Vol. 3 / 2012 No. 1

Journal on European History of Law

9 772042 640001 01

STS SCIENCE CENTRE

The European Society for History of Law

VOL. 3 / 2012 NO. 1

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JOURNAL ON EUROPEAN HISTORY OF LAW

ISSN 2042-6402

„Der richterliche Stand ist unabhängig“ - Zur Rezeption französischen Gerichtsverfassungsrechts im Polen des frühen 19. Jahrhunderts

*Martin Löhnig**

Abstract

Pressed by Napoleon at the beginning of the 19th century in many parts of Europe the French law of constitution of the courts and of procedure was adopted. Contrary to the states founded by Napoleon these legal regulations didn't disappear after his defeat, but instead strongly influenced the legal development in many European countries. The article at hand examines the insofar atypical development of French law in Poland.

Key words: *Judiciary history; constitution of the courts; Napoleon; Dukedom of Warsaw; Kingdom Poland; Republic of Krakow; independent judiciary.*

Zu Beginn des 19. Jahrhunderts wurde unter dem Druck Napoléons in vielen Teilen Europas französisches Gerichtsverfassungs- und Prozessrecht rezipiert. Nach der Niederlage Napoléons ist dieses Recht – anders als die von Napoléon gegründeten Staaten – nicht etwa einfach verschwunden, sondern hat die Rechtsentwicklung vieler europäischer Staaten nachhaltig beeinflusst. Vorliegend wird die – insoweit atypische – Entwicklung des französischen Rechts in Polen nachgezeichnet.

I. Hintergrundinformationen I

Der Frieden von Tilsit 1807 kostete das Königreich Preußen fast die Hälfte seines Territoriums. Napoléon und Zar Alexander I. hatten sich vertraglich über die Neuordnung Nordosteuropas geeinigt, ohne dass Friedrich Wilhelm III. von Preußen als gleichberechtigter Verhandlungspartner zugelassen worden war. Die preußische Beute aus der so genannten „dritten polnischen Teilung“ von 1795, vor allem die Provinz „Neuostpreußen“ südlich und westlich der Memel, wurde so zum Kern des „Herzogtum Warschau“, einem Pufferstaat von Napoléons Gnaden zwischen Restpreußen und Rußland.[1] Herzog wurde der König von Sachsen der 1812 seine Befugnisse an den Warschauer Ministerrat übertrug.[2]

Wie bei allen anderen napoléonischen Staatsgründungen wurde auch im Herzogtum Warschau französisches Recht eingeführt und auch dort sollte es zu einer Grundlage der sich anschließenden sozioökonomischer Modernisierung werden;[3] allerdings wurden nicht alle in Frankreich geltenden „cinq codes“, sondern nur der code civil, der code de commerce und der code de la procédure civile, nicht also das Straf- und Strafverfahrensrecht in Geltung gesetzt. Sollte Napoléon, wie häufig kolportiert, tatsächlich einmal geäußert haben, seine Gesetzgebung, vor allem der code civil, stelle seine bleibende Leistung dar, dann war er sehr hellsichtig. Allerdings traf seine Hellsichtigkeit nicht ganz präzise. Denn es ist nicht das materielle Zivilrecht des glänzenden Code civil, das Europa bis heute prägt, auch wenn Stendal angeblich jeden Tag ein wenig in diesem Gesetzbuch las, um sein Stilempfinden zu schulen – vor der täglichen Lektüre des deutschen BGB unter diesem Gesichtspunkt sei an dieser Stelle ausdrücklich gewarnt. Vielmehr ist es vor allem das von Napoléon geschaffene Gerichtsverfassungsrecht, dessen Spuren etwa in Deutschland, Italien, Belgien, Holland, oder der Schweiz offensichtlich sind. Im Folgenden soll diesen Spuren in Polen nachgegangen werden.

II. Französisches Gerichtsverfassungsrecht im Herzogtum Warschau

Am 22. Juli 1807 oktroyierte Napoléon dem Herzogtum Warschau eine Verfassung. Daß die Verfassungsgebung eigentlich die Befugnis des Sachsenkönigs als Souverän gewesen wäre, ignorierte der französische Kaiser großzügig. Daß Ersterer wiederum die Gültigkeit der Verfassungsgebung durch Napoléon nicht in Frage stellte, ist ein Beleg für die tatsächlichen Machtverhältnisse. Diese Verfassung führte mit einem Federstrich die modernen Institutionen ein, zu deren Einsetzung Polen sich selbst nicht durchringen hatte können,[4] obwohl bereits die polnische Verfassung von 1791 auf den Gedanken der Gewaltenteilung und der Volkssouveränität beruhte. Zwar enthielt diese

* Prof. Dr. Martin Löhnig, Lehrstuhl für Bürgerliches Recht, Deutsche und Europäische Rechtsgeschichte sowie Kirchenrecht, Fakultät für Rechtswissenschaft, Universität Regensburg, Deutschland.

1 KIRSCH, Martin, *Monarch und Parlament im 19. Jahrhundert*, Göttingen, 1999, S. 276 f.

2 Vgl. RADA, Uwe, *Die Memel: Kulturgeschichte eines Flusses*, München, 2011, S. 108.

3 KRAFT, Claudia, *Europa im Blick der polnischen Juristen*, Frankfurt/Main, 2002, S. 39.

4 WITKOWSKI, Wojciech/WRZYSZCZ, Andrzej, *Modernisierung des Rechts auf polnischem Boden vom 19. bis Anfang des 20. Jahrhunderts*, in: GIARO, Tomasz (Hrsg.), *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*, Frankfurt/Main, 2006, S. 249 ff., S. 250.

in Abschnitt VIII die ausdrückliche Bestimmung: „Die richterliche Gewalt kann weder von der gesetzgebenden Gewalt, noch vom König [also der vollziehenden Gewalt] ausgeübt werden, sondern von den zu diesem Ende gegründeten und erwählten Magistraturen." Und enthielt darüber hinaus noch verfassungsrechtliche Einzelbestimmungen zum Gerichtsaufbau, eine tatsächliche Abkehr von der hergebrachten ständischen Justiz erfolgte auf Grundlage der Verfassung von 1791 wegen ihrer kurzen Geltungsdauer und des Widerstands konservativer Kreise jedoch nicht.

Die Verfassung von 1807 reformierte das Gerichtswesen hingegen umfassend. Die ständische Gerichtsbarkeit wurde abgeschafft und die formelle Gleichheit aller Bürger vor dem Gesetz eingeführt, Art. 4. Justiz und Verwaltung wurden getrennt. Art. 74 regelte die Unabhängigkeit des richterlichen Standes. Die Richter wurden vom König auf Lebenszeit ernannt, Art. 75, und konnten ihr Amt nur unter abschließend genannten Voraussetzungen und Durchführung eines besonderen Verfahrens verlieren; damit war also nicht nur die sachliche, sondern auch die persönlich Unabhängigkeit der Richter gesetzlich garantiert, Art. 76. Lediglich die Friedensrichter wurden aus einer vom jeweiligen Landtag zu erstellenden Kandidatenliste ausgewählt und nur auf Zeit ernannt, Art. 73. Die Gerichtsverfahren hatten den Grundsätzen der Öffentlichkeit, Art. 70, und Mündlichkeit, CdPC, des Verfahrens zu genügen. Eingeführt wurde auch das ministčre public, eine Staatsanwaltschaft nach französischem Vorbild, die auch in Zivilverfahren mitwirken und Kassationsanträge stellen konnte; sie diente also der Überwachung der Justiztätigkeit durch den Justizminister. 1808 kam die Einführung eines Notariats nach französischem Vorbild hinzu.[5]

Die Normen der Verfassung zum Gerichtswesen waren freilich, wie auch in anderen napoléonischen Verfassungen, recht knapp gehalten, so daß sie ohne Kenntnis des französischen Vorbilds kaum verständlich gewesen wären.[6] Feliks Łubieński, der dem französischen Vorbild sehr zugetane Justizminister des Herzogtums Warschau, entwickelte das Gerichtssystem aus diesen Vorgaben, wobei aber auch eigenständige Elemente in den Gerichtsaufbau einflossen. Nach Art. 71 der Verfassung wurden in jedem Distrikt ein Friedengericht, in jedem Département ein erstinstanzliches Zivilgericht und schließlich ein Appellationsgericht in Warschau eingerichtet. Die Urteilskassation erfolgte anders als in Frankreich durch den Staatsrat, Art. 72, dem zudem eine eigene Sachentscheidungskompetenz eingeräumt wurde. Nach französischem Recht führte die Kassation zu einer Rückverweisung an ein anderes Appellationsgericht, eine Regelung die mangels der Existenz eines zweiten Appellationsgerichts im Herzogtum nicht in Betracht kam. Łubieński hatte – anders als etwa im Großherzogtum Berg geregelt – auch nicht die Zurückverweisung an ein außerhalb der Staatsgrenzen gelegenes Appellationsgericht anordnen wollen. 1814 trat an die Stelle des Staatsrates das Oberste Gericht, das nach der Kassation ebenfalls selbst zu entscheiden hatte.[7]

Mit der Einführung der französisch geprägten Gerichtsverfassung ging auch eine Professionalisierung der Richterschaft einher, denn alle Richter mit Ausnahme der Friedensrichter hatten nun ein juristisches Studium zu absolvieren. Im bis Ende des 18. Jahrhunderts bestehenden ständischen Gerichtswesen hatten Richter hingegen nicht die Pflicht, eine juristische Ausbildung nachzuweisen. Es gab keine Regelungen, die einheitliche Zugangsvoraussetzungen zum Richteramt normierten; in aller Regel wurde das Richteramt durch adelige Grundbesitzer und Besitzbürger ausgeübt.[8] Das Rechtsstudium hätte einem Richter zu dieser Zeit aber auch nicht unmittelbar genutzt, denn anwendbar waren Gewohnheitsrecht und Stadtrecht des Magdeburger Rechtskreises, nicht das an den Universitäten unterrichtete Gelehrte Recht. Um den durch die Rechtsänderung selbst geschaffenen Bedarf an ausgebildeten Juristen zu befriedigen, wurde 1808 eine eigene Rechtsschule (Szkola Prawa) in Warschau gegründet, die Zahl der ausgebildeten Juristen im Herzogtum Warschau wuchs damit erheblich, eine neue Gesellschaftsschicht entstand.[9]

III. Hintergrundinformationen II

Das Herzogtum Warschau hatte der polnischen Frage nach 1795 immerhin wieder zu einer staatlichen Gestalt verholfen, die auch nach Ansicht der anderen europäischen Mächte auf dem Wiener Kongreß zu berücksichtigen war. 1815 entstand das mit einer am 27. November 1815 in Kraft getretenen Verfassung ausgestattete Königreich Polen, das sogenannte Kongreßpolen, das sich aus Gebieten westlich und östlich der Memel zusammensetzte, in ihm gingen also Teile des Herzogtum Warschaus auf. Zu den territorialen Verschiebungen kam eine weitere, denn von einem Pufferstaat von Napoléons Gnaden war Polen durch die europäische Neuordnung nun zu einem Staat von Rußlands Gnaden geworden; Polnischer König war stets der russische Kaiser in Personalunion. Die Verfassung von 1815 war dem Buchstaben nach äußerst liberal, dürfte aber vor allem ein Propagandainstrument gewesen sein.[10] Westlich der Memel wurde die bisherige, französisch geprägte Verwaltungsgliederung beibehalten, die Gebiete östlich der Memel, die einmal zur polnisch-litauischen Adelsrepublik gehört hatten, unterstanden den Gouvernements von Wilna, Kaunas und Grodno und damit faktisch der russischen Zentralgewalt.[11] Andere ehemals polnische Gebiete fielen nach 1815 an Preußen, das sogenannte Großherzogtum Posen mit Sonderstatus bis 1850, und an Österreich, nämlich Galizien, Lemberg und nach einem Aufstand 1846 auch die seit 1815 bestehende autonome Republik Krakau, auf die noch zurückzukommen sein wird.

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5 WITKOWSKI, Wojciechi, Themis Polska, Die erste polnische Rechtszeitschrift, in: STOLLEIS, Micha-el/SIMON, Thomas (Hrsg.), *Juristische Zeitschriften in Europa,* Frankfurt/Main, 2006, S. 141 ff., S. 145.

6 WITKOWSKI/WRZYSZCZ (Fn. 4) S. 266.

7 WITKOWSKI (Fn. 5) S. 145.

8 WRZYSZCZ, Andrzej, *Die Juristenausbildung an polnischen akademischen Einrichtingen im 19. und zu Be-ginn des 20. Jahrhunderts,* in: POKROVAC, Zoran (Hrsg.), *Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg,* Frankfurt/Main, 2006, S. 191 ff., S. 191 f. KRAFT (Fn. 3) S. 39.

9 KRAFT (Fn. 3) S. 39.

10 WITKOWSKI (Fn. 5) S. 143.

11 Vgl. RADA (Fn. 1) S. 119.

Die Lebensdauer des 1815 gegründeten Königreich Polen war kurz. Nach der Niederschla-gung des Novemberaufstands von 1830 existierte es nur noch auf dem Papier, denn die polni-sche Verfassung wurde vom russischen Kaiser außer Kraft gesetzt, der Sejm, die polnische Armee und die kommunale Selbstverwaltung in Polen abgeschafft. Nach dem Januaraufstand von 1863 wurde das Königreich schließlich als Weichselprovinz offiziell ins Zarenreich ein-gegliedert,[12] wenn auch, wie Uwe Rada[13] darlegt, die Memel als Kulturgrenze erhalten blieb. Ein souveräner polnischer Staat entstand erst wieder nach dem Ende des Ersten Weltkriegs.

IV. Napoléonisches Recht in Polen nach 1815

1. Königreich Polen

a. Konstitutionelle Periode

In ganz Europa wollten nach 1815 die Siegermächte das napoléonische Recht wieder abschaf-fen und so setzte auch Rußland für das von ihm abhängige Königreich Polen einen Ausschuß zur Erarbeitung eigener Kodifikationen ein. Und wie fast überall in Europa, wo Napoléon sein Recht in Kraft gesetzt hatte, blieben diese Bemühungen auch in Polen ohne Erfolg. Napoléons Recht überzeugte nicht zuvorderst mit Waffen, sondern aufgrund seiner allgemein als überle-gen eingestuften Qualität und der Erfüllung von Postulaten der bürgerlich-liberalen Bewe-gung. Was als Prozeß der Inkraftsetzung neuen Rechts durch die französische Siegermacht begonnen hatte, setzte sich in der Folgezeit in ganz Europa als Prozeß freiwilliger Rezeption fort. Erinnern wir uns: Auch bei der Rezeption Magdeburger Stadtrechts oder römischen Zi-vilrechts, die jeweils in großen Teilgebieten Europas erfolgte, war es schlicht die als überle-gen angesehene Qualität, die den Ausschlag gab. Wer weiß: Vielleicht hätte Napoléon gar keinen europäischen Krieg entfesseln müssen, wenn es ihm allein um die Durchsetzung seines Rechts gegangen wäre; sie wäre wohl nur etwas langsamer vonstatten gegangen.

Der polnische Kodifikationsausschuß arbeitete schleppend, längst war das französische Recht wie überall in Europa identitätsstiftend für die bürgerliche Elite, in Polen zudem noch Symbol der staatlichen Besonderheit Polens[14] geworden. Lediglich das Eherecht des code civil, der die obligatorische Zivilehe eingeführt hatte, wurde 1825 durch die Wiederherstellung der reli-giösen Form der Eheschließung und die Wiedereinführung des Scheidungsverbots abgeändert; eine Veränderung, die im ebenfalls katholischen Frankreich übrigens bereits zehn Jahre zuvor erfolgt war. Weitere Änderungen betrafen das Ehegüterrecht und das Hypothekenrecht, also Regelungsmaterien des Zivilrechts, die noch bis heute stark regional und traditional geprägt sind. Die französisch geprägte Gerichtsverfassung hingegen blieb vollständig erhalten.

Das V. Buch mit dem Titel „Vom Stande der Richter, oder der gerichtlichen Hierarchie“ in der polnischen Verfassung von 1815 lehnte sich stark an die entsprechenden Bestimmungen der Warschauer Verfassung von 1807 an. An ihrer Spitze, in § 138, war die sachliche Unab-hängigkeit des richterlichen Standes geregelt, ergänzt um eine neu hinzugetretene Definition derselben in § 139: „Unter der Unabhängigkeit der Richter versteht man die Fähigkeit, seine Meinung beim Urtheil frei zu äußern, ohne dabei weder durch die oberste Macht, noch durch ministerielle Gewalt, noch durch irgend eine Nebenrücksicht geleitet zu werden. Jede andere Erklärung oder Auslegung von der Unabhängigkeit der Richter wird für Mißbrauch erklärt.“ Die vom König ernannten Richter waren von Verfassungs wegen unabsetzbar und bekleideten ihr Amt auf Lebenszeit, §§ 141 ff.

Der bestehende, am französischen Recht orientierte Gerichtsaufbau wurde – verfassungsrecht-lich nun ausführlicher geregelt – ausdrücklich beibehalten: § 144 ordnete die Einsetzung von Friedensrichtern an. „Keine Streitsache kann vor ein bürgerliches Gericht erster Instanz ge-bracht werden, wenn sie nicht vorher dem betreffenden Friedensrichter vorgelegt wurde, mit Ausnahme derjenigen, bei welchen, nach Vorschrift des Gesetzes, eine Sühne nicht Statt ha-ben darf.“, § 145. Hinzukamen die Gerichtshöfe erster Instanz, §§ 146 ff., zwei Appellationshöfe, § 150, eine Neuerung also, und der Oberste Gerichtshof, „der in letzter Instanz über alle bürgerliche und Criminalfälle, Staatsverbrechen [sie waren dem Hohen Nationalhof vorbehalten] ausgenommen, entscheiden wird“, § 151.

Die im Jahr 1808 gegründete Warschauer Rechtsschule ging 1816 in die Juristenfakultät der neu gegründeten Königlichen Universität Warschau über. Ihr Niveau wird als sehr gut beschrieben, ihre Absolventen hatten – so wird gesagt – einen überragenden Anteil „an den Ar-beiten der Justiz und an der Gestaltung der Rechtskultur in der Gesellschaft“.[15]

b. Die Spuren verlieren sich…

Nach der Niederschlagung des Novemberaufstandes von 1831 wurde das gesamte Königreich Polen nach russischem Vorbild in Gouvernements gegliedert. Das Oberste Gericht wurde zu einer Warschauer Abteilung des Regierenden Senats in St. Petersburg, des höchsten russi-schen Kassationsgerichts, degradiert.[16] Die Warschauer Universität wurde geschlossen, weil sie in den Aufstand verwickelt war. Das an die Stelle der Verfassung tretende Organische Statut regelte zwar Aufbau und Kompetenzen der Gerichte unverändert, enthielt aber zwei entscheidende Abweichungen von der Verfassung 1815: Die sachliche Unabhängigkeit der Justiz war nicht mehr geregelt. Vielmehr bildete die Spitze des Abschnitts zum Gerichtswesen die Aussage: „Jede Gerichtsbehörde im Königreich Polen ist Allergnädigst von Uns einge-setzt, und soll in Unserem Namen handeln.“, Art. 55. Auch die persönliche Unabhängigkeit der

[12] Vgl. RADA (Fn. 1) S. 121.
[13] RADA (Fn. 1) S. 122 ff.
[14] KRAFT (Fn. 3) S. 42.
[15] WITKOWSKI (Fn. 5) S. 150.
[16] WITKOWSKI/WRZYSZCZ (Fn. 4) S. 250.

Richter wurde beseitigt: „Die von Uns ernannten Richter verbleiben so lange in ihren Amtspflichten, bis sie, wenn Wir es für nöthig befinden, davon entbunden […] werden.“, Art. 57.

Nach dem Scheitern des Januaraufstandes 1864 wurde das Königreich Polen russische Pro-vinz. Im gleichen Jahr wurde das russische Gerichtssystem umfassend reformiert. Diese neue russische Gerichtsverfassung wurde 1876 schließlich auch auf das Gebiet des ehemaligen Herzogtums Warschau erstreckt. Sie bewirkte einerseits einen weiteren Professionalisierungs-schub, denn erstmals wurden fachliche Zugangsvoraussetzungen auch zum Beruf des „verei-digten Anwalts“ geregelt,[17] beseitigte andererseits allerdings das französische Gerichtssystem. Dieses System hatte den Zentralisierungstendenzen von russischer Seite zwar am längsten widerstanden, weil das russische Gerichtssystem nicht mehr zeitgemäß und deshalb nicht für eine Ausweitung auf Polen in Betracht gezogen worden war. Nachdem aber in Rußland die erwähnten umfassende Justizreformen stattgefunden hatten, für die zum Teil des englische Vorbild Pate gestanden hatte, und ein neues, teilweise wohl auf französische Vorbilder zu-rückgehendes Verfahrensrecht eingeführt worden war, stand einer Unifizierung nichts mehr im Wege.[18]

Die französische Gerichtsverfassung und damit die unmittelbar erkennbaren Spuren des fran-zösischen Rechts, waren in Polen also beseitigt.[19] In Bayern, Kurhessen und Preußen war die in den jeweiligen rheinischen Gebieten fortgeltende französische Gerichtsverfassung der Sta-chel im Fleisch gewesen, der schließlich dazu führte, daß bei den Reformen der Jahre 1848/49 das einheitliche bayerische, hessische und preußische Gerichtsverfassungsrecht – und damit mittelbar auch das Gerichtsverfassungsrecht des Deutschen Reichs von 1871 – in weiten Tei-len dem französischen Muster folgten. Rußland hingegen vereinheitlichte das Gerichtsverfas-sungsrecht nach eigenen, nicht auf der Linie des bürgerlich-liberalen Mainstream in Europa liegenden Vorstellungen.

2. Republik Krakau

Die bereits erwähnte, im Jahr 1815 gegründete autonome Republik Krakau verfügte über ein eigenes Gerichtssystem, das weitgehend dem Vorbild des Herzogtums Warschau nachgebildet war.[20] Die Krakauer Verfassung von 1818 regelt dies in sieben ihrer 22 Artikel: Die Justiz sollte sachlich, Art. 18, unabhängig sein. „Jeder, mindestens sechstausend Seelen enthaltende, Bezirk soll einen, von der Repräsentantenversammlung ernannten, Friedensrichter haben. Seiner Amtsführung ist eine Dauer von drei Jahren gesetzt.“, Art. 14. Es wurden ein Gerichts-hof erster Instanz und ein Appellationsgerichtshof eingesetzt, deren Richter auf Lebenszeit ernannt wurden, Art. 15. Alle Gerichtsverfahren sollten öffentlich sein, Art. 17. Der Zugang zum Richteramt war in Art. 19 exakt normiert: „Die Bedingungen, um das Richteramt zu er-langen, sind: 1) das dreißigste Jahr vollendet - 2) seine Studien auf einer der vorbemerkten hohen Schulen zurückgelegt, und die Doctorwürde erlangt zu haben; 3) ein Jahr lang bei einem Gerichtsactuar gearbeitet zu haben, und eben so lange bei einem Sachwalter in Thätigkeit gewesen zu seyn; 4) ein unbewegliches Eigenthum von achttausend Gulden polnisch am Werthe zu besitzen, das wenigstens ein Jahr früher, als man gewählt wird, erworben ist. Um ein Richteramt in zweiter Instanz, oder die Präsidentenstelle bei einem von beiden Gerichtshöfen zu erlangen, muß man, außer diesen Bedingungen, annoch die Stelle eines Friedensrichters zwei Jahre hindurch bekleidet haben und einmal Repräsentant [einer Gemeinde] gewesen seyn.“

Mit der Eingliederung Krakaus in die Habsburger Monarchie verlieren sich aber auch hier die Spuren napoléonischen Rechts. Das österreichische Gerichtsverfassungsrecht wurde auf das Gebiet der ehemaligen Republik Krakau ausgedehnt; auch die Republik Krakau konnte das Innovationspotential des französischen Rechts also nicht weitertragen. Ehemals polnische Gebiete waren nur insofern für die österreichische Rechtsentwicklung von Bedeutung, als man Galizien als Experimentierfeld benutzte: Dort wurden Gesetzeswerke zunächst einige Jahre getestet, bevor man sie – gegebenenfalls mit Veränderungen – für das gesamte Reich in Kraft setzte.

V. Fazit

Ähnlich wie in Deutschland trug auch in Polen das französische Recht zur Abschaffung der ständischen Justiz, zur Gestaltung bürgerlicher Rechtsformen,[21] zu einer Professionalisierung der Justiz und zur Entstehung einer juristisch gebildeten Intelligenzija bei. Ein unmittelbares Nachwirken der Rezeption französischen Rechts bis heute ist in Polen jedoch – anders als in vielen anderen europäischen Staaten – nicht festzustellen. Zu eng war das Schicksal des rezi-pierten französischen Rechts mit dem staatlichen Schicksal Polens im 19. Jahrhundert insge-samt verbunden, bildete es doch einen Bestandteil polnischer Eigenständigkeit vor allem ge-gen die russische Fremdherrschaft.

Allerdings wäre es spannend zu sehen, ob in der Zwischenkriegszeit bei der Gestaltung der Gerichtsverfassung der Republik Polen wieder an französische Vorbilder gedacht wurde; un-mittelbar augenscheinlich ist ein solches Anknüpfen allerdings nicht. Genauso spannend wäre es zu untersuchen, zu welcher Synthese die Rezeption französischen Rechts als Einpflanzen französischer Normen in polnischen Boden insgesamt geführt hat. Polnische Rechtshistoriker konstatieren: „Freilich besaß das üblicherweise als Geltungsgebiet des code civil angesehene Zentralpolen in Wirklichkeit schon im ersten Drittel des 19. Jahrhunderts ein französisch-polnisch-russisches Mischsystem“.[22] Die Betrachtung dieses Mischsystems könnte wiederum einen Baustein zu einer vergleichenden Rezeptionsforschung bilden.

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[17] KRAFT (Fn. 3) S. 46.

[18] BEREZA, Arkadiusz, *Das Modell der Friedensgerichtsbarkeit im Königreich Polen im Hintergrund des Rus-sischen Reiches in den Jahren 1876.1915,* in: SCHMIDT-RECLA, Adrian/SCHUMANN, Eva Schu-mann/THEISEN, Frank (Hrsg.), *Sachsen im Spiegel des Rechts,* Köln, Weimar, Wien, 2001, S. 355 ff., S. 355.

[19] WITKOWSKI/WRZYSZCZ (Fn. 4) S. 268.

[20] WITKOWSKI/WRZYSZCZ (Fn. 4) S. 251.

[21] WITKOWSKI/WRZYSZCZ (Fn. 4) S. 272.

[22] GIARO, Tomasz, *Modernisierung durch Transfer – Schwund osteuropäischer Rechtstraditionen,* in: DERS. (Hrsg.), *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert,* Frankfurt/Main, 2006, S. 275 ff., S. 319.

The Sceptical Mind – Towards a New European Ius Commune?

*Benedikt Forschner**

Abstract

When it comes to the current Europeanisation of private law, it is little surprise that those, who – referring to Savigny – stress the necessity of an organic legal development, refer to the learned ius commune as historical role model, which had once been pushed back inter alia by the un-beloved codification movement. This essay provides an alternative view on the relationship between the ius commune and current developments in European private law by accentuating the fundamental structural differences between both concepts. It claims that a 'sceptical' historical approach might be more useful for the future of Europe than the myth of a 'paradise lost'.

Key words: *Ius Commune; Ius Communitatis; European Private Law; Political Authority.*

"[...] if history is to do its liberating work it must be as true to fact as it can possibly make itself, and true to fact it will not be if it begins to think what lessons it can teach."
Frederic William Maitland, Letters II, p. 105

I. À la recherche du temps perdu

After the collapse of the moral and physical order in the course of the Second World War, especially German legal scholars reminded an ongoing European legal tradition and its deep rootedness in Roman law and the *ius commune.* Paul Koschaker's study on *Europe and Roman Law,* written in 1947 within the ruins of Berlin, must be understood as an educational appeal to legal historians to keep alive in the time to come *"what Roman law has done in its 850-years history for the law of Europe"*[1]; and Franz Wieacker, deeply grieved by the moral disaster, regarded legal history as an *"utterance about the existence of the law in the depth of the past"* and took it now for its prior duty to save the jurist from becoming *"a mere engineer and routinier, who sacrifices the vital spirit of the law for the commands of an extralegal authority or the dogmatists' dead theorems."*[2] One feels reminded of Proust's narrator in *À la recherche du temps perdu*, who realises that he spent almost all his lifetime dealing with trivia instead of producing some masterpiece, which could remain relevant in the future after his death: At the very moment of this moral disaster, the only and last option to make his life somewhat useful is to write the story of his memories; otherwise, this past would be irretrievably lost.

Despite these attempts to rebuild the "practical relevance" of legal history, it has nevertheless largely been identified as a particular science of history rather than a discipline required to understand current legal developments.[3] From the 1980s on, the significant works of Helmut Coing and Reinhard Zimmermann changed this view fundamentally, emphasizing the Roman foundations of the civilian tradition[4] and a continuous development from the *ius commune* to the newly emerging European private law.[5] At that time, the political and intellectual

* Benedikt Forschner, Wissenschaftlicher Mitarbeiter, Chair for Civil Law, Roman Law and History of Ancient Law, University of Erlangen-Nuremberg., Germany. The author is indebted to Prof. Dr. Hans-Dieter Spengler, Prof. Dr. John Cairns, Dr. Paul du Plessis and Michael Mirschberger for numerous discussions on this topic. The usual disclaimer applies.

1 P. Koschaker, Europa und das Römische Recht, 4th edition, 1966, p. 352: "[...] *ist man eine Besinnung schuldig über das, was es* [*i.e. Roman Law*] *in einer Geschichte von 850 Jahren für das Recht Europas geleistet hat".*

2 F. Wieacker, Privatrechtsgeschichte der Neuzeit, 1952, p. 3: *"Rechtsgeschichte ist uns Heutigen* [...] *jene Aussage über das Dasein des Rechts in der Tiefe der Vergangenheit, die den forschenden wie den lernenden Juristen davor bewahren kann, ein bloßer Techniker und Routinier zu werden, der den lebendigen Geist des Rechts den Befehlen rechtsfremder Macht oder den toten Lehrsätzen der Schuldogmatik aufgeopfert hat".* Consider that Wieacker took up a contrary position exactly ten years earlier, F. Wieacker, Der Standort der römischen Rechtsgeschichte in der deutschen Gegenwart, DR 12 (1942), p. 49.

3 R. Zimmermann, Europa und das römische Recht, AcP 202 (2002), p. 243 at p. 246.

4 R. Zimmermann, The Law of Obligations; Roman Foundations of the Civilian Tradition, 1996.

5 H. Coing, Europäisches Privatrecht, volume I, 1985; volume II, 1989.

climate was more favourable to enforce those ideas:[6] The rapid enlargement and the increasing extension of its legislative power let the European Union move closer to the citizens of the member states than ever before; and the emerging of Europe as a "state-like" entity called for positive, identifying narratives about its common traditions beyond wars and lessons painfully learned from history. Beside this, the neo-savignian[7] idea of an organic legal development was surely a somewhat reassuring reply to the deep uncertainties caused by sweeping changes after the end of the Cold War.

Away from distinctions in detail, this *"suitably renewed"*[8] approach to legal history is given mainly two tasks: instead of merely reconstructing past law, it should provide a deepened understanding of the present (Reinhard Zimmermann uses the analogy of oak tree and acorn to describe the relationship between past and present[9]);[10] and moreover, knowledge about the past should serve as an inspiration and a connecting factor for an organic development of current law.[11] The first task might be characterised as passive, whereas the second provides the legal historian with an active, constructive role in building up a legal order.[12] It is hardly possible to conceal the anti-political affect of this approach, which replaces authority *ratione imperii* with authority *imperio rationis.*[13]

When it comes to the current Europeanisation of private law, it is little surprise that those, who – referring to Savigny – stress the necessity of an organic legal development, refer to the learned *ius commune* as historical role model,[14] which had once been pushed back inter alia by the un-beloved codification movement. The *ius commune* appears here not just as a common root of the national judicial systems in Europe and as an historical example of how to organise an organic, although widespread legal order, but as an alter ego of the emerging European private law, which has to be developed, or more precisely, as Philip Hellwege put it, to be "restored" in accordance with its historical standards.[15]

In what follows I try to provide an alternative view on the relationship between the *ius commune* and current developments in European private law by accentuating the fundamental structural differences between both concepts. It is not my concern to rule out the possibility of a European private law similar to the *ius commune* in an unknown future. But as we will realise, legal development is rather contingent on hardly foreseeable political decisions than on historical inevitabilities; and the context-dependency of the past makes it at least difficult to deduce how the future should be designed. My analysis is therefore mainly confined to the present and the past; the uncertainties caused by the current politico-economical crisis of the European Union prevent me from making any visionary predictions of its future development.[16]

II. Beyond Authority: The Ius Commune as an Educational Process

Some Short Historical Remarks

Whereas the Justinian codification played an important, although declining role in the Byzantine Empire until the final invasion of the Turks in 1453,[17] the legal life in the western part of the former Roman Empire between the 6th and the

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6 A growing number of legal scholars is following these aims now; cf. for instance H. Kötz, Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?, JZ 1992, p. 20; A. Flessner, Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung, RabelsZ 56 (1992), p. 244; H. MacQueen & A. Vaquer & S. Espiau Espiau, Regional Private Laws & Codification in Europe, Cambridge 2003; G. Hamza, Wege der Entwicklung des Privatrechts in Europa, Passau 2004; N. Jansen, Binnenmarkt, Privatrecht und Europäische Identität, Tuebingen 2004; P. Hellwege, Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem, 2004; C. Twigg-Flesner, The Europeanisation of Contract Law, 2008, pp. 2 et seq.; R. Michaels, Umdenken für die UNIDROIT-Prinzipien. Vom Rechtswahlstatut zum Allgemeinen Teil des Vertragsrechts, RabelsZ 73 (2009), p. 866 at pp. 884 et seq.; recently N. Jansen, The Making of Legal Authority, Non-legislative Codifications in Historical and Comparative Perspective, Oxford 2010.

7 R. Zimmermann, Savigny's legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science, Law Quarterly Review 112 (1996), p. 576.

8 R. Zimmermann, supra n. 3, p. 243 at p. 245.

9 R. Zimmermann, supra n. 3, p. 243 at pp. 311 et seq.

10 N. Jansen, Binnenmarkt, supra n. 6, p. 79.

11 D. Heirbaut, Feudal Law: the Real Ius Commune of Property in Europe, or: Should We Reintroduce Duplex Dominium?, EuRPrL 3 (2003), p. 301; R Zimmermann, Roman law and European legal unity, in: A. S. Hartkamp et al. (eds.), Towards a European civil code, 1994, p. 65; idem, Civil code and civil law. The „Europeanization" of private law within the Eurpean Community and the re-emergence of a European legal science, Columbia Journal of European Law 1 (1994), p. 63.

12 H. Coing, Von Bologna bis Brüssel, 1989, p. 19.

13 Cf. recently N. Jansen, Legal Authority, supra n. 6. The same counts for Pierre Legrand's thinking, who – vice versa – denies *any* possibility of the convergence of the legal systems in Europe; see P. Legrand, European legal systems are not converging, International and Comparative Law Quarterly 45 (1996), p. 52; for a critique on Pierre Legrand, see A. Watson, Legal Transplants and European Private Law, Electronic Journal of Comparative Law, vol 4.4 (December 2000), http://www.ejcl.org/ejcl/44/44-2.html.

14 M. Bellomo, The Common Legal Past of Europe, transl. by L G Chochrane, 1995, p. 31: *"From the point of view of history, then, the age of codification is over"*; E. Schrage, Utrumque Ius. Über das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit in Vergangenheit und Zukunft, RIDA 39 (1992), p. 383. Rolf Knuetel, however, stresses the paramount importance of Roman Law, see R. Knuetel, Rechtseinheit in Europa und Römisches Recht, ZEuP 1994, p. 244; idem, Ius Commune und Römisches Recht vor Gerichten der Europäischen Union, JuS 1996, p. 768.

15 P. Hellwege, Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem, 2004, p. 6; see also N. Jansen, Binnenmarkt, supra n. 6, p. 79; idem, Authority, supra n. 6, p. 8: *"empirically adequate reconstruction of the legal system"*.

16 See also T. Giaro, Europäische Privatrechtsgeschichte: Werkzeug der Rechtsvereinheitlichung und Produkt der Kategorienvermengung, Ius Commune 21 (1994), p. 1 at p. 37: *"Die Frage ob, wann, wie und welche Rechtsfiguren ‚wiederkehren' werden, gehört ja weder der Rechtsgeschichte noch der Rechtsdogmatik, sondern der Rechtsfuturologie an"*.

17 See P. Stein, Roman Law in European History, 8th edition 2004, pp. 35-36; G. Mousourakis, The Historical and Constitutional Context of Roman Law, 2003, pp. 397-410.

11th century was mainly influenced by widespread local laws of the diverse Germanic tribes.[18] Although these local laws contained elements of Roman law and did surely not express a pure "Germanic character" of any kind whatsoever,[19] their intellectual penetration of the Roman legal heritage was less sophisticated than in the East.[20] The practical turning point in the West might have been the discovery[21] of a manuscript of the Digests from the 6th century in Pisa at about 1050,[22] even though – as it is mostly the case in history – this single event was not solely responsible for the subsequent development.[23] Above all, the rapid social and economical changes during this time[24] created a strong practical need for a law, which was – unlike the diverse local laws – abstract and flexible enough to deal with the varying socio-cultural problems; and the ongoing controversy between the empire and the papacy about the extent of the respective powers was in particular a controversy about political theories[25] and – linked to this – the interpretation of ancient legal documents.[26]

Without these social, economical, and political impacts, the mere discovery of the *Littera Pisana* would probably not have caused such a sweeping effect on the legal development in Europe. The practical needs served as breeding ground for the intensified intellectual penetration of Roman law[27] and fostered the formation of a university scene, which – built up on the myth of Bologna[28] – eventually ranged from Italy, Spain and Portugal to the German Empire and the Netherlands in the 16th century: Beside Bologna, the significant law faculties in Naples, Padua, Orléans, Montpellier, Salamanca, Valladolid, Coďmbra, Prague, Vienna, Heidelberg, Cologne, Erfurt, Leuven and Douai may be mentioned.

Although a wide gap among the different universities persisted in regard to their particular teaching quality, their general teaching methods did not differ substantially until the early 16th century;[29] and especially since Accursius' Glossa ordinaria was published sometime before 1263, a uniform basic document was available which helped to harmonise legal education.[30] This – mostly – homogenous teaching system, the use of Latin as common *lingua franca* and the students' proverbial wanderlust, which let them travel *per mare et terras,*[31] gave birth to a new class of internationally oriented and European trained jurists. Over the years, these jurists gained influential positions in administrative departments and courts and helped to give practical effect to the former theoretical learned law. Assisted by the church, which already possessed an evolved court organisation, the learned *ius commune* could gain significant impact on the legal practice within the European countries.

Beyond Political Authority

Given this background, Norbert Horn correctly characterised the forming of the *ius commune* primarily as an "educational process", which was mainly developed by analysing and penetrating the Justinian Codification (and the Decretum Gratiani)

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[18] As Maurizio Lupoi could plausibly show, a uniform Germanic legal order did not exist; see M. Lupoi, The Origins of the European Legal Order, 2000, pp. 16-25. Lupoi's work was a substantial contribution to relativise Marco Scovazzis' influental picture of an homogenous Germanic *Bund*; see, for instance, M. Scovazzi, Le origini del diritto germanico. Fonti, preistoria, diritto publico, 1957; idem, Scritti di storia del diritto germanico, 1975.

[19] Ernst Levy has the merit to having raised awareness of this fact and having caused vibrant debates on that topic; see E. Levy, The West Roman Vulgar Law. The Law of Property, 1951; idem, Weströmisches Vulgarrecht. Das Obligationenrecht, 1956. For a balanced sketch of Levy's work see D. Liebs, Roman Vulgar Law in Late Antiquity, in: B. Sirks (ed.), Aspects of law in late antiquity: dedicated to A. M. Honoré on the occasion of the sixtieth year of his teaching in Oxford, 2008, pp. 35-53.

[20] See P. Stein, supra n. 17, pp. 38-43. Nevertheless it would be improper to refer to the Germanic tribe laws as being simply ‚vulgar'; see F. Wieacker, ‚Vulgarrecht' und ‚Vulgarismus'. Alte und Neue Probleme und Diskussionen, in: Studi in onore di Arnaldo Biscardi I, Milan 1982, pp. 33-51; D. Liebs, supra n. 19, pp. 35 – 53.

[21] It is controversially discussed whether the manuscript was discovered by accident or if some jurists searched for it specifically, after having read about the Digests in the Institutes; cf. C M Radding, Vatican Latin 1406, Mommsen's Ms. S, and the reception of the Digest in the Middle Ages, SZ 110 (1993), p. 501 at p. 545.

[22] The manuscript is now stored at the Bibliotheca Laurenziana in Florence.

[23] G. Mousourakis, supra n. 17, p. 423.

[24] See M. Bellomo, supra n. 14, pp. 55-58.

[25] G. Mousourakis, supra n. 17, p. 423.

[26] The importance of the reception of Roman Law in terms of developing a theory of imperial power which does not bestows the right to choose the emperor on the pope is pointed out by J Muldoon, Empire and Order: The Concept of Empire, 800-1800, 1999, p. 87; on the rivalry between imperial and papal claims see G. Dilcher, Der mittelalterliche Kaisergedanke als Rechtslegitimation, in: D. Willoweit (ed.), Die Begründung des Rechts als historisches Problem, 2000, p. 153 at p. 161.

[27] As a document stored at the Bodleian Library in Oxford reveals, the students distanced themselves from rhetoric and philosophy, claiming that "we do not study useless things"; Oxford, Bodleian Library, Rawl.C.427, fol. 70ra; see M. Bellomo, supra n. 14, p. 114.

[28] On Irnerius, Pepo and the myth of Bologna see M. Bellomo, supra n. 14, pp. 112-122; E. Spagnesi, Wernerius bononiensis iudex. La figura storica d'Irnerio, Florence 1970; L. Schmugge, Codicis Iustiniani et Institutionum baiulus. Eine neue Quelle zu Magister Pepo von Bologna, Ius Commune 6 (1977), p. 1; G. Mazzanti, Irnerio: contributo a una biografia, Rivista Internazionale di Diritto Comune 11 (2000), p. 117.

[29] H. Coing, Die juristische Fakultät und ihr Lehrprogramm, in: idem (ed.), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, volume II: Neuere Zeit (1500-1800), 1977, p. 53.

[30] E. Schrage, supra n. 14, p. 383 at p. 395; N Horn, Die legistische Literatur der Kommentatorenzeit, in: H. Coing (ed.), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, volume I: Mittelalter (1100-1500), 1977, p. 268.

[31] R. de Rocosel, De certamine animae. Invectio contra goliardos: „Per mare, per terras, quasi paper inutilis erras"; see O. Dobiache-Rojdesvensky, Les Poésies des Goliards, 1931, p. 184. On the travel activties especially of the German students see W. J. Courtenay, Study Abroad: German Students at Bologna, Paris and Oxford in the Fourteenth Century, in: W. J. Courtenay & J. Miethke (eds.), Universities and schooling in medieval society, 2000, pp. 7-31.

as homogenous textual groundwork.[32] This process generated a learned law, a (theoretically) universal law beyond space and time, and a law which did not, from its internal point of view, require any actual imperial command or order. The validity of the law was rather justified on an abstract, metaphysical level, through the authority of the cultural heritage, which stood for a common tradition with the Roman princeps and the Holy Roman Empire.[33] It would be mistaken to take the jurists of the *ius commune* for un-political scholars in ivory towers; in fact, the reasons underlying the investigation of the *ius commune* were thoroughly political,[34] and it is well known how intensively the Bolognese jurists supported the rulers of their time.[35] But nevertheless, from its own systematic standpoint, the learned *ius commune* was an un-political law, because by creating the future it remained linked to the past, and bound by tradition it had to resist ideological political interventions as far as possible.

III. The Ius Communitatis and the Ideology of the State

Distrust in Political Authorities

When the Lando Commission started to formulate the Principles of European Contract Law (PECL) in 1982,[36] its members surely aimed to pick up the thread of exactly this tradition; the same counts for its successors, the European Group on Tort Law, the Research Group on EC Private Law (Acquis Group), and – last but not least – the Study Group on a European Civil Code.[37] In fact, the work of these commissions has much in common with the work of the medieval jurists: Apart from (especially methodological) differences in detail,[38] all of these projects are carried out privately without any governmental mandate, are strictly limited to a scientific, apolitical approach on law (although the underlying aims might be anything but apolitical)[39], and are based on the belief in legal authority beyond the ideological framework of the modern state. Among the academic legal scholars,[40] Manlio Bellomo points out his distrust in political, state-run authorities most authentically, and his thoughtful remarks are worth to be quoted in full length: *"In 1943 I had to witness blood and pain, tragedies and despairs, and I had to learn the meaning of starvation during the war and the post-war-period. It is difficult for me still to believe in the 'commanders', and it is difficult for me to believe that their heroic deeds can serve as impetus for a culture which follows the principles and aims of humanity and civilisation."*[41]

The Ideology of the State as Legal Coordinate: Incompatibilities between the Ius Commune and the Ius Communitatis

I doubt whether this conception of law is compatible with the basic principles of European law as they have been developed until now. The European *ius communitatis* is still well-entrenched in the ideologies of the state. As far as I can see, there are also no signs that these legal coordinates are seriously fading.

The relationship between the European and the national legal order is basically characterised by "direct effect"[42] and "supremacy"[43]. Underlying this is the idea of the European Union as a partly sovereign entity with a state-like personality. I consciously do not speak of a sovereign entity or a state, since the sovereignty is limited by the authorisation given by the European member states, and this enduring dependency surely appears contrary to Georg Jellinek's three basic elements of a state: state territory, state people and, last not least, state power.[44] But having these crucial differences in mind, it is justified to emphasise the *focus* of the European Union on the *ideologies* of the state, the borrowing of their arguments and reasoning figures and their transfer at a higher level. Neil Walker recognised (inter alia) holism and magisterialism as dominant narratives of the concept of state.[45] By referring to the European Union as a "new legal order" and equipping its law with direct effect and supremacy, the ECJ undoubtedly adheres to these narratives. Also the project of the European Parliament to formulate a European Civil Code[46] is in accordance with these principles: The idea of the codification is almost paradigmatically connected

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[32] N. Horn, supra n. 29, p. 264.

[33] See N. Jansen, Legal Authority, supra n. 6, p. 33.

[34] On the increasing relevance of law in the political debates of the eleventh and twelfth century in general see K. Pennington, Politics in Western Jurisprudence, in: E. Pattaro & P. Stein, The Jurists Philosophy of Law from Rome to the Seventeenth Century, 2007, pp. 158 et seq.; see also R. van Caenegem, European Law in the Past and the Future, 2002, pp. 75 et seq.

[35] W. Ullmann, A Short History of the Papacy in the Middle Ages, 1972, p. 191: *"It was at the Diet of Roncaglia that the ideological alliance between the Staufen empire and the Roman lawyers of Bologna was cemented."*

[36] R. Zimmermann, Die Europäisierung des Privatrechts und die Rechtsvergleichung, 2006, pp. 35-38.

[37] See C. von Bar, Die Study Group on a European Civil Code, in: Festschrift für Dieter Henrich, 2000, pp. 1 et seq.

[38] Cf. N. Jansen, Legal Authority, supra n. 6, pp. 59-60.

[39] T. Giaro, supra n. 16, p. 1 at p. 38.

[40] Cf., for instance, H. Coing, Europäisierung der Rechtswissenschaft, NJW 1990, p. 937; H. Kötz, Gemeineuropäisches Zivilrecht, in: Festschrift für Konrad Zweigert, 1981, p. 481; idem, Europäische Juristenausbildung, ZEuP 1 (1993), p 268; R. Zimmermann, supra n. 4; M. Faure & J. Smits & H. Schneider (eds.), Towards a European Ius Commune in Legal Education and Research, 2002; N. Jansen, Legal Authority, supra n. 6.

[41] M. Bellomo, Europäische Rechtseinheit, Grundlagen und System des Ius Commune, 2005, p. V. The passage is taken from Bellomo's preface to the German readers; it is not part of the Italian and English editions.

[42] ECJ Case 26/62 – van Gend & Loos [1963] ECR 1.

[43] ECJ Case 6/64 – Costa/ENEL [1964] ECR 585.

[44] G. Jellinek, Allgemeine Staatslehre, 1900.

[45] N. Walker, Out of Place and Out of Time: Law's Fading Co-ordinates, EdinLR 14 (2010) pp. 13 at pp. 34-36.

[46] W. Tilmann, Entschließung des Europäischen Parlaments über die Angleichung des Privatrechts der Mitgliedstaaten vom 26.05.1989, ZEuP 1 (1993), p. 613.

with the era of the modern state.[47] Compared to that, the drafting of the 'Common Frame of Reference' seems to be almost less ambitious; but it can be said *"that it shall be backed in some way by the legislative authority of the European Union"*.[48]

The ideologies of the state as legal coordinates are not (yet) fading.[49] Surely, the globalisation caused an increasing dependency of states – especially the European states – on each other, and the law is in search of answers for the new challenges. One answer is the transfer of power to the EU as a higher international level. This caused conflicts between national states and the EU on questions of sovereignty: When Advocate General Jacobs put forward his idea of a "civis europeus"[50] – using Latin, the lost *lingua franca,* as a sign of European commonness[51] – he emotionally attacked the colourful mess of diverse national states; against this, the German *Bundesverfassungsgericht* recently made clear that the German Constitution unchangeably guarantees the national state, claiming that there is absolutely no legal way for Germany to take part in a project that ends up in a unified European state.[52] But this general conflict does not question the *idea* of sovereignty in any way. It questions the sovereignty of the single member state or vice versa the EU, but it perfectly deals with the intellectual framework of the ideologies of the state. In the current crisis it is surely about the political authority of Greece, but not in order to question the ideology of political authority, but in order to save the political authority of the EU. In other words: The ever growing EU does not attack the idea of the state, but of the *member* state; it is not leaving the ideologies of the state, but is adopting them.

The newly emerging forms of unchartered law have not (yet) the potential to jeopardise these ideologies. Be it Global Administrative Law (GAL), "new governance methods" like the Open Method of Coordination (OMC) or Global General Law like the United Nations Security Council: Firstly, they are all linked to very specified areas, if not to say to the margins of law, and do not provide any answers to the general problems of daily social life; and secondly, they are all covered by state law, anyway.

It is also not yet possible to make any serious judgement of the future success or failure of the private research groups mentioned above on a long-term basis. The Principles of European Contract Law had an undeniable impact on the so called "modernisation" of the German law of obligations in 2001;[53] but given the fact that the majority of the reformed rules featured a "European character" already before, this is not overly surprising. Until now, nothing suggests a similar success of the Principles of European Tort Law, whose implementation would require much stronger modifications of the respective national legal orders.[54] And be that as it may: As long as the harmonisation relies on a government-run authoritative order, it does not question the ideologies of the state. Surely, it can be observed by now that courts occasionally consult these privately formulated principles.[55] But they take them into account only if they are authorised to do this by their respective national laws, and do not treat these principles as *independent* sources of law. Also the ECJ points out constantly, that the national courts' obligation to interpret the law in accordance with the European treatises and secondary law rules *"cannot serve as the basis for an interpretation of national law contra legem"*.[56] It might come to an *"organic assimilation"*[57] between the national legal orders beyond state-run legislation one day, and national courts might – as the commentary on the Principles of European Contract Law urges them to do – adjudicate even contrary to their national laws then.[58] It is not the point here to discuss whether such a development is to be welcome or not. But given the fact that the UNIDROIT (International Institute for the Unification of Private Law) is working on issues of legal unification already since 1940 without having any strong impact on the basic principles of private law,[59] one can be at least sceptical whether this could happen anytime soon. That is not to say that the ideologies of holism and magisterialism will remain intact forever. But I doubt that the time has already come to write their obituary.

A system which takes legislation for a top-down-process is hardly compatible with the system of the *ius commune* as a role model. The *ius commune* was aimed at constructing the future

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47 Cf. T. Giaro, supra n. 16, p. 1 at p. 35: *"Mit dem Projekt des europäischen Schuldrechtsgesetzes ziehen es die Zivilisten und die Rechtsvergleicher vor, an den Code Napoléon und an das BGB anzuknüpfen".*

48 N. Jansen, Legal Authority, supra n. 6, p. 15.

49 For a contrary viewpoint see N. Walker, supra n. 45, p. 13 at pp. 33-44. This is also the tendency of J. Schwarze & R. Zimmermann (eds.), Globalisierung und Entstaatlichung des Rechts, Volume I & II, 2008; N. Jansen & R. Michaels (eds.), Beyond the State. Rethinking Private Law, 2008. Cf. also R. Michaels, supra n. 6, p. 866 at p. 885; N. MacCormick, Questioning Sovereignty. Law, State and Practical Reason, 1999, reprinted 2008, esp. chapter 8, pp. 123-136.

50 Case C-168/91 – Konstantinidis [1993] ECR I-1191; Opinion of Mr Advocate General Jacobs.

51 U. Haltern, Das Janusgesicht der Unionsbürgerschaft, Swiss Political Science Review 11 (1), p. 87 at p. 106.

52 BVerfG, 2 BvE 2/08, 30.6.2009: *"European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions."*

53 R. Zimmermann, supra n. 36, p. 39.

54 See below IV.

55 A. Metzger, Extra legem – intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, pp. 266-267; C. Vendrell Cervantes, The Application of the Principles of European Contract Law by Spanish Courts, ZEuP 16 (2008), p. 534; D. Busch, The Principles of European Contract Law before the Supreme Court of the Netherlands. On the Influence of the PECL in Duch Legal Practice, ZEuP 16 (2008), pp. 549.

56 ECJ Case 212/04 – Adeneler [2006] ECR I-6057, paragraph 110; see also ECJ Case 80/86 –Kolpinghuis Nijmegen [1987] ECR 3969 and ECJ Case 105/03 – Pupino [2005] ECR 5285.

57 R. Zimmermann, supra n. 36, p. 39.

58 Art. 9:102, Comment D: *"Under these principles the aggrieved party has a substantive right to demand and to enforce a non-monetary obligation. Granting an order for performance thus is not in the discretion of the court; the court is bound to grant the remedy, unless the exceptions of paragraph (2) and (3) apply. National courts should grant performance even in cases where they are not accustomed to do so under their national law."*

59 R. Zimmermann, supra n. 36, p. 10; R Michaels, supra n. 6, p. 866 at p. 868.

by reconstructing the past; it could (and had to) leave this task to the "experts for the past", the learned lawyers. The current *ius communitatis* is (still) aimed at constructing the future by political decisions of a sovereign, whether they are in accordance with the past or not. Modern thinking, as Wieacker put it, is the victory of the presuppositionless reason over revelation and the authority of the past.[60] It would be mistaken to assume that *tradition* does not play any role in that thinking. But tradition is distinct from the past as a historical fact: It is the ever changing narration of the past,[61] its fairy tale, which is rather embedded in the present than it is embedding the present in the past. The past is alive through tradition, but just in a way it complies with the respective conditions of the present; it can be made useful to support political decisions,[62] but it does not and cannot play any *autonomous* role in legitimating their validity. In a system like that, a *ius commune* without any political authority is in fact, to quote Justice Holmes, an *"omnibrooding presence in the sky"*.[63]

IV. The Ius Commune as a Role Model for Legal Harmonisation?

It is exactly that form of modern re-narration of the past, which tends to characterise the process of the expansion of the *ius commune* as an essentially uniform and steady "reception" of the Roman law:[64] The common past of Europe, which is also, and especially, a past full of wars, blood and tears, full of contradictory political and philosophical ideas, is contrasted with a "common legal past of Europe", which should serve as an argument for a future, *"in which national barriers will be in great parts dismantled"*.[65]

The picture of a European legal unity during the late middle ages and the Early Modern Age is at least inaccurate. The distinctions between the legal systems of England and the rest of Europe are well known.[66] But also regarding the continental European countries, even though most[67] of them shared the forming of a learned *ius commune* to some extent, the assumption of a "common legal past" must be relativised: Firstly, the local emergence of the *ius commune* took different time spans; and secondly, it did not result in a uniform legal layer which stretched from one end of Europe to the other, but in a collection of (some) common legal rules with nevertheless partly logically differing interpretations. Above all, the practical impact of these common rules in the different European countries was dependent on the existence of local laws, which overrode the subsidiary *ius commune*. In fact, the "system of the *ius commune*" stands not so much for overall legal unity as for the development and elaboration of a new systematic approach to law, a new methodology, which never aimed at building up a uniform legal order. Unfortunately, it is not possible to describe this in detail here; some very short notes must therefore suffice.

Wherever the customary law already contained substantial elements of Roman law before, the new ideas could fall on good soil and emerge quite speedily.[68] This especially goes for Italy[69] and Southern France[70], whereas in the north of France – partly as a consequence of Pope Honorarius III's decree "Super specula", which banned the teaching of Roman law from the University of Paris[71] – a dense and ramified net of local *coutumes*[72], *chartes de franchises*[73], *privilèges*[74] and (in the more spacious territories) *atours*[75] hampered the invasion of the new and alien law. A detailed examination of the situation in Spain also confirms the impression of a legal hotchpotch, which indeed contains some common – especially methodical – elements, but is far from being clear, uniform and homogeneous. Although the Spanish jurists could revert to a Romanistic tradition[76] and studied intensively the learned law from Italy and France,[77] not very much Spanish literature on the Justinian codification exists

60 F. Wieacker, supra n. 2, p. 30; see also N. Jansen, Legal Authority, supra n. 6, p. 16.
61 M. Krygier, Law as Tradition, Law and Philosophy, 5 (1986), p. 237.
62 Cf. A. Wijffels, Historical Expertise and Methods in a Forensic Context, in: idem (ed.), History in Court, 2001, p. 35.
63 Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917), J. Holmes dissenting.
64 H. Coing, supra n. 5, volume I, 1985, p. 7: *"Über Jahrhunderte hatten die Länder Mitteleuropas ein gemeinsames Recht, ein Ius Commune, und eine gemeinsame Rechtswissenschaft"*.
65 M. Bellomo, supra n. 14, p. xvii.
66 It is, however, not true that the *ius commune* as amalgam of Roman and canon law did not play any role in the development of English law; see, for instance, R. H. Helmholz, The *Ius Commune* in England. Four Studies, 2001.
67 On the – often neglected – specific situation in eastern Central Europe, especially in Poland and Hungary, see T. Giaro, supra n. 16, p. 1 at pp. 13-18.
68 G. Mousourakis, supra n. 17, p. 423.
69 On the situation in Italy see the classical study by F. Brandileone, Il diritto bizantino nell'Italia meridionale dall'VIII al XII secolo, in: idem, Scritti di storia giuridica meridionale, 1970, pp. 213-313.
70 On the development of the School of Orléans see R. Feenstra, L'école de droit d'Orléons au treizičme sičcle et son rayonnement das l'Europe médičvale, Revue d'histoire des facultés de droit et de la science juridique 13 (1992), p. 23; on its influences on Italy see E. M. Meijers, Études d'histoire du droit, Volume III, Leiden 1959, pp. 3-148, and B. Paradisi, La scuola di Orleans, un'epoca nuova del pensiero giuridico, in: idem., Studi sul Medioevo Giuridico II, Rome 1987, pp. 965-981.
71 On the political background of the decree see R. C. van Caenegem, An Historical Introduction to Private Law, 1992, p. 82; W. Ullmann, The Prohibition of Roman Law at Paris, Juridical Review 60 (1948), p. 177.
72 The coutumes of Normandy, Bretagne, Touraine, Anjou and Borgogne survived.
73 Beauvais; Laôn; Amiens; Lille and Ruen.
74 Nîmes; Bordeaux.
75 Famous examples are the atours from the duke of Burgundy and the duke of the Bretagne as well as the atours from the abbots of Sainte-Genevičve and Saint-Germain-des-Prčs.
76 This tradition becomes manifest inter alia in the Fuero Juzgo, the translation of the Visigothic Liber Iudiciorum.
77 N. Horn, supra n. 30, p. 268.

until the 15th century (the same applies to Portugal)[78]. Instead, the literary scene is dominated by glosses and commentaries on the widespread local laws,[79] which have been largely codified already from the 11th century on.[80] These local laws served as a protective barrier against influences of more abstract, general laws quite successfully; as the fate of the Fuero Juzgo, the Fuero Real and the imposing Libro de las Leyes shows, even on the higher level of the *ius proprium* attempts to unify the legal landscape were – at least partly – doomed to failure.

The most substantial changes in the course of the reception were surely experienced by the German law, but this development started significantly later than in Italy or Southern France, and its intensity and radicality eventually featured specific traits of a German "Sonderweg". The situation in Germany between the 12th and late 14th century with its focus on the compilation[81] and penetration[82] of local laws reminds on the varied Spanish legal landscape. But from the late 15th century onwards, the received Roman law could succeed, especially due to the jurisdiction of the Reichskammergericht, which was founded in 1495 by the Imperial Diet in Worms. When the learned law finally reached its last peak with Savigny temporary winning his battle against Thibaut, the pan-European ideology had already merged into the idea of national states.

Given this background, the process of the demise of the *ius commune*, starting with humanism and proceeding with the emergence of the national state, is not so much a practical break, but an adoption of new theoretical foundations to an already existing legal fragmentation. The codification movements consolidated the fissuring of Europe by powerfully imposing national legal rules. On the national level, they finally achieved more legal unity than the *ius commune* could ever gain previously;[83] but the idea of a pan-European common law, derived from venerable Roman sources and academically penetrated by a class of internationally educated jurists, a law beyond national borders and state authority, had ceased to be.

Against this background it is anything but surprising that a really comprehensive uniform system of Private Law could never arise in Europe. A legal legacy common to most of the current European member states is surely the law of contract. Aside from some mutations especially in the 19th century,[84] which only had (and have) marginal practical effects,[85] its still existing principles have been developed before the national codification movements, combining (theological as well as secular) natural law doctrines with Thomistic Aristotelianism and will theories.[86] But even here, despite their common foundations, some rules differ quite significantly among the European states, such as the rules on offer and acceptance,[87] contractual formalities[88] and contractual liability[89]. In comparison to contractual law, the regulations on tort, unjustified enrichment and property have much less in common.[90] It is not about doubting joint pan-European roots – the law of tort might bear on the *actio legis Aquiliae;* the law of unjustified enrichment on the Roman *condictiones,* Pomponius D.12.6.14, D.50.17.206 and the late scholastic doctrine of restitution; and the law of property surely refers in some way to the Roman *traditio.*[91] But that does not mean a lot. Among the national legal systems, there is still no agreement on the very basic problem of strict liability;[92] the essential question whether a claim for restitution on unjust enrichment requires a corresponding financial loss is answered differently;[93] and neither the transfer of ownership[94] nor more detailed legal constructions like the retention of title[95] are harmonised – just to mention some striking examples. A unified European private law, which also comprehensively regulates tort law, law of unjustified enrichment and property, would therefore be "*a unique project without any historical role models*".[96]

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78 N. Horn, supra n. 30, pp. 300 – 302.

79 E.g. Bonifacio Garcia's Bonifacia; de Cańellas' Liber in excelsis; Bustamente's Peregrina on the Siete Partidas; de Montalvo's numerous commentaries on the Ordonanzas reales de Castilla, the Siete Partidas, the Fuero Real and the Orenamiento de Alcala Vallseca's and de Montjuich's commentaries on the Usatici and de Socarrats' commentaries on the Commemoracións de Pere Albert.

80 E.g. the fueros extensos of Avila, Toledo, Alcalá de Henares, Madrid, Zaragozza, Salamanca and León; Catalonia is dominated by usatges and costums, e.g. the Usatici Barchinoniae, the Consuetuts de Barcelona vulgarmente dites lo ‚Recognoverunt Proceres', the Consuetudines Ilerdenses and the Consuetudines gerundenses.

81 E.g. Eike von Repgow's Sachsenspiegel; the later Deutschenspiegel, Schwabenspiegel and Frankenspiegel and the huge range of city charters.

82 Significant are the works of Johann von Buch, Nicolaus Wurm, Hermann Langenbeck and Dietrich von Bocksdorf.

83 See also T. Giaro, supra n. 16, p. 1 at pp. 11, 13.

84 The German BGB and the Swiss law of obligations are strongly influenced by a strict pandectistic will theory, the French code civil and the Austrian ABGB by the jusnaturalistic contract theory; see J. Gordley, The Philosophical Origins of Modern Contract Doctrine, 1991, pp. 112 et seq.; 161 et seq.

85 N. Jansen, Binnenmarkt, supra n. 6, p. 29.

86 R. Zimmermann, "Heard melodies are sweet, but those unheard are sweeter ...", AcP 193 (1993), p. 121 at pp. 129 et seq.

87 C. von Bar & R Zimmermann, Grundregeln des europäischen Vertragsrechts, Part I & II, 2002, pp. 173 et seq.

88 C. von Bar & R Zimmermann, supra n. 87, pp. 142 et seq.

89 U. Huber, Das geplante Recht der Leistungsstörungen, 1999, pp. 89 et seq.; 105 et seq.; 109 et seq.

90 N. Jansen, Binnenmarkt, supra n. 6, pp. 31-63.

91 R. Zimmermann, supra n. 3, p. 243 at pp. 292 – 293.

92 C. von Bar, Gemeineuropäisches Deliktsrecht, volume II, 1999, paragraph 331 et seq.

93 N. Jansen, Binnenmarkt, supra n. 6, p. 45; P Birks, English Private Law II, 2002, paragraph 15.17 et seq.

94 N. Jansen, Binnenmarkt, supra n. 6, pp. 48-54.

95 E.-M. Kieninger & M. Graziadei (eds.), Security Rights in Movable Property in European Private Law, Cambridge 2004, p. 282 et seq.; B C Sulpasso, La vendita con riserva di proprietŕ in diritto comparato, in: L. Vacca (ed.), Vendita e trasferimento della proprietŕ nella prospettiva storico-comparatistica, volume II, 1991, p. 781 et seq.

96 N. Jansen, Binnenmarkt, supra n. 6, p. 62, referring to a European Civil Code.

V. The Sceptical Mind: Lessons from the *Ius Commune*

One is tempted to see what one wants to see; and one wants to see, what one needs: As Saint-Exupéry could show, the adults are not even capable of distinguishing between a hat and a boa constrictor eating an elephant.[97] This is, surely, not their fault: A boa constrictor eating an elephant looks like a hat, indeed.

The concept of the *ius commune,* as it is outlined above, has relatively less in common with the current basic concept of the *ius communitatis.* The European legal orders undeniably share a common heritage, and this led to some strikingly similar rules, especially in contract law. But the reception of the Roman law was never a uniform process, never ended up in a unified legal practice, and – above all – is based on principles which are deeply distinct from the coordinates of the modern European legal order. One might reproach me for not having understood the signs of the times, for remaining stuck in modernity instead of moving forward into a postmodern, "postpositivistic"[98] openness. But despite all the prophecies of doom, I simply doubt that the ideology of the state, the ideology of holism and magisterialism, has already ceased to be.

If history should be, according to Maitland, *"as true to fact as it can possibly make itself",*[99] it has undoubtedly an unsettling potential.[100] Its relation to tradition[101] can be characterised as an ongoing tension: Instead of being aimed at constructing a role model for the present, such a history deconstructs the respective fairy tales about the past; instead of providing current political decisions with a higher-ranking historical authority, it relentlessly unveils their autonomy and relativity. This is not its intention – but all too often the corollary result.

Does this approach to legal history end up in a pure *art pour l'art,* which is not only pointless, but even, due to its unsettling potential, dangerous? I do not think so. Firstly, in showing us the "otherness" of the past and its respective path-dependency,[102] it presents us with a foil against which we can deepen our understanding of the present we live in: We get aware of the narratives which underlie our own legal systems by contrasting them with the past, and by investigating alternative systems we recognise not only the relativity of the past, but also the relativity of the present. This eventually facilitates rational evaluations and reforms of our own legal systems. And secondly, and this is probably even more important, it shows that legal development is anything but self-evident, far away from being a steady development[103] such as 'from status to contract'.[104] The breaches of continuity, the inconstancies and – in Alan Watson's words – the diverse unforeseeable *"legal transplants"*[105] which can be observed in legal history make it difficult to believe in the necessity or even inescapability of an organic progression of the law: All too often utterly unsystematic and 'inorganic' political decisions are at the basis of legal developments.[106] From its internal point of view, the *ius commune* had a rather un-political character; but its rise based on the political need for a centralised bureaucracy and the strong support the law faculties got from politics therefore.[107] As Roul von Caenegem put it: *"If the ius commune influenced the modernization of government, it did not cause it: things had started to move before the legum professores were teaching and their pupils manning the councils of state and the law courts".*[108] In France, the significant writings of Dumoulin, Bourjon or Pothier did not have the impact to bring about legal unification; they indispensably contributed to its formation, but eventually the project was accomplished through the political will and power of Napoleon.[109] And the German debate between Savigny and Thibaut, which was to a great extent a debate about contemporary political issues,[110] was finally settled by the political power which *"put an end to the bickering among the jurists."*[111] Perhaps the political circumstances in Europe will allow or even support the reinvention of the historical *ius commune* one day; but *without* political support, its emergence – which would probably not end up in a harmonised European law – seems very unlikely. By deconstructing the self-evident authority of traditional

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97 A. de Saint-Exupéry, Le Petit Prince, 1943, chapter 1.

98 J. Basedow, Das BGB im künftigen europäischen Privatrecht. Der hybride Kodex, AcP 200 (2000), p. 445.

99 F. W. Maitland, Letters II, ed. by P. N. R. Zutshi, 1995, p. 105

100 On the threat of historicism cf R. Gordon, Historicism in Legal Scholarship, The Yale Law Journal 90 (1981), p. 1017 at pp. 1018-1024.

101 On "tradition" understood as ever changing "narration" of the past see above III.

102 I do not believe that we can completely escape the hermeneutic circle, but I think we can pragmatically minimise its risks by making us constantly aware of it. On the challenges of that approach see M Lobban, The Tools and Tasks of the Legal Historian, in: M. Lobban & A. Lewis, Law and History, 2004, p. 1 at pp. 8 et seq.; on the hermeneutic circle see H. G. Gadamer, Wahrheit und Methode. Ergänzungen, Register, 2nd edition, 1993, p. 109.

103 T. Giaro, supra n. 16, p. 1 at p. 20. On evolutionary theories of law see very recently H.-P. Haferkamp, Rechtsgeschichte und Evolutionstheorie, in: L. Siep, Evolution und Kultur, 2011, p. 35; C. Henke, Über die Evolution des Rechts, 2010.

104 Cf. H. Maine, Ancient Law, 1861, Chapter 5: *"[...] we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."* For a critique of Maine cf. F. W. Maitland, Letters I, ed. by C. H. S. Fifoot, 1965, p. 222. On Maine's ideological motives see recently K. Mantena, Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism, 2010.

105 A. Watson, Legal Transplants: An Approach to Comparative Law, 2nd edition, 1993.

106 Cf. R. v. Jhering, JhJb 5 (1861), p. 368 et seq.: *"Jene so oft gedankenlos nachgebetete Lehre von dem ‚organischen Werden', der Entwicklung von innen heraus* [...] *trägt doch die Gefahr einer kaum minder großen Verirrung nach der anderen Seite in sich, nämlich die: den Werth und die Bedeutung der menschlichen Thatkraft, die Rolle, die der freie Entschluß, die Reflexion und Absicht in der Geschichte spielen, ebenso zu unterschätzen, als jene Auffassung sie überschätzte".* Jherings critique on Savigny is not entirely fair, since Savigny never denied the impact of political decision, cf. C. F. v. Savigny, System des heutigen Römischen Rechts, volume I, 1840, Vorrede XIII: *"Alles Gelingen in unserer Wissenschaft beruht auf dem Zusammenwirken verschiedener Geistestätigkeiten* [...]*".*

107 On the constitutio „Habita" see P. Stein, supra n. 17, p. 54.

108 R. v. Caenegem, supra n. 34, p. 78.

109 R. v. Caenegem, supra n. 34, p. 78.

110 See J. Rückert, Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny, 1984.

111 R. v. Caenegem, supra n. 34, p. 35.

myths and by showing up alternatives, legal history is the sceptical mind, which reminds the political power on its own specific responsibility: The main features[112] of legal development do not result from an unevitable course of history, but from a number of political decisions.[113]

Those sceptical answers are not always politically rewarded. When Barbarossa asked the Bolognese jurists Martinus and Bulgarus for a historical legitimation to rule as *dominus mundi,* Bulgarus carefully denied for precise forensic reasons; Martinus, however, gave the favoured answer and received a horse as a gift. Bulgarus' famous response tells a lot about the relationship between scholars and their political supporters: *Amisi equum, quia dixi equum, quod non fuit equum.*[114] Does the understanding of the historical concept of the *ius commune* help to understand current developments in European Private Law? Yes, it does – *ex negativo.* And, above all: It reminds that the current as well as the forthcoming European developments are not self-evident, not the result of an "organic" path of history, but the outcome of political decisions. This is surely not an answer to win horses. But it might be more useful for the future of Europe than the myth of a 'paradise lost'.

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[112] I do not deny that legal development, especially in private law, is to some extent autopoietic; but the basic framework is shaped by political decisions.

[113] R. v. Jhering, Kampf ums Recht, 1872, p. 6 et seq.: „[...] *und wir müssen daher die in diesem Sinne von Savigny aufgebrachte und so rasch zu allgemeinen Geltung gelangte Parallele zwischen dem Recht auf der einen und der Sprache auf der anderen Seite entschieden zurückweisen. Als theoretische Ansicht falsch, aber ungefährlich, enthält sie als politische Maxime eine der verhängnisvollsten Irrlehren, die sich denken lassen, denn sie vertröstet den Menschen auf einem Gebiete, wo er handeln soll, und mit vollem klaren Bewusstsein des Zweckes und mit Aufbietung aller seiner Kräfte handeln soll, darauf, dass die Dinge sich von selber machen, dass er am besten thue, die Hände in den Schoß zu legen und vertrauensvoll abzuwarten, was aus dem Urquell des Rechts: der nationalen Rechtsüberzeugung nach und nach ans Tageslicht trete.*"

[114] Ottonis Morenae et continuatorum historia Frederici I, ed. F. Güterborck, Monumenta Germaniae Historia, Scriptores Rerum Germanicarum Nr. 7, 1930, p. 59. The authenticity of the anecdote is highly disputed; see U. Nicolini, La proprieta, il principe e l'espropriazione per pubblica utilitŕ: Studi sulla dottrina giuridica intermedia, Milan 1940, pp. 111 et. seq.

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Die Hildesheimer Stiftsfehde 1519-1523

*Claudia Lydorf**

Abstract

The Hildesheim Diocesan Feud receives little attention in the historical research. Only few relevant monographs have been published. The standard works are not easily accessible and some are not even obtainable via external borrowing or document delivery service. Furthermore these standard works all date form the beginning of the 19th century.

This article presents the participating parties, the causes and the course of the Great Diocesan Feud. In addition the final peace negotiations and the effects of the feud on the future development of the Prince-Bishopric of Hildesheim, the Principality of Brunswick-Wolfenbüttel and the Principality of Lüneburg will be outlined.

Key words: *Hildesheim Diocesan Feud; Great Diocesan Feud; Treaty of Quedlinburg; imperial election of the Holy Roman Empire; Lüneburg-Hildesheim alliance; Battle of Soltau; Prince-Bishopric of Hildesheim; Prince-Bishop John IV of Saxe-Lauenburg; Bishop Francis of Minden; Emperor Charles V.; Francis I of France; Principality of Brunswick-Wolfenbüttel; Henry the Younger of Brunswick-Wolfenbüttel; Henry V, Duke of Brunswick-Lüneburg; Henry V., Prince of Wolfenbüttel; Henry the Elder of Brunswick-Wolfenbüttel; Henry IV.*

Einleitung

Die Hildesheimer Stiftsfehde wird als die „letzte große Fehde[1]“ des Mittelalters bezeichnet, wobei sie in der jüngsten Forschung nur wenig Beachtung findet. Die monographischen Abhandlungen, die sich der Thematik widmen, stammen beide aus der Zeit vor 1920 und sind selbst auf dem Wege der Fernleihe nur begrenzt zugänglich[2]. Dabei lässt die Hildesheimer Stiftsfehde die Gründe für das Scheitern oder den Erfolg der mittelalterlichen Landesherren im Raum des heutigen Niedersachsens bei ihren Bestrebungen nach Verdichtung ihrer Herrschaft erkennen. Gleichzeitig bieten sich Einblicke in die regionalpolitischen Strukturen des niedersächsischen Raumes und Erkenntnisse über die Wechselwirkung von landesherrschaftlichen Strukturen mit reichspolitischen Konflikten[3]. Dabei hat die in der Hildesheimer Siftsfehde angelegte Verknüpfung regionaler mit reichspolitischen Auseinandersetzungen nicht nur eine komplizierte Frontstellung der Gegner zur Folge, sondern bedingt eine ganze Reihe von Motiven und Faktoren, welche den Verlauf der Fehde um das Stiftsgebiet entscheidend prägen. Um die Entstehung und den Verlauf des Konfliktes richtig beurteilen zu können, müssen daher zuerst die Konfliktparteien, ihr politischer Hintergrund, ihre politischen Motive und Bündnisse vorgestellt werden, bevor der Verlauf der Hildesheimer Stiftsfehde geschildert werden kann. Abschließend soll die Frage geklärt werden, welches die maßgeblichen Faktoren für Ausbruch, Verlauf und Ende der Fehde gewesen sind.

* Claudia Lydorf, M.A. (Saarbrücken), Deutschland.

1 Boetticher, Manfred von, Niedersachsen im 16. Jahrhundert (1500 - 1618), in: Geschichte Niedersachsens, hg. von Hans Patze, Christiane van de Heuvel, Dritter Band Teil l: Politik, Wirtschaft und Gesellschaft von der Reformation bis zum Beginn des 19. Jahrhunderts, Hannover, 1998, S. 1-100, hier: S. 37.

2 Roßmann, Wilhelm. Doebner, Richard, Die Hildesheimer Stiftsfehde, 2 Bände, Hildesheim, 1908; Varnové, Elsa, Die Anfänge der Hildesheimer Stiftsfehde und die Chroniken H. Brandis und J. Oldecop, Hildesheim, 1919.

3 Die Stiftsfehde bietet aber auch Quellenzeugnisse, die für weitere Fragestellungen von großem Interesse sind: Lehnhoff, Hans W.A., Zeugenvernehmungen Elzer Bürger über die Hildesheimer Stiftsfehde (1519-1523). Eine verstreute familienkundliche Quelle, in: Norddeutsche Familienkunde 30 (1981) S. 161-164; Hellfaier, Detlev, Der Totenschild Burchards I. von Oberg († 1522). Ein Beitrag zur Geschichte der Hildesheimer Stiftsfehde und zur Heraldik des 16. Jahrhunderts, in: Die Diözese Hildesheim in Vergangenheit und Gegenwart 48 (1980) S. 9-20; Nix, Matthias, Ick prise di, Brunswike! Hermann Botes Lieder zur Hildesheimer Stiftsfehde, in: Braunschweiger Jahrbuch 74 (1993) S. 27-65; Ders., Der Adler, der Löwe und die Lilie. Ein weiteres Lied Hermann Botes zur Hildesheimer Stiftsfehde?, in: Braunschweiger Jahrbuch 75 (1994) S. 73-84; Kruppe, Michael, Die Politik von Nordhausen Mühlhausen und Goslar während der Hildesheimer Stiftsfehde, in: Harz-Zeitschrift 61 (2009) S. 155-161.

Motive und politischer Hintergrund der Beteiligten

In der Hildesheimer Stiftsfehde standen sich die Partei des Bischof Johann IV. von Hildesheim und die Partei der welfischen Herzöge gegenüber.

1. Bischof Johann IV. von Hildesheim

1504 war Johann IV. zum Bischof von Hildesheim gewählt worden und erhielt 1511 die Weihe[4]. Kernpunkt seiner fürstlichen Politik war der Versuch, seine landesherrschaftlich relativ machtlose Stellung zu verbessern[5]. Dabei wurde er jedoch mit verschiedenen Problemen konfrontiert, die sich aus der spezifischen finanziellen und geographischen Lage seines Stiftsgebietes ergaben.

Zum Ersten stellte die finanzielle Situation des Stiftes ein Hindernis für seine Verdichtungsbestrebungen dar. Das Stift war hoch verschuldet und die Mehrzahl seiner Güter und Burgen waren an die Stiftsritter verpfändet[6]. Um seine Landesherrschaft stärken zu können, musste Johann IV. diese Verschuldung abbauen und sich wieder in den Besitz der verpfändeten Güter bringen, damit er seine weltlichen Herrschaftsbefugnisse ausüben konnte. Zu diesem Zweck schränkte er die Ausgaben für seine Hofhaltung ein und erhob Schätzungen vom ganzen Land, was der Wiedereinlösung der verpfändeten Stiftsburgen diente[7].

Zum Zweiten hatte die Lage des Stiftsgebietes - mitten in den welfischen Stammlanden - schon in den Amtszeiten von Johanns Vorgängern zu Auseinandersetzungen mit den Herzögen von Braunschweig - Lüneburg geführt[8]. Besonders die Stiftsburgen hatten beim Ausbau und Erhalt der politischen Machtstellung des Bistums schon immer eine große Rolle gespielt[9]. Sowohl die Hildesheimer Bischöfe, als auch die welfischen Herzöge hatten zur Abgrenzung ihrer Gebietsansprüche Burgen errichtet, wobei die Bischöfe es verstanden hatten, die strategisch günstig gelegenen Stiftsburgen mit ihnen treu ergebenen Vasallen zu besetzen und somit ein Netzwerk informeller Herrschaft in ihrem Stift aufzubauen. Diese Politik wollte der Bischof nun wieder verfolgen[10]. Damit setzte er sich in direkte Konkurrenz zu den Verdichtungsbestrebungen der Stiftsritter und seiner unmittelbaren Nachbarn, den welfischen Herzögen[11].

2. Stadt Hildesheim

Eine weitere wichtige Rolle in dieser Fehde sollte die Stiftshauptstadt Hildesheim spielen[12]. Im Verhältnis zu den Hildesheimer Bischöfen gelang es ihr bereits im 13. Jahrhundert, sich der bischöflichen Landesherrschaft weitestgehend zu entziehen, ohne jedoch den Status einer freien Stadt zu erlangen[13]. Ihr Selbstbewusstsein beruhte zum einen auf ihrer Stellung als Hansestadt, die durch ihren Handel mit Tucherzeugnissen und dem Vertrieb von Bier wohlhabend geworden war[14]. Zum zweiten beruhte es auf der Mitgliedschaft im Sächsischen Städtebund, in dem sie Rückhalt gegen die erstarkende Macht der Landesherren suchte. So hatte die Stadt am 17. Januar 1514 mit Goslar, Magdeburg, Braunschweig, Göttingen, Hannover und Einbeck ein Bündnis zur Abwehr unrechter Gewalt und zur Festigung des Reichsfriedens geschlossen. Daher nehmen die Städte dieses Bundes eine wichtige Rolle bei den Vermittlungsversuchen in der Fehde ein[15]. Im Zuge dieser Emanzipationsbestrebungen war es wiederholt zu Auseinandersetzungen zwischen der Stadt Hildesheim und den Hildesheimer Bischöfen um die Rechte der Stadt gekommen[16]. Auch die ersten Amtsjahre von Bischof Johann waren nicht frei von diesen Machtkämpfen. Dennoch stand die Stadt während der Hildesheimer Stiftsfehde loyal auf Seiten des Bischofs. Grund hierfür war der Versuch der Stadt, von dem Konflikt zu profitieren und ihre Position gegenüber dem Bischof und den umliegenden Herzogtümer auszubauen. Indem sie die starke Konkurrenz der weltlichen und geistlichen Herzogtümer in dem zersplitterten Gebiet ausnutzte, war es ihr schon früher gelungen, sich dem Druck der Landesherren zu entziehen[17]. Getreu dieser Politik ließ sie sich den Eintritt in die Fehde auf Seiten des Bischofs ausdrücklich mit zwei bischöflichen Privilegien belohnen. In den beiden Urkunden vom 31. Mai 1519 erteilten Bischof und Domkapitel der Stadt Hil-

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4 Aschoff, Hans-Georg, Johann, Herzog von Sachsen-Lauenburg, in: Bischöfe des Heiligen Römischen Reiches 1448 - 1648, hg. von Erwin Gatz u.a., Berlin, 1996, S. 339-341, hier: S. 339.

5 May, Georg, Die deutschen Bischöfe angesichts der Glaubensspaltung des 16. Jahrhunderts, Wien, 1983, S. 288.

6 Ebd.

7 Bertram, Adolf, Geschichte des Bistums Hildesheim, Zweiter Band, Hildesheim und Leipzig 1916, S. 1.

8 Aschoff, Hans-Georg, Hildesheim (ecclesia Hildesemensis) in: Bischöfe des Heiligen Römischen Reiches 1448-1648, hg. von Erwin Gatz, Berlin, 1996, S. 796-797, hier: S. 796.

9 Schnath, Georg, Vom Sachsenstamm zum Lande Niedersachsen. Grundzüge der staatlichen Gebietsentwicklung im Niedersächsischen Raum, Hannover, 1966, S. 40; Plümer, Erich, Hildesheim, in: LexMA 5 (1991), Sp. 16-18, hier: Sp. 18.

10 Gebauer, Johann, Geschichte der Stadt Hildesheim, Bd. l, Hildesheim, Leipzig 1922, S. 148; Boetticher, S. 61.

11 Gebauer, S. 148; Schmidt, Heinrich, Heinrich, d. Ä., Herzog von Braunschweig-Lüneburg, in: NDB 8 (1969), S. 350, hier: S. 350; Ders., Heinrich, d. J., Herzog von Braunschweig-Lüneburg, in: NDB 8 (1969), S. 351-352; Boetticher, S. 35.

12 Bertram, S. 31.

13 Jan, Helmut von, Bürger, Kirche und Bischof im mittelalterlichen Hildesheim, in: Niedersächsisches Jahrbuch für Landesgeschichte 49 (1977), S. 67-84, hier: S. 73, 75f., 81, 83; Plümer, Hildesheim, in: LexMA 5 (1991) Sp. 18.

14 Puhle, Matthias, Der Sächsische Städtebund. Entstehung und Wirkung, in: Hanse Städte Bünde, Die sächsischen Städte zwischen Elbe und Weser um 1500, hg. von Dems., Magdeburg, 1996, S. 24.

15 Doebner, Richard, Urkundenbuch der Stadt Hildesheim, Teil 8, Hildesheim, 1901 (ND Aalen, 1980), Nr. 531.

16 Gebauer, S. 147.

17 Bertram, Adolf, Geschichte des Bistums Hildesheim, zweiter Band, Hildesheim, Leipzig, 1916, S. 16. Puhle, S. 26 f.; (vgl. zur gleichen Vorgehensweise durch die Stadt Braunschweig: König, Joseph, Landesgeschichte (einschließlich Recht, Verfassung und Verwaltung), in: Braunschweigische Landesgeschichte im Überblick, hg. von Richard Moderhack, Braunschweig, 19772, S. 61-109, hier: S. 67).

desheim ein Monopolprivileg über das Ausschenken von Bier im Hildesheimer Stiftsgebiet und gaben den aus Hildesheimer Bürgern bestehenden Truppenteilen das Recht, im Fehdefall in der Stadt zu übernachten[18].

Ein weiteres Motiv für den Eintritt in die Fehde auf Seiten des Bischofs war das schlechte Verhältnis der Stadt zu den welfischen Herzögen. Da diese wiederholt und teilweise mit Erfolg versucht hatten, die Rechte, der in ihrem Gebiet liegenden Städte zu beschneiden, befürchtete Hildesheim ein ähnliches Schicksal, wenn der Bischof in der Fehde unterliegen sollte. Daher unterstützte die Stadt den Bischof als den weniger starken Stadtherrn. Diese Haltung tritt deutlich bei Verhandlungsversuchen mit den welfischen Herzögen während der Belagerung Hildesheims 1522 zu Tage. Herzog Heinrich d. J. bot dem Bürgermeister und den Ratsherren Frieden an, wenn die Stadt sich von ihrem Bischof lossagen und die Braunschweiger Herzöge als erbliche Schutzherren anerkennen sollte. Als die Hildesheimer Bürger von diesen Bedingungen erfuhren, lösten sie das Treffen gewaltsam auf. Dies dokumentiert ihre Furcht, von der Herrschaft des auf ihre Unterstützung angewiesenen Bischofs unter die Herrschaft eines mächtigeren Stadtherren zu geraten[19].

3. Stiftsritter

Wie bereits oben dargestellt, war das Verhältnis zwischen den Stiftsrittern und Bischof Johann, durch dessen Sparpolitik und Bestrebungen nach Verdichtung seiner Herrschaft, belastet.21 Zum endgültigen Bruch zwischen Bischof und Stiftsrittern kam es, als Johann 1513 damit begann die Stiftsgüter und -bürgen zwangsweise einzulösen[20]. Dies bedeutete für die Adeligen des Stiftes neben dem Verlust der finanziell einträglichen Ämter, auch den Verlust der strategisch wichtigen Burgen und somit eine doppelte Machteinbuße. Diese Einbußen schürten die Angst vor dem sozialen Abstieg. Unter der Führung des einflussreichen und finanzstarken Grafen Burchhard von Saldern wandte sich der beunruhigte Stiftsadel schutzsuchend an die welfischen Herzöge. Da viele der betroffenen Ritter oft gleichzeitig Lehnsabhängige des Bischofs und der welfischen Herzöge waren und sie mit den welfischen Herzögen das Interesse verband, das Machtstreben des Bischofs zu stoppen, fanden die Stiftsritter bei den Herzögen Unterstützung gegen den Bischof[21]. 1516 und 1518 kommt es daher zwischen ihnen zum Abschluss von zwei, gegen den Bischof gerichteten Bündnissen.

4. Die welfischen Herzöge

A. Vorbedingungen

Eine zentrale Rolle in diesem Konflikt spielen die welfischen Herzöge Heinrich der Jüngere, Erich I. und Heinrich der Mittlere, die alle den Titel Herzog von Braunschweig -Lüneburg trugen. Dieser Umstand war durch die Teilungen des welfischen Herzogtums bedingt, von denen für dieses Thema zwei relevant sind. Einmal die Teilung von 1409 / 1428 in die Häuser Braunschweig und Lüneburg und zum zweiten die Teilung des Hauses Braunschweig 1495 in die Häuser Braunschweig - Wolfenbüttel und Braunschweig - Calenberg. In der Folge kam es zu einem starken Konkurrenzkampf zwischen den neuen, sehr verkleinerten Herzogtümern, die alle nach Ausbau und Expansion ihrer Herrschaft strebten Ausgangspunkt für den Gegensatz zwischen den welfischen Herzögen war der von Herzog Heinrich d. Ä. von Braunschweig - Wolfenbüttel, gemeinsam mit Heinrich d. M. von Lüneburg und Erich I. von Calenberg unternommenen Versuch nach Ostfriesland zu expandieren, um Zugang zur Nordsee zu erhalten. Das gleiche Ziel verfolgten aber auch Herzog Karl von Geldern und Karl von Habsburg-Burgund. Die Expansionsbestrebungen der welfischen Herzöge scheiterten am Tod Heinrichs des Älteren, dem sein Sohn Heinrich der Jüngere nachfolgte, und dem diplomatischen Geschick des Grafen Edzard von Ostfriesland, dem es gelingt, sich durch Verträge mit Karl von Geldern und Karl von Habsburg-Burgund zu retten[22].

In dieser Auseinandersetzung werden zwei sich überschneidende Konflikte sichtbar. Zum ersten der reichs- und europapolitische Konflikt um die Nachfolge von Kaiser Maximilian L, der seit 1517 das politische Klima im Reich überschattete. Als Kandidaten hierfür standen König Franz I. von Frankreich und Erzherzog Karl von Habsburg- Burgund in Konkurrenz. Als im Januar 1519 Kaiser Maximilian I. starb, begannen sich der Konflikt um die Thronkandidatur und der Konflikt um die Hildesheimer Stiftsfehde zu überlagern. Die Entscheidung, welcher dieser beiden Kandidaten unterstützt wurde, beeinflusste nicht nur die Bündniszugehörigkeit der Beteiligten in der Stiftsfehde, sondern auch den Verlauf der Fehde[23].

Für den siegreichen Habsburger Kandidaten, den neu gewählten Kaiser Karl V. bedeutete die Stiftsfehde die Gelegenheit seine Macht in Norddeutschland zur Geltung zu bringen, sich politisch gegenüber Klerus, Adel und Kurfürsten zu profilieren

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[18] Doebner, Nr. 594 und Nr. 595.

[19] Schmidt, in: NDB 8 (1969), S. 350, 352; Schnath, Georg, Lübbing, Hermann, Engel, Franz, Niedersachsen, in: Geschichte der deutschen Länder, 1. Band: Die Territorien bis zum Ende des Alten Reiches, hg. von Georg Sante, Würzburg, 1964, S. 360; Hoffmann, Peter, Niedersächsische Geschichte, in: Geschichte der deutschen Länder: Entwicklungen und Traditionen vom Mittelalter bis zur Gegenwart, hg. von Werner Künzel, Werner Rellecke, Münster, 2005 (ND 2008), S. 227-254. Euling, Karl, Die Chronik des Johan Chronik des Johan Oldecop, Stuttgart, 1891, S. 100; Stanelle, Udo, Die Hildesheimer Stiftsfehde in Berichten und Chroniken des 16. Jahrhunderts, Hildesheim 1982, S. 56; Gebauer, S. 157; Chronik des Johan Oldecop, S. 46 und 118.

[20] Chronik des Johan Oldecop, S. 41; Gebauer, S. 148.

[21] Chronik des Johan Oldecop, S. 129; Stanelle, S. l; Boetticher, S. 36; Bertram, S. 11; Jan, Helmut von, Johann IV. von Hildesheim, in: NDB Band 10 (1974), S. 489-491, hier S. 490.

[22] Stanelle, S. l; König, S. 66; Schnath, Lübbing, Engel, S. 359 und S. 362; Puhle, S. 26f.; Boetticher, S. 34.

[23] Stanelle, S. 2; Gebauer, S. 151; Boetticher, S. 36.

und an den Gegnern seiner Kandidatur ein Exempel zu statuieren. Gleichzeitig wird im Ostfriesland- Konflikt aber auch der regionalpolitische Gegensatz zwischen den welfischen Herzögen deutlich. Herzog Heinrich von Lüneburg, der aufgrund der Lage und Größe seines Territoriums über eine gute Ausgangsbasis verfügte, war bereit mit dem entschiedensten Befürworter der französischen Kandidatur, Herzog Karl von Geldern, zusammenzuarbeiten. Dies war gleichbedeutend mit der Unterstützung des französischen Thronanwärters. Im Gegensatz dazu war Erich I. von Calenberg von Jugend an ein persönlicher Freund seines Taufpaten Kaiser Maximilian I. und ein Anhänger des Hauses Habsburg gewesen[24]. Trotz der Wendung der Habsburger im Ostfrieslandkonflikt gegen die Weisen, übertrug sich diese Loyalität auf den habsburgischen Kaiserkandidaten Karl. Erich gelang es auch, Herzog Heinrich d. J. für seine Seite zu gewinnen[25]. Diese unterschiedliche Parteinahme für die habsburgische und die französische Seite brachte eine reichspolitische Dimension in den bevorstehenden Konflikt.

B. Herzog Heinrich der Jüngere von Braunschweig-Wolfenbüttel und Herzog Erich I. von Braunschweig-Calenberg

Die Politik Heinrichs d. J. von Braunschweig-Wolfenbüttel folgte der seines Vaters, Heinrich dem Älteren, in dem er die Verdichtung seiner Herrschaft anstrebte. Dazu wollte er sich wieder in Besitz der Rechte der reichen Städte seines Gebietes bringen und die Expansionsbestrebungen seines Vaters fortsetzen[26]. Dieselbe Intention findet sich auch bei Herzog Erich I. von Calenberg. Daher waren beide daran interessiert ihre vor 1495 herrschaftlich zusammen gehörenden Gebiete durch einen direkten Verbindungsweg wieder miteinander zu verknüpfen. Dies wurde jedoch durch das dazwischen liegende Stiftsgebiet verhindert. Diese Überlegung sorgte für ein gemeinsames Vorgehen der beiden Herzöge gegen den Bischof von Hildesheim. Des Weiteren stoßen sie aufgrund der Verdichtungsbestrebungen Bischof Johanns auf Probleme bei ihrer eigenen Expansionspolitik. In dem Umstand, dass viele Stiftsritter nicht nur Lehnsmänner des Bischofs, sondern auch der welfischen Herzöge waren, sahen sie die Möglichkeit, durch Schutzbündnisse mit diesen ihre politischen Interessen gegenüber dem Bischof zu verteidigen und sich so den direkten Zugang zwischen ihren Gebieten zu sichern.

Wesentliche Voraussetzung für den zukünftigen Erfolg ihrer Politik sollte das gute Verhältnis zu Karl V. werden, so dass die Kaisertreue ein bestimmendes Element ihrer Politik wurde[27].

C. Bischof Franz von Minden

Franz von Minden war als jüngerer Sohn von Heinrich d. Ä. für die geistliche Laufbahn bestimmt worden, für die er keine Neigung empfand[28]. Seine Regierungszeit in Minden war von ununterbrochenen militärischen Auseinandersetzungen mit seinen Nachbarn bestimmt, auf deren Gebiete er Ansprüche erhob[29]. Während der Fehde stand er im Sinne der Familienpolitik auf Seiten seines älteren Bruders Herzog Heinrich des Jüngeren. Im Zuge des sich auftuenden Gegensatzes mit dem Herzog von Lüneburg kam es zu Übergriffen des Bischofs von Minden auf Hildesheimer Gebiet und auf Gebiete von Lehnsabhängigen Heinrichs von Lüneburg. Diese Übergriffe blieben von der Gegenseite nicht unbeantwortet, so dass sie zusätzlich zur Eskalation des Konfliktes beitrugen[30].

D. Herzog Heinrich der Mittlere von Lüneburg

Es wurde schon angerissen, wie Herzog Heinrich von Lüneburg im Ostfrieslandkonflikt in Gegensatz zum Haus Habsburg geraten war, aber infolgedessen Kontakt zum französischen Königshaus erhalten hatte, den er durch die Ausbildung seiner Söhne am französischen Hof vertiefte. Seine Unterstützung für den Gegner Karls von Habsburg verstärkte seine Rivalität zu seinen nächsten regionalpolitischen Konkurrenten, seinen welfischen Vettern Heinrich und Erich[31]. Zum endgültigen Bruch mit den Braunschweiger Herzögen führte seine eigenmächtige Vorgehensweise bei der Verpfändung von gemeinsamen welfischen Besitzungen, die unter der Verfügungsgewalt aller welfischen Herzöge standen. Diese besonders gewinnbringenden Homburg-Eversteinischen Güter waren dem Hildesheimer Stift seit fast hundert Jahren verpfändet gewesen.45 Wahrscheinlich als Reaktion auf die Hilfegesuche der Stiftsritter hatten Herzog Heinrich d. J. und Erich I. diese 1514 gekündigt, obwohl 1513 ein Vertrag zwischen Heinrich von Lüneburg und Bischof Johann abgeschlossen wurde, indem sich Heinrich, ohne Rücksprache mit seinen Vettern, wieder eine hohe Pfandsumme von Bischof Johann für diese Gebiete hatte auszahlen lassen. Aufgrund dieses Vertrages verweigerte Bischof Johann die Herausgabe der Güter an die Braunschweiger Herzöge. Neben diesem konkreten Anlass sorgten weitere nachbarschaftliche Konflikte und Rivalitäten, die besonders in den Überfallen Franz von Mindens auf Lüneburger und Hildesheimer Gebiet ihren Ausdruck fanden, dafür, dass dieser gemeinsame Gegensatz aus Heinrich von Lüneburg und Bischof Johann Verbündete machte[32].

Im Jahr 1517 schlössen sie ein Bündnis für den Fall einer Fehde gegen Bischof Franz von Minden. In diesem Bündnis

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[24] Aschoff, Johann, S. 340; Boetticher, S. 34ff.; Friedland, Klaus, Erich L, Herzog von Braunschweig- Lüneburg (Calenberg), in: NDB 4 (1959), S. 584, hier: S. 584.

[25] Boetticher, S. 35, 76.

[26] Schmidt, Heinrich d. Ä. und Heinrich d. J., S. 350ff.

[27] Ebd., S. 352; Boetticher, S. 76.

[28] Aschoff, Hans-Georg, Franz, Herzog von Braunschweig-Lüneburg-Wolfenbüttel, in: Bischöfe des Heiligen Römischen Reiches 1448-1648, hg. von Erwin Gatz, Berlin, 1996, S. 192-193, hier: S. 193; Boetticher, S. 61.

[29] Aschoff, Franz, S. 193.

[30] Stanelle, S. 2; Boetticher, S. 36

[31] Jan, Johann IV., S. 400; Schmidt, Heinrich Heinrich der Mittlere, Herzog von Braunschweig-Lüneburg-Celle, in: NDB 8 (1969), S. 350-351, hier: S. 351.

[32] Chronik des Johan Oldecop, S. 57; Stanelle, S. 1f.; Gebauer, S. 149f.; König, S. 66; Boetticher, S. 36; Aschoff, Johann, S. 339.

wurde, neben militärischer Unterstützung, auch eine Nachfolgeregelung vereinbart, die bestimmte, dass ein Sohn Heinrichs, Franz von Lüneburg, die Nachfolge von Bischof Johann im Bistum antreten sollte. Dies stellte eine zusätzliche Bedrohung für die Expansionsbestrebungen Heinrichs d. J. und Erichs I. dar[33].

II. Fazit

Zusammenfassend betrachtet, war bei allen landesherrschaftlichen Kräften dieses Konfliktes das Motiv der Verdichtung ihrer Herrschaft entscheidend für ein Eingreifen. Aufweiche Art dieses Eingreifen erfolgte, hing von den spezifischen Gegebenheiten ihres Herrschaftsgebietes ab. Um die Landesherren gruppierten sich dann kleinere Herrschaftseinheiten, wie die Stadt Hildesheim und die Stiftsritter, die diese Konstellation für die Ausdehnung ihrer Herrschaftsinteressen auszunutzen versuchten.

Verlauf der Hildesheimer Stiftsfehde

I. Eskalation des Konfliktes

Ausgangspunkt für die Zuspitzung der Auseinandersetzung waren die Jahre 1512 und 1513, in denen der Bischof begann, die verpfändeten Stiftsgüter und -bürgen wieder auszulösen. Einige der Stiftsritter wehrten sich durch Klagen gegen die Einlösung oder erklärten Bischof Johann die Fehde, was die Vermittlung der Landstände nötig machte. Endgültig eskalierte der Konflikt im Jahr 1518, als die einflussreichen Grafen von Saldern, nach einem Schiedsspruch der Landstände, die ihnen verpfändeten Güter zugunsten Bischof Johanns räumen mussten und die Stiftsritter daraufhin erneut ein Bündnis mit den welfischen Herzögen eingingen. Im Juni 1518 erklärte Graf Burchard von Saldern Bischof Johann die Fehde. Neben den Übergriffen des Bischofs von Minden, kam es nun zu Brandschatzungen und Plünderungen durch den Stiftsritter[34]. Dabei erhielt er Rückendeckung durch seine Bündnispartner Herzog Erich I. und den Bischof von Minden, in deren Gebiete er sich nach seinen Plünderungszügen zurückziehen durfte[35].

II. Fehdevorbereitungen und Bündnisse

1. Bündnis der Hildesheimer

Durch die zunehmenden Übergriffe wurde die Situation für den Hildesheimer Stift, aber auch für den Herzog von Lüneburg immer unerträglicher. Am 14. Februar 1519 schlössen Heinrich von Lüneburg und Bischof Johann als Reaktion auf diese Übergriffe ein Angriffsbündnis gegen Heinrich d. J. und Franz von Minden. Diesem Bündnis traten die Landstände, lehnsabhängige Adelige Heinrichs von Lüneburg und der Sächsische Städtebund bei. Finanzielle Unterstützung erhielt die Hildesheimer Partei von Herzog Karl von Geldern und, aufgrund der Bemühungen Heinrichs von Lüneburg, vom französischen König[36].

2. Bündnis der welfischen Partei

Die welfische Partei hatte sich bereits 1518 durch ein Bündnis zwischen den Braunschweiger Herzögen und den Stiftsrittern formiert. Daneben standen ihnen der Schwager Erichs L, Georg von Sachsen, die Landgrafen von Hessen, die ebenfalls in diesen Raum expandieren wollten, und alle welfischen Anverwandten in kirchlichen Positionen zur Seite, so u. a. Erzbischof Christoph von Bremen und Verden, Bischof Erich von Paderborn und Osnabrück, die Bischöfe von Geldern, Mecklenburg und Meißen. Im Gegensatz zur territorial geprägten Hildesheimer Partei findet sich hier eine große überregionale Machtakkumulation[37].

III. Verlauf der Fehde

1. Fehdeerklärung und Schlacht auf der Soltauer Heide

Am 18. April 1519 erklärten der Bischof von Hildesheim und Herzog Heinrich von Lüneburg den Braunschweiger Herzögen die Fehde und beantworten gleichzeitig militärisch die Übergriffe der welfischen Partei. In der Anfangsphase der Fehde konnte die Hildesheimer Partei auch militärische Erfolge verbuchen, u.a. die Kapitulation Mindens. Am 28. Juni 1519, dem Tag der Kaiserwahl, kam es zur Schlacht auf der Soltauer Heide, die mit einem Sieg für die Hildesheimer Partei endete. Zugleich gelang es ihnen, viele Adelige der welfischen Partei u. a. Herzog Erich I. gefangen zu nehmen[38].

Da fast der ganze Norden des Reiches in diese Auseinandersetzung involviert worden war, kam es durch die Vermittlung der, um den Reichsfrieden besorgten Kurfürsten zu einem fünfmonatigen Waffenstillstand[39]. In dieser Zeit sollte durch Verhandlungen die Fehde endgültig beigelegt werden.

2. Einflußnahme auf den Kaiser durch die welfische Partei

Unterdessen sahen die Braunschweiger Herzöge gute Chancen das Blatt zu ihren Gunsten zu wenden, da am 28. Juni 1519 der von ihnen unterstützte habsburgische Kandidat zum Kaiser gewählt worden war[40].

Herzog Heinrich d. J. und die Ehefrau Herzog Erichs L, Herzogin Katharina, trafen Karl V. in Brüssel und führten Klage gegen die Partei Bischof Johanns, indem sie diese beschuldigten Gegner Karls V. zu sein. Sie argumentierten, dass sie

[33] Gebauer, S. 150; Stanelle, S. 1.
[34] Chronik des Johan Oldecop, S. 54ff.; Bertram, S. 13; Jan, Johann IV., S. 490; Aschoff, Franz, S. 193; Aschoff, Johann, S. 339; Boetticher, S. 36, Gebauer, S. 15, S. 148.
[35] Boetticher, S. 36; Stanelle, S. 2.
[36] Chronik des Johan Oldecop, S. 57; Aschoff, Johann, S. 340.
[37] Boetticher, S. 39; Bertram, S. 14, 16, 18; Gebauer, S. 151.
[38] Chronik des Johan Oldecop, S. 76ff.; Bertram, S. 16; Aschoff, Franz, S. 193; Gebauer, S. 153; Bertram, S. 20.
[39] Kalkoff, Paul, Die Stellung Friedrichs des Weisen zur Kaiserwahl von 1519 und die Hildesheimer Stiftsfehde, in: Archiv für Reformationsgeschichte 24 (1927), S. 270-294, hier: S. 287.
[40] Gebauer, S. 154.

seien Opfer ihrer treuen Gefolgschaft für Karl geworden und die militärischen Auseinandersetzungen der Fehde hätten nur dazu gedient, dem Gegenkandidaten Franz I. Einfluss in Norddeutschland zu verschaffen. Aufgabe seiner Hildesheimer und Lüneburger Anhänger sei es gewesen, den Einfluss König Franz I. auf die Kaiserwahl zu sichern, indem sie das Land bis zur Elbe besetzten. Genau diesem Ziel habe die Fehde gedient und sei auch aus keinem anderen Grund geführt worden. Es gelang ihnen auch die Unterstützung des Kaisers zu gewinnen, der die Finanzierung der welfischen Partei übernahm[41].

3. Friedensverhandlungen in Zerbst

Am 12. November 1519 kam es, wiederum auf Initiative der Kurfürsten von Mainz, Sachsen und Brandenburg, zu dem Beschluss eines einjährigen Waffenstillstandes zwischen den Fehdeparteien. Gleichzeitig wurde bei diesen Verhandlungen ein weiteres Treffen in Zerbst vereinbart, das Anfang 1520 stattfand und als Teil abschließender Friedensverhandlungen geplant war. Diese Verhandlungen wurden jedoch von Heinrich d. J. dazu benutzt, Briefe zwischen Heinrich von Lüneburg und König Franz I. vorzulegen, die den Verrat Heinrichs an Kaiser Karl V. dokumentieren sollten. Darin sollte Heinrich die Fehde als Krieg gegen die Feinde des französischen Königs bezeichnet haben. Zusammen mit seinen engen Kontakten zum französischen Hof und Herzog Karl von Geldern, sowie der finanziellen Unterstützung durch diese, erschienen die vorgebrachten Klagen gegen den Herzog von Lüneburg als erwiesen[42]. An diesen erhobenen Vorwürfen, die Heinrich der Mittlere nicht wirksam entkräften konnte, scheiterten die Friedensverhandlungen.

So gelang es Heinrich d. J., die Vermittlungsversuche der Kurfürsten, des Städtebundes, der Reichs- und Landstände zu umgehen, da diese bislang immer auf Herausgabe der verpfändeten Güter gegen Ersatz der Erhaltungskosten und damit gegen die Interessen der welfischen Partei entschieden hatten. Um sich der Unterstützung des Kaisers weiterhin zu versichern, begaben sich Heinrich d. J. und Herzogin Katharina im Anschluss an den Tag von Zerbst zu Karl V., um ihm die Briefe als Beweis für ihre Vorwürfe zu unterbreiten[43].

4. Intervention Karls V.

Karl, der sich auf dem Weg zur Krönung in Aachen befand als ihn Heinrich d. J. und Herzogin Katharina erreichten, sah in einer Intervention die Chance sich gegenüber den Kurfürsten und den Gegnern seiner Kandidatur zu profilieren. Im August 1520 befahl er Johann und seinen Verbündeten unter Androhung der Acht, alle Gefangenen in kaiserliche Hand zu überstellen und sich auf dem Reichstag zu Worms für die Fehde zu verantworten[44].

Bevor es jedoch zu dem Treffen auf dem Reichstag zu Worms kommen konnte, erkannte Heinrich von Lüneburg die Aussichtslosigkeit seiner Lage, übergab im November 1520 die Regierung des Herzogtums Lüneburg an seine Söhne und ging an den Pariser Hof ins Exil[45].

5. Reichstag in Worms (Januar 1521)

Auf dem Reichstag in Worms beschuldigte Erich von Calenberg, der sich inzwischen aus der Gefangenschaft freigekauft hatte, Heinrich von Lüneburg und Bischof Johann weiterhin Verbündete des französischen Königs zu sein. Er behauptete, die Fehde sei ein Versuch gewesen, die Kaiserkrone an Frankreich zu bringen, indem man dem französischen Heer eine Schneise in Reichsgebiet zu bahnen versucht habe. Nach der, wie ein Schuldeingeständnis wirkenden Flucht Heinrichs von Lüneburg nach Frankreich war die Position des Bischofs so geschwächt, dass er diese Anklagen gegenüber dem Kaiser nicht mehr wirksam entkräften konnte. Daher endete die Untersuchung in Worms mit einem kaiserlichen Dekret vom 27. Mai 1521, in dem der Kaiser die Hildesheimer Partei nochmals bei Androhung der Acht und Aberacht aufforderte, die Gefangenen zu überstellen und die eroberten Gebiete seiner Verfügung zu überlassen[46].

Die Erfüllung dieser Forderungen hätte finanziell einen großen Verlust und die Preisgabe aller teuer errungen Vorteile bedeutet, so dass dieses Dekret für die Hildesheimer Partei unannehmbar war. Daher entschlossen sich Bischof Johann und die Stadt Hildesheim das Dekret nicht anzunehmen und militärischen Widerstand zu leisten. Daher verhängte der Kaiser am 25. Juli 1521 Acht und Aberacht über die Hildesheimer Partei und übertrug die Vollstreckung derselben den Herzögen Heinrich d. J. und Erich I.[47].

6. Verlauf der Fehde nach der Erklärung der Aberacht

Die meisten Bundesgenossen reagierten auf die Erklärung der Aberacht mit dem Abfall von der Hildesheimer Partei. Die Städte des Städtebundes unterstützten jetzt teilweise ihre Landesherren oder blieben neutral und mahnten Hildesheim zum Einlenken gegenüber dem Kaiser[48]. Am 10. Oktober 1521 wurde der sog. Feldfrieden zwischen Heinrich d. J. und Erich I. und den Söhnen Heinrichs von Lüneburg geschlossen, ohne Gebietsverluste für die letztgenannten. Auch die Adeligen, die unter Lüneburger Schutz standen, schlossen nach der nun erfolgten Resignation Heinrichs von Lüneburg Frieden mit den Braunschweiger Herzögen. Dadurch wurde die Stadt Hildesheim zum alleinigen Träger des gesamten Widerstandes[49].

41 Kalkoff, S. 286; Bertram, S. 23.
42 Chronik des Johan Oldecop, S. 88; Kluckhorst, August, Deutsche Reichstagsakten unter Karl V., Jüngere Reihe, I. Band (= RTA I), Göttingen 1893 (ND Göttingen 1962), S. 719f., S. 29 Anm. l; Bertram, S. 24; Boetticher, S. 37.
43 Gebauer, S. 148f.; Bertram, S. 24f.
44 Gebauer, S. 155.
45 Schmidt, Heinrich der Mittlere, S. 351; Gebauer, S. 155; Boetticher, S. 38.
46 Chronik des Johan Oldecop, S. 88; Wrede, Adolf, Deutsche Reichstagsakten unter Karl V., Jüngere Reihe, II. Band (= RTA II), Göttingen 1 896 (ND 1962 Göttingen), S. 755; Boetticher, S. 69; Chronik des Johan Oldecop, S. 88.
47 Chronik des Johan Oldecop, S. 88; RTA II, S. 757; Gebauer, S. 155.
48 Doebner, Nr. 631; Bertram, S. 27, 33; Gebauer, S. 156 f.
49 Chronik des Johan Oldecop, S. 109 f.; Boetticher, S. 38, 69; Bertram, S. 28; Stanelle, S. 2; Gebauer, S. 156.

7. Verhältnis der Stadt zum Bischof und die finanzielle Lage des Stiftes

Bischof Johann gelang es in dieser Situation nicht, finanzielle oder militärische Unterstützung für seine Seite zu gewinnen oder das Abbröckeln der Verbündeten zu verhindern. Da der ohnehin schon hochverschuldete Stift die Mittel zur Bezahlung seiner Söldner kaum noch aufbringen konnte, übernahm die Stadt das finanzielle „Krisenmanagement“. Diese Notlage spitzte sich jedoch immer weiter zu. Stadt und Domkapitel sahen dies als ein Versagen des Bischofs. So verhandelten im Januar 1522 Stift, Domkapitel und Stadt über eine Neuwahl des Bischofs. Dabei erwogen die Stadt und das Domkapitel einen weiteren Bruder Heinrichs d. J. - Georg von Braunschweig -Wolfenbüttel - zum Koadjutor zu machen. Als sie Bischof Johann IV. daraufhin ein Ultimatum stellten, verpfändete dieser der Stadt Hildesheim als Sicherung für seine Schulden das ertragreichste Amt des Stiftes - Peine - und reiste nach Münster, wo er sich Hilfe von seinem Bruder Bischof Erich von Münster erhoffte. Erst nach einem halben Jahr der Abwesenheit von seinem Stift erklärte sich Erich 1522 bereit ihm zu helfen. Jedoch konnte schon bald nach dem Eintreffen dieser Truppen aus Münster deren Sold nicht mehr bezahlt werden, so dass die Truppen bereits im November 1522 wieder abrückten[50]. Da kurze Zeit zuvor Bischof Erich von Münster verstarb, war Bischof Johann seines letzten Rückhaltes beraubt[51].

