Jaromír Tauchen,
David Kolumber (eds.)

EDGE OF TOMORROW: THE NEXT GENERATION OF LEGAL HISTORIANS AND ROMANISTS

Collection of Contributions
from the 2022 International Legal History Meeting
of PhD Students

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Reviewer: prof. JUDr. PhDr. Tomáš Gábriš, PhD., LL.M., MA

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Introduction

The publication you are currently reading is an output of the International Meeting of PhD Students of Legal History and Roman Law that took place at the Masaryk University Faculty of Law in Brno on 8 and 9 September 2022. The idea for regular meetings of the youngest generation of legal historians and Roman law experts in the Czech and Slovak Republics was the brainchild of Karel Schelle and Jaromír Tauchen at the Department of the History of the State and Law in 2013. In the following years they welcomed PhD students from our fields and other Czech and Slovak law faculties, meaning that this year's international "PhD conference" in Brno had something on which to build.

The international conference of PhD students took place in the shadow of the fading COVID-19 pandemic, which between 2020 and 2022 impacted society not only in the Czech and Slovak Republics but all around the world, affecting the normal functioning of both teaching activities in higher education and also science. This unfortunately meant that many PhD students and young scientists were in the end unable to travel, however in spite of the unfavourable circumstances almost 30 conference guests from 10 countries travelled to Brno.

All conferences are important – and this is all the more true for PhD student conferences, because for many of them they are their first opportunity – in terms of both place and time – to meet and get to know colleagues from neighbouring countries and potentially create long-term personal friendships. The international meetings are unprecedented cases with unusual significance for all scholars but for PhD students they have ever been an astonishing possibility and we are delighted that we were able to provide this opportunity for the next generation of legal historians and Romanists.

This two-day meeting of PhD students studying legal history and Roman law enabled the exchange of experience and the mutual presentation of results of their research based on the themes of their dissertations. Such mutual acquaintance is, in our opinion, very important, as it enables the PhD students to develop mutual social ties and professional cooperation.

The friendly course of the conference was crowned by fruitful and convivial discussions that flared up during individual parts of the conference and that also continued during the accompanying programme prepared for the participants.

The published papers are sorted in chronological order, not alphabetical, and reflect the current professional level of the youngest generation of representatives of European legal history and Roman law.

Let us hope that this year's conference in Brno was not the last event of its type, that a tradition of annual international meetings of PhD students from European states can be established, and that one of the law faculties will take on this role in the coming years.

Jaromír Tauchen, David Kolumber

Editors

The Fraudulent Claim of One's Own Fundus (D. 21.2.73)[1]

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Abstract

The title 50.17 of Justinian's Digest lists many juristic rules *(regulae iuris)*. One of these juristic rules, which can be found in D. 50.17.173.3, reads as follows: *dolo facit, qui petit quod redditurus est*. An application of this rule is described in D. 44.4.8.1, which deals with a problem in the context of the law of succession. Due to the rule's character as a general rule, there must have been more cases in which an *exceptio doli* was granted because of *dolo facit, qui petit quod redditurus est*. However, it is difficult to find other cases of *dolo facit, qui petit quod redditurus est,* as no further direct evidence was cited in the Digest of Justinian. In this paper, I examine whether or not the *exceptio doli* referred to in D. 21.2.73 is a consequence of *dolo facit, qui petit quod redditurus est*.

Keywords

regulae iuris; dolo facit; qui petit quod redditurus est; Liability for Eviction; *actio ex testamento*.

1 Introduction

The term *regulae iuris* has been the subject of many discussions in the academic literature.[2] The roman jurist Paulus characterised *regula iuris* as follows:

> D. 50.17.1 (Paulus libro 16 ad Plautium)
>
> *Regula est, quae rem quae est breviter enarrat. non ex regula ius sumatur, sed ex iure quod est regula fiat. per regulam igitur brevis rerum narratio traditur, et,*

1 I want to thank Prof. Dr. Philipp Scheibelreiter for his revision and feedback on this paper.

2 See, for example, the monographs from STEIN, P. *Regulae Iuris. From Juristic Rules to Legal Maxims*. Edinburgh: University Press, 1966 and LIEBS, D. *Lateinische Rechtsregeln und Rechtssprichwörter*. 7. ed. München: C. H. Beck, 2007.

> *ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum.*
>
> *A rule is something which briefly describes how a thing is. The law may not be derived from a rule, but a rule must arise from the law as it is. By means of a rule, therefore, a brief description of things is handed down and, as Sabinus says, is, as it were, the element of a case, which loses its force as soon as it becomes in any way defective.*[3]

According to this short explanation, the term *ius* is not synonymous with *regula*. A *regula* is only a short repetition of the *ius (regula est, quae rem quae est breviter enarrat; per regulam igitur brevis rerum narratio traditur)*; therefore, the law cannot be deducted from the *regula (non ex regula ius sumatur)*.[4]

However, it is very likely that *regulae iuris* still held significance and were used by roman jurists to solve practical cases.[5] One of these juristic rules is the subject of analysis in this paper.

2 Dolo facit, qui petit quod redditurus est

The juristic rule *dolo facit, qui petit quod redditurus est* derives from one of Paulus's writings. In the Digest of Justinian, this rule appears twice.

> D. 44.4.8 pr. (= D. 50.17.173.3)-1 (Paulus libro sexto ad Plautium)[6]
>
> *Dolo facit, qui petit quod redditurus est. 1. Sic, si heres damnatus sit non petere a debitore, potest uti exceptione doli mali debitor et agere ex testamento.*
>
> *A person who claims what he will have to return acts fraudulently. 1. Thus, if an heir has been condemned not to claim from a debtor, the debtor can employ the defense of fraud, as well as bring an action based on the will.*[7]

---

3 Translation: CRAWFORD, M. In: WATSON, A. (ed.). *The Digest of Justinian IV.* Philadelphia: University of Pennsylvania Press, 1985, pp. 956–957.

4 On the distinction between *regula* und *ius,* see BÖHR, R. *Das Verbot der eigenmächtigen Besitzumwandlung im römischen Privatrecht. Ein Beitrag zur rechtshistorischen Spruchregelforschung.* München et al.: Saur, 2002, pp. 17–29.

5 See HAUSMANINGER, H. Nemo sibi ipse causam possessionis mutare potest – eine Regel der veteres in der Diskussion der Klassiker. In: SEIDL, E. (ed.). *Gedächtnisschrift für Rudolf Schmidt.* Berlin: Duncker & Humblot, 1966, p. 409.

6 *Ad Plautium libri* XVIII is a commentary written by Paulus, in which he discussed a popular work of Plautius; see LIEBS, D. Iulius Paulus. In: SALLMANN, K. (ed.). *Handbuch der Altertumswissenschaft VIII, 4.* München: C. H. Beck, 1997, 152.

7 Translation: BEINART, B. In: WATSON, A. (ed.). *The Digest of Justinian IV.* Philadelphia: University of Pennsylvania Press, 1985, p. 636.

In this text of the Digest of Justinian which was taken from Paulus (ad Plautium), *dolo facit, qui petit quod redditurus est* was mentioned in D. 44.4.8 pr. and later illustrated by an example in D. 44.4.8.1. Furthermore, *dolo facit, qui petit quod redditurus est* was also incorporated in the Digest of Justinian in the context of juristic rules (D. 50.17.173.3), but without any further explanation.

The meaning of *dolo facit, qui petit quod redditurus est* is clear. A creditor should not be able to *"claim* [from the debtor] *what he subsequently had to hand over again in any event."*[8] In the example from Paulus, the testator ordered in his will the discharge of his debtor from an obligation. However, such an order did not have a direct redemptive effect. The debtor (legatee) could have enforced his redemption by suing the heir with the *actio ex testamento*.

On the one hand, the heir was able to sue the debtor (legatee) because he inherited the obligation from the testator. On the other hand, the debtor (legatee) was allowed to sue the heir for the same sum he owed with the *actio ex testamento*.[9] In order to prevent excessive or unnecessary litigation,[10] Paulus concluded that the debtor (legatee) was not forced to pay; he could immediately refuse to pay and argue that a creditor who sues for something he has to give back acts with *dolus*. Therefore, the debtor (legatee) could have countered the action of the creditor with an *exceptio doli*.[11]

The case outlined by Paulus in D. 44.4.8.1 is, by my assessment, an effective example[12] of *dolo facit, qui petit quod redditurus est*. It is questionable whether more examples of *dolo facit, qui petit quod redditurus est* can be found in the Digest of Justinian.

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8 ZIMMERMANN, R. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Clarendon Press, 1996, p. 724.

9 See KRÜGER, H. Die liberatio legata in geschichtlicher Entwicklung. *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart*. 1894, Vol. 21, pp. 317–319.

10 See WACKE, A. Das Rechtssprichwort. Dolo facit, qui petit quod (statim) redditurus est. *Juristische Arbeitsblätter*, 1982, no. 10, p. 477.

11 In cases in which *dolo facit, qui petit quod redditurus est* was applicable, the defendant was most often granted an *exceptio doli*; however, in some cases, the *praetor* already denied the action *(denegatio actionis)* due to *dolo facit, qui petit quod redditurus est* or the judge (*index*) had to take *dolo facit, qui petit quod redditurus est* into consideration (*bonae fidei iudicium*); see MADER, P. Dolo facit qui petit quod redditurus est. In: SCHERMAIER, M. J., RAINER, J. M., WINKEL, L. C. (eds.). *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, Köln et al.: Böhlau, 2002, p. 419.

12 KRÜGER, 1894, op. cit., pp. 317–318; different: ARNDTS VON ARNESBERG, K. L. *Lehrbuch der Pandekten*, 6. ed. München: J. G. Cotta'sche Buchhandlung, 1868, p. 433.

3 D. 21.2.73: Another Case of *dolo facit, qui petit quod redditurus est*?

An analysis of how many cases of *dolo facit, qui petit quod redditurus est* are present in the Digest of Justinian would go beyond the scope of this paper. However, one possible further case from the writings of Paulus is subject to a detailed analysis below.

> D. 21.2.73 (Paulus libro septimo responsorum)
>
> *Seia fundos Maevianum et Seianum et ceteros doti dedit: eos fundos vir Titius viva Seia sine controversia possedit: post mortem deinde Seiae Sempronia heres Seiae quaestionem pro praedii proprietate facere instituit: quaero, cum Sempronia ipsa sit heres Seiae, an iure controversiam facere possit. Paulus respondit iure quidem proprio, non hereditario Semproniam, quae Seiae de qua quaeritur heres exstitit, controversiam fundorum facere posse, sed evictis praediis eandem Semproniam heredem Seiae conveniri posse: vel exceptione doli mali summoveri posse.*
>
> *Seia gave in dowry the Maevian, Seian, and other estates; her husband, Titius, possessed these lands without dispute during Seia's life; but after Seia's death, her heiress, Sempronia, instituted proceedings on the issue of the ownership of the property; my question is: Can Sempronia, being Seia's heiress, lawfully raise such an action? Paul's reply was this: Sempronia, suing in her own right and not as Seia's heiress, can raise an issue over title to the land, but in the event of eviction from that land, Sempronia, as heiress of Seia, can be sued or, at any rate, be resisted with the defense of fraud.*[13]

Seia provided her husband Titius with a dowry of a few estates. One of these estates belonged to Sempronia, who, after Seia died, became Seia's heiress. Sempronia wanted her estate back from Titius and therefore sued him. According to Paulus, Sempronia was not able to claim her estate due to her position as an heiress, but could claim it because of her own right *(iure quidem proprio, non hereditario)*.

After the death of a wife, the dowry usually belonged to the husband, not to the heir of the wife.[14] However, as Seia gave Sempronia's estate in dowry,

13 Translation: THOMAS, J. A. C. In: WATSON, A. (ed.). *The Digest of Justinian II*. Philadelphia: University of Pennsylvania Press, 1985, p. 632.

14 WACKE, A. Die letztwillige Befreiung vom Mitgiftrückgabeversprechen. Zur Entwicklung des Testierrechts über die dos. In: SLAPNICAR, K. (ed.). *Tradition und Fortentwicklung im Recht. Festschrift zum 90. Geburtstag von Ulrich von Lübtow am 21. August 1990*. Rheinfelden et al.: Schäuble, 1991, p. 64.

Seia could not transfer ownership of the estate to Titius, which means that Sempronia was still the owner of the estate and could therefore claim it back.[15]

Meanwhile, Titius also could have sued, because Seia was not able to procure Titius the peaceable possession of the estate.[16] Due to the fact that Seia was no longer alive, Titius could establish an *actio* against her heiress (Sempronia).

This constellation shares similarities with the one described in D. 44.4.8.1. Sempronia was able to sue Titius and Titius could have sued Sempronia. In order to prevent two lawsuits from occurring, Titius could have, if sued, defended himself with an *exceptio doli*.

Kupisch therefore referred in his translation of D. 21.2.73 to *dolo facit, qui petit quod redditurus est* by mentioning D. 50.17.173.3.[17] However, the situation in D. 21.2.73 is less clear, because the claims of Titius and Sempronia differ. Sempronia could have claimed her estate, and Titius – if his *dos* (Semponia's estate) was evicted – would not have been able to get the *dos* back.[18]

In my opinion, the situation described in D. 21.2.73 must be viewed from an economic perspective. Titius had to give Sempronia's estate to Sempronia and could then claim a payment from Sempronia. As, most likely, the payment which Titius could get from Sempronia equalled[19] the value of Sempronia's estate, it was not practical from an economic perspective to allow two (successful) lawsuits. Therefore, Titius had the right to defend himself with an *exceptio doli* against Sempronia's claim.

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15 On the problem of dealing with eviction as a defect in titel, see BENKE, N., MEISSEL, F.-S. *Roman Law of Obligations. Origins and Basic Concepts of Civil Law II. Translated by Caterina Maria Grasl.* Wien: Manz, 2021, p. 150; KASER, M., KNÜTEL, R., LOHSSE, S. *Römisches Privatrecht*, 22. ed. München: C. H. Beck, 2021, p. 306.

16 A man who received an estimated dowry was treated like an emptor; he could, in the case of an eviction, sue the seller with the *actio empti*, see BECHMANN, A. *Das römische Dotalrecht I.* Erlangen: Deichert, 1863, p. 223. Also an action resulting from a *stipulatio habere licere* was maybe possible.

17 KUPISCH, B. In: BEHRENDS, O., KNÜTEL, R., KUPISCH, B., SEILER, H. H. (eds.). *Corpus Iuris Civilis IV, Text und Übersetzung: Digesten 21–27.* Heidelberg: C.F. Müller, 2005, p. 81.

18 See WACKE, A. Die Konvaleszenz der Verfügung eines Nichtberechtigten. Zur Dogmatik und vergleichenden Geschichte des § 185 Abs. 2 BGB. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung.* 1997, Vol. 114, pp. 199–200.

19 Or maybe even (if a *stipulatio duplae* took place) exceed the value of Sempronia's estate.

4 Commonality between D. 44.4.8 pr.-1 and D. 21.2.73

The *exceptio doli* mentioned in D. 21.2.73 is optional. Paulus used the word *"vel"* in order to demonstrate that Titius had the right to defend himself with an *exceptio doli*. However, it was also possible for him to return the estate to Sempronia. This option would have only made sense if he would have been able to claim more after he had given back the estate. Such a situation is easy to imagine: if Seia would have promised to Titius to pay the *duplum* if eviction took place *(stipulatio duplae)*,[20] Titius would have been able to claim from Seia's heiress (Sempronia) the *duplum*. Of course, under such a condition *(stipulatio duplae)*, Sempronia should not have claimed the estate from Titius and therefore prevented the eviction and her liability for the *duplum*.

In a constellation similar to that described in D. 21.2.73, it is clear why a defendant might not have chosen to bring forward an *exceptio doli*. He had the opportunity to receive more, after eviction took place, with an action based on the *stipulatio duplae*.

It is questionable whether it could have been advantageous for the debtor (legatee) in a situation like that in D. 44.4.8.1[21] not to defend himself with the *exceptio doli*, but instead to pay his debt. If the debtor or legatee had paid his debt, he would have been able to sue the heir with the *actio ex testamento*.

With the *actio ex testamento,* the legatee could enforce the *legatum per damnationem*. Thus, if the redemption of an obligation was bequeathed, the legatee could force the heir to release him of his debt in the form of an *acceptilatio* or a *pactum de non petendo*.[22] After payment from the legatee to the heir, the debt does not exist anymore, and therefore the legatee can no longer enforce a formal release of the debt with the *actio ex testamento*. However, according to the will of the testator, the legatee should pay. This

20 See BENKE, MEISSEL, op. cit., p. 153; KASER, KNÜTEL, LOHSSE, op. cit., p. 313.
21 See '3. D. 21.2.73: Another case of dolo facit, qui petit quod redditurus est?'.
22 See MADER, op. cit., p. 417.

result can be achieved if the legatee can claim his money back; the legatee can claim the return of his money with the *actio ex testamento*.[23]

However, it remains questionable why a legatee would intentionally pay and later claim the money back from the heir. In my opinion, the legatee could have gotten a more favourable version of the *actio ex testamento*. Such a version was presented by Gaius.

> Gai. 4.9
>
> *Rem vero et poenam persequimur velut ex his causis, ex quibus adversus infitiantem in duplum agimus; quod accidit per actionem iudicati, depensi, damni iniuriae legis Aquiliae, aut legatorum nomine, quae per damnationem certa relicta sunt.*
>
> *We seek both property and penalty, on the other hand, in those cases where, for instance, we raise an action for double damages against someone who denies a claim, as happens with an action on judgment debt, on expenditure, for wrongful loss under the Aquilian Act, or for definite thing left by obligatory legacy.*[24]

One of the actions with litiscrescence mentioned in Gai. 4.9 is the *actio ex testamento*. Litiscrescence means that a defendant had to pay the *duplum* as a penalty if he denied the action in front of the *praetor (in iure)* and lost the trial.[25] According to Gai. 4.9, only the *actio certi ex testamento* included the procedural penalty of litiscrescence *(damnationem certa relicta sunt)*.

A debtor (legatee) who did not fulfil his obligation and sued the heir with the *actio ex testamento* demanded an act in the form of an *acceptilatio* or a *pactum de non petendo*. This was an *incertum*. If, however, the debtor (legatee) paid and demanded his money back, he demanded a *certum* and therefore the *actio ex testamento* in this case contained litiscrescence.

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23 KRÜGER, 1894, op. cit., p. 318; an example in which the payment could be claimed back with an *actio ex testamento* was provided by Ulpianus. D. 34.3.7.7 (Ulpianus libro 23 ad Sabinum): *Nam et si debitori liberatio sub condicione legata fuisset et vel lis fuisset contestata vel etiam exactum pendente condicione, ex testamento actio maneret liberatione relicta.*
Translation: JAMESON, S. In: WATSON, A. (ed.). *The Digest of Justinian III*. Philadelphia: University of Pennsylvania Press, 1985, p. 159. For, even if release had been left to the debtor conditionally and issue had been joined or [the debt] been collected while the condition was in suspense, an action on the will would subsist in respect of the release that had been left to him.

24 Translation: GORDON, W. M., ROBINSON, O. *The Institutes of Gaius*. 2. ed. London: Duckworth, 2001, pp. 405–407.

25 See BINDER, M. Procedural peculiarities of the lex Publilia de sponsu. In: *Journal on European History of Law*. 2022, Vol. 13, no. 1, p. 229.

5 Conclusion

In this paper, I sought to analyse the juristic rule *dolo facit, qui petit quod redditurus est*. According to this rule, a plaintiff acts fraudulently if he claims something from the defendant which he later has to return again. It was necessary in my analysis to start with D. 44.4.8 pr. (= D. 50.17.173.3)-1, where this juristic rule and an example of this rule can be found.

My goal was to explore, in addition to D. 44.4.8.1, another example of *dolo facit, qui petit quod redditurus est* and to compare the two cases. I identified an example in D. 21.2.73. It is clear in this case that Sempronia could claim her estate and Titius could claim, if forced to return the estate to Sempronia, a payment because of the eviction. Therefore, Semponia would not claim what she would later have to return to Titius. Nevertheless, the unnecessary exchange of the estate and the payment (which had the same or a higher value) could be prevented by Titius with an *exceptio doli* against Sempronia.

Interestingly, Titius in this case was in no way forced to bring forward an *exceptio doli*. Titius's option was expressed in the text with the Latin word *vel*. He could have returned the estate and then sued Sempronia. One can only speculate about the possible reasons for doing so. It is possible that Titus did not only have the option of the *actio empti*, but also a more favourable action from a *stipulatio*.

Analysing D. 21.2.73 can help to better understand D. 44.4.8.1. In D. 44.4.8.1, the defendant (debtor/legatee) must have had the same option. He could have either defended himself with an *exceptio doli* or made a payment to the heir and later claimed his money back with an *actio ex testamento*. The question arises why an individual would intentionally pay and later claim the same money back if he had the option to immediately deny the payment. In my opinion, the reason could have been a procedural penalty called litiscrescence. If a legatee claimed his money back from the heir with an *actio certi ex testamento* and the heir denied his liability and lost the lawsuit, then the legatee would be rewarded with double the amount *(duplum)* of what he had claimed.

References

ARNDTS VON ARNESBERG, K. L. *Lehrbuch der Pandekten*. 6. ed. München: J. G. Cotta'sche Buchhandlung, 1868.

BECHMANN, A. *Das römische Dotalrecht I*. Erlangen: Deichert, 1863.

BEHRENDS, O., KNÜTEL, R., KUPISCH, B., SEILER, H. H. (eds.). *Corpus Iuris Civilis IV, Text und Übersetzung: Digesten 21–27*. Heidelberg: C. F. Müller, 2005.

BENKE, N., MEISSEL, F.-S. *Roman Law of Obligations. Origins and Basic Concepts of Civil Law II*. Wien: Manz, 2021. DOI: https://doi.org/10.1515/zrgr-2022-0038

BINDER, M. Procedural peculiarities of the lex Publilia de sponsu. In: *Journal on European History of Law*. 2022, Vol. 13, no. 1, pp. 227–232.

BÖHR, R. *Das Verbot der eigenmächtigen Besitzumwandlung im römischen Privatrecht. Ein Beitrag zur rechtshistorischen Spruchregelforschung*. München et al.: Saur, 2002. DOI: https://doi.org/10.1515/9783110958676

GORDON, W. M., ROBINSON, O. *The Institutes of Gaius*, 2. ed. London: Duckworth, 2001.

HAUSMANINGER, H. Nemo sibi ipse causam possessionis mutare potest – eine Regel der veteres in der Diskussion der Klassiker. In: SEIDL, E. (ed.). *Gedächtnisschrift für Rudolf Schmidt*. Berlin: Duncker & Humblot, 1966, pp. 399–412.

KASER, M., KNÜTEL, R., LOHSSE, S. *Römisches Privatrecht*, 22. ed. München: C. H. Beck, 2021.

KRÜGER, H. Die liberatio legata in geschichtlicher Entwicklung. *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart*. 1894, Vol. 21, pp. 289–338.

LIEBS, D. Iulius Paulus. In: SALLMANN, K. (ed.). *Handbuch der Altertumswissenschaft VIII, 4*. München: C. H. Beck, 1997, pp. 150–175.

LIEBS, D. *Lateinische Rechtsregeln und Rechtssprichwörter*, 7. ed. München: C. H. Beck, 2007.

MADER, P. Dolo facit qui petit quod redditurus est. In: SCHERMAIER, M., RAINER, J., MICHAEL, J., WINKEL, C. L. (eds.). *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*. Köln et al.: Böhlau, 2002, pp. 417–430.

STEIN, P. *Regulae Iuris. From Juristic Rules to Legal Maxims*. Edinburgh: University Press, 1966.

WACKE, A. Das Rechtssprichwort. Dolo facit, qui petit quod (statim) redditurus est. *Juristische Arbeitsblätter*. 1982, no. 10, pp. 477–479.

WACKE, A. Die Konvaleszenz der Verfügung eines Nichtberechtigten. Zur Dogmatik und vergleichenden Geschichte des § 185 Abs. 2 BGB. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*. 1997, Vol. 114, pp. 197–232. DOI: https://doi.org/10.7767/zrgra.1997.114.1.197

WACKE, A. Die letztwillige Befreiung vom Mitgiftrückgabeversprechen. Zur Entwicklung des Testierrechts über die dos. In: SLAPNICAR, K. (ed.). *Tradition und Fortentwicklung im Recht. Festschrift zum 90. Geburtstag von Ulrich von Lübtow am 21. August 1990*. Rheinfelden et al.: Schäuble, 1991, pp. 63–75.

WATSON, A. (ed.). *The Digest of Justinian II*. Philadelphia: University of Pennsylvania Press, 1985.

WATSON, A. (ed.). *The Digest of Justinian III*. Philadelphia: University of Pennsylvania Press, 1985.

WATSON, A. (ed.). *The Digest of Justinian IV*. Philadelphia: University of Pennsylvania Press, 1985.

ZIMMERMANN, R. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Clarendon Press, 1996. DOI: https://doi.org/10.1093/acprof:oso/9780198764267.001.0001

Non-pledgeable Property in Ancient Law – A Reflection of *favor debitoris*?

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Abstract

One of characteristic features of ancient law was a particular form of restriction on contractual autonomy in the form of provisions on the non-pledgeability of items indispensable for the social or economic life of citizens. This paper outlines the evolution of the closely related provisions in the Code of Hammurabi, the Decalogue, the Code of Gortyn, and Roman Imperial Constitutions, and considers the underlying motives for their enactment. A particular question is whether the relevant norms on non-pledgeability of the Roman Imperial period were motivated by a Christian tendency to favour the debtor *(favor debitoris)*.

Keywords

Pledge; Restriction of Contractual Autonomy; the Law of Things; *favor debitoris*.

1 Introduction

Ἐγγύα πάρα δ Ἄτα,[1] an adage attributed to the Seven Wise Men and reputedly inscribed on a column of the Delphic oracle, can be interpreted both as a warning against taking surety as well as against pledging. A potentially harmful and easily misused institution was one of the crucial matters of debt regulation in ancient laws. A common aspect of the Babylonian, Hebrew,

1 DIODORUS. *Bibliotheca historica* 9, 10. The saying, usually translated as "Surety brings ruin", can generally be understood as a warning against taking on too many demanding commitments. Liddell and Scott translate the word ἐγγύα (ἐγγύ-η) as a "pledge put into one's hand" as well as "a surety, security, whether received or given". Therefore, one could also translate the saying as "Pledge is close to ruin". See LIDDELL, H. G., SCOTT, R. *A Greek-English Lexicon*. Oxford: Clarendon Press, 1996, p. 468.

and Greek legal tradition was a limitation of contractual autonomy by way of designating certain objects, indispensable for the social or economic life of citizens, as being non-pledgeable. According to the prevailing opinion, early Roman law, which is usually considered to have great respect for private autonomy, did not impose any socially oriented legal restrictions on pledging. While such restrictions first appear in Imperial law in a rather limited form, their origin and the rationale for their enactment is still in dispute. A particular question is whether the relevant reforms of Roman Imperial period were motivated by a Christian tendency to favour the debtor *(favor debitoris)*.

2 Non-pledgeability in Ancient Law

The pledge is probably the most important form of debt security in ancient laws. At the same time, many legal precepts emphasized the importance of at least providing a minimally secure living environment for the destitute debtors.

In the Code of Hammurabi, an express clause threatens, under the penalty of forfeiting one-third of a mine of silver, a creditor who would take an ox as a pledge.[2] The reasoning behind the rule is clear: without its ox, a poor family would have been unable to cultivate its property and would thus ultimately lack the resources to pay back a loan.[3]

Many rules which strive to provide protection and dignity to the borrower by limiting pledgeability can be derived from Hebrew law.[4] The norms of Deuteronomy, characterized by their humanitarian and social orientation, intend to protect the most vulnerable classes of society, especially widows, orphans, and the "poor" at large.[5] Some Biblical rules share the policy

2 The Code of Hammurabi § 241: *"If a man seizes an ox for debt, he shall pay one-third mana of silver."* English translation by HARPER, R. F. *The Code of Hammurabi, King of Babylon*. Chicago: The University Press, 1904, p. 85.

3 WESTBROOK, R. *A History of Ancient Near Eastern Law. Volume One*. Leiden, Boston: Brill, 2003, p. 406.

4 WESTBROOK, R. *Security for Debt in Ancient Near Eastern Law*. Leiden, Boston, Köln: Brill, 2001, pp. 254–256.

5 RASOR, P. Biblical Roots of Modern Consumer Credit Law. *Journal of Law and Religion*. 1993–1994, Vol. 10, no. 1, p. 164.

of modern exemption law by stating that the creditors should not deprive debtors of the necessities of life, although they are unable to pay the debts.[6]

The Decalogue makes it clear that a pledgee was not allowed to take a millstone from a debtor as security for debt as whoever took the millstone, took what was necessary to preserve the life of the debtor and his family, and in this sense, he literally "pledged their lives".[7] Moreover, creditors were urged to be particularly considerate of the poorest when contracting pledges.[8] Whoever received a cloak from a poor man as a pledge was to return it to him before sunset so that the man may sleep in it and protect himself from the cold of the night. Then, as stated in Deuteronomy, *"the poor pledgor would be grateful, and the Lord pleased with the pledgee"*.[9] Similarly, it was forbidden to receive as a pledge the cloak of a widow, who was an archetype of a destitute, defenceless, and vulnerable person.[10] Nevertheless the Bible recounts many violations of the aforementioned rules.[11]

The Gortyn law from the 5th century BC exempted the weapon of a free man, loom, wool, iron tools, a plough, ox-yokes, hand-mill stones, equipment from the men's quarters, and marriage beds from being taken as pledges.[12] Furthermore, Oxylus king of Elis is purported to have enacted a law that forbids the securing of loans on a certain proportion of a man's property.[13] A contract resulting in the economic and social ruin of the debtor would

6 RASOR, 1993–1994, op. cit., p. 180.

7 Deut 24: 6: *"Do not take a pair of millstones – not even the upper one – as security for a debt, because that would be taking a person's livelihood as security* (ψυχὴν οὗτος ἐνεχυράζει)."

8 Amos 2: 7: *"They trample on the heads of the poor as on the dust of the ground and deny justice to the oppressed."*

9 Dt 24: 12−13: *"If the neighbor is poor, do not go to sleep with their pledge in your possession. (13) Return their cloak by sunset so that your neighbor may sleep in it. Then they will thank you, and it will be regarded as a righteous act in the sight of the Lord your God."* See also Exod. 22: 25.

10 Deut 24, 17.

11 Job 24, 3. See also Ezek. 22:12; Neh. 5:1−12.

12 Coll. II: "… ὅπλα ἀνδρὸς ἐλευθέρο ὅττ᾽ [ἐ]νς πόλεμο(ν) ἴσχει, πλὰν Fέμας χἀνπιδέμᾶς, ἰστός, ἔρια χἐρίθεχνα Fεργαλεῖα, σιδάρια, ἄρατρον, δυγὸν βοον, χάπετον, μύλανς, ὄνον ἀλέταν, ἐ(χ)ς ἀνδρείο ὅτ᾽ ὀ ἀρχὸς παρέχει χατ᾽ ἀνδρεῖον, εὐνὰ ἀνδρὸς καὶ γυναικός…" Edited by DARESTE, R., HAUSSOULLIER, B., REINACH, T. *Recueil des inscriptions juridiques Grecques. Deuxième Série*. Paris: Ernest Leroux, 1898, p. 328. The list of non-pledgeable things is of special historical interest as it is constituting the essential possessions of a free person in Gortyn. See WILLETS, R. F. *Aristocratic Society in Ancient Crete*. London: Routledge, 1995, p. 221.

13 ARISTOTELES. *Polit*. 1319a 12.

be illegitimate since no Greek polis could afford citizens without weapons or existential goods.[14]

According to the Law of Ptolemaic Egypt, as described by Diodorus of Sicily, debtors may only be required to repay debts from their estates and under no circumstances could the debtor's person be seized: it would be absurd for a soldier to be placed under arrest by his creditor as he prepared to fight for his country. Thus, private citizens' greed may put everyone's safety at risk. This regime, however, appears to deviate from the "Panhellenic" legal rule, reflected by the law of Gortyn:[15]

> Diodorus, *Bibliotheca historica* 1, 79: Μέμφονται δέ τινες οὐκ ἀλόγως τοῖς πλείστοις τῶν παρὰ τοῖς Ἕλλησι νομοθετῶν, οἵτινες ὅπλα μὲν καὶ ἄροτρον καὶ ἄλλα τῶν ἀναγκαιοτάτων ἐκώλυσαν ἐνέχυρα λαμβάνεσθαι πρὸς δάνειον, τοὺς δὲ τούτοις χρησομένους συνεχώρησαν ἀγωγίμους εἶναι.[16]
>
> Diodorus, The Historical Library 1, 79: But certain individuals find fault, and not without reason, with the majority of the Greek lawgivers, who forbade the taking of weapons and ploughs and other quite indispensable things as security for loans but allowed the men who would use these implements to be subject to imprisonment.[17]

In the Greek world at large, the poor debtors were allowed to pledge their own body or the bodies of their children.[18] Indeed, the debt-bondage was,

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14 WEISS, E. *Pfandrechtliche Untersuchungen, Beiträge zum römischen und hellenischen Pfandrecht enthaltend*. Weimar: Hermann Böhlau, 1909, p. 27; HITZIG, H. F. *Das griechische Pfandrecht. Ein Beitrag zur Geschichte des griechischen Rechts*. München: Ackermann, 1895, p. 20.

15 WEISS, 1909, op. cit., p. 28, spoke about "offenbar gemeingriechische Gedanke".

16 Edition: VOGEL, F. *Diodori Bibliotheca Historica*. Stuttgart: Teubner, 1985.

17 English translation by OLDFATHER, Ch. H. *Diodorus of Sicily in Twelve Volumes I*. Harvard University Press, 1933, p. 273.

18 ISOCRATES, *Plataicus* 14, 48: τίνα γὰρ ἡμᾶς οἴεσθε γνώμην ἔχειν ὁρῶντας καὶ τοὺς γονέας αὐτῶν ἀναξίως γηροτροφουμένους καὶ τοὺς παῖδας οὐκ ἐπὶ ταῖς ἐλπίσιν αἷς ἐποιησάμεθα παιδευομένους, ἀλλὰ πολλοὺς μὲν μικρῶν ἕνεκα συμβολαίων δουλεύοντας, ἄλλους δ᾽ ἐπὶ θητείαν ἰόντας, τοὺς δ᾽ ὅπως ἕκαστοι δύνανται τὰ καθ᾽ ἡμέραν ποριζομένους, ἀπρεπῶς καὶ τοῖς τῶν προγόνων ἔργοις καὶ ταῖς αὐτῶν ἡλικίαις καὶ τοῖς φρονήμασι τοῖς ἡμετέροις;. [What, think you, is our state of mind when we see our own parents unworthily cared for in their old age, and our children, instead of being educated as we had hoped when we begat them, often because of petty debts reduced to slavery, others working for hire, and the rest procuring their daily livelihood as best each one can, in a manner that accords with neither the deeds of their ancestors, nor their own youth, nor our own self-respect?]. Edition and English translation by NORLIN, G. *Isocrates. Isocrates with an English Translation in three volumes*. London, 1980.

except for Solon's Athens,[19] widespread in ancient Greece[20] and the same applies to various Middle Eastern legal traditions.[21]

3 Non-pledgeability in Roman Law

3.1 Classical Roman Law

The jurist Gaius provides us with a very unequivocal statement regarding the object of the pledge. Whatever can be sold can also be pledged.[22] The object of the pledge hence consisted in every patrimonial right which was not exempted from legal traffic *(res in commercio),*[23] i.e. not only corporeal and incorporeal things[24] but also assets which constituted so-called general hypothecs.

There were, however, some exceptions to the rule that, at least at first glance, seem to take the social dimension into account.

In republican times, the *pater familias* was not only entitled to sell but also to pledge his child.[25] The right over the child, deriving from his *patria potestas*, was regarded as potentially profitable and could therefore be exploited

19 On the well-known law which Solon is supposed to have brought to Athens from Egypt in 594 BC (the so-called σεισάχθεια, literally "shaking-off the burdens"), see ARISTOTELES, *Const. Ath. 6, 1*; PLUTARCH, *Sol.* 15, 3.

20 MILLET, P. *Lending and Borrowing in Ancient Athenes*. Cambridge: Cambridge University Press, 1991, p. 78; MITTEIS, L. *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*. Leipzig: Teubner, 1891, p. 359.

21 See Exod. 21:7; Neh. 5:5; 2 Kings 4:1; Isa. 50:1.

22 D. 20, 1, 9, 1 Gai. 9 ad ed. provinc.: *Quod emptionem venditionemque recipit, etiam pignerationem recipere potest*.

23 On this see DERNBURG, H. *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts*. Zweiter Band. Leipzig: Hirzel, 1864, p. 426 s.

24 Even though administrative positions, such as *adiutores sacri palatii*, were negotiable under Roman imperial law (Nov. 35), they were not deemed to be pledgeable. In Justinian's law, a pledgee in the case of a general pledge was permitted by Justinian's order to seize and sell an office (Iust. C. 8, 13, 27, 1). According to the later enactment, imperial permission was required for the pledge of the official post (Nov. 53, 5 pr.). See DERNBURG, H. *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts*. Leipzig: Hirzel, 1964, pp. 422–425.

25 CICERO. *De Orat.* 1, 181, claims that the notion of the *patria potestas* had originally included a kind of a right to sell one's children. See also Gai. 1, 132; 5, 79. During the period for which we possess reliable sources, the sale of a free person is void (Paul. D. 18, 1, 34, 2). Emperor Caracalla disapproved of a father's sale of a freeborn son as an illicit and dishonest act (C. 7, 16, 1).

commercially. It was not until the Imperial era, which sought to curtail the private autonomy of the *pater familias* and transform the precepts of morality and piety into legal norms, that the pledging of children was forbidden.[26] They were not *in commercio* and could thus not be pledged even with their own or the father`s consent.[27] From this point onward, the pledge of children was declared null and void and anyone who knowingly took a household's child as a pledge was threatened with the penalty of deportation.[28]

The question of whether the Romans imposed any societal limitations on pledging beyond the mentioned family-law context emerges especially when considering a very wide range of pledgeable objects as pronounced by Gaius. In this respect, two approaches should be mentioned. The first concerns the interpretation of the general pledge and the second the exclusion of specific items as an object of the pledge.

1. Following a strict interpretation of general pledge, the creditor would be allowed to seize the pledgor's personal belongings or the things that comprise the basis of the pledgor's existence. Ulpian mentioned the established presumption exempting the furniture, clothes, and things which had a special emotional value for the pledgor – for example, house slaves, unmarried apprentices, and concubines

26 C. 4, 43, 1 Diocl./Maxim. AA. et CC. Aureliae Papinianae: *Liberos a parentibus neque venditionis neque donationis titulo neque pignoris iure aut quolibet alio modo, nec sub praetextu ignorantiae accipientis in alium transferri posse manifesti iuris est.* <a. 294 D. XVI k. Dec. Nicomediae CC. conss.>

27 Pomp. D. 18, 1, 6 pr. (Pomp. 9 ad Sab.): *Sed Celsus filius ait hominem liberum scientem te emere non posse…* C. 8, 16, 6 Diocl./Maxim. AA. et CC. Rufo: *Qui filios vestros vel liberos homines pro pecunia quam vobis credebat pignoris titulo accepit, dissimulatione iuris se circumvenit, cum sit manifestum obligationem pignoris non consistere nisi in his, quae quis de bonis suis facit obnoxia.* <a. 293 s. k. Mai. Heracliae AA. conss.> Dernburg assumed that Quintilian was referring to an unknown Greek statute. DERNBURG, H. *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts. Zweiter Band*. Leipzig: Hirzel, 1964, p. 429, n. 24.

28 Paul. 5, 1, 1: *Qui contemplatione extremae necessitatis aut alimentorum gratia filios suos vendiderint, statui ingenuitatis eorum non praeiudicant: homo enim liber nullo pretio aestimatur. Idem nec pignori ab his aut fiduciae dari possunt: ex quo facto sciens creditor deportatur.* See also Paul. D. 20, 3, 5 (Paul. 5 sent.)

and their children.[29] These things were assumed to not have been pledged individually by the owner and the named presumption had no meaning either in the case of special pledges or non-contractual pledges.[30]

2. There are no direct legal sources from the pre-classical and classical eras regarding the non-pledgeability of certain objects.[31] However, from Quintilian's discussion on syllogistic reasoning in the *Institutio oratoria* it is possible to draw the conclusion that a rule prohibiting the pledging of the plough as the primary agricultural means of production might have already existed in ancient Rome.[32] In this context, the question arose whether it was forbidden to pledge a ploughshare as an element of a plough, given that there was a legal rule against pledging a plough. As noted by Quintilian, everything that was prohibited in whole was also prohibited in a part:

   Quint. Inst. Orat. 7, 8, 4: *Ergo hic status ducit ex eo quod scriptum est id quod incertum est: quod quoniam ratione colligitur, ratiocinativus dicitur. In has autem fere species venit:* […] *An quod in toto, idem in parte: 'aratrum accipere pignori non licet; vomerem accepit.*

   Quint. Inst. Orat. 7, 8, 4: The *syllogistic basis,* then, deduces from the letter of the law that which is uncertain; and since this conclusion is arrived at by reason, the *basis* is called *ratiocinative.* It may

29 Ulp.–Paul. D. 20, 1, 6–8: *(6) Obligatione generali rerum, quas quis habuit habiturusve sit, ea non continebuntur, quae verisimile est quemquam specialiter obligaturum non fuisse. ut puta supellex, item vestis relinquenda est debitori, et ex mancipiis quae in eo usu habebit, ut certum sit eum pignori daturum non fuisse. proinde de ministeriis eius perquam ei necessariis vel quae ad affectionem eius pertineant (7) vel quae in usum cottidianum habentur Serviana non competit. (8) Denique concubinam filios naturales alumnos constitit generali obligatione non contineri et si qua alia sunt huiusmodi ministeria.* [(6) A general mortgage of present and future assets does not cover things which someone is unlikely to mortgage specially. Thus, the debtor must be allowed to keep household equipment, clothing, and slaves so employed that he would certainly not want to mortgage them, for example, in services essential to him, or with whom he was on affectionate terms. (7) And the Servian action does not lie for slaves in everyday service. (8) Lastly, a mistress, natural child, or foster child, and anyone in a similar position is excluded.] English translation by WATSON, A. *The Digest of Justinian, Volume 2.* Philadelphia: University of Pennsylvania Press, 1998, p. 124.

30 FLEISCHMANN, M. *Das pignus in causa judicati captum. Eine civilistische Studie.* Breslau: Koebner, 1896, p. 32.

31 LITEWSKI, W. Pignus in causa iudicati captum. *Studia et documenta historiae et iuris.* 1974, Vol. 40, p. 253.

32 BERTI, E. Law in Declamation: The status legales in Senecan controversiae. In: AMATO, E., CITTI, F., HUELSENBECK, B. (eds.). *Law and Ethics in Greek and Roman Declamation.* Berlin, München, Boston: De Gruyter, 2015, p. 22.

> be subdivided into the following *species* of question. […] Is that which is lawful about the whole, lawful about a part? Example: "*It is forbidden to accept a plough as security. He accepted a ploughshare.*"[33]

Quintilian's account does not make it clear if the restriction was merely of ethical or also legal nature. It is possible that the rhetor even considered a non-Roman legal source that might have some impact on Roman legal thought. The pledge could place a serious social burden on the pledgor if the property pledged served as a means of production that enabled the pledgor to repay their debt. The farmer seldom decides to sell his property instantly, and in most cases only for a good reason, and the possibility of pledging in the naive hope of a highly unlikely redemption is especially dangerous for him.[34]

3.2 Roman Imperial Law

Emperor Constantine forbade tax officials, creditors, decurions, as well as prefects to seize ploughmen slaves and plough-oxen, and imposed the death penalty on violators of the Constitution:

> C. Th. 2, 30, 1. Const. A. ad universos provincials: *Intercessores a rectoribus provinciarum dati ad exigenda debita ea, quae civiliter poscuntur, servos aratores aut boves aratorios pignoris causa de possessionibus abstrahunt, ex quo tributorum illatio retardatur. Si quis igitur intercessor aut creditor vel praefectus pacis vel decurio in hac re fuerit detectus, a rectoribus provinciarum capitali sententiae subiugetur.* <Dat. IV. non. Iun. Sirmio, Constantino A. IV. et Licinio IV. conss.>
>
> C. Th. 2, 30, 1 Emperor Constantine Augustus to All Provincials: Enforcement officers appointed by governors of the provinces for the collection of those debts which are demanded in civil proceedings are dragging away from landholdings slave ploughmen and plow oxen as pledges and, as a result, the payment of tribute is being delayed. (1) Therefore, if any enforcement officer or creditor or prefect of the peace or decurion should be detected in this practice, he shall

33 English translation by EDGEWORTH BUTLER, H. *Quintilian. With An English Translation*. Cambridge, Mass., Harvard University Press; London, William Heinemann, Ltd. 1922.

34 DERNBURG, H. *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts. Zweiter Band*. Leipzig: Hirzel, 1964, p. 429.

> be subjected to a capital sentence by the governor of the province. Given on the fourth day before the nones of June at Sirmium in the year of the fourth consulship of Constantine Augustus and of Licinius (June 2, 315).[35]

The Constitution is primarily addressed to the provincial tax collectors *(intercessores)*. The Visigothic interpretation of the Constitution highlights that it only covered the enforcement of tax debts *(pro fiscali debito)*.[36] The harsh penalty of death *(poena capitalis)* imposed on the violators of the constitution was an official response to the abuses of tax collectors who notoriously disregarded imperial acts.[37] However, in the light of the second passage of the Constitution which mentions private creditors, the ban was not limited to public tax law relations as argued by Gothofredus.[38] It would be incomprehensible why a tax debtor in a privileged tax procedure would enjoy a special advantage that would not extend to private relationships.[39]

The Constitution of Constantine was incorporated into Justinian's Code with minor revisions.

> C. 8, 16, 7 Const. A. ad univ. provinciales: *Exsecutores a quocumque iudice dati ad exigenda debita ea, quae civiliter poscuntur, servos aratores aut boves aratorios aut instrumentum aratorium pignoris causa de possessionibus abstrahunt, ex quo tributorum illatio retardatur.* (1) *Si quis igitur intercessor aut creditor vel praefectus pagi vel vici vel decurio in hac re fuerit detectus, aestimando a iudice supplicio subiugetur.* <a. 315 D. III non. Iun. Sirmi Constantino A. IIII et Licinio IIII conss.>

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35 English translation by PHARR, C. *The Theodosian Code and Novels and the Sirmondian Constitutions*. Princeton University Press, 1952, p. 60.

36 IT 2, 30, 1.

37 E.g. C. Th. 1, 16, 7 Const. A. ad provinciales.: *Cessent iam nunc rapaces officialium manus, cessent inquam: nam si moniti non cessaverint, gladiis praecidentur* [The rapacious hands of the apparitors shall immediately cease, they shall cease, I say; for if after due warning they do not cease, they shall be cut off by the sword!] English translation by PHARR, C. *The Theodosian Code and Novels and the Sirmondian Constitutions*. Princeton University Press, 1952, p. 28. On the abuses of tax-collectors see WIEWIOROWSKI, J. The Abuses of Exactores and the Laesio Enormis – a Few Remarks. *Studia Ceranea*. 2012, Vol. 2, pp. 75–82.

38 GOTHOFREDUS, J. *Codex Theodosianus cum perpetuis commentariis Jacobi Gothofredi*. Mantua: Pitter, 1740, p. 249.

39 FECHT, W.-R. von der. *Die Forderungspfändung im römischen Recht*. Köln, Weimar, Wien: Böhlau, 1999, p. 107; DUPONT, C. *La réglementation économique dans les constitutions de Constantin*. Lille: Impr Morel & Corduant, 1963, p. 26.

> C. 8, 16, 7 Emperor Constantine Augustus to all provincials: Bailiffs *(exsecutores)*, given by any judge (i.e. governor) to collect debts demanded in civil proceedings, are dragging away from possessions the slave farmers, plough oxen, and farming equipment as pledges, and in consequence, tax collection is being hindered. (1) So, if some mediator or creditor or a district or village prefect or a decurion is found to be doing this, he shall be subjected to a punishment fixed by the judge. <Given June 3, at Sirmium, in the consulship of Constantine Augustus, for the fourth time, and Licinius, for the fourth time (315).>[40]

In Justinian's version, the word *intercessor* is substituted by the *executor*. Both words denote tax officials.[41] In addition to agricultural slaves and plough oxen, the prohibition covered all means of agricultural instruments *(instrumenta aratoria)*, which might include seed grain, manure, straw, and fodder.[42] Justinian also replaced the death penalty with a penalty according to the discretion of the provincial judge.[43] This change corresponds to the extension of the prohibition as when the scope for transgressing the commandment is increased, it was only fair to reduce the punishment of the delinquent *executor* and creditor.

Weiss describes the ban as an important link in a long chain of imperial legislative measures seeking to protect the socially weaker strata of society.[44] Constantine's ban should, however, not be idealised in the light of specific social, humanitarian, or even religious inclinations, as uncritically suggested

40 English translation by FRIER, B. *The Codex of Justinian, A New Annotated Translation, with Parallel Latin and Greek Text, Vol. 3, Books VIII–XIII*. Cambridge: University Press, 2016, p. 2087.

41 On this see LITEWSKI, W. Pignus in causa iudicati captum. *Studia et documenta historiae et iuris*. 1974, Vol. 40, p. 242.

42 FLEISCHMANN, M. *Das pignus in causa judicati captum. Eine civilistische Studie*. Breslau: Koebner, 1896, p. 31; LITEWSKI, W. Pignus in causa iudicati captum. *Studia et documenta historiae et iuris*,.1974, Vol. 40, p. 254.

43 *Rector provinciae* was substituted by *iudex* – a clear sign that the constitution was now valid in the whole Empire.

44 WEISS, E. *Pfandrechtliche Untersuchungen, Beiträge zum römischen und hellenischen Pfandrecht enthaltend*. Weimar: Hermann Böhlau, p. 57 s; STÜHFF, G. *Vulgarrecht im Kaiserrecht unter besonderer Berücksichtigung der Gesetzgebung Konstantins des Großen*. Weimar: Böhlau, 1966, p. 104.

by Brassloff and Biondi,[45] but rather in the light of a pragmatic fiscal policy.[46] It is evident from the very justification of the Constitution, which explicitly recognises that tax exactions, at that time normally collected in natural form,[47] would suffer from the delays caused by the requisitioning of agricultural means of production.[48]

According to the Constitution of Honorius and Theodosius, which was incorporated into the Justinian Code under the title *Quae res pignori obligari possunt vel non*, the prohibition introduced by Constantine seems to no longer be restricted to pledges based on judicial decree *(pignus ex causa iudicati captum)*, but also on contractual and statutory based pledges.[49] It also goes much further than Constantine's enactment by not only covering slaves and oxen but also other agricultural means. This rule was subsequently valid throughout the Empire, and not only in the provinces.

> C. 8, 16, 8 pr. Honor. Theodos. AA. Probo com. sacr. larg.: *Pignorum gratia aliquid quod ad culturam agri pertinet auferri non convenit.* <a. 414 D. III id. Iun. constante et Constantio conss.>
>
> C. 8, 16, 8 Emperors Honorius and Theodosius Augusti to Probus, Count of Imperial Finances: It is improper that anything which is used for cultivating land be taken away as a pledge. <Given June 11, in the consulship of Constans and Constantius (414)>[50]

45 BRASSLOFF, S. *Sozialpolitische Motive in der römischen Rechtsentwicklung.* Wien: Perles, 1933, p. 1933; BIONDI, B. *Il diritto romano cristiano*, III. Milano: Giuffrè, 1954, p. 225. See also VOGT, J. Zur Frage des christlichen Einflusses auf die Gesetzgebung Konstantins des Grossen. In: *Festschrift für Leopold Wenger. Zweiter Band.* München: C. H. Beck, 1945, p. 142.

46 FLEISCHMANN, M. *Das pignus in causa judicati captum. Eine civilistische Studie.* Breslau: Koebner, 1896, p. 32: "Das sozialpolitische Moment hat das finanzpolitische überwunden." SCHWARZ, F. Begriffsanwendung und Interessenwertung im klassischen römischen Recht. *Archiv für die civilistische Praxis*, 1952/1953, Vol. 152, no. 3, p. 212; FECHT, W.-R. von der. *Die Forderungspfändung im römischen Recht*. Köln, Weimar, Vienna: Böhlau, 1999, p. 107. The motive that led Constantine can be also deduced from C. 8, 16, 8 pr. adressing the *comes sacrarum largitionum*, i.e. senior fiscal official.

47 WIEACKER, F. *Römische Rechtsgeschichte, Zweiter Abschnitt, Die Jurisprudenz vom frühen Prinzipat bis zum Ausgang der Antike,* Herausgegeben von Joseph Georg Wolf. München: C. H. Beck, 2006, p. 182.

48 For similar fiscal motives limiting contractual autonomy in Ptolemaic Egypt preserved in the papyri, see WEISS, E. *Pfandrechtliche Untersuchungen, Beiträge zum römischen und hellenischen Pfandrecht enthaltend.* Weimar: Hermann Böhlau, 1909, p. 28.

49 DERNBURG, H. *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts*. Zweiter Band. Leipzig: Hirzel, 1964, p. 429.

50 English translation by FRIER, B. *The Codex of Justinian, A New Annotated Translation, with Parallel Latin and Greek Text, Vol. 3, Books VIII–XIII*. Cambridge: University Press, 2016, p. 2087.

A legal principle concerning the pledge exemption was thus finally established. In this light, Constantine's regulation may be seen as a merely tentative attempt.[51] Roman law established no other exemptions concerning the pledgeability of various items than those listed by Honorius and Justinian.[52]

The generalisation of Constantine's constitution by Honorius and Theodosius is attested to by a provision in the Syro-Roman Lawbook prohibiting the pledge of cattle.

> § 138. *"Should a man borrow a sum of money from another, write him a document about the amount of money and set him a pawn regarding something which he has had and that which comes to him. If it happens that among these, he has oxen or cows, they cannot be pawned, because they are servants and the workers of the ground. The law has excluded oxen from pawning."*[53]

The pledge *"regarding something which he has had and that which comes to him"* is a general pledge *(generalis obligatio)*.[54] As mentioned above, although oxen and cows were not listed as things that were presumed to be exempted from the general pledge this does not mean that, in practice, the presumption was not extended by analogy to cattle, which represented an essential means of production. Bruns suggested that the writer of the Syro-Roman Lawbook had confused the presumption of the general pledge with Honorius' Constitution on non-pledgeability.[55] However, more recent literature tends to believe that it is far more plausible that the drafter was referring to a lost source, which probably suggests a restrictive interpretation of the general pledge.[56] It used to be believed that this very provision of the Syro-Roman

51 FLEISCHMANN, M. *Das pignus in causa judicati captum. Eine civilistische Studie*. Breslau: Koebner, 1896, p. 32.

52 Ibid., p. 32.

53 English translation by VÖÖBUS, A. *The Syro-Roman Lawbook. II. a Translation with Annotations*. Stockholm: Etse, 1983. See also German Translation by SELB, W., KAUFHOLD, H. *Das syrisch-römische Rechtsbuch. Band III, K*. Vienna: Verlag der österreichischen Akademie der Wissenschaften, 2002, pp. 141, § 100; as well as corresponding commentary by SELB, W., KAUFHOLD, H. *Das syrisch-römische Rechtsbuch. Band III, K*. Vienna: Verlag der österreichischen Akademie der Wissenschaften, 2002, p. 212.

54 D. 20, 1, 6 Ulp. 73 ad ed. *Obligatione generali rerum, quas quis habuit habiturusve sit…*

55 BRUNS, K. G., SACHAU, E. *Syrisch-Römisches Rechtsbuch aus dem fünften Jahrhundert*. Leipzig: Brockhaus, 1880, pp. 281.

56 SELB, W., KAUFHOLD, H. *Das syrisch-römische Rechtsbuch. Band III, K*. Vienna: Verlag der österreichischen Akademie der Wissenschaften, 2002, p. 212.

Lawbook was influenced by the Hammurabi Code. This theory, however, has since been rejected.[57]

The prohibition against the pledging of free persons, especially children,[58] already established by classical law,[59] was repeated several times by Diocletian, demonstrating that the pernicious practice became dominant during the period of economic collapse and austerity of the late 3rd century AD.

> C. 4, 43, 1 Diocl. Max. AA. et CC. Aureliae Papinianae: *Liberos a parentibus neque venditionis neque donationis titulo neque pignoris iure aut quolibet alio modo, nec sub praetextu ignorantiae accipientis in alium transferri posse manifesti iuris est.* <a. 294 D. XVI k. Dec. Nicomediae CC. conss.>
>
> C. 4, 43, 1 Emperors Diocletian and Maximian Augusti and the Caesars to Aurelia Papiniana: It is plain law that children cannot be transferred to another by their parents under the tide of sale or donation, or the right of pledge, or in any other way, or under the pretext of the ignorance of the person receiving them. (294)

The fact that the pledging of free persons, and hence debt slavery, persisted in several areas well into the 6th century is shown by the renewed prohibition in Justinian's Novella in 134. To eliminate the practice of abusing the creditor, Justinian imposed the penalty of forfeiture of the claim.

> Nov. 134, 7: *Quia vero et huiusmodi iniquitatem in diversis locis nostrae reipublicae cognovimus admitti, quia creditores filios debitorum praesumunt retinere aut in pignus aut in servile ministerium aut conductionem, hoc modis omnibus prohibemus, et iubemus, ut si quis huiusmodi aliquid deliquerit, non solum debito cadat, sed tantam aliam quantitatem adiciat dandam ei, qui retentus est ab eo aut parentibus eius; et post hoc etiam corporalibus poenis ipsum subdi a loci iudice, quia personam liberam pro debito praesumpserit retinere aut locare aut pignorare.*
>
> We have become aware that there is another impious crime being committed in various regions of our realm, such that creditors are daring to take debtors' children into custody, either as security, or to work them as slaves, or hire them out. This is something that

57 See MÜLLER, D. H. *Das syrisch-römische rechtsbuch und Hammurabi*. Vienna: Alfred Hölder, 1905, p. 184.

58 See MAYER-MALY, T. Das Notverkaufsrecht des Hausvaters. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung.* 1958, Vol. 75, no. 1, p. 130.

59 Paul. D. 20, 3, 5; Paul. 5, 1, 1; Diocl. Max. C. 8, 16, 6. TAUBENSCHLAG (Das römische Privatrecht zur Zeit Diokletians. In: *Opera minora, I.* Warsaw: Panstwowe wydawnictwo naukove, 1959, p. 137) claims significant deviations in provincial law.

> we entirely forbid. We command that anyone who commits any such offence is not merely to forfeit the debt but is also to be condemned to pay as much again to the person held by him, or to that person's parents. He is then to be subjected by the authorities of the region to corporal punishments, for having dared to detain a free person for a debt, hire him out or take him as security.[60]

Justinian might have been inspired by the writings of the Milanese bishop Ambrose. The latter repeatedly attacked the exploitative encroachments of creditors, especially the widespread pledge of the corpses of a debtor, whereby the creditors tried to put pressure on the debtor's heirs to repay the debts of the deceased as soon as possible.[61]

4 Conclusion

In his studies on the Roman pledge, Kaser surprisingly concludes that the balance of interests regarding the rights and obligations of the parties in the Roman pledge is untenable. He even went a step further and emphasized that a fundamental aspect of the Roman pledge is a favourable treatment of the pledgee as the socially and economically superior party.[62]

In certain ways, it makes sense that the pledgee is in a favourable legal position. Given that the main goal of a pledge agreement is to provide security for the creditor, every legal system encourages the debtor to carry out their responsibilities carefully and on time. It can also be accepted that the financial, social, and economic position of the pledgee as a creditor tended to be stronger than the position of the debtor (the pledgor) since, being the more experienced party, it was the pledgee who dictated the terms

60 English Translation by MILLER, D. J., SARRIS, P. *The Novels of Justinian. A Complete Annotated English Translation*. Cambridge: Cambridge University Press, 2018, p. 895. The brutal practices of the sixth-century creditors are richly documented in Justinian's 60th Novella. See BONINI, R. Comportamenti illegali del creditore e Perdita dell'azione o del diritto (nell Novelle Giustinianee). *Studia et documenta historiae et iuris*. 1974, Vol. 40, p. 111−150; PURPURA, G. La 'sorte' del debitore oltre la morte. Nihil inter mortem distat et sortem (Ambrogio, De Tobia X, 36−37). *Iuris antiqui historia*. 2009, Vol. 1, no. 1, pp. 41−60.

61 AMBROSIUS. *De Tobia,* 8 (Ed. MIGNE, Jacques Paul. *Patrologiae cursus completus, tomus XIV*, S. *Ambrosii tomi primi pars prior*, 1845, p. 769.).

62 *"Unsere pfandrechtlichen Studien haben ein Wesensmerkmal der römischen Pfandordnung sichtbar gemacht, den Gläubigervorzug."* KASER, M. *Studien zum römischen Pfandrecht*. Naples: Jovene Editore, 1982, p. 215.

of the contract.[63] Nevertheless, the legal position of a Roman creditor as a pledgee should not be overestimated.[64]

In my opinion, Roman real security has undergone innovative developments in the post-classical age. In this process, the contractual autonomy had been curtailed, as demonstrated by the pledge exemption. The same holds for the ban on pledging free persons and, for the grounds of piety, the ban on pledging the debtor's body. Concerning how the contractual general pledge as well as the pledge of the fruits[65] should be interpreted, the scales likewise leaned in the debtor's favour. The pledgeability exemptions which, in early Roman law, were more of a moral precept, were judicialized in Imperial legislation. This was, however, at least originally not intended as a specific

63 WACKE, A. Max Kasers Lehren zum Ursprung und Wesen des römischen Pfandrechts. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*: *Romanistische Abteilung*. 1998, Vol. 115, no. 1, p. 176; HONSELL, H., SELB, W., MAYER-MALLY, T. *Römisches Recht*. Berlin, Heidelberg, New York, London, Paris, Tokyo: Springer Verlag, 1987, p. 195; KASER, M. *Studien zum römischen Pfandrecht*. Naples: Jovene Editore, 1982, pp. 215−218; BÜRGE, A. Vertrag und personale Abhängigkeiten im Rom der späten Republik und der frühen Kaiserzeit. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. *Romanistische Abteilung*. 1980, Vol. 97, no. 1, p. 145.

64 The tendency to balance the rights of the pledgee and the pledgor, rather than privileging the creditor is – at least until the late classical period – a remarkable trait of the evolution of Roman pledge. See ŽEPIČ, V. Interesno ravnotežje med zastaviteljem in zastavnim upnikom v rimskem pravu. *Zbornik znanstvenih razprav (Ljubljana Law Review)*. 2022, Vol. 82.

65 In classical law, only those fruits of pledged item that passed into the pledgor's ownership by separation were held to be implicitly pledged without the express consent of the pledgor (Alex. C. 8, 14, 3. Cf. Pap. D. 20, 1, 1, 2 and Paul. D. 13, 7, 18, 3). Following an old tradition, the same applied to the somewhat peculiar and privileged position of a pledged slave's children (Alex. C. 8, 24, 1). According to PS 2, 5, 2 and probably also to the Syro-Roman Lawbook, the pledge only extended to the children of pledged slaves and animal offspring if the parties had explicitly agreed to this. Unfortunately, it is unclear from the wording in Paul's Sentences whether the new perspective can be generalized to all products of the thing pledged, or exclusively to the case of the pledge of a slave and an animal. In this context, I do share the view of Kaser, who explained the discrepancy between the classical and postclassical conceptions considering the increments by saying that the classical jurists regarded the fruits as a marginal property value sharing the destiny of the main pledged thing (KASER, M. Partus ancillae. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*. 1958, Vol. 75, no. 1, pp. 191−192). In the economic decline of the early Dominate and general impoverishment of its society, the notion that fruits were of such significant economic value that they had to be explicitly defined as pledged, prevailed. The reversal of the classical view, as Kaser suggests, shows the same tendency of post-classical law to protect the pledgee as can be inferred from Constantine's prohibition of *lex commissoria* (Const. C. Th. 3, 2, 1 (= Const. C. 8, 34, 3).

kindness to the debtor in terms of Christian notion of *favor debitoris*, but as a guarantee to the creditor or to the fisc that the debts and taxes would at least partially be repaid.[66] The Emperors realized that the excessive onerosity, over and above a certain limit, does not result in a benefit of the creditor, but rather in his disadvantage, for rather than strengthening his position it weakens it. It was therefore in the interest of creditors that the obligations imposed on the everyday life of the debtors were not immoderate.[67]

Maintaining the viability of the community comprising the debtors who were likely fathers, soldiers and, ultimately, taxpayers, had to take priority over individual claims. The reasons for the lenient treatment of debtors in the Imperial Constitutions were primarily based on economic and fiscal considerations and not on the social feelings toward the citizens as the state could not simply bolster contractual provisions resulting in the economic ruin of the taxpaying citizen.[68] In this sense the presupposed privilege of non-pledegability of the debtors might be – somehow paradoxically – considered as a *favor fisci* or *favor creditoris* at large.

