achieved their goal, or are close to achieving it'.[116] The situation in the civil service, as he saw it, was quite different. Jobs were rare and, despite legal equality of opportunity, women's chances were slim. It is hard to determine which careers these graduates actually pursued after finishing their degrees. The lives of some of these women have been researched, at least in overview. However, the search for information and sources is often a difficult one, especially as some of them married after completing their studies and took their husbands' names. Of the first wave of women graduates, Marianne Beth deserves mention.[117] Not only was she the first ever woman to graduate with the law degree, but, in 1928, she also became the first female lawyer registered with the Vienna Bar Association.[118] Julie Adler (married name Riesenfeld) also became a lawyer.[119]

Some of the female graduates surface in the following years with publications and lectures. For example, Carla Zaglits gave a paper on 'Impressions of Social Welfare in London' at the Pope Leo Society (Leo-Gesellschaft) in 1930,[120] Helene Eissler (née Mayer) published on mountaineering and criminal law in the *Neue Freie Presse*,[121] and Liese Hirsch spoke on 'The Economic Blockade of States and its Consequences' at the Austrian Working Women's Association (Österreichische Vereinigung berufstätiger Frauen) in 1936.[122] Marianne Beth

[108] The name appears as 'Ephrusi' in the register of women graduates (Universitätsarchiv Wien, Senat Sonderreihe 114, Nr. 1132). However, it is highly likely that this refers to Elisabeth Ephrussi, who had taken her school leaver's examination at the Schottengymnasium in 1918 and who had specified political economy as her desired career. *Jahresbericht des Schottengymnasiums in Wien*. Wien, 1919, p. 59. Elisabeth von Ephrussi also appears as a law graduate in Gaugusch. GAUGUSCH, G., *Wer einmal war. Das jüdische Großbürgertum Wiens 1800–1938* I. Wien, 2011, p. 573.

[109] Marie Postelberg was the daughter of the renowned lawyer Emil Postelberg. See *Index der jüdischen Matriken WIEN und NÖ* 126254, www.genteam.at (last accessed 31/08/2020). Many thanks to Professor Ilse Reiter-Zatloukal for this reference.

[110] This list is based on the register of women graduates; the names are listed by graduation date. Universitätsarchiv Wien, Senat Sonderreihe 114.

[111] Helene Dub (1920), Valentine Adler (1921), Martha Stefanie Hermann (1921), Elise Fränkel (1921), Carolina Zaglits (1922), Karolina Friedmann (1922), Amalie Long née Weiss (1922), Margarethe Schwarz (1922), Edith Leisching (1922), Olga Gerstmann (1923), Susanne Rottenberg (1923), Josefine Schubert (1923), Julia Goglia (1923), ibid.

[112] Calculated according to the survey of women graduates. Universitätsarchiv Wien, Senat Sonderreihe 114. Some women are counted twice because they hold both the doctorate in political science and the doctorate in law. For example Julia Goglia who graduated 1923 in political sciences and 1927 in law.

[113] EHS, Die Staatswissenschaften, p. 245f.

[114] EHS, Das Studium der Staatswissenschaften, p. 208.

[115] *Der neue Tag* Nr. 39, 01/05/1919, p. 8.

[116] GLEISPACH, Das Rechtsstudium der Frauen, p. 10.

[117] Cf. GOLTSCHNIGG, D. (Ed.), *Marianne Beth. Ein brüchiges Leben in Briefen aus Wien und dem amerikanischen Exil*. Wien, 2021.

[118] REITER-ZATLOUKAL, I. 100 Jahre Jus-Studium für Frauen. In: https://geschichte.univie.ac.at/de/artikel/100-jahre-jus-studium-fuer-frauen (24/05/2019).

[119] REITER-ZATLOUKAL, 100 Jahre Jus-Studium für Frauen; REITER-ZATLOUKAL, I., SAUER, B., Die Pionierinnen der österreichischen Rechtsanwaltschaft. In: *Österreichisches Anwaltsblatt* 2013/03, p. 109-112, p. 111.

[120] *Wiener Zeitung* Nr. 238, 14/10/1930, p. 5.

[121] *Neue Freie Presse* Nr. 23422, 27/11/1929, p. 14.

[122] *Kleine Volks-Zeitung* Nr. 97, 07/04/1936, p. 6.

was involved with the reform of lay jurisdiction, among other things.[123]

7. Women as university lecturers in Austria

Before 1938, academic career progression at Austrian universities followed a clearly defined path. The first step was graduation, following which the graduate could obtain a licence to teach at the relevant faculty by passing a postdoctoral qualification, called *Habilitation,* and teach courses as an adjunct professor. The status of adjunct professor did not entail employment at the university. The sole aim of the Habilitation process was to verify the candidate's academic and personal suitability for university teaching. The candidate had to have completed the appropriate academic degree, and was required to submit an academic treatise: the *Habilitationsschrift*, or postdoctoral thesis. The council of professors of the relevant faculty was responsible for conducting the Habilitation process. The decision of the council of professors had to be ratified by the Minister of Education. Only a fraction of adjunct professors would go on to be appointed full or extraordinary professor.

When a professorial chair was vacant and needed to be filled, the relevant council of professors would draft a proposal, which would be sent to the Minister of Education. Academic qualities were not the sole factor in appointing a full professor. Religious denomination, political alignment and membership of corresponding networks all had a great deal of influence on the decision.[124] The actual appointment as full professor was made by the Emperor or, in the republic, by the Federal President.[125]

After the universities and faculties opened to female students, women were admitted to academic careers only with extreme reluctance. They only reached the further stages of the university career path – the opportunity to teach at the law and political sciences faculty as an adjunct professor, or even to occupy a professorial chair – over two decades after the first female law student graduated in Austria.

In the early twentieth century, the question of opening university careers to women had already caused headaches among the Austrian professoriate. The University of Vienna had to confront the issue for the first time in 1904. They distinguished between two separate matters: admitting women to academic assistant posts, and admitting them as adjunct professors. In principle, from 1907 women could be employed as academic assistants, although with limitations compared to their male colleagues.[126] The decision about whether to allow women to become adjunct professors came at the same time, but the debates leading up to it were far more heated. Elise Richter – the first ever Austrian female adjunct professor, who was the 'test case' for these debates – later recalled the misgivings of some professors in the philosophy faculty:

> 'They spared neither time nor effort in rejecting me. Horrifying future visions opened up before their eyes: if she's an adjunct professor, then she'll want to be professor, then dean, then rector… It took a lot of artful persuasion to get it through to them that the majority of the professoriate would certainly not live to see it.'[127]

Three years after she applied, Elise Richter was finally awarded the licence to teach at the Vienna philosophy faculty. It is noteworthy that the long interval was not due to the faculty itself. The Ministry of Education needed two years to ratify Richter's acceptance as an adjunct professor. The Minister of Education took the Richter 'case' as an opportunity to make a statement of principle about admitting women as adjunct professors – admittedly, this was limited to the faculties of philosophy and medicine since, at that time, women were not yet allowed to study at the other faculties. The minister declared that women could undergo the Habilitation process, but on an exceptional basis, subject to a tougher examination process than men.[128] In the decree, he stated:

> 'I may expect, I think, that the professorial councils will give such Habilitations their full attention and will not only require the strictest fulfilment of the conditions prescribed in the Habilitation rules, but – if the faculty's decision to admit the candidate to the next stages of the Habilitation process is to be confirmed here in this ministry – that they will strive, both at the oral examination and at the probationary lecture, to reach the wholehearted conviction that the candidate is academically, pedagogically and personally suited to be allowed to teach at the university.'[129]

At the same time he made it plain that this did not imply any opening of the professoriate to women,

> '[s]ince, in accordance with the applicable organisational structure of the Universities, women are not eligible to succeed to academic chairs; that is, to occupy official teaching posts'.[130]

This decision met with great indignation from women's rights campaigners. For example, Leopoldine Kulka published a long article in *Neues Frauenleben* under the title 'To the adjunct pro-

[123] REITER-ZATLOUKAL, I., Laiengerichtsbarkeit zwischen Demokratie und Diktatur – Geschworenen- und Schöffengerichte in Österreich 1918 bis 1938. In: KOHL, G., REITER-ZATLOUKAL, I. (Ed.), *Laien in der Gerichtsbarkeit. Geschichte und aktuelle Perspektiven.* Wien, 2019, p. 91-141, p. 106 with further evidence.

[124] HUBER, A., ERKER, L., TASCHWER, K., *Der Deutsche Klub. Austro-Nazis in der Hofburg*. Wien, 2020, p. 105.

[125] For details of the Habilitation process and the appointment of professors, see STAUDIGL-CIECHOWICZ, *Dienst-, Habilitations- und Disziplinarrecht*.

[126] Cf. STAUDIGL-CIECHOWICZ, *Dienst-, Habilitations- und Disziplinarrecht*, p. 323-327.

[127] RICHTER, E., Erziehung und Entwicklung. In: KERN, E. (Ed.), *Führende Frauen Europas*. München, 1928, p. 70-93, p. 87-89.

[128] For further detail, see STAUDIGL-CIECHOWICZ, *Dienst-, Habilitations- und Disziplinarrecht,* p. 341-345.

[129] Directive of the Minister for Education 25/08/1907, Z. 29155, Universitätsarchiv Wien, PH PA 3021 (Personalakt Elise Richter) fol. 44.

[130] Directive of the Minister for Education 25/08/1907, Z. 29155, Universitätsarchiv Wien, PH PA 3021 (Personalakt Elise Richter) fol. 43.

fessorship and – no further!', in which she engaged critically with the education minister's decree.[131]

In the inter-war years, several women attained Habilitation at medical and philosophical faculties in Austria, but the law and political science faculties lagged behind. By the 'Anschluss' in 1938, not one woman had gone through Habilitation at the Vienna law and political sciences faculty. There were scattered instances of women working as assistant professors (*Hochschulassistentinnen*) at the various law and political sciences institutes, such as Roda Wieser and Ilse Lukas at the University of Vienna's Institute for Criminal Law and Criminology.[132] The law and political sciences faculty at Graz had a 'woman professor', albeit briefly, before the faculty at Vienna. This was the economist Charlotte von Reichenau, who had obtained her Habilitation in Germany and who worked as a 'deputy professor' (*Vertretungsprofessorin*) in Graz in 1940.[133] During the Second World War, in 1944, the German economist Stella Seeberg obtained her Habilitation, also in Graz.[134]

In contrast, the first female adjunct professor at the Vienna law and political sciences faculty, Sibylle Bolla-Kotek, was admitted only in 1947.[135] Bolla-Kotek was born into an aristocratic family in Pressburg (now Bratislava) in 1913. She had a good school education, and studied law at the German university in Prague. She graduated with a Doctor of Law degree in 1935. She was still a student when the Roman law specialist Egon Weiss recognised her talent and advised her to pursue an academic career. A few years later, Bolla-Kotek returned to this proposal and underwent Habilitation in 1938, under the supervision of Weiss, in Roman Law and Ancient Legal History at the German University in Prague, where she taught until 1945. Bolla-Kotek had to leave Prague in March 1945.[136] She moved to Austria, where she worked in the textile industry in the first post-war years. She was awarded a teaching licence at the law and political sciences faculty in Vienna in 1947. Eventually, in 1958, she was appointed full professor, meaning that the first woman law professor in Austria was also Sibylle Bolla-Kotek.[137]

One year after Bolla-Kotek obtained her Habilitation, Charlotte Leitmaier obtained her own, in canon law, at the law and political sciences faculty in Vienna. She became an extraordinary professor in 1964 and full professor in 1968.[138] Several more decades would pass from the appointment of the first woman law professor to the first female dean of the law faculty. Only in 1988 was the Vienna canon lawyer Ingeborg Gampl 'elected to the office of dean as the first woman in the history of the University of Vienna'.[139]

8. Summary

The road to the admission of women to university studies, and to academic employment in general – but especially in law – was a long and rocky one. A striking feature of the debates around female law students is the disparaging tone directed at women, whose motivations for taking up employment were, at best, derided.

The various women's associations, which fought relentlessly in the face of defeat for equal rights in the study of the law, made an important contribution in opening the law faculties to women. The role of individual professors at the University of Vienna, some of whom were also engaged in further education outside of the university setting, should also be emphasised: that of Edmund Bernatzik in particular. Bernatzik himself would not live to see women admitted to study the law in Austria, since he died at the end of March 1919, shortly before the relevant executive order was adopted. However, his daughter Marie Hafferl-Bernatzik was one of the first women to graduate with a law degree in Vienna.

[131] KULKA, L., Bis zur Dozentur und – nicht weiter! In: *Neues Frauenleben*, vol. 19, Nr. 9, 1907, p. 1-5.

[132] For further detail, see: STAUDIGL-CIECHOWICZ, K., Zur Entstehung der Wiener Kriminologie und Kriminalistik in der 1. Republik. In: *Journal on European History of Law*, vol. 2, Nr. 1, 2011, p. 29-35.

[133] ZIEGERHOFER, A., Charlotte von Reichenau (1890–1952) – Erste "Professorin" an der Rechts- und Staatswissenschaftlichen Fakultät. In: KERNBAUER, A., ZIEGERHOFER, A., *Frauen in den Rechts- und Staatswissenschaften der Universität Graz. Der Weg zur Zulassung und die ersten Doktorinnen von 1919 bis 1945*. Graz, 2019, p. 35-40, p. 37.

[134] KERNBAUER, A., Stella Seeberg – Die erste Dozentin an der Rechts- und Staatswissenschaftlichen Fakultät. In: KERNBAUER, A., ZIEGERHOFER, A., *Frauen in den Rechts- und Staatswissenschaften der Universität Graz. Der Weg zur Zulassung und die ersten Doktorinnen von 1919 bis 1945*. Graz, 2019, p. 40-45.

[135] FLOSSMANN, U., Sibylle Bolla-Kotek, die erste Rechtsprofessorin an der Universität Wien. In: HEINDL, W., TICHY, M. (Ed.), *„Durch Erkenntnis zu Freiheit und Glück…" Frauen an der Universität Wien (ab 1897).* Wien, ²1993, p. 247-256, p. 252.

[136] BERGER, E., Bolla-Kotek, Sibylle. In: KEINTZEL, B., KOROTIN, I. (Ed.), *Wissenschafterinnen in und aus Österreich. Leben–Werk–Wirken*. Wien et al., 2002, p. 81-84, p. 82.

[137] FLOSSMANN, Sibylle Bolla-Kotek, p. 252.

[138] STAUDIGL-CIECHOWICZ, K., Das Kirchenrecht und die Universität Wien im 20. Jahrhundert – seine Ausgestaltung und seine Vertreterinnen und Vertreter. (unpublished masters thesis, University of Vienna 2014) p. 82f.

[139] POTZ, R., Gampl, Inge, In: KEINTZEL, B., KOROTIN, I. (Ed.), *Wissenschafterinnen in und aus Österreich. Leben–Werk–Wirken*. Wien et al., 2002, p. 231-235, p. 232.

Auf dem Schreibtisch jedes preußischen Beamten. Fernwirkungen von Robert Graf Hue de Grais bis nach Japan

(On the Desk of Every Prussian Civil Servant. Robert Graf Hue de Grais: Influences even on Japan)

Robert von Lucius *

Abstract

Robert Graf Hue de Grais was a proliferate and influential writer on public law and administration. His handbook on constitution and administration in Prussia and the German Reich, published in 25 editions between 1881 and 1930, was the standard reference work for generations of Prussian civil servants in the Kaiserreich and the Weimarer Republic. It even influenced, through a translation into Japanese, administration in Japan, and was noted in the USA, Belgium, France. Count Hue de Grais was also influential through his proposals on administrative reforms, as civil servant – he was Regierungspräsident of Potsdam – and in civic education. Part of his archive is now opened, a hundred years after his death.

Keywords: *Robert Graf Hue de Grais; Preußische Verfassung und Verwaltung; Regierungspräsident Potsdam; Japanische Gemeindeverwaltung; Verwaltungsreformen; Staatsbürgerkunde; Archive Wolkramshausen und Gotha.*

1. Einführung

Wissenschaftler im strengen Sinne war Robert Graf Hue de Grais eher nicht. Die Auswirkungen seiner juristischen Handbücher aber haben das preußische Verwaltungsrecht und -handeln stärker beeinflusst als die Werke so mancher Hochschullehrer. Selbst auf die Verwaltungs- und Verfassungsstruktur Japans hatte sich sein „Handbuch der Verfassung und Verwaltung in Preußen und dem Deutschen Reiche“ mit 25 Auflagen zwischen 1881 und 1930 ausgewirkt. Eine japanische Delegation brachte ihm 1890 eine japanische Übersetzung verbunden mit einem hohen Orden. Auch in Belgien, Frankreich, den Vereinigten Staaten wurde das Handbuch schon früh notiert samt Übersetzungsplänen.

Hue de Grais wirkte in Hildesheim, als Polizeipräsident in Stettin, im Innenministerium in Berlin, als Regierungspräsident in Potsdam; als Abgeordneter im Preußischen Abgeordnetenhaus und im Landtag der Provinz Sachsen; als Autor vieler weiterer Bücher und Aufsätze; als Anreger für Verwaltungsreformen; und als Lehrender. Im Kaiserreich wie in der Weimarer Republik diente sein Handbuch, so Michael Stolleis, „der sprichwörtlich wohlgeordneten preußischen Verwaltung, lag sozusagen auf jedem Schreibtisch“.[1] Schon früh setzte er seine Verwaltungserfahrungen um in Reformvorschläge für eine Dezentralisierung der Verwaltung.

2. „Das“ Handbuch als Gattungsmarke

Das Werk, das seinen Namen auf Jahrzehnte zur Gattungsmarke machte unter preußischen Beamten, begann er gen Ende seiner Hildesheim-Zeit. In den acht Jahren in Berlin erschienen ab 1881 bei J. Springer gleich die ersten sechs Auflagen seines Handbuchs, und in den elf Jahren in Potsdam weitere sieben Auflagen – also fast jährlich eine Neuauflage mit jeweils 2500 Stück. Welche Arbeitslast das neben seiner regulären Aufgabe war, kann man ermessen, wenn man die Vorarbeiten, die nun im Landesarchiv Thüringen - Staatsarchiv Gotha liegen, ebenso betrachtet wie seine handschriftlichen Anmerkungen mit Bleistift in den Bänden im Familienarchiv Hue de Grais in Wolkramshausen/Nordthüringen. Zudem hatte er parallel eine auf etwa ein Fünftel des Textes komprimierte Kurzfassung mit jeweils gut hundert Seiten erstellt, den „Grundriss der Verfassung und Verwaltung in Preußen und dem Deutschen Reiche“, sowie ein großes „Handbuch der Gesetzgebung in Preußen und dem Deutschen Reiche“ herausgegeben und teils selber bearbeitet, der das gewaltig anwachsende Gesetzesmaterial sammelte und kommentierte. Sein Grundriss wurde verbreitet, angeregt auch durch das Preußische Kultusministerium, in Ausbildungsstätten. Der Verleger Julius Springer informierte den Autor, dass er Freiexemplare des Grundrisses gesandt habe an 60 politische Zeitungen, an Lehrerzeitungen, Gemeindezeitungen, an Pro-

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Er hütet das Archiv Hue de Grais in Wolkramshausen. Für Hilfe beim Abschnitt zu Japan über Jahre hinweg Dank vor allem an Marco Raindl, Tokio, und Kenichi Moriya, Osaka; sowie post mortem an Michael Stolleis, der mit einer Festrede in Wolkramshausen 1995 die Aufmerksamkeit für Robert Graf Hue de Grais schärfte.

[1] STOLLEIS, M., „Verwaltungspraxis zwischen Kameralwissenschaft und Verwaltungsrecht: Robert Graf Hue de Grais (1835-1922)“ In: *Verwaltungsrundschau* 12/95, S. 472-475.

vinzial-Schul-Kollegien sowie an „Direktoren von Gymnasien, Realgymnasien, Ober-Realschulen".

Was Hue de Grais mit dem Handbuch anstrebte, erläutert er im Vorwort zur 22. Auflage: „will eine vollständige, jedem Gebildeten verständliche und zugängliche Darstellung unserer gesamten öffentlichen Verhältnisse bieten". Die Gesetzgebung sei immer verwickelter, ihr Verständnis immer schwieriger geworden – eine Aussage, die weiterhin gilt. So sieht er sein Handbuch als Hilfsmittel, damit jeder sich leicht und schnell auf dem Feld des öffentlichen Rechts und des Staatswesens zurechtfindet. Dabei hat der Autor sich nicht begrenzt auf eine geordnete Wiedergabe der Rechtsvorschriften, sondern sie um deren Entstehung, Bedeutung und Gestaltung im praktischen Leben ergänzt und das eingebettet mit statistischen Angaben und der Gesetzgebung fremder Staaten. Besonders mühsam wie auch für den Nutzer wichtig war der Hinweis auf die amtlichen Sammlungen, in denen Gesetzestexte veröffentlicht wurden samt späterer Änderungen. Um den Umfang zu begrenzen, verzichtete Hue de Grais auf die Darstellung von Streitmeinungen, die in Lehrbüchern zu finden sind, und weitgehend auf Ausführungsbestimmungen. Er nahm sich zurück auch mit eigenen Meinungen – die „Neue Stettiner Zeitung" schrieb 1886 dazu in einer Besprechung „ein Buch wie dieses, das mit ängstlicher Vermeidung jeder subjectiven Färbung…".

Die 22. Auflage (1914) war die letzte, die Robert Graf Hue de Grais erstellte. Bis zu seinem Tod 1922 bereitete er eine Neuauflage vor – der Übergang zur Weimarer Republik mit der Umgestaltung der Rechtsordnung forderte eine grundlegende Neubearbeitung. Diese übernahmen dann zehn Mitarbeiter, herausgegeben vom Neffen Guiscard Graf Hue de Grais, Regierungsdirektor in Frankfurt an der Oder (1879-1960), sowie der Berliner Professor Hans Peters, einer der ganz wenigen Staatsrechtler, der aktiv im Widerstand gegen den Nationalsozialismus war. Eine geplante neue Auflage (an der auch der Vater des Autors mitwirken sollte) erübrigte sich vorerst - 1933/34 beschlossen der Julius Springer Verlag und die Herausgeber, dass ein Werk, das geltendes Recht darstellen sollte, nach dem Machtwechsel vorerst nicht mehr gefragt sei. Briefwechsel mit Überlegungen einer Neuauflage gab es aber bis 1937. Als zusätzlicher Herausgeber wurde Staatssekretär Wilhelm Stuckart, ein engagierter Nazi, benannt (oder eingesetzt). Peters trat im März 1937 aus „persönlichen Gründen" - vermutlich nach politischen Kontroversen mit Stuckart – aus dem Herausgeberkreis aus, womit weitere Planungen hinfällig wurden.

Wie sich die Aufgaben des Staates ausweiteten, zeigt sich an einem Vergleich der Kapitel. In der ersten Auflage 1881 sind es neun: das deutsche Reich, der preußische Staat, Auswärtige Angelegenheiten, Militär und Marine, Finanzen, Justiz, Polizei, Kulturpflege, Wohlstandspflege. Bis zur letzten 25. Auflage 1930 wurde das ausgedehnt um nur drei auf zwölf Kapitel, teils mit veränderten Überschriften. Wehrmacht sowie „Auswärtige Angelegenheiten, Völkerrecht. Der Versailler Vertrag und seine Ausführung" rückten an das Ende. Justiz hieß nun Rechtspflege. Dazu kamen die Abschnitte „Handel und Gewerbe (einschl. Arbeitsrecht, Kapitalpflege, Bergbau)", Verkehrswesen, Land- und Forstwirtschaft.

Wie sich die Rechts- und Gesellschaftsordnung über diese vier Jahrzehnte hinweg änderten, kann man anhand der Fortschreibungen sehen. Ein Beispiel mag das Thema Kolonialrecht zeigen.[2] In der 13. Auflage (1900) sind die Rechtsvorschriften noch unter der Überschrift Kolonien vermerkt, in der 16. (1904) unter Schutzgebiete. Wie kleinteilig bisweilen die Rechtsverordnungen waren, zeigte etwa eine Verordnung des Kaisers von 1907, der zuvor Bundesrat und Reichstag zustimmten: Kredite für den Bau einer Eisenbahn von Lüderitzbucht nach Keetsmanhoop, bezahlt aus dem Staatsetat, seien von 1912 an mit 3,5 Prozent jährlich zu verzinsen und mit 0,6 Prozent jährlich zu tilgen. Dass das Kolonialrecht auch nach heutigem Verständnis teils weitsichtig war, zeigen Waldschutzvorgaben - die erste Waldschutzverordnung für Kamerun erließ das Reich 1894, noch nicht einmal zehn Jahre nach Übernahme als Schutzgebiet; und 1900 verordnete der Kaiser im Reichsgesetzblatt zum Schutz des Waldbestandes, Personen, die entgegen den Vorschriften Holz gefällt haben, seien verpflichtet, die abgeholzte Fläche wieder aufzuforsten. Der Gouverneur wurde ermächtigt, das mit Zwangsmitteln oder einer Ersatzvornahme durchzusetzen.

Der Rechtshistoriker Michael Stolleis hielt beim Festakt zum 70. Todestag von Hue de Grais eine Rede in der Kirche zu Wolkramshausen. Er würdigte, das Handbuch sei als fortlaufende systematische Darstellung – „schlicht, umfassend und zuverlässig" - nützlich und habe daher „in jeder preußischen Amtsstube" gelegen. Hue de Grais habe die „vielgerühmten positiven Eigenschaften preußischer Verwaltung" im Zeichen des Rechtsstaats belegt.[3] Beim Handbuch sei es „um Genauigkeit, Pflichterfüllung, um rechtliche Ausgestaltung…, um einen Dienst am Gemeinwesen" gegangen. Da sich der Autor wie selbstverständlich zurückgenommen habe, sei „die lebendige Person des Grafen Hue de Grais ganz hinter dem Buch", „dem Hue de Grais" verschwunden – das sei Ausdruck der Versachlichung und Entpersönlichung.[4] Das Handbuch sei eine direkte Fortsetzung der staatswissenschaftlichen Handbücher des 19. Jahrhunderts.

Ähnlich ordnet das der Jenenser Rechtshistoriker Gerhard Lingelbach ein:[5] das ständige Arbeitsmittel für ungezählte preußische Verwaltungspraktiker und für Generationen von Studenten der Rechts- und Staatswissenschaften sei stets „der Hue de Grais" genannt worden. Dass sein Werk sich als Kurzform mit dem Namen des Verfassers verbinde und verselbständige, zum Eigennamen werde, sei eine „Wertschätzung für einen Gelehrten". Die Praxisnähe sichere seinen Ruhm. Er habe mit seinen Schriften und seiner Lehrtätigkeit zwischen Wissenschaft und dem Bürger vermittelt. Lingelbach hat den Thüringer zudem

[2] LUCIUS, R. von, Schutzgebiete als Zubehör des Reiches. In: *NamibiaMagazin* 4/2020, S. 22f.
[3] STOLLEIS, M., *Geschichte des öffentlichen Rechts in Deutschland, Zweiter Band* 1800-1914. München, 1992, S. 304.
[4] STOLLEIS (Anm. 1), Verwaltungsrundschau 12/95, S. 475.
[5] LINGELBACH, G., „Robert Graf Hue de Grais – gelehrter Praktiker in preußischen Staatsdiensten". In: HOYER, A., HATTENHAUER, H., MEYER-PRITZL, R., SCHUBERT, E. (Hrsg.), *Gedächtnisschrift für Jörn Eckert.* Baden-Baden 2008, S. 533ff.

gewürdigt mit einem 36 Seiten langen Heft „Robert Graf Hue de Grais (1835-1922). Leben und Werk“, das 1994 im Privatdruck vom „Förderverein Hue de Grais Wolkramshausen“ herausgegeben wurde. Eine Besprechung zur 23. Auflage 1926[6] schreibt „Ein neuer Hue de Grais ist ein Ereignis auf dem Markt der Rechtsliteratur. Es gibt kaum ein Werk auf dem Gebiet des öffentlichen Rechts, das ein solches Ansehen genossen und eine so weite Verbreitung erfahren hat wie dieses… Es gibt nicht viele Werke, die der Verwaltungsbeamte, Richter und Rechtsschriftsteller, der Studierende und der in Praxis befindliche junge Jurist so oft in die Hand zu nehmen genötigt ist wie dieses Buch, in dem nach wie vor alles zu finden ist, was Verwaltungsbeamte und Juristen in der praktischen Berufstätigkeit brauchen“.

3. Auswirkungen auf Japan

Das Handbuch hatte Auswirkungen über Preußen hinaus. Es wurde 1890 auf Japanisch übersetzt (Hyū de Gurē gencho, „Dokubotsu-seiten“, Tokio 1890). Der Verlag Nihon Shoseki Kaisha (Gesellschaft der japanischen Bücher) war enger verbunden mit der „Meiji Houritsu Gakko“, einer juristischen Fachhochschule. Dass die Wirkung nachhallte, zeigt ein Nachdruck des Werks in Tokio 2003 (beim Verlag Shinzansha Shuppan, 810 S., als Sonderband 271 der Reihe „Materialien zur japanischen Gesetzgebung“). Dass Japan den Beitrag von Hue de Grais würdigte, zeigt die Verleihung zum Kommandeur des Ordens der Aufgehenden Sonne. Eine japanische Juristen-Deputation war nach Potsdam gekommen und hatte ihm das übersetzte Werk und den Orden überreicht.[7]

Einflussreich war das Werk im Verwaltungsablauf Japans vor allem, weil es Sprachhürden überwinden half. Ansonsten war der Zugang zu Informationen aus dem Westen wegen sprachlicher Barrieren nur einer kleinen Elite möglich. Übersetzt hatte es Shigekazu Nakane (1851-1906). Er erlernte Deutsch an der Universität, aber ohne Hochschulabschluss. Von 1877 an war er Übersetzer der Präfektur Niigata, ab 1882 für das Büro des Auswärtigen Amtes und für das Büro für Gesetzgebung. In dieser Aufgabe dürfte er mit der Übersetzung beauftragt worden sein. Später wurde er Generalsekretär des Oberhauses (Aristokratischen Instituts). Nakane hatte auch andere verwaltungsrechtliche deutsche Texte übersetzt, darunter ein für das japanische Publikum gedachtes Vorlesungsmanuskript von Isaac Albert Mosse und ein finanzwissenschaftliches Vorlesungsmanuskript von Karl Rathgen (der Gründungsrektor der Universität Hamburg, 1856-1921, unterrichtete von 1882 bis 1890 Öffentliches Recht und Verwaltungswissenschaften an der Kaiserlichen Universität Tokio und war Berater des japanischen Ministeriums für Landwirtschaft und Handel). Bekannt blieb Nakane nicht zuletzt, weil sein Schwiegersohn Natsume Sōseki, einer der berühmtesten japanischen Schriftsteller der Meiji-Zeit und abgebildet auf einer 1000-Yen-Banknote, ihn auch literarisch als „Schwiegervater“ verewigte. Nakane war Mitglied im Vorstand des Vereins für deutsche Wissenschaften, aus dessen Vereinsschule wiederum die Dokkyo-Universität hervorging.

Japan orientierte sich seit der Meiji-Restauration 1868 beim Verfassungs-, Rechts- und Erziehungswesen, bei der Neuordnung des Militärs und bei der Einführung westlicher Wissenschaften an Preußen. Die Meiji-Zeit (1868-1911) brachte die Restauration des für fast 700 Jahre entmachteten Tennō, des japanischen Kaisers. Dabei lag der politischen Führung an einer Reform von oben und somit am autoritären preußischen Modell – Preußen und Japan nahmen im Modernisierungsprozess international eine Sonderrolle ein. Die japanische Regierung sah sich 1881 gezwungen, ein von der Opposition gefordertes Parlament für 1890 zuzusagen. Als Vorbild der Meiji-Verfassung gilt die preußische Verfassung von 1850, auch wenn weitere deutsche Landesverfassungen und andere europäischen Verfassungen sowie die Reichsverfassung von 1871 bei der Ausarbeitung herangezogen wurden. Dass schon die ersten Auflagen des Handbuches auf der Suche nach einer Verfassung beachtet wurden, zeigt eine Liste der deutschen Rechtswissenschaftler, deren Lehrbücher in die japanischen Verfassungsberatungen Eingang fanden. Unter den fünfzehn Autoren ist Hue de Grais vermerkt mit den Auflagen 1882, 1883 und 1884.[8]

Nach der Hinwendung zu Deutschland, zu deutschem Recht bei Kodifikationen, und dem deutschen Konstitutionalismus 1881 wuchs die Zahl deutscher Rechtsberater in japanischen Diensten. Die deutschen Rechtswissenschaften in Japan blühten auf mit dem Abschluss der weitgehend auf deutsches Recht abgestimmten Kodifikationen in den Neunzigern und mit dem Übergang vom Beamtenstaat zum Parlamentarismus. Das galt vor allem in der „deutschen Dekade“ bis 1890, in der der Satz „Was nicht deutsches Recht ist, ist kein Recht“ zum geflügelten Wort unter japanischen Juristen wurde.[9]

Die preußische Verfassung verband das monarchische und das repräsentative Prinzip. Das kam dem Bedürfnis Japans nach einem Obrigkeitsstaat entgegen und trug gleichzeitig dazu bei, dass westliche Staaten Japan als einen modernen Verfassungsstaat anerkannten. Damit wollte man die Revision der „Ungleichen Verträge“ zwischen 1854 und – mit Preußen – 1861 erreichen und die volle Souveränität.[10] Zur Übernahme des preußischen Modells trug bei, dass in jener Zeit Preußen und das Deutsche Reich durch moderne Gesetzeskodifikationen das Recht vereinheitlichten; und dass Deutschland nach seinen militärischen Siegen gegen das zuvor als Modell bevorzugte Frankreich und durch seine industrielle Revolution Aufmerksamkeit auf sich zog. Mit Bismarcks Ansichten zum Völker-

[6] Ohne Quellenangabe auf dem Ausriss, aus dem Familienarchiv Hue de Grais/Wolkramshausen.

[7] So ein Brief seiner Tochter an den Verf., 21. 1. 1970; sie fand als junges Mädchen am Schönsten, dass der Orden mit breitem roten Band über der Brust zu tragen „in einem entzückenden japanischen Lackkästchen“ lag.

[8] INADA, M., *Meijikenpô-seiteishi.* Tokio, 1962, S. 896; KOKUBUN, N., *Die Bedeutung der deutschen für die japanische Staatslehre unter der Meiji-Verfassung.* Frankfurt aM, 1993, S. 193.

[9] SOKOLOWSKI, Ch., 100 Jahre juristischer Austausch mit Japan. In: *Zeitschrift für Japanisches Recht,* Bd. 28, 2008, S. 69.

[10] ANDŌ, J., *Die Entstehung der Meiji-Verfassung.* München, 2000; als pdf-Kurzfassung auch: ANDŌ, J., Japan und die Preußische Verfassung. In: www.dijtokyo.org, 2016, S. 163ff; HEUSER, R., *Die erste Phase des japanischen Konstitutionalismus: Zum 100. Geburtstag der Meiji-Verfassung vom 11. Februar 1889,* 1989, www.zaoerv.de.

recht konnten sich Japaner besser identifizieren als mit dem angelsächsischen Staatsverständnis. So kam es in rascher Folge zu drei Formen des Rechtstransfers – die Entsendung japanischer Fachkenner in das Ausland; die Beschäftigung ausländischer Spezialisten in Japan; und Literaturimport. In der nun gut 160-jährigen Geschichte deutsch-japanischer Freundschaft spielte der Rechtstransfer eine prägende Rolle.

Diese Einflüsse wurden in starkem Maße mit der Hilfe deutscher Rechtsberater erreicht: der Altliberale Rudolf von Gneist in Berlin und der Sozialkonservative Lorenz von Stein in Wien wurden befragt. In Tokio halfen Hermann Roesler (1834-1894) sowie Albert Mosse (1846-1925) als Rechtsberater in japanischen Diensten. Roesler war wie Hue de Grais ein entschiedener Verfechter der Verwaltungsgerichtsbarkeit. Als der Verfassungsberater Hirobumi Itō (1841-1909) 1882 zu Verfassungsvorstudien nach Europa und vor allem nach Deutschland entsandt wurde, lagen just die ersten beiden Auflagen des Handbuchs vor. 1885 wurde Hirobumi Itō dann erster Premierminister Japans. Einflussreich war Kowashi Inoue (1843-1895), der als Mitarbeiter des Justizministeriums 1875 die preußische Verfassung ins Japanische übersetzte und kommentierte und später preußische Vorbilder beim Entwurf der japanischen Verfassung - das Zweikammersystem, Rechte und Pflichten der Untertanen, die Thronfolgeregelung als getrenntes kaiserliches Hausgesetz - übernahm. Inoue, der auch die meisten anderen wichtigen Gesetzesentwürfe mit schrieb, ist der am besten erforschte Beamte der Meiji-Zeit; sein Archiv ist eine der wichtigsten Quellen über die Kodifikation in der Meiji-Zeit.[11] Inoue war Drahtzieher der Hinwendung zum „Modellstaat Deutschland", der damit die monarchischen Vorrechte gegenüber Forderungen nach einem Parlamentarismus britischer Prägung bewahrt sehen wollte.

Das nun japanischen Beamten zugängliche Werk von Hue de Grais wirkte sich in seiner übersetzten Fassung nicht mehr auf die Meiji-Verfassung aus – sie wurde verkündet am 11. Februar 1889, kurz vor der Veröffentlichung des Handbuchs in Tokio 1890 –, half aber bei der Umsetzung der Vorgaben in Verwaltungsorganisation und die tägliche Praxis; möglicherweise auch bei der Rahmengesetzgebung, die das im November 1890 nach dem Vorbild des Preußischen Landtags errichtete japanische Parlament verabschiedete. Das galt auch beim Entwurf des japanischen Gerichtsverfassungsgesetzes von 1891 nach dem deutschen Modell von 1877, das Hue de Grais im vierten Kapitel seines Handbuchs ausgiebig darstellt. Die Schriften von Hue de Grais waren natürlich dem Berliner Landrichter Mosse geläufig, der 1886 nach Japan kam und dort die Gemeinde- und Städteordnung entwarf sowie die Kreis- und Präfekturordnung. Wie in Preußen erledigten Gemeinden in Japan als autonome Gebietskörperschaften die örtlichen Aufgaben. Indes enthielt die „Shisei Chôsonsei", die 1889 verabschiedete Städte- und Gemeindeordnung, nicht die demokratischen Elemente des preußischen Kommunalsystems.[12] 1890 führte Japan zudem nach deutschem Vorbild das – 1923 wieder abgeschaffte – Kreissystem ein. So erschien der japanische Hue de Grais gerade rechtzeitig, um Beamten auf der Kommunal- und Regionalebene als Handreichung zu dienen beim Einfinden in ihre neuen Aufgaben. Hue de Grais war „dort, wo die Praxis stattfand, häufig nachgeschlagen worden" - in der dezentralisierten Verwaltung vor dem Ersten Weltkrieg, aber auch nach dem Versuch der Zentralisierung des Verwaltungsrechts in der nachkriegszeitlichen Krisenverwaltung, also „vor Ort".[13]

4. Belgien, Frankreich, USA

Übersetzungsvorschläge gab es auch ins Englische und ins Französische. Das Handbuch auf Französisch übersetzen wollte 1886 der luxemburgische Journalist (Korrespondent der Kölnischen Zeitung in Brüssel), Historiker, Übersetzer und Weltreisende Prosper Müllendorff. Er schrieb Hue de Grais als „einer seiner eifrigsten Leser", er habe für eine Staatsdienst-Prüfung in Luxemburg französische und belgische Handbücher studiert; aber keines der Fachwerke seien „so fasslich und übersichtlich gehalten, wie das Ihrige". Er nutze es täglich für seine Berichte für die Kölnische Zeitung wie auch für jene im belgischen „Moniteur des Intérêts Matériels", und schreibe für mehrere belgischen Zeitungen Notizen über jede Neuauflage des Handbuchs. Er habe dieses belgischen Beamten empfohlen, glaube aber, dass eine Übersetzung allen willkommen sein sollte, die der deutschen Sprache nicht mächtig seien, um sich über die Zustände im Reich und in Preußen aufzuklären. Nach einem Briefwechsel mit dem Verleger der Kölnischen Zeitung stimmte der Verleger des Handbuchs, Julius Springer, der Übersetzung zu. Ende 1887 aber musste Müllendorff „auf die Ehre, Ihr Übersetzer zu sein, verzichten": Ein belgischer Verleger hatte in Frankreich nachgefragt mit der zeittypischen ernüchternden Auskunft, so Müllendorff, „wie die politischen Verhältnisse jetzt liegen, wollen die Franzosen, auf deren Markt es doch am meisten ankommt, keine Werke kennen, die Deutschland so schildern, wie es ist".[14]

Vorgeschlagen hatte die Übersetzung ins Englische ein Hochschullehrer an der Universität Pennsylvania. Der Verleger Julius Springer schrieb am zweiten Weihnachtstag 1891, er könne und wolle gegen eine in Amerika erscheinende englische Ausgabe nichts einwenden. Zur Übersetzung bereit war ein in Halle studierender Staatswissenschaftler. Weitere Informationen, warum sich das nicht ergab, sind aus dem Familienarchiv Hue de Grais nicht ersichtlich.

Aufmerksam geworden auf das Handbuch wurde der Forscher in Philadelphia möglicherweise durch eine lange Besprechung der 5. Auflage, die am 19. 8. 1886 in der „Evening Post" in New York, eine der damals auflagenstärksten Zeitungen der USA, erschien. Diese schrieb „…has earned the well-deserved reputation of being the best, in fact the only adequate exposition of the Prussian and German Government which exists in

[11] WANI, A., „Inoue, Kowashi". In: STOLLEIS, M. (Hg.), *Juristen. Ein biographisches Lexikon.* München 1995, S. 324f.
[12] KATAGI, J., *„Kommunale Gebietsreform und Dezentralisierung. Vergleich zwischen Japan und Deutschland".* Potsdam, 2012.
[13] MORIYA, K., Osaka City Univ., in einer Mail an den Verf. 6. 4. 2022. Am 13. 6. 2012 schrieb er, die Übesetzung sei bei den Bibliotheken bedeutenderer japanischer Universitäten vorhanden, was für die praktische Bedeutsamkeit des Werkes in Japan spreche.
[14] Briefwechsel im Archiv Hue de Grais in Wolkramshausen.

a comparatively condensed form… contains very little historical matter, almost nothing that can be called theorizing, and but few criticisms of existing conditions… written in an involved style which is concise." Das Verwaltungssystem Preußens sei, so der ungenannte Rezensent, überaus kompliziert und für Ausländer schwer zu verstehen. Erstaunlich war aus einer amerikanischen Feder die Einschätzung zur preußischen Verwaltung, sie sei effektiv und biete Bürgern umfassenden Rechtsschutz: „As a whole, and in spite of obvious disadvantages, the service is so effective, and the protection of the citizens so complete, that the system deserves thorough study at the hands of those interested in the bettering of our own administration. For this purpose, the book before us furnishes an excellent outline, which will make a good basis for more exhaustive research".[15]

5. Schriften und Reformvorschläge

Unter seinen zahllosen Veröffentlichungen gibt es – neben vielen kurzen Aufsätzen und Buchbesprechungen sowie Beiträgen im Wörterbuch des Deutschen Staats- und Verwaltungsrechts – vor allem drei Gruppen: Handreichungen und Nachschlagewerke; schmalere Bände mit Reformvorschlägen zur Verwaltung; und Aufrufe und Hilfsstellungen zur politischen Bildung. Die Nachschlagewerke (die weit mehr waren als Fleißarbeiten) waren das „Handbuch der Verfassung und Verwaltung in Preußen und dem Deutschen Reiche", das in 25 Auflagen zwischen 1881 und 1930 erschien; der komprimierte „Grundriss der Verfassung und Verwaltung in Preußen und dem Deutschen Reiche" zum raschen Überblick mit elf Auflagen von 1884 bis 1914; sowie ein großes „Handbuch der Gesetzgebung in Preußen und dem Deutschen Reiche", das er herausgab und teils selber bearbeitete. Es sammelte und kommentierte das gewaltig anwachsende Gesetzesmaterial. Darin übernahm er als Autor die Abschnitte Das Deutsche Reich, Reichsverfassung, Reichsangehörigkeit, Reichstag, Reichsbehörden und Reichsbeamte, Reichsfinanzen, Elsaß-Lothringen (Band 1, Teil 1, 1901); Staatsverfassung und Staatsbehörden / Der Preußische Staat (Band 1, Teil 4, 1904, 608 S.); Allgemeine Bestimmungen über Heer und Kriegsflotte, Wehrpflicht, Heereseinrichtung und Rechtsverhältnisse der Militärpersonen, Heereslasten, Versorgung der Militärpersonen, Kriegsflotte (Bd. 1, Teil 3, 1904); Kommunalverbände, Gemeinsame Bestimmungen, Landgemeinden und Gutsbezirke, Städte, Kreise und Provinzen (Bd. 3, Teil 4, 1903). An dieses Großvorhaben – 26 Teile mit zusammen 36 Bänden – setzte sich Hue de Grais erst nach seinem erbetenen Ruhestand 1900. In den Abschnitten jedes Gebiets werden die Hauptgesetze fortlaufend in geordneter Übersicht aufgeführt. Nach einem einleitenden Überblick informieren beigefügte Erläuterungen über Entstehung und Bedeutung der Gesetze, grundlegende Entscheidungen dazu, wissenschaftliche Stellungnahmen und die praktische Handhabung.[16] Wie beim vorigen Handbuch waren die Besprechungen euphorisch.[17]

Daneben setzte Hue de Grais sich schon als junger Beamter in Schriften und im Wirken für Reformen der Verwaltung ein. Als Amtshauptmann in Hildesheim und Landrat im Kreis Hildesheim-Peine hatte er „mit bemerkenswerten Publikationen scharfsinnig"[18] auf überholungsbedürftige Vorstellungen der Kameralistik verwiesen. Mehrfach wies er auf die Notwendigkeit einer dezentralisierten Verwaltung und eigenständiger und flexibler Entscheidungen. 1871 warf er in einer Schrift (Robert Graf Hue de Grais, Reorganisation der inneren Verwaltung Preußens auf Grundlage der Selbstverwaltung vom Standpunkt des praktischen Lebens, Berlin 1871, 94 Seiten) der inneren Verwaltung Mängel vor und schlug eine verstärkte größtmögliche Selbstverwaltung vor. Diese sollte die starken Eingriffe des Staates in alle Bereiche des öffentlichen Lebens zurückdrängen. Die Selbstverwaltung sei „die wirksamste Triebfeder für Gemeinsinn und Rechtsbewusstsein". Die Gemeinde, getragen auch vom Ehrenamt, sei die Grundlage für die Selbstverwaltung; Zentralbehörden sollten nur Aufsichtsinstanz sein und Gesetze vorbereiten. Bei seinen konkreten Vorschlägen für eine Reorganisation und eine Verkleinerung der Zahl der Landkreise hob Hue de Grais die Bedeutung etwa des Volksschulwesens und der Wohlfahrtspflege hervor.

Er ergänzte seine Bemühungen in der Schrift „Die Weiterführung der Preußischen Verwaltungs-Organisation" (1878). Gegen die 1875 und 1876 reformierten Verwaltungsordnungen wandte er ein, die Trennung der Verwaltung von der Verwaltungsjustiz sei „ein Hauptfehler" - notwendig sei als Rechtskontrolle ein über der Verwaltung stehendes Verwaltungsgericht, das bei Rechtsverletzungen gegen Endbescheide der Verwaltung angerufen werden könne.[19] Neben einem gesicherten Rechtsschutz und einer Vereinfachung der Verwaltungsstrukturen war die „Beseitigung der Bureaukratie" ihm ein besonders Anliegen. Auch in Beiträgen zur Deutschen Juristen-Zeitung monierte er 1914 geplante Gesetzentwürfe zum Landesverwaltungsgesetz, die Oberbehörden wie dem Oberpräsidenten zu viel Befugnisse geben. Zur Förderung des Kleinkredits durch öffentliche Sparkassen – auch ein Anliegen, das sein offenes Ohr für soziale Probleme belegt – verfasste er 1893 eine Denkschrift. Dabei begrenzte Hue de Grais sich bei Reformen nicht nur auf Vorschläge. Er erließ 1898 eine Geschäftsordnung für die Königliche Regierung in Potsdam, die bis hin zur Anlegung von Sammlungen und der Behandlung der Akten Anleitungen gab – ebenso wie 25 Jahre davor in Hildesheim „Statuten der Spar-, Leih- und Vorschuß-Casse für die Aemter Hildesheim und Marienburg".

Zu seinem Abschied in Potsdam rühmte das Regierungskollegium, dass er nicht nur „Berathungen in unseren Sitzungen und den gesammten Geschäftsverkehr in vollendeter Form in knappen sachlichen Gruppen zu halten wusste", Gegensätze ausgeglichen und abweichende Meinungen gewürdigt, sondern auch selbstlos jüngere Beamte herangebildet habe. Bei der Bildung war ihm die breite Aus- und Fortbildung Beamter wichtig. Das

[15] *The Evening Post,* New York 19. 8. 1886, S. 3 (https://nyshistoricnewspapers.org/lccn/sn83030384/1886-08-19/ed-1/seq-3.pdf).
[16] *Frankfurter Zeitung,* 9. 3. 1902.
[17] „Gesammtwerkes, das nach Ziel, Plan und Anlage eines der großartigsten und verdienstvollsten litterarischen Unternehmungen der neueren Zeit zu werden verspricht… ein um die Allgemeinheit verdienstliches Unternehmen". In: *Mittheilungen der Handelskammer zu Breslau,* Nov. 1901, S. 218.
[18] LINGELBACH, G. (Anm. 5), S. 536f.
[19] *„Die Post",* Berlin 11. 1. 1883.

bezog er nicht nur auf Juristen – in einem Beitrag zur Vorbildung von Verwaltungsbeamten[20] trat Hue de Grais dafür ein, dass an „technischen Bildungsanstalten" (Technischen Hochschulen, Handelshochschulen, landwirtschaftlichen Hochschulen und Verwaltungshochschulen) Lehrstühle der Rechtswissenschaften eingerichtet werden sollten, um ihren Lernenden Grundlagen der Rechtswissenschaften beizubringen; ebenso wie Jurastudenten neben ihren „reinen Verstandeswissenschaften" auch „Erfahrungswissenschaften" wie Bergbaukunde beigebracht werden sollten. Die Königliche Geologische Landesanstalt wie auch der Verband Deutscher Ingenieure schrieben dem Regierungspräsidenten aD 1917 mit Dank und Zustimmung dazu; diese Bestrebungen wollten sie nach Kriegsende aufnehmen.

6. Staatsbürgerkunde und Politische Bildung

In praktischer Lehre, in Veröffentlichungen und mit konkreten Anregungen warb Graf Hue de Grais für politische Bildung. Schon früh war er aktives Mitglied der „Vereinigung für staatsbürgerliche Bildung und Erziehung". Zusammenfassend stellt Hue de Grais diese dar in seiner „Staatsbürgerkunde" (1913) sowie in „Gegenstand und Methode des staatsbürgerlichen Unterrichts auf der Grundlage des Staatsgedankens" (1914). Kurz, deutlich und übersichtlich müsse der staatsbürgerliche Unterricht über Recht und Wirtschaft sein, gut lesbar für den gebildeten Bürger. Wie in seinen Handbüchern war ihm gegeben, komplexe Materien in einfache Sätze für den Alltagsgebrauch umzusetzen. Vor allem war ihm wichtig, den Staatsgedanken hochzuhalten, damit auch die Jugend Wohl und Wehe des Staates als das eigene empfinde und Lust zu tätiger Mitarbeit gewinne. Bis in seine letzten Lebensjahre warb Hue de Grais für staatsbürgerlichen Unterricht – also auch zu Beginn der Weimarer Republik. Er zählte mit anderen illustren Namen zu den Zeichnern einer Denkschrift an die Verfassunggebende Deutsche Nationalversammlung im März 1919, in der diese weitsichtig schreiben, staatsbürgerliche Erziehung sei „mit der Errichtung des Volksstaates zu einer Lebensfrage der Nation geworden". Ebenfalls 1919 zählt Hue de Grais zum Ausschuss, der zur Gründung der Arndt-Hochschule (Volks-Hochschule) zu Berlin aufruft. Er erklärte sich bereit, auch im Alter von 84 Jahren dort Vorlesungen zu übernehmen, obwohl er seit 1917 vor allem in Wolkramshausen lebte.

Im Vorwort zur „Staatsbürgerkunde" stellt er seine Haltung zum preußischen Staatswesen und zu den öffentlichen Zuständen dar: „… kann mit diesen zufrieden sein. Seit Friedrich dem Großen besitzen wir Glaubensfreiheit, Gleichheit vor dem Gesetz, eine unabhängige Rechtspflege, einen zuverlässigen Beamtenstand und einen wirksamen Rechtsschutz… Nunmehr ist aus dem zerrissenen und wenig geachteten Deutschland ein einiges Reich geschaffen worden, das als angesehene Macht den anderen Staaten gegenübersteht und in dieser Machtstellung wesentlich dazu beigetragen hat, daß der Friede in Europa vier Jahrzehnte hindurch aufrecht erhalten worden ist… Allen Bedürftigen ist durch Gesetz die nötige Hilfe gesichert, und darüber hinaus ist in dem Arbeiterschutz und der Arbeiterversicherung ein Werk geschaffen, wie es noch von keinem anderen Staat erreicht worden ist."

Daraus wird klar, dass ihm das Wohl auch weniger begünstigter Bevölkerungskreise und von Frauen wichtig war. In einem Vortrag über die „hauswirthschaftliche Ausbildung der Mädchen aus den ärmeren Volksklassen" vor dem Vaterländischen Frauen-Verein warb er dafür, diese sei wichtig als vorbeugende Armenpflege. In größeren Städten müssten Gemeindebehörden und Fabrikinhaber zusammengehen. Dieser Vaterländische Frauen-Verein, unterzeichnet von der Kaiserin Auguste Victoria, ehrte ihn 1906 für seine „segensreiche Arbeit". In Stettin dankte 1887 der Centralverband des Armenpflegevereins seinem bisherigen Vorsitzenden mit der Anrede in einer Urkunde „Hochgeborener Herr! Hochzuverehrender Herr Graf!", er habe zusammen mit seiner Frau mit der Stiftung des Vereins „mit Hingebung und Liebe für die Pflege der Armen und Nothleidenden gesorgt" und damit ein „bleibendes Denkmal gesetzt".

7. Leben, Familie, Archiv

Robert Graf Hue de Grais war ein arbeitswütiger, aber bescheidener Mensch. Seine Person trat hinter seine Arbeit. So sei diese geschildert; wobei der Autor eine Befangenheit nicht verstecken will als Urenkel und als Hüter des Familienarchivs in Wolkramshausen. Bis Ende des 18. Jahrhunderts war seine Familie in der Normandie in Beuvron-en-Auge und auf Finorville (Fièreville) bei Lisieux ansässig. Roberts Großvater Achilles Hue Comte de Grais (1734-1799) war kgl. französischer Gesandter am Hof in Hessen-Kassel. Landgraf Wilhelm IX. von Hessen zählte zu den schärfsten Gegner der Französischen Revolution. Nach der Revolution brach Hue de Grais mit seinem Heimatland, blieb in Deutschland und wurde von Preußen mit dem gräflichen Titel aufgenommen. Sein Sohn Wilhelm (1784-1856) heiratete Friederike von Byla; durch sie kam das Schloss/Herrenhaus Hue de Grais in Wolkramshausen bei Nordhausen im Norden Thüringens in die Familie, ein „Denkmal von besonderer nationaler kultureller Bedeutung".

Roberts Vater Wilhelm, noch kaiserlich-französischer Kapitän, legte Wert auf seine normannische Abstammung und gab seinen Kindern normannische Namen – Robert, Guiscard, Tancred. Briefe mit seinem Sohn Robert wechselte Wilhelm teils auf Französisch: Wilhelm schrieb seinem Sohn in damals ungewöhnlich zugeneigter Form und unterschrieb mit „ton tendre père", oder Dein Dich zärtlich liebender Vater. Erst nach dessen Tod 1856 traten die Kinder zum evangelischen Glauben der Mutter über. Die Schreibweise des Familiennamens variierte anfangs: in der gedruckten Geburtsanzeige von Robert schrieb Wilhelm am 25. August 1835 „Die heute Abend erfolgte Entbindung seiner Frau, geb. v. Byla, von einem gesunden Sohn beehrt sich hiermit anzuzeigen W. Graf Grais". Die Vorfahren hießen in Frankreich Hue écuyer Sgr. de la Barbottière (Hue, Ritter, Herr von la Barbottière). Einzelne Vorfahren waren im 17. und 18. Jahrhundert Offizier der Musketiere des Königs oder Mitglied des „Grand Conceil du Roi". Geadelt wurden die Hue 1470.

[20] GRAF HUE DE GRAIS, R., „Vorbildung der Verwaltungsbeamten". In: *Preußisches Verwaltungs-Blatt* 12. 7. 1919; ähnlich in der *Deutschen Juristenzeitung* 1917.

In seinem Geburtshaus wohnte Robert Graf Hue de Grais vor allem im Sommer, ansonsten in Hildesheim, Stettin, Potsdam und Berlin. In Wolkramshausen schrieb er seine Bücher und pflegte mit Handarbeit den Garten und Park. Der Ort wurde wegen seiner fünf innerdörflichen Rittergüter in der Zeitschrift der Deutschen Stiftung Denkmalschutz betitelt als „Klein Paris".[21]

Auch während des Zweiten Weltkrieges und der DDR-Jahre blieben das Herrenhaus und das Familienarchiv weitgehend, wiewohl ausgedünnt, erhalten. Da das dazugehörende Land und Forst, alles verpachtet, deutlich unter 100 Hektar lag, wurde es nicht im Zuge der Bodenreform enteignet. Den Weg dafür bereitete ein Brief des Landkreises vom 31. 12. 1945 an Roberts Tochter Elsa: „von Weimar und vom Kreise Nordhausen der dienstliche Befehl an den Herrn Bürgermeister in Wolkramshausen ergangen, daß Ihr Grundbesitz unter dem besonderen Schutze des Herrn Landrats und des Landeskonservators in Weimar steht". Das war Grundlage auch dafür, dass das Archiv mit Urkunden ab etwa 1400, also auch aus der französischen Zeit der Familie, anders als die meisten Gutsarchive nicht nach 1945 geplündert oder zerstört wurden; auch wenn einige der wertvollsten Bestände des Mobiliars, der Kunstwerke und der Bücher vor allem in den 1960ern/frühen 1970ern gestohlen wurden. Vor allem wegen der Wandbehänge im Watteau-Stil (mehr als 200 Quadratmeter) und der einheitlichen Einrichtung im Barockstil einschließlich gestickter Rokokosessel und der Parkgestaltung stand das Ensemble mit dem Fachwerk-Herrenhaus schon seit den 1920ern unter Denkmalschutz.[22]

Ein wesentlicher Teil des Archivs – vor allem soweit das Interesse über die Familie hinausgeht – ging 2021 als Dauerleihgabe an das Landesarchiv Thüringen - Staatsarchiv Gotha, wo es nach seinem Feinordnen und dem Erstellen eines Findbuchs der Öffentlichkeit zugänglich sein wird. Schwerpunkte dabei sind Regionalthemen zu Wolkramshausen; Landwirtschaft mit Pachterträgen und Ernten; und Gerichtsprozesse im 18. und 19. Jahrhundert etwa über Grenzziehungen und Ernten. Auch Robert Graf Hue de Grais scheute sich nicht vor Prozessen – einer mit einem Pächter ging 1897 bis zum Reichsgericht, bei einem anderen um das Erbbegräbnis stritt er sich mit Kirche und Gemeinde in Wolkramshausen. Vor allem liegen nun im Staatsarchiv Vorarbeiten zum Handbuch und zu anderen Werken. Zum großen Teil sind das Ausrisse aus Gesetzblättern und Aufsätze mit Anstrichen und Randbemerkungen, die Hue de Grais für seine beständigen Aktualisierungen verwandte, aber auch viele handschriftliche Notizen etwa zu Landräten und Regierungspräsidenten in Preußen, vor allem Ostpreußen. Noch in Wolkramshausen sind Familienbriefe, Ernennungsurkunden, Unterlagen aus der französischen Zeit der Familie 1400 bis 1750 sowie eine umfangreiche Siegelsammlung; zudem Bücher, darunter viele französische aus dem 18. und frühen 19. Jahrhundert. Vor allem aber die Werke von Hue de Grais, so alle der 25 Auflagen seines Handbuchs sowie zahllose Sonderdrukke von Aufsätzen und Buchbesprechungen in juristischen Fachzeitschriften.

Robert Achill Friedrich Hermann, geboren am 25. 8. 1835 in Wolkramshausen, war neben Tancred (Tankred) und Guiscard der älteste von drei Brüdern und einer Schwester. Sie gingen auf die Klosterschule im nahen Ilfeld im Südharz; das 1546 gegründete Stift Ilfeld war eine angesehene und traditionsreiche Ausbildungsstätte. Robert studierte Jura an den Universitäten Bonn, Halle und Berlin, zudem Kameralwissenschaften, also die Lehre von der öffentlichen Verwaltung. In Bonn wurde er 1854/55 aktiv beim Corps Borussia, dem später zahlreiche Preußen-Prinzen, auch der spätere Kaiser Wilhelm II., angehörten, dem er vor allem in seinen Potsdam-Jahren regelmäßig begegnete.

Er war stolz darauf, 1864 und 1866 im Heer zu kämpfen - seinen Kameraden des Königin Augusta Garde-Gren.-Regiments Nr. 4 blieb er verbunden. Dessen einstiger Kommandeur, ein Generalmajor, schrieb der Witwe zum Tod am 25. 2. 1922 „Wie oft hat mein seliger Vater mir vom siegreichen Sturm auf Schanze VI. vor Düppel, wie oft dabei auch von der Tapferkeit Ihres Herrn Gemahls erzählt". Im Nachruf der Augusta-Blätter seines Regiments hieß es, er habe keine Zeit gehabt, müde zu sein. Bei der Trauerfeier vor fast genau hundert Jahren wies der Geistliche darauf, man habe mit ihm „Den letzten Deutschen zu Grabe" getragen, der als Offizier die Düppeler Schanzen erstürmte im Kampf um die Macht über das Herzogtum Schleswig; der Lorbeerkranz, der ihm damals die Stirn schmückte, sei ihm mitgegeben worden ins Grab. Zum preußischen Offizierscorps hatte er Beziehungen auch durch seine Brüder Guiscard (Oberst) und Tankred (Major) sowie seinen Schwiegervater Edmund Frhr. v. Hanstein (Generalleutnant).

Seine Beamtenzeit begann er als Referendar – die Prüfung bestand er „mit Auszeichnung" - und Regierungsassessor in Minden/Westfalen und in Koblenz. 1867 bis 1879 war er Kreishauptmann (Amtshauptmann, Landrat) in Hildesheim - laut Bestallungsurkunde des preußischen Königs Wilhelm, gegengezeichnet von Otto von Bismarck, im Vertrauen, dass er „Unserem königlichen Hause in unverbrüchlicher Treue ergeben bleiben" werde. Als Preuße hatte er dort eine schwierige Aufgabe kurz nachdem Preußen das Königreich Hannover annektierte – ein Nachruf schrieb ihm zu, er sei „der Inbegriff des altpreußischen Beamten voll Vaterlandsliebe, Pflichtgefühl und Arbeitsfreudigkeit" gewesen. Seine Erfahrungen in der preußischen Verwaltung gewann er dort, als Polizeipräsident in Stettin (1879-1881), als Vortragender Rat im preußischen Innenministerium in Berlin (1881-1889), wo er für Personalfragen zuständig war, aber auch an Gesetzentwürfen mitwirkte; und vor allem als Regierungspräsident des Regierungsbezirks Potsdam (1889-1900). Dass er auch in späten Jahren seine Ausbildungs- und Vorbildfunktion ernst nahm, zeigt ein Brief seines einstigen Referendars Traugott von Jagow am 27. Oktober 1909: „Hochverehrter Herr Graf, heute zum Polizeipräsidenten von Berlin ernannt, ist es mir ein Bedürfnis, diese Meldung zunächst meinem hochverehrten einstigen Herrn Regierungspräsidenten zu erstatten, der mich für die Verwaltung ausbildete und unter dem ich lange Jahre Landrat sein durfte". Nicht nur

[21] Klein Paris lag bei Nordhausen. Der Comte de Grais und sein Schloß in Wolkramshausen. In: *Monumente,* 7. Jg. 1997, Nr. 1 /2, S. 26f.
[22] HINSCHING, S., *Schloß „Hue de Grais" Wolkramshausen. Kunsthistorische Analyse eines Adelssitzes des 18. Jahrhunderts.* Nordhausen, 1994, 208 S.

in Potsdam pflegte Hue de Grais ein ausgedehntes Netz von Gesprächspartnern – der Diplomat und Schriftsteller Harry Graf Kessler etwa berichtet in seinen Tagebüchern von einem Besuch bei ihm in Potsdam.

Robert heiratete 1873 Wilhelmine Freiin v. Hanstein (1848-1929). Mit ihr hatte er drei Töchter. Seine Tochter Irmgard Frfr. Lucius v. Ballhausen schrieb in unveröffentlichten Erinnerungen an ihren Vater, er sei nicht nur nie krank gewesen, sondern auch ein großer Wanderer: Er sei „nach Hoffesten in Berlin, wenn er den letzten Zug nach Potsdam nicht mehr erreichte, zu Fuß" losgegangen - „zweieinhalb Stunden durch den Grunewald und weiter an den Seen entlang, singend oder Gedichte aufsagend, sich die Zeit vertrieb und dann nach kurzem Schlaf pünktlich im Regierungsgebäude erschien".

Zu seiner Ernennung in Potsdam schrieb eine Berliner Zeitung „ist der namentlich auch als Schriftsteller im Verwaltungsfach rühmlichst bekannte Geheime Regierungs- und vortragende Rath im Ministerium des Innern ernannt worden… er gilt als einer der erprobtesten Verwaltungsbeamten der Monarchie". Der Regierungsbezirk umfasste damals das halbe (das westliche) Brandenburg mit zwei Millionen Einwohnern, auch ein Großteil der Orte wie Schöneberg und Spandau, die 1920 von Berlin zu „Groß-Berlin" eingemeindet wurden. In die Vorbereitungen zur Bildung der Millionenstadt war Hue de Grais beratend eingebunden. Zum Regierungsbezirk zählte die Havelstadt Zehdenick, die ihn zum ersten von bis heute sechs Ehrenbürgern ernannte. Dass der Regierungspräsident nicht nur am Schreibtisch saß, belegen lange Listen seiner Dienstreisen in der Potsdamer Zeit. Diese reichten von Grundsteinlegungen in Charlottenburg bis zur Besichtigung von Abflussvorrichtungen der Flüsse nahe von Provinzstädten. Zuvor war er Mitglied im Preußischen Abgeordnetenhaus (1885-1889) für die Freikonservativen und ab 1901 im Provinziallandtag der Provinz Sachsen.

Als „Pensionär" wohnte er ab 1900 im Winter am Königsplatz 5 im rechten Winkel zum Reichstag und vor der Siegessäule. Abends kam dort, erinnert sich die Enkelin Irmgard in unveröffentlichten Lebenserinnerungen, der Gasmann und zog die Laternen herunter, um sie anzuzünden. Ihre „allerliebste" Großmutter Wilhelmine - „rosig, weißhaarig, zierlich, klein, beweglich und lustig wie ein Kind" - habe sie mitgenommen zu Spaziergängen in den nahen Tiergarten oder am liebsten zum Brandenburger Tor, „wo wir gespannt auf den Kaiser in seinem Auto mit der ta-tü-ta-ta Hupe warteten. Nur sein Auto hatte dieses Signal, und nur er durfte durch das mittlere der fünf Portale des Brandenburger Tores fahren".

Ehrungen erfuhr Robert Graf Hue de Grais zuhauf weit über die bei seinen Ämtern und bei Juristen üblichen. Die Deutsche Juristen-Zeitung würdigte zum 80. Geburtstag 1915, er sei „bei allen deutschen Juristen und Verwaltungsbeamten anerkannt". Kaiser Wilhelm II. sandte ihm dazu „wärmste Glückwünsche" und rühmte seine „hervorragende Kraft". Reichskanzler Theobald von Bethmann Hollweg telegrafierte ihm „Am heutigen Tage, der Sie in voller Rüstigkeit in das neunte Jahrzehnt führt, gedenke ich Ihrer verehrter Graf in treuer Verehrung und dankbarer Erinnerung an unsere langjährigen persönlichen und amtlichen Beziehungen".[23] Den Glückwunsch sandte der Reichskanzler am 25. August 1915 inmitten des Ersten Weltkriegs, sechs Tage, nachdem er im Reichstag den Satz sprach „Die Macht können wir – auch nach außen hin – nur im Sinne der Freiheit gebrauchen" – ein Satz, den Hue de Grais auch so hätte sagen können. Bethmann Hollweg war 1886 bis 1896 im brandenburgischen Oberbarnim, also im Regierungsbezirk von Hue de Grais, jüngster Landrat (und einer der fortschrittlichsten) geworden und dann drei Jahre lang Oberpräsidialrat in Potsdam beim Regierungspräsidenten Hue de Grais. Als Bethmann Hollweg unter Druck des Militärs entlassen werden sollte, sagte Wilhelm II. über seinen Reichskanzler „Und den Mann soll ich entlassen, der alle anderen um Haupteslänge überragt".

Zu den Orden Hue de Grais' zählte neben dem japanischen Kommandeur der Aufgehenden Sonne auch der mecklenburgische Greifenorden im Jahre seiner Stiftung; der Orden von Oranien-Nassau (Großoffizier mit Bruststern); der Kaiserlich Russische St. Stanislaus-Orden I. Klasse; der Herzoglich-Ernestinische Hausorden Komthur I. Klasse (der ursprünglich nur höchstens zwölf Inhaber hatte); der Rote Adler Orden 2. Klasse mit Eichenlaub und Schwertern. Zudem verlieh ihm Kaiser Wilhelm II. die Rote Kreuz Medaille (Preußen) 1. Klasse, die vergeben wurde an Personen, die sich im Frieden oder im Kriege große Verdienste um Kranke oder leidende Menschen erworben hatten oder im Dienste des Deutschen Roten Kreuzes. Noch acht Jahre nach seinem Ruhestand wurde Hue de Grais zum Wirkl. Geh. Oberregierungsrat ernannt.

Im Ort Wolkramshausen zwischen Südharz und Hainleite sind neben seinem Grab allerorts Hinweisschilder „Hue de Grais" zu finden. Dort hatte zeitweise ein Förderverein Hue de Grais ein nach ihm benanntes Museum für Rechtsgeschichte geplant. In der Kreisstadt Nordhausen wurde der Festsaal in der Polizeidirektion nach ihm benannt. Eine Regionalzeitung begann ihre Serie über herausragende Bewohner Nordhausens, des Südharz und der Hainleite mit einem Porträt des Juristen, dessen Name zum Markenzeichen für Beamte zwischen Aachen, Königsberg und Erfurt wurde – der Verfassername seines Hauptwerkes hatte sich verselbständigt und wurde quasi zum Eigennamen.

[23] Telegramm im Hue de Grais-Archiv, Wolkramshausen.

Die Einführung des Tatbestands der Untreue in das österreichische Strafrecht 1931

(The Introduction of the Crime of Embezzlement into Austrian Criminal Law in 1931)

Christoph Schmetterer[*]

Abstract

In May 1931 the largest Austrian bank, the Credit-Anstalt für Handel und Gewerbe (CA) broke down and was saved by the Austrian government. Within days former CA-official Friedrich Ehrenfest was considered the main culprit of the break down. Investigations against Ehrenfest were started but during the next months it became clear that Ehrenfest couldn't be punished under Austrian criminal law. Thus a new crime, embezzlement, was introduced retroactively in December 1931.

Keywords: Austrian criminal law; CA-crisis; Embezzlement; Friedrich Ehrenfest.

1. Der Zusammenbruch der CA[1]

Am 8. Mai 1931, einem Freitag, informierte der Generaldirektor der Creditanstalt für Handel und Gewerbe (CA), Ludwig Neurath, die österreichische Nationalbank darüber, dass die Bank 1930 einen Verlust von 140 Millionen Schilling[2] gemacht hatte und ihr Fortbestand ohne öffentliche Unterstützung nicht möglich war. Am Abend des 11. Mai informierte die Bundesregierung unter Otto Ender[3] die Öffentlichkeit über den Zustand der Bank und verkündete gleichzeitig ein Sanierungsprogramm, das in den wenigen Tagen davor ausgehandelt und ausgearbeitet worden war.

Der Bund sollte 100 Millionen Schilling bereitstellten, das Haus Rothschild und die Nationalbank jeweils 30 Millionen; 29,4 Millionen sollten aus einer Abwertung der vorhandenen Aktien und 40 Millionen aus der Auflösung stiller Reserven gewonnen werden.[4] Mit Gesetz vom 14. Mai schuf das Parlament die rechtlichen Voraussetzungen, um das Sanierungsprogramm umzusetzen.[5] – es sollte das erste von insgesamt acht Creditanstalt-Gesetzen im Jahr 1931 sein.[6]

Die Regierung Ender ging ursprünglich davon aus, dass dieses Sanierungsprogramm nur ein einmaliger staatlicher Eingriff sein würde, und nahm daher zunächst keinen Einfluss auf die Führung der Bank.[7] Obwohl die Mittel nach dem Sanierungsprogramm vom Mai 1931 rechnerisch bequem gereicht hätten, um die der Regierung zu diesem Zeitpunkt bekannten Verluste auszugleichen, war die Sanierung nicht wie geplant möglich.

Einerseits stellte sich in den folgenden Wochen und Monaten heraus, dass die Verluste der CA wesentlich höher waren, als Anfang Mai angenommen, andererseits erschütterte die Be-

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1 Allgemeine Literatur zum Zusammenbruch der CA: AGUADO J., The Creditanstalt Crisis of 1931 and the failure of the Austro-German customs union project. In: *The Historical Journal,* Vol. 44, 2001, S. 199-221; AUSCH K., *Als die Banken fielen. Zur Soziologie der politischen Korruption*. Wien, 1968; BUTSCHEK F., Die CA-Krise 1931. In: *Wirtschaft und Gesellschaft,* Vol. 35, 2009, S. 65-78; NAUTZ J., Die CA-Krise 1931. Ein politischer Skandal? In: GEHLER M., SICKINGER H. (Hrsg.), *Politische Affären und Skandale in Österreich. von Mayerling bis Waldheim*. Wien, 1995, S. 222-252; SCHUBERT A., *The Credit-Anstalt Crisis of 1931*. Cambridge, 1991; STIEFEL D., *Finanzdiplomatie und Weltwirtschaftskrise. Die Krise der Credit-Anstalt für Handel und Gewerbe 1931*. Frankfurt a.M., 1989; WEBER F., *Vor dem großen Krach. Österreichs Banken in der Zwischenkriegszeit am Beispiel der Credit-Anstalt für Handel und Gewerbe*. Köln, 2016, S. 404–535.

2 140 Millionen Schilling von 1930 entsprechen in etwa 542 Millionen Euro 2022 (www.eurologisch.at).

3 Speziell zu Ender und der CA-Krise; MELICHAR P., *Otto Ender 1875-1960. Landeshauptmann, Bundeskanzler, Minister. Untersuchungen zum Innenleben eines Politikers*. Wien, 2018, S. 128-135.

4 Genaue Aufstellung bei WEBER, *Krach* (wie FN 1) S. 436-437.

5 BGBl. 136/1931.

6 BGBl. 143/1931 (2. Credit-Anstalt-Gesetz); BGBl. 214/1931 (3. Credit-Anstalt-Gesetz); BGBl. 215/1931 (4. Credit-Anstalt-Gesetz); BGBl. 216/1931 (5. Credit-Anstalt-Gesetz); BGBl. 414/1931 (6. Credit-Anstalt-Gesetz); BGBl. 415/1931 (7. Credit-Anstalt-Gesetz); BGBl. 416/1931 (8. Credit-Anstalt-Gesetz); im Jahr 1932 folgte noch ein 9. Credit-Anstalt-Gesetz (BGBl. 254/1932) und eine Verordnung des Justizministers (BGBl. 303/1932), die nicht so sehr wegen ihres Bezugs zur Credit-Anstalt berühmt-berüchtigt ist, sondern weil sie aufgrund des Kriegswirtschaftlichen Ermächtigungsgesetzes von 1917 (RGBl. 307/1917) erlassen wurde und so gewissermaßen ein Probeballon war, mit dem Regierung Dollfuß die Möglichkeit, ohne Parlament zu regieren, testete; dazu: REITER-ZATLOUKAL I., Von der Demokratie zur Diktatur. Das Kriegswirtschaftliche Ermächtigungsgesetz in der Ersten Republik. In: *BRGÖ,* Vol. 8, 2018, S. 294-317, hier 306-314.

7 STIEFEL, *Finanzdiplomatie* (wie FN 1) S. 27-31.

kanntgabe der Verluste das Vertrauen in die Bank nachhaltig. Es kam zu einem „Run“ auf die CA, die nach dem 11. Mai binnen zwei Tagen 16 % und innerhalb von zwei Wochen 30 % ihres Geschäftsvolumens verlor.[8]

Außerdem musste auch der Bund das Geld für die Sanierung der CA erst aufbringen. Das sollte mittelfristig durch Schatzanweisungen geschehen. Bis die Mittel aus diesen Anweisungen tatsächlich verfügbar waren, war ein Kredit der Bank für Internationalen Zahlungsausgleich erforderlich. Dieser Kredit über 100 Millionen Schilling war aber an eine Staatshaftung für Darlehen für die Rekonstruktionen und die laufenden Geschäfte der CA gebunden, zu der der Finanzminister mit dem 2. Creditanstalt-Gesetz vom 28. Mai 1931 ermächtigt wurde.[9]

Diese teilweise Staatshaftung hatte aber nicht gewünschten Effekt. Statt – wie beabsichtigt – das Vertrauen in die CA zu stärken, vergrößerte sie die Verunsicherung der Gläubiger und verstärkte den Eindruck, dass die Krise der CA noch lange nicht überwunden sei.[10] Außerdem war nicht ganz klar, auf welche Verbindlichkeiten der CA sich die Staatshaftung beziehen sollte und auf welche nicht.[11] Am 25. Juli 1931 wurde die Staatshaftung daher auf alle Einlagen bei der CA ausgedehnt.[12]

Als sich abzeichnete, dass ein einmaliger staatlicher Eingriff nicht reichen würde, um die CA zu retten, nahm die Regierung unmittelbar Einfluss auf die Führung der Bank. Alexander Spitzmüller, der bereits von 1910 bis 1915 Generaldirektor der CA gewesen war,[13] wurde im Juni 1931 zum Vertreter der Regierung im Rekonstruktionskomitee und am 3. Juli 1931 zum Generaldirektor der Bank bestellt.[14] Spitzmüller war der Meinung, dass der Grund für den Zusammenbruch der CA nicht im strafrechtswidrigen Verhalten ihrer Leitung lag, sondern in deren „falsche[r] Einschätzung der Konjunktur“.[15]

Die tatsächlichen Gründe für die Krise der CA waren vielfältig. Ein in der Literatur immer wieder genannter Grund spielte allerdings keine Rolle. Immer wieder wurde behauptet, französische Geldgeber hätten kurzfristige Kredite abgezogen, um die Pläne für eine deutsch-österreichische Zollunion zu verhindern, die im März 1931 bekannt geworden waren. Stiefel konnte überzeugend nachweisen, dass diese Erklärung wenig plausibel ist.[16]

Die Führung der CA begründete deren Zusammenbruch Anfang der Dreißigerjahre vor allem mit der zwangsweisen Übernahme der Boden-Creditanstalt (BCA) im Jahr 1929. Die BCA war nach der CA die zweitgrößte Bank Österreichs gewesen und hatte nach dem Ersten Weltkrieg in Mitteleuropa eine betont expansive Politik betrieben und einen großen, aber nicht unbedingt rentablen Industriekonzern aufgebaut.[17]

Im Lauf des Jahres 1929 wurde aus der zuvor schon kritischen Lage der BCA eine katastrophale, und am 1. Oktober 1929 informierte der Präsident der Nationalbank, Richard Reisch, die Regierung unter Bundeskanzler Johann Schober über die drohende Zahlungsunfähigkeit der BcA. Um eine Schließung der Schalter der BCA zu verhindern, vereinbarte die Regierung binnen weniger Tage mit der CA, dass diese die BCA übernimmt. Dabei übte die Regierung starken Druck auf die Führung der CA aus. Bundeskanzler Schober meinte später, er habe dem Verwaltungsratspräsidenten der CA, Louis Nathaniel Rothschild „nicht einen Revolver, sondern ein Maschinengewehr an die Brust gesetzt.“ [18]

In den wenigen Tagen, an denen Anfang Oktober die Fusion der BCA mit der CA vereinbart wurde, hatten die Funktionäre der CA kaum die Möglichkeit, sich selbst ein umfassendes Bild von der wirtschaftlichen Situation der BCA zu machen, was durch den starken Druck der Regierung noch verstärkt wurde. Nach dem Zusammenbruch der CA meinten deren Funktionäre nun, dass dieser Zusammenbruch durch die erzwungene Übernahme mit der maroden BCA verursacht worden sei. Tatsächlich hatte die Fusion mit der BCA die wirtschaftliche Situation der CA sicher nicht erleichtert, aber das war keineswegs der einzige Grund für die späteren Probleme der CA.[19]

Auch die CA selbst hatte nach dem Ende des Ersten Weltkriegs eine Geschäftspolitik betrieben, die sich zumindest nachträglich als ungeschickt erwies. Nach dem Ende der Monarchie stand sie vor der Frage, wie sie auf den Zusammenbruch der Habsburgermonarchie reagieren sollte. Wie andere Wiener Großbanken wollte sie sich in ihrer Tätigkeit nicht auf die kleingewordene Republik Österreich beschränken, sondern entschied sich bewusst dafür, weiter in den Nachfolgestaaten der Monarchie tätig zu bleiben und Wien so als zentralen Bankplatz Mitteleuropas zu erhalten. Dieser Strategie blieb aber der dauerhafte Erfolg versagt – nicht zuletzt, weil die anderen Nachfolgestaaten kein Interesse an Wien als zentralem Bankplatz hatten; vielmehr waren sie bestrebt, ihre jeweiligen Bankensysteme möglichst zu nationalisieren.[20]

Überhaupt war die Geschäftspolitik der CA in den Zwanzigerjahren „von einem völlig unbegründeten und nicht vertretbaren Optimismus und einer Leichtfertigkeit getragen […] der jede Voraussicht, aber auch jede Vorsicht fehlte“ – wie der Gutachter Vinzenz Sedlak im Rahmen der gerichtlichen Aufarbei-

[8] FRITSCH H., *Die Causa Ehrenfest: der Prozess gegen „Ehrenfest und Andere“ als Folge des CA-Zusammenbruchs 1931*, Dipl.Arb. Univ. Wien, 2005, S. 14-15.
[9] BGBl. 143/1931.
[10] WEBER, *Krach* (wie FN 1) S. 469.
[11] FRITSCH, *Causa Ehrenfes*t (wie FN 8) S. 15.
[12] WEBER, *Krach* (wie FN 1) S. 469.
[13] NATMESSNIG C., Spitzmüller von Harmersbach, Alexander Bernhard Julius Freiherrn. In: *Neue Deutsche Biographie*. vol. 24, Berlin, 2010, S. 724f.
[14] FRITSCH, *Causa Ehrenfest* (wie FN 8) S. 29.
[15] SPITZMÜLLER A.… *und hat auch Ursach, es zu lieben*, Wien, 1955, S. 372.
[16] STIEFEL, *Finanzdiplomatie* (wie FN 1) S. 75-79.
[17] Zur BCA als Industriebank WEBER, *Krach* (wie FN 1) S. 332-345; zur Fusion mit der BCA als Grund für den Zusammenbruch der CA ebd. S. 493-496.
[18] GULICK C., *From Habsburg to Hitler, vol. 2: Fascims's subversion of democracy*. Berkeley, 1980, S. 115.
[19] WEBER, *Krach* (wie FN 1) S. 493-496.
[20] Ebd. S. 86–112, 257-287.

tung konstatierte.[21] Diese Einschätzung traf er freilich aus der Retrospektive nach dem Beginn der Weltwirtschaftskrise und nach dem Zusammenbruch der CA.

Es stimmte aber, dass die Führung der CA ihre Geschäftspolitik in der zweiten Hälfte der Zwanzigerjahre auf eine bessere Zukunft ausgerichtet hatte, die keineswegs eintreten sollte. Von 1925 bis 1929 zahlte die Bank kontinuierlich Dividenden von 10 % aus – in der Hoffnung, das Geld dafür später zu verdienen. In der Weltwirtschaftskrise war das aber nicht möglich.[22]

Die wahre wirtschaftliche Situation der CA schon vor 1929 wurde von deren Führung nicht publik gemacht. Die Bilanzen wurden nicht eindeutig gefälscht, aber doch bewusst geschönt,[23] um in der Öffentlichkeit ein positiveres Bild von der Lage der CA zu zeichnen. Möglicherweise hatten aber auch die leitenden Funktionäre der Bank keinen vollen Überblick darüber, wie schlecht die Situation der Bank tatsächlich war. Der Überblick über die Lage der CA wurde auch durch deren enge Verknüpfung mit der Industrie erschwert, wobei die Leitung der Bank nicht immer ausreichend über die wirtschaftliche Lage der Unternehmen informiert war, an denen die CA beteiligt war. Außerdem erschwerten die Art der Buchhaltung und die interne Organisation der CA den Gesamtüberblick von deren Leitungsorganen.[24]

Schon vor dem Ersten Weltkrieg hatten die Wiener Großbanken ihre Industriebeteiligungen deutlich erweitert. Von 1890 bis 1914 war die Zahl der Industriebeteiligungen der CA von zwei auf 102 angestiegen,[25] 1931 waren es dann 158.[26] Gerade im Zusammenhang mit ihren Industriebeteiligungen konnte die CA wegen ihrer eigenen widersprüchlichen Interessen leicht in ein Dilemma geraten. Immerhin war sie gleichzeitig Anteilseigner und Gläubiger dieser Unternehmen.[27]

Aus der Gläubiger-Perspektive wäre es sinnvoll gewesen, Konzernunternehmen, deren wirtschaftliche Situation aussichtlos geworden war, keine Kredite mehr zu geben. Als Anteilseigner tat sich die CA wesentlich schwerer, Ihre Konzernunternehmen fallen zu lassen – und das wurde durch die starke personelle Verknüpfung zwischen der Führung der CA und ihrer Konzernunternehmen noch verstärkt.[28]

Tatsächlich erhielten Konzernunternehmen immer noch Kredite, auch wenn sie nach objektiven Kriterien nicht mehr kreditwürdig waren. Die Führung der CA entschloss sich nur sehr schwer, „Verluste zu nehmen und gefährdete Engagements zu lösen“,[29] weil sie hoffte, dass sich die Lage in Zukunft besser würde. Durch die Weltwirtschaftskrise wurde das endgültig zur Illusion.

Es war also ein Zusammenspiel vielfacher Gründe, das zum im Mai 1931 zum Zusammenbruch der CA führte. Im Jahr 1931 wurde aber besonders ein Mann als Schuldiger dargestellt: Friedrich Ehrenfest.

2. Friedrich Ehrenfest

Friedrich Ehrenfest wurde am 10. Mai 1878 in Wien geboren. Er wurde als Jude geboren, trat aber 1923 aus der israelitischen Kultusgemeinschaft aus. Nach der Handelsakademie trat Ehrenfest in die Creditanstalt ein. Dort war er zunächst als Börsenvertreter tätig und spezialisierte sich dann auf den Devisenhandel. Nach erfolgreichen Goldspekulationen wurde Ehrenfest vor dem Ersten Weltkrieg, stellvertretender Direktor in der CA und schließlich in den Vorstand der Bank aufgenommen.[30]

Am Beginn der Zwischenkriegszeit konnte Ehrenfest erfolgreiche, aber riskante Devisengeschäfte machen – sowohl für die CA als auch für sich selbst. Im Lauf der Zwanzigerjahre betrieb Ehrenfest weiterhin hochriskante Spekulationsgeschäfte, doch sie waren insgesamt nicht mehr erfolgreich, sodass sich Anfang 1928 herausstellte, dass er der Bank einen Betrag von rund 4,5 Millionen Schilling schuldete.[31] Bis zum Zusammenbruch der Bank 1931 reduzierte sich Ehrenfests Schuld auf etwa 1,4 Millionen Schilling.[32]

Diese misslungenen Geschäfte Ehrenfests wurden in der CA Anfang 1928 entdeckt. Um die Reputation der Bank nicht zu beschädigen, wurde Ehrenfest aber nicht sofort von seinen Funktionen enthoben. Vielmehr einigte sich die CA mit ihm darauf, dass er bis Juli 1930 im Vorstand der Bank bleiben sollte. Danach wurde er mit einer jährlichen Pension von 60.000,– - Schilling in den Ruhestand versetzt und gleichzeitig zum Repräsentanten der CA in Paris ernannt, wofür er eine jährliche Funktionszulage in gleicher Höhe erhielt. Schließlich wurde Ehrenfest noch befristet für ein Jahr, somit bis Ende Juli 1931, in den Verwaltungsrat der CA kooptiert. Gerüchte über Ehrenfests zweifelhafte Geschäfte drangen trotzdem an die Öffentlichkeit.[33]

Nach dem Zusammenbruch der CA im Mai 1931 wurde Ehrenfest wieder zum Thema, auch wenn seine Malversationen keine wesentliche Ursache für den Zusammenbruch sein konnten. Das ergibt sich schon aus rein rechnerischen Überlegungen. Im Mai 1931 ging die CA von Verlusten von 140 Millionen

[21] Wiener Stadt- und Landesarchiv (WStLA), Landesgerichts für Strafsachen Wien I, 26 d 6373/31 (Gerichtsakt Ehrenfest), Ordnungsnummer (ON) 539.
[22] Zur Dividende: WEBER, *Krach* (wie FN 1) S. 425-427, 491.
[23] Ebd. S. 490.
[24] So zumindest das Gutachten von Deloitte, Plender, Binder & Co, Gerichtsakt Ehrenfest (wie FN 21) ON 17, 18–19.
[25] STIEFEL, *Finanzdiplomatie* (wie FN 1) S. 83–84.
[26] STIEFEL, *Finanzdiplomatie* (wie FN 1) S. 97.
[27] NAUTZ, CA-Krise (wie FN 1) S. 227.
[28] Aufstellung bei FRITSCH, *Causa Ehrenfest* (wie FN 8) S. 106-110.
[29] Gerichtsakt Ehrenfest (wie FN 21), Gutachten Sedlak (ON 539), insbesondere Punkt 2 und 3 der Zusammenfassung.
[30] FRITSCH, *Causa Ehrenfest* (wie FN 8) S. 44f.
[31] Vernehmung Ludwig Neurath, Gerichtsakt Ehrenfest (wie FN 21) ON 13.
[32] Stenographische Protokolle (StenProt) Nationalrat (NR) 54. Sitzung v. 27. 10. 1931, IV. Gesetzgebungsperiode (GP) 1352.
[33] FRITSCH, *Causa Ehrenfest* (wie FN 8) S. 45-51.

Schilling für 1930 aus.[34] Durch Ehrenfests Geschäfte hatte die Bank einen Verlust von 1,4 Millionen Schilling erlitten. Das war zwar ein ungeheurer Betrag, gleichzeitig aber gerade einmal ein Prozent des Gesamtverlustes für 1930. Allein wegen dieser Größenordnungen konnten Ehrenfests Spekulationen auf Kosten der Bank nicht entscheidend für die Krise der CA sein.

Trotzdem sollte Ehrenfest der „Aufhänger" für strafrechtliche Ermittlungen im Zusammenhang mit dem Zusammenbruch der CA werden. Im offiziellen Kommuniqué der Regierung vom 11. Mai 1931, mit dem die Öffentlichkeit über die Situation der CA informiert wurde, wurde er noch nicht erwähnt. Vielmehr hieß es dort: „Diese Verluste sind zurückzuführen auf die Fusion mit der Bodencreditanstalt, auf die Entwertung des Effektenportefeuilles sowie auf notwendige Abschreibungen bei den Debitoren."[35]

Einen Tag nach dem Kommuniqué der Regierung berichtete das Neue Wiener Abendblatt, dass die Sozialdemokratie die Rettungsaktion im Nationalrat nicht verhindern werde, unter Umständen sogar dafür stimmen werde. „In diesem Falle würden sie jedoch nicht nur positive Forderungen stellen, sondern auch gewisse mit der Krise zusammenhängende Vorkommnisse, wie den Fall des Direktors Ehrenfest, zur Sprache bringen."[36] Am nächsten Tag konkretisierte das Abendblatt, dass über Ehrenfest „im Parlament behauptet wird, daß er durch leichtfertige Kreditgewährung und Spekulationsgeschäfte dem Institut große Verluste zugefügt habe."[37]

Am selben Tag wurde Ehrenfest zum ersten Mal nachweislich im Ministerrat genannt, als Handelsminister Heinl erklärte: „es dürfe nicht so vorgegangen werden, als ob die Direktoren der Bank durch ihre Geschäftsführung die gegenwärtige Situation der Anstalt verschuldet hätten. Dies sei in keiner Weise der Fall. Denn die Direktion habe sich gleich, nachdem die Verluste festgestellt waren, an die Regierung gewendet […]. Der Einzige, dem ein Verschulden beigemessen werden könnte, sei der bereits vor geraumer Zeit aus der Bankleitung ausgeschiedene Direktor Ehrenfest, […]"[38]

In der Nationalratssitzung vom 14. Mai 1931 thematisierte dann der sozialdemokratische Abgeordnete Heinrich Allina, Generalsekretär des Reichsvereins der Bank- und Sparkassenbeamten Österreichs, die Frage nach der Schuld an der Situation der CA und meinte dabei über die Führung der CA:

„Es hat dort einen Funktionär gegeben, der nicht nur in den Branchenkreisen, sondern in viel weiter reichenden Kreisen, in ganz Wien bekannt war als notorischer Hasardeur, als notorischer Spekulant. Jahre hat es gedauert, bis sich die Credit-Anstalts-Direktion dieses Funktionärs endlich entledigt hat. Und diese Entledigung ist ja wieder nur erfolgt mit Opfern, die für das Institut verbunden waren. Die Credit-Anstalts-Direktion und die Verwaltung – das muß schon festgestellt werden –, sie waren immer großzügig, großzügig dann, wenn es sich darum gehandelt hat, einen der Ihren dafür zu entschädigen, wenn er von seinem Amte zurücktreten mußte."[39] Allina nannte Ehrenfest (im Gegensatz zu einigen anderen) im Parlament nicht namentlich. Seine Zuhörer wussten aber, wer gemeint war.[40]

Es stellt sich also die Frage, warum Ehrenfest schon so kurz nach Bekanntwerden der CA-Krise als Schuldiger genannt wurde. Dafür dürfte es vor allem zwei Gründe gegeben haben. Auch wenn sich die CA bemüht hatte, Ehrenfest ohne Aufsehen und unter ehrenvollen Umständen als Direktor zu entheben, hatte es schon vor 1931 Gerüchte über seine Malversationen gegeben, die mit dem Zusammenbruch der Bank wieder aufkamen.[41]

Außerdem ist anzunehmen, dass der Vorstand im Mai 1931 vor diesem Hintergrund die Bedeutung von Ehrenfests missglückten Spekulationen für den Zusammenbruch der Bank besonders betonte.[42] Schließlich war Ehrenfest eine geeignete Projektionsfläche für antisemitische Klischees, wobei auch viele andere hochrangige Funktionäre der CA Juden waren.[43]

Nach dem 8. Mai 1931 wurde die Situation der CA für lange Zeit in praktisch jeder Ministerratssitzung ausführlich behandelt. Der Name Ehrenfest wurde in diesem Gremium wieder am 12. Juni genannt: Vizekanzler Franz Winkler vom Landbund meinte, dass die Regierung der Situation der CA hilflos gegen-

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[34] Im Lauf des Jahres 1931 erhöhten sich die Verluste gewaltig; wie groß die Verluste tatsächlich waren, wurde nie abschließend geklärt; die Schätzungen reichten von 500 Millionen Schilling (Spitzmüller) bis zu über 800 Millionen Schilling (Spitzmüllers Nachfolger Adrian van Hengel); WEBER, *Krach* (wie FN 1) S. 482-488; tatsächlich betrugen die Verluste wohl rund 900 Millionen Schilling; STIEFEL, *Finanzdiplomatie* (wie FN 1) S. 15.

[35] Österreichisches Staatsarchiv (ÖStA), Archiv der Republik (AdR), Ministerratsprotokolle (MRP), Nr. 689 vom 11. 5. 1931, Beilage; veröffentlicht in: Wiener Zeitung, Nr. 228 vom 12. 5. 1931; Ob Ehrenfests Name in der Ministerratssitzung vom selben Tag genannt wurde, lässt sich nicht mehr feststellen. Das Protokoll dieser Sitzung hielt nur fest: „Der Vorsitzende [Bundeskanzler Ender] und B.M. Dr. Juch berichten dem Ministerrat eingehend über die Sanierungsaktion für die Oesterreichische Creditanstalt für Handel und Gewerbe", ohne den Inhalt dieses „eingehenden Berichts" wiederzugeben.

[36] *Neues Wiener Abendblatt*, Nr. 131 vom 12. 5. 1931. Die *Arbeiter-Zeitung*, Nr. 131 vom 12. 5. 1931 beschäftigte sich selbstverständlich auch mit der Krise der CA, erwähnte Ehrenfest aber nicht, wohl aber Rudolf Sieghart, den ehemaligen Gouverneur der BCA, den eine besondere Gegnerschaft mit der Sozialdemokratie verband.

[37] *Neues Wiener Abendblatt*, Nr. 132 vom 13. 5. 1931;

[38] ÖStA, AdR, MRP, Nr. 690 vom 13. 5. 1931.

[39] StenProt NR, 29. Sitzung v. 14. 5. 1931, IV. GP, 855.

[40] Daher nannten Presseberichte bei der Zusammenfassung von Allinas Rede auch explizit Ehrenfests Namen; *Arbeiter-Zeitung*, Nr. 133 vom 13. 5. 1931; *Neues Wiener Tagblatt*, Nr. 133 vom 13. 5. 1931;

[41] *Die Stunde* Nr. 2159 v. 23. 5. 1930;

[42] Das lässt sich aktenmäßig nicht direkt belegen, weil es keine Protokolle über die Gespräche zwischen den Vertretern der Bank und jenen der Regierung zwischen 9. und 11. 5. 1931 gibt. In Ihren späteren Vernehmungen vor dem Untersuchungsrichter erklärten die Vorstandsmitglieder Ludwig Neurath (Gerichtsakt Ehrenfest [wie FN 8] ON 13), Otto Deutsch (ebd. ON 9) und Siegmund Löwy (ebd. ON 14) aber einhellig, dass Ehrenfest der Hauptschuldige für die schwierige Lage der Bank war.

[43] Kurze Lebensläufe der wichtigsten Funktionäre, die später als Beschuldigte geführt wurden, sind enthalten bei FRITSCH, *Causa Ehrenfest* (wie FN 8) S. 44-57.

überstehe und eine durchgreifende Lösung des Problems fehle. In diesem Zusammenhang erklärte er:

„Die Bevölkerung könne zu der Aktion kein Vertrauen haben, da sie wisse, dass beispielsweise der frühere Direktor der Credit-Anstalt Ehrenfest, der den Hauptteil der Schuld an dem Zusammenbruche trage, von dem durch ihn zugrundegerichteten Institut weiter eine Pension von 180,000 S beziehe. Die Allgemeinheit verstehe die Opfer nicht, solange eine derartige Ausbeutung betrieben und Millionenbeträge an Pensionen und Abfertigungen weitergezahlt werden." [44]

Landwirtschaftsminister Dollfuss meine dazu: „dass die Oeffentlichkeit den grossen Fleiss, den die Regierung an die Ordnung der Verhältnisse bei der Credit-Anstalt aufwende, nicht zu sehen bekomme und noch immer das Vorgehen gegen die Schuldigen vermisse. Würde die Bevölkerung wahrnehmen, dass die Regierung die Schuldigen zur Verantwortung ziehe, dann bekäme sie auch wieder Vertrauen in die die Credit-Anstalt." [45]

Schließlich kündigte Winkler an, er werde von der Wirtschaftspolizei erheben lassen, „ob Anhaltspunkte für strafgerichtliche Schritte gegen den früheren Direktor der Credit-Anstalt Ehrenfest gewonnen werden können." [46] Bemerkenswert ist auch an dieser Ministerratssitzung, dass für Winkler offenbar feststand, dass Ehrenfest der Hauptschuldige am Zusammenbruch der CA war.[47] Diese Annahme wurde auch von den anderen Ministerkollegen nicht hinterfragt, obwohl Winkler keine konkreten Gründen dafür nannte.

Trotzdem war das der Ausgangspunkt für das Strafverfahren gegen Ehrenfest. Nur vier Tage nach Winklers Ankündigung im Ministerrat, am 16. Juni 1931, zeigte die Wirtschaftspolizei der Bundespolizeidirektion Wien Ehrenfest bei der Staatsanwaltschaft Wien I an. Im Zuge der Ermittlungen wurde Vinzenz Sedlak zum Sachverständigen für die Gebarung der CA bestellt.

In einem ersten Gutachten vom 6. Juli 1931 kam Sedlak zum Zwischenergebnis, dass sich Ehrenfests Schuld an der Zahlungsunfähigkeit der CA nicht beurteilen ließe, ohne die Schuld der anderen Vorstandmitglieder zu beurteilen.[48] Bis Anfang August ergänzte Sedlak sein Gutachten, und dann geschah in diesem Verfahren – nichts.

Außerhalb des Verfahrens stieg hingegen der Druck, die für den Zusammenbruch der CA Verantwortlichen zur Verantwortung zu ziehen. Am 20. Juni 1931 initiierte der steirische Heimwehrführer Walter Pfrimer, der knapp drei Monate später einen Putschversuch unternehmen sollte, ein Volksbegehren mit der Parole „Wir fordern die Schädlinge des Volksvermögens vor einen Staatsgerichtshof", das nach Pfrimers Angaben 620.000 Unterschriften erzielte.[49]

3. Die Einführung der Untreue

Nach einem Regierungswechsel im Juni 1931 – Karl Buresch hatte Otto Ender als Bundeskanzler abgelöst – wurde das Verfahren gegen Ehrenfest erst in der Ministerratssitzung vom 12. Oktober 1931 wieder ausführlicher behandelt. Bei einer Diskussion, deren primäres Thema die Bezüge der damals noch aktiven CA-Funktionäre waren, musste Justizminister Schürff – der diese Position in beiden Kabinetten hatte – eingestehen, dass die Regierung wenig erreicht hatte. Im Zusammenhang mit der Konsolidierung der CA meinte er:

„Man erwarte die Herbeiführung dieses Erfolges durch den Abbau des Personals, die Einschränkung des Betriebes, die Reduzierung der Gehalte und nicht zuletzt die Bestrafung der Schuldigen. […] Die Regierung sei bisher in keinem dieser Punkte imstande gewesen, etwas zu machen, und das Trostlose an der Sache liege darin, dass sich die Heranziehung der Schuldigen zum Schadenersatz oder zur Strafe als unmöglich erwiesen habe. Der Bundeskanzler habe zwar in einer Rede Schritte in diese Richtung angekündigt, es sei aber nichts geschehen. Der gewesene Direktor der Creditanstalt Ehrenfest habe sich kürzlich in Wien aufgehalten und sei frei herumgegangen, denn es konnte nichts gegen ihn unternommen werden, weil das Ergebnis der bisherigen Ermittlungen sich für ein Einschreiten als unzureichend erwiesen habe. Die Regierung habe den Vorwurf zu gewärtigen, dass sie nicht den Willen besitze, etwas zu tun. […] Es müsse wenigstens der Versuch unternommen werden, sie [die früheren Leitungsfunktionäre] zur Verantwortung zu ziehen. Die Gefahr, dass aus einem solchen Schritt ein neuerlicher Run gegen die Credit-Anstalt entstehen könnte, scheine derzeit nicht mehr gegeben zu sein. Die Regierung müsse sich zum Handeln entschliessen, sonst treffe sie der Vorwurf, nichts getan zu haben oder unfähig zu sein, einen entscheidenden Schritt zu unternehmen." [50]

Zwei Tage später, am 14. Oktober beschloss die Bundesregierung, einen Gesetzentwurf zur strafrechtlichen Untreue ausarbeiten zu lassen. Dabei konnten die Legisten des Justizministeriums in zweifacher Hinsicht auf Vorarbeiten zurückgreifen. Im Zuge der Bestrebungen, das österreichische und das deutsche Recht zu vereinheitlichen, war in den Zwanzigerjahren ein gemeinsamer deutsch-österreichischer Strafgesetzentwurf ausgearbeitet worden, mit dem auch die geschäftliche Untreue – anders als im damals geltenden österreichischen Strafrecht – unter Strafe gestellt werden sollte.[51]

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[44] ÖStA, AdR, MRP, Nr. 700, 12. 6. 1931, S. 29-30.
[45] Ebd.
[46] Ebd.
[47] Ganz ähnlich äußerte sich Winkler auch zwei Wochen später in der Sitzung vom 26. 6. 1931; ÖStA, AdR, MRP, NR. 706, 26. 6. 1931, pag. 31.
[48] Gerichtsakt Ehrenfest (wie FN 21) ON 2.
[49] HÖBELT L., *Die Heimwehren und die österreichische Politik 1927–1936. Vom politischen „Kettenhund" zum „Austro-Fascismus"?* Graz, 2016, S. 197f.
[50] ÖStA, AVA, MRP Nr. 736, S. 16-17.
[51] In allen österreichischen Strafgesetzentwürfen seit 1874 war eine Strafbarkeit der geschäftlichen Untreue vorgesehen gewesen, dazu SCHMETTERER C., Die Untreue in den österreichischen Strafgesetz-Entwürfen von 1874 bis zum Ersten Weltkrieg. In: Martin P. SCHENNACH (Hrsg.), *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven.* Wien, 2020, S. 177-202; im gemeinsamen Strafgesetzentwurf siehe RENTROP K., *Untreue und Unterschlagung (§ 266 und 246 StGB). Reformdiskussion und Gesetzgebung seit dem 19. Jahrhundert*. Berlin, 2007, S. 116, 121-125; der gemeinsame Entwurf wurde in Österreich publiziert von KADECKA F., *Der österreichische Strafgesetzentwurf vom Jahre 1927 mit Erläuterungen aus der Begründung und Anmerkungen*, Wien, ¸1931.