8. Eroberung des Stiftsgebietes

Inzwischen war es im August 1522 wieder zu militärischen Auseinandersetzungen zwischen Hildesheim und den Braunschweiger Herzögen gekommen, in deren Verlauf innerhalb kürzester Zeit fast das gesamten Stiftsgebiet erobert worden war. Allein bei der Belagerung der Stadt Hildesheim und der Burg Peine, scheiterten die Braunschweiger Herzöge. Gleichzeitig wurde jedoch durch die Belagerung die finanzielle Situation der Stadt Hildesheim immer drückender. Auch die Braunschweiger Partei begann um ihren finanziellen Ruin durch diese Fehde zu fürchten, zumal es den Herzögen nicht gelungen war, mit Hildesheim die Keimzelle des Widerstandes zu erobern. Durch diese angespannte finanzielle Lage waren die Herzöge, Bischof Johann und die Stadt zu neuen Vermittlungsversuchen durch die Stadt Braunschweig bereit[52].

IV. Verlauf der abschließenden Friedensverhandlungen

1. Verhandlungen vor Hildesheim

Die abschließenden Friedensverhandlungen begannen am 24. November 1522 mit einem Treffen zwischen Heinrich d. J. und Vertretern der Städte Braunschweig und Hildesheim in Goslar. Es handelte sich hierbei, um die schon zu Anfang (S. 4f.) geschilderten Verhandlungen, die an der Forderung der erblichen Schutzherrschaft der Braunschweiger Herzöge über die Stadt Hildesheim gescheitert waren[53].

2. Vermittlungsversuch in Goslar

Ein neuer Vermittlungsversuch wurde am 03. Dezember 1522 in Goslar durch die Städte Goslar, Magdeburg, Einbeck und Lüneburg eingeleitet. Wegen der ungünstigen Bedingungen für das Stift in diesem Friedensvorschlag, wandten sich Bischof, Domkapitel und Stadt an den Kaiser? mit der Bittenden Abschluss der Fehde auf dem bevorstehenden Reichstage zu erzielen. Der Kaiser lehnte dies ab, aber er beauftragte den Erzbischof Albrecht von Mainz und Herzog Georg von Sachsen, sowie die Städte Goslar, Magdeburg und Einbeck mit neuen Vergleichsverhandlungen zu Quedlinburg. Allerdings lehnte die welfische Partei Verhandlungen mit Bischof Johann mit der Begründung ab, dass er nichts mehr habe, worüber man verhandeln könnte. Daher gab die Stadt in den nun folgenden Verhandlungen ihre Loyalität zum Bischof auf. Als er diesen Umstand erkannte, entschloss sich Bischof Johann zu dem Angebot, doch noch die Gefangenen freizulassen und die eroberten Gebiete in die Hand des Kaisers zu geben, wenn dies die Braunschweiger Herzöge auch täten. Aber er war zu diesem Zeitpunkt weder in der Lage Bedingungen zu stellen, noch konnte er damit rechnen, dass die welfische Partei nach der Eroberung des Stiftsgebietes darauf eingehen würde. Auch sein Versuch, die Wirksamkeit der Verhandlungen anzuzweifeln, indem er anführte, die Gesandten Hildesheims seien nicht berechtigt gewesen, für ihn zu verhandeln, schlug fehl und er fand in den weiteren Friedensverhandlungen keine Beachtung[54].

3. Verhandlungen in Quedlinburg und Quedlinburger Rezess

Auf den nun anberaumten Verhandlungen in Quedlinburg erschienen Gesandte der Stadt Hildesheim, des Domkapitels und der Stiftsritter, sowie als Kommissare der Erzbischof von Mainz, Herzog Georg von Sachsen und Vertreter der drei beauftragten Städte[55]. Der Bischof zog den Verhandlungs-Parteien bis Halberstadt nach, konnte aber keinen Einfluss mehr auf den Verlauf der Verhandlungen nehmen. Die Verhandlungen in Quedlinburg führten zur endgültigen Beilegung der Fehde durch den am 13. Mai 1523 geschlossenen Quedlinburger Rezess. Seine wichtigsten Absätze bestimmten:

1. die Freilassung aller Gefangenen ohne Lösegeld[56]
2. die Beistätigung aller Privilegien für die Stadt Hildesheim, die unter dem Schutz ihres Schutzherrn Herzog Erich von Calenberg verbleiben sollte
3. das Verbleiben der Ämter Marienburg, Steuerwald und Peine als „kleiner Stift“ bei der Kirche Hildesheim
4. die Übergabe aller eroberten Gebiete an die Herzöge von Braunschweig.Wolfenbüttel und Calenberg
5. die Zurückversetzung der Ritterschaft des Stiftes in den

[50] Chronik des Johan Oldecop, S. 103; Gebauer, S. 159, 160, 165; Bertram, S. 28, 32; Aschoff, Johann, S. 340.
[51] Chronik des Johan Oldecop, S. 112; Aschoff, Johann, S. 340.
[52] Chronik des Johan Oldecop, S. 106; Gebauer, S. 156, 163f.; Bertram S. 31f..
[53] Chronik des Johan Oldecop, S. 106, 110, 112, 126 f.; Bertram, S. 31; Gebauer, S. 155, 165.
[54] Chronik des Johan Oldecop, S. 100; Stanelle, S. 56; Gebauer, S. 165f.; Bertram, S. 33f.
[55] Doebner, Nr. 690 und Nr. 691.
[56] Doebner, Nr. 691; Chronik des Johan Oldecop, S. 129.

Besitzstand vor der Fehde
6. die Bestätigung aller Rechte und Freiheiten für das Domkapitel, die Bürger Hildesheims und die Kleriker, die sie vor der Fehde innehatten[57].

4. Ergebnisse des Quedlinburger Rezesses

Am 20. Oktober 1523 bestätigte Karl V. den Rezess und die Lösung der Acht für die Hildesheimer Partei. Am 28. September 1530 belehnt er die welfischen Herzöge förmlich mit dem „Großen Stift" auf dem Augsburger Reichstag. Bereits am 26. Mai 1523 war durch den Rat der Stadt Hildesheim die Fehde für beendet erklärt worden[58]. Die Stadt selbst trat am 17. Januar 1524 wieder in das Sächsische Städtebündnis ein und schloss im gleichen Jahr einen Schutzvertrag mit Herzog Erich von Calenberg[59]. Der Quedlinburger Rezess beinhaltete keinen Friedensschluss mit dem Bischof, sondern nur mit seinen verbliebenen Verbündeten, der Stadt und dem Domkapitel. Er wurde daher auch von ihm nicht anerkannt. Der immer noch geächtete Bischof ging zu Kurfürst Joachim von Brandenburg ins Exil. Da nach den Bestimmungen des Quedlinburger Rezesses dem Stift nur ein Viertel seines bisherigen Territoriums erhalten blieb, war die landesherrschaftliche Macht des Bischofs gebrochen. Dies machte die Restitution des Stiftsgebietes zu einem Hauptanliegen von Domkapitel und Bischof. Die Chance, die verlorenen Gebiete wiederzuerlangen, war ohne Johann IV. als Bischof größer, weshalb ihn das Domkapitel zum Rücktritt drängte. Schließlich verzichtete er am 06. Mai 1527 zugunsten des Reichsvizekanzlers Balthasar Merklin, von dem sich das Domkapitel großen Einfluss am kaiserlichen Hof erhoffte. Johann wurde daraufhin 1528 von der Acht befreit[60]. Die Braunschweiger Herzöge gingen eindeutig als Gewinner aus dieser Fehde hervor. Ihr Ziel, den Bischof als machtpolitischen Konkurrenten auszuschalten und eine direkte Landbrükke zwischen ihren beiden Herzogtümern zu erlangen, hatten Heinrich d. J. und Erich I. von Calenberg erreicht. Zusätzlich profitierten sie noch von großen Gebietsgewinnen. Die Herzöge deckten ihre durch die Stiftsfehde entstandenen Schulden aus den Abgaben der neu gewonnenen Stiftsgebiete. Die Ritterschaft wurde wieder mit den Erb- und Lehngütern durch die Braunschweiger Herzöge beliehen, mit denen sie vorher vom Bischof beliehen worden war[61].

V. Entziehung des Hildesheimer Stiftsgebietes

Offen bleibt noch die Frage, mit welchen Argumenten es möglich war, dem Bischof von Hildesheim als geistlichem Fürsten, aufgrund eines Vertrages der militärische Eroberungen festschrieb, sein Stiftsgebiet zu entziehen. Tatsächlich wandte sich die Hildesheimer Partei schon im Jahr 1522 an den Papst um Hilfe, der den Mainzer Domherren Valentin von Teteleben mit der Unterstützung der Hildesheimer Partei beauftragte. Dieser strengte einen Prozess an der Rota gegen die Braunschweiger Herzöge an[62].

Zugunsten der Hildesheimer Partei argumentierte Teteleben wie folgt: Als erstes sei die Ächtung Bischof Johanns ohne rechtliche Grundlage erlassen worden, da sie wegen fehlender Ladung des Bischofs auf den Reichstag und Verletzung von kirchlichen Rechten ungültig gewesen sei. Die aus diesem Grund unrechtmäßige Acht könne daher das Vorgehen der Braunschweiger Herzöge bei Vollstreckung der Acht nicht legitimieren. Diese Unrechtmäßigkeit greife wiederum auf den Vertrag durch, mit dem diese ungerechtfertigte Vollstreckung beigelegt werden sollte, so dass auch der Quedlinburger Rezess unwirksam sei und damit auch die von ihm angeordnete Teilung des Stiftsgebietes unter den Braunschweiger Herzögen. Zudem handele es sich bei Bischof Johann um einen geistlichen Fürsten, so dass die Kompetenz diesen Konflikt zu entscheiden, bei der Kurie gelegen habe und nicht bei Kaiser Karl V. und den Kurfürsten. Gleichzeitig führte er an, dass das Domkapitel im Quedlinburger Rezess nur auf seine Möglichkeit verzichtet habe, militärisch gegen die Bestimmungen des Rezesses vorzugehen, nicht jedoch rechtlich[63]. Durch ihren Fürsprecher an der Kurie ließ die welfische Partei entgegnen, dass die Fehde eine rein weltliche Streitigkeit um ein Reichslehen gewesen sei und daher auch in die Zuständigkeit des Kaisers gefallen sei. Aus diesem Grund sei sowohl die Verhängung als auch die Vollstreckung der Acht rechtmäßig gewesen und damit die Besitznahme des Großen Stiftes - als Folge der Vollstreckung der kaiserlichen Acht - ebenfalls. Infolgedessen sei die in dem Quedlinburger Rez ess vorgenommene Gebietsaufteilung durch die Vollstreckung der Acht durch die Braunschweiger Herzöge gerechtfertigt gewesen. Unterstützt wurden sie bei dieser Argumentation vom Kaiser, der seine Kompetenzen gegenüber dem Papst wahren wollte. Erst 1540 kam es zu einer Entscheidung, in welcher der Vatikan die Entziehung des Stiftsgebietes für unrechtmäßig erklärte und es dem Hildesheimer Bischof wieder zusprach[64].

Schluß

Trotz dieser letztgenannten, rein rechtlichen Entscheidung des Papstes sollte es dem Hildesheimer Stift erst im 17. Jahrhundert gelingen, sich von der Niederlage in der Stiftsfehde zu erholen[65]. Die Gründe für das Scheitern der Bestrebungen des Hildesheimer Bischofs lagen darin, dass er zum einen auf eine zu große Machtakkumulation bei seinen Gegnern stieß, während innerhalb der Gruppe seiner eigenen Verbündeten zu

[57] Chronik des Johan Oldecop, S. 130-132.
[58] Doebner, Nr. 692; Bertram, S. 35; Aschoff, Johann, S. 340; Boetticher, S. 39.
[59] Doebner, Nr.705 und Nr. 716.
[60] Chronik des Johan Oldecop, S. 113; Gebauer, S. 168; Bertram, S. 34; Henkel, Karl, Kurze Geschichte der Diözese Hildesheim und ihrer Einrichtungen, Hildesheim, 1917, S. 41; May, S. 289; Aschoff, Johann, S. 340.
[61] Gebauer, S. 168; Bertram, S. 37.
[62] Gebauer, S. 168.
[63] Doebner, Nr. 678; Chronik des Johan Oldecop, S. 113; Bertram, S. 29, 34; Stanelle S. 4 ; Aschoff, Johann, S. 340.
[64] Aschoff, Johann, S. 340; Stanelle, S. 4; Bertram, S. 29 f.
[65] Stanelle, S. 4f.

viele und zu heterogene Motive vorherrschten, als dass sie die notwendige Geschlossenheit gegen die mächtigere Partei der Welfen hätten aufbringen können.

Auch spielte der reichspolitische Konflikt in der Phase nach 1519 eine entscheidende Rolle für das Scheitern des Bischofs, da er verhinderte, dass Johann zusätzliche Unterstützung gegen die erstarkende welfische Partei gewinnen konnte. Auch wenn dem Herzog von Lüneburg schon früh vorgeworfen worden war, zugunsten König Franz I. Politik im Reich zu betreiben, bedingte dies nur die Spaltung innerhalb der welfischen Herzöge und war keine Ursache für den Ausbruch der Fehde zwischen Bischof Johann IV. und den Braunschweiger Herzögen, die aus reinen territorial- und machtpolitischen Interessen gehandelt hatten. Es gelang ihnen jedoch den Eindruck zu erwecken, dass territorialpolitische Ziele keine Rolle für ihr Vorgehen gespielt hätten, so dass in der Endphase der Fehde der reichspolitische Konflikt den regionalen Konflikt überlagerte und verdeckte[66]. An der unterschiedlichen Behandlung des Bischofs von Hildesheim und des Herzogs Heinrich von Lüneburg zeigt sich jedoch deutlich, dass es der welfischen Partei um die Machtbeschränkung des Hildesheimer Bischofs und die Gewinnung der Hildesheimer Gebiete ging, und nicht um die Verfolgung reichspolitischer Interessen. Im Gegensatz zu der Situation des Bischofs überschneiden sich bei Herzog Heinrich von Lüneburg die Motive der welfischen Expansion mit denen der reichspolitischen Beschränkung der Gegner Karls V. Aus diesen reichspolitischen Gründen wird er erst 1530 aus der Acht befreit. Aber nachdem er 1520 ins Exil gegangen war und seine Söhne mit ihre Unterstützung für die Hildesheimer Partei auch ihre Gegnerschaft zu den Expansionsinteressen der Braunschweiger Herzöge aufgegeben hatten, wurde ein sehr entgegenkommender Frieden ohne Gebietsverluste mit ihnen geschlossen. Und dass, obwohl der enge Kontakt des Herzogs von Lüneburg zu Frankreich, im Gegensatz zu der Unterstützung des Bischofs für Franz I. untermauert werden konnte, er zudem einen weitaus größeren Herrschafts- und Einflussbereich als der Hildesheimer Stift aufzuweisen hatte und die Söhne Heinrichs des Mittleren nicht nur am französischen Hof erzogen worden waren, sondern jetzt auch mit ihrem Vater dort einen guten Kontaktmann zu König Franz I. besaßen. Somit wären die Verhältnisse im Herzogtum Lüneburg als weitaus bedrohlicher zu beurteilen gewesen, als in dem, nach dem Verlust seiner Verbündeten isolierten Stiftsgebiet. Trotz dieser weniger bedrohlichen Lage wurde zwischen den Braunschweiger Herzögen und Bischof Johann kein Friedensvertrag geschlossen, obwohl auch der Bischof 1523 ins Exil gegangen war. Erst 1528 wurde er aus der Acht gelöst, nachdem er 1527 endgültig von seiner Herrschaft über den Hildesheimer Stift resigniert hatte und somit keine Bedrohung mehr für die Interessen der Braunschweiger Herzöge darstellte. Damit zeigt sich deutlich, dass mit der Erfüllung der landesherrschaftlichen Interessen der Braunschweiger Herzögen auch die Verfolgung der vermeintlichen Gegner der Kaiserwahl Karls V. eingestellt wurde, ohne dass diese sich wegen ihres Verrates hätten verantworten müssen, da die Verhängung der Acht nur wegen der Zuwiderhandlung gegen kaiserliche Dekrete erfolgt war[67].

Daher beruhte der Sieg der welfischen Partei auf ihrem geschickten diplomatischen Vorgehen gegenüber Kaiser Karl V., unterstützt durch die große überregionale Machtakkumulation bei ihren Verbündeten. Zudem gelang es ihnen durch die geschickte Ausnutzung des reichspolitischen Konfliktes um die Nachfolge Kaiser Maximilians, den Bischof als geistlichen Fürsten um dreiviertel seines weltlichen Herrschaftsbereiches zu bringen. Dabei trug der Umstand, dass sich Verdachtsmomente gegen den Herzog von Lüneburg fanden, die von diesem nicht wirksam widerlegt werden konnten, entscheidend zu ihrem Erfolg bei.

Abschließend kann daher festgehalten werden, dass der Ausbruch der Fehde allein durch die machtpolitische Konkurrenz der regionalen Landesherren verursacht wurde. Die Gründe für das Scheitern Hildesheims und die Rechtfertigung für den Verlust des Stiftsgebietes sind dagegen in dem reichspolitischen Konflikt um die Kaiserwahl Karls V. zu suchen.

[66] Stanelle, S. 2 f.
[67] RTA II, S. 757; Gebauer, S. 151.

Die Thronbesteigung Kaiser Franz Josephs aus rechtshistorischer Sicht

Christoph Schmetterer[*]

Abstract

On December 2nd 1848 Austrian emperor Ferdinand I. abdicated. He was followed by his nephew Francis Joseph. This article publishes the relevant document and analyzes them from a legal point of view.

Key words: *Ferdinand I; Franz Joseph I.; Abdication; Emperor; Pragmatic Sanction; Order of succession; Age of majority.*

Der 2. Dezember 1848, an dem Erzherzog Franz zu Kaiser Franz Joseph I. wurde, war für diesen ein Tag, der sein gesamtes weiteres Leben bestimmen sollte. Immerhin begann an diesem Tag die Regierungszeit eines Mannes, der mit fast 68 Jahren länger regieren sollte, als nahezu jeder andere Monarch. Dementsprechend ausführlich wird der Ablauf jenes Tages in den Biographien Franz Josephs und seine Vorgängers Ferdinand I. beschrieben.[1] Die rechtlichen Vorgänge dieses Regierungswechsels werden dabei in der Regel aber bestenfalls kursorisch behandelt. Der nachstehende Beitrag enthält eine vollständige Edition der entsprechenden Dokumente und kommentiert sie aus rechtshistorischer Sicht.

Die Thronfolgeordnung

Die Nachfolgeordnung für die Habsburgermonarchie war in der Pragmatischen Sanktion von 1713 niedergelegt. Davor hatte es für die einzelnen Länder der Habsburger keine einheitliche Thronfolgeordnung gegeben.[2] Die Pragmatische Sanktion ging zurück auf das *Pactum mutuae successionis* von 1703. Dieser habsburgische Hausvertrag wurde vor dem Hintergrund des Aussterbens der spanischen Habsburger geschlossen. Leopold I. hatte in der *Cessio monarchiae Hispanicae* im selben Jahr seinen Anspruch auf den spanischen Thron an seinen jüngeren Sohn Karl abgetreten, während sein ältere Sohn Joseph Leopolds Nachfolger in den österreichischen Erbländern werden sollte. Somit sollte es wieder zwei habsburgische Linien geben, nämlich eine deutsch-österreichische nach Joseph und eine spanische Karl. Das *Pactum mutuae successionis* legte nun fest, dass in jeder Linie primär die männliche Erbfolge nach dem Prinzip der Primogenitur gelten sollte; bei Aussterben einer Linie im Mannesstamm sollte der Mannesstamm anderen Linie thronfolgeberechtigt sein, für das Aussterben beider Linien im Mannesstamm war eine subsidiäre weibliche Erbfolge vorgesehen. Das *Pactum mutuae successionis* wurde zunächst geheim gehalten.[3]

Innerhalb von nicht einmal zehn Jahren entwickelte sich die Situation in einer Weise, die im *Pactum mutuae successionis* so nicht vorgesehen war. 1711 starb Joseph ohne männliche Nachkommen. Sein Bruder musste seine auf Ansprüche auf Spanien verzichten und wurde als Karl VI. der Nachfolger Josephs im Reich, in den deutschen Erbländern und in Ungarn.[4] In dieser neuen Situation ließ Karl VI. das *Pactum mutuae successionis* am 19. April 1713 in einer Sitzung des geheimen Rats verkünden und erläuterte dessen Inhalt. Diese Erklärung Karls VI. zum *Pactum mutuae successionis* bildet die Pragmatische Sanktion.[5]

Die Pragmatische Sanktion war zunächst ein habsburgisches Hausgesetz, das die Thronfolge regelte. Als 1716 der einzige

* Dr. iur., Dr. phil. Christoph Schmetterer ist Mitarbeiter der Kommission für Rechtsgeschichte an der Österreichischen Akademie der Wissenschaften, Wien, Republik Österreich.

1 Einen Augenzeugenbericht der Ereignisse bietet Alexander Graf von Hübner, Ein Jahr meines Lebens. 1848–1849 (Leipzig 1891) 317–323; eine gelungene und umfassende Schilderung findet sich bei Jean-Paul Bled, Franz Joseph (Wien–Graz 1988) 83–90.

2 Zur Entwicklung der Thronfolgeregelungen vor der Pragmatischen Sanktion siehe Turba, Geschichte des Thronfolgerechtes in allen habsburgischen Ländern bis zur Pragmatischen Sanktion Kaiser Karls VI. 1156 bis 1732 (Wien–Leipzig 1903).

3 Wilhelm Brauneder, Die Pragmatische Sanktion als Grundgesetz der Monarchia Austriaca von 1713 bis 1918, in: Wilhelm Brauneder, Studien, Bd. 1: Entwicklung Öffentliches Recht (Wien–Frankfurt am Main 1994) 85–115, hier 90–93.

4 Der Text der Pragmatischen Sanktion ist publiziert bei Gustav Turba (Hg.), Die pragmatische Sanktion. Authentische Texte samt Erläuterungen und Übersetzungen (Wien 1913); Heinz Fischer, Gerhard Silvestri (Hgg.) Texte zur österreichischen Verfassungsgeschichte. Von der pragmatischen Sanktion zur Bundesverfassung (1713–1966) (Wien 1970) Nr. 1; Edmund Bernatzik (Hg.), Die österreichischen Verfassungsgesetze mit Erläuterungen (Wien ˛1911); Zum historischen Hintergrund siehe Karl Vocelka, Glanz und Untergang der höfischen Welt. Repräsentation, Reform und Reaktion im habsburgischen Vielvölkerstaat (= Österreichische Geschichte 1699–1815, Wien 2001) 84–87, 144–154.

5 Brauneder, Pragmatische Sanktion 85–88.

Sohn Karls VI. starb und daher damit zu rechnen war, dass die Habsburger im Mannesstamm aussterben könnten, entschloss sich Karl die Pragmatische Sanktion den Ständen der einzelnen Länder zur Bestätigung vorzulegen. 1720 legte er sie den Ständen seiner Länder mit Ausnahme Ungarns, Kroatiens, Slawoniens und Dalmatiens vor zur Bestätigung vor. Bis 1725 nahmen die Stände aller Länder diese Bestätigung vor. Den Ständen Kroatiens, Slawoniens und Dalmatiens wurde die Pragmatische Sanktion nicht vorgelegt, weil diese bereits 1712 Erklärungen zur Thronfolge abgegeben hatten, aus denen sich auch eine Zustimmung zur Pragmatischen Sanktion ableiten ließ.[6]

Entsprechend der Sonderstellung Ungarns innerhalb der habsburgischen Länder und der besonders starken Position der ungarischen Stände war es in Ungarn nicht möglich, die Pragmatische Sanktion von 1713 wie in den anderen Ländern einfach durch die Stände bestätigen zu lassen. In Ungarn wurde daher mit den Gesetzesartikeln I und II:1722 von den Ständen beschlossen, die durch den Gesetzesartikel III:1722 von Karl als König sanktioniert wurde. Damit hatte Ungarn eine formal eigenständige Thronfolgeregelung, die inhaltlich aber weitestgehend jener der Pragmatischen Sanktion von 1713 entsprach. Zum Teil wurden die drei ungarischen Gesetzesartikel auch als ungarische pragmatische Sanktion bezeichnet.[7]

In den folgenden Jahren und Jahrzehnten bemühte sich Karl VI., die Pragmatische auch völkerrechtlich von anderen europäischen Staaten anerkennen zu lassen. Schließlich wurde sie 1732 auch vom Reichstag bestätigt.[8]

Die Pragmatische Sanktion hatte somit nebeneinander verschiedene rechtliche Qualitäten: Sie war zunächst ein habsburgisches Hausgesetz, das durch die Bestätigung der Landtage auch ein staatliches Gesetz wurde, in Ungarn gab es formal verschiedene aber praktisch inhaltsgleiche staatliche Gesetze, und schließlich wurde die Pragmatische Sanktion durch die Bestätigung des Reichstags auch zu einem Reichsgesetz.

Die Bedeutung als Reichsgesetz ging mit der Beendigung des Heiligen Römischen Reiches 1806 verloren, als Hausgesetz wie als staatliches Gesetz blieb die Pragmatische Sanktion aber bis zum Ende der Habsburgermonarchie 1918 erhalten. Die Verfassungen und Verfassungsentwürfe von 1848/49nahmen ebenso wie das Oktoberdiplom von 1860 und das Februarpatent von 1861 direkt Bezug auf die sie. [9] Im Ausgleich mit Ungarn 1867 bildete die Pragmatische Sanktion schließlich die Grundlage der gemeinsamen Angelegenheiten der beiden Reichshälften.[10]

Inhaltlich regelte die Pragmatische Sanktion zwei Bereiche, nämlich einerseits die Unteilbarkeit der habsburgischen Länder, die bis dahin nur durch die Person des gemeinsamen Monarchen verbunden gewesen waren, und andererseits die nunmehr einheitliche Erbfolge in diesen Ländern.[11] Die Erbfolgeregelung folgte den Prinzipien der Lineal- (oder Parentel-)erbfolge und der Primogenitur. Außerdem sah die Pragmatische Sanktion auch die weibliche Erbfolge vor, allerdings nur subsidiär zur männlichen nach Aussterben des Mannesstammes.[12]

Konkret bedeutete dies, dass agnatische Verwandte des letzten Herrschers kognatischen Verwandten immer vorgehen. Unter Agnaten sind in diesem Zusammenhang (anders als im römischen Recht) alle Verwandten zu verstehen, die sich in rein männlicher Linie auf einen gemeinsamen Stammvater zurückführen lassen. Somit sind keineswegs alle männlichen Verwandten auch agnatische Verwandte.[13]

Nach dem Parentelprinzip schließt die nähere Parentel immer die fernere von der Erbfolge aus, sodass etwa agnatische Angehörige der zweiten Parentel nur dann zur Erbfolge gelangen können, wenn es keine agnatischen Verwandten in der ersten Parentel mehr gibt etc.[14]

Das Prinzip der Primogenitur besagt schließlich, dass innerhalb einer Parentel jeweils der Erstgeborene mit seinen Nachkommen, seine später geborenen Brüder mit deren Nachkommen von der Erbfolge ausschließt. Innerhalb der Nachkommen des Erstgeborenen gilt dann wieder der Vorrang des Erstgeborenen etc.[15]

Im Falle der subsidiären weiblichen Erbfolge wurden die Prinzipien der Parentelerbfolge und der Primogenitur genauso auf die kognatischen Verwandten angewendet.[16]

Die Erbfolgeregelungen der Pragmatischen Sanktion wurden durch das Familienstatut von 1839 entscheidend ergänzt. Aus der Pragmatischen Sanktion ergab sich zwar, wer von den Mitgliedern des Hauses Habsburg wann erbfolgeberechtigt sein sollte, sie legte aber nicht fest, wer überhaupt ein Mitglied des Herrscherhauses war. Das war seit 1839 in § 2 des Familienstatuts geregelt. Nach dieser Bestimmung gehörten folgende Personen zum Kaiserhaus: der Kaiser, seine Frau, Witwen früherer Kaiser, Erzherzöge und Erzherzoginnen, die vom regierenden Kaiser oder den Söhnen Maria Theresias und Franz I. Stephans abstammten und Ehefrauen der Erzherzöge. Darüber hinaus legte das Familienstatut fest, dass die Mitglieder des Kaiserhauses einer standesgemäßen, vom Familienoberhaupt genehmigten Ehe entstammen mussten. Außerdem waren legitimierte Kinder den ehelichen nicht gleichgestellt; nur die Ehelichkeit, nicht aber die Legitimation begründete die Zugehörigkeit zum Kaiserhaus. Dieser ausdrückliche Ausschluss legitimierter

6 Brauneder, Pragmatische Sanktion 98–100.
7 Brauneder, Pragmatische Sanktion 100–101.
8 Hugo Pöpperl, Die Pragmatische Sanktion (Leipzig–Prag–Wien 1917) 25–26.
9 § 5 Pillersdorfsche Verfassung, § 40 Kremsierer Verfassungsentwurf, § 9 Oktroyierte Märzverfassung, erster Absatz des Oktoberdiploms, Präambel des Februarpatents.
10 Dazu Karin Olechowski-Hrdlicka, Die Gemeinsame Angelegenheiten der Österreichisch-Ungarische Monarchie (Frankfurt am Main–Wien 2001).
11 Brauneder, Pragmatische Sanktion 107–109.
12 Gustav Seidler, Thronfolge, in: Ernst Mischler, Josef Ulbrich (Hgg.) Österreichisches Staatswörterbuch. Handbuch des gesamten österreichischen öffentlichen Rechts, Bd. 4: R–Z (Wien ¸1909) 548–552, hier 549–550.
13 Hans-Rudolf Hagemann, Agnaten, in: HRG1, Bd. 1 (Berlin 1971) 61–63.
14 Herbert Hofmeister, Parentel, Parentelordnung, in: HRG1, Bd. 3 (Berlin 1984) 1502–1510.
15 Jürgen Weitzel, Primogenitur, in: HRG1, Bd. 3 (Berlin 1984) 1950–1956.
16 Friedrich Tezner, Der Kaiser (Wien 1909) 144.

Kinder war allerdings auch schon in der Pragmatischen Sanktion enthalten.[17]

Mit der Erbfolgeregelung der Pragmatischen Sanktion war die Thronfolge in der Habsburgermonarchie endgültig von der zivilrechtlichen Erbfolge entkoppelt worden. Der vielleicht deutlichste Unterschied zwischen Thronfolge und sonstiger Erbfolge war, dass – unabhängig von der Zahl der Kinder – immer nur eine Person Herrscher werden konnte. Das ergab sich aus dem Prinzip der Primogenitur und aus der daraus resultierenden Unteilbarkeit der Habsburgermonarchie.

Außerdem gab es spätestens mit der Pragmatischen Sanktion nur mehr eine zwingende gesetzliche Thronfolge; eine gewillkürte Thronfolge gab es anders als in der zivilrechtlichen Erbfolge nicht (mehr). Hätte ein Herrscher ein anderes Mitglied des Erzhauses als den nächsten Berechtigten zu seinem Nachfolger bestimmen wollen, wäre das nur durch Verzicht aller davor Thronfolgeberechtigten oder durch eine Änderung der Thronfolgeordnung möglich gewesen. Eine Änderung der Thronfolgeordnung hätte der Herrscher aber nicht mehr eigenmächtig vornehmen können. In Ungarn war sie bereits seit 1722 gesetzlich verankert und hätte daher auch nur durch ein staatliches Gesetz verändert werden können. Die österreichische Lehre war der Ansicht, dass spätestens mit der Einführung der konstitutionellen Monarchie auch in den nicht-ungarischen Ländern für die Änderung der Thronfolge ein staatliches Gesetz erforderlich gewesen wäre.[18] Von 1732 bis 1806 wäre für die Änderung der Thronfolgeordnung der Habsburger außerdem ein entsprechendes Reichsgesetz nötig gewesen.

Die Volljährigkeitserklärung von Erzherzog Franz Joseph

„Wir Ferdinand der Erste, von Gottes Gnaden Kaiser von Oesterrich, König von Hungarn und Böhmen, dieses Namens der Fünfte; König der Lombardei und Venedigs, von Dalmatien, Croatien, Slavonien, Galizien, Lodomerien und Illyrien; Erzherzog von Österreich; Herzog von Lothringen, Salzburg, Steyer, Kärnthen, Krain, Ober- und Nieder-Schlesien; Großfürst von Siebenbürgen; Markgraf von Mähren; gefürsteter Graf von Habsburg und Tirol.

erklären hiemit und thuen kund, wienach Wir durch vielfältige Beweise zur Überlegung gelangt sind, daß unser geliebter Neffe, der durchlauchtigste Erzherzog Franz Joseph, sich der vollkommenen Reife des Verstandes erfreut, dergestalt daß Wir Uns, in Ausübung der Uns nach Unseren Haus- und Staats-Gesetzen als Souverain und Familien-Oberhaupt zustehenden Befugniß bewogen finden, Höchstdenselben hiemit für volljährig zu erklären, zu welchem Ende Wir gegenwärtige Akte höchsteigenständig unterzeichnet, und von dem Minister Unseres Hauses gegenzeichnen zu lassen.

So gegeben in Unserer königlichen Hauptstadt Olmütz, am ersten December im ein tausend acht hundert acht und vierzigstem, Unserem Reiche dem vierzehnten Jahre.

Ferdinand

F. Schwarzenberg“[19]

Das ABGB von 1811 regelte die Volljährigkeit in § 21. Nach dieser Bestimmung, die bis 1919 unverändert bleiben sollte, erreichte man die Volljährigkeit mit Vollendung des vierundzwanzigsten Lebensjahres. Allerdings sah § 252 ABGB die Möglichkeit vor, Minderjährige, die das zwanzigste Lebensjahr bereits vollendet hatten, vorzeitig durch Gerichtsbeschluss für volljährig zu erklären. Dafür musste eine positive Stellung des Vormundes (vom ABGB „Gutachten“ genannt) eingeholt werden.[20]

Für das Kaiserhaus waren die Regelungen des ABGB über die Volljährigkeit jedoch nicht anwendbar. Hier sah das Familienstatut vom 3. Februar 1839 abweichende Regelungen vor. Nach § 6 des Statuts erlangten Mitglieder des Kaiserhauses grundsätzlich schon mit Vollendung des zwanzigsten Lebensjahres die Volljährigkeit. Für einen minderjährigen Monarchen oder Kronprinzen sah § 5 des Statuts aber eine Sonderregelung vor: Er wurde bereits mit dem vollendeten sechzehnten Lebensjahr volljährig. Das Familienstatut verwendet nicht den unter Umständen nicht ganz eindeutigen Begriff des Kronprinzen, sondern spricht vom „unmittelbar zur Thronfolge berufenen Sohn des jeweiligen Souverains“ und begrenzt die Sonderregel über die Volljährigkeit schon mit sechzehn sehr eng. Diese Sonderregel wird im Familienstatut selbst damit begründet, dass eine Regentschaft für einen minderjährigen Monarchen vermieden oder zumindest möglichst kurz gehalten werden sollte. Dementsprechend stellt § 8 Z. 2 ausdrücklich klar, dass die Großjährigkeit das Recht zum unmittelbaren Regierungsantritt mit sich bringt.[21]

Die Vorschriften des Familienstatuts über die Volljährigkeit waren für den Kaiser nicht zwingend. § 7 räumte ihm die Möglichkeit ein, Mitglieder des Kaiserhauses vorzeitig für volljährig zu erklären oder deren Volljährigkeit erst später eintreten zu lassen. Als Voraussetzungen für die vorzeitige Volljährigkeitserklärung nannte das Familienstatut „dringende Umstände und bewiesene Reife des Verstandes“ für die hinausgezögerte Volljährigkeit hingegen etwas allgemeiner „überwiegende Gründe“. Von der ersten Möglichkeit machte Ferdinand I. bei seinem Neffen Gebrauch.

Franz Joseph war kein Sohn des regierenden Kaisers Ferdinand und wäre daher erst mit seinem zwanzigsten Geburtstag, somit am 18. August 1850 volljährig geworden. Franz Joseph sollte aber schon im Dezember 1848 der Nachfolger Ferdinands werden. Wäre er zu diesem Zeitpunkt noch als Minderjähriger Kaiser geworden, wäre eine Regentschaft erforderlich gewesen

[17] HHStA, Familienurkunden Nr. 2362; dazu Christoph Schmetterer, Die Rechtsstellung Kaiserhaus der Mitglieder des österreichischen Kaiserhauses vom 1839 bis 1918, in: Journal on European History of Law 2/1 (2011) 15–20.

[18] Seidler, Thronfolge 549.

[19] HHStA, Familienurkunden Nr. 2425.

[20] Dazu Franz von Zeiller, Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten deutschen Erbländer der oesterreichischen Monarchie, Bd. 1 (Wien–Triest 1811), 116–117, 514–517.

[21] Schmetterer, Kaiserhaus 17–18.

und damit genau das, was das Familienstatut durch die besonderen Volljährigkeitsregeln für den Kronprinzen vermeiden wollte. Daher wurde er noch vor der Abdankung Ferdinands für volljährig erklärt.

Die Erklärung erwähnt das Familienstatut zwar nicht explizit, nimmt aber ausdrücklich auf die „Uns nach Unseren Haus- und Staats-Gesetzen als Souverain und Familien-Oberhaupt zustehenden Befugniß“ Bezug. Außerdem erklärt das Dokument, dass Franz Joseph „vielfältige Beweise [...] der vollkommenen Reife seine Verstandes“ erbracht hat, und erfüllt damit § 7 des Statuts, nach dem eine vorzeitige Volljährigkeitserklärung nur bei „bewiesener Reife“ möglich ist.

Die Verzichtserklärungen Erzherzog Franz Carls und Kaiser Ferdinands

„Ich Franz Carl, kaiserlicher Prinz und Erzherzog von Oesterreich, königlicher Prinz von Ungarn und Böhmen, erkläre hiemit, wienach Seine Majestät Unser allergnädigster Kaiser und Herr, Ferdinand der Erste, Mein geliebtester Bruder mir eröffnet hat, daß Allerhöchstdieselben aus wichtigen Gründen die Absicht hegen, die Krone des Kaiserthums Oesterreich und der sämtlichen zu demselben gehörigen Königreiche und sonstigen wie immer benannten Kronländer niederzulegen, beziehungsweise zu Gunsten Allerhöchst Ihres legitimen Thronfolgers zu verzichten.

Obgleich ich nun hienach, in Gemäßheit der in Unserem Erzhause geltenden Thronfolge-Ordnung zum unmittelbaren Antritte der Oesterreichischen Kaiserkrone berufen wäre, so habe Ich doch, nach reiflicher Überlegung, den Entschluß gefasst, und erkläre hiermit, auf Mein angestammtes Nachfolgerecht unwiderruflich zu Gunsten Meines erstgeborenen, nach Mir zur Nachfolge berufenen Sohnes, Seiner Liebden des durchlauchtigsten Erzherzogs Franz Joseph und der nach Ihm zur Thronfolge bestimmten Nachfolger, zu verzichten und willige ein, daß die Krone des Kaiserthums Österreich und aller unter demselben vereinigten Königreiche und sonstigen wie immer benannten Kronländer für den Fall der Abdankung Seiner Majestät des regierenden Kaisers und Königs Ferdinands des Ersten, nun unmittelbar an diesen Meine geliebten Sohn übergehe.

So geschehen in der königlichen Hauptstad Olmütz im Jahre des Heils ein tausend acht hundert acht und vierzig, am ersten December

Franz Carl
F. Schwarzenberg“[22]

„Wir Ferdinand der Erste, von Gottes Gnaden Kaiser von Oesterrich, König von Hungarn[23] und Böhmen, dieses Namens der Fünfte; König der Lombardei und Venedigs, von Dalmatien, Croatien, Slavonien, Galizien, Lodomerien und Illyrien; Erzherzog von Österreich; Herzog von Lothringen, Salzburg, Steyer, Kärnthen, Krain, Ober- und Nieder-Schlesien; Großfürst von Siebenbürgen; Markgraf von Mähren; gefürsteter Graf von Habsburg und Tirol.

erklären hiemit und thun kund, wichtige Gründe nach reiflicher Überlegung Uns zu dem unwiderruflichen Entschluße bestimmt, die Kaiserkrone niederzulegen. Wir entsagen demnach durch gegenwärtigen Act feierlich der von Uns bisher zur Wohlfahrt Unserer geliebten Völker getragenen Krone des Kaiserthums Oesterreich und der sämmtlichen unter demselben vereinigten Königreiche und sonstigen, wie auch immer bezeichneten Kronländern und zwar zu Gunsten Unseres geliebten Neffen, Seiner Liebden des durchlauchtigsten Erzherzog Franz Joseph und der nach Ihm zur Thronfolge berechtigten Nachfolger, nachdem Unser geliebte Bruder, Seine Liebden der Durchlauchtigste Erzherzog Franz Carl auf das Höchstdemselben in Gemäßheit der in Unserem Kaiserlichen Erzhause geltenden Thronfolgegesetze nach Uns zustehende Recht der Thronfolge laut der Uns behändigten durch die Mit-Unterzeichnung Unserer gegenwärtigen Abdankungsakte neuerliche bestätigten Verzichts-Akte freiwillig zu Gunsten Höchst Ihres Sohnes, Unseres geliebten Neffen, des Durchlauchtigsten Erzherzogs Franz Joseph und der nach Ihm zur Thronfolge berechtigten Nachfolger Verzicht geleistet haben.

Zur feierlichen Beurkundung dessen haben Wir diese Acte unter Beitritt Unseres durchlauchtigsten Herrn Bruders in Gegenwart der in Unserem Kaiserlichen Hoflager anwesenden Glieder Unseres Kaiserlichen Hauses und Unseres Ministerrathes unterzeichnet und von dem Minister Unseres Hauses gegenzeichnen und mit Unserem Kaiserlichen Insiegel versehen lassen.

So gegeben in Unserer königlichen Hauptstadt Olmütz, am zweiten Tage des Monats Dezember im Eintausend Achthundert, Acht und vierzigsten, Unserer Reiche im Vierzehnten Jahre.

Ferdinand
Franz Carl
Schwarzenberg“[24]

Die Verzichtserklärungen Franz Carls und Ferdinands nehmen wechselseitig Bezug aufeinander und stellen dabei eine eindeutige zeitliche Abfolge her. Die Erklärung Franz Carls bezieht sich explizit auf die Absicht seines Bruders, abzudanken. Ferdinands geplante Abdankung war also eindeutig der Grund für Franz Carls Verzicht, lag aber noch in der Zukunft als dieser seine Erklärung abgab. Auch Ferdinands Abdankung erwähnt die Verzichtserklärung Franz Carls ausdrücklich und zwar als bereits geschehen. Außerdem bestätigte Franz Carl seinen Verzicht erneut, indem er die Abdankungsurkunde seines Bruders mitunterzeichnete.[25]

[22] HHStA, Familienurkunden Nr. 2526.
[23] Die Schreibungen „Hungarn“ und „Ungarn“ wurden in diesen Dokumenten beliebig nebeneinander verwendet.
[24] HHStA, Familienurkunden Nr. 2426.
[25] Diese Reihenfolge ist falsch wiedergegeben bei Tezner, Kaiser 160. Die richtige Reihenfolge, dass Franz Carl zuerst verzichtet und Ferdinand dann abgedankt hat ergibt sich aus eindeutig aus dem Patent Ferdinands über seine Abdankung (JGS 145/1848) und dem Manifest Franz Josephs über seinen Regierungsantritt (RGBl. 1/1849).

Die Abdankungserklärung Ferdinands beginnt mit dem mittleren Titel des Kaisers, wie er im Wesentlichen 1806 festgelegt worden war.[26] Während Ferdinands Erklärung im Majestätsplural abgefasst ist, ist die seines Bruders in der ersten Person Singular gehalten. Für besonders formelle, rechtserhebliche Erklärungen des Kaisers blieb der Majestätsplural bis zum Ende der Monarchie in Gebrauch. Bei Erzherzögen war die Verwendung des Majestätsplurals hingegen uneinheitlicher. Eindeutige Kriterien dafür lassen sich nicht eindeutig erkennen. Im Gegensatz zu Franz Carls Verzichtserklärung von 1848 sind beispielsweise die von Franz Ferdinand am 28. Juni 1900 abgegebenen Renuntiationserklärungen bezüglich seiner Frau und seiner Nachkommen im Plural abgefasst.[27]

Weder das staatliche Recht noch die Hausgesetze enthielten Regelungen über den Thronverzicht von Mitgliedern des Erzhauses. Trotzdem war unbestritten, dass ein solcher Verzicht möglich war. Dies wurde im Allgemeinen schlichtweg damit begründet, dass niemand dazu gezwungen werden kann, Monarch zu sein. Das galt sowohl für die Abdankung, also den Verzicht eines bereits regierenden Monarchen (wie bei Ferdinand), als auch für den Anspruchsverzicht, mit dem ein potentieller Thronerbe auf seine Thronfolgeansprüche verzichtete bevor er überhaupt zum Monarchen wurde (wie bei Franz Carl). Einigkeit bestand darüber, dass eine Verzichtserklärung nicht an irgendwelche Bedingungen geknüpft werden konnte, nicht widerrufen werden konnte und dass durch sie Verzichtende selbst gebunden wurde, nicht aber seine Nachkommen.[28]

In den Erklärungen Franz Carls und Ferdinands ist daher ausdrücklich die Unwiderruflichkeit des Verzichts festgehalten; sie enthalten auch keinerlei Bedingungen oder Befristungen. Beide Erklärungen betonen, dass der Verzicht zugunsten Franz Josephs erfolgt. Die entsprechenden Passagen können nur deklarativen, nicht konstitutiven Charakter haben. Ein Verzicht konnte nur zugunsten des nächsten zur Thronfolge Berufenen erfolgen; der Verzichtende hatte keine freie Wahl, wer sein Nachfolger sein sollte.[29] Nach den Regeln der Pragmatischen Sanktion war zur Nachfolge Ferdinands, weil dieser keine Nachkommen hatte, die zweite Parentel berufen. In dieser Parentel wäre zunächst Franz Carl zum Zug gekommen; erst durch seine Verzichtserklärung konnte Franz Joseph Kaiser werden.

Da die Regeln der Pragmatischen auch für den Monarchen verbindlich waren, hätten die beiden Verzichtserklärungen vom Dezember 1848 genau dieselbe Wirkung gehabt, wenn sie die Wendung „zu Gunsten [...] Erzherzogs Franz Joseph nicht enthalten hätten. Mit dieser Formulierung wurde nur klargestellt, dass der Verzicht Franz Carls nicht auch für dessen Sohn Franz Joseph wirkte und dieser daher der neue Kaiser werden würde.

Die Thronbesteigung Franz Josephs

Über den Thronverzicht Ferdinands wurde folgendes Protokoll aufgenommen.

„Nach geschehener Verlesung wurde die Acte[30] über die Abdankung Seiner Majestät von Allerhöchstdemselben und von Seiner Kaiserlichen Hoheit, dem Erzherzoge Franz Carl unterzeichnet und von dem Minister des Hauses gegengezeichnet, sämmtliche Akte aber dem Minister des Hauses zur weiteren Verfügung behändigt.

Hierauf wurden Seine kaiserliche Hoheit, der durchlauchtigste Erzherzog Franz Joseph von Seiner Majestät dem Allerdurchlauchtigsten Kaiser Ferdinand dem Ersten als Höchstdessen legitimer Thronfolger feierlich begrüßt und als Kaiser und König unter dem Nahmen Franz Joseph des Ersten proklamirt.[31]

So geschehen im Krönungssaal der fürsterzbischöflichen Residenz in der Königlichen Hauptstadt Olmütz am eingangsgesetzten Tage und Jahre."

Dieses Protokoll ist insbesondere für die Frage relevant, wann genau Franz Joseph Kaiser wurde. Es wäre naheliegend anzunehmen, dass dies mit Ferdinands Unterschrift der Verzichtserklärung geschah. Das Protokoll deutet aber auf einen etwas späteren Zeitpunkt hin. Nach der Unterschrift der Erklärung begrüßte Ferdinand „Erzherzog Franz Joseph" (nicht etwa den Kaiser) als seinen „legitimen Thronfolger". Dann erst proklamierte Ferdinand Franz Joseph als „Kaiser und König". Nach dieser Formulierung wurde Franz Joseph erst zum Kaiser, als Ferdinand ihn dazu proklamierte. Das scheint im Widerspruch mit der unumstrittenen Auffassung zu stehen, dass der Rechtserwerb des neuen Monarchen von irgendwelchen Proklamationen unabhängig war und *eo ipso* mit dem Ende der Rechtsstellung seines Vorgängers geschah.[32]

Dieser Widerspruch kann durch folgende Überlegung geklärt werden: Erstens war die Abdankung eines Kaisers nicht der Normalfall. Der Normalfall war der Tod des alten Monarchen. In diesem Fall wurde der Thronfolger *eo ipso* mit dem Tod seines Vorgängers zum Monarchen; wenn es irgendeine Proklamation

[26] Dekret vom 6. August 1806.

[27] HHStA, Familienurkunden Nr. 2813

[28] Seidler, Thronfolge 551, Tezner, Kaiser 162–163; Die Verzichtserklärung des bisherigen Erzherzogs Ferdinand Max und nachmaligen Kaisers Maximilian von Mexiko vom 9.4.1864 beinhaltet auch einen Verzicht für seine Nachfahren; dabei handelte es sich aber nicht um eine Verzicht auf seine Thronansprüche, sondern überhaupt auf seine Stellung als Erzherzog, sodass diese Erklärung eher den Charakter eines Austritts aus dem Kaiserhaus hat. Wieder eine Situation lag den Verzichtserklärungen Franz Ferdinands vom 28.6.1900 zugrunde: Franz Ferdinands Ehe mit Sophie Chotek galt als nicht standesgemäß. Nach den Bestimmungen des Familienstatuts wurden Kinder aus einer nicht standesgemäßen Ehe ohnehin keine Mitglieder des Erzhauses und konnten daher keinesfalls Thronansprüche haben. Die entsprechende Erklärung Franz Ferdinands hatte somit nur deklarativen Charakter.

[29] Tezner, Kaiser 163.

[30] Die Schreibweisen „Act" und „Akt" werden beliebig nebeneinander verwendet.

[31] Hier wird der neue Monarch erstmals als Franz Joseph I. bezeichnet. Ursprünglich war als Name Franz II. vorgesehen gewesen, doch knapp vor dem Thronwechsel überredete Ministerpräsident Schwarzenberg den künftigen Kaiser zum Doppelnamen Franz Joseph; Hübner, Ein Jahr meines Lebens 317.

[32] Franz Hauke, Die geschichtlichen Grundlagen des Monarchenrechts. Ein Beitrag zur Bearbeitung des österreichischen Staatsrechts (Wien 1894) 139–140; Seidler, Thronfolge 550; Tezner, Kaiser 160–161.

nötig gewesen wäre, hätte das zu einem Interregnum geführt. Im Sonderfall der Abdankung war das aber nicht so. Der alte Herrscher blieb solange Kaiser, bis sein Nachfolger zum Monarchen wurde. Im konkreten Fall geschah das offenbar nicht schon, als Ferdinand die Verzichtsurkunde unterzeichnete, sondern erst als er Franz Joseph zum Kaiser proklamierte. Das bedeutet auch, dass Ferdinands Abdankung nicht schon mit der Unterzeichnung wirksam wurde, sondern erst, als er Franz Joseph als Kaiser proklamierte.[33] Die Formulierung des Protokolls ist allerdings insofern etwas missverständlich, als das Wort „proklamieren" durchaus so verstanden werden könnte, dass eine Proklamation konstitutiv für die Thronbesteigung Franz Josephs gewesen wäre; tatsächlich muss der konstitutive Akt aber der Verzicht Ferdinands gewesen sein, der jedoch erst wirksam wurde, als Ferdinand seinen Nachfolger als Kaiser apostrophierte.

Allgemein bekannt gemacht wurde der Regierungswechsel durch ein Patent Ferdinands und ein Manifest Franz Josephs jeweils vom 2. Dezember 1848. Da bereits der Thronverzicht seines Vorgängers konstitutiv für die Thronbesteigung Franz Josephs war, hatte sein Antrittsmanifest nur deklarative Wirkung. Das Erlassen des Manifests war aber insofern rechtserheblich, als der neue Kaiser damit deutlich machte, dass er die Thronfolge auch annehmen wollte. Bis zu diesem Zeitpunkt hätte Franz Joseph noch auf den Thron verzichten können, ohne dass er jemals Kaiser geworden wäre.[34] Insofern erfüllte das Manifest also in etwa die Funktion einer Erb(antritt)serklärung. Ab 1861 war das Erlassen eines Manifestes zum Regierungsantritt auch mit Art. VI des Februarpatents im positiven Verfassungsrecht verankert.

Dem Ausland wurde der Thronwechsel durch persönliche Briefe des neuen Monarchen an die jeweiligen Staatsoberhäupter bekannt gegeben.[35]

Ebensowenig wie das Antrittsmanifest hatte der in § 9 der Pillersdorfschen Verfassung vom April 1848 vorgeschriebene Verfassungseid des neuen Monarchen konstitutive Wirkung für die Thronbesteigung. Tatsächlich leistete Franz Joseph diesen Eid auch niemals. Im Dezember 1848 stand die Pillerdorfsche Verfassung zwar formell in Geltung, aufgrund der kaiserlichen Proklamation vom 16. Mai 1848 war der Reichstag aber zum konstituierenden Reichstag erklärt worden. Damir war klar, dass die Pillersdorfsche Verfassung abgeändert oder durch eine andere abgelöst werden sollte; sie wurde nicht praktisch umgesetzt. Auch die oktroyierte Märzverfassung, die im März 1849 die Pllersdorfsche ablöste, bestimmte in § 13, dass der Kaiser bei seiner Krönung die Verfassung beschwören sollte.[36] Dazu kam es schon allein deshalb nicht, weil die in § 12 der Märzverfassung vorgesehene Krönung zum Kaiser von Österreich nie stattfand. Das in dieser Bestimmung vorgesehene Ausführungsgesetz über die Kaiserkrönung ist nie ergangen, wie auch die Märzverfassung insgesamt nicht umgesetzt worden ist. Eine Kaiserkrönung hätte – anders als die ungarische Königskrönung – freilich auch keine konstitutive Wirkung für die Rechtsstellung als Kaiser von Österreich gehabt.[37]

Auch die Dezemberverfassung von 1867 sah in Art. 8 des Staatsgrundgesetzes über die Ausübung der Regierungs- und Vollzugsgewalt erneut vor, dass der Kaiser bei seinem Regierungsantritt einen Eid auf die Verfassung leisten sollte. Zu diesem Zeitpunkt lag der Regierungsantritt Franz Josephs aber schon mehr als 19 Jahre zurück, sodass der nie einen Eid auf die Verfassung ablegte. Das mag seiner im Innersten wohl immer anti-konstitutionellen Einstellung durchaus entsprochen haben.

Mit seiner Thronbesteigung wurde Franz Joseph nicht nur Kaiser von Österreich etc., sondern auch Oberhaupt des Kaiserhauses. Diese beiden Funktionen konnten nicht voneinander getrennt werden, wie auch aus dem Text des Familienstatus hervorgeht, das alle Aspekte der Hausgewalt dem Kaiser bzw. dem Souverän zuordnete. Das führte dazu, dass mit dem 2. Dezember 1848 auch Ferdinand als abgedankter Kaiser der Hausgewalt seines Neffen und Nachfolgers Franz Joseph unterstand.

Aufgrund der strikten Trennung von Thronfolge und zivilrechtlicher Erbfolge, erhielt Franz Joseph 1848 aber nicht das Vermögen Ferdinands. In den ersten Jahren seiner Regierung war Franz Joseph daher ein vergleichsweise „armer Kaiser". Als Ferdinand 1875 starb setzte er ihn aber testamentarisch zu seinem Alleinerben ein, sodass Franz Joseph 27 Jahre nach seiner Thronbesteigung auch bezüglich des Vermögens sein Nachfolger wurde.[38]

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[33] Dies erinnert an das geltende Verwaltungsverfahrensrecht, in dem ein Bescheid überhaupt erst dann entsteht, wenn er erlassen wird. Erlassen wird ein Bescheid aber nicht durch die Unterschrift des zuständigen Organs, sondern mit seiner Verkündung oder seiner Zustellung. § 62 Abs. 1 AVG; Rudolf Walter, Dieter Kolonovits, Gerhard Muzak, Karl Stöger, Verwaltungsverfahrensrecht (Wien 92011) 257–259.

[34] Seidler, Thronfolge 550–551; Tezner, Kaiser 161.

[35] Die diesbezügliche Korrespondenz befindet sich in HHStA, Ministerium des Äußern, Administrative Registratur, Fach 1, Kart. 23

[36] Zum Verfassungseid Hauke, Monarchenrecht 141–142.

[37] Schon in der Pragmatikal-Verordnung Franz I./II. vom 11.8.1804, durch die Titel des Kaisers von Österreich geschaffen wurde, war eine Krönung grundsätzlich vorgesehen. Tatsächlich wurde aber keiner der vier Kaiser von Österreich zum Kaiser gekrönt, während alle vier zum König von Ungarn gekrönt wurden.

[38] Hätte Ferdinand seinen Nachfolger Franz Joseph aber nicht testamentarisch bedacht, hätte dieser gar nichts von seinem Vorgänger geerbt. Der alleinige gesetzliche (aber nicht pflichtteilsberechtigte) Erbe Ferdinands wäre sein Bruder Franz Carl gewesen. Nach den Regeln des ABGB wäre neben Franz Carl auch seine Schwester Maria Klementine gesetzliche Erbin nach ihrem Bruder Ferdinand gewesen. § 38 des Familienstatuts bestimmte aber, dass die gesetzliche Erbfolge im Kaiserhaus auf den Mannesstamm beschränkt sein sollte. Ein gesetzliches Ehegattenerbrecht gab es vor 1914 nicht einmal im ABGB. Ferdinand versorgte seine Witwe Maria Anna durch Legate. Nachdem Tod Kronprinz Rudolfs am 30.1.1889 war klar, dass auch nach Franz Joseph die Thronfolge und die sonstige Erbfolge auseinanderfallen würden. Um einen Teil seines bisherigen Privatvermögens dauerhaft an seine Regierungsnachfolger weitergeben zu können, errichtete Franz Joseph 1901 ein Fideikommiss. Dazu Christoph Schmetterer, Die letztwilligen Verfügungen Kaiser Franz Josephs, in: BRGÖ 1 (2011) 317–338, hier 321–322.

Entwicklungstendenzen bei der Abgrenzung der zivilrechtlichen von der strafrechtlichen Haftung

*József Szalma**

Abstract

In the present paper the author analyses the basic legal features of civil liability (liability for damages arising from torts or breach of contractual duties), delimitating it from criminal liability, taking into account theoretical considerations, regulations and their application, beginning from traditional codifications of civil law in Europe in 19th century (French, Austrian and German). The method of incrimination in civil law is, namely, general, prohibiting by general norm any case of causing of damage (general incrimination), while the incrimination in criminal law is special, precisely describing each and every criminal act (special incrimination). Criminal liability remains a fault-based liability, while civil liability, besides fault liability, also introduces strict liability, which is not based on fault of the tortfeasor, but on causation, i.e. on the increased risk of causing damage. Civil liability may be either tortious or contractual, while continental criminal law doesn't envisage criminal liability for breach of contract.

Key words: *Civil liability; criminal liability; delimitation of civil from criminal liability.*

I. Einleitung

Die grundlegenden rechtlichen Besonderheiten der zivilrechtlichen deliktischen bzw. vertraglichen Haftung werden in dieser Arbeit durch die theoretische, regulative und applikative Abgrenzung von der strafrechtlichen Haftung analysiert, beginnend von den traditionellen europäischen zivilrechtlichen Kodifikationen. Während der langen (zeitlichen und ideal-institutionellen) Evolution der zivilrechtlichen Haftung, ganz bis zur Zeit der großen zivilrechtlichen Kodexe, war die zivilrechtliche Haftung bezüglich ihrer grundlegenden Prinzipien und Haftungsbedingungen in enger Verbindung mit der strafrechtlichen Haftung. Bei der klassischen Periode des Römischen Rechts hat sich die zivilrechtliche Haftung in ihrer Grundidee nicht ganz von der strafrechtlichen Haftung getrennt, denn nach ihrer Funktion, wie auch die strafrechtliche Haftung, hat sie eher bußgeldlichen als restitutiven Charakter, d. h. sie hat eher den Schädiger bestraft, als dass sie den Geschädigten entschädigt hat. Beginnend von der ersten großen Zivilkodifikation, dem französischen Code civil, und teils auch vom österreichischen Allgemeinen bürgerlichen Gesetzbuch, weiterhin dem deutschen Bürgerlichen Gesetzbuch, verläuft die Grenzlinie zwischen der bürgerlich-deliktischen und der strafrechtlichen Haftung auf dem Gebiet der Art der Inkriminierung. Die bürgerrechtliche Inkriminierung durch das allgemeine Verbot der Schadensverursachung gegenüber einer anderen Person (allgemeine Inkriminierung) definiert ist. Die strafrechtlichte Inkriminierung hat einen speziellen Charakter bekommen, indem sie jede Handlung auf eine präzise Weise einzeln vorgeschrieben hat (spezielle Inkriminierung). Von dieser Zeit an ändert sich der Zweck der zivilrechtlichen Haftung; statt des bisherigen bußgeldlichen (pönalen) Ansatzes orientiert sie sich zum Entschädigungsziel, in Richtung der Entschädigung des Geschädigten. Die strafrechtliche Haftung bleibt bis heute auf der Schuld (als subjektive Haftung) basiert, während die bürgerliche deliktische Haftung, neben der subjektiven, auch die Haftung ohne Verschulden akzeptiert hat, basiert auf der Wirkung von Sachen, bzw. auf der Ursächlichkeit. In der Materie der zivilrechtlichen Haftung erfolgt eine weitere Teilung in neue Arten der Haftung wie außervertragliche (deliktische) und vertragliche (oder kontraktuelle) Haftung, abhängig davon, ob das allgemeine Verbot der Schadenverursachung verletzt wurde, bzw. ein gesetzlich geschütztes Gut (Eigentum, Persönlichkeit, Freiheit, Gesundheit, bzw. die psychische, physische und Vermögenssintegrität), oder eine individuelle Norm, eine vertragliche Regel. Obwohl für beide Arten der Haftung (zivilrechtliche und strafrechtliche) die Haftungsbedingungen identisch sind (Schaden bzw. Folge, Widerrechtlichkeit, Ursächlichkeit, bzw. Schuld), haben sie eine wesentlich neue, verschiedenartige Bedeutung bekommen, die

* Prof. Dr. József Szalma, Ordentlicher Professor der Rechtswissenschaftlichen Fakultät der Universität in Novi Sad, Lehrstuhl für Zivilrecht, Serbien; Ordentliches Mitglied der Akademie der Wissenschaften und Künste der Vojvodina, Doctor scientiae iuris der Ungarischen Akademie der Wissenschaften, Ratgebendes Mitglied der Ungarischen Akademie der Wissenschaften, Doctor honoris causa der Universität Miskolc, Mitglied der Forschungsstelle für europäische Rechtsentwicklung und Privatrechtsreform der Rechtswissenschaftlichen Fakultät der Universität Wien.

dem restitutiven Ziel angepasst ist. Bei den Haftungsbedingungen bleibt nur die Ursächlichkeit mit gemeinsamen rechtlichen Inhalt und Bedeutung.[1]

Die zivilrechtliche, und besonders die deliktische Haftung, hat sich relativ *spät* von anderen Haftungsarten *abgegrenzt*, und besonders von der strafrechtlichen Haftung. Zur vollständigen konzeptuellen bzw. legislativen Trennung der zivilrechtlichen von der strafrechtlichen Haftung kommt es erst während des 19. Jahrhunderts, mit der Verabschiedung der großen bürgerlichen Kodexe, wie das französische Code civil (Cc 1804), das Allgemeine Bürgerliche Gesetzbuch für das Kaisertum Österreich - 1811 (ABGB) und das deutsche Bürgerliche Gesetzbuch – 1896/1900 (BGB). Vor diesen Kodexen charakterisierte die Straffunktion auch die zivilrechtliche und strafrechtliche Haftung, infolge der römischrechtlichen Tradition bzw. Duplum. Das heißt, dass die Entschädigung höher als der Schaden sein könnte. Seit dieser (kontinentalen) zivirechtlichen Kodifikationen ist das Ziel der zivilrechtlichen Haftung nicht mehr die Penalisation des Schadensverursachers, sondern die vollständige Entschädigung (damnum emergens und lucrum cessans) der Beschädigten.

Die grundlegenden Grundsätze, nach denen man die funktionelle Trennung und Abgrenzung der zivilrechtlichen von der strafrechtlichen Haftung verwirklicht hat, bezogen sich auf (I) die Methoden der Inkriminierung von bürgerlichen Delikten; (II) das Ziel; (III) die Haftungsbedingungen; und die (IV) Sanktionentypologie.

II. Abgrenzungstendenzen

(I) Inkriminierungsmethode

Unter Inkriminierung versteht man generell die Methode des Vorschreibens der zivilrechtlichen und strafrechtlichen Delikte, d. h. darunter die Art der Bestimmung von Delikten (zivilrechtliche bzw. strafrechtliche). Die strafrechtliche Inkriminierung ist seit der Zeit der Entstehung der bürgerlichen Gesellschaft zu einer *speziellen* geworden, und die zivilrechtliche Inkriminierung zu einer *allgemeinen.* Die spezielle strafrechtliche Inkriminierung geht vom Grundsatz nullum crimen aus (sinae criminae et sinae lege): es besteht keine strafrechtliche Haftung ohne ein vorher vorgeschriebenes und detailliert beschriebenes Strafdelikt. Die Inkriminierung eines Strafdelikts kann wegen der rechtlichen Sicherheit nicht auf flexiblen Direktiven basieren (sog. Kautschuk-Normen, normative Ausdrücke mit einem breiten Bedeutungsspektrum). Sie war zur Zeit der sog. repräsentativen oder feudalen Gesellschaft speziell, aber begründet auf breiten und allgemeinen Formulierungen, so dass die Besonderheit wegen Unpräzisheit gefährdet war. Im modernen Recht ist erlaubt, was durch eine spezielle Inkriminierung nicht verboten ist. Die strafrechtliche Inkriminierung des modernen Strafrechts definiert detailliert bzw. präzise jedes einzelne Strafdelikt (z. B. Diebstahl, Körperverletzung, usw.)

In den Kodexen des bürgerlichen Rechts der repräsentativen Gesellschaft (régime ancien) oder der feudalen gesellschaftlichen Ordnung wird das bürgerliche Recht noch von der Methode der speziellen deliktischen Inkriminierung begleitet, durch die Aufzählung (Enumeration) der unerlaubten Schadensarten. Das deutsche BGB (Bürgerliches Gesetzbuch, 1896) hat zum Teil diese Methode beibehalten, mit Bestimmung von Delikten als Verletzung von gruppierten, rechtlich geschützten Gütern, bzw. als Verletzung von Leben, Körper, Gesundheit, Freiheit und Eigentum.[2]Aber durch die Bestimmung von Delikten als vorsätzliche Verletzung von gesetzlich typisierten Gütern ist es fast zur allgemeinen Inkriminierung gekommen. In der Materie der deliktischen und kontraktuellen Haftung geht das BGB von der Gesetzesverletzung aus, bzw. von vertraglich bestimmten Gütern bzw. Verpflichtungen, bezüglich deren die zivilrechtliche Haftung für den entstandenen Schaden eintritt.[3] Im Unterschied dazu hat das französische *Code civil* die Methode der vollständigen Verallgemeinerung von bürgerlichen Delikten angenommen, indem es vorgeschrieben hat, dass jede Person verpflichtet ist, sich von einer widerrechtlichen Schadensverursachung gegenüber einem anderen Subjekt zu enthalten, denn in einem solchen Fall wäre sie zur Entschädigung des Schadens verpflichtet, der durch ihr Verschulden entstanden ist.[4] Die allgemeine Inkriminierungsmethode nimmt – ähnlich wie die französische Vorschrift – auch das schweizerische Obligationengesetz an (1882, neue Fassung 1911), denn es sieht vor, dass „wer einem andern widerrechtlich Schaden zufügt, sei es mit Vorsatz, sei es aus Fahrlässigkeit, wird ihm zum Ersatze verpflichtet“[5]

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[1] S. z. B. RÜMELIN, Max, Die Verwendung der Kausalbegriffe im Straf- und Zivilrecht, Archiv für zivilistische Praxis, 90, 900, S. 171. TRAEGER, Der Kausalbegriff im Straf- und Zivilrecht (Neudruck 1929). Von CAEMMERER, Das Problem des Kausalzusammenhanges im Privatrecht, 1956. STOLL, Hans, Kausalzusammenhang und Normzweck im Deliktsrecht, 1965. SCHULIN, Der natürliche – vorrechtliche - Kausalitätsbegriff im zivilen Schadenersatzrecht, 1976., usw.

[2] Vgl. Par. 823. Abs. (1) des deutschen BGB. (z. B. in: BGB Bürgerliches Gesetzbuch mit dem Einführungsgesetz zum BGB (EGBGB), Area Verlag GmbH unter Genehmigung von Nomos Verlagsgesellschaft, Nördlingen, 2005, S. 179. Vgl. auch KÖTZ, Hein – WAGNER, Gerhard, Deliktsrecht, zehnte, neu bearbeitete Auflage, Luhterhand, Wolters Kluver, München, 2006, S. 43. Punkt 100; PRÜTTING, Hans – WEGEN, Gerhard – WEINREICH, Gerd, BGB Kommentar, 2. Auflage, Luchterhand, 2007, S. 1347.

[3] Vgl. RANIERI, Filippo, Europäisches Haftpflichtrecht, Springer Verlag, Wien-New York, zweite erweiterte Auflage, 2003, S. 514.

[4] Code civil, Art. 1382., 1383, s. z. B. in: Code civil, 102. édition (redigé de Alice *Tisserand*), Paris, 2003, S. 1175. AUBIN, V., Résponsabilité délictuelle et responsabilité contractuelle, Th. Bordeaux, 1897. SAVATIER, Renné,, Traité de la responsabilité civil en droit français civil, administratif, professionell, procedural, II. Aufl, Durand Auzias, Paris, 1950, S. 5-9.

[5] *Obligationengesetz,,* Art. 41, 42. in der Publikation: Obligationenrecht, Bundeskanzlei, 1984, S. 10-14. – Da das schweizerische Obligationengesetz, neben der deutschen Sprache, im authentischen Text auch in französischer Sprache gilt, vgl. auch: *Code des obligations, Cancelerie federale*, 2001, S. 11-16.

Das *Gesetz über Obligationenverhältnisse Serbiens (Zakon o obligacionim odnosima Srbije*, Abkürzung ZOO)[6] akzeptiert, wie sein überwiegendes Vorbild, das schweizerische Obligationengesetz,[7] auch das allgemeine Inkriminierungsprinzip, indem es vorschreibt, dass „derjenige, der jemand anderem Schaden verursacht, verpflichtet ist, Schadenersatz zu leisten, wenn er nicht beweisen kann, dass der Schaden ohne sein Verschulden entstanden ist."[8] Der Unterschied zwischen dem ZOO einerseits und dem deutschen BGB und dem schweizerischen Obligationengesetz andererseits besteht darin, dass das deutsche und schweizerische Gesetzbuch in die allgemeine Inkriminierung, neben dem *gesetzwidrigen* (widerrechtlichen) Verhalten, auch das den *guten Sitten* widersprechende deliktische Verhalten einschließen. Das ZOO begrenzt die guten Sitten überwiegend nur auf die Grenze der Vertragsfreiheit, und verleiht ihnen keine allgemeine deliktische inkriminierende Bedeutung.

Die Inkriminierungsmethode des *österreichischen Allgemeinen bürgerlichen Gesetzbuchs* verdient eine besondere Aufmerksamkeit.[9] Es bestimmt zuerst den Begriff des Schadens, als Folge eines bürgerlichen Delikts, und dann die Quellen der zivilrechtlichen Haftung, wodurch es sich auf spezifische Weise der allgemeinen Methode der zivilrechtlichen Inkriminierung nähert.[10] Nämlich, nach dem öABGB: „Schade heißt jeder Nachteil, welcher jemandem an Vermögen, Rechten oder seiner Person zugefügt worden ist. Davon unterscheidet sich der Entgang des Gewinnes, den jemand nach dem gewöhnlichen Laufe der Dinge zu erwarten hat."[11] Bei der Regelung der Schadensquellen bestimmt das öABGB: „Der Schade entspringt entweder aus einer widerrechtlichen Handlung, oder Unterlassung eines andern; oder aus einem Zufalle. Die widerrechtliche Beschädigung wird entweder willkürlich oder unwillkürlich zugefügt. Die willkürliche Beschädigung gründet sich teils in einer bösen Absicht, wenn der Schade mit Wissen und Wille; teils in einem Versehen, wenn er aus schuldbarer Unwissenheit, oder aus Mangel der gehörigen Aufmerksamkeit, oder des gehörigen Fleißes verursacht worden ist. Beides wird ein Verschulden genannt."[12]

Bei den Reformländern, bzw. den neuen EU-Mitgliedern, z. B. im *ungarischen Recht*,[13] erkennt man die Tendenz des Annehmens der allgemeinen zivilrechtlichen Inkriminierung.[14] Im *Zweiten Vorschlag des Ungarischen bürgerlichen Gesetzbuches* (2008) wird nämlich das allgemeine Verbot der Schadensverursachung gegenüber anderen angenommen, mit den Worten, dass jede Schadensverursachung verboten ist, außer wenn es vom Gesetz anders geregelt wird.[15] Gemäß der neueren ungarischen Literatur ist nach dem Standpunkt der zivilrechtlichen Haftung jede Schadensverursachung, die mit dem Recht nicht im Einklang ist, widerrechtlich.[16]

Das Strafrecht kennt nur den Begriff des *(strafrechtlichen)*

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[6] Rechtsgeschichtliche Aspekte bzw. über die Einflüsse auf die Kodifikation des Schuldrechtes im ehemaligen Jugoslawien, s. z. B. SZALMA, J., Geltung und Bedeutung der Kodifikationen Österreichs, Serbiens und Montenegros im ehemaligen Jugoslawien, Zeitschrift für Neuere Rechtsgeschichte, Manz Verlag, Wien, Nr. 4/1994, S. 341-348. SZALMA, J., Az ABGB (OAPTK) továbbélése a Monarhia utódállamaiban – Különös tekintettel a volt Jugoszláviára és utódállamaira (Weiterleben des ABGB in den Nachfolgestaaten der Monarchie – Mit besonderer Berücksichtigung des ehemaligen Jugoslawien und seiner Nachfolgestaaten), in: A német-osztrák jogterület klasszikus magánjogi kodifikácói – Tanulmányok az OPTK és a BGB évfordulói alkalmából (Klassische privatrechtliche Kodifikationen des deutschen und österreichischen Rechtsgebiets – Schriften anlässlich der Jubiläen des ABGB und des BGB), Martin Opitz Kiadó, Budapest, 2011, S. 103-108; SALMA, J., Pravne osobine građansko-pravne odgovornosti (Rechtliche Eigenschaften der zivilrechtlichen Haftung), in: Zbornik radova – Collected Papers, Pravni fakultet u Novom Sadu, Novi Sad, Faculty of Law, Serbia, Novi Sad, 2008, S. 79-98; SALMA, J., Odgovornost za štete od dejstva stvari (Haftung für die Wirkung von Sachen), Zbornik radova – Collected Papers, Pravni fakultet u Novom Sadu, Novi Sad, Faculty of Law, Serbia, Novi Sad, 2009, S. 7-31; SALMA, J., Ugovorna odgovornost – u evropskom, uporednom i domaćem pravu (Vertragliche Haftung – im europäischen, vergleichenden und einheimischen Recht), Zbornik radova – Collected Papers Pravni fakultet u Novom Sadu, Novi Sad, Faculty of Law, Serbia, Novi Sad, 2011, S. 69-107.

[7] Über den Einfluss des Schweizerischen Obligationenrechts auf das ungarische und serbische Recht s. SZALMA, J., A svájci kötelmi törvényről, a Kódex és a kódexen kívüli törvények elvi kapcsolatáról (Über das schweizerische Obligationenrecht, prinzipielle Fragen über das Verhältnis zwischen dem Kodex und den Sondergesetzen), in: Lectiones Honoris causa, Új kihívások Európában – a jogtudomány válaszai (Neue Herausforderungen in Europa – Antworten der Rechtswissenschaft), Red. Ilona Görgényi, Miskolc, Bíbor Kiadó, 2008, S. 125- 147.

[8] Vgl. Abs. (1) Art. 154. ZOO. z. B. in: PETAKOVIĆ, Radmila, Priručnik za primenu Zakona o obligacionim odnosima (Handbuch zur Anwendung des Obligationengesetzes), Novi Sad, 1994, S. 47.

[9] S. Art. 10. des ZOO.

[10] Wie WELSER, Rudolf (in: Koziol-Welser, Bürgerliches Recht, Band II Welser, Schuldrecht allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht, 13. Auflage, Manz Verlag, Wien, 2007, S. 338) zu Recht bemerkte, "ein Delikt ist im Zivilrecht ein verbotenes Verhalten, ein *Verstoß gegen allgemeine Verhaltenspflichten*, es ist nicht auf ein strafbares Verhalten beschränkt."

[11] S. Par. 1293. des österreichischen Allgemeinen bürgerlichen Gesetzbuches. Siehe z. B. in: *Kodex des österreichischen Rechts, Bürgerliches Recht*, 34. Auflage, Stand 1.9.2007, LexisNexis, Orac, Wien, 2007, ABGB, S. 135.

[12] S. Par. 1294. des österreichischen Allgemeinen bürgerlichen Gesetzbuches. Vgl. z. B. in: *Kodex des österreichischen Rechts, Bürgerliches Recht*, 34. Auflage, Stand 1.9.2007, LexisNexis, Orac, Wien, 2007, ABGB, S. 135. V. und: WELSER. Rudolf, Bürgerliches Recht, Band II. Schuldrecht allgemeiner Teil, Schuldrecht Besonderer Teil, 13. Auflage, Manz Verlags- und Universitätsbuchhandlung, Wien, 2007, S. 299-306, sowie die Literaturliste auf S. 299.

[13] S. Über Rekodifikation des Ungarischen Zivilrechtes, insbesondere Schadenersatzrecht: SZALMA, J., A polgári jogi (szerződésen kívüli és szerződési) felelősség alapelvei (Grundprinzipien der zivilrechtlichen /außervertragliche und vertragliche/ Haftung) in: Kötelmi jogi kodifikaciós tanulmányok (2003-2005), Redaktion: BIRO, György, SZALMA, J., Novotni Kiadó, Miskolc, 2005, S. 51-99; SZALMA, J., Rekodifikation des ungarischen Bürgerlichen Gesetzbuches aus dem Jahre 1959 (beginned im Jahre 1998) Annales (Universitatis scientiarium Budapestiensis de Rolando Eötvös nominatae), ELTE ÁJK, Budapest, Tomus XLI-XLII 2000-2001, str. 54-80; SZALMA, J. Szabályozási módszerek a magyar polgári jogban (1985-2005), in: A magyar jogrendszer átalakulása (Umwandlung des ungarischen Rechtes) 1985/2005, Bd. I. , Gondolat - ELTE ÁJK, Budapest, 2007, S. 667-679.

[14] Über *allgemeine zivil-rechtsgeschichtliche Aspekte* des ungarischen Rechtes, s. z. B., NESCHWARA, Christian, Das ABGB in Ungarn, in: Österreichs Allgemeines Bürgerliches Gesetzbuch (ABGB), Band III Das ABGB außerhalb Österreichs, Herausgegeben von Elisabeth Berger, Duncker und Humblot, Berlin, 2010, S. 33-133. Siehe weiter HAMZA, G., Az európai magánjog fejlődése, A modern magánjogi rendszerek kialakulása római jogi hagyományok alapján, Budapest, 2002; ibid, Le développement du droit privé Européen, Le role de la tradition romaniste dans la formation du droit privé

Delikts, und das bürgerliche Recht kennt noch aus der entwickelten Periode des Römischen Rechts[17] neben dem Begriff des *(bürgerlichen) Delikts* auch den Begriff des *quasi delictum*, d. h. eines Delikts, welches dem klassischen ähnelt, aber das ist es dennoch nicht wegen einiger seiner Besonderheiten. Das Quasi-Delikt unterscheidet sich vom klassischen Delikt eigentlich darin, dass ein *Delikt das Ergebnis einer menschlichen widerrechtlichen Handlung oder eines Versäumnisses ist*, und das Quasi-Delikt geht aus der *Wirkung von Sachen* hervor[18], d. h. es handelt sich um einen Schaden, der durch das Wirken einer Sache entsteht, und diesbezüglich *besteht eine menschliche Pflicht (jemandes Pflicht), den Schaden zu verhindern*, bzw. die Pflicht der präventiven Aufmerksamkeit. Für die Folgen (des Schadens), die durch das Quasi-Delikt verursacht wurden, ist derjenige verantwortlich, der die notwendige Aufmerksamkeit, die Prävention des Schadens, versäumt hat. So ist für einen von Wildtieren verursachten Schaden derjenige verantwortlich, der – wenn es sich um ein öffentliches Gut handelt – gesetzlich mit der Leitung beauftragt war, oder der Eigentümer, im Falle von Privateigentum. Das Quasi-Delikt unterscheidet sich vom Wirken von höherer Gewalt (vis maior) und vom Zufall (casus) darin, dass bei der *höheren Gewalt* und meistens auch beim Zufall keine Haftung besteht, und beim Quasi-Delikt gibt es sie auf die beschriebene Weise. Höhere Gewalt ist ein äußeres, unvorhersehbares und unvermeidbares Ereignis. Gemäß der Eigenschaft der Unvorhersehbarkeit und Unvermeidbarkeit besteht in diesem Fall keine Haftung, d. h. sie schließt eine Haftung aus. Eine Ausnahme ist die sog. *absolute Haftung* – vorgesehen im neueren deutschen[19], österreichischen[20], ungarischen Recht[21] – in den Gesetzen über *Atomschäden*. Sie sehen vor, dass im Falle, wenn ein Atomschaden durch das Wirken von höherer Gewalt entstanden ist, der Eigentümer des Kraftwerks verantwortlich ist für den Schaden in Form von Todesfällen und Schädigungen von menschlicher Gesundheit.

Das Quasi-Delikt nähert sich dem *Zufall* darin, dass bei ihm die Vorhersehbarkeit in begrenztem Maße *doch* besteht. Daher, wenn die Vorhersehbarkeit im Sinne von Wahrscheinlichkeit besteht, dann besteht auch die Haftung, sowohl für den Zufall als auch für das Quasi-Delikt, und zwar seitens der Person, welche die gesetzliche Pflicht des Voraussehens hatte. Ein Beispiel: ein Autoinhaber kann voraussehen, dass es zu einem Unfall wegen dem Platzen eines Reifens oder wegen seinem Überdruck

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14 cont. moderne, Budapest, 2005. Im traditionellen ungarischen Haftungsrecht betont man als primäres Prinzip die Prävention, ähnlich wie im Strafrecht. Siehe insbesondere MARTON, Géza, Les fondaments de la responsabilité civile, Paris, 1938, S. 344; ibid, A polgári jogi felelősség (sajtó alá rendezte Zlinszky János), Budapest, 1992. SZALMA, J., Parlament und Zivilgesetzgebung in Ungarn, in: MÁTHÉ, G., MEZEY, B., Von den Ständeversammlungen bis zum parlamentarischen Regierungssystem in Ungarn, Studien zur Parlamentsgeschichte, Budapest-Graz, 2011, S. 131. SZALMA, J., Haupttendenzen im ungarischen (deliktischen) Haftpflichtrecht in der zweiten Hälfte des 19. bis zur ersten Hälfte des 20. Jahrhunderts mit besonderer Berücksichtigung der österreichischen Einflüsse, in: Legal Transition, Development of Law in Formerly Socialist States of the Challenges of the European Union – Rechtsentwicklung in den ehemaligen sozialistischen Staaten und die Herausforderung der europäischen Union, Pólay Elemér Alapítvány, Szeged, 2007, S. 321-333. SZALMA, J., Haupttendenzen im ungarischen Deliktsrecht (Haftpflichtrecht), in: Rechtsgeschichtliche Vorträge, Bd. 50 (Jubiläumsband), Budapest, 2007, S. 362-375. SZALMA, J., Der Einfluss des ABGB in der präzedentiellen Rechtsprechung des ungarischen Obersten Gerichtshofes (Curia) zum Schadenersatzrecht in der zweiten Hälfte des 19. Jahrhunderts, in: KOHL, G., NESCHWARA, Ch., SIMON, Th., Festschrift für Wilhelm Brauneder, Rechtsgeschichte mit internationaler Perspektive, Wien, Manz Verlag, 2008, S. 661-676. SZALMA, J., Differenzierung zwischen der bürgerrechtlichen ud der strafrechtlichen Haftung in der Doktrin und den Kodifikationen des 19. und 20. Jahrhunderts, Annales Universitatis Scientiarium Budapestiensis de Rolando Eötvös nominatae, Sectio iuridica, Tomus L, Budapest 2009. S. 187- 210. SZALMA, J., Differenzierung zwischen der zivilrechtlichen und der strafrechtlichen Haftung in der Theorie und in den Kodifikationen des 19. und 20. Jahrhunderts, Rechtsgeschichtliche Vorträge, Publikation der rechtsgeschichtlichen Forschungsgrupe der Ungarischen Akademie für Wissenschaften am Lehrstuhl für ungarische Rechtsgeschichte - Eötvös Lóránd Universität, Herausgegeben von Prof. Dr. MEZEY, Barna, Budapest, 2009. SZALMA, J., Okozatosság és polgári jogi felelősség (Ursächlichkeit und zivilrechtliches Haftungsrecht), Miskolc, Novotni Alapítvány, 2000, S. 18-19. SZALMA, J. Szerződésen kívüli (deliktuális) felelősség az európai és a magyar magánjogban (Außervertragliche-deliktische Haftung im europäischen und ungarischen Privatrecht), Herausgeber: Bibliotheca Iuridica, ELTE ÁJK (Fakultät der Rechtswissenschaften der Universität Eötvös Lóránd) Budapest, - Bíbor Kiadó, Miskolc, 2008, S. 35.

15 Vgl. *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez*, Szerkesztő: VÉKÁS, Lajos, (Expertenvorschlag des Neuen ungarischen bürgerlichen Gesetzbuchs, Herausgeber: Akademiker Lajos Vékás), Complex Wolters Kluwer csoport, Budapest, 2008, Art. 5:509 (Allgemeines Verbot der Schadensverursachung) S. 1115.

16 Vgl. PETRIK, Ferenc, Kártérítési jog – Az élet, testi épség, egészség megsértésével szerződésen kívül okozott károk megtérítése (Ersatz des außervertraglichen Schadens in Folge der Verletzung von Leben, Körper und Gesundheit), HVG ORAC, Budapest, 2002, S. 25. Punkt 1.

17 S. z. B. MARTON, Géza, A polgári jogi felelősség, Triorg, Budapest, ohne Jahreszahl, in Redaktion von János Zlinszky und László Sólyom, Nachwort von János Zlinszky, 1983, S. 36-50, Punkt 34-47; FÖLDI, András, HAMZA, Gábor, A római jog története és institúciói, Nemzeti Tankönyvkiadó, Budapest 1996, S. 408-411, Randnummer 1335-1358, S. 418-425, Randnummer 1362-1382.

18 S. z. B. FÖLDI, András, HAMZA, Gábor, A római jog története és institúciói, Nemzeti Tankönyvkiadó, Budapest 1996, S. 568-569. Randnummer 1856-1861.; MOLNÁR, Imre, A római magánjog, József Attila Tudományegyetem Állam- és Jogtudományi kar, Szeged, 1994, S. 18. 1995; BENEDEK, Ferenc, Római magánjog, Dologi és kötelmi jog, 2. kiadás, Pécs, S. 213-215; BESSENYŐ, András, Római magánjog II, A római magánjog az európai jogi gondolkodás történetében, Dialóg Campus Kiadó, Pécs, 1999, S. 282-283; FIKENTSCHER, Wolfgang, Schuldrecht, 6. Aufl., Walter de Gruyter, Berlin – New York, 1976, S. 680 (Produkthaftung).

19 S. *Atomhaftpflichtgesetz* : Bundesgesetz vom 29. April 1964, BGBL. Nr. 117.

20 S. *Atomhaftpflichtgesetz*, Bundesgesetzblatt (Österreichs), Nr. 1964/117, 1976/91 -2, 1991/628, 3, 1997/140, s. Par. 3, 9. und 11. Quelle: Codex des österreichischen Rechts. ABGB, Orac, Wen, 1999, 27 AtomHG. Die internationale Konvention über die Haftung für Schäden von Atomanlagen wurde in Wien am 21. Mai 1963 verkündet.

21 Vgl. *Az atomkárokért való polgári jogi felelősségről Bécsben 1963. május 21.-én kelt Nemzetközi Egyezmény kihirdetéséről szóló 24/1990 (II. 7) sz. MT rendelet*. /Verordnung der Regierung Ungarns über die Promulgierung der Wiener Konvention über die zivilrechtliche Haftung für Atomschäden (1963) aus dem Jahre 1990/

kommen kann, wenn er die alten Reifen am Auto nicht rechtzeitig wechselt, obwohl er nicht wissen kann, wann und ob es dazu kommen wird.

Bei der Methode der Feststellung der Haftung im Falle, wenn das Delikt seitens *mehrerer Täter* erfolgt ist (z. B. Täter, Mittäter, Helfer, Anstifter), kennt das Strafrecht nur die *individuelle,* einzelne Haftung von jedem Mitwirkenden, proportionell zum Beitrag, gemessen an der Schuld und der Kausalität. Die zivilrechtliche deliktische Haftung stellt als Ausnahmefall auch die *solidäre* Haftung fest[22], unter der Bedingung, dass die Handlungen der Täter bewusst (planmäßig) verbunden sind. In diesem zweiten Fall kann primär im ersten Schadenersatzprozess jeder angeklagte Täter/Schadenverursacher für den ganzen Schaden verantwortlich sein. Natürlich mit dem Recht des verurteilten Schadenersatzerstatters, dass er in einem Regressprozess als Kläger einen Teil des Schadenersatzes von den anderen, ursprünglich nicht angeklagten passiv solidarischen Schadensverursachern verlangt, proportionell zu ihrem Beitrag zur Schadensverursachung, gemessen mit der Ursächlichkeit bzw. Schuld (wenn es sich um subjektive Haftung handelt).

Was die *Art* der Haftung betrifft, so haben die bürgerlichen Kodexe in bedeutendem Maße das Konzept der bürgerlichen Haftung von der strafrechtlichen getrennt. Als erstes, die strafrechtliche Haftung ist *ausschließlich subjektiv,* basiert auf der Schuld, bzw. dem Schuldgrad des Täters. Neben den Umständen und der Art der Ausübung sieht das Strafrecht bei der Feststellung des Haftungsmaßes eine strengere oder mildere Strafe vor, abhängig vom Schuldgrad. Beim gleichartigen Strafdelikt stellt das Strafrecht das Haftungsmaß abhängig davon fest, ob die Tat vorsätzlich oder fahrlässig ausgeübt wurde. Innerhalb dieser grundlegenden Arten von Schuld berücksichtigt das Strafrecht verschiedene „Unterarten" der vorsätzlichen oder fahrlässigen Schuld (z. B. dolus premeditatis, dolus eventualis, dolus malus, usw.), die ihrerseits auch das Maß und die Art der Sanktion beeinflusst. Im Unterschied zur strafrechtlichen Haftung kann die zivilrechtliche deliktische Haftung *subjektiv* (basiert auf der Schuld) oder *objektiv* (unabhängig von der Schuld, basiert auf der Ursächlichkeit, bzw. auf dem bestehenden Risiko für das Entstehen des Schadens durch das Wirken von sog. gefährlichen Gegenständen oder gefährlichen Handlungen) sein.

Die strafrechtliche Haftung wird ausschließlich für *persönliche Handlungen* festgestellt, und die zivilrechtliche Haftung wird – außer der Regel, dass man vor allem für eigene Handlungen haftet – ausnahmsweise in den gesetzlich vorgeschriebenen Fällen auch für *Fremdhandlungen* festgestellt. Die traditionellen bürgerlichen Gesetzbücher, wie auch das geltende ZOO Serbiens, sehen die folgenden Haftungsfälle für fremde Handlungen vor: (1) Die *Haftung von Eltern und Vormunden* für deliktische Handlungen ihrer minderjährigen *Kinder* oder deliktisch unfähiger Personen (deliktisch unfähig sind jene Personen, die nicht in der Lage sind, die Folgen ihrer Handlungen zu begreifen) (2) Haftung des *Staates* für fraudolöse, gesetzwidrige Handlungen ihrer *Organe* (im deutschen Recht: Organhaftung) (3) Haftung von *Firmen* (wirtschaftlichen Gesellschaften) und anderen rechtlichen Personen für Schäden, die gegenüber Drittpersonen seitens Angestellten oder Firmenorganen während der Arbeitszeit bzw. der Ausübung der Arbeitspflicht verursacht wurden. (4) Haftung des Staates für *terroristische Akte,* bis der Täter entdeckt wird. (5) *Vertragliche Übertragung der* Haftung vom potentiellen Schädiger auf eine andere Person, z. B. Versicherungsgesellschaft, auf Grund einer Haftpflichtversicherung oder einer freiwilligen Versicherung.

Die strafrechtliche Haftung kennt die kontraktuelle Haftung nicht (zu Grund). Die zivilrechtliche Haftung ist zweifach für den verursachten Schaden: sie unterscheidet die *deliktische* und die *vertragliche* (kontraktuelle) Haftung. Unter der deliktischen Haftung versteht die zivilrechtliche Doktrin die Verletzung des allgemeinen gesetzlichen Verbots der Schadenverursachung gegenüber anderen Personen, und unter der vertraglichen Haftung versteht sie die Verletzung der vertraglichen Verpflichtung. Der Unterschied äußert sich darin, dass die deliktische Haftung auf der Verletzung eines allgemeinen rechtlichen Akts begründet ist, und die kontraktuelle Haftung besteht in der Verletzung eines individuellen Akts. Die strafrechtliche Haftung kann daher ausschließlich auf dem *Gesetz* begründet sein (wegen dem Prinzip nullum crimen). In Unterschied dazu kann die zivilrechtliche Haftung *sowohl auf dem Gesetz als auch auf dem Vertrag begründet sein*. Die auf dem Gesetz begründete zivilrechtliche Haftung ist eine deliktische Haftung und besteht in einem Verhalten, welches das allgemeine gesetzliche Verbot der Verursachung von Schäden (materielle und immaterielle) gegenüber anderen Personen verletzt. Im Falle der Verletzung der vertraglichen Verpflichtung (Nichterfüllung, unordnungsgemäße Erfüllung, Verspätung) tritt die vertragliche oder kontraktuelle Haftung wegen der Verletzung der früheren, im individuellen Akt enthaltetenen Verpflichtung ein, in diesem Falle nicht durch den Willen des Gesetzes sondern durch den Willen der Parteien festgestellt. Für die deliktische Haftung gilt das Prinzip der vollständigen Haftung, d. h. die Verpflichtung zu Schadenersatz im Ganzen, d. h. sowohl des positiven Schadens (damnum emergens) als auch des entgangenen Gewinns (lucrum cessans), im Prinzip gibt es, ohne Rücksicht auf den Grad der Schuld, keine Reduktion des Schadenersatzes. Es gibt eine Ausnahme von der Regel, dass die deliktische Haftung immer *vollständig*[23] ist, ohne kontraktuelle Reduktion des Schadenersatzes: (1) beim gerichtlichen *Ausgleich,*[24] (2) bei der *Vergebung* (der Tat), bzw. der *Schuldenvergebung*,[25] (3) in Fällen der *geteilten Haftung* zwischen dem Schadenverursacher und dem Geschädigten,[26] (4) bei der Haftversicherung kann man entweder durch das Gesetz oder durch eine besondere Vertragsklausel (über sog. Franchisen, mit

[22] S. Art. 414-424. des ZOO.
[23] S. Art. 190., Art. 185. Abs. (1)-(4) und Art. 189. Abs. (1) ZOO.
[24] S. Art. 1089-1098. des ZOO.
[25] S. Art. 344-347. des ZOO.
[26] S. Abs. (1) und (2) Art. 192. des ZOO.

ihren Unterarten – Absonderungs-, integrale und proportionelle Franchise) die Versicherungssumme limitieren, und manche Versicherungsarten, wie z. B. die Unterversicherung,[27] sind ab initio auf die Versicherungssumme orientiert, die geringer ist als der Wert des potentiellen Schadens, für den Fall des Eintretens des Versicherungsrisikos. Im Allgemeinen kann die Haftung bei vertraglichen Haftungen, Klauseln über die Haftungslimitierung vermindert oder ausgeschlossen werden (wie am Beispiel des abstrakten Schadens, beim Vertrag über die fakultative Versicherung mit der Ausschließung von manchen Risiken, durch die vertragliche Strafe usw.) Bei der zivilrechtlichen Haftung kann man die Haftung feststellen, obwohl es in Folge der Nichtausfüllung keinerlei Schaden gibt (bzw. es gibt keine Folgen), unter der Bedingung, dass es zur Vertragsverletzung gekommen ist, z. B. durch das Vorsehen von Pönalen für jeden Tag der Verspätung bei der Lieferung von Produkten beim Transportvertrag.

Neben den allgemeinen Regeln über die zivilrechtliche Haftung kennt das bürgerliche deliktische Recht auch besondere Regeln, bzw. *besondere Fälle der zivilrechtlichen Haftung*[28], die in etwas (z. B. hinsichtlich der Grundlagen oder des Subjekts der Haftung) von der allgemeinen Haftungsform abweichen, wie z. B. die Haftung von Sportlern und sportlichen Organisationen, die Haftung für Schäden durch den Einsturz von Gebäuden, verschiedene Arten von professionellen Haftungen (z. B. von Ärzten für eine falsche Behandlung, von Ingineuren für nicht ordnungsgemäßes Bauen usw.). Im Unterschied dazu und in diesem Sinne hat die strafrechtliche Haftung keine ausgesonderten Arten, wenn man die Variationen bezüglich derselben wegen erschwerenden oder erleichternden Umständen nicht rechnet.

Das Maß der strafrechtlichen Haftung ist die *Schwere der Tat, die Bedeutung des verletzten öffentlichen oder privaten Interesses sowie die Umstände des Falles.* Das Maß der bürgerlichen deliktischen Haftung wird bestimmt durch das Kriterium der *Verletzung des privaten Interesses,* bzw. von der *Höhe des* materiellen Schadens, bzw. dem Maß der Eigentumsverminderung des Geschädigten durch eine gesetzwidrige Handlung oder durch ein Versäumnis des Schädigers, gemessen mit dem Marktkriterium.[29] Das ist die Wiederherstellung des früheren Eigentumszustands, des Zustands, der vor der Schadenverursachung bestanden hat, d. h. der Schadenersatz ist vollständig.[30] Bei einem nicht eigentumsverbundenen Schaden (Angst, psychischer Schmerz, Rufschädigung, Verminderung der allgemeinen Lebensfähigkeit, Verunstaltung, unbegründete Freiheitsberaubung, physischer Schmerz, Verletzung von Persönlichkeitsrechten und persönlichen Rechten), hängt die *geldliche Genugtuung* ab von (1) der *Bedeutung des verletzten Gutes*, (2) dem Ziel der Entschädigung – Leistung von *Genugtuung*, (3) dass die Genugtuung *nicht zur unbegründeten Bereicherung* des Geschädigten führt. Bei Angst und physischem Schmerz gibt es neben den allgemeinen Kriterien auch besondere wie z. B. die *Intensität und Dauer.*[31]

Die Befreiung von der Haftung bzw. die Ausschließung der zivilrechtlichen und strafrechtlichen Haftung hat gemeinsame, aber auch getrennte Gründe. Die *Notwehr* (die Abwendung eines gleichzeitigen widerrechtlichen Angriffes auf sich oder auf andere)[32] und die *äußerste Not* (Abwendung der Gefahr) sind gleichermaßen Gründe für das Ausschließen der Haftung sowohl im strafrechtlichen als auch im zivilrechtlichen deliktischen Recht. Die *Selbsthilfe* ist im bürgerlichen Recht, aber auch im Strafrecht unzulässig, bzw. im bürgerlichen Recht ist sie nur in Ausnahmefällen erlaubt[33], wenn im Falle einer unmittelbaren Bedrohung der Schutz eines rechtlich geschützten Gutes mittels des staatsrechtlichen Schutzes nicht möglich ist. *Höhere Gewalt* (vis maior)[34] und *Zufall* (casus) sind auch Gründe für die Auschließung der bürgerlichen deliktischen Haftung. *Eine geringe gesellschaftliche Gefahr* ist ein möglicher Grund für die Befreiung von der strafrechtlichen Haftung, aber das ist kein Grund für die Befreiung von der zivilrechtlichen deliktischen Haftung. Im Prinzip muss auch für den kleinsten Schaden ein Schadenersatz geleistet werden, aber wenn es sich um einen kleinen Wert der Streitsache handelt, dann wird (in mehreren Rechtssysteme) in einem Verfahren für Streitfragen von kleinem Wert verhandelt. Im Strafrecht gibt es besondere Institute, mit denen die Haftung gemildert wird, oder es wird auf die Anwendung der Strafe verzichtet. Das sind die *Amnestie* und die *Begnadigung.* Im ersten Fall wird eine größere Zahl von bestimmten, gewöhnlich weniger bedeutenden Straftaten vergeben, entweder aus dem Grund der rechtlichen Politik, während im zweiten Fall die Vergebung für Einzeltaten auf Grund eines individuellen Gesuchs des Täters erfolgt, wenn dafür besondere, gesetzlich vorgeschriebene Bedingungen bestehen. Im bürgerlichen deliktischen Recht gibt es solche Institute verständlicherweise nicht, aber

[27] S. Abs. (1) und (2) Art. 936. des ZOO.

[28] S. Art. 180-184. des ZOO. Diese Artikel umfassen nicht alle klassischen Fälle der besonderen Arten der zivilrechtlichen Haftung (z. B. Haftung von Sportlern, Professionellen, wie z. B. Ärzte, Atomschäden, Haftung für von Tieren verursachte Schäden, Schäden von eingestürzten Gebäuden usw). Im Kodifikationsverfahren des bürgerlichen Rechts sollte man diese besonderen Fälle der zivilrechtlichen Haftung in den Text des neuen Bürgerlichen Gesetzbuches eingliedern.

[29] Gemäß Abs. (2) Art. 189. des ZOO, wird die Höhe des materiellen Schadens „nach den Preisen zur Zeit der Urteilsfällung bestimmt, außer wenn es das Gesetz anders vorschreibt." Nach Abs. (3) desselben Artikels „wird bei der Bemessung der Höhe des entgangenen Gewinns der Gewinn berücksichtigt, den man nach dem regelmäßigen Lauf der Dinge oder nach besonderen Umständen begründet erwarten konnte, und dessen Erzielung durch die Handlung oder durch das Versäumnis des Schädigers verhindert worden ist."

[30] S. Abs. (1)-(4) Art. 185. des ZOO.

[31] S. Abs. (1) i (2) Art. 200. des ZOO.

[32] S z. B. Par. 343 des UBGB-s in der ungarischen Literaratur: PETRIK, Ferenc, Kártérítési jog, hvgorac, Budapest, 2002, S. 37; Vgl. deutsches BGB, Par. 227, in der deutschen Literatur s. z. B.. PRÜTTING – WEGEN – WEINREICH, BGB Kommentar, 2. Aufl., Luchterhand, 2007, S. 310; s. weiter Art. 52 des schweizerischen Obligationenrechts; Vgl. Art. 161. des ZOO.

[33] S. Art. 162. des ZOO.

[34] S. Art. 177. des ZOO.

der Gläubiger/Geschädigte kann dem Schuldner/Schädiger die Schulden vergeben. Manche Gesetzbücher sehen durch die Berufung auf den Gerechtigkeitsgrundsatz die Verminderung des Schadens oder die Inversion der Entschädigungshaftung vor. (Zum Beispiel bei der Elternhaftung für Schäden, die von ihrem minderjährigen Kind verursacht wurden, obwohl eine minderjährige Person deliktisch unfähig ist, unter der Bedingung, dass die Eltern kein Eigentum haben, und die minderjährige Person Eigentum besitzt, erfolgt die Entschädigung nicht aus dem Eigentum der Eltern, sondern aus dem Eigentum der minderjährigen Person). Die Regel ist, dass bei einer Straftat die *Zustimmung des Geschädigten* bei einer Straftat die strafrechtliche Haftung nicht ausschließt. Im Unterschied dazu schließt die Zustimmung des Geschädigten im Prinzip die zivilrechtliche Haftung aus.[35] In manchen Rechtssystemen (z. B. im ungarischen Recht) wird zwar ausdrücklich vorgeschrieben, dass die Zustimmung des Geschädigten auf schwere Körperverletzung oder Lebensentzug die zivilrechtliche Haftung nicht ausschließt.[36] Tatsache ist, dass das ZOO offensichtlich mit ähnlichem intentio legis vorschreibt, dass die Erklärung des Geschädigten nichtig ist, mit der er zugestimmt hat, dass ihm durch eine gesetzlich verbotene Handlung Schaden zugefügt wird.[37]

Die *Beweislast* für das Bestehen von Bedingungen der bürgerrechtlichen bzw. strafrechtlichen Haftung ist wegen dem *inquisitorischen* oder *untersuchungsverfahrlichen* (offiziösen) Charakter des Strafverfahrens, bzw. der *dispositiven* Eigenschaft des Streitverfahrens im Ziele der Feststellung der zivilrechtlichen deliktischen Haftung verschiedenartig eingerichtet. Während im Strafverfahren prinzipiell der Offizitätsgrundsatz für das Einleiten und Führen des Verfahrens gilt und der Staatsanwalt als *öffentliches Organ* (außer in Privatklagefällen) amtspflichtig im Ziele der Feststellung der materiellen Wahrheit die Beweise vorschlägt, wird während dessen im Strafverfahren im Ziele der Feststellung der zivilrechtlichen Haftung wegen des verursachten Schadens das Verfahren auf Vorschlag (Klage) der geschädigten Seite, also eines *privaten Subjekts*, eingeleitet. Beim bürgerlichen Entschädigungsverfahren entscheidet das Gericht in den *Grenzen des Klageantrags* (nemo ultra et extra petitum partium). Wenn sowohl ein materieller als auch ein immaterieller Schaden entstanden ist, und der Kläger/Geschädigte nur eine materielle Entschädigung verlangt, wird das Gericht folglich amtspflichtig keine Beweise im Ziele der Feststellung des immateriellen Schadens erbringen. Das bürgerliche Gericht übernimmt nur diejenigen Beweise, die von den Parteien vorgeschlagen wurden. Im Unterschied dazu kann das Strafgericht *ungeachtet der Beweisvorschläge der Parteien Beweise erbringen*. Im Strafverfahren ist die *vermutete Schuld* nicht bekannt, sondern nur die bewiesene Schuld, wegen der Vermutung der Unschuld, wobei die Beweislast dem Staatsanwalt obliegt. Im bürgerlichen deliktischen und kontraktuellen Entschädigungsrecht wird die vermutete Schuld angewandt, unter der Bedingung, dass die Ursächlichkeit zwischen der gesetzwidrigen Handlung des Schädigers und der Folge/des Schadens bewiesen wurde. Dann geht man von der anfechtbaren Vermutung aus, dass der Schädiger schuld ist. Im Strafverfahren gibt es wegen der Vermutung der Unschuld keine präsumierte Schuld. In diesem Verfahren obliegt dem Staatsanwalt die Beweislast zum Beweis der Schuld des Angeklagten.

Wegen dem Prinzip der Gleichberechtigung der Parteien in Obligationenverhältnissen[38] ist der *Staat*, wenn er über seine *Legislativ-, Verwaltungs- oder Gerichtsorgane* ungesetzmäßig bzw. widerrechtlich einem Bürger Schaden verursacht hat, dazu verpflichtet, den Schaden zu ersetzen. In unser Recht ist die europäische Regel über die Haftung der legislativen Organe noch nicht inkorporiert. Diese bezieht sich auf die Verpflichtung des Staates, Schadenersatz zu leisten, wenn der Schaden einem Bürger wegen der Vorenthaltung von erlangten Rechten entstanden ist. Im geltenden ZOO und ZKP (Gesetz über das Strafverfahren Serbiens) besteht die Regel über die Entschädigung von Personen, denen in einem Strafverfahren unbegründet die Freiheit entzogen wurden.[39] Es fehlt auch die Regel über die Haftung von Verwaltungsorganen, wenn sie mit ihren ungesetzmäßigen Handlungen (gesondert bewiesen in einem Verwaltungsprozess) einem Bürger Schaden verursacht haben.

II. Zweck (Ziel) der zivilrechtlichen und strafrechtlichen Inkriminierung

Die Trennung (Abgrenzung) der zivilrechtlichen von der strafrechtlichen Inkriminierung, und somit auch der zivilrechtlichen von der strafrechtlichen Haftung, erfolgte in den (vergleichenden) Kodexen des bürgerlichen Rechts auch bezüglich der Ziele der Inkriminierung dieser Haftungen. Der Zweck der zivilrechtlichen Inkriminierung und Schadenshaftung ist von *privatrechtlicher* Natur, und besteht in der Idee der (vollständigen) *Entschädigung* des Geschädigten seitens des Schädigers, bzw. der verantwortlichen Person. Im Unterschied dazu haben die strafrechtliche Inkriminierung und die strafrechtliche Haftung, neben der Prävention, die Bestrafung des Täters zum Ziel, also einen *öffentlich-rechtlichen* Zweck, ausgedrückt in der pönalen Funktion, wegen der Verletzung von durch öffentliches Recht geschützten Werten. Die nach den strafrechtlichen Regeln auferlegte Geldstrafe gehört daher dem Fiskus, und die geldliche Entschädigung für materielle und immaterielle Schäden gehört dem Geschädigten. Auf dem Gebiet des zivilrechtlichen Deliktrechts im deutschen und englischen Recht wächst bei immateriellen Schäden wegen der Verletzung der Persönlichkeitsrechte die Bedeutung des Strafschadenersatzes (oder der Anwendung des Pönalitätsprinzips), mit der Begründung, dass die Erhöhung des Schmerzensgeldes präventiv wirkt. Dieser pönale geldliche Schadenersatz wegen der Verletzung von Persön-

[35] S. Art. 163. des ZOO.
[36] S. Abs. (1) und Abs. (2) Par. 342. des Ungarischen Bürgerlichen Gesetzbuches (in: *Polgári Törvénykönyv*, Novissima Kiadó, Budapest, 2007, S. 81).
[37] S. Abs. (2) Art. 163. des ZOO.
[38] S. Art. 2. des ZOO.
[39] S. Abs. (1) Art. 200. des ZOO (Freiheitsverletzung). Diese Frage verdient eine detailliertere Bearbeitung im zukünftigen bürgerlichen Kodex Serbiens.

lichkeitsrechten geht davon aus, dass der Schaden vorsätzlich verursacht wurde.[40]

III. Unterschiede bezüglich der Haftungsbedingungen

Die zivilrechtliche und die strafrechtliche Haftung sind eigentlich nominal identisch. Bei beiden Haftungsarten bemerken wir gemeinsame allgemeine und besondere Bedingungen: (1) den Schaden, bzw. die Folge des Delikts, (2) die Gesetzwidrigkeit des Delikts, (3) die ursächliche Verbindung zwischen der gesetzwidrigen Handlung und der Folge, (4) die Schuld als besondere Bedingung bei der subjektiven Haftung.

Unterschiede bei der Definierung der nominal gleichen Bedingungen entstehen wegen dem Unterschied in den Zielen der zivilrechtlichen und der strafrechtlichen Haftung, besonders auf dem Gebiet der verschiedenen Inkriminierungsmethoden, auf dem Gebiet der Unterschiede im Verständnis der Schuld und der anderen Haftungsbedingungen.

Während im bürgerlichen Recht die grundlegende Bedingung für das Eintreten der zivilrechtlichen Haftung das Eintreten von materiellem oder immateriellem ***Schaden*** ist, tritt die strafrechtliche Haftung auch unabhängig vom Eintreten des Schadens, im Sinne des bürgerlichen Rechts verstanden, ein. Man soll jedoch bemerken, dass aus demselben deliktischen Verhalten sowohl die strafrechtliche als auch die zivilrechtliche deliktische Haftung entstehen kann, falls gleichzeitig ein rechtlich geschütztes Gut des bürgerlichen und des Strafrechts verletzt wurde. Nach der Meinung des französischen Autors René *Savatier*[41] gibt es kein solches Delikt, welches nicht *gleichzeitig sowohl ein zivilrechtliches als auch ein strafrechtliches Delikt* ist. Das kann man natürlich für den meisten Teil von Delikten bestätigen: z. B. Beleidigung und Verleumdung sind – da es sich dabei um die Verletzung der Würde der Persönlichkeit als geschützte Werte des bürgerlichen und des Strafrechts handelt – gleichzeitig inkriminiert sowohl im bürgerlichen als auch im Strafrecht; Diebstahl als widerrechtliche Verminderung des Eigentums ist zivilrechtlich und auch strafrechtlich inkriminiert.

Im sog. *Adhesionsstrafverfahren* (Schadenersatzanspruch im Strafverfahren) kann auch über eine zivilrechtliche Entschädigungsforderung des Geschädigten verhandelt werden, nach den Regeln des Streitverfahrens, bzw. den Regeln des materiellen bürgerlichen Rechts. Die Rechtskräftigkeit des Strafgerichturteils über die Entschädigungsforderung, das im Adhesionsstrafverfahren gefällt wurde, verhindert die wiederholte Einreichung derselben Forderung vor einem bürgerlichen Gericht. In diesem Falle gilt die Regel ne bis in idem (nicht zweimal denselben Gegenstand).

Wenn eine strafrechtliche *Vorfrage* für ein zivilrechtliches Delikt, das vorher nicht vor dem zuständigen Strafgericht verhandelt wurde, von bedingender Bedeutung ist, dann kann das bürgerliche Gericht seine Stehlungnahme haben, die allerdings nur innerhalb des Zivilprozesses wirkt. Über diese Frage kann das zuständige Gericht wieder entscheiden, und zwar aus dem Grund, dass das Zivilgericht im Prinzip nach der Dispositionsmaxime vorgeht, und das Strafgericht nach dem Offizitätsgrundsatz. Wenn das Strafgericht anders entscheidet im Gegensatz zur Stellungnahme des Zivilgerichts, dann kann das im Zivilprozess ein Grund zur Wiederholung des Verfahrens sein. Das *verurteilende strafrechtliche Präiuditium* (praeiuditio), bzw. die rechtsgültig verhandelte strafrechtliche Vorfrage verpflichtet das Zivilgericht in den meisten europäischen Rechtssystemen, welches den Prozess zur zivilrechtlichen deliktischen Haftung, die bezüglich desselben Tatbestandes entstanden ist, führt, nach den gesetzlichen Regeln des Zivilverfahrens in Bezug zum Täter und zu seiner Schuld. Aber das muss weder formell-logisch noch rechtlich der Fall sein, da die deliktische Haftung ungeachtet der Schuld bestehen kann, begründet auf der reinen Ursächlichkeit. Das befreiende strafrechtliche Präiuditium bindet das Zivilgericht nicht, dieses kann bezüglich des Delikts ein verurteilendes Urteil fällen, auch dann wenn das Strafgericht den Täter vorher rechtskräftig von der strafrechtlichen Haftung befreit hat.[42]

Der Unterschied bezüglich der Definierung der ***Widerrechtlichkeit***, wie es schon angeführt wurde, besteht darin, dass die zivilrechtliche Widerrechtlichkeit als eine *allgemeine,* und die strafrechtliche als eine *spezielle* vorgesehen ist. Die Widerrechtlichkeit wird nach dem schweizerischen Obligationenrecht als Verletzung einer beliebigen rechtlichen Norm, genauer einer zwingenden rechtlichen Norm, verstanden, welche das Verhalten gegenüber anderen Subjekten des Rechts bestimmt.[43] Da das Obligationenrecht, besonders im kontraktuellen Teil, zwecks der Garantie der Vetragsfreiheit, dispositive Normen enthält, die ein verschiedenartiges vertragliches Regeln von Rechten und Verpflichtungen der Parteien, als es die Regel des Gesetzes bietet, ermöglicht, wird eine vertragliche Abweichung nicht als widerrechtliches Verhalten betrachtet.[44] In der vergleichenden (schweizerischen und deutschen) Doktrin unterscheidet man die sog. *objektive Widerrechtlichkeit* von der sog. *subjektiven Widerrechtlichkeit*. Die objektive Widerrechtlichkeit bedeutet eine Verletzung der imperativen rechtlichen Norm an und für sich, und die subjektive bedeutet das Bewusstsein und das Wissen des Schädigers von der Verletzung, bzw. es handelt sich um eine bewusste Verletzung der Norm. Diese Unterscheidung hat

[40] S. FUNKEL, Thorsten, Schutz der Persönlichkeit durch Ersatz immaterieller Schäden in Geld, Eine rechtsvergleichende Untersuchung des zivilrechtlichen Persönlichkeitsschutzes unter besonderer Berücksichtigung des Geldersatzes für Nichtvermögensschäden in Deutschland und England. Verlag C. H. Beck, München, 2001, S. 250-251. Im englischen Recht wird der Strafschadenersatz als exemplarische Entschädigung bezeichnet (exemplary damage).