References

BERTI, E. Law in Declamation: The *status legales* in Senecan *controversiae*. In: AMATO, E., CITTI, F., HUELSENBECK, B. (eds.). *Law and Ethics in Greek and Roman Declamation*. Berlin, München, Boston: De Gruyter, 2015, pp. 7–34. DOI: https://doi.org/10.1515/9783110401882.7

BIONDI, B. *Il diritto romano cristiano. III*. Milano: Giuffrè, 1954.

BONINI, R. Comportamenti illegali del creditore e Perdita dell'azione o del diritto (nell Novelle Giustinianee). *Studia et documenta historiae et iuris*. 1974, Vol. 40, p. 111−150.

BRASSLOFF, S. *Sozialpolitische Motive in der römischen Rechtsentwicklung*. Wien: Perles, 1933.

66 MAINE, H. S. *Lectures on the Early History of Institutions*. New York: Henry Holt and Company, 1888, p. 266.

67 See also TAFARO, S. Debitori e debito: nuove prospettive. In: *Annali della facoltà di giurisprudenza di Taranto*. Bari, 2008, Vol. 1, no. 1, p. 261.

68 For modern arguments on debtor protection in civil enforcement proceedings, see HERBERGER, M. *Menschenwürde in der Zwangsvollstreckung*. Tübingen: Mohr Siebeck, 2022, pp. 45−51; see especially the historical introduction p. 1−4.

BRUNS, K. G., SACHAU, E. *Syrisch-Römisches Rechtsbuch aus dem fünften Jahrhundert*. Leipzig: Brockhaus, 1880.

BÜRGE, A. Vertrag und personale Abhängigkeiten im Rom der späten Republik und der frühen Kaiserzeit. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*. 1980, Vol. 97, no. 1, pp. 105–156. DOI: https://doi.org/10.7767/zrgra.1980.97.1.105

DARESTE, R., HAUSSOULLIER, B., REINACH, T. *Recueil des inscriptions juridiques Grecques*. Deuxième Série. Paris: Ernest Leroux, 1898.

DERNBURG, H. *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts*. Zweiter Band. Leipzig: Hirzel, 1864.

DUPONT, C. *La réglementation économique dans les constitutions de Constantin*. Lille: Impr Morel & Corduant, 1963.

EDGEWORTH BUTLER, H. *Quintilian. With An English Translation*. Cambridge, Mass., Harvard University Press; London, William Heinemann, Ltd. 1922.

FECHT, W. R. von der. *Die Forderungspfändung im römischen Recht*. Köln, Weimar, Wien: Böhlau, 1999.

FLEISCHMANN, M. *Das pignus in causa judicati captum. Eine civilistische Studie*. Breslau: Koebner, 1896.

FRIER, B. *The Codex of Justinian, A New Annotated Translation, with Parallel Latin and Greek Text, Vol. 3, Books VIII–XIII*. Cambridge: University Press, 2016.

GOTHOFREDUS, J. *Codex Theodosianus cum perpetuis commentariis Jacobi Gothofredi,* Mantua: Pitter, 1740.

HARPER, R. F. *The Code of Hammurabi, King of Babylon*. Chicago: The University Press, 1904.

HERBERGER, M. *Menschenwürde in der Zwangsvollstreckung*. Tübingen: Mohr Siebeck, 2022. DOI: https://doi.org/10.1628/978-3-16-161208-4

HITZIG, H. F. *Das griechische Pfandrecht. Ein Beitrag zur Geschichte des griechischen Rechts*. München: Ackermann, 1895.

HONSELL, H., SELB, W., MAYER-MALLY, T. *Römisches Recht*. Berlin, Heidelberg, New York, London, Paris, Tokyo: Springer Verlag, 1987. DOI: https://doi.org/10.1007/978-3-642-61576-4

KASER, M. Partus ancillae. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*. 1958, Vol. 75, no. 1, pp. 156–200. DOI: https://doi.org/10.7767/zrgra.1958.75.1.156

KASER, M. *Studien zum römischen Pfandrecht*. Naples: Jovene Editore, 1982.

LIDDELL, H. G., SCOTT, R. *A Greek-English Lexicon*. Oxford: Clarendon Press, 1996.

LITEWSKI, W. Pignus in causa iudicati captum. *Studia et documenta historiae et iuris*. 1974, Vol. 40, pp. 205–302.

MAINE, H. S. *Lectures on the Early History of Institutions*. New York: Henry Holt and Company, 1888, pp. 250–278.

MAYER-MALY, T. Das Notverkaufsrecht des Hausvaters. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*. 1958, Vol. 75, no. 1, pp. 116–155. DOI: https://doi.org/10.7767/zrgra.1958.75.1.116

MILLER, D. J., SARRIS, P. *The Novels of Justinian. A Complete Annotated English Translation*. Cambridge: Cambridge University Press, 2018.

MILLET, P. *Lending and Borrowing in Ancient Athenes*. Cambridge: Cambridge University Press, 1991. DOI: https://doi.org/10.1017/CBO9780511518577

MITTEIS, L. *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*. Leipzig: Teubner, 1891.

OLDFATHER, Ch. H. *Diodorus of Sicily in Twelve Volumes I*. Harvard University Press, 1933.

PHARR, C. *The Theodosian Code and Novels and the Sirmondian Constitutions*. Princeton University Press, 1952.

PURPURA, G. La 'sorte' del debitore oltre la morte. *Nihil inter mortem distat et sortem* (Ambrogio, De Tobia X, 36−37). *Iuris antiqui historia*. 2009, Vol. 1, no. 1, p. 41−60.

RASOR, P. Biblical Roots of Modern Consumer Credit Law. *Journal of Law and Religion*. 1993–1994, Vol. 10, no. 1, pp. 157–192. DOI: https://doi.org/10.2307/1051172

SCHWARZ, F. Begriffsanwendung und Interessenwertung im klassischen römischen Recht. *Archiv für die civilistische Praxis*. 1952/1953, Vol. 152, no. 3, pp. 193–215.

SELB, W., KAUFHOLD, H. *Das syrisch-römische Rechtsbuch. Band III, K*. Vienna: Verlag der österreichischen Akademie der Wissenschaften, 2002.

STÜHFF, G. *Vulgarrecht im Kaiserrecht unter besonderer Berücksichtigung der Gesetzgebung Konstantins des Großen*. Weimar: Böhlau, 1966.

TAFARO, S. Debitori e debito: nuove prospettive. In: *Annali della facoltà di giurisprudenza di Taranto*. Bari, 2008, Vol. 1, no. 1, pp. 249–270.

TAUBENSCHLAG, R. Das römische Privatrecht zur Zeit Diokletians. In: *Opera minora, I*. Warsaw: Panstwowe wydawnictwo naukove, 1959, pp. 3–180.

VOGEL, F. *Diodori Bibliotheca Historica*. Stuttgart: Teubner, 1985.

VOGT, J. Zur Frage des christlichen Einflusses auf die Gesetzgebung Konstantins des Grossen. In: *Festschrift für Leopold Wenger. Zweiter Band*. München: C. H. Beck, 1945, pp. 118–148.

VÖÖBUS, A. *The Syro-Roman Lawbook. II. a Translation with Annotations*. Stockholm: Etse, 1983.

WACKE, A. Max Kasers Lehren zum Ursprung und Wesen des römischen Pfandrechts. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*: R*omanistische Abteilung*. 1998, Vol. 115, no. 1, pp. 168–202. DOI: https://doi.org/10.7767/zrgra.1998.115.1.168

WATSON, A. *The Digest of Justinian, Volume 2*. Philadelphia: University of Pennsylvania Press, 1998.

WEISS, E. *Pfandrechtliche Untersuchungen, Beiträge zum römischen und hellenischen Pfandrecht enthaltend*. Weimar: Hermann Böhlau, 1909.

WESTBROOK, R. *A History of Ancient Near Eastern Law. Volume One*. Leiden, Boston: Brill, 2003. DOI: https://doi.org/10.1163/9789047402091

WESTBROOK, R. *Security for Debt in Ancient Near Eastern Law*. Leiden, Boston, Köln: Brill, 2001. DOI: https://doi.org/10.1163/9789004497214

WIEACKER, F. *Römische Rechtsgeschichte, Zweiter Abschnitt, Die Jurisprudenz vom frühen Prinzipat bis zum Ausgang der Antike, Herausgegeben von Joseph Georg Wolf*. München: C. H. Beck, 2006.

WIEWIOROWSKI, J. The Abuses of Exactores and the Laesio Enormis – a Few Remarks. *Studia Ceranea*. 2012, Vol. 2, pp. 75–82. DOI: https://doi.org/10.18778/2084-140X.02.07

WILLETS, R. F. *Aristocratic Society in Ancient Crete*. London: Routledge, 1995.

ŽEPIČ, V. Interesno ravnotežje med zastaviteljem in zastavnim upnikom v rimskem pravu. *Zbornik znanstvenih razprav (Ljubljana Law Review)*. 2022, Vol. 82.

Between Mutuum and Depositum: Deposit of Money under Ius Commune[1]

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Abstract

This paper presents opinions of three medieval and early modern civil lawyers on the deposit of fungibles. In order to do that regular and irregular deposit and loan for consumption in Roman law are outlined first. Then the opinions contained in Glossa ordinaria and those of Paulus Castrensis and Philippus Decius are discussed. The first of these considered deposit of fungibles to be a deposit contract, the second one did so only under some circumstances and the last one was against this idea and considered it the loan for consumption. Finally, a short conclusion is given.

Keywords

Fungibles; Custody; Deposit; The Contract of Deposit; Irregular Deposit; Storage; Bailment.

1 Introduction

The objective of this paper is to present opinions of three medieval and early modern civil lawyers on the deposit of fungibles in order to demonstrate richness of opinions and high level of argumentation these jurists achieved, thus showing they were not inferior to their Roman predecessors. We shall firstly look at the deposit of fungibles under Roman law to get familiar with the object of the later reception and subsequently we shall see how it was understood by the said medieval and early modern jurist. Due to the length

1 This thesis was written with the full financial support of GAUK and is an output of the grant project No. 228121 entitled Depositum Irregulare and Similar Types of Deposit Contracts in Roman Law and in Later Historical Development.

of this paper, just three were chosen, more precisely Accursius, Paulus Castrensis and Philippus Decius. They were selected because each of them represents a different approach to the legal qualification of the deposit of fungibles thus making their ideas the ideal objects of comparison.

2 Roman law

Under the Roman law deposit of fungibles is known as *depositum irregulare* which is a type of deposit that incorporates some features of the regular deposit as well as the loan for consumption *(mutuum)*. Let us now have a closer look on all these contracts and shortly compare them.

2.1 *Depositum regulare*

First of all, we should look at the *depositum* from the systematic point of view. Gaius[2] as well as other jurists[3] counts it among the real contracts, which means that in order to conclude a contract, parties to it did not only need to arrive at a mutual understanding *(consensus)* as to what object would be deposited, but the depositor also had to physically it to the depositee. Only then did the contract come into existence. A mere *pactum de deponendo* was unenforceable.[4] It should also be remarked that the contract was strictly gratuitous.[5] Should the parties agree on a remuneration the contract would be *locatio-conductio*.[6]

The deposit contract was an *asynallagma* as it always gave rise to an action on part of the depositor and sometimes, but not always, also on part of the depositee.[7] The depositor could always sue the depositee for the return of the thing deposited by *actio depositi directa*, but the depositee himself could do the same by the means of *actio depositi contraria* only if the object

2 Gaius does not mention it explicitly in his Institutions (Gaius, *Commentarius III*, 89) where one might expect that, but in *Aurea* (D. 44, 7, 1, 5). See also WEGMANN STOCKEBRAND, A. On the so-called real contract in the Institutes of Gaius. *Revista de Estudios Historico-Juridicos*. 2018, Vol. 1, no. 1, pp. 97–122.

3 Real contracts are not only mentioned by Gaius, but also by Modestinus in D. 44, 7, 52.

4 ZIMMERMANN, R. *The law of obligations: Roman foundations of the civilian tradition*. Cape Town: Juta & Co, 1990, p. 205.

5 KASER, M. *Das Römische Privatrecht, II. Abschnitt: Die Nachklassischen Entwicklungen*. München: C. H. Beck, 1975, p. 535 and ZIMMERMANN, 1990, op. cit., p. 205.

6 D. 16, 3, 1, 8; KASER, 1975, op. cit., p. 535 and ZIMMERMANN, 1990, op. cit., p. 213.

7 KASER, 1975, op. cit., p. 528.

deposited caused him some damage or expenditure.[8] It is usually said that the actions stemming out of deposit contracts were *actiones bonae fidei*, but this is somewhat of an oversimplification as this only prevailed in the classical law.[9] This action on deposit gave a judge more freedom as it allowed him to take the informal understanding between the parties and even go beyond them as he could e.g., award interest out of his own initiative.[10] In addition it is worth mentioning that should the depositee be condemned for the breach of the contract, he was to suffer infamy *(infamia)*, which not only diminished his social standing, but it also brought certain legal disabilities like inability to inherit property.[11]

When it comes to the rights and obligations of the parties, they are as follows. The depositee was obliged to keep a movable thing deposited with him in safe custody and return it to the depositor on demand.[12] After the thing was transferred to the depositee he did not become its owner nor was he protected as a possessor by the praetor,[13] but was considered as mere detentor, i.e. someone who has a thing in his power but not for himself.[14] The depositee's liability was limited to *dolus*[15] and only in the justinianic law was it extended to *culpa lata*.[16] However, the parties might have agreed to extend the liability of a depositee as far as *custodia*.[17] The depositor had an obligation

8 KASER, 1975, op. cit., p. 528 and 535.

9 TURPIN, C. C. Bonae Fidei Iudicia. *The Cambridge Law Journal*. 1965, Vol. 23, no. 2, pp. 266–268 and ROTH, H.-J. *Alfeni Digesta. Eine spätrepublikanische Juristenschrift*. Berlin: Duncker & Humblot, 1999, pp. 137–138. Originally there was an action penal action *ex causa depositi* contained in the Law of the Twelve tables which was later replaced by the praetor by an action containing in factum formula which was a stricti iuris formula. However, it was later surpassed by formula in *ius concepta* which prevailed and became dominant though not exclusive in Classical Law. See also KASER, 1975, op. cit., p. 535 and ZIMMERMANN, 1990, op. cit., pp. 206–207; WALTER, T. *Die Funktionen der actio depositi*. Berlin: Duncker & Humblot, 2012, pp. 324–325.

10 KASER, 1975, op. cit., pp. 485–489. For details on the differences between these two actions see WALTER, 2012, op. cit., p. 73.

11 For the original sources see e.g., Gaius, *Commentarius IV*, 182 and D. 3, 2, 1, for the modern ones e.g., KASER, 1975, op. cit., pp. 274 and 535 and ZIMMERMANN, 1990, op. cit., p. 207 and the literature cited therein.

12 KASER, 1975, op. cit., pp. 534–535 and ZIMMERMANN, 1990, op. cit., pp. 206–207.

13 D. 16, 3, 17, 1.

14 KASER, 1975, op. cit., p. 535 and ZIMMERMANN, 1990, op. cit., p. 205.

15 D. 13, 6, 5, 2 and D. 50, 17, 23.

16 KASER, 1975, op. cit., p. 535 and ZIMMERMANN, 1990, op. cit., p. 209.

17 D. 16, 3, 1, 6; D. 13, 6, 5, 2 and C. 4, 34, 1 all also cited by ZIMMERMANN, 1990, op. cit., p. 209.

of his own. He was bound to compensate the depositee for any damages and losses caused by the thing deposited as already mentioned above.[18]

The depositee was not allowed to use the thing deposited. If he did so, it was considered a theft committed by usage of the thing *(furtum usus)* and he became liable even for a fortuitous case *(periculum)* which might affect the object of deposit. He could also be sued not only by *actio depositi (directa)*, but also by *actio furti*.[19]

2.2 *Mutuum*

Mutuum is a typical example of a real contract and is listed as such in *Institutes* of Gaius.[20] He further states that only fungibles might be the object of this contract while non-fungibles are the object of *commodatum*[21], but the consumability is once used as the dividing criterion by Ulpian[22]. Loan for consumption is a unilateral contract which means that it only gives rise to *actio (condictio) certae creditae pecuniae* by the means of which the lender (creditor) can sue the borrower (debtor) for the return of the money.[23] However, it was also impossible to arrange interest by informal *pactum* due to the fact that *actio (condictio) certae creditae pecuniae* was *actio stricti iuris* the processual regime of which did not allow a judge to take informal agreements into account.[24] Therefore, the borrower could be sued for the interest payment only if this was arranged by a form of stipulation *(stipulatio)* as *mutuum* was a gratuitous contract. This seems to have been everyday practice in commercial life.[25] Consequently, one can hardly argue that loan transactions were gratuitous.

As a real contract *mutuum* came into existence when the lender transferred the object of the loan to the borrower. The latter became the owner of the things loaned to him and might use them as he saw fit. He was only supposed to return the same amount of the same things of the same

18 D. 16, 3, 23; KASER, 1975, op. cit., p. 535 and ZIMMERMANN, 1990, op. cit., p. 206.
19 Gaius, *Commentarius III*, 196 and ZIMMERMANN, 1990, op. cit., p. 205.
20 Gaius, *Commentarius III*, 89. For nearly identical definition of *mutuum* see also D. 12, 1, 12 pr. by Paulus. See also KASER, 1975, op. cit., p. 531 and ZIMMERMANN, 1990, op. cit., p. 153.
21 Gaius, *Commentarius III*, 90.
22 D. 13,6,3,6.
23 KASER, 1975, op. cit., p. 531 and ZIMMERMANN, 1990, op. cit., p. 153.
24 KASER, 1975, op. cit., p. 531 and ZIMMERMANN, 1990, op. cit., p. 153.
25 See e.g., D. 12, 1, 40 and D. 45, 1, 126, 2; ZIMMERMANN, 1990, op. cit., p. 155.

quality *(tantundem)*[26] at the moment of the termination of the contract. If this moment had not been established by the parties the lender may have demanded the repayment at any time. This might have been possible in day to day neighbourly and friendly relations from which *mutuum* developed,[27] but was unsuitable for business relations. Therefore, in most cases[28] the parties agreed on the date of repayment which is demonstrated by the number of Digest fragments attesting it.[29] Otherwise, the contract would have been useless for the borrower who would have to have the money at his disposal all the time.[30] Finally, the transfer of ownership also meant that the borrower would carry the risk of the fortuitous case occurring (also known as the act of God) due to the maxim *genus perire non censetur* and such a case would not free him from the obligation to repay.[31]

Finally, there are some special rules contained in *CS Macedonianum* which forbids *filius familias* to take a loan[32] or *SC Vellaeanum* which allows a woman who interceded on behalf of a debtor to be liberated from her contractual obligation[33]. However, these special rules are of no importance for the purpose of this article.

2.3 *Depositum irregulare*

The defining feature of *depositum irregulare* under Roman law is its object which is fungible and also consumable.[34]

26 D. 44,7,1,2; for the quality see also D. 12, 1, 3.

27 KASER, 1975, op. cit., p. 531 and ZIMMERMANN, 1990, op. cit., p. 156.

28 Zimmermann even states that in all cases. ZIMMERMANN, 1990, op. cit., p. 156.

29 Such an agreement usually took a form of formal *stipulatio*; see e.g. D. 12, 1, 40 and D. 45, 1, 126, 2; KASER, 1975, op. cit., p. 532.

30 ZIMMERMANN, 1990, op. cit., p. 156 also take a note of it: *"A loan transaction can hardly achieve its purpose if the capital has to be repaid immediately after it has been handed over by the lender to the borrower."*

31 D. 44, 7, 1, 4. See also ZIMMERMANN, 1990, op. cit., p. 154.

32 KASER, 1975, op. cit., p. 532.

33 KUPISCH, B. *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, Berlin: De Gruyter, 2018, pp. 14–60.

34 Some authors like SONDEL, J. Szczególne rodzaje depozytu w prawie rzymskim. *Zeszyty naukowe Uniwersytetu Jagiellońskiego. Prace prawnicze*. 1967, Vol. 159, no. 30, p. 37 and ZIMMERMANN, 1990, op. cit., p. 216 mention just fungibility others like MICHEL, J.-H. *La gratuité en droit romain*. ULB: Institut de sociologie, 1962, p. 74 mention consumability as well. However, this is of little consequence and as all cases of the irregular deposit in the sources deal with the things that are both fungible and consumable, it seems impossible to decide which of these features was more important for the Roman lawyers.

From the systematic point of view *depositum irregulare*, like its regular counterpart, is a real contract. However, it is not asynallagmatic, but a unilateral one, because it cannot give rise to *actio depositi contraria*. Due to the fungible (or consumable) nature of the things deposited the ownership is transferred to the depositee on the handover. This means that even in the improbable case these things caused some harm to the depositee they now belong to him and not to the depositor so there is no reason why the depositee should be made liable for that.[35] Therefore, the only party having an action is the depositor who has *actio depositi directa* at his disposal. It seems that in cases of irregular deposit *actio in ius concepta*, which is *bonae fidei action*, was used.[36]

Like its regular counterpart the irregular deposit is gratuitous in nature and the depositor does not have to pay depositee any deposit fee. However, the question arises, whether the depositee should pay depositor some interest for the money deposited with him. This is quite a complicated topic which lies beyond the scope of this paper. However, the prevailing opinion seems to be that it was not the case during the classical period of Roman law.[37]

Due to the fungibility of the things deposited the ownership is transferred to the depositee on the handover.[38] As a proprietor the depositee may then use the things deposited, but due to the principle *genus perire non censetur*[39] he also carries the risk of the accidental demise of the object of deposit *(periculum)*.[40] The depositee is also obliged to return the things deposited on demand just like in every other deposit contract.[41]

35 ŠEJDL, J. Specifika reálných kontraktů genericky plněných, In: BĚLOVSKÝ, P., STLOUKALOVÁ, K. (eds.). *Caro amico: 60 kapitol pro Michala Skřejpka, aneb, Římské právo napříč staletími*. Praha: Auditorium, 2017, p. 381.

36 See Chapter 4 and discussion on functions of *actio depositi* in WALTER, 2012, op. cit., pp. 287–344.

37 MICHEL, 1962, op. cit., p. 75; SONDEL, 1967, op. cit., pp. 90–93, ZIMMERMANN, 1990, op. cit., p. 218. However, Kaser states that it might have been the case in the late classical period KASER, 1975, op. cit., p. 536.

38 MICHEL, 1962, op. cit., p. 74; SONDEL, 1967, op. cit., p. 37; KASER, 1975, op. cit., p. 536 and ZIMMERMANN, 1990, op. cit., p. 216.

39 D. 44, 7, 1, 4.

40 MICHEL, 1962, op. cit., pp. 74–75; SONDEL, 1967, op. cit., p. 37; ZIMMERMANN, 1990, op. cit., p. 218. However, Kaser states that it might have been the case in the late classical period KASER, 1975, op. cit., p. 536.

41 MICHEL, 1962, op. cit., p. 74; SONDEL, 1967, op. cit., p. 39; KASER, 1975, op. cit., p. 536 and ZIMMERMANN, 1990, op. cit., p. 216.

As for the regulations specific to Roman law, the irregular deposit did not allow for compensation, *exceptio SC Macedoniani* nor *exceptio non numeratae pecuniae*, but the sentenced depositee would suffer infamy under it.[42] This all applied to the regular deposit and it is important to note that where there were no specific rules for the irregular deposit, those of the regular one would apply.

Summing up, it may be said that both the regular and the irregular deposit had the same economic motive *(causa)* which was the protection of values and the moment of return was also the same. However, one can also see that *depositum irregulare* shares some common features with *mutuum*, namely the very object of the contract is fungible which then determines the scope of the restitution obligation, ownership and liability. One can see the common features and differences also in the table below:

Comparison of the Contracts according to the Roman Law			
	Depositum regulare	*Depositum irregulare*	*Mutuum*
Object of the contract	Non-fungible things	Fungible things	Fungible things
Owner of the object	Depositor	Depositee	Borrower
Restitution of the object	*idem*	*tantundem*	*tantundem*
Liability of the depositee	Liability for *dolus* or *culpa lata* (justinianic law)	Liability for Acts of God	Liability for Acts of God
Causa	Protection of values	Protection of values	Investment or consumption
The moment of return	On demand	On demand	Prearranged time/on demand under some circumstances

42 MICHEL, 1962, op. cit., p. 75; SONDEL, 1967, op. cit., pp. 38–39.

2.4 Basis of later Argumentation

Before we proceed to the reception of Roman law by medieval and early modern lawyers, we need to shortly address the text on which many of their arguments were based on. It is a part of D 16, 3, 24:

> *"Quaeritur propter usurarum incrementum. Respondi depositi actionem locum habere: quid est enim aliud commendare quam deponere? Quod ita verum est, si id actum est, ut corpora nummorum eadem redderentur: nam si ut tantundem solveretur convenit, egreditur ea res depositi notissimos terminos."*[43]

Based on this text some lawyers would argue that deposit involving fungibles should be considered *depositum*, others that it is *mutuum*. From the text, one can deduce that the argument can go two ways. Either the deposit of fungibles goes beyond the limits of a deposit contract and is therefore not a deposit anymore, or the deposit of fungibles goes beyond the said limit but is nevertheless considered a deposit. Mark these words and observe the employment of these arguments in the chapters to come.

3 Medieval and Early Modern Jurists

Let us now see how the medieval and early modern jurists dealt with the Roman heritage.

3.1 *Glossa ordinaria*

The Gloss[44] indeed contains some interesting remarks about the deposit of fungibles, especially the glosses concerning the title *depositi vel contra* (D 16, 3). Already the gloss *"incrementum"* to D 16, 3, 24 states the crucial

43 Translation by WATSON, A. *The Digest of Justinian II*. Philadelphia: University of Pennsylvania Press, 1998, p. 18: "*A question is raised on the ground of accrual of interest. I replied that there is cause for the action on deposit; for what is 'to entrust for safekeeping' other than to deposit. This statement is true if the arrangement was that the very same coins be returned; for if it was agreed that an equivalent sum be repaid, then the matter exceeds the very well-known limits of a deposit.*"

44 ACCURSIUS, F. *Corpus Iuris Civilis Iustinianei: Tomus Hic Primus Digestum Vetus continent*. Lyon: sumptibus Iacobi Cardon [et] Petri Cauellat, 1627. All later citations come from this version and all the translations of all the text were translated by the author of this paper unless stated otherwise.

question: *quis contractus sit, depositum, an mutuum*.[45] However, how to answer it? Other glosses such as the gloss *"condemnandus est"* to 16, 3, 25, 1 might be helpful. This gloss contains a lot of information, and it is therefore appropriate to cite it in full:

> *Ut* [D 16, 3, 28 and 16, 3, 29, 1].[46] *Si ergo depositi agitur ubi convenitur inter eos ut tantundem redderetur, quomodo* **sciam detur actio ex mutuo, vel ex deposito***? Nisi dicas,* ***[1] secundum quod est actum inter eos****. Sed pone nihil actum. Ad hoc respondeo quod hic non convenit expresse ut ea uteretur: praesumitur tamen quod voluerit ea uti: quia* ***[2] pecuniam non obsignatam reliquit****: et ideo depositi agitur inspecto initio: ut* [D 16.3.1.13][47]*. Si vero* ***[3a] expresse convenisset****, ut si vellet, uteretur:* ***[3b] demum cum utitur*** *et fit mutuum et de mutuo agitur: ut* [D 12, 1, 10].[48]

As one can see, the glosses, including this one, are rather difficult to read. Let us then decipher it. The central question the gloss deals with is whether the action on deposit or on the loan of consumption lies if the *tantundem* is to be returned. The first solution given is rather simple, it is up to the parties to expressly state which contract they have concluded. However, when they do not do so, the action on deposit shall lie. This applies even to the case when money was deposited unsealed. However, the parties may convert the contract of deposit into *mutuum* by expressly agreeing on that and the action on the loan for consumption shall lie. That this contract shall

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45 ACCURSIUS, 1627, op. cit., *"incrementum"*: *"Which contract it is, deposit or a loan for consumption."*

46 Instead of original reference to each fragment by the first words of it, its number is cited. This should increase the reader's comfort.

47 This fragment deals with the question, what action should lie, when there is a concurrence of two actions.

48 ACCURSIUS, 1627, op. cit., *"condemnandus est"*: "*If, then, the action on deposit was brought in a case where there is an agreement among the parties that the same amount [tantundem] should be repaid, how should I know whether an* **action on loan for consumption or on deposit lies***? What if the* ***[1] parties have not decided*** *which of these contracts exist between them? I responded that if the parties have not expressly agreed whether the money deposited might be used, it is then presumed, that the depositor agreed to it being used, because he left it* ***[2] unsealed****, and therefore action on deposit shall initially lie: because [D 16.3.1.13]. But if it had been* ***[3a] expressly agreed*** *upon, that depositee may use it, if he so desires,* ***[3b] only when he uses it****, deposit can be expressly converted into a loan and when it happens, action on loan for consumption and not on deposit shall lie, the contract becomes loan for consumption and the action on loan for consumption might be brought, because* [D 12, 1, 10]." Parts of the text are highlighted by the author of this paper.

be considered a deposit is again shortly repeated in the gloss *"excedere"*[49] to D 16, 3, 26, 1 and *"ut in caeteris"* to D 16, 3, 29, 1 and even in the gloss *"obnoxium"* to C 4, 34, 3 contained in *Glossa in Codicem* by Accursius.

The interpretation of this gloss offers many interesting points. First, already from the words *ut tantundem redderetur* it is obvious that only fungible things are considered in this case. However, the intentions of the parties play a decisive role here. The parties can themselves establish a type of a contract they concluded. In other words, whether it is a deposit or a loan for consumption depends not on objective circumstances[50], but the will of the parties. The subjective criterion plays a major role here.

The conditions under which a deposit transfers into *mutuum* are contained in the gloss *"mota"* to D 12, 1, 10. The gloss itself begins with a question: *Cur non est mutua statim, cum habuit voluntatem, vel propositum utendi, et mutuum habendi?*[51] Which is then later answered in the gloss. The contract remains a deposit first and does not transit into *mutuum* immediately, because the will of the parties can change before the money is used. Thus, only with the use of money the change occurs. However, for this to happen, the parties must expressly agree as stated at the end of the gloss. It is of lesser importance that the gloss also mentions two possible modifications of the case, that is whether the will to use the thing deposited follows the will to enable its use (D 12, 1, 9, 9) or the other way around (D 12, 1, 10).[52] The transfer of deposit into *mutuum* in this case is also confirmed by the gloss *"debitum iri"* concerning the same fragment.

In conclusion, according to Accursius, there are three rules which enable us to determine whether a contract is *depositum* or *mutuum*. Firstly, the parties

49 ACCURSIUS, 1627, op. cit., *"excedere"*: *"… est tamen depositum…"*

50 Other than whether the object of the contract is fungible.

51 ACCURSIUS, 1627, op. cit., *"mota"*: *"Why does the contract not immediately become loan for use, when the depositee has the will, or it was proposed to him to use the thing deposited?"*

52 ACCURSIUS, 1627, op. cit., *"mota"*: *"Respondeo quia dictum erat in depositione, si voles: quod verbum nimis est extendendum. Licet enim semel velit, tamen potest mutare propositum, antequam moveat: et sic plerumque esset mutuum, et defineret. Aliud in verbo, si volueris ut* [D 45, 1, 112] *et secundum hoc, verbum hic positum, si voles exponitur: id est si voluntarie usus fueris: sic* [D 1, 8, 11]. *Et erit differentia inter hunc, et superiorem casum: quia hic secuta fuit voluntas vtendi voluntatem dantis: ibi autem praecessit. Alii autem faciunt differentiam tantum in verbo, si voles: ut sive a principio, sive postea dicatur, habeat locum haec lex: secus si hoc verbum non apponitur: quod nihil est."*

determine the type of the contract by their will. If they do not state their will expressly and money is deposited unsealed, an [irregular] deposit is presumed. Finally, if parties expressly agreed the depositee may use things deposited, the contract changes into *mutuum* only when the use occurs.

3.2 *Paulus Castrensis*

One of the leading commentators Paulus Castrensis also encounters the problem that deposit of fungibles could be considered either *depositum* or *mutuum*.

> *"Quam non* ***[1] traditur pecunia in sacculo signata*** *quo casu esset verum depositum, ut* [D 16, 3, 25, 1], *sed in nummerata et sic transferitur dominium et datur licentia convertendi in proprios usus et nihilominus dicitur* ***[2] depositum, postquam sic fuit actum****. Quid autem si non apparet quid sit actum: videtur quod potius sit* ***[3] mutuum quia magis accedit ad naturam mutui****, glossa in* [D 16 3, 25, l] *videtur tenere contrarium, quod sit depositum. Idem tenet Baldus in* [C 4, 2, 11], *quam favorabilis est danto habere actionem bone fidei quam stricti iuris."*[53]

The overall views of Paulus Castrensis on the irregular deposit differ very little from the authors writing in the tradition of the Gloss. He suggests that if money is deposited the ownership transfers to the depositee who is also granted a permission to use them. However, contrary to the authors represented in present article by Accursius, there are some important differences, when it comes to determining the type of contract.

He primarily states that if money is deposited sealed it is a [regular] deposit which can be hardly surprising. Then he adds that should money be delivered in cash and parties agree to it, the contract is considered a deposit, which means *action depositi* can be utilized. However, he further states that if parties do not expressly agree that such a contract is *depositum*, it should be primarily

53 CASTRENSIS, P. *In secundam Digesti veteris partem Patauinae praelectiones*, Lyon 1546, *Depositi vel contra, Lucius Titius*. Parts of the text are highlighted by the author of this paper. Transalation: *"If the money is not* ***[1] delivered in a sealed purse****, in which case it was a true deposit, because of [D 16, 3, 25, 1], but in cash, the ownership is transferred and permission is given to convert it for depositee's own use, and it is nevertheless said to be a* ***[2] deposit after it has been agreed upon*** *[by the parties]. However, if it does not appear what contract it is, it seems that it is* ***[3] rather a loan*** *because it approaches the* ***nature of the loan****, the gloss in [D 16 3, 25, l] seems to hold the opposite, that it should be considered deposited. Baldus holds the same opinion in [C 4, 2, 11], because it is more favourable to have an action of good faith than of strict law…"*

considered *mutuum*, because it rather approaches the nature of the loan for consumption.

Paulus Castrensis admits that the Gloss and Baldus de Ubaldis, both of them he cites in the text given above, are of a different opinion then he, but his position is firm, as attested by his statement to D 12, 1, 2:

> *"Et advertendum quod licet aliquo isto deficient non dicatur mutuum imo potest esse et tunc alius contractus si hoc agatur, ut* [D 16, 3, 24 et D 16, 3, 25, 1, D 16, 3, 26, 1 et D 16, 3, 26, 2] *potest esse depositum si hoc agatur licet egrediatur terminus depositi qui sunt ut non transferat dominium et quam restituatur idem corpus et quam depositarius non utatur sed custodiat. Et tamen si depono penes te centum numerata, eo ipso transfertur dominium, quod datur pecunia tamquam pecunia non tamquam species; per hoc datur licentia utendi ea et contrahitur obligatio ad aliud corpus in eodem genere, quae omnia sunt de natura mutui;* ***et tamen non est mutuum sed depositum, postquam sic fuit actum expresse; alias esset mutuum, postquam omnia convenient eius naturae****. Et est magnus effectus quam ex quo est depositum est contractus bonefidei et in eo veniunt usure ex mora ut in dictis legibus* [C 4, 32, 13]."[54]

We can therefore see that though Paulus upholds the power of the parties to qualify their contractual relationship as either *depositum* or *mutuum*, if they omit to do so, he qualifies it primarily as *mutuum*. His argument is simple. Under the contract of deposit, the ownership of the things deposited is not transferred and the same things *(idem corpus)* are to be restored. However, if fungibles are deposited, the opposite is true. The ownership is transferred and only the same amount is supposed to be returned *(aliud corpus in eodem genere)*. Such arrangement, however, transgresses the very well-known limits of deposit and is of the nature of *mutuum*, which should therefore be presumed, if the parties have not expressly decided the contract should be considered *depositum*.

As Niemayer, who wrote the first legal historical treaty about *depositum irregulare*, rightly points out, Paulus is the very first author who so decisively goes against the Gloss which up until that point remained unopposed. Still, for Niemayer who rejects the very idea of an independent existence of the irregular deposit, Paulus does not go far enough, which he bitterly notes.[55]

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54 CASTRENSIS, 1546, op. cit., *Si Certum petatur, mutuum damus*, nn. 4-5. Translation is not provided as commentary is given. Parts of the text are highlighted by the author of this paper.

55 NIEMAYER, T. *Depositum irregulare*. Halle: Max Niemeyer, 1889, p. 116.

3.3 *Philippus Decius*

Philippus Decius is an outspoken opponent[56] of the very existence of *depositum irregulare* as an independent legal institute. He considers the deposit of fungibles, in case *tantundem* shall be returned, to be *mutuum* as this contract assumes the nature of *mutuum*. He addresses not only this question in the commentary to D 12, 1, 12pr.:

> *An autem valeat pactum quod in mutuo eadem res reddatur videtur quod sic, argumentum in* [D 16, 3, 24]*, ubi in deposito valet pactum, quod transferatur dominium* **contra naturam contractus** *et tamen remanet depositum, ut glossa ibi dicit per* [D 16, 3, 25, 1]. *Ita ergo videtur, quod in mutuo dicit possit. Sed tamen contrarium verius videtur, quia tale pactum quod eadem res restituatur, est* **contram substantiam mutui***, ut probatur hic ibi* [i.e., D 12, 1, 2]*, non eadem speciem. Et ideo pactum non valet.* […] *Non obstat textus in* [D 16, 3, 24]*, quia ibi videtur, quod* **in veritate non remanet depositum, sed transeat in mutuum**. *Ex quo transfertur dominium et tan[tun]dem restituitur, ergo non est depositum. Et textus sentit dum dicit quod* **egreditur notissimos terminos depositi**. *Bene verum est, quod pro tali mutuo partes convenire possunt, ut solvatur usurae quae pro deposito debenture. Ista enim solutio usurarum respicit merum favorem partium, ideo partes hoc facere possunt. Sed quod depositum sit quando dominium transfertur et tan[tun] dem debeat restitui, hoc non videturin potestate partium.*[57]

Let us look at this text in more detail. Firstly, concerning the deposit of the fungibles, Decius presents doctrine of the Gloss, but immediately

56 *"Ausgesprochener Gegner"* as NIEMAYER, 1889, op. cit., p. 117 says.

57 DECIUS, P. *In Digestum Vetus Et Codicem Iustinianeum.* Lyon, 1559, *Mutuum damus*, no. 23. Parts of the text are highlighted by the author of this paper. *"It seems pactum* [i.e. an agreement] *according to which the same thing is to be returned under the contract of mutuum is valid, see the argument in* [D 16, 3, 24]*, where an agreement is valid under a contract of deposit, that the ownership is transferred* **contrary to the nature of the contract** *and yet the contract remains a deposit, as the Gloss says in* [D 16 , 3, 25, 1]. *It therefore seems, the same thing can be said also about mutuum.* […] *However, the contrary opinion seems truer, because such an agreement, that the same thing is restored, is* **contrary to the substance of mutuum***, as is proven here* [i.e., D 12, 1, 2], *but not the same species. And therefore, the pactum [i.e. agreement] is not valid.* […] *The text in* [D 16, 3, 24] *does not stand in the way, because* **in reality the contract does not remain a deposit, but transfers into mutuum**. *Whence the ownership is transferred and at the same amount* [*tantundem* and not the same thing] *is returned, therefore it is not a deposit. And it is noted in the text when it says that such arrangement* **goes beyond the well-known boundaries of the deposit**. *It is well true that the parties to such a loan may agree to pay the interest due on the deposit debenture. For this payment of interest regards the mere favour of the parties, therefore the parties may do this."*

follows his explanation that it makes more sense to consider such contract to be *mutuum*. After all, in his view, it rather seems that D 16, 3, 24 states the contract goes beyond the limit of deposit and transforms into the loan for consumption as in that case there is a transfer of ownership, which is typical for the latter. He then says that parties may indeed agree to pay the interest for the money entrusted to the other party in such way, but this should be considered a mere favour provided by one party to the other and might therefore be done. However, in the last sentence he quite staunchly opposes, that it is within power of the parties to designate the contract to be deposit.

There are several important points made in the abovementioned text. Firstly, Philippus Decius uses the nature of the contract argument to determine the type of the contract. The deposit of fungibles, and he does not only speak about money, but about fungibles in general, is against the nature of deposit and is therefore considered the loan for consumption. Note that he uses the argument based on the nature of the contract already utilized by Paulus. Furthermore, he expressly states multiple times the deposit transitions into *mutuum*[58] and refers to the line of text stating that such arrangement goes beyond the well-known boundaries of the deposit,[59] hence even this argument is utilized. It clearly emanates from the text that the will of the parties cannot change this, as the limits of contract are objective.[60] Note that Decius is quite consistent in this approach and uses the same argument also in a different case where it is necessary to determine whether a contract is a deposit or a loan for use. There he also states, that

58 DECIUS, 1559, op. cit., *Mutuum damus*, no. 23: *"… quod in veritate non remanet depositum, sed transeat in mutuum."*
The same idea is also expressed in:
DECIUS, 1559, op. cit., *Si quis nec causam*, no. 2: *"Et quia sicut quando fit depositum ut tantundem reddatur, assumit natura mutui."*
DECIUS, 1559, op. cit., *Deposui*, no. 4: *"Sed diligenter advertendum est: quia ista conclusio non videtur vera: quia ex quo translatum fuit dominium et tantundem reddi debet, natura depositi repugnat, ut dicatur depositum. Et non videtur quod partes hoc facere possint* […] *Et videtur textus hic, ubi agatur ex mutuo facta conversione et in* [D 16, 3, 25, 1]*, ergo est mutuum."*

59 DECIUS, 1559, op. cit., *Mutuum damus*, no. 23: *"Et textus sentit dum dicit quod egreditur notissimos terminos depositi."*

60 DECIUS, 1559, op. cit., *Mutuum damus*, no. 23: *"Sed quod depositum sit quando dominium transfertur et tan[tun]dem debeat restitui, hoc non videturin potestate partium."*

if the regular deposit is concluded for the benefit of the depositee, its nature changes and it should be considered the loan for use.[61]

Moreover, for Decius, it seems inconceivable, that the depositee could possibly use the deposited money. If the depositor allows him to do so, the contract immediately transforms into *mutuum*. He then deviates from the doctrine of the Gloss and indeed of the Romans[62] contained D 12, 1, 10, which both insist that, if the consent to use was given when the money was deposited, *depositum* changes into *mutuum* only with the actual use. Decius is of the opinion, that such a contract is *mutuum* from the very beginning.[63] Thus, in case of deposit, there can be no talk of use of the money under the contract of deposit.

4 Conclusion

In the course of this paper, we have seen three possible outlooks on the deposit of fungibles. While Accursius and Paulus Castrensis both agree the deposit of fungibles can be considered either as *depositum irregulare* or as *mutuum*, they both qualify them according to a different set of rules. They both agree, the will of the parties plays a role in determining the type of the contract. According to Accursius, if there is no agreement of the parties and thing are deposited as fungibles, depositum irregulare is presumed, but the parties may also arrange that a regular deposit changes to *mutuum*, which happens in the moment of use of the object of the deposit by the depositee. Paulus Castrensis on the other hand assumes, that if fungibles are deposited, such an arrangement should be considered *mutuum*, because it is closer to its nature. However, the parties may decide that it is an irregular deposit. Finally, Decius

61 DECIUS, 1559, op. cit., *Si quis nec causam*, no. 2: *"Secundo noto, quando depositum fit gratia depositarii, natura eis alteratur. Nam de tali deposito, iudicatur idem quod de commodato."*

62 Or at least of Ulpian.

63 DECIUS, 1559, op. cit., *Deposui,* no. 10: *"Et deponens pure permisit, quod utentur pecunia deposita, his concurrentibus statim est mutuum: quia partes communi consensu videtur debitum ex causa depositi convertisse in mutuum.* […] *proptera non videtur verum, quando dictum est, videlicet quod si incontinenti tempore depositi permittere quod utatur pecunia, remanet tamen depositum: quia partes non presumuntur mutare primum contractum. Nam dico quod etiam incontinenti esset mutuum, quia videtur constare de mutatione, permittendo, quod utatur pecunia contra natura depositi, per ea quae dixi in notabilibus. Et hoc indubitatum videtur, si quis consentiret et probatur in* [D 12, 1, 10]. *Ubi textus facit vim, quod non fuit permissum simpliciter: sed condicionaliter, ergo permittendo simpliciter: etiam ab initio recessum videtur a deposito."*

approaches the problem differently. For him it is the nature of the things deposited which determines the nature of the contract. If the fungibles are deposited, the contract is *mutuum* and the will of the parties has absolutely no power to change that. What was just said can be also seen in this table:

Glossa ordinaria	**Paulus Castrensis**	**Decius**
1. **Parties determine the type** of the contract by their will.	1. If money is deposited sealed it is a [regular] deposit.	1. Substance of the contract is importnat. **The agreement of the parties does not play a role.**
2. If money is deposited unsealed, an [irregular] deposit is presumed.	2. If money is delivered in cash and **parties agree** to it, the contract is considered an [irregular] deposit.	
3. Parties expressly agreed the depositee may use things deposited, the contract changes into mutuum only when he uses it.	3. If money is delivered in cash and there is no express agreement, a loan for consumption is presumed.	

Which of these mutually excluding approaches eventually prevailed? There is not a definite answer. Some of these approaches or their variants are applied in today's codifications,[64] but how it happened and exactly why these solutions were chosen is a story for another day and paper.

References

ACCURSIUS, F. *Corpus Iuris Civilis Iustinianei: Tomus Hic Primus Digestum Vetus continent*. Lyon: sumptibus Iacobi Cardon [et] Petri Cauellat, 1627.

CASTRENSIS, P. *In secundam Digesti veteris partem Patauinae praelectiones*. Lyon, 1546.

64 See e.g., § 700 BGB which shows common features with the Gloss, but the subjective element is supressed. On the other hand, § 959 ABGB adopts the same solution as Decius.

DECIUS, P. *In Digestum Vetus Et Codicem Iustinianeum*. Lyon, 1559.

KASER, M. *Das Römische Privatrecht, II. Abschnitt: Die Nachklassischen Entwicklungen*. München: C. H. Beck, 1975.

KUPISCH, B. *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*. Berlin: De Gruyter, 2018.

MICHEL, J.-H. *La gratuité en droit romain*. ULB: Institut de sociologie, 1962.

NIEMAYER, T. *Depositum irregulare*. Halle: Max Niemeyer, 1889.

ROTH, H.-J. *Alfeni Digesta. Eine spätrepublikanische Juristenschrift*. Berlin: Duncker & Humblot, 1999. DOI: https://doi.org/10.3790/978-3-428-49747-8

SONDEL, J. Szczególne rodzaje depozytu w prawie rzymskim. *Zeszyty naukowe Uniwersytetu Jagiellońskiego. Prace prawnicze*. 1967, Vol. 159, no. 30.

ŠEJDL, J. Specifika reálných kontraktů genericky plněných. In: BĚLOVSKÝ, P., STLOUKALOVÁ, K. (eds.). *Caro amico: 60 kapitol pro Michala Skřejpka, aneb, Římské právo napříč staletími*. Praha: Auditorium, 2017, pp. 422–431.

TURPIN, C. C. Bonae Fidei Iudicia. *The Cambridge Law Journal*. 1965, Vol. 23, no. 2, pp. 260–270. DOI: https://doi.org/10.1017/S0008197300082830

WALTER, T. *Die Funktionen der actio depositi*. Berlin: Duncker & Humblot, 2012. DOI: https://doi.org/10.3790/978-3-428-53697-9

WATSON, A. *The Digest of Justinian II*. Philadelphia: University of Pennsylvania Press, 1998.

WEGMANN STOCKEBRAND, A. On the so-called real contract in the Institutes of Gaius. *Revista de Estudios Historico-Juridicos*. 2018, Vol. 1, no. 1, pp. 97–122. DOI: https://doi.org/10.4067/S0716-54552018000100097

ZIMMERMANN, R. *The law of obligations: Roman foundations of the civilian tradition*. Cape Town: Juta & Co, 1990.

Price Controls Then and Now: a Comparison of Diocletians' Edictum de Pretiis Rerum Venalium and the Pricestop Introduced by the Hungarian Government

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Abstract

To mitigate the domestic effects of the inflationary pressures arising in the global economy as a result of the coronavirus pandemic and Russio-Ukranian war, the Government of Hungary maximised the price of several goods essential to the population. An early example of this direct intervention into the price-setting mechanism of the markets was the Edict on Maximum Prices *(Edictum de Pretiis Rerum Venalium)* issued by Diocletian in 301 AD, which-together with Diocletian's currency reform-tried to solve the enormous inflation that plagued the third-century Roman Empire. The Diocletian edict and the Hungarian government decrees introducing price caps are very similar, both in their root causes, their legal policy aims, their technical solutions, as well as in the sanctions that they impose on those breaching the law. The failure of the Diocletian reforms provides useful lessons for policy-makers today.

Keywords

Price Cap; Inflation; State Intervention; Economics; Roman Law.

1 Introduction

The coronavirus pandemic and Russio-Ukranian war triggered significant inflationary processes around the world. To mitigate the domestic effects of the inflationary pressures arising in the global economy, the Government of Hungary decided to regulate the price of several goods essential to the population. In particular, the Government maximised the retail price

of basic goods such as granulated sugar, wheat flour, sunflower oil,[1] as well as the price of fuel (E10 petrol and diesel).[2] By introducing a pricestop, the state centrally and directly intervened in the price-setting mechanisms of the markets and thereby into the contractual relations of private persons. An early example of this direct intervention into the price-setting mechanism of the markets was the Edict on Maximum Prices *(Edictum de Pretiis Rerum Venalium)* issued by Diocletian in 301 AD, which – together with Diocletian's currency reform – tried to solve the enormous inflation that plagued the third-century Roman Empire.[3] The edict regulated the maximum price for several hundreds of goods, including the maximum daily wage for certain professions.[4]

This paper consists of four sections. The first section outlines the conception of modern neoclassical economic thought on the price-setting mechanism of the markets. The second section introduces the Roman-law understanding on the role of purchase price in commercial relationships. By examining the varying conceptual frameworks of these two traditions, the paper tries to illuminate under what circumstances they thought it necessary to centrally intervene into the free negotiation process of market agents. The third section analyses Diocletian's Edict on Maximum Prices with particular attention to its root causes, its legal attributes and its failure. The final section compares the edict to the decrees of the Hungarian Government maximising the prices of the aforementioned goods.

2 Price-setting mechanisms and price regulation in neoclassical economic thought

Price is one of the central, if not the most important determining factors of market processes. Price is the monetary expression of the value of goods.

1 Government decree No. 6/2022. (I. 14.), Schedule.
2 Government decree No. 624/2021. (XI. 11.), 1. §. (1).
3 JUSZTINGER, J. *A vételár meghatározása és szolgáltatása a konszenzuális adásvétel római jogi forrásaiban* [Determination and performance of purchase price in Roman legal sources concerning sales contracts]. PhD-dissertation. Pécsi Tudományegyetem, 2012, p. 162. Available at: https://ajk.pte.hu/files/file/doktori-iskola/jusztinger-janos/jusztinger-janos-vedes-ertekezes.pdf [cit. 23. 9. 2022].
4 FÖLDI, A., HAMZA, G. *A római jog története és institúciói* [History and Institutes of Roman Law]. 25 reworked and extended ed. Budapest: Nemzedékek Tudása Tankönyvkiadó, 2021, p. 516.

It conveys the monetary amount for which a good can be bought or sold on the market.[5] Price signals the current state of the market, which helps market agents make their decisions. Following the laws of demand and supply, the interests of customers and sellers are opposed to one another. Consumers would like to buy the most amount of goods at the lowest price, while sellers would like to sell as many goods as they can for the highest possible price. The result of their negotiation is the market price at which the exchange of goods takes place.[6]

One of the basic tenets of neoclassical economics is that under free market conditions the demand, the supply and the market price converge towards an equilibrium.[7] That is beacuse if the supply exceeds the demand, the oversupply will make sellers lower the price, which in turn will increase demand. And if there is an overdemand, sellers are going to increase the price which will cause the demand to fall.[8] The market fluctuates between a state of overdemand and oversupply until in the long run it reaches an equilibrium, where supply and demand equal each other both in terms of the price of the good and the quantity offered, and there are no incentives for market agents to change their behaviour.[9] It is clear from the above that price plays an essential role in coordinating supply and demand and in the efficient allocation of goods. The only prerequisite for this is that self-interested individuals should make rational decisions.

However, we can only speak of a market equilibrium, if "ceteris paribus" everything else is held fixed.[10] The fluctuation of supply and demand is just one potential cause of changing prices. The market equilibrium may be deterred by external factors as well. For the purposes of this paper, two phenomena are worth closer attention in this regard: inflation and monopolies. First, prices may change if the purchasing power of a currency

5 FARKASNÉ, F. M., MOLNÁR, J. *Közgazdaságtan I. Mikroökonómia* [Economics I. Microeconomics]. 1. ed. Debrecen: Debreceni Egyetem Agrár- és Műszaki Tudományok Centruma Agrárgazdasági és Vidékfejlesztési Kar Debrecen, 2007, p. 29.

6 Ibid., p. 37.

7 Ibid., p. 38.

8 LÁZÁR, P., SOLT, K. *Elméleti Gazdaságtan I. Mikroökonómia* [Theoretical Economics I. Microeconomics]. Budapest: Novoprint Rt., 2006, p. 38.

9 Ibid., p. 40.

10 FARKASNÉ, MOLNÁR, op. cit., p. 26.

alters.[11] If the purchasing power of a currency declines, the price of a product will increase. This phenomenon is called inflation. Second, it may occur that a market agent acquires a monopoly in that market. In that case, there is only one agent on the supply side who can decide on the market price.[12] Consistently high prices will cause consumption to fall. As no other companies can enter the monopoly market, there will be a constant disequilibrium in such markets. In such cases where free markets cannot ensure the efficient allocation of goods, state intervention is required.

Intervention in the price-setting mechanism of markets can take several forms. This paper analyses the most direct one when the state centrally determines the price of a good. By introducing a centrally fixed price, the state takes the price-setting away from its market mechanism and brings it under state control. Price-regulation can happen in various ways.[13] One such method is when the state does not directly determine the price of a good or a service but rather determines the lowest or the highest value at which it can be sold. The purpose of introducing a minimum price, or in other words a price floor, is to preclude prices from falling below a certain threshold. The introduction of a maximum price or a price cap, on the other hand, is meant to preclude prices from going above a certain limit and thereby becoming inaccessible for the majority of consumers. Price caps are the most common way of regulating prices and among all forms of regulation probably have the longest history.[14]

11 FARKASNÉ, MOLNÁR, op. cit., p. 61.

12 Ibid., p. 35.

13 HORVÁTH, I. Hatósági árképzés és járványügy [Central pricing and epidemology]. *Infojegyzet*. Budapest: Országgyűlés Hivatala Közgyűjteményi és Közművelődési Igazgatóság, Képviselői Információszolgálat, 2020, no. 26. Available at: https://www.parlament.hu/documents/10181/4464848/Infojegyzet_2020_26_hatosagi_arkepzes_es_jarvanyugy.pdf/82cc91a5-e7bc-0241-ffba-9805cb2a1f9f?t=1588227997386 [cit. 23. 9. 2022].

14 SUGÁR, A. *A piacszabályozás elméleti és gyakorlati aspektusai a közszolgáltató szektorokban* [The theretical and practical aspects of market regulation in the public sector, primarily through the example of the price regulation of the energy sector], PhD-dissertation. Budapest: Budapesti Corvinus Egyetem, 2011, p. 123. Available at: http://phd.lib.uni-corvinus.hu/570/1/Sugar_Andras.pdf [cit. 14. 4. 2022].

3 Purchase Price in Roman Law

Before turning to an analysis of Diocletian's edict, it is necessary to briefly outline the Roman-law understanding of the role of purchase price in commercial relationships. The Roman consensual sale *(emptio venditio)* evolved into its classical form by the late Republican era around the first century BC.[15] It was by this that it became a generally accepted principle among Roman jurists that the binding nature of sales contracts emanates from the consensus of the parties, and everything else (the contractual form, the transfer of the commodity) is merely a question of performing what has previously been agreed.[16] The *emptio venditio* can thereby be distinguished from the so-called real contracts, where beyond the consensus of the parties the validity of the contract also requires the transfer of the commodity over which the parties have agreed. By contrast, the *emptio venditio* does not require the actual transferring of the commodity; in order to create an obligation, it is sufficient if the parties agree on the essential elements of a sales contract: the commodity *(merx)* and the purchase price (*pretium*). In the words of the Digest, *"[S]i id, quod venierit, appareat quid, quale, quantum sit, sit et pretium* […]*, perfecta est emptio."*[17] Naturally, there may be additional terms *(accidentalia negotii)*, such as delivery period, payment conditions etc.; however, these will not influence the validity of the contract. Even if these additional terms are missing, the contract will generally be "complete" *(emptio perfecta)*.[18]

It can be clearly seen from the Roman-law understanding of commercial transactions outlined above that the consensus over the commodity and the purchase price constituted an essential aspect *(essentialia negotii)* of the consensual sale. Without these the contract between the seller and the buyer could not be made. The consensus over the commodity and the purchase price creates a bilateral (synallagmatic) obligation in which both parties provide a consideration tot he other. In this relation the consideration of the seller is the transfer of the possession of the good,

15 JUSZTINGER, op. cit., p. 16.
16 FÖLDI, HAMZA, op. cit., p. 512.
17 Ibid., p. 513.
18 Ibid., p. 512.

while the consideration provided by the buyer is the purchase price which functions as the countervalue for the good served. By the late Republican era, two important requirements had emerged with respect to the consideration provided by the buyer. First, the countervalue always had to be money *(pecunia numerata)*. Second, the purchase price always had to be specified *(certum pecunium)*.[19] The two requirements reflect the dual nature of money, by which it can simultaneously serve as a commidity as well as a medium by which the value of a good can be specified.

It also followed from the consensual nature of sales contracts that the determination of the purchase price was always up to the parties concerned. That is, the *certum pecunium* was in every case the result of a free negotiation process between the buyer and the seller.[20] Consequently, the price could not be determined either unilaterally or tacitly.[21] This contractual 'freedom' was interpreted rather liberally, meaning that it could amount to anything as long as the parties have agreed. As Papirus Iustius said: *"Quibus mensuris aut pretiis negotiatores vina compararent, in contrahentium potestate esse."*[22]

However, even classical Roman jurists advocating the principle of free negotiation realised that there are instances where in the negotiation process one party gains an unfair advantage over the other party.[23] Thus while recognising the opposing interests of the parties to a sales contract, they understood that in some circumstances there need to be legal guarantees, which steer the negotiation process towards a 'just price' and protects the disadvantaged party against the other party who gained an unfair advantage.[24]

Amidst the economic crisis of the late third century Roman Empire, the emperor Diocletian (284–305 AD) tried to protect the poor from selling their properties at a disproportionately low price.[25] He prescribed a "just

19 FÖLDI, HAMZA, op. cit., p. 512.
20 JUSZTINGER, op. cit., p. 46.
21 Ibid., p. 46.
22 *Corpus Iuris Civilis: Digesta* (18, 6, 7 pr.). Available at: https://droitromain.univ-grenoble-alpes.fr/Corpus/d-18.htm#6 [cit. 23. 9. 2022].
23 JUSZTINGER, op. cit., p. 163.
24 Ibid., p. 164.
25 FÖLDI, HAMZA, op. cit., p. 512.

price" *(iustum pretium)* with respect to the buying and selling of properties.[26] According to his edict, the purchase price of a property in a sales contract had to reach at least half of the value of that property. Using the terminology introduced in the earlier section, Diocletian introduced a price floor with respect to the price of properties, which he determined as half of the market value. This limited the free negotiation process, prohibiting the contracting parties from agreeing on a price below this threshold. If the agreed price did not reach half of the actual market value, then the seller could seek a *restitutio in integrum*, which meant the termination of the contract and the return of the property in exchange for the purchase price. This rule was the so-called *laesio ultra dimidium* or what in medieval times came to be called *laesio enormis*. In case the seller litigated over the termination of the contract, the buyer was granted a *facultas alternativa*, by which he could choose whether he consents to the termination of the sales contract, or he complements the purchase price to the actual market value and thereby keeps the sales contract in force.[27] The rule of *laesio enormis* was meant to protect the seller, although he could not be freed from the obligation without the consent of the buyer. The rationale for this was that while an economic crisis may prompt someone to quickly sell their property at a disproportionately low price, it could not prompt anyone to buy the property under unfair conditions.[28]

4 Diocletians' Edict on Maximum Prices

Diocletian was also ready to intervene into contractural relations of private persons in order to protect buyers from paying disproportionately high prices. His Edict on Maximum Prices *(Edictum de Pretiis Rerum Venalium)* introduced comprehensive price control system that limited the price of certain commodities in the Empire. It set a maximum price for several hundreds of goods and services, including for daily wages in certain professions.[29] His edict issued in 301 AD – together with the Diocletian currency reform – tried to solve the enormous inflation that plagued the third-century Roman

26 According to some scholars, the introduction of the rule of the laesio enormis can be connected to Iustinian. Against this view, see JUSZTINGER, op. cit., p. 164.

27 FÖLDI, HAMZA, op. cit., p. 516.

28 BENEDEK, F. *Római Magánjog. Dologi és kötelmi jog* [Roman Private Law. Property law and the Law of Obligations]. Pécs: Pécsi Tudományegyetem, 1995, p. 172.

29 FÖLDI, HAMZA, op. cit., p. 516.

Empire.[30] While in the first two centuries of the Principate, the value of Roman coins were relatively stable, in the third century the purchasing power of the Roman coins significantly decreased.[31] It is important to note, however, that this was not an economic crisis in the modern sense. Rather, it can be conceived of as a long and steady stagnation, which coincided with the decline of the Roman Empire. The second century saw the expansion of the Roman Empire come to a halt. This led to a shrinking of market outlets and to a decrease in domestic trade as it was not economical to ship commodities across thousands of kilometres.[32] As conquests became ever more scarce, the need for military supplies also dwindled and so did the number of slaves coming into the empire, causing significant labour shortages. While production did not collapse, it gradually decreased, leading to shortages and inflation across markest.

There are various estimates regarding the actual extent of inflation. During the reign of Gallienus (253–268 AD) the inflation of the *denarius* reached up to 2400%.[33] According to Visky, by the time of Diocletian, inflation reached such heights that contracting partners had to reckon with around 100% inflation between the making of the contract and the payment of the purchase price.[34] Although recent research in economic history has questioned the accuracy of these estimates, it can be nonetheless established that there was significant inflation during this period, which led to an explosive increase in prices. For instance, while in the first and second centuries the lowest price of 1 modius castrensis wheat was around half a *denarius*, Diocletian's Edict on Maximum Prices capped the price of 1 modius castrensis wheat in a hundred *denarius*.[35] This amounts to a 200% increase in the price of wheat over a hundred and fifty years.

30 JUSZTINGER, op. cit., p. 162.
31 JUSZTINGER, op. cit., p. 162.
32 MOLNÁR, I. Gazdasági válság a császárkori Római Birodalomban [Economic Crisis in the Imperial Period of the Roman Empire]. *Acta Universitatis Szegediensis de Attila József nominatae: Acta oeconomica*. 1996, Vol. 1., p. 224.
33 HAMZA, G. *Gazdaság és jog kapcsolata a császárkori római* birodalomban [Relations between Economy and Law in the Imperial Period of the Roman Empire]. *Jogtudományi Közlöny*. 1995, Vol. 9, pp. 411–417.
34 JUSZTINGER, op. cit., p. 152.
35 TERMIN, P. *The Roman Market Economy*. Oxford: Princeton University Press, 2013, p. 77. Available at: http://piketty.pse.ens.fr/files/Temin2013.pdf [cit. 23. 9. 2022].

