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The German Courts-martial and their Cooperation with the Police Organizations during the World War II

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Abstract

The article focuses on the military justice of the Wehrmacht and their investigation organizations. The armed forces of the Third Reich had command over hundreds of court-martials. These military courts supervise the discipline inside the army. Moreover, they were part of the occupation force of the occupied European territories. Besides the authority over the German soldiers the military judges could also decide on German and foreign civilians. Various police organizations lead investigations for the court-martials of the Wehrmacht: especially the Field-Gendarmerie, which was created in 1939 to work for the military justice just as the Geheime Feldpolizei (Secret Field-Police). The members of these formations had a bad reputation, because their methods of work were brutal and ruthless. On demand the German court-martials cooperated also with the German Ordnungspolizei (Civil Order Police), the Geheime Staatspolizei (Secret State Police) and with police organizations of the occupied European nations. During the war the military tribunals operated more radical and they always declared more death sentences. In the end of 1943 a new type of military police arose: the Feldjäger-Kommandos (Field Hunter Commands). They consisted of disguised sergeants and officers of the Wehrmacht and the SS. Part of the Field Hunters were special military courts. But in this case the police had the commanding power over the judges - not vice versa. Towards the end of the war continuously more and more special police and SS units were created, which supervised the area behind the front. Instead of regular military tribunals these units worked together with flying drumhead trials, which let people be executed in the public.

Keywords: *Second World War; Third Reich; military courts; courts-martials; military judges; secret field police.*

The Wehrmacht's clout had to be assured by securing its cohesion and team spirit, and that was the main task of the German court-martial in the Nazi State.[1] During the World War II the German courts-martial have passed approximately 50000 death sentences – mainly against German soldiers and prisoners of war, but also against German and foreign civilians.[2] For the investigations preceding the lawsuits, the courts-martial fell back on the military police organization, but also on such police formations which were under the control of the Ministry of the Interior or the Reich Security Head Office of SS.

The courts-martial established in 1934 in the German Reich were exclusively responsible for punishment of offences committed by soldiers of the Wehrmacht till September 1939.[3] In this so called peaceful period of the Third Reich the armed forces did not have military police.[4] The investigations against suspects have been conducted by superior officers or investigators. The investigators were military jurists who had the powers of state attorney and investigating judge.[5]

In some cases the investigators were allowed to request administrative assistance from police authorities in order to support their investigations.[6] Such administrative assistance related to members of the regular police force and the criminal police, theoretically also to the Secret State Police (Gestapo).[7] Altogether, the civil police forces were rarely engaged. It is not certain how often the military police and the political police (Gestapo) cooperated in the period 1934-1939. There is only one case known, where Gestapo conducted the investigations on behalf of the Wehrmacht.[8] It concerned a master sergeant whom the

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1 Cf. Supreme Command of the Army (original title: *Oberkammando des Heeres*), Bulletin for Officers at Court, Berlin 1940, p. 3.

2 Cf. Fritz Wüllner/Fietje Foreigners, Selection and Excision in the Service of "male discipline" (*Ausländer, Aussonderung und Ausmerzung im Dienste der "Manneszucht"*), Military Justice under Swastika, in: Fietje Foreigners, Betrayers, Ideals (original title: *Ausländer, Verräter oder Vorbilder?*), Bremen 1990, pp. 65, 74.

3 Cf. Art. 1, Sec. 1, Nr. 1 of the Regulation of the Criminal Courts-martial, Reich Law Gazette 1933 I, p. 924.

4 Cf. Peter Kalmbach, Police Investigation Force of the Wehrmacht Justice, in Criminology, Independent Bulletin for criminalistics science and praxis, Year 2013, p. 118.

5 Cf. Otto Pete Schweling, The German Military Justice during the National Socialism, Marburg 1977, p. 26.

6 Cf. Art. 161 of the Regulation of the Criminal Courts-martial.

7 Cf. Art. 161 of the Regulation of the Criminal Courts-martial; Minister of defense of the Reich on January 15, 1935, Federal Archive -Military Archive Freiburg (BA-MA) RH 14/54, Gazette 27 f.

8 Cf. Crime Report of the Court-Martial of the Reich from March 11, 1939, Federal Archive -Military Archive Freiburg BA-MA RH *15/427,* Gazette 129.

main key for a fortification has been entrusted and then stolen. Gestapo investigated him for a high treason on behalf of the military justice.

The beginning of World War II on September 1st, 1939 led to material changes in the justice competences and the activities of the courts-martial. As the number of the Wehrmacht members grew rapidly up to six million by 1940 only[9], and kept on growing in the next years, the proceedings against German soldiers increased as well. It was primarily about clearly military offences related to the discipline, such as desertion or disobedience for example.[10] Then the jurisdiction on prisoners of war was added. German and foreign civilians could also be subject to the jurisdiction of the courts-martial. This applied for the territories of the German Reich, but also for the occupied countries. Foreign civilians were tried mainly due to active resistance[11]; German civilians were tried mainly due to activities hampering the interest of the armed forces such as critical statements that might be assessed as "clout destructive".[12]

After the attack on Poland on September 1st, 1939 the German armed forces established their own police units: Feldgendarmerie (Field Gendarmerie) (the military police). This German military police consisted initially of 8,000 members of the civil police.[13] The field gendarmerie acted on the first hand as public order control authority, and on the other hand acted as investigators on behalf of the courts-martial.[14] The field gendarmerie had powers to command all soldiers and to request the military authorities, and any soldier, to cooperate with the gendarmerie.[15] The members of the Armed SS were obliged to be at field gendarmerie's disposal at any time.[16] The field gendarmes had to investigate energetically and provide the court in due time with a clear and brief results from the investigation.[17] It had to be acted decidedly against civilians and soldiers.[18] If required, the field gendarmes were entitled to use their weapons immediately.[19]

In the occupied territories the field gendarmerie cooperated with the local police which had to render assistance mainly when acting against local citizens. Such cooperation was a routine for example in Greece[20] and in France.[21] In the Netherlands the Wehrmacht was assisted by 20,000 local policemen.[22]

During the first weeks of the war, the German combat troops did not pay great respect to the field gendarmerie owing to the fact that the field gendarmerie was made up of civil policemen and did not had the necessary uniform.[23] Its main identification as military police consisted of a brassard showing they are field gendarmes.[24] Therefore, they were not deemed Wehrmacht members but uniformed civilians. In November 1939 the combat troops were informed by their commanders that the field gendarmerie is a part of the armed forces acting as a military police.[25] The brassard was removed and replaced by a gorget inscribed "Field Gendarmerie".[26] As the field gendarmes have soon earned a bad reputation due to their brutality and owing to their gorget worn on a neck chain, they were called "Chain-dogs".[27]

In order to complete and relief the field gendarmerie the so called patrol service was established for all three types of armed forces (army, marine and air force), which were united into Armed Forces Patrol Service as of 1941.[28] These patrol services were staffed and deployed as necessary.[29] They controlled especially railway stations, trains and roads but were also directly deployed to arrest deserters.[30] The patrol service was not a self-contained organization such as the field gendarmerie as the soldiers participated in the patrol service mostly on a temporary basis and were moved back to their combat units after certain period of time. They were not officially deemed a military

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9 Martin van Crefeld, Combat Power, Military Organisation and Performance, (original title: Kampfkraft, Militärische Organisation und Leistung) 1939-1945, 4. Ed., Graz 2009, p. 85.
10 Cf. Military Penal Code, Reich Law Gazette (RGBI.) 1872, p. 173.
11 Cf. Special Criminal Law Decree on War, Reich Law Gazette 1939 I, p. 1455.
12 Cf. I.c.
13 Cf. Christopher Browning, Ordinary Men (original title: Ganz normale Männer), The Reserve Police Battalion 101 and the "Final Solution" in Poland, 5. ed., Hamburg 2002, p. 25.
14 Cf. The Secret Field Police, Federal Archive – Military Archive BA-MA RW 5/283, Gazette 4.
15 Cf. Kalmbach, Justice of the Wehrmacht, Berlin 2012, p. 290 ff.
16 Cf. Franz Seidler, Desertion, Munich 1993, p. 166 ff.
17 Cf. Petermann, Cooperation of the Field Gendarmerie with the Court, in: Magazine for Military Defense law (original title: Zeitschrift für Wehrrecht) 1944, Vol. 2, p. 305.
18 Cf. I.c.
19 Cf. I.c.
20 Cf. Vaios Kalogrias/Stratos Dordanas, German Police Authorities in Occupied Greece 1941-1944, in: Wolfgang Schulte, The Police in the Nazi State, Frankfurt a.M. 2009, p. 425, 436.
21 Cf. Kalmbach, Interview with Horst Pfeiffer from January 20, 2006.
22 Cf. Karl Schneider, Outwards Deployed, Bremer Police Battalion and the Holocaust (original title: Auswärts eingesetzt, Bremer Polizeibataillone und der Holocaust), Essen 2011, p. 279.
23 Cf. Secret Instructions by the Army High Command from November 17, 1939, Federal Archive – Military Archive BA-MA RW 5/283, Gazette 2.
24 Cf. I.c.
25 Cf. I.c.
26 Cf. I.c.
27 Cf. Kalmbach, in: Criminalistics 2013, pp. 118, 119.
28 Cf. Karlheinz Bäckle, Field Gendarmes, Field Hunters, Military Policemen, Their History till Today, (original title: *Feldgendarmen, Feldjäger, Militärpolizisten, Ihre Geschichte bis heute*), Stuttgart 1987, p. 170 ff.
29 Cf. Kalmbach, p. 305.
30 Cf. The Secret Field Police, Federal Archive – Military Archive BA-MA RW 5/283, Gazette 4.

police, but their assistants only. In such a way, they made arrests but did not conduct investigations.

In addition to the Field Gendarmerie, the Secret Field Police was introduced in September 1939, which was responsible for the investigation of heavy or complicated offences.[31] The Secret Field Police was deemed Gestapo of the Wehrmacht.[32] The Secret Field Police recruited from the civil police forces but mainly from the criminal and secret state police.[33] The units of the Secret Field Police were manned with selected staff, were motorized and technically very well equipped.[34] They were part of the Wehrmacht but their members were entitled to wear civilian clothes in action.[35]

From the beginning of the war the field gendarmerie and the Secret Field Police partially transferred their military investigative powers to the civil police authorities in order to relief the military police units. That constituted a material change: the Wehrmacht surrendered its jurisdiction to non-military organizations. As of the fall of 1939 the criminal police stayed at disposal for all cases of corruption, and as of 1942 – for all cases of desertion.[36]

In the course of the World War II the military justice radicalized. That resulted in a closer cooperation of the military justice with the SS-integrated security authorities, Gestapo and the Security Service of SS. Thus, the activities of the Soviet spy ring "Red Orchestra" were not only investigated by the criminal police[37], but Gestapo brought an action against it before the highest court martial, the Reich Military Tribunal.[38] It is known about cooperation in 1943 between an investigating judge of the Reich Military Tribunal and Gestapo during an investigation against political resistance fighters who have been military counter-intelligence officers.[39] There was an agreement for the Netherlands between the Wehrmacht and SS according to which the Security Service of SS had to investigate on behalf of the courts martial if the field gendarmerie and the Secret Field Police could not react immediately.[40]

The continuous defeats of the Wehrmacht as of 1943 lead to the introduction of another military police formation: "Field Hunters Commands". That special military police was under the direct control of the High Command, had to be deployed on priorities and had unlimited authority over any person, also over field policemen and all officers – up to the rank of general.[41] Irrespective of the small numbers, each command, which might reach the staffing of a company, had e court martial[42] – in contrast to the usual allocation where only a division (average number of soldiers in 1944: approximately 14,000[43]) had a court martial.[44] Usually, the division court martial had jurisdiction over the soldiers in case of penal proceedings, and the court martial of certain district had jurisdiction over the civilians. The courts martial of the Field Hunter Commands could proceed against any German, whether soldier or civilian, and any foreigner. They had jurisdiction over any person. All police powers and highest command authority was concentrated in this squad. The military police commands were used for the first time in February 1944 on the Eastern front.[45] The "normal" setting was in reverse form at the Field Hunters: if the field gendarmes, the Secret Field Police, the patrol services and other police organizations were obliged to render assistance to the court martial, the roles at the Field Hunter Commands were interchanged. In the Field Hunter Commands the special military policemen determined the procedure, and the military justice was only a subordinate option. In order to relief their work, the courts martial of the Field Hunter Commands were allowed to always conduct criminal proceedings in an only one accelerated procedure[46] – as a flying court martial. Such drumhead court martial could deliver a judgment on site and execute such judgment without remedy and compurgation by a superior instance.[47]

The deterioration of Germany's military situation led to drastic increase in control measures by civil and military police formations as of the fall of 1944. This had to stabilize the Front. In order to strengthen the necessary control measures and the inve-

31 Cf. Memorandum, Federal Archive – Military Archive BA-MA RW 5/283, Gazette 2.

32 Cf. Klaus Gessner, Secret Field Police , the Gestapo of the Whermacht, in: Gerhard Paul/Klaus-Michael Mallman, The Gestapo, Myth and Reality (original title: Die Gestapo, Mythos und Realität), Darmstadt 2003, p. 492

33 Cf. I.c., pp. 492, 494 ff.

34 Cf. The Secret Field Police, Federal Archive – Military Archive BA-MA RW 5/283, Gazette 2.

35 Cf. I.c.

36 Cf. General Army Office from June 10, 1939, Federal Archive – Military Archive BA-MA RH 15/427, Gazette 27 ff.; Council of the Highest Court-Martial for the Surveillance District No. 2 from March 24, 1942, Federal Archive – Military Archive BA-MA RH 26-172/9.

37 Cf. Johannes Tuchei, Between Criminalistics Research and Brutal Torture, About the Activity of the Gestapo Special Commission Red Orchestra (original title: Zwischen kriminalistischer Recherche und brutaler Folter, Zur Tätigkeit der Gestapo-Sonderkommission Rote Kapelle), in: Paull Mallmann, The Gestapo, p. 373 ff.

38 Cf. I.c.

39 Cf. Johannes Tuchei, The Gestapo Special Commission Red Orchestra, in: Hans Coppi/Jürgen DanyellJohannes Tuchei, The Red Orchestra in the Resistance against National Socialism (original title: Die Rote Kapelle im Widerstand gegen den Nationalsozialismus), Berlin 1994, pp. 145, 146 ff.

40 Cf. Commander of the Security Police and Security Service in the Occupied Netherlands from March 18, 1941, Federal Archive Berlin (Bundesarchiv BA), R 70/Netherlands/43, Gazette 116.

41 Cf. Boeckle, p. 174 ff.

42 Cf. The Secret Field Police, Federal Archive – Military Archive BA-MA RW 5/283, Gazette 4.

43 Cf. van Crefeld, p. 73.

44 Cf. Schweling, p. 19 f.

45 Cf. Seidler, p. 168.

46 Cf. Peter Schütz, The Precursor of the Bundeswehr Military Police - A Contribution to the Prussian-German Military Legal History (original title: Die Vorläufer der Bundeswehr-Feldjäger - Ein Beitrag zur preußisch-deutschen Wehrrechtsgeschichte, Berlin 2005, p. 223.

47 Cf. Fourth Ordinance for the Execution and Completion of the Ordinance on the Military Criminal Proceedings in War and in Particular Missions, Art. 13a, Reich Law Gazette RGBI. 1939 I, p. 2132.

stigations, all military and police institutions started to cooperate closer.[48] As of September 1944 all members of the civil police forces and the security forces were entitled to control at any time soldiers in order to reveal deserters.[49] Members of Gestapo and SO had to assume military police tasks, if required, and to serve to the respective locally competent military command.[50] For the main control measures, not only the units of the field gendarmerie, the Secret Field Police, the Military Patrol Service, and the Field Hunter Commands, but also the Special Commands of SS were subordinate to the Wehrmacht command.[51] Those SS Special Commands also assumed military police tasks.

The civil and military police forces and the martial auxiliary policemen and members of the SS special commands were not only at railway stations and traffic hubs omnipresent; all trains and streets were regularly and closely screened.

An eyewitness, who deserted in 1944, reports: "All-around coached the merciless military policemen. (…) The greatest danger came from the military foot patrols. They lied in wait behind buildings or among trees and bushes".[52] Later, in the beginning of 1945 the competences and tasks of the courts martial and the police units merged on. In the meantime the courts martial acted exclusively as drumhead courts-martial, pronounced sentences on site and order execution on the accelerated proceedings.[53] Such drumhead courts-martial travelled partially with motor vehicles, controlled entire areas and were accompanied by a squad of military policemen, who made arrests and performed the following execution.[54] In the last weeks of the World War II, the last limits and distinctions dropped, and the drumhead courts-martial were made up of members of the field gendarmerie, Gestapo and SO.[55]

[48] Cf. The Patrol of the Wehrmacht (Der Wehrmachtstreifendienst), in: ZfW (Defence Law Magazine) 1944, Vol. 2, p. 183.
[49] Cf. Seidler, p. 167.
[50] Cf. Gerhard Paul, I was not deeply moved by these shootings any longer (original title: Diese Erschießungen haben mich innerlich gar nicht mehr berührt), The crimes by the Gestapo at the final phase of the war 1944-45, in: Gerhard Paul / Klaus-Michael Mallmann, The Gestapo during WWII, Home Front and Occupied Europe, Darmstadt 2000, pp. 543, 547.
[51] Cf. Order of the Supreme Command of the Wehrmacht from February 2, 1945, Federal Archive BA NS 6/354, Gazette 61.
[52] Werner Lenz, There are no right ways (original title: Gerade Wege gibt es nicht), Bremerhaven 2006, pp. 198 and 220.
[53] Cf. Manfred Messerschmidt, The Justice of the Wehrmacht 1933-1945, Paderborn 2005, p. 410 f.
[54] Cf. Kalmbach, p. 261 f.
[55] Cf. Paul, in: Paul/Mallmann, p. 543, 548 ff.; Gerhard Bolt, The Last Days of the Reich Chancellery, (original title: Die letzten Tage der Reichskanzlei), Hamburg 1964, p. 103; Bert Albers, „Capital Punishment without Judges", in the newspaper: Zevener Zeitung April 12, 2013.

Zur Geschichte des Erbverzichts
(History of Renunciation of Inheritance)

*Martin Löhnig**

Abstract

The renunciation of inheritance is a common instrument of the preventive administration of justice. It enables the undivided transfer mortis causa of a greater fortune to a single legal successor. Also, as a consequence the admission of the renunciation of inheritance declared before the death of the testator has a big social relevance. This article intends to demonstrate the legal political as well as the dogmatic development of the renunciation of inheritance.

Keywords: *renunciation of inheritance; contract of inheritance; inheritance law of the daughters; church as heiress.*

1. Erb- und Pflichtteilsverzicht als Instrument vorsorgender Rechtspflege

Der Erbverzicht, vor allem aber der Verzicht auf das nur unter ganz engen Voraussetzungen entziehbare Pflichtteilsrecht regelmäßig gegen Abfindung, ist ein gängiges Instrument vorsorgender Rechtspflege. Er ermöglicht die ungeteilte Weitergabe größerer Vermögen von Todes wegen an einen einzelnen Rechtsnachfolger. Durch den Abschluß derartiger Verträge mit pflichtteilsberechtigten gesetzlichen Erben kann ein Erblasser beispielsweise erreichen, daß ein einzelner Erbe das ererbte Unternehmen fortführen kann, ohne daß dieses Unternehmen wegen der Pflichtteilsansprüche enterbter gesetzlicher Erben gleichsam finanziell ausblutet. Oder der Erblasser kann erreichen, daß sein Vermögen ungeschmälert an eine Stiftung fließt, in der er sich verewigen möchte. Außerdem können Erb- und Pflichtteilsverzichtsverträge Streitigkeiten nach dem Erbfall vermeiden oder eine vorweggenommene Erbfolge flankieren.

2. Unwirksamkeit des Erbverzichts nach römischem Recht

Dieses für uns selbstverständliche Rechtsinstitut war dem römischen Recht, wie es uns im corpus iuris civilis begegnet, unbekannt. Das deshalb ist von Bedeutung, weil das römische Recht seit seiner Rezeption das kontinentaleuropäische Zivilrecht maßgeblich prägt. Das römische Erbrecht beruhte auf einer weitgehenden Testierfreiheit, die durch ein Pflichterbrecht für nahe Angehörige beschränkt wurde.

Das römische Recht kannte zunächst wohl keinen Pflichtteil, sondern nur die Möglichkeit einer Testamentanfechtung wegen angeblicher geistiger Verwirrung des Erblassers, wenn dieser bestimmte Verwandte übergangen hatte.[1] Diese Klage war jedoch erfolglos, wenn die Übergangenen mit mindestens L bedacht waren. Die klassische Jurisprudenz gab dem Institut dann festere Formen. Das Testament konnte dann durch Klage nicht mehr völlig vernichtet werden; außerdem bestanden feste Pflichterbquoten.[2] Justinian hat in novella 115 eine Neuregelung im Sinne eines Pflichterbrechts vorgenommen.

Das römische Recht versagte aber sämtlichen Verträgen über den Nachlaß einer noch lebenden Person die Anerkennung. Das war für einen Erbverzicht gegen Abfindung ausdrücklich geregelt: Stipulatio hoc modo concepta, Si haeredem me non feceris, tantum dare spondes? inutilis est; quia contra bonos mores est haec stipulatio.[3] Dieses Sittenwidrigkeitsurteil mag sich zum einen auf den Verlust der Testierfreiheit des Erblassers gestützt haben, zum anderen darauf, daß diese Verträge im Hinblick auf den Tod einer Vertragspartei geschlossen werden. An anderer Stelle wird dem von einem Vater angestrebte Erbverzicht seiner Tochter, die anläßlich ihrer Hochzeit mit einem "dos" abgefunden werden soll, ausdrücklich für unwirksam erklärt:[4] eam scripturam ius successionis non mutasse constitit: privatorum enim cautiones legum auctoritate non censeri.[5] Privatrechtliche Regelungen sollten in diesem Bereich dem Ansehen des Gesetzes nicht gleichgeachtet werden. Beseler[6] meint, dieser Auffas-

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1 Hoc colore inofficioso testamento agitur, quasi non sanae mentis fuerunt, cum testamentum ordinarent, D. 5.2.2.

2 Kipp/Coing, Erbrecht: Ein Lehrbuch, 15. Auflage, Tübingen (Mohr Siebeck) 1990, § 8 I.

3 D. 45, 1, 61 – Iulian.

4 D. 38, 16, 16; genauso auch C. 6, 20, 3.

5 D. 38, 16, 16.

6 Beseler, Die Lehre von den Erbverträgen, Band II/1, Göttingen 1837, S. 113.

sung liege die nicht ausdrücklich ausgesprochene Überzeugung zugrunde, daß das Erbrecht zu den Rechtsbereichen gehöre, die nicht völlig der Parteiwillkür überlassen werden sollten, sondern bis zu einem gewissen Grade einen öffentlichen Charakter hatten. Ein Erbe konnte deshalb lediglich nach Eintritt des Erbfalls entscheiden, ob er die Erbschaft annehmen wollte oder nicht. Das Mißtrauen gegenüber Verträgen über den Nachlaß eines noch lebenden Menschen ist übrigens bis heute in der Regelung des § 311 b IV BGB zu spüren.

3. Der Erbverzicht in den Rechtsspiegeln

Im Gegensatz zum römischen Recht war germanischen Rechtsvorstellungen die gewillkürte Erbfolge regelmäßig unbekannt. Ein Hinweis auf diese Praxis findet sich bereits bei Tacitus: heredes tamen successoresque sui cuique liberi, et nullum testamentum.[7] Diese Aussage hatte bis ins Hochmittelalter Gültigkeit. Das Hausgut war untrennbar mit der Familie als Personenverband verknüpft. Starb ein Mitglied dieses Verbands, so wuchs sein Anteil am Hausgut den anderen Verbandsmitgliedern zu.[8] Diese Rechtsfolge konnte lediglich mittelbar dadurch beseitigt werden, daß die entsprechende Verwandtschaftsbeziehung zwischen Erblasser und Betroffenen beseitigt wurde (Entsippung).[9] Die Möglichkeit, letztwillige Verfügungen zu errichten, begann sich vermutlich erst seit dem 13. Jahrhundert, z.T. unter kirchlichem Einfluß,[10] im Bürgertum wohlhabender Reichsstädte durchzusetzen.

Ein Prozeß, den Peter Landau[11] auf ein bereits erstaunliches Maß an individualistischer Mentalität im spätmittelalterlichen Bürgertum zurückführt. Hinzukommt freilich der erhebliche Einfluß kirchlichen Rechts und klerikaler Praxis. In vielen Reichsstädten sind die ersten erhaltenen Testamente Klerikertestamente und auch kirchlicher Einfluß hat die sogenannten Seelgeräte befördert, also Verfügungen über einen Teil des Vermögens zugunsten der Kirche pro salute animae, die zur gängigen Übung wurden, zunächst als Zuwendungen unter Lebenden von Todes wegen, nach und nach als echte letztwillige Zuwendungen. Der Schwabenspiegel schreibt bereits vor, daß der Erblasser „der Seele ihren Teil geben" müsse.[12] Regensburger Bürgertestamente beispielsweise zeigen eine komplexe Systematik von letztwilligen Zuwendungen an verschiedenste kirchliche und soziale Institutionen und ermöglichen auf diese Weise eine Vorstellung kirchlichen Lebens und sozialer Netzwerke in der spätmittelalterlichen Stadt. Ausgehend von der Möglichkeit, zugunsten kirchlicher Einrichtungen zu testieren, dürfte sich nach und nach die Testierfreiheit durchgesetzt haben. Ein frühres Beispiel aus dem Jahr 1266 ist die Äußerung einer unter dem Vorsitz des päpstlichen Legaten tagenden Provinzialsynode, daß die Laien in Lübeck die libera testandi facultas haben müssten [13]

Hingegen finden sich in den Rechtsbüchern aus dem 13. Jahrhundert, wie dem Sachsen- oder Schwabenspiegel, bereits Regelungen zu einem Erbverzicht, der vereinbart wurde, wenn Kinder aus der Familie der Eltern ausschieden und aus diesem Anlaß Geld erhielten.[14] Der Erbverzicht muß im 13. Jahrhundert ganz geläufig gewesen sein, denn die Spiegel regeln nur Einzelprobleme,[15] etwa den Beweis des Verzichts oder die Möglichkeit der Widerlegung eines behaupteten Verzichts: Die Behauptung eines außergerichtlich erklärten Verzichts konnte mit einem auf die Reliquien abgegebenen Eid widerlegt werden, während bei einem vor Gericht vereinbarten Verzicht das Gerichtszeugnis als unwiderlegliches Beweismittel diente, I 13 § 2 Sachsenspiegel. Der Erbverzicht stellt sich in diesem Zusammenhang offensichtlich als eines von mehreren Ersatzinstrumenten für die unzulässige oder nur begrenzt zulässige Verfügung von Todes wegen dar; ein anderes war die lebzeitige Übertragung von Vermögenswerten auf einen Treuhänder unter Vorbehalt eines lebenslangen Nießbrauchs und bestimmten postmortalen Weisungen.[16]

Übrigens wurden noch sehr lange Erbverträge als Verträge über den Nachlaß oder Teile davon aufgefaßt, es ging also um die unwiderrufliche künftige Übertragung des Nachlasses. Die heutige Sicht, daß ein Erbvertrag als Inhalt die Erbenernennung hat (Erbeinsetzungsvertrag), geht auf die Pandektistik des 19. Jahrhunderts zurück.

Der Erbverzicht diente vor allem den Interessen vermögender, zunächst also adeliger Familien. Sie konnten eine Zersplitterung des Familienguts auf Kosten des „splendor familiae" und der Hausmacht vermeiden, indem sie jüngere Söhne – Töchter erbten vielfach nicht – gegen Erbverzicht abfanden (Abschichtung) und den Familienbesitz ungeteilt an den ältesten Sohn weitergaben. Außerdem konnte auf diese Weise ein Anrechnung einer zu Lebzeiten gewährten Mitgift auf den Erbteil erfolgen.

4. Die Veränderung des Erbverzichts in der Rezeptionszeit

4.1 Einfluss des Kirchenrechts

Die Rezeption römischen Rechts hat die Weiterentwicklung der teilweise bereits vorhandenen Ansätze gewillkürter Erbfolge zur Testierfreiheit erheblich befördert. Hingegen trafen die geschilderten, ganz unterschiedlichen Auffassungen zum Erb-

7 Tacitus, Germania, 20, 5.
8 HRG/Ogris, Testament.
9 Vgl. Lex Salica Kap. 94 § 1.
10 Allerdings relativiert Seif, Römisch-kanonisches Erbrecht in mittelalterlichen deutschen Rechtsaufzeichnungen, ZRG (Germ) 122 (2005), S. 85 ff diesen kirchlichen Einfluß.
11 Landau, Die Testierfreiheit in der Geschichte des Deutschen Rechts im späten Mittelalter und in der frühen Neuzeit, ZGR (Germ) 114 (1997), S. 56 ff.
12 Art. 162 Schwabenspiegel.
13 Pauli, Abhandlungen aus dem Lübischen Rechte, Band III: Das Erbrecht der Blutsfreunde und die Testamernte, Lübeck 1841, S. 192f.
14 Stobbe, Handbuch des Deutschen Privatrechts, Band V: Erbrecht, 2. Auflage, Berlin 1885, § 313.
15 I 13 § 2 Sachsenspiegel; Art. 162 Schwabenspiegel; dazu Beseler (Fn. 6) § 28; Stobbe (Fn. 14) § 313.
16 Vgl. I 52 § 2 Sachsenspiegel.

verzicht aufeinander. Obschon das gelehrte römische Recht in vielen Bereichen lokale Rechtsauffassungen verdrängte, hat sich der nach römischem Recht ausdrücklich unzulässige Erbverzicht behauptet.

Umgekehrt unterzogen sich vielmehr die im römischen Recht ausgebildeten, gelehrten Juristen der Aufgabe, eine Systematik erbrechtlicher Vereinbarungen zu entwickeln. Zuerst wohl Bartolus[17], der den Erbverzicht als einen Unterfall des Erbvertrags (pro iure successionis amittendo seu perdendo) einordnete, weil nach seiner Auffassung sämtliche Verträge den künftigen Nachlaß der Erblassers zu Gegenstand haben; den Erbvertrag ordnete er wiederum neben anderen Vertragstypen ein. Trotzdem sah Bartolus grundsätzlich sämtliche Erbverträge als ungültig an. Gleich in N. 1 seines Kommentars zu D. 45, 1, 61 stellt er den Grundsatz auf: non valet stipulatio per quam aufertur libera testandi facultas.

Allerdings war inzwischen die neben dem römischen Recht und germanischen Rechtstraditionen die dritte, unser Zivilrecht bis heute prägende Kraft auf den Plan getreten: Die Anerkennung des Erbverzichts entgegen dem römischen Recht wurde durch das kanonische Recht ermöglicht: Der juristisch hoch gebildete Papst Bonifaz VIII. (1294 – 1303) hat in einer in den Liber Sextus aufgenommenen Dekretale unter ausdrücklichem Hinweis auf die abweichende Auffassung des römischen Rechts (improbet lex civilis) einen eigentlich nichtigen Erbverzicht einer ausgesteuerten Tochter als gültig angesehen, wenn er beeidet wurde (si tamen iuramento … firmatum fuerit ab eadem).[18] Im Anschluß daran hat sich die Auffassung durchgesetzt, jeder beeidete Erbverzicht sei gültig: Das zivilrechtlich nichtige Geschäft werde kraft kanonischen Rechts geheilt, wie bereits Bartolus in N. 7 seines Kommentars ausführt.

Die Dekretale Bonifaz VIII. ist vor dem Hintergrund zu sehen, daß die Kirche infolge des kirchlichen Einflusses auf das Entstehen der Testierfreiheit versuchte, auch Streitigkeiten über Testamente vor kirchliche Gerichte zu ziehen. Kirchliches Recht beeinflußte beispielsweise auch die Testamentsformen, etwa die Reduzierung von sieben auf zwei bis drei Zeugen.

4.2 Rezeptionsbedingte Veränderungen

Die Konstruktion, daß ein eigentlich nichtiger Erbvertrag durch Eid wirksam werden könne, mutet uns freilich eigenartig an. Und nicht nur uns. Bereits vor 250 Jahren hat Kreittmayr, der Verfasser des bayerischen Codex Maximilianeus Bavaricus Civilis, die Auffassung, daß „ein Erbverzicht an sich actus iure invalidus sey, und der Eid soviel Kraft habe, daß er ex actu invalido validum machen könne“ als „doppelten Irrwahn“ bezeichnet.[19] Einstweilen jedoch hat dieser Irrwahn Auswirkungen auf die Ausgestaltung des Erbverzichts, der jetzt zwingend einer bestimmten Form bedarf: Die Erbverzichtserklärung des Verzichtenden im Rahmen des Erbverzichtsvertrages ist nunmehr immer zu beeiden.

Lediglich Ulrich Zasius[20] unterscheidet zwischen dem ohne weiteres gültigen beeideten Erbverzicht und dem unbeeideten Erbverzicht, der dann gültig sei, wenn der Verzichtende nachweislich durch Zuwendung seines Pflichtteils bereits zu Lebzeiten abgefunden worden ist.

Und noch eine weitere maßgebliche Umgestaltung erfuhr der Erbverzicht durch den Einfluß römischen Rechts. Soweit ersichtlich, beseitigte der Erbverzicht bislang ohne weiteres die Erbenstellung des Verzichtenden. Nach römischem Recht kann ein Vertrag jedoch nur eine obligatio erzeugen, nicht aber eine unmittelbare Änderung der Rechtslage. Also erzeugte nach gemeinrechtlicher Doktrin der Erbverzicht nun eine Verpflichtung des Verzichtenden, eine angefallene Erbschaft nicht anzutreten oder sie auszuschlagen. Schilter etwa formuliert die bis ins 17. Jahrhundert gängige gemeinrechtliche Auffassung anschaulich: omnis renunciatio est pactum de non petendo.[21]

Schließlich wandelte sich der Erbverzicht zu einem Erb- und Pflichtteilsverzicht: Unter dem Einfluß des römischen Rechts hatte sich nicht nur die Testierfreiheit durchgesetzt, sondern auch das ebenfalls rezipierte Pflichterbrecht. Eine ausdrückliche Regelung zum Pflichterbrecht findet sich wohl erstmals in der Nürnberger Reformation von 1479, die in Anlehnung an das römische Recht einen Pflichterbteil von 1/3 für die Kinder reservierte (XX, 1: „des dritten teils des gestorbenen verlaßner habe und gut“). Der Erbverzicht wiederum erfaßte auch diesen Pflichterbteil (legitima). Der Erbverzicht war also im Zuge der Rezeption unter Geltung einer lediglich durch ein Pflichterbrecht naher Angehöriger beschränkten Testierfreiheit nicht nur dogmatisch verändert worden; er hat sich vielmehr auch vom Testamentsersatz hin zu einem Instrument der Ordnung des Nachlasses zu Lebzeiten gewandelt, das die nunmehr bestehende, aber durch das Pflichterbrecht beschränkte Testierfreiheit erweitern konnte.

5. Rechtstatsächliche Bedeutung

5.1 Adeliger Erbverzicht

Das rezipierte römische Recht hatte den Erbverzicht nicht verdrängt, sondern nur verändert. Ursache für den Fortbestand dieses Rechtsinstituts war seine große rechtstatsächliche Bedeutung gerade im ausgehenden Mittelalter. Zu dieser Zeit verbesserte sich nämlich die Rechtsposition adeliger Töchter, denn das hergebrachte Vorrecht der Söhne im Erbgang bezog sich regelmäßig nur auf den familiären Grundbesitz. Das Vermögen einer wohlhabenden Familie wurde jedoch zunehmend nicht mehr nur durch den Grundbesitz, sondern auch durch bewegliche Sachen, insbesondere Geld, gebildet. Deshalb kam eine erbrechtliche Beteiligung der bisher vielfach weitgehend von der Erbfolge ausgeschlossenen Töchter an der Fahrnis ihrer Eltern in Betracht. Diese Entwicklung dürfte im 13. Jahrhun-

[17] Bartolus 7 ad D. 45, 1, 61; genauso Baldus ad C. 2, 3, 30 N. 10-11.

[18] Cap. 2 de pactis in VI° I, 18 und II, 11.

[19] Kreittmayr, Anmerkungen über den Codicem Maximilianeum Bavaricum Civilem: Worinn derselbe sowol mit dem gemein- als ehemalig- Chur--Bayrischen Land-Recht genau collationirt, sohin der Unterschied zwischen dem alt- und neueren Recht, samt den Urquellen, woraus das letztere geschöpft worden ist, überall angezeiget, und dieses dadurch in ein helleres Licht gesetzt wird, München 1765, Anm. 6a zu III 11 § 2 CMBC.

[20] Ad D. 45, 1, 61.

[21] Schilter, Tractatus praecipui de renunciationibus, Quaestio I Nr. 18f (301f).

dert anzusiedeln sein, weil sich ab dieser Zeit auch Vergabungen von Fahrnis finden.

Vergabung bedeutet die Übertragung von Vermögen zu Lebzeiten auf einen Rechtsnachfolger unter Zurückbehaltung lebenslangen Nießbrauchs durch den Übertragenden; sie geschah ursprünglich durch feierliche Auflassung und war eben auf Grundstücke beschränkt.

Zudem begann sich, begünstigt durch die Rezeption des römischen Erbrechts, das eine Gleichbehandlung der Geschlechter bei der gesetzlichen Erbfolge kannte, die Auffassung zu verbreiten, daß Töchter und Söhne in der Erbfolge überhaupt gleichberechtigt seien. Es wurde deshalb ganz üblich, daß adelige Töchter anläßlich ihrer Heirat oder ihres Eintritts in ein Kloster einen Erbverzichtsvertrag schlossen. Aus dieser Gewohnheit hat sich in einigen Teilen Süddeutschlands und Österreichs die Figur des „notwendigen Verzichts" entwickelt: Unabhängig davon, ob die Töchter tatsächlich einen Erbverzichtsvertrag geschlossen hatten, wurden sie nach und nach durch entsprechende gesetzliche Regelungen oder Herkommen so behandelt, als ob sie einen solchen Vertrag geschlossen hätten. Sie hatten also nur einen Anspruch auf eine Aussteuer und wurden ansonsten, wie es vielfach heißt, „ipso iure für verziehen gehalten".[22]

Anläßlich der Aussteuer tatsächlich geschlossene Verzichtsverträge bestärkten nur die ohnehin die bestehende Rechtslage. Vielfach finden sich in Landesordnungen oder Landrechten entsprechende Regelungen für den niedrigen und landsässigen Adel, der nicht autonom war und seiner Erbfolge nicht selbst durch eigenes Hausgesetz regeln konnte. Einen notwendigen Erbverzicht sehen beispielsweise die Tiroler Landesordnung von 1573 (III 34) das Bayerische Landrecht von 1616 (Tit. 36 Art. 6) oder die Landtafel des Erzherzogtums Österreich ob der Enns, ebenfalls von 1616, vor. Diese ordnet für das Fehlen eines Verzichts, den „adeliche Döchter" schuldig seien, an: „so soll es doch anders nit gehalten werden, als ob sie berait solche schuldige Verzicht von sich gegeben hette".[23]

Der Erbverzicht der Töchter war so üblich, daß sich in entsprechenden Handbüchern sogar Formulare finden.[24] Typisch etwa die Formulierung des Verzichts der Gräfin Anna von Bentheim, die am 2. Juli 1595 Fürst Christian I. von Anhalt-Bernburg (1568 – 1630) geheiratet hat, der zu dieser Zeit Statthalter der Oberpfalz mit Sitz in Amberg war und 1608 an der Gründung der Protestantischen die Union beteiligt war. Anna verzichtete anläßlich ihrer Verehelichung „in Betrachtung, dass wir das Erhalten und Aufkommen unseres Stammes und Nahmens zu Bentheim etc. gerne wünschen und sehen wollen" für sich und ihre Abkömmlinge auf ihr Erbe „mit freyem wolbadachtem Mut, ungezwungen, oder durch niemand mit Arglist, Furcht oder Betrug dazue bewegt".

5.2 Bürgerlicher Erbverzicht

Der Erbverzicht gewann aber auch deswegen an Bedeutung, weil sich in den Reichsstädten eine wohlhabende Bürgerschicht gebildet hatte. In den Städten ging man in aller Regel von einer Erbschaft sämtlicher ehelicher Kinder zu gleichen Teilen aus, so daß auch im wohlhabenden Kaufmanns- und Handwerkerfamilien das Bedürfnis nach einer Ausschließung bestimmter Kinder von der Erbfolge, in der Regel gegen Zahlung einer Abfindung, bestand. Auf diesen Aspekt des Erbverzichts wird in der Literatur bislang kaum eingegangen. Ursache dafür mag die gute Dokumentation wichtiger adeliger Erbverzichte und die Existenz von Sondernormen für den niedrigen und landsässigen Adel in verschiedenen Rechten sein, so daß der Erbverzicht vielfach nahezu ausschließlich als Instrument vor allem adeliger Nachlaßplanung erscheint. Die spätmittelalterlichen Stadtbücher der Freien Reichsstädte enthalten jedoch, trotz der sich vor allem dort durchsetzenden Testierfreiheit, eine erhebliche Anzahl von Urkunden über die Vereinbarung von Erbverzichten, die wohl vor allem der Beseitigung des Pflichterbteils dienten. Der Erbverzicht wurden also mit steigendem Wohlstand des Bürgertums mehr und mehr auch eine bürgerliche Angelegenheit.

In Konstanz beispielsweise erbten Söhne und Töchter gleichberechtigt.[25] Zahlreiche Urkunden zeugen von der Möglichkeit eines vertraglichen Erbverzichts gegen Abfindung. So erschienen etwa um 1430 der „frome[n] Cunrat[z] Ruh[en], burger ze Costentz" mit seiner „elich[e] tochter", der „ersam frow" Verena vor dem „stattaman zu Costentz" Ehinger. Cunrat Ruh hatte dem Cunrat Felix aus Ravensburg seine Tochter „zu elichem wip gemählet gegeben" und versprochen als Aussteuer „zu geben tusent pfunt guter und gmainer haller Costentzer werung". Im Gegenzug wollte Verena nun „gut willens und dancks frilich und unbezwungenlich für sich und all ir erben […] vertzihen alles irs väterlichen und müterlichen erbs und gutz, liegendes und varendes, aigens und lehens" und zwar zugunsten ihres Bruders Rudolff Ruh.

Die seit dem Ende des 15. Jahrhunderts entstehenden Stadtrechtsreformationen zeugen ebenfalls von der großen Bedeutung des Erbverzichts für die städtische Gesellschaft. So enthält die erste dieser Reformationen, die Nürnberger Reformation von 1479, eingehende Regelungen zu Errichtung des Erbverzichts (durch personlich ayde, XV, 1), zu dessen Wirkungen für den Verzichtenden und dessen Abkömmlinge und zur Berechnung der Pflichterbquoten anderer Erben nach dem Wegfall des Verzichtenden (XIV, 4 und 6; XIX, 2).

6. Die Weiterentwicklung bis zum CMBC

Auf seinem Weg in die Naturrechtskodifikationen veränderte der Erbverzicht erneut seine dogmatische Gestalt. Dieser Impuls kam jedoch nicht aus dem Naturrecht. Im Gegensatz zu den römischrechtlich orientierten Autoren hielten naturrechtlich orientierte Autoren vor dem Hintergrund der allgemeinen Vertrags- und Verfügungsfreiheit sämtliche Erbverträge für gültig,[26] in der Regel jedoch ohne sich mit dogmatischen Einzelheiten zu beschäftigen.

[22] Bayerisches Landrecht von 1616, Tit. 36 Art. 6.
[23] III 43 § 17 der Landtafel.
[24] Vgl. etwa Beckmann, Idea iuris statuarii et consuetudinarii Stiriaci et Austriaci, Graz 1688, S. 532.
[25] Vgl. Eisenmann, Konstanzer Institutionen des Familien- und Erbrechts, Konstanz 1964, S. 110.
[26] Wolff, Institutiones iuris naturae et gentium, § 942; Darjes, Institutiones Iurisprudentiae universalis, Pars specialis, Sect. II, Cap. II, Tit. VI, § 494.

6.1 Beseitigung der Erbenstellung ipso iure

Im Verlauf des 17. Jahrhunderts erfolgt jedoch in der gemeinrechtlichen Literatur eine Rückbesinnung auf die ursprüngliche, unmittelbar die Erbenstellung beseitigende Wirkung des Erbverzichts. Beispielhaft sind die Ausführungen Strycks (1640-1710),[27] auf den sich der bereits erwähnte Kreittmayr in seinem Kommentar zum Codex Maximilianeus Bavaricus Civilis von 1756 ausdrücklich bezog. Kreittmayr sah als Folge des Erbverzichts den Ausschluß des Verzichtenden von der Erbfolge und damit auch vom Nothgebürniß (Pflichterbteil) an, III 11 § 3 Nr. 1 und III 12 § 1 Nr. 3 CMBC. Der römischrechtlichen Einordnung des Erbverzichts erteilt er eine Absage, die an Deutlichkeit nichts zu wünschen übrig läßt: Es habe der Erbverzicht „welcher originis mere germanicae war, vernünftiger Weise niemals anders als nach diesem Principo betrachtet und beurteilt werden sollen. Allein die Legisten kamen mit ihrem iure romano darüber und trugen keine Bedenken, solches … hierauf zu appliciren". Die Folge sei eine „unschickliche Applikation und Vermischung in- und ausländischer Rechte".[28] Kreittmayr folgt damit einer Strömung, die im 18. Jahrhundert eine Rückbesinnung auf vom rezipierten Recht verdrängte Strukturen anstrebte. Dies wird daran deutlich, daß Kreittmayr, obschon er ansonsten regelmäßig mit lateinischer Terminologie arbeitete, den Erbverzicht nur mit dem deutschen Begriff „Erbschaftsverzicht" bezeichnete.

Für Kreittmayr steht sogar die Vertragsnatur des Erbverzichts zur Disposition, ist für ihn doch eine Annahme des Verzichts nicht „für nöthig erachtet, oder wenigstens so lange praesumiert bis das Contrarium dargetan ist". Krülls Handbuch des königlich-baierischen gemeinen bürgerlichen Rechts[29] hält eine Annahme sogar für überhaupt nicht erforderlich. Trotzdem – und hier folgt Kreittmayr trotz seines Verdikts gegen die Legisten der von Bartolus entwickelten Systematik – ordnet Kreittmayr den Erbverzicht systematisch als Erbvertrag und damit als Vertrag ein.

6.2 Verzicht auf die Beeidung

Außerdem hält Kreittmayr auch die Beeidung des Erbverzichts nicht mehr für erforderlich, würde er doch ansonsten nach eigenen Maßstäben unter „doppeltem Irrwahn" leiden. Das bayerische Landrecht von 1616 war hingegen noch von der Eidesform ausgegangen.[30] Im gemeinen Recht hatte jedoch zunehmend die Auffassung an Boden gewonnen, daß der Erbverzicht formfrei sei.[31] Er hatte sich von seiner kirchenrechtlichen Geltungsgrundlage gelöst und galt jetzt kraft Gewohnheit und communis opinio doctorum. Kreittmayrs Codex schließt sich dieser Auffassung jedoch nicht an, sondern schreibt vor, daß der Erbverzicht obrigkeitlich geschlossen werden muß, III 11 § 2 CMBC.[32] Außerdem sind „Weibsleute und andere der Rechte unverständige Personen" vorher über die Folgen des Erbverzichts zu belehren.

7. Der Erbverzicht in den Kodifikationen um 1800

7.1 ALR und ABGB

Einige Jahrzehnte später enthalten auch das Allgemeine Landrecht für die Preußischen Staaten von 1794 und das österreichische Allgemeine Bürgerliche Gesetzbuch von 1811 vergleichbare Regelungen zum Erbverzicht. Das Allgemeine Landrecht sieht zwar keinen eigenen Abschnitt über Erbverzichte vor, sondern regelt nur Fälle, in denen „ein Kind von dem Nachlasse der Aeltern ganz ausgeschlossen" werden soll, II 2 § 484 ALR. Trotzdem hat die preußische Praxis den Erbverzicht allgemein anerkannt.[33] In den Beratungen zum ABGB erschien den meisten Kommissionsmitgliedern eine ausdrückliche Gestattung des anerkannten Erbverzichts sogar überflüssig. § 551 ABGB, der eine solche Gestattung enthält, verdankt seine Existenz der Bitte des oberösterreichischen Appellationsgerichts nach einer klaren Entscheidung darüber, ob die althergebrachten Verzichte der Töchter weiterhin gültig seien.[34] Der Erbverzicht hat sich damit also im kontinentaleuropäischen Zivilrecht durchgesetzt. Er ist im gemeinen Recht genauso anerkannt wie in allen großen Kodifikationen und wir könnten zum Bürgerlichen Gesetzbuch übergehen.

7.2 Code Civil

Dabei bliebe jedoch der bis heute geltende französische Code Civil von 1804 außer Betracht. Er verbot den Erbverzicht ausdrücklich, Art. 791, 1130 II CC. Der romanische Rechtskreis ist dem Code Civil gefolgt, vgl. etwa Art. 458 Italienischer CC, Art. 1271 Spanischer CC, Art. 1370, 1109 Holländisches BW, und auch das griechische ZGB, Art. 368, kennt eine derartige Regelung.[35] Wieso verbietet der Code Civil 1804 den Erbverzicht, obschon bereits 50 Jahre zuvor Kreittmayr angemerkt hatte, daß „derjenige unter dem Hut nicht recht verwahrt sein muß", welcher die Gültigkeit des Erbverzichts noch in Zweifel ziehe? Und zumal auch in Frankreich zuvor der Erbverzicht anerkannt war, wenn auch nur im Rahmen von Eheverträgen. Dort konnte eine Tochter zugunsten der Söhne, ein jüngerer Sohn zugunsten eines älteren Sohnes gegen eine Abfindung auf sein zukünfti-

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27 Stryck, Tractatus de successione ab intestato, Diss. VIII Cap. X § 59 (788f).

28 Kreittmayr (Fn. 19) Anm.1e zu III 11 § 2 CMBC.

29 Krüll, Handbuch des Königlich-baierischen Gemeinen Bürgerlichen Rechts: Mit Besonderer Rücksicht Auf Das Fränkische Und Preussische Landrecht, Band II, Landshut 1807, S. 696.

30 Tit. 36 Art. 6 Landrecht.

31 Vgl. etwa H. Cocceij, De renuntiationibus et reservationibus filiarum illustrium, § 23; Schilter, Praxis iuris Romani in foro Germanico, Exerc. VIII § 40; Böhmer, Exerc. Ad Pand. Tom. IV Exerc. 71 Cap. 1 § 14; anders etwa noch Leyser, Meditationes ad Pandectas, Tom. I Spec. 45 I.

32 Siehe auch Anmerkung 5c zu dieser Norm.

33 Vgl. nur Dernburg, Preußisches Privatrecht, Dritter Band, Halle 1880, § 180.

34 Ofner, Der Ur-Entwurf und die Berathungs-Protokolle des oesterreichischen Allgemeinen bürgerlichen Gesetzbuches, Wien 1889, Materialien zu § 528 Ur-Entwurf.

35 Etwas anderes gilt jedoch seit 1974 für Auslandsgriechen (Lex Onassis).

ges Erbrecht nach seinen Eltern verzichten. Eine Praxis, die der große französische Jurist Pothier[36] billigte „pour conserver les biens dans la famille“ – obschon man eigentlich nicht auf etwas verzichten könne, was man noch nicht habe, wie Pothier unter Berufung auf Paulus – is potest repudiare, qui et acquirere potest – feststellt.

Der Code Civil – ansonsten vielfach ein in Paragraphen gegossener Pothier – verfolgte jedoch andere gesellschaftspolitische Ziele als Pothier und als die Gesetzgebungen in Bayern, Preußen und Österreich. Ein Erbverzicht der Töchter zugunsten der Söhne, der nachgeborenen Söhne zugunsten des Erstgeborenen erhielt den Glanz adliger Familien und begünstigte feudale Strukturen, gegen die sich die französische Revolution gerichtet hatte. Deshalb verbot bereits ein Revolutionsgesetz vom 15. April 1791 (17. Nivôs II) sämtliche Erbverzichte und auch sämtliche Erbverträge überhaupt. Die Erbverzichte vor allem der Töchter würden ohnehin nur durch Zwang erreicht und widersprächen dem Ideal der Gleichheit;[37] der Code Civil hat dieses Verbot übernommen. Das hat bereits in der Literatur des 19. Jahrhunderts zum Teil Kritik hervorgerufen,[38] jedoch nicht durchgängig, denn der Code Civil steht nicht nur auf revolutionärem Boden, sondern zugleich auch auf dem Boden des klassischen römischen Rechts, das vertragliche Beschränkungen der Testierfreiheit ebenfalls nicht zuließ.

8. Der Erb- und Pflichtteilverzicht im BGB

8.1 Die Auffassung des Redaktors Schmitt

Das deutsche Bürgerliche Gesetzbuch hingegen enthält in §§ 2346ff BGB einen eigenen Abschnitt über den Erbverzicht, der die Erbenstellung ipso iure beseitigt, sich auch auf die Abkömmlinge des Verzichtenden erstreckt, § 2349 BGB, und regelmäßig auch den Verzicht auf den Pflichtteil umfaßt, § 2346 I BGB. Redaktor des Erbrechtsentwurfs war Gottfried Schmitt, der übrigens anschließend Präsident des kürzlich abgeschafften Bayerischen Obersten Landesgerichts wurde. Schmitt hat die seit Bartolus bestehende Einordnung des Erbverzichts als Unterfall des Erbvertrags aufgehoben. Für ihn ist der Erbverzicht allein die Aufstellung „eines Hindernisses zwischen des Verzichtenden Hoffnung und ihrer Realisierung, welches … den Anfall an den Verzichtenden ausschließt“.[39] Schmitt übernimmt dabei einen Ansatz von Franz Hofmann,[40] der in einem Aufsatz aus dem Jahre 1876 den Verzicht auf eine in Zukunft möglicherweise entstehende Rechtsposition als „Hindernis, das zwischen Hoffnung und Realisierung tritt“, bezeichnet hatte. Der Erbverzicht ist also, anders als bei Bartolus und allen anderen Vertretern einer obligatorischen Wirkung des Erbverzichts, kein Vertrag über den zukünftigen Nachlaß des Erblassers.

8.2 Die Wiederkehr des obligatorischen Erbverzichts bei Larenz

Die Rechtsgeschichte des Erbverzichts endet freilich nicht mit Inkrafttreten des Bürgerlichen Gesetzbuchs. Nach fast unbestrittener Auffassung in der ersten Hälfte des 20. Jahrhunderts war der Erbverzicht ein Vertrag, der ipso iure das Erbrecht beseitigt. Das war der Standpunkt des neueren gemeinen Rechts, des Bayerischen und Preußischen Landrechts und schließlich auch des BGB-Gesetzgebers. Die gängige Auffassung nahm deshalb an, daß der Erbverzicht seine Rechtfertigung in sich selbst trage, es sich also um ein Rechtsgeschäft ohne separate causa handle.[41] Ein junger Göttinger Privatdozent namens Karl Larenz hat in einem Aufsatz aus dem Jahre 1931[42] hingegen die heute ganz herrschende Auffassung begründet, daß der in §§ 2346ff BGB geregelte Erbverzicht eines Verpflichtungsgeschäfts als Rechtsgrund bedürfe. Der in §§ 2346ff BGB geregelte Erbverzicht dient hiernach also der Erfüllung eines gesetzlich nicht geregelten Schuldvertrages.

Dogmengeschichtlich ist dieser in der zweiten Hälfte des 20. Jahrhunderts vollzogene und durch eine weitere Abhandlung von Heinrich Lange[43] beförderte Meinungsumschwung äußerst reizvoll: Der lediglich obligatorisch wirkende Erbverzichtsvertrag des gemeinen Rechts kehrt wieder. Allein der Inhalt der Verpflichtung hat sich geändert: Seinerzeit verpflichtete sich der Verzichtende dazu, die in ferner Zukunft einmal anfallende Erbschaft nicht anzutreten, heute verpflichtet er sich zum Abschluß eines verfügenden Verzichtsvertrages bereits zu Lebzeiten des Erblassers. Ob diese Auffassung nicht möglicherweise die Grenzen der Auslegung überschreitet, ist eine andere Frage.

Auf diese Weise scheint nach Jahrhunderte langer Rechtsentwicklung nun tatsächlich eine Synthese aus deutschrechtlicher Funktionsweise des Erbverzichts – sofortige Beseitigung der Erbenstellung noch zu Lebzeiten des späteren Erblassers – und römischrechtlicher Vertragsrechtsdogmatik – lediglich obligatorische Wirkungen des eigentlichen Verzichtsvertrages – erreicht zu sein. Über den dogmengeschichtlichen Reiz hinaus hat die Larenz'sche Sichtweise den großen Vorteil, daß sie beim entgeltlichen Erbverzicht in der Lage ist, Verzicht und Abfindung als Verpflichtungen aus einem synallagmatischen Vertrag miteinander verknüpfen zu können, während man ansonsten die Abfindung als Leistungsversprechen neben den Erbverzicht

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[36] Pothier, Traité des Successions, Ch. I, Sect. II, Art. 4, § 3.

[37] Les renonciations auxquelles on forçait les filles de souscrire par leurs contrats de mariage, et sans lesquelles on ne leur permettait gučre de se marier, avaient la męme tache d'injustice et de féodalité que les exclusions coutumiers concernant de droit d'aînesse et de masculinité; elles blessaient également la nature et l'égalité, il fallait également les proscrire, so die Motive bei Laurent, Princies de Droit Civil, Tome IX, N. 418.

[38] Etwas bei Demolombe, Traité des Successions, Tome II, Livre III, Titre I, Chap. V, § II: Notre ancienne jurisprudence avait bien décidé.

[39] Schmidt, Teilentwurf Ebrecht, S. 765.

[40] Hofmann, Grünhuts Zeitschrift 3 (1876), 661.

[41] Vgl. nur Planck/Greiff, Kommentar zum Bürgerlichen Gesetzbuch, 4. Auflage, Berlin 1928, Vorbem zu §§ 2346 ff. BGB Anm. 4; Meyer, Zur Lehre von der rechtlichen Natur des Erbverzichts nach dem Bürgerlichen Gesetzbuch, Festgabe für Enneccerus, Marburg 1913, S. 9 ff.

[42] Larenz, Der Erbverzicht als abstraktes Rechtsgeschäft, Jherings Jahrbücher (JherJB) 81, 1; eingehender im Anschluß daran Lange, Der entgeltliche Erbverzicht, Festschrift Nottarp, Karlsruhe 1969, S. 119 ff.

[43] Lange (Fn. 42) S. 119 ff.

stellen und beide beispielsweise über eine Bedingung oder über § 139 BGB miteinander verknüpfen müßte.[44]

9. Schluß: Erneuter Blick nach Frankreich

Ein erneuter Blick nach Frankreich soll die Betrachtung beschließen. Dort ist zum 1. Januar 2007 eine Erbrechtsreform in Kraft getreten. Sie sieht – unter ausdrücklicher Berufung auf das Vorbild des deutschen Rechts[45] – nunmehr die Möglichkeit eines vertraglichen Erbverzichts vor. Nach Art. 929 CC können Pflichterben bereits zu Lebzeiten auf ihr Recht verzichten, im Klageweg eine Herabsetzung von Vermächtnissen (legs) zu fordern, durch die ihr Pflichterbrecht (réserve) unzulässig beschränkt wird.[46] Zur Begründung führt der Gesetzgeber aus, daß die ungeteilte Weitergabe von Vermögen vielfach wünschenswert sei, etwa an eines von mehreren Kindern, das ein Unternehmen weiterführen soll. Damit verläßt die Leitrechtsordnung des romanischen Rechtskreises den revolutionsbedingt eingeschlagenen Weg. Man darf gespannt sein, ob andere Länder des romanischen Rechtskreises folgen werden.

[44] Eingehend Lange (Fn. 42) S. 123 ff.

[45] La conclusion d'un pacte successoral, mécanisme inspiré de législations étrangčres, notamment allemande, permettra ŕ un héritier réservataire de renoncer par anticipation, avec l'accord de celui dont il a vocation ŕ hériter, ŕ exercer son action en réduction contre une libéralité portant atteinte ŕ sa réserve héréditaire, Assemblée nationale, Rapport n° 2850 de M. Sébastien HUYGHE, député, fait au nom de la commission des lois, déposé le 8 février 2006, in: http://www.assemblee-nationale.fr/12/rapports/r2850.asp. Le projet de loi introduit un mécanisme inspiré des droits allemand et suisse visant ŕ permettre ŕ un héritier réservataire de renoncer par anticipation, avec l'accord de celui dont il a vocation ŕ hériter, ŕ exercer son action en réduction contre une libéralité portant atteinte ŕ sa réserve, Sénat, Rapport n° 343 (2005-2006) de M. Henri de RICHEMONT, fait au nom de la commission des lois, déposé le 10 mai 2006.

[46] Tout héritier réservataire présomtif peut renoncer ŕ exercer une action en réduction dans une succession non ouverte. Der Vertrag muß von dem Notar geschlossen werden. Er wirkt auch für die Abkömmlinge des Verzichtenden.

The Imperial Court of Justice, Police Authorities and Bertillon's Measurements

*Raluca Enescu**

Abstract

At a time of social and political tensions, the Imperial Court of Justice rendered a unique judgment addressing the practice of police forces with a method of identification developed a few years earlier by Alphonse Bertillon, an anthropologist working at the police prefecture in Paris. An analysis of the line of argumentation of the judges shows how this decision extended the use of identification techniques and sheds light on the objective of their activities more than a century ago. Bertillon's initial incentive to identify recidivists shows moreover how technical and scientific developments can serve law enforcement and contribute at the same to the production of wrongful convictions.

Keywords: *Identification technique; forensic analysis; Imperial Court of Justice; law enforcement; police authority; wrongful conviction.*

1. The identification of criminals according to Bertillon

During the second half of the nineteenth century the industrial revolution had attracted a large number of people into cities. Urban spaces started appearing dangerous due to criminals lurking amidst the ever growing population. The rising criminality in parallel with the difficulties in identifying offenders provoked a feeling of insecurity, which the police eagerly disseminated in an attempt at regaining more autonomy for their activities[1]. At the same time social and political tensions in Europe favoured the emergence of new techniques for the identification of individuals suspected of taking part in revolutionary movements considered as a threat to the social order[2].

During his work at the police department in Paris, Alphonse Bertillon, a French anthropologist, noticed that the sentencing law prescribing a harsher punishment for recidivists could not be applied[3]. Since the abolition of burn marks in 1832, the police faced great obstacles to identifying repeat offenders. The origins of his studies are found in the measurements of body parts undertaken by anthropologists to determine races, and not individuals. By adjusting the type of measures to a new category of people, the criminals, he developed from 1879 to 1883 an identification method called anthropometry, Bertillonage, or signaletics, clearly as a help for the administration of justice.

The method was based on the measurement with special instruments of eleven parts of the body, not altered by pads of fat and remaining constant after the age of twenty: body height, seat height, width of both spread arms, head length, head breadth, cheekbone width, length of the right ear, length of the left forearm, length of the left middle finger, length of the left foot, length of the forearm from the elbow to the extremity of the middle finger[4].

As a complement to the measurements, the person's full-face and profile were photographed according to strict rules: the focal distance of the camera and the light were fixed by Bertillon's instructions and the person was positioned at a precise distance from the objective lens so that the images represented 1/7 of the actual size. This standardized method ensured their comparison with new ones if needed. In this sense, Bertillon was also at the origin of forensic photography with a book published in 1890 entitled Photographie judiciaire, which covered not only photographs of individuals but also of crime scenes[5]. The photographs appeared on the front side of an identity card; name, measurements, and other information were on the reverse side[6]. For these reasons, Bertillon represents the main figure of the transition from lay witnesses to a criminal justice system that relies on material and technical evidence.

Bertillon's method was first introduced in Paris in 1883 and in all of France in 1885, then in Russia in 1890, in Romania in 1894, and in Germany in 1897. In the later years police

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1 DINGES, Martin & SACK, Fritz (Eds.), *Unsichere Großstädte. Vom Mittelalter bis zur Postmoderne*, Constance, 2000, S. 9-39.

2 HAMEROW, Theodote S., *Restoration, Revolution, Reaction: Economics and Politics in Germany, 1825–1870*, Princeton, 1958, p. 139; PARKER, David, Revolutions and the Revolutionary Tradition, New York, 2000, p. 109-150; CAPLAN, Jane & TORPEY, John (Eds.), *Documenting Individual Identity: The Development of State Practices in the Modern World*, Princeton, 2001, p. 123-136.

3 KOETTIG, Paul Richard, Die Verbrecheridentifizierung seit Alphonse Bertillon. In: *DstrafZ*, vol. 1, 1914, S. 27-33.

4 BERTILLON, Alphonse, *Identification Anthropométrique, Instructions Signalétiques*, Melin, 1893, p. 5-6.

5 BERTILLON, Alphonse, *La Photographie Judiciaire avec un Appendice sur la Classification et l'Identification Anthropométriques*, Paris, 1890, p. 46-59.

6 JÄGER, Jens, Photography: a Means of Surveillance ? Judicial Photography, 1850 to 1900. In: *Crime, Histoire & Sociétés*, vol. 5, 2001, p. 27-51.

departments throughout Europe and the United States adopted Bertillon's system. The training lasted 21 days for the measurements and 28 days for the photographs[7]. In 1895 the police headquarters in Berlin sent an officer to Paris for a training with Bertillon himself. After the visit, agents of several police administrators met in Berlin to receive information about the new identification method and decided to sent their officers to Berlin for training. In June 1897 a conference about the anthropometric method for police forces was held in Berlin and shortly afterwards a unit for the storage of anthropometric data was introduced in the German Empire. This unit centralized the measurements and the photographs of all police stations across the German territories[8].

During the nineteenth century the duties of the police were nationalized[9] and the department of criminal investigations was granted larger institutional autonomy to fight against criminality[10]. The limits to this autonomy are addressed in the decision of the Imperial Court of Justice discussed in this paper. While the success of Bertillon's method was largely due to its simple implementation by police officers, it raised concerns about the obligation of individuals to accept the taking of their measurements and about the limits of the police to use force when they encountered resistance. The application of Bertillonage required the cooperation of the person to be measured, which in the context of an arrest was difficult to guarantee.

The anthropometric method proved more reliable than identifications based on usual photographs taken by the police: the objectivity of the measurements and the standardization of the images displaced the objectivity of earlier photographs. The measurements were reduced to a formula, which theoretically would apply to a unique person. The anthropometric method was generally accepted for only thirty years. It had been observed that a precise measure could only be obtained if three trials rendered the same result. Some authors therefore required 61 categories instead of 11 in order to avoid any mistaken identification. Others complained that the system of classification using eleven measurements was difficult to put in practice: "The system is unusable in practice. It is the product of a pathological classification anger"[11].

The anthropometric measurements never recovered from mistaken identifications, hence wrongful convictions, such as this case in 1903, when a man had been sentenced to imprisonment after being identified with his Bertillon measurements. By chance it has been discovered that another prisoner with the same characteristics was already imprisoned. Their measurements were close enough to identify them as the same individual. However a fingerprint comparison quickly identified them as two different persons. Even if he was at first especially reluctant towards fingerprinting, Bertillon later recognized their importance. Ironically fingerprints overshadowed his method and remained a successful identification technique in the twentieth century and the most frequently recovered trace and means of identification worldwide[12]. The case of Bertillon's method reminds us that identification techniques - with the exception of DNA methods - are not based on a scientific ground and lead to wrongful convictions being redressed in the best case after imprisonment time.

2. Imperial Court of Justice, Imperial Laws and identification methods

The Imperial Court of Justice entered into activity on 1 October 1879, the same day as the Imperial Laws of Justice were enacted. In a tight vote, 30 votes against 28 for Berlin, the federal council (Bundesrat) decided to locate the Court in Leipzig. Because there was no adequate Court building, it operated at a place called Georgenhalle until 1895 when the construction of a new building would be finished. The inauguration of the Court took place in the main hall of the University of Leipzig in the presence of the First President of the Court, Eduard von Simson. The Court was divided into several criminal and civil senates, whose number was decided by the Chancellor of the Empire. If a senate arrived at a decision that diverged from that of another senate, it had to refer the case to a special senate named the united senate (Vereinigte Zivil- or Strafsenat), whose duty was to guarantee the consistency of the decisions of the Court[13]. The Court's organisation thus clearly reflected the goal of a unification of laws, procedures, decisions, and practice.

Judges - who were required to be at least 36 years old - were proposed by the Bundesrat and appointed by the Emperor. The Court dealt with questions of law, not of fact, which meant that it did not put the facts of a case on trial, but instead exclusively treated the question of which laws were to be applied and interpreted in a specific case[14]. The decision then became a rule to be followed across the Empire. The Court clearly had the duty to unify legal decisions, which at that time still diverged from one territory to another.

The Court used the Imperial Justice Laws, a set of codes that were enacted on 1 October 1879 and - with numerous modifications - are still in use nowadays. They covered the organisation of courts (Gerichtsverfassungsgesetz), the procedure in civil (Zivilprozessordnung) and criminal cases

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7 KLATT, Otto, *Die Körpermessung der Verbrecher nach Bertillon und die Photographie als die wichtigsten Hilfsmittel der gerichtlichen Polizei sowie Anleitung zur Aufnahme von Fußspuren jeder Art*, Berlin, 1902, S. 15-70.

8 VEC, Milos, *Die Spur des Täters. Methoden der Identifikation in der Kriminalistik (1879-1933)*, Baden-Baden, 2002, S. 40.

9 MATSUMOTO, Naoko, *Polizeibegriff im Umbruch: Staatszwecklehre und Gewaltenteilungspraxis in der Reichs- und Rheinbundpublizistik*, Frankfurt am Main, 1999.

10 ROTH, Andreas, *Kriminalitätsbekämpfung in deutschen Großstädten 1850-1914*, Berlin, 1997, S. 39; FUNK, Albrecht, *Polizei und Rechtsstaat. Die Entwicklung des staatlichen Gewaltmonopols in Preußen 1848-1918*, Frankfurt am Main, 1986.

11 HEINDL, Robert, *System und Praxis der Daktyloscopie und der sonstigen technischen Methoden der Kriminalpolizei*, Berlin, 1922, S. 425.

12 COLE, Simon A., *Suspect Identities. A History of Fingerprinting and Criminal Identification*, Cambridge, 2001, p. 140-167.

13 MÜLLER, Kai, *Der Hüter des Rechts. Die Stellung des Reichsgerichts im Deutschen Kaiserreich 1879-1918*, Baden-Baden, 1997.

14 KELMMER, Klemens, Das Reichsgericht in Leipzig. In: *DRiZ*, 1993, S. 26-31.

(Strafprozessordnung), as well as the costs for judicial proceedings (Gerichtskostengesetz). Moreover, for the first time in legal history they regulated the profession of lawyers (Rechtsanwaltsordnung). The main concern of the laws was therefore procedure and not substance. In accordance with the purpose of the Imperial Court, the Imperial Laws were consequently meant to unify the newly created Empire[15], which - so it was expected - would contribute to the consolidation of the nation against its two main rivals, France and Austria-Hungary.

The Imperial Laws limited the power of the state in order to protect citizens from the arbitrary and unrestrained use of authority. Combined with two more codes it formed the basis of the Rechtsstaat or state of law, defining rights and duties of the citizens, and providing a theoretical equality of treatment in the area of justice. The other two codes forming the main material laws and defining offences included the criminal code (Strafgesetzbuch) passed in 1871. It entered into effect on 1 January 1872, although it could not be applied uniformly across the territories as the power of criminal justice belonged to the territorial rulers since the thirteenth century[16]. A uniform application became possible and even a duty when the Imperial Court started its activity in October 1879. The adoption of the second code, a unique civil code (Bürgerliches Gesetzbuch), lasted until 1896 and entered into effect on 1 January 1900.

In this paper we focused on the whole activity of the Court spanning from 1879 to 1945, that is, the time following the German unification of 1871, also known as the 'Wilhelm Empire' on account of emperors Wilhelm I and II, whose successive reigns were only interrupted by the 99day rule of Frederick III in 1888. The unification of Germany in 1871 brought together 27 territories that, for the most part, were ruled by royal families, of which the Kingdom of Prussia was the most powerful. After having been defeated in World War I, the German Empire was dissolved in 1918 and the Weimar Republic founded[17]. The decisions rendered in criminal cases between 1880 and 1944 and in civil cases between 1880 and 1945 are offered online upon registration at the German Science Foundation. We performed a search of any decision pertaining to methods of identification and found one decision about the anthropometric method of Bertillon issued in 1899 during the first period of activity of the Court[18].

The identification methods and Bertillonage especially served to control individuals who were at risk of reoffending and groups of citizens labelled as dangerous for the social order. They were not subject to a legal frame during several tens of years and were used in a barely regulated legal space. Fingerprinting, photographs (not following Bertillon's rules) and measurements (not specifying Bertillon's method) have been the first identification technique regulated by the Code of Criminal Procedure (StPO) in 1933[19], thus creating an infamous legal frame for the forceful taking and recording of fingerprints, photographs and measurements by police forces[20]. This unique judgment addressing a specific identification method used by police forces before this date will shed light on the legal norm imposed by the highest court on the practice of identifying individuals more than thirty years before becoming part of the criminal procedure.

3. Discussion of the Imperial Court of Justice decision regarding Bertillonage

Our source material consists of a case addressing the obligation of an arrestee to comply with the taking of Bertillon's measurements by police officers. The decisions of the Imperial Court of Justice start with the question(s) addressed by the judges in the respective case.[21]. Here the question to be answered by the court concerned the authority of police forces to take anthropometric data and photographs[22]. The district court (Landgericht) of Posen in Prussia, now Poznan in Poland, decided that the practice of forceful measurements was legal. The appeal contested this decision and called the Imperial Court of Justice to revise the matter.

The police direction in Poznan issued a regulation that arrestees who were already sentenced to imprisonment were to be photographed and measured according to Bertillon's method. In accordance with the regulation the police chief S. ordered two officers B. and Sch. to measure and photograph an arrestee suspected of pickpocketing, before he would be discharged from police custody and brought into the jailhouse. The arrestee was present at the moment of the order being given but refused to comply with it. When the officers approached to measure him, he opposed the execution of the order by keeping his arms stiff. The officers tried to straighten them up by force while he was holding them down repeatedly. Only with the help of four additional police officers could his resistance be overcome and the measurements taken.

The judges state that the conviction of the defendant should not be rejected, according to Article 113 of the Criminal Code

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15 LEDFORD, Kenneth, Lawyers, Liberalism, and Procedure: The German Imperial Justice Laws of 1877-79. In: *Central European History*, vol. 26, 1993, p. 165-193.

16 WESEL, Uwe, *Geschichte des Rechts: Von den Frühformen bis zur Gegenwart*, München, 2014, p. 384-389.

17 CRAIG, Gordon A., *Germany 1866-1945*, Oxford, 1978, p. 415-423.

18 Reichsgericht, IV. Strafsenat. Urt. v. 2 Juni 1899 g. M. Rep. 1824/99, S. 199-203.

19 GRUCHMANN, Lothar, *Justiz im Dritten Reich 1933-1940. Anpassung und Unterwerfung in der Ära Gürtner*, München, 2001, S. 1059.

20 Art. 81b v. 24 November 1933, Reichsgesetzblatt ,Teil I, Nummer 133, S. 1000-1008: *Soweit es für die Zwecke der Durchführung des Strafverfahrens oder für die Zwecke des Erkennungsdienstes notwendig ist, dürfen Lichtbilder und Fingerabrücke des Beschuldigten auch gegen seinen Willen aufgenommen und Messungen oder ähnliche Massnahmen an ihm vorgenommen werden*.

21 The reference of the case is provided above, paragraphs are not numbered.

22 *Liegt die von einer Polizeibehörde getroffene Anordnung, daß vorläufig festgenommene und in Polizeihaft gebrachte Personen den sog. Bertillon'schen Messungen zu unterwerfen und gleichzeitig zu photographieren seien, innerhalb der allgemeinen Zuständigkeit dieser Behörde, und befinden sich die im einzelnen Falle mit der Ausführung dieser Anordnung befaßten Beamten dabei in der rechtmäßigen Ausübung ihres Amtes?* In Urt. v. 2 Juni 1899 g. M. Rep. 1824/99, S. 199.

mentioned in the decision of the Imperial Court of Justice[23]. The execution of the police order is at the core of the appeal: the arrestee was not obliged to accept the actions taken by the police officers in order to measure him, because they constituted an extensive intrusion of his personal freedom. The admissibility of the method could only derive from a positive legal statute. This statute did not exist and could not be found in Article 127 of the Code of Criminal Procedure used by the previous court[24]. The appeal arguments obviously that the police officers didn't find themselves in a lawful exercise of their office when the arrestee resisted Bertillon's measurements.

The Imperial Court of Justice found the objection mistaken. The judges stated nevertheless that the following point might be admitted: the way in which the previous court established the exercise of their office was unclear and insufficient. The previous decision by the district Court in Poznan relied on par. 127 stating that police forces, in the public interest, had the authority to take all appropriate measures deemed necessary to establish an identity, when they arrested individuals having committed a recent illegal act. Regarding the authority of police officers to take measurements, the law did not regulate only cases in which an arrest warrant had been issued and an imminent danger existed, it also covered cases in which a person had just committed an illegal act and could run away or whose identity could not be established at once.

The judges of the Imperial Court of Justice reminded in their motives that when an identity could not be established at once, the police had not merely the authority, but the duty, to establish it immediately, if they were able to do so. This line of argumentation stemmed out less from par. 127 itself than from the general duty of the police to contribute to the criminal prosecution of suspected individuals, which was not put under question by the appeal. The interesting fact that the identity of the arrestee remained unknown to the police officers was not established. The previous judgment pointed more at the police chief S. who, when he ordered to measure and photograph the arrestee, had knowledge of his identity as well as of the fact that he had already been incarcerated.

Although this point did not respect the law, the Imperial Court of Justice decided that this flaw was of no interest for the contested judgment. The question to be decided upon was restrictively if the police officers B. and Sch. exercised legally their office. And its answer depended merely on this point: was the regulation to measure and photograph arrestees from the police direction part of the general competence of the police authority? If this was the case, the police chief S. who gave the contested order and the police officers who conducted the measurements, exercised legally their office, since they had the obligation in virtue of their position to comply with that regulation.

The identity of the person, who was already known, did not represent a relevant point of discussion but rather the duties of the police and the extension of their authority. The officers are not the primary cause for the taking of Bertillon's measurements, the direction is with its regulation. According to the judges, the competence of the police direction for the regulation to submit arrestees who were already sentenced to imprisonment to Bertillon's measurements and photographs should not be objected. It stemmed from the legal duty of the police to make the necessary arrangements for the preservation of the public security according to article 10 of the ALR II. 17 (Allgemeines Landrecht für die Preußischen Staaten translated as the General State Laws for the Prussian States, ALR)[25]. This famous law became the model of German police regulations by stating the duty of the police to assist the administration of criminal justice[26]. For the Court there was no doubt that taking and recording data pertaining to a person's description fell in the category of the police duties, when an individual who was suspected to have committed a criminal action had been arrested and taken to the police authorities.

The Court underlined that a description of the physical appearance with its characteristics can prove important in different ways for law enforcement and criminal prosecution, also when the person was not unknown to the authorities. Article 131 StPO regulated - and still does nowadays - the prosecution with a warrant of arrest[27]. When an arrestee escapes from prison or evades from custody, police authorities were also granted the power to issue warrants of arrest, which should contain a description of the person to chase. The judges emphasized that police authorities were entitles to take and register the

[23] Art. 113, *StGB*, Resisting enforcement officers, 1871: (1) *Wer einem Beamten, welcher zur Vollstreckung von Gesetzen, von Befehlen und Anordnungen der Verwaltungsbehörden oder von Urtheilen und Verfügungen der Gerichte berufen ist, in der rechtmäßigen Ausübung seines Amtes durch Gewalt oder durch Bedrohung mit Gewalt Widerstand leistet, oder wer einen solchen Beamten während der rechtmäßigen Ausübung seines Amtes thätlich angreift, wird mit Gefängniß von vierzehn Tagen bis zu zwei Jahren bestraft.*
(2) Dieselbe Strafe tritt ein, wenn die Handlung gegen Personen, welche zur Unterstützung des Beamten zugezogen waren, oder gegen Mannschaften der bewaffneten Macht oder gegen Mannschaften einer Gemeinde-, Schutz- oder Bürgerwehr in Ausübung des Dienstes begangen wird.

[24] Art. 127, *StPO*, Arrest and provisional apprehension, 1877: *(1) Wird Jemand auf frischer That betroffen oder verfolgt, so ist, wenn er der Flucht verdächtig ist oder seine Persönlichkeit nicht sofort festgestellt werden kann, Jedermann befugt, ihn auch ohne richterlichen Befehl vorläufig festzunehmen.*
(2) Die Staatsanwaltschaft und die Polizei- und Sicherheitsbeamten sind auch dann zur vorläufigen Festnahme befugt, wenn die Voraussetzungen eines Haftbefehls vorliegen und Gefahr im Verzug obwaltet.
(3) Bei strafbaren Handlungen, deren Verfolgung nur auf Antrag eintritt, ist die vorläufige Festnahme von der Stellung eines solchen Antrags nicht abhängig.

[25] Art. 10, *ALR*, Part II, 1794: *Die nöthigen Anstalten zur Erhaltung der öffentlichen Ruhe, Sicherheit, und Ordnung, und zur Abwendung der dem Publico, oder einzelnen Mitgliedern desselben, bevorstehenden Gefahr zu treffen, ist das Amt der Polizey.*

[26] DREWS, Wilhelm A., *Grundzüge der Verwaltungsreform*, Berlin, 1919.

[27] Art. 131, *StPO*, Arrest and provisional apprehension, 1877: *(1) Auf Grund eines Haftbefehls können von dem Richter sowie von der Staatsanwaltschaft Steckbriefe erlassen werden, wenn der zu Verhaftende flüchtig ist oder sich verborgen hält.*
(2) Ohne vorgängigen Haftbefehl ist eine steckbriefliche Verfolgung nur dann statthaft, wenn ein Festgenommener aus dem Gefängnisse entweicht oder sonst sich der Bewachung entzieht. In diesem Falle sind auch die Polizeibehörden zur Erlassung des Steckbriefs befugt.
(3) Der Steckbrief soll, soweit dies möglich, eine Beschreibung des zu Verhaftenden enthalten und die demselben zur Last gelegte strafbare Handlung sowie das Gefängniß bezeichnen, in welches die Ablieferung zu erfolgen hat.

description of an arrestee, because these data could be appropriate for a later identification of this person.

The method of taking and registering an identification constituted a discretionary power of the authorities and officers who were in charge of prisons. The limits of this regulation derives from the perspective that measurements, which have the character of mistreating the body or that can damage the health of an individual, should be excluded. From this line of argumentation there was no reason for the Imperial Court of Justice to forbid the measurements of certain members and body parts and the taking of photographs of the arrestee, as they were both together the basis of the anthropometric identification according to the Bertillon. Even more, these data were considered as valuable resources to describe the identity of an arrestee in order to facilitate a later identification. Hence the regulation of the police direction lay without any doubt in its general competence, and judges expressed firmly that there was no doubt regarding the legality of the exercise of office during which the arrestee resisted the officers B. and Sch. in a violent way. It was not anymore the arrestee who was victim of a violent act, as it appeared in the motives of the appeal, but the police officers who were merely doing their duty.

4. Conclusion

The judgment of the Imperial Court of Justice is the only decision addressing a method of identification that played a major role in the history of criminalistics. The motives emphasized the connection between Bertillonage and public security, or in other terms between technical and scientific discoveries and law enforcement. The judges did neither reject the conviction of the defendant nor accept any points of the appeal. The Article 113 of the Criminal Code represented the main motive for their decision: a person resisting a law enforcement officer is liable to imprisonment from a minimum of fourteen days to a maximum of two years. The article used nowadays brought a major change in the sentence: the maximum amounts to three years of imprisonment, and in serious cases it can be up to five years (with a minimum of six months).

In the present days the German law authorizes the following identification procedures: photographs, fingerprints and palm prints[28]. Distinguishing features, such as tattoos, are also collected in a note. Bertillon's measurements have been replaced by finger- and palm prints but individual characteristics are still registered. As earlier in the period of the Imperial Court of Justice, an identification can be ordered by a court, a public prosecutor, or by the police, and it is generally carried out by the police. Not surprisingly, since this has been already decided by judges in 1899, the identification method can be carried out under compulsion, which means the police is allowed to straighten the arms or fingers of an individual in order to take fingerprints. This admissible practice is connected to our case under appeal at the Imperial Court of Justice, in which the arrestee opposed the Bertillon's measurements even after he had heard the police chief ordering them to two police officers.

Regarding identification procedures and the registration of such data when the identity of a person is already known, the present situation is similar to the one in 1899. They are allowed for purposes of future criminal proceedings if there are reasons to believe that the identified person could be subject to future criminal proceedings, in other words to ensure that public security will not be threatened by a case that may arise at a later date.

Following technical and scientific developments, identification methods have been extended to samples of blood[29], bodily fluid and DNA from hair or saliva[30]. Such samples can be taken only by a doctor, and not by the police. If a person does not agree to the samples, a court will have to order them but where there is danger in delay, the public prosecutor or even the police can order it. For these identification methods as for the previous ones, force may be used. When the samples are no longer required for the criminal proceedings, they must be destroyed. However, the DNA profile, as Bertillon's measurements, fingerprints and palm prints, is stored when there is reason to believe that future proceedings for a serious crime will be brought against the individual.

The existing laws regulating identification methods show how important the decision of the Imperial Court of Justice has been and how its line of argumentation represented a ground for the practice of police authorities. In 1899 the question addressed in the appeal was still new and therefore the judgment rendered was crucial for the unification of the practice across the German Empire. The judges mentioned article 10 of the General State Laws for the Prussian States promulgated in 1794, which was replaced only in 1931 by the Prussian Police Administrative Law. Together with the rendered judgments they serve as a basis for the present police general clauses (Polizei- und ordnungsrechtliche Generalklausel). The objective of these laws was the creation of a rigidly organized state police in order to supplement the local police forces that were lacking coordination[31]. Since then and for the present times, the idea of unification is present at the level of police administration, in the same way as the Imperial Court of Justice had the duty to unify the laws and the practice across the territories.

[28] Art. 81b, *StGB*, 1998.
[29] Blood samples are addressed in art. 81a and 81d, *StGB*, 1998.
[30] DNA tests are adressed in art. 81e, 81f and 81g, *StGB*, 1998.
[31] MLADEK, Klaus (Ed.), *Police Forces. A Cultural History of an Institution*, New York, 2007, p. 147-163.

Medical Responsability in Roman Private Law

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Abstract

Nowadays medical responsibility is a very important issue in private law. However, Roman Private Law had already been concerned about several aspects of civil responsibility of the medical doctor, pointing out, at times, different, but possible solutions, to a particular issue, which highlights the fact that it is a polemical and complex matter.

Keywords: *Medical liability; Civil Responsibility; infirmitas.*

1. Introduction

In recent times, it has been seen a growing number of lawsuits about medical liability. Jurists, medical professionals and other members of society have discussed issues relative to this matter, searching on the one hand, to support the patient, in the name of the defense of the legal assets life and health, and on the other hand, not to exceed the amount of care demanded from the professional, in order not to impair medical initiatives and the progress of science.

This debate seems to be necessary, as medicine, in continuous development, presents to law – permanently- issues to which we still have not found a suitable legal solution. Thus, there is interdisciplinarity between the legal and medical worlds, so that legal science must be aware of the possibilities provided by medical science, in order to find reasonable parameters for the solution of conflicts.

However, even though the discussions about the theme are relatively new, this is not a recent issue. Roman Law had already been concerned about several aspects of civil responsibility of the medical doctor, pointing out, at times, different, but possible solutions, to a particular issue, which highlights the fact that it is a polemical and complex matter.

2. Exegesis of Gai. 7 ed. prov., D. 9, 2, 8 pr. (2nd part), Ulp. Coll. 12, 7, 7, Ulp. 18 ad ed., D. 9, 2, 27, 9, and Inst. 4, 3, 6

The four texts address the responsibility of the doctor who, having correctly performed a surgical operation, was negligent by missing out the post-surgical care.

Gai. 7 *ed prov.,* D. 9, 2, 8 pr. (2nd part): *'sed et qui bene secuerit et derefiquit curationem, securus non erit, sed culpae reus intellegitur"* (but, in addition, whoever performed a good operation and neglected post-surgical care, is not free from responsibility, but shall be considered to be someone who shall also take the blame for the situation.")

Different from fragment D. 9, 2, 7, 8, in this case the operation was correctly performed by the doctor, but he abandoned post-surgical care, and because of this shall be held responsible for the harm thus caused. There are several cases of suspected interpolation with regard to the second part of fragment D. 9, 2, 8 pr.

According to U. VON LÜBTOW[1], this is an interpolated phrase, which breaks the relationship of cause that existed with regard to the first part of the text. There is suspicion regarding the words *sed cuipae reus,* as they appear to be redundant, and also with regard to the word *intellegitur,* which should in fact be *intellegetur*.[2] The words *securum esse* are also causes for doubt.[3]

Finally, there are doubts regarding the phrase *sed et — erit,* and the feeling is that this phrase must also be the work of the compilers, considering that there has a shift in verb tense compared to *secuerit — derelinquit.*[4] Other judicial sources also make statements that are similar to those presented in GAIUS' text (D. 9,2, 8 pr. – 2nd Part). In this regard:

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1 *Untersuchungen zur lex Aquilia*, Berlin, Duncker & Humblot, 1971, p. 104, 179.

2 BESELER, Gehrard, *Beiträge zur Kritik der römischen Rechtsquellen II*, Tübingen, J. C. B. Mohr, 1911, p. 85; ROTONDI, Giovanni, *Teorie postclassique sull' actio legis Aquiliae' in Scritti Giuridici II ´Studi sul Diritto Romano dele Obligazioni*, Milano, Ulrico Hoepeli, 1922, p. 485, 489-490; KUNKEL, Wolfgang, *Diligentia*. In: ZSS (Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteiling) 45 (1925), p. 339; MAYER-MALY, Theo, *Locatio Conductio IV*, Wien, Herold, 1956, p. 159.

3 BESELER, Gehrard, *Beiträge zur Kritik der römischen Rechtsquellen II*, Op. Cit., p. 23.

4 BELOW, Karl-Heinz, *Der Arzt im römischen Recht*, München, Beck, 1953, p. 117.

Inst. 4, 3, 6: "*Praetera si medicus, qui servum tuum secuit, dereliquerit curationem atque ob id mortuus fuerit servus, culpae reus est.*" ("The doctor who, after having performed surgery on his/her slave, abandons the course of treatment, and the slave later passes away as a direct effect thereof, shall be considered as being to blame, and hence guilty.")

Ulp. Coll. 12, 7, 7:[5] *"Si forte*[6] *servus, qui idem conductor est*[7]*, coloni ad fornacem obdormisset et villa fuerit exusta, Neratius scribit ex lacato conventum praestare debere, si neglegens in elegendis ministeriis fuit. Ceterum si alius ignem subiecerit fornaci, alius neglegentur custodierit, an tenetur*[8]*? Namque qui non custodit, nihil fecit: qui recte ignem subiecit, non peccavit: quemadmodum si hominem medicus recte seruerit, sed neglegenter vel ipse vel alius curaverit, Aquilia cessat. Quid ergo est? Et hic puto ad exemplum Aquiliae dandam actionem tam in eum, qui ad fornacem obdormivit vel neglegenter custadit, quam in medicum qui neglegenter curavit*$_i$ *sive homo periit sive debilitatus est. Nec quisquam dixerit in eo*[9] *qui obdormivit rem eum humanam et naturalem passum, cum deberet vel ignem extinguere vel ita munire, ut non evagaretur".* ("If perchance a slave of a tenant farmer, who is a tenant of the land", has slept alongside the furnace and the country house has been burnt down, then Neratius writes that he [the tenant] shall be responsible for the act of leasing, should this party have been negligent on appointing his/her assistants. However, if one has kindled the flame of the furnace and another has negligently cared for this, then should he/she by any chance be held responsible? The fact is that the person who has not taken due care, did nothing, and the person who correctly monitored the fire, did nothing wrong. Similarly, when a doctor performs a surgical operation correctly on a patient, or a third party behaves in a negligent manner during the post-surgical phase, then the application of the Lex Aquilia shall cease. What happens, then? Also in this case, my view is that the lawsuit should be considered "*ad exemplum legis Aquiliae*", both against the person who slept by the furnace or negligently monitored it, or against the doctor who treated his/her patient in a negligent manner, if this patient died or suffered other serious harm. With regard to the person who slept, no-one can say that this occurred through a human or natural cause, as the person should have put out the fire first, or taken other precautions to make sure that the fire would not spread.")

Ulp. 18 *ad ed.,* D. 9, 2, 27, 9: "*Si fornicarius*[10] *servus coloni ad formarem obdormisset et villa fuerit exusta. Neratius scribit ex locato conventum praestare debere, si neglegens in eligendis ministeriis fuit: ceterum si alius ignem subiecerit fornarci, alius neglegenter*[11] *custodierit, an tenebitur qui subiecerit?*[12] *Nam qui*[13] *custodit, nihil fecit, qui recte ignem subiecit, non paccavit*[14]*: quid ergo est? puto utilem competere*[15] *actionem tam in eum qui ad fornacem obdormivit quam in eum qui neglegenter custodit*[16]*, nec quisquam*[17] *dixerit in eo qui obdormivit, rem eum humanam et naturalem passum, cum deberet vel ignem extinguere vel ita munire, ne evagetur."*[18] ("If the slave of a tenant farmer, responsible for the furnace, has slept alongside it and the house has been burnt down, then Neratius writes that this person [the tenant farmer] should be held responsible for the lease action, if he was negligent on appointing his assistants. However, if one of them has kindled the fire of the furnace and another one has taken care of it in a negligent way, then shall the person who lit the flame be held responsible? The fact is the person who took care of the flame did nothing, and the person who correctly managed the fire did not do anything wrong. What happens, then? In my opinion, there are grounds for analogous legal action, both against the person who dozed off beside the furnace and against the person who watched over it in a negligent manner. In addition, in relation to the person who slept, may no-one say that he/she did this due to human or natural causes, as he/she should have put out the fire first, or taken precautions to make sure that the fire did not spread.")

The Collatio text is considered a crux to lawyers who work on the exegesis of Roman sources, because of the similarity to the fragment of the Digest. The changes present in both the texts are disorganised, which makes the texts much harder to analyse.[19] The most significant change is that in the Digest the passage mentioning the doctor has been removed, probably

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5 RICOOBONO, Salvatore, *Fontes Iuris Romani Antejustiniani in usum scholarum*, Florentiae, S. A. G. Barbčra, 1968.

6 WOLFF, Hans Julius, *Ulpian XVIII ad edictum in Collatio and Digest and the problem of post-classical editions of classical Works*. In: Scritti in onere di Contardo Ferrini IV, Milano, Vita e Pensiero, 1949, p. 72; NIEDERMEYER, Hans, *Voriustinianische Glossen und Interpretationen und Textüberlieferung*. In: Atti del Congresso Internazionale di diritto romano, Roma, I (1934), p. 375; VON LÜBTOW, Ulrich, *Untersuchungen zur lex Aquilia*, Op.Cit., p. 162 sugest to substitute the word *fortes* to *fornacarius*.

7 ALBANESE, Bernardo, *Studi sulla legge Aquilia – 'Actio utilis' e 'actio in factum ex legge Aquilia'*. In: Annali del Seminario Giuridico dela Universitŕ di Palermo, XXI, Palermo, 1950, p. 15 sugests the singular.

8 WATSON, Alan, *Two studies in textual history*. In: Tijdschrift voor Rechtsgeschidenis 30 (1962), p. 216 sugests the word *tenetur*.

9 BESELER, Gehrard, *Beiträge zur Kritik der römischen Rechtsquellen II*, Op. Cit., p. 232; KUNKEL, Wolfgang, *Diligentia*, Op. Cit., p. 331.

10 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta*, Berlin, 1954, p. 158 sugest *fornacarius*.

11 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta*, Op. Cit., p. 159 sugest *neglegentem.*

12 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta*, Op. Cit.,p. 159, the words *an ...subiecerit* correspond to *tenetur* in *Collatio*.

13 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta,* Op. Cit., p. 159, corresponds to *manque qui non* in *Collatio.*

14 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta,* Op. Cit., p. 159, corresponds to *quemadmodum si hominem medicus recte secuerit, sed neglegenter vel ipse vel alius curaverit, Aquilia cessa* in *Collatio*.

15 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta,* Op. Cit. p. 159, *puto utilem competere* corresponds to *a et hic puto ad exemplum Aquiliae dandam* in *Collatio*.

16 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta,* Op. Cit., p. 159, *quam... custodit* corresponds to *vel neglegenter custodiit, quam in medicus qui neglegenter curavit, sive homo periit sive debilitatus est* in *Collatio*.

17 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta,* Op. Cit.,p. 159, sugests *quicquam*.

18 MOMMSEN, Theodorus; KRÜGER, Paulus, *Corpus Iuris Civilis I – Institutiones – Digesta*, Op. Cit., p. 159, corresponds to *ut non avagaretur* in *Collatio*.

19 NIEDERMEYER, Hans, *Voriustinianische Glossen und Interpretationen und Textüberlieferung*, Op. Cit., p. 374.

because the same issue had been addressed in the previous fragment, Gai. 7 *ed. prov.,* D. 9, 2, 8 pr. (2nd part).[20]

According to B. ALBANESE[21], the expression *derelinquere curationem,* which appears in fragment D. 9, 2, 8 pr., stresses the omission aspect more than the expression *neglegerzter curare,* which is present in the *Collatio* text. The first hypothesis raised by ULPIANUS about the fragments (Coll. 12, 7, 7 and D. 9, 2, 27, 9) refers to a slave who set the furnace on fire and then fell asleep, setting the house ablaze. The issue here is not beset with too much difficulty, as the tenant farmer shall be held responsible, as according to the terms of the lease contract, because of *culpa in eligendo*.

The authors[22] allege that the core point that ULPIANUS wishes to stress is the second hypothesis, which means the case when there are two slaves and one of them carries out a positive act, which is permitted and without an element of guilt – that of setting fire – while the other commits an omission – going to sleep and not supervising the furnace – thus giving rise to the conflagration. At the end of the fragment, ULPIANUS abstracts the status of the parties involved, considering them to be free, so as to assign greater generality to the decision made.

It is also said[23] that the issue debated by the lawyer is the problem of responsibility, which according to the terms of *Lex Aquilla*, was limited to the relationship of causality. How can one set the relationship of causality, when the person who set fire to the furnace did so in a licit manner, and the person who neglected the furnace on surveillance did nothing? To reinforce the decision made regarding this case, ULPIANUS also shows an example of a doctor who, having performed a surgical operation correctly, abandons the medical care of the post-surgical phase.[24] In all these cases it is not possible to take a direct *actio legis Aquiliae*, which is clearly shown by the expression *Aquilia cessat,* but rather an *actio ad exemplum legis Aquiliae* (as according to the terms set forth in the *Collatio* — et *hic puto ad exemplum Aquiliae dandam)* or an *actio infactum* (as according to the text of the Digest —*puto utilem competere).*

B. ALBANESE[25] notes that the omission cases described in D. 9, 2, 27, 9 are different from the hypotheses of damages caused *non corpore,* as described in fragment Gai. 3, 219. Even though the damage caused by omission *(nihil facere) is,* in the broad sense, a kind of *non corpore datum* damage, for classical Roman jurists the damages caused *non corpore datum* have a lower value, being caused in a mediate form, always connected to a *facere* of the person responsible. In any case, in both situations – of omissions and damages caused *non corpore* — there is the concession of a lawsuit taken, based on the example of *actio ex lege Aquiliae.* According to U. VON LÜBTOW[26], the example of the doctor, as mentioned in the *Collatio,* was not considered in the text D. 9, 2, 27, 9 because, in the pre-Classical period, there was a trend to replace the *actiones utilis,* as mentioned by classic jurisprudence, by *actiones legis Aquiliae directas.*

This occurred with fragment D. 9, 2, 8 pr., which is connected to the previous one (D. 9, 2, 7, 8) through the expression *idem iuris est.* The possibility mentioned in this text *(imperite secare)* is backed up by the *actio legis Aquilia,* or, in order words, by direct action. In this way, the systematics of the fragments leads us to conclude that the compilers had the intention of also assigning, to cases of omission, direct legal action, as a replacement for the concept of *actio utilis,* as mentioned in fragments Coll. 12, 7, 7 and D. 9, 2, 27, 9.[27]

Following this reasoning, in the opinion of U. VON LÜBTOW, probably GAIUS himself would have written: *sed et si bene secuerit, curationem autem derefiquerit, utilis actio ad exemplum legis Aquiliae in eum danda erit".*[28]

Analysing the issue from another standpoint, S. SCHIPANI[29] sustains the concept that fragment D. 9, 2, 8 pr. does not allow the analysis of the issue regarding direct action or action *ad exemplum,* but rather the relationship between omission and carelessness. The reference here made to the previous fragment (D. 9, 2, 7, 8), through the expression *idem iuris est,* shows, on the one hand, that the texts are dealing with situations in counterposition; in other words, doing something in an incorrect way *(imperite secuerit),* and not doing whatever was necessary as a result of something done before *(sed et qui bene secuerit et dereliquit curationem).* On the other hand, carelessness and omission do not exclude each other: much to the contrary, they show themselves to be quite close. The fact is that post-surgical care is a duty of the doctor, as a result of his or her previous activity

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[20] SCHIPANI, Sandro, *Responsabilitŕ "ex lege Aquilia", Criteri di imputazioni e problema dela "culpa"*, Torino, 1969, p. 410; BEINART, B., *Culpa in Ommitendo*. In: Tydschrift vir Hedendaagse Romeins – Hollan Reg 12 (1949), p. 144; ALBANESE, Bernardo, *Studi sulla leggeAquilia – 'Actio utilis' e 'actio in factum ex legge Aquilia'*, Op. Cit., p. 19, 192; VON LÜBTOW, Ulrich, *Untersuchungen zur lex Aquilia,*Op. Cit., p. 162.

[21] *Studi sulla leggeAquilia – 'Actio utilis' e 'actio in factum ex legge Aquilia'*, Op. Cit., p. 20.

[22] SCHIPANI, Sandro, *Responsabilitŕ "ex lege Aquilia", Criteri di imputazioni e problema della "culpa"*, Op. Cit., p. 243-246; BEINART, B., *Culpa in Ommitendo*, Op. Cit., p. 144-147; VON LÜBTOW, Ulrich, *Untersuchungen zur lex Aquilia*, Op. Cit., p. 98, 159-162, 179; ALBANESE, Bernardo, *Studi sulla legge Aquilia – 'Actio utilis' e 'actio in factum ex legge Aquilia'*, Op. Cit., p. 15-25, 191-192; BELOW, Karl-Heinz, *Der Arzt im römischen Recht*, München, Beck, 1953, p. 114-117; KUNKEL, Wolfgang, *Exegetische Studien zur aquilischen Haftung*. In: ZSS (Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung) 40 (1929), p. 329-331; IDEM, *Diligentia*, Op. Cit., p. 329-331; HAYMANN, Franz, *Textkritik. Studien zur römischen Obligationsrecht*, in ZSS (Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung) 40 (1940), p. 252-254.

[23] SCHIPANI, Sandro, *Responsabilitŕ "ex lege Aquilia", Criteri di imputazioni e problema dela "culpa"*, Op. Cit., p. 243-246; BEINART, B., *Culpa in Ommitendo,* Op. Cit., p. 144-147; VON LÜBTOW, Ulrich, *Untersuchungen zur lex Aquilia*, Op. Cit., p. 98, 159-162, 179; ALBANESE, Bernardo, *Studi sulla legge Aquilia – 'Actio utilis' e 'actio in factum ex legge Aquilia'*, Op. Cit., p. 15-25, 191-192; BELOW, Karl-Heinz, *Der Arzt im römischen Recht*, Op. Cit., p. 114-117; KUNKEL, Wolfgang, *Exegetische Studien zur aquilischen Haftung*, Op. Cit., p. 329-331; IDEM, Diligentia, p. 329-331; HAYMANN, Franz, Textkritik. Studien zur römischen Obligationsrecht, Op. Cit., p. 252-254;

[24] ALBANESE, Bernardo, *Studi sulla leggeAquilia – 'Actio utilis' e 'actio in factum ex legge Aquilia'*, Op. Cit., p. 19.

[25] *Studi sulla leggeAquilia – 'Actio utilis' e 'actio in factum ex legge Aquilia'*, Op. Cit., p. 20-21.

[26] *Untersuchungen zur lex Aquilia,* Op. Cit., p. 173, 179.

[27] BELOW, Karl-Heinz, *Der Arzt im römischen Recht*, Op. Cit, p. 116; KUNKEL, Wolfgang, *Exegetische Studien zur aquilischen Haftung*, Op. Cit., p. 162.

[28] VON LÜBTOW, Ulrich, *Untersuchungen zur lex Aquilia*, Op. Cit., p. 179.

– which in this case was the execution of the surgical procedure, in which one can observe the skilled or unskilled conduct on the part of the doctor. The act of omission, which is constituted by the abandonment of the patient's course of treatment after execution of surgery, is not considered from an independent perspective, as the doctor had the duty of taking care of the patient even after surgery. Indeed, the neglect of this duty does indeed bring omission closer to carelessness.

According to the author[30], it is in this sense that one should analyse the final expression *culpae reus intellegitur,* which means that not only carelessness, but also omission, generates responsibilities, to the extent that the omissive behaviour is a case of *iniuria,* thus coming closer to carelessness.

B. BEINART[31] makes interesting contributions on interpreting fragment D. 9, 2, 8 pr. together with Coll. 12, 7, 7 and D. 9, 2, 27, 9. The author comments that both the doctor who fails to provide post-surgical care, and also the slave who fell asleep and did not tend to the furnace, acted with omission, as they had the respective duties of taking care of the patient after surgery, and checking the furnace once the fire had started. Both shall be held responsible through an *actio utilis ad exemplum legis Aquiliae,* as the strategy of *actio legis Aquiliae directa* is not possible. The responsibility stems from the fact that each has taken on an *officium* but not carried it out as they should have. Therefore, anyone who takes on an activity also takes on an obligation to execute this activity completely and correctly. Here the author stresses that fragments Coll. 12, 7, 7 and D. 9, 2, 27, 9 do not deal with responsibilities arising from a simple omission, but from the fact that they have taken on an obligation at a previous moment. These comments are related to the following fragment:

Gai. ed *prov.,* D. 9, 2, 8, 1: "*Mulionem quoque, si per impertiam impetum mularum retinere non potuerit, si eae alienum hominem obtriverint, vulgo dicitur culpae nomine teneri. idem dicitur et si propter infirmitatem sustinere mularum impetum non potuerit: nec videtur iniquuum, si infirmitas culpae adnumeretur, cum affectare quisque non debeat, in quo vel intellegit vel intellegere debet infirmitatem suam alii periculosam futuram. idem iuris est in persona eius, qui impetum equi, quo vehebatur, propter imperitiam vel infirmitatem retinere non poterit"*[32]/[33] ("It is also generally accepted that a mule driver shall be held responsible and to blame if, when leading the animals, he or she is unable to hold them through lack of skill", if these later injure an uninvolved slave through a backward kick. The same is valid when the person is not able to control the animals through lack of strength. Indeed, it does not seem far-fetched to consider lack of strength as a condition for blame, as the fact is that no-one should take on a task if they knowing fair well, or at least should know, that their lack of strength could be hazardous to other people. The same holds for the horse rider who, when walking with his or her steed, is not able to control it, whether through lack of skill or lack of strength.")

In the present case, the person leading the mules has not been able to control the animals, which ended up injuring an uninvolved slave. The behaviour of the driver was that of guilt, for having acted either with lack of skill – not having the necessary skills to control the animals, or weakness or frailness – not having the necessary strength to hold the animals.

S. SCHIPANI[34] says that this fragment is related to the previous one (D. 9, 2, 8 pr.) because it also addresses the issue of lack of skill or care when carrying out a hazardous activity, and blame for omission. As in the previous case, the author tried to establish a link between omission and lack of care, and now tries to show that lack of care or skill is also related to the concept of *infirmitas,* as this also amounts to a form of omission. In the opinion of the author, this concept refers initially to a positive behaviour, which is that of carrying out the activity without being a specialist in the area; however, later on it is also linked to omission, either through lack of technical skill to carry out the task that has been taken on, or through lack of physical ability. In the case here being considered, the person leading the mules has not succeeded in preventing them from running over a slave, either because he or she did not have the effective skill to perform this activity, or through a lack of strength or general weakness. In the opinion of the author, the most important aspect in this fragment is not the damage caused by the technical error, but rather the fact that they took on a task which requires specific technical knowledge, presenting himself or herself as a specialist in the area, when in reality the corresponding skills were lacking, or in cases where they did not have the necessary strength to carry out the task concerned.[35]

As the author well mentions[36], frailness or weakness is considered "guilt" and, as such, can be put on a par with lack of care or skill, as can be inferred from the phrase *infirmitas culpae adnumeratur,* with regard to *imperitia culpae adnumeratur.*

The guilt for characterised carelessness or ignorance, or through weakness, is shown at the moment when the contract is agreed, as it is then that one considers the professional quality of the person who takes on the execution of a task. It is up to this person to assess whether he or she has, or does not have, the necessary conditions to execute the task, both intellectually and physically.[37] This means that, even though the person has

[29] *Responsabilitŕ "ex legge Aquiliae"*, Op. Cit., p. 243-245.
[30] SCHIPANI, Sandro, *Responsabilitŕ "ex legge Aquiliae"*, Op. Cit., p. 245-246.
[31] *Culpa in Omittendo*, Op. Cit., p. 144-147.
[32] (= Inst. 4, 3, 8).
[33] MAYER-MALY, Theo, *Locatio Conductio IV*, Op. Cit., p. 158-159.
[34] *Responsabilitŕ "ex legge Aquilia"*, Op. Cit., p. 246-249.
[35] MOLNÁR, Imre, *Verantwortung/Gefartragung bei der "locatio conductio" zur Zeit des Principats.* In: Aufstieg und Niedergang der römischen Welt, II, Principat, 14, Recht, Berlin, 1982, p. 612, 620; MAYER-MALY, Theo, *Locatio Conductio IV*, p. 159; KASER, Max, *Das römische Privatrecht I. Das altrömische, das vorklassische und klassische Recht*, München, 1971, p. 509; CANNATA, Carlo, *Sul problema della responsabilitŕ nel diritto provato romano I e II*. In: IURA (Rivista INternazionale di Diritto Romano e Antico) 43 (1992), p. 43-44; IDEM, *Per lo studio della responsabilitŕ per colpa nel Diritto Romano*, Milano, 1967-1968, p. 248-251, 254-315.
[36] SCHIPANI, Sandro, *Responsabilitŕ "ex legge Aquilia"*, Op. Cit., p. 249.
[37] SCHIPANI, Sandro, *Responsabilitŕ "ex legge Aquilia"*, Op. Cit., p. 249.

acted in good faith,[508] believing that he or she was appropriately qualified and skilled to perform the task, although in fact he or she was not, the person could be held responsible, as he or she created, in the other party, an expectation regarding their technical competence.[38]

C. CANNATA[39] analyses fragment D. 9, 2, 8, 1 and also sustains that the *infirmitas* is related to guilt, on grounds of lack of skill. This is because, differently from this last document, the concept of *infirmitas* could refer to technical or non-technical tasks.[40] Taking on the execution of a task without having the appropriate physical capacity means a case of carelessness, even though this should be analysed with regard to the technical prerequisites for the execution of the said task.

3. Conclusions and relation to the actually in force law

The present law also discusses this issue, regarding the civil responsibility of the medical doctor. The doctrine[41] says that the medical professional, on taking on an intervention, must also consider whether he or she has the skills and the knowledge, both theoretical and practical, and also if he or she is in good physical conditions to carry them out. Indeed, the doctor must ensure that his or her knowledge and experience correspond to the standard that is sought for the speciality. It is expected and requested that the medical professional is sufficiently well prepared to take on possible difficulties as may arise during the surgery or during treatment. Some factors, such as illness, excessive fatigue, weakness through advanced age, or any other factor, could have an influence on professional capacity, thereby reducing this capacity and jeopardising the correct execution of the intervention as sought. In this way, when the doctor admits that he or she has reached the limit of his or her knowledge or personal capacity, then he or she should converse with other better qualified doctors, to deal with that case, or even transfer the patient to another doctor, or omit or limit the scope of the proposed intervention. The professional must recognise his or her physical and intellectual limits, and these must be respected. If this does not happen, then, on taking on the execution of a course of treatment or an operation, the professional shall be taking the blame for a possible harmful result, as the professional failed to carry out his or her duty of diligence — preventing the patient from suffering damage which could be avoided.

The authors[42] stress that these considerations also hold for beginner doctors, who do not yet have the skills and the experience necessary within their area of specialisation. They should critically ponder over their own capacity, to then conclude – or should conclude – that they are not adequately prepared to take on a certain type of intervention, and that the patient would run less risk if he or she was attended to by a doctor with medium capacity, in which case the execution of the measure should be rejected.

There are other hypotheses which show that the doctor would be taking the blame, such as: not having the correct equipment and professional instruments in the consulting room, for the execution of a certain exam; non-observance of regular conditions of hygiene; not keeping up to date with techniques for treatment, through district of the most modern literature about the area[43].

In cases of urgency or other states of need – the only cases which exempt the assumption of blame by the doctor – the doctor should then intervene up to the moment when there is no longer risk to the patient's life or general health. After that, the patient shall be sent on to a new location which has better conditions for treatment, or even to a specialist[44]. In the light of these situations, professional conduct is appraised objectively, according to the conditions presented by the concrete case.[45]

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[38] Relação com o fragmento D. 19, 2, 9, 5 – *quippe ut artifex, inquit, conduxit*.

[39] *Sul problema della responsabilitŕ nel diritto provato romano I e II*, Op. Cit., p. 46-47.

[40] For exemple, Ulp. 8 ad. ed., D. 9, 1, 1, 5.

[41] LAUFS, Adolf; UHLENBRUCK, Wilhem, *Das Zustandekommen des Arztvertrages*, in LAUFS, Adolf; UHLENBRUCK, Wilhem, (Coord.)*Handbuch des Arztrechts, Zivilrecht, Öffentliches Recht, Vertragsarztrecht, Krankenhausrecht, Strafrecht*, München, 2002, p. 416-419; LAUFS, Adolf, *Die vertragliche Haftpflicht des Arztes und des Kranken hausträgers*. In: LAUFS, Adolf; UHLENBRUCK, Wilhem, (Coord.)*Handbuch des Arztrechts*, Op. Cit., p. 936; DEUTSCH, Erwin; MATTHIES, Karl-Heinz, *Arzthaftungsrecht. Grundlagen,Rechtsprechung, Gutachter- und Schlichtungstellen*, Köln, 1988, p. 48-49; DEUTSCH, Erwin, *Medizinrecht. Arztrecht, Arzneimittelrecht und Medizinproduktrecht*, Berlin, 1999, p. 68-69; HIRTE, H., *Berufshaftung*, München, 1996, p. 101; STEFFEN, Erich; DRESSLER, Wolf-Dieter, *Arzthaftungsrecht*, Köln, 2002, p. 88-90, 134; GIESEN, Dieter, *Arzthaftungsrecht. Die zivilrechtliche Haftung aus medizinischer Behandlung in der Bundesrepublik Deutschland, in Österreich und in der Schweiz*, Op. Cit., p. 75-77; RIEGER, *Lexikon des Arztrechts*, Berlin, 1948, p. 144; CATTANEO, Giovanni, *La responsabilitŕ del professionaista*, Milano, 1958, p. 56-57, 335; MUSOLINO, Giuseppe, *Il contratto dell'opera professionale*, Milano, 1999, p. 294; CRESPI, Alberto, *La responsabilitŕ penale nel trattamento medico-chirurgico*, Palermo, 1955, 109-110, 123-127, TOURNEAU, Philippe Le, *La responsabilitŕ civile*, Paris, 1976, p. 334; SAVATIER, René, *Traité de la responsabilité civile en droit framçais civil, administrative, professionnel, procedural I – Les sources de la responsabilité civile*, Paris, 1951, p. 410; PENNEU, Jean, *La responsabilité du médicin*, Paris, 1996, p. 17.

[42] LAUFS, Adolf; UHLENBRUCK, Wilhem, *Das Zustandekommen des Arztvertrages*, in LAUFS, Adolf; UHLENBRUCK, Wilhem, (Coord.) *Handbuch des Arztrechts,* Op. Cit., p. 416-419; LAUFS, Adolf, *Die vertragliche Haftpflicht des Arztes und des Kranken hausträgers*. In: LAUFS, Adolf; UHLENBRUCK, Wilhem, (Coord.)*Handbuch des Arztrechts*, Op. Cit., p. 936; DEUTSCH, Erwin; MATTHIES, Karl-Heinz, *Arzthaftungsrecht. Grundlagen,Rechtsprechung, Gutachter- und Schlichtungstellen*, Köln, 1988, p. 48-49; DEUTSCH, Erwin, *Medizinrecht. Arztrecht, Arzneimittelrecht und Medizinproduktrecht*, Op. Cit., p. 68-69; HIRTE, H., *Berufshaftung*, Op. Cit., p. 101; STEFFEN, Erich; DRESSLER, Wolf-Dieter, *Arzthaftungsrecht*, Op. Cit., p. 88-90, 134; GIESEN, Dieter, *Arzthaftungsrecht*. Op. Cit., p. 75-77; RIEGER, *Lexikon des Arztrechts*, Berlin, 1948, p. 144.