[41] S. SAVATIER, René, Traité de la responsabilité civil en droit Francais, - civil administratif, professionel, procedural, tome premier, deuxičme edition, Paris, PICHON, R. et DURAND-AUZIAS, R., 1951, in der Einführung, siehe auch RÜMELIN, Max, Das Verschulden im Straf- und Zivilrecht, Tübingen, 1909; ibid: Die Verwendung der Causalbegriffe im Straf- und Zivilrecht, Archiv für zivilistische Praxis, 90, 171; ibid: Gründe der Schadenszurechnung, 1896; ibid: Schadenersatz ohne Verschulden, Tübingen, 1910.

[42] S. z. B. SZALMA, József, Okozatosság és polgári jogi felelősség, (Ursächlichkeit und zivilrechtliche Haftung), Miskolc, 2001.

[43] S. GUHL, Theo, Das schweizerische Obligationenrecht, 9. Auflage (bearbeitet von Alfred KOLLER, Anton K. SCHNYDER, Jean Nicolas DRUEY), Schulthes, Zürich, 2000, S. 186. Punkt. I 2. 1.

[44] S. SALMA, Jožef, Obligaciono pravo, Izdavački centar Pravnog fakulteta u Novom Sadu, 7. (Reprint) Auflage der 6. Aufl, Novi Sad, 2007., S. 124-125, 533-535.

keinen praktischen Nutzen. Gleichzeitig ist die subjektive Auffassung der Widerrechtlichkeit nicht identisch mit der Schuld. Das erste bedeutet das Bewusstsein und Wissen über die Verbotsnormen, und das zweite (im Strafrecht und im bürgerlichen Recht, in der Domäne der subjektiven Auffassung der Schuld) ein bewusstes widerrechtliches Handeln (oder ein Versäumnis, wenn man gemäß der Vorschrift handeln sollte) mit der gewollten Folge. Für die zivilrechtliche Haftung ist es im Prinzip unwichtig, ob das zivilrechtliche oder öffentlich-rechtliche Verbot verletzt wurde (wie das strafrechtliche, verwaltungsrechtliche), in allen Fällen, ungeachtet der Herkunft, des Typs der Verbotsnorm, unter der Bedingung der Ursächlichkeit und der Entstehung des Schadens, kann eine zivilrechtliche Entschädigungshaftung enstehen.[45] Im Unterschied dazu haben die strafrechtlichen Verbotsnormen wegen ihrem speziellen Inkriminierungscharakter ihre Wurzeln in den strafrechtlichen Vorschriften.

Wichtig sind auch die Unterschiede in der Auffassung der *Schuld*. Während das Strafrecht eine *subjektive* Auffassung der Schuld im Sinne der „Maßnahme" des *Wollens der verbotenen Handlung und der Folge der Handlung* hat, akzeptiert das Zivilrecht generell, neben einer gewissen begrenzten Domäne der Anwendung der subjektiven Doktrin über die Schuld, die sog. *objektive Doktrin der Schuld*, welche als *Abweichen vom erwarteten Verhalten in der gegebenen Situtation* definiert wird. Dabei wird das Syntagma „gegebene Situation" präzisiert durch den Standard (1) des *guten Gastgebers – bonus pater familias* (in gewöhnlichen zivilrechtlichen Beziehungen), (2) des *guten Unternehmers* (in Handels- und rechtlichen Beziehungen) und (3) die *Regeln der Profession* bei professionellen Beziehungen. Die Aufmerksamkeit des guten Gastgebers ist jene, die sich in Sachen des eigenen Interesses zeigt. Die Aufmerksamkeit des guten Unternehmers ist jene, die in geschriebenen und ungeschriebenen Sitten (Usancen) vorgesehen ist, und die Aufmerksamkeit der Profession befindet sich in der Regeln des gegebenen Gewerbes (wie z. B. die Regeln über den Bau, Regeln für die Ärzteprofession u. a.). Auf diese Weise unterscheidet sich *die objektive Auffassung der Schuld bei der zivilrechtlichen Haftung von der Widerrechtlichkeit.* Solange die Widerrechtlichkeit ein auschließlich objektiver Begriff war, und die Schuld auschließlich subjektiv verstanden wurde, bestanden bei der Gegenüberstellung keine Schwierigkeiten, denn das erste ist eine objektive und das zweite eine subjektive Kategorie. Bei der Objektivisierung der Schuld war diese Grenzlinie gelöscht. Aber durch die Hinzufügung von Standards als Schuldmaß wurde eine Lösung für die theoretische und normative Abgrenzung gefunden: die Widerrechtlichkeit ist ein Verhalten gegensätzlich zur allgemeinen rechtlichen Norm, und die objektive Auffassung der Schuld bedeutet ein Verhalten gegensätzlich zum Standard eines guten Gastgebers, eines guten Unternehmers oder den Regeln der Profession, also den außergesetzlichen, aber durch ein Gesetz anerkannten Regeln und Maßstäben. Bei der subjektiven Auffassung der strafrechtlichen bzw. zivilrechtlichen Schuld besteht die grundlegende Graduierung der Schuld auf den Vorsatz und die Fahrlässigkeit, wobei bei der strafrechtlichen Haftung im Prinzip für eine vorsätzliche Ausführung desselben strafrechtlichen Delikts eine strengere Strafe vorgesehen wird als für die Fahrlässigkeit. Es gibt bürgerliche Gesetzbücher, wie das österreichische Allgemeine bürgerliche Gesetzbuch, welche die subjektive Auffassung der Schuld annehmen, so dass man für ein vorsätzliches bürgerliches Delikt „strenger" haftet, und so wird der vorsätzliche Schädiger für einen positiven Schaden und auch für den entgangenen Gewinn verantwortlich sein, und der fahrlässige Schädiger nur für den positiven Schaden. Auf diese Weise „pönalisiert" das AOGZ die Entschädigung, es wird mehr der vorsätzliche Schädiger „bestraft" als der fahrlässige, was natürlich in gewisser Weise verständlich ist. Aber wenn man die Entschädigung vom Gesichtspunkt des Geschädigten betrachtet, und wenn wir im *Schadenersatzrecht/Entschädigungsrecht* als vorrangiges Ziel dessen Entschädigung festlegen, dann ist der Grad der Schuld völlig irrelevant, es genügt auch eine „mildere Schuld", für welche man sonst haftet, für die völlständige Entschädigung des Geschädigten, durch die Anerkennung des Rechts auf Entschädigung sowohl für den positiven Schaden als auch für den entgangenen Gewinn, auch bei der geringsten Schuld, für die man haftet, bzw. auch bei Fahrlässigkeit. ZOO akzeptiert zu Recht – unter dem Einfluss des schweizerischen Obligationengesetzes, die objektive Definition der Schuld, somit auch das Ziel des vollständigen enschädigungsrechtlichen Schutzes des Geschädigten, aber nicht auch das Ziel der Pönelisation des Schädigers. Dadurch hat der Schuldgrad im bürgerlichen Recht im Prinzip keine Bedeutung. Außerdem ist bei der objektiven Auffassung der Schuld die Graduierung der Schuld auch formell-logisch nicht möglich, da diese auch im Falle der kleinsten Abweichung vom erwarteten Verhalten in typisierten Situationen besteht, gemessen an den Standards für die entschädigungsrechtliche Haftung. Auch die kleinste Abweichung von diesen Standards stellt eine Schuld dar, ungeachtet des Bewusstseins von der Handlung und des Wollens der Handlung und deren Folge. Sie ist weder vorsätzlich noch fahrlässig, denn aus dem Schuldbegriff ist das subjektive Wollen des Täters ausgeschlossen. Das Fehlen des Bewusstseins von der Handlung und der Folge hat jedoch, auch in dieser Konstruktion der Schuld, eine Bedeutung, wenn der Täter keine deliktische Fähigkeit hat. Die strafrechtliche Schuld, als eine ausschließlich subjektive, gemessen an subjektiven Elementen, am Wollen der Handlung und deren Folgen, sowie die subjektiv verstandene zivilrechtliche Schuld, graduiert die Schuld und stellt aufgrund dessen das Haftungsmaß fest. Im Unterschied dazu graduiert die objektive Auffassung der Schuld, die in einer Abweichung des erwarteten Verhaltens in der gegebenen Situation besteht, die Schuld nicht.

Die objektive Auffassung der Schuld im bürgerlichen Recht *bedeutet nicht,* das man wegen dieser Auffassung die *sog. subjektive Haftung aufgegeben hat,* und dass man bei dieser Art von Schuld auf das Gebiet der objektiven Haften übergeht. Bei der objektiven Haftung kann nämlich der Schädiger oder die verantwort-

[45] Vgl. GUHL, Theo, Das schweizerische Obligationenrecht, 9. Auflage (bearbeitet von Alfred KOLLER, Anton K. SCHNYDER, Jean Nicolas DRUEY), Schulthes, Zürich, 2000, S. 186. Punkt. I 2. 1.

liche Person mangels der Schuld nicht von der Haftung befreit werden, und in der Materie der subjektiven Haftung kann er durch den Beweis, dass sich der Schädiger an die nötigen Aufmerksamkeitsstandards gehalten hat, von der Haftung befreit werden.

Obwohl in der bürgerlichen deliktischen Haftung (wenigstens in ZOO[46], dem schweizerischen[47] und ungarischen Recht[48] - MGZ) im Prinzip die objektive Auffassung der Schuld angenommen wurde, gibt es doch Ausnahmen, wenn man die *Regeln über die subjektive Doktrin anwendet,* mit der Graduierung der Schuld, und zwar mit relevantem Einfluss auf das Maß der Haftung für den Schaden, bzw. auf die Höhe der geldlichen Entschädigung. Diese Fälle sind die folgenden: (1) Wenn ein bürgerliches Delikt des Schädigers zugleich eine *vorsätzliche Straftat* darstellt, *wenn bei dieser Gelegenheit eine Sache des Geschädigten zerstört oder bestätigt wurde,* dann wird die Höhe der geldlichen Entschädigung nach dem Affektionswert bemessen, bzw. nach dem Wert, welchen die Sache für den Geschädigten hat, den Wert der besonderen Vorliebe (Liebhaberwert)[49]. Das bedeutet, dass in diesem Fall die Entschädigung höher sein kann als der Marktwert der Sache, der sonst nach der allgemeinen Regel der grundlegende Maßstab für die Bemessung der Höhe der geldlichen Entschädigung für den materiellen Schaden ist. Aber in bestimmten Rechtssystemen, z. B. im serbischen Obligationengesetz[50], wird die obere Grenze des Affektionswertes limitiert durch die Kriterien für die Bemessung der geldlichen Entschädigung für immaterielle Schäden. (2) Wenn es sich um *das Bestehen der Schuld von einer Drittperson und des Geschädigten selbst* handelt, so wird die Haftung zwischen dem Schädiger, der Drittperson und dem Geschädigten geteilt, verhältnismäßig zum Schuldteil der Drittperson bzw. des Geschädigten. (3) Bei der *Haftpflichtversicherung für Schäden im Verkehr* hängt das *Regressrecht* der Versicherungsgesellschaft gegenüber dem Schädiger davon ab, ob der Verkehrsunfall durch eine vorsätzliche oder fahrlässige Schuld verursacht wurde. Wenn der Unfall *vorsätzlich* verursacht wurde, oder im Zustand der Zurechnungsunfähigkeit, was man rechtlich mit dem Vorsatz gleichstellt – entstanden durch Einfluss von Mitteln, welche das Bewusstsein mindern oder die das Bewusstsein und die Aufmerksamkeit vollständig ausschließen (actiones liberae in causa), – kann die Versicherungsgesellschaft nach der Auszahlung der Versicherungssumme an den Geschädigten, die Rückerstattung der ausgezahlten Versicherungsumme vom Schädiger – Versicherten verlangen.

Das französische Recht hat wegen dem festen Standpunkt des Code civil die *subjektive Auffassung der Schuld* nie aufgegeben. Die Quellen der Schuld liegen nämlich in der psychologischen Einstellung des Täters gegenüber der Tat im Moment des Begehens des Delikts. Demzufolge wurde in der älteren Rechtsprechung die Schuld im *Beweisverfahren* ausschließlich über das Bewusstsein von der Tat und der Folge analysiert. Die Doktrin hat jedoch mit der Zeit die rein subjektive Auffassung der Schuld teils aufgegeben und sie begnügte sich nicht mehr mit dem Standpunkt, dass die Schuld nur auf das subjektive Verhältnis des Täters zur Tat zurückgeführt wird. Dem objektivisierten Standpunkt nähert sich Mitte des 20. Jahrhunderts Renné Savatier, ein bekannter, seinen Ideen nach auch heute noch aktueller Theoretiker der französischen und europäischen bürgerlichen deliktischen Haftung, ausgedrückt in der folgenden Stellungnahme: „Die Schuld ist das Nichtausüben der Verpflichtung, von welcher der Täter wusste oder wissen musste."[51] Wenn die Schuld objektiv verstanden wird, im angeführten Sinne, umfasst das Beweisverfahren nicht die Analyse des Bewusstseins des Täters, sondern unabhängig von diesem Bewusstsein umfasst sie nur, ob es zu einer *Abweichung des Verhaltens des Täters im Gegensatz zum geforderten Verhaltensstandard* in der gegebenen Situation, bzw. ob es zur Erfüllung der verlangten Pflicht gekommen ist.

Alle Gesetzbücher der oben analysierten Rechtssysteme,[52] so auch ZOO,[53] kennen auch die subjektive Schuld, bzw. die abhängig vom Maß des Wollens (des Bewusstseins des Täters von der Tat) graduierte Schuld. Aber diese Graduierung wird nur dann angewandt, wenn das Gesetz die rechtliche Folge damit verbindet, bzw. wenn der größere oder kleinere Umfang der Entschädigung vom Maß der Schuld abhängt.

Die Doktrin über die ***Ursächlichkeit*** ist fast gemeinsam im Strafrecht und bei der bürgerlichen deliktischen Haftung, die sich besonders während des 19. Jahrhunderts entwickelt hat, manchmal wurde sie auch mit der Koautoren-Feder von Zivilisten und Strafrechtstheoretikern geschrieben. Nach der Funktion ist die Ursächlichkeit die *allgemeine Bedingung sowohl der strafrechtlichen als auch der bürgerlichen deliktischen Haftung,* sie ist deshalb bedeutend, weil sie *auf die haftende Person* verweist,

[46] S. SALMA, Jožef, Obligaciono pravo (Obligationsrcht), Izdavački centar Pravnog fakulteta u Novom Sadu, 7. (Reprint) Auflage der 6. Aufl. vom 2007., Novi Sad, 2009, S. 544-547 und die dort angeführte einheimische und internationale Literatur. Unter dem Einfluss der schweizerischen Theorie hat in der serbischen Literatur Prof. KONSTANTINOVIĆ, Mihailo in seinem *Obligaciono pravo* (beleške Kapora sa predavanja [Notizen von Kapor von den Vorlesungen]), Beograd, 1956, zum ersten Male die objektive Defininierung der Schuld angenommen.

[47] Vgl. GUHL, Theo, Das schweizerische Obligationenrecht, 9. Auflage (bearbeitet von Alfred KOLLER, Anton K. SCHNYDER, Jean Nicolas DRUEY), Schulthes, Zürich, 2000, S. 194-195 Punkt. 39-40.BGE (Oberster Gerichtshof der Schweiz) 112 II 180, *Journal de Tribunaux* (Lausanne), 1986, S. 391: Beim Vorsatz ist der Maßstab durch das Element der mangelnden Aufmerksamkeit objektivisiert.

[48] EÖRSI, Gyula, Thesen über die zivilrechtliche Haftung, Acta Juridica Academie Stientiarium Hungarice, Bd. 20 (1-2), S. 34. Punkt, 7.

[49] S. Par. 1331 des österreichischen ABGB. Siehe näher die österreichische Literatur z. B. in: WELSER, Bürgerliches Recht, Bd. II, 13. Aufl., Manz Verlag, Wien, 2007, S. 352.

[50] S. Art. 200. Abs. 2. des ZOO

[51] S. SAVATIER, René, Des effets et de la sanction du devoir moral en droit positif Français devant la jurisprudence, thése, Poitiers, Paris, 1916, S., 131; ibid, La responsabilité civil, op. cit, Bd. I, S. 5.

[52] S. Abs. 1. Art. 41. des schweizerischen Obligationenegesetzes. Auch Art. 339. des Ungarischen BGB (wo die objektive Auffassung der Schuld am ausgeprägtesten ist), in: Polgári törvénykönyv, Kiegészítve a vonatkozó kollégiumi állásfoglalásokkal és jogegységi határozatokkal, Novissima Kiadó, 2007, Budapest, S. 81.

[53] S. Art. 158. des ZOO.

da diejenige Person haftet, auf Grund deren Handlung es zur inkriminierten Folge gekommen ist. Aber die Ursache kann auch die *Funktion der Bestimmung des Entschädigungsumfangs* haben.[54] Man unterscheidet die *direkte* und die *indirekte* Ursächlichkeit.[55] Die direkte Ursache führt zur Haftung nur bei dem Schaden, der unmittelbar nach der Handlung entstanden ist. Die indirekte Ursächlichkeit sowie der indirekte Schaden sind diejenigen, die zeitlich später entstanden sind, für welche der Schädiger nur dann haftet, wenn bewiesen wird, dass die *(indirekte) spätere Folge* (in der deutschen Theorie als Folgeschaden bezeichnet) nicht durch eine andere Bedingung – Ursache bzw. eine andere Handlung im Verhältnis zur initiellen Bedingung hervorgerufen wurde. Der *Folgeschaden* ist als Begriff anscheinend widersprüchlich, da der Schaden die Folge der Ursache ist, und nicht die Folge der Folge. Aber die Widersprüchlichkeit besteht nicht, da es sich um eine fernere, spätere Folge handelt, auch hervorgerufen durch die initielle Ursache. Wenn die initielle Ursache gleichermaßen zur zeitlich näheren und zeitlich ferneren Folge (mittelbarer Schaden) geführt hat, haftet der Träger der Ursache sowohl für die erste als auch für die zweite Folge. So zum Beispiel, wenn ein Jäger eine andere Person verletzt und ein Schaden in Form einer Körperverletzung entsteht, bzw. verbunden mit den Behandlungskosten, und viel später auch mit Krebs, wird der Jäger auch für den Tod des Geschädigten verantwortlich sein, wenn bewiesen wird, dass der Krebs wegen der vorherigen Körperverletzung entstanden ist. Aber wenn bewiesen wird, dass die Krankheit aus einem anderen Grund entstanden ist, z. B. wegen Rauchen, auf Grund einer Anfälligkeit für diese Krankheit, haftet der Schädiger nicht für diesen indirekten, späteren Folgeschaden. Entwickelt hat sich die Theorie über die Ursache als *Bedingung* für die Entstehung der Folge. Die Ursache ist jede Handlung oder jedes Versäumnis, ohne welche es keine Folge gibt. Es ist zur Debatte gekommen zwischen den Anhängern der Theorie über die sog. *natürliche Ursächlichkeit* (John Stuart Mill) auf der einen Seite, und den Anhängern der Theorie über die *ausgewählten Bedingungen*, bestimmt durch rechtliche Kriterien *(adäquate, typische und hypotetische Ursächlichkeit),* auf der anderen Seite.[56] Der Mangel der Theorie über die natürliche Ursächlichkeit liegt darin, dass sie die zeitlich näheren und entfernteren Elemente der Ursachenkette gleichberechtigt betrachtet, und damit erweitert sie rechtlich den Kreis der potentiell haftenden Personen, da jede Folge gleichzeitig auch die Ursache sein kann (der sog. „Nephertiti-Effekt"). Die Ursächlichkeitskette kann man bis zu den zeitlich entfernten Ursachen „zurückverfolgen", den Bedingungen in der Vergangenheit, die logische Vorbedingungen sind, die aber vom Standpunkt der konkreten Haftung unwichtig sind (z. B. wenn der Großvater nicht aus dem Ersten Weltkrieg zurückgekehrt wäre, hätte der Urenkel den Schaden nicht verursachen können). Ein solche Konstruktion macht eine rationelle rechtliche Haftungskonstruktion unmöglich. Daher entwickelte sich die Theorie über die unmittelbaren Bedingungen, bzw. dass als Ursachen jene Handlungen betrachtet werden, die zeitlich unmittelbar der Handlung vorausgegangen sind, bzw. diejenigen, die für die Entstehung des Schadens rechtlich wichtig sind.

In der zivilrechtlichen Doktrin hat sich die Auffassung über die *kumulative* und *konkurrente* Ursächlichkeit entwickelt, mit dem Ziel, dass man das Problem der Teilung der Haftung zwischen mehreren Teilnehmern, Delinquenten löst, wenn es zu einer wahren oder potentiellen Teilnahme von mehreren Personen (z. B. Täter, Mittäter, Helfer, Anstifter) gekommen ist. Nach der Theorie über die konkurrente Ursächlichkeit haftet zwischen mehreren potentiellen Tätern nur derjenige, für dessen Handlung oder Versäumnis man feststellt, ob sie bedeutend war, so dass die Konzentration der Haftung auf einen von mehreren potentiellen Schädigern erfolgt. Aber wenn das Beweisverfahren gezeigt hat, dass die Handlung aller angeklagten Teilnehmer (im kleinerem oder größerem Umfang) zur Entstehung der Folgen beigetragen hat, dann erfolgt im bürgerlichen Recht die Teilung der Haftung für den Schaden zwischen mehreren Teilnehmern, verhältnismäßig zum Beitrag von jedem unter ihnen, oder ausnahmsweise, wenn es das Gesetz besonders vorsieht, entsteht eine solidäre Haftung.

IV. Abgrenzung zwischen Sanktionen

Die Rolle des bürgerlichen Rechts, seit der Zeit der traditionellen zivilrechtlichen Kodifikationen, besteht in der *Restitution* des verletzten Eigentums, das mit den Mitteln des Schädigers beschädigt worden ist. Die Restitution hat ausschließlich einen *Eigentumscharakter*, und hat *keinen Einfluss auf die persönliche Freiheit des Schädigers*. Die grundlegende strafrechtliche Sanktion, der Freiheitsentzug, hebt die Bewegungsfreiheit auf, und ihr Ziel ist die *Bestrafung* des Täters. Die modernen Vollstrekkungsverfahren im bürgerlichen Vollstreckungsprozessrecht kennen kein Schuldnergefängnis, um durch die Pönalisation den Schuldner zur Erfüllung der Entschädigungsobligation zu bewegen. Statt dessen erfolgt die Vollstreckung über das Eigentum der Schuldners, z. B. die Pfändung und den öffentlichen Zwangsverkauf des Eigentums.

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[54] S. SALMA, Jožef, Uzročnost kao determinanta subjekata i obima odgovornosti za štetu (Ursächlichkeit als Determinante der Subjekte und des Haftungsumfangs für den Schaden), Pravni život, Bd. II., Beograd, Nr. 10/1997. S. 529-545. *Ibid,* Uzročna veza u deliktnom pravu (Ursächliche Beziehung im deliktischen Recht), Glasnik Advokatske komore Vojvodine, Nr. 6/1997., S. 215-232 (mit Resümee in englischer Sprache). Siehe auch die neueren Monographien des Autors: SZALMA, József, Okozatosság és polgári jogi felelősség - az európai és a magyar jogban (Ursächlichkeit und bürgerrechliche außervertragliche Haftung nach europäischem und ungarischen Recht), Herausgeber: Miskolci Egyetem és a Novotni Alapítvány a Magánjog Fejlesztésért (Universität in Miskolc - Stiftung Novotni zur Entwicklung des bürgerlichen Rechts von Ungarn), Miskolc, 2000, S. 228. *Zusammenfassung* (S. 219-221): SZALMA, József, *Kausalzusammenhang im Schadenersatzrecht;* SZALMA, József, Szerződésen kívüli (deliktuális) felelősség – az európai és a magyar magánjogban (Vertragliche und außervertragliche Haftung im europäischen und ungarischen Recht), Budapest, Miskolc, Debrecen, Újvidék, Herausgeber: ELTE ÁJK, (Rechtswissenschaftliche Fakultät der Universität ELTE Budapest) Budapest, und Bíbor Kiadó Miskolc, 2008, S. 395, Zusammenfassung: Außervertragliche (deliktische) Haftung im europäischen und im ungarischen Recht, S. 425-428.

[55] S. WELSER, Rudolf, Bürgerliches Recht, Bd. II, 13. Aufl., Manz Verlag, Wien, 2007, S. 314.

[56] S. z. B. WELSER, Rudolf, Bürgerliches Recht, Bd. II, 13. Aufl., Manz Verlag, Wien, 2007, S. 334-336.

Die zivilrechtliche Sanktion, die in der entschädigungsrechtlichen Haftung besteht, mit dem Ziel der *Wiederherstellung des vorherigen Eigentumsstandes* des Geschädigten, sowie darin, dem Geschädigten *Genugtuung* (Schmerzensgeld) zu verschaffen, im Falle der Verletzung der persönlichen, körperlichen oder gesundheitlichen Integrität der Persönlichkeit, sowie der Verletzung seiner Freiheit, befasst sich im Prinzip nicht mit der Bestrafung der Deliquenten (eine Ausnahme besteht beim abstrakten Schaden, bei der vertraglichen Strafe, bei der vertraglichen Haftung). Das Entschädigungsrecht verpflichtet den Schädiger primär zum Ersatz des materiellen Schadens, in Form von materiellem Ersatz (z. B. Ersatz eines zerstörten Gegenstands), oder subsidiär zu geldlicher Entschädigung. In jedem Fall hat der Geschädigte ein Recht auf geldliche Entschädigung, wenn der naturelle Ersatz unmöglich ist, oder wenn er selbst diese Entschädigungsform verlangt. Auch hat der Geschädigte im Falle eines immateriellen Schadens das Recht auf eine geldliche Satisfaktion.

Die *Höhe* des Schadenersatzes hängt im Prinzip vom Wert bzw. dem *Umfang des Schadens* ab, davon, in welchem Maße durch die Handlung des Schädigers das Eigentum des Geschädigten vermindert worden ist. So groß der Schaden ist, so groß ist auch der Schadenersatz. Im Unterschied dazu hängt die *Geldstrafe* von der *Schwere* und der Natur der *Tat* ab, und daher wird zwischen dem gesetzlichen Maximum und Minimum bemessen, wie es auch bei der Strafe in Form von Freiheitsentzug der Fall ist.

The Impact of the Code of Csemegi on the Development of Religious Conditions – Judicial Practice in Baranya County, 1880 - 1900

Eszter Cs. Herger[*]

Abstract

The first modern Hungarian Criminal Code (Code of Csemegi, Act 5 of 1878) regulated religious conditions from several aspects. The religious denominations "recognised by the state" such as the Catholic, Calvinist, Lutheran, Unitarian and the not united Orthodox Churches enjoyed protection by law meaning that several felonies and misdemeanours harming the religion became enacted in the above mentioned Code. Beside these religions also the Israelite denomination was listed among the "recognised religions" both in legal literature and judicial practice but not in the Code. The statutory definitions of revolt and agitation covered a wider circle of injured parties: the term "denomination of faith" was interpreted in the court practice so, that all denominations enjoy the same protection of law – as sight of equality before the law regardless of religion. The study aims to examine the frequency and actual social significance of the felonies and misdemeanours against religion on the basis of the materials of the criminal cases initiated at the Royal Tribunal of Pécs during the two decades following the entry into force of the Code of Csemegi. The study searches answer to the question whether the judicial practice differed from the will of the legislator and if yes, why happened it so.

Key words: *criminal law; religion; church; judicial practice; crimen blasphemiae; turbatio sacrorum; concubinage; abortion; bigamy; anti-Semitism.*

"...in order for the provisions of the civil constitution to equally embrace and extend to everybody regardless of their language, faith and origin so that there be no one, even if in a special position, above the others, favoured to the detriment of others and no one be treated unfairly."

(Miklós Wesselényi)[1]

1. The protection of denominations under criminal law

The modernisation of church matters and the equality of denominations before the law were acknowledged as part of their policy by the liberal government, nevertheless, its actual implementation was not put on the agenda until the 1890s and neither was any significant progress made in this respect in the course of preparing the first modern Hungarian criminal code. The government could not do anything about it, anyway, since the codification of criminal law had to be implemented in line with the constitutional legal order of the day in respect of the relationship between the state and the denominations as well. However, it is a telling fact that the Code of Csemegi (Act 5 of 1878) – like other great European natural law codifications – touched upon religious conditions from several aspects: Chapter IX set forth the "Felonies and misdemeanours against religion and its practice" and expressly regulated conduct injurious to "denominations of faith" in the case of two other offences.

In the course of the debate of the bill in the House of Representatives and the Table of Magnates substantial differences of opinion arose concerning which denominations should be granted legal protection by the state. In accordance with the scale of enlightened, civic values, the special reasoning[2] of the code emphasised that *"religion and faith belong to the inner self of man and are not subjected to the adjudication of temporal powers"* nonetheless, on the one hand the state is the *"protector of recognised religions"*, on the other hand the perpetrator's conduct expressly specified in the fact situations of the special part of the act *"may jeopardise public order by making the harm to members of denominations exasperated"*. There was an obvious need for protection under criminal law, and there was a difference of opinions in only one respect, namely which denominations to protect by law.

Contrary to the bill proposed by the minister, the Judicial Committee "regarded all religions the practice of which was not prohibited by law [...] protectable under the principle of

* Eszter Cs. Herger, associate Professor, Department of Legal History, Faculty of Law, University of Pécs, Hungary.

1 Miklós Wesselényi: Balítéletekről [On Prejudices], Bucharest 1833), in: Magyar liberalizmus [Hungarian Liberalism]. László Tőkéczki, ed., Budapest 1933, p. 28.

2 Special reasoning pertaining to Sections 184 and 185 of Act 5 of 1878, Corpus Juris Hungarici CD. László Pomogyi, ed. Budapest, 2000.

the freedom of conscience".[3] The term of the bill proposed by the minister *"recognised by state"* was also rejected by the House of Representatives, which, amending somewhat the wording of the Judicial Committee (*lawfully not prohibited*), proposed the term *"not prohibited by law"*.[4] In this case the group of protected denominations would have been extended to the limit which might have been laid down by an expressly prohibiting act. It is true to say that this was not in accordance with Hungarian traditions. In 1878 the difference between the two wordings actually meant the Israelite denomination and the Baptist and Nazarene denominations which appeared in Hungary around that time.

Subsequently to the rejection by the Table of Magnates, the Judicial Committee referring to Article 122 of the Austrian Penal Code argued for the term *"religion existing in the state"* in the second draft of the bill, thus upholding its position and intention to grant protection to the same group, albeit specified by a different wording. Károly Csemegi – engaging in a heated argument with count János Cziráky – defended the proposal of the Committee in the Table of Magnates by interpreting the term "existing" as "operating non-unlawfully". Cziráky based his counterargument on the protestant small churches gaining ground, the issue of Israelites did not even arise during the debate at that time. The Table of Magnates insisted on the term "recognised religion", which was commonly used in Hungarian public law, in order to not to let the wording of the criminal code give ground to any public law amendments or be interpreted in that way. Consequently, referring to the examples of the criminal codes of other civilised nations, it proposed to restore the original wording of the bill.

Following this, in the House of Representatives Béla Perczel, Minister of Justice, tried to persuade the representatives to accept the original proposal by broadly interpreting the term "recognised by state": the meaning of the word recognised "cannot only embrace religions duly recognised and thus expressly recognised by the state, it should be extended to embrace also religions the public practice of which is allowed, and consequently, whose lawful existence is tacitly recognised by the state. On the one hand he referred to the Israelite denomination as an example, on the other hand he emphasised that the statutory definitions of revolt and agitation stipulated by law cover the denominations "tacitly recognised" as well. Csemegi *regarded the Israelite denomination as one recognised by state* and emphasised that in his view the interpretation given by the minister *"constitutes an official and inseparable commentary on the act"*.[5]

The parliamentary debate ended with the adoption of the text of the original bill, which meant that state protection was granted to denominations "recognised by state".[6] However, the interpretation by Perczel (and Csemegi) were actually considered official interpretation in practice – as will be shown later –, and *the Israelite denomination was listed among the "recognised religions" in legal literature too*.[7]

While special protection was granted to denominations recognised by state, the statutory definitions of revolt (Art. 153) and agitation (Art. 171 and 172) covered a wider circle of injured parties: the term *"denomination of faith"* was interpreted by Béla Perczel as one the meaning of which also embraces "religions tacitly recognised" during the debate on protected denominations in the House of Representatives on 8th April 1878.[8] Only one precident decision of the superior courts interpreted the Code of Csemegi in this respect in the last two decades of the 19th century: "*... equality before the law has been ensured by the legislation of the Hungarian state to all citizens of the homeland regardless of religion, nationality or class in the most fundamental institutions*.[9]

2. Regulation pertaining to "Felonies and misdemeanours against religion and its practice" and its court practice

The scope of "felonies and misdemeanours against religion and its practice" was regulated by the legislator in a separate chapter (Chapter IX) in the Code of Csemegi. The title expressed, that *it was not only the free practice of religion but also the religion itself which was intended to be protected*. However, Aladár Schnierer emphasised in his commentary that acts insulting religion and the subject of worship "belong to the sphere of criminal law in as much as leaving the sphere of morals they violate the rights of citizens and impair the interests of denominations recognised by state which are to be protected by law. [...] *God itself as the most perfect being cannot be the object of a crime to be retaliated by the criminal jurisdiction of the state*. An act with regard to the supreme God and punishable by temporal law can be committed in as much as [...] the religious feelings of [...] denominations were insulted. [...] the very same reason also justifies why penal legislation which is under the influence of the enlightened spirit of the age does not take any measures concerning heresy or schism and why it excludes them from the circle of punishable acts."[10] It is "Zeitgeist" indeed that can be regarded as the main cause of leaving out public and con-

[3] Tóbiás Löw: A Magyar büntetőtörvénykönyv a bűntettekről és vétségekről (1878:5. tcz.) és teljes anyaggyűjteménye [The Hungarian Criminal Code on Felonies and Misdemeanours (Act 5 of 1878) and its Full Collection of Materials]. Volume 2, Budapest 1880, p. 265.

[4] Löw: ibid p. 266.

[5] Löw: ibid pp. 294-296.

[6] See Löw: ibid p. 260 for further details.

[7] Aladár Schnierer: A bűntettekről és vétségekről szóló magyar büntetőtörvény (1878. V. T. Cz.) magyarázata [Commentary on the Hungarian Criminal Code on Felonies and Misdemeanours (Act 5 of 1878)], Budapest 1885, p. 315.

[8] Löw: ibid. p. 291.

[9] Felsőbíróságaink elvi határozatai. A m. kir. Curia és a kir. táblák elvi jelentőségű döntéseinek rendszeres gyűjteménye [The Precident Decisions of our Superior Courts. The Systematic Collection of the Precident Decisions of the Royal Hungarian Curia and the Royal Tables (Courts of Appeal)]. Dezső Márkus, ed., Budapest 2nd revised and enlarged edition 1893-1902; hereinafter Márkus, C. 77304/1889 III. p. 426.

[10] Schnierer: ibid. pp. 313-314.

demned heresy (Article 329), which was included in Pauler's Criminal Law among the cases of infidelity, from the Code of Csemegi. The crime of magic (crimen magiae) as an assumed crime was referred to as a kind of fraud even by Pauler. What criminal conduct the Code of Csemegi rendered punishable was formed by the joint impact of *traditional Hungarian criminal law and "progressive" European examples*.

I have studied the materials of the criminal cases initiated at the Royal Tribunal of Pécs during the two decades following the entry into force of the Code of Csemegi (1st September 1880) stored in the collection of documents relating to the administration of justice in Baranya County Archives. The data of the Hungarian statistical yearbooks provide information only on the number of persons convicted of a felony or misdemeanour against religion or its exercise in the given year. However, the documents of the archives throw light on the problems concerning interpretation and show to what extent judicial practice conformed to the original legislative intention. Their main value may be the fact that they make it visible whether there is a balance between the criminal conducts regarded as more important and threatened by more severe sanction by the legislator and their actual frequency and social importance.

2.1. Blasphemy (crimen blasphemiae)

Both during the parliamentary debate and in special legal literature[11] blasphemy, the conduct first regulated in Article 190, was defined as follows: he who caused or attempted to cause *a public scandal through using abusive language against God* in the manner specified in the fact situation of agitation, i.e. publicly either orally or in print committed a misdemeanour and could be sentenced to up to one year of imprisonment or fined up to one thousand Hungarian forints. Blasphemy was not included in the proposal of Csemegi, it entered the bill upon the initiative of Lajos Haynald, archbishop of Kalocsa. Pauler pointed out that although crimen blasphemiae could be committed both directly and indirectly through demeaning God and the objects of Christian religious worship with the intent to insult, the laws of our country recognised only this latter, indirect form. To the west of Hungary, in Germanic territory blasphemy against God and the sacraments were punished equally severely under the laws of the particular states of the German Empire, in other words the codified criminal law of the Bismarckian empire simply followed the traditional solution in this respect, while *the proposal of Haynald was alien to Hungarian law*.

In his response Csemegi noted that "he does not consider the omission of that measure as a mistake from a legislative point of view."[12] As members of the Table of Magnates adhered to their position due to the speeches of Haynald and József Samassa, archbishop of Eger, the amendment was discussed in the House of Representatives as well. Dániel Irányi approved of "punishing blasphemy provided it was committed publicly and having caused public scandal" but in his view it could have been punished only as an infraction. Ernő Simonyi – aligning with Irányi – regarded only public commission as punishable: "Honourable House, I admit it even from my own experience that there are hardly any nations in Europe that could compete with Hungary when it comes to swearing. [...] My honourable friend, Irányi has also noted that only if someone commits blasphemy in public. Because if it is committed in a private place, although I will never consider it honourable, neither will I consider it as something the state or its executive should take notice of."[13]

After blasphemy having been included in the Code of Csemegi in the above way, commentaries emphasised that the object of such a misdemeanour could only be the religious belief of citizens which regards the divine being as the object of limitless respect and reverence; further its subject can belong to any denomination since his faith does not influence the factual situation. However, it should not be assumed that after the commencement of the Code all persons taking God's name in vain, swearing in public and causing the indignation of others present by their statements went to jail, according to the commentaries the intent to insult constituted a condition of culpability, in other words *"if the statement was made merely in the state of excitement, as the expression of anger and annoyance or out of bad habit (lubricum linguae)"*, it did not qualify as a misdemeanour.[14] The Curia established that "the names of God and Jesus as the highest ideals of the worship of the denominations of the Christian faith" do not belong to the external objects of religious respect and "*swearing even if committed in public shall not be culpable*".[15] Thus the legislator incorporated blasphemy on pontifical insistence but the judicial practice relaxed statutory regulation – in accordance with traditional Hungarian criminal law – and interpreting swearing as bad habit, virtually withdrew it from the domain of punishable conduct.

Although the above precident decision of the Curia was adopted four years after the entry into force of the Code of Csemegi, I could not find a single criminal case initiated at the Royal Tribunal of Pécs *in which the accused had been found guilty of blasphemy* either in the period of 1880-1884 or during the years after it up to the turn of the century. The judicial practice of assessing swearing as defamation instead of blasphemy by referring to the lack of the intent to insult became stable and standard.

Daniel S., 42, Roman Catholic day-labourer was found guilty of the misdemeanour of assault on officers of the law (Article 165) and *defamation* (Article 261) and was sentenced to 3 months in jail and fined 20 forints. The facts were as follows: The hay stack in the neighbour's garden caught fire. The local magistrate also appeared on the spot to put out the fire and ordered the accused to help. Accused refused to do so by shouting the words "damn G... of the magistrate" and thrust the magistrate by his chest, who fell down, and then grabbed

[11] Schnierer: ibid. p. 316.
[12] Löw: ibid. pp. 268-273.
[13] Löw: ibid. pp. 280-283.
[14] Schnierer: ibid. p. 316.
[15] C. 2887/1884. Márkus, II. p. 604. See also C. 1721/1886. Márkus, II. p. 604, according to which "swearing at the priest having conducted the service cannot be deemed blasphemy against God".

his throat and began to abuse God again.[16] Following the defence counsel's and the prosecutor's appeal, the Royal Table upheld the decision of the first instance court.[17]

2.2. Religious nuisance (turbatio sacrorum)

Under traditional Hungarian criminal law turbatio sacrorum included *violation of church* (violation ecclesiae), i.e. violently attacking or ransacking church and petty violations. The Hungarian penal proposal of 1843 expressly referred to religious nuisance taken in the narrow sense, i.e. inhibiting or disturbing "divine service" by inflicting violence or causing public scandal, and then – creating a general clause – rendered punishable the deliberate violation of existing laws ensuring the free exercise of religion in case it actually bothered someone in the free exercise of religion. The April Laws of 1848 regulated offences committed through the medium of the press as a natural limitation of the freedom of press: the law threatened to punish those who "ridiculed public and religious morality and honourable morals through the medium of the press". The Code of Csemegi differentiated four cases according to the subject of the protection (the protection of service, premises, objects and clergy) and weighted them differently.

2.2.1. Protection of service

Violent obstruction or disturbance of the service of a religion recognised by state, i.e. religious nuisance taken in the narrow sense (Article 190.b.) and *crimen blasphemiae* (Article 190) were regulated by the same article and were threatened by the same punishment. Even their attempt was rendered punishable, unlike further cases of religious nuisance. The object of the violation could be any act of the service regardless of where it took place, however, according to the commentary by Schnierer "*private worship*" did not fall into this category.[18] The scene of the act was irrelevant as regards the statutory definition of the misdemeanour, although the Curia established that if somebody impeded the service in his own house, he did not commit the misdemeanour of religious nuisance under Article 190. In the given case the owner obstructed a priest in the consecration of the house.[19]

In 1889[20] the Curia interpreted the term *violent perpetration* as the condition of culpability. It established that on the one hand violence cannot be inflicted by omission or nonfeasance, on the other hand "since the occurrence of violence in the struggle of spiritual forces is impossible, an act can only be regarded violent if physical violence is employed against some other similar force". Violent perpetration was established by the court in the following case where direct violence was not inflicted.

István B., 49, blacksmith, of Mohács, with a clean criminal record, ordered the funeral of his uncle, whom he had taken care of and who had died in his house, "without a funeral sermon as in compliance with his express will". Mrs. József V., the sister of the defendant ordered a funeral sermon as well but without the defendant's knowledge. "Out of fear the defendant asked the school-master commissioned with conducting the funeral not to perform the funeral sermon" nevertheless the school master continued the service. Defendant had the assistants take the corpse out of the house of mortuary, and then buried the corpse on their own.[21]

According to Schnierer even the *scandalous behaviour* interrupting the act of service was enough to establish the factual situation. Judicial practice regarded this as disturbing service despite the fact that "causing public scandal" as a manner of perpetration *was not expressly specified* in the act itself, it was only included in the draft of 1843.

2.2.2. Protection of premises

He who causes public scandal on the premises registered for the purpose of performing the services of a religion recognised by state was threatened by significantly lighter punishment, by incarceration of up to six months and fine of up to two hundred forints (Article 191.b.). Churches, chapels, prayer houses, the Stations of the Cross, and street altars of processions[22] of denominations recognised by the state were also regarded as such premises. Whilst cemeteries cannot be categorised into this group according to Schnierer's commentary[23], the Curia has established that "cemeteries (worship performed at graves) shall also be deemed places destined for that purpose.[24]

The Curia interpreted the term "*destined*" when it ordered the court of first instance to interrogate "two experts having state qualifications for performing the duties of a rabbi as to whether there shall be any special accessories or fixings on the premises which are not only occasionally used for the purpose of performing the religious services of the Hebrew religion but also destined for that purpose.[25] Thus, the fact whether the building or room was destined to serve the purpose of exercising religion in compliance with the dogma and articles of faith of the denomination constituted a condition of the protection of premises. There was *no need for the unlawful act to be committed during service* to qualify as a misdemeanour. The act was committed *publicly* if the indecent and insulting act was noticed by several persons. Causing a *scandal* was a condition for the act to qualify as a misdemeanour. In the course of establishing this fact the court could not take into consideration whether the witnesses

[16] Baranya Megyei Levéltár [County Archive of baranya (hereinafter CAB)] VII/2b V/1897/273 4092b/1897.
[17] CAB VII/2b V/1897/273 3486/b/1897.
[18] Schnierer: ibid. p. 317.
[19] C. 3150/1885. Márkus, II. p. 604.
[20] C. 10435/1889. Márkus, II. pp. 603-604.
[21] CAB VII/2b V/1886/441 7779b/1889.
[22] "Pilgrim processions of Catholic denominations shall be considered religious services and not only when followers of the faith are at their devotions but also when they are walking there or back from there under church insignia (flags)." See C.4723/1882. Márkus, II. p. 605.
[23] Schnierer: ibid. p. 317.
[24] C. 6580/1883. Márkus, II. p. 606.
[25] C. 6222/1887. Márkus, II. pp. 604-605.

were scandalised by the act or not,[26] it had to establish this on its own grounding of its assessment of the circumstances, which was not always easy to do as is demonstrated by the following case.

József K., 40, farmer of Nagyharsány, accused of a misdemeanour against religion and its free exercise was not found guilty by the Royal Tribunal. According to the reasoning of the judgement of acquittal, Károly D., minister of the local reformed church announced matters concerning church administration after the service. This led to "murmuring and grumbling among the public, amidst of which disturbance the defendant stood up and requested the minister not to incite tempers against him, and since this request does not constitute an act rendered punishable under Articles 191 and 192 of the Criminal Code, and no scandal was caused, the defendant had to be acquitted".[27] However, the court of second instance found the defendant guilty, because "the defendant acted scandalously in front of the whole congregation, thus publicly [...] in the church".[28] The Curia upheld the decision of the first instance court because "the meeting was held after the service, the defendant reacted to the insulting words of the minister and as a member of the denomination was entitled to rise to speak, consequently he did not cause scandal".[29]

The scope of conduct capable of causing scandal – as shown by the following cases – was extremely wide.

Proceeding was initiated upon a report by Károly G, priest of Vokány, against Ádám R, 23, single, pauper, resident of Vokány. The defendant stayed in the bell tower which he refused to leave even after having been ordered to do so by the priest. "*The struggle resulted in a scandal*", for which the court sentenced Ádám R. to three months in jail and fined him 20 forints.[30] Following the appeal of the prosecutor, the Royal Table changed the punishment to 1 month in jail and 10 forints in fine since "committing the act in a church was not an aggravating but a qualifying circumstance".[31] The Curia upheld the second instance decision but imposed the same sentence as the first instance court.[32]

In Bakócza during the morning service on 26th March 1893 György Zs., accused of the third order hit János V., accused of the second order in his neck several times who falsely believing that "the joke inappropriate in a church" came from László V. accused of the first order hit him in the face. The slapping which followed was admitted by the accused persons and testified by witnesses. The court established that the conduct of the accused persons *caused scandal as those present "exchanged glances"*, and sentenced the accused of the first and second order to one month in jail and the accused of the third order to fourteen days in jail.[33] The Royal Table reduced the penalty of the accused of the first order to eight days taking into consideration that it was not him who initiated the scandal,[34] and the Curia upheld this decision.[35]

On 28th October 1894 József A., 57, Roman Catholic, of Pellérd, while the priest was delivering his preaching against pub-crawling, *caused scandal by shouting out "he who has money goes to pub"*, which hurt the morality of the believers being present in the church. The fact that "the scandal was even bigger as the shouting out was directed against the subject matter of the preaching" was taken into account as an aggravating fact, thus the court sentenced him to eight days in jail and fined him ten forints as a supplementary punishment.[36]

A small struggle in a bell tower, some almost ridiculous slapping among the bored participants of a service or a "smart" shouting out – *acts of small significance* which did not insult the given denomination or its faith, but infringed the rules of appropriate conduct on the premises of the church. I could not find a single case initiated in the two decades between 1880 and 1900 in the documents stored in the collection of documents relating to the administration of justice in Baranya County Archives in which a follower of a different faith would have caused public scandal on premises destined to service, in other words these were obviously internal *church disciplinary matters*.

Whilst Ádám R. was sentenced to three years in jail and fined 20 forints for struggling in the bell tower in 1885, ten years later the accused of the second order who caused a scandal by inducing slapping was sentenced to one month in jail and the resident of Pellérd disturbing the preaching of the priest by rude shouting was sentenced to eight days in jail and fined ten forints as supplementary penalty. The gravity of sentences imposed decreased but it was not due to taking into consideration mitigating factors, all the more so as in the case of József A. from Pellérd the court emphasised that the direction of the shouting in added to the weight of the scandal. Instead, approaching the turn of the century, adjudication seemed to have relaxed to a significant extent.

2.2.3. Protection of objects

Insult against the object of religious worship or any object destined to perform service through an act or scandalous words were rendered punishable by up to six months in jail and 200 forints in fine under the Code of Csemegi (Article 191.b).

[26] C. 6200/1883. Márkus, II. p. 605.
[27] CAB VII/2b V/1883/64 2678b/1884.
[28] CAB VII/2b V/1883/64 24106b/1884.
[29] CAB VII/2b V/1883/64 1520b/1884.
[30] CAB VII/2b V/1884/529 136b/1885.
[31] CAB VII/2b V/1884/529 4468b/1885.
[32] CAB VII/2b V/1884/529 4568b/1885.
[33] CAB VII/2b V/1893/362 1644b/1894.
[34] CAB VII/2b V/1893/362 12912b/1894.
[35] CAB VII/2b V/1893/362 3903b/1895.
[36] CAB VII/2b V/1894/1210 9324b/1894.

Commentaries listed Virgin Mary, the saints, the sacraments, the altar, the ciborium, the chalice and finally the "Ark of the Covenant" among such objects, and it was pointed out that the circle of objects belonging to religious worship and service depended on the dogma and liturgy of the given religion.[37] Like the synagogue in the case of the "protection of premises", here the Ark of the Covenant or rather the *Israelite religion* was granted state protection under criminal law. I could not find a single case in 20 years' judicial practice of Pécs in which the charge was grounded on Article 191.b. It seems that this provision had little practical significance if any.

2.2.4. Protection of the clergy

The misdemeanour of publicly assaulting through words or physical acts a clergyman of a religion recognised by state in the course of his performing a religious service was punishable by detainment in jail up to one year and fine up to 500 forints (Article 192.a). The *felony* of inflicting bodily harm on a clergyman performing service was punishable by imprisonment up to two years under the Code of Csemegi (Article 192.b). According to the commentary "*assaulting* someone physically generally means expressing the intent to insult through external acts, thus symbolic violations as well as violence inflicted directly on the person provided its effect does not manifest itself in bodily harm belong to it". On the other hand *bodily harm* "assumes physical contact through which the corporal integrity of the person attacked was hurt – albeit to a small extent – or he suffered at least more than a slight pain".[38] If the bodily harm was more serious, courts applied the general provisions pertaining to grievous bodily harm.

The special protection of the clergyman presupposed that the act directed against him was carried out in the course of his performing religious service both in the case of a misdemeanour and a felony. This could be established even if he dressed up as a clergyman was taking along the sacrament in the street for the purpose of administering the extreme unction,[39] which means that in 1890 the *Curia extended the concept of religious service to cover preliminary arrangements directly connected to it*.

Contrary to this, two years earlier the Royal Tribunal of Pécs[40] and the Royal Table[41] expressly linked culpability to the actual performance of service in their judgements. Antal W., 50, Roman Catholic, wealthy farmer of Laskafalu called the priest feeble-minded *for not beginning the funeral service*, and the priest called him the same. The ruling was acquittal in this case, because "the material fact situation cannot be established" and "complaint is not made for verbal insult".

Neither party appealed, although the Curia must have adopted a ruling of conviction since a month before in another case it established that he *who uses defamatory words in public against a priest performing service* commits a misdemeanour under Article 192.[42] There were some, albeit very few actions initiated for the misdemeanour under Article 192 in the Royal Tribunal of Pécs between 1880 and 1900, but there were no actions for such a felony, also there occurred no grievous bodily harm against any clergyman performing service.

The number of persons convicted of felonies and misdemeanours against religion and its practice in Hungary[43]

	1881	**1882**	**1883**	**1884**	**1885**	**1886**	**1887**	**1888**	**1889**	**1890**
Felony	5	2	-	-	4	2	-	2	-	9
Misdemeanour	60	68	79	95	96	103	124	149	114	79
	1891	**1892**	**1893**	**1894**	**1895**	**1896**	**1897**	**1898**	**1899**	**1900**
Felony	-	1	6	-	2	3	-	-	-	-
Misdemeanour	121	126	156	120	173	196	134	161	175	264

[37] Schnierer: ibid. pp. 317-318.
[38] Schnierer: ibid. p. 318.
[39] C. 4473/189. Márkus, II. p. 606.
[40] CAB VII/2b V/1887/733 2160b/1888.
[41] CAB VII/2b V/1887/733 16430b/1888.
[42] C. 2463/1888. Márkus, II. p. 606.
[43] Hungarian Statistical Yearbook 1894. The number of persons convicted of felonies and misdemeanours broken down to particular acts in Hungary and in Fiume from 1881 to 1893, pp. 359-362; Hungarian Statistical Yearbook 1898. The number of persons convicted of felonies and misdemeanours broken down to particular acts in Hungary from 1894 to 1898, pp. 359-360; Hungarian Statistical Yearbook 1899. The number of persons convicted of felonies and misdemeanours broken down to particular acts in Hungary from 1895 to 1899, pp. 408-409; Hungarian Statistical Yearbook 1890. Penalties imposed on persons convicted in cases closed during the year of 1900 in the Royal District Courts and Royal Tribunals broken down to offences, pp. 419-421.

3. Criminal cases relating to religion

After having studied the issue of the criminal law protection of denominations "recognised by state", attention will now be turned to the question *whether there were any violations with religious motives in the background*. Was Hungarian society tolerant of different religions-denominations in the period of the Austrio-Hungarian Monarchy (1867-1918)? Could neighbours belonging to different religions and with it quite often to different ethnic groups get on with each other? If the aggrieved person was a member of a denomination which was not "recognised by state", did the court take into consideration that the violation might have been traced back to a religious cause? Only some of the conflicts end up in a crime, action is commenced in even fewer cases against the perpetrator. This used to be the case in the 19th century and this is how things happen nowadays as well. Nevertheless, the documents of the administration of justice which were left to us reveal what crimes could be related to religion, to a religious conflict and – in an indirect manner – where were significant deficiencies as regards the equality of denominations.

3.1. The lack of secularised matrimonial law

Mrs Dávid L. née Johanna L., 38, widow with two children, Israelite day-labourer was charged with *murder* by the royal prosecutor. The Royal Tribunal of Pécs found her guilty[44] and sentenced her to one and a half years imprisonment and deprived her of civil rights for a period of three years reckoned from release from prison. The court established that Johanna L. gave birth to a viable daughter but failed to tie the umbilical cord, which caused the girl to bleed to death. Her omission was found to be intentional since in the court's view as she already had a child "she knew quite well that it must be tied", "still she did not save her child". The court took into consideration the fact that "*as she was an Israelite, the Catholic father did not want to maintain the child*" as a mitigating factor. Johanna L. could not prove that contrary to István V.'s denial, the procreative father of the child "urged her to get rid of the child not to put him and herself to shame".[45]

The final judgement in the case of Israelite Johanna L. was adopted in 1882, one year after the liberal government had proposed a bill in the House of Representatives on 22nd March 1881 on "civil marriage contracted between Christians and Israelites and abroad", which was treated with great aversion by legal science. To quote Kornél Sztehlo, "The noblest objective of civil marriage could be to eliminate the antagonism between Christians and Israelites".[46] Until the entry into force of Act 31 of 1894 (1st October 1895) there was no uniform secularized matrimonial law in Hungary. As the remains of postclassical Roman law *the interdiction on contracting a marriage between Christians and Israelites was general in denominational laws*, which prevailed in Hungary as well until 1894.

Whilst the matrimonial legal order of the Protestant, Israelite and Greek Orthodox denominations allowed for the dissolution of marriage, the Catholic canon law rejected the divorce undoing the marriage tie; irretrievably broken down relationships could end with separation from bed and board or with simply living separately in the case of Catholic spouses before the entry into force of Act 31 of 1894. New relationships could only be established in an illegitimate manner in both cases. One form of it was *concubinage*, which in itself resulted in the killing of a greater number of unwanted embryos and newborn babies than happened in the case of offsprings conceived in marriage.

Mrs Zsifkó B. née Anna L., 23, Roman Catholic lived separately from her husband. She was convicted of *murdering* her illegitimate child and was sentenced to half year imprisonment. After her release from prison she became the concubine of Antal V. She became pregnant, and then had a miscarriage. The Royal Tribunal of Pécs acquitted her of the charge of *procured abortion*, although the reasoning of the judgement raises doubts as to the intent of Mrs Zsifkó B.: the miscarriage was not the result of forcible intrusion but "rather of continuous hard labour in which the accused was engaged in until the day of the miscarriage despite her strong bleeding and thus poor health condition, as testified by witnesses".[47]

The other "form" of a new relationship was *bigamy*, although unlike concubinage, it happened more rarely that someone contracted a new marriage despite an existing bond. As the Code of Csemegi allowed the imposition on quite a harsh penalty in the case of the crime of a double marriage, it was a very risky enterprise.

Oswald H., 40, Roman Catholic, of Pécs married Anna G. in 1869, and then Katalin R. in 1882. Defendant misled both his second wife and the priest as to his marital status. The court found him guilty of *the felony of double marriage* (Article 251) and sentenced him to two and a half years imprisonment. When imposing the sentence, the court took into consideration that the second wife was pregnant "and the status of the child to be born would not be the same as that of a child born in legitimate marriage".[48]

The judgements do not inform us as to what induced Oswald H. to commit such a violation. Since bigamy was traditionally a bar on marriage in Christian denominational laws and was penalised since the early Middle Ages, he must have been aware of the illegal nature of his conduct.

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[44] CAB VII/2b V/1882/20 1500b/1882.

[45] CAB VII/2b V/1882/20 22287b/1882. The Curia upheld the first instance decision. CAB VII/2b V/1882/20 13452b/1882.

[46] Kornél Sztehlo: A keresztyén-izraelita polgári házasság. Észrevételek a kormány által a polg. házasság tárgyában beterjesztett törvényjavaslat felett [Christian-Israelite Civil Marriage. Remarks on the Government Bill on Civil Marriage], Budapest 1881, pp.1-10. See also Holló Fehér: Polgári házasság és zsidókérdés [Civil Marriage and the Jewish Question], Budapest 1893.

[47] CAB VII/2b V/1888/576 5694b/1889.

[48] CAB VII/2b V/1884/64 1010b/1886.

3.2. New religious movements

The Baptist and Nazarene movements spread in Hungary in the second part of the 19th century. In Europe the Baptist denomination grew the most dynamically in Hungary in 1883-1907, but the Nazarenes also grew significantly in number.

Ferenc P. Baptist preacher appeared in Magyarbóly on 7th February 1893. He "performed several worships which were frequented mainly by local women and during which he allegedly ridiculed the evangelic faith of local people". Since the preacher "took women away from their work" he was asked several times "not to disturb their peace". On 11th February Ferenc P. was staying in the house of István H. when fourteen local men intruded the house and noisily ordered the preacher to leave, and then pushing the door open by force some of them entered the room and "led the preacher out to the yard by force despite his protest and resistance" as far as the boundary of the village. Several witnesses gave evidence of their act. Four defendants were sentenced to five days in jail for the *misdemeanour of assault against private individuals* (Article 275) and ten defendants were fined 10 forints each for the *misdemeanour of illegal entry of a dwelling* (Article 332).

As a mitigating factor the court took into consideration the fact that the defendants "felt insulted in their religious feelings and that they committed the offence in an angry and annoyed state of mind infuriated by their wives attending Ferenc P.'s worships instead of doing their housework.[49]

3.3. Anti-Semitic insults

During my research conducted in the archives I found several cases where the aggrieved party was abused through insulting words referring to their Jewish origin. I do not think this can always be explained by the general phenomenon of using rude words in a conflict. Samuel Sch., 52, Israelite, native of Szeged, father of three, "adequately educated", propertiless, court bailiff, of Dárda was frequently the aggrieved party in criminal proceedings in cases at the Royal Tribunal of Pécs from 1892. As action for violence against authority was regularly commenced and the position of court bailiff is a "dangerous activity", one might assume that Sámuel Sch. fell victim to his occupation. However, this picture is tinged by the words used against him abusing his origin, religion and God. Pursuant to the precident decision of the Curia adopted on 13th February 1891 "defamation against a person of authority does not constitute a multiple offence with violence against authority committed through assault and battery".[50] However, in the case against Illés C. no assault and battery was involved and the court imposed a merged sentence. The nature of the abusive words was not referred to in the reasoning of the judgement.

Illés C., 32, member of the Reformed Church, farmer, of Kopács attacked Sámuel Sch, court bailiff with a pitchfork shouting "out from here, you stinking Jew, I'll strike you dead". Witnesses testified that the following words could be heard: *"stinking Jew, I'll stab you", what are you doing here, the Jewish G... of yours, out from here", "the Jewish G... of yours, leave my yard or I'll kill you"*. The reasoning of the judgement established that this threatening was capable of filling the bailiff with fear of immediate direct danger. As a merged sentence the court imposed two years of imprisonment on Illés C. and deprived him of civil rights for three years reckoned from release from prison.[51] The Royal Table upheld this decision,[52] however, following the second appeal by the prosecutor the imprisonment was reduced to one year and seven months by the Curia.[53]

3.4. Offences committed against the church

In the course of studying the penal jurisdiction of Baranya County in the years of 1880-1900, I found several cases involving offences committed against the church without any religious motive. Theft belonged typically to this circle.

Péter Sch., 53, Roman Catholic, propertiless farmer *took out 30 forints from the already broken till of the local Catholic church* and used it for his own purposes.[54]

János C. and János U., Roman Catholic residents of Nádasd *broke open the carcass pit of the bishopric estate of Pécs and took away deerskin and meat from there*.[55]

The final judgement was adopted in 1888 in the first case and in 1892 in the second case. When passing sentence, the courts did not take into consideration that the victim of the crime was a church. However, some years later the Royal Tribunal of Pécs deviated from this practice, moreover, the punishment seems extremely severe in the following case closed by a final judgement in 1896.

Lajos Sz., 32, Roman Catholic resident of Görcsöny entered the church through the door which had been left open and opened one of the cabinets with the key of another one, and stole the amount of about two forints fifty fillers to three forints, which had been donated by the followers of faith. He was sentenced to nine months imprisonment and deprived of civil rights for three years for his crime, "*considering the fact that he committed the theft in a church* and stole money which had been intended for charitable purposes.[56]

[49] CAB VII/2b V/1893/183 2975b/1895.
[50] C. 8716/1891. Márkus, III. p. 424.
[51] CAB VII/2b V/1892/657 2468b/1893.
[52] CAB VII/2b V/1892/657 2229b/1893.
[53] CAB VII/2b V/1892/657 10248b/1893.
[54] CAB VII/2b V/1887/738 2541b/1888.
[55] CAB VII/2b V/1891/872 1629b/1892, 875b/1892 and 984b/1892.
[56] CAB VII/2b V/1896/341 3908b/1896.

Das deutsche Bürgerliche Gesetzbuch und der Nationalsozialismus*

*András Bertalan Schwarz***

Das BGB ist wohl die berühmteste gesetzgeberische Schöpfung der Wilhelminischen Epoche, vielleicht das berühmteste deutsche Gesetz überhaupt. Diese Berühmtheit verdankt es keineswegs unbestrittenen Vorzügen. Zwar ist es viel gerühmt, sogar bewundert, aber ebensosehr von jeher auch kritisiert und getadelt worden. So war es keineswegs eine unvermittelte Einstellung, beruhte keineswegs nur auf einem allgemeinen destruktiven Trieb allem Überlieferten gegenüber, wenn das „Dritte Reich" diesem Gesetzbuch der Jahrhundertwende von Anbeginn den Kampf angesagt und den Entschluß gefaßt hatte, dasselbe zu beseitigen und durch ein anderes, das man Volksgesetzbuch nennen wollte, zu ersetzen, an welchem Jahre hindurch (etwa von 1937/1938 ab) tüchtige Juristen mit großem Eifer gearbeitet haben. Es wird zweifellos eine sehr wichtige Frage sein, wie man sich in Hinkunft dieser Kritik und dieser Arbeit gegenüber verhalten und inwieweit in der eingeschlagenen Bahn fortgefahren werden soll. Ich möchte heute versuchen darzulegen, was das BGB war, welche Stellung demselben in der juristischen Geistesgeschichte gebührt, welche seine Vorzüge und seine Nachteile sind, dann warum und aus welchen Tendenzen heraus der Nationalsozialismus dagegen Stellung genommen und was er an dessen Stelle erstrebt hat und schließlich welche Haltung alldem gegenüber nunmehr geboten erscheint.

Seinen Ruhm und seine Berühmtheit in Deutschland selbst verdankt das BGB zweifellos hauptsächlich dem Umstand, daß es auf dem Gebiet des Privatrechts bzw. auf dem engeren Gebiet des sog. bürgerlichen Rechts die deutsche Rechtseinheit verwirklicht hat. Insofern war es die Erfüllung einer fast Jahrhunderte alten Sehnsucht, eine wichtige Ergänzung der politischen Einigung. Die ungeheure Rechtszersplitterung war freilich keine spezifisch deutsche, sondern eine allgemeine Erscheinung der europäischen mittelalterlichen Rechtsentwicklung. In Deutschland wurde sie besonders kompliziert durch die Rezeption des römischen Rechts, die sich da ungleich intensiver durchsetzte als in irgendeinem anderen Land. Danach gelangte das römische Recht zwar als *ius commune*, als „gemeines Recht" für ganz Deutschland zur Geltung, aber nur mit subsidiärer Kraft, also nur die Lücken einer unübersehbaren Fülle einheimischer Stadt- und Landrechte ausfüllend. Nachdem dann am Ende des l8. Jahrhunderts in Pommern das neue ALR, zu Beginn des 19. Jahrhunderts im Rheinland und in Baden der französische *Code civil* in Kraft traten, gab es fortab einerseits Gebiete mit kodifiziertem Gesetzesrecht, zu welchem im späteren 19. Jahrhundert noch Sachsen hinzutrat, andererseits das große gemeinrechtliche Gebiet, dem vor dem Inkrafttreten des BGB ein beträchtlicher Teil der Bevölkerung angehörte mit dem unendlich komplizierten Rechtszustand der subsidiären Geltung des gemeinen oder Pandektenrechts neben einer Unmenge deutscher Lokalrechte.

Nachdem Preußen, Frankreich und Österreich sich um die Wende des 18. und 19. Jahrhunderts ein einheitliches Zivilrecht geschaffen haben, ertönte der Ruf nach Schaffung auch eines gemeinsamen deutschen bürgerlichen Gesetzbuches nach den Befreiungskriegen mit besonderem Schwung in einer kleinen Schrift des Heidelberger Rechtslehrers THIBAUT, die dadurch berühmt wurde, daß er den Anlaß gab, zu der in gewisser Hinsicht epochemachenden Bekenntnisschrift SAVIGNYs „Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft". Warum er darin überhaupt gegen Gesetzgebung und Kritik Stellung nahm, soll heute nicht erörtert werden. Nur nebenbei – da davon hier mehrfach die Rede gewesen ist – möchte ich bemerken, daß es auf der grundsätzlichen Ablehnung des Naturrechts, das naturgemäß zur Gesetzgebung drängt, beruhte und daß der Standpunkt zweifellos weitgehend durch die Erfolge der französischen Revolution und durch die konservative Einstellung allen Neuerungen gegenüber bestimmt war, doch darüber hinaus auch auf einer romantisch-konservativen Einstellung dem künstlich rationalen Zug gegenüber, der aller Gesetzgebung innewohnt und der von diesen zeitlichen Bedingungen unabhängig zu allen Zeiten wiederkehrt. Meines Erachtens

* Es geht um den Text des Vortrages von András Bertalan Schwarz (1886-1953). András Bertalan Schwarz hat diesen Vortrag in Deutschland, wahrscheinlich an der Bonner Universität, den 15. Juni 1945 gehalten. Das Manuskript wurde dem Herausgeber (Gábor Hamza) von Hans Julius Wolff zwecks Veröffentlichung zur Verfügung gestellt.

** Prof. Andreas Bertalan Schwarz (* 17.02.1886 in Budapest † 11.09.1953 in Freiburg); Jurist, 1908 Promotion, 1912 Habilitation, 1920-1926 Prof. an der Universität Leipzig, 1926-1929 an der Universität Zürich, 1929 Prof. für römisches und deutsches bürgerliches Recht an der Universität Freiburg, 1933 Ernennung zum planmäßigen ordentlichen Professor, August 1933 Versetzung in den Ruhestand wegen „nicht-arischer Abstammung", 1934-1953 Prof. an der Universität Istanbul, Rehabilitierung und Emeritierung 1949-1950, Honorarprof. an der Universität Bonn (Quelle: http://www.uniarchiv.uni-freiburg.de).

waren dabei juristische Überzeugungen weit stärker ausschlaggebend als politische Erwägungen.

Ohne sie ist die römische und die englische Rechtsentwicklung gar nicht zu verstehen. In den 1860-er Jahren hat der Basler Gelehrte JOHANN JAKOB BACHOFEN es abgelehnt, sich an der Ausarbeitung des Entwurfs eines ZBG für den Kanton Basel–Stadt zu beteiligen, weil von einer Kodifikation für Wissenschaft und Praxis nur schlimme Folgen zu erwarten seien. Derartige Erwägungen und Überzeugungen waren meines Erachtens für SAVIGNYs Standpunkt bestimmender als bewußte politische Erwägungen. Ganz abgesehen vom grundsätzlichen Standpunkt kommt SAVIGNY, der meines Erachtens noch weit mehr als Historiker Jurist gewesen ist, das Bedenken, daß die leitenden Prinzipien und Begriffe des Privatrechts auch nicht genügend geklärt seien, daß also die wissenschaftlichen Grundlagen, die die Voraussetzung einer jeden gesetzgeberischen Zusammenfassung bildet, für eine solche noch nicht gereift sei. Die gerade von SAVIGNY inaugurierte Richtung der gemeinrechtlichen Wissenschaft stand vor allem im Dienste dieser Aufgabe, die Prinzipien und Begriffe des Privatrecht zu erklären und zu einem System zu bringen. Das war die große geistige Leistung der ganzen Wissenschaft oder Pandektenwissenschaft des 19. Jahrhunderts, aus deren Boden das deutsche BGB herauswuchs und ohne die es schlechterdings nicht verstanden werden kann.

Pandekten heißt der wichtigste Teil des justinianischen *Corpus iuris* und danach hier das in Deutschland durch die Rezeption eingedrungene römische Pandektenrecht, *usus modernus Pandectarum,* modernes Pandektenrecht, heutiges römisches Recht. Die Eigenart der Pandektenwissenschaft des 19. Jahrhunderts, wie sie sich von SAVIGNY an entwickelt, liegt vor allem in ihrer systematischen Tendenz: es wird ein System des Rechts gebaut, in welchem von allgemeinen Lehren aus die Einzelheiten abgeleitet werden. Man glaubt das Recht zu trüben und man beruft sie auf römische Quellen so weit es geht, aber das Ganze ist doch weitgehend ein Produkt spekulativer Konstruktion, wobei der Stoff den Ideen der Zeit entsprechend gestaltet wird. Die systematische Form wie die inhaltliche Gestaltung sind dabei weitgehend von der juristischen Ideenwelt der Aufklärung, nämlich der Naturrechtslehre abhängig. Von da stammt die systematische Form – aufgebaut auf allgemeine Lehren und Grundbegriffe und abstrakte generalisierende Formulierungen und die individualistische Ausgestaltung. Letzteres zeigt sich indes in Grundvorstellungen, von denen das ganze System getragen wird, dem subjektiven Recht und dem Rechtsgeschäft. Beiden Vorstellungen liegen Erscheinungen zugrunde, die jedem Rechtsleben wesentlich sind. Aber erst das Naturrecht macht sie zu den Säulen des ganzen Systems und die Pandektenwissenschaft übernimmt sie. Das subjektive Recht, wie man die Berechtigung in der Naturrechtslehre nennt, ist das Ziel der ganzen Rechtsordnung; Recht zu gewähren und Recht zu schützen, kraft welcher der Wille des Individuums sich entfaltet. Dabei ist der Vertrag das wichtigste Mittel, durch welches der Wille der Individuen deren Verhältnisse gestaltet, der dann aufgeht im weiteren Begriff des Rechtsgeschäfts, dessen wesentlicher Kern die Willenserklärung ist: Kauf, Miete, Bürgschaft, Eigentumsübertragung, Testament sind Rechtsgeschäfte, durch die die Partei ihren Willen kundtut, die die Rechtsordnung anerkennt und gelten läßt. So entsteht ein Rechtssystem, das das Interesse des Einzelnen schützt, das dem Willen des Einzelnen Geltung zu verschaffen bestrebt ist.

Merkwürdig ist, daß diese Rechtswissenschaft sich dieser ihrer Grundlagen und dieser ihrer Tendenzen sozusagen gar nicht bewußt gewesen ist, und es war eine Entdeckung neuester Zeit, dieselben klar zu erkennen. Sie war sich der Grundlagen nicht bewußt, weil sie grundsätzlich als historische Rechtswissenschaft zum Naturrecht in schärfstem Gegensatz stand, die Idee jedes Naturrechts grundsätzlich ablehnte und Jahre übersah und übersehen mußte, wie sehr sie unbewußt auf den Schultern dieser vorangehenden und vergangenen geistigen Epoche stand. Und sie war sich auch der Tendenzen nicht bewußt, weil sie ganz und gar juristisch und völlig unpolitisch war, weil es ihr schlechterdings nicht bewußt war, daß ihre Rechtswissenschaft im Dienste einer politischen und wirtschaftlichen Weltanschauung steht, weil sie in dieser Isolierung auf das juristisch-normative geradezu ihr eigenes Wesen erblickte, nicht im Privatrecht, sondern, was noch auffallender ist, sogar im Staatsrecht, wo es im späteren 19. Jahrhundert als die große Errungenschaft der Staatswissenschaft galt (besonders LABAND), dieselbe von der Staatswissenschaft, also von der Politik loszulösen, eine Erscheinung, die nicht nur im 19. Jahrhundert, sondern auch anderen Glanzperioden der Rechtswissenschaft eigentümlich ist (ausgezeichnet dargestellt von FR. SCHULZ: Prinzipien des römi-schen Rechts. München-Leipzig, 1934. 13 f): in der römischen Gesellschaft der Pax Romana der Prinzipatszeit und in der gesicherten Stabilität der bürgerlichen Gesellschaft des 19. Jahrhunderts und es am frühesten und kraftvollsten im Strafrecht des alten klassischen Gebäudes durch kriminologische und kriminalpolitische Betrachtung erschüttert wurde, wurde es als der Rechtswissenschaft fremd abgewiesen. (Wenn das Ganze überhaupt von einem rechtspolitischen Bestreben getragen war, so war es das nach Rechtssicherheit...)

In der Beschränkung auf das Juristische, auf das Dogmatisch-normative, hat sie sich aber als Meister des Juristischen bewährt. Das System wurde ausgefeilt bis in die kleinsten Nuancen. Eine Klarheit der Begriffe, eine Schärfe der Rechtsprinzipien wurde erzielt, wie wohl keine frühere Jurisprudenz sie aufzuweisen hatte. In dem juristisch so zersplitterten Deutschland gab es eine gewaltige juristische Einheit: Die Pandektenwissenschaft, die *ex cathedris* der deutschen Universitäten gelehrt wurde, auch dort wo das Pandektenrecht nicht galt. Das galt als die Rechtswissenschaft *kat'exochén,* das Modell der wissenschaftlichen Behandlung aller anderen Rechtsgebiete. Die deutschen Fakultäten waren die hohen Schulen des Rechts für die Welt, ihre großen Meister sozusagen *praeceptores mundi,* mit einer Stellung wie sie seit den Scholastikern keine Generation von Rechtsgelehrten hatte. Als endlich die Stunde des Pandektenrechts schlug, konnte kein Zweifel bestehen, daß nur das Pandektenrecht, das Recht der Pandektenwissenschaft, die Grundlage des kommenden Gesetzbuches sein konnte.

Als man sich an die Schaffung eines BGB für das neue deutsche Reich machte – erst im Jahre 1873 wurde die Bismarck'sche Verfassung von 1871 dahin geändert, daß das gesamte bürgerliche Recht in die Kompetenz der Reichsjustizgesetzgebung

gehörte – stand die Art der Verwirklichung nicht auf der Höhe der Aufgabe und nicht auf der Höhe der gegebenen Möglichkeiten. Nicht auf der Höhe der Aufgabe – denn in Aussicht genommen war *a priori* ein Eklektisch-technisches, nicht soziale oder wirtschaftliche Verhältnisse irgendwie schöpferisch gestaltendes Gesetzeswerk (derartiges lag völlig fern), eine Eigentümlichkeit, die übrigens keineswegs nur dem BGB, sondern kodifikatorischen Gesetzgebungen namentlich auf dem Gebiet des bürgerlichen Rechts überhaupt eignet. Schon wenige Wochen nachdem die Novelle zur Reichsverfassung, mittelst welcher die Zuständigkeit des Reichs auf das gesamte bürgerliche Recht (nicht nur wie bis dahin auf das Han-dels-, Wechsel- und Obligationsrecht) ausgedehnt worden war, wurde eine Kommission (sog. Vorkommission) eingesetzt, die Vorschläge über Plan und Methode bei der Ausarbeitung eines Entwurfs machen sollte. Gemäß dieser Vorschläge sollte der auszuarbeitende Entwurf „unter Berücksichtigung der geltenden Gesetzbücher […] das den Gesamtzuständen des deutschen Rechts entsprechende bürgerliche Recht in einer den Anforderungen der heutigen Wissenschaft gemäßen Form kodifizierend zusammenfassen", und zwar sollten alle im Reichsgebiet geltenden Privatrechtsnormen mit Rücksicht auf ihre Zweckmäßigkeit, innere Wahrheit und folgerichtige Durchführung untersucht und dabei insbesondere geprüft werden, inwieweit die Abweichungen vom gemeinen Recht beizubehalten und eine Ausgleichung zu versuchen sei, und es sollte auf Formgebung und Anordnung die hauptsächliche Sorgfalt verwendet werden. Also ein *a priori* pedantisch konservatives Programm, das auf fleißige und sorgfältige Sammlung hinweist und dem eine gestaltende Gesetzgebung fernliegt. (PLANCK [Kommentar zum BGB] I, XXIII f.).

Die Anlage der Arbeit stand nicht auf der Höhe der vorhandenen Möglichkeiten. In einer Zeit, deren kritische Rechtswissenschaft reich an glänzenden weltweiten schöpferischen Namen (JHERING, GIERKE) war, wurde sie einer sorgfältig zusammengesetzten bürokratischen Kommission von Ministerialräten und dgl. anvertraut, deren Namen heute niemand mehr kennt.

Offensichtlich eine Eifersuchtstendenz der Büros, der Ämter der Wissenschaft und ihren großen Vertretern gegenüber. Allerdings waren Mitglieder der Ersten Kommission auch zwei Professoren: PAUL VON ROTH in München, germanistischer Quellenforscher, der dabei wenig hervorgetreten ist und dann, das ist allerdings ein klangvoller und bedeutender Name, der Leipziger Pandektist BERNHARD WINDSCHEID, der die Gestaltung des Ersten Entwurfs, den man einen „in Paragraphen gefaßten WINDSCHEID" nannte, und darüber hinaus das Gesetzbuch selbst erheblich beeinflußt hat. Nun war WINDSCHEID ein bedeutender Systematiker, der durch sein großes zusammenfassendes Lehrbuch des Pandektenrechts eine führende Autorität war und auch blieb, eine Verkörperung jener logisch-formalen Dogmatik, aber weltfremd und lebensfremd, zu Scholastik neigend, in solcher Richtung vielleicht allzu stark getadelt, jedenfalls kein Gesetzgeber, den ein Teil der Verantwortung für den überspitzten, allzu abstrakten Charakter des Gesetzbuches trifft. Die Persönlichkeit, die die Entstehung des Gesetzbuches von Anfang an bis zu Ende begleitet hat, GOTTLIEB PLANCK war ein biederer Politiker und fleißiger Jurist, aber geradezu die Inkarnation des Gegenteils gesetzgeberischer oder sonstiger Genialität.

(Zusammensetzung der Kommission, der Ersten wie der Zweiten: In der Zweiten Kommission neben Beamten auch Vertreter der verschiedensten Wirtschaftskreise, nicht aber der Gewerkschaften, Professoren MENGER, CONRAD, SOHM.)

In der Reihe der großen Privatrechtsgesetzbücher ist vielleicht keines so wenig die Schöpfung eines einzigen Geistes, so sehr das Ergebnis anonymer Arbeit vieler wie das BGB. Es hätte an geeigneten Persönlichkeiten nicht gefehlt. Seit langen Jahren kannte ich eine Bemerkung in einer geistreichen Aphorismensammlung des bedeutenden Juristen JOSEPH UNGER: Mosaik (1911) S. 194/195 „Die Verfassung eines Gesetzbuches sollte stets in eine Hand gelegt werden, dann entsteht es in einem Geist und aus einem Guß", wobei er es als unbegreiflich bezeichnet, daß man nicht den „großen Zivilisten HEINRICH DERNBURG, der als Meister des gemeinen und preußischen Zivilrechts förmlich prädestiniert dazu war, mit der Abfassung des deutschen BGB betraut hat oder ihn doch wenigstens in eine der beiden Kommissionen entsandt hat". Ich war erstaunt, vor einiger Zeit in einer 1928 erschienenen Biographie FRIEDRICH ALTHOFFs, des langjährig unumstrittenen Diktators der preußischen Universitäten (ARNOLD SACHSE, FR. ALTHOFF und sein Werk 1928, S. 300), zu lesen, daß Althoff angesichts der ungünstigen Aufnahme, die der Ersten Entwurf gefunden hatte, eingreifen wollte, indem er Dernburg zu bewegen sich bemühte, die Umarbeitung des Entwurfs und die schließliche Redaktion des Gesetzbuches zu übernehmen, worauf DERNBURG nach einigem Wi-derstand einzugehen bereit war. Der Plan soll jedoch am Widerstand des Fürsten Bismarck gescheitert sein. Gründe sind nicht angegeben, aber vermutlich war für Bismarck die politische Erwägung maßgebend, daß das Werk der Einigung des deutschen bürgerlichen Rechts nicht in die Hände eines Rechtsgelehrten jüdischer Herkunft gelegt werden sollte, wobei man daran erinnert wird, wie sehr der Autorität der Weimarer Verfassung neben etlichen anderen Gründen ihre jüdische Pro-venienz geschadet hat.

So trat das, was groß und bedeutsam war an der Rechtswissenschaft dieser Zeit, nicht in den Kommissionen und den gesetzgeberischen Arbeiten selbst in Erscheinung, als vielmehr in der Kritik, die die letzteren auslösten, vor allem der Erste Entwurf, der nach 15-jähriger Geheimarbeit 1888 mit Motiven erschien.

Eine Flut von Kritik ergoß sich darüber, an der sich alles beteiligte, was da war, Juristen und Laien, Gelehrte und Politiker. Die Kritik war überwiegend der Natur des Entwurfs entsprechend vor allem aufs Juristisch-technische gerichtet. Sie war bisweilen in schärfster Weise, überwiegend ablehnend, richtete sich gegen die unglückliche, schwerfällige komplizierte, ungenießbare, doktrinäre Form, den allzu starken romanistisch-pandektistischen Charakter: ein in Paragraphen gefaßtes Pandektenkompendium gegen WINDSCHEIDs Geist.

Allgemein fand man, der Entwurf sei allzu stark römisch, nicht deutsch, und das bedeutet pandektistisch. Seit der Rezeption wogte auf deutschem Boden zwischen dem eingedrungenen römischen Recht und dem in den unzähligen Lokalrechten so bunt und mannigfach in Erscheinung tretenden, infolge der

Zersplitterung und unvergleichlich geringerer Nationalisierung ungleich schwächeren germanistischen Recht – ein Kampf, der sich durch Jahrhunderte in der Praxis, dann in der Gesetzgebung und im großartigen wissenschaftlichen Aufschwung des 19. Jahrhunderts seit SAVIGNY und EICHHORN in dem wissenschaftlichen Kampf der Romanisten und Germanisten abspielte. In diesem Kampf bedeutete der Entwurf zweifellos einen Sieg des Romanismus. OTTO VON GIERKE ist da der große Apostel des Germanismus, in seiner wahrhaft monumentalen, auch heute noch bedeutsamen Kritik, die in SCHMOLLERs Jahrbuch 1889 erschien und die weiteren Entwürfe des Gesetzbuches weitgehend beeinflußte. Alles in allem war auch die Kritik weitgehend auf das Juristisch-normative als auch das Politisch-soziale eingestellt, mag auch immer wieder, so insbesonders auch von GIERKE gesagt worden sein, der Entwurf sei nicht von sozialem Geiste getragen. Eine *rara avis* in diesem Orchester war die Schrift „Das bürgerliche Recht und die besitzlosen Volksklassen", die 1890 nicht von einem sozialdemokratischen Gewerkschaftsführer, sondern vom Wiener Ordinarius der Rechte, ANTON MENGER erschienen ist mit dem im einzelnen durchgeführten Nachweis, daß der Entwurf ein Privatrecht der Besitzenden sei und die Interessen der Besitzlosen vernachlässige, wenn nicht außer Acht lasse, Töne anschlug, die innerhalb der damaligen Rechtswissenschaft fremd gewesen sind.

Die parlamentarische Behandlung des Gesetzes des wesentlich formell und auch inhaltlich wesentlich verbesserten, vereinfachten, verdeutschten, praktischen Zweiten Entwurfes im Hochsommer 1896 stand gleichfalls nicht auf der Höhe der Aufgabe. Zwar brachte der Präsident des Reichstags gebührend zum Ausdruck, daß die Vorlage die größte Aufgabe darstelle, die dem Reichstag seit seinem Bestehen gestellt worden sei. Aber ein derart unpolitisches, rein juristisches Gesetz vermochte bei all seiner Wichtigkeit naturgemäß kein erhebliches politisches Interesse zu wecken. Der Widerstand des Zentrums gegen die obligatorische Zivilehe und Ehescheidung war ein postumes Gefecht, da ja der Kampf schon im Kulturkampf erst in Preußen, dann durch das Personenstandesgesetz von 1875 entschieden war und der Versuch, die obligatorische Zivilehe durch die meines Erachtens befriedigendere, weil liberalere, fakultativ zu ersetzen (sie gilt in England, in den USA und in den skandinavischen Staaten) erfolglos bleiben mußte. Die Sozialdemokratie bekämpfte natürlich nicht ohne Einsicht und Verständnis „das kodifizierte Unrecht der Ausbeutung" (MUGDAN I. 890) und die Liberalen bekämpften mit ihr das durchaus liberale Vereinsrecht, das zu Gesetz geworden ist und erst durch die Weimarer Verfassung beseitigt worden ist, wonach die Verwal-tungsbehörden gegen die Eintragung sogenannter Idealvereine Einspruch erhoben (also die Erbrechts- und damit die Vermögensfähigkeit verhindern kann), nicht nur wenn der Verein unerlaubt ist, sondern schon wenn er einen politischen, sozialpolitischen oder religiösen Zweck verfolgt (§ 67) nach dem aus solchem Grund dem Verein auch die Rechtsfähigkeit entzogen werden kann (§ 43). Im übrigen hat das ungemein reiche Detail nicht allzu stark interessiert und es bleibt ein denkwürdiges Kuriosum, daß die eingehendste Debatte durch den Wildschadensparagraphen ausgelöst wurde.

Die Konservativen ereiferten sich ausschließlich über die Frage, ob die Haftung des Jagdberechtigten für den Schaden, der dem Grundstück eines anderen durch Wild zugefügt wird, auch auf Hasen erstreckt werden soll. Es wurde ein ganzer Tag darüber debattiert und 22 Redner beteiligten sich an der Debatte und es bestand die Gefahr, daß die Konservativen das ganze Gesetz wegen diesen Details verwarfen. Schließlich wurde über den Antrag des Freiherrn VON GÜLTLINGEN die Worte „durch Hasen" zu streichen namentlich abgestimmt, und der Antrag wurde mit 178 Stimmen gegen 69 Stimmen bei Stimmenthaltungen angenommen. So wurde das Gesetzbuch gerettet. In der Dritten Lesung wurde ein nochmaliger Antrag auf Wiederherstellung des Hasenparagraphen neuerdings abgelehnt (FRASDORF, S. 380). Nach § 835 wird für Hasen und Kaninchen nicht gehaftet, für Fasanen hingegen ja.

Bei der Gesamtabstimmung am 1. Juni 1896 stimmten 222 für das Gesetz, 48 – im wesentlichen Sozialdemokraten – dagegen, 18 enthielten sich der Abstimmung, über 100 waren abwesend, zur Hälfte unentschuldigt, wie dann überhaupt bei der ganzen Beratung niemals mehr als 300 Abgeordnete anwesend gewesen sind. Am 18. August vollzog Kaiser Wilhelm II. durch seine Unterschrift das Gesetz, das dreieinhalb Jahre darauf am 1. Januar 1900 in Kraft trat.

Das BGB ist demnach fast mehr das anonyme Produkt einer bedeutenden Epoche, zumindest einer Epoche von nicht unwürdigen Epigonen bedeutender Vorfahren und nicht das eines oder einiger schöpferischer Geister. Rastloser Fleiß und peinlichste umsichtige Akribie hat es immerhin zu einer Einheit geformt. Es trägt alle Züge seiner Zeit und namentlich der Rechtswissenschaft seiner Zeit. Es ist ein Kind der Pandektenjurisprudenz, in deren System gebaut, es redet mit ausschließlich deutschen Worten, dessen scharfe, präzise, abstrakte Sprache, mit fest-geformten Begriffen, in schweren, nicht nur dem Laien, sondern auch dem darin nicht besonders versierten Juristen schwer verständlichen Paragraphen, die wie mathematische Formeln anmuten. Diese abstrakte Präzision ist sein eigentümlichster Zug, darin hat er alle seine Vorläufer und wahrscheinlich alle seine Nachfolger übertroffen, das ist das, was am meisten bewundert, aber auch nicht weniger getadelt worden ist. Es ist ein eigentümlicher Gesetzesstil, bei allen wissenschaftlichen und gesetzgeberischen Vorläufern in gewissem Sinne sogar originell, jedes Wort hat seine feste Nuance – oft ermüdend pedantisch – Worte wie 'muß' und 'soll', 'kann' und 'darf' werden genau differenziert, eine sehr präzise Verteilung auf Hauptsatz und Nebensatz, mit Bestimmungen die gelten, sofern nicht, es sei denn und dergleichen sollen dazu dienen, die Verteilung der Beweislast im Prozeß zu regeln. In die 2385 Paragraphen ist kunstreich hineingeheimnist, was juristische Erfahrung und Wissenschaft von mehr als zwei Jahrtausenden ergab. Als derartige Zusammenfassung hat das Gesetzbuch eine Bedeutung und einen Wert über die Grenzen seiner örtlichen und seiner zeitlichen Geltung hinaus. Es ist nicht in dem Maße, wie leider der Erste Entwurf es in unerträglicher Weise war, durch ständige Verweisungen von einem Paragraphen zum andern belastet, so daß man bemerkte, um einen Paragraphen des Entwurfs zu verstehen, müsse

man ein Rundreisebillet durch das ganze Gesetzbuch lösen, aber nichtsdestoweniger ist es von einem sehr kunstvoll festen Gefüge, wo ein Rad in das andere greift.

Ein Weber-Meisterstück
wo ein Tritt tausend Fäden regt,
die Schifflein herüber und hinüber schießen
die Fäden ungesehen fließen
1ein Schlag tausend Verbindungen schlägt.[1]

Ein solches Gesetz ist natürlich dazu geschaffen, jede Entscheidung aus diesem kunstvoll konstruierten Gesetz zu deduzieren, es ist eine juristische Rechenmaschine *par excellence,* mit der sich die Entscheidung auch der kompliziertesten Rechtsfälle Schritt für Schritt anhand des Gesetzes sich deduzieren läßt. So steht es im Dienst weitgehend gesetzlicher Bindung, um ein Höchstmaß von Rechtssicherheit zu gewährleisten. Darum sind auch die Bestimmungen weitgehend bestimmt, und der Raum richterlicher Freiheit wird vorsichtig dosiert, jedoch keineswegs ausgeschlossen und mit elastischen Begriffen, Verweisung auf Umstände, wichtige Gründe, vor allem durch die großen Generalklauseln, die auf gute Sitten, Treu und Glauben und dergleichen verweisen, vermag sie sich doch weitgehend zu entfalten.

Zufolge seiner sehr abstrakten Fassung ist es gar nicht lebensnah, man findet darin Schemen, nicht lebendige Bilder der Wirklichkeit. Die Regelung istkonservativ. Manches ist aber praktisch vorzüglich, so z.B. das weitgehend auf preußische Gesetzgebung zurückgehende Sach- und Hypothekenrecht, wo sich Vorzüge sehr präziser Regelungen bewähren. Anderes aber ist weitgehend unpraktisch und kompliziert, z.B. die Erbenhaftung galt als ein historischer Ballast, der fortgeschleppt ist. Traditionen romanistischer Schuljurisprudenz und Scholastik (wenn z.B. die Rechtsverhältnisse an einem eingeflogenen Bienenschwarm §§ 961-964 eingehend geregelt werden).

Manches ist unerhört kompliziert, namentlich im Erbrecht, z.B. die Erbenhaftung für die Nachlaßschulden. Sozial ist manches verbessert, doch ist allerlei sozial rückständig, so z.B. im Schadensersatzrecht, wo der Erfolgshaftung ohne Verschulden viel zu wenig Raum gewährt ist und ganz besonders im Familienrecht: die Stellung der Ehefrau ist untergeordnet, dem Manne steht die Entscheidung in allen Fragen des ehelichen Lebens zu; gesetzlicher Güterstand ist nicht Gütertren-nung, auch nicht Gütergemeinschaft, sondern die sogenannte Verwaltungsgemeinschaft, wobei das Vermögen der Frau der Verwaltung und Nutznießung des Mannes unterworfen ist, so daß sie um die Revenuen ihres eigenen Vermögens beim Manne betteln muß; die Ehescheidung ist, abgesehen vom Fall der Geisteskrankheit, die bei der Dritten Lesung des Gesetzes dank einer Zufallsmehrheit Aufnahme fand, nicht vom Zerrüttungsprinzip, sondern vom Verschuldensprinzip, wodurch die Scheidungsprozesse erschwert und *a priori* mit Schmutz und Gift belastet werden. Rektionär ist insbesondere die Rechtsstellung der unehelichen Kinder: nichts als ein der Lebensstellung der Mutter entsprechender Unterhaltsanspruch, der durch die *exceptio plurium* ausgeschlossen werden kann, also auch bei Anerkennung des Kindes seitens des Erzeugers kein Verwandtschaftsverhältnis, keinerlei sonstige Rechte, insbesondere auch kein Erbrecht nach dem Vater.

So ungefähr ist das BGB. Daß es neben allerlei Vorzügen auch große Mängel hat, ist den besten Zeitgenossen stets bewußt gewesen. Manche, z.B. KOHLER haben es immer negativ beurteilt. Eine kritische Einstellung gegenüber seinem Inhalt und seiner Art hat immer bestanden. Fast kann man sagen, daß es im Ausland, wo man die Dinge mehr *per distance* sieht, uneingeschränktere Bewunderung gefunden hat als in Deutschland selbst – namentlich in Frankreich, wo das BGB erst zufolge der in juristischen Zeitschriften veröffentlichten Arbeiten die ungeheuren Fortschritte der deutschen Privatrechtswissenschaft im 19. Jahrhundert sichtbar werden ließ. Allgemein bewunderte man seine gedankliche Präzision in England.

Am wenigsten gilt diese Bewunderung für die Schweiz, wo man immer das Gefühl einer der eigenen Art sehr entgegengesetzten Mentalität hat, wo aber auch das schlechte Gewissen verstimmend wirkte, daß man daraus mehr gelernt hat als man gerne zugab (oder einem lieb war). Nichtsdestoweniger ist das Gesetzbuch innerhalb Deutschlands populär geworden. Das liegt vor allem daran, daß mit einem solchen Gesetz vor allem die Juristen zu tun hatten, diese aber lernten dann in einer vom ersten Augenblick an überaus intensiven akademischen Schulung damit umzugehen und kraft der großen Präzision gewährte es ihnen die Vorteile einer überaus rationalisierten und präzisen Arbeit, das eine im hohen Maße sichere Lösung aller Rechtsfragen ermöglichte. Es ist meines Erachtens eine allgemeine rechtssoziologische Tatsache, daß, je technischer, rationalisierter, komplizierter ein Rechtssystem ist, desto populärer wird es im Kreise des Juristenstandes, dessen Machtstellung und Standesbewußtsein dadurch erhöht wird (Rom, England, gemeines Recht).

Die Bevölkerung (das Publikum) bekommt die Vorzüge und Mängel eines bürgerlichen Gesetzbuches unmittelbar verhältnismäßig nur wenig zu spüren (weit weniger als etwa ein Steuergesetz oder ein Strafgesetzbuch). Freilich trifft das keineswegs restlos zu. Unter den erwähnten größten Mängeln des Familienrechts haben weite Bevölkerungskreise schwer zu leiden gehabt. Schon nach wenigen Jahren wurde eine novellarische Änderung der unbedingten Erfolgshaftung der Tierhalter, die das BGB zunächst einführte und nach der durch ein Tier einer Person oder einer Sache zugefügter Schaden der Tierhalter ohne jede Rücksicht auf sein eigenes Verschulden haftet, nötig. Die durch dieses strenge Prinzip hervorgerufenen massenhaften Schadensersatzprozesse haben eine derartige Erregung namentlich in bäuerlichen Bevölkerungskreisen zur Folge gehabt, daß schon 1908 eine novellarische Abschwächung notwendig wurde, kraft dessen die Haftung für sogenannte Haustiere und Berufstiere (im Gegensatz zu Luxustieren) durch den Nachweis abgewendet werden kann, daß dem Tierhalter keinerlei Verschulden zur Last fällt.

[1] Anmerkung des Herausgebers (Gábor Hamza): Goethe, Faust, Verse 1922-1927 lauten folgendermaßen:
„Zwar ist's mit der Gedankenfabrik
Wie mit einem Weber-Meisterstück,
Wo ein Tritt tausend Fäden regt,
Die Schifflein herüber hinüber schießen,
Die Fäden ungesehen fließen,
Ein Schlag tausend Verbindungen schlägt."

1914 und noch mehr 1918 bedeutete zweifellos einen Markstein in der Entwicklung des bürgerlichen Rechts. Weltkrieg und Wirtschaftskrise bringen neue Probleme und neue Bedürfnisse, die außerhalb des bisherigen Horizontes lagen, Zusammenbruch und Republik erzeugen oder stärken neue Tendenzen. Das ganze Gefüge des bürgerlichen Rechts wird gelockert. Vor dem Krieg kam es nur zu einer einzigen positiven Änderung des BGB: Die uneingeschränkte sog. Erfolgs- oder Gefährdungshaftung der Tierhalter, kraft welcher diese für jeden vom gehaltenen Tier (einem Pferd, Hund, Kuh) einer Person oder einer Sache zugefügten Schaden ohne Rücksicht auf sein eigenes Verschulden haftet, brachte eine Masse von Schadensersatzprozessen mit sich, die im ländlichen Bevölkerungskreis beträchtliche Beunruhigung erzeugten. So wurde das strenge Prinzip durch eine Novelle von 1908 für Haus- und Berufstiere, also solche, die man braucht und nicht aus Luxus hält, beseitigt und durch das Verschuldensprinzip ersetzt: für solche Tiere haftet der Tierhalter nicht, sofern er nachweist, daß ihm kein Verschulden zu Last fällt. Also eine kleine Einzelheit.

Die neue Zeit greift ganz anders ein. Schon in den allerersten Tagen der Revolution beseitigt der Rat der Volksbeauftragten am 12. November 1918 das Recht, einem Verein die Rechtsfähigkeit zu versagen, weil derselbe einen politischen, sozialpolitischen oder religiösen Zweck verfolgt, was dann auch in der Verfassung Art. 124 festgelegt wird. Die Reichsverfassung von 1919 verwirklicht Prinzipien, die an mancher Sachlage des BGB rütteln: die Ehe beruhe auf der Gleichberechtigung beider Geschlechter, woraus grundlegende Änderungen des ehelichen Güterrechts und des Elternrechts sich ergeben sollten. Eine Angleichung unehelicher Kinder an die ehelichen wird in Aussicht gestellt. Wenn auch all dies keine gesetzlichen Maßnahmen zur Folge hatte, so sind doch Vorschläge zur Verbesserung der Lage der unehelichen Kinder wie auch zur Reform der Ehescheidung an der Tagesordnung. Das Gesetz für Jugendwohlfahrt von 1922 greift tief in das Vor-mundschaftsrecht und auch in das Recht der elterlichen Gewalt ein. Eine neue soziale Konzeption des Eigentums wird in Artikel 153 verkündet: „Eigentum verpflichtet, sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste". Die Bestimmungen über das Wirtschaftsleben deuten in die Richtung einer sozialen Abkehr von liberalen Prinzipien. Weit effektiver wird das private Vertragsrecht durch das Kriegswirtschaftsrecht, wenn auch nur mit provisorischer Wirkung um-gestaltet. Preisgesetzgebung, Maßnahme gegen Preistreiberei und Höchstpreisbestimmungen, Bestimmungen über Beschäftigungs- und Entlassungszwang, Mieterschutz und Pachtschutz bringen ungeahnte Einschränkungen der Vertragsfreiheit, und die Bestimmungen des BGB wurden praktisch weitgehend ineffektiv. In noch höherem Maße gilt das für das reich aufschließende und sich auch wissenschaftlich immer mehr vervollständigende Arbeitsrecht, das in die vorderste Linie juristischen Interesses rückt. Tarifverträge und sonstige Normenverträge werden weit wichtiger als die Bestimmungen des BGB. So setzt ein rascher Prozeß einer Aushöhlung des BGB ein. Eine Kluft tat sich auf zwischen dem traditionellen bürgerlichen Recht und allerlei reifenden Bildungen solcher Gesetzgebung und des Wirtschaftslebens, die man *faute de mieux* als Wirtschaftsrecht zusammenfaßt.

Auch die Rechtsprechung, durch Krieg- und Wirtschaftskrise vor sehr schwierige Probleme gestellt, waren Änderungen erlegen, insbesondere durch die Frage, inwieweit man an Verträge gebunden ist, deren Erfüllung durch die veränderte Situation nicht zumutbar und unbillig geworden ist. Neue Doktrinen keimen empor: Nichtzumutbarkeit und Unerschwinglichkeit der Leistung, die *clausula rebus sic stantibus* lebt auf. Der lange festgehaltene Standpunkt „Mark gleich Mark" verliert seinen Sinn, aus Vernunft wird Unsinn, Wohltat Plage, und nachdem die 3. Steuernotverordnung den ersten entscheidenden Schritt getan hat, beschreitet 1923 das Reichsgericht unter Bezug auf das Prinzip, daß der Schuldner seine Leistung so zu bewirken hat, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern, den Weg der Aufwertung. Damit wurde aus Not ein Weg beschritten, von dem mehr und mehr Gebrauch gemacht wurde: die Lösung von Rechtsfragen nicht auf Gesetzgebung von genauen Prinzipien, sondern aufgrund allgemeiner Leitsätze zu finden. Mehr und mehr riß ein, was man „Flucht in die Generalklauseln" nannte, (in bezug auf welche das BGB so zurückhaltend war und viel bekämpft wurde, weil man darin die Gefahr richterlicher Willkür, die Preisgabe fester Rechtsbasis erblickte).

Hand in Hand damit verschärfte sich mehr und mehr ein Gegensatz hinsichtlich der juristischen Methode. Die neuen Richtlinien gehen auf die Zeit lange vor dem BGB zurück, auf JHERINGs Kampf gegen den formalen Begriffskultus und für eine teleologische Betrachtung. Das BGB selbst mit seinen präzisen Denkformen, scharfen Begriffen, allgemein abstrakten Prinzipien stand im Zeichen der alten Methode und war jedenfalls geeignet, dieselbe zu stärken. So verschärfte sich nach seinem Inkrafttreten der Kampf gegen die konstruktive Jurisprudenz, gegen die Pandektisten, man sprach von einem juristischen Kulturkampf, besonders einflußvoll und erfolgreich wurde die der Begriffsjurisprudenz gegenübertretende sogenannte Interessenjurisprudenz, Entscheidung nicht aus Begriffen deduzierend, sondern aufgrund gerechter Interessenabwägung. Man erkennt, wie unmöglich es ist, jede Entscheidung aus dem Gesetz abzuleiten, das Gesetz habe Lücken, drängt auf immer weitere Ausgestaltung der richterlichen Freiheit, wobei der extremste Standpunkt die sogenannte Freirechtsschule ist, die dem Richter auch das Recht geben will, *contra legem* zu entscheiden.

Angesichts dieser Entwicklungen der Gesetzgebung, der Rechtsprechung und der Rechtswissenschaft befand sich das bürgerliche Recht, das BGB, seine Lehre und seine Praxis in einer unbestrittenen Krise, als der Nationalsozialismus hereinbrach.

Ich mußte Sie mit all dem Gesagten bemühen, um den Standpunkt der einsetzenden sogenannten Rechtserneuerung und deren Anknüpfungspunkte verständlich zu machen. Als der Nationalsozialismus an die Macht kam, wußte man nichts von irgendwelchen klaren Standpunkten in bezug auf das bürgerliche Recht. Am ehesten war bekannt seine ausgesprochen antiromanistische Einstellung. Das ergab sich schon aus Punkt 19 des Parteiprogramms: „Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht". Bei aller Unklarheit, die auf der völlig phrasenhaften Unwissenheit der Urheber beruht, wird dabei an die germanistische Richtung, an die GIERKE'-sche Tradition angeknüpft. Die dem römischen Recht angesagte Gegenerschaft, die *in praxi...* (hier bricht der Text ab – Anmerkung des Herausgebers).

András Bertalan Schwarz (1886-1953)

*Gábor Hamza**

Abstract

András Bertalan Schwarz was born in 1886 in Budapest where he completed his legal studies. After graduation from the Budapest University he went to Leipzig to do research at the Institute of Papyrology. As a disciple of Ludwig Mitteis he defended his „Habilitationsschrift" in 1912. He got his first „Ruf" in 1926 to succeed in Zürich Andreas von Tuhr. He spent four years in Switzerland since he accepted in 1930 the „Ruf" of the University of Freiburg im Breisgau.

After the seizure of power of the NSDAP he was deprived of his professorship and left Germany for England. During the first year of emigration he lectured in London and Oxford as a visiting professor. In 1934 he was invited to the University of Istanbul to teach Roman law and comparative law. After World War II he went to Germany to lecture at the University of Bonn where he passed away in 1953.

The oeuvre of András Bertalan Schwarz is encompassing the juristic papyrology, Roman law, modern private law as well as large fields of comparative law. The extremely manifolded and rich oeuvre of the outstanding legal scholar of Hungarian descent, who never severed his contacts to Hungary, is in our days also valuable part of the international legal science.

Key words: *BGB; codification; comparative law; juristic papyrology; Pandectist School of Law; Roman law; Swis civil code; Swiss code of obligations; Turkish civil code.*

I. Die Jahre bis 1933

1. Die Würdigung des in vielerlei Hinsicht wegweisenden, gleichzeitig sehr vielfältigen wissenschaftlichen Oeuvre[1] von András (Andreas) Bertalan Schwarz ist keine leichte Aufgabe. Das Lebenswerk des großen aus Ungarn stammenden Rechtswissenschaftlers kann nicht von seinem persönlichen Schicksal, von seinem Lebenslauf getrennt werden. Es ist demzufolge zweckdienlich, die verschiedenen Stationen seines ungewöhnlichen, sich hauptsächlich unter Einwirkung äußerer Umstände gestaltenden Lebenslaufes zu überblicken, wobei seinem sich über nahezu zwei Jahrzehnte erstreckenden Aufenthalt in der Türkei besondere Aufmerksamkeit gewidmet werden soll.

András Bertalan Schwarz, geboren im Jahre 1886 in Budapest, absolvierte seine juristischen Studien an der Rechts- und Staatswissenschaftlichen Fakultät der Universität zu Budapest. Von seinem Onkel, dem bekannten Jhering-Schüler Gusztáv Szászy-Schwarz (1858-1920), angeregt, wohnte er – noch als Student der Juristischen Fakultät zu Budapest – den Vorlesungen an der Universität in Bonn bei, wo er hauptsächlich die Vorlesungen des hervorragenden Zivilisten Ernst Zitelmann (1852-1923) besuchte und an dessen Seminaren er teilnahm.

2. Sein Jurastudium beendet er im Jahre 1908 in Ungarn. Noch im selben Jahr kehrt er nach Deutschland zurück. Diesmal arbeitet er im weltberühmten papyrologischen Institut von Ludwig Mitteis in Leipzig. Hier stellt er sein auch auf internationaler Ebene großen Anklang findendes Werk fertig[2], aufgrund dessen er sich im Jahre 1912 im römischen Recht als Privatdozent habilitiert. Diese Tatsache gewinnt umso mehr an Bedeutung, wenn man in Betracht zieht, wie schwer zu dieser Zeit in Deutschland die *venia legendi* einem Ausländer erteilt wurde. Aus administrativen Gründen war die Habilitation auch für András Bertalan Schwarz nicht ganz problemlos. Dies wird auch durch jenen Umstand bezeugt, daß es zur Genehmigung seiner *venia legendi* der persönlichen Intervention von Ludwig Mitteis im sächsischen Ministerium für Kultus bedurfte.[3] Später wurde András Bertalan Schwarz die *venia legendi* auch für das deutsche Privatrecht erteilt.

Die in Leipzig verbrachten Jahre erweisen sich für Schwarz vom wissenschaftlichen Gesichtspunkt her äußerst aufschlußreich und ertragreich. Hier schreibt er seine wegen

* Prof. Dr. Gábor Hamza; Juristische Fakultät, Loránd-Eötvös-Universität Budapest, Ungarn.

1 Die ausführliche Liste der Publikationen von András Bertalan Schwarz befindet sich in: *Rechtsgeschichte und Gegenwart. Gesammelte Schriften zur Neueren Privatrechtsgeschichte und Rechtsvergleichung von A. B. Schwarz*. Hrsg. von H. Thieme, und Fr. Wieacker. Karlsruhe, 1960, S. 227- 281.

2 *Hypothek und Hypallagma. Beitrag zum Pfand- und Vollstreckungsrecht der griechischen Papyri*. Leipzig, 1911, S. VII+152.

3 Es sei hier bemerkt, daß bei Ludwig Mitteis auch Ernst Rabel einige Jahre früher, im Jahre 1902, sich habilitierte.

der Kriegszustände erst nach Jahren publizierte, in der juristischen Papyrologie heute als Standardwerk geltende Arbeit[4]. Nach dem Ersten Weltkrieg kehrt er aus Ungarn nach Leipzig zurück, wo er im Jahre 1922 den Titel des außerordentlichen Professors erwirbt. Im Jahre 1926 wird er nach Zürich berufen. Als Nachfolger des berühmten Zivilisten Andreas von Tuhr (1864-1925) verbringt er in der Schweiz vier Jahre. Im Jahre 1930 begibt er sich wieder nach Deutschland. Hier erhält er an der Universität in Freiburg im Breisgau ein Ordinariat. Seine Vorlesungen erstrecken sich neben dem römischen Recht auch auf das Privatrecht und die Rechtsvergleichung. Daneben leitet er ein Seminar über juristische Papyrologie. Die Freiburger Professur dauerte aber nur kurze Zeit. Bereits im Sommer 1933 ist er infolge der Machtübernahme der Nationalsozialisten gezwungen, seinen Lehrstuhl aufzugeben und das Land zu verlassen.

II. Die Jahre in der Emigration

1. Den größten Teil seines ersten Emigrationsjahres verbringt András Bertalan Schwarz in England, wo er an der Universität in London Vorlesungen hält. Das Sommersemester verbringt er in Oxford.[5] Wie es aus seinen an Károly Szladits, Ordinarius für Zivilrecht an der Universität Budapest, geschriebenen Briefen hervorgeht, hegt er die Hoffnung, in seinem Geburtsland Ungarn einen Lehrstuhl für römisches Recht zu bekommen. Diese Hoffnung konnte jedoch nicht in Erfüllung gehen, deshalb beschließt er, die beehrende Einladung an die Universität zu Istanbul anzunehmen.

Da András Bertalan Schwarz den Rest seines Lebens, nahezu zwanzig Jahre, als Professor an der Universität zu Istanbul verbringt, scheint es angebracht, sich mit dieser Periode seines Lebens etwas eingehender zu beschäftigen.

In Istanbul existiert die Universität im europäischen Sinn – das sogenannte *Dar-ül-fünun* – erst seit Mitte des 19. Jahrhunderts.[6] Über eine juristische Fakultät verfügt aber diese Universität erst seit dem Jahre 1927. Die Fakultät ist eigentlich Nachfolger der von Kemal Atatürk im Jahre 1926 gegründeten Juristischen Schule.[7] Die umfassende Reform der in vielerlei Hinsicht noch mit den alten Traditionen belasteten, von den Eigenheiten des *Medrese* nicht loskommenden Universität wurde zur zehnjährigen Wiederkehr der Ausrufung der türkischen Republik, im Jahre 1933, vollzogen. Die ihre Tore im Jahre 1933 öffnende, im europäischen Sinne moderne Universität benötigte aber die Reformbestrebungen in jeder Hinsicht fördernde Professoren mit internationalem Ruf. Die Vorbereitungen zur Gründung der neuen Universität fallen mit der massenhaften Emigration der Wissenschaftler aus Deutschland zusammen. Die unter der Leitung von Philipp Schwarz, Universitätsprofessor für Medizin, bereits im April 1933 in Zürich ins Leben gerufene *Notgemeinschaft deutscher Wissenschaftler im Ausland* eilt den zur Emigration gezwungenen Gelehrten zur Hilfe. Diese Organisation übernimmt die administrative Abwicklung der Aufgaben im Zusammenhang mit den seitens des türkischen Kultusministeriums initiierten Einladungen der ausländischen Professoren. Der größere Teil der emigrierten Professoren erhält Berufungen an die Universität zu Istanbul, ein kleinerer Teil an die Universität zu Ankara. András Bertalan Schwarz ist einer der vier nach Istanbul eingeladenen Juraprofessoren (außer ihm wurden noch Ernst Hirsch, Richard Honig und Karl Strupp berufen). Er selbst kommt aber erst im Jahre 1934 in Istanbul an.[8]

2. Die Einladung in die Türkei gilt dem Römischrechtler von internationalem Ruf und dem namhaften Privatrechtswissenschaftler. András Bertalan Schwarz erhält an der – dem französischen Hochschulsystem entsprechend organisierten – juristischen Fakultät (obligatorische Prüfung in jedem Semester, Lehrgegenstände in vorbestimmter Reihenfolge) zwei Lehrstühle: nämlich den Lehrstuhl für römisches Recht und den für das Privatrecht. Daneben hält er – wie dies hauptsächlich aus seiner Korrespondenz mit Guido Kisch hervorgeht – auch aus dem Bereich der Rechtsvergleichung Vorlesungen. Ein besonderer Vorteil von András Bertalan Schwarz ist, daß er das schweizerische Privatrecht, welches der türkische Staat zu Zeiten Atatürks rezipiert hat,[9] hervorragend kennt. Vor der Einführung des schweizerischen Zivilgesetzbuches und des schweizerischen Obligationenrechts im Jahre 1926 – an der sich neben den mitwirkenden französischen Juristen auch der hervorragende, schon an der alten Universität zu Istanbul als Professor tätige Schweizer Jurist Georges Sauser-Hall verdient gemacht hatte – wurden bereits im Jahre 1924 die arabischen und persischen Rechtsquellen außer Kraft gesetzt. Die Rezeption des hochentwickelten schweizerischen Privatrechts barg schon im Vorhinein zahlreiche Probleme in sich. Die theoretische Behebung dieser Probleme war hauptsächlich die Aufgabe von András Bertalan Schwarz und Ernst Hirsch. Es ist also kein Zufall, daß András

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4 *Die öffentliche und private Urkunde im römischen Ägypten. Studien zum hellenistischen Privatrecht*. Abhandlungen der phil.-hist. Klasse der sächsischen Akademie der Wissenschaften. 31. Bd. Nr. 3, 1920.