Initially, the Roman imperial policy tried to tackle inflation through coin debasement by gradually decreasing the silver content of the *denarius*.[36] This led to the depreciation of the currency and to further increase in prices. The calculation of the exact extent of inflation is also made more difficult by the fact that the silver content of the coins were not consistent throughout the period, which means that the value of 100 *denarius* at the beginning of the third century was not the same as the value of 100 *denarius* by the end of the third century. By introducing the *solidus* which contained gold instead of silver, Diocletian was hoping to introduce a coin that would keep its value and would thereby be able to fulfil its function. The *solidus* introduced by Diocletian proved to be successful as it kept its weight and gold content for almost seven centuries.[37]

The other part of the Diocletian reform was his Edict on Maximum Prices which was introduced in the final five years of his reign. While the edicts of the *aedilis curulis* did contain various price-capping regulations, this was the first time in the history of the Roman Empire that a comprehensive pricing system encompassing hundreds of commodities was introduced. The historical significance of the edict cannot be underestimated as there is no other surviving official, private or literary text from the ancient world which contains such a complete list of commodities and prices.[38] The edict centrally regulated the maximum price of hundreds of products and services. Among the commodities regulated were basic food items such as cooking oil, salt, pork and honey.[39] Besides these the edict also determined the maximum daily wage for certain professions such as teachers, clerks, and tailors. Those violating the edict's regulation had to face severe sanctions and ultimately capital punishment. *"Audentia, capitali periculo subiugetur"* – as it reads in the preamble of the edict.[40] On the other hand, the edict did not invalidate the contracts that were in violation of its regulations.[41] Therefore, just like the *Lex Laetoria* from the second century BC, the edict imposed

36 Ibid., p. 88.
37 Ibid., p. 68.
38 JUSZTINGER, op. cit., p. 162.
39 LAUFFER, S. *Diokletians Preisedikt*. Available at: http://www.fh-augsburg.de/~harsch/Chronologia/Lspost04/Diocletianus/dio_ep01.html [cit. 23. 9. 2022].
40 Ibid.
41 JUSZTINGER, op. cit., p. 162.

a *lex minus quam perfecta* type of sanction, ordering punishment for unlawful actions but not actually invalidating the unlawful act itself.[42]

However, inflation could not be controlled even with the threat of capital punishment for unlawful actions. The Diocletian reform was not only unsuccessful, but due to the fact that it did not account for the actual market prices and the economic differences across different regions of the Empire, it had the opposite effect of what it originally intended.[43] This was despite the fact that – contrary to the rules of the *laesio enormis* – it tried to protect the buyer, rather than the seller, against the negative effects of the economic crisis. Instead of consolidating prices, it created supply shortages, black markets, smuggling and economic crimes. By the end of Diocletian's reign, the edict was for all practical purposes ignored and was eventually put out of force.[44] It was not just the social and economic effects of the edict that were negative, but it played a decisive role in the downfall of Diocletian, who was forced to resign in 305 AD.[45]

In summary, we can establish that Diocletian's *Edictum de pretiis rerum venalium* is a negative example of state intervention in the price-setting mechanism of the market, contrary to the rules of the *laesio enormis* which survived the Diocletian reform and through its medieval modifications became an integral part of modern civil law systems.[46] The negative social and economic effects of the edict demonstrate the dangers of state intervention into the contractual relations of private persons when the real economic processes and the actual market prices are ignored. It shows that a badly implemented intervention in the name of justice can overturn an otherwise effective market structure, which can result in the destruction of the market. In the case of Diocletian's edict, we saw how commercial activity repositioned itself outside the bounds of the law, leading to the proliferation of black markets. The failure of the edict also illustrates that purchase price can only fulfil its function as the essential element of sales contracts, if the law

42 FÖLDI, HAMZA, op. cit., p. 79.
43 JUSZTINGER, op. cit., p. 162.
44 JUSZTINGER, op. cit., p. 162.
45 Ibid., p. 162.
46 FÖLDI, HAMZA, op. cit., p. 79.

provides adequate freedom for the parties to determine the price.[47] In the case of the *laesio enormis*, the partial limitation of the free negotiation process still left adequate room for the contracting parties to agree on a price that was above half of the actual market value. By contrast, the edict almost eliminated the freedom of the contracting parties by setting price caps that were below the actual market value of the products in some cases. This shows that only mutual negotiation processes protected by sufficient legal guarantees can effectuate prices which are acceptable to both parties and by this serves their interest to enter into a contract.[48]

5 The Comparison of the Pricestop Introduced by the Hungarian Government and Diocletian's

In 2021 and 2022, when the Government of Hungary decided to regulate the price of several goods essential to the population, it opted for the same form of crisis management as Diocletian did 1720 years before. In November 2021, the government capped the maximum retail price of the E10 petrol and diesel fuel at 480 Hungarian forints (HUF) per litre.[49] And in February 2022, the government also set the maximum retail price for the following essential food items: granulated sugar, wheat flour, refined sunflower oil, domestic pork thigh, chicken breast, chicken back, and 2,8% fat UHT milk. For these products the retail prices were capped at the gross retail prices effective on the 15 October 2021.[50] While the price caps were originally meant to be in force until the end of the state of emergency declared by the Act I of 2021 on the Containment of the Coronavirus Pandemic (31 May 2022),[51] they remained in force as the state of emergency was extended until the end of 2022 due to the armed conflict and humanitarian catastrophe in Ukraine.[52]

The Hungarian government decrees introducing the price caps show a great deal of similarity to the edict of Diocletian with respect to their root causes,

47 JUSZTINGER, op. cit., p. 162.
48 Ibid., p. 163.
49 Government decree No. 624/2021. (XI.11.) 1. §. (1).
50 Ibid, 1. § (2).
51 Government decree No. 624/2021. (XI. 11.) 3. §. (1).
52 Government decree No. 180/2022. (V. 24.).

their policy aims, their technical solutions, and the sanctions they impose on those breaching the law. Regarding the policy aims, their goal is likewise to tackle the problem of increasing prices resulting from the inflationary processes in the economy. The causes that triggered these inflationary pressures were the coronavirus pandemic and the escalating Russio-Ukranian conflict which have led to an increase in energy prices and supply shortages that have greatly affected Hungarian markets. Contrary to Diocletian who had to deal with an almost 100% inflation, the Government of Hungary only has to tackle around a 15% annual inflation, which is still the biggest inflation that the country has experienced in the last fifteen years.[53]

The task of the Hungarian government is easier in the sense that while Diocletian had to introduce a comprehensive price system encompassing hundreds products in order to maintain a completely depreciated currency, the value of the HUF is relatively stable and the regulations only concern a very narrow albeit essential range of goods. It must be noted that the fuel-pricestop and the food-pricestop only costitute a part of the government's crisis-management efforts to maintain civilian consumption. Other measures include the freezing of mortgage interest rates, and the utility price cuts which are upheld despite the increasing energy prices.[54] Interestingly, in the latter case the difference between the discounted utility prices that civilian consumers have to pay and the world market prices are borne by the Hungarian State, so in the case of gas heating and electricity the government can only influence the effect on the consumers but not the actual market prices. However, contrary to the aforementioned commodities, these services do not fall under the scope of the Act LXXXVI of 1990 on Pricing (henceforth: the Price Act),[55] so they do not constitute the subject of our discussion.

Contrary to the edict of Diocletian, the decrees introducing the fuel-pricestop and the food-pricestop do not directly determine

53 Hungary inflation rate. *Trading Economics* [online]. Available at: https://tradingeconomics.com/hungary/inflation-cpi [cit. 23. 9. 2022].

54 Orbán: Hungary must maintain utility prices. *Budapest Times* [online]. Available at: https://www.budapesttimes.hu/hungary/orban-hungary-must-maintain-utility-price-cuts/ [cit. 23. 9. 2022].

55 Act LXXXVI of 1990.

the price cap of the aforementioned products. Instead, they expand on the list of commodities enumerated in the schedule of the Price Act.[56] The Price Act was passed by the National Assembly in December 1990, not long after the democratic transition of Hungary had taken place and the country had shifted from the socialist planned economy to free-market capitalism.[57] This Act contains the basic principles of price regulation and the limits of government intervention into the price-setting mechanism of the market. The Act has been modified many times in the past thirty-one years, and while its schedule has always contained various commodities, the list of products only gained wider attention from the public when the Government of Hungary decided to cap the prices of certain products during the state of emergency.

The Price Act was introduced to enforce the market mechanisms outlined in the first section of this paper. Consequently, the Act reserved the possibility of price regulation to instances when those market mechanisms would be impaired for some reason; namely, if an agent using its economic dominance would abuse its monopoly power. The Preamble of the Act reads as follows: *"The main regulator of prices is the market and the economic competition. Direct government intervention into prices is only vindicated where the provisions contained in the act on the prohibition of unfair market practices are insufficient to prevent harmful restriction on competition and the abuse of economic dominance."*[58] The Preamble clearly states that price regulation is a measure against monopolies that abuse their market position. From this follows that according to the Price Act, the purpose of centrally determined prices is to restore the distorted market relations, which aligns with the principles of neoclassical economics outlined in section one of this paper.

However, the government decrees that introduced new commodities into the schedule of the Price Act were not created to restore market mechanisms. Instead, they were made to protect against the harmful effects of the market, and to control or at least to mitigate the inflation that arose in the economy. The decree introducing the food-pricestop states

56 See Government decree No. 624/2021. (XI. 11.) 3. § (1).; as well as Government decree No. 6/2022. (I. 14.) 1. § (1).

57 HORVÁTH, op cit.

58 Act LXXXVII of 1990.

that the decree expands the list of regulated commodities in the schedule of the Price Act *"in order to prevent against the harmful effects of market disorders."*[59] So the government decrees practically provide content to an Act that was made in very different historical circumstances and according to its preamble with a very different goal in mind than it is currently being used for. The original purpose of the Act was to guarantee the functioning of market mechanisms. Thirty-one years later the government has decided to use it to combat the negative effects of the free market.

Of course, using an act for the opposite purpose than it was originally intended for does not mean that such an application of the act was somehow unlawful. Indeed, from the perspective of legislature, the aforementioned government decrees are perfectly legitimate. Unusual situations call for unusual solutions. In the current situation, it is necessary for the government to intervene into the market processes so that essential items remain affordable to the wider population. And currently this can be achieved with an act that was created thirty-one years ago to protect market relations from getting distorted. However, the market regulated prices such that intervention into its price-setting mechanism became necessary in order to maintain consumption levels in the population.

Finally, the decrees are similar to the Diocletian edict also with respect to the sanctions that they impose on those breaching their regulations. In the case of fuel prices, if someone goes above the 480 HUF/litre price cap, the National Tax and Customs Office (NAV) will issue a fine ranging from 100 000 HUF to 3 000 000 HUF.[60] The same fine in the case of the food items range from 50 000 HUF to 3 000 000 HUF, issued by the general consumer protection authority.[61] If the offence is repeated, in both cases the competent authority can temporarily (between one to six months) suspend the operations of the retailer.[62]

59 Government decree No. 6/2022. (I. 14.) 1. § (1).
60 Government decree No. 626/2021. (XI. 13.) 3. §. (2). a).
61 Government decree No. 6/2022. (I. 14.) 3. § (2) a).
62 Government decree No. 626/2021. (XI. 13.) 3. §. (2). b); also Government decree No. 6/2022. (I. 14.) 3. § (2) b).

6 Conclusion

In summary, we can deduce that the Diocletian Edict on Maximum Prices and the Hungarian government decrees introducing price caps are very similar, both in their root causes, their legal policy aims, their technical solutions, as well as in the sanctions that they impose on those breaching the law. Diocletian's edict could not solve the problem of increasing prices in the third-century Roman Empire. The long-term economic and social effects of the government decrees are unknown, and as the pricestop measures are still in force, we are not in the position to establish whether they can successfully keep prices from rising in the long run. Since maintaining the pricestop puts an increasing burden on public finances, it is likely that the Government of Hungary will soon be forced to put an end to the pricestop measures. There is no doubt that as inflation keeps rising in the global economy the government will not be able to prevent it from trickling down into the domestic economy. Hopefully, through a gradual and well-timed lifting of the price regulations, the Government of Hungary may be able to slow down the inflationary processes until the global economy resets and the world market prices normalise, and in this way achieves greater success than Diocletian did in his day.

References

BENEDEK, F. *Római Magánjog. Dologi és kötelmi jog.* Pécs: Pécsi Tudományegyetem, 1995.

FARKASNÉ, F. M., MOLNÁR, J. *Közgazdaságtan I. Mikroökonómia*. 1. ed. Debrecen: Debreceni Egyetem Agrár- és Műszaki Tudományok Centruma Agrárgazdasági és Vidékfejlesztési Kar Debrecen, 2007.

FÖLDI, A., HAMZA, G. *A római jog története és institúciói*. 25. reworked and extended ed. Budapest: Nemzedékek Tudása Tankönyvkiadó, 2021.

HAMZA, G. Gazdaság és jog kapcsolata a császárkori római birodalomban. *Jogtudományi Közlöny*. 1995, Vol. 9, pp. 411–417.

HORVÁTH, I. Hatósági árképzés és járványügy. *Infojegyzet*. Budapest: Országgyűlés Hivatala Közgyűjteményi és Közművelődési Igazgatóság, Képviselői Információszolgálat, 2020, no. 26.

JUSZTINGER, J. *A vételár meghatározása és szolgáltatása a konszenzuális adásvétel római jogi forrásaiban*. PhD-dissertation. Pécsi Tudományegyetem, 2012.

LÁZÁR, P., SOLT, K. *Elméleti Gazdaságtan I. Mikroökonómia*. Budapest: Novoprint Rt., 2006.

MOLNÁR, I. Gazdasági válság a császárkori Római Birodalomban. *Acta Universitatis Szegediensis de Attila József nominatae: Acta oeconomica*. 1996, Vol. 1, pp. 223–229.

SUGÁR, A. *A piacszabályozás elméleti és gyakorlati aspektusai a közszolgáltató szektorokban*. PhD-dissertation. Budapest: Budapesti Corvinus Egyetem, 2011.

TERMIN, P. *The Roman Market Economy*. Oxford: Princeton University Press, 2013.

Historical Traces of Moral Rights in Common Law[1]

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Abstract

The paper aims to track the traces of moral rights in common law, since it is a usual misconception that common law system of copyright protection is incompatible with the moral rights and the rights were consequently adopted to formally satisfy the international legal framework. The paper firstly outlines the regulatory context in which the rights comparable to continental jurisdictions had the chance to be acknowledged. Then it proceeds to an analysis of doctrinal sources as well as case-law of the highest judicial authorities that have touched upon these questions and developed comparable solutions to the jurisdictions traditionally protecting moral rights.

Keywords

Moral Rights; Intellectual Property; Common Law; Comparative Law.

1 Introduction

The concept of moral rights and their origin is more often than not attributed to the judicial doctrinal development of the late eighteenth and nineteenth centuries within continental Europe.[2] Despite the prevailing

1 This research has been supported by the Slovak Research and Development Agency under the contract APVV-18-0417.

2 The specific protection of personality rights developed mainly in France and Germany, and can be considered as an extension of already existing continental ideas about the nature and protection of the interests of authors. See BEITZ, C. The Moral Rights of Creators of Artistic and Literary Works. *Journal of Political Philosophy*. 2005, Vol. 12, no. 3, p. 331.

opinion that the concept at hand is foreign to common law jurisdictions[3] (also in connection with the economic grasp of copyright),[4] the present state of law may point to the opposite direction. At least on a formal level. Although with great difficulty,[5] but at least in a condensed form the moral rights (especially the right to be identified as the author and the right to the integrity of the work) were incorporated into the Anglo-American legal system, either in the United Kingdom in 1988,[6] or two years later in a minimalist form, but with even more resistance in the United States.[7]

As it is already clear from the introduction, this paper focuses on the concept of personal rights of authors, which are often referred to in English literature as *moral rights*,[8] stemming from the French term *droits moraux* (sg. *droit moral)*,[9] also denoted in the German literature as *Urheberpersönlichkeitsrechte* (sg. *Urheberpersönlichkeitsrecht)*.[10]

In general, this concept is defined at the level of the relationship between the author and his work. Since an artist of any kind brings a unique work into the world, he also projects a part of his personality into the world, thus it also deserves a special form of protection.[11]

3 BIRD, R., PONTE, L. Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations. *Boston University International Law Journal*. 2006, Vol. 24, no. 2, pp. 213–214.

4 MARVIN, C. Author's Status in the United Kingdom and France: Common Law and the Moral Rights Doctrine. *International and Comparative Law Quarterly*. 1971, Vol. 20, no. 4, p. 676.

5 DWORKIN, G. The Moral Right of the Author: Moral Rights and the Common Law Countries. *Columbia-VLA Journal of Law & the Arts*. 1994, Vol. 19, no. 3+4, p. 229.

6 Copyright, Designs and Patents Act 1988.

7 Visual Artists Rights Act of 1990 (VARA).

8 NETANEL, N. Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law. *Cardozo Arts & Entertainment Law Journal*. 1994, Vol. 12, no. 1, p. 2.

9 MORILLOT, A. De la nature du droit d'auteur, considéré à un point de vue général. *Revue Critique de Législation et de Jurisprudence*. 1878, Vol. 27, no. 7, p. 124.

10 ULMER, E. *Urheber- und Verlagsrecht*. Berlin: Springer-Verlag, 1960, p. 259.

11 ROEDER, M. The Doctrine of Moral Rights: A Study in the Law of Artists, Authors and Creators. *Harvard Law Review*. 1940, Vol. 53, no. 4, p. 557.

Likewise, the specific content of moral rights differs within individual jurisdictions, but in general, four basic areas of rights can be identified within the academic literature:[12]

- The right to publish the work (first publication),
- The right of withdrawal,
- The right to be identified as the author (right of paternity, right of attribution),
- Right to inviolability of the work (right of integrity).

It can be said with certainty that this list of rights is not a closed set and cannot be considered universal and recognized in every jurisdiction to the same extent. Nevertheless, two of the rights on which there is general agreement even within academic writing are i) the right to be identified as the author and ii) the right of integrity.[13]

In light of these circumstances, the aim of the paper is to analyse the doctrinal and judicial foundations of moral rights in the common law, within the context of development related to continental jurisdictions.

2 Statute of Anne 1710 and the Context of the Protection

The early development of copyright in the common law shares a similar historical development with the civil law jurisdictions, as the regulation took form of the privileges, also fulfilling the censorship interests.[14] It was the same story in the England, where, these rights were vested in the Stationers' Company, a trade guild representing the book trade, reorganized in 1557 by a Royal Charter virtually granting a monopoly over printing and bookselling.[15] The Stationers' Company was administering a register, which served as the evidence of an exclusive right to publish

12 RIGAMONTI, C. Deconstructing moral rights. *Harvard International Law Journal*. 2006, Vol. 47, no. 2, pp. 362–367.

13 MARCUS, E. The Moral Right of the Artist in Germany *Copyright Law Symposium (ASCAP)*. 1975, Vol. 25, p. 93.

14 GIESEKE, L. *Vom Privileg zum Urheberrecht. Die Entwicklung des Urheberrechts in Deutschland bis 1845*. Baden-Baden: Nomos, 1995, p. 39.

15 FEATHER, J. *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain*. London: Mansell Publishing Limited, 1994, p. 15.

the work.[16] Nevertheless, the copyright at this time was not the author's, but the publisher's right.[17]

What could be considered as a gamechanger in terms of the monopoly system,[18] was the Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned (the Statute of Anne),[19] also denoted as the first copyright act.[20] The Act entitled the authors or other persons who have purchased or acquired the copies of already printed books to have the "sole right and liberty of printing" for twenty-one years.[21] Otherwise, they were entitled to fourteen years of protection and additional fourteen years if they remained living.[22] In practical consequences, the Statute of Anne disrupted the market, which initiated the opposition of the booksellers and publishers, trying to argue a separate existence of the absolute, perpetual common law right in order to circumvent the limits of the applicable law.[23]

3 First Disputes: A Prologue

The first cases indicating an early shift, setting a playground for initial iterations of moral rights in English copyright were pleaded before the Court of Chancery.[24] It is no surprise that plaintiffs were seeking remedies in the form of injunctive reliefs, as the so called "Court of conscience"[25]

16 HÖFFNER, E. *Geschichte und Wesen des Urheberrechts: Band I*. München: Verlag Europäische Wirtschaft, 2011, p. 67.
17 PATTERSON, L. *Copyright in Historical Perspective*. Nashville: Vanderbilt University Press, 1968, p. 45.
18 ROSE, M. The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship. *Representations*. 1988, Vol. 23, p. 57.
19 The Statute of Anne, 8 Anne, c. 19 (10 April 1710).
20 BALDWIN, P. *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*. Princeton: Princeton University Press, 2014, p. 65.
21 The Statute of Anne, 8 Anne, c. 19 (10 April 1710), § 2.
22 Ibid., § 11.
23 ROSE, M. The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship. *Representations*, 1988, Vol. 23, p. 57.
24 DEAZLEY, R. *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)*. Portland: Hart Publishing, 2004, p. 51.
25 KLINCK, D. *Conscience, Equity and the Court of Chancery in Early Modern England*. London: Routledge, 2010, p. 13.

operated in a different fashion, free from rigid procedures often associated with the traditional common law court structure.[26]

Among other issues that were left ambiguous by the Statute of Anne was the question of first publishing of the manuscript, an issue also linked to the moral rights aspect of the author's rights. In this regard, the case of *Pope vs. Curl* decided in 1741 by Lord Hardwicke deserves greater attention. The case concerned publishing a volume of letters entitled *Letters from Swift, Pope, and others* that also encompassed letter to and from Alexander Pope.[27] In his bill of complaint invoking the Statute of Anne, the plaintiff requested the Court to prohibit the disposing of any of the letters.[28]

It was suggested that the whole issue should be read not in light of the economic interests, but as a matter of personal right since in the view of Pope, the printing of private letters was an offense against decency.[29]

In the case at hand, the Lord Chancellor was dealing with two questions. The first question, whether the letters fall within the scope of the Statute of Anne was answered affirmatively. As *"it would be extremely mischievous, to make a distinction between a book of letters, which comes out onto the world, either by the permission of the writer, or the receiver of them, and any other learned work."*[30] Additionally, one of the principal arguments raised in defence was that the letters at hand merely constituted a gift.[31] As a response, Lord Hardwicke argued that only the property of the paper may belong to receiver of the letters.[32] Consequently, an early version of the right of first disclosure may be derived from the case at hand, since only the author should be entitled to judge if to publish the letters.

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26 BAKER, J. *An Introduction to English Legal History*. Oxford: Oxford University Press, 2019, pp. 111–114.

27 *Pope vs. Curl* (1741) 2 Atkyns 342, 26 E.R. 608, p. 608.

28 Alexander Pope's Bill of Complaint, and Edmund Curl's Answer, 1741. In: BENTLY, L., KRETSCHMER, M. (eds.). *Primary Sources on Copyright (1450–1900)*. Available at: https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1741c

29 ROSE, M. The Author in Court: Pope v. Curll (1741). *Cultural Critique*. 1992, no. 21, p. 203.

30 *Pope vs. Curl* (1741) 2 Atkyns 342, 26 E.R. 608, p. 608.

31 Ibid.

32 Ibid., in his words: *"I am of opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer."*

In a similar vein, in 1758 an injunction was granted to prohibit the printing of an unpublished manuscript in *Duke of Queensberry vs. Shebbeare*, where the case concerned a copy that was given to the defendant, however with no intention of publishing.[33] Nevertheless, the case affirmed that the author has a property in an unpublished work independent of the statute.[34]

The similar arguments connected with the existence of literal property at common law were also raised before the Court of King's Bench in the case of *Tonson vs. Collins*.[35] Surprisingly, the significance of the case does not lie within its results, as it was suspected that the action was brought in a collusion to obtain a decision upon the existence of the right at common law, thus the Court refused to proceed further.[36]

On the other hand, of a great value were the observations provided by W. Blackstone acting as the counsel for the plaintiff. He argued that every author had in himself the sole exclusive right of multiplying the copies of his literary productions independent of Statute of Anne.[37] Such right was founded in reason and the property may be acquired by mental, as by bodily labour, referring to Lockean labour theory of property established in the Second Treatise on Government.[38]

A reader may in this regard ask a meaningful question: if the property may be acquired by mental labour, can the author of a literary composition acquire property rights? Blackstone provides that the essential requisite of every subject of property is its value, which is certainly satisfied by the literary compositions that may be measured by their sale.[39]

According to Blackstone, *"a literary composition, as it lies in the author's mind, before it is substantiated by reducing it into writing has the essential requisites to make it the subject of property."*[40] Stemming from this background, a nascent right of first disclosure may be seen, since he then opens the argument that before the moment of publication, where the work *"lies dormant in the mind"*,

33 *Duke of Queensbury vs. Shebbeare* (1758) 2 Eden 329, 28 E.R. 924, p. 924.
34 Ibid., p. 925.
35 *Tonson vs. Collins* (1761) 1 Blackstone W. 321, 96 E.R. 180.
36 *Millar vs. Taylor* (1769) 4 Burrow 2303, 98 E.R. 201, p. 214.
37 *Tonson vs. Collins* (1761) 1 Blackstone W. 321, 96 E.R. 180, p. 180.
38 Ibid., p. 180.
39 Ibid.
40 Ibid., p. 181.

the author alone is entitled to the profits of communicating or making public the work.[41]

Finally, the most important exposition in the arguments supporting the case relevant to the moral rights was in the distinction provided for the elements of literary composition. Referring to his words, the literary composition is constituted by the "style" and "sentiment".[42] On the contrary, the *"paper and print are merely accidents, which serve as vehicles to convey that style and identity"*.[43] In this sense, the copies of the work covering the same style and sentiment represent the exact same work crafted by the author's labour.[44] What may be noticed that these ideas are broadening the concept outlined in *Pope v. Curl* differencing between the tangible and intangible parts of the composition.

These ideas were subsequently adopted also in Blackstone's well-known work entitled *Commentaries on the Laws of England* published between 1765–1769.[45] Interestingly, he categorised the literary property and author's rights under the umbrella of "Title to Things Personal by Occupancy". While it was recognized, that in most cases it finds no application, however, in few instances the right of occupancy is still permitted to exist.[46]

In the part devoted to literary composition, Blackstone provides a similar analysis as in the arguments raised on behalf of Tonson. Under that perception, the foundational elements of literary property are the labour and invention.[47]

Moreover, the exclusive right of publishing is expressly mentioned twice. Firstly, with regards to the definition of literary composition – which was

41 *Tonson vs. Collins* (1761) 1 Blackstone W. 321, 96 E.R. 180, p. 181.
42 Ibid., p. 189.
43 Ibid.
44 Ibid.
45 BLACKSTONE, W. *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769, Vol. I Of the Rights of Persons (1765) With an Introduction by Stanley N. Katz.* Chicago & London: The University of Chicago Press, 1979.
46 Namely goods of alien enemy, unclaimed movables, the elements (light, air, water), animals *ferae naturae*, emblements, accessions, confusion of goods. See BLACKSTONE, W. *Commentaries on the Laws of England in One Volume, together with A Copious Glossary of Legal Terms Employed; Also Biographical Sketches of Writers Referred to; And a Chart of Descent of English Sovereigns, Edited by WM. Hardcastle Browne, A. M.* St Paul: West Publishing Co., 1897, pp. 352–354.
47 Ibid., p. 354.

slightly amended, as the identity of the composition consists in the sentiment and the language, substituting the style, but having the same meaning. In this context, the right of disclosure prohibits third persons of exhibiting the work, as Blackstone highlights, especially for profit.[48]

The second time, the right of publishing is touched upon is within the analysis of author's rights. Blackstone explains that in a scenario the author sells a single book, *"the buyer has no right to multiply copies of such book for sale, than he has to imitate a ticket for a concert"*.[49] Finally, in his view, the fact that the unpublished manuscript is an exclusive property of the author is undisputable. However, Blackstone distinguishes between two specific moments (before and after publishing) since only the unpublished manuscript falls within the scope of this right. Upon publication, such right vanishes.[50]

Surprisingly, almost identical rendition of the analysed distinction was developed also in the continental legal system by J. Fichte, whose work served also as the basis of other approaches to intellectual property or personality rights in continental Europe.

Fichte primarily distinguished between the book as a material object and its immaterial content – between the ideas contained therein and the form in which they were expressed.[51] What is the essential starting point of this definition is that the person who bought the book after its publication became the owner of the book itself – its material embodiment. In contrast, the entire community, including the author, owned the ideas expressed in the book.[52] Finally, the form in which the ideas were expressed (as the style and sentiment in Blackstone's theory) remained the exclusive property of the author.[53] Fichte establishes two specific rights that follow from the author as the owner of the form. First of all, it is the right to prevent anyone from denying him the ownership of this form (he explicitly classifies it as the right to demand that everyone recognize him as the author),[54] but

48 BLACKSTONE, 1897, op. cit., pp. 354.
49 Ibid.
50 Ibid.
51 FICHTE, J. G. Beweis der Unrechtmäßigkeit des Büchernachdrucks: Ein Räsonnement und eine Parabel. *Berlinische Monatsschrift.* 1793, Vol. 21, pp. 449–450.
52 Ibid.
53 Ibid., p. 451.
54 Currently the right of attribution.

also the right to prevent others from interfering with his exclusive ownership of this form, an early rendition of the right to the integrity of the work.[55]

4 *Millar vs. Taylor* and *Becket vs. Donaldson*: Interlude and Epilogue

Probably the most influential case in connection with the moral rights and their traces in Anglo-American system is the case *Millar vs. Taylor* decided first time by the Court of King's Bench, known for the acceptance of the author's common law copyright in perpetuity.[56]

The facts of the case were concerning a dispute regarding the collection of poems by J. Thomson.[57] The copyright was acquired by A. Millar, a bookseller, who purchased and registered the book in the Stationer's Company Registry. In 1763, the new copies published by R. Taylor started to appear, thus falling outside the scope of the Statute of Anne's maximum of twenty-eight years period of protection.[58] Humorously, the case was not anyhow connected with authors. Indeed, it was a dispute between the booksellers also denoted as the "Battle of the Booksellers".[59]

The parties were represented by J. Dunning and once again, W. Blackstone on behalf of the plaintiff, as well as E. Thurlow and A. Murphy arguing the case for the defendant.[60]

Yet again, the plaintiff put forth that a real property remained in authors after publication of their works, which was based in common law that already existed and does still exist independent of the Statute of Anne.[61] Therefore the main questions tackled by the Court were i) whether a copy of a book, or literary composition belongs to the author by the common

55 FICHTE, J. G. Beweis der Unrechtmäßigkeit des Büchernachdrucks: Ein Räsonnement und eine Parabel. *Berlinische Monatsschrift*. 1793, Vol. 21, pp. 451–452.

56 PATTERSON, L. *Copyright in Historical Perspective*. Nashville: Vanderbilt University Press, 1968, p. 15.

57 FEATHER, J. *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain*. London: Mansell Publishing Limited, 1994, p. 87.

58 *Millar vs. Taylor* (1769) 4 Burrow 2303, 98 E.R. 201, p. 202.

59 ROSE, M. Authors and Owners: *The Invention of Copyright*. Cambridge: Harvard University Press, 1993, p. 68 et seq.

60 *Millar vs. Taylor* (1769) 4 Burrow 2303, 98 E.R. 201, p. 201.

61 Ibid., p. 202.

law; and ii) whether the common law-right of authors to the copies of their own works was taken away by the Statute of Anne.[62]

While it is usually protracted that the value of the decision lies within upholding the existence of the common law literary property rights, which is certainly a truth, the moral rights aspect is inter-connected to these issues.

Turning firstly to the property aspect, several arguments have been raised. An essential part of them is devoted to the natural rights basis of such rights, as it is held that the common law is founded on the law of nature and reason, derived from natural and moral philosophy, civil and canon law, and from logic and custom stemming from the nature and condition of human kind.[63]

In this sense, it seemed that such right did exist parallel with the Statute, as the decision provides for an example of a transcribed and published manuscript. It would fall outside the scope of the Statute of Anne. It would not amount to larceny, trespass, nor it would constitute an indictable crime, since the physical property would still remain at the author's disposal. Nevertheless, it must be still considered as a gross violation of a valuable right.[64]

Very similar approaches may be also found in natural law theories to author's right in the rest of the Europe. Probably the oldest German works regarding the concept of intellectual property is attributed to N. Gundling.[65] He considered the book as property, not only from the point of view of his own thoughts, but also from the point of view of its value, in case the author wanted to arrange its publication, or any other trading.[66] He discussed this question, similar to the authors of the time, in connection with the issue of unauthorized reprinting *(Nachdruck)*,[67] while he held the opinion that the ideas as such belong to the author,[68] therefore *"the book that the author publishes in a large edition is his special property, which no one can openly or implicitly*

62 *Millar vs. Taylor* (1769) 4 Burrow 2303, 98 E.R. 201, p. 206.
63 Ibid., p. 223.
64 Ibid., p. 216.
65 KOHLER, J. *Urheberrecht an Schriften und Verlagsrecht*. Stuttgart: Verlag von Ferdinand Enke, 1907, p. 71.
66 GUNDLING, N. H. *Rechtliches und Vernunfmäßiges Bedenken eines unparteyischen Rechtsgelerhrten über den schändlichen Nachdruck andern gehöriger Bücher*. Frankfurt; Leipzig, 1774, § 4, p. 5.
67 Ibid., § 5, p. 6.
68 GUNDLING, 1774, op. cit., § 5, p. 7.

to take."[69] In a similar vein, J. Birnbaum also advanced the idea that *"what your own ingenuity, tireless effort has created is your own."*[70] Such ownership is freely enjoyed by authors and other persons are to be excluded.[71] In relation to publishers of authors' manuscripts, he claims that there is not only a transfer of ownership of the physical thing, but also a complete assignment (cession) of all rights associated with it, which otherwise belong exclusively to them.[72] For this reason, an act that is not only contrary to divine and human law, but also an obvious theft that violates natural law, should be considered an unauthorized reprint.[73]

Apart from the basis in natural law, the existence of the literary property has been supported by the cases dealt by the Chancery as giving a proper relief in consequence of the legal right.[74] Furthermore, Lord Mansfield also adopted the distinction between the manuscript itself and incorporeal element, which he considered as a *"set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression detached from the manuscript"* susceptible to a violation by printing without the author's consent.[75] The finding itself greatly resembles the concepts elaborated by W. Blackstone. What it also resembles is the subsequent development at the continent which was also concerned with the questions of printing without the author's consent.

However, what does not resemble any previously mentioned theories is the part of the decision that appears as a follow-up to the natural law reasoned foundations of literary property. Apart from highlighting the author's right to reap the pecuniary profits of his own labour, Lord Mansfield underscores the equal fact that it is *"just, that an another should not use his name, without his consent"*.[76] What could be seen behind these thoughts

69 GUNDLING, 1774, op. cit., § 5, p. 28.

70 BIRNBAUM, J. A. *Eines aufrichtigen Patrioten unpartheyische Gedancken über einige Quellen und Wirckungen des Verfalls der ietzigen Buch-Handlung, Worinnen insonderheit Die Betrügereyen der Bücher-Pränumerationen entdeckt, Und zugleich erwiesen wird, Daß der unbefugte Nackdruck unprivilegirter Bücher ein allen Rechten zuwiederlauffender Diebstahl sey*. Schweinfurth: Tobias Wilhelm Fischer, 1733, § 20, p. 44.

71 Ibid., § 20, s. 45.

72 Ibid.

73 Ibid., § 21, s. 47.

74 *Millar vs. Taylor* (1769) 4 Burrow 2303, 98 E.R. 201, p. 251.

75 Ibid.

76 Ibid., p. 252.

is that not only is the author of a work entitled to a monetary value connected with his mental product, but based on the same foundations he enjoys another set of rights – in this instance, nothing more or less than a right of attribution.

The enumeration of rights did not end there, but also touched upon the right of first publication, in other words that it is only author, who is able to judge, whether the work is fit to publish, or even whether he will ever publish.[77]

Third of the mentioned rights in the case of *Millar vs. Taylor* could be labelled as the right of integrity, since the author may not only choose the time when to publish the work, but also the manner, quantity, volume and type of the print.[78] This elaboration is probably comparable to continental legal doctrine of the 19th century, where for instance O. Gierke derived these entitlements from the author's right to determine the way in which the work shall be disclosed, which occurs when the work is published elsewhere and in a different way than the author intended, or in cases where the work is being reproduced beyond what was agreed, but also in cases it is published under a different name, or with omissions, insertions, or changes to its content.[79]

Additionally, the case also foreshadowed several other future developments such as the right of withdrawal by mentioning that in case the author would not be guaranteed the common law protection, he would not be able to sustain the correctness of the work, since the possibility to retract errors, amend or cancel a work containing faults would not exist.[80]

The conclusion of Lord Mansfield was therefore evident. If an author was entitled to all of the mentioned rights, the Statute of Anne provided no answer as it remained silent on these issues. Therefore, in view of the 3-1 majority, principles of right and wrong, the fitness of things, convenience, and policy, […] the common law must have protected these interests.[81]

77 *Millar vs. Taylor* (1769) 4 Burrow 2303, 98 E.R. 201, p. 251.
78 Ibid.
79 GIERKE, O. *Deutsches Privatrecht: Allgemeiner Teil und Personenrecht*. Leipzig: Duncker & Humblot, 1893, p. 792.
80 *Millar vs. Taylor* (1769) 4 Burrow 2303, 98 E.R. 201, p. 252.
81 Ibid.

On the contrary, the voice arguing against the position upheld by the majority and their brief victory, was the one of Justice Yates, the defence counsel acting in *Tonson v. Collins*,[82] who found difficulties with the prevailing theories concerning the property. The principal problem with the notion of property was according to his understanding its equivocal use, sometimes denoting the personal right, sometimes the object itself – which can hardly exist without any corporeal substance.[83] Interestingly, though, all of the judges agreed that a literary composition is in the dominion of the author and *"no man can lawfully take it from him, or compel him to publish against his will"*,[84] therefore unilaterally supporting the right of disclosure.

The brief victory has been finally overturned in a subsequent case of the House of Lords, *Donaldson vs. Becket* in 1774.[85] Humorously, once again, the case concerned the same composition as in the *Millar vs. Taylor,*[86] and once again, similar actors were involved in the arguments.[87] The questions raised in the case were also substantially linked to the already discussed issues.[88] Nevertheless, the case famously ended the journey of a separate, co-existent literary property by a controversial vote supporting

82 FEATHER, J. *Publishing, Piracy and Politics*: *An Historical Study of Copyright in Britain*. London: Mansell Publishing Limited, 1994, p. 88.

83 *Millar vs. Taylor* (1769) 4 Burrow 2303, 98 E.R. 201, p. 233 et seq.

84 Ibid., p. 230.

85 BALDWIN, P. *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*. Princeton: Princeton University Press, 2014, p. 67.

86 *Donaldson vs. Becket* (1774) II Brown 129 1 E.R. 837, p. 837.

87 DEAZLEY, R. *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)*. Portland: Hart Publishing, 2004, pp. 195–196.

88 The questions put to judges were: I. Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent? II. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition; and might any person afterwards reprint and sell, for his own benefit, such book or literary composition, against the will of the author? III. If such action would have lain at common law, is it taken away by the statute 8th Ann; and is an author, by the said statute, precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby. IV. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law? V. Whether this right is any way impeached, restrained, or taken away by the statute 8th Ann? See *Donaldson vs. Becket* (1774) II Brown 129 1 E.R. 837, pp. 846–857.

the statutory content of copyright.[89] The reason may lie within the fact that acknowledging the perpetual common law literary property would facilitate the monopoly of the booksellers. Indeed, it has been recounted that *"the booksellers, had not, till lately, ever concerned themselves about authors, but had generally confined the substance of their prayers to the legislature, to the security of their own property; nor would they probably have, of late years, introduced the authors as parties in their claims to the common law* […] *had not they found it necessary to give a colourable face to their monopoly."*[90]

Although some of the judges argued that "*right at common law to his manuscript previous to publication 'existed and should continue under certain restrictions after publication' "*,[91] this decision marked the end of the moral rights in the Anglo-American jurisdictions, since the only authoritative source of law, the Statute of Anne made no indications of any similar rights elaborated above.

5 Conclusion

Notwithstanding the defeat that moral rights incurred as a collateral damage following the faith of common law of literary property, it may be claimed that the historical development has shown similarities in the legal thinking between the continental and Anglo-American legal system. Apart from the right of disclosure, also the right of attribution, integrity, as well as the traces of the withdrawal right have found their place in the doctrinal and judicial speech.

While the concept of moral rights vastly disappeared from the legal sphere since the decision in *Donaldson vs. Becket*, it must be highlighted that the philosophical approaches that were framing the discussion before the courts also took part in subsequent development in Europe.

89 DEAZLEY, R. *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775).* Portland: Hart Publishing, 2004, p. 197.

90 COBBETT, W. *The parliamentary history of England, from the earliest period to the year 1803 : from which last-mentioned epoch it is continued downwards in the work entitled, "The parliamentary debates"*, London: T.C. Hansard, 1813, p. 954.

91 Ibid., p. 958.

Unfortunately, the protection of non-pecuniary interests of authors has been left to patchwork solutions negotiated either in the contracts, or to a protection offered by the law of torts.

References

BAKER, J. *An Introduction to English Legal History*. Oxford: Oxford University Press, 2019. DOI: https://doi.org/10.1093/oso/9780198812609.001.0001

BALDWIN, P. *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*. Princeton: Princeton University Press, 2014. DOI: https://doi.org/10.1515/9781400851911

BEITZ, Ch. The Moral Rights of Creators of Artistic and Literary Works. *Journal of Political Philosophy*. 2005, Vol. 12, no. 3, pp. 330–358. DOI: https://doi.org/10.1111/j.1467-9760.2005.00226.x

BIRD, R., PONTE, L. Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations. *Boston University International Law Journal*. 2006, Vol. 24, no. 2, pp. 213–282.

BIRNBAUM, J. A. *Eines aufrichtigen Patrioten unpartheyische Gedancken über einige Quellen und Wirckungen des Verfalls der ietzigen Buch-Handlung, Worinnen insonderheit Die Betrügereyen der Bücher-Pränumerationen entdeckt, Und zugleich erwiesen wird, Daß der unbefugte Nackdruck unprivilegirter Bücher ein allen Rechten zuwiederlauffender Diebstahl sey*. Schweinfurth: Tobias Wilhelm Fischer, 1733.

BLACKSTONE, W. *Commentaries on the Laws of England in One Volume, together with A Copious Glossary of Legal Terms Employed; Also Biographical Sketches of Writers Referred to; And a Chart of Descent of English Sovereigns, Edited by WM. Hardcastle Browne, A. M.* St Paul: West Publishing Co., 1897.

BLACKSTONE, W. *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769, Vol. I Of the Rights of Persons (1765) With an Introduction by Stanley N. Katz*. Chicago & London: The University of Chicago Press, 1979. DOI: https://doi.org/10.7208/chicago/9780226163277.001.0001

COBBETT, W. *The parliamentary history of England, from the earliest period to the year 1803: from which last-mentioned epoch it is continued downwards in the work entitled, "The parliamentary debates"*. London: T. C. Hansard, 1813.

DEAZLEY, R. *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)*. Portland: Hart Publishing, 2004.

DWORKIN, G. The Moral Right of the Author: Moral Rights and the Common Law Countries. *Columbia-VLA Journal of Law & the Arts*. 1994, Vol. 19, no. 3+4, pp. 229–268.

FEATHER, J. *Publishing, Piracy and Politics*: *An Historical Study of Copyright in Britain*. London: Mansell Publishing Limited, 1994.

FICHTE, J. G. Beweis der Unrechtmäßigkeit des Büchernachdrucks: Ein Räsonnement und eine Parabel. *Berlinische Monatsschrift*. 1793, Vol. 21, pp. 443–482.

GIERKE, O. *Deutsches Privatrecht: Allgemeiner Teil und Personenrecht*. Leipzig: Duncker & Humblot, 1893.

GIESEKE, L. *Vom Privileg zum Urheberrecht. Die Entwicklung des Urheberrechts in Deutschland bis 1845*. Baden-Baden: Nomos, 1995.

GUNDLING, N. H. *Rechtliches und Vernunfmäßiges Bedenken eines unparteyischen Rechtsgelerhrten über den schändlichen Nachdruck andern gehöriger Bücher*. Frankfurt; Leipzig, 1774.

HÖFFNER, E. *Geschichte und Wesen des Urheberrechts: Band I*. München: Verlag Europäische Wirtschaft, 2011.

KLINCK, D. *Conscience, Equity and the Court of Chancery in Early Modern England*. London: Routledge, 2010.

KOHLER, J. *Urheberrecht an Schriften und Verlagsrecht*. Stuttgart: Verlag von Ferdinand Enke, 1907.

MARCUS, E. The Moral Right of the Artist in Germany. *Copyright Law Symposium (ASCAP)*. 1975, Vol. 25, pp. 93–120.

MARVIN, Ch. Author's Status in the United Kingdom and France: Common Law and the Moral Rights Doctrine. *International and Comparative Law Quarterly*. 1971, Vol. 20, no. 4, pp. 675–705. DOI: https://doi.org/10.1093/iclqaj/20.4.675

MORILLOT, A. De la nature du droit d'auteur, considéré à un point de vue général. *Revue Critique de Législation et de Jurisprudence*. Vol. 27, no. 7, 1878, pp. 111–136.

NETANEL, N. Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law. *Cardozo Arts & Entertainment Law Journal*. 1994, Vol. 12, no. 1, pp. 1–78.

PATTERSON, L. *Copyright in Historical Perspective*. Nashville: Vanderbilt University Press, 1968.

RIGAMONTI, C. Deconstructing moral rights. *Harvard International Law Journal*. 2006, Vol. 47, no. 2, pp. 353–412.

ROEDER, M. The Doctrine of Moral Rights: A Study in the Law of Artists, Authors and Creators. *Harvard Law Review*. 1940, Vol. 53, no. 4, pp. 554–578. DOI: https://doi.org/10.2307/1333995

ROSE, M. *Authors and Owners*: *The Invention of Copyright*. Cambridge: Harvard University Press, 1993.

ROSE, M. The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship. *Representations*. 1988, Vol. 23, pp. 51–85. DOI: https://doi.org/10.2307/2928566

ROSE, M. The Author in Court: Pope v. Curll (1741). *Cultural Critique*. 1992, no. 21, pp. 197–217. DOI: https://doi.org/10.2307/1354122

ULMER, E. *Urheber- und Verlagsrecht*. Berlin: Springer-Verlag, 1960. DOI: https://doi.org/10.1007/978-3-662-00570-5

Legal Theory and Political Pragmatism by Legal Transfers – The Case of South-Slavic Collective Property

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Abstract

This article focuses on the conflictual relationship between theoretical and practical influences and factors affecting the legislative activity of the Habsburg Monarchy. It is to give a wide overview of the situation, using the example of South-Slavic collective property ("Zadruga"). The goal of the paper is to encourage a debate about the dichotomy theory/practice in this period and to increase the interest for the subject of South-Slavic collective property in the Monarchy.

Keywords

Collective Property; *Zadruga*; Military Frontier; Pragmatism; Collective Family Structure.

1 Introduction

The conflictual relationship between a consistent implementation of a theoretical model and pragmatism, focused on achieving results, is an age-old phenomenon in the fields of law-making and administration. Achieving the perfect balance of legal security, justice in specific situations and the fulfilment of legislative goals is an art onto itself. In the case of important, often used legal institutes, of which property is a good example, the conflict of the various stakeholders and parties is frequently solved trough the introduction of hybrid systems. These systems represent the result of compromise by the involved parties. In our current times this involves in the most cases a series of exceptions and leges specialis within

a single legal system. In the decentralised and pluralist state of the Habsburgs however, there was another possibility to reach such a compromise. Different crown lands/territories could introduce differing regulations and therefore comply to different interests and goals. This was most evident in the differences between systems of Cis- und Transleithania but was not limited to this well-known example. This paper will try to shine a light on another, lesser-known case. It will therefore focus on the differences and conflictual relationship between the development of the term of property in the Austrian, Cisleithanian discourse and the actual legislative activity and proprietary relations in the military frontier with a special emphasis on the discrepancies of individualisation and collectivisation tendencies.

2 The Military Frontier in Historical Context

The military frontier held a special place in the legal system of the Monarchy. It had come to be in the first half of the 16th century and had grown and expanded constantly during the numerous wars with the Ottoman Empire. Although the newly conquered territory was historically part of the lands of the crow of Saint Stephan the Habsburgs were able, using the political circumstances of the time, to establish direct control over the frontier. This control was free from the influence of the estates and was first wielded by the court in Graz and later that in Vienna. Without the influence of the, for example Bohemian or Hungarian, aristocracy or the German estates the emperor was free to legislate as he pleased, including in the fields of property law and land law (Bodenrecht). Because the inhabitants of the frontier were all soldier-farmers there was no triangle of competition (ruler-aristocracy-bourgeoisie), a base for most of the reforms and debates in other parts of the Monarchy at the time.

The purpose of the frontier within the Monarchy was also a specific one. In the beginning it served, with its armed, soldier-like population, as a barrier against the continuous incursions of Ottoman marauder bands. The area was overwhelmingly depopulated by these raids, which allowed for the colonisation of the territory with combat-ready Christian (mainly Serbian) populations from the Ottoman Empire, incentivised by the bestowment of privileges. Some of these motivational privileges,

aiming at immigration, had a property-law character to them. This was most evident in the adoption and incorporation of customary South-Slavic forms of property and especially the "Zadruga."

The defensive function, made necessary by the Ottoman strategic initiative, changed gradually with the shifting of the balance of power between the empires. As the Ottomans were unable to continue their expansion, so too did the frontier, with its multitude of soldiers cease to be a protective wall and turned into a reservoir of able-bodied men for the endless armies of the emperor. Because of the lasting state of war that the territory was in for such a long time the potential for mobilisation in the frontier was much higher, both in quantity and quality, than in any other part of the empire. The change in concept, from defensive to offensive, did not change the main goal and challenges of the frontier administration. While the frontiersmen were, for the most part, not party to any significant feudal obligations, the frontier brought no tangible economic benefit. The focus was therefore laid on the military resources. The main goal was set as the maximisation of the mobilisation potential, to be achieved through the reduction of the cost of the territory and the maximisation of the percentage of recruitable men in the general population. The property law had to be adapted as to serve this purpose.

Because the paper will use the South-Slavic collective property as an example going forward, it will confine itself to parts of the frontier with a pronounced South-Slavic component and namely the Žumberak-District, Varaždin-Frontier, Karlovac-Frontier, Ban-Frontier, Slavonia-Frontier and Banat-Frontier.

3 The Property Discussion in Cisleithania

The development of the property term is a Europe-encompassing phenomenon. It was marked by a tendency towards abstraction, individualisation and the separation from the influence and elements of public law. In the period before the significant codifications, and especially in the Middle Ages, the German-speaking legal world was marked by a relative property term when it came to real property, characterised trough

differentiation by intensity of attribution and usage rights. On the other hand, the ownership of movable property leaned towards an absolute property term, similar to the roman one[1].

Land was treated differently than movable property because it had a role not only as an institute of private but also public law. The shift towards a more pronounced private law character was visible in the cities as soon as the Middle Ages; outside of the cities it would stay bound to public law, in some cases up to the late 19th century. The importance of land, as the primary and most important means of production was too high to allow the free disposition of one over such property. Especially the idea, that an owner is free to not use the land or use it inefficiently, an important aspect of the absolute property term, was inconceivable at the time. There was also no difference made between property as a "full legal right" ("Vollrecht") and encumbrance (jus in re aliena). A thing could also simultaneously have more than one owner.

This push for reform was led by pioneers[2] such as *Bodin*, *Hobbes* and *Locke* and later, in the German-speaking world *Kant* and *Hegel*. In the timeframe of this paper the debate was characterised by influences from Pandectists and natural law.

Through the gradual implementation of the human rights doctrine propagated by the school of natural law property was separated from its group-connections and turned into a personal right[3]. The owner could now, at least in theory, manage his property as he pleased. The rights on the property, held previously by estate and family found themselves in rapid decline.

An even greater influence on the development of the property term in this direction was had by 19th century liberalism. Property was no longer just a right but an extension, expression, and projection of one's personality[4]. A series of liberal reforms ensued including the abolition of serfdom. The fideicommissum and other family holdings were not yet sent to the chopping

1 FLOßMANN, U. *Eigentumsbegriff und Bodenordnung im historischen Wandel*. Linz: Institut für Komunalwissenschaften und Umweltschutz, 1976, p. 33.
2 MÄDER, W. *Freiheit und Eigentum aus neuerer Zeit*. Berlin: Duncker & Humblot, 2011, p. 22.
3 FLOßMANN, op. cit., p. 40.
4 FLOßMANN, op. cit., p. 44.

block, but their further founding was practically impossible[5]. The tendency was therefore clear; The goal was full individualisation of property. This trend would continue for some time, even after 1881.

4 The system of property rights in the military frontier

There exist two distinct periods in the military frontier when it comes to the system of property rights. The first period, from approximately 1530 to 1754, is characterised by legal pluralism and a dominance of customary law influences. In various parts of the frontier the frontiersmen received different privileges, both personal and territorial in their application. The mix of Germanic and South-Slavic customs and customary law not only introduced integral elements of these customs into legal life but also created new, hybrid forms, especially in the field of inheritance customs. The fragmentation of the legal order and the lack of centralisation did not, in any for this paper relevant sense, differ from the legal situation in the German hereditary lands.

With the introduction of the regulations for the military frontier from 1754 ("Militärgrenzrechte") begins the era of centralisation and codification in the frontier. It was followed by further regulations, and namely the canton-system from 1787 ("Cantonssystem"), the basic law for the frontier from 1807 ("Grenzgrundgesetz ") and the basic law for the frontier from 1850. From these only the regulations for the military frontier from 1754 and the basic law for the frontier from 1807 have relevance for property-law. This period ends with the abolition and reintegration of the frontier in 1881.

4.1 Regulations for the military frontier from 1754

The regulations for the military frontier from 1754[6] were in force in the Karlovac and Varaždin frontier from 1754, the Ban and Slavonia frontier from 1769 and in the Banat frontier from 1778. Their goal was the uniformization of the different rules present in the various frontiers

5 FLOßMANN, op. cit., p. 50.

6 *Militär-Gränitz-Rechten von Ihro k. k. Majestät für das Carlstäder und Varasdiner Generalat vorgeschrieben im J. 1754*. Wien: Johann Peter Ghelen, 1754.

and, in a property law sense, the introduction of a new understanding of the nature of property rights held by the frontiersmen.

According to article 4, all ownership over land was to be seen as a military holding[7] ("Militärlehen"). This institute, which was not present in any other part of the empire, was a form of property limited by the obligation of military service[8]. The holders of these military holdings were not to be individuals, but families, and in the most cases the South-Slavic large families ("Zadrugas"). At this point the regulation treated these in a hybrid form, not completely reliant on South-Slavic customary law. It introduced limitations on the divisions of land-plots and therefore also on the divisions of the large family. The division was only allowed on the condition, that each new family still held enough land to be able to simultaneously support itself and provide one man for military service. As a control mechanism the division needed the approval of the local regiment command.

Although the "Zadruga" was incentivised trough the legislation, and its dissolution was made harder, the property related aspect of its structure were not implemented. This is most evident on the example of inheritance law which based itself on the parentela-system (for example evident in article 37). This not only disregarded the customary inheritance rights by all working, married, male members to receive an equal share but also allowed for the possibility of division according to ideal parts (at this time mainly in theory, because of the restrictions on a practical division) which directly contradicted the customary law and was in accordance with the individualisation tendency in the legal theory of the German hereditary lands. The regulations for the military frontier from 1754 were therefore, although using certain aspects of the "Zadruga" generally in accordance with the individualisation tendency present in the general trend. This is true even considering that the individualisation was not realised in its full scope.

7 UTJEŠENOVIĆ OSTROŽINSKI, O., MARX, K. *Kućne Zadruge Vojna Krajina. Biblioteka Povijesna Istraživanja.* Zagreb: Školska Knjiga, 1988, p. 189.

8 KASER, K. *Freier Bauer Und Soldat: Die Militarisierung der agrarischen Gesellschaft an der kroatisch-slawonischen Militärgrenze (1535–1881). Zur Kunde Südosteuropas: 2; 22*. Wien [u.a.]: Böhlau, 1997, p. 380f.

4.2 The Basic Law for the Frontier from 1807

The shift towards collectivisation was made with the introduction of the basic law for the frontier from 1807.[9] The "Zadruga" was regulated in its own chapter of the law (3. chapter "von den Hauskommunionen") under the name "Hauskommunion." In it the "Zadruga" was regulated as a community of acquisition and of ownership[10]. Everything produced or acquired was considered to be common property. All male members of legal age were owners of the "Zadruga"-property as tenants in common. The inheritance within the "Zadruga" was abolished and the ideal parts replaced by the accretion by all working, married, male members in equal measure, without consideration for parentela or other forms of kinship. This shows a strong emphasis laid on the South-Slavic principles of the community of property in the basic law for the frontier from 1807. The division was made to be even harder to achieve, the ideal parts were removed and the inheritance according to parentela no longer applied. It was a clear sign of recollectivisation.

5 Legal theory vs. practical consideration

As shown in the two previous chapters the development of the property term in the two theatres regarding the tendency of individualisation played out in vastly different ways.

In the heart of the empire property distanced itself ever more from the public law domain. It became an individual right, almost free from any legal limitations. The military frontier shows a different turn of events. With the reforms of 1754, and even more with those of 1807 the tendency took an opposite direction. Property became more restrictive, more encumbered with requirements relating to public law and, most importantly, more collectivised. This process went so far, that the "Zadruga" was introduced

9 Statut für die Militärgrenze, 1807.
10 KASER, op. cit., p. 573f.

even to the Romanian frontiersmen in the Banat frontier, disregarding the absence of such an institute in Romanian customary law[11].

How had it come to such a discrepancy? The realm of the Habsburgs was, at the time, a relatively decentralised state. Such an organisational structure led to different power-political facts on the ground in various parts of the empire. Because the centre of the empire was located in the German hereditary lands, and most prominently in Vienna, they had the most influence on the legal theory of the time but also were the most influenced by the general trends on the European continent. The developments of the property term were therefore much more organically coordinated with the theoretical base. In places where such a development was strongly opposed by powerful interests the theory changed or the progress slowed down to adapt to the political reality. This process is therefore to be seen as a part of the general European development even if it was much slower than that of some other countries.

The situation in the military frontier differed completely. The frontier was, as its name suggests, the most peripheral part of the empire. It had no domestic estates or other powerful interest groups that were able to leverage their influence to impact the political process. Not only that, but politics as such were banned by imperial decree, owing to the fact that the territory was de facto a large military camp. New regulations could be implemented without fear of a serious political backlash. This fact allowed the authorities to follow a practical and pragmatic policy without the need to acquiesce to an often ideologized and politicised legal theory and particular interests. The consequence was a pick and choose behaviour in which practical, but anachronistic institutes were readily combined with necessary modern elements to allow for the most practical, if inconsistent solutions.

11 ŞIŞEŞTEAN, G. Die Entwicklung der Haus- und Hofgemeinschaften im Bereich der Militärgrenze in Transsylvanien und im Banat. *Romanian Journal of Population Studies*. 2011, Vol. 4, no. 1, p. 119.

6 Conclusion

The deviations from the legal theory of the time in the case of property related regulations in the military frontier are not to be seen as a one-of-a-kind exception. They are more an example of the influence of practical necessities of this period on the process of legal regulation. Further examples of this phenomenon are to be seen in other parts of the empire, especially in Hungary. The importance of the analysis of context and the influence of pressure groups can therefore not be overstressed if one wishes to understand the law-making process to its full extent. The overreliance on legal theory in the judgement of legal systems or their constituent parts can therefore lead to a lacking understanding of historical legal processes and the romanticising of certain institutes, especially ones so important for certain ideologies such as that of property.

References

FLOßMANN, U. *Eigentumsbegriff und Bodenordnung im historischen Wandel*. Linz: Institut für Komunalwissenschaften und Umweltschutz, 1976.

KASER, K. *Freier Bauer und Soldat: Die Militarisierung der Agrarischen Gesellschaft an der kroatisch-slawonischen Militärgrenze (1535–1881). Zur Kunde Südosteuropas: 2; 22*. Wien [u.a.]: Böhlau, 1997.

MÄDER, W. *Freiheit und Eigentum aus neuerer Zeit*. Berlin: Duncker & Humblot, 2011. DOI: https://doi.org/10.3790/978-3-428-53598-9

Militär-Gränitz-Rechten von Ihro k. k. Majestät für das Carlstäder und Varasdiner Generalat vorgeschrieben im J. 1754. Wien: Johann Peter Ghelen, 1754.

ŞIŞEŞTEAN, G. Die Entwicklung der Haus- und Hofgemeinschaften im Bereich der Militärgrenze in Transsylvanien und im Banat. *Romanian Journal of Population Studies*. 2011, Vol. 4, no. 1, pp. 119–136.

Statut für die Militärgrenze, 1807.

UTJEŠENOVIĆ OSTROŽINSKI, O., MARX, K. *Kućne Zadruge Vojna Krajina. Biblioteka Povijesna Istraživanja*. Zagreb: Školska Knjiga, 1988.

In the Service of the State – Analysis of the Josephinist Policy and Reforms Regarding the Hungarian Court Organization. Analyzing some Oath Formulas Used at the Erection of Iudicia Subalterna[1]

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Abstract

This paper summarizes some observations regarding the new first-instance courts *(iudicia subalterna)* erected in the area of the Hungarian Kingdom and Transylvania in 1787 as a consequence of the judicial reforms carried out by Joseph II. The analysis of subaltern courts seems to be a less frequent topic in those Hungarian legal historical examinations, which concentrate on researching the changes in the native court organization over the centuries. My scrutiny focuses on dissecting the Latin oath texts taken by the judicial personnel appointed to these courts. The outcomes of this preliminary research can act as "a springboard" to conducting the operation of the subaltern courts more profoundly, adapting a social-historical approach.

Keywords

Joseph II.; *Novus ordo judiciarius*; *iudicium subalternum*; Oath.

1 Introduction

The main title of this brief paper covers a broad research topic: analyzing the Josephinist policy concerning the alterations that happened in the Hungarian court system between 1785 and 1790. In this preliminary

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research, I intend to present just a segment of this topic. My descriptive-featured scrutiny principally focuses on the moment of the erection of the new Hungarian courts of the first instance, the so-called subaltern or subordinate courts *(iudicia subalterna)*. I aim to give a glimpse of the oath texts *(iuramenta)* used at the establishment of the subaltern courts in 1787 by dissecting seven oath formulas *(formulae iuramentorum)* applied to the different members of the judicial personnel.

As a result of my archival research conducted in two member institutions of the Hungarian National Archives: Hajdú-Bihar County Archives (referred to as MNL-HBML) and the Szabolcs-Szatmár-Bereg County Archives (referred to as MNL-SZSZBML), I revealed, translated and dissected seven Latin oath formulas mainly using the method of *interpretatio grammatica* combining with a comparative approach and striving after philological accuracy. My goal was to detect similarities and differences and even bare these formulas to find the most common elements expected of the judicial personnel.

2 Briefly about *iudicia subalterna*

This paper cannot undertake to present the interlaced system of Hungarian courts in the second half of the 18th century, which would surely prise open the frameworks of the research topic in a narrow sense. Instead of this mission, I merely zero in on outlining some dominant characters of the Hungarian court organization in this chapter to demonstrate how radical and conceptual the changes introduced in the system of new first-instance courts were.

In the second half of the 18th century, the noble-ignoble distinction prevailed in Hungarian society, and as a consequence, it also determined the whole court organization. Due to this crucial feature, the court system was quite fragmented and tangled. In addition to these characters, it was not without conflict of jurisdiction and other malfunctions. "The massive walls" raised in the Hungarian social structure also issued in drawing lines and digging trenches seemed strict and impassable among the various courts in a vertical and horizontal sense.

Estates, the privileged orders of Hungarian society, especially but not exclusively the nobility, kept almost all low-level and intermediate courts under control. The nobility exercised power over the various courts that pertained to each Hungarian county. During the last centuries, a differentiated court system evolved in the Hungarian counties. In the counties, the principal judicial bodies were the county courts *(sedes iudiciaria*, in abbreviated form: *sedria)*, which had first instance and appellate jurisdictions. The landlords had their seigneurial courts. Free royal cities also exerted sufficiently extended self-government in their internal affairs, inherently having jurisdiction and the right of the local judicial bodies to proceed and judge the legal disputes arising within the community. Beyond these forums, other privileged communities also had judicial bodies in the country, gaining the right to elect judges. Additionally, they wielded "the jurisdiction of the blood" in conjunction with "the law of the sword". In brief, the image of "myriad small separated privileged worlds" is reflected in the structure of the Hungarian court organization.