[43] LAUFS, Adolf; UHLENBRUCK, Wilhem, *Das Zustandekommen des Arztvertrages*, in LAUFS, Adolf; UHLENBRUCK, Wilhem, (Coord.)*Handbuch des Arztrechts*, Op. Cit., p. 416-419; DEUTSCH, Erwin, *Medizinrecht*, Op. Cit., p. 68-69; STEFFEN, Erich; DRESSLER, Wolf-Dieter, *Arzthaftungsrecht*, Op.Cit., p. 88-90.

[44] STEFFEN, Erich; DRESSLER, Wolf-Dieter, *Arzthaftungsrecht*, Op. Cit., p. 88; CATTANEO, Giovanni, *La responsabilitŕ del professionaista*, Op. Cit., p. 335.

[45] LAUFS, Adolf; UHLENBRUCK, Wilhem, *Das Zustandekommen des Arztvertrages*, in LAUFS, Adolf; UHLENBRUCK, Wilhem, (Coord.)*Handbuch des Arztrechts*, Op. Cit., p. 417.

Römisch-Holländisches Recht (Roman-Dutch law, Romeins-Hollands recht, Romeins-Hollands reg) und sein Geltungsbereich in Europa und außerhalb Europas

(Roman-Dutch Law /Romeins-Hollands recht, Romeins-Hollands reg/ and its Influence in Europe and beyond Europe)

*Gábor Hamza**

Abstract

The Humanists Legal School developed in the Netherlands in the course of the seventeenth and eighteenth centuries. The eminent epresentatives of "elegant jurisprudence" were Arnoldus Vinnius, Anton Schulting, Paulus Voëtus, Iohannes Voëtus, Cornelis van Bynkershoek, Gerhard Noodt and Ulrich Huber. Mentioning deserves also Hugo Grotius, one of the founding fathers of modern international law. Dutch jurists exercised a significant influence also on legal science all over Europe as well as in a significant number of countries (territories) outside Europe. Their greatest achievement was the application of Roman law to modern conditions. In 1838 the French Code civil was replaced in Holland by a national civil code entitled Burgerlijk Wetboek. It basically followed the French model with the exception that it contained the law of property in two books. It was professor Eduard Maurits Meijers who maintained, before and after the Second World War, that a recodification of private law was necessary. After the Second World War E. M. Meijers got adherence with his idea that a new Civil Code should be made. In 1947 he was entrusted with the revision of the civil code of 1848. Meijers managed to publish the draft of four volumes out of the planned total of nine before his death in 1954. The new Dutch civil code does not contain, unlike the German Civil code, a general part but the common regulations of property law and the law of obligations are dealt with in separate volumes. The new Dutch Burgerlijk Wetboek that came i.e. comes into force gradually has taken several of its legal principles as well as institutions from Roman law.

The reception of Roman-Dutch law in South Africa can be traced back to 1652 when the Dutch founded Cape Colony. The activities of the court functioning in Cape Town from 1656 were based on the Roman-Dutch law of the colonists and became gradually autonomous from the legal system of the native country of the colonists. Also the British conquest contributed to this tendency i.e. trend since common law was introduced primarily in the domain of public law. South African private law is characterized by the symbiosis of these two legal systems (mixed jurisdiction) both of which have so far resisted all attempts at codification, apart from the statutory regulation of a few legal institutions. The leading role is, however, played by Roman-Dutch law. Modern Roman-Dutch law is effective at least partly in the Republic of South Africa, Namibia, Zimbabwe, Swaziland, Botswana and Lesotho.

Roman-Dutch law consists of Roman law, Dutch and Germanic custom and the customary law of other areas of the Low Countries, statutes of the province of Holland and other regions of the Low Countries (in particular Zealand), and canon law. It is based also on former decisions of courts and the works of certain outstanding jurists.

The island of Ceylon, present-day Sri Lanka, originally used Roman-Dutch law that remained in implementation also during the British rule albeit the significance of English case law was also quite considerable. In the past few decades the influence of Roman-Dutch law was getting stronger that goes back partly to the fact that the majority of lawyers in Sri Lanka has studied at universities outside Great Britain. The Roman-Dutch law as the "common law" of Sri Lanka is the most conspicuous today in the field of the law of things and English law is used as a source of law (fons iuris) exceptionally, predominantly in the field of commercial i.e. mercantile law.

Indonesia, i.e., the former Dutch East Indies, also applied Roman-Dutch law as the civil and commercial code of Indonesia promulgated in 1847 was practically the local version of the Dutch civil code of 1848 and the Dutch commercial code of 1838. This Indonesian civil code that referred for a long time only to citizens of European descent in Indonesia is still in implementation to a considerable extent.

Keywords: *Roman-dutch law; Roman law; influence in Europe and beyond Europe.*

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I. Niederlande im frühen und späten Mittelalter

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1. In der mittelalterlichen Rechtspraxis *(ius in praxi)* in den Niederlanden wurde neben dem feudalen Recht *(ius feudale)* und dem kanonischen Recht *(ius canonicum)* auch dem römischen Recht allgemeine Geltung zugewiesen. Die Bedeutung des römischen Rechts wuchs mit Hilfe der in der Mitte des 15. Jahrhunderts beginnenden Rezeption des *ius commune* und später

auch durch die Gründung der Universitäten in Leuven im Jahre 1425 und Leiden im Jahre 1575.[1] Diese Entwicklung gipfelte im Laufe des 17. Jahrhunderts in der Entstehung des *römisch-holländischen Rechts*, welches in den nördlichen, vom Heiligen Römischen Reich *(Sacrum Romanum Imperium)* im Jahre 1648 auch *de jure* abgespalteten Gebieten Geltung hatte.

2. In den Niederlanden entfaltete sich die Humanistische Schule während des 17. und des 18. Jahrhunderts, wo sie nach ihrer Entfaltung in Italien ihre zweite Blütezeit in Europa erlebte. Besonders nennenswert sind folgende Vertreter dieser wissenschaftlichen Richtung, die unter dem Namen *Elegante Holländische Rechtswissenschaft* bekannte wurde: Arnoldus Vinnius (Vinnen, 1588–1657), Anton Schulting (1659–1734), Paulus Voëtus (Voet, 1619–1667) und sein Sohn Iohannes Voëtus (1647–1714), Cornelis van Bynkershoek (1673–1743)[2], Gerard Noodt (1647–1725)[3], der „holländische Cuiacius", Ulrich Huber (1636–1694) und Johann Ortwig Westenberg (1667–1737)[4].

3. Eigens hervorgehoben werden muss Hugo Grotius (Huig de Groot, 1583–1645). Grotius wird zwar traditionsgemäß – hauptsächlich aufgrund seines bekanntesten Werkes *De jure belli ac pacis libri tres in quibus ius naturae et gentium item iuris publici precipua explicantur* vom Jahre 1625 – als einer der Väter des modernen Völkerrechts *(ius gentium* oder *ius inter gentes)* betrachtet; sein Hauptverdienst liegt jedoch neueren Forschungen zufolge eher in der Begründung des Privatrechts auf der Basis des Naturrechts. Das für die holländische Rechtsentwicklung grundlegende Werk *Inleidinghe tot de Hollandsche Rechtsgeleerdheijdt* (gedruckt im Jahre 1631) schöpft in bedeutendem Maße aus den justinianischen Institutionen.[5]

4. Die niederländischen Rechtsgelehrten *(jurisconsulti)* übten nicht nur große Wirkung auf die Rechtsentwicklung ihres eigenen Landes, sondern auf die Rechtswissenschaft *(scientia iuris)* in ganz Europa aus, indem sie das römische Recht auf die modernen Verhältnisse anpaßten. Ihre Werke von grundlegender Bedeutung begründeten die *Römisch-Holländische Rechtswissenschaft*.

II. Niederlande im modernen Zeitalter

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1. Die Kodifikation des Zivilrechts in den Niederlanden war in Art. 28 der Verfassung („Staatsregelung") vom Jahre 1798 der damaligen Batavischen Republik *(Bataafsche Republiek)*, die im Jahre 1795 ausgerufen wurde, vorgeschrieben.6 Im Einvernehmen mit Art. 28 der Verfassung wurde eine Redaktionskommission aus zwölf Mitgliedern ins Leben gerufen. Die Subkommission unter Vorsitz von Hendrik Constantin Cras (1739–1820), Professor für Zivilrecht am *Athenaeum Illustre* in Amsterdam, erstellte den Vorentwurf bzw. die Vorentwürfe des Zivilrechtskodex für die Batavische Republik. Im Jahre 1806 – in diesem Jahre wurde die Batavische Republik aufgelöst – gab der Hohe Nationalgerichtshof über den Vorentwurf *(Ontwerp)* ein negatives Gutachten an König Ludewijk ab, das gleichsam das Ende dieses Kodifikationsvorhabens bedeutete.

Die Kodifikationskommission nahm noch im Laufe des gleichen Jahres unter der Leitung von Joannes van der Linden (1756–1835), dem bekannten Rechtsanwalt in Amsterdam die Kodifikationsarbeit wieder auf. Die Kommission hat bereits im Jahre 1807 einen neuen, diesmal vollständigen Entwurf erstellt. Das Inkraftsetzen dieses Entwurfes scheiterte daran, dass Napoleon den französischen *Code civil* in den Niederlanden einführen wollte. Eine neue Kommission hatte die Aufgabe, die von König Ludowijk für die niederländischen Verhältnisse als notwendig erachteten Anpassungen im Text des Zivilrechtskodex durchzuführen. In Holland wurde am 1. Mai 1809 der ins Holländische übersetzte französische *Code civil* mit einigen kleinfügigen landesspezifischen Abänderungen in Kraft gesetzt.[7] Die Modifikationen basierten vor allem im alten Recht der Provinz Holland (auf Holländisch: *oud-vaderlandse recht*). Diese betrafen in erster Linie das Ehegüterrecht und die Eigentumsübertragung.[8]

2. Kaiser Napoleon I. war wegen der Modifikationen des *Code civil* (seit dem Jahre 1807 offiziell *Code Napoléon* geheißen) unzufrieden und zwang seinen Bruder, König Ludowijk zum Rücktritt bzw. zur Abdankung. Im Jahre 1810 wurden die Niederlande Frankreich einverleibt. Am 1. März 1811 wurde das *Burgerlijk Wetboek* vom französischen *Code civil (Code Napoléon)* ersetzt. Ebenso wurde auch die holländische Version des französischen *Code de commerce* vom Jahre 1807 in Kraft gesetzt.

3. Das beinahe ausschließlich am französischen *Code civil* orientierte Zivilgesetzbuch wurde im Jahre 1838 von einem neuen *Burgerlijk Wetboek* ersetzt.[9] Das neue Zivilgesetzbuch gründet zwar im Wesentlichen auf seinem Vorgänger, beinhaltet jedoch Elemente des Römisch-Holländischen Rechts *(Romeins-Hollands recht*). Außerdem wird das Vermögensrecht im Gegensatz zum *Code civil* in *zwei* Büchern geregelt.[10] Ein weiterer Unterschied zum französischen *Code civil* ist, dass das *Burgerlijk Wetboek* keinen *Titre préliminaire* hat.

Das *Burgerlijk Wetboek* vom Jahre 1838 wurde durch die richterliche Praxis *(jurisprudence)* fortentwickelt. Der niederländische Gesetzgeber zeigte aber wenig Interesse an der in vielen Fällen fälligen Modifikation des bürgerlichen Gesetzbuches. Die ersten Versuche zur Neukodifizierung des Zivilrechts in den Niederlanden gehen auf die letzten Jahrzehnte des 19. Jahrhunderts zurück. Aus dieser Zeit stammen einige Teilentwürfe, die die Revision des *Burgerlijk Wetboek* zum Zweck haben.

Der neue niederländische Kodex für Handelsrecht *(Wetboek van Koophandel),* der auch im Jahre 1838 verkündet wurde, wurde zusammen mit dem *Burgerlijk Wetboek* in Kraft gesetzt.

4. Anläßlich der Hundertjahrfeier des *Burgerlijk Wetboek,* die in Den Haag stattfand, trat der namhafte Zivilrechtler Paul Scholten (1875–1946), Professor für Zivilrecht an der Universität Leiden, für die Beibehaltung des Bürgerlichen Gesetzbuches vom Jahre 1838 ein.11

Der namhafte Professor für Zivilrecht und internationales Privatrecht in Leiden (1910 bis 1950), Eduard Maurits Meijers (1880–1954),[12] dessen Forschungen sich vor allem auf das Fortleben des römischen Rechts im Mittelalter bezogen, wurde im Jahre 1947 mit der grundlegenden Revision des Bürgerlichen Gesetzbuches beauftragt.[13]

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6 Der gleiche Artikel der Verfassung („Staatsregelung") vom Jahre 1798 sah auch die Kodifikation des Strafrechts und des Prozeßrechts vor.

7 Der offizielle Name des ersten niederländischen Zivilgesetzbuches war *Wetboek Napoleon, ingerigt voor het Koningrijk Holland* (auf Französisch: *Code Napoléon adapté pour le Royaume de Hollande*).

8 Die im römischen Recht wurzelnde *traditio*, war im *Wetboek Napoleon, ingerigt voor het Koningrijk Holland* Voraussetzung der Eigentumsübertragung *(translatio dominii).*

9 In der Provinz Limburg (*Hertogtom Limburg*), die dem Deutschen Bund angehörte, wurde das Bürgerliche Gesetzbuch vom Jahre 1838 erst einige Jahre später, am 1. Januar 1842 in Kraft gesetzt.

10 J. Th. de Smidt: *Rechtsgewoonten. De gebruiken en plaatselijke gebruiken waarnar het Burgerlijk Wetboek verwijst.* Amsterdam 1954.

11 Paul Scholten nannte das *Burgerlijk Wetboek* vom Jahre 1838 als „einen ruhigen Besitz" *(„Ons Burgerlijk Wetboek is een vredig bezit")* und hielt die Neukodifikation des bürgerlichen Rechts nicht für notwendig.

12 Der Ordinarius am Lehrstuhl für Römisches Recht an der Universität Leiden war in dieser Zeit Professor J. C. van Oven (1881–1963).

13 Meijers wurde durch den Königlichen Beschluß *(Koningklijk Besluit)* vom 25. April 1947 mit der Erstellung des Textes des neuen niederländischen Bürgerliches Gesetzbuches beauftragt. Meijers formulierte zunächst 52 Fragen, die der Zweiten Kammer *(Tweede Kamer)* des niederländischen Parlaments *(Staaten-Generaal)* vorgelegt wurden. Die Zweite Kammer hat diese Fragen nach einer gründlichen parlamentarischen Debatte bzw. Diskussion beantwortet.

Bis zu seinem Tode konnte er allerdings von den geplanten neun Büchern des Gesetzbuches nur den Entwurf für vier Bücher fertigstellen. Im Entwurf *(Ontwerp)* des neuen Kodex, der gemäß dem monistischen Konzept *(concept moniste)* auch das Handelsrecht beinhaltet, spiegelt sich hinsichtlich der Struktur (Systematik) und der Regelung zahlreicher Rechtsinstitute (z.B. im Bereich der Rechtsgeschäfte) die Wirkung der deutschen Pandektistik wider.[14] Im Gegensatz zum deutschen BGB enthielt er aber keinen Allgemeinen Teil *(Algemeen Deel).* Immerhin wurden im Entwurf die gemeinsamen Normen des Vermögensrechts und des Schuldrechts gesondert, in einem selbständigen Teil, geregelt.

5. Die Struktur des neuen niederländischen Bürgerlichen Gesetzbuches ist die folgende: Das Erste Buch *(Personen- en familienrecht):* Personenrecht und Familienrecht; Das Zweite Buch *(Rechtspersonen):* Juristische Personen einschließlich der Handelsgesellschaften (unter anderem die Aktiengesellschaft und die Gesellschaft mit beschränkter Haftung), Genossenschaften, Vereine und Stiftungen; Das Dritte Buch *(Vermogensrecht in het algemeen):* Allgemeine vermögensrechtliche Bestimmungen (Vermögensrecht); Das Vierte Buch *(Erfrecht):* Erbrecht; Das Fünfte Buch *(Zakelijke rechten):* Sachenrecht; Das Sechste Buch *(Algemen gedeelte van het verbintenissenrecht):* Allgemeiner Teil des Schuldrechts; Das Siebte Buch *(Bijzondere overeenkomsten),* das aus zwei Büchern, nämlich aus Buch 7 und Buch 7/A besteht: Besonderer Teil des Schuldrechts (einzelne Verträge); Das Achte Buch *(Verkeersmiddelen en vervoer):* Frachtverträge; Das Neunte Buch über das geistige Eigentum und das Zehnte Buch über das Internationale Privatrecht.

Zu bemerken ist, dass zur Zeit noch nicht alle Bücher des neuen *Burgerlijk Wetboek* fertiggestellt bzw. in Kraft gesetzt sind. Das Neunte Buch über das geistige Eigentum ist noch nicht in Kraft getreten.[15]

6. Das neue niederländische Bürgerliche Gesetzbuch (*Nieuw Burgerlijk Wetboek*, abgekürzt: *NBW*), trat und tritt stufenweise in Kraft. Das Erste Buch wurde im Jahre 1970 in Kraft gesetzt. Dieses Buch wurde zwei Jahre später, im Jahre 1972 durch das Gesetz über die Ehescheidung modifiziert. Das Zweite Buch wurde im Jahre 1976 in Kraft gesetzt. Das Achte Buch wurde am 1. April 1991 in Kraft gesetzt. Das Dritte Buch, das Fünfte Buch, das Sechste Buch und das Siebte Buch (Buch 7 und Buch 7/A) traten am 1. Januar 1992 in Kraft. Das Vierte Buch *(Erbrecht)* wurde am 1. Januar 2003 in Kraft gesetzt.[16] Einige Bestimmungen des *Burgerlijk Wetboek* vom Jahre 1838 sowie Gesetze, die teilweise noch in der ersten Hälfte des 19. Jahrhunderts verabschiedet worden waren (wie z. B. das Gesetz über das internationale Privatrecht vom Jahre 1827), sind immer noch in Kraft. Hier verweisen wir darauf, dass nach dem 1. Januar 1992 das Siebte Buch in zwei Bücher, nämlich Buch 7 und Buch 7/A umnumeriert wurde. Die Rechtsmaterie des Buches 7/A ist ein „Restbestand" des Bürgerlichen Gesetzbuches vom Jahre 1838. In diesem Teil des neuen *Burgerlijk Wetboek* sind diejenigen Verträge zu finden, die (noch) nicht abgeändert bzw. ersetzt worden sind.

Das neue niederländische Bürgerliche Gesetzbuch, das im Entwurf *(Ontwerp)* von Eduard Maurits Meijers wurzelt, schöpft mehrere Rechtsprinzipien und konkrete Regelungen aus dem römischen Recht. Demzufolge steht es dem römischen Recht in vielerlei Hinsicht näher als sein vor allem vom französischen *Code civil* inspirierter Vorgänger aus dem Jahre 1838. Das Dritte Buch des neuen niederländischen Bürgerlichen Gesetzbuches hat einen Teil des Vermögensrechtes, welcher am Vorbild des Allgemeinen Teils des deutschen BGB orientiert ist. In manchen Bereichen, insbesondere im Gesellschaftsrecht ist der Einfluss der Rechtsvereinheitlichungsbestrebungen in der Europäischen Wirtschaftsgemeinschaft (EWG) stark bemerkbar. Gleichermaßen verhält es sich mit der Produkthaftung und den unlauteren Vertragsbedingungen.

III. Außengebiete bzw. frühere Außengebiete der Niederlande

1. Das neue niederländische Bürgerliche Gesetzbuch wurde mit Veränderungen bzw. Anpassungen in den Niederländischen Antillen *(Nederlandse Antillen)* am 1. Januar 2001 in Kraft gesetzt.[17]

Das Inkraftsetzen des *Nieuw Burgerlijk Wetboek* erfolgte in Aruba am 1. Januar 2002.[18]

Curaçao und Sint Maarten waren von 1954 bis 2010 Teile der Niederländischen Antillen. Am 10. Oktober 2010 erhielten Curaçao und Sint Maarten[19] den gleichen Sonderstatus *(Status Aparte)* wie Aruba im Jahre 1986. Die grosse Staatsreform im Königreich der Niederlande (*Koningkrijk der Nederlanden)* fand am 10. Oktober 2010 statt. Aufgrund dieser Staatsreform wurden Curaçao und Sint Maarten unabhängig.[20]

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[14] Die Annahme des monistischen Konzepts *(concept moniste)* seitens des niederländischen Gesetzgebers wird vom am 20. Juli 1934 verabschiedeten Gesetz bezeugt, welches die zivilrechtlichen und die handelsrechtlichen Verträge einheitlich regelt. Dieses Gesetz hebt die Unterscheidung zwischen den professionellen Händlern und den nicht professionellen Händlern auf.

[15] Siehe http://zoek.officielebekendmakingen.nl/stb-2011-272.html.

[16] Hier verweisen wir darauf, dass die Bestimmungen über die Beweise, die im *Burgerlijk Wetboek* vom Jahre 1838 zu finden sind, im neuen Zivilprozeßkodex geregelt werden. Der Kodex über das Zivilprozeßrecht wurde am 7. Juni 1938 verabschiedet.

[17] In Bezug auf die Anwendung des niederländischen Bürgerlichen Gesetzbuches vom Jahre 1838 in Curaçao siehe B. De Gaay Fortman: Het Burgerlijk Wetboek in Suriname en Curaçao. In *Gedenkboek Burgerlijk Wetboek 1838 – 1938.* Zwolle 1938.

[18] Aruba ist seit 1636 Niederländisch. Der Sonderstatus *(Status Aparte)* von Aruba geht auf das Jahr 1986 zurück. Die Verfassung Arubas wurde im gleichen Jahre verabschiedet. Das Parlament *(Staten)* dieser Entität hat 21 Mitglieder. Die Wahl zum Parlament findet alle vier Jahre statt. Aruba hat einen Gouverneur und einen Regierungschef.

[19] Wir verweisen darauf, dass nur der südliche Teil der Insel Sint Maarten zum Königreich der Niederlande gehörte. Der etwas größere nördliche Teil ist unter dem Namen Saint Martin Außengebiet *(Collectivité d'outre-mer)* Frankreichs.

[20] Curaçao und Sint Maarten haben seit 2010 einen Gouverneur (Curaçao eine Gouverneurin) und einen Regierungschef.

Die Inseln Bonaire, Saba und Sint Eustatius sind seit 2008 „Besondere Niederländische Gemeinden".[21]

2. Aufgrund dieser Veränderungen bzw. Anpassungen sind auf diesen, über weitgehende Autonomie verfügenden Gebieten des Königreichs der Niederlande *(Koninkrijk der Nederlanden)* in der Karibik drei Varianten des neuen niederländischen Bürgerlichen Gesetzbuches in Kraft. Auf den fünf Karibikinseln (Curaçao, Bonaire, Sint Maarten,[22] Sint Eustatius und Saba) – bis zum Jahre 2008 Niederländische Antillen – ist ein eigenes Bürgerliches Gesetzbuch in Kraft, das vor allem im Gesellschaftsrecht, Familienrecht und Verbraucherrecht Unterschiede zum neuen niederländischen Bürgerlichen Gesetzbuch aufweist.

3. Das *Burgerlijk Wetboek* von Aruba weist nur wenige Unterschiede zum Bürgerlichen Gesetzbuch der Niederländischen Antillen auf. Der Unterschied zeigt sich vor allem im Bereich des Konsumentenrechts, das im Jahre 2003 durch Gesetz modifiziert wurde. Die drei Karibikinseln Bonaire, Saba und Sint Eustatius („Besondere Niederländische Gemeinden") werden in der nächsten Zukunft das neue Niederländische Bürgerliche Gesetzbuch einführen.

IV. Suriname[23]

Schrifttum

B. De Gaay Fortman: *Het Burgerlijk Wetboek in Suriname en Curaçao. In Gedenkboek Burgerlijk Wetboek 1838 – 1938.* Zwolle 1938.; A. Quintus Bosz: *Drie eeuwen grondpolitick in Suriname.* (Diss. Utrecht) Utrecht 1954.; E. van den Bergh – A. J. Rondeel: Overzicht van de in het Surinaams Burgerlijk Wetboek aangebrachte varanderingen gedurende de periode 1869 tot heden, beneves van enkele belangrijke verschillen met het Nederlands Burgerlijk Wetboek. In *Een eeuw Surinaams codificatie. Gedenboek 1 mei 1869 – 1 mei 1969.* Paramaribo 1969.; A. J. A. Quintus Bosz: De weg tot de invoering van de nieuwe wetgivinh in 1869 en de overgang van het oude haar het nieuwe burgerlijk recht. In *Een eeuw Surinaams codificatie. Gedenboek 1 mei 1869 – 1 mei 1969.* Paramaribo 1969.; C. C. Goslinga: *A Short History of the Netherlands Antilles and Suriname.* The Hague 1979.; G. Willemsen: *Koloniale politiek en transformatieprocessen in een plantageeeconomie. Suriname 1873–1940.* Amsterdam 1980.; C. R. Jadnanansing – C. A. Kraan: *Hoofdlijnen van het Surinaams erfrecht.* Groningen 1998.; K. D. de Lange: Het nieuwe Nederlandse erfrecht door een Surinaamse bril. *Surinaams Juristenblad,* 2003. no. 3. Paramaribo 2003.; M. H. D. Pinas: *Een rechtsvergelijkende studie van het Surinaamse erfrecht en het nieuwe Nederlandse erfrecht inzake de afwikkeling van opengefallen nalatenschappen.* (Doctoraalscriptie Universiteit van Suriname) Paramaribo 2004. und J. de Boer: Ontwerp – Boek 4 Nieuw Burgerlijk Wetboek van Suriname. In *Actualiteiten personen en familienrecht.* Paramaribo 2007.

1. In der einstigen niederländischen Kolonie (Niederländisch-Guyana)[24] Suriname *(Republiek van Suriname)* wurde das alte holländische Recht *(oud-Hollandsche regt)* und das subsidiär geltende römische Recht (*Romeinsch regt*) im Jahre 1869 durch das niederländische Zivilgesetzbuch *(Burgerlijk Wetboek)* des Jahres 1838 ersetzt. Das niederländische Recht wurde durch spezifische Rechtsnormen für die Kolonie Suriname ergänzt.

Dieses Gesetzbuch ist unter dem Namen *Surinaams Burgerlijk Wetboek* auch nach der Erlangung der Unabhängigkeit im Jahre 1975 in Kraft geblieben. Mit der Erlangung der Unabhängigkeit wurde ein Großteil der kolonialen Rechtsnormen zu nationalem Recht Surinames erklärt. Die im Jahre 1987 verabschiedete Verfassung hatte diese Erklärung bestätigt. In Suriname werden Teile des Zivilrechts ab Anfang des letzten Jahrzehnts des 20. Jahrhunderts neukodifiziert bzw. neugeregelt. Dies bezieht sich vor allem auf das Erbrecht. Im Jahre 2007 wurde der erbrechtliche Teil (das Vierte Buch) des *Surinaams Burgerlijk Wetboek* neukodifiziert.

2. Das neue niederländische Bürgerliche Gesetzbuch *(Nieuw Burgerlijk Wetboek)* hat sowohl in der Zivilrechtsgesetzgebung als auch in der Doktrin Einfluss auf die Privatrechtsordnung von Suriname. Dieser Einfluss macht sich in erster Linie im Erbrecht bemerkbar.

3. Das Handelsrecht wird weiterhin von dem im Jahre 1838 verabschiedeten niederländischen Handelsgesetzbuch geregelt *(Wetboek van Koophandel).* Dies bedeutet allerdings nicht, dass das monistische Konzept in Suriname nicht zur Geltung käme, da die im Jahre 1934 durchgeführte Reform des niederländischen Handelsgesetzbuches inhaltlich dem monistischen Konzept *(concept moniste)* folgt.

V. Guyana[25]

1. Das im Jahre 1966 unabhängig gewordene Guyana *(Co-operative Republic of Guyana)* war bis zum Jahre 1803 niederländische, ab dann britische Kolonie. Der Vertrag von London aus dem Jahre 1816 legte die Grenzen zwischen dem heutigen Guyana, Suriname und Guyane fest. British Guyana wurde im Jahre 1831 Kronkolonie *(crown colony).* Im Jahre 1831 vereinigten sich die drei ehemaligen niederländischen Kolonien Essequebo, Demerara und Berbice unter dem Namen *British Guyana.* Von Seiten des im Jahre 1831 gegründeten Obersten Gerichtshofes *(Supreme Court)* zeigten sich sogleich Bemühungen, das Römisch-holländische Recht (auf Holländisch: *Romeins-Hollands recht,* auf Englisch: *Roman-Dutch law*) durch das englische Recht *(Common law)* zu ersetzen.

2. Der kontinuierliche Bedeutungsverlust der holländischen Sprache erschwerte die Anwendung von Werken niederländi-

[21] Die Niederländischen Antillen wurden als Entität durch diese (verwaltungsrechtliche und verfassungsrechtliche) Neuregelung aufgelöst. Die Vertreter der fünf Inseln in der Karibik und die Regierung der Niederlande haben sich am 2. November 2006 in Den Haag auf die Auflösung der Niederländischen Antillen, die seit dem Jahre 1954 als autonome politische Einheit innerhalb des Königreichs der Niederlande existierten, geeinigt. Diesen Vereinbarungen waren Volksentscheide auf den fünf Inseln vorausgegangen. Hier sei erwähnt, dass die Niederländischen Antillen im Jahre 1954 auch eine Verfassung erhielten. Das Parlament *(Staten)* der *Nederlandse Antillen* hatte 22 Mitglieder.

[22] Der nördliche Teil der Insel Sint Maarten gehört zu Frankreich (St. Martin bzw. Saint-Martin). St. Martin bzw. Saint-Martin hat den Status einer *Collectivité d'outre-mer* seit dem Jahre 2007.

[23] A. Quintus Bosz: *Drie eeuwen grondpolitiek in Suriname.* (Diss.) Utrecht 1954.; C. C. Goslinga: *A Short History of the Netherlands Antilles and Suriname.* The Hague 1979. und G. Willemsen: *Koloniale politiek en transformatieprocessen in een plantageeeconomie. Suriname 1873–1940.* Amsterdam 1980.

[24] Guayana hieß bis zum Jahre 1664 Neu-Niederland. Hier sei darauf verwiesen, das Französisch-Guayana *(Guyane Française)* erst im Jahre 1817 französischer Besitz wurde. Seit dem Jahre 1947 ist Französisch-Guayana *département d'outre-mer* Frankreichs.

[25] M. C. Dalton: The Passing of Roman-Dutch Law in British Guyana. *SALJ* 26 (1919); M. C. Dalton: *The Civil Law of British Guyana.* Georgetown 1921. und T. J. Spinner: *A Political and Social History of Guyana.* Boulder (Colorado), 1984.

scher Autoren in der Rechtsprechung auf allen Gebieten der Kolonie, einschließlich Barbice (welches die holländische Sprache und Kultur am längsten bewahrt hatte). Gleichzeitig ist zu beobachten, dass Großbritannien durch die Verabschiedung von *ordinances* (Verordnungen) das englische Recht *(Common law)* immer mehr zum verbindlichen Recht erklärte – so geschehen auf den Gebieten des Erbrechts *(law of succession)* und der Verjährungsregeln *(prescriptions).*

3. Trotz des angelsächsischen Vordringens hatte sich Großbritannien im Kapitulationsvertrag mit der Batavischen Republik *(Bataafsche Republiek)* im Jahre 1803 verpflichtet, bis zum 1. Januar 1917 in der Kolonie das Römisch-holländische Recht *(Romeins-Hollands recht* bzw. *Roman-Dutch law)* als geltendes Recht zu bewahren. Trotz der anschließenden Übernahme des *Common law* auch in formaler Hinsicht sind immer noch einige römischrechtliche Institute und Klageformen *(writs),* insbesondere im Bereich des Immobilienrechts *(Law of Real Property),* erhalten geblieben.

4. Es soll darauf verwiesen werden, dass die im Jahre 1980 in Kraft getretene und mehrfach, zuletzt im Jahre 2001 modifizierte Verfassung Guyanas keine Bestimmungen bezüglich der Privatrechtsordnung des Staates enthält.

VI. Ceylon (Sri Lanka)

Schrifttum

G. C. Mendis: *The Early History of Ceylon and its Relations with India and other Foreign Countries.* Calcutta 1932.; T. Nadaraja: *The Roman-Dutch Law of Fideicommissa.* Ceylon 1949.; L. J. M. Cooray: The Reception of the English Trust in the Roman-Dutch Jurisprudence of Ceylon. *SALJ* 86 (1969); J. M. Cooray: *An Introduction to the Legal System of Ceylon.* Colombo 1972.; T. Nadaraja: *The Legal System of Ceylon in its Historical Setting.* Leiden 1972.; H. W. Tambiah: *Principles of Ceylon Law.* Colombo 1972.; C. G. Weeramantry: Contractual Remedies in Sri Lanka. In *Contractual Remedies in Asian Countries Indian Law Institute.* 1975.; K. M. de Silva: *A History of Sri Lanka.* London 1981.; *Law and Culture in Sri Lanka. A Research Report on Asian Indigenous Law.* (Ed. by M. Chiba) Tokyo 1984.; M. J. van den Horst: The Roman-Dutch Law of Possessory Remedies in Sri Lanka. *Lesotho Law Journal,* 1 (1985); C. G. Weeramantry: The Reception and Development of the Roman-Dutch Law in Sri Lanka. *Lesotho Law Journal,* 1 (1985); R. Rajepakse: *An Introduction to Law in Sri Lanka.* Colombo 1990.; A. Cooray: *Sri Lanka: Occidental and Oriental Laws in Harmony. Studies in Legal Systems: Mixed and Mixing.* London 1996.; J. van Goor: *De Nederlandse Koloniën. Geschiedenis van de Nederlandse expansie 1600–1975.* Den Haag 1997[2].;L. R. Reddy: *Sri-Lanka. Past and Present.* New Delhi 2003. und Földi A. – Hamza G.: *A római jog története és institúciói. (Geschichte und Institutionen des römischen Rechts).* Budapest 2014[19]. S. 130.

1. Auf der Insel Ceylon, dem heutigen Sri Lanka, wurde nach der holländischen Kolonisierung, die die portugiesische Herrschaft ersetzt hatte, das Römisch-holländische Recht (auf Afrikaans: *Romeins-Hollands reg,* auf Englisch: *Roman-Dutch law*) eingeführt. Das *Romeins-Hollands reg* bzw. *Roman-Dutch law* konnte dort auch während der britischen Kolonialherrschaft größtenteils seine Geltung bewahren. Immerhin war das englische *case law* in der Rechtsprechung immer stärker präsent. Dies ist unter anderem damit zu erklären, dass aufgrund des *Courts Ordinance* aus dem Jahre 1889 ein englisches Gerichtssystem eingeführt wurde. Die in der Rechtsprechung angewandten zahlreichen Berufungen auf Werke, die dem *Roman-Dutch law* als Grundlage dienten – vor allem die Werke Johannes Voets –, konnten diese Tendenz nicht ausgleichen.

2. In den vergangenen Jahrzehnten konnte das Römisch-holländische Recht jedoch seine Position wieder stärken. Dies ist nicht zuletzt auf den Umstand zurückzuführen, dass die juristische Bildung von Sri Lanka nach dem Erlangen der Unabhängigkeit nicht mehr dem System der englischen Juristenausbildung folgt.

In seiner reinsten Form findet sich das Römisch-holländische Recht heute auf dem Gebiet des Sachenrechts. Dort kommt das englische *Common law* weit weniger zur Geltung. Das *Common law* findet dagegen vor allem im Bereich des Handelsrechts *(commercial law, law of commerce* oder *mercantile law)* breite Anwendung.

3. Als Resultat der Vermischung der Elemente des kontinentaleuropäischen Privatrechts mit dem englischen *Common law* ist die Privatrechtsordnung Sri Lankas als *mixed jurisdiction* zu bezeichnen. In den letzten Jahrzehnten verbreitete sich unter ceylonischen Juristen die Ansicht, die Rechtsordnung Sri Lankas sei als *indigenous* (einheimisches) *Common law* zu betrachten. Im Bereich des Familienrechts und des Erbrechts gelten auch Normen bzw. Prinzipien des islamischen Rechts (Schari'a) und des Gewohnheitsrechts (*ius consuetedudinarium* bzw. *consuetudines*).

4. Die am 7. September 1978 in Kraft getretene Verfassung von Sri Lanka, die mehrfach, zuletzt im Jahre 2001 geändert wurde, beinhaltet im Hinblick auf den „Charakter" der Privatrechtsordnung des Inselstaates keine Bestimmung.

VII. Indonesien

Schrifttum

H. J. van Mook: Indonesia and the Problem of Southeast Asia. *Foreign Affairs,* 27 (1948–1949) S. 561–575.; H. G. Angelo: Transfer of Sovereignty over Indonesia. *American Journal of International Law,* 44 (1950) S. 569–572.; J. la Bree: *De rechterlijke organisatie en rechtsbedeling te Batavia in de XVIIe eeuw.* (Proefschrift) Leiden 1951.; W. A. Engelbrecht: *De Wetboeken wetten en verordningen beneven de Grondet van de Republiek Indonesie.* Bruxelles 1960.; P. Goetzen: Die Rezeption des niederländischen Rechts in Indonesien. *ZVglRWiss* 73 (1972) S. 64 ff.; B. Dahm: *Indonesien. Geschichte eines Entwicklungslandes. 1945–1971.* Leiden 1978.; M. B. Hooker: *Adat Law in Modern Indonesia.* Kuala Lumpur 1978.; J. Ball: *Indonesian Legal History 1602–1848.* Sydney 1982.; S. Gautama – R. S. Hornick: *An Introduction to Indonesian Law. Unity in Diversity.* Bandung 1983.; S. Gautama: *Essays in Indonesian Law.* Bandung 1993[2].; R. Cribb – C. Brown: *Modern Indonesia. A History since 1945.* Harlow 1996.; D. Fitzpatrick: Disputes and Pluralism in Modern Indonesian Land Law. *Yale Studies in International Studies,* 22 (1997) S. 171–212.; J. van Goor: *De Nederlandse Koloniën. Geschiedenis van de Nederlandse expansie 1600–1975.* Den Haag 1997[2].; J. J. P. de Jong: *De waaier van het fortuin. De Nederlanders in Azië en de Indonesische archipel 1595–1950.* Den Haag 1998.; A. J. B. Sirks: „In as far as in Accordance with the Conditions of these Lands and Practice." European and Native Law in the Dutch-East Indies. *IC* 25 (1998) S. 159–179.; M. C. Ricklefs: *A History of Modern Indonesia since c. 1200.* Hampshire 2001[3].; C. Brown: *A Short History of Indonesia.* Crows Nest 2003.; N. S. Efthymiou: *De organisatie van regelgeving voor Nederlands Oost-Indië. Stelsels en opvattingen (1602–1942).* Amsterdam 2005.; J. A. Sommers: *Nederlandsch-Indië. Staatkundige ontwikkelingen binnen een koloniale relatie.* Zutphen 2005. und Földi A. – Hamza G.: *A római jog története és institúciói. (Geschichte und Institutionen des römischen Rechts).* Budapest 2014[19]. S. 130.

1. In Indonesien, dem einstigen Niederländisch-Ostindien (amtliche Bezeichnung: Niederländisch-Indien), hat die Einflussnahme des römisch-holländischen Rechts *(Roman-Dutch*

law) gleichfalls stattgefunden.[26] Dies ist der Tatsache zu verdanken, dass die im Jahre 1847 verabschiedeten Gesetze für Niederländisch-Ostindien über das Bürgerliche Recht und das Handelsrecht im Wesentlichen die nur leicht veränderte Fassung des niederländischen Bürgerlichen Gesetzbuchs *(Burgerlijk Wetboek)* vom Jahre 1838 und des Handelsgesetzbuchs *(Wetboek van Koophandel)* aus dem gleichen Jahre sind.[27] Das Bürgerliche Gesetzbuch für Niederländisch-Ostindien galt gemäß dem Personalitätsprinzip *(personalitas)* lange Zeit nur für die Bevölkerung europäischer Herkunft in Indonesien. Die Rechtsordnung Indonesiens war immer durch Pluralismus gekennzeichnet.

2. Nachdem Indonesien im Jahre 1949 unabhängig geworden war, erweiterte man die Geltung des Kodex auf *sämtliche* Einwohner des Staates. Gleichzeitig wurde sein Geltungsbereich auf das Sachen- und Schuldrecht beschränkt. Der Grund hierfür liegt darin, dass die fortschreitende Islamisierung des Landes auch die Wiedereinführung des traditionellen *Adat*-Rechts[28] mit sich brachte. Dieses örtliche, religiös veranlagte Gewohnheitsrecht kommt vor allem auf dem Gebiet des Personen-, Familien- und Erbrechts zur Anwendung. Oft gibt es ein Spannungsverhältnis von religiösem (islamischem) Recht und örtlichem Gewohnheitsrecht. Das Ehe-und Kindschaftsgesetz vom Jahre 1974 wird von diesem Spannungsverhältnis geprägt. Die Anwendbarkeit dieses Gesetzes hängt davon ab, welcher Religions- bzw. Bevölkerungsgruppe die Beteiligten angehören. Im Bereich des Erbrechts ist das *Adat*-Recht maßgeblich.

3. Der Pluralismus ist auch im Gerichtssystem verankert. Das im Jahre 1971 verabschiedete Gesetz über die Gerichtsverfassung unterscheidet ordentliche und religiöse Gerichte. Der Kompetenzbereich der religiösen Gerichte erstreckt sich allem auf Streitigkeiten des islamischen Familienrechts.

4. Das Gesellschaftsrecht wird durch ein im Jahre 1995 verabschiedetes Gesetz geregelt. Das Grundpfandrecht wird von einem im Jahre 1996 in Kraft getretenen Gesetz geregelt. Das Urheber-, Patent- und Markenrecht, das Investitionsrecht und das Bank-und Kapitalmarktrecht werden auch von eigenständigen Gesetzen, die in den 90-er Jahren des 20. Jahrhunderts verabschiedet oder geändert worden waren, geregelt.

5. Die Bodeneigentumsverhältnisse werden vom Bodengesetz aus dem Jahre 1960 geregelt.

VIII. Südafrika

Schrifttum

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[26] Der erste niederländische Stützpunkt wurde im letzten Jahrzent des 16. Jahrhunderts, durch Cornelis de Houtman, den Leiter der ersten niederländischen Handelsexpedition nach Ostindien in Westjava, in Bantam errichtet. Die im Jahre 1602 gegründete niederländische Vereinigte Ostindische Kompanie (VOC) erhielt alle Vollmachten zur Einrichtung neuer Handelsfaktoreien. Diese Vollmachten bezogen sich auch auf die bereits bestehenden Handelsfaktoreien. J. P. Coen, Generalgouverneur und Begründer Batavais war es gelungen, die Einflußsphäre der Kompanie zu etablieren. Damit wurde die Grundlage für das niederländische Kolonialreich gelegt. Erst im Jahre 1799, als die Vereinigte Ostindische Kompanie aufgelöst wurde, übernahm die Regierung der Batavischen Republik die Besitzungen d. h. das Archipel der Kompanie. Die unabhängige Republik „Indonesien" wurde am 17. August 1945 ausgerufen. Im Einvernehmen mit dem am 15. November 1946 unterzeichneten Abkommen von Linggajati wurden die „Vereinigten Staaten von Indonesien" und die „Niederländisch-Indonesische Union" gegründet. Auf der Konferenz den Haag wurde von niederländischer Seite mit Wirkung vom 27. Dezember 1949 die Souveränität der Republik der Vereinigten Staaten von Indonesien über alle Inseln Niederländisch-Indiens anerkannt. Indonesien blieb mit der niederländischen Krone in Personalunion. Die Personalunion Indonesiens mit den Niederlanden wurde im Jahre 1954 aufgelöst.

[27] Beide Kodices wurden am gleichen Tage, am 30. April 1847 promulgiert. Der Kodex über das Zivilprozeßrecht wurde zwei Jahre später, am 29. September 1849 verabschiedet.

[28] Cornelis van Vollenhoven (1874–1933) gilt als Begründer der Wissenschaft des *Adat*-Rechts. Seine Werke (Het adatrecht in Nederlandsch-Indië. I–III. (1918–1931–1933), Miskenningen van het adatrecht. (1919) und De Indonesiër en zijn grond (1919)) sind auch heute maßgebliche Quellen der Wissenschaft vom *Adat*-Recht. Cornelis van Vollenhoven war auch international anerkannter Kenner des Völkerrechts.

die Romeins-Hollandse Reg. Durban 1983.; A. Földi: A római jog Dél-Afrikában. (Das römische Recht in Südafrika) *Jogtörténeti Szemle,* 3 (1990) S. 72–86.; R. Zimmermann: *Das römisch-holländische Recht im Südafrika.* Darmstadt 1983.; J. Fisch: *Geschichte Südafrikas.* München 1990.; *Das römisch-holländische Recht. Fortschritte des Zivilrechts in 17. und 18. Jahrhundert.* (Hrsg. von R. Feenstra und R. Zimmermann) Berlin 1992.; W. de Vos: *Resgeskiedenis.* Kaapstadt – Wetton – Johannesburg 1992.; J. C. de Wet – A. H. van Wyk: *Die Suidafrikaanse Kontraktereg en Handelsreg.* Durban 1992[5].; R. Zimmermann– Ch. Hugo: Fortschritte der südafrikanischen Rechtswissenschaft im 20. Jahrhundert: Der Beitrag von J. C. de Wet (1912–1990). *TR* 60 (1992) S. 157 ff.; R. Zimmermann: Roman-Dutch Jurisprudence and its Contribution to European Private Law. *TLR* 66 (1992) S. 1690–1721.; J. M. Burchell: *Principles of Delict.* Cape Town – Wetton – Johannesburg 1993.; M. S. Blackman: Companies. In *The Law of South Africa. vol. 4/1* (Ed. by W. A. Joubert) Durban 1995.; E. Fagan: Roman-Dutch Law in its South African Historical Context. In *Southern Cross – Civil Law and Common Law in South Africa.* (Ed. by R. Zimmermann and D. Visser) Oxford 1996. S. 33 ff.; A. Cockrell: Studying Legal History in South Africa: The Lesson of Lot's Wife. *ZEuP* 5 (1997) S. 436 ff.; T. Honoré: Obstacles to the Reception of Trust Law? The Exemples od South Africa and Scotland. In *Aequitas and Equity in Civil Law and Mixed Jurisdictiobs.* (Ed. by A. M. Rabello) Jerusalem 1997. S. 793–818.; G. Hamza A dél-afrikai magánjog fejlődésének újabb tendenciái. (Neue Tendenzen der Entwicklung des Privatrechts in Südafrika) *MJ* 45 (1998) S. 343–350.; J. Church: The Convergence of the Western Legal System and the Indigenous African Legal System in South Africa with Reference to Legal Development in the Last Five Years. *FUNDAMINA* 5 (1999) S. 8–21.; Th. De Smidt: Roman-Dutch Cape Law. *FUNDAMINA* 5 (1999) S. 123–129.; L. M. Thompson: *A History of South Africa.* New Haven (Conn.) 2001[3].; T. R. H. Davenport – C. Saunders: *South Africa. A Modern History.* Basingstoke 2002[5].; I. Farlam: The Old Authorities in South African Practice. *TR* 75 (2007) S. 399–408; JHA Lokin: Harmonisation in Roman, Roman-Dutch and South African Law. *FUNDAMINA* 14 (2008) S. 24–36.; C. Nicholson: Some Preliminary Thoughts on a Comparative Law Model for Harmonisation of Laws in Africa. *FUNDAMINA* 14 (2008) S. 50–65.; GJ van Niekerk: Harmonisation of Indigenous Laws in Southern Africa. *FUNDAMINA* 14 (2008) S. 155–167.; Ph. J. Thomas: Harmonising the Law in a Multilingual Environment with Different Legal Systems: Lessons to be Drawn from the Legal History of South Africa. *FUNDAMINA* 14 (2008) S. 133–154.; L. Schäfer: The Judicial Development of the Roman-Dutch Doctrine of Parental Authority in South African Law. *TR* 76 (2008) S. 133–153. und Földi A. – Hamza G.: *A római jog története és institúciói. (Geschichte und Institutionen des römischen Rechts).* Budapest 2014[19]. S. 129-130.

1. Unter dem Namen Südafrika ist nicht nur die als Südafrikanische Union im Jahre 1910 noch zum *Commonwealth* gehörende, aus der Staatengemeinschaft 1961 ausgeschiedene Republik Südafrika *(Republik of South Africa, Republiek van Suid-Afrika)*[29] zu verstehen, sondern auch jene Staaten, die zwischenzeitlich ebenfalls unabhängig geworden sind und in denen das Römisch-holländische Recht *(Romeins-Hollands recht, Romeins-Hollands reg, Roman-Dutch law)* bis zum heutigen Tage teilweise noch immer angewandt wird.

Die Anfänge des Rezeptionsvorganges des Römisch-holländischen Rechts reichen in Südafrika bis zum Jahre 1652, bis zur Gründung der holländisch-kapländischen Kolonie, zurück. Die Rechtsprechung des in Kapstadt im Jahre 1656 errichteten Gerichts *(Raad van Justitie)* gründete auf dem von den Kolonialherren mitgebrachten Römisch-holländischen Recht (auf Afrikaans: *Romeins-Hollands reg,* auf Englisch: *Roman-Dutch law*).[30] Das Recht der niederländischen Kolonien entfernte sich gegen Ende des 18. Jahrhunderts allmählich von der Rechtsordnung des Mutterlandes. Verstärkt wurde diese Entwicklung durch die Jahrzehnte lang andauernden britischen Eroberungen. Seit deren Beginn im Jahre 1795 bzw. 1806 war vor allem auf dem Gebiet des öffentlichen Rechts – neben dem Römisch-holländischen Recht – auch das englische *Common law* durchgängig präsent.

2. Das traditionale Römisch-holländische Recht setzt sich aus folgenden Bestandteilen zusammen: a) das in der justinianischen Kodifikation bzw. Kompilation zusammengefaßte römische Recht, b) die holländischen, die übrigen niederländischen und die germanischen Gewohnheitsrechte, c) die holländischen und übrigen niederländischen (insbesondere die in Zeeland verabschiedeten) Gesetze und d) die Elemente des kanonischen Rechts. Als spezielle Quellen *(fontes iuris)* des Römisch-holländischen Rechts dienen noch: a) ausschlaggebende präzedenzhafte Gerichtsurteile sowie b) die Werke einzelner herausragender Rechtsgelehrten aus dem 17. und 18. Jahrhundert, z.B. die Werke von Hugo Grotius, Simon van Leeuwen, Ulrich Huber, Jan (Iohannes) Voet und Cornelis van Bynkershoek. Im Vergleich zum „Mutterland" Holland erfolgte die intensivste Rezeption (*receptio in complexu* bzw. *receptio in globo*) des römischen Rechts in Friesland.

In Südafrika hatte das Werk *Inleidinge tot de Hollandsche Rechts-geleerdheid* von Hugo Grotius maßgeblichen Einfluss. Die englische Übersetzung dieses Werkes von Grotius wurde im Jahre 1845 von C. Herbert veröffentlicht.

3. Die im Römisch-holländischen Recht wurzelnden Rechtsinstitute leben auf dem Gebiet des Sachenrechts wohl am stärksten fort. Ein typisches Rechtsinstitut des südafrikanischen Rechts ist das auf dem im Jahre 1813 veröffentlichten *Cradock Proclamation* aufbauende *perpetual quitrent*, das hinsichtlich seiner Konstruktion der aus dem römischen Recht bekannten Erbpacht *(emphyteusis)* ähnelt. Im Falle des *perpetual quitrent* überläßt der Staat für einen jährlichen Pachtzins *(canon)* bestimmte Grundstücke und behält sich dabei bestimmte Rechte vor (so zum Beispiel das Bergbaurecht). Die Beziehung dieses *ius in re aliena* zum *Common law* ist in der Fachliteratur umstritten.

Im Bereich des Sachenrechts brachte das im Jahre 1934 verabschiedete Gesetz Nr. 54 eine entscheidende Veränderung insofern, als durch dieses Gesetz die Pflicht zur Zahlung des Pachtzinses *(canon)* abgeschafft wurde. Somit kann der Staat nicht mehr als Eigentümer des Bodens betrachtet werden. Der Erbpächter *(emphyteuta)* wird so zum tatsächlichen Eigentümer des jeweiligen Grundstücks, auf dem sich der Staat aber auch weiterhin bestimmte Rechte vorbehält. Die im *Common law* bekannte Unterscheidung zwischen dem *dominium directum* des Eigentümers und dem *dominium utile* des *leaseholders* wird vom südafrikanischen Recht nicht anerkannt. Daraus ergibt sich, dass der *leaseholder* in den meisten Fällen als Eigentümer betrachtet wird und der Gesetzgeber den *leasehold* in einigen Fällen zum

[29] Die heutige Republik Südafrika erlangte am 31. Mai 1910 *de facto* ihre Unabhängigkeit. Nominell wurde dieser Staat erst am 11. Dezember 1931 durch das Westminster-Statut *(Statute of Westminster)* unabhängig. Laut der im Jahre 1997 verabschiedeten Verfassung ist die Republik Südafrika eine Präsidialrepublik. Seit dem Jahre 1994 ist die Republik Südafrika wieder Mitgliedstaat des *Commonwealth.*

[30] Der Ausdruck stammt von Simon van Leeuwen, der ihn zunächst noch (im Untertitel seines Werkes *Paratitla iuris novissimi* [1652]) auf Lateinisch, später jedoch, im Titel seines berühmten, im Jahre 1664 in Leiden erschienenen Werks *Het Roomsch Hollandsch recht,* bereits auf Holländisch verwendete. Heutzutage versteht man unter dem „Römisch-holländischen Recht" das im 17. und 18. Jahrhundert in Holland gepflegte und angewandte römische Recht.

Eigentum erklärt. Zuletzt enthielt der im Jahre 1986 verabschiedete *Sectional Titles Act* Bestimmungen hierüber.

4. Auf dem Gebiet des Schuldrechts ist zweifelsohne dem römischrechtlichen Einfluss zuzuschreiben, dass es nicht genügt, beim Kauf von beweglichen Gegenständen, Mobilien *(res mobiles)* die verkaufte Sache zu übergeben, sondern auch der Kaufpreis gezahlt werden muss. Im Bereich der Abtretung wird in der Rechtsprechung ebenfalls die römischrechtliche Regelung angewandt. Eine Besonderheit ist es, dass in der richterlichen Praxis die Regelung des deutschen BGB in Fällen der Abtretung unmittelbar Rechnung getragen wird. In der juristischen Praxis findet die ursprünglich römischrechtliche Unterscheidung zwischen *actio utilis* und *actio directa* immer noch Anwendung.

5. Im Falle des Deliktrechts *(law of torts)* verdient die *actio iniuriarum* viel Beachtung. Diese Klage dient der Erstattung des immateriellen Schadens als prozessuale Grundlage. Ab den sechziger Jahren des 20. Jahrhunderts gewann der *animus iniuriandi* immer mehr an Bedeutung. Interessant ist allerdings, dass die Konstruktion des *amende honorable* allmählich aus dem südafrikanischen Recht verdrängt wurde. Als Generalklage ist die *actio iniuriarum* geeignet, eine Fülle von Sachverhalten im Bereich der Personenverletzung zu umfassen.

6. Die Rezeption des *trust* scheint in erster Linie das Vordringen des *Common law* zu untermauern. Ein Zeichen dieser Rezeption ist unter anderem die Tatsache, dass die *Treuhand ad pias causas* als spezielle Art des *trust (for charitable purposes)* im südafrikanischen Recht Einzug erfuhr. Es könnte aus dieser Tatsache die Schlußfolgerung gezogen werden, dass das römische Recht auf einem immer kleineren Gebiet der juristischen Praxis angewandt wird. Wenn man aber in Betracht zieht, dass der aus dem englischen Recht *(Common law)* bekannte *trust* (Treuhand) – als fiduziarisches Rechtsgeschäft – im römischen Recht *(fiducia)* wurzelt, erscheint diese Tatsache in einem ganz anderen Licht. In diesem Sinne nämlich steht der *trust for charitable purposes* wohl mit dem römischen Recht in Verbindung.[31]

7. Unter den namhaften Spezialisten des *Roman-Dutch law* ragt Robert Warden Lee (1868–1958) hervor. Unbedingt zu erwähnen ist der Name von Johannes Christiaan de Wet (1912–1990), der wohl als einflussreichster Rechtsgelehrte Südafrikas im 20. Jahrhundert zu betrachten ist. Die pandektistisch geprägte kontinentaleuropäische Jurisprudenz – darunter in erster Linie Friedrich Carl von Savigny und Bernhard Windscheid – hatte große Wirkung auf seine Arbeiten. Daraus folgt, dass Johannes Christiaan de Wet weniger als Verfechter des angelsächsischen Rechtsdenkens gilt.

8. Insgesamt läßt sich folgendes feststellen: Obwohl das Römisch-holländische Recht *(Romeins-Hollands recht, Roman-Dutch law)* seine Vorrangstellung behaupten konnte, ist das Privatrecht in Südafrika in den letzten Jahrzehnten vom Nebeneinander der beiden Rechtsordnungen geprägt. Abgesehen von gesetzlichen Regelungen einzelner Rechtsinstitute leistete in Südafrika das Privatrecht bis jetzt jeglichen Kodifikationsbestrebungen erfolgreich Widerstand. Aufgrund der Vermischung der Elemente des kontinentaleuropäischen Privatrechts mit dem englischen *Common law* ist die Privatrechtsordnung Südafrikas als *mixed jurisdiction* zu bezeichnen.

Zu erwähnen ist noch, dass auf lokaler Ebene auch das traditionelle Gewohnheitsrecht *(ius consuetudinarium* bzw. *consuetudines)* eine nicht zu unterschätzende Rolle spielt. Dieses Gewohnheitsrecht darf aber nicht gegen die Prinzipien der am 4. Februar 1997 in Kraft getretenen, mehrfach, zuletzt im Jahre 2004 revidierten Verfassung verstoßen.

9. Das Römisch-holländische Recht *(Romeins-Hollands recht*, *Roman-Dutch law)* hat heute mit seinen lokalen Zügen in der Republik von Südafrika, in Namibia, Zimbabwe, Swasiland, Botsuana (Botswana) und Lesotho Geltung bzw. Anwendung.

10. Aufgrund des im Dezember 1920 abgeschlossenen Mandatsübereinkommens wurde Namibia, das bis 1919 unter dem Namen Deutsch-Südwestafrika eine Kolonie bzw. Schutzgebiet Deutschlands war, zum Mandatsgebiet der im Jahre 1910 unabhängig gewordenen Republik Südafrika. Durch die Wirkung des Mandatars Südafrika kam es in Namibia zur Rezeption des Römisch-holländischen Rechts. Diese wurde auch dann nicht außer Kraft gesetzt, nachdem das Mandatsgebiet seine Unabhängigkeit erlangt hatte. Eine Eigenheit des als Mandat der Klasse B geltenden Südwestafrikas war es, dass es den Charakter des Mandatsgebiets auch nach der Gründung von Völkerbund *(League of Nations, Société des Nations)* und Vereinten Nationen *(United Nations, Nations Unies)* bewahrte und nicht zum Treuhandgebiet *(trusteeship)* wurde. Somit wurde dieses Gebiet nicht vom Treuhandsrat der Vereinten Nationen, sondern von einer UN-Kommission kontrolliert, die allein hierfür aufgestellt worden war. Diese Konstruktion verstärkte in Namibia die Wirkung der Rechtsordnung der Südafrikanischen Union, die im Jahre 1961 zur Republik Südafrika wurde.[32]

11. In Swasiland, das ab dem Jahre 1903 mit Transvaal, einem burischen Staat Südafrikas, gemeinsam regiert wurde, blieb das *Roman-Dutch law* auch nach der Erlangung der Unabhängigkeit in Kraft.[33]

12. Im Jahre 1871 wurde Lesotho, das 1868 unter dem Namen Basutoland unter britische „Schirmherrschaft" gelangte, zur Kolonie von Kapland. Ab dem Jahre 1884 wurde Basutoland von einem südafrikanischen Generalkommissar mit Sitz in Kapstadt regiert. In Basutoland, das nie unter der Herrschaft eines burischen Staates stand, wird das Römisch-holländische Recht selbst nach der Erlangung der Unabhängigkeit im Jahre 1966 weiterhin angewandt.[34]

13. In Botswana, das 1885 unter dem Namen Betschuanaland zum britischen Protektorat wurde, fand das Römisch-holländische Recht durch die burischen Siedler Anwendung. Auch

[31] J. C. Coertze: *Die Trust in die Romeins-Hollandse Reg.* Stellenbosch 1948. und A. M. Honoré: *The South African Law of Trusts.* Kaapstad 1985[3].

[32] M. Silagi: *Von Deutsch Südwest zu Namibia.* Ebelsbach am Main 1977.

[33] Siehe J. H. Paine: The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland. *Comparative and International Law Journal of Southern Africa,* 11 (1978) S. 137 ff.

[34] V. V. Palmer – S. M. Poulter: *The Legal System of Lesotho.* Michigan 1972.

seit Botswana seine Unabhängigkeit im Jahre 1966 erlangt hatte, ist das Römisch-holländische Recht Rechtsquelle *(fons iuris)* im Land. Erwähnenswert ist der Umstand, dass kurz nachdem Betschuanaland unter britische Schirmherrschaft gelangt war, der südliche Teil dieses Gebietes im Jahre 1895 an Kapland angeschlossen wurde, welches wiederum Teil der Südafrikanischen Union wurde, die ihre Eigenstaatlichkeit *de facto* im Jahre 1910 erlangte.

14. Das Römisch-holländische Recht hatte auch in der Rechtsprechung Zimbabwes, des früheren Südrhodesiens Bedeutung. Der Hauptgrund hierfür war, dass ein Teil der weißen Siedler *(settlers)* burischer Herkunft war.[35]

[35] Siehe J. Redgment: *Introduction to the Legal System of Zimbabwe.* Harare 1981[2] und R. Zimmermann: Das römisch-holländische Recht in Zimbabwe. *RabelsZ* 55 (1991) S. 505 ff.

The Medieval History and Development of Company Law

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Abstract

In the business life, the company is one of the most significant legal instruments for capital collection and conducting trade activity with limited personal liability. The modern company forms have direct antecedents in the medieval laws. The roots of the limited partnership can be recognized in the rules of commenda and the operation of the medieval banking and trading houses had impact on the regulation of modern stock companies. The study aims to give an overview about the origin and development of the company types in the Middle Ages.

Keywords: *company; societas; commenda; charter company; regulated company; joint stock company; limited liability.*

1. General economic, social and legal setting

Medieval commerce was centred around the trade-houses which originated on the shores of the Mediterranean Sea from the Arabic word *funduc*, or *fondaco*.[1] Maritime trade flourished in Venice as early as the 9th century, and significant trading cities developed in other regions of Italy as well (Pisa, Genoa, Siena, Milan, Bologna, Florence, Amalfi, etc.).[2] Similar trade centres, called *alfondigo,* functioned in Catalonian regions. These were huge, city-like complexes where merchants ran shops and sent agents.[3] The appearance of merchants in the Christian regions was related to the introduction of the consulate system on the Levantine route. Traders of the German lands created a *fondaco* in Venice in 1228. On Portuguese territory it was the factor system that spread, focusing primarily on destinations in the Netherlands (*Feitoria de Flandres*).[4] Fairs – organised in fixed locations – played an important role in this period too. Fairs supported the development of transportation and insurance.[5] Among these we should highlight the fair in Champagne in the 14th century. Periodic fairs gradually evolved into stable markets with their own internal rules, and their own internal courts, thus creating the grounds for commercial law and maritime law.[6] International fairs were the places where merchants under Italian and German laws met, which resulted in the propagation of Italian commercial legal doctrines in other European states as well.[7]

The development of trade and the consolidation of its institutions created the economic foundations for the joint ventures.[8] Besides family enterprises, *commenda* or *colleganza* appeared – in addition to the *societas* known in Roman law – and this had corresponding forms in all European countries.[9]

An important role in the harmonisation of the mercantile activity was played by guilds, which facilitated the development

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1 After the fall of the Roman Empire, the region maintained only minimal trade relations, but goods trading did not cease. The Carolingian Empire was characterised primarily by local trade, and maritime trade did not dominate. BERMAN, Harold J, *Law and Revolution. The Formation of Western Legal Tradition*, Cambridge, Massachusetts, London, 1993. p. 333.

2 REHME, Paul, *Geschichte des Handelsrechts*, In EHRENBERG, Victor, *Handbuch des gesamten Handelsrechts mit Einschluß des Wechsel-, Scheck-, See und Binnenschiffahrtsrechts, der Versicherungsrechts sowie des Post- und Telegraphenrechts*, Leipzig, 1913. p. 82.

3 KELLENBENZ, Herman (Hrsg.), *Handbuch der europäischen Wirtschafts- und Sozialgeschichte*, Stuttgart, 1986, p. 228.

4 KELLENBENZ, *op. cit.* p. 228.

5 BERMAN, *op. cit.* p. 336.

6 Especially significant in the development of medieval maritime law is the Tabula Amalfitana, adopted literally by the consul Peter IV of Valencia in his edicts in 1336 and 1343, adopted also by the Consolato del mare. LABAND, Paul, *Das Seerecht von Amalfi (La Tabula de Amalfa)*, Zeitschrift für das gesamte Handels- und Konkursrecht 7 (1864). p. 301. ff.

7 The Italian model served as basis for the liability system applied in associations of persons, according to which the members of the partnership were liable to third parties for obligations undertaken by persons acting on behalf of the partnership. HOLDSWORTH, William Searle, *A History of English Law*, London, 1966. vol. V. p. 97.)

8 The development of trade is facilitated primarily by natural production which grew as a result of the agricultural revolution. Thus, in a certain regard, the development of trade is not related to the development of towns, but to the growth in efficiency of provincial production. BERMAN, *op. cit.* p. 334.

9 In connection with the legal structure of *societas* in Roman Law see FÖLDI, András – HAMZA, Gábor, *A római jog története és institucióí* [History and Institutes of Roman Law], Budapest, 2016. p. 536. ff.

of commercial law with their internal regulations and common law.[10] Commercial guilds established a *ius speciale,* with their own commercial accounting, jurisdiction and internal procedures.[11] Other countries based on Roman legal traditions also adopted the common law established in the Italian trade cities.[12]

Naturally, the political regimes of certain states wished to profit from the development of trade on the grounds of mercantilist factors, thus trade activity was often regulated with privileges or even prohibitions, taxes and duties. Often they established monopolies to protect the interests of domestic merchants.[13] The international development of trade resulted in the establishment of a pan-European commercial common law (*lex mercatoria*, *ius mercatorum*, *law merchant*), as well as the unification of maritime law (*Rôles d'Oléron*, *Consolado del Mar*).[14] Trade – especially maritime trade – was naturally subject to many risks, which besides crediting led to the appearance of joint ventures sharing the risks of investors and merchants.[15] These partnerships did not have an independent personality, separate from their members, and generally they had no legal impact in third-party relations. The development of the first partnership ventures was led by Italian and Northern-German merchants.

At the end of the Middle Ages, the capital demands and risks of longer commercial journeys necessitated an even more intensive consolidation of capital, with an even greater sharing of risks.[16] This is when capital companies developed, grouping large numbers of investors, which financed sailing and overseas trade ventures.[17] These companies often represented state interests as well, thus they benefited from privileges from the rulers. In many cases they performed public functions, and in actual fact, joint--stock companies developed from these commercial companies.

Forms of medieval ventures on the continent essentially emerged from the *societas* related regulation as well as other Roman legal institutions, and they developed in accordance with the changes of commercial life. Regulation of the legal forms of Roman legal institutions which appeared besides the *societas* (*universitas*, *corpus*, *collegium*) often served as a model.[18] However, Roman traditions in this regard (also) were alien from the development of Anglo-Saxon law, thus they were established on special grounds that differed from continental ones. Nevertheless, the two systems were akin to each other in respect of many regulation techniques.[19]

2. The societas in the Middle Ages

The term *societas*, as well as *consortium,* implied a community of living in the early Middle Ages. Medieval laws used the terms *socius* and *societas* almost exclusively in the sense of public law, indicating a colleague or state partner. In vulgar law (*Vulgarrecht*) the term *socius* also meant joint proprietor.[20] According to Levy, the origins of the medieval *commenda* are to be sought in vulgar law. However, this thesis has yet to be analysed and proved comprehensively. Max Weber's opinion contrasts with that of Levy.[21] In his view, the *commenda* is primarily the result of medieval commercial relations, although Roman law displayed similar constructions too.[22]

In Helmut Coing's view, the company contract in the period of *usus modernus* – just as in the Middle Ages – was strongly influenced by commercial companies.[23] Coing mentions two forms of companies: the *commenda* and the *compania*. The purpose of the *commenda* was generally to carry out a commercial journey. One member provided the capital necessary for the partnership to function, while the other member took care of the journey and trade. The origins of the *compania* can be derived from handicraft and mercantile family ventures, where the family members, father and son or brothers ran the company. This company form can be considered the forerunner of modern general partnerships due to the relations between the members. Initially, it was a general community of property. According to Coing, the *societas* related regulation can be identified both in the *commenda* and the *compania*. Considering that the partnership under Roman law was formerly based on a community of heirs, accordingly we may speak of the legal constructions *societas omnium bonorum* and *societas bonorum quae ex quaestu veniunt*. One was a general community of property, while the other was a share-based community of property. The companies under Roman law did not have established organisations. Accordingly, we must rely on the *ius modernum*. The trends launched in Justinian law can be identified on the one hand in the internal structure of the companies, and in the liability of company members for the external relations of the company on the

[10] REHME, *Geschichte (op. cit.)* p. 87.
[11] KELLENBENZ, *op. cit.* p. 231. ff.
[12] Thus Portugal, Spain, France and partially German regions. REHME, *Geschichte (op. cit.)* p. 88. ff.
[13] See for example English maritime law in 1381 and 1485. CIPOLLA, Carlo M. (Hrsg.), *Europäische Wirtschaftsgeschichte*, Stuttgart, New-York, 1978, p. 201.
[14] For details see NAGYNÉ SZEGVÁRI, Katalin, *Jog és gazdaság. A gazdasági szervezetek jogállásának története* (Law and Economy. History of the Legal Status of Economic Organisations), Budapest, 1999. p. 35. ff.
[15] CIPOLLA, *op. cit.* p. 205.
[16] CIPOLLA, *op. cit.* p. 325.
[17] Such was for example the *Casa da India* in Lisbon, the *Casa de Contratación* in Sevilla. CIPOLLA, *op. cit.* p. 326.
[18] For details see JOLOWICZ, Herbert Felix, *Roman Foundations of Modern Law*, Oxford, 1957. p. 127. ff.
[19] For legal constructions under medieval partnership law, see also JOLOWICZ, *op. cit.* 157.; HOLDSWORTH, William Searle, *The Early History of Commercial Societies*, The Judicial Review 28 (1916).
[20] LEVY, Ernst, *Weströmisches Vulgarrecht. Das Obligationenrecht*, Weimar, 1956. p. 283. ff.
[21] WEBER, Max, *Zur Geschichte der Handelsgesellschaften im Mittelalter. Nach südeuropäischen Quellen*, Stuttgart, 1889. p. 9. ff., p. 17.
[22] D. 16, 3, 7, 2. The origins of the commenda are derived from the Roman law fenus nauticum also by HAHLO, H. R. – FARRAR, J. H., *Hahlo's Cases and Materials on Company Law*, London, 1987[3]. p. 2.
[23] COING, Helmut, *Europäisches Privatrecht*, München, 1985. Bd. I. p. 464.

other hand; both cases can be clarified by the rules of societas law. The medieval *societas* had two forms: the *societas universalis* and the *societas particularis*. The difference between these two institutions is found in the contribution of member properties to the company. In the case of the *societas universalis* – similarly to the *societas omnium bonorum* – the company members offered their entire property to the company. On the other hand, in the case of the *societas particularis*, the members made set contributions to the company established in advance.

The *societas*, on the grounds of the *ius commune*, was established through an informal consensual contract.[24] Territorial rights could also stipulate other conditions. According to several city statutes, companies had to be registered by guilds. As a general practice, a company was considered to exist when account books and accounting were registered under a common name. Upon the establishment of the *societas* the members had to specify the scope of activity of the company and had to provide the company property. In the case of the *societas omnium bonorum* this property automatically became the *ipso iure* property of the members, while other companies required a legal action regarding the transfer.

As for the legal relationships of the members, all company members were obliged to provide services in accordance with the articles of association, that is, to provide capital. The members had to act with the same diligence as in their own affairs (*diligentia quam in suis rebus)*, and were liable for damages resulting from any breach of this obligation. Literature recognises several models of company management. On the one hand, the company members could appoint one or more representatives from among them, to whom they consequently transferred the company management rights. These leaders ran the company business jointly or separately, in turn, with identical authority. They could also agree for one member to manage the company business in one company office, while the other member managed the affairs in the other office. The companies were subject to bookkeeping obligations, and business accounts were closed and opened on an annual basis. Everything gained by company members on behalf of the company represented the company property (*communio*). The company was terminated by means of an *actio pro socio*, which at the same time served to grant property shares in the company.

The company representative was the person entitled to act on behalf of the company based on his designation as *institor*. The representative entered into transactions in his own name, and consequently he was liable for those. The liability of the other members was applicable only when the associate made legal representations on behalf of the other members. The names of the other company members obviously did not have to be mentioned, specifying the so-called "*ego et socii"* ("I and my partners") was sufficient. The other members could be identified from the records and the company accounts. As it had to be made clear to the other participant of the transaction that he was entering into a contract with the company, the agent or the company representative had to provide proof of their legitimacy, and for lack of this could not act on behalf of the other company members.[25] Generally speaking, all members had to cover the company debt proportionally with their shares (*pro rata*). The company – just as in Roman law – was strongly related to the persons of the members, and consequently, the company was terminated by the death of one member. The articles of association could be terminated if justified. Agreements made for "permanent and everlasting" companies (*pactum de stando in perpetua societate*) were void.

3. The compagnia

The forerunner of commercial associations was the *societas compagnia*.[26] Two major types of medieval partnerships developed: the *compagnia* (the medieval version of the *societas*) which functioned under the identical and unlimited liability of all the members; and the more private *commenda* which functioned under the limited liability of at least one member. Initially, the *compagnia* was based on Roman legal regulations, however, its characteristics gradually changed. The relationships between the partners were institutionalised so that they generated external effects as well. While in the *societas* under Roman law only the leading member was granted unlimited rights and obligations, this aspect changed in the Middle Ages. If one member entered into a contract with a third party on behalf of the partnership, and thus generated profit for the partnership, all members had unlimited liability in the relations with the third party for the obligations under the contract. Within the internal relationships of the members, their liability was proportional to their contributions.

As of the 14th century, most partnerships functioned under a company name, generally derived from the active member's or the founder's name. This was followed by the specification "and company" ("*et socii*", "*et sua societas*", "*cum sua societate*", or "& *Co.*"). Single-person commercial companies did not yet exist at this time.[27] Companies were registered with the guilds, and by the cities starting from the 14th century. If one member of the partnership parted from the company, and this fact was not registered in the records, the member's liability for the company's debts continued. At this time, the company was not yet considered to have a separate personality from its members, but its property was. In the 15th century, Italy was the first to introduce double-entry accounting,

[24] The medieval *societas* largely resembled the *societas quaestus* known from Roman law. The main difference resides in the fact that while Roman legal regulation focused on the relationship between the contracting parties, medieval regulation focused on the relationship between the company and third parties. ROBINSON, O. F. – FERGUSON, T. D. – GORDON, W. M., *European Legal History. Sources and Institutions*, London, Dublin, Edinburgh, 1985. p. 101.

[25] In this regard, it is worth taking into account the Corpus Iuris Civilis. D. 14, 1, 1, 5.

[26] The meaning of *compagnia* is *cum panis*, i.e. 'with bread'. The *companion* is the person one shares bread with. The *compagnia* is rooted probably in the family community and household, and derives its name from there. According to Rehme, the *compagnia* primarily has German origins, and was developed only in the times following the establishment of the *commenda*. Single-person commercial companies are unknown in this period. REHME, *Geschichte (op. cit.)* p. 104.).

which resulted in separate accounts for the company and the members.

According to the regulations in several countries, the claims of creditors were first satisfied from the separate property of the company, and the properties of the members could be claimed only when the company property was insufficient. Creditors of members could not settle their claims from the property of the other members; they could only obtain the member's share in the company. The members were obliged to act bona fide with each other. A competing venture could not be established without the consent of the other members, nor could they participate in such.

A special type of the *compagnia* was the *colonna*, which was preceded by the pseudo-Rhodian institution of the *koinonia*.[28] The *colonna* was detailed by the tabula Amalfitana, as well as the comú des Consolat del mar and the navigatio in commune issued by James I of Aragon in 1258. The *colonna* appeared in Northern-German regions as well, under the name *hjáfélag* in Norway, *widherlégning* in Sweden, with independent historical roots according to Rehme.[29]

All members of the *colonna* had financial investments and interests in the maritime venture: the ship owners, the captain, the crew, the cargo owner as well as the financial investors shared in the profit of the venture at rates established in advance. Based on maritime law, if the ship owners gave the ship to the creditors, they were not accountable for the liabilities undertaken by the venture leader during the journey.

4. The commenda

The commenda was a form of venture which already involved the limited liability of members.[30] According to certain views, the forerunner of the *commenda* is the *fenus nauticum*, the ancient maritime loan.[31] In a maritime loan, the financial investor stayed at home and gave money or merchandise to the contractor for the maritime venture. If the venture generated profit, the lender recovered the amount lent and the value of the merchandise, and shared the profit. Often he also received interest at a rate set in advance. If the ship and the cargo were lost, he lost his investment. As profit sharing and interest functioned as compensation for risks, a maritime loan did not qualify as a usurious loan prohibited by the church.[32]

Scholars reached differing conclusions when studying the origins of the *commenda*. Lehmann derives the *commenda* from the institution of *fenus nauticum* under Roman law,[33] whose spreading in his view was supported by the ecclesiastical ban on interest.[34] It became popular due to the fact that the merchants of Italian city-states slowly extended their activities to German lands as well. When researching the Venetian sources to study the origins of the *commenda (collegantia)*, Condanari-Michler stated that this type of contract appeared in the city law of Rialto in 976.[35] According to the work of Jacobus Bertaldus in 1245, Splendor Venetorum, if someone gave merchandise (*transmissum*) to another party for overseas trading, and the other party did not return, he could place the merchandise in the partnership under another name, which was obliged to tolerate the delay.[36] The *collegantia* also included an element of safeguarding similar to depositing. At the same time, however, Condanari-Michler believes the origin of the *commenda* in Roman law has not been proven, particularly back to maritime loans.[37]

Dietzel links the antecedents and the emergence of the *commenda* to the *actiones adiectitiae qualitatis* known under Roman law.[38] In his view, the limited liability of the members derives from trading the property (*peculium)* received by the son from the *pater familias*.[39] However, trading the *peculium* did not yet create partnership property. This legal structure was merely a liability construction.[40] In comparison to the liability constructions created by *actiones adiectitiae qualitatis*, factors pointing towards separate partnership property are found in situations such as the *actio tributoria* where the *pater familias* was no longer granted the privilege of deduction (*privilegium deductionis*) from the *pecu-*

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27 REHME, *Geschichte (op. cit.)* p. 160.

28 REHME, *Geschichte (op. cit.)* p. 100.

29 This partnership structure is also called *Reederei*. REHME, *Geschichte (op. cit.)* p. 166.

30 The *commenda* derives from the word *commendare* (commend, deposit), cf.: "*commendare nihil aliud est quam deponere*" (commending means nothing other than depositing), D. 50, 16, 186. This changed to *entrust* in the Middle Ages ("to give someone to take care of"). According to Rehme, the *compagnia* developed after the times of the *commenda*. REHME, *Geschichte (op. cit.)* p. 103. The *commodatum* under Roman law was a commodate, which meant giving for use free of charge, however the free nature was left behind in the Middle Ages, leaving the aspect of giving for use. FÖLDI – HAMZA, *op. cit.* p. 501.

31 ASHBURNER, Walter (ed.), *The Rhodian Sea-Law*, Oxford, 1909. p. CCXXIV. ff.

32 In the Middle Ages, the church forbade usury, as it considered that money, as opposed to animals, did not spawn. This gave rise to the principle "*pecunia pecuniam parire non potest*" (property cannot produce property).

33 LEHMAN, Karl, *Lehrbuch des Handelsrechts,* Leipzig, 1912. p. 18.

34 "*Mutuum date nil inde aperantes*" (The Gospel according to Luke 6, 34-35 – …and lend, hoping for nothing again), and "*pecunia pecuniam parere non debet*" (Decretum Gratiani II, C. 14. qu. 3. cau. 3, 4. – property cannot produce property).

35 „*Poterit ipsum (transmissum) ibi in commendacione deponere ad nomen illius, qui illud recipere debet, ubi morabatu*". CONDANARI–MICHLER, Slavomir, *Zur frühvenezianischen Collegantia,* München, 1937. p. 9.

36 CONDANARI–MICHLER, *op. cit.* p. 11.

37 CONDANARI–MICHLER, *op. cit.* p. 20. ff.

38 In relation to the *actiones adiecticiae qualitatis* see HAMZA, Gábor, *Aspetti della rappresentanza negoziale in diritto romano.* INDEX. Quaderni camerti di studi romanistici - International Survey of Roman Law 9 (1980) pp. 193-229.

39 DIETZEL, Gustav, *Die Commanditen-Gesellschaft und die „actio tributoria"*, Zeitschrift für das gesamte Handels- und Konkursrecht 2 (1859). p. 2. ff.; FÖLDI – HAMZA, *op. cit.* p. 407. ff.

40 DIETZEL, *op. cit.* p. 5. ff.

lium, his claims to it were equal to those of the other creditors of the son.[41] It follows that the *institor* known in Roman law is practically the equivalent of the *commenda* member in the Middle Ages, implying the development of a silent partnership.[42]

Rehme traces the development of *commenda* to Islamic law, where it had two forms: a partnership functioning with the capital contribution of only one party (*kirad)*, and a partnership functioning with the contribution of both parties (*schirkat inan*).[43] Given that the *commenda* could be found in almost all European states, with various differences, it can be considered a universal legal institution.[44]

Loans given for maritime (*trans mare*) ventures were soon extended to inland (*in terra*) ventures as well. As the lender shared equally in the profit and loss (*ut pecunia et lucrum et damnum sentiat*) for his investment, the transaction did not qualify as usurious.[49]

The *commenda* had two basic forms. In the earlier form, on behalf of the commendator the tractator performed his activity with the commendator's capital and at the commendator's risk. In the other version of the *commenda*, both the commendator and the *commendatarius* made contributions to the venture. In the first form of the *commenda*, the capital partner (*principal*) was the commendator and the tractator was his agent. The tractator shared in the profit of the venture for his work. While the *colonna* only covered maritime ventures, the commenda gradually started to play an important role in inland ventures as well.

From the commenda we should distinguish the *comune* (or *comunitas, commune marinariorium* or *comunitas navis*), which developed on the grounds of the *koinonia*, where the partners (ship owner, merchant, crew) shared the property of the ship and the cargo.[50] A special form of this structure was the *entigum* (or *entega* or *enticha*) known in Amalfi (*tabula Amalfitana*) where the merchant and the ship owner entered into a contract for certain commercial journeys.[51] Similar legal structures related to the *commune (navigatio in commune)* were found in the ordinance of James I of Aragon in 1258.[52]

Special types of maritime company developed in other regions of the continent. Such was the aforementioned Italian *colonna* and the similar Dutch *rhederij.*[53] In the case of the Dutch *rhederij* the ship was the joint property of several partners who shared in the profit gained according to the quotas of their share in the ship. Merchant vessels functioned in joint ventures, where several persons, i.e. the merchants providing the cargo, the captain and the crew, as well as the ship owners had their own shares. The so-called "*principal partners*" assumed the responsibility for the liabilities of the venture, the investors *(participes)* provided the capital for the venture or gave money to a partnership member. The investors stayed in the background, thus they did not participate in the functioning of the company.[54] The captain was authorised to hire crew, transport cargo or passengers, sign contracts for repairs related to the regular business, or contract a loan to cover the needs of the ship or the crew. The "shares" of the venture could be transferred freely. The "principal partners" were personally liable for expenses undertaken by the captain, while the liability of investors was limited to the quota of their material contribution. Based on the principle of maritime law, if one invested in an "*avontuur der zee*" (sea adventure), one could not lose more than he entrusted to the sea.

While the first version of the *commenda* can be considered a type of agency, the second version qualified as a real partnership venture, where both the commendator and the *commendatarius* contributed to the venture. This version had two sub-types. In one case, the partner residing at home (*socius stans*) provided a fixed amount to the active partner (*socius tractans*, *tractator*). The tractator thus performed his own business venture partially from his own capital and partially from the capital provided by the *socius stans*. In the other case, the *socius stans* and the *socius tractans* unified their contributions, considering them a sort of separate joint partnership property administered by the tractator as the active partner. In both cases the *socius stans* shared in the profit and loss, but this differed from the *compagnia*, as his participation in the venture was unknown to the outside world. As the *socius tractans* was liable personally and without limitation in relations with creditors, the socius stans was liable only according to the proportion and extent of his contribution (*pro rata*).[55] In the case of several unlimited liability partners, their internal legal relationships were regulated by the rules of the *compagnia* and the *societas*. Where several partners with unlimited liability were involved, their actions were legally independent from each other. The investor could also secure the financial support for an active or passive member without entering

41 DIETZEL, *op. cit.* p. 7. Cf. FÖLDI – HAMZA, *op. cit.* p. 353. ff.
42 DIETZEL, *op. cit.* p. 11.
43 REHME, *Geschichte (op. cit.)* p. 94.
44 "With regard to the *commenda*, this connection is challenged; thus it is without doubt a universal legal institution". REHME, *Geschichte (op. cit.)* p. 94.)
45 ASHBURNER, *op. cit.* p. CCXXXVII.
46 REHME, *Geschichte (op. cit.)* p. 102.
47 ASHBURNER, *op. cit.* CCXXXIX. ff.
48 The rogadia – according to its rules – is rather a special type of deposit contract. ASHBURNER, *op. cit.* p. CCXL.).
49 London Ordinance, 1391. Pursuant to this ordinance, profit-oriented investment is not punishable if the investor shared the risks of loss as well.
50 ASHBURNER, *op. cit.* CCXLIV. ff.
51 ASHBURNER, *op. cit.* CCXLVIII. ff.
52 REHME, *Geschichte (op. cit.)* p. 100.
53 For medieval Dutch partnerships, see KOHLER, Joseph, *Niederländisches Handelsrecht in der Blütezeit des Freistaates*, Zeitschrift für das gesamte Handels- und Konkursrecht 59 (1907). p. 293. ff.
54 Cf. *societas publicanorum*.
55 For the internal legal relations of the parties in the case of the *commenda*, see details in CONDANARI–MICHLER, *op. cit.* p. 62. ff.

into a legal relationship with the others, based on the principle "my partners are not partners of my partner" (*"socii mei socii socii non sunt"*).

The *commenda* established according to the Italian model were particularly characteristic of the Northern-German regions, where they played an important role in commerce. However, it is debatable whether this was derived from Roman law surviving in Italy or this form of partnership developed independently on German territories.[56]

The *commenda* had also two forms on German territories: one was created by the capital investment of one party, similarly to the Roman *accommendatio,* while the other was established with the financial deposit of both parties, similarly to the Roman *collegantia*. It appeared primarily on Northern-German lands, in the 12th century in Westford and in the 14th-15th century in Lübeck, under the name *Sendevegesellschaft* (*wedderleginge*, *contrapositio*, *compositio*).[57]

The commenda can be considered the forerunner of the French *société en commandite*. In addition to the development of limited partnerships, the *commenda* also played an important role in the development of silent partnerships.[58]

5. The large medieval trade and banking houses

Contracts made between merchants and investors facilitated the refinement of regulations regarding certain institutions under company law. Medieval trade houses disposed of large sums of capital, thus they played an essential role in economic life. Naturally, the investment of large capital demanded increased security, especially when it accrued from several investors.

Medieval trade houses were loosely structured partnerships, with active members and investors, as in the *commenda*. These partnerships operated at international level too. One of the earliest commercial companies was the company called *Grosse Ravensburger Handelsgesellschaft* (1380–1530), a family-based business that also had external members. The company was established by three families: the Humpis' of Ravensburg, the Muntprats of Konstanz and the Möttelis of Buchhorn (now Ludwigshafen). The most important role in establishing the company was probably played by the Mötteli family, while the largest material contribution was provided by the Humpis family. Initially, the company was established for six years; it was repeatedly extended and thus functioned continuously until 1580. For a long time, the company was exclusively owned by the three families. Considering the relatively large number of proprietors, the company developed a permanent institutional system. The everyday activities of the company were managed by three administrators (*Regierer*). The leader's name was always included in the company.[59] Given that the three leaders primarily handled the accounting for the company, they acted as accountants as well. The major affairs of the company – such as closing the business accounts, the balance sheet, payment of dividends – were subject to decisions by the company's general meeting, convened every three and a half years. The company maintained important commercial relations with other German cities through its agents.

A good example of medieval commercial companies is found in the ventures operating on Swiss territory too, which often had permanent internal structures and internal procedures.[60] Such a company was, for instance, the *Halbysen-Gesellschaft*, which primarily concluded international transactions and also dealt in the wool trade. It flourished between 1425 and 1430. The company had three principals (*Hauptherren*): Heinrich Halbísen, Hans Waltenheim and Wernlin von Kilchen, who were probably also the founders of the company. The basic capital of the company amounted to twenty-five thousand guldens. Besides the three founders, the company probably had another eight members (*Mitgemeinders*). The articles of association unfortunately did not survive, however, available sources indicate that the company was created to share profits and losses, based on the contributions of the members.[61] The company was represented in external relations by the company principals.[62] Similar structures and legal regulations can be found in the case of the *Grosse Basler Gesellschaft*, which functioned in the second part of the 15th century. This company was founded by Bastian Told, Ulrich Meltinger and Zschegkaburlin.

The major family companies also included the Medici, Peruzzi and Bardi families from Florence,[63] the Saulis and the Vivaldis in Genoa, as well as the German Fugger, Hochstätter and Herwart families. These operated under their family names, and in several respects they qualify as the forerunners of modern multinational companies.[64] They were known all around the world. They performed various activities: trade, export-import, mining and loan transactions, etc. Most members were family members who participated actively in the business and were personally liable for the company's liabilities. Passive members also shared in the profit and loss, but only to the extent of their contributions. Occasionally, the Fuggers established a consortium i.e. a quasi-mixed company with other companies. For example, in 1498, German companies established a union with Venice for copper trading.

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[56] Cf. REHME, *Geschichte (op. cit.)* p. 162).

[57] The phrases *sendeve*, *sendegut* mean giving money, capital. REHME, *Geschichte (op. cit.)* p. 163.

[58] For details on silent partnerships see BLAUROCK, Uwe, *Handbuch der stillen Gesellschaft*, Cologne, 2016[8]. p. 32. ff.

[59] Thus, in 1426 for example, the Humpis family provided the principal and the company name was consequently *Noffre Humpis e compani, Jos Hompys e compania, Noffre Humpiß und sine gesellschaft, Jos Hompis und sine gesellschaft, societas que dicitur de Josumpis*.

[60] Numerous sources are available with regard to companies in Basel which were called *Gesellschaft*, or its synonym *Gemeinschaft*. HAGEMANN, Hans Rudolf, *Basler Rechtsleben im Mittelalter*, Basel, Frankfurt am Main, 1987. Bd. II. p. 339.

[61] HAGEMANN, *op. cit.* Bd. II. p. 340.

[62] In this period, the company was not yet called *Firma* – which appeared only later – but *Gesellschaftsname* (HAGEMANN, *op. cit.* Bd. II. p. 341. fn. 2062).

[63] The Peruzzi and Bardi families lent large amounts to Edward III who refused to repay them, and consequently they went bankrupt.

[64] The Fugger company was founded by Hans Fugger in the Middle Ages and was continued by his sons; it flourished under the direction of Jacob Fugger.

The Genovese *Casa (Banca) di San Giorgo* was an early commercial law structure displaying the characteristics of a joint stock company.[65] The Casa did not start operating as a bank, but was a loose association of the creditors of Genoa city. For lack of money, Genoa city borrowed money from its citizens. The capital[66] drawn from various sources was used for secular or humanitarian purposes (*montes profani*, and *montes pietatis*), as well as for transferable bonds (*loca, partes*) representing the value of the loan (*comperae*). The repayment of loans was guaranteed by state revenues, particularly by revenues from the state's salt monopoly (*compera salis*) and from the colonies. Creditors received compensation or an annuity for their money. Thus, the acquisition of bonds was not to prove the loans but to purchase the revenues, i.e. they were not subject to the prohibitions on interest-bearing loans. Bonds had to be registered (*cartularia*), and they were freely transferable in the 13th century. A formal statement before an official or a certified person was sufficient in this regard, and it served as the basis for registering the transfer. In 1323 the office of "capital protectors" (*protectores et defensores capituli*) was established; its members were elected by the bond holders (*participes*) and it represented the interests of the bond holders. The Casa di San Giorgo evolved from an association of bond holders into a company in 1407 (*la societŕ delle compere e de bandri di San Giorgio*), resembling the model of a joint stock company. The Casa took over all the debts of its city, and in return, the city transferred certain state revenues and governmental powers. As of this time the Casa became the creditor of the city, while the former creditors – the shareholders of the Casa – did not receive fixed repayments from 1419 but shared the profit of the Casa, annually in the form of dividends. The Casa was reorganised in 1412 and eight representatives (*procurator)* and protectors (*protectores comperarum)* were appointed who were elected by the company members from among the main shareholders. 52 counsellors (*consilarius*) were also appointed from the major shareholders to represent the body of shareholders. The main transactions required their consent. This created the dualism of management by administrators and shareholders. As years went by, the Casa underwent many changes: in 1568 the *Gran Consilio*, the main managing body of the Casa was established with 480 members, of which 20 were protectors and 460 were general members. The principal-managers (*protectors)* were elected annually by 32 electors. Only shareholders holding at least 25 shares were eligible to be electors. The function of *protector* required at least 40 unencumbered shares or 100 encumbered shares (pledged). 230 members of the *Gran Consilio* were elected secretly, and 230 members were elected by casting lots. Membership in the *Consilio* was subject to having at least ten *locas*. The quorum required three hundred shareholders, and major decisions required a majority of 2/3. Protectors were aided by representatives (*procuratores*) who were appointed by the protectors and served for two years.[67]

Similar company structures were found in German territories as well. According to Gmür the companies from Emden displayed features of both civil law and public law.[68] These companies issued participation certificates (*Anteilscheine*) to members, generally called *Actien,* as in the Netherlands.[69] Occasionally, participation certificates were referred to as obligations (*obligatio*). Companies established later issued with no more than two different nominal values, in the names of the shareholders. Shares could be transferred by assignment. The assignment had to be registered in the share register kept at the company. Foreign partners were issued shares via the principal who assigned them to the foreign partner. Shares were distributed in successive subscriptions, often in the form of public announcements. In many cases the basic capital was raised by newly issued shares.

The main decision-making body of the company was the general meeting. However, not all shareholders could participate in the general meeting. Only the major shareholders could exert their rights in person, while minor shareholders elected a common representative. The principals (generally four in number) acted under the leadership of the general meeting, and they were called *bewindheber* or *bewindhaber*, following the model of Dutch companies. The principals made decisions and handled the company affairs based on the majority principle. The major shareholders strongly influenced the company's management through their decisions. Principals were elected by the general meeting, or the *octroi* often granted the major shareholders the possibility to occupy the positions of directors. Besides this, a so-called chairman's position could be established. The chairman was appointed by the emperor. Accordingly, the aristocratic elements were accompanied by monarchical influence. It is important to mention that these companies had no body corresponding to modern supervisory boards. Supervision was performed exclusively by the general meeting, and rarely by supervisors appointed by the rulers. A specific feature of the companies in Emden was the fact that their management – as opposed to the English or Dutch commercial companies – was not performed by an experienced merchant, but generally by some politician or a person acting on behalf of the monarch.

6. Development of the Northern European commercial companies

The first partnership structures of the Scandinavian and Northern-German territories were created most probably

[65] The Ambrosiusbank (Banca di Ambrosio) in Milan functioned similarly. LEHMANN, *Lehrbuch* (*op. cit.*) p. 378.).

[66] The *mons* derives from the Arabic word *maona*, and means capital.

[67] On 18 January 1408 the Casa was authorised by the government to perform banking activities, thus the bank opened on 2 March 1408 and functioned particularly as a deposit bank. In 1444 the Casa terminated its banking activities, before restarting in 1568. It operated as a private and a central bank, handled public debts and lent money to the city. Part of its profit went to the city. The Casa operated until 1815 and was terminated definitively in 1823.

[68] GMÜR, Rudolf, *Die emder Handelscompagnien des 17. und 18. Jahrhunderts*, In HEFERMEHL, W – GMÜR, R. – BROX, H. (ed.), *Festschrift für Harry Westermann*, Karlsruhe, 1974. p. 185. ff.

[69] The appearance of the word *Actie* dates back to 1606 at the earliest, when it occurred in one of the resolutions of the 17 member college of the Dutch East-Indian Company. GMÜR, *op. cit.* p. 187.

during the migrations, as a result of Viking conquests and based on Italian models.[70] Lehmann suggests the antecedents of these should be sought in the legal structures established on lands inherited generation by generation.[71]

Paul Rehme offers a comprehensive picture of the commercial companies operating in Lübeck in the first part of the 14th century.[72] In this period, there was the *vera societas* (or *justa* or *recta societas)*. The term *vera societas* indicated a company where each member provided capital to the company.[73] The purpose of the *vera societas* was to perform certain commercial activities in order to gain profit (*wynninge*). This form of company corresponds mostly to the *wedderleginge* known from Northern--German sources,[74] which was called *félag* in Scandinavian sources and indicated a community of property.[75] The *félag* is the *societas maris* based on Roman law, or in other words, it was the Northern version of the *collegantia*.[76] Lehmann considers the *weddeleginge* to be a real company.[77] In these companies we find rules related to profit distribution. Profit was distributed equally among the individuals, while losses were shared *pro rata*.

Besides the *félag* there was also the *sendeve*, which did not imply providing property for common use but giving property to another person.[78] While in case of the *vera societas* both parties provided property to the company, in the case of the *sendeve* only one partner did so. This contract was established to perform certain commercial activities.[79] The sendeve corresponds to the Scandinavian legal structure *hjáfélag*, called *commenda* in regions based on Roman legal traditions,[80] and *kirad* in the Islamic world. The sendeve was known not only in Lübeck – in contrast to the wedderleginge – but was broadly applied in Hanseatic territories as well (*selschupp*, *matskoppie*, *cumpanie*, *wynselschop*).[81]

Besides the *vera societas*, the company form simply called *societas* was also known, where not only one member, but both, or their representatives, performed commercial activities. This corresponds best to the modern general partnership.[82] All articles of association were real contracts, i.e. the company was created through the promised contributions. Company members were thus not able to provide their contributions to the company after it was established.[83]

The regulation of medieval Scandinavian companies paints a standard picture. German influence dominated in Denmark and Sweden. Hanseatic law was applied from Bruges to Novgorod. Lehmann connects the development of commercial companies to the conquests, in addition to the legal structures established in agriculture. In the case of the expeditions required for the conquests, a community of property and profit (*hlutskipti*) was established, and this functioned as a sort of wartime venture.[84] It implied that the king gave capital (money or merchandise) to certain merchants. Initially the contract functioned as a simple assignment, later as a silent partnership. It is not clear whether the *félag* had any legal impact in external, third-party relations: whether it acted as a company or the person providing the capital stayed in the background as a silent partner.[85]

Companies were regulated by King Magnus the Law--mender's maritime law ordinance, paragraph 21, which presented two forms of company: the well-known *félag*, and the *hjáfélag*. The félag could be established in the presence of witnesses.[86] No partner could act in external relations without the consent of the other members. The assets of the company could be transported from a certain place with the prior consent of the members. The company property did not serve as guarantees for third parties in the event of delinquent action from the members. The *félag* was known in Icelandic law as well, where it was forbidden to establish it with the purpose of excluding a third party from inheritance. The *félag* under Icelandic law was primarily a community for travel.

In a *hjáfélag*, the partner actively running the company affairs was obliged to manage the property entrusted to him. In the case of profit he was entitled to half of it, while he bore all of the losses. In Lehmann's view, the *hjáfélag* can be considered

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70 LEHMANN, Karl, *Altnordische und Hanseatische Handelsgesellschaften*, Zeitschrift für das gesamte Handels- und Konkursrecht, 62 (1908). p. 289.

71 LEHMANN, *Altnordische (op. cit.)* p. 292.

72 He based his research on data from the Lübecker-Nieder Stadtbuch (liber debitorum, der stad schuld bok), where 280 records are found under the title societas for the period between 1311 and 1360. REHME, Paul, *Die Lübecker Handelsgesellschaften in der ersten Halfte des 14. Jahrhunderts,* Zeitschrift für das gesamte Handels- und Konkursrecht, p. 367.

73 REHME, *Die Lübecker (op. cit.)* p. 369.

74 REHME, *Geschichte (op. cit.)* p. 167. fn. 165.

75 REHME, *Die Lübecker (op. cit.)* p. 370. ff.

76 This legal structure is known under the name *schirkat inan* in Islamic law.

77 LEHMANN, *Altnordische (op. cit.)* p. 308.

78 The term *sendeve* derives from the verb *senden*, that is, it implied giving property. This could be to agents, commissioners and company members as well. The term *sendeve* was applied primarily to commissioning. *"… the main case was doubtlessly an assignment, i.e. engaging an independent merchant in his own name, but for trade on behalf of the assigner"*. LEHMANN, *Altnordische (op. cit.)* p. 306.). The same term (*an cumpanie ofte an sendeve*) was used to refer to companies as well.

79 REHME, *Geschichte (op. cit.)* p. 165. fn. 145.

80 REHME, *Geschichte (op. cit.)* p. 166., LEHMANN, *Altnordische (op. cit.)* p. 340. ff.

81 LEHMANN, *Altnordische (op. cit.)* p. 305.

82 REHME, *Die Lübecker (op. cit.)* p. 373.

83 REHME, *Die Lübecker (op. cit.)* p. 381. The company member could contribute money but also merchandise.

84 LEHMANN, *Altnordische (op. cit.)* p. 295

85 LEHMANN, *Altnordische (op. cit.)* p. 299.

86 The general meaning of *félag* was giving or providing money or merchandise (*leggja fé til lags*). The person giving the goods or money was the *félage* or *félegsmadr*. In a legal sense, *félag* means "having a joint wallet". The félag was established if the parties made contributions for joint trip. AMIRA, Karl von, *Nordgermanisches Obligationenrecht*, Leipzig, 1895. p. 808. ff.

a simple assignment, while the *félag* qualifies as a silent partnership.[87] Additionally, the *hjáfélag* resembled the *commenda*, while the *félag* displayed features of the *societas maris*.

Amin exhibited special forms of companies in his research.[88] Such were the *búlag* or *búfélag* (*bolagh* in Swedish law) related to agricultural production. Parties entered into a contract for the land owner and the farmer to cultivate the land together. Often it was established between family members, and frequently covered not only the agricultural plot but also the dwelling place. In the Icelandic *búlag* the administration of the company was handled by the wife, who entered into a contract with the husband to cultivate the land. As for the company liabilities, a legal relationship resembling joint property (*Gesamthand)* was established among the company members, and expenses were borne according to their shares. A similar case was the marital community of property which also was called *félag*.

Norway and Iceland had fishing companies (*baatlag*), similar to the *colonna*, *rhedereij* and *Reederei*. The fishing company was established by the vessel owner, the owners of the fishing tools and the crew. The company operating on legal grounds existing from the early ages, primarily common law, was established for a given fishing season, and at the end of the season the members shared pro rata in the profit. Besides the company based on mutual capital, the *rhederei* had existed ever since the Vikings, where the vessel and the equipment represented the joint property of the members.

Furthermore, there was also the fleet company (*samflot*), which cannot be considered a *félag* but it was not just a simple community of property either. In the *samflot*, the members administered various vessels for a common goal, and they collaborated continuously in order to ensure the success of the journey. The members did not form a risk community in the fleet company.

Hanseatic law bore witness to the *haverei*,[89] which was a community of risks and necessity. The term *Haverei* appeared in Hanseatic law in the late 16th century. This term referred to a community where the proprietors jointly bore the risks and the damages in the vessel and cargo.[90]

7. Special characteristics of English company law

Literature divides the history of English company law into three main categories: the first stage covers the Middle Ages until the *Bubble Act* in 1720, the second one lasts from 1720 to 1825, and finally, the third period, that of modern company law, starts in 1825 and lasts until the present day.[91] In the present study only the first phase will be shown and analysed.

For a long time there were no registered commercial companies (*incorporations*) in England.[92] Initially, only ecclesiastical and public utility organisations could operate under an official legal framework.[93] The first companies – the *charter company* and its direct predecessor, the *regulated company* – were the successors of medieval commercial guilds (*gild*).

The medieval handicraft and commercial guilds (*gilda, companies*) were derived from the German brotherhoods (*fraternitales, gildonia*).[94] Within the guilds we should distinguish those serving commercial purposes (*gilda mercatoria*) from the simple handicraft and industrial guilds. The internal regulation of the guilds differed significantly according to geographical regions.[95] They were voluntary associations of persons connected by a common goal, or they associated for religious or social purposes. Besides the regular banquets and festivities, the brotherhoods provided support to their members who suffered fires, shipwrecks or other disasters. As a result of the

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87 LEHMANN, *Altnordische (op. cit.)* p. 303.

88 AMIRA, *op. cit.* p. 810. ff.

89 The term *haverei* derives from the Arabic *awârîja* (damaged goods). From the 14th century, in Italy, the term *avaria* referred to damages in the ship and its cargo, and it spread all across Europe. WOLTER, K, *Die Schiffrechte der Hansestädten Lübeck und Hamburg und die Entwicklung des Hansischen Seerechts unter besonderer Berücksichtigung der rechtlichen Bestimmungen über Reisenotlagen und Schiffkollisionen*. Diss. Hamburg, 1975, p. 118.

90 WOLTER, *op. cit.* p. 119.

91 Basically, this classification is applied by DAVIES, Paul – WORTHINGTON, Sarah, *Gower: Principles of Modern Company Law*, London, 2016[10].p. 22.;

92 BALDWIN, Simeon Eben, *History of the Law of Private Corporations in the Colonies and States*, In BRYCE, James – MAITLAND, Frederick William (ed.), *Select Essays In Anglo-American Legal History*, Boston, 1909.; BLACKSTONE, William, *Commentaries on the Laws of England. I. Of the Rights of Persons*, 1765, reprint Chicago, London, 1979; BROWN, Richard, *The Genesis of Company Law in England and Scotland*, The Judicial Review 13 (1901).; CARR, Cecil Thomas, *Early Forms of Corporateness*. In BRYCE, James – MAITLAND, Frederick William (ed.), *Select Essays In Anglo-American Legal History*, Boston, 1909.; CARR, Cecil Thomas, *Select Charters of Trading Companies A.D. 1530-1707*, London, 1913.; CARR, Cecil Thomas, *The General Principles of the Law of Corporateness,* Cambridge, 1905.; CHRISTIE, J. Roberton: *Joint Stock Enterprise in Scotland Before the Companies Acts*, The Judicial Review 21 (1909).; GROSS, Charles, *The Gild Merchant. A Contribution to British Municipal History*, I-II. vols, Oxford, 1890.; HAHLO, H. R., *Early Progenitors of the Modern Company Law,* The Judicial Review 27 (1982)., IRELAND, Paddy, *Capitalism without Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality*, The Journal of Legal History 17 (1996).; HOLDSWORTH, William Searle, *The Early History of Commercial Societies*, The Judicial Review 28 (1916); HORRWITZ, Walter, *Historical Development of Company Law*, The Law Quarterly Review 62 (1946); BANKS, Roderick l'Anson, *Lindley & Banks: On Partnership*, London, 2016[19].; MITCHELL, William, *Early Forms of Partnerships,* In BRYCE, James – MAITLAND, Frederick William (ed.), *Select Essays In Anglo-American Legal History*, Boston, 1909.; RADIA, Max, *Handbook of Anglo-American Legal History*, 1936, Reprint Florida, 1993.; WILLISTON, Samuel, *The History of the Law of Business Corporations Before 1800*. In BRYCE, James – MAITLAND, Frederick William (ed.), *Select Essays In Anglo-American Legal History*, Boston, 1909.

93 DAVIES – WORTHINGTON, *op. cit.* p. 22.

94 At least this is likely, as we find the first guilds in the times following the Norman Conquest. CARR, *The General Principles (op. cit.)* p. 143). At the same time, according to Holdsworth, they already existed in Anglo-Saxon times. HOLDSWORTH, *The Early History (op. cit.)* p. 306.). The guilds, in Radia's view, were already known in London before 1066, and thus the *gilda mercatoria* as well, primarily thanks to the activities of merchants from Cologne (RADIA, *op. cit.* p. 477.).

95 GROSS, *op. cit.* p. 129.

development of industry and commerce, the brotherhoods evolved into guilds, which implied the permanent association of persons performing similar commercial or professional activities.[96] The commercial guilds (*gilda mercatoria*) were associations whereby the merchants performed commercial activities with the same goods in the same geographical region.[97] The primary purpose of establishing guilds was to regulate commerce in the interests of consumers and the public.[98] Using the terms of subsequent English law, the guilds cannot be called *partnerships* (partnerships without legal personality) or *companies* (partnerships with legal personality). Their purpose was to perform trade throughout a common region for the benefit of their members, and they received a *charter* from the monarch for this purpose.[99] Guilds probably resemble modern employers' associations the most, however, they established much closer relationships among the members. The word "borough" which means the parts of the city outside the city walls, is of English origin, but it appeared in Italy as well in the late Middle Ages.[100] Those who were not members of the guild, and did not hold its authorisation, could not trade in the given city and in the given geographical region. Merchant companies were not common and their organisation differed from place to place.[101]

Guilds were known in England as early as the time of King Ine (688–726) and Alfred the Great (871–901). Many guilds functioned in London, York, Oxford, Winchester and Lincoln in the 12th century. German merchants were in a quite privileged position in England. In 1157, the guild of Cologne obtained a "city hall" (*guildhall*) under the name *Stalhof*. In 1377, Richard consolidated the privileges of the Hanseatic League which was also harmonised with Article 41 in the Magna Carta of 1215.[102] In 1391, Richard II granted privileges to English merchants trading in Prussia to establish their own regulations in order to improve governance.[103]

Guilds were established forever (*evermore to lasten*, that is *to abyde, endure and be maynteyned withoute ende*). Their establishment required no authorisation, but it did require approval, according to the practice applicable in this period. "None can create souls but God; but a corporation is created by the Prince (king)". The monarch confirmed the establishment of the guilds with a *charter,* granting them the right to have their common seal, clerks and members, to bring action and be actionable, as well as to hold commercial monopolies.[104] Later the cities could grant charters to the guilds. The general policy of the guilds was to grant everybody the chance of prosperity, to protect the poor against the rich and secure an appropriate quality of life for everyone.[105]

The development of the guilds peaked in the 15th century. The activities of the merchant guilds were directed by the governing body. The governing body comprised one or two *governors* or chairmen (*alderman*) and several collaborating partners (*associates*) who were called *stewards* or *associantes* using the Latin word. Regular feasts and processions replacing the banquets were frequent, and all members had to participate. Absent members were penalised. Membership in the guild was obtained by birth or by apprenticeship. Upon joining the guild the members had to take an oath. The assembly of members and the governing body established the internal regulations which stipulated the conditions for performing the commercial activity and the employment of journeymen and apprentices. Members had to pay fees and had to adopt the internal rules. They traded in their own name, independently, but most guilds stipulated that members should share the business profit with their colleagues. Later, guilds commissioned certain members to perform commercial transactions whose profits were shared by all the members of the guild. Guild regulations often stipulated the obligation of keeping accounts.

The legal construction of companies derived from the guilds – although undoubtedly similar to the *collegia* of merchants known from the Roman Empire – was not based on Roman legal traditions.[106] The significance of the guilds was raised by the fact that the commercial centres steadily moved from the Mediterranean cities to the harbours at the Atlantic Ocean. Political reasons also influenced the increasing role of the guilds: new states were established which led to changes in relationships between states that also affected trade.[107]

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[96] The guilds were established in England primarily under the influence of the Norman Conquest. HOLDSWORTH, *A History of English Law (op. cit.)* vol. VIII. p. 193.

[97] For details on certain merchant guilds see GROSS, *op. cit.* p. 130. ff.

[98] HOLDSWORTH, *A History of English Law (op. cit.)* vol IV. p. 302.

[99] DAVIES – WORTHINGTON, *op. cit.* p. 23. The borough with the first charter can be dated back to the time of Henry VI. CARR, *General Principles (op. cit.)* p. 129.). By contrast, Gross dates it back to the time of Edward I. GROSS, *op. cit.* p. 93.).

[100] CARR, *General Principles (op. cit.)* p. 133. Here we note that the guild and borough appeared very close to each other, and thus are often used as synonyms, however, they refer to different things. CARR, *General Principles (op. cit.)* p. 143.

[101] GROSS, *op. cit.* p. 129.

[102] Article 41 of the Magna Charta stipulates that merchants from all countries could freely enter England – except in times of war or if they are from hostile countries – provided that those countries granted the same rights of free trading to English merchants. The privileges of the Hanseatic League were withdrawn by Elisabeth I.

[103] CARR, *Select Charters (op. cit.)* p. XI.; HAHLO – FARRAR, *op. cit.* p. 3.

[104] "*The king may grant to a subject the power of erecting corporations … but it is really the king that erects, and the subject is but the instrument: for though none but the king can make corporation, yet qui facit per alium, facit per se [he who creates by way of others, creates himself]"*. BLACKSTONE, *op. cit.* vol. I. p. 462.

[105] At the end of the Middle Ages, in many cases the guilds were subject to the direction of rich local oligarchs who used them for their own purposes.

[106] CARR, *The General Principles (op. cit.)* p. 143. Carr based his view primarily on the fact that forty-four types of *collegia* were known in the Roman Empire among which English inscriptions mention only one, that of the smiths.

[107] HOLDSWORTH, *A History of English Law (op. cit.)* vol. IV. p. 315.

7.1 English associations of persons

English associations of persons displayed the following main characteristics compared to European companies. The merchants in the guilds traded independently in partnerships established on a simple contractual basis, similar to the Roman societas.[108] The archaic type of commercial associations was the so-called *societas compagnia* in the early Middle Ages. This evolved into two basic types of partnership: the societas and the *commenda*. Initially, the legal construction of the "English *societas*" essentially complied with the Roman *societas* related regulation, but its nature gradually changed. The relationships between the members (*inter se*) developed in such a way that they generated external effects as well. The *societas* under Roman law only implied unlimited rights and obligations of the principal member. The development of English law was different: if a member entered into a contract with a third party on behalf of the partnership, and the partnership profited under this contract, all members became personally liable without limitation for debts in relations with the third party.[109] As for the internal relationships of the members, their liability was proportional to their contribution. As of the 14th century, most partnerships functioned under a company name derived generally from the active member's or the founder's name. This was followed by the specification "and company" ("& *Co.*").[110] Partnerships, i.e. the commercial companies functioning under a company name, were registered with the guilds, and by the cities starting from the 14th century. If a member left the partnership, and omitted to register this fact, the member's personal liability for the partnership debts continued.

The *societas* was not considered to have a separate personality from its members, but its property was.[111] In several countries, the claims of creditors were first satisfied from the separate property of the partnership, and the property of the members could only be claimed if the partnership's property proved insufficient. Creditors of members could not satisfy their claims from the property of the partnership or the other members; only from the holding of the given member in the partnership. The members were obliged to act bona fide with each other. A competitor venture could not be established without the consent of the other members, nor could they participate in such.