5 Bezüglich seiner Emigrationsjahre liefern seine an Károly Szladits (1871-1956) geschriebenen (in London, vom 22. November und 25. November 1933 datierten) Briefe sowie die mündlichen Mitteilungen seiner in Budapest lebenden, am 2. März 1980 verstorbenen Schwester (Frau Emmy Frigyes, geb. Schwarz) wertvolle Informationen.

6 Der Ausdruck Dar-ül-fünun heißt auf Deutsch "Haus der Wissenschaft". Diese universitätsartige Lehranstalt wurde im Jahre 1845 durch den Sultan Abdülmecid I. im Zuge seiner Reformbestrebungen in Istanbul gegründet.

7 Ausführliche Daten über die Vergangenheit der Universität zu Istanbul, über ihren organisatorischen Aufbau, ferner über die Lage der deutschen Emigration sind im Werk von Horst Widmann (*Exil und Bildungshilfe. Die deutschsprachige akademische Emigration in der Türkei nach 1933.* Bern, 1975) enthalten.

8 Unsere Daten bezüglich der in Istanbul verbrachten Jahre von András Bertalan Schwarz stammen teils aus dem unter Fn. 6 bereits zitierten Werk, teils aus den Erinnerungen von Professor Guido Kisch (*Erinnerung an Bertalan Schwarz. Ein Briefwechsel 1938-1953*, in: Recht im Dienst der Menschenwürde, Festschrift für Herbert Kraus hrsg. vom Göttinger Arbeitskreis e. V., Würzburg, 1964. S. 167-189), – genauer aus der in der erwähnten Ausgabe publizierten Korrespondenz – ferner aus der Schrift von Giovanni Pugliese (*Lettera da Istanbul*. Labeo 1 (1955) S. 376-382).

9 Bezüglich des Einflusses des schweizerischen Rechts auf die Kodifizierung des türkischen Privatrechts siehe aus der neueren Literatur: G. Hamza: *Die Entwicklung des Privatrechts auf römischrechtlichen Grundlage unter besonderen Berücksichtigung der Rectsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn.* Budapest, 2002. S. 232-235.

Bertalan Schwarz seine erste Vorlesung in französischer Sprache unter dem Titel *„Réception et l'assimilation des droits étrangers"* hielt.

Im Laufe seiner nahezu zwei Jahrzehnte lang dauernden Professur in Istanbul erwirbt er unverjährte Verdienste in der Ausbildung von Generationen der türkischen Juristen in der anspruchsvollen Erziehung des Nachwuchses. Seine hervorragendsten Schüler waren Kudret Ayiter, Bülent Davran, Türkan Rado, Ziya Umur und Hifzi Veldet Velidedeoğlu. Sie wurden neben zahlreichen anderen Schülern namhafte Professoren an den Universitäten zu Istanbul und Ankara. Es soll nicht unerwähnt bleiben, daß es András Bertalan Schwarz ist, durch dessen Vermittlung Paul Koschaker – nach dem Ende des Zweiten Weltkrieges – für einige Jahre an der Universität zu Ankara tätig ist. Dessen Nachfolger wird der vorhin unter den Schülern erwähnte hervorragende Romanist Kudret Ayiter (1919-1986).

András Bertalan Schwarz versieht während seines Aufenthalts in der Türkei nicht bloß wissenschaftliche Aufgaben und beschäftigt sich nicht nur mit Unterricht. Trotz der viel Zeit beanspruchenden erzieherischen Tätigkeit ist er, zusammen mit dem Kulturhistoriker Alexander Rüstow, „die Seele", der Antriebsmotor des anspruchsvollen gesellschaftlichen Lebens der Emigration. Im Rahmen der die Entwicklung der Wissenschaften darstellenden interdisziplinarischen Vortragsserien hält er Referate über viele juristische Themen. Außerdem beteiligt er sich auch an den eine popularisierende Aufgabe erfüllenden, große Publizität genießenden Universitäts-Vorträgen. So hält er z.B. im akademischen Jahr 1943/1944 über die Fragen der Rechtsstellung der außerehelichen Kinder Vorlesungen für die breite Öffentlichkeit.[10]

3. Die Konzeption oder die Methode, auf die András Bertalan Schwarz seine römischrechtlichen Vorlesungen aufbaut, soll des weiteren kurz behandelt werden. In seinen Vorlesungen gibt er einen Überblick über die Geschichte des römischen Rechts; daneben widmet er dem Weiterleben und vor allem der Frage der Rezeption des römischen Rechts besondere Aufmerksamkeit. Bei der Analyse des römischen Privatrechts mißt er dem Personenrecht und der Rechtsgeschäftslehre besondere Bedeutung bei, wobei er aber auch das Prozeßrecht nicht vernachlässigt. Das Sachenrecht wird durch das Schuldrecht stark in den Hintergrund gedrängt. Der Charakterzug seiner Vorlesungen über das römische Recht steht mit seiner das römische Recht als eine Art „ius commune Europaeum" auffassenden Betrachtungsweise in engem Zusammenhang, das letzten Endes mit der aktualisierenden Tendenz der deutschen Pandektistik bzw. Pandektenwissenschaft in enger Verwandtschaft steht. Ein derartiger Aufbau seiner Vorlesungen ist aber beinahe ausschließlich mit jener Funktion zu erklären, die das über mehrere Vermittlungen als sogenanntes *ius oecomenicum* betrachtete römische Recht als Universitätsdisziplin in der damaligen Türkei, im Lande der tiefgreifenden politischen, wirtschaftlichen und sozialen Reformen, erfüllte.

András Bertalan Schwarz vernachlässigt aber auch während seiner Professur in Istanbul seine zahlreichen ausländischen Verbindungen nicht. Er nimmt an einer Anzahl von internationalen Kongressen teil. Er ist sogar in seinen letzten Lebensjahren auch in Bonn als Gastprofessor tätig. Erwähnenswert ist seine Beteiligung an der Vorbereitung der Gedächtnisschrift für Paul Koschaker (1879-1951)[11]. Gefühlsmäßig, aber auch infolge des Charakters seiner zivilistischen Tätigkeit, ist er fast untrennbar mit der Türkei verbunden. So können wir – die Frage der Kontinuität diesmal außer acht lassend – mit Recht behaupten, daß András Bertalan Schwarz nicht bloß – ähnlich dem großen Theophilus – *„vir illustris et facundissimus antecessor"* der Universität zu Istanbul gewesen war, sondern gleichzeitig auch ihr *„fidelissimus antecessor"*. Es ist deshalb kein Zufall, daß sich die Verfasser des Jahrbuchs der Universität, der *Annales de la Faculté de Droit d'Istanbul,* bereits im nächsten Jahr nach seinem Ableben mit großer Verehrung und aufrichtigem Dank an ihn erinnern.[12]

III. Das wissenschaftliche Lebenswerk

1. Das wissenschaftliche Oeuvre von András Bertalan Schwarz ist außerordentlich breit gefächert. Seine ersten, dem römischen Recht gewidmeten Aufsätze schrieb er in ungarischer Sprache und publizierte sie in Ungarn. Seine noch während seiner Studienjahre in Budapest geschriebene, preisgekrönte Abhandlung ist ein kritischer Kommentar eines Digestentitels (*D 41.2. - De adquirenda vel amittenda possessione*). Ihrer Quellenbasis nach ist auch seine gleichfalls in Ungarn verteidigte Doktorarbeit *„Die Grundlagen des Besitzrechts und der Besitzlehre"* aus dem Jahre 1907 größtenteils auf dieser Arbeit aufgebaut. Er schrieb ferner Wortartikel aus dem Bereich des Erbrechts für das Ungarische Juristenlexikon. Er veröffentlichte in ungarischer Sprache seine Aufsätze *„Causalgeschäft und Eigentumsübertragung im Recht der griechischen Papyri"* (1912) und *„Alternative Obligation"* (1933). Eine nicht geringe Anzahl von seinen Abhandlungen erscheint später in deutscher, französischer, türkischer und englischer Sprache.

Bereits aufgrund seiner in ungarischer Sprache publizierten frühen Aufsätze lassen sich die Umrisse seiner wissenschaftlichen Tätigkeit erkennen. Neben dem römischen Recht interessiert er sich – hauptsächlich auf die Wirkung seines Meisters, des großen Zivilrechtlers Béni Grosschmid (1852-1938) hin – für zahlreiche Themen der modernen Zivilistik. Dieses Interesse wird als Ergebnis der Leipziger Jahre durch die Aufarbeitung einiger wissenschaftlicher Themen der juristischen Papyrologie noch tiefer. Schließlich führt auch die nicht bloß auf das römische Recht beschränkte wissenschaftliche Hingezogenheit zu den antiken Rechten, gepaart mit der Pflege der modernen Rechte, gleichsam als Synthese zur Bearbeitung der in den komplexen Problemkreis der Rechtsvergleichung gehörenden Themen.

[10] Das diesbezügliche reiche Material befindet sich in seiner Korrespondenz mit Guido Kisch, mit dem er sich noch während seiner in Leipzig verbrachten Jahre angefreundet hat. S. in Fn. 8 zitierte Abhandlung von G. Kisch.

[11] L'Europa e il diritto romano, Milano 1953/1954.

[12] S. den Nachruf des Dekans der Juristischen Fakultät der Universität Istanbul S. Dönmezer: *Andreas B. Schwarz.* Annales de la Faculté de Droit d`Istanbul 3 (1954) S. III-VII.

Die ausdrücklich nur dem römischen Recht gewidmete Tätigkeit von András Bertalan Schwarz ist demzufolge nur ein Teil seines wissenschaftlichen Lebenswerkes. Wenn wir aber seine in Ungarn verfaßten ersten Werke oder seine an der Universität in Zürich gehaltene Antrittsvorlesung, die sich mit der Beziehung des Pandektenrechts zum modernen Studium des römischen Rechts befaßt, oder seine in den letzten Jahren seines Lebens publizierten und auf den Charakter eines „*ius controversum*“ („strittiges Recht“) des römischen Rechts hinweisenden Arbeiten ins Auge fassen, ist es nicht zu bestreiten, daß die wissenschaftliche Pflege des *ius Romanum* stets im Zentrum seiner Tätigkeit stand.

2. Seine Arbeiten über die juristische Papyrologie geben von gründlicher Vorbereitung und großer Vertiefung Kunde. Diese papyrologischen Werke analysieren – wie Franz Wieacker in seinem Nachruf an András Bertalan Schwarz darauf hinweist[13] – die Frage des komplizierten Zusammenhangs zwischen der Urkunde (Form) und dem zugrunde liegenden Rechtsgeschäft (Inhalt). Seine Folgerungen sind – abgesehen von einzelnen sich infolge des Anwachsens des Quellenmaterials ergebenden Korrektionen – bis heute standhaltig und in der Fachliteratur akzeptiert.

Die papyrologische Arbeit, die Erschließung des Bereichs der juristischen Papyrologie bringt den Anspruch zur Analyse des komplexen Problemkreises der Rezeption, mit der auch der Problemkreis der Rechtsvergleichung verbunden ist, mit sich. Die Rezeption und die damit zusammenhängende Rechtsvergleichung aber setzen das wissenschaftliche Interesse gegenüber den modernen zivilrechtlichen Themen voraus. András Bertalan Schwarz befaßte sich eingehend – um als Beispiel nur einige Themen (außer der bereits erwähnten Studie über die alternative Obligation) zu nennen – mit den allgemeinen Prinzipien des Privatrechts, mit dem Problem der internationalen Vereinheitlichung des Privatrechts, mit der internationalen Wirkung des schweizerischen ZGB und mit den Fragen der Risikotragung beim Kauf.

3. Wie bereits angedeutet, kommt in seinem wissenschaftlichen Werk der Rechtsvergleichung große Bedeutung zu. Im Bereich seiner rechtsvergleichenden Forschungen, die zweifelsohne auch durch die Professur in Istanbul determiniert ist, spielt die Frage der Rezeption und der Assimilation der fremden Rechte eine zentrale Rolle. Die Rechtsvergleichung trennt sich aber nicht von der Rechtsgeschichte. András Bertalan Schwarz hält – eben anhand der Analyse der Fragen der sog. *positiven* und der *negativen* Assimilation – jene geschichtlichen Traditionen vor Augen, die die „Einbürgerung“ der fremden Rechtsnormen bzw. juristischen Traditionen ermöglichen oder, im Gegenteil verhindern.

Unter seinen ausgesprochen rechtsgeschichtlichen Arbeiten ragt einerseits die das moderne Pandektensystem analysierende[14], andererseits seine die Rolle des „Professorenrechts“ für die Rechtsentwicklung untersuchende[15] Abhandlung hervor. Unter den sich mit dem Themenkreis der Rechtsvergleichung befassenden Werken sind die Arbeiten über die Quellen des englischen Privatrechts sowie über die Wirkung des schweizerischen ZGB von Bedeutung. Wegweisend sind schließlich – wenn auch eher nur mit einem partikulären Geltungskreis – seine sich auf das schweizerische Privatrecht stützenden, die aktuellen Fragen des türkischen Privatrechts behandelnden Aufsätze. Unter den in türkischer Sprache veröffentlichten Arbeiten sind die Materialien seiner Vorlesungen sowie seine Werke über das Familienrecht und Schuldrecht hervorzuheben.

4. András Bertalan Schwarz erreichte durch sein konsequentes Fernhalten von dem für seine Zeit allgemein charakteristischen engen Positivismus, daß die Gedanken seiner auf dem römischen Recht basierenden Werke ein halbes Jahrhundert nach seinem Tode ihre Aktualität und Originalität bewahrt haben. Dem aus Ungarn stammenden, seine Studien in Budapest absolvierenden András Bertalan Schwarz, der die Beziehungen zu seinem Vaterland bis zu seinem Tode intensiv pflegte, huldigen mehrere Nationen, darunter auch die ungarische Nation, mit Ehrfurcht.

[13] Wieacker, Fr.: *In memoriam Andreas Bertalan Schwarz.* Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Rom. Abt.) 84 (1954) S. 598.
[14] *Zur Entstehung des modernen Pandektensystems.* Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Rom. Abt.) 42 (1921) S. 578-610.
[15] *Einfluß der Professoren auf die Rechtsentwicklung im Laufe der Jahrhunderte.* In: Atti del Terzo Congresso di diritto comparato. Roma 1952, S. 413-442.

The Concept of Autonomous Local Governments and their Different Forms of Appearances in the Traditions of our National Public Law*

*László Papp***

Abstract

The historical beginnings of the Hungarian local government system are rooted in the patrician castle counties and free royal towns of the Middle Ages. Although these local administrative units meant much more than the concept of local governments in the modern understanding of the concept. The unbroken and uncompromising county autonomy suddenly was challenged by the bourgeois state, and this clash caused the need to reform the whole system of local administration. In my short study, I wish to demonstrate this process through the deconstruction of the administrative system of the counties, taking extra care on the unique relationship between the government and the municipality.

Keywords: *municipality; dualism; administrative reform; local government; administrative committee.*

In the process of interpreting the concept of autonomous local governments, one should not hesitate to refer back to our conventions in the field of public law, for our nation has several centuries of history in this matter. The most accepted form of modelling the historical concept of autonomous local governments is the separation of the central and local branches. The beginning of the local autonomous local governments roots back all the way to the 13th Century, when the servients (noblemen) of Zala acquired the right to elect judges by the Charter of Kehida. This privilege "goes along" with those liberties which led to our first national autonomous government unit: the bourgeois caste county. It is barely possible to explain the whole idea of bourgeois castle county with contemporary concepts, for its functions are way beyond our understanding of everyday government units. Traditionally, it carried not only functions relating legislative, executive and judiciary matters, but also political matters.[1]

Because of this, in the Era of Classes, the castle county of the noblemen was not simply a branch of the local government, but also an administrative unit which counteracted with and opposed against the central government. The main reason behind this is the concept of Class Dualism, which determined the government system of Hungary in the Middle Ages, and this is, according to the doctrines of the Holy Crown, is such a relative power balance, where administration and control are shared between the monarch and the classes, and this means that the castle county of the noblemen rules not under the will of the central government, but rather co-ordinated next to it, and, in many ways, worked to substituted the incompleteness of central administrative powers. Due to the widespread authorizations secured by the autonomous counties, during the class system in Hungary, caste counties operated as resorts to secure the interests and constitution of noblemen.[2]

The public administration based on the superiority of the castle counties of noblemen is unimaginable in a bourgeois state. Because of this, the system needed to Laws of April to redefine the function and designation of local government. The most important reason behind this is the 3rd Act of 1848, which rearranged the government system of our native country, guiding Hungary towards the Age of Parliamentarism. According to this Act, the king can only vindicate his executive powers through an independent, amendable ministry (government).[3] This mandate was the first, but not the last, which resulted in raising questions on the legal status of the castle counties of noblemen.[4] Because of this, the most important task after the Austro-Hungarian Reconciliation was the reconstruction of the

* This study is the short summarization of a presentation held at the "On the notions of the developments on the concepts of local governments and public administration systems" conference in Hajdúböszörmény, on the 17th of July, 2011, on the occasion of the Public Administration Day of the Hajdúság.

** Dr. László Papp, Faculty of Law, University of Debrecen, Hungary.

1 István Stipta: *The role of castle counties in securing constitutionalism. Studies from Győr.* (Edited by *JózsefBana*).Number 20, 1998.Pages 85-87.

2 AndorCsizmadia: *The Development of Public Administration in Hungary from the 18th Century to the Formation of the Council System.* Budapest 1976, 34.

3 JózsefRuszoly: *"A New Constitution for Hungary"* (The Formation of the 3rd Act of 1848) In: JózsefRuszoly (Editor): "Constitution and Tradition", Szeged 1997, 42.

4 IstvánStipta: *The Reform of Castle Counties Before the Legislation (1844-1848).* In: "In Memoriam IstvánKovács Doctor of Law, Member of the Academy, University Professor, *ActaJur. et Pol."* Tom. XL. Fasc. 19. Szeged 1992, 330.

public administration.[5] The questions in the focus points of the reforms were basically targeted at the matter of how the castle counties of noblemen can be harmonized with the requirements of the rule of law:

- Can the 3rd Act of 1848 be harmonized with the executive[6] functions of the castle county of noblemen?
- Can the visinertiae be used in a state ruled by law, without any harm done to the legal security?
- Can the principal of separation of the branches of power – which is one of the most important conditions of the rule of law – be reconciled with the legislative and judiciary functions of the county?

After a sophomoric examination of these questions, one can say that the answer to each one of them is a definite "no". In the matter of the *first question*, it is obvious that the lawmaking process, according to the concept of Parliamentarism the amendable government with legislative powers is the only national institution, which has the right and also obliged to ensure the execution of laws. This rule has no exceptions whatsoever, for it would cause unforeseeable consequences if all fifty castle counties would execute this law differently. The norm created by the state must be executed uniformly and consistently, for this secures the legal security of the citizens, which creates the result of only one organization is allowed to do these. This line of thought also answers the *second question*, for it is clearly unacceptable that a general assembly at a castle county – even if it fulfils the principle of public representation – declines the fulfilment of the government's regulations. Nevertheless, this does not mean that every county is obliged to fulfil the regulations which are against the law, but only that it is not in their jurisdiction to judge whether the government's regulations are ruled by law. In the optimal situation, these problems should be dealt with by independent courthouses, and this fact partly answers the *third question*. For this means that as a result of the previous statement, the judiciary functions of the county are incompatible with the rule of law, which means that the courthouses must be removed from public administration and ensure their independence (4th Act of 1869.). The question is not so obvious in the matter of the connection between the local governments and legislation. The 5th Act of 1848 reorganized the Lower House of the Parliament on the principle of public representation, excluding all of the county representatives from there. So this function is seemingly not compatible with the Laws of April, but Kossuth pointed out in his constitutional plans of 1851, that the participation of local authorities in the legislative process does not definitely infringe the principles established above. For one must see that during the first years of dualism, the county lost each and every of its significant legal and political assets, which could be used to validate their pretensions.Kossuth wanted to establish a second chamber with the participation of local governments, based on the example of the Congress of the United States of America, which would have served as the strengthening of the political dominance of the local authorities. We can determine that this solution is not "stillborn" at all, for 70 years later, the reform of the Upper House (22nd Act of 1926.) reorganized the second chamber with the participation of the municipalities.

Based on the facts discussed so far, we can determine the rights, which a local government should not possess in order to not harm the principal of the rule of law. However, with this, the question arises: what a local authority should be like? This question is answered by the municipal centralist debate rooting way back in the Reform Era.[7] To simplify this matter, we are looking for the answer whether we need strong central administration and weak (with not a wide sphere of action) local authorities, or quite the opposite. Based on whether any of these two choices are correct, we should not stand up for either of them, for based on the different situations all around Europe, we could find examples for both of them. It is also undeniable that due to the principle of decentralisation, there is a need to provide the fulfilment of certain government duties on a local level, which goes with the demand of doing all of these through different branches of the local governments, for the government administration in its contemporary understanding has not existed yet back then. This concept of regulation resulted in the creation of the legislative system of the Bourgeois Era (42nd Act of 1870, 21st Act of 1886, 30th Act of 1929.).

The legal authority is a special denomination, and an itemized legal notion, which only referred to public authorities with intermediate and general level of jurisdiction.[8] The castle county, the towns with legislative rights, and the Chief Capital Town of Budapest were also legal authorities.[9] The Municipal Law (18th Act of 1886.) applied to all those settlements which were not considered as legal authorities. It is quite obvious from this partition that this act did not provide all local authorities with the full rights of a local government.[10] According to the law, the duties of the legal authorities are:

a) to practice the duties of the autonomous local governments
   - the creation and execution of by-laws
   - the election of their own representatives
   - the determination of the budget
   - keeping in touch with the government

b) to transmit the national local administration,
   - *"The laws and the government's declarations to the legislative authorities are will be fulfilled and enforced by these legislative authorities on the fields of their own jurisdictions."* (18th para-

[5] Norbert Varga: *Reforms of Public Administration in the Free Royal Towns of Debrecen and Szeged (1870-1872).* In: MáriaHomoki-Nagy (editor): "The Legal Life of the Rural Towns of our Nation in the 18th-19th Centuries", Szeged 2010, 119.

[6] According to the Constitution of the Era of Classes, the castle county of the noblemen was the only constitutional institution with executive powers.

[7] For further elaboration of this matter, see IstvánStipta: *Arguments in the Parliament About the Local Government Authorities (1870-1886)* In: BarnaMezey (Editor): "Studies on Legal History", Budapest 1998, 77-93.

[8] IstvánKajtár: *The Foundations of the Modern Hungarian State-, and Legal System in the 19th Century. Europe - Progress - Hungary.*Budapest-Pécs 2000, 207.

[9] VilmosSápi: *The National Constitution.* In: MártonSarlós (Editor): "The Constitutional and Legal History of Hungary." Budapest 1962, 239.

[10] Norbert Varga: *The Introduction of the Function of Chief Ispán in the Free Royal Towns of Debrecen and Szeged Due to the Law on Authorities of Common Law*. In: BarnaMezey (Editor): "Celebratory Studies On the Occasion of GáborMáthé's 65th Birthday", Budapest 2006, 620-621.

graph of the 21st Act of 1886.) According to this, all national public administrative cases must be dealt by the legal administrative authorities of the area, where the government does not have a local government apparatus.

c) they can deal with other cases of public or parliamental interest

The most important authority of the castle counties was the legislative committee, which was built up of 50 per cent of them were virilis, while the other half were elected members.[11] The jurisdictions of this legislative committee were partly ones of "their own", with which the committee act in local cases, while the other cases were "assigned". In the latter cases, the supervising force over the legislative committee was assigned by the government.

Because of this, the simplest way to determine the contents of the concept of autonomous local governments is by examining the relationship between the government and the local authority. The technical literature rated this relationship based on two main factors. First of all, the legislative committee was under the government's "enactment power", on the other hand, there was the "supervision power"[12] of the government. "There are two methods which can be used to bring something under the enactment power. First, it meant that the legislative authorities were bound to do the government's declarations, except in cases where they consider them to be against the law or their execution would be unwise, taking the local footings into account. Yet they could not refuse to execute these decrees, they could only send a petition to the Home Secretary.[13] Otherwise this decree could be targeted to deny the power of the legislative authority, if the creation of the ruling decree is not in the right, but the duty of the legislative authority, and such a duty was not adequately fulfilled, if it was fulfilled at all. The supervising power of the government served the purpose of providing a standardized governing method, which also ensured that the government could act on a wide variety of areas. So, according to paragraph 11, "*The ruling decrees must not, in any way, be inconsistent with the law and the ruling decrees of the government currently in effect, cannot harm the local administrative rights of the communities secured by the Law, and if the amendable secretary provided them with an additional clause of presentation, then they should be carried out 30 days after their official and regular proclamation*". This means, that in this case, the Right to Supervise appeared in the method, when the government examined the ruling decrees before they came into effect, and if they valued it as and act which comes into conflict with the law, then they could deny its fulfilment (power of decree), and also they bound its validation to an additional clause of presentation.

The supervision power of the government came into effect in a special way when the municipal authority proceeded as the "mediating of the public authority of the government". In this case, the law forced into effect the Committee of Local Administration.[14] This authority was the mediating force between the national and the local governments, and this office also synchronized the national and local governments' management tasks in the regional authority's jurisdiction. The head of the Committee was the Chief Ispán, and its members were the leading office-holders of the castle county, the local chiefs of the authorities of management sections, and other people, who were chosen by the legislative board. In fact, because of it, such a characteristic local administration was realized that, aside from validating the government's supervising powers, was able to draw spheres of authorities away from the legislative authorities.

Parallel with the operation of the Committee of Local Administration, with the local establishment of the authorities of public administration, the reform of local administration came into a completely different view by the end of the Era of Dualism. In the Horthy Era, the question was not that how power and jurisdictions should be balanced between the public authorities and the government, but it changed to how the government wants to provide tasks of management sections on what level of detail, and in what structural form on a local level. The constant expansion of the jurisdictions of the Committee of Local Administration – against the establishment of the Small Assembly – proved to be not effective enough to provide local coordination, so, by the end of the era, the provincial management sections of the local authorities were developed up to the level of the „járások", which meant that the jurisdictions of the legislative authorities were restricted even more. Apart from this, the national supervision of the fulfilment of the tasks by the management sections was strengthened even more, which is remembered in the history of Hungarian public law as the concept of "administrative tutela".

We can deduce from the facts discussed in the previous pages that the castle county of the noblemen was much more than a branch of the local authorities, for in fact it was an autonomous administrative unit. The concept of local authorities remained during the establishment of the system of legislative authorities in the process of reformation of the castle county system, yet it could not prevail in its most pure form, because – due to the lack of local administrative authorities – it became a necessity to provide even such duties of management sections, which were not rooted in the concept of local authorities. Because of this, government supervision became unavoidable, which continued to gain even more strength after the establishment of the system of local management sections, and the notions formed during the reforms of the legislative system did not have the primary functions of drawing away the local authorities from the legislative powers, but it is undeniable that they had a significant part in creating weak local administrative units, defenceless against the will of the central government system.

[11] Norbert Varga: *Reforms in the Public Administration and Local Political Situations in Debrecen and Szeged (1870-1872)* In: Debrecen Review, Volume XV, Number 4, Debrecen 2007, 467.

[12] Pál Kovács: *Legal Authority and Communal Local Government.*Kecskemét 1886, 20.

[13] This Right to Notification is a lot weaker than the institution of visinertiae, which preceded it, for it did not provide the right to postpone the fulfilment of a debatable disposition.

[14] The 6th Act of 1876 on the Committee of Local Administration.

Extracts from 19th Century History of Citizenship and Freedom of Press in Hungary

*Eszter Bakos**

Abstract

Present Paper analyzes national development, roots and early history of freedom of press as a civil right in 19th Century in light of the relevant laws and decrees. We should keep in mind that in Hungary citizenship was not ruled at the same level at time of declaring freedom of press by the law. So, this Paper seeks to demonstrate the legal regulation of freedom of press until the first law that made it clear who would be subjects of this right.

Key words: *19th Century; civil rights; first citizenship law; freedom of press; laws and decrees.*

Preliminary considerations

Conception of civil rights rests on two ideas of bourgeois transformation: firstly, everybody has the same relationship with the state; secondly state power does not cover entire field of social coexistence.

In fact civil rights were not mentioned until the second part of 19th Century, instead of them the category of human rights was used. Human rights derived from human nature and they served as restrictions against state power. As János Sári writes "this distinction refers to distinguishing between rights concerning human, general human being and rights that are related to individual as one part of the political community".[1] So, civil rights are provided to citizens by the state and they and frameworks of their exercise are defined by the law. This statement is true for freedom of press as well because victorious civil revolutions promulgated it as inalienable right that would not be restricted by positive state power.[2] Then, in 20th Century such rights appeared that obliges states to act. Finally, nowadays there are existing third generation rights that provide people possibility to influence public bodies.

In my opinion discussing citizenship and freedom of press together is supported by the fact that history of national first citizenship law goes back to the Revolution and War of Independence of 1848-49 as well. But, the Act on Press declaring freedom of press as civil right had been one of "April Acts", while the first Act on Citizenship was adopted only in year of 1879. This way, citizens under the law faced new press provisions taking into consideration modifications adopted during almost 30 years.

In light of mentioned above, this Paper presents the first citizenship law in brief and after focuses on history of freedom of press in 19th Century.

1. Hungarian citizenship. Its acquisition and loss under the Act L of 1879

As it was mentioned above, antecedents of first citizenship law go back to the Revolution and War of Independence because the bill submitted to the Parliament of 1847/48 also contained the conditions for the acquisition and loss of citizenship.[3] As the author researching in this field states, "due to the importance of bourgeois transformation the detailed debate of the proposal was taken off the agenda" [4] and what is more, another proposal submitted by Boldizsár Horvát, Minister of Justice, in year of 1868 also did not become law. So, citizenship was only regulated by law after arranging the most important issues of the Age of Dualism.

* Eszter Bakos, Department of Civil Law and Civil Procedure Law, Faculty of Law, University of Szeged, Hungary.

1 János Sári: *Alapjogok. Alkotmánytan II.* (Fundamental Rights. Constitution Studies II.) Osiris Kiadó, Budapest, 2006. p. 30-31.

2 Mihály Révész T.: *A sajtószabadság érvényesülése Magyarországon 1867-1875.* (Enforcement of freedom of press in Hungary 1867-1875.) Akadémiai Kiadó, Budapest, 1986. p. 12.

3 Károly Kisteleki: Állampolgárság a dualizmus idején. (Citizenship in Age of Dualism.) *Állam és Jogtudomány,* 1996-1997. p. 42.

4 Norbert Varga: *Az első állampolgársági törvényünk (1879:L. TC.) rövid bemutatása, különös tekintettel a megszerzés és az elvesztés eseteire.* (Brief presentation f our first citizenship law (Act L of 1879), in particular considering the cases of acqusition and loss.) A debreceni egyetem egyetemi és nemzeti könyvtárának közleményei, (243) 17. Könyv és Könyvtár, XXV/2003. p. 267. (Hereinafter: Varga, 2003a)

The first citizenship law links to "Kálmán Tisza", Prime Minister.[5] The bill was discussed and commented by the Naturalization Committee.[6] After detailed discussion it was sent to the Upper House on 8 November 1879. Then the Emperor, Franz Joseph sanctioned the bill on 20 December 1879 that "completely corresponded to conditions in Hungary in the period"[7].

The first citizenship law defined the following cases of acquisition of Hungarian citizenship: *descent, legitimization, naturalization* and *marriage*.[8] According to some researchers, additional ways included retrieving and acquiring citizenship on the basis of "an old right".[9] Later, the Act IV of 1886 introduced new form of acquisition, namely the re-admission for large number of re-settling people.[10] Finally in connection with the acquisition of Hungarian citizenship, two further aspects should be mentioned. Firstly, the voluntary intention originating in one's own resolve as one of the aims of the first citizenship law was fully asserted in case of naturalization only. Secondly, according to Hungarian citizenship law, entering state service did not automatically result in obtaining citizenship. The only exception was when moving into the country was for purpose of settling down permanently and the acquisition of residence in a township was already under way.[11]

The Act of 1879 defined five cases whereby Hungarian citizenship could be lost. Its first and the most problematic way was the *dismissal.* [12] Furthermore, *authority's decisions, absence, legitimization* and *marriage* could lead to losing citizenship. This list was also exhaustive as the cases of acquisition, so "resignation of acquisition of foreign citizenship could not result losing citizenship".[13]

The Act L of 1879 as the first citizenship law of "Hungarian nationality" is unique in Hungarian citizenship law despite of its errors because it detailed how Hungarian citizenship could be acquired and lost, how the relationship between state and citizens could be established. The Act was a permanent legislative source that was in force until the middle of the next century with minor modifications.[14]

2. Legal development of freedom of press in 19th Century in Hungary

2.1. Act XVIII of 1848

The nature of freedom of press derives from two facts. Firstly, it restricts acts of state bodies exercising public authority; secondly guarantees of its execution are mainly legal ones. In Hungary, requests against this freedom appeared during Age of Reform when, on 6 March 1820, County Bars opposed King's decree that prohibited bringing from abroad journals being entirely scientific or literary. [15]

More than a 25 years long struggle led to establishment of freedom of expression, although issue of freedom of press and expression was on agenda at the beginning of Age of Reform and it was discussed by parliamentary discussions until 1847/1848. Only a draft of a special parliamentary journal was adopted,

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5 Kálmán Tisza (1830-1902) was politician, Prime Minister from 1875 to 1890 and member of the Hungarian Academy of Sciencies.

6 Read more about opinions in Commitee: Norbert Varga: *Az állampolgárság elvesztése a 1879:L. TC. alapján.* (Losing citizenship under the Act L of 1879.) In: Stipta István (Ed.): Studia Iurisprudentiae Doctorandorum Miskolciensium. II. Bíbor Kiadó, Miskolc, 2003. p. 455-458. (Hereinafter: Varga, 2003b.)

7 Varga, 2003a. p. 267.

8 Varga, 2003a. p. 268.

9 Cf: Sándor Berényi – Nándor Tarján: *A magyar állampolgárság megszerzése és elvesztése (honosság, letelepülés, kivándorlás, útlevélügy). Az 1879. évi L. törvény-czikk és az ezzel kapcsolatos törvények és rendeletek gyűjteménye és magyarázata.* (Acquisition and loss of Hungarian citizenship (nationality, settling, emigration, affair of passport). Act L of 1879, and collection and explanation of related laws and decrees.) Budapest, 1905. p. 14. and Ferenc Ferenczy: *Magyar állampolgársági jog.* (Hungarian citizenship law.) Gyoma, 1930. p. 57.

10 Varga, 2003a. p. 267.

11 Varga, 2003a. p. 268.

12 Read more about dismissal: Norbert Varga: *The Dismissal and the Hungarian Citizenship in Accordance with Act 50 of 1879.* In: Ovidiu Tutomir (Ed.): Studii Şi Cercetări Juridice Europene, Volumul Conferinţei Internaţionale a Doctoranzilor în Drept organizată de Facultatea de Drept şi Ştiinţe Administrative din cadrul Universităţii de Vest din Timişoara şi Centrul European de Studii şi Cercetări Juridice Timişoara, Wolters Kluwer, Temesvár, 2009. p. 880-886.
See more about the citizenship law: Norbert Varga: *A távollét intézménye a magyar állampolgársági jogban, különös tekintettel az első állampolgársági törvényre (1879:L. tc.).* (The institute of Absence in Hungarian Citizenship Law, with Special Attention to the First Act of Citizenship (Act L of 1879).) In: Stipta István (Ed.): Studia Iurisprudentiae Doctorandorum Miskolciensium. II. Bíbor Kiadó, Miskolc, 2002. p. 417-431., Norbert Varga: *Az állampolgárság megszerzése a magyar és az amerikai alkotmányjogban a 19. században.* (Acquisition of Citizenship in the Hungarian and American constitutional law in the 19th Centuries.) In: Kajtár István, Béli Gábor, Szekeres Róbert (Ed.): Jogtörténeti tanulmányok. VIII. Kiadja: PTE BTK – PTE ÁJK, Pécs, 2005. p. 551-568., Norbert Varga: *Az állampolgárság fogalmának kialakulása a magyar közjogban.* (Development of Concept of Citizenship in Hungarian Public Law.) In: Homoki-Nagy Mária (Ed.): Acta Universitatis Szegediensis, Acta Jur. et Pol., Tom. LXXI., Fasc. 16. Kiadja: SZTE ÁJTK, Szeged, 2008. p. 491-517., Norbert Varga: *Short History of the First Hungarian Citizenship Act.* In: Зборник Радова (Collected Papers). Главни уредник (Editor in chief): Др Драгиша Дракић. XLIII. 1/2009. Novi Sad Faculty of Law, Serbia, 2009. p. 463-488., Norbert Varga: *The Acquisition and Loss of Citizenship in Feudal Hungary*. In: Redactor: Ioana Mogoş, Monica Stoian: Studii Şi Cercetări Juridice Europene. European Legal Studies and Research. Conferenţia Internaţională a Doctoranzilor în Drept. International Coneference of PhD Students in Law. Timişoara aprilie 2010. Volumul II. (Drept public). Wolters Kluwer, Timişoara, Romania, 2010. p. 858-863., Norbert Varga: *The Framing of the First Hungarian Citizenship Law (Act 50 of 1879) and the Acquisition of Citizenship*. Hungarian Studies, vol. 18., 2004. p. 127-153., Norbert Varga: *The Private Law Elements of Citizenship Law in the 19th Century*. Journal on European History of Law. Vol. 2/2011. No. 1. p. 79-85.

13 Varga, 2003b. p. 458.

14 Varga, 2003a. p. 291.

15 András Koltay: *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban.* (Base-lines of freedom of press – in context of Hungarian, English, American and European.) Századvég Kiadó, Budapest, 2009. p. 54.

and the proposal submitted on 3 March by Lajos Kossuth[16] did not make any reference to this freedom. Then, as results of Revolution in Vienna, Kossuth declared the need for a bill on freedom of press, and the "Ellenzéki Kör" also requested free press and it adopted Twelve Points drafted by Joseph Irinyi that included: "We wish freedom of press, the abolition of censorship".[17] So, city of Pest, young revolutionaries achieved freedom of press that was sanctioned by a temporary decree of Royal Council of Governors on 16 March.[18]

Bertalan Szemere[19] drafted the bill on freedom of press. The bill introduced on 20 March declared freedom of press but it provoked significant opposition on the part of "Közcsendi Bizottmány" (Committee on Public Peace) in Pest and Pest City Council, because it required high security deposit (20 thousand forints from political newspaper, in other cases 10 thousand forints) and imposed severe sanctions for breaching press law without defining what cases constituted it.

As a result of this opposition and despite of adopting the bill by District Meeting and Upper Panel, Ferenc Pulszky turned to Lajos Batthyány[20] for modifications. These changes were submitted to the District and National Meeting on 24 March by Bertalan Szemere and were agreed 4 days later by the Upper Panel. Due to them security deposit was decreased by half, breaching press law was defined more precisely and possible secondary liability of press was eliminated. So, the bill sanctioned on 7 April was promulgated as Act XVIII of 1848 four days later. Its Implementing Decree drafted by Bertalan Szemere, Minister of Interior was completed on 28 April.

In Section 1 the Act declared: *"Everybody has right to tell and disseminate his or her ideas through the press."* This Act had 4 Chapters which were about "Breaching press law" and its sanctions, "Judicial proceedings", "Periodicals" and "Press and Bookstores". Section 17 stated: *"Breaching press law is judged by jury publicly. Ministry is entitled to adapt a decree establishing juries taking into close considerations principles of last parliamentary proposal on criminal procedure."*

As the result of this authorization, Ministry of Justice, led by Ferenc Deák[21] was charged with enacting the decree that was signed on 29 April by Deák. This decree included criminal procedural principles, rules on subjects of procedure and the points of process. In addition, the decree acquitted police of task of investigation, defined procedural guarantees for accused and anulled pre-trial detention. Furthermore, followings are worth mentioning regarding points of process. Firstly, investigation was performed by a special judge (judge investigating crime), whose submission was determining in deciding indictment by the public prosecutor and then the case was submitted to the jury that made decision on bringing sue. In case of sue, public prosecutor had 3 days to make indictment and trial was held publicly and orally. This decree establishing juries was a permanent document. It was almost word for word repeated in Press Decree issued by Boldizsár Horváth on 17 May 1867 and was in force until turn of the century.[22]

András Koltay summarized reactions to this Act as the contemporary critics of regulating press formulated opinions of different nature for codificators[23]. But these legislators undoubtedly created freedom of press in civil sense firstly in Hungary and their work was basis of second realization of this freedom in 1867[24].

2.2. Press law in light of Revolution and War of Independence

Revolutionary events influenced rules on freedom of press. On 27 June 1849 Government enacted a decree regulating procedure against newspaper speaking about military secret after the press had been already warned once because of publishing important information by Windischgratz on his way to city of Pest. This decree imposed close-down for newspapers speaking about confidential information and newspapers could be distributed after their prior presentation to authority and its permission.[25] This provision introduced prior censorship again that led to the end of newspaper called Marczius Tizenötödike that was prohibited on 7 July by the Government. As a result of this decree, only "military newspapers" were existing at the end of War of Independence. In fact, these newspapers "were appearing in operational centers, provided general information – primarily about wartime events, of course – that firstly were emerging where national press was hard or not distributed" [26]. So, history of press in Age of Revolution and War of Independence finished when the last military newspaper appeared in Komárom two weeks after laying down arms in Világos.[27]

After suppressing freedom of press, Hungarian press had to restore from pre-reform age. Bach' absolutism eliminated freedom of press entirely, since binding control after printing newspaper was introduced. As a result, publishers exercised more self-censorship that was necessary or they found solutions circumventing official ones.[28]

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[16] Lajos Kossuth (1802-1894) was one of the statesmen who fought for the national independence, civil rights and against the feudal privileges. He is still today remembered as one of the heroes of the War of Independence and Revolution of 1848-1849.

[17] Koltay, 2009. p. 62-63.

[18] Text of decree: János Tarnai: *Sajtójogi dolgozatok*. (Press law Papers.) Franklin Társulat, Budapest, 1913. p. 124-125.

[19] Bertalan Szemere (1812-1869) was politician, Prime Minister and writer, furthermore member of the Hungarian Academy of Science.

[20] Lajos Batthyány (1802-1849) was the first constitutional Prime Minister in Hungary.

[21] Ferenc Deák (1803-1876) was member of the parliament and he is still today remembered as the "wise man" and the "nation's prókátor".

[22] Koltay, 2009. p. 68.

[23] Koltay, 2009. p. 71.

[24] Koltay, 2009. p. 72.

[25] Tarnai, 1913. p. 140.

[26] Koltay, 2009. p. 74.

[27] About military newspapers: Domokos Kosáry: *A forradalom és a szabadságharc sajtója, 1848-1849.* (Press in the Age of Revolution and War of Independence, 1848-1849.) In: Kosáry Domokos – Németh G. Béla (Ed.): A magyar sajtó története II./1. 1848-1867. Budapest, Akadémiai Kiadó, 1985. p. 280-286.

[28] Koltay, 2009. p. 74.

2.3. Press law from 1851 to 1867

In July 1851, the Government adapted a temporary regulation not formally entered into force to handle issues of this field and on 27 May the new press law (Act II of 1852) was promulgated that remained in force until 1867. This Act including 45 Sections regulated the followings. It defined the binding imprint data and collection points of obligatory copies that provision allowed press products remain for posterity. Furthermore, it regulated the right to publish books and conditions of issuing newspapers, and re-regulated security deposit. It was 10 thousand forints that had to be paid by newspapers including political issues and advertisements. Additionally, the Act dealt with principles of warning system. Section 22 stated: "If a periodical is continually against throne, unity and integrity of Empire, religion, morality or basis of state community in general, or is contrary to maintain public peace and order, after twice written warnings without success this periodical can be ended for 3 months by governor of that country where it is published. Longer or entire elimination may be imposed only by the Cabinet Council." Finally, the Act defined petty offenses, extent of punishments and responsibility issues.

Then, on 23 October 1857, the Emperor enacted a decree that was given more significant revulsion than the press law. This decree introduced "stamp tax" from the next year for newspaper obliged by security deposit. Each issue had to pay 1 penny. As its result, price of printing and subscribing daily newspaper increased a lot, but excepted decline did not occurred. In fact, the authority was not able to influence the press and culture contrary to its wish because of strengthening feel of national identity. It is proved by the fact that majority of revolutionary intellectuals could publish in Budapesti Hírlap and press became forum of political public before 1867.[29] Its reason, as Buzinkay writes, that "getting idea of Austro-Hungarian Compromise to Hungarian public opinion and drafting Compromise were performed via the press"[30]. It was thanked to Ferenc Deák who was able to convince the nation of necessity of negotiation and to get it across to them that would not have been without a press considered significant by the general opinion.[31] In 1865, in issue of Easter of Pesti Napló, Deák published anonymously his writing that called for peacemaking with Austrian. This article led to newspaper debate, but Deák's intellectuality made Pesti Hírlap the most considerable and credible Hungarian newspaper in our country and abroad as well.

2.4. Regulating freedom of press after Compromise

After Compromise, on 17 March 1867, the Act XVIII of 1848 on Free Press entered into force again with some modifications. Firstly, its Implementing Decree sought to correct errors of the former Act; secondly this Decree modified establishing juries having jurisdiction in case of breaching press law. As the result, these juries were working at Royal and District Panels.

According to Buzinkay, it is arguable that Hungarian press was the most free between 1867 and 1875[32] and Mihály Révész T. considers the half of century after Compromise as busy period in history of Hungarian press that developed fast during this time.[33] "The most liberal period" is supported by several reasons. First of all, the Act on Press in its Section 14 provided public, both oppositional and national criticism, protection because it excluded punishability in case of publishing public meetings of courts of law and municipalities factually. Secondly, the Act did not make it possible to file formal charges on the ground of merely political opposition. But, this "most liberal period" was continually tried to narrow by the Government and – as Buzinkay says – "certain government members expected from the press – to no effect until Presidency of Kálmán Tisza – to be politely as government friendly as it was during absolutism because of the censorship.[34] Notwithstanding these attempts, liberal legality was existing and juries were paying attention for their independence.

After 1867, the position of press was essentially determined by abolishing "stamp tax" from 1st January 1870 under the Act CXIII of 1869, furthermore by regulating distribution of newspaper. While, during Bach-period newspapers were allowed to distribute only by subscribing, in June 1876 a decree was enacted that empowered local police to permit street sale of newspaper after prior submission, but booksellers were permitted to sell newspapers without any restrictions, freely.[35] In addition to the press, participants of "press life" were given special freedoms. On 1 July 1871 Minister of Justice adapted his decree regulating execution of imprisonment of individuals convicted for violating press law. This decree really gave priority to prisoners mentioned in previous sentence: inmates could keep with their at all personal things; they had to be accommodated in a separate furnished and healthy room; they were allowed to choose between prison meal and self-provided eating; they could smoke, they were permitted to select their readings; they were allowed to be in the yard or garden 6 hours a day; they

[29] Koltay, 2009. p. 75.
[30] Géza Buzinkay: *Kis magyar sajtótörténet.* (Brief history of Hungarian press) http://vmek.oszk.hu/03100/03157/03157.htm#10 (downloaded: 2012.01.30.)
[31] Buzinkay, op.cit.
[32] Buzinkay, op.cit.
[33] Révész T. Mihály: *Sajtószabadság és „médiaegyensúly" Magyarországon 1867 után.* (Freedom of press and "media balance" in Hungary after 1867.) In: Pesti Sándor, Szabó Máté (Ed.): „Jöjj el szabadság!" Bihari Mihály egyetemi tanár 60. születésnapjára készült ünneplő kötet. Rejtjel Kiadó, Budapest, 2003. p. 166.
[34] Buzinkay, op.cit.
[35] Buzinkay, op.cit.

could be visited two hours long in the morning and five hours long in the afternoon and they could correspond free, without control. Last paragraph of decree stated that "… director and police guards should behave properly towards inmate…".

Discussing press law after Compromise, we should mention that there were several attempts to reform this field and to revise the Act of 1848, but they were all stuck at level of codification because of several reasons.[36] So, the lack of statutory regulation increased role of secondary legislation, namely ministerial decrees. Especially, Minister of Interior and Minister of Justice used parliamentary authorization, but "frequent decrees of Cabinet could not substitute lack of legal policy concept aimed at regulating press law" [37], furthermore, they made rules of this area more complex. Decrees could be classified on the ground of their content – as Mihály Révész T. analyzed them – into three groups: they regulating press police, press criminal procedure and execution of press punishment.[38]

Summary

Regulating press – as Bertalan Szemere said which is even true nowadays, as I suppose – is needed because "press is a real power, a real weapon… "[39]. In line with this freedom, Hungarian citizenship should have been defined as well because the concept considering human rights provided by state spread from the second part of 19th century. Taking into consideration this fact, state should have determined whether who was given freedom of press, who was considered Hungarian citizen. But, it was delayed until 1879, while first Act on Freedom of Press was one of "April Acts". Application of this Act was supplemented by decrees because revolutionary events made impossible to adapt criminal procedure code. This way, procedure in case of violating press law was ruled by the Decree on Jury. It, despite of its errors and lacks, is remarkable because it tried to draft criminal procedural rules ignoring feudal principles, and its several progressive provisions provided basis for our later laws.[40] Events of 1848-1849 and following years influenced regulating freedom of press, of course, and after 1867 the first press law entered into force again accompanied by secondary legislations. After Compromise, issue of lacks of press law was emerging often, and certain politicians and political forces felt the press very free. There was not any change until the Presidency of István Tisza, Hungarians could exercise their freedom of press under Act of 1848 came into force in 1867 again and secondary legislation. The new Act was promulgated only in year of 1914 (Act XIV), on "birthday" of Act of 1848. "This Act was not on press, it was Act on socialization of press"[41], and after a short time it was considered too permissive: Prime Minister enacted Decree No. 12.001/I. of 1914 introducing war censorship. Its legal basis was created by the Act LXIII of 1912 on Exceptional Measures in Wartime.

[36] Révész T., 1986. p. 22-32.
[37] Révész T., 1986. p. 32.
[38] Révész T., 1986. p. 32-49.
[39] Ödön Both: *Szemere Bertalan belügyminiszter sajtórendelete és a vezetése alatt álló minisztérium sajtóügyi tevékenysége 1848-ban.* (Press decree of Bertalan Szemere, Minister of Interior and press activity of Ministry leaded by him in 1848.) Szeged Acta Jur. et. Pol. Tom. XXVII. Fasc. 4. 1980. p. 111.
[40] Mária Homoki Nagy: *A sajtószabadság kérdése Böth Ödön munkáiban*. (Issue of freedom of press in works of Ödön Both.) In: Homoki Nagy Mária (Ed.): Both Ödön emlékezete: 1924-1985. Szeged, JATE ÁJTK, 1987. p. 359.
[41] Buzinkay, op.cit.

A Brief History of River Navigation in Bohemia up to the 19th Century – Part 2.

Bohumil Poláček[*]

Abstract

On November 24, 1762 Vienna issued an order prohibiting boatswains from employing any persons suffering from alcoholism. The Edict of May 15, 1766 issued the Rates in the Výtoň water toll in Prague. This rate sheet specified how much should be paid in money and how much in material. Navigation Regulations were issued in the Edict of January 20, 1770. Under this order all and every types of boats, which travel up and down on the Danube and which are commonly used by the boatswains and other boat owners authorized to transport passengers up and down and transportation of cargo and other goods must not be in the worn-out, defective and damaged condition, but must be completely solid, durable and suitable for navigating and carrying the load. Vienna establishes the main toll and water court. Financing of water structures was to be provided by the "Navigation Fund", set up by the Edict issued by Maria Theresa in 1766. Initially the fund collected a part of the general water toll which was established in 1719 and since 1770 the fund collected the entire toll and duty from four customs houses in Bohemia. Other tolls were closed again. The Directorate of Water Navigation was managed by the executive body of the navigation committee, which was established in 1770. As a result of the Supreme Command, the circular dated April 29, 1775 ordered that the water weirs which stood in the way of the navigation were to be completely demolished and the millers were allowed to get the power for their mills only by the method which is not harmful and which has been pre-approved by the governorates. Given the fact that navigable rivers, which belong to the common property of the State Regalia Principis [imperial privilege] and can not become private property, therefore are still reserved for the highest power and therefore their use should be furnished for the common good, the supreme court decision published by the Court Decree of June 14, 1776 ordered that all the weirs, which are desirable for demolition or closure, should be automatically and without any interventions of the dominions or millers cancelled or closed. Otherwise, every structure about which the office has learned and which is found to be an obstacle to navigation must be immediately demolished at the cost of the offender. In order that the millers did not cause any difficulties for the navigation by their arbitrary modifications of weirs, Maria Theresa issued a new navigation order on May 31, 1777, known as the "Navigation Regulations". Navigation guilds were abolished in 1783, which resulted in the freedom of navigation.

Key words: *Water toll; Navigation Regulations; Water court; Navigation Fund; Navigation committee.*

On November 24, 1762 Vienna issued an order **prohibiting boatswains from employing any persons suffering from alcoholism**.[1] This order states that: "*… under certain circumstances the violators will be arrested, imprisoned and subjected to bodily punishment without mercy, and that even if they did not cause any real damage*".

The Edict of May 15, 1766 issued the **Rates in the Výtoň**[2] **water toll in Prague.**[3] This rate sheet specified how much should be paid in money and how much in material. For one large raft of wood it was 2 crowns and 1 trunk for ten rafts. Toll also involved oak or construction wood, wood beams, laths, planks, boards, connecting rods, hard barrel staves, wine pins,

* JUDr. Ing. Bohumil Poláček, Ph.D., MBA, LL.M., Department of International Law, Faculty of Law, University of West Bohemia, Czech Republic.

1 Den 24. November 1762. Schifmeister sollen sich bei Wasserfahrten keiner den Trunkergebenen Leute bedienen (*Boatswains must not employ any persons suffering from alcoholism*), Verordnung Wien den 24. November 1762, Nro. 671 In: Sammlung aller k. k. Verordnungen und Gesetze vom Jahre 1740. bis 1780., die unter der Reierung des Kaisers Josephs des II. theils noch ganz bestehen, theils zum Theile abgeändert sind, als ein hilfs- und Ergänzungsbuch zu dem handbuche aller unter der Regierung des Kaisers Joseph des II. für die k. k. Erbländer ergangenen Verordnungen und Gesetze in einer chronologischen Ordnung. Vierter Band. Wien, verlegt bei Joh. Georg Mötzle k. k. priv. Buchhändler, 1786. P. 130-1.

2 Podskalí opened a large market with timber for Prague, because floating of rafts to the center of the town was not possible due to the number of water weirs. The market certainly included a customs house, which for centuries was known as Na Výtoni. HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 27.

3 Den 15. Mai 1766. Tariffe der Wegtonner Wassermauth in Prag (*Rates of the Výtoň water toll in Prague*), Patent Böhmen betreffend vom 15. Mai 1766, Nro 843. In: Sammlung aller k. k. Verordnungen und Gesetze vom Jahre 1740. bis 1780., die unter der Reierung des Kaisers Josephs des II. theils noch ganz bestehen, theils zum Theile abgeändert sind, als ein hilfs- und Ergänzungsbuch zu dem handbuche aller unter der Regierung des Kaisers Joseph des II. für die k. k. Erbländer ergangenen Verordnungen und Gesetze in einer chronologischen Ordnung, Fünfter Band, verlegt bei Joh. Georg Mötzle k. k. priv. Buchhändler, Wien 1786. P. 38.

rolling wood, shingles, hop poles, two hundred pounds of resin, tannin tanning bag, barrel potash, three weights of iron[4], boxes of wood or stone coal, wool bags, packages of paper, basket of fish, three geese or poultry, Lower-Austria measures of vegetables, oats, corn and flour. During winter season when Vltava was frozen and the shipments were sent on the ice, the payments involved *"tolls for rafts and trucks according to the rates specified in the Edict."* All royal estates, military warehouses[5] and all persons of high status and property owners were exempt from the Výtoň toll, *"providing they were transporting the goods from their estates for their own use."*

Raftsmen tried to cheat already that time, so the Edict further stated that "*the law provides that in addition to toll in money, from 10 rafts of timber to be also levied also given one trunk in natura* and that this is so violated, "*that the raftsmen intentionally assemble unequal barges; in the future it must not be allowed to sail to Prague with uneven barges or perhaps to spread them into unequal sections before the toll, as it fraudulently happened at the expense of in-kind contributions, the barges must be always of equal size and shall consist of 10, 20, 30 or 40 rafts or boards. But if there will be some uneven barges consisting of more or less rafts, they are required in addition to the normal toll in money on 10 rafts and one trunk of 10 rafts, to replace the in kind payment from the excessive number of rafters in money, namely, from one large raft of timber from which the board or raft will be sold for 8 guilders and more, 6 crowns, and from the smaller of which the raft will be sold for less than 8 guilders, by 3 crowns "*.

"It has been ordered that the tenants are not entitled in any case to exceed the rates and or to demand more than what is assessed in them or in the current and new regulation, and if the tenant or his subordinate officers would be seduced to a violation, the first of them would be punished by a pecuniary fine of 50 imperial thalers, and the others by another exemplary punishments; resulting in the fact that in the addition to the current regulation, such regulated toll rates will be publicly posted for the inspection and information of each person in the place of the toll revenue, so as to safely guarantee that the tenants would be punished for the first offense by a fine of 50 Imperial thalers; however in contrast to that, every owner of a boat or raftsman is obliged to come to this privileged Výtoň toll. If this would not happen voluntarily, then the identified owner of a boat or a raft will be taken from the Výtoňák[6] toll by a boat or dinghy and without any additional procedures will be obliged to declare the transported goods in as much detail as possible and to pay the relevant duty. However, if he attempts to bypass the rates and the current regulations, then his vehicle including the load will be confiscated without any regard, as well as all of the concealed or falsely declared goods will be forfeited, and in addition, depending on the circumstances, the infringer could be imprisoned or could be subjected to a fine. Therefore, under the current regulations the tenants have the right to immediately arrest the violators of the rates and the Zinosur[7] and to immediately demand help and the power from the imperial governor to imprison the violators and for the subsequent collection of the assessed penalty. All confiscated goods will always be divided into 3 parts, the first will go to the informer, the other to the owner of the toll who was cheated, and the third will be used to benefit the public. Since the New Town municipality as the owner of real estate is under the current regulations required to protect the tenants during all situations and especially during the emerging restrictions on their rights and interests and must provide help on any request, and if necessary to provide assistance by the town's citizen militias. And thus the new regulation does not contain anything different then what is beneficial for the maintenance of good order, and there it is not a preliminary ruling for the public or to any private persons, however in itself it is based on the royal Edict of the water toll which was announced on February 27, 1737 and as before, it has its full significance in the fact that this permission relates only to the barges that go to Prague to sell their goods; in the absence it also applies to the barges, which the nobility sends to Prague from its forests and for its own use; thus, for greater certainty the tolls have ordered: As it now appears that under the name of nobility or feudal economic official passport fitted to their own estates belonging to the emergency needs are reported various products, which pass through the toll for free, but they are still to be sold, resulting in considerable losses to the toll; therefore in the future, such erroneously labelled goods and chattels will be subject to the toll and will be confiscated; and finally because it was taken into consideration that in addition to the existing rates above, the designated movable assets and in kind goods to be transported to Prague on rafts are not included, and especially if Vltava is to be made navigable by intentirtermassen[8]"; the same decision has been adopted that these are to be subject to a toll as well as others, so that a proportional fee can be demanded, however, in such case the tenants are required to make relevant declaration to the royal chief economic directorate, according to which the toll fee will be regulated and assessed".

Navigation Regulations[9] were issued in the Edict of January 20, 1770. Under this order all and every types of boats, which travel up and down on the Danube and which are commonly used by the boatswains and other boat owners authorized to transport passengers up and down and transportation of cargo and other goods **must not be in the worn-out, defective and damaged condition**, but must be completely solid, durable and suitable for navigating and carrying the load. **Vienna establishes the main toll and water court**, in other places in the country the authorities must undertake such measures as a result of which the subordinate officials, who **certify boats** and barges, stamp the year in which the boat was built, then after each year they enter the new year with a distinct engraving and thus all boats and barges used for navigating on the water will be certified again; while the officials were required to thoroughly inspect the boats before each certification, therefore

4 Von 3 Waag Eisen.
5 Das Magazin = Warehouse in German.
6 Wegtonik
7 This is an archaic German language. We were unable to find the Czech meaning. It was probably derived from the word der Zin – tax, fee, or rent.
8 Derived probably from the word intendiert = intended and die Masse = essence.
9 Den 20. Jäner 1770. Schifffahrtordnung (*Shipping regulations*), Patent Wien 20. Jäner 1770, Nro. 1156. In: Sammlung aller k. k. Verordnungen und Gesetze vom Jahre 1740. bis 1780., die unter der Reierung des Kaisers Josephs des II. theils noch ganz bestehen, theils zum Theile abgeändert sind, als ein hilfs- und Ergänzungsbuch zu dem handbuche aller unter der Regierung des Kaisers Joseph des II. für die k. k. Erbländer ergangenen Verordnungen und Gesetze in einer chronologischen Ordnung, Sechster Band, verlegt bei Joh. Georg Mötzle k. k. priv. Buchhändler, Wien 1786. P. 139.

if they found the boat without any reservations, they were able to certify it, however, if they found a smallest amount of risk, they had to first ask the owner to provide a repair and with the heaviest responsibility they did not provide certification and did not let the boatswain to use the boat.

And now, the navigation upstream and downstream on the Danube is done by the boats and barges of different sizes, which can be loaded with larger and smaller masses, according to the characteristics of these boats and barges; therefore, every boatswain must ensure that the boats transporting persons or cargo upstream or downstream would be submerged without distinction, so **that each boat would loom out of the water with 3/4 of its visible height**, otherwise the boatswains with the boats which do not meet this requirement will be required to pay an unforgivable fine of 12 imperial thalers without remission.

A prudent boatswain must carefully observe that the boat has **the necessary boat equipment and supplies** according to the vessel's characteristics and that the boat is in a good state of repair, in a fresh, well-conditioned and well usable quality, and according to the characteristics of the vessel in a sufficient quantity, and not to be equipped with the ropes woven from bad hemp, or otherwise very badly worn out and therefore almost useless ropes, nearly decomposed wood, cracked oars and otherwise inadequate equipment and that in the event of unexpectedly strong winds and storms the boat would not suffer much damage due to the lack of adequate good equipment, or that it would not completely sink.

Regarding the people needed for the shipments on water, the **commander of navigation, which is responsible for conducting the entire vessel**, must teach the boat servants and hand over the transported goods to the office, which is further required to provide information and answer questions in all cases with the exception of the unexpected; further from **the required number of skilled attendants** according to the vessel size, who are subordinate to the boat commander, therefore it is particularly necessary that such commander would be an experienced and a very knowledgeable man in the water transportation.

No person shall be employed as a commander of the cruise, unless such person started to work on the boat from the lowest rank of the boat servant and with the good behaviour and experience gained the position of the navigation commander and completed the necessary test of his skills in front of boatswains. Other occupations which the commander had to go through before sailing are as follows; rope carrier, boat valet, chef, front helmsman, auxiliary front boat rower, auxiliary helmsman, auxiliary rower, front head boat rider and middle head boat rider. In addition, above all the new commander must be honest and peace loving man who during the sailing can lead the ship's servants, who are dependent on him, to everything that is good, to keep them in a peaceful and unified state, and who can try to resolve amicably any potential disagreements and feuds caused by them and do that with the greatest possible diligence; because very often the disputes and discord among the servants occurring during the sailing or careless approach and character of the cruise commander can be the cause of the resulting disaster, for which the commander is responsible to the boatswain.

It was found from the repeated experience that accidents occurring on the water and especially on the Danube, have been largely attributed to **drunken** persons employed in the navigation. To avoid this kind of evil in the future and for the timely prevention of damage arising from the general being and as already announced by the order of November 24, 1762, during the navigating every boatswain should be using not only an experienced crew, but also the crew that is sober. Cruise commanders, navigators and all boat servants must equally refrain from excessive drinking so surely, that in the opposite case, if the boatswains knowingly employed persons abusing alcohol, they will have an obligation to reimburse the persons travelling on the boat for their damage, but they will also lose their business, the drunken persons will be immediately stopped by the toll authorities and water courts and as the case may be, they will be punished either by arrest or brought into jail or be punished by other corporal punishment without mercy, even if the damage was not serious. For the increased elimination of this filth and for the safety of boat navigation, boatswain must not employ any boat servant, without him having submitted a written proof of his behaviour from his previous boatswain, and on his service level, under the penalty of 30 Imperial thalers.

If during the voyage the boat commander sees this or that servant is drunk, then he is obliged to have this drunkard immediately taken to the mainland and not to tolerate any drunk on the boat. If on the other hand there will be more drunken servants and their dismissal would cause the commander not being able to continue in further travel, in which case his is obliged not to continue in the cruise, but must take the boat ashore and to stay there until he is be able to replace the drunken ship's servants, or until they are sober; but after sailing the boatswain is entitled to ask such drunken servants for the compensation of damages arising from such delay and if the boatswain often sees this or that servant drunk and the previous well-intentioned warnings and threats were not effective, he must dismiss them without issuing a certificate of their behaviour and the provided services, so that such a dangerous person could not be hired by any boatswain.

In order to safeguard the boat against the danger of crashing or other dangers, it is strictly **prohibited to depart from the shore in an intense fog, wind and showers** and it is necessary to wait for a better, peaceful and clear weather. But if during the sailing an adverse weather suddenly appears, then the first opportunity for salvation must be considered as the best option, and if possible, it is necessary to land at the nearest location and wait for a better and safer weather. In order to prevent mishaps while sailing against each other, if two boats meet and one is going upstream and the other one downstream and there is enough room, it is recommended that they employ the necessary care to by-pass each other, but in the location where the landscape is too narrow, then the boat going downstream is supposed to land at the shore and allow the boat going upstream to continue in the ride. In the opposite case, if the landscape does not permit the boat going downstream to land, then to prevent the impending disaster, the boat going upstream is required to land ashore and to clear the entire space

on the water to the boat moving downstream. Since it was also frequently noted that boat-owners and raftsmen are loading and expanding their double vessels to a disproportionate width, thus when passing under bridges, they subject themselves to a considerable danger, even though the main transit openings in the bridges are expanded to more than be necessary. Therefore, according to the provisions of the Decision dated June 27, 1767, boatswains and craftsmen must not load and expand their double vessels over 7 yards in width, otherwise the violators will have to pay a monetary fine of 50 ducats without any excuse, whether they will be caught there or elsewhere.

If one or the other boatswain moving up or down on the Danube comes across hidden **stumps** somewhere in the water, which the boat could hit without his fault, or if he sees at the boat mills something that could harm or impede the navigation and when landing at a safe distance from other boats he sees any other danger in the jutting tree branches, he is obliged to immediately notify the office in order to effectively eliminate these obstacles and the office will take immediate action under heavy responsibilities. Finally, it has been ordered that according to clear contents of the directives dated February 17, 1540 and July 6, 1562 and in many subsequent years, all who own land and meadows on both banks of the Danube, on which stand a large tree stumps, trunks and rough trees that could be swept by the Danube under the water causing unavoidable danger to the navigation, to have such a large tree stumps and tree trunks pulled out and removed during the appropriate season, and to move these to a safe distance from the Danube, under the penalty of 12 Imperial thalers, of which half will belong to the informer who provided the formation to the Count's water office and who will be further available to the chamber prosecutor. According to the previously issued regulations, no boat mill will be attached to any places other than the places on the Danube, where it will not restrict or endanger the navigation, apart from the boat mills that are already in the prescribed places and in the spring will be always well attached by the powerful iron chains, and properly equipped with warning trees.

No empty vessels or boats standing for no good reason will be tolerated in towns and villages bordering the Danube, particularly in Vienna and all other places which provide landing on the shores and in the places reserved for the arrival of both the domestic and foreign boats and rafts which are loaded. Unavoidable landing stations must be equipped with more powerful and well built, deeply embedded sticks, and for their consistently good condition and for the provision of the required number of officials appointed to supervise water, there will be adequate care and control under a heavy responsibility. Further, there will be an ongoing repair and maintenance of trails, to keep them in a good condition for the horses pulling boats along the shores, because very often the presence of such defects can cause a great damage to the loaded and the landing boats and other boats standing empty, without the boatswains' fault.

In addition to that, to achieve a greater safety in the future, no boatswain moving upstream or downstream will depart from the river banks to go for a long journey, until **he reports to the local toll and water authorities**, or to otherwise concerned office, regardless whether he transports passengers or goods travelling upstream or downstream, both in Vienna and in other towns and villages which have the embarking and landing stations. This office will send officials, who according to these regulations will check the properties and equipment of the boat, the employed servants, immersion and the width of the double vessels, and if they find any defects, they will not allow the boatswain to depart, but will restrain him in the place for the speediest elimination of defects and rectification of errors under the actual enforcement of penalties set out herein. In case of refusal they shall immediately notify all local nobility, which will provide them with a sufficient assistance against the boatswains acting against this order under the penalty of 100 ducats.

While complying with this order, all estates, towns and villages, which own the original legitimate claims and use boats to transport people and goods, have an obligation to have the boats adequately inspected and checked for their constantly good and undamaged condition and maintenance both in Vienna and in other towns and municipalities which have departing and landing stations. No boatswain moving upstream or downstream will depart from the river banks to go for a long journey, until he reports to the local toll and water authorities, or to otherwise concerned office. This office will send officials, who according to these regulations will check the properties and equipment of the boat, the employed servants, immersion and the width of the double vessels, and if they find any defects, they will not allow the boatswain to depart, but will restrain him in the place for the speediest elimination of defects and rectification of errors under the actual enforcement of penalties set out herein. In case of refusal they shall immediately notify all local nobility, which will provide them with a sufficient assistance against the boatswains acting against this order under the penalty of 100 ducats. Finally, if any damaged boat, vessel or barge is apprehended and the damage is not immediately repaired, then the case of the fine amounting to 24 Imperial thalers will be enforced without mercy.

Financing of water structures was to be provided by the "**Navigation Fund**", set up by the Edict issued by Maria Theresa in 1766. Initially the fund collected a part of the general water toll which was established in 1719 and since 1770 the fund collected the entire toll and duty from four customs houses in Bohemia[10]. Other tolls were closed again. The Directorate of Water Navigation was managed by the executive body of the navigation committee, which was established in 1770. The waterways were cared for by the trained technicians, mostly military engineers. Since the year 1780, the building supervision and performance of police surveillance over the navigation, rafters and boat owners was performed by the appointed trencher sergeants[11]. They

[10] In Prague Na Výtoni, in Karlín At the last heller, in Ústí nad Labem and in Dolní Žleb. HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P.50.

[11] Trencher was a soldier digging protective trenches. Sergeant (Feldwebel) was the highest rank of the non-commissioned officer in the former Austrian army.

were assigned to five sections, resulting from the division of the waterway from Budějovice to the Czech-Saxony border.

As a result of the Supreme Command, **the circular**[12] **dated April 29, 1775**[13] ordered that the **water weirs** which stood in the way of the navigation were to be completely demolished and the millers were allowed to get the power for their mills only by the method which is not harmful and which has been pre-approved by the governorates. When His Majesty decided to make Vltava more navigable, **the highest decision announced on August 3, 1775** further ordered not to allow the millers' interventions to cause any hindrances and if they were not willing to submit and **if it was necessary for the navigation**, then the **weirs should be immediately demolished**, especially because in every country where there are mills on navigable rivers, these must not interfere with the navigation.

The Court Decree of January 26, 1776[14] provided that - as the highest prince of the country can do everything that is necessary on the navigable rivers and thus to establish mills and other buildings so as not to stand in the way of navigation and the use of rivers - depending on the circumstances and to support navigation, all the current mill weirs and other structures, as well as the weirs set up above the normal need, etc., which do not belong to navigation and which interfere with it and which are only intended to benefit the *[local]* particulars, would be changed or demolished. At the same time, no gate will be permitted at the weirs which were built only for the mills. Although if they do not pose any constraint, the current weirs may stay, however, for the navigation without a gate it would be necessary to establish a sufficient diameter without causing additional expenses to the Fund for the maintenance of the remaining weirs, or without the need to set up ice barriers. Conversely, the mills which may remain on the Danube, are to take care how they would get water without harming navigation and against the obtained permission.

Given the fact that **navigable rivers, which belong to the common property of** the **State Regalia Principis** ***[imperial privilege]*** **and can not become private property**, therefore are still reserved for the highest power and therefore their use should be furnished for the common good, the supreme court decision published by the **Court Decree of June 14, 1776**[15] ordered that all the weirs, which are desirable for demolition or closure, should be automatically and without any interventions of the dominions or millers cancelled or closed. The Court decree of July 10, 1778 further noted that according to existing findings, even if all the mills with the weirs located on the Vltava river would be placed out of operation, the country would not suffer from the shortage of mills in times of peace or in times of war, resulting in the fact that the governorate was given obligation to carry out these orders accurately and not to be fooled by the interventions of the millers.

The Court decree of March 31, 1781[16] further decided that the closure of weirs made ex causa publica did not entitle the weirs for the compensation of damages. It was further noted that although according to the Edict from 1772, the establishment of gates at the weirs was to be paid from the navigation fund, but after the later, the Supreme-approved plan from 1774, weirs and therefore the gates deemed to be unnecessary and this onus *[burden]* was automatically cancelled and from now on no navigation expenses were to be allowed and the current principle to be respected that the weirs and gates, which remained only for the private use, until they were found to be harmful or preventing navigation, will be reduced by the private individuals to the normal level, and will be maintained only as instructed by the navigation or otherwise will be closed.

When all the mill weirs from Prague to Litoměřice were demolished as a result of the highest orders and the Court Decree of December 18, 1806 , which imposed a special obligation for a thorough care for the free and convenient passage and as a result of a complaint by the former chief royal saline office and on the basis of an initiated investigation, it was found that the new obstacles to navigation were created because the millers from Libeň down to the Milevsko arbitrarily and illegally closed the weirs or increased their thresholds. **The circular order dat-**

[12] Circular = a memorandum sent to several recipients

[13] Fortseßung der ursprünglich vom hofsecretär Joseph Kropatschek später vom hofsecretär W. G. Goutta redigirten Sammlung der Geseße im politischen, Cameral- und Justizsache, welche unter der Regierung Seinen k. k. Majestät Ferdinand des I. in den sämmtlichen k. k. Staaten erlassen worden sind, in chronologischer Ordnung. Herausgegeben von Franz Xav. Pichl, Registraturs-Directions-Adjuncten der k. k. vereinigten Hofkanzler. Ein und siebenzigster Band (sechs und vierzigster Fortseßungsband), welche die Geseße vom 1. Januar 1845 bis Ende December 1845 enthält Wien, 1847. BenBraunmüller und Seidel, k.k. Hofbuchhändler, Graben, Sparcasse. P 97.

[14] Fortseßung der ursprünglich vom hofsecretär Joseph Kropatschek später vom hofsecretär W. G. Goutta redigirten Sammlung der Geseße im politischen, Cameral- und Justizsache, welche unter der Regierung Seinen k. k. Majestät Ferdinand des I. in den sämmtlichen k. k. Staaten erlassen worden sind, in chronologischer Ordnung. Herausgegeben von Franz Xav. Pichl, Registraturs-Directions-Adjuncten der k. k. vereinigten Hofkanzler. Ein und siebenzigster Band (sechs und vierzigster Fortseßungsband), welche die Geseße vom 1. Januar 1845 bis Ende December 1845 enthält Wien, 1847. BenBraunmüller und Seidel, k.k. Hofbuchhändler, Graben, Sparcasse. P. 98.

[15] Fortseßung der ursprünglich vom hofsecretär Joseph Kropatschek später vom hofsecretär W. G. Goutta redigirten Sammlung der Geseße im politischen, Cameral- und Justizsache, welche unter der Regierung Seinen k. k. Majestät Ferdinand des I. in den sämmtlichen k. k. Staaten erlassen worden sind, in chronologischer Ordnung. Herausgegeben von Franz Xav. Pichl, Registraturs-Directions-Adjuncten der k. k. vereinigten Hofkanzler. Ein und siebenzigster Band (sechs und vierzigster Fortseßungsband), welche die Geseße vom 1. Januar 1845 bis Ende December 1845 enthält Wien, 1847. BenBraunmüller und Seidel, k.k. Hofbuchhändler, Graben, Sparcasse. P 98.

[16] Fortseßung der ursprünglich vom hofsecretär Joseph Kropatschek später vom hofsecretär W. G. Goutta redigirten Sammlung der Geseße im politischen, Cameral- und Justizsache, welche unter der Regierung Seinen k. k. Majestät Ferdinand des I. in den sämmtlichen k. k. Staaten erlassen worden sind, in chronologischer Ordnung. Herausgegeben von Franz Xav. Pichl, Registraturs-Directions-Adjuncten der k. k. vereinigten Hofkanzler. Ein und siebenzigster Band (sechs und vierzigster Fortseßungsband), welche die Geseße vom 1. Januar 1845 bis Ende December 1845 enthält Wien, 1847. BenBraunmüller und Seidel, k.k. Hofbuchhändler, Graben, Sparcasse. P. 99.

ed December 19, 1811[17] ordered to immediately stop these iniquities and the Imperial regional offices, as well as the Royal building directorate were ordered to be vigilant that the weirs were to be kept open for the purposes of undisturbed navigation, that all obstacles were removed and all water structures, extensions, thresholds, etc., which were established, altered or increased without the prior gubernatorial approval were to be immediately demolished and removed. This regulation particularly ordered a rigorous monitoring to the Rakovnice Regional Authority on May 9, 1812, and the Court Decree of January 4, 1782 explicitly decided that the mills can be permitted and tolerated on navigable rivers in so far as they do not interfere with navigation. These principles were published again by the **gubernatorial circular dated January 28, 1815**.[18] The building directorate, but also the Imperial regional authorities, as well as the county commissioners were strictly ordered to ensure that the obstacles to navigation, which the millers created by increasing the height of weirs, the high placement of thresholds, etc., were to be promptly removed.

These statutory provisions automatically suggest that mills, whose existence there was found to be expendable, are only tolerated on the navigable rivers, that weirs and gates for the mills can only exist there and only for so long and in such extent as allowed by the consideration for the navigation. And if the weirs and locks, where they exist, are found to be interfering with the navigation, they can be automatically and without any compensation cancelled or closed, and that the millers are to be allowed the power of water only after the prior consent obtained from the governor, which would allow the water to run towards their mills. Nevertheless, all of the above suggests that the weirs under Libeň, all the way to Litoměřice were due to the highest command already cancelled and may be rebuilt, increased or changed only by the millers themselves, thanks to the patience of the regional authorities and supervisory bodies.

It can not be subject to any doubt that all such processes which are contrary to the supreme law are automatically null and void, since with the highest decision the owners of the mills cannot afford to build anything on the navigable river if they have not received an explicit gubernatorial approval. Otherwise, every structure about which the office has learned and which is found to be an obstacle to navigation must be immediately demolished at the cost of the offender. In order that the millers did not cause any difficulties for the navigation by their arbitrary modifications of weirs, Maria Theresa issued a new navigation order on May 31, 1777, known as the "**Navigation Regulations**". In this respect, in the Section 1, the highest Edict of May 31, 1777 explicitly orders, that no new structure, whether it is a mill or weir, can be built on the navigable rivers without a prior gubernatorial consent. As a result, if anyone would be planning to build such a structure, that person will be required to submit a plan of the intended construction, in order to first carefully assess whether the structure will not be harmful or whether it will not interfere with the free navigation. If, by contrast, someone does build such a structure without receiving the relevant permit, or if the building is found to have been built otherwise than as specified in the approved plan, that person will be required to demolish such a structure immediately, which is required even by those who during the repair of the weir increase its height, or if is found that such a change causes obstacles to the navigation. If anyone would be delayed with thus ordered demolition or alteration, or if they did not immediately comply with the order, then the order will be implemented by the navigation directorate ex officio, and the costs will be required from the infringer.

Since with no regard to the existence of these highest orders, the Royal Governor has found that the navigable rivers still contain the structures which interfere with the free navigation and which were built without the prescribed building permit, the **highest Edict dated May 31, 1777 was published again in the Circular order dated March 28, 1835**.[19]

No new building may be built on the navigable rivers, regardless of whether it is a mill or weir, no drainage of water or water weir without a prior permission from the governorate. But the permit may be granted only if the building is not found harmful and if it does not interfere with the free navigation. Whoever builds such a building without a written permission or by other means than as was specified in the approved plan will be required to **demolish** such a building immediately again. The same result will apply to the persons who during the repair of the weir increase its height or implement any alterations which

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[18] Fortseßung der ursprünglich vom hofsecretär Joseph Kropatschek später vom hofsecretär W. G. Goutta redigirten Sammlung der Geseße im politischen, Cameral- und Justizsache, welche unter der Regierung Seinen k. k. Majestät Ferdinand des I. in den sämmtlichen k. k. Staaten erlassen worden sind, in chronologischer Ordnung. Herausgegeben von Franz Xav. Pichl, Registraturs-Directions-Adjuncten der k. k. vereinigten Hofkanzler. Ein und siebenzigster Band (sechs und vierzigster Fortseßungsband), welche die Geseße vom 1. Januar 1845 bis Ende December 1845 enthält Wien, 1847. BenBraunmüller und Seidel, k.k. Hofbuchhändler, Graben, Sparcasse. P. 100.

[19] See the Regulation and Decree No. 45 of the Royal Governor in Bohemia dated March 27, 1845. The Building Code for towns, villages and countryside of the Czech Kingdom. As a result of the Supreme Decision of March 4, 1845, and with the repeal of the Building Code of May 17, 1833, the following Decree by the Court Chancellor dated March 8, 1845, generally prescribes the regulations concerning the construction in towns, villages and countryside and their exact compliance by the authorities and population. Annex II. Rules for the removal of obstacles to navigation. In: Fortseßung der ursprünglich vom hofsecretär Joseph Kropatschek später vom hofsecretär W. G. Goutta redigirten Sammlung der Geseße im politischen, Cameral- und Justizsache, welche unter der Regierung Seinen k. k. Majestät Ferdinand des I. in den sämmtlichen k. k. Staaten erlassen worden sind, in chronologischer Ordnung. Herausgegeben von Franz Xav. Pichl, Registraturs-Directions-Adjuncten der k. k. vereinigten Hofkanzler. Ein und siebenzigster Band (sechs und vierzigster Fortseßungsband), welche die Geseße vom 1. Januar 1845 bis Ende December 1845 enthält Wien, 1847. BenBraunmüller und Seidel, k.k. Hofbuchhändler, Graben, Sparcasse. P. 97-106.

will interfere with the navigation. If anyone is delayed with the ordered demolition or alterations of the situations which were found to be harmful, then the demolition or alterations will be initiated by the supreme Royal building directorate and the portion of such **expenses will be demanded** from the infringer.

In order to prevent floods and other damage during **the annual ice movements**, the millers and owners of water works must start to pull out the transverse planks in the release gates well on time. The infringer of this regulation shall be punished by 50 guilders, of which two thirds will be paid to the informer and one third will be paid to the navigation fund, and if a malicious intent was found, the punishment will be more severe. But in all cases the owner of the waterworks must always pay the cost of clearing the riverbed caused by such neglect, or replace the cost to the navigation fund.

Inserting and attaching **fishing baskets**, **trap pins**, etc., must not interfere with the free shipping, otherwise these will be immediately destroyed, the cost of the necessary clearing will be paid by the infringer and depending on the circumstances such infringer will be adequately punished. This also applies for the **catching of salmon**. It is not possible set up the salmon traps on the navigable rivers without the gubernatorial permission. Existing traps must be either placed in the harmless state, or if that is not possible, these must be removed. The owners of salmon traps must clear the river from everything that fell to the river during the salmon catching, or must reimburse the navigation fund for the cost of clearing. If the river is **intentionally blocked by stones** or other objects, the infringer will be liable not only for the reimbursement of the cost for such clearing, but depending on the circumstances will be punished in excess of such liability.

Bridges, which are necessary for the return of horses at the mills, weirs and other waterworks and that includes the existing bridges and the ones which in the future will be found to be important, must be built and maintained by their owners at their costs that much more when their works present an obstacle to the returning horses. The navigation fund has an obligation to cover only the costs for the support of the free navigation, but not the costs for such facilities which are necessary because of the existing buildings and for the benefit individual private owners.

In order to assess the state of water impoundment and the height of weirs, etc. the ferries, mills and other water projects shall establish the **signs of normal level or the water gauges** at the expense of the mill owners and the owners of water works and ferries. For that the countryside will hire the **Royal county engineer** and Prague will use the cooperation of the supreme Royal building directorate. Finally, experience shows that by the gradual **placement and the increased height of thresholds, placement of transverse planks, mounds of stones**, etc., the millers are increasing the height of weirs especially during repairs, narrowing down the gate passages, altering the structure of these waterworks in other directions calculated only for the benefit of their mills, which reduces the amount of water for free navigation, it creates shock waves and gravel sediments under the weirs and passage gates, which makes the return of boats more difficult.

It is now just about time that these injustices by the mill owners were seriously prevented, and who according to these highest decisions have absolutely no rights to the navigable rivers reserved for the prince, and whose presence is tolerated only to the extent in which they do not interfere with the navigation, because for nearly a century the country authorities spent the largest amounts on the regulation of navigation and the fruits of their efforts will result in more vibrant navigation operated on a larger scale and with the superior boats, and these efforts should not be thwarted by the interventions of the millers. In addition to that, as a result of the initiative for the introduction of steamboat navigation, it was only **the Decree of the Court Chancellor of June 9, 1845**, which ordered the removal of all serious obstacles to navigation.

The imperial authority has an obligation to publish the above general standards containing the orders to the knowledge and **compliance** to all dominions, municipalities, owners of mills located on the navigable rivers (Vltava and Elbe, from the Vyšší Brod to the border with Saxony) and to all factory owners, entrepreneurs and private individuals using any waterworks for their business. The Imperial Regional Authority has been ordered, that through all of its subordinate bodies, and namely according to **the Decree of January 28, 1815** through the imperial county commissioners and imperial engineers, it would start the strictest **supervision**, so that the millers and however called entrepreneurs could not implement any alterations to their waterworks, weirs, gates, culverts, etc., or could not increase the height of weirs and thresholds, as has been extensively quoted in the aforementioned basic standards. Otherwise, it will be immediately officially treated together with the building directorate according to the highest Edict from the year 1777, concerning the demolition of unauthorized structures and obstacles to the navigation. The culprit will be punished with the greatest rigor and will be immediately required to pay for the resulting costs and the implemented official act will be described in the detailed report sent to the Royal governorate.

The concerned **nobility authorities** will be required to accurately supervise the millers and owners of any waterworks and it will be up to the imperial office to track down their failures in this respect accordingly. Besides, it will be suggested to the authorities that each structural work at the river and in the river, whether it be a new construction or repair, must obtain gubernatorial permit beforehand and that must be without any exception, because even partial repairs of weirs or laying of thresholds, etc. may cause a change slightly disadvantageous for the navigation. In addition to that, any such construction or alteration will be henceforth strictly controlled by the Royal construction directorate and its subordinate officials, and may be handed over for the use only if the inspections carried out revealed that the structure or repairs are not harmful for the navigation.

If the concerned **local judge or juror** sees or learns that the miller or the owner of waterworks at the river or in the river has built a new structure or a facility, drive or insertion of thresholds, increased the height of weirs, etc., or has made any alteration and innovation at the river or in the river, they shall notify the regional office without delay and the construction will be

immediately suspended and the arbitrary building contractor will be penalized. The imperial authority is obliged to severely punish the local judge and juror who are late with notifying the regional office.

The imperial authority is obliged to report the current regulation in such a way that each municipality located at the navigable river and where the concerned municipal court is located, received **a printed circular specimen of the regional authority**, while simultaneously undertaking the measures and supervision that each miller located at the navigable river would receive one such specimen, which must be posted next to the mill regulations in his mill. This regulation will be also sent to carpenters, millers, construction foremen, masons and others, with a warning that they cannot make any construction or repair of this kind (under the sanctions of investigation of them being builders without the permission under the building code), unless they have an explicit permission from the governorate with a confirmed plan to carry out such construction or repair. The imperial authority has been ordered to report by the 30th day of the Imperial month whether the office did post the signs of the normal level at all mills, and if not, to report why this order has not been implemented. The governorate reserves the right to provide the office with accurate **drawings of each mill and other waterworks**, so that in the future it would not be easy to make alterations to these works and that the resulting deviations could be immediately detected.

Navigation guilds were abolished in 1783, which resulted in the freedom of navigation. That was clarified by the gubernatorial order of January 31, 1832, according to which *"navigation on the Vltava River is allowed to anyone who is equipped with a capable boat and obtains a permit drawn up by the provincial governorate."* This introduced navigation concessions similar to trade licensing and assessing the technical capacity of ships. The safety of navigation was also helped by the issue of navigation regulations by the police.[20]

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20 HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 56.

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Codex Jurix Municipalis Regni Bohemiae, Tomus III., Privilegia Regalium Civitatum Provincialium Annorum 1420-1526. Sbírka pramenů práva městského Království českého. Díl III., Privelegia královských měst venkovských z let 1420-1526, vydává Historický spolek v Praze, v Praze tiskem národní správy fy Dr. Edvuard Grégr a syn, 1948.

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From the development of the Czech technical work. A collection issued on the 75th anniversary of the founding the Association of the Czech Engineers in Prague, 1940, compiled by Ing. Josef B. Stránský.

Den 24. November 1762. Schifmeister sollen sich bei Wasserfahrten keiner den Trunkergebenen Leute bedienen (*Boatswains must not employ any persons suffering from alcoholism*), Verordnung Wien den 24. November 1762, Nro. 671 In: Sammlung aller k. k. Verordnungen und Gesetze vom Jahre 1740. bis 1780., die unter der Reierung des Kaisers Josephs des II. theils noch ganz bestehen, theils zum Theile abgeändert sind, als ein hilfs- und Ergänzungsbuch zu dem handbuche aller unter der Regierung des Kaisers Joseph des II. für die k. k. Erbländer ergangenen Verordnungen und Gesetze in einer chronologischen Ordnung. Vierter Band. Wien, verlegt bei Joh. Georg Mötzle k. k. priv. Buchhändler, 1786.

Den 15. Mai 1766. Tariffe der Wegtonner Wassermauth in Prag (*Rates of the Výtoň water toll in Prague*), Patent Böhmen betreffend vom 15. Mai 1766, Nro 843. In: Sammlung aller k. k. Verordnungen und Gesetze vom Jahre 1740. bis 1780., die unter der Reierung des Kaisers Josephs des II. theils noch ganz bestehen, theils zum Theile abgeändert sind, als ein hilfs- und Ergänzungsbuch zu dem handbuche aller unter der Regierung des Kaisers Joseph des II. für die k. k. Erbländer ergangenen Verordnungen und Gesetze in einer chronologischen Ordnung, Fünfter Band, verlegt bei Joh. Georg Mötzle k. k. priv. Buchhändler, Wien 1786.

Den 20. Jäner 1770. Schifffahrtordnung (*Shipping regulations*), Patent Wien 20. Jäner 1770, Nro. 1156. In: Sammlung aller k. k. Verordnungen und Gesetze vom Jahre 1740. bis 1780., die unter der Reierung des Kaisers Josephs des II. theils noch ganz bestehen, theils zum Theile abgeändert sind, als ein hilfs- und Ergänzungsbuch zu dem handbuche aller unter der Regierung des Kaisers Joseph des II. für die k. k. Erbländer ergangenen Verordnungen und Gesetze in einer chronologischen Ordnung, Sechster Band, verlegt bei Joh. Georg Mötzle k. k. priv. Buchhändler, Wien 1786.

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See the Regulation and Decree No. 45 of the Royal Governor in Bohemia dated March 27, 1845. The Building Code for towns, villages and countryside of the Czech Kingdom. As a result of the Supreme Decision of March 4, 1845, and with the repeal of the Building Code of May 17, 1833, the following Decree by the Court Chancellor dated March 8, 1845, generally prescribes the regulations concerning the construction in towns, villages and countryside and their exact compliance by the authorities and population. Annex II. Rules for the removal of obstacles to navigation. In: Fortseßung der ursprünglich vom hofsecretär Joseph Kropatschek später vom hofsecretär W. G. Goutta redigirten Sammlung der Geseße im politischen, Cameral- und Justizsache, welche unter der Regierung Seinen k. k. Majestät Ferdinand des I. in den sämmtlichen k. k. Staaten erlassen worden sind, in chronologischer Ordnung. Herausgegeben von Franz Xav. Pichl, Registratur-Directions-Adjuncten der k. k. vereinigten Hofkanzler. Ein und siebenzigster Band (sechs und vierzigster Fortseßungsband), welche die Geseße vom 1. Januar 1845 bis Ende December 1845 enthält Wien, 1847. BenBraunmüller und Seidel, k.k. Hofbuchhändler, Graben, Sparcasse.

Stigmata of the First Czechoslovak Republic

*Petr Beránek**

Abstract

The text addresses the complicated development of the young Czechoslovak state in the period between two world wars taking into account the issue of cohabitation of German minority and relations between Czechs and Slovaks, in particular.

Keywords: *Czechoslovakia; Treaty of Munich; Autonomy; Czechs and Slovaks; Germans in Czechoslovakia.*

Founding of Czechoslovakia

The Republic of Czechoslovakia was founded on the basis of soon-to-be-dead multinational Habsburg monarchy. Officially, it was founded on October 28th, 1918, when the National Committeepassed the Act on founding of the independent Czechoslovak State.[1] Passing of this Act was preceded by the takeover of Corn Warehouse in Prague aiming to prevent the export of Czech grain to the front while letting the domestic people dying from hunger. Subsequently, the Prague was flooded by the information that Minister of Foreign Affairs of Austro-Hungarian Empire, Guyla Andrássy, accepted the conditions for peace of the President of the United States, Woodrow Wilson, on October 27th, 1918. In Prague, this fact was interpreted as surrender and collapse of Austria-Hungary. In fact, Andrassy's declaration contained only promise of provision of autonomy to nations of Austria-Hungary, however, weaken monarchy was no more able to face the internal pressure and started to collapse finally.[2]

Coup d'etat itself did not end by declaration of the independent Czechoslovak State on October 28th, 1918. The day after, on October 29th, 1918, negotiations were held with the Austro-Hungarian governor in Prague, Julius Maximilian Coudenhove, on take-over of powers by the National Council. The very same day certain issues occurred, when the military garrison in Prague, (or, as the case may be, its pro-monarchy headquarters) tried to raise encounter with the National Council.[3] Even more serious problem occurred in the North and East of Bohemia, where local Germans founded "Deutschböhmen" and"Sudetenland" provinces.[4] In this way they tried to separate a part of the Czech historical territory and include it into so called German Austria ("Deutschösterreich"[5])as autonomous

* JUDr. Petr Beránek, Ph.D., Department of Legal History, Faculty of Law, University of West Bohemia, Pilsen, Czech Republic.

1 This Act was later published in the Collection of Acts under the No. 11/1918 Coll. Often it is denominated as take-over norm, as in its Articles 2 and 3 it stipulated that "*any and all actual state and national acts and regulations remain in legal force*" and "*any and all municipal, state and regional bodies, state, federal, regional and municipal in particular, are subordinated to the National Council and for the moment they act and work based on actual laws and regulations in force".* In this way the continuity of both legal order and public administration was preserved (in the preamble of the above cited act it is stated that "*… to keep the continuity or actual legal order with the new one, in the way not to create chaos and to regulate the undisturbed transfer to the new state life …)*. Author of the original wording was JUDr. Alois Rašín.

2 Point X. of conditions (of 14 in total) of the president Woodrow Wilson included the request that *„the maximum possibility of autonomous development shall be provided to the nations of Austria-Hungary, the place of which amongst other nations we would love to preserve and guarantee."* – SOVADINA, J.: Čtrnáct bodů prezidenta Wilsona (8. 1. 1918).*Moderní dějiny. Vzdělávací portál pro učitele, studenty a žáky.*[online]. (cit. November, 10th, 2011). <http://www.moderni-dejiny.cz/clanek-ctrnact-bodu-prezidenta-wilsona-8-1-1918-123>; Not even the Decree of Andrássy expressively speaks about the full independence when it say that *"In response to the decree of president Wilson from 18th day of this month sent to the government of Austria-Hungary and in line with the decision of presidents counterpart, to negotiate the issue of armistice and peace separately with Austria-Hungary, the government of Austria-Hungary is honored to be able to declare that it agrees with both this as well as previous speeches of Mr. president as well as with his opinion described in the last decree on rights of nations of Austria-Hungary as well as those of Yugoslavians."* – Decree of Andrássy (1918). *PhDr. Petr Just, Ph.D. Metropolitní univerzita Praha Fakulta sociálních věd Univerzity Karlovy.*[online]. (cit. November, 10th, 2011). *<http://www.just.wz.cz/view.php?cisloclanku=2005010151>*.

3 *"Member of the National Council informed colonel in duty Feigel by phone, that he is aware what is about to happen and that the Czech army is prepared and that if battle bursts out "you will be first to dies". Men from the military headquarters were not even able to assume, if such speech is realistic or not. They could not omit the fact that Romanian soldiers joined the Czechs and that the weights of powers on both sides is more than unsure. Maybe it was this assumption that lead to the stopping of military uprising halfway and that it was defeated by words and look on the prepared Czech army."* - PEROUTKA, F.: Budování státu 1. Československá politika v letech popřevratových. Praha : Fr. Borový, 1933, p. 138-139.

4 In more detailssee KLIMEK, A.: Velké dějiny zemí Koruny České. Svazek XIII. 1918-1929. Praha, Litomyšl : Paseka, 2000, p. 29 an.

5 During the existence of Austria-Hungary, this was unofficial denomination of Cisleithania, after the disintegration of Austria-Hungary it was used for certain period of time as denomination of territory items of the ex- Cisleithania with the dominance of German speaking inhabitants.

unit. However, the attempt of the Austrian headquarters in Prague to start riots was averted on October 30th, 1918, or, as the case may be, it was unsuccessful due to unwillingness of Hungarian and Romanian soldiers to fight. On the other hand, the crisis in the regions with strong German minority worsen – apart of "Deutschböhmen"and"Sudetenland" provinces already mentioned above, the "Deutschsüdmähren" province was founded on November 3rd, 1918, comprising German inhabitants living in Southern Moravia. In the Southern Bohemia the founding of regional unit called "Böhmerwaldgau" started.[6] As the representatives of German minority insisted on creation of own government and refused to become part of the Czechoslovak State during the negotiations with the National Committee, the negotiations failed. The reaction of Czechs on the failure of negotiations was rather clear from the declaration of Mr. A. Rašín (*„…there will be no negotiations with rebels."*[7]), however, e.g. Mr. E. Benešfrom Paris repeatedly asked Prague to act correctly andin forthcoming way towards Germans, to keep better negotiations position with powers of Triple Entente.[8]

Young Czechoslovakia reacted very quickly and rebelling German provinces on the historical territory of Czech lands were quickly and without major resistance controlled by the Czechoslovak army. This takeover of control was successfully finished in December 1918. Czechoslovakia considered, that as a winning state it is entitled, based on the conclusions of the agreement on armistice with Austria-Hungary, to take over the control over "*its recognized claimed territories if it is necessary to keep the order or execution of military operations*"[9] already before signing the peace treaty.The selected way of operation was indirectly approved also by the powers of Entente which, as least until the holding of the peace conference considered it necessary, that Czechoslovakia executes its sovereign power over the historical lands of Czech Crown.[10] In March 1919 the Czechoslovak government prevented the Czech Germans to participate in elections into the Austrian National Assembly. Some fights with the Czechoslovak army occurred in several places during which 52 Germans died and more than 100 of them were injured.[11] These sad events strongly influenced the relations between Czechs and Germans for a long time. On the peace conference in Paris held the very same year,the powers of Entente endorsed the existence of the Czechoslovak borders with Germany and Austria in the original historical borders, separatist attempts of Czech Germans were therefore refused. This happened mostly due to the economic, geographic, political, and security reasons.[12]

Nonetheless Czechoslovakia was successful in suppressing militarily the attempts of Czech Germans to break historical borders of Czech Lands; the situation remained chaotic in Slovakia, which officially joined Czechoslovakia on October 30th, 1918 on the basis of the so called Declaration from Martin.[13] By this document, the Slovak political representation joined the "linguistic and cultural-historical unique Czechoslovak nation", for which it asked the right for self-determination.[14] Realistically seeing however, Slovakia was still under influence of old power structures, gendarmerie, and army. The new Hungarian government of count MihályKároly, which took the power in Budapest on October 31st, 1918 immediately showed, it wishes to be considered the government of the whole actual Hungarian State, whereas it offered the autonomy for Slovakia to the Slovak National Council as the representative of the Slovak nation.[15] However, the Slovak National Council refused this offer and therefore it was clear, conflict will occur. Serious situation in Slovakia became also part of the program of the newly

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6 SLÁDEK, M.: Němci v Čechách. Německá menšina v českých zemích a Československu 1848-1946. Praha : PRAGMA, 2002, p. 27.

7 PEROUTKA, p. 187.

8 *"I would like to ask you to a) help Germans in the need with nutrition, as this is rather strongly asked from me here, b) help them with coal … At the same time it would make you look nice … However, it is definitely necessary to do something to show a good will to allies."* – in the same place, p. 196.

9 KLIMEK, p. 34

10 From the report of S. Pichon: *"The questions of the frontiers here at issue cannot be settled otherwise than by the Peace Conference, and for this purpose must be investigated by the Allied Governments at a very early date. The French Government, however, takes the view that the Czechoslovak State, in accordance with the recognition granted to it by the Allied Governments, must have as its frontiers, until the decision of the Peace Conference, the existing frontiers of the historical provinces of Bohemia, Moravia, and Austrian Silesia."* – see BENEŠ, E.: My War Memoirs. London : George Allen &Unwin Ltd, 1928, p. 482; However, this approval was only granted retrospectively to Czechoslovakia. *"CSR started to occupy the border territory as soon as it was possible with regard to the situation and state of military forces."* – KLIMEK, p. 35.

11 AUBRECHT, R.: Volby do rakouského národního shromáždění a 4. březen 1919. *Sokolovsko a vznik ČSR 1918-1921, část 3.*[online]. (cit. November, 10th, 2011).<*http://www.valka.cz/clanek_13303.html*>.

12 *"The Committee fully acknowledges that rather high number of Germans joined Czechoslovakia and this represented certain disadvantage for the future state. However, the Committee unanimously considers that separation of regions with German inhabitants from Czechoslovakia would only expose Czechoslovakia to even higher risk and would create big problems also for Germans themselves."* - SLÁDEK, p. 34; At the end, Czechoslovakia was able to reach confirmation of its original historical borders to which also parts of so called FeldsbererGebiet, WeitraerGebiet, Thaya triangle and Hlučín area were added. On the other hand it lost a part of Czieszin region, which were connected to Poland. Compare also: *"The Republic was also granted the control over historical Czech Lands (including Egerland), to which certain minor areas from Austria were added so called FeldsbererGebiet and WeitraerGebiet and Hlučín Region from Germany; furthermore Slovakia in borders as we know them today and Carpathian Ruthenia. Abolished was the proposal for corridor between CSR and Yugoslavia and the conference refused to consider the issues of Sorbs."* - KLIMEK, p. 64.

13 As stipulated by J. Měchýř – *"And that moment the history played one of its paradoxical jokes. Nonetheless its sounds incredibly, Slovak politics in Martin still did not know on October 30th, 1918 that Czechoslovakia already exists two days. At the same time Hungarian state and power apparatus in Slovakia still worked and almost nothing showed the possibility that the Austro-Hungarian monarchy is dead."* - MĚCHÝŘ, J.: Slovensko v Československu. Slovensko-české vztahy 1918-1991. Praha : Práce, 1991, p. 17.

14 Deklarácia slovenského národa (tzv. Martinská deklarácia, 1918). *PhDr. Petr Just, Ph.D. Metropolitní univerzita Praha Fakulta sociálních věd Univerzity Karlovy.*[online]. (cit. November, 10th, 2011). <*http://www.just.wz.cz/view.php?cisloclanku=2006071304*>; Srovnej takéKOVÁČ, D.: Dějiny Slovenska. Praha : Lidové noviny, 1998, p. 179-180.

15 For more details see KLIMEK, p. 36 an.

elected temporary National Assembly in Prague in its session in November and December 1918.

Czech army and gendarmerie was sent to Slovakia and thanks to diplomatic struggle the territory of Slovakia was steadily included into the newly founded State. However, Bolshevik revolution under the leadership of Béla Kun burst out in Hungary in spring 1919 and Hungarian Red Army was able to occupy almost one third of Slovak territory within rather short period of time from May to June 1919. Subsequently, Slovak Soviet Republic ("Slovenská republika rad") was declared in June 1919. However, after vehement ultimatum of Entente powers and after the intervention of the Czechoslovak army, Hungarian army vacated the occupied parts of Slovakia.[16] Therefore we can conclude that even before the signature of the Versailles Peace Treaty and other international acts having crucial importance for the existence of Czechoslovakia, the territory of Czech lands and Slovakia was under the sovereign administration of Czechoslovak bodies.

Final form of Czechoslovak borders was subsequently determined by the below mentioned documents:

- Versailles Peace Treaty of June 28th 1919 (borders between Czechoslovakia and Germany);
- Saint Germain Treaty of September 10th, 1919 (borders between Czechoslovakia and Austria, annexation of Carpathian Ruthenia to Czechoslovakia);
- Trianon Treaty of June 4th, 1920 and decision of the Supreme Council of June 12th, 1919 (borders between Czechoslovakia and Hungary);
- Decision of Council of Ambassadors of July 28th, 1920 on Cieszin Silesia, Orava, and Spiš (borders between Czechoslovakia and Poland);
- Sèvers Treaty of august 10th, 1920– non-ratified (borders between Czechoslovakia and Romania, documents the whole border line of Czechoslovakia).

With regard to the state form of Czechoslovak State, this was not completely clear in the moment of its founding. Act No. 11/1918 Coll., on founding of independent Czechoslovak State, in its Article 1 stipulated that *"State form of Czechoslovak State is to be determined by the National Assembly in cooperation with the Czechoslovak National Council in Paris."* Nonetheless, it resulted already during the negotiations of the delegation of the National Council leaded by K. Kramář and E.Beneš as the representative of the Czechoslovak National Council, held at the end of October in Genčve, the Czechoslovakia will be republic.[17] However we have to add, that even the temporary Constitution passed by the plenary session of the National Council on November 13th, 1918(Act No. 37/1918 Coll., on temporary Constitution), let the issue of the future state form of the Czechoslovak State rather open for potential change as it did not stipulate the state form of Czechoslovakia at all.[18]

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[16] However, Slovaks themselves paradoxically in some cases did not agree with the actions of Czechoslovak army (composed mostly of Czechs) when *"… Slovak nation provided in battle against Hungarian less support to Czech soldiers and government of Šrobár, than expected. In municipalities, where there were Hungarian priests in parish office – they number is assumed to be about 1 000 – the Czechoslovak army faced more or less distrust and disapproval. And Czechs, amongst whom there was rather high number of anti-clerical, enemies of Catholic Church, had no sensitive attitude to religious feelings of Slovak Catholics. There was too much distrust at the founding of CSR."* - MĚCHÝŘ, p. 25; However, we have to add, that *"Czechoslovak army was not able to face the pressure of Hungarians and again it was Beneš in Paris who had to intervene. He had to face the displeasure resulting from the adventurous acting of Czechoslovaks, nonetheless he was able to make Entente to issue the declaration first requesting Hungarians to stop their proceeding. Béla Kun, leader of Hungarian Soviets reacted by instruction to found the Slovak Soviet Republic immediately […] Czechoslovakia made counter-steps. It reorganized the army […] As late as sever standpoint of diplomacy in Paris brought everything to an end: armistice was executed and Red Army had to vacate Slovakia by July 5th, 1919. Two days later the Czechoslovak army finished the take-over of the territory."* – KÁRNÍK, Z.: České země v éře první republiky (1918-1938). Díl první. Vznik, budování a zlatá léta republiky (1918-1929). Praha : Libri, 2003, p. 47; However, forcing Hungarian out from Slovakia had crucial impact on later relations between Czechoslovakia and Hungary. During the whole intra-war period Hungary acted as enemy of Czechoslovakia and tried to reach revision of agreements. Still after the World War II in October 1947 while execution the ratification of Czechoslovak-Hungarian Peace Treaty by the Czechoslovak National Assembly (NA), we could hear the following: *"Amongst of all the peace treaties it is the peace treaty with Hungary that interests our people most. It is our neighbor and we would like to live with it in peace in the time of peace and calm. For reach this, however, it is necessary: that Hungary proves that it really started its way of real democracy and that it seeks good relations with its neighbors as well as to Czechoslovakia. Here we have to wait for acts. Words are not enough for us, as the hundreds of years of our history show us that Hungarians always were and unfortunately still are enemies of our state. We are and will be to believe them, but only acts can convince us about it. (Applause.) It is necessary that Hungarians show us that they interrupted any and all relations with the Hungarian foreign propaganda, with Hungarian reaction, and Hungarian revisionism, which still actively works abroad and not long time ago still had connections and relations with home. We ask Hungary to stop any and all revisionism and that it keeps all its obligations arising from the peace treaty. Our state and our government have certain understandings for all troubles and submitted objections of Hungarian government. We made certain compromises, deadline was extended, limits have been decreased, but Hungarians shall not understand this compromises and our good will as our weakness. (Applause.) If Hungary shows a good will, we will certainly be willing to cooperate."* – Stenographic protocols (74th meeting, Wednesday, October 1st, 1947). *Digitální repozitář. Společná česko-slovenská digitální parlamentní knihovna. Ústavodárné Národní shromáždění republiky Československé 1946-1948.*[online]. (cit. November, 10th, 2011). <http://www.psp.cz/eknih/1946uns/stenprot/074schuz/s074004.htm>; Therefore it is clear that Hungarian revisionism was not completely dead not even after the World War II; About the peace treaty with Hungary see e.g.: ŠTĚPÁN, M.: 10. února 1947 – podepsána československo-maďarská mírová smlouva. *Svornost. Ubiestconcordiaibiestvictoria.* [online]. (cit. November, 10th, 2011).<http://www.svornost.com/2010/02/kalendarium-10-unora-1946-%E2%80%93-podepsana-ceskoslovensko-madarska-mirova-smlouva>.

[17] Compare: PEROUTKA, p. 227 an.; BĚLINA, P. A KOLEKTIV: Dějiny zemí Koruny České II. Praha : Paseka, 1992, p. 158; PEJŘIMOVSKÝ, J.: Sesazení Habsburků a vyhlášení republiky. *Kruh přátel blahoslaveného Karla I. stránky o historii, politice, morálce, náboženství, modlitbě a rodině.*[online]. (cit. November, 10th, 2011).<http://mariaterez.sweb.cz/i034.html>.

[18] Nonetheless expressive provision regarding the state form of Czechoslovakia was missing. Its republican form arose amongst other things from provision of Section 13 of the Temporary Constitution, which stipulates that *"Judgments and findings of courts are issued in the name of the republic."* For certain part of politics however, it resulted from the provision of Section 7 which stipulates that *"Office of the president shall last until the moment, when the new head of state will be elected based on the final Constitution."* that the republic form of the state is still temporary – see MALÝ, K.: Dějiny českého

The same as certain other newly founded Central-European States, also Czechoslovakia was composed of several territorial units with different developments from the point of view of law and legal order. In the case of Czechoslovakia we speak about the state, in which legal dualism actually existed.[19] Czech historical lands, as the actual part of the so called Cisleithania, took over, as stipulated by Article 2 of the act no. 11/1918 Coll., the actual Austrian written law, whereas Slovakia and Carpathian Ruthenia as previous parts of Hungarian Kingdom (Transleithania) took over the Hungarian common law system. On July 30th, 1919 already, Ministry for unification of law and organization of administration (Ministry of unifications) was founded in Prague based on the Act No. 431/1919 Coll., on the office on unification of law and organization of administration. It existence was planned as temporary, whereas after unification of law and administration in Czechoslovakia, it ought to be cancelled.[20] However, the struggle for unification was not successful during the interwar era, and the unification was successful only in the case of unification of public administration organization (Act No. 125/1927 Sb., on organization of public administration).[21]

Slovakia on second track

Nonetheless Czechoslovakia was declared as the State of Czechs and Slovaks, we can doubt if this "resolution" of founders of the Czechoslovakia was really fulfilled.[22] During the first years after the revolution Slovaks were thankful for the help of Czech officers, teachers, gendarmes, and professionals, without whom it was impossible to imagine the consolidation and calming of economic, political, and public life in Slovakia. However, the softly-softly attitude of Czechs did not change too much even in the time, when the generation of people with university education or other professionally educated persons grew up in Slovakia, which was able to start to take care of the tasks actually entrusted to Czechs itself.[23] Slovaks steadily developed into independent nation; however, the majority of Czechs was not able to recognize this fact in time and Prague still tended to view Slovakia as baby which needs to be lead and checked and who shall not make anything by its own, unless previously passed or approved.[24] It is more than apparent, that after the consolidation of situation in Czechoslovakia and the first emancipation of Slovak nation during the 1920s, there was ideal time for the Czech political representation to express its good will and make certain compromises towards Slovaks, or, as the case may be, to open the discussion on potentially more just state arrangement of the Czechoslovak State. Maybe the Czech political representatives were discouraged to do this step due to the fear that

18 cont. a československého práva do roku 1945. Praha : Linde, 1999, p. 273; Compare also: *"Only Kramář, amongst all the other Czech delegates in Genčve, declared himself as supporter of monarchy. Nonetheless the Russian dynasty was already dispersed, he would like to see some of its grand-duchesses on the Czech throne, also due to the fact that he expected the soon-to-come revival of Russia and wanted to prepare the best relations with it. He described his ideal of democratic kingdom based on English example. However, he soon submitted to the majority. Other delegates accepted the opinion of the foreign resistance and declared their will to found the republic."* – PEROUTKA, p. 228; However, republican form of the state was never disputed later and the Constitutional Deed of 1920 introduced by the Act No. 121/1920 Coll. stipulated in provision of Section 2 clearly that *"Czechoslovak State is democratic republic, the head of which is elected president."*

19 In the time period from January 1920 until May 1st, 1921, we can speak about legal trialism as in the area of Hlučín region connected to Czechoslovakia from Prussian Silesia the Prussian law applied. Just for comparison, Poland was in even more complicated situation as it had to cope with Prussian, Austrian, Russian and French legal system.

20 It was cancelled on December 11st, 1938 however not thanks to the successful termination of unification of Czechoslovak law, but due to the events after the Munich crisis. The Ministry of unification was renewed in the 1946 and cancelled by the government regulation No. 159/1950 Coll. of December 19th, 1950, by which the number and scope of the individual Ministries was changed. At that moment however the unification was already successfully finished in all branches of law, except of the labor law.

21 Based on this Act, four regions were founded in Czechoslovakia – Czech, Moravia-Silesia, Slovak, and Carpathian Ruthenia. The individual regional office were founded (with 120, 60, 54, and 18 members), regional committees (executive bodies of the regional offices, in all cases 12 members) and offices of regional presidents (regional presidents were nominated by the President of the republic and were submitted to the Ministry of Internal Affairs).