In the spirit of *Gesamtstaat* and his absolutism, Joseph II attempted to rationalize the operation of the whole Empire; to make it more transparent and centralized. As for the administration of justice in the Hungarian Kingdom, through his reforms, the Emperor's aim was primarily to clean the Hungarian court system of the dominant influence of estates – leastways, significantly reduce their sway hold on intermediate and low-level courts. His conception, motivated by the idea of cutting estates out of the governance of the state, was to create a state (royal) court system, which meant a more transparent, highly centralized, unified and hierarchical structure.

In 1785, in the second half of his reign, Joseph II began to build up "a new judicial order" *(Novus Ordo)* in the Hungarian Kingdom and Transylvania. He issued the *Novus ordo judiciarius* (New Order of the Judiciary) on 12 December 1785, which opened the door for reorganization and eliminating particularism. In the following years, numerous reforms rapidly, drastically and exhaustively reshaped the former Hungarian court organization.[2] The changes also reached intermediate and low-level

2 Vide the summary of these reforms. KÉPES, G. Development of the Structural Independence of the Hungarian Judiciary from the Beginning until the End of the 19th century. *Journal on European History of Law*. 2019, Vol. 10, no. 2, p. 164.

courts that previously seemed almost "untouchable". "The Zenit" of the Emperor's measures was 1 September 1787, when 38 courts *(iudicia subalterna)* in the Hungarian Kingdom and 11 in Transylvania started their function as the basic units of the new system.[3]

In the course of building up the new judicial order and setting up the subaltern courts, the keyword was unification regarding the organization, procedure and substantive law. An official and unified organizational schema *(Status personalis et salarialis judicii subalterni)* was also issued, which meant the structural standard at the erection of every subaltern court. This schematism served as a general model concerning the status of the judicial personnel, headcount and salary. The headcount of the court staff became fixed, and the new regulation determined regular salaries.[4]

The court staff consisted of one president, four assessors, two syndics, one advocate for the poor, two recorders, one registrar and two scribes. The president, i. e. "who placed (or sitting) before", and the assessors, i. e. "who sit near", were judges. The syndics were the prosecutors or fiscals in criminal cases. The advocate for the poor principally assisted the parties in need free of charge in the processes initiated before the subaltern court. Recorders worked as minutes secretaries (protocolists), expediters and *taxator*-comptrollers. The registrar was the registry clerk and the *taxator* who levied the charges *(taxae)* of judicial processes. The *cancellistae* were the scribes of the courts, who had to duly accomplish all that the new rules of court *(Norma Manipulationis)* prescribed for them. The auxiliaries (service staff) were composed of one servant of the office, one house servant, one castellan and a variable number of haiduks.

3 MARTINICKÝ, M. Osudy archívov podriadených súdov – iudicium subalternum (1790–2020). *Slovenská archivistika*. 2020, Vol. 50, no. 1, pp. 39–42. SZINERSZEKI KERESZTURY, J. *Introductio in opus collectionis normalium constitutorum, quae regnante August. Imperatore et Rege Apostol. Josepho II. pro regno Hungariae et ei adnexis provinciis, magno item principatu Transylvaniae – Pars II*. Vienna: Typis Josephi Nobilis de Kurzbek, Caes. Reg. Aul. Typogr. et Bibliopolae, 1788, pp. 58–59. KATONA, I. *Historiae critica Regum Hungariae stirpis austriacae – Tomulus XI. Ordine XL. Ab anno Christi MDCCLXXX. Ad annum usque MDCCXCII*. Buda: Typis et Sumtibus Regiae Universitatis Hungaricae, 1810, p. 572.

4 MNL-SZSZBML IV. A. 10. 21. cs. Fons. 1. fasc. 1. n. 2. (4974.) (1. 1.). SZINERSZEKI KERESZTURY, op. cit., pp. 62–63. KATONA, op. cit., p. 572.

These new judicial bodies heard civil and criminal cases at first instance, taking over more jurisdictions from county courts and the judicial forums of other privileged communities. In criminal processes, the subaltern courts were competent at first instance without respect for social status.[5] The unification covered both procedural and substantive law. All Hungarian courts were obliged to adapt and observe the new rules of court, the so-called *Norma Manipulationis,* that came into effect on 1 January 1786. In civil cases, the Hungarian judicial bodies, including subaltern courts, had to proceed according to the *Ordo judiciarius* entered into force on 1 May 1786. The Emperor also brought the Austrian *Allgemeine Kriminal-Gerichtsordnung (Universalis Criminalis Judiciarius Codex)* into force on 1 August 1788. Concerning the charges (*taxae*) levied in judicial processes, the *Ordo Universalis taxarum*, which entered into force on 1 May 1786, served as a cynosure. In addition, the judges needed to implement the remarkable Josephina, the Austrian general criminal code that came into effect on 2 April 1787.[6]

The subaltern courts replaced the former county courts dominated by the noble communities of the Hungarian counties. In contrast with terminated county courts, the subaltern courts, as state (royal) courts, were no longer the judicial forums of the counties. During the elaboration of how to form the system of new first-instance courts, the concept was to separate justice from the administration of the county, cutting off the "centuries-old umbilical cord" that joined the county court to the county.[7] For instance, the new regulation placed a particularly great emphasis on isolating court sessions from administrational activities in a physical sense.[8] Nevertheless, these rules did not mean adopting the principle of the separation of powers as we know it.

Similarly to other judicial reforms, the erection of subaltern courts meant a particularly severe blow for Hungarian estates. It was a heavy attack on a field of cardinal liberties, ancient rights and privileges where the Hungarian estates enjoyed exceptionally extended autonomy. To estates and other privileged communities, the jurisdiction meant the essential and constitutional basis

5 SZINERSZEKI KERESZTURY, op. cit., pp. 63–64.
6 VARGA, E. *A Királyi Curia 1780–1850*. Budapest: Akadémiai Kiadó, 1974, pp. 49–50, 70.
7 VARGA, op. cit., p. 61.
8 SZINERSZEKI KERESZTURY, op. cit., p. 69.

of their status and a clear manifestation of self-governing in the counties, free royal cities and other privileged communities.

Additionally, the coronation of Joseph II with the Holy Crown of Hungary never happened since the Emperor did not feel it necessary. The rescript issued by Joseph upon taking the throne (on 30 November 1780) was not the source of concern and anxiety in the Hungarian Kingdom. On the contrary, it induced a general optimistic feeling in the Hungarian estates. However, there was no mention of coronation and convoking a new Diet, and the silence about these issues could already adumbrate the radical changes.[9] According to Hungarian public law, the coronation is not an empty and formal ceremony but includes more constitutional guarantees. The Holy Crown is not a mere headdress but the ultimate source of all power and the legitim reign. The lack of constitutional legitimization, the unwillingness to convene the Hungarian legislative body, the Diet, and the fact that Joseph II tried to govern without estate and disregarded their interests and grievances led to disastrous consequences. In other words, the Emperor's rejection made his (progressive) reforms and measures fundamentally unconstitutional and unacceptable, inducing widespread outrage and general displeasure among the Hungarian estates.

By the end of the reign of Joseph II, the new judicial order and especially the erection of new subaltern courts became one of the main grievances of Hungarian estates.[10] The general displeasure escalated in resistance in the second half of 1789 and at the beginning of 1790. Several Hungarian counties refused to equip the fighting armies in the Austro-Turkish War with the (corn) supplies required and urged by Joseph II and did not provide

9 MARCZALI, H. *Magyarország története II. József korában, Harmadik kötet*. Budapest: Pfeifer Ferdinánd kiadása, 1885, pp. 5–9. Vide the text of the rescript *Collectio ordinationum Imperatoris Josephi II-di et repraesentationum diversorum regni Hungariae comitatuum – Pars Prima*. Dioszeginum: Typis Pauli Medgyesi, 1790, pp. 1–3.

10 *Collectio repraesentationum et prothocollorum I. I. Statuum et Ordinum Regni Hungariae occasione altissimi decreti de die 28 Januarii 1790. e Generalibus Congregationibus responsi instar submissiorum. – Pars Prima*. Pestinum, Buda et Cassovia: in Bibliopoliis Strohmajerianis, 1790, (referred to as *Collectio repraesentationum et prothocollorum.*) p. 292. *"Quamquam Ordo Judiciarius & Subalterna Judicia nullam legalem autoritatem & firmitatem habeant…"* HORVÁTH, M. *Magyarország történelme – Hetedik Kötet*. Budapest: Kiadja a "Franklin – Társulat" Magyar Irodalmi Intézet és Könyvnyomda, 1873, p. 687. HAJDU, L. *II. József igazgatási reformjai Magyarországon*. Budapest: Akadémiai Kiadó, 1982, p. 474.

recruits.[11] Finally, the combination of too many misfortunate circumstances – the failures suffered in the Austro-Turkish War, the events of the French Revolution, the establishment of the United Belgian States, the resistance of Hungarian estates, the revolting Empire, his illness, the pressure of his environment etc. – compelled the Emperor to withdraw almost all reform measures, including his judicial reforms, introduced in the Hungarian Kingdom and Transylvania during his ten years-reign. On 26 January 1790, he abolished his work simply at the stroke of a pen.[12]

His unstable regime and the new judicial order rapidly collapsed in a few months. The operation of the subaltern courts also ended. The *status quo ante* meant the date when the Emperor's mother, Maria Theresa, passed away. Accordingly, the administration of justice was re-established in conformity with the order that prevailed in the Hungarian Kingdom in 1780.[13] The deadline for restoration was 1 May 1790.[14] Despite this provision, Stephanus Bittó resigned as the president of the Subaltern court of Pozsony County on 1 March in response to the demand of the community of Pozsony County.[15] But the court staff appointed to the Subaltern court of Gömör and Kishont County and the members of the Subaltern court of Trencsén County quitted their offices also *ante terminum praefixum* (on the 2 and 8 March).[16]

The quotation below can clearly illustrate the states and morals in the country. On the 2 March, the members of the Subaltern court of Heves County gathered and wrote to the county and the Hungarian supreme judicial body, the so-called Table of Seven *(Tabula Septemviralis)*, to hand in their notice collegiately. Their reasons, among others, were *"… hence so that our further operation does not give rise to damage and disturbance to our fellow citizens, we can wait*

11 HORVÁTH, op. cit., pp. 661–666. IFJ. BARTA, J. *A nevezetes tollvonás – II. József visszavonja rendeleteit*. Budapest: Akadémiai kiadó, 1978, pp. 116–117.

12 Vide the happenings of the day when the Emperor signed the famous resolution. IFJ. BARTA, op. cit., pp. 29–45.

13 *Collectio repraesentationum et prothocollorum*. p. 1.

14 *Collectio repraesentationum et prothocollorum*. p. 3.

15 *Collectio repraesentationum et prothocollorum*. p. 27.

16 *Collectio repraesentationum et prothocollorum*. p. 86. *Collectio repraesentationum et prothocollorum I. I. Statuum et Ordinum Regni Hungariae occasione altissimi decreti de die 28 Januarii 1790. e Generalibus Congregationibus responsi instar submissiorum. – Pars Secunda*. Pestinum, Buda et Cassovia: in Bibliopoliis Strohmajerianis, 1790, p. 87.

until the 1st of May coming neither, but now we close it with our books, and we are willing to hand over, that we, giving the proof of our faithful to our homeland, hereby notify…" The signature was "the ceased Subaltern court of Heves County".[17]

3 Dissecting oath formulas

The central appointment was not enough to enter the office. In conformity with contemporary practice, the court staff had to take oaths before taking their own offices. The formulas used at swearing were the anonymized and blank forms of oath texts to unify the texts of oaths. Each subaltern court received the official copies of oath formulas, which, fortunately, remained in pretty good condition in the native local archives. The language of the oaths was Latin because this language was the official jargon in the administration of justice in this period. The Emperor attempted to introduce the use of German in vain. Despite perseverant efforts, the language of procedure, sentencing and correspondence among the Hungarian courts remained Latin.

The formulas are akin to ecclesiastic oath texts concerning the generalized beginning and ending form used in these texts. The "overture" of the all analyzed oaths is "to swear to live God, moreover pledge and promise with own faith that etc." while the close sounds as follows: So help me God. Swearing to the Blessed Virgin, i. e. the Holy Mother of God, and all Saints lacked from the beginning phrase. Moreover, the swearer invoked the Saints in the ending form neither. Due to these omissions, taking an oath did not mean conscientious scruples for a deeply religious Lutheran or Calvinist. The phenomenon regarded as oaths formulas having massive and ancient ecclesiastic roots and filling with religious content was not surprising in this period, and these phrases added a frame to these texts.[18]

As yet, I have not searched out such an archival file that can provide information on what the exact way or procedure of swearing an oath was. Although – based on a document revealed in the MNL-HBML – it seems

17 SZEDERKÉNYI, N. *Heves vármegye története – IV. kötet – Egervára visszavételétől 1687-től 1876-ig.* Eger: Kiadja Heves Vármegye Közönsége, 1893, p. 304.

18 MARSCHALKÓ, J. Bírói eskü. In: MÁRKUS, D. (ed.). *Magyar jogi lexikon öt kötetben számos szakférfiú közreműködésével – II. kötet.* Budapest: Pallas Irodalmi és Nyomdai Részvénytársaság, 1899, pp. 8–9.

sure that the members of the judicial personnel (appointed to the Subaltern court of Bihar County) took their oath at the first session of the court before the president who previously swore his oath before the High Lord of the County and Royal Commissioner.[19] The tendency was also similar at the erection of the Subaltern court of Szabolcs County. Supposedly, the form of swearing might be a corporal oath *(iuramentum corporale)* when the swearer confirmed his words by corporally touching a sacred object e.g. the Bible, so that he emphasized his swearing.[20]

If we juxtapose the oath formulas of judges, the president of the court and the assessors, we detect only one distinction, but all other elements are the same. As for the difference, the president had to be obedient to the superior courts, whereas the assessors had to be obedient to the president.[21] This difference can uncover or at least cast light on the strict hierarchical relationships which prevailed in each subaltern court and the complete court system. In general, the court staff was obliged to obey the president except for the advocate for the poor.

In both oath texts, the first three panels following the general beginning phase function as expressions of loyalty to the Emperor and his family. After swearing to God, the judges needed to vow to Joseph II and solemnly promise to be faithful, obedient and devoted perpetually toward the Emperor and even perpetually observe and promote the Emperor's, his

19 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. *"Praesidem* […] *coram fungente Supremo Comite et Commissario Regio, reliqua vero Subalterni hujus Judicii Individua* […] *in hodierna Sessione coram Praeside juxta praescriptam Formulam Juramentam deposuisse, eosdemque Benigne collatis Officiis esse…"* MNL-SZSZBML IV. A. 10. 21. cs. Fons. 1. fasc. 1. n. 2. (1. 4.) *"Quod idem Judicium primam suam Sessionem clementer* […] *videlicet praesentium 1*a 7bris *a. c. die sub Praesidio clementer denominati Praesidis, praesentibusque ex Neo denominatis Individuo* […] *celebraverit;* […] *praelectoq & publicato Bgno praeprovocato Decreto Regio, in obsequium illa* […] *praeposita Individua* […] *Juramenta, secundum Formulas praeposito Bgno Decreto sub ://: transmissas deposuerunt…"*

20 KÖVY, S. *Elemeneta jurisprudentiae Hungaricae – Loco manuscripti edita*. Cassovia: Typis Francisci Landerer de Füskút, 1804, p. 454. ALSÓVISZTI FOGARASI, J. *Magyarhoni magános törvénytudomány elemei – Kövy Sándor után újabb törvényczikkelyek- 's felső itéletekkel és más bővitésekkel*. Pest: Eggenberger József és fia tulajdona, 1839, p. 346.

21 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Praesidis. *"… omnem quoq competentem, & in Officii rebus debitam paritionem superioribus Judiciariis Instantiis exhibebo…"* Ibid. Juramentum Assessorum. *"… omnem quoq competentem respectum Domino Praesidi exhibebo…"*

heirs' and successors' honour, dignity and advantage, moreover to avert their damages.[22]

Beyond these "homagial" panels, both formulas include specific professional standards demanded of judges. The first requirement is the obligation of being unbiased: to consider own duty to do according to God and His justice, according to own ability to give true and just judgement in all cases, scilicet respectless rich or pauper person, putting aside and disregarding request, advantage, hatred, love, fear, favour, willingness to please (complacency), affection and corruption.[23] This panel can link with another phrase that carries the requirement of being impartial and fair at sentencing: not to adhere to the parties' councils except exercising equity.[24] The obligation of being unbiased and proceeding according to God and his Justice did not at all mean a new element in the judges' oath, but it had already become firmly fixed in the oath formula included in the Decree VI of Sigismund I in 1435. Afterwards, it also appeared in the *Decretum Maius* issued by Matthias Corvinus in 1486 and then it was corroborated again by Vladislaus II in 1492.[25] The third prescript

22 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Praesidis. *"… Serenissimo Potentissimo ac Invictissimo Principi Josepho II Electo Romanorum Imperatori, & Germaniae, Hungariae, Bohemiae, Dalmatiae, Croatiae, Sclavoniae &tc. Regi Applico Haereditario Terrae Principi, ac Domino Domino Nostra Clementissimo. Quod Suae Sacrae Caesarea, et Regio=Applicae Matti, perpetuo fidelis, obediens, et devotus ero; Ejudemque Haeredum, & successorum Honorum Dignitatem, Commodumque semper observare, et promovere studebo, damna vero pro viribus avertam…"* Cf. Ibid. Juramentum Assessorum.

23 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Praesidis. *"… omnibus causantibus, et in omni negotio, quod ad officium meum pertinebit, absque cujusvis personae, divitis scilicet, et pauperis acceptione, prece, praemio, odio, amore, timore, favore, aliisque complacentiis, affectibus, aut corruptelis semotis, et postpositis, prout secundum Deum, et ejus Justitiam faciendam cognovero, justum et verum Judicium in omnibus rebus pro posse meo faciam…"* Cf. Ibid. Juramentum Assessorum. Cf. the Title 15 of the Prologue of Tripartitum Section 6. MÁRKUS, D (ed.). *Magyar Törvénytár 1000–1895. Werbőczy István Hármaskönyve – Corpus Juris Hungarici Millenniumi Emlékkiadás*. Budapest: Franklin–Társulat Magyar Irod. Intézet és Könyvnyomda, 1897, pp. 46–47.

24 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Praesidis. *"… nulli partium consilio, aut praeter aequitatem adhaerebo…"* Cf. Ibid. Juramentum Assessorum.

25 Article 1 of the Decree VI of Sigismund I Section 2, Article 76 of the Decree VI of Matthias I of Hungary. Article 33 of the Decree I of Vladislaus II of Hungary. MÁRKUS, D. (ed.). *Magyar Törvénytár 1000–1895. 1000–1526. évi törvényczikkek – Corpus Juris Hungarici Millenniumi Emlékkiadás*. Budapest: Franklin–Társulat Magyar Irod. Intézet és Könyvnyomda, 1899, pp. 254–255, 462–463, 500–503. Cf. MARSCHALKÓ, op. cit., p. 9.

is to observe the obligation of professional confidentiality: to unfold and reveal the secrets related to the sentence to nobody.[26]

Analyzing the other oath formulas, the ecclesiastic beginning and ending forms can be detected in every text. Six of the seven dissected oath formulas include the "homagial" panels that meant an expression of loyalty to the dynasty, the House of Habsburg. The oath formula applied to the advocate for the poor does not involve these elements and, in general, differs from the other oath texts on many points – so it is the odd one out. The explanation may be the quite peculiar role of the advocate for the poor in the organizational structure of subaltern courts. His office principally meant a guarantee for the most pauper persons to receive legal aid free of charge in the processes.[27] Supposedly, the differences stem from his particular function fulfilled in proceedings, which add a bit different content to his oath.

Consequently, in the oath formula of advocate for the poor, there are four specific prescripts on how to proceed in his own office. The first is a general requirement: to justly and faithfully serve and assist the litigious persons who request him to give assistance and promotion in their cases or who are sent to him by the court.[28] The obligation of being unbiased in the course of accomplishing own office also appears, and this phrase is almost the same word for word as the text used in the judges' oath formulas. In all cases, without choosing the persons, the advocate had to disregard the attempt to act in collusion with the adverse party, request, advantage, favour, fear, hatred, love and willingness to please (complacency).[29] He had to proceed according to God and His justice, laws, and the customary law approved in the Kingdom. Furthermore, he was always bound to do his duty

26 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Praesidis. *"Secreta quoque Judicii Nemini pandam, et revelabo…"* Cf. Ibid. Juramentum Assessorum.

27 MNL-SZSZBML IV. A. 10. 21. cs. Fons. 1. fasc. 1. n. 2. (4974.) (1. 1.). *"… cunctis item Causantibus egenis, prompte et fideliter assistet."* Cf. SZINERSZEKI KERESZTURY, op. cit., p. 67.

28 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Advocati Pauperum. *"… Causantibus pro Assistentia, & promotione causarum Suarum me requisituris, aut ad per Judicium inviandis* […] *juste, & fideliter serviam, ac assistam…"*

29 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Advocati Pauperum. *"… in omni negotio, absque cujusvis Personae acceptione, & attentanda quavis collusione, prece, praemio, favore, timore, odio, amore, & complacentia postpositis…"*

according to his ability.[30] Finally, the advocate was not permitted to misuse his office: not to desert his principal (client) without legal or sufficient reason in the undertaken case.[31]

Besides the "homagial" panels, the obligations of being obedient and professional confidentiality can also be detectable in both syndics' and recorders' oath formulas. The syndic had a duty to obey the president and the assessors, while the recorder was not allowed to be disobedient to the president. To be obedient meant that syndic was required to accomplish faithfully – conforming to prescript and order – all that the president or, in his absentia, his vice assigned to him. This text appears almost verbatim in the oath formulas of recorders.[32] The syndic had to reveal the votes and judicial secrets perceived in the court session, where he presented because of giving necessary information to nobody.[33] The recorder was also not allowed to reveal the votes and judicial secrets perceived in the court session to anybody.[34]

The other text panels in the syndics' and recorders' oath formulas meant specific prescripts on how the syndic and recorder had to proceed in their own offices. In the syndics' oath, the first element is to faithfully accomplish the syndic or fiscal office during preparing criminal procedures.[35] The recorders were obliged to exhibit faithfulness and sedulousness in the course of being in their own offices. In other words, they had to prepare expeditions diligently, to faithfully, clearly and all skillfully note and protocol the court

30 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Advocati Pauperum. *"… secundum DEUM, et Ejus Justitiam, Legesque, et approbatam Regni Consuetudinem* […] *meo pro posse…"*

31 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Advocati Pauperum. *"… neque sine Legali, & sufficienti ratione Principalem meum in suscepta causa deseram."*

32 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Syndicorum. *"… Domino Praesidi, Dominis Assessoribus omnem competentem respectu exhibebo, et a Domino Praeside, aut in illius absentia, a vices illius gerente illa, quae in rebus Officium meum tangentibus injungentur, juxta praescriptum & ordinationem fideliter exequar…"* Cf. Ibid. Juramentum Actuariorum.

33 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Syndicorum. *"… vota, et Secreta judicialia in Sessione, ubi illis pro danda necessaria informatione interfuero, a me percepta nemini revelabo…"*

34 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Actuariorum *"… vota, et Secreta Judicialia in Sessione a me percepta nemini revelabo…"*

35 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Syndicorum. *"… Officium meum Syndicii, seu Fisci Criminalis in instruendis Criminalibus Processibus fideliter exequar…"* Cf. SZINERSZEKI KERESZTURY, op. cit., p. 67.

sessions, inclusive of specifying the days of celebrations, the case and the matter proposed and handled during these sittings with the votes cast by the assessors, and also the subsequent conclusion. It was prohibited to add anything to the protocol, take anything away from it and alter it. Furthermore, the recorders were also demanded to faithfully hold their registry office, faithfully note the single petition according to the Instruction (i. e. *Norma Manipulationis)*, and precisely fulfil both the expediter-office and also the *taxator*-comptroller-office according to the Instruction (i. e. *Norma Manipulationis)*.[36]

The oath formulas of the registrar and scribes also involve the fixed phrases used for expressing loyalty to the Emperor and his family, although there is a small addition in both oath texts. The registrar and the scribes had to avert the Emperor's, his heirs' and successors' damage, but they were allowed to forewarn. The requirement of warning in advance expected of registrar and scribes may account for their offices.[37] Confidentiality is a recurrent element again in these formulas as well. The registrar did not have to reveal the secrets of the sentence perceived wherever to anybody.[38] The scribes were also bound to disclose and reveal the secrets of the court through saying, writing, loaning or any other way to nobody. Moreover, they had to conserve these pieces of information until the end of their life.[39]

Both registrar and scribes were obliged to be obedient to superiors. In a general phrasing, the registrar had to due diligently and obediently

36 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Actuariorum. *"… in Officio meo Actuariatus me sedulum, ac fidelem exhibebo, Expeditiones diligenter conficiam, singulas Sessiones cum specificatione diei celebrationis earundem, ac in quavis sessione propositas, & pertractandas res, et materias cum desuper dandis Dnorum Assessorum votis, & eatenus subsecuturo concluso, fideliter & clare omnique solertia connotabo, & protocollabo taliterque protocollatis nihil addam, vel demam, aut immutabo, Officium etiam Protocolli Exhibitorum fideliter geram, singula Exhibita, juxta Instructionem fideliter connotabo* […] *Officium etiam Expeditoratus, vel Officium etiam Contrascribae Taxatoris juxta Instructionem exacte adimplebo.*" Cf. SZINERSZEKI KERESZTURY *Op. cit.* p. 67.

37 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Regestratoris. *"… damna vero pro viribus avertam, et praemonebo…"* Cf. MNL-SZSZBML IV. A. 10. 21. cs. Fons. 1. fasc. 1. n. 2. (1. 3.) Juramentum Cancellistarum.

38 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Regestratoris. *"… secreta Judicii qualiter, et ubicumque a me percepta, nulli revelabo…"*

39 MNL-SZSZBML IV. A. 10. 21. cs. Fons. 1. fasc. 1. n. 2. (1. 3.) Juramentum Cancellistarum. *"… et Secreta autelari Judicii verbis, Scripturas, mutu vel alio quocunque modo nemini patefaciam aut revelabo, sed ad finem usque vitae meae conservabo…"*

fulfil the registrar and *taxator* function. His work had to accord with the Instruction (i. e. *Norma Manipulationis)*, the president's or, in his absentia, his vice's ordination and mind. In addition, the registrar had a general duty to respect assessors and recorders in the course of fulfiling his own office. He was obliged to achieve all with that these persons entrusted him.[40] The scribes were required to exhibit faithfulness, honesty, sedulousness, and honorability in their function through all, and in all. In those cases that appertain to the subaltern court, they had to proceed according to the order and norm of the Instruction (i. e. *Norma Manipulationis)* and fulfil all that was entrusted and demanded by the president, assessors, recorders, or those persons whom it may concern.[41]

Both oath formulas include each specific requirement. The registrar was bound to pay attention to the *defectus seminis*, *defectui proximus*, and *caducitas* with peculiar diligence and vigilance. Additionally, he had to most humbly inform – directly through the subaltern court – the Emperor, when these cases happened.[42] The scribes' duty was to carefully and diligently prepare the various writings.[43]

4 Conclusion

To sum up, each text panels in the seven dissected oath formulas fit into one of two groups. The oath texts include both general or fixed and specific or altering elements. As a result of examining the formulas, I identified

40 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Regestratoris. *"… functionem Regestratoris, prout & Taxatoris Secundum Instructionem, aut Domini Praesidis vel in ipsius absentia Ipsius vices agentis ordinationem, & mentem, & quae mihi in rebus Officii a Dominis Assessoribus, et actuariis committentur, cum debita diligentia, & obedientia adimplebo…"* Cf. SZINERSZEKI KERESZTURY *Op. cit.* p. 67.

41 MNL-SZSZBML IV. A. 10. 21. cs. Fons. 1. fasc. 1. n. 2. (1. 3.) Juramentum Cancellistarum. *"… meque in Functione Cancellistae per omnia, et in omnibus juxta ordinem et normam Instructionis sicut et in iis, quae mihi a Domino Praeside, Assessoribus, et Actuariis, vel aliis, quibus incumbit, in rebus judicium hoc Subalternum spectantibus committentur, et demandabuntur, fidelem, probum, ac Sedulum, honestumque exhibebo…"* Cf. SZINERSZEKI KERESZTURY, op. cit., p. 67.

42 MNL-HBML IV. A. 8/a. 1. cs. Fons. 1. fasc. 1. n. 1. Juramentum Regestratoris. *"… Deficientibus in semine, seu proximis defectui, & caducitatibus peculiari diligentia, & vigilantia attendam, ac si ejusmodi casus evenerint, de eo suam Mattem Caesaream, & Regio Apostolicam mediante Judicio subalterno N. N. humillime informabo…"*

43 MNL-SZSZBML IV. A. 10. 21. cs. Fons. 1. fasc. 1. n. 2. (1. 3.) Juramentum Cancellistarum. *"… Scripturas attente, diligenterque conficium…"*

the most common standards or highly preferred values. All but one of these elements are detectable in the texts of the oath formulas. Six analyzed oath texts include the expression of loyalty to the dynasty, the requirement of obedience and respect to the superiors and the obligation of professional secrecy. The accentuation of the "homagial" panel in the oath texts may function as a potential expression of centralizing the administration of justice and aspiring to have absolute power.[44] The expectation of showing obedience and respect to superiors may refer to strict and transparent hierarchical relationships created in the new judicial system. The obligation of professional secrecy is the third crucial element, even though its content always slightly changes depending on the formula, and it adjusts to the different offices or functions of each member of the judicial personnel.

The altering phases in the oath texts involve specific prescripts of how the judicial personnel had to proceed in their own offices. In other words: how or in what way were the court staff bound to fulfil and accomplish their own offices or functions? The striving after professionalization in the administration of justice can manifest itself in an unsystematic group of some adverbs – unbiasedly, impartially, justly, faithfully, skillfully, sedulously, honestly, honourably, diligently, vigilantly, carefully, exactly, precisely, humbly – selected from the examined oath formulas.

Finally, I want to add a relevant question to my observations: to what extent did judicial personnel adapt the principles, requirements and values implied in their oath formulas? In my personal opinion, the answer is not at all unequivocal. On the one hand, the Emperor's judicial reforms and the establishment of the subaltern courts were inconsistent with Hungarian constitutionalism and the interest of Hungarian estates. On the other hand, the members of judicial personnel came from the noble community of Hungarian counties. Supposedly, most of these persons might previously occupy significant posts in the former administration of their counties.

For instance, Michael Jármy, the president of the Subaltern court of Szabolcs County, was the substitute deputy lord *(vice-comes substitutus)* of Szabolcs County when the Emperor appointed him president of the new court on 7 August

44 Cf. KÉPES, op. cit., p. 164.

1787.[45] Let's see another example, Caspar Orosz de Csicser, the president of the Subaltern court of Ungvár County, was deputy lord of the county before setting up the subaltern court. Three assessors of the same court also fulfiled crucial functions in the former administration of their county. Josephus Csató de Figei was the chief tax collector (cashier) *(generalis perceptor)*, Paulus Horváth de Palócz occupied the post of substitute deputy lord, and Joannes Fekete de Iván held the position of *ordinarius iudlium*.[46] However, there is a need for further research to answer the question of how the staff appointed to the subaltern courts were motivated and sedulous to accomplish their offices. In other words: how far the ideal image depicted by the oath formulas was from everyday practice, from reality.

A short quotation can also intensify the sceptical feeling about the answers to the questions above. The text is from the valediction addressed by Georgius Tokody, the outgoing president of a Subaltern court of Bihar County, on the 15 March 1790. The rough translation of the part of this farewell speech is as follows: *"For that, I was under the obligation to hold this unlawful office, I beg your pardon: but if I would have held it neither, I know that other, maybe worse than me, would have undertaken and held it doing damage to the homeland; while I can boast, even though I did not help, at least, I did not endeavour to cause damage and violate the laws…"*[47]

Of course, *unus testis nullus testis*. Consequently, it would be a big mistake to draw too overall conclusions, albeit these lines seem thought-provoking. I feel a sharp contrast between the solemnity that pervaded the texts of oath formulas and the apologetic tone of this valedictory speech. But that is another story.

45 MNL-SZSZBML IV. A. 10. 21. cs. Fons. 1. fasc. 1. n. 1. (4974.) (1. 1.) Cf. *Vetus et Novum Calendarium ad annum a nativitate Salvatoris nostri Jesu Christi M.D.CC.LXXXIX*. Buda: Typis Regiae Universitatis, (referred to as *Vetus et Novum Calendarium*.) p. 253.

46 SZABÓ, K., SZOPORI NAGY, I. *Gyulafi Lestár följegyzései. Martonfalvi Imre deák emlékirata. A Pálóczi Horvát család naplója*. Budapest: A M. Tud. Akadémia Könyvkiadó-Hivatala, 1881, p. 292. Cf. *Vetus et Novum Calendarium*, p. 246.

47 KERESZTESI, J. *Magyarország polgári és egyházi közéletéből a XVIII-dik század végén*. Budapest: Kiadja Ráth Mór, 1882, p. 203. KRONES, F. *Ungarn Unter Maria Theresia und Joseph II., 1740–1790 – Geschichtliche Studien im Bereiche des Inneren Staatslebens*. Graz: Leuschner & Lubensky's k. k. Universitäts Buchhandlung, 1871, p. 62.

References

ALSÓVISZTI FOGARASI, J. *Magyarhoni magános törvénytudomány elemei – Kövy Sándor után újabb törvényczikkelyek- 's felső itéletekkel és más bővitésekkel*. Pest: Eggenberger József és fia tulajdona, 1839.

Collectio ordinationum Imperatoris Josephi II-di et repraesentationum diversorum regni Hungariae comitatuum – Pars Prima. Dioszeginum: Typis Pauli Medgyesi, 1790.

Collectio repraesentationum et prothocollorum I. I. Statuum et Ordinum Regni Hungariae occasione altissimi decreti de die 28 Januarii 1790. e Generalibus Congregationibus responsi instar submissiorum. – Pars Prima. Pestinum, Buda et Cassovia: in Bibliopoliis Strohmajerianis, 1790.

Collectio repraesentationum et prothocollorum I. I. Statuum et Ordinum Regni Hungariae occasione altissimi decreti de die 28 Januarii 1790. e Generalibus Congregationibus responsi instar submissiorum. – Pars Secunda. Pestinum, Buda et Cassovia: in Bibliopoliis Strohmajerianis, 1790.

HAJDU, L. *II. József igazgatási reformjai Magyarországon*. Budapest: Akadémiai Kiadó, 1982.

HORVÁTH, M. *Magyarország történelme – Hetedik Kötet*. Budapest: Kiadja a "Franklin – Társulat" Magyar Irodalmi Intézet és Könyvnyomda, 1873.

IFJ. BARTA, J. *A nevezetes tollvonás – II. József visszavonja rendeleteit*. Budapest: Akadémiai kiadó, 1978.

KATONA, I. *Historiae critica Regum Hungariae stirpis austriacae – Tomulus XI. Ordine XL. Ab anno Christi MDCCLXXX. Ad annum usque MDCCXCII*. Buda: Typis et Sumtibus Regiae Universitatis Hungaricae, 1810.

KÉPES, G. Development of the Structural Independence of the Hungarian Judiciary from the Beginning until the End of the 19th century. *Journal on European History of Law*. 2019, Vol. 10, no. 2, pp. 158–167.

KERESZTESI, J. *Magyarország polgári és egyházi közéletéből a XVIII-dik század végén*. Budapest: Kiadja Ráth Mór, 1882.

KÖVY, S. *Elemeneta jurisprudentiae Hungaricae – Loco manuscripti edita*. Cassovia: Typis Francisci Landerer de Füskút, 1804.

KRONES, F. *Ungarn Unter Maria Theresia und Joseph II., 1740–1790 – Geschichtliche Studien im Bereiche des Inneren Staatslebens*. Graz: Leuschner & Lubensky's k. k. Universitäts Buchhandlung, 1871.

MARCZALI, H. *Magyarország története II. József korában, Harmadik kötet*. Budapest: Pfeifer Ferdinánd kiadása, 1885.

MÁRKUS, D. (ed). *Magyar Törvénytár 1000–1895. 1000–1526. évi törvényczikkek – Corpus Juris Hungarici Millenniumi Emlékkiadás*. Budapest: Franklin–Társulat Magyar Irod. Intézet és Könyvnyomda, 1899.

MÁRKUS, D. (ed). *Magyar Törvénytár 1000–1895. Werbőczy István Hármaskönyve – Corpus Juris Hungarici Millenniumi Emlékkiadás*. Budapest: Franklin–Társulat Magyar Irod. Intézet és Könyvnyomda, 1897.

MARSCHALKÓ, J. Birói eskü. In: MÁRKUS, D. (ed.). *Magyar jogi lexikon öt kötetben számos szakférfiú közreműködésével – II. kötet*. Budapest: Pallas Irodalmi és Nyomdai Részvénytársaság, 1899, pp. 8–10.

MARTINICKÝ, M. Osudy archívov podriadených súdov – iudicium subalternum (1790–2020). *Slovenská archivistika*. 2020, Vol. 50, no. 1, pp. 22–45.

SZABÓ, K., SZOPORI NAGY, I. *Gyulafi Lestár följegyzései. Martonfalvi Imre deák emlékirata. A Pálóczi Horvát család naplója*. Budapest: A M. Tud. Akadémia Könyvkiadó-Hivatala, 1881.

SZEDERKÉNYI, N. *Heves vármegye története – IV. kötet – Egervára visszavételétől 1687-től 1876-ig*. Eger: Kiadja Heves Vármegye Közönsége, 1893.

SZINERSZEKI KERESZTURY, J. *Introductio in opus collectionis normalium constitutorum, quae regnante August. Imperatore et Rege Apostol. Josepho II. pro regno Hungariae et ei adnexis provinciis, magno item principatu Transylvaniae – Pars II*. Vienna: Typis Josephi Nobilis de Kurzbek, Caes. Reg. Aul. Typogr. et Bibliopolae, 1788.

VARGA, E. *A Királyi Curia 1780–1850*. Budapest: Akadémiai Kiadó, 1974.

Vetus et Novum Calendarium ad annum a nativitate Salvatoris nostri Jesu Christi M.D.CC.LXXXIX. Buda: Typis Regiae Universitatis.

Magyar Nemzeti Levéltár Szabolcs-Szatmár-Bereg Megyei Levéltár (MNL-SzSzBML) IV. A. 10. 21. cs. Szabolcs-Megye Nemesi Közgyűlésének Iratai II. József kori iratok Acta judiciaria Jud. subalterni Anni 1787. Fontes I. II. III. IV. VIII.

Magyar Nemzeti Levéltár Hajdú-Bihar Megyei Levéltára (MNL-HBML) IV. A. 8/a. 1. cs. Acta Judicii subalterni Fons 1. 1787-1789. Fons 2. 1787-1788.

The Transition from a Feudal Society to a Social Structure based upon Civil Rights in Hungary with Particular Regard to Preparatory Draft Law

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Abstract

In this study, I review the immediate antecedents of the civil transition as the most profound development. The codification attempts of the Enlightenment of the 1790s and the liberalism of the 1830s and 1840s are the focal points of my doctoral research. In order to drafting bills to reform the feudal state based on customary law and privileges without changing the basic public law framework, nine so-called national regular committees were set forth by Article 67 of Act 1791. The committees completed their work and sent their drafts, known as so-called operatives, to the king between 1792 and 1795. After all, the completed operatives were not put on the agenda of Parliament due to changes in the domestic and foreign policy status quo. They only emerged from the archives of the Chancellery thanks to the committees set up by Article 8 of Act 1827. These committees were responsible for reviewing the "forgotten" operatives, which were finally printed and sent to the counties for comments. The Hungarian liberal noble opposition was organised first as a movement and then as a party during these county debates (1831–1832) in order to replace the feudal system by manifesting the basic principles of the civil transition in the so-called laws of April (representation of the people, the right to private property, equality of rights, burden sharing, etc.)

Keywords

Civil Transition; Regular Committee Works; Draft Bills; Reform.

1 Introduction

From the cavalcade of longer processes running at multiple levels intersecting and influencing each other, the precise timing of major changes in the fabric of society can rarely be captured and explained from a wider context. When it comes to the history of Hungarian civilisation, one thing is certain that we shall pay particular attention to the year *1848*. The legal framework for the *civil transition* was created by the last Diet (1847–1848), the revolutionary events of March and, above all, the laws of April. In his diary, Sándor Petőfi, poet and revolutionist, wrote about the revolutionary events of 15 March 1848 – almost intoxicated by them – as a day that will *always be remembered*; as *"it* [the day] *had been undoubtedly an ordinary continuation of events, but it was great and glorious in view of what it was, the beginning. It is harder for a child to take the first step than for a grown man to walk miles"*.[1] The results of the March Revolution, however, are not without precedent as we know by now. Nearly six decades of "preparatory work" had prevented it, the first two-thirds of which were connected with the so-called *regular committee work* and its stimulating effect on public life, on the basis of which, by the time of the reform assemblies the Hungarian noble movement was prepared to go to work on the great stage of domestic politics, *the Diet*.

The initial process and its domestic and international background leading to the civil transition will be introduced in my study, with special regard to the *debates on the draft laws* creating the possibility of national and local political activity.

2 The Domestic Background of Regular Works of the Committee

According to the certainties of social and economic history, Europe of the 18th century was an era of uprising. As to demography, the continent's population almost doubled during this period, driven by an accelerating process of people "emancipating from nature", given that the population of the century was less at the mercy of nature. The continent was no longer ravaged by epidemics taking the life of large part of the population and

1 Sándor Petőfi›s diary entry on 30 March 1848. In: MARTINKÓ, A. (ed.). *Petőfi Sándor összes prózai művei és levelezése*. Budapest: Osiris Kiadó, 2022.

a bad harvest did not necessarily mean a decimation of society thanks to the increase in crop yields.[2] Despite – or perhaps because of – the anarchy that swept the continent in the 18th century, the relationship between Habsburg absolutism and the Hungarians between 1711 and 1815 was characterised by compromise, in the words of János Poór. The relationship between the Habsburg absolutism and the Hungarians, despite the anarchy[3] that swept the continent in the 18th century, or perhaps because of it, was characterised by *compromise* between 1711 and 1815, according to János Poór. This contained, however, a certain pettiness and duality since the agreements were not made in the interests of the country, but solely the politically represented nobility, and the agreements had bastioned their rights around as much as they could for decades. The enlightened absolutism of Vienna eventually confronted itself with significant groups of the privileged, both in political and economic terms, so the representatives of the Hungarian reforms found themselves in a *"vacuum"* in the end where they could not and would not cooperate with the disenfranchised masses, nor even with the conservative majority who thought in terms of absolutism or even a noble nation. It follows that, although the population grew and the material culture evolved, the century of Enlightenment "swept" through the strata of Hungarian society without any particular structural change, including the majority of the nobility, the bourgeoisie and the serfs.[4] Thus, the legal and political framework of society in the early 19th century continued to be defined by constraints of the centuries of feudalism. However, as confirmed by Article 10 of Law No. 1790,[5] Hungary retained its autonomy within the empire so the ruler could only pass laws with the consent of the Diet[6], moreover, the orders, in possession with the counties and having

2 POÓR, J. *A kompromisszumok kora*. Budapest: Adams Kiadó, 1992, pp. 7–8.

3 See major wars of 18th century in Europe: the Spanish War of Succession (1701–1714), the Turkish Wars (1716–1718, 1736–1739), the Polish War of Succession (1733–1735), the Austrian War of Succession (1740–1748) or the Seven Years' War (1756–1763).

4 POÓR, 1992, op. cit., pp. 5–6.

5 DEZSŐ, M. (ed.). *Corpus Juris Hungarici. Magyar Törvénytár 1740–1835. évi törvénycikkek*. Budapest: Franklin-Társulat, 1901, p. 109, 159.

6 For more on the workings of the Diet, see DOBSZAY, T. *A rendi országgyűlés utolsó évtizedei (1790–1848)*. Budapest: Országház Könyvkiadó, 2019; BÉRENGER, J., KECSKEMÉTI, K. *Országgyűlés és parlamenti élet Magyarországon 1608–1918*. Budapest: Napvilág Kiadó, 2008; MEZEY, B., GOSZTONY, G. (eds.). *Magyar alkotmánytörténet*. Budapest: Osiris Kiadó, 2020, pp. 149–165.

the capacity to exercise executive power in their territorial administration, were sometimes able and put up real resistance to Viennese absolutism.[7] Really significant national decisions, however, were taken by the *collegial*, that is, socially not accountable institutions in Vienna, which were responsible for the administration of the empire.[8] The work of the so-called *national regular committees (regnicolaris deputations)* set up under Article 67 of the 1791 Act, in other words *operatives*, were the first comprehensive systemic critique of the centralised bureaucracy and absolutism.

Following the death of Joseph II (1780–1790), the political life in Hungary revived. The feudal Orders succeeded in setting up *regular national committees*, to assess the situation in Hungary and to prepare a bill for the next Diet on matters pending before it, in addition to strengthening public sovereignty and the privileges of the Orders[9] at the coronation Diet of the new ruler, Leo II (1790–1792). The Enlightenment, the French Revolution and the liberalism that grew out of them acted as an indicator not only in the western, the so-called *centre countries of Europe*, but also, albeit belatedly, on the *periphery* and brought such a degree of social reorganisation in Hungary from the second half of the 18th century, especially between 1790 and 1848, that had not been seen since the foundation of the state and the adoption of Christianity in the Carpathian Basin. That was the *period of change* when the *feudal system was to be replaced by capitalism*. Although the power of the committees' were limited and did not cover the exclusive prerogatives of the monarch, the so-called *reservations* (foreign affairs, finance, customs and warfare), or matters directly harming the interests of the king, the government bodies and the Orders, some "forbidden" matters were still allowed to be discussed and, even if the committees did not yet achieve the reforms necessary for social transformation, they fulfilled their basic

7 *County* is one of the oldest and most enduring Hungarian territorial units at the medium level, see: MEZEY, B., STIPTA, I. A vármegyék és a kiváltságos kerületek. In: MEZEY, B. (ed.). *Magyar alkotmánytörténet*. Budapest: Osiris Kiadó, 2003, pp. 144–153 and STIPTA, I. *Törekvések a vármegyék polgári átalakulására*. Budapest: Gondolat Kiadó, 1995, pp. 7–15.

8 VELIKY, J. *A polgárosodás hajnala*. Budapest: Adams Kiadó, 1993, pp. 5–10.

9 Article 67 of Act 1791 on appointment of Committees and commissioners for regular preparation of public policy, judicial and other matters which could not be transacted in Parliament (see DEZSŐ, op. cit., p. 203).

purpose of starting the *process of reform*. Anti-absolutistic noble grievances took on a national character and inspired a growing number of people to reform the centuries-old system. Political pamphlets were circulated throughout the country and the leaders of modernisation were members of the enlightened patriotic noble movement, who, at that time, did not form a single party but developed individual programmes as independent initiators.[10] With special regard to national interests, in their constitutional approaches their initial aim was not a bourgeois transformation but rather to implement the social, economic and administrative plans of the thinkers of the Enlightenment.[11] *"The main elements of their programme were the initiative to relieve the pressure on the serfs; the affirmation of the partial abolition of total exemption from taxes for the nobility; the extension of constitutional rights to the nobles; the reform of the judiciary and the administration (Montesquieu), the modernisation of agricultural production (physiocrats), the implementation of reforms by constitutional means and with the consent of the Diet; the pursuit of national self-determination; the change of the monopoly of the Catholic Church; and the full emancipation of Protestants."*[12] A small number of bourgeois groups with rather radical principles formed the left wing of the *Josephinists*, whose focus differed from the noble movement and formed an early liberal tendency. Their most coveted representatives working for the creation of a *bourgeois nation* were Ferenc Verseghy, Károly Koppi and, above all, József Hajnóczy.[13]

With a clever policy of compromise and the contribution of the Hungarian Orders, Lipót II quickly restored stability concerning the domestic and foreign policy of the empire. His enlightened absolutist aspirations aimed to improve the situation of the non-nobles (bourgeoisie and serfs) and he intended

10 On pamphlets see BALLAGI, G. *Politikai irodalom Magyarországon 1825-ig*. Budapest: Franklin-Társulat, 1888; BENDA, K. A magyar nemesi mozgalom (1790–1792). In: MÉREI, G. (ed.). *Magyarország története tíz kötetben*. Budapest: Akadémiai Kiadó, 1980, pp. 29–115.

11 BENDA, K. *Emberbarát vagy hazafi? Tanulmányok a felvilágosodás korának magyarországi történetéből*. Budapest: Gondolat Kiadó, 1978, pp. 64–104.

12 ERDŐDY, G. The Domestic and International Context of Regular Parliamentary Committee Proceedings. In: HEIL, K. (ed.). *The Roots of Hungarian Liberalism and Regular Parliamentary Committee Proceedings*. [s. l.]: [s. n.], 2022. (Working title; Manuscript in press)

13 For more see BENDA, 1978, op. cit., pp. 105–210; GERGELY, A. (ed.). *Magyarország története a 19. században*. Budapest: Osiris Kiadó, 2003, pp. 125–153; ERDŐDY, [2022], op. cit.

to bring under the protection of the constitution the masses who had been disenfranchised or those with only limited rights. However, his sadly sudden and swift death prevented the reformist monarch from carrying out his plans. The operatives were also affected by his death on 1 March 1792. The new king, Francis I (1792–1835), was a retrograde monarch with less talent than his predecessor and had averse to innovation. Moreover, the Habsburg court was in the grip of a both domestic and foreign policy storm cloud. Francis's reluctance to reform was also reinforced by the escalating conflicts in Europe and the Jacobin conspiracy at home. As from 1792 the national regular committees were thus forced to work in this changed climate. While Lipót II was waiting for bills that would be disadvantageous for the county nobility and in favour of the nobles, his successor Francis I did not want reforms, thus freeing the nobility with then conservative majority from *"the serious dilemma of the conflict between their convictions and the wishes of the ruler"*.[14] The committees' work, loosing reformist credentials, lost the attention and support of the public, which resulted in the bills drafted up to 1795 containing only a few drafts seeking to change feudal society.

3 International Context of the Regular Committee's Work

The regular committees began their work in the third year of the French Revolution's decade-long history (5 May 1789 – 9 November 1799) in a European atmosphere of tension preparing for war. The Hungarian reformers saw the hope of external help, in particular, in cooperation with Prussia when they saw it as a potential ally against Austria. They contacted Berlin in the hope of winning the support of Frederick II for a new constitution in 1790. The *Reichenbach Convention* adopted by Austria and Prussia on 27 July 1791 did not include a clause on the Hungarian question, albeit the Prussian side initially showed willingness to cooperate.[15] Similarly, the Hungarians soon lost their other most coveted potential ally, the Poles, whom they regarded as natural partners in their battle against Vienna. In the new constitution of the Order, which strengthened the bourgeoisie

14 BENDA, 1980, op. cit., pp. 164–167.
15 ERDŐDY, [2022], op. cit.

and peasantry alongside the Polish nobility, many of the elements desired by the Hungarian enlightened nobility appeared, but the partition of Poland in 1792 and 1795 quashed the last faint hopes of Polish cooperation. The likelihood of an alliance with South-Netherlands also proved to be a dead letter. The Belgians, divided in their struggle for independence, came under French influence in 1792.[16]

The new, enlightened absolutist government that disowned its predecessor, temporarily fought for "strengthening an increasingly anachronistic empire" successfully and succeeded in forcing Hungarian public and intellectual life onto an inescapable path, but the government itself was on an inescapable path as well, as János Poór correctly pointed out.[17] The military and diplomatic failures also shackled the emperor. In response, the Hungarian nobility retreated and, following its years of experience, defended its privileges, laws and ancient constitution.

4 Reform Efforts on the Agenda

Although Francis I did not allow the completed operatives to be put on the agenda of the Diet and banished them to the archives of the chancellery, moreover made the "ideological divergence"[18] impossible between 1795 and 1825–1830 by tightening the postal and book censorship, the attempts to retain progressive ideas only removed the reform needs from the public discourse, which meant only the surface. *"The memory and spirit of the operatives lived on as a lost river."*[19] The "generation of inescapable paths" kept the embers for their sons within family ties and friends. *"Since no censorship, police whatsoever let be effective, can prevent sons from following their fathers if they so wish, the interruption of continuity between 1792 and 1832 is illusory"*[20], according to Károly Kecskeméti. Where the father was a Freemason the son

16 ERDŐDY, G. *"Szabadságot mindenben és mindenkinek." A belga alkotmányos rendszer létrejötte és működése 1831–1848*. Budapest: Argumentum, 2006, pp. 38–40; ERDŐDY, [2022], op. cit.

17 POÓR, J. *Kényszerpályák nemzedéke 1795–1815*. Budapest: Gondlat Kiadó, 1988, p. 5.

18 KECSKEMÉTI, K. *A magyar liberalizmus (1790–1848)*. Budapest: Argumentum Kiadó, 2008, p. 10.

19 ERDŐDY, [2022], op. cit.

20 KECSKEMÉTI, K. *La Hongrie et le reformisme libéral. Problémes politiques et sociaux (1790–1848)*. Roma: Il centro di ricerca, 1989, p. 23.

became a liberal in many families.[21] Between the Enlightenment of the late 18th century and the liberalism that emerged in the 1820s and 1830s[22], the operatives proved to be an inescapable link even if most of them remained more conservative than expected and never fulfilled their function of becoming law. The operatives of the 1790s, however, became "intellectual monuments without practical effect".[23]

Each of the Diets left the discussion of the operatives to the next one during the Napoleonic Wars, and after 1812 the Diet was not even convened by the monarch only after the abandonment of absolutism in 1825. The case of the National Committee on the agenda was one of the major achievements of the 1825–1827 Diet, but it decided to appoint new national disputes to update the previous proposals upon Article 8 of Act 1827[24], due to the obsolescence of the former proposals that had been closed for decades. The 81-member committee, with a similar structure to the previous one and, the noble rebellion and bandit army matters additionally assigned to it by the Diet, began its work in Pest. The law established two committees in 1827; *the first* one was empowered with reviewing eight works: on public institutions *(Deputatio publico-politica)*, on taxes and war commission *(Deputatio Contributionalis et commissariatica)*, on gentry affairs *(Deputatio urbarialis)*, on trade, customs and economy *(Deputatio commercialis, tricesimalis et in objectis publicae oeconomiae)*, on justice *(Deputatio juridica)*, on education *(Deputatio litteraria)*, on ecclesiastical affairs *(Deputatio ecclesiastica)* and on national petitions and grievances *(Deputatio elaborandorum postulatorum et gravaminum regni)*; and the *second* committee reviewed the reports of the commission on mines and finance *(Deputatio montana et monetaria)*.[25] The members were

21 The best-known example of the time is the case of Ferenc Széchényi and his son, István Széchenyi. On the studies, readings and experiences that influenced István's ideas and thinking, see GERGELY, A. *Széchenyi Eszmerendszerének kialakulása*. Budapest: Akadémiai Kiadó, 1972.

22 For more on the existence and characteristics of the link between the two eras, and the decades-long historiographical debate on 'continuity or discontinuity', see MISKOLCY, A. *A modern magyar demokratikus kultúra "eredeti jellegzetességeiről" 1790–1848*. Budapest: Napvilág Kiadó, 2006; MELKOVICS, T. Felsőbüki Nagy Pál jelentősége a folytonosság-vitában: Egy történész-vita margójára. In: *Vasi Szemle*. 2018, Vol. 69, no. 4, pp. 451–466; KECSKEMÉTI, 2008, op. cit.

23 KECSKEMÉTI, 1989, op. cit., p. 241.

24 DEZSŐ, op. cit., pp. 438–442.

25 DEZSŐ, op. cit., pp. 442–444.

divided into subcommittees and received printed proposals and certain archival material on request. The full deputation, which met in January 1829, had finished discussing and consolidating the drafts by the summer of 1830, ready for submission to the Diet. The *transitional* nature of the times was faithfully reflected by the new proposals. The problems of the obsolete feudal institutional system were undeniable even if they had many advantages, notwithstanding for its critics. Fear of uncertainty was also a reflection of the earlier principle that the only way to change the status quo was to preserve its fundamentals.[26]

The literature assesses the new national proposals differently, to name but a few: according to András Gergely, *"the committees with conservative majority even regressed on some points* […] *compared to the proposals of 1791"*.[27] Kecskeméti also stresses that the work *"was far from satisfying the public expectation of reform"* and he saw the reason thereof in the strict control of the Chancellery and the police.[28] In his doctoral dissertation, István Barta placed the operatives among the key issues of the period for the first time, quotes a correspondence dated 32 August 1831 between two reform politicians, Imre Barkassy and Gábor Lónyay, in which the former calls the new proposals "retrograde".[29] According to János Veliky, some of the results of the proposals can be considered as "progressive in several respects". For instance, easing the situation of the serfs by allowing the free sale of the usufruct of land, or the proposal for establishing a land credit institution to alleviate the lack of capital of the nobility were forward-looking ideas.[30] There is no consensus among legal historians either. Gábor Béli, for example, considers the draft Penal Code of 1830 to be a *"significant setback compared to the previous one"*[31],

26 VÖRÖS, K. Abszolutizmus és rendiség konfliktusának kiújítása (1812–1830). In: MÉREI, G. (ed.). *Magyarország története tíz kötetben. Budapest: Akadémiai Kiadó, 1980,* pp. 639–643.

27 GERGELY, A. A "rendeszeres bizottsági munkálatok" szerepe a magyar reformmozgalom kibontakozásában. *Tiszatáj*, 1974, Vol. 28, no. 6, p. 37.

28 KECSKEMÉTI, 2008, op. cit., p. 186.

29 *Letter to Gábor Lónyay*. National Archives of Hungary P 458. f. 5. cs.; and see BARTA, I. *A fiatal Kossuth*. Budapest: Akadémiai Publisher, 1966, p. 107.

30 VELIKY, J. *A polgárosodás hajnala*. Budapest: ADAMS Kiadó, 1993, p. 14.

31 BÉLI, G. *Magyar jogtörténet. A tradicionális jog.* Budapest-Pécs: Dialóg Campus Kiadó, 2000, p. 150.

while Elemér Balogh has already clarified this short opinion in several studies.[32]

5 The Role of County Proposals on the Path to Civic Transformation

The counties became increasingly vocal in their demands the proceedings conducted behind closed doors by the national committees to be printed and made available for public debate as of the spring of 1830. The printed proposals were sent to the counties since the court could not resist the pressure, which then submitted them to their main decision-making body, the assembly in early 1831. The members of the comitatus with full legal personality, that is, the Orders, who were typically the middle nobility in the counties, were able to take part in the debate, as the assembly was open to all the nobles living in the county. Similarly to the national working method, in nine[33] subject areas, the municipalities[34] set up partial committees (also known as branch or sub-committees), which were divided into further sectional committees in particular cases to discuss more important issues. They discussed their proposals in an ever-widening circle, i.e. in reverse order, which had to be approved by the county assembly, and finally two county

32 For more, among others, see BALOGH, E. Az anyagi büntetőjog egyes intézményei első kódextervezeteinkben. In: SZABÓ, I., KÁROLY, T. (eds.). *Tanulmányok Dr. Besenyei Lajos egyetemi tanár 70. születésnapjára*. Szeged: Szegedi Tudományegyetem, 2007, pp. 9–24; BALOGH, E. Eljárásjogi alapelvek az 1830. évi magyar büntető törvénykönyv-tervezetben. In: JUHÁSZ, Z., NAGY, F., FANTOLY, Z. (eds.). *Sapienti sat: ünnepi kötet Dr. Cséka ervin: professzor 90. születésnapjára*. Szeged: Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2012, pp. 25–33; BALOGH, E. A magyar büntetőtörvény-tervezetek szerkezeti fejlődése. *Acta Universitatis Szegediensis: acta juridica et politica: Tanulmányok Dr. Nagy László egyetemi tanár születésének 90. évfordulójára*. 2004, Vol. 64, no. 1–28, pp. 25–37.

33 The majority of the counties set up nine sub-committees (for gentry, commerce, taxation, public education, church and foundations, legal, public law and banderal work), but it was rare for some municipalities not to appoint branch and section committees for certain: matters because they did not deal with the issue in question. This was usually out of disinterest, for instance, counties without mines were less active on the issue. See VÖLGYESI, O. *Politikai-közéleti gondolkodás Békés megyében a reformkor elején. A rendszeres bizottsági munkálatok megyei vitái 1830–1832*. Gyula: Békés Megyei Levéltár, 2002, pp. 227–235.

34 The noble counties and the free royal counties were considered as municipalities until 1876.

ambassadors could represent the interests and opinions of the comitatus in the lower chamber of the national assembly.[35]

While professional opinions are divided concerning the significance and progressiveness of the 1830 national proposals, it is much easier to assess the reflections on them by the counties. The thoughts of Mihály Horváth, the contemporary historian and the opinion of István Barta, who discovered the importance of these works for modern historiography, were excellently summarised by Orsolya Völgyesi, which I quote below: *"According to István Barta, the printing of the national works and the county debates of the operatums made a paramount contribution to the unfolding of the reform movement of the early 1830s. The emerging local opposition groups' attempt to fill the basically conservative operatums with modern content was, however, facilitated by 'such a highly publicized discussion*[36] *of the political and public conditions of the country'."*[37] Ultimately, in the absence of an adequate forum and an uncensored press, these county debates created the *publicity* that allowed the *liberal opposition* to organise itself.[38] The demand for a civil transition in society was completed. The transition from feudalism to a capitalist system based on free private property became the central issue of social development. Unlike many European examples, the changes in Hungary were not fought for by strengthening the bourgeois class and taking their fate into their own hands, but the *order/noble approach* transformed into a *bourgeois reformer* point of view and that was the peculiarity of the Hungarian transition.[39] The inner engine of the reform era were the middle classes and a few aristocrats.

It is to be stressed, however, that there was still far from being a unified national *progressive liberal left-wing opposition power* in 1832. Although the reformists were able to reach weak majority in a number of counties, a significant proportion of the counties remained *conservative right-wing* or *variable majority*, which were

35 The envoys of the county functioned under a quasi-binding mandate and could only act, speak or vote at the lower chamber of the Diet according to the *envoy instruction* they have received, they could not deviate from it.

36 HORVÁTH, M. *Huszonöt év Magyarország történelméből 1823–1848*. Pest: Ráth Mór, 1868, p. 271.

37 VÖLGYESI, 2022, op. cit., p. 7.

38 On publicity of the public opinion, see BATÓ, S. Közvélemény és a büntetőjog a reformkori Magyarországon. In: *Aetas*. 2001, Vol. 16, no. 3, pp. 182–216.

39 BARTA, 1964, op. cit., pp. 5–10.

known in the terminology of the French Revolution as *marais* or *swamp*. The swamp centrists moved closer to the progressives only in the next decade and a half on key issues such as demolishing the disproportionate system based on the privileges of the Order, the implementation of self-determination or the establishment of bourgeois institutions.[40] Like the European examples, it is to be observed, that more and more people ventured in Hungary to oppose the feudal forces of the Congress of Vienna (1815) and the Holy Alliance, which had vowed to quash all liberal and nationalist aspirations based on solidarity. More and more people took a stand against this conservative-legitimist ideology. Both in German territories and in Hungary enlightened and early liberal reformist ideas were formulated based on the experiences of the French Enlightenment and the English Revolution.