The English partnership regulation was created by adapting to the economic and commercial setting, and thus case law was later codified.[112]

7.2 The commenda in England

The *commenda* was one of the first associations of persons (limited partnership) in the Middle Ages. In English law, this partnership structure was long ignored, as the development of English law sought a venture form with limited liability in partnerships with legal personality. According to Pollock, a *commenda*-like contract did not exist in England, but Holdsworth suggests it was known, albeit to a narrow extent.[113] As mentioned, in the case of the *commenda*, the investor providing the maritime loan stayed at home and gave money or merchandise to the contractor for the maritime venture. If the venture was successful, the lender recovered the loan and shared the profit. Often he also received interest set in advance. If the ship and the cargo were lost, he also lost his investment. As profit sharing and interest were considered compensation for the risks, the maritime loan was not seen as a usurious loan which was prohibited by the church.[114]

Thus, the *commenda* in England had no direct impact – thanks to the joint stock company gaining ground – and therefore the limited partnership was introduced only in 1907 with the Limited Partnership Act.[115] There were several reasons for this: on the one hand, commercial law was dominated by the common law and equity courts, which isolated the development of English commercial law from the continent. On the other hand, trade in England started to develop intensively only from the 16th century with the appearance of joint stock companies which were more enticing for investors due to the limited liability. Furthermore, in the early 18th century, legislation treated the limited liability with hostility, while this was an essential feature of the *commenda*.[116]

The Partnership Act in 1890 governing partnerships corresponding to the continental general partnership came not long before the adoption of the Limited Partnership Act in 1907. The Partnership Act was not a complete code – nor was this its purpose – and several regulations regarding partnerships and limited partnerships were missing. It did not regulate, for instance, the issue of goodwill, the treatment of member assets in the event one of the members goes bankrupt, nor did it provide rules on launching legal action. The law was adopted on the basis of a bill tabled by Sir Frederick Pollock, as a result of drafting, modifying and codifying common law. Apart from rules conflicting with the law, it maintains the rules of equity

[108] DAVIES – WORTHINGTON, *op. cit.* p. 23.
[109] HOLDSWORTH, *A History of English Law (op. cit.)* vol. VIII. p. 197.
[110] HAHLO, *op. cit.* p. 140.
[111] See effective regulations, cf. French and Scottish examples.
[112] BANKS, *op. cit.* p. 1.
[113] In this regard, Pollock wrote in his *Essays on Jurisprudence and Ethics* published in 1882: *"The institution of partnership en commandite, or limited partnership, as we may call it in English, is unknown in the United Kingdom, and in these kingdoms alone, or almost alone, among all the civilised countries of the world"* (Lindley & Banks: op. cit. p. 733.). *„The contract (i.e. the commenda contract; author's note) was very common all over Europe in the Middle Ages, and it was known in England"*. HOLDSWORTH, *The Early History (op. cit.)* p. 309. Holdsworth certifies the existence of the English *commenda* with a source originating in April 1211, but he also is certain this partnership form was not common in the country in the Middle Ages.
[114] *"… the commenda, was in fact a cross between a partnership and a loan …"*. DAVIES – WORTHINGTON, *op. cit.* p. 23.
[115] *"In Continental law the commenda developed into the société en commandite, a form of association which has played, and still plays, an important part in the commercial life of those countries which adopted it. But in England it never took root, possibly because we lagged behind the Continent in book-keeping technique"*. DAVIES – WORTHINGTON, *op. cit.* p. 23.
[116] HOLDSWORTH, *A History of English Law (op. cit.)* vol. VIII. p. 196. ff.

and common law.[117] The one significant change compared to common law is the fact that it provided detailed regulations on the means by which the creditor of one member could gain the shares of the member in the company when enforcing his claims.

Partnership – along with the limited partnership – was regulated in the early 19th century, which facilitated its distinction from partnerships with legal personality. According to the legal regulation, companies with legal personality were "persons created artificially" by authorities entitled to do so (the Crown, the Parliament or English laws), and may obtain rights and undertake liabilities. By contrast, partnerships had no independent legal personality.[118] Anglo-Saxon law also asserts the rule that in partnerships with legal personality, the rights and obligations of the members were separate from those of the partnership. These cannot be separated in partnerships without legal personality. There is one known exception to this principle in English legal history: the International Tin Council – an unregistered association – held independent personality.[119] The limited partnership was regulated in English law as well, similarly to the continental European limited partnerships[120], but its significance fell way short of the latter.

7.3 The charter company

The *charter company* (a company established by a statute) emerged from the guilds.[121] Starting in the 14th century, in England, the Netherlands and France, its development was aided by the foreign trade flourishing as a result of the crusades.[122] Merchants from the same country associated based on the model of the guilds. They gained privileges and monopolies from their ruler, and often also received governmental powers. The charter was issued at the discretion of the ruler, who bore national interests in mind. The charter company had two forms: the regulated company and the joint stock company.

A charter was granted first to weavers by Henry II, and they were followed by the smiths in 1327. Of the *regulated companies,* the first to be established was the *African Company*, the *Russia Company* and the *Turkey Company*. The most well-known charter company was the English East-Indies Company (*Company of Merchants of London, trading to the East Indies*). This company was established because trade routes to the East Indies were long and their outcome was quite uncertain.[123] Members of the company contributed with various amounts to the commercial journey, and shared the profit according to their contribution. Regardless of this, the company was not separate from its members, and any of the members could trade on his own by making reference to the privileges obtained by the company.[124] Until 1614, the investors subscribed shares separately for each business journey, and later, long or short-term investments could be made in the company. After 1692, the members of the companies operating with authorisation from the ruler could no longer trade independently – except for ship captains and crews.

In this period, two other important joint stock companies existed in England: the *Royal African Company* and the *Hudson's Bay Company*. By the end of the 17th century, the advantages of companies operating as corporations came more strongly to the fore. Thus, authorisations granted by the Parliament to the ruler grew in number and allowed the granting of charters.[125] At the same time, the increased number of companies resulted in speculation.

7.4 The regulated company

The *regulated company* is a legal construction with a more limited purpose than that of the guilds (*limited purpose gild*), where, according to the internal rules of the company, each member could trade his own capital, in his own name and at his own risk.[126] The liability of certain merchants was independent from the liability of the other company members, thus the regulated *company* was rather a sort of a framework for collaboration than a modern company.[127] Similarly to guilds, the *regulated company* was often directed by a *governor* or a *mayor* elected by the members. Two or more local *aldermen* or *associates* participated in the company management. According to the principle of *common law*, the adoption of resolutions required a consensus of the majority of the members. New members had to take an oath. Members considered each other as brothers and supported each other in their activities. Banquets and feasts organised by the company played a very important role in the members' lives. Among the early regulated companies in England, a prominent role was played by the *Staplers and the Merchant Adventures*. The *Company of "The Mayor, Constables, and Fellows of the Merchants of the Staple"* was established in the 13th century, and its rights and privileges were stipulated by the *Statute of the Staple* of Edward III in 1353.

The privileges granted to the *staples* can be traced back to the time of Henry III.[128] The *staples* (commercial centres) were cities appointed by the king where merchandise (*staple goods*, such as raw wool) was transported for sale to foreign traders (foreign

[117] BANKS, *op. cit.* p. 2.
[118] BANKS, *op. cit.* p. 19.
[119] BANKS, *op. cit.* p. 18.
[120] BANKS, *op. cit.* p. 733.
[121] HAHLO, *op. cit.* p. 150.
[122] DAVIES – WORTHINGTON, *op. cit.* p. 24.
[123] WILLISTON, *op. cit.* p. 199.
[124] WILLISTON, *op. cit.* p. 200.
[125] Such was for example the Company of Merchants of London trading to Greenland in 1692, the Bank of England in 1694, the National Land Bank, the Royal Lustring Company, the Company of Mine Adventurers, the South Sea Company, the Royal Exchange, and the London (Marine) Assurance Company. In 1720 nearly 200 companies received authorisation from the monarch.
[126] DAVIES – WORTHINGTON, *op. cit.* p. 24.
[127] CARR, *Select Charters (op. cit.)* p. XX. ff.
[128] GROSS, *op. cit.* p. 140.

trade centres).[129] Such commercial centres existed in England, Scotland, Wales, Ireland and other countries. The Merchants of the Staple Company was the organisation of the merchants entitled to sell in trading centres, however, they could not export anything themselves. Foreign trade was the privilege of the foreign merchants who purchased in the trading centres and enjoyed royal protection. The development of the legal protection of trading centres served the mercantilist endeavour to have foreign traders conducting their activities in the country pay with gold and silver. The Merchants of the Staple company was directed by one *mayor* and two or several *constables* elected annually by the community. In numerous commercial centres, the city mayor was also the ex officio mayor of the staple. The mayor and the constables maintained order. Disputes were settled on the grounds of commercial law rules – and not those of common law – in cheap and expeditious *staple courts* (the courts of the commercial centres). Foreign traders could sue and be sued exclusively in these courts.

The *Fellowship* or *Company of the Merchant Adventures of England* was the regulated company of English merchants who traded overseas from the middle of the 13th century. The legal personality of the company was recognised by Elisabeth I in a charter in 1407, authorising its continuous operation. Furthermore, it enabled the use of a common seal, the acquisition of property rights and the creation of internal regulations. The *company* was managed by the *governor* and his assistants.

8. Legal origins of joint stock company law

8.1 General development of stock companies

Following Karl Lehmann's research, the general view in literature was that the development of the stock company law started in the 17th century with the appearance of companies to establish colonies. The companies – primarily stock companies – had forerunners in German territories too in the form of various associations, such as the minting house cooperative (*Münzerhausgenossenschaft*), which was essentially a real capital company.[130] The development of European law marks the beginning of stock company regulation with the Dutch East Indian Commercial Company established in 1602, until the adoption of the first legal regulation, the Code de Commerce in 1807. In Germany, the early modern age witnessed the development of commercial companies, which led to the development of German company law. We should mention the Prussian National Bank established by Frederick II in 1772, called the Maritime Commercial Company (*See-Handlungs-Gesellschaft*). Initially, this bank was a commercial venture and later it evolved into a state banking house. By the end of the 17th century, the form of stock company appeared with larger banks as well, for the first time in Europe at the Bank of England in 1694. Insurance companies were established in the form of stock companies a decade earlier than banks. These companies contributed significantly to the development of stock companies. There is a direct link between modern joint stock company law and the development of commercial companies, for reasons rooted in the history of their origins. On German territories, based on public law, stock companies were first regulated within the framework of association law. Initially, stock companies included commercial companies endowed with state privileges which could only be established with official authorisation.

In Austria, the earliest stock company was the National Bank established in Vienna in 1816.[131]

According to Karl Wieland's view generally accepted in literature, the origins of stock companies can be found in Italy.[132] In the 15th century, the association of state creditors in Genoa, the Banca di San Giorgio, was created, and by the same model the Banca di Ambrosio in Milan. Wieland believes that neither exerted a direct influence on the regulation of the modern stock companies.[133] Modern stock companies find their direct origins rather in the commercial companies established in the 17th century in the Netherlands, France and England. These stock companies played prominent roles in overseas trading and the establishment of colonies. One of the first was the Dutch East Indian Company established on 20 March 1602. All the commercial companies established in this period were created by ruler ordinances (*octroi*). The *octroi* regulated the deed of foundation, autonomy and internal regulation of the companies. The companies received privileges. Shareholdings in the companies could be obtained by purchasing shares. Initially, company assets were pooled by the shareholders for certain business trips, and later these formed the share capital (*founds perpetuel*). As of the second half of the 17th century, stock companies were of crucial importance both in domestic ventures – banks and insurers – and foreign trade.

8.2 The joint stock company

The English *joint stock company* emerged as a result of growing commerce and consequently, the development of regulated companies.[134] While in regulated companies all merchants traded on their own account with their own merchandise, in joint stock companies the *stock* (merchandise, goods) was the capital provided by the members for common use, held by the company as an independent legal entity, separate from its

[129] *"In the middle of the thirteenth century (1267) the Merchants of the Staple appear as a series of full-grown organizations of men united by the common possession of certain privileges (liberties) of trading in England and abroad. A Staple (Étape) was an <emporium>, i.e. a market for the sale of goods of a special kind"*. RADIA, *op. cit.* p. 478.).

[130] RAUCH, Karl, *Die Aktienvereine in der geschichtlichen Entwicklung des Aktienrechts*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung 69 (1952). p. 239.

[131] RAUCH, *op. cit.* p. 247.

[132] The first written record of the concept of legal personality as a fictitious person (*persona ficta*) is traced back to Sinibald Fieschire (Pope Innocent IV). HOLDSWORTH, *A History of the Law (op. cit.)* III. p. 470.

[133] WIELAND, Karl, *Handelsrecht*, München, Leipzig, 1921. Bd. II. p. 5.

[134] DAVIES – WORTHINGTON, *op. cit.* p. 24.

members.[135] Its origins can be traced back to a type of *societas* developed in medieval Italy, where each business trip qualified as independent venture, and everybody could decide whether or not to invest in it. At the end of the business trip the profit was shared, generally not in the form of dividends, but with merchandise.[136] Certain trips were replaced by continuous activity as of the 17th century.

Companies with independent legal personality in English law could be established in four ways. The company could be established authoritatively by the monarch via a *charter*;[137] or based on legal authorisation by a charter[138]; furthermore, by law of the parliament[139], and by company members provided they respected the conditions set forth by the law.[140]

Companies established by royal permission were created not by a contract of the members, but a charter, issued by the king in knowledge of the goal set by the company, and in recognition thereof by the monarch.[141] Given that not all economic organisations received permission from the monarch to establish legal personality, companies acting without one qualified simply as private contract partnerships. Companies established according to the model of joint stock companies and operating with royal permission were essentially exact copies of their models in commerce, except for the legal personality, and therefore the limited liability of the members, which resulted in constant difficulties since their ability to transact and launch legal actions was hardly legitimate.[142]

The joint stock company was run by the *governor* and the *associates*, and unless the charter stipulated otherwise, the consent of the majority engaged the minority. In the *East Indian Company* – which was the first such company with its statute obtained in 1600 – the profit generated at the end of trips was divided among the shareholders.[143] After 1614 it was possible to participate in the company for a certain number of years. In 1653 continuous shares were introduced and private trading was forbidden for the members only in 1692. Until then the East Indian Company represented the transition from the regulated company to the joint stock company.[144] In 1692, besides the East Indian Company two similarly important companies existed in England, the Royal African Company and the Hudson's Bay Company. These companies served state purposes as well: they reflected the endeavours to intensify foreign trade.[145]

With English companies functioning under permission from the monarch it is often hard to distinguish whether they were simply regulated companies – where the members traded independently on their own account – or joint stock companies, where the resources were pooled in a joint corporative form, and profit was shared pro rata.[146]

In the *Case of Sutton's Hospital*, Coke states that organisations with separate legal personality had to be established rightfully, which could take place on the basis of a charter from the parliament or the monarch, and according to the rules of common law.[147] Accordingly, corporations could not be created without state permission. Medieval English literature distinguishes three main categories with regard to the powers of organisations with legal personality. On the one hand, there were activities which could not performed by a corporation (e.g. it could not be a testator, it could not have committed criminal acts, etc.). Then there were the activities closely related to the legal personality (e.g. the ability to acquire capital, a common seal, etc.). In the 16th century it was also recognised that exerting the main rights was based on the will of the majority shareholders. The third category comprised the activities which depended on the nature of certain corporations, since ecclesiastical and lay corporations for example had different powers.[148]

There were three main reasons for the termination of corporations in medieval English law: withdrawal of all or essential members, the corporation renouncing the charter or the confiscation of the charter.[149]

In early literature, William Blackstone studied the issue of English regulation of corporations in detail.[150] Blackstone

[135] As opposed to the commercial centres, these were expressly private companies and could not be considered a public administration body of the British Empire. GROSS, *op. cit.* p. 148. Support from the monarch to companies with legal personality was not a subjective right, but could take place as an exception, in justified cases. CARR, *Select Charters (op. cit.)* p. XVII. See also "Incorporation was a privilege which the state was prepared to confer upon few business organisations". MANCHESTER, A. H., *A Modern Legal History of England and Wales 1750–1950*, London, 1980. p. 347.

[136] See Society of the Mines Royal (1571), East Indian Company and Ayr and Newmills clothes manufacturer (1670–1713).

[137] For instance the Russia Company (1555), the East-India Company (1600) and the Hudson's Bay Company (1670).

[138] After the revolution in 1688 companies which also received monopolies could be authorised by the monarch only in this form. HUNT, Carleton, *The Development of the Business Corporation in England 1800–1867*, New York, 1926, p. 5. This is how the Bank of England (1694), and London Assurance (1720) were established.

[139] In the second half of the 18th century, this was the general form especially for companies established to construct drainage systems and ensure the supply of water. HUNT, *op. cit.* p. 5.

[140] This implied the normative system whose primitive forms in England were introduced in 1844, and its contemporary version in 1862.

[141] CARR, *Select Charters (op. cit.)* p. XV.

[142] CARR, *Select Charters (op. cit.)* p. XIX.

[143] Its full name according to the charter issued by Queen Elisabeth is *Company of Merchants of London trading to the East Indies*.

[144] DAVIES – WORTHINGTON, *op. cit.* p. 24.; CARR, *Select Charters (op. cit.)* p. xxi.

[145] CARR, *Select Charters (op. cit.)* p. XIX. WILLISTON, *op. cit.* p. 201.

[146] E.g. in the case of the East-India Company it is hard to decide whether its charter provided for a regulated company or a joint stock company. Only the references found at the end of the document – that is any member who fails to pay his subscribed participation for the first trip within twenty days at the latest is excluded from the company – indicate that the company was actually established for trade on joint account. For details see CARR, *Select Charters (op. cit.)* p. XXI.

[147] HOLDSWORTH, *A History of English Law (op. cit.)* vol IX. p. 46.

[148] HOLDSWORTH, *A History of English Law (op. cit.)* vol IX. p. 57. ff.

[149] HOLDSWORTH, *A History of English Law (op. cit.)* vol. IX. p. 62. ff.

[150] BLACKSTONE, *op. cit.* 455. ff.

divides corporations into two main categories: *aggregate* and *sole* corporations. The main difference between the two resides in whether the independent personality was granted to one or more members. Furthermore, within aggregate corporations he distinguished between the *ecclesiastical* and the *lay* organisations. The organisation could be established in England only with the consent of the king, or only organisations existing by force of common law could be recognised.[151] Blackstone defines five main elements of the organisations[152]: *perpetual existence and succession*, the ability *to sue or be sued*, *grant or receive*, the ability *to purchase land and hold them*, the *common seal*, and the possibility to *make by-laws or private statutes for the better government of the corporation*.[153]

The first forms of corporations in Scotland were the city and church foundations.[154] In the next stage, companies were created according to commercial needs.[155] While in England the practice in the 16th-17th century was to create companies only with the consent of the king, in Scotland the Council of Trade was established in 1661, with powers covering the authorisation to establish companies and secure various rights and privileges.[156] In 1693 a law[157] was created whereby merchants could associate in order to establish companies, which later received privileges. Scottish companies were managed by managers. The companies had capital fixed in advance and had their own seal. In this period, company members did not yet have limited liability.[158]

The development of Scottish company law in the Middle Ages was closer to the European continental development – primarily thanks to the French influence – than the English one. Scottish legal practice recognised independent legal personality. The perpetual existence of a company was acknowledged, the separate management from the members, as well as the unlimited transferability of shares and the handling of company liabilities separately from members' assets.[159] The first joint stock companies appeared in the 17th century, such as the Darien Company in 1695 for trade to African and Indian nations, or the Bank of Scotland in the same year, as well as the African Company in 1707[160].

In England, the shareholders were not liable for company debts, but the company charter could grant the company the right to stipulate contributions (*leviations*) from the members. By making reference to this, in order to settle accounts, creditors could demand that the company oblige the members to pay the promised contributions.[161] Companies attempted to avoid such regulations. The joint stock company had full legal powers. Representatives of the company could make legal representations only by using the company seal. In the 17th century, stock exchanges emerged and brokers started their activities in England, Scotland, France and the Netherlands.

According to Holdsworth the reasons for the rise in joint stock companies in the 17th century can be found in the advantages of this form of company.[162] One positive aspect of stock companies without doubt was that as a company with legal personality – unless established for a fixed period of time – it functioned as a permanent organisation which was not terminated by the death or withdrawal of a member. As a legal entity, it could sue third parties and its own members more easily. The common seal certified the legal actions of the company and distinguished it from the members' own legal actions. The decisions of the majority were mandatory for the minority as well, as opposed to a partnership. In joint stock companies the continuity of the operative management of the company could be secured more easily than in case of associations of persons, as it was not affected directly by changes in the company membership. Some joint stock companies (such as the New River Company) also obtained public law licences. Shares were freely transferable. The company liability was separate from the liability of the members, and involved a better definition of the members' liability against company creditors and the company itself. The decline of privilege-based foreign trade companies that dominated the 17th century was caused by them gradually losing their exclusivity. Thus free competition emerged by the early 18th century.[163] The East Indian Company lost its commercial monopoly for India in 1813 and for China in 1833.

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[151] "*… the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. The king's implied consent is to be found in corporations which exist by force of the common law, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole community*". BLACKSTONE, *op. cit.* p. 460.

[152] "*These five powers are inseparably incident to every corporation*". BLACKSTONE, *op. cit.* p. 464.

[153] BLACKSTONE, *op. cit.* p. 463.

[154] See e.g. Paisley Abbey in 1488, the old university in Aberdeen in 1497, the Prior of St. Andrews in 1513, etc. WALKER, David M., *A Legal History of Scotland*, Edinburgh, 1995. Vol. III. p. 700.

[155] At the proposal of King Charles I in 1630 the Fishing Company was established, followed by the Linen Companies Act in 1661. WALKER, *op. cit.* vol. IV. p. 687.

[156] An application for the establishment of the company had to be submitted to the Commercial Council, and it was evaluated by the commercial board of the Privy Council, granting the possibility to present opposing opinions. If the application was accepted, the birth of the given company was included in a law.

[157] Foreign Trade Act 1693 (A.P. S. IX. 314, c. 50.).

[158] WALKER, *op. cit.* vol. III. p. 689.

[159] CHRISTIE, *op. cit.* p. 129.

[160] CHRISTIE, *op. cit.* p. 134.

[161] See *Salmon v. The Hamborough Company (1671) 1 Ch. Cas.* This practically implied that the members' limited liability was established even when the members could omit contributions payable for losses – additional contributions in modern parlance – or set the level thereof. HOLDSWORTH, *A History of English Law (op. cit.)* vol. VIII. p. 204. At the same time, these companies were not established for the purpose of creating the unlimited liability of the members, but to obtain royal privileges. HORRWITZ, *op. cit.* p. 375.).

[162] HOLDSWORTH, *The Early History (op. cit.)* p. 317. ff.

[163] HOLDSWORTH, *A History of English Law (op. cit.)* vol. XI. 439. ff.

The South-Sea Company lost its privilege in 1815. The Sierra Leone Company was terminated in 1824, as was the Levant Company in 1825.[164] The void created by the companies losing their privileges was filled with new, freely competitive companies. These operated as *deed of settlement* companies in an *unincorporated* form, i.e. as a partnership, and by using the opportunities granted by the legal institution of trust.[165] The economy functioning in the spirit of *laissez faire* gradually established the framework of modern company law.[166]

In England, a clear distinction between incorporated companies with legal personality and the unincorporated companies started to appear in the latter part of the 17th century. Many joint stock companies were created by mere agreement, as an unincorporated company, granting a common seal[167] and ensuring that participations in the venture could be exchanged for shares. Shares were more or less freely transferable according to the provisions of the contract.[168] The companies set up their by-laws which were rooted in the model of the guilds.[169] The *by-laws* primarily regulated the members' activities in order to achieve the goals of the company, but often they provided for property or liability issues as well.[170] However, these companies did not provide limited liability for their members, even though this was the image they endeavoured to convey in external relations.[171]

9. Final remarks to the development of medieval company law

In the Middle Ages, the burgeoning urban trade and later on distance trading created the economic need to separate the tasks of the contracting parties in asset-based associations. Thus, the activities of persons conducting professional activities and providing material contributions to the operations of the company were separated. The capital for persons performing commercial activities related to the venture was secured by external investors. This meant the capital partner did not actually participate in the business activities, and at the same time, his risks therein were limited to his contribution. This legal structure facilitated the establishment of ventures requiring capital and professional skills. Thus it can be considered the forerunner of limited partnerships and silent partnerships.

Bigger journeys at sea required a more significant pooling of capital, thus those who wished to achieve greater profit established a capital company. The members did not settle up with each other, the company kept independent accounts for the given investors, and the settlements with them were made according to the rules set forth in the deed of foundation of the company. This structure necessitated the establishment of a separate organisation by the companies with independent legal personality, where the will of the investors and proprietors was asserted, and an executive body also functioned. The organisation of the entity dominated, as opposed to the associations of persons, enabling the company to function independently from the members.

In the Middle Ages, the development of the theory of fictitious persons brought about a significant change, allowing for – albeit on an *ad hoc* basis – the establishment of legal entities. This process led to the development of independent legal personality for companies, paving the way to the prototype of the modern joint stock company.

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[164] HOLDSWORTH, *A History of English Law (op. cit.)* vol. XIII. p. 365.

[165] HOLDSWORTH, *A History of English Law (op. cit.)* vol. XIII. p. 368.

[166] HOLDSWORTH, *A History of English Law (op. cit.)* vol. XV. p. 4.

[167] The companies used the common seal only for the major contracts, i.e. legally representing the company in writing did not require the use of the seal to be valid (e.g. the Bank of England, and the East Indian Company did not place their seal on their invoices). For details on the use of seals see WILLISTON, *op. cit.* p. 211. ff.

[168] Participation in the company was certified by the issuance of shares of a certain nominal value which embodied the rights and obligations of the members in the company. The issuance of the shares terminated the earlier concept according to which the members could have direct ownership of the company assets, thus the members *cestuis que trust* as co-proprietors assigned only the administration of the property to the company, and the company did not act as a proprietor but as a *trustee*. For details see WILLISTON, op. cit. p. 217. ff.

[169] WILLISTON, op. cit. p. 215. ff.

[170] In the *Child v Hudson's Bay Company* case (2 P. Wms. 207.) the court determined in principle that the by-laws could provide for everything serving commercial interests, except if the rule is unreasonable or unjust. *"…all by-laws for the benefit and advantage of trade are good unless such by-laws be unreasonable or unjust"*. Thus, in this case it was possible for the company to rightfully mortgage the members' shares in the event of their insolvency.

[171] A contrary view is held by Holdsworth: *"as early as the fifteenth century it was clear that an individual corporator was not personally liable for the debts of the corporation; and after some hesitation, this conclusion was ultimately accepted in the latter part of the seventeenth century"*. HOLDSWORTH, *A History of English Law (op. cit.)* vol. VIII. p. 203.). This view is supported by the fact that the company contracts provided for *leviation*, which could be enforced by creditors, that is – albeit indirectly – they could enforce their claims against the company members as well [see *Salmon v. The Hamborough Company* (1671) I Ch. Cass. At pp. 206, 207.]. At the same time, members could omit the regulation of their leviation obligation from the company charter. Therefore, "*this opened the door to the possibility of limiting the liability of members of the company by a contract between the members of the company and the company, which provided that the members should not be liable to be called upon to pay more than a fixed sum*". HOLDSWORTH, *A History of English Law (op. cit.)* vol. VIII. 204. ff.).

What is Modern in the State of Exception?*

*Guy Lurie***

Abstract

In this article, I explore the modernist assumption inherent in discussions of emergency powers, or, the state of exception. I dwell on some of the modern aspects of the state of exception through an overview of some examples from both pre-modern and modern political theory. More specifically, I examine the history of the political language of the state of exception. I do so in the context of three influencing and interconnected developments: the rise of the state, changes in perceptions of authority, and developments in conceptions of law. In doing so, this article contributes to the robust scholarship on emergency powers and the state of exception by combining an historical analysis of pre-modern and early modern primary sources with an institutional contextualization (the rise of the state) as well as a political theory and legal theory contextualization. In essence, for the Hobbesian modern state, the potential temporary constitutional dictatorship is part of the regular sovereign power. Within this power, I distinguish between the exception outside the law and the exception within the law, which are in a dialectical relationship. The exception outside the law, which was the state of exception on which Carl Schmitt wrote, was unimaginable prior to modern times, since it was tied to the modern positivist understanding of law.

Keywords: *State of Exception; Emergency Powers; Carl Schmitt; Hobbes; The Modern State.*

1. Introduction

For the past several decades, scholars have discussed at length the issue of emergency powers. They have done so in many aspects: juristic, philosophical, sociological, cultural, and historical, to name just a few. Emergency powers hold a fascination for many scholars because of the contradiction inherent in them: free people willing to adopt temporary institutions and norms of an authoritarian nature, in order to protect their democratic institutions and their freedom (i.e. the "constitutional dictatorship"). An implicit or explicit assumption of most of these discussions on emergency powers is their modern inception. This modernist assumption has been especially manifested in discussing the legal and theoretical construct of "the state of exception," which is, generally speaking, a decision to suspend the regular legal order to deal with an emergency. Georgio Agamben, for instance, argues that only nineteenth and twentieth centuries' jurists turned the state of exception into a part of the law.[1] For many scholars, including Agamben, the only relevant pre-modern state of exception is Republican Rome's dictator model. According to the modernist assumption, the Roman dictator model was forgotten in the Middle-Ages and was only rediscovered by Renaissance writers, such as Machiavelli. Thus discussions of the history of emergency powers and the state of exception focus almost exclusively on early modern and modern times.[2]

In a formal legal sense, the modernist assumption with regard to the inception of emergency powers is simply wrong. Medieval Europe, for instance, had various legal constructs dealing with

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1 AGAMBEN, Giorgio, *State of Exception*, Chicago, 2005, pp. 24-26.

2 WRIGHT, Claire, "Going beyond the Roman Dictator: A Comprehensive Approach to Emergency Rule, with Evidence from Latin America," *Democratization* 19(4), 2012, p. 713; ZREIK, Raef, "Notes on the Value of Theory: Readings in the Law of Return – A Polemic," *L. & Ethics Hum. Rts.* 2, 2008, p. 343; LAZAR, Nomi Claire, "Must Exceptionalism Prove the Rule?: An Angle on Emergency Government in the History of Political Thought," *Politics & Society* 34(2), 2006, p. 245; NEOCLEOUS, Mark, "The Problem with Normality: Taking Exception to 'Permanent Emergency'," *Alternatives: Global Local, Political* 31, 2006, p. 191; SCHEUERMAN, William E., "Survey Article: Emergency Powers and the Rule of Law after 9/1," *The Journal of Political Philosophy* 14(1), 2006, p. 61; GROSS, Oren and AOLÁIN, Fionnuala Ní, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge, 2006; ACKERMAN, Bruce, "The Emergency Constitution," *Yale Law Journal* 113, 2004, p. 1029; FEREJOHN, John, and PASQUINO, Pasquale, "The Law of the Exception: A Typology of Emergency Powers," *Int'l J. Const. L.* 2, 2004, p. 210; VLADECK, Stephen I., "Emergency Power and the Militia Acts," *Yale Law Journal* 114, 2004, p. 149; GROSS, Oren, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?," *Yale Law Journal* 112, 2003, p. 1011; SCHEUERMAN, William E., "The Economic State of Emergency," Cardozo L. Rev. 21, 2000, p. 1869; ROSSITER, Clinton L., *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, Princeton, 1948.

emergencies, which granted emergency powers to political leaders and regulated them.[3] Yet, in a deeper jurisprudential sense, the state of exception does have distinctly modern features. For instance, it is difficult to imagine *constitutionally based* emergency powers before the modern constitutions of the eighteenth and nineteenth centuries, or at least before the fundamental laws of the sixteenth century and the instruments of government of the seventeenth century.[4] It is equally difficult to imagine Carl Schimtt's notion that the sovereign is he who decides upon the state of exception, before Jean Bodin's legislative conception of sovereignty in the 1570s.[5] Finally, the state of exception is unimaginable without the modern positivist understanding of law (to which the state of exception is the exception).

In this article, I explore the modernist assumption. I dwell on some of the modern aspects of the state of exception (or, of legal emergency powers) through an overview of some examples from both pre-modern and modern political theory. More specifically, I examine the history of the political language of the state of exception. I do so in the context of three influential and interconnected developments: the rise of the modern state, changes in perceptions of sovereignty and authority (i.e. changes in political ideologies in general), and developments in conceptions of law. As I show in this article, through an examination of examples from both pre-modern and modern times, the modern understanding of the state of exception relies on these interconnected developments and to a large degree is based on them. This article contributes to the robust scholarship on emergency powers and the state of exception by combining an historical analysis of pre-modern and early modern primary sources with an institutional contextualization (the rise of the state) as well as a political theory and legal theory contextualization.

I emphasize several aspects in the development of modern conceptions of the state of exception. During the late Middle-Ages, as central authorities developed, so did conceptions that distinguished powers in regular times from powers in times of necessity. Until then stepping outside the law was not deemed possible, except in cases in which enforcing the letter of the law would bring injustice. As the state grew stronger in the early modern period, so did conceptions of *raison d'État*. This idea was considered a necessary decision for the preservation of the state and the law; a decision which was itself outside the law. The rise of the bureaucratic state in the seventeenth and eighteenth centuries was important, because it brought about greater emphasis on security and order, for which the ruler may act outside the law.

In essence, for the Hobbesian modern state, the potential temporary constitutional dictatorship is part of the regular sovereign power. Within this power, I distinguish between the exception outside the law and the exception within the law, which are in a dialectical relationship. The exception outside the law was the state of exception on which Carl Schmitt wrote, i.e. the element of decision in sovereign power. This conception of the state of exception was unimaginable prior to modern times, since it was tied to the modern positivist understanding of law.

2. Contributing Developments

Before surveying some examples of historical conceptions of emergency powers, some preliminary remarks are in order on three factors, which have influenced these conceptions: the institutional context (namely, the rise of the modern state), the wider political theory context, and general jurisprudential conceptions. These three factors are themselves interconnected.

It is extremely important to understand institutional and political structures and capacities when contextualizing conceptions of emergency powers. Medieval monarchies lacked almost any administration, not to mention a fully-fledged bureaucratic apparatus. Even in late medieval times, France, for example, had a very small permanent number of legal and financial officers. A permanent military began to develop there only in the middle of the fifteenth century (after an aborted start in the mid-fourteenth century).[6] That kind of institutional structure and weak administrative capacity cannot compare with the modern state, or even with the early modern state, with its much larger military, legal and fiscal administration.[7]

Conceptions of emergency powers, and especially conceptions of how to regulate or limit emergency powers, grew in the context of a gradual rise and centralization of political power. The first example of this reciprocal process is the gradual growth of military and fiscal powers of the late medieval monarchy, which saw a corresponding process in the growth of legal constructs dealing with emergencies, such as the laws governing "necessity" and "defense of the realm."[8] The new and growing bureaucracies of the early modern age prompted a change. The centralization of power which they entailed, especially in emergencies, called for new legal ways to regulate them, through instruments of government and constitutions in the seventeenth and eighteenth centuries,[9] and in the nineteenth century also through constitutional instruments governing emergency powers (e.g. the French constitutional *état de siĕge*).

The second connected influencing factor is the rise of the state in political theory and in political language. The issue of

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3 LURIE, Guy, "Medieval Emergencies and the Contemporary Debate," *Athens Journal of Law* 1, 2015, p. 53.

4 See, e.g., OESTREICH, Gerhard, *Neostoicism and the Early Modern State*, Cambridge, 1982, pp. 169-186.

5 See, e.g., KEOHANE, Nannerl O., *Philosophy and the State in France*, Princeton, 1980.

6 GUILLOT, Olivier, RIGAUDIČRE, Albert and SASSIER, Yves, *Pouvoirs et institutions dans la France médiévale: Des temps féodaux aux temps de l'État*, Paris, 1998, pp. 196-306.

7 COLLINS, James B., *The State in Early Modern France*, Cambridge, 2009, pp. 20-27.

8 RIGAUDIČRE, Albert, *Penser et construire l'État dans la France du moyen âge (XIIe-XVe siĕcle)*, Paris, 2003, pp. 537-545; STRAYER, Joseph, *Medieval Statecraft and the Perspectives of History*, Princeton, 1971, pp. 292-298; POST, Gaines, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322*, Princeton, 1964, pp. 8-22.

9 OESTREICH, *supra* note **4**, at 186.

the medieval/modern divide in the history of ideas has plagued historians for decades.[10] Do we see a clear break between medieval and modern times in ideas of government, and ultimately in conceptions of the state? Some historians see continuity between ideas of government and law in medieval times and in modern times. Walter Ullman has argued, for instance, for a continuous Hegelian dialectic in political theory between ideas of "ascending authority" from the people and ideas of "descending authority" from one "supreme organ."[11] Even if one does not accept this version of the continuity thesis, it is apparent that important constitutional ideas of power in modern times, such as popular sovereignty, consent, and constitutionalism, have origins in twelfth century political and ecclesiastical thought on the legitimacy of authority and the origins of jurisdiction.[12] As shown, most notably, by Quentin Skinner, the most important elements of the modern state came to existence only between the thirteenth and sixteenth centuries.[13]

On the other hand, other historians emphasize a clear break between medieval and modern times. Most influentially, John Pocock who argues that something unique happened in the Florentine Renaissance of the fifteenth and early sixteenth centuries. The "Machiavellian moment," which occurred around the turn of the century, was a paradigmatic change in forms of thought. The medieval set of mind had a limited language to deal with the particular, the temporal; it therefore tended to think that man should strive for universals, since the particular was uncontrollable by man, calling it either fortune or providence. Pocock argues that Machiavelli and his peers began to look at the particular as controllable through political institutions. Pocock traces this new paradigm of thought from the fifteenth century onwards.[14] This change from the medieval to the modern form of thought had a corresponding change in the conception of political authority, from the universal unchanging empire and church, to the specific unstable republic.[15]

We do not need to ascribe to a particular side in this historiographic debate, since both sides accept that a transformation occurred. The debate is mostly on the issue of how gradual it was, when it occurred, and so forth. For our purposes, it is enough to accept that at some point in the late medieval period (or gradually over that period), a paradigmatic transformation occurred in the views of political authority. The perceptions of medieval times, which tended to focus on universal all-encompassing political hierarchies (the Roman Empire, the Church and the Christian commonwealth), were replaced by modern perceptions focused on particular republics or states.

The modern state with its autonomous (or absolute) conception of sovereignty had made enormous strides by the end of the sixteenth century, though it is important to remember that the process was not completed even in the eighteenth century. Theories of natural law, for instance, flourished also in modern times. Furthermore, the Atlantic European empires of the sixteenth, seventeenth and eighteenth centuries were at first, at least, still largely based on various different, at times universal, ideologies of empire.[16] In the seventeenth century, as the former international legal regime unraveled, and as Spain, for instance, relinquished its claims to imperial exclusiveness, conflicting claims to universality of empire were replaced by the idea of European states controlling wide expanses of the Atlantic.[17]

The relevance of the paradigmatic change in conceptions of authority and sovereignty to the issue of emergency powers becomes apparent when we focus on its influence on the third factor: conceptions of the law. Medieval ideas of law were distinctly different from the modern positivist paradigm. States only gradually monopolized the authority to make law. Two issues are important in this context. First, medieval polities and the early modern states practiced legal pluralism. Legal systems co-existed and overlapped within each polity: secular and temporal; natural; written; customary; and so forth.[18] Second, the common idea of law, notwithstanding local laws, was also to a large degree the perception of an immobile, universal, and hierarchical – even an objective – structure, including divine law, natural law, Roman law and canon law. In a very real sense, Western Europe had a single common law system based especially on Roman and canon laws that were taught in the universities.[19] In this system, the conception of the king was largely as a judge. Law was already there; the king needed to discover and enforce it.

The modern paradigm of the state as the sole author of law gradually replaced this medieval paradigm. Law gradually became particular to a specific state instead of universal. At first, European empires (Spanish, English, French, etc.) practiced legal pluralism within their empires. The English legal regime, for instance, included competing court systems and jurisdictions,

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[10] My description of the historiography on this issue relies on NEDERMAN, Cary J., "Empire and the Historiography of European Political Thought: Marsiglio of Padua, Nicholas of Cusa, and the Medieval/Modern Divide," *Journal of the History of Ideas* 66(1), 2005, p. 1.

[11] ULLMANN, Walter, *A History of Political Thought: The Middle Ages*, Middlesex, 1970; ULLMANN, Walter, *Principles of Government and Politics in the Middle Ages*, London, 1961.

[12] TIERNEY, Brian, *Religion, Law and the Growth of Constitutional Thought*, Cambridge, 1982, pp. 1150-1650.

[13] SKINNER, Quentin, *The Foundations of Modern Political Thought*, Cambridge, 1978.

[14] POCOCK, J. G. A., *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton, 2003.

[15] POCOCK, J. G. A., *Barbarism and Religion: The First Decline and Fall*, Vol. 3, Cambridge, 2003.

[16] SEED, Patricia, *Ceremonies of Possession in Europe's Conquest of the New World 1492-1640*, Cambridge, 2005; PAGDEN, Anthony, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c. 1500-c. 1800*, Yale and London, 2005.

[17] MACMILLAN, Ken, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640*, Cambridge, 2006; MANCKE, Elizabeth, "Empire and State," in *The British Atlantic World, 1500-1800*, David Armitage and Michael J. Braddick eds., New York, 2002, p. 175; SEED, *Supra* note 16.

[18] For a legal tract describing the law in this manner from the 1390s, see BOUTILLIER, Jean, *Somme rurale* I., Lyon, 1494, ff. 1-3. Similarly, from around 1416, see MÂCON, Jean de, *Summa juris civilis*, BnF. MS. Arsenal 695, ff. 2-8.

[19] BELLOMO, Manlio, *The Common Legal Past of Europe 1000-1800*, Washington, 1995.

and several sources of law, such as ecclesiastical law, Roman law, common law and equity. The Spanish empire was based on separate conceptions of ecclesiastic and secular laws, and also several separate religious systems (Muslim, Jewish and Christian).[20] European states gradually imposed unified coherent legal regimes, especially from the late eighteenth century. The European tendency of trying to rationalize state structures and create a more strictly defined nation state replaced plural legal regimes with state law. The nation state became a stronger source of legitimacy, bringing with it a state bureaucracy, and a more unitary legal regime.[21] The modern paradigm culminated in the national codifications of the late eighteenth and nineteenth centuries, in which each state attempted to create a system of law that would be both exhaustive and exclusive.[22]

The implications of these modern features of legal thought are extremely important for an understanding of the modern features of the state of exception. Where there is a "civil state" in the Hobbesian meaning of the term, in which the state is a Leviathan or a "commonwealth" in which the sovereign has the sole power of making law binding all, there can also be a "state of exception," which is the decision of the sovereign in the state to suspend "civil law."[23] Christoph Schmidt focuses on the process of secularization, when he similarly argues that Carl Schimtt promoted a distinctly modern state of exception in the sense that it was based on a secular (rather than religious) idea of sovereignty, which could only be imagined in this post-Hobbesian legal order.[24] In other words, the medieval sovereign did not have a monopoly on making law, because legal plural systems co-existed and because law was universally conceived to include, for instance, Roman, divine and natural laws. He therefore could not decide upon the state of exception. Such a decision would have been inconceivable (lacking a positivist conception of sovereign legislative powers), not to mention unenforceable, in light of his weak institutional capacities.

3. Pre-State

What does it mean that the law was universal and part of a hierarchy in pre-modern times? How did this generalization take specific form in the context of emergency powers? Of course, ancient and medieval political thought was varied and multifaceted. Generalizing, as I do, involves a distinct process of disregarding some ancient views of the law. In Plato's *Crito*, for instance, the emphasis of Socrates on obedience to the particular laws of Athens reveals a particular and non-universal conception of law.

Yet, ancient conceptions of law that remained influential throughout the Middle-Ages somewhat justify my generalization. Cicero's treatment of the institution of the Roman dictator, for instance, emphasizes its role as subject to higher laws of the common good, justice and the republic. In a passage from his *On the Republic*, well known in the Middle-Ages as Scipio's Dream (most of *The Republic* was rediscovered only much later), Cicero argues that the duty of the dictator is to "restore order in the commonwealth." His emphasis is on the commonwealth (*rem publicam* or *civitas*), and on the supreme duty of defending such an association of men "in justice."[25] Similarly in Cicero's *On the Laws*, he writes against "the most foolish notion of all" that all laws enacted are just. Specifically discussing emergency powers usurped by a dictator, such as "to put to death with impunity any citizen he wished, even without a trial," Cicero argues that "justice is one; it binds all human society, and is based on one Law, which is right reason applied to command and prohibition."[26]

Cicero promoted not only a material idea of the rule of law, but also a universal, objective and supreme law. Cicero appreciated the usefulness of emergency powers, even elsewhere articulating the rule of the Roman dictator, in which "when a serious war or civil dissensions arise, one man shall hold, for not longer than six months, the power which ordinarily belongs to the two consuls, if the Senate shall so decree."[27] Yet Cicero clearly describes a very different institution than the modern state of exception. The dictator is not only constitutionally bound (by the authorization of the Senate), but is also bound by the supreme and universal laws of justice. Cicero appreciates the contradiction inherent in granting dictatorial emergency powers infringing on liberties of citizens in order to preserve the republic and the liberty of its citizens. His solution to this contradiction is through the supreme law of justice.

Cicero's idea of universal supreme justice is of course neither unique nor original.[28] Aristotle's views on the matter would become especially important in medieval times. For Aristotle, laws may be just or unjust just as regimes may be good or bad. The end of the good regime and its laws, according to Aristotle, is the common good and justice.[29] It is in light of this Aristotelian understanding of law and its subordination to the common good, that we can understand Thomas Aquinas'

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[20] BENTON, Lauren and ROSS, Richard J., *Legal Pluralism and Empires, 1500-1850*, New York, 2013; MACMILLAN, *supra* note 17, at 25-31; ELLIOTT, J. H., *Empires of the Atlantic World: Britain and Spain in America 1492-1830*, New Haven and Yale, 2006, p. 127 and p. 142; OFFUTT, William M., "The Atlantic Rules: The Legalistic Turn in Colonial British America" in *The Creation of the British Atlantic World*, Elizabeth Mancke and Carole Shammas eds., Baltimore and London, 2005, p. 160; BENTON, Lauren, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, Cambridge, 2002, chapter 2.

[21] MANCKE, *supra* note 17.

[22] BELLOMO, *supra* note 19; BENTON, *Law and Colonial Cultures*, *supra* note 20, at 6-10.

[23] HOBBES, Thomas, *Leviathan*, Cambridge, 1994 [1651], chapter 26.

[24] SCHMIDT, Christoph, "Logic of Exception: Reflections on Carl Schmitt's Theory of the Partisan" in *State of Exception and State of Emergency* [Hebrew], Christoph Schmidt, Yehouda Shenhav and Shmshon Zelniker eds., Jerusalem, 2009, pp. 31-32.

[25] CICERO, Marcus Tullius, *On the Republic in On the Republic and On the Laws*, Cambridge, 1928, p. 265.

[26] CICERO, On the Laws, in CICERO, *supra* note 25, at 343.

[27] CICERO, On the Laws, *supra* note 26, at 467.

[28] See, e.g., Plato's discussion of the idea of justice in PLATO, *The Republic*, New York, 1968, p. 123.

[29] ARISTOTLE, *The Politics*, Chicago, 1984, p. 103.

well-known discussion of acting outside the letter of the law in emergencies.

Aquinas' discussion (written in the 1260s and 70s) is of course important due to the influence that his work had on contemporaries in the Middle-Ages. In two separate articles, Aquinas discusses the questions of whether a person under the law may act outside the letter of that law and when a ruler may ignore the law. Both discussions envision emergency situations of peril, referencing the Roman law principle that "necessity knows no law." In both cases, Aquinas' rational is Aristotelian: the end of the law is the common good. If in some particular event following the letter of the law would hurt the common good, a ruler (and in urgent extreme cases of peril even not a ruler) may act outside the letter of the law.[30]

As Agamben notes, Aquinas' notion of necessity was far from a modern state of exception, but rather a particular dispensation from acting according to the law.[31] Aquinas described more a principle of equity than a state of exception. Especially in the conception of law that Aquinas promoted, all laws are part of one hierarchy, and the end of all laws (again, explicitly following Aristotle) is the common good: eternal divine law, natural law, and human law.[32]

For modern jurists the state of exception may typically be justified, if by stepping outside the legal order one would save the regime. Yet for Aquinas, stepping outside the legal order was simply impossible. The legal order was universal, hierarchal, and divine. Except for stepping outside the letter of a specific human law in order to prevent injustice, the ruler could not be justified in putting aside the whole legal order. For Aquinas (as for Aristotle), that step would mean the regime's destruction.

4. The State Enters the Stage

Aquinas' conception of law and emergency powers resonated in many writings in the West. Even relatively innovative writers, such as Marsilius of Padua, who promoted a more positivist and consent-based understanding of law in his *Defender of Peace* (1324), saw, following Aquinas, the monarch as limited by the letter of the law except for instances such as equity. Marsilius, the former rector of the University of Paris, even specifically wrote against the French king's usage of what he saw as illegal emergency powers in 1314 in order to raise taxes.[33] Other influential writers also followed Aquinas' version of the singular event dispensation. The important conciliar theologian Pierre d'Ailly, in a letter to the council of Pisa (1409), followed the justification of a necessity based singular event exception for the common good, when the community (rather than the Pope) may call a general council of the Church.[34] And of course most writers shared Aquinas' universal and hierarchical conception of law and justice.[35]

At the same time, during the late Middle-Ages, some conceptions of emergency powers began to depart from Aquinas' all important scholastic doctrine. In fact, legal practice was already diverting from Aquinas' doctrine while he articulated it. Monarchies in the West developed legal concepts that would allow them to disregard property rights during emergencies. As already mentioned, these legal concepts came hand in hand with a centralization of power. Monarchies, including England and France, increasingly used in the late thirteenth century, feudal and Roman law formulas of necessity ("necessity knows no law"), such as a "case of necessity," "necessity of the realm," and "defense of the realm" to raise funds when revenues did not suffice to fight their wars.[36]

Theoretical legal tracts and redactions of customary laws began to include these emergency powers, based on the principle of necessity, and turned them into a field of the law.[37] The jurist Philippe de Beaumanoir, for instance, wrote circa 1283 a redaction of the customs of his district, *Coutumes de Beauvaisis*, which was also a theoretical treatise on law. In this treatise he widens the singular event of necessity and turns it into "times of necessity," governed by "laws," explaining that "some times are exceptional," in which one cannot follow regular usage and customs. Such are "times of war or fear of war," in which rulers may act in ways that otherwise would have been wrongful. The importance of his discussion is not only in turning the singular event into a period of time governed by a field of the law, but also in its details. He discusses various emergencies (such as famine) and what measures authorities may take, which they otherwise cannot take. He mentions that even a low-level ruler (such as a baron) may create in such times new customs or laws.[38] In short, Beaumanoir describes what he sees as the legal norms governing the projection of public power in times of emergency. He describes a legal field: a significant stretch of Aquinas' singular event dispensation from acting according to the letter of the law.

The theoretical conception of emergency was thus in a process of change. William of Ockham is another example, this time from the middle of the fourteenth century. In the context of discussing the people's ability to renounce a jurisdiction, he distinguishes between regular times and times of necessity. In an emergency (necessity), the people may not renounce the

30 AQUINAS, *Summa Theologica*, I-II, Q 96, A. 6 and Q 97 A. 4 [c. 1274].
31 AGAMBEN, *supra* note 1, at 24-26.
32 AQUINAS, *Summa Theologica*, I-II, Q 90, A2, and Q 91 [c. 1274].
33 MARSILIUS OF PADUA, *The Defender of Peace*, 1956 [1324], p. 43.
34 d'AILLY, Pierre, "Aliae prepositiones a utiles, ad exterminationem praesentis schismatis, per viam Concilii generalis," in *Jean Gerson Opera Omnia*, Antwerp, 1706 [1409]. For a similar more developed argument based on necessity see: CUSA, Nicholas of, *The Catholic Concordance*, Cambridge, 1991 [1433].
35 See, e.g., GERSON, Jean, "Diligite justiciam qui judicatis terram," in *Śuvres complčtes*, Vol. VII*, Paris, 1968 [1408].
36 KANTOROWICZ, Ernst, *The King's Two Bodies: A Study in Mediaeval Political Theology*, Princeton, 1957, p. 284; POST, *supra* note 8, at 8-22; STRAYER *supra* note 8, at 292-298; RIGAUDIČRE, *supra* note 8, at 537-545 ; LURIE, *supra* note 3.
37 Cf. KRYNEN, Jacques, *L'empire du roi: Idées et croyances politiques en France xiiie-xve sičcle*, Paris, 1993, p. 270.
38 BEAUMANOIR, Philippe de, *Coutumes de Beauvaisis*, Paris, 1899-1900 [1283], § 1510-1514.

ruler's jurisdiction. Similarly, he differentiates between regular times, in which no one is to be deprived of his rights without fault, and occasions in which the ruler may do so.[39]

In other words, during the late Middle-Ages, the development of central authorities also saw the development of new conceptions that distinguished between powers in regular times and powers in times of necessity. The changing idea of emergency powers was also connected to the changing ideas of law and human authority, as already mentioned.

Niccolo Machiavelli's early sixteenth-century conception of emergency powers is the epitome of this change. In his idyllic, unhistorical and ideological portrayal of the Roman dictator, he claims that the office of dictator was created in order to prevent someone from usurping such powers illegally by force, and that this office was always beneficial to Rome. The dictator only acted for a specific purpose, and could not change the constitution. Most significantly, Machiavelli argues that a republic should always have laws to deal with emergencies, in order to maintain its republican regime.[40] It should be mentioned, that Machiavelli's focus is on the particular republic, but in many ways his conceptions of justice (at least in the *Discourses*) are still very universal. He almost takes it for granted, that the best regime allows for stability in a form of government that takes care of the common good and the liberty of the citizens. He takes it for granted, that a city is formed and the laws of the city are legislated for justice.[41] Still, his focus is on the laws and the regime of the specific republic, and he also thinks that such a regime should intrinsically allow for special emergency powers.

Machiavelli's views on emergency powers turned out to have lasting influence. Montesquieu in the eighteenth century, for instance, explicitly refers to Machiavelli in a similar passage on emergency powers, stating that "when a citizen takes excess powers in a republic […] the abuse is greater, because the laws that had not thought of such an appearance have done nothing to prevent it." To prevent such a corruption of the regime, Montesquieu also mentions constitutional emergency powers, or as he calls them "an exorbitant power" (*un pouvoir exorbitant*), as Rome had through its dictators.[42]

While for Machiavelli the end of emergency powers was ultimately the common good and the liberty of the citizens, the course of the sixteenth century saw a shift. As the early modern state grew stronger, and eventually as the term "state" itself began to be used (in the modern sense), so did conceptions of *raison d'État*. The idea of *raison d'État* was considered necessary for the preservation of the state and the law; a decision that was itself outside the law. Maurizio Viroli aptly describes this important conceptual shift as a transformation of the language of politics. Various writers, such as Giovanni Botero (1589), turned "reason of state" into the ruling concept that defines politics. The language of politics, according to Viroli, changed from a noble science devoted to promoting human virtue, to an ignoble cynical art focused simply on staying in power.[43]

The rise of the bureaucratic state, with its increasingly greater public functions, was important in this context. This model of the state put a greater emphasis on public order as having an intrinsic value, especially against the background of the religious wars of the sixteenth century and the wars of the seventeenth century. For writers such as Justus Lipsius, for instance, writing at the end of the sixteenth century, the end of the state was not only the public good, but also security and order; for him the state was truly based on order and power.[44] Thus it was perceived by more and more writers in the early seventeenth century that in times of necessity, the ruler may act outside the law in order to maintain public order.

Legislative sovereignty was a key feature of this new state, in which the sovereign could step outside the letter of the law in times of emergency. Yet one should stress that for the most part, the sovereign was still deemed limited by supreme types of law. For Bodin, for instance, while the sovereign was above the law (as the author of the law), he was still limited by such things as fundamental laws, natural law and consent to taxation.[45] In the French context (in a relatively traditional tract) he added the courts of law, equity and truth, as limitations of the monarch.[46]

Thomas Hobbes is pivotal in elucidating the complete theoretical construct of the new state model of the seventeenth century. Hobbes too saw security as the ultimate end of the state. Without this power to keep all in awe, he argued, people live in a state of nature (as he termed it). Through a covenant of everyone with everyone people institute a commonwealth. The sovereign power in this commonwealth (or state) is the sole legislator. According to Hobbes, even the law of nature (including justice) is part of civil law, and the legislator controls it. The law of nature is part of the civil law because only when the commonwealth is established, the law of nature becomes a law that people obey.[47]

Hobbes' type of sovereign supremacy is underscored by his treatment of emergency powers. In essence, all sovereign power, according to Hobbes, is focused, truly, on the anticipation of emergency. As he argues: "[sovereign governors] draw from them [their subjects] what they can in time of peace, that they may have means on any emergent occasion, or sudden need, to resist or take advantage on their enemies."[48]

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[39] OCKHAM, William of, *A Short Discourse on Tyrannical Government*, Cambridge, 1992 [1340s], p. 91 and p. 112.
[40] MACHIAVELLI, Niccolo, *The Discourses on the First Ten Books of Titus Livius in The Prince and The Discourses*, New York, 1950 [c. 1517], p. 204.
[41] MACHIAVELLI, *supra* note 40, at 112.
[42] MONTESQUIEU, Charles de Secondat, *De l'esprit des lois*, 1748, book 2, chapter 3.
[43] VIROLI, Maurizio, *From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics 1250-1600*, Cambridge, 1992, p. 331.
[44] OESTREICH, *supra* note 4, at 70-71.
[45] KEOHANE, *supra* note 5.
[46] BODIN, Jean, *Methodus ad facilem historiarum cognitionem*, Paris, 1566, pp. 301-303.
[47] HOBBES, *supra* note 23, at chapter 26.
[48] HOBBES, *supra* note 23, at chapter 18.

Hobbes version of legislative sovereignty is such, that emergency powers and regular powers are one and the same, since the sovereign can disregard the regular civil laws in time of need: "The sovereign of a commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him and making of new."[49] For Hobbes, the only relevant issue in times of emergency is for sovereign assemblies who need "in all great dangers and troubles" to appoint "*custodes libertatis*" or "dictators or protectors of their authority, which are as much as temporary monarchs."[50] In other words, the temporary constitutional dictatorship was for Hobbes the regular sovereign power.

5. The Growing State

The Hobbesian conception of sovereignty resounds to this day in practice and in theory. Political theory was greatly influenced by his ideas. Spinoza, for instance, writing two decades later in 1675-7, also saw the goal of the state as security. He described sovereignty in terms of sole legislative powers, thought that justice was contingent on the existence of civil laws, and that the state must do all it can to survive.[51] The Hobbesian sovereign who may decide whenever he wishes to disregard the law or to create a dictatorship remains to a large degree the prototype of the sovereign in Schmitt's version of the state of exception. Yet as Nomi Claire Lazar rightly points out, Machiavelli's version of emergency powers also had lasting effects. Lazar calls these two traditions the "republican" exceptionalism (of Machiavelli) and "decisionist" exceptionalism (of Hobbes).[52]

In practical terms, one could relate the two traditions that Lazar traces to *two different kinds of emergency powers*. The first is *the exception outside the law*, i.e. emergency powers that the law did not provide for. The second type is *the exception within the law*, i.e. emergency powers that the law did provide for. Hobbes and Carl Schmitt point to the first type. Machiavelli and Montesquieu point to the second type. *These two types of exceptions are in a dialectical relationship. The exception outside the law, which to a large extent creates the legal system (revolutions and emergencies often may result in new constitutions and legal systems), is also its biggest threat.*[53] *The exception within the law exists in order to prevent the use of the exception outside the law.*

John Locke tried to argue against the extent of Hobbesian sovereign powers. Locke's sovereign was limited by the natural rights of life, liberty and property. Locke's sovereign, like Hobbes', had sole supreme legislative powers, but he had to execute these powers for the public good of the people, and they were limited and bounded. He could not rule by "extemporary arbitrary decrees," and therefore emergency powers or the exception outside the law was not possible.[54] Locke's well-known idea of prerogative power is a different thing altogether. Prerogative power is, according to Locke, the power "to act according to discretion for the public good, without the prescription of the law and sometimes even against it."[55] The prerogative power is not the power of the sovereign, but of the executive, which is a fiduciary of the sovereign power. Locke's "prerogative power" is almost the same as Aquinas' necessity doctrine, i.e. the discretion to act outside the letter of the law (or without the letter of the law in cases not foreseen by the law), for the common good. Indeed, Locke, unlike Aquinas, promoted the sole legislative sovereign state. Yet, Locke's version of prerogative power was a very limited and traditional exception within the law (or the supreme law of the public good).

Locke's purpose was generally to maintain the freedom of the citizens of the commonwealth even within the stronger modern state. Rousseau saw things similarly when he defined the problem in the *Contrat social* as to "find a form of association which will defend and protect, with the whole of its joint strength, the person and property of each associate, and under which each of them, uniting himself to all, will obey himself alone, and remain as free as before."[56]

However, while emergency powers serve for Rousseau the same higher purpose of republican freedom,[57] his discussion of the exception is strikingly different than Locke's treatment of the subject. Though Rousseau also begins, like Locke and Aquinas, from the inflexibility of law, he goes beyond them. Through an analysis of the office of the Roman dictator, Rousseau differentiates between the exception within the law and the exception outside the law. In the first type of exception, the emergency is such that only increased and more concentrated government activity is necessary, while "the authority of the laws is not affected." In the second type of exception, a supreme chief is appointed who silences all laws and suspends sovereign authority.[58]

Rousseau thus was part of both traditions of the exceptions within the law and outside it. He retained the Hobbesian model of a sovereign power that always includes the potential constitutional dictatorship. From a modern positivist understanding of law, everything which is part of the constitutional order–including emergency powers–is constitutional in the "material sense," as Hans Kelsen called it.[59] While the Hobbesian model of sovereign power, which includes the potential constitutional dictatorship, echoes to the present, the basic problem of the

[49] HOBBES, *supra* note 23, at chapter 26
[50] HOBBES, *supra* note 23, at chapter 19.
[51] SPINOZA, Benedictus, *Tractatus Politicus* [Hebrew], Jerusalem, 1982 [c. 1677], chapters 2-4.
[52] LAZAR, *supra* note 2.
[53] Cf. AGAMBEN, *supra* note 1.
[54] LOCKE, John, *Of Civil Government: Two Treatises*, London, 1924 [1690], pp. 185-187.
[55] LOCKE, *supra* note 54, at 199.
[56] ROUSSEAU, Jean-Jacques, *The Social Contract*, Oxford, 1994 [1762], I-6, pp. 54-55.
[57] Cf. LAZAR, *supra* note 2.
[58] ROUSSEAU, *supra* note 56, at IV-6, 153.
[59] KELSEN, Hans, *General Theory of Law and State,* Cambridge Mass., 1945, pp. 123-131.

exception in the twentieth century in fact resonates Locke's legacy. The question debated focuses on the issue of the contradiction that is created by giving tyrannical emergency powers to the executive branch in a democratic-liberal regime, whose purpose is the protection of rights infringed by these powers. Hobbes would not have acknowledged the problem. In contrast, Carl Schmitt, the twentieth century (Fascist) scholar, saw this problem and highlighted it at the core of his political theory. Curiously, his solution was also to place the sovereign outside the law, which in essence is not such a different solution from that of Hobbes'. It only demonstrates more awareness on his part of the intrinsic contradiction in this solution.

Schmitt in his books on *Dictatorship* and on *Political Theology* based all his theory of sovereignty on emergencies or the exception, stating that the sovereign is whoever decides that a state of exception exists. The sovereign *decides* to stop the normal legal processes and norms. *Decision* is an important aspect of Schmitt's ideas, comprising one of two elements of the legal order: decisions and norms. The sovereign stands outside the legal order, and constitutes the connecting link between the *decision* element and the *normative* element.[60] By placing the sovereign outside the legal order, Schmitt sought to solve the contradiction inherent in the very idea of a state of exception. The sovereign serves as a link between the state of exception and regular civic norms.

Both Walter Benjamin and Giorgio Agamben tried to eradicate this same connection between the legal order and the government's violent acts during a state of emergency.[61] Agamben disagrees with Schmitt with regard to his major thesis. The state of exception, in Agamben's view, is not one of the constitutive elements of the legal order. Agamben thinks that the state of exception reveals a basic dialectic relation between the two different fundamental elements of *potestas* and *auctoritas*. *Potestas* is the legal element of the state manifested in acts of parliament, the king and so forth. *Auctoritas* in Agamben's view is the meta-legal element of the state, the thing that gives authority to the legal order. It is outside the legal order but it provides the source of its power. The state of exception is the meeting of these two elements, the way both of them are balanced. Agamben's main argument is that the problem with current western regimes is that they have started to use the fiction of the state of exception as a regular means of government instead of as an unused legal fiction.[62]

6. Conclusion

This article has examined the language of the state of exception from ancient times to the twentieth century in order to analyze what is exactly modern in this legal construct of emergency powers. As shown in this article, a key moment occurred in late medieval times. During that period and into early modern time, as central authorities developed and then the state entered the stage, new conceptions arose that distinguished between powers in regular times and powers in times of necessity. These new conceptions were also connected to the changing ideas of law and human authority, culminating in the seventeenth-century Hobbesian model of sovereignty as always including the potential powers of constitutional dictatorship. Agamben's current critique does not go against this Hobbesian model of the sovereign: it embraces it while arguing that these potential powers of constitutional dictatorship should never be realized. This model of sovereignty is one of the distinctly modern features of the state of exception. As shown above, the rise of strong central state institutions, the transformation of conceptions of authority into what we know of as the modern state, and the growth of the modern positivist conception of law – all contributed to this modern feature of the state of exception. Other modern features of the state of exception, mentioned in this article, include the distinction between powers in regular times and powers in times of emergencies, as well as the modern emphasis on security and order as the end of the regime in such situations, to the exclusion of the common good.

The realization that the issue of the exception includes an inherent contradiction is not exclusively modern, although the rise of democratic regimes in the past two centuries accentuated this contradiction (non-democratic measures used for the preservation of the democracy). *What is more important for an appreciation of the modernity of the state of exception is its close connection with the rise of the bureaucratic state with its corresponding positivist understanding of the law*. During the past two centuries, the modern model of the state as the sole, exclusive and all-encompassing legislative authority has resulted in national codifications of emergency powers. Combined with the growing range of issues with which the bureaucratic state came to engage, this process has resulted in a larger set of regulated emergencies (such as economic emergencies): a modern feature of the state of exception to be dealt with in future research.

[60] AGAMBEN, *supra* note 1, at 33-36.
[61] AGAMBEN, *supra* note 1, at 55-63.
[62] AGAMBEN, *supra* note 1, at 85-87.

Citizenship in Croatia-Slavonia during the First World War

*Ivan Kosnica**

Abstract

The paper deals with the concept of national citizenship in Croatia-Slavonia, a land within the Austro-Hungarian Monarchy, during the First World War. Citizenship is analysed as multidimensional concept that includes status, rights and identity. The research question concerns influence of war on each dimension of citizenship. Therefore, in the status dimension, analysed are practices of acquisition of citizenship by naturalizations, and practices of loss of citizenship by dismissals and absence. In the dimension of rights analysed are passports and changes in migration regime. In the dimension of identity analysed is the issue of loyalty of citizens. The paper shows that the war significantly influenced all three dimensions of citizenship. The research bases on relevant literature, legislation and in great part on archival sources available in the Croatian State Archive.

Keywords: *citizenship; Croatia-Slavonia; Austro-Hungarian Monarchy; First World War; naturalization; dismissal; absence; passport; migration; loyalty.*

1. Introduction

War has always influenced citizenship, although these influences could vary and could have different effects.[2] The influence of war on citizenship one can see in each dimension of citizenship, namely status, rights and identity.[3] For instance, the war can influence citizenship status in the issue of naturalizations, specifically in the matters of regulation of naturalisations and in practice of naturalisations, in regulations and possible restrictions of loss of citizenship etc. The war could also influence citizenship as rights in restrictions of citizen's rights etc. Influence of war on citizenship as identity one can see in intensified efforts of state authorities to build common identity, in issues of loyalty/disloyalty of citizens etc.

Closer look at specific experience of First World War indicates that the war significantly influenced citizenship in European states. The war influenced all dimensions of citizenship. For example, the war influenced policy of naturalisations although not always in the same direction. In France, this policy was restrictive[4] while in Germany it was more generous since German authorities tried to attract Jews, Russians of German origin and German-Americans.[5] Another important influence of war was restriction of freedom of movement. As part of this scheme, many countries introduced obligatory photographs on identity documents, namely on passports and identification cards.[6] During the war, the authorities of many European states influenced citizenship as identity in a way that introduced ethnic criteria in administrative practice and in this way destabilized civil concept of citizenship.[7] One can especially see that in multinational empires where authorities extended measures against aliens on internal ethnic and religious minorities.[8] An example is the Russian Empire where authorities interned Russian citizens, dominantly Germans and Jews, because of their ethnicity, religion or former citizenship.[9]

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1 FEVERT, Ute, „Citizens at war: Traitors and internal enemies", in: PELED, Yoav, LEWIN-EPSTEIN, Noah, MUNDLAK, Guy (et. al.), *Democratic Citizenship and War,* Routledge, London and New York, 2011, p. 100.

2 About status, rights and identity as dimensions of citizenship see: JOPPKE, Christian, „Transformation of Citizenship: Status, Rights, Identity", *Citizenship Studies,* 11(2007)/ 1, p. 38; Similar division of the concept see in: JENSON, Jane, „Place–Sensitive Citizenship: The Canadian Citizenship Regime until 1945", in: HOERDER, Dirk, HARZIG, Christiane, SHUBERT, Adrian, *The Historical Practice of Diversity: Transcultural Interactions from the Early Modern Mediterranean to the Postcolonial World*, Berghahn Books, New York, Oxford, 2003, p. 225-226.

3 WEIL, Patrick, *How to Be French: Nationality in the Making since 1789*, Duke University Press, Durham and London, 2008, p. 60-63.

4 FAHRMEIR, Andreas, *Citizenship: The Rise and Fall of a Modern Concept,* Yale University Press, New Haven and London, 2007, p. 121.

5 *Ibid.,* p. 120.

6 FAHRMEIR, *op. cit.,* p. 121; CAGLIOTI, Daniela L, "Why and How Italy Invented an Enemy Aliens Problem in the First World War", *War in History,* 21(2014), p. 151.

7 CAGLIOTI, *op. cit.,* p. 143.

8 LOHR, Eric, *Nationalizing the Russian Empire: The Campaign against Enemy Aliens during World War I*, Harvard University Press, Cambridge, Massachusetts, and London, England, 2003, p. 129-45.

9 MILNER, Emanuel, *Die österreichische Staatsbürgerschaft und der Gesetzartikel L:1879 über den Erwerb und Verlust der ungarischen Staatsbürgerschaft,* Verlag und Druck von Franz Fues, Tübingen, 1880, p. 1-4.

The First World War also influenced citizenships in the Austro-Hungarian Monarchy. Here the complex structure of the Monarchy, which included Austrian and Hungarian part, and Croatian-Slavonian limited autonomy within Hungarian part, had reflection in the matters of citizenship. Namely, there were two national citizenships, Austrian and Hungarian.[10] In Hungarian part, this citizenship was the same for all the lands of the Hungarian Crown, but Croatia-Slavonia had executive autonomy in the matters of citizenship, including autonomy in naturalizations.[11] In Croatia-Slavonia, the name of this citizenship was Hungarian-Croatian citizenship.[12]

Previous notions give us starting point for research of the concept of Hungarian-Croatian citizenship in Croatia-Slavonia in the period of the First World War (1914–1918). Here it is necessary to note that in the research we deal only with the Hungarian-Croatian citizenship, and not with other forms of public belonging that were also relevant for someone's legal position in Croatia-Slavonia, such as local citizenship *(zavičajnost)* and Croatian-Slavonian membership *(hrvatsko-slavonska pripadnost).*[13]

The research focuses on all three dimensions of Hungarian-Croatian citizenship in Croatia-Slavonia. In the dimension of citizenship as status, we research the issue of naturalizations, specifically the matter of regular naturalizations as the most common type of naturalizations in which the autonomous Croatian-Slavonian institutions were fully competent. Further, we analyse the issue of loss of citizenship by dismissal and loss of citizenship by absence as two most important possibilities of loss of citizenship. In the dimension of citizenship as rights, we research the issue of passports and possibilities of migration during the war. At the end, we research the issue of citizenship and loyalty.

Finally, we should give some methodological remarks about the research conducted in the Croatian State Archive. The main problem we met in the research concerns the study of naturalizations and loss of citizenship by dismissal. The problem is that centralized records of naturalizations and dismissals do not exist. In other words, each county and each bigger city, i.e. Zagreb, Varaždin, Osijek, and Zemun, recorded naturalizations and dismissals individually. Additional problem are improper-sorted materials nowadays so it is hard to collect data for each year. However, despite mentioned problems, we collected data for the city of Zagreb, the capital of Croatia-Slavonia, and for the Požega County. The reason why we decided to analyse naturalizations and dismissals in these two jurisdictions is relevant number of naturalizations and dismissals in pre-war period but also during the war.[14] In the research, we will compare naturalizations and dismissals in war years 1915, 1916 and 1917 with naturalizations and dismissals for available pre-war years. For simplicity, we will analyse the number of naturalization and dismissal procedures and not number of naturalized or dismissed persons.[15] Additionally, in cases of naturalizations we will analyse share of Austrian citizens in total number of naturalizations and the number of women as applicants. In case of dismissals, we will analyse only the number of women as applicants. This because records do not give us always information about new citizenship of dismissed person.[16]

2. Naturalization

The naturalization in Croatia-Slavonia regulated the common Hungarian-Croatian citizenship law of 1879.[17] The law enacted Croatian-Hungarian Diet in which Hungarians had dominant position.[18] Nevertheless, the law recognized autonomous competences to the Ban of Croatia-Slavonia in the matters of naturalization and this was completely in accordance with the Croatian-Hungarian Compromise of 1868 and with the legal practice established in the period before the citizenship law of 1879 entered into force in 1880.[19]

According to the citizenship law of 1879, foreign citizens could acquire Hungarian-Croatian citizenship in Croatia-Slavonia in the process of regular naturalization by the act of the Croatian-Slavonian Ban. By this kind of naturalisation citizenship could acquire foreigner if proved legal capacity, if proved that he will be accepted in a municipality in Croatia-Slavonia, if continuously lived in the country for five years, if he was of

[10] VARGA, Norbert, „The Framing of the First Hungarian Citizenship Law (Act 50 of 1879) and the Acquisition of Citizenship", *Hungarian Studies,* 18(2004)/2, p. 136-137; MILNER, *op. cit.,* p. 27.

[11] KOSNICA, Ivan, „Naturalizacija u Hrvatskoj i Slavoniji od 1848. do 1918.", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci,* 34(2013)/2, p. 713.

[12] About concepts of local citizenship and Croatian-Slavonian membership see: KOSNICA, Ivan, "Hungarians and Citizenship in Croatia-Slavonia 1868-1918", in: FRENKEL, David A, and VARGA, Norbert, *Law and History,* ATINER, Athens, 2015, p. 62-65; KOSNICA, Ivan, „Hrvatsko-slavonska pripadnost u Hrvatskoj i Slavoniji u nagodbenom razdoblju", *Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration,* 14(2014)/2, p. 470-485; ČEPULO, Dalibor, „Pravo hrvatske zavičajnosti i pitanje hrvatskog i ugarskog državljanstva 1868–1918 – pravni i politički vidovi i poredbena motrišta", *Zbornik Pravnog fakulteta u Zagrebu,* 49(1999)/6, p. 811-822; ČEPULO, Dalibor, *Prava građana i moderne institucije: europska i hrvatska pravna tradicija,* Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2003, p. 77-78, 85.

[13] It would be more difficult to illustrate pattern of naturalizations and dismissals on the example of smaller units in which the number of naturalizations and dismissals was lower.

[14] The total number of naturalized was always higher. It was so because naturalized were also applicant's women and children if any.

[15] However, from the records it is evident that in most cases persons acquired Austrian citizenship.

[16] "Zakonski članak L: 1879. zajedničkog Ugarsko-hrvatskog sabora o stjecanju i gubitku ugarskoga državljanstva", *Sbornik zakonah i naredabah valjanih za kraljevinu Hrvatsku i Slavoniju* (hereafter cited as Sbornik), Zagreb, (1880)/7; About process of enactment of the law see more in: VARGA, *The Framing of (…), op. cit.,* p. 128-139.

[17] ČEPULO, Dalibor, „Building of the modern legal system in Croatia 1848-1918 in the centre-periphery perspective", in: GIARO, Tomasz, *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert,* Vittorio Klostermann, Frankfurt am Main, 2006, p. 64-65.

[18] KOSNICA, *Naturalizacija (…), op. cit.,* p. 713-718.

[19] Besides this, there was exceptional naturalisation given by the king on suggestion of the Central Government. More about types of naturalisations see in: KOSNICA, *Naturalizacija (…), op. cit.,* p. 718-722; VARGA, *The Framing of (…), op. cit.,* p. 141-143.

good moral conduct, if he had adequate earnings or wealth, and if he had paid taxes for five years (§ 8, 11).[20]

The number of positively solved naturalization procedures in the capital of Zagreb for pre-war years is as follows. In 1904, there were 15 such naturalization procedures. All applicants were former Austrian citizens and they were all men.[21] In 1907, there were 17 naturalization procedures. In fifteen procedures naturalized were Austrian citizens. In one procedure naturalized were members of Bosnia and Herzegovina and in one procedure naturalized were Serbian citizens. In one, a woman independently submitted a request.[22] In 1909, there were 17 naturalization procedures. Sixteen applicants were former Austrian citizens and one was former Prussian citizen. In only one procedure, a woman submitted a request.[23] In the year, 1910 there were 36 naturalization procedures. In thirty-three procedures naturalized were former Austrian citizens, in two procedures naturalized were former Serbian citizens, and in one procedure naturalized was a former Ottoman citizen. All applications submitted men.[24]

The number of positively solved naturalization procedures in the war years in the city of Zagreb is as follows. In 1915, there were 16 naturalization procedures. In fourteen procedures naturalized were former Austrian citizens and in other two members of Bosnia and Herzegovina and an Italian. The authorities naturalized this Italian in the period before Italy entered the war. In one case a woman submitted a request.[25] In 1916, there were 14 naturalization procedures. In eleven procedures naturalized were Austrian citizens. In one procedure naturalized were citizens of Württemberg, in other Bulgarian citizens and in one naturalized were persons of unknown citizenship. In four procedures, applications submitted women.[26] In the year, 1917 there were 11 naturalization procedures. All naturalized were former Austrian citizens. In one procedure, an application submitted a woman.[27]

If we look at naturalization in the Požega County during pre-war years, the data are as follows. In 1907, there were 15 naturalization procedures. In fourteen procedures naturalized were Austrian citizens and in one procedure naturalized were Italian citizens.[28] In 1909, there were 8 naturalization procedures. In seven procedures naturalized were Austrian citizens, and in one procedure naturalized were Italian citizens.[29] In 1910, there were 15 naturalization procedures. In twelve procedures naturalized were former Austrian citizens. In other procedures naturalised were citizens of Italy, Prussia and Württemberg.[30]

In Požega County during the war in 1915 nobody acquired citizenship.[31] In 1916 there were 6 naturalization procedures. In five procedures naturalized were Austrian citizens and in one procedure naturalized were Italian citizens. In the last case, the head of household was born in 1861 so he was no longer a military conscript. The authorities naturalized him with his wife Ana and with five children. They issued the naturalization decree on 19 August 1916. Although he died before the oath, his wife and children acquired citizenship.[32] In 1917 there were 3 naturalization procedures. All naturalized were Austrian citizens.[33]

Previously exposed data show decline of naturalizations during the war. As regards to the structure of naturalized one can see that before as well as during the war most of naturalized were former Austrian citizens. In most cases, men submitted requests for naturalization. During the war, the authorities in principle stopped to naturalize citizens of enemy states. An exception to this was the case of naturalization of Italian citizens in Požega County.

3. Dismissal

The common Croatian-Hungarian citizenship law of 1879 prescribed two regimes of dismissals from citizenship. The first regime applied during peace period. In this regime, the Croatian-Slavonian Ban could dismiss a citizen (§ 21).[34] The power of the Ban was limited only in cases of military conscripts. In these cases the Ministry of war or, in the case of home guardsmen, the Ministry of Home Defence had to give special permission (§ 22).[35] The second regime was for the case of war. In this regime a king dismissed a citizen after suggestion of the Central Government in Budapest (§ 25). In practice, the minister of Home Defence submitted applications to the king on final solution.[36] This regime was in force during the First

[20] HR Hrvatski državni arhiv, *Zemaljska vlada za kraljevine Hrvatsku, Slavoniju i Dalmaciju. Odjel za unutarnje poslove (fond-79)*, (hereafter HR-HDA-79), the box 3146, IV-4 14581/904 (7023/1905)
[21] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[22] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[23] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[24] HR-HDA-79, the box, 4062 IV-2 3036/1915 (32744/1916)
[25] HR-HDA-79, the box 4062, IV-2 3036/1915 (25787/1917)
[26] HR-HDA-79,the box 4062, IV-2 3036/1915 (V-2 24906/1918)
[27] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[28] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[29] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[30] HR-HDA-79, the box 4062, IV-2 3036/1915 (32744/1916)
[31] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[32] HR-HDA-79, the box 4062, IV-2 3036/1915 (V-2 24906/1918)
[33] KOSNICA, Ivan, „Gubitak državljanstva u Hrvatskoj i Slavoniji od Bachovog apsolutizma do raspada Monarhije“, *Pravni vjesnik,* 29(2013)/3-4, p. 69.
[34] See also art. 62 of „Zakonski članak XXX: 1912 zajedničkog Ugarsko-hrvatskoga sabora o vojnoj sili,“ *Sbornik,* Zagreb, (1912)/6; See art. 10. of „Zakonski članak XXXI: 1912. zajedničkog Ugarsko-hrvatskog sabora o domobranstvu,“ *Sbornik,* Zagreb, (1912)/6; See art. 1. of “Naredba kr. povjerenika u kraljevinama Hrvatskoj i Slavoniji od 26. studenoga 1913. broj 82458. o podjeli iseljeničkih dozvola muškim osobama od 17. godine života do svršene vojnostavne ili vojnoslužbovne obvezanosti,” *Sbornik,* Zagreb, (1914)/2; KOSNICA, *Gubitak (…), op. cit.*, p. 70.
[35] HR-HDA-79, the box 4064, IV-2 12506/1915
[36] HR-HDA-79, the box 3146, IV-4 14581/904 (7023/1905)

World War. Below are data about successful dismissals in Zagreb and in Požega County.

The data for the city of Zagreb for the year 1904 show 15 dismissal procedures.[37] In the year, 1907 there were 11 dismissal procedures.[38] In 1909, there were 7 dismissal procedures. Here, in five procedures, applications submitted men and in two, a woman.[39] In 1910 there was one successful dismissal.[40] In 1915, there was only one dismissal.[41] In 1916, there were no dismissals.[42] In 1917, the authorities dismissed a woman.[43]

In Požega County in 1907, there was one dismissal procedure.[44] In 1909 there were two dismissals.[45] In 1910, there were also two dismissals.[46] In 1915 and 1916 there were no dismissals.[47] In 1917, there was one dismissal. Dismissed was Grgur Mišević with his wife and two daughters. Mišević was born 1854 and was no longer a conscript.[48]

The previous data indicate decline of dismissals during the war. The reason of decline was the ban of dismissals to military conscripts. Crucial change happened during 1915 when the Minister of Home Defence informed the Ban Ivan Skerlecz that he did not considered requests because of the war.[49] Since then, only men who were not military conscripts and women had possibility of dismissal.[50] In these cases the Minister of Home Defence instructed the Ban to submit more dismissal requests at once so he could give them all at once to the king on final solution.[51]

The analysis of legal practice also indicates unwillingness of authorities to give dismissals to citizens in cases of emigration in enemy states. As part of this scheme, the authorities kept an eye on citizens abroad and investigated did they lose citizenship in regular procedure.[52] The authorities recognized new citizenship to these persons only if they dismissed them in regular procedure.[53] An exception to this was emigration in United States of America (hereafter USA). In these cases, relevant was international agreement according to which formal dismissal was not necessary.[54]

4. Absence

The Hungarian-Croatian citizenship law of 1879 stated that a citizen would lose citizenship if he were continuously absent ten years from the lands of the Hungarian Crown.[55] This rule had few exceptions, which enabled a citizen to retain citizenship (§ 31).[56] The Provincial Government in 1893, having in mind similar order of the Central Government, expanded list of exceptions. The decree enabled the Provincial Government to retain someone's citizenship, independently of citizens will.[57] The practice during the war indicates that the Croatian-Slavonian authorities extensively interpreted the norms of the citizenship law of 1879 and the order of 1893 on retention of citizenship in cases of military conscripts. For instance, the fact that a man was in military evidence was enough to classify him as Hungarian-Croatian citizen.[58]

The exception to the previous regulation was an emigration in USA. In these cases, the authorities should apply international agreement reached between USA and the Austro-Hungarian Monarchy in 1870. The agreement contained a rule according to which a Hungarian-Croatian or Austrian citizen lost citizenship if he had been residing in the USA for five years and if he had acquired citizenship of the USA. In other words, that meant that a citizen could lose citizenship by emigration in the USA even before the expiration of the period of ten years and

[37] Additionally, one person lost citizenship by absence. HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[38] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[39] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[40] HR-HDA-79, the box 4062, IV-2 3036/1915 (32744/1916)
[41] In the report was mentioned only Hermina Petrović (worker in Wien). She lost citizenship by absence. HR-HDA-79, the box 4062, IV-2 3036/1915 (25787/1917)
[42] Recorded was also one person that lost citizenship by absence. It was a man born in 1859. He was not anymore a military conscript. HR-HDA-79, the box 4062, IV-2 3036/1915 (V-2 24906/1918)
[43] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[44] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[45] HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[46] HR-HDA-79, the box 4062, IV-2 3036/1915 (32744/1916); In 1916 one dismissal was recorded but since this dismissal happened before the war we did not count it. HR-HDA-79, the box 4062, IV-2 3036/1915 (46184/1917)
[47] In the record for the year 1917 mentioned are also Matija Hatze, born in 1849, with his wife and three children. We did not count this dismissal because the authorities dismissed them before the war by the decree issued on 27 June 1914. HR-HDA-79, the box 4062, IV-2 3036/1915 (V-2 24906/1918)
[48] HR-HDA-79, the box 4064, IV-2 8471/1915; HR-HDA-79, the box 4065, IV-2 15353/1915
[49] See a case of dismissal of Paulina Resanović in: HR-HDA-79, the box 4066, IV-2 21556/1915
[50] HR-HDA-79, the box 4064, IV-2 12506/1915
[51] HR-HDA-79, the box 4061, IV-2 1776/1915
[52] HR-HDA-79, the box 4067, IV-2 35774/1915
[53] The international agreement reached between USA and the Austro-Hungarian Monarchy in 1870 contained a rule according to which a Hungarian-Croatian or Austrian citizen lost his citizenship if he had been residing in the USA for five years and if he had acquired citizenship of the USA. KOSNICA, *Gubitak (…), op. cit.,* p. 67.
[54] VARGA, Norbert „The Pretences of Loss of Hungarian Citizenship in the 19th Century", *Forum historiae iuris,* p. 39-50, Source: http://fhi.rg.mpg.de/media/zeitschrift/1008varga.pdf (18.01.2017).
[55] KOSNICA, *Gubitak (…), op. cit.*, p. 70-71.
[56] *Ibid.,* p. 74.
[57] See the report of the Provincial Government to the Minister of Home Defense: HR-HDA-79, the box 4068, IV-2 37684/1915
[58] KOSNICA, *Gubitak (…), op. cit.*, p. 67, 74-75.

despite the efforts of Austrian, Hungarian or Croatian-Slavonian authorities to keep him under jurisdiction.[59]

Among many cases, specifically intriguing are cases of persons of Croatian-Slavonian origin who emigrated in USA, there acquired citizenship of the USA, and later came back in Croatia-Slavonia. In these cases, in first years of the war, Croatian-Slavonian authorities, many times on incentive of the army, questioned and investigated citizenship. The authorities in principle researched did these persons acquire citizenship in accordance with the international agreement of 1870 reached between the Monarchy and the States. Disputable could be continuous five-year residence in USA, tax debt, and previous criminal investigation. However, if everything was in accordance with the international agreement, the authorities treated these persons as citizens of USA.[60] The basic benefit of US citizenship in first years of the war was exemption from military service. Although sometimes happened that the army enlisted some of these naturalized Americans, after intervention of the consulate of USA the Croatian-Slavonian authorities exempted these persons from military service.[61]

The situation changed after USA entered the war in 1917. As before, the Croatian-Slavonian authorities investigated citizenship of naturalized Americans but now interpreted rules in a different way. Apart from the international agreement, the authorities also in great measure used citizenship law of 1879 particularly its rule about presumption of Hungarian-Croatian citizenship of all born in the lands of Hungarian Crown (§ 19).[62] On that basis, the authorities denied American citizenship to children of naturalized Americans if born on the soil of the lands of Hungarian Crown. For illustration, we can mention the case of Ivan Ružić, born in Hreljin in Croatia-Slavonia in 1899. His father during emigration in United States in 1893 acquired US citizenship. So on the basis of the principle of *ius sanguinis* Ivan Ružić should acquire US citizenship. However, during 1917 and 1918 Croatian-Slavonian authorities denied him American citizenship and provisionally treated him as Hungarian-Croatian citizen. Their main argument was that Ivan Ružić was born on the soil of the lands of the Hungarian Crown.[63] Here it is interesting to note that initial purpose of the norm about *ius soli* was to give national citizenship to persons of unknown citizenship. However, significant was that during the War the authorities interpreted this norm in a very extensive way and implemented it on persons whose foreign citizenship was not disputable earlier.

5. Passports and Migration

The Law of 1903 about passports in its first article stated that for residence and travel in the lands of Hungarian crown as well as for the cross of state border passports are not necessary.[64] This was similar to development in other European countries. In this spirit, Frenchman Charles Sée in 1906 in his doctoral thesis predicted demise of passports "in a world of unrestricted travel".[65] This liberal regime of migration resulted in a massive emigration from the Monarchy, including Croatia-Slavonia, towards the United States. The emigration was especially intensive in the period from 1900 up to 1910.[66]

However, this partially changed on 30 November 1912 during the First Balkan War when the king's commissioner for Croatia-Slavonia Slavko Cuvaj, on the ground of decision of the Central Government, introduced obligatory passport regime for traveling in the Kingdom of Serbia and for travellers from the Kingdom of Serbia.[67] The introduction of such regime had legal basis in the Law of 1903 about passports which authorized the Central Government to order obligatory passport regime in the case of war or in the case of emergency (§ 2). In addition, on 9 December 1912 the Provincial Government proclaimed the order of the Central Government about restriction of issuing passports to military conscripts without consent of the Minister of Home Defence.[68] From then on, the Minister of Home Defence gave such permissions to persons who needed passports for educational, medical and business purposes.[69]

The order of 15 January 1914 introduced new restrictions of movement. The order was result of agreement reached between the Austrian Government, the Ministry of Common Finances, and the Central Government in Budapest. The order aimed to establish better migration control of military conscripts within the Monarchy. According to the order, Austrian military conscripts and military conscripts from Bosnia and Herzegovina who enter the lands of Hungarian Crown were obliged to show to authorities adequate documents on regulation of the military service. The same regime was in force for Hungarian--Croatian military conscripts who enter the Austrian part of the Monarchy or Bosnia and Herzegovina.[70]

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[59] HR-HDA-79, the box 4061, IV-2 2277/1915; HR-HDA-79, the box 4061, IV-2 3025/1915; HR-HDA-79, the box 4066, IV-2 24395/1915; HR-HDA-79, the box 4067, IV-2 32900/1915; HR-HDA-79, the box 4064, IV-2 7749/1915

[60] One such case see in: HR-HDA-79, the box 4071, IV - 2 4171/1916

[61] HR-HDA-79, the box 4611, V-2 44/1918

[62] The case of Ivan Ružić see in: HR-HDA-79, the box 4611, V-2 353/1918; Similar cases of Nikola and Andrija Ružić see in: HR-HDA-79, the box 4612, V-2 3877/1918

[63] „Zakonski članak VI: 1903. zajedničkog Ugarsko-hrvatskoga državnoga sabora o putovničkom poslu", *Sbornik,* (1903)/ 4.

[64] FAHRMEIR, *op. cit.,* p. 118.

[65] ČIZMIĆ, Ivan, "O iseljavanju iz Hrvatske u razdoblju 1880-1914", *Historijski zbornik*, 27-28(1974-75), p. 29-32.

[66] "Naredba kraljevskog povjerenika u kraljevinama Hrvatskoj i Slavoniji od 30. studenoga 1912. broj 5390 pr. kojom se proglašuje putovnička obveznost prema kraljevini Srbiji", *Sbornik,* Zagreb, (1913)/1.

[67] The Central Government issued this order based on the article 2 of the *Law article VI: 1903 about passports*. HR Hrvatski državni arhiv, *Zemaljska vlada za kraljevine Hrvatsku, Slavoniju i Dalmaciju. Predsjedništvo (fond-78)*, (Hereafter HR-HDA-78), the box 861, 6-22 5583/1912

[68] HR-HDA-78, the box 861, 6-22 5583/1912; HR-HDA-78, the box 864, 6-22 5583/1913

[69] HR-HDA-78, the box 865, 6-22 371/1914

[70] HR-HDA-78, the box 854, 6-14 2999/1914

On 25 May 1914, the Provincial Government issued an order about obligatory photographs on passports. *Ratio* of the order was prevention of illegal trade with passports and prevention of illegal emigration from the country. Here, the Provincial Government followed development in the Austrian part of the Monarchy where photographs on passports were obligatory while in Hungary this was not the case still.[71]

The next measure was restriction of migration from the Monarchy to Serbia and Montenegro and *vice versa* in July 1914 because of crisis after the assassination in Sarajevo. On 17 July 1914, the Provincial Government explicitly banned subordinated jurisdictions to issue passports and permissions for emigration to military conscripts who wish to travel or emigrate to Serbia and Montenegro. In other cases, the Provincial Government instructed subordinated jurisdictions to collect data about wealth, family members, about *citizenship behaviour* of an applicant etc. After this, they should deliver the data to the Provincial Government on final solution.[72]

After the war broke out, as a reaction on similar measures of other European states, i.e. Netherlands, the Central Government issued an order about obligatory passport regime. The Ban Ivan Skerlecz proclaimed this order in Croatia-Slavonia on 20 January 1915. According to the order, all persons who pass the border of the lands of Hungarian Crown should have passports. Exempted from this measure were only persons who travelled in and from the Austrian part of the Monarchy. Foreigners, with the exception of Austrian citizens and members of Bosnia and Herzegovina, should have passports during they stay in the lands of Hungarian Crown. All passports should have photography and signature of a holder. Foreigners should validate their passports before entrance on the territory of the lands of Hungarian Crown.[73] After proclamation of the order, the next day the Ban issued an implementing order. The order mostly dealt with procedure of issuing passports and treatment of foreigners without passports. The order contained clause about removal of foreigners without passports from Croatia-Slavonia.[74]

Previous regulations indicate transition from liberal towards restrictive regime of migration. The transition happened gradually. At first, it was only obligatory passport regime for traveling in Serbia. Later, the authorities restricted issuing passports to military conscripts, introduced control of migration of military conscripts, and introduced obligatory photographs on passports. Finally, when the war began, the authorities imposed additional measures of control of migration and introduced general obligatory passport regime.

6. Citizenship and Loyalty

During the First World War, the issues of citizenship and loyalty were strongly interwoven. Even before the beginning of the War, during the Balkan Wars (1912-13), the authorities in Croatia-Slavonia carefully looked at loyal conduct of citizens. Among many cases, we can mention the case of police officer Gjoka Vukobradović, Hungarian-Croatian citizen and ethnic Serb, released from service for being disloyal. The concrete reason was hanging portrait of the Serbian king on the wall in the military base in Zemun.[75] After the assassination in Sarajevo on June 28 of 1914 the issue of loyalty of citizens got primary importance in the whole Monarchy, including Croatia-Slavonia.[76]

Very important aspect of citizenship and loyalty would be reactions of citizens on the assassination and declarations of loyalty toward the king after it. These reactions varied although, if we look at political parties, all of them condemned the deed of assassination. However, some of them "adopted a hostile attitude towards Serbia", such as the Frank Pure Party of Right.[77] Along with reactions on the assassination came declarations of loyalty towards the king.[78] For example, in the beginning of July 1914 the Croatian-Slavonian Diet prepared declaration of loyalty toward the king and the Monarchy.[79] On 3rd August 1914 Serbian orthodox parish from the city of Petrinja declared loyalty to the king.[80] During first months of the war, some citizens returned medals given by the Serbian king in the pre-war period and in this way declared loyalty.[81] All these declarations, although sometimes given under pressure, supported his

[71] HR-HDA-78, the box 834, 4-1 3894/1914

[72] HR-HDA-78, the box 834, 4-1 117/1915

[73] HR-HDA-78, the box 834, 4-1 117/1915

[74] HR-HDA-78, the box 829, II 4555/1912; Some other cases emerged in April of 1914 see in: HR-HDA-78, the box 831, II 2082/1914.

[75] For development in Austrian part of the Monarchy see: HIRSCHHAUSEN, Ulrike, "From imperial inclusion to national exclusion: citizenship in the Habsburg monarchy and in Austria 1867–1923", *European Review of History – Revue européenne d'histoire*, 16(2009), p. 557-562; HEALY, Maureen, "Becoming Austrian, Women, the State, and Citizenship in World War I", *Central European History*, 35(2002), p. 13-19; MANDIĆ, Davor, "Pulski *Hrvatski list* (1915.-1918.) - zapisi o „evakuircima" s područja Pomorske utvrde Pula", *Časopis za suvremenu povijest*, 42(2010), p. 784-786.

[76] PLETERSKI, Janko, „The Southern Slav Question", in: CORNWALL, Mark, *The Last Years of Austria-Hungary: A Multi-National Experiment in Early Twentieth-Century Europe,* Liverpool University Press, Liverpool, 2015, p. 133.

[77] Mark Cornwall points out that the „dynasty continued to be the main ideological glue for the Empire". CORNWALL, Mark, „Disintegration and Defeat: The Austro-Hungarian Revolution", in: CORNWALL, *The Last Years (…), op. cit.,* p. 168.

[78] AGIČIĆ, Damir, "Civil Croatia on the Eve of the First World War: The Echo of the Assassination and Ultimatum", *Povijesni prilozi* 14(1996), p. 307.

[79] HR-HDA-78, the box 855, 6-14 5001/1914

[80] During the first months of the war Vjekoslav Heinzel, the director of Croatian Chamber of trade and crafts, and Ivan Bojničić, the director of Croatian State Archives, returned their ordens to the Serbian king and in this way declared loyalty to Habsburgs and to the Austro-Hungarian Monarchy. For Vjekoslav Heinzel see: HR-HDA-78, the box 837, 5-3 6024/1914; The case of Ivan Bojničić see in: HR-HDA-78, the box 837, 5-3 6268/1914. Interesting was that after the war Ivan Bojničić in the letter sent to authorities of the Kingdom of Serbs, Croats and Slovenes declared that in 1914 the Ban of Croatia-Slavonia forced him to return the orden.

[81] CORNWALL, *Disintegration and Defeat (…), op. cit.,* p. 184.

majesty and were unconditional. However, this changed in the following years when demands for reorganization of the Monarchy came up along with declaration of loyalty to the king.[82]

Another aspect of citizenship and loyalty was determination of someone's loyalty in practice. During the war, the authorities monitored citizens, conducted searches of houses, interrogations, investigations of citizens conduct prior and during the war etc.[83] For instance, the authorities classified as expression of disloyalty statement of one Serb from eastern Croatia-Slavonia that he lives on the Serbian land.[84] Incriminated was also possession of weapons, Serbian flags, portraits of the Serbian king, Serbian literature, but also possession of all other foreign flags, coat of arms, portraits of foreign rulers etc. Among many cases that aimed to determine loyalty of citizens, as very illustrative we can mention the case that emerged in the Western Slavonia in Novska and in the village of Raić near Novska. There the Provincial Government in Zagreb and military authorities ordered investigations on October 26 of 1914. The investigation aimed at "orthodox population living in Novska and in its surroundings including village of Raić". Special investigator with circa twenty soldiers from Zagreb conducted searches in the period from 26th October 1914 up to 3rd November 1914. During searches, the investigators found incriminating things, guns, rifles, Serbian flags, etc. After the searches, the authorities fined involved persons, and arrested some of them. Among arrested was also teacher Sofija Knežević. The authorities arrested her because of statements: "King Petar (the king of the kingdom of Serbia) is my king because I am Serb". The authorities pointed out that she named the Austro-Hungarian king as "the old Franjo or Austro-Hungarian ruler" and she never used words "our king".[85]

After determination of someone's disloyalty repressive reactions followed. The measures included money fines, arrests, sentences to prison, internments, house arrests, repositions of officers, dismissals from service etc.[86] Very widespread and significant measure toward potentially disloyal citizens was internment. It consisted in deportations from border areas of the country to camps in interior. Here we would like to mention internment of citizens from Zemun to Pleternica, Požega County. According to the report from 26 October 1914, the authorities interned 114 persons. In the case, interned were all Hungarian-Croatian citizens. In the report, there was no ethnicity but just religious affiliation. According to the religious affiliation, there were 106 Orthodox, 6 Nazarenes and 2 Catholics, and that in practice related to ethnic Serbs.[87]

Besides in the country, the authorities tried to control Hungarian-Croatian citizens living abroad, especially in the USA. The Provincial Government during December of 1914 instructed government commissioners to warn citizens of Serbian ethnic origin who have relatives living in the USA that it will not tolerate participation of citizens in Serbian forces. In such cases, the authorities will ban them entrance in the country and the authorities will confiscate their property. The Provincial Government also pointed out that many citizens of Serbian ethnic origin are fighting in the Austro-Hungarian army.[88]

Except repression, the authorities used propaganda to strengthen desirable loyalties. If we look at Austria-Hungary as a whole, one can say that because of lack of social or national consensus possibilities of general "patriotic propaganda" were limited.[89] However, on regional level, in Croatia-Slavonia the authorities took measures which aim was strengthening of desirable loyalties, mostly toward the king and the country. For this purposes the authorities used annual ceremonies such as ceremony held on August 18 on occasion of birthday of the king Franz Joseph I.[90] On these occasions promotion of loyalty toward the king sometimes went hand in hand with promotion of loyalty towards the country. For instance, on the king's birthday on August 18 of 1915 the newspapers *Ilustrirani list* on its front-page put the image of the king Francis Joseph I and below there was the Croatian coat of arms. Under the illustration states: "Living God, keep our king and our home!"[91] The picture of the king and below only the Croatian coat of arms could implicit that he is primarily the Croatian king. It could also have deeper meaning of interconnection of loyalties towards the king and Croatia-Slavonia, no matter of the rest of the lands of the Hungarian Crown. Such tendencies symbolically weakened the concept of one national Hungarian-Croatian citizenship.

As part of efforts to strengthen desirable loyalties toward the king and the court, some municipalities changed names of streets and squares. For example, local authorities in the city of Bjelovar changed names of one street and one square in their town. They renamed the "Serbian street" *(Srpska ulica)* in the "Street of the duchess Sofija". They also renamed the square of "Zmaj Jovan", a Serbian writer, in the square of the archduke Franz Ferdinand.[92] In Virovitica, local

[82] HR-HDA-78, the box 857, 6-14 848/1915; HR-HDA-78, the box 854, 6-14 3632/1914; HR-HDA-78, the box 854, 6-14 3639/1914; HR-HDA-78, the box 854, 6-14 3810/1914; HR-HDA-78, the box 854, 6-14 3863/1914

[83] HR-HDA-78, the box 831, II 3701/1914.

[84] HR-HDA-78, the box, 878, 6-22 7546/1914

[85] Some repositions of officers see in: HR-HDA-78, the box 842, 6-8 5251/1914.

[86] HR-HDA-78, the box 841, 6-5 740/1914

[87] HR-HDA-78, the box 856, 6-14 8912/1914

[88] CORNWALL, *Disintegration and Defeat (…), op. cit.,* p. 185.

[89] About ceremonies and building of loyalty in the Austrian part of the Monarchy see: COLE, Laurence, "Military Veterans and Popular Patriotism in Imperial Austria, 1870-1914", in: COLE, Laurence and UNOWSKY, Daniel L, *The Limits of Loyalty: Imperial symbolism, popular allegiances and state patriotism in the late Habsburg Monarchy,* Berghahn Books, New York, Oxford, 2009. p. 46-47.

[90] Surce: http://ss-primijenjenaumjetnostidizajn-zg.skole.hr/upload/ss-primijenjenaumjetnostidizajn-zg/images/static3/2574/attachment/PRILOZI_1-5.pdf, (15.1.2017.)

[91] HR-HDA-78, the box 844, 6-13 6530/1914

[92] HR-HDA-78, the box 855, 6-14 4863/1914

authorities' renamed one street in the street of the archduke Franz Ferdinand.[93]

Finally, an important aspect of the issue of citizenship and loyalty are politics concerned with flags. As part of this the head of Croatian-Slavonian autonomous executive, the Ban Ivan Skerlecz, on 21 November 1914 promulgated the order about usage of flags in Croatia-Slavonia. The order prescribed almost exclusive usage of Croatian-Slavonian flag in the autonomous affairs. It was red-white-blue flag, in the order called "the people's flag" *(narodna zastava).* The order in this way repeated the provision of the Croatian-Hungarian Compromise of 1868 about official flag in the autonomous affairs in Croatia-Slavonia. Additionally, in ceremonial occasions the order permitted use of Hungarian and Austrian flags and official flags of subordinated jurisdictions, i.e. cities and counties. On contrary, the Ban forbade use of flags of other states and the use of national and political flags, with the exception of flags of friendly states. Order particularly aimed at Serbian national flag.[94] The order in this way changed previously established practice that tolerated use of Serbian flag in Croatia-Slavonia.[95]

7. Conclusion

The analysed data for the city of Zagreb and for the Požega County show decline of naturalizations during the war. The war also influenced the structure of naturalizations in a way that the authorities did not naturalize citizens of enemy states anymore. As regards to dismissals during the war, analysed data indicate decline of dismissals. The reason of decline was result of order that forbid dismissals to military conscripts.

The practice of loss of citizenship by absence during the war indicates that Croatian-Slavonian authorities and the Central Government in Budapest extensively interpreted the norms of the citizenship law of 1879 and the order of 1893 on retention of Hungarian-Croatian citizenship. Exception to that was treatment of US citizens in first years of the war. In these cases, the authorities applied the international agreement between the Monarchy and the States. However, after the entrance of USA in the war, the practice changed. Since then, the authorities, besides the international agreement, used the article 19 of the citizenship law of 1879 about presumption of Hungarian-Croatian citizenship of all born in the lands of Hungarian Crown. On that basis, they denied American citizenship to children of naturalized American citizens if born on the soil of the lands of Hungarian Crown.

Important influence of war on rights of Croatian-Hungarian citizens was abolishment of liberal system of migration. The process began during the First Balkan War with the order about obligatory passport regime for travelling in the Kingdom of Serbia and the order about restriction of issuing passports to military conscripts. After this, followed new restrictions about control of migration of military conscripts within the Monarchy and the order about obligatory photographs on passports. At the beginning of the war, the Provincial Government followed the Monarchy policy and restricted migration in and from Serbia and Montenegro. Another measure was introduction of obligatory passport regime for all travel and this significantly reduced possibility of migration.

The war bring significant changes in the matters of citizenship and loyalty. More than ever before the authorities questioned loyalty of citizens, looked at their behaviour, their political attitudes, used ethnic criteria in legal practice, especially of Serbian ethnic origin etc. All this destabilized civil concept of citizenship and helped in its transition from ethnically neutral toward ethnically determined concept. Also, efforts of authorities that aimed to strengthen preferable loyalties, especially towards the king, strengthened loyalties toward Croatia-Slavonia as well. Apart of this, authorities in Croatia-Slavonia did not adequately support the identity dimension of the concept of Hungarian-Croatian citizenship.

[93] One can see this from the correspondence of the Ban with the Hungarian Minister of Internal Affairs in late November 1914. The Hungarian Minister contacted the Ban on the use of Serbian flag and the fact that the Khuen's Government (1883-1903) tolerated use of Serbian flag. In the response, the Ban explicitly declared ban of Serbian flag in Croatia-Slavonia. HR-HDA-78, the box 856, 6-14 8378/1914

[94] Khuen's Government tolerated the flag under explanation that this is not Serbian national flag but the flag of Serbian Orthodox Church. RACKO, Ljerka, „Pozadina sukoba oko isticanja srpske zastave u Hrvatskoj na prijelazu iz XIX. u XX. stoljeće", *Radovi (Zavod za hrvatsku povijest)*, 27(1994), p. 120-124.

Solidary and Divided Liability of Joint Tortfeasors - with Special Regards to the Provisions of the New Hungarian Civil Code

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Abstract

According to the generally accepted standpoint in the historian and comparative literature, solidary liability should be established restrictively and not generally. The liability for nonperformance of multiparty contractual obligation, just as the contractual liability for damage arising from nonperformance, is solidary, if it explicitly provided so by a clause in the contract. The new Hungarian Civil code prescribes solidary liability of joint tortfeasors as a general rule, instead of divided liability, where the share of the tortfeasors is determined taking into account their contribution in causing of or their accountability for the damage.

Keywords: *Hungary; civil code; solidary; divided Liability; joint tortfeasors.*

1. Solidary Obligations in Roman Law

The idea of multiple debtors (correlitas, solidaritas) in obligation emerged already in the pristine Roman Law, that is in the Laws of Twelve Tables[1], primarily in the field of liability for non-contractual damage, in relation to multiple tortfeasors. Concerning juridical acts, obligations with multiple debtors could emerge upon the will of the testator. In both cases the question arises whether the debtors were obliged to pay damages or perform the obligation as solidary or divided debtors.

According to the rules of *divided obligation*, all debtors must perform at the same time, but only their portion in the obligation, determined taking into account their respective fault. The sources of Roman Law reveal that divided liability of multiple debtors was the general rule, whereas solidary liability was merely an exception. According to the rules of solidary liability, the creditor could claim the performance of the obligation in its entirety from any of the multiple debtors upon his choice.

Solidary liability had its *legal sources* in *juridical acts* (for instance, last will)at the time, on the one hand, or in *statutes*, on the other. In both cases, all debtors in multiparty obligation had been obliged, but the performance of the primary duty arising from the obligation in *its entirety* affected *only* the debtor *against whom the action was filed*. Statutory law envisaged that such solidary obligation might arise only in relation to indivisible obligations, emerging from joint actions of *guardians* or from *joint causation of damage by more tortfeasors*.[2]

Active and passive solidary obligations, contractual and delictual solidary obbligations

According to the sources of Roman law, just as according to the German *Pandectists*, who developed this theory further, solidary obligations could be *passive* solidary liability or solidary duty to perform, on the one hand, whereby multiple debtors were liable or bound to perform single obligation towards sole creditor. On the other hand, solidary obligations could be active, whereby multiple creditors are entitled to claim performance of a single obligation from sole debtor.

Solidary obligations were considered merely as an *exception*, since in case of multiple debtors divided obligation was that general rule, meaning that all debtors were liable or bound to perform *at the same time*, in proportion to their share in the obligation. In contrast, by solidary obligations the liability of the debtors, or their duty to perform emerges not at the same time, but successively.

The one debtor from whom performance was requested and who performed the obligation entirely has, namely, so-called *recourse claims* against the other debtors from whom the creditor did not request performance. The purpose of the proceedings initiated by recourse claims is to divide the obligation between solidary debtors. The aim of the plaintiff in this proceedings is to provide compensation from the other debtors, in proportion to their culpability or causation.

The sources of Roman Law supports that recourse claims were not possible in relation to divided obligations. For instance, if the damage was caused by joint tortfeasors, the one

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1 Laws of Twelve Tables, 5, 9. See, forexample, *Földi* András és *Hamza* Gábor, A római jog története és institúciói [History and Institutions of Roman Law], Nemzeti Tankönyvkiadó, Budapest, 2011, p. 406, note1304-1306.

2 See *Földi* András és *Hamza* Gábor, A római jog története és institúciói [History and Institutions of Roman Law], Nemzeti Tankönyvkiadó, Budapest, 2011, p. 407, note 1309.

who compensated the injured party fully, could not reimburse from the other debtors their respective share. However, by passive solidary obligations, should one of the debtors cease to exist, the others are liable for his share in the obligation.[3]

Contractual solidary obligations[4], besides testamentary dispositions, according to the tradition of Roman Law, could emerge if the obligation was indivisible[5], or by causing damage by multiple tortfeasors. From *condominium* and *partnership contract* initially did not emerge solidary obligation in Roman Law. From the mere existence of multiplicity of debtors or creditors no solidary obligation emerged.[6]This means that solidary obligation, being an exceptional form of liability, required a special clause in juridical act or norm of statutory law explicitly prescribing it. In case of *societas publicanorum*, whereby the employee of one the partners caused damage to a third party, any member of the partnership could have been sued for damages by the injured third party.[7]

The procedural implications of the ne bis in idem rule

Regarding procedural implications of solidary obligations, two periods in the evolution of Roman law may be identified. The first lasted during the *classical period*, in which it was strongly supported that *action in the same case could be filed only once* (ne bis in idem). This caused however a disadvantageous effect in the context of solidary obligations: if the plaintiff initiated proceedings only against one debtor, who eventually did not performed the obligation, he could not file an action against the other debtors any more (If the procedural implications of the rule of ne bis in idem are analyzed in the light of modern procedural law, there is no bis in idem situation in respect of recourse claims, since in this relation the parties or the procedural roles of the parties are separate). The second period corresponds to the *era of Justinian*. From this period originates the amendment of the rule on solidary obligations, whereby the *initiation of proceedings* against one of the debtors *does not remove solidary obligation*, but the *effective performance* of the obligation in its entirety. Later, however, Justinian abolished solidary liability entirely, by prescribing that the creditor may require performance from each and every debtor separately by a special form of action, leading to division of obligation.[8]

Duty to perform and liability for nonperformance in contractual solidary obligations

From the Roman law originates the division of *debt* arising from juridical act and liability for *nonperformance of the debt*. For instance in the liability of the pater familias for the acts of another person of limited capacity[9], the debt is the primary obligation that has been agreed to by the parties to the juridical act. In contrast, the liability for the debt is the secondary obligation, which is the liability for damage caused by nonperformance or defective performance of the debt. Accordingly, in case of multiplicity of debtors, the liability may be solidary or divided as well. The dichotomy of debt and liability had been by the German Pandectists further developed.[10]

The doctrine of causation in relation to multiple tortfeasors

The *Pandectists*[11] shed also light on another important issue regarding non-contractual liability for damage: namely, when one could speak about *multiple causation* and, consequently, about division of liability between tortfeasors. This question is dealt by the *doctrine of causation*, but there are many theories on

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3 See *Pomponius*, D. 45,2.19. See *Földi* András és *Hamza* Gábor, A római jog története és institúciói [History and Institutions of Roman Law], Nemzeti-Tankönyvkiadó, Budapest, 2011, p. 407, note 1308.

4 On the evolution of concurrence between contractual and delictual liability see for instance *Földi* András, A kontraktuális és deliktuálisfelelősség konkurrenciájának történetéhez, Acta, Budapest, 27, 1985. Ibid, Sulla responsabilitŕ per fatto altrui in diritto romano, Publ. Miskolc 3, 1988.

5 Una res veritur, Inst.3.16.1. If one thing is the object of the obligation, in case of multitude of creditors, any of them may demand performance from the sole debtor in entirety. See *Brósz-Pólai*, Római jog, Tankönyvkiadó, Budapest, 1976, p. 335.

6 See *Földi* András és *Hamza* Gábor, A római jog története és institúciói [History and Institutions of Roman Law], Nemzeti Tankönyvkiadó, Budapest, 2011, p. 407, No. 1309.

7 Ulp. LV ed.D.39,4,3,1. See: *Földi* András, A másért való felelősség a római jogban [Liability for others in Roman Law], Rejtjel Kiadó, Budapest, 2004, p. 219.

8 Ulp. D.16,3,1,43. See *Földi* András és *Hamza* Gábor, A római jog története és institúciói [History and Institutions of Roman Law], Nemzeti Tankönyvkiadó, Budapest, 2011, p. 408. note 1310, 1311.

9 See Max *Kaser*, Das römische Privatrecht, I, München, 1971; *Földi* András (Red.), Összehasonlító jogtörténet [Comparative Legal History], ELTE Eötvös Kiadó, Budapest, 2012, p. 484.

10 See Otto *Gierke*, Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse, Breslau, 1910.

11 See for the German literature: Max *Rümelin*, Die Gründe der Schadenszurechnung und die Stellung des deutschen bürgerlichen Gesetzbuches zur objektiven Schadenersatzpflicht, Freiburg, Leipzig,1892; Max *Rümelin*, Die Verwendung der Kausalbegriffes im Straf- und Zivilrecht, Archiv für die Zivilistische Praxis, 90, 1900, p. 171; Max *Rümelin*, Das Verschulden im Straf- und Zivilrecht, Tübingen, 1909; *Rümelin* Max, Schadenersatz ohne Verschulden, Tübingen, 1910; *Träger*, Der Kausalbegriff im Straf- und Zivilrecht, 1904; *Träger*, Problem der Unterlassungsdelikte im Straf- und Zivilrecht, in Festgabe für Enneccerus, 1913; for the Swiss literature: *Oftinger* Karl, Schweizerisches Haftpflichtrecht, I-II, Polygrafischer Verlag, Zürich,1958, 1960; for the common law: *Posser*, Kausalzusammenhang und Fahrlässigkeit zum anglo-amerikanischen Recht, 1958; for the French law: *Savatiér* Renné, Traité de la responsabilité civil en droit Française, civil; administrativ; professionel; procedural; préface de Georges Ripert; Bd: I-II, II. Auflage, Librairie de droit et de jurisprudence, R. Pichon et R. Durand-Ausias, Paris, 1951; for the Hungarian literature:*Marton* Géza. Les fondaments de la responsabilité civil - Révision de la doctrine, Essai d'un systčm unitaire, premičre partie, Libraire du Recueil Sirey, Paris, 1937; *Marton* Géza, Kártérítési kötelmek jogellenes magatartásból [Liability for damage caused by unlawful conduct], Különlenyomat a Magyar magánjog II. és IV. kötetéből, szerk. *Szladits* Károly, Általános Nyomda és Grafikai Intézet Rt., Budapest, 1942; *Marton* Géza, A polgári jogi felelősség [Civil law liability], Nachdruck, Red. *Zlinszki* János, *Sólyom* László),Triorg Kft, Budapest, 1992, p. 174. note 168. See also: *Szalma* József, Okozatosság és polgári jogi felelősség [Causation and Civil Law Liability], Novotni Alapítvány a Magánjog Fejlesztéséért, Miskolc, 2000, p. 227; *Szalma* József, Szerződésen kívüli (deliktuáluis) felelősség az európai és a magyar magánjogban [Non-contractual Liability in European and Hungarian Private Law], Budapest ELTE ÁJK - Miskolc, Bíbor Kiadó, 2008, from p. 395. See for the latest Hungarian literature: *Fuglinszky* Ádám, Kártérítési jog [Tort Law], HVGORAC, Budapest, 2015, p. 160-161, 320-331.

how to determine what is to be considered as the exact cause of the damage. They determine which unlawful acts of omission of a person may be considered as the cause of damage, lacking which the damage would not emerge, which are chronologically immediate and adequate to the damage. If the damage could be related to one or multiple causes, determines whether a situation of concurrence of causes exists, which can, according to the prevailing theory, lead to adequate causality, concurrence of causality, cumulative causality, prevailing causality and hypothetical causality. If initially, that is at the time of the claim for compensation only one instance of damage exists, there will be no division of damages, provided that one of the two unlawful conduct that lead to the damage *is not considered adequate*. If the damage is obviously the consequence of multiple causes (accumulation of causes), the liability will be divided between multiple tortfeasors. According to *prevailing causation* only one tortfeasor will be held liable for damages, the one who decisively contributed to the emergence of damage. The theory of *hypothetical causation* holds liable the one tortfeasor who acted first, regardless that a subsequent act of another would surely lead to the same consequence. A conclusion may be drawn that only the accumulation of causation leads to the liability for damage of multiple tortfeasors. In other cases the liability eventually gets limited to one of the tortfeasors.