22 Certain issue at the beginning of the common state was represented by rather low numbers of Slovak representatives present in the NA called based on temporary Constitution (Act No. 37/1918 Coll.). This NA was founded by changing the actual National Council and extended based on so called "Švehla's key" (results from the last elections to the Empire Assembly of 1911 were taken into account). Of total of 256 representatives, Slovaks had only 40, whereas some of them could not even participate on negotiations held in Prague as they dealt with acute issues of Slovakia connected with the complicated political situation on place. Certain Slovak mandates were also held b Czechs. Compare: *"As there were not established political parties in Slovakia and division from 1911 could not be used, Slovaks were considered unique political organization while dividing the mandates. Mandates were provided to those Slovaks, who were determined by Slovak leaders cooperating with Prague at that time, Šrobár in particular. Also some Czech received Slovak mandates, known as promoters of Czechoslovak unity (e.g. professor of literature Jaroslav Vlček, engineer Záruba-Pfeffermann), and later also some Czech political persons, who were not members of any Czech political party and belonged to the Assembly due to their importance (dr. Eduard Beneš, dr. Alice Masaryková). Slovak mandates were therefore used as reward or as solution of tricky situations. This is the proof of the fact that the Slovak political situation was not considered sufficiently developed. Otherwise no one would dare to act like this."* – PEROUTKA, p. 261-262; The number of Slovak representatives was increased by 14 based on amendment of Temporary Constitution of spring 1919 (see Act No. 138/1919 Coll., by which the Section 1 of the Act of November 11th, 1918, No. 37 Coll., on temporary constitution) was changed; therefore later the National Assembly had 270 representatives in total.

23 In the period of years 1910-1930 the number of Czechs in Slovakia increased more than ten times – *"Meanwhile at the last Hungarian census in 1910 there were only 7 556 Czechs in the northern regions only partially corresponding to the territory of Slovakia, in the 1921 there were already 71 733 Czechs and in the 1930 their numbers increased to 120 926."* – RYCHLÍK, J.: Češi na Slovensku 1918-1938. *Obnova.sk. Pamiatky, remeslá a zbierky.*[online]. (cit. November, 10th, 2011).<http://www.obnova.sk/clanok-1487.html&mode=thread&order=0&thold=0>.

24 Compare: *"Czechs demonstrated inappropriate paternalism against Slovaks nonetheless it was based only on sincere effort to help younger brother. This was also demonstrated in the refusal of Slovak autonomy movement. M. Hodža e.g. proposed to call the Slovak Assembly which would declare Czechoslovak state unity and its members would be members of Central parliament. However, this proposal was refused by A. Rašín due to centralism of the state."* - KLIMEK, p. 37.

Slovak autonomy would support and inspire Czech Germans to call for their own rights more strongly.[25] Therefore it systematically and for long time refused Slovak requests, whereas it rigidly stand on its Czechoslovak concept and refused to admit that Slovaks are full and independent nation.[26] Therefore, during the era of the first Czechoslovak republic the Czech politics was not able to overcome the fiction of Czechoslovak nation and acknowledge the independence of Slovak nation on political arena.[27] This negligible potential of empathy of Czech politics was more and more viewed as demonstration of superiority and arrogance in Slovakia, mostly by the politics and voters of Hlinkova slovenská ľudová strana (HSĽS – Hlinka's Slovak Popular Party). This fact steadily developed into anti-Czech attitude in many Slovaks.[28]

Imbalance of Czechs' attitude towards Slovaks demonstrated amongst other things also on government level. Slovaks usually occupied only 2 or 3 ministries in the governments of the first Czechoslovak republic, which was at least one place less than adequate with regard to the number of Slovak inhabitants.[29] Crucial ministries (Ministry of Foreign Affairs, Ministry of Defense or Ministry of Internal Affairs) were granted to Slovaks only exceptionally or not at all. The post of prime minister was granted to Slovak hands in the 1935 for the first time when Milan Hodža became prime minister. The representation of Slovaks in central bodies was very low. *"As counted by members of Popular Party in the 1936 (and the office of the president of the republic in the 1934), of the total of 10825 officers or clerks positions, Slovak had only 123 or even less […], i.e. a bit more than 1 %."*[30] It results from this data that participation of Slovaks was, at least on the level of central bodies, definitely insufficient.

Disputes between Czechs and Slovaks existed also in the language issues. Based on Constitutional Deed of 1920, the official language in Czechoslovakia was "Czechoslovak language", which was merely a fiction; however it was to be understood as Czech or Slovak, i.e. languages of both branches of "Czechoslovak nation", Czechs and Slovaks.[31] In reality however, Czech language dominated in many Slovak offices, as incoming Czech officers simply used Czech as their mother tongue.

If we will have a look on the cohabitation of Czechs and Slovaks from economical point of view, Slovakia remained in the

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[25] E.g. already in the 1921 V. Tuka elaborated based on proposal of A. Hlinka denominated "Proposal of federative deed of the Czechoslovak Federative Republic" (so called Tuka's Constitution). This document was submitted to the Chamber of representatives on January 22nd, 1922, but this one did not discuss it. For more details see SLUŠNÝ, J. (ed.): Obraz slovenských dejín. *Zborník dokumentov k dejinám Slovenska a Slovákov (2).* Praha : 2008, p. 140 an. [online]. (cit. November, 10th, 2011). <http://slusny.aspone.cz/default.aspx?pg=0ef2b0fb-c936-473a-aa14-91666028314d>; Great affair was stared in January 1928 due to other Tuka's activity – in the *Slovák* newspaper there was an article published on January 1st, 1928 under the name "The tenth anniversary of Declaration of Martin", which informed about alleged secret provision, from which it should result the connection of Slovakia to Czechoslovakia for trial period of 10 years. Therefore, on October 30th 1928 Slovakia ceased to be part of Czechoslovakia if the supreme representatives do not decide otherwise. Due to this Tuka was accused of high treason and espionage for the benefit of Hungary and on October 5th, 1928 Tuka was sentenced to 15 years of prison. For more details see KOVÁČ, p. 192; To this theme compare: *"When we read the declaration of Slovak nation of October 30th, 1918, we can hardly imagine that some precise amendment is passed based on such vague document – there is not a word about the Czechoslovakia in that document."* - MĚCHÝŘ, p. 41; Compare also opinion of S. Falťan on the situation in Czechoslovakia in 1919, after departure of the leader of Popular Party, A. Hlinka, to Paris, where he fought for the autonomy of Slovakia: *"Also international respect played its role here, as Polish and Hungarians led furious campaign against Czechoslovakia during the peace conference. Therefore the actual Slovak issue in Czechoslovakia remained rather unspoken."* - FALŤAN, S.: Slovenská otázka v Československu. Bratislava : Vydavateľstvo politickej literatúry, 1968, p. 68; To make the picture complete, we have to add that Hlinka's desperate "Paris trial" was unsuccessful and Hlinka was arrested, investigated and later interned due to it after his return. Compare: *"Illegal actions of the representative of RNS finished in general catastrophe. The Supreme Committee did not accept it at all and based on intervention of ŠtefanOsuský (Beneš was absent) the delegation was banned from Paris, Czechoslovak government declared that such act is in breach with mandate of a representative, and Slovak club of the Assembly clearly refused Hlinka …"* – KÁRNÍK, České země v éře první republiky (1918-1938). Díl první, p. 78-79; ČAPKA, F.: Dějiny zemí Koruny české v datech. XI. Léta první i druhé republiky a protektorátu. *Nakladatelství Libri.* [online]. (cit. November, 10th, 2011). Label "8. října". <http://www.libri.cz/databaze/dejiny/text/t89.html>.

[26] Compare: *"However, the official Czech policy did not take these changes into consideration and stood on Czechoslovakism i.e. on the theory of one single Czechoslovak nation."*- KAPLAN, K.: Pravda o Československu 1945-1948. Praha : Panorama, 1990, p. 159; Convinced advocates of the theory of single Czechoslovak nations were amongst others also the first and the second president of Czechoslovakia, T. G. Masaryk and E. Beneš.

[27] F. Peroutka justified the refusal of Slovak autonomy as follows: *"Autonomy cannot be granted until at least one elections prove that the citizens are able to send majority loyal to its own state to its assembly. We have seen however how Slovaks themselves fear their own Slovak Assembly …"* – PEROUTKA, F.: Budování státu 3. Rok 1920. Praha : Fr. Borový, 1936, p. 1605.

[28] Warning from haughty attitude of Czechs against Slovaks is clear from words of F. X. Šalda*: "Nothing would be more fatal than if Czechs would like to play the role of some cultural colonizers in Slovakia or promotes of culture. Slovakia is old cultural land – its visual popular culture for example is absolutely unique in the whole Europe, there is nothing comparable to it, and its intelligence is not worse than our own. It is rather the other way round. And I would understand of Slovaks would be offended by such attitude. I would like to stress to all those who are in Slovakia that they enter the land consecrated by big creation, struggle, work, heroism of the past and presence, and that they should rather follows and learn and follow than teach and repair. We have to enter with our heads uncovered into the land of Hviezdoslav and Štefánik. And we shall speak in whisper. Due to the respect to all those dead heroes, who came from this country to let our own land grow in time of our misery. If we realize this clearly, we will understand that if we give anything to Slovakia today, we pay our very old and very big debt. Afterward, we will be equal."*– ŠALDA, F. X.: Kritické projevy 11. 1919-1921. Praha : Československý spisovatel, 1959, p. 160-161.

[29] This data to certain extent corresponds to the e.g. information deduces from Beneš's memories V. Šrobár – Slovaks should have 4 Ministers in the government based on the agreement of Genčve (Štefánik, Ivanka, Hodža and Šrobár). For more details see ŠROBÁR, V.: Oslobodené Slovensko. Pamäti z rokov 1918-1920. Zväzok prvý., Praha : Čin, 1928, p. 215 an.

[30] KÁRNÍK, Z.: České země v éře první republiky (1918-1938). Díl druhý. Československo a české země v krizi a v ohrožení (1930-1935)., Praha : Libri, 2002, p. 174.

[31] E.g. pursuant to the Act No. 139/1919 coll., on publication of Acts and regulations, Acts were published in Czech and subsequently they were officially translated into Slovak. Amendment introduced by the Act No. 500/1921 Coll. already speaks about "Czechoslovak language"; *"Czech and Slovak version of the official language shall be considered equal."* - KLIMEK, p. 148.

period between the word wars in comparison with the Czech territories very underdeveloped with regard to the industry and the economy relied mostly on agriculture. Slovakia was strongly hit by the economic crisis in 1921-1923. "*Meanwhile in the Czech Lands it leaded to the rationalization of production, in Slovakia certain industries almost ceased to exist. As only few branches existed here including the whole production process up to the final product, the interruption of business with Hungary influenced local businesses much more than production plants in Czech lands which lost their markets in the exmonarchy.*"[32] Processing industry was underdeveloped and therefore Slovakia played the role of raw material basis for the Czech lands. Similar applies also for the working power – Slovaks very often left to work in Czech Lands, namely to less qualified positions, generally as workers or laborers. This caused also certain social friction as Slovaks were willing to work for less and work more than Czechs.[33]

The above mentioned summary is not very positive for Czechs. However, we cannot interpret these facts independently and in negative view without further consideration of also other parts of the cohabitation of Czechs and Slovaks. In the inter-war period Czechs significantly contributed to the both cultural and political development of Slovakia.[34] Cohabitation with Czechs, with their culturally and democratically more developed society represented a drive and possibility for free demonstration of national identity in all aspects of life for Slovaks. Therefore we have to mention, that nonetheless many issues existed mostly in political level, cohabitation with Czech had reviving and positive impacts on Slovak nation. Anything similar would be impossible in Hungary. This unexpected level of Slovak revival however collided in certain extent with the concept of unique Czechoslovak nation, as it reinforced and profiled Slovak nation, and not Czechoslovak one.[35]

Finally, in the inter-war period the above mentioned resulted into situation, when our parliament democracy so often and pompously used to describe Czechoslovakia in this period, systematically suppressed and frustrated the struggle of emancipating Slovaks to reach autonomy which is in contradiction to democraticprinciples. However, due to this rather risky play of Czech political elites Czechoslovakia steadily lost its support from Slovaks. Logically, they turned towards an alternative promising independence, acknowledgement and future to Slovaks -i.e. mostly to Slovak members of Popular Party under the leadership of A. Hlinka. His successor, J. Tiso, gained the autonomy for Slovakia. Moreover, the gaining of autonomy became only a starting point for other base – full Slovak independence, nonetheless it was not planned originally. Under the influence of the geopolitical situation in the Central Europe at the end of 1930s this because a fact (independent Slovak republic was founded under the pressure of Germany on March 14th, 1939).[36]

Curse of the first Czechoslovak republic – national minorities

As already revealed above, Czechoslovakia was founded on ruins of Habsburg monarchy. This disappearing state unit was famous thanks to its multinationality and Czechoslovak Republic smoothly took this tradition over. Beside Czechs and Slovaks Germans, Hungarians, Polish, Rausens, Jews, and several other minor other national or ethnical minorities used to live in Czechoslovakia. The most significant was the ration of ethical Germans who e.g. based on the results of census in 1921 formed almost one third of inhabitants of historical Czech Lands (more than 3 million people) and exceeded therefore the number of inhabitants registered as Slovaks (or as the case may be Slovak branch of Czechoslovak nation)[37]).[38] *"Hungarians, and Germans, in particular, who exceeded the Slovaks in number in the*

[32] KÁRNÍK, České země v éře první republiky (1918-1938). Díl druhý, p. 42.

[33] Compare: *"The more east you went, the more agrarian was the character of the state. At the same time starting from Slovak borders the underdevelopment was more and more apparent and economic performance decreased as well as quality of roads, electrification, etc."* - KLIMEK, p. 95.

[34] S. Falťan say to this: *"…Czechoslovakism – Czech chauvinism was the same enemy due to its negation of existence of Slovak nation as the Hungarian chauvinism before 1918. However, to the contrary of the Hungarian chauvinism which deprived us of both (national) freedom as well as civil democracy, Czechoslovakism offered civil (bourgeois) democracy and this very condition in cooperation with Czech progressive powers in Slovakia supported also quick development of national life. Principles of democracy were more developed in the Czech society as well as in the Czech political structure. State relationship with the Czech nation and help of its progressive and revolutionary powers helped to create basis and hope of potential state idea of Czechoslovakia based on equality. Nonetheless all the negative sides, especially in the national issue, the cohabitance in one state brought also items of democracy and progress into Slovak society as well as the opposite of the Czechoslovakism – quick development of the national self-confidence."* - FALŤAN, Slovenská otázka v Československu, p. 87.

[35] Slovak Revival demonstrated amongst other things also in spread of education in Slovakia, should, according to the advocates of the idea of unique Czechoslovak nation, help to its consolidation. In fact it helped to strengthening of the national perception of Slovak independent nation. Compare with the opinion of A. Pražák, who was not very inclined to this development: *"Hungarian framework was cancelled, however in Slovak mentality remained the hypertrophic cult of provisialism, Slovak language, Slovak nationality, and it was not able to align with the new state framework. Hungarians, who discovered this Slovak inclination towards provincial specifics, supported Slovak nationalism and refusal of everything not coming directly from Slovak territory and not speaking the local language in such a way that in general public they created certain form of xenophobia against any and all non-domestic elements and this xenophobia turned mostly against the Czechs who moved into Slovakia after the revolution. […] Slovak old fashioned nationalism constantly fighting against someone else and some leader change its direction in these circumstances and as it worked against Hungarians before, now it starts to demonstrate against Czechs."* – PRAŽÁK, A.: Češi a Slováci. Praha : Státní nakladatelství, 1929, p. 182.

[36] *"Slovaks proved what the modern nations can do while growing: they used their rights with vigor that nations already using their rights for centuries can only admire."* – KÁRNÍK, České země v éře první republiky (1918-1938). Díl druhý, p. 182.

[37] Certain traces of concept of the unique Czechoslovak nation (theory of Czechoslovakism), i.e. of the idea that Czechs and Slovaks are the only one nation speaking two different dialects of the Slavic language can be traced back to e.g. effort of F. Palacký on the session of Constitutional Assembly in Kroměříž in January 1849, when Palacký spoke about the need to create 8 territorial units within Austria-Hungary, one of which (denominated "Czech lands") included also territory of Slovakia. Majority of then Constitutional Committee considered this request as *"illusory and fantastic"* – see KOŘALKA, J.: František Palacký (1798-1876). Životopis. Praha : Argo, 1998, p. 313-314; URBAN, O.: Česká společnost 1848-1918. Praha : Svoboda,

new State, were considered national minority."[39]

Czech became rulers in their own state after almost three hundreds of years of German dominance and Slovaks were in such situation for the first time ever.[40] However, such change did not only bring advantages, as Czechs in particular felt chosen to change roles with Germans and rule them.[41] On one hand such attitude is understandable, Czechs and Slovaks after long struggle gained what they deserved; however, on the other hand this attitude was dangerous and based very instable situation for integrity and compactness of the Czechoslovak State, in which part of citizens started to lose (or even worse never felt) sense of belonging to this state and steadily started to look over the Czechoslovak borders where they searched "their own kind", or as the case may be, stared to incline towards revisionism. The possibility of cooperation between Czechs and Germans was e.g. weakened already by passing the Act No. 122/1920 Coll. (so called "Act on language") which stipulated in its Section 1 that the state language in Czechoslovakia is the "Czechoslovak language".[42]

Nonetheless, Czechoslovakia was democratic state, this democracy was not very included towards the political cooperation with ethnic minorities. After all, similar attitude was and is usual in the case of many other nations liberated from the foreign dominance – it is usually characterized by certain intoxication by victory.[43] Absolute majority of political parties in Czechoslovakia was organized on national basis and cooperation between Czech and Slovak political parties on one side and German, Hungarian or Polish parties on the other side was often very problematic. This resulted into situation, when these parties searched for support elsewhere – in Berlin, Budapest or Warsaw. As demonstrated later, this "over-border cooperation" had fatal consequences for Czechoslovakia in late 1930s. The fear of the Czech political representation from potential increase of German influence in Czech Lands fully demonstrated rather soon after the founding of the independent state in connection with the necessity to re-organize the system of public administration in Czechoslovakia. Nonetheless the National Assembly passed the Act Mo. 126/1920 Coll., on establishment of regional and district bodies in the Czechoslovak republic (Regional act) on February 29th, 1920, it never enter into force for the Czech lands.[44] Part of Czech politics (and of course also of the Czech public) strongly criticized the fact that within historical Czech Lands some regions should have been founded having German majority (e.g. Karlovy Vary or Česká Lípa). At the end this was one of reasons, why the Regional Act was not successful in Czech lands and administrative reform from the 1927 (executed based on so called organizational act No. 125/1927 Coll.) preferred the division into lands.

Inability of Czechoslovak State to integrate minority nations successfully into the administrative and political life of Czechoslovakia, or, as the case may be, fear to concede greater share on power in the state to these nations leaded in 1930s to their radicalization supported also by the impacts of the Great Economic Crisis and non-democratic development in the

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[37 cont.] 1982, p. 75; However the theory of Czechoslovakism helped a lot at the end of the World War I when it was used by T. G. Masaryk, E. Beneš and other representative of the idea of the independent Czechoslovak state as one of arguments against the winning powers why common state of Czechs and Slovaks should be founded (e.g. it was important argument for separation of Slovak territory from the mother Hungary and its connection with Czech Lands). However, certain Slovak authors mean, that this fiction on unique Czechoslovak nation was rather misused to enforce the power and political dominance of Czechs in Slovakia. Compare e.g.: *"Masaryk did not consider the Czecho-Slovak cohabitance as proceed of common life of Czech and Slovak nations. He considered it the tool for return (inclusion) of Slovaks into the arms of Czech nation as he refused the idea of existence of Slovak nation. Masaryk did everything to inform about string hungarization of Slovaks both abroad as well as at home in Bohemia, but not for the benefit of Slovaks as a nation. He was interested, as he wrote in 1904 to the Naše doba newspaper, in one quarter of our nation living under foreign rulers..."* - FALŤAN, Slovenská otázka v Československu, p. 74.

[38] Number of inhabitants with Slovak nationality based on the data available in the 1921 was 1 976 824, Germans were 3 195 820 – for more details see Historická statistická ročenka ČSSR. Federální statistický úřad. Praha : SNTL, 1986, p. 826.

[39] Ukončené vědecké projekty – archiv - RM 04/01/10. Politika československých vlád vůči národnostním menšinám 1918-1938. *Ministerstvo zahraničních věcí.* [online]. (cit. November, 10th, 2011). <http://www.mzv.cz/public/7/af/f/637455_546714_NAR_MENS_MONOGR_20_stran.pdf>.

[40] However, the concept of common State of Czechs and Slovaks suffered from the apparent dominance of Czechs to which Slovaks could hardly resist either from historical reasons or due to the absence of educated masses. *"...by founding of Czechoslovakia, everything Czech changed into Czechoslovak but it mostly remained Czech. The new State was presented as renewed referring formally to the Czech statehood as its historical basis. References to revenge for the Bílá Hora battle and other similar examples from the history connected with Husites movement or national renaissance were comprehensible only for the Czech public. Slovak character was completely lost in this attitude."* – in the same place.

[41] This issue was accurately described by K. Krofta: *"Czechoslovak Republic and its state system – I could certainly say in my lecture in May – is the result of work of Czech and Slovak citizens done without the presence and almost against the will of its German inhabitants. Both the previous Czech State as well as the Czechoslovak republic based on its roots was founded by Czechs nonetheless with the help of their Slovak brothers, who were separated from the common national tribe for centuries. And similarly as the ancient Czech State, which was nonetheless many German influences present in it, basically State of Czech nation, expression of its will and tool for the execution of its historical mission, also Czechoslovak Republic has such importance for the Czechoslovak nation. Created by member of Czechoslovak nation, based on their will and work, their merits and sacrifice, according to their dreams and ideas, it is basically founded to make them possible to life full national life."* – KROFTA, K.: Němci v československém státě. Praha : Orbis, 1937, p. 7.

[42] *"...Czechs who were certainly against the introduction of official language in the pre-war Austria, immediately found this necessity out in their own state."* - SLÁDEK, Němci v Čechách. Německá menšina v českých zemích a Československu 1848-1946, p. 45; provision of Section 2 of the Act No. 122/1920 Coll. only permitted to use the language of the national minority in the official contact if such minority represented at least 20 % in the respective territory.

[43] Compare e.g.: *"The bad manners displayed by the Czechs in the days of their triumph were unfortunate but not very different from those of other liberated nations in comparable circumstances."*– WISKEMANN, E.: Czechs and Germans. A study of the struggle in the historic provinces of Bohemia and Moravia. London, New York, Toronto : Oxford University Press, 1938, p. 118-119.

[44] German majority in certain regions would represent not negligible gander to the territorial integrity of the State and the enforcement of the regional act in the Czech Lands would therefore weaken the Czecho-Slovak principle of the common state, so attentively followed by its creators under the leadership of Masaryk and Beneš. Regional Act No. 126/1920 Coll. therefore entered into legal force only in Slovakia namely as to January 1st, 1923.

neighbor states. Results of the elections into the national Assembly in 1935 were certainly a shock and cold shower for supported of Czechoslovakia as the State of Czechs and Slovaks, as the absolute majority of votes (approx 15.2 %) was gained by the Sudeten-German Party (SudetendeutchePartei- SdP) under the leadership of KonradHenlein, which never pretended to be a friend of Czechoslovakia.[45] Nonetheless Henlein's party was not part of government after elections, their success in elections marked the start of the last battle of the first Czechoslovak republic, battle for existence or non-existence of the independent state.[46]

Way to Munich

When the Nazi army marched into the demilitarized Rhineland on March 7th, 1936 and occupied it, France and Great Britain were only able to issue a verbal protest. In fact in such case they could, based on so called Rhineland Guarantee Pact forming integral part of Treaties from Locarno, enter into war with Germany immediately.[47] Hitler himself was surprised by the smoothness of the operation and confirmed that France and Great Britain are not willing to fight. At the same time, he found out they are really afraid of him. Policy of British-French appeasement was definitely confirmed after weak reaction of these countries to Anschluss of Austria in March 1938. Western democracies acknowledged the Anschluss after purely formal protests, and tried to calm themselves by the idea that in this case it was just the enforcement of right on self-determination of nations. The fact that the inclusion of Austria into the Reich evidently represented the breach of Section 80 of the Versailles Treaty was omitted based on superior principle.[48] However, for Czechoslovakia, the Anschluss of Austria represented immediate danger. Its borders with Germany extended to amazing 2 100 km and the historical Czech Lands became a headland encircled by Nazi Germany from three sides.[49] Minister of Foreign Affairs of Czechoslovakia, K. Krofta, noted to the Anschluss of Austria: *"Anschluss is acid test for the future of our state."*[50]

After partial mobilization of Czechoslovak army in May 1938 which represented amongst other things a reaction to alleged concentration of German army on Czechoslovak borders and increased activity and aggression of German paramilitary troops in Czech borderland, France and Great Britain feared that war could burst out soon in the Central Europe and they could become a part of it. E.g. Britain notified France that it is prepared to provide any and all support, if France will be attacked by Germany. However, if France makes any military steps to support Czechoslovakia before German aggression against France, it cannot rely on British help. French and British opinions regarding the "support" for Czechoslovakia soon aligned. It resulted into very simple conclusion – "*… no war, peace solution to the detriment of Czechoslovakia, conflict would only help Moscow*."[51] Really strange way of acting, in particular on the side of France, which was bound to provide help to Czechoslovakia in the case of aggression based on ally agreement from the 1923…

When the Sudetenland crisis fully burst out in summer 1938 (for the detailed analysis of which there is not enough space in this article, unfortunately) and the requests of Sudeten-Germans, or, as the case may be of the SdP Party against the Czechoslovak government became more and more unacceptable and started to put in danger the very sovereignty of Czechoslovakia, also fears of France and Britain increased. They constantly made pressure on Czechoslovakia to make compromises under the threat of revision of ally obligations.[52] Lord Runciman mission sent to Czechoslovakia on August 3rd, 1938 should have mediated the negotiations between SdP Party and Czechoslovak government. With regard to the above mentioned facts however, it was clear that the aim of this mission was not to save Czechoslovakia but to prevent the burst out of war of which France and Britain could became a part. It is rather paradoxical, that Lord Runciman mission failed not due to resistance on the side of Czechoslovak representatives but on the unwillingness of the SdP Party to accept the very offer it

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[45] Compare e.g. Volby do Poslanecké sněmovny Národního shromáždění ČSR 1920–1935. *Český statistický úřad.* [online]. (cit. November, 10th, 2011). <http://www.czso.cz/csu/2006edicniplan.nsf/t/22005E7C52/$File/4219rr_1.pdf>; Druhá světová válka. Volby a sudetoněmecká strana. *Fronta.cz.*[online]. (cit. November, 10th, 2011). <http://www.fronta.cz/dotaz/volby-a-sudetonemecka-strana>.

[46] Government based on wide coalition was named on June 4th, 1935 (Republican Party of Agrarians and Little Farmres, Czechoslovak Social-Democratic Workers' Party, Czechoslovak Social-National Party, Czechoslovak Popular Party, Czechoslovak Middle Class Party of Traders and Busuinesman, German Social-Democratic Workers' Party in the CSR, German Association of Farmers and Rural Traders) under the leadership of J. Malypetr. Not even in the subsequent governments before Treaty of Munich under the leadership of M. Hodža and J. Syrový, there were not representatives of SdP Party. Compare Seznam vlád Československa. *Wikipedie. Otevřená encyklopedie.*[online]. (cit. November, 10th, 2011).<http://cp.wikipedia.org/wiki/Seznam_vl%C3%A1d_%C4%8Ceskoslovenska>.

[47] *"At that time we said clearly to the French ambassador in Prague that we will support France if it will react to the Hitler's acts as we felt bound towards France based on the agreement. Hitler breached Locarno Treaty and its so called Rhineland Pact, based on which France and Britain were entitled to enter into war immediately in this special case. Western democracies could stop Germany and its criminal acts at the very beginning. In my opinion we were bound to them and we would support them. Nothing happened however …"* –BENEŠ, E.: Paměti. Od Mnichova k nové válce a k novému vítězství. Praha : Orbis, 1948, p. 21

[48] *"Germany acknowledges and will respect strictly the independence of Austria, within the frontiers which may be fixed in a Treaty between that State and the Principal Allied and Associated Powers; she agrees that this independence shall be inalienable, except with the consent of the Council of the League of Nations." - Peace Treaty of Versailles* (Article 80). [online]. (cit. November, 10th, 2011). <http://net.lib.byu.edu/~rdh7/wwi/versa/versa2.html>.

[49] Compare *"Absolute inactivity of guarantors of status quo and at the same time guarantors of Austrian independence was symptomatic. However, Anschluss influenced Czechoslovakia also directly: Its strategic position significantly worsen […] In the 1938 the issue of dispute was not only Czechoslovakia, but the very principles of layout of European continent."*- ČELOVSKÝ, B.: Mnichovská dohoda 1938. Šenov u Ostravy : Tilia, 1999, p. 115.

[50] KVAČEK, R., CHALUPA, A., HEYDUK M.: Československý rok 1938. Praha: Panorama, 1988, p. 50.

[51] ČELOVSKÝ, p. 183-185.

[52] Lord Halifax really proposed that France amends the French-Czechoslovak Ally Pact – see the same, p. 211-212

asked from the Czechoslovak government.[53] It is clear that SdP Party in fact did not want acknowledgement of any German autonomy but the aim was to place requests that would be unacceptable for the Czechoslovak government and such refusal could than lead to war, whereas Czechoslovakia would be considered guilty as it would refuse the right of German minority for self-determination.[54]

It seems that also Lord Runcimen discovered this fact and wrote to his report for prime minister N. Chamberlain of September 21st, 1938 as follows: "*Responsibility for the final fail of negotiations shall be, in my opinion, attributed to Mr. Henlein and Mr. Frank and those supporters of them both home and abroad, who urged them to place extreme and unconstitutional acts.*" However this knowledge did not prevent him from stating that "*Furthermore, I reached the conclusion that those border districts betweenCzechoslovakia and Germany, where Sudeten-German inhabitants represents vast majority should immediately receive the right for self-determination. If certain withdrawal of territory will be necessary, and I think it will, it should be done immediately and without undue delay.*"[55]

Parellely with the mission of Lord Runciman, also other negotiations took place. On September 15th, 1938 Hitler met British prime minister Chamberlain on Berghof to discuss the Sudetenland crisis. Chamberlain here accepted Hitler's request for withdrawal of Sudetenland territory to Germany.[56] On September 19th, 1938 the governments of Great Britain and France invited Czechoslovakia to hand over its border territories to Germany in which the ratio of German inhabitants exceeded 50 %. As the Czechoslovak government refused this request, the ambassadors of France and Great Britain submitted an ultimatum to Czechoslovakia on September 21st, 1938 from which it clearly resulted that in the case of armed conflict they will not provide any help to Czechoslovakia and moreover Czechoslovakia will be considered guilty for burst out of war.[57] Czechoslovak government abandoned in this was accepted the British-French proposal the very same day.

As soon as the news about the acceptance of British-French plan for withdraw from Sudetenland reached the general public, strong riots occurred both in Prague and in countryside, which resulted into resignation of government on September 22nd, 1938. President Beneš in the cooperation with new government of the general J. Syrový subsequently declared general mobilization on September 23rd, 1938 at 22:20 o'clock.[58] This was done very quickly and decently. Partial mobilization was also done in France and Britain mobilized its fleet into state of alert. However, the willingness of France and Britain to enter the war for Czechoslovakia was negligible, which we can see e.g. from the literally whining and weepy declaration of N. Chamberlain in his radio speech of September 27th, 1938: "*How fearful, fantastic, unimaginable, that we should dig trenches and try the as masks on due to controversy in some distant country between people we do not know anything about.*"[59] Political myopia and naivety resulting from these words does not require deeper analysis.

After the declaration of mobilization Czechoslovakia was internationally isolated. Soviet Union declared its support; however, it was only oral. Moreover, it had no common border with Czechoslovakia and therefore its potential military help was more than problematic. France and Britain are still seeking the way to prevent the burst out of war. Based on British initiative (and with support of American president F. Roosvelt) the conference of four powers – Great Britain, France, Italy and Germany - was called into Munich on September 29th, 1938. These countries agreed, without presence of Czechoslovakia, that for the salvation of peace in Europe it is necessary that Czechoslovakia withdraws from large areas around borders with Germany. After considering the desperate situation the Czechoslovak government agreed with the opinion of president Beneš that fruitless fight with Germans would only cause destruction of nation. Therefore the government at the end accepted the Munich diktat on September 30th, 1938 nonetheless only the National Assembly was entitled to do such step.[60] Subsequently,

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[53] Representatives of the SdP Party were very surprised when the Czechoslovak Government accepted so called Fourth Plan on September 5th, 1938 which represented almost full acceptance of eight points from Carlsbad submitted by K. Henlein on April 24th, 1938 (full equality Germans and Czechs, acknowledgement of German national group as legal entity, detailed delimitation of German territory within CSR, full national autonomy of such territory, legal protection of Germans living outside such territory, compensation of economic and national-political injustice caused to Germans as of 1918, exclusive nomination of German state and public employees on German territory, full freedom to register as member of German nation and German world view). For more details see SLÁDEK,Němci v Čechách. Německá menšina v českých zemích a Československu 1848-1946, p. 82 an.

[54] Compare: *"Henlein and Hitler were surprised again. Actually they did not want the Czechoslovak government to accept these request. They only wanted to increase the pressure."* - KOVÁČ, p. 207.

[55] Text of the above mentioned report is available here: Druhá světová válka. Lord Runciman: zpráva z 21. září 1938. *Fronta.cz.* [online]. (cit. November, 10th, 2011). <http://www.fronta.cz/dokument/lord-runciman-zprava-z-21-zari-1938>; SLÁDEK, Němci v Čechách. Německá menšina v českých zemích a Československu 1848-1946, p. 170-177.

[56] Example of description of situation: *"…he accepted the principle of withdrawal and convinced also its government about it as well as the French and Czechoslovak government. Withdrawal from the purely German territories does not represent any trouble, the withdrawal from the mixed territories must be established by a commission (1 German, 1 Czech, 1 neutral person)."* - ČELOVSKÝ, p. 320.

[57] CHOCHOLATÝ-GRÖGER, F.: Rok 1938 – konec naději, ztráta iluzí. *CS Magazín. Český a slovenský zahraniční časopis.* [online]. (cit. November, 10th, 2011). <http://www.cs-magazin.com/index.php?a=a2007051037>.

[58] 1 500 000 man was mobilized, including 300 000 Sudeten-Germans. See ČELOVSKÝ, p. 325.

[59] Compare: Chamberlain Addresses the Nation on His Negotiations for Peace.*BBC.Archive.* [online]. (cit. November, 10th, 2011).<http://www.bbc.co.uk/archive/ww2outbreak/7904.shtml>; In this radio speech N. Chamberlain in the position of defeated cries over the bitter destiny of Britons who should die due *"quarrel in a far away country, between people of whom we know nothing…"*; See also CUHRA, J., ELLINGER, J., GJURIČOVÁ, A., SMETANA, V.: České země v evropských dějinách. Díl čtvrtý. Od roku 1918. Praha, Litomyšl : Paseka, 2006, p. 95.

[60] In more detail see CUHRA, p. 95.

E. Benešresigned on October 5th, 1938 and retired to Great Britain. From October 1st and October 10th, 1938 than German army occupied the withdrawn territories and the era of the first Czechoslovak republic was conclusively ended.[61]

Munich Treaty is (and probably will be for a long time) a stigma of the Czech (or, as the case may be, Czechoslovak) history similarly as the battle on Bílá Hora. We could even say that it represents stigma more perceptible and more important, as on Bílá Hora hill Czech and Moravian Protestant Estates (or mercenaries paid by them) at least lead heroic fight for their truth, nonetheless that fight was unsuccessful. Munich, on the other hand, represents surrender without fight, or at least without physical one. However we very often forget, unjustly, the intensive battle lead by the Czechoslovak diplomacy during the Munich crisis. This battle was not less heroic than the fight of Moravian Estatesbesieged at the walls of the preserve around summer residence Hvězda, from where they could not escaped. Similarly as those ancient warriors, also Czechoslovak politics (or, as the case may be Czechoslovak government) had no way of escape in September 1938. They were betrayed and cynically offered to the enemy as sacrifice to secure "the peace for our time"[62] by those who helped them to found the independent Czechoslovakia, whom they admired and to whom they showed fondness for a long time. Without real possibilities to succeed in military defense of Czechoslovakia they decided to accept the imposed act of injustice and accept the Munich diktat. They accepted it with the knowledge that it breaches the principles of international law, that democratic values and principles slowly reached by the western society after hundreds of years are trampled based on the idea that they are saving thousands of lives of Czechs and Slovaks who would certainly die in the fruitless battle against stronger aggressor and their lackeys.Such surrender can be, from certain point of view, considered victory, namely victory of good sense.[63]

With regard to the standpoint of Slovaks in the time of danger for the republic by Nazism, we have to state that nonetheless the activity of HSĽS increased as well as its pressure on granting autonomy to Slovakia, fear from the State in danger increased the election preferences of centrist parties. This fact demonstrated e.g. in elections to municipalities' representations in May 1938. In these elections "Slovenská jednota" (Slovak Union) succeeded, which represented the group of ex-centrist parties, e.g. Agrarians and Social Democrats. This political party gained 49.93 % of votes, the second HSĽS only 26.9 %. However, not even HSĽS called for break up of common State with Czech, but only for granting of wide autonomy. Not even death of A. Hlinka in august 1938 changed this fact significantly.[64]

Slovakia on crossroad – autonomy or independence, definite downfall of thesecond Czecho-Slovak Republic

The year 1938 did not only bring up escalation of relations between Czechs and Germans, but also domesticdisputes between Czechs and Slovaks which steadily worsen before already, reached its peak, namely due to the unwillingness of centrist Czech political parties to provide certain level of autonomy to Slovakia in particular. HSĽS in particular steadily increased its pressure and it felt the opportunity in the moment of acceptance of Munich diktat by Czechoslovak government on September 30th, 1938.[65] Czechoslovak republic already weakened from all sides was not able to resist to the strong pressure connected with the arguments regarding the right of Slovaks for self-determination and request of autonomy. The further path of Slovakia after the Munich betrayal was extensively indicated by the Treaty of Žilina executed on October 6th, 1938. HSĽS and other political forces in Slovakia (except of Communists and Social democrats) agreed on their meeting held in Žilina that it is necessary to pass constitutional law on autonomy of Slovakia by October 28th, 1938. Wording *"We want freely and fully, based on our own will, determine our future life, including the state form …"*[66] let no doubts. It was clear, that in the future reevaluation of the state relation of Slovakia with the other parts of Czech Lands will occur. HSĽS took over the power in Slovakia without major resistance of democratic forces, nonetheless they represented majority of the nation.[67] *"Popular Party established its power monopole very aggressively."*[68]

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[61] Text of the Treaty of Munich – see SLÁDEK, Němci v Čechách. Německá menšina v českých zemích a Československu 1848-1946, p. 123-126; Also Poland and Hungary used their possibilities during the Munich crisis. Based on ultimatum sent to the Czechoslovak government of October 1st, 1938, Poland reached the annexing of Cieszin district – see Mnichov v dokumentech II. Praha : Státní nakladatelství politické literatury, 1958, p. 332-335; Hungary subsequently received southern parts of Slovakia based on so called Vienna arbitration held on November 2nd1938 - in more details see Druhá světová válka. Vídeňská arbitráž. *Fronta.cz.* [online]. (cit. November, 10th, 2011). <http://www.fronta.cz/foto/videnska-arbitraz-1>.

[62] Compare: Chamberlain Returns from Negotiations with Hitler.*BBC.Archive.* [online]. (cit. November, 10th, 2011).<http://www.bbc.co.uk/archive/ww2outbreak/7903.shtml>; 1st October 1938: Chamberlain returns from Munich and declares "Peace for our time".*The Guardian.From the Archive Blog.*[online]. (cit. November, 10th, 2011). <http://www.guardian.co.uk/theguardian/from-the-archive-blog/2011/may/25/guardian-190-chamberlain-returns-from-munich>; Neville Chamberlain and appeasement.*The Guardian.From the Archive Blog.* [online]. (cit. November, 10th, 2011). <http://www.guardian.co.uk/world/2009/sep/05/chamberlain-munich-appeasement-second-world-war>.

[63] From the point of view of human life, the victory of sense is to be considered, in some cases, more convenient also for the price of humiliation than to prefer the immediate alternative of pride connected with sure death and destruction.

[64] Compare: *"Slovak autonomy shall reinforce the republic. The unwillingness to grant autonomy to Slovaks makes the republic weak."* - KOVÁČ, p. 209-210.

[65] Short summary of reasons for absolute invalidity of the Treaty of Munich: 1) Czechoslovakia was not a party to the treaty nonetheless it regarded its territory on which it executed its sovereign and immediate state power. In this way, the sovereign Czechoslovak state was inadmissibly and unworthy humiliated to the mere subject of the agreement of four powers; 2) Czechoslovakia was under the pressure of threat of use of military power. In the case it would refuse to accept the treaty, it was under the gander of direct military aggression of several times stronger Nazi Germany and its allies. In no case we can speak about the free expression of will; 3)As pointed out by E. Beneš, the treaty was not approved in constitutional way. The Constitution of 1920 stipulated in Article 3 (1) that *"…territory of Czechoslovakia represents unique and integral unit the borders of which van only be amended by constitutional law."* Therefore, based on this wording the change of Czechoslovak borders could only occur based on constitutional law passed by the NA. The treaty of Munich was only accepted by the Czechoslovak government, who was not entitled to do so. Withdrawal from the territory for the benefit of

The rests of the National Assembly passed Constitutional law No. 299/1938 Coll. On autonomy of Slovak land, on November 22nd, 1938, i.e. a little bit later than expected based on the assumptions included in Treaty of Žilina. The name of the State subsequently changed into Czecho-Slovak Republic. Soon afterwards followed the Constitutional law No. 328/1938 Coll., on autonomy of Carpathian Ruthenia.[69] However, the development in Slovakia gained clearly antidemocratic nature, namely after the elections into the autonomy assembly held on December 18th, 1938 in particular. Before the elections the voters received only one candidate list, in which only little space was reserved for candidates from other parties than those from HSĽS and representatives of German a Hungarian minority. Inacceptable intervention into the elections represented also the impossibility to vote in a ballot, "*on many places citizen also voted separately divided into nations etc.*"[70]

The last desperate attempt to change the development in Slovakia and stopping the steadily estrangement of Slovakia from the common Czech-Slovak State was made by the government of the republic in the night from March 9th to March 10th, 1939. President E. Hácha removed the Slovak autonomy government of J. Tiso and declared the state of siege.[71] This step however, did not lead to the expected result. The other way round, it made it possible for Hitler to use the dispute occurred to let Slovakia to join his power plots. On March 3rd, 1939 Hitler received J.Tiso in Berlin and made him to make a complicated decision. Slovakia will either declare independence in the shortest possible time and Germany will become its guarantor or it will be let as pray for Horthy's Hungary prepared to occupy Slovakia in a military way. "*The question is if Slovakia wants to live its own life or not.*" Hitler promised to Tiso, that "*he will keep his word as soon as Slovakia openly declares its will to be independent*."[72]

Jozef Tisohad no third alternative in the case of options presented in this way. However, he refused the Hitler's request to declare the independence of Slovakia directly in Berlin and let the Slovak Assembly to decide on this important step.[73] This one really passed the decision on independence of Slovakia on March 14th, 1939 – "*In the name of God and from the will of Slovak nation we hereby declare the independence of Slovak State.*"[74] In this

65 cont. Germany was not even approved retroactively by the NA; 4) The Treaty of Munich was deliberately breached by Germany itself which nonetheless the guarantees made unacceptable pressure to Czechoslovakia in March 1939 to make it declare the independence of Slovakia and later openly breached the territorial integrity of residual Czech Lands by occupying it and by declaring the Protectorate of Bohemia and Moravia; GERLOCH, A., HŘEBEJK, J., ZOUBEK, V.: Ústavní systém České republiky. Základy ústavního práva. Praha : Prospektrum, 1999, p. 30; Threat of military power is also in breach with so called Briand-Keloog's Pact (Act of Paris) of the 1928, which bans the war as the form of resolution of international disputes. See e.g. ŠRÁMEK, P.: Politická situace v Evropě v letech 1918 až 1938 a ČSR. Studie a materiály předválečné armády. [online]. (cit. November, 10th, 2011). <http://armada.vojenstvi.cz/predvalecna/studie/5.htm>; Vývoj a současný stav mezinárodního humanitárního práva (1. část). *www.Juri§tic.cz.* [online]. (cit. November, 10th, 2011). <http://mezinarodni.juristic.cz/159310/clanek/mpv1>; KUKLÍK, J.: Dekrety prezidenta republiky - výraz kontinuity československého právního řádu nebo jeho revoluční změny?In MALÝ, K., SOUKUP, L.: Vývoj práva v Československu v letech 1945-1989. Sborník příspěvků. Praha: UK, 2004, p. 133; Not only from the point of view of Czechoslovak constitutional law it is clear that the Treaty of Munich had crucial and non-removeable legal defects. The four powers grossly breached the both positive international law and international customs and traditions. At the beginning, France and Great Britain refused to accept their mistake and stand on the validity of the treaty. The change of attitude occurred as late as after the shameful and humiliating quick defeat of France by Germans. However, to make Britons and French to declare Treaty of Munich void and null was very demanding process taking several years. In particular the relations between the Czechoslovak government and Great Britain born the burden of disputes over the legal interpretation of invalidity of the Treaty of Munich and connected issues of future Czechoslovak borders and position of German minority in Czechoslovakia for a long time (see KUKLÍK, J.: Mýty a realita takzvaných Benešových dekretů. Dekrety prezidenta republiky 1940-1945. Praha: Linde, 2002, p. 122). For the Czechoslovak government in exile it must have been rather painful to know that Great Britain recalled its signature under the treaty of Munich on August 5th, 1942 not based on the above mentioned serious legal mistakes; however it deduced the invalidity of the Treaty of Munich ex tunc only based on the breach of it by Germany.

66 Žilinská dohoda. Manifest slovenského národa. In BEŇKO, J. (ed.): Dokumenty slovenskej národnej identity a štátnosti II. Bratislava: Národné literárne centrum – Dom slovenskej literatúry, 1998, p. 178.

67 PLEVZA, V.: Vzostupy a pády. Bratislava : Tatrapress, 1991, p. 25.

68 ČAPLOVIČ, D. A KOLEKTÍV.: Dejiny Slovenska. Bratislava : AEP, 2000, p. 242.

69 GERLOCH A KOLEKTIV, p. 31.

70 ČAPLOVIČ A KOLEKTIV, p. 242.

71 Vyhlásenie štatária na Slovensku. In BEŇKO, p. 200.

72 Rokovanie Jozefa Tisa s Adolfom Hitlerom (Berlín, 13. 3. 1939). In BEŇKO, p. 203-205; Compare also: *"During the discussion Hitler described to Dr. Tiso options of the future destiny of Slovak nation In the case it will not terminate its relations with Prague in time. In such case Hitler will let Slovakia at the mercy of time and will not accept any liability for what may happen."* – POLOWNIK, R.: Co mnozí nevědí, nebo nechtějí vědět o dr. Tisovi. *Altermedia.info.* [online]. (cit. November, 10th, 2011).<http://cz.altermedia.info/historie/co-mnozi-nevidi-nebo-nechtiji-vidit-o-dr-tisovi_3841.html>; Compare also: *„Am 13. März lud Hitler Tiso nach Berlin, teilte ihm seine Pläne zur Zerschlagung der Tschechoslowakei mit und drängte ihn, die slowakische Unabhängigkeit auszurufen. […] Tiso begriff, daß Hitler Ungarn freie Hand zur Annexion der Slowakei geben würde." ("Hitler invited Tiso to berlin on March 13th and described him his plans for destruction of Czechoslovakia. At the same time Hitler forced Tiso to declare independence of Slovakia. […] Tiso knew that otherwise Hungary will be free to annex Slovakia."* – SCHWARZ, K., P.: Tschechen und Slowaken. Der lange Weg zur friedlichen Trennung. Wien, Zürich : Europaverlag, 1993, p. 131.

73 *"Under the pressure of these circumstances, when there was a danger that if Slovakia does not declare independence quickly, it will be occupied by Hungarians, or as the case may be , partially also by Germany and Poland, the Slovak Assembly declared independence. All witnesses confirmed that during this session the humor was very low and at the end there was not even one representative who would be willing to submit formal proposal of declaration of independence of Slovakia. At the end such proposal had to be submitted ex praesidio."*– POLOWNIK, R.: Co mnozí nevědí, nebo nechtějí vědět o dr. Tisovi. *Altermedia.info.* [online]. (cit. November, 10th, 2011). <http://cz.altermedia.info/historie/co-mnozi-nevidi-nebo-nechtiji-vidit-o-dr-tisovi_3841.html>.

74 Uznesenie Snemu Slovenskej republiky. (Bratislava, 14. 3. 1939). In BEŇKO, p. 206-207; from today's point of view the decision of the Slovak Assembly was justifiable facing the Hungarian threat, nonetheless after the World War II this step was described as betrayal of Czecho-Slovak Republic.

way a new chapter of Slovak history began.[75] It also represented definitive end of very short period of existence of crippled second Czech-Slovak Republic which was divided by Slovak members of Popular Party and Nazis, who extremely quickly occupied the rests of Czech lands a day later, on March 15th, 1939.[76] Declaration of Protectorate of Bohemia and Moravia on March 16th, 1939 based on Hitler's decree represented merely a formal act.[77] For more than six years Czechoslovakia was cancelled from the map of Europe and the triumph of Nazis was, at least for that moment, finished…

[75] ČAPLOVIČ A KOLEKTÍV, p. 243.

[76] It is also worth to mention the fact not very known amongst the laics. Slovak declaration of independence remained not without Hungarian reaction, which also wanted to use the final phase of decline of Czechoslovakia. Nonetheless Hungary de iure acknowledged the independent Slovak republic on March 16th, 1939, it had no problem to attack it militarily on March 23rd, 1939. The very same day the "ally agreement" between Germany and Slovakia was signed (drafted on March 18th, 1939 in Vienna); however Germany did not provide any help to Slovakia against Hungary. On the other hand it forced Slovakia to conclude the armistice after several days of fights with Hungary and to accept its territorial requests – see MIKUŠ, J., A.: Slovensko v dráme Európy. Bratislava : Matica slovenská, 2002, p. 106; ČAPLOVIČ A KOLEKTÍV, p. 245.

[77] Text of Hitler's decree on founding of Protectorate Bohemia and Moravia of March 16th, 1930 is available here: Hitler's decree on founding of Protectorate Bohemia and Moravia. *Druhá světová válka.Fronta.cz.* [online]. (cit. November, 10th, 2011). <http://www.fronta.cz/dokument/hitleruv-vynos-o-zrizeni-protektoratu-cechy-a-morava>.

Development of the Legal Regulation of Compensation for Injury to Health in the Czech Republic in Period 1950 – 1990 and its Impact on Legal Regulation de lege lata

*Ingrid Kovářová Kochová**

Abstract

Legal regulation of the Central Civil Code, act no. 141/1950 Coll., (hereinafter referred to as the "C.C.C."), should have replaced the so-called bourgeois legal regulation, it should have been the new socialist civil law, the civil law should have become simplified. Legal regulation of compensation for damage was contained in chapter no. 16, sections no. 337 to 359 of the C.C.C., titled as Obligations to compensate for damage. The law again did not distinguish between compensation for damage inflicted by violation of an obligation or as result of violation of legal provision. The law already did not distinguish particular degrees of culpability as it was stated in case of G.C.C.; it only distinguished between culpability in forms of intention and negligence. On 1st April 1964, the act no. 40/1964 Coll., the Civil Code (hereinafter referred to as the "C.C.") came into effect; it newly regulated liability for damage and unjust enrichment in the part 6 in sections no. 415 to 459. There was emphasized the prevention in instance of compensation for damage. Luby's conception created grounds for other authors, who devoted to liability. All authors agree with the fact that liability should be conceived as liability for intentional violation of legal duty. Consensus about requirements of liability and identification of liability with sanction are typical for the period after year 1964.

Key words: *Compensation for injury; culpability; liability.*

I. Introduction

Currently, there is being under discussion the modification of legal regulation of compensation for damage to health in health service, then also the method of organization and providing of medical care in the Czech Republic. These discussions and their results are influenced by means of provision of medical care during the period of "unfreedom" in 1950-1990. At the same time, the current legal regulation of compensation for injury to health in the health service is the direct consequence of survival of legal theoretical conceptions being created during that period.

II. Article

II. 1.1. Content of the legal regulation

Legal regulation of the Central Civil Code, act no. 141/1950 Coll., (hereinafter referred to as the "C.C.C."), should have replaced the so-called bourgeois legal regulation, it should have been the new socialist civil law, the civil law should have become simplified. This regulation was constructed pursuant to the pragmatic modification of the legal order that occurred after year 1948. There were established strong relations of an individual towards state and the state towards individual in the consequence of state ideology based on an interference of state to all spheres of the individual life. That enabled state control an individual in all spheres of his life, thus during provision of medical care as well. It is possible to define these fundamental systematic changes, which took shape in the current legal regulation in force of the scope of the public and private law:

a) The fundamental form of ownership was the state ownership, therefore
b) provision of the medical care was being provided fundamentally in state health service facilities, it is related to system of public unified universal health insurance
c) there was stated legal duty to work and transfer payments to the system of health insurance, the duty was being in the process introduced gradually
d) the compensation for damage inflicted during work was regulated primarily
e) State ideology presupposed conscious stance of an individual to life, therefore there was enormously emphasized the prevention and upbringing persons to aware performance of their duties.

The assumption caused a belief that no injury would be inflicted. The fundamental legal framework was consisted of provisions of section no. 29 par. 1 of the constitutional act no. 150/1948 Coll., The Constitution of 9th May, with effect from 9th June 1948 till 10th July 1960, with an effect from

* Mgr. Ingrid Kovářová Kochová, Department of Civil and Labor Law, Faculty of Law, Palacký University Olomouc; Judge of the District Court in Olomouc, Czech Republic.

11th July 1960 of provisions of article no. 23 of the constitutional act no. 100/1960 Coll.[1], The Constitution of the Czechoslovak Socialist Republic. It is evident from dictions of the both Constitutions that even after year 1948, there was no constitutional guarantee or claim for full and free of charge care towards state.

Legal regulation of compensation for damage was contained in chapter no. 16, sections no. 337 to 359 of the C.C.C., titled as Obligations to compensate for damage. The law again did not distinguish between compensation for damage inflicted by violation of an obligation or as result of violation of legal provision. The law already did not distinguish particular degrees of culpability as it was stated in case of G.C.C.; it only distinguished between culpability in forms of intention and negligence. The expression "to be liable for damage" in section no. 338 of C.C.C. is used as synonymous formulation "is obliged to compensate for damage" used in section no. 337 of C.C.C. It is applied in this meaning also on setting norms for circumstances excluding liability. In section 350 of C.C.C., there was constructed a presumption of malefactor's guilt with possibility of his exculpation. The Civil Code regulated in section no. 351 of C.C.C., apart from duty to compensate damage inflicted by violation of obligation, also liability of entrepreneur for damage inflicted by especially dangerous activity, which was conceived as guaranty for result. The health service institutions were not included in the mentioned activities.[2] The damage was being compensated in accordance with section no. 354 of C.C.C. in form of actual damage and lost profit. In case of injury to health, there were in accordance with section no. 355 of C.C.C. compensated costs of treatment, loss of earnings and in future lost earnings, reasonable compensation for injuries and mutilation, which thwarts in life use of the injured person. If the claims for compensation for injuries and mutilation were laid by the injured person, then they did not cease to exist by death of injured person. It sufficed to quantify them by injured towards malefactor, it was not necessary to prosecute them in court by an action. All of those claims transferred to heirs in accordance with section no. 335 of C.C.C.

C.C.C. did not include any legal definition of concepts of "compensation for injuries" and "mutilation". The compensation for injuries meant financial compensation for suffered pain, where the given compensation was reasonable. It was defined by an independent consideration of judge based on expert report, which determined an intensity of suffered pain. This intensity was expressed in percents, where 100 % meant the pain evaluated as conceivably bearable for up to few days, where the person after this period dies of exhaustion or as consequence of shock. It was not stated by any legal rule, what amount compensated a percent of pain. Judge stated, in scope of his independent consideration, by what amount should have been provided the suffered immaterial injury to consider it as reasonable.[3]

The mutilation was interpreted pursuant to section no. 355 of C.C.C. by judicial practice as "mutilation of permanent nature, which limits the injured in normal content of life by his exclusion from the use in society, sports, cultural life etc. Although the consequences of injury are manifested rather in whole conduct and behavior of the injured person (grimacing, gait disturbance, way of communication with people), than in the physical disfigurement.[4] Compensation for mutilation was determined in the civil trial by consideration of judge. The court took into account the previous way of life of the injured person and possibilities of his further social position.[5]

The system of providing medical care and health instance completely changed. Medical and curative care was provided in state institutions or even in medical centers established by enterprises, because the nationalization of health care facilities and institutes was effected in accordance with the act no. 185/1948 Coll. of 3rd August, 1948. Medical care was provided by the state, it was free of charge for legally defined category of persons in the medical institutions established by state. As the category of persons involved in the provision of free care was concerned, as well as the extent of free care is gradually. Both the category of persons, who were affected by the provision of care free of charge, and the extent of the free care, was expanding gradually.[6]

The act no. 99/1948 Coll., on the national insurance, in effect from 15th May 1948 till 1st January 1957, regulated the provision of sickness benefits[7], then it declared the free choice of medical service in section no. 55, nevertheless section no. 56

[1] Even in this period, there was no constitutionally granted right to free medical care from the state.

[2] The extremely hazardous operations included extremely hazardous industrial operations, e.g. production of explosives, or other activities connected with an extreme danger, as e.g. circuses, roller coasters at amusement parks, mines, quarries, compare BLAŽKE, J.: *Náhrada škody v novém československém právu*, Praha: Orbis, 1954, p. 36.

[3] The judgment of the Supreme Court CSR (Rc) Cz 291/58 of 10.7.1958. From this judgment also comes that the Supreme Court led a research to find out the average of amount of compensation for injuries for 100% pain, it was 134 Kč per day, in proceeding before regional courts, there was lower amount – 120 Kčs per day, thus the Supreme Court CR recommended in its statement Ec 27/57-5 no. 15 to courts in case of dissenting from universal state average for determination of amount of compensation for injuries to rationalize properly why the lower or higher compensation was awarded.

[4] The decision of the Regional Court in Uherské Hradiště (Rc) 3 Co 596/56 of 14.9.1956.

[5] The Supreme Court CSR in judgment (Rc) Cz 571/55 of 29.12.1955.

[6] For example, free delivery care began to be granted with effect from 25th October 1956, also delivery care began to be provided free of charge. All legal rules were effective until 1st July 1966.

[7] In section no. 26, it distinguished between material benefits and monetary benefits. The material benefits were: benefits for treating in diseases and special medical care, help in maternity, dental care, assistance in mutilation, disfigurement and physical defects, help in infertility. The monetary benefits were benefits for sickness, maternity allowance, support for institutional care, special assistance in social diseases, compensation for assistance in the family and funeral. According to section no. 34 of the Act in case of mutilation, disfigurement and physical defects that affect the performance of profession the insurance institute provided to insured person and members of his family the necessary auxiliary means, if it was necessary, it expended also the cost of necessary and useful services and treatments in the same extent as in case of treatment in sickness. Concrete conditions for providing medical care were determined by the Treatment order. Treatment order was issued by the decree no. 255/1950 Ul.I, by ordinance of the Central Health Insurance institute of 16th March 1950, effective from 3.5.1950 till 31.12.1958. Then, there was issued a new treatment order under no. 164/1958 Ul.I., in effect from 1.1.1959 till 1.7.1966.

stated that there was no legal claim for certain method of medication or institutional treatment pursuant to demand of the insured person. If the insured party or member of his family had a claim for compensation for damage based on reason for which the benefits were awarded, the claim for this compensation was up to provided benefits.[8] In case that the injury was inflicted intentionally or with gross guilt of employer, the employer was obliged to compensate to the insurance company the benefits which were paid by it, only in these cases the insured person was entitled to claim the compensation for injury in accordance with section no. 112 of the act, though only the difference between inflicted injury and benefits paid from the health insurance.[9] The judicial practice stated that section no. 112 of the act affected all claims accrued pursuant to sections 356 and 356 of C.C.C., it does not affect claim for compensation for material damage.[10] The health benefits basically did not accrue during the institutional treatment.

The civil proceedings were governed by the principle of material truth in accordance with section no. 1 par. 2, section no. 88 par. 2 of the act no. 142/1950 Coll., The Civil Procedure Rules. All elements of civil delict were being detected by court, and court determined also the amount of the claim.

II. 1.2. Approach of the legal science during years 1950-1964

What was the reaction of the legal theory to this new legislation, respectively the theory of civil law? There were three major works published by Blažke[11], Luby[12] and Knapp.[13]

Jaromír Blažke gives a comprehensive description of a new conceptual definition of compensation for damage in his work, he devotes to the new ideologically justified compensation for damage, where is emphasized an importance of prevention instead of the repressive character (Blažke concludes that the injured party could have even an interest on occurrence of the damage himself to be entitled to claim compensation, instead of prevention of the damage.) As a result of changes in ownership relations with dominant of the state ownership, the state would de facto compensate for damage in many cases to itself. Therefore, he puts emphasis on prevention, the new conception means to pre-empt and prevent the damage[14]. For these reasons, it was necessary to establish new conception of civil delict, different from the previously used roman-law construction as qualification of merits of case undertaking to compensate for damage. Subsequently, he defines also the characteristics of the new merits of case in his work:[15]

1. Illegality, the fundamental element of civil delict, defined as objective relationship, whereby the facts of the case are contrary to the legal norm, independently of will of the acting person
2. Damage, the fundamental element of civil delict, it may be both imminent damage, and also the damage already incurred. He considered health and work ability as material goods, with reference to the conclusions of Marx, when any energy is consumed at work, which must be replaced, contrary to the name, honor and authorship. Therefore, Blažke considered the injury to health as a material damage.[16]
3. Nexus, i.e. the relationship between illegality and malefactor, respectively the liable person, namely in two forms:
   - in factual form, thus as the causal connection
   - in legal form, thus as the liability

   Blažke deduced that "civil delict always violates concrete or concretized relationship and modifies it. Active legitimacy for compensation for damage belongs always to person, who was the subject of concrete relationship violated by the civil delict in the given situation and nobody else. Thus, there is nexus given between illegality and damage, if it is between malefactor and injured party. There it would be mostly the unity with a casual connection, thus both kinds of the nexus must not miss at the same time. …There must be given both kinds of the nexus for the liability occurrence."[17]

   He perceived the casual connection as strict natural causality, which is in its nature objective, it is given or not. This conception was ideologically based on Lenin's theory of artificial isolation of effects, where the main cause and main effect of this cause should be in an objective viewpoint of natural science. There were some institutes refused from ideological reasons, such as interrupted causality, adequate connection.[18]

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[8] Prov. of section no. 110 also constructed legal fiction that the performance of such benefits is considered as damage that was caused directly to the insurance institute.

[9] The calculation of sickness benefits was modified in section no. 36, the sickness benefit belonged from the latest 43rd day of incapacity for work, for a maximum period of 365 days, it was a fixed amount according to the assessment base from 15 Kčs to 159 Kčs a day. According to section no. 39 during the institutional treatment the sickness benefit was not granted. The method of calculating benefits from sickness insurance of employees was subsequently modified in sections no. 15 to 24 of Act 54/1956 Coll. on Sickness Insurance of Employees, in effect from 1st January 1957, the amount of sickness benefit under section no. 18 depended on the length of previous employment and it ranged from 60% to 90% of net daily wage, with a maximum limitation for the first three days of illness from 50% to 70% of the net daily wage, at least 16 Kčs per day.

[10] Judgment of the Supreme Court ČSR (Rc) Cz 318/54 of 4.9.1954.

[11] BLAŽKE, J.: *Náhrada škody v novém československém právu*. Praha: Orbis, 1954.

[12] LUBY, Š.: *Prevencia a zodpvoednosť v občianskom práve* I.,II., Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958.

[13] KNAPP, V.: Některé úvahy o odpovědnosti v občanském právu, *Stát a právo I.,* Praha: Nakladatelství ČSAV, 1956, p. 66-85.

[14] BLAŽKE, J.: Náhrada škody v novém československém právu. Praha: Orbis, 1954, p. 7.

[15] Ibidem, p. 16-17.

[16] BLAŽKE, J.: Náhrada škody v novém československém právu. Praha: Orbis, 1954, p. 101-102.

[17] Ibidem, p. 22-23.

[18] Ibidem, p. 64 – 68.

4. Culpability, as subjective state, which is considered in accordance with objective measures, it is an element of civil delict of facultative character. Blažke dealt with the issues of culpability in connection with legal regulation, where legal rule newly presumed guilt of the malefactor with wide possibility of exculpation, even the extent of his guilt was not legally relevant to define a relationship of liability.

Perception of the causal connection as an objective relationship between consequence and cause as natural rule is not convenient for solving of compensation for damage; it brings logically problems in juridical practice, because it often excludes the malefactor and his acting from the chain of causes and effects, in which there is damage at its end.[19] It was necessary legal theoretically to get over this absence of the relationship of malefactor to the consequence in the matter of casual connection. Therefore, it is based on conception of liability as relationship between illegality and malefactor in legal area, not in the sphere of legal theory as a whole, but only in the theory of civil law. The term "liability" forfeited its original linguistic meaning and legal theorists tried to fill this term with a "new" content, by which they tried to eliminate deficiencies of new conception of the compensation for damage, even they were aware of imperfection of the new conception of compensation for damage.

However, the work by Viktor Knapp is considered as crucial for solving question of legal liability issue.[20] Knapp concerned with defining of content of "liability" in connection with adoption the Hungarian legal regulation - regulations on economic contracts, was conceived in conflict with the prevailing concept of liability for guilt, namely as liability for the result. Knapp criticizes the lack of differentiation between contractual and non-contractual liability. He called also the breach of contractual obligation as a civil delict; he distinguished them depending on whether the malefactor is responsible for breach of obligation under the contract or for breach of obligation by the law. He recommends to implement division of liability to contractual and non-contractual liability, and at the same time, the ideas presented further in the text affect primarily the contractual liability. Thereafter, he comes to a finding that:

1. Liability is not identical with contractual liability, when the liability could be excluded by an agreement of parties in accordance with section no. 227 of C.C.C.[21]
2. Liability is not identical with sanction, because the liability is not created only at the moment of creation of sanction, and thus the liability exists before the sanction is created[22]
3. Afterwards, he comes to result what liability is, namely that liability for breaching of obligation, respectively for inflicting damage, it is a threat for violation of duty, respectively for inflicting damage.[23]

Knapp concludes that liability should be conceived as liability for guilt, even from the practical view (in civil proceedings and distribution of burden of proof, which is on the side of malefactor, thus there is localization of damage in business that caused it. In the property sphere of the injured party, there will be located that damage, which will be proved that the malefactor is not at fault). In case of liability for the result, the acting person is in the position of a common cause, what completely ignores consciousness and will of a person, who inflicted the damage, thus this concept is not convenient for contractual liability, because it excludes any effort or attempt to fulfill obligation and leads to loss of interest in performance of the obligation.[24] Liability for the result should be given only if there is significant practical reason, for example in case of liability for damage caused by extremely hazardous operations. Knapp considers the conception of liability for culpability even in case of contractual sanctions such as fines and penalties.[25] It could seem that it is not possible to generalize these Knapp´s conclusions for liability itself, nor he does it himself.[26]

Štefan Luby disagrees with Knapp's definition of content of the liability that if liability should be threat of sanction, then there is liability only so far as to threaten sanction, if the legal relationship was not violated. If there would the relationship violated, the liability would cease to exist and the sanction would commence. The essence of liability would be only the prevention. There is no reason to burden with liability someone who did not breach any legal obligation and even did not intend to do so.[27] Luby concludes that liability is an obligation which occurs from an unlawful violation of legal relationship, and he determines it as an obligation of liability, which is secondary in its nature and it is a consequence of infringement of existing primary obligation. The purpose of the primary legal obligation is realization economic relationship, the purpose of the relationship of liability are the secondary targets, namely

[19] BLAŽKE, J.: *Náhrada škody v novém československém právu*. Praha: Orbis, 1954, p. 23: The cause of death of an individual, when he got arsenic, is a chemical reaction that took place in his body. This solution of causal connection does not take account of fact that arsenic is given by other, concrete person.

[20] Luby gives this evaluation to it, comp. LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve* I.,Bratislava: Publisher Slovenskej akademie vied, 1958, p. 35, authors of publication DRGONEC, J., HOLLÄNDER, P.: *Moderná medicína a právo*, Bratislava, Obzor, 1988, on the p. 197 talk about „ glove for a legal theoretical fight", also Hurdík and Handlar considered these thesis of Knapp as primary.

[21] KNAPP, V.: *Některé úvahy o odpovědnosti v občanském právu*, Stát a právo I., Praha: Nakladatelství ČSAV, 1956, p. 70.

[22] KNAPP, V.: *Některé úvahy o odpovědnosti v občanském právu*, Stát a právo I., Praha: Nakladatelství ČSAV, 1956, p. 71.

[23] Ibidem, p. 71.

[24] KNAPP, V.: *Některé úvahy o odpovědnosti v občanském právu*, Stát a právo I., Praha: Nakladatelství ČSAV, 1956, p. 83.

[25] Ibidem, p. 84 Ján Spišiak came to similar conclusions in relation to liability occurred from economic relations as Knapp, in SPIŠIAK, J.:*Náhrada škody a záruka v oblasti hospodářských zmlúv*. Bratislava: Slovenské vydavatelstvo politickém literatúry, 1956, p. 130-131.

[26] After nearly fifty years, Knapp makes this generalization in relation to liability for culpability, when liability, without distinction whether contractual or non-contractual, it is for him still an objective threat of sanctions, i.e. sanctions specified in the statute. But at the same time, the liability is a duty to bear the sanction, which is a secondary obligation arising as a result of breach of primary obligation. Subjective sanction is then the concrete sanction that is carried by malefactor. See KNAPP, V.: *Teorie práva*, Praha: C.H.Beck, 1995, p. 201.

[27] LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve I.,II*., Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958, díl I. p. 33.

reparation, satisfaction, or repression. Sanction is an obligation to give compensation for damage, for costs, interest on arrears. Therefore, he identifies the civil liability (i.e. civil-law obligation of liability) and civil sanction. Thus, he uses the term obligation of liability or penalty obligation.[28]

Luby determines generally the merits of case of liability, there is an obvious inspiration by theory of criminal-law (in the original meaning of this term), which is the conception of subjective liability, namely due to the following elements:

1. Illegality, which arises from the provision of objective legal order and it has an objective character.[29]
2. Culpability of the subject, which is an indispensable subjective element of the merits of case, it is a psychological relation of the subject to his own conduct and to consequences of this acting.[30] He considered the presumed culpability conception as seminal, which transfers burden of proof from the injured party to malefactor.[31]
3. The consequence in form of an injury. He perceived content of the term injury really widely, as a disturbance of the object or its destruction, but also as its threat, i.e. a state of imminent cause of injury[32], he considered only material damage as a damage, which is expressible in cash[33], he used for destruction or impairing of personal relations, apart from their material attributes, the term immaterial disturbance[34], which is further divided in case of harm to health to: a) material, as a concrete physical bodily injury, b) ideal, expressed as an impediment of social position and c) mixed, which is the pain itself. Luby conceptually refused the monetary compensation for injuries and mutilation; nevertheless he accepted that monetary compensation could have also a positive importance in these instances and it is reasonable to award it.[35]
4. The casual connection between conduct of the subject and consequence of this acting, which is under the widespread Lenin's theory considered by him as a natural rule that does not have to be defined for the necessity of law in other way, such as the legal casual connection. He refused to admit any legal definition of casual connection and application of any legal measure to determine legally relevant causes, with regard to a fact that it is not problematic for judicial practice to determine the casual connection.[36]

Apart from the aforementioned definition of Blažke, Luby newly added these elements:

5. Subject, namely the malefactor and his delictual capacity
6 Object, namely the legal relationship[37]
7 Conduct of the subject, which is in conflict with the legal norm.

However, Blažke operated also with these terms; he solved the issue of subject and object within the legal connection, i.e. the liability. In case of the conduct, Blažke concluded that the illegality of an act and illegality of a consequence of this acting is not possible to separate and he occupied an illegal acting in framework of illegality.[38]

Apropos the liability for the result in accordance with section no. 351 of C.C.C., Luby determined requirements of liability coincidently as in case of subjective liability, except for element of culpability.[39] He also conducted that it is an obligation to compensate for damage not subject to liability, because only the event itself cannot be illegal. The reason to impose a duty to compensate for damage to certain subject is an occurrence of damage in acting sphere of the liable subject.[40]

Jiří Švestka devoted to the liability for damage caused by extremely hazardous operations.[41] Švestka considered subjective liability coincidently with Luby, thus as a sanction for an illegal conduct.[42] Marta Knappová occupied the issue of delictual capacity in her work.[43] Knappová used the term sanction as synonym to the relationship of liability[44], under an influence of Luby. Delictual capacity is defined as a capacity to establish legal relationship and to become in its sphere a subject regardless of his will by his own non-contractual illegal act.[45]

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[28] LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve I.*, Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958, p. 43.
[29] Ibidem, p. 306.
[30] LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve I.*, Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958, part I., p. 453.
[31] Ibidem, part I., p. 608.
[32] Ibidem, part I., p. 272.
[33] Ibidem, part I., p. 281.
[34] Ibidem, part I., p. 285-286.
[35] LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve II.,* Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958, p. 389. He states in addiction "Compensation has the character of satisfaction, although it has typically the form of reparative sanctions." Compensation for injuries should be determined with regard to the duration and intensity of suffered pain, not in relation to other circumstances. In the case of mutilation, there should be applied similar measures.
[36] LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve I.,* Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958, p. 222, p. 240.
[37] LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve I.,* Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958, p. 156-159: Luby concluded that the illegal act can be discussed, only if it violates legally protected relationships, if it affects a certain thing, then only as the object of legal relations. The legal relationship is characterized by elements, namely the subject, content and object. Intervention into physical integrity means intervention on subject of the legal relationship. If there is a parent as the subject and e.g. relation between parent and child is being violated, then the ideal injuries are not appropriate for remedy in case of civil relationships, material damage - loss of maintenance can be already the object of compensation.
[38] BLAŽKE, J.: *Náhrada škody v novém československém právu*, Praha: Orbis, 1954, p. 14.
[39] LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve II.,* Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958, p. 46.
[40] LUBY, Š.: *Prevencia a zodpovednosť v občianskom práve II.,* Bratislava: Vydavatelstvo Slovenskej akademie vied, 1958, p. 19.
[41] ŠVESTKA, J.: *Odpovědnost za škody způsobené při provozech zvlášť nebezpečných*, Praha: Nakladatelství ČSAV, 1960.
[42] Ibidem, p. 18.
[43] KNAPPOVÁ, M.: *Právní subjektivita a způsobilost k úkonům v československém občanském právu*, Praha, Nakladatelství ČSAV, 1961.
[44] Ibidem, p. 9.
[45] Ibidem, p. 11.

II. 2. The development during years 1964-1990

II. 2.1. Content of the legal regulation

On 1st April 1964, the act no. 40/1964 Coll., the Civil Code (hereinafter referred to as the "C.C.") came into effect; it newly regulated liability for damage and unjust enrichment in the part 6 in sections no. 415 to 459. There was emphasized the prevention in instance of compensation for damage.

The fundamental legal framework of the discussed issue was given by article no. 23 of the constitutional act no. 100/1960 Coll., The Constitution of the Czechoslovak Socialist Republic. The health of a person was protected as a personal right in section no.11 of C.C.

Liability for damage, which was regulated due to a subject of malefactor – the liability of citizens in section no. 420 of C.C., constructed as liability for culpable acting, thus the law presumed culpability and it was up to the malefactor to exculpate himself. Similar regulation of liability of organizations was contained in section no. 421 of C.C. It is expressed in both cases under influence of the aforementioned discussion about the liability with a formulation "Person is liable for damage he inflicted by breaching of his legal obligation".

In the third part, there were regulated claims arising as a result of the injury to health, namely the compensation for injuries and diminishing of social position, instead of previous compensation for mutilation, in form of lump-sum compensation in accordance with section no. 444 of C.C., then in form of monetary pensions under section no. 445 of C.C., compensation for loss of earnings, if it was caused due to the injury to health, and section no. 446 of C.C. for the duration of incapacity for work and under section no. 447 of C.C., when the incapacity for work terminated, then compensation for reasonable costs of treatment under section no. 449 par. 1 of C.C. to person who expended them. Under section no. 448 of C.C., monetary pension belonged to heirs in case of death of the injured person, who provided or was obliged to provide maintenance to them, also for costs of treatment and funeral in accordance with section no. 449 par. 1, 2 of C.C.

The separated merits of case of compensation for damage were sections no. 424 and 425 of C.C.[46], liability of person – citizen, not the business, which violated the duty to contribute to prevent the damage in accordance with section no. 416 of C.C. This person, however who were not the malefactor, could be obliged to contribute within the compensation for damage under certain circumstances, if it was not possible to compensate whole damage by malefactor, so thus behalf of malefactor.[47]

Henceforth, the Civil Code should have regulated only relationships among individuals among each other and relationships between an individual and state. There was totally abolished the legal regulation related to economical relationships, business relationships. Therefore, legal theorists begin to use the term "civil liability".

More detailed regulation of compensation for injuries was implemented by section no. 16 of the ordinance no. 45/1964 Coll., in effect from 1st April 1964 till 30th April 1965. It meant completely new establishing concrete method of determination of compensation for injuries and diminishing of social position by reference to the labour legal rules,[48] when the total amount of the compensation for injuries and diminishing of social position may have not exceeded 40 000 Kčs, thence in case of the compensation for injuries, there was amount 12 000 Kčs, the court could increase the amounts only in the reasons worthy of special consideration. It was replaced by the ordinance no. 32/1965 Coll., on reparation of compensation for injuries and diminishing of social position, in effect from 1st May 1965 with 3 amendments until 1st January 2002.[49] The ordinance stated the minimal value of point coincidently for both claims as 10 Kčs for 1 point in its section no. 7; in effect from 1st September it was 15 Kčs for 1 point. The compensation was limited with same amounts as in the previous ordinances, only from

[46] According to the provisions of section no. 424 of C.C., the malefactor was liable for violation of rules of socialist coexistence, when a legal duty is the section no. 415 of C.C. imposing an obligation to prevent damages. The obligation to compensate was after inferred even for cases of breach of rules of sports games, namely decision of the Municipal Court in Prague, no. 10 Co 190/1976 of 17th May 1978 (R 16/80). Furthermore, it affects the damage caused by the animal, if the owner of the animal neglected control over it, decision of the Supreme Court SR, File no. 3 Cz 31/79 of 25th May, 1979 (R 5 / 81).

[47] However, application interpretation of the judicial practice was rather restrictive, where the condition for the imposition of an obligation to compensate for damage in the event failure of obligation to notify, there was a threat of fundamental and very serious damages in the objective sense, not the threat of subjectively serious harms, then it was possible to prevent damage at the time of notification, as it implies from the decision of the the Supreme Court CSSR 3 Cz 29/69 dated 21.10.1969. In case of duty to intervene, there were 3 conditions eliminating the requirement to fulfill this obligation examined as a priority: an objective circumstance preventing the subject to act and to prevent damage by their actions, the existence of threat of acting person, threat of close person of the acting person. The problem was the perception of the legal status of the person who had to act this way. This person was not a malefactor. Therefore, it was inferred that the person is obliged subsidiary, thus on behalf of the malefactor, but not in solidarity with the malefactor. This opinion is maintained in: ČÍŽKOVSKÁ, V., ELIÁŠ, J., et al: *Československé občanské právo II.*, Praha: Orbis, 1974, p. 367. Alternatively, he should participate on the compensation for damage, without further specification of the part. This view was maintained in the publication: BIČOVSKÝ, J., HOLUB, M.: *Občanský zákoník a předpisy související*, 3. podstatně přepracované a doplněné vydání, Praha: Panorama, 1984,p. 658.

48 Act no. 150/1961 Coll. however, there was no further specification, if the provisions of section no. 5 of the ordinance imposed a general obligation to provide compensation for earnings for the duration of incapacity for work, the provisions of section no. 9 of the ordinance imposed an obligation to provide reasonable lump-sum compensation for injuries and diminishing of social position.

[49] There was elected by a similar method for determining the amount of the claim of compensation for injuries and diminishing of social position, when it stated a point range for evaluation of pain and diminishing of social position. In section no. 4, it defined diminishing of social position de facto as a result of damage to health, which has demonstrably adverse consequences for the life actions of the injured party, to satisfy his living and social needs or for the performance of social roles, while the damage is not temporary, the minor scars, minor cosmetic defects and pathological changes that cannot lead to more significant reduction of social position, were excluded. The evaluation under the point range was determined by medical report. In cases, where the possibility of further position of the injured person in his life were reduced or lost, there the final amount determined in this report could be doubled.

1st September 1981 with amount 60 000 Kčs, thence compensation for injuries 18 000 Kčs. It was possible to exceed this amount by judgment of court or arbitration body only in absolutely exceptional cases, which were worthy of special consideration .[50] Provisions of sections no. 15 to 24 of the act no. 54/1956 Coll., on the health insurance, continued to be applied on method to calculate the payments of health insurance of employees.

The act no. 20/1966 Coll., on care for the general health of public, came into effect on 1st July 1966. In accordance with the ideology of prevention and developing better, socialist society, the act emphasized the prevention and health care. It is necessary to understand the term "health care" in its widest, general meaning. The manifestation of the health care of public was the provision of medical services free of charge from state, with a fact that the services are being provided in compliance with current knowledge of medical science without their more detailed definitions.[51] According to section no. 23 of the act, the examining and medical performances were basically exercised after previous instruction by a doctor and consent of patient, the written form was not required for this consent. The written form was required only for refusal of the care. The medical services were being provided in facilities established by state. According to section no. 77 par. 6 of the act, there should have been established expert commissions at Regional National Committees and the Ministry of Health to consider those cases with doubt if there was observed the right proceeding in the process of performance of medical services, or if there was injury to health inflicted. Under section no. 78 of the act, the provisions of Civil Code were applied on compensation for damage. Even if the duty to compensate for damage did not occur, the state could provide benefits to the injured person in extraordinary case worthy of special consideration.

Liability for damage to health caused by medical facility was conceived as a subjective liability, namely under section no. 421 of C.C., the violated duty was the duty under section no. 415 of C.C., respectively duties stated separately in provisions of sections no. 9 and 55 par. 2 letter d) of the act no. 20/1966 Coll., i.e. failure to render first aid, provisions of section no. 11 of the act no. 20/1966 Coll., thus the procedure non lege artis, and prov. sec. no. 55 par. 1, 2 letter e) of the act no. 20/1966 Coll., namely the violation of moral rules and obligatory confidentiality.

With hindsight of 10 years from the effectiveness of C.C., in 1974, there had been the attitude to compensation for injury to health changed, when the section no. 238 of C.C. was applied, in accordance with the judgment of the Supreme Court of the SSSR f.ref. no. 1 Cz 110/74.[52] The previous conception of services is possible to find out from wording of Zdeněk Kratochvíl[53], who considers provision of care as a kind of social labour process, which was not private affair of an individual. These services were being provided to individuals free of charge in the scope of education, culture, and medical services from social consumable funds.[54] Milan Kindl deduced the correctness of conclusion about liability of medical institution under section no. 238 of C.C. in 1986 pursuant to the judicial decisions by the Supreme Court, even through the medical services are provided free of any charge.[55] In the scope of its consolidating statement on compensation for damage Cpj 44/85 of 4th August 1986, the Supreme Court excluded the consideration of liability of medical organizations for damage, which had the cause not in nature of any concrete used apparatus or other thing, but in the medical intervention itself, or else in method of its performance. Concrete defect or other imperfections of the used instrument or other thing were not necessary requirements for consideration of liability of organization under section no. 238 of C.C. This kind of liability was given even if the cause of damage was grounded in nature of the used instrument or other thing, which commonly did not cause damage occurrence, but it caused damage in concrete case.[56]

Legal framework of the civil procedure legislation was established in accordance with the act no. 99/1963 Coll., the Civil Procedure Rules, which is based on prevailing principle of material truth, when the court ex officio detected and investigated

[50] According to decision of the Supreme Court (Rc) 1Cz 60/88 of 31st October 1988, if the court intends to increase the amount of compensation beyond the limit stated by the ordinance, it must produce evidence in relation to life of the injured party and his activities before the damage occurred, in relation to his real potential social position currently limited by the state of health of the injured person. Increase Is possible only if the sport, cultural or other social activities of the injured was completely exceptional and on the high level, thus it is not possible to take into account only the performance of work with increased effort.

[51] It is possible to deduce from the systematic placement in the act that the health services include also health education of the population, work in the field of hygiene and the fight against communicable diseases, medical preventive care, which included outpatient and institutional care, spa care, as well as provision of medicines and medical aids.

[52] This decision stated that the provision of health services is a service, even if this type of service is not regulated by the Civil Code. Therefore, the health care facility is liable under section 238 of C.C. for damage caused by the device or instrument is defective, or device, instrument, medicine, or other thing used during the provision of medical services was not defective, but it caused damage by its nature. If you used drugs or diagnostic instruments were not defective, but there were having side effects that caused the damage, it is necessary to determine whether these side effects were caused by the nature of the used instrument. That would be applied in the case where it is known that side effects can occur increasingly. The incidence of such side effects must be proved.

[53] KRATOCHVÍL, Z.: Služby ve vztazích mezi občany. *Socialistická zákonnost*, 8/1964, p. 12-19, Z.Kratochvíl is one of the co-authors of the act no. 40/1964 Coll.

[54] KRATOCHVÍL, Z.: Služby ve vztazích mezi občany. *Socialistická zákonnost* 8/1964, p. 12.

[55] KINDL, M.: Některé otázky náhrady škody při poskytování zdravotnických služeb. *Socialistická zákonnost* 6/1986, p. 313-319, p. 315.

[56] In the unifying statement, there is an evident restrictive approach to the liability of the medical facilities as defined in section no. 238 C.C. However, there is another decision of that same court, which deduced the liability under section no. 238 C.C. in injury to health caused by defective chair, tables, or dishes in canteens restaurant facilities, as it concluded in the decision file no. 1 Cz 40/1984 dated 31.10.1984. In the mentioned case, the injury to health occurred as a result of the fall of customer from defective chair in the restaurant facility.

confines of the exercised claims under section no. 120 par. 1 during the civil proceeding.

II. 2.2. Approach of Czech legal science during years 1964 – 1989

In this period, there were published monographic works about liability by Švestka[57], Knappová[58], and Macur[59]. All of them consider civil liability as sanction; it means that they adopted the Luby's sanction conception of compensation for damage. He did not consider the liability of medical institution for injury to health, albeit only in some cases pursuant to section no. 238 of C.C.

Knappová considers liability as synonym for obligation of liability[60], in other context; she stated that civil liability is a special type of civil-law obligation[61]. Even Knappová did not consider the liability of medical institution for injury to health, albeit only in some cases pursuant to section no. 238 of C.C.

The requirements of liability and content of obligation of liability, i.e. sanction also in an official text book of civil law, are presented by Švestka identically.[62] Reasons for extraordinary liability for the result are being seen in idea of risk and equity legitimating an intensive interest in protection of injured persons.[63] Even the section no. 238 has relatively unequivocal wording, the authors of the text, concretely Josef Eliáš and Jiří Švestka, did not consider possibility of application this provision on compensation for damage occurred during provision of medical services.[64]

Josef Macur devoted to the civil-law relationship of liability and culpability in his work as subjective element of liability. Macur adopted Luby's conception and considers the conception for presumed culpability[65] corresponding with the Czechoslovak legal regulation as most convenient conception of liability; even he did not consider the liability of medical institution for injury to health, albeit only in some cases pursuant to section no. 238 of C.C.

The liability, however primarily for the sphere of economic relationships,[66] was dealt also by Petr Hajn[67] with Josef Bejček[68]. Both of them notify the incongruity of present conception for development of economic relationships; they both notify the incongruity of identifying liability with sanction.

Hajn separates the liability from sanction.[69] According to him, liability is related with violation of primary legal duty, it occurs at moment of interference of the legal duty, it is an obligation to bear the unfavorable consequences as a result. Sanction is only the unfavorable consequences of this violation.[70]

Bejček is wondering if it is rational to discuss liability at all, he adverts the variability of particular theories, the concept and terminology disunity. He proposes to conclude a consensus about what the liability will be called. He notifies that the difference between objective and subjective liability is not in opposite, it lays in the method of cognition, in case of objective liability, it is the statistic method, in the second case, it is the causal method.[71] He considers an application of subjective liability convenient in economic relationships, because it is complicated to determine the casual connection between damage occurrence and conduct of concrete worker, especially in those situations, where more individuals participate together on one labour operation (realized activity), or there is some other circumstance having a share in damage occurrence.[72]

There were three monograph works devoted to legal liability in the medical services published, namely two works by Jaromír Štěpán[73] and common work by Ján Drgonec and Pavel Holländer.[74]

According to Jaromír Štěpán, the liability for injury to health in medical services is a liability of organization providing medical care, namely for intentional violation of legal duty of persons performing the medical care under section no. 421 of C.C.,[75] also as liability for the result under section no. 238 of C.C. in case of fulfillment of stated requirements. Appraisal

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[57] ŠVESTKA, J.: *Odpovědnost za škodu podle občanského zákoníku*, Praha: Academia, 1966.
[58] KNAPPOVÁ, M.: *Povinnost a odpovědnost v občanském právu*, Praha: Academia, 1968.
[59] MACUR, J.: *Odpovědnost a zavinění v občanském právu*, Brno: Spisy UJEP, 1980.
[60] KNAPPOVÁ, M.: *Povinnost a odpovědnost v občanském právu*, Praha: Academia, 1968, p. 270-271.
[61] Ibidem, p. 203.
[62] ČÍŽKOVSKÁ, V., ELIÁŠ, J. et al: *Československé občanské právo*, Praha: Orbis, 1974, I., II., hlavy 24 a 25 z pera J. Švestky.
[63] ČÍŽKOVSKÁ, V., ELIÁŠ, J. et al: *Československé občanské právo*, Praha: Orbis, 1974, I., II., hlavy 24 a 25 z pera J. Švestky, p. 375.
[64] ČÍŽKOVSKÁ, V., ELIÁŠ, J. et al: *Československé občanské právo*, Praha: Orbis, 1974, I., II., srov. hlava 21 z pera J.Eliáše a hlavy 24 a 25 z pera J. Švestky.
[65] MACUR, J.: *Povinnost a odpovědnost v občanském právu*, Brno: UJEP, 1980, p. 193.
[66] The legal one was with effectiveness from 1st July, 1964 contained in the Act no. 109/1964 Coll., the Economic Code, the damage between the organizations were compensated in accordance with Reg. no. 46/1967 Coll., based on a system of liability for result with the possibility of liberation in the stated reasons.
[67] HAJN, P.: *Riziko a odpovědnost v hospodářské praxi*. Praha: Nakladatelství Svoboda, 1984, dále v HAJN, P: Institut právní odpovědnosti a efektivnosti práva. *Acta universitatis Carolinae- Iuridica*, Praha, 1986, p. 279-300.
[68] BEJČEK, J.: *Obecně teoretické otázky hospodářskoprávní odpovědnosti*. Právník 6/1983, p. 571-585.
[69] HAJN, P.: Institut právní odpovědnosti a efektivnost práva. *Acta universitas Carolinae-Iuridica, Praha*, 1986, p. 279-300.
[70] Ibidem, p. 282.
[71] BEJČEK, J.: *Obecně teoretické otázky hospodářskoprávní odpovědnosti*. Právník 6/1983, p. 577.
[72] BEJČEK, J.: *Obecně teoretické otázky hospodářskoprávní odpovědnosti*. Právník 6/1983, str. 571-585, p. 585.
[73] ŠTĚPÁN, J.: *Právní odpovědnost ve zdravotnictví*, 2.zcela přepracované vydání, Praha: Avicenum, 1970 a ŠTĚPÁN, J.: *Právo a moderní lékařství*, Praha: Panorama, 1989.
[74] DRGONEC, J., HOLLÄNDER, P.: *Moderná medicína a právo*, Bratislava: Obzor, 1988.
[75] ŠTĚPÁN, J.: *Právní odpovědnost ve zdravotnictví*, 2.zcela přepracované vydání, Praha: Avicenum, 1970, p. 85.

of the liability for injury to health in medical services in accordance with section no. 238 of C.C. is considered as problematic. According to him, even the matter if the liability under section no. 238 of C.C. affects also provisions of medical service is questionable and he notifies that expert literature does not consistently devote to this kind of liability in medical services.[76] He admits the liability under section no. 238 C.C. only in relation to damage caused by side effects.[77] However, he deduced concurrently also a possibility of liability under section no. 432 of C.C., if the damage was caused during performance of medical experiment where damages are the consequences of effect of scientifically still not sufficiently examined.[78] With hindsight almost 20 years, Štěpán also comes to the conclusion that relationship between patient and medical services facility is a specialized kind of administrative-managing relationship, it is possible to delimit a curative (nursing) sphere from the side of doctor, participating sphere (complicit) from the side of patient and traditional sphere of administration, which includes obligatory cares, examining and educating, enforceable by the state power.[79]

Drgonec and Holländer devote to aspects of modern medical procedures, namely in the process of performance of medical research, transplantation, medical interventions to the human reproduction. He agrees dealing with the civil liability with a conception as sanction liability presented by Luby, thus the liability is a sanction for him in sense of material liability.[80] The authors subordinate the liability of medical institutions under section no. 421 of C.C. coincidently with Štěpán, they identify contrary to Štěpán with an application of provisions of section no. 283 of C.C. on all of the cases, where the damage occurrence has its origin in the character of the used instrument or material and also in cases when the used thing or medical substance was not defective, but it caused damage occurrence by its character.[81] They agree with Štěpán and they deduce a possibility to proceed also pursuant to section no 432 of C.C. in case of damage inflicted in connection of medical research.

According to the authors, "the objective liability has its position everywhere, where certain human activity carries higher danger for other subjects",[82] therefore they propose to implement de lege ferenda for the liability for damage inflicted in medical services generally a conception of liability for the result with possibility of sole liberating reason in form of culpability of injured party. At the same time, they labour under the protection of the doctor, which was granted by labour-law relationship towards provider of the medical care in form of labour-law liability based on subjective principle.[83] Drgonec and Holländer also deal with casual connection and suggest to revise the so far govern theoretical consideration of causal connection and to widespread comprehension of causality in way that not only indispensable but also sufficient reason will be admitted.[84]

III. Conclusion

The period of effectiveness of C.C. can be in the Czechoslovak conditions characterized as period of problem liability occurrence. The attitude of Blažke to reformulation of theoretical substance of liability and obligations to compensation for damage completely miss the element of activities, he focuses on illegality itself, and the liability is relationship between illegality and malefactor for him. Attitude of Blažke remains absolutely isolated in this direction. Luby's conception created grounds for other authors, who devoted to liability. Luby extended requirements of liability contrary to the legal science in the First Republic; it is naturally only an apparent extension. The object, which is the relationship for him, means the exclusion. Just in the relation to this requirement, Luby must conceptually refuse compensation for immaterial injuries to health, because the health does not have social dimension in form of relationship to other subjects of legal relationships, it is related exclusively and merely to the subject himself. Luby admitted his definition of liability without closer regard to legal regulation at that time in force and effective. Luby's designation of liability, respectively obligation of liability, by term "sanction"[85] was accepted by other authors. Only Knapp does not identify liability with sanction, he applies the term "threat of sanction". It follows from the cited judicial decisions that judicial practice was not influenced by this attitude and it awarded compensation for suffered pain and mutilation in accordance with the legal regulation in force and effect.

All of the cited authors agree with the fact that liability should be conceived as liability for intentional violation of legal duty.[86] Liability means the subjective liability. Luby does not consider the liability for the result as a liability (compare with the obligation not subject to liability), Švestka designates it simply as an obligation to compensate for damage, i.e. in accordance with the legal theory during period before the year 1948.

Consensus about requirements of liability and identification of liability with sanction are typical for the period after year 1964. Ideas of Luby are being adopted by all authors. Critical opinions did not appear until the 80's, namely the opinions of Hajn and Bejček, who suggest modification of attitude to liability, prima

[76] ŠTĚPÁN, J.: *Právní odpovědnost ve zdravotnictví*, 2.zcela přepracované vydání, Praha: Avicenum, 1970, p. 87.
[77] Notification on the common position of the Ministries of Health and Justice, the Supreme Court, the General Prosecutor's Office and state arbitration published in the Bulletin of the Ministry of Health no. 8-10/1966.
[78] ŠTĚPÁN, J.: *Právní odpovědnost ve zdravotnictví*, 2.zcela přepracované vydání, Praha: Avicenum, 1970, p. 233.
[79] ŠTĚPÁN, J.: *Právo a moderní lékařství*, Praha: Panorama, 1989, p. 12.
[80] DRGONEC, J., HOLLÄNDER, P.: *Moderná medicína a právo*, Bratislava: Obzor, 1988, p. 205.
[81] Ibidem, p. 211.
[82] DRGONEC, J., HOLLÄNDER, P.: *Moderná medicína a právo*, Bratislava: Obzor, 1988, p. 217.
[83] DRGONEC, J., HOLLÄNDER, P.: *Moderná medicína a právo*, Bratislava: Obzor, 1988, p. 217.
[84] Ibidem, p. 248.
[85] The synonym of term "sanction" is in general Czech – fine, penalty, in Latin, the term "poena" means punishment, penalty, retribution.
[86] The author was not successful in searching for any more detailed work devoted to liability for injury to health in the medical services from this period.

facie to terminology apparatus, they does not agree with the identification of liability with sanction. Although, section no. 238 was a part of legal regulation from year 1964, the legal theory did not react to this provision, thus it dealt conception of liability on general level. Liability for injury to health was considered as an objective liability under section no 238 of C.C. only as the result of application practice. Without an interest of legal science, there was established dual approach to compensation for injury to health in medical services, which had no parallel in Czech law so far and it was accepted. Only Štěpán expressed dissenting statement, without appropriate legal argumentation.

In the process of civil procedure, court found out all relevant facts with application of investigative principle in order to subordinate them under section no. 421 of C.C. or section no. 238 of C.C. It determined amounts of the claims mechanically pursuant to delegated legislation, which stated limitation for amount of compensation for injuries and diminishing of social position. Purpose of the limitation was to unify the procedure of application. Limitation could be exceeded only by court in prescribed cases. Reasons for increase of compensation for diminishing of social position were more connected to social manifestations of injured patient. Requirements stated by ordinance were allocated to certainly delimit uncertain measures. There has been lost concentration on the injury itself and irreversible negative consequence of the injury to physical functions and integrity of injured person.

Provision of the medical care was the "service" provided to patient even by the concrete doctor, but from the state pursuant to act no. 20/1966 Coll. Therefore, it is understandable that the state has intention to regulate amount of claims, which could be exercised by patients towards it (even though indirectly towards medical facilitates established and controlled by state).[87]

There also new medical methods start to appear in this period. Performance of the medicine was already not similar to performance of casual human activity. There were performed many of completely new specific activities in process the medical performance. There was increasing number of effect of instruments and of specific substances. Performance of medical services seemed rather more like industrial activity. As consequence was obvious attempt to transfer potential risks from these activities of patient to medical facility (in consequence of provided medical care by state – to state). Holländer and Drgonec suggested modification of whole conception to so-called objective liability with an only liberating reason of culpability of injured person. Probably also vis maior should have been attributed to the provider of medical care (what was undoubtedly an advantage for patient). They agreed with Štěpán in conception of liability under section no. 432 of C.C. for the medical research.

In the period after 1989, there was typical an attempt to transfer Czech law with almost unchanged content of legal norms by new procedures of interpretation and application from subjective liability to objective liability under section no. 421a of C.C. and thus ensure higher financial compensation, which would be really proportionate satisfaction to injured person within the system of provision of medical care. Attitude of doctors when providing medical care is rather or mostly paternalistic. Pursuant to this development, there is an attempt of Czech legislator to conceive the liability for injury to health in medical services as an objective liability, as it is declared in proposal of new Civil Code,[88] it means to abandon concept of liability as liability for violation of legal obligation. However, this modification is not the right deal, because it is not possible to impact this new conceptual change on all specifics of provision of medical care.[89]

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[87] If we look at it from this perspective, then there is given another explanation why the procedure under section no. 238 C.C. was accepted. It increased the possibility of patient to obtain compensation from the state for the suffered injury even in cases, where a violation of the duties specified in Act no. 20/1966 Coll., respectively of the general preventive duties was absent. However, such reasoning is not supported on any legal reason. Nevertheless, it is implied in the decision of the Supreme Court of SSR no. 1Cz 110/74.

[88] According to the explanatory memorandum to the proposal of new Civil Code, there should be liability for breach of contractual obligations, under section no. 2608 and following, the objective liability under section no. 2883, comp. explanatory memorandum is part of the press of the Chamber of Deputies no. 362 available at <www.psp.cz/sqw/text/orig2.sqw?idd=71122> dated 09.08.2011

[89] The author elaborately devoted to the theme of liability for injury to health in medical services in her dissertation of the same name.

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Code of International Commerce

Lenka Doubravová *

Abstract

The paper focuses on the analysis of Code No. 101/1963 Col., Code of International Trade, as amended (hereinafter referred to also as "the Code"). The main aim of the present article is to underline objective and nature of present Code and to show the historical background. An analysis of particular legal provisions and structure of the Code will be an integral part of the article with an accent to the modern elements of the Code. It became an inspiration even for the current Commercial Code and for the parts of the big set of amendments of Civil Code after the year 1989. Often, it is also stressed that only thanks to this Code of International Commerce one can follow an uninterrupted development of commercial law on Czech territory during the second half of the twentieth century, in spite of complete deformation of commercial legal obligations. The Code actually preserved in itself certain purely private law principles that the Code of Business did not contain.

Key words: *International trade; International business contracts; Code of International Trade.*

Introduction

The Code of International Commerce (hereinafter referred to also as *"the Code"*) regulated international commercial law. It came into force on April 1, 1964, and it was repealed effective on January 1, 1992 when the new Commercial Code came into force. According to the doctrine, the Code of International Commerce reflected modern tendencies; it was based on comparison that took "capitalistic legal philosophy" into account, considering Haag Uniform Law on the International Sale of Goods, Swiss Code of Obligations as well as Italian and Greek codes. Similarly, the Law on International Commercial Contracts of People´s Republic of China was influenced by western legal philosophy.[1]

The process of codification

First of all, it should be noted that the first half of the 1960's brought an overall disintegration of legal regulations due to re-codification of civil and family law and due to the creation of new Code of Business, Code of International Commerce and a new Code of Labour. All of them followed an approach according to which the codes were all independent, none of them had a general character (meaning it would apply in all areas), and on the other hand each of the new codes was a specific set of rules self-sufficiently regulating a particular sector of social relationships. Such a concept caused a fragmentation of legal relations. This fragmentation could be best demonstrated by the fact that particular legal institutes were – without any specific, objective reason – regulated multiple times within autonomous codes (for example legal capacity, conclusion of contracts, statute of limitation, damages, etc.)[2].

It is clear from the stenographic records of the 22nd session of the National Assembly (December 4, 1963)[3] that the Code of International Commerce stems from the legal equality of parties to the international trade, with no regards to whether the party comes from a socialistic or capitalistic country. When introducing the proposal of the Code of International Commerce, the representative of the Constitutional committee and of the Committee for planning and budget stressed that the equality of the parties was its key characteristic and the one that could assure there would be no pretext available for foreign countries to criticize the concept of the new *Code* with regards to possible discrimination. Moreover, it was assumed that many more international partners would agree on choice of Czechoslovak law because the new *Code* dealt solely with legal relations with

* Mgr. Ing. Lenka Doubravová, the head of the department of family, health care and labour of the Office of Ombudsman, a PhD. student at the Department of Commercial Law at the Faculty of Law, Masaryk university.

1 Rašovský, P.: Rozhodné právo v závazkových vztazích z mezinárodního obchodu - Lex mercatoria – part III, EPRAVO.CZ – Sbírka zákonů, judikatura, právo. [online] [cit. 29.11.2010] http://www.epravo.cz/top/clanky/rozhodne-pravo-v-zavazkovych-vztazich-z-mezinarodniho-obchodu-lex-mercatoria-cast-iii-22526.html.

2 For more see Explanatory report on amendments to Civil Code, available online at http://obcanskyzakonik.justice.cz/tinymce-storage/files/Duvodova_zprava_OZ_LRV_090430_final.pdf

3 Available online at http://www.psp.cz/eknih/1960ns/stenprot/022schuz/s022013.html [cit. 29.11.2010]

international element, whereas the Civil Code contained the regulation of domestic legal relations. Another quite interesting conclusion from the stenographic record is that the importance of Code of International Commerce was to surpass Czechoslovak borders; the *Code* was supposed to be a clear evidence of the fact that "*Czechoslovak Socialistic Republic strictly applies the politics of peaceful coexistence and fair economic competition of both world economic systems*."

In the course of discourse on the proposal of the Code of International Commerce, the member of parliament Novák had expressed his opinions on purpose of this *Code*.[4] According to him, the Code of International Commerce aimed to become an important tool of the development of Czechoslovak international trade and thus indirectly of the entire Czechoslovak economy. The achievement of this goal relied on increased security in the course of international business relations due to precisely defined rights and obligations of the actors of such relations guaranteed by *the Code*. *The Code's* function to support the volume of Czechoslovak international trade could, according to PM Novák, properly operate only if the domestic enterprises fulfilled their obligations which they took upon themselves with regards to their international partners.

The process of repeal of *the Code*

For now, it is worth to move a few decades forward in time and to mention the historical context of the repeal of the Code of International Commerce at the beginning of 1990's. In the process of adopting new codes during the 18th meeting of the Federal Assembly, on October 31, 1991, deputy Prime Minister, Pavel Rychetský, also mentioned the legislative history of the previous era. He stated, among other things, that in the altogether deformed economy, the laws incapable of regulating the market relations had been often adopted. This had created the need to issue, along with them, the law on international trade – however, one applicable only to the commercial relations with foreign countries.[5]

It follows from the above mentioned as well as from a short analysis of the process of repeal of the Code of International Commerce, that *the Code* became an inspiration even for the current Commercial Code. Often, it is also stressed that only thanks to this Code of International Commerce one can follow an uninterrupted development of commercial law on Czech territory during the second half of the twentieth century, in spite of complete deformation of commercial legal obligations. *The Code* actually preserved in itself certain purely private law principles that the Code of Business did not contain. The Code of International Commerce strongly influenced the legislative development after the year 1989, for example by becoming an inspiration for the parts of the big set of amendments of Civil Code.[6] On the other hand, the above mentioned set of amendments is often criticized for preserving certain schemes typical for totalitarian legal constructions, even though it removed the most blatant displays of socialistic legal terminology created in the sixties. For example, this set of amendments did not touch the principle of absolute nullity of legal acts, even though the Code of International Commerce – quite liberal in socialistic atmosphere – lessened the impact of this principle. However, the solution included in this legal act was not taken into account, and the old concept was preserved in the Civil Code instead.[7]

Structure and content of *the Code*

With everything already mentioned in mind, it is clear that the adoption of the Code of International Commerce was motivated by the effort of lawmakers to create legal conditions favourable for the development of international economic and scientific and technical cooperation. It is frequently praised that *the Code* was based on equality of the actors of international trade, with no regards to the social system of the state from which the actors came from.[8] This much is obvious from the entire text of *the Code*.

As for the structure itself, the Code of International Commerce was divided into five heads:

- Head I: Opening provisions
- Head II: Common provisions
- Head III: General provisions on obligations
- Head IV: Special provisions on some obligations
- Head V: Special, transitory and final provisions

Each head was then divided into chapters, sub-chapters and sections. The Code of International Commerce contained 826 sections in total.

The opening provisions (that is the first five sections) dealt with the purpose of the act and more importantly with the subject matter of this legal regulation as well as with its relation to other legal acts. Both available commentaries[9] confirm that a subsidiary use of Act no. 40/1964 Coll., Civil Code, was excluded. The provisions of the Civil Code could thus be applied only if the Code of International Commerce expressly referenced them. The Code of International Commerce was mainly used when the Czechoslovak law should have been applied in accordance with the provisions on choice of law or in accordance with the agreement of the parties. If slightly simplified, one could say that *the Code* was applicable to those relationships "*arising in the international business relations and containing a foreign element*" that were minutely described in provisions of section 2 of *the Code*. The subject matter of these relationships was defined objectively; this meant that if the conditions of the section 2 par. 1 were

4 As above

5 Available online at http://www.psp.cz/eknih/1990fs/slsn/stenprot/018schuz/s018026.htm [cit. 30.11.2010].

6 For more see explanatory report available online at http://obcanskyzakonik.justice.cz/tinymce-storage/files/Duvodova_zprava_OZ_LRV_090430_final.pdf [cit. 1.12.2010].

7 As above.

8 Kopáč, L.: Komentář k zákoníku mezinárodního obchodu. Prague: Panorama 1984, page 7.

9 Kanda, A.: Zákoník mezinárodního obchodu. Prague: Orbis 1976, 335 pages a Kopáč, L.: Komentář k zákoníku mezinárodního obchodu. Prague: Panorama 1984, 349 pages.

met, the Code of International Commerce applied also to the relationships between Czechoslovak actors. Antonín Kanda, in his commentary[10], divides the relationships, which the Code of International Commerce regulated, into four groups:

1. Relationships between persons who do not have their seat or their place of residence on the territory of the same state,
2. Relationships where the performance is realized on an international scale,
3. Relationships arising from procurement or performance of marine transport of consignment, or from renting of ships, or from contracts on operation of ships,
4. Relationships connected to some of the above mentioned relationships.

Provisions of section 5 of the Code of International Commerce state that the regulation is in principle of non-mandatory character. The list of mandatory provisions is contained in section 722.

In *common provisions* (that is Head II, sections 6 to 99), *the Code* regulates legal status of persons and things; it defines rules for legal acts, representation and power of attorney (including proxy and power of attorney for cases of operation of business). Moreover, this part deals with the counting of time, contains the statute of limitation and acquisitive-prescription (usucaption). As seen from this list, this part of *the Code* is quite extensive. Therefore, a few interesting features will be pointed out.

Compared to the Code of Business, the Code of International Commerce uses a different terminology in relation to actors of legal relations. Instead of "citizen" used in the Code of Business, *the Code* defines a "natural person". In the same way, instead of "organization" of the Code of Business, *the Code* uses "legal person". Moreover, according to the commentary, it was not necessary for the "legal person" to be classified as "organization" according to section 114 of the Code of Business because the Code of International Commerce was (as already mentioned above) intended also for the regulation of property relationships between parties from states with different social systems. The terminology of the actors of legal relations was thus trying to reflect the terms used in international trade.

In the area of the legal capacity, the Code of International Commerce references to the Civil Code.

It is astonishing, even, that definitions of for example immovable assets, (section 14), of generic things (section 15) or of accessory of things (section 16) could be found in the Head II of *the Code*. The analysed part of *the Code* also devotes numerous provisions to the topic of legal acts (sections 22 to 48).

The general time limit under the statute of limitations was 3 years, in some cases it was 10 years (the compensation of damage from the debt secured by surety, the return of insurance payment). On the other hand, *the Code* also anticipated the situations in which the time limit was only 1 year (e.g. claims towards the carrier). It is also very interesting that it was possible to agree upon a time limit, but *„together the time limit agreed upon and the statutory time limit could not exceed 15 years,"* (section 88).

Head III (sections 100 to 275) contained *general provisions on obligation*. It encompassed many provisions that are known today. Again, with regards to the extent of the regulation, only some parts are pointed out. Thus Head III contained provisions on: creation of obligation, creation of contract, references to general business terms and conditions, contract forms, custom rules, agreement on a future contract, and so on.

Head IV (sections 267 to 720) regulated *particular types of contracts*. As stated in the section 101 of the Code of International Commerce, "*obligations arise from contracts, caused damage, unjustified enrichment or from other circumstances listed in this code.*" The Code of International Commerce envisioned the so called "typical" (author's note: named) contracts–which were regulated in this Head–on one side and other "atypical" (author's note: unnamed) contract–which had to fulfil certain substantial conditions[11]–on the other hand. The commentary classifies contracts such as a contract on production specialization and a contract on production cooperation into the second category. Particular contract types defined in the Code once again resembled those in the current Commercial Code. There were for example: a contract on sale, a barter contract, a contract on loan, a lease contract, a contract on deposit, a storage contract, custody of a thing by third person, a contract on performance of work, a contract on supervision activities, a transport contract, an insurance contract, a procurement contract, a contract on association, some contracts on bank transactions and so on.

Conclusion

The Code of International Commerce was, in its era, a rather well done legal regulation based on the equality of the parties. Its terminology and structure was closer to that of the Commercial Code adopted in the 1990's rather than to that of Code of Business (that was adopted at around the same time). It stems from historical context and the analysis in this paper that it was a rather comprehensive and to a certain extent from other codes autonomous legal regulations. However, in general, first half of the 1960's brought a rather substantial fragmentation of legal regulations due to re-codification of civil and family law and due to the creation of new Code of Business, Code of International Commerce and a new Code of Labour. With regards to a high level of autonomy of all the above mentioned codes, Czech legal regulation was much disintegrated. Thus particular legal institutes were often and without any specific, objective reason regulated multiple times within autonomous codes.

[10] Kanda, A.: Zákoník mezinárodního obchodu. Prague: Orbis 1976, page. 19-20.
[11] Kopáč, L.: Komentář k zákoníku mezinárodního obchodu. Prague: Panorama 1984, page. 77.

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The closer I knew Poles the better I understood them and the better I felt among them. Poland and Poles in the Biography of Carl Gustaf Emil Mannerheim

*Marek Białokur**

Abstract

The biography of Marshal of Finland C. G. Mannerheim Poland and the Poles didn't play important role. Despite this it can be concluded that in the first period of his adult life he had very close contacts with them. That was a consequence of stationing in the area of Poland by Russian troops in which he was serving at the end of the nineteenth century and beginning of the twentieth century. Even after gaining the independence of Finland in 1917, Mannerheim didn't cease extensive contacts with Poles. Mannerheim's contacts seemed particularly interesting with Joseph Pilsudski who was respected by him as a real and strong leaders of the Polish nation. In this article one also presented similar historical issues of Finnish and Polish history at the background of the Mannerheim's biography.

Key words: *Carl Gustaf Mannerheim; Poland and Finland in the XX century.*

Baron Carl Gustaf Emil Mannerheim is a person, who in the history of Finland raises similar emotions as Marshal Joseph Pilsudski in Poland and Charles de Gaulle in France. In this article, the most interesting thing is the history of Finland and Poland, which as the biographies of Mannerheim and Pilsudski have many common elements[1]. These analogies were pointed out in the early twentieth century by Władysław Studnicki and Leon Wasilewski – Polish experts on national subject matters[2]. They especially put stress on the reality of the nineteenth century, when the whole Finland and the bigger part of Poland were within the boundaries of Russia[3]. Also, the time to become independent states was in Finland, as in Poland, due to the aftermath of the Great War (1914-1918), revolutionary events in Russia and Germany and the struggle of both nations[4]. In those historical moments, both Finns and Poles were led by Mannerheim and Pilsudski[5]. One will return to the relationships between them later in the text.

The history of war and peace can and must be studied not only on the basis of the documents, but also of human destiny. This statement repeatedly cited as any other one matches the Marshal Mannerheim. Focusing mainly on those aspects of his activity which concern Poland and the Poles, it is worth recalling a few key facts from his biography.

Mannerheim was born on 4th June 1867 in Askainen (the Louhisaari mansion) in Finland. He came from an aristocratic family of Swedish roots[6]. In 1886 he left the Finnish school of cadets and devoted himself to professional military service in the Russian army. One of the conditions of acceptance to elite Mikolajewski Cavalry School was the positive result of the mature final exam. Mannerheim graduated Mikolajewski Cavalry School in 1889 with very good marks[7]. During his service in the Tsar's army Russia fought against Japan (1904-1905) and took part in the First World War (1914-1918). During the first of those conflicts, Mannerheim was promoted to the rank of colonel. The First World War brought him the promotion to the rank of general.

* Marek Białokur, Ph.D., Department of History of the Countries of Central and Eastern Europe, Institute of History, University of Opole, Poland.