Außerdem hatte der christlich-soziale Abgeordnete Erwin Waihs die legislative Abteilung des Jusitzministeriums schon im Juni 1931 um einen Entwurf für ein Gesetz zur strafrechtlichen Untreue gebeten, weil in der christlich-sozialen Partei damals erwogen worden war, einen entsprechenden Initiativantrag im Nationalrat einzubringen. Das Justizministerium hatte tatsächlich einen Entwurf zur Verfügung gestellt, der in der inhaltlichen Ausgestaltung der Untreue (entsprechend der Missbrauchs- und nicht der Treubruchstheorie) dem deutsch-österreichischen Strafrechtsentwurf von 1927 folgte. Der erwogene Initiativantrag war schlussendlich aber nicht eingebracht worden.[52]

Auf diesen im Sommer 1931 ausgearbeiteten Entwurf konnten Justizministerium und Regierung nun zurückgreifen, und zwar nicht nur in Bezug auf die rechtstechnische Ausgestaltung des neuen Straftatbestands,[53] sondern auch bezüglich der großen rechtspolitischen Besonderheit. Schon im Entwurf vom Sommer 1931 war nämlich vorgesehen gewesen, dass die Untreue rückwirkend eingeführt werden sollte, um die neue Bestimmung auch auf den Zusammenbruch der CA und damit insbesondere auf Ehrenfest anwenden zu können.

Die geplante rückwirkende Strafbarkeit der Untreue erklärt auch, warum die Staatsanwaltschaft am 15. Oktober 1931, nur einen Tag nach dem Regierungsbeschluss, Voruntersuchung und Untersuchungshaft gegen Ehrenfest beantragte. Beides wurde mit dem Verdacht der fahrlässigen Krida in Bezug auf die CA begründet.[54]

Fahrlässige Krida und Betrug waren auch nach dem damals geltenden österreichischen Strafrecht strafbar,[55] doch als die Staatsanwaltschaft die Einleitung der Voruntersuchung beantragte, war bereits klar, dass Ehrenfest nach der bestehenden Gesetzeslage vermutlich nicht verurteilt werden konnte. Es liegt daher nahe, dass die Staatsanwaltschaft zwar formal die Voruntersuchung wegen Fahrlässiger Krida und Betrugs beantragte, damit in Wirklichkeit aber schon eine Voruntersuchung wegen Untreue einleiten wollte, weil intern bekannt war, dass sie demnächst und zwar auch rückwirkend, strafbar sein würde.[56]

Am 26. Oktober genehmigte der Ministerrat den Entwurf zur rückwirkenden Einführung des Straftatbestandes der Untreue,[57] der am nächsten Tag als Regierungsvorlage im Nationalrat eingebracht und von Justizminister Schürff erläutert wurde. Art. I der Regierungsvorlage sah folgenden Wortlaut für die Strafbestimmung vor:

„§ 205 c. Wer die ihm durch Gesetz oder Rechtsgeschäft eingeräumte Befugnis über fremdes Vermögen zu verfügen oder einen anderen zu verpflichten, mißbraucht und dadurch dem anderen einen Vermögensnachteil zufügt, macht sich der Untreue schuldig. Die Untreue wird zum Verbrechen, wenn der Schade, der verursacht worden ist oder auf den die böse Absicht gerichtet war, 250 S übersteigt. Die Strafe dieses Verbrechens ist insgemein Kerker von sechs Monaten bis zu einem Jahre, bei erschwerenden Umständen aber Kerker von einem und fünf Jahren, wenn jedoch der Schade 2500 S übersteigt, ist die Strafe schwerer Kerker von fünf bis zu zehn Jahren."

Das Wesen der Untreue war somit – entsprechend der Missbrauchstheorie[58] – der Missbrauch einer Vertretungsbefugnis, durch den der Vertretene geschädigt wurde. Dabei bedeutete Missbrauch, dass der untreue Vertreter etwas tat, das er im Außenverhältnis zwar rechtswirksam tun konnte, im Innenverhältnis aber nicht durfte.[59]

In Art. III Abs. 1 war die Rückwirkung vorgesehen: „Dieses Gesetz tritt am… in Kraft. Seine Bestimmungen sind auch auf Handlungen anzuwenden, die vor diesem Tage begangen worden sind, sofern die Strafbarkeit der Tat nicht schon durch Verjährung erloschen ist."

Obwohl es gerade wegen der Rückwirkung eindeutig um eine „lex Ehrenfest" handelte, wurde Ehrenfest in der Regierungsvorlage selbst überhaupt nicht erwähnt. Genauso wenig nahm der Text der Regierungsvorlage Bezug auf die CA im Allgemeinen. Es wurde nur ausgeführt, dass es im Strafrecht bisher insofern eine Lücke gegeben habe, als zwar das Verhalten eines ungetreuen Verwahrers mit Strafe bedroht war,[60] das eines ungetreuen Verwalters hingegen nicht.

Die Regierungsvorlage wies darauf hin, dass der neue Tatbestand weitgehend dem § 348 des gemeinsamen Strafgesetzentwurfs 1927 entsprach, sich aber durch das zusätzliche Erfordernis der Bereicherungsabsicht von diesem unterschied. Schließlich ging die Regierungsvorlage auch darauf ein, warum die Rückwirkung des neuen Straftatbestandes zulässig sein sollte – allerdings wurde Ehrenfest als konkreter Anlassfall auch in diesem Zusammenhang nicht erwähnt.[61]

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52 ÖStA, AVA, Justiz, allg. Reihe GZ 11.352/31.

53 § 348 des gemeinsamen Entwurfs von 1927 konnte hier nicht unverändert übernommen werden, weil die Untreue bei isolierter Einführung an das System und die Terminologie des bestehenden österreichischen Strafgesetzes von 1852 angepasst werden musste. Ausschussbericht (AB) 238 der Beilagen zu den Stenographischen Protokollen des Nationalrats (BlgNR) IV. GP 1.

54 Gleichzeitig beantragte die Staatsanwaltschaft – entsprechend Sedlaks Gutachten – Vorerhebungen gegen fünf weitere Vorstandsmitglieder der CA: Ludwig Neurath, Sigmund Löwy, Otto Deutsch, Zoltan Hajdu, Oskar Pollak, sowie zusätzliche Vorerhebungen gegen Ehrenfest wegen des fahrlässige Krida in Bezug auf ihn selbst, StenProt 54. Sitzung v 27. 10. 1931 IV. GP, 1351-1355.

55 § 197 (Betrug) und 486 (Krida) StG 1852 (RGBl. 117/1852).

56 Der Akt der Staatsanwaltschaft Wien I zu Ehrenfest (21 St 576/31) ist offenbar nicht erhalten. Im Allgemeinen Verwaltungsarchiv (AVA) ist jedoch der Akt der Oberstaatsanwaltschaft Wien in den Registern unter der Zahl 621/31 verzeichnet. Es sind drei Kartons mit Akten der Oberstaatsanwaltschaft aus dem Jahr 1931 vorhanden (ÖStA, AVA, Justiz, Kartons 5093-5095), deren dritter die Akten mit Zahlen über 501 enthält. Auch in einem Aktenverzeichnis in diesem Karton ist das Verfahren gegen Ehrenfest unter 621/31 verzeichnet, die entsprechenden Aktenstücke sind in diesem Karton aber nicht vorhanden, der nur die Akten bis zur Nummer 620/31 enthält.

57 ÖStA, AdR, MRP Nr. 741 vom 26. 10. 1931 Punkt 20.

58 Zu Missbrauchs- und Treubruchstheorie SCHMETTERER, Untreue (wie FN 51).

59 RV 222 BlgNR IV. GP 2.

60 Durch das Delikt der Veruntreuung, § 181 StG 1852.

61 RV 222 BlgNR IV. GP 2.

Justizminister Schürff erklärte in seiner Rede vor dem Nationalrat nach einer kurzen allgemeinen Erläuterung des neuen Delikts und einem Hinweis auf die geplante Rückwirkung: „Hohes Haus! Es ist vielleicht zweckmäßig, gerade anschließend an meine allerletzten Mitteilungen hier nunmehr über einen Fall zu sprechen, der in der letzten Zeit in der Öffentlichkeit viel erörtert worden ist und unter sensationeller Ausschlachtung als Justizskandal bezeichnet wurde. Es ist, kurz gesagt, die Angelegenheit Ehrenfest.“ [62]

Schürff las dann den gesamten Bericht der Staatsanwaltschaft vom 14. Oktober 1931 vor und kam zum Resümee: „Aus dem Gesagten ergibt sich, daß die Bundesregierung alles getan hat, um die Durchführung der Erhebungen gegen Ehrenfest zu beschleunigen, daß die gegen die Staatsanwaltschaft und die Wirtschaftspolizei erhobenen Anwürfe, sie seien verantwortungsscheu vorgegangen oder hätten die Behandlung der Sache pflichtwidrig verzögert, ungerechtfertigt sind und daß die endgültigen Entscheidungen nunmehr in der Hand des unabhängigen Gerichts liegen.“ [63]

Hier ist zunächst bemerkenswert, dass Schürff die Situation ganz anders darstellte als rund zwei Wochen zuvor im Ministerrat. Im internen Gespräch hatte er gegenüber seinen Regierungskollegen durchaus einbekannt, dass die Regierung bislang nur wenig hatte ausrichten können, nun hob er die Tatkraft der Regierung hervor.

Außerdem fällt auf, dass der Minister Ehrenfest zwar ausdrücklich nannte, aber kaum erläuterte, wodurch dieser sich der Untreue schuldig gemacht haben konnte. Was Ehrenfest getan hatte, ergab sich nur aus dem von Schürff zitierten Bericht der Staatsanwaltschaft. In diesem auf Sedlaks Gutachten beruhenden Bericht wurde das Thema Untreue aber als solches nicht behandelt, sondern nur ein möglicher Zusammenhang zwischen Ehrenfests Verhalten und dem Zusammenbruch der CA_

„Gelegentlich der Sanierungsaktion hat sich der Vorstand der Credit-Anstalt genötigt gesehen, für Uneinbringlichkeiten an Außenständen per 31. Dezember 1930 140,000.000 S zu reservieren. Nach der Äußerung des Sachverständigen sind von diesen zumindest dubiosen Außenständen zirka 80 Prozent solche, über die Ehrenfest als Direktor und Vorstandsmitglied referiert hat und für die er, wenn auch nicht zur Gänze allein, die Verantwortung zu tragen hat. […] Wie obenerwähnt, hat Ehrenfest weiters der Credit-Anstalt durch seine Privatspekulationen einen Schaden von 1,400.000 S zugefügt. Der Sachverständige hat bei seiner Untersuchung nicht geprüft, ob und inwieweit bei diesen Transaktionen Ehrenfests Eigenmächtigkeiten desselben in seiner Funktion als Direktor und Vorstandsmitglied vorlagen.“ [64]

Aus Sedlaks Gutachten ergab sich also, dass Ehrenfest an einem Großteil der geschäftlichen Fehlentscheidungen der CA-Führung beteiligt war, die zur Überschuldung von 140 Millionen Schilling in der Bilanz für 1930 geführt hatten. Außerdem hielt der Sachverständige fest, dass Ehrenfest der CA 1,4 Millionen Schilling schuldete. Mit der Frage, ob Ehrenfast dabei seine Befugnis als Direktor der CA missbraucht hatte, beschäftigte sich Sedlak hingegen ausdrücklich nicht.

Justizminister Schürff erklärte ebenfalls in keiner Weise, inwiefern Ehrenfest sich durch seine Geschäfte der neu einzuführenden Untreue schuldig gemacht hatte. Auch mit der Frage, ob Ehrenfest andere Delikte wie fahrlässige Krida oder Betrug begangen haben könnte, beschäftigte sich Schürff nicht. Er erklärte daher auch nicht, warum die rückwirkende Einführung eines neuen Tatbestands nötig war, um Ehrenfest bestrafen zu können – bemerkenswert, weil die Rückwirkung doch ganz gezielt wegen und gegen Ehrenfest vorgesehen war.

Tatsächlich wurde Ehrenfest vorgeworfen, sich selbst und einem Viktor E. Freeman als Vorstandsmitglied und Direktor der CA und als Verwaltungsrat der Amstelbank eigenmächtig und unter Verletzung der internen Vorschriften Kredite gewährt zu haben. Diese konkreten Vorwürfe wurden aber weder im Ministerrat noch später im parlamentarischen Verfahren thematisiert.[65]

Das bedeutet, dass Ehrenfest als Untreue nur seine Malversationen zur seinem eigenen (und Freemans) Vorteil vorgeworfen wurden, nicht aber seine sonstige Geschäftspolitik als Vorstandsmitglied und Direktor. Wie bereits ausgeführt hatten diese Malversationen für die CA zwar einen gewaltigen Schaden bedeutet, der im Vergleich zu den noch viel gewaltigeren Verlusten der Bank aber so relativ gering war, dass er als solcher kein wesentlicher Faktor für deren Zusammenbruch war.

In den Wochen nach Einbringung der Regierungsvorlage zur Untreue gab es zahlreiche Reaktionen auf diesen Gesetzesentwurf – teils in Form von Stellungnahmen an das Justizministerium, teils in Form von Beiträgen in Zeitungen und Zeitschriften.[66] Der weitaus überwiegende Teil dieser Reaktion war eindeutig negativ. Die Regierungsvorlage wurde vielfach als Anlassgesetz gesehen, wobei ganz besonders die Rückwirkung des Gesetzes auf heftige und grundlegende Kritik stieß.[67]

Am 19., 24. und 26 November 1931 wurde die Regierungsvorlage zur Untreue im Justizausschuss behandelt, wobei die Kritik an der Regierungsvorlage teilweise berücksichtigt wurde. Die inhaltliche Auseinandersetzung fand am 24. November in einem eigens gebildeten Unterausschuss statt, in dem einige Änderungen gegenüber der Regierungsvorlage beschlossen wurden.[68]

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[62] StenProt NR 54. Sitzung v. 27. 10. 1931, 1352.

[63] Ebd. 1354.

[64] Ebd. 1353.

[65] Haftbefehl Gerichtsakt Ehrenfest (wie FN 21) ON 19; siehe auch ÖStA, AVA, Justiz, Rechtshilfesachen Geschäftszahl (GZ) 22.229/33; Grundzahl (GrZ) 21.466-6/33.

[66] ÖStA, AVA, Justiz, Allg. Reihe, Sektion I, GrZ 11352/31.

[67] Die Diskussion um die Rückwirkung bei der Einführung der Untreue soll in einem Folgeaufsatz ausführlich behandelt werden.

[68] Parlamentsarchiv, Unterausschuss des Justizausschusses zu Vorbereitung der 2. Strafgesetznovelle (222 d. Beil.) Protokoll über die Sitzung am 24./Xi. 1931; zu den Sitzungen des Justizausschusses enthält auch die Wiener Zeitung Nr. 270 v. 21. 11. 1931, 1f. und Nr. 276 v. 28. 11. 1931 1f., ausführliche Berichte über die Sitzungen des Justizausschusses, der Ausschussbericht ist Nr. 238 BlgNR IV. GP.

Der Berichterstatter war – wie auch zwei Jahre zuvor bei der Novellierung der Bundesverfassung – der spätere Bundeskanzler Kurt Schuschnigg. Auf seinen Antrag wurde ergänzt, dass die missbrauchte Befugnis nicht nur durch Gesetz oder Rechtsgeschäft, wie in der Regierungsvorlage vorgesehen, eingeräumt sein konnte, sondern auch durch behördlichen Auftrag. Weiters beantragte Schuschnigg, einzufügen, dass die Untreue nur „in Bereicherungsabsicht geflissentlich" begangen werden kann. Nach längerer Diskussion wurden beide Merkmale aufgenommen.[69]

Außerdem wurde diskutiert, wie das Verhältnis von Verjährung und Rückwirkung am besten formuliert werden konnte. Es war nämlich fraglich, ob eine Verjährung von Taten, die bisher nicht strafbar gewesen waren, begrifflich überhaupt möglich war. Der Ausschuss beschloss, daher nicht auf die Verjährung dieser Taten sondern auf den Ablauf der Verjährungszeit seit ihrer Begehung abzustellen.

Zu Beginn der Diskussion im Unterausschuss hatte der sozialdemokratische Abgeordnete Arnold Eisler außerdem beantragt, wegen deren besonderer Bedeutung zuerst über die Frage der Rückwirkung zu verhandeln. Darauf erklärte Justizminister Schürff, „daß die Regierung am Art. III (Rückwirkung) festhält", was wohl bedeuten sollte, dass sie nicht zur Diskussion stand. Tatsächlich wurde die Rückwirkung im Justizunterausschuss nicht mehr in Frage gestellt. Im Protokoll wurde Ehrenfest übrigens kein einziges Mal genannt.

Schließlich schlugen der Unterausschuss und der Justizausschuss folgende Formulierung für die neue Strafbestimmung vor: „§ 206 c. Wer die ihm durch Gesetz, behördlichen Auftrag oder Rechtsgeschäft eingeräumte Befugnis über fremdes Vermögen zu verfügen oder einen anderen zu verpflichten, in gewinnsüchtiger Absicht geflissentlich mißbraucht und dadurch dem anderen einen Vermögensnachteil zufügt, macht sich der Untreue schuldig."[70]

Für die Regelung von Rückwirkung und Verjährung schlug der Ausschuss folgende Fassung vor: „Dieses Gesetz tritt am 15. Dezember 1931 in Kraft. Seine Bestimmungen sind auch auf Handlungen anzuwenden, die vor diesem Tage begangen worden sind, wenn nicht seither die Verjährungszeit abgelaufen ist."[71]

Am 1. Dezember 1931 wurde die Regierungsvorlage in der Fassung des Justizausschusses im Plenum des Nationalrats verhandelt. In seinem eher knappen Bericht erläuterte Schuschnigg die einzelnen Tatbestandsmerkmale und erklärte dann: „Eine besonders sorgfältige und eindeutige Abgrenzung des Tatbestandes war schon deshalb nötig, weil die Regierungsvorlage […] die Rückwirkung des Gesetzes vorsieht."[72]

Als Grund für die Rückwirkung führte er nur die „Besonderheit der gegenwärtigen Verhältnisse" an, ohne konkret auf die CA oder Ehrenfest einzugehen. Erst in seiner Erwiderung auf die Stellungnahme des sozialdemokratischen Abgeordnete Josef Pazelt erwähnte Schuschnigg „jene großen Fälle, die wir ohne Unterschied ja alle gemeinsam in Gedanken tragen."[73]

Außer Schuschnigg war Pazelt als Vertreter der sozialdemokratischen Opposition der einzige Abgeordnete, der sich in dieser Debatte im Plenum zu Wort meldete. Pazelt spielte in einer Weise auf Ehrenfest an, die praktisch einer namentliche Nennung gleichkam. Zunächst kritisierte er den Umgang der Regierung mit der CA und meinte dann:

„Indessen ist eine der Drohnen, die vom Honig der Arbeitsbienen lebten, aus dem honigarmen Stock der Creditanstalt nach Frankreich ausgeflogen und sendet von dort – in Ehren fest – dem österreichischen Staat freundliche Grüße. […] Merkwürdig, daß die Regierung vor lauter Hinstarren auf diese ausgeflogene Drohne, die vielen anderen noch im Stock befindlichen Drohnen bisher gar nicht bemerkt hat."[74]

Kritik an der Regierung bildete auch sonst den Tenor von Pazelts Rede. Er meinte, dass die Bestimmungen des StG über Veruntreuung und Betrug (und das zivilrechtliche Bankhaftungsgesetz) an sich ausreichend gewesen wären, um die am Zusammenbruch der CA Schuldigen zur Verantwortung zu ziehen. Gleichzeitig kritisierte er das Gesetz über die Untreue als nicht scharf genug, weil sich durch die Vorsatzerfordernisse[75] und die konkrete Ausgestaltung der Rückwirkung Schlupflöcher ergeben könnten.

Auf der anderen Seite beanstandete Pazelt die seiner Meinung nach zu hohe Strafdrohung und meinte, dass die Regierung durch das rückwirkende Strafgesetz mit der Tradition breche. Er kam zu dem Ergebnis, dass die Vorlage aus sozialdemokratischer Sicht unzulänglich war. Vermutlich gegen die Stimmen der sozialdemokratischen Abgeordneten wurde das Gesetz über die Untreue am 1. Dezember vom Nationalrat in jener Form beschlossen, die die Mehrheit des Justizausschusses vorgeschlagen hatte.[76]

Am 15. Dezember 1931 wurde die Untreue-Vorlage im Bundesrat behandelt. Der Berichterstatter hier war Karl Gottfried Hugelmann vom katholisch-nationalen Flügel der christlichsozialen Partei. Interessanter Weise war seine Stellungnahme keineswegs frei von Kritik. Er beurteilte den Entwurf insgesamt ähnlich wie der Sozialdemokrat Pazelt. Auch Hugelmann meinte, dass Ehrenfest nach der bestehenden Gesetzeslage wegen Betrugs hätte bestraft werden können. Dabei nannte er Ehrenfest nicht namentlich, bezog sich aber eindeutig auf ihn, indem er dessen Geschäfte zu Lasten der CA genau beschrieb.[77]

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[69] Diese Trias der Befugnisgrundlagen wurde auch in § 153 StGB (BGBl. 60/1974) als Nachfolgenbestimmung des 1931 eingeführten § 205c StG übernommen; bei der Novellierung des Untreuetatbestandes 2015 (BGBl. I 154/2015) wurde sie aber als entbehrlich gestrichen.

[70] AB 238 BlgNR IV. GP./2.

[71] Ebd.

[72] StenProt NR 57. Sitzung v. 1. 12. 1931, 1425

[73] Ebd. 1427.

[74] Ebd.

[75] Böse Absicht auf Bereicherung, Wissentlichkeit bezüglich des Befugnismissbrauch und Eventualvorsatz wegen der Schadenszufügung.

[76] StenProt NR 57. Sitzung v. 1. 12. 1931 IV. GP, 1424-1428, ob die Opposition für oder gegen die Regierungsvorlage stimmte, geht aus dem Stenographischen Protokoll nicht hervor.

[77] StenProt Bundesrat (BR) 171. Sitzung v. 15. 12. 1931 IV. GP 1774f.

Die Rückwirkung beurteilte Hugelmann ambivalent und eher differenziert, befürwortete sie im Endeffekt aber für diesen Fall. Seiner Meinung nach konnten die besonderen Vorsatzerfordernisse dazu führen, dass die Vorlage „nur in geringerem, ja in geringem Maße den Zweck erfüllen wird, diejenigen zu treffen, welche in schamloser Gewissenlosigkeit unser Land in das Unheil geführt haben, in dem es sich jetzt befindet." [78]

Trotzdem beantragte Hugelmann, dass der Bundesrat keinen Einspruch gegen die Untreue-Vorlage erheben sollte. Obwohl er mit der Vorlage nicht völlig einverstanden war, wollte er eine Verzögerung des Gesetzgebungsverfahren in dieser dringenden Sache vermeiden, „damit nicht in der Bevölkerung der Eindruck entsteht, daß man die kleinen Diebe hängt und die großen laufen läßt." Außerdem appellierte Hugelmann an den Justizminister, die Möglichkeiten des neuen Gesetzes durch Weisungen an die Staatsanwaltschaft „rücksichtslos und restlos" auszunützen.[79]

Tatsächlich beantragte die Staatsanwaltschaft Wien I noch am 15. Dezember die Ausdehnung der Voruntersuchung gegen Ehrenfest auf das Verbrechen der Untreue.[80] Das zeigt, wie sehr das Gesetz über die Untreue eine lex Ehrenfest war. Der Antrag auf Ausdehnung der Voruntersuchung muss schon vorbereitet gewesen sein, und die Staatsanwaltschaft hatte offenbar nur darauf gewartet, dass der Bundesrat keinen Einspruch gegen das Gesetz erhob.

Einen Tag später gab außerdem der Untersuchungsrichter dem zwei Monate zuvor gestellten Antrag der Staatsanwaltschaft statt und erließ einen Haftbefehl gegen Ehrenfest.[81] Außerdem stellte das Justizministerium ebenfalls am 16. Dezember einen Auslieferungsantrag an Portugal, wohin sich Ehrenfest mittlerweile nach einem Aufenthalt in Frankreich abgesetzt hatte.[82]

Die portugiesische Regierung verweigerte allerdings seine Auslieferung, weil: „a) ein Auslieferungsvertrag zwischen Portugal und Österreich nicht bestehe, b) die portugiesische Gesetzgebung das Verbrechen der Untreue, das dem Beschuldigten zur Last gelegt wird, nicht kenne, c) eine Rückwirkung von Gesetzen dem portugiesischen Strafgesetz vollständig fremd sei, d) die Auslieferung das Gastrecht wegen einer Tat verletzten würde, die, wenn sie in Portugal begangen worden wäre, mangels einer diesbezüglichen strafgesetzlichen Bestimmung keinerlei Verfolgung nach sich ziehen würde".[83]

So führte die lex Ehrenfest nie zu einer Verurteilung von Friedrich Ehrenfest. Im Übrigen wurden auch keine anderen Funktionäre der CA strafrechtlich verurteilt, obwohl im Verfahren gegen Ehrenfest im Lauf der Zeit insgesamt 35 Personen als Beschuldigte geführt wurden.[84]

4. Fazit

Der Zusammenbruch der CA führte zwar dazu, dass eine Lücke im österreichischen Strafrecht geschlossen wurde, an deren Schließung schon seit dem Strafgesetzentwurf von 1874 gearbeitet worden war.[85] Zu einer strafrechtlichen Verurteilung von Personen, die für den Zusammenbruch der Bank (mit)verantwortlich waren, kam es hingegen trotz Rückwirkung nicht. Ohne das erklärte Ziel, Ehrenfest und allenfalls andere CA-Funktionäre zur Verantwortung ziehen zu können, wäre die – damals zulässige, aber völlig unübliche – Rückwirkung aber nicht nötig gewesen.[86]

Der Zusammenbruch der CA war nun tatsächlich eine wirtschaftliche Katastrophe von gewaltigen Ausmaßen, doch das Strafrecht konnte von Vornherein kein Instrument sein, um mit den wirtschaftlichen Folgen des Zusammenbruchs umzugehen. Das Bemerkenswerte ist, dass das Strafrecht – und zwar auch die rückwirkend eingeführte Untreue – auch kein Instrument waren, um die CA Funktionäre zur Verantwortung zu ziehen.

Gegen alle Beschuldigten außer Ehrenfest wurde das Verfahren eingestellt. Bei Ehrenfest ist immerhin denkbar, dass es zu einer Verurteilung gekommen wäre, doch da er sich, als die Untreue rückwirkend eingeführt wurde, bereits ins Ausland abgesetzt hatte, muss es schon damals sehr zweifelhaft gewesen sein, ob ein Strafverfahren gegen ihn wegen der neu eingeführten Untreue je würde durchgeführt werden können.

Trotzdem wurde die Untreue rückwirkend eingeführt und das zeigt, dass dieses Gesetz vor allem Symbolpolitik war. Zu einem ähnlichen Ergebnis kam auch Alexander Spitzmüller, der – allerdings weniger in Bezug auf Ehrenfest als auf die anderen CA-Funktionäre, gegen die dann auch ermittelt wurde – meinte, dass es der Regierung vor allem darum gegangen sei „sich selbst zu entlasten und bei der Bevölkerung durch Bloßstellung der jüdischen Bankgewaltigen populäre Effekte zu erzielen." [87]

Die Lehre daraus ist, dass es nicht besonders erfolgreich ist, wenn Regierungen etwas nur tun, um etwas zu tun. Das gilt für heute genauso wie für die frühen Dreißigerjahre.[88] Dass durch eine bedenkliche Anlassgesetzgebung eine wesentliche Lücke im österreichischen Strafrecht geschlossen wurde, war ein eigenartiger „Kollateralnutzen".

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[78] Ebd. 1775.
[79] Ebd.
[80] Gerichtsakt Ehrenfest (wie FN 21) ON 19.
[81] Ebd. ON 20
[82] Ebd. ON 21
[83] ÖStA, AVA, Justiz, Rechtshilfesachen GZ 21.083-6/31; GrZ 20.123/32.
[84] FRITSCH, *Causa Ehrenfest* (wie FN 8) S. 44-63.
[85] Einen Überblick über die weitere Entwicklung der Untreue gibt WESS N., Entwicklung des Untreuestraftatbestands in Österreich Auswirkungen der Neuregelung für die Praxis. In: *CEOaktuell*, vol. 9, 2015, S. 224-227.
[86] Die Diskussion um die Rückwirkung soll in einem Folgeaufsatz ausführlich dargestellt werden.
[87] SPITZMÜLLER, *Ursach* (wie FN 15) S. 358.
[88] Dazu auch WEBER, *Krach* (wie FN 1) S. 496-502.

Old Practices, New Justifications. The Effects of transactio in criminalibus in the Age of Ius Commune

*Daniela Buccomino**

Abstract

This paper is meant to reconstruct the crucial value attribuited to the institution of criminal transaction and its effects. For this purpose, an attempt will be made to emphasizethe indispensable role of legal science in the practical aspect of law, in a relevant moment to the political and institutional evolution of the municipalities of late medieval Italy. At the same time, the essay analyzes the implications of the relationship between doctirnal law and practical law during the period of Ius commune, through the analysis of some topical queaestione.

Keywords: *transactio in criminalibus; effects of transaction; public power and private autonomy; Albertus de Gandino; quaestiones disputatae; Ius Commune; Italy.*

1. Introduction

The possibility that the author of a crime may avoid punishment by agreement with the victim or their family constitutes a fundamental feature of the penal system of classical Ius commune. Even capital punishment could be the subject of such a settlement.

The regulation of pecuniary settlements[1] – fundamental in Lombard and Frankish law – is also clearly visible in the early age of the Communes, as several old city statutes attest.[2] The persistence of the issue in the age of the Communes was determined by the many internal conflicts in Italian cities.[3] Private peace always represented a way out, to which we have numerous testimonies.[4]

But from the beginning of the thirteenth century, things changed: the city statutes excluded recourse to private agreement for the most serious crimes[5]. At the same time, the introduction of inquisition powers bestowed on city judges posed

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1 The discipline is based on Cod. Ius. 2. 4. 18: "Transigere vel pacisci de crimine capitali excepto adulterio non prohibitum est. In aliis autem publicis criminibus, quae sanguinis poenam non ingerunt, transigere non licet citra falsi accusationem".

2 See, for example, *Liber Consuetudinum Mediolani anni MCCXVI*. BESTA, E. and BARNI, G.L. (ed.), Milano, 1949, p. 66); *Antiquae collationes Statutis Veteris civitatis Pergami*. FINAZZI, G. (ed.), Augustae Taurinorum 1876, *Historiae Patriae Monumenta*, XVI, *Leges Municipales*, II, col. 1921-2086.

3 The bibliography is exstensive. See, for example, SBRICCOLI, M., *Legislation, justice and political power in italian cities, 1200-1400*. In: *Legislation and Justice: The Origins of the Modern State, 13th-18th Centuries*, PADOA SCHIOPPA, A. (ed.), Oxford, 1997, pp. 37-55 (now published in SBRICCOLI, M., *Storia del diritto penale e della giustizia*. vol. I, Milano, 2009, pp. 47-72); MILANI, G., *L'esclusione dal comune. Conflitti e bandi politici a Bologna e in altre città italiane tra XII e XIV secolo*. Roma, 2003; ID., *Giuristi, giudici e fuoriusciti nelle città italiane del Duecento: note sul reato politico comunale*. In: *Pratiques sociales et politiques judiciaires dans les villes de l'Occident à la fin du Moyen Âge*, Roma, 2007, pp. 595-642; GAUVARD, C. – ZORZI, A., *La vengeance en Europe: XIIe au XVIIe siècle*. Paris, 2021, and broad scientific production of Andrea Zorzi, of which mention *Pace e conflitti nelle città comunali italiane*. In: *Grup de Recerca Consolidat en Estudis Medievals "Espai, Poder i Cultura" delle Universitats de Lleida, Balaguer, 2-4 juliol 2008, vol. Idees de pau a l'edat mitjana, atti del XIII Curs d'estiu Comtat d'Urgell (Balaguer, 2-4 juliol 2008)*, Leiden, 2010, pp. 265-301; ID., *Bien commun et conflits politiques dans l'Italie communale*. In: LECUPPRE-DESJARDIN, E., VAN BRUAENE, A.-L., *De Bono Communi. The Discourse and Practice of the Common Good in the European City (13th-16th c.)*. Turnhout, 2010, pp. 267-290; ID., *Amici e nemici: i conflitti nelle città comunali italiane*. In: ISRAEL, U., JASE, CH., *Agon und Distinktion. Soziale Räume des Zweikampfs zwischen Mittelalter und Neuzeit*. Berlin, 2016, pp. 267-276.

4 *Collectio Chartarum pacis privatae Medii Aevi ad regionem Tusciae pertinentium*. MASI, G. (ed.), Milano 1943. The widespread practice of *concordiae*, concluded between hostile families and often promoted by the city authorities themselves, is also addressed in notarial forms, strarting with that of Rolandinus. See Rolandinus, *Summa totius artis notariae Rolandini Radulphini Bononiensis*. c. 6 *de compromissis*, r. *instrumentum pacis*, Venetiis 1546, anast. reprint, Bologna, 1977, ff. 158-159: "Antonius ex una parte et Corra. ex altera fecerunt ad invicem osculo pacis vicissim inter eos veniente, pacem perpetuam, finem, remissionem atque concordiam. Specialiter de vulneribus dicebantur illata esse ab uno alteri vicissim, de quibus quidem vulneribus erant accusationes hincinde factae. Et generaliter de omnibus iniuriis et maleficiis offensionibus (…). Promittentes ad invicem per se et per eorum haeredes (…). Sed praedictam pacem, finem, remissionem atque con- cordiam, et omnia singula suprascripta perpetuo firma et rata habebunt, tenebunt et observabunt et non contravenient per se vel alios aliqua ratione vel causa de iure vel de facto".

5 See, for example, *Le règlement des conflits au Moyen Âge*, Paris, 2001; *L'infrajudiciaire du Moyen Âge à l'époque contemporaine.* Actes du colloque de Dijon 5-6 octobre 1995. GARNOT, B. (ed.), Dijon, 1996. For a sintetic presentation: CARBASSE, J.-M., *Histoire du droit pénal et de la justice criminelle*. Paris, 2006.

new problems for the doctrine, from the perspective that "omnis delinquens offendit rem publicam civitatis".[6]

In this context, the *transactio in criminalibus* becomes a hot topic. This institution, encompassing all the points of tension between theory and practice, between criminal procedure and applicative reality, shows that high degree of pervasiveness that has been noted both by medieval *legum doctores* as well as by more recent historiography.[7]

In this paper, an attempt will be made to give a concrete dimension to the theme of *facere iustitiam* within the common law system, proceeding with a historical-comparative analysis of the legal institution.[8]

The aim is to reconstruct both the structure and the effects of *transactio in criminalibus*. The starting point for the reflection will be some *quastiones*, coming both from legal doctrine, the real place of scientific elaboration of late medieval legal systems[9], and from the practice embodied in statutes[10].

2. The *transactio in criminalibus* in the legal doctrine. A brief excursus

The point of reference for regulating the *pacta de crimine* is C. 2.4.18.[11] The Constitution in question, promulgated in 293 AD by the emperors Diocletian and Maximian, provides for the possibility of concluding settlements or pacts for capital crimes, with the exception of adultery. At the same time, the same rule prohibits such agreement for all other public crimes that do not inflict a *poena sanguinis*, except in the case of the crime of forgery.

According to the gloss, to *transigere in criminalibus* one must follow the principle *cuilibet est licitum redimere sanguinem suum*.[12]

According to this, jurists should not ask whether or not it is permissible to settle about *crimine capitali*. They should focus on the effects the settlement between the victim and the perpetrator would have on third parties, including the judge.

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[6] ALBERTUS DE GANDINO, *Tractatus de maleficiis*, 10, *De transactione et pace in maleficiis faciendis*, KANTOROWICZ, H. (ed.), *Albertus Gandinus und das Strafrecht der Scholastik.* Bologna, 1906-1926, vol. II, pp. 185-209. On this point SBRICCOLI, M., «*Vidi communiter observari». L'emersione di un ordine penale pubblico nelle città italiane del secolo XIII*. In: *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 27, 1998, pp. 231-268 (now published in ID., *Storia del diritto penale e della giustizia*, vol. I, cit., pp. 72-110).

[7] Even today, the historical debate on the subject can be said to be lively and the question open. Cfr. PADOA SCHIOPPA, A., *Delitto e pace privata nel pensiero dei legisti bolognesi, Brevi note*. In: *Studia Gratiana*, 20, 1976, pp. 269–288; ID., *Delitto e pace privata nel diritto lombardo, prime note*. In: *Diritto comune e diritto locale, Atti del convegno di Varenna (12–15 Giugno 1979)*, Milano, 1980, pp. 555–578, both now In: ID., *Italia e Europa nella storia del diritto*, Bologna, 2005, pp. 209-250); ID., *Delitto e pace privata: il pensiero di Bartolo*, In: *Italian review of legal history*, 6, 2020, pp. 1-16; MASSETTO, G.P., *Un magistrato e una città nella Lombardia spagnola. Giulio Claro pretore a Cremona*. Milano, 1985; ROUSSEAUX, X., *De la négociacion au procès pénal: la gestion de la violence dans la societé médiévale et moderne (500-1800)*, In: *Droit négocié, droit imposé*, GÉRARD P., OST F., VAN DER KERCHOVE M. (eds.), Bruxelles, 1996, pp. 273-312; ROMANO, A., *La composizione dei conflitti fra privati nell'area italiana fra medioevo ed età moderna*, in *L'assistance dans la résolution des conflits = Assistance in conflict resolution. Part 4, L'Europe médiévale et moderne (suite) = Medieval and modern Europe (continuation)*. Bruxelles, 1998, pp. 167-176; BELLABARBA, M., *Pace pubblica e pace privata: linguaggi e istituzioni processuali nell'Italia moderna*. In: *Criminalità e giustizia in Germania e in Italia. Pratiche giudiziarie e linguaggi giuridici tra tardo medioevo ed età moderna. Atti del convegno internazionale di studi organizzato dall'Istituto storico italo–germanico in Trento, dal Dipartimento di storia dell'Università degli Studi di Firenze e dalla Fakultät Geschichte dell'Universität Bielefeld, Trento 21-23 ottobre 1999*, BELLABARBA, M., SCHWERHOFF G., ZORZI A. (eds.), Bologna, 2001, pp. 189-213; SBRICCOLI M., *Giustizia negoziata, giustizia egemonica*, ivi, pp. 345-364; VALLERANI M., *La giustizia pubblica medievale*. Bologna, 2005; NICCOLI O., *Perdonare, Idee, pratiche e rituali in Italia tra Cinque e Seicento*. Roma-Bari, 2007; *Forme stragiudiziali o straordinarie di risoluzione delle controversie nel diritto comune e nel diritto canonico*, BONNET P. A. and LOSCHIAVO, L. (eds.). Napoli, 2008, pp. 5 ss.; LOSCHIAVO, L., *La risoluzione dei conflitti in età altomedievale: un excursus storiografico,* In: *Il diritto per la storia. Gli studi storico giuridici nella ricerca medievistica,* CONTE, E., MIGLIO, M. (eds.), Roma 2010, pp. 91–107; ECKERT, R., *Entre peine publique et pacification: le règlement des différends pénaux à la fin du Moyen Âge (XIIIe-XVe siècles)*. In: *Les cahiers de la justice*, 2010, 4, pp. 89-101; EDIGATI, D., *Pace e transazione nella storia del processo criminale: il caso toscano dell'età moderna*. In: *Stringere la pace: teorie e pratiche della conciliazione nell'età moderna (secoli XV–XVIII),* BROGGIO, P. - PAOLI, M. P. (eds.), Roma, 2011; BUCCOMINO, D., *Studi sulla transazione penale nell'opera di Alberto da Gandino e Angelo Gambiglioni. Prime indagini sulla composizione amichevole delle liti nell'età di diritto comune*. Roma, 2020; CERRITO, M., *Pena negoziata e arbitrium iudicis. Le transazioni criminali nel Regnum Siciliae (secc. XIII-XV)*. Bologna, 2020. On civil issues, see: TREGGIARI, F., *Profili storici della transazione*. In: *Studi Senesi*, 104, 1992, pp. 304-378; ID., *Transazione (dir. interm.)*. in *Enciclopedia del diritto*, 44, 1992, pp. 790-813; PARINI VINCENTI, S., *Transactionis causa. Studi sulla transazione civile dal tardo diritto comune ai codici. Parte prima, la dottrina dei secoli XV e XVI*. Milano, 2011; EAD., *Tra tutto e niente. Studi sulla transazione civile dal XVII secolo al Codice del 1865.* Milano, 2018.

[8] For a presentation of juridical medieval pluralism, see: P. GROSSI, *L'ordine giuridico medievale*. Roma-Bari, 2022 (new edition); CARBASSE J.-M., *Manuel d'introduction historique au droit*, Paris, 2009, pp. 100-112.

[9] The process emerges at first as a cultural development of a generation of jurists and legal practitioners engaged in outlining the forms of a new system of judicial confrontation called *ordo*: sequence of actions according to a triadic scheme in which two sides face each other under the judge's critical eye. This model became an important tool to assert public power of municipal authorities. It is a potestas that ha salso included tools for peacemaking of disputes.

[10] The level of local practice is essential to understand what justice a communit has known, what were its judicial practices of conflict resolution. The lvel of knowledge, however, allows us to understand which system regulated the process of "effectiveness" of the procedure in the specific procedural fact.

[11] On the romanistic origin of *transactio in civilibus et in criminalibus*, see at least: NEPPI MODONA, L., *La transazione in diritto romano*, Bologna 1889; BERTOLINI C., *Della transazione nel Diritto Romano*, Torino 1900; BOHACEK, M., *Un esempio dell'insegnamento di Berito ai compilatori, Cod. Just. 2.4.18*. In: *Studi in onore di Salvatore Riccobono*, Palermo 1936, pp. 335-398; PETERLONGO, M.E., *La transazione nel diritto romano*. Milano, 1936; BRASIELLO, U., *La repressione penale in diritto romano*, Napoli 1937, pp. 521-545; KASER, M., *Transactio*. In: *PW Enc*, 12, 1937, pp. 2139-2146; ABOUCAYA, C., *Essai sur l'historie de la transaction en droit romain*. In: *Revue historique de droit français et étranger*, 37, 1959, pp. 275- 405, spec. 275-281; PROVERA, G., *Riflessi privatistici dei "pacta de crimine"*. In: *Studi in onore di Biondo Biondi*, 2, Milano, 1965, pp. 543-569; SCHIAVONE, A., *Studi sulle logiche dei giuristi romani. Nova negotia e transactio da Labeone a Ulpiano*. Napoli, 1971, p. 7 ss.; ID., *Transazione*. In *Novissimo Digesto Italiano*, 19, 1973, p. 498; MELILLO, G., voce *Transazione (dir. rom)*. In: *Enciclopedia del Diritto*, 44, 1992, pp. 771-790; ID., *Contrahere, pacisci, transigere*, Napoli 1994, pp. 60-100, 225-300.

[12] Gl. *Prohibitum*, tit. *De transactionibus*, (ed. Venetiis, 1592), *post princ*. The principle is reiterated among other *doctores*, also in CINUS DE PISTOIA, *In Codicem et aliquot titulos primi Pandectorum tomi.* Francofurti ad Moenum, 1578 (anast. reprint, Torino 1964), comm. *ad* C. 2.4.18, n. 6, f. 63a; ALBERTUS DE GANDINO, *Tractatus de maleficiis*, § *De transactione et pace in maleficiis faciendis*, cit., p. 185; ALBERICUS DE ROSCIATE, *In primam Codicis partem commentarii*. Venetiis, 1586, (anast. reprint, Bologna, 1979), Comm. *ad* C. 2.4.18 *De transactionibus,* l. *Transigere,* n. 2, f. 62v. During XVI century in DECIANI, T., *Tractatus criminalis*, Augustae Taurinorum, 1593, n. 21, f. 115r; CLARUS, J., *Sententiarum receptarum liber quintus in quo diversorum criminum materia XX*. Venetiis, 1589, § *diligenter explicatur,* q. 58, n. 4, f. 163v.

There are many opinions among jurists, with as many reasons to support each positions. The core issue is whether or not the agreement would have a preclusive capacity. As one would imagine, the range of positions is varied both in terms of opinions and in terms of the reasons supporting the individual theses.

For example, Rogerius, referring to D. 48.21.1, maintains that agreements of this kind between private individuals do not conflict with the public interest as long as the choice to keep the offender alive, thanks to the agreement with the offended party, is respectful of the interest of the community.[13] The view of Willelmus de Cabriano is different, limiting the effectiveness of the settlement to the parties by recalling the principle that a *res inter alios acta* cannot prejudice the legitimate rights of a third party.[14] The explanation is interesting because it is based on the protection of the accuser and not on a necessary application of a penalty. Pillius de Medicina, in his *distinctiones* and in some *quaestiones*, is of a different opinion. Pillius holds that the wrongdoer, the *transigens*, is to be deemed acquitted with the benefit of *ne bis in idem*[15], that is, they cannot be charged again, except in exceptional cases provided for by the sources.[16] Pillius, in outlining the preclusive effect of the settlement, in another *quaestio* goes so far as to affirm that if the accuser and the accused conclude a prohibited settlement, this should not be considered *tamquam non esset,* but, on the contrary, it will be effective only for the accuser who signed it, precluding them from the possibility of renewing their accusation, since the latter incurs the penalties of the Turpillian Senate Decree and is now deprived of the *ius accusandi*.

The same thesis is taken up by Azo, who points to a "private" vision of the settlement and of the trial, which, "in reality, was not private in the strict sense".[17] In fact, the choice of identifying the settlement with acquittal did not mean making the trial private, but rather accepting within the public judiciary an agreement between the parties that suspended the conflict and reduced the crime contained in the accusation.[18] In the *Summa,* he introduces new arguments that greatly influenced later doctrine. First of all, Azo states that if the conclusion of a *transactio de crimine* is not possible, both in the case of crimes not involving the *poena sanguinis* and in the case of adultery, the parties are still left the possibility of concluding a *gratuitous pactio vel remissio*.[19] This statement is innovative, in the first place for the fact that it distinguishes the discipline of the transaction from that of the gratuitous agreement in criminal law, considered until then identical on the basis of the literal content of C. 2.4.18. Azo makes another distinction, this time in relation to the penalties provided by the Turpillian Senate Decree, distinguishing the position assumed by the accuser from that of the offender. In fact, despite the validity of the *transactio* concluded, such penalties concern only the accuser, while the offender, by virtue of what Ulpianus asserts, is immune from such risks.

Holding the opposite positions we find Ugolinus and Accursius. Both deny *ne bis in idem* and admit the intervention of a third party who can charge the same person again for a given crime, by virtue of a restrictive reading of the agreement, whose effects bind only the contracting parties.[20]

After the Glossators, the question becomes even more debated. The main reason for this is the fact that this instrument is also used because it is provided for by the *iura propria*. In the second half of the thirteenth century, legal reflection on *de crimine* settlements shifted to the consequences on punishment: could the authority still inflict punishment after the settlement between accuser and accused? In other words, is the settlement enforceable against the city authority? Once again, the doctrine is divided.

On the premise that *transactio omnibus praeiudicet*, Guidus de Suzzara gives a negative answer. By prohibiting the judge from proceeding ex officio, the agreement between the parties prevents the judge from proceeding against the offender, in all offences, even in those "of blood" and those liable to capital punishment. There is only one exception: the case where it is the law which provides that *non obstante pace vel transactione, iudex deberet procedere*.[21]

Guido's negative view is opposed by Jacopus d'Arena[22] and Jacques de Révigny.[23] We are at the dawn of commentary. The latter, basing themselves on the principle that *quoad vindictam publicam, non praeiudicet nisi transigenti*, argue that the settlement

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13 ROGERIUS, *Summa Codicis*. PALMIERI G.B. (ed.), In: *BIMAe*, Bononiae 1913, I, Summa *ad* C. 2. 4 *De transactionibus*, n. 4, p. 67. On this thesis, PADOA SCHIOPPA, A., *Delitto e pace privata*, cit., p. 217.

14 WILLELMUS DE CABRIANO, *Casus Codicis*. Lugduni, 1574, comm *ad* C. 9.2.11 *De accusationibus et inscriptionibus*, l. *si quis homicidii*.

15 *Dist*. 55 "Transactio alia fit"; *Dist*. 56 "Cum queritur utrum de populari" in *Distinctiones glossatorum*, SECKEL E. (ed.), Graz, 1956, pp. 370ss; PADOA SCHIOPPA, A., *Le "Quaestiones super Codice" di Pillio da Medicina*. In: *Studia et Documenta Historiae et Iuris*, 39, 1973, pp. 239-290.

16 D. 12.2.30.3; D. 48.2.2.

17 VALLERANI, M., *La giustizia pubblica medievale*, cit., p. 171.

18 Odofredus agrees with Pillius and Azo: Odofredus believes that concord is an unnecessary and useless instrument, unless it has the effect of preventing the accusation from being repeated. ODOFREDUS, *In primam Codicis partem*. Lugduni, 1522 (anast. reprint, 1968), comm.ad C. 2.4.18, n. 10, f. 74v: "ut transacio aliquid operetur, dicendum est quod omnibus preiudica".

19 AZO, *Aurea Summa*… Lugduni, 1550, rubr. *De transactionibus*, n. 4, p. 27.

20 ACCURSIUS, *Glossa in Codicem*. Venetiis, 1488 (anast. reprint, Augustae Taurinorum 1968), gl. *Prohibitum*, *ad* C. 2.4.18, *de transactionibus*, l. *Transigere*, f. 41v.

21 GUIDUS DE SUZZARA, *Suppleciones super Codice*. a C. 2.4.18l. *Transigere*, C., tit. *De transactionibus*, f. 36rb. The unpublished *Suppleciones* are handed down from manuscript BnF, Par. Lat. 4489, ff. 30ra-76rb. The original text is available on the website of Bibliothèque Nationale de France, Gallica: at http://gallica.bnf.fr/ark:/12148/btv1b9076494j/f73.item.r=guidonis%20de%20suzaria.

22 JACOPUS D'ARENA, *Commentarii in universum Ius Civile…*, Lugduni, 1541 (anast. reprint, Torino 1971), in C. 2.4.18, n.1, f. 6v. Also Pseudo-Vitalini, BONIFACIUS ANTELMI, *Tractatus de maleficiis, in Angelus Aretinus De maleficiis. Angeli Aretini De inquirendis animaduertendisque criminibus opus… cui contractus nonnulli tùm Alberti de Gandino, tùm Bonifacij de Vitalinis, vnà cum apostillis Augustini Arimineniensis: & Hieronymi Chucalon, vt apendiceo subiecimus.* Lugduni 1551, § *De pace*, n. 4, specifies the exceptibility of the office is made because *rei publicae interest ne maleficia sint impunita*; *doctores* – he underlines – *communiter* support this concept.

23 JACQUES DE REVIGNY, *Lectura insignis et fecunda super prima parte Codice*. Parisiis, 1519 (anast. reprint, Bologna, 1967) ad C. 2. 4. 18, l. *Transigere*, C., tit. *De transactionibus*, f. 68r. Only conseguence for the accuser, in case of new accusation, is the restitution of what has been received (ivi, f. 68v).

between accused and accuser was not preclusive either for the complainant or for the judge by virtue of the principle that *ne crimina remaneant impunita*.[24]

Pierre de Belleperche is of the same view.[25] In particular, he holds that in capital crimes the settlement is valid with respect to the accused and the accuser, provided that the settlement takes place before the parties "inscripserint ad poenam talionis".[26]

It is perhaps in these approaches that one can discern signs of an early awareness of the essential problem, in other words, that which would lead to the progressive publicization of the punishment, accompanied by a progressive reduction of the criminal settlement to within the scope of damages alone.

Among those who particularly emphasize, by reason of public interest, the necessity that the *iudex ad maleficia* be granted the necessary authority to impose the punishment, independently of the agreement intervened between perpetrator and victim, we find Dynus de Mugello.[27] According to the Tuscan jurist, the judge must not stop in the presence of a settlement between a killer and the heirs of the deceased. The *pax privata* has value only *inter partes.* This is regardless of the compensation paid. The penalty is no longer a private matter: the judge is endowed with a *ius reprimendi* in the name of the interests of the community.[28]

At the end of the century, Albertus de Gandino's *Tractatus de maleficiis*[29] dedicates ample space to such settlements in criminal matters. To the traditional questions are added others, taken from the work of various jurists or from his vast experience as assessor *ad maleficia* and as ruler.

The jurist admits the possibility for the offender and the victim to make peace in a valid manner. All this, however, does not preclude the punishment of the crime, *quia omnis delinquens offendit rem publicam civitatis.*[30] Gandinus's opinion is the final evolution of a reflection that the judge of criminal matters undertook, starting from the statutory regulations that were being established in this regard.[31] He, in particular, identifies a public interest in the punishment of wrongdoers, which cannot be removed or modified by the parties: for this reason, the *inquisitio* of the judge cannot be stopped by a settlement that only takes place between the concluding parties, since they are free to *remittere iniuriam suam,* but not that of the entire community.

For Gandinus, the private settlements are an instrument offered by the system not only to protect the economic interest of the victim, but also to maintain social cohesion. This private interest, however, can no longer raise a claim against the interest of the *res publica* in the punishment of crimes, which represents a higher political interest that belongs to the community and is protected by the inquisitor judge.

3. A look at the institution in Church law

Some interesting insights also come from canon law. In drawing from the Romanist tradition, the norms of the Church seek to adapt the *transactio* to its own specific needs, spiritual and disciplinary (*ecclesia vivit iure romano*).[32]

In reality, there are no canonical texts that expressly refer to such settlements.[33] Nevertheless, the apostolic precept to avoid

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[24] This principle is mainly used in the field of judicial torture since in the inquisitorial process in a slow but inexorable manner the reason for punishment shifts from *id quod interest alicui* to *id quod interest civitatis*. For a detailed overview, see SBRICCOLI, M., «Tormentum idest torquere mentem». *Processo inquisitorio e interrogatorio per tortura nell'Italia comunale*. In: VIGNEUR, J.C. MAIRE and PARAVICINI BAGLIANI, C. (eds.), *La parola all'accusato*, Palermo, 1991, pp. 17-32 (now In: SBRICCOLI, M., *Storia del diritto penale e della giustizia*, vol. I, cit., pp. 111-130). Some reflection on this point, already in FRAHER, R., *The theoretical justification for the new criminal law of the high middle ages: "rei publice interest ne crimina remaneant impunita"*. In: *The University od Illinois Law Review*, 1984, pp. 577-595.

[25] PIERRE DE BELLEPERCHE, *Lectura Codicis*, a C. 2.4.18, *De transactionibus*, l. *transigere*.

[26] The Glossa *Prohibitum*, l. *Transigere*, C., tit. *De transactionibus*, had left to late Medieval reflection restrictive indication, circumscribing the right to ask for a *transactio* only to the *accusatus*; *accusanti est prohibitum unde si paciscereturi, vel transigeret, incideret in Turpillianum*. The reflection is also held by Albertus de Gandino in the *Tractatus de maleficiis*, cit., § *De transactione et pace in maleficiis faciendis*, n. 2. However, commentators seem to distance themselves from this approach and end up authorizing the transaction even on the iniziative of the accuser, provided that it loomed *ante inscriptionem*: cfr. BARTOLUS DE SAXOFERATO, *Super prima Codicis…commentaria*. Venetiis 1526 (anast. reprint, Roma, 1996), comm. *ad* C. 2.4.18, *De transactionibus*, l. *Transigere*, n. 6; CINUS DE PISTOIA, *In Codicem et aliquot titulos primi Pandectorum tomi,* cit., Comm. *ad* C. 2.4.18, nn. 2-3; ALBERICUS DE ROSCIATE, *In primam Codicis partem commentarii*, cit., Comm. *ad* C. 2.4.18 *De transactionibus,* l. *Transigere,* n. 2, f. 62v. Albericus remindes guidelines in this sense also of Willelmus Durantis and Pierre da Belleperche.

[27] "Dico ergo quod remissio adversarii non impedit quin iudex procedat […] quatenus enim ex pacto leditur ius publicum nullum est" in DINUS DE MUGELLO, *Additiones super Digesto Novo*, l. *Hoc edicto, § Inde, De operis novi nuntiatione*, D'AMELIO, G. (ed.), *Indagini sulla transazione nella dottrina intermedia*. Milano, 1972, p. 101.

[28] "Nam pax est ad bonum et lenitatem" is a fundamental tool for maintainig harmony between individuals and families. Cfr. ALBERTUS DE GANDINO, *Tractatus de maleficiis*, § *De transactione et pace in maleficiis faciendis*, cit., p. 193.

[29] Ivi, pp. 185- 209.

[30] SBRICCOLI, M., *Giustizia criminale*. In: *Lo Stato moderno in Europa. Istituzioni e diritto*, FIORAVANTI, M. (ed.), Roma-Bari, 2002, pp. 163-205 (now In: SBRICCOLI, M., *Storia del diritto penale e della giustizia*, vol.I, Milano, 2009, pp.1-44, spec. p. 7; ID., «*Vidi communiter observari*», cit., p. 102.

[31] ALBERTUS DE GANDINO, *Quaestiones statutorum*. SOLMI, A. (ed.), *Quaestiones statutorum di Alberto da Gandino*, In: *BIMAe,* III, Bononiae, 1901, q. 106, pp. 209-210. The extend of the question of *transactio* was also fluctuating as a result of the political direction that occurred in each city. Cfr. PADOA SCHIOPPA, A., *Delitto e pace privata*, cit.; BUCCOMINO, D., *Studi sulla transazione penale*, cit., pp. 97-102; CERRITO, M., *Pace negoziata e arbitrium iudicis*, cit.

[32] "Le peculiarità del diritto penale ecclesiastico sono riconducibili alla circostanza che il diritto della Chiesa è un diritto che persegue dei beni supremi: meglio quel bene della salvezza delle anime, che per il credente si distacca in modo fondamentalmente […] da ogni altro bene, non consentendo deroghe di sorta" JEMOLO, A.C., *Peculiarità del diritto penale ecclesiastico*. In: *Studi in onore di Cammeo*, Padova, 1933, vol. I, p. 732; cfr. FEDELE, P., *Il principio "nullum crimen sine praevia lege poenali" e il diritto penale canonico*. In: *Rivista italiana di diritto penale*, 15, 1937, pp. 489-505.

[33] Despite the lack of express rules of settlements, it is certain that the Church made exstensive use of the transaction: already in patristic literature one can read that Christians, according to St Paul's precept, were obliged to bring their disputes before the bishop, who sought to end them mainl through settlements. Cfr. *Ad Ephesios*, 4, 32 "Estote autem invicem benigni, misericordes, donantes invicem sicut et Deus in Christo donavit vobis". Bringing the dispute before a pagan is considered a failure of the community. This, however, does not contradict the principle that all authority comes from God, but confirms it because the authority of the internal courts of the Church comes from God. Cfr. DE LUCA L., *La transazione nel diritto canonico: contributo alla dottrina canonistica dei contratti*. Roma, 1942, pp. 15- 34; VISMARA, G., *La giurisdizione civile dei Vescovi (secoli I-IX)*. Milano, 1995, pp. 3-7.

litigation[34] in the name of *salus animarum* is well present.[35] Evangelical justice is not satisfied in relations between people which feature mere respect for the law. It excludes recourse to any kind of violence or revenge; the aim pursued, on the one hand, is the guarantee of justice for the injured party, but on the other hand it also seeks the redemption of the evildoer. *Caritas* is the leading thread of this uninterrupted narrative dialogue. What is sought, then, is the union in solidarity of the People of God, composed of brothers and sisters in the faith.[36]

It is evident, therefore, that Gospel justice demands more than mere external respect for the law in inter-subjective relationships. It requires, in particular, the exclusion, as part of overcoming the law of retaliation, of every kind of violence or revenge, because in vindicating one's own violated right, the redemption of the evildoer and the unjust to justice and goodness through *caritas* must be sought.[37] Justice is fully realized only if others, without any discrimination, are recognized as members of the same community. From the end of the twelfth century, canonists show a different approach to the question of settlements about crimes, due as much to the (profoundly canonistic) principle that crimes must not go unpunished as to the increasing centrality of public power,[38] especially in the criminal process.

A turning point on the subject is first of all Paucapalea, who gives us a definition of what such a transaction is in canon law;[39] then, Bernard of Pavia deals with the subject in the *Compilatio Prima Antiqua* with the title *De transactionibus*.[40] But, as far as the study of the transactional phenomenon in criminal matters is concerned, the most important is his *Summa decretalium*, in which the canonist dwells first of all on the definition of the settlement and then identifies the subjects legitimated to transact and the possible objects of a valid settlement.[41]

With regard to the latter, the jurist from Pavia refers directly to Justinian law:

" […] Sanguinis et capitis metuens de crimine poenam,/ Transige si placeat; non transiget ullus adulter;/ Numquam de reliquis, excepto crimine falsi."

The Church, as already pointed out, will never go so far as to approve the barbaric custom whereby punishment is generally left up to private vengeance and on which it would be possible to settle, as contrary to Christian ethics.[42] Even more: not being able to distinguish between public and private crimes[43] and to separate definitively the concept of crime from that of sin, some canonists including Goffredus de Trano (Tranensis) and Henricus of Susa (Hostiensis), hold that any crime must be considered public, and consequently the possibility of settlement in penal matters is forbidden[44], while admitting the possibility of an *amicabilis compositio*.[45]

Such a rigid view is opposed by another, more moderate, which deems possible a settlement for those crimes whose punishment can be assimilated to the *poena sanguinis*, unless there is an obligation to denounce by the faithful. According to Nicolaus de Tudeschis – also known as Panormitanus -, there are crimes for which "potest tradi curiae seculari. Et tunc satis crederem quod admittatur transactio".[46] The same is true of those offences that carry lifelong imprisonment.

In such cases where a settlement is allowed involving the accused of a crime, what are the effects of the same?

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[34] This evangelical precept is the fundamental motif, which is found in most of the authors and collections of early centuries of the Church. Moreover, since the full fulfilment of the law is love, one must, in an case and always, come to an agreement with the adversary. Cfr. *Mt*. 5, 25; 5, 39-41; *Ad Rom*. 12, 21; 13, 8-10; ISIDORUS HISPALENSIS, *Concilium Carthaginense quartum. Africae concilia*. in *Patrologia Latina*, 84, XXV coll. 202; LIX coll. 204; BENEDICTUS DIACONUS, *Capitularium collectio*. in *Patrologia Latina*, 97, coll. 705.

[35] The *salus animarum*, is not only the goal of the Church but also the goal – at least mediated, if not immediate – of the entire canonical order. This is already been taught by St Thomas Aquinas – *finis iuris canonici tendit in quietem Ecclesiæ et salutem animarum* –, but also Raymond of Peñafort –*… adeo ut sola salus hominum, tanquam præcipuus finis iuris canonici, agnosci debeat* – and by many others *auctores probati*, including Ivo of Chartres and F. Suárez, up to the famous *Discorso generale sull'ordinamento canonico* di Pio Fedele. Cfr. FEDELE, P., *Discorso generale sull'ordinamento canonico*. Padova, 1971, pp. 120-121.

[36] "È in giuoco pertanto uno degli interessi supremi della Chiesa […]. È quindi per il profondo significato morale, e solo per questo, che la transazione come ogni altro mezzo idoneo a prevenire o a far cessare le liti, viene accolta nell'ordinamento canonico ed è da questo valorizzata" in DE LUCA, L., *La transazione nel diritto canonico*, cit., p. 19. Cfr. PARINI VINCENTI S., *Aequitas canonica e periculum animae nello svolgimento del patto nudo in diritto canonico*. In: *Apollinaris*, 89, 2, 2016, p. 637 and cited bibliography.

[37] *Iustitia dulcore misericordiae temperata* in HENRICUS OF SUSA (HOSTIENSIS), *Summa aurea…* Venetiis, 1574 (anast. reprint, Torino, 1963), rubr. *De dispensationibus*, § 1, p. 1874.

[38] KÉRY, L., *Kirchenrechtliche Grundlagen des öffentlichen Strafrechts.* In: ZSS, KA, 91, 1, 2005, pp. 128-167; CHIFFOLEAU, J., *Ecclesia de occultis non iudicat. L'Eglise, le secret et l'occulte du XII eau XVe siècle*. In: *Micrologus. Nature, sciences and medieval societies*, XIII (Il segreto del Medioevo), 2006, pp. 359-481.

[39] *Summa des Paucapalea über das Decretum Gratiani*, von SCHULTE, J.F. (Hrsg.), Giessen 1890, C. XXIII, q. 4, cap. 29, p. 101.

[40] *Quinque Compilationes Antique nec non Collectio Canonum Lipsiensis*, Friedberg (ed.), Graz 1956, Comp. I, Lib. I, tit. XXVII *De transactionibus*, p. 10.

[41] BERNARD OF PAVIA, *Summa decretalium…* Lasperes Th. (ed.), Ratisbonae 1860 (rist. anast. Graz 1956), tit.XXVII *De transactionibus*, pp. 21-22.

[42] DEDOCK,W., *Transacciones (DCH)/settlement agreements*. In: Max Planck Institute for European Legal History Research Paper Series, 2021, 3, pp. 1-14.

[43] For the civil doctrine only public offences were provided for the prohibition of transaction. See, for example, WILLELMUS DURANTIS, *Speculum iudiciale*. Venetiis 1566, III pars, lib. IV, *de accusationibus, inquisitionibus et denunciationibus*, cap. *Nunc*, nn. 5-6, p. 737.

[44] JOHANNES TEUTONICUS, Ordinary Glossa on the *Decretum* at c. 8, Ca. II, q. 3: "sed videtur quod secundum canones non possit transigi super aliquo crimine, quia secundum canones nullum crimen irrogat poenam sanguinis […] et ita super publico crimine non licet transigi. […] omne crimen publicum est". On this point also GOFFREDUS DE TRANO, *Summa in titulos Decretalium*. Venetiis, 1586, *sedes materiae*, 3, f. 55v. Cfr. INNOCENT IV (SINIBALDUS FIESCHI), *In quinque Decretalium libros…commentaria*. Venetiis, 1570, lib. V, rubr. *De collusione detegenda*, f. 308r.

[45] This is a conventional dispute resolution for the purpose of avoiding, as far as, the continuation of quarrels, as a source of sin. The *amicabilis compositio* was allowed, for example, for *res spirituales*, for which the transaction was prohibited. Cfr. c.4, X, 1, 36; c.7, X, 1, 36. Cfr. DE LUCA L., *La transazione nel diritto canonico*, cit., p. 119.

[46] NICOLAUS DE TUDESCHIS (ABBAS PANORMITANUS), *In quartum et quintum Decretalium libros commentaria*. Venetiis 1582, lib. V, cap. 1, n. 7, f. 179. See KUMHERA, G., *The benefits of the peace. Private Peacemaking in Late Medieval Italy*. Brill 2017, pp. 24 ss.

First of all, notes Antonius de Butrio, the accused who has settled is not considered to have confessed, and this is because "in tanto delicto, et poena sicut est sanguinis, lex non sic amare praesumit quod transigens velit confiteri"[47]; at the same time, they are freed from the accusation. For, as Panormitanus argues, "quid autem operatur transactio ubi licita est? Breviter dic quod respectu Dei operatur ut ab isto actore non possit amplius molestari. Item finitur instantia, sed non praecluditur aliis facultas accusandi aundem de eodem delicto, nec etiam iudici quominus possit ex officio suo inquirere, super nova tamen instantia. Et hoc in casibus, in quibus iudex potest ex officio suo inquirere de illo crimine […] ex quo infero quod de iure canonico post transactionem in casu licito factam, non potest iudex inquirere accusatores […] ubi alias transactio non esset permissa […] posset iudex procedere super instantia inchoata, et punire reum".[48]

In other words, in order to draw some concluding notes, the canonists are cautious and settlements are limited. The accuser, for their part, when they abandon the charge via settlement, does not incur the *poena talionis* or *calumniae*, provided the *transactio* is valid.[49]

From this it is clear that the effects of settlement in criminal matters are extremely limited, at least at this point, before the prosecution of offences *ex officio* will end any possibility of settlement in criminal matters even to these limited effects.

4. Some *quaestiones* on the *effectus transactionis*

An interesting question that often arises in courtrooms and is the subject of heated doctrinal debate is the following: is a settlement made about a lesser offence also effective against a more serious offence that may ensue?

The practical case which gives rise to the question is as follows: Titius and Caius, after striking each other and inflicting many wounds on each other, enter into a settlement and Titius desists from pursuing the matter, for the payment of a price as damages.

However, he later dies of injuries sustained in the quarrel, and his heirs intend to accuse Sempronius of murder. The jurist asks: can the heirs accuse Sempronius despite the settlement?[50] The argument is divided, according to the classic Brocardian method, into analyzing first the pros and cons and then concluding with a *solutio*. The dominant doctrine denies that the validity of the transaction can be extended to death. In fact, injury and murder are two different crimes. Admitting that the transaction that took place for one can also be extended to the other would mean prejudicing the criminal action that the victim's heirs might want to bring.[51]

There is a different argument mentioned that argues for the ability of a settlement to prevent the further accusation, according to which a settlement for the wounds should be understood as valid for everything that can follow from them, and therefore also for death, interpreting the will of the agreeing parties extensively. It must then be considered that the wounds can be of two types: either fatal, and in this case the injured person must be considered as already dead and therefore the *pax* must arise directly *de morte*, or non-fatal, and in this second case the agreement must be reached *de vulnere.* However, in the latter case, if the wounds lead to the death of the subject anyway, the agreement operates automatically *de morte*, taking into account the negligence of the wounded person who should have grasped their fatal nature. The basic idea is that a subject cannot settle for a *dolus futurus*[52], nor can they waive the right of accusation which is not yet theirs. In fact, in the case of murder, it is not to the victim, but rather to the heirs[53] that the right to bring such a challenge belongs, in line with the idea that no one can transfer to another a right that they themselves do not have.[54].

From the *Lex Cornelia de sicaris*[55] it can be deduced that, even if the action has been brought and the proceedings initiated for the injury, although fatal, nevertheless there has been no action brought for murder. From this it necessarily follows that homicide and injury are two distinct criminal offences: if this were not the case, a sentence passed on one of the two charges would lead to the exception of *res judicata* for the other, which is certainly not the case.[56]

Moreover, at that time, in the 13th and 14th centuries, due to a custom that was widespread in Lombardy and in Italy in general, an accusation of wounding, as an exception to the common law, was not public, but private: this is also demonstrated by the fact that the intervention of the defense was allowed and that the penalty was a fine. The crime of homicide, on the

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47 ANTONIUS DE BUTRIO, *In librum quintum Decretalium commentarii*. Venetiis 1578 (rist. anast. Torino 1967), cap. I, n. 14, p. 72.

48 NICOLAUS DE TUDESCHIS (ABBAS PANORMITANUS), *In quartum et quintum Decretalium libros,* lib. V, n. 9, f. 182rv.

49 ANTONIUS DE BUTRIO, *In librum quintum Decretalium commentarii*. Venetiis 1578 (rist. anast. Torino 1967), cap. I, n. 15, p. 72; NICOLAUS DE TUDESCHIS (ABBAS PANORMITANUS), *In quartum et quintum Decretalium libros,* lib. V, cap. I, n. 9, f. 179.

50 "Item subiicio aliam utilem et dubitabilem questionem et que sepius assessoribus occurrit de facto. Ecce Titius percussit et vulneravit Sempronium, inferendo sibi multa vulnera; iste Sempronius eidem Titio fecit pacem et remissionem de vulneribus illis et postea mortuus est. Queritur, an videatur pacem fecisse etiam de morte postea subsecuta?" in ALBERTUS DE GANDINO, *Tractatus de maleficiis, § De transactione et pace in maleficiis faciendiis*, cit., n. 12 p. 195; GAMBIGLIONUS, A., *Tractatus de maleficiis.* Lugduni 1551, § *De anno praesenti & mense Novembris*, n. 10. The authorship of this *quaestio disputata* is not clear. But according to what is stated in Margarita, it most probably took place in the city of Modena (where both Guidus de Suzzara and Albertus Galoetti taught) in the second half of the thirteenth century.

51 KUMHERA, G., *The benefits of the peace*, cit.

52 ALBERTUS DE GANDINO, *Tractatus de maleficiis, § De transactione et pace in maleficiis faciendiis*, cit., n. 12 p. 195. Cfr. D. 2.14.27.4.

53 "Item, nec accusationem, quam non habet, potest remittere, quia accusatio de morte non tam defuncti quam heredis est" in ALBERTUS DE GANDINO, *Tractatus de maleficiis*, § *De transactione et pace in maleficiis faciendiis*, cit., n. 12. Cfr. D. 35.2.84.

54 It is the famous brocard of Ulpiano contained in D. 50.17.54 *Ulpianus libro 46 ad edictum*: "Nemo plus iuris ad alium transferre potest, quam ipse haberet".

55 D. 48.8.3.5.

56 C. 9.2.9.1; D. 47.1.2.

other hand, was public: the defender could not intervene and the penalty was death.[57]

From the foregoing, it is clear that the two offences are of a different nature, one public, the other private: hence the inadmissibility of extending the settlement made on one to the other.

Not everyone, however, shares this interpretation. There are those who, basing themselves on ethical-political considerations, affirm the extensibility of the settlement from one crime to the other. Peace, abstractly considered, is a good whose benefits must be extended as much as possible.[58]

One could not bring against this thesis the example of a preclusion arising from the civil action, brought under the the Aquilia law[59], against the criminal action, brought under the Cornelia law[60] for the killing of the servant. For in this case we are dealing with two actions of a different nature, the one civil, the other criminal, while in the case of the two offences of injury and murder, the legal action for both being of a criminal nature, such preclusion would no longer take place.

It could therefore be said that the settlement conducted on one of the two offences would also extinguish the other, "nam cum principale sublatum est, per consequens et accessorium".[61]

Gandinus, like Guidus de Suzzara and most of the doctrine at the time, does not agree with this thesis,[62] but affirms on the contrary that, when the agreement has been expressly made for injuries, it cannot be considered as also including the death that may follow. The right of action for murder remains unaffected. Nor is it a good counterargument in this regard that mortal wounds in a certain sense could be compared to death (which in fact follows from them): one can consider the individual, as a subject of law, as dead only when he has breathed his last. The Aquilia law is also very clear in this regard, where it states that whoever kills the servant of another, even though already mortally wounded, is nevertheless responsible for murder, which would not be the case if one could consider the servant already dead. The only means for a lesser offence is "transigere de vulneribus et de morte si fuerit subsecuta".[63] A gloss to the Code expressly admits that by a covenant a future right may be waived.[64]

4.1 Preclusive effect of the settlement vis-à-vis public prosecution

We now pose the question of the intangibility of the settlement, which also has repercussions on the public prosecution. To be precise, this problem doesn't seem to be correctly set out: a right acquired through an agreement between private individuals does not prejudice public action.[65] Moreover, wrongdoing must not go unpunished.

Nevertheless, the public prosecution has no power to proceed against the offender once a settlement has taken place. There are two obstacles: for Roman criminal law, the proceedings must begin by the will of the party[66], while the settlement is considered the supreme *remedium lenitatis*. Otherwise the very meaning of the *Lex Transigere* would be lost.[67]

The problem, according to Gandinus's view, can be solved in two possible ways: the first would say that when the statute has established a certain penalty for an offence, that penalty must be effectively enforced.[68] The various urban centers have

[57] "Nam hodie secundum consuetudinem generalem totius Italiae vulnerum non est accusatio publica, sed privata, quamquam secundam iura communia consueverit esse capitalis, quod patet ex eo, quod defensor intervenit et quia pena sequitur pecuniaria; sed secus, cum agitur de morte, quia tunc defensor respuitur et capitalis imponitur poena" ALBERTUS DE GANDINO, *Tractatus de maleficiis*, *De transactione et pace in maleficiis faciendiis*, cit., n. 12; ANGELUS GAMBIGLIONUS, *Tractatus de maleficiis*, § *Quas si non soluerit intra decem dies amputetur sibi manus de extra* & *c.*, nn. 21-23.

[58] "E contra videtur, quod pax facta obstet favore pacis, ut C. de caducis tollendis l. unica circa princ. (C. 6,51,1), quia pacis beneficium debet ampli- ari, quia beneficia et favores ampliandi sunt, ut ff. de liberis et posthumis l. cum quidam (D. 28,2,19) (…)" in ALBERTUS DE GANDINO, *Tractatus de maleficiis*, § *De transactione et pace in maleficiis faciendiis*, cit., n. 12.

[59] D. 9.2.23.9 *Ulpianus libro 18 ad edictum*: "Si dolo servus occisus sit, et lege Cornelia agere dominum posse constat: et si lege Aquilia egerit, praeiudicium fieri Corneliae non debet".

[60] D. 9.2.46 *Ulpianus libro 50 ad Sabinum*: "Si vulnerato servo lege Aquilia actum sit, postea mortuo ex eo vulnere agi lege Aquilia nihilo minus potest". D. 9.2.47 *Iulianus libro 86 digestorum*: "Sed si priore iudicio aestimatione facta, postea mortuo servo, de occiso agere dominus instituerit, exceptione doli mali opposita compelletur, ut ex utroque iudicio nihil amplius consequatur, quam consequi deberet, si initio de occiso homine egisset".

[61] "Tunc videtur, quod facta pace vel absolutione super una, quod altera tollatur" in ALBERTUS DE GANDINO, *Tractatus de maleficiis*, § *De transactione et pace in maleficiis faciendiis*, cit., n. 12; cfr. D. 47.10.7. 1 e D. 50.17.178.

[62] Gandinus does not seem to have alwyas been of this opinion: in the *Quaestiones statutorum*, in fact, the rubr. 86 poses the same problem: "Vulnerato Titio a Sempronio pluribus vulneribus, Titius fecit pacem de dictis vulneribus, et pestea mortuus est: queritur an videatur fecisse pacem solum de vulneribus vel etiam de morte subsecuta". Diametrically opposite, however, is the solution proposed here: "Item et similiter fingimus mortuum tempore vulnerstionis, et hanc ultimam oppinionem approbo".

[63] ALBERTUS DE GANDINO, *Tractatus de maleficiis*, *De transactione et pace in maleficiis faciendiis*, cit., n. 12.

[64] Glossa *te filio ad* C. 2.3.1.: "pactum ideo valet de iure futuro, quia duorum consensu vallatur".

[65] D. 2.14.7.14: " Si paciscar, ne operis novi nuntiationem exsequar, quidam putant non valere pactionem, quasi in ea re praetoris imperium versetur: Labeo autem distinguit, ut si ex re familiari operis novi nuntiatio sit facta, liceat pacisci, si de re publica, non liceat: quae distinctio vera est. Et in ceteris igitur omnibus ad edictum praetoris pertinentibus, quae non ad publicam laesionem, sed ad rem familiarem respiciunt, pacisci licet: nam et de furto pacisci lex permittit".

[66] D. 50.4.6.2: "Si quis accusatorem non habeat non debet honoribus prohiberi, quemadmodum non debet is cuius accusator destiterit".

[67] C. 6.43.2.3: "Nos enim non verbis, sed ipsis rebus leges impnimus". On the subject, Gandinus also recalls a law of Frederick II, collected in *Libri Feudorum* (F. 2, 53): "Si quis vero aliquod ius de quacumque re vel facto contra aliquem se habere putaverit: iudicialem adeat potestatem et per eam ius sibi competens exequatur".

[68] "Sed pone homicidam habuisse ab heredibus pacem occisi. Numquid per potestatem poterit puniri, non obstante pace predicta? Et videtur quod sic: quia ius acquisitum, communi pactione privatorum nec tolli nec mutari potest […]. Item quia maleficia non debent impunita manere […]. Secundum opiniones communiter aliorum (*contra opinionem Guidonis de Suzaria*) dic quod sive super illo crimine possit transigi sive non, quod illa transactio sive pax non impediat condemnationem super eo faciendam per potestatem, sive sit statutum sive non, et ita de consuetudine observatur, et hoc per illa ratione, quia omnis delinquens offendit rem publica civitatis, ubi maleficium committitur, et illum quem ledit" in ALBERTUS DE GANDINO, *Tractatus de maleficiis*, § *De transactione et pace in maleficiis faciendis*, n. 10, p. 194.

the capacity to legislate, so that the rules deliberated by them find effective application, regardless of their greater or lesser severity. If, moreover, there is no statute which derogates from the common law with regard to the discipline to be applied to a given offence, and the power of settlement is provided for, the authority cannot proceed against the offender in any way, since the purpose of the settlement is both to heal the enmity between the parties and to annul the harm which the offence of the individual has caused to the community.

The other possible direction of the doctrine, towards which Gandinus also seems to lean, is that the *maleficium* is committed not only to the detriment of the private individual, but also to the detriment of the whole community; therefore, whether it has been settled or not[69] the authority fully retains its power to punish the offender. The settlement is an institution for the benefit of the individual offended, not of the whole community.

This is a fundamental principle. Until the thirteenth century, a criminal offence was considered harmful only to the personal legal sphere of the individual, and not to a good which, although pertaining to the individual, was part of a community. When an indisputable right is infringed, the injury does not remain in the legal sphere of the harmed individual, but is reflected on the whole *societas* of which the individual is a member.

In the *Quaestiones statutorum,*[70] Gandinus deals with this problem and says that if the city has created a statute under which a peace agreement or settlement entered into between private individuals has no preclusive effect against the public prosecution, then it may observe the statute and punish the offender. Peace and settlement, he concludes, according to the *Lex Transigere*, have the capacity to heal every wrong, which cannot be brought back up by any subsequent event: if, however, the municipal statute contains an exception to the law, it must be enforced.

Others, Gandinus tells us, have different opinions on the subject, and say that the settlement has value if it is not certain that the crime has been committed, nor who the perpetrator is, while if the perpetrator is known and notorious, the settlement is not valid.

4.2 What about civil effects?

At first sight, it could be said that the criminal settlement does not prejudice a civil action to be brought regarding the same deed. In fact, it is held that, when different actions derive from the same illicit act, they can all be brought and therefore the criminal settlement does not compromise the exercise of the other actions.[71]

A gloss attributed to Accursius, however, considers this reading false. This is for three reasons: first, because when there is a settlement of general value, it is a cause of preclusion against all actions, including those not taken into consideration; then, because the obligation assumed not to sue cannot in any way be overruled; and finally, because whoever agrees not to advance certain claims is obliged not to do so, or if they do, they must change their title. With respect to an *iniuria*, one can, therefore, act *civiliter aut criminaliter*. If one acts *civiliter*, one retains full ownership of the action brought, which can be revoked *dissimulatione causa*, that is, in the *quaestio,*[72] by displaying a behavior that *verbis vel pacto* overrules the offense through *acta subsequentia.* The *quaestio* is posed in the following terms: "Sed quid, si tibi feci iniuriam et postea bibisti et cooedisti mecum?": if the action brought by the offended regarding that *iniuria* was of a civil type, their subsequent behavior would have the value of an annulment *nuda voluntate*, a *transactio de facto,*[73] because the fact of *bibere et comedere* was in itself held as able to represent both forgiveness and renunciation of any revenge.[74]

Only a stated exception has the power to leave the victim with a residual cause of action for civil damages.

But if the action brought has a criminal character, then the public function would be implicated, because according to the criminal logic, what the plaintiff is asking for is a penalty, and the penalty, the reference runs to the brocard "quae debet imponi, applicanda est fisco"[75]: that is to say, the public subject acquires a right not owned by anyone other than it, and certainly *not tollitur* by the one who set the proceedings in motion.

There are two profiles, therefore, with a private and a public character, both contained within a rational and plausible logic, which complete each other in a design that aims to harmonize the purposes via a division of tasks. The violation of the right is separated from the violation of the good, and the injured good is divided according to two distinct logics that give life to two different aspects: the material one, concretely appreciable, that belongs to the victim, and that must be compensated; and the immaterial one, which belongs to the *civitas* and which must be

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69 D. 50.17.45. 1: "Privatorum conventio iuri publico non derogat".

70 ALBERTUS DE GANDINO, *Quaestiones statutorum*, cit., q. 106, pp. 209-210: "De homicidio vel de vulnere est facta pax vel transactio: numquid, non obstante pace vel transactione, potestas possit punire, secundum formam statuti?".

71 CARBASSE, J.-M., *Note sur le fondements civilistes du pactum pacis médieval*. In: *Auctoritas. Mèlanges offerts à Olivier Guillot*, Paris, 2006, pp. 385-396.

72 ALBERTUS DE GANDINO, *Tractatus de maleficiis*, § *De transactione et pace in maleficiis faciendis*, n. 11, pp. 194-195.

73 According to the gloss to the *Institutiones* "tollitur etiam nudo pacto ipso iure", a transactio de facto would be admissible, and this would happen when the parties, after the commision of the illicity, had friendly relations. The contrary view, on the other hand, states that the offence gives rise to the infrigement of a right and, at the same tim, to the claim to satisfaction. Now, a transactio de facto, while healing the enmity between the parties, does not annul the injury, let alone the right to satisfaction. In the case of a criminal offence, for which the law allows the transaction, for this to be valid, the will is not enough, but a pact and unequivocal agreements are necessary. Cfr. Glossa *non revocaverit, ad Ist*. 4, 4, *de iniuriis*, lege haec actio: "sed si semel ad animum revocaverit, non remittitur per nudam voluntatem: sed pro voluntatem nudam versis vel pacto expressam, sic etiam ipso iure".

74 The sourses agree in welcoming the teaching of the practical and in equalizing, as to the effectiveness of peace, the form of the public act and that of kissing and being diners. Vd. *Statutum Urbis Romae* ref. 1580, II, 28, *De frangentibus reconciliationem osculo oris aut aliter factam*: "Pacem de qua non est factum instrumentum, sed solum pacis osculum seu potus, vel alius reconciliationis modus intervenerit".

75 ALBERTUS DE GANDINO, *Tractatus de maleficiis*, § *De transactione et pace in maleficiis faciendis*, n. 12, p. 195.

repaid through punishment. Legally, a qualitative leap has been made. "An abstraction, as we see. Which happens whenever the juridical makes a qualitative leap".[76]

5. Conclusions

The jurists, not questioning the authority of Diocletian's constitution, never wondered whether or not it was lawful to settle in the field of criminal law, but rather focused their attention, from the earliest generations of the Gloss school, on a series of questions relating to the effectiveness, limits and effects that a settlement concluded *super crimininibus* could have on the subjects outside the transaction and, above all, on the *res publica*.

The *quaestiones* all revolve around a single question: how far can the autonomy of private individuals go in conditioning repression against crime? And furthermore, to what extent could a valid agreement between the injured party and the offender prejudice third parties or be enforceable against them? If one accepts the efficacy *erga omnes* of the settlement, does this preclusion also affect the inquisitorial judge? On the basis of the *quaestiones* examined, we can conclude that criminal settlements are no longer held capable of preventing *inquisitio ex officio*. However, their validity is not diminished, because at trial they ensure that the offender does not incur the death penalty.

In this regard, it is of particular interest that, despite the fact that the *transactiones de crimine* belong fully to the sphere of criminal law, the problem is analyzed and resolved according to private *rationes.* The reason for this attitude is that *paces*, *concordiae*, *transactiones de crimine* operate as settlements *iuris privatorum* and are configured as civil instruments 'lent' to a criminal law that is not yet fully placed in the sphere of public interest.

The novelty of the positions that we read as emerging from the *quaestiones* does not concern the practical solution proposed. After all, the insertion of a clause capable of extending the validity of the *transactio* to the case of *morte subsecuta* was already known and widely used in notarial practice, being a very useful tool to avoid feuds and private vendettas. On the contrary, the *quid novi* is contained in the motivations that led doctrine to agree with a practice that had been long in use.

From the comparative-historical analysis and the *quaestiones* addressed, it is clear that for the *transactiones de crimine* we cannot speak of a 'survival', but rather of a transformation, of an adaptation to the new needs of society. The *auctoritas* chooses to make use of instruments such as the criminal settlements, able at the same time to achieve and maintain the *pax publica seu civitatis* and to satisfy the ancient thirst for revenge which, although dormant, hidden between the folds of a public justice, continues to live in the forms of a negotiated justice.

[76] SBRICCOLI, M., *"Vidi communiter observari"*, cit., p. 109.

'Pandemic Criminal Law' in Continental European Legal History

*Vid Žepič**

Abstract

The article outlines the development of official criminal policy against the spread of infectious diseases, especially the plague, in continental Europe from antiquity to the end of the 18th century. The crimes and their punishments are presented on the basis of city statutes, early modern penal codes and contemporary legal doctrine. Surprisingly, even though European countries faced devastating plague pandemics, no significant criminal-law related state intervention in pandemics took place until the 16th century, except in a number of coastal cities of the Mediterranean and northern Italian cities. The prosecution of sanitary crimes was the business of sanitary magistrates, who were in charge of wide criminal jurisdiction. The 'pandemic criminal law' was characterised by harsh penalties resembling martial law, criminalisation of both commission and omission, intentional and negligent offences, and the departure from the principle of legality when it was already an established legal principle.

Keywords: *Plague law; criminal law; Pestordnungen; pandemic; health magistrates; plague spreaders; Holy Roman Empire; Dubrovnik; Italy; quarantine; sanitary cordon; Roman law.*

1. Introduction

'The time of the plague is called the time of death. The plague dissolves all law.'[1] The idea that the laws remained silent at the time of the plague was the governing topos of the early modern legal treatises.[2] However, the pandemic situation did not lead to a context of total lawlessness, as it is occasionally invoked by the legal adages such as 'Necessity knows no law' and 'Necessity makes licit what is illicit.'[3] From the 16th century onward, jurists, in legal treatises dealing with the plague (*Tractatus de peste*), described and analysed deviations from the general law in pandemic situations, the issues involved concerning mainly civil law aspects; meanwhile, questions of criminal law were largely neglected.

Taking into account the fact of there being virtually no reports in ancient legal and literary sources on the official reaction to the health offences,[4] the task of medieval and early modern jurists in dealing with the legal aspects of recurrent plague waves was particularly challenging.[5] Jurist Bartolus (1313–1357) believed the plague to be a greater scourge than most human wars. According to him, the pandemic was God's war against human wickedness.[6] In his characterisation of the plague as a divine punishment, Bartol referred both to the Bible and to Justinian's 77th Novella, which is in fact the only constitution

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1 *Tempus pestis dicitur tempus mortis, quo solvuntur omnia iura*. GAIL, A., *Practicarvm observationvm tam ad processvm ivdiciarivm praesertim imperialis camerae, qvam cavsarvm decisiones pertinentivm*. Köln, 1578, p. 114.

2 *Tempore pestis leges silent.* DIANA, A., *Antonini Diana Panormitani, clerici regvlaris, coram sanctiss. d.n. Innocentio x. episcoporvm examinatoris, & sancti officij regni siciliae consultoris, resolvtionvm moralivm*. Lyon, 1664, p. 146.

3 See the adages *Necessitas non habet legem* and *Propter necessitatem illicitum efficitur licitum*.

4 WAZER, C., *Salus Patriae: Public Health and the Roman State*. Columbia, 2017, p. 76 ss.

5 The author of the 16th-century legal treatise on the plague, Praevidellus, prefaced his work by stressing its importance: *Nec forsitan hic melius labor erit inutilis, quandoquidem de hac re parum uel nihil admodum scripti reliquit antiquitas. Cum tamen materia esset magnopere scriptione digna*. ('And this work may not be useless, given that little or nothing was written on the subject in the ancient world. Although the matter would be worthy of extensive writing.') PRAEVIDELLUS, H., De peste & eius priuilegiis. In: *Tractatus illvstrivm in vtroqve tvm pontificii, tvm caesarei iuris facultate Iurisconsultorum, De variij verbis Iuris*. Venice, 1584, p. 2.

6 *[T]empore mortalitatis instantis de anno Domini 1348 prout scitis erat tanta pestilentia […] & fuit illa hostilitas Dei, fortior quod hostilitas hominum*. ('At the time of the sudden mortality in the year of the Lord 1348 there was such a plague, as you know […] and this hostility of God was stronger than the hostility of men.') BARTOLUS DE SAXOFERRATO, *Bartolus super prima digesti novi cum additionibus antea positis additis etiam apostillis Andree Barbatie*, Venice, 1505, p. 100.

in Justinian's legislation that mentions the plague (*pestilentia*) in a legal context.[7]

Later jurists, in line with Bartolus' teaching, consequently suggested that deviant behaviour in pandemic situations should be judged according to the rules applicable in a state of war: 'And since this enmity of God is greater than the enmity between men […] the doctors conclude that the argument of war is also valid in times of pestilence.'[8]

In 1570, Ingrassia (1510–1580), an Italian physician and major figure in the history of medicine and human anatomy, stressed that the governmental response during the plague period should not only encompass necessary material means to aid the citizens and the organised disposal of contaminated objects, but also sanction the use of legally prescribed force. Not merely 'gold', but 'gallows and fire' were indeed 'the three true remedies against contagious diseases.'[9]

Pandemic situations in the past have been linked to the quest for scapegoats among ethnic, religious, professional, and social minorities. Already in the early medieval *leges (barbarorum)*, commandments were common that requiring lepers, who were commonly considered 'civilly' dead, to live in a leprosarium.[10] During the reign of King Philip the Fair, they were blamed for poisoning wells on a massive scale and thereby causing the plague in the first place. The legal response was mass burnings at the stake.[11] Subsequently, the same suspicion was assigned to Jews.[12] The first criminal trial of Jews accused of poisoning wells and spreading disease took place in 1348 in Chillon.[13] Persecutions of these two minorities were later combined with the witch trials. One of Calvin's letters stated that a group of men and women were said to have practised witchcraft to bring the plague into the flesh, whereupon they were burnt at the stake by the authorities.[14] In the early modern era, the suspicion of plague spreaders was also geard toward the Roma people, beggars, prostitutes, pimps, and foreigners at large.[15] Ripa, the author of *Tractatus iuridicus de peste*, an influential legal treatise on the plague, argued that beggars spread the disease by way of their lingering, dishonourable living, and vagrancy in the city.[16] Much like pimps and prostitutes, they ought to

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[7] Iust. Nov. 77, 1: *Et quoniam quidam ad haec quae diximus et blasphema verba et sacramenta de deo iurant deum ad iracundiam provocantes, et istis iniungimus abstinere ab huiusmodi blasphemis verbis et iurare per capillos et caput et his proxima verba. […] Propter talia enim delicta et fames et terrae motus et pestilentiae fiunt, et propterea admonemus abstinere ab huiusmodi praedictis illicitis, ut non suas perdant animas*. ('In addition to the above, there are some who arouse God's anger by swearing in blasphemous language, and oaths using God's name. […] It is because of offences such as these that famines, earthquakes and plagues occur, and that is why we admonish such people to desist from the said evildoings, lest they lose their own lives.') Translationy by MILLER, D. J. D., SARRIS, P., *The Novels of Justinian A Complete Annotated English Translation*. Cambridge, 2018, p. 540.

[8] *[Q]uod maior sit hostilitas Dei quam hominum […] propterea doctores concludunt, valere argumentum de bello ad pestem.* RIPA, G. S., *Tractatus Iuridicus ac Politicus de peste*. Leipzig, 1598 [1522], p. 3 (n. 9). For subsequent use of the topos see VAZ BARBOSA, S., *Principia et loca communia tam decisionum quam argumentorum vtriusque iuris cum plenissima doctorum allegatione collecta.* Barcelona, 1630, p. 38, No. 107: *'Argumentum valet de bello ad pestem, ita Ripa tract. de peste in princ. no. 11. Pestis enim dicitur bellum inter Deum, & homines, ex Bart. l. naturaliter, nu. 23 ff. de vsucap. Ripa vbi proxime, Iodoc. in enchiridion parium, verbo pestis.'* See also intriguing saying in the Pestordnung for the Land of Steiermark (1681): *'Die während der Seuche herrschende Vergiftung der Luft ist gleich dem offenen Kriege'.* SCHAUENSTEIN, A., *Handbuch der öffentlichen Gesundheitspflege in Österreich: systematische Darstellung des gesammten Sanitätswesens des österreichischen Staates*. Vienna, 1863, p. 485.

[9] *Oro, forca, e fuoco, tre sono i veri Rimedi del pestifero contagio*. INGRASSIA, G. F., *Informatione del pestifero, et contagioso morbo.* Palermo, 1576, p. 315. On Ingrassia's treatise, see COHN, S. K., *Cultures of plague. Medical Thinking at the End of the Renaissance.* Oxford, 2010, p. p. 80 ss.

[10] Edictum Rothari, Art. 176: *De lebroso. Si quis leprosus effectus fuerit et cognitum fuerit iudici vel populo certa rei veritas, et expulsus foris a civitate aut casam suam, ita ut solus inhabitet: non sit ei licentia res suas alienare aut thingare cuilibet personae. Quia in eadem diae, quando a domo expulsus est, tamquam mortuus habetur. Tamen dum advixerit, de rebus, quas reliquerit, pro mercedis intuitu nutriatur.* ('The leper. If someone becomes a leper and the truth of the matter is ascertained by the judge or the people and is expelled from the city and his house, so that he lives alone, he is not allowed to legally alienate or donate his possessions to anyone. Because from the day he was expelled from his home, he is considered dead. However, if he lives, he shall be supported by the proceeds of the goods he left behind.') Edited by BLUME, F., Edictus Langobardorum. In: PERTZ, G. H. (Ed.), *Monumenta Germaniae Historica. Legum Tomus IIII*, Hannover, 1868. Translation by LOMBARDO V. In: https://www.freemasonryresearchforumqsa.com/edictus-rothari.php (2. 7. 2022).

[11] HAESER, H., *Lehrbuch der Geschichte der Medicin und der epidemischen Krankheiten*, 2. Bd., Jena, 1865, p. 89. On the criminal prosecution of lepers in modern history, see INGLIS, K. A., Leprosy and the Law: The 'Criminalisation' of Hansen's Disease in Hawaii, 1865–1969. In: QUIRK, H., STANTON, C. (Ed.), *Criminalising Contagion, Legal and Ethical Challenges of Disease Transmission and the Criminal Law*, Cambridge, p. 55 ss.

[12] GRAUS, F., *Pest, Geissler, Judenmorde: das 14. Jahrhundert als Krisenzeit*. Göttingen, 1987. On the origins oft he Jews' association with the disease, see BAY, C., Contagion of the Jews: Metaphorical and Rhetorical Uses of Sickness, Plague and Disease in Pseudo-Hegessipus. In: METHUEN, C.; SPICER, A. (Ed.), *The Church in Sickness and in Health.* Cambridge, 2022, p. 8–27.

[13] On pogroms against Jews, see HECKER, J. F. C., *Die grossen Volkskrankheiten des Mittelalters, Historisch – pathologische Untersuchungen*. Berlin, 1865, p. 65–75; 43. HOENIGER, R., *Gang und Verbreitung des schwarzen Todes in Deutschland von 1348-1351 und sein Zusammenhang mit den Judenverfolgungen und geisselfahrten dieser Jahre*. Berlin, 1881, p. 6 ss; and MODESTIN, G., Von der fama communis zur 'forensichen Evidenz'. Der Vorwurf der Brunnenvergiftung während der Pestjahr 1348–1350 im Spiegel der zeitgenössischen Chronik Heinrichs von Diessenhofen. In: VÖGELE, J., *Epidemien und Pandemien in historischer Perspektive*. Wiesbaden, 2016, p. 287 ss.

[14] 'The Lord is testing us greatly; a conspiracy of men and women has recently been discovered who have, by I know not what magic, spread the plague in the city during these three years. Already fifteen women have been burned, several men have committed suicide in prison because of the terrible punishments, and there are still twenty-five prisoners – yet they do not stop greasing the locks of the houses with ointments daily. Look, these are the dangers we find ourselves in.' Henry, p. 416 s. See also RÜPING, H., JEROUSCHEK, G., *Grundriss der Strafrechtsgeschichte.* München, 2011, p. 57 s; PIETH, M., *Strafrechtsgeschichte*. Basel, 2020, p. 36.

[15] BIRABEN, J. N., Les hommes face à la peste, en France et dans les pays européens et méditerranéens. In: *Annuaires de l'École pratique des hautes études*. 1971, p. 810.

[16] See COHN, S. K., *Cultures of plague. Medical Thinking at the End of the Renaissance.* Oxford, 2010, p. 223.

be banned from the city immediately.[17] The appeals of legal practice were implemented not only in Italian cities. Because they were suspected to be Turkish spies and plague spreaders, in 1512, Emperor Maximilian banned Roma people from entering Austrian lands.[18]

The repertoire of legal-historical studies of the criminal response to the spread of infectious diseases is surprisingly scarce.[19] Nevertheless, it is quite certain that the authorities responded to the socially destructive effects of the spread of infectious diseases and the many accompanying deviant circumstances linked to personal dramas[20] and and limitation of socialisation with restrictive legislative measures, thoroughly transforming the general criminal law.[21] Muratori was undeniably right in saying: 'Despair, terror and melancholy are also a plague in times of pestilence.'[22]

This paper aims to trace the development and basic features of 'pandemic criminal law' as a form of extraordinary criminal law up to the 18th century. In the first section, I discuss the ancient development, followed by the 'pandemic law' in the legislation of the Northern Italian or Mediterranean geographical circle and of the Holy Roman Empire.[23] Then, I describe the basic features of the relevant Theresian and Josephine legislation in the Austrian territories. Lastly, I highlight several common traits of the early-modern 'pandemic criminal law'.

2. Antiquity

Ancient society is led by the conviction that no human being can assert a significant influence on the spread of infectious diseases, whose *causa efficiens* is assigned a transcendent origin. The deep-rooted notion of plague as a divine punishment imposed on corrupt humanity was not only present in Ancient Greece,[24] it was also common in Rome. Hence, when the plague broke out, they addressed public vows (*vota publica*) to spare them of the worst. The vower promised to perform a public service on the condition that the pandemic or some other elementary or social danger would cease. The *votum* was performed in front of the priests, the consul, the praetor, and the assembled people. Titus Livius reported that during the great pestilence (*pestilentia*) of 433–432 BC, a mass vowing in the Temple of Apollo in Rome was held: 'The pestilence that year kept everything quiet. The duumvirs did many things prescribed by the sacred books to appease the wrath of the gods and remove the pestilence from the people.'[25]

In addition to these sacral measures,[26] the Roman authorities sought to protect public health through rudimentary pre-

[17] *Sed si tabificus morbus immineat, non solum lenones & meretrices, sed etiam mendicantes validos debent, qui curam Reipublicae habent, ab vrbe secludere. Hi enim sunt qui morbum introducunt introductumque nutriunt dum vagantur, dum singulos urbis angulos circumeunt, dum se ingurgitant, dum turpiter vitam agunt*. RIPA, G. S., *Tractatus Iuridicus ac Politicus de peste*. Leipzig, 1598 [1522], p. 247.

[18] PEINLICH, R., *Geschichte der Pest in Steiermark*, Graz, 1877, p. 197.

[19] The most comprehensive monograph on the legal-historical aspects of the pandemic, written by ASCHERI, M. (*I giuristi e le epidemie di peste (Secoli XIV–XVI)*, Siena, 1997) deals with criminal law on only two pages from a total of one hundred and seventeen.

[20] The authorities encouraged the denouncement of the afflicted even among the family members. They thereby contributed to breeding discord and distrust in society. CENTORIO, A., *I cinque libri degl'avvertimenti, ordini, gride et editti, fatti et osservati in Milano ne' tempi sospettosi della peste, ne gli anni 1576 et 77.* Venice, 1579, p. 90.

[21] [*N*]*am quo tempore gentes peste affliguntur, ea est rerum omnium perturbatio, ut noui casus emergentes nouas ordinationes necessario exigere uideantur*. ('For at a time when peoples are stricken with the plague, that is, the upheaval of all things, it seems that the cases which appear anew also necessarily call for new ordinances.') PRAEVIDELLUS, H., De peste & eius priuilegiis. In: *Tractatus illvstrivm in vtroqve tvm pontificii, tvm caesarei iuris facultate Iurisconsultorum, De variij verbis Iuris*. Venice, 1584, p. 2.

[22] MURATORI, L. A., *Del governo della peste*. Modena, 1720, p. 9.

[23] Historical developement of the criminal law legislation in anglo-american legal circle is outside the scope of this paper. On this, see COKE, E., *The Third Part of the Institutes of the Laws of England concerning Hight Treason, and other Pleas of the Crown and Criminal Causes.* London, 1797, where a felony against the public health is cited as follows: *'If any person infected with the plague, commanded (by such persons as are appointed by the act) to keep house, shall contrary to such commandment wilfully and contemptuously goe abroad, and shall converse in company, having any infectious fore upon him uncured, such person shall be adjuged a felon.'*

[24] Homer, Ilias 1, 1: '[T]he son of Leto and Zeus; for he in anger against the king roused throughout the host an evil pestilence (νοῦσον), and the people began to perish, because upon the priest Chryses the son of Atreus had wrought dishonour.' See also Homer, Ilias 1,44–53. Ed. HOMER, *Iliad*, Volume I: Books 1–12, translated by MURRAY, A. T.

[25] Liv. *Ab urbe condita* 4, 25, 3–7: *Pestilentia eo anno aliarum rerum otium praebuit. Aedis Apollini pro valetudine populi vota est. Multa decemviri ex libris placandae deum irae avertendaeque a populo pestis causa facere*. Translation by ROBERTS, C. Canon, *Livy's History of Rome*, 1912–24.