The reception of Roman law concept of solidary obligations in the classical European codifications of private law

The majority of classical European codifications of private law from the beginning of 19th century (for instance the Austrian ABGB, the German BGB, the Swiss ZGB and OR, and the French Code civil) follow the tradition of Roman law and in cases of multiple tortfeasors only exceptionally prescribe solidary liability. The general rule is the divided obligation, both in respect of liability for damaged and duty to perform divisible obligation, especially if the division of debt between joint debtors is envisaged by a juridical act.[12]

Accordingly, under Par 1302. of Austrian *ABGB* solidary obligation emerges only under the condition that (a) alternative causation exists and it could not be established which one of the more potential tortfeasors actually caused damage; (b) but only in cases when it can be ascertained that all persons contributed to damage in respect of their fault or causation, (c) when the contribution of all tortfeasors may be regarded as unlawful; (d) in which case there are all liable; and all increased (e) the risk of damage.[13]

Regarding joint causation and division of delictual liability par. 830. sec. 1. p. 1 of the German *BGB* also follows the tradition of Roman law. According to this paragraph solidary liability may only exceptionally be prescribed. The German BGB, namely, in case of joint tortfeasors sets out the division of liability as a general rule: „If more than one person has caused damage by a jointly committed tort, then *each* of them is responsible for the damage.“[14] Solidary liability of joint tortfeasors is possible, if the individual contribution of tortfeasors or their *share* in the damage could *not be determined*, that is it cannot be proved.[15] By passive solidary liability more debtors owe a debt or being held liable in a way that the creditor may require the performance of the entire obligation from any of the debtors on his choice. Naturally, the creditor may receive performance only once.[16] Par. 830. of the German BGB prescribes liability for the damage caused by *joint tortfeasors*, while par. 840. the liability for damage caused by tortfeasors who acted *independently* one from another. Par 431. regulates the liability of debtors in indivisible obligation. The par 128. of the German Commercial code (Handelsgesetzbuch) sets out joint liability of companies. There are other statutory exceptions to the rule of divided liability in the BGB, whereby liability is solidary, are envisaged by par. 613a, sec. 2, par. 769 (*co-suretyship*), and par. 1357. sec. 1 (*spouses*). In these cases more debtors owe one obligation towards the creditor; (b) the creditor is entitled to demand performance of the entire obligation from any of the debtors; (c) but he is entitled to receive performance of the obligation only once.[17] The traditional (pandectistic) German literature distinguishes

[12] See for example Christian *Bar*, Gemeineuropäisches Delitksrecht, Vol. I München, 1996, Vol. II München,1999, ibid, The common European law of torts, Vol. I, Oxford 1998, Vol. II, Oxford, 2000; *Coing*, Helmut, Europäisches Privatrecht, Band I – Älteres Gemeines Recht (1500-1800), München 1985, Vol. II – 19. Jahrhundert, Überblick über die Entwicklung des Privatrechts in den ehemahls gemeinrechtlichen Länder, München, 1989; *Kötz*, Hein, Europäisches Vertragsrecht, Vol. I, Tübingen,1996, ibid, European Contract Law, Oxford, 1997; Filippo *Ranieri*, Europäisches Obligationenrecht, 2. erweiterte Auflage, Springer, Wien New York, 2003; Reinhard *Zimmermann*, The Law of obligations: Roman Foundations of the CivilianTradition, Cape Town,1990; Konrad *Zweigert* - Hein *Kötz*, Einführung in die Rechtvergleichung auf dem Gebiete des Privatrechts, 3. Auflage, Tübingen, 1996.

[13] See for example *Welser/Zöchling*-Jud, Bürgerliches Recht, Vol II, Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht, 14. Auflage, Manz'sche Verlags- und Universitätsbuchhandlung, Wien. 2015., p. 373, note 1375. For the older Austrian litrature see *Wahiner*, Die korreale Solidarität, Wien, 1885.

[14] See for example *Brambring*, Mittäter, Nebentäter, Beteiligte, 1973; *Bydlinski*, Mittäterschaft im Schadensrecht, Archiv für die zivilistische Praxis, 158, 410; *Keuk*, Die Solidarhaftung der Nebentäter, Archiv für die zivilistische Praxis 168,175; *Wagenfelt*, Ausgleichsansprüche unter solidarisch haftenden Delitksschuldnern im englischen und deutschen Recht, 1972; *Weckerle*, Die deliktische Verantwortlichkeit mehrerer,1974.

[15] See for example *Buxbaum*, Wiebke, Solidarische Haftung bei ungeklärter Verursachung im deutschen, französischen und anglo-amerikanischen Recht, in relation to the application of Par. 830 Sec. 1. point 2 BGB, Hrsg. Karlsruhe, C.F.Müller, Inaug. Diss. Bekeley- Köhler Rechtsstudien, Kölner Reihe, Vol. 7.

[16] https://wikipedia.org/wiki/Gesamtschuld.

[17] See for example the latest literature:Thomas *Zerres*, Gesamtschuld, Jura, 2008, p. 726; Franke *Wernecke*, Die Gesamtschuld - ihre Befreiung von internationalen Merkmalen und ihre Rückführungin der Gesetzsystematik, - zur gestörten Geamtschuld,1990; Anne-Maria *Mollenhauer*, das gestörte Gesamtschuldverältnis, Neue Justiz, 2011,1. p. and the commentaries of the BGB: Sonja *Meier*, in: Historisch-kritische Kommentare zum BGB, Hrsg von Reinhard *Zimmermann*, Vol. 2., 2007, Commets to Par. 420; *Bydlinski* in: Münchener Kommentar des BGB, 6. Auflage, 2012, Par. 421, note 10,12; Palandt, BGB, 72. Auflage, 2013, Par. 421, note 8. Rechtsprechung: Bundesgerichtshof, Neue Juristische Wochenschrift, 1965, 1175; Bundesgerichtshof, Neue Juristische Wochenschrift, 2007, 1208, Rn.17.

two types of solidary obligations: *perfect* and *non-perfect* solidary obligations. If a solidary obligation is perfect, objections raised by the sued debtor (for instance objection that the limitation period has expired) extend their legal effect to other debtors as well who have not been sued, while in case of non-perfect solidary obligation they do not render legal effect on behalf of the other debtors.[18]

In Swiss Law (*OR*, 1811, Art.143)[19] obligations are solidary only exceptionally, in cases envisaged by statute or prescribed by a contract.[20] Statuary solidary obligations exist in relation to sposues, who jointly concluded a loan contract. According to the art. 166. sec 3. of the *ZGB* their liability is solidary.

The French ***Code civil*** (1804) also envisages solidary obligations only exceptionally, in situations determined by statute.[21]

2. On solidary and divided liability arising from tort, its purpose, source, causation, types of solidary obligations and the legal solutions adopted in specific continental civil law systems

Notion. Solidary liability primarily emerges in relation to non-contractual liability for damage, regularly based on a statutory provision, though exceptionally it may pertain to contractual liability as well, arising from specific clauses in contract. In both cases, liability is solidary in situations in which damage was caused by joint tortfeasors. This means that, in the regime of non-contractual solidary liability, the person who has suffered damage may claim indemnification from *any of more tortfeasors* (the persons who actually caused the damage or their accessories) on *his choosing*, for *all the damage sustained*, and neglect the others. If the one tortfeasor against whom the action was filed, fully compensates the person who has suffered damage, the others are relieved from their liability towardshim.[22] However, in the internal relations of the tortfeasors the obligation still exists, since the one who compensated fully the person who has suffered damage, has a recourse claim against the others. In the litigation upon his recourse claim, the other tortfeasors shall be held liability to the compensating tortfeasor in the extent of their contribution to the occurrence of damage. This means that the person who has suffered damage may sue any of the tortfeasors, even the one who might have *contributed* to the occurrence of the damage the *least*, in terms of his culpability or causation, for instance the abettor, and claim full indemnification from him. Therefore, if the liability is solidary, the sued tortfeasor temporarily bears the burden of compensating the person who has suffered damage fully, i.e. even for that part of the damage he did not cause or cannot be imputed to his fault. Thus solidary liability activated by an action of the person who has suffered damage against one of the tortfeasors, provisionally gains punitive traits, besides its compensatory nature.

The solidary liable tortfeasor, condemned to full compensation in the litigation between the person who has suffered damage and him, in order to divide his liability with the other tortfeasors, needs to file a *recourse claim*, i.e. to initiate a separate litigation against the others.[23] In this proceedings the plaintiff is the one tortfeasor who was condemned to full compensation upon the claim of the person who has suffered damage, while the respondents are the other tortfeasors, who were not parties in the proceedings initiated by the person who has suffered damage. In this secondary proceedings the liability of tortfeasors

[18] Seefor example *Fikentscher*, Wolfgang, Schuldrecht, Walter de Gruyter, Berlin - New York, 1976, p. 335; in Pandectistic literature: *Helmholt*, Die Correalobligationen, Giessen, 1857; *Fitting*, Die Natur der Correalobligationen,1859; *Hölder*, Das Wesen der Correalobligationen, Freiburg,1884; *Brinz,* Die Lehre von Correalobligationen und der solidarischen Schuldverhältnisse, 1873;*Unger*, Passive Correalität und Solidarität, 1884; *Binder*, Korrealobligationen, Leipzig, 1898; *Binder*, Die Korrealobligation im römischen und heutigen Recht,1899.

[19] See for example, *Code des obligations*, Loi fédérale complétant le Code civil Suisse, Livre cinquičme : Droit des obligations du 30. mars 1911 (Etat le 24. Avril 2001), Cancellerie federale, Payot, 2001, p. 33. According to section 2. of art. 143. Chapitre premier: Des obligations solidaires: from a mere declaration no solidary obligation emerges, only if it is explicitly stated in statute.

[20] See for example Theo *Guhl*, Das schweizerische Obligationenrecht, Siebente Auflage, Schulthess Polygrafischer Verlag, Zürich, 1980, p. 570 (solidary liability of companies), p. 27, 28 (active solidary obligation), p. 26,27,29 (formal solidary obligation), p. 30, 187, 188-190, 254, 256, 523 (genuine solidary obligation), p. 30, 188-190 (non-genuine solidary obligation), p. 528, 530 (solidary suretyship), p. 489 (solidary liability of foundations, depositary banks).

[21] See for example Renné *Savatier*, Traité de la responsabilitécivile, tomus I-II. – Responsibility, liability of insurance companies and the insured tortfeasor (S. II/769), in relation to common property if things are wasted or damaged (S. I/360), joint tortfeasors (S. I/488), the liability of founders and organs of legal entities (S. I and II,483,493 and 573). See also the following French literature: *Carbonnier* Jean, Droit civil, tome second, Les biens et les obligations, Presses universitaire de France, 1959, p. 766-768. According to these authors, in multiparty obligation divided liability is the rule. The exceptions are set out for indivisible obligations (Indivisilibité), in objective (indivisibilité naturelle) or in concrete meaning (indivisibilité accidentelle, conventionelle, indivisibilité de paiement). According to Henri et Léon Mazeaud – Jean *Mazeaud*, in: Lecons de droit civil, tome deuxieme, Obligations théorie generale, Biens – Droit de propriété, deusieme édition, Éditions Montchrestien, Paris, 1962, p. 889-905, - is more debtors should perform obligation to a single creditor, solidary liability is presumed in commercial contract, while in other cases there is no such presumption and, in principle, the liability is divided. On the connection with the tradition to Roman law see p. 890, note. 1054. And Ambroise *Colin* et Henri *Capitant*, in: Traité de droit civil, tome II – Obligations, théorie générale, Droit reels principaux, Paris, Dalloz, 1959, p. 961. note 1740., who based on Art. 1202 of Code civil emphasize that Solidary obligation cannot be as a principle presumed. On the evolution of the notion of solidary obligations from the era of Roman law onwards see p. 961, note 1738.

[22] Cf. *Eörsi* Gyula, Kötelmi jog [Law of Obligations], Általános rész [General Part], Tankönyvkiadó, Budapest, 1979, p. 229.

[23] See, for example, the Austrian and German literature on recourse claim: *Frotz*, Dogmatische Fortschritt - ein Verständnis der Regressmethoden bei Schuldnermehrheit, Juristenzeitung (deutsch), 1964, p. 665.; *Welser-Graff*, Zum Rüktrittsrecht des Massenverwaltersgem Par. 21. des Konkursordnunges im Konkurs eines ARGE –Partners, Der Gesellschafter, Zeitschrift für Gesellschaftsrecht, 1984, p. 121.; OGH (Supreme Court), Juristische Blätter, 1987, p. 670.; OGH SZ, 2008; - Ob der „entlassene" Schuldners eine Regressverpflichtung auf den Gläubiger überwälzen kann ist durch Auslegungzuermitteln, in: OGH ÖBA (Österreichisches Bankarchiv), 1996, p. 661.; *Messner*, Gesamtschuld und Regress bei Schädigung durch DN und Dritte, Österreichische Juristen Zeitung 2014/90, p. 584.; *Hoyer*, Eingriff des Simultanhipoteksgläubigers in die Rückgriffslage der Nachberechtigten macht haftbar, Wien, Ecolex, 1996.

is determined by taking into account their culpability or causation. Thus, for instance, if the abettor paid full compensation to the person who has suffered damage, while his contribution to the occurrence of the damage may be assessed as only 20%, in the proceedings upon his recourse claim may request from the actual tortfeasors a reimbursement of 80% of the compensation paid to the person who has suffered damage, let us say 30% from one and 50% from another, if the court determines that this is their respective contribution to the occurrence of the damage. Nonetheless, he will permanently bear the consequences of 20% of compensation paid to the person who has suffered damage, if for instance, the court decides that this is his contribution to the occurrence of the damage, by abetting the actual tortfeasors in their acts.

Sources of solidary liability. As an exception to divided liability, solidary liability for damage may have three sources: statutory provision, clause in a contract (or other juridical act)[24] ora court decision (for instance in the enforcement proceedings).

The purpose of solidary liability. In cases in which the damage has been caused by joint tortfeasors, the purpose of solidary liability is to provide the injured party *more efficient protection* of his *interest to receive compensation* for the damage sustained, since in principle he could get full compensation „more easily", being able to designate one of the tortfeasors as the respondent in the litigation, whom he considers the most solvent, and from whom he hopes to receive full compensation earlier.

Joint tortfeasors and the relation between causation and divided, joint or solidary liability. According to the theory of condition[25], that circumstance should be considered as the cause of damage, lacking which the damage would not be materialized. The legal purpose of causation[26] is to(1) *identify the person liable for the damage*, i.e. the person or the persons, whose unlawful conduct or omission was the cause of damage, hence being liable.[27]Its second purpose is that, in case of joint tortfeasors, it determines the nature of their liability (2) as *solidary* or *divided liability*, i.e. to hold liable only that tortfeasor who was in control of the decisive cause of damage. Furthermore, causation is (3) a *general condition of legal liability*, i.e. it is necessary in all types of civil liability, be it non-contractual or contractual liability, and even in criminal liability.[28] Finally, the fourth purpose of causation is that it may (4) *determine the extent of liability*, that is it may be a criterion to be used to divide the liability between joint tortfeasors taking into account their contribution to the occurrence of damage.

There are several theories of causation. Each has a role in identifying the liable person and determining the means and extent of his liability.[29]There are two basic theories: John Stuart Mill's scientific *theory on equal relevance of all conditions* (the so-called theory of factual causation), according to which proximate and distant causes have the same relevance,[30] and the so-called *cause-selective theories*, i.e. legal theories of causation[31] that emphasize the importance of differentiating legal causation from scientific causation, since otherwise establishing civil law liability would prove unreasonable. Namely, by adopting the theory of equal relevance of causes a person to whom a distant cause is linked might be considered liable, who might not be a living person anymore, thus making indemnification virtually impossible (so-called Nefertiti effect). Every cause is merely a consequence of a previous one, making the causal link indefinite. Therefore, the interchange of causes and consequences, i.e. the indefinite causal link does not confirm the legally equal relevance of all causes, thus it may not serve as a ground of establishing liability. For this reason it is far more efficient to determine an immediate preceding cause, and not a cause distant in the past, as the legal cause of the damage.

According to the cause-selective theories of causation, not all cases of causing damage by more persons, or similar situations, lead to divided or solidary liability of joint tortfeasors. According to the theory of so-called *competitive causation*, amongst more causes only one will be considered decisive, and the person to whom it is linked liable, which means that this theory leads to *concentration of liability*.[32]Thus, if the person who has suffered damage presumes that more than one person contri-

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[24] Cf. Regarding Roman law, *Földi* András, *Hamza* Gábor, A római jog története és institúciói [History and Institutions of Roman Law], Nemzeti Tankönyvkiadó, Budapest, 2010, p. 407., note 1309.

[25] See for example *Koriath*, Heinz, Kausalität, Bedingungstheorie und psychische Kausalität, Göttingen (Göttinger Rechtswissenschaftliche Studien, 139), Vrl. Schwartz, 1988, XII, p. 260.

[26] See *Szalma* József, Szerződésen kívüli (deliktuális) felelősség az európai és a magyar magánjogban [Non-contractual (delictual) Liability in European and Hungarian Law], ELTE ÁJK Bibliotheca Juridica, Budapest - Bíbor Kiadó, Miskolc, 2008, p. 238.

[27] According to §6:519 of the new Hungarian Civil Code, any person causing damage to another person wrongfully, shall be held liable for that damage. The tortfeasor shall be relieved from liability if able to prove that his conduct was not culpable.

[28] See for the attempt to identify the common application of causation both in respect of civil and criminal law liability: Max *Rümelin*, Die Verwendung der Kausalbegriffe im Straf- und Zivilrecht, Archivfür Zivilistische Praxis, Nr. 90/1900, p. 171.; *Traeger*, Der Kausalbegriff im Straf- und Zivilrecht, Neudruck 1929; M.L. *Müller*, Die Bedeutung des Kausalzusammenhanges, 1912, *Kramer*, Multikausale Schäden – Landesberichte Schweiz - Österreich, in: Fenyves-Weyers, Multikausale Schäden in modernen Haftungsrechten, 1988, etc.

[29] See *Szalma* József, Okozatosság és polgári jogi felelősség [Causation and Civil Law Liability], Novotni Alapítvány, Miskolc, 2000, p. 53-72, 73-80, 88-90.

[30] Cf. *Szalma* József, Szerződésen kívüli (deliktuális) felelősség az európai és magyar magánjogban, [Non-contractual (delictual) Liability in European and Hungarian Law], ELTE ÁJK Bibliotheca Juridica, Budapest - Bíbor Kiadó, Miskolc, 2008, p. 398.; *Fuglinszky* Ádám, A polgári jogi felelősség útjai vegyes jogrendszerekben [The Development of Civil Law Liabilityin Mixed Jurisdictions], Québec, Kanada, ELTE Eötvös Kiadó, Budapest, 2010, p. 178-183. Ibid, Kártérítési jog [Tort Law], HVG ORAC, Budapest, 2015, p. 109-115.

[31] See *Szalma* József, Szerződésen kívüli (deliktuális) felelősség az európai és magyar magánjogban, [Non-contractual (delictual) Liability in European and Hungarian Law], ELTE ÁJK Bibliotheca Juridica, Budapest - Bíbor Kiadó, Miskolc, 2008, p. 398-418.

[32] See *Szalma* József, Okozatosság és polgári jogi felelősség [Causation and Civil Law Liability], Novotni Alapítvány, Miskolc, 2000, p. 53-72, 73-80, 88-90, 57.

buted to the damage, he will sue all of them. In the proceedings, some of the respondents may assert that reasons for the exclusion of their liability exist, which will lead to the exemption of their liability. For instance, one asserts and proves that he was not present at the place where the damage was caused (alibi), therefore he may not be qualified as a joint tortfeasor. Competitive causation leads to the concentration of liability by narrowing the liability from multiple respondents to single one, who will be regarded as the one to whom the decisive cause is linked. According to the theory of so-called *decisive causation*, if presumptively the damage was caused by joint tortfeasors, the court will neglect all causes but the one considered decisive, and the respondent to whom it is linked hold liable for the damage. The other respondents, to whom only the so-called irrelevant or incidental causes are linked, will be exempt from liability. This means that, according to the theory of competitive causation and theory of decisive cause, in such cases the concentration of liability and not divided or solidary liability will emerge. Upon judicial evaluation of respondents' contribution to the damage, only one of them will be held liable for the damage.

Contrariwise, according to the theory of so-called *cumulative causation*[33]the liability is divided between joint tortfeasors, since the contribution of all of them was requisite for the occurrence of damage.

According the theory of so-called *hypothetical causation*[34],in a situation of seemingly joint causation of damage, instead of potential sharing of liability, the concentration of liability arises. Hypothetical causation means that one cause precedes another one, renders the latter ineffective, while it is certain that the latter would also have resulted in the very same damage, had the former not preceded it. Let us take a widely known example to demonstrate the hypothetical causation: Children playing a ballgame crashed the window of a shop with their ball, after which due to an explosion caused by surface mining all windows in the town got also crashed. The explosion would undisputedly crash that window too, which has been crashed by the children's ball beforehand. There were different standpoints in the literature whether the actual or the hypothetical cause of damage should be considered as the legal cause of damage. However, according to the prevailing opinion only the actual cause should be considered as the legal cause of damage, thus there is no ground for dividing the liability with the person to whom the subsequently emerged, hypothetical cause is linked. Only the person to whom the actual cause is linked, will be held liable for the damage. In our example, according to the rules of vicarious liability, only the parents of the children, who crashed with their ball the window of that one shop, would be held liable for the damage, who could not divide the liability with the mining company, which carried out the surface explosion.

Just as the previous one, the new Hungarian Civil Code determines the *subject of the duty to compensate for damage*. The main rule is that *the person* who caused the damage is liable for damages,[35]from which the cases of *statutory* (for instance theliability for others, such as the liability of parents or guardian for the damage caused by minors, or the liability of employers for the damage caused by employees to third parties)or *contractual* (for instance the liability insurance) liability for others represent exceptions.

In relation to the issue of solidary or divided liability in the context of joint tortfeasors, one should take into account the difference in burden of proof of causation in different forms of liability. Namely, in non-contractual liability, causation is a factual issue in relation to which the person who has suffered damage, i.e. the plaintiff, bears the burden of proof. In contractual liability causation is presumptive, although the interested party, regularly the respondent, has the possibility to disprove the presumption, hence causation is primarily a legal question. According to this presumption, the party who infringed the contract is liable for all damage emerged after the breach of contract, unless he proves that the damage cannot be attributed to the breach of the contract, but to an extrinsic cause, being outside of his scope of control, for instance, it is the result of contribution of a third party.[36]

The exceptional nature of statutory solidary non-contractual liability, due to its unfairness in respect of the interest of tortfeasor who indemnified the person who has suffered damage. The solidary liability of tortfeasors might have a somewhat unfair outcome from the viewpoint of individual tortfeasors, because, as the aforementioned hypothetical case shows, the least „culpable" tortfeasor must provisionally bear the burden of full compensation, only because the plaintiff considered him the most „solvent", while the other tortfeasors, who have predominantly contributed to the occurrence of damage, do not have to bear the burden of compensating the plaintiff even temporally and their liability for the damage arises only when the judgment rendered upon the claim of the one tortfeasor, who actually compensated the plaintiff, in the recourse proceedings becomes conclusive. Another unfair side-effect of solidary non-contractual liability could be identified with regard to the distribution of the burden of proof: the injured party does not have a burden of proof in determining the contribution of each tortfeasor to the occurrence of the damage, while the tortfeasor who compensates fully the person who has suffered damage, in the recourse proceedings bears the burden of proof of determining the actual contribution of other tortfeasors to the damage. The recourse proceedings, due to the necessity of determining the contribution of all tortfeasors to the damage, may last much longer than the primary proceedings

33 See *Szalma* József, Okozatosság és polgári jogi felelősség [Causation and Civil Law Liability], Novotni Alapítvány, Miskolc, 2000, p. 57.

34 See for example *Caemmerer*, Ernst, Das Problem der überholenden Kausalität im Schadenersatzrecht (Vortrag gehalten vor der Juristischen Studiengesellschaft in Karlsruhe am 15. März 1962), Verlag Müller, Karlsruhe, 1962; *Kahrs*, B. Kausalität und überholende Kausalität, 1954; Karl *Larenz*, Neue Juristische Wochenschrift, 50, 487; *Niederländer*, Archiv für zivilistische Praxis, 153, 41; Hermann *Lange*, Archiv für zivilistische Praxis, 152, 153; *Jauernig*, BGB mit Erläuterungen, C.H. Beck, München, 1979, p. 206.

35 See Civil Code §6:.519 (generalruleonliabilityfordamage).

36 See *Szalma* József, Szerződésen kívüli (deliktuális) felelősség az európai és magyar magánjogban [Non-contractual (delictual) Liability in European and Hungarian Law], ELTE ÁJK Bibliotheca Juridica, Budapest - Bíbor Kiadó, Miskolc, 2008, p. 416-418.

initiated by the person who has suffered damage, making the burden for the compensating tortfeasor even greater.

Due to these unfair outcomes of solidary liability, it is not surprising that in **European** (German[37], French[38], Swiss[39], Austrian[40]) doctrine of civil law liability, just as in the legislation, in case of joint tortfeasors solidary liability is considered exceptional and there is a tendency to reduce its scope of application to the cases of contractual liability. These legal systems prefer *divided liability*, whereby the contribution to damage of each tortfeasor is assessed based on his culpability or causation. Due to its unfair effects, in these legal systems solidary liability is merely an *exception* and not a general statutory regime. The statutes only exceptionally set out solidary liability for situations defined by circumstances envisages by statutory norms.

The general rule of solidary liability adopted in the new Hungarian Civil Code. Contrary to the aforementioned legal solutions adopted in foreign jurisdictions, *the new Hungarian Civil Code prescribes solidary liability of joint tortfeasors as a general rule*. I, for one, do not consider this solution proper, taking into account the experience of comparative law.

The rules of the new Hungarian Civil Code on the assignment of claims (cessio) and the liability of the assignor and assignee gained new doctrinal interpretations and application in the case law in relation to factoring contract.[41]

The priority of divided liability over solidary liability. In foreign jurisdictions in case of joint tortfeasors, the liability is exceptionally solidary, if the tort represents a *criminal act*or the tortfeasors are in *organized relations* and share common intention to cause damage. Thus, in these legal systems the *liability* is *not solidary*, if the damage is *not a consequence* of *jointly planned* and *organized* act or omission of joint tortfeasors *sharing a common intention*. For example, accidental contribution of more participants in the traffic accident does not generate solidary, but divided liability. In some jurisdictions, the solidary liability is exceptionally also justified, if in the light of the circumstances of the case the contribution of individual tortfeasors cannot be determined.

Contractual solidary liability for the performance of contractual duty and for the breach of contract. The legislation and doctrine in foreign jurisdictions recommend *solidary liability* as an *exception*, *not only in non-contractual*, *but in contractual liability as well*. There is a *legal presumption* that in *commercial contracts* the *liability is solidary*, if there are *more persons on the side of the debtor* (for instance, in building contracts the designing architect and the contractor). This presumption is, however, not irrebuttable. The tortfeasor claiming that the liability is divided bears the burden of rebutting the said presumption. In case of a dispute, in non-commercial contracts decisive may be wheth-

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[37] See the following par. of the German BGB concerning solidary liability (*Gesamtschuld*): cession legis, §421, §755. sec. 2, §2060; the liability of spouses towards third parties in respect of common matrimonial property; the liability of transferor and transferee in the assumption of debt, §425.; - the liability of the builder, contractor and entrepreneur, §634.; - liability of multiple contractors, §632.; - rules on performance, §422; - the indivisibility of liability, §426.; - deposit, §422. sec. 2.; - liability for indivisible things, §431; - liability in insolvency, §425.; - liability in relation to obligation with solidary liability, §1363.; the claim of the person who has suffered damage arising from solidary liability, §2058 and §2059; - the recourse claim of the performing debtor, §2032. See for example *Prütting, Wegen, Weinreich*, BGB Kommentar, Luchterhand, 2007, p. 3182. In German law, solidary liability generally emergesin connection with the statutory common matrimonial property of spouses, in relation to third parties, if no special matrimonial contract is concluded. If such a contract is concluded, the liability of spouses is either individual, divided or separate. On the other hand, the liability of heirs for the debts of the devisor is solidary. See for example *Prütting*, p. 2035. See further German literature: *Ehmann*, Die Gesamtschuld, Versuch einer begrifflichen Erfassung und drei Typen, 1972; *Helmholt*, Die Correalobligationen, Giessen, 1857; *Fitting*, Die Natur der Correalobligationen, Erlangen, 1857; *Hölder*, Das Wesen der Correalobligationen, Freiburg, 1884; *Brinz*, Zur Lehre von der Korrealobligationen und der solidarischen Schuldverhältnissen,1873; *Unger*, Passive Correalität und Solidarität, 1884; *Binder*, Korrealobligationen, Leipzig, 1898; *Binder*, Korrealobligation im Römischen und heutigen Recht, 1899; *Juhn*, Aussenwirkung und Haftungsbeschränkungen, Diss. Bonn, 1970. The exceptional nature of statutory solidary liability for non-contractual damage is supported by the recent German literature too: See Karl *Larenz*, Lehrbuch des Schuldrechts, Bd. I, Allgemeiner Teil, 2. Auflage, Verlag C.H. Beck, München, 1979, p. 507; Hein *Kötz,* Gerhard *Wagner*, Deliktsrecht, Zehnte neubearbeitete Auflage, Wolters Kluwer, München, 2006, p.

[38] The French doctrine also restricts solidary liability to specific cases determined by statute. See for example Renné *Savatier*, Traité de la résponsabilité civil, Pichon-Auzias, volume I-II, Paris, 1951, namely to the solidary liability of insurer and insured tortfeasor (op. cit. II/769), joint tortfeasors, if the contribution of individual tortfeasor to the occurrence of damage could not be determined (Vol. I, p. 488,498), in the case of damage caused by things, to the liability of co-owners (Vol. I, p. 360), liability of the founder and of the organ of a legal entity (Vol. I. and II, p. 483, 493 and 573). In other cases of joint tortfeasors, the classic French doctrine of civil law liability supports divided liability. See *Chabas*, F. L'influence de la pluralité de causes sur le droit á réparation (préface Henri *Mazeaud*), R. Pichonet. R Durand – Auzias, Paris, 1967; *Deschenaux* Henri, Norme et causalitá et responsabilité civil, in: Erhaltung und Entfaltung der Rechtsprechung des schweizerisches Bundesgerichts, 1975, p. 399-430; *Ghestin* ,Jaques, Viney, Traité de droit civil, Les obligations, Résponsabilité, effets, L.G.D.J., Paris, 1988. Concerning causation in relation with the liability of joint tortfeasors in traffic accidents see *Jaufferet*, C., La résponsabilité civil en matičre d'accidents d'automobile (etude comparé de droit Espagol, Italie et Français, R. Picon et R. Durand Auzias, Paris, 1965. In relation to French case law concerning the legal criteria of causation see *Joly*, A. Vers un critčre juridique du rapport de causalité en pens de l'article 1387. al. prémičre, Revue trimestrielle de droit civil, 1942, p. 257.

[39] *Fenyves-Weyers* (edit.), Multikausale Schäden in modernen Haftungsrechten (In light of comparing Austrian and Swiss law), 1988; *Oftinge*r, Karl, Schweizerisches Haftpflichtrecht, Vol. I-II, Poligrafischer Verlag, Zürich, 1958, 1960.

[40] See *Welser-Zöchling*-Jud, Bürgerliches Recht, Band II, Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht, 14. Auflage, Manz Verlag, Wien, 2015, p. 158, note 624. As for 19th century's literature on solidary liability see *Wahiner*, Die korreale Solidarität, Wien, 1885, while as for the recent, 20th century's literature see: *Bydlinski*, Franz, Zum gegenwartigen Stand der Kausalitätstheorie im Schadensrecht, Juristische Blätter, 1958, p. 1.; *Bydlinski*, Franz, Probleme der Schadensverursachung, Wien, 1964.

[41] See Ferenc *Szilágyi* (Lehrstuhl für Privatrecht und Handelsrecht, Juristische Fakultät, Katolische Pázmány Péter Universität, Budapest, Doktorand, European Legal Studies Institute, Universität Osnabrück), das Zessionsrecht im neuen Zivilgesetzbuch Ungarns, Zeitschrift für Europäisches Privatrecht, Herausgeben von Jürgen Basedow, Eva – Maria Kieninger, Reiner Schulze, Gerhard Wagner, Marc-Philippe Weller, Reinhard Zimmermann, Verlag C.H. Beck, Vol. 1/2015, p. 52-86.

er the contract contains a clause establishing solidary liability. Concerning commercial contracts in which there are more persons at least on one side, the new Hungarian Civil Code does not have a rule on solidary liability.[42] Therefore, the general rules on non-contractual solidary liability may be applied.[43] By the way, the new Civil code identifies contractual liability with the breach of contract,[44] though obviously it covers nonperformance[45] default[46] and defective performance[47].

The *contractual solidary liability* may, however, have two interpretations. The first meaning of the notion is the duty of persons in the capacity of the same party to a contract to *perform the contractual duty as solidary obligation* (the so-called primary liability or performance liability). The second is their duty to *compensate the other party for the damage caused by the breach of contract*(the so-called secondary liability or liability for damages). The first meaning of the notion concerns situations in which more persons are in the capacity of the same party to a contract (for instance the emptor in sales contract). They are obliged to pay the price as solidary debtors, meaning that the vendor, if the emptors failed to perform voluntarily, may claim the full price from any of them. If one of the emptors fully performs, the vendor cannot claim the price from the others, since it is regarded that they also performed the obligation, though the emptor that actually performed has a recourse claim against the others.[48] The other meaning of contractual solidary liability concerns liability for damage, as a secondary obligation, arising from non-performance, default or defect in performing contractual obligation. In *non-commercial contracts* solidary liability cannot be presumed merely from the fact that there are more persons on one side of the contract, for example, more persons appear in the contract as emptors. Their liability will be solidary, namely, only if such liability is envisaged by the *contract*. Lacking a clause establishing solidary liability, their duty to perform contractual obligation is divided, just as their liability for damages arising from failure to do so. The share of each debtor in the divided liability for damage is equal, unless otherwise established by the contract.

Solidary liability and solidary right to performance. Solidary liability exists when there are more than one person on the side of the debtor in obligation, and one person on the side of the creditor, whereby the creditor is entitled to claim full performance from any of the debtors. Solidary right to performance exists when more persons are on the side of the creditor, but only one on the side of the debtor, whereby any of them may demand full performance from the sole debtor.[49]

Perfect and imperfect solidary liability. Solidary liability is *perfect*, if the defense invoked by the debtor whom the creditor sued (for instance, the defense that prescription period has expired or the defense offset-off with the creditor) does not produce the legal effect of deferring or extinguishing the claim only regarding him, but regarding all other debtors as well, who have not been sued.[50]In case of *imperfect solidary liability*, contrariwise, the objection of the debtor whom the creditor sued, produces legal effect regarding only his legal position, but not of the others who have not been sued. There is no general rule according to which one may in advance conclude whether the given case of solidary liability may be qualified as perfect or imperfect. This qualification depends on the source of solidary liability (statute or contract), its content and the circumstances of the case. Thus, the defense of *prescription* may produce the effect of both perfect or imperfect solidary liability. If the prescription period is subjective in its nature, meaning that it runs from person's getting aware of the fact from which the prescription period starts, it may run from different points of time for different debtors, depending on when they got knowledge of the same fact (imperfect solidary liability). Therefore, the defense of prescription invoked by the tortfeasor whom the person who has suffered damage sued, does not have legal effect on the position of other tortfeasors. If, however, in given case a prescription period is applied that is objective in nature, for instance if it runs from the moment of formation of contract, the prescription period runs uniformly for all tortfeasors (perfect solidary liability). The *defense of set-off*, on the other hand, regularly leads to imperfect solidary liability, since if it is founded on a counterclaim of the respondent tortfeasor that concerns only him and the plaintiff, the objection does not affect the legal position of other tortfeasors, whom the plaintiff did not sue.

3. The rule of the new Hungarian Civil code on joint tortfeasors' solidary and divided liability

In the first place, attention will be paid to the provisions of the new Hungarian Civil code concerning multi-party obliga-

[42] See the specific provisions of the Civil code on the contracts for professional services, §6:238-6:271.

[43] The §6:144 of the Civil Code, namely, sets out, if there is no specific rule on contractual liability, the rules on non-contractual liability shall apply, as supplementary rules on issues such as the duty to prevent damage, notion of damage, means of indemnification, etc., with the exception of the rule on the duty to mitigate the damage, since according to an explicit provision of the Civil Code, it cannot be applied in relation to contractual liability.

[44] See §6:142 of the Civil code.

[45] See §6:183 of the Civil code (withholding performance).

[46] See §6:153-156 of the Civil code.

[47] See §6:157-167, just as §6:168-6:170 (product guarantee) and §6:171-6:173 (commercial guarantee) of the Civil code. The liability for damage, as a result of lack of conformity, is governed by §6:174 of the Civil code, while the liability for the infringement of warranty of title by §6:175-6:176.

[48] See the case law of the Austrian Supreme Court: OGH Juristische Blätter, 2007, p. 309 (Karner), Österreichisches Bankarchiv, 2006 (Apáthy).

[49] The institution of solidary liability (solidaritas, correalitas) originates in Roman law. Roman Law knew two types of solidary obligation, solidary liability and solidary right to performance. The main feature of solidary obligation is that the claim or the debt, respectively, is not divided between the persons who constitute a multiparty obligation. See *Földi* András, *Hamza* Gábor, A római jog története és institúciói [The History and Institutions of Roman Law], Nemzeti Tankönyvkiadó, Budapest, 2010, p. 406.old., No. 1304-1306. As for the recourse claim of the performing debtor see ibid, p. 407. No. 1308.

[50] See for example the standpoint of the Austrian Supreme Court: Für eine Wirkung gegenüber allen Solidarschuldnern, OGH, Österreichisches Bankarachiv, 2001, p. 653. Under German law, the source of perfect solidary liability is contract, and exceptionally statute. See for example Wolfgang *Fikentscher*, Schuldrecht, Walter de Gruyter, New York, Berlin, 1976, p. 335.

tions, which pertain to a context wider than civil law liability, primarily to the performance of obligation.

Title II. comprising §6:28 of the new Hungarian Civil code refers to multi-party obligations.[51] Within this title, Chapter VI, according to its wording, deals with multiple liability in obligation, while the heading of §6: 28 itself reads: *Divided liability*. According to this paragraph, (1) unless otherwise provided, if a *divisible obligation* is *to be performed* by *more than one debtor*, the creditor may demand from each debtor to perform his share in the obligation. In case of *doubt* concerning their shares, the debtors are required to perform in *equal proportions*. (2) The obligation is considered divisible, if it can be broken up into portions that may be *used independently*, unless such division is likely to harm relevant lawful interests of the creditor.

The said paragraph contains legal solutions concerning divisible obligations that may be considered usual and generally accepted. It seems, however, that the definition of divisible obligation lacks that, besides that they can be broken up into more parts that can be used independently, the parts produced by division individually do not lose their purpose they have had before the division.

Subsections (1)-(5) of §6:29 and subsections (1)-(3) of §6:30 of the new Civil Code govern solidary liability, while §6:31 and §6:32 contain rules on multiple creditors in divisible obligation and collectivity of creditors. Subsections (1)-(5) of §6:33 govern solidary right to performance.

According to the rule on solidary liability (§6:29), (1) if an *indivisible obligation* is to be performed by *more than one debtor*, performance can be *demanded* from *any of them*. Liability shall also be solidary if a *divisible* obligation is to be performed by more than one debtor, whereby the creditor is entitled to demand performance from any of the debtors. (2) In the case of solidary liability, *each debtor owes entire performance*. However, if *any of them performs the obligation*, the *obligation of the others towards the creditor shall also cease to exist up to the extent of performance*. The debtors shall also be liable for each other's breach of contract. (3)The debtor may challenge the creditor's claim, invoking other debtors' *defenses* relating to the satisfaction of the creditor; however, he shall *not be entitled* to *offset* the *other debtors' claims*. (4) Default of the creditor towards one of the debtors shall stand in respect to all debtors. (5)The *prescription* of the claim in respect of one debtor shall have no effect on the others.

Subsections (1)-(2) §6:30 govern the (internal) relations between solidary liable debtors. According to this paragraph (1) debtors under solidary liability shall bear the obligation in equal shares, unless their relationship implies otherwise. If one debtor has performed exceeding his share in the obligation, he shall have a right to recourse for the excess in performing the obligation from the other debtors, up to the value of their share in the obligation. (2) The debtor may not refer to an advantage against the other debtors that he has received from the creditor. (3) The debtor against whom the claim of the creditor lapsed, may refer to such prescription with respect to the other debtors as well.

These provisions (6:29-6:30) seem to be correct.

As far as the claim of creditors having solidary right to performance from one debtor is concerned, according to §6:31, if there are more creditors in a *divisible* obligation, each shall be entitled to claim *his share* in the obligation. According to the rule on the collectivity of creditors (§6:31), if there are more creditors in an *indivisible* obligation, the obligation will be performed *into the hands of all of them*.

The institution of solidary right to performance is governed by subsections (1)-(5) of (§6:33) of the new Civil Code. According to these rules, (1) if a claim is due to several creditors in such a manner that each is entitled to demand the performance of the entire obligation but the debtor is bound to only single performance, the obligation to each creditor shall cease to exist if any of them is satisfied. (2) Each creditor shall be affected by the default of any of them, or by a legal statement that is a condition of enforcement of a claim to perform of the obligation. (3) The claim shall not lapse in respect of any of the creditors insofar as the conditions for prescription have materialized in respect of all of them. (4) If any of the creditors brings action regarding performance, the debtor may refuse performance to the other creditors, without being exempted thereby from the legal consequences of default, until the final conclusion of the litigation. (5) Creditors shall be entitled to equal shares of a claim, unless their relationship suggests otherwise.

In relation to cases of joint tortfeasors, the new Hungarian Civil code has special rules on solidary liability, which deviate from the general rules on active and passive solidarity, especially from the general rules on the performance of obligation.

Subsections (1)-(3) of §6:524 prescribe solidary liability of joint tortfeasors, as a general rule. According to this paragraph (1) if the *damage is caused jointly by two or more persons, their liability shall be solidary towards the person who has suffered damage*. (2) The court shall be *entitled not to apply* the rule on solidary liability, if the *person who has suffered damage himself contributed* to the occurrence of damage or solidary liability seems unjustified in the light of *exceptional circumstances* of the given case. In the event of non-application of solidary liability, the court shall hold liable the tortfeasors in the extent of their conduct constituting fault or their contribution to the occurrence of the damage. If the degree of their contribution cannot be established, the court shall hold the tortfeasors liable for the damage in equal shares.

Subsection (1) of the aforementioned paragraph that raises solidary liability of joint tortfeasors to the level of principle seems disputable, taking into account the comparative legislation and doctrine. The experience from foreign jurisdictions shows that divided liability is the general rule, in relation to which solidary liability is merely an exception. Subsection (2) somewhat „mitigates" the general rule of solidary liability by enabling the court to establish divided liability, if the person who has suffered damage himself contributed to the occurrence of damage or if solidary liability seems unjustified in the light of the exceptional circumstances of the given case. A question may be raised why should the possibility of establishing divided

[51] See for examplein: Polgári Törvénykönyv, 2013. évi V. törvény, 2013. évi CLXXVII. törvény, Novissima Kiadó, Budapest, 2015., p. 151-152.See §6:28-6: 33 of the Civil code.

liability of joint tortfeasors depend on the exceptionality of circumstances of the given case, if in other European civil codes, unlike to the Hungarian, divided liability is the general rule, and not an exception.

4. A proposal for a rule on solidary and divided liability of joint tortfeasors (de lege ferenda)

According to the aforementioned, it seems that instead of the new Hungarian Civil code's general rule on solidary liability of joint tortfeasors, the general regime of liability in case of joint tortfeasors should be the divided liability, in which the share of each tortfeasor would be determined by his contribution to the occurrence of damage, while the solidary liability would be limited to cases explicitly governed by statute or contract, since this solution seems to be the most rational, usual, generally accepted and one the with fair outcome.

In this regard, in my opinion the following (de lege ferenda) legal solution might be, or might have been expedient: (1) Joint tortfeasors are liable for damage in the extent of their respective fault (contribution) to the occurrence of damage, i.e. their liability is divided. (2) As an exception, their liability is solidary if (a) it is prescribed by statute; (b) the tortfeasors caused damage in concord, in an organized manner and sharing a common intention; or (c) it is established by contract or ordered by court in enforcement proceedings. (3) In commercial contracts, if otherwise not provided and there is plurality of debtors, their liability to perform the contractual obligation, just as their liability for the damage caused to the other contracting party by non-performance, defective performance or default in performance, is solidary. If however the contribution of any tortfeasor to the damage is preponderant, divided liability may be established. (4) Full indemnification of the person who has suffered damage by any of the solidary liable tortfeasors relieves the others from liability. (5) If one of the solidary liable tortfeasors fully indemnifies the person who has suffered damage, he has a right to recover the excess from other tortfeasors to the extent of their shares in the obligation, determined by their contribution to the occurrence of damage.

5. Concluding remarks

The rules of the new Hungarian Civil code on creditor and debtor solidarity in multi-party obligations seems to be nearly excellent, being in line with the generally accepted standpoints in the European and Hungarian doctrine. These rules govern the issues of creation and performance of obligation.

However, the rules on joint tortfeasors differ from the legal solutions usually adopted in comparative law. Namely, the new Hungarian Civil code prescribes solidary liability of joint tortfeasors as a general rule, instead of divided liability, where the share of the tortfeasors is determined taking into account their contribution in causing of or their accountability for the damage.

It is beyond dispute that the new Hungarian Civil code adopts solidary liability of joint tortfeasors, since the person who has suffered damage may claim full indemnification from any of the joint tortfeasors, even from the one who contributed to the occurrence of the damage the least. This is in line with the main principle of tort law, according to which the primary purpose of liability for damage is to provide legal protection for the person who has suffered damage to a greater extent. Debtor solidarity strengthens his position, since he may claim full indemnification from any tortfeasor of his choosing. However, the extension of debtor solidarity to all cases of joint tortfeasors, regardless how important is the goal to provide more efficient legal protection to the person who has suffered damage, is not typical and legally not always justified. Namely, solidary obligations usually are merely an exception, prescribed for specific cases by statute or contract, or ordered by court decision. According to the generally accepted standpoint in the literature, solidary liability should be established restrictively and not generally. It should not be applicable to all cases of causing damage by joint tortfeasors, because the one tortfeasor, whom the plaintiff sued and have been condemned to full indemnification, bears the burden of liability for damage alone until the end of the recourse proceedings, when the liability eventually is divided between joint tortfeasors. The tortfeasor who was held liable to full indemnification towards the person who has suffered damage is, namely, compelled to sue the other tortfeasors, who have not been sued in the initial litigation, in order to accomplish the division of liability in proportion to tortfeasors' contribution to the occurrence of damage. This burden may reasonably be considered as unjust, since the secondary, recourse litigation may significantly protract, because the other joint tortfeasors, according to their interest, may „endlessly" dispute the extent of their contribution to the occurrence of damage. In non-contractual liability, therefore, the usual and reasonable solution is that the liability of joint tortfeasors towards the person who has suffered damaged, in primary proceedings initiated by him, is divided, the share of each tortfeasor to be determined on their objective, ascertainable contribution to the occurrence of damage. Their liability is solidary, or seems to be reasonable to establish it as solidary, if the contribution of joint tortfeasors to the occurrence of damage cannot be determined in the proceedings initiated by the person who has suffered damage, or it seems just, based on exceptional circumstances of the case, to provide for him full indemnification immediately, or the tortfeasors caused damage in consort and in organized manner. The liability for nonperformance of multiparty contractual obligation, just as the contractual liability for damage arising from nonperformance, is solidary, if it explicitly provided so by a clause in the contract.

Juridification as an Ideology of Polizeiwissenschaft in 18th Century

*Michał Gałędek**

Abstract

The focus of this article is the juridification of the public domain, which took place in Germany in the period of 16th-18th centuries. Juridification is perceived here as a manifestation of a certain ideology which shrouded, as it does currently, the need for bringing order to the state and the belief that this may be accomplished through the meticulous regulation of the public sphere. The constantly increasing number of provisions is presented by the public authorities as beneficial to the public good and, per facta concludentia, it is perceived as such by a wide circle of indoctrinated recipients.

Keywords: *juridifaction; Polizeiwissenschaft; cameralism; ideology; German science; police state; well-ordered state; science of police.*

1. Assumptions

In my work, I will attempt to demonstrate the contextual aspects of the era, which indicate that juridification[1] of life is an expression of ideological manoeuvres rather than the end result of some "natural", spontaneous proclivity towards weaving a tight net of codified law around the reality. They also suggest that juridification is merely a logical consequence of the realization of different ideologies, while not an ideology in and of itself. I do not attempt to resolve the issue of the extent to which juridification is a self-contained ideology or a technique in the service of embodiment of other ideologies. I perceive the phenomenon of juridification as an expression of a certain ideology, all the while with awareness of a certain "general system of notions and attitudes that defines a society in a given epoch and serves for the holistic interpretation and reshaping of the world". In reference to Marxist theories, I will attempt to illustrate to what degree the ideology of juridification of the law constitutes a collection of notions whose function is to affirm the current system of relations and which, simultaneously, expresses the interests of the state authority[2].

I assume that the example of Germany in the early modern and enlightenment times may serve to document the stipulation that this conviction, solidified in the early modern era and still dominant today[3], has grown to become a permanent element of thinking about managing public affairs (with the use of broadly construed administrative law[4]). This is true regardless of the

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1 Juridification as "the proliferation of law", see: *Habermas, Jürgen, The Theory of Communicative Action, Boston, 1987, p. 359*. Juridifaction as "the tendency towards an increase in formal (or positive, written) law", see *Brooker, Penny, "The Juridification of Alternative Dispute Resolution", Anglo American Law Review, 20 (1999), p. 1*.

2 Compare *Marks, Karol, Engels, Fryderyk, Ideologia niemiecka, Warszawa, 1961*.

3 See Götz, *Volkmar, Allgemeines Polizei- und Ordnungsrecht, Göttingen, 2001, p. 15–24; Stolleis, Michael, Boldt, Hans, Petri, Thomas, „Geschichte der Polizei in Deutschland", in: Handbuch des Polizeirechts (eds. Denninger Erhard, Lisken Hans), München, 2012, p. 3–61*. Compare, however, the opinion: "It was not too long ago that many legal philosophers and sociologists were expressing deep concerns about juridification, i.e. law's expansion as a mode of governance and its distorting effects on social relations. Now, however, under conditions of globalisation and in the midst of a global crisis, there are several indications that the trend of juridification is being reversed, that law is subsiding and giving way to other modes of governance. With governments offloading many of their central tasks to civil society, with international economic agencies exercising normative authority, with people seemingly recognising each other more as economic actors than as legal subjects, and with the interpretation of indeterminate laws being carried out not by courts but by actual power-holders, to mention only very few examples, it seems appropriate to ask questions regarding a process of de-juridification which seems to be afoot" – http://www.law.qmul.ac.uk/docs/research/126418.pdf (accessed on: 17.07.2015).

4 The convention I have adopted here is that the administrative law of the early modern times, identified with the police state, spread onto all spheres designated by the contemporaries as police matters, thus regulating the entire scope of internal affairs of a state. The only exceptions were the law applied in the practice of justice (court law) and the public law of those days in its narrow sense (the equivalent of modern constitutional law), which determined the basic system-forming mechanisms in the state. I qualify thus construed branch of law as administrative law, following Marian Zimmermann, who was of the opinion that „[…] throughout the 17th and 18th century, an administrative law comes into being, separate from court law and regulating the activities of the authority apparatus. Consequently, there emerges a division of the entire body of law into two groups of diverse nature: private law and public law, as well as the final breakup of administrative and judicial domains". *Zimmermann, Marian, Pojęcie administracji publicznej a „swobodne uznanie", Poznań, 1959, p. 9*. It must be noted, however, that qualifying thus understood law as full-fledged administrative law raises objections. For example, Maria Gromadzka-Grzegorzewska points out that "Until the norms laid down by a separate legislative authority became binding for the bodies of executive power in relations with natural persons and legal entities, the provisions defined by M. Zimmermann as administrative

form of government and political objectives to be accomplished by a given state. The selection of the country and historic period is not a matter of accident, either. Germany, until the second half of the 19th century a conglomerate of sovereign states with shared legal culture and developmental vision, to date remains a modern model of efficiency, the epitome of a "well-ordered state", marked by particular care for order in the public sphere and spectacular accomplishments in the domain of legislative technique[5]. In my search for the genesis of the specific "regulatory cult" in this territory, I will focus on its connection to the system of education of future civil servants that formed in the 18th century, in the unique scientific and educational climate of the enlightenment. Academic lectures, course books, scientific literature, examination requirements, educational policies of the state - in short, everything that authoritatively defined the proper methods of managing society with the aid of legal provisions, will serve as the point of departure for the conclusions drawn in this work.

2. Genesis

Urban life in the Europe of Middle Ages became an arena for intensified legislative activities. German towns, along with Italian ones, were the unquestionable forerunners in this respect. This was facilitated by their dynamic development, as well as by the fact that the creeping defragmentation of the Holy Roman Empire resulted in their particularly broad autonomy, which also spread onto the legislative field. Soon enough, urban centres developed the tradition of collecting numerous written sources of law. What stood out more than anything from amongst them were the *Willkürs* - statutes issued by municipal councils, often very voluminous and containing provisions from all branches of law. The intensifying legislative activities in cities brought along the gradual increase of various regulations from the scope of broadly understood administrative law. The progressing growth of urban agglomerations led to the exacerbation of complexity and specificity of urban relations, which, in turn, gave rise to a host of new and unique social, economic, order-related, infrastructural and fiscal issues. All these issues required the establishment of certain permanent legislative solutions[6].

Parallel to this, the new ideology of legislation was shaping, soon to become the fuel for the tightly linked ideology of juridification. "The law – writes Michael Stolleis – discovered in the ecclesiastical realm in the thirteenth century as a central instrument of control and guidance, was gradually taken over also by secular powers. In the course of the sixteenth century, the *potestas condendi leges* became the right of the ruler *par excellence*; as the authority to issue legal directives generally and individually, it appeared to be the noblest and most important element of sovereignty. The early modern state, by shaping itself through lawgiving into a »state«, became the great legislator, whether through a flood of rules of »*police*y« (public order and administration), or in repeated attempts since the seventeenth century as a codifier of the legal order of society, or at least of civil law. This state arose through the medium of centralised law-giving; it took shape as a »system that learns«. The control over and the reorganisation of space, its demarcation externally and its structuring internally, were the mutually intertwined tendencies. The phenomena that went along with it – the increasing density of law, the professionalization of jurists, and the growing willingness also of state organs to be bound by the law – have been frequent topics of descriptive accounts"[7].

Thus, first in the cities and later also on the level of separate states, there started to emerge a new category of normative acts, dubbed "*Polizeiordungen*" and "*Landenordungen*"[8]. The term "police" as employed in those times, in principle encompassed the whole of activities regarding internal affairs. Generally, then, it covered the broadly understood administrative activities, spreading onto the sphere of activity of public authorities as regarding order-related, social, economic, financial, trade-related and even penal matters. The veracious outburst of police ordinances in nearly all of the German states may be traced back to 16th century, which marked the beginning of the "classical era of police legislation of the German territories"[9].

The popularization of the practice of issuing police ordinances constituted one of the fundamental elements of the process which Gerhard Oestereich called the establishment of "social discipline" *(Sozialdisciplinierung)*[10], which is also in line with the theory of discipline of Michel Foucault[11]. The need for the establishment of social discipline - sparked by various overlapping motives, from the escalation of religious conflicts to the solidification of public authority (as an objective on its own) - was perceptible not only in the cities, but also on the level of various

law constituted merely administration's *res internae*. Therefore, they did not grant to the subjects any rights to demand that they be exercised by the bodies of government administration". *Gromadzka-Grzegorzewska, Maria, Narodziny polskich nauk administracyjnych, Warszawa, 1985, p. 22*. Compare *Oczapowski, Józef B., Policyści zeszłego wieku i nowożytna nauka administracji. Przyczynki do dziejów tej nauki, Warszawa, 1882, p. 9*.

5 *Raeff, Marc, The Well-Ordered Police State. Social and Institutional Change through Law in the Germanies and Russia, 1600-1800, New Heaven-London, 1983, p. 4–5*.

6 *Patkaniowski, Michał, „Charakterystyka ustawodawstwa statutowego na tle rozwoju komuny włoskiej", Czasopismo Prawnicze 31 (1939), p. 119–175*.

7 *Stolleis, Michael, "In the Name of the Law" in: idem, The Eye of the Law. Two Essays on Legal History, New York, 2009, p. 62–63*.

8 "These were ordinances that contained regulations pertaining to the police and the government (in the sense of *pays*, territorial unit […] Normally, *Polizieiordungen* were regulations concerning specific areas of administration and public life; *Landesordnungen*, on the other hand, were more comprehensive in scope, frequently summarizing all the administrative rules in force" - Raeff, *Well-Ordered State, p. 5*. See also: *Preu, Peter, Polizeibegriff und Staatszwecklehre, Göttingen, 1983, p. 15–25*.

9 *Salmonowicz, Stanisław, „Niemieckie ordynacje policyjne (XVI-XVIII wieku). Uwagi o sytuacji badawczej", Czasy Nowożytne 23 (2010), p. 154*.

10 *Oestreich, Gerhard, Neostoicism and the Early Modern State, Cambridge (USA), 1982, p. 265, 267*.

11 *Foucault, Michel, Discipline and Punish. The Birth of the Prison, Warsaw, 1998, p. 131–220*. Although I consider the theory of Michel Foucault (as the theory of Andre Wakefield quoted below) as very useful for the broadening of the research perspective, at the same time I concur with Stanisław Salomonowicz in that "[…] perhaps he placed excessive emphasis on the "conscious" politics of imposing stringent social discipline, connecting it to the processes of modernization of the society by the state almost on its way to capitalism" – *Salmonowicz, Niemieckie ordynacje policyjne, p. 168*.

German states[12]. It was this need that set new tasks, broadening the material scope of the interests of the authorities, and it also resulted in the increased inclination towards the juridification of life. The need to secure social order gave rise to a true explosion of acts regulating the day-to-day existence of citizens. Therefore, this plexus of determinants oscillating around securing public safety in German states destabilized by religious wars and around the manifestation of power of the authorities reaching for the absolutist omnipotence, contributed to the politics of the public authorities taking on the repressive nature of the "new severity". This change of attitude began to differentiate the police ordinances of the 16th-18th centuries from the previous normative acts to which this term was applied. Now they served, primarily, the purpose of regulation of social and economic life. Their contents were dominated by a system of orders and prohibitions, fortified by stringent sanctions, relating to numerous new spheres of life which had previously not been an object of such overbearing interest of the public authorities. The features which enabled certain acts to be designated as police ordinations were then not only their name, but the special nature of their contents[13]. A new, more narrow definition of this term was starting to take shape, just as the very word "police" was beginning to take on more oppressive semantic connotations, albeit not consistently so - not always and not in the works of every author dealing with this issue[14].

3. Idea of codification and the German "system of taming (dressage)"

In the 18th century, the German territories were covered by a network of states reformed in the spirit of the ideology of enlightened absolutism. Underlying the sources of this transformation was, among others, the assumption that the state is capable of closely controlling the society and of achieving the self-imposed goals by way of a reformed legal system. The 18th century has been dubbed the century of codification. There prevailed the conviction that state bodies are able to create an ordered system of legal norms. It may take on a complete form, regulating every sphere of life in a fashion befitting the expectations of the state. It was widely believed that the advances of legislative techniques may bear fruit in the form of clear-cut laws devoid of any loopholes and internal contradictions; in short: free of any grey areas that may cause interpretative doubts in the course of application of the law. Thus understood, the law of the enlightenment era in the hands of an absolute state could become an efficient tool of discipline, surveillance and punishment, pursuant to the theory of Michel Foucault,[15] even much more perfect that the entire heretofore existing legal order created spontaneously, without a keynote and, as a result, fairly chaotic, leaky and full of contradictions. On the other hand, a duly educated official, judge – civil servant, whose job is to apply the law, will be a guarantee of the efficient use of such a perfected tool. This was the time of emergence of the positivist belief, which still stands strong today, that a legal provision which incorporates the enlightened thought of the legislator is capable of demarcating standards of social conduct and that the representative of public authority who applies it will easily identify this thought and put the provision to appropriate use.

The 18th-century Germany became a model example of the birth and solidification of the strongly ideologized technocratic view that a modern and ordered legal system allows for the close control and "proper" orientation of social life. Therefore, the vision of German states as an exemplar of order and organization encompassed also the legal domain. This vision was as compelling as it was erroneous. This is confirmed by the results of research conducted by German scientists, which I present below and which expose just how imperfect was the implementation of police law and programmed administrative policy. The phantasm of well-ordered state was consolidated by journals issued by German cameralists, popular in Europe at the time and serving, among others, as a propaganda mouthpiece, which Andre Wakefield attempted to expose recently[16].

The conviction that this falsified order of things does indeed exist was harboured at universities, springing up all over the German dominion. The German academic world spared no effort to convince the students, the future civil servants of the enlightened state, that positive law drafted by an illuminated legislator may be an excellent tool for the realization of state goals, provided that it is in the right hands. On the other hand, the students were induced to believe that the overarching task of an enlightened monarchy is, against all appearances, to secure the happiness and well-being of its subjects. Thus, the confines of 18th-century German universities were left by scores of indoctrinated graduates, whom the school attempted to convince that their future employment in the state apparatus would

[12] *Hahn, Peter-Michael, „Landesstaat und Ständetum im Kurfürstentum Brandenburg wärend des 16. und 17. Jahrhunderts", in: Ständetum und Staatsbidung in Brandenburg-Preußen: Ergebnisse einer internationalen Fachtagung (ed. Peter Baumgart), Berlin-New York, 1983, p. 46–53, 62–67; Schulze, Winfried, „Das Ständewesen in den Erblanden der Habsburger Monarchie bis 1740: Vom dualistischen Ständestaat zum organisch-föderativen Absolutismus", in: Ständetum und Staatsbidung, p. 263–279; MacHardy, Karin J., „Staatsbildung in den habsburgischen Ländern in der Frühen Neuzeit. Konzepte zur Überwindung des Absolutismusparadigmas", in: Habsburgermonarchie 1620 bis 1740: Leistungen ind Grenzen des Absolutismusparadigmas (eds. Petr Mat, Thomas Vinklebauer), Stuttgart, 2006, p. 73–98.*

[13] *Salmonowicz, Niemieckie ordynacje policyjne, p. 152, 154–7; Raeff, Well-Ordered State, p. 43–55; Lindenfeld, David F., Practical Imagination. The German Sciences of State in the Nineteenth Century, Chicago-London, 1997, p. 11.*

[14] A similar process of semantic narrowing of the term „police", perhaps even more dynamic, may be observed in France. This may be attributable to the permeation of French influences onto the German territories.

[15] In particular, the remarks on the softening of punishment - *Foucault, Discipline, p. 18–25.*

[16] *Wakefield, Andre, The Disordered Police State: German Cameralism as Science and Practice, Chicago, 2009.* "Andre Wakefield shows that the cameral sciences were at once natural, technological, and economic disciplines, but, more important, they also were *strategic* sciences, designed to procure patronage for their authors and good publicity for the German principalities in which they lived and worked. Cameralism, then, was the public face of the prince's most secret affairs; as such, it was an essentially dishonest enterprise." – http://books.google.pl/books?id=um-lGvXZwGwC&dq=Kameral&hl=pl&source=gbs_navlinks_s [accessed on: 19.04.2014].

consist in the skilled subsumption of continuously perfected legal norms to the state of facts, so as to manage the society efficiently. This, supposedly, was what they had been prepared for and it was to serve the happiness of the humankind. More so than in later times, this conviction was expressed openly, and many, led by a circle of professors, naively believed in the causative power of law, guaranteed by the scientific advances. All this was shrouded in a unique veil of enlightenment. The German network of territories spearheaded the progress of "taming official bodies" described by M. Foucault[17]. This system of taming – or, more precisely, of *dressage* of civil servants was regarded, especially in its Prussian version, as the best one in Europe; the German officials had the fame of the best-tamed tamers of their subjects and, as a result, the progress of taming of the society as the final target of tamed bodies seemed particularly advanced.

4. Threads of the rule of law in enlightened absolutism

While attempting to describe the ground on which grew concept of legal state, we may revert to the era of absolutisms and note that the concept of absolute power which, by definition, has unlimited competences, collided openly with the intuitively sensed need to observe the law in force whenever this law was violated by the ruler. In the German context, what is of key importance in this respect is how this issue was addressed in states gradually absorbing the 18th-century ideas of light and reason. After all, the rationalism of the enlightenment era required the monarch to abide by the laws he himself had laid down. Even before, as early as in the 17th century, there had been cases of German princes attempting to observe the rule of *princeps legibus solutus*. In the countries ruled according to the ideas of enlightened absolutism, however, we can identify the prerequisites for the shaping of a law-abiding state.[18]

This issue was well-known in the neighbouring France, as exemplified by the famous dispute between Louis XIV and the Parisian Parliament about the adoption of an act which, pursuant to the intentions of the Supreme Court, was to secure the control of legality of acts issued by the monarch[19]. Above all, however, the echo of this perennial debate struck its final chord in the physiocratic construction of *absolutisme legal* of the latter half of the 18th century, according to which, similarly to the modern cannons, the entire state apparatus, monarch included, was to abide by the general norms binding at the time of issuing an individual decision[20].

Not only the absolutist justifications of the monarchs' tendency to act arbitrarily worked to kink the principle of legalism. Also the concept of superiority of natural law over positive law allowed for certain leeway in this respect as, after all, the idea of abiding by the law lost value in the fundamentally defective and unjust system of feudal law. As a result, the overarching rationale, cloaked in more or less concrete catalogues of natural law rules, could be held above the crippled creation of the *ancien regime's*[21] legislator. On the other hand, pursuant to the utopian visions of enlightened ideologues, in the future legal order built from scratch, *ex nihilo*, the problem of collision between natural law and positive law was to cease. The perfect system of positive law, embodying the enlightened ideas, could not stand in opposition to its natural law basis upon which it was to be rationally erected, using the accomplishments of the scientific progress. Thus, the enlightened vision of lawmaking was partially ambivalent. On the plane of *de lege lata* postulates, it could allow for certain departures from the principle of legalism (although not in penal law, with the humanitarian *nullum crimen sine lege* and *nulla poena sine lege*), due to the imperfections of the feudal legal system. On the plane of *de lege ferenda* postulates, however, the idea of rule of law, even as one of the natural law principles, could be accepted with no reservations, because the system would be perfect. Underlying this dual approach was the overarching issue of creating a system that could guarantee the protection of individual rights, and the idea of the rule of law was not yet, generally speaking, perceived as a value in and of itself, but rather as a tool that could be used to this end.

Philosophical deliberations on the natural law meta-order were far removed from run-of-the-mill everyday life. Whenever a subject encountered an official, this problem gained a new dimension. Since even the absolute monarch was expected to abide by the law, then this expectation applied even more so to his servants. Therefore, it is impossible to overlook a certain legalistic peer pressure exerted upon wayward wielders of power, and this pressure was certainly intensified by the atmosphere of the enlightenment. Arbitrariness of the rulers was met with mounting resistance. Not only the most drastic instances of power abuse in connection with penal repression exercised by the justice system were stigmatized, as exemplified by Voltaire. It was not until fairly recently, however, that German science started to pay heed to studies of the history of legal sociology. Meticulous research resulted in the reconstruction of the process of application of legal provisions, which allows more general conclusions to be drawn, among others regarding the real scale of various abuses of the power apparatus, ranging from bending of the rules to their conscious and direct violation, as well as the reasons and motivations for such transgressions[22]. Research results suggest that even in the 19th century it was fairly common for the administration to act in clear disregard for the contemporary legalistic standards. Nonetheless, the main reason for such situation was not some natural proclivity to disobey the law, nor the arbitrariness dictated by the commonplace subservience to one's superiors, but rather more complex situational determinants. As a result, makeshift solutions were preferred.

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[17] *Foucault, Discipline, p. 169–190.*

[18] *Salmonowicz, Stanisław, „Rozważania o oświeconym absolutyzmie", Kwartalnik Historyczny, 93/3 (1986), p. 810.*

[19] *Seagle, William, The History of Law, New York, 1946, p. 225.*

[20] *Izdebski, Hubert, Historia administracji, Warsaw, 1997, p. 67.*

[21] *Grzybowski, Konstanty, Dzieje prawa. Opowieść, refleksje, rozważania, Wrocław-Warsaw-Cracow-Gdańsk, 1981, p. 152–160.*

[22] Compare: *Härter, Karl, Policey und Strafjustiz in Kurmainz. Gesetzgebung, Normdurchsetzung und Sozialkontrolle im frühneuzeitlichen Territorialstaat, Frankfurt am Mein, 2005; Simon, Thomas, „Gute Policey" – Ordnungsleitbilder und Zielvorstellungen politischen Handelns in der Frühen Neuzeit, Frankfurt am Mein, 2004.*

Local expectations and interests played a more important role in politics than strict adherence to the letter of the law. The scope and methods of activities provided for by the normative acts were also affected by the limited capacity to finance them[23]. The discord between the legal reality and the state of facts was the result of a host of objective obstacles for which the officials themselves could not be held accountable. This, in turn, made them accustomed to this situation, as they did not know any other standards. They treated the avalanche of provisions as loosely binding guidelines, at best, unless of course the pressure of their superiors - rarely of anyone else - forced them to stick to directives more rigorously.

The motives for the superfluity of police legislation, precisely in the context of problems with their implementation not necessarily only in the early modern times, were explained by Stanisław Salmonowicz: "What we are dealing with here, first and foremost, is the problem of having to repeat, publish essentially the same legal provisions which - as can be deduced from this practice - were quickly forgotten and fell into disuse. This is one of the key problems […], whether certain groups of such typical provisions never truly left the paper, if they were not provisions laid down against the fundamental realities of the social life, which they were to rectify or scorn in vain, usually for reasons of religious piousness. Secondly, since the legal provisions in force in those times were usually communicated orally, the necessity to continuously repeat that they remained in force was a normal occurrence"[24].

Regardless of whether the odium, which to this day trails behind the *ancien regime's* apparatus of power, allegedly quick to abuse its prerogatives for ignoble purposes, seems largely an effect of the ideological propaganda of the enlightenment period, which, struggling against the old order, made a conscious effort to vilify its opponent[25]. Still, it seems that the rule of law had no standing chance in that world. Ultimately, the outburst of new regulations did not increase the working capacity of the officials who applied them. In fact, it was quite the opposite.

In this context, the juridification of life comes forth as more of a psychological procedure: the constant inflow of formally binding provisions to a certain extent influenced the officials as much as the subjects, even if their promulgation did not trigger a psychological need to observe them as compelling as in modern times[26]. In other words, the ideology of juridification exercised by the absolutist state did not necessarily connote that the absolutist state would attempt to implement formal rule of law. Not because this was against the absolutist premises, especially in their enlightened version, but rather because practical limitations precluded such endeavour.

5. Polizeiwissenschaft

The advancement of science and ideology favoured the invariably dynamic diffusion of police law and the consolidation of the tendency towards juridification. In Germany, this dual role was exercised by cameralism - both a programme and a doctrine, which took shape following the Peace of Westphalia in 1648 and, from then on, served as the determinant for the establishment of social discipline and axiological legitimization for this process. For a long period, cameralism was employed as the programme base for the system of education of civil servants - for "taming the tamers" and for thus laying the ideological foundations for the "tamed" subjects who constituted the public opinion[27]. The turning point in the development of cameralism was its introduction to universities as a new academic subject. At the time, some of these universities underwent significant reforms in the spirit of enlightenment. The first hub was the University of Halle, where Christian Thomasius (1655-1728) lectured. He designed a teaching programme for the department of law, oriented towards inculcating students with knowledge that was ready for practical application, guiding them on how to shape and implement administrative policies. From then on, law departments usually had affiliate chairs specialized in the problems of administration of public affairs. For the development of the ideology of juridification, this could have had a massive significance in the longer run, especially since already beginning in the 17th century, jurisprudence started to dethrone philosophy as the principal science[28]. Christian Thomasius stood at the vanguard of a group of people from academic and official elites who called for the revitalization of the education system in the field of administration and economics, sidestepping the traditional frameworks of "practical philosophy"[29]. In this group was also Johann Georg Püttner (1725-1807), a lecturer of law at the University in Göttingen[30]. This institution, through its academic accomplishments, became the second leading centre for popularization of the reformed model of teaching law and administration.

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23 *Salmonowicz, Niemieckie ordynacje policyjne, p. 173.*

24 *Ibidem, p. 169.*

25 The propaganda manoeuvres of „the other side" are also constantly brought up by A. Wakefield in his *Disordered Police State*.

26 At this point, it is important to remember the common proclivity to unconsciously imagine the past within the modern paradigm of notions and visions, which may cause a twofold distortion of the perception of the past, as it affects both the authors of historical publications and their readers. To the modern narrator and reader, a given message may be logical and reliable, while an eyewitness of the described events could have a diametrically different opinion. In order to avoid this pitfall, authors describing phenomena and events of the past should, above all, know how they were perceived by the contemporary actors and reviewers and be able to present their reception. See A. Wakefield's remarks on the analysis of cameralism - *Wakefield, Disordered Police State, p. 5*.

27 *Stolleis, Michael, Geschichte des öffentlichen Rechts in Deutschland, vol. 1: Reichspublizistik und Policeywissenschaft 1600–1800, München, 1988, p. 374.*

28 *Schmidt Biggemann, Wilhelm, "New Structures of Knowledge", in: A History of the University in Europe, ed. Rüegg, Walter, vol. 2: Universities in Early-Modern Europe (1500-1800), ed. De Ridder-Symoens, Hilde, Cambridge (UK), 1996, p. 515–516.*

29 *Tribe, Keith, Governing Economy: The Reformation of German Economic Discourse, 1750-1840, Cambridge (UK), 1988, p. 35–39.*

30 *Preu, Polizeibegriff, p. 167–192.*

Based on these and subsequent reforms of late 17th and early 18th century, academic teaching started to place more emphasis on comprehensive and systematized transfer of knowledge on public affairs to law students, of which many aspired to careers as officials. "*Auch an den Juristischen Fakultäten bestand in dieser Zeit kaum Interesse an der Ausbildung der Policeywissenschaft*"[31]. Parallel to this process, the prestige of the profession gradually increased. Official specialization was not designed as the principal objective of academic education also in the sense that professional preparation of civil servants was not yet oriented towards turning them exclusively into specialists in the interpretation of law. The far-reaching goal was rather the formation of scores of illuminated, comprehensively educated administrators. In the first half of the 18th century especially Christian Wolff, who had dedicated himself to work on combining different fields of knowledge in order to produce one coherent system, professed this vision. King Frederick William I of Prussia loaned generous support to this endeavour. Dissatisfied with the poor quality of economic and financial[32] education of law students in his country, whom for the most part he deemed future legions of officials, in 1727 the monarch issued a decision on the establishment of two *Kammeralwissenschaften* chairs (professorships) at universities in Halle and in Frankfurt an der Oder. This decision furthered the widespread significance of cameralism (as plural cameral sciences), hereafter distinguished as tantamount in scope to the teaching of the faculties of public finances (cameralism in its narrow definition), economics and police science[33].

What played a key role in this composition, from the perspective of our topic, was police science (*Polizeiwissenschaft*), formed based on police ordinances profiled since the 16th century in the regulatory spirit. In terms of ideology, these ordinances served the purpose of bringing social discipline, mostly through juridificational processes. Police ordinances, in the early 18th century already representing a voluminous normative material, were without a doubt the basic point of reference for the development of this branch of knowledge[34]. Police science had to be constantly monitored, considering its tight connections to the ideology of absolutist enlightenment and the strong propaganda inclinations towards deforming the accepted assumptions and conclusions. Let us quote a remark made by Wilhelm Schmidt Biggemann: "However, arguing historically and pragmatically solely for the benefit of the State and in its service, the jurists became incapable of dealing philosophically with the question of its legitimacy. The price jurisprudence paid for its political advance was a loss of critical competence"[35].

Thus construed *Polizewissenschaft* focused on the examination of issues related to the internal administration of state, the sphere of administrative policies and activities of officials. Due to the circumstances of the times, the main axis of its interests was the challenge of working out universal methods of securing social discipline, which, for the obvious reasons, was also at the centre of attention of the absolutist state. In particular, its enlightened German version had appetites - albeit not possibilities - comparable to a 20th-century totalitarian state, for transforming the state machinery into a system of surveillance fashioned after Bentham's Panopticon[36]. There, the law as the exponent of all project rules still had to occupy a central position. Along with these transformations, the proclivity for juridification could only intensify.

As Stanisław Salmonowicz noted, police sciences "at the start of the 18th century became, in the educational aspect (related to teaching the staff), almost the main element of staff policy of the absolutism era, and this applies in particular to enlightened absolutism"[37]. In comparison to the 19th-century positive law model, the teaching system was oriented at forming not only properly indoctrinated, but also well-rounded officials, not mere technicians able to dexterously subsume the state of facts to legal norms. Police sciences shaped in the mid-17th century, under the influence of natural law doctrine, played a key role in the process of indoctrination. They determined the objective

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31 *Stolleis, Geschichte des öffentlichen Rechts, p. 373*.

32 *Lindenfeld, Practical Imagination, p. 15*.

33 See also: *Stolleis, Geschichte des öffentlichen Rechts in Deutschland, p. 376*: „*Überall wurden die Lehrstühle entweder als Derivate der Praktischen Philosophie, als Teil der «philosophischen Staatswissenschaften», als neue technische, finanzwissenschaftliche, statistische oder ökonomische Fächer oder als Seitenzweige der Medizin und Biologie (Tierkunde, Veterinärmedizin) den Philosophischen Fakultäten zugeordnet. Diese, mit ihrer vergleichsweise lockeren Binnenstruktur und ihren in der Praktischen Philosophie angelegten Möglichkeiten der Ausfächerung eigneten sich hierzu offenkundig am besten. Der Anteil der Jurisprudenz an diesen Materien war gering und konnte nach Ansicht der Zeitgenossen am besten anhand der konkreten Rechtsfrage dem entsprechenden Gebiet innerhalb der Juristischen Fakultät zugeordnet werden. Kameral--Wissenschaften und Jurisprudenz blieben in Distanz; die ältere Rechtswissenschaft nährte Zweifel am Wissenschaftscharakter der neuen Disziplin.*"

34 However, as Michael Stolleis noticed: „*Grundlage des juristischen Unterrichts waren nach wie vor die Texte des geltenden Rechts, die kommentierend erläutert wurden. Solche Texte standen jedoch in der Verwaltung nur selten zur Verfugung, ihr Geltungsbeereich war lokal oder territorial begrenzt - die Reichspolizeiordnungen des 16. Jahrhunderts waren längst veraltet -, und sie standen dem Zugriff der Obrigkeit so stark offen, daß schon ihre Qualifizierung als «Recht», jedenfalls aber der Nutzen ihrer wissenschaftlichen Aufbereitung bezweifelt werden konnte. Gewiß wurde die Verwaltungstätigkeit, seit sie einen gewissen Grad der Verdichtung angenommen hatte, auch normativ angeleitet und gestützt. Dies geschah durch eine intensivere Regulierung des Beamtenwesens und im Verhältnis von Obrigkeit und Untertan durch «Policeyordnungen» und Einzelfallregelungen aller Art. Aber dieses normative Material war fragmentiert und inhaltlich so sehr von wechselnden Zwecken bestimmt, daß seine Erfassung und Systematisierung noch als aussichtslos erscheinen mußte. Doch selbst wenn es möglich gewesen wäre, fehlte ein Motiv dafür: Weder gab es in der Staatslehre des Absolutismus einen prinzipiellen und als zwingend angesehenen Gegensatz zwischen Gesetz, Verordnung und Einzelakt, noch war der Individualrechtsschutz, der später zum mächtigsten Antrieb bei der Entstehung des Verwaltungsrechts werden sollte, ein Thema des 17. Jahrhunderts. Gesetzgebungs- und Befehlsmacht lagen gebündelt in der Hand des Souveräns. Die von ihm geschaffenen Normen konnten allenfalls nach äußeren Kriterien von Tradition und Dignität, nicht aber prinzipiell nach inhaltlichen Kriterien unterschieden werden. Ihre Einteilung nach Adressaten folgte der ständischen Gliederung der Gesellschaft. Ihre Verwendung war instrumenteil und gelenkt von den Tagesbedürfnissen der Wiederaufbau- und Reformpolitik der jeweiligen Landesherren. Für die Ausbildung einer übergreifenden wissenschaftlichen Disziplin des «Polizeirechts» im Sinne eines Rechts der inneren Verwaltung fehlte es also sowohl aus praktischen als auch aus verfassungstheoretischen Gründen an den entsprechenden Antriebskräften.*" *Ibidem*.

35 *Schmidt Biggemann, New Structures, p. 515–516*.

36 This is very well illustrated with the example of Happe's Panoptikon vision given by Andre Wakefield - *Wakefiled, Disordered Police State, p. 198–227*.

37 *Salmonowicz, Niemieckie ordynacje policyjne, p. 151–152*.

which social discipline was to serve. Chairs of cameralism were swept by Wolff's philosophy of state eudaimonism as a collection of ideological arguments that the objective of a state is to secure the happiness of its subjects. This happiness was to rest mainly on well-being in its strictly material aspect (the proliferation of the *Wohlfahrtstaat* vision), as well as on a sense of security. In order to accomplish this, the state must be active; it must ensure public order and the increase of national wealth, by employing the method of regulation based precisely on the development of written law, care for its quality and the formation of civil servants responsible for the application of the legal provisions. The society, on the other hand, must succumb to the state, to law and to officials; it must trust that the state machinery will work to its benefit, regardless of the lack of a social control system. Police concepts of a modern state started to stand out by the fact that the legal norms in the hands of state and, at the same time, the regulations that organized this state, were becoming the most pivotal tool for turning reality the action plans that they formulated. The above-mentioned W. Schmidt Biggemann observed: "Because the modern State was understood in juridical terms, it was all the easier to define the conditions of its internal order and economy. Making the State efficient was the purpose of the central European 'political sciences' which studied appropriate forms of administration and the well-being and discipline of Citizens, and prepared proposals for government legislation."[38]

Just as the law remained at the centre of attention of cameralists, who regarded it as an efficient tool, the economic assumptions of mercantilism, which were to turn reality the vision of *Wohlfahrtstaat*, were the program base of police concepts, determining their contents. "The welfare of the State was always dependent on a flourishing economy. Since the efficacy of government had become the main task of jurisprudence, the science of economics - located in the common area of practical philosophy, jurisprudence and politics - become one of the main scientific tasks of the university" - explains W. Schmidt Biggemann[39]. In other words, while focusing on the structures of state management in the programs formulated for it, representatives of police science drew particularly from the contemporary economic science, and envisioned their proper performance in the tight corset of detailed legal regulations.

All these assumptions, based on the then available knowledge of the state, society, economy and finances exuded modernity in the mid-18th, but at the turn of centuries, they already seemed completely outdated. At the time, however, the revitalized police science, saturated with enlightened ideas, as the remaining cameral sciences, was entering its golden age. In the 1760s of the century, as many as nine chairs of cameral sciences were established, and about 60 publications on this topic came out between 1760 and 1790[40]. What may be even more significant, as cameral sciences, including their police component, were being popularised, usually under the auspices of the local enlightened monarch, separate territorial states decided that obtaining an administrative (and sometimes even judiciary) position would require knowledge of this science. What is more, cameralistic ideas were treated seriously as guidelines for redefining the political line pursued by the separate states of the German dominion[41].

Expansion of cameralism and police science followed also from a certain change of attitude towards the idea of social discipline. The regulatory tendencies intensified even more, and on two planes: vertically, due to the depth of legislative interference; and horizontally, due to the extension of regulations onto the new spheres of public life. This tendency was additionally fuelled by the fact that the ideology of enlightened absolutism was absorbed by police sciences, at least to the extent of those elements, which generated the need for intensification of state influence on internal affairs. Stanisław Salmonowicz notes that the high point of conscious "politics of discipline" came forth "[…] in the process of building absolutism, whereby in its terminal phase enlightened absolutism changed not so much the methods, but the ideology behind them, drawing justification for its politics of detailed regulation and disciplining, and ultimately of reaching the apogee of the role of state (within the contemporary social capacities, of course), from the theory of natural law and slogans of enlightened politics for the good of subjects. This occurred in line with the principle that administration *sensu largissimo*, which ruled supreme in enlightened absolutism, strove for 'the good of subjects', but without asking them for input or active participation (all for the state, by the state), ultimately for the omnipotence of the state"[42]. Under these conditions came into being the idea of a police state, as an effect of symbiosis between the stipulations of enlightened absolutism and the doctrinal assumptions of police sciences[43]. The term "police state" quite quickly began to acquire negative connotations, suggesting excessive supervision and punitive attitude of the authorities. This was accompanied by the inclination towards superfluous output of laws. On the horizontal plane, enlightened absolutism became interested in disciplines which had so far been removed from its area of focus, or did not attract much attention. The systems of education, welfare, private economic sector, are just a few examples of the fields where the presence of state was multiplied in comparison to the earlier relations. The thicket of continuously proclaimed laws was growing, as the state was extending its reach insatiably[44]. The parallel intensification of interference (vertical aspect) may

[38] *Schmidt Biggemann, New Structures, p. 515.*

[39] *Ibidem, p. 515–516.*

[40] *Tribe, Governing Economy, p. 91.*

[41] *Lindenfeld, Practical Imagination, p. 22.*

[42] *Salmonowicz, Niemieckie ordynacje policyjne, p. 157.*

[43] *Gromadzka-Grzegorzewska, Narodziny prawa administracyjnego, p. 16.*

[44] *Koselleck, Reinhart, Preußen zwischen Reform und Revolution: Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848, Stuttgart, 1975, p. 116–152.*

be observed by measurements with the use of such coefficients as the degree of minuteness of the regulations, increase of the number of normative orders and prohibitions and the sanctions for their violation. All this was still taking place with a view of improving social discipline, ultimately in order to bring happiness and well-being to the subjects. However, as David Lindenfeld has pointed out, noting that the dynamic development of education bore fruit in the form of a sizeable stratum of knowledgeable citizens, the leaven of the future middle class, "the goal was not to enforce blind obedience, but rather to instill a sense of self-discipline whereby that obedience would be freely rendered. The mentality was thus neither that of classical liberalism, in which the freedom of individual took a precedence over the bestowed by a state, nor the discipline of the prison and the barracks described by Foucault, in which the actions or groups are controlled down to the last detail; rather, it was something in between that was particularly suited to German circumstances."[45] The cameralist who had best expressed these ideas was Johann Heinrich Gottlob von Justi (1702-1771). He was also the most popular German author on public affairs in his times.

Regardless of how the representatives of police sciences evaluated the mechanism of law's influence on society, in each case it could seem that cameralists, including those of the police vein, were characterized by an "enthusiastic and straightforward belief in the beneficial effects of authoritarian legislation" - as concluded by Marcel Prélot[46]. This can be accepted, with the reservation that regardless of the true faith of certain ideologues of cameralism in the theses they proclaimed, some could have also been guided by cold-blooded calculation. Ultimately, while propagating catchy slogans, they were at the same time popularizing ideas that consolidated the state and backed the monarch's interests, in hope of furthering their own careers. This was not a vain hope. What calls for attention in this context is how little space the representatives of police sciences dedicated to controversial issues, such as setting boundaries which the need for social discipline, taking the form of legal regulation, should not transgress.

6. Conclusions

We may speak of the definite shaping of the ideology of juridification starting with 19th century, following the crystallization of legal positivism and the attempts at a practical application of basic legal constructions underlying the need for a detailed regulation of public life, such as the idea of the rule of law or the idea of legal state. It was then that the ready-made package of justifications for the reign of contemporary systems of codified law was established. The ideology of juridification, thriving on this ground, led to an extreme form of fetishization of the significance of law, coupled with an indiscriminate belief in its beneficial effects. It was in the 19th century that the fundamental formulas marking the cult of law, namely "the eye of law" and "in the name of law"[47] were popularized. Earlier on, in the period of 16th-18th centuries, these ideas were only just hatching, and various states were still far from the full implementation of the rule of law. The German states of the Holy Roman Empire certainly stood at the vanguard of the development of legislation.

Within the German context which, despite its outstanding advancement of juridificational procedures may also be somewhat meaningful for many other regions of contemporary Europe, a number of factors may be identified which, starting from the 16th century, favoured the intensified legislative activities in this part of the world. Firstly, it was the need for securing the safety and stability perturbed in the 16th and 17th centuries as a result of the crisis of the Middle Ages order, determined in line with the rules of the Catholic Church and of the escalation of religious wars. In these conditions, the people themselves expected a new social discipline to be instilled. Eyes were turned to primarily state structures, which, with the aid of codified law and law enforcement services, were capable of providing the much desired order and sense of safety. Secondly, the intensification of legislative activities was in the very interest of the state apparatus, aware that juridification serves to empower the public authority. Europe of the early modern times, oriented towards the absolutist form of rule, was a fertile soil for the development of the idea of regulating the entirety of political, social and economic life. The authorities desired for the law to set the standards of conduct and to render them binding, even if the practice of showering subjects with superfluous provisions was not yet accompanied by due care for their observance by people and authorities alike, according to the contemporary standards. Thirdly, the juridificational inclinations were favoured by ideologues of the enlightenment, who championed the idea of a world ordered according to natural law principles. Even if they were guided by the assumption that a legal order should be built from scratch, in no way did they question the very need for juridification of life. Indeed, they in fact hoped to achieve this by means of a complete (loophole-free) codification of all branches of law. Lastly, juridification of life was furthered by the way, in which the German scientific world was shaped in the 18th century. New universities were springing up all over the territory of the Holy Roman Empire, with law departments holding center stage. The German states supported the idea of legal education reformed in the spirit of enlightenment, and so they sought civil servants who were well qualified in this craft.

Based on all the transformations that favoured the juridification of life, the cameral ideology, promoting the vision of well-ordered state, crystallized in the German scientific world. Its popularizing activity inculcated the European elites with the conviction that it was not only possible to create a perfectly organized state, but also that some of the German states already fulfilled the cannons of this archetype. The propaganda axis of cameral ideology rested on a chain of notions according to which universities were capable of providing the state with an army of comprehensively educated civil servants. With the

[45] *Lindenfeld, Pracitcal Imagination, p. 24.*
[46] *Prélot, Marcel, Histoire des idées politiques, Paris, 1980, p. 347–348.*
[47] *Stolleis, The Eye of the Law.*

aid of technocratic methods, whose efficacy was guaranteed by the dynamic advancement of science, they were supposedly able to steer the society and the economy, doing so in the best interest of the subjects and for their good. According to this vision, an enlightened civil servant operating within a rationally organized state apparatus would be able to undertake activities serving the safety, well-being and happiness of the people.

The strength of the cameral ideology, which hinged on these theses, was further solidified in the 18th century German states, after it gained the status of a scientific discipline and was introduced at universities as an autonomous academic area. Special chairs of cameral sciences were established at German universities, focusing solely on the development of this scientific field, naturally along with its accompanying ideology. One of the branches of cameral sciences, which with time grew to occupy a central position, was the police science, which concentrated on the art of correct management of the society. In line with the spirit of the times and in connection with all the above--mentioned premises for the popularization of meticulous regulation all life, the vision of a strongly juridized reality had to become the bedrock of police science. According to representatives of police science, only elaborate regulations setting the goals and action plans for the state apparatus could be deemed an efficient tool for improving the conditions of life of the subjects, as long as it was wielded by comprehensively educated and enlightened civil servants. Within this context, the idea of juridification was rallying even stronger support from the monarchies in the vein of enlightened absolutism, which dominated in the German territories. Ultimately, this idea served also the intensified control over the whole of social life and it furthered the processes of instilling discipline in the society. The development of police science had its peak in the second half of the 18th century.

Knowledge of the legal craft still occupied a key position in the education of police science as, despite the autonomy of cameral chairs, they were still usually organizational units affiliated with law departments. The enlightenment doctrine, which dominated the legal education at the time, was already popularizing a vision of complete codification, predicating full juridification of the whole of social life. Therefore, the idea of codification was also permeating the police science, taking concrete shape in the concept of drafting codes of police law. At the same time, the cameral and police ideology was not only about convincing the future civil servants to the vision of a strongly juridized reality as the natural environment for their work. The objective was much more far-reaching. The representatives of the police science had the ambition the persuade the entire intellectual elite - and then the rest of society through the trickle-down effect - that meticulous regulation, incorporating the conscious intention of the legislator, is a necessary and progressive means to providing subjects with safety, well-being and happiness. In the perfect system, abiding the law was not to be forced with fear for reaction of the repressive state, but rather brought about by developing the subjects' conviction that even the more vexing provisions are laid down in public interest. It seems that, in this aspect, the 18th-century police science, professing the idea of juridification, was not much different in its ideological assumptions from the mainstream concepts of the modern legal science.

Execution of Tax Credits in Rome

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Abstract

From very soon the forced execution of tax debts followed a different path to the rest of debts. Although we have no news about the details of the application of the manus iniectio, the legis actio per pignoris capionem marks the origin of the executive privilege of the tax credit, which does not seem to have been subjected to the actio iudicati proper of the process per formulas. The sources, on the other hand, provide detailed information on the application of the singular execution (pignus in causa iudicati captum) to the levying of tax debts.

Keywords: *Execution; tax debts; judicial seizure; pignus in causa iudicati captum.*

The insufficiency of patrimony to face the debts of its owner is repeated throughout the history of civilization. Within the societies of different historical periods, the search of legal solutions to the cases of non fulfilment of an obligation has been constant. It has been characterized by the common necessity of regulating mainly those situations of insolvency or the difficulties to face the debt.

Delays in payment and insolvency, always considered a social problem capable of endangering the whole economic system of a state, appear to be a primary question when affecting the payment of tributary credits.

All political organizations require, since the early stages of time, the contribution of financial resources for its maintenance. As long as a society becomes more complex and the public organization assumes more competences, the need to organize an efficient fiscal system becomes compulsory for the survival of the state. Notwithstanding the above with the fact that for centuries there was confusion between the personal patrimony of the ruler and the public funds.

Within any social model we could imagine, public works, the structure of the administration and the army require a source of funding, something that, generally, comes from the patrimony of the citizens.

Even though the Roman state system experienced a great evolution, from the primitive political structures of the monarchy to the extremely complex imperial bureaucracy of the Dominate, it can be observed from the very beginning the growing concern of the jurist to assure –and also to delimit- the legal status of the tax credit, especially when coinciding with strictly private debts.[1]

In this regard, it is difficult to establish with certainty those institutions previous to the Roman culture due to the lack of precise sources[2]. Although, we could state that within certain groups living at the banks of the rivers Tigris and Euphrates, there were developed systems that looked for the responsibility of the debtor with measures that ranged from being sold as a slave or personal punishments[3]. In texts like the Old Testament, there are interesting references to the regulation of the plurality of debts. We could also find examples of singular execution in documents such as the Laws of Esnunna[4] in

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1 As stated by Professor Fernández de Buján, A., Ius fiscale: instrumentos de política financiera y principios informadores del sistema tributario romano, in *IURA*, 58 (2010) p. 19, Roman jurists knew how to develop a legal tax system based on principles such as proportionality and economic capacity, equality and generality, benignity, humanity and equity, legality or reserve of law, inability, objectivity, legal security, reasonability and common utility or preconclusion.

2 Giménez Anzola, H., «Notas sobre los orígenes históricos de la ejecución singular y de la quiebra», *Revista de la Facultad de Derecho*, Caracas, nº31, 1962, p. 125-126.

3 Zambrana Moral, P. , *Historia jurídica: valoraciones crítico-metodológicas, consideraciones doctrinales alternativas y espacio europeo,* Zaragoza-Barcelona, Cátedra de Historia del Derecho y de las Instituciones de la Universidad de Málaga, 2006, p. 284: «En el Deuteronomio, se explican las formalidades con las que el acreedor debe cobrar las compensaciones, dándosele mayor importancia al hecho de que debe tratar misericordiosamente al deudor, independientemente de la gravedad del daño cometido, también a la hora de exigirle la compensación, debe hacerlo de tal manera que pueda administrar sus recursos para su mera subsistencia, al menos."

4 Zambrana Moral, P. , «*Derecho Concursal Histórico, I: trabajos de investigación,* Barcelona *2001.» Respecto a las* Leyes de Esnunna (arts. 6 y 22 a 24), Where the assumption arises of an unrelated debtor who illegally retained assets, slaves or even the wife or child of another. The Hammurabi Code provided for the payment of the debt through the sale of the slave or her delivery, as well as other measures.

Mesopotamia, and more specifically in the Code of Hammurabi[5], in which the illegal confiscation is regulated and the requirements of legal confiscation are established, even with the possibility of the captivity for the debtor.

The object of our work focuses on the different mechanisms established in order to make the tributary credit effective, in a coactive way, for the cases of unfulfilment of the debtor.

Roman law experienced different systems of execution of money debts, always starting from the pre-existence of a certain debt established on a declarative sentence or acknowledged by the debtor[6].

The historical and dogmatic starting point of Law, as a way to regulate social coexistence, is always, as we know, private vengeance. This is the normal form of protection of interests in a pre-legal stage of human species. Archaic Roman law is a good proof[7] of the transition, experienced in all societies, of this *law of the jungle* to the acceptance of the law by the citizens, through the monopoly of the violence that, gradually, is being reserved by the public power.

The evolution of the system of the compulsory execution of liquid debts is the result of this transition process that starts with the right of the creditor to seize the debtor, exhibit him at the market and sell him or dismember him, as it was described in the XII Tables, and culminates in the times of the emperor Antoninus Pius with the establishment of a system of singular confiscation of the goods of the debtor, very similar to the one included in modern legal systems[8].

As stated by to Aulio Gelio[9], in the XII Tables[10], there was regulated the *manius iniecto pro iudicatio* (substituting the archaic *manus iniecto* that did not require a previous declarative stage), according to which the creditor, after letting pass a period of 30 days since the sentence in order to allow the voluntary fulfilment, could arrest the debtor, holding him prisoner for 60 days with chains that did not exceed 15 pounds and exhibit him at the market in order to facilitate the appearance of a *vindex* that could take charge of the debt. According to the story we know, after this period without being the debt paid, the executor could sell the debtor as a slave (*trans Tiberim*), and if there were various creditors, having the obligation of splitting the executed one into pieces (*in partes secanto*), although we hope that it was the patrimony of the debtor and not his body what was finally divided.

According to the legend told by Livius in 326 BC, there started a plebeian revolt against personal execution of debts. Titus Livius tells us that the moneylender Lucius Papirius had the young Gaius Publilius in the *nexum*[11] because of a debt of his father. The creditor tried to abuse the slave, undressing him and being whipped. The people, outraged when they knew the event, revolted and ordered the Senate to present a proposal, by virtue of which no one in the future could be imprisoned because of the debts. According to the tradition, this event was the origin of the lex Poetelia Papiria.

In accordance to the account of Titus Livius[12], the prison because of the debts disappeared with that law of the year 326 BC, although the doctrine keeps important doubts about it[13].

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5 113ª law, Hammurabi Code, ed. G. Fatás, (based on the ed. De Joaquin Sanmartin, Trotta, Barcelona, 1999). http: //www.unizar.es/ hant/Fuentes/Hammurabi.pdf consultado el 24 de julio de 2013.: «If one has a credit of wheat or silver against another and if in ignorance of the owner of the wheat, in the sheaf or in the barn, has taken wheat, this man is guilty of having taken wheat in the sheaf or in the barn in ignorance Of the owner of the wheat, and will return as much wheat as he has taken and will lose all that he had given.»

6 The duality between final judgment and *confessio* (acceptance) as an executive title stood through the Roman legal history. Cfr. Díaz-Bautista Cremades, A.: *El embargo ejecutivo en el proceso cognitorio romano (pignus in causa iudicati captum)*, Marcial Pons, Madrid, 2013, p. 66.

7 The reference to the Retaliation Law contained in the XII Tables (but also in the Exodus 21:23-25, in Leviticus 24:18-20, in Deuteronomy 19:21 and it Hammurabi´s code itself) is quoted as the first attempt to drive private vengeance to legitimate limits, but it is not difficult to find other examples of limited self-protection in Public Law, like the possibility of the owner of using violence to maintain or even recover possession against acts of disturbance or dispossession, thanks to the privation of self-protection injunction to the vicious owner or the owner who supposes in *sensu contrario* the legitimacy of the violence of the pacific owner.

8 The so-called *pignus in causa iudicati captum* established (or generalized) through a command of Emperor Antoninus Pius and noted by Ulpian and Callistratus *in* D. 42.1.15 D. 42.1.31 respectively. *Vid.* Díaz-Bautista Cremades, *Op. cit.*

9 20.1 46-47

10 3.4-6

11 8.28

12 We only know, thanks to some references, the institution of *nexum*, that seems to have been the possibility, given to the insolvent debtor, of giving to the creditor, temporarily and as a guarantee of the fulfillment of the obligation, a son *in potestae* as a hostage, as it was normally done in the relation among states as a proof of the fulfillment of international treaties. Such a figure may be close to the *vindex* that according to different sources was an alternative to the corporal execution of the *manus iniecto*. In the same way, the function of the *nexum* could be coherent with the *noxae deditio*, faculty given to the *pater familiasresponsible of the salve or alieni iuris* guilty of a crime, of liberating himself of the payment of the punishment giving the son or slave to the victim. The doctrine has also seen in this nexum an antecedent of in rem guarantees. Vid. RODRIGUEZ OTERO, L., El enigmático nexum como precedente de la hipoteca, en *Rev. Crít. de Derecho Inmobiliario,* 677(2003), pages 1619-1692. Como explica PEREZ ALVAREZ *"A tenor de las fuentes, el nexum consistía en un acto o rito formal de automancipación (Selbsmanzipation, según la doctrina alemana) per aes et libram por el que el deudor se coloca bajo la potestad del acreedor, el cual adquiría no sólo el poder de retener al deudor (ius retinendi creditoris), sino, también, la facultad de encadenarlo y encerrarlo en su cárcel privada hasta que pagase su deuda mediante la prestación de su propio trabajo"*. PEREZ ALVAREZ M.P. , La posición del deudor en la Historia. De la responsabilidad personal a la patrimonial, en *Revista General de Derecho Romano*, 16 (2011) p. 3.

13 On the one hand, according to Torrent (Diccionario de Derecho Romano, v. *lex poetelia papiria*, Edisofer, Madrid, 2005) the law really sweetened the situation fo te nexi, but it did not completely abolish imprisonment because of the debts, which kept being applied until IVth century. In the same sense, vid. D'Ors, A., *Derecho Privado Romano,* EUNSA, Pamplona, 7ª ed. 1989, paragraph 35. On the other hand, it is not difficult to find testimonies of personal executions and imprisonments for debts in times after the promulgation of the *lex*, such as for instance, the passage told in Mt 17, 25-34: "*And since he could not pay, his master ordered him to be sold, with his wife and children and all that he had, and payment to be made*". In the same sense, Díaz-Bautista Cremades (Algunos elementos de ejecución personal en el Dominado, en *Revista Internacional de Derecho Romano,* 10(2013), page 320 underlines how

What is true is that in somehow more gradual way, the execution of liquid sentences evolved from the archaic *manus iniecto* to the *actio iudicati* of the process *per formulas*, that implied universal, patrimonial and insolvency execution, so that all the goods of debtor were expropriated and allocated in a public auction to a *bonorum emptor*. With the payment, the credits of all creditors were –in their correspondent proportion- satisfied.

But this execution system of liquid debts did not seem to have been the way used since ancient times for the exaction of tributes. From the very beginning, the pragmatism of tax collectors understood that corporal execution to satisfy tributary credits was of little use beyond its coactive power over the debtor. Then they opted to take pledges from the debtor in order to oblige him to pay. For that reason, the *legio acto per pignoris capionem*, an enigmatic appeal of self-protection that allowed the creditor of some especially transcendent credits to directly take a good from the debtor as a pledge, was used[14]. Initially, following Gaius, the *pignoris capio* was licit as a pledge of the payment of animals used for the sacrifice to the Gods, the payment of salaries to the Army and the refund to them of the expenses for the acquisition and support of horses. Afterwards, through a *lex censoriae* it was extended, in an unknown date, the provenance of this system to the *publicani*[15], in order to assure tax collection.

However, it is needed to specify the circumstances in which the tax credit of the *publicani* coincided with the rest of the creditors in the case of the exercise by any executor of the *actio iudicati* above mentioned. It can be assumed that the tax collector, as pledged creditor, could be exempt of the insolvency agreements and the universal transmission of the patrimony of the debtor to the *bonorum emptor*, or he could have a preferential credit against him, based on his strengthened position as a pledge owner, even though these are none but mere speculations as long as there is not a more detailed study.

Nevertheless, the evolution of the process per formulas to the *extraordinaria cognitio* made the judiciary mechanism of liquid sentences execution coincide with the particular system of the *pignoris capio*, and thus the taking of singular pledges was generalized for all kinds of liquids debts, building the base of the modern process for collection of debts[16].

According to a great part of the doctrine, the *extraordinaria cognitio* started to spread from the times of Augustus, coinciding with the process of expansion of imperial power[17]. In times of Hadrian, that is, during the II Century AC, the *cognitio* was already the usual process[18], although both existed for a long time[19].

In this new procedural system, the execution of a condemnatory sentence (wheter liquid or in kind) belonged to the same public servant that had passed the sentence, once it was a final judgement, always limited to the specific goods needed to satisfy the expectations of the actor and the procedural expenses.

A command from Emperor Antoninus Pius[20], noted by Ulpian[21] and Callistratus[22], orders those who pronounced the sentence to execute it[23] through the pledges of condemned debtors, reglating the competence of the organ, its auxiliaries, the order to proceed to the confiscation an possible incidents (mediation, auction collapse, etc.) of the process of collection of debts.

The process of taking pledges (property lien) and public auction in the case of non-payment is similar to the one used for the execution of sentences and for the fulfilment of conventional or tributary pledges, though the Emperors outlined the specialties of tributary credit paying attention, in many cases, to the necessities of Treasury (and maybe in some cases to the social and economic reality of the moment)[24].

Thus, for instance, a command from Gordian in 240, collected in C.4.15.3, establishes the subrogation action allowing compelling the payment to the debtors of those whose own the

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the papire London 6-1915, dated circa 330-340 aC contains: *"The unfortunate story of an Egyptian wine merchant who owed a great deal of money to his creditors, and being unable to pay, stripped him of all his possessions, including the garments that he wore. By not reaching their assets to cover the total debt, the creditors took away all their children, even the smallest"* Somehow, until Contemporary Age there does not really disappear the prison for debts, reappearing as an atavism, in moments of crisis, through History.

14 *Gai.*4.12 includes it among the *legis actiones* together with the *actiones per sacramentum, per iudicis postulationem, per condictionem* and *per manus iniectionem;* también en 4.31. For von der FECHT (*Die Forderungspfändung im römischen Recht. Der Vollstreckungszugriff auf Forderungen im Rahmen des* pignus in causa iudicati captum *und des Fiskalrechts der römischen Kaiserzeit*, Böhlau, Colonia, Weimar, Viena, 1999, p. 38), the carácter of self-defence is confirmed by the fact that audience was not given to the debtor: *Es handelte sich also bei der legis actio per pignoris capionem offenbar um einem Akt legalisierter Selbshilfe. Unterstütz wird diese Vermutung durch die Tatsache, dass für die Pfandnahme dem Schuldner ausnahmsweise kein rechtliches Gehör gewährt werden musste.*

15 Tax tenats who built up important societies of tributary management.

16 *Vid.* Díaz-Bautista Cremades, A., *Op. cit*, p. 19. If the *pignoris capio*, established by the emperor Antoninus Pius was or not an evolution of the old *legis actio per pignoris capionem* is a debated matter by the doctrine. Litewski denies any relationship between the two institutions, while Fleischmann sees it as self-evident. On the other hand, Díaz-Bautista, more modernly, denies transcendence to the polemic, beyond identifying the undeniable similarities. *Vid.* Díaz-Bautista, *op. cit,* p. 34. Litewski, W., Pignus in causa iudicati captum, *SDHI* 40(1974) p. 215, Fleischmann, M.: *Das pignus in causa iudicati captum*, Koebner, Breslau, 1896, p. 8.

17 VOLTERRA, E., Istituzioni di diritto privato romano, ed. Ricerche, Roma 1974, p. 251.

18 D'ORS, A., *Derecho Privado Romano*, EUNSA, Pamplona, 7ª ed. 1989, paragraph 123.

19 KASER, M., *Das römische Zivilprozessrecht* Beck, Munich,1996, p. 66, I, p. 436.

20 138-161 dC.

21 *Ulp. 3 de off. cons.* D.42.1.15.

22 Conained in D.42.1.31.

23 Clear antecedent of the concept of jurisdiction contained in article 117.3 of the Spanish Constitution of 1978.

24 It can be outlined in this sense the recognition, for tributary sales, of the principle of irreplaceability of the sold thing, giving a more legal security, as noted by Agudo Ruiz, A., ADQUISICIÓN DE LA PROPIEDAD Y PAGO DEL PRECIO EN LAS VENTAS fiscales, in Revista General de Derecho Romano 22 (2014), p. 3.

Treasury per officium procuratoris. However, it is forbidden for the procurator to confiscate if any controversy is raised[25].

> C.4.15.3 (Gord. 240): *Si debitum non infitiantur hi, quos obnoxios debitoribus fisci esse proponis, potest videri non esse iniquum quod desideras, ut ad solutionem per officium procuratoris compellantur. nam si quaestio aliqua refertur, id concedi non oportere et ipse perspicis.*

Nevertheless, that rule also applied to private creditors, even though facing tributary debtors (something that could redound to a less effective collection action)[26].

Likewise, the execution of tributary credits, in spite of the evident transcendence of its nature, cannot exceed the authority of the general rules of execution, especially of the prohibition –more theoretically tan real, as it has been pointed out- of prison because of the debts. A constitution of Constantius in year 345 (C.10.19.3) establishes that if a civil servant (ab uno officio) imprisoned a debtor in order to compel the payment (something that no doubt would happen from time to time), he will be obliged to the payment of the whole amount.

> *Quotiens quis et privati debitor invenitur et fisci, et abreptus ab uno officio teneatur, ad universi debiti solutionem qui eum abstulit coartetur ac totius summae exactionem in se suscipiat, qui eundem avellendum subtrahendumque crediderit.*

Although not always is the tributary credit subjected to the general rules on execution. A law of Constantine in year 315, noted in C.8.16.7, forbids taking as a pledge, in the execution of civil sentences, slaves or oxen that plough or farming tools (*…servos aratores aut boves aratorios aut instrumentum aratorium…*), although the reason of what looks like the precedent of modern unattachability of work instruments, appears in the Constantine´s rule due to a less "humanitarian" basis, as it tries to avoid any delay in the payment of the taxes because of the confiscation (*…ex quo tributorum illatio retardatur)*,that is, the interest of the Treasury is given priority before that of the particular citizen.

One of the most important periods in this process of delimitating the executive faculties of tributary credit is the Diocletian Tetrarchy[27]. Attributed to Diocletian and Maximianus, seven fragments appear in the Code, which are expressly devoted to the management of taxes. These are: C.11.55.1 (no date), C.2.17.4 (294), C.4.15.4 (293), C.2.17.3 (293), C.4.46.2 (no date), C.10.1.5 (no date) and C.10.3.4 (290).

The first of them[28], without a certain date, establishes some limitation to the fiscal pressure over peasants, avoiding the abuses of the accountants. The Tetrarchs order that no other taxes than those specifically established for them could be demanded to the plebeians[29], being exempted of any other tributary obligation.

The next three fragments –C.2.17.4 (294)[30], C.4.15.4 (293)[31] and C.2.17.3 (293)[32] - try to delimit the tax action, establishing its nature and extension. Thus, the first one defines that the condition of the tributary debtor does not impede to the responsibility that the subject could have towards of other creditors, and he could oppose in front of them the allowed exceptions according to their particular relations (*secundum leges uti potes*).

The following texts are devoted to the regulation of the way in which the Treasury can subrogate in the actions of the debtor[33]. In C.4.15.4 is established, as a general rule, the subsidiarity of the subrogation for the Treasury in the actions of the tributary debtor (*nisi patuerit principales reos idoneos non esse*), although it is allowed such indirect exercise of the debtor credits with no necessity whatsoever –so it seems- of an express cession, in opposition to what is established with a general character in C.4.15.5 (294)[34], according to which the credits cession does not automatically implies the transfer of the actions that protect it (although it could be saved with a useful action).

Finally, in C.2.17.3, the Emperors emphatically forbid the use of the Treasury in order to demand a particular debt. The categorical redaction of the command makes us understand

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[25] Vid. KLINGENBERG, G., Der 'Fiskus' im Dienste privater Rechtsdurchsetzung, en *Sodalitas* 4 (1984) p. 1705-1717.

[26] d'ORS, *op. cit,* paragraph 420 n. 1, deduces so from *Marcel. 25 dig.*D.48.13. where it is stated that the one who demands money from a debtor does not commit *peculatus,* since the money is not taken from the Treasury, but from a his debtor, who is at the same time a debtor of the Treasury: *Peculatus nequaquam committitur, si exigam ab eo pecuniam, qui et mihi et fisco debet: non enim pecunia fisci intercipitur, quae debitori eius aufertur, scilicet quia manet debitor fisci nihilo minus.*

[27] This does not prevent, as it was stated by Fernández de Buján (*Derecho Público Romano,* 9ª ed., Thomson-Civitas, Madrid, 2005, p. 174), from some characteristics of the Diocletian period, such as a quasi confiscatory fiscal pressure. Precisely, the interest of the Imperial Chancellery of having a more efficient source of income probably made them devote more attention to fiscal problems. Moreover, a greater taxation and a greater rigour in the exaction of tributes implies, necessarily, a greater litigiousness, seen in the production of imperial commands.

[28] C.11.55.1 Diocl. et.Maxim. ad Charisium (no date): *ne quis ex rusticana plebe, quae extra muros posita capitationem suam detulit et annonam congruam praestat, ad ullum aliud obsequium devocetur neque a rationali nostro mularum fiscalium vel equorum ministerium subire cogatur.*

[29] Capitatio and annona.

[30] C.2.17.4 Diocl. et Maxim. Achilli (294): *ad fraudem creditoribus faciendam invidiam fiscalem contra saeculi nostri tranquillitatem implorari non decet. Redde itaque fisco nostro quod debes, ac si conventus velut a creditore fueris, quem tibi numerasse pecuniam negas, exceptione non numeratae pecuniae secundum leges uti potes*.

[31] C.4.15.4 Diocl. et Maxim. Zosimo (293): *non prius ad eos, qui debitoribus fisci nostri sunt obligati, actionem fiscalem extendi oportere, nisi patuerit principales reos idoneos non esse, certissimi iuris es*.

[32] C.2.17.3 Diocl. et Maxim. Amphioni (293): *abhorret saeculo nostro sub praetextu debiti procurationem contra privatos fiscum praestare.*

[33] The subrogation of the debtor is a normal way of execution of debts, especially when the patrimony of the debtor has few material goods. Such possibility was already included in the *pignus in causa iudicati captum* by Ulpian in D.42.1.15.8. However, it is argued if such prevision comes from the command of Antoninus Pius that established (or generalized) the executive confiscation, or it comes from a reform of Caracalla. Cfr. Díaz-Bautista, *op. cit.,* page 127.

[34] C.4.15.5 Diocl. et Maxim. Nanidiae (294) *in solutum nomine dato non aliter nisi mandatis actionibus ex persona sui debitoris adversus eius debitores creditor experiri potest. Suo autem nomine utili actione recte utetur.*

that the subsidiary exercise of the actions of the taxpayer on behalf of the Treasury could have been used for the interest of the creditor, in order to compel his debtors to pay. In this way, the Tetrarchs make clear that the subrogation is a prerogative of Public Law, whose purpose is the protection of the interest of the public funds, not a mechanism for the use of the particulars in their own profit.