1 K. Baronowski, *Mannerheim i Pilsudski (Mannerheim and Pilsudski)*, „Życie Warszawy" 1993, Nş 263, s. 2.

2 W. Studnicki, *Finlandia i sprawa finlandzka (Finland and Finnish case)*, Kraków 1910. L. Wasilewski, *Finlandia (Finland)*, Kraków 1925; A. Skrzypek, *Związek Bałtycki. Litwa, Łotwa, Estonia i Finlandia w polityce Polski i ZSRR w latach 1919-1925 (Baltic Language Association. Lithuania, Latvia, Estonia and Finland in the Polish and Soviet policy in the years 1919-1925)*, Warszawa 1972, p. 27-29.

3 Finland before 1809 was an integral part of the Kingdom of Sweden. In the result of several wars of Sweden against Russia after the Treaties of Tilsit went under Russian dominion. As a part of the Empire in the years 1809-1917 Finland had the status of the autonomous Grand Duchy. Issues of mutual Finnish-Russian relations with regard to breakthrough of the nineteenth and early twentieth century, are dedicated in an interesting book: B. Szordykowska, *Finlandia w polityce caratu w latach 1899-1914. Problemy rusyfikacji i unifikacji (Finland in Tsars politics in the years 1899-1914. Problems of Russification and unification)*, Gdańsk 1994.

4 L. Wasilewski, op. cit., p. 157; B. Szordykowska, op. cit., p. 5.

5 R. Pullat, *Stosunki polsko-fińskie w okresie międzywojennym (Polish-Finnish relations in the interwar period)*, Warszawa 1998. (See Chapter I: *Finland and Poland - the differences and similarities*).

6 Biographical information about Mannerheim had been taken mainly from his memoirs published in part in Poland. C. G. Mannerheim, *Wspomnienia (Memoirs)*, Gdynia 1996. Look also: *Pierwszy Marszałek Finlandii (The first Marshal of Finland)*, "The Polish-Finnish-Estonian Review", 1937, Nş 6; T Konecki, *Wojna radziecko-fińska 1939-1940 (Soviet-Finnish War of 1939-1940)*, Warszawa 1998, p. 66-67.

7 C. G. Mannerheim, op. cit., p. 20-21.

In 1917 Mannerheim returned to Finland and started to form Finnish national troops which were often called the *White Army.* Polish newspapers, for example Krakow's "Time" described the Finnish reality at the end of the Great War very graphically: "[...] Bolshevism prowled at its best basing on Russian garrisons which terrorized the whole country"[8].

The year 1918 was a breakthrough in the career of Mannerheim when, for the first time he gained popularity and a strong position in the minds of his countrymen. Beside the first independent Prime Minister of Finland – Pehr Evind Svinhufvud, Mannerheim became an unqestionable leader of the struggle for independence and the candidate for the highest posts in the sovereign country. Finns didn't mind that he didn't speak Finnish in the first years of between war period and communicated with his subordinates through interpreters.

After the war for independence Mannerheim was ruling Finland as a regent for seven months from December 1918 to July 1919. When the Finnish parliament passed the constitution and elected the president, he took a back seat of political life[9]. He spent the period of twelve years between 1919 and 1931 on social work, travels and military research. In 1931 he became the Chairman of the State Defence Council. Two years later he became the first Marshal of Finland in independent history of that country.

The Press Attache of the Polish Embassy in Helsinki Norbert Żaba, who occupied this office at the end of the thirties, wrote about Mannerheim "Marshal Mannerheim, co-founder of independence. He defeated the Reds (bolsheviks) and assured the independence of Finland and the western model of democracy. He didn't reach for the dictatorship power which was actually lying on the street. He withdrew from the command and politics and occupied only the honourable positions of Chairman of the State Defence Council and the Red Cross. The time came for him when the independence of Finland was threatened again in 1939"[10].

We have to remember that the period preceding the outbreak of World War Two was used by Mannerheim to modernize and reorganize the Finnish Army[11]. According to Bernard Piotrowski, the Polish historian and author of the monography devoted to the Winter War (Talvisota) at the end of the thirties, the role of Mannerheim as an experienced and influential commander grew rapidly in the military and political circles in Western Europe[12]. One of the most important projects of that period was the construction of fortifications on Karel Isthmus along the borders with the Soviet Union which was of the highest priority in Finland. Mannerheim, who was one of the initiators of this project, mainly due to social support, was given an original gift – the whole system of fortifications was named "The Mannerheim Line" - naturally derived from his name[13]. From 1939 to 1945 he was the commander in-chief of the Finnish Army twice, giving evidence of the capacity of commanding. Once again he was a genuine "Father of the Finnish people who commanded them against "immemorial enemy" – Russia – in the name of defending "home, faith and fatherland"[14]. Talvisota, so-called Winter War (1939-1940) and Continuation War (Soviet - Finnish war from 1941 to 1944) strenghtened permanently the position of Mannerheima in the history of one thousand lakes country[15].

From August 1944 to March 1946 Mannerheim occupied the office of President of the Republic of Finland. The last important act of his activity on the political and military stage was the declaration of war against the Third Reich in March 1945.

At all stages of his life Mannerheim met with Poles. For many of them, especially for those whom he knew before the outbreak of World War One, he was a very close person. After many years of early contacts with Polish people he wrote down his memories: *"The closer I knew Poles the better I understood them and the better I felt among them"*[16]. Kalisz, one of the oldest urban centers on the Polish territory was the place where he began his military adventure as a cornet in the Russian cavalry. He was serving in 15th Alexander's Dragon Regiment which was popularly called "the hussars of death". This tradition had a strong influence on his youthful imagination[17]. This period did not last too long because in 1890 he was displaced to St. Petersburg.

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[8] *Bohater finlandzki [Finnish hero]*, „Time" [Kraków], 1919, Nş 286.

[9] About civil war in Finland in 1918 see: T. Cieślak, *Historia Finlandii (History of Finland)*, Wrocław 1983, p. 207-232; Idem, *Geneza i rozwój wydarzeń rewolucyjnych w Finlandii w latach 1917-1918 (Genesis and development of revolutionary events in Finland during the years 1917-1918)*, [in:] *"Z pola walki" ("From the battlefield"*), 1972, Nş 1; Idem, *Rola prasy fińskiej w odrodzeniu narodowym (The role of the press in the Finnish national revival)*, [in:] "Kwartalnik Historii Prasy Polskiej" ("Quarterly of the History of Polish Press"), Nş 4, 1979; S. Sierpowski, *Między wojnami 1919-1939 (Between wars 1919-1939)*, Part 1: Years 1919-1929, Poznań 1998, p . 142-143; L. Wasilewski, op. cit., p. 65-68.

[10] N. Żaba, *Finowie i Polacy w roku 1944 (Finns and Poles in 1944)*, „Zeszyty Historyczne" (Paryż), vol 106, 1993, p. 211.

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[12] B. Piotrowski, *Wojna radziecko-fińska (zimowa) 1939-1940. Legendy, niedomówienia, realia (Soviet-Finnish War (Winter) 1939-1940. Legends, understatements, realities)*, Poznań 1997, p.122.

[13] Ibidem, p. 124-127

[14] Ibidem, p. 218.

[15] See: M. Zgórniak, *Wojna zimowa 1939-1940 (Winter War of 1939-1940)*, [in:] *Bałtowie. Przeszłość i teraźniejszość (Balts. Past and Present),* ed., A. Kastory, A. Essen, Kraków 1993, p. 138-153; A. Czubiński, *Druga wojna światowa 1939-1945. Część 1: Geneza konfliktu i działania wojenne do 1942 roku (The Second World War 1939-1945. Part 1: The genesis of the conflict and the war till 1942)*, Poznań 1999, p. 155-161, 276-278; K. Grünberg, *Czas wojny 1939-1945. Wykłady z historii (Time of War 1939-1940. Lectures from history)*, Toruń 1991, p. 121; J. Smaga, *Narodziny i upadek imperium ZSRR 1917-1991 (The birth of the empire and the collapse of the USSR 1917-1991)*, Kraków 1992, p. 157-158; M. Smoleń, *Stracone dekady. Historia ZSRR 1917-1991 (Lost Decade. History of the USSR 1917-1991*, Warszawa-Kraków 1994, pp.156-157; A. Kastory, *Radziecka polityka wobec Finlandii (październik 1939- marzec 1940) (Soviet policy towards Finland (October 1939 - March 1940)*, [in:] *(Balts...)*, p. 154-202.

[16] C. G. Mannerheim, op. cit., p. 21.

[17] Ibidem.

He spent the next 18 years in the Tsar's army so he had a limited contact with the Poles apart from those who were in the capital of the empire, or as he did, wore the uniform of the Russian Army.

The beginning of the twentieth century announced the breakthrough events. The Russian-Japanese War (1904-1905) which was to be a local conflict for Russia and to be ended quickly took a completely different turn. The event was to prove equally important to the future of Finland and Poland. The revolution which started in 1905 was the best confirmation. Mannerheim accurately assessed this turbulent period from the perspective: "The Russian defeat and the subsequent internal shocks, which have breached the empire basis, turned out to have a decisive impact on the world politics [...]. Also in Finland, the new wind was blowing. The revolution in Russia has given our nation the spirit of fight against increasing oppression from the turn of the centuries"[18]. The views, similar to those expressed by Mannerheim, were also expressed by Poles who, the same as Finns, wanted to use the internal problems of Russia to improve the conditions of national well-being.

Mannerheim spent the longest period of direct contacts with Poles from 1908 to 1914. During this period he was re-assigned to serve in Poland. This fragment of his biography was fully reflected in the memories which he wrote down after many years. ''Shortly after the return I could enjoy my own regiment because I received a command of 13th Vladimir's Lancer Regiment which stationed in Minsk Mazowiecki, in the heart of Poland[19]. I accepted the appointment and transfer to Poland with pleasure where 19 years ago I had started a military career [...]"[20]. The fact that Mannerheim felt very well among the Poles didn't prevent him from quick promotions in the Tsar's army. Coming back after years of memories to the times spent in Poland he wrote: "Even today I remember spending pleasant 7 years in Poland." Before I started serving there, I had officially visited the Polish stables and two times I had been detached to Warsaw for an inspection connected with the emperor's stay at Polish territory. Thanks to the cavaliers from the Ministry of Court I met with many distinguished Poles who visited St. Petersburg in the winter season. As a result, I had had many friends among them before I became a commander of 13th Vladimir's Lancer Regiment. Passion for horses, hunting and sport opened many doors before me. I took part not only in the higher spheres of social life of the Russian military and government officials but I also spent some time in the Polish company, which is known to be excellent and exclusive. Shortly after the arrival I was admitted to the Hunting Club in Warsaw, the Polish Jockey Club which is able to suit the most famous clubs of London, Paris and St. Petersburg"[21]. This shows that Mannerheim felt very well in the Polish reality. He saw very clearly similarities and differences in the position of Finland and Poland.

During a stay on the territory of Poland at the beginning of the twentieth century Mannerheim paid attention that a long history of hatred between Poles and Russians didn't find its outlet in acts of violence. According to him a lot of Poles understood that rebellion would only cause more repression. In his estimation, the Polish-Russian relationships and connections despite the hostility were often characterized with courtesy[22]. "Despite my position the Poles welcomed me without prejudice. As a Fin who was a declared opponent of Russian policy in my own country I understood the feelings of Poles and their views on touchy issues. That was the reason why I never talked with them about politics. They didn't break that unwritten law either so we created the type of the alliance without oath"[23].

After years of staying in Poland, Mannerheim recalled hunting with great sentiment. There were not only hunting activities, but above all social events[24]. In the memory of those who had direct contacts with him, he was recorded as a tall and handsome aristocrat, officer in every inch and first of all, an idol of women[25]. This picture was commemorated by Mary Lubomirska, a wife of Zdzislaw Lubomirski, the President of Warsaw during the German occupation and a member of the Regency Council which was formed by Germany and Austria-Hungary on the occupied Polish territories in September 1917[26]. Historians define their mutual relations in terms of a very close friendship. We can observe this picture in memories of Maria Lubomirska. On 29th January 1915 we can read: "In the afternoon Mannerheim who has not been seen since the beginning of the war paid us a visit. We used to write to each other, but we did not actually do anything else. The uniform always fits him perfectly, under which there is a man of blood and flesh"[27].

The correspondence with Mannerheim dominated the next part of Maria Lubomirski's memories. On 24th October 1915 we can read: "In those days I received a lovely letter from General Mannerheim (...). For a moment he cast down the armour and stood before me as a real man. Your beautiful letters which You Madame wrote to me – Mannerheim wrote about letters from Lubomirska – were my greatest joy during the war. In severe and difficult moments those letters were very important to me and cheered me up. These letters showed me your right and noble soul. The letters helped me to fight against the atmosphere of baseness, which comes after the great army procession and stifles all that is weak. These words brought me joy and relief,

[18] Ibidem, p. 28-29.
[19] T. Adamczak, *W izolacji od Mińszczan (The isolation from Mińszczan)*, [in:] *585 lat Mińska Mazowieckiego (585 years of Minsk Mazowiecki)*, ed., J. Kuligowski, Minsk Mazowiecki 2006, p. 25-26
[20] C. G. Mannerheim, op. cit., p. 37.
[21] Similar opinions see.: M. Murawiow, *Wspomnienia (Memories)*, Warszawa 1990.
[22] C. G. Mannerheim, op. cit., p. 39.
[23] Ibidem, p. 38.
[24] Ibidem, p. 41.
[25] R. Pullat, op. cit., p. 209.
[26] See.: *Pamiętnik Księżnej Marii Zdzisławowej Lubomirskiej 1914-1918 (Memoirs of Maria Princess Zdzisławowej Lubomirski 1914-1918)*, J. Pajewski prepared for printing, ed. I, Poznań 1997.
[27] Ibidem, p. 124.

even the pride. They tied a little golden thread between us"[28]. This kind of memories show Mannerheim as an ordinary human being, not only the person involved in the great and groundbreaking events. Maria Lubomirska must have remained in the permanent memory of Mannerheim. This is proved by the fact that the correspondence was kept by Mannerheim for many years[29]. At this point it should be mentioned that during World War One General Mannerheim as a commander of brigade cavalry, 12th cavalry divisions, and finally the 6th corp of cavalry had been operating on the territory of former Poland, especially Galicia for two years.

The interwar period opened entirely a new chapter in the history of the relations between Poles and Finns[30]. According to the expert on the problems of the Baltic States, Professor Peter Łossowski: "Poland has maintained good relations with Finland. It wasn't a very close co-operation because Finland inclined geographically and culturally to Scandinavia and established closer relationships with the countries of that region. (...) The obstacle which slowed down the development of closer relations between Poland and Finland was the direct vicinity of the Soviet Union and Finnish fear of the conflict with that country. The Finnish political circles considered Polish eastern policy too risky and refused to co-operate on those areas which could cause Moscow suspicions – for example, the establishment of the Union of the Baltic States or open military co-operation and partnership with Poland"[31]. A Polish historian Alexander Bregman described this situation in a sketch entitled *In the Soviet empire's neighbours* in which we read: "There is no coincidence that all Russian allies are dependent on the Kremlin. These are the consequences of the nature of the soviet policy, as well as the disparities between giant Soviet Union and its neighbours"[32]. These factors exert an influence on the perception of Poland by Mannerheim, as well as on the Polish opinions of the Finnish national hero.

The relations between Pilsudski and Mannerheim are another important topic in the biography of Finnish Marshal[33]. According to some Polish historians their meeting could take place in 1887 in Kharkov where they were in the same place at the same time. Neither of them reminisced that such a meeting had taken place[34]. From the available published writings of Joseph Pilsudski, we can learn that he was interested in the history of Finland at the end of XIXth century. It was connected with russification of Finland by the Tsar's regime[35]. In the opinion of Pilsudski Finns should organize the revolution together with Poles against Russia. Unfortunately, on the basis of this opinion the ways of Mannerheim and Pilsudski couldn't come together. It was the consequence of Mannerheim's position. He underlined: "Poland herself should solve problems with Russia, because only this way gives them the chance for better future"[36].

The sources confirmed that Mannerheim had met Pilsudski for the first time in November 1919 during the journey of the former regent of Finland around Europe[37]. In Poland, besides official meetings, Mannerheim also came back to the memories, old friends and home, which he was forced to leave at the beginning of World War One[38]. For us the most interesting conversations between Mannerheim and Pilsudski concentrated on relations between Poland and Finland and the issue of Eastern Europe. After the meeting with Pilsudski, Mannerheim left an interesting description of the encounter. "I have visited Marshal Pilsudski, great Pole who, at the time of withdrawal of Germans in November 1918 stood at the head of a young republic. His seat was Belvedere, a small palace near the Royal Baths. [...] Pilsudski not behaving pompously, but simply and naturally, welcomed me into his modestly arranged office. Immediately, we started to talk about the most important problem for our countries-Russia. According to him, Poland and Finland should co-ordinate actions against bolsheviks. "What should I do – said Pilsudski – since the white leaders don't understand that during the process which we are observing, a new Russia exists is being established and that Poland, as well as Finland won't be included in that country! [...] Negotiations with Russian leaders seem to me hopeless, as long as such a conviction and principle of the indivisibility of Russia as a basis of discussions"[39]. In this question, as Mannerheim stated "Motifs of the Polish Marshal could be understood". Mannerheim also wrote that Pilsudski was very critical when he talked about Ententa. According to him, Ententa wasn't able to undertake the mediation between the antibolshevik forces, which gave bolsheviks time and better positions. From the point of view of the observers and analysts, after the visit to Poland Mannerheim appreciated more the importance of the mutual co-operation between Helsinki and Warsaw. He also started to think seriously about closer relations between the Baltic countries[40].

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[28] Ibidem, p. 258-259.

[29] M. Kopczyński, *Wstęp (Introduction)*, [in:] C.G. Mannerheim, op. cit, p. 397.

[30] J. Czechowski, *Wzloty i upadki w politycznych relacjach Polski i Finlandii w dwudziestoleciu międzywojennym, (The Ups and Downs of Political Relations between Poland and Finland in the Interwar Period)*, "Dzieje Najnowsze", 2009, Nş 1, pp. 50-59.

[31] *Historia dyplomacji polskiej (History of Polish diplomacy)*, vol IV 1918-1939, ed., P. Łossowskiego, Warszawa 1995, p. 379; W. Materski W., *Tarcza Europy. Stosunki polsko-sowieckie 1918-1939 (Shield of Europe. Polish-Soviet relations 1918-1939)*, Warszawa 1994, p. 102-103, 114; M. K Kamiński, M.J. Zacharias, *W cieniu zagrożenia. Polityka zagraniczna RP 1918-1939 (In the shadow of the threat. Foreign Policy of Poland 1918-1939)*, Warszawa 1993, p. 68-70; L. Wasilewski, op. cit., pp 158-159; T Cieślak, op. cit., pp 245-246.

[32] A. Bregman, op. cit., p. 40.

[33] R. Pullat, op. cit., p. 101.

[34] Ibidem, p. 103.

[35] J. Pilsudski, *Pisma zbiorowe (Collective texts)*, Volume I, Warszawa 1937, pp. 265-268.

[36] R. Pullat, op. cit., p. 103.

[37] Despite the publication of Mannerheim's memories in Poland in 1996, which give information about his meeting with Pilsudski, historians sometimes make the error by informing the public opinion that such a meeting had never taken place. See: D. Baliszewski, *Cudotwórca z Helsinek. (Magician from Helsinki)* "Wprost" ("Direct") 2008, Nş 7, p. 81.

[38] C.G. Mannerheim, op. cit., p. 148.

[39] Ibidem.

[40] R. Pullat, op. cit., p. 103.

The efforts to promote co-operation of Finnish and Polish military authorities were the confirmation of good relationships between Mannerheim and Pilsudski. It should be recalled that Mannerheim exerted an important impact on the Finnish army, even at the time when he didn't occupy any significant function[41]. After the coup d'état in May 1926, Pilsudski took more decisive steps towards a political rapprochement[42]. These two men met for last time in 1932 during Mannerheim's last visit in Poland[43].

For a better picture of the Polish aspects of Mannerheim's biography it is necessary to pay attention to the formation and perception of his image and Finland by the Polish public opinion. According to the Estonian historian Raimo Pullat, "Finns were always interested in what other nations think about them". It is interesting that the picture of Finland and Finns emerging from the analyses of some Polish newspapers and magazines gives a very positive impression. The Finnish cities like Helsinki "The pearl of the North" were perceived very positively in Polish titles.

Polish journalists underlined the beauty of nature and a highlevel of education in Finland. Finns were also shown as tough and capable of fighting for their independence. The Polish press devoted a lot of interesting texts to Mannerheim. One of the first lengthy articles in the Second Republic of Poland appeared in connection with his visit in Poland in November 1919. The correspondent of Krakow "Time", even before his arrival to Poland, wrote in the text entitled *Finnish hero:* "The conqueror of Soviets in Finland, national hero, ex-Regent, General Mannerheim comes to Warsaw, expected by Polish officials"[44]. In the next part of the article, there is a description of a civil war in Finland. Mannerheim turns out to be providential, someone unique and unusual, who is also very clever as a commander and a politician. In all the articles, journalists stressed his close ties with the Poles and the times when he stationed on the Polish territory as a soldier. In the thirties, when Mannerheim returned actively to political and military life, the Polish press wrote, e.g.: The Finns showed a great struggle against a giant neighbour country – Russia. In these fights for freedom of Finland Mannerheim led Finnish patriots[45]. An interesting journal "The Polish-Finnish-Estonian Review", one of the fruit of the Polish-Finnish co-operation. The journal was devoted to the issues of intellectual, cultural and economic co-operation of the Baltic countries. The figure of Marshal Mannerheim appeared in the "Review" very often. Despite the fact that the Polish national minority in Finland wasn't numerous, Mannerheim visited the Polish diplomatic agency several times[46]. Most of the visits were connected with cultural events which promoted Polish culture in Finland. Among other things, he was at the concert of Arthur Rubinstein – a famous Polish pianist[47]. The sympathy of Mannerheim for Poland and Poles is confirmed by his meetings with Polish delegations who visited Finland. During those visits he had an occasion to ask about his friends and colleagues in Poland[48].

Also the Winter War (Soviet-Finnish War 1939-1940) has its dimension to Polish aspects of the biography of Marshal Mannerheim. The key to clarify this situation is the fact that Poland and Finland were the two European countries which were attacked by the Red Army in 1939[49]. For the sake of historical truth, it must be said that in the beginning of September 1939 the Finnish authorities, as well as a part of the public opinion in Finland didn't maintain a friendly attitude towards Poland. Finns were afraid that Poles could expect help from the Soviet Union against The Third Reich. They changed their attitude to Poland when it became clear that on 17th September the Soviet Union invaded Poland as an equally ruthless invader[50]. It meant that the secret protocol of the Molotov-Ribbentrop Pact from 23rd August 1939 was also a mystery for Finns who had very good relationships with Germany.

For the Finns, the problem was to preserve the neutrality which determined their actions both in terms of political and military relations. Despite the pressure exerted by the Germans, Marshal Mannerheim sent a letter to the Polish diplomat in Helsinki – Henry Sokolnicki on 5th October 1939 in which he wrote among others: "I have it at heart to express to You my great admiration for Polish heroic soldiers"[51]. Could Mannerheim predict that in less than two months the ambassador of the Republic of Poland in Bucharest Roger Raczyński would express the words of sympathy for Finland, the victim of brutal Soviet aggression, to the Finnish diplomat in Romania Bruno Kivikoski?[52] The Soviet-Finnish War (Talvisota) was in the center of interest of Polish officials and society, mainly due to a sense of community threatened by the same enemy

[41] Ibidem, p. 102.
[42] T. Cieślak, *Historia Finlandii (History of Finland)...*, p. 268.
[43] N. Żaba, op. cit., p. 211; R. Pullat, op. cit., p. 103; B. Piotrowski, op. cit., p. 218
[44] *Bohater finlandzki [Finnish hero]*, „Time" [Kraków], 1919, Nş 286.
[45] R. Pullat, op. cit., p. 180.
[46] More about this see: E. Later-Chodyłowska, M. Zieliński, *Polonia w Finlandii. Dzieje i współczesność (Polish imigrants in Finland. The history and the present)*, „Przegląd Zachodni", 1979, Nş 2.
[47] Ibidem, p. 168.
[48] Ibidem, pp. 209-211.
[49] See: M. Adamiak, *Projekt wysłania żołnierzy polskich internowanych na Litwie i Łotwie na front sowiecko-fiński (A Project of Dispatching Polish Soldiers Interned in Lithuania and Latvia to the Soviet-Finnish Front)*, "Dzieje Najnowsze" 2009, Nş 1, pp. 75-81.
[50] B. Piotrowski, op. cit., pp. 62-63.
[51] A. Suchcitz, *Polska a wojna fińsko-sowiecka 1939-1940, (Poland and the Soviet-Finnish War 1939-1940)*, „Niepodległość", 1988, Volume XXI, p. 167; R. Pullat, op. cit., p. 183.
[52] *Polska współczuje Finlandii (Poland feels sorry for Finland)*, „Głos Polski", 1939, Nş 5, p. 1.

– the Soviet Union[53]. This dramatic period in the history of Poland and Finland was one the last moments in the biography of the national hero of Finland, Marshal Mannerheim, when he had good and direct relations with Poles. The agreement for the military support declared by the Prime Minister of the Polish Government in exile general Władysław Sikorski was the best proof of Polish intentions and will to provide a real aid for heroicly fighting Finns[54]. During the Winter War, Mannerheim proved another time that the respect and honours granted by his countrymen and foreigners weren't a coincidence. The attitude of Finns who were led by Mannerheim against much stronger Red Army guaranteed them sympathy and admiration of international public opinion. And as it was fifty years ago when Mannerheim was in touch with Poles for the first time, the enemy was the same, but they only changed their name from white to red regime.

[53] W. Długoborski, *Polska a wojna zimowa 1939-1940 (Poland and the Winter War 1939-1940)*, [in:] *Bałtowie... (Balts...)*, pp. 203-221.
[54] W. Długoborski, op. cit., pp. 209-210; R. Wapiński, *Władysław Sikorski (Wladislav Sikorski)*, Warszawa 1978, pp. 263-264.

National Democratic Camp of the Former Grand Duchy of Lithuania and its Attitudes towards War, Peace and Independence during World War I

*Przemysław Dąbrowski**

Abstract

The Polish people living in Lithuanian and Belarusian lands had ambivalent feelings about the breakout of World War I in August 1914. The war instilled fear and anxiety, but it also aroused hopes and expectations. Many people were well aware of the cruelty that military activities involved, yet he believed that the Polish nation would politically benefit from the conflict rather than fall its economic prey. Nationalist periodicals demanded all the people who could contribute to the common good to stay in the country and fulfill their civic duty. A large number of representatives of the National Democratic, propounded to all the people in the lands of former Grand Duchy of Lithuania,regardless of their nationality, education or creed, joining their forces and demonstrating solidarity. Claimed that only real danger can motivate a nation to display the moral value of an individual and society as a whole.

Key words: *National Democratic; nationalist periodicals; peace; independence; World War I.*

The Polish people living in Lithuanian and Belarusian lands had ambivalent feelings about the breakout of World War I in August 1914. The war instilled fear and anxiety, but it also aroused hopes and expectations.[1] Aleksander Zwierzyński, for example, was well aware of the cruelty that military activities involved, yet he believed that the Polish nation would politically benefit from the conflict rather than fall its economic prey.[2] Nationalist periodicals demanded all the people who could contribute to the common good to stay in the country and fulfill their civic duty. It was written: "When a rush like this comes, no calls for remaining calm and sensible are of value, though probably only by them could the panic-stricken be prevented from leaving the country to sail the uncharted waters of tomorrow".[3] A contribution to the dispute was also made by Jan Obst, who propounded to all the people in the lands of former Grand Duchy of Lithuania,regardless of their nationality, education or creed, joining their forces and demonstrating solidarity. Obst claimed that only real danger can motivate a nation to display the moral value of an individual and society as a whole.[4]

In 1915, *Mały Kurier* published a list of duties imposed upon city authorities as a result of war activities. Authors used to write: "The responsibility to tackle and satisfy all the needs of the city and its population falls upon the city council, all the institutions of the local government as well as the social institutions. A grave responsibility it is indeed, since it burdens us at a time of widespread feverishness and restless excitement. Still, it is a honorable duty for it is performed as a civic service for the benefit and safety of us all." Undoubtedly, as it was emphasized, society as a whole had to be addressed since "only then, can we as an organized and socialized group, pass the test of adjustment and shall be protected against all odds much better than we would have been as egoistic individuals relying on themselves only".[5] On that basis society was divided into two camps: one aware of its civic duties and the other " … living in the bliss ignorance ofwhat it owes to its milieu". It was said that "as far as the first camp is concerned, more than a year of an ongoing warfare had exclusively positive influence upon it. Within this group, the war became a stimulus to enhance citizenship in its broadest sense and expandedthe scope of duties people believed to have towards the nation. It also helped their personal lives attain a more abstract level allowing them to resist submission to 'everyday lives' more effectively".[6]

Columnists of *Mały Kurier* claimed time and again that with the war coming to an end, the Polish nation would gain the opportunity of an independent economic, cultural and national growth. It was stressed that however challenging a task it was, it

* Przemysław Dąbrowski, Ph.D., Department of History of State and Law, Faculty of Law and Administration, University of Gdansk, Poland

1 For more, see:: J. Jurkiewicz, *Rozwój polskiej myśli politycznej na Litwie i Białorusi w latach 1905 – 1922*, Poznań 1983, s. 105; J. Bartoszewicz, *Sprawa polska*, Kijów 1918, s. 3.

2 E. Romer, *Dziennik 1914 – 1918*, t. 1, Warszawa 1995, s. 27.

3 *Na tułaczkę*, „Kurier Litewski", Wilno, 10 (23) VIII 1915, nr 210, s. 1.

4 J. O.[bst], *Kiedy trwoga …*, „Dziennik Wileński", Wilno, 10 VI 1917, nr 130, s. 2.

5 *Dla obowiązku*, „Mały Kurier", Wilno, 14 (27) VIII 1915, nr 4, s. 1.

6 *Wpływy wojny*, „Mały Kurier", Wilno, 18 (31) VIII 1915, nr 8, s. 1.

was possible to be performed by "getting as many social groups as possible interested in the duties of an individual towards the nation".That was the background to claim that "this should be the way to prevent the actual as well as spiritual illiteracy. The wall of insensitivity to general matters has to be pulled down". The above mentioned aims were to be achieved by making the society an active participant in the works of various public and social institutions.[7] Only then would it be possible to learn how to predict certain events in the future. As it was asserted: "Without predicting skills and abilities to make logical conclusions out of premises – scheduled work is impossible. And it is the scheduled work which is one of the main signs of culture".[8] One of the *Mały Kurier* publicists pointed out that organizing mutual help or any other enterprises that would reflect that particular moment and exceptional circumstances "… happen drowsily, without necessary elasticity. 'Activists' look back on each other; everyone waits for somebody else to initiate the act and even perform the act themselves". Referring to the situation in Vilnius in the times of World War I, he claimed that "it was unlikely to call [Vilnius] either the heart or the brains of the country. Two factors independent of us, largely contributed to this situation, yet the society is to be blamed as well. This means we are not deprived of the ability to change this state of things".[9]

Nowy Kurier Litewski also commented upon the situation stating that "if we do not want our politics to be left to chance, we have to organize it on our own. Otherwise, foreign forces will decide about us, without us". As one of the newspapers editors noticed – the current war "shook the economic foundations of almost every country, and disturbed usual economic relations".[10] In such a situation some were voicing hopes that in the course of "the most probable events, political consciousness in the wide circles of the Polish nation will arise. An endeavor to make foreigners understand the Polish cause well and tie it with the interest of their homelands shall enter this consciousness. This is one of the political missions ahead of the Polish nation to be completed".[11] The victorious Germany could have expected nothing but to "ceaselessly pursue the life-and-death struggle, yet not for political rights anymore. They would struggle for the land and the people, the safeguards of their survival. Either us, or them".[12] The first issue of 1917 *NowyKurierLitewski* stated that 1917 would put an end to the war as well as "over a century of Polish martyrdom. The chains of slavery and the partition are to be removed, and normal conditions to grow as any other European nation obtained. May this year make our national dreams come true,may we fully spread the wings of our creative powers".[13]

The journalists of *Dziennik Wileński* also provided lots of interesting reflections. In words expressing certain helplessness it had been stated that "war is no entertainment and all of us have been convinced by that. It is beyond any doubt that war brings the inevitable that we can do nothing about but accept. It should not, however, mean sinking into apathy and helplessly accepting all the inconveniences that could be dealt with in so many cases".[14] The heavy financial burden that accompanied all military activity was also pointed out. It was written that "this total war we are witnessing now, the scale of which had previously been unknown to the world, must influence all spheres of life, including economic life in general and financial matters in particular".[15] In reference to the earlier accounts, it was underlined that "the political importance of money in international relations reached the point of being a decisive factor in many matters. Among the other reasons for the current war the money issue … was of great importance".[16] For this reason, a post-war economic situation of European countries had been repeatedly analyzed. It was emphasized that, beginning with those memorable August days, Europe was pushed off its economic path and "took the wrong turning whose purpose and ending are shrouded in a dense fog". That was why the development of industry and trade as well as income from gradually introduced excise were thought to contribute to the success of individual countries.[17]

Hence, the national democratic circles called for establishing peace as soon as possible. They realized, however that it was not an issue that could be solved quickly and without prior consideration. It was stated that "the war like the one we have now cannot be terminated over a night. Undoubtedly our patience shall be tried over and over again. Still, judging by prevailing social moods, what gained popularity was making peace rather than prolonging the war".[18] There were also other voices saying that "the present war is an unprecedented cataclysm, a disaster taking revenge on those who spelt it. It strikes with the speed and power of an avalanche which obliterates everything in its way. A power in its own right, leading to unpredicted consequences. … Mankind yearns for peace but fears it at the same time for it would bring a pause for reflections that would undoubtedly provoke a dire question: why was the war waged for so many years, why has so much blood been shed if everything is to remain unchanged?"[19] Another question was raised, "How about lifting German supremacy? To which Germans may

[7] Ibidem, s. 1.
[8] *Wojna uczy*, „Mały Kurier", Wilno, 4 (17) IX 1915, nr 25, s. 1.
[9] *Wystygłe ognisko*, „Mały Kurier", Wilno, 23 VIII – 5 IX 1915, nr 13, s. 1.
[10] M. T. [signature of an unresolved], *Spekulanci*, „Nowy Kurier Litewski", Mińsk, 10 (23) I 1916, nr 8, s. 2.
[11] Idem, *Nasze zadanie*, „Nowy Kurier Litewski", Mińsk, 14 (27) I 1916, nr 12, s. 2.
[12] Idem, *Albo my, albo oni*, „Nowy Kurier Litewski", Mińsk, 16 (29) I 1916, nr 14, s. 2.
[13] *1917*, „Nowy Kurier Litewski", Mińsk, 1 (14) I 1917, nr 1, s. 2.
[14] *Najwyższy czas*, „Dziennik Wileński", 1 IV 1916, nr 51, s. 2.
[15] *Pieniądz podczas wojny*, „Dziennik Wileński", Wilno, 20 V 1916, nr 91, s. 2.
[16] *Pieniądze a polityka*, „Dziennik Wileński", Wilno, 23 IX 1916, nr 193, s. 1.
[17] *Jak Europa spłaci dług?*, „Dziennik Wileński", Wilno, 19 VII 1917, nr 162, s. 2.
[18] *Warunki*, „Dziennik Wileński", Wilno, 28 V 1916, nr 98, s. 2.

respond that they do not lay any claims to supremacy. Finally. Guarantees of permanent peace. The pressure exerted by some statesmen on precisely this point seems to be a kind of safeguard for a critical moment when the public opinion and history would confront them with a question: Why was the war waged? Then they could make a magnificent gesture and say: We have hereby fought to provide you, your children and their children with ever lasting peace.... however thick and threatening the clouds looming on the horizon are, perhaps the not-too-distant future shall disperse them and bring back the gleam of peace to the world".[20] *Dziennik Wileński* stated that the outbreak of the war was a failure of diplomacy that couldn't have predicted or prevented it. For that reason there were calls for changes in its form and content".[21]

In the context of the pope's, Benedict XV, peace address scheduled for 25 December 1917, Jan Obst presented his stance on the peace matter in one of his articles.[22] Emphasizing the importance of the upcoming speech he said that "we should not close our eyes to insurmountable difficulties that lie in the way of peace today. Sincerely believing in the triumph of better instincts, we do not know, however, when it may happen and nobody, including Christ's vicar is able to predict when the goblet of our misery and sins, as well as God's anger shall be full to the brim". He went on pointing out that "it's certain that starting this war, humankind took a very dangerous routeunder the banner of elevated and pompous slogans, but without God in their hearts". According to Obst "the people trapped themselves and they shall quiver in blood, losing all their strengths in vain without any way out, as long as they do not humble themselves in front of Christ's Cross".[23] Despite earlier promises, the fighting countries were addressed on August 1, 1917 while the public opinion was acquainted with the content only on August 18. Referring to the letter of the law instead of force when calling for freedom and consensus on future borders among the nations, Benedict XV in peace filled words appealed for "God to inspire you with a resolution that his most sacred will would hope for. Let the heavens make you earn the recognition, not only among the contemporaries but also among future generations, ensuring you the magnificent title of fathers of peace".[24] The address was very well received by the national press released in Vilnius at that time. Having underlined its landmark dimension as well as the fulfilled duty of the pope asChrist's vicar, it was emphasized that the address "quite realistically looks into the material interest of the nations. It also showed full respect to military honors".[25] In some other source it was written: "Once so many years have passed, who shall guess? When present catastrophe from the historic perspective shall still be a catastrophe, the future objective historiographer will undoubtedly have to assert that pope's peace address was one of the most momentous acts of those turbulent times".[26]

In her memoirs, in a surge of fierce passion, Emilia Węsławska writes that "the release of the war monster which breathed fire consuming our lands, laying waste our palaces, manor-houses, country manors, cottages, and destroying our nation's cultural fellowships enabled our nation to display its great strength, power of love for anything Polish, all-embracing devotion and imperishable feeling of national unity".[27] She also added that "So far, we, the Poles, have been most severely affected by the war which turned our country ... into a desert and threw us into slavery's abyss. All in all, the war has a good side too. If it hadn't been for the war we would have never felt so intensely that we are the sons of the very same motherland, that the Kingdom, Galicia, Poznan and Lithuania make up, equally precious for all Poles, that partitions are nothing when we beat as one strong Polish heart".[28] According to Węsławska the servitude stemming from that situation was particularly painful for the intelligentsia. Describing that situation she wrote: "Putting myself in the desperate position of the intelligentsia fleeing from the war-consumed areas to Vilnius I turned to the Polish landowners in Lithuania and Belarus for help. In *KurierLitweski* I encouraged them to help the Poles from the Kingdom and let them come under the shelter of their roofs until the war ended. At the same time I offered my help as an intermediary between employers and job seekers".[29]

Significant changes were introduced in 1916 after proclamation of the Act of 5 November. The origins of the Act could be traced back to the provisions made at the conference between Reich Chancellor and Austro-Hungarian Minister of Foreign Affairs who met in Vienna between August 11 and 12, 1916. It had been decided that when military activities subside an independent Kingdom of Poland with hereditary monarchy and constitutional system would be created. Until that moment the Congress Kingdom of Poland was supposed to remain an occupied area with its own army, however without decisive voice in its foreign affairs.[30] That was why on November 5, 1916 German Colonel General Hans Hartwig von Beseler in Warsaw and Austro-Hungarian Colonel General Karl Kuk in Lublin declared the manifesto of two emperors which made these provisions public. It was pointed out that the Kingdom of Poland shall remain in constant contact with allied superpowers.[31] The Act

[19] *W trzecią rocznicę*, „Dziennik Wileński", Wilno, 1 VIII 1917, nr 173, s. 2.
[20] jot. [signature of an unresolved], *Na schyłku roku*, „Dziennik Wileński", Wilno, 31 XII 1916, nr 275, s. 1 – 2.
[21] *Dyplomacja*, „Dziennik Wileński", Wilno, 14 VII 1917, nr 158, s. 2.
[22] *Orędzie pokojowe Ojca św.*, „Dziennik Wileński", Wilno, 17 VIII 1917, nr 186, s. 2.
[23] J. O.[bst], *Pośrednictwo pokojowe Ojca św.*, „Dziennik Wileński", Wilno, 18 VIII 1917, nr 187, s. 2.
[24] *Orędzie pokojowe Ojca św.*, „Dziennik Wileński", Wilno, 19 VIII 1917, nr 188, s. 2.
[25] J. O.[bst], *Moment*, „Dziennik Wileński", Wilno, 21 VIII 1917, nr 189, s. 2.
[26] Idem, *Fermenty*, „Dziennik Wileński", Wilno, 30 IX 1917, nr 224, s. 2.
[27] E. Węsławska, *Polacy na Litwie i Białej Rusi na tle zawieruchy wojennej*, rkps, Biblioteka Narodowa w Warszawie, sygn. IV 10721, , s. 4.
[28] Ibidem, k. 12.
[29] Ibidem, k. 7.
[30] J. Pajewski, *Odbudowa państwa polskiego 1914 – 1918*, Warszawa 1985, s. 118.
[31] Ibidem, s. 125.

of 5 November was received in different ways by the society, parties and political organizations. National Democracy opposed its provisions. Having presented thorough assessment of the Act, it formulated the so called 'Lausanne protest' of November 11, 1916. Emphasizing unity and indivisibility of the Polish nation scattered around three regions, National Democracy argued that "Constituting a country only out of one part of Poland does not fulfill this aim but creates new divisions. Parting forces of the Polish nation, Germany and Austro-Hungary condemn this future country to helplessness. They make it an instruments of their politics.... We see the military plans of Germany and Austro-Hungary as another disaster spelt on Poland. In a political dimension, this will yet be renewed confirmation of Poland's partitions".[32] Vilnius press, on the contrary, was very favorable of the November document stating that the day it was passed would be memorable for the Polish nation. It was written "None of us, the Poles, has ever witnessed any event so dramatically and profoundly influencing our affairs as this one.... National laws, like the one we have in front of our very own eyes, in which just a few lines influence lives of the millions and combined efforts of whole centuries, are not the result of a spur of a moment but of a deep and broad thinking processes. Thus, every word has a deeper meaning and should be considered in great detail". It was well-known that the November, 5 Act was not a final solution of the Polish matter, but a mere beginning. It was said that "The final decision concerning our fate has to be made on the bloody battlefield, and only the peace treaty may seal that. The current act is significant in that for the first time since the Congress of Vienna, the Polish cause which remained in a deadlock for over 100 years, has been finally touched upon. And this is already a lot".[33]

The Polish people living in Lithuanian and Belarusian lands had ambivalent feelings about the breakout of World War I in August 1914. The war instilled fear and anxiety, but it also aroused hopes and expectations. Many people were well aware of the cruelty that military activities involved, yet he believed that the Polish nation would politically benefit from the conflict rather than fall its economic prey. Nationalist periodicals demanded all the people who could contribute to the common good to stay in the country and fulfill their civic duty. A large number of representatives of the National Democratic, propounded to all the people in the lands of former Grand Duchy of Lithuania,regardless of their nationality, education or creed, joining their forces and demonstrating solidarity. Claimed that only real danger can motivate a nation to display the moral value of an individual and society as a whole.

[32] *Deklaracja lozańska z 11 listopada 1916 roku*, [in:] W. Bartoszewicz, *Mój ojciec i jego czasy. Wspomnienia z lat 1867 – 1920*, mszp., t. 1 – 2/*Włodzimierz Bartoszewicz*, ZNiO, sygn. 15611/II/t. 1 – 2, k. 245 – 246; for more, see: R. Wapiński, *Narodowa Demokracja 1893-1939. Ze studiów nad dziejami myśli nacjonalistycznej*, Wrocław – Warszawa – Kraków – Gdańsk 1980,s. 138; K. Kawalec, *Roman Dmowski 1864 – 1939*, Wrocław – Warszawa – Kraków 2002, s. 163; *Protest Dmowskiego i towarzyszy*, [in:] P. B. I. [signature of an unresolved], *Odbudowanie państwa polskiego. Dokumenty chwili bieżącej*, z. I, Kraków 1916, s. 50 – 51; Z. Opacki, *Między uniwersalizmem a partykularyzmem. Myśl i działalność społeczno – polityczna Mariana Zdziechowskiego 1914 – 1938*, Gdańsk 2006, s. 83 – 84; the declaration was signed by twenty people, including, inter alia, by their signatures: Roman Dmowski, Stanisław Filasiewicz, Hipolit Korwin Milewski, Zygmunt Laskowski, Jan Modzelewski, Erazm Piltz, Marian Seyda and Kazimierz Woźnicki.

[33] *Dzień 5 listopada*, „Dziennik Wileński", Wilno, 7 XI 1916, nr 230, s. 2; see also: *Niemcy*, „Dziennik Wileński", Wilno, 27 I 1917, nr 21, s. 1; for help in translating this text I wish to thank Mrs. A. Olszańska.

The Maritime Law in the Commercial Code of France of 1807

*Anna Klimaszewska**

Abstract

The authors of the Commercial Code of France of 1807 (Code de commerce) included rules from the field of the maritime law in the act as its book II (Of Maritime Commerce). As a result, the maritime law began to be viewed as a component of the commercial law, acquiring the doctrinal name of the maritime commercial law (droit commercial maritime). The strong influence which Code de commerce and its systematics exerted all over the world made a lot of countries treat the civil standards of the maritime law as part of the commercial law. This idea was not, however, commonly adopted, an example of which is the Anglo-Saxon and Scandinavian countries and Switzerland. But even in the countries where the maritime law was included in the regulations from within the commercial law,criticism of the representatives of the doctrine appeared.In consequence, the view on the maritime law as a separate whole began to emerge more and more, and the commercial maritime law stopped being an object of interest for the reformers of the commercial law. Nouveau Code de commerce of 2000 maintained this approach, too.

Key words:*The Commercial Code of France of 1807; maritime commercial law; contract of insurance; contract of bottomry; bill of lading; charter party; crew; master; sea ships.*

I. Introduction

The authors of the Commercial Code of France of 1807 (*Code de commerce*) included rules from the field of the maritime law in the act as its book II (*Of Maritime Commerce*)[1].
It consisted of the following titles:

- Title I - Of Ships and Other Vessels
- Title II - Of Seizure and Sale of Ships and Vessels
- Title III - Of the Owners of Vessels
- Title IV - Of the Captain
- Title V - Of the Engagement and Wages of Seamen
- Title VI - Of Charter-Parties and Affreightment
- Title VII - Of the Bill of Lading
- Title VIII - Of the Freight
- Title IX - Of Contracts of Bottomry and Respondentia
- Title X - Of Insurance

Section I - Of the Contract of Insurance, Its Form and Object
Section II - Of the Obligations of the Insurer and the Insured
Section III - Of Abandonment

- Title XI - Of Average
- Title XII - Of Jettison and Contribution
- Title XIII - Of Prescription and Limitation of Actions
- Title XIV - Of Exceptions or Bars to Actions

Analysis of these regulations indicates explicitly that Book II of *Code de commerce* was practically a copy of the regulations of *Ordonnance de la marine* of 1681, excluding the standards concerning, among others, the port police, fishing or shipwrecks[2].

As a result, the maritime law began to be viewed as a component of the commercial law, acquiring the doctrinal name of the maritime commercial law (*droit commercial maritime*)[3]. The very issue of joining the maritime and commercial laws resulted from the historical relationship between the two, for both were

* Anna Klimaszewska, Ph.D., Chair of Comparative Legal History, Faculty of Law and Administration, University of Gdansk, Poland.

1 *Nota bene*, it was the most extensive part since it had 247 articles, whereas the remaining books of the code:I (*Of Commerce in General,* regulating, among others, merchant accountancy, commercial partnerships and securities) - 189 articles, III (*Of Failures and Bankruptcies*) - 178 articles, IV (*Of Commercial Jurisdiction*) - 34 articles.

2 A detailed concordance table is included in the annexe to: Anna Klimaszewska, *Code de commerce – francuski Kodeks handlowy z 1807 r.* (Gdańsk: Arche, 2011), 216-235. This did not stop *Ordonnance de la marine* from constituting the law in force at that time, which, in turn, also contributed to the fact that *Code de commerce* was never a masterpiece of significant value to the culture of the maritime law; Jassuda Bédarride, *Droit commercial ou Commentaire du Code de commerce, Livre II, Du commerce maritime* (Paris: Chez Durand, 1859), 1:27. It is also worth noting that the regulations of *Ordonnance de la marine* were still in force until recently when they were finally abrogated on the strength of article 7 of the ordinance of 21stApril 2006;*Ordonnance n° 2006-460 du 21 avril 2006 relative ŕ la partie législative du code général de la propriété des personnes publiques*;Journal Officiel de la République Française (henceforth: JORF)of 22ndApril 2006, p. 6024.

3 The following works are an example thereof: Pierre-Sébastien Boulay-Paty, *Cours de droit commercial maritime, d'aprčs les principes et suivant l'ordre du Code du commerce*, 4 vols. (Rennes: Chez Cousin-Danelle, 1821-1823); Arthur Desjardins, *Traité de droit commercial maritime*, 9 vols. (Paris: A. Durand et Pedone-Lauriel, 1878-1890); René Bayssičre, Julien Bonnecase, *Le droit commercial maritime du Maroc français*, (Paris: Rabat Impr. Nouvelle, 1934).

disciplines through which the political idea of the government's mission got expressed, which aimed at the increased prosperity of the state. However, in period of the final work on the code this ideology was dominated by the civil point of view which developed with regard to the view that put the commercial law in opposition to the civil law[4]. This orientation appeared to be very restrictive for *Code de commerce*.As a result, contrary to the universalism of thecontent of the ordinances, the rules expressed in the content of the code got reduced to regulations supplementing the civil law or ones which due to their character or economic effects required a separate procedure[5]. Despite this the maritime law got included in the subject matter of the Commercial code. That fact was explained with the opportunism of the editors of the project who, pressed by Napoleon and anxious about the success of their undertaking, decided that the inclusion of *Ordonnance de la marine* would ensure at least partial success of the whole codification[6].

II. The subject matter

Sea ships (navires)

Depending on the size and the tonnage, sea ships (*navires*)[7] were called different names: a three-master (*trois – mât*), a two-master (*brick*), a brigantine (*brigantin*) and a cutter (*cotre*). However, regardless of the type, the term *navire* included the ship and its equipment (masting, rigging, etc.). Before each vessel left the port it was supposed to carry aboard the documents of both the ship and the load. These included (article 226):

1. Certificate of the title to the ship - if the owner did not build it himself, he was supposed to have the certificate of title, e.g.: proof of the purchase, whereas the constructor of the vessel was supposed to keep the invoices of the purchase of the materials.
2. Certificate of the registration of the ship as a French one (*l'acte de francisation*) - the same name was given to the permission which was granted to a foreign ship for sailing under the French flag. (This issue was regulated more extensively in the act of 18th October 1793).
3. List of the crew, ship's articles - these were used for the identification of the persons authorised to stay aboard, assuming that at least three quarters of the seamen and all the officers should be of the French nationality.
4. Charter-parties.
5. Bills of lading.
6. Inspection report – beforeloading, the master was obliged to check through inspection the readiness of the vessel to set sail. The report of these activities was then submitted to the office of the commercial tribunal while an abstract thereof remained at the master's disposal.
7. Receipt of the customs clearance, conditional or final.
8. Pass.
9. Manifest.

Ships were regarded by the law as movables (article 190), however unusually specific, for they resembled real property more than movables for many reasons (e.g.: they served as houseboats). In consequence, the principle *en fait de meubles, possession vaut titre* did not apply to *navires*[8]. Besides, according to the general principles, the debtor's goods, both real property and movables, secured his creditors' claims only when they belonged to him, whereas, when the debtor stopped being their owner, they were not subject to the creditors' *actiones,* unless these had a privilege with regard to them, or unless they functioned as collateral. In case of ships, however, the creditors' situation was quite different. Generally speaking, in a situation of a voluntary sale of *navire* they all had the so called *droit de suite*, according to which the vessel was still a guarantee of their rights despite being disposed of by the debtor (art. 196). In consequence, creditors could challenge a contract of sale as treacherous and made in violation of their rights, or lead to its dissolutionif the price had not been paid. At the same time they could exercise their rights not only with respect to the vessel but also the price which was obtained for the sale. Regardless of the above, a detailed catalogue of privileged liabilities was established[9], and more restrictive procedures were set which verified their lawfulness[10](articles 191 and 192). It was all the more important when the liabilities were claimed to the disadvantage of the right of lien of ordinary creditors.

For the sake of business relations and their correct development, the authors of the code decided that a ship which was ready for the departure could not be subject to seizure (*saisie*), and that a guarantee of the debts was enough even for the liabilities incurred for this voyage[11] (article 215).In other cases, to execute a seizure, it was necessary to hand the order for payment

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4 D. Seysen-Guérin, *Le Code de commerce et le droit maritime*, [in :] *Quel Code de commerce pour demain? Bicentenaire du Code de commerce 1807-2007, sous la direction de P. Bloch et de S. Schiller* (Paris: LITEC, 2007), 262.

5 Ibidem.

6 Ibidem, 263.

7 *Navires* were generally understood as vessels sailing on a sea, designed for trade, as opposed to *vaisseau*, a term which described state vessels; Pierre Bravard-Veyričres, *Manuel de droit commercial contenant un traité élémentaire sur chaque titre du Code de commerce, le texte des Ordonnances de 1673 et 1681, et le texte du Code, une analyse des tous les articles du Code réduits en questions, et des formulespour tous les actes*, (Bruxelles: Société Belge de Librairie, 1841), 119.

8 This maxim was proclaimed on the strength of article 2279 of *the Civil Code* and meant that „In the case of movables, possession is equivalent to the title".

9 These included, among others, court fees, ship charges, customs duties, local fees, amounts due to the person supervising the ship until it was sold, cargo storage charges, costs connected with the maintenance of the ship, the master's and the crew's wages, amounts borrowed by the master from third parties, or the equivalent of the goods sold by him in case of necessary expenses connected with the ship and amounts due for the materials and the labour of the workers building the ship if it hadn't been on any cruise yet (article 191).

10 These liabilities, depending on their character, had to be proved with official documents, receipts, bills approved by the president of the commercial tribunal, master's registers, registers of admission to the service on the ship, etc. (article 192).

11 In the period of *Ordonnance de la marine* being in force the owners of a vessel ready to sail could not dispatch it to sea without securing the liabilities owed by any of them, which was to be executed by seizure of part of the ship. They were entitled to insure that part and to pay the costs of the

issued by a court to the debtor or the person staying in their place of residence (article 199, par. 1). If the debt concerned the vessel, the verdict was handed to the master as the person representing the owners of the vessel (article 199, par. 2).

24 hours after the order was issueda competent officer executed the seizure of the ship, established a supervisor of the ship and made a report of the conducted activities (article 200). The owner was then summoned to court, or possibly received an abstract of the report. The summons was to be delivered to him within three days, or, in substitution for the owner, to the master, if the owner did not reside in the district of the tribunal (article 201, par. 1). This period was prolonged in case of a more distant place of residence (article 201, par. 2). The sale was made by means of auction preceded by a public announcement (articles 202-206).

Owners of ships (proprietaires de navires)

Although there was no general ban on trade plied by foreigners, no vessel had the right to enjoy the privileges due to French ships if it was not totally owned by the French[12]. Unfortunately, the authors of the Commercial Code did not define the concept of the owner of a ship uniformly. Sometimes it referred to who the ship belonged to (*propriétaire*), sometimes it was used to name the subject that paid the costs of the vessel's rigging (*armateur*)[13]. It was a serious inconsistency since both the roles were not always joined in one person. For example, the absolute right to dismiss the master without giving a reason (article 218) belonged, according to the doctrine, to the *armateur* who was not the owner, or to the owner only when he was the *armateur* at the same time[14].

Controversies were also aroused by article 216 on the strength of which the owner's civil liability was established for the master's actions connected with the ship or the voyage, regardless of whether he personally played the role of the *armateur* of his own vessel, or the ship was hired by another *armatuer* who appointed the master themselves[15]. The owner could get out of this liability only through renouncing the ship and the freight to the benefit of the creditors[16]. The owner's liability could also acquire a criminal character when it was proved he was an accomplice to the crimes committed by the seamen, or the people who made up armed force on the vessel, and when he derived benefits from the crimes, if any (article 217).

Like every other thing a ship could belong to a few co-owners. It was a common phenomenon. Co-ownership decreased the risk connected with sea sailing, which suppressed the popularity of maritime insurance[17]. All the decisions concerning "the common good"[18] had to be made by a majority of votes calculated on the basis of the size of the shares(article 220, par. 2). What follows is that they could be made by one person if the shares amounted to over 50 per cent. Besides, in case of a sale by auction the consent of the majority was required unless contrary provisions in respect thereof had been made in writing (article 220, par. 3). It was also a principle that the division of profits and losses was proportionate to the co-owners' shares.

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11 cont. insurance by means of a contract of bottomry. The authors of the code found it senseless and unfair to impose the burden of the insurance of the debt on all the co-owners. Besides, the creditor who executed the seizure could not claim an amount which exceeded the rights due to the debtor on the ship. All the more, when the debtor was not able to withdraw his share as long as the company lasted. What's more, regaining the amounts lent to cover the costs of the insurance was often illusory because of the lack of profits. It was decided then that the general interest connected with the realisation of a voyage is more important and requires stronger guarantees than the seizure of the ship to satisfy the interests of an individual creditor, whose activities undoubtedly had a negative effect on the interests of the freighting parties, the remaining owners of the ship and the crew, all the more with the existing instruments which allowed the creditor to secure his liabilities earlier; Jean Guillaume Locré de Roissy, *Législation civile, commercial et criminellede la France ou commentaire et complément des codes français* (Paris: Treuttel et Würtz, 1829),18:322 and on.

12 It was a principle which was established on the strength of the decree of 24thOctober 1681, the ordinance of 18thJanuary 1717, and numerous later acts, among others the decrees of 21stSeptember 1793 and 9thOctober 1794 (*27 vendémiare an 2*).

13 Isidore Alauzet, *Commentaire du Code de commerce et de la législation commerciale* (Paris: Imprimerie et Librairie Générale de Jurisprudence Cosse, Marchal et Cie, 1856), 3:55; Bravard-Veyričres, 137; Jean Claude Colfavru, *Le droit commercial comparé de la France et d'Angleterre suivant l'ordre du Code de commerce français, ouvrage théorique et pratique nécessaire á l'application du nouveau traité de commerce du 23 janvier 1860*, (Paris: Imprimerie et Librairie Générale de Jurisprudence Cosse et Marchal, 1863), 284.

14 Bravard-Veyričres, 138.

15 When the master incurred liabilities within the limits of his entitlements, a consequential action could be brought against the owner or the master, or against both of them at the same time. Still, if the plaintiff chose the master, the master was treated as a mandatary of the owner, due to which the verdict was executable with regard to the latter. This was connected with the fact that the master could be held personally responsible only when he incurred personal liabilities or exceeded his entitlements; Colfavru, 285. A similar approach was represented in judicature: „the master who took a hardship loan on behalf of the owners of the ship whose names, status and residence he mentions, is not personally liable"; a ruling by the Court of Appeal in Brussels of 5thJanuary 1822; Louis Pouget, *Principes de droit maritime suivant le Code de commerce français, analogie avec les lois ou codes étrangers*(Paris: Auguste Durand, 1858), 2:290. "When the master was made to sell the goods carried on the vessel in order to satisfy the costs of repairs, the owner of the vessel cannot evade the obligation to pay the value of these goods"; a ruling by the Court of Appeal in Brussels of 26thApril 1819 (Journal du Palais 1850, IX, 597).

16 There was one exception when during a voyage the master incurred liabilities on behalf of the owner in order to repair the vessel, even though the costs exceeded the value of the ship. The owner could not get out of these liabilities through renouncing the ship and the freight. Compare the rulings by the Court of Cassation of 16th July 1827 and 1stJuly 1834; Joseph AdrienRogron, *Code de commerce expliqué par ses motifs, par des exemples et par la jurisprudence, avec la solution, sous chaque article, des difficultés, ainsi que des principales questions que présente le texte et la définition de tous les termes de Droit* (Bruxelles: Société Belge de Librairie, 1841), 85.

17 Stanisław Matysik, *Prawo morskie Gdańska, Studium historyczno prawne* (Warszawa: Wydawn. Prawnicze 1958), 276.

18 „The common good" (*intéręt commun*) was not defined in the Commercial Code. Some representatives of the doctrine included in this category the choice of the master and the members of the crew, liabilities with respect thereto, the content of the instructions which were to be obeyed during a voyage, hiring a ship, its repairs or rigging;Jean Marie Pardessus, *Cours de droit commercial*(Paris:Garnery, 1815), 2:29-32; Colfavru, 286.

However, in case of hiring a vessel upon their consent, a co-owner's failure to deliver his quota resulted in a possibility of the master's execution of the right to incur a bottomry loan on his behalf upon a prior consent of the court (article 233).

The master of a ship (capitaine)

The title of *capitaine* was granted by the minister of the navy after the candidate had fulfilled the requirements defined by law. In everyday language also the terms *patron* or *maître* were used interchangeably although they were not identical as they-were often connected with different prerogatives[19]. Because of his function the master was responsible to the owners of the vessel, to the freighting parties for the condition and the lot of their freight and to everybody for the actions of the dependent crew. In connection with that it was decided that he should bear the consequences of even the smallest violations while holding his office[20] (article 221).

In all the issues connected with the ship the master was a representative of the owners, their mandatary and plenipotentiary. He could not, however, acquire the title to the vessel by prescription (art. 430), or ply trade on his own account (article 239). Also, he could not carry goods on his own account without the owners' special consent and payment for the freight unless his contract of employment included contrary provisions. If the owners of the vessel were present (personally or by procurators), the master's authoritygot limited,e.g.: decisions about the repair of the ship, the purchase of sails or rigging were made upon their consent (article 232). Similarly, despite the master's right to choose the crew, the owners' presence obliged him to obtain their approval for the suggested candidates for the seamen (article 223).A special agreement of the owners was also absolutely required under pain of nullity in case of the sale of the ship unless total incapacity of such a vessel to sail was determined (article 237).

All these standards concerned general principles connected with the master's performing his functions. However, he had, first of all, definite rights and obligations before, during and after the voyage.

Before starting the voyage, or even before loading, *capitaine* was supposed to survey the vessel in order to verify its readiness for the voyage (article 225).Taking goods aboard was connected with the obligation to issue a bill of lading[21] and placing them in the most adequate place (article 222). In consequence, he was not allowed to store the goods on the deck, where they could be exposed to unfavourable weather conditions, or waves, unless he had a written consent of the owners of the load, under pain of liability for all the consequential damage (article 229). The master was also responsible for collecting the required documents of the ship (article 226) and keeping the logbook(*livre de bord*), which was kind of *livre – journal*. Its pages had to be numbered and signed by a judge of the commercial tribunal, or the mayor, or his assistant where there was no tribunal (article 224, par. 1). The logbook should include not just the revenues and the expenses that occurred during the voyage, but everything that was connected with performing the function of the master (article 224, par. 2 and 3). The master and the members of the crew who were on the ship or in the lifeboats sailing towards the ships had the privilege of inviolability established for the sake of the development of business relations. In consequence, none of them could be arrested for debts other than the ones they incurred for the voyage, and if it did happen, they were to be released on some security (article 231).

During the voyage the master was supposed to leave the ship as rarely as possible. While calling at a port or departing, sailing into and out of bays and rivers, he had to stay aboard personally under pain of liability for all the consequential damage (articles 227 and 228). If he was forced to call at a French or foreign port during the voyage, he had to present to the competent authorities the reasons for such action and resume the voyage as soon as possible. If it happened in a foreign port, he was obliged to obtain a certificate of the time of arrival and departure from the French consul on the basis of the submitted report. In case of shipwreck, his duty was to draw up a report and certify it pursuant to the regulations of law (art. 244-247). While in danger, the master could not leave the ship without the consent of the officers and the high-rank members of the crew, and when he did it, he had to take with him the most precious things (article 241). Due to the necessity of protection of all the interests entrusted to him, the skipper also had a possibility of incurring a bottomry loan, selling or pledging part or the whole of the cargo or the vessel[22] (article 234). In case of exceeding his authority unreasonably, he incurred civil and criminal liability (article 236). Besides, during the voyage the master played the role of an investigation officer, a registrar and a notary[23].

After the voyage *capitaine* was obliged to complete a number of formalities.First of all, within twenty-four hours[24] he had to submit the logbook and a report of the voyage to the office of the commercial tribunal in the presence of its president

[19] The act of 25thOctober 1795, (*loi du 3 brumaire an IV*) and the government's directive of 30thJuly 1802 (*arręté du gouvernement du 11 thermidor an X*). For example, it was not enough to be *patron* or *maître* incase of an ocean voyage, you had to be *capitaine*.

[20] It was necessary, however,to show the cause-and-effect relation between the damage and the master's mistake; a ruling by the Court of Cassation of 1st September 1813 (D. 1813, I, 510). The only case when the master was exempt from the responsibility was when he acted under some irresistible force (article 230).

[21] Assessment of the credibility of the bill of lading lay within the competence of the court, and in case of doubts the court could make use of other evidence that the load had been received; a ruling by the Court of Cassation of 25thMarch 1835 (Journal du Palais 1857, II, 843).

[22] In principle, the master could not sell the vessel without a specific authority from the owners except for the legally proved incapacity to sail (article 237). The act of 13thAugust 1791(*Loi du 13 août 1791*) required in this respect that a special report should be made by experts. Still, the Court of Cassation decided that other evidence could be produced, too; a ruling of 14thMay 1834 (Sirey, v. 35, I, 637).

[23] In case of a crime committed aboard, the master drew up a report and arrested the person who had committed it until handing them to the judiciary. He certified births and deaths (article 86 of the Civil Code) and could draw up a testament (article 988 of the Civil Code).

[24] This deadline was not in force in case of shipwreck or an enforced break; a ruling by the Court of Cassation of 1stSeptember 1813 (D. 1813, I, 510).

(article 242). Until that time he was not allowed to unload the goods carried aboard, unless they were in danger (article 248). When the ship came back from the expedition, the owners of the goods were supposed to have been advised in advance about the condition of the goods and the price they had been sold for (article 234, par. 2), as well as about the incurred loans which had to be paid off.

The crew (équipage)

The Commercial Code regulated only the issues connected with the employment of seamen (*matelots*) and other members of the crew (*gens de l'équipage*). Despite distinguishing these two separate terms, the principles used with respect to them were uniform.

The employment of a sailor was made through signing a contract on the strength of which he was obliged to hire out his services to the master of the ship in return for a definite payment which the master was obliged to pay to him. It was then a contract of hiring services(*contrat de louage de services*). There were a few options of the employment of the members of the crew:*au voyage* - for the voyage, in return for a definite amount for the whole voyage, which was kind of lump-sum remuneration; *au mois* - monthly, which was connected with the payment of the salary for each month of the duration of the voyage; *au profit* - for the profit, in return for part of the expected profits; *au fret* - for the freight, in return for a share in the price which the owners of the cargo were to pay for the transport. It must be noted, however, that the last two types of employment were closer to the contract of a partnership than the contract of hire, which is why in those cases the rules concerning the first one were applied. It was a consensual contract, yet without a possibility of proving its existence by witnesses, but only in writing, which usually took place by means of a list of the crew or ship's articles (article 250).

The sailors who hired out their services for a definite voyage, or in return for a lump sum or monthly remuneration, were obliged to do their work until the arrival at the destination and unloading the goods. If their contract covered the voyage there and back, this obligation lasted until reaching the port of the departure and unloading the goods. When the master, not forced by any conditions at sea, decided to prolong the voyage, the crew was entitled to a relevant pay rise. Whereas in case of voluntary shortening of the voyage, they were dismissed earlier without any negative effect on their remuneration.

In principle, the hired sailors were to be paid their remuneration in full provided, of course, they had completely fulfilled their obligations. However, if they had not performed their services, the remuneration was not paid. When they performed them partially, the payment was proportionate.In fact, these issues depended on a lot of factors which were considered individually, taking into account whether the failure to fulfil the duties was due to force majeure[25], the sailor's or the master's fault, the fault of the owners of the vessel, or the owners of the cargo[26].

The contract of affreightment, the charter party (charte – partie)

The contract of affreightment (*charte-partie*[27]) was an agreement on the strength of which the master of the ship or its owner hired out the whole vessel or its part for the transport of goods to a definite place and the person who was obliged to pay the freight in return (*fret, nolis*). The lessor was called *fréteur*, while the lessee -*affréteur*.

The contract of affreightment was an onerous contract. Lack of freight meant transformation thereof into a contract without remuneration which, in consequence, became a mandate. However, not including a literal clause in this respect certainly did not mean it was not due. Lack of payment was not assumed, it was the will of the parties that was the most important. The freight could be reserved in different ways. It was possible to agree on a charge for the whole voyage (charter for the voyage - *affrètement au voyage*), a monthly charge (monthly charter - *affrètement au mois*), and a charge for using specific space for an agreed period of time (charter for a limited time - *affrètement à temps limité).*

The contract of affreightment was a consensual obligation, yet, it could not be proved by means of witnesses.Usually, it was agreed by means of a deed called identically with the very contract, that is a charter party (*charte-partie*)[28]. It was supposed to include (article 273):

1. The name of the master, the lessee and the lessor;
2. The name and the tonnage of the ship;
3. The type of charter and the price for the freight;
4. The place and the time of loading and unloading; if the time was not agreed between the parties, the common law was applied in this respect (article 274);
5. The agreed time of the voyage and compensation in case of delay[29].

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[25] To give an example, in case of shipwreck and loss of the goods the seamen could not demand their pay (article 258). However, they did not have to give back what they had received in advance; a ruling by the Court of Appeal in Rouen of 29thDecember 1831 (Sirey, v. 32, II, 160) and by the Court of Appeal in Bordeaux of 24thJuly 1834 (Sirey, v. 34, II, 479)

[26] The crew's situation improved diametrically in case of discontinuing or cancelling of the voyage due to the fault of the owners of the ship, the fault of the master, or thosewho had hired the ship. *Ordonnance de la marine* contained an absurd clause which made the sailor hired for a month receive lower pay when the voyage was discontinued after departing from the port than when it did not take place at all (Book III, Title IV, article 3). The authors of the code secured the crew's interest and decided that the sailors should receive half of the pay planned for the whole period of the voyage and the reimbursement of the costs of the journey back home (article 252).

[27] In Atlantic relations it was called *charte-partie*or*affrčtement*, whereas in the Mediterranean basin - *nolissement*.

[28] The confusion arose from the form originally taken to establish the fact of making the contract. *Charte* – chart, deed, *partie* – part. Customarily, the contract was written on a single sheet of paper or parchment, which was then torn apart so that each party had their part. Examining the join of both pieces was then necessary to prove potential claims. More on the subject of the charter party and its history: René Rodičre, Emmanuel du Pontavice, *Droit maritime*(Paris: Dalloz, 1991), 221 and on.

[29] Usually a specific amount was agreed upon for every day of the delay. However, if the delay was not caused by an action of the party to the agreement, but e.g. by orders of the port administration, or force majeure, the compensation was not due. Compare the ruling by the Court of Appeal in Brussels of 16th December 1830 and 17thSeptember 1831; Rogron, 104.

The authors of the code did not introduce the requirement of making the charter party in duplicate. It could be replaced by another deed, especially a bill of lading, which stated that the contract of affreightment had been fulfilled.

All the obligations of the person hiring the ship out arose from the original obligation to enable the lessee to use the hired thing at the agreed time and in the agreed way. A number of secondary obligations followed. *Fréteur* should not disturb the lessee during the loading of his goods onto the ship, and should do away with all the factual and legal obstacles. He was also obliged to take on responsibility for the goods and to deliver them to the owners of the bill of lading.

The bill of lading (connaissement)

The bill of lading (*connaissement*[30]) was a security which was proof of the master's receipt of the cargo defined therein aboard for transport purposes[31]. It differed from the charter party by the fact that the latter established the conditions of the charter of a vessel while the bill of lading meant a statement that the goods had in fact been loaded. The role it played in the maritime trade earned it a frequently used name of "the bill of exchange of seas" (*lettre de change des mers*)[32]. It was supposed to include (article 281):

1. The information about the persons: the name of the shipper, the name and the seat of the recipient and the name and the domicile of the master;
2. The information about the things: the name and the tonnage of the ship, information about the transported goods (kind, amount, brand) and the price for the freight;
3. The information about the places: the place of the departure of the ship from a port and the destination.

Sometimes it also included information about the time of the delivery and compensation in case of a delay, the loss of the goods or average. The bill of lading had to be made in minimum four copies, which were given to the owner of the vessel, the shipper, the recipient of goods and the master (article 282). It could be made out to a recipient defined by name (the straight bill of lading),to the bearer or to order, which resulted in a possibility of its transfer by means of endorsement[33] (article 281). While delivering the goods, the master was supposed to make sure that he was presented and given a copy of the bill of lading, especially when it was made out to order and the bearer (article 285).

Connaissement was one of the acts which were assigned the biggest power of evidence by law. If made out correctly, it was credible not only with regard to the parties involved, but also to third parties, including the insurers[34] (article 283). In case of any differences between the copies of the bill of lading, the one held by the master was deemed to be credible if it had been signed by the shipper or hisagent, or the copy held by the shipper or the recipient if it had been signed by the master (article 284).

The contract of bottomry (contrat à la grosse)

The contract of bottomry (*contrat à la grosse*)[35] was a loan against the things exposed to the maritime risk.When the objectson which the loan was effected came back from the expedition, the lender (*pręteur*) regained the capital and the promised profit[36]. When the thing got lost or damaged, his rights as of a creditor were limited to the value he could obtain for the sale of the remaining things[37]. On the one hand the contract of bottomry was regarded as a consensual contract, on the other hand as a real one[38]. It was also an onerous aleatory contract. It was regarded to be unilaterally obligatory due to the fact that after paying out the money to the borrower (*emprunteur*), the lender had no other obligations[39]. Unlike the contract of insurance, the contract of bottomry was regarded as one of the so called *de droit strict*contracts (contracts of "strict law"), as the good faith

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30 In Mediterranean ports it was also called *police de chargement*.

31 More on the subject: Alauzet, 3:165;Rogron, 576;Pardessus, 2:150-158;Aldrick Caumont, *Dictionnaire universel de droit maritime*(Paris: Auguste Durand, Bruxelles: Bruylant-Christophe, 1867), 511 and on; Boulay-Paty, 4:342 and on.

32 Louis Pouget, *Du transport par eau et par terre* (Paris: Auguste Durand, 1859), 1:131.

33 Similar rules applied then to those in case of the bill of exchange payable to order. Compare the ruling by the Court of Appeal in Brussels of 27thAugust 1830, 27thJune 1830 and 1stMarch 1832; Rogron, 106.

34 If the formalities had not been fulfilled, the insurer was not obliged; a ruling by the Court of Cassation of 6thJuly 1829 (D. 1829, I, 288).

35 Titles IX and X were devoted to the regulation of the issues connected with the contract of bottomry and insurance. In *Exposé des motifs* of 8thSeptember 1807 both contracts were jointly discussed at a separate sitting. There also appeared suggestions of including clauses regulating the issues connected therewith in one title; Jean Guillaume Locré de Roissy, *Esprit du Code de commerce, ou commentaire puisé dans les Procčs – verbaux du Conseil d'Etat, les Exposés de motifs et discours, les Observations du Tribunat celles de Cour d'appel, Tribunaux et Chambres de commerce, complément du Code de commerce, par la conférence analytique et raisonnée avec ses dispositions, des articles du Code civil, du Code de procédure civile, et généralement des Lois, Rčglements et décrets antérieurs qui s'y rapportent, ou auxquels il se réfčre*(Paris: Chez Garnery, 1811), I:342. These issues were developed in great detail, as it was the lender and the insurer who were regarded to bear the costs of the maritime risk. Both contracts were also based on similar principles. Neither of them could be treated as a way of acquiring the legal title to the thing, as both were connected with a real risk. The principal object of the contracts was to help the borrower pay back the borrowed amount and to secure the insured person against a loss in a situation of unexpected emergency.Besides, undoubtedly the development of maritime business relations was based on the existence of the contracts of bottomry and insurance;John Rodman, *The Commercial Code of France with the motives, or discourses of the Caunsellors of State delivered before the legislative body illustrative of the principles and provisions of the code, translated from the French with explanatory notes and a complete analytical index* (Stanford: C. Wiley, 1814), 35 and on. Of course, the authors of *Code de commerce* drew on the solutions proclaimed in *Ordonnance de la marine*to a great extent. Nevertheless, in case of these two issues, they were definitely more sensitive to the evolution of the commercial practice and customs which developed after 1681.

36 Pardessus, 2:203.

37 Ibidem.

38 The contract was made through a unanimous statement of will of the parties. It was not, however, a typical contract of loan as the contract of bottomry had effects only after the money was paid.Besides,*actione* of the lender depended on the existence of the things against which the loan had been given;Bravard-Veyričres, 180.

39 Ibidem.

of the parties did not influence the discipline of the regulations. If the thing against which the loan was given did not exist at the moment of the making of the contract, the contract was not made in fact, regardless of whether the parties knew about it or not[40].

An effectivecontract of bottomry required fulfilment of a number of formal criteria. In connection with the fact that it entailed a privileged position of the creditor (art. 320), it had to be made in writing and registered at the seat of the commercial tribunal[41](articles 311 and 312). It was supposed to include: the amount of the loan and the expected profit, the objects on which the loan was effected, the master's name and the name of the vessel, the lender's and the borrower's names, what voyage and period of time the loan was given for and the time of the repayment. The letter of bottomry was a document that confirmed it, and, if it was made out to the bearer, it was treated as a bill of exchange and was subject to endorsement (article 313)[42]. Such a contract could not amount to a sum exceeding the value of the vessel or the cargo[43] under pain of nullity, which was declared upon the lender's request (article 316)[44]. If he did not request the treacherous contract to be revoked, after the return of the vessel he could claim the whole sum the contract amounted to, increased by the maritime profit[45]. Regardless of the lender's will, the contract of bottomry which was based on the profits or objects forbidden by law fell under the sanction of absolute nullity[46] (article 318).

It was a similar case with contracts amounting to the sailors' expected remuneration (article 319). However, when the same vessel or cargo were covered by both the contract of bottomry and insurance at the same time, the value of the things rescued after shipwreck was divided proportionately between the lender with respect to the capital and the insurer with respect to the total amount of insurance (article 331)[47].

The contract of insurance (contrat d'assurance)

In the contract of insurance one of the parties, called the insurer (*assureur*), undertook with respect to the other to make up for the loss and the damage which could arise from a shipwreck in return for the insurance price[48]. Insurance was divided into two groups:*assurances mutuelles* (mutual insurance) and *assurances ŕ prime* (commercial insurance), which were commercial acts. The first one was regarded as a type of company, not calculated to make profit, in which each of the parties had the function of both the insuring and the insured party, in connection with which they did not play any major role from the point of view of business relations.For this reason the Commercial Code dealt with commercial insurance, and in fact, maritime insurance, exclusively. The regulations contained therein, however, were also applied to insurance on land with necessary exceptions due to the nature of things.

The contract of insurance was a consensual contract. Nonetheless, the obligation of making it in writing was introduced[49] (article 332). The document stating that the contract had been made was called an insurance policy.It was anoneroussynallagmatic contract, aleatory and *de bonne foi*, which meant that assessment of good or bad faith of the parties was of crucial importance to the validity of the contract. Unlike in the contract of bottomry, any actions by the insured party aiming at misleading the insurer about the real degree of danger or the actual value of the object of the insurance resulted in absolute invalidity of the contract (article 348)[50]. It happened even when concealing, false information or discrepancies between the contract and the bill of lading had no influence on the loss of the object of the insurance[51].

The contract of insurance was also supposed to include information concerning: the name and the seat of the insured party, whether he insured the thing as its owner or agent, the

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40 Ibidem.

41 In case of contracts made outside France, intervention of competent authorities was also required (article 312).

42 The endorsement of the letter of bottomry was treated as an endorsement of the bill of exchange. The Court of Cassation explicitly confirmed the obligation of payment to the person to the benefit of whom the endorsement was made; a ruling of 27thFebruary 1810 (Journal du Palais 1866, I, 355). As in case of bills of exchange, the endorsement of the letter of bottomry entailed responsibility of the endorser. However, in this case his liability was limited exclusively to the lent sum which the letter amounted to, without the maritime profit as it was regarded as an accessory and indefinite part of the liability; Alauzet, 3:235 and on. It was acceptable, however, for the parties to include contrary clauses in the contract (article 314).

43 In this respect *Ordonnance de la marine* referred only to the vessel or its part (Book III, Title V, article 3).

44 The contract was void when fraud was proved to the borrower. However, if no unlawful actions had taken place, the contract of bottomry was valid to the extent equal to the real value of the vessel or the cargo, while the excess loan had to be given back (article 317).

45 It was punishment for the borrower who treacherously inflated the real value of the vessel or the cargo. Compare Pardessus, 2:218.

46 The difference resulted from the fact that in the case sanctioned by article 316 it was only the borrower who was guilty, therefore it was necessary to protect the lender's interests. In case of article 318 both consciously broke the law, therefore the authors of the code decided that the only way to stop this practice was to deprive the lender of the possibility of regaining the money; Ibidem, 221 and on.

47 The privileged position of the insurer was a definite innovation with respect to *Ordonnance de la marine,* on the strength of which it was the lender who was privileged. The difference resulted from the fact that in the 17thc. the contract of bottomry was definitely more popular and more commonly used than in the 19th c. What's more, meanwhile the insurance system developed considerably and the relations between both contracts underwent a serious evolution; Locré, *Législation*, 18:427;Alauzet, 3:277.

48 Pardessus, 2:294.

49 In duplicate; a ruling by the Court of Cassation of 19thDecember 1816 (Journal du Palais 1866, X, 1264).

50 This resulted from the fact that the contract of insurance was of consensual character and misleading the insurer was a basis for undermining his statement of will; Louis Rondonneau, *Corps de droit français civil, commercial et criminel*(Paris: Garnery, 1811), 314.

51 Assessment of these reasons lay within the competence of the judge as the Commercial Code did not include a legal definition of concealment; a ruling by the Court of Cassation of 25thMarch 1835(Journal du Palais 1857, II, 492).

52 Lack of the details of the vessel rendered the contract of insurance void; a ruling by the Court of Appeal in Bordeaux of 28th August 1829 (Journal du Palais 1830, II, 268).

name and the description of the vessel[52], the master's name, the place in which the cargo was to be transported, the port of departure, the ports where the goods were to be loaded or unloaded, and those which the vessel was to call at, the kind and the value of the objects covered by the insurance[53], the duration of the contract[54], the amount of the insurance[55], the price or the insurance premium and other agreed conditions, in particular, a statement of the jurisdiction of the arbitration court (article 332). The authors of the code additionally imposed on the parties the obligation of including the date of the making of the contract therein, indicating whether it took place in the morning or in the afternoon (article 332). Such precision was connected with the principle according to which the earlier contract covering the whole risk abolished the later one[56]. That is why arrangements concerning the moment of the making of the contract with the insurer were indispensable for regulating the situation of different creditors who claimed their rights to the object of the insurance.

The object of the contract could be all things expressible in a money value and exposed to risk at sea[57](articles 334 and 335). This did not concern, however, the expected profits, the unpaid freight or the crew's remuneration. Additionally, in case of *contrat d'assurance*, a loan of bottomry or the profits expected therefrom could not be the object of the contract (article 347).

The insured party was first of all obliged to pay the premium. Besides, they were obliged to advise the insurer within three days about the suffered damage and to prove the loss of the objects of the insurance, total or partial, their number and value (articles 374 and 383). In return, the insurer was first of all obliged to compensate the insured party for the loss in all the cases which the insuring party was responsible for. These were situations connected exclusively with accidents at sea, e.g.: a storm, capture of the ship, shipwreck (article 350). Thus, *assureur* did not bear the responsibility for the damage resulting from the actions of the very insured party, regardless of contrary provisions (article 351). Also, he was not responsible for indirect and direct actions of the persons acting on his behalf, that is the workers, the contractors or the plenipotentiaries of the insured party, unless it was agreed otherwise (article 353). He did not bear the responsibility for the internal defects of the articles or the loss thereof or damage resulting from this fault (article 352), or for regular costs of the sea voyage, such as the pilotage or the tonnage fee (article 354). In cases defined by law, the insured party could at their discretion demand the payment of the agreed amount in full, while waiving the right to what was left to the benefit of the insurer, or, preserving what was left, claim appropriate compensation. It was related to the institution of the so called *délaissement*.

Délaissement was the insured party's resignation from the damaged or totally lost things to the benefit of the insurer for the purpose of gaining the whole amount of the insurance.Due to the serious influence which the institution of *délaissement* had on the obligations of the insuring party, it could only be used in cases predicted by law, e.g.: crashing a vessel against a rock(articles 369 and 375). The insured party then had a choice between the abandonment and a claim for settling the average; they never accumulated, though. *Délaissement* could not be partial,or conditional (article 372).Effective abandonment had to be made in the period of time predicted by law. The period began not earlier than on the day when the insured party learnt about the damage[58], and lasted longer or shorter depending on the distance from the place where the loss occurred (article 373).This enabled the insured party to acquire detailed information on the whole situation and to make a choice between *délaissement* and a claim for settling the average.

The insured party was supposed to make *délaissement* in the same deed wherein he told the insurer about the damage, or to preserve the right to the abandonment in the periods predicted by law (article 378), except for the situations when embargo had been imposed on the insured goods, or the insured vessel had been found to be unable to sail[59](articles 387 and 389). Making the abandonment, the insured party was supposed to indicate all the other insurance and loans of bottomry which had been incurred against the objects of the insurance (article 379). He was also supposed, as mentioned earlier, to indicate the number and the value of the objects of the insurance, as well as prove the damage, which did not belittle, however, the insurer's right to prove to the contrary (article 384).

Accepted and approved of as valid, *délaissement*immediately and irreversibly transferred the title to the waived things to the insurer (article 385). In consequence, the insured party could not pick them back under any circumstances or for any reasons. Within three months from the abandonment the insurer was obliged to pay the amount of the insurance, allowing for the fact that the parties could arrange another time (article 382).

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[53] If the value of the freighted goods had not been indicated, the regulations of the code allowed using the value shown in the invoices or the merchant books. In case of the lack of the above, the goods were calculated according to the price at the place of loading (article 339).

[54] If the duration of the contract had not been settled article 328 applied, which concerned the loan of bottomry, which meant that the beginning and the end of the voyage were regarded as the beginning and the end of the contract (article 341).

[55] The Court of Cassation permitted additional specific contracts within the scope of increasing the amount of the insurance over the value of the object of the insurance; a ruling of 15thDecember 1830 (Sirey, v. 32, I, 615).

[56] Rodman, 42.

[57] Creating this clause, the codifiers relied on the principle contained in *Ordonnance de la marine*(Book III, Title VI, articles 9 and 10), which allowed making the contract of insurance of man's freedom, but not their life, as only man's freedom could be assessed in terms of money. The lives of African slaves were an exception, which was dictated by the obvious ideology ruling in the times of the development of mercantilism and the times of building up world powers through numerous colonies. Compare Pardessus, 2:300-301 and on;Alauzet, 3:313;Bravard–Veyričres, 189.

[58] A ruling by the Court of Appeal in Rouen of 7thDecember 1822 (Journal du Palais 1827, I, 45).

[59] On details of the reasons for finding the vessel to be unable to carry on the further voyage compare the ruling by the Court of Appeal in Paris of 22nd-March 1836 (Sirey, v. 36, II, 257) and by the Court of Appeal in Bordeaux of 1stMarch 1828 (Sirey, v. 28, II, 155).

Average (avarie)

The insured party, while preserving what was left, had the right to claim proportionate compensation for the damage from the insurer. It was the fundamental purpose of the claim for settling the average(*action d'avarie*). Such a procedure was not, however, connected only with the institution of insurance, but could also take place in case of uninsured objects. Average was understood as material loss or an extraordinary expense incurred for the ship or the goods, together or separately. In connection with the above average was divided into: simple (*simple*)/particular (*particuličre*) ones and gross (*gross*)/ general (*commune*) ones (article 399).Unintentional and accidental loss was treated as *avarie simple*(article 403), whereas intentional damage, done for the common good in order to save the ship or the goods, was classified as *avarie grosse* (article 400). All the extraordinary expenses were counted as general average when they were incurred for the common good and to save the ship or the goods. In other cases they were counted as particular average.

The authors of the code defined a relatively precise catalogue, which allowed classification of a given situation as a definite category of average. It was not finite, though. Establishing the criteria for classifying a given situation as a definite type of average was unusually important since the costs resulting from *avarie grosse* were borne jointly by different subjects[60](article 401), whereas in case of particular average only the owner of the damaged goods, or a specific person managing the given costs, was liable (article 404). The most serious innovations, introduced with regard to the earlier binding legal state,were connected with regarding the port charges and the costs related to the unloading, the pilotage or towing, as ordinary maritime expenses which were supposed to be borne by the owner of the ship (article 406). Besides, another, third type of shipwreck, caused by accident, was added to the two existing cases which were recognised by the ordinance of 1681[61], which resulted in bearing the costs of the repairs by the ship that was damaged (article 407).

Jettisoning in the sea (jet) and relative suffering of the loss resulting therefrom (contribution)

Jet consisted in throwing part or whole of the cargo into the sea in order to lighten the ship. Naturally, within *jet,* the title to the thrown-away objects was not waived, therefore, in case of rescuing the property, the owner had the right to demand to have it back. Due to the fact that *jet* gave the title to compensation, it could only occur in cases predicted by law and after the master's justified decision, made after a consultation with the owners of the ship and the higher-rank members of the crew (article 410). The legal regulations defined the priority of the things subject to throwing away, therefore, the potential opinion of the people having shares in the objects did not matter (article 411).

According to the principle of equity: *omnium contributione sartiatur quo pro omnibus jactum est*. Thus, all the general average resulted in the right of the person whose property suffered for the purpose of saving the common good of the ship and the cargo to claim damages or a share in the general average with respect to the persons having shares in the ship or the goods. *Contribution* was then actions calculated to lead to the collection of the claims for damages which had their source in the damage and to satisfy them adequately. In other words, it was aimed at dividing the compensation between all the interested parties proportionately to their contribution[62]. There were also things whose loss was not connected with any compensation. In particular, it concerned the goods for which no bill of lading had been issued (article 420).

In consequence, the owners of what was left as a result of general average were obliged to compensate for the loss to those who had suffered for the common good. Contributing to the compensation took place through:

1. The ship and the freight; the loss thanks to which the ship was saved the freight as well. However, if the vessel had not been saved, contribution to the compensation for the loss did not take place (article 423). If the ship had suffered to a lesser and greater extent, *contribution* did not cover the whole of the vessel and freight, but just the half (article 417).
2. The saved goods (article 424);
3. The objects that had been thrown away; however, the owners of such things were more privileged than the owners of the saved things (article 423).

Some objects, such as food, things belonging to the crew or ammunition, did not take part in the relative bearing of the loss on the strength of article 419.

Contribution was supposed to happen at the place of unloading, where the assessment of the damage was made. It was made amicably, by means of experts appointed by the parties, or by the judiciary (article 414). Expert witnesses defined the total amount of the average(*quantum*) and of all the goods subject to *contribution* (article 416).It was then necessary to calculate the liabilities(*passif*) to share and the assets (*actif*) to charge. All the thrown-away, damaged and saved goods were assessed at the actual price in force at the place of unloading (article 415). Thus, the general amount of the loss was distributed among all the goods which made up the assets, relative to their value (articles 417 and 418).

III. Conclusions

The strong influence which *Code de commerce* and its systematics exerted all over the world made a lot of countries treat the civil standards of the maritime law as part of the

[60] Also, for example the price of the freight was taken into account; a ruling by the Court of Appeal in Bordeaux of 20thMay 1833 (Sirey, v. 34, II, 141).

[61] The ordinance distinguished a situation brought about by one of the masters from the one where the guilty party could not be determined (Book III, Title VII, articles 10 and 11).

[62] Philippe-Antoine Merlin, *Répertoire universel et raisonné de jurisprudence*(Bruxelles: Chez H. Tarlier, 1826), 6:301-303;Rogron, 153 and on; Locré, *Esprit du Code*, 3:358 and on.

commercial law. This idea was not, however, commonly adopted, an example of which is the Anglo-Saxon and Scandinavian countries and Switzerland.

But even in the countries where the maritime law was included in the regulations from within the commercial law, criticism of the representatives of the doctrine appeared. Germany was a good example, where the maritime law was one of the books of the commercial code since 1861. Paul Rehme found such "commercial" character of the maritime relations to be inappropriate due to the liberation of the maritime law from the connections with the merchant class. In his opinion it is difficult to treat the *armateur* as "a merchant of the maritime law", and a number of institutions such as shipwreck or sea rescue have little in common with the essence of trading[63].

Also French scholars noticed this problem. Georges Ripert assumed that there was civil maritime law(*droit civil maritime*) and that the issues of the property rights and the ownership of the ship had a stronger connection with the civil law than with the commercial one[64]. Similar views were shared by Daniel Danjon, who additionally claimed that: "if the legislators of 1807 merged [the maritime law] with the commercial law, it was mainly in order to entrust decisions about maritime matters with commercial tribunals; the maritime institutions themselves have nothing commercial in them - such as, for example, the ownership of the ship, sailors' employment, general average, rescue or help at sea."[65]

In consequence, the view on the maritime law as a separate whole began to emerge more and more, which had its expression, for example, in the titles of the monographs dedicated to the maritime law,concerning *„droit maritime"*[66], without the adjective "commercial".Naturally, in consequence of this tendency changes reached the statutory subject matter, too, as a result of which the subject matter contained in book II got excluded from the code later on[67], and the commercial maritime law stopped being an object of interest for the reformers of the commercial law. *Nouveau Code de commerce* of 2000 maintained this approach, too.

[63] Paul Rehme, *Die geschichtliche Entwickelung der Haftung des Reeders* (Stuttgart: F. Enke, 1891), 8 and on.
[64] Georges Ripert, *Droit maritime*(Paris: Édition Rousseau, 1950), 1:44.
[65] Daniel Danjon, *Traité de droit maritime* (Paris: Recueil Sirey, 1926), 27.
[66] See footnote below.
[67] More on the maritime law currently in force in France: Pierre Bonassies, Christian Scapel,*Droit maritime*(Paris: LGDJ, 2006);Jean-Pierre Beurier, *Droit maritime*(Paris: Éditions Dalloz, 2006); Alain Le Bayon, *Dictionnaire du droit maritime*(Paris: PUR, 2004); Antoine Vialard, *Droit maritime*, [in:] *Collection Droit Fondamental*(Paris: PUF, 1997);Martine Rémond-Gouilloud, *Droit maritime*(Paris: Éditions A. Pédone, 1993); René Rodičre, *Traité général de droit maritime*, 7 vols.(Paris: Dalloz, 1967-1983); Ripert, passim.

Joseph Georg Wolf

Die Lex Irnitana. Ein römisches Stadtrecht aus Spanien.

WBG Wissenschaftliche Buchgesellschaft Darmstadt, Darmstadt 2011 (Texte zur Forschung Bd. 101), 159 S., 39,90 Euro,
(ISBN 978-3-534-24597-0)

Die Siedlung Irni, der Fundort der Lex Irnitana, war eine nicht unbedeutende antike Stadt, die zwischen den heutigen Städten Osuna und Ronda lag. Die Ortschaft lag in 500 Meter Höhe auf einem Bergrücken, den im Westen und Süden der Rio Corbones umfloss, in dessen Tal der Bergrücken unüberwindlich steil abfiel. Von Irni bis zum nächsten Küstenpunkt, wenig westlich von *Malaca* (Málaga), waren es ca. 60, nach Norden bis *Urso* (Osuna) noch ungefähr 30 Kilometer. Damit befand sich Irni in der *Baetica*, also der kleinsten der drei römischen Provinzen auf der iberischen Halbinsel. In seiner „Geografika" berichtet Strabon, dass die *Baetica* bereits zu seiner Zeit in Sprache und Sitte römisch und dass Spaniens Süden schon zu Beginn des Prinzipats vollkommen romanisiert war. Die *Baetica* wurde gleichfalls „Die Wiege der spanischen Bildung" genannt und umfasste insbesondere das Land der Turdetaner, die seit Jahrhunderten in dauerndem Austausch mit Phöniziern und Griechen, mit Puniern und Römern lebten und im Gegensatz zum Norden auf vielfältige Weise eine besondere kulturelle Erziehung erfuhren. Im Land der Turdetaner lag Irni, dass an der wirtschaftlichen und kulturellen Blüte der *Baetica* teilnahm. Denn die Stadt wuchs schnell, ihre Einwohner waren bereits nach Rang und Stand gegliedert. Noch bevor ihr das Stadtrecht in der ersten Hälfte der 90er Jahre n.Chr. verliehen wurde, hatte Irni sogar ein Theater und einen Stadtrat mit 63 Sitzen besessen sowie andere stadtrechtliche Institutionen, nämlich die den römischen offenbar nachgebildeten Magistraturen, den Duumvirat, die Ädilität und die Quästur, und wohl auch eine Bürgerversammlung.

Der Buchtitel „Ein römisches Stadtrecht" klingt allzu bescheiden, denn von keinem anderen römischen Stadtrecht besitzen wir mehr Text als von der Lex Irnitana, die insoweit Modellfunktion besitzt. Mit ihr haben wir aber nicht bloß große Teile der Munizipalordnung von Irni vor Augen, sondern die Gemeindeordnung aller Städte Spaniens *(universae Hispaniae)*, die in der Folge eines Dekrets Kaiser Vespasians (vermutlich 73 oder 74 n.Chr.) zu *municipia* promoviert wurden, d.h. die Städte erhielten vom Kaiser aus Dankbarkeit und Lohn für ihre Treue im Bürgerkrieg eine Verfassung, ein Stadtrecht und wurden damit auch zur Stadt nach den Kriterien des römischen Staatsrechts. In der Regel bekamen sie ferner die Latinität, wurden *municipia iuris Latini* mit weitgehender Selbstständigkeit in Verwaltung und Jurisdiktion.

Die Lex Irnitana war auf zehn Bronzetafeln (90 cm breit und 57 cm hoch) eingraviert. Wolf druckt hierzu einige Ausschnitte am Ende des Buches ab. Neben den Abbildungen stößt der Leser noch auf ein sehr nützliches Register, mit dessen Hilfe er nach Stichworten in Kommentierung und Text der Lex Irnitana rasch zu den einschlägigen Passagen gelangt. Von den zehn Tafeln der Lex wurden im Frühjahr 1981 sechs Tafeln aufgespürt und sofort verkauft. Der „heimliche" Verkauf durch „Clandestini" wurde aber bekannt, die Tafeln konnten ausfindig gemacht und in das Archäologische Museum von Sevilla gebracht werden, wo sie sich heute befinden.

Wolf untersucht, wie viel Textkorpus uns von der Lex Irnitana erhalten ist und was sie von den anderen Stadtrechten unterscheidet. Außerdem widmet er sich der inneren Ordnung der Lex Irnitana und geht näher ein auf die Bürgerversammlung, den Stadtrat und die Magistraturen, schließlich die *duumviri,* welche die Bürgerversammlung und den Rat einberiefen und deren Sitzungen leiteten. Als die höchste Gewalt in der Stadt konnte jeder von ihnen nahezu jede Maßnahme des Kollegen und der nachgeordneten Magistrate durch Einspruch verhindern, aber auch jede Sache an sich ziehen. Zwei den duumviri ausdrücklich vorbehaltene Aufgaben waren die Verpachtung (Steuerpacht) sowie die Gerichtsbarkeit, welche ihnen auch den Namen gab, nämlich *duumviri qui iuri dicundo praesunt* oder einfach *duumviri iure dicundo.* Den *duumviri* oblag lediglich die Zivilgerichtsbarkeit, Strafsachen waren dem Statthalter vorbehalten. Die eigene Gerichtsbarkeit galt als das eigentliche Kriterium der städtischen Autonomie. In der Lex Irnitana (90 Rubriken) nimmt sie mit neun Rubriken mehr Raum ein als jeder sonstige Regelungsbereich. Ihr ausschließlicher Gegenstand waren die Gerichtsverfassung und das dazu gehörige Verfahren. Für das anzuwendende materielle Recht verweist sie auf das Edikt des Statthalters sowie pauschal auf römisches *ius civile,* dessen Geltung für die Bürger und Einwohner der latinischen Munizipien sich bereits *per definitionem* verstand. Die Geltung des römischen Zivilverfahrensrechts wurde ohne Weiteres vorausgesetzt.

Mit dem vorliegenden Buch liegt nicht nur eine kommentierende Einführung und mit den Originaltafeln abgeglichene Edition des lateinischen Textes vor, sondern auch eine gut lesbare und gründliche deutsche Übersetzung der Lex Irnitana.

Thomas Gergen*

* Prof. Dr.iur. Dr.phil. Thomas Gergen; der Verfasser ist Professor an der Universität des Saarlandes in Saarbrücken sowie Rechtskundiger im französischen und spanischen Recht.

Wie der Geschichtsschreiber Plinius der Nachwelt berichtet, verlieh der römische Kaiser Vespasian *universae Hispaniae* vermutlich im Jahre 73 (oder 74 n.Chr.) das latinische Bürgerrecht: *„universae Hispaniae, Vespasianus imperator Augustus iactatum procellis rei publicae Latium tribuit."* (Plin. n. h. 3, 30). Dies wohl zum Dank und als Lohn für die ihm gewährte militärische Unterstützung im Bürgerkrieg. Alle bis dahin noch nicht privilegierten, mithin noch peregrinen Gemeinden Spaniens wurde demnach zu *municipia iuris Latini* erhoben. Im Zuge dieser Munizipalisierung erlangten sie weitestgehende Selbstständigkeit in Verwaltung, Rechtsprechung sowie in Frage der Religion und erhielten eine „Verfassung", ein eigenes Stadtrecht.

Sechs der insgesamt zehn Bronzetafeln, auf denen das Stadtrecht der Stadt *Irni* in der bevölkerungsreichen Provinz *Baetica* eingraviert war, wurden erst im Frühjahr 1981 entdeckt und erstmalig im Jahre 1986 im 76. Band des *Journal of Roman Studies* (S. 147 – 238) veröffentlicht. Seither gab es zahlreiche Editionen und Übersetzungen der *lex Irnitana,* von der wir mehr Text besitzen als von jedem anderen Stadtrecht.

Das Besondere dieser jüngsten Ausgabe ist die Tatsache, dass sie den Gesetzestext zeigt, wie er uns auf den Tafeln im Archäologischen Museum zu Sevilla überliefert ist: mit all seinen Wiederholungen, Verschreibungen, Interpunktionen und den zahlreichen Auslassungen von Buchstaben sowie Wörtern. Um dem geneigten Leser aber das Studium des lateinischen Textes zu erleichtern, werden diese „Mängel" vom Herausgeber sichtbar durch eckige bzw. spitze Klammern markiert und dort, wo sie evident sind, korrigiert. Daher handelt es sich bei der deutschen Übersetzung von ihrem Anspruch her auch weniger um eine freie, sinngemäße Übersetzung, sondern sie folgt (fast wörtlich) dem Originaltext, um dessen Duktus und Struktur zu verdeutlichen bzw. zu erhalten.

Der Herausgeber begnügt sich aber dankenswerter Weise nicht damit, eine zuverlässige Edition des Gesetzestextes und eine sorgfältige deutsche Übersetzung vorzulegen. Nach einer gut bestückten Auswahl an Monographien und Aufsätzen, die zum weiterführenden Studium der *lex Irnitana* anregen sollen, liefert er in einer keineswegs mit unnötigen Details überladenen Einführung (S. 13 – 35) wichtige Hintergrundinformationen zum historischen Kontext (S. 13 – 20), zu den Unterschieden und Einzigartigkeiten (vor allem im Vergleich zu älteren Stadtrechten wie der *lex coloniae Genetivae Iuliae sive Ursonensis*), zum Aufbau, zur Anwendbarkeit bzw. rechtlichen Durchsetzung, zur Auswirkung auf die Romanisierung in den westlichen Provinzen und zur literarischen Darstellungsform der *lex Irnitana* (S. 20 – 34) sowie einige Anmerkungen zu bereits erschienenen Editionen und Übersetzungen (S. 34 – 35). Hierbei lässt er es sich freilich nicht nehmen, im Anschluss auf die Besonderheiten seiner Ausgabe hinzuweisen.

Da alle Stadtrechte der flavischen Munizipien (abgesehen von zu vernachlässigenden minimalen Abweichungen) fast wortgetreu ein und derselben Vorlage folgen, lernen wir durch die *lex Irnitana* nicht nur das Stadtrecht einer einzigen Gemeinde kennen. Sie gewährt uns vielmehr Einblicke in die Gemeindeordnung aller Städte Spaniens, die in Folge des *Latinum*-Dekrets Vespasians zu *municipia iuris Latini* erhoben worden sind und ist daher von unschätzbarem Wert, wenn es darum geht, mehr über das alltägliche Leben und die Rechtswirklichkeit in einer westlichen römischen Provinz zu erfahren.

Vor diesem Hintergrund ist Wolfs Ausgabe, mit der nach Editionen und Übersetzungen ins Englische, Spanische und Italienische die *lex Irnitana* nun endlich auch dem deutschsprachigen Leser zugänglich gemacht wird und die WBG (Wissenschaftliche Buchgesellschaft) Darmstadt damit eine in ihrer Reihe „Texte zur Forschung" schmerzlich bestehende Lücke schloss, eine wertvolle und willkommene Bereicherung für das Studium der Stadtrechte. Wer einen raschen Zugriff auf die *lex Irnitana* sucht und dabei auch den geschichtlichen Hintergrund nachgezeichnet sowie die juristischen Zusammenhänge aufgezeigt haben will, der wird mit dieser Ausgabe einen zuverlässigen, klaren und soliden Begleiter finden.

Nikola Galaboff*

* Akad. Rätin Nikola Galaboff, Friedrich-Alexander-Universität Erlangen-Nürnberg, Deutschland.

Ernesto Bianchi

Per un´indagine sul principio „conceptus pro iam nato habetur" (Fondamenti arcaici e classici)

Mailand: Giuffrè 2009,38,00 Euro, (ISBN 88-14-15229-2)

Ernesto Bianchi verfolgt in dem 2009 erschienenen *„Per un'indagine sul principio `conceptus pro iam nato habetur´ (Fondamenti arcaici e classici)"* das Ziel,die archaischen Quellen, welche den Ausgangspunkt für die spätere Intepretation und Anwendung dieses Rechtsgrundsatzes bilden, zu untersuchen.

Obwohl der Gegenstand dieser Recherche nicht völlig *inédit* ist, da die Bedeutung dieses Grundsatzes früher die Aufmerksamkeit der Romanistik gelegentlich bereits erweckt hat[1], bleibt sie von großem Interesse, denn die methodologischen Prämissen, unter denen die Quellen damals erforscht worden waren, sind selbstverständlich nicht mehr dieselben, die heutzutage *in usu* sind. Dies hat Bianchis Bemühungen deutlich originell gemacht.

Die Regelung des *nondum natus* in klassischer und postklassischer Zeit spiegelt, so der Verfasser, wieder, was in Frühzeit schon etabliert war. Es wäre auf diese Weise mit relativer Sicherheit auch möglich, aus den späteren Quellen, zumindest *d'une façon générale,* den *regime decemvirale* zu restaurieren.

[1] Am Anfang des 20. Jahrhunderts hat Albertario zum Beispiel eine bekannte Abhandlung über die Bedeutung dieses Grundsatzes veröffentlicht.

Der Grundsatz *„conceptus pro iam natus habetur“* wurde aber ausschließlich im Rahmen des Erbrechts behandelt (S.2), was bedeutet, dass der Verfasser beispielsweise dessen Relevanz für die Regelung der Abtreibung kategorisch negiert (S.2)[2].

Die methodologische Strenge der exegetischen Bearbeitung der Rechtsquellen bedeutet aber nicht[3], dass der politische und kulturelle Zusammenhang, in dem dieser Grundsatz entstand und sich entwickelte, ignoriert wurde. Im Gegenteil: Indem sich Ernesto Bianchi mit der Frage nach der Relevanz der Empfängnis im alten Rom beschäftigt, wird die Rolle der Religion als von fundamentaler Bedeutung für das Verständnis des juristischen Phänomens dargestellt (etwa S. 18 oder S. 33). Die Untersuchung analysiert in der Tat auch grammatische und semantische Aspekte der juristischen Quellen (zum Beispiel, wenn die Anwendung des Neutrums in Bezug auf den *nasciturus* erforscht wird – S. 332)und umfasst schließlich auch literarische Texte (etwa S. 37).

Im zweiten Kapitel befasst sich die Monographie mit der archaischen erbrechtlichen Regelung der Erbfolge, wenn der *heres* nach dem Tod des *pater familias* geboren ist (S.52), und im dritten mit der Differenzierung zwischen *esistenza giuridica* und *esistenza fisiologica* des *conceptus* und auch zwischen der Bedeutung der Ausdrücke *in rerum natura* und *in rebus humanis* (S. 274), Unterscheidungen, auch philosophischer Art, die später fundamental für die Etablierung des Grundsatzes geworden sind (S. 273).

Der *nondus natus* bestehe angesichts des Rechts in keiner bloßen Abstraktion, sondern sei als in der *realtŕ materiale* ontologisch existent zu betrachten (S. 278), obwohl, noch ungeboren, nicht eigentlich auch als *in rebus humanis* definiert werden solle (S. 280)[4]. Da liegt vielleicht der Kern der Monographie, welche somit die *communis opinio* und deren traditionelle Kategorien widerlegt; aber erfolgreich.

Von dieser Unterscheidung ausgehend, wurde später der Rechtsgrundsatz *„conceptus pro iam natus habetur“* formuliert, dessen Wortlaut freilich dem römischen Recht aller Zeit fremd sei(S.1, 342).

Es sind Ergebnisse, die ohne jeden Zweifel einen wichtigen Beitrag zur Lehre des römischen Erbrechts bilden und folglich die Aufmerksamkeit der Romanisten verdienen.

Renato Beneduzi*

[2] Freilich handelt es sich um eine fesselnde Frage, sodass es interessant gewesen wäre, wenn der Verfasser sich damit ausführlicher auseinandergesetzt hätte.

[3] Die exegetische Behandlung der Frage nach der exakten Bedeutung der decemmensesfür die legittimitŕdes natus belegt die schon erwähnte methodologische Strenge (S.44)

[4] In rebushumanis sei deswegen derjenige, der schon geboren ist, aber noch nicht verstorben(uomovivente).

* Prof. Mestre Renato Beneduzi, Professor für Zivilprozessrecht und Römisches Recht, Pontifícia Universida de Católica do Rio de Janeiro (PUC-RIO), Brasilien.

Christoph Lundgreen

Regelkonflikte in der römischen Republik: Geltung und Gewichtung von Normen in politischen Entscheidungsprozessen

Stuttgart: Franz Steiner Verlag 2011, 68,00 Euro, (ISBN 978-3-515-09901-1)

Aloys Winterling (Hrsg.)

Zwischen Strukturgeschichte und Biographie: Probleme und Perspektiven einer neuen Römischen Kaisergeschichte: 31 v. Chr. – 192 n. Chr.

München: R. Oldenbourg Verlag 2011, 64,80 Euro, (ISBN 978-3-486-70454-9)

Zwischen Rechtsgeschichte und Alter Geschichte findet heute ein intensiver Austausch kaum statt. Beiden Disziplinen ist es im Laufe des 20. Jahrhunderts gelungen, jeweils das geistige Erbe des 19. Jahrhunderts zu überwinden. Dies führte jedoch auf beiden Seiten zu einem hohen Grad an Spezialisierung, was wiederum zur Folge hatte, dass man separat seinem jeweiligen Erkenntnisinteresse nachging und interdisziplinäre Forschung bis heute vernachlässigt.

Die beiden vorgestellten allgemeinhistorischen Werke veranschaulichen zum einen das Ergebnis dieser Entwicklung, gehen nun aber auch einen deutlichen ersten Schritt auf die Rechtsgeschichte zu. Sie zeigen methodische Wege hin zu einer stärkeren Interdisziplinarität auf und offenbaren gleichzeitig Forschungsfelder zwischen Alter Geschichte und Rechtsgeschichte, die sich wohl nur interdisziplinär bearbeiten lassen.

Der von *Aloys Winterling* herausgegebene Tagungsband zu einem Kolloquium des Historischen Kollegs in München vom 11. bis zum 13. Januar 2007 möchte methodische Grundlagen für eine Wiederbelebung des altgeschichtlichen Werktyps „Kaisergeschichte“ schaffen. Die ersten Beiträge zu den Quellen (Kaiserbildnisse, Inschriften und literarische Quellen) sind zwar in erster Linie für den Althistoriker methodisch relevant, jedoch auch für den Rechtshistoriker mit Gewinn zu lesen, weil sie gut belegte Vorgänge in der antiken römischen Gesellschaft beschreiben, die in den juristischen Quellen nicht vorkommen. Im zweiten Abschnitt werden die strukturellen Bedingungen

kaiserlichen Handelns zwischen der neuen Monarchie und den alten Strukturen der römischen Republik dargestellt. Im dritten Teil werden schließlich die Ergebnisse der bisherigen Forschung zu den Kaisern bis Commodus aufgearbeitet. Als Ergebnis lässt sich festhalten, dass der Werktyp „Kaisergeschichte" im Sinne einer Ereignisgeschichte wiederbelebt werden kann, die auf den bisher gewonnenen strukturgeschichtlichen Erkenntnissen aufbaut, diese jedoch gleichzeitig überprüft und beispielhaft veranschaulicht. Die neue Kaisergeschichte wird einer Biografie durchaus ähneln, sich jedoch auf das politisch-soziale Verhalten eines Kaisers als Gegenstand beschränken und auf andere Aspekte wie den familiären Hintergrund oder die Erziehung eher verzichten.

Aus spezifisch rechtshistorischer Sicht sind insbesondere die Beiträge von *Dieter Timpe* und *Christer Bruun* aus dem Abschnitt zu den Strukturproblemen kaiserlicher Handlungsfelder herauszugreifen.

Timpe befasst sich eingehend mit der Person, in der Alte Geschichte und Rechtsgeschichte noch vereint waren: Theodor Mommsen. Geprägt durch seine juristische Bildung hatte dieser das grundlegende „Römische Staatsrecht" verfasst, welches die folgende altgeschichtliche Forschung prägte, jedoch später wegen seiner Rückprojektionen zeitgenössischer Ideen des 19. Jahrhunderts heftige Kritik erfuhr. *Timpe* beschreibt diesen Emanzipationsprozess detailliert anhand vieler Beispiele aus der Forschung. Dabei berührt er Fragen, die sich auch die Rechtsgeschichte seit langem stellt. So geht er nach einer Darstellung der Forschung zum Begriff der kaiserlichen *auctoritas* auch auf das *ius respondendi ex auctoritate principis* ein (S. 150). Mit der Verleihung dieses Privilegs hatten es die Kaiser geschafft, die in der Republik noch rein privat respondierenden Juristen allmählich in ihre Nähe zu ziehen, bis sie schließlich Teil der kaiserlichen Verwaltung wurden. Der Begriff der *auctoritas* ist jedoch vielschichtig und lässt sich nicht nur aus den juristischen Quellen klären. Wie dieser Einbindungsprozess genau verlief und welche Auswirkungen er hatte, werden wir nur interdisziplinär klären können.

Christer Bruun schreibt nun über die Zusammensetzung der kaiserlichen Verwaltung, insbesondere über „Beförderungskriterien" (S. 165 ff.). Freilich kommt er hierbei nicht umhin, auch die Juristen im Umfeld des Kaisers zu erwähnen (vgl. S. 169), wobei sich dem Rechtshistoriker wieder die oben genannte Frage stellt. *Bruuns* Ausführungen gerade zu diesem Thema mögen zunächst oberflächlich erscheinen. Dies offenbart jedoch keine Schwäche des Althistorikers, sondern nur einen Mangel an interdisziplinärer Forschung. *Bruun* geht bei seiner Darstellung genau bis an die Grenze seines Fachgebiets, indem er als Mitglieder des *consilium principis* neben Senatoren und Rittern auch „erfahrene Juristen" (S. 169) nennt. Hier kann er jedoch verständlicherweise nicht weiter vertiefen, weil dies ohne juristische Quellen nicht mehr zu bewerkstelligen ist. Einem Rechtshistoriker, der sich von der anderen Seite an die Grenze herantastete, stünde freilich vor dem entsprechenden Problem. Welches Potential gerade in Bezug auf dieses Thema in einem Zusammenwirken der Disziplinen liegt, braucht nicht näher erläutert zu werden.