[26] *Lectisternium* (*lectum sternere,* 'to spread (or to cover) the bed') was an ancient Roman ritual in which food was placed on the bed and offered to the deities. The rite, which is said to have been first performed in 399 BC and was practised especially during epidemics, is described by Livy, Ab urbe condita, 5, 13, 4-8: *tristem hiemem, sive ex intemperie caeli raptim mutatione in contrarium facta sive alia qua de causa, gravis pestilensque omnibus animalibus aestas excepit. cuius insanabili pernicie quando nec causa nec finis inveniebatur, libri Sibyllini ex senatus consulto aditi sunt. duumviri sacris faciundis lectisternio tunc primum in urbe Romana facto per dies octo Apollinem Latonamque et Dianam, Herculem Mercurium atque Neptunum tribus quam amplissime tum apparari poterat stratis lectis placavere. privatim quoque id sacrum celebratum est. tota urbe patentibus ianuis promiscuoque usu rerum omnium in propatulo posito, notos ignotosque passim advenas in hospitium ductos ferunt et cum inimicis quoque benigne ac comiter sermones habitos, iurgiis ac litibus temperatum; vinctis quoque dempta in eos dies vincula; religioni deinde fuisse quibus eam opem di tulissent vinciri*. ('The severe winter was succeeded, whether in consequence of the sudden change from such inclement weather to the opposite extreme, or for some other reason, by a summer that was noxious and baleful to all living creatures. Unable to discover what caused the incurable ravages of this distemper, or would put an end to them, the senate voted to consult the Sibylline Books. The duumvirs in charge of the sacred rites then celebrated the first *lectisternium* ever held in Rome, and for the space of eight days sacrificed to Apollo, to Latona and Diana, to Hercules, to Mercury and to Neptune, spreading three couches for them with all the splendour then attainable. They also observed the rite in their homes. All through the City, they say, doors stood wide open, all kinds of viands were set out for general consumption, all comers were welcomed, whether known or not, and men even exchanged kind and courteous words with personal enemies; there was a truce to quarrelling and litigation; even prisoners were loosed from their chains for those days, and they scrupled thenceforth to imprison men whom the gods had thus befriended.') Translation taken from LIVY, *Books V, VI and VII With An English Translation*. Cambridge, Mass., 1924, p. 48 s.

ventive measures. For example, the Temple of Asclepius, where the sick usually sought refuge, was built outside the city in 293 BC at the specific request of the Senate.[27] Legislative sanitary precautions included the prohibition of burial within the city walls (*pomerium*) and the precepts to keep drinking water reservoirs and streets clean.

The prohibition of burial within the confines of the walls in the *Lex Duodecim tabularum* was motivated not only by the risk of the outbreak of fire during cremation, but also by the danger of spreading possible diseases caused by the decomposition of a corpse in a warm climate.[28] The sources show several repetitions of this sanitary measure, which is probably indicative of its numerous violations, but also of a strong awareness on the part of the authorities that minimum sanitary standards ought to be ensured. Hadrian extended the prohibition of burial in the city to all cities of the empire.[29] During the time of Marcus Aurelius, it is said that the notorious Antonine plague led to the re-enactment of strict laws on burial practices.[30]

In the 3rd century AD, jurist Paul observed that the act of polluting drinking water in wells, waterworks, lakes, or the pollution by any other substance that would be detrimental to the public interest, was an *iniuria* contrary to sound morals (*iniuria contra bonos mores*).[31] The engineer Frontinus mentioned that the deliberate pollution of water in an aqueduct was punishable by a fine of ten thousand sesterces.[32] Censors and ediles controlled sanitary irregularities.[33] In fact, the cleanliness of the public streets was subject to interdicts by every Roman.[34] Most sanitary offences were treated as *crimina extraordinaria*, i.e., offences imposed by senate decree or by the imperial constitution.[35] Roman law did not include a specific offence protecting public health.[36]

3. 'Plague Law' in Northern Italian and Littoral Towns

3.1 The First Plague Statute

The first curative measures taken by the authorities in the wake of the outbreak of the plague were administrative, introduced with the intention to restrict mobility. The majority of reports on the subject come from the Italian regions.[37] Boccaccio records that in 1348, the authorities in Florence banned infected people from entering the city.[38]

While various sanctions and prohibitions had been put in place to ensure the hygienic minimum for citizens, the first recording of a penal reaction to the violation of pandemic provisions lies in the Plague Statute issued by Visconti on 13 January 1374 for the town of Reggio in Modena: 'We, the lord of Milan, etc., the imperial Vicar, etc., desiring, as far as possible, to protect our subjects from contagion, have adopted the decree

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27 CILLIERS, Public Health in Roman Legislation. In: *Acta Classica*, vol. 36, Classical Association of South Africa, 1993, p. 2, n. 4.

28 Cic. *De legibus* 2, 23, 58 (= XII tab. 10, 1): *Hominem mortuum […] in urbe ne sepelito neve urito* ('Do not bury nor burn a dead body in the city.'); Diocl. Max. C. 3, 44, 12; Isid. *Etymologiae* 15, 11, 1: *Prius autem quisque in domo suo sepeliebatur. Postea vetitum est legibus, ne foetore ipso corpora viventium contacta inficerentur*. ('Originally people were buried in their own homes. Later this was prohibited by law, so that the bodies of the living would not be infected by contact with the stench.') Translation by BARNEY, S. A., LEWIS, W. J., BEACH, J. A., BERGHOF, O., *The Etymologies of Isidore of Seville,* Cambridge, 2006, p. 313.

29 Ulp. D. 47, 12, 3, 5: *Divus Hadrianus rescripto poenam statuit quadraginta aureorum in eos qui in civitate sepeliunt, quam fisco inferri iussit, et in magistratus eadem qui passi sunt, et locum publicari iussit et corpus transferri. quid tamen, si lex municipalis permittat in civitate sepeliri? post rescripta principalia an ab hoc discessum sit, videbimus, quia generalia sunt rescripta et oportet imperialia statuta suam vim optinere et in omni loco valere.* ('The deified Hadrian in a rescript prescribed a penalty of forty gold pieces, payable to the imperial treasury, for those who bury bodies in a city, as also for the magistrates who allow it, and he directed that the place of burial should be expropriated and the corpse moved elsewhere. What if the municipal law allows burial in the city? We must consider whether, in the light of imperial rescripts, this provision has to be departed from; for the rescripts are of general scope and imperial legislation has its own force and should apply everywhere.') Translation by WATSON, A. *The Digest of Justinian, Vol. 4.* Philadelphia, 1985, p. 300.

30 Historia Augusta, Vita Marci 13, 4: *tunc autem Antonini leges sepeliendi sepulchrorumque asperrimas sanxerunt, quando quidem caverunt ne quis villae adfabricaretur sepulchrum, quod hodieque servatur* ('From that time onwards, however, the laws of the Antonines severely punished burials and the making of sepulchres, for they stipulated that no one was to build a sepulchre in his own villa. This is still the case today.')

31 Paul. D. 47, 11, 1, 1: *Fit iniuria contra bonos mores, veluti si quis […] aquas spurcaverit, fistulas lacus quidve aliud ad iniuriam publicam contaminaverit: in quos graviter animadverti solet*. ('It is an affront contrary to sound morals when a person […] defiles waters, water pipes, or a lake, or contaminates anything to the detriment of the public; against such persons, stem action is taken.') Translation by WATSON, A. *The Digest* of *Justinian, Vol. 4*. Philadelphia, 1985, p. 298.

32 Front. Aq. 2, 97: *Ne quis aquam oletato dolo malo, ubi publice saliet. Si quis oletarit, sestertiorum decem milium multa esto.* ('No one shall with malice pollute the waters where they issue publicly. Should any one pollute them, his fine shall be ten thousand sestertii.')
Translation by https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Frontinus/De_Aquis/text*.html, 2. 7. 2022.

33 BAAS, H., *Zur Geschichte der öffentlichen Hygiene,* Braunschweig, 1879, p. 332.

34 Ulp. D. 43, 23, 1, 2: *Curavit autem praetor per haec interdicta, ut cloacae et purgentur et reficiantur, quorum utrumque et ad salubritatem civitatium et ad tutelam pertinet: nam et caelum pestilens et ruinas minantur immunditiae cloacarum, si non reficiantur*. ('The praetor has taken care by means of these interdicts for the cleaning and the repair of drains. Both pertain to the health of civitates and to safety. For drains choked with filth threaten pestilence of the atmosphere and ruin, if they are not repaired.') Translation by WATSON, A. *The Digest of Justinian, Vol. 4.* Philadelphia, 1985, p. 115. On Roman private law protection against pollution of the environment, especially drinking water, see FARGNOLI, Umweltschutz und römisches Recht. In: *Das Vermächtnis der Römer: römisches Recht und Europa: Referate einer Vorlesungsreihe des Collegium Generale der Universität Bern im Frühjahrssemester 2011*. Bern, Stuttgart, Wien, 2012, p. 151 ss.

35 On crimina extraordinaria, see FALCHI, G. F., *Diritto penale romano, I singoli reati*. Padova, 1932, p. 246 ss.

36 REIN, W., *Das Criminalrecht der Römer von Romulus bis auf Justinianus: ein Hülfsbuch zur Erklärung der Classiker und der Rechtsquellen,* Leipzig, 1844, p. 399: 'Injury to health and to the human body in general was never considered a specific, distinct offence under Roman law, but was incorporated in various forms into other offences and constituted partly a punishment and partly compensation for the damage caused.'

37 CARMICHAEL, A. G., Plague Legislation in the Italian Renaissance. In: *Bulletin of the History of Medicine*, Vol. 57, (1983) No. 4, pp. 508–525.

38 BOCCACCIO, G. *Il Decameron, a cura di Aldo Francesco Massera*, Bari, 1927, p. 10.

which we are sending to you, and which we ask to be observed in the town of Reggio and to be inserted in the statute book. Given in Milan on the 17th of January 1374. – To the noble lord, the *podestà* of our town of Reggio: We wish that anyone infected should immediately leave the town, fortified town, or castle where he has been and depart to the fields, countryside, or woods, and remain there until he dies or recovers. Whoever has served (to the infected) should keep himself away (from other people) for ten days after having been in contact (with the infected person). The priests should examine the infected people and find out what is wrong. They should report the sick to officials immediately; otherwise, they are threatened with being burned at the stake. Both movable and immovable property (of the infected) should belong to the commune. The property of the one who spread the plague should be assigned to the *camera domini*, and the property shall not be returned. No one, except those specially qualified to do so, shall, being liable to the penalty of death and forfeiture of property, be allowed to help the infected. The aforesaid shall be communicated to all the subjects.'[39]

The Visconti Decree was adopted in a context in which the adherence to religious processions[40] and veneration of relics were widely regarded as the most effective means to overcoming epidemics. The decree commands the infected to isolate themselves. It is reasonable to conclude that the prescribed isolation period lasted at least ten days, given that this period is also imposed on apparently healthy individuals who have served or have encountered the infected person in one way or another. The statute does not yet envisage specific institutional care for the infected in terms of the subsequent quarantine facilities: the sick person was left to fend for themselves.

The priests, to whom the administrative functions of health inspection were delegated, were responsible for detecting any signs of the disease. The obligation to report obvious signs of the plague among one's social circle was, however, imposed on all residents, whose disobedience was said to be penalized by death. Because priests might, out of pity for the infected, conceal suspicious persons, an omission to report was punishable by death at the stake (a punishment usually reserved for heretics).

The exiled patients had their immovable property confiscated and contaminated movable property was destroyed. The criminal sanction of (definitive) confiscation of property affected those who had deliberately or negligently spread the disease among the city. In the meantime, these people were not explicitly threatened by the death penalty.

In 1383, Visconti reinforced the provisions of the statute and, under penalty of death, forbade city officials to allow foreigners to enter the city if travelling from infected areas[41] Under threat of the death penalty, no one was allowed to take under his roof a refugee who had fled from these areas.[42] These provisions of both orders reveal just how much the authorities sought to compensate for the evasive control of the epidemic by way of total control of the infected.[43]

Among the Mediterranean coastal cities, the Republic of Dubrovnik (*Ragusa*), as a junction of overland and maritime trade routes, had the oldest anti-plague legislation.[44] On 27 July 1377, the Grand Council of Dubrovnik issued, according to the prevailing views (which may be questioned),[45] the world's first quarantine decree: 'In the same year, on the 27th of July, in a Great council assembled as is customary, in which 47 councilors were present, it was taken and confirmed by 33 of them that both our own people and newcomers coming from pestilential places should not be received into Dubrovnik or its district, unless they had first stood in Mercana in the Old City to purify themselves for one month. Likewise, by the councilors 43 of the same council it was taken that no person from Dubrovnik or its district shall dare or presume to go to those who come from pestilential places that stay in Mercana or in the Old City, under penalty of standing there for one month. And those who will bring them provisions or other necessaries cannot go to them without the permission of the officials for this purpose, with an order from the said officials giving them, under the said penalty of standing there for one month. Also by the votes of 29 councilors of the

[39] *Nos Dominus Mediolani, etc. Imperialis Vicarius, etc. Volentes subditos nostros a contagione morbi quanto plus possumus conservare, fecimu quaedam decreta, quae tibi in hoc inclusa mittimus, et quae volumus in Rhegio observari, et in volumine Statutorum nostrorum inseri. Data Mediolani 17. Januarii 1374. – Nobili Viro Potestati nostro Rhegii. Volumus, quod quaelibet persona, cui nascentia, vel brosa veniet, statim exeat Urbem, vel Castrum, vel Burgum, in quo fuerit et vadat ad campos in capannis, vel in nemoribus, donec aut moriatur, aut liberetur. Item qui servient, stent post mortem alicujus decem dies antequam habeant consortium cum aliqua persona. Item Sacerdotes Ecclesiarum Parochialium inspiciant infirmos et videant, quod malum est, et statim notificent Inquisitoribus deputatis sub poena ignis. Item quod omnia bona tam mobilia, quam immobilia applicentur Camerae Domini. Item qui aliunde portaverint Epidemiam, similiter ejus omnia bona sint Camerae Domini, de quibus nulla unquam fiat restitutio. Item quod sub poena bonorum et vitae nullus alius vadat ad serviendum infirmis, praeterquam ut supra. Et de praedictis fiat omnibus subditis notitia. Chronicon Regiense ab anno 1272 usque ad 1388*. In: MURATORI, L. A., *Rerum italicarum scriptores ab anno aerae Christianae quingentesimo ad millesimumquingentesimum*, Milano, 1731, p. 82.

[40] See LEE, A. R. A., Plague and Popular Revival: Ecclesiastical Authorities and the Bianchi Devotions in 1399. In: METHUEN, C.; SPICER, A. (Ed.), *The Church in Sickness and in Health.* Cambridge, 2022, p. 68–90.

[41] SIMON, Ueber Geschichte und Contagiosität der Pest. In: *Zeitschrift für die gesammte Medicin: mit besonderer Rücksicht auf Hospitalpraxis und ausländische Literatur,* 1838, p. 28.

[42] CARMICHAEL, A. G., Plague Legislation in the Italian Renaissance. *In: Bulletin of the History of Medicine,* 57 (4), 1983, p. 512.

[43] See FOUCAULT, M., *Discipline and Punish. The Birth of the Prison.* New York, 1979, p. 195–200, who is vividly describing importance of order and the totality of surveillance during the plague: 'The plague is met by order; its function is to sort out every possible confusion […].'

[44] BLAŽINA TOMIĆ, Z. and BLAŽINA, V., *Expelling the plague: the Health Office and the implementation of quarantine in Dubrovnik 1377-1533*, 2015.

[45] See BLAŽINA TOMIĆ, *Z., Kacamorti i kuga: utemeljenje i razvoj zdravstvene službe u Dubrovniku,* Zagreb in Dubrovnik, 2007, p. 81. However, the Visconti Decree, published three years earlier, already contains a demand for the isolation of the infected and of those who came into closer contact with him. As I have already indicated, the Visconti Decree did not clearly set a time limit for isolation. In the section on protection against infectious diseases in the wider European context, Blažina Tomič surprisingly does not mention the Visconti Decree.

same council it was taken and confirmed that whoever does not observe the aforesaid or any of the aforesaid must pay a fine of fifty perperos and is bound to observe the aforesaid as well.'[46]

The decree stipulated that no newcomer from infected places could enter the city without spending a month in *purgatio* (purification) on the islands of Mrkan (*Mercana*) and Cavtat (*Civitas veteris*), south of Dubrovnik. If townspeople violated the decree and hosted newcomers in their homes or provided them with food without permission from the authorities, they were liable to a one-month quarantine and a fine of fifty perperi. The original Dubrovnik quarantine lasted thirty days (*trentina*) but was later increased to forty days, giving rise to the now commonplace term *quarantina* (forty days).[47]

3.2 Sanitary Magistrates with Penal Jurisdiction

A particular innovation of Dubrovnik's anti-plague legislation was the establishment of the first official anti-pandemic service. In 1390, three officials from the ranks of the city patriciate were responsible for supervising 'those coming from infected places' (*officiales contra venientes de locis pestiferis, officiales ad providendum super venientibus de locis pestiferis*). From 1395 onward, these officials were called *cazamortae* (*caxamortae, cazzamortae*);[48] in other words, those who 'persecute the dead'.[49] Their extensive penal competencies, which led some to place them alongside the ordinary courts,[50] were specified in the decree *Contra eos qui veniuut de locis pestiferis* (1397). Violators of anti-pandemic measures were commonly punished with a fine. However, if they failed to pay their debts, the *cazamortae* arranged for a rigorous corporal punishment: 'The same officials may inflict corporal punishment on the previously named offenders who have not paid the aforementioned (pecuniary) penalty, namely, by beating them with a cane, branding them, or inflicting a similar punishment, up to and including the cutting-off of an ear. […]'[51]

All the while, the *cazamortae* also imposed jail sentences ranging from a few months to a year.[52] As Tomič notes, the *cazamortae* had powers that ranged from the judicial to the executive, and even acted as criminal judges in the case of serious crimes.[53] In 1482, for instance, two gravediggers were prosecuted for having dumped the clothes and other personal effects of a wealthy man who had died of the plague on the street in such a way that the contaminated items were easily accessible to the masses. They were promptly sentenced to death by hanging in light of their carelessness.[54] When the plague spread from Dubrovnik to the village of Konavle in 1503, the jurisdiction of the *cazamortae* was further increased: officials were allowed to incinerate the houses of Konavle villagers who disobeyed the plague laws.[55] Punishment is also reported in the form of branding the convict's cheek and public shaming on the column of infamy.[56]

In 1486, the Senate of the Republic of Venice appointed a Sanitary Council, composed of three councillors (*magistri sanitatis* also known as *proveditori della sanità*), to supervise the observation of health legislation.[57] With the consent of all its members, it was initially allowed only to impose financial penalties on those who infringed the sanitary ordinances.[58] In 1504, the Senate considerably extended its competencies. They were allowed to detain a suspected violator of the sanitary regulations and even torture him when being questioned; famously, the imposition of the death penalty was also available.

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[46] *Cap. 49 Veniens de locis pestiferiis non intret Ragusium. vel districtum. Eodem anno, die XXVII iulii, in consilio maiori congregato ut est moris, in quo interfuerunt consiliarii XLVII, captum et firmatum fuit per XXXIIII ipsorum quod tam nostrates quam advene venientes de locis pestiferis non recipiantur in Ragusium nec ad eius districtum, nisi steterint prius ad purgandum se in Mercana in Civitate Veteri per unum mensem. Item per consiliarios XLIII eiusdem consilii captum fuit quod nulla persona de Ragusio vel suo districtu audeat vel presumat ire ad illos qui venient de locis pestiferis et stabunt in Mercana vel Civitate Veteri, sub pena standi ibidem per unum mensem. Et illi qui portabunt illis de victualibus seu aliis necessariis non possint ire ad illos sine licentia officialium ad hoc ordinandorum, cum ordine a dictis officialibus illis dando, sub dicta pena standi ibidem unum mensem. Item per consiliarios XXVIIII eiusdem consilii captum fuit et firmatum quod quicumque non observaverit predicta seu aliquod predictorum, solvere debeat de pena yperperos quinquaginta et nichilominus teneatur predicta observare*. The text of the Decree can be found in Chapter 49 of the Green Book (*Liber Viridis*). NEDELJKOVIĆ, B. M., *Liber Viridis*, Beograd 1984, p. 23.

[47] More on the carantine of Dubrovnik, see RAVANČIČ, G., Dubrovnik's Invention of the Quarantine and the Transfer of Knowledge about the Spread of Pandemics, In: *Radovi – Zavod za hrvatsku povijest*, Vol. 53 (3), Zagreb 2021.

[48] [*A*]*rctissimis legibus et poenis nexum et institutum est super hoc quoddam officium, cui nomen Cazamortae, in quo ex potioribus et mortis timidioribus quinque eliguntur nobiles, qui vigilantissime a venientibus inquirunt quae urbes, quae oppida et quae loca ac regiones morbo contagioso infectae sint*. DIVERSIS, P. de: *Situs aedificiorum politiae et laudabilium consuetudinem inclytae civitatis Ragusij.* Zara, 1882*,* p. 82.

[49] BLAŽINA–TOMIĆ, *Z., Kacamorti i kuga: utemeljenje i razvoj zdravstvene službe u Dubrovniku,* Zagreb and Dubrovnik, 2007, p. 93, n. 186.

[50] LONZA, N., *Pod plaštem pravde, Kaznenopravni sustav Dubrovačke Republike u XVIII. stoljeću,* Dubrovnik 1997, p. 71.

[51] [*P*]*ossint ipsi officiales praedictos contrafacientes non solventes dictam poenam punire in personam faciendo ipsos fustigare, aut brusculare, vel similem poenam illis inferendo, usque ad incisionem auriculi*. […] GELČIĆ, J., *Delle istituzioni marittime e sanitarie della Repubblica di Ragusa.* Trieste, 1882, p. 140; BLAŽINA–TOMIĆ, *Z., Kacamorti i kuga: utemeljenje i razvoj zdravstvene službe u Dubrovniku,* Zagreb and Dubrovnik, 2007, p. 87.

[52] LONZA, N., *Pod plaštem pravde, Kaznenopravni sustav Dubrovačke Republike u XVIII. stoljeću,* Dubrovnik 1997, p. 71.

[53] BLAŽINA–TOMIĆ, *Z., Kacamorti i kuga: utemeljenje i razvoj zdravstvene službe u Dubrovniku,* Zagreb and Dubrovnik, 2007, p. 93 in 104.

[54] Ibid. p. 108. In 1528, a similar affair broke out when the very member of the health service who was supposed to supervise the burials and burning of contaminated personal effects of the plague victims himself concealed these in order to gain pecuniary benefit. He was sentenced to death by hanging. Blažina–Tomič, p. 174, quotes an excerpt from the judgment (citing *Libro deli Signori Chazamorbi*, a tergo, f. 109'): *'Dizemo et criminalmente ad morte sententiamo prefato Giorgi de Marchetto, sia conduto fore della zitta alle Pille et li sia, infra le porte, inpicato per le canne della gola, ad eo che l`anima si parta dal corpo suspenso, el corpo suspenso senza animma rimanga ad exemplo et castiga deli altri simil exzessi cometer volesseno.'*

[55] Ibid. p. 131, op. 249: […] *de dando libertatem officialibus Cazzamortis quod infectis in Canali et alibi, si non obedient possint conburi facere domum et ipsos inobedientes in ipsis domibus possint conburi facere.* (Acta consilii Rogatorum*,* ser. 3, sv. 29, f. 131–131').

[56] Ibid., p. 134.

[57] RODENWALDT, E., *Die Gesundheitsgesetzgebung des Magistrato della sanità Venedigs. 1486–1550.* Heidelberg, 1956, p. 6.

[58] *Habeant plenam et omnimodam libertatem, Fakultatem, et potestatem ipsi tres de concordia imponendi penas, exigendi eas* […] Codex 'Terra 1483–1485, Senato I–R. 9'. RODENWALDT, E., *Die Gesundheitsgesetzgebung des Magistrato della sanità Venedigs. 1486–1550*. Heidelberg, 1956, p. 117.

The death sentence was to be imposed by the Sanitary Councils for even relatively trivial offences, such as destroying a sign on a door indicating that a plague patient was accommodated in the house.[59] From 1585 onwards, an appeal against a decision of the Council of Sanitary Magistrates was no longer admissible.[60] The position of the sanitary magistrates can be compared with that of the 'judges of blood', since a criminal judgment of the judges of blood also could not, in principle, be subject to appeal under the rules of the *ius commune*.

Additionally, the Sanitary Council was responsible for supervising lazarettos, i.e., facilities where newcomers and locals who were likely to have been infected with a contagious disease had to reside temporarily.[61] Even after recovery, plague survivors were required to spend forty days in the infirmary. Ancient Greek physicians believed that the 40-day period marked the transition from an acute and, in principle, contagious disease to a chronic one that was, in principle, non-contagious.[62]

In Milan, in 1534, Francesco II. Sforza, by a particular act of the *Nuove Constitutioni*, laid the foundations for the functioning of the Sanitary Prefecture (*Officium praefectorum sanitatis*), which eventually became a permanent municipal magistrate's office. The Senate annually elected members of the Council that consisted of two Quaestors, two doctors, a lawyer, and a secretary.[63] The Prefecture was empowered to 'command, fine, confiscate property, judge and punish, including the imposition of the death penalty, all those who do not obey the orders and decrees of the (Sanitary) Commission and the city authorities'.[64] The constitution also contains a rather striking justification for harsh punishments: 'Strict measures are to be taken to prevent crimes which not only ruin the city but threaten the whole province and the human race with a certain end'.[65]

Soon thereafter, specialised councils of sanitary magistrates (*provisores sanitatis, officiales sanitatis, commissarii sanitatis, gubernatores sanitatis, deputati sanitatis*) became a permanent institution throughout the cities of Europe. Under supervision of these councils, addressees seem to have predominantly complied with the sanitary legislation.[66] The harsh penalties certainly contributed to its effectiveness, at least to some extent. According to Muratori, in 1656, four medical magistrates of the Pontifical Congregation for Health in Rome were empowered to prosecute clerics who did not comply with the health measures and, 'after verifying the truth under the martial law, without (the accused's) right of defence' (*sola veritate inspecta, denegatis defensionibus, more belli*), impose the familiar death penalty.[67] Given the general rule that ecclesiastical tribunals were not allowed to shed blood (*Ecclesia non sitit sanguinem*), it is surprising that, once the plague broke out in 1656, the Pontifical Congregation for Health (*Congregazione della Sanità di Roma*) was empowered to carry out the death penalty even against clerics if they violated health precautions. In turn, offences against public health were considered to be among the most aberrant acts, which were subject to the notable observation by Carpzov: 'In the most serious offences, it is permissible to exceed the applicable law because of the immeasurable criminal quantity.'[68]

3.3 *Tractatus de peste* – Criminal Law Aspects

The pioneering work on the (civil) law aspects of the plague was the *Tractatus iuridicus de peste* (1522), written by the professor of Roman and canon law Sannazario della Ripa (1480–1535). Ripa's overview of relaxations of legal rules was followed by the *Tractatus legalis de peste* (1524) by the Bolognese jurist Praevidellus (1496–1534). These two treatises, which have been repeatedly reprinted due to their originality and applicability, addressed a broader audience and contrasted with the specialised commentaries.[69] In both treatises, contagion is described as a deadly disease, which, because of its rapid spread and uncontrollability, forced a frightened population into fleeing. The 'plague law' came into force when an pandemic was officially declared in an area, but according to some views, it was sufficient if it was at least notorious.[70] The texts focused on

[59] RIVA, R. B., 'Per istirpare questa maligna e pestifera contagione'. Sanità pubblica e diritto penale durante la peste di San Carlo (1576-1577). In: *Italian Review of Legal History,* 2020 (6), 11, p. 262.

[60] LE BRET, J. F., *Staatgeschichte der Republik Venedig von ihrem Ursprunge bis auf unsere Zeiten, aus echten Quellen vorgetragen, und nach einer richtigen Zeitordnung geordnet, Des zweyten Theiles zweyte Abtheilung.* Riga, 1775, p. 752.

[61] RODENWALDT, E., *Die Gesundheitsgesetzgebung des Magistrato della sanità Venedigs. 1486–1550.* Heidelberg, 1956, p. 16 ss. The Lazzaretto Vechio, established in 1423, was the first official lazzaretto in Europe. The name lazzaretto comes from the name of the island Santa Maria of Nazareth.

[62] WEDEL, G. W., *Propempticon inaugurale de quadragesima medica*. Jena, 1688, p. 3: *Quadragesima medica terminus est morborum acutorum terminus limitaneus inter acutos & chronicos, ultimus acutorum primus chronicorum, inde productorum, ut, qui ultra quadragesimum diem durat morbus*. ('The forty-day medical time limit is the time limit which separates acute from chronic diseases, the last day of an acute disease being the first day of a chronic disease, as is evident in cases where the disease lasts longer than forty days.')

[63] *Constitutiones Dominii Mediolanensis.* Milano, 1552, p. 22b.

[64] *[I]imperandi, mulctandi, ac bonorum confiscationem ad Sanitatis beneficium, nec non et quascumqe corporis poenas, ad ultimum usque ad Supplicium inclusive iudicandi, et quoscumque eorum mandatis et ordinibus non obtemperantes puniendi, servatis ac non servatis ordinibus et constitutionibus*. *Constitutiones Dominii Mediolanensis.* Milano, 1552, p. 23a.

[65] *Severius enim agendum est ad ea facinora comprimenda, quae non solum oppido, aut civitati perniciem parere, sed universae Provinciae, & humano generi exitium afferre possunt*. *Constitutiones Dominii Mediolanensis.* Milano, 1552, p. 23a.

[66] LE BRET, J. F., *Staatgeschichte der Republik Venedig von ihrem Ursprunge bis auf unsere Zeiten, aus echten Quellen vorgetragen, und nach einer richtigen Zeitordnung geordnet, Des zweyten Theiles zweyte Abtheilung.* Riga, 1775, p. 752.

[67] MURATORI, L. A., *Del governo della peste.* Modena, 1720, p. 247.

[68] *Notissimum est, quod in delictis atrocissimis propter criminis enormitatem jura transgredi liceat.* CARPZOV, B., *Practicae novae Imperialis Saxonicae Rerum Criminalium,* Leipzig, 1723, p. 14.

[69] ŽEPIČ, V., Kužni privilegiji v občepravni doktrini in evropskih civilnih kodifikacijah. In: *Acta histriae,* 30 (1), Koper, 2022, p. 4.

[70] The principle of the law of necessity, which applied only at a certain time and place (*Necessitas est lex temporis et loci*), applied to the privileges of the plague. As soon as the state of emergency ended, the established rules of law came into force. Ibid., p. 6.

private law. In Praevidellus' treatise, there are a few, albeit distinctly limited, questions relating to criminal law. For example, the jurist wondered how to punish a deliberate spreader of the plague: 'I am thinking about a new question, which everyone knows has arisen this year because of the event in Bologna: a plague-infected person, either out of desperation or hatred of humanity, wanting to kill others while himself was dying, went, surrounded by a crowd of people, to a densely populated part of the city to spread the disease (among the inhabitants). Which punishment is to be imposed on him? I argue that he should be punished with the death penalty: the similar text in D. 47, 11, 9 speaks in favour of this since the very matter (namely, the deliberate spreading of the plague) itself leads to death. Baldus also says at the beginning of his commentary on C. 9 (entitled 'Who cannot bring an accusation?') that he who has set the fire must himself be burned. As Baldus says, arson leads to death, so the arsonist should taste that punishment which he threatened. And so, in its sense, is D. 47, 11, 9.'[71]

Thus, Praevidelli proposed that the wilful spreader of pestilence should be condemned to death. He justifies his verdict with two arguments. The first refers to Ulpian's description of the so-called scopelism (*σκοπελισμὸν*, *lapidum positio*), the second includes Baldus' teaching on the just punishment of the arsonist. Scopelism was a rite which was supposed to be especially widespread among the Arab peoples.[72] The local peasants placed stones in the fields of their enemies and threatened that any cultivator of the fenced fields would suffer a violent death, thereby invoking magical powers. Due to the superstitious tendencies of the population, the practice led to famine, as the peasants did not dare to cultivate their fields. Ulpian records that the provincial governors imposed the death penalty owing to the widespread danger of this occult act, which caused great fear among the population: 'There are activities which allow punishment according to the custom of the province. For instance, in the province of Arabia, *σκοπελισμὸν* is called a crime. Its nature is this: several enemies *σκοπελίζειν* the land of the person to whom they are hostile, that is, they place stones as a sign that if anyone cultivates that land, he will die horribly because of the plot of those who place the stones; this creates such fear that no one dares to approach this land, fearing the maleficence of those who place the stones. Such conduct the governor should punish severely, even with the capital penalty; for the very act threatens death.'[73]

In the second part, Praevidellus summarised Baldus' view that the arsonist deserved the death penalty. The criminal quantity of wilful arson was said to be comparable both to scopelism and the deliberate spread of infectious diseases.

From the point of view of assessing the grounds of criminal defenses, the following dilemma of Praevidellus is particularly interesting: 'Someone who is suffering from the plague, and who is known to everyone as being infected, is so foolish or crooked that he wants to embrace or stick to a healthy person and talk to his face: can such a healthy person, who cannot defend himself or slip out of the hands of an infected person except by using a sword or a torch and, if necessary, by killing him, remain unpunished? Think about it, because all laws stipulate that whoever has done something to protect his body has done it by the law. Baldus says in C. 9, 12, 8, that he who kills another out of fear of a tyrant will not be justified in his act (*non penitus excusatur*), but neither does he have to die for it. He may be punished by some other penalty. In addition, both the fear of the tyrant and the fear of the plague may be treated equally in this case, as you have already seen above. […]'[74]

Praevidellus discusses how one could punish a person who, fearing infection, killed a deliberate plague-spreader. He compares the event with Baldus' case, where the perpetrator had killed someone as an order of a tyrant. Baldus considered that this was an unlawful act; however, he argued that the perpetrator could have been punished more leniently because of a serious fear of the tyrant. Praevidellus adopted the same reasoning in the case of the killing of the infectious disease spreader. In this case, he also thought the perpetrator's conduct was illegal, but that his guilt, and therefore the sanction, was reduced.

One of the most detailed descriptions of the authorities' response during the pandemic period is Centorio's report. It records the development of the outbreak of the plague in Milan

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[71] *Quaero de vna noua quaestione quam omnes sciunt hoc anno contigisse Bononiae: quidam peste infectus vel desperatione vel odio humani generis, vt quia moriendo vellet alios secum perire, iuit per frequentes hominum conuentus in frequentioribus locis ciuitatis hunc & illum studiose infectando: qua poena debet puniri. Ego dico istum usque ad poenam capitis esse puniendum: de hoc in simile est tex. in l. sacularij. § sunt quaedam ibi, quia & ipsa res mortem comminat ff. de extraordi. crimi. per quem tex. Bal. in l. data opera: in prin. C. qui accus. non poss. dicit, quod qui magnum incendium iuxta aliquod aedificium fecit causa comburendi debet & ipse comburi ratio est, dicit ipse: quia incendium in quantitate ignis mortem multis praeparat. & ideo incenso mortem quam minatur experiatur. d. § sunt quaedam in ratione sui*. PRAEVIDELLUS, H., De peste & eius priuilegiis. In*: Tractatus illvstrivm in vtroqve tvm pontificii, tvm caesarei iuris facultate Iurisconsultorum, De variij verbis Iuris. Tomus XVIII*., Venice, 1584, p. 184.

[72] The most comprehensive treatise on this mysterious Roman public crime was published by RHODE, M., *Dissertatio juridica de scopelismo.* Frankfurt an der Oder, 1705.

[73] D. 47, 11, 9 (Ulp. 9 de off. procons.): *Sunt quaedam, quae more provinciarum coercitionem solent admittere: ut puta in provincia Arabia σκοπελισμὸν crimen appellant, cuius rei admissum tale est: plerique inimicorum solent praedium inimici σκοπελίζειν, id est lapides ponere indicio futuros, quod, si quis eum agrum coluisset, malo leto periturus esset insidiis eorum, qui scopulos posuissent: quae res tantum timorem habet, ut nemo ad eum agrum accedere audeat crudelitatem timens eorum qui scopelismon fecerunt. hanc rem praesides exequi solent graviter usque ad poenam capitis, quia et ipsa res mortem comminatur*. WATSON, A. *The Digest of Justinian, Vol. 4.* Philadelphia, 1985, p. 299.

[74] *[A]liquis peste laborans quem omnes sciunt secum gestare pestilentiam est ita fatuus vel malignus, quod vult hominem sanum amplexari, vel alias homini sano adhaerere & in faciem eius loqui: An iste sanus non valens aliter illum pestilentem euitare nec alio modo ex manibus illius elabi possit gladio vel fuste illum impune repellere et occidendo si necesse fuerit. Cogitabitis super hoc, omnes leges & omnia iura dicunt, quod illud, quod quis ad tutelam sui corporis cum moderamine fecerit iure fecisse aestimetur. Bal. tamen in l. seruos C. ad l. Iul. de vi. diciti, quod ille, qui metu tyranni occidit aliquem: non penitus excusatur, licet non debeat mori tamen aliqua poena debet puniri & metus tyranni & pestis in hac materia per Docto. solet aequiparari: ut uidistis supra*. PRAEVIDELLUS, H., De peste & eius priuilegiis. In*: Tractatus illvstrivm in vtroqve tvm pontificii, tvm caesarei iuris facultate Iurisconsultorum, De variij verbis Iuris. Tomus XVIII*., Venice, 1584, p. 184.

between 1576 and 1577. Under penalty of confiscation of property, corporal punishment, and – at the judge's discretion – even the death penalty, it was forbidden to enter the city without a certain health pass (*bolletta di sanità*).[75] The authorities encouraged the denunciation of offenders with a denouncer's reward of one-third participation in the exacted fine.[76] The heads of families were obligated, under the threat of the death penalty and confiscation of their property, to report infectious patients to the priests, who in turn reported them to the Sanitary Commission.[77] The home of the infectious patient was sealed and the priest kept the keys.[78] If anyone wished to leave their home, they had to be granted permission by the Health Commission. The houses were locked and the doors of the houses of the sick and suspicious persons (mainly brothels) were sealed with chains.[79] As a consequence of the fear of plague caused by scroungers and beggars, the Milanese health board sought to control also other sectors of the poor. 'Porters, mountain people, women rag dealers, and similar persons who lodged in bed-sits, kept their clothes unwashed and greasy, and gave off the worst stench', were particularly risky 'of causing a big pandemic'.[80] The health board prohibited the entry of tricksters, knaves, negroes, gypsies, herbalists, street-singers, comedians, prostitutes, and similar 'odd sorts of people'.[81] The Health Commission ordered the strict burning of contaminated objects belonging to infected residents. The theft or concealment of these items was considered a qualified crime punishable by death.[82] The Milanese authorities relied heavily on the deterrent effect of the death penalty.[83]

One of the best-known descriptions of criminal proceedings against alleged plague spreaders is Manzoni's depiction of the trial of the greasers (Italian: *untori*, French: *engraisseurs de peste*) in his brilliant novel *I promessi sposi* (The Betrothed, published in 1827). On 22 April 1630, Milanese citizens encountered the walls and doors of the houses and the cathedral to be covered in grease.[84] As the occupants of these buildings were dying of the plague in large numbers and at a higher rate than other Milanese, the belief spread that the plague was caused by humans and that it was therefore 'artificial' (*Teoria della peste manufatta*).[85] The alleged perpetrators were accused of having gathered the grease from the saliva of the plague victims and having maliciously rub it upon public surfaces. The two unfortunate scapegoats were quartered, allegedly left alive in the square for six hours, and then burned at the stake. A pillar of shame (*collona infame*) was erected on the site of the alleged perpetrators' burnt-down house.[86] The accusations against them were unfounded entirely, while the trial itself appeared with Musumeci's words as 'esempio più deteriore della giustizia dell'ancien régime in cui prova legale e tortura sono i tratti peculiari del sistema probatorio.'[87]

4. The "Plague Law" in the Lands of the Holy Roman Empire between the 16th and the 18th Centuries

4.1 Pestordnungen

In the Holy Roman Empire, the governmental measures with a criminal or at least an administrative-punitive character, aimed at limiting the spread of pandemics, are found in the Police Regulations (*Policeyordnungen*). These were the prince's collection of regulations covering mainly administrative, but also, to a lesser extent, civil and criminal law. Regulating various aspects of daily life and public morals would ensure a harmonious life of the community.[88] One of the areas of 'good policy' was also the protection of public health.[89] Due to the *ad hoc* nature of these measures that had to consider local incidence of the disease, they were not included in general state '*Polizeyordnungen*' but in separate '*Infektionsordnungen*' or '*Pestordnungen*'.[90] A common feature of all these orders is that the criminal law means of controlling the pandemic were strik-

[75] CENTORIO, A., *I cinque libri degl' avvertimenti, ordini, gride et editti, fatti et osservati in Milano ne' tempi sospettosi della peste, ne gli anni 1576 et 77.* Venice, 1579, p. 27 s.
[76] Ibid., p. 28.
[77] Ibid., p. 90.
[78] Ibid., p. 259.
[79] RIVA, R. B., 'Per istirpare questa maligna e pestifera contagione'. Sanità pubblica e diritto penale durante la peste di San Carlo (1576-1577). In: *Italian Review of Legal History,* 2020 (6), 11, p. 276.
[80] COHN, S. K., *Cultures of plague. Medical Thinking at the End of the Renaissance.* Oxford, 2010, p. 225.
[81] CENTORIO, A., *I cinque libri degl' avvertimenti, ordini, gride et editti, fatti et osservati in Milano ne' tempi sospettosi della peste, ne gli anni 1576 et 77.* Venice, 1579, pp. 13–15.
[82] Ibid., p. 278.
[83] Ibid., p. 285.
[84] On criminal procedure against alleged Milanese plague-spreaders, see FARINELLI, G., PACCAGNINI, E. (Ed.), *Processo agli untori. Milano 1630: cronaca e atti giudiziari,* Milano, 1988; MUSUMECI, E., 'Il funesto delitto': il contagio e l'imbarazzo dei giuristi. In*: Historia et ius – Rivista di storia giuridica dell'età medievale e moderna,* 12, 2017, p. 5; DI RENZO VILLATA, M. G., Il processo agli untori di manzoniana memoria e la testimonianza (ovvero… due volti dell'umana giustizia). In: *Acta Histriae,* 19 (2011) 3, p. 419–452; PASTORE, A., Dal lessico della peste: untori, unzioni, unti. In: *Acta Histriae,* 15 (2007) 1, p. 134.
[85] STICKER, G., *Abhandlungen aus der Seuchengeschichte und Seuchenlehre, I. Band, Die Pest,* Gießen, 1908–1910, p. 141.
[86] Ibid., p. 144.
[87] MUSUMECI, E., 'Il funesto delitto': il contagio e l'imbarazzo dei giuristi. In*: Historia et ius - Rivista di storia giuridica dell'età medievale e moderna,* 12, 2017, p. 6.
[88] HÄRTER, *K.*, Policeyordnungen. In*: Handwörterbuch zur deutschen Rechtsgeschichte IV,* col. 646–652.
[89] BERGIUS, *J. H. L., Polizey- und Cameralmagazin,* Vienna, 1788, p. 93.
[90] STURM, P., *Leben mit dem Tod in den Reichsstädten Esslingen, Nördlingen und Schwäbisch Hall, Epidemien und deren Auswirkungen vom frühen 15. bis zum 17. Jahrhundert*, Ostfildern, 2014, pp. 137–226. An outline of the *Infektionsordnungen* for the Austrian lands is given by BERGIUS, J. H. L., *Polizey- und Cameralmagazin,* Vienna, 1788, p. 95.

ingly not prioritised. The prevailing norms are, to use the contemporary terminology, those of the law of minor offences or even misdemeanours.[91] The descriptions of offences are either non-existent or of a blanket character: for example, they prescribe that an act is to be 'severely punished' or that an act is forbidden 'under penalty'.

In 1521, Archduke Ferdinand for the Inner-Austrian lands issued the first *Infektionsordnung*.[92] Yet, these did not include penal regulations. The Infection Order of Ferdinand I (1551) identified the source of the plague with people's impiety, debauchery and villainy, which was not renounced despite divine admonitions and commandments from the authorities.[93] It was not until the Infectious Orders of 1571 and 1578 that monetary and corporal punishments for violation of quarantine decrees first appeared.[94] On 12 November 1710, an imperial patent threatened the violators of health legislation with an instant execution by firing squad.[95]

4.2 Crimen extraordinarium

The German-speaking jurists of the late 18th and early 19th centuries classified the deliberate spread of infectious diseases under the crime of 'generally dangerous conduct' (gemeingefährliche Handlung).[96] According to the provisions of the *Allgemeines Landrecht*, as observed by Binding, the threat had to endanger 'the State, public safety or many people'. It was not until the 19th century that the prohibited consequence was limited to injury to life, health and property.[97] Notably, the spread of the animal plague was defined as a separate crime.[98] In addition to the deliberate spread of infectious disease, arson, causing a flood risk, and poisoning were the main manifestations of the offence of 'generally dangerous conduct'. Only arson (*incendium*) was regarded as a separate offence, with a history going back as far as Roman law.[99] Ultimately, a great dilemma arose for the learned jurists as to which Roman law delict or public crime the spreading of infectious diseases could be classified as. The question was also related to whether only intentional or also negligent forms of the commission were to be targeted.

Abegg, German criminal law scholar, commented on the crime of 'generally dangerous conduct' found in the Roman *Lex Aquilia*.[100] Meister claimed that the delict of *damnum iniuria datum* could only be spoken of in the case of an interference with property and not with public health. If, on the other hand, the interference was concerning personal property, the judges would have to resort to the principles of the crime of public violence (*vis*), injury (*injuria realis*), or another extraordinary crime (*crimen extraordinarium*).[101] Abegg's attempt to describe universally dangerous conduct in the mould of the Aquilian law was supported above all by the desire to criminalise the negligent form of the spread of infectious disease.[102] This was unthinkable under the rules of *iniuria*, which were applicable only in the case of intentional acts. Some jurists equated the intentional spreading of a contagious disease, such as syphilis, with being a form of poisoning.[103] The latter resulting in death was found to be a qualified form of manslaughter.[104]

The history of regulations against plague in the Middle Ages and of the practice confirms the criminal relevance of any act or omission that constituted a danger to public health.[105] This applied not only to epidemic diseases such as plague, but also included the spread of sexually infectious diseases such as syphilis. Roßhirt, antoher German criminal law scholar, pointed out that the dispositions of the offence were rather blanketed. In the practice of the Middle and Modern Ages, 'any deliberate circumvention of the rules of the sanitary police was punishable if the authorities had so ordered […] and even without a prescribed penalty, it was possible to impose a penalty *ex arbitrie* since police practice never bothered to apply the principle of

[91] They are cited by HIERSCHE, A., HOLZINGER, K. IN EIBL, B., *Handbuch des Epidemierechts unter besonderer Berücksichtigung der Regelungen betreffend COVID-19*. Vienna, 2020, p. 4, n. 21. See also the detailed study by STURM, P., *Leben mit dem Tod in den Reichsstädten Esslingen, Nördlingen und Schwäbisch Hall, Epidemien und deren Auswirkungen vom frühen 15. bis zum 17. Jahrhundert*. Ostfildern, 2014, pp. 206-210.

[92] FLAMM, H., *Die ersten Infektions- oder Pest-Ordnungen in den österreichischen Erblanden, im Fürstlichen Erzstift Salzburg und im Innviertel im 16. Jahrhundert.* Vienna, 2008, p. 11.

[93] GLASER, E., Kuga v dobi Andreja Perlacha. In: *Časopis za zgodovino in narodopisje. Maribor,* 62 (1991) 2, p. 207.

[94] FLAMM, H., *Die ersten Infektions- oder Pest-Ordnungen in den österreichischen Erblanden, im Fürstlichen Erzstift Salzburg und im Innviertel im 16. Jahrhundert.* Vienna, 2008, p. 22.

[95] MACHER, M., *Handbuch der kaiserl. königl. Sanität-Gesetze und Verordnungen mit besonderer Beziehung auf die inneröstreichischen Provinzen, Erster Band.* Graz, Ljubljana, Klagenfurt, 1846, p. 36.

[96] HEFFTER, A. W., *Lehrbuch des gemeinen deutschen Criminalrechtes.* Halle, 1848, p. 331; BINDING, K., *Lehrbuch des Gemeinen Deutschen Strafrechts. Besonderer Teil, Zweiter Band, Erste Abteilung, Leipzig, 1904*, p. 1–9.

[97] BINDING, K., *Lehrbuch des Gemeinen Deutschen Strafrechts. Besonderer Teil, Zweiter Band, Erste Abteilung,* Leipzig, 1904, p. 2.

[98] Under the provisions of the Allgemeines Landrecht, the intentional spreading of cattle plague was punishable by three to six years' imprisonment, or, if the perpetrators could only be held guilty of gross negligence, by six months' to three years' imprisonment: 2, 20, 17 § 1506 ALR: *'Wer ansteckende Seuchen unter das Vieh verbreitet, hat, wenn es vorsätzlich geschehen ist, eine drey- bis sechsjährige; im Falle einer groben Fahrläßigkeit aber, oder bey übertretenem Polizeygesetze, eine sechsmonathliche bis dreyjährige Zuchthaus- oder Festungsstrafe verwirkt.'*

[99] ABEGG, J. Fr. H., *Lehrbuch der Strafrechts-Wissenschaft.* Neustadt, 1836, pp. 515–516.

[100] Ibid., p. 526.

[101] *Quodsi desit damnum patrimoniale, ad aliud delictorum genus laesio referenda est. Sic, quod illicite dolo malo, alteri tantum nocendi aut aegre faciendi causa fit, sed sine patrimonii damno, pro varia circumstantiarum ratione, tanquam vis, iniuriarum, stellionatus, aliudve extraordinarium crimen puniri potest*. MEISTER, G. J. F., *Principia ivris criminalis Germaniae Commvnis.* Göttingen, 1819, p. 202.

[102] Ulp. 9, 2, 44: *In lege Aquilia et levissima culpa venit*. ('Under the lex Aquilia even the slightest degree of fault counts.')

[103] GROLMAN, K., *Grundsätze der Criminalwissenschaft nebst einer Darstellung des Geistes der deutschen Criminalgesetze.* Giessen, 1798, p. 346.

[104] Cf. Ant. C. 9, 18, 1 pr., *Plus est hominem veneno extinguere quam occidere gladio*. ('It is worse to kill someone with poison than with a sword.')

[105] ROßHIRT, K. F., *Geschichte und System des deutschen Strafrechts, Dritter Theil, Zweite Abtheilung.* Stuttgart, 1839, p. 182.

nulla poena sine lege to these matters'.[106] The absence of a consistent application of the principle of legality is particularly important in terms of the history of public health offences. If there was no prescribed punishment for acts, but the gravity of the act corresponded to some other foreseeable offence, there was no obstacle to punishment according to the judge's discretion or by analogy.[107] The *Constitutio Criminalis Carolina*, a source of substantive and procedural criminal law from the 16th to the 18th centuries, did not acknowledge the principle of legality. Moreover, *Carolina* did not foresee a closed catalogue of offences, of which only a small number are described by way of exhaustive statutory signs. The judge was allowed to apply, in the alternative, the 'common law of the empire', in other words, the received rules of Roman and canon criminal law.[108]

The cases of the spread of sexually transmitted diseases were particularly challenging. This field has been the subject of legal theoretical debate from a relatively early stage.[109] Curiously, according to Carpzov, prostitution *per se* was still punishable by burning at the stake, whereas he made no mention of the intentional transmission of a sexually infectious disease.[110]

The *Allgemeines Landrecht* regulated the offences of prostitutes (*Gemeine Hurerey*) in the section on 'carnal offences' *('Von fleischlichen Verbrechen'),* although the prevailing view at the time was that prostitution was not a crime; after all, it did not lead to injury or endangerment of third parties.[111] The ALR stipulated that a prostitute who showed signs of syphilis had to inform the manager of the brothel, who in turn informed the police, to prevent the further spread of the sexually contagious disease by isolating the subject.[112] Regardless of whether the prostitute knew of her syphilis infection and the disease spread,[113] she was liable to a three-month prison sentence and, in the event of a relapse, to the sentence's extension by six months.[114] If the infected female prostitute (*angesteckte Weibsperson*) concealed the existence of the disease and thereby continued the spread, she was subjected to a six- to a twelve-months prison sentence.[115] Persons who were not employed in a brothel, but who knew they were infected with syphilis and who recklessly had intercourse with others and infected them, also risked three months of imprisonment.[116]

4.3 *Constitutio Criminalis Theresiana* (1768)

In 1728 and 1732, Charles VI ordered the establishment of a sanitary cordon with quarantine facilities on the Austrian-Ottoman border.[117] Whoever crossed the border at a time when the plague on the Turkish side was raging had to remain in quarantine for 84 days, while 42 days sufficed in the event of a suspected plague. Even when there were no plague reports or rumours thereof, the quarantine lasted up to 21 days.[118] Quarantines made border crossings very difficult, but they were effective in reducing the risk of an outbreak of the plague.[119]

Between 1755 and 1764, Maria Theresia amended Charles's decrees for the Austrian Littoral (the counties of Gorizia and Burgenland) as well as for the Austro-Turkish frontiers. In 1766, all the provisions were supplemented by punitive decrees in the 'Penal Code for Sanitary and Contumacy Offenders' (*Strafgesetz für die Uebertreter der Sanität- und Kontumaz-Ordnungen*). The rel-

[106] Ibid, p. 183.

[107] SCHMIDT, E., *Einführung in die Geschichte der deutschen Strafrechtspflege.* Göttingen, 1965, p. 166 s.

[108] 'Art. 105 [of the CCC], *qui, ingenue fatens, omnium omnino criminum poenas CCC, haud contineri, judices, si de crimine aliquo aut plane nihil sancitum, aut poena ejus silentio praetermissa aut certe non satis distincte explicata sit, ante omnia ad jura communia imperialia respicere jubet. Sub juribus imperialibus autem in primis jus Romanum intelligi neminem fugit, quocirca hic, ubi crimen aliquod in CCC omissum esse deprehendimus, ad jus illud recurrendum atque ex ejus praeceptis CCC. supplendam esse, sequitur*.' Since the question of the application of the law and the understanding of the sources often caused insurmountable difficulties for the untrained judge, he was permitted to turn to the learned jurists (*radts pflegen*) at the law faculties in doubtful cases.

[109] On recent history, see GREGG, S. M., Criminal Punishment for the Transmission of Sexually Transmitted Diseases: Lessons from Syphilis. In: *Bulletin of the History of Medicine*, vol. 65, no. 4, 1991, p. 550 ss.

[110] *'Der Fall, wenn ein mit venerischer Krankheit behafteter Mensch einen andern durch Beischlaf ansteckt, gehört ganz vorzüglich zu den Verbrechen wider die Gesundheit. Die deutschen Gesetze erwähnen denselben nicht. Sie wollen Schwächung und Hurerei bestraft wissen, und vergessen im heiligen Eifer über diese strafbaren (??) Vergehen, die Hauptsache!'* TITTMANN, C. A., *Grundlinien der Strafrechtswissenschaft und der deutschen Strafgesetzkunde zum Gebrauche bei Vorlesungen*. Leipzig, 1800, p. 118.

[111] MAYER, C. W., *Prostitution unde venis, quo vadis? Zur Definition, rechtshistorischen Entwicklung und aktuellen juristischen und gesellschaftlichen Bewertung der Prostitution.* Hamburg, 2021, pp. 150 ss.

[112] 2, 20, 12 § 1013 ALR: *'Wird eine Weibsperson in einem dergleichen Hause mit einer venerischen Krankheit befallen: so muß es die Wirthin der Polizey sofort anzeigen, und nach deren Anordnung, für die Cur und Verhütung des weitern Ansteckens sorgen.'*

[113] FEUERBACH, P. J. A. V., MITTERMEIER, C. J. A, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechtes,* Giessen, 1847, p. 727.

[114] 2, 20, 12 § 1014 ALR: *'Unterläßt sie dieses: so hat sie das erstemal Gefängnißstrafe auf drey Monathe; im Wiederholungsfalle aber sechsmonatliche Zuchthausstrafe, mit Willkommen und Abschied verwirkt.'*

[115] 2, 20, 12 § 1015 ALR: *'Hat die angesteckte Weibsperson ihre Krankheit verschwiegen, und dadurch zur weitern Ausbreitung des Uebels Anlaß gegeben: so soll sie mit Zuchthausstrafe auf sechs Monathe bis Ein Jahr, nebst Willkommen und Abschied, belegt werden.'*

[116] 2, 20, 12 § 1026 ALR: *'Alle nicht in Hurenhäusern lebende Personen, welche wissen, daß sie mit einer venerischen Krankheit behaftet sind, aber dennoch sich mit Andern fleischlich vermischen, und wieder damit anstecken, haben eine dreymonatliche Gefängniß- oder Zuchthausstrafe verwirkt.'*

[117] See the text of Charles order in: HERRENLEBEN, S. G. *Sammlung Oesterreichischer Gesetze und Ordnungen wie solche von Zeit zu Zeit ergangen und publiciret worden, so viel deren vom Jahr 1721 bis Höchst-traurigen Tod-Fall der Römisch-Kayserlichen Majestät Caroli VI aufzubringen waren*. Supplementum Codicis Pars II. Vienna, 1752, s.v. Sanitäts-Sachen, pp. 499 s and pp 789–790. On this see BRONZA, B., Austrian Measures for Prevention and Control of the Plague Pandemic Along the Border With the Ottoman Empire During the 18th Century. In: *Scripta Medica*, 50 (4), 2019, p. 179.

[118] BRONZA, B., Austrian Measures for Prevention and Control of the Plague Pandemic Along the Border With the Ottoman Empire During the 18th Century. In: *Scripta Medica*, 50 (4), 2019, p. 180.

[119] After the introduction of the sanitary cordon, the plague spread to the Austrian lands only in the years 1739 to 1742 within the territory of Croatia and Hungary. BRONZA, B., Austrian Measures for Prevention and Control of the Plague Pandemic Along the Border With the Ottoman Empire During the 18th Century. In: *Scripta Medica*, 50 (4), 2019, p. 180.

evant norm reads as follows: 'Against all who either themselves knowingly issue false certificates, passports or similar forgeries relating to health, or who make use of such forged documents, or who have knowingly assisted in the use of such forged documents, or who have otherwise obtained such documents, and who attempt, evade quarantine, that such persons shall be punished by death by hanging, and that such persons shall be committed to the nearest criminal court and noble or otherwise privileged persons to their authorities for trial, without the slightest distinction between persons, whether medical officers or subordinates, aliens or serfs. Likewise, We intend that the same punishment shall be inflicted on those officials who allow persons or goods to pass with a knowingly forged passport, as well as on those who allow persons or goods to leave before the expiration of the prescribed period for settlement, and, lastly, on subalterns and officials if they have knowledge of such abuse and do not immediately report it within twenty-four hours to the nearest military command or to the civil authorities, where the proceedings against such offenders shall be expedited as far as possible, and the punishment inflicted shall be executed immediately and without a petition for clemency.' [120]

The death penalty by hanging was foreseen for anyone who had made, presented, or helped to manufacture false sanitary certificates. It did not matter whether the offenders were sanitary officials, foreigners, or serfs. The same penalty was also prescribed for officials who allowed persons with false certificates to cross the border, persons who had not passed the prescribed quarantine or those who received newcomers outside the prescribed quarantine border posts.[121] Those who had travelled from infected areas and lied about their origin or about the origin of goods also faced the death penalty. Innkeepers were threatened with two years of forced labour if they allowed a person to stay overnight without medical authorisation.[122] Offenders were processed promptly, and no pardon was granted.

After the adoption of Maria Theresa's Criminal Code (*Constitutio Criminalis Theresiana*) in 1768, ancillary criminal legislation became part of the general code. Under the heading, 'On public authority and those violent acts contrary to public safety' (*Von dem öffentlichen Gewalt, und jenen gewaltsamen Thathandlungen, so der gemeinen Sicherheit entgegen stehen*), we thus find a characteristically blanketed criminalisation of violations of epidemiological rules: 'The salutary police constitution and the general national security are violated […] in various other ways, for which the violator is to be punished according to the malicious intent, the danger and the harmfulness of the act. […] For crimes of this kind, our noblest ancestors, or ourselves, have already enacted their own and detailed penal laws against the violators; for there are: Firstly, those who act unlawfully at the time of the plague or other contagious diseases, or who exceed the generally prescribed measures in the event of a cattle plague, or who otherwise undertake something dangerous against the state of health.' [123]

4.4 *Constitutio Criminalis Josephina* (1787)

In the General Code of Crimes and their Punishment [124] of Joseph II., the violation of the sanitary regulations can be found in the chapter on political offences that harmed the life and health of fellow citizens (*Von den politischen Verbrechen, die dem Leben oder der Gesundheit der Mitbürger Gefahr oder Schaden bringen*). *Politische Verbrechen* were misdemeanours, prosecuted in administrative proceedings; in this feature, they differed from criminal offences (*Criminalverbrechen*).[125] Since certain ordinances carry the death penalty, their nomotechnical classification as 'political crimes' does not seem to be a very apposite solution.

Under the provision § 25 (2nd Part) of General Code of Crimes and their Punishment, anyone who crossed borders or brought goods by land or sea to a place beyond a province was quarantined because of the risk of plague outbreaks. Ad-

[120] '*Wider alle, welche entweder selbst falsche attesstate, Pässe, Fehden, Prattika, oder dergleichen die Passirung wegen der Gesundheit betreffende Falsa wissentlich verfassen, oder sich einer solchen falschen Urkunde bedienen, oder wissentlich hiezu verhilflich gewesen, oder auch solche in anderen Wegen erworben haben, und wodurch die jemand treffende Kontumaz abzuleiten versucht wird, ohre weiters mit der Todesstrafe, und zwar mit dem Strang fürgegangen, und zu solchem Ende die hiers unter verfangenen Personen dem nächsten Kriminalgerichte, adelige oder sonst privilegirte aber ihrer betreffenden Obrigkeit zur Prozeßformirung, und zwar ohne den geringsten Unterschied der Personen, sie mögen Sanitätbeamte, oder Subalterne, Fremde oder Untertonen sein, übergeben werden sollen. Ingleichen wollen Wir, daß mit dieser nämlichen Strafe diejenigen Beamten unnachsichtlich angesehen werden sollen, welche auf einen wissentlich falschen Paß die Personen oder Waaren passiren lassen, nicht weniger jene, so den Personen oder Waaren vor Ablauf der vorgeschriebenen Kontumazzeit den Austritt gestatten, und endlich auch die Subalternen und Amtsdiener, wann sie von einer solchen Mißhandlung Wissenschaft haben, und solche nicht sogleich in Zeit von 24 Stunden dem nächstgelegenen Militärkommando, oder der Zivilobrigkeit anzeigen, wo sodann der mit solchen Missetätern abzuführende Prozeß möglichst beschleuniget, und das ausgefallene Urteil sogleich, ohne Bestattung eines Gnadengesuche zum Vollzug gebracht werden solle*.' The text of the Law of 25 August 1766 is quoted by MACHER, M., *Handbuch der kaiserl. königl. Sanität-Gesetze und Verordnungen mit besonderer Beziehung auf die inneröstreichischen Provinzen, Erster Band.* Graz, Ljubljana, Klagenfurt, 1846, p. 85 ss.

[121] § III: 'The officers of the Cordon Stations shall therefore immediately return any person who enters the frontier of the place or direct him to the quarantine station, and if their warning is not obeyed and he tries to enter by force, they shall without hesitation execute him on the spot in accordance with the penal law published on 25 August 1766.' Anno 1770 Sanitäts- und Kontumazordnung, Zweyter Theil, (I. Instruction für die Sanitätskordone, wo sie immer aufgestellet sind, Codex Austriacus Pars IV, Suppl. VI., p. 1264.

[122] BERGIUS, *J. H. L., Polizey- und Cameralmagazin,* Vienna, 1788, p. 96.

[123] § 15 CCT: *Die heilsame Polizeyverfassung, und gemeine Landessicherheit wird […] in verschiedene andere Wege verletzet; welcher wegen entgegen die mißhandlende nach Gestalt des bösen Vorsatzes, Gefährde, und Schädlichkeit der That peinlich zu verfahren ist. […] Oder es sind wegen so gearteter Verbrechen allschon vorhin von Unsern löblichsten Vorfahren, oder von Uns selbst eigene, und ausführliche Straffgesetze gegen die Uebertretter erlassen worden; als da sind: Erstlich: Welche zur Zeit der leidigen Pest, oder anderen ansteckenden Krankheiten gesetzwidrig handlen; oder bey einem Vieheumfall die allgemein vorgeschriebene Maßregeln überschreiten, oder in anderweg was gefährliches wider den Gesundheitsstand unternehmen*. The marginal title to the criminal offence is *Qui tempore pestis, vel contagionis armentariae ordinationibus publicis contraveniunt* ('Whoever, during a time of pestilence or contagion of cattle, contravenes a public ordinance.')

[124] *Allgemeines Gesetzbuch über Verbrechen und derselben Bestrafung.* Vienna, 1787.

[125] § 7, Part 2 of General Code of Crimes and their Punishment. The penalties for political offences were flogging, the scaffold, imprisonment with or without community service (§ 10, Part 2 General Code of Crimes and their Punishment).

ditionally, anyone who failed to report when crossing a sanitary cordon, or who, when reporting to the authorities, gave a false statement of the country of origin, or who used false sanitary documents, and anyone who left a quarantine establishment on his account committed a punishable offence, had to isolate. Acts by the authorities that, by their very nature, constituted a violation of the sanitary orders were also criminalised, in particular the unlawful release of an individual from quarantine, the issuing of a false sanitary certificate, and the like. Interestingly, in addition to the cases listed exhaustively in § 25, the Penal Code also equates with them 'all acts which the perpetrator knows are or may be harmful to health.' Since the Code could not define all these acts exhaustively, the following acts were listed as examples: dumping dead livestock in wells, streams, and rivers; violating sanitary orders in the event of an outbreak of cattle plague; and failing to report rabies. The sanction prescribed was forced labour, the duration of which was determined by the court according to the extent of the damage[126] The Code also prescribes that the military courts be given jurisdiction to deal with the above offences, which were first laid down in 1732.[127] As suspected, the death penalty remained an applicable sentence for this political crime.

5. Conclusion

In the Middle Ages and early modern era, jurists followed a widespread belief that the plague was a war of God or a Divine punishment inflicted on sinful people. Since the human race must endure this 'punishment', an official response against a force that lying beyond all resistance would itself be illegitimate and doomed to fail in advance. Although the aetiology of plague as a phenomenon of transcendent origin persisted in Europe until the 18th century,[128] the appearance of the plague treatises in the first half of the 16th century marks the beginning of the 'pandemic criminal law' debate.

The most prominent feature of the 'pandemic criminal law' was the harsh punishment of delinquents; the more the authorities lost control over the epidemic situation, the harsher the penalties they sought to impose on the masses.[129] Even though Muratori, the famous Italian Enlightenment intellectual of the first half of the 18th century, was in principle committed to the humanisation of criminal law, he stressed the importance of generally preventive death sentences for anyone who violated sanitary norms.[130] Criminal law theorist Filangieri described the deliberate spread of plague as the deadliest crime of all, a threat to the public health commons that necessitated a corresponding measure.[131] Salomo Zachariä, who in 1826 drafted the penal code for the German federation, included the violation of rules established to limit infectious diseases among the crimes considered to pose the gravest threat to man, in addition to high treason and murdering one's parents. Whereas high treasonists, by their predations against the state as *hostes reipublicae*, were excluded from the community of the state, the murderers of parents and the spreaders of infectious diseases were – to use Salomo Zachariä's terms – 'enemies of the human race' (*hostes generis humani*).[132] In the second half of the 18th century and the first half of the 19th, the by then relatively generally recognised principle of legality fell into oblivion when enlightened monarchies faced pandemic situations in several European monarchies.

The pandemic criminal law was, up to the 18th century, characterised by the blanket nature of the dispositions of offences; the criminality of both the commission and omission of offences; and the relevant feature of fault being, as a rule, intent, or sometimes negligence. The prosecution of sanitary offences was mainly the responsibility of assigned medical magistrates, who

[126] § 28, Part 2 of General Code of Crimes and their Punishment.

[127] KUDLER, J., *Erklärung des Strafgesetzes über schwere Polizey-Uebertretungen, mit Berücksichtigung der auf dasselbe sich beziehenden, später erlassenen Gesetze und Erläuterungen, Erster Band.* Vienna, 1831, p. 312 s.

[128] See, e.g., BERGIUS, *J. H. L., Polizey- und Cameralmagazin,* Vienna, 1788, p. 93: 'Although the plague is indeed God's judgment, we are now convinced that, like other infectious diseases, it is not only possible to keep it out of a country by taking precautions, but also to prevent its further spread. […]'

[129] HIERSCHE, A., HOLZINGER, K. IN EIBL, B., *Handbuch des Epidemierechts unter besonderer Berücksichtigung der Regelungen betreffend COVID-19*. Vienna, 2020, p. 2.

[130] MURATORI, L. A., *Del governo della peste.* Modena, 1720, p. 25 s: *'Le Città e Terre preservate non hanno riportato sì gran benefizio senza la morte di qualche di: subbidiente in cose gravi, quale è chi venendo da Luogo Appestato passa i confini senza Fedi, o con Fedi false, e simili Trasgressori troppo nocivi. Per altro ai Conservatori della Sanità s'ha a dare in tali casi un'assoluta balia ed autorità di poter procedere more belli contra i trasgressori; e se la necessità il richiede, sarà Carità verso il Pubblico il Rigore verso qualche privato disubbidiente, e massimamente nella Guardia de'Confini e delle Porte in sospetti di Contagio.'*

[131] *'Tra' delitti contro la salute pubblica, il più funesto è il contagio della peste.'* FILANGIERI, G., *La scienza della legislazione e gli opuscoli scelti, Tomo terzo.* Livorno, 1827, p. 240. The Italian Penal Code of 1930 also imposed the death penalty in the case of the deliberate spread of an infectious disease resulting in the death of several people (Art. 438 Codice penale: (Epidemia): *'Chiunque cagiona un'epidemia mediante la diffusione di germi patogeni e' punito con l'ergastolo. Se dal fatto deriva la morte di piu' persone, si applica la pena di morte.'*)

[132] SALOMO ZACHARIÄ, K., *Strafgesetzbuch Entwurf mit einer Darstellung der Grundlagen des Entwurfes.* Heidelberg, 1826, p. 9. See Art. 590–593 of the draft. Art. 592: *'Wer eine Sperranstalt verletzt, welche gegen eine ansteckende Krankheit für das Land oder für einen Bezirk des Landes oder für einen Ort oder für ein Haus angelegt worden ist.'* Article 590 refers to a violation of quarantine. Art. 591: *'Wer von einer ansteckenden Krankheit die Anzeige bey der Behörde zu machen unterläßt, die er nach den bestehenden Verordnungen oder sufolge eines obrigkeitlichen Befehls zu machen verbunden war, oder wer, gegen einen obrigkeitlichen Befehl, die Kleis dungsstücke, die Betten oder die Geräthschaften eines, an einer ansteckenden Krankheit Verstorbenen zu vernichten oder sie auf die vorgeschriebene Weise zu reinigen unterläßt, oder wer, gegen einen obrigkeitlichen Befehl, die Kleiedungsstücke, die Betten oder die Geräthschaften eines an einer ansteckenden Krankheit Verstorbenen verheimlichet oder verkauft oder sonst weggiebt oder sie an sich bringt oder nimmt, oder wer, gegen ein obrigkeitliches Verboth eine Leiche, während eine ansteckende Krankheit am Orte herrscht, zur Schau ausstellt.'* Art. 592: *Die Regierung ist berechtiget, die Nichtbefolugung derjenigen Verordnungen, die sie, um den Ausbruch oder die Verbreitung einer ansteckenden Krankheit in einem bestimmten Falle zu verhindern, erlässt, mit Gefängnisstrafe von einer jeden Klasse und selbst mit der Todesstrafe zu bedrohn, auch in einem solchen Falle die in den S. 590. 591. enthaltenen Strafdrohungen in demselben Masse zu erhöhn.'*

were equal in the jurisdiction to judges of blood. In this sense, it is a case of extraordinary criminal law.

Among the offences against sanitary care (*Sanitäts-Gesetzübertretungen*), Austrian criminal law[133] included offences against quarantine (*Kontumaz*) and infectious institutions; omitting objects belonging to those who had died of an infectious disease; grave robbing; contamination of wells and cisterns; sale of meat from animals not slaughtered according to the regulations; offences against the current regulations on rinderpest; transfer of beverages and goods in a manner injurious to health; and conversion of pewter vessels with lead.[134]

Perhaps surprisingly, no comprehensive and specialised legal debates on epidemic criminal law prior to the 19th century took place. This, in my view, is largely a reflection of the scepticism of legislators, who rightly wondered whether it was even possible to respond to the relatively rare attempts of deliberately transmitting infectious diseases effectively with the instruments of criminal law.[135]

[133] For the Austrian lands, see *Strafgesez in Bezug auf Gesezübertretungen 1805 bei anstekenden Krankheiten* (21. Mai 1805). According to § 393 of the Austrian Criminal Code (1852), a person was responsible for an offence, if, in a district in which special institutions had been established to prevent the imminent danger of plague or other contagious and for the general state of health dangerous diseases, he or she undertook any act, consisting in commission or omission, deliberately or negligently, that according to its natural consequences or those which are easily recognisable to everyone by the specially published regulations, caused or further spread the disease. The provision is almost identical to § 1 of 'Penal Law concerning Offences against the Law in the case of contagious diseases' (1805). Regarding punishment, § 393 referred to the special regulations enacted at the time in question. The punishment for the offence was determined by the existing regulations for such circumstances or by special regulations issued depending on the circumstances of the case. On this HERBST, E., *Handbuch des allgemeinen österreichischen Strafrechtes: mit Rücksicht auf die Bedürfnisse des Studiums und der Anwendung.* Vienna, 1883, p. 335 ss. For the solutions of the German StGB, see BINDING, K., *Lehrbuch des Gemeinen Deutschen Strafrechts, Besonderer Teil, Zweiter Band, Erste Abteilung.* Leipzig, 1904, pp. 88–100. On the emergence of the 'pandemic criminal law' (Seuchenstrafrecht), see WAHLBERG, W. E: *Das Strafrecht des Gesundheitswesens.* In*: Gesammelte kleinere Schriften und Bruchstücke über Strafrecht, Strafprocess, Gefängnisskunde, Literatur und Dogmengeschichte der Rechtslehre in Oesterrreich*, 3. Bd. Vienna, 1882, p. 307.

[134] For a concise historical introduction to the more recent Austrian 'pandemic law', see HIERSCHE, A., HOLZINGER, K. and EIBL, B., *Handbuch des Epidemierechts unter besonderer Berücksichtigung der Regelungen betreffend COVID-19*. Vienna, 2020, p. 1–28; the Italian development in 19th century criminal codes is presented by MUSUMECI, E., 'Il funesto delitto': il contagio e l'imbarazzo dei giuristi. In*: Historia et ius – Rivista di storia giuridica dell'età medievale e moderna,* 12, 2017, p. 8 ss.

[135] This legal-political aspect in the prosecution of public health offences is pointed out by QUIRK, H., STANTON, C. (Ed.), *Criminalising Contagion, Legal and Ethical Challenges of Disease Transmission and the Criminal Law*, Cambridge, p. 16 pp.

On the Origin of One Roman Law Rule in the Moravian Legal Manual from the Second Half of the 14th Century*

*Lenka Šmídová Malárová***

Abstract

The Moravian legal handbook, Manipulus vel directorium iuris civilis, written by Jan of Gelnhausen in the second half of the 14th century represents an important source directly connected to the older Law Book of Jan the Notary (Brno, Czech Lands). Manipulus reflects an extensive body of interpretive rules and definitions which his author, Jan of Gelnhausen, took over from some medieval manuscript including 16th and 17th title of 50th of Digest, an integral part of the Corpus iuris civilis. The aim of this paper is to introduce the section De regulis iuris et de verborum significatione, which includes the regulations adopted from those titles of Digest and reflects on the origin of one modified rule and its comment.

Keywords: *Roman Law; Middle Age; Manipulus vel directorium iuris civilis; Jan of Gelnhausen; Rules of Interpretation; Digest; Corpus iuris civilis; Accursius; Municipal Law; Brno; Czech Lands.*

1. Introduction

An important source of the Brno municipal law represents famous *Law Book of Jan the Notary* (i.e. *Law Book*) from the middle of the fourteenth century, written for the practical needs of the Brno Municipal Court and Municipal Council.[1] Due to its elaborate legal regulation consisting of its own rules, supplemented by judgments and legal instruction of the Brno Municipal Court, which were supplemented by rules from Roman law, this work enjoyed considerable popularity.[2] It was not only for these reasons that the *Law Book* naturally became a model for Jan's successors, who, following his example, strove to create a content-compatible handbook of municipal law and thus continued the tradition this work. Among the very first inspirers of Jan's *Law Book* was the well-known Jan from Gelnhausen, one of his later successors in the Brno municipal office.

Due to the reputation of the *Law Book*, not only in Moravia, but also in Bohemia, Jan of Gelnhausen undertook the task of redactig this work in such a way that it could be generally used anywhere outside the borders of the Brno legal circle. The work, called *Manipulus vel directorium iuris civilis* (i.e. *Manipulus*), was written in the 80s of the 14th century in Brno, less than 30 years after the completion of the *Law Book*. In terms of content and form, Gelnhausen's *Manipulus* fundamentally adheres to the original. This is evident from the systematics, which remained the same as in the *Law Book*, minor modifications can be noted within individual thematic sections, where some original provisions were divided into several others and provided with a new title. Compared to the *Law Book*, Gelnhausen's *Manipulus* also lacks most of the casuistry provisions, the core of the Brno case law recorded in the non-preserved *Book of Sentences*. What differentiates *Manipulus* from the *Law Book* at first glance is the fact that Gelnhausen's work also contains several hundred rules of interpretation and definitions that correspond to the two final titles of the fiftieth book of *Digest* (Dig. 50.16 *De verborum significatione* and Dig. 50.17 *De diversis regulis iuris antiqui*).

Jan of Gelnhausen placed these rules in a special section, which he similarly named *De regulis iuris et de verborum signifi-*

* The post is based on my earlier article and supplements it with new findings obtained by studying the sources stored in the Vatican Apostolic Library in Rome. See ŠMÍDOVÁ MALÁROVÁ, L., Omyl nebo záměr? Příspěvek k modifikaci jednoho římskoprávního pravidla v Příručce práva městského Jana z Gelnhausenu z 2. pol. 14. století. In: *Acta iuridica Olomucensia. (Supplementum „Recepce římského práva v Evropě")*, vol. 9, 2014, no. 3, p. 93-101.

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1 The *Law Book of Jan the Notary* was published in edition by Miroslav Flodr. See FLODR, M. (ed.), *Právní kniha města Brna z poloviny 14. století. I. Úvod a edice. II. Komentář. III. Rejstříky a přehledy*. Brno, 1990, 1992, 1993.

2 From the extensive literature on the Brno Law Book, see in particular: FLODR, M., *Brněnské městské právo. Zakladatelské období (-1359)*. Brno, 2001. To the Roman law influences in the Law Book see mainly: BOHÁČEK, M., *Římské právní prvky v právní knize brněnského písaře Jana*. Praha, 1924; Idem. Ještě k římskoprávnímu obsahu brněnské právní knihy. In: ČÁDA, F. (ed.), *Sborník prací z dějin práva československého*. Sv. I. (K 50. narozeninám profesora Jana Kaprasa jeho žáci). Praha, 1930, p. 34-49. Cf. SCHUBART-FIKENTSCHER, G., Das Brünner Schöffenbuch. Beiträge zur spät mittelalterlichen Rechts-und Kulturgeschichte. In: *Deutsches Archiv*, vol. 1, 1937, p. 457-498; Eadem. Römisches Recht im Brünner Schöffenbuch. Ein Betrag zur Rezeptions-geschichte. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. Germ. Abt., vol. 65, 1947, p. 86-176. For the relationship of the *Law Book* to contemporary legal practice, see FIEDLEROVÁ, N., ŠMÍDOVÁ MALÁROVÁ, L. The Earliest Law Books of the City of Brno and Their Relation to the Contemporary Legal Practice. In: *Krakowskie Studia z Historii Państwa i Prawa*, vol. 10, 2017, no. 2, p. 263-287.

catione. The content of this section includes over four hundred articles of an interpretive nature, mostly corresponding to the original wording of the *Digest*. Despite this fact, the *Manipulus* has long been outside the scope of interest of legal historians and legal romanists, although it holds considerable potential from the point of view of legal history and knowledge of the interpretation practice of the time.

The aim of this contribution is to draw the attention of foreign audiences to the importance of the Moravian legal handbook, *Manipulus vel directorium iuris civilis* from the second half of the 14th century and, following this, to point out the probable origin of one modified Roman law rule that was reflected in the section *De regulis iuris et de verborum significatione*.

2. *Manipulus vel directorium iuris civilis* and its reflection in the contemporary legal-historical literature

The lack of interest in the *Manipulus* is to some extent justified by the fact that this legal handbook was published in the form of an edition only fifteen years ago. The editor of the *Manipulus* is Czech historian, palaeographer and codicologist Miroslav Flodr, who has systematically published the editions of Brno legal sources since the 1990s. The edition of the *Manipulus* reflects the texts of both extant manuscripts – the manuscript stored in the Brno City Archive (No. 3) and the other manuscript preserved in the collection of the Olomouc branch of the Regional Archives in Opava (CO 328). In the introductory part of the edition, M. Flodr evaluated the previous unsuccessful editorial plans and dealt with the question of the genesis of the *Manipulus* and its legal sources. There he proved that the so-called section *De regulis iuris et de verborum significatione* has a purely Roman legal nature and determined that the individual sentences correspond in literal or modified form to the legal definitions and rules contained in the two final titles of the 50th book of the *Digest*. Any textual differences between the above mentionedt section of the *Manipulus* and the *Digest* were taken into account by M. Flodr in the overview of concordances at the end of the edition.[3]

M. Flodr drew attention to the presence of the *De regulis iuris et de verborum significatione* section in the *Manipulus* and its relationship with the Roman Law *Digest* even before the publication of the edition itself. First, in an article focused on the character of Brno municipal law and administration in the period between 1359 and 1389, where he placed the *Manipulus* in the context of the written tradition of Brno law books.[4] In the older literature, most of the attention was paid to the person of Jan of Gelnhausen, or to his official activities in Jihlava, where he worked for the rest of his life.[5]

The Gelnhausen's *Manipulus* is briefly mentioned by the work of legal historian J. Čelakovský, as well as in later studies by historians and archivists such as J. Dřímal, F. Hoffmann and L. Sulitková.[6] From the literature focused on the history of the Roman law influences in the Czech lands, it is evident that the authors either did not know the *Manipulus*, or ignored its existence in favor of the more generally known *Law Book*. Legal romanist and codicologist, Miroslav Boháček, lists Gelnhausen's *Manipulus* in his study, *Einflüsse des römischen Rechts in Böhmen und Mähren,* published in 1975 as a part of the *Ius Romanum medii aevi* series.[7] It is surprising that other authors of overview works on the reception of Roman law in Bohemia and Moravia do not mention the *Manipulus* at all.[8] The exception is a more

[3] FLODR, M. (ed.), *Příručka práva městského Jana z Gelnhausenu (Manipulus vel directorium iuris civilis)*. Brno, 2008, p. 7-24 (introduction), p. 290-314 (notes to the section *De regulis iuris et de verborum significatione*), p. 397-402 (concordance). Srov. MALÁROVÁ, L. (rec.), Miroslav Flodr (ed.): Příručka práva městského. (Manipulus vel directorium iuris civilis). Brno: Matice moravská 2008. 401 s. In: *Mediaevalia Historica Bohemica*, vol. 13, 2010, no. 2, 2010, p. 178-179.

[4] FLODR, M., Brněnské městské právo po smrti notáře Jana. In: *Časopis Matice moravské*, vol. 121, 2002, no. 1, p. 46; Idem, *Brněnské městské právo po smrti notáře Jana (1359-1389)*. Brno, 2006, p. 64.

[5] See TADRA, F., Zur Lebensgeschichte Johann's von Gelnhausen, Registrators der Kanzlei Karl's IV. In: *Mitteilungen des Instituts für österreichische Geschichtsforschung, vol. 20, 1899, p. 100-104; ZAPLETAL, F., Jan z Gelnhausenu a Ješek z Hranic. In: Záhorská kronika, vol. 21, 1938-1939, no. 4, p. 106-110;* BRETHOLZ, B. Johannes von Gelnhausen. Kritisch-historische Studie mit zwei Anhängen. In*: Zeitschrift des deutschen Vereines für die Geschichte Mährens und Schlesiens*, vol. 7, 1937, p. 1-34. From more recent literature on the life of Jan of Gelnhausen in generally, see ŠMÍDOVÁ MALÁROVÁ, L., Z Gelnhausenu, Jan. In: MAKARIUSOVÁ, M. (ed.), *Biografický slovník českých zemí*. 19. díl. Fu-Gn. Praha, 2016, p. 184. For the work of Jan of Gelnhausen during his time in Jihlava, see in particular ČELAKOVSKÝ, J., Mistr Jan z Gelnhausenu a staré městské knihy Jihlavské. In: *Časopis Musea Království českého*, vol. 72, 1898, p. 494-501; HOFFMANN, F., K dílu Jana z Gelnhausenu a jeho pokračovatelů v Jihlavě. In: *Studie o rukopisech*, vol. 11, 1972, p. 67-81. JAMBOROVÁ, M., Dva rukopisy českého překladu sbírky nálezů brněnsko-jihlavských Jana z Gelnhausen. In: MITTER, P., MENŠÍKOVÁ, Z. (edd.), *Minulost, přítomnost a budoucnost v jazyce a v literatuře. Sborník z mezinárodní konference pořádané katedrou bohemistiky PF UJEP v Ústí nad Labem ve dnech 1.-3. září 2010. 1. díl., část jazykovědná*. Ústí nad Labem, 2011, p. 172-176; Eadem, Staročeský překlad sbírky nálezů brněnsko-jihlavských. In: ČMERJKOVÁ, S., HOFFMANNOVÁ, J., KLÍMOVÁ, J. (edd.), Čeština v pohledu synchronním a diachronním. Stoleté kořeny Ústavu pro jazyk český. Praha, 2013, p. 169-172; Eadem, Staročeský rukopis sbírky nálezů brněnsko-jihlavských. In: KRUŠINSKÝ, R., VINTROVÁ, T. (edd.), Bibliotheca antiqua 2015. Sborník z 24. konference, 4.-5. listopadu 2015, Olomouc. Olomouc, 2015, p. 32-35.

[6] See ČELAKOVSKÝ, J., O právních rukopisech města Brna. In: *Časopis musea Království českého*, vol. 56, 1882, p. 496. Cf. DŘÍMAL, J., Brněnské městské knihy, právo a listiny za písaře Jana z Gelnhausenu. In: Sborník archivních prací, vol. 8, 1958, no. 3, p. 109; HOFFMANN, F., Brněnské městské právo. In: ZŘÍDKAVESELÝ, F., PEŠA, V. (edd.), *Brno mezi městy střední Evropy (Sborník projevů, studií, úvah a sdělení z vědeckého sympozia konaného 29.-30. listopadu 1979)*. Brno, 1983, p. 169; SULITKOVÁ, L., *Vývoj městských knih v Brně ve středověku (v kontextu vývoje městských knih v českých zemích)*. Praha – Brno, 2004, p. 134.

[7] BOHÁČEK, M., Einflüsse des römischen Rechts in Böhmen und Mähren. *In: Ius Romanum Medii Aevi, vol. 11, 1975, no. 5, p.* 159-160.

[8] OTT, E., *Beiträge zur Rezeptiongeschichte des römisch-canonischen Processes in der böhmischen Ländern*. Leipzig, 1879; VANČURA, J., Recepce. In: *Ottův slovník naučný. Ilustrovaná encyklopedie obecných vědomostí*. 22. díl, Rozkošný-Schloppe. Praha, 1904, p. 351-353; ČÁDA, F., Vzájemné vztahy mezi českým právem a cizími právními řády. In: *Vědecká ročenka Právnické fakulty Masarykovy univerzity v Brně,* vol. 12, 1933, p. 113-124; VANĚČEK, V., Pronikání římského a kanonického práva na území dnešního Československa od 2. pol. 9. stol. do 1. pol. 14. století. In: *Právněhistorické studie*, vol. 12, 1966, p. 27-40; DOSTALÍK, P., Das Privatrecht der böhmischen Länder im Mittelalter. Die Rezeption des Römischen Rechts in den böhmischen Ländern im Mittelalter. In: VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. (edd.), *Die Entwicklung des tschechischen Privatrechts*. Brno, 2011, p. 35-43.

recent article by Miroslav Černý, who explicitly drew attention to the Romanistic significance of Gelnhausen's *Manipulus,* specifically in relation to the its section *De regulis iuris et de verborum significatione.*[9] *Manipulus* was recently mentioned also by historian Petr Kreuz, as one of the legal sources of the codification process of municipal law in Bohemia, completed by the publication of Koldín's Code in the year 1579 (i.e. *Práva městská Království českého*, eng. *Municipal Laws of the Czech Kingdom*).[10]

Although the *Manipulus* does not generally belong to the unknown law books, the actual content and legal-historical nature of the Gelnhausen's work has not yet received sufficient attention in the literature. The authoress of this paper tried to fill this gap in several sub-studies. First, she dealt with the issue of acquiring ownership rights from non-owners in the legal regulation of the *Manipulus* and came to the conclusion that this issue is dealt with equivalently to Roman legal sources.[11] The authoress dealt with the *Manipulus* more comprehensively in her diploma thesis, the core of which was an analysis of the Roman law section, *De regulis iuris et de verborum significatione*.[12] In another contribution, she pointed out the occurrence of so-called legislative abbreviations in this section and drew attention to their importance for contemporary interpretation.[13] In the following contribution she highlighted the fact that one of the rules originally from Roman law does not correspond to the *Digest*. That this was not Jan of Gelnhausen's own mistake, the authoress proved by comparing this rule with the wording of the same provision in the manuscript *Liber sententiarum scabinorum Brunnensium in Moravia*, stored in the Österreichische Nationalbibliothek in Vienna (No. 12472 ÖNB). It turned out that even the comment attached to this rule, which changed its original meaning quite a bit, cannot be connected with the author of *Manipulus*, Jan of Gelnhausen.[14] At the same time, a study by historians Hana Jordánková and Ludmila Sulitková was published, in which the authors compared selected provisions in the Latin version of the *Manipulus* with its later Czech translations from the 16th century.[15]

After that, the importance of the Roman law section *De regulis iuris et de verborum significatione,* an integral part of *Manipulus,* was discussed by Michal Skřejpek and Petra Skřejpková.[16] To the *Manipulus*, respectively to its Roman law section, M. Skřejpek subsequently returned and focused on the meaning of some legal principles and attached medieval comments. This intention can only be welcomed, however we consider the Skřejpek's conclusion to be problematic – namely that he attributed the authorship of those comments to Jan of Gelnhausen or to the scribers, who worked for him.[17] As we stated above, these comments are not Gelnhausen's own, but probably originated from the different (foreign) manuscript.

3. The *De regulis iuris et de verborum significatione* – composition, content, modifications

The Roman law section *De regulis iuris et de verborum significatione* is placed in the *Manipulus* between the sections *De renunciacionibus* and *De rescriptis*. This is a section that contains two subsections, the names of which correspond to the 16th and 17th titles of the 50th book of the *Digest*. The first of them, *De verborum significatione*, contains 329 legal definitions focused on the interpretation of frequent legal terms and phrases. The next subsection, *De regulis iuris*, records the interpretative legal rules with a total number of 279 provisions. The individual rules and definitions are arranged in this section of the *Manipulus* in the same way as in the *Digest*, however, several of them are missing – a total of 18 fragments are not listed in the *Manipulus* at all.[18] On the contrary, some fragments originally from the *Digest* were shortened.[19]

In the individual provisions of the section, the original personal and place names remained as they appear in the *Digest*. Specifically, these are the names of the cities (*Roma,* art. No. 835, 979; *Verona*, art. No. 1174; *Troia,* art. No. 952) and the states (*Sicilia, Italia, Gallia,* art. No. 931), the names of the Roman emperors (*Antonius Pius,* art. No. 1088; *Caesar,* art. No. 1250), lawyers (*Proculus,* art. No. 837; *Labeo,* art. No. 838,

[9] ČERNÝ, M., Recepce římského práva (středověk). In: SCHELLE, K., TAUCHEN, J. (edd.). *Encyklopedie českých právních dějin*. X. svazek. R-Říš. Plzeň-Ostrava, 2017, p. 84-96.

[10] KREUZ, P. Pavel Kristián von Koldíns Stadtgesetzbuch von 1579 und die mittelalterlichen Stadtrechte in den Böhmischen Ländern. In: DEUTSCH, A. (ed.), *Stadtrechte und Stadtrechtsreformationem*. Heidelberg, 2021, p. 519-569.

[11] MALÁROVÁ, L., Zásada „bonae fidei" a institut nabytí věci od nevlastníka v Příručce práva městského Jana z Gelnhausenu. In: ŽATECKÁ, E., KOVÁČOVÁ, L., HORECKÝ, J., OMÁČKA, V. (edd.), *Cofola 2011. Conference proceedings*. Brno, 2011, p. 130-137.

[12] Eadem, *De regulis iuris et de verborum significatione. Rozbor římskoprávního oddílu Příručky práva městského Jana z Gelnhausenu*. (Diploma thesis). Brno, 2012.

[13] ŠMÍDOVÁ MALÁROVÁ, L., Pravidla výkladu legislativních zkratek a vybraných gramatických jevů v římskoprávním oddílu Příručky práva městského Jana z Gelnhausenu. In: *Studia Historica Brunensia*, vol. 60, 2013 (2015), no. 1/2, p. 65-76.

[14] Eadem, Omyl nebo záměr? op. cit. 2014, p. 93-101.

[15] JORDÁNKOVÁ, H., SULITKOVÁ, L., K důležitosti zkoumání filiace právních rukopisů na příkladu Brna. *Studie o rukopisech*, vol. 44, 2014, p. 271-287.

[16] SKŘEJPEK, M., SKŘEJPKOVÁ, P., Einfluss des römischen Rechts auf das Städterecht in den böhmischen und mährischen Ländern am Beispiel eines Manuskripts vom Ende des 14. Jahrhunderts. In: PIRO, I. (ed.), *Scritti per Alessandro Corbino*. Tricase: Libellula, 2016, p. 39-59.

[17] SKŘEJPEK, M., Manipulus Jana z Gelnhausenu a recepce římskoprávních zásad ve středověku. In: ĽALÍKOVÁ, N., SOUKENÍKOVÁ, D., VITKÓOVÁ, A., VRANKOVÁ, M. (edd.), *Princípy v práve. Zborník príspevkov z medzinárodnej vedeckej konferencie*. Bratislava, 2015, p. 26-35.

[18] These fragments were released: Dig. 50.16.87, Dig. 50.16.98, Dig. 50.16.116, Dig. 50.16.122, Dig. 50.16.125, Dig. 50.16.126, Dig. 50.16.137, Dig. 50.16.138, Dig. 50.16.139, Dig. 50.16.140, Dig. 50.16.142, Dig. 50.16.147, Dig. 50.16.203, Dig. 50.16.205, Dig. 50.16.222, Dig. 50.16.240, Dig. 50.16.241, Dig. 50.17.147. Cf. FLODR, M. (ed.), *Příručka práva městského*, op. cit. p. 21; ŠMÍDOVÁ MALÁROVÁ, L., *Pravidla výkladu legislativních zkratek,* op. cit., p. 70.

[19] See Dig. 50.16.220.1, Dig. 50.16.220.2, Dig. 50.16.233.1, Dig. 50.16.233.2, Dig. 50.16.233.3, Dig. 50.16.233.4, Dig. 50.16.242.1, Dig. 50.16.242.2, Dig. 50.16.242.4, Dig. 50.16.245.1, Dig. 50.17.2.1, Dig. 50.17.152.2, Dig. 50.17.155.1, Dig. 50.17.155.2, Dig. 50.17.156, Dig. 50.17.156.2 and Dig. 50.17.156.3. Cf. ŠMÍDOVÁ MALÁROVÁ, L., *Pravidla výkladu legislativních zkratek,* op. cit., p. 70.

862, 876, 871, 878, 886, 893, 1015, 1056, 1059, 1060; *Marcellus,* art. No. 842, 1126; *Iulianus*, art. No. 842, 910; *Sabinus*, art. No. 847, 1061; *Celsus*, art. No. 1083; *Quintus Mutius*, art. No. 858; *Servius*, art. No. 858, 863, 859, 910; *Alfenus*, art. No. 910; *Fulcinius*, art. No. 912; *Scaevola*, art. No. 859; *Massurius*, art. No. 966; *Cassellinus*, art. No. 979; *Modestinus*, art. No. 937; *Neratius Priscus*, art. No. 918; *Mela*, art. No. 1026; *Paulus*, art. No. 1038; *Iabelus*, art. No. 1132), names of the Roman citizens (*Titius*, art. No. 971, 1028, 1072, 1102, 1155, 1230) and the slaves (*Sticho,* art. No. 1220; *Damas,* art. No. 983). In some provisions, the original names of the sources of Roman law even appear, namely *Lex duodecim tabularum* (art. No. 895, 913, 957, 1016, 1037, 1052, 1151) and *Lex Aelia Sentia* (art. No. 903).

It is a question why Gelnhausen did not remove these names and titles, which clearly do not fit the late medieval period, or replace them with others, more suitable for the territory of Czech lands. It should be noted that the provisions styled in this way have a somewhat disturbing effect in relation to the rest of the *Manipulus*. We mentioned above that Gelnhausen, when compiling his work, released a number of domestic personal and place names that were part of the casuistic provisions of the Brno *Law Book*. On the other side, some of them Gelnhausen kept in the text (e.g. Hainricus and Cunradus appear in art. No. 671, from the local names we can mention Boskovice – Boscowitz and Jevíčko – Gewiczka, included in art. No. 660).

The Roman law section, *De regulis iuris et de verborum significatione,* shows a number of modifications compared to the original *Digest*. First of all, these are additional comments that are attached to some rules in the subsection *De regulis iuris*. However, these comments are not Gelnhausen's own, he merely copied them into the *Manipulus* from the another manuscript. Unfortunately, the original of the manuscript that Gelnhausen worked with has not preserved, but its supposed copy from the 15th century is currently in the funds of the Österreichische Nationalbibliothek in Vienna, where it forms an integral part of the later redaction of the *Law Book by Jan the Notary*. The manuscript with a total number of 240 folios is named as *Liber sententiarum scabinorum Brunnensium in Moravia* (No. 12472 ÖNB). The part of the manuscript, which contains the text *De regulis iuris et de verborum significatione,* is identical in all aspects to the same section of the *Manipulus*.

4. On the question of the origin of the Roman law section *De regulis iuris et de verborum significatione* [20]

As we noted in the previous chapter, the section *De regulis iuris et de verborum significatione* as it is found in Gelnhausen's *Manipulus* is identical in content to the relevant part of the Viennese manuscript *Liber sententiarum scabinorum Brunnensium in Moravia* (No. 12472 ÖNB). We have dealt with the relationship between these two sources before, when we tried to find a template for art. No. 1186 of the *Manipulus*.[21] Even before we get to the question of the origin of this provision in the *Manipulus* and in the manuscript *Liber sententiarum scabinorum Brunnensium in Moravia*, we will briefly recall what its content was and how it differs from Roman law *Digest*.

The art. No 1186 of the *Manipulus* is a modified Roman law rule focused on the issue of unjust enrichment. While in the Digest this rule is found in the wording *"Locupletior non est factus, qui libertum adquisierit"* (Dig. 50.17.126.1), in the relevant article of the *Manipulus* the same rule has the following form: *"Locuplecior non est factus, qui liberum to adquisierit…"*. Leaving aside the use of the letter "c" instead of "t" in the adjective "locupletior", which is of course in accordance with the grammatical form of medieval Latin and has no effect on the meaning of this word, it is necessary to focus on the second part of the sentence, where the announced change is located. At first glance, the mentioned modification has an insignificant character and is easily overlooked. The change consists in simply removing the letter "t" in the word libertus.

Cf.
Dig. 50.17.126.1
*"Locupletior non est factus, qui **libertum** adquisierit."*

The *Manipulus*, art. No. 1186
*"Locuplecior non est factus, qui **liberum** to adquisierit…"* [22]

A comparison of these two examples shows that while the grammatical subject in the relevant sentence of the Digest is the adjective "libertus" (given in the accusative case as "libertum"), there is, in the *Manipulus*, used the word "liber" (in the accusative case as "liberum"). It can be deduced from this that in the case of the original Roman law sentence, we are talking about a freed person, i.e. a freed person (= libertus), however, according to the same rule as stated in the *Manipulus*, the rule in question refers to a free person (= liber). The change then naturally affects the interpretation of this rule as a whole. The original rule, as stated in the Digest (Dig. 50.17.126.1), regulates the principle according to which it is forbidden to enrich oneself at the expense of the liberated (i.e. freed slave), while art. No. 1186 of the *Manipulus* states that it is not allowed to enrich oneself at the expense of the naturally free man. Of course, objections can be raised against this, that this is only a formal modification, because the term free man (liber, or liber homo) in Roman law included both persons free by birth (ingenui) and persons set free, i.e. former slaves (liberties, libertines).[23]

However, in the case of art. No. 1186 of the *Manipulus*, it is apparently not a matter of free persons in general (i.e. libertini, eng. freedmen), but of persons free from birth (ingenui). This assertion is supported by a brief commentary immediately attached to art. No. 1186 of the *Manipulus*: *"…quia non est quis*

[20] The text of this chapter is translated from my older post and is supplemented with new findings. Cf. ŠMÍDOVÁ MALÁROVÁ, L., Omyl, nebo záměr, op. cit., p. 93-101.
[21] Ibidem, op. cit., p. 97-100.
[22] FLODR, M. (ed.), *Příručka práva městského*, op. cit., p. 180.
[23] Cf. Inst. 1.3.5: *„In liberis multae differentiae sunt: aut enim ingenui sunt aut libertini."*; Inst. 1. 4: *„Ingenuus is est, qui statim ut natus est liber est, sive ex duobus ingenuis matrimonio editus, sive ex libertinis, sive ex altero libertino, altero ingenuo."*; Inst. 1.5: *„Libertini sunt qui ex iusta servitute manumissi sunt."*

locuplecior per filios, sed pecunia tantum, cum non sint in bonis nostris liberi nostri legittimi vel naturales."[24]

Cf.

Dig. 50.17.126.1

„Locupletior non est factus, qui libertum adquisierit."

The *Manipulus*, art. No. 1186

„Locuplecior non est factus, qui liberum adquisierit, quia non est quis locuplecior per filios, sed pecunia tantum, cum non sint in bonis nostris liberi nostri legittimi vel naturales."[25]

The material difference between these two sentences then lies in the fact that, while in the case of the quote from the *Digest*, it concerns the issue of unjustified enrichment of the master (patron) at the expense of the freedman, i.e. the former slave, and is thus related to patronage law, art. No. 1186 of the *Manipulus* is aimed at the unauthorized father's profit on his children. According to the commentary to art. No 1186, it is not possible to profit from the naturally free status of children, because children are not objects, but subjects of legal relationship and thus cannot be the object of someone's property.[26]

Of course, the object of the legal relationship was not even the freedman (libertus) in Roman law. His position, however, differed from that of freedmen in that he had certain obligations towards his lord (patron), who granted him his freedom. In the literature, it is sometimes even stated that the status of the freedmen was on the borderline between persons free from birth (ingenui) and slaves (servi).[27] The relationship between the former master (patron) and the freedman was regulated in Roman law through the law of patronage (ius patronatus). The patron, by virtue of the title *ius patronatus*, had the right to demand from the freedman the performance of certain services (operae), including the right to an inheritance share in the event of the death of the freedman (if the freedman did not leave his own descendants). The patron's rights towards the freed had to be clearly defined, exceeding the established framework was equivalent to unjust enrichment.[28]

If we return to the comparison of these two sentences, the rule included in the *Digest* (Dig. 50.17.126.1) refers to unjust enrichment under the patronage law regime. In contrast, art. No. 1186 of the *Manipulus* regulates the prohibition of materially enriching oneself in any way from the human freedom of descendants and profiting from their position, because a free person is not and cannot be the subject of property relations.

It is interesting that in the medieval text thies rule appears in such a modified wording. As a result of the deletion of one letter, an essentially "new" principle was created from the original rule of Roman law. On the other hand, this modification is completely in accordance with medieval law. It is known that the law of patronage in its original Roman legal form did not prevail in our conditions, although the institute of the same name, but based on completely different principles, was applied in church law.[29] In addition, the fact that the *ius patronatus* did not fall under the competence of the secular power is explicitly informed by the *Manipulus*, art. No. 52, where, in the event of a dispute, reference is made to the relevant canon law regulations.[30]

We can exclude Jan from Gelnhausen from the authorship of this modification, because the manuscript with the Roman law section *De regulis iuris et de verborum significatione,* including noted medieval commentary was already known before Gelnhausen came to Brno to draw up his own handbook of municipal law (i.e. *Manipulus*), following the example of his predecessor (i.e. Jan the notary, the author of the Brno *Law Book*).[31] This is evidenced by the presence of the same text in the Viennese manuscript *Liber sententiarum scabinorum Brunnensium in Moravia* (No. 12472 ÖNB).

Cf.

The *Manipulus*, art. No. 1186

„Locuplecior non est factus, qui liberum adquisierit, quia non est quis locuplecior per filios, sed pecunia tantum, cum non sint in bonis nostris liberi nostri legittimi vel naturales."[32]

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[24] FLODR, M. (ed.), *Příručka práva městského*, op. cit., p. 180.

[25] Ibidem.

[26] Cf. *Manipulus*, art. No. 1166: *„Libertas inestimabilis res est. Et similiter res sacra non recipit estimacionem. Sed tamen fallit, ubi liber homo venditur certo precios. Et alia omnia estimantur pecunia, sed non econtra pecunia per res. Unde dicitur omnia sunt venalia Rome."* (= Dig. 50. 17. 106); art. No. 1182: *„Libertas omnibus rebus favorabilior est."* (= Dig. 50.17.122) and mainly cf. art. No 1235: *„Infinita est estimacio libertatis et necessitudinis, id est cognacionis inter patrem et filium."* (= D 50.17.176.1). FLODR, M. (ed.), *Příručka práva městského*, op. cit., p. 177, 179 and 188.

[27] BURDICK, W. W., *The Principles of Roman Law and their Relation to the Modern Law*. 3rd printing. New Yersey, 2004, p. 184.

[28] BUCKLAND, W. W.,*The Roman Law of Slavery. The Conditions of the Slave in Private Law from Agustus to Justinian*. 3rd printing. New Yersey, 2000, p. 280. Cf. BARTOŠEK, M., *Encyklopedie římského práva*. Praha, 1994, p. 200.

[29] Cf. art. No. 46 (De iure patronatus) in Arnošt's provincial statutes from 1349. The text is made available in the edition: POLC, J. V., HLEDÍKOVÁ, Z. (edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 139-140.