However, C.4.46.2[35] (no date), C.10.1.5[36] (no date) and C.10.3.4 (290)[37], are devoted to the execution of the goods of the taxpayer. The first of them declares the real encumbrance of the properties of the taxpayer to the payment of tributary debts, meaning that they can be sold in case of necessity, when the buyer behaves in good faith and pays a fair price, and only if the debtor has the authorization of the President (ex permissu praesidis), being revoked the sale if this authorization does not exist[38].

Once the tributary obligation is not fulfilled, the Treasury can take the goods of the debtor, having the previous disposition of the Augustus (quam a nobis forma fuerit data) as it is stated in C.10.1.5. From this imperial authorization, those who possess the goods are obliged to give them to the agents.

The fragment C.10.3.4 regulates the way in which the bids in the auction must be done, noting the necessity of being adequate to the fair price of the thing.

[35] C.4.46.2 Diocl. et Maxim. Atiniae Plotiniae (no date) *si deserta praedia ob cessationem collationum vel reliqua tributorum ex permissu praesidis ab his, quibus periculum exactionis tributorum imminet, distracta sincera fide iusto pretio sollemniter comparasti, venditio ob sollemnes praestationes necessitate facta convelli non debet. Sin autem venditio nulla iusta auctoritate praesidis praecedente facta est, hanc ratam haberi iura non concedunt, idque quod frustra gestum est revocari oportet , ita ut indemnitati tributorum omnibus modis consulatur. Quae omnia tractari convenit praesente eo, quem emptorem extitisse proponis.*

[36] C.10.1.5 Diocl. et Maxim ad Flaccum (no date): *Prohibitum est cuiuscumque bona, qui fisco locum fecisse existimabitur capi prius, quam a nobis forma fuerit data. Et ut omni improvisionis genere occursum sit caesarianis, sancimus licere universis quorum interest obicere manus his, qui ad capienda bona alicuius venerint, qui succubuerit legibus, ut, etiamsi officiales ausi fuerint a tenore datae legis desistere, ipsis privatis resistentibus a facienda iniuria arceantur. Tunc enim is, cuius interest bona alicuius non interpellari, officialibus volentibus ea capere debet adquiescere, cum litteris nostris cognoverit non ex arbitrio suo caesarianos ad capiendas easdem venisse facultates, sed iustitiae vigorem id fieri statuisse.*

[37] C.10.3.4 Diocl. et Maxim. Marcellinae (290): *Si tempora, quae in fiscalibus hastis statuta sunt, patiuntur, cum etiam augmentum te facturam esse profitearis, adi rationalem nostrum, ut iuxta ius pretii uberioris oblationem admittat.*

[38] Vid., among others SOLAZZI, L'origine storica della rescissione per lesione enorme, en BIDR, 31 (1921) 55s.; ROTONDI, Scritti Giuridici, I (Milano 1922) 209; ALBERTARIO, Iustum pretium e iusta aestimatio, en Studi di diritto romano, III: Obligazioni (Milano 1936) 407; GRADENWITZ, Vat. 22 und CJ. 4. 46. 2, en ZSS, 45, 488 ss.; TALAMANCA, Contributi allo studio della vendite all'asta, cit., 239 ss.; KLINGENBERG, Das Edictum divi Marci, cit., 208 s.; BOULVERT, L'autonomie du droit fiscal: le cas des ventes, cit., 833 s.; AGUDO RUIZ, El iustum pretium y sus efectos en las ventas fiscales, en Revista General de Derecho Romano (IUSTEL) 21 (2013) 1 ss.

Some Thoughts on the Inexistence, Invalidity and Ineffectiveness of Juridical Acts in Roman Law and in its Subsequent Fate*

*Iván Siklósi***

Abstract

Our study can be considered as a brief contribution to the well-disputed questions of the so-called inexistence, invalidity, and ineffectiveness of legal transactions in Roman law and in its subsequent fate.

As a theoretical starting point, we emphasize that there are four levels of ability for producing legal effects: 1. inexistence (when a legal transaction is not able to produce any typical legal effect; 2. invalidity (when a legal transaction exists but it is not able to produce the intended legal effects); 3. ineffectiveness (when an existing and valid juridical act could produce the intended legal effects, but only potentially and not actually); 4. effectiveness (when an existing, valid, and effective legal transaction is actually producing the intended legal effects).

After the Introduction, the problem of inexistence of legal transactions, some questions of the invalidity of legal transactions (e.g. terminological questions; elimination of the cause of invalidity; partial invalidity), and the problem of the ineffectiveness of legal transactions will be analysed.

Finally, our most important conclusions will be summarized.

Keywords: *juridical act; inexistence; invalidity; ineffectiveness; punitive character of invalidity; terminological inconsistency and the great variety of Roman law sources concerning invalidity; nullity and annulment of contracts; convalescentia; conversio; partial invalidity; revocation of will.*

1. Introduction

a) Our study is a brief contribution to the disputed *dogmatic and terminological questions of inexistence, invalidity, and ineffectiveness of juridical acts*[1] in Roman law and in modern legal systems.

Inexistence, invalidity, and ineffectiveness of legal transactions, and the dogmatic and terminological problems related to these concepts are analysed by many researchers of Roman and private law even today.

In 2014, we published already an autonomous book in Hungarian language regarding these questions, too.[2]

In this short essay, summarizing several scientific results of our book, only few questions can be analysed from the numerous problems of the inexistence, invalidity, and ineffectiveness of legal transactions. Following the Introduction, we would like to deal briefly with the *problems of inexistence of legal transactions* (2). Then to some *dogmatic and terminological questions related to invalidity of contracts* will be referred (3) – regarding, inter alia, the virtually boundless Roman law and modern private law literature on the invalidity of juridical acts, only some important problems can be mentioned. Last but not least, we deal with several *theoretical, dogmatic, and terminological problems of ineffectiveness of juridical acts* with special regard to the *revocation of will* from the point of view of legal dogmatics (4). Finally, our most important conclusions will be summarized (5).

b) According to an ironic observation of Kant, a definition of the concept of law has been searched by the jurists for centuries without any success.[3] This statement can be regarded as current not only for the concept of law in general, but for its components, too, including inexistence, invalidity, and ineffectiveness of legal transactions as well.

Regarding the various interpretations of these concepts, *our purpose is to clarify and to systematize the concepts of inexistence, invalidity, and ineffectiveness of juridical acts*. In addition, special scientific problems related to these concepts will be mentioned (e.g. the raison d'ętre of the dogmatic construction of contractual

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1 In this regard the terms "act in law", "act in the law", "juristic act", "legal act", and "legal transaction" are also used in English terminology. See e.g. J. H. Merryman, *The civil law tradition*, Stanford 1985[2], 75 ff. Therefore, in our study we use these terms as synonyms.

2 I. Siklósi, *A nemlétező, érvénytelen és hatálytalan jogügyletek elméleti és dogmatikai kérdései a római jogban és a modern jogokban* [Theoretical and dogmatic questions of the inexistence, invalidity, and ineffectiveness of juridical acts in Roman law and in modern legal systems], Budapest 2014. As a kind of summary of the research see Idem, *Quelques questions de l'inexistence et l'invalidité des actes juridiques dans le droit romain*, in: A. Földi / I. Sándor / I. Siklósi (ed.), Ad geographiam historico-iuridicam ope iuris Romani colendam. Studia in honorem Gábor Hamza, Budapest 2015, 327–336.

3 I. Kant, *Kritik der reinen Vernunft*, 1787[2], 759: „Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht".

inexistence; the applicability of the modern concept of the inexistence of contract in Roman law; the formation of the modern concepts of nullity and annulment and the applicability of these legal categories in Roman law; the problems of elimination of the causes of invalidity in Roman law as well as in its subsequent fate; the dogmatic questions of partial invalidity; the theoretical problems of the ineffectiveness of juridical acts; the dogmatic problems of the revocation of will).

c) The reader may conceive that it can be hardly added anything new to the literature. Notwithstanding, during research in Roman law, in history of private law, and in modern legal systems one can identify *uncertain as well as inconsequent dogmatic and terminological solutions*. Therefore, we would like to try to apply a clear and consequent conceptual system and terminology.

From the point of view of theory, it is unquestionable that consequent application of legal concepts is of great importance. The main purpose of our study is to emphasize that *existence (inexistence), validity (invalidity), and effectiveness (ineffectiveness) are concepts based on each other in a logical order*. Therefore, we distinguish *four levels of ability for producing legal effects*:

1. *Inexistence* – when the "legal transaction" is not able to produce any typical legal effect; it does not exist in the contractual sphere.
2. *Invalidity* – when the legal transaction exists but it is not able to produce the intended legal effects.
3. *Ineffectiveness* (in strict sense) – when the existing and valid juridical act (without any legal fault) could produce the intended legal effects, but only potentially and not actually.
4. *Effectiveness* (in strict sense) – when the existing, valid, and "effective" legal transaction is actually producing the intended legal effects.

d) As for *antecedents* of our research, the earlier literature of Roman law often dealt with the general theoretical, dogmatic, and terminological questions of invalidity of juridical acts (e.g. we can refer to the books and studies of Gradenwitz,[4] Hellmann,[5] and Schachian[6]).

Apart from these works – which are still significant– the modern authors of Roman law usually analyses special scientific questions instead of elaborating the general dogmatic and terminological problems of invalidity. In 20th and 21st century many important studies and books were published e.g. on the details of contracts in violation of a legal rule (e.g. Kaser[7]), of mistake (e.g. Flume,[8] Zilletti,[9] Wolf,[10] Winkel,[11] and Harke[12]), of simulation (e.g. Partsch,[13] Pugliese,[14] and Dumont-Kisliakoff[15]), of partial invalidity (e.g. Seiler,[16] Zimmermann,[17] and Staffhorst[18]), of *laesio enormis* (e.g. Dekkers,[19] Hackl,[20] Sirks,[21] Pennitz,[22] Cardilli,[23] Harke,[24] Ziliotto,[25] Westbrook,[26] Finkenauer,[27] Platschek,[28] Grebieniow;[29] from the Hungarian literature Visky,[30] Jusztinger,[31] and Pókecz Kovács[32]), of

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4 O. Gradenwitz, *Die Ungültigkeit obligatorischer Rechtsgeschäfte*, Berlin 1887.
5 F. Hellmann, *Terminologische Untersuchungen über die rechtliche Unwirksamkeit im römischen Recht*, München 1914.
6 H. Schachian, *Die relative Unwirksamkeit der Rechtsgeschäfte*, Berlin 1910.
7 M. Kaser, *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht*, Wien 1977.
8 W. Flume, *Irrtum und Rechtsgeschäft im römischen Recht*, in: Festschrift Fritz Schulz, Weimar 1951.
9 U. Zilletti, *La dottrina dell'errore nella storia del diritto romano*, Milano 1961.
10 J. G. Wolf, *„Error" im römischen Vertragsrecht*, Köln–Graz 1961.
11 L. Winkel, *Error iuris nocet*, Zutphen 1985.
12 J. D. Harke, *Irrtum über wesentliche Eigenschaften*, Berlin 2003; Idem, *„Si error aliquis intervenit" – Irrtum im klassischen römischen Vertragsrecht*, Berlin 2005.
13 J. Partsch, *Die Lehre vom Scheingeschäfte im römischen Rechte*, SZ 42 (1921), 227 ff.
14 G. Pugliese, *La simulazione nei negozi giuridici*, Padova 1938.
15 N. Dumont-Kisliakoff, *La simulation en droit romain*, Paris 1970.
16 H. H. Seiler, *Utile per inutile non vitiatur. Zur Teilunwirksamkeit von Rechtsgeschäften im römischen Recht*, in: Festschrift für Max Kaser zum 70. Geburtstag, München 1976, 126 ff.
17 R. Zimmermann, *Richterliches Modifikationsrecht oder Totalnichtigkeit?* Berlin 1979.
18 A. Staffhorst, *Die Teilnichtigkeit von Rechtsgeschäften im klassischen römischen Recht*, Berlin 2006.
19 R. Dekkers, *La lésion énorme*, Paris 1937.
20 K. Hackl, *Zu den Wurzeln der Anfechtung wegen „laesio enormis"*, SZ 98 (1981), 147 ff.
21 B. Sirks, *La « laesio enormis » en droit romain et byzantin*, TR 53 (1985), 291 ff.; Idem, *Laesio enormis again*, RIDA 54 (2007), 461 ff.
22 M. Pennitz, *Zur Anfechtung wegen „laesio enormis" im römischen Recht*, in: Iurisprudentia universalis. Festschrift für Theo Mayer-Maly, Köln–Weimar–Wien 2002, 575 ff.
23 R. Cardilli, *Alcune osservazioni su leges epiclassiche e interpretatio: a margine di Impp. Diocl. et Maxim. C. 4, 44, 2 e C. 4, 44, 8*, in: Molnár Imre Emlékkönyv [Studies in honour of Imre Molnár], Szeged 2004, 115 ff.
24 J. D. Harke, *Laesio enormis als „error in negotio"*, SZ 122 (2005), 91 ff.
25 P. Ziliotto, *La misura della sinallagmaticitŕ: buona fede e 'laesio enormis'*, in: L. Garofalo (cur.), La compravendita e l'interdipendenza delle obbligazioni nel diritto romano, 1, Padova 2007, 597 ff.
26 R. Westbrook, *The origin of laesio enormis*, RIDA 55 (2008), 39 ff.
27 Th. Finkenauer, *Zur Renaissance der „laesio enormis" beim Kaufvertrag*, in: Festschrift Hans Peter Westermann, Köln 2008, 183 ff.
28 J. Platschek, *Bemerkungen zur Datierung der „laesio enormis"*, SZ 128 (2011), 406 ff.
29 A. Grebieniow, *La 'laesio enormis' e la stabilitŕ contrattuale*, RIDA 61 (2014), 195 ff.
30 K. Visky, *Appunti sulla origine della lesione enorme*, Iura 12 (1961), 40 ff.; Idem, *Spuren der Wirtschaftskrise der Kaiserzeit in den römischen Rechtsquellen*, Budapest–Bonn 1983, 24 ff.
31 E.g. J. Jusztinger, *The principle of laesio enormis in sale and purchase contracts in Roman law*, in: Studia iuridica auctoritate universitatis Pécs publicata 149 (2011), 107 ff.
32 A. Pókecz Kovács, *Laesio enormis and its survival in modern civil codes*, in: E. Štenpien (ed.), Kúpna zmluva – história a súčasnosť II, Košice 2014, 219 ff.

conversion (e.g. Giuffrč[33] and Krampe[34]), of convalescence (e.g. Wacke,[35] Schanbacher,[36] and Potjewijd[37]), of *dolus* (*actio de dolo* and *exceptio doli*; e.g. Guarino,[38] Albanese,[39] Wacke,[40] Burdese,[41] and Meruzzi[42]), and of *actio quod metus causa* (e.g. Kupisch[43] and Calore[44]) Naturally, in the famous and important monographs and handbooks treating general questions of juridical acts (see for instance the works of Scialoja,[45] Álvarez Suárez,[46] Albanese,[47] and Flume[48]), invalidity and ineffectiveness of juridical acts were discussed, too.

However, from the modern Italian literature of Roman law – which often distinguishes between invalidity and ineffectiveness in a strict sense – we can refer e.g to the monograph of Di Paola (published in 1966[49]) treating the problems of invalidity *(invaliditŕ)* and ineffectiveness *(inefficacia)* of juridical acts in Roman law. A lengthy study of Talamanca (published in 2005[50]) deserves a special mention, too; here, the Italian scholar investigates the inexistence *(inesistenza)*, invalidity *(invaliditŕ)*, and ineffectiveness *(inefficacia)* of juridical acts in context of Roman law.

As for Hungarian (Roman law as well as private law) literature, the most specialised analysis of invalidity of contracts can be found in the great monograph of Emilia Weiss, published in 1969,[51] which did not lose much from its scientific significance. Since 1998, András Földi has been deeply analysing the theoretical problems of validity and effectiveness of juridical acts on the basis of provisions of the (old) Hungarian Civil Code of 1959 but with also regard to Roman law, legal history, and comparative private law. Földi's studies[52] induced a scientific debate in the Hungarian literature (e.g. see the studies of András Bessenyő[53] and Iván Siklósi[54]). In 2000, a monograph on invalidity due to the faults of contractual will[55] and, in 2004, another excellent treatise on contracts against good morals[56] was published by Attila Menyhárd who also scrutinized these questions in a comparative manner. In the year of 2008, a monograph treating the problems of invalidity of contract in Hungarian private law was published by Gábor Kiss and István Sándor (2nd edition: 2014).[57] The problems of contracts in contradiction to good morals were analysed in legal historical and comparative context by Gergely Deli in several studies[58] and an excellent book (published in 2013).[59]

e) Since this short essay has been written on the basis of our above-mentioned book on inexistence, invalidity, and ineffectiveness of legal transactions in Roman law and in its subsequent fate, here are some words on the *methods of our research*.

Our quite complex choice of topic – with special regard to the Roman law research – needed the application of a *complex scientific method which is dogmatic on the one hand and historical on the other*. Although the dogmatic method has enjoyed priority, a kind of "mixed" methodology of dogmatic and historical approach was applied.

During our Roman law research we often applied modern concepts in order to describe and to analyse the Roman law institutions. Since *the main concepts investigated in our book were created to a considerable extent in the Pandectist legal science*, some

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33 V. Giuffrč, *L'utilizzazione degli atti giuridici mediante 'conversione' in diritto romano*, Napoli 1965.
34 Chr. Krampe, *Die Konversion des Rechtsgeschäfts*, Frankfurt am Main 1980.
35 A. Wacke, *Die Konvaleszenz der Verfügung eines Nichtberechtigten*, SZ 114 (1997), 197 ff.
36 D. Schanbacher, *Die Konvaleszenz von Pfandrechten im klassischen römischen Recht*, Berlin 1987.
37 G. H. Potjewijd, *Beschikkingsbevoegdheid, bekrachtiging en convalescentie. Een romanistische studie*, Deventer 1998.
38 A. Guarino, *La sussidiarietŕ dell' 'actio de dolo'*, Labeo 8 (1962), 270 ff.
39 B. Albanese, *Ancora in tema di sussidiarietŕ dell' 'actio de dolo'*, Labeo 9 (1963), 42 ff.
40 A. Wacke, *Zum „dolus"-Begriff der „actio de dolo"*, RIDA 27 (1980), 349 ff.
41 A. Burdese, *L'eccezione di dolo generale in rapporto alle altre eccezioni*, Diritto @ Storia 5 (2006) (= http://www.dirittoestoria.it/5/Tradizione-Romana/Burdese-Eccezione-dolo-generale.htm).
42 G. Meruzzi, *L'exceptio doli dal diritto civile al diritto commerciale*, Padova 2005. In addition, see e.g. L. Garofalo (cur.), *L'eccezione di dolo generale*, Padova 2006; G. Finazzi, *L'exceptio doli generalis' nel diritto ereditario romano*, Padova 2006.
43 B. Kupisch, *Überlegungen zum Metusrecht: Die „actio quod metus causa" des klassischen römischen Rechts*, in: Festschrift für Bruno Huwiler zum 65. Geburtstag, Bern 2007, 415 ff.
44 E. Calore, *'Actio quod metus causa'. Tutela della vittima e azione in rem scripta*, Milano 2011.
45 V. Scialoja, *Negozi giuridici*, Roma 1933.
46 U. Álvarez Suárez, *El negocio jurídico en derecho romano*, Madrid 1954.
47 B. Albanese, *Gli atti negoziali nel diritto privato romano*, Palermo 1982.
48 W. Flume, *Allgemeiner Teil des bürgerlichen Rechts, II. Das Rechtsgeschäft*, Berlin–Heidelberg–New York 1992[4].
49 S. Di Paola, *Contributi ad una teoria della invaliditŕ e della inefficacia in diritto romano*, Milano 1966.
50 M. Talamanca, *Inesistenza, nullitŕ ed inefficacia dei negozi giuridici nell'esperienza romana*, BIDR 101–102 (1998–99), 1 ff.
51 E. Weiss, *A szerződés érvénytelensége a polgári jogban* [Invalidity of contracts in private law] Budapest 1969.
52 Especially see A. Földi, *Zur Frage der Gültigkeit und der Wirksamkeit im modernen Zivilrecht*, in: Festschrift Ferenc Benedek, Pécs 2001, 73 ff. (= *Zur Frage der Gültigkeit und der Wirksamkeit im modernen Zivilrecht*, in: G. Hamza [ed.], Hundert Jahre Bürgerliches Gesetzbuch, Budapest 2006, 20 ff.).
53 Especially see A. Bessenyő, *A jogügyletek érvényessége és hatályossága* [Validity and effectiveness of legal transactions], Jura [Pécs] 2001/2, 5 ff.
54 See for instance I. Siklósi, *Zu den privatrechtsdogmatischen Fragen des Widerrufs des Testaments*, in: Constans et perpetua voluntas. Pocta Petrovi Blahovi k 75. narodeninám, Trnava 2014, 539 ff.
55 A. Menyhárd, *A szerződés akarathibák miatti érvénytelensége* [Invalidity of contract due to the faults of will], Budapest 2000.
56 A. Menyhárd, *A jóerkölcsbe ütköző szerződések* [The contracts against good morals], Budapest 2004.
57 G. Kiss G. / I. Sándor, *A szerződések érvénytelensége* [Invalidity of contracts], Budapest 2014[2].
58 See for instance G. Deli, *„Nec facere nos posse credendum est". Ein Interpretationsversuch zur Papinian D. 28, 7, 15*, Journal on European History of Law 3 (2012/2), 165 ff.; Idem, *How did good morals become a general clause?*, in: F. Reinoso Barbero (ed.), Principios generales del derecho: antecedentes históricos y horizonte actual, Madrid 2014, 11 ff.
59 G. Deli, *A jó erkölcsökről* [On the good morals], Budapest 2013.

important works from the German jurisprudence of 19th century have been taken into account (e.g. the books of Savigny,[60] Puchta,[61] Dernburg,[62] and Windscheid[63]).

Prominent handbooks as well as important and often cited textbooks of Roman law were also reflected.

In addition to the studies and monographs in which the problems of inexistence, invalidity, and ineffectiveness of juridical acts were exclusively dealt with, we made use of the above-mentioned great German, Italian, and Spanish monographs treating the *general problems of juridical acts*.

Considering the sources of Roman law, legal history, and modern legal systems as well, we always attempted to go back to the original, primary sources. As for the interpretation of Roman law sources, *we usually did not search for interpolations*, regarding the mainstream scientific approach of modern Roman law researchers according to which the textual critic ("Textkritik") can only be regarded as the last instrument during the interpretation of a given text.[64]

The definition of existence (inexistence) of juridical acts, the axiological approach of invalidity, and the analysis of the relation of existence (inexistence), validity (invalidity), and effectiveness (ineffectiveness) deserved a *legal theoretical and legal philosophical approach*.

Since the above-mentioned dogmatic constructions in some modern legal systems were also within the scope of our research, we also applied a *comparative legal approach*.

Roman law solutions were always scrutinized in the first place, the modern legal constructions were analysed later on the basis of the Roman law tradition. In this respect we have to refer to the method of Zimmermann, elaborated in his famous book entitled "The law of obligations". His work considerably inspired the approach as well as the method of our research.[65]

Hereafter, we would like to briefly summarize the essence of our scientific results.

2. Inexistence of legal transactions

a) As for the problems of inexistence of contract in Roman law and in modern legal systems, we have to emphasize that *the raison d'ętre of the category of inexistence of contract and its applicability in Roman law were and still are heavily disputed both in Roman law and private law literature*. In this respect a kind of ontological approach would have to be needed. We can cite the famous question of Heidegger: "Warum ist überhaupt Seiendes und nicht vielmehr nichts?"[66]

b) As a starting point of the research of the construction of "inexistence" in Roman law – following the theory of Mitteis[67] – serves the famous text of Gaius (3, 176)[68] which can be described as a good example of the Roman law roots of the distinction between inexistence and invalidity of legal transactions. On the basis of the casuistic Roman law sources (see Ulp. D. 12, 1, 18 pr.; Ulp. D. 12, 1, 18, 1; Ven. D. 45, 1, 137 pr.; Iul. D. 41, 1, 36; Ulp. D. 2, 14, 1, 3; Iav. D. 44, 7, 55; Ulp. D. 18, 1, 2, 1; Pomp. D. 18, 1, 8 pr.; Paul. D. 18, 4, 7; Gai. 3, 140; Gai. 3, 142; Pap. D. 24, 1, 52 pr.; Inst. 3, 24 pr.; Paul. D. 44, 7, 3, 2) *we can find the roots of the modern category of inexistence of contract in Roman law*. However, *the modern concept of inexistence of contracts and the modern distinction of inexistence and invalidity of juridical acts are not applicable without restrictions to Roman law sources*. In the sources the terms are often irrelevant (see for instance Paul. D. 17, 1, 22, 3; Pap. D. 13, 7, 40 pr.; Iav. D. 41, 3, 21; C. 4, 38, 2; Ulp. D. 24, 1, 32, 24; Ulp. D. 41, 3, 27).

c) It is worth mentioning that – contrary to invalidity – *the inexistence of contract is not to be regarded as an unlawful situation*. The "inexistence" of a contract in the contractual sphere means inexistence regarding the lack of the so-called "äußerer Tatbestand". This consideration can help us to distinguish between inexistence and invalidity of juridical acts in the modern legal systems, too.

3. Invalidity of legal transactions

a) Considering the dogmatic and terminological questions related to invalidity of contracts, first of all, the dogmatic nature of *invalidity* – which *always has a punitive character* (contrary to the inexistence and ineffectiveness) – has to be analysed.

According to Windscheid, *an invalid legal act is a body without soul and it does not exist in the sphere of law*.[69] On the basis of a famous phrase of Anatole France ("l'Âme est la substance; le corps l'apparence") we can emphasize that *an existing but*

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[60] E.g. F. C. von Savigny, *System des heutigen römischen Rechts*, IV, Berlin 1841.

[61] E.g. G. F. Puchta / Th. Schirmer, *Pandekten*, Leipzig 1877[12].

[62] E.g. H. Dernburg, *Pandekten*, I, Berlin 1900[6].

[63] E.g. B. Windscheid / Th. Kipp, *Lehrbuch des Pandektenrechts*, Frankfurt am Main 1906[9].

[64] See W. Kunkel / M. J. Schermaier, *Römische Rechtsgeschichte*, Köln–Weimar–Wien 2001[14], 309: „Textkritik ist heute nicht das erste, sondern das letzte Mittel bei der Textauslegung."

[65] However, we could not forget about the importance of ancient Greek laws, for they had influence on certain categories of Roman law. Furthermore, results of the legal papyrology concerning the contractual practice of Rome are also to be taken into consideration. The tradition of *ius commune* has also a great importance, especially the canon law which serves as a basis of many modern legal principles and categories (e.g. the principle "pacta sunt servanda", the doctrine of cause, the construction of transformation from one legal act into another [*conversio*]). In these respects further researches should follow.

[66] M. Heidegger, *Was ist Metaphysik?* Frankfurt am Main 1975, 42.

[67] L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians I. Grundbegriffe und Lehre von den juristischen Personen*, Leipzig 1908, 249.

[68] *„Nam interventu novae personae nova nascitur obligatio et prima tollitur translata in posteriorem, adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis iure tollatur; veluti si quod mihi debes, a Titio post mortem eius vel a muliere pupillove sine tutoris auctoritate stipulatus fuero. Quo casu rem amitto: nam et prior debitor liberatur et posterior obligatio nulla est. Non idem iuris est, si a servo stipulatus fuero; nam tunc proinde adhuc obligatus tenetur, ac si postea a nullo stipulatus fuissem."* From the literature of this text see for instance Di Paola, *op. cit.* passim; F. Bonifacio, *La novazione nel diritto romano*, Napoli 1959[2], 19 ff.; Talamanca, *op. cit.* passim, especially 32; M. Girolami, *Le nullitŕ di protezione nel sistema delle invaliditŕ negoziali. Per una teoria della moderna nullitŕ relativa*, Padova 2008, 46 f.

[69] Cf. Scialoja, *op. cit.* 234[1].

invalid juridical act has a body but – without having a soul – it *is not able to produce any intended legal effect, even potentially*. Contrary to the invalid juridical act, the valid legal transaction can be regarded as a *mens sana in corpora sano*; *an existing and valid juridical act is able to produce potentially the intended legal effects*.

It is well-known that *the abstract term of invalidity*, inter alia, *had not been composed by Roman jurists*. With Zimmermann's words, "the Roman lawyers were unconcerned about dogmatic niceties".[70] This remark is especially relevant concerning invalidity since there are *more than hundred different expressions* describing inexistence, invalidity, and ineffectiveness of juridical acts in Roman law sources. See e.g. the terms *nullum esse*, *nullum* (or *non*) *fieri*, *nullum stare*, *nullius momenti esse*, *non* (or *nec*) *valere*, *nullam vim* (or *nullas vires*) *habere*, *effectum non habere*, *inefficax esse*, *ad effectum perduci non posse*, *sine effectu esse*, *pro non facto haberi* (or *pro non facta est*), *pro non scripto haberi*, *non videri factum*, *non intellegi*, *nec facere potest*, *non esse*, *non consistere*, *non subsistere*, *neque* (or *nisi*) *constat*, *non contrahi (obligationem)*, *non videtur contrahi*, *contrahi non potest*, *nihil agere*, *inutilis*, *utile non esse*, *irritus*, *imperfectus*, *ratum non* (or *nullo tempore*) *haberi* (or *ratum non est*), *inanis* (or *inane factum*), *vitiosum esse*, *vitiari*, *frustra facere*, *non posse* (or *non potest fieri* etc.), *non licere*, *illicitus*, *non permitti*, *non* (or *nihil*) *est permissum*, *prohiberi*, *impedire* (or *impediri*), *obstare*, *corrumpere*, *infirmare* (or *infirmari*), *infirmum*, *non nocere*, *non prodesse* (or *non* [*nihil*] *proficere*), *non sequi* (or *nec sequenda est*), *non teneri*, *non tenere*, *iuris vinculum non optinet (obtinet)*, *non obligari* (or *non est obligatorium*, *non* [*nec*] *nascitur obligatio*, and *nulla obligatio nascitur*), *non* (or *nullo modo*) *deberi* (or *debere*), *non acquirere*, *actio non datur* (or *actio denegatur*, *actio non competit*, *actio peti non posse*), *compelli non posse* (or *cogendum non esse*, *ne cogatur*), *ius* (or *facultatem*, *potestatem*) *non habere (faciendi)*, *recte* (or *iure*) *non fieri* (or *facere*), or *non iure factum*, *iustum non haberi* (or *iniustum*), *coiri non posse*, *evanescere*, *nihil esse*, *nihil posse*, *nihil momenti habere*, *submoveri*, *supervacuum*, *pro infecto haberi*, *pro non adiecto haberi*, *invalidus*, *vanum*, *impedimentum adferre*, *perimi*, *remitti*, *tolli*, *rescindere*, and *rumpere* (cf. e.g. the results of research of Mitteis,[71] Hellmann,[72] Di Paola,[73] and Staffhorst[74]). Bringing these expressions into a logic order turned out to be hopeless but important scholars (from the modern Roman law literature e.g. Marrone[75] and Földi[76]) find signs of a consequent terminology in case of a few expressions (see for instance *infirmari*, *pro non scripto haberi*, *irritum fieri*, *rumpitur*, and *rescindere*).

The terminological inconsistency and the great variety of Roman law sources concerning invalidity deeply affected the modern legal terminology in this respect.[77]

b) As for "nullity" and "annulment" of contracts in Roman law, the *applicability of modern concept of annulment to Roman law sources* is disputed even in the modern literature of Roman law. On the basis of casuistic sources and vast literature we can lay down that *the Roman law roots of the concept concerning annulment can mainly be found in the legal constructions related to the "annulment" according to ius civile* (see e.g. the rescission of *testamentum inofficiosum*, the rescission of sale in case of *laesio enormis*, and the *exceptio* based on *senatus consultum Vellaeanum*).

Regarding the distinction of nullity and annulment, it is generally accepted and emphasized in the literature that the modern concept of annulment (*Anfechtbarkeit* in German legal terminology) and the distinction of nullity and annulment had been created by Savigny[78] in the 19th century and that the distinction of nullity and annulment within the context of the invalidity was used for the first time by German scholars of the Pandectist legal science. In this regard, however, we also have to take into consideration the achievements of the earlier jurisprudence. Scrutinizing the Dutch and French antecedents of the distinction of nullity and annulment before the 19th century, we would like to emphasize the significance of the śuvre of Vinnius,[79] Domat,[80] and Pothier.[81] With special regard to Domat's "Les loix civiles dans leur ordre naturel" the *distinction of nullity and annulment seems to be known in the French jurisprudence even at the end of 17th century*. Therefore, *the traditional view, according to which the distinction of nullity and annulment was first elaborated in the German Pandectist legal science, needs to be revised*.

c) As for *elimination of the cause of invalidity*, the legal constructions of *convalescence* and *conversion* of juridical acts have to be mentioned. Since invalidity can be normally regarded as a "final verdict on the fate of a transaction" (Zimmermann),[82] the elimination of cause of invalidity is always exceptional in

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70 R. Zimmermann, *The law of obligations. Roman foundations of the civilian tradition*, Oxford 1996³, 680.

71 Mitteis, *op. cit.* passim.

72 Hellmann, *op. cit.* passim.

73 Di Paola, *op. cit.* passim.

74 Staffhorst, *op. cit.* passim, especially 17 f.

75 M. Marrone, *Istituzioni di diritto romano*, Palermo 1994², 128 f.

76 Földi, *op. cit.* 75 f.

77 As for the terminology of invalidity in modern legal systems, in our book we distinguished between a "German-type" and a "French-type" terminology. The characteristic terminology of the French *Code civil* of 1804 concerning invalidity had an essential impact e.g. on the terminology of Spanish *Código civil* of 1889 and of Civil Code of Québec of 1994 concerning invalidity. The terminology of Italian *Codice civile* of 1942 and the Portuguese *Código civil* of 1966 concerning invalidity is based, however, both on the German and French legal tradition.

78 F. C. von Savigny, *System des heutigen römischen Rechts*, IV, Berlin 1841, 536 ff.; cf. from the modern German literature e.g. S. Mock, *Die Heilung fehlerhafter Rechtsgeschäfte*, Tübingen 2014, 10 ff.

79 A. Vinnius, *Institutionum imperialum commentarius*, Amsterdam 1665⁴.

80 J. Domat, *Les loix civiles dans leur ordre naturel*, I, Paris 1745.

81 R.-J. Pothier, *Traité des obligations*, I, Paris 1764.

82 Zimmermann, *The law of obligations* (op. cit.), 682. Cf. H. Honsell / Th. Mayer-Maly / W. Selb, *Römisches Recht* (aufgrund des Werkes von P. Jörs / W. Kunkel / L. Wenger), Berlin–Heidelberg–New York 1987, 128: „die Unwirksamkeit eines Rechtsgeschäfts war für die Römer im Grundsatz eine endgültige".

Roman law (cf. the so-called *regula Catoniana* in Roman law[83]) and in modern legal systems. Contrary to *convalescentia*, which means *convalescence of an originally invalid transaction in the same form* (see e.g. Ulp. D. 44, 4, 4, 32; Ulp. D. 6, 1, 72; Pomp. D. 21, 3, 2; Paul. D. 13, 7, 41; Mod. D. 20, 1, 22), *conversio* could be considered as a *transformation of an invalid juridical act into another valid one* (see the definition of Harpprecht, published in 1747: "traductio vel commutatio unius negotii in alterum"[84]). The applicability of modern concept of conversion elaborated according to subtle dogmatic distinctions is much disputed in the Roman law literature (see for instance Giuffrč[85] from the Italian and Krampe[86] from the German bibliography, concerning the problem of dogmatic nature of conversion). After due consideration of the most important sources (cf. Gai. 2, 197; Ulp. 24, 11a; Paul. D. 17, 1, 1, 4; Ulp. D. 29, 1, 3; Ulp. D. 29, 1, 19 pr.), we think that *the modern concept of conversion may be—with certain restrictions—equally applicable in Roman law*.

d) Although – according to Scialoja – the *distinction of total and partial invalidity* is very simple, the reason for existence of partial invalidity is highly contested both in Roman law and private law literature (see for instance the above-cited works of Seiler and Zimmermann; recently see the excellent monograph of Staffhorst). In the light of the most relevant Roman law sources, *partial invalidity of contracts was already known by the classical Roman jurists, who often applied the legal instrument of fiction* in this regard (cf. Paul. D. 18, 1, 57 pr.; Marci. D. 18, 1, 44; Gai. 3, 103; Paul. D. 13, 6, 17 pr.; Ulp. D. 24, 1, 5, 5; Pomp. D. 24, 1, 31, 3; Pap. D. 24, 1, 52 pr.; Ulp. D. 45, 1, 1, 5; Ulp. D. 45, 1, 1, 4; Pomp. D. 45, 1, 109). However, partial invalidity was only expressly formulated by the scholars of *ius commune* (see Accursius, gl. *Per hanc inutilem*, ad. D. 45, 1, 1, 5; *Liber Sextus decretalium D. Bonifacii Papae VIII.*, *De regulis iuris*, *regula* XXXVII). As for the raison d'ętre of partial invalidity: in our opinion, *partial invalidity of a juridical act can only be recognized when the contractual will and, therefore, the juridical act itself can be divided into different autonomous parts and, additionally, when it is backed by the interests of the parties*.

4. Ineffectiveness of legal transactions

a) As for *ineffectiveness of juridical acts*, we would like to focus on the revocation of will from the point of view of the legal dogmatics (from the Hungarian literature see the above-cited essays of Földi and Bessenyő).

First of all, however, some words on the various interpretations of the notion "ineffectiveness".

In our interpretation, *validity is merely a theoretical possibility of producing legal effects*. *Effectiveness means, however, the actual production of the intended legal effects.* The relation of invalidity and ineffectiveness can be described through *various theoretical models*. Nevertheless, *a strict interpretation of ineffectiveness seems to be useful according to which only valid juridical acts are regarded as effective or ineffective*. In this sense, *ineffectiveness only means the state of a valid juridical act when it cannot produce the intended legal effects actually*.

However, modern German lawyers generally use the word "Unwirksamkeit" in the sense of invalidity, without differentiating between invalidity and ineffectiveness of juridical acts.[87] There is a similar situation for instance in the French jurisprudence which does not distinguish dogmatically and terminologically between invalidity ("invalidité") and ineffectiveness ("inefficacité") in strict sense.[88] However, in Italian (using the term of "inefficacia in senso stretto"[89]), Spanish (using the term of "ineficacia en sentido estricto"[90]), and Hungarian[91] literature, the strict distinction of invalidity and ineffectiveness is well-known.

b) As for the legal aspects of *revocation of will*, our point of departure is that *a will cannot induce the required legal consequences*

[83] *„Quod initio vitiosum est, non potest tractu temporis convalescere."* (Paul. D. 50, 17, 29). See e.g. J. Lambert, *La règle catonienne*, Paris 1925; H. Hausmaninger, *Celsus und die regula Catoniana*, TR 36 (1968), 469 ff.; J. M. Sainz-Ezquerra Foces, *La regula catoniana y la imposibilidad de convalidación de los actos jurídicos nulos*, Madrid 1976; I. Buti, *'Regula Catoniana' e convalidazione*, Index 12 (1983–1984), 230 ff.; W. Flume, *Die regula Catoniana – ein Exempel römischer Jurisprudenz*, in: Festschrift für Hubert Niederländer, Heidelberg 1991, 17 ff.; M. Wimmer, *Das Prälegat*, Wien–Köln–Weimar 2004, passim; F. Pergami, *'Quod initio vitiosum est non potest tractu temporis convalescere.' Studi sull'invalidità e sulla sanatoria degli atti negoziali nel sistema privatistico romano*, Torino 2012.

[84] Cf. Krampe, *op. cit.* 29 f.; Zimmermann, *The law of obligations* (op. cit.), 683; Flume, *Allgemeiner Teil* (op. cit), 590.

[85] Giuffrč, *op. cit.*

[86] Krampe, *op. cit.*

[87] See e.g. Staffhorst, *op. cit.* passim; Flume, *Allgemeiner Teil* (op. cit), 58; R. M. Beckmann, *Nichtigkeit und Personenschutz*, Tübingen 1998, 17, contrary to the German literature of the beginning of the 20th century in which the term "Unwirksamkeit" was used in a strict sense (i.e. contrary to the term "Ungültigkeit"; see e.g. W. Figge, *Der Begriff der Unwirksamkeit im BGB*, Diss. Rostock 1902; E. Zitelmann, *Die Rechtsgeschäfte im Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, Berlin 1889–1890, II, 69 ff.; E. Till, *Fehlerhafte Rechtsgeschäfte*, Grünhuts Zeitschrift 40 [1914], 209 ff.). See Földi, *op. cit.* 73 ff.

[88] Cf. e.g. F. Terré / Ph. Simler / Y. Lequette, *Droit civil. Les obligations*, Paris 1996[6], 75, describing the inexistence as a third form of the ineffectiveness of a legal transaction („troisičme forme d'inefficacité de l'acte juridique").

[89] See e.g. Scialoja, *op. cit.* 234; A. Guarino, *Diritto privato romano*, Napoli 2001[12], 68 f.; Talamanca, *op. cit.* passim; G. Spoto, *Le invalidità contrattuali*, Napoli 2012, 19 ff. Nevertheless, according to Sacco the distinction between *invalidità* and *inefficacia* can only be regarded as a possible approach (R. Sacco, *Modčles français et modčles allemands dans le droit civil italien*, Revue internationale de droit comparé 28/2 [1976], 225 ff.). On the whole problem, see from the modern Italian bibliography A. La Spina, *Destrutturazione della nullità e inefficacia adeguata*, Milano 2012.

[90] See e.g. Álvarez Suárez, *op. cit.* 41. There are, however, different approaches in this respect, too (see e.g. M. J. García Garrido, *Caducidad de los efectos del contrato y pretensión de restitución. La experiencia española*, in: L. Vacca [cur.], Caducazione degli effetti del contratto e pretese di restituzione, Torino 2006, 135).

[91] In Hungary, the dogmatic and terminological distinction between invalidity („érvénytelenség") and ineffectiveness („hatálytalanság") can be considered is a generally accepted and applied one, especially in the law of obligations. In this sense, "érvénytelenség" means that an existing legal transaction is *potentially* not able to produce the intended legal effects, contrary to "hatálytalanság" which means that an existing and valid legal transaction is *actually* not able to produce the intended legal effects. See e.g. Földi, *op. cit.* 73 ff.; Siklósi, *A nemlétező, érvénytelen és hatálytalan jogügyletek* (op. cit.), passim.

before the testator's death (vivente testatore), only thereafter *(mortuo testatore)*, although the will can produce certain legal effects before the testator's death (e.g. the revocability of the will itself) too. However, these cannot be regarded as intended legal effects.

Related to the provisions of the Hungarian Civil Code of 1959 (650. § [1]) and the new Hungarian Civil Code of 2013 (7:41. § [1]), the revocation of will results in its *subsequent ineffectiveness*. This terminologically problematic provision served as starting point for the investigation of András Földi who strongly criticized the legal provisions of the Civil Code of 1959, proposing the application of the *retroactive invalidity* in this context.

In our opinion, however, *the dogmatic category of retroactive invalidity of juridical acts is untenable*. The undisputable fact that a testator's intentions are changeable right to the end of his or her life cannot justify the retroactive nullity of a revoked will. If that were the case, the parties could annul their contract by mutual agreement with a retroactive effect (e.g. the Roman *novatio*, the French *novation*, or the Italian *novazione* do not cause the retroactive invalidity but the termination of the contract). It is unacceptable to consider a Roman law source (Ulp. D. 34, 4, 4: *„ambulatoria enim est voluntas defuncti usque ad vitae supremum exitum"*) as an evidence for the theoretical justification of retroactive invalidity in modern legal systems. Revocation is an act for which the category of retroactive invalidity cannot be used because invalidity always has a punitive character. To put it briefly, *invalidity is always a sanction*. As for the revocation of a will, it seems appropriate to introduce a third category: the *fall of the will*.[92] It expresses the idea that *a revoked will is incapable of inducing legal effects*. (In Roman law the terminology for it is *rumpitur*, cf. Inst. 2, 17 pr.[93])

We cannot share Bessenyő's opinion, that the problem can be solved by differentiating between "institutional" and "normative" theories. We would recommend instead the determination of an appropriate frame of reference and its consistent adherence. The various meanings and levels of effectiveness need to be kept apart, and the relationship between validity and effectiveness has to be clarified.

c) From the point of view of a practical lawyer, however, it does not make a substantial difference which approach (the subsequent ineffectiveness, the retroactive invalidity, or the fall of the will) is accepted. The essence of all above-mentioned theories is, of course, that the heir is not able to acquire the "inheritance" before the testator's death. However, legal theory delivers further arguments in favour of a consequent, logic, and clear terminology not only because it has a great importance in legal science but also because of its indirect or direct influence on law in action.

5. Conclusions

a) As a starting point, we distinguished *four levels of ability for producing legal effects*: 1) *inexistence of a legal transaction* (when it is not able to produce any typical legal effect); 2) *invalidity of a legal transaction* (when it exists but it is not able to produce the intended legal effects; 3) *ineffectiveness* (in strict sense) *of a legal transaction* (when the juridical act without any legal fault could produce potentially the intended legal effects); and finally 4) *effectiveness* (in strict sense) *of a legal transaction* (when the valid legal transaction is actually producing the intended legal effects).

b) At the first level, the "juridical act" is not able to produce any "typical" legal effects. At the fourth level, however, the existing, valid, and effective juridical act is able to produce potentially as well as actually and in fact is producing the "typical" and intended legal effects. Naturally, it is a simplified model and the reality is much more difficult. At the second level, for instance, the juridical act can be partial or relatively invalid, and at the third and fourth level ineffectiveness or effectiveness can have different intensities.

c) It has been pointed out that a consequent application of legal concepts is of great importance from the point of view of theory. Apart from the theoretical importance one may ask whether the results of this system could be applied in law-making or in legal practice. Here are some examples in this respect.

This conceptual system serves not only for educational purposes but it *can have significance in legal practice and in law-making, too*. For instance, i*n case of inexistence the consequences of invalidity cannot be applied*; an *in integrum restitutio* is not possible; the fault cannot be eliminated since there is no juridical act and, therefore, convalescence or conversion is not possible because no legal transaction exists. In case of inexistence, the rules of extra-contractual liability for damages or the norms of unjustified enrichment are applicable.

As for the discussions concerning the dogmatic nature of the revocation of will, we have to stress the point that (on the basis of the critic of the Hungarian legal experiences) *ineffectiveness must have the same sense in law of contracts and in law of succession as well*. This opinion might be considered in law-making, too.

As for the factors violating the validity of the contracts, we have to note that *the traditional division of the causes of invalidity into faults of contractual will, of declaration, and of intended legal effect can be regarded as schematic*. Therefore, the importance of this model is not to be overestimated. In regard to a famous text of Paul (D. 18, 1, 57 pr.[94]) – which is in the context of partial invalidity relevant – we can lay down that the invalidity of the sale

[92] See the term "caducité" in French law (cf. e.g. F. Terré / Y. Lequette: *Droit civil. Les successions. Les libéralités*, Paris 1997[3], 325 ff.). "Caducité" cannot be identified with "nullité" which always has a punitive character. In addition, see *Código civil brasileiro* (art. 1939ão_III_Da_Caducidade_dos_Legados, *Caducidade dos Legados*); *Nieuw Burgerlijk Wetboek* (4:112, "vervallen").

[93] *„Testamentum iure factum usque eo valet donec rumpatur irritumve fiat."*

[94] *„Domum emi, cum eam et ego et venditor combustam ignoraremus. Nerva, Sabinus, Cassius nihil venisse, quamvis area maneat, pecuniamque solutam condici posse aiunt. Sed si pars domus maneret, Neratius ait hac quaestione multum interesse, quanta pars domus incendio consumpta permaneat, ut, si quidem amplior domus pars exusta est, non compellatur emptor perficere emptionem, sed etiam quod forte solutum ab eo est repetet: sin vero vel dimidia pars vel minor quam dimidia exusta fuerit, tunc coartandus est emptor venditionem adimplere aestimatione viri boni arbitratu habita, ut, quod ex pretio propter incendium decrescere fuerit inventum, ab huius praestatione liberetur."* See for instance M. J. Schermaier, *Auslegung und Konsensbestimmung*, SZ 115 (1998), 235; M. Pennitz, *Das „periculum rei venditae". Ein Beitrag zum «aktionenrechtlichen Denken» im römischen Privatrecht*, Wien–Köln–Weimar 2000, 224 f.; Harke, *„Si error aliquis intervenit"* (op. cit.), 188 f.; Staffhorst, *op. cit.* 94 f.

of a house which has been partially burnt can be based either on mistake (as a fault of contractual will) or on impossibility (as a fault of intended legal effect). There can be different argumentations and approaches in this case, but the result will be the same: invalidity. As for the dogmatic nature of *emptio mixta cum donatione* in context of Ulp. D. 24, 1, 5, 5,[95] the invalidity of the legal transaction might be explained by simulation (as a fault of contractual will) or by an evasion of a legal rule (as a fault of intended legal effect) since the purpose of simulation is always to evade a legal rule.

Both in Roman law and private law literature it is usual and generally accepted to distinguish between physical and legal impossibility. In our opinion, however, *the application of the dogmatic category of legal impossibility has no raison d'ętre since a legally impossible contract is always against the law that is always illegal*.[96]

Regarding the reasons for the existence of the partial invalidity the interest of the parties is to be mentioned rather than abstract dogmatic considerations. It means the application of the so-called "principle of interest" (see the German term "Utilitätsprinzip") which is known and applied in the sphere of contractual liability.[97]

d) The above-mentioned examples clearly show that *dogmatic analysis and dogmatism do not mean the same*. Jurisprudence has to serve, first and foremost, the legislative process and the legal practice.[98] This general statement is also valid for our research concerning the inexistence, the invalidity, and the ineffectiveness of juridical acts.

e) Finally, we hope that the system of concepts of existence (inexistence), validity (invalidity), and effectiveness (ineffectiveness) of legal transactions can be useful for lawyers working both in theory and practice, and not only for private lawyers but also for the experts of other legal branches (e.g. constitutional law, administrative law, law of civil procedure). Since the contract itself can be regarded as a "special norm", inexistence, invalidity, and ineffectiveness of a "special" norm and of a "general" one can be examined in a similar manner. On the basis of this consideration we can speak about, for instance, "non-existing", invalid, ineffective act, judgement, and administrative decision. Placing this assumption in a wider context, the importance of the traditional distinction of private and public law[99] – which is fundamental for lawyers in civil law jurisdictions but unimportant for common lawyers – can also be revised.

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[95] *„Circa venditionem quoque Iulianus quidem minoris factam venditionem nullius esse momenti ait. Neratius autem (cuius opinionem Pomponius non improbat) venditionem donationis causa inter virum et uxorem factam nullius esse momenti, si modo, cum animum maritus vendendi non haberet, idcirco venditionem commentus sit, ut donaret: enimvero si, cum animum vendendi haberet, ex pretio ei remisit, venditionem quidem valere, remissionem autem hactenus non valere, quatenus facta est locupletior: itaque si res quindecim venit quinque, nunc autem sit decem, quinque tantum praestanda sunt, quia in hoc locupletior videtur facta."* See for example Seiler, *op. cit.* 54 f.; Zimmermann, *Richterliches Modifikationsrecht oder Totalnichtigkeit?* (op. cit.), 128 f.; Staffhorst, *op. cit.* 83 ff.; R. Scevola, *Negotium mixtum cum donatione. Origini terminologiche e concettuali*, Padova 2008, 178 ff.

[96] Nevertheless, e.g. A. M. Rabello, *The „impossible contract": From Roman law to the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law*, in: Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History in Honour of Philip J. Thomas, Pretoria 2010, 349 distinguishes between physical and legal impossibility without reservation.

[97] See e.g. B. Kübler, *Das Utilitätsprinzip als Grund der Abstufung bei der Vertragshaftung im klassischen römischen Recht*, in: Festgabe für Otto von Gierke, II, Breslau 1910, 235 ff.; D. Nörr, *Die Entwicklung des Utilitätsgedankens im römischen Haftungsrecht*, SZ 73 (1956), 68 ff.; J.-H. Michel, *Gratuité en droit romain*, Bruxelles 1962, 325 ff.; Zimmermann, *The law of obligations* (op. cit), 198 ff.; M. Navarra, *'Utilitas contrahentium' e sinallagma*, in: L. Garofalo (cur.), La compravendita e l'interdipendenza delle obbligazioni nel diritto romano, 2, Padova 2007, 223 ff.

[98] In respect of the relation of theory and practice see Ph. le Tourneau / L. Cadiet, *Droit de la responsabilité et des contrats*, Paris 2000–2001, 7: « La pratique est la réalité de la théorie ; la théorie est la nature intime et mystérieuse de la pratique. ».

[99] On the problem of distinction between private law and public law see e.g. G. Hamza, *Reflections on the Classification (divisio) into 'Branches' of Modern Legal Systems and Roman Law Traditions*, in: Fides Humanitas Ius. Studii in onore di Luigi Labruna, IV, Napoli 2007, 2449-2476.

Economic Significance of the Ancient Roman Superficies

*János Jusztinger**

Abstract

This study deals with the dogmatic issues related to the origin and basic economic purpose of the ancient Roman hereditary building lease. It introduces the development of superficies, the process of having a contractual basis then gradually becoming a legal institution belonging to the right in rem during the history of Roman law. The analysis breaks with the thesis drawing a parallel between superficies and hereditary lease (emphyteusis), which has been prevailing in literature for a long time. In order to determine the exact content of hereditary building lease first of all it tries to give a clear picture of the causas establishing superficies by the thorough analysis of the relevant primary legal sources. Regarding the point of this legal institution, the study determines it as the superficiarius's constant and – at least from the late classical period – transferable and inheritable right of building use, which was not bound to a certain person.

Keywords: *Roman law; hereditary building lease; superficies; inaedificatio; solarium; emphyteusis; economic significance; causas establishing superficies; primary entitlement; right of building use.*

1. Development of hereditary building lease

The hereditary building lease (*superficies*) is an original ancient Roman legal institution, which appeared sometime at the end of the Republic.[1] According to the prevailing view in literature, its origin can be attributed to the lease of state or municipal lands for the purpose of building, therefore this legal institution derives from public law.[2] One thing is certain, the emergence of superficies related to the sudden increase in the population of cities – starting at the end of the Republic –, the destructions of civil war and consequently the housing shortage. Furthermore, if we take into consideration the fact that beside the inalienable ownership of *municipium*s more and more building lands got into the hands of patrician families, who – purchasing a huge amount of lands that were confiscated during the wars – were not willing to sell their real estates at all or only at an extravagant price, the thesis – regarded as less accepted in Romanistics – which says that *superficies* originally appeared between private persons seems to be plausible.[3] Beside retaining the ownership, lending the use of lands to wealthy contractors for a certain consideration, most often leasing them – so the investor, by building houses (tenement houses), could provide housing for mass of people coming to the city – served the acquisition of wealth. Although the owner of the land acquired the ownership of the building as *accessio* of his land according to the rules of *inaedificatio* (*solo cedit, quod inaedificatum est*), the builder of the tenement house also benefitted by this construc-

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1 Connected to the issue from the international literature see KOEHNE, Carl, *Das superficiarische Rechtsinstitut. Untersuchungen zu seiner Geschichte, Regelung und wirtschaftlichen Bedeutung im Altertum,* Berlin, 1909; PUGLIESE, Giovanni, Note sulla superficie nel diritto giustinianeo, in: *Studi giuridici dedicati dai discepoli alla memoria di Gino Segrč*, Emiliana, Temi (cur.), Milano, 1943, pp. 119–144; VOGT, Heinrich, *Das Erbbaurecht des klassischen römischen Rechts*, Marburg, 1950; BRANCA, Giuseppe, Considerazioni intorno alla proprietŕ superficiaria nel diritto giustinianeo, *Revue internationale des droits de l'antiquité* 4 (1950), pp. 189–201; SOLAZZI, Siro: La 'superficies' nel diritto giustinianeo, *Archivio Giuridico «Filippo Serafini»* 146 (1954), pp. 24–32; PASTORI, Franco, *La superficie nel diritto romano*, Milano, 1962; MAYER-MALY, Theo, Problemi della «Superficies», *Labeo* 11 (1965), pp. 78–82; BRÓSZ, Róbert, Geschichtliche Ausbildung und Wesen der Superficies, *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Sectio iuridica* 9 (1968), pp. 63–93; SITZIA, Francesco, *Studi sulla superficie in epoca giustinianea*, Milano, 1979; PASTORI, Franco, *Prospettiva storica della superficie nel sistema dei diritti*, Milano, 1988; RAINER, Johannes Michael, Superficies und Stockwerkseigentum im klassischen römischen Recht, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 106 (1989), pp. 327–357; ZAERA GARCÍA, Ana Belén, La propiedad superficiaria en el derecho romano Justinianeo, *Revue internationale des droits de l'antiquité* 51 (2004), pp. 369–379.

2 Thus, for instance, VOGT, *op. cit.* p. 5. With references to further reading see KASER, Max, *Das römische Privatrecht*, I, München, 1971, p. 456.

3 In Hungarian literature this thesis appeared first at BRÓSZ, op. cit. pp. 64–78. In his work the author analysis the primary sources of ancient Roman *superficies* thoroughly and by giving answers to the questions – regarding the point of this legal institution – asked he confutes several views that can be regarded as *communis opinio* in contemporary literature, introducing the development and changes of hereditary building lease during the history of Roman law. Meanwhile he managed to take a position – contrary to the generally accepted view – in respect of the development, purpose and point of this legal institution and he enriched the science of Romanistics with new results. In contemporary Romanistics see more PASTORI, *La superficie* (cit.), pp. 27–38. In Hungarian textbook literature foremost see BRÓSZ, Róbert – PÓLAY, Elemér – MÓRA, Mihály, *A római magánjog elemei* [Elements of Roman Private Law], I, Budapest, 1967, p. 14. and BRÓSZ, Róbert – PÓLAY, Elemér: *Római jog* [Roman Law], Budapest, 1995, p. 270.

tion, because he saved the high purchase price of the building land, while he had a right close to ownership in respect of the building. The consideration – generally paid once a year in the form of *solarium* – has been covered by the rent of the flats in the building. Thus, we can say that the origin of hereditary building lease has to be searched much rather in private law, especially in the relations between landowners and people who contract for building or lease of an extant tenement house, furthermore in the activity of the praetor aiming at legal development in connection with it.[4]

2. The basic economic purpose of hereditary building lease

If we want to determine the point of hereditary building lease, ancient jurists – as in several cases – do not make it easy for us at all.[5] The Latin *terminus technicus* refers unambiguously to the creation above the ground (*'super facere'*), a building built there.[6] At first sight it is a legal institution – generally mentioned in comparison with hereditary lease (*emphyteusis*) in textbooks – that do not raise special dogmatic questions. The principle of *superficies (aedificium) solo cedit*[7] determines the ownership structures of the land and the building built on it: in ancient Rome – in default of the conception of separated ownership – only hereditary building lease could be the solution concerning the utilization of the building by a person being different from the landowner. Of course, from a didactic point of view it can be useful to draw a parallel between this legal institution and *emphyteusis*, but considering its economic purpose we need a much more subtle definition. For this reason – beside clarifying the issues of *causa*/*causa*s establishing *superficies* – the determination of primary entitlement due to the *superficiarius* is also indispensable.

2.1 The circle of causas establishing superficies

Concerning the issue of titles being recognized as the basis of *superficies* literature is quite shared. A substantial part of Romanists believes that hereditary building lease could be established only by right of a lease contract.[8] However, others consider it possible that beside the title of *locatio conductio* – for example by *emptio venditio*, *donatio* or *legatum* – *superficies* could be established on the basis of other title as well.[9] A third group of Romanists reckons that beside lease only the *causa* of sale can be regarded as a legal basis.[10]

Making it clear is important in order to give an answer to that further question whether hereditary building lease could be established only for a consideration or free of charge too, in the former case consideration must have been periodical or not, possibly it could be performed by the *superficiarius* in a lump sum or not. In order to take a stand on these questions correctly, it seems to be most efficient to examine our primary legal sources regarding this topic. In the *Digesta*-fragments – being mainly interpolated probably – beside the *causa* of lease[11] that can be regarded as a base case and can be seen in the text of the praetorian *edictum* as well, we can find the *causa* of sale, in addition legacy too.[12]

As for *causa emptionis*, D. 43, 18 (*De superficiebus*) containing the *sedes materiae* of hereditary building lease states it clearly in the first paragraph of the Ulpian-fragment taken at the head by Justinian's compilers.

> Ulp. D. 43, 18, 1, 1 (*libro 70 ad edictum*)
> *Qui superficiem in alieno solo habet, civili actione subnixus est: nam si conduxit superficium, ex conducto, si emit, ex empto agere cum domino soli potest.*

Thus, according to the jurist anyone who has the superficies of the ground of someone else relies on a civil action. For if he has leased it, he can bring suit under the lease; if he has purchased it, he can bring an action on purchase against the owner of the land.

Ulpian talks about the actionability of *ex empto* – being alternative beside *stipulatio* – similarly in the fifth paragraph of the same fragment in favour of the *superficiarius* deprived of his right.

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4 Cf. FÖLDI, András – HAMZA, Gábor, *A római jog története és institúciói* [History and Institutes of Roman Law], Budapest, 2015, p. 368.

5 Considering the notorious rule of Iavolenus all this may not be surprising. See Iav. D. 50, 17, 202: *Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset.*

6 Cf. BRÓSZ – PÓLAY, *op. cit.* p. 270.and FÖLDI – HAMZA, *op. cit*. p. 368.

7 Gai. 2, 73: *Praeterea id, quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit*. Gai. D. 41, 1, 7, 10.: *Cum in suo loco aliquis aliena materia aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit… .* Similarly Ulp. D. 43, 17, 3, 7; Paul. D. 46, 3, 98, 8. To the rule from literature see RICCOBONO, Salvatore, La violazione del principio 'superficies solo cedit' nel diritto giustinianeo, in: *Scritti di Diritto Romano*, II, Idem (cur.), Palermo, 1964, pp. 301–317; MEINCKE, Jens Peter, Superficies solo cedit, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 88 (1971), pp. 136–183; ZAERA GARCÍA, Ana Belén: Superficies solo cedit, *Anuario da Facultade de Dereito da Universidade da Coruña* 12 (2008), pp. 1007–1015.

8 Thus, for example, KOEHNE, *op. cit*. p. 42. or MARTON, Géza, *A római magánjog elemeinek tankönyve, Institúciók* [Textbook on the Elements of the Roman Private Law, Institutions], Debrecen, 1947 p. 174. o. With reference to the classical period see PASTORI, *La superficie* (cit.), pp. 59–61. In latter literature RAINER, op. cit. pp. 332–333. on the basis of primary sources regarding the obligation of paying *solarium* (*pensio*) as an essential element of the agreement – for example Paul. D. 6, 1, 74; Ulp. D. 39, 1, 3, 3 and Pomp. D. 39, 2, 39, 2 – he also doubts if hereditary building lease could be established by another title beside *locatio conductio*.

9 Thus, for instance, MASCHI, Carlo Alberto, Proprietà divisa per piani, superficie e'lestensione ai provinciali del principio 'superficies solo cedit', in: *Studi in onore di Vincenzo Arangio-Ruiz*, IV, Lauria, Mario (cur.), Napoli, 1953, pp. 158–161. and BIONDI, Biondo, *La categoria romana delle 'servitutes'*, Milano, 1938, pp. 455–456.

10 According to BRÓSZ, op. cit. p. 80. in the classical period only the *causa emptionis* was a suitable title beside *causa locationis.* Similarly MAYER-MALY, op. cit. p. 80.

11 Ulp. D. 43, 18, 1 pr.: *Ait praetor: 'Uti ex lege locationis sive conductionis superficie, qua de agitur, nec vi nec clam nec precario alter ab altero fruamini, quo minus fruamini, vim fieri veto. Si qua alia actio de superficie postulabitur, causa cognita dabo'.*

12 The *causa emptionis* appears: Ulp. D. 43, 18, 1, 1; Ulp. eod. 1, 5; Pomp. D. 23, 3, 32 and Paul. D. 6, 2, 12, 3. Both legacy and gift are mentioned by Ulp. D. 43, 18, 1, 7; only the former one appears Iul. D. 30, 86, 4 and Iul. D. 30, 81, 3.

Ulp. D. 43, 18, 1, 5 (*libro 70 ad edictum*)
Si soli possessori superficies evincatur, aequissimum erit subvenire ei vel ex stipulatu de evictione vel certe ex empto actione.

However, this source mentions sale rather in connection with the resale of an extant hereditary building lease, than in connection with its formation, even as the two fragments below.[13]

Pomp. D. 23, 3, 32 (*libro 16 ad Sabinum*)
Si ex lapidicinis dotalis fundi lapidem vel arbores, quae fructus non essent, sive superficium aedificii dotalis voluntate mulieris vendiderit, nummi ex ea venditione recepti sunt dotis.

The standpoint of Pomponius is the following: if a husband, among other things, with the consent of his wife sells the superficies of a building on dotal land, the money received from the sale will form part of the dowry.

Paul. D. 6, 2, 12, 3 (*libro 19 ad edictum*)
Idem est (Publiciana competit) et si superficiariam insulam a non domino bona fide emero.

We are told by Paul that the same rule applies – the *actio Publiciana* is available – where I bought in good faith from a nonowner a block of flats that is *superficies*.

If we are searching for further legal bases in our primary legal sources, we can find more fragments that mention other titles – such as legacy and gift – in connection with hereditary building lease, but these are – almost without exception[14] – about the transfer of an extant *superficies* and not about its establishment.[15] The following fragment – reflecting the position of Justinian's compilers probably[16] – is a good example, as it mentions a special legacy aiming at hereditary building lease connecting to a land which is in the ownership of the legatee.

Iul. D. 30, 86, 4 (*libro 34 digestorum*)
Valet legatum, si superficies legata sit ei, cuius in solo fuerit, licet is dominus soli sit: nam consequetur, ut hac servitute liberetur et superficiem lucrifaciat.

According to Julian, the legacy will be valid, if *superficies* has been bequeathed to the person on whose land it is, even if the owner of the land: for he will get freedom from this servitude and the profit from the *superficies*.

Finally, in the technical meaning of the word we cannot talk about the establishment of hereditary building lease by legacy according to the following voluminous fragment either.

Iul. D. 30, 81, 3 (*libro 32 digestorum*)
Qui fundum excepto aedificio legat, appellatione aedificii aut superficiem significat aut solum quoque, cui aedificium superpositum est. Si de sola superficie exceperit, nihilo minus iure legati totus fundus vindicabitur, sed exceptione doli mali posita consequetur heres id, ut sibi habitare in villa liceat: in quo inerit, ut iter quoque et actum in ea habeat. Si vero solum quoque exceptum fuerit, fundus excepta villa vindicari debebit et servitus ipso iure villae debebitur, non secus ac si duorum fundorum dominus alterum legaverit ita, ut alteri serviret. Sed inclinandum est testatorem etiam de solo cogitasse, sine quo aedificium stare non potest.

Thus, he who bequeaths a land except for the building means by 'building' either the edifice or in addition the tract of land on which the building stands. If he has excepted only the edifice itself, then the whole land, nevertheless, will be vindicated by the terms of the legacy, but the heir will, by bringing a defense of fraud, obtain the right of living in the house, which include the right of entry to it in person or with cattle. But if the tract of land on which the building stands was excepted, the land with the exception of the house will have to be vindicated and a servitude will by reason of this attach to the house, just as where an owner of two lands had bequeathed the one subject to a servitude to the other. But one must incline to the assumption that the testator meant to include the tract of land without which the building cannot stand.

From the point of the examined issues the first turn of the text is significant, where the heir can be regarded as *quasi superficiarius* since both the ownership of the land and – as an *accesio* of it – the ownership of the building have been acquired by the legatee. On the other hand, because of the fact that legacy did not refer to *aedificium*, the heir is entitled to the use of the building and the servitudes ensuring the practice of it. It is certain that in the case of this source we cannot talk about an extant *superficies* or the transfer of it, because the testator – as an owner – disposes of the whole real estate including both the land and the building. Consequently, this fragment could – only indirectly – be the example of the *ex legato* establishment of *superficies* as a limited property right. However, accepting the thesis which says that hereditary building lease has a contractual basis and

[13] Although *sedes materiae* does not mention other concrete example for the establishment of hereditary building lease by sale, and the *causa emptionis* inserted in the first fragment can be an interpolation by Justinian's compilers easily, but it cannot be excluded with absolute certainty that in classical law it has already been possible to establish *superficies* by sale beside lease. It is enough to evoke the paragraph from the Institutes of Gaius, where the jurist emphasizes that because of the high degree of similarity between sale and lease the qualification of a given transaction was questionable frequently (for example in the case of agreements aiming at *agri vectigalis*) for classical jurists. See Gai. 3, 145: *Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis quaeri soleat, utrum emptio et venditio contrahatur an locatio et conductio. Veluti si qua res in perpetuum locata sit, quod evenit in praediis municipum, quae ea lege locantur, ut, quamdiu [id] vectigal praestetur, neque ipsi conductori neque heredi eius praedium auferatur. Sed magis placuit locationem conductionemque esse.* Further literature about the borderline cases of sale and lease see JUSZTINGER, János, A római adásvétel és bérlet határain: vételár vagy bérleti díj? [At the borders of Roman sale and lease: purchase price or rent?], *Acta Universitatis Szegediensis, Acta Juridica et Politica. Publicationes Doctorandorum Juridicorum* 7 (2007), pp. 113–133.

[14] Although a probably interpolated Ulpian-fragment virtually recognizes the establishment of *superficies* not only by *legatum* but *donatio* as well – mentioning *in rem actio* provided for the *superficiarius* –, but we cannot find concrete examples for the establishment of hereditary building lease on these titles anywhere else. See Ulp. D. 43, 18, 1, 7: *Sed et tradi posse intellegendum est, ut et legari et donari possit*. Cf. BRÓSZ, op. cit. p. 80.

[15] Contra PASTORI, *La superficie* (cit.), pp. 63–67.

[16] In connection with the interpolation-suspicion see SOLAZZI, Siro, Sulla superficie come servitů, *Studia et documenta historiae et iuris* 13–14 (1947–1948), p. 308. MASCHI, op. cit. p. 160. and RAINER, op. cit. p. 342. also takes a position that the final sentence of the text in the source (*'nam … lucrifaciat'*) can be regarded as an interpolation by Justinian undoubtedly. VOGT, *op. cit*. p. 26. despite a possible interpolation and the expression of *'servitute'* used in the text he does not exclude that the idea came from Julian originally.

it has become a legal institution belonging to the right in rem gradually,[17] it is hard to imagine that Julian would have thought about a legal institution appearing much later in time. It is more likely that he referred to the legal institution of *usus* – that has already existed since the pre-classical period[18] – including the use of the house or flat before Justinian.[19] This supposition is confirmed by the expression of *habitare* in the text and also by the fact that the jurist does not provide a special *in rem* protection to the heir, who can take only the opportunity of *exceptio doli* against the legatee – referring that the latter party should respect the right of the heir according to the testator's will.

2.2 Primary entitlement due to the superficiarius

In order to clarify the basic economic purpose of *superficies* it is also necessary to determine the primary entitlement due to the *superficiarius*. First of all we have to give an answer to the question whether the point of hereditary building lease is the transfer of an urban land with the aim of building on it or the use of the building built on this land of another person. In connection with it, we have to decide whether we recognize the establishment of *superficies* on an extant building or part of a building. By reason of the reticence and silence of our legal sources literature is quite shared concerning these issues too.

According to a prevailing view in Romanistics[20] – which can be still regarded as prevailing today and can also be found in several textbooks actually[21] – the main entitlement of *superficiarius* is the building, compared to this the right of use on it is only secondary.[22] However, other Romanists[23] see the point of this legal institution in the latter one (namely in the *superficiarius'*s right of building use) and for this reason they recognize the establishment of *superficies* also on an extant building which is not built by the *superficiarius.*[24] Applying a kind of intermediate solution, a part of literature – slightly evading the question – does not mark the entitlements in question *expressis verbis*.[25]

In order to get a correct answer we should set out from the name of the legal institution, from which it follows obviously that as long as there is no building on the other person's land – where there could be an entitlement – we cannot talk about *superficies*. Still, it does not mean that the emphasis would be on building, because here we talk about a transferable and inheritable right. The successor – for example the heir – can practice his right undoubtedly in respect of an extant building.

Furthermore, we cannot ignore the economic relation either, namely that the *superficiarius* – as a wealthy contractor – establishes his right with a purpose of investment. Thus, the *superficiarius* – being the member of plutocracy and having an own villa – does not build on another person's land in order to provide his housing there. His aim is to start a profitable business: generally he builds a tenement house (*insula*) on the other person's land in order to increase his wealth by leasing it. Developing the train of thought we can realize that there is no contractor who invests a huge amount of money in building a tenement house merely with the purpose of using and leasing it for a short time. It is much more realistic if he implements the project on another person's land in a way that later he provides the write-off of his costs – the planned amortisation of the investment – by leasing the building and the flats in it for a long time. A hereditary building lease that exists for a short time[26] has economic reality only in the case if the building costs can be saved, namely if this right is established on an extant building.

Thus, according to the above-mentioned facts the point of *superficies* is not the entitlement of building on another person's land but the *superficiarius*'s right of building use. On the other hand, in my opinion it does not result in the thesis – being generally accepted in Romanistics[27] – which states that hereditary building lease would be connected to a given building, therefore it would terminate necessarily and non-renewably by the destruction or demolition of the building. Regarding the fact that in our legal sources we cannot find a trace of such a particular reason for termination, personally I would not exclude the possibility of an agreement, which says that in the above-mentioned cases the *superficiarius* is entitled to build on the land again, and this way the parties do not bind hereditary building lease to the existence of a given building:[28] the attribute of 'hereditary' can be totally correct only if we accept this. In every

[17] Cf. BRÓSZ, op. cit. p. 78; MAYER-MALY, op. cit. p. 78. o.; RAINER, op. cit. p. 329.
[18] See FÖLDI – HAMZA, *op. cit*. p. 363.
[19] Similarly RAINER, op. cit. p. 343.
[20] See already PERNICE, Alfred, Parerga, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 5 (1884), pp. 90–91.
[21] From Hungarian textbook literature see, for example, MARTON, *op. cit*. p. 214.; BENEDEK, Ferenc – PÓKECZ KOVÁCS, Attila: *Római magánjog* [Roman Private Law], Budapest – Pécs, 2015, p. 228.
[22] See VOGT, *op. cit*. p. 89; MEINCKE, op. cit. p. 145; RAINER, op. cit. p. 331.
[23] See, for instance, KOEHNE, *op. cit*. p. 46; ARANGIO-RUIZ, Vincenzo, *Istituzioni di diritto romano*, Napoli, 1927, p. 258; BRÓSZ, op. cit. p. 84.
[24] BESSENYŐ, András, *Római magánjog* [Roman Private Law], Budapest–Pécs 2010, pp. 291–292. mentions this legal institution as a right of building use according to this.
[25] For example according to the neutral definition of KASER, *op. cit*. p. 456. the entitlement of *superficiarius*: „…ein Gebäude zu halten". BIONDI, *op. cit*. p. 453. does not give an answer to the question either. In his view *superficies* is a „biphasic" legal institution: it means a right to build on a given land at the time of its establishment, then – when the building exists – it means a right to use the building.
[26] As it was possible according to our primary sources, such a *superficies* existing for a limited time did not have an *in rem* protection. See Ulp. D. 43, 18, 1, 3: … *si ad tempus quis superficiem conduxerit, negetur ei in rem actio.* Cf. PUGLIESE, Giovanni, Heinrich Vogt, Das Erbbaurecht des klassischen römischen Rechts, *Studia et documenta historiae et iuris* 17 (1951), p. 369.
[27] See, for example, BRÓSZ, op. cit. p. 85; FÖLDI – HAMZA, op. cit. p. 368.
[28] BENEDEK – PÓKECZ KOVÁCS, *op. cit*. p. 229. also refers to it, emphasizing that the destruction or demolition of the building could be a particular reason for termination only in the case if the *superficiarius* was not entitled to build a new building according to the agreement.

other cases this right is not hereditary, since it can exist until the existence of the building at most.[29]

Thus, *superficiarius* does not acquire a right simply to create a building, but he has the right for total utilization concerning the land and the building – depending on *lex locationis* or the agreement – for a long time or hereditarily: namely building on the land, or use and lease of the building. Furthermore, he is entitled to make an alteration on the building and rebuild it unless otherwise specified in the agreement of the parties. His hereditary building lease can be inherited and alienated by transactions among living people (by sale or gift), moreover – contrary to hereditary lease – here the landowner does not have a right of pre-emption and does not have a share in the purchase price either. He is entitled to establish servitude for the benefit of the land, in addition he can authorize usufruct, use and *habitatio* on his hereditary building lease or he can pledge it too.[30]

On the other hand, he does not become the owner of the land,[31] what is more, he has not been regarded as *civilis possessor* in the classical period either, therefore he has been in need of the protection of the landowner during the use of the building – even with the transfer of his legal actions. In order to complete these, the praetor – in the case if he practiced his right in reality – made an *interdictum* available to him in his capacity as *iuris quasi possessor* providing an independent legal protection for the *superficiarius*. This legal instrument is the so-called *interdictum de superficie* (*superficiebus*), which is an *interdictum duplex prohibitorium* issued after the model of *interdictum uti possidetis*.[32] According to our primary legal sources the praetor promised in his edict that – using his discretionary powers (*causa cognita*) – for good cause he is willing to issue an independent *in rem actio* in defence of hereditary building lease.[33] Above all, in the post-classical period the *superficiarius* in his capacity as quasi owner has already been entitled to legal aids *utiliter* – as petitorial legal instruments – against any possessor, namely *rei vindicatio utilis*, *actio confessoria utilis* in defence of servitudes acquired for the benefit of the land, while *operis novi nuntiatio* was available against the neighbour.[34]

Thus, in the early classical period *superficies* has probably been a legal relation having only an interdictal protection and a contractual basis, but later on – still in the classical period presumably[35] – it has gradually become an entitlement having *in rem* protection. Although in the post-classical period it disappeared from legal practice, giving place to the conception of shared ownership, Justinian renewed this legal institution and recognized it as a right in rem having a petitorial protection expressly, in addition – emphasizing that it does not have an ownership-like character – he endeavoured to place it among servitudes.[36]

3. Conclusion

On the basis of our examined legal sources it can be ascertained that in the classical period hereditary building lease could have probably been established only for a consideration yet. As a general rule, its contractual establishment happened through *locatio conductio* and the other *causa*s (such as *emptio venditio, donatio, legatum*) appearing in the sources – having an effect of compilers, thus, reflecting the standpoint of Justinian law – originally referred much rather to the transfer of an extant hereditary building lease and not to its establishment. This transferability was exactly one of the most important signs of the fact that this legal institution became a right in rem gradually.

In Justinian law *superficies* as a right in rem could be established through sale beside lease, moreover the establishment could happen not only for a consideration but free of charge (mainly *ex legato* or *ex donato*) too. Getting over the issue of legal bases, the comparison with hereditary lease is no good because in the case of a building – contrary to the object of *emphyteusis*, an agricultural land – it is difficult to interpret perpetuity, mainly in respect of tenement houses that were built in a short period of time hoping a quick enrichment. If we want to determine the maximum period of the right of use, as a general rule, we have to bind it to the existence of the building with the proviso that in a certain case it cannot be excluded that the *superficiarius* – according to an agreement – is entitled to build a new building in the case of its destruction or demolition. Based on the above, in ancient Rome *superficies* was a constant and – at least from the late classical period – a transferable and inheritable right of building use, which was not bound to a certain person.

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[29] Maybe it is not a coincidence that in our primary legal sources we cannot find expressions referring to 'perpetuity' such as '*ius perpetuum*', '*in perpetuum*' or '*infinitas*'. These are frequent much rather in connection with the lease of *ager vectigalis* or the legal institution of *emphyteusis*. Cf. BRÓSZ, op. cit. p. 86.

[30] Cf. BENEDEK – PÓKECZ KOVÁCS, *op. cit.* pp. 228–229.

[31] Gai. D. 43, 18, 2: *Superficiarias aedes appellamus, quae in conducto solo positae sunt: quarum proprietas et civili et naturali iure eius est, cuius et solum.*

[32] Ulp. D. 43, 18, 1, 2: *Proponitur autem interdictum duplex exemplo interdicti uti possidetis. Tuetur itaque praetor eum, qui superficiem petit, veluti uti possidetis interdicto, neque exigit ab eo, quam causam possidendi habeat: unum tantum requirit, num forte vi clam precario ab adversario possideat. Omnia quoque, quae in uti possidetis interdicto servantur, hic quoque servabuntur.*

[33] Ulp. D. 43, 18, 1, 3: *… Et sane causa cognita ei, qui non ad modicum tempus conduxit superficiem, in rem actio competet.*

[34] Cf. BRÓSZ, op. cit. pp. 81–83; RAINER, op. cit. pp. 333–336.

[35] Thus, already KOEHNE, *op. cit*. pp. 36–37.

[36] See SOLAZZI, op. cit. pp. 307–312; PASTORI, *La superficie* (cit.), pp. 203–221; BRÓSZ, op. cit. p. 78.

"Parsimonia atque tenuitas apud veteres custodita sunt" Certain Aspects of Laws Preventing Extravagant Expenditures in Roman Law

*Janos Erdődy**

Abstract

Sumptuary laws, the legislative measures of the Roman republic and early imperial era, were aiming to restrain extreme and extravagant expenditure via limiting the amount of money spent on feasts, games, funerals, weddings and other social events. Not much interest is shown in sumptuary laws: contemporary jurisprudence regards it as a limitation of property, a minority of authors deem these laws the results of a social legislation, whereas earlier secondary works put a stress on their historic impact. As a first step in the detailed research of the topic of sumptuary laws, this paper intends to give an outline of the actual content of these laws, in a chronological order. Such a primary source-based analyses could serve as the first step towards a better understanding of the Roman concept of limitation of property.

Keywords: *sumptuary laws; leges sumptuariae; property; limitation of property; luxury; extravagance; Gellius; Macrobius.*

1. Preliminary remarks

In ancient republican Rome and during the early years of the principate, the term *leges sumtuariae* or *sumptuariae*[1] served to designate a set of various laws passed to prevent inordinate expense (*sumtus* or *sumptus* in the original sources) with regard to wedding and / or funeral ceremonies and other similar festive events, such as public games[2] for instance, as well as female clothing.[3] Pursuant to the regulations of these laws in general clothing, jewellery and the overall cost of the aforesaid ceremonies couldn't exceed a certain sum of money in accordance with a report given by the renowned author of the 2nd century BC, Aulus Gellius.

> Gell. Noct. Att. 2, 24, 1
> *Parsimonia apud veteres Romanos et victus atque cenarum tenuitas non domestica solum observatione ac disciplina, sed publica quoque animadversione legumque complurium sanctionibus custodita est.*

As Gellius informs us in this passage on the customs of the early Romans, frugality (*parsimonia*) in general, and especially moderation (*tenuitas*) in food (*victus*) and meals (*cenae*) were secured not only by family observance (*domestica observatione*) and training (*disciplina*), but also by public observation (*publica animadversione*) and even by manifold punishments (*complurium sanctionibus*) if necessary, as well as the inviolable provisions of numerous laws.[4]

Resulting from this brief description given by the author and grammarian, Aulus Gellius in his famous and priceless work, Attican Nights, which is aiming to give a general compilation of almost all aspects of Roman daily life in twenty books, it was considered one of the several duties of both the Roman

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1 With regard to the term *leges sumptuariae*, it should be pointed out that Macrobius, whose work on Saturnalia serves as one of the primary sources pertaining to this legislation, in his previously mentioned work addresses these laws as *leges cibariae*, referring to Cato who deems all these laws as such, which puts a restraint on luxury in meals. Therefore, terminology itself seems a bit diverse, despite the fact that the two appellations mentioned are connected to each other as general and specific or specialised terms. Cf. Macrob. Sat. 3, 17, 13: *Sylla mortuo Lepidus consul legem tulit et ipse cibariam: Cato enim sumptuarias leges cibarias appellat*. On this, see also BALTRUSCH, Ernst: *Regimen morum. Die Reglementierung des Privatlebens der Senatoren und Ritter in der römischen Republik und frühen Kaiserzeit*. Vestigia Band 41. Verlag C. H. Beck, München, 1989. p. 41; ROSIVACH, Vincent J.: The Lex Fannia Sumptuaria of 161 Bc. *The Classical Journal*, Vol. 102, No. 1 (2006). p. 1.

2 Concerning restrictions pertaining to public games a certain *lex Aufidia de feris Africae* should be referred to covering regulations on the importation of wild animals from Africa. On this see e.g. Plin. N. H. 8, 24: *Senatus consultum fuit vetus ne liceret Africanas in Italiam advehere. Contra hoc tulit ad populum Cn. Aufidius tribunus plebis, permisitque circensium gratia inportare*. Until the 2nd century BC such supply of wild beasts was strictly forbidden by a *senatus consultum*, when the aforesaid *lex* permitted the commerce of these animals sometime between 170 and 103 Bc. As for the content and the dating of this law cf. LONGO, Gianetto: Leges sumptuariae. In: *Novissimo Digesto Italiano* IX. Torino, 1965. P. 629–630; Bleicken, Jochen: *Lex publica. Gesetz und Recht in der römischen Republik*. De Gruyter, Berlin – New York, 1975. p. 155, and particularly footnote 57; BERNSTEIN, Frank: *Ludi Publici. Untersuchungen zur Entstehung und Entwicklung der öffentlichen Spiele im republikanischen Rom*. Historia Einzelschriften 119. Stuttgart, Franz Steiner Verlag, 1998. p. 277, and also footnote 276.

3 Cf. LONGO op. cit. p. 630; PETZ Vilmos (ed.): *Ókori lexikon* [Lexicon of the Ancient]. Budapest, Franklin Társulat, 1902-1904. s. v. "sumptus". As for *leges sumptuariae* in general reference should be made to ROTONDI, Giovanni: *Leges publicae populi Romani*. Milano, 1912. p. 98–99.

4 For the Latin expressions mentioned in brackets cf. e. g. Charlton T. Lewis: *An Elementary Latin Dictionary*. New York – Cincinnati – Chicago, American Book Company, 1890. s. h. vv.; *Oxford Latin Dictionary*. Oxford, Clarendon Press, 1968. s. h. vv.

family and the ancient Roman state to put a check upon extravagance in the private expenses of people. Traits of such a public endeavour are clearly and positively traceable in many laws of the Roman republican age, though some provisions of the Law Twelve Tables definitely reflect the same effort.[5] During the Republic, resulting mainly from *mores* and from a purely administrative aspect from *nota censoria* related to the violation of these legislative provisions, it was considered a vice to live luxuriously.[6] Still, a certain elevated affinity towards luxury and a luxurious way of living increased recurrently, especially with the foreign conquests of the Republic and with the growing wealth as a consequence. This appears to be the reason why various *leges sumptuariae* were passed at different times with the object of restraining extravagance. Even these days it is much debated how effective these laws were. The most common argument according to which these laws rarely accomplished their object could be the fact that they were subsequently repealed for the most part. The following paper is aiming to examine the actual content of these *sumptuariae leges* in chronological order to render a better understanding of Roman attitude to *mores* and sometimes *leges*.

At this point it is worth mentioning that besides those enactments which are traditionally referred to as *leges sumptuariae*, some other laws could likewise be brought up as such intending to restrict certain aspects of life with the ultimate purpose of prevent posh lifestyle. The first of these is *lex Metilia de fullonibus*, a plebiscite which regulated the activity of fullers prescribing them how to launder clothes, especially how and to what extent they should use earth, chalk, water and detergent in order to restrain luxury in clothing.[7]

2. The meaning of the term sumptus

The word *sumptus* or *sumtus* as a denominative stems from the verb *sumo* (*sumere*, *sum[p]si*, *sum[p]tum*), which amongst others refers to the action of taking certain resources (as a result money as well) from a certain source, to get or to procure, hence the nominal meaning which first presumably designated merely the activity derived from the verb – thus the meaning "the spending of money". [8] Further on more abstract connotations gradually gained in significance, such as reference to any kinds of costs, outlay or expenditure.[9] From this on, the next set of meanings contains a certain moral evaluation, when *sumptus* has gradually tended to refer to lavish or even extravagant expenditure as well.[10] As a consequence of all this, the term *leges sumptuariae* designate generally such legislative provisions which were aiming to restrain luxury pertaining to clothing, jewellery, food, games and festivals or even buildings and funerals.[11]

3. Leges sumptuariae in chronological order

At this point, the first remark to be made is an explanation why these laws are presented in a chronological order. The aim of this paper is to examine the content of the so-called sumptuary laws in Roman law. Only after this enumerative scrutiny could further analysis take place with the indispensable evaluation of the secondary literature as well. A detailed and well-elaborated examination has been carried out recently by Baltrusch who formed certain classes of these *leges*.[12] He set up eight groups of these laws, which fully corresponds with the primary sources. Still, this classification leaves some doubts or raises particular questions when it comes to examining each act separately. As we see it, the best example of such questions is *lex Cornelia sumptuaria*, which maximised both festive and funeral outlays, thus the logical question whether this law is to be regarded as one restricting "Tafelluxus", or it rather put a stop to "Grabluxus"? Of course Baltrusch himself made a very distinctive choice and the choice in its own constitution could hardly be debated, yet, this single example shows – at least according to our view – the relative and mutable character of classifications. Therefore, at this point we guard against the temptation of form groups and classes of these laws, and try merely relying on the more dependable chronological analysis.

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5 Cf. e. g. leg. XII tab. 10, 3 = Cic. de leg. 2, 23: *Discebamus enim pueri XII ut carmen necessarium, quas iam nemo discit. Extenuato igitur sumptu tribus reciniis et tunicula purpurea et decem tibicinibus, tollit etiam <nimiam> lamentationem: „Mulieres genas ne radunto neve lessum funeris ergo habento"*. Correspondingly see also leg. XII tab. 10, 4; Cic. de leg. 2, 63: *Postea quom, ut scribit Phalereus <Demetrius>, sumptuosa fieri funera et lamentabilia coepissent, Solonis lege sublata sunt, quam legem eisdem prope verbis nostri Xviri in decimam tabulam coniecerunt. Nam de tribus reciniis et pleraque illa Solonis sunt. De lamentis vero expressa verbis sunt: „mulieres genas ne radunto neve lessum funeris ergo habento"*.

6 On the topic of *censores* see first and foremost BALTRUSCH op. cit.; the latest work on censors cf. EL BEHEIRI, Nadja: *Das regimen morum der Zensoren. Die Konstruktion des römischen Gemeinwesens*. Dunker & Humblot, Berlin, 2012.

7 Cf. Plin. N. H. 35, 57, 197: *„Neque enim pigebit hanc quoque partem adtingere, cum lex Metilia extet fullonibus dicta, quam C. Flaminius L. Aemilius censores dedere ad populum ferendam*". See also Longo op. cit. 630; PETZ op. cit. s. v. "lex Metilia"; WALLINGA, H.T.: Official Roman Washing and Finishing Directions Lex Metilia Fullonibus Dicta. *Tijdschrift voor Rechtsgeschiedenis* LXIV (1996). p. 183–190; FLOWER, Harriet I. (ed.): *The Cambridge Companion to the Roman Republic*. Cambridge University Press, 2014[2]. p. 175–176.

8 ERNOUT, Alfred – MEILLET, Antoine: *Dictionnaire étimologique de la langue latine. Histoire des mots*. Paris, 1951. s. v. "sumo"; *Oxford Latin Dictionary* s. v. "sumptus".

9 Cf. *Oxford Latin Dictionary* s. h. v. With this regard it is highly interesting to refer to a passage in the Digest by Ulpian (Ulp. D. 11, 7, 14, 7 [25 ad ed.]) in which the jurist evokes the regulations of an imperial rescript pertaining to the expenses of funerals. It may occur sometimes, as he puts it, that a particular individual assumes the payment of funeral expenses, but he cannot recover them (*qui sumptum in funus fecit, sumptum non recipit*), especially when he did so by dutiful respect based upon his familial relationship with the deceased (*pietatis gratia fecit*), and did not pay with the intention of recovering the incurred amount (*non hoc animo quasi recepturus sumptum quem fecit*).

10 Cf. *Oxford Latin Dictionary* s. h. v. On this cf. also in the primary sources Cic. de leg. 2, 25: *"[…]Quom enim <Cur> paupertatem cum divitiis etiam inter homines esse aequalem velimus, cur eam sumptu ad sacra addito deorum aditu arceamus? […]"*.

11 Cf. BALTRUSCH op. cit. p. 41.

12 Cf. BALTRUSCH op. cit. p. 44–106.

3.1 Lex Oppia

The first such law, *lex Oppia*, is all the more important to us, as this act is an interesting demonstration of how the Romans had reference to *utilitas*.[13] This *lex sumptuaria* enacted in 215 BC is considered to be the first law to prevent inordinate expenses in all different fields of life.[14]

> Liv. 34, 1
>
> *Inter bellorum magnorum aut vixdum finitorum aut imminentium curas intercessit res parva dictu sed quae studiis in magnum certamen excesserit. M. Fundanius et L. Valerius tribuni plebi ad plebem tulerunt de Oppia lege abroganda. tulerat eam C. Oppius tribunus plebis Q. Fabio Ti. Sempronio consulibus in medio ardore Punici belli, ne qua mulier plus semunciam auri haberet neu vestimento versicolori uteretur neu iuncto vehiculo in urbe oppidove aut propius inde mille passus nisi sacrorum publicorum causa veheretur.*

Livy's report on this particular law, *lex Oppia*, is not only interesting because we get to know certain pieces of practical information about it, but also because he points out that this act was trivial to relate, still, the passions it arose developed into a violent contention.[15] *Lex Oppia* was proposed by the tribune Gaius Oppius under the consulship of Quintus Fabius and Tiberius Sempronius, in the middle of the second Punic War. It is clear from the excerpt by Livy that the two plebeian tribunes, Marcus Fundanius and Lucius Valerius, would have been willing to abrogate this law. The reason for this was obvious, as it enacted that no woman should possess more than half an ounce of gold, nor wear a dress of different colours (*vestimentum versicolor*), nor ride in a carriage (*iunctum vehiculum*) in the city or in any town, or within a certain radius of it, unless on account of public sacrifices.[16] This law was repealed twenty years afterwards, mainly because as the war passed, the question was raised whether it would be better to do away with this law, since the circumstances had changed already. Basically two factions arouse, one arguing that the repeal of this law would be a mistake, as modesty (*pudor*) is a virtuous act, which used to be characteristic to women as well.[17] On the other hand, the faction for the repeal of the law emphasised that there are other places than Rome where ladies also wore ornaments.[18] Moreover, the leader of this second faction, Lucius Valerius also points out the difference between men and women, as the former are allowed to wear purple on their garments (*purpura vir utemur*).[19] As for their technical arguments, Cato in defence of the law referred mainly to the *exemplum maiorum*, which happens to be the primary reason why the ancestors passed no such law before, as there was no extravagance to be restrained.[20] The motive for following the *exemplum maiorum* is that it guarantees the common welfare of the people, the benefit of *res publica*. In contrast to these arguments, Valerius put stress on the existence of two different kinds of laws: he acknowledges that from laws passed as permanent institutions due to their enduring benefit, none should be repealed (*perpetuae utilitatis causa in aeternum latae sunt, nullam abrogari debere fateor*).[21] Yet, there are laws demanded by the community itself in cases of crisis, and which are subject to change as conditions themselves change (*temporibus ipsis mutabiles esse*).[22] Consequently, laws passed in time of peace are frequently annulled by war, and vice versa: those passed in times of war are often repealed as peace returns (*quae in pace lata sunt, plerumque bellum abrogat; quae in bello, pax*).[23] He compares this situation to ways of handling of a ship: while some means are useful in fair weather, there are others which are deemed applicable in a storm. The most important conclusion by Valerius is claiming that these two kinds of laws are so distinguished by nature (*haec cum ita natura distincta sint*).[24] The consequences of these arguments and counter-arguments was that all people voted against the law, thus it was repealed twenty years after it had been passed.[25]

3.2 Lex Publicia

This law is briefly mentioned by Macrobius as he gives a detailed account on the origins of *Saturnalia*, the festival of light honouring the deity Saturn. During this festival a strong

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[13] Sometimes it is *lex Orchia* of 181 BC to be mentioned as the first *lex sumptuaria*, as this law was repealed twenty years afterwards. Cf. Liv. 34, 8: "*Nulla deinde dubitatio fuit quin omnes tribus legem abrogarent. viginti annis post abrogata est quam lata.*"

[14] Concerning the content of *lex Oppia* it is enough to refer only to the latest works in the rather rich secondary literature, such as e.g. AGATI MADEIRA, Eliane Maria Madeira: La lex Oppia et la condition juridique de la femme dans la Rome républicaine. *Revue Internationale des Droits de l'Antiquité* LI (2004). P. 88–92; EL BEHEIRI, Nadja: Jog és erkölcs egy korai római törvény tükrében [Law and Morals in the Reflection of an Early Roman Law]. *Jogelméleti Szemle* 2003/4 http://jesz.ajk.elte.hu/el16.html; PÉTER Orsolya: "Feminae improbissimae" A nők közszereplésének és nyilvánosság előtti fellépésének megítélése a klasszikus római jog és irodalom forrásaiban [The Assessment of Women's Public Appearance in the Sources of Classical Roman Law and Literature]. *Miskolci Jogi Szemle* 2/2008. p. 82–83.

[15] Cf. BALTRUSCH op. cit. p. 52–59.

[16] Cf. LONGO op. cit. p. 630; Flower op. cit. p. 176. Interesting as it is that she deems Livy's account on the debate prior to the repulsion of the law fictitious, without any particular evidence though.

[17] Cf. essentially Liv. 34, 2, 7–10; for the further arguments by Marcus Portius Cato cf. AGATI MADEIRA op. cit. 93-96; PÉTER op. cit. p. 83.

[18] Cf. Liv. 34, 7, 5-7.

[19] Cf. Liv. 34, 7, 2; AGATI MADEIRA op. cit. p. 97.

[20] Cf. Liv. 34, 4, 7.

[21] Cf. Liv. 34, 6, 4.

[22] Cf. Liv. 34, 6, 5.

[23] Cf. Liv. 34, 6, 6.

[24] Cf. Liv. 34, 6, 7.

[25] Cf. Liv. 34, 8. On the history and content of *lex Oppia* see also Val. Max. 9, 1, 3: "*[…] quo tempore matronae Brutorum domum ausae sunt obsidere, qui abrogationi legis Oppiae intercedere parati erant, quam feminae tolli cupiebant, quia his nec veste varii coloris uti nec auri plus semunciam habere nec iuncto vehiculo propius urbem mille passus nisi sacrificii gratia vehi permittebat. et quidem optinuerunt ut ius per continuos XX annos servatum aboleretur: non enim providerunt saeculi illius viri ad quem cultum tenderet insoliti coetus pertinax studium aut quo se usque effusura esset legum victrix audacia […]*".

symbolism of candles or wax torches was used, on which the author remarks the following decree.

> Macrob. Sat. 1, 7, 33
> *Illud quoque in litteris invenio, quod, cum multi occasione Saturnaliorum per avaritiam a clientibus ambitiose munera exigerent idque onus tenuiores gravaret, Publicius tribunus plebi tulit, non nisi cerei ditioribus missitarentur.*

This law is sometimes referred to as *lex Publicia de cereis* of 209 Bc.[26] Macrobius here alludes to the works of other authors who stated that giving wax torches to one another was an ancient custom, but it constituted a rather hard burden on *clientes*, therefore a plebeian tribune prescribed that such an act was only obligatory to wealthy citizens.[27]

3.3 Lex Orchia

It was proposed by the tribune Gaius Orchius in the third year after the censorship of Cato 181 Bc. [28]

> Macrob. Sat. 3, 17, 1–3
> *(1) Longum fiat, si enumerare velim quot instrumenta gulae inter illos vel ingenio excogitata sint vel studio confecta. Et hae nimirum causae fuerunt propter quas tot numero leges de coenis et sumptibus ad populum ferebantur, et imperari coepit, ut patentibus ianuis pransitaretur et coenitaretur, sic oculis civium testibus factis luxuriae modus fieret. (2) Prima autem omnium de coenis lex ad populum Orchia pervenit, quam tulit C. Orchius tribunus plebi de senatus sententia tertio anno quam Cato censor fuerat. Cuius verba, quia sunt prolixa, praetereo: summa autem eius praescribebat numerum convivarum. (3) Et haec est lex Orchia de qua Cato mox orationibus suis vociferabatur, quod plures quam praescripto eius cavebatur ad coenam vocarentur.*

According to its regulations, the number of guests to be present at entertainments was strictly limited. When attempts were afterwards made to repeal the law, Cato himself offered the strongest opposition, and delivered a speech in defence of the law – his deed is referred to by Macrobius in his work *Saturnalia*.

3.4 Lex Fannia

This law was proposed by the consul Gaius Fannius in 161 BC, limiting the sums to be spent on certain events.[29]

> Gell. 2, 24, 3-6.
> *(3) Sed post id senatus consultum lex Fannia lata est, quae ludis Romanis, item ludis plebeis et Saturnalibus et aliis quibusdam diebus, in singulos dies centenos aeris insumi concessit decemque aliis diebus in singulis mensibus tricenos, ceteris autem diebus omnibus denos. (4) Hanc Lucilius poeta legem significat, cum dicit: Fanni centussis misellus.(5) In quo erraverunt quidam commentariorum in Lucilium scriptores, quod putaverunt Fannia lege perpetuos in omne dierum genus centenos aeris statutos. (6) Centum enim aeris Fannius constituit, sicuti supra dixi, festis quibusdam diebus eosque ipsos dies nominavit, aliorum autem dierum omnium in singulos dies sumptum inclusit intra aeris alias tricenos, alias denos.*

This law of Fannius enacted that the amount of money spent on entertainments could not exceed the amount of 100 *as*. In addition to this monetary restriction, the law enumerated certain festivals, such as Roman and plebeian games, *Saturnalia*, to which this former limit of 100 *as* applied, from where it was called *centussis* (*Fanni centussis misellus*; the paltry hundred pence of Fannius) by the poet Lucilius. Also it designated ten other days in each month when not more than 30 as could be spent. It was otherwise decreed that on all other days not more than 10 as should be expended.[30]

It is interesting that Gellius remarks in his account on *lex Fannia* that some commentators on Lucilius have been mistaken in thinking that Fannius' law authorized a regular expenditure of a hundred asses on every kind of day, while according to the actual enactment Fannius authorized one hundred asses on holidays expressly named. Regarding all other days he limited the daily outlay to thirty asses for some days and to ten for others.

> Plin. N. H. 10, 71, 139
> *Gallinas saginare Deliaci coepere, unde pestis exorta opimas aves et suopte corpore unctas devorandi. hoc primum antiquis cenarum interdictis exceptum invenio iam lege Gai Fanni consulis undecim annis ante tertium Punicum bellum, ne quid volucre poneretur praeter unam gallinam quae non esset altilis, quod deinde caput translatum per omnes leges ambulavit.*

It is also worth examining a passage by Pliny the Elder of the 1st century AD from his "model-encyclopaedia" entitled *Naturalis Historia*, which is widely considered as the first work purporting to cover virtually all knowledge available in his times. As he reports, the people of Delos were the first to cram poultry, so the "abominable mania" for devouring fattened birds, larded with the grease of their own bodies originated from them. In comparison, the author adds that it was the law of consul Gaius Fannius; an ancient sumptuary regulation on banquets, prohibiting these posh events to decree that no bird could be fattened or should be served at table beyond a single pullet. He also remarks that this law was enacted eleven years before the Third Punic War.

3.5 Lex Didia

Passed in 143 BC, this law extended the regulations of *lex Fannia* to the totality of what we call the Italian peninsula today. In addition, it enacted that everybody violating the regulations of this enactment should fall under the penalties of the

[26] Cf. BALTRUSCH op. cit. p. 61–63.
[27] Cf. LONGO op. cit. p. 630; PETZ op. cit. s. v. "lex Publicia"; BALTRUSCH op. cit. p. 77–81.
[28] Rosivach dates this law 182 BC, and claims that this was the first sumptuary law, which statement is obviously contrary to the primary sources. Cf. ROSIVACH op. cit. p. 3.
[29] A detailed analyses is available by ROSIVACH op. cit. p. 4 sq. and especially p. 6.
[30] Cf. BALTRUSCH op. cit. p. 81–85.

law: i.e. not only those who gave entertainments exceeding the limit of expenses prescribed by the law, but also those present at such entertainments should be deemed liable.[31]

3.6 Lex Licinia

This law brought forward by Publius Licinius Crassus presumably during his praetorship in 103 BC, roughly agreed in its primary provisions with *lex Fannia*.

> Gell. 2, 24, 7.
> *Lex deinde Licinia rogata est, quae cum certis diebus, sicuti Fannia, centenos acris inpendi permisisset, nuptiis ducenos indulsit ceterisque diebus statuit aeris tricenos; cum et carnis autem et salsamenti certa pondera in singulos dies constituisset, quidquid esset tamen e terra, vite, arbore, promisce atque indefinite largita est.*

According to Gellius' account, this law allowed the outlay of 100 *as* on designated days, just like *lex Fannia* did. Also, the former conceded 200 *as* for weddings and set a limit of 30 for other days. This enactment also named a fixed daily weight of dried and salted meat, as well as the indiscriminate (*promisce*) and unlimited (*indefinite*) use of the profits of earth, vine and orchard.[32]

3.7 Lex Cornelia

A law of the dictator Lucius Cornelius Sulla 81 BC was enacted on account of the neglect of *leges Fannia* and *Licinia*. Similar to these latter laws, the Sullan law regulated the expenses of entertainments and restrained funeral extravagance already forbidden even in the Law of the Twelve Tables, yet often forgotten. It is highly likely that the very same law put a limit to how much might be spent on monuments.[33]

> Gell. 2, 24, 11
> *Postea L. Sulla dictator, cum legibus istis situ atque senio oblitteratis plerique in patrimoniis amplis helluarentur et familiam pecuniamque suam prandiorum conviviorumque gurgitibus proluissent, legem ad populum tulit, qua cautum est, ut Kalendis, Idibus, Nonis diebusque ludorum et feriis quibusdam sollemnibus sestertios trecenos in cenam insumere ius potestasque esset" ceteris autem diebus omnibus non amplius tricenos.*

A brief excerpt by Gellius first gives us the reason why Sulla came forward to bring forth such a strict piece of legislation. As the author points it out artistically, *leges Fannia* and *Licinia* got gradually forgotten – they almost fell into oblivion by time (*senio*). The consequence of all this was that, with the lapse of time, whole family fortunes (*familia pecuniaque*) were spent on dinners and banquets, *prandium* and *convivium* respectively. In response to such practice Sulla proposed a law providing that on the *Kalendae* (that is the first day in a month), *Idus* (the middle of a month) and *Nona* (which happened to be the fifth, or in some occasions the seventh day in a month), as well as on days of games and on certain regular festivals, three hundred sesterces should be spent on a dinner. In contrast to these exceptions, on all other days a sum not exceeding thirty sesterces was allowed.[34]

It is highly interesting, however, how Plutarch pillories Sulla in his "Parallel Lives" stating that when his wife, Metalla fell fatally ill, he sent her a letter of divorce and ordered her to be brought to another house while she was still alive. Plutarch adds maliciously that in this the dictator had observed the law meticulously – merely out of superstition. Still, he did not think twice to transgress the law on the limitation of funeral expense introduced by himself, and spared no outlays. In addition, he did the same when it came to banquet costs, where extravagance also prevailed.[35]

3.8 Lex Aemilia

Proposed by the consul Aemilius Lepidus in 115 BC[36], this law is peculiar amongst *sumptuariae leges* in a sense that it did not try to limit the expenses of entertainments, but it was aiming to regulate the kind and the quantity of food to be used and served on such occasions.[37]

3.9 Lex Antia

It is a law of uncertain date, and it is worth mentioning amongst *leges sumptuariae* because it was aiming to restrict *ambitus*, in other words it decreed (besides limiting the expenses of entertainments) that no actual magistrate or magistrate elect

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[31] Cf. Macrob. Sat. 3, 17, 6: *Fanniam legem post annos decem et octo lex Didia consecuta est. Eius ferundae duplex fuit causa: prima et potissima, ut universa Italia, non sola urbs, lege sumptuaria teneretur, Italicis existimantibus Fanniam legem non in se sed in solos urbanos cives esse conscriptam: deinde ut non soli qui prandia coenasve maiore sumptu fecissent, sed etiam qui ad ea vocitati essent atque omnino interfuissent, poenis legis tenerentur*. See also BALTRUSCH op. cit. p. 85–86.

[32] Cf. BALTRUSCH op. cit. p. 88–93.

[33] Cf. Cic. Ad Att. 12, 35–36: *(35) Ante quam a te proxime discessi, numquam mihi venit in mentem, quo plus insumptum in monimentum esset quam nescio quid quod lege conceditur, tantundem populo dandum esse. (36) Fanum fieri volo neque hoc mihi eripi potest. sepulcri similitudinem effugere non tam propter poenam legis studeo quam ut maxime adsequar* ἀποθέωσιν.

[34] On the content of this law cf. ARANGIO-RUIZ, Vincenzo: *Storia del diritto romano*. Jovene, Napoli, 1985[7]. p. 198. See also BALTRUSCH op. cit. p. 93–96.

[35] Cf. on this topic Plut. Sull. 35, 2–3: [2] διὰ μέσου δὲ τῆς θοίνης πολυημέρου γενομένης ἀπέθνησκεν ἡ Μετέλλα νόσῳ: καὶ τῶν ἱερέων τὸν Σύλλαν οὐκ ἐώντων αὐτῇ προσελθεῖν οὐδὲ τήν οἰκίαν τῷ κήδει μιανθῆναι, γραψάμενος διάλυσιν τοῦ γάμου πρὸς αὐτὴν ὁ Σύλλας ἔτι ζῶσαν ἐκέλευσεν εἰς ἑτέραν οἰκίαν μετακομισθῆναι. καὶ τοῦτο μὲν ἀκριβῶς τὸ νόμιμον ὑπὸ δεισιδαιμονίας ἐτήρησε: τὸν δὲ τῆς ταφῆς ὁρίζοντα τήν δαπάνην νόμον αὐτὸς εἰσενηνοχὼς παρέβη, μηδενὸς ἀναλώματος φεισάμενος. [3] παρέβαινε δὲ καὶ τὰ περὶ τῆς εὐτελείας τῶν δείπνων ὑπ᾽ αὐτοῦ τεταγμένα, πότοις καὶ συνδείπνοις τρυφὰς καὶ βωμολοχίας ἔχουσι παρηγορῶν τὸ πένθος.

[36] As for the actual date of this law, some sources allude that this piece of legislation was brought forward by Aemilius Scaurus consul, from which the year 115 BC seems obvious. Cf. Plin. N. H. 10, 71, 139: *Saurices et ipsos hieme condi auctor est Nigidius, sicut glires, quos censoriae leges princepsque M. Scaurus in consulatu non alio modo cenis ademere quam conchylia aut ex alio orbe convectas aves*. Similarly see Aurelius Victor De Vir. 3, 72: *Consul legem de sumptibus et libertinorum suffragiis tulit*.

[37] Cf. Gell. 2, 24, 12: *Praeter has leges Aemiliam quoque legem invenimus, qua lege non sumptus cenarum, sed ciborum genus et modus praefinitus est*. See also PETZ op. cit. s. v. "lex Aemilia". It is interesting though that Longo doesn't deem this law to be mentioned amongst leges sumptuariae; cf. LONGO op. cit. p. 630. See also BALTRUSCH op. cit. p. 86–88.

should dine abroad anywhere else, except at the houses of certain persons. This law, however, was little observed, as Gellius notes it.[38]

3.10 Leges Iuliae sumptuariae

Under such name, two laws were passed on the same topic; one by Iulius Casar, supposedly in 46 BC, the other by his adopted son, Augustus, in the year of 18 Bc. [39]

3.10.1 Lex Iulia sumptuaria Caesaris

This law was proposed Gaius Julius Caesar during his dictatorship. The main purpose of this law was to re-enforce the application of all former sumptuary laws pertaining to entertainments, as almost all had fallen into disuse.[40]

> Dion Cass. 43, 25, 2
> […] καὶ τὰ ἀναλώματα τῶν τι ἐχόντων ἐπὶ πλεῖστον ὑπ᾽ ἀσωτίας ἐξηγμένα οὐκ ἐν νόμῳ μόνον ἐμετρίασεν, ἀλλὰ καὶ τῷ ἔργῳ ἰσχυρῶς ἐν φυλακῇ ἐποιήσατο.

This text gives a precise account on Ceasar's regulations on expenditures (ἀναλώματα), which had grown to an enormous extent because of people's prodigality (ἀσωτία). He not only regulated these by law (οὐκ ἐν νόμῳ μόνον ἐμετρίασεν), but also practically checked them by several severe measures (ἀλλὰ καὶ τῷ ἔργῳ ἰσχυρῶς ἐν φυλακῇ ἐποιήσατο).

Despite all his stern actions adopted on this issue, it should also be remembered though that his enactments were violated when he was absent from Rome.[41]

How strict these provisions were, suffice it to cite a passage by Suetonius.

> Suet. Iul. 43
> *Lecticarum usum, item conchyliatae vestis et margaritarum nisi certis personis et aetatibus perque certos dies ademit. Legem praecipue sumptuariam exercuit dispositis circa macellum custodibus, qui obsonia contra vetitum proposita retinerent deportarentque ad se, submissis nonnumquam lictoribus atque militibus, qui, si qua custodes fefellissent, iam adposita e triclinio auferrent.*

According to Suetonius, Caesar forbade the use of litters and wearing scarlet robes or pearls to all, except those of a designated position and age, and on set days. He specifically enforced the laws against extravagant expenditures, setting watchmen in various parts of the market, who were to seize and bring to him all consumable products transfer and exchange of which were forbidden by the law. Also, he sometimes sent his *lictores* and soldiers to banquets to take from the dining tables any items, even after being served.[42]

3.10.2 Lex Iulia sumptuaria Augustana

This Augustan *lex sumptuaria* was part of a legislative package the aim of which was to revise and reinstate certain formerly abolished laws of the Republic, for example that on extravagance, on adultery and chastity, on bribery, as reported by Suetonius.[43]

> Sueton. Octav. 34
> *Leges retractavit et quasdam ex integro sanxit, ut sumptuariam et de adulteriis et de pudicitia, de ambitu, de maritandis ordinibus.*

As for the actual content of his *lex sumptuaria* Gellius gives us plenty of details.

> Gell. 2, 24, 14
> *Postrema lex Iulia ad populum pervenit Caesare Augusto imperante, qua profestis quidem diebus ducenti finiuntur, Kalendis, Idibus, Nonis et aliis quibusdam festis trecenti, nuptiis autem et repotiis sestertii mille.*

This law was passed during the principate of Caesar Augustus: it determined the ceiling of festive outlays, and decreed the limit to be 200 *sestercii* on working days. Similar to the legislation by Sulla, this amount reached 300 *sestercii* on the *Kalendae*, *Idus* and *Nona* of each month, or certain other holidays. Wedding ceremonies and the subsequent banquets were set the limit of 1000 *sestercii*.[44]

3.11 Further enactments restricting expenses

The first issue to be dealt with is the question whether or not some regulations of the Law of the Twelve Tables could be considered *leges sumptuariae*. The way we see it, answering the former question positively is a hasty, or even summary response to this problem. Suffice it to refer to the fact that almost all *leges sumptuariae* exclusively or mostly cover the topic of leading a luxurious life; regardless to the fact what segment of everyday life it may have been. Still, it leaves the least doubt that even the Law of the Twelve Tables contained several provisions the objective or the accidental result of which was to put a check on luxury of any sort. However, a remark by Kaser is definitely worth mentioning, namely that these provisions were for the most part an uncommon mixture of sacral rules and regulations of *ius publicum* in an age when

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[38] Gell. 2, 24, 13: *Lex deinde Antia praeter sumptum acris id etiam sanxit, ut qui magistratus esset magistratumve capturus esset, ne quo ad cenam, nisi ad certas personas, itaret*. Cf. BALTRUSCH op. cit. p. 96–98.

[39] The date of this law is partly debated in secondary literature. On this cf. ROTONDI op. cit. p. 99; ARANGIO-RUIZ op. cit. p. 236.

[40] Cf. BALTRUSCH op. cit. p. 99–100.

[41] Cf. Cic. ad Att. 13, 7: "*[…] hoc scribere, sibi certum esse Romae manere causamque eam ascribere quae erat in epistula nostra, ne se absente leges suae neglegerentur sicut esset neglecta sumptuaria (est εὔλογον idque eram suspicatus sed istis mos gerendus est, nisi placet hanc ipsam sententiam nos persequi)*".

[42] With regard to its content, an affirmative report is found in SCHERILLO, Gaetano – DELL'ORO, Aldo: *Manuale di storia del diritto romano*. Milano, 1987 (ristampa). p. 293. Cicero equally mentions this law in two instances in one of his other works (Cic. ad Fam. 7, 26, 2 and 9, 15, 4). The first excerpt is all the more important, because the author describes the law with a Greek term referring to its plain and simple attitude to everyday life (cf. Cic ad Fam. 7, 26, 2: "*[…] lex sumptuaria quae videtur* λιτότητα *[…]*".

[43] Cf. BALTRUSCH op. cit. p. 100–101.