Bei *Christoph Lundgreens* Werk legt schon der Titel nahe, dass es Berührungspunkte mit der Rechtsgeschichte gibt. Umso wunderlicher ist, dass der Verfasser keine einzige juristische Quelle zitiert oder gar auswertet. Es geht um die Konflikte *nicht*juristischer Normen bei den Wahlen zum Magistrat, bei der Provinzvergabe, im Sakralrecht sowie bei der Triumphvergabe. Der Rechtshistoriker erhoffte sich gerade bei der Darstellung zu den Wahlen des Magistrats Näheres zum Amt des Prätors. Obwohl dieser als Gerichtsmagistrat in der Rechtsgeschichte eine zentrale Stellung einnimmt, weiß man wenig über dieses Amt. Wurde es von vornherein zu Rechtsprechungszwecken geschaffen? Inwiefern spielte juristischer Sachverstand bei der Ämtervergabe eine Rolle? Eine Antwort darauf vermag *Lundgreen* nicht zu geben. Doch dies ist auch nicht Ziel des Werkes; vielmehr geht es *Lundgreen* darum zu zeigen, dass keine Hierarchie zwischen den *nicht*juristischen Normen bestand, Konflikte fast immer als Einzelfragen entschieden wurden und dass dies aber immer nur im Konsens möglich war, was wiederum durch die im Hinblick auf Sozialisation und Normtradierung große Homogenität der Senatsaristokratie erleichtert wurde. Für den Rechtshistoriker macht jedoch vor allem die erschöpfende Auswertung gerade der literarischen Quellen im Grenzbereich zur Rechtsgeschichte den Reiz des Werkes aus, zumal man zur Beantwortung von Fragen zur Struktur des Magistrats gerade in der Republik auch auf literarische Quellen angewiesen ist.

Doch dies ist noch nicht alles. Einerseits stellt *Lundgreens* Werk die Leistungsfähigkeit der neueren Ansätze der altgeschichtlichen Forschung unter Beweis. Andererseits offenbart es auch die Schwächen der derzeitigen Separierung von Alter Geschichte und Rechtsgeschichte: Wäre es gerade im Hinblick auf *Lundgreens* Thema gelungen, rechtshistorische Expertise einzubinden, hätten weitere wichtige Erkenntnisse gewonnen werden können.

Gründe für den Mangel an interdisziplinärer Forschung finden sich in beiden Lagern. Der Althistoriker lässt sich von den juristischen Quellen abschrecken, weil ihm der juristische Sachverstand fehlt. Studenten der Alten Geschichte besuchen jedenfalls nicht zwingend eine juristische Grundlagenvorlesung wie „Römisches Recht". Der Rechtshistoriker scheut als ausgebildeter Jurist den Blick über den eigenen Tellerrand und misstraut sowohl den nicht-juristischen Quellen als auch den „unjuristischen" Untersuchungen der Alten Geschichte. Er muss allerdings gelten lassen, dass er für den Blick auf die wirtschaftlichen, gesellschaftlichen und politischen Umstände auf die Alte Geschichte angewiesen ist.

Ihm sei die Lektüre der beiden Bücher wärmstens ans Herz gelegt, denn sie geben insbesondere einen guten Überblick über die errungenen Erkenntnisse sowie die aktuellen Diskussionen der Alten Geschichte. Nur wenn wir Rechtshistoriker uns mit den Werken unserer wissenschaftlichen „Nachbarn" auseinandersetzen, kann ein kritischer – aber auch fruchtbarer – Dialog stattfinden. Der Alten Geschichte ist zunächst ein Dank auszusprechen für den beherzten Schritt in unsere Richtung, der gerade für die nachwachsende Forschergeneration neue Möglichkeiten eröffnet. Beide Seiten stehen nach alledem in der Verantwortung, den gegenseitigen Austausch zu fördern. Denn die Suche nach Erkenntnis darf nicht an den willkürlich gezogenen Grenzen der Disziplinen haltmachen.

Sebastian Stepan*

* Sebastian Stepan, ref. iur., Institut für geschichtliche Rechtswissenschaft - Romanistische Abteilung, Juristische Fakultät, Ruprecht-Karls-Universität Heidelberg, Deutschland.

Conference Report - Family Law in Early Women's Rights Debates International Conference from September 30 to October 1, 2011, at Leibniz University, Hanover, Germany

The conference "Family Law in Early Women's Rights Debates" held at the Leibnizhaus Convention Center in Hanover focused on international women's rights debates from 1830 to 1914, their influence on the development of family law, and their importance for the critical analysis of law. The event was organized by Prof. *Stephan Meder* (project leader) and Dr. *Christoph-Eric Mecke* (project manager) within the framework of the DFG research project "International Reform Debates in Family Law and Rights Struggles of the World Council of Women 1830–1914."

As *Stephan Meder* emphasized in his welcome address, the women's rights debates that took place between 1830 and 1914 represent extremely important sources for the study of legal history and for the law itself. Although the women who took part in these debates were excluded from university study, they made decisive contributions to jurisprudence. This remarkable fact had already come to light in an earlier stage of the project when the German sources were evaluated. In its current phase, the project is turning its attention to international women's rights debates as an engine of developments in family law. The aim of the conference was to consider these international debates in light of questions of historical jurisprudence as well as international and comparative women's rights and gender research and thus to facilitate an interdisciplinary exchange.

In her opening lecture, Prof. *Ute Gerhard* (Frankfurt a. M.) looked back at the fundamental women's rights declarations of Olympe de Gouges (France, 1791), Mary Wollstonecraft (England, 1792), Elizabeth Cady Stanton (USA, 1848), and Louise Otto (Germany, 1849). If these declarations demonstrate the universality of the theory of women's rights, an analysis of the subsequent political publications shows that numerous debates and battle lines cut across national boundaries. As regards family law in particular, in all of the countries studied it involved an assignment of roles that adversely affected women. What is needed, then, Prof. *Gerhard* argued, is an interdisciplinary analysis of legislative decisions which exposes the interests that shaped them as well as their actual real-world effects. The historiography of family law draws its critical potential from the consideration of sociological questions; it can show which goals have already been achieved in realizing women's rights as human rights and what obstacles still remain to be overcome.

Prof. *Bonnie S. Anderson* (New York, USA) reported on her research on the women's rights activist Ernestine Rose (1810–92), whose life is itself an illustration of the international character of the women's rights movement. Born Ernestine Louise Polowsky in the region of Poland administered by Prussia, she was ultimately able to avoid a forced marriage only by means of a civil suit. Legally and economically independent, she lived in a number of different European countries before moving to the United States with her husband. There she campaigned in various ways against slavery, religious constraints, and legal discrimination against women. While her demand for an improvement of married women's property rights was taken up in New York state as early as 1848, her call for a no-fault divorce law went unheeded until 2010.

Prof. *Karen M. Offen* (Stanford, California, USA) dealt with the important role of French women's rights organizations, which she placed in a causal connection with the highly patriarchal marriage law of the Code Civil (1804). The duty of the wife to obey her husband (Art. 213 Cc), included in the Code at Napoleon's personal insistence, had gained special prominence in part because the relevant passage of the law was recited verbatim in the civil marriage ceremony. For the hundred-year anniversary of the Code Civil, a group of women's rights activists presented a draft proposal for a reformed matrimonial law. The Conseil National des Femmes Françaises (CNFF), which grew out of this circle of activists, soon forged personal and institutional ties to the International Council of Women (ICW) and worked with it to carry out important women's rights campaigns.

Prof. *Nadine Lefaucheur* (St. Luce, France) examined the statutes enacted in Napoleonic France regarding the filiation of children born outside of wedlock. Whereas the laws of the Ancien Régime had placed no restrictions on the use of records to establish biological paternity or maternity, the Code Civil completely ruled out the determination of parentage for important categories of persons, thus turning the objective fact of biological origin into a normative title of descent. A person who, by engendering a child, had violated his or her own duties from an existing marriage was excluded by law from being identified as a biological father or mother, while even in the remaining cases a man could only be established as a biological father with his consent. The intention of the legislators in passing these laws was to create disincentives to having children outside marriage. In practice, in the following years more women gave birth to their children anonymously in foundling hospitals; at the same time, the new law operated as a legal benefit for men acting irresponsibly. Overall, the legal isolation of children born out of wedlock remained the dominant paradigm in France until 1972.

Prof. *Rebecca Probert* (Warwick, United Kingdom) offered an overview of the expansion of women's rights through fam-

ily law reforms in England and Wales in the nineteenth century. She advanced the thesis that despite extensive journalism on the issue of women's rights at the time, these reforms should not be attributed to an explicit women's rights movement. Precisely early women's rights activists did not operate within fixed organizational structures. In Parliament, the principal bills were introduced by men and defended not with appeals to women's "natural rights" but by citing their need for protection as well as the need to extend already existing provisions.

Dr. *Marion Röwekamp* (Mexico City, Mexico, and Berlin, Germany) used the example of the custody rights of women vis-ŕ-vis their children to show that the realization of women's family law demands in the United States progressed extremely slowly. A major obstacle in this regard was the fact that legislative authority in matters of family law was assigned to the states. In addition, women's rights activists had to contend with religiously motivated conflicts in their own ranks. Far-reaching legal reforms did not take place in this area in part until the period 1960–1990.

As Prof. *Christina Carlsson Wetterberg* (Örebro, Sweden) showed, the marriage law reforms of the Scandinavian countries in the early twentieth century were enacted in an environment fundamentally different from nineteenth-century continental Europe. As a result of economic development, many more women were now gainfully employed, while marriage and birth rates were sinking. In this context, the Scandinavian legislators saw the modernization of their marriage model as a means to make marriage more attractive, especially for women. Given the progressive and homogeneous character of marriage law reforms between 1920 (Sweden) and 1929 (Finland), one is justified, according to *Christina Carlsson Wetterberg*, in speaking of a "Scandinavian model of marriage."

Prof. *Harry Willekens* (Hildesheim, Germany) also discussed the pioneering role of Scandinavian family law. He stressed that the legal situation there before the passage of the twentieth-century reforms had been remarkably regressive. This was especially true for the legal position of unmarried women, women's rights of inheritance, and married women's property rights. With their legislative reforms, the Scandinavian countries then became true trailblazers. One of the few repressive aspects of the new legislation was its authoritarian procedures for determining the paternity of children born outside of marriage.

In his concluding lecture, Prof. *Okko Behrends* (Göttingen, Germany) shed light on the legal status of women in Roman personal law. In response to the ideological critique of the skeptical Academy of Athens, Roman jurisprudence set aside the gender hierarchy rooted in natural law and religion that had previously held sway. From this point on, the long-standing exclusion of women from public office was only legitimated by reference to the traditional laws of custom, the *mos maiorum*. It is clear, *Prof. Behrends* argued, that a concept of personal equality based on reason and merely placed under a general moral and cultural exception was much more open to the elimination of discriminatory practices than a natural law founded on biologistic and religious arguments. With its modern concept of the person, Roman law created a fundamental structure of legal thought which was subsequently adopted by many legal systems that built on it directly or indirectly and thus lay a vitally important foundation for women's legal equality.

The information and analyses presented at the conference demonstrated in various ways that the women's rights demands of the nineteenth and early twentieth centuries were historically effective and that they must be interpreted in the context of their respective social environments and the laws of their time. The idea of the conference – to situate the development of family law in the context of historical women's rights struggles – thus turned out to be extraordinarily productive. The conference proceedings will be published in English by Böhlau in the course of 2012.

Sybille Rompe*

* Sybille Rompe, Berlin, Germany; translation by James Gussen, Boston (Mass.).

Conference Report - ACTIONES, CONDICTIONES, EXCEPTIONES
Conference from 13 to 14 May, 2011, at Faculty of Law, Masaryk University, Brno, Czech Republic

In May 2011, an annual meeting of Roman law researchers of the Czech and Slovak Republic took place at the Faculty of Law of Masaryk University. Representatives of all public Czech and Slovak law faculties from Plzeň to Košice took part. Official opening of the conference was chaired by vice-dean of the faculty *Petr Mrkývka* that opened the conference by memories of his Roman law exam. The organizer was represented by the head of the Department of the History of The State and Law prof. *Ladislav Vojáček* and by the supervisor of the field Roman Law *doc. Michaela Židlická*.

The topic of this year's conference were means of judicial remedy, however, the first session of the conference started by

papers focused on teaching of Roman law. *Doc. Michaela Židlická* / Masaryk University Brno/ was addressing Roman law teaching in general, *David Falada* /Charles University in Prague/ was presenting issues concerning the reception of Roman law in Europe.

The first paper aimed to the conference topic was presented by *prof.* Peter Blaho /Trnava University/ that examined concurrence of condictio ex causa furtiva with other actions. He was followed by another Slovak colleague, *Róbert Brtko* /Comenius University in Bratislava/ that presented, as usual, the controversies between the Sabinians and the Proculians, this time concerning the nature of actiones noxales. *Peter Mach* /Trnava University/ devoted his paper to the problems of real and personal actions pertaining to the pledgee. His university colleague *Vojtech Vladár* paid attention to medieval actio spolii in canon law.

In the afternoon, only the participants from Bohemia and Moravia were presenting their papers. *Doc. Jiří L. Bílý* /Palacký University Olomouc, Comenius University in Bratislava/ continued with another medieval paper by examining reception of actiones in duplum in the Middle Ages and the modern period. *Jan Šejdl* /Charles University in Prague/ was examining whether negatory action is the same as the negative action or whether there is a difference – his paper was called Few Comments on Legal Protection of Servitutes. *Petr Dostalík* /Palacký University Olomouc, University of West Bohemia Plzeň/ was adressing problems of representation and determining the defendant in case of representation – title of his paper is Actio institoria.

The final session was started by *prof. Michal Skřejpek* /Charles University in Prague/ that examined the origins of condictions. The last one to present the paper was *Miroslav Frýdek* / Palacký University Olomouc/ analysing the praetorian idiom „IN FACTUM ACTIONEM DANDAM" and its impact on giving redress in case of solding a horse that was later revealed to be an extra-commercial thing.

This part of the conference was followed by social program connected with conversation, experience exchange and informal dinner. Apart from very interesting papers the conference enabled sharing teaching experience and presenting young assistents or postgraduate students interested in Roman law that acquired some useful contacts with other colleagues.

A paper into conference proceedings was not submitted by all the presenters, on the other hand papers were submitted by those who could not participate actively. The problems of agency actions were addressed (apart from above-mentioned Petr Dostalík's paper) by *Ivana Stará* /Masaryk University Brno/ with paper Some Notes on Actiones Adiecticiae Qualitatis in Roman Law and her colleague *Lucie Obrovská* with paper The Actiones Adiecticiae Qualitatis and the Position of the Slave in the Law of Obligation. *Katarína Lenhartová* /Comenius University in Bratislava/ analysed actions available in guardianship over the women. *Kamila Stloukalová* /Charles University in Prague/ examined the institute of exception – the paper title is Exceptio as the Institute of Roman Law and its Forms. Her colleague *Martin Šlosar* analysed special means of graves protection in his paper Actio Sepulchri Violati and Other Forms of the Graves Infringment Protection.

One more information deserves mentioning – more than a half of the papers in the conference proceedings come from postgraduate or master students. This can be an indicator that there are plenty of young and promising researchers in the area of Roman law in the Czech and Slovak Republic.

Pavel Salák*

Prof. JUDr. Jan Vážný

Vor 65 Jahren starb einer der größten tschechischen Romanisten Prof. JUDr. Jan Vážný im Alter von 51 Jahren in Mauthausen, also in einem der schlimmsten NS-Konzentrationslager.

Jan Vážný wurde am 1. Jänner 1891 in Prag geboren. Er besuchte das Prager Gymnasium in der Truhlářská-Straße, wo er auch seine Matura 1909 erfolgreich ablegte. Im demselben Jahr begann er auch an der Juristischen Fakultät der damaligen Karl-Ferdinands-Universität zu Prag zu studieren. Aus den vorhandenen Akten ergibt sich, dass er sehr gute Studienergebnisse aufwies und schon zu dieser Zeit begann er, sich für das Studium des römischen Rechts bei Prof. Heyrovský sehr intensiv zu interessieren. Sein Studium schloss er mit einer Doktorpromotion am 12. Dezember 1914 ab. Angesichts der Tatsache, dass er vom Militärdienst freigestellt wurde, hatte er nicht einzurücken. Die Stelle des Gerichtsreferendars besetzte er schon am 1. November 1914. In diesem Amt verblieb er mehr als vier Jahre und erst am 7. Mai 1919 wurde er zum Richter am Oberen Gericht in Prag ernannt.

Als Richter war er jedoch nicht lange tätig, denn noch im Herbst desselben Jahres nahm er ein postgraduelles Studium (1919 – 1920) an der Königlichen Universität in Rom bei Prof. Pietro Bonfante auf, was eine entscheidende Bedeutung für sein weiteres Leben darstellte. Sein fachliches Wachstum war sehr schnell. Schon im Jahre 1920 legte er eine Habilitierungsschrift „Actiones poenales" vor, welche er am 16. Dezember 1920 erfolgreich verteidigte (Gutachter: Prof. Heyrovský und Prof. Vančura). Nach der Entscheidung des Ministeriums für Schulwesen vom Dezember 1920 wurde er zum Dozenten für das Gebiet des römischen Rechts ernannt. Vorträge im römischen Recht hielt er in den Jahren 1920 – 1921 an der Karls-Universität zu Prag. Früh kam

* JUDr. Pavel Salák, Ph.D., Department of the History of the State and Law, Faculty of Law, Masaryk University Brno, Czech Republic.

ein Angebot der neu errichteten Juristischen Fakultät der Komenský-Universität in Bratislava; dieses Angebot nahm Vážný gleich an. Am 20. Mai 1921 wurde er vom Präsidenten der Republik zum außerordentlichen Professor des römischen Rechts an dieser Fakultät ernannt. Pädagogisch und wissenschaftlich wirkte hier Jan Vážný bis 1927. Zu dieser Zeit gab er die ersten größeren Arbeiten heraus (Custodia im römischen Recht, 1925; Römisches Schuldrecht, Teil I., 1924; Teil II., 1927). In diese Zeitperiode fällt auch seine Anfangsaktivität in einigen juristischen Lehrgesellschaften. Zum Beispiel wurde er zu einem ordentlichen Mitglied der juristischen Abteilung der Šafařík-Lehrgesellschaft und zum korrespondierenden Mitglied der Anstalt Instituto di studi Legislativi in Rom.

Im Jahre 1927 nahm er das Angebot der Brünner juristischen Fakultät an und wurde zu ihrem ordentlichen Professor. Vážný unterrichte römisches Recht in Brünn jedoch schon früher. Seit dem akademischen Jahr 1922/23 hielt er hier auch Vorträge in Papyrologie.

Vážný trug sich in Geschichte der Brünner juristischen Fakultät auch als ein akademischer Funktionär ein. Im akademischen Jahr 1932/33 übte er die Funktion des Dekans aus. Er war auch Mitglied des Senats der Masaryk-Universität und in diesem Organ verblieb er auch im folgenden akademischen Jahr 1933/34 als Vizedekan.

Prof. Vážný gehörte nicht nur zu einem bedeutenden Pädagogen, sondern auch zu einer ausgeprägten Autorität, was sich auch in seinem umfassenden wissenschaftlichen Werk widerspiegelt.

Die wissenschaftliche Arbeit von Prof. Vážný wurde in der Zeit seiner Universitätsstudien von Prof. Heyrovský und während seines Studienaufenthalts in Rom von Prof. Bonfante beeinflusst. Das damalige Interesse der Bonfante-Schule, über das Vážný in seinen ersten literarischen Werken referierte, brachte ihn zum Studium der Fragen des römischen Schuldrechts, dem er auch den größten Teil seiner Forschungsarbeit widmete. Zum Beispiel handelte es sich um Werke: „Die neueste italienische Wissenschaft über Definitionen der römischen Obligationen“ oder „Neue italienische Theorien über die Entstehung der römischen Obligation“. Später wurde Vážný auch von Riccobono beinflusst, was aus seiner weiteren literarischen Tätigkeit ersichtlich ist.

Die Auszeichnung der Verdienste von Prof. Vážný auf dem Gebiet der Wissenschaft stellt ohne Zweifel auch seine Wahl zum Mitglied des Tschechoslowakischen Nationalforschungsrates in Prag am 5. April 1937. Im Jahre 1939 wurde er auch zum Stellvertreter des Obmanns der Mährischen juristischen Vereinigung.

In der Zeitperiode seiner größten wissenschaftlichen Aktivität erreichten ihn die deutsche Besetzung Böhmens und Mährens und später auch die Schließung der tschechischen Hochschulen. Wenn auch er tief erschüttert war, begann er nicht, zu dieser Zeit wissenschaftlich zu arbeiten. Aktiv griff er auch in politische Arbeit ein. Er wurde zum Mitglied der Widerstandsgruppe „der Anfang“ und seine ganze Energie widmete er dem Kampf gegen die Besatzer. Am 23. Dezember 1941, also in der Zeit der sog. ersten Heydrichiade wurde er mit einer ganzen Gruppe der Brünner Hochschulprofessoren festgenommen. Am 4. Februar 1942 wurde er mit anderen nach Mauthausen transportiert, wo er noch im demselben Jahr starb.

Die rechtshistorische Wissenschaft verlor einen Romanisten des europäischen Formats mit einem weiten Horizont; seine Forschungstätigkeit wurde eine Reihe von Jahren nicht nur im Inland, sondern auch im Ausland vor allem in Italien anerkannt. Sein Werk wird bis heute bewundert und stellt eine Inspiration für heutige Romanisten dar.

Karel Schelle*

* Doc. JUDr. Karel Schelle, CSc., Lehrstuhl für Rechts- und Staatsgeschichte, Juristische Fakultät der Masaryk-Universität Brno, Tschechische Republik.

Prof. JUDr. Jiří Cvetler

Vor 105 Jahren wurde ein bedeutender Brünner Romanist Prof. JUDr. Jiří Cvetler geboren. An die Brünner Universität wurde er nach dem Krieg im Jahre 1946 berufen, wo er den von den Nationalsozialisten ermordeten Prof. Jan Vážný ersetzte. Es war keine leichte Aufgabe, diesen berühmten Romanisten zu ersetzen, Cvetler verfügte jedoch über die besten Voraussetzungen. Er kam als ein eruierender Fachmann über das römische Recht nach Brünn; er hatte eine breite Übersicht über das Recht in der Antik und im Orient, sowie über das Kontinental- und angloamerikanische Recht. Es ist auch sein wissenschaftliches Hobby zu erwähnen – die Papyrologie.

Nach der Absolvierung der Prager juristischen Fakultät und der Teilnahme an Seminaren im römischen Rechtsei Professoren Heyrovský und Vančura und an Übungen des damaligen Dozenten Sommer in Papyrologie ging Cvetler in die Rechtspraxis. Diese übte er zuerst beim Urheberrechtkenner Dr. Lövenbasch aus. Seit Dezember 1929 war er als Rechtsanwalt tätig und seit Dezember 1941 war er in den Diensten der Firma Vacuum Cil Company a.s., wo er 1945

zum Syndikus und zum Mitglied der Direktion ernannt wurde.

Neben der Rechtspraxis pflegte er sein Talent und Voraussetzungen für wissenschaftliche und pädagogische Arbeit. Sein ursprüngliches Interesse für römisches Recht erweiterte er um ganze Antike, Papyrologie und Byzantinistik. Zwischen den Jahren 1931 – 1932 studierte er an der Philosophischen Fakultät in Müncher beim Papyrologen Leopold Wenger (Institut für Papyrologie und antike Rechtsgeschichte); ein Jahr später studierte er an der Juristischen Fakultät in Rom beim berühmten Romanisten Salvator Riccobono. Seine pädagogische Tätigkeit nahm er an der Staatlichen Archivschule in Prag im Jahre 1932 auf und war hier praktisch bis 1946 tätig. Zu gleicher Zeit wirkte er pädagogisch auch an der Juristischen Fakultät der Karls-Universität, wo er sich 1935 habilitierte (Habilitierungsschrift: „Deneion und Darlehen im Recht des ptolemäischen Ägypten"). Als Privatdozent hielt er dann hier Vorträge bis 1946.

Cvetler nahm an internationalen papyrologischen Kongressen in München im Jahre 1933 und in Florenz zwei Jahre später teil, wo er auch einen Vortrag über die sog. Vorschüsse im Ackerbau des ptolemäischen Ägypten hielt. Er unternahm Studienreisen nach Holland im Jahre 1935, nach Griechenland im Jahre 1936 und nach Kreta, nach Süditalien und Sizilien im Jahre 1937. Zur Erkenntnis der römischen Denkmäler dienten auch seine Reise nach Spanien im Jahre 1930, bzw. auch seine ersten Reisen nach Frankreich (1924) und England (1925).

Im Jahre 1946 kam Jiří Cvetler nach Brünn. Wissenschaftliche und pädagogische Arbeit nahm er mit einem großen Elan auf. Wieder unternahm er Studienreisen, und zwar zuerst nach Frankreich und in die Schweiz im Jahre 1946; ein Jahr später nach Italien, wo er die durch den Krieg unterbrochenen Beziehungen in den Fachkreisen wiederherstellte. Er wurde zum korrespondierenden Mitglied des Instituts de Droitin Paris. Er schrieb Nachrufe über seinen Vorgänger Prof. JUDr. Jan Vážný.

Diese Aktivität unterbrach die Auflösung der Brünner juristischen Fakultät im Jahre 1950. Seit 1952 arbeitete er am Slawischen Institut der Tschechoslowakischen Akademie der Wissenschaften in Brünn, wo er sein Interesse auf Studium der bulgarischen und polnischen Rechtsgeschichte, der mittelalterlichen Byzantinistik und Balkanistik konzentrierte. Aus dieser Zeitperiode stammt eine Reihe von Monographien und Aufsätzen, welche er sowohl im Inland, als auch im Ausland (vor allem in Polen) veröffentlichte. Später erweiterte er sein wissenschaftliches Interesse noch auf neuere bulgarische Rechtsgeschichte; er konzentrierte sich auf die Hervorhebung des Anteils der tschechischen Juristen beim Aufbau des bulgarischen Staates und seines Verwaltungs- und Justizapparats. Im Jahre 1963 trat er in den Ruhestand, jedoch die wissenschaftliche Arbeit setzte er mit einer unveränderten Intensität fort.

Nach der Wiederherstellung der Brünner juristischen Fakultät wurde Jiří Cvetler im Jahre 1969 zum Professor für allgemeine Rechts- und Staatsgeschichte, für römisches Recht und zum Inhaber des Lehrstuhls für Rechts- und Staatsgeschichte ernannt. Er nahm also die Aufgabe an, den Lehrstuhl aufzubauen und festen pädagogischen Grund des Faches der Rechts- und Staatsgeschichte und des römischen Rechts zu legen, sowie an wissenschaftliche Tradition anzuknüpfen und die Forschung im Bereich der Rechts- und Staatsgeschichte zu entwickeln.

Im Jahre 1971 ging er wieder in die Rente, dies bedeutete jedoch wieder keine Minderung seiner Aktivitäten. Er blieb ein externer Angestellter des Lehrstuhls für Rechts- und Staatsgeschichte und seit 1973 war er im Kabinett der Balkanistik und Hungaristik am Lehrstuhl für Geschichte und Ethnographie der Länder Mittel-, Ost- und Südosteuropas an der Philosophischen Fakultät der Brünner Universität tätig. Er nahm u.a. an der in den achtziger Jahren vorigen Jahrhunderts erschienenen Herausgabe der Biliographie der tschechoslowakischen Hungaristik und Balkanistik teil.

Prof. JUDr. Jiří Cvetler war ein Autor oder Mitautor einer Reihe von Lehrmitteln aus dem Bereich des römischen Rechts, des antiken Rechts, der Geschichte der Staaten Orients, der Staats- und Rechtsentwicklung des byzantinischen Reiches und Bulgariens. Diese Problematik bildete auch das Thema einer Reihe von wissenschaftlichen und populärwissenschaftlichen Studien. Seine Rezensions- und Informationstätigkeit war auch sehr umfangreich.

Jiří Cvetler war eine bedeutende kulturelle Persönlichkeit. Er interessierte sich für die Belletristik und bildende Kunst. Eine Bewunderung verdienen auch seine Sprachkenntnisse. Er starb im Jahre 1991 in Brünn.

Karel Schelle*

* Doc. JUDr. Karel Schelle, CSc., Lehrstuhl für Rechts- und Staatsgeschichte, Juristische Fakultät der Masaryk-Universität Brno, Tschechische Republik.

Annex
Legal Archeology

Legal Archeology

*Karel Schelle**

Legal archeology is a scientific discipline which examines tangible legal historical artifacts; it is a part of the history of law and can be regarded as an auxiliary science of history.

Legal archeology has a rich and long tradition which, however, has recently been developed on a very modest scale. First signs of a revival of the science were two conferences hosted by the Department of the History of the State and Law of the Faculty of Law of the Masaryk University, Brno, in 2005 and 2006. However, they failed to initiate systematic research. This was the reason why another international conference was organized in 2011 under the name "Law and Archeology", which undertook to initiate systematic research efforts and to provide a platform where members of the academia and experts from other institutions and governmental and non-governmental organizations could meet and exchange their views. The organizers organized the event believing that it would mark the beginning of renewed interest in this scientific discipline, both in our country and elsewhere in Europe.

Altogether six speakers delivered their very interesting presentations during the conference. Professor JUDr. et PhDr. Karolina Adamová, DrSc., spoke about the significance of statues of Roland symbolizing rights and privileges of towns. Associate Professor JUDr. Jiří Bílý, Ph.D., explained the methodology and analysis of legal historical artifacts, using a coat-of-arms as an example. JUDr. Miroslav Frýdek presented signs and markers of private roads and land lots as evidence of the life of old Romans and Greeks. Associate Professor JUDr. Karel Schelle, CSc., described the history of jails in Brno, while JUDr. Vilém Knoll, Ph.D., delivered a presentation on executioner's swords and, last but not least, Marian Małecki from Poland introduced legal historical artifacts of Cracow.

The conference has undoubtedly contributed to the revival of legal archeology and hopefully opened a new period of research in this field.

* Doc. JUDr. Karel Schelle, CSc., Department of the History of the State and Law, Faculty of Law, Masaryk University Brno, Czech Republic.

About Statues of Rolands in Bohemia*

*Karolina Adamová** - Antonín Lojek****

If we want to address the topic of Rolands we first need to mention Bruncvik. When hearing this name some people will recall the legend of Štifríd and Bruncvik, others heraldic legend from Augustin Sedláček or Jirásek's narrative about mythological figure of just and noble Czech prince Bruncvik and his faithful lion or the original legend about Bruncvik's sword from Adolf Wenig. It is said that when Czech's will face their grimmest moment St. Wenceslaus (svatý Václav) will come to the rescue on a white horse with his cavalry and with Bruncvik's sword, which is according to the legend hidden in a pillar of the Charles Bridge, to drive away the enemies of the Czech lands.

However, many of us will recall the lean figure of knight from Charles Bridge, whose statue has been sculpted by Czech sculptor Ladislav Šimek and in 1884 erected near the Prague's island Kampa. The knight with a serious expression in his face and a sword in his hand has inspired the sad verses of Russian poet Marina Tsvetaeva, an unfortunate author of rueful poems, who ended her own life in 1941. For her, Bruncvik from Prague was the symbol of loyalty and security she found in Prague during her three exile years after emigrating from her motherland in 1922 and before leaving for France.

A different stone knight used to stand here originally – since early 16th century. However, in 1648 the statue was severely damaged in artillery fire during Swedish siege of Prague. The torso is today stored in Prague's Lapidarium. The shape of the knight is known from indistinct wood engraving of Prague's panorama from 1562. Also a small copy of the statue was preserved as alabaster from the first half of the 17th century.

* Literature about Rolands (especially in Germany this literautre is particularly rich) see e.g. GATHEN, A.: *Rolands als Rechtssymbole,* Berlin 1960. Newer mongraphies see PÖTSCHKE, D.(Hrsg.): *Rolande, Kaiser und Recht, Zur Rechtsgeschichte des Harzraumes und seiner Umgebung,* Harzforschungen, Bd.11, Berlin 1999 or PÖTSCHKE, D. (Hrsg.): *Stadtrecht, Roland und Pranger. Beiträge zur Rechtsgeschichte von Halberstadt, Goslar, Bremen und Städten der Mark Brandenburg* (= Harzforschungen, Bd. 14). Lukas, Berlin 2002.

** Prof. JUDr. et PhDr. Karolina Adamová, DSc., Centre of History of Legal Studies of the Academy of Science, Faculty of Law, Charles University in Prague, Czech Republic.

***JUDr. Antonín Lojek, Ph.D., Institute of State and Law of the Academy of Sciences of the Czech Republic.

Close inspection of the original statue shows that it was most likely an analogue of German Rolands – stone knights named perhaps after Palatine Charles the Great and the heroes from the Song of Roland, old French epic poem from the 12th century. However, some authors derive the name Roland (Ruland) from rügen (reprimand), others point out the etymological affinity of the name with "dat rode land" – place endowed with legal jurisdiction Gerichtsstätte. Rot – Blut (red, blood) as a color symbolizes an act of justice. Still others see the origin of the name in the word rolla (salary, toll). In Southern Europe Orlando is often used instead of Roland. All these interpretations of the statues of knights highlight their symbolical importance.

Especially in Germany, Holland, France, Austria and Poland these stone statues of knights represented from late Middle Ages the freedom and independence of towns, town jurisdiction or the right of towns to punish by death, in other cases town market and tariff privileges and other privileges and freedoms. Roland in Zerbst represented also freedoms and privileges of towns. Some of them, such as the statue of Roland in Bremen located in the market place in the city center, are important historical monuments.[1] The statue of Roland in Bremen is so important that UNESCO has put in on World Heritage List.

Let us now stop by Czech Rolands that represent town privileges. It is not clear whether the statue of a knight in Cheb with spear (symbol of the right to punish by death) and shield can be considered to be a Roland. The original wooden sculpture of Roland knight, located on a fountain in a town square in Cheb in 1528 lasted until 1591, when it was replaced by a sandstone statue made by sculptor Wolf Hempf. The people of Cheb called this knight Wastl with sword. The original statue can be seen in a museum in Cheb; what can be seen on the fountain is a sandstone copy made by sculptor J. Živný in 1981.[2]

Also Žumbera from Pilsen (according to Pilsen legends a plundering knight) located on a pillar of the Imperial House (Císařský dom) on the square of the Republic (náměstí Republiky) was until the 17th century a gargoyle on one of the four city fountains. In 1981 the fountains disappeared. After 20 years the shattered statue was discovered in sugar factory's shed by a representative of the town's Building Authority. In the 1980s the statue was restored by sculptor J. Šindelář. However, the age and style of the statue raise doubts whether it was a Roland at all.[3]

What we definitely can consider a Roland is a stone man from Litoměřice,[4] dressed in fur with stick in his right hand and a shield with engraved relief of a small money bag in his left hand. The rendering of this Roland is exceptional, because it resembles more the mythical Hercules than a medieval knight. This Roland is one of many sculptures of wild men[5], particularly popular in Litoměřice.

Let us note in this context that Roland in Saxony's town Belgern is similar to the wild man from Litoměřice – it is also barefoot. He is the only Roland in Saxony and the only Roland in Germany, which stands barefoot on a stone pedestal.[6]

In case of the Roland from Litoměřice the Herculean way of expressing might and strength was more acceptable than the traditional knight figure. This is understandable when one realizes that at the time this statue was created Litoměřice was one of the most important towns trying to achieve emancipation of townsmen with nobility.[7]

The original statue was located near Renaissance town hall on a tall pillar with date 1539 inscribed. This sculpture was replaced in 1978 by a copy. In the lower part of the pillar we can still find the Litoměřice cubit (traditional unit of length) used by merchants and buyers. Originally the statue would stand near the river Elbe as a symbol of tariff privilege granted to Litoměřice by Charles IV and confirmed in 1459 by Jiří z Poděbrad and again in 1473 by Vladislav Jagellonský. Also Ferdinand I confirmed on September 24th 1547 the privileges granted to Litoměřice by his predecessors.

The conclusion that the Roland in Litoměřice is a symbol of the protector of market and trade in Litoměřice is supported by the fact that during town markets units of length and weight were located right next to the pillar of the statue.[8]

However, let us go back to the stone knight near Charles Bridge. The discussion whether the original knight was Bruncvik or Roland has not been concluded until this day. There is evidence supporting either side.[9]

Cyril Merhaut claims that it was neither Bruncvik nor Roland but a "monument created by the citizens of the Old Town individually without full capacity to be classified within certain type with the purpose of declaring their rights and as an expression of respect and gratitude towards Czech kings, who appreciated their services".[10]

The Roland in Litoměřice, as well as the knight in Prague, was a symbol of tariff privilege of Prague's Old Town. In 1459 Jiří z Poděbrad granted the Old Town the right to collect tariff

1 SCHILD, W.: Die Geschichte der Gerichtsbarkeit, Hamburg 1980, pg. 74.
2 http://www.muzeumcheb.cz/texty/vario/kasny.html, referred to on November 12th 2011.
3 GRÉGR, R.: *Pod ochranou Rolandů v Čechách [Under the protection of Rolands in Bohemia],* Lidé a země, Praha 2009, s. 2.
4 The original statue was restored by sculptors M.Kodedová and T.Konstantinová from Prague and it is currently in exposition of a museum – former Litoměřice town hall. Standing on the pillar today is a copy made from artificial sandstone by sculptor J.Kaifoše. See KOTYZA, O. et al.: *Dějiny města Litoměřic* [History of the town of Litoměřice], Litoměřice 1997, pg. 176.
5 A similar wild man protecting with gilded club town's symbol can be seen also on one of the fountains in the town Cheb. This statue was made in 1738 from red granite by renowned baroque sculptor Peter Anton Felsner. The statue was restored in 1980 by J. Živný. Http://www.muzeumcheb.cz/texty/vario/kasny.html, referred to on November 12th 2011.
6 http://www.stadtbelgern.de/Stadtinfo/Historisches/Der%20Roland.html, referred to on October 26th 2012.
7 SMETANA, J.: *Litoměřický Roland [Ruland of Litoměřice],* Kulturní měsíčník, Roudnice nad Labem, 14, 1978, pgs. 161-162.
8 KOTYZA, O. et al.: cit. d., pg. 179.
9 Copmpare with . MERHAUT, C.: *Bruncvík na Karlově mostě [Bruncvik on Charles Bridge],* Praha 1940, pgs.57-70.
10 Same source, pg. 70.

on the bridge and in 1472 Vladislav Jagellonský confirmed this privilege.

In the course of the 15th century conflicts emerged between the citizens of the Old Town and citizens of the Lesser Town (Malá Strana) over the privileges and rights related to the adjacent banks of Vltava. The people of the Lesser Town finally accepted the rights of the Old Town and shortly after that, near the end of 1506, the statue of a knight in armor with sword and shield and with the symbol of Prague's Old Town was erected near the island Kampa. The sword symbolized the higher legal protection of a place, where goods could be stored.

Some could be disappointed that the statue of the knight near Charles Bridge, or at least the original one, was not the legendary Bruncvik, but merely a symbol of town's privileges. However, a privilege, if founded in virtue and humanity is no less inspiring than the legend about Czech prince Bruncvik.

Statues of knights appeared also at the tops of some pillories, but it seems that it was just for decoration purposes. Based on historical evidence Jan Klabouch claims that the "figurine with sword in hand" was called "maňas" (puppet).[11]

Also Richard Horna in an older essay about pillories refers to some statues of knights at pillory tops as "maňas".[12] He literally writes that on some pillories we "see smaller and larger stone figures with helmet and sword in the right hand. Such figures could also be made of sheet metal and painted colorfully". In German language the figure was called Prangerhansl, in Czech it was "maňas" (puppet).

Horna claims that these figures are "statues of the magistrate[13]".[14] He also notes that the relationship between this figures and statues of Rolands symbolizing town's privileges has not yet been thoroughly studied in literature.[15] This claim is somewhat less justified after the publication of German monograph about pillories and Rolands.[16]

Whether Roland represented town's jurisdiction, various privileges and freedoms of towns (it used to be placed also as decoration on top of pillories) its symbolism always contained an element of justice. After all, every town privilege and freedom was to be used in accordance with the principles of justice. This aspect is symbolized also by the sword, which is often found in works of fine arts to represent Justice.

[11] KLABOUCH, J.: *Staré české soudnictví [Old Czech Judiciary],* Praha 1967, pg. 357.

[12] HORNA, R.: *Pranýř: o některých zachovalých pranýřích v našich a okolních zemích [Pillory: on some preserved pillories in our and neighboring countries],* Knihovna Sborníku věd právních a státních, Praha 1941, pg. 52.

[13] Translator's note: the word "rychtář" used in the original text initially referred to a mayor in a town district or a village, who was also a lower-grade judge, controller and representative of the district or village. However, during the 15th and 16th centuries the content of the function (and the meaning of the word) was changing until it finally referred to a person appointed by the ruler to represent his interests; English equivalent of the word in this period would be "magistrate".

[14] Same source, pg. 53.

[15] Same source, pg. 53.

[16] PÖTSCHKE, D. (Hrsg.): *Stadtrecht, Roland und Pranger. Beiträge zur Rechtsgeschichte von Halberstadt, Goslar, Bremen und Städten der Mark Brandenburg* (= Harzforschungen, Bd. 14). Lukas, Berlin 2002.

Methodology, Analysis of Legal-Archaeological Objects Demonstrated on an Example of Coat of Arms

*Jiří L. Bílý**

PROBLEMS OF RESEARCH OF LEGAL-ARCHEOLOGICAL OBJECTS

The legal-archeological findings are comparable to wasps in the river sand. We perceive them as "*lateral product*" of long-term research activities. Many legal-archeological visual objects, their legal symbolism- gestures and rituals - did not deserve to be noted and we can get any information about them only casually[1]. Therefore it is important to gather knowledge collectively and summarize them clearly as well[2].

I chose the coat of arms as a legal-archeological object, of which we have more sources also thanks to the auxiliary historical sciences – Heraldry, and we would like to show by work with a specific material how the way of handle individual objects should be.

Problems of legal-archeological research of coat of arms

Coat of arms was associated closely with the legal life. Already commentator Bartolus de Saxoferrato (1314-1355) wrote in the mid-14th century his first treatise on omens and signs. Heraldry, with regard to its practical importance to the law, was integrated along with statistics into the teaching of law

* Doc. JUDr. Jiří L. Bílý, Ph.D., Department of the Theory of Law and Legal History, Faculty of Law, Palacký University Olomouc, Czech Republic.

[1] For example in research activities e.g. in estate of businessman from Olomouc. We can get some information about field signs,etc.

[2] ADAMOVÁ, Karolina : Za systematické rozvíjení československé právní archeologie, In: Legal historical studies 16, p. 255-268

schools. Like in cases of other legal-archeological objects, we can distinguish also coat of arms as the object of legal relationships. In this context we talk about the Law of Coats of arms. Legal institutes of law of the coats of arms in Germany were being prepared by lawyers and legal historians[3]. In the narrow sense, legal archeology includes legal symbolism of coat of arms, also the gestures and rituals. However, this distinction has no greater significance, thus we deal with the issues of coat of arms comprehensively[4].

Terminology

It is always necessary to pay attention to the terminology, which is used in the process of exploration of legal-archeological objects.[5] The issue is semantics of designation of object and also exploration of etymology of applied terms.

In the Czech language, there is the term coat of arms ("erb") applied for designation of a shield with a sign and sometimes for a helmet with covers along with jewel. This term was probably transferred from Czech language to the Slovak language, where it replaced the older title from Hungarian *címer*, Polish herb, Russian gerb and many more Slavonic languages. The term erb is derived from the german term *die Erbe = the heir*. It already reflects some legal function of this object as an expression of the membership to the dynasty, respectively heritance of this symbol. The term *sign* is a new term from the 19th century. It has a wider meaning than only determination of the heraldic artifact. Its usage in the Constitution of 1920 should have demonstrated distance from the monarchist system. It was the same in the period of socialism in case of using e.g. municipal signs.

In English "*coat of arms*", there is pointed out the coat as a spreading meaning and France and Germany use designation (*Wappen, Armoire)* accenting the military meaning. In French, the term cimer is derived from jewels worn on helmets which reflects rather function during tournaments. It probably got to Hungary and also influenced Hungarian language.

Description of the object

It is necessary to analyze the object description for exploration of legal-archeological objects. The legal archeology consorts with museology and archeology in this direction. In case of coat of arms, it meant real combat shield of a knight, which was hanged in his habitation on a strap or rope with hook. Sometimes, this way of suspension imitates stony design of coat of arms. Originally, there were only ornaments on the shield, which sometimes had also functional character such as e.g. a centre of shield hammered out into the ornaments, iron bands of the shield or bands in form of *štenýř*[6] used in order to reinforce the shield. Later, the helmet with jewel and maybe also covers were added to the shield.

This protective armor developed into a drawing symbol. It was important that the coat of arms did not present only real object, but also a symbol, where shields were covered by metal, furs and colors, wherein geometrical diagrams (heraldic figures) or real objects (general figures) and added jewels on helmets and covers were.

EXTERNAL CHARACTERISTICS OF LEGAL-ARCHEOLOGICAL OBJECT

The legal archeology must classify legal-archeological objects primarily pursuant to their external characteristics. Also these findings are not without importance for legal history. They often clarify origins of these objects to us and show us the way of spreading their usage. We will try to outline shortly how the classification looks like in case of coats of arms.

Coat of arms as a legal-archeological object

According to picture of coat of arms or symbol, we can distinguish the complete characteristics, when the coat of arms consisted of shield, helmet with jewel and covers or else other opulent items. The coats of arms appear sometimes only in form of shield, or else shield with rank crown. In the 14th and 15th century, there are only pictures of jewels appeared on the seals. It has not been explored yet, what meaning of this common was. It could have origin in tournament practice and we can express without an intense exploration the provisional hypothesis that the picture of coat of arms could have origin in property background of the dynasty. For example sons of the Moravian margrave Jan II. Jindřich Lucemburský had the title of Moravian margraves. However, the only monarch of Moravia, Jošt Lucemburský, used jewel on his seal. It is possible that the jewel should have symbolized his position in the Luxembourg dynasty of Moravia[7].

Special kind of coat of arms is the funeral shield ("*rundace*", "*rundáč*"). There were round shields with coat of arms on paper twisted by bay wreath used for its designation during funeral of death person.

Coat of arms documents and miniatures

Coat of arms documents are absolutely the artifacts of the legal life, because they accrued from the legal necessity. The oldest documents of the first half of the 14th century from the imperial bureau granted a shield. Thus the document confirmed that the sovereign handed over a shield with symbol to the given person. In the age of Emperor Karel IV., we can see already developed practice of granting of emblem. We can divide the coat of arms documents pursuant to their effects into those, which are effects of nobilitation and one of the attributes of nobility is grant of the coat of arms. Besides there are documents for coat of arms, where

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[3] HAUPTMANN, F. : Das Wappenrecht, Bonn 1896, 579 p. (zde uveden přehled starší literatury). KEKULE von Stradonitz : Rechtgeschichte über Wappen und Wappenteile im Mittelalter. Jahrbuch Gesellschaft „Adler", Band XIV., Neue Folge, Wien 1904, p. 50-59. BECK, Edward : Grundfragen der Wappenlehre und Wappenrechts, Speyer am Rhein 1931, 314 p.

[4] BÍLÝ, Jiří L. : Vztah heraldiky a právní historie. In: II. setkání genealogů a heraldiků, 15. 16. 1983,Ostrava, 1983, p. 9. -11.

[5] VRTEĽ, Ladislav : Heraldická terminológia, Slovenská genealogicko-heraldická spoločnosť, Martin2009, p. 7-40.

[6] A Czech term for a kind of construction item, e.g. a wooden pillar

[7] BÍLÝ, Jiří L. : Moravská orlice - symbol panovníka, země a národa (Tři právní významy šachované orlice). In: Moravský historický sborník. Ročenka Moravského národního kongresu 2002- 2005, Brno (2006),1019 p. 289-290.

is the coat of arms only granted, modified or transferred to a new person. As component of the documents, there is regularly also a decoration of the coat of arms, which however depends on initiation of the receiver[8]. The original picture of coat of arms is modifying into sights, where the coat of arms is only central motive of so-called miniature of coat of arms. From the legal-archeological view, there are interesting especially those miniatures, where the Emperor sitting in collegiums of electors is pictured. Well-deserved attention is paid to documents of coat of arms in the diplomatic, artistic and also heraldic respects[9].

The list of coats of arms ("Erbovníky") and the registers of coats of arms

The list of coats of arms or rather said armorials originated as handwritings that served to heralds and other officials in order to discover coats of arms and their holders. The herald's the list of coats of arms served for the legal practice. Herald needed these books, because he re-examined whether the person who used the coat of arms belonged to this dynasty and if there was no usurpation, no ceremonial and tournament affair, where only nobles could appear on the tournaments. Heralds decided also legal affairs in cases of coats of arms and they were authorized to exercise judicial power, which was symbolized by the herald staff[10]. Heralds were maintained especially in Great Britain and errands of coat of arms affairs had rather official character in the Habsburg absolutistic monarchy and there were only Saalbuchen registering issued documents of coat of arms[11]. The list of coats of arms originated also as representation of certain estates and communities[12].

Gallery of coats of arms

The gallery of coats of arms represented assemblage of coats of arms, which were located with certain purpose, mostly in order to represent certain rights. Galleries of coats of arms symbolized the monarch court, extension of power and property, land and municipal judges, related dynasties, offices, church institutions and knight orders[13]. They appear on exteriors and also interiors of buildings, but also in handwritings. Coats of arms are in the only one place or also in particular handwritings connected by the same circumstances of their origins e.g. coats of arms of chamberlains of Moravian Margraviate on particular handwritings of Moravian land boards[14].

Outlets of coats of arms

The outlets of coats of arms represented ascendants of certain person (*probant*), which are determined by the coats of arms or their symbols and sometimes also by titles under shield served as certificate of nobility, membership to Estates or title. The outlets of coats of arms were used for access into court and to estates institutions.

We can divide the outlets of coats of arms from the view of external characteristics into two groups. The first group joints emblems of ancestors into one shield. It is for example headstone of the famous astronomer Tycho /Tyga/ Braho in Temple of Týnský in Prague[15]. The second group is consisted of shields, which can be in corners (e.g. of headstone) or ordered abreast. For the clerical purposes, there was outlet used in form of tree, where coat of arms of the *probant* and his name was beneath and it was further divided to paternal and maternal line, the geometrical line of ancestors in each generation was on the increase. According to the amount of ancestors, we distinguish outlets for four, sixteen, thirty two and more ancestors. Sometimes there were used irregular outlets, especially where one line of dynasty was very ancient and the second one was younger[16]. In the upper part of outline, there are coats of arms of the oldest ancestors pictured. The outlines have often an artistic shape[17].

Genealogies of coats of arms and tree descendancy

Genealogies of coats of arms represented picture of coat of arms and often also name of the oldest ancestor and his wife and then his descendants with coats of arms, eventually their wives and is continued with line of male descendants. Genealogies of coats of arms and descendancy appeared on architecture

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8 KREJČÍK, Tomáš : Ke studiu erbovních listin. In: Sborní I. Setkání genealogů a heraldiků Ostrava 18-19. 10. 1980, Ostrava 1980, p. 38-40.

9 ŠIŠMIŠ, Milan (ed.): Erbové listiny. Zborník príspevkov z medzinárodnej konferencie, ktorá sa v dňoch 19-20 októbra 2005 uskutečnila v priestoroch Slovenské národnej knižnice v Martine,issued by Slovenská genealogicko-heraldická spoločnosť, Martin 2006, 236 p.

10 RŮŽEK, Vladimír: Znakové soubory v Evropě. In: Heraldická ročenka 1979, issued by Česká numismatická společnost , pobočka Heraldika, Praha 1979, p. 68-93.

11 von DOERR August : Der Adel der Böhmischen Kronländer. Ein Verzeichniss derjenigen Wappenbriefe und Adelsdiplome welche in den Böhmischen Saalbüchern des Adelsarchives, Prag 1900, 372 p.

12 POKORNÝ, Pavel R.: Vídeňský rukopis CPV 8330. In: Sborník archivních prací, roč. L. č. 2, Praha 2000, p. 395-432.

13 NOVÝ, Rostislav : Jindřichohradecká znaková galerie. In: Acta Universitatis Carolinae, Philosophica et historica 3-4, 1971,Studia historica VI-VII, Z pomocných věd historických, Univerzita Karlova, 1971, p. 179-198. ADAMOVÁ, Karolina : K heraldické výzdobě staroměstské mostecké věže. In: Pražský sborník historický XV, Panorama, 1982, p. 44-62. LOJKO, Jerzy : Średniowieczne herby polskie, rysunky herbów Jan Gliński, Krajova agencja wydawnicza, Poznań 1985,1. vydání,150 p. NOVÝ, Rostislav : Nejstarší heraldické památky staroměstské radnice v Praze In: Pražský sborník historický XXII,Praha, 1989, p. 33-70. FIALA Michal – HRDLIČKA, Jakub : Znaková galérie v chrámu sv. Víta na Pražském hradě (Příspěvek k panovnické reprezentaci 16. století)Sborník archivních prací, roč. XLII., rok 1992, č. 2, Praha 1992, p. 261-306. RŮŽEK, Vladimír : Chebská radnice a její středověké fresky issued by Chebské muzeum, Cheb,1994, 207 p. MÜLLER, Karel : Erbovní „minigalerie" Hofmanna z Grünbüchlu na zámku v Janovicích u Rýmařova. In: Acta historica et museo-logica Slezské univerzity, č. 3/1997, Opava 1997, p. 110-114

14 HRUBÝ, František : Moravské zemské desky, issued by Zemská správa moravskoslezská v Brně, Brno 1931, 74 p., 44 faksimilí.

15 PRP /Pavel R. Pokorný/ : Znak na náhrobku Tychona Brahe. In: Erbovní sešit, issued by Heraldická sekce Klubu vojenské historie při Vojenském historickém ústavu Praha, Praha 1971, p. 39-42

16 SMETANA Jan : Neobvyklý erbovní vývod z Litoměřic. In: Heraldická ročenka 1984, issued by Česká numismatická společnost, pobočka Heraldika, Praha 1984, p. 3-12.

17 OROS, Zuzana - ŠIŠMIŠ, Milan : Rodové postupnosti a ich grafický vývoj, Slovenská genealogicko-heraldická spoločnosť , Martin 2004, 214 p.

as representation of dynasty, but it appeared also in legal affairs. Their shape could be from simple design up to beautiful made pieces[18]. They are mostly genealogies in form of trees with coats of arms hanged on the branches. Sometimes, it rose directly from bosom of the pictured ascendant.[19]

Alliance coats of arms

Origin of alliance coats of arms is dated till second half of the 13th century, when the symbol of coat of arms already does not mean only visualization of person, but it also declares certain rights of its holder. Due to its external characteristics, we can divide the Alliance coats of arms to associated shields, or the symbols are jointed in one shield. These symbols or coats of arms are jointed only relatively because in case of modification of legal state, they can be separated[20]. Therefore, it was not necessary to have special permission e.g. in British heraldry. This symbolic expression is called *marshalling* in British heraldry[21]. We can classify the Alliance coats of arms to marital and official alliances.

Coats of arms owe to their application

We can also explore the arms due to their application and follow the social-legal aspects. Classification of coats of arms follows where the coats of arms were used in life of the society. Thus, we can distinguish: coats of arms on seals, on portals, on banners, on headstones, epitaphs and funeral shields ("*rundace*"), the coats of arms in interiors and exteriors of seats.

INTERNAL CHARACTERICTICS OF TE LEGAL-ARCHEOLOGICAL OBJECT

Exploration of the way how the objects function in legal life is the other form of classification of legal-archeological objects.

COAT OF ARMS AS THE SYMBOL OF SOVEREIGNTY AND SOVEREIGN RIGHTS

Coat of arms was component of designation of state (see the state symbols) and the state itself is the holder of sovereign right to grant coats of arms or to delegate this right to person or institutions. The right to grant could be performed in the 12th century on the West and here in the 13th century. In the ancient period, sovereign gave the shield with symbol as an award to well-deserved fighter. It was probably developed from submissions of honorable weapons, in this case of shields. The granted shield was more appreciated because it was based on the monarch's authority. In the 14th century, the monarch reserved the right to grant nobility (document of nobilitation) with granted coat of arms, which was the document of coat of arms in wide sense of the word or only the coat of arms, thus so a document for coat of arms, which was the document of coat of arms in its narrower sense. In central Europe, there were found documents for symbols and documents of nobilitation during reign of the Roman Emperor and Czech monarch Karel IV., where the coat of arms was granted concurrently with promotion to the noble estate. It was later granted also to other subjects e.g. townsmen, cities, guilds, associations. There were special institutes developed in order to grant the coats of arms in many countries. In England, it is the College of Arms in London[22], The Court of the Lord Lyon in Scotland, republican Ireland has the Office of Arms and maybe with the only exception of France, each of the European states (also some overseas countries) has heraldic institution. In the Czech Republic, there is the Heraldic commission at the Chamber of Deputies of the Czech Republic.[23]

Coats of arms as legal symbol of judicial jurisdiction

The Law was being found at courts and it depended on recognition of justice by judges. There was their authority being developed. Three characteristics had to meet in a person of land judge. He must have been noble, rich and had to evince some psychical abilities. Arms of judges in the judicial room should have represented their actual presence and they were evidence of judicial honor also for future[24]. These arms mostly created the galleries of coats of arms. We can meet these galleries in the historical building of Moravian land assembly in Brno[25] or in judicial room by the Vladislav Hall in the Prague Castle[26]. The common to place arms of judges in area of municipal court was usual also in cities. For the present, there were boards of arms of the municipal court in Opava appeared and elaborated[27]. Also in the 19th and 20th century, there was the state symbol in judicial courts located in accordance with the internal rules.

Arms appeared also on stanchions that determinate the scope of jurisdiction. We can find the arms on object served for imprisonment. Pillories were ended by symbols of right (a sword and a hand with sward, red flag) or the holder of judicial power (coat of the nobility, city or the flag of city).[28]

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[18] OROS, Zuzana - ŠIŠMIŠ, Milan : Rodové postupnosti a ich grafický vývoj, Slovenská genealogicko-heraldická spoločnosť , Martin 2004, 214 p.

[19] PAPROCKÝ z Hlohol Bartoloměj : Zrcadlo slavného markrabství Moravského, Olomouc 1593, faksimile prvního vydání, issued by Genealogická agentura, Ostrava 1993, 448 listů.

[20] BILÝ, Jiří L. : Alianční znaky v měšťanské heraldice. In: Heraldická ročenka 1982. - Praha : Česká numismatická společnost, 1982, Praha 1982, p. 57-62

[21] BUBEN, Milan : Marshalling v britské heraldice. In: Heraldická ročenka 1987 , issued by Česká numismatická společnost , pobočka Heraldika , Praha 1987, p. 5-24.

[22] LOUDA, Jiří: College of Arns – svojí výročí. In: Genealogické heraldické informace (GHI), rok 1984, č. 1, Brno 1984, p. 29-31.

[23] von VOLBORTH, Carl-Alexander : Heraldika. Úvod do světa erbů, Ostrava 1996, p. 18.

[24] ŠVECOVÁ, Milena : Spor o valdštejnský erb v roce 1727. In: Heraldická ročenka 1984, issued by Česká numismatická společnost , pobočka Heraldika, Praha 19 p. 65

[25] HANÁČEK, Jiří Hanáček : Ročenka na rok 1981. Heraldická výzdoba Nové radnice v Brně, vlastním nákladem, Brno, část 1.,Brno, 1981, nestránkováno. TÝŽ: Heraldická výzdoba Nové radnice v Brně,vlastním nákladem, Brno, část 2., Brno, 1982, nestránkováno.

[26] BURDOVÁ, Pavla : Zemský soud v malbách na Pražském hradě a v rukopisu stavovského archivu. Sborník archivních prací, roč. XXXI.,rok 1981, č. 1, p. 207-226.

[27] MÜLLER, Karel : Znaková tabla opavského městského soudu ze 17. a 18. století. In: Časopisu Slezského zemského muzea, série B, roč. 40., rok 1991, p. 148-162.

[28] HORNA Richard : Pranýř, Praha 1941, 143 p.

COAT OF ARMS AND ITS APPLICATION OR SYMBOLISM FOT THE PERSONAL AND FAMILY RIGHTS

František Čáda[29] devoted to the arm as to a personal right already in the period of Czechoslovakia. It was only a part of larger complex. That question has not been elaborated so far, thus the following part of study constitutes a certain attempt to depict this legal problem.

Visualized attribute of the legal subjectivity

Fundamental legal-social meaning of the arm is the expression of legal subjectivity of a person stating an ability to acquire rights and duties and sometimes also capacity to legal acts. Coat of arms (similarly to the name) should have determined unchangeably the person as a holder and it has an absolute character in the possibility to exclude everybody who does not have the right to use it.

Subject of the coat of arms could be a dynasty as it was in the central Europe. The holder of arm was an endowed ancestor and his legitimate descendants. The coat of arms reflected their inseparable property organization of the family relations in case of noble dynasty. Documents of coats of arms are expressed forthwith: *"My, aby se týž Petr Vincig i s dědici svými od něho řádně a manželsky pošlými těmi, kteréž nyní má aneb jmíti ještě míti bude obojího pohlaví z Winzigthalu psali psáti mohli"*[30]. Coat of arms was passed through the male members and also wives and unmarried daughters were using the arms and arm symbols. If there was arm identical or similar, the holder whom some damage was inflicted could claim to remove or differentiate it. These disputes were in noble and also municipal surroundings. Bartolus de Saxoferrato presents only that arm granted by monarch has priority before the adopted emblem. Each holder of the arm (mostly the head of family) could forbid to other persons to use the arm or arm which could be changeable and to claim rectification before the court. It is noted by dispute of member of the manorial dynasty of Vilém from Pernštejn with Vladyka Hrdý from Klokočné[31].

Distinction of arms of particular branches of dynasty had mostly the property reasons, thus so the division of inseparable property. The oldest handed evidence was in the nobleman dynasty of Vítkovců, where the property allocation undoubtedly led to differentiation of emblems by tinctures (these are colors: the red rose on silver- from Rožmberk, gold rose in blue-the lords from Hradec, silver rose in red- lords of Landštejn, blue or maybe originally black in gold the Sezimové from Ústí).

Members of dynasty could admit an access to arm in Moravia and in Bohemia with a permission of monarch also to other person – *"erbovní strýcovství"*. It was an older dynasty which admitted the permission for a new person or document of the coat of arms originated where the coat of arm was granted to more unrelated persons concurrently. Mikuláš Dačický from Helov presents a case that some *„Samuel Horáček syn Horáčka ševce v Ledči, hyv pány Trčky, jichž byl poddaným byl, z poddanosti propuštěn, byl od rytířů Nejepínských z Nejepína k jejich štítu i titulu přijat a psal se odtud Samuel Nejepínský z Nejepína"*[32].

Sometimes, we can talk about the collective nobility and these people acquired automatically the same coat of arm. In 1680, the Svatováclavský seminar gained palatinate from Leopold I., where the excellent students got a personal nobility and identical coat of arms[33].

In Poland, the access to the arm did not require a permission of monarch. The *families of coats of arms* are originated in this way[34]. One arm having a name (*e.g. Leliwa, Lis, Poraj*) could be used by more unrelated dynasties[35].

In Great Britain, the arm reflected the fact that only the oldest son is the heir in accordance with the law. The coat of arms proved a membership to its dynasty on one side, but it has also its personal character. Undistinguished arm could be held only by holder of the title of dynasty's property and the other members must distinguish it. In England, there were used signs, respectively brisures located in the arm for these purposes[36]. In Scotland, there is the same purpose reached by means of heraldic figures e.g. hems and slashes of heraldic figures[37]. In Portugal, the members of dynasty can elect name from genealogy of mother or father. The same affects also the arms. The signs in coats of arms inform whether they come from grandfather, grandmother from the side of father[38].

In case of the legal person, the arm is adopted or granted.

The arm as well as the name represented its holder. Presence of the arm symbolically represented its holder during his life and also after his death. There was the common law spreading. It reflected the social-legal organization of society, often also emancipation of the estate and autonomy of the legal persons. Later, the monarch (resp. state) delegated right to grant emblem of heraldic authority, coming out of sovereign rights of the monarch, respectively the state.

The natural persons

Originally, the coat of arms was connected with a natural person respectively with dynasty, whose members carried shields and banners into the fight. It visualized a person directly. When

[29] ČÁDA, František : Práva osobnostní u nás. In: Všehrd, roč. IX, Praha p. 1-15.
[30] MEJTSKÝ, Josef : Příspěvky k dějinám šlechty v Čechách s připojením rodopisu. Rytířů Nebeských z Vojkovic, Praha 1901, p. 32. Erbovní listina Petra Vinciga z Winzigthalu z roku 1585.
[31] VOREL, Petr: Heraldický spor Viléma z Pernštejna. In: Heraldica viva. Sborník příspěvků z konference českých, moravských a slezských heraldiků konané 7.-8. června 1991 v Pardubicích, issued by Východočeské muzeum Pardubice, Pardubice 1992, 69-74.
[32] MEJTSKÝ, Josef : Příspěvky k dějinám šlechty v Čechách s připojením rodopisu . Rytířů Nebeských z Vojkovic, Praha 1901, p. 17.
[33] BERÁNEK, Karel: K otázce palatinátu /komitivy/ Pražské univerzity /Nobiles de Lauro/. In: Acta Universitatis Carolinae -Historia Universitatis Carolinae Pregensis, Tom. XIII., fasc. 1-2,pag . 83-98.
[34] KULIKOWSKI, Andrzej : Heraldika szlachecka, wydawnictwo „Chateau", Warszawa 1990, 240 p., 24 tab.
[35] SZYMAŃSKI, Józef: Herbarz średniowiecznego rycerstwa polskiego. Wydawnictwo naukowe PWN,kresby Zbigniew Kwiatkiewicz, Warszawa 1993, 316 p.
[36] BUBEN Milan : Brisury v britské heraldice. In: Heraldická ročenka 1985, Česká numismatická společnost, pobočka Heraldika, Praha 1985 p. 53-68
[37] von VOLBORTH, Carl-Alexander : Heraldika. Úvod do světa erbů, Ostrava 1996, p. 91
[38] von VOLBORTH, Carl-Alexander : Heraldika. Úvod do světa erbů, Ostrava 1996, p. 91

it ceased to be military artifact, it expanded to society. Therefore, we classify holders of the arm due to their membership to the estate.

The monarchal coats of arms

The monarchal coats of arms originated at first. They had an analogical development as noble coats of arms. They came from signs of seals and banners[39]. At first, it was only a personal symbol, which became a heritable coat of arm and the coat of arm symbolizing power over certain land[40], which constituted land coats of arms.

The noble coats of arms

The noble coats of arms originated in the West as a reflection of martial culture in the social-legal view and their content in the technical and psychological view[41]. The oldest arms originated by the big feudal lords firstly about years 1100-1400 as individual maintained symbols and during years 1140-1180 the individual symbols on shields changed to the heritable symbols which were subjected to certain rules.

We meet the first coats of arms in Moravia and Bohemia in the beginning of the 13th century. Due to terminology we presume that the arm came to us already as an artifact of legal life. The arms as well as predicates were being adopted spontaneously as an expression of western mode. The arms and symbols of arms were used by nobles on seals and headstones. In 1227, the seal of Kojat, the son of Hrabiš, was hanged where crossed rakes in the field of seal are[42]. Chronicler called Dalimil appointed death fighters in war at the Moravian Loděnice only in accordance with their arms[43].

Coats of arms of non-noblemen

The first coats of arms of non-noblemen appeared by locators of countries and cities and their descendants. There were especially persons, who held offices which enforced to seal and the content was an arm or symbol of seal[44]. Usage of arms was connected to ambiguous estate inclusion of the old patriciate[45]. In Italia, patriciate created the municipal nobility, or in Moravia and Bohemia the patricians went fluently inside of the lower nobility. The arms of patricians were protected by the municipal court. There is known dispute between the patrician dynasties of Lempenfulers in Prague and dynasties of Rosts on the identification of arm[46]. The usage of arms spread in the municipal surroundings especially on seals, houses and headstones also to middle classes of municipal habitants. There were mostly smaller businessmen, shopkeepers and craftsmen. In these coats of arms, there are often appeared ownership brands, often in the form of *"merka"* and the crafts emblems, which are common symbols of the craft or guild emblems. The guild emblem in this legal concept is based on the guild as a so-called German corporation, where the individual rights of members of unity of corporations with the rights of the member are connected. Guild emblem is understood as a collective emblem of guild masters. The fact that the guild masters had the guild emblems engraved on their seals their guild emblem and further used it was an instrumental in it.

Already in the 14th century, the monarch granted the emblems also to townsmen and documents had a nobilitation effect. However, the social and legal process of closing estates from the 15th century in Bohemia and Moravia, where the states accepted new members and they left the current way of living and changed lifestyles and granted full political rights to their descendants in the third generation, created in urban social group.

The legal persons

Arms related to a visualization of the legal person, thus an artificial legal institute to which the legal order granted an ability to acquire subjective rights and duties, had a remarkable development.

The land emblems

The land emblems were created in connection with procedure of State of the Estates formation. The land nation, respectively the land community, was a subject of the land emblem. The land emblems mostly originated continually from the governing dynasty. For example in Moravia, it originated from the margrave lioness in period of margrave Přemysl II. Otakar during the 13th century, in Bohemia it originated from symbol of lion used by the monarch Přemysl II. Otakar after

[39] PASTOUREAU, Michel: vznik erbů na Západě .Stav problémů In: Sborník archivních prací, roč. L.,rok 2000, č. 2, Praha 1990, p. 339-352.

[40] BÍLÝ, Jiří L. : Moravská orlice - symbol panovníka,země a národa (Tři právní významy šachované orlice). In: Moravský historický sborník. Ročenka Moravského národního kongresu 2002-2005,Brno (2006), p. 261-328.SEDLÁČEK, Pavel : Česká panovnická a státní symbolika, Státní ústřední archiv v Praze, Praha 2002, 149 p.

[41] PASTOUREAU, Michel: vznik erbů na Západě .Stav problémů In: Sborník archivních prací, roč. L.,rok 2000, č. 2, Praha 1990, p.339-352.

[42] KOLÁŘ, Martin : Nejstarší pečeti šlechty české až do roku 1300. Ročenka Gymnasia v Táboře, Tábor ...., 25 p. DUŠKOVÁ, Sáša -VAŠKŮ, Vladimír (ed.): Codex diplomaticus et epistolaris regni Bohemiae, tom V, fasciculus 4 (...1253-1278 (... Sigilla), Praha 1993, 500 p., rejstříky. VELÍMSKÝ Tomáš: Hrabišici, páni z Rýzmberka. Šlechtické rody Čech,Moravy a Slezska 1, Praha, 2002, p. 260.

[43] Staročeská kronika tak řečeného Dalimila, for issuance prepared by Jan DAŇHELKA, Karel HÁDEK, Bohuslav HAVRÁNEK, Naděžda KVÍTKOVÁ, svazek 2 nakladatelství Academia, Praha 1988,1. vydání, 604 p.

[44] Nejstarší pečetě měšťanů v Čechách uvádí : NOVÝ, Rostislav : Počátky znaků českých měst. In: Sborník archivních prací, ročník 26., rok 1976, č. 2, Praha 1976, p. 367-412.

[45] FIALA Michal: Heroltské figury ve znacích měšťanů Starého Města Pražského v době předhusitské. In: Heraldická ročenka 1989, issued by Česká numismatická společnost , pobočka Heraldika, Praha 1990, p. 29-44. also : Obecné figury ve znacích měšťanů Starého Města Pražského v době předhusitské. In: Heraldická ročenka 1990, issued by Heraldická společnost v Praze, Praha 1990, p. 21-32. MAYER, Wolfgang : Die Siegel der Wiener Ratsbürgerfamilien des Spätmittelalters. Jahrbuch Adler, Folge III, Band 9 Jahrgang 1974/1978, Wien 1978, p. 69-84; Band 10, Jahrgang 1979/1981, Wien 1981, p. 87-107.

[46] NOVÝ, Rostislav: Počátky znaků českých měst. In: Sborník archivních prací, ročník 26., rok 1976, č.2, Praha 1976, p. 367-412.

a short intermezzo of flaming female eagle[47]. Land emblems were exceptionally created from municipal emblems and sometimes they were created also separately e.g. Zhořelecko.

The state emblems

The state emblems originated from the land emblems. Sometimes, it happened by means of transformation of national emblems. Land emblem of Bohemia, the lion, became a symbol of the Czech nation and hence it was assumed to the state emblems of Czechoslovakia and currently the Czech Republic[48].

Emblems of self-administered territory

Administrative and sometimes also judicial autonomy of determined territory was the requirement of arms of the self-administered territories. These territories were smaller than land or the lands which descended to the self-administered territory. Arms of the Hungarian provinces are the classical example. Arms of the Hungarian noble commits – provinces originated at the end of the 15th and especially 16th century from the royal privilege. The legal article no. 62/1550 ordered to all provinces to use their own arm and seal. The arm mostly composed of symbols inferred from arm of the local magnate dynasties[49].

The municipal coats of arms

The oldest municipal seals depict often city walls and towers as one of the fundamental attributes of the city. There was a symbol of special monarchal privilege – to embattle the settlement by city walls. There is arm of the lord often appeared as a component. It is proved by the seal of the aristocratic City of Brno from 1247. On the seal there are walls, three towers and tower with a gate in the middle, where shield with symbol of margrave is hanged– uncrowned double-tailed lion. On the oldest seals, also arms or arm signs of lords in the legal relevance-the ownership emblem. Institutional municipal arms originated already in the 13th century, which is connected to the expansion of municipal autonomy[50].

The guild arms

Guilds originated from religious fraternity showing respect to the saint that protected the industry and they guaranteed the dignified funeral of their members. The guilds later tried to gain three monopolies – the monopoly for purchase of goods, the monopoly for production and monopoly for sales. Besides, they controlled the quality of production and ensured the members in various social situations. Guild articles issued by the monarch or municipal commission were the main element of the guild life. Guild arms originated from guild symbols. They were mostly manufacturing instruments, products or religious symbols[51]. These arms were granted later by the monarch[52].

The village arms

Arms of villages originated in connection with administrative and judicial autonomy[53]. In the oldest time, the land noble administrative activity in the village was delegated to the magistrate, who used seal with a symbol of nobility or with personal symbol of magistrate. Some symbols were sometimes implemented directly by the noble ordinance and each had particular symbols from the emblem of land nobility. The first village arms were created with development of the village administration and activities of the village courts. They were closely related to their elementary usage as seal pictures. Other ways of usage are rather exclusions. Most of the emblems and seals were informally permitted by the land nobility. Some villages in Moravia claimed in way of the subordinated cities their own arm privileges. As registers show, the significant part of villages in Moravia had during the 16th and 17th century their own seal with the emblem or seal symbol. In contrary to Moravia, this procedure appears later in Bohemia and Silesia. General spreading of village arms and seals was connected with preparation of the land registry which was sealed by the village seals. Seals and arms of villages came out of using in 19th and 20th century and we can meet them only exclusively on the rubber stamps. Possibility of their usage ceased to exist during existence of the national committees. There was using of the emblem with the pattern statute permitted only to the Municipal national committees. After 1989, the self-government was restored along with granted right to use coat of arms for villages.

Coats of arms of the clerical offices, monasteries, canon monasteries, orders and universities

Coats of arms of particular clerical institutions were being gradually constituted in the Church[54]. *Arms of archdioceses and*

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[47] NOVÝ, Rostislav: K počátkům feudální monarchie II.- K počátkům českého znaku. Časopis Národního muzea. Historické muzeum, roč. CXLVII, rok 1978, č. 3-4, p. 147-172. BÍLÝJiří L.: Moravská orlice - symbol panovníka, země a národa (Tři právní významy šachované orlice), Moravský historický sborník. Ročenka Moravského národního kongresu 2002-2005, Brno (2006), p. 261-328.

[48] To state emblems of Czechoslovakia and the Czech Republic: SEDLÁČEK, Pavel : Česká panovnická a státní symbolika, Státní ústřední archiv v Praze, Praha 2002, 149 p..

[49] VRTEĽ, Ladislav : Osem storočí slovenskej heraldiky, Matice slovenská, Martin, 1999, p. 158

[50] NOVÝ, Rostislav : Počátky znaků českých měst. In: Sborník archivních prací, ročník 26., rok 1976, č. 2, Praha 1976, p. 367-412.

[51] FRANZ, A. Franz: Mährische Zunftsiegel. Museum Francisceum Annales MDCCCXCVII, Brunae 1898, p. 247-290, XIX tab. NOVÁK, Jozef : Cechové znaky, Ilustroval Ján Švec, Mladá letá, Bratislava 1975, 1. vydánie, nestr.

[52] SEDLÁK, Vladimír J. O počátcích erbů pražských cechů, nakladatel Svaz přátel rodopisu v Praze, Praha 1945, 56 p. Jeho teorie o vzniku cechovních znaků v důsledku husitské revoluce se nepotvrdila. HRDLIČKA Jakub: Pražská heraldika. Znaky pražských měst, cechů a měšťanů,Public History, Praha 1994, s 77-149.

[53] Privilege of coats of amrs of the 13tn July 1496 for Křenovice u Kojetína directly speak for the legal fiction of emblem „Chřenovičtí … při právě svojím mnohokráte rozumy svými dosti učiniti nemohouce, na peníze obojích stran pro naučení k vyššímu právu do Kroměříže posílati musejí, kdež už páni Kroměřížané pro mnohé příčiny a příhody chtí, když se těm lidem pro taková naučení a práva k nim posílati přinde, aby obojích stran popsané a zapečetěné byly poslané...

[54] POKORNÝ, Pavel R.: Církevní heraldika se zvláštním zřetelem k českým zemím. In: Sborník příspěvků I. setkání genealogů a heraldiků Ostrava 18.-19.10. 1980, p. 29-32.

dioceses were created already in the 14th century in Moravia and Bohemia[55]. We can find the origin of arms of the *cleric orders, monasteries and canon monasteries* in this period as well[56]. The origin of *arms of vicarages, deaneries and church offices* cannot be found till the 19th and 20th century[57].

The knight orders have their own institutional coats of arms. It was mostly the herald cross differed by colors. Silver one in red field – the Maltese knights, black one in the silver field – the German Knights, green cross in the silver field – The Lazarus cross[58].

Universities used to be originally meant also as cleric institutions. Only pope had the authority to constitute them and later also Emperor had the competence as well. Rector of university was delegated to important rights, primarily to grant academic degrees. There was seal provided for certification of important documents, which was being held by the rector on chain on his chest and the seal picture became the symbol of university, in some cases even the main one[59]. This tradition is still continued by some current universities[60], whereby most of them, especially in the Anglo-Saxon world, use the coat of arms[61]. But it appears also in the middle Europe[62].

Coats of arms of the associations, foundations

Arms of knight secular orders established mainly by overconfident[63] or knight societies and fraternities were being created pursuant to the cleric ones. There are symbols or logos of associations, foundations of sport clubs and also political parties often using coats under the herald rules as expression of their identities.

Coats of arms or heraldic signs as the symbol of legal membership

A membership to certain institution has dual character. On one side, it is being expressed heraldically and thus it is the legal-archeological expression of membership e.g. sign in coat of arms or opulent pieces accompanying arm or usage of coat of arms and then it is expression of membership under law on the coats of arms(*erbovní právo*).

In heraldry we can find symbols or artifacts of *membership to monarch's court.* There are also symbols of court services in some cases[64]. The monarch and his court were symbolically constantly present in his seat by means of the galleries of coats of arms[65]. There is a unique gallery of coats of arms being kept in the Lauf Castle in the current Bavarian[66], which was perfectly designed by Vladimír Růžek.

Knights of the secular orders express their membership mainly by wrapped order's insignia. The coat of arms galleries appear here as well. The Garter knights have their heraldic sign on flags in the Wensminster's chapel.

Membership of the guild was often expressed by using of the guild sign as municipal coat of arm, sometimes as the alliance one as well along with a guild sign and personal sign. There are also galleries of guild masters kept for representative purposes. The unique set are panels are *Desky brněnského soukenického cechu* from 1438 in the Moravian land archive with the arms of individual guild master or an extensive set of coat of arms of guild masters on the round guild board from 1556 from the town of Füssen[67].

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55 LOUDA, Jiří : Moravská církevní heraldika, Znaky olomouckého biskupství a arcibiskupství olomouckých biskupů a arcibiskupů, issued by Apoštolská administratura v Olomouci,Olomouc 1977, 32 p., 54 obr. RYBIČKA, Antonín : O erbích, pečetěch a znacích stavu kněžského v Čechách, Praha, 1862, 31 p. ŠTORM, Břetislav : Znaky stavu kněžského v zemích českých, nákladem Družiny literární a umělecké v Olomouci,Olomouc 1929, /18 p./.

56 JIRÁSKO,Luděk : Církevní řády a kongregace v zemích českých, issued by Klášter premonstrátů na Strahově, Praha 1991, 173 p.

57 BUBEN, Milan : Znak farního úřadu při kostele sv. Michaela archanděla v Borohrádku. Heraldická ročenka 1976, issued by Heraldický klub České numismatické společnosti, Praha 1976, p. 98-99.PECINA, František – ALEXY, Zdenko : Schematismus diecéze královéhradecké 1977. Zpracoval a mapky vikariátů nakreslil František Pecina, znaky biskupů a vikariátů nakreslil Ing. Zdenko Alexy, issued by Kapitulní konsistoř v Hradci Králové,Hradec Králové 1977,315 p. ČECH, Zdirad J. K. : Nové farní znaky. In: Heraldická ročenka 1997, issued by Heraldická společnost v Praze, Praha 1997, p. 51-52. ŠTAFL, Ivan K. J.: Znak děkanství v Chlumci nad Cidlinou. Heraldická ročenka 1974, Heraldický klub České numismatické společnosti, p. 64-65.

58 KOLAK, Waclaw – MARECKI, Józef : Leksykon godel zakonnych, rysoval Kazimierz Wiśniak, issued by ADI,Krakow 1994, 280 p.

59 VOJTÍŠEK, Václav : O starých pečetích University Karlovy. Sborník historický III.Praha 1955, p. 89-110. HERBER, Otto : Insignie, medaile, taláry Univerzity Karlovy, issued by Univerzita Karlova, Praha,1987, 150 p.

60 HINNEROVÁ Jiřina – CSÁDER, Viliam: Akademické insignie a slávnostné obrady na Univerzite Komenského v Bratislave, Bratislava 2006, 56 p.

61 VOLBORTH Carl Alexander : Heraldik aus aller Welt in Farben. Bearbeitung und Ergänzug der deutschen dr. Ottfried Neubecker, Universitas Verlag Berlin, Berlin 1972, p. 161.

62 Examples from the Habsburg Monarchy : GALL, Franz : Österreichische Wappenkunde, Böhlau, Wien-Köln-Weimar 1992, 2. verbesserte Auflage, p. 256-258. Erb užívala na pečeti Moravská univerzita : ŠANTAVÝ, František – HOŠEK, Emil : Organizace pečeti a insignie Olomoucké univerzity v letech 1573/1973, Olomouc 1980, 188 p. a 50 stran příloh, rejstřík.

63 GALL, Franz : Österreichische Wappenkunde, Böhlau, Wien-Köln-Weimar 1992, 2. verbesserte Auflage, p. 259-261. DRÁPELA, Jiří P.: Společenství moravských rytířů svatého Rostislava. In: Moravský historický sborník 1999-2001. Ročenka Moravského národního kongresu, Brno 2001, 747-793.

64 Vladykové z Klukovic have coat of arms symbolizing the court function

65 BOBKOVÁ, Lenka : Hrady Karla IV. v Laufu a Tangermünde. Panovnická reprezentace vepsaná do kamene. In: Verba in imaginibus. Františku Šmahelovi k 70. narozeninám, Argo, Praha 2004, p. 141-157.

66 PILNÁČEK, Josef : České heraldické památky na hradě Laufu u Norimberka Časopis společnosti přátel starožitností roč. LVII., rok 1949, Praha 1949, p. 65-77, 7 vyobr. ZELENKA Aleš : Der Wappenfries aus dem Wappensaal zu Lauf, Verlag Passavia,leporelo. RŮŽEK Vladimír : Česká znaková galérie na hradě Laufu u Norimberka z roku 1361. (Příspěvek ke skladbě královského dvoru Karla IV.) Separát Sborník archivních prací, XXXVIII,1988, p. 37-311., rejstřík

67 LEONHARD, Walter : Das gro3e Buch der Wappenkunst, Verlag Georg D.W. Callwey, München 1976, p. 281 obr. 7

The coat of arms, its sign or its part as a legal form of expression of membership to the state is being a component of modern uniforms. These are army uniforms, official uniforms (e.g. municipal employees). They contain official insignias or appliqués with the state emblem or its part. In this context, we can mention hemmed hats of the Czechoslovakian army uniforms or signed (sewed) sleeves of the Castle guard (here the emblems of lands of the Czech Republic) and Honor Prague guard and Bratislava garrison (here the municipal emblems)[68].

Coats of arms or heraldic signs as a symbol of marital and family status

We can find mostly an expression of the family relationship of women. Women were subjected to the paternal power and they were authorized to use arm of their family. In English and French and later also in British modern heraldry, where the coat of arms meant a symbol of an individual, the unmarried women and widows were distinguished by using special rue shield, where the jewel is stated without helmet[69]. In 1950, the divorced women were required to have a black edge of the shield (*mascle*), because the divorced wife had to come back to her previous sign and that distinguished her from her unmarried sisters[70].

The husband acquired a marital power over his wife which was expressed also in the coats of arms. She could use the arm of her father or her husband. Later, the legal relationship was expressed in form of alliance sign. It was an association of symbols in one or two shields or more or signs were in one coat of arms or half figures in one shield. The origin of heraldic expression of the legal status of woman is found in Moravia and Bohemia already in ancient times. Let us mention interesting documents of Eliška z Dubé, widow of Václav from Koldice, she had two shields side by side the seal on the right there was shield with the sign of the lion appearing on top divided and below there was a field four times divided - Lords of Koldice and in the left of the shield there were crossed branches - Lords of Dubé. The seal of Herka from Oblanov of the 11th January 1387, had a board head on the right and vehicle round on the left of the shield. Anežka from Obřany had in her seal of the 12th April 1287 half of the family coat of arms of four shots from a circle on the right side and on the left there were three higher beams of Kunovicové[71]. In the British heraldry it is called dimidiation, where the husband's shields are vertically separated, whereby the right side of the husband's shield is jointed with the left part of the shield of wife[72].

Illegitimate child had only mother and he did not have any right to the property, name or coat of arms of his father. He got a new arm in case of nobilitation or granting the coat of arms or sometimes he got it with some condition of the father. For example, Válclav Kekule from Stradnice na Pravoníně who fathered illegitimate children with Alžběta Trojanová. The emperor Matyáš II. promoted them to the upper noble class on the 17th February 1614 with a predicate Kekule from Žírovnice. They got a red – silver divided shield on the green top with lion of inverted tincture holding a hook from the coat of arms of the father[73]. The monarch families, namely in the Western Europe, had some restricted rights excluded to the illegitimate children as well. It is implied in the right to use the coat of arms of the father with a symbol of the illegitimate origin of the child.

The right to arms was not guaranteed to the spouse who entered into morganatic marriage. Such a marriage was valid, but it was within the Estates inconsistent and therefore he did not have a right for the title of spouse or not even children from the marriage. There are mostly royal families with their own house rules.[74]

We assume that the reason for distinguishing the various branches of noble families were the property division respectively disintegration of integral. This may be a change in tinctures, addition or multiplication of figures, different jewelry. In the Czech heraldry there is known legend about the division of property of Vítkovci when the sons of each of them got roses of other tinctures. It is true that particular branches used the rose in various tinctures.

It is similar to the French and British heraldry. The coat of arms of three lilies was used exclusively by the monarch and his follower (dauphin) divide this sign into four parts with blue dolphin in the gold field, the dukes of Bourbon wore a red *"pružec"* over the sign, the dukes of Anjou had a red edge and the Orlean dukes had a silver tournament collar.[75]

Coats of arms or coat signs as the symbol of dependence

The sign on shield serviced very early to determine persons which were subjected to power of the feudal nobleman. It was a usage of colors of the shield in dress so-called *livrej* or it was directly sewed coat on a shield or sewed on a dress for service or a fight. It was related only to the direct servants but also to the ministerial nobility. There is obviously an origin of Poland coat of arms dynasties, which were jointed around one nobleman dynasty. In Moravia and Bohemia, the emblems of monarch dynasties were being worn also by inferior nobility. The origin

[68] SVOBODA, Zbyšek: Československá státní a vojenská symbolika, issued by Federální ministerstvo obrany, Praha 1991, příloha 30 a 33. Zbyšek Svoboda: Česká státní a vojenská symbolika, issued by Ministerstvo obrany ČR, Praha 1996, 44 p.

[69] OSWALD, Gert: Lexikon der Heraldik,VEB Bibliographisches Institut Leipzig, Leipzig 1984,1. Auflage, p. 324. MACKINNON of Dunakin Charles: The Observer´s Book of Heraldry, Frederic Warne a Co LTD, London-New York 1975, p. 106-110.

[70] BUBEN, Milan: Brisury v britské heraldice. In: Heraldická ročenka 1985, issued by Česká numismatická společnost, pobočka Heraldika , Praha 1985, p. 64.

[71] VJS /Vladimír J. Sedlák/: Erby českých paní. In: Heraldika, roč. XIII, rok 1980 č. 1, p.36-39, č. 2, p. 80, č. 3 p. 120, č. 4 , p. 172-174.

[72] BUBEN, Milan: Marshalling v britské heraldice. In: Heraldická ročenka 1987, v Česká numismatická společnost, pobočka Heraldika, Praha 1987, p. 8.

[73] SEDLÁČEK, August: Českomoravská heraldika, část zvláštní, Praha 1925, p. 469

[74] HAUPTMANN, F.: Das Wappenrecht, Bonn 1896, p. 356-358.ŽUPANIČ, Jan : Hohenbergové. In: Heraldická ročenka 2007, issued by Heraldická společnost v Praze, p. 135-143.

[75] VOLBORTH Carl Alexander : Heraldik aus aller Welt in Farben. Bearbeitung und Ergänzug der deutschen dr. Ottfried Neubecker, Universitas Verlag Berlin, Berlin 1972, p. 85.

was also in the fighting tactics, where the attacks were being directed to the commander. That was the reason of using the same jewel or even the same emblem in order to protect the monarch. Coats of arms on the oldest seals can be meant also as legal expression of dependence. That also presented protection of individual and sometimes privilege as well. There is a proof in case of Martin Jakubův of Velimi who got a right to wear and use coat of arm including on the dress from Hanuš of Kolovraty whom he was decorating a gradual. The shield along with coat of arms could be hanged in the painter's house.[76]

That is way of origination of coats of rams, where emblems of the monarch or state appeared in so-called honor fields. The dynasty *"Olričtí Švarcenberkové"* (the Schwarzenbergs from Orlice) can be given as an example, who have field with the dynasty symbol of Habsburg-Lothringen house, where a sword resembling victory over Napoleon I. by Karel Schwarzenberg is placed on Babenberg beam.

Coats of arms or heraldic signs as a symbol of feudal dependence

Feudal signs participated in the origination of noble coats of arms. We assume that the battalion as a general symbol of the fief[77] turned into battalion, which represented a particular fief. There were "feudal coats of arms", which turned into noble dynasty coats of arms, formed from signs that were used on them by transferring to shield[78].

In Moravia and Bohemia, the western feudal system was not generally adopted and became in these countries rather as an import. However, we can also probably find evidence proving expression of feudal relations in the coats of arms. The founder of the feudal system of the Moravian bishops was the Holstein Count Bruno of Schaumburg. The dynasty symbol of heraldic nettle leaf appears on his election seal[79]. The specific coat of arms of Lords of Deblin had heart sticker with a crossbar with edge of heraldic nettle leaf (serrate edge) that was undoubtedly the expression of feudal relationship of Lords of Deblin with bishops from Olomouc[80].

Coats of arms as a legal symbol of membership of the Estates

Originally the shield and jewel as part of a fighter explicitly expressed membership to royal retinue. In the 13th and 14th century, it largely lost its military function and was used more in social life, hence in legal society. Use of coat of arms was spreading among persons (noblewomen, clerics), who in fact did not use shields with jewels, and other social classes (cities, townspeople, lance corporals etc.) that did not live chivalric way of life. Formally, these coats of arms did not originally differ from the noble ones. In the societies of the Estates, there is obvious attempt to express membership to the state.

The simplest evidence of nobility was proof by showing the father's coat of arms so-called one shield outlet. In case of newly promoted nobles, there were distinguished so-called one shield nobles. Since the second half of the 15th century in Moravia and Bohemia there was required to proof the nobility in the third generation for admission the status and full political rights81. A nobleman was considered as a person of good noble origin who could proof coats of arms ordered into so-called *„čtyřkoutný vývod"*. The coats of arms of previous generation must have been shown in cases of disputes over a good origin and also infaminations[82]. There is sometimes an attempt to emphasize an antiquity of the dynasty by outlets of several generations or circumvention of defects by atypical outlets[83]. The outlet of Bokůvky from Bokůvky in Moravian Ivanovice in Hané is an example of large outlet[84].

The membership of the Estates was being proved also in the Habsburg Monarchy, required at the imperial court[85]. The noble origin must have been proved by person who demanded an access to the court and to places of squirets, namely by the coat of arms outlet of 8 noble ascendants and 4 ascendants from the father's side and 4 from the mother. This membership, respectively the noble origin was required for knight cleric orders. If a person wanted to enter the Order of Maltese Knights he had to submit outlet of 16 ascendants on parchment[86]. Also noble institutions required to prove noble origin by the coat of arms outlet.

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[76] MACEK, Josef : Jagellonský věk v českých zemích (1471-1526),II. díl,Šlechta, Academia, Praha 1994, p. 27 pozn. 88.

[77] Mostly they were flags (often gonfanony) which had a list from precious cloth often with precious stones of pink or red color. Viz SCHRAMM, Percy E.: Herrschaftszeichen und Staatssymbolik von III. bis XVI. Jahrhundert. Bd. 2., Stuttgart 1955. HORSTMANN, Hans : Die Lehnsfahnender deutschen Bischöfe und ihre Bedeutung für die Heraldik. In: Herold-Jahrbuch, 1. Band, Berlin 1972, p. 41-47.

[78] PASTOUREAU, Michel: Původ erbů problém k vyřešení ? In: Sborník archivních prací, roč. L.,rok 2000, č. 2, Praha 2000, p. 365.

[79] POKORNÝ, Pavel R.: Elekční pečeť olomouckého biskupa Bruna. In: Heraldická ročenka, issued by Heraldický klub České numismatické společnosti, Praha 1977, p. 62-65.

[80] POKORNÝ, Pavel R.: Původ erbu pánů z Deblína. In: Heraldická ročenka 1982, issued by Česká numismatická společnost, pobočka heraldika, Praha 1982, p. 48-55.

[81] KLECANDA, Vladimír : Přijímání do rytířského stavu v zemích českých a rakouských na počátku novověku. In: Časopis archivní školy, roč. VI., Praha 1928, p. 1-125.

[82] JANIŠOVÁ, Jana: Šlechtické spory o čest na raně novověké Moravě (Edice rokové knihy zemského hejtmana Václava z Ludanic z let 1541-1556, issued by Matice moravská, Brno 2007, I. vydání, 470 p.

[83] SMETANA Jan : Neobvyklý erbovní vývod z Litoměřic. In: Heraldická ročenka 1984, issued by Česká numismatická společnost, pobočka Heraldika, Praha 1984, p. 3-12. POKORNÝ, Pavel R. : Ojedinělý tříkoutní erbovní vývod johanitského velkopřevora Václava z Michalovic na hradě ve Strakonicích. In: Heraldická ročenka 2007, issued by heraldická spočnost v Praze, Praha 2007, p. 44-45.

[84] PLICHTA, Jiří a kol.: Erbovní vývody v Ivanovicích na Hané. Příspěvek ke genealogii Bukůvků z Bukůvky, issued by Genealogická a heraldická společnost v Praze - pobočka Brno, Brno 1979, nestr.

[85] KOLÁŘ, Martin : Českomoravská heraldika, upravil August SEDLÁČEK, I. Část všeobecná, Praha 1902, p. 112. They started to be issued see VÁSÁRHELYI Miklos – SZLUHA, Márton : Magyar Császári és Királyi Kamarások ösfaj 1740-1918, I díl, A-G, Heraldika Kiadó 2005, 558 p.

[86] KOLÁŘ, Martin : Českomoravská heraldika, upravil August SEDLÁČEK, I. Část všeobecná, Praha 1902, p. 112. NEDOPIL, Leopold : Deutsche Adelsproben aus dem Deutschen Ordens-Central archive, I-III Band, Registr, Wien 1868.

From the 17th century, there was an attempt to distinguish formally the coats of arms of noblemen. There was promoted the practice that the open helmets were reserved for the noble coats of arms.

From the 16th century, the ancient nobility tried spontaneously to become different from the newly promoted nobility by using mantle blanket (e.g. *Žerotínové, Vratislavové z Mitronic, Valdštejnové*). These coats of arms with blankets in form of mantle were codified through documents of coats of arms[87].

By the time of Maria Theresa, there was an attempt to reduce non-noble symbols and to distinguish the noble ones visually in the official practice. In accordance with the ordinance of Theresa from 1752, there should have been noble coats of arms granted distinguished by different amount of helmets on the shield. Common nobleman should have had one helmet, the knight two of them, the independent lord three and the count three and more[88]. This rule was applied only for a certain time and it was being violated in the 19th century in favor of heraldic style.

The most common expression of membership of the Estates and a title was rank crown and rank paper crown. These crowns were real and were used exclusively on the monarch coronation in England. However, they are mostly the paper crowns, which actually do not exist. In the Habsburg monarchy, there was used the system of crowns – with three leafs and two pearls – nobleman, a crown with seven (originally five) pearls – the independent lord, with nine pearls – court and it is followed by the prince crown and ducal crown[89].

The symbol of state and a title is in Russian and British heraldry the right to use the shield holders.

The other symbol is a mantel spreading over the prince's coat of arms and mantels with the symbol of coat of arms were used in case of the French pairs.

In the heraldry of Habsburg lands, the attachment of new figures and rank pieces to shield and jewel was determined by the official practice with the exception of motto of superior estates of their lord.

In early 19th century, the Emperor Napoleon I. created a new nobility and new heraldic system in France. The Napoleonic heraldry established a number of ensigns of noble titles and offices of the holder. Therefore the coat of arms determined distinction of noble title and the held office in the form of head or independent quarters of the shield.

From the 16th century, the governing or former governing dynasties in German Lands tried to express their sovereignty by so-called regal field (Regalienfeld, Bannschild, Regalienschild). An empty red field was derived from a feudal red flag[90].

In the 19th century, the coat of arms in the Habsburg monarchy became an exclusive symbol of nobility.

Coats of arms or heraldic signs as a symbol of political affiliation

We can meet the political affiliation in coats of arms rather rarely. In Bohemia, the political coalition may resemble a connection of two feudal dynasties of Lords of Opočno and the Lords of Choustník. The coats of arms contained connection of emblems of both dynasties expressed by signs - the ladder in the first and the fourth field of Lords of Choustník and in the second and third of Lords of Opočno it was the crossbar, as we can see on the seal of Štěpán from Opočno or Beneš from Choustník (1402) [91].

The political life of Italy suffered with a deep political division in the supporters the imperial policy in Italy (Ghibellini) and supporters of the papal policy (Guelfs). This political division also reflected in the coats of arms. Ghibellini wore in their coats of arms golden head with a black crowned eagle or eagle derived from the imperial coat of arms. Guelfs wore a blue head with red tournament collar, underneath three gold lilies, derived from emblem of the Neapolitan monarchs of the Anjou dynasty[92].

Coats of arms legitimacy as evidence of a person and signs convening

Legal-archeological object convening also included signs. This article at first legitimized its holder, but it also determined an obligation under sanctions for those who saw him or had been passed. In ancient times, they were objects describing the obligation or a sanction. In Bohemia, *viť* (rope of bats) as a symbol of punishment expressing the defense obligation to those who had been handed, in Hungary it was a sword soaked in the blood of sheep as a symbol of punishment for those who did not obey calls to defend the country. The seals were later used for the court summons, where was the symbol of ordering power of superior or the convening tables, which notified the addressee and so that person had a duty to attend the assembly[93].

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87 BRŇOVJÁK, Jiří : Conforme est arti et statui. K barokní heraldické tvorbě v první polovině 18.století na příkladech udělování šlechtických titulů a erbů. In: Těšínský muzejní sborník č. 4/ 2010, p. 169.

88 ŽUPANIČ,Jan : Nová šlechta rakouského císařství ,Agentura Pankrác 2006, p. 197.

89 GÖBL, Michael : Neuer Kronen-Atlas. Die Kronen der Erde, ihre Geschichte, Bedoutung und Schicksal, Edition Winkler-Hermaden, Neunkirchen 2009, 115 p.

90 OSWALD, Gert : Lexikon der Heraldik,VEB Bibliographisches Institut Leipzig, Leipzig 1984,1. Auflage, p. 325-326.

91 KOLÁŘ, Martin : Českomoravská heraldika, upravil August SEDLÁČEK, I. Část všeobecná, Praha 1902, p. 252

92 VOLBORTH Carl Alexander : Heraldik aus aller Welt in Farben. Bearbeitung und Ergänzug der deutschen dr. Ottfried Neubecker, Universitas Verlag Berlin, Berlin 1972, p. 133.

93 NAGYBÁKAY, Péter : Magyarországi céhbehívó -táblák, Corvina Kiádó, Budapest 1981, 63 p., 48 fotografií.

COATS OF ARMS AND ITS USAGE OR SYMBOLISM WITHIN THE PROPERTY DISPOSITIONS

Coats of arms and their signs as an object of the property dispositions

In the 14th century, the coat of arms was not excluded from legal trade and the emblem holder could dare or sell it to other persons[94]. In accordance with Stephan Kekule von Stradonitz[95], it is possible to divide those dispositions into 4 types: purchase of the coat of arms (*Verkauf*), whereby the seller lost all rights to the coat of arms or to part of it, false purchase of the coat of arms (*unechter Verkauf*), whereby the seller allowed purchaser only to use the coat of arms or its part and it was similar with donation (*Schenkung*) and false donation (*unrechte Schenkung*). Those dispositions influenced also form of the imperial coat of arms of Hohenzolerns. On the 10th March 1317, Lutold from Regensberg sold a jewel in form of head of dog to the burgrave from Norimberg Fridrich for 36 marks of good silver[96]. These rights of disposals were disappearing by the extension of the monarch right to grant coat of arms in the 14th century. The middle classes retained legal dispositions in connection with purchase of the professional brands.

Coats of arms and their signs as a legal symbol of the estate, fief of an office possession

The first coats of arms and their signs were created by the monarchs who wanted to express extent of their governing. We can meet this expression for the first time on seals. There is the monarch with shield and a flag depicted with shield of other lands placed on the flag and on horse cover (*kropíř*)[97]. There were also established galleries of coats of arms, where the arms expressed extent of the holder's land property.

Later, the sings were getting into one shield.

There are also heraldic signs which should symbolize the held office, thus the arm informed others about the functions of its holder.

The Count from Pappenheim had, in their shield divided into four parts under the golden head with imperial eagle, red crossed swards on a black-silver divided field – an official symbol of the imperial heritage Marshall in the first and fourth field and the third field.

Since 1466, Margraves of Brandeburg wore in a silver shield a red eagle having on the chest a blue shield with a golden scepter - the official sign of highest imperial chamberlain[98].

Even more often, there are symbols of offices as sumptuous pieces. For example, Sweden Imperial Marshal had the shield with two red crossed sticks behind with a golden crown on top[99].

Coats of arms and their signs as legal symbol of patronage right and donation

The founder of the Church or other religious institution has acquired patronage rights in accordance with the Canon Law. Patrons of the church had the right to place their sign there in accordance with the law.

The coat of arms of the patron of the church symbolizing the presence and protection of the patron of were often placed on the bolts of the vault of the church, where should be raised thankful prayers of the church. Sometimes the coats of arms appear in the exterior of the church, mostly at the door of the portals. In the years 1658-1667, the Moravian lords of Kounice financed reconstruction of Dominican Church of St. Michael in Brno and they stipulated that their coat of arms would be placed on the portal[100]. Similarly arms of purchasers respectively patrons of the bells were placed on the bells[101].

Fraternity of St. Christopher with the support of sovereigns in the Tyrol collected contributions for hospital of St. Christopher at Arlberg in Tyrol over the Central Europe. They gained apart from these one-time contributions also donors who obliged to contribute regularly and to leave money in the multiple amount after death. Therefore, there was created the book of arms (*"erbovník"*) with pictures of all donors from different countries[102].

Coats of arms and their signs as a legal symbol of the property rights

Proprietary signs or signs of possession are older than the coats of arms. These are symbols derived from real objects or abstract patterns of lines. The creation of the coat of arms caused heraldization of proprietary signs[103].

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94 BÍLÝ, Jiří L. : K počátkům duševního vlastnictví na Moravě a v Čechách. IURIDICA 4, Acta Universitatis Palackianae Olomucensis, Facultas iuridica 4 - 2002 Univerzita Palackého, Olomouc, 2002, p. 20-26.

95 KEKULE von Stradonitz : Rechtgeschichte über Wappen und Wappenteile im Mittelalter. Jahrbuch Gesellschaft „Adler", Band XIV., Neue Folge, Wien 1904, p. 50-59.

96 BÍLÝ, Jiří L. : Soukromoprávní dispozice ke znaku v měšťanském prostředí. In: Heraldická ročenka 1983, Pobočka ČNS - Heraldika, Praha 1983, p. 58-67.

97 ČAREK Jiří : O pečetěch českých a králů z rodu Přemyslova. In: Sborník příspěvků k dějinám hlavního města Prahy, díl VIII, Praha 1938,1-56

98 VOLBORTH Carl Alexander : Heraldik aus aller Welt in Farben. Bearbeitung und Ergänzug der deutschen dr. Ottfried Neubecker, Universitas Verlag Berlin, Berlin 1972, p. 55, 56.

99 VOLBORTH Carl Alexander : Heraldik aus aller Welt in Farben. Bearbeitung und Ergänzug der deutschen dr. Ottfried Neubecker, Universitas Verlag Berlin, Berlin 1972, p. 56.

100 SAMEK, Bohumil : Umělecké památky Moravy a Slezska 1. svazek A/I, Akademie věd České republiky, Praha 1994, p. 171

101 MLČÁK, Leoš : Znaky a pečetě na zvonech severní Moravy, In: Sborník příspěvků II. Setkání genealogů a heraldiků Ostrava 15-16. 10- 1983, Ostrava 1983, p. 43-45.

102 HLAVÁČEK, Ivan : Miscelanea k české heraldice doby Václava IV. (Bohemika Insbruckého rukopisu sv. Kryštofa na Arlberku. In: Časopis Národního muzea. Historické muzeum, roč. CXLVII, rok 1976, č. 1-2, p. 20-28.

103 BÍLÝ, Jiří L. : Merky neboli kamenické značky či domovní znamení. In: Zpravodaj Klubu genealogů a heraldiků, roč. IV./ 10 , 1982, č. 1-2, p. 11-14.

On the other hand, coat of arms replaced content of the proprietary signs and they are placed as proprietary signs. The coats of arms can be mostly seen on the immovable properties (castles, palaces, houses, etc.) or the movable ones (dishes, porcelain, furniture, etc.)[104]

Proprietary signs were also used for books[105]. The oldest book signs were painted. Mostly it was the coat of arms of the owner. With an increasing number of books, there was a graphic technique used to describe books. That is the way how the *supralibros* originated, whereby the book sign was printed as a decorative image on the front page of the book. Usually there are decorations, coat of arms of the owner or other proprietary sign and the inscription with the name of the owner[106]. *Ex Libris* is a paper sheet indicating the ownership of the book pasted inside to the front and it should have included among other things the name of the owner of the book in full or in abbreviated form in the legend, namely in genitive. The oldest ex libris contained regularly arms of owner, they presented later expressions, which should have corresponded to taste of the creator or they characterized his work, hobbies, etc.

The paper mills were regularly in ownership of the land nobility or of the city, which leased them to the paper mill managers. For determination of producer there were used watermarks or filigrees[107], which guaranteed its quality. The watermark with the coat of arms is being regularly appeared on the produced sheets on paper[108]. Additionally, there were used also *paper mill trade marks* on wrappers of sheets to determine the producer[109].

Coats of arms as a legal symbol of the boundary law

The boundaries were originally determined by natural marks. Later, there were used stones boundaries and then boundary marks (*„hranečníky"*) or milestones (*„mezníky"*), which had the form of prisms or plates[110]. Besides boundary mark also coats of arms, arms signs or from arms derived symbols of possessors of dominions, respectively of lands[111]. Use of the coat of arms was here a legal symbol of beginning to end of jurisdiction or possession of lands. The year of the determination of boundary settling the boundary marks is on them the year 1669. The coat of arms of the owner of Opersdorf lands is craved plastically and titled by a name and title of the owner FRACIS: EUSEB: S:R:I: COM: AB OPPERSDORF L: B: IN EYCH ET FRIEDSTEIN HAERES: DNVS GLOGOVIAE SVPER FRIDECII ET RATIBOR: S.C: M: CONSIL: ACT: CAM: ET DVCAT: OPPOL: ET RATIB: CAPITANEVS *and the title particularizing boundaries:* PROSTRED RZEKY GEST HRANICE *and the name indicated*[112]. There are still kept state symbols on borders and also tables with municipal and city symbols on boards at the entrance to the village.

Coats of arms as a legal guarantee of quality and origin

Since the 13th century and perhaps even earlier, the products were determined by signs of their origin. Later, also the symbol of workshop and master and in some professions also symbols of quality. These symbols were being heraldizated. The municipal or noble coat of arms or a sign derived from the coat of arms appeared in the symbols of place of origin. The master symbol was often the basis for creation of municipal or noble coat of arms[113] or oppositely municipal or noble coat of arms or by it created symbol was the basis for master symbol[114].

Symbols on products were fairly widespread. *"Bečváři"* and *"bednáři"* determined their products by marks. In Gdaňsk, the status from year 1597 stated to bednars to burn out their

[104] RICCI Isabella Massabó -CARASSI Marco – GENTILE Luisa Clotilde : Blu Rosso et Oro. Segni e colori dell´araldica in carte, codici e oggetti d´arte, Electa, Milano 1998, 304 p. Many examples of usage of coats of arms as ownership marks.

[105] JANKOVIČ, Ľubomír : Ex libris a supralibros na Slovensku v 16.-19. storočí, issued by Matice slovenská, Martin, 2004, 192 p. LIFKA, Bohumír : Ex libris a supralibros v českých korunních zemích v letech 1000 až 1900, issued by Spolek sběratelů a přátel exlibris, Praha 1980, 229 p. OBRÁTIL Karel J. l: O počátcích českého ex libris /I./ (p.1-96) also Po stopách starých českých ex libris II. (p. 3-96) also: Po stopách starých českých ex libris III. (p. 89-96). In : Sborník pro ex libris a jinou užitkovou grafiku, roč. 1., Praha 1923, p. 1-96,3-96,roč. 2., Praha 1924, p. 3-7. PROCHÁZKA, Alois : Vlastivědný sborník okresu vyškovského, II. díl: Soupis památek pravěkých a historických, X. Erby, Slavkov 1932, 25 p.16 obr. V textu, 3 tab. RIEDL, Mirko : Ex libris ve fondu starých tisků Státní vědecké knihovny (tj.Moravské zemské knihovny) (p.2-11) Duha. Informace o knihách a knihovnách z Moravy, ročník 5. rok 1991, č. 2 (léto), 24 p.

[106] POKORNÝ, Pavel : Supralibros Zikmunda Antocha z Helfenberka. In: Heraldická ročenka 1976, issued by Heraldický klub České numismatické společnosti, Praha 1974, p. 82-86.

[107] BARTOLUS de Saxoferrato : Tractatus de insigniis et armis. Přeložil Zdeněk UHLÍŘ. Úvod napsali Jiří L. BÍLÝ a Pavel R. POKORNÝ a and prepared for issuance by Karel MÜLLER, issued by Klub Heraldiků a genealogů Ostrava, Ostrava 1989, p. 28-29. BARTOLUS de Saxoferrato : Tractatus de insigniis et armis – Traktát o znameniach a erboch. Editor Ladislav VRTEĽ, preklad Mária MUNKOVÁ, Veda, Bratislava 2009, čl. XII, p. 89.

[108] ZUMAN, František : Papír a heraldika (Studie zapomenutých pramenů). In: Rodokmen, roč. III, rok 1948, č. 3 p. 73-80, č. 4 p. 107-115.

[109] ZUMAN, František : Nové české a moravské papírnické obchodní značky. In: Časopis Národního muzea, roč. CXIV., rok 1940, sv.I. Duchovědný, p. 58-66.

[110] BÍLÝ, Jiří L. : Hranice neboli meze, hranečníky, mezníky v právu. In: Pocta prof. Jozefu Klimkovi, DrSc., 2012 /v tisku/.

[111] PETRÁŇ, Josef a kol. : Dějiny hmotné kultury II, díl 1, Karolinum, Praha 1995, p. 396 obr. 179/2 (autor Z. Procházka). MUSIL, Jiří : Hranečník v Arboretu Bílá Lhota. In: Zprávy Vlastivědného muzea v Olomouci č. 159, rok 1973, p. 26. ŽUREK, Karel: Hraneční kameny z Červené a Bílé Lhoty. In: Zprávy Krajského vlastivědného muzea v Olomouci č. 258, rok 1989, 25-26.

[112] AL SAHEB, Jan -MÜLLER, Karel : Hraniční kameny z roku 1669 v údolí Černé Ostravice. In: Těšínský muzejní sborník -Cieszyńskie Studia Muzealne, 4/2010, Česky Těšín 2011, p. 123.

[113] Brněnský mincmistr Jan Konrád Richthausen užíval v letech 1646-1648 jako mincmistrovskou značku trojúhelník s koulí uprostřed. Erbovní listinou byl císařem Ferdinandem III. dne 29. 7. 1653 povýšen do stavu svobodných pánů s predikátem z Chaosu a byl mu udělen erb, kde je uprostřed srdcovité modré pole s obráceným stříbrným rovnostranným trojúhelníkem uprostřed s. červenou koulí. Viz MARCO, Jinřich : Münzzeichen aus aller Welt, Dausien, Artia Verlag, Praha 1982, značka č. 475. FAUST, Ovidius : Monumenta Historica Bratislavensia, I. Archív mesta Bratislavy 1. Súpis erbových listín zemianských, Bratislava erbovní listina č. 93.

[114] Jan z Vartenberka a Albrecht z Gutštejna jako mincmistrovské značky používají rodové erby. MARCO, Jinřich : Münzzeichen aus aller Welt, Dausien, Artia Verlag, Praha 1982, značka č. 376, 377.

symbols on produced casks, potters determined their products already since prehistoric times[115]. In the early middle Ages we can find symbols of feudal lords. Potters used their master symbols in cities[116]. *"Konváři"* had a very old tradition of using the craft symbols, which were being stamped on products as duty stamps. In Moravia, ratio of alloys to prices of products was bindingly regulated pursuant to the pattern of *"konvářů"* and tinners in Nuremberg and Vienna. This provision was best to be controlled by the obligation to indicate tin products by signs. Statute issued by the Moravian Margrave Jošt and Prokop, along with the Mayor, magistrate and the City Council in 1387[117] states: *"... and they will have two signs: firstly our municipal emblem, then sign of their guild, that is the letter B. They both will have the same signs and each master will have his own special brand, thus each product will continue to be branded by three brands. "*[118]

The blacksmith respectively also sword brands were mentioned in his treatise in the 14th century, by the famous jurist Bartolus de Saxoferrato[119].

Many metalworking crafts adopted branding of the products from blacksmiths. In Poland in the city Poznaň, the municipal council ordered in 1782 to brand products produced by them with a guild sign or a private sign. Trade in blacksmith products branded with foreign brands was forbidden to Jews from Poznaň.