[30] For this cf. the *Manipulus*, art. No. 52 (*De accione iuris patronatus*): *"Iuris patronatus questio est iure canonico decidenda."* In FLODR, M. (ed.), *Příručka práva městského*, op. cit., p. 30. Compared to this provision, one article of the *Manipulus*, which is included in the section *De regulis iuris et de verborum significatione*, also refers to the relationship between the patron and the freedman. It is art. No 1016: *"Familie appellacio qualiter accipiatur, videamus. Et quidem varie accepta est: nam et in res et in personas deducitur… Ad personas autem refertur familie significatio ita, cum de patrono et liberto loquitur lex…"* In FLODR, M. (ed.), *Příručka práva městského*, op. cit., p. 159-160. (For this, see also Dig. 50.16.195). The question is why Gelnhausen included this sentence in the *Manipulus*, when he must have known that the medieval patronage law had a quite different form and meaning than the *ius patronatus* in Roman law.

[31] This opinion was already expressed by M. Flodr. See FLODR, M. (ed.), *Příručka práva městského*, op. cit., p. 17-18.

[32] FLODR, M. (ed.), *Příručka práva městského*, op. cit., p. 180.

Liber sententiarum scabinorum Brunnensium in Moravia (No. 12472), f. 201
„Locuplecior non est factus qui liberum acquisierit quia non est quis locuplecior per filios, sed pecunia tamen, cum non sint in bonis nostris liberi nostri legittimi vel naturales."

Although this manuscript was created later, than Gelnhausen's *Manipulus*, it was a key source for our further research. As we found out, the author of the medieval version of the *De regulis iuris et de verborum significatione* on which was the relevant part of the Gelnhausen's *Manipulus* based, probably took the individual comments from *Accursius' Glossa*. We came to this conclusion during our study stay in Rome, where we got our hands on a manuscript from the 13th century, called *Digestum Novum cum Accursii glossa glossulisque siglatis et anonymis* and stored in the collection of the *Vatican Apostolic Library*. As is clear from the comparison below, the modified rule, including the commentary, as written in Gelnhausen's *Manipulus*, is found in this *Vatican* manuscript. It therefore follows from the above that the author of the relevant factual modification and commentary, is not Jan of Gelnhausen, who merely adopted this rule from another source that was evidently based on *Accursius' Glossa*.

Cf.
The *Manipulus*, art. No. 1186
„Locuplecior non est factus, qui liberum adquisierit, quia non est quis locuplecior per filios, sed pecunia tantum, cum non sint in bonis nostris liberi nostri legittimi vel naturales."[33]

Digestum Novum cum Accursii glossa glossulisque siglatis et anonymis (sign. Ross. 586), f. 211v
„Locuplecior non est factus qui liberum acquisierit, quia non est quis locupletior per filios sed sola pecunia cum non sunt in bonis nostris liberi nostro legittimi vel naturales…"

5. Conclusion

Manipulus vel directorium iuris civilis of John of Gelnhausen is a remarkable source of municipal law based on Roman law. Although the actual text of the *Manipulus*, except for a few modifications, corresponds to its original, the Brno *Law Book*, the same cannot be said about the section *De regulis iuris et de verborum significatione*, which is not included in the *Law Book*. The section records the extensive corpus of Roman law interpretative rules and legal definitions that were incorporated to the *Manipulus* in order to create a legal manual for practice purposes. Despite its considerable Romanistic potential, the *Manipulus* stands in the shadow of the *Law Book*, without historical and especially legal historical literature asking itself what impact the so-called Roman law section *De regulis iuris et de verborum significatione* could have had on the legal practice of the time and whether the rules contained therein correspond with the rest of the Gelnhausen's work.

It can be considered proven that Jan of Gelnhausen is not author of comments to the Roman law section *De regulis iuris et de verborum significatione* in generally and probably used another manuscript like the *Accursius' Glossa.* Although this manuscript has not been preserved in Brno, one of its later copies from the 15th century is stored in the Österreichische Nationalbibliothek in Vienna.

[33] FLODR, M. (ed.), *Příručka práva městského*, op. cit., p. 180.

Die Sprache der Bilder in den Josephinischen Gesetzbüchern*

(The Language of Imagery in Emperor Joseph II's Codes of Law)

*Zdeňka Stoklásková***

Abstract

The imagery in Emperor Joseph II's codes of law has not been a subject of research, which is understandable to a certain degree. The copperplate engravings from the Josephine codes of law are probably not that interesting for art historians, but they are exceptionally attractive for historians and legal historians. These copperplate engravings visualize, often very critically, some of the published codes of law. The method of study is the „language of imagery" and the „language of text". The language of imagery is understood as an expression of the ruling power, while the language of texts in the codes of law (as well as an expression of power) is held up here as a mirror in the form of the language of contemporary authors – i.e. a juxtaposition between the official meaning and the satirical texts written at the time. The title images of the codes of law of Joseph II and Leopold II might also be interpreted as a result of the „thawing" of censorship, as the subsequent codes of law of Francis I/II do not contain allegoric engravings.

Keywords: *Legal history; The codes of law of Joseph II.; Legal iconography; Copperplate engravings; Joseph Georg Mansfeld; The Enlightenment; The Habsburg Monarchy.*

1. Exposé

Die Bilder in den Josephinischen Gesetzessammlungen stehen außerhalb des Interesses der wissenschaftlichen Forschung, was bis zu einem gewissen Punkt nachvollziehbar scheint. Für die Kunstgeschichte wirken die Kupferstiche in den Josephinischen Gesetzsammlungen vermutlich nicht sehr anziehend, in Geschichtswissenschaft und Rechtsgeschichte hingegen rufen sie ein starkes Interesse hervor. Methodisch dominieren hier die „Sprache der Bilder" und die „Sprache der Texte". Die Sprache der Bilder wird dabei als Ausdruck der herrschenden Macht verstanden, die Sprache der Texte in den Gesetzbüchern (ebenso als Ausdruck der Macht) wird der Sprache der zeitgenössischen Autoren gegenübergestellt, d. h. die offizielle Meinung mit den kritischen und satirischen Texten der Zeitgenossen konfrontiert. Die Kupferstiche auf den Titelseiten der Gesetzbücher der kaiserlichen Brüder Josef II. und Leopold II. haben eine tiefere Bedeutung, da sie auf publizierte Gesetze Bezug nehmen. Dies ist bei den späteren Gesetzbüchern nicht der Fall, da diese lediglich das Staatswappen auf der Titelseite zeigen. Die hypothetische Frage, warum die Josephinischen und die Leopoldinischen Gesetzbücher mit den bedeutungsvollen Kupferstichen versehen sind, ließe sich mit dem Hinweis auf das „Tauwetter" der Zensurvorschiften der Aufklärung in Österreich und nicht zuletzt mit dem Sinn für die Ironie beider Herrscher erklären.

2. Die Rechtsikonographie – Gesetze und Gesetzgeber im Bild

Die Rechtsikonographie wird hier als interdisziplinärer Zugriff zur Rechtssymbolik, Geschichte, Rechtsgeschichte, Kunstgeschichte und Rechtsvolkskunde verstanden, wie Personen, Realien, Texte und deren Funktionen dargestellt werden können. Bilder zählen zu den sekundären Rechtsquellen ebenso wie Gebäude oder Gegenstände, rücken aber im Vergleich zu primären Rechtsquellen – d. h. Texten – fast ganz in den Hintergrund.[1] Sie tragen nicht nur dazu bei, „der Trockenheit" der Rechtsgeschichte zu einem für das Publikum freundlicheren Bild zu verhelfen, sondern sie vermögen zugleich Lücken in der interdisziplinären Forschung zu schließen und der Visualisierung der Rechtsquellen zu dienen.

Im Josephinismus kommt es zum Prozess des Zurücktretens der Rechtsbilder. Warum jedoch geschieht dies gerade in dieser Zeit? Die Ursachen können wir vermutlich in einem Rückgang des Analphabetismus erblicken, dem besseren Zugang einer breiteren Öffentlichkeit zu Veröffentlichungen, und zwar nicht allein religiösen Büchern, Kalendern und ähnlicher Lektüre für das „gemeine Volk", sondern eben auch in den Rechtsnormen selbst. Der Staat bemüht sich um Möglichkeiten, Gesetze auch den untersten Schichten zugänglich zu machen. Die Josephinischen Rechtsnormen beinhalten zudem einen neuen Faktor:

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[1] KOCHER, G., *Zeichen und Symbole des Rechts. Eine historische Ikonographie*. München, 1992, S. 7.

die Möglichkeit, gegen die Herrschaft Beschwerde einreichen zu können. Wem aber käme ein solches Recht zugute, wenn die unteren Schichten nicht lesen könnten? Man geht offenkundig primär von einem Alphabetismus aus. Der Staat also vermittelt nicht mehr so viele Rechtsnormen in Gestalt von Bildern, sondern bereits in Form des gedruckten Textes. Analysierte Bilder stellen dabei eine Rarität dar. Andere Gesetzsammlungen zeigen häufig zudem immer wieder den Herrscher (oft in gleicher Position) oder das Staatswappen. Die Josephinischen Gesetzsammlungen jedoch zieren andere Titelbilder, die einen Bezug zum Inhalt des Bandes oder zu wichtigen Reformen aufweisen. Nicht selten entbehren sie auch einer leisen Ironie oder einer spröden Sachlichkeit nicht.

Im Josephinismus zeigt sich nicht allein ein Zurücktreten des Rechtsbildes, sondern zugleich erfolgte auch dessen inhaltliche Schwerpunktverlagerung. Es tauchen Rechtsbilder auf, deren Hauptfunktion nicht in der Vermittlung der Information besteht, sondern in einer kritischen oder satirischen Stellungnahme zu den behandelten Problemen. In dieser Zeit entsteht eine – in satirischen und humoristischen Periodika sehr beliebte – karikierte Darstellung, die ihre Blütezeit vor allem in der zweiten Hälfte des 19. Jahrhunderts erlebt. Satirische Bilder erscheinen darüber hinaus auch in der zeitgenössischen Publizistik. Die Verlagerung hin zu einer für die Regierung unvorteilhaften Form ist zweifellos dem Josephinischen „Tauwetter“ [2] der Zensur zu verdanken, das die Veröffentlichung satirischer und kritischer Literatur, nicht selten mit Bildern ausgestattet, ermöglichte. Primärjuristische Bilder tangieren gleich mehrere Disziplinen, vor allem Rechts- und Kunstgeschichte, daneben aber auch Geschichtswissenschaft, Volkskunde, Literaturgeschichte u. a. Disziplinen. Sie sind also unterschiedlich zu bewerten, was im Grenzfall dazu führen kann, dass sie vom Standpunkt der Rechtsgeschichte bzw. der Rechtsikonographie aus als extrem wertvoll, von der Kunstgeschichte hingegen als fast wertlos angesehen werden könnten.

3. Der Autor der Kupferstiche

Alle Rechtsbilder, deren Inhalt hier zu analysieren versucht wird, wurden in den Gesetzsammlungen der Regierungszeit Josephs II. veröffentlicht. Der Autor der Rechtsbilder, Jos(ef) G(eorg) Mansfeld, entstammt wahrscheinlich der alten Kupferstecher-Familie Mansfeld (auch Mannsfeld), deren Mitglieder späterer Generationen ebenfalls als Maler ihr Geld verdienten.[3] In der zweiten Hälfte des 18. Jahrhunderts lebten in Prag mindestens fünf Kupferstecher mit Namen Mansfeld (Mannsfeld): A(nton) Johann Mansfeld,[4] Gerhard Mannsfeld (tätig in Prag 1740-1754), Johann Ernst Mansfeld (1738 Prag – 1796 Wien),[5] Kajetan Mansfeld und Martin Mansfeld. Gerhard Mansfeld zog 1754 mit seinem Sohn Johann Ernst nach Wien, wo er zum k. k. Stempelgraveur aufstieg und zahlreiche Portraits bedeutender Persönlichkeiten seiner Zeit schuf. Alle bekannten Kupferstecher und Maler mit Namen Mansfeld erblickten nachfolgend in Wien das Licht der Welt, ohne dass wir jedoch aufgrund fehlender Quellen die Möglichkeit haben, eine Verwandtschaft aller Künstler namens Mansfeld nachzuweisen.

Johann Georg Mansfeld (1763-1817), Sohn des Johann Ernst Mansfeld, schuf Illustrationen zu verschiedenen Taschenbüchern und Almanachen. Dieser Johann Georg Mansfeld, den einige Autoren Josef Georg Mansfeld (mit dem Sterbejahr 1818, wobei freilich lediglich einige Tage in Frage kämen, da das Sterbedatum im Falle von Johann Georg auf den 21. Dezember 1817 fällt) nennen, könnte der Illustrator der Kupferstiche zu den hier behandelten Gesetzsammlungen sein.[6] Josef (Johann) Georg Mansfeld erhielt anfänglich seine Ausbildung durch den eigenen Vater, nachfolgend besuchte er die kaiserliche Akademie der bildenden Künste, wo er sich vor allem dem Kupferstich und der Lithografie widmete. Seine Idee, eine eigene Schriftgießerei zu errichten, erwies sich als tragfähig, zumal er damit seine Existenz absichern konnte. Neben dem Kupferstich widmete er sich auch der Aquarellmalerei. Seine Stiche zeichnen sich nach Auffassung von Fachleuten zwar durch eine sehr professionelle Technik aus, wirken jedoch inhaltlich kaum lebendig.[7] Unter den bekannten Arbeiten von Josef (Johann) Georg Mansfeld erscheinen allerdings die hier behandelten Bilder aus den Gesetzbüchern nicht, sodass leise Zweifel an seiner Autorenschaft weiter bestehen. Im 19. Jahrhundert fand die höchstwahrscheinlich familiäre Tradition der Familie Mansfeld ihre Fortsetzung in der Person des Kupferstechers Heinrich

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[2] BODI, L., *Tauwetter in Wien. Zur Prosa der österreichischen Aufklärung*. (Schriftenreihe der Österreichischen Gesellschaft zur Erforschung des 18. Jahrhunderts 6). 2. erweiterte Auflage, Wien – Köln – Weimar, 1995.

[3] Zur Familie Mansfeld vgl. SCHWARZ, H., HERRMANN-FICHTENAU, E., *Die Anfänge der Lithographie in Österreich*. Wien, 1988.

[4] In der Taufmatrikel der Pfarrkirche zu St. Wenzel auf der Kleinseite in Prag wird er als Vater des am 9. Dezember 1705 getauften Kindes angeführt. Er muss spätestens 1687 geboren worden sein, vermutlich aber früher. Vgl. DLABACZ, J. G., *Allgemeines historisches Künstler-Lexikon für Böhmen und zum Teil auch für Mähren und Schlesien*, Prag, 1815, hier S. 253-254.

[5] Sein Name lautet auch Joseph Ernst Mansfeld, wobei – ebenso wie bei seinem Sohn – der Name Johann Georg und Joseph Georg verwechselt wird. Es handelt sich aber unbestritten um denselben Mann.

[6] NAGLER, G. C., *Neues allgemeines Künstler-Lexicon oder Nachrichten von dem Leben und den Werken der Maler etc.* München, 1838, Bd. 8, S. 255. Joseph Georg nennt ihn auch Friedrich MÜLLER (Fortsetzung Karl KLUNZIGER) *Die Künstler aller Zeiten und Völker oder Leben und Werke der berühmtesten Baumeister, Bildhauer, Maler, Kupferstecher, Formschneider, Lithographen etc.*, Bd. 3, Stuttgart 1853, S. 17. Dagegen führen ihn Franz GRAEFFER und Johann Jakob Heinrich CZIKANN *Oesterreichische National-Encyklopaedie oder alphabetische Darlegung der wissenswürdigsten Eigenthümlichkeiten des österreichischen Kaiserthumes*, Wien, 1835, Bd. 3, S. 532, unter dem Namen Johann Georg Mansfeld mit dem Sterbedatum 21. 12. 1817. In der Allgemeinen deutschen Biographie erscheint er als Johann Georg Mansfeld, *Allgemeine deutsche Biographie*, Bd. 20, Leipzig, 1884, S. 211. Auch Hans VOLLMER (als Fortsetzer von Ulrich Thieme und Felix Becker), *Allgemeines Lexikon der bildenden Künstler von der Antike bis zur Gegenwart,* Bd. 24, Leipzig, 1978 (Nachdruck, 1. Aufl. 1930), S. 33, führt lediglich Johann Georg Mansfeld an. Constant von WURZBACH *Biographisches Lexikon des Kaiserthums Oesterreich enthaltend die Lebensskizzen der denkwürdigen Personen, welche seit 1750 in den österreichischen Kronländern geboren wurden oder darin gelebt oder gewirkt haben*, Bd. 16, S. 396-397, äußert die Meinung, dass es sich bei Josef Georg Mansfeld und Johann Georg Mansfeld um eine und dieselbe Person gehandelt haben könnte, was sehr wahrscheinlich sein dürfte, zumal das Geburtsjahr übereinstimmt und das Sterbejahr lediglich aus zwei Varianten besteht: 21. 12. 1817 oder 1818.

[7] WURZBACH, C. von, *Biographisches Lexikon des Kaiserthums Oesterreich…,* Bd. 16, S. 397.

Joseph Mansfeld (1785-1866). Dieser war der Sohn des Kupferstechers und Stempelgraveurs Sebastian Mansfeld (1751-1816), Vater des Graveurs Eduard Mansfeld (1815-1861) und des Malers August Heinrich Mansfeld (1816-1901). Der Maler Josef Mansfeld (1819-1894) wiederum war der Enkel des Kupferstechers Josef (Johann) Georg Mansfeld.

4. Die Kupferstiche [8]

Die Justiz [9]

Im Zusammenhang mit dem hier analysierten Thema verdient insbesondere der fünfte Band der Josephinischen Gesetzsammlung Interesse, der den „Gerichtssachen" gewidmet ist, was auch die übergroße Gestalt der Justitia im Titelbild unterstreicht.[10] Justitia ist hier mit den üblichen Attributen des Rechts ausgestattet – dem Schwert und der Waage, jedoch fehlt im Stich die übliche Augenbinde. Die Gestalt der Justitia ohne Augenbinde ist in dieser Gesetzsammlung üblich. Es bleibt ein Desiderat der Forschung, inwieweit dies auch in anderen Darstellungen der Zeit Josephs II. der Fall ist. Beim heutigen Stand der Forschung wäre die „sehende Justitia" als eine gezielte Absicht der Josephinischen Selbstdarstellung zu interpretieren.

Die „keineswegs blinde Justitia" fand bei Zeitgenossen einen satirischen Widerhall: *„In Tropos, einer großen Stadt dieses Landes, war Herr Schlendrian der oberste Richter. So lange die Gerechtigkeit noch eine Binde vor den Augen hatte, hielt er es für seine Pflicht, die arme blinde Frau an seiner Hand zu leiten; und er führte sie sehr oft in eine Grube, worein sie stürzte. Da nun der Gerechtigkeit die Binde abgenommen ward, glaubte er, daß sie ihn leiten müsse, und war froh, eine so gute Führerin, auf die er sich ganz verlassen könnte, gefunden zu haben."* [11]

Die Justitia ohne Augenbinde ist mit den üblichen Attributen, der Waage und dem Schwert, dargestellt. Weniger geläufig ist hingegen die Positionierung des Schwertes, das nicht wie üblich in der energisch vorgestreckten Hand gehalten wird, sondern einfach an den Arm angelehnt ist (was durchaus dem Geist des Josephinismus entspricht). Nicht der Strafe, d. h. dem Schwert, sondern dem Recht, d. h. der Waage, die sie hält, kommt eine größere Bedeutung zu. Zu Füßen der Justitia ruht das Liktorenzeichen – das Band mit dem Rutenbündel – als Symbol der herrscherlichen Funktion, die auch durch Bücher, Urkunden und versiegelte Schriftstücke (vielleicht Strafgesetze, Urkunden und Patente) zum Ausdruck kommt. Im Hintergrund ist die Hinrichtungsstätte am Rande der Stadt zu erkennen, konkret der Galgen. Die Bestrafung von Übeltätern wird hier noch ganz im „alten" Sinne, also öffentlich, zur Abschreckung des Publikums vollzogen, wie die Gestalt eines Hingerichteten zeigt. Der „erzieherische" Zweck der öffentlichen Bestrafung von schweren Verbrechen wird hier der „modernisierenden" Tendenz von nicht öffentlich zugänglichen Hinrichtungen vorgezogen. Die Darstellung widerspricht den Bemühungen der Josephinischen Juristen und jenen des Herrschers hinsichtlich einer Aufhebung der Todesstrafe im Zivilrecht, wie dies im Strafgesetzbuch 1787 kodifiziert wurde.[12]

Die Toleranz und die Aufhebung der Leibeigenschaft

Es dürfte sicherlich nicht dem Zufall geschuldet sein, dass das Titelblatt des ersten Bandes der Josephinischen Gesetzsammlung eine Allegorie der wichtigsten Merkmale der Regierung von Josef II. darstellt – nämlich den Hinweis auf die gebrochene Macht der Kirche und der Herrschaften. Die „sehende" Justitia als Verkörperung der *„Gott gefälligen reinen Justiz"* umarmt das aufgeschlagene *„Handbuch der Gesetze"*. Die Ursprung der Gesetze ist also nicht vom Gott, sondern *„Gott gefällig" „(…) folglich Seiner Majestät*

[8] Alle hier behandelten Rechtsbilder von Joseph Georg Mansfeld sind Kupferstiche im Oktavformat.

[9] Alle Bezeichnungen der Kupferstiche stammen lediglich von der Verfasserin, um die einzelnen – im Original nicht betitelten – Bilder auseinanderzuhalten.

[10] *Handbuch aller unter der Regierung des Kaisers Joseph des II. für die k. k. Erbländer ergangenen Verordnungen und Gesetze in einer sistematischen Verbindung*. Wien, 1780-1789, weiter bloß: Joseph II. – Gesetze, hier Bd. 5 (1786), Titelblatt. Die Gesetze werden hier nach den Herrschern zitiert, da ich dies für die leserfreundlichste Lösung halte.

[11] HUBER, F. X., *Herr Schlendrian, oder der Richter nach den neuen Gesetzen*. Wien, 1787, S. 5.

[12] Beibehalten wurde die Todesstrafe im Stand- und im Militärrecht.

obliege, eifrigst zu sorgen, damit Ihrer getreuen Länder und gehorsamsten Untertanen Wohlstand und gute Regierung befördert erhalten, und dann die Gott gefällige reine Justiz auf das genaueste gehandelt werde."[13]

Ihre Symbole hält Justitia freilich nicht wie üblich in Händen, sondern Schwert und Waage ruhen neben ihrer Gestalt am Piedestal des Denkmals. Hervorgehoben wird in diesem Bild die Rolle des Gerichts durch die Schwurhand, die Justitia im Schoß am Arm angelehnt hält. Neben Schwert und Waage liegt die Kette mit gesprengten Fesseln – Attribute der nunmehr eingeschränkten Macht der Grundherrschaften, wie sie in der Aufhebung der Leibeigenschaft zum Tragen kommt.[14] Die auf dem Boden unterhalb der Füße der Justitia liegende bischöfliche Mitra sowie das Kreuz und die Bibel verweisen auf die gebrochene Macht der katholischen Kirche (Toleranzpatent 1781, Aufhebung der nicht sozial tätigen geistlichen Orden 1782-1784,[15] Neuordnung des Pfarrsystems 1782,[16] Gründung von Generalseminaren 1783 usw.).[17] Das niedergeworfene Liktorenzeichen neben der Bischofsmitra kann als Symbol des Machtverlustes der katholischen Kirche gedeutet werden. Das gesamte Bild ist in antikem Stil arrangiert: nicht allein die Kleidung der Figuren, sondern auch die Architektur, ebenso das Bild der Pallas Athena, die zum kaiserlichen Porträt – im antiken Stil mit Lorbeerblattkranz auf dem Haupt – hinaufschaut. Josef II. erscheint als Sieger über „die alte Ordnung".

Die Mutter Kirche [18]

Eine geistlich gekleidete Frau – als Gestalt der Mutter Kirche – im Titelbild des zweiten Bandes der Josephinischen Gesetzsammlung hält in einer Hand ein Kreuz, in der anderen einen Kelch, auf dem Schoß ein aufgeschlagenes Evangelium als Zeichen für die nunmehr tolerierten Kirchen. Neben der Ruine einer Kirche im Hintergrund erhebt sich ein neues Kirchengebäude als Allegorie des neuen Pfarrsystems. Der auf dem Boden kauernde Mensch auf dessen Ornat die Kirche geradezu demütigend den rechten Fuß gestellt hat, soll vermutlich die besiegte Kirchenhierarchie symbolisieren, während deren Attribute – bischöfliche Mitra und Stola – neben dem Kauernden und zu Füßen der Mutter Kirche ruhen.

Das Evangelium steht hier also über der Interpretation durch die Menschen. Die Bulle könnte das Toleranz-Patent darstellen, die neu tolerierten Kirchen symbolisiert darüber hinaus der Kelch in der Hand der Mutter Kirche.[19] Die auf den Boden geschleuderte Fahne (neben den Kerzenständern) kann als Symbol der bereits verbotenen Prozessionen gedeutet werden. *„Da alle Prozessionen außerhalb der Erbländer ohnehin verboten bleiben: so sollen von nun an auch iene Prozessionen, wo man auch innerhalb der Erbländer über Nacht ausbleibt, abgestellt werden*; (…)[20] Von diesem strengen Verbot waren lediglich Wallfahrten nach Maria Zell, dem zentralen Wallfahrtsort des Marienkults, ausgenommen. 1783 verbot Joseph II. auch diese Wallfahrt.

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[13] Regierungsantritt, Joseph II. – Gesetze, Bd. 1 (1780-1784), S. 12.

[14] Hofreskript und Patent vom 1. November 1781, Joseph II. – Gesetze, Bd. 1 (1708-1784), S. 74ff.

[15] In der ersten Welle (1782-1784) der Aufhebungen geistlicher Orden wurden vor allem Bettelorden und kontemplative Orden aufgelassen, in der zweiten Welle (1784-1786) weitere Ordensgemeinschaften wie Prämonstratenser und Zisterzienser, jedoch nur einige Klöster, während andere Lokationen erhalten blieben. Im Gegensatz hierzu wurde der Besitz der Barmherzigen Brüder durch direkte Geldzuwendungen oder durch Immobilienbesitz vermehrt, oder es kam sogar zur Gründung neuer Klöster.

[16] Die neue Ordnung des Pfarrsystems sollte die katholische Messe zugänglicher machen, Gläubige sollten nicht mehr als eine Stunde zu Fuß zur Messe gehen müssen. Der Kaiser befahl – je nach Einwohnerzahl – den Aufbau oder die Errichtung neuer Kirchen, Lokalien (kleiner, untergeordneter Kirchen) oder Kapellen. Der steigende Bedarf an Geistlichen sollte aus den Priestern aufgehobener Orden gedeckt werden, was jedoch bei diesen freilich keinen großen Widerhall fand.

[17] Generalseminare, je eines in jedem Kronland, sollten für die Erziehung staatsloyaler Geistlicher sorgen und den Einfluss der jeweiligen Bischöfe mindern. Sie wurden nach dem Tode Josefs II. aufgehoben, was ein pragmatisches Zugeständnis Leopolds II. der Kirche gegenüber darstellte.

[18] Joseph II. – Gesetze, Bd. 2 (1785), Titelblatt.

[19] Das Toleranzpatent vom 13. Oktober 1781 bewilligte drei Kirchen: die protestantische, die helvetische und die „griechisch-unierte", die in Österreich toleriert wurden, ohne dass man sie der „Hegemonialkirche" gleichstellte. Joseph II. – Gesetzte, Bd. 2 (1785), S. 421ff.

[20] Verordnung vom 11. April 1772, Joseph II. – Gesetze, Bd. 2 (1785), S. 112.

Dies war das Ergebnis langer Debatten unter den Aufklärern im Umfeld des Herrschers, die von kritischen Veröffentlichungen ebenso gesinnter Publizisten unterstützt wurden. Prozessionen galten immer häufiger als Vagabunden-Lust-Wanderungen, die herzlich wenig mit einer wahren Andacht zusammenhingen, zumal sie gerade während der wichtigsten Feldarbeiten stattfanden. Dabei wurde argumentiert, Prozessionen würden ohne wirkliche geistige Hingabe verlaufen, die Sittlichkeit von Wanderern lasse im Gegenteil besonders bei Übernachtungen zu wünschen übrig. *„Da lagen oft in einem Zimmer gegen 50 Menschen, Männchen und Weibchen, wie das liebe Vieh auf Stroh beysammen."*[21] 1775 wurde auch die Möglichkeit unterbunden, nach Rom zu pilgern. Offiziell wurde das Verbot dieser Pilgerreisen nach Rom mit einem möglichen Bevölkerungsschwund (besonders für das Militär) begründet, doch müssen hier ohne Zweifel auch die bestehenden Antagonismen zwischen Kaiser Joseph II. und Papst Pius VI. berücksichtigt werden. Das vom Himmel einfallende Licht mag der üblichen Darstellung von religiösen Themen entsprechen, doch kann dies auch als das Licht der Aufklärung gedeutet werden. Das sonst übliche Gottesauge fehlt. Interesse verdient, dass dieses Rechtsbild in der Leopoldinischen Gesetzessammlung erneut Aufnahme fand.

Die Waisen[22]

Im Vergleich zur Rohheit in der Darstellung des Strafgesetzes präsentiert Joseph Georg Mannsfeld das Bild des Staates in Gestalt einer schönen jungen Mutter, die sich der Waisen und (eventuell Findelkinder?) erbarmt und für sie sorgt. Die Kinder blicken ergeben und liebevoll zum Staat (d. h. der Mutter) auf. Die Absicht des Bildes offenbaren das auf dem Boden liegende Waisenprotokoll sowie das Schema einer genealogischen Tafel, deren Namenstellen freilich leer sind – sie stehen symbolisch für die verstorbenen oder unbekannten Eltern, die somit nicht für ihre Kinder sorgen können. Die insgesamt friedlich und geradezu anrührend wirkende Szene spielt in einer ebenso stillen Umgebung unter einem weiten Himmel.

Das Strafgesetz[23]

Unter Kaiser Joseph II. erschien das erste moderne österreichische Strafgesetzbuch, die sog. Josephina.[24] Zum ersten Mal erfolgte auf dem Boden der österreichischen Erbländer die Regelung des Strafrechts nicht in Gestalt einer Halsgerichtsordnung, sondern dies geschah durch die Josephina und die ein Jahr später erlassene Allgemeine Kriminalgerichtsordnung. Als Novum galt die Aufteilung des Strafgesetzes in zwei Bereiche von Missetaten: Kriminal- und politische Verbrechen. Die Todesstrafe wurde für die Zivilgesetzgebung abgeschafft, während sie im Stand- und im Militärrecht weiterhin Anwendung fand. *„Die Todesstrafe soll außer den Verbrechen, bey welchen nach dem Gesetze mit Standrecht verfahren werden muß, nicht stattfinden."*[25] Im Zentrum des Titelbildes von Band 14 der Josephinischen Gesetze befindet sich ein freier Raum vor einem Gebäude, das als Gefängnis oder Zwangshaus gedient haben mag. Der Kupferstich zeigt die Spannbreite der in der Josephina festgelegten Strafen. An die Stelle der Todesstrafe traten schwere, allgemein nützliche, zugleich aber auch abschreckende Strafen, darunter das Schiffeziehen, das im Hintergrund des Kupferstiches zu erkennen ist. Im Falle von Kriminalverbrechen mussten die Gefangenen zusätzlich öffentliche Arbeiten verrichten, was eine Verschärfung bedeutete, wie dies im Vordergrund des Bildes gezeigt wird: Zwei von einem Aufseher bewachte Männer mit Fesseln an den Füßen kehren mit Besen den Platz vor dem Gebäude. In unmittelbarer Nähe wird eine andere Bestrafung vollzogen (und zwar ebenfalls innerhalb der Kategorie der Kriminaltaten): Öffentliche Stock-, Karbatsch- oder Rutenstreiche, ausgeführt durch einen uniformierten Mann, wobei die zuschauenden

[21] RICHTER, J., *Bildergalerie katholischer Mißbräuche*. Frankfurt und Leipzig, 1784, S. 103.
[22] Joseph II. – Gesetze, Bd. 11 (1788), Titelblatt.
[23] Joseph II. – Gesetze 14 (1789), Titelblatt.
[24] Patent vom 13. Januar 1787. *Joseph des Zweyten römischen Kaisers Gesetze und Verfassungen im Justiz-Fache.* Für Böhmen, Mähren, Schlesien, Oesterreich ob und unter der Enns, Steyermark, Kärnthen, Krain, Görz, Gradisca, Triest, Tyrol und die Vorlande. In dem siebenten Jahr seiner Regierung, Wien, 1817, Nr. 611, S. 7ff.
[25] § 20, ebenda.

Frauen und Männer die Öffentlichkeit darstellen. Die sichtbare Vereinfachung von Strafen im Josephinischen Strafgesetzbuch entbehrt nicht einer leichten Ironie, die einigen Kupferstichen Mansfelds einen besonderen Reiz verleiht.

Die Abbildungen in der Gesetzsammlung der Regierungszeit Josef II. zeigen in ihrem mild ironischen Ton die sich wandelnde österreichische Gesellschaft und vor allem die neue Rolle des Staates. Die übereilte Umwandlung der „alten" in eine moderne Gesellschaft rief innerhalb der meisten Schichten der Bevölkerung Widerstand gegen den großen Reformer Joseph II. hervor. Bereits einige Zeitgenossen des Kaisers versuchten, die Gründe der allgemeinen Revolte, die mit der Zeit ein immer größeres Ausmaß annahm, zu erkunden. Die Gesellschaft bzw. ihre Intellektuellen erhielten damit ein durchaus modernes Gewand: zum ersten Mal konnte eine offene Kritik am Herrscher und an der Regierung als Suche nach möglichen neuen – „besseren" – Wegen der gesellschaftlichen Entwicklung interpretiert werden. Joseph Richter hob die Verdienste Josephs II. in einer Schrift hervor, offen und zurecht verbunden mit der Frage, warum die neue Gesetzgebung einen derart heftigen Widerstand hervorrufe. *„Die Gesetze waren dunkel, der Gang der Rechte langsam, die Richter spielten mit Gesetzen, und die Rechtsfreunde mästeten sich vom Vermögen ihrer betrogenen Partheyen. Joseph verbesserte die Gesetze, gab den Rechten einen raschen Gang, beschränkte die Habsucht der Advokaten, – stellte unbestechliche Männer zu Richtern auf – und doch liebt ihn sein Volk nicht."*[26] Die Kritik betrifft nicht so sehr die Reformen selbst, die in vielen zeitgenössischen Broschüren zwar mit Ironie aufgenommen, jedoch keineswegs abgelehnt werden. Eine kritische Haltung nimmt Joseph Richter gegenüber der allzu strengen Persönlichkeit Josefs II. und der kaiserlichen Methoden zur Verwirklichung der Reformen ein. *„Ein Regent soll dem Gotte der Christen gleichen: Er soll kein strenger Richter, er soll ein liebreicher Vater seyn. Strenge verhärtet nur die Herzen; aber Großmuth und Güte gewinnt sie."*[27]

Natürlich wurde eine derart bislang undenkbare Äußerung allein aufgrund der Lockerung der Zensur möglich, was wiederum auf die Klugheit und Selbstironie des Kaisers schließen lässt. Die Josephinische Zensur erlaubte die Äußerung eines bisher unvorstellbaren Gedankens: nämlich die Artikulation eines Zweifels an der Person des Herrschers. Dabei schwingt natürlich keineswegs der Gedanke mit, ein schlechter Herrscher könne durch die republikanische Staatsform ersetzt werden, wenngleich die Mittel für eine „Vervollkommnung" der bisher

[26] ANONYMUS [RICHER, J.], *Warum wird Kaiser Joseph von seinem Volke nicht geliebt?* Wien, 1787, S. 14.
[27] Ebenda, S. 45.

unantastbaren Person des Herrschers – nämlich Erziehung und Pressefreiheit – bereits als sehr modern erscheinen. *„(…) Ein einziger Umstand machte mir die Alleinherrscher noch auf eine gewisse Art fürchterlich: dies ist die Besserung der Fürsten. Politische Höhe schützt nicht vor moralischer Tiefe. (…) Wie es wohl möglich sei, einen Fürsten zu bessern, der vom Glanze seines Thrones geblendet, vom Geklirre seines zahllosen Heeres trotzig gemacht, und, von den Schmeicheleien seiner Hofschranzen eingewiegt, einmal auf die schlimme Wege geraten sei und sich einbilde, das Volk sei bloß seinetwegen da. (…)"*. Die Anspielung auf die religiöse Gerechtigkeit, die erst im jenseitigen Leben folgen wird, jedoch das irdische Leben unverändert lässt, beinhaltet einen Angriff auf die Macht der Kirche als eine fundamentale Stütze des Herrschers. *„Wir sollen ein Mittel haben, das den irrenden Gewaltsmann noch bei seinem Leben bessert. Die erwachende Philosophie gibt uns gelindere Mittel: diese sind Erziehung und Preßfreiheit, (…) die doch das einzige aufrichtige Organ ist, durch das der Fürst die Gesinnungen seines Volkes gegen ihn und seine Bedienten unverstellt erfahren kann."* [28]

5. Zusammenfassung

„Die Archonten dieses Reiches fühlten sich verpflichtet, dem aufgehenden Tage gemäß, alle Verordnungen, Einrichtungen usw., die in den Finsternissen eingeführt und verfaßt wurden, abzuschaffen, und an deren Stelle neue einzuführen. Man fand die alten Gesetze dunkel, woraus denn in den Gerichtsstuben nichts als Verwirrung entstund, (…) Diesem Unfuge zu steuern, traten die ältesten und geschicktesten aus dem Rate zusammen, und verfaßten ein neues Gesetzbuch. Deutlichkeit aller Gesetze war die erste Grundregel: und man befolgte sie. Das Gesetzbuch erschien und der Verstand dieser neuen Gesetze war so einleuchtend, dass Schulknaben sie ohne einen Kommentar verstehen konnten. Durch dieses neue Gesetzbuch glaubten die Archonten der Gerechtigkeit die Binde abgenommen zu haben, (…) [29]

Wie haben wir uns den Staat Österreich unter Josef II nun vorzustellen? Die kritischen und zuweilen kargen Kupferstiche von Johann (Joseph) Georg Mansfeld sowie die satirischen Texte von Franz Xaver Huber, Johann Pezzl und Joseph Richter zeichnen trotz scharfer Kritik kein negatives Bild des Staates und seiner Herrscher. Sie geben eher Auskunft über die sich verändernde und modernisierende Gesellschaft, deren weitere Entwicklung unter anderem durch die Veröffentlichung des Allgemeinen Gesetzbuches im Jahre 1786 und des Strafgesetzbuches 1787 ermöglicht und beschleunigt wurde. Wenngleich an die Stelle beider Gesetzbücher relativ schnell andere Normen (ABGB 1811 und StG 1803) traten, stellt die Periode Josephs II. sehr wohl einen wichtigen Meilenstein in der Rechtsgeschichte des österreichischen Staates dar.

[28] Beide Zitate: PEZZL, J., *Marokkanische Briefe*, S. 32-33, 34.
[29] HUBER, F. X., *Herr Schlendrian, oder der Richter nach den neuen Gesetzen*. Wien, 1787, S. 4.

The Collective Agreement in the Interwar Czechoslovak Republic (Clash of Legal and Philosophical Ideas)*

*Miriam Laclavíková**, Tomáš Gábriš****

Abstract

The article describes the transformation of legal thinking in the transition from liberalism to collectivism, respectively transition from the minimal state to welfare state, on the example of the development of legal regulation of collective agreements in the interwar Czechoslovak Republic. These changes affected alike jurisprudence, legal science and legislation, but it was ultimately the legislation that had to answer the questions that both theory and practice were reluctant to resolve.

Keywords: *Collective agreement; interwar Czechoslovak Republic; liberalism; collectivism; solidarity; welfare state.*

1. Introduction

The battle for collective freedom (freedom of association) of employees, for collective bargaining and for collective agreements is intertwined on the European continent with the rise of the organised labour movement and with the forming of the idea of protection of an employee as a so-called weaker party to the contract. These developments have taken place on the background of a clash between the ideas of liberalism and collectivism (including the Christian social doctrine of solidarity), and later, in a particular way, the ideas of corporativism.[1] It is also an example of a clash between the concept of the minimal state and the emerging welfare state. It is precisely the collective labour law in which the political and ideological influences of political and social doctrines on law and legal dogmatics are especially strong. In this paper, we will therefore look at the changing perspectives of legal theory, legislation, and the judiciary on the new, previously unregulated legal institution of collective bargaining agreement in the interwar Czechoslovakia.[2]

2. From Liberalism to Corporativism and Back Again: The Evolution of Collective Labour Law

The clash between the dogmatics of law and political and social reality in the field of employer-employee relations emerges in Central Europe particularly with the development of capitalist production in the second half of the 19th century. Labour law as a separate field emerged in Germany at the turn of the 19th and 20th centuries, in the context of state intervention in what had originally been a private law relationship between an employee and employer, when the desire for state protection of employees replaced the previous endless liberalism, which had assumed that the employment contract was a usual civil contract between free and equal subjects. Economic inequality, and the resulting economic dependence of employees on the employer, had been ignored. Therefore, labour law was considered a private law discipline, essentially a part of civil law of obligations. The collective aspect of labour law were legally non-existent at that time. Trade unions, collective bargaining and strikes were initially even explicitly prohibited, but these prohibitions were gradually weakened in the face of changing political realities - shifting to a respect or tolerance of freedom of association and collective action. In the end, freedom of association and collective bargaining, including the strike and also a special collective agreement,[3] were accepted as a "social necessity" - particularly in the conditions of the inter-war Czechoslovak Republic, marked by "socialisation" of law and society immediately after the First World

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1 On interwar corporatism see e.g. ŘÍCHOVÁ, B., *Přehled moderních politologických teorií. (An overview of modern political science theories).* Prague, 2006, p. 177-195.

2 It is also necessary to be aware of the disparity between the individual parts of the Czechoslovak state, in simplified terms between the Czech lands, Moravia and Silesia on the one hand, and Slovakia and Subcarpathian Rus on the other, consisting in fundamentally different economic strength, level of industrial development, imbalanced trade union organisation, collective solidarity and collective participation. PRŮCHA, V. and coll., *Hospodářské a sociální dějiny Československa. 1918 – 1992. (Agricultural and social history of Czechoslovakia. 1918 – 1992).* Brno, 2004, p. 374.

3 See also JACOBS, A. Collective Self-Regulation. In: HEPPLE, B. (ed.), *The making of labour law in Europe: A Comparative Study of Nine Countries Up to 1945*. London, 1986.

War.[4] With the extension of the right to vote to working classes, political parties, and consequently the legislator, had to reflect their electoral potential and respond to their requirements for social protection. Emil Hácha described this economic, social and legal transformation on the entire European continent in legal-philosophical terms as a process which happened "*only under the impression of the English model and certainly as a result of the falling faith in the salvation of economic liberalism and perhaps also as a result of the recognition of the factual impossibility of the state to confront the workers' movement.*" [5]

Freedom of association recognized by passive tolerance of the state,[6] has opened up possibilities for workers to organise and negotiate collectively, usually with the aim of improving working and pay conditions. The danger of a strike, however, was still perceived as a disproportionate form of coercion, and a part of the political spectrum in both Austria and Hungary underlined the criminal dimension of collective action. The collective bargaining process was therefore not a social dialogue in today's sense, rather it was a search for a delicate balance of interests. In this context, the collective agreement was perceived politically and sociologically as an "achievement of the new era" and interpreted also as a means of preventing social unrest. Even the period name "tariff" agreement [7] itself speaks explicitly for the fact that it was mostly the wage conditions of the workers that have been addressed as a priority through collective negotiations. Private law initially tolerated collective (mass, tariff) agreements as a kind of abnormal phenomenon, disproportionately interfering in the freedom of contract and in the autonomy of the contracting parties.[8] From a legal point of view, it was an "innovation" of a highly problematic nature.[9] In Czechoslovakia, until the end of the 1930s, the collective agreement was "flying in the air" [10] without a more complete and conceptual legal regulation.

Some mentions of collective agreements in interwar Czechoslovakia [11] were contained in several statutes, without a unifying legal basis and without general recognition of their legally binding character. As Zdeněk Deyl noted, collective agreements in this period "*were only the result of mutual agreement and their provision and observance was not dependent on the law.*" [12] The former Austrian legislation in force in the Czech Republic, Moravia and Silesia, regulated the collective agreement mainly in the provisions of § 114b of the Trade Licensing Act.[13] Under this law, it was possible to conclude a collective (mass) agreement obliging tradesmen and their employees in a given sector, with subsequent authorisation by the provincial administration bodies.[14] The contract could include the working hours of the employees (determination of the beginning and end of working hours), work breaks and wage conditions (amount, due date of wages). However, the collective agreement's binding nature was fundamentally limited by the fact that tradesmen (employers) and their employees could agree on other conditions of the employment relationship in an individual employment contract, i.e. they could depart from the provisions of the collective agreement.[15] It was namely assumed that the individual agreement reflected the truly free intention of both parties, without any coercion or economic dependence.

Similarly, the regulation of the collective agreement was dealt with in Act No. 20/1910 on commercial assistants. Section 6 provided for the option of concluding a collective agreement between associations of employees and employers, with the open option for individual arrangements.

Another regulation was provided under the Domestic Labour Act of 1920. Collective agreements, however, were also partially regulated in several other regulations - in the Act No. 82/1920 Coll. regulating the legal status of housekeepers; in Act No. 144/1920 Coll. on factory and review councils in mining, in Act No. 330/1921 Coll. on factory boards, etc.

Despite the partial regulation, however, the Czechoslovak legal framework still lacked their general definition and general legislative regulation. This resulted in an anomalous situation in which the normative framework provided for the existence of

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[4] BEŇA, J. Socializácia a publicizácia v súkromnom práve a reflexie v právnej vede na Slovensku v medzivojnovom období. (Socialization and publicization in private law and reflection in legal science in Slovakia in the interwar period). In: MALÝ, K., SOUKUP, L. (eds.), *Československé právo a právní věda v meziválečném období (1918 – 1938) a jejich místo ve střední Evropě. svazek 2*. Prague, 2010, p. 1152.

[5] HÁCHA, E. Koaliční právo. (Coalition law). In: *Slovník veřejného práva československého. Sv. 2*. Brno, 1932, p. 198.

[6] Coalition freedom received its constitutional expression in the Constitutional Charter of the Czechoslovak Republic No. 121/1920 Coll. (§ 114).

[7] See more details: ŠVEC, M., *Collective agreement*. Bratislava, 2016, p. 9.

[8] RÁKOSNÍK, J., TOMEŠ, I., *Sociální stát v Československu. Právně-institucionální vývoj v letech 1918–1992. (Social State in Czechoslovakia. Legal and institutional development in the years 1918 – 1992).* Prague, 2012, p. 58.

[9] HÁCHA, E. Koaliční právo. (Coalition law). In: *Slovník veřejného práva československého. Sv. 2*. Brno, 1932, p. 199.

[10] HEXNER, E., Pracovná smluva priemyslových zamestnancov na Slovensku. (Employment contract of industrial employees in Slovakia). In: *Právny obzor*, vol. 5, 1922, p. 140.

[11] See: VOJÁČEK, L., Pracovní právo (Labour Law). In: VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. a coll. (eds.), *Vývoj soukromého práva na území českých zemí. II. díl,* Brno, 2012, s. 829-862. On the development of labor law in the interwar Czechoslovakia and in the Protectorate of Bohemia and Moravia, see: TAUCHEN, J., *Práce a její právní regulace v Protektorátu Čechy a Morava* (1939–1945). (Labor and its legal regulation in the Protectorate of Bohemia and Moravia (1939–1945)). Praha, 2016, p. 2 ff.

[12] DEYL, Z., *Kolektivní smlouvy v Československu 1918 – 1938. (Collective agreements in Czechoslovakia 1918 – 1938).* Prague, 1987, p. 10.

[13] Imperial Patent No. 227/1859 r.z. Trade Licensing Act. The amendment and implementation of the collective agreement was introduced in 1907 by Act No. 26/1907 r.z.

[14] A collective agreement that was not approved at the provincial (regional) level was not legally effective. Compare the decision of the Supreme Court of the Czechoslovak Republic from 24 February 1938, Rv II 1154/37, No. 16739. In: Vážný, F., *Collection of Decisions of the Supreme Court of Czechoslovak Republic in Civil Cases (1918-1938)*. Prague, 1919 – 1939 (abbr. Vážný).

[15] An analogous provision was also adopted in the new Trade Licensing Act for Slovakia and Subcarpathian Rus, No 259/1924 Coll. z. a n. (§ 161).

collective agreements, but "*does not dictate their conclusion or the execution of negotiated points.*"[16]

Likewise, although references to collective agreements have been a useful addition to election campaigns and government programme statements, political parties did not strive for detailed regulation of collective agreements in their programmes. The problem was mainly the possibility, introduced above, of changing a collective agreement (*Abdingsbarkeit*) by an individual employment contract. Even the Ministry of Social Affairs was essentially lax in answering this question. The recognition of the priority of collective agreements over individual contracts was, in fact, unimaginable to the legal thinking of the time in the light of the traditional doctrine of the law of obligations, based on the "sanctity" of contractual autonomy, and the contractual freedom of the parties, which a priori were considered legally equivalent thanks to the constitutionally guaranteed "equality before the law". However, in fact, from the mid19th century, due to large-scale industrialisation, factory workers gradually became more and more dependent on their employers, while on the other hand their work became relatively easy to replace thanks to the arrival of new potential employees. The employee thus became a relatively easily replaced element in the production and working process, which directly affected his or her negotiating position both in the conclusion of the employment contract and in the negotiation of working conditions and wages in the workplace. The work of the employee has thus, since the end of the 19th century, become really "dependent work" - also in the sense of being subject to authority and control.[17] The employee was explicitly obliged to be loyal to the employer, to follow the employer's instructions and to behave in a decent manner.[18] This is already a sign of a reality which denies a purely contractual basis of the employment relationship and views the employment relationship more like an organisational or personal relationship. Instead, one could speak of elements of "paternalism" in labour law.[19] Yet this argument about the move away from liberalism to paternalism and dependence hardly resonated in the legal and political discourse of the time, although it might have been used as a useful counter-argument to the liberalist basis of the contractual relationship between an employee and employer.

It is at this historical breaking point that the really antagonistic interests between the group of employees and the group of employers envisaged by the doctrine of Marxism-Leninism emerge. A solution to this situation was possible to find in several ways. The less radical one is that chosen by Western Europe, which has continuously developed the relationship between employees and employers in the direction of strengthening the negotiating position of employees, thanks to the possibility of trade union association and thanks to collective bargaining and collective action. The second, extreme way of possible solution was the understanding of the employment relationship in German, Austrian, Italian, and even Slovak legal science of the first half of the 20th century. The legal relationship between employee and employer was understood as a communitarian relationship,[20] which was to be subordinated to a higher collective interest - national production.[21] The idea of a private law contractual relationship has thus been completely discarded. In the eyes of later socialist theory, however, corporativism conceived in this way served only as a tool for the exploitation of the working class by employers. Nevertheless, later, the ideals of a people's democratic or socialist unity of the interests of employees and employers introduced in Czechoslovakia after 1948 were in fact based on the same formula, but in addition combined with totalitarianism, where the state was to be the exclusive employer. This represents a third possible solution to the relationship between employees and employers - the totalitarian approach.

The rejection of this development in Central Eastern Europe after 1989, however, closed the historical circle of development and triggered a return to the private-law contractual relationship, but certainly not in the pure form of liberalism from the beginning of the 20th century. In this way, in Czechoslovakia and its successor states, the Czech and Slovak Republics, the collectivist or solidarity-based "social model" of labour law is respected now, instead of the extremes of the liberal, corporativist or even socialist (communist, totalitarian) model.

3. The Collective Agreement in the Judicial Practice of Interwar Czechoslovakia

The struggle between individualistic liberalist ideas and collective, social or even corporatist or socialist ideas was manifested not only in political terms. The above-mentioned clash can be witnessed also in legal science[22] and in judicial practice, from which we will present here the essential cases solved before the Supreme Court of the Czechoslovak Republic. The reasoning of these court decisions provides convincing evidence not only of the struggle between the ideas of liberalism and collectivism (communitarianism), but also of a call for the adoption of legislation regulating the collective agreement in more complex terms.

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[16] PRŮCHA, V. and coll., *Hospodářské a sociální dějiny Československa. 1918 – 1992. (Agricultural and social history of Czechoslovakia. 1918 – 1992).* Brno, 2004, p. 76.

[17] Ibid, p. 65.

[18] *Czechoslovak labour law*. Bratislava, 1956, p. 321.

[19] VENEZIANI, B., The Employment Relationship. In: HEPPLE, B., VENEZIANI, B. (eds.), *The Transformation of Labour Law in Europe.* Oxford, 2009, p. 100.

[20] GÁBRIŠ, T., Závislá práca a súkromné právo. (Dependent Labour and Private Law). In: VOJÁČEK, L., TAUCHEN, J., SCHELLE, K. (eds.), *Proměny soukromého práva*. Brno, 2011, p. 285-299.

[21] MALATINSKÝ, M., Stavovské zriadenie a Slovenská republika (1939-1945). (The class structure and the Slovak Republic (1939-1945)). In: *Míľniky práva v stredoeurópskom priestore*. Bratislava, 2014, p. 86 ff.

[22] This fact is also pointed out by the eminent civilist Prof. Jaromír Sedláček. Cf. SEDLÁČEK, J., *Občanské právo československé. Všeobecné nauky. (Czechoslovak Civil Law. General doctrines).* Brno, 1931, p. 82.

Honestly speaking, in the case of the interwar debates on the nature of the collective agreement, Czechoslovak judicial practice did not play a leading role in the development of the legal regulation of collective agreements, because it was inconsistent, even at the level of the Supreme Court itself, where both liberal and socially oriented decisions in similar collective agreement cases appear. This, however, only confirms the contemporaneous ambivalence and lack of crystallization of views on the role of the collective agreement in labour law, but also on the nature of labour law itself. Although the court decisions filled the legal gaps[23] to a certain extent and in their reasoning expressed broad views on, for example, the concept of a collective agreement,[24] the identification of the parties to a collective agreement, their subjectivity, the material and formal elements of a collective agreement, etc., they were still unable to resolve satisfactorily the question of the priority of collective or individual employment agreements. In the court decisions, it is thereby possible to identify substantial judicial creativity (activism) in the attempt to find a suitable solution, without any success, though.[25]

In June 1924, a Supreme Court senate was hearing a case of an employee with whom an individual employment contract was concluded in conflict with the provisions of the collective agreement - namely, with a lower wage than the wage specified in the collective agreement, for reasons of lesser quality of work. Czechoslovak Supreme Court, in its final decision in the case of 26 June 1924, Rv I 562/24, declared that collective agreements were valid and legally binding by limiting the possibility of individually agreeing on working and wage conditions other than those specified in the collective agreement which were more favourable to the employee. It thus expressly stated the superiority of the collective agreement over the individual employment contract.

According to the judges, the violation of the supremacy of the collective agreement was, *"in the light of the social feeling of the times",* an act against good morals and therefore not valid (§ 879 ABGB).[26]

Still, one year later, the same court, in a similar case, decided a conflict between a bank clerk employee and his employer - a bank, in which the court ruled to the contrary, i.e., against the supremacy of the collective agreement. In the decision of 22 December 1925, Rv II 892/24,[27] the Supreme Court declared that *"unless the law provides otherwise, the parties to a collective agreement are not limited in their contractual freedom to agree on other terms and conditions of employment and wages in the individual employment contract, and may therefore derogate from the collective agreement to the benefit of both the employee and the employer."* In the present case, the court followed a strict interpretation of the law, holding that if the law allows for an individual employment contract, there can be no conflict with good morals. In the case of section 6 of the Commercial Assistants Act, there was "merely" a dispositive provision of the Act which could be varied by agreement of the parties. The court solved the problem with an attempt at legal-philosophical argumentation: *"In private law relations… the contracting parties have the right to regulate their relations according to their consensual will; any other way of regulating their mutual relations is an exception… Only in a system based on collectivism, which is the antithesis of an individualist system, is acceptable public regulation, which does not allow free private dispositions… But the private-law and individualist system is still valid, albeit reformed in the spirit of modern social ideas unknown to Roman law."* Thus, while on one hand the Court acknowledged the shift towards social ideals, it refused to transcend individualism to the extent of allowing the limitation of contractual freedom by a collective agreement. Although the new Czechoslovak legislation - the Domestic Labour Act of 1920[28] - by its special regulation of collective agreements gave collective agreements precedence over individual ones, or accepted that a collective agreement replaced a labour agreement in so far as the agreements contradicted each other, this provision could not, according to the interpretation of the Supreme Court, be extended to legal relations regulated by the Trade Licensing Act and the Act on Commercial Assistants. Because the legislature did not change the provision of Section 6 of the Commercial Assistants Act, and at the same time did not adopt a general regulation of collective agreements for all sectors of the economy, the Supreme Court therefore rejected a creative interpretation (contained in its earlier decision) justified by the changed social, economic and political conditions after World War I. In its further interpretations, the Supreme Court referred to its Plenary Resolution No. 544/1925 of 24 November 1925 and summarised that the collective agreement can be understood as a "model" for concluding individual employment contracts in order to "save time" in their negotiation, but - most importantly - the collective agreement does not replace the individual employment contract. It is therefore necessary to ask, as a matter of priority, what the content of the individual employment contract is, and only if there are gaps in its provisions, to look at the collective agreement.

[23] *"The legal character of collective agreements has been clearly established by countless decisions of the trade courts and the Supreme Court. They are and will remain, until regulated by law, private contracts, which are to be judged according to the civil law."* From the reasoning of the decision of the Supreme Court of the Czechoslovak Republic from 30 August 1929, Rv I 1781/28 (No. 9145 Vážný).

[24] For example, the decision of the Supreme Court of the Czechoslovak Republic from 15 January 1937, Rv I 1268/36, No. 15746 (Vážný): *"The purpose of such agreements is that the employer should not be forced to negotiate a service or employment contract with each employee separately, but rather that they should all have the same content, the relations in the undertaking should be stabilised and thus conflicts between employer and employee should be avoided. However, collective agreements are only a framework for the conclusion of individual contracts and do not replace them…"*

[25] Decision of the Supreme Court of the Czechoslovak Republic from 24 June 1924, Rv I 5628/24, No. 4009 (Vážný): *"only deviations in favour of the employee can be left to a special arrangement…"*

[26] Similarly, the decision of the Supreme Court of the Czechoslovak Republic from 1 March 1921, Rv I 131/21, No. 949 (Vážný).

[27] Decision of the Supreme Court of the Czechoslovak Republic from 22 December 1925, Rv II 892/24, No. 5587 (Vážný).

[28] Act No. 29/1920 Coll. on the regulation of labour and wage conditions of domestic work, § 21.

This apparently conflicting jurisprudence[29] was to be unified by the plenary decision of the Supreme Court of 24 November 1925.[30] In this plenary decision - which has been quoted frequently in the judicial practice of the interwar period - the Supreme Court deals quite extensively with the differences in the legal regulation of collective agreement in the individual laws, pointing out the difference between the pre-war regulation, which was based on the liberalist concept, and the post-war Czechoslovak regulation, which took into account the new social situation and was influenced by the ideas of collectivism. The pre-war regulation was based, as the Supreme Court stated in the grounds of its plenary decision, on the principles of freedom of contract and equality of the parties. In contrast, in the opinion of the Supreme Court, the newer Czechoslovak regulation was more casuistic, applicable only to specific sectors and professions, and therefore could not be fundamental for the interpretation of norms in other sectors. The Supreme Court thus clearly passed the ball to the legislator, to change the "general concept" of collective agreements in favour of the primacy and validity of collective agreements.

4. The Collective Agreement in the Legislation of Interwar Czechoslovakia

Efforts to introduce new private law codification had been underway in Czechoslovakia since its establishment in 1918. The draft Civil Code published in 1931 thereby defined the limits of contractual freedom in individual employment contracts by a clear formulation in the proposed provision of § 1043: *"… the individual contract may not deviate from the collective contract."* The collective agreement was thus understood in the proposal as "superior" to the individual employment contract. At the same time, the proposal also defined mandatory provisions determining the rights of the employee which could not be limited or excluded by the collective agreement.[31] However, the elements of a collective bargaining agreement, the capacity to conclude the agreement, the rules on registration, etc., were not addressed by the 1931 draft Civil Code.

In the end, however, after six years of comments and revisions to the original 1931 draft, not even a single provision on the relationship between the collective employment contract and the individual employment contract made it into the final version of the 1937 draft Civil Code.[32] The government's draft Civil Code essentially defined a collective agreement only in simple terms (§ 981): *"If a contract is concluded in such a way that it lays down the terms of individual labour contracts for a particular undertaking (factory) or for several undertakings (factories) of a particular branch or district, a collective agreement shall arise."*[33]

This was a natural expression and result of the persistent political disagreements on the solution of this political and legal problem, which is also manifested in the stenographic records of the sessions of the National Assembly of the Czechoslovak Republic, where numerous proposals, interventions, questions and polemics concerning the need to adopt a new general regulation of the collective agreement and its legal validity appeared quite regularly since the 1920 s, but always without any results.

From among the most important legislative efforts one can mention here the 1926 bill on the validity of collective agreements by Senators Rudolf Pánek, Ferdinand Šťastný and associates.[34] The proposal attempted to define a collective agreement as a contract regulating the work and wage requirements of particular groups of employees and other rights and obligations of the parties arising out of the employment relationship. The obligation to conclude a collective (tariff) agreement was to be explicitly imposed on all enterprises with at least 10 employees and on all associations of commercial (trade) assistants, irrespective of the number of members. A register of collective agreements was to be kept by the Ministry of Social Welfare or by another body designated by the Ministry. This body would examine the collective agreement in terms of its content and the contractual capacity of its parties and only after examining them it would authorise or refuse entry of the collective agreement in the register.

The reasons and grounds for this parliamentary draft defined the aim of collective agreements as a means to *"prevent free competition both between employees and between employers when it comes to the determination of working conditions, and therefore these agreements are a kind of analogy of trusts and cartels, which are intended to prevent free competition in the formation of prices… Collective agreements are therefore nothing more than another link in the development of the organisation of the production of economic goods and a logical consequence of the necessary restriction of free contract and free competition."*[35] The

[29] The inconsistent judicial practice was pointed out by decisions of the trade courts. More details: ŘÍHA, J. – FREUDENFELD, F., *Pracovní právo republiky československé. Soubor norem upravujících pracovní právo s judikaturou a poznámkami. (Labour Law of the Czechoslovak Republic. A collection of norms regulating labour law with case law and notes).* Prague, 1931 and ROUČEK, F. *Služobné pomery na Slovensku a v Podkarpatskej Rusi.* (*Service relations in Slovakia and Subcarpathian Rus*.) Prague, 1925.

[30] Plenary decision of the Supreme Court of the Czechoslovak Supreme Court from 24 November 1925, No. 544/25 (No. 5479 Vážný). Similar decision from 16 February 1933, Rv II 427/31 (No. 12364 Vážný).

[31] See *Vládní návrh. Zákon, kterým se vydává občanský zákoník. Důvodová zpráva.* (*Government proposal. An Act to establish the Civil Code. Explanatory memorandum*). Prague, 1937.

[32] The explanatory memorandum expressed the following comments: *"After inter-ministerial negotiations and after careful reconsideration, it was finally decided that the government proposal should not even discuss the relationship between collective and individual contracts." Vládní návrh. Zákon, kterým se vydává občanský zákoník. Důvodová zpráva*. (*Government proposal. An Act to establish the Civil Code. Explanatory memorandum*). Prague, 1937.

[33] Cf. SEDLÁČEK, J., *Hospodářství a nový občanský zákoník. (Economy and the New Civil Code).* Prague, 1937.

[34] *Návrh senátorů Rudolfa Pánka, Ferdinanda Šťastného a spol., aby byl vydán zákon o závaznosti kolektivních (tarifních) smluv. (Proposal by Senators Rudolf Pánek, Ferdinand Šťastný and others to adopt an Act on the validity of collective (tariff) agreements).* Senate of the National Assembly of the R. Czechoslovakia, 1926. Press 79. Available on: internet : https://www.psp.cz/eknih/1925ns/se/tisky/t0079_01.htm (visited on 01. 02. 2022).

[35] Ibidem.

explanatory memorandum to the deputies' proposal thus explicitly declared a departure from the ideas of liberalism.

The key provision - also in view of the ongoing controversy in court practice - was to be the provision of § 9 of the proposal, according to which all agreements between an employer and an employee which contained conditions less favourable than those laid down in the collective agreement were to become legally ineffective and the collective agreement and its more favourable provisions were to be applied instead. The proposal was thus based on positions close to collectivism, emphasizing the need for social solidarity. The proposal was ultimately unsuccessful, however, and the struggle for a new general regulation of collective agreements continued for the following ten years.

From among the later legislative efforts in this area, special mention should be made of R. Köhler's proposal for the legal regulation of collective labour and service contracts and for the establishment of a conciliator office,[36] which even envisaged the possibility of extending the collective agreement to the entire economic sector, through the institution of the *"Declaration of Collective Agreements as a Rule"*. However, this proposal was also unsuccessful in the end of the day.

As a result of the economic crisis, when unemployment grew, hunger strikes, marches and lockouts multiplied, the Ministry of Social Welfare began to draft a government act on collective agreements. But this was probably more about calming the turbulent political scene than about a real commitment. The only result was the positive and negative definition of a collective agreement in the Prime Minister's Decree of 16 February 1932 on the statistics of collective agreements, according to which a collective agreement could be regarded as a "written agreement between one or more employers or one or more employers' organisations on the one hand and one or more employees' organisations on the other hand, if it provides for general norms".

In 1935, there was another proposal submitted to the Parliament as a parliamentary draft by Alois Petr and Bedřich Bezděk to issue a law on collective labour contracts and wage commissions,[37] in the justification of which one can also find a presentation of the struggle between the ideas of liberalism and collectivism, or solidarism. The proposal was namely again based on the binding nature of collective agreements, while individual employment contracts could only deviate from their provisions if these deviations were to the benefit of the employee or concerned matters were not covered by the collective agreement. The proposal was based on the necessity of state intervention in the economy and in labour relations: *"Today it is generally accepted that the state has a duty to intervene in the private economy, even if private property is otherwise fully recognised… Yes, it is characteristic of our times that many social matters that were once considered private have now become part of the public sphere… The Prime Minister spoke of regulated production and distribution, of a regulated democracy, that is to say, a democracy which, especially in economic life, interferes with individual rights for the benefit of society."* The parliamentary draft also underlined that it was not based on any new concept, but followed the ideas of Christian social doctrine (Pope Leo XIII's encyclical *Rerum novarum*). In the end, however, the legislative proposal was - like all previous ones - unsuccessful.

The situation began to change only due to the external factors threatening the stability and security of the state from the mid-1930s onwards. The first impetus towards the recognition of the binding nature of collective agreements was Government Decree No 118/1934 Coll. extending the validity of concluded collective agreements. It was issued under a special authorisation granted to the Government under the Emergency Act No 95/1933 Coll. The decree in question effectively bypassed the Parliament, which was unable to reach agreement on the matter, and explicitly and directly interfered with contractual freedom, which until then had been considered immutable. It can be said that this started the process of openly eliminating, or at least weakening, the hitherto prevailing principles of liberalism in the field of collective labour relations.[38]

Subsequently, in 1935, a further Government Decree was adopted extending the validity of collective agreements until 1 March 1936. The provisions of the employment contract were invalidated in this respect and replaced by the more favourable provisions of the collective agreement (§ 4 of the Government Decree). Violation of this provision was treated as an offence and punishable by a fine (up to CZK 50,000) or imprisonment (up to 6 months). If the financial penalty imposed was uncollectible, it was to be replaced by a prison sentence of up to 6 months. A penalty of deprivation of trade licence could also be imposed.[39]

A definitive and more complex legislative regulation of the collective agreement in interwar Czechoslovakia came soon after these changes - in 1937 - although again "only" in the form of a Government Decree of 26 June 1937, No 141/1937 Coll.[40] on the binding force of collective labour contracts. It defined a collective bargaining contract as a contract regulating working and wage conditions between one or more employers or one or more employer organisations (corporations) on the one hand and one or more trade union organisations of employees on the

[36] Print 216. Available on the Internet: https://www.psp.cz/eknih/1929ns/ps/tisky/t0216_03.htm (visited on 01. 02. 2022).

[37] *Návrh poslanců A. Petra a B. Bezděka a druhů na vydání zákona o hromadných smlouvách pracovních a mzdových komisí. (Proposal of Members of Parliament A. Petr and B. Bezděk on enacting the Act on collective labour contracts and wage commissions).* House of Representatives, 1935. Print 2892. Available on the Internet: https://www.psp.cz/eknih/1929ns/ps/tisky/t2892_01.htm (visited on 01. 02. 2022).

[38] § Section 1 of Government Decree No 118/1934 Coll. which extends the validity of collective agreements: "Collective agreements governing wage issues…, in force on the date of entry into force of this Government Decree, may not be terminated until 30 April 1935. This shall not apply to collective agreements in force after 30 April 1935, which shall remain untouched."

[39] Act No 109/1934 Coll. to amend the Acts on the emergency decree-making power.

[40] By a number of regulations (for example Regulation No 118/1934 Coll., Regulation No 89/1935 Coll., Regulation No 89/1935 Coll., Regulation No 89/1935 Coll.) the possibility to cancel the collective agreement was excluded and their validity was prolonged.

other. Collective agreements, with the exception of a collective agreement applicable only to one particular undertaking, were subject to registration by the Ministry of Social Welfare and were to be published in the Collection of Laws and Regulations of the Czechoslovak Republic. The Ministry of Social Welfare could also, in agreement with the relevant ministry, declare a collective agreement to be binding for an entire economic area or sector.

This regulation thus brought, on one hand, a more precise definition of collective agreements, but also an explicit solution to the priority of collective agreements over individual employment contracts, and, finally, the previously proposed possibility of extending the collective agreement to non-signatories, as foreseen in the proposals of the late 1920s and early 1930s was also accepted.

However, what was specific here was the particular legislative situation and the particular legislative instrument - these regulations were in fact adopted outside Parliament, by the government, on the basis of emergency legislation, which also seems to have been the "secret" behind their successful enactment after decades of unsuccessful attempts. It was only the specificity of the period just before the abandonment of liberalism with all its features that made it possible to overcome the outlived "liberalism argument" in relation to contractual freedom and equality of parties in labour relations. As an important epilogue, it may be added in this line that the validity of the regulation on collective agreements was subsequently extended – and this time not by decree, but by proper Act of the Parliament No 258/1937 Coll., which was however, really in the period of doing away with all the liberal traditions in the eve before the World War II.

The clash of legal-philosophical ideas was soon interrupted by the events of the forthcoming war, which brought in the sector of labour law new ideas of fascist corporativism instead of "mere" collectivism, and then, after the World War II, even communist "state capitalism", where collective bargaining and collective agreements lost their justification and meaning for several decades. The return to their original meaning and the return to the clash of legal-philosophical ideas is associated again only with the period after 1989 - in changed political and social conditions, when many of the partial battles had already been fought in the meantime in Western, Northern and Southern Europe, and the Czech and Slovak Republics were thus able to build on the already generally accepted social models of collective labour law, applied in the successor states of Czechoslovakia up to these days.

5. Conclusions

The legal life of the interwar Czechoslovak Republic was characterised by a clash of two strong ideological trends. Liberalist ideas, the principle of freedom of contract and the autonomy of the contracting parties were the starting point and in many respects (with regard to the nature of legal education and legal culture in general) also the key approach taken in legal theory and practice in interwar Czechoslovakia. The new social ideas, collectivism, but also the emerging welfare state ideas, were a new product of the post-war period full of social insecurity, tension and revolutionary ferment. They were also a reaction to the disillusionment with liberalist concepts and the proclaimed "freedom" of the individual, which did not correspond to economic reality. This process of "socialisation" or "publicization" affected many areas of the law (e.g. increased protection for tenants) and became symptomatic of the construction of welfare state.

Labour law was one of the sectors with a greater degree of state interference - through the adoption of mandatory norms in order to redress for the imbalanced position of the employee. However, there was a lack of political will for a successful finalisation of these efforts with respect to legal regulation of collective bargaining agreements. The endless discussions were finally resolved only under the pretext of economic and political crisis in central Europe since the mid-1930s. Only then, adjustments were adopted which, although declared as temporary, were in fact permanent adjustments of the binding nature of collective agreements.

The process of the struggle of legal-philosophical ideas and, ultimately, the elimination of the pure liberalist model of contractual labour law, culminates in the late 1930s with the adoption of Government Decree No. 141/1937 Coll. on the Binding Nature of Collective Agreements. Already a year later, the clash of ideas, concepts, efforts and proposals was closed by the constitutional transformation and subsequent disintegration of Czechoslovakia, at the cost of a move towards the extreme - in the form of corporativism and then, after 1948, even state capitalism and totalitarianism. It was not until after 1989 that free discussion on the modern form of welfare state and on the actual shape of collective labour law was restored.

Selected Aspects of the Exchange and Removal of the Population of Hungarian Nationality from the Czechoslovak Republic

*Ján Štefanica**

Abstract

After the Second World War, the political representation of Czechoslovakia as well as Hungary had to deal with a difficult question concerning people of Hungarian nationality, who lived in Czechoslovakia. While the issue of the expulsion of the German population from war-torn countries was addressed at the European level, the issue of expulsion of Hungarian nationals from Czechoslovakia stood behind. This article attempts to address this issue in detail.

Keywords: *Nationality; emigration; immigration; repatriation; Hungary; Czechoslovakia.*

1. Introduction

Forced population displacement, transfer or deportation of minority populations was often considered to be legal and preventive solution in Europe's political history, with a potential of being a source of tension in international relations. The same situation happened when it comes to displacement of the German and Hungarian population in the Czechoslovak Republic after World War II. The issue has become important in the light of current situation, which could result in the same scenario, considering the consequences of the war conflict.

The exchange of population between Czechoslovakia and Hungary has become a special solution to the issue of persons of Hungarian nationality. London and Moscow emigration during the war also dealt with a possible population exchange. After its completion, the Slovak National Council presidency agreed on the need to adopt an agreement on the exchange of population between Czechoslovakia and Hungary as soon as possible. The Postdam conference[1] decided only on the necessary resettlement of the German population from Poland, Czechoslovakia and Hungary, and this regulation was subsequently reflected in the legal acts of the individual countries. Czechoslovakia was interested in taking a similar approach suspected traitors and collaborators from the Hungarian minority, and although it did not succeed in full, it must be stated that this method and the resulting legal status of Hungarian nationals in 1948-1949 was not at the time and given the circumstances nothing unusual and was present in other post-war countries, even in Hungary itself.[2] Hungary, almost analogous to Czechoslovakia, also addressed the following changes in the legal status of persons of German nationality.

The German community in Hungary was to be completely eliminated. In a similar vein to the decrees of the Czechoslovak president and the decrees of the National Council of the Soviet Union, the Hungarian Decree on the People's Judiciary and Land Reform punished members of fascist organisations, collaborators, and war criminals. Even the land reform decree penalised members of the Hungarian-German Volksbund organisation across the board and confiscated their private property, regardless of whether they were rank and file members or leaders. Further, those who 'adopted a German-sounding name' were also punished in the same way. The aim of such collective property confiscation, which was strictly illegal, was to expand the land pool and to acquire it for Hungarian peasants and returnees from the territories occupied by Hungary during the war.[3]

Imre Kovács, Secretary General of the National Peasants' Party, demanded immediate displacement: 'Down with the Swabian traitors. They have separated themselves from their homeland, they have proved by their every action that they feel themselves to be linked to Hitler's Germany. Now let them also share the fate of Germany!"[4] Minister of the Interior, Fer-

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1 The conference in the resulting protocol from Potsdam, even though this condition was not always met, called for the resettlement to be carried out in an explicitly humane manner.

2 See also at: MATIS, J., NAGYOVÁ, L., Migration - a Significant Social Security Concern for the European Union. In: *Security Dimensions,* Nr. 29, 2019, p. 22-63.

3 TILKOVSKY, L., Nemzetiségi politika Magyarországon a 20. században. In: ROMSICS, I.(ed.): *Parížska mierová zmluva z roku 1947.* Bratislava, 2008, p. 164-165.

4 Szabad Szó (newsletter of the National Peasant Party), 11 April 1945 In: ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 217.

enc Erdei, was of the same opinion when he declared that *"the only successful and quick solution is the resettlement of the Swabians"*.[5] Finally, the Hungarian Communist Party shared this opinion too. Of the five political parties which formed the provisional government, only the social democrats had minor reservations about the procedures. The other parties proposed against the people of German nationality in Hungary *"the same procedure which the Czechoslovak authorities began to use against the Hungarians there: first, the withdrawal of citizenship from anyone who claimed to be German in 1941, then the expulsion of people who were deprived of citizenship"*.[6]

Some Hungarian politicians were slightly concerned that Czechoslovakia began to deal in a similar way with collaborators and traitors not only of German, Slovak, or Czech nationality, but also automatically with collaborators of Hungarian nationality and with other people of Hungarian nationality who, based on their Hungarian citizenship, were foreign nationals on Czechoslovak territory. Only the minister, János Gyongyosi, who later took an active part in negotiations with Czechoslovak representatives on the question of Hungarian minority on our territory, recommended extreme caution regarding people of Hungarian nationality in Czechoslovakia, although he himself assumed that *"one can speak of a certain collective responsibility in this area"*.[7]

Despite the slightly changed standpoint and cautiousness of the Ministry of Foreign Affairs, it was the decree issued by the Hungarian Prime Minister on 29th December 1945 which stated that *"It is obligatory to resettle those Hungarian citizens in Germany who, on the occasion of the last census, declared themselves to be of German nationality, or stated that their native tongue is German, or who changed their "Hungarian-sounding" name back to a "German-sounding" one and, furthermore, those who were the members of the Volksbund organization or any other armed formation"*.[8] Some Hungarian politicians were concerned about the removal of the significant productive minority in the labour market at a time of Hungary's complete economic meltdown and rising unemployment. Eventually, they solved the situation with immigrants and resettlers from other areas. By the decree from March 1950, the Hungarian government restored citizenship to people of German nationality who remained living in Hungary, and those displaced Germans who had relatives in Hungary were allowed to return.

2. The status of the Hungarian minority in the pre-war Czechoslovakia

Before the Second World War, in 1930, the Hungarian minority living on our territory constituted 17.5% of the population of Slovakia[9]. The power situation of the Hungarian minority in the pre-war period differed from that of the German population, residing primarily in the Czech countries. The situation differed mainly in the fact that the Hungarian minority did not yet have a strong political party. At the same time, a considerably larger proportion of Hungarian voters, in comparison to German voters, voted for the Communist Party from 1925 to 1935. After the initial post-revolutionary chaos, when a number of Hungarian political parties and national and labour councils emerged, two parties in particular gradually established themselves among the Hungarian population: the Provincial Christian Socialist Party and the Hungarian National Party. The Provincial Christian Socialist Party was founded on the conservative principles of the Christian Social Reform Movement. It had the ambition to become a national party, and sought for the votes of Slovaks and Germans, among whom it had numerous supporters for a relatively long period of time. The leading figure in the party was Géza Szűllő, and János Esterházy became its chairman in 1932. It advocated the principle of autonomy and demanded the territorial reorganisation of districts according to the ethnic principle. The Hungarian National Party evolved from the previous agrarian and nationalist-oriented grouping. Both political parties were directly linked to Budapest and its government, from which they used to receive instructions. In a way, they were the instrument of Hungarian irredentist politics and were very negative and revisionist towards the Czechoslovak Republic. It can be stated that they rejected the then form of existence of the Czechoslovak state. Finally, in 1936, also under the influence of the Budapest government, Hungarian parties united to form the Hungarian United Party.

Like the Hungarian parties, the German parties grew out of the post-revolutionary chaos after the First World War. The Germans in Slovakia, however, were divided confessionally and territorially and lacked better mutual communication when compared to the German minority living in the Czech countries. People of German nationality from Bohemia, Moravia, and Silesia tried from the beginning to create a unified political organization, uniting all Germans, also the Carpathian Germans, living in Slovakia. However, there was a competitive struggle between this tendency and the Budapest government, which also planned to use the Carpathian Germans for its own purposes. Despite the fact that the Germans in Spiš were strongly anti-Hungarian, the Spiš German Party itself had become an integral part of the Hungarian National Party since its formation. Before the 1929 elections, the Carpatho-German Party was formed with the aim of uniting all Slovak Germans and wresting them from Hungarian influence. However, its success was not great at that time. In 1935, however, it entered into a coalition with the Sudeten German Party and the number of its voters almost doubled.[10] The change in policy and the associated support of the revisionist-oriented United Hungar-

[5] ROMSICS, I., *Parížska mierová zmluva z roku 1947.* Bratislava, 2008, p. 167.
[6] ROMSICS, I., *Parížska mierová zmluva z roku 1947.* Bratislava, 2008, p. 166.
[7] ROMSICS, I., *Parížska mierová zmluva z roku 1947.* Bratislava, 2008, p. 167.
[8] Magyar történeti szoveggyujtemény 1914-1999. In: ROMSICS, I., *Parížska mierová zmluva z roku 1947.* Bratislava, 2008, p. 453-454.
[9] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 85.
[10] ŠTEFANICA, J., Political organization and status of Carpathian Germans in Slovakia 1918-1939. In: TAUCHEN, J., SCHELLE, K. (ed.), *Czechs and Germans in interwar Czechoslovakia.* Ostrava, 2013, p. 271-279.

ian Party first became publicly apparent in the 1938 municipal elections. This is evidenced by a comment on the events of the time by a direct participant of Hungarian origin: *"… he who lived in southern Slovakia in 1938 cannot deny that 90% of the Hungarian population, despite the not very attractive aspects of the Horthy regime, were in favour of joining Hungary. This was confirmed by the May municipal elections, but by late summer and early autumn, there was already a definite open separatism".*[11] It should be noted that Slovakia was seen in Hungarian politics as an integral part of the Hungarian state, both geographically and economically. On the basis of Hungarian revisionist interpretations, Slovakia was forcibly torn out of Hungary, constantly misidentified by many Hungarians as an imaginary Hungarian kingdom. However, the blame was mainly attributed to the Czech political representation, which, according to them, in order to gain Slovakia, together with Czechoslovak-oriented Slovak politicians, found support for their political ambitions among the Covenant Powers.[12]

When A. Hitler came to power, Hungary began to believe it would succeed in its efforts to assert Hungarian territorial claims against neighbouring countries.[13] Hungarian politicians, actively supported by the Hungarian minority living in the neighbouring states, contributed in every possible way to the international isolation of Czechoslovakia and the subsequent curtailment of the Slovak territory after the Vienna Arbitration. They did not treat Slovakia as an equal partner, but as an object of their power interests, whose status belonged exclusively to the Hungarian state. They insisted that the national development of the Slovaks could only be solved within the framework of Hungary and considered any other solution to be a manifestation of *"alienation from a thousand years of tradition".*[14] After the decision of the four great powers in Munich, it was necessary, according to the addendum imposed on the Czechoslovak government, to resolve the question of the Hungarian and Polish minorities within three months. Subsequently, Hungary took advantage of the political situation and, after the negotiations in Komárno were thwarted, the Hungarian government mobilised five age groups, to which the Czechoslovak government reacted by declaring the martial law in the southern regions of Slovakia. Germany and Italy intervened in this situation, with the active cooperation of Hungary. After the subsequent negotiations which were unsuccessful, the Vienna Arbitration took place, whereby Slovakia lost 10,390 km of territory with 853,670 inhabitants according to the 1930 census. Of these, 503,980 were of Hungarian and 272,145 of Slovak nationality.[15] Several months later, despite the clear arbitration decision, Hungary attempted to annex the Subcarpathian Rus.

3. People of Hungarian nationality in Slovakia and the question of Hungarian revisionism

In the period after the Vienna Arbitration, representatives of the Slovak intelligence, irrespective of their political orientation, expressed their views on the issue of the Hungarian minority and the Slovaks. Milo Urban published an article entitled "Justice above all" on the front page of Slovák. From his point of view: *"Hungary's treatment of Slovaks in Hungary not only has an adverse effect on our relationship with our southern neighbour, but it does not allow us to become closer to the local Hungarian national group either. Those who know what national pride and national honour are cannot ask us to embrace those who do not want to understand that more than half a million nationally conscious people in Europe today have rights to their own national life… The Slovak public is not enthusiastic about the indulgence of our leaders; it is making clear all the time that Hungarians should be treated here as the Slovaks are treated in Hungary, which would be practically based on the principle of reciprocity, and also denying the local Hungarians the rights they have… but by employing reciprocity, we would disqualify ourselves morally, and in this way, we would only obscure and sideline our right to a just solution of this question. Perhaps the first to misunderstand this will be the Hungarians, they will possibly interpret it as our weakness, but let us just look on, believing that every wrong will one day be avenged…, but we must be careful so that this belief does not turn into a "revisionist apron", as it did to the Hungarians. Let us not think that justice only binds the others".*[16] Public opinion towards the people of Hungarian nationality in this country was also influenced by the unfavourable position of the Vojvodina Slovaks in Hungary, where their total number was further increased by occupying the part of Yugoslavia by Hungary in 1941.

In the area of the Czechoslovak exile, the Slovaks did not initially have a clear concept of their attitude towards the Hungarian minority. On November 23, 1944, the exile government in London addressed the USSR, Great Britain, and the USA with a Memorandum of the Czechoslovak Government on the Problem of the German Minority in Czechoslovakia. Paragraph II, article 20 of the Memorandum concerns the Hungarian minority in Czechoslovakia, which does not cause problems as much as the German minority. However, the Government of the Czechoslovak Republic: *"… reserves the right to proceed, in accordance with the proposals in this Memorandum, in a similar manner against those elements of the Hungarian minority which have shown themselves to be hostile to the Republic. It is pointed out that the presence of a considerable Slovak minority within the Hungarian borders, according to its state in 1938, makes a far-reaching solution of this problem possible on the basis of population exchange".*[17]

[11] JANICS, K., *Years without a homeland. The Hungarian minority in Slovakia after the Second World War 1945-1948.* Budapest, 1994, p. 21.
[12] DEÁK, L., *Slovensko v politike Maďarska v rokoch 1938-1939.* Bratislava, 1990, p. 15-16.
[13] The Hungarian regent Horthy in 1936 openly called Czechoslovakia „…a cancerous tumour on the body of Europe." SZINAI, M., SZÜCS, L., *Horthy Miklós titkos iratai.* Budapest, 1965, p. 166.
[14] DEÁK, L., *Hra o Slovensko. Slovensko v politike Maďarska a Poľska v rokoch 1933-1939.* Bratislava, 1991, p. 92-93.
[15] DEÁK, L., *Viedenská arbitráž, Dokumenty I.* Martin, 2002, p. 16-25.
[16] URBAN, M., Spravodlivosť nadovšetko. In : *Slovák,* 20. 10. 1940, vol. 22, p. 1.
[17] CHURAŇ, M., *Postupim a Československo, mýtus a skutočnosť.* Praha, 2001, p. 105.

Within the U.S. Government reply to this memorandum from 31st January 1945, it is highlighted that a coordinated approach should be taken. As a part of the adoption of an international consensus on the question, they suggest that the Czechoslovak Government, within the matter of the minority population transfer, proposes the repatriation plans to the Control Council in Germany and the Control Commission in Hungary. At the same time, they requested that this question be postponed until the time of the Tripartite Conference.[18] In a subsequent note from the Czechoslovak Government dated 3rd July 1945, sent by V. Clementis to the ambassadors of the USSR, the USA, and Great Britain, the Czechoslovak government pointed out that the Czech and Slovak nations (despite E. Beneš's opinion, it is not the case of the Czechoslovak nation), unanimously considered the removal of the Germans and Hungarians to be necessary for the future of the Czechoslovak state and for peace in Central Europe. Each of the leaders was asked to raise the subject at the forthcoming conference of the three victorious powers.[19] Among the Slovak politicians, it was V. Clementis who was particularly involved in this matter. He had already expressed his views on the question of treating people of Hungarian nationality on 6th September 1943 in a radio address on the London Radio.[20] Before the Moscow negotiations, on June 19, 1945, L. Novomeský, on behalf of the Presidium of the SNR and the CPSU, wrote a letter to V. Clementis on the border issues with Hungary: *"Corrections in our favour on the southern frontiers are necessary and welcome for economic and ethnographic reasons. Be so kind and ask whether they are possible. More than new territory, however, we are interested in having a nationally united Slovakia. This means that we would be more than happy to welcome the possibility of evicting – and evicting quickly – the Hungarians from Slovakia or exchanging the Hungarian population for the Slovak population living in Hungary, rather than acquiring new territories within our southern borders. We do not give up the idea of extending our territory to include areas in Hungary where the Slovaks live and where it is important for us for economic and other reasons, but Slovakia would be able to give up this demand if the powers, namely the Soviet Union, would allow us to exchange the population as quickly as possible. In no case would we want to extend the territory of Slovakia in the south without the population exchange, i.e., with the Hungarian minority remaining on our territory".*[21]

The post-war efforts to create a national Czechoslovak state can be understood mainly as a reaction and an attempt to prevent the repetition of events from 1938, when, on the basis of the Vienna Arbitration, Hungary occupied the territory of southern Slovakia[22] and in the following weeks, approximately 800 Slovak teachers, postmen, railwaymen, civil servants, and their families were expelled from the occupied territory. During the entire period of occupation until the end of the war, approximately 100,000 Slovaks and Czechs had to leave their homes in the occupied southern Slovakia.[23] In Šurany, 19-year-old Maria Kokosová was shot during Christmas and more than 30 men and women were arrested. After the Vienna Arbitration, Slovak schools began to be liquidated. 28 "civic schools", 386 "folk schools" and 10 "grammar schools" were abolished. The Slovak language lost its official status as a minority language. The bishop, Jozef Cársky, was expelled from Košice.[24] The Hungarian police authorities intervened forcefully against manifestations of enhancing the Slovak awareness among the population. The Hungarian police were shooting at people in Komjatice, in the village of Čechy and in Černík. On the feast of the Three Kings in the village of Čechy near Nové Zámky, Hungarian Honveds shot and killed Katarína Mihalíková, 30, a mother of two children in advanced pregnancy, and Ferdinand Šulák, a 14-year-old boy. The reason for doing this was singing Slovak hymn songs.[25] The Hungarian soldiers tortured the priest Jozef Balog for not attending the demonstration on the day of M. Horthy's arrival in Košice, but for celebrating mass. On 24th March 1939, nine Hungarian planes bombed the airfield of the open town of Spišská Nová Ves. The air attack was actually the culmination of the undeclared Hungarian-Slovak, the so-called Little War, which claimed 36 lives on our side.[26] The crimes of the Nyilaš family that took place between 1943 and 1945 (Košice, Hrán, Byšta, Veľká Ida, Krásna nad Hornádom) have not been fully

[18] CHURAŇ, M., *Postupim a Československo, mýtus a skutočnosť.* Praha, 2001, p. 108.

[19] Note of the Czechoslovak Government of 3 July 1945 In: CHURAŇ, M., *Postupim a Československo, mýtus a skutočnosť.* Praha, 2001, p. 110.

[20] *„The propaganda of the Hungarian masters wants to prove that they are not to blame for taking part in the war, that they are only in self-defence, and that the taking of the territory of neighbouring states was not a conquest – so wrote Minister Ghyszy and had it spread to the world. And they do not forget to add – as quoted from Budapest Radio – that it is understood that there is no room for any discussion on the matter of the parts of Hungary that have been annexed back to the thousand-year-old Hungary… No, we are not going to discuss with the murderers of Maria Kokesova from Šuriany, the MP Olex Borkaňuk and thousands of loyal citizens in Subcarpathia. You don't discuss with murderers – they are tried for their actions".* CLEMENTIS, V., *Odkazy z Londýna. Speech of 6. 9. 1943*, Bratislava, 1947, p. 60-62.

[21] National Archives of the Czech Republic (NA ČR), MNB, card no. 208, sig. 62/2, Group file of the state security investigation against Gustáv Husák and associates. 7 A Evidence against Ladislav Novomeský. (The materials were moved to: „Archiv bezpečnostních složek" (ABS) Prague).

[22] The assessment of the Hungarian side in 1946 is presented by REZSO, Peéry in his work The Rich Harvest of Seven Poor Years – Lessons of the Hungarians in Slovakia from the Second Minority Period (1938-1945): *'Although the Hungarian occupation authorities in 1938 treated the Slovak colonists in more than one place very deplorably, it must be remembered that they were pushed into purely Hungarian territory by an artificial policy of glorification, and therefore their position and role were not happy.'* In: VADKERTY, K., *Maďarská otázka v Československu 1945-1948.* Bratislava, 2002, p. 808.

[23] VIETOR, M., *Dejiny okupácie južného Slovenska 1938-45.* Bratislava, 1968, p. 39.

[24] For a more detailed discussion of the persecution of the Slovak population in the occupied Slovak territory after the Vienna Arbitration, including archival materials, see KIRSCHBAUM, J., *Krvácajúca hranica (The Bleeding Frontier). Documents on the suffering of Slovaks in Hungary.* Prievidza, 2003.

[25] MIŠLAN, Ľ., *Slovensko-maďarský vojenský konflikt v marci 1939. Dissertation.* Prešov, 1998, p. 113.

[26] DEÁK, L., *Viedenská arbitráž. Dokumenty I.,* Martin, 202, p. 8-25.

documented to this day.[27] In some cases, the Hungarian national population also joined the organised groups causing the repressions. It is necessary to mention these crimes, especially because it is not possible to exclude the influence of these events on the attitude of the Slovak population within the settlement of the Hungarian question in Czechoslovakia after the end of the Second World War.[28]

R. W. Seton-Watson defines three basic points of the policy of the interwar governments of Hungary: securing better treatment of the Hungarian minorities in Czechoslovakia, Yugoslavia, and Romania, the acquisition of purely Hungarian territories related to the change of borders, and, under more favourable conditions, the eventual full restoration of borders of the former Hungary.[29] It can be thus concluded that the following relations had a significant influence on the basic orientation of Czechoslovak policy and its formation, attitudes of state authorities of Czechoslovakia and, consequently, the legal status of people of Hungarian (German) nationality living on the territory of Czechoslovakia: before the Trianon period (national assimilation of Slovaks in Hungary and the legal status of minorities in Hungary), before the Second World War (Trianon, Vienna Arbitration), and during the Second World War (especially the annexation of southern Slovakia).[30]

Already during the liberation of Slovakia, and more emphatically after the liberation of the entire territory of the republic, the establishment of basic priorities in Slovak politics in relation to the Hungarian minority can be observed. It was primarily about the following: restoration of borders of the pre-monarchic republic; punishment of collaborators, fascists, and traitors (not only of Hungarian nationality); confiscation of the property of traitors and collaborators (not only of Hungarian nationality); dissolution of fascist parties and organisations; internal resettlement; exchange of population between the Czechoslovak Republic and Hungary; preservation of minority rights of population of Hungarian nationality; removal of Hungarian nationals who arrived in the annexed territory of southern Slovakia after the Vienna Arbitration back to Hungary. Standpoints taken in the "Address of the Communist Party of Slovakia" to the members of the Communist Party of Slovakia and the Slovak public, adopted at a conference in Košice on March 1st, 1945, were presented in a similar way. In particular, the inviolability and indivisibility of the borders, elimination of consequences of the forcible Hungarianisation of southern Slovakia, punishment of war offenders, and the resettlement of Hungarian nationals[31] who moved to the territory of southern Slovakia after November 1st, 1938, were emphasised.[32] Due to the fact that even the programme of the Hungarian Provisional Government of December 1944 did not contain an unequivocal rejection of the Vienna Arbitration, it did not become a sufficient guarantee for the representatives of the Czechoslovak exile government or the domestic resistance. Consequently, the government concept included a thesis guaranteeing the security of the Czechoslovak Republic only by substantially reducing the number of German and Hungarian nationals on our territory.

Simultaneously with the occupation of Slovakia by the Red Army, the SNR and its organs became the supreme, legislative, and executive body on our territory. The attitude towards national minorities was among the first issues they wanted to resolve. The SNR expressed it clearly in its Manifesto of 4th of February 1945: *"The exponents of the Hungarianisation and feudal-fascist regime, who were sent to the occupied territory of Slovakia after 1938 by the Peshtian government, must leave where they came from. The position of the local Hungarian citizens will depend on how they determine their relation to the Slovak nation, to the new Czechoslovakia, and to their democratic and Slavic orientation. It is the duty of the democratically minded Hungarians to root out all fascist, anti-Slovak, and Hungarist elements. We shall allow the Hungarian citizens of Slovak origin to integrate into the Slovak national life".*[33] Another important landmark was the programme of the first home government of the National Front of Czechs and Slovaks, adopted and proclaimed at the first meeting of the Czechoslovak government in Košice on 5th of April 1945.[34] The Košice government programme thus became the basic programme document of the resurgent republic. It represented a series of measures and interventions in the political, cultural, and economic spheres, which also affected people of Hungarian nationality on

[27] The so-called Arrow Crosses (Hungarian: Nyilaskeresztes Párt-Hungarista Mozgalom), a Hungarian fascist party founded in 1935 by Ferenc Szálasi. At first, it rejected any resemblance to the NSDAP and was anti-German, but later it collaborated with the Germans. It took part in the murder of mainly Jewish but also minority populations in the Hungarian-occupied territories. For example, in Topoľnice and Trhové Mýto in the district of Dunajská Streda in 1945, 64 Olah Roma were murdered right on the banks of the Little Danube. The village of Černík reports that 5 of its inhabitants were shot dead at the end of the war. In October and November 1944, Hungarian fascist forces carried out punitive expeditions against partisans in the forests near Moldava nad Bodvou. During them, they captured 70 partisans and anti-fascists, who were executed by the Košice Nyilash in the forest of Soroška. In Košice, on 5 January 1945, they hung 12 prisoners from trees on the main street without a verdict. In addition, many other people were shot by the Hungarian Nyilash in Košice: 3 persons at the Gajdoš baths, 11 persons at Bankowa, 10 persons at Rudnik, 10 persons in the forest called „Chvalabohu", 5 persons at Petrov orchard, 14 persons at the railway blocks, 5-6 persons at the city baths, in Čermel, a citizen of Tost from Košice, near the Polio factory 3 persons, near the Calvary 6-8 persons, in the Čermel valley 2 persons, in the village of Veľká Ida a citizen of Košice, in Krásná nad Hornádom 2-3 persons.

[28] ŠUTAJ, Š., MOSNÝ, P., OLEJNÍK, M., *Prezidentské dekréty Edvarda Beneša v povojnovom Slovensku.* Bratislava, 2002, p. 31.

[29] ŠUTAJ, Š. (ed.), *Dekréty Edvarda Beneša v povojnovom období*. Prešov, 2004, p. 10.

[30] ŠUTAJ, Š., MOSNÝ, P., OLEJNÍK, M., *Prezidentské dekréty Edvarda Beneša v povojnovom Slovensku.* Bratislava, 2002, p. 31.

[31] *The term „anyási"* was used for these persons in the terminology of the time. These were mainly civil servants, railwaymen, guards of public order, customs and postal workers, who were to replace employees claiming Slovak nationality or not speaking the Hungarian language in the annexed territory.

[32] *For national freedom and people's democracy.* Documents of the Košice Working Conference of the Communist Party of Slovakia, Trnava, 1945, p. 13-24.

[33] *Dokumenty slovenskej národnej identity a štátnosti II.* Bratislava, 1998, p. 397.

[34] *Programme of the Government of the National Front of Czechs and Slovaks*. Košice, 1945, p. 11-14.

our territory. The anti-fascist character of the programme was expressed by the provisions for the strict punishment of fascist criminals, collaborators, and traitors to the Czech and Slovak nations, and the provision for the banning of fascist parties and organisations. National administrations were established on the property of German and Hungarian as well as domestic fascists, traitors, and collaborators. In the category of these measures was also the provision for confiscating land and allocating it to small peasants, landless peasants, and deputies. The solution of the Hungarian question in the Košice government programme focused on the following priorities: displacement of Hungarian nationals (anyás) who came to work in Hungarian-occupied parts of Slovakia after the expulsion of employees of Slovak nationality; punishment of war offenders of Hungarian nationality (but not only); establishment of administrative bodies for the temporary administration of municipalities and districts with a majority Hungarian population; not granting Czechoslovak citizenship to people of Hungarian nationality who had voluntarily lost it by acquiring Hungarian or German nationality, but later those who had not offended against the Republic were given the option; abolition of Hungarian schools and school education in the state language. At the same time, the highest Czechoslovak political circles at the time doubted Hungary's intentions, and this was reflected in concrete attitudes towards the Hungarian population in Slovakia. The situation, complicated by anti-Hungarian sentiment, was similar in Slovakia, Yugoslavia, and Romania.

Immediately after the approval of the Košice Government Programme, intensive preparations began for the final settlement of the question of people of Hungarian nationality and foreign nationals residing on the territory of Czechoslovakia. In May 1945, it was proposed by Czechoslovakia to the Hungarian Government that, in the framework of joint negotiations, they should together try to resolve the questions affecting the interests of the two neighbouring states. From about this time onwards, decrees issued by the president of the Czechoslovak Republic and decrees issued by the National Council of the Republic of Hungary directly affected the Hungarian minority, its property and civil rights, and, especially in recent years, they have become the subject of controversial discussions among Hungarian politicians, historians, and lawyers. In Slovakia, all political parties supported the exchange. Ján Ursíny supported the idea of resettlement at the Democratic Party congress in Martin in July 1945. He argued mainly for the role played by people of Hungarian nationality during the Munich crisis. In Novy Slovo, no. 5, from 29th July 1945, Gustáv Husák stated that the Hungarian minority *had "completely failed, in its overwhelming majority, it sided with the fascist enemy and inflicted heavy casualties on the lives and property of our nation"* [35]. He also stressed the need *"to pay tribute to those German and Hungarian anti-fascists who marched and fought with us. And no one must harm those in our country… We have no hatred for the Hungarian people… History has shown that minority politics has failed"*.[36] On August 9, 1945, the exchange of population between the Czechoslovak Republic and Hungary was discussed at a meeting of the Assembly of Ministers, particularly in connection with the preparation of materials for the Paris Peace Conference. The resettlement was not to concern people of Hungarian nationality who had contributed to the restoration of Czechoslovakia. At its meeting on 24th October 1945, the government, hoping for an early agreement on the population exchange, even suspended the confiscation of the property of people of Hungarian nationality, except for those who were functionaries of fascist organisations and irredentist parties; persons who sabotaged the cultivation of the land; and persons who fell under Section 1 of the Presidential Decree no. 108/1945 of the legal code.[37] The Slovak National Council also dealt with the issue of the population exchange at its meeting on 14th and 15th September 1945. Vladimír Clementis, the State Secretary of the Ministry of Foreign Affairs, informed the plenary of the Slovak National Council in detail about this issue. On 15th September 1945, he told the plenum that Hungary rejected the principle of exchange and that in Hungary *"indirectly this form of solution is described as Nazism and racism"* [38]. From the Czechoslovak side, this was seen as an effort to keep the Hungarians in Slovakia close to the border, as a prerequisite for a revisionist policy after the situation had been consolidated. Vladimir Clementis, interpreting the government position, proposed to resolve the Hungarian question in several ways: those people who, especially as civil servants, had come to the Slovak south after 1938, were to be unilaterally resettled from Czechoslovakia to Hungary, unless they were tried by the people's courts; other people of Hungarian nationality were to be resettled to Hungary as a part of an interstate population exchange. At the same time, V. Clementis pointed out the fact that the idea of adjusting the Slovak-Hungarian state borders in favour of Hungary was being raised and emphasised more and more frequently in Hungarian official circles. In response to the current situation, the Slovak National Council adopted the following resolution: *"The Slovak National Council, wishing to ensure the unthreatened development of the Slovak nation, considers it necessary to address the governments of the United Nations with the following request for supporting its efforts, as well as for the efforts of the Czechoslovak Government to exchange the Slovak population from Hungary for the Hungarians living in Slovakia. The Slovak National Council agrees to request the Government to submit a memorandum to the Governments of the United Nations setting forth our efforts to realise the exchange and our request for their support in this matter"* [39].

[35] *Nové Slovo*, vol. 1, Nr. 5, Bratislava, 1945.
[36] *Nové Slovo*, vol. 1, Nr. 5, Bratislava, 1945.
[37] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 205.
[38] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 205.
[39] Slovak National Archive Bratislava. In: BOBÁK, J., *Maďarská otázka v Česko-Slovensku (1944-1948).* Bratislava, 1996, p. 83.

After the end of the Second World War, the Czechoslovak Republic sought to prevent a repetition of history by legal and lawful means, to protect its interests and territorial integrity, and to deal with foreign nationals, former Czechoslovak citizens who had voluntarily accepted the citizenship of states with which Czechoslovakia was in a state of war. The Republic found itself in a situation where 600 000 to 700 000 citizens of a foreign state were on its territory, the question of their citizenship had to be urgently addressed, some of them were persons actively collaborating in the dismemberment of the Republic, the question of the property of collaborators arose, at the same time the economically strong areas of the borderlands were left empty, and in a time of post-war scarcity, it was necessary to ensure the continuity of agricultural and industrial production.[40] The Czechoslovak Republic tried to cope with all this within the framework of its constitution, laws, and international treaties in force.

4. Administrative and legal preconditions for population exchanged

After the end of the Potsdam Conference and during the preparations for the Paris Conference, the governments of Czechoslovakia and Hungary were recommended to hold a population exchange. At that time, many international disputes were resolved by mutual exchange of population. The resettlement of the population also concerned the policy of Hungary. It was the relocation of Székelys from Bukovina to Bačka, which was directly managed by a delegation of the Hungarian government from Szeged. The relocation of 12,000 Székelys took 41 days.[41] The Serbian population was displaced from Bačka. The proposal to apply the exchange principle was also mentioned during the delimitation commission meeting in Komárno in October 1938. The Union of Public Employees from Slovakia submitted a proposal that the Czechoslovak delegation tried to "*achieve the exchange of local Hungarians for our Slovaks from Hungary and in this case not to make any territorial concessions in favor of Hungary*".[42] In addition to the resettlement of the Székelys, there were several population exchanges between neighboring countries in Europe at the beginning of the 20th century. Even Professor József Kovács from Budapest recommended that Hungary itself, more than a plebiscite, strive to repatriate Hungarians from the surrounding countries to its territory. On the Czechoslovak side, in the November of 1938, agrarian politician Fedor Houdek and, after the First Vienna Award, former Minister of Foreign Affairs of the Slovak Republic Ferdinand Ďurčanský had the same opinion.[43] Repatriation, as a highly humane act of exercising human rights, was guaranteed at the international level by the remigration agreements that the Czechoslovak government concluded with Bulgaria, Yugoslavia, the Soviet Union and Romania. Slovaks and Czechs from other countries returned to their homeland individually.