The nobility complained mostly about in the country's dependency, thus they set sights on regaining powers from the ruler in as many areas as possible for themselves and the nation. The county committees proposed the "acquisition" of certain reservations on several issues. In addition to the law of trade and commerce or otherwise called the economic proposal (commerciale), most attention was focused on attempts to reform the customs system.[41] The majority of the counties wanted the commercial proposal to be the first on the agenda of the future National Assembly was no coincidence.[42] As to the reformers, the solution was the retroactivity of customs duties within the empire in order to prevent Austrian industry from

40 On political views of the counties, see BARTA, 1964, op. cit., pp. 172–173; KECSKEMÉTI, 2008, op. cit., pp. 309–314.

41 On the development of Hungarian commercial law see KÉPES, G. An Overview of the Hungarian Private Law Codification until 1918, with Special Regard to the Codification Aspects of a Separate Commercial Law. In: ŠVECOVÁ, A., LANCZOVÁ, I. (eds.). *Legal-Historical Trends and Perspectives V*. Trnava: Universitas Tyrnaviensis, 2020, pp. 45–76; HEIL, K. M. A nemesi vármegye és a rendszeres bizottsági munkálatok. Kereskedelmi- és adóügyi operátumok Esztergom, Győr és Nógrád Vármegyékben. In: MEGYERI-PÁLFFI, Z. (ed.). *Szuverenitáskutatás*. Budapest: Gondolat Kiadó, 2020, pp. 72–92; HEIL, K. M. Adalékok a magyar borkereskedelem történetéhez. Törvényjavaslatok és tervezetek a 18–19. század fordulóján és a reformkor elején. In: MEZEY, B. (ed.). *Kölcsönhatások. Európa és Magyarország a jogtörténelem sodrásában*. Budapest: Gondolat Kiadó, 2021, pp. 120–129; VÖLGYESI, 2002, op. cit., pp. 91–104.

42 For more on the debate, see VÖLGYESI, 2002, op. cit., pp. 11–23.

being protectionist vis-à-vis other member states.[43] Following the opinion of Széchényi, in addition to reciprocity of customs, the complete abolition of internal tariffs and price regulations was often advocated. *"The touchstone of the reformist tendency was nevertheless the work of the gentry"* has become a household word in the literature.[44] By this time, the most progressive counties like Pest and Nógrád had already reached the principle of *voluntary hereditary ownership*, i.e. the serf could gain ownership of the land by redeeming it in perpetuity in one sum from his lord, thus freeing himself from the burdens of the land (e.g. tithes payable to the church, ninths payable to the landlord, compulsory free labour, i.e. the socage and other benefits in kind). The criticisms of the legal system based on feudal privileges were intended to put together by the five major chapters of the *law project*.[45] The opinion of Nógrád is to be noted, since it argued for the extension of the rights of the nobility to all[46], several counties also argued for the abolition of the death penalty and torture and several fundamental principles of law already known in the West to be codified.[47] *Public education and science work* attempted to obtain education from the Austrian government and called for the introduction of Hungarian as the official and teaching language.[48] When assessing the *public law work*, political self-determination was kept in mind by the counties. They aimed at extending the powers of the legislature vis-à-vis the monarchy. Some counties even gained the representation of the serfs, who had previously

43 For more, see HEIL, 2020, op. cit., pp. 78–92.

44 GERGELY, 1974, op. cit., p. 39.

45 For more, see HEIL, K. M. A jogügyi rendszeres bizottsági munkálat szerkezeti vázlata. In: *Jogtörténeti Szemle*. 2019, no. 3–4, pp. 75–81; HEIL, K. M. Országos és vármegyei büntetőjogi rendszeres bizottsági munkálatok (1791–1832). In: FAZEKAS, M. (ed.). *Jogi tanulmányok 2021*. Budapest: Eötvös Loránd Tudományegyetem, 2021, pp. 287–297.

46 *Nógrád igazságügyi munkálata*. National Archives of Hungary (MNL OL) Archivum palatinale secretum archiducis Josephi (1795–1847). N 22 f. 17. cs. *Nógrád igazságügyi munkálata*.

47 Among others, see MOLNÁR A. (ed.). *"Javítva változtatni". Deák Ferenc és Zala megye 1832. évi reformjavaslatai*. Zalaegerszeg: Zala Megyei Levéltár, 2000; HOMOKI-NAGY, M. *Az 1795. évi magánjogi tervezetek*. Szeged: JATEPress, 2004 and HAJDU, L. *Az első (1795-ös) magyar büntetőkódex-tervezet*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1971.

48 For more, see KORNIS, G. *A magyar művelődés eredményei 1777–1848. I–II. kötet*. Budapest: Királyi Magyar Egyetemi Nyomda, 1927; MIKÓ, I. *A magyar államnyelv kérdése a magyar országgyűlés előtt 1790–1825*. Kolozsvár: Az Erdélyi Múzeum-Egyesület Kiadása, 1943; HEIL, K. M. "Embernek születtünk, polgárnak neveltetünk." Nógrád vármegye észrevételei a közoktatás és a magyar nyelv ügyében (1831–1832). In: NAGY, N. (ed.). *Nemzetiségi-nyelvi szuverenitás a hosszú 19. században*. Budapest: Gondolat Kiadó, 2020.

been disenfranchised, in the Diet (representation of the people).[49] Counties were typically reticent regarding *ecclesiastical proposals*. This was explained by anti-clericalism of the liberal camp by András Gergely.[50] They mainly reflected on the abolition of the monastic orders, which had been dragging on since the reign of Joseph II, and on the plans to place the education of priests under the supervision of the Diet.[51] The majority of the counties, likewise the national proposals, argued in favour of maintaining the system of noble rebellion concerning the question of the banderias[52] and intended to limit the obligation of care provided for the serfs.[53] As regards *taxation*, the utmost important issues were discussed by the committees for trade, lordship and banderias.

6 Preparedness of the county committees

It was common for counties to come up with different solutions to the same problem, since the committees developed their opinions independently of each other, therefore a comprehensive national debate could not evolve. One fifth of the municipalities, however, expressed their own convictions by sending their printed resolutions to other counties.[54] In addition to the above, through correspondence or personal visits, a lively exchange of information could also be observed between the municipalities.[55] It was

49 PAJKOSSY, G. *Az 1791/3-as közpolitikai bizottság javaslatai. Az országgyűlés, a közigazgatás és a cenzúra rendezése*. Bölcsészdoktori disszertáció. Kézirat. Budapest: [s. n.], 1978; VÖLGYESI, 2002, op. cit., pp. 155–182; Gergely, 1974, op. cit., pp. 38–39.

50 GERGELY, 1974, op. cit., pp. 39–40.

51 FAZEKAS, C. A szerzetesrendek közéleti szerepének megítélése a reformkorban, különös tekintettel a jezsuitákra. In: FAZEKAS, C. (ed.). *Fiatal egyháztörténészek írásai*. Miskolc: [s. n.], 1999, pp. 76–113; GERGELY, 1974, op. cit., pp. 39–40; VÖLGYESI, 2002, op. cit., pp. 123–130.

52 VÖRÖS, K. Bizottsági munkálatok az adó-, a nevelésügy, a nemesi katonáskodás és a bányaügy vonatkozásában. In: MÉREI, G. (ed.). *Magyarország története tíz kötetben*. Budapest: Akadémiai Kiadó, 1980, pp. 658–663.

53 *Nógrád bandériumügyi munkálat*. National Archives of Hungary *Acta diaetalia II. (1790–1848). A 96 f. 10 cs.*

54 Pest County was at the forefront of this and had begun to take on a *leading role* in county politics.

55 STRÉTER, J. *Visszaemlékezések*. Buda, Magyar Kir. Egyetem betüivel, 1842, p. VII.

known, that the notary of Nógrád county, János Stréter[56] *"there is hardly a county that he had not been to, since have travelled annually to all parts of Hungary. He diligently looked into the records of the counties so as the most notable libraries during these journeys and he seized zealously every opportunity wherever he could gain some insight into the public affairs of Hungary."* As a result, an active network of political contacts could be weaved in the county system.

The liberal nobility took great care to analyse and assess their own situation, and they made their proposals and formulated their demands on this base, in addition to liaising with other counties. This also led to a vibrant local public life that had not been seen for long.[57]

The direct or indirect influence of various national and international works should also be highlighted along with individual influences. By all means, the most evident work in public life of the county was of István Széchenyi. Széchenyi's works (Hitel[58], Világ[59], Stádium[60]), however, received great interest by the public but regarding the political sphere they supported primarily the reformists in the implementation of their plans. In any case, the fructifying influence of Széchenyi's works, first and foremost the publication of Hitel, is undeniable. *"It was from where they* [the committees – HCM] *could gain certainty how to find a way out of the crisis."*[61] Concerning the impetus generated by Hitel, Sréter stressed that *"The first copies of the book in Nógrád immediately attracted the attention of the entire educated public. Everyone wanted to read the book, those who didn't have a copy were enviously clamouring for it. A few copies passed from hand to hand. Few had the patience to wait, while others read it through or even bought more copies. Several people could read the Hitel together in small or large groups, in private or public places and those who could not get hold of it, the most noteworthy details of the Hitel could be told them by others. The Hitel*

56 See briefly about János Sréter: HEIL, K. M. Sréter János, a reformkor ismeretlen hőse. In: *Az MTA–ELTE Jogtörténeti Kutatócsoport Blogja*. 21. 5. 2021. Available at: https://tinyurl.com/heilkm

57 HORVÁTH, I. Politikai nézetek és viták a reformkori Nógrád megyében az 1830-as évek elején. *Nógrád Megyei Múzeumok Évkönyve*. 1980, Vol. 6, no. 26, p. 17.

58 SZÉCHENYI, I. *Hitel*. Pest: Petrózai Trattner J. M. és Károlyi István könyvnyomtató-intézete, 1830.

59 SZÉCHENYI, I. *Világ*. Pest: Fuskuti Landerer, 1831.

60 SZÉCHENYI, I. *Stádium*. Lipcse: Wigand, 1833.

61 HORVÁTH, A. *A magyar magánjog történetének alapjai*. Budapest: Gondolat Kiadó, 2006, p. 44.

was then the subject of all interesting conversations and all political debates in Nógrád. As soon as it was published, Széchenyi's book was greeted with widespread applause."[62] The intelligentsia of the time was familiar with the international economic and state administration of their time, regardless of any political views. The Hungarian Enlightenment and later liberalism also referred to foreign authors. Among others, the doctrines of Voltaire, Montesquieu, Rousseau and Kant on the rights of liberty and on state administration and state organisation were well-known and, in the political discourse of the county, the influence of Adam Smith in the field of economics, also the French bourgeois economist Say Jean Baptiste's thinking can be observed.[63]

Hungarian public opinion was also influenced by European events. The greatest direct impact on the nobility was the French Revolution. *"Revolution in the works is presented, without exception, as a deterrent alternative, historical aberration or as a misleading of nations."*[64] Relating to Széchenyi's view, the noble public opinion saw the revolution as the death of the nation so reform against revolution became the watchword of many.

7 The Bases of the Propensity to Reform

Although all realized the importance of regular committee works, groups of the nobility with political willingness considered them as having different approaches. To improve the condition of the taxpaying people, which was invoked regardless of political views, was the general and most frequently cited objective. This led to a number of practical proposals for solutions, of course, among other things, the correction and recondition of the feudal order, which was in crisis. The reformer counties, in line with the national works, did not yet wish to jeopardise the integrity of the ancient constitutional order, i.e. the landlord and noble prerogatives. The situation of the taxpaying population was regarded to be worse by some counties, such as Pest, than it actually was, and calculated the income of a serf's land insufficient to cover his subsistence. The proposals of such extremely

62 SRÉTER, 1842, op. cit., p. 4.

63 HORVÁTH, 1980, op. cit., p. 19; MÁTYÁS, A. *A polgári közgazdaságtan történet*. Budapest: Közgazdasági és Jogi Kiadó, 1963, p. 191.

64 FÓNAGY, Z. Az úrbéri operátum megyei tárgyalása (1831–32). *Agrártörténeti Szemle*. 1988, Vol. 1, no. 2, pp. 26–27.

pessimistic municipalities were not to reform but to restore the legal order and they considered the abuses allowed by the ancient constitution as the source of their problems.[65]

It was impossible to concurrently achieve both goals, i.e. to improve the situation of the serfs and to keep landlord rights intact as realized by several counties (Baranya, Borsod, Csanád, Pest, etc.). In return for certain concessions from the nobility, they intended to ensure that *"the natural and legal rights of the landowners are not subject to undue arbitrariness"*[66], i.e. that the privileges of the nobility were limited only according to necessity and proportionality. *"The condition of the bearers of the public burden depends the prosperity or decline of the nation"*[67] was the novel insight that the followers of the new aspect openly acknowledged. Otherwise *"a curse will lie on the nation slowly digging its own grave"*[68], as stressed by the county of Satu Mare.

The "consideration of the pure desires of morality"[69], i.e. the counties' own inner moral attitude was a further incentive. The committees drew their motivation from the ideas of the Enlightenment. Removing the obstacles to industrialisation and the monetary conditions on which it was based a further objective. According to Fónagy, *"All these aims are only in the service of a higher end. This is set out in the opinions of the most advanced counties: Pest, Timis, Nógrád, Baranya, Arad."*[70]

8 Conclusion

In this study I could not attempt to describe the content of the operatives. Since the weight of these drafts is nowadays unquestionable, yet they receive undeservedly so little attention, my objective has been to introduce the work of the national and county committees in terms of constitutional history

65 According to Fónagy this is actually the same opinion as the justification of the 8th Act of 1824 appointing the National Regular Committee contains, and aptly highlights Torontal's opinion that 'the whole gentry legislation was only necessary because of the cruel minority of landlords' (FÓNAGY, 1988, op. cit., p. 25).

66 FÓNAGY, 1988, op. cit., p. 25.

67 Ibid.

68 Ibid.

69 Ibid.

70 Ibid.

and to emphasise its importance. In my opinion, the main reason for this is the lack of processed source material.[71]

The national and county drafts served as a reference point for the Orders until 1848, despite the fact that they were only partially put into practice. The fact that the civil transition did not take place in the 1830s only a decade later, was due to the fact that the enlightened majority of the Diet could not or dared not to embrace progressive ideas at that time. It is clear that Petőfi was right in his perception that 15 March 1848 was indeed "great and glorious", but it was by no means the beginning. The first childlike steps were taken by the Hungarian enlightened nobility in the 1790s, and then the adolescent liberal nobles continued the work in the first half of the 1820s and 1840s, so that, having grown up, the nation could straighten up as an adult in the spring of 1848. By setting up committees that gave wide publicity to commence a socio-political debate, the Orders took the first steps on the rough path to the reform and thus, as an indicator, contributed to the reforms of the following decades and to the April Act manifesting the civil transition. Hereby, in strict constitutional historical terms, it is to be stressed that the beginning of the reform era as from 1791 was marked by the work of the National Committees.

References

BALLAGI, G. *Politikai irodalom Magyarországon 1825-ig.* Budapest: Franklin-Társulat, 1888.

BALOGH, E. A magyar büntetőtörvény-tervezetek szerkezeti fejlődése. *Acta Universitatis Szegediensis: acta juridica et politica: Tanulmányok Dr. Nagy László egyetemi tanár születésének 90. évfordulójára*. 2004, Vol. 64, no. 1–28, pp. 25–37.

BALOGH, E. Az anyagi büntetőjog egyes intézményei első kódextervezeteinkben. In: SZABÓ, I., TÓTH, K. I. (eds.). *Tanulmányok Dr. Besenyei Lajos egyetemi tanár 70. születésnapjára*. Szeged: Szegedi Tudományegyetem, 2007.

71 Apart from the results of historiography, independent monographic work on the subject was undertaken only by Mária Homoki-Nagy and Lajos Hajdu. – HOMOKI-NAGY, M. *Az 1795. évi magánjogi tervezetek. Szeged: JATEPress, 2004 and HAJDU Lajos. Az első (1795-ös) magyar bünetetőkódex-tervezet. Budapest: Közgazdasági és Jogi Könyvkiadó, 1971.*

BALOGH, E. Eljárásjogi alapelvek az 1830. évi magyar büntető törvénykönyv-tervezetben. In: JUHÁSZ, Z., NAGY, F., FANTOLY, Z. (eds.). *Sapienti sat: ünnepi kötet Dr. Cséka ervin: professzor 90. születésnapjára*. Szeged: Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2012.

BATÓ, S. Közvélemény és a büntetőjog a reformkori Magyarországon. *Aetas*. 2001, Vol. 16, no. 3, pp. 182–216.

BÉLI, G. *Magyar jogtörténet. A tradicionális jog*. Budapest-Pécs: Dialóg Campus Kiadó, 2000.

BENDA, K. *Emberbarát vagy hazafi? Tanulmányok a felvilágosodás korának magyarországi történetéből*. Budapest: Gondolat Kiadó, 1978.

BÉRENGER, J., KECSKEMÉTI, K. *Országgyűlés és parlamenti élet Magyarországon 1608–1918*. Budapest: Napvilág Kiadó, 2008.

DEZSŐ, M. (ed.). *Corpus Juris Hungarici. Magyar Törvénytár 1740–1835. évi törvénycikkek*. Budapest: Franklin-Társulat, 1901.

DOBSZAY, T. *A rendi országgyűlés utolsó évtizedei (1790–1848)*. Budapest: Országház Könyvkiadó, 2019.

ERDŐDY, G. *"Szabadságot mindenben és mindenkinek." A belga alkotmányos rendszer létrejötte és működése 1831–1848*. Budapest: Argumentum, 2006.

ERDŐDY, G. The Domestic and International Context of Regular Parliamentary Committee Proceedings. In: HEIL, K. (ed.). *The Roots of Hungarian Liberalism and Regular Parliamentary Committee Proceedings*. [s. l.]: [s. n.], 2022. (Working title, Manuscript in press).

FAZEKAS, C. A szerzetesrendek közéleti szerepének megítélése a reformkorban, különös tekintettel a jezsuitákra. In: FAZEKAS, C. (ed.). *Fiatal egyháztörténészek írásai*. Miskolc: [s. n.], 1999.

FÓNAGY, Z. *Az úrbéri operátum megyei tárgyalása (1831–32)*. Agrártörténeti Szemle, 1988, Vol. 1–2. No. pp. 20–45.

GERGELY, A. (ed.). *Magyarország története a 19. században*. Budapest: Osiris Kiadó, 2003.

GERGELY, A. *A "rendeszeres bizottsági munkálatok" szerepe a magyar reformmozgalom kibontakozásában*. Tiszatáj, 1974, Vol. 28, no. 6, p. 37.

GERGELY, A. *Széchenyi Eszmerendszerének kialakulása*. Budapest: Akadémiai Kiadó, 1972.

HAJDU, L. *Az első (1795-ös) magyar bünetetőkódex-tervezet*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1971.

HEIL, K. M. "Embernek születtünk, polgárnak neveltetünk." Nógrád vármegye észrevételei a közoktatás és a magyar nyelv ügyében (1831–1832). In: NAGY, N. (ed.). *Nemzetiségi-nyelvi szuverenitás a hosszú 19. században*. Budapest: Gondolat Kiadó, 2020.

HEIL, K. M. A jogügyi rendszeres bizottsági munkálat szerkezeti vázlata. In: *Jogtörténeti Szemle*. 2019, Vol. 3–4. No. pp. 75–81.

HEIL, K. M. A nemesi vármegye és a rendszeres bizottsági munkálatok. Kereskedelmi- és adóügyi operátumok Esztergom, Győr és Nógrád Vármegyékben. In: MEGYERI-PÁLFFI, Z. (ed.). *Szuverenitáskutatás*. Budapest: Gondolat Kiadó, 2020.

HEIL, K. M. Országos és vármegyei büntetőjogi rendszeres bizottsági munkálatok (1791–1832). In: FAZEKAS, M. (ed.). *Jogi tanulmányok 2021*. Budapest: Eötvös Loránd Tudományegyetem, 2021.

HEIL, K. M. Sréter János, a reformkor ismeretlen hőse. In: *Az MTA–ELTE Jogtörténeti Kutatócsoport Blogja*. [online]. 21. 5. 2021. Available: https://tinyurl.com/heilkm

HEIL, K. M. Adalékok a magyar borkereskedelem történetéhez. Törvényjavaslatok és tervezetek a 18–19. század fordulóján és a reformkor elején. In: MEZEY, B. (ed.). *Kölcsönhatások. Európa és Magyarország a jogtörténelem sodrásában*. Budapest: Gondolat Kiadó, 2021.

HOMOKI-NAGY, M. *Az 1795. évi magánjogi tervezetek*. Szeged: JATEPress, 2004.

HORVÁTH, A. *A magyar magánjog történetének alapjai*. Budapest: Gondolat Kiadó, 2006.

HORVÁTH, I. Politikai nézetek és viták a reformkori Nógrád megyében az 1830-as évek elején. *Nógrád Megyei Múzeumok Évkönyve*. 1980, Vol. 6, no. 26, pp. 5–33.

HORVÁTH, M. *Huszonöt év Magyarország történelméből 1823–1848*. Pest: Ráth Mór, 1868.

KECSKEMÉTI, K. *A magyar liberalizmus (1790–1848)*. Budapest: Argumentum Kiadó, 2008.

KECSKEMÉTI, K. *La Hongrie et le reformisme libéral. Problémes politiques et sociaux (1790–1848)*. Roma: Il centro di ricerca, 1989.

KÉPES, G. An Overview of the Hungarian Private Law Codification until 1918, with Special Regard to the Codification Aspects of a Separate Commercial Law. In: ŠVECOVÁ, A., LANCZOVÁ, I. (eds.). *Legal-Historical Trends and Perspectives V*. Trnava: Universitas Tyrnaviensis, 2020.

KORNIS, G. *A magyar művelődés eredményei 1777–1848. I–II. kötet*. Budapest: Királyi Magyar Egyetemi Nyomda, 1927.

MARTINKÓ, A. (ed.). *Petőfi Sándor összes prózai művei és levelezése*. Budapest: Osiris Kiadó, 2022.

MÁTYÁS, A. *A polgári közgazdaságtan történet*. Budapest: Közgazdasági és Jogi Kiadó, 1963.

MELKOVICS, T. Felsőbüki Nagy Pál jelentősége a folytonosság-vitában: Egy történész-vita margójára. *Vasi Szemle*. 2015, Vol. 69, no. 4, pp. 451–466.

MÉREI, G. (ed.). *Magyarország története tíz kötetben*. Budapest: Akadémiai Kiadó, 1980.

MEZEY, B., GOSZTONY, G. (eds.). *Magyar alkotmánytörténet*. Budapest: Osiris Kiadó, 2020.

MIKÓ, I. *A magyar államnyelv kérdése a magyar országgyűlés előtt 1790–1825*. Kolozsvár: Az Erdélyi Múzeum-Egyesület Kiadása, 1943. DOI: https://doi.org/10.36240/etf-160

MISKOLCY, A. *A modern magyar demokratikus kultúra "eredeti jellegzetességeiről" 1790–1848*. Budapest: Napvilág Kiadó, 2006.

MOLNÁR, A. (ed.). *"Javítva változtatni". Deák Ferenc és Zala megye 1832. évi reformjavaslatai*. Zalaegerszeg: Zala Megyei Levéltár, 2000.

PAJKOSSY, G. *Az 1791/3-as közpolitikai bizottság javaslatai. Az országgyűlés, a közigazgatás és a cenzúra rendezése*. Bölcsészdoktori disszertáció. Kézirat. Budapest: [s. n.], 1978.

POÓR, J. *A kompromisszumok kora*. Budapest: Adams Kiadó, 1992.

POÓR, J. *Kényszerpályák nemzedéke 1795–1815*. Budapest: Gondlat Kiadó, 1988.

STIPTA, I. *Törekvések a vármegyék polgári átalakulására*. Budapest: Gondolat Kiadó, 1995.

STRÉTER, J. *Visszaemlékezések*. Buda: Magyar Kir. Egyetem betüivel, 1842.

SZÉCHENYI, I. *Hitel*. Pest: Petrózai Trattner J. M. és Károlyi István könyvnyomtató-intézete, 1830.

SZÉCHENYI, I. *Stádium*. Lipcse: Wigand, 1833.

SZÉCHENYI, I. *Világ*. Pest: Fuskuti Landerer, 1831.

VELIKY, J. *A polgárosodás hajnala*. Budapest: Adams Kiadó, 1993.

VÖLGYESI, O. *Politikai-közéleti gondolkodás Békés megyében a reformkor elején. A rendszeres bizottsági munkálatok megyei vitái 1830–1832*. Gyula: Békés Megyei Levéltár, 2002.

National Archives of Hungary.

Austria and Artistic Freedom: A Troubled History?

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Abstract

Austria perceives itself as "cultural superpower". Therefore, it seems fairly surprising that an own fundamental rights provision to protect the arts was positivised only in 1982. The socio-political situation in the perished Austrian Empire and the Weimar Constitution had a decisive impact on attempts to adopt a corresponding provision after World War One. Following the horrors of World War Two, the young Second Republic of Austria used arts and culture as tool to draw the picture of a peace-loving "Kulturnation" sui generis. In the following years a significant cleavage between the Austrian self-perception and the legal-political reality can be observed (also) in regard to Artistic Freedom. Neither Austria's authoritarian past nor its Nazi past and related crimes had a significant impact on the legislative process.

Keywords

Artistic Freedom; Austria; Staatsgrundgesetz 1867.

1 Introduction

Austria perceives itself as *"cultural superpower"*.[1] The current government program underlines this idea in stating *"Arts and culture are an essential factor for Austria's global importance."*[2] This sentence already assures what every experienced Austrian shall never forget: Austria is a nation characterised

1 PLASSNIK, U. On the Road to a Modern Identity: Austria's Foreign Policy Agenda from the Cold War to the European Union. In: BISCHOF, G., KARLHOFER, F. (eds.). *Austria's international position after the end of the Cold War.* New Orleans, Louisiana: UNO press; Innsbruck university press, 2013, pp. 55–94, p. 73.

2 *Österreichische Bundesregierung, Aus Verantwortung für Österreich. Regierungsprogramm 2020–2024.* Wien: Bundeskanzleramt Österreich, p. 35.

by its arts and culture. Having said this, it seems rather confusing that Austria positivised an own fundamental rights provision aiming to protect Artistic Freedom only in 1982. Yes, there have been constitutional provisions before 1982 that included Artistic Freedom to a certain extent. Nevertheless, it took the "cultural superpower" Austria decades to protect the arts with an own (national) constitutional provision. This paper aims to explain this contradiction. Firstly, an overview about the legal status quo regarding Artistic Freedom in Austria needs to be given. This seems to be necessary in order to understand the context. Secondly, the developments on the way to the Austrian Federal Constitutional Law 1920 (Bundes-Verfassungsgesetz 1920 – B-VG) will be addressed, including some basic thoughts related to the attitude towards art and culture in the Habsburg and German Empire. Thirdly, the situation after World War Two will be analysed. It goes without saying, that crucial thoughts regarding the Nazi regime cannot be excluded. The mentioned aspects will be put in the context of Austria's self-perception as "cultural superpower". Finally, some concluding remarks will sum up the basic notions of this article.

2 The Constitutional Status Quo in Austria – A Brief Overview

In order to understand the context of the following paragraphs, it is important to give at least a brief overview about the current constitutional situation regarding Artistic Freedom in Austria. In terms of fundamental laws, the arts are protected by Article 17a Basic Law on the General Rights of Nationals of 1867 (Staatsgrundgesetz über die allgmeinen Rechte der Staatsbürger 1867 – StGG). The article was adopted in 1982. Article 13 StGG has been protecting the arts before but in the framework of Freedom of Expression and with a limited scope of protection excluding certain art forms.[3] The StGG itself was adopted in 1867 and is an Austrian legal codification that positivises certain fundamental rights. It is still in force.[4] Moreover, the arts

3 KRÖLL, T. Artikel 17a. In: KNEIHS, B., LIENBACHER, G., SCHÄFFER, H. (eds.). *Bundesverfassungsrecht*. Wien: Verlag Österreich, pp. 1–78, pp. 3–4.

4 BERKA, W. *Vorbemerkungen zum StGG*. In: KNEIHS, B., LIENBACHER, G., SCHÄFFER, H. (eds.). *Bundesverfassungsrecht*. Wien: Verlag Österreich, pp. 1–55, pp. 1–11.

are protected by Article 10 ECHR (European Convention on Human Rights) as part of the Freedom of Expression and by Article 13 CFR (Charter of Fundamental Rights of the European Union).

Article 17a StGG constitutes that artistic creativity, dissemination of art and its teaching are free. The Austrian constitution, however, does not define what art is. Following the intentions of the legislator the constitution sees art as an *"open and dynamic"* phenomenon.[5] In order to assure the justiciability non the less courts developed an approach that merely examines the *"honesty of the artistic aspiration"* on a case-to-case basis.[6] It needs to be underlined, that despite this approach Article 17a StGG does not grant a privileged position to the arts within the system of fundamental rights. The scope of protection of this provision is in its core twofold. Firstly, the entire process of creation is protected in all forms, preparatory acts included. Secondly, the facilitation of art is protected. This is to ensure that the artist can address the public appropriately. It includes also activities of professions that are directly involved in the facilitation process (for instance gallerists or publishers). In addition, the academic and non-academic teaching of art is protected.[7]

Finally, it needs to be mentioned that the major difference between Article 17a StGG and Article 10 ECHR are the expressed limits in the ECHR provision. However, immanent limits do apply without any doubts to Article 17a StGG. These limits are particularly relevant in cases in which Artistic Freedom could potentially interfere with other fundamental rights. It goes without saying that general legal provisions have to be obeyed by artists as well, which is seen as another immanent limit. Legal provisions that would intentionally and directly interfere with the arts, however, would be a violation of Article 17a StGG.[8] The practical relevance of Article 17a StGG remains limited.[9]

5 KRÖLL, T. Artikel 17a. In: KNEIHS, B., LIENBACHER, G., SCHÄFFER, H. (eds.). *Bundesverfassungsrecht*. Wien: Verlag Österreich, pp. 1–78, pp. 10–12.

6 Ibid., p. 16.

7 Ibid., pp. 19–22.

8 Ibid., pp. 22–28.

9 BRUNEDER, A. M. Die Kunstfreiheit nach Art 10 EMRK und Art 17a StGG in der Rechtsprechung der Höchstgerichte – eine vorläufige Bilanz. *jrp*. 2022, Vol. 12, no. 1, pp. 63–70.

3 From Empire to Republic

Towards October and November 1918, the Austrian Hungarian-Empire disintegrated.[10] In the wake of these developments the Provisional National Council established on 30 October 1918 the Republic of German-Austria.[11] At the same day an act was adopted that aimed to re-establish certain fundamental rights provided by the StGG before World War One. This included the Freedom of Press, the Freedom of Assembly as well as the Freedom of Association. In addition, every form of censorship was abolished and declared unlawful. This act by the Provisional National Council of 30 November 1918 is still in force and part of the Federal Constitution.[12] It can be seen as one first step towards protecting the arts. Nevertheless, there are no documents that would indicate that this provision was initially adopted to protect the arts in particular.

In the subsequent years, different constitutional drafts were developed for the newly found Republic of (German-)Austria.[13] Some of these included Artistic Freedom, usually combined with Academic Freedom.[14] Seemingly, no archive materials exist that could explain the intentions and thoughts behind these certain provisions. So, the question why the arts were protected in some drafts and why they were not in others cannot be answered with absolute certainty. However, one highly likely explanation for including

10 RAUCHENSTEINER, M. *Unter Beobachtung. Österreich seit 1918*. Wien: Böhlau Verlag, 2021, pp. 13–64.

11 OLECHOWSKI, T. *Introduction to Austrian and European Legal History*. Wien: facultas, 2021, pp. 92–96; BRUCKMÜLLER, E. *Österreichische Geschichte. Von der Urgeschichte bis zur Gegenwart*. Wien, Köln, Weimar: Böhlau Verlag, 2019, pp. 457–485.

12 LEHNER, O. *Österreichische Verfassungs- und Verwaltungsgeschichte. Mit Grundzügen der Wirtschafts- und Sozialgeschicht*e. Linz: Trauner, 2007, pp. 255–280; OLECHOWSKI, T. *Introduction to Austrian and European Legal History*. Wien: facultas, 2021, pp. 92–96.

13 ERMACORA, F. *Die Sammlung der Entwürfe zur Staats- bzw. Bundesverfassung.* Wien: Braumüller, 1990; OLECHOWSKI, T. *Introduction to Austrian and European Legal History*. Wien: facultas, 2021, pp. 92–96.

14 HOLUBEK, M., NEISSER, H. Die Freiheit der Kunst. In: MACHACEK, R., PAHR, W., STADLER, G. (eds.). *40 Jahre EMRK Grund- und Menschenrechte in Österreich. Band II Wesen und Werte.* Kehl am Rhein: Engel, 1997, pp. 195–244, pp. 197–198; Kröll, Thomas. KRÖLL, T. Artikel 17a. In: KNEIHS, B., LIENBACHER, G., SCHÄFFER, H. (eds.). *Bundesverfassungsrecht*. Wien: Verlag Österreich, pp. 1–78, p. 5.

Artistic Freedom in some drafts could be the post-war development in Germany.[15] The Weimar Constitution (Weimarer Reichsverfassung 1919 – WRV) positivised Artistic Freedom together with the Academic Freedom in its Article 142 and has been adopted already in August 1919.[16] Additionally, strong similarities in the formulation between the Article 142 WRV and the Austrian drafts can be identified. Some drafts are even identically.[17] So, it seems highly probable that the "cultural superpower" Austria did not invoke its long-standing cultural tradition in lengthy parliamentarian debates in order to come up with concepts that would finally protect the arts but took example from post-war Germany? The general lack of political and legal debates concerning Artistic Freedom in the early years after World War One (and the years before) in Austria would support this assumption. But how come?

Answers can perhaps be found in comparing the developments in both countries in the centuries before World War One. In this period the freshly unified and Prussian ruled German Empire aimed to pursue its "Weltpolitk", particularly during the Wilhelmine Era.[18] Society was fairly militarised and the liberal forces were rather under pressure than on the rise. The stark contrast between the cultural prosperity in the German lands before and after the unification is described by Friedrich Nietzsche with the rhetoric question: *"The Germans* […] *are nowadays the culturally most retarded people in Europe?"*[19] Doubtlessly, he had a point even though his words would be considered as highly inappropriate today. In the perception of most parts of the Prussian elites the arts were useful, if they fostered the narratives of the German Empire. They were supposed to praise the newly found nation, should depict the alleged superiority or simply be a comfortable

15 HOLUBEK, M., NEISSER, H. Die Freiheit der Kunst. In: MACHACEK, R., PAHR, W., STADLER, G. (eds.). *40 Jahre EMRK Grund- und Menschenrechte in Österreich. Band II Wesen und Werte.* Kehl am Rhein: Engel, 1997, pp. 195–244, p. 198.

16 WÜRTENBERGER, T. Zur Geschichte der Kunstfreiheit. In: GEIS, M.-E. (ed.). *Von der Kultur der Verfassung. Festschrift für Friedhelm Hufen zum 70. Geburtstag.* München: Beck, 2015, pp. 137–147.

17 For instance: Article 127 Dannenberg Draft; Article 159 Hans Kelsen Draft V; Article 139 Socialist Draft.

18 KISSINGER, H. *Diplomacy.* London: Simon & Schuster, 1994, pp. 168–200.

19 MOMMSEN, W. J. *Bürgerliche Kultur und politische Ordnung. Künstler Schriftsteller und Intellektuelle in der deutschen Geschichte 1830–1933.* Frankfurt am Main: Fischer, 2000, p. 76.

decoration.[20] But the given order should not be criticised or questioned. Although, towards the end of the century, modernism gained ground in the German Empire (supported by some aristocrats like the Grand Duke of Hesse) most parts of the ruling Prussian elite, Wilhelm II in particular, still despised the Avantgarde and the idea of a free cultural life.[21] The censorship was strict even though the judicial system was often more liberal than politics or the administrative bodies.[22] Overall, the exerted pressure towards the arts in the German Empire was considerable.[23] In Austria, however, the situation was different and this has nothing to do with the popular myth of Emperor Francis Joseph I being a kind grandfatherly figure. Starting his reign in 1848, Francis Joseph I was known as de facto enemy of any liberal movement. It is an irony of history that the ultimate "casket nail" of the Austrian neo-absolutism was the defeat against Prussia in Königgrätz 1866. This finalised the process of a multidimensional erosion that started already years before and forced Francis Joseph I to make liberal concessions.[24] One of them was adopting the December Constitution of 1867 which included also the StGG from 1867, that was mentioned above.[25] The rise of the liberals became unstoppable. The arts flourished even more then in the decades before and were strongly supported by the wealthy liberal bourgeoise. Sure, the relation between the Austrian Emperor and the arts, particularly the Avantgarde, remained rather distanced. Censorship laws were in force,

20 PARET, P. *Die Berliner Secession. Moderne Kunst und ihre Feinde im Kaiserlichen Deutschland:* Ullstein, 1983, pp. 41–46; MOMMSEN, W. J. *Bürgerliche Kultur und politische Ordnung. Künstler Schriftsteller und Intellektuelle in der deutschen Geschichte 1830–1933.* Frankfurt am Main: Fischer, 2000, pp. 59–75.

21 MOMMSEN, W. J. *Bürgerliche Kultur und politische Ordnung. Künstler Schriftsteller und Intellektuelle in der deutschen Geschichte 1830–1933.* Frankfurt am Main: Fischer, 2000, pp. 83–85.

22 WÜRTENBERGER, T. Zur Geschichte der Kunstfreiheit. In: GEIS, M.-E. (ed.). *Von der Kultur der Verfassung. Festschrift für Friedhelm Hufen zum 70. Geburtstag.* München: Beck, 2015, pp. 137–147, pp. 138–141; Paret, Peter. *Die Berliner Secession. Moderne Kunst und ihre Feinde im Kaiserlichen Deutschland:* Ullstein, 1983, pp. 17–46.

23 MOMMSEN, W. J. *Bürgerliche Kultur und politische Ordnung. Künstler Schriftsteller und Intellektuelle in der deutschen Geschichte 1830–1933.* Frankfurt am Main: Fischer, 2000, pp. 76–96.

24 SCHORSKE, C. E. *Fin-de-siècle Vienna. Politics and culture.* New York: Alfred A. Knopf, 1979, pp. 3–10; BRUCKMÜLLER, E. *Österreichische Geschichte. Von der Urgeschichte bis zur Gegenwart.* Wien, Köln, Weimar: Böhlau Verlag, 2019, pp. 372–383.

25 OLECHOWSKI, T. *Introduction to Austrian and European Legal History.* Wien: facultas, 2021, pp. 53–58.

but were pursued in a rather Austrian way. However, the crucial difference compared to Germany was the relatively strong position of liberal forces particularly in Vienna (despite the conservative and antisemitic Viennese mayor) which enabled more space and freedoms for the arts to develop. Furthermore, it might be, to a certain extent, a generally more generous approach towards the arts by a large part of the Austrian elites, including the emperor himself due to a weakened position. Whereas Wilhelm II hardly missed a chance to disparage modern art forms publicly,[26] Francis Joseph I granted the presidium of the Viennese Secessionist, among them Gustav Klimt, an audience on 10 March 1898 in which they personally invited him to their opening expedition.[27] After careful consultations he refused to attend the opening on 26 March 1898 (various top-ranking members of his administration did) but decided to come to a visit on 5 April 1898. Together with his aide-de-camp he arrived at 9.45 in the morning. Rudolf von Alt and Gustav Klimt, among others, welcomed him. Klimt led him through the exhibition and after some acknowledgements (for the aquarelles of Rudolf von Alt) he left again at 11.10 o'clock. Before he left the emperor did what he always did. He thanked everyone and expressed that he was happy to have been there.[28] It needs to be reemphasised: The Austrian Emperor and some of his top public servants visited the exhibition of one of the most progressive Avantgarde groups back then. This happened nearly at the same time when the military commander of Berlin officially prohibited German officers to visit the Berlin Secession in uniform.[29] So, on the one hand, this tells us a lot about the official Austrian approach towards the arts which included largescale state subsidies for all art forms around 1900.[30] On the other hand, it sheds light on the Austrian Avantgarde

26 PARET, P. *Die Berliner Secession. Moderne Kunst und ihre Feinde im Kaiserlichen Deutschland:* Ullstein, 1983, pp. 39–42.

27 SHEDEL, J. Kunst und Identität. Die Wiener Secession 1897–1938. In: VEREINIGUNG BILDENDER KÜNSTLER WIENER SECESSION (ed.). *Secession. Permanenz einer Idee.* Ostfildern-Ruit: Hatje, 1997, pp. 13–57, pp. 13–19.

28 JUST, T., Irmgard, P,. *Kaiser Franz Joseph und die Erste Ausstellung der Secessionisten 1898. Wiener Geschichtsblätter.* 2006, Vol. 12, no. 1, pp. 59–66.

29 PARET, P. *Die Berliner Secession. Moderne Kunst und ihre Feinde im Kaiserlichen Deutschland:* Ullstein, 1983, p. 123; Heerde, J. B. van. *Staat und Kunst. Staatliche Kunstförderung 1895 bis 1918.* Wien: Böhlau, 1993, p. 51.

30 Heerde, J. B. van. *Staat und Kunst. Staatliche Kunstförderung 1895 bis 1918.* Wien: Böhlau, 1993, pp. 325–328.

which existed mostly without being openly anti-aristocratic. A rather contradictory metamorphosis that seemingly produced one of the most impressive and productive periods in the Habsburg Empire, namely the era of Fin de Siècle in Vienna.

This brief comparison helps to understand why in post-war Germany Artistic Freedom was adopted with large consensus and without any controversial debates. After decades of strict censorship and suppression it was simply perceived as a crucial and very natural element to implement in a constitution. Two of the prestigious commentaries on the WRV support this assumption in stating that there were *"no indications* […] *that someone thought something special or new"*[31] and furthermore that it was the Prussian State Minister for Cultural Affairs who supposed to include Artistic Freedom in Article 142 WRV: *"He maybe took action because he memorised the former unfree circumstances and it is still very present to all of us how hostile the last Prussian monarch has been towards everything new and free concerning the arts."*[32] The consequence was similar to what happened in Vienna around 1900. The Weimar Classic emerged and soon the arts flourished in the German interwar period.

In contrast to the German situation, there are no materials or protocols that would indicate that the newly founded Austrian parliament did conduct substantial debates about Artistic Freedom, even though some constitutional drafts included such a provision. One could argue, this topic was perhaps overall of secondary relevance in these years of scarcity. But if one looks into the conducted research concerning constitutional debates by the Provisional National Council between 1918 and 1920 one understands that the range of discussion was a fairly broad one.[33] A consensus for a new fundamental rights catalogue could not be reached. However, a compromise was found in one of constitutional drafts by Hans Kelsen (that basically

31 ANSCHÜTZ, G. *Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar f. Wiss. u. Praxis*. Bad Homburg v.d.H.: Gehlen, 1968, p. 658.

32 KITZINGER, F. Artikel 142 Satz 1. Die Freiheit der Wissenschaft und der Kunst. In: NIPPERDEY, H. C. (ed.). *Die Grundrechte und Grundpflichten der Reichsverfassung. Kommentar zum zweiten Teil der Reichsverfassung.* Berlin: Hobbing, 1930, pp. 455–456.

33 ERMACORA, F. *Die österreichische Bundesverfassung und Hans Kelsen. Analysen und Materialien ; zum 100. Geburtstag von Hans Kelsen*. Wien: Braumüller, 1982, pp. 3–38.

excluded a fundamental rights catalogue).[34] In 1920 the B-VG was adopted and the StGG was readopted. The latter re-entered into force in 1920 and contained no noteworthy extension or amendments.[35]

Overall, these assumptions lead to a rather obscure outcome: In both countries a broad debate regarding Artistic Freedom did not take place. But the reasons for that are fairly different. The German legislators had seemingly a large consensus concerning Artistic Freedom due to the tough situation in the decades before. Thus, it seems understandable that no extensive debates were conducted in 1919 and a positivisation seemed obviously reasonable. In Austria the official approach towards the arts was far more liberal in the decades before World War One and thus it was seemingly less of a pressing issue for the Austrian parliamentarians in the interwar period.

4 Towards the Second Republic of Austria

In 1933 Austria became an authoritarian, some argue "austrofascist", regime.[36] The newly adopted May Constitution of 1934 contained certain fundamental laws.[37] In Article 31 May Constitution, the first paragraph declares *"The state cultivates and promotes science and the arts"* but the second paragraph constitutes merely that *"Science and its teaching is free."*[38] From the standpoint of an authoritarian regime it makes sense to limit the arts as much as possible in order to hinder the emergence of any kind of critical voices. An approach that prevailed in the subsequent years as Austria was annexed by Nazi-Germany in 1938. With the "Ostmark Act" of 14 April 1939 Austria was finally and *"completely liquidated"*.[39] Nevertheless, this

34 ERMACORA, F. *Die Sammlung der Entwürfe zur Staats- bzw. Bundesverfassung.* Wien: Braumüller, 1990, pp. 19–36.

35 OLECHOWSKI, T. *Introduction to Austrian and European Legal History*. Wien: facultas, 2021, pp. 98–99.

36 LEHNER, O. Österreichische Verfassungs- und Verwaltungsgeschichte. Mit Grundzügen der Wirtschafts- und Sozialgeschichte. 4. Aufl. Linz: Trauner, 2007, pp. 309–336.

37 OLECHOWSKI, T. *Introduction to Austrian and European Legal History*. Wien: facultas, 2021, pp. 104–108.

38 Verfassung des Bundesstaates Österreich vom 24. April / 1. Mai 1934 – BGBl. Nr. 239/1934, BGBl. II Nr. 1/1934.

39 OLECHOWSKI, T. *Introduction to Austrian and European Legal History*. Wien: facultas, 2021, pp. 108–109.

time is of course a crucial period for contemporary Austria and cannot be neglected. In addition to the Shoa, the countless atrocities and all the horrors of World War Two, the Nazi regime persecuted also the arts and artists. So called "degenerated art", which was basically every sort of modern art, art by Jewish artists or art that was not in line with the Nazi ideology, was prohibited, confiscated, burned or likewise. The artists were forced to leave in the best case or were killed in the worst case. Numerous Austrians supported or actively contributed to this system.[40] But did these actions materialise in some regard to Artistic Freedom in the aftermath of World War Two, like it did for instance in the German Basic Law? Was it overall addressed in the constitutional and/or political debate after 1945?

On 27 April 1945 the Second Republic of Austria has been founded with its declaration of independence.[41] The Concentration Camp Mauthausen, most parts of Austria, nearly all of the Czech Republic and relatively large parts of Germany were not liberated yet. Nevertheless, one could say amidst firing artillery guns, the Viennese Philharmonic Orchestra conducted on 27 and 28 April 1945 their first two concerts in the liberated Vienna. Austria celebrated the re-emergence of the Republic (particularly and constantly supported by the Soviets, later by most Allied Forces, in order to foster an own national identity). Of course, parts of Ludwig van Beethoven's Liberation Opera Fidelio were included in these concerts.[42] To the sound of the Viennese Philharmonic Orchestra official Austria began to enshrine the "First Victim Myth" in its fundaments. A few days afterwards, on 1 May 1945, the B-VG was re-established and re-entered into force together with the StGG.[43] In the subsequent months and years, politicians together with

40 BRUCKMÜLLER, E. *Österreichische Geschichte. Von der Urgeschichte bis zur Gegenwart*. Wien, Köln, Weimar: Böhlau Verlag, 2019, pp. 546–551; RAUCHENSTEINER, M. *Unter Beobachtung. Österreich seit 1918*. Wien: Böhlau Verlag, 2021, pp. 165–196.

41 RAUCHENSTEINER, M. *Unter Beobachtung. Österreich seit 1918*. Wien: Böhlau Verlag, 2021, pp. 250–251.

42 HEHER, H. Musik und Politik in Österreich 1945 bis 1956. Annäherungen und Fragen. In: SCHMIDL, S. (ed.). *Die Künste der Nachkriegszeit. Musik, Literatur und bildende Kunst in Österreich*. Wien: Böhlau, 2013, pp. 25–30, p. 26; RATHKOLB, O. *Die paradoxe Republik. Österreich 1945 bis 2005*. Wien: Zsolnay, 2005, p. 241; Wiener Philharmoniker/Krauss. Freitag, 27. April 1945, 16:00 Uhr, Großer Saal. Available at: https://konzerthaus.at/konzert/eventid/14177

43 OLECHOWSKI, T. *Introduction to Austrian and European Legal History*. Wien: facultas, 2021, pp. 110–111.

the Viennese Philharmonic Orchestra travelled around the world to do what no one did after World War One: Invoking that Austria is a peace-loving nation full of culture, arts and of course Mozart. A nation with a people that by its nature identifies with the arts – a "Kulturnation" sui generis. A nation with a people that celebrates the re-emergence of the Austrian Republic in their very Austrian way – with operas and classical music, as the international press reported.[44] In this regard, one could expect at least now some fervours debates or speeches concerning Artistic Freedom in parliament. But overall, this was not the case. In stark contrast to the national and international political proclamations nearly no substantive parliamentarian, legal or academic debates regarding Artistic Freedom occurred until the late 1970s, when the legal discussion finally started on a larger academic scale.

The only relevant exception was a rather short debate in the National Council on 25 June 1952 and a non-public reform commission (the latter see below). Regarding the debate on 25 June 1952, a crucial aspect needs to be underlined: The initial topic of discussion was not even Artistic Freedom. In fact, the discussion was supposed to address questions concerning subsidies for horse betting ("Pferdetoto").[45] The socialist Member of Parliament merely took the opportunity to emphasis the matter of Artistic Freedom because 25% of these subsidies were dedicated to arts and science. In a well differentiated, fairly comprehensive and impressively reflected statement various crucial aspects of Artistic Freedom were mentioned. This included modern art and at least one reference to *"totalitarian"* times in the past.[46] The reactions were diverse. The subsequent speaker, a member

44 SZABÓ-KNOTIK, C. Selbstinzenierung und Handelsbilanz. Die (Re)Konstruktion Österreichs nach 1945 mittels Musik. In: SCHWEIGER, D., STAUDINGER, M., URBANEK, N. (eds.). *Musik-Wissenschaft an ihren Grenzen. Manfred Angerer zum 50. Geburtstag*. Frankfurt am Main: Lang, 2004, pp. 355–382, pp. 360–371; SZABÓ-KNOTIK, C. Mythos Musik in Österreich: die Zweite Republik. Musik als Inhalt und Praxis. In: BRIX, E., BRUCKMÜLLER, E., STEKL, H. (eds.). *Memoria Austriae: Memoria Austriae 1. Menschen – Mythen – Zeiten: Bd I*. Wien: Verlage für Geschichte und Politik, 2004, pp. 243–269, pp. 248–249; GRATZER, W. Rein geistiger Imperialismus? Die Salzburger Festspiele 1951 als Ort der Identitätsstiftung. In: SCHMIDL, S. (ed.). *Die Künste der Nachkriegszeit. Musik, Literatur und bildende Kunst in Österreich*. Wien: Böhlau, 2013, pp. 181–198, pp. 192–194.

45 Stenografisches Protokoll, 93. Sitzung des Nationalrates der Republik Österreich, VI. GP, 25. Juni 1952, 3613.

46 Ibid., pp. 3613–3616.

of the conservative party (ÖVP – Österreichische Volkspartei), shared some arguments, assured that the ÖVP is in favour of Artistic Freedom but had a different approach regarding subsidies for artists, which he largely rejected. Furthermore, he had some ressentiments against modern art.[47] Rather disturbing seems his claim that *"the people lost the connection to nowadays arts"*[48] which reminds one, from a nowadays perspective of course, to the NS-regime's idea that artists have to depict the alleged ideals of society. The most radical speaker was doubtlessly the member of the far-right party (VdU – Verband der Unabhängigen nowadays known as FPÖ – Freiheitliche Partei Österreichs). He made no serious reference concerning Artistic Freedom but, shortly after the end of the Nazi terror, in which thousands of people were killed in mental asylums, he stated that *"overlymodern* (sic!) *art excesses belong in a madhouse."*[49] Moreover, that the parallels to modern art could be found in *"the* [n-word] *art, art made by children, art in a madhouse."*[50] Towards the end he stated that modern art leads directly to Bolshevism and chaos before insinuating that modern art is *"amoral"*, therefore not art and overall has to be *"rejected completely"*.[51] This back then Member of Parliament depicts clearly how the VdU, founded largely by former Nazis and in their self-perception the party for former Nazi party members,[52] approached the matter of Artistic Freedom and modern art as well as the question of the Nazi past in the upcoming decades.

Overall, the mentioned debate reflected already the fault lines for the few upcoming debates in the following decades. Should subsidies for artists be included in Artistic Freedom? A key point in the discussion i.e. between the SPÖ and the other parties. Further, the question of how to approach modern art? A matter that created opposition in the VdU/FPÖ, skepticism in the ÖVP and a rather open mindset in the SPÖ. However, all parties were rather united in their ignorance regarding Nazi crimes, with merely few exceptions in the SPÖ and ÖVP. This can be explained with the mentioned

47 Stenografisches Protokoll, 93. Sitzung des Nationalrates der Republik Österreich, VI. GP, 25. Juni 1952, p. 3617.
48 Ibid., p. 3617.
49 Ibid., p. 3619.
50 Ibid., p. 3619.
51 Ibid., p. 3619.
52 REIMANN, V. *Die dritte Kraft in Österreich*. Wien: Molden, 1980, p. 196.

"First Victim Myth" (also known as "Victim Theory"). Particularly due to the ongoing occupation by the allied forces and with regard to the aspired Austrian independence it was of crucial importance to not subvert this narrative. At least until the "Waldheim Affair" in the late 1980s the "First Victim Myth" remained the widespread and largely unquestioned Austrian self-conception.[53]

5 The Reform Commission and the Positivisation of Artistic Freedom in 1982

In the early 1960s, stemming also from international developments, it became clear that the back then fundamental law situation did not correspond to the state of the art any longer. Therefore, the Federal Chancellor ordered to install a reform commission (Expertenkollegium für Probleme der Grund- und Freiheitsrechte) aiming to draft an entirely new and modern catalogue of fundamental rights. It seemed as if the nearly 100-year-old provisional solution StGG should finally be replaced. After two years of preparatory work (1962–1964) the reform commission started its actual non-public work in 1964 and met in different compositions until 1984. It was comprised of various top law professors, attorneys, public servants and judges as well as members of parliament later on.[54] On 24 January 1969 the topic of Artistic Freedom was addressed.[55] The central aspects can be summed up as following: Firstly, the protocols indicate that the commission quickly found a consensus that an own provision should be part of a new fundamental rights catalogue. Secondly, discussions were held if the arts can be defined at all. At the end of the day this idea was rejected. However, the discussion was rather heated. Also, in light of the "Wiener Aktionismus",[56] a movement

53 RATHKOLB, O. *Die paradoxe Republik. Österreich 1945 bis 2005*. Wien: Zsolnay, 2005, pp. 279–307.

54 LOEBENSTEIN, E. Die Behandlung des österreichischen Grundrechtskatalogs durch das Expertenkollegium zur Neuordnung der Grund- und Freiheitsrechte. In: MACHACEK, R., PAHR, W., STADLER, G. (eds.). *70 Jahre Republik. Band I Grundlagen, Entwicklung und internationale Verbindungen*. Kehl am Rhein: Engel, 1991, pp. 365–457, pp. 365–371.

55 Parlamentsbiblitothek, Protokoll des Expertenkollegiums für Probleme der Grund- und Freiheitsrechte, I-7.634/1, 41. Arbeitstagung.

56 BADURA-TRISKA, E., Klocker, H. *Wiener Aktionismus. Kunst und Aufbruch im Wien der 1960er-Jahre*. Köln: König, 2012.

of artists which got famous for (among other things) urinating on the federal flag in 1968 in a class room at the University of Vienna while singing the national anthem. Some participants have been concerned that society would be flawed or could not cope these developments. But even some rather conservative members of the commission denied the idea of defining the arts and underlined the need of protecting also the Avantgarde. Thirdly, a key aspect was the question of clearly expressed limits for Artistic Freedom. After rather intensive debates it was concluded that limitations should not be expressed. Immanent limitations would be in force anyway. It seems noteworthy that at least one member of the commission voted in favour for expressed limitations and two had significant doubts. Fourthly, the question of subsidies was addressed but no concrete opinion was constituted. Fifthly, censorship and the teaching were discussed with a consensus that the latter shall be included.

It can be concluded that this commission indeed discussed various crucial aspects of Artistic Freedom already in 1969. Most of them became relevant in the late 1970s when the discussion re-emerged. Having said this, it needs to be mentioned that solely one member, namely Ludwig Adamovich junior, one of the most famous constitutional lawyers in Austria, president of the Constitutional Court 1984–2002 and currently still advisor to the Federal President, was the only one who referenced the Nazi crimes indirectly. He meant it is *"to be recommended"* to positivise Artistic Freedom to prevent the re-emergence of any sort of *"pictureburners"* regardless of what party they might be.[57] It remained the only reference that was fairly clear, despite some other references to human dignity. In 1984 the commission and its follow-up commission ended its work without any substantial legal outcome. One of the very few exceptions: The positivisation of Artistic Freedom in 1982.

It was in 1977 when the legal debate finally began to emerge due to an academic article by the Professors Manfried Welan and Raoul Kneucker.[58] This rather

57 Parlamentsbiblitothek, Protokoll des Expertenkollegiums für Probleme der Grund- und Freiheitsrechte, I-7.634/1, 41. Arbeitstagung, 24.

58 WELAN, M., KNEUCKER, R. Die Freiheit der Kunst in Österreich. *ÖHZ*. 1977, Vol. 12, no. 1, 1–4; ERMACORA, F. *Verfassungsnovelle 1981 und Staatsgrundgesetznovelle 1982. JBl.* 1982, (21 und 22), pp. 577–583, p. 6.

short article basically argued that Austria has never conducted a serious legal debate about Artistic Freedom and that the back then status quo was rather unacceptable. It took two more years for the SPÖ to draft and introduce a bill that included Artistic Freedom as an amendment to the StGG.[59] The reasons for getting active in 1979 were not merely the legal debate that emerged but in addition a public debate concerning two controversial movies.[60] The bill was conveyed to the Constitutional Committee of the National Council and later to another subcommittee, which was partly composed by members of the reform commission that was mentioned above.[61] In other words, the subcommittee and later parliament discussed again what has been discussed about 10 years before. The key questions remained fairly the same with a particular focus on a paragraph that would include subsidies. This would have entitled artists to receive financial support by the state. However, the ÖVP and FPÖ disagreed with this aspect since they intended to adopt merely a provision that defends individual liberties rather than including a social dimension in this (or any other) provision. Nevertheless, there was broad consensus among the parties that a separate provision should be implemented to protect the arts in all its manifestations without defining what art is.[62] So, on 12 May 1982 the National Council finally adopted the Article 17a StGG after a rather differentiated and serious discussion.[63] Sure, the FPÖ, as to expect, did not represent the spearhead of modern art proponents and some of the ÖVP members also shared some ressentiments against modernism. But overall, particularly the members of the ÖVP and SPÖ addressed a variety of reasonable arguments in terms of constitutional law that even 40 years later did not lose their pertinence. To a certain extent the SPÖ even included some (not very substantive) references to the NS regime.[64] Nevertheless, in line with the Austrian "First Victim Myth" a serious contextualisation or discussion to face the situation of persecuted or murdered artists between 1933/38 and 1945 in Austria did not happen on 12 May 1982.

59 Antrag 29/A der Abgeordneten Blecha, Dr. Hawlicek und Genossen, II-387 BlgNR 15. GP.
60 NEISSER, H. Die verfassungsrechtliche Garantie der Kunstfreiheit. *ÖJZ*. 1983, no. 1, p. 6.
61 Felix Ermacora and Heinrich Neisser (both ÖVP).
62 NEISSER, H. Die verfassungsrechtliche Garantie der Kunstfreiheit. *ÖJZ*. 1983, no. 1, p. 7.
63 Stenografisches Protokoll, 114. Sitzung, NR XV. GP, 12 Mai 1982.
64 Stenografisches Protokoll, 114. Sitzung, NR XV. GP, 12 Mai 1982, 11504.

6 Conclusion

In 1982 Austria positivised Artistic Freedom with Article 17a StGG. The analysis of the development of Artistic Freedom in Austria shades light on fairly bright and very dark episodes of Austrian history. The first is here depicted by the liberal atmosphere in Fin de Siècle Vienna. Times when the conservative Emperor Francis Joseph I visited the first exhibition of the Vienna Secession in 1898. The heavily subsidised art landscape contributed to the governments narrative of a being a healthy, integrative and generous empire. In return most artists were loyal to the monarchy. This approach might have contributed to a situation in which the legislators of the direct successor state, the First Republic of Austria, did not even saw the urge for having a substantive political or legal debate about positivising Artistic Freedom. Due to ideological disputes a fundamental rights catalogue was finally not incorporated in the B-VG and the StGG from 1867 was readopted – without an own provision protecting the arts.

On 27 April 1945, after the darkest episode in Austrian history, the Second Republic of Austria emerged. At the same evening, before hammering artillery guns came to silence in Austria and elsewhere, even before the KZ Mauthausen was liberated, the violines of the Viennese Philharmonic Orchestra resounded to the melodies of Beethoven's liberation opera Fidelio. In the upcoming years and decades Austrian politicians travelled, often accompanied by the Vienna Philharmonic Orchestra, around the world and invoked that Austria is a peaceful alpine nation characterised by arts and culture. However, it needs to be underlined that none of this materialised legally. Until the late 1970s just one relatively substantive parliamentary debate about Artistic Freedom was held. A profound legal debate did not take place until an academic article finally started it in 1977. In the entire implementation process of Article 17a StGG, which started in 1979, basically no references to Austria's Nazi past, Nazi atrocities or the Nazi concept of "Degenerated Art" were made. In line with the "first victim" narrative every party refrained from addressing the crimes conducted by Austrians in this context. It seems noteworthy that other European countries like for instance Germany and Italy but also Greece, Portugal and Spain at least

implemented specific fundamental rights provisions that would protect the arts shortly after abolishing their autocratic systems. In Austria this was not the case. The most likely explanation why it took the Second Republic of Austria so long to positivise Artistic Freedom in the subsequent years can be found in the work of the reform commission, which met (in different forms) from 1964 to 1984. This commission originally aimed to draft a totally new catalogue of fundamental rights and a singular amendment (e.g. Artistic Freedom) was not intended. However, for various reasons the draft of an entirely new fundamental rights catalogue never entered a parliamentary process. Merely Artistic Freedom among very few other provisions was adopted in the aftermath.

Finally, the question remains how Article 17a StGG developed in the years after 1982. Current research indicates that a strictly legal benefit compared to the Article 10 ECHR can be doubted particularly in regard to questions of public law.[65] Nevertheless, the socio-political importance remains undoubted. An appraisal that needs to be seconded.

References

ANSCHÜTZ, G. *Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar f. Wiss. u. Praxis.* Bad Homburg v.d.H.: Gehlen, 1968.

BADURA-TRISKA, E., KLOCKER, H. *Wiener Aktionismus. Kunst und Aufbruch im Wien der 1960er-Jahre.* Köln: König, 2012.

BERKA, W. Vorbemerkungen zum StGG. In: KNEIHS, B., LIENBACHER, G., SCHÄFFER, H. (eds.). *Bundesverfassungsrecht.* Wien: Verlag Österreich, pp. 1–55.

BRUCKMÜLLER, E. *Österreichische Geschichte. Von der Urgeschichte bis zur Gegenwart.* Wien, Köln, Weimar: Böhlau Verlag, 2019. DOI: https://doi.org/10.7767/9783205208730

BRUNEDER, A. M. Die Kunstfreiheit nach Art 10 EMRK und Art 17a StGG in der Rechtsprechung der Höchstgerichte – eine vorläufige Bilanz. *jrp.* 2022, Vol. 12, no. 1, 63–70. DOI: https://doi.org/10.33196/jrp202201006301

65 BRUNEDER, A. M. Die Kunstfreiheit nach Art 10 EMRK und Art 17a StGG in der Rechtsprechung der Höchstgerichte – eine vorläufige Bilanz. *jrp.* 2022, Vol. 30, no. 1, pp. 62–70, p. 63.

ERMACORA, F. *Die österreichische Bundesverfassung und Hans Kelsen. Analysen und Materialien; zum 100. Geburtstag von Hans Kelsen*. Wien: Braumüller, 1982.

ERMACORA, F. Verfassungsnovelle 1981 und Staatsgrundgesetznovelle 1982. *JBl.* 1982, (21 und 22), pp. 577–583.

ERMACORA, F. *Die Sammlung der Entwürfe zur Staats- bzw. Bundesverfassung*. Wien: Braumüller, 1990.

GRATZER, W. Rein geistiger Imperialismus? Die Salzburger Festspiele 1951 als Ort der Identitätsstiftung. In: SCHMIDL, S. (ed.). *Die Künste der Nachkriegszeit. Musik, Literatur und bildende Kunst in Österreich*. Wien: Böhlau, 2013, pp. 181–198. DOI: https://doi.org/10.7767/boehlau.9783205789840.181

HEERDE, J. B. van. *Staat und Kunst. Staatliche Kunstförderung 1895 bis 1918*. Wien: Böhlau, 1993.