Tailoring brands undoubtedly evolved from clothing brands. Already in 1392, there is evidence that Olomouc tailors branded their products with masterpieces brands[120]. Cutters of cloth used craftsman, respectively trade brands. Masters of the mint were liable for the quality of production of coins and masterpieces brands guaranteed that quality. Brands were duty stamps that were stamped on the coin[121]. Cutlery brand undoubtedly evolved from a blacksmith respectively sword brands. Their existence is mentioned by the record from 1471 in Olomouc, which required the cutlers to be obliged to mark their products by stamped brands, because they undertook that year not to impale pike on blade of a knife, which was a brand used by the master Šénhanus[122]. Spur brands undoubtedly evolved from the blacksmith brands. In 1786, there was imposed to mark spur products by the brand, which were formed in the way that the first initial of the place where he worked, then the initial of his surname and any symbol that used by him. The signs had to be kept in records[123]. We have also evidence that the bakers used on their products their own brands. Brand of bread was used by bakers already in the ancient world, as it is proved by findings of charred bread in the Roman Pompeii. It was a duty to mark each product by their brand stamped on the product. The obligation was stated in Olomouc in 1571[124]. The brands were being used also for firearms[125]. Goldsmiths' product brands are among the oldest, as it guaranteed the purity of precious metals. Already before 1289, goldsmiths in Erfurt were obliged to stamp municipal mark on their products. Later individual masters used their own brands to indicate the products. Later individual masters used to indications products in its brand. We have the first evidence in Central Europe from the 14th and 15th century in Braunschweig (1395) and Gdaňsk (1395), Wismar (1403), Baden (1456)[126]. There was for marking of precious metals a set of rules[127]. In addition, there are developing quality brands, whereby still being used hallmarks[128]. We have also documented brands of goldsmiths from Olomouc[129]. In 1427, according to the Council Olomouc, drapers had to brand more expensive kinds of cloth on the edge by a trim from one flaxen and woolen threat, the cheaper than from two flaxen and two woolen threats. They must have been particularly branded by one to five seals pursuant to the draper's guild[130]. There was also a duty of controllers over draper's guild stated in 1654 to monitor if the brand or seal was fulfilled[131]. Linen weavers had a duty to brand the cloth by their own seal in accordance with the guild articles from Olomouc in 1574[132].

[115] SIMSON, P.: Geschichte der Danziger Willkür,. In: „Wiadomości Archeologiczne", 1953, t. XIX, p. 3, p. 180-195.
[116] LABUDA, Josef : Kolkovaná grafická keramika z Banskej Štiavnice ako doklad obchodných vztahov. ŠTEFANOVIČOVÁ, Tatiana : Príspevok ku stredovekým kamenárskym značkám z Bratislavy Archaelogia historica 15/90, p. 405-409, p. 447-451.
[117] CDM, XI, č. 461, 403. K označování cínu viz KRÁL, Adolf Bunny : O významu cínařských značek /separát/. In: p. 277-286
[118] Překlad viz FLODROVÁ, Milena- SAMEK, Bohumil, Cín ve sbírkách Muzea města Brna (Katalog se seznamem brněnských cínařů a jejich značky), Brno 1970, p. 8.
[119] BARTOLUS de Saxoferrato, Tractatus de insigniis et armis. Prepared for issuance by Jiří L. BÍLÝ, Karel MÜLLER, Pavel R. POKORNÝ, Zdeněk UHLÍŘ , Ostrava, 1989, p. 23-24. BARTOLUS de Saxoferrato : Tractatus de insigniis et armis – Traktát o znameniach a erboch. Editor Ladislav VRTEĽ, preklad Mária MUNKOVÁ, Veda, Bratislava 2009, čl. VII, p. 65-67.
[120] ČERMÁK, Miloslav: Olomoucká řemesla a obchod v minulosti, Memoria, Olomouc, 2002, p. 165.
[121] MARCO, Jindřich : Münzzeichen aus aller Welt, Battenberg Verlag, 2. vydání, Augsburg, 1992, 58 p. + 1725 značek.
[122] ČERMÁK, Miloslav, Olomoucká řemesla a obchod v minulosti, Memoria, Olomouc, 2002, p. 161 (SOA Olomouc, AMO, inv. č. 7, fol. 217 b).
[123] ČERMÁK, Miloslav, Olomoucká řemesla a obchod v minulosti, Memoria, Olomouc, 2002, p. 161 (SOA Olomouc, AMO, inv. č. 7, fol. 217 b).
[124] ČERMÁK, Miloslav: Obchod s pečivem v Olomouci. In: Výroční zpráva Okresního archivu v Olomouci 1979, Olomouc, 1980, p. 73.
[125] VANĚK, Jiří : Lovecké pušky z dílen rodiny Schnepfů ve sbírkách MMB (p.159-167). Forum brunense 1992, 187 p. also : Brněnští puškaři 1650-1900. Historie jednoho řemesla. Muzeum města Brna,47 p. 97 příloh. GARGELA, Jan – FAKTOR, Zdeněk Faktor: Zeichen auf Handfeuerwaffen, Dausien, Artia Verlag, Praha 1985, 191 p.
[126] BAUER, Konrad F.: Das Bürgerwappen. Ein Buch den Wappen und Eigenmarken der deutschen Bürger und Bauern, Frankfurt a. M, 1935, p. 48-49.
[127] HRÁSKÝ, Josef: Značkování výrobků z drahých kovů (Příspěvek k dějinám pražských zlatnických cechů). In: Pražský sborník historický VIII, Praha 1973 p.29 –55. VOKÁČOVÁ, Věra : Puncovní značky moravských stříbrníků, Forum brunense 1995/1996, Brno 1996, p. 192-197.
[128] DIVIŠ, Jan : Goldstempel aus aller Welt, Dausien, Hanau/M. 1989, 256 p.
[129] MLČÁK, Leoš : K dílu olomouckého barokního zlatníka Wolfganga Rossmayera. In: Střední Morava. Vlastivědná revue, roč.15., rok 2002, p. 104-109.
[130] ČERMÁK, Miloslav: Olomoucká řemesla a obchod v minulosti, Olomouc, 2002, p. 52.
[131] SOka, Knihy, inv. č. 1304, fol. 1
[132] ČERMÁK, Miloslav: Olomoucká řemesla a obchod v minulosti, Olomouc, 2002, p. 186.

Sometimes there were coats of arms on the wrappers of products. This was also the case of mint scales with leaf along with coat of arms of producer[133].

Coats of arms and their signs as the object of inheritance as a legal symbol of law of succession

Coats of arms and their signs were objects of the law of succession. But the arms as well as the estate fell on the monarch, who could grant the coat of arms sometimes with the property to another nobleman. In 1360, the Emperor Charles IV. acquired the coat of arms after death of heirless Vojtěch and he granted it to Dětřich from Portice by a special diploma[134]. It was later possible to transfer the arm and title to heir of the last dynasty with consent of Monarch power.

Also particular estates were components of the heritage. Thus particular lands are symbolized directly in the coat of arms by symbols of those lands. As example, there can be given the history of prince from Schwarzenberg. Prince Ferdinand from Schwarzenberg (1652-1703) got married with Anna Maria Countess from Sultz (+1698), daughter of the last George Ludwig from Sultz from the younger Bavarian line.

Some of the coats of arms are composed from symbols which present a right to some property, most often from title of succession. These symbols are widespread in case of monarch coats of arms. These parts of arms are being titled as *the rights symbols* (*"pretenční znamení"*).

Coats of arms and their signs as the object of the imprisonment

There is mostly the one- shot dishonor of the coat of arms as a part of imprisonment. In Moravia and Bohemia, there is an overturning of imprisonment, dishonest placement, (pillory, gibbet - see gesture of turning of coat of arms), or grating field of shield[135].

Permanent mark of shame in our country does not exist. In England and Ireland, there are in the literature signs of honor reduction only for non-compliance, breach or withdrawal of a word. It should have been delf (delve, delph), which should have presented such a square placed in the middle of the shield. Scotland was the only exception. That spouse, who is convicted of infidelity, gets a gusset sinister to his coat of arms-that is a symbol of adultery which by its form reminds a funnel and touches with its top the upper edge of the shield or edge of the gore – it is a symbol composed of two rounded lines creating a sharp angle by the middle[136]. In British heraldry, there is a point – marking a shield for petit crimes e.g. boasting. However, these fines of heraldic symbolism do not have any reflection in a practice.

LEGAL GESTURES AND RIUALS

The object of our research must be the use of legal-archeological material objects in the legal symbolism. We distinguish legal gestures that represent concrete voluntary behavior having general accepted legal effects. By connection of gestures, there is created legal ritual, respectively a ceremony. We are able to find some knowledge about this area only with difficulties and often from the narrative sources.

Gesture of submission of shield (coat of arms)

The first coat of arms granted by the monarch had undoubtedly a form of submission of shield. The miniature of coat of arms of the Emperor Ludvík Bavor directly depicts admissive shield.

Gesture of inverted coat of arms

Coat of arms inverted by 180 ° should generally have expressed termination of existence of a certain state. The expression of term *inverted* meant in general symbolism the opposite of the existing one. For example, the inverted cross, the Lord's Prayer contrarily was understood as the opposite of God, therefore as Satan. These symbols of inverting represented the opposite of life, thus the death.

In 1378, flag with inverted picture of the imperial eagle was carried as the last one in the funeral procession of the Emperor Charles IV. Undoubtedly, it was the symbol of the end of earthly life of the emperor[137].

The inverted coat of arms at the funeral or on the headstone symbolizes that the dynasty died out and no person may claim the coat of arms, neither explicitly the dynasty[138]. In the description of funeral of Petr Vok of Rožmberk as the last member of the dynasty states that Jan Býšovec of Býšov carried a banner with down inverted coat of arms, *"Dynasty of Lords of Rožemberk was already taken"* and other coats of arms were being carried afterwards inverted[139].

Overturning the coat of arms that was nailed to the instrument of imprisonment represented a symbolic punishment of a person. In 1419, there were the banners of Jan Městský from Opočno and Lord from Plavno similarly hung on the pillory.[140]

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[133] MICHNOVÁ, Věra : Příspěvek ke studiu mincovních vážek. In: Zprávy Krajského vlastivědného muzea v Olomouci, č. 120, 1981, p. 20-26.

[134] HOLINKA, Rudolf : O formulích erbovních listin z kanceláře císaře Karla IV. In: Erbovní knížka na rok 1939, Praha 1939, p. 15,17-20

[135] JANIŠOVÁ, Jana : Hanobení erbu a jména v raně novověkém moravském zemském právu. In: Heraldická ročenka 2007 , Heraldická společnost v Praze, Praha 2007, p. 62-74.

[136] BUBEN, Milan: Brisury v britské heraldice. In: Heraldická ročenka 1985, issued by Česká numismatická společnost, pobočka Heraldika, Praha 1985, p. 63

[137] Red. : Kalendárium roku 1978. In: Heraldická ročenka 1978, issued by Heraldický klub České numismatické společnosti, p. 1-17. Podle popisu pohřebního průvodu Burckarda Zingga z Memmingenu, autora německé kroniky města Augsburgu.

[138] CHROMÝ, Mojmír – KUČERA, František : Náhrobník s převráceným erbem v kostele arnoštovickém In:Heraldická ročenka 1962, issued by Česká numismatická společnost, Praha 1982, p. 43-47. PAVLŮ, Miroslav : Náhrobník s převráceným erbem v Uhřicích na Kyjovsku. In: Zpravodaj Klubu genealogů a heraldiků Ostrava č. 34, Ostrava 1988, p. 13-14.

[139] BŘEŽAN, Václav : Životy posledních Rožmberků, díl II., Svoboda, Praha 1985 I. vydání p. 634-636 Též SEDLÁČEK, August : Českomoravská heraldika, část všeobecná, Praha 1902, p. 129

[140] Staří letopisové p. 27,28, 121. SEDLÁČEK, August : Českomoravská heraldika, část všeobecná Praha 1902, p. 129

Gesture of broken coat of arms

A broken coat of arms should also generally have expressed termination of the existence of dynasty. Writings of the Count Ludvík from Rogendorf describe the funeral of Jan Drnovský from Drnovice in the year ..... *"... Herald person appeared before / funeral / assembly in black robe according to ancient custom and he was pointing at all the cardinal points with the sword, he asked whether, indeed, an old and powerful Dynasty of Drnovský extinguished. Even then he broke the evidence of the truth of Drnovský's coat of arms, which was carried before the coffin wrapped in the veil and she aid: - There are no strong and famous Drnovských. They put pieces of the coat of arms to the corpse in the coffin ..... lowered to the crypt or cellar.*[141]

Ritual of violation of coat of arms

An example of the ritual can be a violation of coat of arms. The ceremony is being exercised by the judicial authority or herald as a holder of judicial power over coats of arms. In case of the worst violating offences, the punishment was performed by executioner or his helper. In Britain, for some crimes, especially for high treason, heralds overturned, trampled and torn the shield to pieces in a public place as a deprivation of honor and dignity[142].

Punishment was performed by a herald and it was composed of several gestures. Throwing of the coat of arms on the floor meant symbolically staining the coat of arms[143]. The holder of the coat of arms could use defense against disparagement of the arm by private persons in a court[144].

[141] BŘEŽAN, Václav : Životy posledních Rožmberků, díl II., Svoboda, Praha 1985 I. vydání p. 634-636 Also SEDLÁČEK, August : Českomoravská heraldika, část všeobecná, Praha 1902, p. 129

[142] BUBEN, Milan : Brisury v britské heraldice. In: Heraldická ročenka 1985, issued by Česká numismatická společnost, pobočka Heraldika, Praha 1985, p. 63

[143] BUBEN, Milan : Brisury v britské heraldice. In: Heraldická ročenka 1985 , issued by Česká numismatická společnost , pobočka Heraldika , Praha 1985, p. 64.

[144] JANIŠOVÁ, Jana : Hanobení erbu a jména v raně novověkém moravském zemském právu. In: Heraldická ročenka 2007 , Heraldická společnost v Praze , Praha 2007, p. 62-74.

Terminus - Witness of the Ancient Roman Life

*Miroslav Frýdek**

Introduction

The term landmark is a word of many senses. On one side it can mean "immaterial landmark" as a date, battle or other event as a ground for something new. For example, dates of *before Christ (BC)* and *after Christ (AC)*. Otherwise, the landmark is "material" and it determines certain circle or a distance. The best known ancient material landmark is so-called null milestone in Rome. In both cases, landmark designated certain marking - determination of certain area. This article is devoted to landmarks, which determine private (land) ownership and their legal regulation.

Origination of the quiritarian land ownership - *agri limitati, ager gentilicius, heredium*

In the ancient time, there was a joint ownership in one family (gens), all gentiles worked on so-called *ager gentilicius*, which was land that belonged to the family as a whole. This land stood means of subsistence for the family. The basic question is: how did the individual families get *ager gentilicius*?

In accordance with the Roman legend, each Roman inhabitant got from the founder – Romulus- two iugars[1]. Roman citizens acquired these estates into a private and heritable ownership and they titled them also as *heredium*. As all reports of the Ancient Roman time, also this one sounds as a legendary, but it is obvious from the latest development that this report has its stable historical substance[2]. In accordance with opinion of Milan Bartoška[3], Romulus (thus the Roman monarch) might not have been the organ that granted these estates, but it is important that this division of land was not realized. These estates were not meant to serve for agricultural production, but for house, garden, graves of the ascendants and corrals[4]. It is possible to agree with this theory except for graves of the ascendants. In accordance with archeological researches, the necropolis was always situated between city walls. Newly originated Roman community needed to attract most amount of people who

* JUDr. Miroslav Frýdek, Institute of Skill Teaching and Learning Innovation, Faculty of Law, Masaryk University Brno; Department of Classical Studies, Faculty of Arts, Masaryk University Brno, Czech Republic.

1 Skřejpek, M. Ius et religio,Vydavatelství 999, 1999, p. 127 a Bartošek, M.: Administrativní problémy antického Říma do poloviny 3. století př. n. l. In Právněhistorické studie No. 22. p. 227-228.

2 Bartošek, M.: Administrativní problémy antického Říma do poloviny 3. století př. n. l. In Právněhistorické studie č. 22. p. 228.

3 Bartošek, M.: Administrativní problémy antického Říma do poloviny 3. století př. n. l. In Právněhistorické studie No. 22. p. 228.

4 Bartošek, M.: Administrativní problémy antického Říma do poloviny 3. století př. n. l. In Právněhistorické studie No. 22. p. 228.

would become their "state citizens". Also Romulus, pursuant to Livius (Ab Urbe condita I, 8) tried it by opening land between two groves for free movement. He did not restrict anyone, everybody who wanted had free chance to move and settle there. Romulus did not make any differences between these immigrants, whereby they were independents or servants, all of them became Romans: „*Crescebat interim urbs munitionibus alia atque alia appetendo loca, cum in spem magis futurae multitudinis quam ad id quod tum hominum erat munirent. Deinde ne uana urbis magnitudo esset, adiciendae multitudinis causa vetere consilio condentium urbes, qui obscuram atque humilem conciendo ad se multitudinem natam e terra sibi prolem ementiebantur, locum qui nunc saeptus descendentibus inter duos lucos est asylum aperit. Eo ex finitimis populis turba omnis sine discrimine, liber an seruus esset, auida novarum rerum perfugit, idque primum ad coeptam magnitudinem roboris fuit*"

This report and the regal act (leges regiae) is being dated to age of Numy Pompilius governing: Dionysius of Halicarnassus Roman Antiquities II, 74: „*His regulations, moreover, that tended to inspire frugality and moderation in the life of the individual citizen and to create a passion for justice, which preserves the harmony of the State, were exceedingly numerous, some of them being comprehended in written laws, and others not written down but embodied in custom and long usage. To treat of all these would be a difficult task; but mention of the two of them which have been most frequently cited will suffice to give evidence of the rest. 2 First, to the end that people should be content with what they had and should not covet what belonged to others, there was the law that appointed boundaries to every man's possessions. For, having ordered every one to draw a line around his own land and to place stones on the bounds, he consecrated these stones to Jupiter Terminalis and ordained that all should assemble at the place every year on a fixed day and offer sacrifices to them; and he made the festival in honour of these gods of boundaries among the most dignified of all. 3 This festival the Romans call Terminalia, from the boundaries, and the boundaries themselves, by the change of one letter as compared with our language, they call termines. He also enacted that, if any person demolished or displaced these boundary stones he should be looked upon as devoted to the god, to the end that anyone who wished might kill him a sacrilegious person with impunity and without incurring any stain of guilt. 4 He established this law with reference not only to private possessions but also to those belonging to the public; for he marked these also with boundary stones, to the end that the gods of boundaries might distinguish the lands of the Romans from those of their neighbours, and the public lands from such as belonged to private persons. Memorials of this custom are observed by the Romans down to our times, purely as a religious form. For they look upon these boundary stones as gods and sacrifice to them yearly, offering up no kind of animal (for it is not lawful to stain these stones with blood), but cakes made of cereals and other first-fruits of the earth. 5 But they ought still to observe the motive, as well, which led Numa to regard these boundary stones as gods and content themselves with their own possessions without appropriating those of others either by violence or by fraud; whereas now there are some who, in disregard of what is best and of the example of their ancestors, instead of distinguishing that which is theirs from that which belongs to others, set as bounds to their possessions, not the law, but their greed to possess everything, — which is disgraceful behaviour. But we leave the considerations of these matters to others.*"[5]

Michal Skřejpek noted in his work Ius et religio the following words related to this boards of lands (limes): one more "thing" had completely specific legal regime, which was undoubtedly connected to religious ideas. They were boarders between lands (limes) and thus the boundary line between them of width five ft. (confinium) had special regulation. It was not possible to usucapion in under Lex doudecim tabularum: VII. 4 „*usus capionem XII tab. intra V pedes esse noluerunt*", but also disputes over determination of board lines had specific character. There was used the *action finium regundorum*, which although related to determination of boarders between particular lands and thus to accurate determination of the ownership, it did not have a character of material action, but it was the action *in personam* – the personal action. However, because the boarders between lands were guaranteed by protection of god Terminus, the judgments in those cases could have very serious religious impact[6]. Religious protection, initiation of boarders to Iovov Terminus, clearly proves that the ownership was not a stated legal institute in the royal period and violation of the ownership – violation of the boarder stones- was punished under the divine law, not the human one.

The Roman law institute of possession of certain ownership is derived from the term *possessio* – the possession, thus what was possessed, etymology has probably its origin in terms *potis sedeo* – sitting on land as a lord[7]. The subsequent developmental grade is the dominium itself – from the term *dominus* – a lord, it is understood in sense of general dominion over a thing.

Between terms *possessio* and *dominium*, in my opinion, there the term *heredium* originated. Heredium is a designation for material and immaterial things[8] that were objects of inheritance, thus what in case of death was transferred to other member of the family who became temporary an administrator of this estate – *pater familias*, this estate belonged to the family, but the only one who had the right to dispose of it was exclusively *pater familas*. This "administration" over the family estate is obvious from the legal regulation of profligacy, where the prodigal-*prodigus* is not allowed to alienate – squander – the inherited estate beyond measure[9].

Anyway everything that is able to be an object of ownership is thing defined among others also in The four commentaries of Gaius: Gaius II.1: *Superiore commentario de iure personarum exposuimus; modo uideamus de rebus: quae uel in nostro patrimonio sunt uel extra nostrum patrimonium habentur* – In the preceding book the law of persons was expounded; now let us proceed to the law of things, which are either subject to private dominion or not subject to private dominion.[10] Gaius II. 2: *Summa itaque*

[5] English translation adopted from: cited on the 3. 3. 2012: http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Dionysius_of_Halicarnassus/2C*.html
[6] Skřejpek,M. Ius et religio,Vydavatelství 999, 1999, p. 127.
[7] Bartošek, M.: Dějiny římského práva ve třech fázích jeho vývoje, Academia Praha 1995, p. 179
[8] These are ceremonies of the family – *sacra privata*.
[9] See e.g. Veselá, R. Jak to bylo s marnotratníkem? In Význam peňazí vo vývoji rímskeho práva. Košice. p. 52-57.
[10] English translation adopted from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2_Poste.htm cit. 3. 3. 2012.

rerum diuisio in duos articulos diducitur: nam aliae sunt diuini iuris, aliae humani – The leading division of things is into two classes: things subjects of divine, and things subjects of human right.[11] Gaius II. 3 *Diuini iuris sunt ueluti res sacrae et religiosae* – Subjects of divine right are things sacred and things religious.[12] Gaius II.10 *Hae autem res, quae humani iuris sunt, aut pu-blicae sunt aut priuatae* – Things subject to human dominion are either public or private.[13] Gaius II.11: *Quae publicae sunt, nullius uidentur in bonis esse; ipsius enim uniuersitatis esse creduntur. priuatae sunt, quae singulorum hominum sunt* – Things public belong to no individual, but to a society or corporation; things private are subject to individual dominion[14]. Other division is into groups of *res mancipi* (Gaius II.14a) and *res nec mancipi* (Gaius II.15). The other is not so important in context of this article, because the attention is being paid on family and ownership, resp. it was in ownership of the family or its individual members.

The family was being gradually internally differed, as it is written by Milan Bartošek in The history of Roman law in three phases of its development, the agnate large families got gradually from the family to exclusive using of the lands, where they lived and cultivated. Further in the text, Bartošek follows the other development and independence of the agnate larger families, the individual families which were later separated from the agnate larger ones preferred obviously to have their own existence basis in order to cover their needs, but to exclude all others from using it. These are already the essential signs of the private ownership of which there was in Rome in heredium its legal form, heritable existential substance of the roman family, namely house, garden, corral, eventually also land, which the family lived from, became its private ownership. That is why it was necessary to grant the small, equal and delimited segments to the private entrepreneurs by state - *adsignatio*.[15]

Adsignatio was division of the land into two determined roads. The first one led from the North to the South and was called *cardo maximus*, the second one led from the East to the West and was called *decumanus maximus.* Between these two roads, there were created fields subsequently awarded to individual families.[16]

The private (individual) ownership, which is fully accessible for free disposal in form of will, was established really very early: *Lex doudecim tabularum* V, 3:: *„Uti legassit super pecunia tutelave suae rei ita ius esto*". The act from half of the 5th century BC already stated completely individual ownership as common legal institute.

Legal protection of the landmarks

Originally, the landmarks were under protection of the God called Terminus, who protected border lines and boundaries. In ancient Rome, the border lines and boundaries were very important, because they determined limits of the private ownership, they were also sacred. Nobody may not have moved with them without any permission, otherwise he could be sentenced to death. Placement of each boarder stone was celebrated by a victim, which pointed out inviolability and sanctity of the boarders on one side and also extraction of the boarder stone (landmark) from validity of the human law and its transfer to the divine law (ius divinum) on the another. There is a legend from the era of monarch Tarquinius Superbus about construction of the temple which should have been dedicated to the highest God Iovus. Tarquinius Superbus wanted to build this temple on a place where the temple of Terminus was situated, but he did not dare to "move" with the temple, resp. to transfer it somewhere else and thus Jupiter and Terminus had their temple jointly[17]. This irremovability of the temple itself was followed also by a legal regulation of irremovability of the landmarks.[18]

The exclusive sacral character of the protection was early modified and the landmarks got following legal regime, where the person, who would move or destruct any landmark, would be punished largely by sanctions under human law. Legal regulation of protection of landmarks was included in the Title 21 of Digest of the Emperor Jusitinianus titled *De termino motto* – About violation of landmarks[19]:

- Dig. 47.21.1 Modestinus 8 reg.
  Terminorum avulsorum non multa pecuniaria est, sed pro condicione admittentium coercitione transigendum.
  The penalty for the removal of boundaries is not a pecuniary fine, but should be regulated according to the social position of the guilty parties.
- Dig. 47.21.2 Callistratus libro tertio de cognitionibus
  Divus hadrianus in haec verba rescripsit: „quin pessimum factum sit eorum, qui terminos finium causa positos propulerunt, dubitari non potest. de poena tamen modus ex condicione personae et mente facientis magis statui potest: nam si splendidiores personae sunt, quae convincuntur, non dubie occupandorum alienorum finium causa id admiserunt, et possunt in tempus, ut cuiusque patiatur aetas, relegari, id est si iuvenior, in longius, si senior, recisius. si vero alii negotium gesserunt et ministerio functi sunt, castigari et ad opus biennio dari. quod si per ignorantiam aut fortuito lapides furati sunt, sufficiet eos verberibus decidere".
  The Divine Hadrian stated the following in a Rescript. There can be no doubt that those who remove monuments placed to establish boundaries are guilty of a very wicked act. In fixing the penalty, however, its degree should be determined by the rank and intention of the individual who perpetrated the crime, for if persons of eminent rank are convicted, there is no

[11] English translation adopted from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2_Poste.htm cit. 3. 3. 2012.
[12] English translation adopted from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2_Poste.htm cit. 3. 3. 2012.
[13] English translation adopted from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2_Poste.htm cit. 3. 3. 2012.
[14] English translation adopted from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/gai2_Poste.htm cit. 3. 3. 2012.
[15] Bartošek, M.: Dějiny římského práva ve třech fázích jeho vývoje, Academia Praha 1995, p. 179-180.
[16] Similar development was e.g. in Greece, where the allocations were decided by drawing lots every year and they were called *klarus*.
[17] Encyklopedie antiky. p. 603.
[18] To legal regulation and conjunction of divine and human law compare e.g. work of M. Skřejpek. Ius et religio.Vydavatelství 999: 1999. p. 221 – 224.
[19] English translation adopted from: http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D47_Scott.htm#XXI, cit. 3. 3. 2012.

doubt that they committed the act for the purpose of obtaining the land of others, and they can be relegated for a certain time, dependent upon their age; that is to say, if the accused is very young, he should be exiled for a longer time; if he is old, for a shorter time. Where others have transacted their business, and have furnished their services, they shall be chastised and sentenced to hard labor on the public works for two years. If, however, they removed the monuments through ignorance, or accidentally, it will be sufficient to have them whipped.

- Dig. 47.21.3pr. Callistratus 5 de cogn.
  Lege agraria, quam gaius caesar tulit, adversus eos, qui terminos statutos extra suum gradum finesve moverint dolo malo, pecuniaria poena constituta est: nam in terminos singulos, quos eiecerint locove moverint, quinquaginta aureos in publico dari iubet: et eius actionem petitionem ei qui volet esse iubet.
  A pecuniary penalty was established by the agrarian law which Gaius Caesar enacted against those who fraudulently removed monuments beyond their proper place, and the boundaries of their land; for it directed that they should pay to the Public Treasury fifty aurei for every boundary mark which they took out or removed, and that an action should be granted to anyone who desired to bring it.
- Dig. 47.21.3.1 Callistratus 5 de cogn.
  Alia quoque lege agraria, quam divus nerva tulit, cavetur, ut, si servus servave insciente domino dolo malo fecerit, ei capital esse, nisi dominus dominave multam sufferre maluerit.
  By another agrarian law, introduced by the Divine Nerva, it is provided that if a male or female slave, without the knowledge of his or her master, commits this offence with malicious intent, he or she shall be punished with death, unless his or her master or mistress prefers to pay the fine.
- Dig. 47.21.3.2 Callistratus 5 de cogn.
  Hi quoque, qui finalium quaestionum obscurandarum causa faciem locorum convertunt, ut ex arbore arbustum aut ex silva novale aut aliquid eiusmodi faciunt, poena plectendi sunt pro persona et condicione et factorum violentia.
  Those, also, who change the appearance of the place in order to render the location of the boundaries obscure, as by making a shrub out of a tree; or plowed land out of a forest; or who do anything else of this kind, shall be punished in accordance with their character and their rank, and the violence with which their acts were committed.

Punishments are very various and social status of the perpetrator is taken into account in considering the punishment[20], also motive that made him to do it – the incentive[21], but also his age was important[22]. If somebody removed landmarks, he should have been sent to *relegatio*[23] as a punishment, if the perpetrator was younger, he should have been expelled from the country for a longer time, if he was older then for a shorter time[24]. If somebody removed landmarks on behalf of somebody else in performance of his duties, he should have been whipped and sentenced to two years of hard labour. If the stones were moved by disregard or accidentally, he should have been only whipped.[25]

Gaius Caesar issued act which stated a financial fine of 50 *aureus* for removing of boarder stones from their right place intentionally.[26]

In accordance with the act issued by divine Nervus, it is stated that if the male of female slave intentionally commits this crime without consciousness of his lord, he or she would be sentenced to death, if the lord ordered it to them; he should have paid only a fine.[27]

Very specific legal regulation is devoted to visual change of the places where the landmarks were placed e.g. who would plant the trees, or who would transform a forest to a fallow land, or something similar. Person that committed this offence should have been punished by *poena plectendi* – the punishment of battering.[28]

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Just. Inst. IV, XVIII
Dig. 1.1.2
Dig. 1.8.11.
Dig. 48.1.
Dig. 50.16.131pr.
Dig. 50.16.131.1.
Dig. 47.21.1
Dig. 47.21.2
Dig. 47.21.3pr.

[20] Dig. 47,21,1; Dig. 47,21,2
[21] Dig. 47,21,2
[22] Dig. 47,21,2
[23] The term *relegatio* is from the latin term *relegare – to send away, to withdraw*. Relegatio is the fighter from of banishment. Sometimes, *relegatio* was jointed with material penalty, losing a citizenship or death penalty for forbidden re-entry. Often, it was awarded for a certain period, only exclusively for whole life.
[24] Dig. 47,21,2
[25] Dig. 47,21,2
[26] Dig. 47,213pr.
[27] Dig. 47,21,3,1
[28] Dig. 47,21,3,2

Dig. 47.21.3.1
Dig. 47.21.3.2
Gaius II, 8
Gaius II, 9
Gaius II.1
Gaius II.2
Gaius II. 3
Gaius II.10
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Executioner's Swords – their Form and Development Brief summary*

*Vilém Knoll***

To the contrary of the judiciary sword, which was used as insignia while announcing the judgment,[1] the executioner's sword was a tool of administration of justice. However, it is not considered a sword or a weapon, as it is mere tool having the same name and form with the weapon, however with different purpose.[2] It was used to kill the offender by cutting off his/her head (decapitation), which was made but cut lead against the neck of the convicted person which was no his/her knees or sitting. In ideal case the head should have been cut off the rest of the body by single cut lead between the third and fourth vertebra. To the contrary of all other capital punishments, the execution in form of cutting off the head by sword was considered respectable and did not breach the honor of convicted person nor his/her family.[3] Sword, as one of bold tools connected with the execution of executioner's craft used for the killing of convicted person, reached also a state of symbol.

To the contrary of the judiciary sword, the executioner's sword had to be fully operational. Its constructional and technical characteristics were based on its purpose. With regard to type, the majority of swords still existing today and identified as executioner's swords correspond to the battle swords from the Late Gothic Era. With total length of approximately 97 to 110 cm, they have doubled blade usually about 80 to 90 cm long in which we can often find a short groove. In comparison with battle swords they are typical by their significant width of 4 to 7 cm (usually all the length long) and blunt, semi rounded to straight peak. The blade tends to be thinner and more flexible. The widths of the sword may be connected with the need of regular sharpening. Blunt tip of the executioner's sword results from the fact that to the contrary of the battle swords it was not used for stabbing, but only to cut. In the period from which the majority of sword origin the development of battle swords tended to have narrower blade made rather for stabbing. Usually short, rather formal, guard has the form of cross in major cases, sometimes slightly bent or with widened ends, very rarely with protective rings. In comparison with the battle swords, the head is rather smaller and has the form of pear, ball or tulip. In many cases executioner's sword differs from the battle sword also by material of guard and head, often made of brass. The lengths of the hilt with wood overlay and sometimes braided with tissue, leather or wire, represents about one fifth of the total lights of sword (17 to 22 cm) and therefore in majority cases it corresponds to use with both hands. In exceptional cases we can still today find also one hand swords. Average weight of the executioner's swords was 1.1 to 2.2 kg (mostly 1.5 to 1.8 kg). They are usually a bit heavier that battle weapons having the corresponding measures, the weight of which usually does not exceed 1.3 to 1.5 kg. Nonetheless they were usually very well balanced, nonetheless in a way different from the battle swords. Their center of gravity is closer to tip, usually in the middle or one third of the blade's lengths to the contrary with the battle swords, which have the center of gravity close to the guard. Due to this

* The essay is based on author's articles Vilém KNOLL, *Krátké zamyšlení nad symbolickým významem a podobou meče soudního a meče katovského.* [Res: Short reflection on the symbolic meaning and form of the judicial sword and the executioner's sword], in: Vilém KNOLL (Ed.), Naděje právní vědy. Býkov 2010, Plzeň 2011, pp. 69–74; Vilém KNOLL, *O katovských mečích,* in: Karel SCHELLE, (Ed.), Právní archeologie. Sborník z mezinárodní vědecké konference pořádané Katedrou společenských věd FSv ČVUT v Praze a The European Society for History of Law, Brno – Ostrava-Přívoz 2011, pp. 63–68. These are partial outcomes of more extensive elaboration in preparation.

** JUDr. Vilém Knoll, Ph.D., Department of Legal History, Faculty of Law, University of West Bohemia, Pilsen, Czech Republic.

1 To judiciary swords in more detail please see Vilém KNOLL, *Krátké zamyšlení…*, pp. 69–70 and literature cited there.

2 Leonid KŘÍŽEK – Zdirad J. K. ČECH, *Encyklopedie zbraní a zbroje*, Praha 1999, p. 160.

3 To the issue of honor as significant element of individual legal personality lately in short in Vilém KNOLL, *Legal personality of natural persons in the Czech medieval private law. Brief Summary*, in: Journal on European History of Law, Vol. 1, No. 1, London 2010, pp. 59–61.

fact the executioner's swords have harder impact towards the tip which fact fully corresponds to their purpose to cut. Sword was usually deposited into a simple scabbard with possibility to hang it on the belt or over the shoulder.[4]

Some of the still existing swords have 2 to 3 cm from the end of the blade two, usually however three, occasionally also four little holes called "bloody". Their purpose remains a mystery today. With regard to their description of "bloody" referring to the fact they ought to serve for outflow of blood, this is certainly based on wrong romantic idea. It is not clear where from and where to should the blood flow. It is the same case of wrong denomination as in the case of blood groove.[5] The purpose of holes is often interpreted based on reference to Holy Trinity, which is however valid only in the case of three holes and not when the number differs. Based on one of possible versions, these holes were use to attach leather straps with lead weights at the ends to increase the strength of cut.[6] This would however jeopardize the accuracy of cut. These weights would cause both horizontal inaccuracy as well as the unwanted twist of blade in both horizontal cut as well as in upper cut against the neck of convicted person on knees or sitting. Other authors mean that the reason for making these holes was the effort to avoid the possibility to sharpen the tip and use the sword for battle.[7] However, also this view seems not to be very probable as nothing avoided the sharpening of tip up to the holes, whereas with regard to the placement of holes near the end of blade, the blade would not be much shorter. These holes would, on the other hand, make such amendment easier. On the other hand, we have to mention, that standard executioner's sword could be difficult to use in battle due to its parameters. However, we cannot exclude also technological purpose of holes connected with the making of sword, or as the case may be with the testing of its quality during the master trial. We can also assume certain not very probable possibilities, according to which such holes could serve for attachment of blade during sharpening or for hanging the sword on the wall. Other possibilities occurred in the discussion in conference, e.g. that such holes could make the spirit of the executed person leave for eternity easier or that they were used as marks for discarded swords which ought not to be used for its original purpose any more however, at the same time as "unclean" tool it could also not be re-forged to be used into another purpose.

Nonetheless generally speaking the executioner's swords had been less decorated some of still existing pieces are masterpieces also from the artistic point of view. Decoration concentrates mostly on blade and usually clearly shows the connection between the sword and administration of justice. Very often we can see here executioner's tools, usually gallows (sometimes also with the hanged man) or execution wheel or, as the case may be the whole scene of execution. We can find here the justice, Christian symbols as St. Michael, St. George, Our Lady with Baby or Holy Cross, but also Judith with the Head of Holophernes or a Skull symbolizing maybe Memento Mori.[8] We can also find here many initial and invocatory inscriptions connected with their mission referring to the judgment, calling God or dictating morale only. Some inscriptions or coat of arms determine the town, or as the case may be, capital court, to which the sword belong.[9] In exceptional cases we can find a list of important persons on the blade who were executed by that sword or even the name of executioner who used it. This all is often amended by different ruins based on than fashion. In many cases the blades are signed by the workshop sign or even the whole name of master, whose workshop made it, often also including the year of making. Based on this we know, that many still existing swords were made by top class workshops in Passau or Solingen, whereas we are able to identify also works of the bets sword makers of that time. However, we shall not forget that similarly as in the case of weapons, we can find pieces with fake workshop signs.[10]

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[4] Overview of sword deposited in Czech collections elaborated by Jindřich Francek lists 48 pieces representing probably only a part of examples still existing today. At the same time we can find different type of weapon under some of his inventory numbers or even completely different things. With regard to the absence of more detailed data, the use of this list is limited. Data about usual form are based mostly on elaboration of 88 Bavarian swords made by Ulrich Kühn, 23 swords from Lower Silesia elaborated by Maciej Trzciński and on author's findings. Of course there are many examples having different parameters. However average data of European executioner's swords belong to this range. Ulrich KÜHN, *Das Richtschwert in Bayern*, in: Waffen- und Kostümkunde. Zeitschrift der Gesellschaft für historische Waffen- und Kostümkunde, Band 12, München – Berlin 1970, pp. 89–126, e. g. pp. 89–91, catalog pp. 108–126; Witold MAISEL, *Archeologia prawna Polski*, Warszawa 1982, p. 180; Heinrich MÜLLER – Hartmut KÖLLING, *Europäische Hieb- und Stichwaffen*, Berlin 1981, especially p. 67; Witold MAISEL, *Archeologia prawna Europy*, Warszawa – Poznań 1989, pp. 141–142; Jindřich FRANCEK, *Soupis hmotných pramenů*, in: Jindřich FRANCEK – Tomáš ŠIMEK, (Edd.), Hrdelní soudnictví českých zemí. Soupis pramenů a literatury, Pardubice 1995, pp. 30–31, castalog p. 45; Eduard WAGNER, *Zbraně sečné a bodné*, Praha 2004, pp. 23–24, 110–111; Jan ŠACH, *Chladné zbraně. Fotografický atlas*, Praha 1999, pp. 57, 103, 147; Maciej TRZCIŃSKI, *Miecz Katowski. Pręgierz. Szubienica. Zabytki jurysdykcji karnej na Dolnym Śląsku (XIII–XVIII w.)*, Wrocław 2001, especially s. 52–57, catalog pp. 82–117; Tadeusz GRABARCZYK, *Na gardle karanie. Kara śmierci w średniowiecznej Polsce*, Warszawa 2008, pp. 74–77. To the development of European swords and other cold weapons and their types see in particular Ewart OAKESHOTT, *The Sword in the Age of Chilvary*, London 1964, passim; Ewart OAKESHOTT, *Records of the Medieval Sword*, Woodbridge 2002, passim; Eduard WAGNER, *Hieb- und Stichwaffen*, Praha 1965, passim; Eduard WAGNER, *Cut an Thrust Weapons*, Praha 1967, passim; Eduard WAGNER, *Zbraně*..., passim; Jan ŠACH – Petr MOUDRÝ, *Chladné zbraně období habsburské monarchie 1526–1918*, Praha 2009. In broader context see also the work Petr KLUČINA, *Zbroj a zbraně. Evropa 6. – 17. století*, Praha – Litomyšl 2004, passim.

[5] To the blood groove accurately Leonid KŘÍŽEK – Zdirad J. K. ČECH, *Encyklopedie*..., p. 321. Also its purpose was to make the blade lighter or stronger; it might also have aesthetic function.

[6] Ulrich KÜHN, *Das Richtschwert*..., p. 90, examples see p. 109, no. 9, p. 117, no. 46, p. 123, no. 83; Tadeusz GRABARCZYK, *Na gardle karanie*..., p. 75, pict. no. 21, p. 76.

[7] Eduard WAGNER, *Zbraně*..., p. 23.

[8] Ulrich KÜHN, *Das Richtschwert*..., pp. 101–103; Maciej TRZCIŃSKI, *Miecz*..., especially pp. 57–60.

[9] Ulrich KÜHN, *Das Richtschwert*..., pp. 95–101, 103–106; Maciej TRZCIŃSKI, *Miecz*..., especially pp. 60–65.

[10] Ulrich KÜHN, *Das Richtschwert*..., p. 105; Maciej TRZCIŃSKI, *Miecz*..., especially pp. 65–71.

As an example we can use one of swords coming originally from the collection of the last executioner of Cheb, Karl Huss, which was therefore connected with the city of Cheb, on the blade of which there is a declaration "WANN ICH DAS SCHWERD THUN AUFHEBEN / SO GEBE GOTT DEM SUNDER DAS EWIGE LEBEN". Besides the workshop sign (head of bishop) we can also read doubled inscription "PETER MUNICH IHNN SOLINGEN" and the date 1677. The inscriptions are framed by vegetable motifs and we can also see gallows and execution wheel. The sword, the author of which is famous sword maker Peter Munich the younger, active in Solingen maybe between years 1620 and 1680, is in exhibition today in the guided tour of the State Castle in Kynžvart.[11] From the same workshop come also many other executioners' swords scattered across the Europe.

Decoration of executioner's swords and their signing is certainly connected with the longing of the town, or of the court, for the representation due to which fact they then ordered the sword in the first class workshops in Passau and Solingen, which were also very trendy in the 16th and the 17th century. At the same time, the decoration in some cases is related to the fact that pursuant to the rules of some sword making guilds also executioner's sword was to be done, amongst other things, and this was later donated to the town.

The way how the executioners' swords got into the property of capital courts, mostly in cities, were different and were clearly summarized by Maciej Trzciński.[12] The sword might have been done on court's (or city council's) order which paid for it to its maker, or it ordered it and it was paid by the condemned delinquent. This was the case of aristocrats or generally more wealthy men who cared about their honor and therefore they wanted not to be executed by the sword already used before.[13] The city council could also have acquired it as masterpiece of some sword maker who provided it to the city free of charge. E.g. pursuant to the sword makers' guild rules of the city of Poznań of the 1497 three pieces had to be presented at the master trial – usual sword, cavalier's sword, and executioner's sword, of which the last one was provided to the town after the trial.[14] Howeverm, the town could receive executioner's swords also as a donation of wealthy maecenas.[15] Nonetheless a situation might have occurred, when no special sword was available. In such case also usual battle sword might have been used (or adjusted, as the case may be). This is the case of sword still existing today connected by tradition with the execution of the prince Nicolas II of Opole in the 1497.[16]

The majority of towns, or as the case may be, their executioners, had several sword available. E.g. Zürich had in the 1503 at least for of the executioner's swords. The city of Poznań had twelve of them in the 1567 and fifteen in the 1626. However, the real number could have been different due to the above mentioned guild rules. This was e.g. the case of the city of Kraków. Many local swords acquired by the city due to the master trials based on guild rules still exist. It seems however, that only few of them were actually used in praxis.[17] The legend says the executioner in the city of Ząbkowice in the Lower Silesia had his room decorated by swords all around.[18] The executioner of Prague, Jan Mydlář used four swords in total for the well known execution of Czech nobleman on June 21st, 1621. Using the first one he executed eleven persons, using the second one five and another eight persons were executed by the other two swords.[19] Also the executioner of the city of Bremen had to have more swords available as in the 1539 he executed eighty pirates during one execution. The same applies also for the executioner of the city of Hamburg during the execution of approximately thirty pirates under the leadership of famous Klaus Störtebeker in the 1401,[20] forty pirates in the 1464 or 26 pirates in the 1573.[21] Also the last executioner of Cheb, Karl Huss held more swords in his possession. However, with regard to his passion for collections, we cannot exclude the possibility that some of the swords he has got from executioners of other towns or in different ways from completely other sources.[22]

Nonetheless the capital punishment in form of decapitation occurs in Europe many hundred years before; the absolute majority of still existing specialized executioner's swords comes

[11] National Heritage Institute, Regional Office in Loket, State Castle Kynžvart (Národní památkový ústav, Územní odborné pracoviště v Lokti, Státní zámek Kynžvart), inv. no. KY00260.

[12] Maciej TRZCIŃSKI, *Miecz*…, p. 71.

[13] E.g. in the 1684, Juliana of Žerotín let the sword made for her own execution in Wroclaw. The sword was destroyed after the 1942. Maciej TRZCIŃSKI, *Miecz*…, pp. 86–87, no. 1.

[14] Witold MAISEL, *Archeologia prawna Polski*…, pp. 180–181; Maciej TRZCIŃSKI, *Miecz*…, p. 65. To sword makers in general e.g. Petr KLUČINA, *Zbroj*…, pp. 664–676.

[15] Witold MAISEL, *Archeologia prawna Polski*…, p. 181.

[16] To this more details in Maciej TRZCIŃSKI, *Miecz*…, p. 76, p. 79, pict. no. 44.

[17] Many thanks for the information to Dr. Marian Małecky, Chair of General Constitutional and Legal History, Faculty of Law and Administration of the Jagiellonian University, Kraków, Poland.

[18] Ulrich KÜHN, *Das Richtschwert*…, p. 94; Witold MAISEL, *Archeologia prawna Polski*…, p. 181.

[19] Josef PETRÁŇ, *Staroměstská exekuce*, Praha 2004, pp. 14, 15, 17.

[20] Legend says, the executioner Rosenfeld should have used four swords for the execution of 73 pirates on October 20th, 1401. In fact the number of executed was lower, maybe approximately thirty. The skull of one of the executed was later showed on public as a warning and therefore it was perforated by nail. It was discovered in the 1878 and exhibited in the exposition of Hamburgmuseum – Museum for Hamburg History (Hamburgmuseum – Museum für Hamburgische Geschichte).

[21] Ulrich KÜHN, *Das Richtschwert*…, p. 94.

[22] At least one of them however was merely a copy. To Karl Huss and his collection Eva HUMENÍKOVÁ, *Karel Huss (1761–1838).* [Res: Karl Huss], in: Sborník Chebského muzea 1997, Cheb 1998, pp. 43–97; Jaromír BOHÁČ, *Karl Huss. Sběratel a kat – Muzeum v katovně – Kronikář a sběratel – Karl Huss. Sammler und Henker – Museum in Scharfrichterhaus – Chronist und Sammler*, in: Jaromír BOHÁČ, (Ed.), Deset obrazů z dějin chebského muzea – Zehn Bilder aus der Geschichte des egerer Museums, Cheb 2003, pp. 36–56.

from the time period between the 1st half 16th century and the mid of 18th century. At the same time, however, by their form they correspond to battle weapons form the Late Middle Ages. Specialized executioner's sword as such which is not weapon but tool occurred at the beginning of the 16th century as the result of the steady evolution and professionalization of executioners' profession. In the same form it survived until the end of its use.[23] At the same time however, we can follow certain deliberate tendency to make the sword look archaic trying to refer to judicial power tradition and administration of justice in the Middle Ages. In some cases the archaism is connected not only with the form of the sword, but also with mentioned apparently older dates than real date of production of the sword.[24]

Relatively late origin of executioner's sword as specialized tool with certain forms is proved also by iconography from that period represented, beside pictures or specific executions[25], by martyrdom of any of the Christian Saints in the older periods in particular. On such picture we can usually see common battle sword the type of which corresponds to the dating of painting.[26] Similarly, we can see no differences between the sword in the hands of executioner and other swords on the paintings of so called "Saxon Overview" (*Sachsenspiegel*) e.g. in the manuscript from Dresden from the time around the 1350.[27] From homeland we can find sword not having the form of executioner's swords e.g. on paintings Death of St. James on St. James Altar by Master of Rajhrad Altar (1420–1430), deposited in Moravian Gallery in Brno, or Execution of St. James on St. James and Our Lady Altar by Master of Olomouc Altar (around 1450), deposited in National Gallery in Prague. Similarly not even the sword in the hands of executioner in initial "C" on fol. 150 in the Collection of municipal law of Brno by the scribe Václav of Jihlava (1446) does not have the form of executioner's sword. Interesting sword with oversized long hilt can be seen in the Scenes of life and martyr or St. Catherine on winged altar (around 1530) in the St. Mark Church in Mostiště near Velké Meziříčí. One of few exceptions showing probably the forms of executioner's sword is e.g. the Execution of St. James by Hans Holbein the Older (around 1502) and maybe the Execution of St. Catherine from the workshop of Lucas Cranach the Older (around 1515). However in this case the executioner has his sword in the scabbard.[28] However in some cases we can see the weapon showing oriental forms or less usual weapon, as hunting knife or sabre. An example of picture of specific weapons in the hands of executioners is e.g. Martyrdom of St. Killian painted by Nuremberg Master (1575), Martyrdom of St. James by Stephan Lochner (1st half of the 15th century) or Altar depicting the scenes from life of John the Baptist according to Rogier van der Weyden (1st half of the 15th century).[29] Amongst the painting with Czech origin we can mention the Execution of St. Barbra from the central part of the Altar of Osek by Master I. W., from the period after the 1530, deposited in the National Gallery in Prague. However the picture of these less usual weapons was, with high probability, the result of the struggle to show the executioner as pagan character killing the Christian Saint. Surprisingly this actually reflects the reality– amongst others in Arabic lands the sable was used for the execution instead of the sword.[30]

The end of European executioner's swords was caused by the humanism of the Age of Enlightenment in the late 1800s when we can see shift to other "more humane" forms of capital punishments. From this point of view, the year 1792 seems to represent a symbol of these changes, as the guillotine was introduced in France.

Nowadays there is quite a serious issue in recognizing real and fake executioner's swords. There are usually only few archive sources connected to the individual still existing swords. Due to this fact, if we do not have any inscriptions or pictures on them, we often have problem to determine where the specific sword comes from and executioners of which capital court used it. This is in particular due to their certain "attractiveness" thanks to which they started their journey through different private collections as of the 18th and the 19th century in particular, very often without the possibility to review the tradition of origin.

In the collections of museums and individuals we can find many different types of swords under denomination of executioner's or execution sword, whereas many of them are considered to be executioner's sword by tradition; however, they often lack their characteristics. The situation is made even more complicated by the fact that in the Era of Historicism and Romanticism in the 19th century many copies or even fakes of executioner's swords were produced and tend to be declared original until today. Unfortunately, only in the case of very few executioners' swords we can follow the tree of life of their owners in the way we can prove their origin or at least way they got to the collections and confirm their originality in a satisfactory way.

[23] See e.g. Maciej TRZCIŃSKI, *Miecz…*, p. 76.
[24] Maciej TRZCIŃSKI, *Miecz…*, pp. 73–74.
[25] Compare e.g. well known picture of execution of Captain Theobald of Brescie for high treason in the year 1311 in the illuminated chronicle of Roman cavalry of Emperor Henry VII. called Codex Balduini Trevirensis, from years 1330 – 1340. Jiří SPĚVÁČEK, *Jan Lucemburský a jeho doba 1296–1346*, Praha 1994, p. 8; Wolfgang SCHILD, *Die Geschichte der Gerichtsbarkeit. Vom Gottesurteil bis zum Beginn der modernen Rechtsprechung. 1000 Jahre Grausamkeit*, München 1980, reprint Hamburg 2003, p. 71.
[26] From many existing pictures of executioners and their swords compare e.g. picture published in Wolfgang SCHILD, *Die Geschichte…*, pp. 176–191.
[27] See e.g. repro in Christoph HINCKELDEY, *Bilder aus dem Kriminalmusem. Band VII der Schriftenreihe des Mittelalterlichen Kriminalmuseums Rothenburg ob der Tauber*, Rothenburg o. d. T. 1984, pp. 3–18.
[28] Repro published e.g. by Wolfgang SCHILD, *Die Geschichte…*, pp. 187, 190.
[29] Repro see e.g. Wolfgang SCHILD, *Die Geschichte…*, pp. 188–189.
[30] Martin MONESTIER, *Historie trestu smrti. Dějiny a techniky hrdelního trestu od počátků do současnosti*, Praha 1998 (Martin MONESTIER, *Peines de mort*, Paris 1994), p. 227.

Cracow's Legal Heritage

*Marian Małecki**

God's gifts are for use, but without excess,
Keep that in mind and don't forget your age.[1]

As one of earliest urban centres in this part of Europe Cracow can boast of a large number of buildings and artefacts that are of special interest to the archaeology of law. For all those sites that are still in place today there are some that have not been able to withstand the ravages of time. The latter category includes those that were destroyed after the partitioning of Poland in the late 18th century (in Cracow by the Austrians during the rule of Emperor Joseph II).

This study attempts to take stock of the diversity of Cracow's legal heritage - which is part of its rich cultural heritage and at the same time testimony to the legal culture that flourished in Poland's ancient royal capital. It can also be treated as a Guide to Cracow's Legal Heritage.

However, before we enter on our tour, it may be necessary to clear up one or two points of terminology. The term legal archeology (*Rechtsarchäologie*) was coined by Karl von Amira in 1889[2] and popularized by his disciple Claudius von Schwerin.[3] In Poland this discipline was pioneered by Professor Witold Maisel from Poznań, author of two foundational studies *Poland's legal archaeology* (Warszawa and Poznań, 1982) and *Europe's legal archaeology* (Warszawa and Poznań, 1989). Although the term has found broad acceptance in Europe, its use is not free from doubt and controversy. So for example Professor Stanisław Grodzicki questions the way 'legal archaeology' is extended to cover clothes, sphragistics, or the customs and manners connected with law enforcement and justice. Terminological issues are no doubt very important, but there is no room within the scope of this study to pursue them any further.

What follows is a list of the principal buildings and objects that represent Cracow's legal heritage.

The Townguards' Gate (Baszta Ceklarzy). Until its demolition it housed the town guards and the hangman's assistants. It was a square tower crowned with a turret roof ; its walls were decorated with arches and Gothic tracery. Old engravings also show a chimney pot sticking out of the roof, which indicates that inside was a fireplace used by its inhabitants. Its general appearance, with windows instead of arrow slits, suggests that it was built for residential rather than defensive purposes. In the 18th century the Townguards' Gate military function was to be enhanced by a sconce built next to it. Eventually, however, the Gate was pulled down before the sconce was anywhere near completion. A wooden water supply pipe (called Rurmus) laid underground near the Gate was wrecked during the siege of Cracow by the Swedes, who invaded Poland in 1655.

The pillory (pranger), aka the Pilate, was a sandstone column situated in the Market Square opposite the Krzysztofory Palace between Szewska and Szczepańska Street. Although the pillory dates back to the 16th century, its earliest iconographic representation can be found on a map of the Market Square from the year 1669. Facing Spiski House, the column is mounted on round platform two steps above the ground level. Another important iconographic representation of the pillory comes from 1795. In Michał Stachowicz's gouache painting of 'Kościuszko Taking Oath at the Cracow Market Square on 24 March 1794' it is flanked by a row of food stalls. The following year the Austrian administration decided to clear up the clutter in the Market Square and give it a modern look. The facelift involved getting rid of the pillory. It was eventually pulled down in 1820 and removed to a village churchyard at Mydlniki. There it functioned for a while as a pillar supporting a statue of the Virgin Mary. Fortunately, it was spotted by Wincenty Dąbrowski, Secretary of the Senate of the Cracow Republic and owner of a landed estate at Mydlniki. He bought the remains of the pillory and had it mounted on a pedestal.

The pillory was an instrument of punishment; it was marked a place from where persons sentenced to banishment from the city were led under escort through Sławkowska Street and its gate, and further along Długa Street to Pędzichów, a place notorious for the city gallows. In 1625 the printer Jedrzej Piotrowczyk was sent to the pillory for publishing three pamphlets defending the Cracow Academy against the Jesuits. The last public execution at the pillory took place in 1794 when Maciej Dziewoński, a Catholic priest, was beheaded for treason (ie. handing over to the Russians the plan of the Polish camp at Bosutow). At present the ancient Cracow pillory stands near House Nr 200 in the eastern part of the village of Mydlniki.

The convict cemetery. Its beginnings are connected with alderman Andrzej Wierzynek who was caught stealing a large sum of money from the city treasury. He was brought before the court with small bags of money tied to his neck, found guilty, and sentenced to death. After beheading, his body and his coffin were carried down Sienna Street and buried in non-consecrated ground outside the New Gate. In 1429-1432 at that spot,

* Dr. Marian Małecki, Faculty of Law and Administration, Jagiellonian University in Krakow, Poland.

1 From an inscription on a silver spoon from the 17th century (from the collection of the Jan Matejko Museum in Cracow)

2 K. von Amira, *Grundriss des germanischen Rechts*, Strassburg 1889. On „Rechtsärcheologie" cf. p. 15ff.

3 K. von Schverin, *Rechtsärcheologie*, Berlin -Dahlem 1943.

beyond the outer perimeter of the Dominican convent, the Wierzynek family, or more precisely the deceased's son Mikołaj, built a church dedicated to St Gertrud (destroyed during the Swedish-Polish War, it was rebuilt in 1666[4]). Nearby, in 1679, Bishop Andrzej Trzebicki funded Cracow's first hospital for the mentally ill. St Gertrud's went up in flames during the civil strife of the late 1760s (triggered off by the Confederation of Bar), but was rebuilt in 1778. However, as its condition continued to deteriorate it was abandoned in 1810. Twelve years later it was auctioned and torn down. We know that it was built on a square plan and had a rectangular presbytery with an apse topped by a roof with an ave bell. The cemetery was closed down in the same year. Father Maciej Dziewoński, found guilty of spying for the Russians, ie. treason, was the last victim of a death sentence handed down in Cracow to have been interred in the old convict burying ground before its closure.

The meeting place of Sejms. Cracow was the customary venue of Coronation Sejms even after the capital was moved to Warsaw in 1596. The coronation ceremony was held in the Cathedral, while Sejm met in the Deputies' Hall and the Senators' Hall. Between 1918 and 1848 members of Assembly of the Republic of Cracow used these halls. In 1587 the Provincial Parliament of Małopolska held its general session at Wawel instead of Korczyn, and in 1618 the castle hosted members of the Sejmik of the Cracow Voivodship (which as a rule met at Proszowice). These occasions were, however, absolutely exceptional.

The venue of church synods. Wawel Cathedral was the venue of four church synods. It was also the seat of the Bishopric of Cracow. Established by Pope Sylvester II in 999, its status was confirmed by Emperor Otto III at the Congress of Gniezno in the year 1000.

Wawel. The castle was the official seat of the Supreme Treasurer, the Grand Marshal of the Crown and his deputies, and the court hetman. It was also the seat of the Castellan, Governor and Voivod of Cracow,. Neither the Castellan nor the Voivod were members of the royal court. Wawel (or the Upper Castle) was divided into three zones. The 'lower storey', ie. ground floor rooms, were used as offices; the 'middle storey', ie. rooms on the first floor, was set aside for the monarch and the royal family; and finally the 'upper storey', ie. rooms in the second floor, housed the Senate and the Sejm, as well as the reception of foreign envoys. Both the King's Council and courts of law convened at the castle; some of its towers were used as prisons. The royal insignia were kept here as well (exceptionally, during the Swedish-Polish War they were removed to Lubowla Castle in Spisz; on two occasions, in 1704 and in 1764, they were sent to Warsaw for the coronation of Stanisław Leszczyński and Stanisław August Poniatowski respectively). The Crown Archives were relocated to Warsaw in 1765. Finally, Wawel Castle was the seat of the High Courts of German (Magdeburg) Law in Poland.

Lanterns of the Dead. At least two such lanterns are known to have existed in Cracow. One of them marked a place where priests used to hear confessions in front of St Valentine's church; it. Now it can be found in the yard of St Nicholas's church in Mikołajska Street. Next to St Valentine's church, probably situated near today's intersection of Słowiańska Street and Pędzichów Street in Kleparz, was a leper hospital. The earliest mention of the latter comes from 1441. The lantern of the dead was placed there to warn the residents of the danger ofinfection. The site seems to have been doomed in more ways than one. St Valentine's church burned down in 1528. It was rebuilt with timber post-and-beam walls only to be destroyed in 1655 during the Swedish-Polish War. The construction of a new brick and stone church, financed by a well-off Kleparz burgher Tomasz Olszowski, began in 1661. It was, however, demolished in the late 1760s (during the civil war connected with the Confederation of Bar). Rebuilt again, it was finally sold and torn down in 1818. Its lantern of the dead was removed to yard of St Nicholas's church.

The other lantern can be found at the back of Hotel Garnizonowy, or 'Hotel Royal'. It arrived there most probably from St Sebastian's church in Kleparz. That church, too, had a small infirmary attached to it. It. Both the church and the adjoining home which offered care to venereal patients were completed by 1528. In 1793 a gale-force wind caused severe damage to the church. The repair work stalled until the financially strapped Senate of the Free City of Cracow decided to demolish the church and to transfer its patients to the Holy Ghost Hospital. What reminds us today of that church is the name St Sebastian Street.

Capital punishment

Execution sites. Burnings at the stake were carried out in front of the main entrance of St Mary's Church (eg. in 1539 and 1588), and exceptionally in Salwator, on the bank of the Vistula. So, for instance, in 1539 a woman, Katarzyna Wajglowa née Malcherowa, wife of Melchior Wajgel alderman and goldsmith, was convicted of apostasy. The verdict was formulated as follows: "Katarzyna Malcherowa, the wife of an alderman, beguiled by the Jews, renounced the Christian faith; partly this was caused by her mental infirmity or despair, which was shown in her disputatious temper. As it proved impossible to wean her off her mad delusions, she was convicted and sentenced to death by Piotr Gamrat, Bishop of Cracow; she went to her death with as much good cheer as if it was a wedding; she was burned in Cracow's Main Square." In 1588 a man named Zakrzewski suffered the same fate. He was charged with assaulting an altar boy and a priest celebrating mass and desecrating the host. As a contemporary chronicler writes "and so it all ended on 1st July, Friday, after a long pause for reflection, at 10 o'clock in the Market Square in front of St Mary's church, where that Zakrzewski was burned at the stake."

Beheadings were carried out in front of Grey House in the Market Square[5], in the Town Hall yard, at the town entrance

[4] Ten years later the church was consecrated by Bishop Mikołaj Oborski.

[5] This place was believed to be tainted. The revulsion and shame it provoked lingered on well until the beginning of the 20th century in spite of the fact that it was 'cleansed' by the majestic statue of Adam Mickiewicz. At the turn of the 19th century it was still a place of ill repute as evidenced by the shady domestic staff exchange (or, to give the procedure its more colloquial designation, 'servant trafficking') that throve under the patriotic monument. A female servant was expected to carry a Work Book in which the employer would mark her character. The common formula consisted of three words, "loyal, hard-working, moral".

opposite Floriańska Street, and at the pillory in the Market Square. Noblemen were beheaded at Wawel, where their trials took place. It was also possible to decapitate the culprit at the scene of his crime.[6]

Hangings were performed at the town gallows in Pędzichów Street. The Kazimierz gallows was erected on Krzemionki Hill. The latter was also the site of some qualified executions like that of Aleksander Kostka Napierski, who was executed by impalement. This cruel death is recalled in Wespazjan Kochowski's verses:

"I wonder who's that cook newly in town
Serving Kostka grill instead of roast fowl".

The gallows. The Kołłątaj City Map of 1785 puts it on the grounds of today's Helclów Care Home, near the end of Pedzichów Street. The convicts were led to it along Sławkowska Street and Długa Street up to Pędzichów. Early sources refer to it as a hamlet on the outskirts of Kleparz, "Pędzichów in Kleparz".[7] Cracow's principal gallows, mounted on a paved pedestal, was situated near the intersection of Helclów Street and Pędzichów Streets, approximately at a place occupied today by the ZUS office block. The Austrians, acting in the spirit of enlightened Josephinism, demolished that grisly landmark in 1796.

In the course of the next century the Austrian authorities carried out executions by hanging in the courtyard of the Samuel Maciejowski House (which today belongs to the Cracow Polytechnic) in Kanonicza Street. This site was conveniently close to the police headquarters, courts of law, and prisons. Today, we can find there a walled-up passageway through which convicts were led to the scaffold; the exact spot where it stood is marked by a small lawn.

Royal insignia. The Spear of St Maurice (or the Spear of Destiny). According to attested tradition this is the spear that Otto III presented to Bolesław Chrobry at the Gniezno Congress in 1000. It seems the Emperor had more such relics for he is known to have given another Spear of St Maurice to the King Stephen I of Hungary. In the 14th century the spear was deposited in Wawel Cathedral: chronicler Marcin Kromer saw it at the altar 'where the Bishop takes his seat'. The Spear of St Maurice is the oldest of Poland's royal insignia. Queen Jadwiga's royal insignia are displayed on her marble tomb in the nave of the cathedral. While Kazimierz the Great's regalia, including his funebral crown, remain in his tomb, their copies can be seen in the Cathedral Treasury.

Instruments of torture. Found in the cellars of the Town Hall in 1873, they would have been destroyed if it were not for Jan Matejko who offered to buy them. Since then they have been stored in the Jan Matejko House in Florianska Street. The collection includes a mouth gag, a beheading axe, manacles, iron collars, and a Spanish boot used to crush the joints of the foot.

Other forms of punishment practiced in Cracow

Excommunication. In Poland this form of ecclesiastical censure was first declared by the Bishop of Cracow Stanisław of Szczepanów in the 11th century. King Bolesław the Bold retaliated by having the bishop sentenced to death by hacking off the limbs (*truncatio*) in the courtyard of Wawel Castle. Excommunication was a formal act of the church: it was made from the steps of the altar with all the candles lit up, accompanied by the ringing of bells and the singing of psalms. The words of the declaration were as follows: " May he be cursed so that his limbs fail him, from the crown of his head to the toes of his feet. May his bowels break out and his body teems wit worms (...) At the Last Judgement may he be cursed like the devil and his angels and may he vanish for ever unless he repents ".

Flogging. Culprits were usually flogged at the pillory, though there were exceptions. This form of punishment was still in use during the time of the Republic of Cracow (ie. the first half of the 19th century). In one such case Jan Wazon, a confectioner's apprentice and son of a councilor from Graubinden, came to blows at a ball with General Paweł Grabowski. The Senate sentenced the young Swiss to 15 strokes with the rod and issued him with a deportation order. The corporeal punishment was administered in public in front of the Town Hall and Wieland pastry shop. Soon afterwards Wazon left town, without waiting for the deportation deadline. The incident apparently divided Cracow's public opinion into two hostile factions which 'kept their war going until 1931'.

Community service. This kind of punishment was popular in the 19th century due to its individual focus and deterrent effect. Most often it involved doing unpaid work for a municipal service, eg, garbage collection. The following amusing incident comes from 1834. The culprit, one Anastazy Podgórski, went to jail for impersonating a duke. He was to be banished but that sentence was commuted to a term of imprisonment with community service. When the sentence was being read out he stood on a scaffolding opposite the Cloth Hall on the side of Bracka Street. He was handcuffed, a placard with the sentence tied round his neck. When he served his term sweeping the streets he was on the watch for coaches about to pull up. He would then rush to help open the door and pressed his assistance on the ladies climbing down the steps.

Flogging in the guardhouse. It was a punishment meted out in the yard of the guardhouse in the Market Square, away from the onlookers' gaze, and therefore saving the culprit the public humiliation. In 1836 a citizen of Cracow was sentenced to a flogging in the guardhouse for offending an Austrian soldier on guard in front of the Sign of the Rams Palace, the official residence of General Kaufmann.

Iron collars. A pair of jougs that were fastened on the neck of the convict are hung up at a side entrance to St Mary's Church.

Chamber of Industry and Commerce. Its stylish building in Długa Street (at present used by the publishing firm Wydawnictwo Literackie) was designed by Franciszek Mączynski and Tadeusz Stryjeński in 1904-1906. In the Mehoffer Hall on the first floor there is a fine collection of Józef Mehoffer's paintings. The staircase is decorated with stained glass panels, designed by Francizek Mączynski, showing allegories of Industry and Trade.

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[6] The first execution by beheading was carried out in Cracow in 1395. The case was rather unusal as the convict happened to Judge Spytko of Dytrychów, arraigned for rape and abuse of office.

[7] In the 15th century Pędzichów belonged to the Canons Regular of the Order of the Holy Spirit in Saxia.

The Executioner's House. It was in fact the Executioner's Gate at the end of św. Marka Street (formerly Rogacka Street). The tower gate was crowned with a Renaissance attic decorated with Cracow's coats of arms and lions' heads (on the frontal façade). These may have been added, together with a projecting cornice, in the 16th century, while medieval origin of the Executioner's Gate itself is indicated its pinnacled roof (as attested by iconographic sources; the building does not exist any more). In 1601 the defensive functions of the Gate were upgraded: it was reinforced by escarpments on all sides. Although it was place where the executioner had his living quarters, the name 'Executioner's Gate' was gven to it by Ambroży Grabowski.

Buildings of the former St Michael Benedictine Monastery and St Michael's Prison. The complex of buildings was connected with the fortifications of Wawel Castle through a multi- level network of tunnels, which still exist. Until the 18th century this area at the foot of Wawel and the Planty (Ring Garden), were surrounded by bogs and mires.

House of the Abbot of the Tyniec Benedictine Monastery. According to a 1482 document, it was a house close to the Chapter House of the Wawel Cathedral canons (aka the Deans' residence) in Kanonicza Street.

Knaves' Chapel (St Anthony's Chapel). This side chapel to the left of main entrance of St Mary's church was a place where convicts sentenced to death could see a priest and spend the last hours of their lives. After spending his last night in that chapel, a convict followed by some clergy, was conducted to the site of execution, which was either near the church entrance or opposite the Gray House. The sad ceremony was accompanied by the knell of a bell from the lower tower of St Mary's church.

A knife used to carry out sentences of humiliating mutilation. An iron knife which hangs on a chain in the central passage of the Cloth Hall is in fact a successive copy of what is believed to have been the original instrument of punishment for lesser offences (ie. cutting off ears for theft) in the Middle Ages. An alternative explanation of the reason why the knife has been treated with such respect is provided by a legend about two brothers who were building the towers of St Mary's church. When one of them saw that he would not be able to build a tower as tall as his brother's, he stabbed him in a fit of envy. The knife used to commit that crime was hung up in the Cloth Hall as a gruesome reminder of that incident.

The Cloth Hall (Sukiennice). This spacious building in the centre of the Marquet Square dates back to the 13th century. Thoroughly rebuilt in the 16th century, its functions were never narrowly commercial. The chambers of the Cloth Hall saw countless galas and balls, and in 1880 the homage of Galicia's nobility to Emperor Franz Joseph I. A list of star guests of various functions held at the Cloth Hall includes King Stanisław August Poniatowski (1787), Prince Józef Poniatowski (1809) and Fryderyk August Wettin, Duke of Warsaw (1810).

The site of homage ceremonies. This is a piece of ground in the Market Square opposite Bracka Street and House No 21 (the Evangelists' Mansion, but also known as the Waxman Mansion, the Bolepin Mansion, or Lanckoroński Family Mansion) where Polish kings received homage from the citizens of Cracow. The spot was called 'At the Majesty' or 'At the Gold'. During the ceremony the king would sit on a throne mounted on a raised wooden platform (also called 'Theatrum'). Today a plaque which commemorates the Homage of the Duke of Prussia in 1525 marks that spot, though somewhat imprecisely.[8] The first known homage ceremony took place there on 21 January 1320, when Cracow burghers presented King Władysław Łokietek with the keys to the city and 1000 gold florins. The King on his part raised a few prominent burghers to the rank of nobility in gold. Of the Polish kings neither Stanisław Leszczyński nor Stanislaw August Poniatowski presided over a Cracow homage: their coronation took place in Warsaw.

In the 19th century the ancient ceremony was revived during Emperor Franz Joseph's official visit to Galicia. It was observed by Stanisław Cyrankiewicz, who left us the following account: "The monarch, accompanied by Count Alfred Potocki, the Governor of Galicia, and without any escort, walked out of the Sign of the Rams Mansion and moved between the cheering crowds towards the Cloth Hall; once in the Hall he stopped by the throne installed for him on a platform in the passage opposite Szewska Street as a Cracow wedding party, dancing to the tune of something like a Polonaise, came up and deposited gifts of bread, salt and a large wedding cake at the foot of the throne." Then, a huge loaf of bread was presented to the monarch by Count Kazimierz Badeni.

An account of the first homage in the Cracow Market Square can be found in the chronicles of Jan Długosz: "The following day [after the coronation] King Władysław dressed in royal robes walked down in the company of prelates and lords to the city of Cracow and take his seat on a throne specially prepared for that occasion; having first strolled round the city, he received the homage and oaths of loyalty made freely by the the burghers of Cracow. It was then that the Cracow Cathedral was granted the exclusive privilege of royal coronation; it was a right it has enjoyed ever since. By common consent it was decided that the crown and other royal insignia would be deposited and kept at Cracow Castle which had very strong fortifications; the village of Gniezno had no means of repelling an enemy attack and thus could not ensure the safety [of these precious objects]. It was also decided that all future coronations of the kings and queens of Poland would take place in the Cracow cathedral."

The Town Hall. The earliest mention of the Cracow Town Hall comes from the year 1313. It seems that originally, in addition to its secular function, the place may have also had some religious significance. This is suggested by a 1383 record of a grant of indulgences to the Town Hall chapel by Archbishop Dymitr, the Papal legate.

The construction of the Town Hall was probably completed in the second half of the 15th century when its tower was finally capped with a massive spire, built under the supervision of Master Jan of Toruń. Various annexes, which had hardly anything to do with principal function of the building, kept being added in the following centuries. The largest of them

[8] In fact the ceremony took place opposite Bracka Street, in front of the Evangelists' House.

was a grain store abutting on the north wall of the tower. This northern wing was rebuilt and expanded in 1637-1640. Another notable addition was a decorative frieze with portraits of Polish kings. Apart from office rooms the Town Hall had a few large rooms, chief among them the Lords' Chamber, where the Town Council held its meetings, and the Jury Chamber, whose walls were decorated with portraits of the Polish kings. In the early 19th century the buildings clustered round the tower were in such a bad state of repair that the Sejm of the Republic of Cracow ordered their demolition. The clearance began in 1818 with the granary and continued until 1820. Although the assembly also endorsed also plans to rebuild the demolished buildings, this project was never carried out. What remains of the old Town Hall is just the tower. Although it was completed in 1383, its construction may well have begun in the late 13th century. The tower was capped with a Gothic spire, consumed by flames in 1556. Another fire damaged it in 1680. In the following years both the foundations and the helm were repaired. A thorough renovation of the whole structure did not take place until 1783-1784. The entrance to the tower is now guarded by a pair of stone lions brought here from the Pławowice Palace; they have replaced the original, 19th-century lion statues worn out by wind and rain (one of them can still be seen in the Town Hall Museum). A door on the south side of the tower opens to stairs that lead to a clutch of subterrain passages, rooms and halls, one of them a converted into a theatre. The Town Hall's underground storey housed an inn called the Świdnicka Cellar (it got its name from the Silesian Świdnica beer that was sold there) or alternatively The Indies. The inn could be accessed through a separate staircase opening onto Szewska Street and św. Jana Street (later walled up) and through a passageway from 'Tortornia', as the Torture Chamber was called in common parlance. The latter was connected by another passage with the felons' ward of the city jail called 'Dorotka'.

The extant 16th-century stone portal is the sole reminder of the former splendour of the Lords' Hall where members of the Cracow City Council convened for their sessions.

Instruments of torture from the Torture Chamber were salvaged by Jan Matejko and since that time they have keep kept in the Jan Matejko House in Florianska Street.

Coat of Arms of the Cracow Academy. The blazon of the Cracow Academy (and its successor the Jagiellonian University) is Azure, two crossed rector's scepters or. This emblem has been known since the reign of Władysław Jagiełło. Jan Brożek traces the origins of the arms to "a long deliberation in the days of King Jagiełło... In the end, when everybody had his say, the conclusion was that if the Chapter was to have three crowns, the Academy may have two scepters".

Policing the town. Law and order in the streets was kept by guards (Pol. w*ieletnicy,* Lat. *circulatores*) under orders from the *burgrabia* (aka *hutman*) and town grooms (they should be distinguished from night watchmen, Lat. *vigiles*). Their principal duty was to do sentry duties and some policing in the streets. They were headed by *magister circulatorum* (a beadle); their pay was 6 groszy. They were armed with shields, helmets, and pieces of armour. Among their many rights was the right of arrest of suspects.

Wójt's House. The residence of the *wójt* (or elected town reeve) was situated in a fortified place 'na Gródku', a low hill in the east of Cracow, near today's church of Our Lady of the Snows. In the 13th century this place was attached to the main line of Cracow's fortifications. Gródek was an important point of communication: through it ran the shortest route to Mały Rynek (Little Market) and from it to the Kraków-Sandomierz road. In the extant fragment of the city walls there is still an opening which marks the site of the Butchers' Gate. Built after 1285, the Gate stood near the house of wójt Albert, who led a mutiny against Władysław Łokietek. The king had the house destroyed after quelling the rebellion, after 1312. Soon afterwards another house ('Gródek Łokietkowy', or 'Łokietek's little castle') was built on that spot, ie. between the Butchers' Gate and Mikołajska Gate. From the middle of the 14th century it housed the official residence of the *starosta grodowy* (ie. city mayor appointed by the king). The office was introduced by Wacław II, king of Poland 1300-1305, as the old system with castellans in charge had been getting unwieldy. Later Gródek's ownership passed into the hands of the landed nobility. When it burned down in 1475, the Tarnowski Family, the current owners, had it rebuilt. They continued to reside in it until the 17th century, when they decided to donate it to the Order of Dominican Nuns.[9]

Official residences of the Bishop of Cracow. Tradition has it that the first Cracow bishops as well members of Bishops' Curia were Benedictines from the Tyniec, hence the strong tie between the Bishopric of Cracow with the Tyniec Monastery. In the early days the Bishops of Cracow resided at Wawel near the cathedral. Later their official residence was to be found in Kanonicza Street. Eventually they settled down at the Archbishop's Palace opposite the Franciscan Church in Franciszkańska Street.

Headquarters of the communist authorities. The tower house in Tomasza Street No 43, which came to be known as the Party House, was built in 1921. Designed by Ludwik Wojtyczka, it was to house the local grain exchange. In 1944-1990 it was the headquarters of the Cracow Committee of the Polish United Workers' Party. This building was believed by many to be Cracow's first high-rise, an opinion which need not be true.[10]

The last public execution. In Cracow the last public beheading was carried out at the time of Kosciuszko's insurrection. On 31 May 1794, at 10.30 am Maciej Dziewoński, convicted of spying for the Russians, was decapitated in the Market Square in front the Grey House. Having found him guilty of passing information about Polish army units stationed in Cracow in letters to his sister, who had married a Russian general named Parczewski, the Insurrectionist Tribunal condemned him to death on the previous day and ordered that the sentence be

[9] In 1621 Anna Lubomirska in addition to disposing of Gabriel Tarnowski's house funded the construction of a church and convent for the nuns (wreckage from medieval walls was used to put up the new buildings).

[10] Cf. M. Rożek, *Przewodnik*..., p. 53.

carried out within 24 hours. The event is recorded in Ambroży Grabowski's memoirs; his account is worth quoting at length: "[Father Dziewoński] was imprisoned in the Cracow Town Hall. On the day of the execution he was led out of jail by a group of militiamen, ie. Cracow burghers who joined this formation for there was no army around. Father Józef Męciński, a Franciscan friar, prepared the victim for his death and led him to the square next to St Wojciech Church, opposite the Grey House. The spot was surrounded on all sides by the said militia. Father Dziewoński was wearing a shroud and looked more dead than alive. When he stepped into the death circle where a stool was waiting for him, men helped him to sit down; then the hangman with his sleeves rolled up came up to him and, having tucked the man's hair under his nightcap, made his last toilet; the head dropped down in an instant. A black coffin marked with white lines was ready; as soon as the body and the head was put into it, the peasants [who brought it] carried it shoulder-high, suspended on a horizontal pole, to St Gertrud's churchyard, where it was buried; this was in accordance with the custom that the decapitated be interred near that small church." But the punishment was not over yet. It was reported that the hangman shouted "Long live the Commonwealth!" and the ill-fated letters were burned.

Kleparz Market. This market was the centre of Kleparz, a small town in its own right just outside the gates of Cracow, later one its districts. In the old days the market extended from today's Kleparz Market over to Matejko Square. The area of historic Kleparz was bounded by the following streets: Szlak, Ku Promnikowi (today's Warszawska Street), then Długa and Krowia (today's św. Filipa Street), and Podwale (ie. that part of it which is now Basztowa Street) and św. Walentego (former Pędzichów Street), including the site of Cracow's city gallows.

The market was overlooked by the town hall of Kleparz, a brick house with a wooden tower. The first known mention of it comes from 1465. A stone's throw away from Cracow, Kleparz was dangerously exposed to the depredations of the various armies that every now and again laid siege to the royal capital. In 1587 Kleparz and its town hall suffered great damage from the troops of Archduke Maximilian Habsburg; it was burned down repeatedly during the Swedish-Polish war (late 1660s), and burned down again during the insurrection spurred by the Confederation of Bar (late 1760s). When the rebuilding work started in 1774, it was decided that the town hall would be a modest two-storey building. In the early 19th century it came into private hands. The burgher family that acquired it in 1805 had it pulled down: in its place the new owners built a residential house, typical of the time. The foundations of the medieval town hall were first located in 1906.[11] Their remains are exposed in the cellars of House No 12 in Rynek Kleparski.[12]

In the late 18th century Kleparz had 120 houses, over a hundred of them wooden. This made the place highly vulnerable to fires, which seem to have occurred all too frequently. The following churches (all of them have survived) were in the vicinity of the old Kleparz Town Hall: St Philip and St James's, St Florian's (where the so-called Royal Road starts off), St Valentine's, St Simon and St Jude Thaddeus's.

Kleparz. This small town, situated to the north of Cracow on the so-called Toruń Route, leading to Toruń via Miechów, was incorporated under Magdeburg Law (with the Cracow charter serving as a model) in 1366. Kleparz, however, was not allowed staple rights nor the right to operate a municipal weighing scales. Its population, which, until the end of the 18th century, never exceeded 1,000, depended for their livelihood on agriculture, vegetable growing and handicraft. The town was also famous for its horse markets. The local government was modeled on the Cracoovian one, though there were some differences. The executive function was exercised by the municipal council alongside the wójt-jurymen type of administration, which was normally concerned with judicial matters. These differences persisted until end of the 18th century when Kleparz was annexed by Cracow. It was followed, in the 19th century, by a phase of intense development which gave Kleparz its present urban look.

Cracow's *jurydykas*. *Jurydykas* were small territorial units which functioned independently of the jurisdiction, laws and regulations (especially concerning manufacturing and trade) of the town they bordered on. Cracow's *jurydykas* were Szlak (cf. today'street of that name) in the north, Prądnik (since the 17th century this neighbourhood has been called Wesoła) in the east, and Biskupie, Pędzichów and Błonie in the west.

Trade unions offices. The Railwaymen's Trade Unions (ZZK) was headquartered at Warszawska Street No 17 in the former Przeworskich Mansion. It could be found at the same address in the interwar period.[13]

Military Tribunals of the *k.u.k.* Monarchy. The Garrison Court of the Imperial and Royal Monarchy of Austria-Hungary and the *Landwehrgericht* (Court of the Home Army)

resided in Montelupich Street not far from the Archduke Rudolph Barracks. The court building was designed in accordance with the appropriate official code by an unknown Austrian architect. For their neighbours the military courts had the barracks of an OED battalion (*Pionier-Bataillon*).[14]

Urban chains. Iron chains, aka safety chains, were stretched from wall to wall across the streets in order to hinder the advance of enemy troops in case they managed to break through the outer defences of the city. The earliest information about the use of this device comes the end of the 14th century. Quite a number of those chains have been preserved in various parts of the city; a specimen of this type of defensive hardware still hangs down the steep slope near House Nr 18 of św. Tomasza Street.

Votive manacles. Among the votive gifts showcased near the altar of the Church of Our Lady of the Redemption of Slaves there is a pair of manacles which were left here, according to

[11] Cf. M. Rożek, *Przewodnik*..., p. 15.
[12] Cf. M. Rożek, *Przewodnik*..., p. 26.
[13] Cf. M. Rożek, *Przewodnik*..., p. 28.
[14] Cf. M. Rożek, *Przewodnik*..., p. 29.

tradition, by a convict who had been saved from the gallows by the miraculous intervention of the Virgin Mary. The church, dedicated to SS. John the Baptist and John the Evangelist,is of Romanesque provenance; it is believed to have been founded in the 12th century by Piotr Włostowic aka Dunin (the Dane), *comes palatinus* of King Bolesław III the Wrymouth and Władysław II the Exile.

Dead bells. Also known as Passing Bells, these were hand bells rung to mark the death or the agony of a relative or close friend. As a rule every church had such a bell and its use was believed to tap special indulgences promulgated by the pope. One such bell hangs on the wall near the wicket gate of the Franciscan convent at Reformacka Street No 15.[15]

Association for Mortgages and Singular Credits. The Modernist mansion at św. Anny Street No. 9 was designed by Rajmund Meus specially for that respectable institution. The plot of land on which it was built in 1908 had previously belonged to the university printers. Now it houses the Chamber of Small and Medium-Sized Business (*Izba Rzemieślnicza*).

Guardian of the rights of the Jagiellonian University. This title belongs to St Bernard of Clairvaux, proclaimed patron of university rights by Pope Martin V. St Bernard was a Cistercian monk, classic expounder of Mariology, philosopher, medieval intellectual, the actual spiritus movens of the Second Crusade, author of the Rule of the Templars. In 1418 the Church of St Anne came under the patronage of the Cistercians; this may explain the presence of the effigy of St Bernard of Clairvaux on the façade of that oldest university church in Cracow.[16]

Allegory of the Faculty of Law. This is one of four allegorical figures – the other three represent Theology, Philosophy and Medicine - in the Confession of St Jan Kanty, a statuary in the transept altar of the university church of St Anne's. They bear on their shoulders the coffin reliquary of the saint, who was a professor of the Cracow Academy in the 15th century. With its medieval origins Cracow's Faculty of Law is the oldest in Poland.

Sejm of the Republic of Cracow. This legislative body of the city state established in 1815 held its sessions in House No 12 of św. Anny Street, a university building formerly known as Collegium Nowodworskiego, but lately renamed, to suit its new function, Collegium Medicum. The addition in 1855 of a wing with an arcade gallery and a stylish flight of steps designed by Tomasz Majewski improved the look of the place and created more space that was used to accommodate the reading rooms and offices of the Jagiellonian Library.

Border stones. One such stone which marks the old border between Kleparz and Pędzichów can be found beween Houses No 1 and 3 of Pedzichów Street. The stone put in place in 1782 indicated the limits of the Pędzichów jurydyka, a piece of land under the jurisdiction of the cathedral canons of Wawel.

The Market Square. Measuring 200 x 200 metres, the Market Square was laid out in the run-up to the promulgation of the City Charter (*Akt lokacyjny*), based on Madeburg Law, in 1257. The area of the chartered city was divided into four quarters created by the intersection of two perpendicular axes at the centre point of the Market Square. The quarters were named Grodzki, Garncarski (Potters'), Rzeźniczy (Butchers') and Sławkowski (from the town Sławków). The Cloth Hall made its appearance in the Market Square in the 13th century; it was thoroughly rebuilt in the 16th century. In the late 16th century with a huddle of 342 stalls the Market must have looked like a small town by itself. In the Market the burghers were able to access all the facilities and services that a medieval city should provide: there was the Town Hall, the weighing scales (*waga*), the shops (*Sukiennice*), the guard house, and churches (St Wojciech's and St Mary's). The Market was also the scene of public executions, which were carried out as a rule in two places, in front of St Mary's church and the Grey House, or in the Town Hall courtyard, near the city gaol. Early 19th century sources make mention of a salt market and salt store operating along the north-western border of the Market Square and of a coal market which occupied a plot between the Town Hall and the house fronts between Bracka Street and Wiślna Street. There was also a hen market that abutted on the northern side of the salt market and a lead market next to the coal market, facing the houses between Bracka Street and Grodzka Street. A Jewish market was in business near St Wociech's church; other spots round the Market Square saw occasional appearance of coopers, bakers, fish and crayfish vendors setting up their own stands in competition with regulars.

The Grey House. This huge, four-storey building at Market Square No 6 was the headquarters of Tadeusz Kościuszko's staff after called on the Poles to join his insurrection on 24 March 1794. In 1846 it became the focal point of another uprising headed by Jan Tyssowski and Professor Michał Wiszniewski. The National Government in which they played the key roles operated from the Grey House until the very end of hostilities. Earlier, in the good old days of the Polish Commonwealth Poland's first elected king Henryk Walezy came to the Grey House to a banquet organized after his coronation by Piotr Zborowski. The Grey House was a hideout of Samuel Zborowski, banished by the king in the same year 1574, and condemned to death and beheaded at Wawel ten years later after he had broken the terms of his earlier sentence.

The Grey House is said to have been built in the 14th century, an estimate which is sometimes backed by the story that Kazimierz the Great had it built for his mistress Sara – hence the name Szara (Grey House, in Pol. *Kamienica Szara*). In fact, however, the Grey House is a 16th-century construction.

The Boners' House. This historic building at Market Square No 9 (also known as Firlejowska House) is connected with the marriage in 1605 of Maryna Mniszchówna and Tsar of Russia, Dmitriy Ioannovich (False Dmitriy I). At that time two houses, No 7 and 8, were joined with No 9 to have ample room for the wedding. The marriage was solemnized in the Firlejs' private chapel in the most extraordinary circumstances. Mniszchówna married Tsar Dmitriy by proxy: the bridegroom was represented by his secretary Ofnas Vlasov. The wedding was attended

[15] Cf. M. Rożek, *Przewodnik*..., p. 118.
[16] Cf. M. Rożek, *Przewodnik*..., p. 137.

by king Zygmunt III Vasa. In the 16th century House No 9 belonged to the Boners (first to Jan Boner and then to the famous patron of the arts Seweryn Boner who married Zofia nee Betman). After the marriage of Zofia Boner with Jan Firlej, Voivod of Cracow, the house passed into the hands of the Firlejs. In 1574 Henryk Walezy Poland's first elected king stood godfather to baby Henryk Firlej.

Residence of the Embassy of the Venetian Republic. The Venetian Embassy was located in the Grey Carp House at Market Square No 11. It was the residence of the envoys of Doge of Venice when they came to Cracow. Its façade is topped by a cartouche with the coat of arms of the Most Serene Republic of Venice – a lion representing St Mark the Evangelist. At the end of the 16th century the house passed into the hands of the Alantses, a family of noted apothecaries who ran a pharmacy on the ground floor. Unfortunately at the beginning of the 20th century the old house was demolished; it was replaced by new one in 1914 with the impressive façade of 1788 carefully reconstructed.

Wierzynek. Wierzynek was the name of a Cracow merchant who hosted a grand meeting of European monarchs invited to Cracow by King Kazimierz the Great in September 1364. Kazimierz the Great's guest were Emperor Charles IV, King Louis I of Hungary, King Peter I of Cyprus, King Valdemar IV of Denmark, Duke Otto of Brandenburg, Duke Władysław of Opole, Duke Bolko of Świdnica and Duke Siemowit III of Masovia. They were all attended a banquet organized by the City Council at Mikołaj Wierzynek's house (the occasion, dubbed Feast at the Wierzynek's, passed into legend). The assembled royals discussed issues of international politics and decided to give more help to the King of Cyprus and start preparations for another crusade. The troubadour Guillame de Machaut left us a vivid record of the Cracow meeting in one of his poems. Its high point is the jousting at Wawel, which is won by the chivalric King of Cyprus, Pierre de Lusignan. Finally, its should be made clear that the acclaimed restaurant 'U Wierzynka' did not open until 1945.

The Hetman House. This mansion, also known as The Old Mint, at Market Square No 17, was built c. 1300. Inside there is a magnificent hall with a 14th-century groin vault and bosses showing finely carved heads of Kazimierz the Great and Elżbieta, daughter of Władysław Łokietek and Queen Consort of Hungary. At the end of the 14th century the Hetman House was owned by Piotr Borek, Master of the Royal Mint.

The Sign of the Rams Palace. The guest list of this grand mansion is studded with great names, not least those of Europe's rulers: in 1709 Tsarevich Alexei, son of Peter I of Russia; in 1809 Prince Józef Poniatowski, Maréchal d'Empire; in 1810 Fryderyk August King of Saxony and Duke of Warsaw; in 1880 Emperor Franz Joseph I.

The original townhouse of that name at Market Square No 27 was built in the 14th century. Its transformation into an imposing palace resulted from the amalgamation of three adjacent houses in the south corner of the Market Square (The Karniowski, The Kislingowski and The Szastembergerowski House). In c. 1545 the Palace was bought by Just Decjusz, King Zymunt August's secretary and treasurer; afterwards it was owned in succession by some of Poland's great noble families (Radziwiłł, Wielopolski, Potocki). Since the 19th century it The Sign of the Rams Palace has built up a unique reputation as an important focus of Cracow's cultural life.

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Prisons of Brno

*Karel Schelle**

Beginnings of Prison Service in Brno

The medieval prisons played a somewhat different role as prisons in modern times. It has to do with the nature of criminal law, considering punishment solely an act of revenge for the offense committed. The so-called educational nature of the penalty was a concept that was completely unknown, and the sentence in prison was not included in the catalogue of medieval punishments. Of course, there were mainly economic reasons. Guarding prisoners and their livelihood were expensive and it was economically more advantageous either to completely physically destroy the prisoner - or to execute various mutilating punishments, which in turn had a greater effect than incarcerating criminals. Therefore, prisons were rather exceptionally used especially by the nobility. For urban and tributary population prisons (jails) served mostly, as we would say today, detention centers, used for detention of criminals before their execution or any other type of physical punishment.

This is probably the main reason why we don't know much about the oldest prison in Brno. First mentioned probably (at least reported in the literature) not earlier than in the 15th century in association with the Brno Town Hall (now known as Old Town Hall) in the premises of which thetown jail was located.[1] We only know that it was built with raw bricks.

The Špilberk Prison

The unquestionably best known prison in Brno is the Špilberk prison. A part of the fortress served as a prison since the originally Gothic castle was built. It was only a fortress prison. Good known is the period after the Battle of White Mountain, associated with the imprisonment of Moravian nobility in Špilberk. For example, after the defeat of the Estates Uprising in 1620, its leading Moravian participants were imprisoned in Špilberk for several years. Since the last quarter of the 17th century to the early 80s of the 18th century, there were also a number of military personalities imprisoned such as Austrian generals Bonneval and Wallis and the famous Pandurs Colonel Franz Trenck, who died in Špilberk in 1749.

A fundamental change in the conception of punishment occurred under the reign of Joseph II., who issued his Criminal Code called the General Code of Crimes and Their Punishment from 1787. In relation to penalties, here appears for the first time an effort to enforce the corrective function of a penalty and to maintain a moderation between crime and punishment. And so, the cruel medieval liquidating or mutilating punishments disappear from the criminal law and more penalties associated with imprisonment start to be applied. And thus the function of prisons was enhanced.

In connection with the forthcoming changes in criminal law, therefore the Emperor Joseph II decided in 1783 to transform the prison in Špilberk to a civilian prison for the heaviest criminals. The heaviest criminals were sent there, such asmurderers, robbers and counterfeiters. And later also political prisoners. Together with the older prison building also the upper floor of the Northern casemates (the Josephinian Tract) was renovated. After the completion, the first prisoners were moved there in June 1784. In December 1784, another emperor's command was executed and the criminals sentenced to life imprisonment were put into the worst casemates on the lower floor. Thus, there were gradually established 29 individual cells, assembled from strong beams and planks, to which the prisoners were permanently chained. In the second half of 1785 also the upper floor of the south casemates was adapted to prison, but was not used until the reign of Joseph's successor, Leopold II (Leopold Tract).

In May 1790, however, Leopold closed the lower casemates used for persons with life imprisonment including chaining and introduced also further reliefs for all convicts. The upper floor of the casemates still continued to serve as prison until the early 30s of the 19th century.

Since the late 18th century, also "political" prisoners started to reveal the overground premises of the Špilberk fortress, among them the French revolutionary Jean B. Drouet, the Hungarian writer and Jacobin Ferenc Kazinczy, and later the Italian patriot and poet Silvio Pellico, whose book "My Dungeon" made the Špilberk prison famous throughout Europe. It became famous as a feared prison and the "prison of nations".

In the period from the 10th June 1841 to 29th May 1855, among others there was also a prisoner no. 1042 arrested, is own name was Václav Babinský. After the abolition of the Špilberk prison he was transferred to the Carthusian in Jičín where he served the rest of his twenty-year sentence.

The Austrian prison administration protested since 1848, that Špilberk was in a very poor condition. In 1855 the Emperor Franz Joseph I closed Špilberk prison and its premises were converted into military barracks, which remained the next hundred years. The relocation of prisoners started in the same year by transporting women in prison in Valašské Meziříči. The last prisoners, working on clearing, were relocated to Cejl. They left the walls of the former royal castle on 13th February 1858.

Since then the premises of Špilberk were used only occasionally for the purpose of imprisonment. During the First World War, except soldiers also civilian opponents of the Austrian regime were imprisoned there. In the first year of the Nazi occupation of Czechoslovakia several thousand Czech patriots

* Doc. JUDr. Karel Schelle, CSc., Department of the History of the State and Law, Faculty of Law, Masaryk University Brno, Czech Republic.

[1] DŘÍMAL, Jaroslav (edd.): Dějiny města Brna 1. Brno 1969.

found imprisonment (and some of them even death) there. Between 1939 - 1941 the German army carried out extensive modifications in Špilberk and created barracks in spirit of the Romantic Historicism of the Pan-German ideology.[2]

The Cejl Prison[3]

The origins of the building of the former Cejl prison No. 71 dated back to the Court Decree of 4th August 1770, which ordered to establish one penitentiary for the whole territory of Moravia (Moravian-Silesian provincial prison) in Brno at Cejl. Ernst Christopher Count von Kaunic laid the foundation stone of the penitentiary and working shop at Cejl on 20th July 1772. In the years 1772 - 1776 the construction was completed. Already in 1779 the bishop of Brno M. F. Chorinský of Ledská consecrated the prison chapel of the Ascension of Virgin Mary.

Shortly after completion, however, the building served for a different purpose. In 1778 the Academy of Estates was relocated to Brno from Olomouc and for this reason, 147 were orphans from the Jesuit college in Brno were transferred into a new building at Cejl. Joseph II ordered to close the orphanage in 1784 and the building returned to its original purpose - the penitentiary. In the years 1786-1855 there were imprisoned-criminals convicted of less serious offenses. In the early years, the number of prisoners ranged from 30 to 40 people, after 1790 their number increased significantly. The total number of prisoners in the penitentiary in April 1797 was 335 heads, men and women together.

After the battle of Austerlitz there was a hospital for Austrian soldiers established in the premises of the jail. The large complex was rebuilt between 1843 - 1844.

In the early 20th century the building of the criminal court and the prison were renovated. Since 1904 the courthouse was to be extended by an one-storey outbuilding and an office building.

Unfortunately, there has not remained much information about the events in the prison in the period between the wars. An important source of information about this period is the brochure „Prison Service in the Czechoslovak Republic“ from 1930, where mainly statistics on the Cejl prison in the years 1926-1929 were published. During theFirstRepublicthe Cejl prison was governed by the Regional Court Brno, which also resided in the prison building.

In prisons of regional courts, the arrested persons served imprisonment and penalties of less than one year inflicted by the Regional Court. There were sections for women, men and teenagers, they could be sentenced to a maximum of six months. The prisons of regional courts were divided into three types depending on the occupancy.

The prison capacity during the First Republic still did not suit the needs of the court, and therefore suffered from constant overcrowding. The report from 1920 shows that the average number of prisoners in that year was 500.

The German occupying forces took only a part of the building in the first floor of the rear wing, about 16 to 20 rooms, for their purposes in Cejl. The rest remained for the Czech Regional Criminal Court, where only Czech guards were employed and the conditions here were much milder. Shared prison kitchen was intended only for prisoners.

After the liberation the first new prisoners were mainly Germans, prisoners from the police prison, which was destroyed by bombing, and military prisoners. Groups of police and military prisoners left the building gradually until the end of 1945.

After the Second World War there were persons imprisoned and executed, who were sentenced according to the so called Major Retribution Decree.

After 1948 there were also political prisoners put in the prison. Some of them were even executed, ironically on the same gallows as Nazi criminals.

In fact, very soon after its completion the prison was no longer sufficient for its purposes, and thus, theyear 1956 with the final building approval of the newly-built detention center in Brno - Bohunicebrings an end to the Cejl prison.

The Bohunice Prison

The prison in Bohunice was built in 1956 and is designed in particular as a detention center.For serving imprisonment there was a section with moderate regime and a detention section for sentenced juvenile perpetrators established.

The penalty of imprisonment here is served by people sentenced to imprisonment in maximum security prisonsand all of them are employed under the direction of the prison with a capacity of 93 beds. In addition to these permanently stationed prisoners there are also prisoners stationed for a transitional period of time (going to enter the prison, escorts to other courts, etc.). The detention center Brno also has a section for serving imprisonment in maximum security prisons. It has a capacity of 10 beds and is intended for prisoners studying universities.

In 1997, the prison hospital with rehabilitation, specialist (internal, infectious, intermediate care unit and department of subsequent medical care) and psychiatric pavilion started operating in the premises of the Detention Center in Brno. From 1stJanuary 2009 the Institute of Security Detention started its operation in the premises of the Detention Center Brno, intended especially for mentally disturbed perpetrators of serious crimes. Since 15thSeptember 2005 the Detention Center has a new object in Rapotice about 30 km west of Brno.

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[3] Information primarily taken from the thesis of Hana Frišaufová: Věznice na Cejlu č. 71 v Brně¸ Faculty of Philosophy of Masaryk University. Brno 2011

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Some Remarks on the Coins as Potential Symbols of Roman Law Tradition

Renata Veselá – Karel Schelle***

There are not many things symbolizing the period they were created so well like a coin. It is an evidence of not just the economic strength of the subject issuing the coin but also the political and cultural maturation of such subject.

Roman coins are a beautiful proof of the matureness and culture of the human society more than two thousand years ago. Their appearance is highly perfect, with many details especially depicting various deities or the issuer.

The precursor of the aes signatum (signed copper) was the so called aes rude, lump raw copper. It was a piece of copper weighing 2 grams to 2.5 kilograms, which was used on the Italian territory as currency in the 1st millennium BC until the turn of the 3rd and 4th century BC. Aes signatum appears as the first Roman „coin" in the form of a bronze plate with dimensions 90 x 170 mm, weighing approximately 1600 grams. The image was created by casting metal in which the Romans often saw the animal. The most common was a bull, cattle. From the Latin term pecus (cattle) is derived the old Czech word for money - pecinka. There may have originated even the currently used Czech word for money, peníze.

This was followed by real round shaped coins. They were also made of copper, on both sides were reliefs. They are considered to be the beginning of the Roman coinage. They were called aes grave and reportedly weighed one pound or about 273 grams, later perhaps 327 grams.

After the year 290 BC gold and silver started being used for striking coins. Coins called didrachmas stamped with the legendary she-wolf nursing the Rome's founder, then were replaced by staters and dinars introduced between 213 -211 BC. The dinar was a silver coin struck in the first half of the third century BC, whose name is probably derived from the Latin denarius. From the Roman denarius (denarius grossus) from 211 BC probably derived the name of the later currency - the groschen.

In recent years of the Roman Republic new gold coin called aureus started to be struck. The coin with a weight of 5.46 to 7.28 grams and a diameter of 17-18 mm was highly valued.

Under the empire we still meet a number of other coins: solidus, quinarius, dupondius, follis, tremissis, centenionalis. Some of these coins were also found in our territory. Although they appear just as individual pieces, these archaeological relics clearly testify that the commercial and exploratory expeditions of the Romans reached our territory. It cannot be forgotten that coins also served to maintain military garrisons.

Some researchers believe that in many cases no direct payment occurred and Roman coins were not in circulation. They were only used in relation a Roman trader - our market and back. It is important to realize that the Germanic environment was dominated by the barter trading and there was no domestic coin. Sometimes there were used the older silver (not valid in Rome any more) dinars, or serrati (serrated coins) struck by Rome especially for trades with Germans.

The findings of these coins in our territory are quite numerous, especially individual pieces as if they were lost. Mass discoveries are rare and include a very large period, which could document a partially delayed circulation not related to the validity of coins in the territories controlled by the Romans. In particular there are coins from 1st - 2nd century and the 3rd - 4th century.[1]

The existence of advanced coins indicates a developed banking system in ancient Rome. And here we come to the Roman law relating to money trading.

Money trading in ancient Rome was operated by both, money changers (*nummularii*), dealing with money changing and antiforgery, and bankers (*argentarii*), dealing with traditional banking operations. The importance of both professions is not just the fact that they facilitated business relations of that time, but it can be found in the practical life and also in the law.

* JUDr. Renata Veselá, Ph.D., Department of the History of the State and Law, Faculty of Law, Masaryk University Brno, Czech Republic.
** Doc. JUDr. Karel Schelle, CSc., Department of the History of the State and Law, Faculty of Law, Masaryk University Brno, Czech Republic.

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Such considerable volume of money transactions in Rome performed by bankers caused the need for banking operations. The banker activities were supervised especially to avoid possible future disputes. The supervision of bankers in Rome was performed by the *praefectus urbi,* in provinces then by the administrator of each province. *Praefectus urbi* did not carry out just a kind of police surveillance of bankers, but also dealt with disputes arising from their activities: D.1.12.2 Paulus l.S. de off. praef. urb. *Adiri etiam ab argentariis vel adversus eos ex epistula divi hadriani et in pecuniariis causis potest* (Paulus, On town prefect's duties: *According to the edict of the deificated Hadrian, he /the prefect/ is submitted applications of bankers or against bankers relating to money cases*).

Praefectus urbi surveyed also money changers: D.1.12.1.9 Ulpianus l.S. de off. praef. urb. Praeterea curare debebit praefectus urbi, ut nummularii probe se agant circa omne negotium suum et temperent his, quae sunt prohibita. (Ulpianus, On town prefect's duties: Furthermore, it is the duty of the prefect to ensure that money changers act honestly in all their trading and limit the / action / which are prohibited.).

Ulpianus does not inform us any more what are such prohibited actions. But we can assume, that it was either the failure to comply with the usual local currency rate, or speculations with counterfeits.

The supervision of bankers was performed by supervising the accounts, led by the bankers: D.2.13.10pr. Gaius 1 ad ed. provinc. *Argentarius rationes edere iubetur: nec interest cum ipso argentario controversia sit an cum alio.* (Gaius, To the provincial edict, 1 Book: *The banker is ordered to keep the accounts. It is not a cause of dispute over whether to keep the accounts by himself / the banker / or / with the help of / someone else*). D.2.13.10.1 Gaius 1 ad ed. provinc. *Ideo autem argentarios tantum neque alios ullos absimiles eis edere rationes cogit, quia officium eorum atque ministerium publicam habet causam et haec principalis eorum opera est, ut actus sui rationes diligenter conficiant.* (Gaius, To the provincial edict, 1st book: *The reason why the praetor orders to maintain accounts just to bankers and not to other persons working in a different business is that activities of those bankers are in the public interest and their main task is to maintain carefully accounts of what they did*).

Bookkeeping of bankers was actually (at least formally) closely guarded by the state and for that matter, from the public point of view maintaining accounts appears as perhaps the most important banker activity *(…ministerium publicam…. sui rationes diligenter conficiant)*. Everyone who was engaged in banking activities was required to maintain accounts. If a slave dealt with such activity with his master's permission then his master was responsible for maintaining the accounts, even if the slave used his *peculium* as capital.[2] Even persons who ceased their banking activities are required to maintain accounts.[3] A heir of a banker must continue the bookkeeping of the bank. In the case that the bank is a part of a coparcenary, the accounts are to be maintained by the one who has the books.[4] Accounts are maintained at that location (in that province), where banking activities are performed, or where the business transactions was carried out.[5]

All relevant business transactions were recorded in the book of accounts by the banker *(codex accepti et expensi syn. ratio accepti et expensi)*. D.2.13.4pr. Ulpianus 4 ad ed. Praetor ait: *„argentariae mensae exercitores rationem, quae ad se pertinet, edent adiecto die et consule"*. (Ulpianus, To the edict 4th book: The praetor says: *„Those engaged in banking activities shall maintain accounts in matters relating to their business, indicating the day and the consul*").

Roman bankers kept three books. One contained records of the daily turnover, revenue and expenses. This book was called *adversalis* or *ephemeris.* The items were then transferred once a month to another book - the already mentioned *codex accepti et expensi.* This ledger included chronological records of cash revenues and expenses with receivables and liabilities of the bank. Every creditor and debtor had his own account there (*ratio*). This book had its income side (*ratio accepti*) and its expenditure side (*ratio expensi*). Even the banker had his account in this book. There was also a special side for non-cash payments (*ratio*). The *codex accepti et expensi* also included records of sham claims (as if *mutuum*) made with the consent of the debtor, which created the *litteratum* (literary contract). In certain regular periods the banker compiled balance (*rationem putare*), summed up the both sides of the book, deducted the higher amount from the lower (*rationem subducere*) and determined the balance of debts and receivables (*reliqua*).

The banker was required to submit books for inspection by the court (*edere rationes*). In the case that the banker did not maintain accounts, he was threatened with punishment, even in case of a willful and knowing error.[6] The punishment was the payment of a financial compensation in the amount of what had the financial transaction at the time when it had to be recorded in the respective ledger.[7]

Money changers were obliged to maintain accounts of all transactions, but maintains them just on the request of the client (in such case it was their duty).[8]

An interesting aspect of the relationship between banker and customer is the question of interest (*usurae*). They were set by accessoric obligation (usually *stipulation*), related to the primary obligation (mostly *mutuum*). At the time of the Republic of the usual level of interest varied around 12 %, under early principate around 6 %. the provinces the interests were significantly higher (sometimes up to 48 %).

Another area affecting the business of a Roman banker was the issue of financial compensation (*compensationes*). Although the relationship between banker and customer, was largely based on *bona fide* contracts (very often *mandata*), there is

2 D. 2, 13, 4, 3
3 D. 4, 13, 4, 4
4 D. 4, 13, 6, 1
5 D. 4, 13, 4, 5
6 D. 4, 13, 8 pr.
7 D. 4, 13, 8, 1
8 D. 2, 13, 9, 3

a situation, where the banker has to use an exactly given action under *stricti iuris.* The banker is obliged (*compensatio necessaria*) to sue his customers just after a collision of counterclaims from the same business connection (*agere cum compensatione*): Gaius IV., 64. *Alia causa est illius actionis, qua argentarius experitur. nam is cogitur cum conpensatione agere, et ea conpensatio uerbis formulae exprimitur, adeo quidem, ut statim ab initio conpensatione facta minus intendat sibi dari oportere. ecce enim si sestertium X milia debeat Titio, atque ei XX debeantur, sic intendit: SI PARET TITIVM SIBI X MILIA DARE OPORTERE AMPLIVS QVAM IPSE TITIO DEBET.* (*Different situation is with that action filed by the banker /against a borrower/: Cause he is forced to sue with compensation and the compensation is expressed /directly/ with the words of the formula. Even so, that /the banker as a result/ of performing compensation raises from the /very/ beginning the claim, that the /defendant/ is obliged to less performance. For, if he owes, say, 10 thousand sesterces to Titius and Titius owes him 20 thousand, he raises his claim as follows: If it turns out that Titus is obliged to give him 10 thousand more, than /what/ he owes to Titius. If he sued for just a little bit more than what was such difference, he lost the entire dispute*).[9]

The legal regulation of banker activities strengthened in a certain way also the position of informal promises (*pacta*), in the case of *recepta argentaria. Receptum argentarium* is an informal takeover of guarantees (falling under *pacta praetoria*) by the banker, who promises on a certain day to pay on behalf of his client an amount to a third party. For this person then emerges the action (*actio repticia*) against the banker, who failed to pay the promised amount. If such amount was covered by the client or not, there was a current or a credit account opened accordingly.

There were also situations where the banker was broker of an auction, cause even in such case we can find several interesting institutions. *Argentarius* is often the organizer of an auction, he also pays to local (*forani*) suppliers and producers of goods that were auctioned. As an assistant the banker had *argentarius coactor,* seeking to recover fees from non-resident buyers (*circumforani*). If a thing was sold at auction, the banker could not require the stipulated market price until the respective thing was delivered (*excepcio mercis non traditae*), unless otherwise agreed: Gaius IV., 126a. *Item si argentarius pretium rei, quae in auctionem uenerit, persequatur, obicitur ei exceptio, ut ita demum emptor damnetur, si ei res, quam emerit, tradita est, et est iusta exceptio. sed si in auctione praedictum est, ne ante emptori res traderetur, quam si pretium soluerit, replicatione tali argentarius adiuvatur aut si praedictum est, ne aliter emptori restraderetur, quam si pretium emptor solverit.* (*Also against a banker, requesting payment of the price of an item which was sold at auction shall be raised objection that a buyer should only be sentenced if the thing you bought was handed over to him. And this is a fair objection. But, if there was said in advance during the auction, that the respective thing won't be handed over to the buyer until he has paid the market price, then such replica is an aid for the banker, or if it was said in advance that such thing will be handed over to the buyer only after having paid the market price.*)[10]

Examples of aspects of some legal relations between bankers and customers are only for demonstration, illustrating the frequency of financial business relations in ancient Rome, and depending on the comprehensiveness of legal regulation.

[9] Gaius IV., 68

[10] Bartošek, M.: Encyklopedie římského práva, Praha, 1994; Bartošek, M. : Dějiny římského práva, Praha, 1995; Bürge, A.: Fiktion und Wirklichkeit: Soziale und rechtlichen Strukturen des römischen Bankwesen, ZSS 104, (1987), pp.465-558; Crook J. R.: Law and Life of Rome, pp.232-233; Hošek R., Marek V.: Řím Marka Aurelia, Praha 1990 ; Kincl J.: Gaius (Učebnice práva ve čtyřech knihách), Brno, 1999; Encyklopedie antiky, Praha 1974; Slovník antické kultury, Praha, 1974; Kurz K.: Finanční a mincovní správa za raného císařství, Num.listy, XLVII,(1993), 5 - 6, pp 129 – 137; Kurz K.: Úvod do antické numismatiky-Římské mince, Praha 1997; Sear D. R.: Greek Imperial coins and their Values, London, 1997; Suetonius: Životopisy dvanácti císařů (přel. B.Ryba), Praha, 1974; Zimermann R.: The Law of Obligations, pp.468-9, 514-5, 764-7; Watson A.(ed.): The Digest of Justinian [revised English-language edition], 2 vols. 1997

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