The situation of Slovaks living in Hungary occupied a special place, there were two basic aspects:

- in the first place was the interest of nationally conscious Slovak class in this resettlement
- the intention of some political circles in the Czechoslovakia to reduce the number of people of Hungarian nationality in Slovakia.

The realization of both points was expected within the gradual course of the population exchange.[44]

The Hungarian government has been opposed to the exchange between the two countries since the beginning of the negotiations. Several representatives of the Hungarian government questioned the reality of the exchange and claimed that due to the good situation of Slovaks in Hungary, they were not interested in it. At the same time, they claimed that, given the number of approximately 73,000 Slovaks living in Hungary, the exchange is practically unrealistic. According to the census of Hungary in 1941, 175,550 people declared their Slovak nationality. However, there were 399,176 people in Hungary at the time who admitted to speaking Slovak. According to estimates by the Slovak side, the actual number of Slovaks in Hungary was between 450,000 and 500,000.[45]

In Slovakia, the exchange was supported by all political parties. In July 1945, Ján Ursíny supported the idea of displacement at the Congress of the Democratic Party in Martin. He argued mainly for the role played by Hungarian nationals during the Munich crisis. In *New Word* no. 5 of July 29, 1945, Gustáv Husák stated that the Hungarian minority "*completely disappointed, in the vast majority stood on the side of the fascist enemy and inflicted heavy casualties on our lives and property.*"[46] He also stressed the need to "*pay tribute to those German and Hungarian anti-fascists who walked and fought with us. And no one in our country should hurt them… We have no hatred for the Hungarian people… History has shown that minority politics has failed.* "[47]

V. Široký spoke at the Žilina Conference in August 1945: "*We demand the immediate eviction of all Nyilas and Anyáš(, as well as officials of the Hungarian United Party. As for the rest of the Hungarian population, we demand its exchange for Slovaks living in Hungary.* "[48]

Based on Presidential Decree no. 27/1945 Coll. on July 17, 1945, the Settlement Office for Slovakia with its seat in Brat-

[40] POTŮČEK, M., KOTRUSOVÁ, M., DOBIÁŠOVÁ, K., HOREMUŽ, M., KLUS, M.: Polityka społeczna Republiki Czeskiej i Republiki Słowackiej: polityka społeczna byłej Czechosłowacji do roku 1992: okres Monarchii Austro-Węgierskiej. In: KRAUS, K., GEISEN, T. (ed.), *Państwo socjalne w Europie: Historia - Rozwój – Perspektywy.* Toruń, 2013, p. 443-552.

[41] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 204

[42] Slovak National Archive Bratislava. Slovak League Fund, Nr. 72.

[43] ĎURČANSKÝ, F., *Stredná Európa v minulosti a budúcnosti.* Spisy vedeckej spoločnosti pre zahraničných Slovákov č. 7., Bratislava, 1944, p. 20.

[44] ŠUTAJ, Š. (ed.), *Dekréty Edvarda Beneša v povojnovom období*. Prešov, 2004, p. 43.

[45] ŠUTAJ, Š., Maďarská *menšina na Slovensku v rokoch 1945-1948.* Bratislava, 1993, p. 74-75.

[46] *Nové Slovo.* vol. 1, Nr. 5, Bratislava, 1945.

[47] *Nové Slovo.* vol. 1, Nr. 5, Bratislava, 1945.

[48] Slovak National Archive Bratislava Archive of ÚML ÚV KSS. Fund 15, Nr. 8.

islava and the Settlement Office in Prague for Bohemia and Moravia were established. Both settlement offices were organizationally subordinated to the Central Settlement Commission at the Ministry of the Interior.

The Settlement Office for Slovakia, whose chairman was Ján Čech, began its activities on August 15, 1945. It was divided into 3 departments:

- Department for the Emigration of Germans and Hungarians
- Department for Moving Slovaks from Abroad
- Department for Internal Colonization.

Based on the Decree of the President of the Republic no. 108/1945 Coll. and according to the statute of the Settlement Office for Slovakia, regional offices of the Settlement Office were created to fulfill the tasks for individual districts. Organizationally, they were divided into:

- Settlement department,
  included the following sub-departments: Exchange, Settlement and sub-department For cultural, economic and social care
- Property department,
  which was divided into sub-departments: Reports and reconstructions of contract assets, Inventory, Allocation and bookkeeping of contract assets.

A total of 15 regional offices were established, which were completed in 1946.[49] Individual resettlement stations were created for temporary accommodation, records for settlers, repatriates, re-emigrants and social and medical assistance.

On August 9, 1945, the Board of Commissioners dealt with the exchange of population between the Czechoslovakia and Hungary at its meeting, especially in connection with the preparation of materials for the peace conference in Paris. The resettlement did not affect persons of Hungarian nationality who contributed to the reconstruction of Czechoslovakia. At a meeting on October 24, 1945, the government even suspended the confiscation of property of Hungarian nationals outside those who were officials of fascist organizations and irredentist parties that sabotaged the cultivation of land and persons falling under § 1 of Presidential Decree no. 108/1945 Coll.[50]

The issue of population exchange was also addressed by the Slovak National Council at its meeting on 14 and 15 September 1945. The Secretary of State of the Ministry of Foreign Affairs Vladimír Clementis informed the Slovak National Council Plenum in detail about this issue. On September 15, 1945, he informed the plenary that Hungary rejected the principle of exchange as a whole, and in Hungary "*this form of solution is indirectly referred to as Nazism and Racism.*"[51] From the Czechoslovak side, this was understood as an effort to keep the Hungarians in Slovakia close to the borders, as a prerequisite for revisionist policy after the consolidation of the situation. Interpreting the government's position, Vladimír Clementis suggested addressing the Hungarian question in several ways:

- from the territory of Czechoslovakia, those persons who came to the Slovak south after 1938, especially as civil servants, were to be displaced unilaterally to Hungary, unless they are tried by people's courts,
- other persons of Hungarian nationality were to be relocated to Hungary as part of an international population exchange.

At the same time, Clementis pointed to the fact that the idea of adjusting the Slovak-Hungarian state borders in favor of Hungary is being established and emphasized in Hungarian official circles.

In response to the current situation, the Slovak National Council adopted the following resolution: "*The Slovak National Council, wishing to ensure non endagered development of the Slovak nation, considers it necessary to address the United Nations with a request to support its efforts, as well as the efforts of the Czechoslovak Government to exchange the Slovak population from Hungary for Hungarians living in Slovakia. The Slovak National Council resolves to request the Government to submit a memorandum to the United Nations Governments setting out our efforts to hold an exchange and our request for support in this regard.*"[52]

The Hungarian government has long rejected the issue of exchange. It was not until December 2-6, 1945, on the initiative and urging of Czechoslovakia, that the first Czechoslovak-Hungarian negotiations took place. Clementis, representing the Czechoslovak government, presented its current position. The exchange was to be the first step in the solution, followed by the expansion of the category of citizens who are of Slovak origin and can apply for the return of citizenship. However, these negotiations ended in failure. The political representation of Czechoslovakia did not escape criticism either.[53]

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[49] BOBÁK, J., *Maďarská otázka v Česko-Slovensku (1944-1948).* Bratislava, 1996, p. 75.

[50] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 205.

[51] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 205.

[52] Slovak National Archive Bratislava. SNP SN Fund, Box. Nr. 969.

[53] The *„New Currents"* issued by Jozef Lettrich stated on January 20, 1946 that: „Instead of imposing conditions on the Hungarians, they set them for us. To all this, after reasonable consideration and objective criticism, we come to the conclusion that it is our fault. It is not enough to touch on the eviction of Hungarians, possibly in the DNS, at meetings of political parties, but it is necessary to proceed with the removal of Hungarians from Slovakia. Do we have prepared statistical material with which we could prove abroad that Hungarians must come from Slovakia? Does the letter of the President's Decree on German and Hungarian schools be complied with in our country? - No! It is therefore time for the Slovak National Council to prepare statistical material to prove the necessary eviction of the Hungarians... Let us keep in mind, and we will see, that a strict Slovak position must be taken on the Hungarian issue, but objective and human. „New Currents in our present life. year II., number 2., 20. 1. 1946 Bratislava.et us keep in mind, and we will see, that a strict Slovak position must be taken on the Hungarian issue, but objective and human. " *Nové Prúdy (New Currents) v našom súčasnom živote.* vol. 2, Nr. 2, Bratislava, 1946.

Negotiations continued from 6 to 10 February 1946. In the second round of negotiations, the delegations agreed to exchange a voluntary number of Slovaks and Czechs from Hungary "*… against the same number of Hungarians in Czechoslovakia.*".[54]

5. Population exchange agreement

The agreement on the exchange of population between Czechoslovakia and Hungary was signed by Vladimír Clementis and János Gyöngyösi on February 27, 1946 in Budapest. It contained a total of fourteen articles, of which population exchanges were directly affected by Articles I, V and VII. In them, the Hungarian government undertook not to prevent persons of Czech and Slovak nationality with permanent residence in Hungary from moving to Czechoslovakia. As a result of the move, these persons ceased to be citizens of the Republic of Hungary and, if they were not already, they became citizens of the Czechoslovak Republic. At the same time, the Republic of Hungary was released from its obligations to those persons and they were released from their obligations to Hungary. Article I set out the conditions for Slovaks living in Hungary to register, Article V regulated the displacement of Hungarian nationals from Czechoslovakia, and its government had the right to designate part of Hungarian nationals without Czechoslovak citizenship to move. At the same time, in addition to the reciprocal exchange of population, it had the right to unilaterally evict persons of Hungarian nationality covered by Article VIII. Under this article of the exchange agreement, Hungarian war criminals displaced to Hungary could not take all their movable property with them and could not be compensated for their real estate.

Based on II. Article of the Agreement between Czechoslovakia and Hungary on the Exchange of Population, a Czechoslovak Resettlement Commission was established in Hungary. Its headquarters were in Budapest, but it worked very closely with the settlement offices in Bratislava and Prague. The executive bodies of the resettlement commission were:

- Plenipotentiary of the Czechoslovak Government (performed all the powers of the delegates and ministries),
- the central office commission (organized and coordinated the entire activities of the resettlement commission in the territory of Hungary),
- regional offices (established in areas where a large Slovak minority lived, coordinated the activities of the resettlement commission in their area),
- sub-branches (set up by regional offices as appropriate).

The resettlement of persons of Hungarian nationality to Hungary was provided by the Settlement Office for Slovakia with its registered office in Bratislava. The tasks related to resettlement were performed by the regional offices of the Settlement Office and mainly by the departments: census, settlement and relocation.[55]

The principle of parity was established for the exchange and applied to persons of Hungarian nationality who had lost their citizenship on the basis of Presidential Decree no. 33/1945 Coll. The Czechoslovak government gained the right to relocate persons of Hungarian nationality who committed crimes under § 1-5 of Slovak National Council no. 33/1945 Coll. of 15 May 1945. The provisions of the Exchange Agreement did not apply to Hungarians who settled in Slovakia after 2 November 1938.[56] According to the Ceasefire Agreement with Hungary, their displacement became a unilateral matter for the Czechoslovak Republic. The agreement is based on Article XII. And did not apply to persons who settled in southern Slovakia occupied by Hungary after November 2, 1938, the so-called Anyáš.

On September 24, 1946, the Board of Commissioners adopted directives removing certain individuals from the lists submitted by the Czechoslovak to Hungarian Government according to Articles V. and VIII. of intergovernmental agreement on population exchange. According to Article V, the following were exempted with immediate effect:

a) persons of Slovak, Czech or other Slavic nationality who, in times of threat to the Republic, declared themselves compulsorily or in other circumstances on behalf of the Hungarians, if they prove themselves by a certificate of national reliability issued by the relevant district national committee and approved by the Commission
b) persons of Slovak, Czech or other Slavic nationality,
c) persons of Hungarian nationality who, before the entry into force of the Decree of the President of the Republic. 33/1945 Coll. acquired foreign citizenship, including Hungarian,
d) persons of Hungarian nationality who came to the territory of the Czechoslovak Republic after November 2, 1938,
e) persons of Hungarian nationality living in a mixed marriage with Slovaks or Czechs, regardless of gender,
f) persons of Hungarian nationality who prove themselves with a certificate of Czechoslovak citizenship according to § 2 of Presidential Decree no. 33/1945 Coll.,
g) persons of Hungarian nationality who prove themselves with a model B certificate on the temporary preservation of Czechoslovak citizenship (Section 2 (2) of Decree No. 33/1945 Coll.).

According to Article VIII. persons of Hungarian nationality who are immediately exempted:

a) have been proved by an acquittal of a court having jurisdiction under Slovak National Council Regulation no. 33/1945 Coll.
b) live in a mixed marriage with Slovaks, Czechs or members of other Slavic nationalities, regardless of gender

Persons of Slovak, Czech or other Slavic nationality were considered to be persons who, during the official censuses since 1930, have continuously declared their Slovak, Czech or other

[54] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 206.
[55] BOBÁK, J., *Maďarská otázka v Česko-Slovensku (1944-1948).* Bratislava, 1996, p. 79-85.
[56] BOBÁK, J., *Maďarská otázka v Česko-Slovensku (1944-1948).* Bratislava, 1996, p. 83.

Slavic nationality and submit a credible official document. Individuals who submitted a certificate of Slovak nationality according to the Decree of the Commissioner of the Interior no. 20.000 / 1-1946 of 17 June 1946 on the reslovakization of the population and in which the Settlement Office for Slovakia, in agreement with the Interior Commission, preliminarily recognizes Slovak origin. According to these directives, the exclusion of individuals from the lists also applied to family members if they lived in the same household as them and were dependent on them.[57]

6. Peace conference in Paris

Already at this time, both countries began to place hopes of fulfilling their demands in the forthcoming peace conference in Paris. In Hungary, only the most necessary measures were taken and, until the end of the Paris peace negotiations, they showed no interest in launching a population exchange. The Hungarian government has adopted the principle for peace negotiations that the Hungarian delegation could only negotiate the takeover of emigrants from neighboring countries if territorial compensations were agreed at the same time. According to an alternative Hungarian plan, Hungary could cover 4,000 km^2 with 300,000 inhabitants, Czechoslovakia 65 km^2 with 46,000 inhabitants. The Czechoslovak government has submitted a request for the transfer of approximately 200,000 Hungarian nationals in the form of amendments.[58] Discussions on the Czechoslovak transfer proposal lasted in the relevant committee from September 16 to October 3, 1946. Foreign Minister Ján Masaryk spoke about this issue at the conference in his opening speech: "*Trust us when we say that it is not only in the interest of peace in Czechoslovakia, but also the Hungarian minority and Hungary itself, and that it will also serve peace in Eastern Europe if this problem is solved once and for all in the way we have proposed.* "[59] However, the issue of a unilateral transfer was postponed on the basis of a New Zealand proposal.

In the peace treaty, Hungary undertook to renegotiate with Czechoslovakia and at the same time "*regulate the affairs of those inhabitants of Hungarian origin based in Czechoslovakia who, in accordance with the provisions of the agreement of 27 February 1946 concerning the exchange of population, will not be displaced to Hungary. If no agreement is reached within six months of the entry into force of the current Treaty, Czechoslovakia shall have the right to refer the matter to the Council of Foreign Ministers and to seek the assistance of the Council in order to reach a definitive solution.* "[60]

However, Hungary continued to refuse to admit its nationals to its territory. It was the citizens to whom it itself granted Hungarian citizenship. In his critical speech of September 20, 1946, Soviet Deputy Foreign Minister A. J. Vyshinsky expressed his views on the Hungarian government's position at the conference: *"200,000 people are offered to return, but the Hungarian government's answer is: We do not want them, we do not need them they are going to be a burden for us. It's the same as a mother of big family moved her children to their neighbors."*[61]

The American ambassador to Prague, L. Steinhard, was particularly active in supporting Czechoslovakia in the matter of the transfer.

The Hungarian government constantly tried to reject all Czechoslovak demands by all available means. On 19 August 1946, the Council of Democratic Hungarians who left Slovakia sent a telegram to the President of the Peace Conference stating: "*… we reject the principle of population exchange forced by violent and inhuman methods. In the interests of lasting peace, we advocate a full legal margin for minorities guaranteed by the United Nations and human rights guaranteed in the spirit of the Atlantic Charter. Otherwise, we consider the reintegration of the Hungarian regions into a democratic Hungary to be the only fair solution, as land belongs to every population.*"[62]

Even after the end of the peace negotiations and the signing of the peace treaty, in which the Hungarian government committed itself to new negotiations with Czechoslovakia, Hungary did not recognize the natural obligation to accept its own citizens located in the Czechoslovak Republic. On the contrary, the Hungarian press launched a campaign against Czechoslovakia and regularly published various false reports about the repatriation of Hungarian nationals.[63] At the same time, it tried to continue to delay and postpone the exchange of the population. Such an attitude had a negative impact, especially on Slovaks in Hungary who applied for resettlement. In many cases, the Hungarian authorities denied them any help and support. In this context, Slovaks from the Salgotaryan region sent a memorandum in which they write: "*We are convinced that by unnecessarily prolonging our resettlement, we are only causing damage to the Hungarian and Czechoslovak governments. We also see that the reluctance to relocate us quickly is on the Hungarian side… We urge that our relocation take place during March (1948). If that doesn't happen, we're determined to end this desperate state of ours in a radical way, by crossing the border by car and on foot with our families.* "[64]

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[57] BOBÁK, J., *Maďarská otázka v Česko-Slovensku (1944-1948).* Bratislava, 1996, p. 88.

[58] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhoslávio*u. Bratislava, 1999, p. 197.

[59] KRNO, D. M., *Jednali sme o mír s Maďarskem.* Praha, 1946, p. 47-49.

[60] KRNO, D. M., *Jednali sme o mír s Maďarskem.* Praha, 1946, p. 171.

[61] KRNO, D. M., *Jednali sme o mír s Maďarskem.* Praha, 1946, p. 152.

[62] TÓTH, L., *„Hívebb emlékezésül". Csehszlovákiai magyar memorandumok és egyéb dokumentumok a hontalanság éveiből 1945-1948.* Bratislava, 1993, p. 143.

[63] „The terrorist groups of the Hlinka Guard are pushing thousands of Hungarians into the unknown future. Diplomatic interventions, the writing of the Hungarian and world press did not help alleviate the misfortune of thousands of Hungarians. The Slovak authorities are accelerating the pace of deportation of Hungarians, as they fear intervention by the great powers. Many Hungarians find death in the waves of the Danube. Slovak soldiers illuminate the river with spotlights, and as soon as they notice the Hungarian refugees, a wild machine-gun fire begins. On the other hand, first aid is waiting for refugees. The Red Cross and foreign missions accredited in Budapest help these unfortunates. „Hétfoi Kossuth Népe. In: *Nové Prúdy (New Currents) v našom súčasnom živote.* vol. 2, Nr. 2, Bratislava, 1946.

[64] *Freedom.* vol. 4, Nr. 6. Budapest, 1948.

The population exchange took place in the years 1946-1948. During these years, the Hungarian government forced breaks and, as far as possible, tried to curb its speed and range. Resettlement was organized by the Settlement Office for Slovakia (from Czechoslovakia to Hungary) and the Czechoslovak Resettlement Commission (from Hungary to Czechoslovakia). The Czechoslovak government expected a larger number of Slovaks to sign up for the exchange. However, after clarifying all the context, the government eventually considered the population exchange a success. Vladimír Clementis justified this with the following two facts: *"… this minority has never enjoyed minority rights and is therefore nationally unconscious"*[65] and continued, *"… the exchange agreement was systematically violated by the Hungarian government and various means of coercion were used to keep the number of entries as small as possible."*[66] Resettlement was welcomed mainly by those who expected an improvement in their economic situation and those, especially intelligence, who felt the need to return to their homeland and the homeland of their ancestors.

In addition to the persons displaced under Article V of the Agreement in the framework of the population exchange, 6,000 Hungarian nationals who unilaterally moved to Hungary were unilaterally displaced, 2,905 political offenders (Article VIII of the Agreement), 1,032 so-called regimeists (Article I of the Agreement) and 75 Hungarians were moved to Hungary from the village of Rusovce. A total of 89,660 Hungarian nationals relocated from Czechoslovakia to Hungary, of which approximately 34,000 were outside the Population Exchange Agreement.

A total of 71,787 Slovaks came from Hungary to Czechoslovakia between 1945 and 1948. In addition to the population exchange event, 12,013 Slovaks moved from Hungary to Slovakia. After a statistical check, 95,421 people from Hungary signed up for the exchange.[67] This fact corresponds sharply with the contradictory statements of the Hungarian party, which constantly used distorted national statistics from 1910 as arguments during the negotiations at the Paris Peace Conference.[68] On the one hand, they argued with the "*fact*" that " *600,000 Czechoslovak Hungarians, cannot be compared against with 60,000 Slovaks living in Hungary."*[69] On the other hand, they said that "*the low number of Slovaks applying for resettlement from Hungary, however, also caused great disappointment in Prague and Bratislava."*[70] However, it was a number much larger than the number of all Slovaks in Hungary according to the "numbers" of the Hungarian party, which it originally declared.

7. Conclusion

It is difficult to assess population exchange in terms of "success" or "failure". There were many factors that influenced the final decision of individuals to relocate to a neighboring country, starting with interpersonal relationships and ending with self-acquired property or ending fears of uncertain times.[71] When it comes to the emergence of legal norms affecting post-war life, we must necessarily take into account the immediate life experience of the political and civic generation of Slovaks from the struggle for a free Czechoslovak state, recognition of the nation as such, opportunities to express themselves freely and study in their mother tongue. It is not objectively possible to present this issue in connection with the beginning connected only with the Košice government program, decrees of the Czechoslovak president and Slovak National Council regulations, as if there was no Hungarianization in Hungary, Vienna arbitration or occupation of part of Slovakia in the so-called Little war. Historical events taking place on our territory shaped the immediately older and middle generation of our citizens living in the war and post-war years in Slovakia. In this way, they preceded the legal regulations on the position of persons of Hungarian nationality in our territory, in particular by the Presidential Decree and the Slovak National Council regulations, which became a reaction to previous developments. Despite other perspectives, it is clear that without knowledge of historical and legal context, it is not possible to objectively present the reasons for the subsequent position of Hungarian nationals, which was to serve to secure and protect the rights and freedoms of Czechoslovak citizens and thus prevent previous revisionist attacks on sovereignty of the state itself. However, this cannot be a justification for the illegal infringements.

The last issues related to population exchange were addressed in the late fifties. They were related to the issue of family reunification divided by population exchange.

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[65] *Almanach oslobodeného juhu.* Nitra, 1947, p. 251.

[66] *Almanach oslobodeného juhu.* Nitra, 1947, p. 251.

[67] ŠUTAJ, Š. (ed.), *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938-1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou.* Bratislava, 1999, p. 212.

[68] Historians from Slovakia and the successor states of the former Hungary are critical of the evaluation of the statistical results of Hungarian historiography on the ethnic composition of the Hungarian population. They have the biggest reservations about the data from the 1910 census, which was a reflection of the power national policy of government circles during the systematic process of denationalization of the non-Hungarian population and subsequent Hungarianization. In view of this fact, statements about injustices, „historical mistakes" and wrongs on the Hungarian people, committed by the great powers after the Second World War, were unfounded by the confirmation of the „Trianon" borders. More on this issue: DEÁK, L., O hodnovernosti uhorskej národnej štatistiky z roku 1910. In: *Pohľady do problematiky slovensko-maďarských vzťahov,* Bratislava, 2009, p. 7-17.

[69] ROMSICS, I., *The Paris Peace Treaty of 1947.* Bratislava, 2008, p. 172.

[70] ROMSICS, I., *The Paris Peace Treaty of 1947.* Bratislava, 2008, p. 179.

[71] See also at: ŠVEC, J., On the Problems of the Limitation of Individual Freedom in the Context of the History of Selected Authors of Social Liberalism. In: *Filozofia*, vol. 76, Nr. 8, 2021, p. 624-635. In this article, the author explains the legality and legitimacy of state power to restrictions on personal liberty and property within a certain range under the conditions of respect for the rule of law (the author refers to the theory of the treaty) and human rights.

Not only Roman Law. Political Activity of Leon Piniński (1857 – 1938)

*Grzegorz Nancka**

Abstract

Leon Piniński (1857–1938) was a professor of Roman law associated with the University of Lviv. His scholarly focus on Roman law was not his only area of activity. This scholar was also closely involved in political activity. Leon Piniński was a governor of Galicia. It is interesting to consider whether his political activity in any way affected his scholarly achievements. It also seems interesting to look at how this scholar is perceived nowadays and whether his political activity contributed to it. The article uses the legal-historical method.

Keywords: *Leon Piniński; politics; Roman law; Lviv; Poland.*

1. Introduction

In the second half of the 19th century and in the first decades of the 20th century, the University of Lviv was considered one of the most significant academic centers in Europe.[1] Many prominent and distinguished scholars at the turn of the 20th century had a Lviv background. The Faculty of Law and Political Skills of the University of Lviv had a number of charismatic scholars specializing in the area of Roman law. Those included, among others, Leon Piniński. Apart from his common scholarly interests, this Romanist was actively involved in non-university activities and engaged in wide-ranging political activity in addition to (and sometimes instead of) his academic work. This study refers to the political sphere of his activity. It seeks to answer the question of what the political activity of this Romanist entailed and how it affected his scholarly work and his perception as a scholar.

2. First of all, a Romanist?

Leon Piniński was one of the most recognizable Lviv scholars at the turn of the 20th century.[2] This Lviv professor of Roman law stood out from other scholars due to his love of art and the political activity in which he was closely involved. Leon Piniński was born on 8 March 1857 in Lviv. He began studies at the University there, and having obtained a certificate of completion after passing the first two state examinations in 1878, he went to Germany. As he indicated in his CV attached to his habilitation application, he participated in lectures and seminars given by Bernhard Windscheid and Johannes Emil Kuntze at the University of Leipzig and by Karl Georg Bruns and Heinrich Dernburg in Berlin.[3] Shortly afterwards, in 1880, Leon Piniński was awarded the degree of doctor of laws. He continued his foreign studies in Vienna. The basis for his habilitation was the first volume of the work titled *Der Thatbestand des Sachbesitzerwerbs nach gemeinem Recht*, which he prepared for three years.[4] Despite some reservations expressed by F. Źródłowski, the work was favorably received by the academic community, and R. von Ihering ranked the second volume of the work, which was written three years later, as one of the greatest advances in science in the 19th century.[5] The Lviv scholar got renown and recognition in the world of science of Roman law thanks to that work. This

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1 As regards the University of Lviv, see REDZIK, A., ed., *Academia Militans. Uniwersytet Jana Kazimierza we Lwowie*, Kraków, 2017; FINKEL, L., STARZYŃSKI, S., *Historya Uniwersytetu Lwowskiego*, Lviv, 1894; FINKEL, L., CHLAMTACZ, M., *Kronika Uniwersytetu Lwowskiego. I. (1894/95-1897/98)*, Lviv, 1899; HAHN, W., *Kronika Uniwersytetu Lwowskiego. II. (1898/9-1909/10*), Lviv, 1912.

2 On L. Piniński's life and activity see e.g. CZECH-JEZIERSKA, B., Profesor Leon Piniński – wybitny lwowski uczony przełomu XIX i XX wieku In: GUZ, T., BEDNARUK, W., PAŁUBSKA M. R., (eds.) *Ius et Historia. Księga pamiątkowa dedykowana Profesorowi Jerzemu Markiewiczowi*, Lublin 2011, pp. 169-192; JOŃCA, M., Leon Piniński – historyk sztuki stworzony przez podróże In: KRAWCZYK, Z, LEWANDOWSKA-TARASIUK, E., SIENKIEWICZ, J.W., *Aksjologia podróży*, Warsaw, 2012, pp. 176-198; WIADERNA-KUŚNIERZ, R., Leon hr. Piniński (1857-1938) – prawnik, polityk, historyk sztuki, znawca literatury i kompozytor. Zarys biografii In: DOROCKI, S. and BRZEGOWY, P., *Przedwojenny Lwów i jego uczeni. Sylwetki – działalność naukowa – osiągnięcia*, Kraków, 2016, pp. 183-209.

3 Central Archive of Historical Records (hereinafter: AGAD), team: Imperial Royal Ministry of Denominations and Education (hereinafter: C.K. -MWiO), file no. 102u, pp. 599-600.

4 AGAD, C.K. - MWiO, file no. 102u, 600; see PINIŃSKI, L., *Der Thatbestand des Sachbesitzerwerbs nach gemeinem Recht. Eine zivilistische Untersuchung. Erster Band*, Leipzig, 1885.

5 IHERING, R., *Der Besitzwille. Zugleich eine Kritik der Herrschenden juristischen Methode*, Jena, 1889, pp. XIV–XV; see also: SKRZYWANEK-JAWORSKA, D., Polemika Leona Pinińskiego na temat corpus possessionis z wybranymi przedstawicielami XIX-wiecznej nauki prawa, In: *Studia Prawno-Ekonomiczne* Vol. 118, 2021, pp. 95-118.

was due to the disputes conducted there with the theses put forward by F. K. von Savigny and R. von Ihering. The views presented by the Romanist, in which he treated, among other things, possession as an economic relation between a human and a thing, aroused considerable interest in the doctrine of his time.[6]

Leon Piniński published further works as a full professor of Roman law, whom he became in 1892. In 1900, he published his work titled *Pojęcie i granice prawa własności według prawa rzymskiego*,[7] in which he presented his own original approach to the ownership right. The work was also published in German in 1902.[8] In the dissertation, he defined the ownership right as "the possibility of exclusive economic use of a physical thing provided by the provisions of law."[9] This definition was in line with the theory on possession that he had previously announced. Leon Piniński held the view that "just as possession is not »physical control« but an actual »economic relation« between a person and a thing, consisting in the fact that a person has a certain thing in his exclusive economic sphere, may freely use it for his economic purposes, so is ownership such a relation based on objective law that formulates the legal affiliation of a thing to a certain person.[10] That work did not attract such a great deal of comment as the one on possession. His another work in the area of Roman law came over twenty years later. It was a dissertation *O stosunkach prawnych nieobronionych skargą*, published in 1925.[11] Leon Piniński published two more works on Roman law.[12] He devoted much more space to his activities related to art,[13] producing numerous publications in this area.[14] This scholar and politician died on 4 April 1938 in Lviv.[15]

3. Between law and politics

In a radio broadcast given on the Polish Radio in Lviv on the day of Leon Piniński's funeral, Stanisław Łempicki remembered him in the following words:

"He loved science from his early age, especially law, and he dreamed of an academic career, which he built quite quickly, having made a mark not only on Poles, but also on foreigners, as early as with his first excellent work on Roman law. After a few years he abandoned his academic career and went into politics. He was active in the Galician Sejm and the Austrian parliament, he was the adornment of the Polish Circle, a member of the Tribunal, governor of Galicia, a member of the House of Lords. Interestingly, during all that political work he was still a scholar and professor. In parliamentary bodies, in committees, and in the Tribunal, he was valued primarily for his knowledge and excellent scientific spirituality in resolving practical issues. As a governor, he feels as if he was not himself. But again a strange thing: when he gives up that prominent position, he does not go back to legal studies or university. He goes through a period of many years of attraction to other areas: art, literature, music. In the privacy of his home or on a journey, he creates his most widely read works. He leads a rather bohemian life of an artist. And only after the rebirth of our state does he really return to his earliest and perhaps most profound endeavors: in his old age he resumes the hard work of university teaching and research."[16]

Leon Piniński is remembered not only as a scholar, but as a politician showing commitment to the matters of Galicia. His political career started in 1886, i.e. a year after the publication of the first volume of his monumental work titled *Thatbestand des Sachbesitzerwerbs nach gemeinem Recht*. At the time he was a member of the Poviat Council and Department in Skalat. Soon he was also elected member of the Council of State for the curia of the grand property of the constituency of Tarnopol-Zbarazh-Skalat-Terebovlia, and in 1891, for the constituency of rural gminas Tarnopol-Zbarazh-Skalat. He was a member of the Council of State until 1898.[17] His activity concentrated primarily on work in the legal and financial committees. He was the chairman of the committee that developed the draft code of civil procedure and a member and the main rapporteur of the committee preparing a draft of the Austrian Penal Code.[18] His activity as a codifier was greatly respected, as may be evidenced by Stanisław Witkowski's account: "He took a very prominent part in the development of the new Austrian penal code, not only as a rapporteur, but also as the author of numerous monographic scientific studies on various criminological issues."[19] As it turned out later, Leon Piniński's chairmanship of the committee that prepared a draft of the Austrian code of civil procedure

[6] Cf. PINIŃSKI, L., *Der Thatbestand des Sachbesitzerwerbs*, 29.
[7] PINIŃSKI, L., *Pojęcie i granice prawa własności według prawa*, Lviv, 1900.
[8] Cf. PINIŃSKI, L., *Begriff und Grenzen des Eigenthumsrecht nach römischen Recht*, Vienna, 1902.
[9] PINIŃSKI, L., *Pojęcie i granice prawa własności*, p. 9; cf. also: CHLAMTACZ, M. Pojęcie i granice prawa własności według prawa rzymskiego, napisał L. Piniński, In: *Przegląd Prawa i Administracji* Vol. 26, 1901, pp. 123-133, where M. Chlamtacz praises L. Piniński's theory.
[10] PINIŃSKI, L., *Pojęcie i granice prawa własności*, 9.
[11] PINIŃSKI, L., O stosunkach prawnych niebronionych skargą In: *Księga pamiątkowa ku czci Oswalda Balzera*, Vol. 2. Lviv, 1925, pp. 189-253.
[12] PINIŃSKI, L., Wpływ błędu *in corpore* i *in qualitate* na ważność umów według prawa rzymskiego In: *Księga pamiątkowa ku czci Władysława Abrahama*, Vol. 1, Lviv, 1930, pp. 393-428; IDEM, *W 1400-letnią rocznicę kodyfikacji Justyniana. Odczyt wygłoszony we Lwowie na zaproszenie Towarzystwa Filologicznego*, Lviv, 1935.
[13] JOŃCA, M., Szekspirolog. Przyczynek do biografii Leona Pinińskiego In: KAMIEŃ J., ZAJADŁO, J., ZEIDLER, K., *Prawo i literatura. Parerga*, Gdańsk, 2019, pp. 177-179.
[14] See e.g. PINIŃSKI, L., *Przechadzka po muzeach madryckich*, Lviv, 1908.
[15] WIADERNA-KUŚNIERZ, R., Leon hr. Piniński (1857-1938)…, p. 205.
[16] http://www.lwow.com.pl/cracovia/pininski.html (viewed 11. 10. 2021).
[17] WIADERNA-KUŚNIERZ, R., Leon hr. Piniński (1857-1938)…, pp. 189-190.
[18] OSUCHOWSKI, W., Śp. Leon hr. Piniński In *Ruch Prawniczy, Ekonomiczny i Socjologiczny* Vol. 18, no. 3, 1938, p. 731.
[19] WITKOWSKI, S., Życie i działalność Leona Pinińskiego In: WITKOWSKI, S., LONGCHAMPS DE BERIER, R. (eds.), *Leon Piniński. Z okazji pięćdziesięciolecia doktoratu*, Lviv, 1931, p. 4.

was of significance as regards the work on codification in reborn Poland after World War I. The Codification Commission that made law in interwar Poland relied on the effects of the work of that committee. It was thus considered that the activity of the Lviv Romanist at the end of the 19th century brought indirect benefits to the Polish state.[20]

4. Crowning of his political career

Over time, Leon Piniński's political career took off. In 1894, he was appointed for life as a member of the Tribunal of State, and in 1894-1898, he was a member of the Diet of Galicia and Lodomeria in Lviv.[21] However, the most important and prominent manifestation of Leon Piniński's political activity was holding the office of governor of Galicia, which he assumed on 31 March 1898, succeeding Prince Eustachy Stanisław Sanguszko.[22] This great honor meant a temporary leave from the Chair of Roman Law.[23] The matter of the appointment of the Lviv scholar as the governor of Galicia received extensive coverage in "Polish Review", where his candidacy aroused great hopes:

"Count Leon Piniński was immediately appointed the successor. He had already made himself known and won recognition in the Diet and in the Council of State – suffice to say that we look at placing the reins of the government of the country in his hands with good cheer and even better wishes. He did not serve in the administration: an undeniable difficulty lies in that. But the innate ability and acquired knowledge of public affairs will easily replace this lack and quickly allow him to get an understanding of the activities to be performed (…). The strengths of youth, with a prudent mind and a balanced disposition, may be the perfect condition for the resilience of action and its effectiveness."[24]

It was not a secret that the scholar was appointed to the office through the mediation of Kazimierz Badeni. As the governor, he also held the position of the president of the Treasury Directorate, State Goods Directorate and the School Council. He was also awarded the title of secret counselor.[25] He came into office as governor at the peak of anti-Semitic excesses in Galicia. The riots targeted mainly Jewish traders, innkeepers and lenders whose properties were looted and destroyed. The large scale of the riots was magnified by the proclaimed slogans of the fight against Jewish usury.[26] Having been in office for a few weeks, Governor Leon Piniński took up the fight against the Ukrainian nationalistic, socialist and anti-Semitic movement. On 28 June 1898, he declared a state of emergency in entire Western Galicia and set up summary courts directed against socialist activists and the national movement in two poviats.[27] He came under heavy criticism from Ignacy Daszyński, who accused him of using emergency legislation against socialists. During a session of the Vienna Parliament in November 1898, Ignacy Daszyński not only accused the ruling camp of suppressing the opposition, but also the nobility and Jews of exploiting the poor.[28] The riots and the introduction of the state of emergency were not the only issues to be dealt with by Leon Piniński at the start of his service as governor. Another matter that he managed to address quite quickly and efficiently was to sort out the issues related to the operations of the Galician Savings Bank, where irregularities were detected.[29]

As the governor, he struggled with numerous problems, which he reported effusively in his letters to Adam Jędrzejowicz, Minister for Galicia in Franz Thun's cabinet.[30] Apart from giving an account of numerous personal animosities and verbal jostling between politicians, L. Piniński described his emotional state in one of the letters as follows: "I go through all sorts of emotions because of the political situation in Vienna. I wish that you somehow escaped with life and limb this time, too."[31] As the governor, he encountered numerous political and health problems. It is likely that as a result of the serious problems of his first months in office, Leon Piniński's health deteriorated in 1899, forcing him to go abroad for treatment for several months.[32] After convalescence, he managed to put into effect the appointment of Józef Bilczewski as the Metropolitan of Lviv in 1900.[33] However, relations between Poles and Ukrainians residing in Eastern Galicia became increasingly strained since 1902 and resulted in further strikes by Ukrainian peasants. The authorities in Vienna put the blame for that primarily on Leon Piniński.[34] As a result, following the bloody incidents in the

[20] CHLAMTACZ, M., Śp. Leon Piniński (Wspomnienie pośmiertne i ocena działalności naukowej)", In: *Gazeta Sądowa Warszawska* no. 18, 1938, p. 276.
[21] Archive of New Records (hereinafter: AAN), team: Ministry of Religious Denominations and Public Education in Warsaw (hereinafter: MWRiOP), file no. 5015, p. 76; see also: WIADERNA-KUŚNIERZ, R., *Prawo rzymskie na Uniwersytecie Jana Kazimierza w okresie międzywojennym (1918-1939)*, Toruń, 2015, pp. 147-148.
[22] WIADERNA-KUŚNIERZ, R., Leon hr. Piniński (1857-1938)..., p. 191.
[23] AAN, MWRiOP, p. 62.
[24] Przegląd Polityczny, *Przegląd Polski*, Vol. 128, no. 4, 1898, pp. 196-197.
[25] ZDRADA, J., Piniński Leon Jan (1857-1938) In: *Polski Słownik Biograficzny*, Vol. 26, Wrocław-Warsaw-Kraków-Gdańsk-Łódź: 1981, p. 333.
[26] FAŁOWSKI, J., Żydzi w parlamencie wiedeńskim – z działalności poselskiej Emila Byka (1845-1906), *Państwo i społeczeństwo*, Vol. 9, no. 1, 2009, pp. 52-53.
[27] ZDRADA, J., Piniński Leon Jan (1857-1938)..., p. 334.
[28] FAŁOWSKI, J., Żydzi w parlamencie wiedeńskim..., p. 54.
[29] WIADERNA-KUŚNIERZ, R., Leon hr. Piniński (1857-1938)..., p. 191.
[30] State Archive in Rzeszów, Post-court Archive Mierów – Jędrzejewiczów, Letters of Leon Piniński, former governor, to Adam Jędrzejowicz, file no. 59/24/0/2.2/362.
[31] IBIDEM, p. 19 (Letter of 21 September 1899).
[32] WIADERNA-KUŚNIERZ, R., Leon hr. Piniński (1857-1938)..., p. 191.
[33] IBIDEM, p. 192.
[34] DUDEK, T., Konserwatyści galicyjscy wobec kwestii ukraińskiej w okresie rządów Leona Pinińskiego (1898-1903) In: *Krakowskie Pismo Kresowe* Vol. 12, 2020, pp. 74-75.

Sanok area, he was dismissed from the office of governor at his own request on 8 June 1903.[35] Even though his dismissal was tainted with scandal, he became a life member of the House of Lords of the Council of State. A year later he became a member of the National School Council in Lviv. He also resumed work in the Tribunal of State and the University in Lviv.[36]

5. Back to politics?

L. Piniński was politically involved until Poland regained independence.[37] He did not leave Lviv during World War I. He was one of the founders of the Polish Civic Committee and was in charge of the local branch of the Red Cross. In 1916, he became the head of the Central National Committee, which strove for the independence of Galicia.[38] S. Witkowski referred to Leon Piniński's substantial achievements during World War I as follows: "In the House of Lords, he made a great contribution to defending the interests of our country and nation during the war, opposing the Minister of Foreign Affairs Count Czernin's ideas, which were disastrous for the Polish nation and which were reflected in the treaty concluded in Brest-Litovsk. He also made endeavors to cripple Prime Minister Seidler's activity, which was harmful to Polishness, as the latter furtively made an agreement with the Ruthenians for the division of Galicia."[39] Finally, he quit politics and returned to more intense academic work and art-related activity. He said that holding the office of governor resulted in a temporary separation from the Chair, yet "it is not a complete break with my main subject of study. After all, during a difficult administrative profession, I published a work in the field of Roman law, although it was not easy to find time and freedom of thought for it."[40] He also claimed that political work did not give him full satisfaction. In a speech for the 50th anniversary of his doctoral degree, he noted that "If I were to express the impressions gained from political life in a few sentences, I would have to say that, in general, the work I put into it did not give me full satisfaction. I tried to fulfil my duties as best I could and as much as I could, withdrawing from all personal honors, and all the more so, personal benefits were foreign to me. But I far too often came to deplore that the course of public affairs, contrary to my attempts, went on the wrong track in the monarchy and sometimes in the country as well. And it was absolutely no consolation for me that I had occasionally foreseen the consequences of the roads wrongly taken, not being able to prevent them. »Utinam falsus sim vates« was often my fervent wish, which, however, usually did not come true."[41]

6. Conclusions

It is clear that the most prominent Lviv scholars at the turn of the 20th century include Leon Piniński. In turn, an overview of his scholarly achievements allows the conclusion that his contribution to the development of Roman law studies was significant. He raised difficult issues in his works, often engaging in vivid discussions with the then luminaries of the science, thus taking part in the international discourse.

Leon Piniński remains the most recognizable Lviv Romanist despite his relatively small number of works in the field of Roman law. There may be at least several reasons for this. The performance of the distinguished function of the governor of Galicia clearly meant that the memory of this scholar lived on much longer than that of any other Roman law scholar from Lviv. Count Piniński was a member of the local elite at the turn of the 20th century and played a significant role in it. Paradoxically, therefore, one of the important factors that made him remembered as the leading Lviv Romanist of the time was his political activity. As a politician taking decisions important for Galicia, he was not only well-known during his lifetime, but it was much easier to keep his memory alive after his death. At the end of his life, Leon Piniński isolated himself from political activity and thus avoided the risk of getting involved in something that could blemish his record. The fact that he was a professor of Roman law and an art connoisseur gave him adequate splendor. The latter issue merits particular attention. The scholar, who did not have specialist education in that field, was regarded as an art historian in many circles due to his excellent knowledge of the subject. It was within this area of interest that he published the most of his works.

The reception of L. Piniński's works was also of great importance. The fact that he entered into a discussion with the then luminaries of Roman law in his work *Der Thatbestand des Sachbesitzerwerbs nach gemeinem Recht* meant that his dissertation was noticed by them. Given that this work aroused interest from the very R. von Ihering and his opinion on the work was more than positive, it became clear even then that L. Piniński came to the forefront of the scholarly world at the turn of the 20th century. Consequently, even though his scholarly output was not significant, its quality determined its great importance for the science of Roman law. Although L. Piniński published only a few works in the field of Roman law, the success of his habilitation dissertation contributed to his future scholarly prestige.

[35] AAN, MWRiOP, file no. 5015, p. 76
[36] ZDRADA, J., Piniński Leon Jan (1857-1938)..., p. 334.
[37] JOŃCA, M., Szekspirolog. Przyczynek do biografii Leona Pinińskiego, p. 177.
[38] WIADERNA-KUŚNIERZ, R., Leon hr. Piniński (1857-1938)..., p. 197.
[39] WITKOWSKI, S., Życie i działalność Leona Pinińskiego, p. 4.
[40] Pięćdziesięciolecie doktoratu Leona hr. Pinińskiego In: WITKOWSKI, S., LONGCHAMPS DE BERIER, R. (eds.), *Leon Piniński. Z okazji pięćdziesięciolecia doktoratu*, Lviv, 1931, p. 18.
[41] IBIDEM.

Protected by Lex Laetoria: Two Papyri of Roman Egypt and their Effect on Roman Law

*János Erdődy**

Abstract

Lex Laetoria was a Roman Act from about the turn of the 3rd and 2nd centuries BC, granting additional protection to adults under the age of 25. Amongst its primary sources the Tabula Heracleensis, a.k.a. lex Iulia municipalis (cf. FIRA I, 112), an excerpt from the Theodosian Code (C. Th. 8, 12, 2), and four papyri (BGU II 378, BGU II 611, P. Oxy. X 1274 and P. Oxy. XVII 2111) bear greater importance. These papyri are resourceful in the debate about the actual name of the Act (lex Laetoria versus lex Plaetoria). From a legal point of view, BGU II 378 and P. Oxy. X 1274 contain a petition and a contract or agreement, respectively, where the reference to lex Laetoria is part of a legal argumentation. Besides the actual case, these papyri are significant because they give a presentation of the quotidian social and economic life and practice of the Roman world in Egypt around the 2nd century AD. By examining and analysing the cases described in these papyri, we get a closer view to the everyday reality of Roman law. The characters involved in the cases bear Roman names, the cases take place in Hellenised Egypt, the correspondence is in Greek, yet Roman law measures are used to settle the disputes. We sense multiculturalism in these documents, without the awkward feeling of being unfamiliar to Roman Egyptian culture. This paper aims to catch a glimpse of Roman law in action by multicultural approach, and to provide an example of how Rome had managed to handle herself as an Empire.

Keywords: *Lex Laetoria; lex Plaetoria; praetorian edict; exception; circumscription; minor; minores; protection of minores; Arsinoe; Alexandria; Oxyrhynchus; Faiyum Oasis.*

1. Introduction: the connection between *lex Laetoria* and papyrology

Lex Laetoria is a famous and widely known Act of Roman law for jurists and historians alike. Its literature contains an almost inexhaustible number of titles, many of which are frequently cited.[1] Manuals, textbooks, dictionaries, encyclopaedias outline its regulations providing the same pieces of information. Amongst other authors, Adolf Berger emphasises that this Act "[p]rotected persons *sui iuris* under twenty-five years of age (*minores*) who have been defrauded in a transaction. The latter was valid in principle, but the minor, when sued for payment, had an exception: *exceptio legis Plaetoriae*, for his defense [sic!]. Besides, an *actio legis Plaetoriae* was available to anyone (*actio popularis*) against the person who exploited the inexperience of a minor (*circumscription adolescentium*)".[2]

This excerpt furnishes a concise description of what is generally considered to be the content of *lex Laetoria*. At this point,

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1 The following list on *lex Laetoria* is not exclusive: the following are works referred to on several occasions, and excerpt are generally regarded as points of departure when it comes to discussing this topic. The most important works are as follows SAVIGNY, F. K. v., Schutz der Minderjährigen und Lex Plaetoria 1831. In: *Vermischte Schriften*, (1850), p. 321–395.; SENN, F., *Leges perfectae minus quam perfectae et imperfectae*. 1902, p. 55–69.; ROTONDI, G., *Leges publicae populi Romani*. Milano, 1912, p. 271–272.; BUCKLAND, W. W., *A text-book of Roman law from Augustus to Justinian*. 1921, p. 171.; SCHULZ, F., *Classical Roman law*. Oxford, 1951, p. 191.; BERGER, A., *Encyclopedic Dictionary of Roman Law*. New Yersey, 2010, s. h. v.; KUNKEL, W., *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*. München, 1962, p. 52–53.; KASER, M., *Das römische Privatrecht*. München, 1971, p. 276–277.; KASER, M., *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht*. Wien, 1977, p. 39–42.; ALBANESE, B., *Le persone nel diritto privato romano*. Palermo, 1979, p. 514–528.; DI SALVO, S., *Lex Laetoria. Minore età e crisi sociale tra il III e il II a. C*. Napoli, 1979, p. XVI, 340.; WACKE, A., Zum Rechtsschutz Minderjähriger gegen geschäftliche Übervorteilungen. In: *Tijdschrift voor Rechtsgeschiedenis*, 48 (1980), p. 203–225.; KNOTHE, H.-G., *Die Geschäftsfähigkeit der Minderjährigen in geschichtlicher Entwicklung*. Frankfurt - Bern, 1983, p. 53–68.; MUSUMECI, F., L'interpretazione dell'editto sui minori di 25 anni secondo Orfilio e Labeone. In: ROMANO (ed.), *Nozione, formazione e interpretazione del diritto dall'età romana alle esperienze moderne. Ricerche dedicate al Professor Filippo Gallo*. Napoli, 1997, p. 39–58.; SANFILIPPO, C., *Istituzioni di diritto romano*. 2002, p. 60.; MUSUMECI, F., *Protezione pretoria dei minori di 25 anni e ius controversum in età imperiale*. Torino, 2013, p. XI, 262 S.; ROBRA, E. C., *Die Drittwirkung der Minderjährigenrestitution im klassischen römischen Recht*. Berlin, 2014, p. 204 S.

2 Text cited from BERGER, A., op. cit. s. v. "Lex Plaetoria". Additionally, the textbooks and manuals generally report the same content; c.f. e.g. BENEDEK, F. – PÓKECZ KOVÁCS, A., *Római magánjog* [Roman Private Law]. Budapest – Pécs, Dialóg Campus Kiadó, 2014. 2nd ed. p. 146.; FÖLDI, A. – HAMZA, G., *A római jog története és institúciói* [The History and Institutes of Roman Law]. Nemzeti Tankönyvkiadó, Budapest, 2010. 15th ed. p. 227.; KASER, M. – KNÜTEL, R., *Römisches Privatrecht*. München, 2014, p. 94.; SANFILIPPO, C., op. cit. p. 60.

however, it is worthwhile emphasising that lex Laetoria itself merely provided protection to *minores* against contractual fraud. The further legal means of protection, such as *exceptio* and *in integrum restitutio* were granted by the praetorian edict, the regulations of which were based mainly on the Act.

There are several debates amongst scholars in connection with *lex Laetoria*, which are first and foremost important from a scientific aspect.

a) One issue is related to the name of the Act. It is still debated whether it was *lex Laetoria* or *Plaetoria*. The form *Plaetoria* is used in *Tabula Heracleensis*, which is also known as *lex Iulia municipalis*[3], as well as in Theodosian Code[4], also, two Cicero texts[5] refer to the Act as *Plaetoria*. In turn, the name *Laetoria* appears in the papyri sources[6] of this Act.[7]
b) Also, the question arose whether *lex Laetoria* was a *lex imperfecta*[8]— a debate related mostly to the work of Félix Senn and Max Kaser.
c) As for the *actio* based on this Act; it is debated whether the *actio legis Laetoriae* was a *iudicium publicum* or an *actio popularis* (a dissent of opinions between Theodor Mommsen and Wolfgang Kunkel).[9]
d) When it comes to the evaluation of the dupe of *minores*, there is diversity in the terminology (*minor captus* / *circumventus* / *deceptus* / *laptus*) as analysed by Francesco Musumeci.[10]

1.1 Protection of *minores* as of *lex Laetoria* and regarding the praetorian edict

For a person who just begins studying Roman law, the impression on this *lex* might be that it granted a variety of measures to protect *minores* starting from guardianship and penal actions to processual remedies, and that all these complex legislative measures were provided simultaneously. Contrary to this tempting assumption, the actual situation was that the protection of those below the age of 25 was carried out in two separate stages. In the former stage there was a protection by *ius civile* via *lex Laetoria* (*Plaetoria*). Dating back to the late 3rd or early 2nd century BC,[11] it protected *minores*, i.e. adults under the age of 25. However *minores* possessed full capacity, they were granted additional or extra protection: it was permitted that a *curator* be appointed to administer their affairs.[12] Additionally, a *popularis actio poenalis*, the so-called *actio legis Laetoriae* was occasionally granted against any person who defrauded or duped a *minor*.

The latter stage was based on these legislative measures and relied on the praetorian authority. Established by his annual edict, the praetor ensured certain processual remedies: he introduced *exceptio* on the one hand, and *in integrum restitutio* on the other.[13]

1.2 The primary sources of *lex Laetoria*

The original text of *lex Laetoria* is not handed down to us directly; there are still some ancient records available which are useful in the reconstruction process.[14] *Tabula Heracleensis* (*lex Iulia municipalis*) and a fragment in *Codex Theodosianus* recapitulate the content of the Act as legal sources.[15] Another legal source is the praetorian edict (EP 10, 41) the rules of which are cited in book four, title four of the Digest. This title is also important because it also contains the related practice as well.[16] Besides legal sources, literary sources also provide information on legal institutions, describing them in action for the most part; in our case, two Ciceronian texts are to be primarily mentioned.[17]

There is a third category of sources, the papyri. They could essentially belong to the group of legal sources, yet two reasons could be brought forward for analysing them independently. The one is that the term "papyri" refers not only to the document, but also to the writing surface, and this sort of writing surface bears such specialities which by themselves are suffi-

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[3] Cf. FIRA I, 112: "*[…] queive lege Plaetoria ob eamve rem, quod adversus eam legem fecit fe cerit, condemnatus est erit […]*".
[4] Cf. C. Th. 8, 12, 2: "*[…] donec is, cuius facultatibus cesserit, annos Laetoriae legis egressus legitimam compleverit aetatem […]*".
[5] Cf. Cic. de off. 3, (15), 61: "*[…] circumscriptio adulescentium lege Plaetoria […]*"; Cic. ND 3, (30), 74: "*[…] inde iudicium publicum rei privatae lege Plaetoria […]*".
[6] Cf. BGU II 378, BGU II 611, P. Oxy. X 1274, P. Oxy. XVII 2111.
[7] Secondary literature is also divided with regard to the name of the Act; cf. e.g. ROBRA, E. C., op. cit. p. 14.; as well as KASER, M., op. cit. p. (1977) 39.
[8] Cf. SENN, F., op. cit. p. 67–69.; KASER, M., op. cit. p. (1977) 39–42.
[9] Cf. KUNKEL, W., op. cit. p. 52–53.
[10] Cf. MUSUMECI, F., op. cit. p. 65–103.
[11] As for chronology, there are cautious authors, such as BUCKLAND, W. W., op. cit. p. 171.; DI SALVO, S., op. cit. p. 19 sqq.; KNOTHE, H.-G., op. cit. p. 53.; SANFILIPPO, C., op. cit. p. 60. At first, Wacke also determined the date of this Act by the century; in his late works he claimed it dates back to 190 Bc. In detail cf. WACKE, A., op. cit. p. 204. and 206.
[12] The fact that a *curator* could be appointed to administer the affairs of a *minor* is an indication of their full capacity, as the task of a *curator* was to administer the affairs of another person, should the latter be hindered or impeded by any means. The contribution of a *tutor*, by comparison, was aiming to provide protection to *sui iuris* persons: those under the age of puberty if they lacked paternal power as well as women in the absence of paternal or marital power over them. In detail cf. Gai. 1, 144: *Permissum est itaque parentibus liberis, quos in potestate sua habent, testamento tutores dare: masculini quidem sexus inpuberibus, feminini uero inpuberibus puberibusque, uel cum nuptae sint*.
[13] It is easy to comprehend from this description why the term "*exceptio legis Laetoriae*" is somewhat misleading: it has nothing to do directly with *lex Laetoria*, it was a processual means provided by the praetor on behalf of his official power. As a result, this was a remedy *iure praetorio*, based on the praetorian edict, whereas *lex Laetoria* was an Act of *ius civile*.
[14] Cf. On this KASER, M., op. cit. p. (1977) 39., and footnote no. 2; WACKE, A., op. cit. p. 204., and mainly footnote no. 5, with literature; DI SALVO, S., op. cit. p. 3., and footnote no. 3. Similarly, in recent literature cf. MUSUMECI, F., op. cit. p. (2013) 10., especially footnote no. 3, with abundant reference to secondary works. Contrary to this view cf. e.g. ROBRA, E. C., op. cit. p. 14.
[15] Cf. FIRA I, 112; C. Th. 8, 12, 2; ROTONDI, G., op. cit. p. 271.
[16] On this cf. LENEL, O., *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*. Leipzig, 1927, p. 116.
[17] Cic. de off. 3, (15), 61; Cic. ND 3, (30), 74.

cient for separation. The other reason is that the contents of the documents reflect mainly actual everyday practice. In case of *lex Laetoria* this everyday practice is preserved in BGU II 378 and P. Oxy. X 1274, whereas BGU II 611 contains the transcript of a speech, while P. Oxy. XVII 2111 reports about an imperial constitution, the text of which was inserted in the Digest (Paul. D. 49, 1, 25 [20 resp.]).[18]

This is the point where the connection between a passage in an old Roman law manual and the ancient text of crumbling papyri is established. The two papyri preserving everyday practice both refer to *lex Laetoria*. The Greek texts are worth scrutiny. Both contain a particular case: the one a petition to a *iuridicus*, a complaint against a process of execution commenced by the petitioner's cousin, the other a statement which allows an appointed representative to act on a window's and her son's behalf before an official of Alexandria.[19]

2. The Drusilla lawsuit

The protagonist of the case known as "the Drusilla lawsuit" is a lady, Tertia Drusilla. She is the widow of a soldier named Valerius Apollinarius, an inhabitant of the agricultural town of Karanis[20] during the Ptolemaic Kingdom. Between 119 and 128 AD Valerius contracted several loans with another person named Iulius Agrippianus. To secure these loans, Valerius Apollinarius pledged certain estates. As Appolinarius was unable to reimburse the loans on expiration, Agrippianus seized the estates. Valerius Apollinarius passed away presumably not later than 129—135 AD, after which his widow, Drusilla took over and partially reclaimed some of the estates from Agrippinus, a soldier *legio II Traiana Fortis* and son of Agrippianus, who also died in the meantime. Proceeding on behalf of both herself and her children, Drusilla's basis of reclaiming the estates was that some of the pledged estates belonged to her dowry, whereas others made part of her children's legacy. The Drusilla lawsuit comes into two parts, Agrippianus' time of death serving as a dividing line. After this point, his son took over the place of the defendant against Drusilla. In accordance with the remaining papyri, as of 148 AD the case was unsettled.

2.1 The *corpus* of the lawsuit

There is an archive consisting of 21 papyri related to Iulius Agrippinus, and the documents of the Drusilla lawsuit also make part of this archive.[21] Its documents can be found in Berlin, London, Aberdeen, Geneva, Paris and Alexandria, 16 of which are directly related to the Drusilla lawsuit. Except for two texts, each of the 19 documents undoubtedly belongs to this archive.[22] Most of them are outgoing documents; mostly claims and petitions by Agrippianus, and his son, Agrippinus addressing different officials. The documents are primarily final drafts or copies of a petition.

The reason why *lex Laetoria* is related to the Drusilla lawsuit lies in this papyrus which is a petition by Agrippinus to Calpurnianus *iuridicus*.[23] The document covers a debate between Agrippinus and his cousin, Saturninus.

2.2 The actual link between the protection of *minores* and the Drusilla lawsuit

The Drusilla lawsuit lasted for at least 15 years, it could most likely be dated between 135—148 AD. As it was mentioned previously, out of the 21-document archive, 16 items are those belonging to the "Drusilla file". In this archive 15 items were created in the period after the death of Agrippianus in 139 AD, 12 of which are related to the Drusilla lawsuit. It is therefore a two-generation archive. Regarding its content, the core of the archive contains chiefly court files and official documents, and only a smaller segment of the material consists of private letters or correspondence on all sorts of business transactions (sale, hire, lease, loans, etc.). From the aspect of Roman law, the papyrus in question is of high relevance not only because via this document we can reconstruct a specific business transaction, but also because a piece of legislation, the *lex Laetoria* is expressly mentioned in lines 21—22, and this fact in particular may lead us to certain conclusions beyond the actual case to which the papyrus refers.

3. Papyrus BGU II 378

The size of this papyrus is 33 x 34 cm (height x width).[24] It is preserved and reconstructed due to the work of Mitteis[25] and

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[18] BGU II 378 *„τυγχάνω γὰρ γεγραφὼς [τ]οῦτο ἔτι ἐντὸς ὢν τοῦ Λαιτωρίου νόμου"*, as well as BGU II 611 *„[qui · ad ·] res · suás · age[n]das · legis · Laetoriae [utantur · au]xiliô"*. With regard to BGU II 611 cf. BUONGIORNO, P., Das "verleumderische" negotium. Geschichte einer Ergänzung von BGU II 611. In: *The Journal of Juristic Papyrology*, XL (2010), p. 111–134.

[19] On the literature related to BGU II 378 cf. MEYER, P. M., Zum Drusilla-Prozess. In: *Archiv für Papyrusforschung*, III (1906), p. 247–248.; KUPISZEWKSI, H., The Iuridicus Alexandreae. In: *The Journal of Juristic Papyrology*, VII-VIII (1953-1954), p. 197.; BASTIANINI, G., Lista dei prefetti d'Egitto dal 30ª al 299P. In: *Zeitschrift für Papyrologie und Epigraphik*, XVII (1975), p. 290. Concerning P. Oxy. X 1274 the following papers should be mentioned: GRENFELL, B. P. – HUNT, A. S., *The Oxyrhynchus Papyri.* London, 1914, p. 211–212.; KRUSE, T., *Der Königliche Schreiber und die Gauverwaltung.* München - Leipzig, 2002, p. 910–911.

[20] The agricultural town of *Καρανίς*, during the Ptolemaic Kingdom, was situated in the north-eastern segment of the Faiyum Oasis, in Arsinoe *nomos* (*νομός* = "district"), an administrative unit of Ancient Egypt. Today the town is called Kom Oshim.

[21] Amongst the literature related to this archive the most important ones are as follows MEYER, P. M., Papyrus Cattaoui. I. The Text. In: *Archiv für Papyrusforschung*, III (1906), p. 55–67.; MEYER, P. M., Papyrus Cattaoui. II. Kommentar. In: *Archiv für Papyrusforschung*, III (1906), p. 67–105.; MEYER, P. M., op. cit. p. 247–248.; SEIDL, E., *Rechtsgeschichte Ägyptens als römischer Provinz*. Sankt Augustin, 1973, p. 62., 1. 9. pont; MAEHLER, H., Neues vom Prozess der Drusilla gegen Agrippinus. In: LIEBS – MODRZEJEWSKI (ed.), *Symposion 1977. Vorträge zur griechischen und hellenistischen Rechtsgeschichte*. Köln, 1982, p. 325–333.; MONTEVECCHI, O., *La papirologia*. Milano, 1988, p. 253., no. 36.

[22] Cf. e. g. MONTEVECCHI, O., op. cit. p. ibid.

[23] Serving as the Emperor's legate, the *iuridicus* (*ὁ δικαιοδότης*) was an official who assisted the *prefectus* in *iurisdictio*. In detail cf. KUPISZEWKSI, H., op. cit. p. 189–190.

[24] Cf. BGU = *Aegyptische Urkunden aus den Königlichen Museen zu Berlin. Griechische Urkunden*. Band II., Berlin, 1898. 38. (hereafter BGU II.)

[25] MITTEIS, L., *Grundzüge und Chrestomathie der Papyruskunde. Zweiter Band: Juristicher Teil, zweite Hälfte: Chrestomatie*. Stuttgart, Teubner, 1912. p. 67–68., with apparatus.

Krebs[26], each providing critical apparatus to the text. As for the establishment of its date, the names in the text are extremely useful; one should especially mentioned: Claudius Neokydes (*Κλαυδίου Νεοκύδους*) who held office in 141 AD.[27] In the second part of the text Lucius Valerius Proculus is also mentioned, who held the office of *praefectus* between 145 and 147 AD. Currently, the papyrus is dated April 15th – 24th, 147 AD.[28] The document is written in Greek and stems from Arsinoe, the Faiyum Oasis, where it was originally found. This *recto*-only document consists of 28 lines.

[- ca.20 - Καλ]πουρνιανῶι δ[ι]καιοδότηι
[παρὰ Γαίου Ἰουλίου Ἀγριππίνου σ]τρ[α]τιώτο[υ λεγεῶνος]
[β Τ]ρ[αϊανῆς Ἰσχυρᾶς (ἑκατονταρχείας) Πο]υβλικίου(*) Σευή[ρου .....]
[- ca.28 -]... [ ]υτης υ[- ca.11 -]. υ
5 [οὗ ἐπιδέ]δωκα τ[ῷ κ]ρ[ατί]στῳ [ἡ]γεμόνι βιβλειδίου(*) καὶ τῆς ὑπ' αὐτοῦ(*)
[γενομέν]ης [ὑπογρα]φῆ[ς ἀν]τίγραφον ὑποτάξας δέομαι, ἐάν
[σου τῇ] τ[ύχῃ δόξῃ π]ρὸ[ς] τὸν [ἀ]ντίδικον Ἰ(*)ούλιον Σατορνῖνον
[ἀκοῦ]σαί μο[υ.....]. ἀναπομπὴν καὶ [[τ[ὴ]ν συν]]
[...] μεν[- ca.12 -]ες. παρ' αὐτῷ οὖσαν. διε[υτύ]χ(ει)
10 [- ca.11 -]... ε.
Λ[ου]κίωι [Οὐαλερίωι Πρόκ]λωι ἐπάρχωι Αἰγύπτου
παρὰ Γαίου [Ἰ]ο[υλίου Ἀγρ]ιπ[πίν]ου στρατιώτου λεγεῶνος β
Τραϊ(*)ανῆ[ς Ἰ]σχυρ[ᾶς (ἑκατονταρχείας) Σουλπι]κίου Σευήρου. περιγραφείς, κ[ύ]ρ[ιε]
πρ[ὸ]ς τῆς. [- ca.10 - Ἰου]λίου Σατουρνείνου ἀνεψιοῦ μου
15 ἐντυγχάνω σ[ο]ι [- ca.10 -] μὲν [κ]ληρονόμος [τ]οῦ π[ατρό]ς
μου Ἰ(*)ουλίου Ἀγριππινιαν[οῦ]. κακοπραγμόνως ὁ Σατορνεῖνο[ς]
ἐπ[ο]ίησεν πρ[ός] με κατά[σ]τασ[ι]ν ἐπὶ Κλαυδίου [Ν]εοκύδους
γε[ν]ομένου δικαιοδότου, ἀπαιτῶν με ἣν ἔλεγεν δεδωκ[έν]αι
τῷ πατρί μου παραθήκην, ἐπενέγκας μου χειρόγραφ[ο]ν [ ]. ν
20 χρ[υ]σίου μναϊ(*)αίω[ν] ὀκτώ, [ὅ]περ ἀνάγκασέν(*) με γράψαι βίᾳ ἄκον-
τα, τυγχάνω γὰρ γεγραφὼς [τ]οῦτο ἔτι ἐντὸς ὢν τοῦ Λαιτωρίου νόμου, ἔτι δὲ καὶ ἐξισχύσας [μ]εταξὺ ἐκ παραλογισμοῦ ἐπ[ι]στολὴν [τοῦ]
κρατίστου δικαι[ο]δότου Καλπουρνιανοῦ τῷ τοῦ Ἀρσινο[ίτο]υ στρατηγῷ, ὅπως ἐν[β]ιβασθῇ [εἰ]ς τὰ ὑ[π]άρχο[ν]τά μοι, ὄντ[α ἐν συ]ντι-
25 μήσει τα[λά]ντων δέκα καὶ πρός, χάριν [τ]ῶν προκειμ[ένων τ]ο[ῦ]
χρυ[σί]ου [μναϊ]αίων ὀκτώ, διαπεμψά[μ]ενος ὁ Σατορ[νε]ῖνος
τὴν ἐπ[ι]σ[τολ]ὴν διὰ δύο στρατιωτῶν [τοῦ κρατίσ]του δικαι[οδότου].
(ἔτους) ι Φαρμοῦθι β[].

Apparatus
^ 3. cf. BL 6.11: [Σο]υπλικίου (l. [Σο]υλπικίου) prev. ed.; ^ 5. l. βιβλιδίου; ^ 5. l. αὐτο<ῦ>; ^ 7. ϊουλιον papyrus; ^ 13. τραϊανη[σ] papyrus; ^ 16. ϊουλιου papyrus; ^ 20. μναϊαιω[ν] papyrus; ^ 20. l. ἠνάγκασέν.

This papyrus contains a petition put forward by Gaius Iulius Agrippinus to Calpurnianus *iuridicus* (*δικαιοδότης*) in which he makes a formal complaint against Iulius Saturninus, who is Agrippinus' cousin (cf. line 14: *ἀνεψιός*). To this document another petition is enclosed; this latter file begins from line 11. The fact that the document contains the copy of another official file is also clear from the term *ἀντίγραφον* in line 6. This copy was originally addressed to Lucius Valerius Proculus *praefectus*. The petitioner complains that a process of execution was launched to enforce the fulfilment of a loan, the subject of which was 8 *mina* gold (cf. line 20*: χρυσίου μναϊαίων ὀκτώ*). The reason for Agrippinus' his complaint was that, according to him, the handwritten document (line 19: *χειρόγραφον*) containing information on the loan and his obligation to pay was violently extorted (cf. words *βίᾳ* and *ἀναγκάζω* in line 20) by his cousin, Saturninus.[29]

However Agrippinus was a *minor* at that time, therefore (as he assumes it in accordance with the text) the protection provided by *lex Laetoria* also applies to him (cf. line 21: *τυγχάνω γὰρ γεγραφὼς τοῦτο ἔτι ἐντὸς ὢν τοῦ Λαιτωρίου νόμου*). Yet Saturninus fraudulently (cf. line 22: *ἐκ παραλογισμοῦ*) wrote a letter to the governor of Arsinoe *nomos* (*Καλπουρνιανοῦ τῷ τοῦ Ἀρσινοίτου στρατηγῷ*) claiming that he should be admitted (line 24: *ἐνβιβασθῇ*) to Agrippinus' property (ibid.: *εἰς τὰ ὑπάρχοντά μοι*).

4. The text of P. Oxy. X 1274

The other papyrus quoted, P. Oxy. X 1274 contains the appointment of a representative and dates to the 3rd century AD. Its text cited below is based on the original publication of the papyrus by Bernard P. Grenfell and Arthur S. Hunt.[30]

1 *Αὐρηλία Ἀριστοῦς θυγάτηρ Αὐρηλίο[υ] Ἡρώδου Ἀπίωνος γυμνασιαρχήσαντος βουλε[υτοῦ τ]ῆς Ὀξυρυγχειτῶν πόλεως μετὰ κυρί[ο]υ τοῦ δεδομένου μοι κα[τὰ] τὰ Ῥωμαίων ἔθη Μάρκου Αὐρη[λί]ου Νει[κ]ο-κλέους Ζωί(*)λου γυμ(νασιαρχήσαντος) τ[ῆς αὐ]τῆς π[ό]λε̣ω̣[ς] Αὐρη[λ]ίῳ Ἡ[ρ]ακλ[εί]δῃ τῷ κ[αὶ]*
5 *Λουκίωι Λουκίου καὶ ὡς χρηματίζεις χαίρειν. ἐπεὶ ἀπευκταίας μ[ο]ι καταγγελείσης φάσ[ε]ως περὶ τελευτῆς τοῦ μακαρείτου(*) μου ἀνδ[ρὸς]*
Ἀχιλλίωνος τοῦ καὶ Ἀπολλωνίου Ἀπολλωνίου ὄντος ἐν ᾗ ἦν ἐπικεχειρισμένος βασιλικῇ γραμματείᾳ Ἀλεξανδρέων χώρας, ὁμολογῶ ἀποσυνεστακέναι σε κατὰ ταῦτά μου τὰ γράμματα κατελθεῖν εἰς Ἀλεξάν-

[26] BGU II. 38. (as for the apparatus see ibid. 355.)
[27] On this cf. MITTEIS, L., op. cit. p. 67., who mentions that the petitioner is the same person as the one referred to on the *verso* of *Papyrus Cattaoui*. Cf. also MEYER, P. M., op. cit. p. (II). 94–95.
[28] On this cf. HABERMANN, W., Zum Ende der Amtszeit des Präfekten L. Valerius Proculus. In: *Zeitschrift für Papyrologie und Epigraphik*, CXVII (1997), p. 181.
[29] The papyrus applies the form *ἀνάγκασέν*, which is incorrect according to the apparatus. The correct form is supposed to be *ἠνάγκασέν*, as a 3rd person *indicativus aoristos activi singularis* is due in this sentence.
[30] Cf. GRENFELL, B. P. – HUNT, A. S., op. cit. p. 211–212.

10 *δρειαν καὶ ἀπογράψασθαι παρὰ τῷ κρατίστῳ τῶν οὐσιακῶν ἐπι-*
τρόπῳ ἐξ ὀνόματός μ[ου ὑ]πὲρ τοῦ ἀμφοτέρων ἐμοῦ τε καὶ τοῦ αὐτοῦ
ἀνδρός μου υἱ(*)οῦ ϙαὶ [κλ]ηρονόμου Αὐρηλίου Διονυσίου τοῦ καὶ Ἀπολλω-
νίου γυμνασιάρχου τῆς αὐτῆς πόλεως ἔτι ὄντος ἐντὸς τοῦ Λαιτωρίου
νόμου τὴν ὕ(*)παρξιν αὐτοῦ πᾶσαν οὖσαν τιμήματος δουκηναρίας.
15 *ἀπὸ δὲ ταύτης τῆ[ς] ὑ(*)ποστάσεως δηλῶ ὀφείλειν τὴν ἄνδρα μου*
ἐμοὶ μὲν ἀπὸ τῆ[ς προσε]νεχθείσης αὐτῷ ἐπ' ἐμοὶ γ[α]μουμένῃ
αὐτῷ προοικὸς(*) [ἔν τε κοσ]μαρίοις χρυσοῖς καὶ ἱ(*)ματίοις καὶ ἄλλοις
[σ]υντιμήσεως [ἀργυρίου ταλάν]των δ[ύο] καὶ δραχμῶν τρισχειλί-
ων(*) με[- ca.10 -]ιᾳ προ []ιῳνιᾳ [ ].. [] ἐν [σ]υντιμήσει
20 *δραχμῶ[ν... χιλί]ων πεντακοσίων [.....]. ἔχρη ἀπὸ*
[τ]ῆς ἰ(*)δίας [- ca.31 -] ταλά[ντ]ω[ν]
δύο κα[ὶ δραχμῶν - ca.22 -]. ὑ(*)π[α]ρχόν-
των μο[ι - ca.31 - τάλαντα]
τρία καὶ δ[ραχμὰς -ca.?-]

Apparatus

4. *ζωϊλου papyrus*
6. l. *μακαρίτου*
12. *υϊου papyrus*
14. *ϋπαρξιν papyrus*
15. *ϋποστασεωσ papyrus*
17. l. *προικὸς*
17. *ϊματιοισ papyrus*
18-19. l. *τρισχιλί|ων*
21. *ϊδιας papyrus*
22. *ϋπ[α]ρχον papyrus*

5. The content of the papyrus – an overview

The size of papyrus P. Oxy. X 1274 is approximately 16 x 14 cm (height x width), Grenfell and Hunt dates it to the 3rd century AD. According to the result of Gonis, the date scale could be narrowed to the third quarter of the 3rd century.[31] Whitehorne, however, presumes that Aurelius Appollonius mentioned in the text could be the same person mentioned in the text of P. Oxy. I 55. If this assertion should prove right, then our papyrus in question might as well be dated to even 20-30 years earlier than Grenfell, Hunt and Gonis estimated.[32]

Grenfell and Hunt conspicuously refer to the content of this document as a "contract", however, it actually contains a statement concerning the appointment of a representative. By this document, the widow Aurelia Aristous agrees unilaterally that Aurelius Herakleides should administer her affairs in Alexandria as a representative.[33] According to the text, Aurelia Aristous acts *μετὰ κυρίου* (line 2), that is with her guardian[34], and by this document she accepts the appointment of the aforesaid Aurelius Heraklides, a. k. a. Lucius to become her representative. His task is to see to the administration of the estates of her late husband, Achillion alias Apollonios. This task of administration includes to be present in Alexandria in front of the *procurator usiacus*[35] to register the actual value of the late Achillion's estates. The representative, Herakleides shall act on behalf of the heir, who is not the widow, Aurelia Aristous, but Dionysios Aurelius Apollonios, the son of Achillion and Aurelia. Even though Dionysios is the *γυμνασιάρχης* in Oxyrhynchus, he is still under the age of 25 years, as a result he is regarded as a *minor*. This is the reason why the text of the papyrus contains a reference to *lex Laetoria*, when in lines 13–14 the expression *ἔτι ὄντος ἐντὸς τοῦ Λαιτωρίου νόμου* is used, which means that he is still subject to *lex Laetoria*. Beyond this, however, the text contains no further information if there is any importance or result of the fact that *lex Laetoria* is still applicable to Dionysios.

Aurelius Heraklides' activity is described by the term *ἐπίτροπος* in the text, which designates the individual requested to carry out a certain action on behalf of somebody, so this person is an executor, a trustee or an administrator.[36] This is supported by the expression *ἐξ ὀνόματός μου* through which Aurelia refers to the fact that Herakleides should act in her name.[37] At the same time the text implies that Herakleides should act on behalf of Aurelius Dionysious, who is the son of Aurelia and her late husband (*ὑπὲρ τοῦ ἀμφοτέρων ἐμοῦ τε καὶ τοῦ αὐτοῦ ἀνδρός μου υἱοῦ*).

The first five lines of the text are greetings to Aurelius Herakleides; lines 5 – 15 contain Aurelia's consent to Herakleides' activity, and the background of the consent given. From line 15 on, the papyrus enumerates several debts charged to the estate. These debts are connected mostly to Aurelia's dowry. In addition to these, further claims also appear in the text, however, we do not have in-depth information on these claims because of the gaps in the text of the papyrus due to imperfect preservation.[38]

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[31] Cf. GONIS, N., Prosopographica III. In: *Archiv für Papyrusforschung und verwandte Gebiete*, LXV (2019), p. 349.

[32] Cf. WHITEHORNE, J. E. G., The Date of P. Mich. Shelton 623. In: *Zeitschrift für Papyrologie und Epigraphik*, XXVI (1977), p. 252.

[33] Correspondingly see also the catalogue of the Institute for Papyrology at the homepage of Heidelberg University http://aquila.zaw.uni-heidelberg.de/hgv/31728

[34] Pape identifies *κύριος* with "Vormund"; cf. PAPPE, W., *Handwörterbuch der griechischen Sprache. Griechisch-deutsches Handwörterbuch*. Bd. 1: A–K. 3. Auflage, 6. Abdruck, Braunschweig, Vieweg & Sohn, 1914. s. h. v. 1c. Liddell – Scott defines it as "guardian of a woman", in detail see LIDDELL, H. G. – SCOTT, R., *A Greek-English Lexicon.* Oxford, 1940, s. h. v. B).

[35] On the office of *procurator usiacus* cf. BEUTLER-KRÄNZL, F., Der procurator usiacus. In: MAYER – BARATTA – ALMAGO (ed.), *Acta XII congressus internationalis Epigraphiae Graecae et Latinae*. Barcelona, 2007, p. 147–154. with literature; MITTHOF, F., Betrügerische Zollbeamte und der procurator usiacus Bemerkungen zu P. Amh. II 77. In: *Zeitschrift für Papyrologie und Epigraphik*, CLIX (2007), p. 256–260.; BEUTLER, F., Wer war ein Procurator usiacus? Die Verwaltung des Patrimoniums in Ägypten in der ersten Hälfte des 2. Jahrhunderts. In: *Cahiers du Centre Gustave Glotz*, XVIII (2007), p. 67–82.

[36] Cf. PAPE, W., op. cit. s. h. v.; LIDDELL, H. G. – SCOTT, R., op. cit. s. h. v.

[37] Cf. line 11; see also ibid. s. v. *ὄνομα*.

[38] Correspondingly cf. GRENFELL, B. P. – HUNT, A. S., op. cit. p. 211.

5.1 Individuals involved in the case

From the previous overview the case may turn out to be complex. The core of this complexity resides in the fact that many people are involved in the case, and these people bear family ties towards one another. These family ties are referred to from time to time, as people of that era lacked all those official registers which provide us today with IDs, credentials, and other documents of identification. As a result of this, people then were bound to identify themselves via their personal connections, the most obvious of which are family relations. Additionally, some people had aliases, names they were commonly called. To avoid misunderstandings, these aliases are also added to each individual's common name. These are the reasons why this text seems to be packed with people, but the people actually involved in the case are the following ones.

a) Aurelia Aristous (*Αὐρηλία Ἀριστοῦς*): She's the daughter of Aurelius Heroides (*Αὐρηλίος Ἡρώδης*) and the widow of Achillion. The papyrus contains her consent through which she approves the appointment of a representative responsible for the administration of the estates of her deceased spouse on behalf of both her and her son.
b) Marcus Aurelius Nikokles (*Μᾶρκος Αὐρήλιος Νεικοκλης*): He is the *κύριος* of Aurelia, whose appointment took place in accordance with Roman custom (*δεδομένου μοι κατὰ τὰ Ῥωμαίων ἔθη*).
c) Achillion alias Apollonios (*Ἀχιλλίωνος Ἀπολλώνιος*) Aurelia's deceased husband who held the office of the Royal Scribe of Alexandria (*βασιλικός γραμματεύς*).[39] As the papyrus puts it, the task of the representative was to register the actual value of his estate before the *procurator usiacus* of Alexandria.
d) Dionysios Aurelius Apollonios (*Διονύσιος Αὐρήλιος Ἀπολλώνιος*): The heir of Achillion, the son of Achillion and Aurelia.[40]
e) Lucius Aurelius Herakleides (*Λούκιος Αὐρήλιος Ἡρακλείδης*): The addressee of Aurelia's consent; he is to administer the affairs of the estate as a representative.

5.2 The role and importance of *procurator usiacus*

As of the text of the papyrus, Aurelia agrees (cf. line 8: *ὁμολογῶ*) that the requested Aurelius Heraklides shall travel to Alexandria (cf. lines 9-10: *κατελθεῖν εἰς Ἀλεξάνδρειαν*) in order to register the value of the property of her late husband before the *procurator usiacus* (cf. lines 10-11: *ἀπογράψασθαι παρὰ τῷ κρατίστῳ τῶν οὐσιακῶν ἐπιτρόπῳ*). This official is referred to in the text as *κράτιστος τῶν οὐσιακῶν ἐπίτροπος*.[41] The Latin counterparty *procurator usiacus* is used by Felix *libertinus* (cfö. ILS 8759g). This office was typical to ancient Egypt, it was unknown in other Roman provinces. The core of the Greek term is *οὐσία*, which in the Greek dialect of the Ptolemaic dynasty referred to property or estates — an observation underpinned by several papyri.[42] By the imperial era the meaning of the expression has gradually switched to designate imperial estates, and to refer to the property of important and / or wealthy people.[43]

To determine the tasks of *procurator usiacus* is far from being an easy undertaking. There are only a few sources left to cover the actual content of this office; moreover, these papyri show a diversity with regard to the places they are gathered from, and the ages they date back to. Despite the fact that the first texts dealing with the office of *procurator usiacus* go back to 130 – 131 AD, the term *οὐσία* as such is first mentioned a century earlier (5 AD).[44] According to the task description of the office, these officials were responsible for the administration of imperial estates in Egypt.[45] Other papyri from the subsequent two centuries show that manifold cases occurred in which the *procurator usiacus* had a particular role. A good example is given by a papyrus[46] stemming from the 2nd century AD, which informs us about the fact that the *procurator usiacus* had jurisdiction in certain types of debates (e. g. legelőbérlet), as the parties were bound to be present before him. Yet the papyrus fails to contain any information about the actual activity of the *procurator usiacus* with which he was tasked. Again, other papyri[47] may as well lead to the conclusion that the *procurator usiacus* what also tasked with hereditary issues. In papyrus P. Oxy. X 1274 of the 3rd century AD, the task of the *procurator usiacus* was to determine the actual value of the testator's estates – presumably in connection with the *inventarium*. As a consequence of these evaluations, it is safe to say that the *procurator usiacus* was a state official linked closely to provincial Egypt, and specifically to the city of Alexandria, who was assigned mainly to carry out practical tasks of administrative kind, while the actual content of these tasks was in a constant flux. It would be hard to determine whether this flux referred to an actual change or rather a mere expansion of duties.

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[39] On this cf. ÚJVÁRI, E., *A gyámrendelésre feljogosított szervek kárfelelőssége a római jogban* [The Liability of Authorities Entitled to Appoint a Guardian]. Közszolgálat és felelősség történeti aspektusból. Budapest, Nemzeti Közszolgálati Egyetem, 2020. p. 19., footnote no. 78.

[40] On this person cf. GONIS, N., op. cit. p. 348–349.

[41] This form appears in the following papyri (enumerated in a timeline): P. Oxy. LI 3601; P. Giss. I 40; BGU II 362; P. Oxy. XLIII 3092; P. Oxy. XLIII 3103. Another form of reference is *κράτιστος οὐσιακός ἐπίτροπος*, which appear in P. Tebt. II 317 and P. Oxy. XII 1514 respectively. On this see also BEUTLER-KRÄNZL, F., op. cit. p. 147., with footnotes.

[42] On the meaning of the expression see in detail LIDDELL, H. G. – SCOTT, R., op. cit. s. h. v. We should bear in mind that the term *οὐσία* has a broad range of senses. In philosophy for example, it designates the specific characteristic of an entity, its essence, a counterparty of the Latin term *substantia*. Cf. SOKOLOWSKI, P. v., *Die Philosophie im Privatrecht. Sachbegriff und Körper in der klassischen Jurisprudenz und der modernen Gesetzgebung*. Halle, 1902, p. 28–43.; SCHERMAIER, M. J., *Materia. Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht*. Köln – Weimar – Wien, 1992, p. 55 sq.

[43] Cf. BEUTLER-KRÄNZL, F., op. cit. p. 147–148.; BEUTLER, F., op. cit. p. 67.

[44] See also BEUTLER-KRÄNZL, F., op. cit. p. 148–149.; BEUTLER, F., op. cit. p. 67–68.

[45] Cf. *CIL* XIV 2504: *P. Aelius Hilarus Augg. lib., qui proc(uravit) Alexandriae ad rat(iones) patrimonii*. Correspondingly see also BEUTLER-KRÄNZL, F., op. cit. p. 149.; BEUTLER, F., op. cit. p. 74–75.

[46] P. Tebt. II 317.

[47] BGU II 362, as well as P. Oxy. X 1274.

5.3 *Lex Laetoria* in the papyrus

As the tax reconstruction has already shown, the papyrus is a statement by Aurelia Aristous granted to Lucius Aurelius Herakleides, with which Aurelia accepts Herakleides as a representative in Alexandria before the *procurator usiacus*. In the text Aurelia states clearly that Herakleides acts on her behalf (cf. line 11: *ἐξ ὀνόματός μου*). In addition, the text contains the following clause: *ὑπὲρ τοῦ ἀμφοτέρων ἐμοῦ τε καὶ τοῦ αὐτοῦ ἀνδρός μου υἱοῦ*, i.e. "on behalf of both me, and my son born from my late husband".[48] As for this son and heir (*υἱός καὶ κληρονόμος*), Dionysios Aurelius Apollonios, the first important information is the term *κληρονόμος* itself, as this is the first reference to Dionysios as "heir", the second is the reference that *lex Laetoria* is applicable to him (*ἔτι ὄντος ἐντὸς τοῦ Λαιτωρίου νόμου*).[49]

Grenfell and Hunt use the term "*minor*" with reference to Dionysios, who, despite the fact that the law is applicable to him, was a *γυμνασιάρχης* in Oxyrhynchus. In other words, he held the office of a local town official.[50] Beutler-Kränzl explicitly refers to this heir as a "minderjähriger Sohn".[51] In German secondary literature the expression "Minderjähriger", which means minor or underaged, goes very often hand in hand with the Latin term "*minor*". However, *minores* in Rome were surely not underaged: the Latin term is nothing more than an abbreviation[52] for the term "*minores XXV annis*", the reference to the age of 25 supposedly fell into disuse, leaving only the word "*minor*" to refer to those people younger than 25 years of age. Consequently, the Latin term "*minor*" designates an adult person who has not yet reached the age of 25. As a result, the assumption by Kruse, according to which the document is about the appointment of a *tutor ad actum* to an heir who has not yet come of age (!), is positively mistaken („[…] einen *tutor ad actum* zu bestellen, um den Besitz ihres verstorbenen Mannes zu Gunsten Ihres noch nicht volljährigen Sohnes beim *procurator usiacus* in Alexadria registrieren zu lassen").[53] Kruse's opinion should mainly be done away with because of the term "nicht volljähriger Sohn": *minores* were those who "exceeded the age of *impuberes* and were under twenty-five years of age".[54] The text of the papyrus makes it clear that Aurelia Aristous acted via a guardian (*μετὰ κυρίου*); the appointment of Marcus Aurelius Nikokles took place in accordance with Roman custom. As a result, Herakleides could rather be regarded as a *curator adiunctus*, who should act on Aurelia's behalf because her guardian was hindered for some reason. In accordance with the view by Kramer and Hagedorn, it should be emphasized that the appointment of a *tutor ad actum* could take place in the case when neither the husband, nor the father, a brother, nor any distant male relative was available to take the role of a guardian (*κύριος*); thus the tasks of a guardian also remained unattended. In such a situation, the appropriate official allowed the tasks to be taken care of.[55] It is obvious that in our case this situation did not emerge since the text explicitly mentions Aurelia's guardian.

In case of *minores* the situation was different. The appointment of a *curator minorum* was supposedly possible based on *lex Laetoria*. This appointment, however, was not obligatory, and in accordance with the rules of *lex Laetoria*, and with praetorian edictal practice, it did not aim to serve as a substitute for the missing transactional capacity. It was more likely a protective measure to prevent *minores* from hasty decisions in their transactions. From a legal aspect the decisive moment of the case in the papyrus in question was the death of Apollonios. Its most direct result was that his son, Dionysios Aurelius Apollonios became his heir, so no specific circumstance occurred which might have hindered or obstructed the son in becoming his father's heir.[56] As Grenfell and Hunt[57] point it out, it is true that the second part of the papyrus text enumerates many debts which all charged the estate in question, but the text is not about the acceptance of the property by Herakleides in the name of the heir; it is about the registration of the estates in Alexandria before the *procurator usiacus*.

Consequently, the fact that *lex Laetoria* is mentioned in the text would not serve as grounds for the action of Lucius Aurelius Herakleides as a representative. The mother, Aurelia Aristous mentions incidentally that *lex Laetoria* is applicable to Dionysios Aurelius Apollonios, though he is the *γυμνασιάρχης* of Oxyrhincus.

6. Conclusions

The papyri presented above stem from the era of Emperor Antoninus Pius (138—161 AD) and of the barracks emperors, respectively. In accordance with secondary literature, *lex Laetoria* is dated from the turn of the 3rd — 2nd century BC; Salvius Iulianus compiled Edictum Perpetuum around 130 AD, i.e. during the reign of Emperor Hadrian. The compilation covered the praetorian and aedilician edicts as well as the practices exercised

[48] On the meaning "on behalf of" of the term *ὑπὲρ* (here with the genitive case) see mainly LIDDELL, H. G. – SCOTT, R., op. cit. s. h. v. II 3.
[49] Correspondingly see also GRENFELL, B. P. – HUNT, A. S., op. cit. p. 212.
[50] Cf. LIDDELL, H. G. – SCOTT, R., op. cit. s. v. "*γυμνασιάρχης*"; GRENFELL, B. P. – HUNT, A. S., op. cit. p. 211.; ÚJVÁRI op. cit. p. 19., footnote no. 78.
[51] BEUTLER-KRÄNZL, F., op. cit. p. 151.
[52] Correspondingly see also BERGER, A., op. cit. s. v. "minores".
[53] Cf. KRUSE, T., op. cit. p. 910–911. On the *tutor ad actum* cf. ÚJVÁRI op. cit. p. 23–24., and specifically footnote no. 97. The work referred to by the author also deals with *tutor ad actum* designated to women. Cf. in detail KRAMER, B. – HAGEDORN, D., *Kölner Papyri*. Wiesbaden, 1978, p. 104.
[54] BERGER, A., op. cit. s. v. "minores"
[55] Cf. KRAMER, B. – HAGEDORN, D., op. cit. p. 104.; ÚJVÁRI op. cit. p. 23., footnote no. 97.
[56] This is directly supported by the fact that other papyri inform us about further contracts concluded by Dionysios Aurelius Apollonios (see for instance P. Laur. IV, 155), where no protection granted by *lex Laetoria* comes up. Still, a good hint could be a reference to the date when the transaction in question was made. On this cf. KLOPPENBORG, J. S., *Greco-Roman Associations: Texts, Translations and Commentary. III. Ptolemaic and Early Roman Egypt*. Berlin - Boston, 2020, p. 483.
[57] Cf. GRENFELL, B. P. – HUNT, A. S., op. cit. p. 211.

by provincial governors. The rules of the praetorian edict based on *lex Laetoria* are reported in Title 4, Book IV of the Digest ("*De minoribus viginti quinque annis*") were chiefly responses by the jurists of the Law of Citations. The majority of the texts are by Ulpian who lived in the 2nd — 3rd century AD; altogether 50 fragments are attributed to him. Consequently, when the papyri in question were written, both the practice of *lex Laetoria* and the praetorian edict had already been settled.

The first text of the two analysed papyri outlines an actual case of a loan contracted between Agrippinus and Saturninus, while the second one is a statement in which a widow, Aurelia Aristous, agrees upon the appointment of a representative, Lucius Aurelius Herakleides to administer the affairs of the estate of Dionysios Aurelius Apollonios, heir of his deceased father.

Under the provisions of the contract laid down in the first papyrus, Agrippinus was obligated to pay due to a written document, a *khirographum*. With reference to this written document, Agrippinus states that the *khirographum* was a result of an act of extortion. It is unusual that at this point Agrippinus does not set out to question the legal grounds of the contract; he does not claim that it was unlawfully contracted, or that the contract would be void. On the contrary, without contesting the legal existence of his obligation to pay, Agrippinus nonetheless emphasises a fact; the act of extortion, by means of which he wants to undermine Saturninus' claim. As a result, we face a special situation: Saturninus puts forward a claim for payment, which is of legal nature. Agrippinus confronts this legal claim with a fact; he therefore wouldn't contest the legal ground for his obligation to pay.[58] He simply asserts that this demand, however well-established it may be from a legal aspect, is simply not claimable because of a fact which occurred subsequently. It is this fact, the act of extortion, which Agrippinus refers to as illegal, hence, it qualifies for barring any further claim to be brought on this matter. This is the reason why he demanded protection from Lucius Valerius Proculus *praefectus*. His petition for protection is based not only on facts but also on the regulations of *lex Laetoria*: he strongly believes that the statutory protection brought about by this act is equally applicable to him at this instance by virtue of his age, as he was a *minor* at the time when the loan was contracted. Still, what we experience is that Saturninus fraudulently addressed a letter to Calpurnianus *iuridicus* to process the execution based on the contract. Despite the act of extortion exercised originally when the loan was contracted, and despite Agrippinus' plea for protection based on lex Laetoria, Saturninus still wants the loan to be repaid to him. Therefore, he processes the execution for being refunded. Agrippinus wants to avoid execution, hence he lodges a complaint against his counterparty's claim, which is covered in papyrus BGU II 378: a complaint put forward by Agrippianus against the letter by Saturninus in which he asks for the execution for refund to be processed.

In the second papyrus, the reference to *lex Laetoria* is truly incidental: it has no particular impact on the outcome of the actions carried out by the representative. The fact that the heir, who is accidentally a town official himself, is under the protection of *lex Laetoria* due to his age simply grants additional information.

The cases in these papyri indicate what Roman law was like as law in action, thousands of miles away from Rome. Chronologically, both texts stem from an era when a statutory regulation and its elaborate everyday practice served as legal background for the cases in question. The reference to *lex Laetoria* is also unusual since it is not used as the basis of a gross argument; it is rather a "special guest" taking the cameo role as a reference point.

In addition to the opportunity to see Roman law as law in action, it is also fascinating to examine how Rome as an Empire worked. These papyri set us back in time to the 2nd – 3rd century AD Egypt, where we can observe how people with Roman names were trying to settle a dispute in Greek language, using material means to conserve their thoughts and arguments, the papyrus, so typical then to Egypt. This is multiculturalism *par excellence*, where each and every element adds to the bigger picture, and where you do not seem to lose anything from your customs and traditions by being added to the melting pot called the Roman Empire.

[58] As the text of the papyrus indicates in line 15—16, *κληρονόμος τοῦ πατρός μου Ἰουλίου Ἀγριππινιανοῦ*, which means that Agrippinus got into this case as the heir of his father.

The Emergence of the Idea of Religious Freedom in Ancient Rome

*Pál Sáry**

Abstract

It is well known that the so-called Edict of Milan, issued in 313, was a landmark in the religious history of mankind, because it declared for the first time the doctrine that freedom of religion belongs as of right to everyone. The present paper seeks to investigate the intellectual background of this famous edict.

The emergence of the idea of religious freedom is linked to the persecution of Christians in the Roman Empire. This idea first appeared in the works of Christian apologists. It was Tertullian who firts emphasized that the free choice of religion is a natural right of every human being. This idea was previously unknown in the pagan world. Tertullian was a pioneering thinker because he was the first to be able to combine biblical theology with the natural law teachings of Stoic philosophy of law.

Of the later apologists, Lactantius dealt with the idea of religious freedom in the most detail. Lactantius had a great influence on Constantine, who, together with Licinius, decided to issue the so-called Edict of Milan. The edict guaranteed everyone the right to choose their religion freely, but did not declare this right a natural right that the state could not restrict.

Keywords: *Roman Law; State Religion; Religious Coercion; Persecution of Christians; Apologists; Tertullian; Lactantius; Natural Law; Religious Freedom; Edict of Milan.*

1. The Lack of Religious Freedom in the Pagan World

One of the essential features of classical Greco-Roman civilization was the close intertwinning of religion, law, and politics. Denial of the existence of gods revered by the political community was considered a serious crime in ancient city-states.[1] According to Flavius Josephus, the Athenians nearly executed Anaxagoras (c. 500 BC – c. 428 BC) "because he maintained that the sun, which the Athenians held to be a god, was an incandescent mass […]"[2] Moreover, the ancient Greeks punished not only those who openly denied the divinity of an entity they considered a deity, but also those who doubted the existence of the gods. Cicero tells us that Protagoras of Abdera (c. 490 BC – c. 420 BC), the greatest sophist of his age, was banished by the Athenians from their city, and his books were publicly burnt, for beginning a book with the words "About the gods I am unable to affirm either how they exist or how they do not exist."[3]

The citizens of Athens had to abstain from the cult of foreign gods, and they could not begin to worship new gods instead of or in addition to the old gods of their city. Josephus writes of the Athenians that "[t]hey put Ninus the priestess to death, because some one accused her of initiating people into the mysteries of foreign gods; this was forbidden by their law, and the penalty decreed for any who introduced a foreign god was death."[4] As we know, Socrates, sentenced to death in 339 BC, was accused of not believing in the traditional gods of Athens, and introducing new divinities of his own.[5] Probably because of this conservative religious approach, the apostle Paul told the Athenians that, instead of new gods, he preached to them a God whom they revered as an 'unknown god', and to whom an altar had already been erected by them.[6]

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1 Understandably, the inhabitants of the city-states protected their gods by all means, as they believed their gods protected them. As Peter Garnsey writes, "The polis protected its gods because the gods protected the polis" [GARNSEY, P., Religious Toleration in Classical Antiquity. In: SHEILS, W. J. (ed.), *Persecution and Toleration*. Oxford, 1984, p. 3].