HEHER, H. Musik und Politik in Österreich 1945 bis 1956. Annäherungen und Fragen. In: SCHMIDL, S. (ed.). *Die Künste der Nachkriegszeit. Musik, Literatur und bildende Kunst in Österreich*. Wien: Böhlau, 2013, pp. 25–30. DOI: https://doi.org/10.7767/boehlau.9783205789840.25

HOLUBEK, M., NEISSER, H. Die Freiheit der Kunst. In: MACHACEK, R., PAHR, W., STADLER, G. (eds.). *40 Jahre EMRK Grund- und Menschenrechte in Österreich. Band II Wesen und Werte*. Kehl am Rhein: Engel, 1997, pp. 195–244.

JUST, T., PANGERL, I. Kaiser Franz Joseph und die Erste Ausstellung der Secessionisten 1898. *Wiener Geschichtsblätter*. 2006, Vol. 12, no. 1, pp. 59–66.

KISSINGER, H. *Diplomacy*. London: Simon & Schuster, 1994, pp. 168–200.

KITZINGER, F. Artikel 142 Satz 1. Die Freiheit der Wissenschaft und der Kunst. In: NIPPERDEY, H. C. (ed.). *Die Grundrechte und Grundpflichten der Reichsverfassung. Kommentar zum zweiten Teil der Reichsverfassung*. Berlin: Hobbing, 1930, pp. 455–456.

KRÖLL, T. Artikel 17a. In: KNEIHS, B., LIENBACHER, G., SCHÄFFER, H. (eds.). *Bundesverfassungsrecht*. Wien: Verlag Österreich, pp. 1–78.

LEHNER, O. *Österreichische Verfassungs- und Verwaltungsgeschichte. Mit Grundzügen der Wirtschafts- und Sozialgeschichte*. Linz: Trauner, 2007, pp. 255–280.

LOEBENSTEIN, E. Die Behandlung des österreichischen Grundrechtskatalogs durch das Expertenkollegium zur Neuordnung der Grund- und Freiheitsrechte. In: MACHACEK, R., PAHR, W., STADLER, G. (eds.). *70 Jahre Republik. Band I Grundlagen, Entwicklung und internationale Verbindungen*. Kehl am Rhein: Engel, 1991, pp. 365–457.

MOMMSEN, W. J. *Bürgerliche Kultur und politische Ordnung. Künstler Schriftsteller und Intellektuelle in der deutschen Geschichte 1830–1933*. Frankfurt am Main: Fischer, 2000.

OLECHOWSKI, T. *Introduction to Austrian and European Legal History*. Wien: facultas, 2021.

Österreichische Bundesregierung, Aus Verantwortung für Österreich. Regierungsprogramm 2020–2024. Wien: Bundeskanzleramt Österreich, 2020.

PARET, P. *Die Berliner Secession. Moderne Kunst und ihre Feinde im Kaiserlichen Deutschland:* Ullstein, 1983.

PLASSNIK, U. On the Road to a Modern Identity: Austria's Foreign Policy Agenda from the Cold War to the European Union. In: BISCHOF, G., KARLHOFER, F. (eds.). *Austria's international position after the end of the Cold War*. New Orleans, Louisiana: UNO press; innsbruck university press, 2013, pp. 55–94. DOI: https://doi.org/10.2307/j.ctt1n2txd9.5

RATHKOLB, O. *Die paradoxe Republik*. Österreich 1945 bis 2005. Wien: Zsolnay, 2005.

RAUCHENSTEINER, M. *Unter Beobachtung. Österreich seit 1918*. Wien: Böhlau Verlag, 2021, pp. 13–64. DOI: https://doi.org/10.7767/9783205212690

REIMANN, V. *Die dritte Kraft in Österreich*. Wien: Molden, 1980.

SHEDEL, J. Kunst und Identität. Die Wiener Secession 1897–1938. In: VEREINIGUNG BILDENDER KÜNSTLER WIENER SECESSION (ed.). *Secession. Permanenz einer Idee*. Ostfildern-Ruit: Hatje, 1997, pp. 13–57.

SZABÓ-KNOTIK, C. Mythos Musik in Österreich: die Zweite Republik. Musik als Inhalt und Praxis. In: BRIX, E., BRUCKMÜLLER, E., STEKL, H. (eds.). *Memoria Austriae: Memoria Austriae 1. Menschen – Mythen – Zeiten: Bd I*. Wien: Verlage für Geschichte und Politik, 2004, pp. 243–269.

SZABÓ-KNOTIK, C. Selbstinzenierung und Handelsbilanz. Die (Re) Konstruktion Österreichs nach 1945 mittels Musik. In: SCHWEIGER, D., STAUDINGER, M., URBANEK, N. (eds.). *Musik-Wissenschaft an ihren Grenzen. Manfred Angerer zum 50. Geburtstag.* Frankfurt am Main: Lang, 2004, pp. 355–382.

WELAN, M., KNEUCKER, R. Die Freiheit der Kunst in Österreich. *ÖHZ,* 1977, Vol. 12, no. 1, 1–4.

WÜRTENBERGER, T. Zur Geschichte der Kunstfreiheit. In: GEIS, M.-E. (ed.). *Von der Kultur der Verfassung. Festschrift für Friedhelm Hufen zum 70. Geburtstag.* München: Beck, 2015.

Josef Redlich and the Glorious Revolution of Liberalism

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Abstract

Josef Redlich is a representative of the new generation of Austrian liberals that came of age around 1900. Through his legal-historical publications, diaries, and the surviving voluminous correspondence, he offers a glimpse into the highly changeable times of the turn of the 19th and 20th centuries in Europe and expresses his frustration with political developments. Redlich, who was a university professor of Constitutional and Administrative Law, was the first to see the lack of the Rule of Law as the reason for the collapse of the Austro-Hungarian Empire in the first place, and he named two different conceptions of the state in Western Europe and Central Europe. He thus came into confrontation with the state doctrine of the Prussian university professor Rudolf von Gneist, which was taught in all German-speaking law schools. The difference between the authoritarian state in Central Europe and the British people's state is still apparent today.

Keywords

Josef Redlich; Rudolf von Gneist; Liberalism; Rule of Law.

1 Introduction

Josef Redlich was born in 1869 into a prominent family of assimilated Jews in the South Moravian border town of Hodonín.[1] The predominantly agricultural town of 3 000 inhabitants underwent dynamic industrialisation in the mid-19th century thanks to the construction of a railway connecting

1 ÖNB (Österreichische Nationalbibliothek), Nachlass Josef Redlich, Cod. Ser. n. 53661, Aus dem alten Österreich, p. 4.

Vienna with Bohumín and Cracow, and by 1900, with more than 10 000 inhabitants, it was one of the most industrial towns in South Moravia after Brno.[2] The December Constitution of 1867 gave Jews equal rights within the Austro-Hungarian Empire, allowing ambitious individuals, including members of the Redlich family, to rise socially from a persecuted and excluded group to the elite of the Habsburg Monarchy. The liberalism that began to take hold in Austria after the revolutionary year of 1848 brought with it an unwavering belief in a self-regulating market and the rule of law. According to the renowned Hungarian historian Karl Polanyi, the British liberals created a four-point value system consisting of a balance of power between the five European great powers, a liberal state, a self-regulating market set according to the doctrine of laissez-faire and a gold standard.[3] This system was supposed to guarantee stability and prosperity in Europe and, except for minor local war conflicts, a long-term peace that lasted from the end of the Napoleonic Wars until the outbreak of the First World War. The mainstay of this system and the new liberal age was civil society, for which laissez-faire was an unquestioned doctrine and belief in the rule of law was considered the new religion of the 19th century. Although today the concept of the rule of law seems clear and its meaning is understood by all, it is an essentially contested concept. The difference concerns not only the content but also the very essence of the concept. The difference and specificity between the pragmatism of the British Rule of Law and the normative character of the German Rechtsstaat are so pronounced that, in Walter van Gerven's words on how to "bridge the unbridgeable", we have to ask ourselves whether any comparison between the two legal cultures is possible and whether a common view can be achieved on several topics that became pressing issues for 19th-century European society and continue to arouse passions in contemporary Europe.[4] The fundamental problem of the rule of law, which has persisted to the present day, is the perception of equality before the law, within society and the political liberty that goes with it.

2 HYNEK, M. Soumrak Habsburků a katarze nové doby. In: PLAČEK, M. (ed.). *Hodonín: Dějiny města do roku 1948*. Hodonín: Tiskárna Lelka, 2008, p. 296.

3 POLANYI, K. *The Great Transformation*. Boston: Beacon Press, 2001, p. 3.

4 GERVEN, W. van. Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie. *International and Comparative Law Quarterly*. 1996, Vol. 45, no. 3, p. 507.

What the Austrian liberals behind the Revolution of 1848 thought of equality is beautifully illustrated by the statement of the later Finance Minister and President of the Imperial Council, Karl Friedrich von Kübeck: *"Justice is a progress in the human formation of society, in all directions; equality is a regression to barbarism."*[5] Although one could argue that this is a unique elitist approach a certain sense of elitism and superiority characterised Austrian and German liberals, as evidenced by Karl Kraus' famous statement: *"Parliamentarianism means putting political prostitution in barracks."*[6]

2 The Revolution of 1848 and the Beginning of a New Era

Resistance to democratic structures was rooted in the Habsburg Monarchy from the beginning of the liberal movement. The Juridical-Political Reading Association, founded in Vienna in 1841, emerged as an elite gentlemen's club for civil servants, academics and aristocrats, which served as a key platform for the exchange of information in the field of politics and law. It was the members of this club who were behind the Revolution of 1848 in Vienna and subsequently won government, civil service and university positions.[7] From their beginnings, liberals in Austria had been fascinated by the ancient aristocratic culture of the Habsburg imperial court, which in later times manifested itself in perhaps excessive servility towards the emperor. The old Austrian aristocratic culture was the opposite of that of the bourgeoisie. It was very sensual, malleable and imbued with a deep Catholicism. Nature played a major role in the eyes of the aristocracy, which saw in its spirituality a mystical connection with God, while in the eyes of the industrial bourgeoisie it was to be conquered and dominated by the rational order.[8] Hence the different understanding of Austrian aristocratic culture, which had an aesthetic character. Cultivating good

5 KÜBECK, Max von. *Tagebücher des Carl Friedrich Freiherrn Kübeck von Kübau*. Wien: Gerold Verlag, 1910, p. 35.

6 KRAUS, K. *Sprüche und Widersprüche*. Munich: Albert Langen Verlag, 1909, p. 97.

7 BRAUNEDER, W. *Leseverein und Rechtskultur. Der Juridisch-Politische Leseverein zu Wien 1840 bis 1990*. Wien: MANZ Verlag, 1992, pp. 65–66.

8 SCHORSKE, C. E. *Wien: Geist und Gesellschaft im Find de Siècle*. Wien et al.: Molden Verlag, 2017, pp. 6–8.

taste, visiting cultural institutions and discussing the importance of art, including self-study of art, which was very popular in the 19th century, was an important step toward the adoption of aristocratic culture for every member of the bourgeoisie. All of this was part of the goodwill of every cultured citizen, for whom it became a necessity and a feature of belonging to an upper-class and upper-middle-class society that distinguished its members from the small-town or rural population.[9] Similarly, Joseph Redlich was not only impressed by British legal culture and the British sense of political progressiveness, but he admired the elegance of the English upper class, which he contrasted with the provincialism of Austria. He was also deeply impressed by the aristocratic ethos of the universities of Oxford and Cambridge and the famous private secondary schools such as Eton College. In his view, this was how Britain combined a liberal legal culture with an aristocratic culture of mercy.[10] *"That such an aristocratic-conservative feeling has existed and continues to exist among the Jews almost everywhere and at all times is known to everyone who knows Jewish traditions,"*[11] Josef Redlich later commented in his memoirs and wrote further: *"I felt Austrian and therefore I was imperial-minded. Besides, Bismarck and Gladstone and all European questions interested me even then more than Austrian politics, especially since I believed I knew that the Austrian members of parliament were not able to push through anything against the will of the Emperor. I also took a deep dislike to the national radicalism of the Austrian Germans, as now embodied by Schönerer and his followers, if only because of the brutal anti-Semitic clamour that these people were now raising everywhere."*[12]

3 The Common Law Constitutional Tradition

The sense of his exceptionalism was nurtured from childhood by his very progressive and liberal-minded mother Rosa Fanto-Redlich, whose ancestors had been court Jews in the service of the imperial house since the time of Francis Stephen of Lorraine.[13] A close family friend Sigmund Kolisch, who personally fought on the Vienna barricades in 1848 as a student

9 SCHORSKE, 2017, op. cit., p. 9.
10 NG, A. *Nationalism and Political Liberty: Redlich, Namier, and the Crisis of Empire.* Oxford: Clarendon Press, 2004, p. 20.
11 ÖNB, Nachlass Josef Redlich, Cod. Ser. n. 53661, Aus dem alten Österreich, p. 7.
12 Ibid., p. 74.
13 Ibid., p. 66.

of history and philosophy, also had a great influence on the formation of the young Josef Redlich's personality.[14] Not surprisingly, Redlich devoted his school-leaving thesis at the grammar school to Napoleon and the building of civil society during the French Revolution.[15] His father's finances enabled him to study at the elite and progressive Academic Grammar School in Vienna, where his classmates included Herman Bahr, Hugo von Hofmannsthal and Theodor Herzl, and then to study law at the University of Vienna.[16] During his study in England in 1894, he not only got to know the young Oxford liberals, one of whom, Francis Wrigley Hirst, co-wrote Redlich's habilitation thesis dealing with British constitutionalism *"Local Government in England"* (German edition 1901 and English edition 1903), but through Albert Venn Dicey, Professor of English Law at Oxford, he better understood the nature of the common law.[17] The original idea that power was given to the sovereign not by divine will but through a social contract between the people and a chosen ruler came from Thomas Hobbes. This idea was further developed by English empiricists along with French thinkers such as Montesquieu, Tocqueville, Voltaire and Rousseau. But it was Jeremy Bentham who turned the philosophical ideas of the 17th and 18th centuries into a real political movement of liberalism and made law a real scientific discipline. Influenced by Enlightenment absolutism in the early stages of his political thought, he still believed in the good judgment of a benevolent monarch, but over time he began to realise how the interests of powerful families frustrated the will of parliament and thwarted any attempts at rational reform. This frustration led him to abandon trust in the government and turn his attention to constitutional reform as a way to control government, taking it out of the hands of a family, group and professional interests and making it accountable to the public. The basis of Bentham's new constitutional reform was to be representative democracy with the widest possible suffrage as a means of holding the government

14 DONATH, O. Sigmund Kolischs Leben und Wirken. In: PLITZKA, A. (ed.). *Vierzehnter Jahresbericht der Deutschen Landes-Oberrealschule in Göding.* Hodonín: Verlag der Deutschen Landes- und Oberrealschule, 1912, p. 32.

15 ÖNB, Nachlass Josef Redlich, Cod. Ser. n. 53662, Maturaarbeit.

16 BELLER, S. *Wien und die Juden 1867–1938*. Wien et al.: Böhlau, 1993, p. 60.

17 NG, 2004, op. cit., p. 20.

accountable to the public interest.[18] Bentham was followed by his pupil and the most influential authority on 19th-century English law, Albert Venn Dicey. According to Dicey, the Rule of Law was to be based on the interaction between the common law and parliamentary sovereignty. Parliamentary sovereignty with common law functioned as two mutually reinforcing principles of the British legal system. In his book *"Introduction to the Study of the Law of the Constitution"* he presented three meanings of the Rule of Law as a fundamental principle of the constitution:

- *"the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government*
- *equality before the law, or the equal subjection of all classes to the ordinary Law Courts; the 'rule of law' in this shadow excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals*
- *the 'rule of law', lastly, may be used as a formula for expressing the fact that the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Court"*[19]

According to Dicey's understanding of the Rule of Law, the Anglo-Saxon legal tradition differs from the Continental tradition in its marked emphasis on legal pragmatism and the central role of the judge in the development of common law. This moves the British Rule of Law away from a purely formal or normative view of the rule of law. In this sense, the British Rule of Law is not primarily based on a reliance on existing formal rules, nor on the application of pre-existing abstract rules that find their source in natural law, but rather on the experience of the legal system.[20] The well-known Italian legal philosopher Norberto Bobbio, in his book *"The Future of Democracy: A Defence of the Rules of the Game"*, emphasised the connection between the rule of law and the ideal of democracy

18 KELLY, P. J. *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*. Oxford: Clarendon Press, 1990, pp. 80–81.

19 DICEY, A. V. *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Classics, 1982, pp. 120–121.

20 ATIYAH, P. S. *Pragmatism and Theory in English Law*. London: Stevens and Sons, 1987, pp. 143–144.

when he wrote: *"Democracy is the rule of law par excellence"*.[21] In this context, parliamentary sovereignty remains an important aspect of the British Rule of Law.[22] Conversely, the Rule of Law recognises the indispensable role of judges in the making of the law and their independence is thus a central element of the British Rule of Law. In contrast, the highly normative character of the German Rechtsstaat has its origins in the dynamic political developments in continental Europe at the turn of the 18th and 19th centuries and can be seen as a reaction to the existing arbitrariness and violence in the private and public spheres.[23] Not surprisingly, the philosophical roots of the Rechtsstaat lie in Immanuel Kant and his reflections on the nature of justice. Kant, like other Enlightenment philosophers, asked how to transform unfree serfs into critically minded individuals responsible for their actions. In this respect, he saw the law as a means of guaranteeing each individual the maximum sphere of external freedom.[24] In this context, the law aims to limit the power of the state in the sense that the state should benefit from executive power only by the law. The concept of the state as a *"State of Reason"* was developed in the philosophy of Georg Wilhelm Friedrich Hegel and the legal theorists Robert von Mohl and Rudolf von Gneist, who were influenced by Hegel.[25]

After his return from England, Redlich was instrumental in founding the Fabian Society in Vienna in 1894.[26] This had its origins in the Fabian movement in Britain, influenced by the legal thinking of Albert Venn Dicey, who thus became its spiritual father. After the Panic of 1873 and the collapse of the belief in laissez-faire, a new generation of Austrian liberals in the 1880s and 1890s began to question the dogmatic truths of their fathers. This was evident in the defiance of the philosopher Heinrich Gomperz, who clearly defined himself against Platonism as the mainstay philosophy of bourgeois

21 BOBBIO, N. *The Future of Democracy: A Defence of the Rules of the Game*. Minneapolis: University of Minnesota Press, 1987, p. 156.
22 Ibid., p. 159.
23 HEUSCHLING, L. *Etat de Droit, Rechtsstaat, Rule of Law*. Paris: Dalloz, 2002, p. 42.
24 FLETCHER, G. P. Law and Morality: A Kantian Perspective. *Columbia Law Review*. 1987, Vol. 87, no. 533, p. 535.
25 BÖCKENFÖRDE, E.-W. *Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*. Frankfurt am Main: Suhrkamp Verlag, 1991, p. 145.
26 HOLLEIS, E. *Die Sozialpolitische Partei*. Wien: Verlag fur Geschichte und Politik, 1978, p. 10.

society as applied by his father Theodor Gomperz, a respected professor of Classical Philosophy at the University of Vienna. Heinrich Gomperz came up with the new Neosocratics movement seeking a mystical search for truth in the pre-Socratic period.[27] The frustration of the times was perhaps most evident in the heralding of the new philosophy of Friedrich Nietzsche. *"In the younger generation, the realisation is growing that we will have to clean up from the bottom up, and the hitherto wide-meshed net of reasonable – not social democratic dreaming – in short, positivist opposition is closing more tightly. And we have also already seen a kind of youth alliance. For one and a half years, an elite society of this radical youth has been meeting casually – without forming an association – and discussing major political and social problems,"*[28] wrote Josef Redlich in 1895 about the Fabian Society in a letter to his friend Flora Darkow-Singer. The Fabians entered public life with great determination and a sense of democracy and social justice. They tried, perhaps with the naive conviction of the younger generation, to bring egalitarianism closer to the original uncorrupted ideals of the Revolution of 1848. By their harsh criticism of the ruling establishment, as well as of the newly formed nationalist-oriented mass parties, especially the Christian Socialists of Karl Lueger, they won the sympathy of the well-to-do Viennese youth of predominantly Jewish origin. Inspired by John Stuart Mill, they sought to extend suffrage and introduce representative democracy.[29] However, not all of the liberals shared the enthusiasm for universal, equal and direct suffrage, as can be seen from a remark by Ernst von Plener, leader of the traditional Austrian liberals and then Minister of Finance, in his diary: *"But the electoral reform project is also full of dangers for Germans, and nothing is more alarming for Austria than for Germans to see their position undermined by legislation. This plan may well lead to democratic federalism, but it is more likely to lead to the destruction of the state."*[30] Thus, at the end of the 19th century, liberalism appears to be fragmented between two groups of liberals based on two completely different legal-philosophical cultures. Despite the still very strong influence of German idealism, figures such

27 LE RIDER, J. *Das Ende der Illusion: zur Kritik der Moderne. Die Wiener Moderne und die Krisen der Identität*. Wien: ÖBV, 1990, pp. 98–99.
28 ÖNB, Nachlass Josef Redlich, Cod. Ser. n. 53579, Flora-Darkow 9. März 1895.
29 NG, 2004, op. cit., p. 17.
30 PLENER, E. *Erinnerungen, Vol. 3*. Leipzig: Deutsche Verlags-Anstalt, 1921, p. 95.

as Ernst Mach, Franz Brentano and Sigmund Freud emerged in Austria who were inclined towards nominalism. With his nominalist critique of language, Fritz Mauthner fought against the idealist mystification of abstract contested concepts such as the nation or the state. The idealist interpretation of these abstract concepts led to their modification and the frequent creation of terms that referred primarily to race, culture, and language in all their purity and profanity. Through nominalism, Redlich sought to refute the notion of imperishable abstract truths and advocated greater tolerance and a willingness to compromise, which he considered one of the key political virtues and the only correct principle by which parliamentary government should function. With the same determination with which Wittgenstein and Russell fought for linguistic criticism, Redlich denounced rampant state bureaucratism.[31]

4 Redlich versus Gneist

Like many other German law students, Redlich was confronted with the work of Rudolf von Gneist. Half a century older Gneist, who was a professor of Civil Law at the University of Berlin, was regarded in the German-speaking world as an authority on English local government, and his doctrine of the state was hailed as state doctrine and taught at every university in the German Empire and Austria-Hungary during the second half of the 19th century. Even his doctrine was successfully exported abroad and enthusiastically adopted in Japan.[32] Gneist was convinced that it was because of English self-government that British politics differed so markedly from continental practice and that European countries could never reach the same level of political maturity as the British unless they adopted the English system. The starting point for Gneist's interpretation of the English system of government was the distinction between state and society as described by the social bourgeois philosopher Lorenz von Stein, himself a Hegelian.[33] The state was the supreme embodiment of the community as will and action, and it aimed to ensure the best possible

31 NG, 2004, op. cit., p. 20.
32 Ibid., p. 21.
33 Ibid., p. 21.

development for all its members. The community, however, manifested itself economically as a society. But society is in constant conflict with the state because self-interest and class struggle have the upper hand. This idea comes directly from Hegel, who in his *"Elements of the Philosophy of Right"* describes post-feudal civil society as an egoistic society in which individuals compete for power, domination and the satisfaction of their economic interests. Hegel thus very successfully described a capitalist society in his dialectic of master and slave. The ideal state, according to Hegel, regulates this egoistic competition and educates its members to overcome the selfishness of society and develop a consciousness of the state.[34] Because the sovereign stood above the class struggle and society, his will embodied the will of the state. The English monarchs in their wisdom created the institution of arbitration, under which members of the local wealthy classes were responsible for local self-government without remuneration. By bestowing political power on the nobility and bourgeoisie and involving them in local self-government, the state educated them to forgo their interests for the sake of the common good and to perform their duties not for money but out of a sense of social responsibility.[35]

Lorenz von Stein took up Hegel's dialectic, which, in connection with his idea of the ownership of the means of production, he developed into a theory of class struggle, which was ultimately popularised by Karl Marx, another follower of Hegel. According to Stein, the rich upper class has always wielded state power, which it has used to exploit the working class. The state was thus an instrument of class control and class rule.[36] Marx even regarded law as a means of oppressive class mechanism determined by the economic base of society and thus looked with admiration to the strictly coordinated and democratised form of the German Rechtsstaat.[37] Gneist's conception of the state was thus based not on the notion of law but on duty. Citizens were not born; they had to become citizens through education and upbringing mediated by the state.[38] He rejected John Stuart Mill's idea

34 HEGEL, G. W. F. *Grundlinien der Philosophie des Rechts*. Hamburg: Meiner 2009, p. 190.
35 NG, 2004, op. cit., p. 21.
36 WILL, M. *Selbstverwaltung der Wirtschaft*. Tübingen: Mohr Siebeck, 2010, p. 39.
37 EASTON, S. *Marx and Law*. Farnham: Routledge, 2008, p. 43.
38 WILL, 2010, op. cit., p. 41.

of pluralistic representative democracy. For him, politics was not just a service but a duty to the state and the public trust. Voting in elections had no intrinsic educational value in his view because it could not create a sense of politics or the skills for active participation. Nothing can replace personal responsibility. As a morally loaded model, the Rechtsstaat doctrine transcends legality and creates a form of constitutionalism that aims at the realisation of public reason. This very idea comes from Hegel the founder of the doctrine of civil society. He, therefore, considered the 19th-century reforms of English administration to be extremely dangerous, because the administration would be run by paid officials subject to democratic control, rather than being performed as an unpaid public service.[39] Gneist also had reservations about parliamentary government and insisted that at least a deep system of local self-government must be established in Prussia before this government could be implemented.[40] British and German jurisprudence should merge. He was even supported by Bismarck himself, which enabled him to carry out reforms that forced the wealthy classes in the countryside to serve the state. Although Gneist was initially one of Bismarck's opponents, he later became one of the main protagonists of Bismarck's illiberal policy. Many liberals in Central Europe experienced a similar disillusionment with liberalism. Gneist was no mere opportunist born of a failed idealist. His education and political attitudes reflected some of the deep anti-democratic instincts of Prussian bourgeois liberals, which enabled them to find a connection with the traditional landed aristocracy rather than with the masses of people uprooted by industrialisation. His doctrinaire view of politics as a constant struggle between state and society led him to conclude that political rights should be extended only to the rich and educated, not to the politically immature lower classes.[41]

Gneist's ideas influenced the emerging Austrian bureaucracy in the 1850s. Politicians such as Heinrich Clam, Leo Thun, Karl Friedrich von Kübeck and Hans von Perthaler, co-author of the February patent of 1861, lent their support.[42] *"It is not democracy that is a disease, but the misunderstanding of it.*

39 NG, 2004, op. cit., p. 22.
40 WILL, 2010, op. cit., p. 42.
41 NG, 2004, op. cit., p. 22.
42 Ibid.

One does not want inequality in society and understands by people only the lowest stratum of it. If it is possible to carry out this responsibility, we will be able to return to the state of savagery, barbarism and unrest. The great, reasonable democracy, consists of equality before the law without destroying the hierarchy of society. Some believe that democracy is essentially linked to a republic and that it is only possible in a republic. That is a major irritant. Democracy can exist under any form of government. The best and purest form of government is, however, one whose power is enshrined in specific institutions, which is the most legitimate one. But justice consists essentially in treating each according to his merits, his qualities and his social position; absolute equality, however, treats each according to the measure of the other's jealousy,"[43] wrote Karl Friedrich von Kübeck during the Revolution of 1848. Gneist's authoritarian form of liberalism, in which citizens had more responsibilities in the application of laws at the regional level than at the state level, and equally much more responsibility to the crown than to civil society, reinforced the centrality of the state as the main actor, which ultimately manifested itself in Prussian militarism and bureaucratisation. Gneist thus reinforced Prussian constitutional monarchism in Central Europe.[44] At the same time, it highlighted the difference between political liberty in Western Europe and civil liberty in Central Europe. This different perception of liberty had already been noticed by Johann August Eberhard, an Enlightenment professor of Philosophy at the University of Halle, at the end of the 18th century. In his essay *"On the Liberty of the Citizen and the Principles of the Form of Government"* from 1784, he reflected on the nature of liberty and whether liberty can only be achieved in democracies and not monarchies.[45] According to him, the subjects of Frederick the Great were already essentially free citizens and did not need to be liberated, but it was a different kind of liberty. In the newly forming United States and Western Europe, he said, the people had political liberty because they participated in government. Therefore, political liberty existed only in constitutional monarchies or popular republics and most of all in democratic republics. But the people, who enjoyed the right to act freely according to their will, provided that this action was not restricted by law, enjoyed civil liberty, and

43 KÜBECK, 1910, op. cit., p. 35.
44 WILL, 2010, op. cit., p. 42.
45 DIJN, A. de. *Freedom: An Unruly History*. Cambridge: Harvard University Press, 2020, p. 231.

this kind of liberty could equally well occur in a monarchy as in a republican system.[46] History can attest that when the population enjoyed greater political freedom, they were more restricted in their civil liberty than those living in absolutist monarchies, where people often enjoyed great civil liberty. He pointed to Britain, Switzerland, and the Netherlands, for example, where the tax burden was higher and the penalties more severe than in Prussia. This would also explain why the inhabitants of these free countries left their homeland for countries ruled by absolutist monarchs. Fearing the discontent of their subjects, absolutist monarchs usually allowed the people greater civil liberty than in countries where the people were responsible for their political decisions.[47] For this reason, social reforms were much easier to implement in Bismarckian Germany than in Western Europe.

Rudolf von Gneist's philosophy resulted in the Austrian liberals' attempt to introduce an elitist, meritocratic form of government in Austria after 1848. This was the reason why Josef Redlich turned away from Gneist and described his philosophy as corrupt, as it departed from the democratic ideals of liberalism originally espoused in 1848 and leaned towards a more conservative pseudo-liberalism that suited the propertied classes.[48] According to Redlich, Austria and Germany never saw the introduction of a true constitutional state; instead, during the 1850s and 1860s, an administrative state (Verwaltungsstaat) was introduced, which emerged from the police state (Polizeistaat) whose 18th-century precursor was the authoritarian state (Obrigkeitsstaat). In his book *"Austrian War Government"*, published in German in 1925 and English in 1929, Josef Redlich offers a precise analysis of the authoritarian state: *"After the Revolution of 1848, one great change was introduced in the reforms drafted by Dr. Alexander Bach, Minister of the Interior in the Schwarzenberg Ministry, and accepted by the young Emperor Francis Joseph in 1850–1855. Although the revolutionary movement of 1848 was dominated even more by national than by liberal ideas, it led to a determination not merely to fulfil the principle of an unlimited, absolutist, and authoritarian State, but to give it a technically perfect*

46 DIJN, A. de. *Freedom: An Unruly History*. Cambridge: Harvard University Press, 2020, p. 232.
47 Ibid., p. 233.
48 NG, 2004, op. cit., p. 22.

form.[49] *This created a completely new and powerful institution compared to the medieval social order and its political ideas that had been inherited for centuries, the state as such, i.e. the apparatus of power and government placed entirely in the hands of the monarch, whose ethical support was based almost exclusively on the monarch's duty to promote as far as possible the existence, the material and moral well-being of the subjects, the peoples and countries subject to his system, as postulated by the philosophy of that epoch, by the idea of the Enlightenment that emerged in France. This state, both in its external form and in its internal structure, was also in Austria by all means an artificial creation of the supreme authorities, and for this reason, it has recently been agreed to call it an authoritarian state, to contrast its character scientifically with the people's state, as which appears that state order which in the whole nature of its institutions grows up on the will of the people themselves, i.e. on the more or less strongly developed cooperative consciousness of the people concerned. The authoritarian state is therefore the form in which Austria, as a totality of the non-Hungarian possessions of the House of Habsburg, became a state in the first place. And even though profound changes have taken place since 1860 in connection with the acceptance of the constitutional principle by Emperor Franz Josef at that time, Austria has remained in truth an authoritarian state until its end."*[50] While Austria and Germany retained the form of an authoritarian state even after the change of political regime, Great Britain, according to Redlich, succeeded in establishing an ideal people's state. According to Redlich, Austria became an administrative state in which an increasingly powerful bureaucracy assumed a crucial role within the functional structure of the state: *"The actual monopoly of power of the bureaucracy has thus basically remained in Austria even in the constitutional era."*[51] According to Josef Redlich, Gneist's conception of liberalism was to blame, in which he saw the old Roman model of government dressed up in the garb of Hegelian philosophy. He, therefore, assumed that the separation of state and society was a metaphysical "léger de main" because, in reality, the state could not exist separately from society. The real ideal should be the transformation of the old authoritarian state into a community that governs itself.[52]

49 REDLICH, J. *Austrian War Government*. New Haven: Yale University Press, 1929, p. 4.
50 REDLICH, J. *Österreichische Regierung und Verwaltung im Weltkriege*. Wien: Hölder-Pichler-Tempsky, 1925, pp. 8–9.
51 Ibid., p. 29.
52 NG, 2004, op. cit., pp. 22–23.

"On the one hand, German science has recognised in the development of England's democratic social policy an admirable and, to a large extent, exemplary development for the mainland; on the other hand, Gneist's account of the English constitution and administration, and thus his damning judgement of English democracy and its influence on both, is still held in hardly diminished esteem," writes Redlich in his *"English Local Government"*,[53] a book that has received much positive feedback in the Anglo-Saxon world, with even British Prime Minister Lord Asquith not hesitating to quote from the book during parliamentary debates.[54] In Germany and Austria, however, his book caused a scandal by sharply attacking Hegelian metaphysics and the Gneist doctrine of the state. Redlich mentioned his frustration in a letter to his friend Flora Darkow-Singer: *"You see, the Germans are not happy about that! And here in Austria? No one is interested here! The conditions at our university are not very pleasant: I keep away from all the ruling cliques, I am not very popular because of my sense of independence and my critical acuity, and in recent years I have been in contrast to some men who are now very wealthy here. I can hardly be expected to go to another great German university at present: for, although I have a very good scientific name outside, I am too well known as an opponent of the present Prussian-German system to be accorded much official sympathy. And then there is my reputation as a rabid Anglophile! In England, I experience my happiness at all!"*[55] Redlich came into open conflict with Georg Jellinek, who was a professor of Constitutional Law at the University of Vienna. The mutual animosity between the two men resulted in the persecution of Redlich and anti-Semitic attacks on his person, which led him to convert to the Protestant faith.[56] Redlich was obstructed from obtaining a professorship at the Faculty of Law of the University of Vienna, a position he did not obtain until after Jellinek died in 1915.[57]

5 Conclusion

Redlich's distinction from Gneist was essentially a philosophical difference between the nature of liberty and the state. Whereas for Gneist the true

53 REDLICH, J. *Englische Lokalverwaltung*. Leipzig: Duncker & Humblot, 1901, pp. 8–9.
54 FELLNER, F. *Schicksalsjahre Österreich. Die Erinnerungen und Tagebücher Josef Redlichs, Band 3*. Wien et al.: Böhlau, 2011, p. 13.
55 ÖNB, Nachlass Josef Redlich, Cod. Ser. n. 53579, Flora-Darkow 12. März 1906.
56 Ibid., Cod. Ser. n. 53576, Bahr 16. Nov. 1920.
57 FELLNER, F. *Schicksalsjahre Österreich. Die Erinnerungen und Tagebücher Josef Redlichs, Band 2*. Wien et al.: Böhlau, 2011, p. 85.

purpose of the state is that it enables a high degree of social development through the promotion of liberty, which means that absolute obedience to the state is the path to liberty and development, Redlich never made such theological and metaphysical claims about the state. In his view, the state should simply be a community that governs itself.[58] In Great Britain, Redlich saw liberty protected by a Rule of Law and laws to which everyone, including the monarch, submits. Unlike Gneist, who was convinced that the development of local government in Britain was the result of positive legislation by a wise monarchy, Redlich held that the success of the English government was achieved at the expense of the monarchy. The greatest achievement of the English, therefore, was the creation of a genuine Rule of Law, since administrative law in the continental sense had never been introduced into the Anglo-Saxon legal system. For centuries, attempts by monarchs to bring administration under royal control through their laws made outside parliament failed.[59] *"These, then, are the two indestructible principles of English legal and state life: the preservation of the uniformity of all law based on the common law and its sovereignty over public authority. In other words, administration in England has been carried out in the form of legislation since the beginnings of the regular function of Parliament, apart from the fluctuating cases of the royal prerogative,"*[60] for this reason, according to Redlich, the separation of government and law was an unknown condition in England. While for Gneist political liberty could only be protected through a just oligarchy that suited the meritocratic sensibilities of Prussian and Austrian liberals, the democrat Redlich could not identify with a doctrine that saw the great democratic progress of the 19th century as a gradual decline and decay. He argued adamantly that the reforms had brought with them a much more efficient, uncorrupted and effective administration which had successfully managed the task of maintaining and developing the industrial capitalist state while improving the situation of the working class.[61] Although Redlich became a member of the Imperial Council in 1907, and in 1913 obtained a position on the Imperial Commission to promote administrative reform

58 NG, 2004, op. cit., p. 23.
59 Ibid.
60 REDLICH, 1901, op. cit., pp. 688–689.
61 NG, 2004, op. cit., p. 23.

and proposed several preventive measures, his proposals were not taken into account.[62] From 1915 he was involved with the wholesaler Julius Meinl II, Max Friedmann and Karl Lammasch in the Austrian Political Society, which wanted to restore parliamentarianism in Austria and initiate peace negotiations.[63] After the accession of Emperor Charles I to the throne, Josef Redlich and Karl Lammasch were in the close circle of the Emperor's associates and worked hard to create federalism.[64] As an Anglophile, Redlich preferred British empiricism to the German metaphysical philosophical tradition. For this reason, in his view, a territorial definition of the nation in a multinational state such as Austria-Hungary would have been preferable to the linguistic one that applied in continental Europe.[65] In 1918 Redlich became the last Minister of Finance for two weeks before the fall of the Habsburg Monarchy. In Redlich's view, the monarchy had long been destined to decline, having failed to break free of the authoritarian state form in 1848 and establish a genuine Rule of Law. While the German Empire and Austria-Hungary did not survive the First World War, Great Britain managed to survive it because it was a real constitutional monarchy.

References

ATIYAH, P. S. *Pragmatism and Theory in English Law*. London: Stevens and Sons, 1987.

BELLER, S. *Wien und die Juden 1867–1938*. Wien et al.: Böhlau, 1993. DOI: https://doi.org/10.7767/boehlau.9783205105954

BOBBIO, N. *The Future of Democracy: A Defence of the Rules of the Game*. Minneapolis: University of Minnesota Press, 1987.

BÖCKENFÖRDE, E.-W. *Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*. Frankfurt am Main: Suhrkamp Verlag, 1991.

BRAUNEDER, W. *Leseverein und Rechtskultur. Der Juridisch-Politische Leseverein zu Wien 1840 bis 1990*. Wien: MANZ Verlag, 1992.

62 Archive of the Vienna University of Technology, Professoren, Inv. N. 2231, Standestabelle J. Redlich.

63 MORGENBROD, B. *Wiener Grossbürgertum im Ersten Weltkrieg*. Wien: Böhlau, 1994, p. 56.

64 Ibid., pp. 111–112.

65 NG, 2004, op. cit., pp. 208–209.

DICEY, A. V. *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Classics, 1982.

DIJN, A. de. *Freedom: An Unruly History*. Cambridge: Harvard University Press, 2020. DOI: https://doi.org/10.4159/9780674245617

DONATH, O. Sigmund Kolischs Leben und Wirken. In: PLITZKA, A. (ed.). *Vierzehnter Jahresbericht der Deutschen Landes-Oberrealschule in Göding*. Hodonín: Verlag der Deutschen Landes- und Oberrealschule, 1912, pp. 7–72.

EASTON, S. *Marx and Law*. Farnham: Routledge, 2008.

FELLNER, F. *Schicksalsjahre Österreich. Die Erinnerungen und Tagebücher Josef Redlichs*. Wien et al.: Böhlau, 2011. DOI: https://doi.org/10.7767/boehlau.9783205790136

FLETCHER, G. P. Law and Morality: A Kantian Perspective. *Columbia Law Review*. 1987, Vol. 87, no. 533, pp. 533–558. DOI: https://doi.org/10.2307/1122670

GERVEN, W. van. Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie. *International and Comparative Law Quarterly*, 1996, Vol. 45, no. 3, pp. 507–544. DOI: https://doi.org/10.1017/S0020589300059340

HEGEL, G. W. F. *Grundlinien der Philosophie des Rechts*. Hamburg: Meiner 2009.

HEUSCHLING, L. *Etat de Droit, Rechtsstaat, Rule of Law*. Paris: Dalloz, 2002.

HOLLEIS, E. *Die Sozialpolitische Partei*. Wien: Verlag fur Geschichte und Politik, 1978.

HYNEK, M. Soumrak Habsburků a katarze nové doby. In: PLAČEK, M. (ed.). *Hodonín: Dějiny města do roku 1948*. Hodonín: Tiskárna Lelka, 2008, pp. 289–335.

KELLY, P. J. *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*. Oxford: Clarendon Press, 1990.

KRAUS, K. *Sprüche und Widersprüche*. Munich: Albert Langen Verlag, 1909.

KÜBECK, M. *Tagebücher des Carl Friedrich Freiherrn Kübeck von Kübau*. Wien: Gerold Verlag, 1910.

LE RIDER, J. Da*s Ende der Illusion: zur Kritik der Moderne. Die Wiener Moderne und die Krisen der Identität*. Wien: ÖBV, 1990.

MORGENBROD, B. *Wiener Grossbürgertum im Ersten Weltkrieg*. Wien: Böhlau, 1994.

NG, A. *Nationalism and Political Liberty: Redlich, Namier, and the Crisis of Empire*. Oxford: Clarendon Press, 2004. DOI: https://doi.org/10.1093/acprof:oso/9780199273096.001.0001

PLENER, E. *Erinnerungen, Vol. 3*. Leipzig: Deutsche Verlags-Anstalt, 1921.

POLANYI, K. *The Great Transformation*. Boston: Beacon Press, 2001.

REDLICH, J. *Austrian War Government*. New Haven: Yale University Press, 1929.

REDLICH, J. *Englische Lokalverwaltung*. Leipzig: Duncker & Humblot, 1901.

REDLICH, J. *Österreichische Regierung und Verwaltung im Weltkriege*. Wien: Hölder-Pichler-Tempsky, 1925.

SCHORSKE, C. E. *Wien: Geist und Gesellschaft im Find de Siècle*. Wien et al.: Molden Verlag, 2017.

WILL, M. *Selbstverwaltung der Wirtschaft*. Tübingen: Mohr Siebeck, 2010. DOI: https://doi.org/10.1628/978-3-16-151280-3

The Role of the State in Child Protection in Hungary during the Period of the Austro-Hungarian Monarchy

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Abstract

The complex, multi-jurisdictional regulation of child protection in Hungary, coordinating the activities of the competent bodies in this field, emerged during the period of the Austro-Hungarian Monarchy (1867–1918). Legislation reflected the change in the way childhood were perceived, recognising that children need additional protection in accordance with their age-related physical and psychological characteristics. In the narrower framework of child protection, administrative child protection dealt with children who had been declared abandoned by the authorities, while judicial child protection dealt with juveniles and children who had been debauched. The two areas were in some ways linked, the legislator's aim was to ensure cooperation between the public administration and the justice system for the protection of children.

Keywords

Child Protection; Abandoned Children; State-run Children's Shelters; Child and Juvenile Delinquency; Juvenile Justice.

1 Introduction

The reasons for the development of child protection systems can be associated with the industrial child labour, high rates of child mortality, the problem

of child delinquency as well as with the changing perception of childhood.[1] The position of children has undergone a significant transformation since the 17th century,[2] with the recognition of the importance of childhood as an autonomous stage in the process of growing up.[3] Legislation responding in a complex way to the special characteristics of childhood, arising also from children's age, appeared in Hungary after 1867. There were earlier efforts in this direction – representatives of enlightened absolutism, including Maria Theresa and Joseph II, issued decrees to this effect[4] – but legislation harmonising the operation of the competent bodies in this field, covering several branches of law, appeared only in the examined period. These legislations include, but are not limited to, the acts on early childhood education,[5] public primary education,[6] industrial child labour,[7] and the creation of administrative child protection as well as special criminal legislation for juveniles. This paper presents the legal regulation of child protection in Hungary during the period of the Austro-Hungarian Monarchy, focusing on child protection by the state and judicial child protection.

Child protection by the state, which became autonomous from the poor-law system, focused on abandoned children, and was implemented within the framework of administrative child protection.[8] In the area of judicial child protection, the issue of juvenile delinquents and children in conflict with the law was addressed. The protection of these mentioned groups of children falls within the narrower framework of child protection, where

1 EGRESI, K. *Szociálpolitika Magyarországon. Nézetek, programok és törvények 1919–1939.* Budapest: Napvilág Kiadó, 2008, pp. 283–291; GERGELY, F. *A magyar gyermekvédelem története (1867–1991).* Budapest: Püski Kiadó, 1997, pp. 6–9; KELEMEN, R. A polgári kor társadalombiztosítása – Társadalombiztosítási bíráskodás a polgári korban. In: MOLNÁR, A., SZÉPLAKI, L. (eds.). *Tanulmányok a győri felsőbíráskodás történetéből a XIX–XX. század fordulóján.* Győr: Győri Ítélőtábla, 2019, pp. 149–150.

2 HERCZOG, M. *A gyermekvédelem dilemmái.* Budapest: Pont Kiadó, 1997, pp. 17–29.

3 ARIÉS, P. *Gyermek, család, halál.* Budapest: Gondolat Kiadó, 1987, pp. 311–317.

4 HERCZOG, M. *A gyermekvédelem dilemmái.* Budapest: Pont Kiadó, 1997, p. 31.

5 Act no. XV. of 1891.

6 Act no. XXXVIII. of 1868.

7 Act no. VIII. of 1872 and Act no. XVII. of 1884.

8 KÁDÁR, L. Gyermekvédelem. In: CZETTLER, J., FELLNER, F., KORÁNYI, F., TELEKI, P. (eds.). *Közgazdasági Enciklopédia II. kötet.* Budapest: Athenaeum Irodalmi és Nyomdai Részvénytársulat kiadása, 1929, pp. 570–578.

increased state involvement was needed on behalf of these children.[9] In the 19–20th centuries, the states of Western Europe enacted series of acts dealing with the narrow term of child protection,[10] and international child protection congresses were held to discuss the subject.[11]

2 Child protection by the state – administrative child protection

"Child protection is a historically and socially determined helping activity, which aims to ensure that, in a given place, age and circumstances, the group of society considered to be children receive the care and assistance indispensable for the maintenance of their lives, the development of their capacities, their harmonious development, the enjoyment of childhood, their future fulfilment and social integration."[12] In this caring-helping relational context, the state has progressively taken over the tasks previously performed by civil society and the church, thus institutionalising and increasing the role of the interventionist behaviour of the state.

Child protection was a relatively well-defined area of the poverty system[13] until the last quarter of the 19th century,[14] then, evolving out of the poor relief system, into a more and more independent and complex area where preventive state intervention began to dominate. In 1871 and 1886, the state entrusted the municipalities with the duties of poor relief.[15] The care and

9 CSORNA, K. *A szociális gyermekvédelem rendszere*. Budapest: Eggenberger-Könyvkereskedés, 1929, p. 14.

10 See explanatory memorandum for act on "state-run children's shelters". Az 1896. évi november hó 23-ára hirdetett Országgyűlés Nyomtatványai. Képviselőházi irományok, 1896. XXXIV. kötet, 997. sz. iromány, Budapest: Pesti Könyvnyomda-Részvény-Társaság, 1901, pp. 143–146.

11 CSORNA, K. *A szociális gyermekvédelem rendszere*. Budapest: Eggenberger-Könyvkereskedés, 1929, p. 28.

12 KATONÁNÉ PEHR, E., HERCZOG, M. *A gyermekvédelem nagy kézikönyve*. Budapest: Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2011, p. 57.

13 On the history of poverty system see for example RIGÓ, B. A Liber Vagatorum és a világi szegényügyi igazgatás kezdetei Strasbourgban (1509–1523) – Szatíra a koldulásról a reformáció előestéjén. In: MEZEY, B. (ed.). *Kölcsönhatások. Európa és Magyarország a jogtörténelem sodrásában*. Budapest: Gondolat Kiadó, 2021, pp. 293–300.

14 HILSCHER, R. *Bevezetés a szociálpolitikába*. Budapest: MEKDSz Szövétnek-Kiadás, 1928, p. 15.

15 Act no. XVIII. of 1871 22. § g), 131. §.; Act no. XXII. of 1886 21. § g), 145. §.

assistance of the poor was based on municipality of residence,[16] the essence of this legal institution was "the individual's belonging to the municipality", *"such that he cannot be administratively removed from it and, in case of poverty, must be assisted by the municipality"*.[17] Responsibilities in the field of poverty have not been clearly defined at national level, but the act of public health has already set out specific duties for municipalities in the field of childcare.[18] The municipalities were obliged to provide for the maintenance and care of the abandoned orphans and the children placed in foster care,[19] and organise close administrative and medical surveillance of such children.[20]

2.1 Moving away from poor relief system

A significant shift from the poor relief system came with the adoption of Act no. XXI of 1898 on covering the costs of public health care.[21] The national health care fund established by the Act was intended to reduce the childcare burden of municipalities by covering the costs of fostering and caring for children declared abandoned.[22] The costs of education, care and nursing of children declared abandoned by the authorities up to the child's seventh year of age were covered by the fund.[23] After the age of seven, the costs were still covered by the municipality of residence, so the municipality of residence also played a significant role in relation to children.[24] In the history of Hungarian administrative child protection, the acts of 1901 on state children's shelters[25] and the care of children over the age of 7[26] played a significant role. The increasing number of abandoned children

16 POMOGYI, L. *A szegényügy és községi illetőség a polgári Magyarországon*. Budapest: Osiris Kiadó, 2001, p. 21.
17 CONCHA, G. *Politika. Második Kötet (első fele). Közigazgatástan*. Budapest: Grill Károly Könyvkiadóvállalata, 1905, p. 284.
18 Act no. XIV. of 1876.
19 Act no. XIV. of 1876 140. § a).
20 Act no. XIV. of 1876 16. §.
21 Act no. XXI. of 1898.
22 SZAKOLCZAY, Á. A gyermekvédelem Magyarországon tekintettel az 1898. évi XXI. törvényczikkre. In: SZLADITS, K. (ed.). *Magyar Jogászegylet értekezések. 20. kötet*. Budapest: Magyar Jogászegylet, 1900, pp. 4–5.
23 Act no. XXI. of 1898 3. § d).
24 Act no. XXI. of 1898 8. § b).
25 Act no. VIII. of 1901.
26 Act no. XXI. of 1901.

urged the government to set up state-run institutions. The explanatory memorandum to the act on state-run children's shelters made it clear that the care of abandoned children was the responsibility of the state in the first place.[27]

State protection for abandoned children over the age of seven was needed not only to reduce child mortality, but also to prevent the increase in juvenile delinquency.[28] Thus, Act no. XXI of 1901 extended the scope of child protection to children over the age of 7 who had been previously declared abandoned, as well as to children who were declared abandoned only at a later age. Under the law, children could be placed in state children's shelter or, through the intermediary of a state children's shelter, outside an institution.[29]

The state children's shelters were established between 1904 and 1907,[30] and their detailed regulation was laid down in the Decree of the Minister of Interior no. 1 of 1903.[31] The purpose of the regulation of the state-run children's shelters was to coordinate the activities of the persons and bodies responsible for child protection, in particular the state-run children's shelters and the local authorities, as well as to integrate the social organisations providing child protection services into this system. According to Tivadar Forbáth's broader definition, *"The state-run children's shelter, as the carrier of national child protection, is a summary institution. It includes not only the institution which is the administrative centre of child protection, and which is also called a children's shelter, but also all the measures which are intended to rescue and educate children who are in the sphere of poverty."*[32]

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27 Az 1896. évi november hó 23-ára hirdetett Országgyűlés Nyomtatványai. Képviselőházi irományok, 1896. XXXIV. kötet, 997. sz. iromány, Budapest: Pesti Könyvnyomda-Részvény-Társaság, 1901, pp. 142–143.

28 See Explanatory memorandum to the Act on the care of children over 7 years of age in need of public aid. Az 1896. évi november hó 23-ára hirdetett Országgyűlés Nyomtatványai. Képviselőházi irományok, 1896. XXXVII. kötet, 1062. számú iromány, Budapest: Pesti Könyvnyomda-Részvény-Társaság, 1901, p. 23.

29 Act no. XXI. of 1901 1–4. §.

30 CSORNA, K. *A szociális gyermekvédelem rendszere.* Budapest: Eggenberger-Könyvkereskedés, 1929, p. 150.

31 Decree of the Minister of Interior no. 1. of 1903.

32 FORBÁTH, T. *Adatok a magyar szegényügy rendezéséhez.* Budapest: Márkus Samu könyvnyomdája, 1908, p. 98.

3 Judicial Protection of Children

In the second half of the 19th century, juvenile delinquency and the growing proportion of children growing up in an environment that was depraved and threatening to their moral development demanded urgent action, nearly 19% of released convicts in the early 20th century had not reached the age of majority.[33] In addition, data on minors under the age of criminal responsibility were scarce and there was a high latency regarding minors who had committed minor offences but had not been prosecuted.[34]

Criticisms of Hungary's first criminal code, the Csemegi Code,[35] which was born in the spirit of the classical school of criminology, include the lack of special criminal law provisions for young offenders.[36] The terminology of child and juvenile was not yet used in the Code.[37] For young people aged 12 to 16, the legal consequences were based on whether the person had discernment to recognise guilt at the time of the offence. If not, the court could not impose a penalty, but could decide to send the person to a reformatory until the age of 20.[38] If the offender had the discernment to foresee the consequences of the act, he was punishable and the Code provided reduced sanctions.[39] In addition, the Csemegi Code, which applied a punishment system based on a general preventive approach[40] and a retributive approach,[41] already allowed the court to transfer the young perpetrator to a reformatory institution instead of solitary confinement.

33 KUN, B., LÁDAY, I. (eds.). *A fiatalkorúak kriminalitása ellen való küzdelem Magyarországon*. Budapest: Franklin Társulat Nyomdája, 1905, pp. 6–8.

34 See BALOGH, J. *Fiatalkorúak és büntetőjog.* Budapest: Magyar Jogászegylet Könyvkiadó Vállalata, 1909, pp. 16–34.

35 Act no. V. of 1878.

36 See IRK, A. *A magyar anyagi büntetőjog.* Pécs: Dunántúl Egyetem Nyomdája Pécsett, 1928, p. 31.

37 VARGHA, F. *A gyermekkorban levő bűnösök*. Budapest: Franklin-Társulat Könyvnyomdája, 1895, pp. 8–9. p.

38 Act no. V. of 1878 84. §.

39 Act no. V. of 1878 85. §.

40 HORVÁTH, T. *A büntetési elméletek fejlődésének vázlata*. Budapest: Akadémiai Kiadó, 1981, p. 115.

41 FINKEY, F. *A magyar büntetőjog tankönyve*. Budapest: Grill Károly Könyvkiadóvállalata, 1914, pp. 33–34.

Special procedural provisions for the proceedings against young perpetrators were scattered and limited in the Code of Criminal Procedure, and the rules applicable to adults were applied to them.[42] According to the Code of Criminal Procedure, it was obligatory to appoint a defence attorney for the main hearing of the accused person under the age of 16,[43] to ask the age of the accused person at the first hearing,[44] and to avoid placing young persons in the same room together with detainees having a criminal record during pre-trial detention and pre-trial arrest.[45] Regarding legal remedies, the law granted the right of appeal in favour of the perpetrator to the legal representative of the accused person who was not of legal age.[46]

3.1 Criminal Law Reforms and the Birth of Juvenile Criminal Law

The path to the development of judicial protection of children and, in this context, to the birth of the juvenile justice system began with the criminal law reform movements. The focus was shifted from the exclusively offence-oriented approach of the classical school of criminology to the offender, incorporating the findings of criminology. Instead of punishment, the idea of correction and education was brought to the centre of attention, and special prevention became the goal of criminal policy for juvenile offenders.[47] In the period under discussion, legal scholars and practitioners of the legal profession also called for urgent reforms. The reforms were intended to affect three areas: material law, procedural law, and enforcement law.[48] The need to move away from a retributive approach in certain groups of offenders and to treat them differently was also recognised by the legislator,[49] one of the major socio-political problems

42 Act no. XXXIII. of 1896.
43 Act no. XXXIII. of 1896 56. §.
44 Act no. XXXIII. of 1896 133. §.
45 Act no. XXXIII. of 1896 152. §.
46 Act no. XXXIII. of 1896 383. § II. a).
47 CSEMÁNÉ VÁRADI, E., LEVAY, M. A fiatalkorúak büntetőjogának kodifikációs kérdéseiről – történeti és jogösszehasonlító szempontból. *Büntetőjogi Kodifikáció*. 2002, Vol. 2, no. 1, p. 12.
48 VARGHA, F. *A gyermekkorban levő bűnösök*. Budapest: Franklin-Társulat Könyvnyomdája, 1895, pp. 5–6.
49 ANGYAL, P. *A biztonsági intézkedések reformkérdései*. Budapest: Attila-Nyomda Részvénytársaság, 1941, p. 4.

of the period of the Austro-Hungarian Monarchy was the increasing rate of child and juvenile delinquency.[50]

In the context of the reform thoughts, the emergence of new disciplines such as criminal pedagogy should be mentioned. A prominent figure at the connection point between criminology and education in Hungary was Elemér Kármán, who specifically studied the field of delinquent children and juveniles.[51] The father of juvenile criminal law in Hungary and former Minister of Justice, Jenő Balogh, also expressed the view that criminal lawyers and criminologists must consider the results of psychology and pedagogy, as only in this way can sanctions achieve their specific preventive aim.[52]

Several proposals for the reform of the Csemegi Code remained only in the form of proposals until the drafting of the First Amendment to the Csemegi Code.[53] The First Amendment concentrated on those issues which, based on practical experience, required an urgent solution.[54] The Act no. XXXVI of 1908 was based mainly on the child protection laws of the low countries and on reform ideas from the United States of America,[55] and the provisions of the Csemegi Code concerning young perpetrators were repealed by the First Amendment.

The second chapter on juveniles of the Act no. XXXVI of 1908, which entered into force on 1 January 1910, created the substantive legal basis for the criminal law of juveniles, providing the framework for different treatment.[56] The Act made a distinction between minors under the age of 12, who could not be punished due to their childhood at the time

50 BALOGH, J. *Fiatalkorúak és büntetőjog*. Budapest: Magyar Jogászegylet Könyvkiadó Vállalata, 1909, p. 1.

51 See KÁRMÁN, E. *A gyermekek erkölcsi hibái és erkölcsi betegségei*. Budapest: Tudományos Könyvkiadó Vállalat, 1922; KÁRMÁN, E. A fiatalkorú bűntettesek tanulmányozása. *A Gyermek, A Magyar Gyermektanulmányi Társaság Közlönye*. 1914, Vol. 8, no. 7, pp. 514–532.

52 BALOGH, J. Adalékok a fiatalkorú bűntettesek psychológiájához. *Magyar Filozófiai Társaság Közleményei*. 1909, Vol. 9, no. 3, pp. 145–146.

53 Act no. XXXVI. of 1908.

54 LENGYEL, Al. A Magyar Jogászegylet Büntetőjogi Bizottságának tanácskozásai a büntető-novella tárgyában. In: SZLADITS, K. (ed.). *Magyar Jogászegyleti értekezések 36. kötet*. Budapest: Franklin Társulat Nyomdája, 1908, p. 4.

55 BALOGH, J. Adalékok a fiatalkorú bűntettesek psychológiájához. *Magyar Filozófiai Társaság Közleményei*. 1909, Vol. 9, no. 3, p. 160.

56 Decree of the Minister of Justice no. 20.001. of 1908.

of the offence, and minors who had already reached the age of 12 but had not turned 18. In this way, the Hungarian legislator created the criminal law terminology of childhood and juvenile delinquency.

The minimum age of criminal responsibility has not been changed, but the necessary intellectual and moral development has been made a required condition for criminal responsibility. Juveniles who were 12 years of age at the time of the offence but under 16 years old without the necessary mental and moral development to be eligible for criminal responsibility were not punishable. The modification of the criterion of criminal responsibility also found opponents among the scholars of Hungarian criminal law, for example, Rusztem Vámbéry objected to it: *"However, our criminal law novel cannot be a proper answer to this question, which is not sufficiently psychologically clarified and criminologically prepared."*[57]

The court could decide on criminal law measures to be taken against the juvenile offender if he had the mental and moral capacity to commit the offence: among these, disciplinary reprimand and probation were added to the sanctions available in Hungary. Measures involving the deprivation of the juvenile's liberty were reformatory, detention, and state prison. In choosing the appropriate individualized measure for the future behaviour and moral development of the juvenile, it was necessary to consider the juvenile's personality, the degree of intellectual and moral development, life circumstances and all the other factors of the case. Within the framework of the law, the courts were therefore given a wide margin of flexibility to apply the desired measure.[58] The administrative authority could not order a juvenile for committing a misdemeanour to be placed in a reformatory institution, the case had to be referred to the competent district court. However, in case of urgent need, the administrative authority could arrange for the transfer of the juvenile to a state-run children's shelter for temporary admission.[59] In the case of juveniles who were not criminally responsible, the court could order home supervision or, in the presence of a deteriorated environment, reformatory education. For children over the age of seven,

57 VÁMBÉRY, R. *Büntetőpolitikai követelések*. Budapest: Politzer Zsigmond és Fia kiadása, 1900, pp. 86–87.
58 Act no. XXXVI. of 1908 18. §.
59 Act no. XXXVI. of 1908 33. §.

only the court of wards could decide for placement in a reformatory, while the court had the possibility of placing children in a state-run children's shelter temporarily.[60]

The juvenile court first appeared in the United States of America at the end of the 19th century and rapidly conquered the countries of the old continent,[61] in the second decade of the 20th century, a special judicial forum also appeared in Hungary. The Juvenile Courts Act[62] laid down special rules on the organisation and procedure of juvenile courts compared to the Code of Criminal Procedure and dealt with some material legal issues.[63] The Act made some changes to the system of punishment set out in the Act no. XXXVI. of 1908[64] and detailed the duties of the juvenile courts in relation to the enforcement of certain sanctions[65] or the tasks related to the sanctions.[66] The provisions of the Juvenile Courts Act entered into force on 1 January 1914 and were applicable to ongoing proceedings unless the lower court had already set a date for the main hearing.[67]

The Act conferred the jurisdiction on the regional courts, although, recognising the different territorial distribution of crime, the legislator, depending on the decision of the Minister of Justice, allowed the establishment of juvenile courts in a district court. The juvenile court acted as a single court – this issue was therefore decided to the detriment of the co-judiciary – based on a 3-year appointment by the Minister of Justice.[68]

The charge was represented by a juvenile prosecutor and the defence of the juvenile was provided by an appointed defending counsel

60 Act no. XXXVI. of 1908 15–16. §.

61 FINKEY, F. *A fiatalkorúak büntetőjoga Észak-Amerikában*. Budapest: Athenaeum Irodalmi és Nyomdai Részvénytársulat, 1913, p. 84.

62 Act no. VII. of 1913.

63 Act no. VII. of 1913 8. § The rules of the Code of Criminal Procedure were applicable only insofar as no derogation from the provisions of the Act no. VII. of 1913 was inferred.

64 Act no. VII. of 1913 among the final and mixed provisions, modified the provisions of Act no. XXXVI. of 1908 and set the general minimum and maximum limits of imprisonment. A financial penalty was also made applicable to juveniles who were already 15 years old at the time of committing the offence and who were wealthy or had a wage or salary. Act no. VII. of 1913 68–69. §.

65 See the detailed rules on probation: Act no. VII. of 1913 46–51. §.

66 See the detailed rules on reformatory: Act no. VII. of 1913 52–54. §.

67 Decree of the Minister of Justice no. 56.000. of 1913.

68 Act no. VII. of 1913 1–2. §.

in the absence of a chosen defender. There was no mandatory defence, as the appointment of a defence counsel depended on expediency, but this did not restrict the right to choose a defence attorney.[69]

Juveniles were protected by limiting the publicity of proceedings and the separation of actions from those against adults.[70] Criminal proceedings against juveniles could be completed with or without a trial. The purpose of holding a trial, in addition to clarifying the facts of the case, was to determine what measures appear to be the most appropriate for the future conduct and moral development of the juvenile offender.[71]

4 Conclusions

By the end of the 19th century, it was clear that the state had to take an active role in protecting children. The growing social problems could not be tackled by the charitable child protection system alone. The trend of increasing and stagnating – but certainly not decreasing – rates of child and juvenile delinquency as a proportion of total crime called for criminal justice reforms.