[44] The content is supported by ARANGIO-RUIZ (1985[7]) op. cit. p. 236.

these two segments of norms were far from being easy to be separated.[45]

The second question raised with regard to *leges sumptuariae* is whether or not laws aiming to impede large gifts (especially between spouses, such as *lex Cincia*), or those primarily related to hereditary issues (*lex Voconia*, *lex Furia testamentaria*, etc.) should be taken into consideration when it comes to browsing the so-called catalogue of sumptuary laws.[46] Having considered arguments and counter-arguments on this topic, it should be asserted that since the main profile of the aforesaid laws is not the regulation of the extent to which luxury is allowed in Roman society, thus these laws are not examined at the moment, despite all their efforts and merits in putting a check to sumptuary lifestyle. The same approach applies to laws the purpose of which was to abrogate a particular *lex sumptuaria*. Therefore *lex Valeria Fundania* and *lex Duronia*, aiming to do away with all provisions of *lex Oppia* and *lex Licinia* respectively, are not dealt with, either.[47]

In addition to the laws scrutinised above, there are two further enactments to be mentioned despite the fact that they are not considered as *leges*. One of them is *rogatio Pompeia sumptuaria* of 55 BC the content of which is obscure; the other is *rogatio Scribonia* of uncertain date which is said to have regulated issues related to crews during travels.[48]

Beside these legislative attempts some imperial decrees also deserve to be mentioned. It could still be debate whether these count amongst *leges sumptuariae*, though it is beyond doubt that these pieces of legislation are never referred to as *leges*. Emperors Tiberius and Nero were those who set certain regulations restraining luxury. In his work on the Life of the Twelve Ceasars, Suetonius mentions that Emperor Tiberius also attempted to check different sorts of extravagance.

Suet. Tib. 34

Ludorum ac munerum impensas corripuit mercedibus scaenicorum recisis paribusque gladiatorum ad certum numerum redactis. Corinthiorum vasorum pretia in immensum exarsisse tresque mullos triginta milibus nummum venisse graviter conquestus, adhibendum supellectili modum censuit annonamque macelli senatus arbitratu quotannis temperandam, dato aedilibus negotio popinas ganeasque usque eo inhibendi, ut ne opera quidem pistoria proponi venalia sinerent.

Suetonius first reports that the Emperor reduced the costs of games and theatrical shows via decreasing the payment of actors, as well as limiting the pairs of gladiators to a certain number. According to the author, he also expressed his complaints about the rises in the prices of certain items, such as Corinthian bronze and mullets, and he equally proposed that a price restriction should be introduced to household furniture. In terms of jurisdiction pertaining to these affairs, he ordered that market prices should be annually regulated at the senate's discretion, and *aediles* got responsible for regulating the sale of pastry in taverns and inns.

Dion Cass. 57, 15, 1-2

τότε μὲν ταῦτ᾽ ἐγένετο, Στατιλίου δὲ Ταύρου μετὰ Λουκίου Λίβωνος ὑπατεύσαντος ὁ Τιβέριος ἀπεῖπε μὲν ἐσθῆτι σηρικῇ μηδένα ἄνδρα χρῆσθαι, ἀπεῖπε δὲ καὶ χρυσῷ σκεύει μηδένα πλὴν πρὸς. [2] τὰ ἱερὰ νομίζειν. ἐπεί τε διηπόρησάν τινες εἰ καὶ τὰ ἀργυρᾶ τὰ χρυσοῦν τι ἔμβλημα ἔχοντα ἀπηγορευμένον σφίσιν εἴη κεκτῆσθαι, βουληθεὶς καὶ περὶ τούτου τι δόγμα ποιῆσαι, ἐκώλυσεν ἐς αὐτὸ τὸ ὄνομα τὸ τοῦ ἐμβλήματος ὡς καὶ Ἑλληνικὸν ἐμβληθῆναι, καίτοι μὴ ἔχων ὅπως ἐπιχωρίως.

Another famous author commenting on Tiberius' sumptuary legislation was Cassius Dio who emphasises that the Emperor forbade any man to wear clothing made of silk, and he also banned the use of golden vessels except for sacred ceremonies. As an intriguing anecdote, Cassius Dio remarks that pursuant to such rules some became eager to find out whether they were also forbidden to possess silver vessels with a golden inlay. Consequently, the Emperor wanted to issue an imperial decree on this topic, still he was reluctant to allow the application of the term "*emblema*", because in this case the Greek word ἔμβλημα should have been inserted in the text of the imperial legislation, and the Emperor failed to find any native Latin word for inlay.

Some regulations concerning excessive costs were also made by Emperor Nero, as again Suetonius tell us

Suet. Ner. 16, 2

„[…] adhibitus sumptibus modus; publicae cenae ad sportulas redactae; interdictum ne quid in popinis cocti praeter legumina aut holera veniret, cum antea nullum non obsonii genus proponeretur […]"

As it is briefly reported in the text, a limit was introduced to expenditures, and public banquets were confined to a distribution of food. In addition, the sale of any kind of cooked meals in the taverns was restricted to pulse and vegetables, while previously all sorts of food were free to be sold.

4. Conclusions

The aim of this paper was to collect, enumerate and analyse the actual content of those laws which are for the most part referred to as sumptuary laws. Prior to this analysis, a brief evaluation of terminology was important, so that the presentation of a Roman attitude towards luxury could be established. On the basis of the results of this analysis, both the philosophical, as well as the dogmatic background of these measures should be explored, as logical next steps of a deeper scrutiny.

Leges sumptuariae are doubtlessly intriguing and captivating remnants of ancient Roman history. It can hardly be debated

[45] KASER, Max: *Das römische Privatrecht I.* Handbuch der Altertumswissenschaft X. 3. 3. 1-2. C. H. Beck'sche Verlagsbuchhandlung, München, 1971[2]. p. 125.
[46] On this see also BALTRUSCH op. cit. p. 41.
[47] With this regard cf. LONGO op. cit. p. 630.
[48] On this see also ROTONDI op. cit. 98-99; LONGO op. cit. p. 630.

that these enactments are all good examples of a particular social legislation during the republic era, and to a lesser extent in imperial Rome. As for the republican legislation, all laws are worthy assets to the constitutional development of the City.[49] They all serve as specific restraints and restrictions on excessive luxury of citizen –even of state authorities and officials, sometimes. Control inflicted upon civilians, specifically expenses on wedding ceremonies and the following banquets, as well as those on funerals were put to confinement; as Cicero asserts:

> Cic. Sen. 42
> *Impedit enim consilium voluptas, rationi inimica est, mentis ut ita dicam praestringit oculos, nec habet ullum cum virtute commercium.*

As the author points it out in this text, pleasure hinders deliberation, it is contrary to, or even hostile towards *ratio*, which could first and foremost be considered as the order of things around us whence reason stems. It also blindfolds our mental eyes and has no link to virtue. In other words, *leges sumptuariae* as legislation imposing restrictions on ceremonies accompanied by joy and grief, i.e. emotions of considerable significance and impact, represent lucidity and reason. True as it may be that these laws as representatives of a certain financial sanity might be regarded as means of transition between administrative regulations and private.[50] Still, such a concept of *leges sumptuariae* which deems these laws as mere restrictions on private property remains to be subject of further examination.

[49] With a similar approach, see also LONGO op. cit. p. 630.
[50] Correspondingly cf. ROTONDI op. cit. p. 73

Morning-gift, a Special Marital Legal Instrument

*Ibolya Katalin Koncz**

Abstract

The morning-gift as an instrument must have been an integral part of the legal system of the era for decades or centuries. In the history of Hungarian law, the instrument of morning-gift existed until the time of the 19th century civil law codification efforts; even during the discussions on the civil law bill debates, its basic form was intended to be eliminated, whereas written morning-gift was wished to be kept.

The first specific sum was determined in Werbőczy's work. In periods before Werbőczy, the extent of this legal instrument was not provided; it was the social status and properties of the husband that were considered.

However, in the second half of the 19th century, it was pointed out that whereas specific sums were favourable in former times, as the given sum was the amount payable to the wife as a minimum, the inflation caused the sums specified in the legislation to be ridiculously low.

***Keywords**: Morning-gift; Marital; civil law; separate legal instrument; lawful morning-gifts; written morning-gift; marital property law; Webőczy; Tripartitum; Szladits; Benő Zsögöd.*

Morning-gift is a legal instrument system in Hungarian civil law originating from Hungarian common law, stipulated in legal rights, which existed for several centuries. It was already specified as a separate legal instrument in the Golden Bull of 1222.[1] In case we accept the point of view that the Golden Bull, among other issues, ensured the written confirmation and royal sanction of already operating legal instruments and achieved privileges, it is also accepted that morning-gift as an instrument must have been an integral part of the legal system of the era for decades or centuries. This assumption is also verified by the contents of the Tripartitum of Werbőczy, as, in the introductory section of his work, the jurist himself expressed his intension to collect common laws already applied in practice.[2] In the history of Hungarian law, the instrument of morning-gift existed until the time of the 19th century civil law codification efforts; even during the discussions on the civil law bill debates, its basic form was intended to be eliminated, whereas written morning-gift was wished to be kept.[3]

Regarding lawful morning-gifts, the first authentic source, where the term is actually defined, is the Tripartitum of Werbőczy, in which the following can be read: A morning-gift "…is nothing but the sum given to a wife from the husband's possessions for the loss of her virginity and the consummation of marriage."[4] On the other hand, Werbőczy pointed out that "We need to know that the morning-gift, according to Hungarian old and lawfully accepted customs, is a gift given to a woman legally married, and it is to be received by the woman from the husband's estates and property rights according to her status in exchange of the fulfilment of her marital obligations."[5]

In the era of that time, the effectuation of marriage was not considered completed upon expressing the will to marry and upon the occurrence of the wedding ceremony; a required condition specified was the commencement of the marital community, i.e. the consummation of marriage. That is why preconditions for the re-occurrence of morning-gift were "matrimonii comsummatio" and marital fidelity. These two pre-conditions for the morning-gift continued to exist for centuries, although different legislators placed emphases on one or the other as more significant elements in different times.

Out of the 19th century legal practitioners, Acsády stated that a morning-gift "…is payable by the heirs of a husband to his lawfully wedded wife, in case she stayed faithful throughout,

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1 Section XII: "Noble women, upon their husband's death or lawful killing or death during a duel or by any other means whatsoever, shall not be bereft of their morning-gifts." In: Érszegi Géza: Az Aranybulla, Helikon Kiadó, Budapest, 1990; The Golden Bull of 1222 modernised the legal system of the late Árpád Era, and also established the foundations for a feudal society, regulating the respective rights and obligations.

2 "…in order that I could collect and integrate the statutes, legislations and laws as well as customs of the country, which are currently rather dispersed, incomplete, confusing and incongruous, and to offer it to you, Your Majesty, to release it for the public good, with my utmost deference." In: Trip. Bev.; Csiky Kálmán: Webőczy István és Hármaskönyve Franklin Társulat, Budapest, 1899., pp. 6.

3 An example for this issue is Pesti Napló (newspaper), 17 May 1898. Vol. 136, pp. 6.

4 Trip. Part I, Section 93.

5 Trip. Part I, Section 93, Article 2.

from the assets of the deceased husband …"[6] On the other hand, according to Schaurek, "A morning-gift, as it is known, is the reward of a spouse for fulfilling marital liabilities." "…above all, an instrument of ethical significance. It is the rewarding, a kind of a recompense for the wife, who, through her matrimonial attraction, willingly fulfilled one of the most significant obligations of marriage: matrimonii consummation."[7] Regarding the specification of the definition, Károly Szladits also emphasized the importance of marital fidelity instead of the consummation of marriage,[8] although "debitum matrimonii" serves as the basis for the occurrence of lawful morning-gifts, which cease upon the infidelity of the wife.[9] A lawful morning-gift is a claim of a wife for a sum of money as stipulated by law in exchange of her non-breaching of proper marital conduct throughout the term of marriage. A claim for a lawfully payable morning-gift occurs upon the conclusion of marriage, and becomes duly payable upon the termination of marriage.[10]

A morning-gift is a reward, which is payable to a woman from the assets of the husband, upon the termination of marriage, for the woman's fulfilment of marital obligations.[11]

The definition for the term of written morning-gift was summarised by Almási, whose standpoint was also shared by Knorr. As a consideration for proper marital conduct, it was a contribution of assets promised to be given by one spouse or a third party to the other spouse according to a respective contract.[12] It is known that even Planum Tabulare stated that "the lawful morning-gift is superseded by written morning-gift, thus the widow cannot claim both, as the provided assets of a man supersedes the provisions of the law."[13] According to Szladits, the "…husband may undertake contractual obligations with respect to his wife; a written morning-gift annuls the lower-ranked lawful morning-gift.[14] However, in case the written morning-gift clause was void or ineffective due to any elements of the respective contract, the lawful morning-gift became effective again.[15] Consequently, these two kinds of morning-gifts only had the provision not to exist simultaneously, in parallel, therefore could not be effected at the same time.[16] Lallossevits called the written morning-gift as contracted morning-gift[17], and defined the commencement of its effectiveness as of the consummation of marriage.[18]

Although in the 16th century, Werbőczy did not know, or even if he knew, did not put down the respective regulations in the Tripartitum, the Planum Tabulare compiled in the 18th century upon the order of Maria Theresa described counter-morning-gift as a practically applied legal instrument.[19]

It was also a well-known instrument in the first half of the 19th century, as Acsády wrote about in in his book intended to be used by interns, although he did not call it counter-morning-gift. "A lawful morning-gift is only payable to wives …, but the written one may be payable to the husband as well."[20] Schaurek accepted that point of view according to which a morning-gift should only be payable to women. He supported his standpoint by a provision included in Werbőczy's Tripartitum.[21] Also, he accepted the view of Frank as well, who, in his work[22], discussed the morning-gift payable to the husband not as a morning-gift, but as a separate marital property law instrument. Despite the fact that Schaurek acknowledged that nothing is mentioned on written morning-gifts in Werbőczy's Tripartitum, although it did exist in practice in the 16th century, he still ponted out that dos sripta "it is the straight and logical enhancement, improvement of the lawful morning-gift, i.e. it is not contrary to but rather supplemental to the limitedness and deficiencies of the legal morning-gift[23]. As he expressed "it is a perverse and distorted notion that a woman should reward a man for «propter concubitum»"[24]

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6 Sándor Acsády: Magános magyar törvény kérdések- és feleletekben [Hingarian Civil Law in Questions and Answers] Pest, 1842. (hereunder: Acsády, 1842.), pp. 80.

7 Schaurek, 1917. pp. 170; Alajos Knorr: Házassági perek és eljárás a házassági perekben [Marriage-related trials and practices in marital procedures] Bp., 1899. (hereunder: Knorr, 1899.) pp. 128.

8 Károly Szladits: A magyar magánjog vázlata [A draft introduction to Hungarian civil law] Bp., 1933. (Hereunder: Szladits, 1933.), pp. 356 – "A morning-gift is a reward for the fidelity of a wife, for whom «propter deflorationem et concubitum» is payable."

9 Szladits, 1933, pp. 356.

10 Magyar magánjog [Hungarian Civil Law] Chief editor: Károly Szladits, Volume II, Antal Almási: Családi jog [Family law] Bp., 1940. (Hereunder: Almási, 1940) pp. 283.

11 Curia 5377/1906. The same term definition was accepted by Lallossevits: János Lallossevits – Márton Lányi: A magyar magánjog kézikönyve [A handbook on Hungarian civil law] Bp., 1910. (Hereunder: Lallossevits-Lányi, 1910.), pp. 96; as well as by Knorr: Knorr, 1899. pp. 128.

12 Almási, 1940, pp. 285; Knorr, 1899. pp. 129.

13 Planum Tabulare Dec. 9. ad acquis. mobil. Cited by: Staud, 1913., pp. 66.

14 Szladits, 1933, pp. 356; This standpoint was also accepted by Lallossevits. Lallossevits-Lányi, 1910., pp. 96.

15 Almási, 1940, pp. 285.

16 The Curia took a stand through its Resolution No. 5952/1894.

17 Lallossevits-Lányi, 1910, pp. 96.

18 Lallossevits-Lányi, 1910, pp. 97.

19 "…however, in case the bride undertakes to pay a counter-morning-gift (contrados) to the bridegroom in a prenuptial agreement, and after a violation-free marriage, the bride dies before the husband, without an heir … the husband is also entitled to receive the counter-morning-gift, further to the parties specified in the last will and testimony, as per the respective contract." Planum Tabulare Dec. 3. ad obt. success. Cited by: Lajos Staud: A magyar magánjog tételes jogszabályainak gyűjteménye [A collection of individual Hungarian civil law legislations] Bp., 1913. (Hereunder: Staud, 1913), pp. 66.

20 Acsády, 1842. pp. 82.

21 Schaurek, 1917. pp. 169.

22 Frank, I.r. pp. 537.

23 Schaurek, 1917. pp. 169.

24 Schaurek, 1917. pp. 170.

"The morning-gift so much stigmatised to be exclusively provided by men to women, that bereaving it from such nature of its would seriously threaten its ethical character."[25]

The instrument of contrados seemed to be acceptable to him with respect to the principle of equity, as it was the husband who took his wife beside him and provided a social status and reputation for her, and through the morning-gift, the wife could get disproportionately larger financial advantages in comparison to the husband. He also found the lawful allowances payable to a woman upon her widowhood to be disproportionately generous. Based on these aspects, his final conclusion was that he considered the practical applicability of contrados as compatible to the principles of aequitas and conjugalis paritas.[26] Nevertheless, he also pointed out that this new instrument must not and should not be called a morning-gift. According to his motivation, the reason for it is based on ethical issues and gender roles.[27] He suggested that the instrument should be called "a gift ordered to be provided to the husband upon the termination of marriage".[28]

This point of view was disregarded by the Curia by stating that "although morning-gifts are payable after the death of the party liable to pay, this liability, as a legal act regulating the property relations of spouses, does not fall into the category of measures upon death…", as, according to the practices, morning-gifts were also payable upon the cancellation of marriages as well, and thus the death-related characteristic was not possible.[29] On the other hand, Szladits found it completely natural that "A wife can also provide a counter-morning-gift for her husband."[30] A written morning-gift could also be undertaken by a woman. It is called a counter-morning-gift.[31]

Due to the fact that the instrument of the morning-gift was a property share of a husband's possessions to be duly provided to the wife lawfully married to him, the subject of the instrument presumed a special range of persons, and was primarily concluded between a husband and a wife. Upon the death of the husband, it was transferred to the heirs as a heritage liability. This brings up the question who the morning-gift was payable to in case the wife died first. As early as in the Árpád Era law, it was stated that the right to claim the morning-gift was transferred to the heirs of the wife, in accordance with the rules of succession.[32] After the death of the wife, the claiming rights of her relatives – of her paternal family descendants – were regulated in the Tripartitum.[33] In the civil society era, a similar approach was characteristic with respect to lawful morning-gifts.[34] Regarding written morning-gifts, as they were based on civil law contracts, the contracting party was liable to pay, and the party to receive the payment was always the wife.[35]

In case an engaged couple concluded a contract between them on a written morning-gift, such gift could be claimed upon the conclusion of marriage of the contracting parties. Upon the death of either spouse, the written morning-gift could be claimed by the heirs of the deceased. In case a deceased woman did not have descendants or children, the counter-morning-gift was inherited by the husband under the title of legal inheritance.[36] However, applying the above principle in an analogue manner, the wife inherited the gift in parallel with the above.[37] I would like to highlight here that upon the examination of the provisions of the Tripartitum, we may notice that Werbőczy only mentioned noblemen, or more particularly, noblemen with estates with respect to the morning-gift[38]. This can lead us to the conclusion, that the instrument of lawful morning-gift did not become effective upon the marriage of non-noble parties.[39] Accordingly, there were significant differences between the social layers. In the middle of the 19th century, legislations stipulated the sum of morning-gift regarding non-noble people as well.[40]

In case of written morning-gifts, upon the nature of the instrument, there were no social class provisions with respect to the contracting parties.

In the following, upon the determination of the range of potential parties, we sought regulations on the property coverage of the morning-gift. In the Árpád Era law, the whole property of the husband warranted the extent of the morning-gift.[41] Furthermore, payments could be made in cash, tangible or intangible assets.[42] At the end of the 13th century, real estate morning-gift was a well-known practice, and actually Act 30 of 1291 was adopted to restrict this practice[43]; according to this

25 Schaurek, 1917. pp. 170.
26 Schaurek, 1917. pp. 171.
27 Schaurek, 1917. pp. 171.
28 Schaurek, 1917. pp. 172.
29 Curia 450/1900; Staud, 1913. pp. 70.
30 Szladits, 1933, pp.356.
31 Knorr, 1899. pp. 130; Almási, 1940, pp. 285.
32 Illés, 1900. pp. 27.
33 Trip. Part I Section 93 Article 6 Upon the death of the wife, her morning-gift can be claimed and received by the next of kin.
34 Lawful morning-gift can be claimed by the heirs to the wife deceased before the husband from the bankrupt estate of the husband. (Curia 504/1881.)
35 Schaurek, 1917. pp. 179.
36 Curia 1113/1882.
37 Schaurek, 1917. pp. 179.
38 Trip. Part I. Section 93.
39 This conclusion was drawn: Schaurek, 1917. pp. 180.
40 Act 1840:XXII, Section 85. b).
41 József Illés: A magyar házassági vagyonjog az Árpádok korában [Hungarian marital property law in the Árpád Era] Bp., 1900., (Hereunder: Illés, 1900.) pp. 21.
42 Illés, 1900., pp. 21; Schaurek, 1917., pp. 173.
43 Corpus Iuris Hungarici, Milleneum Edition (hereunder: CIH) 1291. Act XXX – relatives need to provide money as consideration for the noble estate payable as a morning-gift.

Act, heirs could pay cash to the widows in exchange of the estate received as morning-gift, thus keeping the estates together, without the need to break them up.

Werbőczy summarised the subject of the morning-gift[44] by specifying it to be primarily cash or a movable asset, yet he also emphasized that morning-gifts could be given from any kinds of assets, therefore any kind of properties could be the subject of it. Nevertheless, there was one important provision: the asset in which form the morning-gift was provided had to have real value.[45] Throughout the centuries, however, this was not applied in practice due to different economic and social developments. In the second half of the 19th century, it was the Curia that made respective resolutions, stating that a lawful morning-gift can only be given in cash, and its subject can only be a sum of money, the quantity of which was stipulated[46] by law[47] and could be claimed from any assets of the husband.[48] On the other hand, the subject of a written morning-gift could be any kind of property, i.e. money, movable or immovable assets.[49] Acsády firmly stated that it could only be settled from acquired assets.[50] However, nearly half a century later (according to court practices), it was stated to be settled primarily from acquired assets, and only if such assets were not sufficient, the respective family assets were to be used.[51]

Nevertheless, the Curia also stated that although the morning-gift as a debt-type claim was primarily debited from the acquired assets of the husband, in the case when "…the claimant inherits an acquired property exceeding the lawfully due extent of the morning-gift from the husband, she cannot claim the legal settlement of her morning-gift from the family assets of the defendant."[52] This differentiation between the acquired and the inherited properties was mainly characteristic to the avicitas practices, and it was not relevant in the second half of the 19th century, as the instrument of avicitas, and accordingly, the protection of inherited property, were irrelevant in practice.

The stipulation of the exact values could be valid only in cases of lawful morning-gifts, as written morning-gifts were established between the parties in the form of a civil law contract, therefore the respective values could be determined freely, case by case. Naturally, written morning-gifts seemed to be a sensible choice in case the value of the gift was higher than that of the lawful morning-gift.

The first specific sum was determined in Werbőczy's work. In periods before Werbőczy, the extent of this legal instrument was not provided; it was the social status and properties of the husband that were considered.[53] In Tripartitum, it was also stipulated that upon the determination of the extent of the morning-gift, the rank, titles, positions as well as the property and asset magnitude of the husband had to be taken into consideration, and, accordingly, the wife of a wealthier husband with higher ranks and positions had to receive a higher payment than that of a husband with less fortune.[54] In the

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[44] SECTION 95 As a morning-gift should be settled by cash or easily marketable items, what are the easily marketable items?
The payment of morning-gift should be settled partly by cash and by movable and easily marketable items, but the prices should be determined according to their current real values.
Article 1 However, the estimated prices of mended clothes, rifles, lame horses, oxen or other cattle shall not be accepted in exchange of the payment of morning-gifts.
Article 2 The movable and easily marketable items should be partly items that can be easily sold at common markets, such as sheep, cattle, horses, goals, cows, calves and pigs, that can be transported from one place to another easily.
SECTION 96 Wives should get a whole morning-gift from the first husband and half of it from the second husband, how is the morning-gift settled?
Furthermore, it must be noted that a woman is entitled to receive a complete morning-gift from her first husband, in loss of her existing virginity at the time of the marriage; from the second husband, whom she married already in loss of her virginity, only half of such gift is to be provided, from the third husband, only a quarter of such gift, and from the fourth husband only one-eighth of the gift is to be given.
Article 1 In case a woman marries for the fifth or sixth time, her morning-gift will decrease to a very small extent.
Article 2 A morning-gift shall be paid to the wife from the estates and possessions of the husband where she resided.
Article 3 As based on paternal rights, it is not a morning-gift, but a daughter's quarter share is paid, women can only claim the morning-gifts of their mother or grandmother; in case no sufficient certificate is available, it can be claimed by law.
Section 98 Article 3 Furthermore, in case the estates and possessions of the husband, who died sooner, are so extensive and profitable that they significantly exceed the morning-gift of the wife, the person inheriting the estates can legally exclude the wife from the estates that seem to exceed the extent of the morning-gift of the wife at a court his own choice and can only provide such an extent of property rights that is rightfully provided based on the extent of the morning-gift, even if the wife takes the husband's name and title.
Section 101 Article 3 However, the rest shall be transferred, together with the property rights, to the sons or other kin and other descendants and the morning-gifts and quarters payable to daughters must be paid from this sum, in order to avoid that the descendants, who, based on their paternal rights, must ensure the proper marriage of daughters, would need to alienate their inheritances.

[45] Tripartitum, Section 95.

[46] Act 22 of 1840.

[47] Curia 3428/1888.; Márkus, 1891. Vol. II. pp. 60.

[48] Lfit. 869/1870. Dt. VI. 77.).

[49] Curia 4547/1913.; Jogutd. Közlöny Vol. VIII pp. 168; Lallossevtis-Lányi, 1910. pp. 97.

[50] Acsády, 1842. pp. 82.

[51] Lfi. 11944/1878.; "A woman married for the second time may claim her morning-gift duly payable regarding the first husband … primarily from acquired possessions. Inherited properties may only serve as settlement bases only to the extent that cannot be covered from acquired possessions." Lf. ref. No. 7127/1879); Curia 10238/1881., Curia 304/1884.; Curia 9307/1892.

[52] Curia 1153/1892 Cited by: Staud, 1913. pp. 70.

[53] Illés, 1900., pp. 23.

[54] Trip. Section. 93, Article 3.

subsequent Articles, the sum is also specified for different cases.[55] As Werbőczy specified that the entitlement of a wife to a morning-gift commences upon the conclusion of marriage, it was also natural to specify provisions on the case when a woman marries several times.[56]

The next legislation determining the sum of the morning-gift was adopted in the second half of the 19th century.[57] It was also accepted by Szladits for the determination of the sums of morning-gifts[58]. Almási also took this legislation as a basis.[59] However, in the second half of the 19th century, it was pointed out that whereas specific sums were favourable in former times, as the given sum was the amount payable to the wife as a minimum, the inflation caused the sums specified in the legislation to be ridiculously low.[60]

Throughout the civil law codification processes, Benő Zsögöd as the legislator on marital property law pointed out that lawful morning-gifts had no reason to exist, "…it has no applicability for our current circumstances", and that is why it should be cancelled from the legal system. On the other hand, he found the written morning-gifts to be still applicable; what is more, he considered it to ne "one of the safeguards of proper conduct of spouses", therefore he wished to maintain it as a "…separate instrument".[61] The legislator committee of the Hungarian Civil Code, presided by Sándor Erdély, accepted the proposal and stipulated that "…the instrument of lawful morning-gift should be excluded from the draft Civil Code; however, contractual morning-gift shall be maintained to exist and shall be regulated in the marital property right section of the draft as an individual legal instrument."[62]

This study also verifies that the legal instrument applied in the feudal society operating for centuries went through a change of role, and completely left its original function – i.e. a reward for the consummation of marriage – and took several other functions – a pledge for marital fidelity – and thus it became capable of continuing to meet the demands of the more and more civil society.

[55] Trip. Section. 93, Article 4. Because in case the husband has a baron title, the wife shall receive a hundred giras, and in case the husband was a magnate or was only a baron by name and had no entitlements, or in case he was a nobleman or high-ranking officer or had a serf estate with fifty or more serfs, the widow receives fifty giras as morning-gift, with the rate of one gira equalling four Hungarian Forints, or, according to the valid currency, four hundred denars.
Article 5 The widows of other, lower-rank noblemen should receive their morning gifts from the estates and properties of the husbands to a lower or higher extent, i.e. in ratio with the quantity of such estates, upon public estimation (not including external incomes from cultivated lands, forests, meadows and other areas and from estates).

[56] Trip. Section 96. Furthermore, it must be noted that a woman is entitled to receive a complete morning-gift from her first husband, in loss of her existing virginity at the time of the marriage; from the second husband, whom she married already in loss of her virginity, only half of such gift is to be provided, from the third husband, only a quarter of such gift, and from the fourth husband only one-eighth of the gift is to be given.
Article 1 In case a woman marries for the fifth or sixth time, her morning-gift will decrease to a very small extent.

[57] Act 1840:XXII Section 85 *b)* The lawfully payable morning-gift for a wife of a bankrupt man shall be 400 Forints for magnates, 200 Forints for noblemen and civilians, and 40 Forints for non-noblemen in a legal currency.

[58] Szladits, 1933, pp. 356.

[59] Almási, 1940, pp. 283.

[60] Márkus Dezső: A holtkézi törvények Magyarországon in: Jogtudományi Közlöny Vol 31 No. 47. 20 November 1896.

[61] Pesti Napló, 17 May 1898. Vol. 136, pp. 6.

[62] Pesti Napló 26 June 1898. Vol. 175, pp. 3.

The History of Hungarian Civil Service from the Austro-Hungarian Compromise of 1867 to the First World War

*Máté Pétervári**

Abstract

The Hungarian legislation was able to concentrate its powers on modernizing the organizational system of the state and forming the burgeouis state after the Compromise. It was at that period when an increased demand for the uniform settlement of the situation of civil servants and for the creation of „közszolgálati pragmatika" (service pragmatics) arose. As a result of the government's efforts to settle the issue several proposals were created, none of which were finally discussed by the National Assembly. In my paper I would like to demonstrate the efforts made in Hungary to create uniform regulation on civil servants at the end of the 19th century and at the beginning of the 20th century based on legal literature and National Assembly transcripts.

Keywords: *Hungary; public administration; civil service; civil servants; National Assembly; Association of civil servants; service pragmatics; pension; appointment.*

The Hungarian Revolution of 1848 and the War of Independence, which strove for independence from the Austrian Empire, failed in 1849, and subsequently the Habsburg Emperor attempted to make a territory of Austrian Empire from Hungary. This period was the neo-absolutism in Hungary, in which the Habsburg Emperor handled as an uniform state the complete empire. In 1867, the compromise was become between Austria and Hungary, which organized the legal, economic and political situations between the two countries. In Hungary after the Compromise, next to the enforcement of the legal continuity, the acts of 1848 came into effect again, which was the basis of the civil state organization. Pursuant to the Compromise act, the real union was created between the two countries. So Hungary had separate National Assembly, prime minister and government again, as well as gained full independence in handling internal affairs, except for the common cases. As a result, Hungary was ready to build civilian government, and it's important part was the establishment of the civil administration.

As a first step, the National Assembly (Hungarian Parliament) introduced the Act 4 of 1869, which is about the exercise of the judicial power.[1] The National Assembly realized the separation of powers, what was articulated by Montesqieu. This act put into practice the separation of execution and jurisdiction. This was the theoretical basis for the establishment of an independent administrative organization. The Hungarian legislation was able to concentrate its powers on the transformation of the local administration, which led to the Act 42 of 1870, which was about municipality (köztörvényhatóság).[2] The municipality included the counties and the county boroughs too.[3]

The National Assembly paid attention to reforms of the public administration.[4] The reforms of the public administration had an important part, the question of the civil service.[5]

The April Acts of 1848, which laid the foundation for the civil state, only very narrowly spoke about officials. The Act 29 of 1848 about the officials contained just, that the principle of the irremovability was applied just to the judges, but not the other officials.[6]

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1 Máthé, Gábor: *A magyar hurzsoá igazságszolgáltatási szervezet kialakulása 1867-1875* [The Development of the Hungarian Bourgeois Jurisdictional Organization] .Budapest, 1982. p.35-63.; Antal, Tamás: A közigazgatás és a bíráskodás újjászervezése Debrecenben 1867-ben [The Reorganisation of Public Administration and Legislation in Debrecen in 1867]. In: Radics, Kálmán (ed.): *A Hajdú-Bihar Megyei Levéltár Évkönyve* [Annual of Hajdú-Bihar County's Archive]. Vol. XXVIII. Debrecen, 2001. p.93-119.

2 Varga, Norbert: A polgári közigazgatás kiépítése felé tett lépések a dualizmus időszakában [Steps towards the working up of a civil administration in the era of Dualism]. In: Radics, Kálmán (ed.): *A Hajdú-Bihar Megyei Levéltár Évkönyve* [Annual of Hajdú-Bihar County's Archive]. Vol. XXXI. Debrecen, 2009. p.227-250.; Varga, Norbert: *A köztörvényhatósági törvény (1870:XLII. tc.) létrejötte* [The birth of Public Administration Act (Act no. XLII of 1870)]. Debreceni Jogi Műhely Vol. IV. 4.

3 Kajtár, István: *Magyar városi önkormányzatok (1848-1918)* [The Self-government of Hungarian towns (1848-1918)]. Budapest, 1992. p.68-86.; Stipta, István: *Törekvések a vármegyék polgári átalakítására* [Ambitions to the Bourgeois Transformation of the Counties]. Budapest, 1995. p. 125-172.

4 Stipta, István: Parlamenti viták a területi önkormányzatról (1870-1886). [Parliamentary Debates about the Territorial Self-governments (1870-1886)]. In: Mezey, Barna (ed.): *Hatalommegosztás és jogállamiság* [Delegation of Authority and Rule of Law]. Budapest, 1998. p. 77-93.

5 *Az 1869-ik évi april 20-dikára hirdetett országgyűlés képviselőházának irományai* [The Papers of the National Assembly summoned for 20 April 1869]. Vol. XI. Pest, 1872, p.206.

6 Varga, Norbert (trans.): *Reformtörvények Magyarországon 1848-ban. The Acts of 1848 in Hungary.* Szeged, 2012. p. 93.

After the introduction, I wish to determine who fall within the definition of the civil servants in the period under review. In the period of neo-absolutism all the civil servants were appointed by the state in Hungary, therefore they were denominated unified state office-holders (állodalmi tisztviselő). Récsi made a distinction between official (hivatalnok) and attendant (szolga) within the office-holder. The attendant did mainly manual labour, and the official did intellectual work.[7]

Ferenc Boncz separated the officials of the state, and the officials of the municipality and the community the after the Compromise, because the officials of the state were appointed by the state, but the officials of the municipality and the community were elected by the municipality or community again.[8] The 1878 Hungarian Penal Code determined the concept of the civil servants, this determination was a list, not an abstract concept, but the officials of the state and the officials of the municipality and community were included in the concept again. At the age of outstanding jurists of public administration, Ferenc Keleti[9] and Kálmán Csiky,[10] agreed with the legislator, that the officials of the state and the officials of the municipality and community were civil servants uniformly. The concept of the civil servants meant not just these civil servants, who were working for the public administration, but the judges, the public prosecutors and the professors of the university. Ferenc Keleti defined the abstract concept of the civil service, that this is an action, which was executed by the public servant on behalf of the state, in interest of the state and on state's authority.[11]

The 1878 Hungarian Penal Code and the jurisprudence determined the unified concept of the civil servants, but this was not used in the public administration acts consequently. The reasons for Act 10 of 1904 took a stand on the question, that the state officials and the municipal officials formed unified civil service.[12]

The civil servants law did not concern only the civil servants, but the assistants and the operators, too, for example the mechanics, the cleaners and the gardeners. I would like to support my statement with the following example: Ordinance of Szeged about the organization in 1872 summarized in the 211. § who concern this staute. The public organization of Szeged was composed of 1872 37 officials, 77 assistants and 133 domestic servants.[13] The rights and the obligations of these three groups were regulated by the state similarly.

The service pragmatics is a regulation, which was codified the legal status of the civil servants in one act. According to Ferenc Keleti, practice of civil service is a system of legal rules which consist of legal questions of civil service, rights and obligations of civil servants, initiation and termination of civil service.[14] Three operators, the jurisprudence, the associations of civil servants and the Members of National Assembly, wanted to make this act, consequently this was an important question in the Hungarian society in the 19th and 20th centuries. I would like to introduce these three efforts.

The jurisprudence emphasized the necessity of the service pragmatics continously. Récsi and Fésüs laid stress on the lack of service pragmatics in Hungary, and they wrote about the Hungarian attempts.[15] Keleti, Csiky and Kmety expected the acceptance of the service pragmatics by the National Assembly. They held that the service pragmatics was a condition of the good public administration and a qualified, conscientious officialism. But according Csiky the unified service pragmatics is impossible, if the legislator want to extend this to the officials of the state and the officials of the municipality and community.[16]

After the Compromise the organization of civil servants began in Hungary. The first association was the First Hungarian General Civil Servants Association (Első Magyar általános tisztviselő-egylet), which founded in 1869 and its aim was encouragement of the civil servants' financial interests. The National Association of Hungarian Civil Servants was founded in 1874. This organization represented the political interests of Hungarian civil servants. [17]

The associations of civil servants supported the birth of act about the civil service. At the first time the Hungarian officials of state held a meeting in Budapest in 1872, in which they

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7 Récsi, Emil: *Közigazgatási törvénytudomány kézikönyve* [Handbook of Public Administration Law]. Vol I. Pest, 1854. p. 236-237.

8 Boncz, Ferenc: *A magyar közigazgatási törvénytudomány kézikönyve* [Handbook of the Hungarian Public Administration Law]. Vol I. Budapest, 1876. p. 175.

9 Keleti, Ferenc: *Az államszolgálat jogi természete és a rendszeres államszolgálati pragmatika elvei* [Legal nature of state service and the principles of regular state service pragmatics]. Budapest, 1886. p.1-7.

10 Csiky, Kálmán: *A magyar állam közigazgatási joga* [The Public Administration of the Hungarian State]. Budapest, 1888. p. 177-178.

11 Keleti, Ferenc: *Az államszolgálat jogi természete és a rendszeres államszolgálati pragmatika elvei* [Legal nature of state service and the principles of regular state service pragmatics]. Budapest, 1886. p.2-3.

12 Mártonffy, Károly: Köztisztviselők szolgálati pragmatikája [The service pragmatics of civil servants]. In: Mártonffy, Károly (ed.): *Fejezetek a közjog és közigazgatási jog köréből* [Chapters from the Sphere of Public Law and Public Administration Law]. Budapest, 1932. p. 322-323.

13 *Szeged Szab. Kir. Város Hatóságának szervezete* [Organization of Szeged Free Royal City's Authority]. Szeged, 1873. p.72.; Ruszoly, József: *Szeged szabad királyi város törvényhatósága 1872-1944* [Municipality of Szeged Free Royal City]. Szeged, 2004. p. 11-50.

14 Keleti, Ferenc: *Az államszolgálat jogi természete és a rendszeres államszolgálati pragmatika elvei* [Legal nature of state service and the principles of regular state service pragmatics]. Budapest, 1886. p. 217.

15 RÉCSI, Emil: *Közigazgatási törvénytudomány kézikönyve* [Handbook of Public Administration Law]. Vol I. Pest, 1854. p.237.; Fésüs, György: *A magyar közigazgatási jog kézikönyve* [Handbook of the Hungarian Public Administration Law]. Budapest, 1880. p. 421.

16 Keleti, Ferenc: *Az államszolgálat jogi természete és a rendszeres államszolgálati pragmatika elvei* [Legal nature of state service and the principles of regular state service pragmatics]. Budapest, 1886. p.217-218.; Csiky, Kálmán: *A magyar állam közigazgatási joga* [The Public Administration of the Hungarian State]. Budapest, 1888. p.178-179.; Kmety, Károly: *A magyar közigazgatási és pénzügyi jog kézikönyve* [The Handbook of Hungarian Public Administration Law and Financial Law]. Budapest, 1911. p. 575.

17 Schwingenschlögl, Rezső (ed.): *Az Osztrák-Magyar Első Általános Tisztviselő-Egylet* [The Austro-Hungarian First Association of Civil Servants]. Budapest, 1890. p. 9-10.

discussed about the service pragmatics. After its foundation the National Association of Hungarian Civil Servants presented three petitions about the situation of officials to the king, the House of Representatives and Council of Ministers in December of 1874, but this petitions were unsuccessful. In 1880 the same association created a memorandum about the service pragmatics, and it urged the birth of pragmatics and the government promised this, but the government did not keep its word.[18]

In 1886 the Central Association of Hungarian State Officials (Magyar Állami Tisztviselők Központi Egyesülete) was established, because the members of other associations considered, that their interests were not represented satisfactorily. The all associations of civil servants set up a commission on behalf of service pragmatics' creation, and this conducted a competition, that the competitors wrote a work about pragmatics, but the competition was unsuccessful.[19]

The associations realized that they could not make the pragmatics by the government, they tried to write their own drafts. The National Association of Hungarian Civil Servants adopted the proposal of Ferenc Keleti in 1897. In 1905 József Szilágyi and János Madarász wrote new proposals about pragmatics, but the all attempts were ineffective.[20]

The ambitions of civil servants' associations could not be successful, because they were not able to represent their interests on the basis of the same principle. They were not able to make a strong, unified association.[21]

Finally, I want to introduce the work in National Assembly in connection of service pragmatics. Daniel Irányi, one of the leading figures of the opposition, said for the first time about the question of the officials rules in the lower house of parliament, in the House of Representatives. The first time, his draft resolution on 21 January 1871 dealt with this question.[22] In the draft resolution, which was the number of 781, he did not want to codify the complete civil servants law, he just supported the establishment of the competition system in the public administration.[23] Irányi made a speech about this question again on 31 March 1871 in the National Assembly and he argued for the competition system, because he held that the officers in the ministries became more suitable. The representatives voted about the draft resolution, whether they wanted to include to the agenda this question. The National Assembly passed this, but they were not able to discuss the draft resolution, because the agenda was flooded and after the Easter the National Assembly did not consider this.[24]

On 7 December 1871, Irányi reintroduced his draft resolution, which consisted of three points. The second point dealt with the abovementioned question. He expected more effective public administration and improvement of the work of civil servants on account of his proposal. The representatives of the governing party voted down all three points, because – as they argued - they did not want to deal with such a serious question during the budgetary debate and there was nothing new in Irányi's proposal.[25]

On 15 January 1884, Irányi reminded the government, that it did not set the service pragmatics before the House of Representatives against its promise. He said, that it is a lack of respect in direction of House of Representatives. Gyula Szapáry, the Minister of Finance, gave an answer, that the service pragmatics was not ready, therefore they were not able present to the House of Representatives.[26]

On 1 February 1887, Irányi made a speech in the House of Representatives and returned to the question.[27] He emphasized the problems of the civil service and he suggested constituting the rules of practice of civil service as a remedy. He called up the government to introduce his proposal, which was accepted by the House of Representatives,[28] to the National Assembly. Nevertheless the government did not introduce it during the session.

On 8 May 1889, Irányi proposed again, that rules of practice of civil service should be constituted.[29] In his argument he pointed out, that the government is in a convenient situation

[18] Csikvári, Jákó: *A tisztviselői mozgalmak története (1867-1908)* [The History of Officials' Movements (1867-1908)]. Budapest, 1909. p. 103-105.
[19] Csikvári, Jákó: *A tisztviselői mozgalmak története (1867-1908)* [The History of Officials' Movements (1867-1908)]. Budapest, 1909. p. 112-113.
[20] Csikvári, Jákó: *A tisztviselői mozgalmak története (1867-1908*) [The History of Officials' Movements (1867-1908)]. Budapest, 1909. p. 116.; p. 124.
[21] Gerelyes, Ede (ed.): *A közalkalmazottak szakszervezete történetéhez* [The History of Civil Servants' Union]. Budapest, 1970. p.8.
[22] Nagy, Iván (ed.): *Az 1869-ik évi april 20-dikára hirdetett országgyűlés képviselőházának naplója* [The Journal of the National Assembly summoned for 20 April 1869]. Vol. XII. Pest, 1871, p. 72-73.
[23] *Az 1869-ik évi april 20-dikára hirdetett országgyűlés képviselőházának irományai* [The Papers of the National Assembly summoned for 20 April 1869]. Vol. VIII. Pest, 1871, p. 29.
[24] Nagy, Iván (ed.): *Az 1869-ik évi april 20-dikára hirdetett országgyűlés képviselőházának naplója* [The Journal of the National Assembly summoned for 20 April 1869]. Vol. XV. Pest, 1871, p. 332.
[25] Nagy, Iván (ed.): *Az 1869-ik évi april 20-dikára hirdetett országgyűlés képviselőházának naplója*. [The Journal of the National Assembly summoned for 20 April 1869.] Vol. XVIII. Pest, 1871, p. 300-306.; Matlekovits, Sándor: Magyarország államháztartásának története 1867-1893 [History of Hungary's Public Finance 1867-1893]. Vol. I. Budapest, 1894. p. 343.
[26] P. Szathmáry, Károly (ed.): Az 1881. évi szeptember hó 24-ére hirdetett országgyűlés képviselőházának naplója [The Journal of the National Assembly summoned for 24 September 1881]. Vol. XI. Pest, 1884, p. 28-29.
[27] P. Szathmáry, Károly (ed.): *Az 1884. évi szeptember hó 25-ére hirdetett országgyűlés képviselőházának naplója* [The Journal of the National Assembly summoned for 25 September 1884]. Vol. XIV. Pest, 1887, p.333-334.; MATLEKOVITS, Sándor: Magyarország államháztartásának története 1867-1893 [History of Hungary's Public Finance 1867-1893]. Vol. II. Budapest, 1894. p. 571.
[28] P. Szathmáry, Károly (ed.): *Az 1884. évi szeptember hó 25-ére hirdetett országgyűlés képviselőházának naplója* [The Journal of the National Assembly summoned for 25 September 1884]. Vol. XIV. Pest, 1887, p.336.
[29] P. Szathmáry, Károly (ed.): *Az 1887. évi szeptember hó 26-ára hirdetett országgyűlés képviselőházának naplója* [The Journal of the National Assembly summoned for 26 September 1887]. Vol. XI. Pest, 1889, p. 229.; MATLEKOVITS, Sándor: Magyarország államháztartásának története 1867-1893 [History of Hungary's Public Finance 1867-1893]. Vol. II. Budapest, 1894. p. 711.

without unified law of civil service, because civil servants was not able to take steps against arbitrariness of ministers without unified certain rights. The National Assembly accepted his proposal with a change suggested by the Prime Minister, Kálmán Tisza.[30] They pulled out the deadline from Irányi's proposal.[31] Kálmán Tisza stated on the parliamentary debate in 1887 and 1889 that the question of law of civil service is significant, but the complexity of the question makes the legislation more burdensome, therefore to have an exact deadline would be irresponsible.

József Ferenc mentioned in his king's speech, which he said at the opening of National Assembly of 1892/97, that the government will submit the proposal about the regulation of civil service.[32] The answer of House of Representatives confirmed this, that they expected to pass the act, but this promise remained unsuccessful.[33]

On 20 November 1905 Géza Fejérvári, the Prime Minister, presented and the Council of Ministers came to a decision that it delegated a commission with the purpose of service pragmatics' working out. The commission was composed of the representatives of Ministries, Hungarian Royal High Court of Justice, Hungarian Royal Administrative Court, Hungarian Royal State Audit Office and National Association of Hungarian Civil Servants.[34] The proposal originated, but the Fejérváry Government failed and the new Prime Minister, Sándor Wekerle examined the proposal, but he was able to make an act from this.[35]

A unified law of civil service pragmatics was not enacted until First World War. Various legal civil service relationships were regulated by diverse legislation. The National Assembly regulated the most crucial issues by act, for example qualification of civil servants, retirement or salary. Legal relationship of certain civil servants was regulated by sectoral legislation, for example Act 31 of 1879 regulating the legal status of forest officers. In case of community and municipality-level servants, issues not covered by act were regulated by local decrees. An illustrative example is the Organizational Statute of 1890 issued by the Municipality of Szeged with decree no. 76, regulating the salary servants were entitled to, way of fulfilling office statuses, duration of working hours.[36]

After the Compromise the regulation of neo-abolutism was applied in the legal relation of civil servants for lack of civil service pragmatics.[37] This rule was implied by a German language handbook from F. J. Schopf.[38] Then for governmental officers in unregulated issues the Regulation of Financial Service (rules regulating the legal status of employees of the Ministry of Finance) was used by unwritten law. The regulation was released first in 1874 than in 1896. The Minister of Finance declared before the House of Representatives in 1902, that the Cabinet Council extended Regulation of Financial Service to the all department field of civil service.[39]

Increasing social interest in the second half of the 19th Century towards civil service law is represented well by the call for submissions by the Hungarian Academy of Sciences for the introduction of the domestic and foreign regulation of civil servants. Ferenc Keleti[40] submitted his work „Legal nature of state service and the principles of regular state service pragmatics", published in 1883 and awarded by the Academy's Sztrókay Foundation with the 100 gold price.[41] Keleti conducted through research and his work introduces foreign countries' (France, Germany, England) legislative activity on this field besides general knowledge on civil service. The author stressed in the book's preface that he created it for the subsequent Hungarian legislation as a guideline for regulation. The previous presentation of the book was the first and single exceptional work of Hungarian civil service research.

In his work Keleti outlined his opinion in 53 points on the required principles of laws regulating state service. The principles laid down cover all important aspects of civil service law. By focusing on the main principles I present the realization of Keleti's regulatory ideas in the Hungarian civil service law.[42]

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[30] P. Szathmáry, Károly (ed.): *Az 1887. évi szeptember hó 26-ára hirdetett országgyűlés képviselőházának naplója* [The Journal of the National Assembly summoned for 26 September 1887]. Vol. XI. Pest, 1889, p. 235.

[31] P. Szathmáry, Károly (ed.): *Az 1887. évi szeptember hó 26-ára hirdetett országgyűlés képviselőházának naplója* [The Journal of the National Assembly summoned for 26 September 1887]. Vol. XI. Pest, 1889, p. 244-245.

[32] *Az 1892. évi február 18-ára hirdetett országgyűlés képviselőházának irományai* [The Papers of the National Assembly summoned for 18 February 1892]. Vol. I. Pest, 1892, p. 2.

[33] *Az 1892. évi február 18-ára hirdetett országgyűlés képviselőházának irományai* [The Papers of the National Assembly summoned for 18 February 1892]. Vol. I. Pest, 1892, p. 165.

[34] MNL MOL W12 Minisztertanácsi jegyzőkönyvek [The Journal of Council of Ministers] 1905.11.20. [20.11.1905].

[35] Csizmadia, Andor: *A magyar közigazgatás fejlődése a XVIII. századtól a tanácsrendszer létrejöttéig* [The Development of Hungarian Public Administration from 18 Century to Establishment of Soviet System]. Budapest, 1976. p. 449.

[36] *Szeged Szab. Kir. Város Törvényhatóságának szabályrendeletei*. [Ordinances of Szeged Free Royal City's Municipality] Szeged, 1890. p. 121-160.

[37] Hencz, Aurél: *Törekvések a közszolgálati etika kialakítására* [Ambitions to the Formation of Civil Service's Ethics]. Vol I. Budapest, 1987. p. 60.

[38] F. J. Schopf: *Der kaiserlich-österreichische Civil-Staats-Dienst, und die damit verbundenen Pflichten, auch Rechte und Vorzüge der k. k. Staatsbeamten*. Pest, 1855.

[39] *Az 1901. évi október hó 24-ére hirdetett országgyűlés képviselőházának naplója* [The Journal of the National Assembly summoned for 24 October 1901]. Vol. III. Budapest, 1902, p. 91.

[40] Ferenc Keleti (1846-1928) was a lawyer, who published his articles about the civil service and penal law. (Gulyás, Pál (ed.): *Magyar írók élete és munkái* [The Life and Works of Hungarian Writers]. Vol. XVII. Budapest, 1995. p.66.; Szinnyei, József: *Magyar írók élete és munkái* [The Life and Works of Hungarian Writers]. Vol. V. Budapest, 1897. p. 1379-1380.)

[41] *A Magyar Tudományos Akadémia 1882. évi június 4-én tartott XLII-dik közülésének tárgyai* [The Themes of Hungarian Academy of Sciences' Session on 4 June 1882]. Budapest, 1882. p. 48.

[42] Keleti, Ferenc: *Az államszolgálat jogi természete és a rendszeres államszolgálati pragmatika elvei* [Legal nature of state service and the principles of regular state service pragmatics]. Budapest, 1886. p. 217-228.

1. Under point 6 among the fundamental principles Keleti expresses that for civil servants life-long appointment is preferable vis-á-vis periodic appointment or election.
   We may observe this principle to prevail widespread as government servants were appointed. The appointing authority was the Head of State for executive civil servants, judges, military officers and diplomatic clerks, while for the rest of the statuses the competent Minister had the right to appoint.
   For municipal statuses the two principals were parallel in effect for a long period. Reviewing the Organizational Statute of 1904 issued by the Municipality of Szeged reveals that emphasis shifted gradually to life-long appointments from election, and the number of servants elected for six years decreased.[43] Among those servants are the mayor, the notary and the chief prosecutor. After Act 21 of 1886 entered into force, the police superintendent, the chief auditor and the chief physicist held its office life-long by appointment, while previously these servants were elected by the general assembly for six years. The final shift in line with the principle was accomplished by Paragraph 68. of the Act 30 of 1929 introducing life-long election for the Municipality Committee. Subsequently, with the exception of the mayor, every servant held its office life-long, and the mayor was elected for a ten year term.
2. In the 37th fundamental principle Keleti expresses the necessity of the right for pension for civil servants. Besides laying down the principle, he defined detailed rules as well. The right for pension could have been acquired by turning 65 or becoming incapable of executing his tasks due to physical or intellectual decline. He tied the pension rate to service years and salary. Keleti also recommended the extension of pension care obligation to widows and orphans.
   The Act 11 of 1885 on the retirement of civil servants, junior officers and clerks regulated the issue almost completely corresponding to Keleti's principles. According to the Act 21 of 1886 communities and municipalities were obligated to establish in their by-laws a pension fund for civil servants in the given community of municipality following the provisions of the Act 11 of 1885. The Municipality of Szeged created the pension regulation for local civil servants in its decree no. 71/1888. However the regulation brought few novelties since Szeged has already established the pension fund for its servants in the 1870s, which has been altered following the 1888 Act.

The examples above show that the legal status of civil servants was not regulated in a single law. Despite that the provisions of various regulations comply with the important requirements, fulfilling this function regarding the civil servants, although hindering the application of the law. However we have to agree with the statement made by Zoltán Magyary, that the lack of a unified regulation for state level and municipal level civil servants dispossessed them from a feeling of togetherness. From this Magyary originates the absence of a civil service ethos, preventing the development of an honoured civil servant community providing cohesion for the state.[44] According István Bibó the gentry was transformed into the majority of civil servants after the Compromise and that civil servants, which was not nobility, wanted to become nobles, therefore the community of civil servants was not able to form, so the pragmatics was not so important for the all Hungarian civil servants.[45]

[43] *Szeged Szab. Kir. Város Törvényhatóságának szabályrendeletei*. [Ordinances of Szeged Free Royal City's Municipality] Szeged, 1904. p. 173-174.
[44] Magyary, Zoltán: *Magyar közigazgatás* [Hungarian Public Administration]. Budapest, 1942. p. 393-394.
[45] Bibó, István: A magyar közigazgatásról [About the Hungarian Public Administration]. *Városi Szemle*, Vol. 33. 5-6. p. 289-290.

Thoughts on the Special Relationship between Nationalism and Islam in Particular the Late Ottoman Empire and the Early Turkish Republican Era

*Katalin Siska**

Abstract

Due to the strong position of Islam in Turkish context the issue of secularism is the first and foremost significant principle of modern Turkey that has always remained on the national agenda as the most polarizing political problem. In my opinion Islam in Turkey was never completely abandoned but in fact has been continuously and strategically used in Turkish political life for pragmatic reasons. I think it is deeply related to Islam's symbolic power, its potential to provide a sense of belonging and cohesion as well as present a code of ethics for people that think of themselves as sharing a way of life. So there is no exaggeration to say that the secular Turkey's most successful political ideologies, trends contains noticeably Islamic ideas, elements. In this paper the relationship between Turkish nationalism, identity and Islam is examined in the Turkish nationalist debates of the late Ottoman and early Republican era. I focus only those disputes in which the compatibility between the ideas of Islam, nationalism and modernism is proven. I analyze the two most significant thinkers of the late Ottoman era because they influenced the dominant thinkers of the officially secular Kemalist era which created the ideological basic of the present Turkey.

***Keywords**: Turkey; Islam; Islamism; Secularism; Nationalism; National Identity; Identity Crisis; Kemalism.*

1. Introduction

The special relationship between religion and nationalism - whether it is incompatible with each other, or coexist – is in the long-standing focus of the scientific interest. The views concerning this relationship in the literature is basically divided into two main groups. The first group consists of proponents who have modernist approach to nationalism and assume a fundamental incompatibility between religion and nationalism. According to them nationalism is a modern phenomena, while religion and its impact on people's lives belong to secularism and modernization issues. Ernest Gellner[1] highlights the cultural influence on the nationalism and though emphasizes the Protestant effect on nationalism believes that basically religion have no effect on nationalism. Eric Hobsbawm also believes that religion and nationalism are incompatible, because the nation needs to maintain an exclusive loyalty from its members.[2]

According to the other group despite all these facts, religion and nationalism can exist side by side symbiotically. According to representatives of the latter views Anthony Smith[3] and John Hutchinson[4] assume that religion has an essential role in the construction of national identity. Anthony Smith claims although the concept of nationalism is fundamentally secular, religious nationalism however is not unusual as the nationalists are generally find it necessary to affect on the religious feelings of the masses.

Beyond these dichotomous views that are either not emphasize enough or put too much emphasis on the role of religion in constructing national identity Barbara-Ann Rieffer[5] examines the interaction between religion and nationalism categorizes three types of nationalism according to what extent has the religion an effect on nationalism and national identity. According to this classification there are secular nationalism, religious nationalism and *instrumental pious* nationalism. Examples on secular nationalism are French, German, Italian and Turkish nationalism. The official secular nationalism does not allow any space for religion in creating national identity. As religious and instrumental pious nationalism Rieffer differentiates based on the institutionalization of the law, the decision-making bodies and to what extent the role of nationalism.[6] According to him the religious nationalism as a political movement actually is a group of people strongly influenced by the definition of re-

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1 GELLNER, Ernest, Nations and Nationalism. Blackwell, Oxford, 1983, p. 23.

2 HOBSBAWN, Eric Nations and Nationalism since 1780: Programme, Myth, Reality, Cambridge University Press, Cambridge, 1992, p. 56.

3 SMITH, Anthony, National Identity, Nevada University Press, London, 1991, p. 49.

4 HUTCHINSON, John, The Dynamics of Cultural Nationalism: The Gaelic Revival and the Creation of the Irish Nation State, Allen&Unwin, London, 1987, p. 127.

5 RIEFFER, Barbara-Ann, Religion and Nationalism: Understanding the Consequences of a Complex Relationship, Ethnicities 2003/2, p. 215-242. http://etn.sagepub.com/content/3/2/215.short

6 RIEFFER, Barbara-Ann, opt.cit., p. 225.

ligious beliefs and political independence aspiring to national unity in addition to their own independent political unit, which is regulated in accordance with institutionalized religious laws and procedures. The religion has an indispensable role in these nationalist movements as they rely heavily on the language of religion and modes of religious communication. This kind of nationalism is the Irish, Polish, Iranian and Indians (20th century) nationalism.

In contrast according to Rieffer the instrumental pious nationalism is a movement where religion occupies an influential position as a key element supporting national identity. In this group there are the Russian and Iraqi nationalism of the 1980 s to the present day.[7]

The present study aims to provide a brief overview on the relationship between nationalism and Islam from the late Ottoman period to the Young Turkish Republic. My work focuses on the discourses of the key Turkish nationalist figures who incorporated Islam in their nationalist views. I can also see relationship between the nature of Islam and nationalism in Turkey except for a short period of time since the mid-nineteenth century (such as the official secular Kemalist nationalism), andin claim that Islam and Turkish nationalism was a symbiotic relationship in Turkey, which is an instrumental pious nationalism, rather than Islamic religious nationalism.

At this point, I need to emphasize two important facts. First, although in this paper I do not directly address the issue of modernization in the views of these figures, it should be kept in mind that focusing on the relationship between religion and nationalism necessitates viewing this issue within the context of Turkish modernization. Mid-nineteenth/early-twentieth century modernization efforts concentrated on the question of how to save the unity of the empire and prevent its decay vis-ŕ-vis developments in Europe while holding onto its Islamic identity. Second, this work is concerned with (modernist/reformist) Turkish nationalists who contended that nationalism is compatible with Islam. They argued pragmatically that the best path in the age of nations was to establish unity under the name of the "nation" with the help of Islam, which would further the interests of both the Turkists and the Islamists.[8]

This paper is divided into two main parts. In the first section, I outline the symbiosis between nationalism and Islam in the late Ottoman era. In the second part I focuse on the discourse of the key Turkish nationalists of the late Ottoman and early Republican period and the official discourse concerning the role of religion in Turkish national identity.

2. The Links between Islam and Nationalism in the Late Ottoman Era

The Ottoman Empire had first met the sense of nationalism during the Greek rebellion in the early 19th century. This revolt became a watershed in the Ottoman history. This was no simple loss of territory, but at the same time the empire also had to face with various independence movements of non-Muslim provinces.[9] This period was also typical of modernization efforts in order to avoid the disintegration of the empire, at the same time strengthen their position against their European competitors. The biggest challenge in doing so was to modernize and civilize the empire, while retaining its Islamic identity.

Ahmet Cevdet Pasha, the leading statesmen of the Tanzimat era was the first figure in the Turkish political history, whose statesments on nationalism embraced Islamic themes. He suggested a political and legal modernization, which was based on Islamic values, addressed strictly and exclusively to Muslims, who formed the majority of the population of the Ottoman Empire. At the center of his political thoughts was the assimilation/Islamization of the non-Muslim population. To Cevdet Pasha, the success and longevity of the empire depends on the „Turks" contribution, which may be achieved through a cultural solidarity. It should be emphasized, however, that Turkey Cevdet Pasha meant mainly Muslim people under the idea of Turks. He also adhered to the policy of Ottomanism. The Tanzimat era's leading politicians - whether Islamists or Turkists - was intended to preserve the territorial unity of the empire. To achieve this, they could not have any other alternatives of Ottomanism, which aimed to set out the territorial nationhood.[10] They believed that this was the best strategy to cope with the diverse population of the empire. However this attempt to unite the empire's diverse population regardless of religion and ethnicity did not work.

The Young Ottomans emerged along these thoughts. Although they supported the modernization efforts of the Tanzimat elite they actively acted against the privileges given the non-Muslim communities. In particular, they protested against the reform provisions of the Ottoman Reform edict of 1856, which provided a formal legal equality between the Muslims and non-Muslims. They emphasized the importance of Islam as a primary factor in uniting the Muslim population and an important pillar of the Ottoman state and society. They adopted the *Ittihad-i Islam* (unity of Islam) referring to Islamic nationalism. The main activists of the Ottomanism, Namık Kemal and Ali Suave actually were no specific political goals.[11]

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7 RIEFFER, Barbara-Ann, opt cit., p. 224.

8 YAVUZ, Hakan, Islamic Political Identity in Turkey, Oxford University Press, Oxford, 2003, p. 277.

9 ZUBAIDA, Sami, *Islam and Nationalism: Continuities and Contradiction. Nations and Nationalism*, 2004/10, p. 407-424. http://onlinelibrary.wiley.com/doi/10.1111/j.1354-5078.2004.00174.x/abstract

10 GÜLALP, Haldun, Using Islam as Political Ideology: Turkey in Historical Perspective, Cultural Dynamics 2001/14, p. 21-39. http://www.kanak-attak.de/ka/down/pdf/amr/21guelalp_islam_as_pol_ideology.pdf

11 BERKES, Niyazi, Ziya Gökalp: His Contribution to Turkish Nationalism, in: Turkush Nationalism and Western Civilization: Selected Essays of Ziya Gökalp, Greenwood Press, Westport, 1981, p. 56.

2.1 The Islamisation process of the nationalism

Three main factors influenced and paved the way for nationalism supported by Islam in Turkey: the nationalist movements of the Balkans supported by non-Muslims, the independence aspirations of the Christians and the European powers[12]; Jamal ad-Din al-Afghani (1838-97) Persian intellectual who constituted the idea of the *Ittihad-i Islam* as a protonationalism[13]; and Turkish-Tatar modernization movement (*cedidism*[14]), which served the fusion of Turkish nationalism and Islamic modernism.

The following three influencing factors will be analyzed.

Starting with the way in which nationalist movements in the Balkans affected the evolution of nationalism with Islamic themes, Turkish nationalism is rooted in the protonationalistic vein of Islamic political consciousness that developed as a result of the centralization and mass expulsion of Muslims from the Balkans.[15] Due to the territorial losses of the empire and the rising threat of the Christian European forces in the Balkans against the ottoman unity Sultan Abdülhamid II (1876-1909) recognized the need to rethink the role of the religion. Abdülhamid II decided that moves the ottomanism, the main policy of the empire towards the direction of a pan-Islamism, which is a progressive Islamic and nationalist movement, and its main purpose is the modernization and transformation of the state.[16] He used Islam, as a lever which would instill some consciousness of a collective goal into his subjects[17] and strengthen the social foundation of the weakening state.[18] It is important to emphasize that the adoption of pan-islamism by Sultan Abdülhamid II was an instrumental tool to maintain and keep unity of the Ottoman Muslims of the Empire. It was rather a part of his political plan, not the result of his personal religiosity. According to Kemal H. Karpat historian Abdulhamid II has launched a nation-awekening process by mobilizing and glorifying the Islamic identity under Muslim nationalism.[19]

The second influence thought that have had an impact on the evolution of a symbiotic relationship between Islam and nationalism is Afghani's call for the Islamic unity, the *Ittihad-i Islam* as a proto-nationalism. As an Islamic reformer, Afghani wanted to awake the nationalist feelings of Muslim countries. According to him the main reason of the backwardness of these countries was they were not aware of and did not live with the possibility of nationalism. He believed that the survival of the Islamic countries depends largely on how they become consciously nationalists. He argued that the nationalism of the Islamic unit should strengthen the individual elements of the Muslim nations the unit's building blocks. Although his influence on political ideas within the Ottoman Empire has always been subject to debate, it is difficult to dispute his influence on the most influential thinker of the Kemalist era, Ahmet Ağaoğlu and other Muslim intellectuals.

As Nikki Keddie[20] historian states, this impact was not a well-developed reformation program on the basis of theological questions. Instead Afghani attempted to find out an appropriate way to adopt and absorb the technical achievements from Western Europe without letting Western European cultural values enter Muslim lands. His idea that religion plays a critical role as a cohesive social force for forging group solidarity inspired Ziya Gökalp as well.[21]

The third factor affecting the evolution of pan-Islamism as proto-nationalism was the impact of Tatar-Turk modernist nationalism. Its most important representative, Ismail Gasprinski[22] (1851-1914) wanted to reconcile Islam, modernism and Turkish nationalism. In his opinion, Islam is nothing more than a useful tool for the promotion of group solidarity and leading a national and intellectual revival among Russian Muslims. Gasprinski's opinion is important because he had a strong influence on the ideological leaders of Turkish nationalism, Yusuf Akçura and Ahmed Ağaoğlu. As Holly Schissler states, the significant contributions of these two emigrants from the Russian Empire to the articulation of Turkish nationalism and Islam stemmed from the specific circumstances of Muslims under Russian rule. This led them to appropriate a particularly ethno-national interpretation of modern society which was previously unknown amongst the Muslim Turks of the Ottoman Empire.[23]

3. The missing links between nationalism and Islam in the late Ottoman and Early Republican Eras

The three most important and most significant figures of Turkish nationalism in its formative period whose discussion and dialogue included Islamic themes and defined the percepti-

[12] YAVUZ, Hakan (ed.) The Emergence of a New Turkey, Democracy and the AK Parti, University of Utah Press, Salt Lake City, 2001, p. 23-34.
[13] Afghani who was regarded as an influential Islamic reformer, traveled extensively in the Middle east and Europe to encourage the strengthening of the Muslim World against Europe.
[14] Cedidism refers to the „*New Method*" whose appropriation was endorsed in an educational methods to make the Turks of Russia learn modern subjects such as mathematics and geomatry in their native languages as well as traditional subjects such as Quran recitation Persian and Arabic. They prohibited the blind memorization and recitation with a much more comprehension based method of instruction. in: SCHISSLER, Holly, Between Two Empires: Ahmed Agaoglu and the New Turkey. I.B.Tauris, London, 2003, p. 107-108.
[15] YAVUZ, Hakan opt.cit., p. 180.
[16] KARPAT, Kemal H., The Politicization of Islam: Reconstructing Identity, State, Faith, and Community in the Late Ottoman State, Oxford University Press, Oxford, 2001, p. 27-28.
[17] MARDIN, Serif, Religion and Secularism in Turkey, in: by KAZANCIGIL, Ali – ÖZBUDUN, Ergun (ed.) Ataturk: Founder of a Modern State, CHurst & Co Publishers, 1981, p. 201.
[18] GÜLALP, Haldun, Using islam as Political Ideology: Turkey in Historical Perspective, Cultural Dynamics 2014/1, p. 21-39.
[19] KARPAT, Kemal H. opt.cit., p. 320.
[20] KEDDIE, Nikki, An Islamic Response to Imperialism: Political and Religious Writings of Sayyid Jamal ad-Din al Afghani, University of Califirnia Press, Berkeley, 1968, p. 40.
[21] SCHISSLER, Holly, Between Two Empires: Ahmed Agaoglu and the New Turkey, I.B Tauris, London, 2003, p. 103.
[22] GASPRINSKI, Ismail Bey, Russian Islam, The Society for Central Asian Studies, 1985, p. 219-21.
[23] SCHISSLER, Holly Schissler, opt.cit., p. 103.

on of Islam and nationalism ideas: Yusuf Akçura (1876-1935), Ahmed Ağaoğlu. (1869-1939) and Ziya Gökalp (1876-1924). While Akçura – founder of the turanism – promoted nationalism in order to address the problem of the preservation of the Ottoman state, Ahmet Ağaoğlu's – the advocate of the pan--turkism – main reason for embracing nationalism was his ideal of Westernism.[24]

The first and most important motive of the Turkish nacionalism – as a political plan – was to preserve the unity of the Ottoman Empire, because this was threatened by the autonomus efforts of the non Muslim groups during the reign of Sultan Mahmut II (1808-1837). As the first aim of the Turkish nacionalism was to preserve the integrity of the state, the nationalism primarily serves the state, not the citizens.[25]

The Turkish nationalism shaped by those intellectuals who were interested in preservation the unity of the decaying Ottoman Empire, and at the same time the westernization. These intellectuals were linked to the Young Turk movement in period of 1904-1913. The movement takes its name afterthe Parisian newspaper of the Turkish emigrants, *La Jeune Turqie* (Young Turkey). The members named themselves as *„jöntürkler*", the French counterpart of the Young Turk.[26]

In Europe for the first time the Young Turks formed an organization called the Committee of Unity and Progress (*Ittihad ve Terakki Cemiyetiága*)[27] which was officially founded in 1889. Until the formation of the Second Constitutional Monarchy (1908) the political scene was determined by the struggle between monarchists and the Comittee and later by the quarrel between the Young Turks.

The Movement is basically consisted of two significant groups. The liberal wing led by Prince Sabaheddine who initiated the market economy, decentralization and establishment of the capitalist structure. The liberal wing consisted of top-class, well--educated, Westernized intellectuals and some religious groups. They hoped that the British force will return and in cooperation with the high-class bureaucrats together will govern the constitutional monarchy. In this cooperation, they would have been willing to protect the rights of national minorities.[28]

Within the Committee of Unity and Progress the unifying, nationalist wing was led by Ahmed Riza, the Minister of Education. They were also banded together to defend the constitutional monarchy, but were opposed to any idea of foreign intervention. Instead, they were filled with national aspirations and wanted to empower and control their own body. Unlike the Liberals their members were from the middle classes, teachers, officials and military officers. The unifying nationalists almost ferociously propagated the revolution above all idea, which in their opinion should be executed by public officials. The „national" nationalists who were sympathetic towards the views of the famous writer Ziya Gökalp did not want to co-operate with any non-Turkish factor.[29] After 1908 this wing found enthusiastic followers and strenghten its position in the Committee.[30] Overall, the nationalists' victory over the liberals marked the beginning of the Turkish nationalism, which was largely based on the concept that the state should be protected, and the nation must stand in the service of the Turkish state. In fact, the Turkish nationalism and national identity worked as a necessary public officer.[31]

The second motive of the Turkish nationalism was the intention of westernization. In the 18th century, the reforms imitating western solutions affected the military organization and in 1839 the main characteristics of the provincial administration, education, judicial system. At the beginning in the concept of the westernization movement turkism and nationalism were latent elements. However, since the movement accepted the ideology of Ahmet Ağaoğlu's pan-turkism which basic pillar was the westernization its aim was implemented through these thoughts.[32] The increasing number of Turkish nationalists who began to criticize the lifestyle of non-Muslims within the empire indicated ideological effects. This was expressed by one of the most prominent nationalist thinkers in Turkey, Ziya Gökalp (1876-1924): *„There is in our country a class, the so called Levantines or Cosmopolitans, who try to adopt the aesthetic, moral, philosophical tastes, and entire customs, ceremonies and behaviour of the West rather than its scientific methods or industrial techniques. That is they try erroneously tom imitate the cultures of other nations under the name civilization."*[33]

According to Ziya Gökalp the balance searching between the Western materialism based on the principles of the Enlightenment and the Eastern spirituality, civilization and local culture

[24] MEYER, James, Turks Across the Empires. Marketing Muslim Identity in the Russian-Ottoman Borderlands 1856-1914, Oxford University Press, Oxford, p. 151–171.

[25] HEPER, Metin –SAYARI Sabri (ed.), The Routledge Handbook of Modern Turkey, Routledge, New York, 2012, p. 15–26.

[26] BULAC, Ali, Turkey's Democracy Saga: The Struggle Against Interventionist Politics, Blue Dome Press, New York, 2015, 204.

[27] At the beginning the Committee of Unity and Progress was named Ottoman Unity Movement (*Ittihad-i Osmani Cemiyeti*). In 1895 they changed their name to Committee of Unity and Progress. The Committee after the first Turkish Youth Conference held in Paris in 1902, splitted into two parts. Between 1902 and 1906 the Young Turks movement began to collapse and break down. In 1906 the team renewed with new members who were fleeing from Ottoman territories. In 1907 at the Second Young Turkish Conference in Paris the nationalist wing gained a leading role. The road leading to the second constitutional monarchy thanks to this wing. The second organization after the establishment of a constitutional monarchy (1908) was appointed Committee of Ottoman Unity and Progress.

[28] KADIOĞLU, Ayşe, An Oxymoron: The Origins of Civic-Republican Liberalism in Turkey. Critical Middle Eastern Studies 2007/16 /2, 171–191, p. 172–173. http://research.sabanciuniv.edu/5096/1/Critique.pdf, 2016.01.22.

[29] KAROGLU, Erol, Ottoman Propaganda and Turkish Identity: Literature in Turkey During World War I. Tauris, London, 2007, p. 92.

[30] HANUOGLU, Sükrü, A Brief History of the Late Ottoman Empire, Princeton, New York, 2010, p. 197.

[31] CAGAPTAY, Soner, Islam, Secularism, and Nationalism in Modern Turkey: Who Is a Turk? p. 14–19.

[32] ÖZAVCI, Özan, Intellectual Origins of the Republic. Ahmet Agaoglu and the Genealogy of Liberalism in Turkey. Brill, Leiden, 2015, p. 192–194.

[33] AKTAR, Ayhan, Economic Nationalism in Turkey: The Formative Years, 1912-1925. Review of Social, Economic and Administrative Studies (Bogazici Jopurnal) 1996/10 /1., p. 263–290., https://www.academia.edu/5534169/Economic_Nationalism_in_Turkey_The_Formative_Years_1912_-_1925, (2016.01.12.)

is a returning companion of the Turkish modernity. In his view, the Turkish nationalism rejects western culture, and at the same time imitates the western civilization results and supports local, ancient ancestral identity.[34] According to Niyazi Berkes[35], in Gökalp's conception of nationalism the two concepts (culture and civilization) does not represent a conflicting and exclusive entities, instead two closely related and complementary features that provides the social reality.[36]

After the Young Turk Revolution (1908) only one question occupied the Turkish political thought was how to stop the collapse of the Ottoman Empire? The discussions revolved around three main political currents: ottomanism (its aim was to establish an Ottoman nation on the basis of common territory), Islamism (a movement aimed to establish an Islamic state) and Turkism (movement aimed to establish an ethnic-political nationalism). In 1904, Yusuf Akçura, known as the first leading modern nationalist wrote an article titled *Üç Tarzı Siyaset* (Three Types of Policies) in the Cairo-based magazine *Türk* in which he analyzed these three political currents in terms of their potential to help save the empire from the deterioration.

In this writing he regarded the policy of Ottomanism as impracticable, the other two policies he argued did they have enough potential to save the empire from the external and internal enemy and collapse, but it was not clear which way he preferred.

Suave Aydin (1993), Francois George (1996) and David Thomas (1978) Turkish nationalism researchers claim that the choice of Akçura was Turkish nationalism, political conception of the Turkish nation, which based exclusively on ethnic collectivity free from any religious influence. According to them, Akçura was a secular nationalist who did not give religion any measurable role in construction national identity, so thus he is regarded the father of Kemalist nationalism[37]. Aydin and Georgeon emphasize that Akçura deliberately separated the religion from nationalism, because he saw the Islam as taking a merely supporting role in Turkish national culture to strengthen the soul of unity. They assert that Akçura is different from Ağaoğlu and Gökalp in the sense that he did bnot attempt to reconcile Islam and nationalism by citing the Quran to prove the existence of nationalism in Islam.[38] Akçura adopted a historical approach to the role of religion in Turkish nationalism and asserted that Islam had to accept nationalism due to the changing laws of history. In Akçura's conception, Islam should be in the service of the Turkish race. [39]

Some works point to the significance of religion in Akçura's nationalist discourse, emphasizing that he made no clear distinction between the two but tried to prove that Islam could play an important role in the development of Turkish nationalism. Like Georgeon, Yavuz contends that Akçura treated Islam as a social, in fact historical phenomenon that can change in light of different circumstanses.[40]

Due to this historical approach to religion Akçura did not see Islam and nationalism incompatible, and it is argued that he endorsed a kind of religious nationalism.[41]

In my opinion, at this point two things are clear: on the one hand it is impossible to ignore the significance of Islam in Akçura nationalist views. On the other its not proper to call Akçura's articulation of Islam and nationalism a religious one. Instead its more appropriate to regard it as an instrumental pious nationalism. Under Ismail Gasprinski's influence whose approach to Islam was determined by the extent to which Islam contributed to national life and was based on his belief that Islam could help nationalism fluorish and gain strength by providing symbolic tools that enhance unity and solidarity.[42]

According to Schissler[43] Ahmed Ağaoğlu, with his Russian background is a very important figure of the Turkish nationalism especially in the development of particularly Islamic identity among the Muslim Turks.[44] He believed that religion and nationalism and national identity are mutually supportive elements of national identity. This is quite a complex and delicate relationship where each element both serves and feeds of other.

In a series of articles (*Türk Alemi*/Turkish World) writes about how can be reconciled the Turkish Islam and the Turkish nationalism. He considers Islam is crucial to create the unity of of Muslims, as well as believes that Islamic welfare largely depends on how the well-being of the nations in which it exists.[45]

Ağaoğlu points to the articulation of the nation and religion in Turkey, and says that the 900 year-history of the Turks as the principal defenders of Islam had created a connection between the nation and the religion so deep, that there is no institution in the Turkish life that was not permeated by the Islam. We can

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[34] DAGLYER, Üner, Ziya Gökalp on Modernity and Islam: The Origins of an Uneasy Union in Contemporary Turkey, Compararative Civilization Review No.57., Fall 2007, p. 53–57. https://journals.lib.byu.edu/spc/index.php/CCR/article/viewFile/13052/12913

[35] BERKES, Niyazi, Turkish Nationalism and Western Civilization: Selected Essays of Ziya Gökalp, Greenwood Press, 1981, p. 23.

[36] KADIOĞLU, Ayşe, An Oxymoron: The Origins of Civic-Republican Liberalism in Turkey, Critical Middle Eastern Studies 2007/16 /2, 171–191, p. 172–173.

[37] LANDAU, Jacob see Akçura's position on nationalism as the first significant (political) challenge to the other policies of the Ottoman Empire, namely Islamism and Ottomanism.

[38] KADIOĞLU, Ayşe – KEYMAN, *Symbiotic Antagonism, Competing Nationalism in Turkey*, Universtiy of Utah Press, Michigan, 2011, p. 139.

[39] *Uc Tarz-i Siyaset* (THREE POLICIES), AKÇURA, Yusuf (1876-1935) in English see http://vlib.iue.it/carrie/texts/carrie_books/paksoy-2/cam9.html

[40] Akçura believed that the logic of history was moving in a certain direction: in order not to be left behind, everyone had to keep up with tahis evolution. Thus he saw religion as a phenomenon within the flow of history. in: SCHISSLER, opt.cit. p. 176.

[41] YAVUZ, Hakan opt.cit. 203.

[42] BORA, Tanil, Nationalist Discourses in Turkey, South Atlantic Quarterly, 2003/2-3, p. 433-451. https://muse.jhu.edu/article/43701

[43] SCHISSLER opt.cit. p. 173.

[44] Ağaoğlu, a Turkic emigrant from Russia, was an influential figure of Turkish nationalism, particularly through his work in 1911 in founding the highly influential Turkist journal *Türk Yurdu* as well as the Turkist institution Türk Ocaklan (Türkish Hearts) the same year. He also worked as an editor and regular contributor to many daily newspapers and journals.

[45] SCHISSLER opt.cit. 173.

call Islam as the national religion of the Turks. He stated that the spread of Islam is the only solution to the Turks, and they are dedicated to eradicating religious ignorance and inculcating the Turkish nation with Islamic truths and not totally eliminating the religion from the life of Turks.[46]

Ağaoğlu stressed the importance of Islam for nationalism, he attempted to prove that Islam is not incompatible with nationalism. He based his idea on two arguments. One is that nationalism mean a challenge to Islamic community. In 1914-15 he wrote a lenghty, two-part article for the most important Turkish journal of the period called *Türk Yurdu* entitled *Islamda Dava-yi Millet* (Nationalist issues in Islam). The article was a response to a 1914 article by Babanzade Ahmet Naim (1872-1934), a leading Islamist. Naim analyzed the question of nationalism in the Islam on the basis of Quran. He concluded that nationalism is an illness that comes from the West, can not be accepted as part of Islam, because it violates the Islamic world, and damages the unity of Islam.[47]

Rejected Naim's claim that nationalism is rejected in Islam, Ağaoğlu argued that Islam's original purpose was to establish unity among the Arab nations. He sets out that the Prophet Muhammad did a lot in order to overcome the tribal feelings (*asabiyyet*) and establish the Islamic consciousness among the Arabs, which then leads to Arab unity. Here underlines the importance of religion as one of the most important principles of nationalism. In his view, the essential role of religion is establishing „the national language, national customs, convictions and national mode of thought and way of life. He stated that religion has always played a key role in the formation of nations (if nation is defined as a group of people who feel the same way.[48]

According to Ağaoğlu nationalism and Islam is having a kind of symbiotic relationship. Religion, an integral part of a nationalist program is needed to overcome *asabiyyet* and national unity is needed to create a "worthy vessel" for the transmission of Islam.[49] He stressed that Islam and nationalism are not only compatible but indeed complementary.

The second argument of Ağaoğlu to prove that nationalism is not incompatible with religious concepts and Islam based on the historical perspective of religion. He conceived religion as a dynamic force that constantly remakes itself through the historical process and in the light of changing circumstances as part of a complex dynamic interaction process between revelation and context. He claimed that flexibility of Islam in terms of adapting itself to the requirements of the environment's social conditions and spiritual circumstances which can help the nation found itself together with preserving its own fundamental truth and essentials. He tried to refute that Islam and nationalism cannot coexist. Ağaoğlu had an instrumental attitude toward Islam: he thought that it was a form of discourse that could be effectively used to promote the goals of nationalism. He believed that Islam contributes to the creation of national unity, nationalism will also support Islam with strengthening the Islamic community and unity.

Ziya Gökalp also worked on the best way to establish a national identity in the context of the impending disintegration of the Ottoman Empire and the Westernization efforts of the nascent Turkish republic.[50] Gökalp saw Ottomanism as an ineffective policy for creating a nation due to the coexistence of several different nationalities and religions. He believed that for decades Turks had become alienated from their own national traditions and instead appropriated the cultures of other nations. It was the Turks' neglect of nationalism that led to their demise:[51] Gökalp wrote:

As the non-existence of the ideal of nationalism among the Turks resulted in the lack of any national economy, so the same factor has been an obstacle to the development of a national language and to the appearance of national patterns in fine arts. And, again, because the ideal of nationalism was not present Turkish morality remained only a personal and familiar morality. The notions of solidarity, patriotism and heroism did not transcend the confines of the family, the village and the town. As the ideal of ümmet (religion) was too large and the ideal of family was too narrow, the Turkish soul remained a stranger to the sort of life and to the intensive moral feelings that should be the bases of sacrifice and altruism. The disintegration seen in our economic, religious, and political institutions is the consequence of this state of affairs.[52]

Therefore what Gökalp referred to was a nation based its unity through a synthesis of the three ideals on which a Turkish nation should be founded: Islamism, Turkism and modernism. Gökalp maintained that these three ideals were not irreconcilable but rather complementary, because they appealed to different needs. For example, modernism stood for the pursuit of the scientific, technological and industrial civilization of the West, not the adoption of a European way of life. While culture represents the moral and aesthetic aspect of civilization, science and technology represent the cognitive and material aspects.[53] In fact this synthesis is very well expressed in his saying "The Turkish nation today belongs to the Ural – Altai group of peoples, to the Islamic *ümmet* and to Western internationality.[54]

Gökalp also rejected the view that Islam and the idea of nationalism are contradictory by pointing to the distinction between the universally valid truths in Islam and those aspects which were only socially and temporary relevant and claimed that Islamists failure to see this distinction led them to see

[46] ÖZAVCI, Özan, Intellectual Origins of the Republic, Ahmet Agaoglu and the Genealogy of Liberalism in Turkey, Brill, Leiden, 2015, p. 151.
[47] ÖZAVCI, Özan, opt. cit., p. 152.
[48] SCHISSLER opt. cit., p. 174-175.
[49] SCHISSLER opt.cit. p. 179.
[50] BERKES, Niyazi, GÖKALP, Ziya, His Contribution to Turkish Nationalism in: Turkish Nationalism and Western Civilization: Selected Essays of Ziya Gökalp, Greenwood Press, Westport, 1981, p. 375-76.
[51] BERKES, Niyazi opt.cit. 73.
[52] BERKES, Niyazi, opt.cit. p. 74.
[53] PARLA, Taha, The Social and Political Thoughts of Ziya Gökalp, 1876-1924. Brill, Leiden, 1985, p. 27.
[54] BERKES, Niyazi, opt.cit.p. 76.

nationalism and Islam as irreconcilable.[55] Turkism, a scientific, philosophical and aesthetic movement to elevate the Turkish nation by awekening national culture which included both non-Islamic evolving national traditions and historically variable Islamic traditions that had over time become part of the Turkish national identity, and Islamism are complementary.[56] He regarded Turkism as a nationality and cultural norm and Islamism as an internationality and moral norm.[57] In this respect as Berkes notes[58] Gökalp transformed the Turkism of the purist pan-Turks from a political movement into a cultural one.

Gökalp contended that religion constituted one element of the national culture and added that, as Turks were Muslims, Islam would naturally be an indispensable element in their culture.[59]

He stated that what was irreconcilable with Western civilization was the culture of religious community, because it refused to view religion as a sphere of life that changes and evolves alongside the mores of the people. Gökalp stated that Islam is a historical phenomenon, that is changing and depending on the social circumstances and sought to employ it to enhance Turkish nationalism.[60] Gökalp rejected the view that the sources of Islamic law (*sharia*) should be found solely in divine revelation (*nass*) meaning the sayings and doings of the Prophet Muhammad.

Gökalp evaluated similarly to sharia the morality and common law of the various Islamic communities as well (*örf*). Gökalp is not regarded Islam as a civilization and demanded purging of the Arab traditions from Islam in Turkey, arguing that they did not accord with the Turkish national soul. Gökalp suggested combining Islam and Turkish nationalism in such a way that the Islamic religion is the most important component of Turkish national culture to revive national pride and consciousness in establishing Turkish national identity.

In tracing the roots of the relationship between Islam and nationalism it is clear that pan-Islamism functioned as a proto-nationalism in the formative period of Turkish nationalism in the late Ottoman Empire. The nationalist discourse throughout this period and the following early republican period, in which constructing a national identity was the main concern endorsed a symbiotic and instrumental articulation of Islam and Turkish nationalism on the basis that nationalism could be enhanced through the help of Islam.

There was an implicit alliance between the Turkists and the Islamists. Turkists such as Ağaoğlu and Akçura wrote for Islamist journals, and Islamists such as Mehmet Akif Ersoy and Şemsettin Günaltay never raised a serious challenge to the Turkists and also contributed to Turkist journals. The idea of Islamism was replaced by the idea of nationalism supported by Islam in the discourse of the Islamists, the Turkists strongly emphasized the elements of Islamic nationalism in their writings.[61]

4. The links between Islam and nationalism in the official discourse of the Early Republican era

During the Turkish War of Independence, religion was employed as the ultimate glue holding the nation together against the European enemy.[62] Here a kind of Islamic nationalism was used to justify the nationalist struggle.[63] When it was realized that Islamic nationalism's traditional aspects were impeding reforms toward modernization, the secular Kemalist ideology did not hesitate to subordinate the role of religion contrary to language and history for Turkish nationalism.[64] According to Ümit Cizre Sakallioglu[65] Islam was being a threat to the Kemalist project of Western-style Enlightenment, which primarily aimed to cause a fundamental change in terms of the attitudes of individuals whose communal self-identity and emotional security had been provided by Islam.

Rejecting any close affinity with pan-Turkism or pan-Islamism as acceptable policies for the Turkish republic, Mustafa Kemal adopted language and history as the main constituents of the Turkish nation. To him a nation was based on political, territorial, linguistic and cultural unity (unity of lineage and roots, shared history, shared morality). In that regard Mustafa Kemal also rejected Perso-Arabian and Ottoman cultural elements and instead endorsed the Turk's Asiatic roots. By claiming that the Turks were a great nation before adopting Islam he stressed the need to focus on the pre-Islamic history of the Turks and the purification of the language as prominent goals for strengthening the idea of Turkish national identity.[66]

This strictly secular Kemalist nationalism can be said to have changed the discourse of Turkish nationalism by being strongly against the idea that nationalism should be enhanced or established through the help of Islam.[67] Although religion was replaced by language and history as the main elements of Turkish

[55] HEYD, Uriel, Foundations of Turkish Nationalism: The Life and Teachings of Ziya Gökalp, Harvill Press, London, 1950, p. 98.
[56] BERKES, Niyazi, opt.cit., p. 288.
[57] PARLA, Taha, opt.cit., p. 26.
[58] BERKES, Niyazi, opt.cit., p. 383.
[59] BERKES, Niyazi, opt.cit., p. 285-286.
[60] HEYD, Uriel opt.cit., p. 82
[61] CETINSAYA, Gökhan, Rethinking Nationalism and Islam: Some Preliminary Notes on the Roots of Turkish-Islamic Synthesis in a Modern Political Thought, Muslim World 1989/3-4, p. 350-376.
[62] BORA, Tanil opt.cit., p. 34.
[63] POULTON, Hugh, Top Hat, Grey Wolf and Crescent, Hurst, London, 1997, p. 45-6.
[64] POULTON, Hugh opt.cit., p. 91, 98.; ZUBAIDA, Sami, Islam and Nationalism: Continuities and Contradictions, Nations and Nationalism 2004/10, p. 407-424.
[65] SAKALLIOGLU, Ümit Cizre, Parameters and Strategies of Islam-State Interaction in Republican Turkey. International Journal of Middle East Studies, 28/2, 1996, p. 231-251. https://www.cambridge.org/core/journals/international-journal-of-middle-east-studies/article/parameters-and-strategies-of-islam state-interaction-in-republican-turkey/1D757D8F1BA3FC64A0F158C982EA422A
[66] LANDAU, Jacob, Pan-Turkism: From Irredentism to Cooperation, Hurst and Company, London, 1995, p. 74.
[67] POULTON, Hugh, opt.cit., p. 100, 102, 128.

nationalism during this era through the transfer of sacredness and legitimacy from religion to the national state, religious symbols were being used in the official discourse to cope with the problem of thhe illegitimacy of secular nationalism.[68]

5. Summary

In my study I examine the relationship between Turkish nationalism and Islam in the Turkish nationalist debates of the Late Ottoman and Early Republican era in Turkey. I focus on those disputes in which the compatibility between the ideas of Islam, nationalism and modernism is proven. This symbiotic relationship had a strong political orientation in Turkey. That why it is inaccurate to talk about an Iran-like religious nationalism in case Turkey. Islam in Turkey has never dominated over the sentiment of nationalism; rather it was an instrumental tool of nationalism to achieve its individuals.

This relationship was marked by the strengthening and mutual relations on both sides. In this essay I analyze the two most significant thinkers of this era. I concentrate mostly on the late Ottoman thinkers because they influenced the dominant thinkers of the Kemalist era, who confirmed or refuted their predecessors's writings and statements.

In the Ottoman Empire religion played an outstanding role in both the society and political life. The social, political and legal system was so deeply woven by the Islam, that the 19th-century's Ottoman reformers can hardly modernize the Muslim society where Islam had penetrated all subcultures of the Ottoman political system. Even during the secular Kemalist period religious symbols were used to win public support and provide social integration.

Islam in Turkey was never completely abandoned but in fact has been continuously and strategically used in Turkish political life for pragmatic reasons.

In my opinion, this is deeply related to Islam's symbolic power, its potential to provide a sense of belonging and cohesion as well as present a code of ethics for people that think of themselves as sharing a way of life. So it is no exaggeration to say that Turkey's most successful political ideologies, trends contains noticeably Islamic ideas, elements.

This approach has allowed Turkey to be regarded as a Muslim and *laik* (not the same as secular, rather non-clerical). Due to the strong position of Islam in the Turkish context the issue of secularism is the first and foremost significant principle of modern Turkey that has always remained on the national agenda as the most polarizing political problem. However, the problem in my opinion not the continuous threat from the Islam in the permanent political and ideological competition. The dilemma in my opinion is where is the role of Islam at the axis of secularism and political democracy.

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[68] BORA, Tanil, opt.cit.p. 24.,27.

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The Basic Methodology Problems in Study of Medieval Political and Legal Thought

*Jiří Bílý**

Abstract

The present article offers the single magisterial view to be found in a Gierke, a Carlyle, or an Ullmann. Its aim is, rather, to present a conspectus, as comprehensive as is possible within prescribed limits of space, of the present state of historical scholarship in the field surveyed. Such a conspectus need not be, nor is it here, so neutral as to preclude critical assessment. The judgements of the authors concerned have been brought to bear upon the issues arising in scholarly debate; and since the division between one article and another cannot be absolute and rigid, there is room for differences of emphasis and approach in the handling of topics that are relevant to more than one article. It is hoped that such differences do not amount to contradictions and that their presence may yield a degree of cross-fertilisation rather than confusion.

Keywords: *political theory; law; thought middle age.*

1. Introduction

The character of „medieval political thought" is problematic. Its very existence, as an identifiable entity or subject, may be questioned, and has been denied. Yet such doubts and denials seem less than plausible in the light of the sustained and fruitful scholarly investigation and exposition that the subject - though not always under this title - has received for the best part of a century. Some aspects of that historiography will be considered in a moment. First, however, something needs to be said more directly about the nature of the subject itself. It is no doubt true that if certain definitions of „political thought" are accepted it will be hard to find such thought in the period surveyed in this book. For most medieval thinkers the analysis, whether conceptual or institutional, of „politics" in its original Greek sense was neither relevant nor possible. Even after the so-called „Aristotelian revolution" of the thirteenth century this is still substantially true. Concepts and terminology derived from Aristotle's *Politics* then indeed became common intellectual currency; and yet there is no medieval work challenging even distant comparison with that massive treatise. The influence of Platonic or neo-Platonic ideas was no doubt more continuous, though the light it shed was refracted; but there is no medieval text of the character, let alone the calibre, of Plato's *Republic.* Ideas, whether Platonic or Aristotelian, rooted in the life *of the polis* or city-state had at best a limited application in most medieval societies.

If, on the other hand, „political thought" is understood in terms of „the state" as it has been experienced and analysed in the post-medieval western world, we shall again encounter a concept largely inappropriate in the medieval context. There is certainly room for argument both for and against the view that some kind of „state" emerged, both in fact and in idea, in medieval Europe. This is a recurrent issue in the chapters that follow. Even if that question is resolved in an affirmative sense, however, it remains a hazardous enterprise to credit any medieval writer with a „theory of the state" in what has been, at least for one tradition, the classic modern sense of the term.

2. Data and methodology

In comparison, it may seem, medieval thinkers were concerned with issues much less distinctively „political". Walter Ullmann argued that the medieval putlook in general was characterised by a „wholeness point of view" (Ullmann, W., 1975a, pp. 16). By this lie intended to discriminate between that outlook and one in which, as in modern thinking, separate spheres are distinguished for what is „moral", what is „religious", and so on — including, specifically and emphatically, a sphere of „the political". It is certainly the case that this kind of division and specialisation of disciplines has been a characteristic and important modern development. It is not, however, the case that the alternative „wholeness point of view" has been peculiarly or exclusively medieval. It is surely a viewpoint of that kind that makes Plato's *Republic,* for instance, so much more than a „theory of the state". As for Aristotle, just because the *polis* was for him a society uniquely capable of making possible a „good life" in comprehensive terms, its analysis could not be narrowly „political". Thus a theory of the household forms an integral part of Aristotle's „political theory"; and his account of political systems as such cannot dispense with such ethical concepts as „friendship" and „justice". Theories of „the modern state" have likewise transcended the restrictions of the explicitly „political". There are „sociological" dimensions in the thought of Bodin

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or Montesquieu. Again, vitally important political thinking in the modern period has developed within the matrix of jurisprudence or of the „political economy" which emerged from the moral philosophy of the seventeenth and eighteenth centuries. As for explicit modern variants of the „wholeness point of view", it may suffice to cite the influential case of Hegel, for whom „the strictly political state" is far from exhausting the content of the term „state" itself (Hegel, G., 1942, pp. 364-5).

The credentials of „medieval political thought", then, are not impugned by the recognition that its subject-matter extends to themes which, in other periods or for some thinkers, might seem alien to strictly political discourse. Nor is it necessary, in the defence of those credentials, to have recourse to a definition of politics as nothing less than (in Michael Oakeshott's phrase) „the activity of attending to the general arrangements" of a society (Oakeshott, M., 1962, p. 122). It is sufficient to recognise that issues seemingly *prima facie* „social", „economic", „ecclesiastical" or even „spiritual" arise here because of their bearing upon questions of *authority* and *jurisdiction.* Thus the theory of *dominium* expounded by John of Paris at the turn of the thirteenth and fourteenth centuries has a great deal to do wkh problems arising from changing economic conditions (Oakeshott, M., 1962, pp. 638-40), but it is expounded deliberately in the context of an argument - a *political* argument, we may properly say - about royal and papal *power.* Again, the theoretical issues raised by the conciliar movement of the fifteenth century were largely theological issues regarding the nature of the church as a spiritual society; but - setting aside the overtly political conflicts in the context of which the movement developed - those issues were, for some writers at least, concerned with the consequences of treating the church as a particular instance of the genus comprising *political* societies as such.

There are various ways, accordingly, in which the genuinely political character of „medieval political thought" can be established. Yet it remains, also, *medieval,* and nothing said here is intended to deny that there are specifically „medieval" characteristics to be considered and particular problems in the historical interpretation of this body of ideas. For one thing, medieval society was theocentric and even, for some of its leading figures, theocratic. Necessarily, therefore, an account of medieval political thinking will include more theology and ecclesiology than would be expected in a modern sequel. Again the relative dearth, especially in the earlier phases, of explicit political theorising in medieval society means that historians must concern themselves to a very considerable extent with ideas that are implicit in institutions and procedures, including (an important element in the evidence) ritual and ceremonial. The exploration of ideas and attitudes embedded in governmental and social structures means, moreover, that the history of medieval political thought must frequently merge into the historical analysis of medieval society itself. There is also, however, a more general question about the approach to the subject adopted here, which may itself be approached by way of some brief comments on earlier historiography.

It is possible, and not necessarily unrewarding, to write the history of political thought in this as in other periods as, essentially, the history of political thinkers. Medieval thinkers can indeed be given places among „the masters of political thought" (Foster, M. B., 1942). „The medieval contribution to political thought", again, can be assessed by reference to the work of outstanding figures - Aquinas, Marsilius, Hooker (Passerin d'Entręves, A., 1939). Yet whatever the merits and disadvantages of this kind of history may be for other periods, it can hardly fail to yield an imperfect and distorted picture of political ideas in the medieval centuries. For reasons already stated, few writers in that period can be meaningfully identified as „political thinkers" at all; and very few indeed can be regarded as having made a major individual contribution to the subject. Even if the net is cast more widely and the definition of a „political thinker" made more flexible, so much of the evidence will be lost as to leave the resulting „history" unacceptably spasmodic and patchy. Whole tracts of time, indeed, would virtually disappear if the record were restricted to the work of individual thinkers. Yet without an understanding of, in particular, the earlier medieval centuries, our perspectives on the later period, with its revival of explicit political discussion and analysis carried out by more readily identifiable „political thinkers", must be misleadingly foreshortened. To see these later medieval political ideas, in some sense no doubt ideas reflecting a more sophisticated culture, in the context of the earlier sources upon which their exponents continued to draw is, for one thing, to gain a degree of security against the risk of distortion when what is „medieval" is viewed and assessed in terms of its supposed anticipation of what is regarded as „modern".

Thus a more thematic or conceptual approach must potentially be, and has been in fact, more fruitful in the history of medieval political thought. The point may be illustrated by a brief consideration of three major contributions to the historiography of the subject since the late nineteenth century. There is first the dominant figure of Otto von Gierke and the three volumes (published between 1868 and 1881) of *Das deutsche Genossenschaftsrecht.* Gierke's monumental and magisterial work was of course concerned with more than the strictly medieval period; and particular importance here, especially for English-speaking scholars, attaches to that part of the third volume which was translated by F.W. Maitland and published in 1900 under the significant title of *Political Theories of the Middle Age.* Gierke was indeed concerned with „political theories", and his concern was expressed through the deployment of formidable learning in an immense body of source-material. It was, however, for all its range, a concern of a rather specific kind. Not only is Gierke's work explicitly directed to „the law of associations" *(Genossenschaftsrecht)*: it seeks and finds in that law an „ideal type" or model of fellowship and group personality. The ideal, moreover, is essentially and avowedly Germanic, even if both Gierke and those influenced by him saw it as a source of more generally applicable principles for a modern world suffering from excessive „individualism". In this powerful perspective, medieval political thought reveals above all the principles of a group or corporate life generating in those who share it morally valuable qualities of loyalty and brotherhood which transcend even the political division between rulers and ruled. It is a thesis which can be and has increasingly been questioned (Black, A., 1984, pp. 210-217); but it cannot be doubted that

Gierke's work opened up, effectively for the first time, much of the buried wealth of medieval thinking about society.

Shortly after the publication of Maitland's important translation from Gierke, R.W. and A.J. Carlyle produced the first of what eventually amounted to the six volumes of *A History of Mediaeval Political Theory in the West.* Reprinted as recently as 1970, this remains an invaluable contribution to the subject, not least on account of its copious provision of quotations from the sources in the original languages. What calls for comment here, however, is the structure and method adopted by Carlyle (the singular form seeming warranted in view of the fact that the work was preponderantly written by A. J. Carlyle, with some contributions by the brother who predeceased him). Within a broadly chronological framework, the approach is essentially thematic, with relatively little attempt to give sustained and systematic attention even to major individual thinkers (exceptionally, separate chapters are devoted in vol. IV to John of Salisbury and Gerhoh of Reichersberg; but these deal only with the two authors' views on the relationship between the spiritual and temporal powers). A particularly characteristic feature is the recurrence in successive sections and volumes of the work of chapter-headings which Carlyle clearly regarded as identifying the principal themes to be explored: „The source of law"; „The source and nature of the authority of the ruler"; „The theory of the divine right"; „Representative institutions", and so on. Even more striking and important, however, is the clear conviction that it is possible to identify certain „great political conceptions of the Middle Ages": these are listed as „the supremacy of law, the authority, of the community, the contractual relation between ruler and subject" (Carlyle, R. W., 1903-36). Here again we have a view - with its corollary, that „the theory of the absolute Divine authority of the King . . . had little importance in the Middle Ages" - which has exercised a good deal of influence but which would now be regarded as too restricted and one-sided for anything like unqualified acceptance.

The Carlyle view would, in terms of a third important and influential approach to medieval political thought, be seen as an emphatic - indeed over-emphatic - assertion of an „ascending", in contradistinction from a „descending", conception of political authority. Walter Ullmann's familiar formulation recognised indeed the presence and the importance of both views in medieval thought; but he argued that throughout the long period between the Christianisation of the Germanic peoples of northern and western Europe and the late thirteenth century, it was the descending theory - in which political power comes by delegation from God, to whom alone the ruler is accountable - that overwhelmingly preponderated. Even so, Ullmann claimed, „The history of political ideas in the Middle Ages is to a very large extent a history of the conflicts between these two theories of government" (Ullmann, W., 1975a, p. 13). Here yet again, no doubt, we have an illuminating and fruitful hypothesis which is nevertheless open to question and debate and which would certainly not be universally accepted as a sufficient framework for a thorough exploration of the subject. In any case it is of course by no means the only important general concept to have emerged from Ullmann's massive and wide-ranging scholarship. His insistence on the medieval „wholeness point of view" has already been mentioned. Even more important, arguably, is Ullmann's concern to convince his readers that for most of the medieval period our investigation is concerned with „governmental" rather than strictly „political" ideas - with ideas essentially about the exercise of authority in *gubernatio,* which in turn was seen as being indissolubly connected with *jurisdictio,* „laying down the law" (Ullmann, W., 1975a, pp. 17-18). It followed trom this that legal and juristic sources had for Ullmann an importance which had assuredly not been overlooked by other historians but which for him meant that the medieval view of society and authority „found its most conspicuous expression in the law and in . . . jurisprudence" (Ullmann, W., 1975 b, p. 12).

3. Conclusion

There are questions which will naturally be asked and which it is necessary to consider even if they cannot be completely or definitively answered. There are questions as to method and approach - questions which may perhaps be encapsulated in the question whether these pages have reflected any significant change or development in the histriography of the subject. It can perhaps be claimed that there is evidence of such a shift, both in the range of the evidence considered and in at least some of the perspectives in which it has been analysed. One illustration of both points may be found in the thoroughness with which ecclesiological concepts have been considered, whether in the Carolingian and post-Carolingian period or in the context of fifteenth-century conciliarism - the latter in particular a case in which earlier historians would have taken a more narrowly „political" view of the material. Again - a not unrelated point - it is surely the case that the evidence of canon law has taken a much more prominent place here than would have been the case even in the early decades of this century. This is not to say that the canonists were neglected in earlier account: Carlyle, for example, drew extensively on canonistic sources, and devoted the greater part of his second volume to „the political theory of the canon law" from the ninth to the thirteenth century. Yet it was precisely in the preface to that volume that Carlyle acknowledged the disadvantage under which he had laboured from lack of access to „the mass of unprinted material, especially in the canon law of the twelfth century" (Carlyle, R.W., 1903-36, vol. II). Over recent decades, however, the work of such scholars as Walter Ullmann, Stephan Kuttner, and Brian Tierney among many others has transformed this situation; and that transformation is one of the changes reflected in the pages of this volume.

Similar points could be made in respect of the now immense mass of scholarly work on medieval philosophy, even though that work has not, for the most part, concentrated primarily on the political or even the moral theory of the scholastics.[1] This has clearly, for example, added new dimensions to our understanding of Ockham's political ideas, however complex the relationship between those ideas and Ockham's general philo-

[1] Cf. *The Cambridge History of Later Medieval Philosophy,* Cambridge University Press, 1982, where some 130 pages out of 850 or so are devoted to „Ethics" and „Politics".

sophical position may seem to remain. Again, a tendency in the study of the medieval period - as indeed of other periods too - to move from predominantly political history to a history more fully aware of interconnected social, cultural and economic factors is one reason why the political ideas examined above have so often been sought in a broader context of ideas about communities in general.

A line has been drawn in the middle of the fifteenth century. Can this be defended? History does not abound in unmistakable final curtains like that which descended upon the eastern empire of Byzantium in 1453: and in the west there is no mid-fifteenth-century event of comparable decisiveness which might be seen as marking an end or a beginning in any aspect of political thinking. If, for example, we say - as we might - that the conciliar movement in the western Church ended with the final dissolution, in 1449, of the Council of Basel-Lausanne and the „Little Schism" it had precipitated, the fact remains that conciliarist *ideas* (and even in some measure policies based upon them) retained their importance and relevance well into the next century and even beyond (Oakley, F., 1981). It is no doubt true that the last major thinker considered in these pages is Nicholas of Cusa, who lived until 1464, but whose creative thinking had all been done two or three decades earlier. And many would agree that for the next political thinker of notable originality we have to wait for Machiavelli, who was not born until five years after Nicholas' death. On the other hand, if anything has emerged from this survey it is surely that a comprehensive study of political ideas cannot restrict itself to the contributions of „great thinkers"; and our notional dividing--line of 1450 is spanned by a diversity of writers and sources still essentially concerned with the problems examined above and analysing them in the language and with the conceptual equipment of „medieval" society. It has not been possible, and it would have been absurd to attempt, to exclude such sources rigidly from consideration here.

It could no doubt be argued indeed, that it is not the elasticity of the 1450-1500 limit that is open to criticism but rather the attempt to operate within such a limit at all. Historians of medieval political thought have sometimes interpreted their terms of reference as extending down to the end of the sixteenth century (Carlyle, d'Entręves) - or even later. Brian Tierney, for one, has pointed to issues for debate and analysis which he sees as extending over a period from the mid-twelfth to the mid-seventeenth century (Tierney, B., 1982); and, though doubtless less convincingly, John Locke has been represented as having been, at the end of the seventeenth century, largely content in his political thinking with „the solutions of St Thomas Aquinas".

Must we conclude then that there is no more to be said in justification of ending this survey in the mid-fifteenth century than the somewhat limp observation that, after all, middle age must end somewhere? The answer surely is that something more, and more to the point, can in fact be said. It is of course true that many of the medieval themes and „traditions" of thought analysed above persist with considerable vitality into the later fifteenth century and beyond. It is also true, however, that they survive increasingly in a situation of co-existence with other, newer (and no doubt at the same time older) ways of thinking. The co-existence of what, for convenience and brevity, we may loosely designate as „scholasticism" and „humanism" was at times easier and more peaceful than has sometimes been supposed. Yet there was a fundamental divergence which inevitably led to hostility; and just as the great institutions of medieval society - the papacy, the empire, the „feudal monarchies", the canon and civil laws - survived only in changed forms, so medieval political ideas survived to play a part in changed circumstances and were themselves changed in the process. The new forces that were at work were not, of course, simply or absolutely new. Humanism itself, after all, must be traced to beginnings at least as far back as the mid--fourteenth century; and the great, the revolutionary changes in religious and ecclesiastical life which were to provide, precisely, the context into which many medieval ideas about society and authority were to survive, have themselves been seen as the product of an „age of reform" extending from the mid--thirteenth to the mid-sixteenth century (Ozment, S., 1980). When all this is said and acknowledged, however, when it is recognised that the „new" was not entirely new, while the „old" was not yet, or for many decades, a spent force, the sense of change survives. It is neither mistaken nor misleading to suggest that somewhere around the middle of the fifteenth century we can detect enough of a decisive shift in the patterns of intellectual life to justify the claim that the principal movements of „medieval political thought" as it has been analysed in these pages were drawing to a significant close.

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National Mobilization of Labour Force in Czechoslovakia (1945 – 1949)*

*Veronika Steinová***

Abstract

The regulated mobilization and distribution of the labour force is a process in which individual workers are allocated to work positions in specific branches or fields of social production in such a way as to enable together the functioning of the overall social work.

After the end of World War II was a labour shortage in Czechoslovakia and of course the Czechoslovak economy focused on the needs of the war. The structure of the labour market (the employment rate and distribution of the labour force in individual branches and regions) was completely uneven. The District Labour Protection Offices were established pursuant to the Ordinance No. 13/1945 Sb., to provide for the temporary building up of Labour Protection Offices and Regulation no. 164/1945 Sb., to provide for districts and seats of District Labour Protection Offices and their branches. The compulsory recording of all changes in employment relationships was gradually implemented. A job seeker and also an employer had always the duty to apply to the Labour Protection Office when seeking or offering a job (Under Ordinance No. 15/1945 Sb.). The award prior approval of a competent District Labour Protection Office is the most important requirement to enter into the valid employment relationship (apprenticeship).

In Czechoslovakia was in 1946 – 1947 planned the labour force mobilization (based on a voluntary) only for some individual areas of the economy. Only after two years the state proceeded to the central planning of the labour force mobilization.

At the turn of the 1940s and 1950s, plan-based labour force management can be divided into reproductive movement of the labour force, recruiting new labour resources from adult citizens capable of work who had not yet been engaged in the work process or redistribution of the labour force (placement of workers within sectors. School graduates represented the largest labour recruitment as for the number of workers. The socialist law knew three major methods of the planned movement of the labour force: the selection of job seekers carried out by social authorities, recruitment of workers, direct (administrative) orders to place workers into the labour force.

Keywords*: National Mobilization of Labour Force; the Labour Protection Office; The compulsory recording of changes in employment relationships; mobilizing the labour force; the Communist programme of reconstruction of Gottwald´s government (two-year plan); the regulated mobilization; the distribution of the labour force; direct (administrative) orders to place workers into the labour force.*

A free and democratic society is characterized by the unrestrained movement of the labour force during which people voluntarily make new employment engagements or terminate existing ones. However, these standards are nowhere near as common and automatic as it may seem. This has been proved by statistical data and reports from countries governed by totalitarian and authoritative regimes where the government often substantially intervenes in the process of the selection of one´s occupation with the intention to affect economic (and other – e.g., family, moral, legal) relations. Freedom of free movement of the labour force as one of the fundamental rights and freedoms of each individual was curtailed quite recently in the territory of the current Czech Republic, too. Tendentious efforts of the central power to control and determine the course of the Czechoslovak economy arose just after the end of World War II and then fully developed in the period of socialism, when the placement of workers was carried out exactly in such a way as to conform to the needs of socialist national economy.[1]

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[1] Closer to the topic focuses example: *Budovatelský program Gottwaldovy vlády*. Prague: Orbis, 1946, p. 14; ČERNÝ, Svatopluk. *Socialistická rozšířená reprodukce pracovní síly*. Prague: Státní nakladatelství politické literatury, 1961; GLOS, Bohuslav. *Hospodářské plánování ČSR*. Prague: Práce, 1946; GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948; GLOS, Bohuslav. *Problémy plánování v ČSR: 4 studie. Otázky politické ekonomie*. Prague: Orbis, 1950; GLOS, Bohuslav. *Usměrnění distribuce pracujících*. Olomouc: Spolek komerčních inženýrů, 1947; CHYSKÝ, Jiří. *Rozmisťování pracovních sil*. Prague: Orbis, 1968; KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965; NOVOTNÝ, Jaroslav. *Nábor a rozmisťování pracovních sil v Československu po 2. světové válce: historie a současnost*. Prague: Ministerstvo práce a sociálních věcí ČSR, 1975; *První československý plán*. Prague: Ministerstvo informací 1946; *První československý pětiletý plán*. Prague: Ministerstvo informací a osvěty, 1948; *První pětiletý hospodářský plán rozvoje Československé republiky*. Prague: Orbis, 1949; SONIN, Michail Ja. *O bilanci pracovních sil: (methodika sestavování)*. Knihovna Státního úřadu plánovacího. Prague: Orbis, 1951; VOJÁČEK, Ladislav, SCHELLE, Karel, KNOLL, Vilém. *České právní dějiny*. Pilsen: Aleš Čeněk, 2008; WITZ, Karel, SLÍŽ, Josef, CHYSKÝ, Jiří. *Čs. Pracovní právo – obecná část*. Prague: Státní pedagogické nakladatelství, 1952.