2 Josephus, *Contra Apionem* 2.37.265 (trans. H. St. J. Thackeray).

3 Cicero, *De natura deorum* 1.23.63 (trans. H. Rackham).

4 Josephus, *Contra Apionem* 2.37.267 (trans. H. St. J. Thackeray).

5 See Plato, *Apologia* 24b.

6 See Acts 17:23.

The ancient Roman religion was a strict state religion. E. G. Hardy's following statements are very important: "The Roman religion was essentially and before all things a national religion; its object was primarily, not the honour of the gods, but the safety of the state, of which the goodwill of the gods was supposed to be the necessary condition. Its observance was therefore the duty of every citizen, and was an even more necessary part of patriotism than service in the army, because the sin of a single recusant might call down the anger of the neglected gods on the whole state." [7]

We are told by Plutarch that the Roman *pontifex maximus* had the duty "of directing sacred rites, not only being in charge of public ceremonies, but also watching over private sacrifices and preventing any departure from established custom, as well as teaching whatever was requisite for the worship or propitiation of the gods." [8] Livy also mentions that Numa Pompilius, the second king of Rome, delegated the supervision of religious ceremonies to the authority of the high priest "that there might be someone to whom the commons could come for advice, lest any confusion should arise in the religious law through the neglect of ancestral rites and the adoption of strange ones." [9]

Livy, recounting the events of Rome in the last years of the fifth century BC, writes that "not only were men's bodies smitten by the plague, but a horde of superstitions, mostly foreign, took possession of their minds, as the class of men who find their profit in superstition-ridden souls introduced strange sacrificial rites into their homes, pretending to be seers; until the public shame finally reached the leading citizens, as they beheld in every street and chapel outlandish and unfamiliar sacrifices being offered up to appease Heaven's anger. The *aediles* were then commissioned to see to it that non but Roman gods should be worshipped, nor in any but the ancestral way." [10]

We are also told by Livy that in 212 BC, during the Second Punic War, religious customs of foreign origin proliferated in Rome. In the course of time, "not only in secret and within the walls of houses were Roman rites abandoned, but in public places also and in the Forum and on the Capitol there was a crowd of women who were following the custom of the fathers neither in their sacrifices nor in prayers to the gods. […] Now that the disorder appeared to be too strong to be quelled by the lower magistrates, the senate assigned to Marcus Aemilius, the city *praetor*, the task of freeing the people from such superstitions. He read the decree of the senate in an assembly, and also issued an edict that whoever had books of prophecies or prayers or a ritual of sacrifice set down in writing should bring all such books and writings to him before the first of April, and that no one should sacrifice in a public or consecrated place according to a strange or foreign rite." [11]

In 186 BC, the patrician *consul* Spurius Postumius Albinus drew the attention of his fellow citizens to, among others, the following in connection with the Bacchanals: "How often, in the times of our fathers and our grandfathers, has the task been assigned to the magistrates of forbidding the introduction of foreign cults, of excluding dabblers in sacrifices and fortune-tellers from the Forum, the Circus, and the City, of searching out and burning books of prophecies, and of annulling every system of sacrifice except that performed in the Roman way. For men wisest in all divine and human law used to judge that nothing was so potent in destroying religion as where sacrifices were performed, not by native, but by foreign, ritual." [12]

Stopping the spread of foreign rites was thus one of the most important tasks of the state. Nevertheless, Rome adopted the cult of many foreign gods during the Republican era. However, as Peter Garnsey pointed out, there was never a religious toleration behind such procedures: the cult of the gods protecting the enemy was adopted for the success of the Roman expansion.[13] *Evocatio* was a Roman rite in which the patron deities of a besieged city were asked to abandon the inhabitants and side with the attackers in exchange for a cult in Rome. As John Rich writes, "When the permanent destruction of a besieged city was planned (a relatively rare occurrence), the Roman commander sometimes pronounced an *evocatio* ('calling away') before its capture. This was a form of vow in which the tutelary god was asked to desert the city and come to Rome, with the promise of a temple and cult." [14]

Both the Greeks and the Romans burned books that were considered religiously dangerous. The censorship, possible confiscation and destruction of works containing religious teachings was a common practice in the ancient world.[15] According to Livy, in 181 BC, at the foot of the hill Janiculum, on the land of a public clerk named Lucius Petilius, the labourers who worked there, while digging deeper into the ground, found two large chests of stone. In one of the chests there were "two bundles, tied with waxed rope, containing seven books each, not merely whole, but looking absolutely fresh." When the *praetor urbanus* Quintus Petilius learned of this, he asked for the books to be read. When, after reviewing the contents of the books, he found that most of them would have a devastating effect on

[7] HARDY, E. G., *Christianity and the Roman Government: A Study in Imperial Administration*. London, 1925, p. 3.
[8] Plutarch, *Numa* 9.4 (trans. B. Perrin).
[9] Livy 1.20.6 (trans. B. O. Foster).
[10] Livy 4.30.9-11 (trans. B. O. Foster).
[11] Livy 25.1.7-12 (trans. F. G. Moore).
[12] Livy 39.16.8-9 (trans. E. T. Sage).
[13] GARNSEY, Religious Toleration in Classical Antiquity (supra n. 1), p. 6-7.
[14] RICH, J., Roman Rituals of War. In: CAMPBELL, B., TRITLE, L. A. (eds.), *The Oxford Handbook of Warfare in the Classical World*. Oxford, 2013, p. 549. This is how the Romans took over the cult of Juno Regina when Veii was destroyed (in 396 BC), the cult of Vortumnus when Volsinii was occupied (in 265 BC), the cult of Minerva and of Juno Curitis when Falerii was captured (in 241 BC), and the cult of Juno Caelestis when Carthage was besieged (in 146 BC). For more details on *evocatio*, see GUSTAFSSON, G., *Evocatio Deorum: Historical & Mythical Interpretations of Ritualised Conquests in the Expansion of Ancient Rome*. Uppsala, 2000.
[15] See FORBES, C. A., Books for the Burning. In: *Transactions and Proceedings of the American Philological Association*, vol. 67, 1936, p. 114-125.

religious traditions, he told Lucius that he would burn them. The *praetor*, with the approval of the senate, did so: "The books were burned in the *comitium* in sight of the people, the fire having been supplied by the *victimarii*."[16]

Cicero also represented this old, conservative religious view. In his work On Laws (*De legibus*), he emphasized the following: "No one shall have gods to himself, either new gods or alien gods, unless recognised by the State. Privately they shall worship those gods whose worship they have duly received from their ancestors."[17] This basic view continued to live on in the age of the Principate. According to Cassius Dio, Maecenas advised Augustus to punish those who dared to introduce foreign religious rites in Rome: "Those who attempt to distort our religion with strange rites you should abhor and punish, not merely for the sake of the gods […], but because such men, by bringing in new divinities in place of the old, persuade many to adopt foreign practices, from which spring up conspiracies, factions, and cabals, which are far from profitable to a monarchy."[18] In 28 BC, by accepting this counsel, the emperor "did not allow the Egyptian rites to be celebrated inside the *pomerium*," the sacred boundary of Rome.[19] A few years later, Agrippa extended this ban to the suburbs within one mile of the city.[20] According to Suetonius, Tiberius followed a similar religious policy: "He abolished foreign cults, especially the Egyptian and the Jewish rites, compelling all who were addicted to such superstitions to burn their religious vestments and all their paraphernalia."[21] It is important to point out that Roman citizens who lived in the provincial colonies were not entitled to free choice of religion either. This is clear from the words of those who made the following accusation against the apostle Paul and his companion, Silas: "These men are Jews and they are disturbing our city. They advocate customs which it is not lawful for us Romans to accept or practice."[22]

The fact that Christianity was a new and foreign religion clearly contributed to its condemnation. Tacitus calls Christianity a disease from Judaea,[23] and according to Suetonius, Nero inflicted punishment "on the Christians, a class of men given to a new and mischievous superstition."[24]

In 112, the governor Pliny the Younger, according to his account to the emperor Trajan, acquitted from the charge of Christianity only those who had denied their faith in Christ before him and confirmed this with a pagan sacrifice. Those who did not want to deny their faith were threatened with punishment by the governor. Those who persisted in their Christian faith were executed or, if they were Roman citizens, sent to Rome for trial.[25] The emperor considered this procedure correct in his reply.[26]

2. The Emergence of the Idea of Religious Freedom in Tertullian

During the persecution of Christians, therefore, efforts were made to force followers of Christ to deny their faith and participate in the practice of the Roman state religion. It was during this period that Christian apologists came forward in whose works the idea of religious freedom appeared, which was a whole new idea in the intellectual world of the Roman Empire. Prior to the Christian apologists, no one had reflected on this idea on a theoretical basis.[27] In several of his writings, Tertullian (c. 160 – c. 220) points out that religious coercion against Christians is completely useless, since deity cannot be pleased with respect that is not based on free will. In his famous Apology (*Apologeticum*) written around 197, he notes the following: "Look to it, whether this also may form part of the accusation of irreligion, to do away with freedom of religion (*adimere libertatem religionis*), to forbid a man choice of deity (*et interdicere optionem divinitatis*), so that I may not worship whom I would, but am forced to worship whom I would not. No one, not even a man, will wish to receive reluctant worship."[28] Later he adds: "It might easily seem unjust that free men should be compelled to sacrifice against their will, for in other acts of divine service a willing mind is enjoined. It would certainly seem silly for a man to be forced by another to honour the gods whom he ought to wish to please on his own account […]"[29]

From 211 to 213, Scapula was the *proconsul* of the province of Africa who brutally persecuted Christians. Tertullian wrote a separate book to the governor (*Ad Scapulam*) in which he emphasized the following: "We are worshippers of one God […] You think that others, too, are gods, whom we know to be devils. However, it is a fundamental human right, a privilege of

[16] Livy 40.29.2-14 (trans. E. T. Sage).
[17] Cicero, *De legibus* 2,8,19 (trans. C. W. Keyes).
[18] Dio 52.36.2 (trans. E. Cary).
[19] Dio 53.2.4 (trans. E. Cary).
[20] Dio 54.6.6.
[21] Suetonius, *Tiberius* 36 (trans. J. C. Rolfe).
[22] Acts 16:20-21. The Biblical quotations are taken from: *The Holy Bible. Revised Standard Version Catholic Edition*. San Francisco, 1966.
[23] Tacitus, *Annales* 15.44.
[24] Suetonius, *Nero* 16,2 (trans. J. C. Rolfe).
[25] Pliny, *Epistulae* 10.96.
[26] Pliny, *Epistulae* 10.97.
[27] As E. Gregory Wallace writes, "A principled defense for religious toleration did not appear until the writings of Christian thinkers near the end of the second century" [WALLACE, E. G., Justifying Religious Freedom: The Western Tradition. In: *Penn State Law Review*, vol. 114, Nr. 2, 2009, p. 500].
[28] Tertullian, *Apologeticus* 24.6 (trans. T. R. Glover). Timothy Samuel Shah properly notes the following in relation to the quoted passage: "To repel the oft-repeated charge that Christians were guilty of sacrilege, Tertullian characteristically throws the charge back in the face of the Romans. He argues that the Roman policy of religious coercion was not a sign of their much-vaunted *pietas* […] but of their lack of respect for religion and piety" [SHAH, T. S., The Roots of Religious Freedom in Early Christian Thought. In: HERTZKE, A. D., SHAH, T. S. (eds.), *Christianity and Freedom: Historical Perspectives*. Vol. 1. Cambridge, 2016, p. 52]. Jed W. Atkins expresses similar thoughts (ATKINS, J. W., *Roman Political Thought*. Cambridge, 2018, p. 154).
[29] Tertullian, *Apologeticus* 28.1 (trans. T. R. Glover).

nature, that every man should worship according to his own convictions (*tamen humani iuris et naturalis potestatis est unicuique quod putaverit colere*): one man's religion neither harms nor helps another man. It is assuredly no part of religion to compel religion (*sed nec religionis est cogere religionem*) – to which free-will (*sponte*) and not force (*non vi*) should lead us – the sacrificial victims even being required of a willing mind (*cum et hostiae ab animo libenti expostulentur*). You will render no real service to your gods by compelling us to sacrifice. For they can have no desire of offerings from the unwilling, unless they are animated by a spirit of contention, which is a thing altogether undivine."[30] These thoughts are of paramount importance in the history of the idea of religious freedom.

As we can see, religious freedom (*libertas religionis*) in Tertullian's conception is essentially an exemption from coercion. The concept of religious freedom primarily and in a negative approach means the same today. It is worth noting that Tertullian calls the free choice of religion a human right (*ius humanum*) which, by its very nature, belongs to everyone without having to declare it by state law.[31] The right to freedom of religion is therefore an institution of natural law (*ius naturale*).

To the question of why the idea of religious freedom first appeared in the writings of Christian apologists, we can give the following answer. In the pagan world it was considered natural that all peoples follow the religion of their ancestors.[32] The Romans also allowed foreign peoples to practice their ancient religious customs. Based on the sources, it can be stated that under Roman rule, every tolerated religion had to have two characteristic features: it had to be ancient and national. When the Jewish religion was attacked (or threatened with attack), the Jews relied on the ancient nature of their religious customs,[33] or on the national privileges they had received from the Romans.[34] All of this provided them with adequate protection, so they did not have to come up with a new idea to defend their religion.[35] Christianity, however, was a new and supranational religion.[36] Christians therefore had to create a new idea to defend their faith.

As we have seen above, even before the advent of Christianity, the Roman state took action against its own citizens who began to cultivate new and foreign religious cults. These citizens did not reject the Roman state religion, but revered other gods in addition to the Roman gods, and performed other religious rites in addition to traditional Roman rites. The religious behaviour of these citizens could be relatively easily pushed back to the desired limits. However, those who converted to the Christian faith were completely separated from the state religion, and many of them were by no means willing to return to it. The persecution of Christians was the greatest religious persecution of antiquity, affecting masses, enduring and cruel. During this long period, Christianity spread to the more educated circles, and some of the educated believers sought to use their philosophical knowledge to defend their faith.

Here the question arises: how did Tertullian come to the view that the right to free choice of religion is a human right that exists independently of the law of the state? As Mar Marcos notes, "We do not know what Tertullian's sources were in his arguments in favour of religious freedom and the inefficacy of coercion, and in the use of the expression *libertas religionis*."[37]

According to Robert Louis Wilken, the biblical history of creation determined Tertullian's way of thinking. In the Book of Genesis, we read that God created man in his own image. This is the foundation of human dignity. God gave man reason and free will. It follows that the free choice of religion is a human right.[38]

In agreement with Wilken, I would like to draw attention to two other biblical passages that may have influenced Tertullian. According to the Book of Joshua, the Jewish people were free to choose which god they wanted to serve: "if you be unwilling to serve the Lord, choose this day whom you will serve, whether the gods your fathers served in the region beyond the River, and in Egypt, or the gods of the Amorites in whose land you dwell […]"[39] According to Jesus' teaching, God is to be worshiped from the heart: "the hour is coming, and now is, when the true

[30] Tertullian, *Ad Scapulam* 2.2 (trans. S. Thelwall). Cf. HARTOG, P., Religious Liberty and the Early Church. In: *Detroit Baptist Seminary Journal*, vol. 17, 2012, p. 64-65; MARCOS, M., The Debate on Religious Coercion in Ancient Christianity. In: *Chaos e Kosmos*, vol. 14, 2013, p. 4-7; LEPPIN, H., Christianity and the Discovery of Religious Freedom. In: *Rechtsgeschichte – Legal History*, vol. 22, 2014, p. 68-69; ATKINS, *op. cit*. (*supra* n. 28), p. 154-158.

[31] Cf. WILKEN, R. L., The Christian Roots of Religious Freedom. In: HERTZKE, A. D., SHAH, T. S. (eds.), *Christianity and Freedom: Historical Perspectives*. Vol. 1. Cambridge, 2016, p. 64; TALIAFERRO, K., The *Possibility of Religious Freedom: Early Natural Law and the Abrahamic Faiths.* Cambridge, 2019, p. 105.

[32] This is evident from the words of Celsus, which are quoted by Origen: "As the Jews, then, became a peculiar people, and enacted laws in keeping with the customs of their country, and maintain them up to the present time, and observe a mode of worship which, whatever be its nature, is yet derived from their fathers, they act in these respects like other men, because each nation retains its ancestral customs, whatever they are, if they happen to be established among them" (Origen, *Contra Celsum* 5.25; trans. F. Crombie).

[33] When Caligula ordered a statue to be erected in the temple of Jerusalem, the Jews protested with these words: "In order to preserve our ancestral code, we shall patiently endure what may be in store for us […]" (Josephus, *Antiquitates Judaicae* 18.8.2; trans. L. H. Feldman). Tacitus notes about the Jewish religion: "Whatever their origin, these rites are maintained by their antiquity" (Tacitus, *Historiae* 5.5; trans. C. H. Moore).

[34] Josephus literally cites with great national pride the decrees which granted the Jewish people various privileges as a reward for their services (Josephus, *Antiquitates Judaicae* 14.10.2-26; 14.12.3-6; 16.6.2-7; 19.5.2-3; 19.6.3).

[35] We may add to this that after the destruction of Jerusalem in AD 70, the Jews had to pay a special tax to the Romans in order to retain their religious freedom. Cf. HARDY, *op. cit*. (*supra* n. 7), p. 24.

[36] Hardy explains the different situation of Christians and Jews as follows: "The Christian religion had no national claim to toleration, and the very absence of a national basis and its claim to universality suggested possibilities of extension of which there had been no fear in the case of the Jews" [HARDY, *op. cit*. (*supra* n. 7), p. 61).

[37] MARCOS, *op. cit*. (*supra* n. 30), p. 5.

[38] WILKEN, *op. cit*. (*supra* n. 31), p. 65.

[39] Josh 24:15.

worshipers will worship the Father in spirit and truth, for such the Father seeks to worship him. God is spirit, and those who worship him must worship in spirit and truth."[40] Tertullian literally quotes these words of Jesus in his work on prayer.[41]

I think Tertullian linked these biblical thoughts to the legal philosophical teachings of the Stoics.[42] According to Cicero, the *lex natura* is a creation of God, derived from the divine reason, which stands above the *ius civile*.[43] Since the divine reason, according to the Bible, does not regard as true worship that which is not based on free will, religious coercion is contrary to the *lex natura*. State power must therefore not restrict the freedom of religion that everyone is entitled to under natural law.

Regarding the behaviour of Christians, it is worth noting that while they were completely separated from the state religion, they still wanted to remain members of the political community. The apologists, therefore, primarily sought to justify and emphasize that Christians, despite their religious separation, remain loyal subjects of the Roman Empire: they observe the laws of the state in all things except in the religious worship of the emperor and pagan gods. In his work On Idolatry (*De idololatria*), Tertullian summed it all up in these words: "Therefore, as to what relates to the honours due to kings or emperors, we have a prescript sufficient, that it behooves us to be in all obedience, according to the apostle's precept, 'subject to magistrates, and princes, and powers;' but within the limits of discipline, so long as we keep ourselves separate from idolatry."[44]

The apostle in this text of Tertullian is apparently St. Paul, who called on Christians to obey state power on the principle that all power comes from God.[45] In addition to this, the behaviour of Christians was best defined by the well-known command of Jesus, which clearly separated the direction of political and religious obligations: "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's."[46] That is, be a faithful subject (today we would say a law-abiding citizen), but make a distinction between the emperor and God, and give the deepest religious reverence only to the latter.

3. Martyrs' Views on Religious Violence

For a long time, the efforts of the defenders of the Christian faith remained completely ineffective. At the end of 249 or the beginning of 250, the emperor Decius issued an edict requiring all the inhabitants of the empire to perform a sacrifice to the gods in the presence of a Roman magistrate.[47] St. Cyprian, the martyred bishop of Carthage (c. 200 – 258), expressed his incomprehension and shock at the brutal torture of Christians and pointed out that a change in religious belief should not be achieved by force and breaking the body, but intellectually by arguments of reason: "What is this insatiable madness for blood-shedding, what this interminable lust of cruelty? […] Why do you turn your attention to the weakness of our body? Why do you strive with the feebleness of this earthly flesh? Contend rather with the strength of the mind, break down the power of the soul, destroy our faith, conquer if you can by discussion, overcome by reason […]"[48]

As we know, at the beginning of 304, emperor Diocletian also ordered that all the inhabitants of the empire should offer a sacrifice in honor of the Roman gods. As Eusebius writes, a general decree commanded "that all the people should sacrifice at once in the different cities, and offer libations to the idols."[49] According to the document on the martyrdom of St. Crispina executed at that time, the *proconsul* Anullinus threatened Crispina with these words: "So our gods are not acceptable to you. But you shall be forced to show them respect if you want to remain alive for any worship at all." Crispina replied: "That piety is worthless which forces persons to be crushed against their will."[50] Religion, therefore, cannot be a matter of compulsion.

4. Lactantius' Theological Arguments against Religious Violence

Lactantius (c. 250 – c. 325), who was born in North Africa like Tertullian and St. Cyprian, also pointed out in his main work entitled Divine Institutes (*Divinae institutiones*) that the religious coercion used by the pagans was utterly futile, as those who were forced to offer a sacrifice against their will did not lose their Christian faith; moreover, they hated pagan gods even more because of the torture they had suffered, and as soon as the compulsion ceased, they immediately returned to their Christian brethren.[51] Like Tertullian, he believed that the choice of religion should be a voluntary decision of man, and therefore asked the following questions indignantly: "For who is so arrogant, who so lifted up, as to forbid me to raise my eyes to heaven? Who can impose upon me the necessity either of worshipping that which I am unwilling to worship, or of abstaining from the worship of that which I wish to worship? What further will now be left to us, if even this, which must be

[40] Jn 4:23-24.
[41] Tertullian, *De oratione* 28.2.
[42] For details on the relationship between Tertullian and Stoicism, see COLISH, M. L., The *Stoic Tradition from Antiquity to the Early Middle Ages II. Stoicism in Christian Latin Thought through the Sixth Century*. Leiden, 1985, pp. 9–29; PAP, L., Stoic Virtues in Tertullian's Works and their Relation to Cicero. In: *Acta Universitatis Sapientiae. Philologica*, vol. 6, Nr. 1, 2014, p. 7-16.
[43] See Cicero, *De officiis* 3.17.69; *De re publica* 3.22.33; *De legibus* 1.3.8-4.14.
[44] Tertullian, *De idolatria* 15.8 (trans. S. Thelwall).
[45] Rom 13:1.
[46] Mt 22:21. Cf. Mk 12:17; Lk 20:25.
[47] Reference to this decree can be found, among others, in the Martyrdom of Pionius: "You know well that there is a decree of the emperor which bids you to offer sacrifice […]" (*Martyrium Pionii* 3.2; trans. H. Musurillo).
[48] Cyprian, *Ad Demetrianum* 13–14 (trans. R. E. Wallis). Cf. HARTOG, *op. cit.* (*supra* n. 30), p. 66.
[49] Eusebius, *De martyribus Palestinae* 3.1 (trans. A. C. McGiffert).
[50] *Martyrium Crispinae* 2.1 (trans. H. Musurillo).
[51] Lactantius, *Divinae institutiones* 5.13.8–10. Cf. WALLACE, *op. cit*. (*supra* n. 27), p. 507-509.

done of one's own will, shall be extorted from me by the caprice of another?" [52]

According to Lactantius, the practice of religion, if not based on free will, is worth nothing: "Oh with what an honourable inclination the wretched men go astray! For they are aware that there is nothing among men more excellent than religion, and that this ought to be defended with the whole of our power; but as they are deceived in the matter of religion itself, so also are they in the manner of its defense. For religion is to be defended, not by putting to death, but by dying; not by cruelty, but by patient endurance; not by guilt, but by good faith: for the former belong to evils, but the latter to goods; and it is necessary for that which is good to have place in religion, and not that which is evil. For if you wish to defend religion by bloodshed, and by tortures, and by guilt, it will no longer be defended, but will be polluted and profaned. For nothing is so much a matter of free-will as religion; in which, if the mind of the worshipper is disinclined to it, religion is at once taken away, and ceases to exist." [53]

Lactantius clearly points out that a sacrifice offered under duress does not benefit anyone: "I wish therefore to ask them to whom especially they think that they are doing a service in compelling them to sacrifice against their will, is it to those whom they compel? But that is not a kindness which is done to one who refuses it. But we must consult their interests, even against their will, since they know not what is good. Why, then, do they so cruelly harass, torture, and weaken them, if they wish for their safety? Or whence is piety so impious, that they either destroy in this wretched manner, or render useless, those whose welfare they wish to promote? Or do they do service to the gods? But that is not a sacrifice which is extorted from a person against his will. For unless it is offered spontaneously, and from the soul, it is a curse; when men sacrifice, compelled by proscription, by injuries, by prison, by tortures." [54]

These ideas were completely at odds with the religious views of the Romans. The Roman religion was characterized by formalism.[55] As Charles King points out, for the pagan Romans, orthopraxy was important instead of orthodoxy: "In practice, the Pagan focus upon orthopraxy produced a rather different approach to the activity of attempting to please a deity than would be found in an orthodox system like Christianity. […] For the orthoprax Pagans, carefully performed rituals, not carefully purified sets of beliefs, were what the deities desired." [56]

As Lactantius writes, people should not be forced to follow a religion, but should be convinced by reason that a religion is right and worth following: "Let their priests come forth into the midst, whether the inferior ones or the greatest; their flamens, augurs, and also sacrificing kings, and the priests and ministers of their superstitions. Let them call us together to an assembly; let them exhort us to undertake the worship of their gods; let them persuade us that there are many beings by whose deity and providence all things are governed; let them show how the origins and beginnings of their sacred rites and gods were handed down to mortals; let them explain what is their source and principle; let them set forth what reward there is in their worship, and what punishment awaits neglect; why they wish to be worshipped by men; what the piety of men contributes to them, if they are blessed […] There is no occasion for violence and injury, for religion cannot be imposed by force; the matter must be carried on by words rather than by blows, that the will may be affected. Let them unsheath the weapon of their intellect […]" [57]

5. The Official Proclamation of the Right to Freedom of Religion

Seeing the ineffectiveness of sanctions against Christians, emperor Galerius issued an edict of toleration in 311, shortly berore his death, authorizing the practice of the Christian religion.[58] The tone of the edict is bitter: the emperor says that he is compelled to make concessions to Christians who insist on their foolishness and who could not be persuaded to return to ancient religious customs. After Galerius' death, his successor, Maximinus Daia, repealed the edict of toleration and began persecuting Christians again. Maxentius also pursued an anti-Christian policy. After Licinius defeated Maximinus and Constantine triumphed over Maxentius, the two victorious emperors held a meeting in Mediolanum at the beginning of 313, at which important decisions were made, among other matters, on religious policy issues. This consultation led to the edict traditionally attributed to Constantine and known as the Edict of Milan (*edictum Mediolanense*). This edict, in addition to allowing Christians to practice their religion freely and unrestrictedly, gave all subjects of the empire "the liberty to follow that mode of religion which to each of them appeared best […]" [59] It was pronounced in a solemn tone: "it befits the well-ordered state and the tranquillity of our times that each individual be allowed, according to his own choice, to worship the Divinity […]" [60]

The drafters of the edict condemning religious coercion and declaring the right to free choice of religion were certainly

[52] Lactantius, *Divinae institutiones* 5.13.18–19 (trans. W. Fletcher).
[53] Lactantius, *Divinae institutiones* 5.19.21–23 (trans. W. Fletcher). Cf. ATKINS, *op. cit*. (*supra* n. 28), p. 159.
[54] Lactantius, *Divinae institutiones* 5.20.5–7 (trans. W. Fletcher).
[55] According to the convincing opinion of Jenő Szmodis, the formalism of archaic Roman law (*ius civile*) arised from the formalism of the Etruscan religion (SZMODIS, J., On Law, History and Philosophy. In: *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, vol. 29, 2011, p. 139).
[56] KING, Ch., The Organization of Roman Religious Beliefs. In: *Classical Antiquity*, vol. 22, Nr. 2, 2003, p. 299.
[57] Lactantius, *Divinae institutiones* 5.19.10-11 (trans. W. Fletcher). Cf. BOWLIN, J. R., Tolerance among the Fathers. In: *Journal of the Society of Christian Ethics*, vol. 26, Nr. 1, p. 19-28; HARTOG, *op. cit*. (*supra* n. 30), p. 65-66; MARCOS, *op. cit*. (*supra* n. 30), p. 8-10; LEPPIN, *op. cit*. (*supra* n. 30), p. 69-70.
[58] Cf. Lactantius, *De mortibus persecutorum* 34; Eusebius, *Historia ecclesiastica* 8.17.3-10.
[59] Lactantius, *De mortibus persecutorum* 48 (trans. W. Fletcher). Cf. Eusebius, *Historia ecclesiastica* 10.5.4.
[60] *Ibid*.

influenced by the thoughts of Christian apologists, especially Tertullian and even more so of Lactantius.[61] As we know, Lactantius was called to the imperial court in Augusta Treverorum (today's Trier) in Gaul, to teach Crispus, one of the sons of Constantine.[62] As Elizabeth DePalma Digeser argues convincingly, between 310 and 313 Lactantius was instructing not only Crispus, but the court and the emperor in Christianity.[63] In these years, therefore, Lactantius could significantly influence Constantine's religious policy.[64]

The thoughts of the Christian apologists are clearly reflected in the text of the Edict of Milan. However, the most important Tertullianic idea was left out of the text of the edict. As Brad Inwood and Fred D. Miller Jr. emphasize, the right to freedom of religion was conferred by an imperial edict and was not asserted as a natural right against the Roman state.[65] The emperor thus reserved the right to restrict religious freedom, which he did shortly afterwards.

6. Conclusions

The classical Greco-Roman civilisation did not know the idea of religious freedom. This idea did not appear among ancient Jews either. In the ancient world it was considered natural that all peoples practiced the religious customs of their ancestors. It was both a right and an obligation for everyone. Christians, breaking with the religious traditions of their ancestors, joined a new and supranational religion. The Romans tolerated the Jewish religion because of its ancient and national character. Christianity, however, did not have an ancient, national character that would have ensured its protection. Christian apologists therefore had to find a new idea to defend their faith. The originator of the idea of religious freedom (*libertas religionis*) was Tertullian, who linked the teaching of the Bible on free will to the natural law teachings of the Stoics. St. Cyprian and other martyrs also condemned religious violence. These views were supplemented by further theological arguments of Lactantius. Christian authors primarily emphasized that religion should be based on free will. Contrary to the formalist religious view of the Romans, they held the theological position that Deity desires sincere, heartfelt respect. All these ideas had a decisive effect on Constantine, who put an end to the persecution of Christians and declared the right to freedom of religion. However, the emperor did not base this right on natural law but on the permission of the state. This perception allowed him to later restrict religious freedom.

[61] As Wallace properly suggests, "Lactantius provided the theological and philosophical foundations for Constantine's religious policy" [WALLACE, *op. cit*. (*supra* n. 27), p. 507].

[62] Cf. Jerome, *De viris illustribus* 80.

[63] DEPALMA DIGESER, E., Lactantius and Constantine's Letter to Arles: Dating the Divine Institutes. In: *Journal of Early Christian Studies*, vol. 2, Nr. 1, 1994, p. 52.

[64] Cf. WILKEN, *op. cit*. (*supra* n. 31), p. 56; DEPALMA DIGESER, E., Lactantius on Religious Liberty and His Influence on Constantine. In: HERTZKE, A. D., SHAH, T. S. (eds.), *Christianity and Freedom: Historical Perspectives*. Vol. 1. Cambridge, 2016, p. 93-94, 96.

[65] INWOOD, B., MILLER, Jr., F. D., Law in Roman Philosophy. In: MILLER, Jr., F. D., BIONDI, C.-A. (eds.), *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*. Dordrecht, 2007, p. 159.

Das freie Vorbringen und seine Begrenzung nach der Kodifikation des ungarischen Zivilprozessrechts*

(The Free Submission and its Boundaries after the Codification of Hungarian Civil Procedure)

*Kristóf Szivós***

Abstract

The first Hungarian code of civil procedure was enacted at the end of 1910, after almost thirty years of codification. Previously, the procedural regulation based on the Austrian General Judicial Ordinance of 1781. The main aim of the legislator after the Austro-Hungarian Compromise of 1867 was to introduce a procedural order that bases on the principles of orality, immediacy, and publicity. As a result, the principle of contingent cumulation (Eventualmaxime) was replaced by the principle of unity of the cause which meant that the parties could submit new allegations and proofs until the closure of the last hearing. Thy study examines this new system and the tools with which the code of civil procedure tried to avoid undue delay. The main result of the study is the determination of the boundaries of the free submission and the circumstances of the application of sanctions against undue delay.

Keywords: *allegations and proofs; civil procedure; codification; contingent cumulation; free submission; oral hearing; preclusion; undue delay.*

1. Einleitung: die Eventualmaxime als Mittel der Prozessbeschleunigung in der Geschichte des ungarischen Zivilprozessrechts

1.1 Die Einführung der Eventualmaxime in Ungarn

Die österreichische Allgemeine Gerichtsordnung von 1781 (AGO) wurde in Ungarn zweimal eingeführt: erstmal von Joseph II in 1785 (das war die sog. *Novus Ordo Judiciarius* oder *Novus Ordo*),[1] die ein wichtiger Schritt auf dem Weg zur Schaffung eines modernen, einheitlichen, zentralisierten und verstaatlichten Rechtsdienstes war.[2] Diese Einführung hatte zur Folge, dass bürgerliche Rechtsstreitigkeiten zum ersten Mal in einer einzigen Rechtsordnung geregelt wurden.[3] Die zweite Einführung war in 1852, unter dem Name *Provisorische Zivilprozessordnung* (Prov. ZPO).[4] Die Grundlage dafür war das Scheitern des Unabhängigkeitskrieges von 1848-1849 und der Umstand, dass die Österreicher das ungarische Rechtssystem auf der Grundlage des einheitlichen Reichskonzepts regelten.[5] Obwohl der Name anders war, war die Gesetzgebung dieselbe: Die Prov. ZPO war die ungarische Rezeption der AGO. Dementsprechend war der Prozess „zwar schriftlich, heimlich, von der Eventualmaxime geprägt und mittelbar, jedoch von extremer Parteiherrschaft gekennzeichnet."[6] In Ungarn war also die Eventualmaxime erstmals in 1785 durch die *Novus Ordo* angewendet.[7] Obwohl die

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1 PAPP, L., Az Ordo judiciarius pro omnibus tribunalibus et foris judiciariis Regni Hungariae praescriptus. In: *Miskolci Jogi Szemle*, vol. 12, Nr. 1, 2017, S. 87–99.

2 BÓNIS, GY. – DEGRÉ, A. – VARGA E., *A bírósági szervezet és a perjog története*. Zalaegerszeg, 1996. S. 94.

3 PAPP L., Az Ordo judiciarius pro omnibus tribunalibus et foris judiciariis Regni Hungariae praescriptus. In: *Miskolci Jogi Szemle*, vol. 12, Nr. 1, 2017, S. 88.

4 Die provisorische Civilprozeßordnung für Siebenbürgen (Ungarn, Kroatien, Slavonien, die serbische Woiwodschaft und das Temeser Banat. Die Prov. ZPO wurde in verschiedenen Teilen des Reichs in verschiedenen Zeitpunkten eingefürht. BERZEVICZY, A. A*z absolutismus kora Magyarországon 1849-1865. I.* Budapest, 1922, S. 337.

5 STIPTA, I., *A magyar bírósági rendszer története.* Debrecen, 1997, S. 111. Die „Zäsur" in der Geschichte der Justiz war zwar nicht 1848, sondern 1869, als die Justiz eine staatliche Funktion wurde, aber die „Vorstudie" dazu lieferten die imperialen Bestrebungen des Neoabsolitionismus. BALOGH J., A neoabszolutizmus időszakának bíróságszervezési törekvései. In: BIRHER, N. – MISKOLCZI-BODNÁR, P. – NAGY P. – TÓTH J., Z. (Hrsg), *Studia in honorem István Stipta 70*. Budapest, 2022, S. 78.

6 JELINEK, W., Einflüsse des österreichischen Zivilprozessrechts auf andere Rechtsordnungen. In: HABSCHEID, W. J. (Hrsg.), *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen.* Bielefeld 1991, S. 49.

7 HERCZEGH M., *Magyar polgári törvénykezési rendtartás: 1868: LIV, 1881: LIX, 1881: LX. törvényczikk: kapcsolatosan a váltó-, kereskedelmi és kisebb polgári peres ügyekben való eljárással, a birói ügyvitellel, a vonatkozó hazai s részben külföldi jogforrásokkal, különösen pedig a M. K. Curia fontosabb elvi határozataival*. Budapest, 1891. S. 47.

Landesrichterkonferenz von 1861[8] die Entscheidung getroffen hat, die Prov. ZPO aufzuheben, wurde sie in der Praxis noch verwendet.

1.2 Die Reformen des Zivilprozesses nach dem Ausgleich

Als Ungarn in 1867 durch die Herstellung der Verfassung seine staatliche Selbständigkeit wieder erlangte und die durch das absolute Regime eingeführten österreichischen Gesetze außer Kraft traten, musste das Prozessverfahren in aller Eile provisorisch geregelt werden.[9] Daraufhin wurde die Prozessordnung für die Zivilrechtsprechung in 1868 (Gesetzartikel LIV von 1868) akzeptiert, die zwei Arten des Verfahrens unterschied: das ordentliche und das summarische Verfahren. Das vorherige stützte sich auf die frühere Regelung, d.h. die Prov. ZPO und die AGO, da sich die Praxis daran gewöhnt hatte.[10] Die AGO war also war „die Quelle der Wahrheit", aus der der Gesetzgeber schöpfte.[11] Das summarische Verfahren wurde jedoch durch die Prozessmaximen von Mündlichkeit, Unmittelbarkeit und Öffentlichkeit dominiert und die Eventualmaxime wurde gelöscht.

Nach der 1860er Jahren hatten die Reformen des Zivilprozesses ein ähnlicher Weg, wie in Österreich im 19. Jahrhundert:[12] der Gesetzgeber einerseits probierte, das ordentliche Verfahren zu reformieren[13] und andererseits wurden zahlreiche Gesetzen akzeptiert, die der Anwendungsbereich des summarischen Verfahrens erweiterten.[14] Diese hatte zur Folge, dass die Bezirksgerichte un Ungarn schon in 1881 für den größten Teil der vermögensrechtlichen Prozesse sachlich zuständig waren.[15] Dies war der Grund, warum der Gesetzgeber zunächst eine einheitliche Prozessordnung für das Summarverfahren als Gesetzartikel XVIII von 1893 (SummV) geschaffen hat.[16]

Die ungarische Zivilprozessordnung wurde nach fast 30 Jahre von Kodifikation am Ende 1910 akzeptiert (GA I von 1911). Das SummV und die ZPO hatte eine interessante Beziehung. Beide wurden von Alexander von Plósz[17] geschaffen und das SummV war ein „Probegesetz" der ZPO, d.h. sie hatten ähnliche Lösungen und Regelungen und die gerichtliche Praxis hatte die Möglichkeit, das mündliche, unmittelbare und öffentliche Verfahren auf bezirksgerichtlichen Instanz zu „probieren", bevor die ZPO auf Gerichtshöfe auch eingeführt wurde. Sie waren auch in der Lage, dem Gesetzgeber nützliche Rückmeldungen über Vorschriften, die Änderungen brachten, zu geben.

2. Das freie Vorbringen in Ungarn

2.1 Gesetzliche Regelung

Laut ZPO § 221 Satz 1, „Tatsächliche Behauptungen, Äußerungen auf gegnerische tatsächliche Behauptungen, die Benennung oder Vorweisung der Beweismittel und die auf dieselben bezüglichen Äußerungen können in der Regel zu jeder Zeit bis zum Schlusse jener Verhandlung vorgebracht werden, welche dem die obwaltende Frage erledigenden Beschlusse vorangeht." Damit hat der ZPO „den für das mündliche Verfahren unentberlichen Grundsatz"[18] ausgesprochen, dass „die mündliche Verhandlung […] ein einheitliches Ganzes"[19] ist. Die Verhandlung bewog sich nicht im Rahmen nach der Anzahl bestimmter, formeller Prozessreden, sondern solange fortzusetzen war, bis die Angelegenheit zur endlichen Entscheidung geeignet war.[20] Aus diesem Grund wird diese Regel gewöhnlich auf zwei Arten bezeichnet: die Einheit der mündlichen Verhandlung[21] oder freies Vorbringen[22] und es war die Anlehnung der Eventualmaxime.[23]

2.2 War die mündliche Verhandlung wirklich ein einheitliches Ganzes?

Es stellt sich die Frage, wie man die Verhandlung in der ZPO als ein einheitliches Ganzes betrachten kann, wenn das Gesetz zwischen zwei Arten der Verhandlung (d.h. der Prozessaufnahmeverhandlung und der meritorischen Verhandlung) unterschied, zwischen denen – im Falle eines Prozesses vor dem Gerichtshof in der Regel, und im Falle eines Prozesses vor dem Bezirksgericht ausnahmsweise (ZPO § 191) – die schriftliche Vorbereitung stattfand.

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[8] Über die Landesrichterkonferenz siehe KAJTÁR, I., Charakteristiken der modernen ungarischen Rechtsentwicklung im 19. Jahrhundert. In: MÁTHÉ, G. (Hrsg.), *Die Entwicklung der Verfassung und des Rechts in Ungarn*. Budapest, 2017, S. 393–394.

[9] FODOR, Á., *Die neue ungarische Zivilprozeßordnung.* In: *Ungarische Rundschau für Historische und Soziale Wissenschaften*, vol. 1, Nr. 1, 1912, S. 35–36.

[10] KENGYEL, M., *A bírói hatalom és a felek rendelkezési joga a polgári perben.* Budapest, 2003, S. 148.; SZIVÓS, K., The Eventualmaxime in the Hungarian Civil Procedure – A Historical Perspective. In: FRENKEL, D. – VARGA, N. (Hrsg.), *New Studies in History and Law.* Athens, 2019, S. 79–89.

[11] GARAY, D., Még egyszer a ptr. 113. §-ról. In: *Jogtudományi Közlöny*, vol. 14, Nr. 37, 1879, S. 293.

[12] OBERHAMMER, P. – DOMEJ, T., Germany, Switzerland and Austria (ca. 1800-2005). In: VAN RHEE, C. H. (Hrsg.), *European Traditions of Civil Procedure*. Oxford – Antwerpen, 2005, S. 118–119.

[13] In 1881 hatte er ein Teilerfolg mit dem Gesetzartikel LXIX von 1868, der die Novellierung des Gesetzes von 1868 war.

[14] In Österreich waren die zwei wichtigsten das Summarpatent von 1845 und das Bagatellverfahren in 1873.

[15] FODOR, Á., Die neue ungarische Zivilprozeßordnung. In: *Ungarische Rundschau für Historische und Soziale Wissenschaften*, vol. 1, Nr. 1, 1912, S. 36.

[16] STIPTA, I., Das Zivilverfahrensrecht (1848–1945). In: MÁTHÉ, G. (Hrsg.), *Die Entwicklung der Verfassung und des Rechts in Ungarn*. Budapest, 2017, S. 545. Zwei andere wichtige Gesetze wurden akzeptiert, die auch die sachliche Zuständigkeit der Bezirksgerichte erweiterten: GA XIX von 1893 über das Mahnverfahren und GA XVI von 1894 über das Nachlassverfahren.

[17] Über sein Leben und Werken siehe SZIVÓS, K., Sándor Plósz (1846-1925). In: *FORVM. Acta Juridica et Politica*, vol. 11, Nr. 2, 2021, S. 167–184.

[18] *Materialien zu den neuen österreichischen Civilprozessgesetzen.* Bd. I. Wien, 1898, S. 260.

[19] Indokolás a polgári perrendtartásról szóló törvényjavaslathoz. In: *Az 1910. évi junius hó 25-ére összehivott országgyülés képviselőházának irományai IV. kötet.* Budapest, 1910, S. 310.

[20] GOTTL, A., *Ungarische Zivilprozeßordnung (G. A. I: 1911. Sanktioniert am 8. Jänner 1911) mit Erläuterungen.* Wien, 1911, S. 173.

[21] STEIN, F., *Grundriß des Zivilprozeßrechts und des Konkursrechts.* Tübingen, 1928, S. 192.

[22] KODEK, G. E. – MAYR, P., *Zivilprozessrecht.* Wien, 2018, S. 97.

[23] Als die Eventualmaxime der Gegensatz des freien Vorbringens war, hat Jenő Bacsó die Eventualmaxime das „gebundene Vorbringen" genannt. BACSÓ, J., *A polgári perrendtartás tankönyve.* Budapest, 1917, S. 98.

(1) Das freie Vorbringen war in den Vorschriften für die meritorische Verhandlung enthalten (sechstes Kapitel der ZPO: § 206-254), was darauf hindeutet, dass die Vorschrift für diese Art der Verhandlung galt. In jedem Fall war die Möglichkeit, sich zu äußern, in der Prozessaufnahmeverhandlung wesentlich eingeschränkter, was im folgenden Unterabschnitt erläutert wird. Obwohl das Gesetz die Prozessaufnahme als eine Verhandlung bezeichnete, gibt es sowohl in der Literatur als auch in der Rechtsprechung zahlreiche Beispiele, in denen die Prozessaufnahme nicht als *Verhandlung*, sondern als ein *Termin*[24] oder einfach als *Prozessaufnahme*[25] bezeichnet wurde, wobei die Terminologie der Verhandlung für die meritorische Verhandlung reserviert wurde.

(2) Die Erörterung privatrechtlicher Fragen – der Hauptzweck des Zivilprozesses – nur in der meritorischen Verhandlung stattfinden konnte. Zu dieser Schlussfolgerung gelangt man, wenn man den Zweck der Prozessaufnahme untersucht. Laut der Plósz'schen Gedankenwelt, war die einzige Frage der Prozessaufnahme ob der Beklagte den Klagegrund bestreiten würde, d. h. ob er prozesshindernde Einrede erhebt und damit die Einstellung des Prozesses beantragen würde. Wenn ja, musste das Gericht dies gesondert – und in der Regel mit einem Urteil – entscheiden (ZPO § 181). Der Zivilprozess im System der ZPO bestand also im Wesentlichen aus zwei Prozessen: aus einem eventuellen kontradiktorischen Prozess in der Prozessaufnahmeverhandlung über das Zustandekommen des Prozesses,[26] und, falls ein solcher Prozess nicht stattfand oder scheiterte, aus der Erörterung der privatrechtlichen Fragen im Rahmen der meritorischen Verhandlung. Laut Plósz „ergibt sich demgemäss eine Zweiteilung der Processhandlungen. Sie zerfallen in solche, welche sich auf das Zustandekommen des Processes beziehen, und ferner in solche Handlungen, welche den Process seinem Ziele entgegenführen."[27] Der beste Beweis dafür ist die Tatsache, dass die Entscheidung über die prozesshindernden Einreden in Form eines Urteils ergangen war, was traditionell die Form der Entscheidung der privatrechtlichen Fragen ist.

Was die privatrechtliche Frage angeht, so konnten die Parteien zu Beginn des Verfahrens nur sehr begrenzte Erklärungen abgeben. Bei Beginn der Prozessaufnahmeverhandlung, trug der Kläger seine Klage vor (ZPO § 178 Abs. 1), auf die der Beklagte auf zwei Arten antworten konnte: entweder er anerkannte zu oder er bestritt sie zumindest teilweise. Im ersten Fall erließ das Gericht sofort ein Urteil, im zweiten Fall verlas er seinen meritorischen Gegenantrag aus einer Schrift (ZPO § 185 Abs. 1). In einem solchen Fall konnte der Beklagte in seinem meritorischen Gegenantrag nur die folgende Erklärung abgeben: „Der Beklagte bringt solchen Gegenantrag vor, dass der hon. Gerichtshof die Klage abweist und den Kläger obliegt, alle Prozesskosten zu tragen."[28] In Bezug auf die Klage konnte der Beklagte nichts anderes behaupten (d.h. er konnte seine Forderung nicht mit Tatsachen und Beweisen begründen), da die ZPO, wie in der Begründung hervorgehoben wurde, „dem Beklagten nicht vorschreibt oder gar erlaubt, den Gegenantrag zu begründen. […] [Die Begründung] wäre nicht einmal in der Prozessaufnahmeverhandlung möglich, weil sie nur das Ergebnis der Vorbereitung sein kann, die nach dem Vorschlag nach der meritorischen Verhandlung stattfindet."[29]

Zusammenfassung: da die privatrechtlichen Fragen nur in der meritorischen Verhandlung erörtert werden konnten und der Zweck des Zivilprozesses darin bestand, darüber zu entscheiden, war die mündliche Verhandlung, wie oben dargelegt, in der Tat ein einziges Ganzes, da sie die privatrechtlichen und die damit zusammenhängenden verfahrensrechtlichen Fragen betraf (z. B. Versäumnis des Termins).

2.3 Theoretische und praktische Fragen der Einheit der mündlichen Verhandlung

Die Einheit der mündlichen Verhandlung bestimmte – ebenso wie die Eventualmaxime – die Rechtzeitigkeit der Handlungen der Parteien, ermöglichte aber auch eine weitaus größere Flexibilität, da im Rahmen der Prozessfreiheit in der Regel alle bis zum Schluss der mündlichen Verhandlung vorgenommenen Handlungen, die über die Frage entscheiden, als rechtzeitig vorgebracht anzusehen war.[30] Bis zum 18. und 19. Jahrhundert hatte das Gericht nicht so starke negative Befugnis, um zu verhindern, dass sich der Prozess in die Länge zieht, so dass die schriftliche Verfahrensordnung die Eventualmaxime anwandte, um den Prozess in Gang zu halten.[31] Die Tatsache, dass die Reformbewegungen des Zivilprozessrechts dem Richter negative Befugnis verliehen haben, hat die Beibehaltung der Eventualmaxime ungerechtfertigt gemacht.

Der Wortlaut der ZPO war abstrakt genug, um alle Arten von Handlungen zu erfassen, die in der meritorischen Verhandlung vorgenommen werden können. Die Formulierung „welche dem die obwaltende Frage erledigenden Beschlusse vorangeht" beinhaltete jede Arten der gerichtlichen Entscheidungen (z. B. das Urteil im Falle der privatrechtlichen Fragen). Das Urteil umfasste jedoch nicht nur das Endurteil, sondern auch das Tei-

[24] MNL CsML VII. 1-b. 676. d. 233/1920.; GAÁR, V., *A magyar polgári perrendtartás (1911. évi I. t.-cz.) magyarázata I.* Budapest, 1911, S. 151.; MAGYARY, G., *Magyar polgári perjog*. Budapest, 1924, S. 267.

[25] Kurie 1918 febr. 12. P. V. 6100/1917. sz.; PLÓSZ, S., Der Bau des Prozesses in erster Instanz nach der ungarischen ZPO. In: *Zwei Vorträge aus dem ungarischen Zivilprozessrecht.* Berlin, 1917, S. 47.; ALFÖLDY, E., A polgári perrendtartás egyszerűsítése. In: *Jogtudományi Közlöny,* vol. 55, Nr. 14, 1920, S. 104–105.

[26] MNL CsML VII.1-b. 676. d. 233/1920.; MNL CsML VII. 1-b. 682. d. 182/1921.; MNL CsML VII.1-b. 675. d. 160/1920.; MNL CsML VII. 1-b. 682. d. 147/1921.

[27] PLÓSZ, A., *Beiträge zur Theorie des Klagerechts.* Leipzig, 1880, S. 8.

[28] MNL PML VII. 1-b. 2. d. 15/1916.; MNL PML VII. 1-b. 109. d. 299/1917.

[29] Indokolás a polgári perrendtartásról szóló törvényjavaslathoz. In: *Az 1910. évi junius hó 25-ére összehivott országgyülés képviselőházának irományai IV. kötet.* Budapest, 1910, S. 297.

[30] KASERER, J., *Das Gesetz vom 27. April 1873 über das Verfahren in geringfügigen Rechtssachen (Bagatellverfahren) mit Materialien*. Wien, 1873, S. 77.

[31] MAGYARY, G., *Magyar polgári perjog*. Budapest, 1924, S. 287. Fußnote Nr. 1.

lurteil, das Zwischenurteil und sogar das Ergänzungsurteil. Die „obwaltende Frage“ könnte jedoch auch verfahrensrechtlicher Natur sein, da es einer Partei, die beispielsweise eine Frist versäumt und in der Anhörung einen Antrag auf Rechtfertigung gestellt hat, freisteht, bis zum Abschluss der Anhörung alle Umstände zur Begründung dieses Antrags vorzubringen.[32]

Die Einheit der Verhandlung bestand in einem strukturierten Ansatz zur Erörterung privatrechtlicher Fragen. Daran ändere auch der Umstand nichts, dass es mehrerer Verhandlungstermine bedürfe, um die Fragen zu erörtern, da die Einheitlichkeit nicht das Erfordernis einer einzigen Verhandlung impliziere,[33] sondern dass die Möglichkeit, sich zu einer bestimmten Frage zu äußern, durch das Gesetz zeitlich nicht getrennt sei.

Diese Freiheit galt jedoch nicht nur für die Parteien und ihr Vorbringen, sondern auch für das Gericht, d. h. es stand ihm frei, nicht zeitgerecht vorgebrachtes Vorbringen zu berücksichtigen,[34] auch wenn die Voraussetzungen für die Anwendung des gerichtlichen Zurückweisungsrechts erfüllt waren, d. h. die ZPO wandte ein weites richterliches Ermessen an. Die richterliche Freiheit bedeutete auch, dass es dem Richter freistand, über die Wiedereröffnung des Verfahrens zu entscheiden, wenn sich nach Abschluss der Verhandlung Umstände ergaben, die die Partei zuvor nicht vorgetragen hat.[35] Eine Partei, die sich nicht rechtzeitig äußerte, riskierte, dass das Gericht die Verhandlung schließt, bevor sie ihr Vorbringen vorgebracht hat.[36]

3. Die Sanktionen nicht rechtzeitigen Vorbringens

3.1 Allgemeine Bemerkungen

Nach der Regel des freien Vorbringens galt eine vor dem Ende der mündlichen Verhandlung vorgenommene Handlung, die über die Frage entschied, als rechtzeitig vorgenommen, aber aus dem Umkehrschluss folgt, dass man ausnahmsweise von nicht rechtzeitigen Leistungen sprechen konnte. Die ZPO und die Literatur bezeichneten solche Vorbringen als ex post facto, und das Gesetz verstand darunter: „Wenn die bereits in einem Fall vorgetragenen Tatsachen sich als nicht ausreichend erwiesen haben, um den Klagegrund zu begründen, und die vorgebrachten Beweise nicht zu einem Ergebnis geführt haben, versucht die Partei, neue Tatsachen und Beweise ex post facto anzuwenden.“[37] Um zu verhindern, dass die Parteien ihre prozessuale Handlungsfreiheit dazu nutzen, den Rechtsstreit in die Länge zu ziehen, gewährte das Gesetz den Parteien diese Freiheit nicht unbedingt, sondern nur in der Regel, da das Gesetz mehrere Sanktionen für nicht zeitgerechte Vertretungen vorsah, die jedoch nur indirekt dafür sorgten, dass der Missbrauch verhindert wurde.[38]

Eine Partei konnte bis zum Ende der Verhandlung, jeder Zeit praktisch alles vorbringen. Um diese beiden Wörter drehte sich auch das Sanktionssystem, denn es gab rechtliche Konsequenzen für die Abgabe einer Eingabe zu einem unangemessenen Zeitpunkt (zu jeder Zeit) und für den unangemessenen Inhalt der Eingabe (alles). Diese Sanktionen wurden schrittweise verhängt, wobei das Gesetz zunächst die nachlässige Verzögerung (ZPO § 221 Satz 2), dann die absichtliche Verzögerung (ZPO § 222 Abs. 1) und schließlich das allgemeine Lügenverbot (ZPO § 222 Abs. 2) regelte.[39]

3.2 Nicht rechtzeitige und nachlässige Vorbringen

Laut ZPO § 221 Satz 2, „Die Partei aber, die durch ihr Vorbringen, welches sie nach Überzeugung des Gerichts früher geltend zu machen in der Lage gewesen wäre, die Vertagung der Handlung veranlasste, ist in die hieraus entstandenen Kosten, selbst in dem Falle zu verfallen, wenn sie den Prozess gewinnt.“ Die erste Stufe der Sanktionen kam zur Anwendung, wenn eine der Parteien Tatsachen oder Beweismittel vorbrachte, die für den Ausgang der Rechtssache wesentlich waren und die eine Vertagung der Verhandlung erforderlich machten.[40] Die Regelung, dass der Verursacher der Verzögerung die Kosten zu tragen hat, reichte in der Regel aus, um die „Störung“ zu verhindern,[41] d. h. der Gesetzgeber ging implizit davon aus, dass die Ursache der Verzögerung nicht die Folge eines Rechtsmissbrauchs, sondern eines einfachen menschlichen Fehlers war. Dies zeigt auch, dass der Geist der ZPO gegenüber den Parteien äußerst großzügig war.

Das Gesetz sollte die „Störung“ vor allem durch eine vermögensrechtliche Konsequenz verhindern, nämlich die Anwendung des sog. Kostenseparation. In der Regel hat das Gericht in der Entscheidung über die Einstellung des Verfahrens über die Kosten des gesamten Verfahrens entschieden (ZPO § 424 Abs. 1). Durch die Kostenseparation wurde eine Ausnahme geschaffen, wenn das Gericht über bestimmte Elemente der Prozesskosten gesondert entscheidet. Im Falle einer fahrlässigen Vertagung wurden die Kosten von der Partei getragen, die die Vertagung

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[32] Indokolás a polgári perrendtartásról szóló törvényjavaslathoz. In: *Az 1910. évi junius hó 25-ére összehivott országgyülés képviselőházának irományai IV. kötet.* Budapest, 1910, S. 310.

[33] GAÁR, V., *A magyar polgári perrendtartás (1911. évi I. t.-cz.) magyarázata I.* Budapest, 1911, S. 188.

[34] Kurie 1898. decz. 29. G. 527. sz. a.

[35] Oberlandesgericht Budapest 1917 jan. 8. P II. 7437/1916. sz.

[36] HERCZEGH M., *Magyar polgári törvénykezési rendtartás: 1868: LIV, 1881: LIX, 1881: LX. törvénycikk: kapcsolatosan a váltó-, kereskedelmi és kisebb polgári peres ügyekben való eljárással, a birói ügyvitellel, a vonatkozó hazai s részben külföldi jogforrásokkal, különösen pedig a M. K. Curia fontosabb elvi határozataival.* Budapest, 1891. S. 31.

[37] KISS, K., *A sommás eljárás (1893. évi XVIII. t.-czikk.) kapcsolatban a fizetési meghagyásról szóló és a törvénykezési bélyegekre és illetékekre vonatkozó törvényekkel (1893:XIX. t.-cz. 1894:XXVI. t.-cz.).* Nagy-Kikinda, 1894, S. 67.

[38] MAGYARY, G., *Magyar polgári perjog*. Budapest, 1924, S. 267.

[39] SCHAUER, H., A szóbeli tárgyalás elhalasztása. In: *Jogtudományi Közlöny*, vol. 46, Nr. 47, 1911, S. 397–398.

[40] KISS, K., *A sommás eljárás (1893. évi XVIII. t.-czikk.) kapcsolatban a fizetési meghagyásról szóló és a törvénykezési bélyegekre és illetékekre vonatkozó törvényekkel (1893:XIX. t.-cz. 1894:XXVI. t.-cz.).* Nagy-Kikinda, 1894, S. 67.

[41] Indokolás a polgári perrendtartásról szóló törvényjavaslathoz. In: *Az 1910. évi junius hó 25-ére összehivott országgyülés képviselőházának irományai IV. kötet.* Budapest, 1910, S. 310.

verursacht hat, unabhängig davon, ob er der Sieger war. Die Anwendung des Grundsatzes der Kostenseparation entspreche der besonderen Kostentragungsregel, wonach die Partei in jedem Fall die Kosten der von ihrer verschuldeten Verzögerung zu tragen habe (ZPO § 431 Abs. 1).[42] Nachlässig konnte die Partei nur bei der nachträglichen Darstellung sein, da die Absicht bereits zu der folgenden Sachlage geführt hatte.

3.3 Nicht rechtzeitiges Vorbringen mit Verschleppungsabsicht

3.3.1 Einleitendes Beispiel aus der Praxis

Die Parteien haben am 23. Mai 1922 einen Kaufvertrag mit Beförderung geschlossen, in dem sich der Verkäufer verpflichtete, die von ihm gekauften Minen und das Brennholz nach Kiskundorozsma (heute Teil von Szeged, Ungarn) zu liefern und dem Käufer gegen Zahlung des Kaufpreises auszuhändigen. Da der Verkäufer dies nicht tat, reichte der Käufer vor dem kgl. Gerichtshof Szeged eine Klage gegen ihn ein. In der Prozessaufnahmeverhandlung hat der Beklagte die Abweisung der Klage und den Verfall des Klägers in den Prozesskosten (also er brachte einen meritorischen Gegenantrag vor). Da dieser Prozess von einem Gerichtshof stattfand, ging der meritorischen Verhandlung eine schriftliche Vorbereitung voraus. Der Beklagte legte jedoch keine vorbereitenden Schriftsätze vor, so dass die erste meritorische Verhandlung mangels eines solchen Schriftsatzes verschoben werden musste. Der Beklagte trug seine Verteidigung (genauer gesagt seine Gründe, einschließlich der Tatsachen und Beweise) in der Fortsetzungsanhörung zur Sache vor und versuchte, seine Verspätung damit zu entschuldigen, dass er nicht in der Lage gewesen sei, sie früher vorzubereiten. Das Gericht hat die Argumente des Angeklagten, die sich auf eine Verzögerungsabsicht beziehen, nicht berücksichtigt. Dafür gab es mehrere Gründe, wie z. B. die Oberflächlichkeit der Klageerwiderung (der Beklagte konnte z. B. weder ein Datum noch einen Betrag nennen, den er vom Kläger forderte) oder andere verfahrensmäßig unmögliche Anträge (z. B. ein Antrag an eine Behörde in Arad, was zwei Jahre nach dem Vertrag von Trianon wahrscheinlich unmöglich gewesen wäre).

Das Gericht kritisierte auch, dass der Beklagte erst an der zweiten meritorischen Verhandlung ankündigte, dass er eine bestimmte Gesellschaft als Garantiegeber in Anspruch nehmen wolle, während er nach Ansicht des Gerichts seinen diesbezüglichen Antrag gesondert und rechtzeitig hätte stellen müssen, um zu vermeiden, dass das Gericht eine gesonderte Verhandlung anberaumen muss, d. h. die Berücksichtigung dieses Antrags hätte zu einer weiteren Vertagung geführt. Laut der Begründung des Gerichts: „auf der Grundlage der vorstehenden Ausführungen ist die Feststellung des Gerichts, dass die Einrede des Beklagten darauf abzielt, den Prozess zu verschleppen, und daher gemäß ZPO § 222 unberücksichtigt bleibt."[43]

3.3.2 Das dogmatische und praktische Gründen des Sanktionierens des schikanösen Vorbringens

Der oben genannte Fall veranschaulicht die sog. „Nichtberücksichtigung", die wie folgt definiert werden kann: eine Nichtberücksichtigung (gerichtliches Zurückweisungsrecht) ist eine negative Befugnis[44] der gerichtlichen Überprüfung, durch die das Gericht alle oder einen Teil der als nicht rechtzeitig erachteten Eingaben aus den Akten ausschließen und ohne sie entscheiden kann. Obwohl die ZPO auf dem Grundsatz des freien Vorbringens beruhte, musste sie, wie andere Prozessordnungen auch, Schutz vor schikanösen Vorbringen bieten.[45] Die ZPO kämpfte gegen solche Vorbringen.[46] Laut ZPO § 222 Abs. 1: „Das Gericht kann solche im vorigen Paragraphen [d. h. ZPO § 221 Satz 2] erwähnte nachträgliche Angaben und nachträglich angebotene Beweise der Partei, deren Berücksichtigung die Vertagung der Verhandlung erfordern würde, auch von Amts wegen unberücksichtigt lassen, wenn es sich überzeugt, dass die Partei ihre Angaben behufs Verzögerung der Erledigung der Sache absichtlich aufgeschoben hat." Im Falle der Nichtberücksichtigung hat das Gericht aktiv eingegriffen und den Akt der absichtlichen Verzögerung zurückgewiesen. Das ist warum kann diese Möglichkeit auch gerichtliches Zurückweisungsrecht genannt werden.[47]

Nur Angaben, die die Partei bewusst später erbringt, als sie die Möglichkeit dazu gehabt hätte, könnte als Schikane angesehen werden.[48] Im Falle eines schikanösen Vorbringens handelte es sich also um einen Fall, in dem eine Partei ein Recht ausübte, da es ihr freistand, bis zum Schluss der mündlichen Verhandlung vorzutragen, dieses Recht aber entweder zwecklos ausübte, nur um die andere Partei zu schädigen oder zu verärgern, oder, obwohl die Ausübung des Rechts einen anderen Zweck verfolgte, der anderen Partei einen solchen Schaden zufügte, der in keinem Verhältnis zu dem aus der Ausübung des Rechts zu ziehenden Nutzen stand.[49] Hier wird der „andere Zweck" in erster Linie so verstanden, dass das Gericht die Erklärung der Partei berücksichtigen und beispielsweise eine Beweisaufnahme durchführen soll. Und „ein solcher Schaden" bedeutet in erster Linie, dass die gegnerische Partei zu Recht erwarten kann, dass das Gericht den Rechtsstreit rechtzeitig entscheidet.

Im Vergleich zum SummV (SummV § 33) sind zwei Unterschiede festzustellen. Hinsichtlich der Möglichkeit, von Amts wegen über nicht berücksichtigen, ist darauf hinzuweisen, dass das österreichische ZPO einen deutlichen Einfluss auf die Einführung dieser Möglichkeit hatte, da das SummV die Möglichkeit, sich über die Entscheidung Nichtberücksichtigung, nur auf

[42] Kurie II. 6609/1927. – 1928. XI. 15.
[43] MNL CsML VII. 1-b. 699. d. 28/1923.
[44] MAGYARY, G., *Magyar polgári perjog*. Budapest, 1924, S. 286.
[45] *Materialien zu den neuen österreichischen Civilprozessgesetzen. Bd. I.* Manz, 1898, S. 261–262.
[46] SCHAUER, H., A szóbeli tárgyalás elhalasztása. In: *Jogtudományi Közlöny*, vol. 46, Nr. 47, 1911, S. 398.
[47] KLEIN, F. – ENGEL, F., *Der Zivilprozess Oesterreichs.* Mannheim/Berlin/Leipzig, 1927, S. 269.
[48] MESZLÉNY, A., Meszlény Artur: Visszaélés a joggal. *Polgári Jog*, 9 (1933) 1., S. 8–9.
[49] SZLADITS, K., A magánjogi tényállások. In: SZLADITS, K. (Hrsg.), *Magyar magánjog I.* Budapest, 1941, S. 367.

Antrag anerkannte (der Entwurf von Franz Klein wurde 1893 fertiggestellt).[50] Die Nichtberücksichtigung von Antrag wegen war ein charakteristisches Merkmal der deutschen ZPO und wurde von manchen ungarischen Juristen, stark unterstützt. Wenn die gegnerische Partei keinen Antrag auf Nichtberücksichtigung gestellt hat, weil die Sache für sie nicht eilig war, gab es für das Gericht keinen Grund, das spätere Vorbringen zum Nachteil der Parteien und der gründlichen Prüfung der Sache zurückzuweisen.[51] Da jedoch die ZPO nach der Konzeption von Klein bereits die soziale Konzeption übernommen hatte, hielt das Gesetz die Nichtberücksichtigung zweifellos für eine richtige Regelung im öffentlichen Interesse.[52]

Der andere Unterschied bestand darin, dass die ZPO das Wort „absichtlich" in den Gesetzestext einfügte, was für die Gerichte eher eine erklärende als eine dogmatische Bedeutung hatte, da „behufs Verzögerung" sich auf ein absichtliches Verhalten bezieht und es die Absichtlichkeit auch beinhaltete.

Nach dem Inkrafttreten der ZPO gab es drei Voraussetzungen für eine Nichtberücksichtigung: Die Partei (1) hat einen nachträglichen Antrag gestellt, (2) dessen Berücksichtigung eine Vertagung der Verhandlung erfordern würde, und (3) die Partei hat den nachträglichen Antrag in der Absicht gestellt, einen Prozess zu verschleppen. Es ist wichtig, darauf hinzuweisen, dass die Bedingungen konjunktivisch waren, so dass das Vorbringen als nachträglich erfolgt angesehen werden konnte, wenn seine Berücksichtigung keine Vertagung der mündlichen Verhandlung rechtfertigte, weil z. B. die zu vernehmenden Zeugen in der mündlichen Verhandlung anwesend waren.[53]

Das Gericht hatte die Möglichkeit, das nachträgliche Vorbringen zu berücksichtigen, auch wenn die Voraussetzungen erfüllt waren. In diesen Fällen wurden die Bestimmungen der ZPO § 221 Satz 2 angewendet.[54] Diese gerichtliche Option ergab sich aus der Tatsache, dass die Souveränität des Gerichts und nicht die Eventualmaxime[55] als Rahmen verwendet wurde, um die Prozessverschleppung zu vermeiden.

Die Nichtberücksichtigung war nicht besonders nachteilig für die Partei, da zum einen die vorsätzliche Verzögerung in der Regel unbegründet waren[56] und zum anderen die ausgeschlossenen Angaben in zweiter Instanz oder im Wege der Wiederaufnahme des Verfahrens durchsetzbar waren.[57] Obwohl das Gericht nicht verpflichtet war, über die Anwendung der Rechtsfolge des § 222 Abs. 1 in einem gesonderten Bescheid zu entscheiden,[58] musste es im Urteil ausdrücklich darauf hinweisen (ZPO § 401 Abs. 4). Der Zweck dieser Vorschrift bestand darin, einer Partei die Möglichkeit auf eine Wiederaufnahme zu geben. Ob die Nichtberücksichtigung einer Angabe oder eines Beweismittels zu einer günstigeren Entscheidung geführt hätte und ob sie daher geeignet war, ein neues Verfahren zu veranlassen, konnte das Gericht nur zum Zeitpunkt der Wiederaufnahme prüfen und entscheiden.[59]

3.3.3 Die Frage der Zurückweisung in der ersten meritorischen Verhandlung

In der Rechtsprechung war die Frage der Nichtberücksichtigung in der ersten mündlichen Verhandlung nicht eindeutig geklärt, wobei zwei unterschiedliche Standpunkte zu beobachten sind: a) einerseits war eine Nichtberücksichtigung in der ersten mündlichen Verhandlung möglich, wenn der Vortrag im vorbereitenden Schriftsatz früher hätte erfolgen können (d.h. die Nichtvorlage des Schriftsatzes wurde ebenfalls als Versäumnis angesehen);[60] b) andererseits gab es keine Zurückweisung in der ersten mündlichen Verhandlung[61] und in einem Fall vertrat die Kurie sogar die Auffassung, dass keine Nichtberücksichtigung vorliegt, wenn die Partei ihre Zeugen in der zweiten mündlichen Verhandlung benannt hat.[62] Es ist daher zu prüfen, ob das gerichtliche Zurückweisungsrecht in der ersten mündlichen Verhandlung in der Sache hätte ausgeübt werden können.

Ad a) Zur Veranschaulichung dieses Falles betrachten wir folgenden Fall: Mihály Ökrös schloss mit dem Beklagten einen Darlehensvertrag, den er später an den Kläger abtrat. Da der Beklagte den Vertrag nicht erfüllte, erhob der Kläger eine Klage gegen ihn bei dem kgl. Gerichtshof Szeged. Die Beschreibung der Vorgeschichte des Falles zeigt, warum das Gericht das Vorbringen des Beklagten in der ersten Verhandlung nicht berücksichtigte: „Der Beklagte hat beantragt, die Klage abzuweisen und der Kläger die Kosten des Verfahrens aufzuerlegen. In der meritorischen Verhandlung stützte sich seine Verteidigung ohne jegliche Vorbereitung auf die Leugnung, dass er ein Darlehen

[50] KENGYEL, M., *A bírói hatalom és a felek rendelkezési joga a polgári perben.* Budapest, 2003, S. 99–100.
[51] FODOR, Á., Az uj osztrák polgári perrendtartás. In: *Magyar Jogászegyleti Értekezések*, vol. 12, Nr. 7, 1896, S. 22.
[52] Indokolás a polgári perrendtartásról szóló törvényjavaslathoz. In: *Az 1910. évi junius hó 25-ére összehivott országgyülés képviselőházának irományai IV. kötet.* Budapest, 1910, S. 310.
[53] Oberlandesgericht Budapest 1903 június 4. 1903. I. G. 60. sz. a.
[54] KISS, K., *A sommás eljárás (1893. évi XVIII. t.-czikk.) kapcsolatban a fizetési meghagyásról szóló és a törvénykezési bélyegekre és illetékekre vonatkozó törvényekkel (1893:XIX. t.-cz. 1894:XXVI. t.-cz.).* Nagy-Kikinda, 1894, S. 68.
[55] Klein wies auch auf den Konflikt zwischen der Suveränität des Gerichts und der Eventualmaxime hin. KLEIN, F., Die neuen österreichischen Civilprozess-Gesetzentwürfe, In: *Zeitschrift für Deutschen Civilprozess*, vol. 11, 1894, S. 2.
[56] MNL CsML VII. 1-b. 691. d. 292/1922.
[57] Indokolás a polgári perrendtartásról szóló törvényjavaslathoz. In: *Az 1910. évi junius hó 25-ére összehivott országgyülés képviselőházának irományai IV. kötet.* Budapest, 1910, S. 311.
[58] KOVÁCS, M., *A polgári perrendtartás magyarázata I.* Budapest, 1927, S. 591.
[59] Indokolás a polgári perrendtartásról szóló törvényjavaslathoz. In: *Az 1910. évi junius hó 25-ére összehivott országgyülés képviselőházának irományai IV. kötet.* Budapest, 1910, S. 369.
[60] Kurie 1922 márc 8. P. I. 4607/1921. sz.; Oberlandesgericht Budapest 1897 deczember 2. 1897. II. G. 103. sz. a.; Oberlandesgericht Budapest 1899 október 12. 1899. II. G. 72. sz. a.
[61] MNL CsML VII. 1-b. 692. d. 504/1922.; Kurie I. G. 386/96.; Oberlandesgericht 1915 szept. 29. P IV. 7164. sz.
[62] Kurie 1904. okt. 21. I. G. 269.

von Mihály Ökrös erhalten habe […]. In Anbetracht der Tatsache, dass der Beklagte diese Einrede im vorbereitenden Schriftsatz hätte offenlegen müssen, um dem Kläger die Möglichkeit zu geben, die Beweise rechtzeitig vorzulegen, betrachtete das Gericht die vom Beklagten angebotenen Beweise als bloße Verzögerungstaktik […] und hat die Anhörung der angebotenen Zeugen nicht berücksichtigt."[63]

Das Gericht stützte sich dabei auf die Bestimmung der ZPO, dass der Beklagte in der ersten Hälfte der Verhandlungszwischenfrist dem klägerischen Advokaten einen vorbereitenden Schriftsatz zuzustellen hat, in welchem er sich über die ihm mitgeteilten tatsächlichen Behauptungen und Beweise der Klage äußert und unter einem seine eigenen tatsächlichen Behauptungen und Beweise, sowie seine etwaigen neuen Anträge mitteilt (ZPO § 195 Abs. 1). Außerdem war der Vorsitzende gehalten, dafür zu sorgen, dass die Sache einer erschöpfenden Verhandlung unterzogen, dessen ungeachtet aber durch Weitschweifigkeit und nicht zur Sache gehörige Abschweifungen nicht verwirrt und ohne Unterbrechung womöglich in derselben Sitzung beendet werde (ZPO § 224 Abs. 3). Der Vorsitzende konnte seine Rechte in ihrer Gesamtheit nicht an ein anderes Mitglied des Senates übertragen.[64] Ausgehend von einer grammatikalischen Auslegung dieser Vorschrift ergibt sich, dass das gerichtliche Zurückweisungsrecht bereits in der ersten mündlichen Verhandlung hätte angewendet werden können.

Ad b) In einem Fall entschied die Kurie, dass „das Gericht einen Verfahrensfehler begangen hat, indem es in einem Fall, in dem nur eine Verhandlung stattfand, der Partei nachträglich angebotene Beweise nicht berücksichtigte […]."[65] Dies war der richtige Ansatz. Neben dem mündlichen Charakter der Verhandlung sah die ZPO auch vor, dass eine Bezugnahme auf den Inhalt von Schriftstücken statt mündlichem Vortrag nicht gestattet war und die Verlesung von Schriftstücken war ausnahmelos zulässig (ZPO § 219 Abs. 1-2). Daher konnten Erklärungen rechtswirksam nur mündlich abgegeben werden, und das Gericht musste den Parteien gemäß dem Grundsatz des zweiseitigen Gehörs, die ein wesentliches Element des Zivilprozesses ist,[66] Gelegenheit dazu geben. Wenn nur die mündliche Erklärung Rechtswirkungen entfalten kann, muss die erste Erklärung der Parteien zur Sache berücksichtigt werden, auch wenn sie in der Absicht abgegeben wurde, das Verfahren zu verschleppen.

Die schriftliche Vorbereitung war obligatorisch, aber hatte keine gültige Anforderung. Der Inhalt der vorbereitenden Unterlagen wurde nur berücksichtigt, wenn sie mündlich vorgetragen wurden. Die Parteien waren jedoch berechtigt, von diesem Inhalt abzuweichen.[67] Dem ist hinzuzufügen, dass die erste Angabe aufgrund der vorherigen Definition von Nachträglichkeit begrifflich keine nachträglich sein konnte und somit unter keinen Umständen sanktioniert werden konnte. Das Erfordernis der Erledigung in einer Sitzung hätte andernfalls einfach dadurch erreicht werden können, dass dem vorbereitenden Schriftsatz eine gewisse Rechtswirkung beigelegt worden wäre.

Die Nichtberücksichtigung auf der Grundlage des vorbereitenden Schriftsatzes war nicht richtig, weil er dem Geist des Gesetzes völlig zuwiderlief. In der Ministerialbegründung heißt es weiter: „eine Folge des Charakters der Vorbereitung ist die, dass die diesbezüglich geschehene Versäumnis einen das Meritum der Sache berührenden Nachteil nicht nach sich ziehen kann. Die Partei kann in der mündlichen Verhandlung jedes Versäumnis in Bezug auf die Vorbereitung heilen, sie kann solche tatsächliche Behauptungen und Beweise vortragen, welche sie in den vorbereitenden Schriftsätzen nicht vorgebracht hat."[68] Die Nichtberücksichtigung erfolgte in der Regel in der letzten Verhandlung vor dem Urteil, denn wenn es Fragen gab, die eine weitere Verhandlung erforderten, und sie ohnehin verschoben werden musste, war es nicht angemessen, z. B. die Aussage eines Zeugen aus Gründen der Verzögerung zurückzuweisen.

4. Zusammenfassung

Die Parteien waren nicht bloß an die Beurteilung des erstrichterlichen Urteils gebunden, sondern sie waren berechtigt, die neue Verhandlung des Prozesses zu verlangen.[69] Sie konnten im Berufungsverfahren auch solche tatsächlichen Behauptungen und Beweismittel vorbringen, sowie als Verteidigung und Angriff auch solche neue Rechte geltend machen, welche sie vor dem Gerichte erster Instanz nicht vorgebracht oder nicht geltend gemacht haben (ZPO § 498 Abs. 2). Dieses weites Novenrecht entwertete das gerichtliche Zurückweisungsrecht der ersten Instanz, weil die Parteien alle Möglichkeiten hatten, zurückgewiesene Angaben wieder vorbringen. Das war das Gegenteil des Neuerungsverbots von Franz Klein und der österreichischen Zivilprozessordnung.

Die Rechtsprechung ist sehr großzügig mit dem Vorbringen der Parteien umgegangen, was sich darin zeigt, dass sie in der Regel die Anwendung des Grundsatzes der Kostenseparation als ausreichend angesehen hat, wobei die Präklusionsvorschrift als *ultima ratio* angewendet wurde. Der Paradigmenwechsel in der Prozessführung im 19. Jahrhundert bewies, dass es möglich war, Verfahren ohne starre Formalismen in Gang zu halten, auch wenn die damaligen Prozessbeteiligten nicht auf die Präklusion als Sanktion verzichten wollten.

[63] MNL CsML VII. 1-b. 692. d. 558/1922.
[64] GOTTL, A., *Ungarische Zivilprozeßordnung (G. A. I: 1911. Sanktioniert am 8. Jänner 1911) mit Erläuterungen.* Wien, 1911, S. 175.
[65] Kurie I. G. 504/98. 1899 január 28.; Kurie 1922 máj. 24. P. IV. 5119/1921. sz.
[66] MAGYARY, G., *Magyar polgári perjog*. Budapest, 1924, S. 3.
[67] MAGYARY, G., A szóbeliség és közvetlenség alapelvei az uj polgári perrendtartásban. In: *Jogtudományi Közlöny*, vol. 47, Nr. 40, 1912, S. 349.
[68] GOTTL, A., *Ungarische Zivilprozeßordnung (G. A. I: 1911. Sanktioniert am 8. Jänner 1911) mit Erläuterungen.* Wien, 1911, S. 164.
[69] GOTTL, A., *Ungarische Zivilprozeßordnung (G. A. I: 1911. Sanktioniert am 8. Jänner 1911) mit Erläuterungen.* Wien, 1911, S. 369.

A Special Professional Authority of Cartel Supervision in Hungary: The Cartel Committee*

*Norbert Varga***

Abstract

The Hungarian Cartel Act of 1930 regulated the cartel supervisory authorities, with the primary task of making sure that the operations of cartels were on the right path in order to protect public interests and public well-being. Cartels should provide customers with public needs goods at an affordable price. The government of Hungary wished to ensure this by creating cartel supervisory authorities in cartel matters. Amongst the specialized cartel supervisory authorities, one must emphasize the Cartel Committee, with its primary task of establishing whether or not the agreements formed by cooperating companies contain cartel-like competition-limiting clauses. In my essay, I wish to describe the establishment, the organisation and the practices of the Hungarian Cartel Committee, based on the one of the most important archival sources related to the bakery cartel.

Keywords: *Cartel law; Hungary; Cartel Committee; cartel supervisory authorities; bakery cartel; archives sources.*

The reasoning of the Cartel Act reasoned that the operation of cartels affects a wide range of society, especially those working in industrial areas. Lawsuits against cartels could concern both cartel members and people in connection to them, therefore the legal action affected the economic branch in question as a whole. This is why the law-maker might have thought that unlike in general, a cartel case might take more circumspection and expertise to get to the bottom of. In every case, the ministry had to act upon the notion of protecting public interests. This is why the need to establish a national authority with the primary task of drafting expert opinions arose.[1]

The formation of the Cartel Committee was also proposed on the 1930 conference of the Interparliamental Union, where it was stated that all nations should create a Cartel Committee separate from the government, representing both consumers and employers, in order to conduct examinations, and make the results public.

We can find authorities with similar scopes of duties in European cartel law, for example, in the Bulgarian law accepted on 16th December, 1931 on the inspection of cartel and monopoly prices, and in the Act No. 141 that was accepted in Czechoslovakia on 12th July, 1933 on cartels and private monopolies. According to the act on the examination of monopolistic companies and associations that was accepted on 16th July, 1925, Sweden established a separate authority. Contrary to this, Spain had a separate committee for this specific task according to the edict ratified on 3rd December, 1926 (that regulated gross national product, on the topic of establishing a committee), just like in Denmark, specified in the act accepted on 28th April, 1931. In Norway, the supervisory body was organised as a separate council (monitoring council and monitoring office), according to the act accepted on 12th March, 1926 (on monitoring competition limitations and price sharking), in Belgium, according to the royal edict accepted on 13th January, 1935 (on the institutional economic regulation of production and circulation), the permanent committee on economic council in Holland, according to the act accepted on 24th May, 1935 (on the mandatory and non-mandatory registration of entrepreneurial contract), and in Romania, in the cartel edict that was accepted on 8th May, 1937.[2]

The president and the deputy of the Cartel Committee were appointed by the head of the government in accordance to the suggestions of the government for three years. As for the members, the minister of trade provided suggestions from the representatives of the manufacturing industry, smaller industries, trade and agriculture. The other two members of the Committee were suggested by the Home Secretary. The members were also appointed for three years, and could be nominated again. Not only the members, but even the president could be relieved

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1 DOBROVICS, K., *A kartellek helyzete és működése Magyarországon*. [The Situation and Operation of Cartels in Hungary]. Budapest, 1934, p. 131-132. STIPTA, I., A gazdasági versenyt szabályozó megállapodásokról szóló 1931. évi XX. tc. hazai előzményei. [Domestic Predecessors of the 20th Act of 1931 on the Agreements Regulating Fair Trade], Versenytükör, [Competition Mirror], special issue, Volume XII., 2016, p. 53-63.

2 DOBROVICS, K., KŐHÁZI, E., *Kartell, árelemzés, külföldi törvények*. [Cartel Price Analysis, Foreign Laws]. Budapest, 1938, p 57-201. Also: SZILÁGYI, P., TÓTH, A., *A kartellszabályozás történeti fejlődése*. [The Historical Development of Cartel Regulation] Versenytükör, [Competition Mirror] special issue, Volume XII. 2016, p. 4-13.

of their duty, even before their tenure was over. Why is this so vital to examine? This regulation endangered the independent actions and free speech of the Committee. This meant nothing more and nothing less than the government's chance to validate its political interests, especially in the field of commercial policies. This system resulted in a dependant relationship between the government and the Committee, and by looking at it from another perspective, it made much easier for the government to validate its new economic policies. Therefore, the opinion of Károly Dobrovics is valid, according to which the "Cartel Committee […] is not an adjudicating judicial forum, but a consultant institution, that has to accommodate to the controlling economic policies of the time."[3]

The operation of the Cartel Committee was mainly regulated by the Cartel Act and the M. E. edict No. 5382/1931.[4] The minister of trade could pronounce his opinion on his own, or per the request of a different authority, if a question arose on the implementation of the Cartel Act. The former was stated by the edict, interpreting the regulations of the Cartel Act (Paragraph No. 5) in an extensive manner, which was significant, because henceforth the Committee was granted a more pronounced role in cartel lawsuits, despite the fact that it would have had administrative rights. The practical application of the viewpoint of the committee expressed in its opinion meant that the government significantly appeared amongst its members.[5]

The president of the Committee appointed a member to be the presenter to a specific case. The sessions of the Committee were summoned by either the president or his deputy. In case the latter was unavailable, the minister appointed the individual who temporarily fulfilled the presidential duties.[6]

Per the wishes of the minister of trade, the session of the Cartel Committee had to be summoned at the specified time, and the case relegated in from of the Committee had to be put on trial. The president established the items on the agenda of the session.[7]

The members of the Committee, the assigned ministers and the royal legal director had to receive a notification on the assembly of the sessions by describing the agenda at least on the previous day.

After the session of the Committee was called to open, the presenter described both the cases and his opinion. After this, the members of the Committee, the assigned ministers and the royal legal director could express their opinions.

After the trial ended, the Committee made its decision. Only the members of the Committee had voting rights, the envoys of the ministry and the legal directorate only had consulting and deliverance rights. In case of a tie, the accepted opinion that became a part of the decision was the one the president supported. Decision-making needed the presence of at least five members.[8] Following this, the president sent the Committee's decision to the minister of trade and the authorities that requested the opinion.

To protect economic interests, the sessions were held behind closed doors. Outsiders were not allowed to receive information on the agenda or the course of the sessions. The members of the committee were under the same NDA rules as other clerks, meaning that their actions fell under the effects of Paragraph No. 479 of the criminal code in case of a leak.[9]

Minutes were an obligatory part of any session of the Committee, which contained the description of the documents and the course of the legal action, not to mention the accepted decisions. The minutes were put down by an appointed official of the ministry, and were authenticated by the signature of the president, the notary and two assigned members.

The easiest method to follow the course of the legal action is by referring to the surviving minutes of the Cartel Committee available in the Hungarian National Archives.

The series of topics on the 24th February, 1933 session of the Cartel Committee were as follows: Ferenc Löwinger crude oil salesman's complaint against the dumping of the crude oil cartel and an inspection against the crude oil cartel; a complaint against the timber cartel of Kecskemét; the complaint of Gyula Bakk and the farmers of the Győr area against the scrap metal cartel and the case of the milk cartel of Sárvár.[10]

According to the records of the session, namely the minutes the Council accepted the presenters' suggestions. In all of the aforementioned cases, the debate was over the institution of legal action against the cartels, to be more precise, examining crude oil prices, disbanding the timber cartel of Kecskemét, examining the scrap metal cartel and disbanding the milk cartel.[11]

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3 DOBROVICS, 1934, p. 133.

4 According to Decree No. 5382/1931. M. E. of the H. Roy. Ministry on the organisation and operation of the Cartel Committee.

5 DOBROVICS, 1934, p. 135.

6 STIPTA, I., *Az első magyar karteltörvény (1931. évi XX. tc.) dogmatikai jellemzői*. [The Dogmatic Characteristics of the Fist Hungarian Cartel Law (the 20th Act of the year 1931) In: Homoki-Nagy, M. (editor.): FORVM, Volume V., Issue 1, p. 121., SZABÓ, I., *A kartellfelügyelet szervezete és hatásköre az 1931. XX. törvénycikk nyomán*, [The Organisation and Authority of Cartel Supervision According to the 20th Act of 1931] Versenytükör, [Competition Mirror] special issue No. 2, (12) 2016, p. 70-72.

7 SZABÓ, 2016, p. 72-74.

8 DOBROVICS, 1934, p. 131.

9 DOBROVICS, 1934, p. 131. Paragraph No. 479 of the 5th Act of 1878. Any functionary who shows a third party or distributes any official Discussion, commission, report or any document they officially received, knowing that its contents are an official secret capable to harm the state or private individuals shall receive imprisonment up to a year.

10 The National Archives of the Hungarian National Archives, the Archives of the Ministry of Agriculture, general documents, (henceforth: MNL. K-184.) 1932. Batch number: 41. Radix: 51140. Registry book number: 88298., MNL. K-184. 1932. Batch number: 41. Radix: 51140. Registry book number: 53726.

11 In the case of the raw leather purchasing, or so-called "leather cartel", it was found out that it endangered public interests. MNL. K-184. 1932. Batch number: 41. Radix: 51140. Registry book number: 53726. Even in the case of the fruit syndicate of Kecskemét, the Committee determined that it was against Paragraph No. 6 of the Cartel Act. It reached the same verdict in the cases of the crude oil, petrol and sugar merchants' cartels. MNL. K-184. 1932. Batch number: 41. Radix: 51140. Registry book number: 88298., MNL. K-184. 1932. Batch number: 41. Radix:31105. Registry book number: 31405.

As the final point of the series of topics, the president of the Committee, Béla Ivády made a suggestion on the operation program of the Cartel Committee. The reason behind this was that the minister of trade expressed his opinion on the operation of the committee in his 1932 transcript (66.210/1932). The "price of the (so-called) manufactured goods circulated at a set price inflated, even in the midst of a general price reduction, however, the non-cartelled ones reduced, therefore unhealthy price formation can be presupposed at every presented cartel."[12] Therefore, the minister suggested that the only way to effectively enforce the law is by having the Cartel Committee examine every cartel ex officio on the matter of price formation. "This is why the prime cost and operational outcomes of every important cartel should be examined ex officio, and if, according to the examination, a higher than usual price can be stated, the most imperious of lawsuits should be instituted against such a cartel, even if there is no charge against it."[13] This would have widened the scope of ex officio actions of the Committee, because they usually initiated requesting an opinion from the Committee according to the complaint of an interested party.

In the following, I wish to elaborate upon the minutes of another meeting, an extremely significant one on the operation of the Cartel Committee. On its 20th October, 1933 session, the Committee discussed the suggestion of the Ministry of Agriculture in connection to the legal action against cartels containing isolation. In connection to the case, the president asked Károly Dobrovics, the secretary of the ministry to summarize past actions. Some cases reached the Cartel Committee (for example, the petroleum and liquid soluble glass) in connection to which they established clauses against non-paying customers in the cartel contracts. The minister of agriculture reached out to the minister of trade iin connection to contracts that contained clauses of isolation and exclusion. Some members of the Cartel Committee (for example, Miksa Fenyő), due to the unpreparedness of the legal practice, suggested that the Committee should not make any statement but rather suspend the decision. The Cartel Committee examined case by case which matters fall under Paragraph No. 6 of the Cartel Act. They brought up Paragraph No. 9 of the German Cartel Act as an example. The minister of agriculture suggested that the Hungarian cartel law should be modified according to Paragraph No. 9 of the German cartel act. According to the Hungarian law, public interests are in the forefront every case, and this is what the Committee primarily examines, and grievances of private interests are always secondary.

According to Miksa Fenyő's opinion, the Cartel Committee proceeded correctly in connection to specific cases to protect the attacked parties. He described the severity of the situation through the following ironic example. "I know that on one day, His Excellency, the minister of agriculture spotted a milk merchant in a doorway who sold his milk cheaper than allowed. Therefore the merchant was locked up. If boycott is practiced at such a rate on the other side, then the esteemed minister of agriculture shall rightfully say that economic life is brutalised to its fullest."[14]

Despite this, most of the committee members supported that the Committee should embrace a statement on principle. According to Farkas Heller, the vice president of the Committee, apart from the examination of individual cases, the Committee should take matters of principle into consideration, "to serve as measures […] for specific cases."[15] This is especially significant due to the fact that the available tools of enforcement could interfere with other legal directions. Such as the industry act (12th Act of 1922) which stated that everyone is free to pursue an industry in the country. Even the reasoning of the 5th Act of 1923 on banning unfair trade established that "categorical imperatives of morals should be implemented even in conflicts on the fields of trade and industry, if we do not want to dump selfishness all over sales and if we do not want to exterminate the last scrap of belief in fair prosperity on the field of commerce."[16]

According to my humble opinion, the assessment of the problem is far more complex than simply examining the industry act and the mandates of the act on unfair trade and cartels, but we should turn to judicial practices for help, as well.

In its decree No. 4936/1927, the Curia stated that a clause that compromises competition is against good morals, it is null and void. "According to financial laws, free practice of the industry, especially in cases of business transfer and not with unreasonably long time constraints, the participants shall limit via a contract with the caveat that if it severely, unethically or overly impedes another parties' occupation, even if for its own economic interests, it shall be considered morally harmful, therefore null and void."[17]

Going back to the documents of the Cartel Committee, Farkas Heller stated that he supports the Committee's statement of principle, and should say that exclusion and boycott should not be ruled out of cartel contracts in general, but only in cases where thir aim is to destroy the participants' livelihoods. In other words, the vice president made a legally sound argument that the Cartel Committee does not possess legislative powers, but could only express its opinion in a moral declaration which turn affect business life towards a rightful path.

Antal Seryl, vice attorney general of the Treasury also expressed his opinion on the topic, for the legal directorate had an important role to play in the execution of the law. According to his point of view, there is no such a cartel contract that did not contain an edict of exclusion of boycott, implicitly or otherwise.

[12] MNL. K-184. 1932. Batch number: 41. Radix: 31960, Registry book number: 92488.
[13] MNL. K-184. 1932. Batch number: 41. Radix: 31960, Registry book number: 92488.
[14] MNL. K-184. 1932. Batch number: 41. Radix: 31960, Registry book number: 92488.
[15] MNL. K-184. 1932. Batch number: 41. Radix: 31960, Registry book number: 92488.
[16] MNL. K-184. 1932. Batch number: 41. Radix: 31960, Registry book number: 92488.
[17] IV. P. 4936/1927. Curia. In: MNL. K-184. 1932. Batch number: 41. Radix: 31960, Registry book number: 92488. On cartel contracts: HOMOKINAGY, M., *Megjegyzések a kartellmagánjog történetéhez*. [Comments on the History of Cartel Private Law] Versenytükör, [Competition Mirror] special issue, Volume XII. 2016, p. 45-52.

His opinion states that such a statement of principle should be made that is acceptable by Hungarian courts.

Apart from the acceptance of the statement of principle importance, the Committee deemed the recommendation of principle to be published due to its preventative nature. Károly Balkányi (committee member) deemed this vital for a number of contemporary press articles of the time did not paint a flattering picture on the operation of the Committee.[18] In Issue No. 1 of the first volume of Cartel Survey, Baron Zsigmond Perényi (the president of the Cartel Committee) expressed his opinion on the operation of the Cartel Committee.

According to the statement of principle No. 1 of the Cartel Committee on the topic of business isolation, boycott or exclusion stated the following. "Any exclusion, isolation or boycott from business contacts is an extremely pointy weapon of industrial struggle, which greatly affects not only an individual's business success, but also his livelihood. Therefore the Cartel Committee as per Paragraph No. 6 of the 20th Act of 1931, only deems this method acceptable in view of public economy and public well-being, if there is an extremely severe and valid reason in view of public interests of its appliance. The Cartel Committee deemed it against the interests of public economy and public well-being if the reason behind the isolation reached beyond economically reasonable drawbacks for the concerned party, but is enough to destroy its economic existence. Whether or not this danger is present, the Committee wishes to examine every case separately for the time being."[19]

On its 21st September, 1934 session, the Cartel Committee discussed the inquiry against the bakers' cartel. A thought arose during the session, namely that just like with the price of brown bread at that time, 22 Fillérs, it would have been desirable to establish a lower price for a type of bread rolls, as well. This would have suited agricultural interests, as well, since wheat flour would have reached even more national consumers.

The contract of the Industry Protection Agreement of Bakers, also known as bakers' cartel was written down on 25th January, 1934, and was presented on 8th February.[20] However, the agreement only came into effect on 26th February, and as to the pastry, only on 8th March, not to mention only on 29th March as to bread. The ministry presented the cartel contract to the Committee on its next session on 28th June. The Committee decided that the contract requires no further consideration, since the Price formation Committee kept an ever vigilant eye on bread prices.[21]

The agreement was valid for our nation's capital, Budapest, and those areas which fell under the same regulations as Budapest as to clocking in and transport. However, the organisation of the bakers' cartel reached beyond these areas, and the professional bakers of other villages connected to Budapest (for example, Budakeszi and Kerepes) also joined the organisation. The point of the cartel contract was to form a unified price and establish conditions, not to mention ensuring consumer protection. On the matter of consumer protection, the contract contained strict clauses, and this was the most prevalent even in the operation of the agreement. "Luring" a customer from one member to another could only be done with the explicit permission of the consumer protection committee of the agreement, and only after the consumer protection committee's approval could another member attend to the customer's needs. The member that lost the customer received ample compensation, and if the peaceful resolution was unsuccessful, a court of arbitration judged the amount of the compensation.

The bakers' cartel organised a permanent court of arbitration that could mete out a penalty every time a contract was broken. The cartel was a relatively large operation, employed permanent inspectors who constantly checked upon the members – both on adhering to price s and customer protection.

The number of members of the agreement was around 600 in September, 1934. Due to the strict operation of the court of arbitration and the inspection in general, the members had a number of grievances, however, these were resolved peacefully.

One of the purposes of the agreement was industry rationalisation, which was attempted by buying up the shops in "*weak*" hands, and dissolving them after reaching an agreement with the creditors. According to the statement of the leaders of the agreement, they wished to downsize the number of bakeries in Budapest by at least 70 or 80 shops. The agreement unified wheat-acquisition, agreed with the mills, and the mills provided half a per cent as recompense for the bakers who granted this half a per cent to the agreement. Basically, this gave mills a chance to get rid of lending risks, for their demands were met due to the agreement. The agreement also provided both financial support and flour to smaller bakers.[22] The list of aims of the cartel contract also contained agreement with the workers, and began negotiations in order to reach a collective agreement with the employees.

As for the economic operation of the bakers' cartel, according to the minutes of the 9th August session of the great-com-

[18] MNL. K-184. 1932. Batch number: 41. Radix: 31960, Registry book number: 92488.

[19] MNL. K-184. 1932. Batch number: 41. Radix: 31960, Registry book number: 92488.

[20] Recommended readings on the topic: *Riadalom: felugrottak a zöldségárak!*, [Terror! Vegetable Prices on the Rise!] 8 Órai Ujság, [Newspaper at 8] (22) 3rd September, 1936, p. 3., *A bíróság a kereskedelmi minisztériumhoz fordul a pékkartel ügyében*, [The Court Turns to the Ministry of Trade in the Case of the Bakers' Cartel] Budapesti Hírlap, [Budapest News] (55) 7th August, 1935, p. 6., *A gazdavédelmi javaslat csak előőrse a reformoknak*, [The Farmer Protection Proposal is Only the Vanguard of Reforms] Budapesti Hírlap, [Budapest News] (55) 28th October, 1935, p. 4., *Hírek a gazdaságból*,[Economic News] Budapesti Hírlap, [Budapest News] (53) 20th October, 1933, p. 4., *Megdöbbentő adatok, a bíróság előtt a pékkartel defenzív osztályának működéséről,* [Shocking Data Reaches the Court on the Operation of the Department of Defence of the Bakers' Cartel] Az Est, [The Night] (27) 26th September, 1936, p. 3, SZABÓ, I., *Jogesetek az első magyar kartelltörvény gyakorlatából (1931)*, [Legal Precedents from the Practice of Hungary's First Cartel Act] in: Homicskó Árpád Olivér – Szuchy Róbert (szerk.): Studia in honorem Péter Miskolczi-Bodnár: 60, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, [Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law] Budapest, 2017, p. 489-502. Further material on the bakers' cartel: MNL. K-184. 1934. Registry book number: 71732.

[21] According to the No. 1934/71723 Minutes of the Cartel Committee.

[22] According to the No. 1934/71723 Minutes of the Cartel Committee.

mittee of the agreement, they established a non-accountable provisional fund of 40 000 Pengős which the board of directors had at its disposal. They received a monthly amount of 5-6 000 Pengős from membership fees, complemented by the half per cent of recompense from the mills which, taking the 1 000 train carriages of monthly flour consumption, came out at around 15 000 Pengős of monthly income.[23]

During its September 1934 session, an incident at Kispest on 27th august, 1934 also received the Cartel Committee's attention, for it fundamentally questioned the validity of the operations and the methods of the bakers' cartel.

Mrs. Gyula Balázsi, a grocer filed a document of complaint to the minister of trade. According to the statement, she attempted to acquire pastries under cartel prices several times, which she succeeded at several bakers in Budapest. Later on – according to her testimony – associates of the cartel threatened her, and demanded the sales to be at cartel prices, and later on, her suppliers in Budapest ceased their supplies. After this, the complainant purchased her pastries from a baker of Kispest, also a member of the agreement for 3 Fillérs. Yet in the morning of 27 August, when her employee attempted to carry the pastries from Kispest, four people entered the shop, one of the a baker of Kispest, the other of Budapest, the third an official of the Budapest Bakers Trade Association, and took the pastries by force, not to mention they assaulted her employee and threw her out of the store. Later on, her supplier, the baker of Kispest compensated her for the price of the pastries.

After the grocer pressed charges, even the police began an investigation. The information gathered through the investigation corroborated the charges. According to the documents of the investigation, the Budapest Bakers Trade Association sent out the committee in order to check up on early deliveries. However, according to the enquiries of the investigation, the committee also called the baker of Kispest to terms for selling under the established cartel price.

In its defence, the bakers' cartel pointed out that the Trade Association sent out the committee in order to check up on the early deliveries, and denied any order calling for the use of excessive force. Such a thing must have been the delegates' individual action.

During its session on 21st September, 1934, the Cartel Committee decided that it will establish a separate committee to examine the emerged complaints about the Bakers Trade Association.

Apart from the specific complaint in question, a number of complaints arose about the fact that the pastries made from wheat flour are also more expensive, therefore no matter how much poorer customers wished to consume these types of pastries, they could not afford them. Therefore the Cartel Committee reached out to the royal minister of trade of Hungary to order the aforementioned committee and the Price Analysing Committee as well to examine and work out a type of bread roll that is also made of wheat flour, but would be affordable to poorer classes.

Now I wish to elaborate upon the defence of the representatives of the Bakers Trade Association, submitted in accordance to the complaint that served as the foundation of the inquiry against the bakers' cartel- The incident of the Kispest bakery occupied the headlines for weeks, such as "*The Siege of Cartel-Bakers on the Small Bakers and the Community*" or "*The Terror of the Bakers' Cartel on Cheap Pastries*". This press coverage did not paint a favourable picture of the bakers' cartel, therefore in order to prove its own rightness, the association filed a petition to the minister of trade in order to present their defence.

Most importantly, the complained described the necessity of the cartel agreement's formation and the conditions of its establishment. According to their reasoning, an unavoidable force of economic necessity gave birth to their agreement. During the times of inflation after the war, a surge of new entrepreneurs flooded the baking industry, the number of industrialists at least doubled in the capitol. In the meantime, the technology of the industry began its rapid development, not to mention that the machines that multiplied productive force became readily available. They assessed that due to the rapid increase of productive forces, the baking industry is basically experiencing a new industrial revolution. However, after the period of inflation passed, and a new era of deflation and scarcity arose, the consumption of bread and pastries reduced not only relatively, but absolutely, as well. This reduction only increased after the general economic depression of the thirties, especially after the bank closures. "*Specific baking factories got stuck between the grindstones of the market's overproduction and the reduction of consumptions wished to protect themselves from destruction using the tools of the grim, suffocating competition, and flooded the market with their products under cost prices in order to at least guarantee their factories' continuous operation. This resulted in the severe crisis of the baking industry.*"[24]

According to their reasoning, the number of factories did not decrease, on the contrary, the depression became general in other ways of business. Broken bakers were replaced by other entrepreneurs who escaped there from other branches, and shortly after also became bankrupt, but in the meantime, continued harming the industry, and pulled down the rest of the still alive and well factories with their unforgiving and desperate competition. According to the statistics of the bakers' cartel, a quarter of the factories in the nation's capital changed hands annually.

In order to solve the depression, the Capitol of Budapest's Bakers Trade Association turned to the predecessor of the minister of trade with a unified and orderly plan back in March 1930 in its Petition No. 141.263/1931. K.M. in order to rationalize baking industry and to stabilize correct price formation. The suggestion wished the determination of both minimal and maximal standard prices concerning the standard products of the baking industry, via a permanent price formation committee consisting of all the interested parties from manufacturers to consumers. The motion stemmed from the viewpoint of public interest that since bread is one of the basic needs of everyday human life, the balanced and publicly accepted, correct price stipulation of bread would fundamentally contribute to the bal-

[23] According to the No. 1934/71723 Minutes of the Cartel Committee.
[24] Submission No. 954/1934 of the Industry Protection Agreement of Bakers, submitted on 10 September, 1934.

anced development of economic life, and also to the solidification of the baking industry. However, this motion did not receive any substantive action, meanwhile the new trade association law got in the way of the baking industry's efforts to solve its own economic depression via its own legally established society, the trade association. The method was provided by the 20th Act of 1931 on the agreements regulating economic competition, with its reasoning containing the ministerial statement of "*due to the enormous number of twists rooting in outside conditions, the authority of the state cannot go without any sort of organizing societal power, and should accept the clustering of entrepreneurs that aids the more balanced progression of economic life with understanding.*" [25]

The complainants explained that in its own battle for self-preservation, the baking industry is forced to accept the legal methods provided by the Cartel Act. "*Therefore, the Trade Association was established on 26th February, 1934 due to necessitating conditions and the pressure of the masses of baking industrialists struggling for survival.*" [26]

The purpose of the Bakers Trade Association was to ensure that the competition of the members of the baking industry does not get out of hand in order to protect public interests and by strictly obeying contemporary legal mandates, therefore stopping the decline of professional industrialists and ensure their respectable livelihoods. It incorporated about 600 small and middle-level baking industry companies of Budapest and the surrounding about 20 municipalities. Many large-scale factories of the Budapest Bakers Trade Association's was not a member of the cartel, although about half of the members of the Association that joined said agreement was a baking industry professional of the area. We are not talking about two institutions that were one and the same, they did not overlap, and both of them had their separate and distinct legal scope of duties that were managed by their own independently separate organisations. The Association managed their affairs via a chief committee of about 60 members via a board of directors with 18 members on a monthly basis. Printed documents were used to notify the members of the decrees.

According to the representatives of the Bakers Trade Association, the Association was not an industrial organisation established with the purpose of profiteering. "*Through the heaving billows of such an unparalleled industrial revolution, the Association attempted to rescue those smaller scale industrial individuals who, with their family members and employees, would make the masses of people without livelihoods even more of a liability.*" [27]

In their statement, the complained underlined that transparent operation was the Agreement's aim from the beginning, therefore anybody had access to price calculation, and the prices were always determined by taking the strictest examinations of the Price Analysing Committee into account and after the preliminary consent of the minister of trade. According to Paragraph No. 46 of the cartel contract, the two factors they took into account with the greatest consideration were public needs and the interests of bakery as a profession. Before price formation, the price formation committee always attempted to get in contact with supervisory authorities, and did everything in its power to determine the price with their input in mind, therefore ensuring the livelihood of professional tradesmen, and also not hurting the lawful interests of public consumption.

After this, the representatives of the bakers' cartel expressed their viewpoints in connection to the price formation of bread. On this topic, they referred to the fact that they conducted their price examination for months and under public scrutiny, and this resulted in raising the price of half whole wheat bread from 28 Fillérs to 32, and then to 34 which, according to their assessment, was not profitable even back then due to the skyrocketing flour prices. However, quite the contrary happened to the price of primary brown bread, for the minister of trade lowered and maximised the price from 25 Fillérs to 22 Fillérs by regulation for the sake of poorer costumers.

The Agreement did not force anything on distributors. According to Paragraph No. 77 of the cartel contract, during the actions of the customer protection committee, it strived to act in unison with the customer, however, if the customer tried to purchase their basic needs at another member, the customer protection committee did not have the power to forbid the customer to do so. The only thing the organisation could do is to obligate the new supplier member to pay a temporary compensation of 5 per cent to the former supplier member, but even this could be set aside if the customer's fall away way caused by some serious malpractice of the former supplier member.

The representatives of the Bakers Trade Association deemed the presentation of the aforementioned necessary in order to make the statements of the petition of complaint verifiable and appraisable.

According to the representatives of the Agreement, it is not the complainant who deserves compassion, on the contrary, she is the attacker who attempted to gain unwarranted financial advantages via unlawful methods, by attacking the basic foundations of the industry and crippling the baking industry tradesmen of the area. Their opinion stated that even her statement that the citizens of Kálvária Square and the surrounding area are mostly the poorest of the working class. They claimed this to be untrue, for the population of Kálvária Square and the surrounding area is just as mixed as the rest of our nation's capital.

According to the standpoint of the complained, there was another untrue statement, namely that in general, the wholesale price of pastries in Budapest was 3 Fillérs in general, therefore the retail price was 3 and a half Fillérs, and this situation lasted all the way to May 1934. However, they agreed that before this, pastries in Budapest were available not only for 3 and a half Fillérs, but in fact, for 2 and a half Fillérs, or even cheaper.

[25] Submission No. 954/1934 of the Industry Protection Agreement of Bakers, submitted on 10 September, 1934; submission No. 363/1911 of the H. Roy. Curia referred to the same reasoning, according to which it is not against public morals if professionals of the same industry form a coalition in order to establish a price minimum in order to avert harmful effects of unhealthy competition and also by keeping distribution prices in mind.

[26] Submission No. 954/1934 of the Industry Protection Agreement of Bakers, submitted on 10 September, 1934.

[27] Submission No. 954/1934 of the Industry Protection Agreement of Bakers, submitted on 10 September, 1934.