Child protection required a holistic, cross-jurisdictional approach, so it was necessary to move away from a one-sided criminal law perspective in the state response to child and juvenile delinquency and to examine the social administrative aspects of child protection. Child and youth protection has become an intersection of criminal policy and social policy.[72] An interaction between judicial and administrative child protection was emerging. The need for this cooperation was most apparent in the case of juvenile offenders who could not be held criminally responsible and children who were considered delinquent. There were no significant changes in the regulation of both administrative child protection and judicial child protection during the years of during the period of the Austro-Hungarian Monarchy, however, the state had to react to the consequences of the war, and a series of decrees dealt

69 Act no. VII. of 1913 4. §.
70 Act no. VII. of 1913 9–10. §.
71 Act no. VII. of 1913 28. §.
72 LŐRINCZ, J. *A fiatalkorúak büntetés-végrehajtása*. Vác: Duna-Mix Nyomda, 1998, p. 21.

with the situation of war orphans, relying on the system of state-run child protection.[73]

In the field of state-run child protection, there was a shift from the general system of poor relief, where the role of the municipality was only subsidiary, i.e., the municipality's duty of care was only considered – and only in accordance with local conditions – if private charity could not even provide the minimum necessary subsistence. The legislation defined the provision of poor relief services as an obligation on the municipalities but did not confer any enforceable rights on the people in need. In comparison, children declared abandoned by the authorities have the right to be admitted to the state-run children's shelter, which means that the children concerned have an explicit claim to state care.

The legal-historical perspective in the field of judicial child protection is justified by the fact that reform efforts in recent decades have also looked to the pre-World War I legislation of the 20th century as a reference point,[74] which *"can serve as a model and resource for domestic reform of the juvenile criminal justice system that serves to ensure consistent enforcement of the 'other treatment'."*[75]

References

ANGYAL, P. *A biztonsági intézkedések reformkérdései*. Budapest: Attila-Nyomda Részvénytársaság, 1941.

ARIÉS, P. *Gyermek, család, halál*. Budapest: Gondolat Kiadó, 1987.

BALOGH, J. Adalékok a fiatalkorú bűntettesek psychológiájához. *Magyar Filozófiai Társaság Közleményei*. 1909, Vol. 9, no. 3, pp. 145–180.

BALOGH, J. *Fiatalkorúak és büntetőjog*. Budapest: Magyar Jogászegylet Könyvkiadó Vállalata, 1909.

73 See TELEKI, P. *Sociálpolitika és hadigondozás gyakorlati tapasztalatok alapján*. Budapest: Kiadja az Országos Hadigondozó Hivatal, 1918; FINKEY, F. *Die Aufgaben der Kriegsfürsorger*. Pozsony: Buchdruckerei Carl Angermayer, 1917; ZOMBORY, L. *Gyermekvédelem a háború alatt*. Budapest: Nyomda R. T., 1916.

74 See CSEMÁNÉ VÁRADI, E. A Fiatalkorúak Büntető-Igazságszolgáltatása. Reformelképzelések. In: *Kriminológiai Közlemények 68*. Budapest: Magyar Kriminológiai Társaság, 2011, pp. 152–162.

75 LÉVAY, M. Az I. büntető novella fiatalkorúakra vonatkozó rendelkezései. *Jogtörténeti Szemle*. 2008, no. 4, p. 31.

CONCHA, G. *Politika. Második Kötet (első fele). Közigazgatástan*. Budapest: Grill Károly Könyvkiadóvállalata, 1905.

CSEMÁNÉ VÁRADI, E., LÉVAY, M. A fiatalkorúak büntetőjogának kodifikációs kérdéseiről – történeti és jogösszehasonlító szempontból. *Büntetőjogi Kodifikáció*. 2002, Vol. 2, no. 1, pp. 12–27.

CSEMÁNÉ VÁRADI, E. A Fiatalkorúak Büntető-Igazságszolgáltatása. Reformelképzelések. In: *Kriminológiai Közlemények 68*. Budapest: Magyar Kriminológiai Társaság, 2011, pp. 152–162.

CSORNA, K. *A szociális gyermekvédelem rendszere*. Budapest: Eggenberger-Könyvkereskedés, 1929.

EGRESI, K. *Szociálpolitika Magyarországon. Nézetek, programok és törvények 1919–1939*. Budapest: Napvilág Kiadó, 2008.

FINKEY, F. *A fiatalkorúak büntetőjoga Észak-Amerikában*. Budapest: Athenaeum Irodalmi és Nyomdai Részvénytársulat, 1913.

FINKEY, F. *A magyar büntetőjog tankönyve*. Budapest: Grill Károly Könyvkiadóvállalata, 1914.

FINKEY, F. *Die Aufgaben der Kriegsfürsorger*. Pozsony: Buchdruckerei Carl Angermayer, 1917.

FORBÁTH, T. *Adatok a magyar szegényügy rendezéséhez*. Budapest: Márkus Samu könyvnyomdája, 1908.

GERGELY, F. *A magyar gyermekvédelem története (1867–1991)*. Budapest: Püski Kiadó, 1997.

HERCZOG, M. *A gyermekvédelem dilemmái*. Budapest: Pont Kiadó, 1997.

HILSCHER, R. *Bevezetés a szociálpolitikába*. Budapest: MEKDSz Szövétnek-Kiadás, 1928.

HORVÁTH, T. *A büntetési elméletek fejlődésének vázlata*. Budapest: Akadémiai Kiadó, 1981.

IRK, A. *A magyar anyagi büntetőjog*. Pécs: Dunántúl Egyetem Nyomdája Pécsett, 1928.

KÁDÁR, L. Gyermekvédelem. In: CZETTLER, J., FELLNER, F., KORÁNYI, F., TELEKI, P. (eds.) *Közgazdasági Enciklopédia II. kötet*. Budapest: Athenaeum Irodalmi és Nyomdai Részvénytársulat kiadása, 1929, pp. 570–578.

KÁRMÁN, E. A fiatalkorú bűntettesek tanulmányozása. *A Gyermek, A Magyar Gyermektanulmányi Társaság Közlönye*. 1914, Vol. 8, no. 7, pp. 514–532.

KÁRMÁN, E. *A gyermekek erkölcsi hibái és erkölcsi betegségei*. Budapest: Tudományos Könyvkiadó Vállalat, 1922.

KATONÁNÉ PEHR, E., HERCZOG, M. *A gyermekvédelem nagy kézikönyve*. Budapest: Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2011.

KELEMEN, R. A polgári kor társadalombiztosítása – Társadalombiztosítási bíráskodás a polgári korban. In: MOLNÁR, A., SZÉPLAKI, L. (eds.). *Tanulmányok a győri felsőbíráskodás történetéből a XIX–XX. század fordulóján*. Győr: Győri Ítélőtábla, 2019, pp. 149–174.

KUN, B., LÁDAY, I. (eds.) *A fiatalkorúak kriminalitása ellen való küzdelem Magyarországon*. Budapest: Franklin Társulat Nyomdája, 1905.

LENGYEL, A. A Magyar Jogászegylet Büntetőjogi Bizottságának tanácskozásai a büntető-novella tárgyában. In: SZLADITS, K. (ed.). *Magyar Jogászegyleti értekezések 36. kötet*. Budapest: Franklin Társulat Nyomdája, 1908, pp. 1–45.

LÉVAY, M. Az I. büntető novella fiatalkorúakra vonatkozó rendelkezései. *Jogtörténeti Szemle*. 2008, no. 4, pp. 28–32.

LŐRINCZ, J. *A fiatalkorúak büntetés-végrehajtása*. Vác: Duna-Mix Nyomda, 1998.

POMOGYI, L. *A szegényügy és községi illetőség a polgári Magyarországon*. Budapest: Osiris Kiadó, 2001.

RIGÓ, B. A Liber Vagatorum és a világi szegényügyi igazgatás kezdetei Strasbourgban (1509–1523) – Szatíra a koldulásról a reformáció előestéjén. In: MEZEY, B. (ed.). *Kölcsönhatások. Európa és Magyarország a jogtörténelem sodrásában*. Budapest: Gondolat Kiadó, 2021, pp. 293–300.

SZAKOLCZAY, Á. A gyermekvédelem Magyarországon tekintettel az 1898. évi XXI. törvényczikkre. In: SZLADITS, K. (ed.). *Magyar Jogászegyleti értekezések. 20. kötet*. Budapest: Magyar Jogászegylet, 1900, pp. 1–22.

TELEKI, P. *Sociálpolitika és hadigondozás gyakorlati tapasztalatok alapján*. Budapest: Kiadja az Országos Hadigondozó Hivatal, 1918.

VÁMBÉRY, R. *Büntetőpolitikai követelések*. Budapest: Politzer Zsigmond és Fia kiadása, 1900.

VARGHA, F. *A gyermekkorban levő bűnösök*. Budapest: Franklin-Társulat Könyvnyomdája, 1895.

ZOMBORY, L. *Gyermekvédelem a háború alatt*. Budapest: Nyomda R. T., 1916.

Questions of Judicial Interpretation of Certain Felonies in the Trial of the People's Commissioners of the Soviet Republic of Hungary

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Abstract

Following the fall of the Soviet Republic of Hungary, the criminal prosecution of the political leaders of the former Bolshevik state confronted the courts of the country with a number of problematic questions on the interpretation of both constitutional and criminal law. From a constitutional perspective, establishing the applicable law under which the actions of the defendants would be evaluated was not obvious as the validity of both the Soviet Republic and that of the previous so-called People's Republic of Hungary were dubious. From a criminal perspective – as at the time being criminal codes lacked specific crimes for the prosecution of political leaders of past dictatorships. Therefore, prosecutors and adjudicating courts tried to evaluate political actions committed using state power as if these would have been committed by private individuals which raised a number of interesting legal problems of interpretation.

Keywords

Criminal Law; Criminal Procedure; Transitional Justice; Bolshevism; Accessory (of Crime).

1 Introduction

Following 1 August 1919, when the military of the Kingdom of Romania placed most of the territory of the country under military occupation and the leaders of the former Bolshevik dictatorship left the country, and

therefore the United Socialist Soviet Republic of Hungary [Hungarian: *Magyarországi Szocialista Szövetséges Tanácsköztársaság*] fell, as in all similar cases, when a dictatorial regime that produced widespread abuses that claimed human lives is overthrown, the justice system, as well as the government, was faced with the extreme challenge of restoring order, while meeting the need of the society for doing justice and deliberating both the valid and applicable provisions of criminal law, as well as the practical requirements of restoring normal social order as soon as possible.[1]

Owing to the existence and operation of a number of totalitarian dictatorships of the 20th century, to date criminal law has developed a system of rules to manage such crimes with a political nature, and new categories of crime have emerged, inseparable from the development of international criminal law, and, moreover, an interdisciplinary field of research into the most ideal way of handling a change of regime and accountability (from a practical, legal and moral point of view, taking into consideration, above all, public interest) has also emerged; that of *transitional justice*, but at the time of the prosecution of the leaders of the Soviet Republic – one of the first twentieth century totalitarian dictatorships to be overthrown – these institutions of criminal law were not available, nor were any scientific argumentations or legal theoretical structures substantiating them.[2]

2 Facts of the Case (Historical Overture)

In order to present the prosecution of the perpetrators of the most serious political offences of the Soviet Republic, it is first of all necessary to present

1 See the archives of the legislature, e.g. *Nemzetgyűlési Napló* (Records of the National Assembly of Hungary, abbrev. NN). 1920, vol. I. pp. 1–5; contemporary articles often lacking an indication of authorship, e.g. A Kúria elnöke és másodelnöke a bolsevizmus szörnyű bűneiről, s a Magyar bíróság feladatairól. *Budapesti közlöny*. Reggeli Kiadás 11 August 1919, pp. 1–2.; reasonings of several criminal sentences, e.g. Budapesti Büntető Törvényszék Bkgy.6274/1920. Budapest Főváros Levéltára (Archives of Budapest capital, abbrev.: BFL) VII.5.c.; and secondary sources e.g. NÁNÁSI, L. Politika, alkotmányjog, büntetőjog az 1918/19-es hatalomváltásokkal kapcsolatos büntetőeljárásokban. *Jog, Állam, Politika*. 2017, no. 2, pp. 3–23.

2 ELSTER, J. *Closing the Book: Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, 2004, p. 10. DUTHIE, R. *Justice Mosaics: How Context Shapes Transitional Justice in fractured Societies*. New York: International Center for Transitional Justice, 2011. UN Security Council. *The Rules of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General. S/2004/616 August 23, 2004*. New York: United Nations, 2004, pp. 27–48.

the historical facts of the crimes being made part of the indictment. However, given the circumstances of the case, in particular the manner in which the coup d'état in question took place (and more specifically because the People's Commissioners did not directly overthrow the legal system of the Kingdom of Hungary, the courts of which ware adjudicating the same People's Commissioners, but seized power from – or rather, as it was, accepted it from the hands of – the People's Republic of Hungary [Hungarian: *Magyar Népköztársaság*, in academic and political discourse also referred to as the "First Republic of Hungary"], which had already overthrown the Kingdom), is also essential for one to fathom the questions of criminal law associated with the crimes against the state that were the subject of the trial.

To briefly summarize the historical process leading to the establishment of the Soviet Republic, we have to first recall that after the loss of the First World War by the Central Powers, on the 31 October, 1918, the Hungarian National Council [Hungarian: *Magyar Nemzeti Tanács*] – convened at its own intention without any summons – aided by the police and the army seized power in Budapest, following which, on 13 November 1918 the reigning king Charles [*Károly*] IV. stated in his Declaration of Eckartsau to "withdraw from the conduct of public affairs" with respect to Hungary, soon to be followed by the self-dissolution of the House of the Representatives and the adjournment of the sessions of the House of Lords by its president both on the 16 November 1918.[3]

By the aforementioned legal acts, the revolutionary breach of legal continuity with the Kingdom of Hungary was fully implemented, and also with the (albeit unconstitutional) but explicitly active cooperation of the former institutions of the *ancien régime* (however, the National Executive Committee of the National Council [*Népköztársaság Nemzeti Tanácsa Intéző Bizottsága*] acting as the depository of the authority of the nascent state just created, did not conceal the fact that *"if these abdications and dissolutions had not taken place, we would have abolished them by the force of the revolution."*[4]

3 NÁNÁSI, 2017, op. cit., p. 4. BATHÓ, G. A főrendiház közjogi pozíciója a köztársaság kikiáltása után Wlassics Gyula és Rudnyánszky József álláspontján keresztül, 1918–1920. *Állam- és jogtudomány*. 2019, no. 3, pp. 3–17.

4 Képviselőházi Napló 1910–1918, XLI., p. 457.

During the very brief period of the existence of the First Republic, its political and state activities and mere being (especially that of the largest governing party, the Social Democratic Party) were constantly and intensely criticized by the future Bolshevik leaders of the Soviet Republic (in this later capacity governing jointly with the leading politicians of the same Social Democratic Party), engaged in propaganda activities specifically aimed at inciting rebellion and insurrection to overthrow the state and instill proletarian dictatorship, culminating in the riot orchestrated by the Communist Party on the 20 February 1919 and directed against of the offices of *Népszava*, the daily newspaper of the Social Democratic Party, and leading to the death of five policemen and serious harm inflicted to at least thirty persons, and an eventual arrest of the leaders of the Communist Party on 22 February 1919.[5]

The Cabinet of the First Republic, at its meeting on the 20 March, confronted with the order of the Entente sent via telegraph, known as the Vix Note, ordering the Hungarian army to be withdrawn from the existing front line to a considerable extent (thus expanding the already considerable territories subject to foreign occupation), having neither the power to oppose nor the will to comply with it, decided to resign, and the Social Democrats to form a joint government with the communist leaders, whom, they speculated, would have and be able to secure the active support of the Soviet Union, and therefore on the night of 20 March, the most prominent of former government politicians presented themselves in the national central prison [Hungarian: *Országos Gyűjtőfogház*], to sign the so-called platform of unification of the Social Democratic and Communist Parties with the Communist leaders imprisoned there for the felony of attempted modification of the form of the state as a People's Republic.[6]

The first act issued by the Soviet Republic thus established was the declaration of martial law [Hungarian: *Statárium*] pursuant to the three articles of the Decree No. I. of the Revolutionary Governing Council [Hungarian:

5 KUPINÉ DRÓCSA, I. *Rendtörvények a két világháború között: különös tekintettel az állami és társadalmi rend hatályosabb védelméről szóló 1921. évi III. törvény anyagi és eljárásjogi elemzésére a Budapesti királyi Törvényszéken kialakult bírói gyakorlaton keresztül*. PhD thesis. Budapest: Pázmány Péter Catholic University, 2021, pp. 87–89.

6 HATOS, P. *Rosszfiúk viláforradalma. Az 1919-es magyarországi Tanácsköztársaság története*. Budapest: Jaffa, 2021, pp. 57–71; BFL. VII. 5. c. 3087.

Forradalmi Kormányzótanács] drafted with utmost brevity as follows: *"1. Everyone who disobeys the orders of the Soviet Republic with arms or incites rebellion against the Soviet Republic shall be punishable by death. 2. Everyone who steals or plunders shall be punished by death. 3. The guilty*[7] *shall be judged by the revolutionary tribunal."*[8] This was soon followed on 26 March 1919 by Decree No. IV. composed with a similar economy of words, and hance lending itself – in line with the intention of the legislator – a very broad scope of interpretation, regulating the Revolutionary Tribunals [Hungarian: *Forradalmi Törvényszékek*], which abolished the system of justice as a whole – i.e. the substantive and procedural criminal rules, in addition to the organization of the courts and prosecutors, the bar and the notaries public – and provided for revolutionary tribunals to be set up "according to need", anywhere, at any time. Under the decree, the Revolutionary Governing Council appoints the president of the tribunal, the two voting judges and the prosecuting commissioner, without any legal or other qualifications being a prerequisite for holding these offices. The trial shall, as far as possible, be conducted without interruption, and be finished in a day, there shall be no appeal, and the sentence shall be carried out immediately after it has been passed.[9]

Owing to the utmost levity bordering on total absence of procedural rules and guarantees of the procedure of the Revolutionary Tribunals, in addition to the bodies trying perpetrators for non-political [Hungarian: *köztörvényes*] crimes, the terrorist detachments sent to maintain order and exercise political reprisal in the name of the Soviet Republic, also formally functioned as Revolutionary Tribunals.[10]

A detailed account of the legal activities of the Soviet Republic is not the subject of this article, even though most of them certainly may constitute

7 Not a translation error: the Decree used the world the word "bűnös" translating to guilty or sinner instead of the Hungarian equivalent of "perpetrator", thus eliminating the differentiation between perpetrator and guilt prevailing in modern criminal law. The Decree also differs from the commonly used legal terminology in using "everyone" [mindenki] instead of "any person."

8 STATÁRIUM! A Forradalmi Kormányzótanács I. sz. rendelete. *Budapesti Közlöny*. Budapest, 21. 3. 1919.

9 A Forradalmi Kormányzótanács IV. sz. rendelete. *Budapesti Közlöny*. Budapest, 26. 3. 1919.

10 HALMÁGYI, P. (ed.). *A makói terroristák pere (a Návay-per) 1919–1920*. Makó: Csongrád Megyei Múzeumok Igazgatósága, 2001, pp. 60–62.

a subject of criminal law provided especially – in line with the conviction of the competent courts and made obvious in their reasonings – that they were perpetrated without a valid constitutional authorization (however, as we shall see, the public prosecutor brought the case against the Peoples' Commissioners by highlighting the criminal offences thought to be the most characteristic and grave, and moreover, in respect of some of the offences included in the indictment, proposed that the proceedings be tried separately, given that the more serious felonies against the state and against life diminished those of e.g. larceny [Hungarian: *lopás*] and extortion [Hungarian: *zsarolás*], but further hearings regarding these crimes were never held).[11]

3 Preliminary Questions of the Trial of the People's Commissioners

After the restoration of constitutionality, the main task of the judiciary became the prosecution of crimes committed during and under the proletarian dictatorship, as the regime following the fall of the Soviet Republic sought to legitimize its own constitutionality by demonstrating the concept of legal continuity with the Kingdom of Hungary, while at least relatively restoring the legal situation and dismantling the Bolshevik state. During the rise into power of the new legal and societal order immediately succeeding the fall of communism, apart from the criminal proceedings conducted by the central authorities and in a legal manner, reprisals of an extrajudicial nature and executions carried out in an unleashed vengeance under the guise of the reprisal but at times against persons not connected with the Soviet Republic were also on the agenda, collectively known as the "White Terror" [Hungarian: *fehérterror*] in contrast to the atrocities carried out during the Soviet Republic, which are collectively referred to as the "Red Terror" [Hungarian: *vörösterror*].[12]

11 Budapesti Büntető Törvényszék Bkgy. 6274/1920. Budapest Főváros Levéltára (Archives of Budapest capital, abbrev.: BFL) VII.5.c. p. 1.

12 BODÓ, B. *The White Terror. Antisemitic and Political Violence in Hungary 1919–1921*. London-New York: Routledge, 2019, pp. 88–130.

It should also be mentioned that, pursuant to the Government Decree No. 4 039 of 19 August 1919 of the Cabinet, the great number of proceedings against *"the organs, intermediaries and agents of the Soviet Republic, exercising or pretending to exercise the competence of authorities, committed acts contrary to the criminal laws"* were conducted under the simplified provisions of the so-called communist summary [Hungarian: *kommunista gyorsított*] procedure, not allowing for the exercise of the right of appeal against decisions of the court handed down during the criminal proceedings, and also giving the public prosecutor's office full authority to conduct the investigation instead of the investigating judge, and excluding the right of appeal against the sentence, (reducing the remedy provided for by a later modification) to the procedure of the acting court, automatically transforming into a council hearing the eventual pardon appeal after handing down its judgment.[13]

From the large number of People's Commissioners, due to the rapid changes in the organizational structure, and frequent personal changes of the Soviet Republic, only ten People's Commissioners were indicted on 6 June 1920 – with the approval of the Government required as a prerequisite for the initiation of criminal procedures of a political nature pursuant to the provisions enacted having regard to the World War and still not repealed, granting exceptional power to the Government under Act LXIII of 1912 – whose escape abroad was not successful, and only after the departure of the occupying Romanian army, which prohibited the initiation and conduct of criminal proceedings on account of the anti-state, and therefore political nature of the crimes.[14]

Moreover, the courts hearing communist criminal cases had dealt with the question of the applicability of the laws of the Soviet Republic that were contrary to the elementary requirements of substantive justice – while at the same time meeting the requirements of legal formalism – in such a way that, by refusing to recognize the statehood of the Soviet Republic, they excluded the validity of the legal system of it *en bloc*, and thus applied the rules of the former Hungarian legal system to criminal offenses under the Soviet Republic.

13 A magyar kormány 1919. évi 4.039. M. E. számú rendelete, a törvénykezés ideiglenes szabályozásáról szóló 1919. évi 4.039. M.E. számú rendelet kiegészítéséről. *Magyarországi Rendeletek Tára*. Magyar Királyi Belügyminisztérium, Vol. 53, 1919, pp. 651–656.

14 Budapesti Büntető Törvényszék Bkgy. 6274/1920. BFL VII.5.c.

The decision 1886/1920 of the Hungarian Curia and the judgments based on the legal theory and constitutional law findings contained therein establish, axiomatically rather than as a consequence of any theoretical deduction, that the Soviet Republic cannot be considered a state (and consequently its legislation as valid law). This is supported, for example, by statements to the effect that *"what Béla Kun and his fellow People's Commissioners, under his command, carried out for months against the lives and property of citizens cannot be included in the activities of a politician: it was not political rule, but the rampage of an organized gang trampling on law, morals and justice."*[15]

Following the commencement of the trial however, the People's Commissioner of the Soviet Union's for Foreign Affairs communicated by way of telegram to the Hungarian Cabinet that ten Hungarian officers held as prisoners of war were declared hostages by the Soviet Union, eventually subjecting them to the same punishment as the People's Commissioners on trial, moreover, the extradition of the prisoners of war captive in Soviet Russia came to a halt indefinitely, and thus, although the trial may have been relevant in terms of appeasing society's sense of justice and legitimizing the existing power structure, was no longer decisive for the fate indicted politicians.[16]

4 Questions of Evaluation of the Perpetrated Crimes as Crimes against the State

The more grave of the crimes against the state the indictment of the People's Commissioners contained was lese-majesty [Hungarian: *felségsértés*; Latin: *crimen laesae majestatis*] translating to plain English as an insult to the monarch as murder or battery committed against members of the royal family were also criminalized pursuant to the same section. The applicable provisions of the Criminal Code of Hungary (Act V of 1878. on the Criminal Code of the Kingdom of Hungary; hereinafter: CC) deemed to be in affect at the time due to the constitutionally null and void nature of the states and legal systems of both the First Republic and the Soviet Republic proclaimed by Act I of 1920, penalized any action aimed at the violent modification

15 Budapesti Büntető Törvényszék Bkgy. 50328/1919. BFL VII.5.c.
16 NÁNÁSI, 2017, op. cit., p. 16.

of (i) the constitution of the Hungarian state, (ii) the relationship between the countries forming the state of Hungary or (iii) the connection between Hungary and another country of the Austro-Hungarian Monarchy, although, as the defense pointed out in its reasoning in the lawsuit without success, it is difficult (or rather, as the case may be, theoretically impossible) to establish any intent on the part of the indicted People's Commissioners of any one of violently modifying a constitution the rules of which were not observed at the time of the offences; however, the Royal Criminal Tribunal of Budapest established in its sentence that the historical constitution of Hungary was merely suspended, but not inapplicable (i.e. it did not lose its effect), and therefore – although the bodies (the Houses of the Parliament, the King and the Cabinet) vested with constitutional powers pursuant to the (historic) constitution did not exercise their functions as they were unable to do so – it does constitute a criminal offense to render impossible their proper function even if the circumstances making it possible to do so these not provided for by (or, to put it bluntly: were made impossible by) the previous – then extant, however, from the perspective of the acting court of the Kingdom; null and void – rules of the preceding legal system of the First Republic.[17]

The other crime against the state included in the indictment was that of insurrection [Hungarian: *lázadás*] under 153. § of the CC with the aggravating circumstances defined in 154. § and the first paragraph of 155. § the Code. Pursuant to the sections referred to above, "A grouping whose aim is to attack with arms a class of society, a nationality or a religious denomination of citizens also constitutes a rebellion. In such cases, the instigators and leaders shall be punished by a term of five to ten years of imprisonment, and the others by imprisonment for a term of two years.[18]

Article 154 imposes a penalty on the instigators and leaders of a rebel group that has attacked or taken control of a village, house, armory, military arsenal, shooting range, railway, telegraph or post office and Article 155

17 Paragraph 2 of 127 § of Act V of 1878; and Budapesti Büntető Törvényszék Bkgy. 50328/1919. BFL VII.5.c. p. 16. ff., for the argumentation of the defense, see Budapesti Büntető Törvényszék Bkgy. 50328/1919. BFL VII.5.c. vol. CXII. 5765. ff.

18 Article 155. § of the CC.

provides for the aggravating circumstance of insurrection if the group has committed robbery, arson, destruction, or violence against certain persons.[19]

The court established that the above elements of the crime and the aggravating circumstance were fulfilled, and in its reasoning placed a great emphasis on the acts of the heavily armed so-called death train of the terror brigade under the leadership of Szamuely Tibor, the former People's Commissioner for public education and military affairs (not simultaneously; the public law and administrative system of the Soviet Republic was also characterized by constant institutional and personal changes; in Hungary, never having a written constitution in its history, two constitutions were adopted in the course of one summer during the Soviet Republic, the People's Commissioners often headed more than one People's Departments [Hungarian: *Népbiztosság*], while several People's Commissions were headed by more than one People's Commissars, and the public law relations did not correlate with the extent or nature of the actual political power exercised by each person or institution, which is illustrated by the fact that the leader of the Soviet Republic, Béla Kun, was not the President of the Revolutionary Governing Council but the People's Commissioner for Foreign Affairs, and the Revolutionary Governing Council itself was legally or theoretically subordinate to the Allied Central Executive Committee [Hungarian: *Szövetséges Központi Intézőbizottság*], which, however, issued only two decrees during its existence) and the practice of taking hostages.[20]

5 Questions of Evaluation of the Perpetrated Crimes as Non-political Crimes

A special characteristic of the trial of the People's Commissioners, constituting a rarity of legal history, was that the conduct of the perpetrators

19 Budapesti Büntető Törvényszék Bkgy. 50328/1919. BFL VII.5.c.file No. 6285. p. 26. ff.

20 The first, provisional, or "smaller" constitution was enacted on 2 April 1919 by the Decree XXVI of the Revolutionary Governing Council, and the "greater" Constitution on 23 June 1919. For the constitutional position of the Allied Central Executive Committee, see Articles 20–31 of the same. For the organizational structure of the Revolutionary Governing Council, see HATOS, 2021, op. cit., 77–88; BÖLÖNY, J. *Magyarország Kormányai 1848–1975.* Budapest: Akadémiai, 1978, pp. 59–61. For the relevant part of the reasoning, see Budapesti Büntető Törvényszék Bkgy. 50328/1919. BFL VII.5.c.file No. 6285. p. 38 ff.

was classified by both the prosecution and the court as a "private" (i.e. non-political, in Hungarian: *köztörvényes*) offences in cumulation with the crimes against the state having regard to the unconstitutional and therefore invalid nature of the power exercised (note that the indictment explicitly seeks to avoid the usage of the term of Soviet Republic, consistently referring to it as the "so-called 'Soviet Republic' " between quotation marks, but even defining it as "the criminal organization [Hungarian: *bűnszövetkezet*] operating under the name of 'Soviet Republic' ".[21]

The classification of political functions as crimes of private offenders is best exemplified by the fifth charge included in the indictment, the crime of counterfeiting currency committed repeatedly, on the basis of which the court found the People's Commissioners criminally responsible under Paragraph 1 of Article 203 of the CC for issuing currency without the authorization of the Austrian-Hungarian Bank, or by the charges of extortion and larceny, based on the fact of the extensive nationalizations and requisitions by the Soviet Republic (ranging from tapping the currency reserves of the Bank to collecting art treasures from the aristocratic palaces of Budapest and the acts of the armed and/or administrative authorities executing them, which were, as mentioned above separated from the lawsuit but eventually – obviously having regard to the extended and convoluted nature of these acts, the complexity of the evidencing them at trial following from it, and the extradition of the convicted politicians to the Soviet Union – never tried.[22]

The reason for such a classification of the acts at hand as non-political crime was twofold, firstly justified by a fundamental sense of justice, which demanded that the individuals who were morally and practically responsible for the creation and operation of a dictatorship that claimed lives, should also be held legally responsible for such actions, even in the absence of specific legal provisions (owing to the unprecedented nature of the case) fitting to the facts of the case, and secondly, from a practical point of view, having regard to the fact that the applicable rules of international law did not allow

21 Budapesti Büntető Törvényszék Bkgy. 50328/1919. BFL VII.5.c Vol. XXVII. p. 1401. File no. 19738/1920k.ü. p. 19.

22 See the relevant parts of the indictment: Budapesti Büntető Törvényszék Bkgy. 50328/1919. BFL VII.5.c Vol. XXVII. p. 1409. File no. 19738/1920k.ü. p. 30.

for the extradition of offenders of crimes against the state to be extradited, although the Austrian Republic nevertheless refused to comply with the request for the extradition of former People's Commissioners and considered them to be political refugees.[23]

The decision of the court agreed with the indictment that passing of the Decrees No. I and IV of the Revolutionary Governing Council exhausted the definition of incitement to murder (in the case of the activity of the Revolutionary Tribunals, an indirect or successive incitement, inciting the president and voting members of the Tribunals – by handing down death sentences – to incite the actual executioner under Paragraph 1 of Article 69 of the CC.[24]

It should be noted that, however, the court acquitted the defendants of the charge of incitement to murder committed during the course of the first retaliatory expedition of Szamuely Tibor, due to the lack of availability of evidence – especially the minutes of the meeting of the Revolutionary Governing Council – regarding the day it was ordered.[25]

In countering the above argument, the defense, in its legal reasoning in support of the acquittal, argued that, on the one hand, the existence of intent as an element of criminal liability could not be established in the case of these offences, because the perpetrators in question had no knowledge about the constitutional classification (i.e. the invalidity of the legal order they had introduced) of their power, and that therefore they had reason to believe, that they were acting in the possession of state power, in adopting the above-mentioned decrees inter alia, and thus, in the absence of a subjective element of guilt, they could not be punished, and moreover, they also pointed out – although unsuccessfully – that most of the victims proved by the prosecution (including those involved in the rebellions against the Soviet Republic such as in Dunapataj) had taken up the fight against the Red Guard of their own volition, and thus the People's Commissioners could not be held liable as instigators (indirectly) for these deaths as these

23 Bp. Büntető Törvényszék 5736/1919. BFL VII.5.c.

24 Bp. Büntető Törvényszék 5736/1919. BFL VII.5.c. p. vol. CXXIV. 6261-6263. pp. 14–16.

25 Bp. Büntető Törvényszék 5736/1919. BFL VII.5.c. p. vol. CXXIV. 6311-6314. pp. 94–97.

should legally be doomed to be a result of the behavior of the victims, recurring element of the defense is that a call (being the prerequisite of an incitement) to murder can only be committed if it is directed at a defined person, which in this case could not be established, and that a general call to murder an unspecified person cannot be included under the definition of incitement to murder.[26]

As an epilogue of the lawsuit, two facts deserve attention; the general amnesty proclaimed by the Governor of Hungary on the Christmas Eve of 1920 and another one applying to a broader scope of perpetrators on 22 December 1922 granting pardon to all offenders who committed crimes sentenced to five years of imprisonment, and the express political decision not to prosecute the political leaders of the First Republic regardless of the unconstitutionality of such state declared in the decision handed down in the trial of the People's Commissioners as well as in other summary communist trials, Act I of 1920 and the Government Decree No. 2 394. on the naming of the state authorities restoring monarchy.[27]

6 Conclusion

In the case of the successive regimes, which differed considerably in their ideology and state organization practices, the criminalization of the political responsibility of the leaders of the former regime was not an unusual phenomenon during the 20th century, but the so-called communist criminal trials are of particular significance in terms of constitutional history, as the judgments handed down show that their aim was to reassess the constitutionality and the state character of the Soviet Republic by means of criminal law, perhaps even more so than to establish the criminal responsibility of the perpetrators.

However, as the judicial activity of the new Kingdom of Hungary was aimed at establishing the responsibility of former perpetrators of political crimes, while at the same time aiming to keep proceedings within the framework of the rule of law, precisely in order to distinguish between the new and

26 Budapesti Büntető Törvényszék Bkgy. 50328/1919. BFL VII.5.c Vol. CXII. pp. 5762–5820.

27 *Budapesti Közlöny*. 25. 12. 1920, p. 1; *Budapesti Közlöny*, 25. 12. 1922, p. 2.

the previous system and to emphasize predictability and public order, which two aims naturally were conflicting with each other, and if the judiciary did not go so far as to use retroactive application of the law (although one of the first act of the newly established legislature was to introduce an act criminalizing political crimes of the same nature), under the special historical circumstances they did interpret certain categories of crime in quite a broad and novel way.[28]

References

BATHÓ, G. A főrendiház közjogi pozíciója a köztársaság kikiáltása után Wlassics Gyula és Rudnyánszky József álláspontján keresztül, 1918–1920. *Állam- és jogtudomány*. 2019, no. 3, pp. 3–17.

BODÓ B. *The White Terror. Antisemitic and Political Violence in Hungary 1919–1921*. London-New York: Routledge, 2019. DOI: https://doi.org/10.4324/9780429507960

BÖLÖNY J. *Magyarország Kormányai 1848–1975*. Budapest: Akadémiai, 1978.

Budapesti Közlöny. 25. 12. 1920.

DUTHIE, R. *Justice Mosaics: How Context Shapes Transitional Justice in fractured Societies*. New York: International Center for Transitional Justice, 2011.

ELSTER, J. *Closing the Book: Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, 2004. DOI: https://doi.org/10.1017/CBO9780511607011

HALMÁGYI, P. (ed.). *A makói terroristák pere (a Návay-per) 1919–1920*. Makó: Csongrád Megyei Múzeumok Igazgatósága, 2001.

HATOS, P. *Rosszfiúk viláforradalma. Az 1919-es magyarországi Tanácsköztársaság története*. Budapest: Jaffa, 2021.

KUPINÉ DRÓCSA, I. *Rendtörvények a két világháború között: különös tekintettel az állami és társadalmi rend hatályosabb védelméről szóló 1921. évi III. törvény anyagi és eljárásjogi elemzésére a Budapesti királyi Törvényszéken kialakult bírói gyakorlaton keresztül*. PhD thesis. Budapest: Pázmány Péter Catholic University, 2021.

UN Security Council. *The Rules of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General. S/2004/616 August 23, 2004*. New York: United Nations, 2004.

28 Act III of 1921, KUPINÉ DRÓCSA, op. cit., 2021.

The Phenomenon of Czech and Slovak Lawyers Meetings in the First Half of the 20th century

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Abstract

The article deals with the historical development of the phenomenon of the Czech and later also Slovak meetings of lawyers in the first half of the 20th century in the territory of Czech lands. In addition, the article will focus on the significations that vary somewhat across meetings of lawyers concerning the state, lay and professional society. Finally, the article reminds the renewed Congress of Czech Lawyers in the Czech Republic this year's May in the scope of former meetings in the first half of the last century.

Keywords

Meeting of Lawyers; Congress of Lawyers; Czech Lawyers; Czechoslovak Lawyers.

1 Introduction

The concept of meetings of lawyers is well known in the Central European legal area, especially in Germany where the so-called *Juristentags* have been held regularly since 1860 but also in Austria or Switzerland where it has its place and importance in the key legal debate to this date. In the first half of the 20th century, the event with the same meaning functioned in the Czech lands for quite a long time but it has been almost forgotten if not for its resuscitation[1] which took place in the Czech Republic this May.

So, this article deals with legal congresses in the sense of organized meetings of the general legal public intending to receive the views of these

1 As the organizers of the Congress of Czech Lawyers aptly state on their website. In: *Jednota českých právníků* [online]. Sjezd českých právníků. [cit. 20. 8. 2022]. https://jednotaceskychpravniku.cz/sjezd-ceskych-pravniku/

lawyers in the discussion of selected and often complicated legal issues with the potential to influence social discourse and legislation. Typically, these meetings had their pre-approved normative rules and an organizing committee. Due to capacity constraints, the article will present only the congresses that continuously followed each other after the First Scientific Congress of Czech Lawyers in 1904 which was followed by the second, third and fourth congress held in 1949 as the last one for a long time. To complete the context, the article also mentions the circumstances that preceded the creation of congresses which date back to the end of the 19th century. It should be noted that apart from these "numbered" congresses, there were held other congresses such as the First Congress of Lawyers of the Slavic States in 1933, the First Trade Union Congress of Czechoslovak Lawyers in 1936 or the Unification Congress of Czechoslovak Lawyers in 1937 which will not be the subject of this article.[2]

Although a major advance in the direction of the analysis of the congresses in depth came with the renewal of the law congress this year when the topic was rather popularised,[3] and then briefly recalled at the congress itself,[4] no one has yet attempted to analyse it more. The contribution to the current state of knowledge of this article is thus to describe in a broad context the holding of selected congresses. To that end, the article will attempt to portray the different purposes that individual congresses generally had.

First, the article deals with the development that led to the first congress in 1904 with the reflection on the possible inspirations for its organization. Then the further text proceeds chronologically from the first congress

2 It should also be noted that during the period of the First Republic, congresses of German lawyers were held in the Czech territory, with a total of eight congresses taking place during this period.

3 E.g. TICHÝ, L. Doporučuje se obnovení právnických sjezdů? [Is it recommended that Meetings of Lawyers be reinstated?] *Advokátní deník* [online]. 4. 10. 2021. [cit. 24. 8. 2022]. Available at: https://advokatnidenik.cz/2021/10/04/doporucuje-se-obnoveni-pravnickych-sjezdu/

4 By the contribution of *Stanislav Balík* which is currently available from the minutes of the Congress of Czech Lawyers available in Prvního novodobého Sjezdu českých právníků se účastní právnické špičky. *Advokátní deník* [online]. 5. 5. 2022 [cit. 24. 8. 2022]. Available at: https://advokatnidenik.cz/2022/05/05/prvniho-novodobeho-sjezdu-ceskych-pravniku-se-ucastni-pravnicke-spicky/

to the fourth with which the tradition ceased. The article concludes with a chapter devoted to the renewed congress of Czech lawyers.

2 Early Efforts of Czech Lawyers for their Meetings

The history of the organisation of Czech[5] lawyers' meetings dates to the end of the 19th century when the first efforts of the Czech legal profession to organise a national Meeting are evident. Such effort which was led by *Právnická jednota,*[6] *Všehrd* and *Česká akademie profesorů universitních* can be seen in 1898 for the first time when mentioned associations made the Organisation Committee forming of its members to arrange the celebration memory of the famous Czech lawyer *Viktorin Kornel of Všehrdy* (or just Všehrd) by the unveiling of his statue[7] in his hometown of Chrudim.[8] For this purpose the Committee then friendly invited all Czech lawyers to honour his memory by contributing one coin to the creation of the statue.[9] The memorable unveiling of the *Všehrd* statue finally took place on 27 October 1901 in Chrudim and can be described as the beginning of the phenomenon of Czech meetings of lawyers and as a kind of pre-meeting. It was here where the idea of congresses was first raised.[10]

The actual event was not yet like a lawyer congress as we know it from later times. Together with the unveiling of the statue, laying of the laurel wreaths and speeches by eminent personalities such as *Karel Wollmann* and *Antonín*

5 We cannot talk about Slovak lawyers yet because Slovakia was part of the Hungarian part of the monarchy. They join the lawyer congresses later in the Czechoslovak Republic.

6 Both Czech and Moravian branches of this association.

7 The statue was created by the academic sculptor *František Rous*.

8 All regarding 400 years anniversary of the publication of his famous work O právích země české knihy devatery [On the Laws of the Czech Land Nine Books]. In: Oslava památky mistra Viktorina Kornela ze Všehrd. *Národní listy*. 1898, Vol. 38, no. 143, p. 2.

9 Přátelské poslání všem právníkům českým. *Moravská orlice*. 1898, Vol. 36, no. 129, p. 1.

10 This wish was expressed by President of the Imperial and Royal Regional Court in Chrudim *Karel Wollmann* during the informal part of the event with the general consent of those present. In Slavnost odhalení pomníku mistra Viktorina Kornela ze Všehrd. *Právník*. 1901, Vol. 40, p. 731. Or in Českému právnictvu! *Národní listy*. 1903, Vol. 43, no. 101, p. 17. In addition to this wish, there was also a demand that a second Czech university be established in Moravia on the territory of the Czech lands (in Brno). In Zprávy spolkové. *Zprávy Právnické jednoty moravské v Brně*. 1902. Vol. 11, no. 1, p. 42.

rytíř Randa,[11] there was another less professional programme. The reality is that the event had more societal significance with the aim of making a gesture to promote awareness of Czech lawyers within Austria-Hungary.[12] All this was supposed to happen under the auspices of the celebration of an important Czech lawyer than a professional conference as were the cases of lawyer's meetings later.

The next programme continued in the Technical Museum in Chrudim by *Jaromír Čelakovský* who presented the scientific and national importance of *V. K. of Všehrdy*. Then the program was followed by a free discussion and cultural programme.[13] Next time the lawyers met as part of their first congress. Finally, it is worth mentioning that the whole event was well publicized and had a great response in local and major newspapers.[14]

2.1 Possible Impulses for Arrangements of the first Czech Lawyers Meeting

As was mentioned in the Introduction, the idea of congresses was not new in Central Europe. German lawyers[15] with their *Juristentags* can be considered as founders in this regard. The first such *Juristentag* was held in Berlin

11 Zprávy spolkové. *Zprávy Právnické jednoty moravské v Brně*. 1901, Vol. 10, no. 4, pp. 194–195. Or also in Odhalení pomníku Viktorina Kornela ze Všehrd. *Plzeňské listy*. 1901, Vol. 37, no. 248, p. 2.

12 This is evidenced by the fact that the organizers had a symbolic "tribute" telegram sent to the emperor. As it follows from: Odhalení pomníku Vikt. Kornela ze Všehrd v Chrudimi. *Katolické listy*. 1901, Vol. 5, no. 296, p. 4. The senders were soon (in November 1901) answered by an expression of the highest thanks from the emperor himself. In Císařský dík. *Brněnské noviny*. 1901, no. 257, p. 2.

13 During which the wish to hold a congress of all Czech lawyers in Prague in 1903 was expressed. In: Slavnost Všehrdova v Chrudimi. *Plzeňské listy*. 1901, Vol. 37, no. 232, p. 3. Or in Slavnostní odhalení pomníku Viktorina Kornela ze Všehrd. *Třeboňské listy*. 1901, Vol. 2, no. 46, p. 5.

14 That cannot be said, for example, of this year's renewed congress. Back then it were *Třeboňské listy, Plzeňské listy, Obnova* or *Národní listy, Lidové noviny, Katolické noviny* etc. which were starting with the invitation of Czech lawyers to participate, as well as the subsequent coverage of the whole event and the general awareness of the importance of *V. K. of Všehrdy*. In Feuilleton. Klasik starého práva českého. *Národní listy*. 1901, Vol. 41, no. 295, p. 1. Or in: Ledaco. B*rněnské noviny*. 1901, no. 249, p. 2.

15 Until 1961, Austrian lawyers also attended the congresses. Since that year, Austrian lawyers have organised their own congresses. In MAYER-MALY, T. Der 1. Österreichische Juristentag. *Juristenzeitung*. 1961, Vol. 16, no. 14, pp. 460–461. Even though independence was proposed, for example, at the VIIth Congress of Austrian Attorneys in 1884. In Sedmý sjezd advokátů rakouských. *Právník*. 1884, Vol. 23, pp. 676–677.

on 28–30 August 1860 while 800 lawyers attended. The establishment of a general, regularly recurring assembly of German jurists was intended to prepare the ground for the unification of the German nation in the field of law. Besides, the *Juristentag* was intended to bring together legal experts to fight dogmatism in law and to solve contemporary legal problems.[16] Remarkably, German lawyer's meetings have been lasting with various time delays to the present day,[17] although it has changed its significance over the years.

Even in the territory of the Austrian Monarchy can be seen meetings of lawyers at the level of the individual legal estates in the second half of the 19th century and many of these meetings were also participated by Czechs. Although such congresses are not the subject of this article, they could undoubtedly have influenced the organisation of the first Czech lawyer's meetings. For example, the First Meeting of Austrian Notaries was held from 20 to 22 September 1872 in Prague[18] and the First Meetings of Austrian Lawyers was held in Vienna from 4 to 6 October 1875.[19]

Based on the above it may be assumed that the organizers of the Czech meetings were inspired by the congresses in the German territory.[20] Later, the inspiration for the organisation of the first Czech congress was fully

16 OLSHAUSEN, T. *Der Deutsche Juristentag: Sein Werden und Wirken. eine Festschrift Zum Fünfzigjährigen Jubiläum des Deutschen Juristentages*. Berlin: Boston: De Gruyter, Inc, 1910, p. 18.

17 The upcoming *Juristentag is the 71st and will take place in Bonn, Germany*. For more see 71. Deutscher Juristentag Bonn 2022. *Deutscher Juristentag e.V.* [online]. [cit. 3. 9. 2022]. Available at: https://djt.de/73-djt/teilnahme/organisatorische-hinweise/

18 Sjezd notářů Rakouských. *Právník*. 1872, Vol. 11, p. 582.

19 Sjezd advokátů rakouských. *Právník*. 1875, Vol. 14, pp. 673–674.

20 In general, the nationality separation is already evident in the voluntary law societies, which were either only German or only Czech in the territory of the Czech lands. In public law corporations with compulsory membership (chambers), nationalities were mixed. For more see SLAPNICKA, H. Die deustchen Juristenvereine und Juristentage in der Tschechoslowakei. *Germanoslavica*. 1995, Vol. 2, no. 1, p. 101.

revealed by *A. Randa* in his introductory speech during the first congress in 1904.[21]

The unveiling of the statue of *Všehrd* with the first congress of Czech lawyers highlighted the national aspect of these events. The strong nationalist undertone can be evidenced by contemporary sources.[22] In these resources, the emphasis is on a call to all Czech lawyers not to all other lawyers who may have been German lawyers living in the territory of Czech lands. This is probably why the mentioned Committee chose in 1898 the Czech jurist *of Všehrd* through whom they wanted to gather the Czech forefathers as his successors in the legal profession.[23] This can be concluded that the inspiration for the possible organization of the firsts Czech lawyer's congresses was eventually overshadowed by their motivation lying in national distinction within the nations in the monarchy.

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21 He explicitly pointed out the importance of the German congresses in the unification of German law but at the same time he reproached it for the fact that although Austrian jurists were also invited, the legal issues of Austrian law were unfortunately not addressed there. After the collapse of the Greater German solution in 1866, the need to extend the congress to Austrian lawyers appeared as well but under the condition of Austrian lawyers that the German congresses be renamed to German-Austrian congresses. However, German lawyers dismissed it. This refusal thus apparently forced the Czech lawyers to go their own way as the participation in German *Juristentags* seemed to represent a national barrier for them which they were probably willing to accept only as citizens of the Austrian monarchy. ZOLL, F. *Pierwszy zjazd czeskich prawników*. Poland(?): publisher unknown, 1904, p. 2. And *Publikace prvního vědeckého sjezdu českých právníků: konaného v Praze ve dnech 21., 22. a 23. května 1904*. Praha: Nákladem sjezdu, 1904, p. 60.

22 This is already evident from the headlines of relevant newspapers freely translated as "To the Czech lawyers!" or "Friendly message to all Czech lawyers". For more see Přátelské poslání všem právníkům českým. *Moravská orlice*. 1898, Vol. 36, no. 129, p. 1. This is confirmed by the whole course of the event, e.g. the unveiling of the statue itself took place to the sound of the chant "Svatý Václave" [Holy Wenceslas] and nationalistic appeal is also heard in almost all the speeches of the participants. In Slavnost Všehrdova v Chrudimi. *Plzeňské listy*. 1901, Vol. 37, no. 232, p. 3.

23 As stated in issue 129 of the Moravská Orlice newspaper: *"it is certainly fully justified by the cultural and national importance for the Czech nation that memory of him* [V. K. of Všehrdy, note J. K.] *should be honoured in his hometown of Chrudim* […] *let every Czech lawyer contribute to the memory of the master V. K. ze Všehrd."* In: Přátelské poslání všem právníkům českým. *Moravská orlice*. 1898, Vol. 36, no. 129, p. 1.

3 First Scientific Congress of Czech Lawyers in Prague

Soon after the unveiling of the statue of *Všehrd* began the preparations for the first-ever meeting of Czech lawyers which was supposed to be held in honour of the 40th anniversary of the founding of the *Právnická jednota* association and the *Právník* journal in Prague in 1903.[24] January 1902 is crucial in this respect when the Leadership of the *Právnická jednota* passed a resolution granting permission to hold the congress. Leadership also decided that congress would be organised to cultivate legal science in the Czech language and the manifestation of the importance of Czech lawyers in society.[25] The subject matter of the whole congress was determined by questions on controversial or lesser-known legal topics which were divided into five sections (civil, civil procedure, criminal, public and national economic policy)[26] after the Committee of the *Právnická jednota* with its President *A. Randa* was formed. The Committee was the main organizing body in charge of putting together the sections of the topics and the programme of the meeting. Then it invited Czech lawyers to submit their contributions to the prescribed questions[27] by the third quarter of 1903 at the latest.[28]

All the preparations continued with an appeal in the press "Českému právnictvu!" [to the Czech lawyers!][29] who were invited as widely as possible to submit applications for the occasion. Any Czech or Slavic graduated

24 Slavnost odhalení pomníku mistra Viktorina Kornela ze Všehrd. *Právník*. 1901, Vol. 40, p. 731.

25 As is evident from the surviving invitation to the Congress.

26 První český sjezd všeprávnický. *Právník*. 1902, Vol. 41, pp. 551–552.

27 In general, the questions focused on contemporary industrial phenomena e.g. compensation for non-fault damage, legal protection of the use of electricity, copyright protection, alcoholism, cartels, social insurance and autonomous administration reform, and much more. In *Publikace prvního vědeckého sjezdu českých právníků: konaného v Praze ve dnech 21., 22. a 23. května 1904. Praha: Nákladem sjezdu, 1904, p. 61.*

28 První český sjezd všeprávnický. *Právník*. 1902, Vol. 41, p. 552. It was explicitly stipulated not to send overly lengthy contributions but briefly reasoned contributions stating the position of the solution. In Českému právnictvu! [To the Czech lawyers!] *Národní listy*. 1903, Vol. 43, no. 101, p. 17.

29 Very remarkable is again the great media coverage of the whole congress.

lawyer was eligible according to § 7 of the Congress Statute[30] dated 10 May 1904 to be a participant. Beyond that, representatives of legal communities from foreign Slavic states were also invited to the event.[31] The date has been finally set for 21–23 May 1904 and the venue for Prague.

The whole meeting was preceded by a cultural programme at the National Theatre.[32] On the following day, almost 1 300 lawyers[33] were welcomed at the opening ceremony in the National Museum building by a speech of the High Marshal of the Kingdom of Bohemia *Jiří Kristián Lobkowicz* under whose auspices the event was held and of the President of the *Právnická jednota, A. Randa*. The lawyers then broke up according to their topics into their sections which met in the *Karolinum* on both days remaining to a total of 50 contributions. Summaries with the reports of the individual sections were published in a separate publication. The whole event was closed on the last day with a Plenary Session of all lawyers with a summary of the event with individual resolutions[34] and thanks to the organizers.[35] It is surprising that in the final communiqué no mention can be found of further continuation of the lawyer congresses. So, another early congress remained only *A. Randa's* wish.[36] Anyway, it was the last Czech meeting

30 *Publikace prvního vědeckého sjezdu českých právníků: konaného v Praze ve dnech 21., 22. a 23. května 1904*. Praha: Nákladem sjezdu, 1904, p. 11.

31 The event was evidently attended by delegation from the Polish Academy of Sciences led by *Fryderyk Zoll jr*, University of Lviv led by *Stanislaw Głąbiński* and *Stanislav Dnistrjanskyj* who participated with him. Also present was a representative of Kharkiv University *Alexander M. Popov*, Ruthenian representative *Kosťa Levicki*, representative of Bulgarian University *Stefan S. Bobčev* and Croatian lawyer *Majcen*. In *Publikace prvního vědeckého sjezdu českých právníků: konaného v Praze ve dnech 21., 22. a 23. května 1904*. Praha: Nákladem sjezdu, 1904, p. 62.

32 The cultural programme on the first day was followed by a second day when the invited lawyers (about 400) gathered for a banquet at the *Žofín* Palace.

33 Which is a remarkable number considering that the First Meeting of Czech Attorneys was held in Prague on the exact same date. In SEIDL, V. První sjezd advokátů českých. *Zprávy Právnické jednoty moravské v Brně*. 1904, Vol. 13, no. 3, pp. 160–162.

34 Among other things, it was decided on the frequency of repeating congresses. Furthermore, a resolution on the proposal of the secretary of the congress *Vilém Pospíšil* was adopted, for example, on the necessity of establishing a second Czech university in Brno. In *Publikace prvního vědeckého sjezdu českých právníků: konaného v Praze ve dnech 21., 22. a 23. května 1904*. Praha: Nákladem sjezdu, 1904, p. 72.

35 *Publikace prvního vědeckého sjezdu českých právníků: konaného v Praze ve dnech 21., 22. a 23. května 1904*. Praha: Nákladem sjezdu, 1904, p. 69.

36 ČÁDA, F. *Druhý sjezd československých právníků v Brně ve dnech 31. května, 1. a 2. června 1925*. Brno: S.l.: s.n., 1926, p. 254.

under the Austro-Hungarian Empire, as no other meetings were organised within the monarchy.[37]

4 Meetings of Czechoslovak Lawyers during the First Republic

As can be concluded from the above, further law congresses in the Czech lands were held after 1918 i.e., after the establishment of the Czechoslovak Republic. So, the initiative was taken up by Czechoslovak lawyers who managed to maintain it consistently more or less until the dissolution of the so-called First Republic in 1938.

The role of congresses has thus undoubtedly shifted since the time of the monarchy. The environment of the independent state provided its lawyers with a somewhat better opportunity with a chance to directly influence its legislative process. Newly, the congresses are thus given a pragmatic dimension with the chance for each interested professional group to influence the laws within which very often these different professional groups had to work together. It can be said that congress became a good platform for cooperation between the groups concerned to promote their common and consensual interests at the legislative level. In this way, the questions were prepared in the framework of the individual congresses which were concerned with important legislative issues. The question has always been whether a certain fact is recommended. The fact that the congresses were of great interest and resonance is again evidenced by the very thorough media coverage.

37 The first incentives to organize a second congress can be still found during the monarchy when in 1912 the *Právnická jednota Moravská*, the Moravian branch of *Právnická jednota*, submitted an open request to the Faculty of Law of Charles University to organize a second congress in 1914 in Brno. The dean's office retorted that it would be impossible to organize such congress in one year and recommend to association itself to organize the congress to know the Brno conditions. So, the consensus was only on the city of Brno, but no one organized the congress. For the request see Zprávy spolkové. *Zprávy Právnické jednoty moravské v Brně*. 1913, Vol. 22, no. 1, p. 55. And for the report see Zprávy spolkové. *Zprávy Právnické jednoty moravské v Brně*. 1913, Vol. 22, no. 2, pp. 111–112.

4.1 Second Meeting of Czechoslovak Lawyers in Brno in 1925

The first call for the Czechoslovak lawyer's congress can be seen in 1923 in the appeal of *Právnická jednota* to *Právnická jednota moravská* to take over the organisation of the second congress to Brno.[38] Based on this call then *František Weyr,* Vice-President of *Právnická jednota moravská* convened a meeting of prominent legal officials, judges, some law corporations and the professorial staff of all Czechoslovak faculties of law on February 1923 where the organization of the congress was confirmed and a Preparatory Committee was appointed to organize it.[39] Then the General Meeting of *Právnická jednota* demanded a congress in 1924 on the anniversary of the founding of the association of *Právnická jednota* and *Právník* magazine but also on the 10th anniversary of the death of *A. Randa.*[40] The Ministry of Justice was opposed as it was felt that in just one year the participants would not have had time to get acquainted with the papers of the contributors[41] that is why the date of the Second Congress of Czechoslovak Lawyers in Brno was set for 31 May to 2 June 1925.[42]

Throughout the preparations for the second congress, continuity with the first congress is acknowledged but almost always with the addition that at that time it was an expression of the loyalty of the Czech jurists to the monarchy[43] and the importance of the whole congress was weaker

38 Druhý vědecký sjezd československých právníků. *Všehrd*. 1923, Vol. 4, no. 8, p. 168.

39 According to the contemporary press, Jaromír Sedláček had one of the greatest organizational roles as secretary of the whole congress. In ČÁDA, F. *Druhý sjezd československých právníků v Brně ve dnech 31. května, 1. a 2. června 1925*. Brno: S.l.: s.n., 1926, p. 271.

40 Zpráva o valné hromadě Právnické Jednoty v Praze. *Právník*. 1923, Vol. 62, p. 242.

41 ČÁDA, F. *Druhý sjezd československých právníků v Brně ve dnech 31. května, 1. a 2. června 1925*. Brno: S.l.: s.n., 1926, p. 254.

42 Ke druhému právnickému sjezdu československých právníků v Brně. *Právník*. 1924, Vol. 63, no. 12, p. 541.

43 ČÁDA, F. *Druhý sjezd československých právníků v Brně ve dnech 31. května, 1. a 2. června 1925*. Brno: S.l.: s.n., 1926, p. 253.

because it could have contributed to the improvement of Austrian law.[44, 45] It can be said that the second congress did not differ from the first in terms of organisation. Again, its subject matter was set out in five sections according to the branch of law.[46] The difference, though, lies in the funding of congress as the government is involved in funding.[47]

The whole congress, like the first one, started on the first day with a cultural programme at the National Theatre in Brno. Officially the congress with the attendance of about 1,200 participants[48] under the patronage of the President of the Republic was opened by *František Vážný* as President of the Congress Committee.[49] Again, prominent Czech and foreign lawyers were invited.[50] Discussions of the individual sections then took place on the individual contributions over the following two days on the premises of the Technical University.[51] All papers were printed in a two-volume congress publication.[52] The whole congress ended with a Plenary Session which adopted the final resolutions to close the ongoing

44 Ke druhému právnickému sjezdu československých právníků v Brně. *Právník*. 1924, Vol. 63, no. 12, p. 542.

45 This seems somewhat hypocritical as many of the lawyers attending the second congress also attended that first one but it is also true that the second congress could had realistically higher legislative ambitions even in view of the ongoing unification of the Czechoslovak law In this sense, the Minister of Justice, Josef Dolanský, spoke at the congress on behalf of the government and stressed that the Congress was expected to support efforts to consolidate and unify the legal situation in the country. In: Druhý sjezd československých právníků v Brně. *Právník*. 1925, Vol. 64, no. 11, pp. 361–363.

46 These were the Civil, Commercial, Bills of Exchange and Mining Law Section, the Civil Procedure Section, the Criminal Law and Procedure Section, the Administrative Law Section and the Financial Law Section. In: Druhý sjezd československých právníků v Brně. *Všehrd*. 1925, Vol. 6, no. 10, pp. 281–320.

47 Druhý sjezd československých právníků v Brně. *Všehrd*. 1925, Vol. 6, no. 10, p. 282.

48 This information comes from the preparations for the third congress, which reflected the previous one. In BAŘINKA, C. Zpráva o průběhu III. sjezdu právníků československých v Bratislavě 1930. *Právny obzor*. 1930, Vol. 13, pp. 600–601.

49 Druhý sjezd československých právníků v Brně. *Všehrd*. 1925, Vol. 6, no. 10, p. 283.

50 For example, Professor *Alfred Légal* from the Faculty of Law of Grenoble University or the Polish lawyers *Morawski* and *Blaszkowski*. *Johann Jarolim* was present on behalf of the German lawyers. In Druhý sjezd československých právníků v Brně. *Všehrd*. 1925, Vol. 6, no. 10, p. 282.

51 Today's Faculty of Civil Engineering of the Brno Univeristy of Technology which is located at *Veveří* street in Brno.

52 *Druhý sjezd právníků československých: konaný ve dnech 31. května, 1. a 2. června 1925 v Brně*. Brno: Nákladem přípravného výboru druhého práv. sjezdu, 1925.

session. The individual resolutions were formulated as answers to prepared questions and proposed to the Plenary by the individual sections. Thus, Congress unanimously expressed its opinions on selected legal topics which is a change from the previous Congress in 1904 as the Plenary was more social in character. At the very end, the congress on the proposal of *Karel Hermann-Otavský* adopted the last resolution on the permanent meeting of the Congress Committee and that from now on the congresses should be held every five years and the next one will be in Bratislava.[53]

4.2 Third Meeting of Czechoslovak Lawyers in Bratislava in 1930

According to the resolution of the 1925 congress, another congress of Czechoslovak lawyers was held in Bratislava on 11–13 October 1930 and it has to be said that the organization continued along the lines of the previous congresses but this time under the auspices of the *Právnická jednota slovenská*. The first mention of the organization can be found in 1929 when the permanent Preparatory Committee established the rules of the congress, its President *Vladimír Fajnor* with the executive *Cyril Bařinka*, its six sections[54] and the questions for each section.[55] The organization soon received 55 contributions.[56] The preparations then culminated in a meeting of the Preparatory Committee in June 1930, when the papers to be published and the composition of the individual sections were finally selected within the General Assembly of the *Právnická jednota*.[57] The expectations of the professional public were mainly aimed at deepening the Slovak "fraternal" knowledge of Czech law, as Slovak lawyers were still relatively oriented towards Hungary, e.g. Hungarian case law.[58]

53 Druhý sjezd československých právníků v Brně. *Všehrd*. 1925, Vol. 6, no. 10, p. 320.
54 The sections have been supplemented by a new "section on special private rights". In Třetí sjezd československých právníků. *Všehrd*. 1929, Vol. 10, no. 10, p. 298.
55 BAŘINKA, C. Zpráva o průběhu III. sjezdu právníků československých v Bratislavě 1930. *Právny obzor*. 1930, Vol. 13, pp. 565–571.
56 BAŘINKA, C. Zpráva o průběhu III. sjezdu právníků československých v Bratislavě 1930. *Právny obzor*. 1930, Vol. 13, pp. 577–578.
57 Tretí všeprávnický sjazd v Bratislave 1930. *Právny obzor*. 1929, Vol. 12, no. 1, p. 71.
58 BAŘINKA, C. Zpráva o průběhu III. sjezdu právníků československých v Bratislavě 1930. *Právny obzor*. 1930, Vol. 13, p. 599.