Within the course of World War II the Czechoslovak economy focused first of all on the needs of the war, which also had an impact on the employment rate and distribution of the labour force in individual branches and regions immediately after its end. At the same time, workers called up to do forced labour, prisoners or immigrants began to return to the Republic. All of them sought a new beginning and a new job. Germans, Hungarians and collaborators who were labelled by the state as its enemies were the opposite case. They were supposed to be mercilessly and in particular, swiftly evacuated. The evacuation affected more than one million people. In connection with the idea to equally distribute workforce this fact, however, came into sharp conflict and many foreign citizens, especially experts, were artificially retained simply because there was no one to occupy their jobs.

Evacuation and resettlement had serious consequences as to geographic and demographic layout and they also significantly changed the structure of the labour market.[2] The shortage of workforce concerned particularly agriculture and the building industry. The following instance presents a small idea of the allocation of labour to German citizens:[3]

"The Ministry of Labour Protection and Welfare – Repatriation Department, Brno-based Centre

Brno, 18th June 1945.

Re:

Reference number: Titl.

Detention Camp Administration
To the attention of the Administrator
Maloměřice.

We strongly request that at least 20 men and 20 women be sent every day to do heavy cleaning and disinfecting work. We have nobody at all for this work, there is a danger of infection during its performance and if you do not send us the requested number, the production in our factory will be delayed. We take care of the people who suffered most under the German persecution, some of them for the whole 6 years and therefore we have a particular right to the p e r m a n e n t allocation of Germans to this work.

We kindly ask you not to make our work more difficult and to ensure that we do not have to ask again every day for what we have a full entitlement to. Thank you and Yours sincerely."

The movement of new settlers in Czech border areas took place very spontaneously. The so-called Settlement Authorities only recorded the final results of such settlement rather than anything else. Industrial and agricultural areas in the neighbourhood of large districts were settled disproportionally as first, while the poorer areas became significantly depopulated (e.g., Western and Southern Bohemia, Northern Moravia). As for the existing state authorities, they continued to fulfil their function in their current premises and more or less with the identical staff – only senior and managerial positions where the German management had been artificially appointed during the war obviously underwent changes.

The compulsory recording of all changes in employment relationships was gradually implemented as early as in 1945. The duty of a job seeker to apply to the Labour Protection Office[4] when seeking a job arose soon afterwards. It was the competence of the Labour Protection Offices that was soon widely extended – they were not to act any more as mere registers of changes in the distribution and re-distribution of employees but they themselves planned and controlled such changes.[5]

The District Labour Protection Offices were established pursuant to the Ordinance No. 13/1945 Sb., to provide for the temporary building up of Labour Protection Offices and Regulation no. 164/1945 Sb., to provide for districts and seats of District Labour Protection Offices and their branches.[6] The Labour Protection Offices were directly subordinated to the Ministry of Labour Protection and Welfare. The competence of Labour Protection Offices covered: engaging in work, wages policy, trade licence inspection, occupational medicine and other employee welfare.[7]

The activity of the authorities was usually subject to administrative regulations: only some specific issues were governed by special regulations. Within three days of its delivery it was possible to lodge an appeal against a decision of the District Labour Protection Office with the Administration Committee, which was to decide on it in a senate consisting of a chairman and two assessors. The appeal had a suspensory effect (however, the senate of the Administrative Committee was allowed to completely exclude the suspensory effect). A party to the proceedings had the right to appeal against the decision of

2 GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 5-6.

3 AMB – Brno, B-1/42, *Národní výbor města Brna.* Ústředí pracovních středisek. Card no. 15, inv. no. 59.

4 GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 84-90.

5 KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 112.

6 WITZ, Karel, SLÍŽ, Josef, CHYSKÝ, Jiří. *Čs. Pracovní právo – obecná část*. Prague: Státní pedagogické nakladatelství, 1952, p. 42.

7 VOJÁČEK, Ladislav, SCHELLE, Karel, KNOLL, Vilém. *České právní dějiny*. Pilsen: Aleš Čeněk, 2008, p. 465.

a senate with the Provincial Labour Protection Office. No remedial measures against the decisions of the Provincial Labour Protection Office were admissible.

Legal regulations did not omit sanctioning either – in accordance with section 6 of Regulation no. 13/1945 Sb., the Labour Protection Offices could sanction conduct against and omission of regulations that were within the scope of the competence of such authorities by imposing a procedural fine up to the sum of 10,000 crowns, administrative punishments (again a procedural fine up to 100,000 crowns) through administrative authorities or even by imprisonment of up to one year; accumulative punishments were possible.

The following two examples represent the activity of the District Labour Protection Office in Prague:[8]

" Ref. no. II-2198-9/4-46
Re: Indukta, electrical manufacturing works in Žilina – request for approval to employ J.H. and J.S. from Modřany near Prague.

Referring to ref. no.: 5758-2/4-46-3 dated 6th April, 1946.
To: District Labour Protection Office in P r a g u e.

The Ministry of Labour Protection and Welfare requests a notification as to who has given consent to J.S. allowing him to take a job in Slovakia and whether the person in question has duly terminated his employment relationship. At the same time, state whether the mentioned person can be as a specialized worker expendable on the labour market.

Prague, 23rd April 1946

Ref. no. II-2198-17/4-46

Re: K.K. Ružomberok, Revoluční nám no. 6 – Request for approval to take a job in Slovakia

Referring to the Request of 28th March, 1946.
Mr R.K., a car painter in Ružomberok, Revoluční nám. no. 6

The Ministry of Labour Protection and Welfare d o e s n o t f u l f i l your request for approval to take a job in Slovakia because you have left a job without the consent of the employer and the competent Labour Protection Office, by which you have violated work morals."

Under Ordinance No. 15/1945 Sb., to provide for reporting employment relationship and termination thereof, within three days the employer was obliged to report to the District Labour Protection Office every entry into employment as well as every termination of employment (apprenticeship). The Ordinance expressly conditioned the effect of such termination of employment relationship or apprenticeship by prior approval given by the District Labour Protection Office. Such approval was not necessary in the following cases:

a) both parties agreed to termination of the employment relationship (apprenticeship)
b) if an employee was hired on a probation period or as an auxiliary worker for an employment period not exceeding one month,
c) in employees hired for temporary or seasonal work after such work ended,
d) in agriculture (forest) enterprises where the workers are not employed in agriculture (forestry) industry but are hired only temporarily for urgent work,
e) in occasional work and part-time work not subject to health insurance taxation.

The Regulation to report the employment relationship and the termination thereof became applicable on the day it was published, i.e., on 27th June 1945, retroactivity was not applicable. This legislation, however, was applied to a limited circle of persons, employees and their employers in employment relationships (apprenticeships) established by private law contracts. It did not apply to state employees or employment relationships (apprenticeships) of Germans, Hungarians, traitors and collaborators, which were regulated by special laws.

Based on Minister of the Interior Decree No. 371/1947 Ú.l.I, Advisory Boards were established to coordinate the activities of National Committees during the labour force mobilization (so-called Mobilization Boards) at the seats of District Labour Protection Offices. The task of the Boards was to ensure the uniform and organized procedure of all involved bodies in mobilizing the labour force, in particular in identifying new efficiency at work or more economical use of employees. Before a two-year plan act had been passed by the Chamber of Deputies, Presidential Decree N. 88/1945 Sb., the provision of section 15, stipulated that in the decision-making procedure regarding proposals to award approval to enter into or

[8] NA – Prague, Chodovec, Fond Ministerstva práce a sociální péče. Card no. 396, Otázky náboru a včleňování pracovních sil; žádost o umístění. Location mark no. 2198.

terminate employment (apprenticeship), the Labour Protection Offices should take into consideration the following[9]:

a) social circumstances and professional training of an employee,
b) needs of the labour market,
c) the importance of tasks of the involved enterprises and industrial branches
d) efficiency of the enterprises in question.[10]

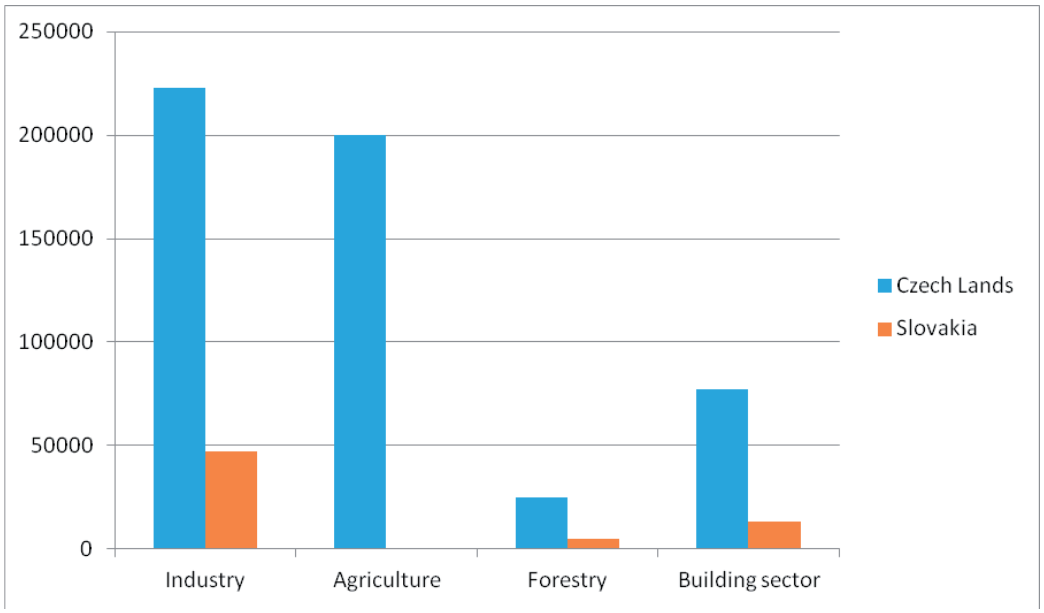
The requirement that a competent District Labour Protection Office must award prior approval to allow an employment relationship (apprenticeship) to be effectively established and an individual employee to enter into the respective employment (apprenticeship) was in other cases regulated by the act providing for compulsory labour service.[11] This regulation also allowed exceptions in the following cases:

a) employees whose employment relationship was usually concluded for a period not exceeding seven consecutive calendar days,
b) auxiliary workers employed for emergency work in agriculture or forestry for a period not exceeding four consecutive weeks
c) persons who were hired only to eliminate states of emergency (e.g., consequences of natural disaster).

The same strict rules for awarding approval by a state authority for an employee to enter into employment were obviously also applied to cases of terminating employment (apprenticeship) where this fact was also required to be reported without delay to a competent District Labour Protection Office. The act expressly stipulated that the losses that might be incurred by an employer as a result of a decision by a District Labour Protection Office would not be indemnified.

- According to the Communist programme of reconstruction of Gottwald´s government[12], there was a shortage of at least half a million workers after the expulsion of Germans and this was supposed to be compensated by means of a great national labour force mobilisation.[13] Initial plans considered the labour force mobilization to be essentially on a voluntary basis[14] (for more details see section 1(3) of Act No. 87/1947 Sb., to provide for some measures for the national mobilization of the labour force). However, since these measures were not sufficient, the state central authority arrived at the conclusion that it was necessary to implement legal measures of compulsory labour service.

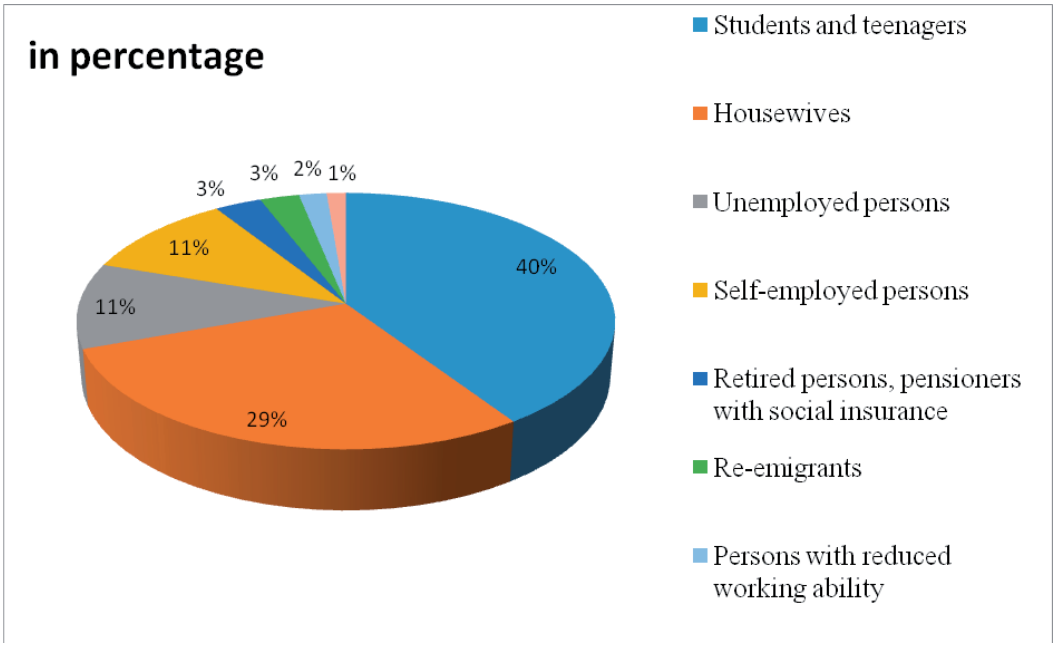
The issued two-year plan (based on Act No. 192/1946 Sb., to provide for a two-year economic plan) planned the labour force mobilization only for some individual areas of the economy, so the total need of the labour force was only calculated in individual state enterprises.[15] The plan of the requirement for a new labour force for the years of 1947 and 1948 is presented in the following chart:



Data received from: KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil.* **Prague: Československá akademie věd, 1965. p. 113.**

[9] GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 91-106.
[10] Under section 4(1) Ordinance No. 15/1945 Sb., to provide for reporting employment relationships and termination thereof; see also GLOS, Bohuslav. *Plánovitá distribuce pracujících*. Ministry of Information, p. 88.
[11] CHYSKÝ, Jiří. *Rozmisťování pracovních sil*. Prague: Orbis, 1968, p. 58-86.
[12] Closer: *Budovatelský program Gottwaldovy vlády*. Prague: Orbis, 1946, p. 14; *První československý plán*. Prague: Ministerstvo informací, 1946.
[13] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 112-113.
[14] GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 5-6.
[15] GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 23-29.

Immediately after the post-war years 1945 and 1946, in its two-year plan the state proceeded to the central planning of the labour force mobilization. School graduates represented the largest labour recruitment as for the number of workers.[16] Decree of the Ministry of Labour Force No. 318/1952 Ú.l. of 3rd November 1952 contained detailed legislation regulating individual requirements for allocated workers. The following chart shows the workers newly engaged in work within the framework of the two-year plan.



Data received from: KOCANDA, Rudolf. ***Způsoby plánovitého rozdělování pracovních sil*****. Prague: Československá akademie věd, 1965. p. 116.**

In general, the regulated mobilization and distribution of the labour force can be explained as a process based on which individual workers are allocated to work positions in specific branches or fields of social production in such a way as to enable together the functioning of the overall social work.[17] At the same time, allocation to individual qualifications (i.e., the degrees of simple or complex work) takes place and of course workers undergo territorial placement. The term labour force represents the summary of the physical and psychological abilities of a human being to work, meaning to create usable values. However, labour force is very diversified because it is composed of people and therefore can be differentiated according to sex, age or qualifications, also with respect to territory and various needs and requirements. It is necessary to note that the labour force is one of the factors of the development of productive power.

Social division of labour differs in different social orders depending on what material basis it is based on. Job placement of an individual became a characteristic feature of his/her affiliation to a given social class after World War II. The division of the labour force meant the engagement of workers in individual processes of production cooperation and based on the above stated at the same time represents the implementation of the distribution of the total social labour force.[18] The developed division of labour gives rise to an objective need for the total amount of individual concrete work to correspond with the need of society as a whole and for a certain proportionality to take place among individual sectors.[19] Socialist legislation understood this need not in connection with the internal need of a concrete production enterprise but in the relations of society as a whole. A social need expressed in the plans of work meant the assurance of efficient and progressive development of social reproduction of the labour force in the needed structure and form (based on sectors or fields, professional qualifications or territorial placement).[20]

The socialist law interpreted the mobilization in a way that the total social labour force needed to be divided in a way that at the same time a socialist man would be free in selecting his work position (occupation) as far as possible. However, as was revealed, the reality was different.[21]

[16] VOJÁČEK, Ladislav, SCHELLE, Karel, KNOLL, Vilém. *České právní dějiny*. Pilsen: Aleš Čeněk, 2008, p. 584-585.
[17] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 9.
[18] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 16.
[19] CHYSKÝ, Jiří. *Rozmisťování pracovních sil*. Prague: Orbis, 1968, p. 44-50.
[20] CHYSKÝ, Jiří. *Rozmisťování pracovních sil*. Prague: Orbis, 1968, p. 5-19.
[21] WITZ, Karel, SLÍŽ, Josef, CHYSKÝ, Jiří. *Čs. Pracovní právo – obecná část*. Prague: Státní pedagogické nakladatelství, 1952.

At the turn of the 1940 s and 1950 s, the regulated placement of the labour force had several consequential phases during which collective interest was weighed on the one hand and the interests of an individual on the other.[22]

1. analysis of prior development – in this phase data on the work efficiency of individual enterprises were gathered,
2. analysis of future needs and sources to determine the concept of the development of the national economy,
3. articulation of major tasks and delimitation of sources in the state plan and other plans
4. final phase where, particularly, the issue of how to specifically ensure the implementation of the plan of the division of labour was dealt with.

Plan-based labour force management can be divided into the following forms: [23]

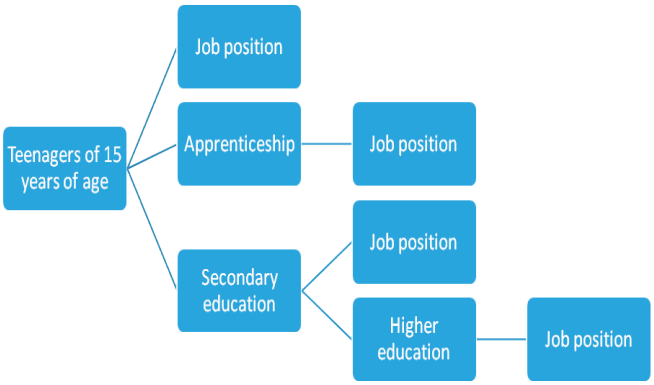
a) reproductive movement of the labour force – it is the generation exchange of workers, i.e., entry into the work process of a new generation and older age-groups taking retirement,[24]
b) recruiting new labour resources from adult citizens capable of work who had not yet been engaged in the work process (in particular, women after maternity leave and housewives),[25]
c) redistribution of the labour force (placement of workers within sectors).[26]

Major methods of the planned movement of the labour force numbered three, as follows:[27]

1. the selection of job seekers carried out by social authorities – this was applied where there was a lower number of more attractive job positions of a certain kind in comparison with the number of job seekers who had applied for them. Those who best fulfilled the given requirements important for a given job position were selected from the job applicants;
2. recruitment of workers – was used when society needed a higher number of workers for certain branches of the economy, and using various methods (e.g., economic incentives) it persuaded them to more or less voluntarily take these needed jobs;
3. direct (administrative) orders to place workers into the labour force – in this method of placement a state, economic or social authority ordered an individual to take up a job determined for him in advance, and in the same way the period of such employment was ordered too. This very method of allocating work often took place without regard to the interests or needs of an individual and thus caused social tension. The direct placement of workers in a forced manner was implemented especially later, between 1952 and 1958, in selected groups of persons (in particular, in case of graduates from higher or vocational schools, graduates from apprentice training centres of state working reserves, etc.).

Features of coercion exercised on an individual through an administrative, i.e., direct manner[28] were also included in cases where an individual was prevented against his will from leaving a specific job (similar measures used to be used mostly in agriculture). Such direct control could be performed in two ways – in a positive way (i.e., ordering somebody to take up a given job) or a negative way (i.e., forbidding the creation of a given employment relationship).[29] On the contrary, indirect control[30] represented a plan-based economy regulating the influx of workers into selected economic branches or individual regions in other ways than ordering them to take up a job or imposing sanctions on them (e.g., through a financially interesting wage increase, better working conditions, ensuring the stability of work, possibility of wage and social advancement, more acceptable living conditions and the overall social status given by the occupation, eliminating difficulties connected with training, expertise in a given field and knowledge of job opportunities).[31]

Teenagers engaged in the national labour force mobilization as first; the chart below shows the placement of teenagers.[32]



Data received from: KOCANDA, Rudolf. ***Způsoby plánovitého rozdělování pracovních sil.*** **Prague: Československá akademie věd, 1965. p. 127.**

[22] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 47.
[23] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 50.
[24] GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948. p 31-58.
[25] GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 36-41.
[26] GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 30-36.
[27] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 63-68.
[28] GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 63-71.
[29] GLOS, Bohuslav. *Plánovitá distribuce pracujících*. Ministry of Information, p. 63 and subsequent.
[30] GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 71-73.
[31] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 127.
[32] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 127.

The so-called "Lánská akce" in 1949 was the first great event of teenagers recruitment on a nationwide scale, further actions of this kind soon took place afterwards.[33] Subsequently – in 1951 – the Ministry of Labour Force was established and as a central body it took over care for the preparation and education of apprentices and, apart for that, even control over some sections of job placements.[34]

The Ninth-of-May Constitution of 9th May 1948 No. 150/1948, in Article III., guaranteed the right of all citizens to education, the right to work, a fair remuneration for work done and to rest after work.[35] The National Insurance ensured that citizens would be provided for in case they are unable to work. In accordance with the provision of section 32, every citizen was obliged to work according to his capabilities and to contribute by his work to the wellbeing of the whole. And in this very line the national mobilization of the labour force took place at the very end of the 1940 s and subsequently to the end of the regime (let us mention for instance Act No. 247/1948 Sb., to provide for forced labour camps).

In conclusion, I would like to summarize the key legal regulations devoted to the issue of the controlled placement of the labour force at the end of the1940s, as outlined above:

- Ordinance No. 13/1945 Sb., to provide for the temporary building up of Labour Protection Offices,
- Ordinance No. 14/1945 Sb., by which the inapplicability of some regulations regarding the management of work and emergency service are declared and employment relationships created by ordering (allotting) are cancelled
- Ordinance No. 15/1945 Sb., to provide for reporting employment relationships and termination thereof,
- Government Decree No. 32/1945 Sb., to provide for extraordinary measures to ensure necessary work in agriculture in 1945,
- Presidential Decree No. 71/1945 Sb., to provide for general compulsory labour service of persons who have lost their Czechoslovak citizenship,
- Presidential Decree No. 88/1945 Sb., to provide for general compulsory labour service,
- Act No. 121/1946 Sb., to ensure labour force for agricultural production within the national construction of the state,
- Act No. 192/1946 Sb., to provide for a two-year economic plan,
- Act No. 87/1947 Sb., to provide for some measures to implement the national mobilization of the labour force,
- Act No. 175/1948 Sb., to change the Presidential Decree on general compulsory labour service,
- Decree No. 88/1948 Sb., to provide for general compulsory labour service,
- Act No. 247/1948 Sb., to provide for camps of forced labour.

Economic coercion to work thus became a very efficient instrument of state power after World War II, especially in socialist society, by which the state acquired absolute control over the movement of the labour force and could affect the destinies of all its citizens. One of the fundamental human rights – the freedom to choose one´s occupation and workplace, was suppressed. Fortunately, this harmful trend managed to be eliminated after the Velvet Revolution and we can but hope that also in the future everyone will be able to freely and independently decide what profession to choose and in what occupation or in what way he/she wants to work.

Conclusion

In every modern society exists a need of individual concrete work to support the development of society as a whole. The social division of labour has to be in a certain proportionality to take place among individual sectors.

The socialist law established that every citizen was obliged to work according to his capabilities and to contribute by his work to the wellbeing of the whole (the Constitution of 9th May 1948 No. 150/1948, in section 32). But the trouble was the methods of the planned movement of the labour force, especially direct (administrative) orders to place workers into the labour force. This very aggressive method of allocating work often took place without regard to the interests or needs of an individual and thus caused social tension.

The regulated mobilization and distribution of the labour force can be very helpful to the national economics but it represented also dangerously effective weapon against all enemies of the state and opponents of the regime as the communist regime show in the 1940 s and 1950 s (and after to 1989 in moderate form) in Czechoslovakia.

[33] KOCANDA, Rudolf. *Způsoby plánovitého rozdělování pracovních sil*. Prague: Československá akademie věd, 1965, p. 127.
[34] CHYSKÝ, Jiří. *Rozmisťování pracovních sil*. Prague: Orbis, 1968, p. 101-113; p. 119-123.
[35] CHYSKÝ, Jiří. *Rozmisťování pracovních sil*. Prague: Orbis, 1968, p. 31-43; GLOS, Bohuslav. *Plánovitá distribuce pracujících: Problém pracovních sil v poválečném Československu Dvouletka v plánu a v činech*. Prague: Ministerstvo informací, 1948, p. 7-11.

Constitutional Conflict as the Basis for American Revolution*

*Vojtěch Vrba – Pavel Homolka***

Abstract

Presented work deals with the issue of unconstitutionality of the Stamp Act, issued by British Parliament in the 1765. Authors analyse the primary sources (obtained from the Yale University database of Avalon project) in context with literature related to the issue (in minor extent Czech and primarily English). Because of the extent of the issue, only one particular colony of the Thirteen was chosen – the colony of Connecticut. The work tries to argue, that there was no formal imperfection of the Act, and so it had to be repealed not because of legal reasons, but because of the reasons presented by a public opinion.

Keywords: *American revolution; Connecticut; Constitutional law; taxation.*

1. Introduction

It is a rare case when a legislator is forced to recall legal effect of his work due to his fear of consequences from the side of addressees of such work. Even rarer and less typical is the situation when the above occurs in the case the respective Act is formally perfect. Such fact usually means a signal of major social change or even change in mentality of whole society.

One of such cases, being subject of this paper, was also the case of so called Stamp Act of British Parliament of the 1765. Nonetheless, the Act was declared invalid due to the fact *"(it) would be attended with many inconveniencies, and may be productive of consequences greatly detrimental to the commercial interests of these kingdoms,"*[1] affected stakeholders marked it formally condemnable, unconstitutional, and *therefore* invalid.[2]

Authors, being aware of complexity of legal issues arising from such argumentation, decided to ask the following study question and two subquestions:

1) Was the tax imposed on colonies based on Stamp Act of the 1765 passed by the British Parliament, legal?

a) Does British Crown waive its right to impose direct taxes on colonies – which could lead to illegality of the Act?

b) Does insufficient representation of colonies in the Parliament represent valid argument for impossibility to impose direct tax?

Sources used included both primary sources, as transcriptions available from database held by Yale University library within so called Avalon project, and secondary sources used in particular for better description of primary source content into historical context.

To limit scope of the papers to keep it sufficiently concrete, we have chosen only one of thirteen colonies – Connecticut, which was considered than one of colonies with the highest level of constitutional independence, or, as the case may be, autonomy. It would be certainly interesting to draw similar papers regarding colonies having strong liaisons with Britain; however, in our case we want to accentuate picture of the conflict, which is the case of extreme case of Connecticut.

1.1 The Stamp Act

On 22 March 1765 British Parliament in London passed so called Stamp Act.[3] Its aim was to cover costs occurred to Britain during seven-year war, and, at the same time, to ensure partial return of investments into security of American colonies.[4] Major intakes should come from territories under British control in Asia, earning from American continent should only have played marginal role, and were considered negligible in comparison with costs for existence and security of those colonies.[5] Based on British assumptions, earnings from taxes collected based on

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1 *Great Britain: Parliament - An Act Repealing the Stamp Act; March 18, 1766,* [online] *Available at:* http://avalon.law.yale.edu/18th_century/repeal_stamp_act_1766.asp, quoted 27 April 2016.

2 *Connecticut Resolutions on the Stamp Act: December 10, 1765,* [online] *Available at:* http://avalon.law.yale.edu/18th_century/ct_resolutions_1765.asp, quoted 27 April 2016.

3 RAKOVÁ, Svatava, *Podivná revoluce: dlouhá cesta Američanů k nezávislosti (1763-1783)*, Praha, 2005, p. 67.

4 Ibid. p. 67.

5 Ibid. p. 57.

Stamp and Sugar Act (passed shortly before Stamp Act[6]) should have covered barely half of costs for army protecting American colonies against Native Americans and French, amounting to fixed amount 400 000 pounds a year.[7]

The Stamp Act actually introduced tax from any and all documents. The Act included exhaustive list of such documents. Tax regarded any and all men living in American colonies.[8] Burden introduced by this Act could significantly differ for individual persons; however, in average it amounted to one third of daily income of common American colonist a year.[9]

Nonetheless, the burden was rather low, it raised strong backlash based on the belief of some colonists, that it is the first of the whole series of Acts used by Britons to "*try to enslave them*".[10] Protest lead to convention of colonies' leaders on which delegation to London was nominated, the aim of which was to inform the Parliament about colonists' opinion, and to try to make the Act, which was due to enter in legal effect within several months, void.[11] However, in London the delegation not only failed to meet its aim; some members even accepted positions of the first leading tax collectors offered by the Parliament.[12] In the meantime, embargo to goods imported from Britain was introduced in colonies, to remain applicable up to abolition of the Stamp act.[13] Upon delegation's return from London, the result was already known. Persons who accepted positions of tax collectors were marked quislings, their property was systematically liquidated, and symbolic lynching using gallows and straw dummies occurred in public.[14] Common idea connecting this aggressive crowd was only resistance against the liquidating tax. However, this should change in the future.

1.2 Short historical introduction: Connecticut constitutional history

The territory called between 1763-1774 Connecticut used to form steadily over the period from the 1633 up to the 1789.[15] It is the State with turbulent and rich history firstly because it is one of the states based on Puritan colonies, as e.g. Massachusetts,[16] and secondly because it had to cope with Native American of Pequote tribe in its neighborhood,[17] as well as with Dutch settlers' expansion.[18] At the beginning three colonies were founded on its current territory.[19]

The first of them was the Saybrook colony. Its cornerstone was the fortress in the area of today's Windsor founded by the group lead by Mr. William Holmes, coming from neighbouring puritan Massachusetts.[20] Approximately at the same time when this happened, six miles down the Connecticut river the business station Hartford was founded by Dutch settlers from Manhattan.[21]

The second colony was called New Haven. Its founders were Puritans lead by Mr. Thomas Hooker coming from Europe to Massachusetts, where they stayed less than a year, and subsequently they settled in the Suckiaug river basin.[22]

Third one is represented by Connecticut itself, than simply called "the River". It was founded by a group lead by reverend John Davenport and Theophilus Eaton. It arrived from Britain directly and purchased land from today's Guilford, through Stratford up to Wallingford from Native Americans.[23]

If there are any relevant deeds from that period in existence, they refer mostly to transfers of property rights to land. Any documents of constitutional nature are missing. Such document firstly occurs as late as in the 1639 – Fundamental Orders of "the River" colony.[24] Although formally the colony was under Britain rule, it created its own, rather wilful, government. As of its founding the colony was governed by General Council formed pursuant to Fundamental Orders by seven magistrates. One of its powers was also to collect taxes. [25]

The second constitutionally relevant deed is the Fundamental Agreement – the original constitution of New Haven colony.[26] Rather than including concrete rights and obligations, it

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6 *The Sugar Act 1764*; [online] *Available at*: http://avalon.law.yale.edu/18th_century/sugar_act_1764.asp; Quoted 27 April 2016.
7 RAKOVÁ, p. 67.
8 RAKOVÁ, p. 53.
9 Ibid. p. 53.
10 RAKOVÁ. p. 54.
11 Ibid, p. 52.
12 Ibid, p. 54.
13 Ibid. p. 60.
14 Ibid. p. 64.
15 SURPRENANT, Donald J., *Connecticut Constitutionalism 1639-1789,* [online] *Available at:* http://www.yale.edu/ynhti/curriculum/units/1980/cthistory/80.ch.02.x.html, quoted 27 April 2016.
16 Ibid.
17 In fact in a very bloody way…; ibid.
18 HOLLISTER, Gideon Hiram, *The history of Connecticut, from the first settlement of the colony to the adoption of the present constitution*. New Haven, 1855, p. 18.
19 Main reason for colonies founding in this area was the potential to find valuable business commodities. See HOLLISTER, p. 23 ff.
20 Ibid. p. 18.
21 HOLLISTER, p. 18.
22 HOLLISTER, p. 18.
23 Ibid., p. 18.
24 SURPRENANT, HOLLISTER, p. 18.
25 *Fundamental Orders of 1639*, [online] *Available at:* http://avalon.law.yale.edu/17th_century/order.asp, quoted 27 April 2016, Articles 10 and 11.; furthermore, see SURPRENANT, or HOLLISTER, s. 28.
26 *Fundamental Agreement, or Original Constitution of the Colony of New Haven, June 4, 1639,* [online] *Available at:* http://avalon.law.yale.edu/17th_century/ct01.asp, quoted 27 April 2016. Hereinafter referred to as the Fundamental Agreement.

was rather austere. On the other hand, it stipulates in big detail the way of voting on passing the deed,[27] on several places it states redundantly formal issues as "origin of applicable law" incorporated into deed.[28] Moreover, based on Script's example, it is written as parable – in form of minutes of festive Consultative Assembly.

Its cornerstone is represented by stipulated of relationships between "ecclesial community liability" and "colonial community liability" – from today's point of view, we could say relationship between "state" and "church". Trend governing the whole deed is to make them as close as possible while keeping clear (formal) separation.[29]

1.2.1 More details to The Fundamental Orders

The deed is composed by eleven Articles. The most interesting is the preamble which apparently refers to the fact that colonial community government system was based on social contract. *"[…]to order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield are now cohabiting and dwelling in and upon the River of Connectecotte and the lands thereunto adjoining; and well knowing where a people are gathered together the word of God requires that to maintain the peace and union of such a people there should be an orderly and decent Government established according to God, to order and dispose of the affairs of the people at all seasons as occasion shall require; do therefore associate and conjoin ourselves to be as one Public State or Commonwealth[…]."*[30]

For our scope articles ten and eleven are the ones of the most importance. The former stipulates both the quorum of colonial council – General Court – founded by the deed, as well as its powers. These include: *"[…] shall have power to make laws or repeal them, to grant levies, to admit of Freemen, dispose of lands undisposed of, […] and also shall have power to call either Court or Magistrate or any other person whatsoever into question for any misdemeanor, and may for just causes displace or deal otherwise according to the nature of the offense; and also may deal in any other matter that concerns the good of this Commonwealth."*[31]

Article eleven than reads as follows: *"It is Ordered, sentenced, and decreed, that when any General Court upon the occasions of the Commonwealth have agreed upon any sum, or sums of money to be levied upon the several Towns within this Jurisdiction, that a committee be chosen to set out and appoint what shall be the proportion of every Town to pay of the said levy, provided the committee be made up of an equal number out of each Town."*[32]

Tax issues are only regulated in these documents with regard to power of the court to impose and collect taxes. It is very sad that they completely lack provision of relationship with the Crown – it looks like the commonwealth assumes it is created *out of nothing* and it is not subject to any sovereign power. However, this could not be legitimate assumption. Colony only resolved this discrepancy by the deed of the 1662.

1.2.2 Fundamental Agreement, or Original Constitution of the Colony of New Haven

With regard to New Haven constitution, we have to state that it does not include any important provisions applicable to our issue. At the same time, it is rather complicated to find and interpret provisions having normative nature from this deed at all.

Nonetheless, we can deduce from the deed that community is represented by seven men elected from twelve elected by free members of the community.[33] Free member of the community was member of the church.[34] Subsequently, these seven magistrates are bound*"[…]to have power of transacting all the public civil affairs of this plantation; of making and repealing laws, dividing of inheritances, deciding of differences that may arise, and doing all things and businesses of like nature […]"*[35] Such matters certainly include also collecting and imposing taxes. Problem is that in New Haven many public issues were apparently governed by provisions of Holy Script – and therefore there are no more detailed records. These were interpreted by practice; however such interpretation was not stipulated in normative deed. It was not necessary.

1.2.3 2nd Constitution of New Haven – "Government of New Haven Colony" of the 1643

The second constitution of New Haven represents legally and stylistically more successful document.[36] It grants tax powers to so called General Court,[37] which was composed by all magistrates and by two representatives elected for each plantation.[38] In this Court new magistrates were elected, Acts were passed an abolished, and finally and, in particular, taxes and other charges were imposed.

Only *free burgesses* could become member of any council (there was both General Court, as well as Magistrates Court) – *free burgesses* were only members of Puritan church.

1.2.4 Connecticut Charter of the 1662

A deed finally solving not only position of individuals within community (colony), but also standing of colony (and

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[27] E.g. Part I., Part II. par. 2, Part III. Etc., see *Fundamental Agreement*.

[28] *"[…]Mr. Davenport declared unto them, by the scripture, what kind of persons might best be trusted with matters of government; and by sundry arguments from scripture proved that such men as were described in Exod. xviii. 2, Dent. 1. 13, with Dent. xvii. A, and 1 C or. vi. 1, 6, 7[…]"* see Fundamental Agreement.

[29] Part II, par. 1. Fundamental Agreement.

[30] Fundamental Orders, Preamble, this statements is perfect expression of the aim of drafting this document and it repeats throughout the whole arguments of the American side – what was created, was a *social contract*. But could this actually be?

[31] Fundamental Orders, Article 10.

[32] Fundamental Orders, Article 11.

[33] Fundamental Agreement, Query VI.

[34] Fundamental Agreement, Query V.

[35] Fundamental Agreement, Query V.

[36] *Government of New Haven Colony*, [online] *Available at:* http://avalon.law.yale.edu/17th_century/ct02.asp, quoted 27 April 2016.

[37] Government of New Haven Colony, 5.5.

[38] Government of New Haven Colony, 5, for the purpose of this paper we can consider plantation as lower level organizational unit.

its members) within English (and later British) Empire is the Connecticut Charter of the 1662. It was issued by the king Charles II and it represents list of privileges granted to settlement in the New World, this time consolidated into "compact" Connecticut.[39]

By his deed, King Charles II grants both "body political" as well as "body corporal" to the colony[40] which means the broadest autonomy possible – as only the king has both body political and corporal in one person in English legal system.[41] Colony shall have its so called General Council composed of twelve free assistants, a governor, and a deputy governor. These were elected for a year.[42] Apart of judicial power and power to accept oaths of officials, the court had also the power to *"make, ordain, and establish all manner of wholesome, and reasonable laws statutes, ordinances, directions, and instructions, not contrary to the laws of […] realm."*[43] Another power of this Court was to "establishment of necessary fees and imposing fines". This most probably includes internal taxes.

Here we get the core of the issue. The Crown did not explicitly waive its right to impose taxes on colonies. It merely provided colony the tax independence – as it is clear that a colony needs it for its administration. Procedure including reallocation of taxes in England would be time consuming and financially very demanding – H.M. Treasury was spared this duty. Although this leads to an option of an independent administration, it lies in the level of a relationship between sovereign and colony, but certainly not on the level of relationship between colonists and colony. If we use analogy, let's imagine a situation, when we entrust our securities portfolio, free of charge, to a very talented employee. We do not waive our right to profit in advance – we merely let the employee to handle profit at his/her own discretion. Such a situation shall certainly not lead to absolute freedom of obligations between us and the employee - the hierarchically subordinate person from subjection of superior person established by law. *Au contraire* – such relationship is established to increase wellbeing of the whole community as a person who rules (leads) has no sufficient knowledge to multiply means and person having no means has nothing to multiply. As legal regulation is rather vague it may lead to misinterpretation, however idea of law (and its natural law basis) being repeatedly recalled in Anglo-Saxon environment, does not necessarily imply waiver of profit/internal taxation. It only does not speak about it. Question is, if we can consider extensive interpretation in *ius publicum* in this way. Considering customs and duties, the Crown not only does not waive them, but it requires them directly.[44]

Very interesting is the part of the deed in which the king guarantees through the words of it enforcement of law against his person and his successors by issuing the deed as a Royal Patent.[45] By doing this, the privileges are affirmed.

2. Legitimacy issue of the tax imposed

The first direct tax for the period of existence of colonies was imposed by the King with the Parliament approval by the Stamp Act in the 1765. Direct tax meant such tax that was paid to the Crown directly without any "agent" represented by merchant with respective commodity. Logically, it was the most visible, although certainly not liquidating[46] taxation, which was the reason for immediate outrage of potential payers. But while expressing opposition against the tax and reasoning against it, it is necessary to take two aspects into account: 1. Who and on what ground the tax is imposed, 2. if tax was imposed through formally correct process.

2.1 Taxes in Britain

A person responsible for imposition of a tax in British law in the 17th and 18th century was certainly the King, based on simple fact that he had power to do so. This power was reserved to him (or not prohibited) by the Constitution, which is however problematic – from the point of view of its definition. With regard to the fact that this document is unwritten, or, more precisely, nonwritten and polylegal[47], most powers of top State bodies are merely based on customary law. One of examples is the power of the Parliament to pass laws – it is not stipulated in any of British law charters explicitly, nonetheless it is legislation body without any doubts.[48] Tax powers of the King have the same nature.

Nonetheless, such power is not unlimited – its development is complex. Its main features are its steady narrowing applied by different Acts issued by the Parliament in particular. The first one, or the most important one, is the Magna Charta Libertatum. In its version of the 1215 its First Article states that: *"To all free men of our kingdom we have […] granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs"*[49] followed, from the point of view of our scope, by the Article 12: *"No 'scutage' or 'aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable 'aid' may be levied. 'Aids' from the city of London are to be treated similarly."*

[39] *Charter of Connecticut – 1662*, [online] *Available at:* http://avalon.law.yale.edu/17th_century/ct03.asp, quoted 27 April 2016, par. 1.
[40] Charter of Connecticut – 1662, par. 1.
[41] Kantorowicz considers this dualism also with regard to church officials, however for need hereto this is irrelevant. See KANTOROWICZ, Ernst Hartwig, *The King's Two Bodies: A Study in Mediaeval Political Theology,* Princeton, 1957.
[42] Charter of Connecticut, par. 2.
[43] Charter of Connecticut, par. 6.
[44] Charter of Connecticut, Art. 5.
[45] Charter of Connecticut, Art. 6.
[46] RAKOVÁ, p. 53.
[47] BLACKBURN, Robert, *Britain's unwritten constitution,* [online] *Available at:* http://www.bl.uk/magna-carta/articles/britains-unwritten-constitution, quoted 27 April 2016.
[48] Ibid.
[49] *English translation of Magna Carta*, [online] *Available at:* http://www.bl.uk/magna-carta/articles/magna-carta-english-translation, quoted 27 April 2016.

Version of the Magna Charta of the 1225 – i.e. the best known and legal more binding one – however returns the tax regimen back to the period before the reign of the King John – or, as the case may be, into limits applicable during the reign of his grandfather, the King Henry. Nonetheless its rather short life, the Article 12 of the 1215 shows that there was clear tendency to limit King's tax powers.[50]

Other – and for American settlers' mainstay – document regarding taxes was The Petition of Right of the 1628.[51] The driving idea of American colonial intellectual leaders is that there is no taxation without representation, and the source of it is the Petition of Right itself.[52] Moreover, it also stipulates appurtenances of tax act – i.e. that such Act is to be passed by the Parliament. Tax imposed on anyone by the King is invalid for the future.

The above-mentioned regards powers of the King and the Parliament in general. Tax acts have not only their issuers, but also addressees. In general, we can state that a tax was paid by any free man.[53] Definition of free man is stipulated in more details in the part of these papers dealing with representation.

Amount, or, as the case may be, type of tax applicable to each specific person could significantly differ. Apart of the general tax applicable in overall British territory, many local taxes existed.[54] These were based on local customs, while their territorial scope ranged from larger manors to territories of individual towns and villages.[55] However, none of British territories was free of tax liability.

Tax payers were divided into two classes, landowners and movables owners.[56] The amount of tax payed in the case of the first group was based on earnings from the land, whereas in the case of the other it was based on value of their property.[57] To the first group could be also imposed additional tax from whereas in the case of the second group general goods tax may also be imposed besides the basic tax.[58]

2.2 Taxes in colonies

With regard to American colonies tax regimen, tax actually collected and requested was the tax stipulated by charters of individual colonies. In the case of the State Connecticut, first such tax occurs in the Fundamental Orders of the 1639.[59] We have to take into account, that the deed represents expression of colonists' common will, but definitely not demonstration of will of the King, or more precisely, the Crown. Therefore, its binding nature is based only on the level colonists-colonial court, not crown-colonists. It looks like this issue is solved by Royal Deed of the 1662. By this deed the King grants to the General Court the power of *"granting necessary Commissions,"*[60] which may certainly include tax liability.

However, again it only reflects relationship of colonists with the council, the Crown here only pays the role of authority and authorizer confirming and affirming rules of this relationship. From this point of view we can consider it as an analogy to a local tax.[61] However, financial means collected this way remained in colonies, and its nature therefore does not correspond to either general or local taxes. Subsequently, it represents specific tax, because its structure is not similar to any other domestic tax.[62]

2.3 Tax legitimacy analysis

For the purpose of subsequent analysis we will apply two opinions issued by colonies to the Stamp Act – both opinion of Continental Congress[63], and Connecticut Resolution to the Stamp Act.[64]

Colonists state that they should demonstrate the same loyalty towards the Crown and the same subordination to the Parliament, as everyone else born in Britain.[65] This is also the basis for equality of rights and obligations with such persons.[66] One of these rights is also a right of absence of such tax burden which was not approved by either themselves or their

[50] To be on the safe side, the deed of the 1215 was immediately (24 June) sent in seven copies around the Kingdom, so it is evident that its wider distribution and binding nature were planned. See *Timeline of Magna Carta and its legacy*, [online] *Available at*: http://www.bl.uk/magna-carta/articles/timeline-of-magna-carta, quoted 27 April 2016.

[51] The Petition of Right. [online]. *Available at*: http://www.constitution.org/eng/petright.htm. Quoted 27 April 2016.

[52] RAKOVÁ, p. 75.

[53] DOWELL, Stephen. *A history of taxation and taxes in England from the earliest times to the present day*. London: Longmans, Green, and co., 1884.

[54] DOWELL, p. 156.

[55] DOWELL, p. 156.

[56] DOWELL, p. 156.

[57] DOWELL, p. 156.

[58] DOWELL, p. 156.

[59] Fundamental Orders, Article 10.

[60] Charter of Connecticut, par. 6.

[61] Charter of Connecticut, par. 6.

[62] We can find certain similarities with other colonial tax – in Bengal. However, in this case the problem is that tax administration in Bengal was fully under control of the East India Company, even on formal level (Parliament Act of the 1773 entrusted it with this administration. See DUTT, Romesh Chunder, *The economic history of India under early British rule, from the rise of the British power in 1757 to the accession of Queen Victoria in 1837,* London, 1916, p. 6. However as the company was a legal person with its seat established in England, its taxes were therefore paid there. See HARRIS, Peter, *Income tax in common law jurisdictions: from the origins to 1820*, New York, 2006, p. 315. By doing this it also paid for its profits from colony– i.e. money from Bengal arrived to the Crown. This does not apply in American case.

[63] *Resolutions of the Continental Congress October 19, 1765,* [online] *Available at*: http://avalon.law.yale.edu/18th_century/resolu65.asp, quoted 27 April 2016.

[64] *Connecticut Resolutions on the Stamp Act: December 10, 1765*, [online] *Available at*: http://avalon.law.yale.edu/18th_century/ct_resolutions_1765.asp, quoted 27 April 2016.

[65] Resolutions of the Continental Congress par. 2.

[66] Resolutions of the Continental Congress, par. 3.

representatives.[67] At the same time, colonists state *"that every tax imposed upon English subjects without consent is against the natural rights and the bounds prescribed by the English constitution."*[68]

For every right there corresponds a liability on the other side – that represents an integral part of any legal relationship. Colonists consider themselves equal to native Englishmen, however, as we demonstrated above, taxation system in colonies was significantly different from the system in Britain. Distinctive is imbalance of total tax burden, as citizens of Britain paid taxes ten times higher than colonists in America in the 1714.[69] With regard to this fact we have to ask if colonists really had the same rights and liabilities as those born in Britain. As concerning tax burden it is clear that this was not true. American colonies had autonomous tax powers independent on the Crown, as well as immunity against general and local British tax liabilities. From this point of view, colonist was certainly not equal to born Englishman and in fact was a person *sui generis*.

3. Representation issue

Further claim of American colonists against the imposition of tax burden is based on their insufficient representation in the British Parliament. This claim was shortened into the motto *"no taxation without representation"*[70]. American side interpreted it as a part of the British Constitution, namely of the Petition of Right.[71] However occurrence of this document is connected with extraordinary tax imposed by the king Charles I in the 1628,[72] which was imposed on all inhabitants of the whole British territory without the Parliament's consent to gain financial means necessary for King's political causes.[73] Inhabitants of Britain, already suffering of significant tax burden, refused to pay such tax and subsequently the Parliament immediately passed the Act called "Petition of Right" which deprived the King of the power to impose any new taxes without a parliamentary consent.[74]

Aim of this Act was to limit King's arbitrariness to interfere into private property of Kingdom's individual inhabitants, namely by changing process of imposing new tax liabilities. In the future prerogative should be replaced by legal power – or, as the case may be, power based on and limited by the law. Power to issue such act – and to form such law – was in the Parliament's hands, but the obligatory confirmation of the king still remained as a part of the process.[75] The Act was passed in late May 1628[76] and it was formally approved by the King later that year.[77]

Provision regarding taxes came into legal force and it was repeated in the 1689 in the Bill of Rights passed at the accession to the throne of William, Prince of Orange.[78]

King's prerogative was replaced by "people's consent". However, who were these "people"?

3.1 Representation in Britain

We have to take into account that in the 18th century there was no universal equal suffrage and therefore only minority of inhabitants were represented in the Parliament. Several major requirements had to be met by inhabitant to be able to participate in vote for the Parliament. Firstly, to gain the voting right a voter had to be of full legal age – older than twenty-one, and by member of Protestant Church by confession.[79]

Electoral census was another limit. Voting right belonged only to those having property of at least 40 schillings a year from the land, in burrows this census was established by norms passed by specific court, or by owner of a burrow.[80] Such condition was met approximately by one of four adult men and insignificant number of women.[81] At the end of the 18th century, there were approximately 8 million inhabitants living in territory of England of which only 214 000 had voting right, representing almost three percent of population.[82]

3.2 Representation in colonies

On the other side of the Atlantic, colonies' inhabitants had no voting right for English Parliament.[83] Nonetheless they brought idea of representative bodies with them into the New World. We spoke about it before. Voting right was not subject

[67] Resolutions of the Continental Congress par. 4.
[68] Connecticut Resolutions on the Stamp Act, first item of par. 4.
[69] *Tea, Taxes, and the Revolution,* [online] *Available at*: http://foreignpolicy.com/2012/07/03/tea-taxes-and-the-revolution/, quoted 27 April 2016.
[70] RAKOVÁ, p. 75.
[71] RAKOVÁ, p. 75.
[72] REEVE, L. J. *The Legal Status of the Petition of Right,* In: The Historical Journal, 29 (2), 257–277, p. 260, [online] *Available at*: http://www.jstor.org/stable/2639062, quoted 27 April 2016.
[73] Support of Danish king, Bohemian king and others, in particular. See CUST, R., *Charles I, the Privy Council, and the Forced Loan,* In: Journal of British Studies, 24(2), 208–235, s. 218, [online] *Available at*: http://www.jstor.org/stable/175703, quoted 27 April 2016.
[74] Petition of Right, Article X.
[75] JONES, Clyve (ed.), *A short history of parliament: England, Great Britain, the United Kingdom, Ireland & Scotland,* Woodbridge, 2009, p. 78.
[76] *Petition of Right of 1628: Definition & Summary,* [online] *Available at:* http://study.com/academy/lesson/petition-of-right-of-1628-definition-summary.html, quoted 27 April 2016.
[77] *Charles I and the Petition of Right,* [online] *Available at:* http://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/petition-of-right/, quoted 27 April 2016.
[78] *English Bill of Rights 1689,* [online] *Available at:* http://avalon.law.yale.edu/17th_century/england.asp, quoted 27 April 2016, par. 1. sect. 5.
[79] *Poll of Electors 1734*, [online]. *Available at*: http://www.angmeringvillage.co.uk/history/electors1734.htm, quoted 27 April 2016.
[80] Ibid.
[81] Ibid.
[82] *Voting rights before 1832,* [online]. *Available at:* http://www.nationalarchives.gov.uk/pathways/citizenship/struggle_democracy/getting_vote.htm, quoted 27 April 2016.
[83] This custom logically arose from reality of rather complicated connection between colonies and England. We have to note that the first impulse to found English colonies was not to bring certain land to England but rather to leave England and search for better future in a place with less British influence – the first settlers were Puritans who left England due to religious and social prosecution.

of any major change in time although it was applied based on regimen of several fundamental deeds.

Its final form arises from the deed of the 1662: *"[…]And we do hereby for Us, Our Heirs and Successors, establish and ordain, That once in the Year for ever hereafter, Namely, the said Second Thursday in May, the Governor, Deputy-Governor, and Assistants of the said Company, and other Officers of the said Company, […] shall be […], newly chosen for the Year ensuing, by such greater Part of the said Company for the Time being, then and there present[…]"*[84]

The definition is too simple to be used for consideration – it only establishes one condition – presence. Application of electoral census is a matter of course – it simply formed part of the political culture and it was not questioned by anyone. Issue itself represents its amount. We have information available from the 1763, when it amounted to two pounds of yearly annuity or forty pounds in property.[85] There is also another information available regarding ratio between voters and non-voters – in colonial times this ratio amounted from forty to fifty percent.[86]

Therefore, there was no major difference in principles between Britain and Connecticut, yet it was more stringent with regard to electoral census, and more favourable with regard to ratio of "free" voters and non-voters. However, this was still applicable for voting to colonial specific Court.

3.3 Analysis of representation issue

If we analyze arguments of colonists who stated that they have both same rights and obligations as Britons in British territory,[87] as well as that thanks to this fact tax may only be imposed on them under their consent, we have to mark two discrepancies included.

First of all there is logical conflict with autonomous administration of colonies by their own bodies being elected by colonists. Subsequently, we have to accept the fact that the mere existence of such administration implies special position of colonies and its bodies towards Britain and consequently to the Parliament. Of course, there ought not be a problem with establishment of colonies' administration based on the same model applied in England on lower levels – such bodies would be fully legal and their potential subordination to the Parliament would lead to direct and proportional subordination of inhabitants to the Crown similar to inhabitants of Britain. Then a basis for argument of "same rights and obligations" would occur. But that did not happen.

The same applies to inhabitants. If from this point of view, colonies inhabitants are inhabitants of Britain, they are not inhabitants *sui generis* – and logically they have the same rights and liabilities as all other Britons and, at the same time, they have no special liabilities or rights. This theory is but rather disadvantageous for colonists, as it would mean for them several times higher total tax burden including the need to impose and pay such taxes unpaid in the past retrospectively.

4. Conclusion

Concerning the submitted facts we consider the tax imposed by the Stamp Act in the 1765 fully legal. Legislation process including two conditions – draft submitted by the King and approval by the Parliament (the general consent) – was applied correctly. Nonetheless there might be disputes if the King actually submitted the draft,[88] The Parliament passed and issued it.

There is no other provision besides the above-mentioned Article of Petition for Right, prohibiting the Crown to impose direct tax also to colonies. It never waived such right and American side therefore applies excessively wide interpretation of the above-mentioned legal rule. Moreover – the rule certainly did not confer universal option for everyone to participate on his/her own personal tax burden, as its prime aim was to limit prerogative of the King.

5. Currency of the issue

What interesting for today's world can we find in this historical reflection? Crucial is a danger of too extensive interpretation of legal rule. What would happen, if voter today, who would willingly waive his/her voting rights or who would vote for losing candidate, claimed the right not to pay taxes? This is certainly undesirable. State provides for protection of everyone without asking who voted for whom.

In context of that time we can see parallel of "outer" protection also in presence of British army on borders of colonies with Native American land and should protect them either against Native Americans as well as against French in neighbourhood. This army was funded from British budget exclusively and colonies did not participate in it in any way.[89]

We can also find certain similar traits in current political situation. Power without sufficient centralization, which nonetheless is acting in line with rules established by it, is slowly decomposed due to despotism of a public opinion, which is unable to determine irrelevant argument as incorrect. Local politicians trying to gain power easy-to-get from a crowd who wants quick and easy solutions are maybe preparing similar future for many of countries of European Union today.

Legal battle in the 1765 resulted in defeat of the Stamp Act. It looks like main reason for this was circumstance really undesirable in any state governed by law. By "bending" core of a legal principle it was possible to attack the law itself, moreover not by legal experts,[90] but based on power of a crowd. Should such situation occur today, it could concern principles such as freedom of speech – which in excessively

84 Charter of Connecticut, par. 3.
85 Voting in Early America.
86 KEYSSAR, Alexander, *The Right to Vote: The Contested History of Democracy in the United States,* New York, 2001, p. 6.
87 Resolution of the Continental Congress, par. 2.
88 At this time, the Parliament actually already had power to issue laws on behalf of the King and therefore such requirement was not necessarily unavoidable.
89 RAKOVÁ, p. 67.
90 Constitution protection bodies.

wide interpretation leads to freedom of extremism and therefore to destabilization of society – or right for protection using state exclusivity to apply enforcement by powers – this may, on the other hand, lead to an absolute stabilization of society – in a totalitarian state. Proportionality and emphasis on legal idea of any principle is therefore one of the highest moral obligations of a legislator. Because a legislator is also a person being in charge to create and abolish law in legal state and, as their acts sometimes seem to refer to merely minor issues, may lead to more significant or even global things in the future. One of examples of such a matter was indisputably the American Revolution.

Eva Kell – Sabine Penth (Hrsg.)

Vom Empire zur Restauration. Die Saarregion im Umbruch 1814-1820. Beiträge der Wissenschaftlichen Tagung zum 175jährigen Jubiläum des Historischen Vereins für die Saargegend e.V.

Saarbrücken: Historischer Verein für die Saargegend e.V., 2016, 307 S., ISBN 978-3-9818087-0-4

Der Band vereint in fünf Kapiteln elf Aufsätze zum politischen und wirtschaftlichen Umbruch in der Saarregion Anfang des 19. Jahrhunderts. Im Vordergrund stehen die territoriale Neugliederung infolge der Auflösung des Rheinbundes, der Übergang der südöstlichen Saarregion an Bayern 1816 und die wirtschaftlichen Weichenstellungen in der Saarregion (z.B. Neustart oder Depression?). Weitere Themata sind die konfessionelle Neuordnung im ersten Drittel des 19. Jahrhunderts, das Verhältnis der Bevölkerung der Saarregion zu Frankreich in der Krise (Kollaborateure oder Patrioten?), die institutionellen Umgestaltungen in Verwaltung und Justiz und die historischen Deutungen dieses Wandels.

Angesichts der Raumknappheit können nur einzelne Schwerpunkte hervorgehoben werden. Besondere Beachtung verdient der Aufsatz aus dem Abschnitt *institutionelle Umgestaltungen* von Thomas Gergen, der Mitglied des Landesvorstands der Kommission für die Geschichte des Saarlandes ist und durch zahlreiche Veröffentlichungen zur (Rechts-)Geschichte der Saarregion und zu den Institutionen des Rheinischen Rechts in der Saargegend mit Beispielen aus der Rechtspraxis hervorgetreten ist. Er zeichnet (S.243ff) auf spannende Weise die Wirkungen des damals an der Saar geltenden französischen Rechts nach. Die Saarregion, in Grenzgebiet zu Frankreich gelegen und damals Teil des französischen Staatsgebiets, spielt in der Rechtsgeschichte sonst kaum eine Rolle. Doch Gergen zeigt, dass die dortigen Rechts- und Verfassungsprobleme eine über die Region hinausgehende Wirkung entfalteten – vor allem auf die linksrheinischen Gebiete und die sog. Rheinprovinzen.

Die Folgen der Französischen Revolution erforderten ein neues Privatrecht und neue Institutionen, die mit der Herrschaft Napoleons ihren Anfang nahmen. Das französische Recht, das seit 1794 in der Saarregion galt, bedeutete einen erheblichen Fortschritt gegenüber dem bisherigen Partikularrecht (das auf dem Feudalsystem und dem Ständestaat beruhte) auf den Gebieten der Wirtschaft, der Verwaltung und der Justiz. Dazu gehörten vor allem die Zentralisierung der Staatsordnung, die Trennung von Justiz und Verwaltung (Gewaltenteilung), die Gewährleistung der wirtschaftlichen Freiheit (nicht der politischen! Die Regierung Napoleons hatte eine autoritäre Herrschaft zur Folge. Anm. d. Rez.), der Freiheit des Einzelnen und die Einführung der Rechtsgleichheit. Auch die Öffentlichkeit und Schriftlichkeit der Gerichtsverfahren und die sog. freie Advocatur wurden eingeführt. Im materiellen Recht traten die Vertragsfreiheit, die Garantie des Privateigentums, die Zivilehe und das weltliche Scheidungsrecht an die Stelle des alten Feudalrechts. Kurz: das gesamte französische Recht und seine Gerichtsordnung wurde eingeführt, wie es in den fünf napoleonischen Codes (Code civil 1804, Code de procédure 1807, Code de commerce 1808, Code d'instruction criminelle 1809, Code pénal 1811) zusammengefasst war.

Das französische Recht wirkte aber über die Saarregion hinaus auch auf die linksrheinischen Gebiete und die Rheinprovinzen aus, denn diese Gebiete waren infolge der napoleonischen Kriege bis 1814 Teil des französischen Staates gewesen. Infolge des Wiener Kongresses 1815 kam Rheinhessen zum Großherzogtum Hessen, Bayern erhielt die Pfalz, die übrigen Gebiete fielen an Preußen, auch Saarlouis und Saarbrücken. Obwohl in Preußen „eigentlich" das *Allgemeine Landrecht* (ALR, seit 1794) galt, wurde in diesen Gebieten das französische Recht beibehalten, allerdings jetzt unter der Bezeichnung „Rheinisches Recht", weil nach 1815 eine antifranzösische Stimmung herrschte und das „französische Recht" von den Rheinländern als „zu undeutsch" abgelehnt wurde. Dieses „Rheinische Recht" blieb das ganze 19. Jahrhundert hindurch in Kraft – auch in Baden („Badisches Landrecht") – bis zur Einführung des Bürgerlichen Gesetzbuchs (BGB) im Jahr 1900. Andererseits wollte man nicht „um jeden Preis" am französischen Recht festhalten, sondern griff in Konfliktfällen auf internationales Privatrecht zurück, das teilweise wiederum auf altes Partikularrecht Bezug nahm.

Fazit: Wie im Brennglas zeigt sich der Kern einer modernen Rechtsordnung, die einen völligen Bruch mit dem alten Feudal- und Ständesystem bedeutete. Der Autor untersucht abschließend sehr detailliert die einzelnen Auswirkungen des französischen Rechts in der Saarregion im Straf- und Zivilrecht und schildert zwei interessante Rechtsfälle von 1827 und 1842. Die verschlungenen Wege der (Rechts-)Geschichte zeigt der Aufsatz in hervorragender Weise.

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Estudios de Historia del Derecho penal. Vindicatio, inimicitia y represión penal en el Derecho español medieval y moderno.

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Die Verfasserin hat jüngst in der von Manuel Peláez herausgegebenen Zeitschrift „Revista europea de derecho de la navegación marítima y aeronáutica" XXXIII, Neue Serie V, 2016, über die Ozeanreisen anhand der Indio-Gesetze aus dem Jahre 1680 gehandelt: „Los viajes de ultramar en la Recopilación de Leyes de Indias de los reinos de las Indias de 1680. Las licencias como elemento preceptivo en el ámbito contractual" (S. 79-117). Diese Studie ist Ergebnis des Exzellenzprojektes der andalusischen Regierung zum vereinheitlichten Europäischen Recht von Seeverträgen („Derecho europeo uniforme de contratos marítimos: Fundamentos históricos. Implicaciones medioambientales y económicas" sowie ebenfalls aus dem Projekt „INTELITERM: Sistema inteligente de gestión terminológica para traductores". Zur elektronischen Version der Zeitschrift siehe alles Weitere unter: http://www.eumed.net/rev/rednma/33/rednma33.pdf [8.4.2017].

Das nun vorliegende und hier zu besprechende Buch zum Strafrecht (in der Tat erschienen im Verlag OmniScriptum mit Sitz in Saarbrücken) führt den Leser nicht allein streng chronologisch in die Strafrechtsgeschichte ein, wie etwa das klassische Studienbuch von Hinrich Rüping und Günter Jerouschek mit dem Titel „Grundriß der Strafrechtsgeschichte" (München, 6. Auflage noch von 2011).

Vielmehr bildet die Autorin drei große Wissens- und Entwicklungsblöcke, um die sie zentrale Begriffe von Straftat, Strafe und Vergeltung rankt. Im ersten Teil beleuchtet sie Elemente der Straf(rechts)vollstreckung unter den Vokabeln von *vindicatio* und *inimicitia*. Das antike Recht der Blutrache lässt sie dabei zuerst zu Wort kommen, um in einem zweiten Kapitel die „Geburt der Strafe" im europäischen und insbesondere spanischen Mittelalter zu beleuchten. Die Gottes- und Landfriedensbewegung spielt dabei für Nordostspanien, insbesondere Katalonien eine bedeutende Rolle (Stichwort Eugen Wohlhaupter), mit Fug und Recht geht sie ausführlich auf die Usatges de Barcelona ein. Anhand der Quellen sichtet die Autorin sodann die Leibesstrafen, beginnend mit dem Recht der Westgoten bis in die Neuzeit.

Lesenswert ist auch die dritte Sektion des Buches: Das Talionsprinzip als Strafe und Grenze von Racheakten wird anhand der einschlägigen Vorschriften sowie dem Schrifttum (Strafrechtstheorien) gründlich analysiert. Sehr nützlich ist schließlich Zambrana Morals umfassendes Literaturverzeichnis (S. 197-219), das die hohe Qualität dieses sorgfältig und Quellen gestützten Buches noch einmal unterstreicht.

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Guido Fontaine

Fraulautern im Dritten Reich - die Geistlichkeit im Widerstand.

Fraulautern: Verein für Geschichte und Heimatkunde Saarlouis-Fraulautern e.V., Vortragsreihe Nr. 01, Fraulautern im Dritten Reich, 79 S.

Die jüngere Rechtsgeschichte resp. juristische Zeitgeschichte hat bereits Grundlegendes erforscht. Doch ermöglichen gerade Einzelstudien kritische und dabei auch ausgewogene Resultate und Gesamtbetrachtungen. Das im Folgenden zu besprechende Opus aus der saarländischen Rechts- und Kirchengeschichte wird dieser Forderung sehr gut gerecht.

Guido Fontaine, Rechtsanwalt und seit langen Jahren erster Vorsitzender des Vereins für Geschichte und Heimatkunde im Saarlouiser Stadtteil Fraulautern, hat mit vorliegendem Werk den ersten Band der neuen Vortragsreihe begründet und sogleich ein heißes Eisen angefasst, nämlich die Geschichte seines Heimatortes im Dritten Reich und die Rolle der Fraulauterner Geistlichkeit. Fontaines gründlich an Primärquellen belegte und sehr lesenswerte Studie geht in erster Linie auf seinen Vortrag zurück „Pfarrer Josef Neunzig, Kaplan in Fraulautern, Priester im KZ“, den er dadurch vervollständigt hat, dass er auch die anderen Geistlichen berücksichtigt, die in Widerstreit zu den örtlichen NS-Machthabern traten und die Pfarrangehörigen gegen diese zu schützen versuchten. Dazu gehören allen voran Pastor Josef Gilles (1921-1948) sowie zahlreiche Kapläne, deren Wirken in Fraulautern und in anderen Pfarreien minutiös aufgezeigt wird (Auflistung auf den Seiten 19-20).

Der konkreten Darstellung stellt der Verfasser Überlegungen voran, in denen er nach den Wurzeln des kirchlichen Widerstandes im Dritten Reich fragt und dabei auf die Zeit des Kulturkampfes im 19. Jahrhundert sowie seine Folgen im religiösen wie politischen Bereich zu sprechen kommt. Dabei vertieft Fontaine die Rolle des Klerus in der „Saargebietszeit“ (seit 1920) sowie den Streit um die Gemeinschaftsschule seit 1937, ehe er zur politischen Situation in Fraulautern vorstößt. Als besondere Quellen stützt er sich auf das Protokollbuch des Zentrum-Wahlvereins Fraulautern, die Festschrift zur 10-Jahresfeier der Ortsgruppe der NSDAP Saarlautern 3 (Fraulautern) von 1937 sowie auf Artikel der Trierer Bistumszeitung Paulinus und der Saar-Zeitung.

Am 10. November 1938, also unmittelbar nach der so genannten „Reichskristallnacht“, schrieb der Ortsgruppenleiter an den Kreisleiter der NSDAP in deutlicher Sprache: „In unserer Ortsgruppe sind 3 Geistliche tätig. 1. Pastor Gilles, 2. Kaplan Stein, 3. Kaplan Heinzen. Über die politische Zuverlässigkeit derselben kann gesagt werden, dass sie bei jeder Gelegenheit die ihnen noch geboten ist z.B. Predigten, Vorträge u.s.w. gegen den NS-Staat losschlagen, sowie dass ihr Verhalten der Öffentlichkeit gegenüber überhaupt kein Interesse von nationalsozialistischen Geschehnissen aufbringen. Die Hauptschuld dieser Tatsachen, trägt nur Pastor Gilles, der bis heute noch nicht einmal den Deutschen Gruss ausgesprochen hat und auch den Kaplänen dieselbe Belehrung gibt. Nach unserer Beurteilung sind dieselben unzuverlässig.“ Des Weiteren wurde gemeldet, dass Pastor Gilles, am 25. August 1937 von einer Wallfahrt nach Blieskastel mit ungefähr 900 (!) Frauen zurückkommend, vom Saarlouiser Bahnhof eine Prozession mit Fackelzug und vollem Glockengeläut in die Pfarrkirche durchführte. Mehrfach wurde Pastor Gilles wegen NS-feindlicher Stellungnahmen verhaftet (S. 21-22), blieb aber standhaft in seinem Widerstand gegen die braunen Machthaber.

Guido Fontaine arbeitet sodann die Verdienste der Kapläne Oskar Stein, Alois Piroth und Johann Hecken heraus, deren Lebensläufe er ebenfalls angibt. Die Strafrechtsakte von Kaplan Felix Biehl arbeitet Fontaine rechtshistorisch gründlich auf; so war Biehl wegen mehrerer Vermögensdelikte vor der II. Großen Strafkammer des Landgerichts Koblenz angeklagt. Diesen Prozess griff auch die NS-Presse heraus, um nicht nur Pfarrer Biehl, sondern auch Bischof Bornewasser völliges Versagen vorzuwerfen – ein NS-politischer Rundumschlag gegen die Amtskirche und alle ihre Vertreter.

Ausführlich behandelt Fontaine den Widerstand von Kaplan Josef Neunzig, der sich beharrlich weigerte, die in Fraulautern mitgliederstarke „Sturmschar“ in die HJ zu überführen. Obwohl die Gestapo mehrfach das Pfarrhaus nach schriftlichen Konzepten der Predigten durchsuchte, um Beweismittel gegen Neunzig zu haben, gelang es dem Kaplan stets, dass die Durchsuchungen erfolglos endeten. Sogar in einer Sonntagspredigt sprach er, nachdem er auf die Gegenwart eines vermeintlichen Spitzels hingewiesen worden war, die Worte: „Nun Spitzel, nimm deinen Stift und schreibe, aber schreibe richtig!“ Die sich anschließende Gestapo-Untersuchung in der Sakristei blieb letzten Endes aber erfolglos. Intelligenterweise hatte Kaplan Neunzig nämlich versucht, sich nie politisch zu engagieren. Zwar war er Mitglied der Deutschen Front, Ortsgruppe Fraulautern, trat dem Reichsluftschutzbund und der NSV bei, doch nie der Partei selbst. 1935 nach Freisen versetzt pflegte er immer noch regen Briefwechsel mit seinen Unterstützern in Fraulautern. Wegen „Verächtlichmachung des nationalsozialistischen Staates vor den Schulkindern“ entzog ihm der Regierungspräsident in Koblenz die Genehmigung des schulplanmäßigen Religionsunterrichts zum 16. Juli 1937. Danach gab es verstärkt Verhöre Neunzigs. Das Sondergericht Dortmund befand in seiner Sitzung vom 9. September 1939 in Kirchen an der Sieg den Angeklagten Neunzig nach dem „Heimtückegesetz“ schuldig und verurteilte ihn zu einer Gesamtgefängnisstrafe von acht Monaten. Versetzt in die Erzdiözese Paderborn wurde Neunzig abermals verhört und der Kollaboration mit feindlichen Ausländern angezeigt, was -so der Vorwurf- zur Beunruhigung der Bevölkerung und zur Gefährdung der Staatssicherheit geführt haben soll. Nach zwei Monaten strenger Haft, davon 14 Tage in der Dunkelzelle, ließ ihn das Reichssicherheitshauptamt am 14. Oktober 1944 aus dem Polizeigefängnis in Dortmund ins KZ Dachau überführen, wobei der „Abtransport“ aufgrund eines „Schutzhaftbefehls“ erfolgte: „Wegen Verteilung von Geschenken an polnische Arbeiter gibt Pfarrer Neunzig Anlass zu Missstimmungen in der Bevölkerung.“ In Dachau kümmerte sich Neunzig vor allem um seine kranken Mitbrüder und versorgte deren Verwandte und Bekannte mit Informationen. Noch am 9.4.1945 wurde er aus Dachau entlassen und war nach der Kapitulation wieder als Priester tätig. Zudem kümmerte er sich um die Gemeinschaft der Dachaupriester. Infolge seiner Zuckerkrankheit verstarb Pastor Neunzig am 4. August 1965.

Natürlich können an dieser Stelle lediglich einige Punkte herausgegriffen werden. Die Lektüre des gesamten Bandes der neuen Vortragsreihe ist sehr zu empfehlen, verbunden mit der zweifachen Hoffnung: nämlich einmal, dass der Verein die nächsten Bände bald veröffentlicht, und zum zweiten, dass die vorliegende Studie Nachahmung in anderen Orten findet.

Seit 1984 wirkt der Jubilar ununterbrochen als Seelsorger von Ayl und Biebelhausen. Der „Ruhestand“ als Pfarrer zum 1. Juni 2016 konnte daran nur formell, aber in der praktischen Arbeit sicherlich überhaupt nichts ändern. Im Hauptberuf war Pastor Hommens gleichfalls stellvertretender Bischöflicher Delegat und Diözesanrichter im Bischöflichen Offizialat des Bistums Trier.

Der Universität des Saarlandes, an der Maximilian Hommens als Professor für Kirchenrecht gewirkt hat, legte er bereits 1975

seine juristische Dissertation mit dem Titel vor „Heinrich von Bode, Jurisconsultus: Lebensbild eines Rechtsgelehrten im protestantischen Deutschland um die Wende vom 17. zum 18. Jahrhundert“ (XLVIII+459 Seiten). Seinem akademischen Lehrer und Saarbrücker „Doktorvater“ widmete er in Dankbarkeit den Nachruf: „In memoriam Wilhelm Wegener: 1911-2004“, veröffentlicht in der Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung 122 (2005), S. 1054-1059.

Aus den vielen Publikationen von Professor Maximilian Hommens seien noch folgende genannt:

- Bischofsernennung oder Bischofswahl? Zum Verfahren bei der Bestellung der Bischöfe in der römisch-katholischen Kirche, 1980, Konferenzarbeit Trier Priesterseminar;
- Magnus Cancellarius einer kirchlichen Hochschule: eine kanonistische Dissertation, erschienen in Sankt Ottilien (EOS-Verlag), 1985 (Dissertationen. Theologische Reihe 9);
- Der bayerische Kanonist Isidor Silbernagl (1831-1904): ein Beitrag zur Gelehrtengeschichte des kanonischen Rechts, in: Forum Katholische Theologie. Vierteljahresschrift für das Gesamtgebiet der katholischen Theologie 6 (1990), 4, S. 290-304.

Die Festschrift zum 110jährigen Stiftungsfest des Kirchenchores „Cäcilia“ Ayl bereicherte der Jubilar 1991 mit seinem Beitrag „Zur Geschichte von St. Bartholomäus Ayl, series pastorum“. Zur Pfarrgeschichte von Ayl ist schließlich noch zu erwähnen: „Habent sua fata campanae - Glocken haben ihre Schicksale: dargestellt an den Glocken der Pfarrkirche von Ayl an der Saar, zugleich ein Beitrag zur Glocken- und Pfarrgeschichte im Bistum Trier“, erschienen in der Zeitschrift für die Geschichte der Saargegend 52 (2005), S. 33-52, abrufbar ebenfalls unter http://www.ayl.vg-hosting.de/Habent%20sua%20fata%20campanae.pdf?id=446 [13.4.2017].

Ad multos annos!

Thomas Gergen**

* Diese Besprechung widme ich meinem verehrten Lehrer des Kirchenrechts, Herrn Prälat Professor Dr. jur. Maximilian Johannes Hommens, der am 1. Juni 2017 in Ayl/Saar sein 70. Lebensjahr vollendet.

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Janine Wolf

Aspekte des Urheberrechts bei Carl Maria von Weber, Albert Lortzing und Otto Nicolai (= Leipziger Juristische Studien – Rechtshistorische Reihe Band 9 = Schriftenreihe der Albert-Lortzing-Gesellschaft, Band 3).

Leipzig: Leipziger Universitätsverlag, 2015, 219 S., ISBN 978-3-86583-966-4

Was den Schutz des geistigen Eigentums anging, waren die Verhältnisse der deutschen Schriftsteller im ersten Drittel des 19. Jahrhunderts „traurig“, die der einheimischen Komponisten und sonstigen Kunstschaffenden „noch trauriger“. Das jedenfalls schrieb der an der Universität Jena lehrende Jurist Albert Berger, als er in der Allgemeinen Preßzeitung vom 27. Mai 1845 über den - wenige Jahre zuvor in Leipzig gegründeten - „Verein deutscher Musikalienhändler“ berichtete. In dem Aufsatz, der das unermüdliches Wirken der Vereinigung „zur Unterdrückung des Nachdrucks“ herausstrich, brachte Berger die Lage der geistig Schaffenden, wie sie in Deutschland bis zum Ende der 1830er Jahre herrschte, auf den Punkt: „Wer der Ausbildung des Autorrechts nur einige Aufmerksamkeit geschenkt hat, wird zugeben, daß noch vor wenig Jahren die Schriftsteller wenig oder gar keine Rechte hatten. Allerdings galt in Norddeutschland das sogenannte ewige Verlagsrecht; allein nicht zum Vortheil der Schriftsteller, sondern zum Vortheil der Verleger. In Süddeutschland hingegen waren Schriftsteller und Verleger machtlos, und der Nachdruck war ein erlaubtes Gewerbe.“ Das musikalische Urheberrecht litt seiner Ansicht nach noch größere Not: „Es möchte wol nicht leicht eine Sache gefunden werden, wo es so schwer ist als bei einer musikalischen Composition zu bestimmen, was das charakteristische Merkmal des Eigenthums sei, und wie weit sich das Eigenthum ausdehne“[1].

Der Kampf gegen den sogenannten „Nachdruck“ zählte zu den unbewältigten Problembereichen des Wiener Kongresses von 1815. Das Ob und Wie der Sicherung des geistigen Eigentums blieb über weitere zwanzig Jahre den zahlreichen deutschen Einzelstaaten überlassen, die völlig disparate politische und wirtschaftliche Interessen verfolgten, den Nachdruck teils gesetzlich verboten (etwa Preußen und Sachsen), teils – wie Württemberg - grundsätzlich zuließen und nur im Einzelfall Schutz dagegen gewährten. Dazu war aber ein entsprechendes Privileg zu erwerben; ein mühsames (und auch kostenpflichtiges) Unterfangen, das im wahrsten Sinne des Wortes eine gnädig gestimmte lokale Obrigkeit voraussetzte[2]. Zudem stand überall – wie Berger richtig bemerkte – der Verleger im Zentrum des Interesses, der Autor und Komponist konnte, wenn überhaupt, nur mittelbaren Schutz erlangen.

Gleichwohl fallen in die Zeit des Deutschen Bundes die Anfänge sogar des modernen *Urheber*rechts[3], das Privilegienwesen findet sein Ende. 1845, als Berger über den letztlich erfolgreichen Lobbyismus einer umtriebigen privaten Gemeinschaft von Musikverlegern berichtete, stand es um den Schutz des geistigen Eigentums der Schriftsteller, mit gewissen Abstrichen auch der (Ton-) Künstler, schon erheblich besser. Gerade auch auf Drängen Preußens, das sich alsbald an die Spitze der Entwicklung zum Urheberrecht setzte, hatte der Bund am 9. November 1837 einen – von Einzelstaaten zum Teil sogar erweitert umgesetzten – Beschluss erlassen, der die vom Urheber nicht genehmigte „mechanische Vervielfältigung", also den so genannten Nachdruck von „literarischen Erzeugnissen aller Art, so wie Werke(n) der Kunst" vom Grundsatz her verbot; 1841 war ein weiterer Bundesbeschluss gefolgt, der auch die Aufführung dramatischer und musikalischer Werke an die Zustimmung des Autors band. Da dieser Schutz allerdings den unveröffentlichten Werken vorbehalten blieb, die Nachfrage nach Aufführungsmaterial aber groß war, entwickelte sich in den deutschen Staaten insbesondere ein Markt, wo die Partituren der Komponisten - auch ohne deren Zustimmung - gehandelt wurden; eine Situation, die ein gezieltes Vorgehen der Urheber erforderte, für die der Verkauf der Notenschriften plus Aufführungsrecht an die Bühnen ein wichtiges finanzielles Standbein war.

Die Entwicklung der hier skizzierten Urheberrechtsgesetzgebung in Deutschland ist zwischenzeitlich hinlänglich erforscht. Weniger bekannt, aber nicht minder interessant ist, wie die eigentlichen Adressaten des staatlichen Handelns oder Unterlassens, also etwa die Autoren, Komponisten, Verleger, aber auch die Literatur- und Musikkonsumenten, mit den vorgefundenen rechtlichen Gegebenheiten umgingen. Die Darstellung solcher (auch für den Musikwissenschaftler interessanten) Rechtstatsachen verlangt – so sie ein einigermaßen schlüssiges Bild abgeben soll – eine profunde Kenntnis aller verfügbaren Quellen, wozu insbesondere auch die publizierte wie nicht publizierte Hinterlassenschaft der einzelnen Akteure zählt. Diese Kärrnerarbeit in den (deutschen) Archiven und Bibliotheken wird gerade auch von Juristen gerne gemieden. Umso erfreulicher ist es, dass sich die Rechtswissenschaftlerin *Janine Wolf* daran macht, dem bis dahin wenig erforschten Umgang deutscher Tonkünstler des beginnenden 19. Jahrhunderts mit dem geistigen Eigentum nachzuspüren. *Wolf* untersucht in ihrer von dem Leipziger Rechtshistoriker und Opernliebhaber *Bernd-Rüdiger Kern* betreuten Dissertation paradigmatisch die Urheberrechtsauffassung der deutschen Musikgrößen Carl Maria von Weber (1786 bis 1826), Gustav Albert Lortzing (1801 bis 1851) und Otto Nicolai (1810 bis 1848) und deren Beziehung zu bedeutenden Musikalienhandlungen und anderen Rechteverwertern. Dazu nutzt sie – neben der aufgefundenen Sekundärliteratur – zahlreiche bis dahin teilweise unbekannte briefliche Selbstzeugnisse, Prozessakten, Verlags- und Theaterverträge, aber auch Textbücher und Partituren aus der Zeit.

Die Auswahl der Tonkünstler ist sehr geschickt, war doch deren – von *Wolf* ausführlich dargestelltes - deutschlandweites und sogar transnationales Schaffen in besonderer Weise bestimmt von den oben skizzierten, von Bundesstaat zu Bundesstaat wechselnden rechtlichen Rahmenbedingungen (ganz zu schweigen von den Bedingungen des nicht-deutschen Auslandes): Der lange vor Erlass der Bundesnorm von 1837 verstorbene Weber arbeitete zu einer Zeit, die in Deutschland die Rechte der eigentlichen Musikurheber gering achtete, die insbesondere auch das „Aufführungsrecht als Verwertungsrecht" nicht anerkannte (*Wolf*, S. 40). Lortzings „glorreiche Jahre" wiederum begannen mit dem Erfolg des Werkes „Zar und Zimmermann" im Jahre 1837, im Grunde also nach Inkrafttreten des Bundesbeschlusses und des bahnbrechenden preußischen Urheberrechtsgesetzes von 1837. Aber auch diese Jahre kannten zum Beispiel kein „selbständig verwertbares Aufführungsrecht", waren doch in allen Bundesstaaten nur noch nicht gedruckte Werke geschützt (*Wolf*, S. 46). Nicolai schließlich war nicht nur in Deutschland tätig, sondern schrieb einen Teil seiner Opern in und für Italien, wo ihm der Turiner Theaterdirektor 1838 zwar nicht – wie ursprünglich versprochen – als Kapellmeister anstellte, ihm aber einen ersten Kompositionsauftrag verschaffte. Damals (und jedenfalls bis 1840) herrschte in dem ebenfalls zersplitterten Italien eine die Zustände in Deutschland noch übertreffende „urheberrechtsfreie Zeit" (*Wolf*, S. 57), was Nicolai zu einem anderen – in der Arbeit ausführlich dargestellten - Umgang mit den Theaterdirektoren nötigte, als er ihn von der Heimat her gewohnt war.

Anhand der Untersuchung der Urheberrechtsauffassung der drei genannten Großkünstler erreicht *Wolf* ohne weiteres ihr auf Seite 13 selbstgestelltes Ziel, „die entscheidenden Entwicklungen des Urheberrechts in der ersten Hälfte des 19. Jahrhunderts (nachzuvollziehen)" und gewährt ganz nebenbei auch für den Nichtjuristen wertvolle Einblicke in das mitunter mühevolle Geschäftsleben zeitgenössischer Künstler und ihrer Umgebung. Hierzu führt sie den Leser zunächst in Forschungsstand und Methodik ein und gibt dann einen kurzen Überblick über die (Urheberrechts-)Lage in Deutschland und Italien seit Beginn des 19. Jahrhunderts; immer wieder zieht sie auch Querverweise zum geltenden deutschen Musikurheberrecht. Folgerichtig betrachtet *Wolf* dann die einzelnen infrage kommenden Rechte der im Titel der Arbeit genannten Musikschaffenden, nämlich das bereits erwähnte Aufführungs- und das Verlags- und Bearbeitungsrecht, untersucht die Erträge aus den Verwertungsrechten und das Recht auf Werkintegrität, um sich dann in überaus gelungener Weise dem Verhältnis der Komponisten zu ihren (zum Teil auch „eingesparten") Librettisten zu widmen.

Dabei gelingt *Wolf* etwa der Nachweis, dass sich die dargestellten Protagonisten samt und sonders jedenfalls ihres Bearbeitungsrechts bewusst waren; dies galt insbesondere für Weber, der seine Werke noch unter völlig unzulänglichen rechtlichen Rahmenbedingungen komponierte und verkaufte. Was Lortzing und Nicolai angeht: Auch in der Zeit nach 1837 blieb mitunter völlig unklar, ab wann etwa die (Fremd-)Bearbeitung einer Oper – die gerne in Form der überaus marktgängigen Klavierauszüge erfolgte - als neue und „eigentümliche" Komposition anzusehen und damit nicht als mechanischer „Nachdruck/Nachstich" verboten war[4]. Weber jedenfalls suchte zunächst das Heil darin, sich bestimmte Bearbeitungsrechte (rein vertraglich) vorzubehalten, was aber seinen

Verleger, den mit allen Wassern gewaschenen Adolf Martin Schlesinger (1769-1838) nicht daran hinderte, neben einem – immerhin 3000 Talern werten - Klavierauszug zum Freischütz auch andere Arrangements zu veröffentlichen (*Wolf*, S. 118). Daneben suchte sich Weber immer wieder mit warnenden Anzeigen und Rundschreiben an die Theaterdirektoren und das Publikum zu wenden; jedenfalls sein Verleger führte auch Prozesse gegen preußische und sächsische Nachdrucker. Für seine letzte, in London uraufgeführte Oper „Oberon" und aus Erfahrung klug, beantragte der Komponist 1826 schließlich gleich in mehreren deutschen Bundesstaaten die Erteilung von Privilegien, die insbesondere auf den Schutz der Melodie zielten und die dem ohnehin berühmten Tondichter ein überdurchschnittliches Honorar sicherten. Lortzing ging einen anderen Weg: Ihm - der sich seinerseits unbekümmert fremder französischer Inhalte bemächtigte - war es vor allem um die Verbreitung seiner Werke zu tun. Aus diesem Grunde trat er an seine Verleger, etwa die Gebrüder Schott, grundsätzlich die (zwischenzeitlich sogar gesetzlich geschützten) Bearbeitungsrechte ab und behielt nur das Recht an der Partitur selbst.

Schließlich bietet Wolf gerade auch im Schlusskapitel über die Librettisten erstaunliche Einsichten. Dort handelt sie von der Frage, wie sich die Komponisten in Bezug auf das Autorrecht der Libretto- und Vorlagedichter verhielten (*Wolf*, S. 172 ff.). In diesem Zusammenhang weist sie rein tatsächlich zunächst nach, dass die gängige Auffassung, der entsprechend vorgebildete Lortzing sei der einzige gewesen, der „vor Wagner vollgültige Texte habe schreiben können", nur bedingt richtig ist. So bediente sich der Komponist mitunter der Hilfe seiner Freunde (etwa Philipp Reger oder Philipp Jacob Düringer), während Weber und Nicolai das ein oder andere Mal durchaus substantielle Beiträge zum Text ihrer Opern leisteten und insoweit jedenfalls nach heutiger Vorstellung als Miturheber der entsprechenden Libretti anzusehen sind. Wichtiger aber ist die im einzelnen begründete Feststellung, dass Lortzing die (Mit-)Urheberschaft eines Dritten nur in Einzelfällen und gefühlt freiwillig öffentlich machte (und schon gar nicht in klingender Münze honorierte), auch unbekümmert französische (und wohl auch deutsche) Vorlagen nutzte, ohne sich um deren Gemeinfreiheit zu scheren. Dagegen suchten Weber und Nicolai ganz offiziell nach Librettisten, veranstalteten sogar entsprechende Preisausschreiben und bezahlten auch den jeweiligen Dichter. Aber auch sie waren sich – was *Wolf* etwa dem Umstand entnimmt, dass Nicolai den gleichwohl entlohnten Schreibhelfer zu „Il Proscritto" ausnahmsweise nicht namentlich erwähnt – einer Miturheberschaft an einem Libretto durchaus bewusst.

Die Arbeit, die in einem Anhang auch die einschlägigen preußischen Normen aus dem Allgemeinen Landrecht von 1794 und dem „Gesetz vom 11. Juni 1837, zum Schutze des Eigentums an Werken der Wissenschaft und Kunst gegen Nachdruck und Nachbildung" aufführt, bringt die Forschung zur Geschichte des geistigen Eigentums im allgemeinen und zum Musikurheberrecht im besonderen unbedingt weiter. Das Lesen lohnt sich also.

Rainer Nomine*

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1 A(lbert) B(erger), Der Verein deutscher Musikalienhändler, in: Allgemeine Preßzeitung Nr. 42 vom 27. Mai 1845, 165 f. (165).

2 Umfassend dazu Thomas Gergen, Die Nachdruckprivilegienpraxis Württembergs im 19. Jahrhundert und ihre Bedeutung für das Urheberrecht im Deutschen Bund, Berlin 2007.

3 Vgl. Wadle, Der Weg zum gesetzlichen Schutz des geistigen und gewerblichen Schaffens, in: ders. Geistiges Eigentum. Bausteine zur Rechtsgeschichte II, München 2003, 4.

4 Vgl. hierzu den leider von der Verfasserin nicht erwähnten Aufsatz eines J. K., Beitrag zur Lehre vom Nachdruck musikalischer Compositionen, in: Allgemeinen Preßzeitung 1844, Sp. 121 f., 133 f., 137 f., 141 f.

Johannes M. Geisthardt

Zwischen Princeps und Res Publica. Tacitus, Plinius und die senatorische Selbstdarstellung in der Hohen Kaiserzeit (= Studies in Ancient Monarchies, vol. 2).

Stuttgart: Franz Steiner Verlag, 2015 (zugl. Univ. Diss. Konstanz 2012), 430 S., ISBN 978-3-515-10843-0*

Das hier zu besprechende Werk stimmt mit der ein wenig überarbeiteten Version der von der Fachrichtung Geschichte und Soziologie angenommenen und an der Universität Konstanz 2012 eingereichten Dissertation von Johannes M. Geisthardt überein. Hinter dem aussagekräftigen Titel „Zwischen Princeps und Res Publica" verbirgt sich eine mehr als gute und gewissenhafte Analyse zur literarischen Selbstdarstellung der Senatoren Plinius des Jüngeren und Tacitus, die in ihren Abhandlungen mit dem trajanischen Leitgedanken des Prinzipats in Verbindung zu bringen sind und diesen im Umkehrschluss auf ihre persönliche Funktionsrolle von alten Kaisern losschlagen. Schenkt man dem Verfasser Glauben, entdeckt man geschwind die Affirmation der autonom agierenden und darstellenden Systemträger, die gleichbedeutend als *optimus princeps* umrissen werden können.

In der Einführung führt der Autor zur Fragestellung, ob es eine Gruppe von Senatsmitgliedern gegeben hat, die sich lediglich dem Militär hingab und in die *viri militares*, eine eigene Form der beruflichen Laufbahn, eingebunden war; überdies wie sich die

Führungsschicht in den höheren kaiserlichen Ämtern bildete. Die Bescheinigungen der anfänglichen Debatten zwischen Befürwortern und Gegenpolen sind geläufig und wurden vom Autor allesamt festgehalten. Geisthardt tritt dafür ein, prospografische Überlegungen fallen zu lassen und andere literarische Quellen in den historischen Zusammenhang zu stellen. Die Zielrichtung bleibt im Buch fortgesetzt und stringent wie ein roter Faden offenkundig.

Der Einstieg mit der *viri-militares*-Debatte ist zweigeteilt. Eingangs geht es um *captatio benevolentiae*. Der zweite Teil widmet sich Geisthardts persönlichem Ansatz. Im Dreh- und Angelpunkt des Interesses stehen die Darbietung senatorischen Handelns und die darin enthaltenen Bezugnahmen zum Kaiser bei Tacitus und Plinius. Die Abfassungen (*Agricola*, *Annalen* und *Historien* des Tacitus, *Panegyrikus* und die Briefe des Plinius) werden diskursanalytisch ausgeschlachtet. Die Forschungsweise leitet sich von Norman Faircloughs ab. Es werden gegenwärtige Herrschaftsdiskurse adaptiert und abgeändert, so dass in deren Rahmen Taktiken zur Selbstdarstellung entfaltet werden.

In Kapitel II.1. geht es um die senatorische Distanz von der Historie zwischen den Herrscherzeiten von Domitian und Trajan. Diese Epoche war für die Senatsmitglieder von Unsicherheit geprägt – zum einen durch Anklagen, die ihnen seitens der Standesgenossen wegen Mitläufertums Furcht einjagten, zum zweiten durch eine politische, instabile Lage nach der Ermordung des Tyrannen und unter Nervas Prinzipat. Die Senatoren probierten, den Konflikt mit ihrem vorausgehenden Angreifen zur Feinheit gegenüber den anderen Ratsherren und neuen Kaisern zu verwerten. Im *Agricola* nimmt sich Tacitus einer gemeinschaftlichen Geschichte an, deren Spuren bis in das Jetzt nachwirken. Die Schuld an der Entfremdung von den *virtutes* tragen die Senatoren, welche die unter Domitian gebilligten Reaktionen abstreifen müssten. Der Gewaltherrscher wird in Gegenüberstellung mit dem redlichen C. Iulius Agricola beschrieben. Es charakterisieren ihn Missgunst, Furcht und Abneigung. Die Ambivalenz des in den Diensten des Kaisers stehenden „Gegners" Domitians wird aufgelöst, weil Agricola als unbescholtener und immerhin innerlich vom Machthaber höriger Mime gemalt wird. Dies ändert keineswegs etwas daran, dass die Senatorenschaft sich an den Gräueltaten dieser Zeitspanne mitschuldig gemacht hat. Unterdessen sind sie Opfer des Tyrannen, der isoliert ist. Zusammenfassend gelingt es Geisthardt, ein Bindeglied in die neue Ära herzustellen: „Tacitus legt mit dem *Agricola* also Zeugnis ab für die selbstbewusste Einschreibung eines konsularen Senators als unabhängiger Systemträger in die Herrschaft unter dem neuen Monarchen, dem *optimus princeps*, Trajan".

Das schemenhafte und mosaikähnliche Bild des senatorischen Handelns gegenüber dem neuen Prinzeps wird im Kapitel II.2. anhand des *Panegyrikus* des Plinius anerkannt. Nach einer Auseinandersetzung mit der Literatur und der persönlichen Sachlage einer ‚veröffentlichten' Dankesrede, die in einen neuen Zusammenhang geändert wird, wiederholt Geisthardt das Bildnis des *optimus princeps* und die Rolle der Senatsmitglieder in dessen Hegemonie. Zudem geht es um die Fragestellung, wie man die Echtheit des Lobes im *Panegyrikus* erneuern kann. Was charakterisiert die Lobesworte von scheinheiliger und arglistiger Schmeichelei unter Domitian, und wie können sie authentisch erscheinen? Diese zwei Fragen haben das Recht auf eine Antwort, zumal die plinianische Probe, trotz wiederholter Taktiken, die Ernsthaftigkeit der Rede zu begründen, wird damit in Zusammenhang gebracht, dass dem *genre* der *gratiarum actio* wegen der ungleichmäßigen Machtverhältnisse und Bestrebungen, die die Verständigung charakterisieren, unveränderbar eine Ambiguität anhaftet. Mit der Verfeinerung und Veröffentlichung der Rede nimmt Plinius die Niederschrift aus der standardisierten politischen Umgebung und überführt sie in den Aufgabenkreis des *otium*, in welcher die senatorische Selbstdarstellung ungezwungener enthüllt werden kann. In Anlehnung an den *optimus princeps*-Diskurs lässt er ein Mahnmal für den Imperator entstehen, aber auch für sich als einflussreiches Senatsmitglied, das sich ausnahmslos von der Geschichte selbständig mehr als nur emanzipiert hat.

Kapitel II.3. hat die Briefe des Plinius zum Inhalt. In der Inschrift von *Comum* darbietet sich Plinius als Förderer seiner Heimatstadt und gibt im munizipalen Rahmen ein Exempel an *civilitas* ab – eine Aufrichtigkeit, die sich im Benehmen des Imperators zeigt. Mit jener Beschriftung werden die Briefe konfrontiert, welche nach Geisthardt vom Heterotopos des *otium* bestimmt sind. Nach einer Abschweifung zum *otium* in Beziehung zum *negotium* zwischen Republik und Kaiserzeit, die ausdrücklich auf den Analysen Ulrich Gotters beruht, geht es um die Auslegung der Schreiben bzgl. der otiös wirkenden Selbstdarstellung. Hierbei ist das Brieflot weniger eigene Lebensbeschreibung als ein „literarisches Selbst-Porträt". Durch die Darbietung eines in *otium studiosum* gegliederten, schöngefärbten Rauminhaltes soll senatorische Souveränität zur Physiognomie gebracht werden, welche sich von Domitian abhebt. Plinius erscheint demzufolge in „Facetten des Senator-Seins" und benutzt Anhaltspunkte des *optimus-princeps*-Diskurses. Er schließt an republikanische Redekünstler an, um sich als *orator* in der Dichtung zu formen. Trajan ist in den Schreiben keineswegs explizit vorhanden, aber eine Art übersteigertes Ideal durch seine beherrschenden Vortrefflichkeiten, die Plinius imitiert. Der Ratsherr ist klar vom Prinzeps unterschieden, da er in den Briefen weder im Fach der *negotia* handelt noch eine militärische Position antritt. Das senatorische *otium* steht zwischen Begrenzung von den althergebrachten senatorischen Beschäftigungen und dem Nachdruck für die Erhabenheit in der Anordnung der Herrschaft.

Schließlich werden die *Historien* des Tacitus nach dem Bild der senatorischen Funktionselite befragt, das sich aus deren Handeln und ihrer Beziehung zum Kaiser ergibt. Dabei ist abzuleiten, dass Tacitus zwischen dem Erörterten und dem Befinden des Ereignisses und der Darsteller eine Anspannung herstellt. Hintereinander wird anhand mehrerer Senatsmitglieder, die in Diensten des Kaisers stehen, deren militärisches Handeln, die Interaktion mit anderen Senatoren und dem Kaiser erforscht. Abzulesen ist, dass die Herangehensweise einerseits zu einem mechanistischen Bild führt, weil strikt in konzisen Handlungsschemata gedacht wird (z.B. x interagiert mit y), was dem literaturwissenschaftlichen Entwurf des Tacitus durchaus nicht gerecht wird. Wenn ein Befehlshaber negativ gezeigt wird, kann dies daran liegen, dass sich das Misslingen bei einer kriegerischen Auseinandersetzung in der Figur des Befehlshabers personifiziert, sodass gleichartige Stellen weniger dafür angelegt sind, viel über die Person zu sagen. Geisthardt

versteht in dem Kernnarrativ einer Funktionselite, die 69 n. Chr. die Kaiser machte, ein gutes und formvollendetes Anzeichen auf das Bild einer selbstsicheren Elite, welche sich rastlos in das Regierungsgewaltssystem einschreibt.

Im Schlussabschnitt versucht Geisthardt, mit pointierten und eindringlichen Worten eine Gegenüberstellung zwischen den Texten des Plinius und des Tacitus abzufassen. Während Letztgenannter unter Trajan abermals seiner Wichtigkeit als Historiker Ausdruck verleihen kann, erforscht Plinius sein Subjekt im *otium*. Die indirekte Bestätigung der Herrschaft Trajans ist abschließend weder als Abenteuer noch als Propaganda in Vorstellung zu bringen. Mehr noch: Sie ist ein mehr als eine wegweisendere Ingredienz der Selbstdarstellung, der die *persona* stählt. Das Risiko eines Appells der Schmeichelei darf mit einem aufsehenerregenden Republikanismus als kaduk angesehen werden, den Tacitus und Plinius deutlich betonen. Zusammenfassend trägt die Elite ein Stück zur Harmonisierung der ehrwürdigen Meritokratie der Senatoren und der unangefochtenen trajanischen Autokratie bei.

Geisthardt komplettiert das erstklassige und ausführlich recherchierte Werk mit drei Anhängen. Dazu zählt eine Übersicht konsularer Staathalter und deren bürgerliche und militärische Curricula prätorischer Prägung zwischen 70 und 235 n. Chr., ferner eine in Tabellenform aufgebaute Aufstellung, die die mehrfachen Referenzen auf Domitian im Panegyrikus mit den Geschichtsbezügen auf andere Kaiser gegenüberstellt und eine Nennung aller in den Historien des Tacitus angeführten Senatoren mit anschaulichen und knappen Angaben ihrer Haltung zu den Principes des Vierkaiserjahres und zu ihrer militärischen Tätigkeit.

Auf diese Weise kann man das Buch Geisthardts als ein sehr gelungenes und methodisch klar durchdachtes angesehen. Es ist ein Paradebeispiel für Althistoriker, die Antworten auf Fragestellungen im Hinblick auf das Auftreten der Elite im literarturgeschichtlichen Zusammenhang ausfindig machen wollen. Überdies darf die soziale Komponente zu keiner Zeit fehlen. Mit akribischer Sorgfalt und einem reichen Wortschatz ist der Autor sehr in seiner vielfältig und verflochten scheinenden Materie vertieft. Selbst der nebeneinander aufgezogene Wirkungskreis zweier Themenkomplexe stört nicht weiter den Lesefluss. Dass man das Eine oder Andere feiner trennen und die Unterschiede zwischen Plinius und Tacitus ausarbeiten könnte, schadet dem positiven Gesamteindruck des Werkes nicht. Jedenfalls überzeugt der Autor mit seiner Darbietung der ausgearbeiteten Texte und der Autoaffirmation der Senatsmitglieder im Hinblick auf Historie und Jetzt. Also wird dem Leser relativ schnell vor Augen geführt, dass die Diskussion der Selbständigkeit wegen der auf Machtkonzentration und -erhalt hinweisenden Strukturen, Machtverhältnisse und -abhängigkeiten Schiffbruch erleiden oder wie es eine andere Rezensentin hervorragend und frappant in klare und keinesfalls beschönigende Worte fasste, ins Leere laufen musste. Es ist daher abzuleiten, dass dieser Fall auch den altehrwürdigen Historikern bewusst war. Diese Ambivalenz wäre gewiss andeutungsweise oder skizzenhaft in dem hochinteressanten Werk Geisthardts so etwas wie ein Sahnehäubchen gewesen, kann aber auch als eine Herausforderung für neue Forscher in dieser so eng verflochtenen Thematik und deren Arbeiten in diesem komplizierten und bisweilen unübersichtlich angehauchten Gebiet der Alten Geschichte gelten.

Andreas Raffeiner**

* Meinem akademischen Lehrer em. o. Univ.-Prof. Dr. Reinhold Bichler zum 70. Geburtstag, der mir mehr als nur das Einmaleins des Imperium Romanum beigebracht hat, in Dankbarkeit und steter Verbundenheit gewidmet.

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Susanne Hähnchen

Rechtsgeschichte. Von der Römischen Antike bis zur Neuzeit (fünfte Auflage).

Heidelberg: C.F. Müller, 2016, XXIV, 465 S., ISBN 978-3-8114-9421-3

Das bunte, weiträumige und mitunter nicht immer ganz einfache Themenfeld der Rechtshistorie bringt eine beinahe unendliche Anzahl von Publikationen verschiedenster Art ans Tageslicht. Auch Lehrbücher gibt es in Hülle und Fülle. Diese haben das hehre Ziel, die Zweckdienlichkeit des Lesers zu vereinen. Wenn man die jüngste Entwicklung in Anbetracht der Dimension des Stoffes betrachtet, war die Differenzierung nach außen immer wichtig, auch wenn es anerkennenswerte Versuche gibt, den Studierenden das Einmaleins der Rechtsgeschichte als eine in sich geschlossene Ganzheit begreifbar zu machen. Das ist der Autorin Susanne Hähnchen mehr als nur gelungen.

Hähnchens Lehrbuch richtet sich in kompakter und konziser Form im Regelfall an Studierende, aber auch an historisch Interessierte. Außerdem dient es als Vorlesungsbegleiter im Kernfach Rechtsgeschichte. Des Weiteren kann es gewinnbringend zur Festigung im Rahmen des Schwerpunktbereichs zu Rate gezogen werden. In der Überlieferung der vier vorigen Vorlagen wird der historische Bogen von der römischen Antike über das Mittelalter und die Neuzeit bis hin zur deutschen Wiedervereinigung gespannt. Nicht fehlen dürfen Kapitel über die Strafrechtsgeschichte, die Verfassungshistorie im 19. Jahrhundert, die Weimarer Republik und die NS-Ära zwischen 1933 und 1945.

Didaktisch ist das zu rezensierende Buch auch von größter Tragweite. Für den ersten Einstieg werden neben der Erklärung wichtiger Begrifflichkeiten auch Hinweise von rechtshistorischen Arbeiten oder Verfassen von schriftlichen Hausarbeiten gegeben. Allgemein verständliche und Vergleiche in Tabellenform von (rechts)geschichtlich bedeutenden Abläufen geben dem Leser einen Überblick über die folgenden Kapitel. Bleiben die Quellen. Ihre Verknüpfung – falls erforderlich mit Übersetzung – erleichtert dem Interessierten, das Gelernte und Zeiträume mit ihren eigenen Frage- und Problemstellungen zu begreifen.

Wie die vierte Auflage ist das zu besprechende Buch von Hähnchen geschrieben worden. 1969 in Berlin-Pankow geboren, schloss die Autorin 1995 das Studium der Rechtswissenschaften in Berlin ab. Später wirkte sie als wissenschaftliche Mitarbeiterin von Uwe Wesels und wissenschaftliche Assistentin von Friedrich Ebel. 2007 wurde sie für bürgerliches Recht, römisches Recht und Privatversicherungsrecht habilitiert. Seit nunmehr sieben Jahren hat sie in Bielefeld einen Lehrstuhl für bürgerliches Recht, deutsche und europäische Rechtsgeschichte sowie Versicherungsrecht inne. Nach der sehr guten und zum Studium einladenden Einführung hat Hähnchen die Quellen des Werkes aufrechterhalten, zumal sie es durchaus erleichtern, sich in die mannigfaltigen Zeiträume und Forschungsgegenstände hineinzuversetzen. Überdies sind jede Menge Querverweise eingefügt, die Zusammenhänge noch deutlicher und verständlicher machen sollen. So nebenbei ist das Erkennen von Zusammenhängen für jeden, einerlei, ob es ein Geschichtswissenschaftler, ein Jurist oder ein Nichtstudierter ist, wohl für die eigene Denkweise wichtig.

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Christian Fischer – Walter Pauly (Hrsg.)

Höchstrichterliche Rechtsprechung in der frühen Bundesrepublik.

Tübingen: Mohr Siebeck, 2015, 332 S., ISBN: 978-3-16-154032-5

Man muss sich vor Augen halten, dass das politische System der Bundesrepublik durch die Rechtsprechung des Bundesverfassungsgerichts oft schon (bisweilen scherzhaft) als Karlsruher Republik bezeichnet wird. Trotzdem ist die wissenschaftlich tradierte Rolle der frühen politischen Justizgeschichte kaum vorhanden und bis vor kurzer Zeit ein weißer Fleck in der rechtshistorischen Forschungslandschaft geblieben.

Das Herausgeberduo Christian Fischer und Walter Pauly hat den hehren Versuch gestartet, sich mit der Historie der Justiz zu beschäftigen. Im Sommersemester 2014 fand eine hochdotierte Ringvorlesung an der Jenaer Friedrich-Schiller-Universität statt, welche die höchstrichterliche Rechtsprechung in der frühen Bundesrepublik zum Inhalt hatte. Die Ergebnisse finden im zu rezensierenden Sammelband Platz. Doch trotzdem ist das Ganze erst ein Schritt in der Forschung und ein Hinweis auf in der Tat spannende Rechtsfälle. Insgesamt kann man sagen, dass man die spätere politische Geschichte auch erforschen kann. Denn die Justiz hat mehr zu bieten als nur die NS-Vergangenheitsbewältigung.

Walter Pauly betont in seinem profunden Text den unaufhaltsamen Aufstieg des Bundesverfassungsgerichts und geht sogar so weit, das Ganze als Selbstinszenierung eines Verfassungsorgans, schenkt man seinem Untertitel Glauben, zu sehen. Christoph Ohler beschäftigt sich auf höchst interessante Weise mit der Rückkehr in die internationale Gemeinschaft und charakterisiert das Bundesverfassungsgericht als Türhüter des offenen Staates. Christian Fischer dokumentiert in seiner lesenswerten Abhandlung „Bundesgerichtshof als Reichsgericht?“ offenkundig den Aufbau des oberen Bundesgerichts der ordentlichen Gerichtsbarkeit und seine frühe Zivilrechtsprechung. Christian Alexander beschreibt in seinem guten Aufsatz den Einfluss des Verfassungsrechts in der frühen Rechtsprechung des II. Zivilsenats des BGH. Tiefgründig sind auch die Zeilen von Giesela Rühl. Wer ihren Aufsatz liest, versteht das Wesentliche des Einflusses des Grundgesetzes auf die (frühe) Rechtsprechung des BGH zum Internationalen Privatrecht.

Edward Schramm beschreibt in seiner wegweisenden Untersuchung „Skalen der strafrechtlichen Verantwortung für Systemunrecht“ die täterfreundliche Gerichtsbarkeit, welche tonangebend mit einer Schlussstrichmentalität diese förderte. Burkhard Jähnke listet in seiner genauen Untersuchung „Aufräumen und neu Beginnen“ sowohl Fälle als auch Urteile zum Ost-West-Konflikt auf und wirft jede Menge Fragen in den Raum, deren Antworten alle für sich ein eigenes Buch ergeben könnten. Heiner Alwart macht sich nützliche Gedanken über den Sinn und Unsinn in der „öffentlichen“ Hauptverhandlung und geht dabei auf das Leben von Fritz Bauer (1903–1968) ein, welchen er als entscheidenden Generalstaatsanwalt für das 21. Jahrhundert sieht. Michael Brenner bildet in seiner aufschlussreichen Arbeit den Parteibegriff in der Rechtsprechung des Bundesverfassungs- und Bundesverwaltungsgerichts heraus, während Matthias Knauf sich gekonnt mit der wirtschaftlichen Freiheit im paternalistischen Staat befasst. Dabei beschäftigt er sich mit Betrachtungen im Lichte der frühen Rechtsprechung des BVerwG.

Der in der Summe aufschlussreiche und sehr gelungene Aufsatz von Martina Haedrich hat das Völkerrecht in der frühen Rechtsprechung des Bundesveraltungsgerichts zum Inhalt, der mit einem Rückblick beginnt und einem Ausblick endet. Achim Seifert versteht es blendend, das Bundesarbeitsgericht in der „Ära Nipperdey" zu skizzieren. Der gute Beitrag von Eberhard Eichenhofer befasst sich mit dem ersten Jahrzehnt des Bundessozialgerichts und bringt die Kriegsfolgen und gerichtsfeste Sozialverwaltung augenscheinlich ans Tageslicht. Anna Leisner-Egensperger erkennt in ihrem zweckdienlichen und verständlichen Aufsatz die mangelnde Aufarbeitung der Rechtsfinanzhofrechtsprechung und sucht in ihren guten Ausführungen nach organisatorischen, methodischen und inhaltlichen Kontinuitäten zum Bundesverfassungsgerichtshof und versucht den Bundesfinanzhof auf dem Weg zu einem rechtstaatlich verfassungsgeprägten Steuerrecht zu begleiten. Matthias Rufferts informativer Text „Tucked away in the fairytale Duchy of Luxembourg" hat die Entstehung einer europäischen Gerichtsbarkeit und ihrer Wahrnehmung in der Bundesrepublik zum Inhalt. Bleibt noch die lesenswerte Abhandlung von Gerhard Lingelbach. Mit dem Halbsatz „… es soll schnell und richtig urteilen!" geht es um Aufgaben, Zuständigkeiten und um die Spruchpraxis des Obersten Gerichts in der Deutschen Demokratischen Republik.

Kurzum ist es Christian Fischer und Walter Pauly eindrucksvoll gelungen, ein Forschungsfeld zu finden und mit erstem Leben zu füllen bzw. weitere Forschungsaufträge anzustoßen. Der Sammelband kann für die nächsten rechtshistorischen Generationen ein Gradmesser sein, wenn es darum geht, die Rechtsprechung des Bundesverfassungsgerichts anschaulich zu dokumentieren und für die Allgemeinheit zur Verfügung zu stellen.

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Michael Stolleis

Margarethe und der Mönch. Rechtsgeschichte in Geschichten.

München: C.H. Beck, 2015, 352 S., ISBN 978-3-406-68209-4

Michael Stolleis, ein mehr ausgezeichneter Rechtshistoriker, hat 2015 ein Buch geschrieben, in dem es auch zeitweilig unterhaltsam und spannend zugeht. So informiert er den Leser von Margarethe, der ältesten Tochter einer reichen Bürgersfrau, die mit ihrem ersten Gatten acht Kinder hatte. Als der Mann starb, schloss die Witwe erneut den Bund der Ehe, und weitere fünf Nachkommen erblickten das Licht der Welt. Bei der Geburt des 13. Kindes starb die vermögende Frau, und Margarethe musste 18-jährig den Haushalt ihres Stiefvaters führen und in die Mutterrolle schlüpfen. In der Folge trat ein Mönch in das Leben der Familie. Um 1450 herum wütete in Reval, der heutigen estnischen Hauptstadt Tallinn, die Pest. Diese Krankheit raffte binnen kurzer Zeit alle zwölf Geschwister Margarethes dahin. Der Stiefvater war dem Mönch hörig und verkaufte zwei Häuser, die seiner am Leben gebliebenen Stieftochter gehörten. In Gerichtsverfahren ging es um die Bauten, und die Verfahren zogen sich mehr als drei Jahrzehnte hin. Man muss nicht viel Phantasie haben, um sich ausmalen zu können, wie so ein Rechtsstreit eine Schande in der Stadt und in der Kirche war. Der Priester, der den Untergang der Welt voraussagte, wurde eingesperrt. Zudem prophezeite der Geistliche, dass 1516 ein Mensch kommen wird, welcher der Kirche einen Schlag versetzen würde. Dass Martin Luther beinahe genau aufs Jahr die 95 Thesen an die Schlosskirche von Wittenberg nagelte, brachte dem Mönch, der so viel Unglück über Margarethes irdisches Dasein brachte, unbeabsichtigt einen Platz in die Geschichte der Reformation ein.