They also implied that as the complainant herself put it, when she sold the pastries at the same price as the rest of the retailers, and not lower than the generally accepted prices, the turnover of her other goods also decreased, saying "*it is common knowledge that customers do not split their shopping, and if they cannot find none of the sought product in a shop, they will not purchase anything else there.*"[28]

Hearing this, the complained explained that the Curia unifies such business practices under the concept of unfair competition. The complainant who, by her own admission, is not a professional baker but a grocer dealing with all sorts of provisions, did not have the right to pep up her goods turnover by undercutting the prices of bakery products. *"As the H. Roy. Curia stated, the fairness of business competition is irreconcilable with the concept of selling a product at such an unreasonably low price that it endangers the economic survival of the effected competition. According to the statement of the Roy. Curia, when a company continuously circulates products of a different industry with no profit in order to gain extra profit otherwise unavailable via ordinary competition practices in its actual business area oversteps the boundaries of the agreeable business competition"*[29]

In their petition, the complained presented that the suggestion of the complainant on the role of Secretary Vegel of the Trade Association was also falsified. The aforementioned did not entrust with any type of action. According to the information received from the secretary of the Trade Association, on the specified day he, according to his office duties, he ensured that the law forbidding earlier opening is observed, not only in front of the store in question, but also in front of others, however, he denied exchanging even a single word with the complainant, for he did not even visit the complainant's store. "*All in all, the complainant's statement on this topic is a transparent arrogance, for in order to determine which baking industry tradesmen supply the complainant, one does not need to interrogate the complainant on this matter. The supply chain of the baking industry is not an industrial secret, on the contrary, in order to respect the fairly acquired clientele, it is specifically registered in our agreement.*"[30]

The complainant knew and accepted in her complaint that her supplying companies breached contract by continuously delivering supplies to the complainant. The complainant, also affirmed that for that specific reason she made a "secret agreement" these contract-breaching treaty members.

The representatives of the Agreement made their statement on the events happened at the store of Kispest baker József Károlyi after these. They stated that they do not have any direct knowledge on what transpired there. The complained appealed to János Kleisz who, with one of the envoys of the working group at Kispest, conducted his inspection on whether or not the law on earlier opening is observed at the time of the event. They stated that János Kleisz is above reproach in every sense of the word, he is a serious professional and family man, not to mention an official of the ministry. According to Kleisz, the events at the Kispest bakery could simply be summarized as that during the inspection, they witnessed that József Károlyi began the delivery of pastries as soon as a quarter past 7, therefore they entered the store and warned the mother of József Károlyi that the delivery of pastries cannot begin before a quarter to 8. Even then, two grocery employees were in the store who attempted to pack the pastries into basket-trunks to deliver them before a quarter past 7, reasoning that the products were ordered and packed, therefore it can be delivered, not to mention that the payment was already on the counter. This is when József Károlyi entered the store, and could only hear the last sentence. János kleisz stated that he is willing to pay the price of the pastries, but objected the delivery before a quarter to 8, for it is against the law, and because of this, legal action has to be taken against Károlyi. Hearing this, József Károlyi ordered his mother not to accept the grocer's money. Therefore the grocer's employees retrieved the payment from the counter, and János Kleisz paid for the pastries from his own pocket. However, the employees still insisted on the immediate delivery of the pastries. Yet János Kleisz demanded that the pastries are his, for he paid for them, therefore the products belong to him now. As a closing statement, the representatives of the Agreement presented that they had no knowledge on the police cases mentioned in the petition of the complainant.[31]

The Cartel Committee, lead by Béla Ivándy reached a decision on 9th November, and determined the outcome of the case. During the session, the committee focused its concerns exclusively on the bakers' agreement, and made a decision in connection to this. The committee accepted the subcommittee's suggestion of not allowing the members of the trade associations to organise any sort of cartel. However, the Budapest Chamber of Trade and Industry took a completely different policy on this suggestion.

In the matters of bread and pastries, Dezső Laky LLD, vice president of the Price Analysing Committee submitted his report and proposed that for the wide range of less than well-off customers, the price of brown bread maximised at 22 Fillérs should remain unchanged, and the price of pastries should be 4 and a half Fillérs apiece, meaning a 10 per cent price reduction. In just a handful of days after the meeting, bakers immediately put the reduced prices in force. The Cartel Committee acknowledged the submission.[32]

After this, the committee discussed the report of the delegated three-member subcommittee chaired by Farkas Heller submitted on the operation of the bakers' cartel. In order to ensure the eliminate misconducts and enforce public interests, the committee made the following suggestions:

"*The criminal action currently in progress should be concerned about the retribution of the Kispest violence, but apart from this, any office-*

[28] Submission No. 954/1934 of the Industry Protection Agreement of Bakers, submitted on 10 September, 1934.
[29] Submission No. 954/1934 of the Industry Protection Agreement of Bakers, submitted on 10 September, 1934.
[30] Submission No. 954/1934 of the Industry Protection Agreement of Bakers, submitted on 10 September, 1934.
[31] According to the submission No. 954/1934 of the Industry Protection Agreement of Bakers, submitted on 10th September, 1934.
[32] According to the 10th November, 1934 issue of the periodical Magyarország [Hungary].

holder conduction actions against public interests should be removed from office, and if they are also the employees of the trade association, should face disciplinary action. Employees of the trade association should not be the employees of the baking industry's protection agreement, any cartel regulations and verdicts of courts of arbitrations should be presented immediately and closely observed in order to stop the development of actions against the law and public interests." [33] The minister of trade accepted the suggestion of the Cartel Committee, and arranged its immediate implementation.

The government created a supervisory organisation that had a significant effect on the operation of cartels. Even the Cartel Court could appeal to the Cartel Committee for its opinion, if it was deemed necessary. However, by recommending the aforementioned principle, the Cartel Committee in a sense developed this authority even further, for it wished to establish rules on a fundamental level in order to establish a unified legal practice for cartels. In order to create this legal unity, only the Cartel Court could act in cartel cases as the top ranking specialized court among the orderly courts organised within the framework of the Curia. However, in order to established a unified legal practice by taking this decree, it is undeniable that the Cartel Committee practiced a legal authority only matched by our upper-level courts, such as the Curia or the Administrative Court. The Cartel Committee also played a significant part in practice via its professional opinions on cartel matters. This is why it is vital to analyse the rest of the archival cases, among which the case of the Bakers Cartel stood out due to its social backlash. This is the reason why the Cartel Committee, alongside the Cartel Court could become one of the most influential participant of cartel cases in the 20th Century.

[33] According to the 10th November, 1934 issue of the periodical Magyarország [Hungary].

The "Hungaricum" of the Crusader Orders: the Order of St Stephen

Orsolya Falus[*]

Abstract

It was in the early 1970 s that historiography "discovered" the Order of St Stephen, the "Stephanites", the canonical order of the Hospitaller Crusaders of St Stephen, founded by King Géza II of Hungary in the 1150s in honour of King St Stephen of Hungary (977-1038), crowned:, modelled on the European knightly orders already in existence at the time. The first archaeological evidence of the existence of the order was found in 1959 during an archaeological excavation in the Danube Canyon near Esztergom. The study examines the circumstances of the founding of the Order of the Stephanites, the administrative activities of the knights in "locus credibilis authenticus", and their role in Árpád-era Hungary.

Keywords: *St Stephen; Stephanites; hospitaller crusaders; knights; administration; locus credibilis authenticus.*

1. The charitable institutions of the Arpad-era [1]

The first charitable institutions in Hungary date back to the time of the Hungarian Church, as sources about hospitals in the country date back to the reign of Prince Géza (r. 972-997) and his son King Saint Stephen (r. 997-1038). At the call of Géza and then of St Stephen, the influx of Western Christian missionaries and monastic orders began in the last third of the 10th century.[2]

The knightly and monastic orders that arrived in Hungary at the beginning of the 11th century settled almost exclusively along the Danube and in the Transdanubian region. This is probably due to the fact that the armies of the Crusades arrived in Hungary from this direction, and also, because the houses of these orders in Hungary were in close contact with their brothers in Jerusalem until the fall of the Holy Land, and the pilgrim route leading to them left the territory of the Kingdom of Hungary at Nándorfehérvár /now: Belgrade, capital of Serbia/. In Transylvania /now: Romania/, the Highlands /now in Slovakia/, the Great Hungarian Plain, and Banat /now in Romania, Serbia and Hungary/, therefore, monasteries and their associated hospitals appeared only at the end of the 11th century and after. In the first decades of the 11th century, the first monastic hospitals were established in Pécsvárad, Pannonhalma, Bakonybél, and Esztergom.[3] Also in Kolozsvár /now: Cluj Napoca, Romania/, the xenodochium [4] was constructed at the end of the 11th century, which continuously received patients until the last third of the 19th century.[5]

Picture 1. Early medieval xenodochium [6]

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1 The first ruling dynasty of Hungary from 1000 to 1301, named after their ancestor, Árpád, head of the confederation of the Hungarian tribes at the turn of the 9th and 10th centuries.

2 KORBULY, GY., Egészségápolás (Healthcare.) In: DOMANOVSZKY, S. - BALLANYI, GY. - MÁLYUSZ, E. - SZENTPÉTERY, I. - VARJÚ, E. (eds.), *Magyar Művelődéstörténet. Ósműveltség és középkori kultúra*. Budapest, 1990, p. 1381-1382.

3 JÓZSA, L., A kórházi ápolás kialakulása a 11-14. századi Magyarországon. (The development of hospital care in 11th-14th century Hungary.) In: *Debreceni Szemle*, vol. 16, Nr. 1, 2008, p. 11.

4 xenodochium (from the Greek *xenos* 'stranger' and *dekhomai* 'to receive') See: DIÓS, I. - VICZIÁN, J. (eds.), *Magyar Katolikus Lexikon.* Budapest, 2007.

5 JAKAB, E., *Kolozsvár története*. (History of Kolozsvár.) Kolozsvár, 1870, p. 303–310.

6 See:https://hyperleap.com/topic/Xenodochium (Accessed: June 30, 2022)

The first Hungarian physicians were the Benedictines, for whom St Benedict himself prescribed the care of the sick (*cura infirmorum*) in his regulation. Their mother monastery, Monte Cassino, is inseparable from the name of Constantinus Africanus (c. 1020 - 1087), who made the intellectual heritage of famous physicians such as Ali Abbas, Hippocrates, Galen, Theophilus, Philalaetes and Isaac Judaeus available to the Western world through his Arabic translations.[7] In 996 the Benedictines also modelled the organisation of their first monastery in Hungary, founded in Pannonhalma, on the mother monastery of Montecassino.[8] The first monastery of the Order in Hungary was founded by our King Saint Stephen in Pécsvárad in 1002. The hospital, which was built alongside the monastery, was soon equipped with a water supply system, unlike, for example, the palace in Buda Castle, whose first water supply system was only built centuries later, between 1414 and 1416.[9] The staff of the Pécsvárad monastery also included 4 nurses and 6 bath attendants.[10]

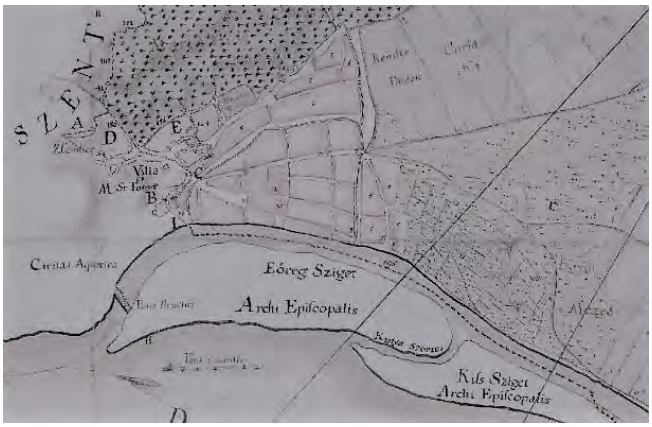
Picture 2. The old church of Pécsvárad Abbey [11]

Most of the monasteries were built in the immediate vicinity of medicinal and thermal springs precisely because of the need for patient care. There is evidence of the accommodation of "guests" (hospes) who fell ill while travelling in the monasteries of Lébény, Pannonhalma and Pécsvárad from the early 13th century.[12] Soon not only the king, but also wealthy nobles and even noblewomen with wealth were happy to make donations to these orders.[13] The Benedictines were soon followed by other nursing orders, such as the Cistercians, the Premonstratensians, the Carthusians, the Dominicans and the Franciscans, who settled in the 12th century. At the same time as the crusades, the knightly orders, which lived under the monastic rule, also became involved - - including the only Order of Crusader Knights founded in Hungary: the Stephanites.

2. Archaeological finds in the footsteps of the Stephanites

It was in the early 1970s that historiography "discovered" the Stephanites, the canonical order of the hospitaller crusaders of St Stephen, founded by King Géza II of Hungary (r. 1141-1162) in the 1150s in honour of King St Stephen, modelled on the European knightly orders already in existence at the time.

In 1959, during an archaeological field survey in the Danube canyon, pot fragments dating from the 11th to the 14th centuries were collected on low hillsides about 400-600 metres long on both sides of the road from the flood protection embankment near the calf field in a S and NW direction, indicating the site of a large medieval settlement.[14]



Picture 3. Detail of an eastern map showing Esztergom as a free royal town, and the then two islands of Prímás Island, Kender Lands, Curia, Borjúmező [15]

[7] CZAGÁNY, I., Az európai orvos- és gyógyszerésztudomány feudalizmuskori befolyása a magyarországi orvoslásra. (The feudal influence of European medical and pharmaceutical science on Hungarian medicine.) In: *Orvostörténeti Közlemények*, vol. 77, Nr. 1, 1976, p. 68.

[8] Ibid. p. 70.

[9] ZOLNAY, L., Buda középkori vízművei. (Medieval waterworks of Buda.) In: *Történelmi Szemle,* vol. 4, Nr. 1-3, 1961, p. 34-37.

[10] KORBULY, *Egészségápolás*, cit. p. 359.

[11] Photo: SZELÉNYI, K. See: BALÁZS, GY. - SZELÉNYI, K., *Magyarok. Egy európai nemzet születése.* (Hungarians. The birth of a European nation.) Budapest, 1990, p. 26. Digitized: http://mek.oszk.hu/01900/01992/html/index581.html (Accessed: September 8, 2020)

[12] SOMOGYI, Z., A középkori Magyarország szegényügye. (Poverty in medieval Hungary.) In: *Palaestra Cala Sanctiana. A Piaristák doktori értekezései az 1932. évtől,* vol. 37, Budapest, 1941, p. 15.

[13] BÉLI, G., Women's Acquisition of Property during the Era of the Arpad Dynasty in Hungary. In: BÉLI, G. - HERGER, CS. - PERES, ZS. (eds.), *Jogtörténeti tanulmányok*, vol. X, Pécs, 2009, p. 45.

[14] TORMA, I., Komárom megye régészeti topográfiája: Esztergom és a dorogi járás. (The archaeological topography of Komárom county: Esztergom and the district of Dorog.) In: TORMA, I. (ed.), *Magyarország régészeti topográfiája*. Budapest, 1979, p. 182. Digitized: Magyar Nemzeti Múzeum Régészeti Adatbázis. (Hungarian National Museum Archaeology Database.) https://archeodatabase.hnm.hu/hu/node/22183 (Accessed: September 7, 2020)

[15] *Országos Levéltár.* (Hungarian National Archives.) http://www.szeretgom.hu/content/72091--kiss-esztergom-falu-terve-es-egyeb-terkep-ritkasagok (Accessed: January 31, 2014)

Graves were also found in the area during an excavation in 1913. These were identified by Ferenc Pál Sinka as the cemetery of the Order of St Lazarus.[16] The graves, covered with stone slabs, are indeed indicative of a cemetery around an Arpad-period church, but they are located about 500 metres from the supposed site of the St Lazarus convent, so they probably did not belong to its cemetery. The burial site and the above-mentioned settlement traces can be identified with the Arpad-age settlement of Szentistván (*possesio seu villa sancti Stephani*),[17] the written record of which is known only from the contents of a single frontier charter of 1272.[18] According to the charter, Szentistván is the property of the Crusaders of Szentkirály village, which lies between villages Szentistvánkirály and Szentpál. This charter was issued by the Crusaders of St Stephen themselves. It also reveals that at that time there were two villages called Szentistván, of which the one indicated in the charter merged with Szentkirály in later years because of the same owner and geographical proximity: *„[…] ab altera […] parte […] metis possesionum ecclesie nostre, videlicet sancti Stephani, prope villam sancti Pauli, ac Sancti Stephani regis et terre, Byele vocate[…]"*[19] Paragraphs (1) and (2) of Article 8 of Decree No 17/2004 (VIII. 27.) of the Hungarian National Council of Ministers on the declaration of certain archaeological sites as protected sites and the designation of archaeological protection zones - Act LXIV of 2001 on the Protection of Cultural Heritage, Act No 15. § (1)-(2) of the Act of 15th December LXV of the Cultural Heritage Act, the prehistoric and Arpad-age settlement identified at the Szentgyörgymező-Dunapart (Danube bank) site in Esztergom, the Arpad-age church, late medieval enclosure, 11th-12th century and Turkish tombs identified at the Szentkirály site in Esztergom, and the remains of the monastery and church of the Order of the Stephanite Knights founded by King Géza II. The aim of archaeological protection is to preserve the archaeological treasures lying below the surface of the earth and to ensure that they can be explored.

The other village of Szentkirály, which is not considered to be the place of the mother convent of the Stephanite order, was probably the former Széplak, which was also given to the Stephanites by King Géza II. It was then called Szentistván. It was situated on the Danube, on the right bank of the river. Across from the village, on the north bank of the Danube, was Szép (*Seep*), the archbishop's estate, named after Széplak. In 1215, King Andrew II (r. 1205 – 1235) ordered the archbishop and the crusaders to jointly employ ferrymen and force merchants crossing the river to return to the town and pay tolls to the chapter.[20]

Szentkirály (formerly known as *Abony, Obon, S. Rex*) was originally a royal estate, which belonged to the ecclesiastical-administrative territory of the bishopric of Veszprém. Its church is mentioned several times in the 13th-14th centuries.[21] The village was donated to the Crusaders by King Géza II. From then on, it was called the village of King St Stephen, or Szentkirály (mentioned in contemporary charters also as: *villa Sancti Stephani Regis; villa Sancti regis; Zent Király; Zenth-Kyral; Szen Király*).[22] The settlement was a port on the Danube for the Stephanites, where 12 ships are mentioned in 1181. The area on the Little Danube is still called St. Királyrét. It was the site of the Order's mother convent, founded around 1150 and held until about 1440.[23]

Until the Tatar invasion, Esztergom was much larger than the present city. The area of the former Szentkirály is still uninhabited, and only the Szentkirály vineyard preserves its name. On the bank of the Danube there was a small hill, which was traditionally considered to be the site of a church. In 1895-96, the archaeologist Lajos Némethy excavated this ruin. From his reports we know that in the Árpád period there was a 20-metre-wide, 36-metre-long, three-naved basilica with a narthex and two towers on its western façade.[24] It was in this church that King Andrew II renewed the Treaty of Bereg in 1133.[25]

These medieval ruins have long been regarded by historians as the remains of the church, convent and hospital *("conventus Cruciferum domus hospitalis Ecclesiae Sancti Stephani Regis de Strigonio"*) of the Esztergom-Sentkirály Crusaders, named after King St Stephen, who were considered to be the same as the Johannite knights. The scholarly achievement of the second half of the 20th century was to prove that the Stephanite hospitaller crusaders of Esztergom were not identical with the Johannites, but had been functioning as a separate canonical order from the time of King Géza II. In the literature on the Hungarian Middle Ages, the separate Stephanite order has been mentioned only since the 1970s.[26] György Győrffy's research has made

[16] SINKA, F. P., A jánoslovagok temploma és rendháza Esztergom mellett. (The church and the monastery of the Knights of St John near Esztergom.) In: *Esztergom Évlapjai*, 1926, p. 25-39.
[17] TORMA, *Komárom megye régészeti topográfiája: Esztergom és a dorogi járás,* cit. p. 182.
[18] KNAUZ, N. (ed.) *Monumenta Ecclesiae Strigoniensis*. vol. I-II, (MSI), p. 599-601.
[19] MSI, p. 599.
[20] MSI, p. 207., See also: SZENTPÉTERY, I., *Az Árpád-kori királyok okleveleinek kritikai jegyzéke*. (A critical index of the charters of the Arpad-dinasty kings.) Budapest, 1930, reg. 102., GYŐRFFY, GY., *Az Árpád-kori Magyarország történeti földrajza*. (The historical geography of Arpad-era Hungary.) Budapest, 1987, p. 281., 311.
[21] *Monumenta Vaticana historiam regni Hungariae illustrantia*. Budapest, 1885 (MREV), p. 16., 20., 21., 49., 50., 379., 320-322.
[22] TORMA, *Komárom megye régészeti topográfiája: Esztergom és a dorogi járás,* cit. p. 183.
[23] BOROVICZÉNYI, K-GY., Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről. (Studies on the history of the Stephanites, a medieval Hungarian hospitaller order.) In: *Orvostörténeti Közlemények*, vol. 26, Nr. 133-140, 1991-92, p. 133-140., GYŐRFFY, *Az Árpád-kori Magyarország történeti földrajza*, cit. p. 211-217., 277-282.
[24] NÉMETHY, L., Tudományos czélú ásatás az esztergomi határban, a szentkirályi földeken. (Scientific excavation on the border of Esztergom, on the lands of Szentkirály.) In: RÓZSA, V. (ed.), *Az Esztergom-vidéki Régészeti és Történelmi Társulat első évkönyve.* Esztergom, 1896, p. 33-54., 114-118.
[25] FALUS, O., *Ispotályos keresztes lovagrendek az Árpád-kori Magyarországon*. (Hospitaller crusader orders in Arpad-era Hungary.) Pécs, 2015, p. 102.
[26] GYŐRFFY, GY., *István király és műve*. (King Stephen and his works.) Budapest, 1977, p. 303., 319., 382., 563.

it possible to learn about the history of the order from this time onwards, based on the content of original documents.[27] Győrffy, analysing the "intitulations" (the name of the issuer of the document) of the charters, pointed to the fact that the charters of the *"cruciferi sancti refis Stephani de Strigonio"* never contained a reference to St John or the city of Jerusalem, as in the Johannite charters.

3. The foundation and operation of the Order of St Stephen

The Crusaders of Esztergom-Sentkirály were established as a separate canonical hospitaller congregation and functioned until the 16th century.[28] Demjén Fuxhoffer was looking for the site of the convent at the foot of St Thomas' Hill,[29] but its true location was determined by Nándor Knauz.[30] According to Ágoston Boltizsár, the convent was founded around 1150,[31] due to Ede Reiszig, however, it was between 1147 and 1151.[32]

The starting date of 1147 essentially coincides with the appearance of the Crusader orders in Hungary. In the summer of 1147, the armies of the Second Crusade marched through the territory of the Hungarian Kingdom under the leadership of King Louis VII of France (r. 1137 – 1180), who had established such a good relationship with King Géza II that he even became the godfather of his child. Among the crusaders were a number of Knights Templar and Johannite Knights, who became acquainted with Hungary and established convents here. It was probably under the influence of the crusaders who were passing through and modelled on them that Géza II organised the Order of the Stephanites. The original name of the Order of St Stephen was therefore *Cruciferi Sancti Stephani Regis*, i.e. the Crusader Knights of King St Stephen.[33] The name goes back to King St Stephen, who founded pilgrim shelters and hermitages in Jerusalem between 1017 and 1018, and also provided them with estates. In 1135, a Hungarian noble lady named Petronilla also bought two neighbouring houses in Jerusalem for 400 Byzantine gold coins for the purpose of a hospital. The sale was witnessed by three Hungarians: the hermit Kozma and his companion Boniface, and Symeon, a Hungarian archdeacon.[34] The connection between these houses and the foundation of King Géza II is assumed in the literature, but not proven.[35]

On March 26, 1187, after the final fall of Jerusalem, Pope Urban III (r. 1185-1187) confirmed the order with his bull "*Religiosa loca*" and granted it privileges and exemptions.

Picture 4. Portrait of Pope Urban III, bust-length in profile to left, wearing tiara and cope with morse, within roundel in rectangular frame, his coat of arms below. Engraving[36]

The text of the charter clearly states that the Order was founded by King Géza II: *„Geyza quondam rex Hungarorum Jerosolimis, sicut in eius scripto autentico continetur, ecclesiam in honorem sancti stephani regis fecisset de suis et suorum principum elemosinis pietatis intuitu construi et domum etiam Hospitalem, copiosam terram ad construendas domos et ad preparandas officinas necessarias strignij contulisset…"* The original of the papal bulla is in the archives of the Archbishop of Esztergom.[37]

The most important of the exemptions granted to the Stephanites by the founding charter was that they were directly subject to the Pope, and thus exempt from paying church tithes locally. The Stephanites paid an annual tax to the Holy See. In the *Liber Censuum*, the official tax book of the Apostolic Camera, which lists only churches dependent on the Pope, the Johannite convent of Székesfehérvár, the Stephanite hospital of Esztergom and the French abbey of Somogyvár are listed from

[27] GYŐRFFY, *Az Árpád-kori Magyarország történeti földrajza*, cit. p. 280-283.
[28] MEZEY, L., Székesfehérvár egyházi intézményei a középkorban. (The ecclesiastical institutions of Székesfehérvár in the Middle Ages.) In: KRALOVÁNSZKY, A. - FITZ, J. (eds.), *Székesfehérvár Évszázadai*. Székesfehérvár, 1972, p. 31., GYŐRFFY, GY., Budapest története az Árpád-korban. (The history of Budapest in the Arpad-era.) In: HORVÁTH, M. (ed.), *Budapest története*. Budapest, 1973, p. 272., 315., 345.
[29] TORMA, *Komárom megye régészeti topográfiája: Esztergom és a dorogi járás,* cit. p. 186.
[30] KNAUZ, N., A jánoslovagok Esztergomban. (The Knights of St John in Esztergom.) In: *Magyar Sion,* vol. 3, 1867, p. 641-665.
[31] BOLTIZSÁR, Á., A keresztes lovagok regestái hazánkban az árpádkorszak alatt. (The documents of the crusaders in our country during the Árpád-era.) In: *Magyar Sion*, vol. 1, 1863, p. 58-62.
[32] REISZIG, E., *A jeruzsálemi Szent János lovagrend Magyarországon*. (The Order of St John of Jerusalem in Hungary.) Budapest, 1925, p. 42.
[33] FALUS, O., Szent István esztergomi kereszteseinek rendje: a stefaniták. (The Crusader Order of St Stephen in Esztergom: the Stephanites.) In: *Jogtörténeti Szemle*, vol. 15, Nr. 1, 2013, p. 38-43.
[34] WENCZEL, G. (ed.), *Árpádkori új okmánytár. Codex Diplomaticus Arpadianus Continuatus*. Pest, 1860–1874 (ÁÚO), p. 52.
[35] BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 9.
[36] ROSSI, G. G., *Chronologia Summorum Romanorum Pontificum*. Rome, 1675. British Museum. Registration number: 1870,0514.143.B See: https://www.britishmuseum.org/collection/term/BIOG141025 (Accessed: June 30, 2022)
[37] MSI, p. 132-133., SZENTPÉTERY, *Az Árpád-kori királyok okleveleinek kritikai jegyzéke*, cit. reg. 100.

Hungary in 1192. The tax rate was one Byzantine gold coins per year.[38]

The Stephanites followed the regulation of St Augustine of Hippo. The grandmaster of the order was the head of the Esztergom convent, the rector of the hospital, and later the prior of the house of Budafelhévíz (mentioned also as: *Forum Geysa, Héviz, Budafelhévíz, Calida aqua*), situated at the Buda side of the present-day Margaret Bridge. It was originally a market town, probably founded by King Géza I (r. 1074-1077). That is why it was originally called Gézavására (In English: Géza's Market). After the foundation of the Order of the Stephanites, it is recorded as a separate priory in 1245 under the name *Calida aquae*. Its existence in this form is documented until 1439. The convent of Felhévíz also maintained an elementary school. The oldest authentic deed of the house of Budafelhévíz, which is preserved in the Hungarian National Archives, dates back to 1278, the last one to 1348.[39]

Picture 5. The seal of the St Stephen Hospital of Esztergom, 1258[40]

The Order maintained a convent also in the Holy Land until the fall of Acre in 1291. With the renewed and, for a long time, permanent loss of Jerusalem, the Hungarian hospital of Jerusalem was lost, as was the motherhouse of the other hospitaller crusader orders. However, the order continued to function even after the end of its nursing activity in the Holy Land. While the Johannites moved their headquarters to Rhodes and then to Malta, the motherhouse of the Stephanites naturally remained the central house in Esztergom. The order flourished and its branches multiplied. The Stephanites also owned the church of the order in Karcsa, in the middle of the Bodrog region, which still stands today.

Picture 6. The D-K facade of the former Stephanite now Calvinist church in Karcsa /Photo: Falus, O., 2021/

Torda city belonged to the Stephanites as well, and certainly the crusaders gave the name to the field of the Keresztes-mező (In English: Crusader-meadow) near Torda. For a long time, the Order was also responsible for the operation of the Lower Danube fleet and the guarding of the southern border of the country.[41]

The history of the Stephanites' houses in Esztergom and Felhévíz was covered in detail by Knauz[42], Némethy[43] and Reiszig[44]. They were only wrong in classifying the Stephanites as Johannites, but the further conclusions they drew from their research are correct.[45] In the middle of the 15th century, the houses of the Stephanites were transformed into secular chapters, which no longer had nursing functions.

4. Charters of the Stephanites. "Locus credibilis auhenticus"

Apart from running the hospitals, the convent of the Stephanites in Esztergom and Budafelhévíz also played an important

[38] BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 9.
[39] Ibid. p. 22-23.
[40] MSI, p. 333., See: https://hu.wikibooks.org/w/index.php?curid=39137 (Accessed: September 7, 2020)
[41] See: www. stefanitalovagrend.communio.hu (Accessed: September 8, 2020)
[42] KNAUZ, N., Az esztergomi szerzetesek története. (History of the monks of Esztergom.) In: *Pauli Szent Vincze lányai meghonosítva Esztergomban Nagykéri Scitovszky János bíbornok érsek által 1865. évben*. Esztergom, 1865, p. 23., 43-44., 49-59.
[43] NÉMETHY, *Tudományos czélú ásatás az esztergomi határban, a szentkirályi földeken*, cit. p. 33-54., 114-118.
[44] REISZIG, *A jeruzsálemi Szent János lovagrend Magyarországon*, cit. p. 42.
[45] BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 28.

role as *locus credibilis authenticus*. The locus credibilis authenticus was the name given to the ecclesiastical bodies that had the right to issue a public charter, i.e. a certified seal. The chancery and the monastic convent were such places of authenticity. The study of the activities of locus credibilis authenticus has long been a popular topic in Hungarian legal history, perhaps primarily because it falls within the scope of the history of culture in the narrower sense of the term, in connection with literacy, and also because it is an institution that grew out of Hungarian roots and is undoubtedly a product of the development of Hungarian law. In the centuries of the Middle Ages, the phenomenon of ecclesiastical bodies issuing a document under their own seal in the affairs of others, which would have been generally recognised, was completely unknown elsewhere in Europe.[46]

In addition to running hospitals, the convent of the Stephanites in Esztergom and Budafelhévíz also played an important role as a locus credibilis authenticus – as "authentication offices". This is attested to by numerous documents issued here.[47] Károly-György Boroviczényi analyses the role and place of the Order in the contemporary issuance of charters by analysing the intitulations and inscriptions of 49 documents issued by the "authentication offices" of the Stephanites.[48] On the basis of the chronological distribution of the Stephanite documents that he processed and evaluated,[49] he noticed that their number dwindled considerably after the middle of the 14th century. In his opinion, this could be explained primarily by the fact that King Louis the Great (r. 1342-1382) took away their seal of authenticity and they could no longer issue documents of public authenticity. In his opinion, the reason for this measure may be linked to the great plague of 1347-49, as the number of some convents and chapters was reduced to less than the required 8.[50]

Due to the illiteracy of the time, negligible information is available on the first decades of the history of the Stephanites. Their main activity was probably the operation of their hospitals Esztergom and Jerusalem, and after the fall of the latter they had to organise the move of their Order to Acre. The 13th century was the heyday of the Order. The second copy of the Golden Bull (1222) was deposited with the crusaders of the Holy King, in accordance with Article 34, as a clear testimony to their prestige.[51]

Picture 7. Reconstruction of the Golden Bull in the Hungarian Parliament Museum[52]

In 1230, in a lawsuit between the Abbey of Pannonhalma and the Chapter of Veszprém, the verdict was given *"… apud Hospitali sancti Regis in Strigonio in Capella s Alexii"*.[53]

When King Andrew II, together with his sons, reiterated the agreement at Bereg (oath of Bereg) concluded with the papal prelate Jacobus on 20 August 1233, and put it in writing and affixed his golden seal, he proclaimed it solemnly in the presence of the sovereigns in the convent of the Stephanites.[54] The renewed convention *("… Acta sunt hec in hospitali Cruciferorum sancti Regis de Strigonio…"*) is preserved in the Primate's Archives in Esztergom[55], as is the original copy of the Bereg treaty.[56] In 1238, a charter of King Béla IV (r. 1235-1270) mentions that the Esztergom public baths, built by order of his grandmother, Queen Anne, belonged to the Crusaders of Esztergom.[57]

The Stephanites also took part in the Battle of Mohi (Battle of Sajó River) in 1241 against the Mongols, along with the other knightly orders, and must have suffered heavy losses. Nevertheless, the Order survived the Mongol invasion successfully, since when Béla IV moved their seat to Buda, the Stephanites built a house next to the church in Felhévíz, which had existed since their foundation, probably for political reasons, so that they would have a representation in the vicinity of the royal court. The first mention of the Order of Buda-Felhéviz is found in a papal bull of 1248.[58]

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46 FALUS, *Ispotályos keresztes lovagrendek az Árpád-kori Magyarországon*, cit. p. 42.
47 KNAUZ, *Az esztergomi szerzetesek története,* cit. p. 23., 43-44., 49-59.
48 BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 10-13.
49 Ibid. p. 28-30., 32.
50 FALUS, *Szent István esztergomi kereszteseinek rendje: a stefaniták*, cit. p. 99-106.
51 *Corpus Juris Hungarici. Laws of the years 1000-1526*. Translated and annotated by NAGY, GY. The laws of 1000-1526 are accompanied by explanations and references by MÁRKUS, D., Budapest, 1899, p. 142-143.
52 Photo: BENCZE-KOVÁCS, GY. *Hungarian Parliament Museum*. See: https://www.parlament.hu/web/orszaggyulesi-muzeum/kozepkor-aranybulla (Accessed: September 8, 2020)
53 MSI, p. 307.
54 BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 29.
55 MSI, p. 297.
56 Ibid. p. 282-297.
57 Ibid. p. 326., KNAUZ, *Az esztergomi szerzetesek története,* cit. p. 37.
58 BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 30.

Picture 8. A knight with a pot of medicine in the 13th century, on the seal of the Budafelhévíz convent[59]

According to a charter dated 27 May 1254[60] King Béla IV entrusted the locus credibilis authenticus of the Stephanite house of Esztergom to testify in a land trial. According to the facts, the king had reclaimed the land of Bálint's son György in the village of Vngyeney, because György had been sentenced to hang (*„qui ob crimen furti suspendio patibuli uitain finiuit"*) and to forfeiture of property for the crime of theft. The king donated the estate to the monastery of St. Michael in Nyúl Island of the Premontreans (*„Ecclesie Sancti Michaelis site in insula nostra Budensi, in qua fratres Ordinis Premonstratensis commorantur, contulissemus perpetuo possidendam*"). But Aba, from the Apor clan, sued the monks, claiming that the land belonged to his mother-in-law by right of dos. (*„Aba de genere Opovr dictos fratres traxit in causam, dicens iam dictam terram ad socrum suam racione dotis pertinere"*). The plaintiff, however, had not proved anything, so it would have been sufficient, according to the procedural law of the time, to sentence the plaintiff to perpetual silence (*„silencium perpetuum"*) - in today's terms: dismiss the action without issuing a summons. However, the King, probably in view of the ecclesiastical character of the defendant, entrusted the investigation of the case to Brother James, the master of the Esztergom hospital (*„Jacobi Magistri Domus Hospitalis Sancti Regis de Strigonio"*). The judgment stated that the king had granted the estate to the Premonstratensian monks for perpetual confirmation and confirmed this with his seal.

The firmness of the Stephanites is demonstrated by one of their famous lawsuits. In 1294 the Stephanites destroyed the church of St Andrew of the former Abony in the village of Szentkirály. The destruction was caused by a dispute between the order and the bishopric of Veszprém over the tithe of the church. Abony-Szentkirály was located in the territory of the Bishopric of Veszprém. At the request of Benedict, Bishop of Veszprém, Pope Boniface VIII (r. 1295-1303) entrusted the abbot of Zirc with the task of investigating the case and passing judgement. In 1328, despite their appeal, the Stephanites were excommunicated by the Church for the destruction of the church, which was pronounced by the parish priest of Esztergom on the abbot's order. The litigants finally reached a settlement on 19 August 1329, when Henry, Bishop of Veszprém and royal chancellor, reached an agreement with James, the Stefanite master of Esztergom, before the bishop of Csanád.[61] The deed of settlement refers to the destroyed church as *„[…] ecclesia […] sancti Andree circa eandem villam sancti regis Stephani quondam existencium, iam diruta et destructa"*.[62]

In the course of researching the history of the Johannite Order, I found two documents in the archives of the Cistercian monk Konstantin Horváth, among the documents related to the lawsuit.[63] One dated 28 July 1295. According to its contents, Pope Boniface VIII sends the Abbot of Zirc to judge the trial between the Bishop of Veszprém and the Knights of St Stephen for the destruction of the Church of St Andrew,[64] and the other was issued on 25 May 1296. In it, the abbot James of Zirc excommunicates the Knights of St John of Esztergom for destroying the church of St Andrew.[65] Following the research of Károly-György Boroviczényi, it can now be established that the knights mentioned in the documents were not in fact the „Knights of St John", but the Stephanites of Esztergom. However, the Stephanites did not make much use of the right of tithing, since the church was probably not rebuilt. This is confirmed by the fact that no finds from its cemetery dating back to the 12th or 13th century have been found during excavations.[66]

The last known charter of the Stephanite convent of Esztergom was issued in 1353. The latest known charter mentioning the Order is dated 13 January 1439. The document, issued by the Buda judge royal István Báthori, settled the customs matters of the villages Kakat and Szentkirály between the Stephanites and the Esztergom Chapter.[67]

After the Battle of Mohács (29 August, 1526) between the Hungarian Kingdom and the Ottoman Empire, led by Suleiman the Magnificent, the Order ceased to exist. The archdiocese managed to take all the documents from Esztergom, including

[59] *Hungarian National Archives*. The seal was probably made immediately after the Mongol invasion, with the inscription "*S[IGILLVM] AT[E]R[NITAT]IS DOMVS HOSPITALIS S[AN]C[T]I: REGIS HVNGARIAE*." Charter of 1290. See: http://mek.oszk.hu/09100/09175/html/11.html#note3 (Accessed: September 9, 2020)

[60] ÁÚO, p. 244.

[61] BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 36.

[62] MSI, p. 317-318.

[63] HORVÁTH, K., *Zirc története.* (The history of Zirc.) Veszprém, 1930.

[64] MREV, II. k. 16.

[65] FEJÉR, G., *Codex diplomaticus Hungariae ecclesiasticus ac civilis.* vol. I-XI. Budae, 1829-1844 (FCD), IX/7., p. 718—20.

[66] *Esztergomi Balassa Bálint Múzeum Adattára, Horváth István terepbejárási, leletmentési jegyzetei.* (Archives of the Bálint Balassa Museum in Esztergom, fieldwork and finds rescue notes of István Horváth) vol. 3, 1963-1972. In: TORMA, I. (ed.), *Magyarország régészeti topográfiája*. Budapest, 1979, p. 182. Digitized: Magyar Nemzeti Múzeum Régészeti Adatbázis. (Hungarian National Museum Archaeology Database.) https://archeodatabase.hnm.hu/hu/node/22183 (Accessed: September 7, 2020) p. 185.

[67] BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 37.

those relating to the Stephanites, to Nagyszombat. This is why the original bull of Pope Urban III, which was slightly damaged during the Mongol invasion, has survived in the archdiocesan archives.

5. The afterlife of the memory of St Stephen and the Stephanite Order

5.1 The Royal Hungarian Order of St Stephen

The memory and respect of St Stephen, however, lived on in even later centuries despite of the termination of the Order. On 5 May 1764, Maria Theresa, Queen of Hungary (r. 1741-1780) founded the Royal Hungarian Order of St. Stephen (*Germ. Königlich Ungarischer Sankt Stephans-Orden, Lat. Insignis Ordo Sancti Stephani Regis Hungariae Apostolici*). Its Grand Master was the reigning King of Hungary, its Prelate the Archbishop of Esztergom in power. The members of the Order, appointed by the king, were bound to honour King St Stephen and to render special service to their country and the Emperor. Between 1764-1918 and 1938-44, the Order conferred 3 classes: the Grand Cross, the Middle Cross and the Low Cross, which was the highest civil decoration in our country until 1918. The post of Grand Master was taken over by Governor Miklós Horthy in 1938. The Order was finally dissolved in 1946.[68]

Picture 9. The insignia of the Royal Hungarian Order of Saint Stephen[69]

We have no information on how much Maria Theresa knew about the history of the Stephanites, or whether she specifically intended to renew the order by establishing the medal. Károly-György Boroviczényi answers this question in the negative when he draws a parallel in his study between the Johannite cross bestowed by the King of Prussia and the Order of St Stephen, indicating that the receipt of the medal could clearly not have been an act of admission to the Order.[70]

The Order of St Stephen was renewed in 2011. It is currently the highest state decoration, established by Act CCII of 2011, which is intended to recognise the most outstanding, special merits, lifetime achievements and significant international results in the interests of Hungary. From 2013 onwards, it will be awarded every year on 20 August by the President of the Republic, who is himself a laureate. The Order of St Stephen of Hungary has no class and is open to women, but the medal is the same as that awarded in the time of Maria Theresa.

5.2 The newly founded Knight Order of Saint Stephen

After the change of regime, Cardinal László Paskai, Archbishop of Esztergom, on 20 August 1993, allowed the Cruciferi Sancti Stephani Regis to operate again as a private ecclesiastical association in the Esztergom-Budapest Archdiocese. He became the main patron of the order and also its ecclesiastical superior.

Their fundamental task is to defend the Church, to help Christianity and to serve the glory of God. They strive to live consistently according to the principles of King Stephen's Admonitions and the 13 chivalric virtues enshrined in their statutes, following the Regulations of St Augustine of Hippo. According to Article 1(a) of the Statutes, they consider themselves the successors of the historic Order of St Stephen: *„The Order of St Stephen considers as its spiritual and historical predecessors the 'Crusaders' of the pilgrim and monastic houses of Jerusalem and Esztergom, founded by King Stephen, and of Rome, Ravenna and Constantinople, who became a Knightly Order by the will of our King Géza II and the Holy See's acceptance of Pope Alexander III."*[71]

Picture 10. The Order of St Stephen celebrates the anniversary of its foundation in St Stephen's Basilica, Budapest, on 8 October 2017[72]

Members of the Order take part in annual retreats and pilgrimages. The St Stephen's Basilica of Budapest is their home church, so they are an integral part of the life of the basilica, and are present at all major celebrations. Their main feast day is 20 August, the day of King St Stephen. Their emblem is the apostolic double cross that bends in two at its apex.

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[68] MKL

[69] *Hungarian National Museum*. See: http://data.europeana.eu/concept/base/194 (Accessed: June 30, 2022)

[70] BOROVICZÉNYI, *Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről*, cit. p. 40-42.

[71] See: *Homepage of the Order of St Stephen*. http://stefanitalovagrend.communio.hu/alapokmany/ (Accessed: September 8, 2020)

[72] SPÁNYI, A., Elődeink örökében. (In the legacy of our ancestors.) In: *Stefanita Krónika,* June-December 2017, p. 9. See: https://docplayer.hu/109237133-A-szent-istvan-lovagrend-cruciferi-sancti-stephani-regis-lapja.html (Accessed: June 30, 2022)

6. Conclusion

The fate of the only Hungarian-founded nursing crusader order, the Stephanites, proved to be unique. After the fall of the Holy Land, they lost their houses and hospitals there, so they continued their charitable activities exclusively in the territory of the Kingdom of Hungary, with their headquarters in Esztergom. They won the recognition and financial support of kings and society through their nursing and healing work in their hospitals, their reliable and professional procedures in their places of authority (*locus credibilis authenticus*), their courage in battle and their unconditional loyalty to the monarch. This is evidenced by the fact that, in addition to the Johannites and the Knights Templar in Hungary, the Stephanites were also entrusted in 1222 with the custody of a copy of the Golden Bull.

However, unlike the other crusader knight orders, they did not have an extensive international organisation, so they did not have a contingency plan in case of loss of life. The Order had already been shaken at the Battle of Mohi, but thanks to the support of King Béla IV, they were able to reorganise. Strengthened, they subsequently founded a new house and a hospital in Buda, the new royal seat after the Mongol invasion. The Battle of Mohács, however, marked the end of the Order's activities, as the division of the country into three parts and the turbulent internal political situation meant that they no longer had the backing of a ruler, power or will to save them from dissolution.

The present Knight Order of St Stephen is not the successor of the institution founded by Géza II, nor does it have a papal bull approving its statute. However, it cannot be said that the Order is not ecclesiastically affiliated, since the founder of this civil organisation is the Archdiocese of Esztergom-Budapest, and therefore this once again prestigious organisation has stronger ecclesiastical links than most of the „traditionalist" crusader knight orders that have been re-established like it.

Heidegger on Hegel's Concept of State

*András Karácsony**

Abstract

It is often said of Heidegger that he did not engage in political philosophy. However, the publication of his legacy reveals a brief period when he was interested in politics and the state. Specifically, we can refer to two seminars Heidegger delivered in 1933/34, when he interpreted Hegel's conception of the state and debated Carl Schmitt's theory of politics. This study focuses on Heidegger's interpretation of Hegel's conception of the state. The texts on which the analysis is based are seminar notes and transcripts, and as such, only reflect the questions Heidegger raised in his lectures. More definitive texts on the subject are not available, because neither did Heidegger teach any course addressing the relevant topic after 1935, nor did he publish anything on the subject in the later decades. Accordingly, this paper is a brief presentation of a unique episode.

Keywords: *Hegel; Heidegger; state; politics; law; morality.*

1. Introduction

An interesting and long unknown digression in the oeuvre of Heidegger took place between 1933-1935, when he took an intense interest in state and political philosophy. Specifically, he held two courses on the subject. His notes written for this seminar, as well as the texts of the recorded seminar lectures have recently been made public.[1] However, he would never return to this problematic and never published a study of it. It is telling that from the mid-1930s he had announced seminars on Hölderlin. The import of these documents is thus quite significant, since they show that Heidegger had a political philosophy. More precisely, that with his analysis of Hegel's philosophy of law in 1933, he set out to develop a political philosophy, a philosophy of state.

In the winter semester of 1933-34, Heidegger held a course called "*Über Wesen und Begriff von Natur, Geschichte und Staat",* the recorded text of which can be found in the fourth volume of the Heidegger Yearbook.[2] The second half of this seminar concerned itself entirely with the question of state, though at this point Hegel's concept of state had not yet been published. More precisely, only a reference uttered at the end of the lecture series indicates a connection. In the last paragraph of the last lecture, we find, "The Leader State (*Führerstaat*) - as we possess it - means a fulfillment of its historical development: the realization of a nation in a leader. The Prussian state, as the Prussian nobility realized it, is the forerunner of the modern state. This relationship demonstrates the kinship (*Wahlverwandtschaft*) between Prussia and the Führer."[3] This line of reasoning is an obvious reference to Hegel's concept of state, according to which the Prussian state had reached the pinnacle of state development. And with that, we have his correction of Hegel. For history did not end, according to Heidegger, the way that Hegel envisioned it. There is rather one more newer stage, the *Führerstaat*, and indeed, this means the full realization of state development.

From this conclusion, it logically follows that Heidegger is so receptive to historicity that he wanted to examine this certain 'archetype' more thoroughly. So it is not therefore surprising that the next seminar he announced in the winter semester of 1934/35 would expressly concern Hegel's concept of state ("*Hegel, Über den Staat"*). He and Erik Wolf co-sponsored this seminar. In the fall of 1933, when Heidegger became the rector of Freiburg University, Erik Wolf was the dean of the university's Law and State Science Department, but the following year, both he and Heidegger resigned their positions. Their decades-long close relationship dates back to this period. Notes from the seminar show that Wolf's contribution to the joint work was the lesser - Wolf's text comprised 10 of 166 handwritten pages of one notary, Hallwachs's notes. From the other notary, Bröse

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1 DENKER, A., ZABOROWSKI, H. (eds.), *Heidegger und der Nationalsozialismus I (Dokumente). Heidegger-Jahrbuch 4.* Freiburg/München, 2009 (hereinafter: HEIDEGGER-Jahrbuch 4.). HEIDEGGER, M., Seminare. Hegel – Schelling. In: KLOSTERMANN, V. (ed.), *Gesamtausgabe Bd. 86.* Frankfurt/Main, 2011. Study volumes concerning this period: DENKER, A., ZABOROWSKI, H. (eds.), *Heidegger und der Nationalsozialismus II (Interpretationen). Heidegger-Jahrbuch 5.* Freiburg/München, 2009.

2 HEIDEGGER-Jahrbuch 4, op.cit. 53-88.

3 HEIDEGGER-Jahrbuch 4, op.cit. 88.

there were 37 pages of notes containing 3 pages of Wolf's text.

In the following, I will primarily quote Heidegger's analysis of Hegel as supported by the notes of the report prepared on the seminar. I cannot review all of Heidegger's important remarks and interpretations here, so for instance, I will refrain from analyzing the oft-discussed Hegelian method (Hegelian Dialectic), and strictly concentrate on when Heidegger directly discussed Hegel's interpretation of state.

In these seminar sessions, Hegel is obviously the main character. There is a remarkable difference between Heidegger's remarks on the actual political situation at the time in his notes, and what he was recorded to have said at the seminar. Many of his notes concern the National Socialist state, and the radical political changes of 1933. This change is perhaps most precisely expressed by the following Heidegger note: "Liquidation (*Entgründung*) of the foundations of the former state and the founding (*Begründung*) of the new state is the task at hand.".[4] However, the seminar record shows no such forceful political reference was made. This is also different than the previous seminar. While in the 1933/34 seminar, there were specific references to the then current political situation (see e.g. the closing thought quoted above), this kind of reference was essentially absent from the 1934/35 seminar.

In the first session, Heidegger noted the purpose of the seminar, that he would formulate philosophical considerations about the state, based on Hegel. He went on to say, "This may seem outdated as nowadays it is said that the present state came into existence not by books but by battle. Behind such a statement, lies the idea that the spiritual is only found in books. In this way, it is forgotten that the state must still exist in another 50 or 100 years. To that end, it must have at its disposal something *through which* it can exist. And it can only endure through the spirit. However, while the people bear the spirit, people must be *educated*."[5] This thematic opening of the course informs us of the two important characteristics of Heidegger's basic position. On one hand, that the state is always conditional on a spirit behind it, which is expressed in books, but in its daily political struggles also - this is clearly Hegelian-inspired conviction. On the other hand, that when a radical change (battle) results in a state, if you like, overnight, then some part of the people won't possess the appropriate spirit for the new state. This is how education in proper spirituality comes to the fore. Whether the state must educate a minority or majority of society, Heidegger did not openly say. But revisiting what he said on the previous seminar of 1933/34, the reader may get the impression that aside from the Leader (Führer), everybody else must be educated. Heidegger's 1933 rector's speech, under the heading of "Knowledge Service" also emphasized the essential role of education.

So why does Hegel provide him the appropriate theoretical starting point for an investigation of the concept of state? To this, Heidegger offered two thoughts:

1) In one way, the whole of western philosophy was fulfilled in Hegel's philosophy, thus his work summed up the principle foundational thoughts of the state. Hegel, however - according to Heidegger's analysis - was not only a great systems thinker, but in fact, through him philosophy was complete. "What comes after Hegel, is no longer philosophy. Neither Kierkegaard nor Nietsche."[6] So, if we would begin from a *philosophical* approach, even from within it, from a *philosophy* of state, then according to Heidegger, the last thinker whom we can still go back to is Hegel.

2) Second of all, Hegel's political science was decisive - in both the positive and negative senses. The positive being that the concept of state for 19th century liberalism can only be understood through him. The negative, that Marx's rejection included Hegel, so to grasp Marxist theses required understanding of Hegel's political science.

December 5, 1934 was one of the few occasions in the seminar where Erik Wolf presented a longer series of thoughts. Wolf argued how, in one way, for Hegel the state and questions of law are bound inextricably together (this view, as will be apparent later, was also of fundamental significance to Heidegger). Yet in another way, he said that when examining law, we must distinguish between different strata. Accordingly, we can speak of *positive law*, of the *understanding of law based on expediency*, and of a *just law*. Incidentally, Heidegger redefined this trinity at the seminar as law as laws, law as interests and law as ideas. For these three distinguishable-distinguishing legal strata, Wolf listed three legal theories with different motives. According to him - depending on with which strata of the law we identify ourselves - we can determine:

- legal dogmatics (this is doctrine of positive law and its systematic, logical interactions, in which the principle of deduction can be implemented),
- general jurisprudence (that of legal teleology and legal interpretation), and
- philosophy of law (which is the doctrine of justice as a doctrine of regulatory law).

2. The "Place" of the State in the Hegelian System

A recurring theme of the seminary sessions is where can issues of state be placed in the Hegelian system? Heidegger's interpretation taking many aspects into account, digressing on detours, reaches the conclusion that, at least formally, it fundamentally diverges from a conventional Hegelian interpretation. What specifically is this about?

The taxonomic place of state is generally the realm of philosophy of state, yet Hegel discussed it the *Philosophy of Law* (*Elements of the Philosophy of Right*). So from this, we can say that Hegel examined the theme of the state in his *Philosophy of Law* (and in that regard, Heidegger called attention to his philosophy of law), and so the question is unavoidable, in what relation to each other are the law and the state? Formally, since Hegel

[4] HEIDEGGER, M., Seminare. Hegel – Schelling. In: KLOSTERMANN, V. (ed.), *Gesamtausgabe Bd. 86.* Frankfurt/Main, 2011, op.cit. 75.
[5] Ibid. 549.
[6] Ibid. 550.

discussed this in *Philosophy of Law*, it seems as if the question of state is a question within legal thinking. At the same time, Philosophy of Law § 257 states that the state is the reality of moral ideas, and that Hegel speaks here of spirit, will and freedom. Yet law as such is not at stake here. Heidegger concludes from this that Hegel understood law to be the union of the spirit, will and freedom, that here it is, in reality, a metaphysical connection. And if this is so, then the metaphysical sense of law differs from how legal thinking understands law. So there is no legal question to be examined here. It is not the duty of a lawyer to make statements about the essence of the law. This is the task of philosophy. Nor does the lawyer concern himself with the relationship between state and the law. Jurisprudence conveys legal thinking to the lawyer, i.e. those abilities with which he learns the conditions for the application of law.

The subtitle of *Philosophy of Law* is "*Natural Law and Political Science"*. With it, Heidegger also denotes support of the earlier line of reasoning. That is to say, he thinks Hegel understand natural law, not as it was meant today (or in the 1930s), but rather, for Hegel the concept of nature meant the essence of a thing. Thus, as in Hegel, the term natural law here refers to the metaphysical nature of law. To this we might add that science and philosophy coincide in Hegelian terminology, so 'political science' means the same as philosophy of state. From all this in Heidegger's approach, we can only conclude that Hegel's *Philosophy of Law* is also a philosophy of state.

According to Heidegger, Hegel choose his *Philosophy of Law* for the expression of his thoughts on the state not just to definitively state his thoughts, but rather in order to base them in a strict *philosophical form*. Again we come to the importance of a philosophical approach and to the form Hegel offers him. Heidegger's assessment is clear: "We cannot philosophize generally in a deliberate way. Philosophizing means that we ask a question on the path designated by the question, one which leads to an answer, i.e. to the method. Hegel's philosophy is the *method*, meaning fulfillment in the sense of *procedure*." [7] Hegelian method is the dialectic. Further, (and in other seminar sessions), Heidegger dealt in detail with the issue of the dialectic method in the context of philosophical history, as well as his role in its appearance in the Hegelian oeuvre.

Based on the structure created for *Philosophy of Law*, we can state that Hegel begins his analysis with abstract law, then follows with morality and ethics. Within the chapter about ethics, following analysis of the family and civil society, he analyzes the state. On the basis of formal logic, since the state appears within the subjects of law, we can conclude that Hegel "derives the state from the law." [8] Heidegger, while also considering the whole of Hegel's system, (the Encyclopedia of the Philosophical Sciences and its third volume, *The Philosophy of Spirit*) sees that "the state's most general definition, however, is not that it is law, but that it is spirit, objective spirit." [9] This, of course, brings up further questions.

Heidegger's questions: Can the state really be founded in law? Where does *Philosophy of Law* actually belong? As we've seen previously, Heidegger clearly emphasized the philosophical foundation of the *Philosophy of Law*, while elsewhere he stressed that the 1821 edition of the *Philosophy of Law* serves merely *educational* purposes. It seems that Heidegger's position concerning the Philosophy of Law is contradictory, but his conclusion here is similar to his earlier ones. We must examine where Hegel positions the law and the state in his final system. This position is none other than the world of the objective spirit within the philosophy of spirit. In this way, the supreme determinant of the state is not the law but the spirit.

According to Heidegger, we can only provide incorrect answers to both the questions: Does the state derive from the law or the law from the state? Namely, because the state does not rest in law and is not before the law, "but only where there is law, is there state".[10] Let us remember that his seminar colecturer, Erik Wolf also stressed that for Hegel the issue of state and law are inextricably bound together. The state and the law therefore stand in a dialectical relationship for Hegel. According to Heidegger, with Hegel's dialectic method, it in no way follows that the state must be derived from the law. "Hegel does not infer the state from the law, but rather preserves law, morality and ethics through abolition of them in the state." And at this point, Heidegger's interpretation marks a bold turn concerning the structure of Hegelian Philosophy of Law. "If we want to give a *one-sided* answer, then we must say that law is based in the state, and not vice-versa".[11]

Thus, Heidegger's position is clear. For Hegel, the state belongs to the world of objective spirit within the negotiation of the absolute spirit. Hegel locates the *Philosophy of Law* within the metaphysics of the objective spirit as the philosophy of freedom. Freedom is not a characteristic, but the will. And where there is will, there is freedom. Yet in Heidegger's interpretation of Hegel, freedom can only be interpreted where the *self* stands in relation to a community. Because in Hegel, the spirit doesn't signify a *self* standing alone, but always denotes a reciprocal relation. Thus, we're speaking of a kind of situation where a fully autonomous individual is in a reciprocal relationship with another autonomous individual. These points can be grasped by the law, as the law is created from the mutual recognition by autonomous individuals who stand side by side or in opposition to each other. So, if freedom can be interpreted in a mutual relationship of individuals, and if the law is acknowledgement of individuals in this relation, then it logically follows - as Heidegger summarizes Hegel - that "there is only freedom, where there is law. The law is the *existence* (*dasein*) of freedom. The full realization of this acknowledgement is the state." [12]

[7] HEIDEGGER, M., Seminare. Hegel – Schelling. In: KLOSTERMANN, V. (ed.), *Gesamtausgabe Bd. 86.* Frankfurt/Main, 2011, op.cit. 551-552.
[8] Ibid. 588-589.
[9] Ibid. 590.
[10] Ibid. 636.
[11] Ibid. 591.
[12] Ibid. 578.

3. Updating Hegel

The lecture of key importance in the 1934/35 series occurred on January 23, 1935. Here Heidegger turned to his political issue. He emphasized that Hegel first mentions "politics" in the *Philosophy of Law* § 276. This is, we might add, not the Schmitt sense of "politics"(*das Politische*), but simply that at this point, Hegel examined the nature of the political state. Regarding this, Heidegger turned to how Hegel used a wide sense of the concept of state., which doesn't cover the idea of "political", that is the political state is just one definitive type among many possible forms of the state. But it is a very unique type. "The political state is more than a state. It is actually the state state (*staatlicher Staat*)" [13], said Heidegger.

How does this relate to the concept of the post-1933 German state? Considering the situation at the time, the reception of Heidegger's Hegel was positive, or if you like, a triumphant voice had sounded. As we can see in the seminar material, "Many say that Hegel died in 1933. On the contrary, he's only begun to live!" [14] In Hegel, the essence of the state is freedom. The metaphysical regard for freedom, and not the sociological one. For Hegel - as we've already discussed - the state is a part of the objective spirit, and this spirit is incidentally the basis of the family and civil society. Marx had reversed this relationship, the spirit being only an ideological construct. According to Heidegger, this reversal and thus the devaluation of the spirit can be observed not only in Marxism, but it influenced the entire century. He saw liberalism which spoke of the freedom of every person as an individual, as fitting. "Hegel, on the other hand, defines the essence of freedom from the essence of spirit. And by this, from the beginnings, freedom is understood not in recognition of every person as an individual, but rather in recognition of the individual as an other. Freedom is only there where existence is the simultaneous and common independence of several. And in the mutual recognition of autonomy, the law is historically realized." [15]

Heidegger asks, "Where is the state today?" And when we examine this question, then shall we suppose a higher order non-concept? For example, like when we speak of plants? If that is so, then it would follow that, as there are separate, specific plants, there are also individual states. According to Heidegger, however, we are not asking about *the* state, but rather in reality about *our* state. But in this case, too, we're unsure. This is precisely why it is important to know Hegel's thoughts on the state. It's not important that "we adopt his concept of the state as the gospel." [16], but that it provides a means so we can philosophize about the state.

How do we understand the oft-quoted Hegelian pronouncement, "What is rational is real and what is real is rational". Heidegger brings up two examples for argumentation of this:

- the Versailles Treaty is real, but for the Germans it is not understood as rational;
- university students experience the reality of university reform, but don't think it rational.

The examples suggest that the Hegelian theorem is invalid. But according to Heidegger, this is not the point. "Hegel understood 'real' to be something completely different. What is real is not 'existence', not that which has just occurred. Reality is the realization of the essence of the matter." [17] That is, reality is only rational if it exists as the realization of the essence of the thing. Returning to the examples he mentioned, since according to Heidegger neither the Versailles treaty nor the German university reform of the first third of the 20th Century referred to the essence of the matter, their reality did not mean, could not mean, their rationality. At this point though, the question arises - What do we regard as the *essential* realization of a thing? Perhaps it is when we consider what has been realized to be rational, then can we conclude that we are facing the realization of the essence? This naturally leads us to split the concept of reality in two. There being rational reality (this is the realization of the essence), and not-rational reality (in this case, the essence did not become reality). Heidegger, however, did not reflect on this possible differentiation.

Returning to the seminar material, since Heidegger's position says that the will is also thought, so the human mind becomes the new principle of the state, contrary to the old definition of the state, according to which the state rests on divine foundations. According to Heidegger, the state does not grow like a plant, but forms in the reality of human thinking and action. The state is not something that exists beside man, but rather "it is a human achievement, perhaps the greatest one, in which human thought and existence is confirmed and manifest". The essence of man defines the essence of the state. It is not the power of God or nature. Consequently, "the bond of the state to the essential existence of the people makes it impossible for any citizen to accept or reject it at will. Although the citizen may reject or approve of a government or state institution, it can never reject or approve of the state.[18] In short, man can not live outside the state.

Regarding the state, Heidegger always spoke of the people, as he formulated it in the previous, 1933/34 course, "The foundation that bears the state: *the people*" [19]. This is only interesting because the movement forming the new system took the name, National Socialism. Heidegger, however, in contrast to representatives of the conservative revolution, never concerned himself with differentiating the terms *the people* from *the nation*, but always consistently used the term, *the people,* without analyzing the range of meanings of this concept. In only one session of the 1933/34 course, in a text lacking notes, do we find a reference to the concept of 'nation'. Here Heidegger spoke of how

[13] Ibid. 608.
[14] Ibid. 606.
[15] Ibid. 650.
[16] Ibid. 619.
[17] Ibid. 558.
[18] Ibid. 639., 641.
[19] HEIDEGGER-Jahrbuch 4, op.cit. 72.

the people are not simply a known quantity of national subjects (*Staatsangehörigen*). More strongly binding than the community of origin and race is "the nation - a way of life growing from the midst of a common destiny expressed within *a* state".[20] In the context of what was said in both courses, this remark shows that Heidegger could simply have understood the concepts of people and nation as synonymous.

According to Heidegger, Hegel started from Rousseau and rationalism in regard to the question of the principle of state. However, the state based on a treaty can only arise from a basis in the rationality of the individual. Contrary to this, the state of Hegel is under the power of the spirit. Rationality is not manifest in an idea taken in and of itself, but rather presents itself in the development of the state. That is to say, in historicity, as a people comprehends itself as a state. How the essential origin of the state lies in the will - this was discovered by Rousseau. From this point of view, a comparison of how Rousseau and Hegel conceived of the state is an important question. Although in Rousseau's approach, general will is of key importance - its goal, even - but not a foundation on which to build. In Rousseau's contradictory theoretical construct, freedom appears as a negative freedom, at once limiting the state as it also culminates in it. Deviating from this, Hegel conceives of a positive freedom ("freedom for something"), according to which, it is through the state that man becomes historically free. Contrary to the differentiation mentioned, it is Heidegger's conviction that only since Rousseau and Hegel does he see clearly that the state is proof of human moral, ultimate freedom. Up to Hegel, and even to the present day (that is, the 1930s), there is an old view that regards the state as standing opposed to man's moral will, as sinful and dangerous (such was Humboldt's concept of the state). It is opposition to these very perceptions of state, that Heidegger holds Hegel's theory of state to be current.

Although, Heidegger emphasized on the second session of the seminar that *the* state, that he is speaking of, is the state of the people. That is, he gave the feeling that hidden behind his philosophical explanations lie the specific life experience at the time. Yet, through the whole course, as I mentioned in the introduction, he refrained from making any direct political references. An exception in this regard, is the concept of a total state. On one hand, this concept was often uttered in public political life of the time, that is referring to specific political life. On the other hand, they sought their place in a possible typology of state theory.

At the Heidegger seminar, the expression 'total state' appeared in just two contexts. In one place, we read "we often speak of the total state". So what does this mean? All we can know about it, according to Heidegger, is that we can only grasp it through a metaphysical, essential disposition. We learn that within the debate over Hegel's Philosophy of State lies "how the metaphysical thoughts of state look, its metaphysical contemplation."[21] It's not the content of Hegel's thought that we gain, just the format in which he thought about the state. Incidentally, Heidegger defined this basic relation to Hegel's philosophy of state in several sessions, as I quoted one of them previously. On another occasion, he spoke about his question being how a total state tends toward the existence of a people's state.[22] This brief reference interests us only in how clearly it states that, in Heidegger's view, the people's state and the total state are identical.

Otherwise, Heidegger focused on the term *the people* not only in reference to the state, but also in connection to the political problematic. Thus, for example, Schmitt, arguing with his political analysis, emphasized that, "political friend/foe relations only appear on the basis of the self-affirmation (*Selbstbehauptung*) of the historical presence of a people ".[23] I will not digress to Heidegger's critique of Schmitt here.

In the last lecture of the 1934/35 course, Heidegger formulated three fundamental questions which must be addressed in further work:

- What is the essential political basis of Hegel?
- How does a self-developing process of unity lead to the ultimate, that is, the spiritual state.
- How is the state founded on the family and civil society and vice-versa: how the family and civil society are founded on the state, that is, in regard to examination of their mutual establishment.

These concluding questions suggest that at the end of January 1935, Heidegger was thinking about the continuation of the course. However, this did not happen. In the later work, he did not deal with the issues of politics, or of the state systematically. Retrospectively, this two and a half year period proved to be an intermezzo in the oeuvre of Heidegger.

[20] HEIDEGGER-Jahrbuch 4, op.cit. 73.
[21] HEIDEGGER, M., *Seminare. Hegel – Schelling*. In: KLOSTERMANN, V. (ed.), *Gesamtausgabe Bd. 86.* Frankfurt/Main, 2011. op.cit. 606-607.
[22] Cf. Ibid. 651.
[23] Ibid. 655.

Some Issues Regarding Fraud in the First Hungarian Criminal Code

*Sándor Madai**

Abstract

The first Criminal Code is always of paramount importance in the life of a nation. Not only because written law, especially criminal law, has been in demand by society from the outset, but also because it is crucial for applying the law, the justice system must also adapt to this. The first Hungarian Criminal Code – the Csemegi Code – met this expectation. The following study focuses on one of the fundamental delicts of property crimes: fraud. We present the questions that the codifier had to answer, then the result of this thinking. Finally, we look at the first amendment to the Csemegi Code, which affected the crime in several respects. The study is based primarily on descriptive, historical and comparative methods, and we try to approach the subject of our study from a theoretical and practical point of view at the same time.

Keywords: *Csemegi Code; Hungary; criminal law; codification; history of criminal law.*

1. Introduction

Changes in social relations often pose serious challenges to the legislator of criminal law. The more developed or "civilized" a society is, the more behaviour that violates or threatens the established complex system of relations should be threatened with sanctions, as there are numerous forms of behaviour that attack and the existing crimes in Criminal Codes do not provide adequate protection. The ministerial justification of the Csemegi Code[1] states that Fraud is "*actually even if not a child of the civilization, but at least a pupil*".[2]

The social changes in Hungary – at least in terms of content – made it necessary very early on (even during time of the founder of the state St. Stephen) to create a fraud-like crime category. However, it was only after a long time that the generic type of these behaviours gained its final form, which is considered to be definitive, at least to this day, and which, in its name, only found its place in the term "fraud" in recent times.

2. Historical background

Why can we say regarding the crime of fraud that it is one of the crimes that had a hard time finding its real place in the Criminal Code? It is known that the development of Hungarian terminology was hindered in Hungary by the spread of Latin. For many centuries, the terms *'stellionatus'* and *'falsum'* have been used in the legal consciousness, if not as a synonym. With the spread of Hungarian terminology, those struggling for the independence of the facts of fraud could not escape the magic of the concept of counterfeiting, and they could not make fraud independent, so counterfeiting initially covered fraudulent behaviour also. This could be explained by the fact that for a long time, fraudulent behaviour also emphasized the falsification of truth, the violation of the right to truth[3]; the right that – and we now know for sure – does not exist.

Referring to the positions of the Hungarian literature, the ministerial justification of the Csemegi Code notes that "*the views of our older scientists also differ infinitely on this crime*".[4] It is probable that the mentioned scholars did not reach a consensus due to the influence of several factors, which could be due to the lack of a uniform, statutory definition, as well as the change in the content of the Latin conceptual set and the increase in foreign influences.

The settlement of the fraud already arose during the preparation of the proposal in 1795. The crime is among the rules of substantive law, in Part Two under Section XL. "*crimes against the property and liberty of citizens*". The Latin title of the section is *'De*

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1 The Csemegi Code was the first Criminal Code of Hungary (Act no. V. of 1878).

2 LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanours and its complete collection of materials - Volume II.*) Budapest, 1880, p. 731.

3 ILLÉS, K., A vagyon elleni bűntettekről. (About crimes against property.) In: *Magyar Igazságügy.* vol. Nr. 4, 1875, p. 304.

4 LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 733-735.

Stellionatu, seu Falso', which in the translation of Lajos Hajdu is *„deception and fraud*".[5]

The substantive law proposal of 1843 is considered controversial in terms of fraud. On the one hand, progress had been made regarding the distinction from counterfeiting, although not yet fully clarified, and on the other hand, there was no clear legislative position mirroring the anti-property nature of the act.

The substantive law proposal of 1843 was another step towards a modern Hungarian substantive law regulation that draws from European intellectual currents and surpasses them in some respects. However, known Hungarian historical events have made it impossible for it to serve the construction of the domestic rule of law, either in its original form or in a revised form. After the revolution and the War of Independence of 1848-49 in Hungary, Austrian criminal law became the obligatory compass for Hungarian science and practice, as in 1849 the Austrian Criminal Code of 1803, and later of 1852, came into force in Hungary.[6]

The creation of the Provisional Rules of Jurisdiction again led to difficult years for practice, given that in 1861, as a result of opposition to Austrian law, the application of pre-1848 Hungarian law was ordered. Not only did the spirit of the proposal of 1843 seem to be lost, but in many respects even the principles of the proposal of 1795 seemed to be pushed into the background, and Hungarian criminal law returned to a fragmented, untraceable regulation.

Minister of Justice Boldizsár Horvát wanted to shed light on this darkness when he started intensive codification work. Although with a change of emphasis, this process led to the entry into force of Hungary's first Criminal Code, Act V of 1878 (Károly Csemegi was the codifier of the Act, so we call the Act the Csemegi Code).[7] We believe that it is unnecessary to present the historical significance of the Code. Therefore, we merely point out that in our opinion, it is not only Csemegi's merit that he created a coherent norm, but it is also at least as important that the Code has also entered into force.

Csemegi's approach – and we will see concerning the regulation of fraud also – was put into practice in several areas before embarking on creating the Code. Although he was not an explicitly theoretical expert, his work was also recognized by scholars, and he also gained experience as a codifier, as his name is associated with Act IV. of 1869 on judicial power. He also knew the practice well, as he practised as an advocate for a long time, so he had the opportunity to know the shortcomings and mistakes of the regulation of criminal law. A circumstance related to the latter fact is that – and the appearance of the influence of foreign countries in Hungary in connection with the regulation of fraud is already clear – he had to apply Austrian criminal law in his legal practice, also considering that the Austrian Criminal Code was in force in Hungary from 1849 – until the entry into force of the Provisional Rules of Jurisdiction.[8] Therefore, it is understandable that applying an existing code provided Csemegi with the basis for drafting the Hungarian Code. He knew precisely the flaws and virtues of the applicable rules, which made it difficult for the judge, the prosecutor, and the advocate. Csemegi considered the problems of codification from the point of view of practice, and the legislative atmosphere favoured calm, professional legislation.[9]

The Code had to answer several questions on the crime of fraud. Such was that fraud should solely be regulated as an act detrimental to property interests, or perhaps non-pecuniary rights should also be protected? It was also a question to which the range of offending behaviours should be abstracted or concretized? Furthermore, perhaps one of the most important resolutions, looking at the issue from a historical point of view, was the settlement of the relationship between fraud and counterfeiting? We have repeatedly pointed out that acts of fraud and counterfeiting have long been considered closely related, parallel, and often regulated the crimes in an inseparable way. So Csemegi had to deal with this fundamental problem – in a way that could be handled for practice.

The crime of fraud is set out in the Part Two, Chapter XXXI of the Code, expressing the conspicuous change of attitude of the legislator, *before* the forgery of documents. Given that the structure of the Code differs from the structure used by our Criminal Code today, it is not easy to take a clear position on what kind of acts Csemegi wanted to define as acts against property, just keeping in mind the structure of the Code. The chapter of fraud regulated several aggravated cases also.

3. Regulation of fraud in the Csemegi Code

The basic definition of fraud was regulated in Section 379 of the Csemegi Code:

"A person who, for the purpose of obtaining an unlawful property benefit for ownself or for another, leads someone to error or maintains his/her error under false pretences, thereby causing him/her property damage: commits the fraud."

For many centuries, as we have already mentioned, it has been a matter of debate why a crime regulated under the name of fraud (stellionatus, etc.) is necessary, what value it protects, that is, in modern terms, what is its legal subject?

The Csemegi Code broke with the legislative hesitation that existed even in the substantive law proposal of 1843, which, in our opinion, was, among other things, an obstacle to the creation of a modern definition that could be well applied to practice. The Code clearly emphasizes the anti-property nature of the act, which is confirmed by the ministerial justification of

[5] HAJDU, L., *Az első (1795-ös) magyar büntetőkódex-tervezet. (The first (1795) draft of Hungarian Criminal Code)*, Budapest, 1971, p. 285.
[6] FINKEY, F. *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1914, p. 83.
[7] SZABÓ, A., A Csemegi-kódex és a magyar polgári állam kiépítése. (The Csemegi Code and the establishment of the Hungarian civil state.) In: *Jogtudományi Közlöny*, vol. Nr. 4, 1979, p. 201-203.
[8] FINKEY, F., *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1914, p. 83.
[9] HORVÁTH, T., Az első magyar büntető kódex száz év távlatából. (The first Hungarian Criminal Code from the perspective of a hundred years.) In: *Jogtudományi Közlöny*, vol. Nr. 4, 1979, p. 200.

the Code: "*among the generally established items, we mentioned in the first place that fraud constitutes a crime against property. There is now a consensus among professionals on this.*"[10] Pál Angyal adds that "*any form of right on property, that is, both property rights that provide for the protection of property and contract law governing the movement of property*."[11] Finkey also joined the position of Angyal.[12]

Therefore, we can see that a consensus has developed among criminal lawyers on the legal subject of fraud, which not only for the period of the Csemegi Code but practically to this day, has influentially defined the field of social values protected by the definition of fraud.

There was no complete agreement among the contemporary authors as to what could be considered criminal conduct in the definition, as there was a position that, in addition to leading to error or maintaining the error, also considered causing damage as criminal conduct. According to Angyal, in the definition of the Csemegi Code, the behaviour of the perpetrator of fraud is "leading to error" or "maintainig the error", while the occurrence of damage can be grasped as a result, similar to the modern dogmatic approach.[13] According to Finkey's dissenting opinion, "causing damage" is also a "criminal activity" of fraud.[14] Schnierer, on the other hand, opposes both positions[15] when he writes that "*in addition to 'leading to error', our law identifies 'maintaining the error' as a mode of committing fraud*."[16] Nor does the ministerial justification of the Code state unequivocally: "*the mode and means of committing fraud, after the previous ones: leading someone to error under false pretences or maintaining someone's error under false pretences*".[17]

Nor was the practice uniform in judging different behaviours. Such an area was, for example, the misuse of different weights when the seller made a false measurement of the weight of the thing. In one case, the accused sold whitewash to the victim but deceived the victim about its weight because he also put a piece of iron on the scales, thus asking for more money for the goods. However, the victim made a control measurement on his hand scales, thus revealing the fraud. The Curia[18], contrary to the conclusions of the previous courts in the case, acquitted the accused, claiming that, based on the victim's objection, he immediately returned the purchase price, took back the whitewash, so the transaction was not completed, and the victim was not damaged. For this reason, according to the Curia, the decision to establish guilt (as completed fraud) is erroneous, and only an attempt of fraud can be established, which, at that time, was not punishable by the Code[19]; in the case of a similar act committed by a cereal trader, since he had discovered the deception before the transfer of the purchase price, Curia also found an attempt at fraud.[20]

In the definition of fraud, the *'leading to error'* and *'maintaining the error'* represented, as it does today, an anti-trust element, further aggravated by commiting *'under false pretences'*. "*Commiting 'under false pretences' does not presuppose hand-operation, mechanical preparation, action. Excuse, intrigue, dazzling, insidious craftsmanship can also be called 'under false pretences'* "[21], the ministerial justification states. However, it could not solve the dilemma. After the explanations of the mode of perpetration, we read: "*we believe that, even if we have not marked the borderline with certainty and precision, we have used a term which, on the one hand, explicitly excludes the dangerous extension of the concept of punishable fraud and, on the other hand, provides the right direction and guidance in practical cases*."[22]

The judgment of *'under false pretences'* may have depended on many factors, and therefore, as mentioned above, the ministerial justification of the Code itself did not take a position on its assessment. In modern terms, the problem was decided based on a careful examination of all the circumstances. However, the criterion of *'under false pretences'* also meant that if, although there was a profit motive and the damage occurred, but it did not occur as a result of *leading to error* or *maintaining the error* with *'under false pretences'*, the perpetrator could not be punished for fraud.

Finkey agrees with the use of *'under false pretences'* because, in his view, it is clear to the judge to include only specifically fraudulent types of conduct in the crime of fraud, thus distinguishing *fraus criminalis* from *fraus civilis*.[23] Illés Edvi's position is similar to that of Finkey.[24] From a modern point of view, this can be considered the contemporary prevalence of the ultima ratio nature of criminal law.

In addition to Illés Edvi, do others, including Fayer, argue that *'under false pretences'* should be considered an absolute or

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[10] LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 737.
[11] ANGYAL, P., *A csalás. (The fraud)*, Budapest, 1939, p. 36.
[12] FINKEY, F. *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1905, p. 734.
[13] ANGYAL, P., *A csalás. (The fraud)*, Budapest, 1939, p. 43. and p. 72.
[14] FINKEY, F., *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1914, p. 738.
[15] The explanation for the difference is that the mode of crime differs from criminal conduct in Hungarian criminal dogmatics.
[16] SCHNIERER, A., *A büntettekről és vétségekről szóló magyar büntető-törvény (1878. V. t. cz.) magyarázata (Explanation of the Hungarian Criminal Code on offenses and misdemeanours)*, Budapest, 1893, p. 568.
[17] LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 757-758.
[18] The name of the Supreme Court in Hungary at the time.
[19] Büntető Jog Tára (Repertory of Criminal Law), Vol. L., p. 58-59.
[20] Büntető Jog Tára (Repertory of Criminal Law), Vol. XVIII., p. 201-204.
[21] LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 756.
[22] Ibid.
[23] FINKEY, F., *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1905, p. 738.
[24] EDVI ILLÉS, K., *A büntetőtörvénykönyv magyarázata. (Explanation of the Criminal Code)*, Vol. III., Budapest, 1894, p. 266.

a relative concept? Illés Edvi distinguishes between absolute and relative concepts. He considers the former as behaviours by which even the most prudent person can be "*lead to error*" or "*maintain the error*". Under the latter, however, he meant only behaviours which, because of the passive subject's lack of knowledge or experience, were suitable only for fraud, so that it would be unsuitable for fraud against those who have knowledge or experience in a given field. In his view, the only relative concept can be considered in the application of fraud, as this is the only way to ensure the criminal protection of simple people. Joining the position, Fausztin Heil states that "*criminal protection can be denied*" to individuals who ignore their life experience, while criminal protection for simple individuals is more justified.[25]

Fayer also sees the notion of *'under false pretences'* as a relativizing moment of the crime of fraud when he states that "*what can be established for people who have moved from the village to the city but not for urban people*."[26]

The authors did not attempt to define *'under false pretences'* but approached the issue from the point of view of judicial practice, and we can get an idea of what types of behaviours the practice considered *'under false pretences'*. However, it must also be noted that, as acknowledged in contemporary literature, the judicial practice has been quite volatile with regard to *'under false pretences'* as a mode of perpetration.[27] Several decisions generated theoretical debate. In one case, lottery ticket sellers deceived several of the "*ignorant peasant inhabitants of some gardening village*" by selling lottery tickets above the real value of tickets saying those were issued by Budapest's "chief president" and could win significant sums. Two of the three judicial forums acquitted the accused persons, while the Curia found them guilty. According to the substance of reasoning, the accused persons committed the crime in a settlement where "*there was no clerk or priest*", precluding the less informed persons from receiving information from a person they considered credible.[28]

The courts decided differently in the case where the accused deceived the victim when she promised to conjure more money out of less money, and then claiming that if she enchanted the hens of the victim, they would lay silver, and finally she asked for garments and utility items, claiming to be able to triple their number. The accused admitted that she had received money from the victim in order for her hens to lay gold and silver; she also admitted that she also took the victim's garments to mesmerize the victim's husband so as not to leave the victim. On the other hand, the accused denied taking the money to make more of it and the garments to make three of each. The court of the first instance acquitted the accused of the fraud, although it found her liable for a breach of public order. The appellate court agreed with the first-instance decision because "*in the supernatural allegations of the accused, 'under false pretences' could not be recognized, because the promise of a hen laying silver to a person being in an accountable state of mind cannot be considered 'under false pretences' at all*." Curia convicted the defendant of fraud. In its view, the accused took advantage of the victim's educational and living conditions by "*imagining the seductive effect of his promises quite 'under false pretences' in the light of the facts set out above*". The Curia found, in the present case, that all the elements of fraud existed.[29]

Therefore, we can see that fraudulent, deceptive-type conduct has always been an immanent element of fraud, at least since the Csemegi Code.

The result of the crime is property damage indicated in the definition. We mentioned above that it did not agree in all respects with Csemegi's proposal for the final text of the Code. This is also true of the result of the crime. Csemegi originally intended to define the result with "*and thereby damage his/her property*", but instead of the proposal, the following was included in the Code: "*and thereby causes property damage to him/her*".[30]

We could speak of pecuniary damage if "*the situation of the property has become more unfavourable so that it has decreased in value after the event in question.*"[31] Depreciation had to be pecuniary, i.e. quantifiable in money, given that it served as a basis for classifying the offence; in the case of damage not exceeding HUF 50, the act was a misdemeanour; and above that amount as an offence.

It is necessary to mention the interpretation of several experts in the literature, according to which the actual damage (*damnum emergens*) and the *lucrum cessans* were to be understood as the property damage.[32] Regarding the issues of damage, we must mention the problem that judicial practice has finally solved. The question was whether, according to the wording of the Code ("*and thereby causes property damage to him/her*"), the physical identity of the deceived and damaged person is necessary or whether legal identity is sufficient. Schnierer notes in 1893 that "*the relevant words of the law, however, must be interpreted extensively, so that personal identity is not considered to exist in a figurative sense, even when the erroneous person acted as a representative*

[25] HEIL, F., A ravasz fondorlat mint a csalás tényeleme. (False pretence as the element of fraud.) In: *Jogtudományi Közlöny*, vol. Nr. 34, 1888, p. 278.

[26] FAYER, L., *A magyar büntetőjog kézikönyve. (Handbook of Hungarian criminal law)*, Vol. II., Budapest, 1905, p. 411.

[27] FINKEY, F., *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1905, p. 738.

[28] BÁTTASZÉKI, L., Relativ-e a csalás?(Is fraud relative?) In: *Jogtudományi Közlöny*, vol. Nr. 27, 1889, p. 214-215. és SERLY, A., Relativ-e a csalás? (Is fraud relative?) In: *Jogtudományi Közlöny*, vol. Nr. 34, 1889, p. 273-274.

[29] Büntető Jog Tára (Repertory of Criminal Law), Vol. XXX., p. 178-180.

[30] LŐW, T., *A magyar Büntetőtörvénykönyv a bűntettekről és a vétségekről és teljes anyaggyűjteménye* - II. kötet. (*The Hungarian Criminal Code on Crimes and Misdemeanors and its complete collection of materials - Volume II*), Budapest, 1880, p. 737.

[31] EDVI ILLÉS, K., *A büntetőtörvénykönyv magyarázata (Explanation of the Criminal Code)*, Vol. III., Budapest, 1894, p. 272.

[32] ANGYAL, P., *A csalás (The fraud)*, Budapest, 1939, p. 72-75., EDVI ILLÉS, K., *A büntetőtörvénykönyv magyarázata (Explanation of the Criminal Code)*, Vol. III., Budapest, 1894, p. 272-273., SCHNIERER, A., *A büntettekről és vétségekről szóló magyar büntető-törvény (1878. V. t. cz.) magyarázata.* (*Explanation of the Hungarian Criminal Code on offenses and misdemeanours*), Budapest, 1893, p. 568-569. However, the current Hungarian Criminal Code does not follow that example when it defines the concept of damage in Section 459 Subsection (5) Point 16 as "any diminution in the value of property caused by the crime". The lucrum cessans also appears in our law in Section 459 Subsection (5) Point 17 of Criminal Code, but it is mentioned in the Code in the context of pecuniary disadvantage: "any damage caused to property and the missed property advantage".

of the victim's property interest."[33] Illés Edvi in 1894, while accepting the latter theory, which is therefore satisfied with a legal identity, mentions that the practice was still volatile to the theoretical consensus (or rather contrary), as he acquitted an accused who realized all the factual elements of fraud, only the deceived and the damaged person were different.[34] In his work, published in 1905, Finkey already clearly states that the practice accepted the second theory, which means the legal identity of the deceived and damaged person is sufficient to establish fraud.[35] Therefore, we can see in what direction the practice approach has changed, perhaps due to the influence of science, or perhaps the necessity recognized by practice, which is satisfied with the existence of legal identity for the detection of fraud to ensure adequate criminal activity protection.

In addition to the basic definition of the crime, we could find several aggravated cases in the Code. If the damage caused by the fraud did not exceed HUF 50, the fraud was considered a misdemeanour by law; if the damage exceeded this amount, it was a criminal offence. It is also important to point out that there were circumstances defined in the law under which the legislator ordered the act to be punished as a criminal offense, regardless of the amount of damage:

"381. § Irrespective of the amount of damage caused, fraud is punishable if:

1. *the perpetrator pretends to be a public official or to have an official mandate in order to commit the crime;*
2. *it has been committed by a public official, advocate, trustee, administrator or private official in the course of his office or assignment;*
3. *the perpetrator has already been punished in two cases for fraud, and it has not yet been ten years since he served his sentence before committing his last fraud.*

§ 382. Irrespective of the amount of damage caused, fraud is a criminal offence: if someone commits it by destroying or damaging one's own insured property. "

The differentiation was also marked in terms of punishment: the misdemeanor was punishable by imprisonment for up to one year and a fine of up to five hundred forints, and the penalty for felony was imprisonment for up to five years and a fine of up to two thousand forints. If the value of the damage caused by fraud exceeded two thousand forints, or in cases of recidivism or the crime classified as insurance fraud, the fraud was punishable by imprisonment for up to five years.

4. The First Amendment of Csemegi Code

The Csemegi Code was a decisive work in the history of Hungarian criminal law. Its dogmatic system and approach are also reflected in today's criminal law.

Earlier, we pointed out that this Code was the first independent, complex Criminal Code in Hungary. As a result of this fact, it is evident that there was not – could not have been – a work that reflects the views of all representatives of science or practice. In recognition of the merits of the Code, several have criticized specific issues regarding the General Part and Special Part also. Here we want to avoid general explanations of the norm, we only want to draw attention to the problems concerning the definition of fraud, and within that, as we have already talked about the importance of the Code on the crime of fraud, we only touch on the points that changed the definition.

The relevant provisions of the Csemegi Code have been challenged by practice and science on the following points:

1) the use of the term *'under false pretences.'*
2) the question of the identity of the deceived person and the damaged person,
3) the impunity of the attempt of fraud misdemeanour.

According to the aspects above, the legislator amended the basic definition and Section 50 of the First Amendment already defined fraud as follows:

"A person who, for the purpose of obtaining an unlawful property benefit for themselves or another, leads someone to error or maintains his/her error by pretence, thereby causing him/her or for another property damage: commits the fraud. Attempts to commit fraud shall be punishable."

4.1 The use of the term *'under false pretences'*

We have already touched upon the problem of *'under false pretences'* in the past, so now we merely refer to the fact that such an expression of the Code generated such a fluctuating, unpredictable judgment. After hearing professionals' views, the legislator wanted to make this inconsistent judicial practice more predictable by omitting the adjective *'under false pretences'*.

Contrary to Finkey's view, Angyal explains that the concept of pretences must be endowed with "*content elements*" which "*on the one hand do not involve unnecessary inhibitions that hinder the normal course of daily life, and on the other hand provide protection for the optimistic weakers."*[36] By presenting this element, we can get an idea about Angyal's conception of criminal law and its role and function when he states that the educational function of criminal law can be observed in the structure of the definition, as the legislator tries to persuade people to certify reliable and correct conduct.

Nevertheless, what can be considered *'pretence'* according to the amendment? How different is this criterion from *'under false pretences'*? Judging this subjective element also kept itself with the entry into force of the First Amendment. Judging when a lie can be considered *'pretence'* should always be "*judged according to the cases and the individuality of the actors*".[37] Although it was clear from the wording of the Code, the Curia nevertheless con-

[33] SCHNIERER, A., *A büntettekről és vétségekről szóló magyar büntető-törvény (1878. V. t. cz.) magyarázata.* (*Explanation of the Hungarian Criminal Code on offenses and misdemeanours*), Budapest, 1893, p. 569.

[34] EDVI ILLÉS, K., *A büntetőtörvénykönyv magyarázata.* (*Explanation of the Criminal Code*), Vol. III., Budapest, 1894, p. 274-275.

[35] FINKEY, F. *A magyar büntetőjog tankönyve. (Textbook of Hungarian criminal law)*, Budapest, 1905, p. 738.

[36] ANGYAL, P., *A csalás. (The fraud)*, Budapest, 1939, p. 53-54.

[37] *Büntető Törvénykönyv a büntettekről és vétségekről (1878. V. t. cz.) (Criminal Code on offenses and misdemeanours*), Jegyzetekkel, utalásokkal és joggyakorlatokkal összeállította ANGYAL Pál és ISAÁK Gyula (Compiled by Pál ANGYAL and Gyula ISAÁK with notes, references and case law), Budapest, 1937, p. 469.

firmed in several decisions that, due to the modifications set out in the First Amendment, no extraordinary finesse was required to commit the fraud.[38]

In one decision, the Curia stated this in principle: "*The definition of 'pretence' is not a generally closed theorem, the elements of which are identical in each case; but according to the changing conditions of life, the level of intellectual maturity and difference of the opposing parties, it can be a 'pretence' that, when practised by one party, it is capable of deceiving the opposing party and persuading to act.*"[39]

We must criticize one point of this statement, because it is not the *'pretence'* itself that misleads the passive subject, as opposed to the Curia finding, but the criminal conduct *leads someone to error or maintains his/her error*; *'pretence'* – as the mode of the crime – is intended to help, as it refers to its implementation, and it merely supports fraud, but does not in itself cause or maintain the error.

In that case, moreover, the accused, "*known as the fortune-teller and quack doctor*", committed the fraud to the detriment of several victims, whose "*rudimentary intelligence and intellectual weakness immediately appeared to the accused*".[40]

Another decision of the Curia contains a similar approach in terms of content. According to the essence of the historical facts, the victim handed over money to the accused, trusting in the favourable assessment of his application for immunity from military practice, but the accused, although he promised to cooperate, did not and could not do so.

In another case, the defendant sold his horses to the victim, which he said were healthy but were, in fact, sick. The Curia found the crime was committed with *'pretence'*, as signs of sickness could not generally be detected on horses, and also because the victim "*could not be persuaded of the accused's allegation in the lack of special expertise*".[41]

Pál Angyal is one of the few authors who defined the concept of *'pretence'*: "*pretence which contributes to or occurs at the same time as 'leading to error' or 'maintaining the error' which, by increasing the effectiveness of the 'leading to error' or 'maintaining the error', weakens or even excludes the ability to doubt in a third party, or which is suitable for that purpose.*"[42]

We must emphasize two elements of the definition: one is *additionality*, and the other is *efficiency*. The former means that, in the presence of elements of fraud, it is a circumstance contributing to *'leading to error' or 'maintaining the error'* which can be taken into account only in connection with it, as is clear from the wording of the definition itself. Angyal here also refers to *'pretence'* as conduct. However, presumably, the designation of the mode of perpetration would be more correct, considering that the *'pretence'* alone – in this relation – cannot be interpreted, because the perpetrator can be punished only if they lead someone to error or maintains their error *by pretence,* in other words, with a fraudulent mode. Thus, the legislator did not want to designate a new criminal conduct, but to record the mode of the conduct which conduct already existed in the Csemegi Code. By the effect-enhancing nature of *'pretence'*, we can mean that by supplementing the perpetrator's behaviour (*'leading to error'; 'maintaining the error'*), it emphasizes its credibility and makes it easier for the passive subject to accepting the lie.

4.2 The identity of the deceived person and the damaged person

Much of the criticism of fraud in the Csemegi Code mentioned the fact that it was a problem for the practice that the text of the Code required the identity of the passive subject and the victim: "*A person who… leads someone to error or maintains his/her error under false pretences, thereby causing him/her property damage…*". It is clear from the law that fraud could have been established only if the person who had erred or was held in error was the same as the victim, i.e., the person with whom the damage occurred. This deficiency showed its effect in practice relatively early on. As early as 1892, Ferenc Vargha put it this way: "*The issue of the identity of the damaged and mistaken person and, consequently, of the punishability of fraud has given rise to most controversy and criticism in the doctrine of fraud.*"[43]

After the initial extreme fluctuations, separating the physical and legal identities, the judicial practice was finally satisfied with the legal identity of the passive subject and the victim.[44]

Schedius, when drafting a plan of amendment, suggested adding a phrase "*or to someone else*" to the text of the definition of fraud. However, the assembly convened on this issue of the amendment suggested a longer modification: "*A person who has mistaken and been damaged shall be deemed to be the same even if the person who has mistaken had the possibility of a legal or factual provision over the thing.*"[45] Based on various considerations, Fayer disagreed with none of the proposals, arguing that the text of "*and thereby cause property damage to* or *someone else*" would have been the most expedient.[46]

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[38] SCHÄFER, I., Néhány szó a »fondorlat« büntetőjogi fogalmához. (A few words on the criminal law concept of "pretence".) In: *Jogtudományi Közlöny*, vol. Nr. 11, 1933-1934, p. 67.

[39] Büntető Jog Tára (Repertory of Criminal Law), Vol. LXX., p. 122.

[40] Ibid.

[41] Büntető Jog Tára (Repertory of Criminal Law), Vol. LXVII., p. 111-112.

[42] ANGYAL, P., *A csalás. (The fraud)*, Budapest, 1939, p. 55.

[43] VARGHA, F., A büntető-törvénykönyvek módosítása tárgyában összehívott enquéte határozatai. (Decisions of the assembly convened to amend the Criminal Codes.) In: *Jogtudományi Közlöny*, vol. Nr. 9, 1892, p. 66.

[44] FINKEY, F. *A magyar büntetőjog tankönyve.* (*Textbook of Hungarian criminal law*), Budapest, 1905, p. 738.

[45] VARGHA, F., A büntető-törvénykönyvek módosítása tárgyában összehívott enquéte határozatai. (Decisions of the assembly convened to amend the Criminal Codes.) In: *Jogtudományi Közlöny*, vol. Nr. 9, 1892, p. 66.

[46] FAYER, L., Észrevételek a Btk. és a Kbtk. novella-javaslatára XI. (Comments on Draft of the Amendment of Criminal Code and Code on Tresspases XI.) In: *Jogtudományi Közlöny*, vol. Nr. 32, 1892, p. 250.

In the end, the First Amendment chose the text of "*for that or someone else*", and thus it was already clear at the level of the norm that the mistaken person and the victim (the damaged person) could be the same but different too.

4.3 The impunity of the attempt of fraud misdemeanour

The Csemegi Code contained different rules for the attempt than the current Hungarian Criminal Code. According to Article 65 of the Csemegi Code:

"*The act by which the commission of the intended offence or misdemeanour is commenced but not completed: it is an attempt at the commencement of the offence or misdemeanour. An attempt to commit an offence is always punishable, but a misdemeanour is punishable only in the cases specified in a special part of the Code*."

Based on the text, we can state that Csemegi took a clear position during the drafting of the Code: the attempt to commit fraud as an offence – referring to the second sentence of Section 65 of the Code – was punishable in general, while the misdemeanour of fraud was not.

Concerning fraud, the Enquete convened to amend the Criminal Codes already took the view that any attempt to commit fraud as a misdemeanour was also punishable.[47] A legitimate expectation has been formulated in connection with the relevant provisions of First Amendment, because, for example, the chapter of the Csemegi Code regulating theft – and within that Article 339 – ordered the attempt to punish the misdemeanour of theft.

The legislator, agreeing with the position of theory and practice, corrected the shortcomings of the Code in the First Amendment, and ordered the attempt of the misdemeanour of fraud to be punished as well.

5. Closing remarks

It can also be seen from the above that the first Hungarian codification of the definition of fraud, followed by its subsequent amendment, was surrounded by heated debates. However, these were not in vain since based on these – with only minor modifications – It was possible to create a concept that still holds its place in the current Hungarian Criminal Code.

[47] VARGHA, F., A büntető-törvénykönyvek módosítása tárgyában összehívott enquéte határozatai. (Decisions of the assembly convened to amend the Criminal Codes.) In: *Jogtudományi Közlöny*, vol. Nr. 9, 1892, p. 66.

Papal Monarchy Challenged

*Jiří Bílý**

Abstract

The following article analyzes the power structures within the Catholic Church from a sociological and historical perspective, especially the power of the Curia in relation to the various national bishops' conferences and individual dioceses, but also in relation to the Pope, as it developed above all from the 19th century to have. Unlike the spirit of the Second Vatican Council, it is the Roman Curia, not the College of Bishops, that holds the real power in its hands. The bishops appear before the competent Vatican authorities more as supplicants than as confreres. The Curia is not even well organized internally. There are often no clear boundaries between competencies and no regular cabinet meetings between the heads of authorities. While one has long since learned in the secular area to use systems of separation of powers and mutual control in order to remain capable of learning as an organization, the Roman Church apparently believes that it can do without such „checks and balances". As the sacred aura of the papacy fades, the institutional character of the church becomes more and more conscious, and in many ways it contradicts generally accepted socio-ethical principles such as the rule of law, subsidiarity, the participation of those concerned and administrative control. It looks as if the largest religious community in the world is ruled by a small group of old men who shirk human responsibility in the name of God and demand unconditional obedience from the bishops, priests and believers of the universal Church for their decisions, regardless of theirs Reasons and their plausibility on site. This increasingly calls into question the credibility of the church's message itself.

Keywords: *Centralism; popes; the Curia; the Vatican; church; council.*

1. Popes and the Roman Curia

The Vatican is a microcosm, in that it has always wrestled not only with faith and the salvation of people but also with power, influence, and money. It is therefore correct to assume that most popes did not have the Vatican fully under their control and this is true not only for Benedict XVI. The last Pope who took on the Roman authorities was Paul VI., but even he only managed to achieve a half-hearted reform of the Curia. His successor, John Paul I died shortly after being elected pope and some suggest the tensions he had with the top leadership of the Curia were partly responsible for his death. John Paul II. in essence specified the status quo of the organization of the Curia and the relationships of residing bishops to Rome in the Apostolic Constitution *Pastor Bonus* (1988).

He also appointed cardinals he trusted to head the most important dicasteries, so that he could focus on proclaiming the faith during his travels to the entire world. When Benedict XVI. took over the Curia, it was in a condition that can at best be described as uncoordinated; or, less favorably formulated, corrupt.[1] Now he has resigned and the world waits anxiously to see whether and how his successor, Francis, will manage to cope with the Hydra.

In a casual survey of the list of popes since the First Vatican Council (1869-70), the personal qualities of the church leaders are impressive, regardless of what one may think of their individual decisions. Each of them elevated the reputation of the church in his own way. This reputation was anything but controversial in the 19th century: after all, the Papal State was seen as „one of the most corrupt and worst governed countries in Europe".[2] Today, the administration of the Vatican State is separated from that of the global church. Even the latter does not depend only on the popes but also on the composition and leadership of the Roman Curia. The influence of the Curia is widely underestimated.

This became evident during the Second Vatican Council, the preparation of which lay entirely in the hands of the grandees of the Curia. When at the first General Congregation, where the approximately 2500 council fathers who had gathered from all over the world were being coerced, by the invocation of a guarantee given by a Vatican I procedure, into determining the members of the council commissions without discussion, leading cardinals of the universal church from France (Liénart) and Germany (Frings) protested against these proceedings, to the increasing applause of the Council Fathers. They demanded that the proposals of the national episcopal conferences should be obtained first, which led to the termination of the session.

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1 DECKERS, D., Brutal im Vatikan. In: *Frankfurter Allgemeine Zeitung,* 26 June, 1, 2012, p. 36.

2 SCHIMMELPFENNIG, B., *Das Papsttum.* 4th ed., Darmstadt, 1996, p. 297.

That was the beginning of an emancipation of the Council, which was able to succeed only thanks to the support of Pope John XXIII. The conflicts between the bishops of the Curia and the bishops from around the world became particularly evident in the discussions on the importance of the College of Bishops and the episcopal decrees. At the Council the demand arose for the creation of an Executive Council, an idea borrowed from the episcopal synods of the Eastern Churches, as the highest authority in the world church, which would be entitled to a right of supervision over the departments of the Roman Curia. In a clever move, before a resolution of the Council was reached. Pope Paul VI. ruled for the establishment of the Institute of the Roman Synod of Bishops with much more limited powers. In practice, the Synod of Bishops, which meets every four years - and in secret like all Vatican forums - has become less of a collegial advisory body to the Pope and more of a tool for motivating the global clergy concerning ideas originating in Rome.

The cardinals acquired greater influence under Pope John Paul II. and the current Code of Canon Law, the Codex Iuris Canonici (CIC) of 1983, recognizes three different forms for their convening. Not all cardinals have to be invited for the most common form of the ordinary Consistory, but at least for the Rome-based ones. This easily leads to a predominance of the cardinals of the Curia.

2. The Curia Organized on a Courtly Principle and the Worldwide Episcopate

If one follows the teachings of Vatican II, the relationship between the Pope and the bishops is modelled on the relationship between Peter and the other apostles. In this connection, reference is often made to the way the first council understood the gathering of the apostles in Jerusalem, at which Paul, coming his demand to spare the gentiles from obligatory circumcision and the observation of Jewish ritual commandments.

Current practice is different however; it is not the heads of the dioceses in the world but the bishops of the Curia, residing in Rome as fictional leaders of long disappeared dioceses from Antiquity, who have the say in the church, although always in the shadows and formally on behalf of the Pope, but definitely not in accordance with generally valid rules. Operatively the dicasteries carry much more responsibility. At their head is the Secretariat of State, then nine congregations and twelve councils, both roughly comparable in importance to different government ministries, three courts and other offices or secretariats. In general, the departments are headed by a cardinal, next to a council assembled from cardinals of the Curia and from outside Rome, but which meets only rarely and with low levels of non-Roman involvement. The chairman is assisted by a secretary, usually of episcopal rank, and an under-secretary, who direct the executive staff. This is where the input from the global church is processed and the decisions of the Pope are prepared.[3] The bishops of the universal church come - usually in national groups but not infrequently also individually - to Rome periodically, bringing their reports and accounts and to present their concerns. Generally they are received by the Pope, but in practice the visits to the departments responsible for their respective issues are more important. Here they are much more supplicants than brothers.

Responsibilities are often disputed by the various departments; overlapping competencies are frequent. The Curia should not be imagined as a modern ministerial administration, whose ministers work together within the form of a cabinet run by the federal chancellor or the prime minister. Rather, it is still very much reminiscent of the organization of a royal court, where personal relationships are more important than substantive rules, and where fiefdoms of various cliques exist. Each dicastery leads a life of its own and lacks the rules and structures that would allow for the coordination of its functions in terms of a mission of the universal church. The political scientist and former president of the Central Committee of German Catholics, Hans Maier, has repeatedly pointed to the model of political cabinets and cabinet discipline in the secular sphere. Formally, everything goes to the Pope as the sole regent of the Church but he would be overwhelmed by such a practice as an everyday rule. His position is more akin to that of a president or a federal chancellor but with the significant exception that he can always select a specific matter for himself to deal with and to decide about it personally - if ever he can! His ability to do this has many limitations, in some cases even of information or the lack of, as is suggested by some unfortunate episcopal appointments by Pope John Paul II. or Benedict XVI's dealing with the bishops consecrated by the dissident Archbishop Lefevre.

If there is such a thing as a de facto government in the Vatican, then it is to be found at the level of State Secretariat. Originally, it was more a kind of foreign ministry, which through its nuncios (diplomats) maintains contact with states, but which also reports on national-level church relationships and often exerts considerable influence on the appointment of bishops. The position of the national episcopal conferences is usually weaker than that of the nuncios who report to the Vatican.

Today the State Secretariat is divided into two departments: the so-called First Department under the direction of the „Substitute" (the third most important man in the Vatican after the Pope and the cardinal who is Secretary of State) is responsible for the internal affairs of governance and thus also for the coordination of the dicasteries. The responsibility of the Second Department is for external relations. The Substitute is the Pope's closest fellow-worker, next to his private secretary, and both of them hold the significant role of gatekeeper, which not infrequently leads to rivalry between the two. To put it in simple terms: the only person in the Catholic Church who beholds all the authority, in whose name everything that is binding in the Church is done, is essentially shielded from or connected to their surrounding world by two individuals. The Jesuit J.P. Reese reports about an American Substitute under John Paul II. in an interview, „He had alarmed the Pope by telling him the reality. They wanted someone who spared him the problems. So, they pushed him out after thirteen months".[4]

[3] REESE, J. P., *Inside the Vatican: The Politics and Organization of the Catholic Church.* Cambridge, MA, 1996, p. 147.
[4] REESE, J. P., *Inside the Vatican: The Politics and Organization of the Catholic Church.* Cambridge, M.A., 1996, p. 231-236.

The cardinal who is Secretary of State is the most important man in the Church after the Pope. He is responsible in particular for the external relations of the Vatican, including the Apostolic Nunciature and in this he is supported by the Second Department of the Secretariat of State. Benedict XVI. appointed Cardinal Tarcisio Bertone as the Cardinal Secretary of State, who was his confidant from the Congregation for the Doctrine of Faith, which had been led by Benedict before his election as Pope, but who was hardly familiar with the foreign policy of the Vatican. Many observers thought this an unfortunate appointment.

It would require almost superhuman powers, very loyal close collaborators, highly successful teamwork, and support from the universal church for a Pope to bring about real reform of the Curia, according to the principles of „good governance". As a first step, Reese proposes a move away from the recently diminished exercise of making all higher officials in the Curia bishops or even cardinal bishops and reserving those titles instead for the leaders of the universal church. Thus the rank of curial officials would be reduced.[5] The proposal also carries weight in church politics as a curial blocking-minority of one-third of the cardinals would be sufficient to eliminate candidates who present a „danger" to reform.

3. The Early Miseries of Roman Church Centralism

Martin Luther's rebellion against late medieval views on salvation was also a rebellion against papal authority, but he was by no means the first to question the assumptions of papal monarchy. He could borrow virtually all his language of condemnation from the poison created by ‚Imperialists', apologists for the Holy Roman Emperor in thirteenth-century conflicts with the papacy, and by similar abuse created during the clash between certain popes and the Spiritual wing of the Franciscans. It was imperial spokesmen who first regularly termed the pope ‚Antichrist', that enemy of Christ constructed out of various apocalyptic passages in the Bible - papal spokesmen were rather less successful in fastening the same image on the emperor.

At the highest level of the ecclesiastical court system stood the pope, who exercised both original and appellate jurisdictions over controversies from every part of Western Christendom. Popes, like other bishops, for centuries exercised their judicial functions in person and routinely spent numerous hours almost every day attending to the complaints of litigants, the arguments of advocates, and the advice of their own legal counsellors. This was not entirely a disinterested attention to duty. The bishop of Rome's standing as the ultimate appeals judge of the Latin church was one of the principal sources of papal power. In addition, the fees and costs collected from litigants furnished an important source of revenues for members of the curia and accounted for a large part of the prosperity of medieval Rome.[6]

By the mid-twelfth century, however, the pope's judicial duties threatened to overwhelm the rest of his responsibilities. Concerned churchmen urged that he cut back on this part of his duties and delegate all but the most essential judicial tasks to others. Thus St Bernard of Clairvaux (1090-1153) admonished his former pupil. Pope Eugene III (1145-53):

> I ask you, what is the point of wrangling and listening to litigants from morning to night? And would that the evil of the day were sufficient for it, but the nights are not even free! One day passes on litigation to the next, one night reveals malice to the next; so much so that you have no time to breathe, no time to rest and no time for leisure. I have no doubt that you deplore this situation as much as I, but that is in vain unless you 07 to remedy it… Patience is a great virtue, but I would hardly have wished it for you in this case.[7]

The Franciscan Spirituals elaborated talk of the Antichrist, particularly to condemn Pope Boniface VIII (Pope 1294-1303). In order to become pope, Boniface had summarily displaced and brutally imprisoned a disastrously unworldly hermit-partisan of their movement who had been unwisely elected pope as Celestine V.[8]

Boniface went on to claim jurisdiction for the papacy throughout the world in a bull of 1302, *Unam Sanctam* (‚One Holy [‚Church]'). This was a culminating moment in the universal pretensions of the papacy, but the Pope's aspirations were curtailed by his imprisonment and humiliation at the hands of King Philip the Fair of France. A French successor-pope then chose to live in the city of Avignon, a small papal enclave in southern France. There were many good reasons why Pope Clement V. should choose Avignon in 1309: it saved him encountering the constant infighting in Rome, and since the papal court was now a bureaucratic centre affecting all Europe, it made sense to find a more accessible place from which it could operate. Nevertheless, the move brought the papacy closely under French influence, and it caused great indignation in Italy, where the great poet Petrarch described it as a ‚Babylonian captivity'. It showed how far the pope had moved from the intimate association with the body of St Peter which had brought him his power in the Church.

One of the most peculiar new sources of church law in the early Middle Ages was the collection of canons that we now call the Pseudo-Isidorian Decretals. This work comprised a vast compendium of genuine conciliar canons and papal letters, interwoven with falsified canons composed by forgers whose precise identity remains a mystery. The collection was ascribed to 'Isidore Mercator' and was apparently confected in the mid-ninth century by reformers in the archdiocese of Reims who sought to bolster the authority of bishops and the papacy by composing a battery of 'ancient' texts, supposedly from the 'golden age' of the early church, that would support their con-

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5 idem., p. 189.

6 ROBINSON, I. S., *The papacy, 1073-1198: Continuity and innovation.* Cambridge, 1990, p. 3.

7 St. BERNARD of CLAIRVAUX, De consideratione 1. 3. 4-1. 4. 5. In: *Bernard's Opera,* ed. LECLERCQ, J., TALBOT, C. H. and ROCHAIS, H. M., 8 vols in 9, Rome, 1957-77, p. 397-9.

8 A good discussion on the theme is McGINN, B., Angel Pope and Papal Antichrist. In: *Church History,* 47, 1978, p. 158-173.

tention that the hierarchical structure of the church went back to its very foundations.

This pious fraud was immensely successful. Almost a hundred medieval manuscripts of the Pseudo-Isidorian collection still survive, which makes it the most frequently copied canonical collection of its age. Its comprehensive range, moreover, made it seem an especially valuable reference work, one that bishops and abbots wished to have at hand when legal questions arose and they needed to consult past authorities and precedents. Although a few contemporaries suspected the authenticity of the collection, most students of canon law and authors of later canonical collections used Pseudo-Isidore freely as a source and copied both genuine and spurious texts from the work for their own compilations. Thus the forgeries quickly entered the mainstream of canon law, where they remained, largely undetected, for centuries.[9]

Pseudo-Isidore's influence was pervasive. The forgers inserted a wholly new office into the church's hierarchy, that of primate, intermediate in authority between the metropolitan and the patriarch. The forgers' inventions also seemed to demonstrate that the bishops of Rome had dominated Christian life from the earliest times and that papal approval was essential for the validity of conciliar and synodal canons. Such exaltations of papal prerogatives furnished later reformers in the eleventh century with ammunition that they used effectively in their campaigns to centralize the church's administrative authority at Rome. The forgers likewise invented new procedural forms and evidential requirements that considerably complicated litigation in the medieval church.[10]

By 1200 canonists had begun to distinguish between natural ‚persons' in the traditional legal sense and juristic ‚persons' *(persona quoad iuris intellectum),* or bodies corporate, who possessed the same attributes of legal personality as natural ‚persons'.

It was an easy and natural further step to think of juristic persons as having a head and members, just as natural persons did. Huguccio (d. 1210) and the author of the anonymous *Glossa Palatina* (written between 1210 and 1215), among others, approached the problem of the relationship between the head and members of a corporate body on the basis of Gratian's teachings about the relationship between the pope and the remainder of the Christian church. Was the pope bound, they asked, by the decisions of a general council or could he singlehandedly overrule them? What, for that matter, about the relationship between the pope and the College of Cardinals? The cardinals elected the pope; but did that imply that if they found him unsatisfactory, or if somehow he fell into heresy, they could depose him? It was well-established custom by the late twelfth century that the pope routinely sought the advice of the cardinals who served in the curia on difficult or delicate issues. But if the pope should choose not to consult the cardinals on some matter, did that render his disposition of the matter invalid because of a procedural defect? [11]

Although decretists and early decretalists discussed these and related questions, they failed to arrive at a coherent theory of corporate structure and power relationships within a corporate body. Two distinguished thirteenth-century canonists. Pope Innocent IV. (1243-54) and Cardinal Hostiensis (d. 1271), undertook more elaborate analyses of canonical corporation law. They disagreed in their conclusions, however, since each began with a fundamentally different conception of how corporate entities ought to conduct their business.

Innocent IV. grounded his treatment of ecclesiastical corporations on the premise that power within these institutions ought to be concentrated in the hands of the principal officer. The head of the group, to be sure, might delegate partial responsibility and limited authority over some matters to subordinate officers, who were answerable to him for the proper discharge of their duties. Innocent's view of corporations, accordingly, may be described as authoritarian. The head of the corporation is ultimately the sole legitimate source of power and the members are dependent upon him. The exercise of power by the head is not subject to review or limitation by the other members of the group. Innocent envisioned the corporate head as an authoritarian ruler, responsible only to higher authority and ultimately to God.[12]

Hostiensis rejected this view. Instead, he taught that head and members shared corporate authority and responsibility. The head of the body, Hostiensis conceded, was entitled to make the final determination on matters that solely affected the rights and property that belonged to his office. Even on those issues, however, he must consult the other members of the group before taking final action. The members, according to Hostiensis's view, retained authority over matters that affected them alone. On these the members could make final disposition, although the head of course retained the right to participate in discussions of these affairs and even to vote on them, since he remained, after all, a member of the corporate body. On matters that involved the joint interests of head and members, according to Hostiensis, the two shared authority and responsibility, so that neither could act without the consent of the other.[13]

This analysis of corporate decision-making required those who taught canon law in the schools to define the meaning of terms such as ‚advise' and ‚consent'. Thirteenth-century academic lawyers who taught canon law in universities such as Bologna, Paris, and Oxford, accordingly took up this task. Although some early writers used the terms ‚advise' and ‚consent' as if they were synonyms, Hostiensis and others by mid-century distinguished them sharply from one another. When the head

[9] A Calvinist pastor, David Blondel (1591-1655), first demonstrated in 1628 that the work of, Isidore Mercator' was a forgery; LAMBERT, A.‚Blondel (David)'. In: *Dictionnaire de droit canonique,* 7 vols, Paris, 1935-65; cited hereafter as DDC, p. 926-7.

[10] FUHRMANN, H., *Einfluss und Verbreitung der pseudoisidorischen Fälschungen von ihrem Auftrachtung bis in die neuere Zeit,* 3 vols, MGH, Schriften, vol. 24, Stuttgart, 1972-74, esp. p. 39-53.

[11] See particularly TIERNEY, B., *Foundations of the conciliar theory.* Cambridge, 1955, p. 23-84, and PENNINGTON, K., *Pope and bishops: The papal monarchy in the twelfth and thirteenth centuries.* Philadelphia, 1984, p. 71-72.

[12] INNOCENT IV., *Apparatus* to X 1. 2. 8 v. *sedis* § 2. Frankfurt a/M., 1570, repr. 1968, fol. 4 ra-rb.

[13] HOSTIENSIS, *Lectura* to X 1. 2. 8 § 7-8, 5 pts in 2 vols. Venice, 1581, repr. Turin, 1965, pt 1, fol. 9va.

of a corporate group, such as a chapter, a monastery, or perhaps the college of cardinals, was required only to take counsel with the members, but was not bound to abide by the advice he received from them, then 'advise' was the appropriate verb to describe the situation. But if the 'consent' of the members was required, the head must not only consult with the members, but also win their approval. The result was to impose limits upon the authority and discretion of the head of a corporation and to allow the members a voice in the determination both of corporate policy and actions.

As early as the time of Innocent III some writers had seen the theological teaching that the church formed the mystical body of Christ as grounds for classifying the entire Latin church as a corporate entity, with the pope as its head and the college of cardinals as members. Later canonists, such as John of Paris (d. 1306) and Cardinal Zabarella (d. 1417) in the fourteenth and fifteenth centuries, pushed this analysis much further. Just as the powers of the heads of other ecclesiastical corporations were limited by the powers of the members, they argued, so likewise papal power was not absolute. Instead, the cardinals and especially the general councils of the church enjoyed the right to limit the exercise of papal discretion and to establish boundaries within which popes must operate.[14] The pope, like other Christians, they asserted, was bound to observe the laws of the church. Should he defy the limits that the law established, he acted illegitimately and, in extreme circumstances, might even be deposed. These issues concerning the limits of papal authority and the relationship between popes, cardinals, and councils lay at the heart of the conciliarist controversies in the later Middle Ages.

Pope John XXII. made further vocal enemies when after first crushing the Spiritual Franciscans, he further infuriated the ‚Conventual' wing of the order which had made careful arrangements to avoid holding property while still establishing a regular life in convents. In 1321 John reversed earlier papal pronouncements supporting Franciscan poverty, and repudiated previous papal trusteeship of their goods, restoring ownership to the Franciscans themselves, a far from welcome gift. Pope John's canonization of Francis the following year by no means mollified the Franciscans: new identifications of the Pope with Antichrist outdid all previous efforts in shrillness, and some Franciscans accused John of heresy for repudiating the pronouncements of his predecessors. That lent an urgent topicality to earlier rather theoretical discussions about how to deal with a pope who was a heretic. One of the most distinguished of Franciscan philosopher-theologians, the Englishman William of Ockham, was among those leading the campaign. He had no hesitation in declaring Pope John a heretic to whom no obedience was due: ‚Our faith is not formed by the wisdom of the Pope. For no one is bound to believe the Pope in matters which are of the faith, unless he can demonstrate the reasonableness of what he says by the rule of faith'.[15] Ockham survived John XXII's condemnation for this opinion, and his nominalist approach to philosophy flourished, becoming one of the most influential modes of philosophical and theological argument in late medieval Europe.

Ockham was naturally supported in his attacks by some order's friars, and they had their own powerful spokesman in a former rector of the University of Paris, Marsilius or Marsiglio of Padua, principally presented in his *Defensor Pacis* (‚Defender of Peace') of 1324. What was so effective about Marsilius's polemic on papal jurisdiction was that it was a careful dialogue with Thomas Aquinas, and through him with Aristotle, punctiliously backed up at every stage by biblical quotation. Since Thomas had so effectively shown that Aristotle could be reconciled with Christian doctrine, if it appeared that Aristotle's teaching on political arrangements clashed with current Christian understandings, then the fault must lie with mistaken Christian teachers, not with the great philosopher. And the chief Christian teacher was of course the Holy Father in Rome, who could further be shown to have caused much of the political troubles of Christendom in his own time. Protestant monarchs and their publicists much relished Marsiglio's arguments two centuries later; in the 1530s Marsiglio was to be translated (and judiciously tweaked) to support Henry VIII's break with Rome, on the initiative of his unusually well-educated minister Thomas Cromwell.[16]

Although Gregory XI. a generation after John XXII. tried to cure the wars in his Italian possessions by moving back to Rome in 1377, the situation which emerged from the political wrangles of the late fourteenth century was still worse: from 1378 there wem two rival popes, both lawfully elected by the College of Cardinals.[17] An effort to solve the situation at the Council of Pisa in 1409 only resulted in a third candidate emerging: in 1414 one of them, John XXIII., took action in conjunction with the Holy Roman Emperor Sigismund to call a council safely outside Italy across the Alps at Konstanz. The council finally ended four decades of schism when, in 1417, it recognized the election of a new pope acknowledged by all factions, Martin V. In the midst of the complex wrangles which produced this result, the council produced a decree, *‚Sacrosancta',* proclaiming itself to hold its authority 'immediately from Christ; everyone, of every rank and condition, including the Pope himself, is bound to obey it in matters concerning the faith, the abolition of the schism, and the Reformation of the Church of God in its head and its members'.[18]

Who precisely among the clergy were to be represented? Konstanz had been an assembly of bishops and cardinals; Basel 1431 widened its membership so that lower clergy were also given delegates, even with a voting majority over the bishops.

[14] TIERNEY, B., *Foundations,* p. 157-237.
[15] OCKHAM, I., Dialogus c. 20, 459, qu SHOGIMEN, T., From Disobedince to Toleration: William Ockham and the Medieval Discourse on Fraternal Correction. In: *Journal of Ecclesiastical History,* 52, 2001, p. 599-622.
[16] LOCKWOOD, S., Marsilius of Padua and the case for the Royal Ecclesiastical Supremacy. In: *Transactions of the Royal Historical Society,* 6the Ser., I, 1991, p. 89-125.
[17] WILLIMAN, D., Schism within the Curia: The Twin Papal Election of 1378. In: *Journal of Ecclesiastical History,* 59, 2008, p. 29-47.
[18] BETTENSON, H. (ed.), *Document of the Christian Church.* 2nd edn, Oxford, 1961, p. 135-6.

Conciliarists tended to be clergy and were naturally clericalist in their outlook; this was not a movement which viewed lay participation with much sympathy. And if conciliarists were drastically limiting the pope's power, how did that affect the centuries-long disputes between the pope and secular rulers? It was unlikely that Philip the Fair's successors as kings of France were going to accept a new rival for power in an effective and permanent General Council of the Church, at least not without a good deal of careful explanation from sure-footed theologians that their own power was not affected by the special sacred status of the council.

When the French theologian Jean Gerson, one of the most prominent activists in the Council of Konstanz, consequently struggled to find a way of reconciling conciliarism with the traditional claims of the French monarchy, he developed a view of the Church's history later of great importance to Reformation leaders who sought to achieve the same balance between Church and secular commonwealth against more radical Christian thinkers. Gerson saw a threefold development in the Church: a first primitive heroic era while it was still unacknowledged and often persecuted by the Roman Empire; a second period after the Emperor Constantine I had allied with it, when Church leaders had justifiably and responsibly accepted power and wealth; but then a third era of decay after the time of Gregory VII., when this process had been taken to excess, so that it must now be curbed. Gerson was not a revolutionary, but in his meditations on the Church he had hit on that perpetually subversive anonymous writer Dionysius the Areopagite. One of the aspects of Dionysius's picture of a heavenly hierarchy which especially appealed to Gerson was an insistence on the highest standards possible for the clerical order, clergy's imitation of the order of Heaven itself. This Dionysian emphasis resonated with many reform-minded clergy; often it produced a clericalism so high as to seem almost anticlerical.[19]

Gerson was not seeking to destroy hierarchical Church structures, simply to recall them to purity, but he did not see a hierarchy as necessarily culminating in a papal monarchy. He was also a strong defender of parish clergy against the pretensions of monks and friars, pointing out that there had been no monastic vows in the Church in the time of Christ, Mary and the Apostles.[20] Sixteenth-century Reformers and the princes who supported them chose what they wanted from these various emphases in his writings. They took note of what Gerson had said about history, hierarchy, monks and friars, just as they took notice of Marsiglio's views on authority in the Church. For the problem which conciliarism had originally raised - principally, how to deal with a pope who cannot lead the Church as God wishes - would not go away. After 1520, Martin Luther was forced to give the drastic answer, going way beyond Ockham arid the fourteenth-century Franciscans, that if the pope turned out to be Antichrist, then one must walk out of the pope's false Church and recreate the true body of Christ. Even though in political terms conciliarism faced eclipse from the mid-fifteenth century, plenty of leading churchmen and academics (particularly canon lawyers) continued to believe that conciliar action to solve the Church's problems would be preferable to the rapid rebuilding of centralized papal power now taking place.

4. Nominalists, Lollards and Hussites

A centralized papacy, particularly one which recruited such dubious assistants, could not stop people thinking new thoughts. Two movements, the Lollards and the Hussites, rose to challenge the Church authorities. Another potential challenge was from the nominalism espoused by mentioned William of Ockham yet. The Franciscan Ockham denied the assumptions embodied in the Dominican Thomas Aquinas's adaptation of Greek philosophy to Christianity, centring on the word *nomen.* At its simplest this is the ordinary Latin word for ‚name', but in the philosophical terminology of the time it signified the universal concept of a particular phenomenon: the word ‚tree', for instance, is the *nomen* which unites our perception of every individual tree and points to the universal concept of a tree. Ockham and his fourteenth-century nominalist successors denied that there was any such individual reality behind a *nomen.* For them, it was simply a word to organize our thinking about similar phenomena - thus individual examples of objects which we decide to label trees. If this was accepted, it became impossible to construct overall systems of thought or explanation by the use of reason. This denied the value of Aquinas's work, with its majestic system of relationships throughout the cosmos: it implied that the line of analytical thought derived from Aristotle was pointless.

To turn from trees to the problem of discussing one of the chief issues of the Christian faith: what happens when bread and wine are consecrated in the Eucharist? If they become the body and blood of Christ, as virtually all medieval Western Christians agreed was the case, how can this be explained? As we have seen, those theologians or philosophers like Aquinas who drew on the vocabulary provided by Aristotle, could do so in terms of ‚substance' and ‚accidents'. Ockham and nominalist philosophers or theologians denied the usefulness of this language of substance and accidents, so they had no way of constructing such an explanation. The doctrine, and indeed any other doctrine of ultimate divine truths, could only be treated as a matter of faith, relying on the authority of the Church. And what would happen if one felt that the authority of the Church was at fault, as many nominalist-trained clergy were to do in the sixteenth century? As a result, nominalism was a corrosive doctrine for the accepted principles of medieval Western Christianity; while still glorying in the disputes of scholastic debates, nominalist academic debaters disrupted many of the given principles within those debates, and split apart the concerns of philosophy and theology. Still nominalism came to dominate the universities of northern Europe during the fifteenth cen-

[19] MacCULLOCH, D., *Reformation: Europe's House Divided.* London, 2003, p. 33-34.

[20] POSTHUMUS – MEYJES, G. H. M., *Jean Gerson - Apostle of Unity: His Church Politics and Ecclesiology.* Leiden, 1999.
RUBIN, M., Europe Remade: Purity and Danger in Late Medieval Europe. In: *Transactions of the Royal Historical Society,* 6the Ser., 11, 2001, p. 101-124.

tury, wherever the Dominicans could not defend the standing of their hero Aquinas. Many Protestant Reformers gained their university education in a nominalist tradition.

Those same thoughts - the comparability of layfolk and clergy, and the calling of all to the highest standards - were behind the two movements of Church reform which sprang like nominalism from universities, but which were forced out by official opposition and repression. John Wyclif, an Oxford philosopher, was the reverse of a nominalist: in the manner of philosophers like Aquinas, he championed the idea that there were indeed universal, indestructible realities, greater than individual phenomena. Wyclif's career in controversy was comparatively brief, no more than a decade or so. In the mid-1370s, well into his career, having returned from an unproductive royal mission to Bruges to argue the case for a remission of England's taxation to the pope, he began turning his philosophical assumptions into an attack on the contemporary institutions of the Church: not merely their everyday faults, but their whole foundation.

Wyclif contrasted the universal reality of the invisible true Church with the false Church which was only too visible in the everyday world. He maintained that the true Church was made up solely of those who were saved, not just in the next world, but here and now. There were some people, probably most, who were eternally damned and who therefore never formed part of the true Church. No one could know who was damned or who was saved, and therefore the visible Church, that presided over by popes and bishops, could not possibly be the same as the true Church, since it claimed a universal authority in the world. Moreover, since all authority to rule or the right to own property *(dominium)* was in the hands of God, only those in a state of grace could enjoy them. Wyclif argued that it was more likely that rulers chosen by God like kings or princes were in this happy condition than was the pope, and therefore *dominium* should be seen as being entrusted to them. Churchmen who were critical of the Church had discussed *dominium* before, particularly in the controversies around papal authority at the beginning of the fourteenth century, and they had pointed out that it was ultimately still in the power of God, but rarely with this radical conclusion.[21]

Wyclif's followers were given the contemptuous nickname of „Lollard": that is, mumblers who talk nonsence.

The suppression of Lollardy by no means ended talk of reforming the Church in England. Since at least the eleventh century, it had been one of the best-regulated parts of the Western Church, and accordingly had bred many clergy with ultra-rigorous standards, who were not going to cease lamenting clerical faults just because Wyclif had been part of the stream of lamentation.

Ann independent Hussite Church structure still survived, grudgingly and incompletely recognized by Rome. After all the destruction of the previous decades, it was a surprisingly traditionalist body, still cherishing images, processions and a cult of Mary, but it was proud of two points of difference from the pope's Church: its use in worship of Czech, the language of the people, rather than Latin, and its continuing insistence on reception in both kinds or species *(sub utraque specie).* So important was the latter to the mainstream Hussite Bohemian Church that it took the name ‚Utraquist'. From 1471 the Utraquist Church had no archbishop of its own, and in a curious compromise with the rest of the Catholic world, it sent prospective priests off to Venice for ordination by bishops in that independent-minded republic. In default of a native episcopate, effective power in the Church was firmly in the hands of noblemen and the leaders of the major towns and cities. It was an extreme example of a transfer which was quietly happening in large areas of Europe, and which became a major feature of the official ‚magisterial' Reformations in the following century: a slow decentralization of the Church from below, inexorably working against the late medieval papacy's attempts to reassert its authority.[22]

Formally separate after 1457 from the Utraquists were remnants of the more radical Hussites, the Union of Bohemian Brethren *(Unitas Fratrum).* What survived of their religious radicalism had major social implications, for, inspired by the south Bohemian writer Petr Chelcický and in the name of New Testament Christianity, they condemned all types of violence, including political repression, capital punishment, service in war or the swearing of oaths to earthly authorities. They rejected the idea of a separate priesthood, as well as the belief (still so dear to the Utraquists) that the Eucharist was a miracle in which bread and wine became the body and blood of Jesus. All these doctrines were to re-emerge in the sixteenth-century Reformation.

So, between the Utraquist Church and the *Unitas Fratrum,* the Union of Bohemian Brethren, Bohemia became the first part of Latin Europe to slip out of its medieval papal obedience. Only a few German-speaking areas and a few royal free cities within the Bohemian kingdom retained their papal loyalty through the fifteenth century. These lonely outposts of obedience to Rome in Bohemia are worth noting, because they represented the only part of medieval Europe to which the description ‚Roman Catholic' can be applied with any meaning. It may at first sight seem surprising that this term familiar in the world makes no sense before the Reformation, but it is clearly redundant when applied to an age when everyone outside Bohemia consciously or unconsciously formed part of the same Catholic Church structure, tied in so many complex ways to the heart and head of the whole organization in Rome. Soon that was to change. By 1500, the failings of successive popes in their pretensions to be leaders of the universal Church compromised their defeat of the conciliarists in the fifteenth century, and did nothing to end continuing criticism of papal primacy. That made the papal machine all the more sensitive to any new challenge to its authority, or to any attempt to resurrect language and ideas which had been used against it before, as Luther discovered in the years after 1517. Even before Luther, challenges were being posed by some of the minds in Europe. In the aftermath of the Protestant Reformation, canon law experienced renewed growth and importance in those parts of Europe

[21] EVANS, G. R., *John Wyclif: Myth and Reality.* Oxford, 2005.
[22] MacCULLOCH, D., *A History of Christianity.* Oxford, 2010.

that retained their allegiance to the Roman church. The Council of Trent made numerous significant changes in the church's substantive law.

5. The Catholic Counter-Revolution and its Modern Erosion

The monarchical government of the Pope over the universal church has developed since the definitive separation of the churches of Rome and Byzantium in the 11th century and even then only very gradually. The movement that led to the dogma of infallibility in matters of faith and of the primacy of jurisdiction at the First Vatican Council first began in the 19th century, the wake of the emergence of Catholicism as an independent social structure.[23]

Up until the French Revolution and the Napoleonic expropriation of church property, the higher ecclesiastical offices remained largely in the hands of the nobility, and thus under the influence of regional powers or emerging nation states. Outside his immediate dominion in the Papal States, the Pope essentially had only spiritual authority and diplomatic influence, and even these reached a low point in the 18th century.

The interconnectedness of church and state precluded any fundamental institutional and ideological separation, also because neither the state nor the church was internally united. „Febronius" or J. N. von Hontheim, Vicar General of the Archbishop of Trier, presented in 1753 essay On the State of the Church and the Legitimate Power of the Roman Pontiff, the theory of the limited power of Rome.

In Koblenz in 1769 and in the so-called Ems's puncture from 1786, three German archbishops - electors questioned the authority of the papacy. In the spirit of traditional themes, they promoted the view that the highest legislative and judicial power belongs only to the general council.

After the confiscation of church property, a *fundamental* reorientation was necessary for the secular ruling-basis of the church. Greater autonomy of the church no longer conflicted with the „reason of state" and so, thanks to a clever concordat policy, the Vatican succeeded in securing the right to choose its own bishops, which was a strategic basis for the renewal of the Church. The minority status of Catholics in Protestant or secular states promoted a resurgence of popular piety. The renaissance of scholastic theology, the improved training of the clergy, the use of civil liberties for the self-organization of Catholics, the proliferation of religious orders and congregations and the emergence of world mission all worked together to give new strength the Catholic Church after the rather tepid 18th century. Only at this point did *Catholicism* as a social configuration rooted in the people emerge, which confirmed the Pope's special position in the dogmas of the infallibility and primacy of jurisdiction, and acknowledged it with a hitherto unprecedented sacralization of and devotion to the Pope.

The papacy now saw itself in competition with the emerging nation states and claimed similar sovereignty over its believers as a state would over its citizens - but all this at the level of the *absolutist* state that had gradually been overcome in the 19th century through moving to the rule of law, economic freedom, and democracy.

In the era of ideologies, which lasted from the French Revolution until the Second World War, the exclusive claim of the Catholic Church to truth was quite plausible to the faithful: nationalism and ideological struggles dominated politics, which actually made Catholicism look good. Catholic political parties became basic participants in the political life of many countries and a far-reaching *solidarity of Catholics* was inwardly strengthened not only by the homogeneity of ritual and belief, but also by a world-view based on natural law. Social and regional differences and interests could therefore appear as secondary.

This constellation broke up after the Second World War to the extent that modernization became the formative force of social life. The anti-modernist papal teaching lost its validity even for Catholics, as they were confronted with the beliefs of other Christian denominations and the achievements of the Enlightenment and liberalism. New theological currents became daring and attacked the doctrinal rigidity of Pius XII., who condemned these, especially in the encyclical Humani Generis (1950). Catholics themselves now talked about a „Catholic ghetto", and so the announcement of the Second Vatican Council by Pope John XXIII. was welcomed by many as a liberation.

The course of the Council and its substantive results testify to an impressive self-reform of ecclesiastical consciousness within the horizon of modernity. This applies particularly to the opening toward ecumenism, to the recognition of religious freedom and of the non-Christian religions, of the relative autonomy of social issues and the acknowledgment of human rights. The role of the laity was upgraded and a common priesthood was attributed to them that is more basic than the ministerial priesthood. Struggles took place particularly concerning the relationship between community and hierarchy in the way the Church understands itself and in which the hierarchical momentum was strengthened by papal interventions.

6. „…most dutifully accept and eagerly execute orders and advice"

What is understood by *Roman centralism* is the extensive concentration of everyday and basic ecclesial decision-making powers in the hands of the Roman Curia. It was only developed in the course of the 19th and 20th centuries and many bishops wanted to confront the issue at the Council. However, since its completion, and especially since the pontificate of John Paul II., the unbroken influence of the Roman Curia has become even stronger. So, for example, the council is not mentioned in the CIC of 1983 as an independent institution in addition to the Pope, but is included in the „communio hierarchica" of the College of Bishops. The Pope has not only a particular competence within the meaning of the primacy of jurisdiction, but also a general competence that gives him the power to reverse any communal decisions within the church. In principle, this also applies to decisions at the Curia, but a kind of interdependence is at work there, which Hegel described as the relationship between master and slave. The Curia considers itself to be

[23] KAUFMANN, F. –X., *Kirche in der ambivalenten Moderne.* Freiburg i. Br., 2012, ch. 4.

the „centre" of the Church and the dioceses of the world as the „periphery" and no appeals are possible against decisions of the „centre".

The claim of obedience by Rome is very clearly expressed in the oath of allegiance that every bishop must swear before taking office: „From time to time and at the appointed times, I will give an account to the Apostolic See (= the Pope and the Curia) of how I manage what has been entrusted to me and most dutifully accept and eagerly execute its orders and advice".

The growing weight of the centre also contributes to the teaching of the „ordinary magisterium" of the Pope, a figure of speech that was „invented" only in 1856 by Father Joseph Kleutgen SJ, a German theologian who was influential in Rom.[24] This idea served the last popes, not least, to disqualify calls for a modification of the conditions for the priesthood as not worthy of discussion.

Further centralizing momentum has resulted from technological advances that generate, transport, and move to the centre ever increasing amounts of data. However, this can easily lead to flooding the centre with data and decision requirements. This factor, in the sense of centralizing, can also be found in secular organizations but there it is processed through specialization and delegation of powers.

Given the limitations of human judgment, the autocracy that was also widespread in the secular sphere during the absolutist era has long since been replaced there by the principle of the separation of powers and by a system of reciprocal checks. If the Roman Catholic Church still believes that it can forego such institutional „checks and balances" that compensate for human susceptibility to error, it is probably the expression of a sacred self-consciousness. The Pope still carries the title of the „Vicar of Christ," which was first claimed by the powerful Pope Innocent III. (1198-1216). The Curia seems to be quite certain of the assistance of the Holy Spirit, but such a belief is not convincing anymore and in practice it denies itself by misjudgments and bad decisions. The Roman Church is confronted with the growing complexity and opacity of the world in a way similar to all other modern institutions. As a global institution, it is faced with a particularly broad heterogeneity of political and social conditions, so she must expect that uniform rules and measures „on site" can lead to very different effects. And to the extent that regional or local churches develop their own selfawareness and activities related to it, so it is likely that the regulation of these without detailed knowledge of the local circumstances can have increasingly discouraging consequences.

Currently in Germany, for example, a growing „inner emigration" of the clergy can be observed and the attractiveness of the priesthood seems to have reached a low point. Many bishops find themselves experiencing a conflict between plausible requests and demands from their believers and the stipulations of Rome. Some are afraid of being reprimanded. All this does not provide motivation for preaching the Christian gospel. The debate over Catholic pregnancy counselling in Germany and especially the recent talk about sexual abuse have led to a further loss of legitimacy of the leadership of the Roman Church in Germany.

7. Hierarchical Organizations Need Irritation from Outside for Being Effective

What has been briefly sketched above does not surprise sociologists. The personnel of organizations usually orient themselves in the performance of their tasks more toward internal rather than toward external conditions, which makes the organizational environment appear to be diffuse, uncontrollable, and therefore as a disturbance. From a higher perspective, the existence of such organizations will be legitimized by their services for certain environments, so it is their duty, to allow „interference". Their effectiveness is dependent on the fact that they have been disturbed strongly enough and that they have been made aware of the needs of those for whom they are there in the first place. In the development of a secular state, therefore, a variety of methods and instances have been created in addition to internal management control: parliamentary administrative controls, administrative litigation, audit offices, ombudsmen, audits and evaluations, and, not to forget, external control by the public, all of which can be mobilized by different stakeholders - that is how the demand for greater transparency in political decisions is being repeatedly raised. When the public sector works in a reasonably satisfactory way in developed countries, this is due to this variety of mutually coordinated systematic controls, which in their entirety represent a kind of resonance-space for administrative errors. This response to political and administrative failure then creates pressure for change, which within the administration manifests itself as a *learning ability.*[25] The Roman Curia seems to think that all this is unnecessary because it has virtually no binding internal rules or external administrative controls in place, and the formal as well as informal secrecy on all its important processes makes the mobilization of the public appear only as subversive, not to say revolutionary, as was recently illustrated by the „Vatileaks" affair. However, both efficiency and effectiveness as well as the pastoral aims of the Church are undermined if the subsidiary institutions of the Pope immunize themselves against any external control by citing his authority.

In proportion to the waning of the sacred aura of the papacy, to which the resignation of Pope Benedict XVI. contributed, there has been greater awareness of the institutional character of the Church. But this institutional character contradicts in many ways generally recognized socio-ethical principles such as I the rule of law, subsidiarity, participation of stakeholders, and management control. The largest religious community in the world is ruled by a small group of old men who defy any human responsibility in the name of God and demand unconditional obedience of their decisions from the bishops, priests and faithful of the universal Church, regardless of their reasons and their plausibility for the local situation. This places the credibility of the Church's message increasingly into question.

[24] WOLF, H.,Wahr ist, was gelehrt wird' statt, Gelehrt wird, was wahr ist'? Zur Erfindung des, ordentlichen' Lehramts. In: SCHMELLER, T., EBNER, M., HOPPE, R. (eds.), *Neutestamtliche Ämtermodelle im Kontext* (Quaestiones disputatae 239). Freiburg i. Br. 2010, p. 236-259.

[25] KAUFMANN, F.-X., *The Public Sector – Challenge for Coordination and Learning.* Berlin and New York, 1991, p. 38.

Zdeňka Kokošková, Monika Václavíková/Sedláková, Jaroslav Pažout (Hrsg.)

Die Oberlandratsämter im System der Besatzungsverwaltung des Protektorats Böhmen und Mähren und ihre leitenden Beamten

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Als erstes Ergebnis des Projekts „NS-Besatzungsverwaltung im Protektorat Böhmen und Mähren und ihre leitenden Beamten" hat das Herder-Institut für Ostmitteleuropaforschung Band 10 der Quellen zur Geschichte und Landeskunde Ostmitteleuropas vorgelegt. Bei dem von vier tschechischen Historikern und Archivarinnen herausgegebenen und übersetzten Werk über die Oberlandräte im Protektorat Böhmen und Mähren handelt es sich um ein klassisches zeitgeschichtliches Handbuch, welches übersichtlich gegliedert ist in eine historische Einleitung, die Biogramme der Oberlandräte, einen Dokumententeil mit 25 Dokumenteneditionen sowie einen Anhang mit Lichtbildern, Karten, Tabellen und weiteren Übersichten, schließlich ein Abstract in englischer Sprache. Das Werk entstand auf breitester Basis archivalischer und gedruckter Quellen, darunter vielfältige im Tschechischen erschienene Literatur. Benutzt wurde eine Vielzahl deutscher und tschechischer staatlicher Archive. Insgesamt gut gelungen ist die Übersetzung des Werks ins Deutsche.

Ausgangspunkt sind die im April 1939 im Protektorat Böhmen und Mähren eingerichteten 20 Bezirke der Oberlandratsämter, von denen sich zwölf in Böhmen und acht in Mähren befanden; nach Reformen blieben am Ende noch sechs von ihnen übrig. Eine zusammenfassende und vergleichende Darstellung zu Herkunft, Werdegang und Nachkriegsschicksal bzw. -karriere der leitenden Amtsträger (Oberlandräte) enthält die historische Einführung, die gut ein Fünftel des Buchs ausmacht. Da ein besonderer Fokus auf Deutsche aus der Tschechoslowakei als Oberlandräte gelegt wird, beginnt der biografische Teil mit den drei ausführlichen Biografien Gustav Jonaks, Hanns Blascheks und Friedrich Rempliks, die zwar nach dem Krieg in der Tschechoslowakei strafrechtlich verurteilt wurden, danach aber dennoch Karriere im Staatsdienst der Bundesrepublik machten. Es folgen die tabellarisch angelegten 53 Biogramme aller Oberlandräte, welche gut ein Drittel des Gesamtumfangs und pro Person im Durchschnitt zwei Seiten ausmachen. Enthalten sind darin jeweils neben den wesentlichen Lebensdaten, Besonderheiten und Quellenangaben regelmäßig auch zeitgenössische Lichtbilder der vorgestellten Amtsträger. In der Gesamtschau der Biogramme findet sich das Resümee aus der historischen Einführung bestätigt, dass es sich bei den Oberlandräten um eine recht homogene Gruppe promovierter Juristen handelte, welchen nach dem Krieg in der Bundesrepublik zumeist eine nicht unbedeutende zweite Karriere beschieden war. So gelang etwa Walter Hopf, 1939 bis 1942 Oberlandrat in Zlín, völlig ungeachtet seiner NSDAP-Mitgliedschaft der Aufstieg zum Staatssekretär im Bundesverteidigungsministerium und schließlich zum Präsidenten des Bundesrechnungshofs.

Da es stets verdienstvoll ist, Unbekanntes zu recherchieren, zu kontextualisieren und zu editieren, soll die folgende Kritik auf das Notwendigste beschränkt werden. Gefragt werden muss dennoch, was das Buch leisten kann. Eine so kohärente Darstellung, wie es der Titel „Die Oberlandratsämter im System der Besatzungsverwaltung des Protektorats Böhmen und Mähren und ihre leitenden Beamten" nahelegt, enthält die Publikation leider nicht. Was hinsichtlich der „Oberlandratsämter" fehlt, ist eine Analyse der Verwaltung, ihrer Tätigkeit und des Gesamtpersonals; schon die Darstellung ihrer genauen Zuständigkeiten kommt zu kurz. Zum „System" mangelt es an einer zumindest kurzen grundlegenden Einführung in die Staats- und Verwaltungsstrukturen der Tschechoslowakei unter der NS-Herrschaft bzw. der Besatzungsverwaltung. Zu unklar bleibt das Verhältnis zwischen tschechoslowakischer Verwaltung und deutscher Besatzungsverwaltung, zumal eine Vielzahl von Planungen, Änderungen und (Um-)Benennungen die Entstehungsgeschichte verkomplizieren. Nur en passant erfährt man, dass das „Netz der Oberlandräte" „grundlegendes Element der Besatzungsverwaltung" war (die aber „zweigleisig" blieb), zugleich als unterste Verwaltungsinstanz für Reichsdeutsche, für die tschechische Bezirks- und Gemeindeverwaltung aber als Aufsichtsinstanz fungierte; dass die Oberlandratsämter von ursprünglich kleinen Verwaltungsbehörden mit nur wenigen Mitarbeitern zu großen Institutionen mit vielen Abteilungen wurden, bis sie seit 1939 auch als Außenstellen des Reichsprotektors fungierten. Ungeachtet erheblicher Aktenverluste der Oberlandratsämter selbst, bleibt mithin zu allgemein die Beschreibung, dass den Oberlandratsämtern die Kontrolle der autonomen Verwaltung oblag, sie im Laufe der Zeit aber eine Reihe weiterer eigener Aufgaben wahrnahmen.

Eine Vielzahl von Ungenauigkeiten, Ungereimtheiten und Inkohärenzen weisen die Biogramme auf. Beispielsweise erschließt sich nicht, weshalb in zwei getrennte, jeweils aber chronologisch aufgebaute Abschnitte „Staatsdienst" mit Benennung der Behörden und „Amtsbezeichnung" gegliedert wird, wird doch ein Amt regelmäßig bei einer bestimmten Behörde verliehen. Ebenso unklar ist dann, weshalb die Funktion des Landrats unter „Staatsdienst", aber nicht noch einmal unter „Amtsbezeichnung" aufgeführt wird. Die rudimentäre Funktionsbezeichnung „Leiter" taucht etwa auch dort auf, wo es sich bei der angegebenen Dienststelle um ein Ministerium handelt, dessen Gesamtleitung der Betreffende aber nicht innegehabt haben kann. Wenig zweckmäßig ist es, das

Erste Juristische Staatsexamen unter dem Gliederungspunkt „Höchster Bildungsabschluss“ aufzuführen, die Große Juristische Staatsprüfung aber stets unter „Weitere Informationen“. Unplausibel sind bisweilen etwa die Angaben zur zeitlichen Dauer des juristischen Vorbereitungsdiensts. Untunlich erscheint die Anführung der „Wikipedia“ als Quellenangabe in einigen der Biogramme. Sie dürfte auch verzichtbar sein, da ihr quellenmäßiger Mehrwert zumal bei der hier intensiv betriebenen Primärquellenauswertung nicht ersichtlich ist.

Essentiell ist der Band, um sich einen Überblick über Struktur und Personal der entsprechenden Besatzungsverwaltung zu verschaffen, was bisher so nicht möglich war. Kernstück insoweit sind die Kurzbiografien der Oberlandräte sowie ein bunter Dokumentenanhang. Eine analytische Auseinandersetzung mit der Materie darf man hingegen nicht erwarten; insoweit ist der Titel für einen Quellenband etwas missverständlich formuliert und wären weitere Untersuchungen wünschenswert.

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Thomas Groß

Verwaltung und Recht in antiken Herrschaftsordnungen. Ägypten, Assyrien, Athen und Rom im Vergleich

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Das vorliegende Werk mit seinen gut 250 Seiten und reichlich Literaturnachweisen kann in erster Linie als ein Grundlagen-, Nachschlage- und Studienbuch zu den rechtlichen und verwaltungsorganisatorischen Grundlagen der antiken Herrschaften Ägyptens, Mesopotamiens, Athens und Roms betrachtet werden. Auf der Grundlage der internationalen Forschungsliteratur wird mit den Augen des Juristen und Verwaltungswissenschaftlers das Funktionieren dieser recht verschiedenen Herrschaftssysteme als solche, aber gerade auch in ihren unteren Verwaltungsebenen untersucht. In spezifisch juristischer Hinsicht stehen Fragen wie diejenige nach der Kodifizierung von Recht, nach Ansätzen einer Bindung der Herrschaft an Rechtssätze und damit korrespondierendem Rechtsschutz im Vordergrund. Insgesamt leistet Groß mit dieser Arbeit zugleich einen Beitrag zum Verständnis der Gesellschaften über die administrativ-juristischen Funktionsweisen ihrer Beherrschung hinaus.

Grundlegende Überlegungen etwa zum Wesen des Rechts in der jeweiligen Herrschaftsordnung bleiben dabei aber eher Desiderat. Auch werden historische Phänomene häufig ohne Erklärungsversuche belassen wie etwa jenes, dass es in keiner der antiken Herrschaftsordnungen eine Institution zur Wahrung der öffentlichen Sicherheit gab, die den Polizeibehörden der Moderne entspräche. Für derartige, freilich über die Rechtsgeschichte hinausgehende Fragestellungen bietet das Werk jedoch sowohl Anregung als auch Grundlage. Es enthält eine gestraffte und jeweils in die Abschnitte „Historischer Überblick – Herrschaftsorganisation – Verwaltungsfunktionen – rechtlicher Rahmen – Fazit“ gut gegliederte Darstellung, die sich durch ein hohes Abstraktionsniveau, wo nötig aber auch durch ganz praktische Beispiele staatlicher Tätigkeit auszeichnet.

Im Kapitel der Gesamtbilanz zieht Groß das Modell des Politikwissenschaftlers Samuel Finer, der die Herrschaftstypen „Palast, Forum, Adel und Kirche“ unterscheidet, der Kategorisierung nach Monarchie, Aristokratie und Demokratie vor, womit er überwiegend zu fruchtbaren Ergebnissen gelangt. Fragt man, was denn ein solches Werk auch an Gewinn neuer Erkenntnisse bietet, bleibt im Hinblick auf die vergleichende Fragestellung der Arbeit jedoch gerade das Bilanz-Kapitel ein wenig blass, in welchem eine deutlichere Fokussierung auf mögliche Wechselbeziehungen und übergreifende Entwicklungsstränge mit etwas pointierteren Schlussfolgerungen wünschenswert gewesen wären.

Die abschließenden Ausführungen zur Wirkungsgeschichte erscheinen mit ihren plötzlich in die Gegenwart versetzten Erwägungen insbesondere zu modernen Demokratien, auch wenn sie bloß exemplarisch gedacht sind, isoliert, zumal in den zur Betrachtung herangezogenen europäischen Staaten nur wenige Fortwirkungen ausgemacht werden. Interessant ist bei alledem aber doch die Erkenntnis, wie nahe uns in vielen Bereichen von Aufgaben und Organisation die Verwaltungstätigkeit Jahrtausende zurückliegender Staaten gleich welcher Herrschaftsform steht, nachdem es der Autor nicht nur unternimmt, ein „Skelett“ von Herrschaftsstruktur zu beschreiben, sondern auch, soweit die Quellen dies zulassen, die Verwaltungspraxis des Alltags vollständig in den Blick zu nehmen. Mit Recht weist Groß darauf hin, dass auch die hier behandelten Rechtsordnungen zu den Vorläufern unseres Rechts zählen, was mutatis mutandis zugleich für „die“ Verwaltung gilt. Allen Rechtskundigen, Historikern und an den Staaten des Altertums Interessierten bietet das Werk somit gewinnbringende Einblicke.

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Christian Reiter

Einführung in das römische Privatrecht. Ausgewählte Themengebiete und Fälle

Wien, Köln: Böhlau Verlag, 2021, 260 p., ISBN 978-3-8252-5700-2

Einführung in das römische Privatrecht. Ausgewählte Themengebiete und Fälle [Introduction in Roman Private Law. Selected Topics and Cases] is an unconventional textbook of Roman law. As explained in its preface, it is not a systematic summary of the entire material, but rather sequence of relatively independent cases. These cases however provide in their complex a comprehensive picture of the basic principles and institutes of Roman law. It gives an idea of an intention to follow the nature of Roman law because Roman law is in its essence a typical case law (*Fallrecht par excellence*).

Therefore, instead of the usual introductory explanation of history of Roman law or its sources, the textbook itself begins on p. 17 similarly to a detective novel. The reader is introduced without any theoretical preparation to the first case solved, which concerns a possible fraud in the sale of a house destined for demolition because it hinders the observation of omens (*auspicia*). Even a student not particularly attracted to Roman law, who opened the textbook rather *pro forma*, will probably continue reading out of curiosity to see how the case develops. The textbook gradually explains the other possible or necessary steps for solving of the case successfully. The reader (with a little exaggeration) does not even notice reading the textbook and reads almost ten pages in one breath, after which he learns that the final solution to the case is to be found more than 100 pages further on. Author's intention to allure even the not-so-interested reader is obvious, and what should be especially appreciated is the very readable composition with which the author's aim was fulfilled.

Concerning the cases solved, it must be noted that they are fictitious – one might wonder why the author did not rather use some of the plethora of actually extant cases which would have added even more authenticity (although he discusses such cases in many different places in the textbook). However, this can be answered quite easily by the fact that the author clearly intended to use examples as a link for a relatively systematic interpretation, for which the analysis of actual cases would not always be suitable – at least not to the extent that would be needed for each individual chapter or subchapter of the reviewed textbook.

In addition, the textbook is partially conceived as an introduction to Roman life, customs, literature, and culture in general. Thus, for example, it explains who the augurs were (p. 17), or on p. 97 it uses Ovid's *Ars amatoria* as a subject of a contract of sale. From the point of view of classical education, it may seem unnecessary but in view of the fact that the general overview and level of education in this field among the average graduate of contemporary secondary schools is probably not very good (and it should be noted that in many countries it is even considerably worse than in Germany), it can be seen as a sympathetic effort to convey at least in subtle hints the atmosphere of ancient times so it perhaps encourages the reader to further study in this area. The textbook is therefore accompanied apart from the usual references to the sources (especially the Digests) by non-legal ones such as Aulus Gellius and Iuvenalis.

Worth noting is an unusual feature for a Roman law textbook, a comparison with contemporary law. Thus, in the above-mentioned case, it is described how the injured party should proceed according to contemporary law in Germany and further on it is stated that in Roman law the procedure was somewhat different. Quite logically it is followed by a standard explanation of Roman civil procedure, i.e. the stages *in iure* and *apud iudicem*, the importance and characteristics of Roman lawsuits (*actiones*), and the *legisactiones* and formulary procedures. During explanation of various individual aspects of Roman law, comparisons with the current regulations in the *BGB* (and sometimes with other legal orders, too) are mentioned as well. This corresponds to the conception of Roman law as a timeless model for most legal systems, although not every aspect is necessarily reflected in each of them. Thus, in the case of the acquisition of property (p. 82–83), attention is drawn to the causal nature of the Roman informal transfer of property (*traditio*), which is still found in most legal systems today, but not in Germany, and it is also pointed out that, for example, the *ABGB* fully adopts the doctrine of *titulus* and *modus adquirendi*, whereas neither the *Code civil* nor the *Codice civile* does, since they are based on the consensual principle. The provisions of the above-mentioned foreign codes are accompanied by their text in footnotes, but with the exception of the *Codice civile*, which is quite a pity – it is somewhat unsystematic and, moreover, in my opinion, it is the code which text is the most difficult to find (a small complication, which can be nonetheless quite noticeable for a beginning student who is the intended reader of this textbook).

In a similar vein to the above passage, the rest of the work continues with individual topics being introduced by further cases of similar nature (nineteen cases in total), to which solutions are then sought and thus explaining all major areas of sources of law, law of property, law of obligations, and law of succession. The result is a comprehensive, albeit unconventionally conceived exposition of the entire system, therefore the subtitle "Selected Topics" (*ausgewählte Themengebiete*) should be rather understood as

topos modestiae or notice that not all aspects are addressed in depth which is caused by the nature of the textbook and relatively low number of its pages.

Special mentions should be made of the excursus in the chapter 4 and the whole chapter 5. The excursus about Q. Mucius Scaevola *pontifex* (p. 209–212) follows the description of the famous *causa Curiana*, and in addition to basic information about the life of this eminent jurist mentions his relationships with other persons (Q. Mucius Scaevola *augur*, M. Tullius Cicero, or his less known family relationship with L. Licinius Crassus).

Chapter 5 "Relevancy of Legal History and of Roman Law" (*Aktualität der Rechtsgeschichte und des römischen Rechts*) is chosen as an example of the usefulness of Roman law as a timeless system for solving current legal problems. In a particular case, obstacles arose after conclusion of employment contract and then a question is laid whether the employer is nevertheless obliged to pay the agreed remuneration. An analysis of the Roman law (in particular the Digests, but also non-legal sources) is followed by an outline of further development and another analysis of the current regulation in the *BGB*. This chapter is truly a selected one as stated in the book title, because it serves as an particular illustration how Roman law can be used as a tool to illuminate contemporary issues – there are many other topics which could be explored in the same manner as this topic, in which the current legal regulation shows equal or even stronger influence and congruence with Roman law.

At the very end of the textbook (p. 243-254), there are the texts of other sources which are used in the textbook and their translations. I consider this solution somewhat unfortunate, since it would have been more practical, if they had been listed directly in the text (or footnote) of the textbook, instead of mere reference to it and placing the texts themselves into this appendix. As the author already chose to place them here, it would at least be useful to indicate the page to which they relate to (admittedly, this can be identified by their respective topics, but it would be certainly a welcome aid, especially for a less experienced reader).

Overall, I must conclude that it is a very interesting and well written textbook which will engage the reader after reading just a few lines. Perhaps it could be said that it is not aimed at a reader who is already interested in Roman law and would welcome a comprehensive systematic exposition, but rather at a reader, who would find it difficult to muster motivation to finish reading of a standard textbook. Therefore, the text is designed to be as accessible as possible, even if some of the details may be somewhat superfluous from the point of view of an informed reader. In fact, a comparison with contemporary law is included for similar reasons – while such an influence on contemporary law is obvious to the expert in Roman law, a layman who often lacks enthusiasm for Roman law may find the study of the law of a "long gone" empire unnecessary – but the references to the *BGB* and other contemporary codes make him realise from the outset how wrong he was.

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Pfadfinden und Recht an der Saar.
Rede anlässlich der Gedenkfeier zur Erinnerung an die jüdischen Pfadfinder in St. Ingbert/Saar

Am 17. Februar 2022 fand im saarländischen St. Ingbert die Gedenkfeier zur Erinnerung an die ermordeten oder vertriebenen Mitglieder der jüdischen Pfadfindergruppe MAKKABI HAZAÏR statt. Die Freunde und Förderer der Pfadfinderinnen und Pfadfinder im Saarland e.V. hatten diese Veranstaltung gemeinsam mit saarländischem Landtag und Landesregierung sowie der Stadt St. Ingbert organisiert[1]. Es folgt der ausführlich ausgearbeitete Redebeitrag des Stellvertretenden Vorsitzenden der Kommission für saarländische Landesgeschichte, Universitätsprofessor Dr. phil. Dr. iur. Thomas Gergen:

Sehr geehrter Herr Präsident des Landtages des Saarlandes,

sehr geehrter Herr Präsident des Verfassungsgerichtshofes des Saarlandes,

sehr geehrter Vertreter der saarländischen Landesregierung, Herr Staatssekretär,

sehr geehrter Herr Oberbürgermeister der Mittelstadt St. Ingbert,

sehr geehrte Frau Bürgermeisterin dieser Stadt,

sehr geehrte Vertreterin der Synagogengemeinde Saar,

sehr geehrte Vertreterinnen und Vertreter der Pfadfinderschaft,

sehr geehrte Freundinnen und Freunde der lebendigen Geschichte,

heute darf ich mich an Sie wenden als stellvertretender Vorsitzender der Kommission für saarländische Landesgeschichte (= KSL), die im Jahre 2021 ihr 70jähriges Bestehen feiern durfte und sich einsetzt für den wachen Blick auf Landesgeschichte und dazugehörige Forschung.[2]

Das Erinnern an die ermordeten und vertriebenen jüdischen Pfadfinder konnte ich bereits vor zwei Jahren im August 2019 in meiner Geburtsstadt Saarlouis miterleben.[3] Diese Erinnerung an den Holocaust sowie all die Schrecken der Reichspogromnacht von 1938 dürfen nicht bloß wissenschaftlich bearbeitet und erforscht sein.[4] Nein: Wir alle müssen diese Ereignisse hellwach im Bewusstsein tragen und uns aktiv am Bewusst-Werden und Bewusst-Wachhalten in allen Generationen beteiligen durch öffentliche Bekenntnisse, damit hieraus Bewusst-Sein fließt. Dabei helfen Stolpersteine, die uns bei jedem Dorf- oder Stadtbesuch zur Einkehr anhalten, ein Besuch auf jüdischen Friedhöfen. Auch in meinem Wohnort Saarwellingen gibt es einen der wohl ältesten jüdischen Friedhöfe im Saarland. Eine eigene Schule existierte dort sogar.[5] Zudem gibt es immer wieder das Zurückblicken auf die Pogrome, die damals eine mit Schrecken behaftete und unrühmliche Geschichte schrieben – leider auch in Angriffen, Vertreibungen und Ermordungen auch der jüdischen Saarwellingerinnen und Saarwellinger.[6]

Die jüdische Pfadfinderschaft konnte sich **hier in St. Ingbert** gründen und entfalten, genauer gesagt war es die jüdische Pfadfindergruppe MAKKABI HAZAÏR. Dank der längeren Freiheiten zur Saargebietszeit war dies noch bis 1936 möglich.[7] Schon nach der Abstimmung 1935[8] tagte die erste Volksvertretung nicht mehr: Der 1922, also vor 100

[1] https://www.saarbruecker-zeitung.de/saarland/saar-pfalz-kreis/sanktingbert/gedenktafel-in-st-ingbert-zum-juedischen-pfadfinderbund-makkabi-hazair_aid-66379867 sowie die gesamte Dokumentation unter https://s6851cfb9df78c9fb.jimcontent.com/download/version/1648654871/module/9328816576/name/Gedenkstunde%20MAKKABI%20HAZAIR.pdf [11. 04. 2022].

[2] https://www.saarland.de/landesarchiv/DE/ueberuns/partner/kommission/kommission_node.html [alle folgenden https abgerufen 02. 02. 2022].

[3] Johannes Bodwing: https://www.saarbruecker-zeitung.de/saarland/saarlouis/saarlouis/gedenktafel-in-saarlouis-erinnert-nun-an-juedische-pfadfinder_aid-45458367

[4] Paul Burgard, Das Saarland im Nationalsozialismus (1935-1945), in: Hans-Christian Herrmann/Johannes Schmitt (Hg.), Das Saarland. Geschichte einer Region, St. Ingbert 2012, S. 263-311 sowie bahnbrechend und immer noch maßgebend: Hans-Walter Herrmann, Das Schicksal der Juden im Saarland 1920 bis 1945, in: Dokumentation zur Geschichte der jüdischen Bevölkerung in Rheinland-Pfalz und im Saarland von 1800 bis 1945, hg. von der Landesarchivverwaltung Rheinland-Pfalz in Verbindung mit dem Landesarchiv Saarbrücken (Veröffentlichungen der Landesarchivverwaltung Rheinland-Pfalz, 17), Koblenz 1974, S. 257-491.

[5] Hans Peter Klauck / Klaus Mayer: Gelöst ist die Schnur - gebrochen das Band. Die jüdische Gemeinde Saarwellingen 1700-1940. Hrsg. Gemeinde Saarwellingen - Vereinigung für die Heimatkunde im Landkreis Saarlouis e.V. Saarwellingen 2013.
Sowie im Internet: https://www.alemannia-judaica.de/saarwellingen_synagoge.htm

[6] Tina Leistenschneider: https://www.saarbruecker-zeitung.de/saarland/saarlouis/saarwellingen/besuch-auf-dem-judenfriedhof-in-saarwellingen-mit-heimatforscher-klauck_aid-62188565 (August 2021).

[7] Thomas Gergen, Recht im Saargebiet. In: Die 20er Jahre. Leben zwischen Tradition und Moderne im internationalen Saargebiet (1920-1935), Begleitband zur Ausstellung im Historischen Museum Saar, S. 26-33. Sowie: Die Zwischenkriegszeit in der saarländischen Rechtsgeschichte - mit Beispielen aus Arbeits- und Sozialrecht im Saarjahrhundert (1920-2020). In: Saar(jahr)hundert, hg. von der Arbeitskammer des Saarlandes, 2020, S. 30-67.

[8] Martin Schlemmer, Politik und Raum Saar bis 1935, in: Helmut Rönz/Markus Gestier (Hg.), „Herr Hitler, ihre Zeit ist um!“ Widerstand an der Saar 1935-1945, Saarbrücken/St. Ingbert 2016, S. 47-84, hier S. 50-62.

Jahren, gegründete Landesrat, das wohl erste Parlament des Saarlandes, musste für immer schweigen.[9]

Pfadfinderschaft und Stadt St. Ingbert legen sich mit dem heutigen Gedenken fest auf ein Credo religiösen wie politischen Inhalts. Sie bekennen sich zur Verantwortung in der saarländischen Gesellschaft, wenn die Freunde und Förderer der Pfadfinderschaft die jüdischen Pfadfinder erforscht und beim Namen genannt haben sowie obendrein, gemeinsam mit uns allen, Ehre erweisen. Damit mahnen wir als „communio", religiös wie politisch, in einer Weise, wie sie nachhaltiger nicht sein könnte. Es ist das Ausrufen gegen „Baal", wie es der saarländische Existenzphilosoph Peter Wust (1884-1940) aus Rissenthal (heute Gemeinde Losheim am See) schon im Krankenbett 1938 in Münster tat,[10] gegen NS-Verbrechen wider die Humanität.[11]

Die Gedenktafel **hier in St. Ingbert** gehört nunmehr dazu als historisch belegte und öffentlich bekundete Namensnennung - der vorgelegte Dossier, mit Fleiß und historisch-fachlicher Präzision erstellt, ist dazu berufen, uns diese Legitimation zu geben. Die Dokumentation ist Mahnung und neue Forschung zum Widerstand zugleich. Erinnerung ist schließlich essentieller und vitaler Eckstein unserer Kultur, weswegen der Ort dieser Veranstaltung, das St. Ingberter Kulturhaus, gut und sorgfältig gewählt wurde.

So buchstabieren wir von nun an, archivalisch gestützt und verbürgt, die Namen all derjenigen, die Opfer einer „Abirrung von Staatlichkeit" waren, welche sich bloß einseitig „Verwaltung" nannte: kaltschnäuzig, verroht, blind-bürokratisch und parteiergeben,[12] industrieunterwürfig,[13] intrigant und in ihrer bleiernen Anpassung und Selbstgefälligkeit die Menschenrechte und die menschliche Natur nicht beachtend, eine sich nur selbst feiernde „Elite", der jeglicher Anstand, ja jede Ehrfurcht vor der Natur allgemein, und vor allem vor der *humanitas*, abging. Von echten Bürgerrechten möchte ich gar nicht sprechen.

Religionen wie das Juden- und Christentum müssen sich aufgrund des Schöpfungsgedankens uneingeschränkt für Humanität stark machen, im Verbund mit den Pfadfindern, denn der nachhaltige und pflegliche Umgang mit der Natur gehört zum Kern von Pfadfinden, so Hans Enzinger, der geschäftsführende Vorsitzende der Freunde und Förderer der Pfadfinder Saar, der ferner sagte: „Pfadfinden ist politisch".[14]

Ja, hier sollten wir alle Pfadfinder sein und den Pfad gegen den „Hass" in sozialen Medien, aber auch im nicht-virtuellen Leben einschlagen. Dafür streiten wir heute nicht nur symbolisch, wenn wir den jüdischen Pfadfindern ein Denkmal setzen, das Außenwirkung haben soll und in der St. Ingberter Innenstadt haben wird. Denn ein Verlust an Ehrfurcht mittels einer bürokratisierten und bürgerfernen Verwaltung führt genau in diese Verrohung, gegen die Widerstand zu leisten ist.[15]

Wir alle dürfen nicht müde werden, diese Stolpersteine auszulegen, gegen eine Wiederkehr einer irrlichternden Ideologie, die die demokratische Gesetzgebung umgeht, aushebelt, verhöhnt und die Verwaltung listig zur entseelten und nur noch Bürokratie-zentrierten Vollstreckungsmaschine verkommen lässt, leider gemeinsam damals mit Großindustriellen, aber und vor allem in Kollusion mit Verfassungsfeinden. Dabei denke ich zuallererst an die Menschen, die -wie die Juden damals- als Randgruppen gestempelt wurden und werden. Gerade der sublime, latente Hass ist gefährlich. Überdies ist gefährlich, wenn sich eine Verwaltung verschanzt und die Gremien, wie Gemeinderat, so instrumentalisiert, dass wenig reflektierte Entscheidungen getroffen werden, die der dialog- und diskussionsfernen Verwaltung weites Ermessen einräumen, um wirtschaftlich und ethisch völlig haltlose und unfundierte Angriffe gegen unsere Umwelt zu erlauben, obwohl Bürgerinnen und Bürger sich gegen die harten Eingriffe in die Natur aussprechen, wofür sich Religionen wie das Juden- und Christentum aufgrund des Schöpfungsgedankens stark machen müssen. Im Verbund mit den Pfadfindern, die

[9] Ludwig Linsmayer, Politische Kultur im Saargebiet 1920-1932: symbolische Politik, verhinderte Demokratisierung, nationalisiertes Kulturleben in einer abgetrennten Region, St. Ingbert 1992 (Saarland Bibliothek 2, zugleich Dissertation Saarbrücken 1990). Sowie bereits: Maria Zenner, Parteien und Politik im Saargebiet unter dem Völkerbundsregime 1920–1935, Saarbrücken 1966, S. 90–98, [online:] http://nbn-resolving.de/urn:nbn:de:bsz:291-sulbdigital-163733 [12. 02. 2022].

[10] Inge Plettenberg: https://www.literaturland-saar.de/personen/peter-wust/ sowie: Franz-Josef Tremer: https://www.die-tagespost.de/kultur/peter-wust-ich-befinde-mich-in-absoluter-sicherheit-art-206995; Béla von Brandenstein, Der Philosoph Peter Wust, ein Sohn unserer Heimat, in: Klaus Altmeyer, Jakob Szliska, Werner Veauthier, Peter Weiant (Hg.), Das Saarland, ein Beitrag zur Entwicklung des jüngsten Bundeslandes in Politik, Kultur und Wirtschaft, Saarbrücken 1958, S. 295-301; Marc Röbel, Zwischen Traum und Trauma: Kirchenerfahrungen des katholischen Philosophen Peter Wust, in: Trierer Theologische Zeitschrift: Pastor bonus, Trier 125 (2016), S. 223-234; Ders., Ungesicherte „Katholizität"? Zum Kirchenbild des Philosophen Peter Wust, in: Trierer Theologische Zeitschrift: Pastor bonus, Trier 122 (2013), S. 203-223.

[11] Thomas Gergen, Der Humanitätsbegriff bei Peter Wust – Versuch einer Herleitung. In: Ekkehard Blattmann (Hg.), Peter Wust – Aspekte seines Denkens. Frank-Werner Veauthier zum Gedächtnis (Schriftenreihe der Peter-Wust-Gesellschaft Bd. 2), Münster 2004, S. 247-252.

[12] Armin Nolzen, Symbolische Gewalt. Die NSDAP im Saargebiet vor und nach dem 13. Januar 1935, in: Helmut Rönz/Markus Gestier (Hg.), „Herr Hitler, ihre Zeit ist um!" Widerstand an der Saar 1935-1945, Saarbrücken/St. Ingbert 2016, S. 85-115, hier S. 91-107; Christian Bunnenberg, „Daher sieht es die Partei als ihre vornehmste Aufgabe an…", „Schulungen" als Instrumente der Differenzierung und Kontrolle, in: Nicole Kramer/Armin Nolzen (Hg.), Ungleichheiten im „Dritten Reich". Semantiken, Praktiken, Erfahrungen, Göttingen 2012, S. 139-154.

[13] Nolzen, Symbolische Gewalt, S. 95-96. Zum Arbeitserziehungslager Etzenhofen (Köllerbach, heute Ortsteil der Stadt Püttlingen/Saar) als betriebseigenes Straflager der Röchlingschen Eisen- und Stahlwerke (RESW) und dem betrieblichen Schnellgericht, das Hermann Röchling (1872-1955) eingeführt hatte, siehe Elisabeth Thalhofer, Die Lagerstätten an der Saar, in: Rönz/Gestier (Hg.) „Herr Hitler, ihre Zeit ist um!", S. 211-242, hier S. 220-221.

[14] Siehe die Rede des Vorsitzenden F+F Saar, in der Dokumentation unter https://s6851cfb9df78c9fb.jimcontent.com/download/version/1648654871/module/9328816576/name/Gedenkstunde%20MAKKABI%20HAZAIR.pdf – dort Seite 25 [11. 04. 2022].

[15] Wilfried Busemann, Nach dem Widerstand: Widerstände! Beobachtungen zum Leben der NS-Verfolgten an der Saar ab 1945, in: Helmut Rönz/Markus Gestier (Hg.), „Herr Hitler, ihre Zeit ist um!" Widerstand an der Saar 1935-1945, Saarbrücken/St. Ingbert 2016, S. 263-284.

den nachhaltigen und pfleglichen Umgang mit der Natur als ehernen Grundsatz postulieren, müssen wir in der Gesellschaft dagegen initiativ werden und aufstehen.

Die Naturpflege gehört zum Kern des Pfadfindens. Darüber hinaus ist die zentrale Botschaft, die uns aus der Bequemlichkeit wachrüttelt und aufstehen lässt, und die ich gerne wiederhole: „Pfadfinden ist politisch".[16] Dafür streiten wir heute nicht nur symbolisch, wenn wir den jüdischen Pfadfindern, die sich hier noch zur Saargebietszeit entfalten durften,[17] ein Denkmal setzen, das Außenwirkung haben soll. Ja, dies ist gerade unser aller Vorsatz. Geschichte, und auch das ist Intention der Kommission für Saarländische Landesgeschichte, soll Bewusstsein und Weitblick schaffen. Der Verlust an Ehrfurcht vor der Natur in all ihren Verästelungen und Phänomenen (Pflanzen, Tiere und vor allem der Mensch[18]) mittels einer bürokratisierten und bürgerfernen Bürokratie, die das positiv besetzte Wort „Verwaltung" nicht verdient, führt genau in diese Indifferenz, Machtkonzentration, ja sogar Verrohung, für die es heute leider Beispiele an der Saar gibt[19] und die morgen auch vor Menschen nicht Halt macht, vor allem vor Anders-Denkenden.[20]

Verehrte Gedenkende!

Warnen wir stets vor Geschichtsklitterung und -verfälschung.

Bekennen wir uns überdies zu Ehrfurcht vor dem Leben, d.h. der uns geschenkten göttlichen Natur in pflanzlicher, tierlicher, aber vor allem menschlicher, Gott ebenbildlicher (wie Martin Luther es übersetzte) und damit unantastbarer Gestalt.

Versammeln wir uns dazu konkret in aufrichtiger Dankbarkeit und Verneigung vor den jüdischen Pfadfindern, die uns vorausgegangen sind. Die Gedenktafel hier in St. Ingbert soll uns zur augustinischen *Confessio*, zum Bekenntnis, ja zum Gebet führen für die Vertriebenen und Ermordeten[21] der jüdischen Pfadfindergruppe MAKKABI HAZAÏR und Änne Meier, die bereits in der Regionalgeschichte Eingang in Veröffentlichungen gefunden hat;[22] dazu erneut der saarländische Existenzphilosoph Peter Wust, der in Münster lehrte: „Die großen Dinge des Daseins werden nur den betenden Geistern geschenkt."[23]

Vielen Dank für Ihre Aufmerksamkeit und unser gemeinsames Gedenken.

Thomas Gergen*

[16] Siehe die Rede des Vorsitzenden F+F Saar, Hans Enzinger, in der schon genannten Dokumentation unter https://s6851cfb9df78c9fb.jimcontent.com/download/version/1648654871/module/9328816576/name/Gedenkstunde%20MAKKABI%20HAZAIR.pdf – dort Seite 25 [11. 04. 2022].

[17] Hans-Walter Herrmann, Das Schicksal der Juden im Saarland 1920 bis 1945, in: Dokumentation zur Geschichte der jüdischen Bevölkerung in Rheinland-Pfalz und im Saarland von 1800 bis 1945, hg. von der Landesarchivverwaltung Rheinland-Pfalz in Verbindung mit dem Landesarchiv Saarbrücken (Veröffentlichungen der Landesarchivverwaltung Rheinland-Pfalz, 17), Koblenz 1974, S. 257-491.

[18] Thomas Gergen, Tierisches, menschliches, göttliches Recht? Bemerkungen zum Verhältnis Tier-Mensch-Gott in Rechtsgeschichte und geltendem Recht. In: Andreas Deutsch/Peter König (Hg.), Das Tier in der Rechtsgeschichte (Schriftenreihe des Deutschen Rechtswörterbuches, im Auftrage der Heidelberger Akademie der Wissenschaften, Akademiekonferenzen, Bd. 27), Heidelberg 2017, S. 103-122.

[19] Frank Faber, 26. 01. 2021, Erste Konsequenzen für den Investor (Rodung beschäftigt Landtag), SZ-St. Wendel, C1. https://www.saarbruecker-zeitung.de/saarland/st-wendel/nohfelden/rodung-im-eiweiler-silence-park-one-thema-im-saarlaendischen-landtag_aid-55879931 oder die gesamten SVolt-Debatten um den Eingriff in den örtlichen Naturhaushalt, der vielen Menschen am Herzen liegt und zum Protest dagegen demonstrieren lässt (Saarbrükker Zeitung, *passim*) sowie https://www.saarbruecker-zeitung.de/saarland/saarlouis/schwalbach/schwalbach-rat-erteilt-logistikunternehmen-absage-gewerbe-huelzweiler_aid-56513321 (SZ 28. 02. 2021).

[20] Bürger, die nach dem altpreußischen Dreiklassenrecht eingeordnet werden und hinter den Interessen einiger Industrieller zurückbleiben, die in oligarchischem Gutsherrentum eine ökonomisch und leider auch ethisch kärglich ausgebildete nepotistische „Verwaltungselite" beeinflussen, welche sich wiederum einseitig von Industriellen bespielen lässt und nicht den Mut hat, Bürgerrechte gegen das unehrenhafte Spiel mit der Androhung des Verlustes von Arbeitsplätzen anzugehen, um respektloses Vernichten von Natur zu verhindern. Leider schreibt seit 2019 Saarwellingen an einer unrühmlichen Landesgeschichte: https://www.saarbruecker-zeitung.de/saarland/saarlouis/saarwellingen/gemeinderat-saarwellingen-beschliesst-ausbau-von-gewerbegebiet-john-gegen-widerstand-der-buerger_aid-45815121; lobenswert dagegen der Stadtrat Saarlouis: Saarbrücker Zeitung 09. 02. 2022, C1 (Teil SLS).

[21] Für die 7 verlesenen Einzelschicksale ist zwar Vertreibung, aber keine explizite Ermordung dokumentiert. Das „Gedenken an die ermordeten und vertriebenen Kinder und Jugendlichen" steht gleichwohl stellvertretend für die Gesamtheit der Opfer.

[22] Unter dem Protest couragierter weiblicher Einzelpersonen, siehe: Albert Kraus, „Stellen Sie mich an die Wand und knallen Sie mich nieder!" Die katholische Widerstandskämpferin Änne Meier (1896-1989), in: Saarpfalz. Blätter für Geschichte und Volkskunde 47 (1995), S. 33-37 sowie Keywan Klaus Münster/Hermann-Josef Scheidgen, Der konfessionelle Widerstand an der Saar 1935-1945, in: Helmut Rönz/Markus Gestier (Hg.), „Herr Hitler, ihre Zeit ist um!" Widerstand an der Saar 1935-1945, Saarbrücken/St. Ingbert 2016, S. 133-182, hier S. 148, Fn. 57.

[23] Inge Plettenberg: https://www.literaturland-saar.de/service/wanderwege/peter-wust-weg/ sowie: Susan Gottlöber, Peter Wust, in: Internetportal Rheinische Geschichte, abgerufen unter: http://www.rheinische-geschichte.lvr.de/Persoenlichkeiten/peter-wust/DE-2086/lido/57c93651c9ff23.70652676 [abgerufen am 02. 02. 2022].

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In memoriam
Prof. Dr. Michael Stolleis
(* 20. 7. 1941 Ludwigshafen – † 18. 3. 2021 Frankfurt/M)[1]

„Die Bundesrepublik hat eine moralische Institution, die globale Gelehrtenrepublik einen ihrer Leuchttürme verloren". Dieser Satz eines Hochschullehrers im Nachruf auf Michael Stolleis in der „Frankfurter Rundschau" spiegelt die Rolle, die Stolleis für die Rechtswissenschaft, für Frankfurt und für sein Corps Saxo-Borussia gespielt hat. Der Wiener Rechtshistoriker Miloš Vec beschreibt den führenden Rechtshistoriker seiner Generation als Ikone eines Forschers und Pionier seines Fachs, als einen umfassend gebildeten Gelehrten mit einem menschenfreundlichen Ton.

Ehrungen wurden Michael Stolleis viele zuteil - Ehrendoktorate aus Lund, Toulouse, Padua, Helsinki; der Balzan-Preis und der Stuttgarter Hegelpreis; das Bundesverdienstkreuz mit Stern; und vor allem der Orden Pour le mérite. Der Verf. unter den Zuhörern war stolz, wenn der seit seiner Jugend ihm vertraute Stolleis als Vizekanzler des Ordens (und damit gleichsam als Sprecher aller Wissenschaftler) das Geleit der Ordensträger im Konzerthaus am Berliner Gendarmenmarkt anführte – im Olymp der Wissenschaftler und Künstler. Die Preissumme des renommierten Gottfried-Wilhelm-Leibniz-Preises (damals 1,5 Millionen DM) setzte er für Stipendien für Jurastudenten aus den neuen Bundesländern ein. Er war Ehrenmitglied der American Society for Legal History und Mitglied von zehn wissenschaftlichen Akademien im In- und Ausland, darunter der Nationalakademie Leopoldina in Halle und der ihm als Freund der gediegenen Sprache besonders nahen Deutschen Akademie für Sprache und Dichtung. In deren Präsidium entschied er viele Jahre mit über den Büchner Preis, den angesehensten deutschen Literaturpreis. Er sei, sagte der berückende Stilist 2002 zur Aufnahme in die Darmstädter Akademie, ein schreibender Leser und lesender Schreiber mit der „frühen Sehnsucht zu schreiben, irgendwie in der Sprache zu leben, Bücher zu machen. Das beginnt, wie üblich, mit exzessiver Lektüre und mit eigenen Versuchen, gefolgt vom langsamen Gehenlernen in den spanischen Stiefeln der Jurisprudenz."

Zur Einführung in den Orden Pour le mérite 2014 sagte der Berliner Völkerrechtler Christian Tomuschat, Stolleis' holistische Sicht in seinem wissenschaftlichen Vorhaben könne in der gesamten deutschen Rechtswissenschaft gegenwärtig niemand anders leisten – es werde „wie ein rocher de bronce die Zeiten überdauern." Dessen Konzept der Rechtsgeschichte überspringe Grenzen und Zeiten. Und zum Abschied vom Orden sagte im Juni 2022 in seinem Gedenkwort der amerikanische Verfassungsrechtler Gerhard Casper, Stolleis habe schwierige Themen und schwere Fragen nie gescheut – sein Werk sei in jeder Beziehung „groß" gewesen.

Wie anerkannt er war, zeigt nicht zuletzt die Liste der Nachrufe auf ihn, die der Frankfurter Rechtshistoriker Joachim Rückert – wie Stolleis ein Schüler des Schweden Sten Gagnér - in seinem ebenso umfangreichen wie gehaltvollen Nachruf in der „Zeitschrift der Savigny-Stiftung für Rechtsgeschichte" ebenso zusammenstellte wie die immense Bibliographie. Dazu kamen danach weitere, selbst in der japanischen Rechtszeitschrift „Geschichte und Denken im Recht" kam ein „Nekrolog". Den liebevollen Satz Rückerts kann der Verf. bestätigen: „er antwortete zuverlässig auf Zusendungen und auch zur Sache – bekanntlich eher eine Seltenheit".

Der Universalgelehrte blieb trotz mancher Rufe Frankfurt treu in seiner Doppelaufgabe als Professor für öffentliches Recht und Rechtsgeschichte und als Direktor am Max-Planck-Institut für europäische Rechtsgeschichte. Er habe – so das MPI – als Mentor und Förderer, Gestalter und Initiator die deutsche und europäische Rechtsgeschichte maßgeblich geprägt und neue Forschungsfelder erschlossen. Dazu zählten die Geschichte des öffentlichen Rechts, des Völkerrechts und des Sozialrechts sowie die Rechtsgeschichte der DDR und Osteuropas – überall setzte er Maßstäbe. Besonders nahe, voller Leidenschaft, gingen ihm die (Un) Rechtsgeschichte im Nationalsozialismus und Exilschicksale deutscher Juristen jüdischer Herkunft.

Der Präsident der Frankfurter Goethe-Universität, Enrico Schleiff, sagte, Stolleis habe den Ruf der Hochschule mit seiner Tatkraft, seinem Wissensschatz und mit seiner Redlichkeit und Integrität weit über die Landesgrenzen hinaus verbreitet. Im Sommer 2022 luden die Goethe Universität und das Max-Planck-Institut Kollegen und Vertraute zu einer mehrstündigen Gedenkveranstaltung mit dem Titel „recht erzählen". Dazu kamen Wissenschaftler aus Japan, Frankreich, Österreich. Dort sagte Schleiff, Stolleis habe stets den richtigen Ton getroffen und sich durch hohes Verantwortungsbewusstsein auch gegenüber seinen vielen Schülern ausgezeichnet. Der Dekan der juristischen Fakultät ergänzte, Stolleis habe wissenschaftliche Redlichkeit, Substanz und Humor verbunden. Eine französische Hochschullehrerin sagte, in Frankreich gebe es kein einziges jenem von

[1] Erweiterter und aktualisierter Nachdruck mit freundlicher Genehmigung aus „Corps", Bad Kösen. Heft 2/2021.

Stolleis vergleichbares monumentales Werk - sie gibt derzeit mit anderen Franzosen ein Gedenkbuch an Stolleis heraus. Der Komponist Michael Kunze (Autor vieler Musicals und Lieder wie „Griechischer Wein“ und Empfänger mehrerer Dutzend Platin-Schallplatten) erinnerte an das gemeinsame Münchner Rechtsgeschichte-Seminar, bei dem Stolleis danach suchte, wie es zu der monströsen Fehlentwicklung der Nazi-Jahre kommen konnte. Dabei ging er nicht mit moralischer Überheblichkeit vor, sondern versuchte die Wurzeln der deutschen Fehlentwicklung freizuschaufeln, bei der die Verwendung von Worten und Begriffen eine wichtige Rolle spielte. Dass er darüber schrieb, zeigte seine aufrechte Haltung – das war in den frühen Sechzigern für jemand, der eine Hochschullaufbahn anstrebte, überaus mutig.

Stets war Michael Stolleis ansprechbar mit seiner zugewandten Herzlichkeit und einem wunderbaren Humor. Er kümmerte sich um das Große, aber auch um das Kleine. Wenn er eine Kollegin des Autors in der F.A.Z. - für die er gerne schrieb – auf etwas aufmerksam machte, ging es für und um andere. So fragte er sie noch wenige Monate vor seinem Tod, warum ein alter Zeitungsausträger an der Hansaallee verschwunden sei. Die vermeintlich kleinen Geschichten fand er auch bei seinem Lieblingsautor Johann Peter Hebel – Stolleis liebte Literatur und Sprache und präzise, verdichtete Worte. Noch gut drei Wochen vor seinem Tod schrieb er aus der Klinik, sein definitiv letztes Buch werde gerade gesetzt, Geschichten aus der Kurpfalz zwischen 1650 und 1850 sowie eine Juristenbiographie eines Johann Theodor Sprenger aus dem 17. Jahrhundert, den keiner mehr kenne. Seine Belesenheit kam auch seinem Corps zugute – etwa durch den Hinweis auf den Dichter Jean Paul, der auf der Terrasse des Riesensteins, des späteren Corpshauses, oft zu Gast war; oder auf den Sachsenpreußen Wilhelm Hillebrand, der als Arzt von 1850 an Berater des Königs von Honolulu war und als Botaniker 250 neue Arten fand.

Seine zugewandte, bescheidene Art schenkte er auch seinem Corps in Heidelberg, zuletzt als Mitherausgeber und Autor der Festschrift, die die Sachsenpreußen zu ihrem 200. Stiftungstag veröffentlichten. Dabei war ihm in seiner unermesslichen Schaffenskraft nichts zu klein oder unwichtig – er kümmerte sich um Details von Bauplänen, stöberte im Corpsarchiv, hielt Vorträge auf dem Riesenstein. Vor allem begleitete er junge Corpsbrüder auf ihrem Weg in die Wissenschaft. Einem jungen AH, der sich für den Europagedanken einsetzt, schrieb er noch wenige Wochen vor seinem Tod am 18. März 2021, kurz vor seinem achtzigsten Geburtstag, er bewundere dessen Aktivitäten und stehe mit seinen „Überzeugungen pro Europa“ ganz bei ihm und seinen Mitstreitern. Dass er nicht nur für Gefälliges stand, bezeugte sein Zusatz „Ich habe mit meinen Vorschlägen für eine europäische (gemeinsam finanzierte) Arbeitslosenversicherung immer wieder geradezu entsetzte Abwehr gefunden; denn dies würde ja bedeuten, dass man von Nord nach Süd etwas abgibt…“

Seine Offenheit zu Europa begründet Stolleis damit, er sei „aus tiefem Herzen“ mit dem Europagedanken aufgewachsen – in der Pfalz grenznah zu Frankreich, im Schatten des Kalten Krieges, und mit einer Hälfte der Familie in der späteren DDR. So brachte er seine Arbeiten mühelos nicht nur durch Zeiten und Epochen ein, sondern auch in verschiedene Länder und Kulturen. Eine seiner Pionierarbeiten, die Erfassung der „Policeyordnungen“ der frühen Neuzeit (1500 – 1800) als europäisches Großprojekt in gut zwanzig Bänden, umfasste auch Dänemark, die Schweiz und das ihm besonders nahe Schweden.

In der Kurpfalz wuchs Michael Stolleis auf dem väterlichen Carl-Theodor-Hof, einem Weingut in zehnter Generation, in Gimmeldingen-Mußbach auf, das nun sein Bruder und Neffe – beide sind Göttinger Sachsen – bewirtschaften. Seine liberal-konservative Grundierung hat er aus dem deutschen Südwesten übernommen. Stolleis hatte 1961 eine Winzerlehre absolviert, bevor er in Heidelberg und später Würzburg Rechtswissenschaften, Germanistik und Kunstgeschichte studierte und dort Fuchsmajor und Erstchargierter der Saxo-Borussia wurde. Schon fünf Jahre nach seinem Zweiten Staatsexamen in München wurde er 1974 als einer der jüngsten Professoren Deutschlands nach Frankfurt berufen. Dort entstand sein Hauptwerk, die vierbändige „Geschichte des öffentlichen Rechts in Deutschland“ - selbst ins Chinesische wurde es übersetzt, zudem in Englisch, Französisch, Italienisch, Russisch, Spanisch, Koreanisch, Portugiesisch, Türkisch… Diese Wissenschaftsgeschichte des öffentlichen Rechts von der Frühen Neuzeit bis zur Gegenwart gilt

als unübertreffbares Standardwerk. Als Stolleis von der Vorstellung der italienischen Übersetzung seiner „Geschichte“ in Florenz schrieb, bemerkte er schelmisch „mit viel italienischem Überschwang; und der Autor ermahnt sich innerlich, nicht alles für bare Münze zu nehmen.“

Neben zahllosen anderen juristischen, historischen und literarischen Vorhaben nahm er sich Zeit zum Töpfern oder zum Schreiben eines „Dramoletts“ über einen Disput der Familien Goethe und Textor am Reichskammergericht in Wetzlar, das als Hörstück auf CD erschien. Beim Rechtshistorikertag stellte er den von ihm geschaffenen ersten Unterrichtsfilm für Jurastudenten vor, in dem Adam und Eva ihren Sohn Kain am Gefängnistor abholen – dabei geht es natürlich nicht nur um das Beweisverfahren und den Umgang mit dem Täter, sondern auch um den Seelenzustand der Gesellschaft. Michael Stolleis war ein begnadeter Erzähler, Aufklärer, Anreger, Menschenfänger. Trotz bisweilen fordernder Strenge, Zeitvergeudung war ihm ein Greuel: Er hat mit seiner inneren Gelassenheit, fast Heiterkeit, viele geprägt und wird, auch in Heidelberg, fehlen. Sinnbildlich für ihn sind seine Schlussworte eines posthum in Zürich veröffentlichten Essays „Was ist ein Name“: „Und die Moral von der Geschicht‘? Die Welt will benannt sein. Alles andere verläuft in den höheren Sphären, von denen nur Gott wissen mag. Und das ist auch irgendwie tröstlich.“

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100 Jahre Fürstlicher Oberster Gerichtshof des Fürstentums Liechtenstein – Ein Interview mit Universitätsprofessor Dr. iur. Dr. phil. Thomas GERGEN, Maître en droit (Luxemburg)

Professor Thomas Gergen lehrt am Institut Supérieur de l’Économie, ISEC Université Luxembourg von Anfang an seit dessen Gründung. Er lehrt und forscht im Großherzogtum seit fast 10 Jahren zu den Themen Internationales Zivil- und Wirtschaftsrecht mit Immaterialgüterrecht. Zur Jubelfeier 100 Jahre Fürstlicher Oberster Gerichtshof nahm er am 18. Mai 2022 in Vaduz teil. In der noblen Festschrift hat Thomas Gergen auch einen Beitrag zum internationalen Markenrecht verfasst, in dem es um das Stresa-Abkommen ging, welches Käsesorten herkunftsrechtlich schützt und das für Liechtenstein nach wie vor Gültigkeit hat. Rechtshistorisch interessant ist die Tradition des französisch beeinflussten Völkerrechts („droit international public“) beim Stresa-Abkommen, aber auch bei verwandten Vereinbarungen.

Frage: Was ist Ihr Lehr- und Forschungsgebiet an der ISEC Université?

Wir beschäftigen uns an der ISEC in den Bachelor- und Masterstudiengängen mit dem Recht der Grenz- und Großregion, also vor allem mit dem nationalen Recht von Luxemburg und Deutschland sowie dem Europa- und Völkerrecht. Die Studierenden lernen die für die Wirtschafts- und Managementpraxis relevanten Grundlagen im Vertrags-, Sachen-, Handels-, Gesellschaftsrecht mit Bezügen zu Steuer-, Insolvenz- und natürlich dem Europarecht. Auch das Arbeitsrecht wurde und wird als Vertiefung gewählt. Geistiges Eigentum (IP) bzw. Immaterialgüterrecht bildet an der ISEC sogar einen eigenen Forschungsschwerpunkt, d.h. Geistiges Eigentum: Grundlagen und Anwendungen. Hierbei legen wir auf die Rechtsgenese gesteigerten Wert.

Es ist obendrein wichtig, dass die BA-Studierenden im Master diese Rechtsgebiete vertiefen können; dort heißt es in englischer Sprache: International Business Law.

Frage: Luxemburg und Liechtenstein: Kleinstaaten mit spannendem Wirtschaftsrecht. Was ist an den beiden Monarchien so spannend?

Luxemburg und Liechtenstein sind konstitutionelle Erbmonarchien, d.h. Demokratien auf starkem parlamentarischem Grund. Während das Großherzogtum EU-Gründungsmitglied ist, zählt das Fürstentum zu den EFTA-Staaten, deren Gerichtshof ebenfalls in Luxemburg (Kirchbierg) residiert.

Dank Napoleon, dem wir in Luxemburg vor allem den Code civil (1804) verdanken, ist auch das Fürstentum Liechtenstein unabhängig geworden, weil Napoleon 1806 das Fürstentum in den Rheinbund aufnahm. Seit über 300 Jahren sind die Grenzen des Fürstentums unverändert. Wie Luxemburg war Liechtenstein zwischen 1806 und 1866 Mitglied des Deutschen Bundes, Liechtenstein sodann mit starker Anlehnung an die Habsburgermonarchie. Seit den 1920er Jahren hat das Fürstentum eine Wirtschafts- und Währungsunion mit seinem Nachbarland Schweiz.

Auch zur britischen Monarchie gibt es einen eher witzigen Bezug: Wer „God save the Queen“ anstimmt, hat schon die Melodie für „Oben am jungen Rhein“, die liechtensteinische Nationalhymne. Vor einer Fahrt nach Liechtenstein sollte man sich dieses Lied einmal z.B. bei Youtube anhören.

Die Beschäftigung mit dem luxemburgischen und liechtensteinischen Wirtschaftsrecht ist nicht allein für Nur-Juri-

sten spannend, sondern geradezu für Ökonomen nutzbringend, um sich auf dem Arbeitsmarkt gut aufzustellen und interessante Nischen zu besetzen; sich unterscheiden heißt gerade hier die Devise für erfolgreiches Studium und Beruf. Nie fehlen dürfen dabei die Erkenntnisse insbesondere aus der europäischen Rechts- und Verfassungsgeschichte der jüngeren und jüngsten Geschichte.

Frage: Worum geht es in Ihrem Beitrag in der Festschrift zu 100 Jahre Oberster Fürstlicher Gerichtshof Liechtensteins?

Der Titel lautet folgendermaßen: „Die Alternativ-Formel bei Ursprungsbezeichnungen in Artikel 3 Stresa-Abkommen - Entstehung und Translation der „appellation d'origine" seit den 1920er Jahren". Er ist rechtsvergleichend, immaterialgüterrechtlich wie rechtshistorisch gleichermaßen. Die Studie zeigt auf, dass sich die französische „appellation d'origine" als Herkunftsbezeichnung in Artikel 3 des in Stresa am 1. Juni 1951 unterzeichneten Internationalen Abkommens über die Anwendung der Ursprungsbezeichnungen und Benennungen für Käse (kurz StresaA) niedergeschlagen hat. Das StresaA, heute noch über den Zollverein mit der Schweiz in Liechtenstein gültig, schützt gemäß Artikel 3 Urprungsbezeichnungen („appellations d'origine"). Der Schutz aus Artikel 3 steht nur denjenigen Ursprungsbezeichnungen zu, die aufgrund eines im StresaA geregelten Verfahrens vor dem hierfür eigens eingerichteten „Ständigen Rat" in den Anhang A des StresaA aufgenommen worden sind. Auch ist der Umfang des Gebrauchsverbotes gemäß Artikel 3 in Übereinstimmung mit der bis 1951 ausgeformten französischen Rechtspraxis zu bestimmen. Das Adverb „alleine" („seul/alone") in der Alternativen-Formel des Artikel 3 bedeutet nicht, dass neben der Verwendung mit Zusätzen lediglich der Gebrauch einer identischen Bezeichnung erfasst wird. Auch eine ähnliche Bezeichnung „imitation" mit Namencharakter kann unzulässig sein; Maßstab für die Feststellung der Ähnlichkeit ist die phonetische Wirkung der Ursprungsbezeichnung und der konkurrierenden namensmäßigen Kennzeichen.

Frage: Warum lohnt es, sich mit dem liechtensteinischen Recht zu befassen?

Deutsch als Gerichts- und Rechtssprache ist traditionell zwischen eigenem, aber viel österreichischem und Schweizer Recht. Österreichisches Recht, das ABGB von 1811, sowie das Gerichtsorganisations- und Verfahrensrecht sind österreichisch, welches nach wie vor Impulsgeber bei Rechtsreformen ist. Damit einher geht eine Kooperation mit dem maßgebenden Forschungszentrum der Universität Innsbruck, die sich auch als Hochschule versteht mit Liechtensteinischer Ausrichtung: https://www.uibk.ac.at/rewi/fz-liechtensteinisches-recht/

Besondere Ausprägungen liegen im Gesellschafts- und Steuerrecht vor, prominent dabei das Trust- sowie Finanzmarktrecht, sodann Regulierung neuer Technologien aus privat- und öffentlich-rechtlicher Sicht. Aber auch Erb- und Stiftungsrecht müssen gekonnt sein! Lohnenswert ist stets ein Aufenthalt in Liechtenstein, in der National- oder Universitäts-Bibliothek, dem Liechtenstein-Institut sowie natürlich beim Parlament und bei den Gerichten sowie für historische Themen beim Landesarchiv.

Blick vom Parlament/Vorplatz auf die Hauptstadt Vaduz. Foto: Thomas Gergen.

Gerichtsgebäude in Vaduz, Foto: „Fürstliches Landgericht/Beham".

Flyer der Festschrift 100 Jahre Fürstlicher Oberster Gerichtshof. Foto: MANZ-Verlag Wien.

Report from the Conference "International Legal History Meeting of PhD Students"

Nowadays, especially after the isolation and limitation of personal contact during the numerous lockdowns caused by the Covid-19 pandemic, there is a need to create space for development and communication between PhD students and members of the academic community not only within a single faculty. For this reason, with the end of summer and the beginning of a new semester, on the 8th and 9th of September, a conference named "*International Legal History Meeting of PhD Students*" was held at the Masaryk University Faculty of Law in Brno. This conference was organised by the Department of the History of the State and Law of the mentioned faculty. The aim of the meeting was to enable beginning researchers not only to exchange their partial research results, based primarily on the topics of their PhD theses, but also to improve the presentation of the academic community. Besides that, the conference allowed participants to make new contacts and exchange their experience from their previous studies and academic life as well as from their PhD studies.

The beginning of the conference was introduced by Associate Professor Jaromír Tauchen, the head of the Department of the History of the State and Law, who then welcomed participants from universities in Austria, Belgium, Czechia, Germany, Hungary, Netherlands, Poland, Slovakia, and Slovenia. After that, Professor Tauchen turned the floor over to Doctor David Kolumber. Doctor Kolumber outlined the flow of the conference, explaining how the conference was divided into five thematic parts.

The first part of the conference was named Roman Traces. As the name suggests, this part of the conference was mainly devoted to Roman law. The chair of this part was taken by Doctor Radek Černoch. The first presentation was given by Michael Binder from the University of Vienna on "*The Fraudulent Claim of One's Own Fundus (D. 21.2.73)*". In this presentation Mr. Binder considered whether or not the *exceptio doli* referred to in D. 21.2.73 is a consequence of *dolo facit, qui petit quod redditurus est*. Second in the order of the first session was Václav Dvorský from Charles University and KU Leuven with the topic "*Between Mutuum and Depositum: Deposit of Money under Ius Commune*". In his contribution, he compared and reflected on the differences of opinions of three medieval and early modern civil lawyers on the deposit of fungibles. Then the following speaker, Vid Žepic from the University of Ljubljana, spoke on the topic "*Non-pledgeable Property in Ancient Law – A Reflection of favor debitis?*", in which he mentioned not only the historical development of this topic, but also, and especially, reflected on the possibility of a Christian tendency. The last presenter in this part of the conference was Marek Prudovič from Trnava University. His presentation was named "*Legislative Activity of Magistrates as a Possible Inspiration for the Judicial Law-Making in the Current Anglo-American and Continental Legal System*". Then, the part Roman Traces was concluded with a discussion.

After the coffee break, when the participants had one of the first opportunities to get to know each other, the second part of the conference named Historical Traces started. This time, the chair was taken by Doctor Kolumber. The first speaker was Danilo Brajović from the University of Vienna with his presentation on the topic of "*Legal Theory and Political Pragmatism by Legal Transfers – The Case of South-Slavic Collective Property*". Mr. Brajović spoke about the example of South-Slavic collective property named "Zadruga" in the Habsburg Monarchy. The second presenter was Bernard Gollob from University of Graz. His research was named "*Austria and the Freedom of Artistic Expression: A Troubled History*?". In it, he talked about the development of an own fundamental rights provision to protect the arts in Austria. The third in the order of the second part was Kristóf Mihály Heil from Eötvös Loránd University who spoke on "*The Transition from a Feudal Society to a Social Structure Based upon Civil Rights in Hungary. With Particular Regard to Preparatory Draft Laws*". As the title of his contribution suggests, Mr. Mihály Heil discussed the civil transition and the codification attempts in the late 18th century and the first half of the 19th century. After this contribution, Petr Vilem Koluch from Leiden University and the University of Vienna took the floor with his presentation on "*Josef Redlich and the Glorious Revolution of Liberalism*", in which he spoke about the personality of Josef Redlich and his work. The last in this part of conference was Igor Hron from Comenius University in Bratislava. His research was based on "*Historical Traces of Moral Rights in Common Law*" and mentioned the development of the moral rights and then analysed the doctrinal sources. As in the previous session, the part Historical Traces ended with a lively debate on the topics presented.

During the lunch break, the topics presented resonated, but time was relentless, and it was necessary to move on to the next part of the conference. This part was named Civil Traces and the chair was taken by Associate Professor Pavel Salák. In this part were two presenters. The first one was Kristóf Szivós from the University of Szeged. He prepared the presentation on his research and named it "*The Written Preparation of the Oral Hearing in the First Hungarian Code of Civil Procedure*". The second speaker was László Ádám Joó from the University of Debrecen with the contribution on "*Extension of the Hungarian Private Law to the Returned Territories*

after the Second Vienna Award". With this part the first day of the conference ended. However, the organizers held an additional program to bring the participants closer together and to get to know the city where the conference was held, Brno.

The next day, on the 9th of September, were planned two parts of the conference. The first one was named Public Traces and started at 9.00 a.m. The chair was taken by Bernard Gollob and introduced the first presenter András Biczó from the University of Debrecen. His presentation was titled "*In the Service of the State – Analysis of the Josephinist Policy and Reforms regarding the Hungarian Court Organisation*". In this presentation Mr. Biczó considered the new first-instance courts erected in the area of the Hungarian Kingdom and Transylvania in 1787 and then focused on the Latin oath texts taken by the judicial personnel appointed to these courts. The next was Alicia Harispershad from the Max Planck Institute for Legal History and Legal Theory and spoke on "*De-missionise Education? An Exploration of the Legally Endorsed Protestant Missionary Contribution to Education in Southern Africa from 1880 to 1920*". The last one in this part was Jan Kabát from Masaryk University. His contribution was named "*The Phenomenon of Czech and Slovak Lawyers Meeting in the First Half of the 20th Century*". The contribution was a window into the history of the meeting of Czech and Slovak Lawyers with a focus on its significance. As with the previous ones, the session ended with an interesting discussion.

After a short coffee break, the conference was coming to an end and the last part named Criminal Traces started. This part was again chaired by Bernard Gollob. The first contribution was on "*Criminal Prosecution of Public Officials of the Hungarian Soviet Republic*" by Borisz Bendegúz Burger from Pázmány Péter Catholic University. In his contribution he spoke about the period after the fall of the Soviet Republic of Hungary, when prosecutors and adjudicating courts evaluated political actions committed with the use of state power. This was followed by Paulina Kamberov from the University of Gdańsk with the presentation on "*Conceptualisation of Ideas on the Codification of Criminal Lax in the Early Period of the Second Polish Republic*", in which she showed the situation and conditions in which criminal law was shaped until the establishment of the Criminal Law Codification Commission. The third presenter in this part was Petra Zapletalová from Masaryk University and her theme was "*The Historical Development of the Legal Profession in the 1950 s: Defence Attorney*", in which she outlined the role of Defence Attorneys in 1950s, both their development and their activity in criminal proceedings. The last speaker, not only in this part but also in the whole conference, was Milan Dobeš from Masaryk University. His contribution, based on his research, was named "*Offenders of the Crime of Social Parasitism*". Mr. Dobeš mentioned the obligation to work, which was typical for totalitarian states and was enforced, and also spoke about types of social parasitism as well as its criminal regulation.

After the last participant finished speaking, the last discussion took place. The organizers thanked the participants for their participation in the conference and the lively discussions on the various contributions. The conference then ended with a lunch.

In the end, it can be said that the conference was beneficial not only in terms of contributions and information, but also in terms of interesting suggestions in discussions and meeting PhD students from other universities who could share their dissertation research as well as their academic life. Moreover, presented contributions are accessible not only to the academics but also to general public because they have already been published in the conference proceedings named *"Edge of Tomorrow: the Next Generation of Legal Historians and Romanists: Collection of Contributions from the 2022 International Legal History Meeting of PhD Students".*

Petra Zapletalová*

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