Stolleis schafft es, mit spitzer Feder nicht bloß die Geschehnisse um das Gerichtsverfahren nachzuskizzieren, sondern auch die abwechslungsreiche Stadtgeschichte von Reval zu beschreiben und das spätmittelalterliche Treiben bunt und allgemein verständlich zu dokumentieren, ja mit Einzelheiten zu bereichern. Das ist nur ein Beispiel von vielen. Der angesehene Rechtshistoriker schrieb auch die anderen Episoden mit viel Liebe zum Detail. Auf diese Weise berichtet er im Kapitel „Die Prinzessin als Braut", wie man mit Ehen Politik betrieb. Da fällt dem rechtsgeschichtlich Interessierten gleich die Binsenwahrheit, die die günstige Heiratspolitik der Habsburger charakterisierte, ein: *Bélla geránt alii, tú felix Áustria nūbe* (Kriege führen mögen andere, du glücklich Österreich, heirate). Bei allem Farbenglanz und aller Prachtentfaltung war es im Regelfall für die Prinzessinnen alles andere als ein Märchen. Stolleis, ein renommierter Historiker und Jurist, liegt auf keinen Fall falsch, wenn er seine Absicht darlegt. So stellte er fest, dass diese Verbindungen keine Liebesheiraten waren, denn das war anno dazumal alles andere als denkbar. Diese Thematik hat ihn gefesselt, weil er dachte, die Historie habe sich um die Bürgersfrauen, Mägde und Arbeiterinnen gekümmert, aber die Prinzessinnen seien demzufolge fast, weil es keineswegs mehr in Mode war, in einem toten Winkel geblieben und hätten so ihr irdisch Dasein gefristet.

Die 20 Geschichten, die Stolleis in einem Buch gesammelt hat, sind vielfältig. Die Themenpalette reicht von einem Krieg mit einem Toten über Löwen und Füchsen. Selbst hat sich der Autor auf die Rechtsgeschichte der frühen Neuzeit und der Jetztzeit spezialisiert. Die Begebenheiten im Werk „Margarethe und der Mönch" haben auch Rechtsprobleme zum Inhalt. Kurzum gelingt es dem Verfasser, rechtsgeschichtlich Interessierte Menschen von Beginn an zu fesseln und in seinen Bann zu ziehen. Das Werk

beinhaltet freilich Geschichten aus der Geschichte, doch kann man den Bezug zur Gegenwart ableiten und daher die Gegenwartsbezogenheit mehr als nur erkennen. Anmerkungen machen das zu besprechende Werk für den juristisch und historisch gebildeten Leser zu einem nahezu unendlichen Sammelsurium rechthistorischen Wissens. Und wer sich nach der Lektüre dieses Buches keineswegs ansatzweise zur Vielfalt der Rechtsgeschichte hingezogen fühlt, hat die Diktion des Werkes von Stolleis nicht begriffen oder ist im flatterhaften und oberflächlichen Dasein fernab jeglicher Realität steckengeblieben.

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Joachim Rückert

Abschiede vom Unrecht. Zur Rechtsgeschichte nach 1945.

Tübingen: Mohr Siebeck, 2015, 563 S., ISBN 978-3-16-154136-0

Das zu rezensierende Werk beinhaltet 19 Studien. Die Themenpalette ist bunt und facettenreich zugleich, denn es geht sowohl um Bilanzen, Methoden- und Verfassungswandel als auch um Alternativen. Rückert versteht es blendend, die rechts- und zeithistorischen Elemente zu einer Einheit zu verschmelzen und als autonome Wissenschaft formvollendet zu präsentieren.

Dabei kommen wichtige Bereiche wie das Richterrecht, die Abwägung als neueren Methodenprimus und die Legenden zur juristischen Methodenhistorie seit Savigny zur Geltung. Des Weiteren werden strittige Phänomene wie die gesetzmäßige Beseitigung des Deutschen Reiches nach dem Zusammenbruch 1945, die Giordano-Frage einer „zweiten Schuld" unserer Ahnen, die NS-Verarbeitung durch Justiz und erstmals aus den Personalakten die NS-Belastung des Justizminiserums nach dem Entstehen der Bundesrepublik Deutschland nach 1949 angeschnitten.

Als „Alternativen" werden die pionierhafte Verfassung Hessens von 1946, die Jurisdiktion der Deutschen Demokratischen Republik, aber auch die entgegengesetzte Umgestaltung der Diktaturen in Europa beschrieben. Ferner kommen neben der Sozialstaatsjurisprudenz das neue Juristenausbildungsjahrzehnt 1974–1984 und der große, dem Anschein nach überlieferte wie in der gleichen Weise entscheidende Zeitenwandel in punkto Mitbestimmung dargelegt.

Rückert betont ohne Scheuklappen die derzeitige Vergangenheitspolitik und will sie als ausgezeichneter und mehr als nur wortgewandter Rechtszeithistoriker aus ihren Fesseln befreien. Dabei möchte der Autor keinesfalls den Niedergang des Rechts beschwören, sondern scharf und pointiert analysieren, noch unerschlossene geschichtliche Abläufe enthüllen und ihre vornehmliche Bedeutung für die Rechts- und Geschichtswissenschaften umreißen. Dass dazu noch die Kultur des Rechts von zentraler Prägung ist, verleiht dem Werk eine entscheidende und für alle Zeiten klare historische Note.

In allen Beiträgen erörtert Rückert in spannender Weise Grundfragen. Dank seiner interessanten Ausdrucksart lernt der Leser viel; ferner kann man im zu besprechenden Buch ein imponierendes und buntes Bild der Rechtszeitgeschichte erkennen. Ein Sach- und Personenregister runden das generell verständliche und didaktisch sehr gut gelungene Werk ab.

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Andreas Groten

Corpus und universitas: römisches Körperschafts- und Gesellschaftsrecht: zwischen griechischer Philosophie und römischer Politik.

Tübingen: Mohr Siebeck, 2015, XV, 477 S., ISBN 978-3-16-153316-7

1. Dalla sua tesi di dottorato, discussa nel semestre invernale 2012/2013 presso l'Università di Colonia, Andreas Groten – attualmente avvocato in Colonia – ha tratto la monografia *Corpus* und *Universitas*. L'opera è stata accolta nella nuova collana *Ius Romanum*, diretta dai Professori Avenarius (Colonia), Baldus (Heidelberg), Dajczak (Poznan), Miglietta (Trento) e Rodríguez Martín (Madrid), nonché dal notaio Böhr (Colonia): collana che si arricchisce così di un nuovo contributo e che si sta via via proponendo come la serie scientifica dedicata al diritto romano, in area germanica, maggiormente interessante. L'ampia monografia di Groten (*Corpus* und *Universitas* [Römisches Körperschafts- und Gesellschaftsrecht: zwischen griechischer Philosophie und römischer Politik], *Ius*

Romanum, 3, Tübingen-Mohr Siebeck, 2015, pp. XV-477, ISBN: 978-3-16-153316-7) è dedicata ad un tema classico del diritto romano, vale a dire la disciplina del fenomeno associativo. Associativo, appunto, perché l'A. giustamente non si occupa dell'aspetto societario, se non rapidamente (344-347), per ribadire la *communis opinio* che il contratto di *societas* potesse dare luogo ad un ente, distinto dalle persone dei soci, soltanto nel caso, essenzialmente, delle società di pubblicani. Conclusione che l'A. raggiunge dalla fonte principale della sua analisi, Gai. 3 *ed*. *prov*. D. 3.4.1, e che ribadisce contro il recente tentativo di Andreas Fleckner di negare attendibilità sul punto al testo gaiano.

L'opera si struttura in un'ampia Introduzione (1-46), seguita da sette sezioni (47-369), e in una conclusiva Sintesi della ricerca (371-388), in un'ottima versione italiana curata da Salvatore Marino, il quale antepone una dotta nota preliminare (371 nt. 1) circa la traduzione dei due termini chiave della ricerca, vale a dire «Personenverbände» e «Begriff», resi dal traduttore con «corporazione» e «nozione» o «termine». Chiudono il lavoro gli imponenti indici, bibliografico (389-437) e delle fonti (447-474), che l'A. ripartisce in giuridiche, letterarie ed epigrafiche. Groten cita altresì le edizioni delle fonti antiche che ha consultato (439-446) e aggiunge infine un conciso (475-477) indice delle cose.

2. Nell'Introduzione (1-46) Groten ripercorre, a partire da Mommsen, la vastissima letteratura in materia, sottolineando come le due opere principali sul punto siano quelle di Ludwig Schnorr von Carolsfeld (*Geschichte der Juristischen Person*, I, München, 1933) e i vari contributi in materia di Francesco Maria de Robertis. Lo Studioso espone poi, in questa parte brevemente, il fondamento filosofico della nozione di associazione, riportando la dottrina che si è espressa a favore dell'influsso stoico, di quello accademico-peripatetico, di quello epicureo e infine di quello scettico. Il dottore di ricerca di Colonia introduce infine la fonte principale della ricerca, come detto tratta dal commento all'editto provinciale di Gaio (D 3.6.1). Un testo dove l'autore delle Istituzioni afferma sostanzialmente che non esiste una generale libertà associativa nel diritto romano, in quanto leggi, senatoconsulti e costituzioni imperiali hanno stabilito che la fondazione di enti privati è soggetta ad approvazione, o da parte del Senato oppure con atto imperiale. Gli enti di questo tipo, quelli che hanno un *corpus* – scrive il giurista antoniniano –, possono legalmente avere un fondo comune e agire a mezzo di un rappresentante (perché di tale figura si tratta), *ad exemplum rei publicae*. Gaio conclude infine con l'aspetto della rappresentanza processuale, citando l'operato del proconsole, il che costituisce l'aggancio con la trattazione nel commento all'editto provinciale.

Nella prima sezione (47-71) l'A. si occupa del concetto di *universitas*. Groten parte dall'osservazione che, nella fonte gaiana, il sostantivo *universitas* costituisce il *genus* che congloba le varie *species* di enti, appunto accomunati dall'essere tutti un'*universitas*. «Gaius ist der älteste Autor, der uns *universitas* als Bezeichnung für Personenverbände überliefert» (47). Lo Studioso di Colonia ricerca allora l'origine del termine, che egli ritrova in Cicerone, il quale avrebbe inventato la parola, nella lingua latina, traducendo il Timeo platonico, e l'espressione *to pan* che ivi ritrovava. Di qui il sostantivo si sarebbe dapprima affermato nel linguaggio gromatico, nel corso del I sec. d.C., per poi passare, a cavaliere fra I e II sec., nel gergo dei giuristi. Con un progressivo processo di astrazione, il termine avrebbe dapprima indicato le entità territoriali, private (i fondi con gli edifici ivi costruiti) o pubbliche (il territorio di una comunità), per poi passare a connotare le *res publicae*, appartenenti alla collettività (appunto l'*universitas*), e specialmente l'eredità, il complesso dei diritti trasmissibili del *de cuius*, non indefettibilmente collegato ad entità tangibili e percepibili. Infine con *universitas* Gaio, e di lì i giuristi severiani, avrebbero nominato appunto il complesso delle corporazioni, degli enti privati, paragonati o meno alle entità pubbliche.

La seconda e la terza sezione sono le più lunghe della ricerca, e ne costituiscono perciò il nucleo.

Nella seconda sezione (73-204) il dottore di ricerca di Colonia si occupa del problema fondamentale di come si pervenne a concepire una soggettività in capo alle associazioni, come cioè il diritto romano giunse a distinguere, dalle persone degli associati, il *quid* per cui essi si erano riuniti in associazione. Senza volere utilizzare la categoria della persona giuridica, in che modo, cioè, anche l'esperienza giuridica romana conobbe centri di imputazione di diritti e di obblighi diversi dalle persone fisiche (entro quali limiti, poi, lo Studioso lo analizza nel seguito dell'analisi).

Ebbene, sostiene Groten in scia a quanto la dottrina ha intuito fin dai tempi di Cuiacio, ciò fu possibile unicamente per l'influsso del pensiero greco. Soltanto la conoscenza dell'impalcatura noetica greca, che la conquista del relativo territorio portò, anche grazie al trasferimento a Roma di Carneade, a partire dalla metà del II sec. a.C., fornì lo strumentario concettuale perché i giuristi romani potessero dare rilevanza giuridica ad un *quid* che non aveva consistenza fisica, ad un'entità diversa da esseri umani. Riprova ne è la tricotomia dei *corpora*, quale si ritrova specialmente in Pomponio (30 *ad Sab*. D. 41.3.30 pr.: già in Sabino, si chiede giustamente l'Autore?) – ma anche in Paul. 21 *ad ed*. D. 6.1.23.5 e in I. 2.20.18 (ad avviso dell'A., qui ricalcate su Giuliano) –: *corpora uno spiritu* (l'essere umano), *ex cohaerentibus* (l'edificio), *ex distantibus* (il popolo, l'esercito, il gregge). L'aggancio con il pensiero greco è qui testuale.

Ciò posto l'A. si profonde in un'impegnativa analisi, condotta direttamente sulle fonti filosofiche greche, per individuare su quale precisa corrente di pensiero possa essersi sviluppata la concezione giuridica romana a riguardo. Groten passa così in approfondita rassegna la gnoseologia platonica, aristotelica, stoica, epicurea e scettica. D'accordo con la dottrina dominante, fin dai tempi di Cuiacio, l'A. conclude che l'influsso fondamentale per la formazione del concetto di ente privato, quello che Gaio indicherà come *universitas*, fu spiegato dal pensiero stoico. Quest'ultimo era peraltro di natura empirica, fondato sulla percepibilità materiale delle cose, tale per cui l'oggetto di un pensiero sono entità percepibili con i sensi. *Nihil est in intellectu quod prius non fuerit in sensu*, se questo brocardo leibniziano non tradisce l'essenza del pensiero stoico a riguardo. Al tempo stesso, tuttavia, Groten afferma che la

critica scettica alla concezione stoica – nota a Roma tramite la scuola fondata nel I sec. a.C. da Filone di Larissa – coesistette nel pensiero giuridico romano, e sarebbe visibile soprattutto nell'opera di Alfeno Varo (6 *dig*. D. 5.1.76) e nello stesso testo principe in materia di Gaio. Critica articolata su una contraddizione di fondo dell'assioma stoico: se quest'ultimo si fonda sulla percepibilità materiale del tutto, è paradossale che su di esso si basi il riconoscimento di entità immateriali, proprio perché esse non possono, a tacer d'altro, essere viste. La scepsi, per l'appunto, mostra la fragilità della dottrina stoica. Si deve allora pensare che, in termini gaiani, un'*universitas* possa sussistere sebbene essa non sia percepibile fisicamente, ma soltanto idealmente.

Groten conclude l'indagine al riguardo con considerazioni che fungono da ponte con la sezione successiva. Il *quid* distintivo dell'ente è quello di potere avere un *corpus*, come reca la fonte gaiana. Con questa espressione si indica la possibilità di porsi come soggetto di diritto distinto dagli associati, tramite l'agire di un *actor* o *syndicus*. Dunque di avere *in primis* un patrimonio. Ebbene in fonti del III secolo, e successivo, ritroviamo anche l'espressione *ius corporis*, segno di un processo di astrazione che – se è lecito instaurare un paragone da parte del recensore – si può constatare anche in materia di postliminio, quando, a partire con tutta probabilità da Servio, accanto al concetto materiale di *postliminium* si forma quello ideale, giuridico, di *ius postliminii*.

Quello appena esposto è il ponte con la successiva sezione (205-314) perché oggetto dell'autorizzazione amministrativa è proprio l'*habere corpus* o *ius corporis*.

La concessione costituisce pertanto il presupposto del *corpus habere*, senza che debba perciò confondersi con quest'ultimo, nota l'A., seguendo sul punto Mitteis (205 s.).

Nella sezione in esame, allora, Groten ripercorre la disciplina pubblicistica del fenomeno associativo privato, vale a dire se a Roma fosse consentito ai *cives* di associarsi liberamente e, nel caso, quando siano state introdotte limitazioni a questo diritto originariamente libero.

Secondo l'A. le XII Tavole avrebbero introdotto un limite non alla libertà associativa, bensì stabilito che le regolamentazioni interne fra associati non potessero andare contro l'ordine pubblico, da Gaio (4 *ad l. XII Tab*. D. 47.22.4) indicato con l'espressione *lex publica*.

Il S.C. *de Bacchanalibus* è poi analiticamente indagato dall'A. (208-235), il quale conclude, seguendo Mommsen e De Robertis, che la specifica approvazione senatoria testimonia, *a contrario*, che all'inizio del II sec. a.C. la libertà associativa non era ancora sottoposta, in via generale, ad alcuna autorizzazione pubblica. Per quanto concerne poi l'oggetto dell'approvazione – e, in difetto, della sanzione, che Groten riconosce con la dottrina più recente essere di tipo capitale –, essa riguardava secondo l'A. la fondazione di associazioni dedicate al culto di Bacco.

Dopo i torbidi dell'ultimo secolo della Repubblica, con le bande armate delle fazioni politiche che turbavano l'ordine pubblico, sarebbe stata allora la *lex Iulia de collegiis* ad introdurre l'autorizzazione amministrativa per la costituzione di enti privati.

Groten propone un'ampia disamina (238-305) delle fonti relative alla legge in questione.

Lo Studioso conclude che essa, come ci è stata tramandata, sarebbe stata approvata fra il 22 e il 17 a.C., senza che si possa escludere (come pure nel caso della *lex Iulia peculatus*, si aggiunge qui), che la legge augustea costituisse il perfezionamento di una prima regolamentazione legislativa introdotta da Giulio Cesare, il quale già aveva disciolto la generalità delle associazioni.

La legge avrebbe in primo luogo disposto lo scioglimento – rinnovando la prescrizione cesariana – della generalità delle associazioni, eccettuate quelle antiche e legittime, ancora una volta sul modello della legislazione (?) cesariana. Quali fossero tuttavia i collegi antichi e legalmente costituiti resta dubbio, ammette Groten.

Nel merito, poi, la fondazione di qualunque nuova associazione fra privati sarebbe stata soggetta ad autorizzazione da parte del potere pubblico. In particolare, conclude l'A., a Roma e in Italia l'autorizzazione in questione avrebbe dovuto essere chiesta al *Princeps*, il quale avrebbe poi deferito istruttoria e deliberazione sulla domanda al Senato. Nelle province, l'autorizzazione sarebbe stata imperiale per gli enti costituiti nelle province *Caesaris*, senatoria per quelli operanti nelle province del popolo romano. Se, in ambito provinciale, la disciplina della legge fosse stata rispettivamente estesa da costituzioni imperiali e disposizioni senatorie, oppure trovasse diretta applicazione la *lex Iulia de collegiis*, rimane aperto.

Oggetto dell'autorizzazione, infine, sarebbe stato il *coire*, il *convenire* e il *conferre*, come Groten scioglie la tripla C che tramanda epigraficamente il contenuto della predetta autorizzazione. Diritto, perciò, di riunirsi, di convocarsi formalmente in assemblea e di apportare conferimenti per la formazione di un fondo, distinto dal patrimonio degli associati.

Gli enti privati costituiti in difetto di autorizzazione, senza rientrare nel novero di quelli confermati dalla legge augustea, erano illegalmente costituiti e venivano disciolti su ordine dell'autorità, imperiale o senatoria. Il fondo comune veniva tuttavia messo in liquidazione a vantaggio degli associati, senza che vi fosse la sua confisca da parte delle casse pubbliche (naturalmente ci si potrebbe chiedere se una simile soluzione valesse nel caso in cui il collegio non fosse illecito soltanto perché non autorizzato, ma in quanto gli associati intraprendessero attività di natura addirittura criminale).

A seguito dell'autorizzazione, allora, era riconosciuta all'ente una certa capacità negoziale: una soggettività giuridica, come già detto, senza timore di adottare tale categoria, in grado al contrario di orientare il giurista odierno nell'interpretazione delle complesse fonti relative alla disciplina del fenomeno associativo nel mondo romano.

Del contenuto di questa capacità giuridica si occupa l'A. nella quarta sezione (315-347).

Groten sostiene che la capacità negoziale sarebbe stata riconosciuta nell'editto pretorio, mentre, dal punto di vista del *ius civile*, gli enti privati sarebbero stati confinati alla tradizionale incapacità che colpiva quanto non appartenesse alla categoria degli esseri umani, salvo che non si trattasse di enti pubblici.

Di conseguenza il dottore di ricerca di Colonia è scettico sulla possibilità degli enti privati di acquistare il dominio civilistico, se non tramite l'usucapione per mezzo del possesso continuato del bene, come postulato dalla scuola proculiana.

Per quanto concerne la *testamenti factio* passiva, Groten ritiene che tale capacità fu riconosciuta al più tardi, in via generale, da una costituzione di Leone del 469 (C. 6.24.12), mentre in precedenza la via generale per destinare il complesso del patrimonio ereditario ad un ente era istituire erede lo schiavo dell'associazione. A parte stava poi la possibilità riconosciuta al liberto di istituire erede l'ente che lo aveva liberato.

Sotto Marco Aurelio si risolse, in senso positivo, la «querelle» riguardante la capacità dell'ente di ricevere per legato, poi confermata da Giustiniano.

Nella dottrina ulpianea (10 *ad ed*. D. 3.4.7.2), infine, i decurioni o altra *universitas* possono sussistere anche quando rimanga un solo associato, ad avviso di Groten per effetto della critica scettica della nozione stoica, dunque per la rappresentazione necessariamente ideale dell'ente. Rappresentazione non fenomenica, pertanto, la quale può portare altresì a concepire un ente con un unico associato, almeno non in fase genetica dello stesso (si sta infatti trattando di un prodotto del pensiero).

Brevi sono le tre sezioni finali: quella dedicata alla concezione giustinianea (349-356) e a quella più antica dell'ente privato (357-361), nonché alle linee direttrici che connotarono lo sviluppo del fenomeno associativo nel diritto romano (363-369).

In epoca giustinianea si nota la tendenza a fare dell'*universitas*, piuttosto che del *corpus habere*, il concetto fondamentale del fenomeno associativo (l'A. lo evince specialmente da Iust. C. 2.58.2.5, del 531). Ciò non portò tuttavia ad una sistematica revisione dei testi classici, nella compilazione, bensì alla valorizzazione di quelli – come Gai. 3 *ed*. *prov*. D. 3.4.1 o Ulp. 10 *ad ed*. D. 3.4.7.2 – dove già emergeva questa nozione di *universitas* come «Oberbegriff».

Nella visione più risalente, invece, percepibile ancora in Gaio, era l'analogia con l'ente pubblico territoriale, a partire da quello fondamentale – la *res publica* – per estendere poi la personificazione agli enti pubblici locali (municipi e colonie), il paradigma grazie al quale agli enti privati si poteva riconoscere, entro determinati limiti, la soggettività giuridica.

Storicamente, infine, la disciplina del fenomeno associativo si sviluppò partendo, come appena detto, dall'analogia con gli enti pubblici territoriali, per poi fondare la capacità degli enti privati sul pensiero greco, prima stoico poi scettico (che coesistevano in maniera non priva di tensioni), con relativa valorizzazione del concetto ideale di *ius corporis* (piuttosto che di *corpus habere*), e concludersi in epoca giustinianea con l'erezione dell'*universitas* a «Oberbegriff».

La ricerca si conclude infine con la pregevole sintesi della stessa in lingua italiana (371-388), incentrata soprattutto sulle nozioni di *universitas* e di *corpus habere*, piuttosto che su un'epitome dell'intero contenuto dell'indagine.

3. Lo studio di Groten si lascia apprezzare, quanto a forma, contenuto e metodo.

Relativamente al profilo formale, va sottolineato che lo Studioso scrive in un tedesco molto chiaro, che non abusa delle peculiarità sintattiche della sua lingua – altrimenti ostiche per un non madrelingua – e che si articola perciò in proposizioni brevi, le quali non si strutturano tuttavia nello stile – fuori luogo – di un telegramma. L'Autore aiuta perciò il lettore non madre lingua a comprendere il contenuto della sua ricerca, memore degli obiettivi perseguiti dalla collana che ospita la sua indagine e consapevole della dimensione europea e internazionale dello studio del diritto romano. Dimensione che – va ribadito a ogni piè sospinto – deve portare i suoi cultori ad esprimersi in un linguaggio – certo non sciatto! – accessibile ai lettori non madri lingua.

Dal punto di vista del contenuto, le conclusioni di Groten sono solidamente appoggiate sulle fonti e si inseriscono armonicamente nel dibattito scientifico sul punto, senza perseguire la fuorviante originalità a tutti i costi che connota alcune opere prime.

È tuttavia dal punto di vista metodologico che il libro del ricercatore di Colonia si fa maggiormente apprezzare.

Groten dimostra, in primo luogo, una completa padronanza delle fonti e della sterminata letteratura sul tema. Quest'ultima viene citata e criticamente discussa dall'A., che ha saputo pescare anche i contributi ospitati nelle sedi di più difficile accesso ed estranei al circuito delle riviste giuridiche e romanistiche. In ciò lo Studioso dimostra un'ammirevole e sicura propensione per la ricerca scientifica.

Per quanto concerne poi le fonti, il dottore di ricerca di Colonia fa prova di sapere ricondurre agli scopi di un'indagine giuridica le testimonianze afferenti ad altri campi del sapere, con ciò, se si vuole, integrando con successo il tratto distintivo del grande giurista, colei o colui che è per l'appunto in grado di interpretare fonti diverse da quelle normative per giungere ad una convincente e motivata analisi di fatti di produzione normativa.

Mi spiego meglio: Groten è consapevole che il riconoscimento di un ruolo nel traffico giuridico privatistico a soggetti diversi dalle persone fisiche e, se si vuole, distinti dalle collettività pubbliche – la cui esistenza era sotto gli occhi di tutti ed era perciò facilmente percepibile – richiedeva uno sforzo concettuale non indifferente. Un'attività noetica, peraltro, che, per le sue peculiarità, non era congeniale alla mentalità empirica romana e a quella degli stessi uomini per eccellenza di pensiero nel mondo romano, vale a dire i giuristi. L'influsso del pensiero greco, in materia, è stato perciò riconosciuto come detto fin da Cuiacio. Di ciò conscio, allora, l'A. non si è limitato a ripercorrere la vasta letteratura sul punto, ma ha compiuto un lavoro di prima mano sulle fonti filosofiche greche. Fonti che egli ha tradotto di persona e ha dimostrato di padroneggiare. Il romanista sa bene quanto il testo greco rappresenti uno schermo invalicabile, ragione per cui non può non levarsi il cappello di fronte alla padronanza della lingua greca mostrata da Groten, che ha tradotto di persona tutte le fonti latine e greche citate, anche quando una traduzione era già disponibile. Soltanto per quanto concerne la difficilissima fonte epigrafica costituita dal S.C. *de Bacchanalibus* l'A. dichiara onestamente di avere modellato la traduzione su quella nelle lingue moderne che accompagna le edizioni più recenti del testo del 186 a.C. (210 nt. 43).

Non soltanto: anche nei contenuti – che č poi quanto piů rileva – Groten mostra di padroneggiare le fonti filosofiche greche, e di saperle calare nel dibattito scientifico coevo.

4. Qualche passaggio dell'analisi di Groten avrebbe potuto essere, a mio giudizio, affrontato meglio.

Dal punto di vista della forma, rilevo che le note dell'A. sono, a volte, eccessivamente pedanti, in quanto si cita a ogni piè sospinto la letteratura e le fonti. L'impostazione dell'apparato bibliografico, come taglio, è di stampo anglosassone, in quanto nelle note compaiono niente più che brevissime annotazioni, talora, sul pensiero di un Autore. Tale apparato non prende, però, la sobrietà dell'impianto anglosassone, in quanto, va ribadito, è talvolta troppo pesante. Esso sembra peraltro non di rado improntato ad un «taglia e incolla», come prova il fatto che un'opera della Cracco Ruggini viene sempre citata come «Associazoni» (anche nell'indice bibliografico), mentre, dove interviene la traduzione di Marino, tale errore viene emendato (384 nt. 117).

La soluzione di alcuni problemi sostanziali, proposta dall'A., non è poi riuscita a convincermi.

Mi riferisco in particolare a tre aspetti, tralasciando il profilo del significato del versetto decemvirale, che a mio avviso va calato non in un antistorico riconoscimento della libertà associativa, quanto in una norma di contrasto dell'autorità dei clan gentilizi, *praeter* e a volte *contra legem*. Episodi come quello degli Orazi e Curiazi restituiscono secondo me lo sfondo della norma decemvirale.

I tre profili in questione, dicevo, sono quello del rapporto fra dottrina stoica e critica scettica, dell'interpretazione della procedura di riconoscimento prevista dalla *lex Iulia de collegiis* e della relazione fra *ius honorarium* e *ius civile*, relativamente alla capacità giuridica degli enti.

Per quel che riguarda il primo aspetto, le mie perplessità non si concentrano sulla ricostruzione del pensiero stoico e di quello scettico, bensì sulla coesistenza che l'A. ravviserebbe nelle fonti romane dei due indirizzi. Devo dire che le modalità di concorrenza dei due pensieri fra i giuristi romani non mi sembrano risolte felicemente dall'A., né, mi parrebbe, convincentemente sostenute. L'influsso della dottrina scettica sulle soluzioni date da Alfeno, Gaio ed Ulpiano, nei passi richiamati sopra (§ 2), mi pare fortemente opinabile. Sono certo che Groten considererà quella che segue un'obiezione piuttosto grossolana, ma non riesco a scorgere nel pensiero di Ulpiano un influsso della critica scettica. Forse, come osserva lo stesso A. (342 i.f.), maggior rilievo, nel postulare la permanenza dell'*universitas* – *nominatim*, il *corpus decurionum* – nonostante la sopravvivenza di un solo associato, può avere giocato l'epidemia di peste che decimò la popolazione sotto Marco Aurelio. Si rammenti d'altra parte la velata critica ulpianea alla simulata *philosophia*, diversa dalla vera, perseguita dai giuristi, in apertura del suo manuale giuridico. Naturalmente era una critica che si basava su letture, non avanzata per partito preso, e proprio per questo mi riesce arduo convincermi che dietro soluzioni ulpianee stessero precise concezioni gnoseologiche piuttosto che, per così dire, di *utilitas publica*.

Riguardo poi alla procedura di riconoscimento, ho sopra (§ 2) volutamente semplificato il pensiero dell'A., ma, mi parrebbe, anche appianato. Incontro infatti difficoltà a seguire Groten quando afferma che Gaio testimonierebbe l'esistenza di due procedure di riconoscimento, ai sensi della legge augustea: una per i nuovi enti, l'altra per gli enti già esistenti al momento di approvazione del tenore normativo, fra il 22 e il 17.

Alla prima alluderebbe il giurista antoniniano quando scrive *neque societas neque collegium neque huiusmodi corpus passim omnibus habere conceditur*: *nam et legibus et senatus consultis et principalibus constitutionibus ea res coercetur*. *Paucis admodum in causis concessa sunt huiusmodi corpora*…

Alla seconda farebbe riferimento la proposizione che chiude D. 3.4.1 pr., *item collegia Romae certa sunt*, *quorum corpus senatus consultis atque constitutionibus principalibus confirmatum est*, *veluti pistorum*…

Erano pochi i nuovi enti, che riuscivano ad ottenere la concessione per la loro costituzione, mentre per quelli già esistenti la procedura di conferma avrebbe avuto luogo, ai tempi di Gaio, soprattutto in provincia, e di qui l'ingresso del passo nel commento all'editto provinciale.

L'interpretazione mi pare scarsamente suffragata.

In particolare Groten basa la seconda affermazione sull'assunto che *certa* non vada inteso come aggettivo di *collegia*, in quanto ad esso posposto. Contrariamente alla dottrina dominante (Brutti, Fleckner, le stesse traduzioni attuali del Digesto in italiano e in tedesco), perciò, il testo non andrebbe letto nel senso che a Roma vi sono alcuni enti privati, la cui soggettività è stata confermata (per ora, uso il verbo in senso generico) con deliberazione senatoria o imperiale, bensì supponendo che a Roma vi fosse un *numerus clausus* di enti, la cui esistenza era stata confermata da atti senatori o imperiali.

A me pare invece che il discorso sia impostato da Gaio unitariamente, e che la specificazione degli enti romani porti su una localizzazione spaziale sull'Urbe. In altri termini il giurista antoniniano esprime – in termini non felicissimi – il concetto che, ai sensi delle fonti ufficiali, non esiste una generale libertà associativa nel diritto romano, ma che la costituzione di enti è soggetta ad approvazione dell'autorità. Concessione che viene rilasciata in pochi casi, e di qui Gaio passa all'esemplificazione delle società di riscossione delle imposte, di sfruttamento delle miniere di oro e di argento, di estrazione del sale nonché, allo stesso modo, di alcune associazioni a Roma, come quelle dei mugnai e simili, nonché dei battellieri, i quali si trovano pure nelle province. Certamente va riconosciuto che il pensiero del giurista non scorre in maniera piana e che disturba l'uso del verbo *confirmare*, a proposito dei collegi romani. La menzione in proposito dei S.C. e delle prescrizioni imperiali che ne avrebbero confermato l'esistenza esclude infatti che si potesse trattare dei collegi legali e costituiti *ab antiquo* preservati prima da Cesare e poi da Augusto. Mi pare cioè che Gaio si occupi solamente degli enti di nuova costituzione, senza nulla dire di quelli non soppressi dalla *lex Iulia de collegiis*.

Mi sembra perciò che la dicotomia si giochi, in linea generale (non nel passo gaiano), su un piano distinto: da un lato, gli enti confermati dalla legislazione cesariana ed augustea, che a mio avviso erano contemplati nella stessa legge, con riferimento all'ambito urbano e, in caso, italiano; dall'altro, la procedura di riconoscimento per gli enti di nuova costituzione – sciolti tutti gli altri – ricostruita in termini altrove convincenti dall'A., parlando a riguardo di un'approvazione senatoria (pur se delegata dal *Princeps*, cosa magari più discutibile) nell'ambito italico e delle province senatorie, di quella imperiale per gli enti operanti nelle province imperiali. Io penso che la legge augustea non trovasse applicazione in ambito provinciale, ma che la sua disciplina fosse stata ivi estesa per effetto di S.C. e di costituzioni imperiali, recepiti nell'editto provinciale (e l'aggancio con il commento gaiano mi sembra maggiormente appoggiato sull'aspetto della difesa processuale degli enti che sul riconoscimento di quelli esistenti, nel contesto provinciale).

La tesi, infine, che la capacità giuridica degli enti fosse attribuita dagli editti magistratuali, dunque dal *ius honorarium*, praticamente assente, invece, per il *ius civile* (317-331), non riesce proprio a convincermi. Il fatto che Gai. 3 *ed. prov*. D. 3.4.1.1 attesti una simile capacità negoziale, a mezzo di un rappresentante e un patrimonio comune, sul modello della *res publica*, in un'opera di commento all'editto, non vedo che concludenza abbia. Mi sembra piuttosto che la legge augustea fondi, in quanto tale, una disciplina di *ius civile*, attribuendo soggettività giuridica agli enti riconosciuti. L'attività negoziale potrà poi insistere su fattispecie regolate dal diritto civile o da quello onorario, ma questo è un altro aspetto. In ambito provinciale riguarderà necessariamente quest'ultimo (e anche per ciò Gaio ne può parlare in un'opera di commento all'editto provinciale), ma anche in tal caso ciò attiene ad un profilo funzionale piuttosto che strutturale, sul quale mi sembra invece si concentri Groten. Più in generale, poi, la sezione più strettamente privatistica sul contenuto della capacità giuridica degli enti avrebbe potuto essere sviluppata con maggiore diffusione dall'A., magari a scapito di altre parti afferenti al pensiero filosofico greco e alla questione del riconoscimento degli enti, le quali avrebbero forse potuto giovarsi di un'esposizione più sintetica.

5. Le osservazioni di cui al punto sopra (§ 4) intendono semplicemente stimolare il dibattito su parti dell'analisi di Andreas Groten che, a mio parere, sono suscettibili di revisione.

Rimane fermo che, pur nella torrenziale produzione scientifica sul diritto associativo romano, la monografia dello Studioso riesce a stagliarsi come l'opera ora di riferimento in materia, da cui, per la messe di informazioni contenute e la puntualità dei risultati raggiunti, ogni successiva indagine dovrà partire.

Soprattutto, vorrei concludere, ogni futura analisi in tema dovrà a mio parere seguire, metodologicamente, la traccia segnata dal giovane ricercatore di Colonia.

Il conferimento, infine, del Premio Boulvert come migliore opera prima di diritto romano fra quelle – in concorso – pubblicate fra il 2013 e il 2015, conferma autorevolmente il giudizio qui dato.

Stefano Barbati*

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Ludwig Marum zum Gedenken – Zur Verleihung des Marum-Preises 2016 an Diemut Majer

Am 5. November 2016 wurde unserer Autorin, Frau Kollegin Professor Dr. Diemut Majer, in Karlsruhe der Ludwig-Marum-Preis 2016 verliehen, zu dem die Redaktion dieser Zeitschrift herzlich gratuliert. Die Badischen Neuesten Nachrichten vom 7. November 2016 berichteten darüber unter dem Haupttitel „Das Gesetz als Deckmantel missbraucht. Marum-Preisträgerin Diemut Majer hat die Perversion des Rechts durch die Nazis beschrieben“ (Katja Stieb).

Ludwig Marum war 1933 sozialdemokratischer Reichstagsabgeordneter, der im März 1933 verhaftet und 1934 im Konzentrationslager Kißlau bei Bruchsal ermordet wurde.

Nachfolgend drucken wir die Laudatio von Dr. Detlev Fischer, Richter am Bundesgerichtshof a.D. und Vorsitzender des Rechtshistorischen Museums in Karlsruhe e.V., sowie die Dankesrede von Prof. Dr. Diemut Majer ab. Eingangs soll der Leser mit der Vita Marums vertraut gemacht werden.

Thomas Gergen*

Ludwig Marum, Karlsruher Rechtsanwalt und Badischer Staatsmann

Ludwig Marum (1882-1934)[1] war fast 25 Jahre als Rechtsanwalt in Karlsruhe tätig. Er stammte aus einer jüdischen Familie aus Frankenthal in der Pfalz und ging in Bruchsal auf das Gymnasium, anschließend studierte er Rechtswissenschaften in Heidelberg und München. Bereits 1904 schloss er sich der SPD an und gehörte alsbald in Karlsruhe zu den führenden sozialdemokratischen Politikern. Als badischer Justizminister hat er die Ausarbeitung der republikanischen Landesverfassung von 1919 aktiv mitbegleitet. Über zehn Jahre gehörte er als Staatsrat der badischen Landesregierung an. Ab 1928 war er Reichstagsabgeordneter in Berlin. Ludwig Marum war ein Mann der „Praxis”, der sich durch Augenmaß und Besonnenheit auszeichnete. Sein politischer Realitätssinn war ausgeprägt, so sah er die junge Republik gleichermaßen von links- wie rechtsextremistischer Seite bedroht. Er setzte sich mit großer Entschiedenheit für den Ausbau des demokratischen Rechtsstaats in Baden und im Reich ein. Seine rechtspolitischen Positionen und Äußerungen im Landtag und Reichstag belegen dies eindrucksvoll.[2]

Marum war ein vielbeschäftigter Rechtsanwalt; er war sowohl als Strafverteidiger wie auch in Zivilsachen tätig. Seit 1928 war Marum ehrenamtliches Vorstandsmitglied in der badischen Rechtsanwaltskammer. Ende März 1933 setzte der neue NS-Landesjustizminister in Anwendung der verhängnisvollen Reichstagsbrandverordnung den bisherigen Vorstand der Anwaltskammer ab. Sowohl der Kammervorsitzende Eduard Dietz[3] als auch Marum, die angesichts ihrer demokratischen Überzeugungen für die braunen Machthaber unerwünscht waren, hatten die vorherige Aufforderung, ihre Vorstandsämter freiwillig aufzugeben, ausdrücklich zurückgewiesen.[4]

Bei der von der NS-Regierung veranlassten vorzeitigen Reichstagswahl am 5. März 1933 erhielt Ludwig Marum erneut ein Mandat. Dieses konnte er aber nicht mehr antreten; bereits in den Abendstunden des 10. März 1933 wurde er unter Bruch der Abgeordneten-Immunität in seiner Karlsruher Wohnung festgenommen. Neben anderen führenden badischen Sozialdemokraten wurde er im Wege der sog. NS-Schutzhaft zunächst in das Amtsgefängnis Karlsruhe verbracht, wenige Monate später in das bei Bruchsal gelegene KZ Kißlau verschleppt. Die zahlreichen Schritte, die Dietz nach seiner Entlassung aus dem Amt des Vorstandsvorsitzenden als Anwalt Marums unternahm, um dessen Freilassung zu erreichen, blieben erfolglos. Die an offizielle Stellen in Berlin gerichteten Gesuche wurden entweder nicht beantwortet oder es erfolgten zynische Absagen. So wies der neubestellte Präsident des Deutschen Anwaltsvereins[5] im August 1933 auf eine entsprechende Bitte Dietz sich für eine Freilassung Ludwig Marums zu verwenden, darauf hin, er halte sich nicht verpflichtet, die Vertretung zu übernehmen. Er sei vielmehr bestrebt, die jüdischen Anwälte aus dem Deutschen Anwaltsverein zu entfernen[6]. In der Nacht vom 28. zum 29. März 1934 wurde Marum in seiner Zelle von mehreren SA- und SS-Leuten erdrosselt. Der Mord geschah auf Anweisung des badischen NS-Reichsstatthalters und

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1 Grundlegend zur Biographie Monika Pohl, Ludwig Marum, Ein Sozialdemokrat jüdischer Herkunft und sein Aufstieg in der badischen Arbeiterbewegung 1882-1919, Karlsruhe 2003; dies., Ludwig Marum, Gegner des Nationalsozialismus, Das Verfolgungsschicksal eines Sozialdemokraten jüdischer Herkunft, Karlsruhe 2013, ferner Detlev Fischer, Karlsruher Juristenportraits aus der Vorzeit der Residenz des Rechts, Karlsruhe 2004, S. 58-64.

2 Hierzu im Einzelnen Detlev Fischer, Rechtsanwalt Ludwig Marum (1882-1934) als Rechts- und Verfassungspolitiker, Recht und Politik 2008, 234, 238.

3 Hierzu Detlev Fischer, Eduard Dietz (1866-1940), Vater der badischen Landesverfassung von 1919, 2. Aufl., 1912, Karlsruhe.

4 Detlev Fischer, Wiederkehr, Begegnungen zwischen den Karlsruher Anwälten Eduard Dietz und Ludwig Marum, in: 1879-2004, 125 Jahre Erfahrung mit Recht, 125 Jahre Anwaltsverein e.V., Karlsruhe 2004, 51, 54f.

5 Hermann Voß [1878-1957], vgl. Detlev Fischer, Wiederkehr aaO, 51, 56.

6 Detlev Fischer, Wiederkehr aaO, 51, 56.

Gauleiters, der bereits seit dem Novemberputsch von 1923 mit Hitler in enger Verbindung stand und in Marum aufgrund früherer Auseinandersetzungen im badischen Landtag seinen politischen Hauptgegner (der „badische Rathenau“) sah. Als offizielle Version wurde ein Selbstmord Marums vorgespiegelt. Am 3. April 1934 wurde auf dem Hauptfriedhof Karlsruhe die Trauerfeier abgehalten. Mehrere tausend Personen fanden sich trotz Überwachung durch die Gestapo dort ein, um von dem Toten, einem der ersten NS-Opfer, Abschied zu nehmen.

Detlev Fischer**

Laudatio anlässlich der Verleihung des Ludwig-Marum-Preises an Professorin Dr. Diemut Majer am 5. November 2016 im Neuen Ständehaus zu Karlsruhe

Es ist für mich eine große Freude, die heutige Laudatio auf die Preisträgerin des diesjährigen Ludwig-Marum-Preises, Frau Professorin Dr. Diemut Majer, halten zu dürfen. Die Ziele, die mit diesem Preis verfolgt werden, sind vielfältig. Er dient als Auszeichnung für Menschen, die sich im Sinne von Ludwig Marum für soziale Demokratie, Rechtsstaatlichkeit und Gleichberechtigung einsetzen. Hervorragende Leistungen zur Bewahrung einer humanen und toleranten Gesellschaft sollen hierdurch ihre verdiente Anerkennung finden. Nicht zuletzt zählt auch die Aufarbeitung der Geschehnisse in der NS-Diktatur im Sinne einer demokratischen Erinnerungskultur dazu.

Aber auch das Gedenken an das facettenreiche Wirken von Ludwig Marum als sozialdemokratischer Politiker in Karlsruhe, der auf allen drei Ebenen des politischen Handelns erfolgreich tätig war, gehört dazu. Zunächst in der Kommunalpolitik als Karlsruher Stadtrat, dann auf Landesebene als Landtagsabgeordneter und langjähriges Mitglied der badischen Landesregierung, zuletzt als Reichstagsabgeordneter in Berlin. In diesen Tätigkeitsfeldern hat er sich auch als profilierter Rechtspolitiker bewährt: Schon in der Zweiten Kammer war er mit Fragen der Verfassungs- und Justizpolitik befasst, als erster republikanischer Justizminister hat er neben seinem Anwaltskollegen und Parteifreund Eduard Dietz, dessen 150. Geburtstag wir vor wenigen Tagen gedenken konnten, Entscheidendes zur Ausarbeitung und Verabschiedung der badischen Landesverfassung vom 25. März 1919 beigetragen. In der Folgezeit hat er im badischen Landtag sowie im Reichstag sich wiederholt zu Fragen der aktuellen Rechtspolitik mit wegweisenden Beiträgen zu Wort gemeldet. Als Stichworte mögen hier die Forderung nach Abschaffung der Todesstrafe, die Gleichberechtigung von Mann und Frau in Staat und Gesellschaft sowie die Bewährung des demokratischen und sozialen Rechtsstaats im Kampf gegen rechts- und linksextremistische Tendenzen und Gefährdungen genügen. Er wusste aus eigener Sachkunde, wovon er sprach. Nicht nur als vielbeschäftigter Rechtsanwalt hatte er tiefen Einblick in die Nöte der damaligen Bevölkerung gewinnen können.

Dieser Ausschnitt aus seinem vielfältigen Lebenswerk führt uns zur heutigen Preisträgerin. Sie ist nach *Helmut Simon*, den wir im Jahre 2009 ehrten, der zweite Jurist der mit diesem Preis ausgezeichnet wird und damit die erste Juristin. Seit 1988 wird der Preis vergeben, so dass wir uns heute auch über diesen besonderen Aspekt einer Vervollständigung, nicht nur im Sinne von Ludwig Marum, sehr freuen. Auch Diemut Majer hat sich intensiv mit verfassungsrechtlichen Fragen befasst und mit ihren vielfältigen Studien zum Unrechtsregime des Nationalsozialismus tiefgreifende Beiträge vorgelegt. Als Richterin, Hochschullehrerin und als Rechtsanwältin war und ist ihr der demokratische und soziale Rechtsstaat, wie einst für Ludwig Marum, Herzensanliegen.

Ich darf ihren Werdegang in kurzen Worten schildern. Aufgewachsen in einem schwäbischen Pfarrhaus mit sechs Geschwistern hat sie das humanistische Gymnasium besucht und in Stuttgart das Abitur abgelegt. Sie entschloss sich zum Studium der Rechtswissenschaften, bekanntlich das Studium, das zahlreiche Berufsbilder ermöglicht und im Gegensatz zu anderen Studiengängen bei Studienaufnahme keine abschließende Festlegung bedeutet. Die Auswahl ihrer Studienorte ist vielfältig, im Schwerpunkt das südbadische Freiburg, das ihr den Zugang zum badischen Landesteil eröffnete, der auch für die kommenden Jahrzehnte ihr Lebensmittelpunkt werden sollte, daneben aber auch Bonn und Westberlin. Während ihres Studiums war sie Stipendiatin der Friedrich-Ebert-Stiftung, und als Hochschullehrerin über viele Jahre Vertrauensdozentin für diese Stiftung; beides kann auch als Standortbestimmung verstanden werden.

Nach dem erfolgreich bestandenen Ersten Staatsexamen in Freiburg nahm sie wieder den Koffer in die Hand und absolvierte im oberitalienischen Bologna ein einjähriges Studium am Bologna Center – School for Advanced International Studies – der John-Hopkins-University in Baltimore. Dann folgte der damals noch dreieinhalbjährige juristische Vorbereitungsdienst im Landgerichtsbezirk Freiburg. Während dieser Zeit erstellte sie bei *Konrad Hesse*, einem der herausragenden Staatsrechtler der Freiburger Fakultät und späterer Bundesverfassungsrichter, ihre Dissertation zum anspruchsvollen Thema *Die Folgen verfassungswidriger Gesetze im öffentlichen Recht*. 1966 hatte sie mit der Doktorprüfung und dem Zweiten Staatsexamen eine vielseitige Ausbildung abgeschlossen und blieb aus Neigung im akademischen Betrieb. Zunächst als wissenschaftliche Assistentin an der Universität Mannheim, im Anschluss daran an der Freien Universität in Berlin.

Sie erhielt ein Habilitationsstipendium der Deutschen Forschungsgemeinschaft für ihr selbst gewähltes, breit angelegtes Thema, die juristischen Strukturen des NS-Unrechtsregimes gegenüber den sogenannten *Fremdvöl-*

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kischen im Einzelnen auszuleuchten. In dieser Bezeichnung spiegelt sich der menschenverachtende Rassenwahn des Nationalsozialismus unmittelbar wider: Einerseits die sog. Deutschblütigen und andererseits die sog. Fremdvölkischen, also Bürger jüdischer Herkunft, Sinti und Roma und weitere Minderheiten, zunächst im Inland und dann mit dem Eroberungskrieg im Osten auch die slawischen Völker. Die zeitgeschichtliche Forschung hatte sich zur damaligen Zeit bereits ausführlich mit der Entwicklung der NS-Diktatur befasst; erwähnt sei statt vieler anderer Studien das Grundlagenwerk von *Karl Dietrich Bracher*, *Die deutsche Diktatur, Entstehung, Struktur Folgen des Nationalsozialismus*, 1969 erstmals erschienen. Aus juristischer Perspektive gab es aber, abgesehen von der Monographie von *Bernd Rüthers*, *Die unbegrenzte Auslegung – Zum Wandel der Privatrechtsordnung im Nationalsozialismus* noch keine grundlegende Untersuchung, jedenfalls nicht aus der Feder der unbelasteten Nachkriegsgeneration.

Es ist daher äußerst bemerkenswert, dass sich Diemut Majer als junge Wissenschaftlerin entschloss, in die *Werkstatt des Bösen* hinabzusteigen, um selbst zu erforschen, wie wenige Jahrzehnte zuvor Juristen dem Nationalsozialismus ihr Handwerkzeug reichten, um dessen totalitäre Herrschaft zu etablieren und den Rassenwahn bis zum Massenmord zu perfektionieren. Drei Jahre arbeitete sie unermüdlich in zahlreichen Archiven im In- und Ausland. Da ihre Arbeit sich insbesondere auf die nationalsozialistische Terrorherrschaft im besetzten Polen erstreckte, suchte sie auch die dortigen Einrichtungen auf, insbesondere die Hauptkommission zur Erforschung der Hitlerverbrechen in Warschau und das Staats- und Wojewodschaftsarchiv in Posen. Im Anschluss folgte die Abfassung der Untersuchung, die zu einem voluminösen Werk anwuchs und den Titel erhielt *Fremdvölkische im Dritten Reich. Rechtslehre und Rechtspraxis des NS-Staates (unter besonderer Berücksichtigung der eingegliederten Ostgebiete und des Generalgouvernements [Polen])"*. Die in der Bibliothek des Bundesgerichtshofs vorhandene Habilitationsschrift aus dem Jahre 1975 weist mehr als zweitausend Seiten auf; die 1981 erschiene Buchausgabe über tausend Seiten. In dieser monumentalen Ausarbeitung wird minutiös das rechtliche Schicksal der Juden, Polen und anderer Gruppen nachgezeichnet, die als „Fremdvölkische" verfolgt wurden. Mit Hilfe „rechtlicher Maßnahmen" wurden sie stufenweise entrechtet, der lange Leidensweg bis zur eigentlichen Vernichtung wird aufgezeigt. In einer Würdigung, zehn Jahre nach Erscheinen des Buches, hieß es treffend, selten kann man Voraussetzung und Folgen des Wirkens von Juristen so gut studieren wie in diesem Werk. Hierauf und dem sich anschließenden Habilitationsverfahren komme ich gleich noch einmal zu sprechen.

Nachdem die Habilitationsschrift im wesentlich fertiggestellt worden war, trat Diemut Majer in die Verwaltungsgerichtsbarkeit des Landes Baden-Württemberg ein und wurde dem hiesigen Verwaltungsgericht zugewiesen. Nach knapp einem Jahr folgte bereits die Abordnung an das Bundesverfassungsgericht als wissenschaftliche Mitarbeiterin bei dem damaligen Verfassungsrichter *Martin Hirsch*, einst langjähriger stellvertretender Fraktionsvorsitzender der SPD-Bundestagsfraktion in Bonn. Im Bundesverfassungsgericht war sie zeitweilig auch der Verfassungsrichterin *Wiltraut Rupp-von Brünneck* und ihrem Kollegen *Helmut Simon* als Mitarbeiterin zugeordnet, so dass sie aus unmittelbarer Nähe das Wirken großer Richterpersönlichkeiten sozialdemokratischer Provenienz miterleben konnte. Nach knapp vier Jahren Tätigkeit ging es wieder zurück in die Verwaltungsgerichtsbarkeit, wo sie als Landesanwältin bei der Landesanwaltschaft beim Verwaltungsgericht Karlsruhe wirkte, bis diese Behörde, die Vertreterin des öffentlichen Interesses, 1983 aufgelöst wurde.

Dies bot die Chance, wieder etwas Neues und zugleich Altbewährtes in Angriff zu nehmen. Die Tätigkeit als Hochschullehrerin, diesmal an der Fachhochschule des Bundes für öffentliche Verwaltung im Fachbereich Bundeswehrverwaltung, der sich im nahen Mannheim befindet. Hier war sie bis zur Versetzung in den Ruhestand im Jahre 2002 tätig, immer wieder mit neuen Herausforderungen konfrontiert, etwa dem Unterricht in dem neuen aufgekommenen Fach Umweltrecht.

Daneben wirkte sie 19 Jahre an der juristischen Fakultät der Universität Bern, zunächst als Privatdozentin, dann als Titularprofessorin in den Fächern Deutsches und Europäisches Umweltrecht sowie Verfassungsgeschichte der Neuzeit. Auch an der hiesigen Universität war sie aktiv: über 20 Jahre lang bis 2014 hielt sie dort Lehrveranstaltungen im Umwelt- und Europarecht ab. Als Rechtsanwältin ist heute noch tätig.

Zur Bedeutung des Umweltrechts möchte ich unsere Preisträgerin mit ihren eigenen Worten zitieren: *Den Aufstieg der Umweltbewegung und des Umweltrechts mitzuerleben und etwas vom Ethos weitergeben zu können, sich für den Schutz der Natur, der Umwelt allgemein einzusetzen, das ist etwas, was über die Befriedigung, andere Lehrinhalte weiterzugeben, weit hinaus ging.*

Ich komme zurück auf das *opus magnum*. Das Habilitationsverfahren zog sich nicht nur hin, sondern endete nach mehr als sechs Jahren Begutachtungszeit in einer Ablehnung der Schrift durch den Fachbereich Rechtswissenschaft der FU Berlin im Juli 1981.

Was war der Grund? Der Konstanzer Rechtslehrer *Bernd Rüthers*, von dem bereits die Rede war, hat in einem Aufsatz unlängst dargelegt, dass Autoren die damals die Rechtsentwicklung im Nationalsozialismus zum Thema wissenschaftlicher Arbeit machten, mit *herben Abwehrreaktionen* zu rechnen hatten. Nicht nur die Verfahrensverschleppung war ungebührlich, sondern erst recht die Ablehnung. Das hiergegen von unserer Preisträgerin geführte Verfahren vor dem Verwaltungsgericht Berlin zeigte die zahlreichen Rechtsmängel der Ablehnung auf. Bevor das Gericht in der Hauptsache entschied, hob die FU ihren unhaltbaren Ablehnungsbescheid selbst auf; in der nachfolgenden Kostenentscheidung legte das Gericht die Verfahrenskosten der Universität auf und führte aus, der angegriffene Bescheid hätte keine Rechtsgültigkeit aufgewiesen. Zum gleichen Zeitpunkt als

die FU zur Ablehnung gelangte, erschien das Werk in der renommierten Reihe *Schriften des Bundesarchivs*. Der damalige Präsident des Bundesarchivs, Hans Booms, hob in seinem Vorwort hervor: *Nur die sorgfältige Ausbreitung und Interpretation einer Vielzahl von Quellen, wie sie Diemut Majer vorgenommen hat, kann zur Widerlegung gerade in jüngster Zeit wieder aufgestellter Behauptungen beitragen, viele Ergebnisse der deutschen Zeitgeschichtsforschung seien methodisch unseriös und politisch tendenziös zustande gekommen und müssten daher fragwürdig bleiben.* 1993 kam es zu einer Neuauflage der Arbeit; längst hatte es den Rang eines unentbehrlichen Standartwerks im In- und Ausland erreicht. Zahllose Rezensionen in deutschen und ausländischen Zeitschriften haben dies eindrucksvoll bestätigt. In Polen erschien 1984 eine Übersetzung des Werks; in den USA 2002 und 2013.

Angesichts ihrer Erfahrung mit der FU, verwundert es nicht, dass Diemut Majer in Berlin keinen neuen Anlauf nahm. Es war schließlich die juristische Fakultät in Bern, die 1984 ihre Arbeit als Habilitation annahm; dort wurde sie, wie bereits erwähnt, Privatdozentin. Zu den führenden Berner Professoren, die sich für ihre Arbeit stark machten, gehörte der Staatsrechtler *Peter Saladin*. Das Berner Habilitationsverfahren war, wie Saladin treffend bemerkte, gegenüber den Berliner Ablehnern, eine „Lektion in Gerechtigkeit".

In zahlreichen weiteren Beiträgen hat sich Diemut Majer mit der Perversion des Rechts in der NS-Diktatur auseinandergesetzt. An der Universität Bern entstand aus zahlreichen Lehrveranstaltungen ein weiteres Grundlagenwerk Frauen – Revolution – Recht, das 2008 erschienen ist. In dieser interdisziplinär ausgerichteten Darstellung befasst sie sich mit dem Zeitraum von der französischen Revolution bis zum Ende des Ersten Weltkriegs. Es behandelt sowohl die Ereignisgeschichte als auch die Normgeschichte in Frankreich, Deutschland und Österreich unter Einbezug der Verhältnisse in England, Russland, USA und der Schweiz. Mit dieser Schrift knüpft unsere Preisträgerin auch unmittelbar an das insbesondere von der Sozialdemokratie zu Zeiten Ludwig Marums verfolgte Postulat der Gleichberechtigung von Mann und Frau an.

In einer bereits 1981 erschienen Buchbesprechung zu ihrem Erstwerk wurde folgendes treffend festgehalten: *Die Verfasserin, der zweiten Generation nach der NS-Zeit zugehörig, steht diesem grausigen Kapitel der Zeitgeschichte mit großer Objektivität und Unbefangenheit gegenüber. Sie hat in hingebungsvoller Arbeit zehn Jahre ihres Lebens diesem Werk gewidmet, das in der Rechtsliteratur zur NS-Diktatur einen führenden Platz einnehmen wird. Sie hat sich den Dank all derer verdient, denen die Wahrheit über diese Zeit am Herzen liegt. Und das sind, so steht zu hoffen, sehr viele.* Mit diesen Worten von Rechtsanwalt Walter Schwarz, einem führenden Anwalt auf dem Gebiet des Entschädigungsrechts und selbst Verfolgter des NS-Regimes, der stets deutlich seine Meinung zum Ausdruck brachte, möchte ich schließen.

Detlev Fischer*

Replik von Diemut Majer

Sehr geehrte Familie Marum,
sehr geehrter Herr Oberbürgermeister,
sehr geehrter Herr Marvi,
sehr geehrter Herr Dr. Fischer,
sehr geehrte Damen und Herren!

Ich danke Herrn Dr. Fischer vom Rechtshistorischen Museum Karlsruhe und Herrn Wiegand von der Technischen Universität Darmstadt für die freundlichen Worte.

Die heutige Preisverleihung ist für mich eine große Ehre.

Gestatten Sie mir als Juristin, Ludwig Marum unter einigen Aspekten der juristischen Zeitgeschichte zu würdigen. Einmal unter dem Aspekt des Rechts, an das er fest glaubte, ferner als frühes Symbol für das Schicksal, das das Regime allen seinen Gegnern zugedacht hatte.

Zum ersten Aspekt:

Marum, der schon im März 1933 verhaftet worden war, versuchte über seinen Anwalt, den bekannten Karlsruher Strafverteidiger Eduard Dietz, wieder freizukommen, denn als Reichstagsabgeordneter genoss er ja Immunität. Eine Gelegenheit zur Flucht nutzte er nicht, da dies verantwortungslos sei. Er erntete jedoch sowohl in Karlsruhe wie auch in Berlin nur Ablehnung.

Dies führt uns zum zweiten Aspekt: Marum, der eines der frühesten und gleichzeitig wohl auch prominentesten Opfer des NS-Regimes war, muss geradezu als Symbol für die Praxis des Nicht-Rechts gesehen werden, denn das geltende Verfahrensrecht, das vor willkürlicher Verhaftung schützen sollte, wurde auf ihn einfach nicht angewendet. Er ist somit ein Beispiel dafür, dass dieses Nicht-Recht schon in den ersten Wochen des Regimes begonnen hatte, und nicht erst mit dem sog. Röhm-Putsch 1934.

Zur Verschleierung dieses Terrors wurden neutral klingende Formulierungen verwendet. Hier einige Beispiele:

a) Schon im Mai 1933 meldete eine juristische Zeitschrift (DJZ), dass diese und jene Professoren aus den Universitäten „ausgeschieden" seien, darunter waren die berühmtesten Namen der Rechtswissenschaft (so z.B. die Sozialdemokraten Gustav Radbruch in Heidelberg und Hermann Heller in Frankfurt). Die dahinterstehenden Tragödien kann man nur erahnen: nämlich Zwangsbeurlaubungen, politischer Druck, Zwangspensionierungen, Pensionswegfall und damit Vernichtung der beruflichen Existenzgrundlage.
b) Besonders makaber ist eine Entscheidung des RG aus 1935, nach der die jüdische Abstammung eines Prozessbeteiligten „dem Tode" gleichzusetzen sei, die den Geschäftspartner zum Rücktritt des Vertrags, wie andere Rücktrittsgründe auch berechtigten (z.B. Krankheit, leiblicher Tod etc.) (Charell-Fall).
… wenn in Nr.6 des Manuskriptsvertrages … davon die Rede ist, daß ein Rücktrittsrecht vereinbart ist, wenn Charell … durch Krankheit oder Tod oder ähnlichen Grund nicht zur

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Durchführung seiner Regietätigkeit imstande sein sollte, so ist unbedenklich eine aus gesetzlich anerkannten rassepolitischen Gesichtspunkten eingetretene Änderung in der rechtlichen Geltung der Persönlichkeit dem gleichzuachten, … wie Tod oder Krankheit es täten.

Quelle: JW 1936, 2529 ff; zitiert nach Majer, Fremdvölkische, 1981/93 264f 689

Das Nicht-Recht herrschte auch in anderen Rechtsbereichen. So galt die korrekte Anwendung des Mietrechts auf Juden geradezu als „Fehlgriff", wie das Reichsjustizministerium 1938 verlauten ließ; ebenso löste allgemein die korrekte Geschäftsabwicklung gegenüber jüdischen Vertragspartnern Missbehagen und Tadel der Machthaber aus. Umgekehrt wurden belastende Vorschriften auf Juden stets strikt angewendet: So musste die Tochter Ludwigs Marums erst die Haftkosten für ihren 1934 ermordeten Vater bezahlen, ehe die Gestapo ihr erlaubte, Deutschland zu verlassen.

c) Die Praxis des Nicht-Rechts wiederholte sich tausendfach im besetzten Polen. Dort herrschte das Prinzip des „Volkstumskampfes", das die „Rechtlosstellung" der Polen zum Ziel hatte. Instrument hierfür war der Begriff der „sinngemäßen Anwendung". Dies bedeutete rassistische Rechtsprechung: kein Pole sollte Vorteile vom deutschen Recht haben. Seine Aussagen im Prozess galten von vornherein als unglaubwürdig, einen Prozess gegen Deutsche konnte er nicht gewinnen, da dies deutschen Interessen widerspräche. Eine entsprechende Verordnung (Ostrechtspflegeverordnung 1941) sanktionierte dies, indem sie den Behörden völlig freie Hand ließ: Wenn es politisch opportun war, wurde das deutsche Recht angewendet, in allen anderen Fällen jedoch ignoriert; d.h. es wurde nach rassischen (antipolnischen) Gesichtspunkten entschieden.

Die Perversion des Rechts verbarg sich somit auch hier hinter unbestimmten Klauseln oder politischen Kampfbegriffen, wie die genannten Beispiele zeigen.

Ludwig Marum ist also ein Symbol für die beiden Charakteristika der Diktatur, die gegensätzlicher nicht sein konnten: Einmal fortgeltende rechtstaatliche Ordnung, andererseits die Nicht-Anwendung gegenüber allen missliebigen Personen, etwas, das man sich in einem Kulturstaat nicht vorstellen konnte.

Marum hatte eine Leitschnur: Das Recht als Grundlage jeder Herrschaft – wie dies früher als Inschrift am Eingang des OLG Karlsruhe stand: *Justitia fundamentum Regnorum.* Diesen Leitspruch hat er oft und gerne wiederholt – und danach gelebt.

Ludwig Marum – unser Vorbild – zu dessen Angedenken wir heute versammelt sind. Ich danke Ihnen für ihre Aufmerksamkeit.

„Gemeinsame Elemente des österreichischen und ungarischen Familienrechts zur Zeit der Doppelmonarchie und innerhalb der EU". Bericht über das Forschungsseminar der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte

(Pécs, den 25.-28. Oktober 2016)

Als Teil des Projekts „Gemeinsame Elemente des österreichischen und ungarischen Familienrechts zur Zeit der Doppelmonarchie und innerhalb der EU" der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte[1] fand ein Forschungsseminar mit dem Schwerpunkt Vergleich des österreichischen und ungarischen Eherechts in der Organisation von Univ. Doz. Dr. habil. *Eszter Cs. Herger*, Assoz. Prof. Mag. Dr. iur. *Susanne Kissich* und Ao. Univ. Prof. Mag. Dr. iur. *Markus Steppan* zwischen dem 25. und 28. Oktober 2016 in Pécs mit der Teilnahme von Studierenden, Doktoranden und Dozenten der Rechtsgeschichte und des Privatrechts der Juristischen Fakultät der Karl-Franzens-Universität Graz und der Juristischen Fakultät der Universität Pécs statt. Die Forschungsgruppe wurde 2016 zwecks einer internationalen Forschungszusammenarbeit ins Leben gerufen. Die Forschungstätigkeit richtet sich besonders auf die einzelnen Institutionen des europäischen Familienrechts, die säkularen und konfessionellen Werte der europäischen Rechtskultur, die staatliche Rechtsverfolgung, die Teilbereiche der Beziehung von Staat und Kirche, wie auch auf die Frage der Rechtsübernahme – Modellbefolgung. Das Vorhaben der Forschungsgruppe ist die Aufdeckung der Werte und der gemeinsamen Wurzeln der europäischen Rechtsentwicklung mit der Forschungsmethode der vergleichenden Rechtsgeschichte, sowie die Darstellung der gemeinsamen Grundlagen, auf die das gemeinsame europäische Recht basieren kann. Das Forschungsseminar hat sich im Bereich des Familienrechts ausführlich mit dem Eherecht beschäftigt.

[1] Siehe Eszter Cs. Herger – Markus Steppan: Gründung der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte in Pécs. Beweggründe – Motive – Visionen. In: *Journal on European History of Law*, vol. 7/2016, no. 2, pp. 180-184.

Am 26. Oktober 2016 hat Professor Emeritus *István Kajtár* im Sitzungssaal der künftig den 650. Geburtstag feiernden Universität Pécs die Teilnehmer und die Interessenten des Forschungsseminars begrüßt. In seiner Rede hob er hervor, dass die fachliche Zusammenarbeit zwischen den Rechtshistorikern aus Graz und Pécs schon Jahrzehnte lang bestehe, und deren würdige Fortsetzung dieses Forschungsseminar sei. Im Anschluss daran beschäftigte sich *Markus Steppan* in seinem Vortrag mit der Vorstellung der konfessionell-rechtlichen Regelungen bezüglich der österreichischen Rechtsnormen ab dem aufgeklärten Absolutismus bis zur Mitte des 20. Jahrhunderts („*Spannungsfeld Kirche-Staat im Eherecht*"). Im ihrem Vortrag („*Die nichteheliche Lebensgemeinschaft im österreichischen Recht*") befasste sich *Susanne Kissich* mit der rechtlichen Regelung der Lebensgenossenschaft und verglich diese mit der Institution der Ehe. Sie kam auch darauf zu sprechen, dass das Erbrecht der Lebensgefährten ab dem 1. Januar 2017 eine Veränderung in Österreich erleben wird, da die Lebensgefährten als nahe Angehörige anerkannt werden. Der Vortrag von *Eszter Cs. Herger* („*Der Einfluss des österreichischen Familienrechts in Ungarn*") befasste sich mit den Auswirkungen des österreichischen Rechts auf das ungarische Rechtswesen auf Grund des Beispiels des ehelichen Vermögensrechts mit Fokus auf das 19. Jahrhundert, worin die Faktoren dargestellt wurden, die teils durch die gemeinsame historische Vergangenheit, teils durch die heutigen kulturellen Bindungen den Rechtsvergleich in den benachbarten Ländern aktuell machen.

Nach den drei wissenschaftlichen Vorträgen haben die Teilnehmer des Forschungsseminars in ihren Referaten auf Grund eines vorbereiteten, gemeinsamen Fragenkatalogs je einen Themenbereich im Eherecht miteinander verglichen. Es wurden die einzelnen Stationen der Entwicklung des Rechtswesens in Österreich und Ungarn ab dem 19. Jahrhundert bis zum geltenden Eherecht vorgestellt: In Österreich die Veränderungen der letzten zwei Jahrhunderte des Eherechts ab dem Inkrafttreten des österreichischen ABGB (1812), sowie in Ungarn angefangen vom konfessionellen Eherecht, durch den GA 1894: XXXI über die bürgerliche Ehe und die Entwürfe des ungarischen Privatgesetzbuches (1900-1928) bis hin zu den familienrechtlichen Bestimmungen der parteistaatlichen Zeit (GA 1952: IV) und schließlich zum neuen Bürgerlichen Gesetzbuch (GA 2013: V). Die Thematik des Forschungsseminars machten aufeinander bauende Themenbereiche und sich daran anknüpfende Rechtsfälle aus, zuerst im Referat eines österreichischen Studenten gemäß dem österreichischen Recht, anschließend in der Präsentation eines ungarischen Studenten gemäß den Bestimmungen des ungarischen Familienrechts.

Den ersten Themenbereich machte das Zustandekommen der Ehe aus. *Lisa Pettauer,* Jurastudentin und *Adrienn Rékasiné Adamkó,* Doktorandin haben im Bereich die Definition der Ehe und die Lebenspartnerschaft der Gleichgeschlechtigen untersucht. Festzulegen ist, dass beim Prozess vor der Eheschließung und bei der Bestimmung der Definition der Ehe gemäß dem gültigen österreichischen und ungarischen Recht die gleiche Basis vorliegt. Bei gleichgeschlechtigen Paaren bietet das ungarische Recht ab 2009, das österreichische Recht ab 2010 die Möglichkeit, eine eingetragene Partnerschaft einzugehen. Zur Untersuchung der Fähigkeit zur Eheschließung trugen in Österreich und Ungarn die beiden Jurastudenten *Lisa Pettauer* und *Vivien Weiszenburger* bei. Unter Anderem hoben sie das von der Organisation der Vereinten Nationen angenommene Abkommen CEDAW über die „Einstellung der Benachteiligung der Frauen in jeglicher Form" (New York, 18. Dezember 1979) hervor, welches besagt, dass unter dem 18. Lebensjahr keine Ehe geschlossen werden darf. Das Abkommen wurde sowohl von Ungarn als auch von Österreich ratifiziert, demgemäß kann in beiden Ländern als Hauptregel ab 18 Jahren Ehe geschlossen werden. Nebenher erlaubt das ungarische Recht die Eheschließung - den lokalen Sitten folgend - ab 16 Jahren mit der Erlaubnis der Vormundschaftsbehörde. Demgegenüber stehen die rechtskräftigen familienrechtlichen Regelungen des österreichischen Rechts, die besagen, dass die eine Hälfte mit 16 Jahren ausschließlich mit einer volljährigen anderen Hälfte eine Ehe eingehen kann, im Fall, wenn man als ehereif gilt. *Vera Köller,* Jurastudentin und *Beáta Korinek,* Doktorandin und Assistentin analysierten die Frage der Eheverbote, und sie betonten, dass die Gründe der Ungültigkeit im ungarischen und österreichischen Recht im Wesentlichen übereinstimmen. Mit der Form der Eheschließung haben sich die Jurastudenten *Vera Köller* und *Patrícia Dominika Niklai* beschäftigt. Ihr Referat – worin sie dem Verlauf der Beziehung zwischen der standesamtlichen Ehe und der kirchlichen Trauung große Aufmerksamkeit widmeten – wurde dadurch bereichert, dass sie als Zusammenfassung denselben Fall gemäß des ungarischen sowie des österreichischen Rechts lösten.

Den nächsten Themenbereich bildeten die rechtlichen Folgen der Eheschließung. Die Rechte der Ehepartner und ihre belastenden Pflichten schilderten in der historischen Entwicklung *Moritz Deinhammer,* Jurastudent und *Kinga Császár,* Doktorandin und Richteramtsanwärterin. Sie haben untersucht, wie und inwiefern die Gleichstellung der Ehepartner früher erfüllt wurde und wie sie heute zur Geltung kommt. Erwähnenswert ist, dass das rechtskräftige österreichische Recht in dieser Hinsicht die Haushaltsführung besonders hervorhebt und sie als Teil der ehelichen Gemeinschaft betrachtet. *Julia Standler* und *Kristóf Mangel,* Jurastudierende beschäftigten sich mit der rechtskräftigen Einrichtung der Frauenhaltung im rechtsgeschichtlichen Sinn und der ehelichen Unterhaltung. Wobei der Entwicklungsbogen in Frage der Unterhaltung gleich ist, kennt das österreichische Recht nicht die in Ungarn relevante Regelung, der gemäß sich die Ehepartner in einer öffentlichen Urkunde oder vom Juristen gegenzeichneten Privaturkunde darin einigen können, dass der unterhaltspflichtige Partner die Unterhaltspflicht mit einem adäquaten Besitzstück oder mit einer einmaligen Zuwendung erfüllt. In diesem Fall darf der bedachte Ehepartner in Zukunft mit Unterhaltsfor-

derung auch dann nicht auftreten, wenn er auf Grund des Rechts befugt wäre. Die Güterrechtssysteme wurden von *Moritz Deinhammer*, *Ágnes Vihart*, sowie *Anna Kosztich* vorgestellt. Wobei auf österreichischer Seite die zwei Stufen der Untersuchung die originale Textgrundlage des ABGB aus dem Jahr 1811 und die Modernisierung des Ehegüterrechts Mitte des 20. Jahrhunderts bildeten, haben sich auf ungarischer Seite der Vielfältigkeit des Themas wegen *Ágnes Vihart*, Studentin der familienrechtlichen Fachjuristenausbildung, Gerichtssekretärin mit der geschichtlichen Entwicklung, während *Anna Kosztich,* Jurastudentin mit den Lösungen des geltenden Rechts auseinander gesetzt. Der Vortrag von *Ágnes Vihart* bildete in mancher Hinsicht dadurch eine Ausnahme, dass sie den Teilnehmern des Forschungsseminars und Interessenten ihre eigenen Recherche-Ergebnisse aus dem Archiv bekannt gab. Unter den aufrecht erhaltenen Schriften eines Notars aus Székesfehérvár (Stuhlweissenburg) wurden 121 Eheverträge aus den Jahren 1875-1877 gefunden, auf Grund deren man die Schlussfolgerung gezogen hat, dass der Ehevertrag –vorrangig im Kreis der deutschen Nationalität – als eine „beliebte" Rechtsinstitution in Székesfehérvár zur obigen Zeit der Monarchie galt. Aus den drei Vorträgen ging hervor, dass es im Vermögensrecht wesentliche Unterschiede im österreichischen sowie im ungarischen gültigen Recht gibt: Das Erste erkennt das System der Gütertrennung als gesetzlicher Güterstand, das Zweite dagegen erkennt es als vertraglicher Güterstand, wobei als gesetzliches System die Gütergemeinschaft erscheint.

Den dritten Themenbereich im Forschungsseminar bildete die Beendigung der Ehe. Zuerst gaben *Doris Mayr* und *Máté Horváth* einen Überblick über die Fälle der Auflösung einer Ehe, danach sprachen sie ausführlich über die Institution der *separatio a thoro et mensa* (Trennung vom Bett und Tisch), welche im säkularisierten Recht hierzulande ihre Bedeutung inzwischen verloren hat. Anschließend sprachen *Doris Mayr* und *Eszter Csillag* Jurastudenten über die Aufhebungs- und Nichtigkeitsgründe, danach stellten *Melanie Leitner,* Jurastudentin und *Eszter Cs. Herger* die geschichtlichen Stufen der Ehescheidung in Österreich sowie in Ungarn dar, angefangen von der Zeit des konfessionellen Rechts bis hin zur geltenden rechtlichen Regelung.

Als krönenden Abschluss des Forschungsseminars konnten die Teilnehmer einen Besuch am Kreisgericht in Pécs abstatten, wo sie ihre theoretischen Kenntnisse durch die praktischen Erfahrungen ergänzen konnten. Das Podiumsgespräch führte *István Hajdu*, Vorsitzender des Kreisgerichts Pécs, der nach kurzer Vorstellung des Gebäudes – dem Interesse der österreichischen Gäste nachkommend – einen Einblick in das Ausbildungssystem der Richter in Ungarn gewährte. Die Richter im Bereich Familienrecht beantworteten alle fachlichen Fragen bereitwillig und unterstützten ihre Aussagen auch mit statistischen Belegen. Sie berichteten darüber, dass in den vergangenen zwanzig Jahren am Kreisgericht in Pécs kein Ungültigkeitsprozess gestartet worden sei. Sie treffen bei Scheidung auf den Anspruch auf Unterhalt und nicht als Anspruch des getrennt lebenden Ehepartners. Besonders interessierte die Teilnehmer des Forschungsseminars, was es in der Praxis bedeute, dass man die „Bedürfnisse des Kindes" in Betracht ziehe, welche Rolle dabei die körperliche, geistige und moralische Entwicklung des Kindes, die Meinung des Kinderpsychologen und eines Experten spiele, und was die eigene Meinung des Kindes ausmache, wenn es bereits das 14. Lebensjahr überschritten hat. Als eheliche Konflikte hinter den Scheidungsgründen verstecken sich meistens Arbeitslosigkeit, Alkoholsucht, Drogensucht, Ehebruch, Schulden, sowie kulturelle und religiöse Unterschiede bei Mischehen. Das Kreisgericht Pécs verwendet besonders erfolgreich unter Anderem zur Regelung der familiären Konflikte die Institution der Mediation, wobei ausgebildete Mediatoren die Beschwerden der Ehepartner beheben und bei der Konfliktlösung Hilfe bieten.

Die Ersteller des Berichts waren die aktiven Teilnehmer des Forschungsseminars. Auf Grund des fachlichen Programms, welches gründliche Auf- und Vorbereitung unsererseits erwünschte, ist unsererseits die Meinung formuliert worden, dass durch die Darstellung der und die Diskussion über die Unterschiede und aus der Bekanntgabe der Ähnlichkeiten zwischen der österreichischen und ungarischen gültigen Rechtspraxis alle Teilnehmer bereichert wurden. So konnte die erste Phase des Projekts erfolgreich abgeschlossen werden, das 2017 in Graz fortgesetzt werden soll.

Adrienn Rékasiné Adamkó*– Gabriella Dávid**

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„Nichtgeborene Kinder des Liberalismus? – die Zivilgesetzgebung in Mitteleuropa in der Zwischenkriegszeit“

In den Tagen vom 20. bis 21. 10. 2016 fand die Konferenz „Nichtgeborene Kinder des Liberalismus? – die Zivilgesetzgebung im Mitteleuropa der Zwischenkriegszeit“ in Regensburg statt. Sie wurde vom Prof. M. Löhnig, (Leiter des Lehrstuhls für Bürgerliches Recht, Deutsche und Europäische Rechtsgeschichte sowie Kirchenrecht an der Universität Regensburg) und seinem Kollegen Prof. Dr. S. Wagner mit Unterstützung der Deutschen Forschungsgemeinschaft veranstaltet.

Die Konferenz, die in einem der Universitätsgebäude im Stadtzentrum abgehalten wurde, hatte zum Thema die gemeinsamen Fragen sowie Schnittstellen der Rechtsgeschichte der Länder der ehemaligen österreich-ungarischen Monarchie. Die Beiträge konzentrierten sich insbesondere auf die Entstehung von Entwürfen einzelner zivilrechtlicher Gesetze in diesen Ländern in der Zwischenkriegszeit, die bisher relativ wenig erforscht worden sind. Die Referenten fokussierten sich vor allem auf die gemeinsamen Einflüsse bei der Entstehung einzelner zivilrechtlicher Gesetzesentwürfe, die jedoch in vielen Fällen nicht in die Praxis umgesetzt wurden. Allerdings wiesen alle solche Entwürfe eine hohe legislative Qualität auf, so dass jeder davon eine detaillierte Analyse verdient. Ein Vergleich der Gesetzesentwürfe, die in der Zwischenkriegszeit entstanden waren, stellt zweifelsohne nicht nur einen Beitrag zur Erforschung der Rechtsgeschichte dar, sondern kann auch als Anlass zum Nachdenken oder sogar als Impuls zur Entstehung einer neuen Kodifikation, wie es bei unserem neuen Zivilgesetzbuch der Fall war, dienen. Konzeptionell knüpfte die Konferenz an die Tagung mit dem Titel „Das ADHGB von 1861 als gemeinsames Obligationenrecht in Mitteleuropa“, die in vom 17./18. 3. 2016 stattfand. Diese befasste sich mit gemeinsamen Fragen sowie Schnittstellen der Rechtsgeschichte in den Ländern der ehemaligen Monarchie Österreich-Ungarn und des Deutschen Vereins auf dem Gebiet des Handelsrechts, dem bisher ebenfalls relativ wenig Aufmerksamkeit seitens der Rechtshistoriker geschenkt worden ist. Die beiden Konferenzen wurden also einem privatrechtlichen Gebiet gewidmet, von dessen Erforschung die Gegenwart zweifelsohne nur profitieren kann.

Die Konferenz in Regensburg wurde vom Prof. Dr. S. Wagner eröffnet, der in seinem Vortrag die Problematik der Entstehung neuer Gesetze in den einzelnen Ländern Mitteleuropas und des Baltikums übersichtlich zusammenfasste. In diesem Zusammenhang legte er eine Grundgliederung und Chronologie der erforschten Problematik folgendermaßen dar: a) die Ausgangssituation auf dem Rechtsgebiet nach dem Ersten Weltkrieg; b) Argumente für die Entstehung neuer Gesetzessammlungen mit dem Hinweis darauf, dass es in der Forschung zu verfolgen ist, welche Impulse, also konkret welche gesellschaftlichen, politischen oder sonstigen Gründen für die Gesetzentwürfe von Ausschlag waren; c) wer waren die Personen, die in den einzelnen Kommissionen mitgewirkt hatten, von wem wurden sie zusammengerufen, wie war die ethnische Zusammensetzung solcher Kommissionen oder welche Bindungen gab es zwischen den Kommissionen der einzelnen Nachfolgerstaaten; d) wie sahen die Gesetzesentwürfe inhaltlich aus, also wie war ihre formelle Struktur, z. B. in wie weit wurden einige Bestimmungen aus anderen Kodifizierungen übernommen. Er betonte dabei, dass bei dem Vergleich vor allem einige Institute des Eigentumsrechts, wie z. B. der Kaufvertrag, oder eventuelle Unterschiede, wenn es sich um eine bewegliche oder unbewegliche Sache handelte, im Fokus stehen müssen. Von besonderer Bedeutung sei seiner Ansicht nach die Ehe- und Familienregelung, insbesondere die Eheschließung, sei es einer zivilen oder kirchlichen Ehe. Im letzten Themenkreis stellte Prof. Wagner den aktuellen Forschungsstand vor, indem er darauf hinwies, dass vor allem Länder außerhalb des sog. Ostblocks sich in der Vergangenheit mit dieser Problematik auseinandergesetzt hatten. Erst nach dem Fall des „Eisernen Vorhangs“ wurden die Kodifizierungsbemühungen der einzelnen Länder aus der Zwischenkriegszeit neu betrachtet. Er betonte, dass das Ziel der Konferenz sowie einer anschließenden Publikation ist, eine gemeinsame Grundlage für eine weitere Forschung zu schaffen, und zwar vor allem in heutiger Zeit, wo nach der gemeinsamen Identität im Rahmen des vereinten Europas gesucht wird.

Den nächsten Vortrag mit dem Titel „Das Zivilrecht der Ersten Deutschen Demokratie“ hielt M. Preisner aus Regensburg, wobei sie sich zuerst mit der Entstehung sowie der Verabschiedung des BGB im Jahre 1900 befasste. Ferner sprach sie über Änderungen, die im Laufe der Zeit vorgenommen wurden, und zwar im Rahmen des Übergangs von der individualistischen Konzeption des Einzelnen zur kollektiven Auffassung, die den Vorstellungen der Weimarer Republik besser entsprach. In diesem Kontext konzentrierte sie sich auf die Zusammenhänge zwischen der Verfassung von 1919 (§19) und der Regelung des bürgerlichen Rechs, zivilrechtlichen Regelung, ferner dann in deren Rahmen auf die Familie und Recht unehelicher Kinder. Der anschließende Redner, N. Lindner von der Universität Göttingen setzte sich in seinem Referat „Zivilrecht in der Schweiz“ mit der schweizerischen Kodifizierung von 1907 auseinander, wobei er sich auf Gemeinsamkeiten mit dem deutschen BGB von 1900 konzentrierte. Er wies auf unterschiedliche Ausgangslagen der beiden Gesetze hin. Bei der Schweiz handelte es sich um eine demokratische Republik, im Falle

Deutschlands um ein bürokratisches Kaisertum, das auf dem deutschen Idealismus mit seinem Motto „eine Armee, ein Recht“ basierte. Das schweizerische Gesetzbuch ging von der Prämisse aus, dass der Text des Zivilgesetzbuchs von jedem Bürger verstanden werden müsste, sodass er klar und verständlich sein sollte. Die nächste Vortragende K. Staudigl-Ciechowicz von der Wiener Universität fasste in ihrem Referat „Deutschösterreich als Bestandteil der Deutschen Republik“ die Situation in Österreich auf dem Gebiet des Zivilrechts nach der Verabschiedung von drei Teilnovellen des allgemeinen Zivilgesetzbuchs in den Jahren 1914, 1915 und 1916 zusammen. Ferner richtete sie ihr Augenmerk auf Änderungen, die der erzwungene Anschluss Österreichs an das Deutsche Reich auf dem Gebiet des Eherechts mit sich brachte, in dem es wesentlichere Unterschiede zwischen der deutschen und der österreichischen Kodifizierung insbesondere bei Eheschließung gab, indem nach dem Anschluss zwingend die Zivilehe eingeführt worden war. Abweichungen gab es auch in der Regelung der Stellung unehelicher Kinder sowie ihrer Unterhaltsansprüche gegenüber dem Vater. Die Rednerin aus Ungarn, M. Hamoki-Nagy aus Szeged konzentrierte sich in ihrem Vortrag „Ungarn“ auf die Analyse des ungarischen Zivilgesetzbuchs von 1848, ferner auf den Zeitraum, in dem das österreichische Zivilgesetzbuch in Ungarn in Kraft war und anschließend auf Änderungsvorschläge des Erbrechts. Nach dem Zerfall der Monarchie wurde ein neues Gesetz erarbeitet, das das bisher gültige Recht ersetzt hatte, indem der Parlamentsgesetzesentwurf de facto rechtsverbindlich wurde, ohne dass er formell verabschiedet wurde. Dadurch war Ungarn bis Ende der 1950er Jahre ein Land, in dem richterliches Gewohnheitsrecht galt. Der nächste Vortragende war P. Salák von der Brünner Juristischen Fakultät, der in seinem Beitrag „Tschechoslowakisches Entwurf des BGB“ die Gesetzgebungsbemühungen in der Tschechoslowakei anschaulich darstellte. Zuerst befasste er sich mit Mitgliedern der Gesetzgebungskommissionen, und zwar sowohl aus fachlicher, als auch nationaler Sicht. Ferner schilderte er den Verlauf von Sitzungen einzelner Kommissionen sowie den Wortlaut einzelner verabschiedeter Gesetzesentwürfe. Detaillierter beschäftigte er sich mit der vorgeschlagenen Regelung auf dem Gebiet des Familienrechts, ähnlich wie die anderen Vortragenden. Er skizzierte auch Gründe, die das Scheitern die Gesetzgebungsbemühungen verursacht hatten, wobei er kurz auch auf die Nachkriegsentwicklung vor 1948 einging. Polnische Gesetzgebungsprobleme wurden von A. Moszyńska von der Universität in Toruń (Thorn) dargelegt. Sie konzentrierte sich zuerst auf die Fragen bezüglich der Eheschließung, wobei sie auch die Regelung der fünf Rechtsgebiete, die es in der Zwischenkriegszeit in Polen gab, erörterte. Es handelte sich um Gebiete, in denen die österreichische, deutsche, russische oder französische Gesetzgebung, im letzten Gebiet dann das ungarische Gewohnheitsrecht galten. Diese Unterschiede von Rechtsregelungen brachten viele Probleme mit sich, insbesondere diesbezüglich, dass sie de facto auch Bigamie begründen konnten, denn eine Person, die die Ehe in einem Landesteil nach dem österreichischen Gesetz einging, konnte sich nach dem deutschen BGB in einem anderen Teil scheiden lassen und wieder heiraten, indem die erste Ehe als weiterhin bestehend galt. Diese Tatsache war auch der Grund für den sog. Ehetourismus. Diese komplizierte Situation wurde erst in der Nachkriegszeit gelöst, nachdem eine Reihe von die Eheschließung vereinheitlichenden Novellen verabschiedet wurden. Ein gemeinsames Gesetzesbuch wurde erst 1964 verabschiedet, das bis heute in Kraft ist. Die Problematik der Länder des ehemaligen Jugoslawiens wurde im Vortrag „Kingdom of Jugoslavia“ durch G. Drakičova von der Universität in Novi Sad (Neusatz) näher beschrieben. Sie betonte, dass es sich in diesem Fall um eine Vereinheitlichung von sogar sechs unterschiedlichen Rechtsgebieten handelte. Sie konzentrierte sich anschließend auf Gesetzesentwürfe, einzelne Kommissionen und deren Mitglieder, die wichtige Fachleute mit Ausbildung von verschiedenen europäischen Universitäten waren. Im Vortrag „Bürgerliches Recht in Rumänien“ erklärte Ch. Alunaru von der Universität Aradu die Zivilrechtsregelung in Rumänien in der Zwischenkriegszeit. Er wies auf die Kompliziertheit der ganzen Regelung hin, denn nach der Entstehung Rumäniens galten auch verschiedene Gesetzesbücher, von denen der Code Napoleon wahrscheinlich am wichtigsten war. Er betonte, dass Probleme, die infolge der Unterschiede einzelner Rechtsgebiete auftraten, mit Hilfe von Kollisionsnormen gelöst wurden. Versuche, ein neues einheitliches Gesetzbuch zu schaffen, bleiben in der Zwischenkriegszeit ohne Erfolg. Die Problematik der Vereinheitlichung der zivilrechtlichen Regelung in Estland stellte H. Siimets-Gross von der Universität in Tartu dar. Sie hob hervor, dass es 1920 vier verschiedene Rechtssysteme in Estland gab, die sowohl auf die Gesetzgebung von der Mitte des 19. Jahrhunderts, als auch auf Bauernordnungen sowie der deutschen Gesetzgebung basierten. Auch hier wurden die Kodifizierungsbemühungen nicht abgeschlossen, aber das Gesetz von 1922 führte die Zivilehe sowie neue Scheidungsgründe ein. Das litauische Recht stellte J. Spaičiené von der Universität in Kaunas vor, wobei sie die Gründe analysierte, war die Kodifizierung in der Zwischenkriegszeit nicht abgeschlossen wurde, obwohl verschiedene Entwürfe des Zivilgesetzbuchs entstanden waren. Als letzter Redner trat Ph. Schwarz auf, der sich in seiner Qualifizierungsarbeit mit der Problematik Lettlands befasste, wodurch er das Thema so zu sagen von „außen“ und nicht als Vertreter des jeweiligen Landes präsentierte. Er analysierte detailliert die Zwischenkriegszeit auf diesem Gebiet sowie einzelne Kodifizierungsentwürfe. Er betonte, dass die hiesigen Kommissionen ähnlich wie Kommissionen in den anderen Ländern das Problem der Vereinheitlichung der Gesetzgebung so gelöst hatten, dass zuerst Rezeption, Reform oder Wiedereinführung des nationalen Gewohnheitsrechts in Erwägung gezogen wurde. 1921 wurde dann als eine Teilregelung eine Norm verabschiedet, die das Eherecht und die Zivilehe ein-

geführt hatte. In diesem Fall wurde jedoch das neue Gesetz als die einzige neue zivilrechtliche Kodifizierung der Zwischenkriegszeit verabschiedet. Das Gesetzbuch beinhaltete 2400 Artikel, in denen der Einzelne zugunsten der Gesellschaft verloren ging. Schwarz betonte ebenfalls, dass das Verständnis der Kodifizierung in diesem Land sich verändert hatte, und zwar, dass dort zur Zeit ihrer Verabschiedung eine ganz andere politische Atmosphäre herrschte. Man ging von der Prämisse aus, dass das Gesetzbuch „dank" des Bestehens eines autoritären Regimes verabschiedet werden konnte. In diesem Zusammenhang wurden auch Mitglieder der Gesetzgebungskommission vorgestellt sowie ihre weiteren Schicksale nach der Machtübernahme durch die autoritäre Regierung geschildert.

Abschließend wurde die ganze Problematik vom M. Löhnig zusammengefasst, der betonte, dass die einzelnen Gesetzesentwürfe sich durch eine außerordentlich hohe Fachqualität und Erudition ausweisen, deswegen eignen sie nicht nur dazu, theoretisch erforscht zu werden, sondern bieten auch ein Beispiel für eine praktische Umsetzung. Er wies auf die Tatsache hin, dass alle Länder danach gestrebt hatten, eine eigene, nationale demokratische Kodifizierung zu schaffen, die Ausdruck ihrer selbständigen Existenz werden sollten.

Petra Skřejpková*

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In memoriam Imre Molnár (*1934 – †2016)

Professor emeritus Imre Molnár, internationally recognised scholar of Roman law, respected and beloved teacher of generations of jurists, passed away on 15 October 2016.

Imre Molnár was born on 22 September 1934 in Tatháza. He pursued his secondary school studies in Baja and later on at the Baross Gábor Grammar School in Szeged. He took an interest in classical Antiquity in these years already, primarily owing to the influence of his teacher of Latin at the grammar school, József Visy (1911–1988).

During the years of dictatorship in the 50's he was labelled as a class-alien – paying regard to the family's former landed property amounting to fifteen cadastral acres – so, he could start his university studies only in 1956 at the Faculty of Law of the University of Szeged where he took a degree in law in 1960. He became closely connected with Roman law as a university student already, as he actively took part for four years in the work of the Roman Law Scientific Students' Association led by professor Elemér Pólay (1915–1988).

The opportunity of researcher/lecturer profession was preceded as a kind of detour by a practising lawyer's career: it was followed by more a than decade's activity at the Csongrád County Catering Company first as a company solicitor, then as senior jurisconsult, finally as head of the administration department.

At Elemér Pólay's invitation, he returned to the Roman Law Department of the university in 1968 where he educated and researched as assistant lecturer from 1968 and then as assistant professor from 1971. He defended his Candidate's thesis in 1977, and after acquiring the degree *Candidatus Scientiarum*, he was appointed an associate professor in 1979. He took over leadership of the Roman Law Department in 1985 from his master Elemér Pólay, who unselfishly helped him both in his academic activity and in the academic scene in general – with whom he was from first to last on sincere friendly terms – and he headed the department until 1999. He was awarded the degree *Doctor Scientiarum* in 1987, was appointed university professor in 1988. From 1994 to 1998 he filled the office of the Dean of the Faculty of Law and Political Sciences of the József Attila University of Szeged.

As a regular speaker of international conferences, he kept up deep friendly relations with numerous foreign scholars. Under longer scholarships abroad, he researched in Munich, Rome and Cologne; he gave presentations at conferences and delivered guest lectures, among others, in Rio de Janeiro, Munich, Salzburg, Cologne, Graz, Halle, Venice, Bratislava, Belgrade and Cluj Napoca.

His field of research covered three large subject areas –

as his most important publications also show – which came from the scope of *locatio conductio*, the rules of liability in Roman law and Roman criminal law.

The revised edition of his Candidate's (i.e. PhD) thesis defended in 1977 (*Locatio conductio in Roman law of the classical age*) was published in 1982 (in the *Acta Universitatis Szegediensis*) in Hungarian with the title *Chapters from the scope of locatio conductio in the classical age*. In this subject area, he published a study with monographic demand *(Verantwortung und Gefahrtragung bei der locatio conductio zur Zeit des Prinzipats)* in the highly respected encyclopaedic series entitled *Aufstieg und Niedergang der römischen Welt*.[1] In the subject area of *locatio conductio* he published several further studies in Hungarian and foreign languages.[2]

His doctoral thesis *Rules of liability in Roman private law* defended in 1987 was published in 1993 in Szeged. Five years later, this monograph appeared in German too under the title *Die Haftungsordnung des römischen Privatrechts* (Szeged, 1998). During the decades, he published several studies that analyse the issues of the rules of liability in Hungary and abroad.[3] The researches carried out and the results attained by him in this subject area made him an internationally indispensable and recognised expert now not only in *locatio conductio* but also in this topic that represents one of the most important issues of Roman law.

In the last two decades of his career, his scholarly interest turned towards Roman criminal law; as the first result of his research, he analysed numerous details of the issues of this subject area. He published several of the listed papers in German too.[4] Although he did not summarise his researches in Roman criminal law in a monograph, in 2013 his papers were summed up in a volume of studies with monographic demand in Hungarian and German with the title *Ius criminale Romanum* in Szeged as volume 45 of the *Library of the Pólay Elemér Foundation*.

In addition to these three large subject areas, he treated numerous topics in his studies; in particular, the issues of the study of contracts, especially of sale and purchase and bearing hazards[5] as well as of education and research of Roman law. He published several studies that examine the history of development of Roman law and papers on history of sciences and recollections; the first edition of his textbook entitled *Roman law* written with a co-author was published in 2001 in Szeged.

His academic achievements were recognised by numerous official honours. In 1999 by the *Apácai Csere János Prize*, on two occasions (in 1995 and 2004) on the basis of students' votes by the title *Lecturer of the Year*, in 2004 by the title *professor emeritus* and in 2005 by the *Klebersberg Kúnó Prize*. In 2003 he was awarded the *Silver Commemorative Medal of the Academic Committee of Szeged*, also in 2003 the *Order of Merit of the Republic of Hungary, Officer's Cross*, and then in 2007 the *Eötvös József Wreath*. The appreciation of him and his life-work is indicated by the fact that his colleagues and students congratulated him by a *Festschrift* on the occasion of his 70th, 75th and 80th birthday (published in Szeged in 2004, 2011 and 2014).

The background of his successful researcher's and teacher's life was provided by the harmonic private life of a *bonus et diligens pater familias.* Sports also played a key part in his life: from first to last he lived up to the principle of *mens sana in corpore sano*; in the 1970's with his team he won a gold medal in throwing the hammer in the National Athletic Championship.

As a teacher, during his almost half century's activity at the university, he made several thousands of law students acquainted with and like Roman law. He was able to pass his knowledge plastically, with the one-time practising lawyer's sensitivity of problems of real life and with the scholar's thorough grounding – in the spirit of his lecturer's creed taken over from professor Pólay – as a *Schulmeister*.

By the death of the master and friend who unselfishly helped, supported his colleagues, students in word and deed, Imre Molnár, by the last member of the Romanistics generation following Elemér Pólay (1915–1988) and Róbert Brósz

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1 Molnár, I.: *Verantwortung und Gefahrtragung bei der locatio conductio zur Zeit des Prinzipats*. In: *Aufstieg und Niedergang der römischen Welt.* Teil. II. Band 14. Berlin–New York, 1982. 583–680.

2 Molnár, I.: Gefahrtragung beim römischen Dienst und Werkvertrag. *Labeo* 1975. 23–44; Subjekte der locatio conductio. In: *Studi in onore di Cesare Sanfilippo, II.* Milano, 1982. 413–430; Objekt of locatio conductio. *Bullettino dell'Istituto di Diritto Romano* 1982. 127–142; The Social Determination of Lease Relations and the Social Programs Arising from that in the Ancient Rome. In: *Studia in honorem L. Nagy.* Szeged, 1984. 223–229; Rechte und Pflichten der Subjekte der locatio conductio. *Index* 1983–1984. 157–188; Le cause di estinzione del contratto e il problema dell' esistenza del diritto di disdetta nella „locatio-conductio". *Labeo* 1986. 298–309; Beruf und Arbeit im römischen Recht. In: *Facetten des Wandels.* Mannheim, 2001. 54–62.

3 Molnár, I.: Die Ausgestaltung des Begriffes der vis maior im römischen Recht. *IURA* 1981. 73–105; *Erfolgshaftung oder ein typisierter dolus malus im archaischen römischen Recht. Bullettino dell'Istituto di Diritto Romano* 1987. 27–43; Der Haftungsmaßstab des pater familias diligens im römischen Recht. In: *Vorträge gehalten auf dem 28. Deutschen Rechtshistorikertag (Nimwegen 23. bis 27. September 1990).* Nijmegen, 1992. 23–31; Die Haftungsordnung des römischen Privatrechts. In: *Emlékkönyv Dr. Szentpéteri István*. Szeged, 1996. 371–383.

4 Molnár, I.: Grundprinzipien des römischen Strafrechts. In: *A bonis bona discere: Festgabe für János Zlinszky zum 70. Geburtstag.* Miskolc, 1998. 189–208; Das adulterium als ein das Ansehen der römischen Familie verletzendes Verbrechen. In: *Status familiae. Festschrift für Andreas Wacke zum 65. Geburtstag.* München, 2001. 345–364; Ausgewählte gesetzliche Straftatbestände im antiken Rom und in unserem geltendem Recht. In: *Roman law as formative of modern legal systems. Studies in honour of Wieslaw Litewski.* Kraków, 2004. 15–24.

5 Molnár, I.: Periculum emptoris im römischen Recht der klassischen Periode. In: *Sodalitas. Scritti in onore di Antonio Guarino.* Napoli, 1984. 2227–2255; Die Frage der Gefahrtragung und des Eigentumsüberganges beim Kauf. *Index* 1987. 57–75.

(1915–1994) – where, listing the most significant ones, György Diósdi (1934–1973), Ferenc Benedek (1926–2007) and János Zlinszky (1928–2015) also belonged to – making his exit the great age of Hungarian Romanistics ended. *Sit ei terra levis!*

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Zum 30. Todestag von Christian Broda: Lebensskizze und Reformen

Christian Broda war von 1960 bis 1966 und von 1970 bis 1983 österreichischer Bundesminister für Justiz. Am 1. Februar 1987, also vor 30 Jahren, starb er in Wien. In diesem Aufsatz werden sein Leben und seine bedeutenden Reformen beschrieben.

Inmitten der Wirren des Ersten Weltkriegs erblickte Christian Broda am 12. März 1916 in Wien das Licht der Welt. Sein Vater Ernst Broda[1] war ein auch als Schriftsteller tätiger Staatsbeamter. Seine Mutter war die Bühnenkünstlerin Viola Broda,[2] Schwester des Regisseurs Georg Wilhelm Pabst.[3] Im Vaterhaus, in dem u.a. Max Adler und Brodas Pate Hans Kelsen ein- und ausgingen, bekamen sowohl Broda als auch sein um sechs Jahre älterer Bruder Engelbert[4] fortschrittliche, geistreiche Anregungen.

Christian Broda gehörte seinen persönlichen Worten zufolge jenem Menschenalter an, dessen Jugendzeit „in die Bürgerkriegsatmosphäre der mitteleuropäischen Zwischenkriegszeit“[5] fiel, was sein politisches Leben und die Schärfung seiner Gedanken lenkte. Nach dem Besuch der Grundschule wechselte er 1926 an das Akademische Gymnasium. Unter der Wahrnehmung des 15. Juli 1927[6] schloss er sich den sozialistischen Mittelschülern an, ging in der Folge „noch weiter nach links“[7] und schloss sich 1931 der kommunistischen Jugendbewegung an.[8] Kurz vor seiner Reifeprüfung wurde er im Februar 1934 wegen „kommunistischer Betätigung“ eingesperrt und auf dem Weg der Verwaltung zu 42 Tagen Kerkerstrafe[9] verurteilt. Später verbrachte er über ein Jahr bei seinem Onkel im US-amerikanischen Santa Monica/Kalifornien.[10]

Zum angestrebten Hochschulstudium aus politischen Gründen anfänglich keineswegs zugelassen, durfte er sich auf Gesuch seiner Mutter im Wintersemester 1936/37 an der Universität Wien in den Fächern Geschichte und Jurisprudenz einschreiben. Im Widerstand gegen den „Ständestaat“ arbeitete Broda in der in Fritz Kellers Veröffentlichung „Gegen den Strom“ als ausführlich beschriebenen Anordnung oppositioneller Jungkommunisten *Weg und Ziel*[11] unter dem Pseudonym „Genosse Janda“ mit.[12]

Sein Geschichtestudium schloss Broda im Mai 1940 mit der Untersuchung „Volk und Führung. Ein Beitrag der politischen Willensbildung im zweiten Deutschen Reich über den verfassungsrechtlichen Aufbau des Bismarck-Staates“ ab. In den 1960er-Jahren und auch später[13] gab diese Dissertation zu politischen Attacken Anstoß, wonach Broda in jenem Zeitraum in einem Naheverhältnis zum Hitlerregime gestanden wäre. In der über 300 Seiten starken Arbeit ist jedoch „kein Satz enthalten, der sich als NS-Propaganda auslegen ließe, dafür so mancher Satz, der den damaligen Machthabern und ihren Ideen nicht entsprochen hat.“[14]

Im Mai 1940 begann mit der Einberufung zur Wehrmacht seine „militärische Laufbahn“.[15] Das Ende des Zweiten Weltkrieges 1945 erlebte Broda im Innviertel, wo er sich in der „Österreichischen Freiheitsbewegung“ um die Entstehung

1 Vgl. Maria Wirth, Christian Broda. Eine politische Biographie (= Zeitgeschichte im Kontext, Bd. 5), hrsg. von Oliver Rathkolb, Wien 2011, 38.
2 Ebd.
3 Georg Wilhelm Pabst war ein österreichischer Filmregisseur.
4 Dazu passend Engelbert Broda, Ludwig Boltzmann. Mensch – Physiker – Philosoph, Wien 1955.
5 Christian Broda, Demokratie – Recht – Gesellschaft, Wien 1962, 2.
6 Stellvertretend Norbert Leser/Paul Sailer-Wlasits, 1927 – Als die Republik brannte. Von Schattendorf bis Wien, Wien/Klosterneuburg 2002.
7 Archiv Christian Broda, X.1.7.
8 Vgl. *Zukunft* 4 (1986), 11.
9 *Der Sozialdemokratische Kämpfer* 1/2/3 (2016), hrsg. v. Bund Sozialdemokratischer Freiheitskämpfer/innen, Opfer des Faschismus und aktiver Antifaschist/inn/en, 23.
10 Vgl. Wirth, Broda, 66–68.
11 Ebd., 69–78.
12 Vgl. *Zukunft* 4 (1986), 11.
13 *Falter* 50 (1992).
14 *Kleine Zeitung* vom 31.7.1965.
15 Archiv Christian Broda, X.7.1.

demokratischer Formen bemühte.[16] Bei den Nationalratswahlen 1945 unterstützte er die KPÖ,[17] doch nach kurzer Zeit war die Beziehung zu den Kommunisten abgebrochen, weil ihm der anhaltend antidemokratische Geist der Partei bestätigt worden war.[18] Seine anschließende Vorliebe für antistalinistische Rebellen fußt auf dieser Erfahrung mit dem Kommunismus.

In seine Vaterstadt Wien heimgekehrt, war Broda in der Verwaltungsbibliothek des Bundeskanzleramtes tätig, promovierte im März 1947 zum Dr. iur. und legte die Rechtsanwaltsprüfung ab. Im Dezember 1948 in die Rechtsanwaltsliste eingetragen, eröffnete er ein Anwaltsbüro in der Bogner-, anschließend in der Schottengasse.

Der ehemalige geschäftsführende Chef des Bundes Sozialistischer Akademiker, Wilhelm Rosenzweig, wollte im Herbst 1948 den angehenden Advokaten für die SPÖ gewinnen.[19] Erst mit der Wahl in die Leitung der Sozialistischen Juristen wurde Broda im Mai 1949 SPÖ-Parteimitglied. Als Schreiber der Vereinigung regelte er Arbeitsgemeinschaften, die die ausschlaggebenden Devisen der späteren Rechtsreform überlegten und ausführten. Broda verfasste die rechtspolitischen Teile des „Wiener Programms" der SPÖ 1958. Doch war nach seiner Berufung zum Justizminister in die Koalitionsregierung am 23. Juni 1960 keinesfalls mehr an eine Verwirklichung der Reform des Strafgesetzes zu denken. Der SPÖ/ÖVP-Koalition war es lediglich in einigen wenigen Gebieten geglückt, längst überfällige Berichtigungen zu setzen.

> „Zur konzeptiven, über den Tag hinausweisenden Politik war seither die Koalition nur noch selten befähigt."[20]

Broda hat in seinen Absichten der Strafgesetzreform das auf Übereinstimmung ausgerichtete Klima bei den Auseinandersetzungen betont. Arbeiten jüngeren Datums[21] betonen einschneidender die Differenzen, in denen die SPÖ politisch in der Fragestellung der Strafrechtsreform enorm unter Druck geriet und in denen die Rechtsreform angegriffen wurde. Auf diese Weise verringerte sich die Unterstützung für die Erneuerung der SPÖ durch Broda.[22]

In den 1960er-Jahren gab es darüber hinaus auch eine innerparteiliche Krise. Ein Teil dieser Divergenz wurde wegen Franz Olah[23] ausgetragen. Während Broda sich für den althergebrachten Sozialismus, für Durchführungen und Wertigkeiten stark machte, setzte Olah auf Charisma, mediale Schlichtung und Populismus. In einem Zeitschriftenaufsatz[24] umriss Broda einen Maßnahmenkatalog von schlechten, auf Olah umgeschriebenen Führereigenschaften: ohne Ideologien, verbalradikal und imponderabel – als Gegenpol der uneingeschränkte Führer: überzeugend, attraktiv, bahnbrechend, authentisch und dem Kollektiv maßgeblich verbunden. Aus der Tatsache, dass Bruno Kreisky in dieser Gegenüberstellung zu Olah stand, dürfte sich jene Erbitterung zwischen den beiden ableiten, die zeitlebens angedauert hat. Die auflagenstarke Kronen Zeitung verbreitete im Wahlkampf 1966 eine Kampagne der Diffamierung gegen Broda.

Eine Petition der Österreichischen Widerstandsbewegung an das Justizministerium im März 1965 ergab, dass noch aktive Justizangehörige in die Fällung und Durchführung von Todesurteilen gegen Dissidenten im Dritten Reich verwickelt gewesen waren. Nach dem Zweiten Weltkrieg waren diese Personen durch kraft § 19 des Verbotsgesetzes eingesetzte Sonderkommissionen kontrolliert und in den Justizdienst der Republik Österreich einfach übernommen worden, wobei keine genaueren Untersuchungen über die juristische oder staatsanwaltliche Funktion in der NS-Periode abgeschlossen waren.

Unter Broda wurde amtsintern im Frühjahr 1965 erwogen, Disziplinarverfahren gegen die betroffenen Juristen durch die Generalprokuratur beantragen oder durch Selbstanzeige auslösen zu lassen, doch ließ eine nähere gesetzmäßige Prüfung solche Schritte als ungünstig erscheinen.

> „Bei dieser Sach- und Rechtslage sieht das Bundesministerium für Justiz keine Möglichkeit, die seit vielen Jahren abgeschlossenen Dienstrechtsverfahren wieder aufzurollen, zumal gesetzliche Grundlagen für die Wiederaufnahme dieser Verfahren nicht bestehen."[25]

Zu einer kundigen rechtsgeschichtlichen Aufarbeitung der gesamten NS-Justiz in der Zweiten Republik Österreich ist es ansatzweise gekommen. Die von Broda 1976 ins Leben gerufene Tagung „Justiz und Zeitgeschichte" war ein erster Schritt dafür.

Während der monocoloren ÖVP-Minderheitsregierung Josef Klaus 1966 bis 1970 kam die Rechtsreform zu einem Stillstand. Mit den Wahltriumphen der SPÖ 1970 und 1971 fand Broda abermals seinen Platz in Kreiskys Regierungsmannschaft. Endabsicht der nun neu angefangenen Reform des Rechts war es, vor allem das Straf- und Familienrecht den entstandenen kollektiven Umgestaltungen und

[16] Ebd., X.5.
[17] *Neue Zeit* vom 15.11.1945.
[18] *Sozialistische Korrespondenz* vom 24.3.1964.
[19] Vgl. Wilhelm Rosenzweig, Der politische Weg Christian Brodas, in: Michael Neider (Hrsg.), Christian Broda zum 70. Geburtstag, Wien 1986, 123–131, hier 123.
[20] Christian Broda, Heraus aus der Sackgasse, Wien 1964, 45.
[21] Dazu passend Wolfgang Stangl, Die neue Gerechtigkeit in Österreich 1954–1975, Wien 1985.
[22] Vgl. Stangl, Gerechtigkeit, 100.
[23] Franz Olah war ein österreichischer Politiker, unter anderem Innenminister und Präsident des Österreichischen Gewerkschaftsbundes (ÖGB).
[24] Vgl. *Zukunft* 7 (1964).
[25] *Wiener Zeitung* vom 24.7.1965.

Begehren stattzugeben. In seiner zweiten Amtsperiode als Justizminister

> „sicherte Broda seine politische und justizpolitische Strategie mit großer Umsicht und mit enormen Fingerspitzengefühl sorgfältig ab […].“[26]

Die parlamentarische Durchsetzung seines Reformwerkes betrieb Broda mit überall geachteter Fertigkeit, wobei er in ÖVP-Justizsprecher Walter Hauser einen Partner des Kompromisses gefunden hatte. Mit seiner ansehnlichen Arbeitskapazität verstand Broda es, seine Mitarbeiter zu beeinflussen. Sein verstandesmäßiger Horizont, seine klaren Ansichten und Visionen ließen ihn zu einer glorifizierten Figur einer ganzen Generation junger Linksintellektueller werden.

Gedanken der „Großen Strafrechtsreform“, welche mit dem neuen Strafrechtsbuch 1975 in Kraft trat, waren beispielsweise die Zurückdrängung der Freiheitsentziehungen oder der Ersatz der kurzen Freiheitsstrafen durch die sozial klassifizierte Geldstrafe nach Tagessätzen. Aufgrund unüberbrückbarer Differenz zwischen den beiden österreichischen Großparteien wurde diese Strafrechtsreform nur mit den Stimmen der SPÖ-Abgeordneten in die Wege geleitet.

Neben der Strafrechtsreform hatte sich die SPÖ-Mehrheitsregierung die Neugestaltung des aus dem Jahr 1811 stammenden Familienrechts zum Ziel gesetzt. Mit der Sozialgerichtsbarkeit, dem Mietsrechts-, Medien- und Sachwaltergesetz wurden weitere Gesetzesbereiche erneuert. Während seiner Amtsperiode war Broda Kritik in der Allgemeinheit ausgesetzt: Vorzugsweise seine Idee von einer gefängnislosen Gesellschaft war Blitzableiter der Boulevardpresse. So schrieb Norbert Leser 1988, ein Jahr nach Brodas Tod:

> „Dr. Broda hatte mindestens zwei Gesichter: das Gesicht des liberalen Reformers […] und der Machtpolitiker Broda […] Besonders das Weisungsrecht des Ministers gegenüber der Staatsanwaltschaft, das nicht bloß durch ausdrückliche Weisungen zu Anklageerhebungen und Ermittlungen, sondern auch im Wege von diskreten Winken und Aktenanforderungen u. ä. m. ausgeübt wird, eignet sich vortrefflich, um Gegner zu vernichten und über Freunde schützend die Hand zu halten.“[27]

Auch in Pension blieb Broda politisch aktiv: Am 28. April 1983 wurde durch seine Inangriffnahme das 6. Zusatzprotokoll zur Europäischen Menschenrechtskonvention zur Unterzeichnung durch die Staaten des Europarates aufgelegt.

Am 28. Jänner 1987 erhielt er in Straßburg den Europäischen Menschenrechtspreis. Vier Tage später starb er, noch mit dem Studium des Presseechos zur Verleihung beschäftigt, wenige Wochen vor seinem 71. Geburtstag, an einem Herzinfarkt in Wien.

Andreas Raffeiner*

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[26] Fischer, Volksanwaltschaft, 92.

[27] Norbert Leser, Salz der Gesellschaft. Wesen und Wandel des österreichischen Sozialismus, Wien 1988, 153f.

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