The congress, which was attended by nearly 3,000 lawyers, 125 of them foreign[59], started in the traditional cultural way. After the arrival of *Tomáš Garrigue Masaryk, the President of the Republic,* who took the patronage of the congress and whose participation strengthened its prestige of it, the participants attended the first programme.[60] The congress was opened by the speech of the President of the Republic[61] and many other important participants.[62] After this part, the attendees dispersed to the meetings of their sections which were held in the Agricultural Museum, the Industrial School and the Regional Office building. Finally, there was a closing Plenary Session which, unlike previous congresses, was very detailed. The chairs of the different sections presented the conclusions of the questions and sections, all to adopt the final resolutions of the congress. The final approval of the questions already approved in the sections was rather formal as congress approved all questions unanimously. At the suggestion of *F. Vážný*, the congress agreed that the next congresses should be held every two years. An appeal was also made for deeper cooperation between the lawyers of the Slavic states.[63]

Although the lawyers of the third meeting resolved to organize the fourth one, it was never held during the First Republic. Firstly, concerns that two years for the preparation of the next congress were not enough already appeared with the end of the third congress.[64] The Annual Report

59 In addition to visitors from in total 11 countries (neighbouring countries, southern European countries and countries that were part of the Little Entente) came to the congress also a delegation of the Tokyo Japanese Attorneys Association. In *Slovenský denník*. 1930, Vol. 9, no. 19, p. 3.

60 BAŘINKA, C. Zpráva o průběhu III. sjezdu právníků československých v Bratislavě 1930. *Právny obzor*. 1930, Vol. 13, p. 611.

61 He, however, in his opening speech reproached lawyers for absence of questions on constitutional law which would have been quite interesting for the new state. In BAŘINKA, C. Zpráva o průběhu III. sjezdu právníků československých v Bratislavě 1930. *Právny obzor*. 1930, Vol. 13, p. 609.

62 For example, President of the Supreme Court *Augustin Popelka*, President of the Supreme Administrative Court *Emil Hácha* or deans of Czechoslovak law faculties (*Bohuš Tomsa, Robert Mayr-Harting, Rudolf Dominik*).

63 This appeal was apparently answered by the arrangement of the First Congress of Lawyers of the Slavic States in 1933 which was held in Bratislava again. In BAŘINKA, C. Zpráva o průběhu III. sjezdu právníků československých v Bratislavě 1930. *Právny obzor. 1930, Vol. 13, p. 679.*

64 IV. sjezd právníků československých v Praze 1932. *Právník*. 1930, Vol. 69, pp. 713–716.

of the *Právnická jednota* for 1932 confirms that the organization of the fourth congress of Czechoslovak lawyers in Prague is completely unrealistic. In this way, the organisation of the fourth congress is postponed until the end of the First Republic.[65]

5 Meetings of Lawyers after 1948

In the years 1930–1948, the activity of Czechoslovak lawyers in connection with the organization of the fourth congress was relatively on the wane. Yet in 1948 the baton is taken up by socialist lawyers. Although they maintain continuity and after the restoration of Czechoslovakia, they also renew the Congress as "Fourth", it is no longer a congress in the pre-war sense. The addition in the title of the fourth congress proclaims all: "Za socialistické pravo!" [For Socialist Law!].

The organisation of this congress was approved by the Conference of the Legal Council at its meeting on June 1949. The role of the congress was clear, namely, to contribute to the fulfilment of the tasks set for Czechoslovak communist lawyers by the IXth Congress of the Communist Party of Czechoslovakia which meant based on the Constitution of 9 May to carry out the people state administration and the judiciary towards the socialist transformation of the state. The planned congress thus had no other purpose than to be a manifestation of Czechoslovak lawyers for the socialist construction of law. The organisation of the fourth congress was entrusted to the *Jednota československých právníků* and Labour Unions under the direct leadership of the Communist Party.[66]

Even the course of the event which finally took place in Prague on 23–25 September 1949 with the participation of approximately 2 000 lawyers did not resemble its predecessors. It was no longer an event with set questions on which any of the lawyers could suggest the paper for possible presentation. The entire program was centralized around three predetermined topics. The first, presented by the Minister of Justice *Alexej*

65 KUBEŠ, V. Výroční zpráva o činnosti Právnické jednoty v Praze za rok 1937, podaná na valné hromadě dne 19. května 1938. *Právník. 1938, Vol. 77, no. 7, p. 444.*

66 Usnesení přijaté konferencí Právní rady ze dne 26. 6. 1949 v Praze. *Právník*. 1949, Vol. 88, no. 5–6, p. 286.

Čepička on the necessity of a new codification of the basic codes, the second, presented by the Vice-President of the Supreme Court *Vladimír Procházka* on the Marxist-Leninist conception of the function of law in a people's democratic society and the third, presented by the dean of the Faculty of Law of the Charles University *Josef Tureček* on Czechoslovak lawyers and the world struggle for progress and peace, all this with the participation of Soviet lawyers.[67] The participants then discussed the various branches of law in the spirit of the contributions made. Finally, the Plenary adopted a final declaration in which Czechoslovak lawyers pledged their loyalty in eight points[68] to the new order that had been established in Czechoslovakia since 1948. From that time the tradition of congresses was completely silent.

6 Renewal of Meetings and their Continuation?

On 5 May of this year, the first congress of Czech lawyers was held in Prague. The event was organized as a continuation of its predecessors at the instigation of a few inflamed members of the *Česká právnická jednota*. Preparations for the event began in January 2020 at the suggestion of the President of the Czech Bar Association *Vladimír Jirousek* who came up with the idea of reviving law congresses. *Luboš Tichý*, who popularized the whole topic in his article,[69] played important role in this process as well. The congress of lawyers was then renewed after almost 74 years when selected lawyers gathered in Prague *Klementinum*. The topic of the congress of May 2022 was determined as: *"Lawyers – not only professional but also social responsibility, institutional safeguards of their independence"* which was then discussed by presented contributors.

Although the congress did not adopt any report in its final communiqué suggesting the organisation of another congress in the future, it is nevertheless positive that this idea was raised at the Congress Committee in late May.

67 RAIS, Š. (ed.). *Za socialistické právo: manifestační sjezd čs. právníků ve dnech 23.–25. září 1949* [For Socialist Law: the Manifestation Congress of Czechoslovak Lawyers, 23-25 September 1949]. Praha: Ministerstvo spravedlnosti, 1949, pp. 7–9.

68 Ibid., pp. 114–115.

69 TICHÝ, L. Doporučuje se obnovení právnických sjezdů? [Is it recommended that Meetings of Lawyers be reinstated?]. *Advokátní deník* [online]. 4. 10. 2021. [cit. 24. 8. 2022]. Available at: https://advokatnidenik.cz/2021/10/04/doporucuje-se-obnoveni-pravnickych-sjezdu/

The attempt to bring the renewed congresses closer to the former congresses it seeks to build on by setting up specialised sections with the current topics can be also welcome. However, only the future will show whether this renewal will be able to outgrow its predecessors in importance.

7 Conclusion

This article aimed to present the events of successive law congresses of Czech and Slovak lawyers in the first five decades of the last century and to reveal their specific meanings across their development. Finally, the aim was also to mention the renewed tradition through this year's congress in Prague.

Despite the importance of the congresses of Czech (and Czechoslovak) jurists playing a significant role in the Czech legal development and the development of professional reciprocity, these congresses are not the subject of deeper and systematic interest. The main reason for this is the Congress of 1949, which was abused by communists who exploited the tradition of congresses to present their interests and declare their usurpation of power in Czechoslovakia. External events have repeatedly disrupted the possibility of regular congresses of lawyers of different professions. This article intends to recall the tradition of these congresses and to give a comprehensive overview of their history which is quite crucial thanks to the Congress of 2022 which support greater interest in its tradition.

In any case, the interaction of lawyers of all professions has ever been important. Successful samples of congresses in history show that the cooperation and ability to deal together with contemporary legal challenges encourage the development of the legal system. Except for the Congress of 1949, the previous congresses present the possible way of cooperation. Legal history is still able to provide great examples of the potential for the future of legal professions. This article shows the importance of this kind of meeting as well as the necessity of reflecting on all mistakes which were done.

References

IV. sjezd právníků československých v Praze 1932. *Právník*. 1930, Vol. 69, pp. 713–716.

71. Deutscher Juristentag Bonn 2022. *Deutscher Juristentag e.V.* [online]. Available at: https://djt.de/73-djt/teilnahme/organisatorische-hinweise/

BAŘINKA, C. Zpráva o průběhu III. sjezdu právníků československých v Bratislavě 1930. *Právny obzor*. 1930, Vol. 13, pp. 557–704.

ČÁDA, F. *Druhý sjezd československých právníků v Brně ve dnech 31. května, 1. a 2. června 1925*. Brno: S.l.: s.n., 1926.

Českému právnictvu! *Národní listy*. 1903, Vol. 43, no. 101, p. 17.

Císařský dík. *Brněnské noviny*. 1901, no. 257, p. 2.

Druhý sjezd československých právníků v Brně. *Právník*. 1925, Vol. 64, no. 11, pp. 361–365.

Druhý sjezd československých právníků v Brně. *Všehrd*. 1925, Vol. 6, no. 10, pp. 281–320.

Druhý sjezd právníků československých: konaný ve dnech 31. května, 1. a 2. června 1925 v Brně. Brno: Nákladem přípravného výboru druhého práv. sjezdu, 1925.

Feuilleton. Klasik starého práva českého. *Národní listy*. 1901, Vol. 41, no. 295, pp. 1–2.

Ke druhému právnickému sjezdu československých právníků v Brně. *Právník*. 1924, Vol. 63, no. 12, pp. 541–542.

KUBEŠ, V. Výroční zpráva o činnosti Právnické jednoty v Praze za rok 1937, podaná na valné hromadě dne 19. května 1938. *Právník*. 1938, Vol. 77, no. 7, pp. 443–451.

Ledaco. *Brněnské noviny*. 1901, no. 249, pp. 2–3.

MAYER-MALY, T. Der 1. Österreichische Juristentag. *Juristenzeitung*. 1961, Vol. 16, no. 14, pp. 460–461.

Odhalení pomníku Vikt. Kornela ze Všehrd v Chrudimi. *Katolické listy*. 1901, Vol. 5, no. 296, p. 4.

Odhalení pomníku Viktorina Kornela ze Všehrd. *Plzeňské listy*. 1901, Vol. 37, no. 248, p. 2.

OLSHAUSEN, T. *Der Deutsche Juristentag: Sein Werden und Wirken. eine Festschrift Zum Fünfzigjährigen Jubiläum des Deutschen Juristentages*. Berlin: Boston: De Gruyter, Inc, 1910. DOI: https://doi.org/10.1515/9783111541990

Oslava památky mistra Viktorina Kornela ze Všehrd. *Národní listy*. 1898, Vol. 38, no. 143, p. 2.

Přátelské poslání všem právníkům českým. *Moravská orlice*. 1898, Vol. 36, no. 129, p. 1.

První český sjezd všeprávnický. *Právník*. 1902, Vol. 41, pp. 551–552.

Prvního novodobého Sjezdu českých právníků se účastní právnické špičky. *Advokátní deník* [online]. 5. 5. 2022. Available at: https://advokatnidenik.cz/2022/05/05/prvniho-novodobeho-sjezdu-ceskych-pravniku-se-ucastni-pravnicke-spicky/

Publikace prvního vědeckého sjezdu českých právníků: konaného v Praze ve dnech 21., 22. a 23. května 1904. Praha: Nákladem sjezdu, 1904.

RAIS, Š. (ed.). *Za socialistické právo: manifestační sjezd čs. právníků ve dnech 23.–25. září 1949*. Praha: Ministerstvo spravedlnosti, 1949.

Sedmý sjezd advokátů rakouských. *Právník*. 1884, Vol. 23, pp. 674–680.

SEIDL, V. První sjezd advokátů českých. *Zprávy Právnické jednoty moravské v Brně*. 1904, Vol. 13, no. 3, pp. 160–162.

Sjezd advokátů rakouských. *Právník*. 1875, Vol. 14, pp. 673–683.

Sjezd českých právníků. *Jednota českých právníků* [online]. Available at: https://jednotaceskychpravniku.cz/sjezd-ceskych-pravniku/

Sjezd notářů Rakouských. *Právník*. 1872, Vol. 11, pp. 582–584.

SLAPNICKA, H. Die deutschen Juristenvereine und Juristentage in der Tschechoslowakei. *Germanoslavica*. 1995, Vol. 2, no. 1, pp. 101–105.

Slavnost odhalení pomníku mistra Viktorina Kornela ze Všehrd. *Právník*. 1901, Vol. 40, pp. 727–732.

Slavnost Všehrdova v Chrudimi. *Plzeňské listy*. 1901, Vol. 37, no. 232, p. 3.

Slavnostní odhalení pomníku Viktorina Kornela ze Všehrd. *Třeboňské listy*. 1901, Vol. 2, no. 46, p. 5.

TICHÝ, L. Doporučuje se obnovení právnických sjezdů? *Advokátní deník* [online]. 4. 10. 2021. Available at: https://advokatnidenik.cz/2021/10/04/doporucuje-se-obnoveni-pravnickych-sjezdu/

Třetí sjezd československých právníků. *Všehrd*. 1929, Vol. 10, no. 10, pp. 296–302.

Tretí všeprávnický sjazd v Bratislave 1930. *Právny obzor*. 1929, Vol. 12, no. 1, p. 71.

Usnesení přijaté konferencí Právní rady ze dne 26. 6. 1949 v Praze. *Právník*. 1949, Vol. 88, no. 5–6, p. 286.

ZOLL, F. *Pierwszy zjazd czeskich prawników*. Poland(?): publisher unknown, 1904.

Zprávy spolkové. *Zprávy Právnické jednoty moravské v Brně*. 1901, Vol. 10, no. 4, pp. 194–196.

Zprávy spolkové. *Zprávy Právnické jednoty moravské v Brně*. 1902. Vol. 11, no. 1, pp. 40–48.

Zprávy spolkové. *Zprávy Právnické jednoty moravské v Brně*. 1913, Vol. 22, no. 1, pp. 52–58.

Zprávy spolkové. *Zprávy Právnické jednoty moravské v Brně*. 1913, Vol. 22, no. 2, pp. 111–112.

Conceptualisation of Ideas on the Codification of Criminal Law in the Early Period of the Second Polish Republic[1]

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Abstract

The period preceding the Second Polish Republic is time when it was still unclear whether and when Poland would regain independence, and what territory it would cover. With the emergence of hope for regaining the State, questions arose how to rebuild the country after the war and the years of partitions. Socio-economic problems followed the geopolitical situation. The law shaped collective identity and that criminal law had a special task. It was to satisfy the sense of social justice. In order to achieve its goals, it must be based on solid foundations. Thus, the consolidation of Polish lands was to be an act not only of a mechanical nature, but also required to focus on the aspect of the unification of society and the issue of the law to be applied in the regained territory. The article is an attempt to show the situation and conditions in which criminal law was shaped at the eve of regaining independence, until the establishment of the Criminal Law Codification Commission.

Keywords

Interwar Period; Beginning of 20th century; Criminal Law Reform; Second Polish Republic.

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1 Introduction

At the beginning of 20th century polish territories were divided within neighbouring states and Poland as a country was not existing in geo-political scene since 1795. During first fifteen years of new century it was unclear whether and when Poland would regain independence, and what territory it would cover. With the emergence of hope for regaining the state, questions arose about how to rebuild the country after the war and the years of partitions. The period in Polish history called the Second Polish Republic spreads across interwar period. The official beginning of it was 11 November 1918 when Poland regained independence after more than one hundred years of being under partitions, and then was interrupted by World War II.

The early period of the Second Polish Republic was dominated by a patriotic mood, especially within polish intellectual elite. It was also a time of intense changes in the law of other European countries. Legal experts faced the post-war reality in a country that was diversified in every aspect, being a patchwork of three statehoods that had grown up on different cultural and economical grounds. Thus, they faced a dilemma on what legal solutions to rely on, and which ones to definitely reject in the work on codification. Shall the codification work be fast and result in new legal solutions or rather slow, precise and adopted to the contemporary reality? Shall it be partially amended step by step or built from a scratch and change biding laws completely? Those and many other questions had to be answered after regaining independence. At the top of that, the post-war society was shaken by the war, ineffective penal system and bothered by soaring crime rates. To address those matters, the Codification Commission was appointed in 1919.

2 Unification, Modernisation and Codification

The opening commission proceeding was filled with sublime, elevated speeches of leading polish lawyers and legal scholars. The president of the commission, Franciszek Ksawery Fierich called the moment of regaining independence "an act of historical justice" which led to freedom. "The sense of law gave us freedom. Let the freedom give us laws" became

the historical phrase.[2] The codification was associated with high degree of importance. Right after regaining independence and over the course of inter-war period, there was a noticeable pressure from the society and ruling elite on codifiers to issue and introduce new laws fast. However, the quality of codification process which results in certain legislation and the speed of the wole process was under consideration of many leading legal minds. Several representatives of University, Legal Association, and Advocates Association from Lviv joined in a statement issued in professional legal press. According to them *"The modern state based on the principle of freedom citizens, must give a guarantee of security against arbitrariness of any source. The modern state is based on a rule of law. The citizen must know exactly what is allowed and what is not. State authorities must comply with the rule of law as strictly as possible* […] *The law should be clear, understood system, accessible to everyone. Where there are not good laws, there is no real freedom* […] *The good law is a blessing to the people, a strength and development of the state. The bad law is a ruin for the individual, a cause of collapse of the state. The act is bad not only when the intention of the legislator does not match the needs of the society but also when the legislative technic is poor"*.[3] Such words were published already early on the commission proceedings, at the very beginning of its existence, in 1919. Those lawyers believed that to create laws one had to know the history of native laws in addition to the laws of foreign countries but Polish codifiers should know also elements of partitioners' codes to be able to relate to them while building the new legislation. The saw newly created state as a Republic, where "there is no sovereign. The law is ruling".[4]

Fast unification of law was at that time seen as one of the ways to unify the whole country. The closest legislative tasks after regaining independence were understood as a political (through constitution, through state administration reform, reforms of a justice system and a military organisation) and economical unification. The latter one was especially important since the newly build country was consisting of economically

2 Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. *Dział ogólny. Tom I. Zeszyt 1*. Warszawa: Wydawnictwo urzędowe Komisji Kodyfikacyjnej, 1920, p. 12.

3 Memoriał Wydziału Prawa i Umiejętności politycznych Uniwersytetu, Towarzystwa Prawniczego i Związku Adwokatów Polskich we Lwowie, W sprawie techniki ustawodawczej. *Kwartalnik Prawa Cywilnego i Karnego*. 1919, Vol. 2, no. 1–4, p. 153.

4 Ibid.

different parts. Some of them dominated by industry, mining, another by agriculture, textiles and metallurgy.[5] Unification of the law was supposed to smooth the differences and lead to unification of the land, society and legal culture. That is why the initial idea, right after regaining independence was to introduce law reforms regarding the most important domains of life and to simultaneously proceed with a codification process which should result in codification later on.

In the early period of the Second Polish Republic, on the newly forming polish territory there were several binding penal legislations: Tagancew's Code of 1903, German Reichsstrafgesetzbuch of 1871, Austrian Franciscana of 1852 and Hungarian Penal Code of 1879. The awareness of the upcoming necessity to work on new legislation was known within legal circles already for some time prior to 1918. Some lawyers were opting for creating a native, national penal criminal law legislation and forecasted an enormous workload related to that.[6] While others were proponents of reception of one of already binding codes. The newest one was the Tagancew's Code of 1903 which was binding at majority of polish territory. It was considered to be created under the influence of the newest European ideas, thus the first, general part of it doesn't contain any "specifically Russian moral, customary elements". Hence, this code could serve polish society for a long time before creation of native legislation.[7] This idea was being seriously considered. Especially since Sejm, which was at the time a legislative body, was burdened by a task of unifying many domains of law, there were not enough of professionals to work on legal matters. Rappaport as one of the main Polish legal scholars was claiming that the main scope of work should evolve around the detailed part of the code, where particular crimes are being defined, since it would characterise polish society and address the main problems of it and its needs. Therefore, in his opinion the general part of Tagancew's code was to be fully implemented across all Polish territory.[8] This would be a way of fast

5 BOSSOWSKI, F. O naszych najbliższych zadaniach ustawodawczych. *Kwartalnik Prawa Cywilnego i Karnego*. 1919, Vol. 2, no. 1–4, p. 119.

6 MAKOWSKI, W. Materiały do kodyfikacji prawa karnego. Wstęp. *Gazeta Sądowa Warszawska*. 1916, no. 9, p. 93.

7 RAPPAPORT, E. S. Nowela karna z 9 grudnia 1918 r., jej braki i skutki. *Kwartalnik Prawa Cywilnego i Karnego*. 1918, Vol. 1, no. 1–4, pp. 530–531.

8 Ibid.

unification. Although, over the course of time, the pressure on introducing new legislation was weakening. At the early period of the Second Polish Republic, lawyers overestimated the influence of legal reform on real life and it became clear that the country could function in post-partition state without any great harm.[9]

The leading member of the Codification Commission, Juliusz Makarewicz, as many other lawyers, focused on the originality of solutions. They opted for setting up a main goal to create a Polish code of penal law, built on solid foundations, being a response to the needs of the nation, not a repetition of solutions from partitioner's codes. They believed that the creation of a domestic codification was an urgent matter that should not be transferred to the next generation, but they were also aware of the enormous amount of work involved. Hence, on the way to achieving ideal solutions, the process of their creation has been extended. The lawyers at the time managed not to succumb to the pressure of time, society or politicians, and the solutions they proposed were not adopted until 1932. Juliusz Makarewicz believed that it was forbidden to interpret the law in the Second Polish Republic on the basis of earlier penal acts. The pre-partition ones were too archaic, the society had its own dynamics and was constantly changing, while the partition laws were foreign laws. As such, they did not meet the needs of the Polish society that were developing over more than a hundred years. Therefore, the legislator's goal was to introduce a product that would be a modern, complete code, taking into account the needs of the society and be based on the latest legal solutions the should be adopted to Polish conditions.

3 Schools of Law

Interwar period was very intense time nor only for Poland but also other European countries. It was time of transformation and legislative changes. This notion started already at the and of 19th century at the moment of emergence of two schools of criminal law, Italian anthropological one

9 GAŁĘDEK, M. *Ideologia i aksjologia polskiego prawa prywatnego w okresie międzywojennym: debaty nad założeniami kodyfikacji*. [s. l.]: [s. n.], [s.a.], pp. 9–10. (Forthcoming)

and German sociological one[10]. Poland was of no exception when it came to searching for an answer to the question on a role of a criminal law in the life of the society at the beginning of 20th century.

Also, at the turn of the 19th and 20th centuries the idea of a punishment has changed. Not only lawyers but also legal scholars were considering what it should look like and what tasks it should fulfil. Aleksander Mogilnicki in his lecture delivered at the University of Warsaw on 20 November 1917 summed up the development of criminal law. He saw the beginning of those changes starting from the French Revolution, which resulted in a switch in the approach to a human being as an individual, as well as his rights and position in the criminal proceedings. There was also a debate as to the causes of the crime. The old school, the classical one, was standing on the ground that the source of it is the character of the perpetrator as well as his bad will, and the aim of the punishment was to scare off potential perpetrators and to compensate for the harm suffered. Thus, the punishment was based on fear. Fear and retaliation, and was essentially brutal. For centuries, society had dealt with cruelty in the administration of punishments. It took place in public and had the form of a performance. The offender was a subject to a punishment in front of the crowd, which was supposed to be terrifying and fulfil a preventive function of a criminal law. It was also intended to discourage potential criminals. Initially, the means of fighting crime was only punishment. The punishment and the person of the perpetrator were considered during criminal proceedings in isolation from real life, the circumstances of the crime, the same as the perpetrator's situation. The crime, on the other hand, was considered only as an act of the individual's bad will.[11] However, at the turn of the 20th century, there was a reflection on the effectiveness of such a method. With crime rates soaring, and the society struggling with cruelty, came the reflection on a failure of very punitive penal law system. A certain change in views came about under the influence of two Italian scholars, Caesar Beccaria and Caesar Lombroso. They initiated the new-classical trend.

10 JANICKA, D. *O przestępstwach, karach i prewencji kryminalnej. Studia z najnowszej historii polskiego prawa karnego i nauki prawa*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2021, p. 119.

11 MOGILNICKI, A. Zadania nauki prawa karnego. *Kwartalnik Prawa Cywilnego i Karnego*. 1918, Vol. 1, no. 1–4, p. 228.

The first of them, in his work "Dei delitti e delle pene" from 1764, proposed changing the function of the punishment, from one aimed at deterring the offender, into one aimed at improving it. He considered that excessive severity of the penalties "awakens the lust for blood" and desensitises the citizens. The deterrent punishment continued to be used, but this function was relegated to the background. However, what has remained unchanged is ill will as the root cause of crimes. It was a common point of the Old Classical and New Classical schools. It was still the focus of the entire justice system. The works of the second scientist, Caesar Lombroso, a Turin physician, brought a certain change in views on committing crimes. The results of his research among criminals were published in 1876. He drew attention to the reasons for committing crimes lying in the person of the perpetrator and thus initiated the anthropological school of criminal law. There was a turn from disease of the will. Lombroso saw the reasons for committing the prohibited acts in the psychophysical nature of the perpetrator. According to him, there were no criminals in the world, only sick and degenerate people, who were different from the rest of human kind. He understood the crime as a disease, and the perpetrator as a human being endowed with a certain set of features that predestined him to a crime from birth.[12] Another trend that changed the perception of the phenomenon of crime and thus turned out to be a breakthrough, was the sociological school, which appeared on the basis of a dispute between the two previous schools. It was initiated by Enrico Ferri and Rafael Garofalo, then developed by Franz von Liszt. According to its assumptions, each crime had a clear external cause, it is determined by social or family conditions. On the basis of the those discoveries, the following emerged: criminal anthropology, criminal sociology and criminal policy, which provided a broader perspective on the phenomenon of crime, tried to study its causes in a broad sense and eventually led to the development of new methods and tools for fighting crime.[13]

All those international trends were widely discussed in Polish legal press. According to Aleksander Mogilnicki, who was amongst of the members of Codification Commission, Poland after the partitions and after the war

12 MOGILNICKI, A. Zadania nauki prawa karnego. *Kwartalnik Prawa Cywilnego i Karnego*. 1918, Vol. 1, no. 1–4, p. 228–241.

13 Ibid.

resembles a human organism devastated by disease. This disease was called a crime and must not only be treated but also prevented, because the exhausted organism is susceptible to it. He recommended studying criminal law at several platforms. The first was a historical analysis which reflected on the course of human thought, allowed to learn the history of the development of certain concepts by showing their meaning, and ways that they have shaped the present reality. That led to better understanding of it. The second platform was the philosophical analysis of the concept of punishment, crime and their mutual interaction, and the next is a comparative analysis. The latter one was referring to how other countries, with different socio-economic conditions, fought against the crime and what were the results. Mogilnicki agreed with the rejection of incorporating one of partitioners codes, as foreign, which should be used only till the adoption by the Sejm of new, native law, better suited to the needs of Polish society and its conditions. In the lecture, he referred to the "feelings and aspirations" of Polish society as a determinant for the development of new solutions in legal regulations. He analyses criminal law as the social phenomenon against which the state has the right to apply coercion. The state is also responsible for establishing the rules and measures to combat crime. Mogilnicki postulated that for the codification work it was important to divide the work into two parts, the first one would concern the general part, within which it was necessary to thoroughly analyse the concept of punishment, and main rules of the criminal code, research the causes of crimes, and the second – the detailed part with a division into specific crimes.[14] Similar views are presented by another lawyer of the interwar period – Wacław Makowski in his lecture "Introduction to the philosophy of criminal law" delivered at the University of Warsaw. Like its predecessor, he was proposing that criminal law and the phenomenon of crime should be studied globally, in its entire extent and development. To implement this assumption, the dogmatic and historical methods of law analysis were not enough. They tend to take the crime out of its socio-cultural context. While, the prohibited act is not only an act of the individual's bad will and does not function in isolation

14 MOGILNICKI, A. Zadania nauki prawa karnego. *Kwartalnik Prawa Cywilnego i Karnego*. 1918, Vol. 1, no. 1–4.

from external factors. Thus, only its global analysis in the sociological and psychological context would bring tangible results. The criminal law was closely related to the existence of the state. Before the state organisation, primitive societies were built on ancestral foundations. Characteristic for them was the presence of the kinship factor, economic and religious community, and therefore the existence of strong ties between individuals and members of the family. The communities were characterised by a lack of individualism, the uniformity of social and mental life, and a community of property and work. In the pre-state ancestral organisation, in external relations, f.e. between families, punishment was related to feeling of anger and a strong need for retaliation. According to Makowski, it was a prototype of a penal law notion. The harm suffered by a family member was treated as a loss for the entire family, which rooted from the aforementioned sense of community. Punishment was a reaction of the group against the offender, a revenge. On the other hand, if an individual acted against the rules or order of the family and it caused an internal conflict, he was rejected by the family, sentenced to exile, and thus to homelessness and eventually death. With the birth of the state organisation, a new aspect of punishment emerged, punishment as a mean exercise power. At a certain stage in the development of statehood, it was recognised, as noted by Makowski, that the state had the right to use coercion against an individual. Polish lawyers have devoted a lot of attention to the sources of criminal law that the world has known so far.[15]

The aforementioned exchange of thoughts took place at the eve of regaining independence, and then around the establishment of the Codification Commission. On the one hand, the condition of Polish society and its needs were analysed, and on the other, the applicable legal regulations and the basic assumptions of criminal law and the direction of its development were discussed in detail. The result of this dialogue was the opening of a different view of crime. Namely, it began to be considered on many levels. New trends in the science of Polish criminal law have emerged, such

15 MAKOWSKI, W. Wstęp do filozofii prawa karnego. *Kwartalnik Prawa Cywilnego i Karnego*. 1918, Vol. 1, No. 1–4, pp. 301–313.

as criminal anthropology, criminal sociology and criminal policy. The move was towards making punishment more rational.[16]

Already at this early stage of a post-war state organisation, the tendency to build a rationalising attitude in society by eliminating the primal instincts of revenge and retaliation from the collective consciousness was visible. The coercion applied by the state should have a deeper meaning and purpose. One couldn't apply primitive punishment methods while expecting an improvement in society and a reduction of crime rates. The legal community was highly involved and had a sense of responsibility for the process of creating Polish statehood.

4 Conclusions

Conceptualisation of Ideas on the Codification of Criminal Law in Poland was a process spreaded across interwar period, with main assumptions created during the early period of the Second Polish Republic. Conceptualisation was spinning around the matters of if when and how to codify law in the newly built state and what should be a foundation of it. After some debates, the idea of creating national legislation in slow but meticulous process prevailed over reception of one of the partitioners code on the whole territory of Poland. The idea of fast codification process and on the other hand, the process of amending criminal law piece by piece and seeing the reaction of the society and leave the codification work to next generation, were also left behind. Polish lawyers fuelled by patriotism and the need of unifying and modernising laws decided to built native criminal code from a scratch and manage to defend the slow pace of work. The patriotic and solemn mood among the lawyers emerges from the analysed materials. The exchange of ideas was happening in the legal press and commission proceedings. Lawyers were repeatedly referring to vague concepts such as "the spirit of the nation", "individual properties of the Polish nation", "national distinctiveness" or "sense of tradition". While those notions were never defined by them, the conclusion is that there was a strong need for independence and for emphasising it after years of partitions. Contemporary

16 JANICKA, D. Hube – Makarewicz – Wolter. Trzy koncepcje karania na przestrzeni lat. *Archiwum Kryminologii*. 2017, no. 34, p. 17.

lawyers had a willingness to exchange ideas, they were open for external inspiration and had the desire to create one's own, innovative solutions. The Second Polish Republic and its criminal law were being built during the era of transformation in Europe. Many ideas and institutions were redefined at that time and Poland was a part of this process. There was a general atmosphere of creation and recovery from the devastation of war, not only material. At the same time the development of philosophy of the criminal law of was observed.

Two main ideas that took over the whole process were from the one hand the urge for unification understood not only as unification of the law but in a global perspective, as an unification of the territory, culture, law, economy and society. The second one was an idea of modernisation. Newly created legal solutions were supposed to be modern. Polish criminal law and the code of 1932 was created on a base of the clash of two schools od law, classical and positive. Even though the code eventually adopted many solutions of positive school of law it was a product of a compromise between the traditional approach to criminal law and positivist's one. The first ideas on how the code shall look like and which notions shall it follow were born during early period of the Second Polish Republic. The debate of this time set the path for the course of legislative work, lasting for 13 years, till the code was introduced. The reform of a penal law developed at that time laid a foundation for some solutions that are used today.

References

BOSSOWSKI, F. O naszych najbliższych zadaniach ustawodawczych. *Kwartalnik Prawa Cywilnego i Karnego*. 1919, Vol. 2, no. 1–4, p. 119.

GAŁĘDEK, M. *Ideologia i aksjologia polskiego prawa prywatnego w okresie międzywojennym: debaty nad założeniami kodyfikacji*. [s. l.]: [s. n.], [s.a.]. (Forthcoming)

JANICKA, D. Hube – Makarewicz – Wolter. Trzy koncepcje karania na przestrzeni lat. *Archiwum Kryminologii*. 2017, no. 34, pp. 5–26.

JANICKA, D. *O przestępstwach, karach i prewencji kryminalnej. Studia z najnowszej historii polskiego prawa karnego i nauki prawa*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2021.

Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. *Dział ogólny. Tom I. Zeszyt 1.* Warszawa: Wydawnictwo urzędowe Komisji Kodyfikacyjnej, 1920.

MAKOWSKI, W. Materiały do kodyfikacji prawa karnego. Wstęp. *Gazeta Sądowa Warszawska*. 1916, no. 9, p. 93.

MAKOWSKI, W. Wstęp do filozofii prawa karnego. *Kwartalnik Prawa Cywilnego i Karnego*. 1918, Vol. 1, no. 1-4, pp. 301–313.

Memoriał Wydziału Prawa i Umiejętności politycznych Uniwersytetu, Towarzystwa Prawniczego i Związku Adwokatów Polskich we Lwowie, W sprawie techniki ustawodawczej. *Kwartalnik Prawa Cywilnego i Karnego*. 1919, Vol. 2, no. 1–4, p. 153.

MOGILNICKI, A. Zadania nauki prawa karnego. *Kwartalnik Prawa Cywilnego i Karnego*. 1918, Vol. 1, no. 1–4, pp. 227–241.

RAPPAPORT, E. S. Nowela karna z 9 grudnia 1918 r., jej braki i skutki. *Kwartalnik Prawa Cywilnego i Karnego*. 1918, Vol. 1, no. 1–4, pp. 521–536.

The Hungarian Arbitration System and the Unfair Competition[1]

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Abstract

This entry will deal with the history of competition law, including the first substantive competition law of Hungary, i.e. Article V of 1923, which contained provisions regarding unfair competition. Currently, unfair competition is the subject of competition law, one of the branches of economic law, which contains regulations regarding the protection of economic competition and the prevention of consumer detriment. The purpose of Article V of 1923 was to offer general protection against any form of unfair competition.

The demonstration of each provision of the Article and the detailed demonstration and investigation of their practical implementation is not the topic of the present entry. The present paper will specifically focus on the arbitral tribunals of the Chamber and the practice of the jury since the fact that the duty and practice of these two bodies were highly significant for the application of the law in that era can be clearly concluded from the summary of research results.

Keywords

The Unfair Competition; Specific Act; the Arbitration Institute of the Budapest Chamber of Commerce; Hungary; Court.

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1 Introduction

In this paper, I will exclusively focus on the general clause expressed in section 1 of the article. Investigating the practice of Arbitral Tribunal of the Chamber of Commerce and Industry of Budapest and the Jury of the Chamber, I am seeking to know what meant the moral standard to them, based on which they could decide whether a certain commercial conduct was considered unfair or not. The reason I chose the practice of the Arbitral Tribunal of Budapest Chamber of Commerce and Industry is that they were the bodies of enforcement that made their best endeavour to standardize the practice of law regarding commercial competition with their policies in the era.

I selected the 22 legal precedents in this paper for they contained statements and explanations in connection with section 1 of the article on unfair competition, thus endeavouring to fill the category of honest commercial practice with a wide range of content as possible.

As sources, I mostly used the documents of the Arbitral Tribunal and the Jury of the Budapest Chamber of Commerce and Industry from 1923 – the year the article came into force – until 1933, the first amendment of the article. In addition, I used the decisions of the Curia (the Supreme Court of Hungary) and the verdicts of the Budapest Royal Court. As secondary sources, I used literature on unfair competition and literature on private law.

2 The General Rules of Honest Commercial Practice and Accepted Principles of Morality in the Article on Unfair Competition

Norms always stem from a moral norm accepted by society. We can even say that law and morals are inseparable concepts. This standpoint is supported by Károly Szaladits, according to whom *"with the voluntary conformity of citizens and the disapproval of unlawful procedure, morals largely provide the rule of law as well"*[2] The Hungarian legal literature attributes primarily gap filling functions

2 SZALADITS, K. *Magyar magánjog I. Általános rész.* Budapest: Grill Könyvkiadó, 1941, p. 7.

to the clause on accepted principles of morality and regards it to be *"applicable when and insofar where legal regulation is not applied."*[3]

In most cases, morality as a private law concept arises in connection with contracts, the invalidity of contracts, In the legal literature of the 19th and 20th century, it was typical to discuss the breach of accepted principles of morality within the impossibility of the service.[4] As early as in the 1800s, Ignácz Frank declared contracts not conflicting with the law void because *"they were not compatible with honour."*[5] The legal literature of the interwar period made an attempt to distinguish contracts which were contrary to public policy and accepted principles of morality. In the latter, not only the agreements concerning individuals and families were included, but also the transactions – usurious and exploitative contracts – concerning public policy and economic order.[6]

Before World War II, due to the lack of a firm distinction between public policy and accepted principles of morality, every contract that *"limited individual freedom to the extent that it deprives the individual of the practice such freedoms"* were declared void.[7] This includes the limitation of industrial and economic freedom with non-compete, unlawful wage competition or anticompetitive cartel agreements,[8] but we can also find references to the accepted principles of morality in connection with unlawful pyramid schemes. We can see the phenomenon of accepted principles of morality in connection with the increased economic free competition and widespread unfair competition as the principle that provides a general starting point for the protection against unfair competition.

3 MENYHÁRD, A. *A jóerkölcsbe ütköző szerződések*. Budapest: Gondolat, 2004, p. 286.

4 Ibid, p. 145.

5 FRANK, I. *A közigazgság törvénye Magyarhonban*. Buda: Magyar Királyi Egyetem, 1845, p. 589.

6 DELI, G. *A generális klauzulák dogmatikai, történeti, és összehasonlító elemzése, különös tekintettel a jóerkölcsbe ütköző szerződések tilalmára. Doktori értekezés*. Budapest: PPKE JÁK, 2009, p. 188.

7 SZALADITS, K. *Magyar magánjog I. Általános rész*. Budapest: Grill Könyvkiadó, 1941, p. 340.

8 For further information see: HOMOKI-NAGY, M. Megjegyzések a kartellmagánjog történetéhez. In: *Versenytükör*. 2016, Vol. 12, no. 2, pp. 39–40. VARGA, N. Kartelljog a gyakorlatban: a bemutatási kötelezettség elmulasztása miatt indított eljárás. In: GOSZTONYI, G., RÉVÉSZ M. (eds.). *Jogtörténeti parerga II. Ünnepi tanulmányok Mezey Barna 65. születésnapja tiszteletére*. Budapest: ELTE Eötvös Kiadó, 2018, pp. 283–289.

According to judicial practice, the accepted principles of morality expressed the general value judgement of the society, the limits determined by private autonomies and common consent, the general moral norms and the standard of generally expected conduct. While the origin of accepted principles of morality as a private law category should be sought in the general value judgement of society, the starting point related to unfair competition can be found in a more limited circle, i.e. the moral judgement of the commercial and industrial world. In the following, I will seek to know how different could the content of interpreting accepted principles of morality – regarding unfair commercial conduct – be from the general interpretation of accepted principles of morality.

3 Honest Commercial Practice and accepted Principles of Morality as the Standards of Unfair Competition

The central element of Article V of 1923 on unfair competition (AUC) was obviously honest commercial practice which served as the starting point for judging each commercial act. Here, the concepts of honest commercial practice and unfair competition are worth talking about briefly.

"Any business conduct regarded as unfair competition by the commercial and industrial world is unfair competition."[9] This statement is supported by the standpoint of the Jury of the Budapest Chamber of Commerce and Industry (Jury) according to which *"by causing his competitors harm or heavy losses by his success, or commercial or industrial activity with licit means, one is not engaged in unfair competition."*[10] When we usually talk about honest commercial practice and accepted principles of morality a a narrower category of private law appearing in commerce, by it, we should always mean the moral judgement of the business world.

On the one hand, a distinction was made between the proper judgement of good taste unaccepted principles of morality. On the other hand, the competitor's

9 BÁNYÁSZ, J. *A tisztességtelen verseny legújabb joggyakorlata*. Budapest: Ujságüzem könyvkiadó és nyomda rt., 1933, p. 3.

10 KRUSÓCZKI, B. The Role of the Budapest Chamber of Commerce and Industry regarding Unfair Competition. In: FRENKEL, D., VARGA, N. (eds.). *Law and History New Studies*. Athens: Athens Institute for Education and Research, 2021, p. 88.

endangered, legitimate interests were also respected in the context of honest commercial practice. From the standpoint quoted above, it also follows that the harsh, ruthless battle unfolding in the commercial world, which could aim at destroying another person, the competitor or conflicted with any other law provisions, did not, in itself, constitute as unfair conduct. This presupposed that the competitive intent and the applied means were not immoral.[11]

The quoted standpoint of the Jury raises several questions when the competition law categories of accepted principles of morality and honest commercial practice are analysed. On the one hand, it is clear that the standpoint according to which the concept of accepted principles of morality has to be interpreted with different contents in relation to unfair competition was correct. While in general, we can say that the value judgements in connection with morality originated from the general judgement of society, we could only rely on the traders and manufacturers' moral judgements as far as commercial competition is concerned. In my opinion, it resulted from the fact that the society of the era would have regarded any commercial act that aimed at destroying and harming competitors or was illegal as unethical, despite the fact that these acts were not automatically constituted as unfair practices. The emphasis was on the circumstances and if the competitive intent and the applied means were not immoral, competition remained free. In my opinion, based on these, we could say that the boundaries established by the commercial and industrial world of the era proved wider than what was accepted by the general moral judgement of society. However, this is not necessarily true. During the examination of the practice, some of the cases demonstrated the opposite. It might be more accurate to state that the moral standard which had to be used when judging competitive acts could not be set accurately in a general manner. As I will seek to emphasize in the present entry, whether a commercial procedure was legal or not always depended on the judgement of the circumstances of the particular case.[12] The category and interpretation of accepted principles of morality with the content described here is what we can summarize as honest commercial practice.

11 KRUSÓCZKI, 2021, op. cit.

12 The right guidance has always been provided by the circumstances of the particular case, the experiences of everyday life and the phenomena of commercial life. KRUSÓCZKI, 2021, op. cit., p. 89.

There is one more issue regarding the analysis of accepted principles of morality and honest commercial practice I would like to clarify. A conduct could automatically constitute as unfair if a commercial procedure was carried out in a way that it conflicted with the law. According to Attila Menyhárd, the prohibition of conflicting with the law could be considered lex specialis compared to the prohibition of conflicting with accepted principles of morality.[13] Does the violation of law mean the violation of accepted principles of morality at the same time?[14] However, when we examine this question through the category of honest commercial practice, we can come to different conclusions.

The spice merchant plaintiff based on his lawsuit on the defendant selling milk without a permit. The Royal Court of Budapest decided that unfair competition took place. This decision was later upheld by the Budapest Royal Court of Appeal. However, the standpoints regarding the issue[15] found the judicial practice which, based on other laws, decided that it was unfair competition resulting from punishable acts, doubtable.[16] *"The purpose of the competition law was to persecute those acts and conducts that could not be persecuted based on any other law." So it is clear that an act that violates the law, cannot be one to be persecuted based on the law on unfair competition."*[17] The Curia agreed with this standpoint as in its verdict, they rejected the plaintiff with the following justification. *"Even if the defendant violated the regulations on the permit to selling milk, it does not necessarily mean that this conduct violates the AUC as in itself not every act prohibited by the law is unfair or immoral."*[18] In this case the expression "in itself" had to be emphasized as, in my opinion, theabove-mentionedd standpoint, according to which an act that violates the law cannot be one to be persecuted based on the law on unfair competition, is not correct. In my opinion, the interpretation of the verdict of the Curia in this context would be misleading and would conflict with the moral content

13 MENYHÁRD, 2004, op. cit., p. 252; According to his line of thoughts, the particular legal order and the value system that it conveys are also parts of the contents of accepted principles of morality.

14 DELI, 2009, op. cit., p. 169.

15 For further information see MESZLÉNYI, A. *A tisztességtelen versenyről szóló törvény magyarázata*. Budapest: Athenaeum, 1936.

16 *Közigazgatási értesítő*. 1937, Vol. 32, no. 3, p. 4.

17 Ibid, p. 5.

18 KRUSÓCZKI, 2021, op. cit., p. 90.

of competitive fairness. The first competition law of Hungary wanted to provide protection against any manifestation of unfair competition and provided special legal consequences – prohibitory injunction, interdiction, publication in newspapers, etc. – for competitor, since only with these means could get the conducts violating commerce back on track.[19] It would have been incorrect to deprive the competitors, against whom unfair procedures – realizing acts conflicting with other laws as well – had been carried out, of these means. As far as I am concerned, I find the approach, according to which despite the fact that a commercial act conflicted with the law, it did not automatically lose its feature of being contradictory to honest commercial practice, more accurate. According to my interpretation, what the expression "in itself" highlighted in the verdict of the Curia exactly tried to express was that in such cases, the circumstances of an act have to be investigated as well, since only in consequence of these – based on the moral judgement of the commercial and industrial world – could it be decided whether the act violated the requirements of honest commercial practice.[20]

19 *"The chapter on the transgression of the limits laid down by honest commercial practice is not exhaustive. It only provides a non-exhaustive list of the most significant cases of unfair competition. Thus, the arbitral tribunal is not barred from deciding that unfair competition took place even if they find that none of the cases of Chapter II is taking place. This is what the rule stated in Section 1 of the law provided a procedure for. According to the rule, commercial competition must not take place in a way that it conflicts with honest commercial practices or accepted principles of morality in general and the person whose conduct conflicts with these can be ordered to put an end to such conduct by the party so entitled."* KRUSÓCZKI, 2021, op. cit., p. 90.

20 In verdict p. IV. 3596/1935. the Curia considered that: *"Although the violation of statutory or contractual obligations does not imply that a certain conduct conflicts with the AUC as well because not every act prohibited by the law or contract is unfair or immoral in itself, but it can be so due to the nature of the act or the circumstances, namely, when the purpose, manner or means of violation is incompatible with the requirements of honest commercial practice or accepted principles of morality."* The point of the following case is that the defendant was selling razor blades after closing time. According to the plaintiff, this act was conduct conflicting with Section 1 of the AUC since the plaintiff was trying to circumvent the general non-compete, which conflicted with honest commercial practice. According to the standpoint of the Curia, if the defendant had been engaged in this act in a planned, regular manner, he would have, indeed, committed an unlawful act. Here, I would like to point out that the reason the defendant's conduct constituted as conflicting with honest commercial practice might not have been that it was unlawful regarding the closing time, but because of the circumstances, namely its planned and regular manner. According to the judgement of the Curia, however, the circumstance that the defendant sold only one razor blade per time and did it three times after closing time, cannot be regarded as planned conduct in the particular case. KRUSÓCZKI, 2021, op. cit., pp. 90–91; In several similar cases, too – when a competitive action also conflicted with the law –, the Arbitral Tribunal of the Budapest Chamber of Commerce and Industry concluded that even though a certain commercial conduct conflicts with the law, it does not automatically constitute as unfair competition. KRUSÓCZKI, 2021, op. cit., p. 91.

Both legislation and jurisprudence have agreed that the content of accepted principles of morality cannot be determined by law. Both leave the specification of the content in the hands of judicial practice.[21] So it was regarding the determination of the content of honest commercial practice in connection with unfair competition. At this point though, there was a substantive difference between the judicial specification of accepted principles of morality and the judicial consideration of honest commercial practice. In the latter case, enforcement had to be based on the moral judgements of the commercial and industrial world of the era, which, in many cases, was not a simple matter for judges with no commercial expertise. This is what the legislature recognized and created opportunities to ask the chambers of commerce and industry for help and advice regarding particular cases.

4 The Guidelines of the Arbitral Tribunal of the Budapest Chamber of Commerce and Industry Regarding each Act of Competition

The arbitral tribunal procedures were not actually civil proceedings, they rather substituted these. The state set up its own institutions of judicial protectio, but did not oblige the parties to use them in case of a dispute. Rather, the parties involved were enabled to deal with their disputes between themselves, without the assistance of the state's body of judicial protection.[22] Overall, we can say that the proceedings and decision of the arbitral tribunal were based on private-law relationships and they fell under private law as they could only proceed on the basis of the contracts concluded by the parties.[23] However, if the executive power endows the verdict of the arbitral tribunal with qualities of a public document or other qualities of a final judgement,

21 Bálint Kolosváry emphasized that determining what the accepted principles of morality were had to be sought in the current social perceptions, so he did not categorise it as a legal issue. In his opinion, though, how business intent related to public morality was a legal matter. KOLOSVÁRY, B. *A magyar magánjog tankönyve*. Budapest: Grill Károly Könyvkiadóvállalat, 1911, p. 102; Its examination will be essential with regard to the judgement of unfair competition.

22 GAÁR, V. *A magyar Polgári Perrendtartás magyarázata. 2. kötet*. Budapest: Athenaeum irodalmi és nyomdai Rt., 1911, p. 385.

23 MAGYARY, G. *Magyar polgári perjog*. Budapest: Franklin-társulat, Budapest, 1924, p. 729.

the legislative power has an obligation to guarantee that the public interest and the legitimate private interest cannot be violated by the arbitral tribunal proceedings.[24] In relation to the foregoing, Article I of 1911 on the Code of Civil Procedure (hereinafter: CCP) had already contained that the effects of arbitral tribunal verdict and the agreement are the same as the that of the final judgement of a court and it sought to regulate the entire proceedings with guarantee elements.[25]

As I explained earlier, regarding specific acts of unfair competition, the aggrieved competitor had more opportunities to resort to the protection provided by the competition law. One form of enforcing rights was to initiate arbitration before the arbitral tribunals working within the organisation of the chambers of commerce and industry. Before examining the practice of the Arbitral Tribunal regarding acts of unfair competition, I would like to briefly summarise the points where essential differences occur between the arbitral tribunals of the chambers and thee arbitrations regulated in Title XVII of the CCP.

In respect to the cases described in the AUC, the arbitral tribunals are regarded as ordinary courts, while the arbitration regulated in the CCP was always exceptional. The power of the arbitral tribunals of the chambers was determined by the unilateral declaration of the plaintiff, according to which they filed the lawsuit before them, while according to the rules of the CCP, the arbitration clause was only valid if the parties stipulate it in a joint, bilateral legal act. The members of the arbitral tribunals could only be selected from the register of the jury members. Its president was always one of the judges of a High Court designated by the Minister of Justice, while, according to the regulation of the CCP, anyone could be a member of the arbitral tribunal, except for those who could be excluded on the basis of Section 774 of the CCP, and it was not mandatory to appoint a president. Nevertheless, one of the main differences was that the arbitral tribunals carried out judicial

24 MESZLÉNYI, A. *Bevezető a Polgári perrendtartáshoz*. Budapest: Athenaeum irodalmi és nyomdai Rt., 1911, p. 396.

25 In relation to the arbitral proceedings, the Code of Civil Procedure of 1911 also determined the subject of the arbitral contract and its means of validity, its discontinuation, the selection and exclusion of the members of the arbitral tribunal, as well as the judicial procedure and the actions for annulment of a decision.

activities, they could hear witnesses and perform proofs of concept, while, according to the rules of the CCP, if an arbitral tribunal wished to carry out such activities, they had to turn to the competent District Court.[26] It was possible to appeal against the decisions of the arbitral tribunals to the competent High Court, while, according to the rules of the CCP, the decisions of the arbitral tribunals could only be challenged with lawsuits of annulment.[27]

Thus, the main difference between the chamber jury and the arbitral tribunals was the fact that while the jury provided opinions, assessments regarding specific commercial conducts, the arbitral tribunals gave irrevocable judgements in case of a lawsuit brought before them by the aggrieved party.[28] In the following, I will provide some insight, with honest commercial practice and accepted principles of morality in the centre, into the practice of the Arbitral Tribunal working within the Budapest Chamber of Commerce and Industry.

After the arguments presented by the parties, the Arbitral Tribunal determined the following facts. In their shop, the defendant served their customers asking for Franck coffee another brand of coffee. They did it without drawing their attention to the fact that they were serving another brand instead of the one the customers had asked for. According to the judgement of the Arbitral Tribunal, this procedure was, on the one hand, capable of deceiving the customers and on the other hand, it could put the manufacturer of the product requested by the customers at a particular disadvantage. Finally, the Arbitral Tribunal drew attention to the fact that the defendant's commercial conduct *"clearly destroyed the tradesmen's respectability as the with their procedure, the defendant undermined the most important basis of commerce, namely the faith and trust in tradesmen which should have existed towards them from the manufacturer of the product and the other tradesmen as well."*[29] The conduct determined in the facts, therefore, clearly conflicted with the law

26 KRUSÓCZKI, 2021, op. cit., p. 96.

27 Section 784 of the CCP: *"The decision of the arbitral tribunal can be annulled with action before a regular court."*

28 JULOW, J. *A választott bíróságokról.* Miskolc: Magyar jövő nyomdaüzem és lapkiadó r.-t., 1926, pp. 8–9.

29 KRUSÓCZKI, 2021, op. cit., p. 97.

and the defendant had to be made subject to an injunction prohibiting provision under Section 1 of Article V of 1923.

In the above-mentioned decision by the Arbitral Tribunal, their moral judgement is made ever clearer. Their decision was not only based on whether the defendant was engaged in a commercial practice that was prohibited by the existing law, but going far beyond that, representing every honest tradesman and craftsman, the Arbitral Tribunal tried to express their morality as well. They did this by laying down in judgement and detailing why the defendant's commercial practice conflicted with honest commercial conducts and what adverse consequences can it have on commercial life, which, ultimately, justified the injunction.

The Jury could not stress enough that regarding cases of competitive acts, it is always the circumstances of the case that one has to focus on. This resolution by the Jury was expressed to the full in every arbitration.[30]

In a case that started in 1933, the plaintiff complained that the defendant, a charcoal vendor, put charcoal packages labelled as "white impregnated charcoal" on the market, advertising them as odourless. The plaintiff attached the results of the examination carried out by the Royal Joseph University to the lawsuit. The examination determined that the examined charcoal *"had an unpleasant odour and the effects of examined charcoal wares not different from that of the ones without the white coating."*[31] Based on the arguments, referring to Section 1 of the AUC, the plaintiff requested the Arbitral Tribunal to ban the defendant from such means of advertisement and also requested the decision to be published in the specialist magazine titled Fűszerkereskedők Lapja and the newspaper titled Ujság at the defendant's expense. In their decision, the Arbitral Tribunal stated that the defendant admitted that the package of the charcoal said that it was smokeless and odourless but according to their defence, it meant that the charcoal was smokeless and odourless was it was not used, but it gave off a slight smoke and coal odour when used. According to the consideration of the Arbitral Tribunal, *"the customer who was offered smokeless and odourless charcoal by the vendor, did not put the emphasis on the fact that the charcoal they purchased had these qualities*

30 KRUSÓCZKI, 2021, op. cit., p. 98.
31 Ibid., p. 98.

when not used, but clearly interpreted the advertisement as meaning that the charcoal did not give off an unpleasant smell and smoke when used."[32] According to the resolution of the Arbitral Tribunal, the defendant's act deceived the public, which ultimately constituted as unfair competition, thus they have to be banned from continuing this activity. *"The Arbitral Tribunal banned the defendant, under the penalty of a 50-pengo per package fine, from selling charcoal in packages according to which the coal is smokeless and odourless, and also obliged the defendant to pay the plaintiff a 250-pengo litigation cost within 15 days."*[33] As the Arbitral Tribunal did not find the defendant's procedure such a serious offence to be punished with the burden of being published in a newspaper, they gave the plaintiff permission to publish the decision without giving away the defendant's name and premises in a newspaper at their own cost.

Based on the decision of the Arbitral Tribunal, the successful party three more possibilities. In case the defendant did not comply with the decision, they could institute enforcement proceedings and pursue their claim by a lawsuit before the competent royal court. Finally, if the defendant was still engaged in their unlawful conduct after the decision took effect or after the deadline for compliance with the decision – with regard to the fact they obviously acted despite their better knowledge –, they could initiate prosecution.[34]

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32 KRUSÓCZKI, 2021, op. cit.

33 Ibid.; *"The decision of injunction imposed a fine in case the defendant did not comply with the decision by adding that the imposed fine can be collected as many times as the defendant violates the provisions of the decision."* In cases permitted by the law, the decision could also order publications in newspapers and made arrangements regarding the matters of paying the litigation cost and its amount. KRUSÓCZKI, 2021, op. cit., p. 99.

34 KOVÁCS, M. *A polgári perrendtartás magyarázata*. Budapest: Athenaeum kiadó, 1933, p. 1598. Based on the decision of the arbitral tribunal, the execution petitions always had to be submitted to the arbitral tribunal itself, which forwarded the documents to the competent royal district courts. I will summarise the possibilities that could be considered during the enforcement proceedings as follows. Based on the conviction of the arbitral tribunal, the purpose of the execution petition would be that the court banned the defendant from continuing their conduct and repeating their act with imposing a fine. However, in case the arbitral had already imposed the fine in their decision – see the case above –, it was only the repetition of the banned activity that the plaintiff had to prove in order for the court that enforced the measures to collect the fine. These, however, were only applied to the cases in which the measures expressed in the decisions were physically unenforceable – e.g. spreading false information, touch customers –since in case the measure proved enforceable, the court, beyond collecting the fine, banned the forbidden activity by enforcing the measures via its delegate.

As I have pointed out multiple times when discussing the practice of the Jury, regarding their specific resolutions, the Jury increasingly tried to avoid their decisions to be regarded as fundamental statements. Contrary to this, though, the Arbitral Tribunal, in their judgements, expressed fundamental decisions as well, contributing to the even clearer assessment of competitive acts.

In the following case, it was not the exactly the non-compliance with honest commercial practice of a specific commercial conduct that the Arbitral Tribunal had to assess, but they had to decide whether an idea, a unique advertising method, a commercial notion could be defended on the basis of the law on unfair competition. In their lawsuit, the plaintiff presented that they had been using a unique propaganda instrument for marketing their lozenges for almost a year. It consisted of an advertising character depicting a chimney sweeper holding a sign advertising the lozenge "Negro", placed in front of lozenge shops or in their shop windows. As the plaintiff presented, *"the defendant violated the intangible rights implicit in this propaganda instrument by their practice of placing a child's figure standing next to a snow pile, holding their hand in front of their mouth with a sign advertising the Kaiser toffee on s sign attached to a pole."*[35] The de facto basis of the plaintiff's lawsuit was laid down on the second page of the lawsuit. According to it, *"the use of such advertising characters was their idea, they acquired the right to this idea and made it renowned at great effort and cost. The defendant committed their act violating honest commercial practice by copying this idea."*[36] The defendant requested the rejection of the lawsuit as in their opinion, the way they used the advertisement was widespread. According to their view, moreover, he had started this method of advertisement earlier than the plaintiff.

The Arbitral Tribunal considered that the plaintiff's idea was neither ne, nor unique. It was, indeed, well-known that the advertisement method used by both the defendant and the plaintiff had been common, widely used for years and the use of suspended, free-standing boards or ones that could be placed in shop windows and depicted human characters could not be considered as an idea that would create monopoly for someone.[37] We can

35 KRUSÓCZKI, 2021, op. cit., p. 100.
36 Ibid.
37 Ibid.

see that, in this case as well, the Arbitral Tribunal proceeded on the basis of the moral judgement of the business world and concluded that nobody could consider an existing commercial practice their own, thus that could not be defended. Beyond what has been mentioned above, though, a more important decision of principle is evident from the arbitration, which could be regarded as guidance in the assessment of competitive acts with a comparable situation. On the basis of the decision, we can say that in this case, the specificity of the idea – the application of advertisements on the human figures – might not generally have been in the use and place of the set-up of the figures, but exclusively in the application of particularly shaped figure. Solely because somebody used a particularly shaped figure as an advertising instrument, others still had the right to apply other figures, i.e. the use of figures depicting humans could not be appropriated.[38]

5 Conclusion

In my entry, I sought to choose legal cases which are especially in relation to Section 1 of the article on unfair competition, as in these cases, the particular moral standard, the content of which I was focusing on, had to be applied. Due to the length limit, I could not present all the 22 chosen cases in detail in my paper, so in many cases, footnotes indicated their contents.

Summarising my results, I assume that the foundations of the chamber work were obviously professionalism, moral reliability and promptness. In the course of their work, the endeavour of the acknowledged experts gathering in the arbitral tribunals of the chamber and juries was always for their moral resolutions and decisions to comply with the public perception of the commercial and industrial world of the era. Despite the fact that the resolutions provided by the jury were not binding on the competitors

38 Moreover, in their lawsuit, the plaintiff pointed out the fact that for them, protection was registered for the *"chimney sweeper"* figure. In relation this, the Arbitral Tribunal pointed out that in this regard, the fact that the plaintiff got the protection and set up human figures in front of shops in the lozenge business makes no difference as it was merely a matter of detail. The advertising character depicting a human figure had been generally used for years, thus the idea could not be regarded as the plaintiff's exclusive right and a right to be protected.

complained of, it was, of course, permitted to refer to them. In my opinion, Sections 44-45 of the Article on unfair competition have definitely fulfilled their purpose as our courts preferred to turn to the chambers of commerce and industry if they had doubts on the assessment of specific business conducts. The arbitral tribunals before which disputes regarding unfair competition were brought, were often criticised for applying excessively strict standards. At the same time, though, we could see that they sought to bear the decade-long business habits and procedures in mind and they tried to break them down step by step, gradually.[39]

As the primary objective of my paper, I set out the examination of the standard of honest commercial practice and demonstrating how the practice of the chambers tried to fill it with content. I am of the opinion that based on the practice of the Jury and the Arbitral Tribunal of the Budapest Chamber of Commerce and Industry, we can clearly state that the content of the conception of honest commercial practice is slightly different from the well-known private law categories of accepted principles of morality and honesty. On the basis of the cases presented in my entry, we can say that the content of honest commercial practice sometimes showed a stricter and in some other cases, it showed a more lenient standard compared to the general moral judgement of the society.[40] For this reason, it would be right to say in general that a stricter standard had to be always applied against commercial conducts that were classified on the basis of honest commercial practice. In this case, I accept the investigation method expressed by the Jury so many times as right, according to which, all the circumstances of business conducts had to be assessed. There is no doubt that it was not an easy task to classify the commercial conducts and to determine whether they conflicted with the article on unfair competition. Thanks to the variety and diversity of the cases, though, I think that this is what makes this topic interesting and special.

References

BÁNYÁSZ, J. *A tisztességtelen verseny legújabb joggyakorlata*. Budapest: Ujságüzem könyvkiadó és nyomda rt., 1933.

39 KRUSÓCZKI, 2021, op. cit., p. 101.

40 Constituted more severe and less severe, compare KRUSÓCZKI, 2021, op. cit., p. 102.

DELI, G. *A generális klauzulák dogmatikai, történeti, és összehasonlító elemzése, különös tekintettel a jóerkölcsbe ütköző szerződések tilalmára*. Doktori értekezés. Budapest: PPKE JÁK, 2009.

FRANK, I. *A közigazgság törvénye Magyarhonban*. Buda: Magyar Királyi Egyetem, 1845.

GAÁR, V. *A magyar Polgári Perrendtartás magyarázata. 2. kötet*. Budapest: Athenaeum irodalmi és nyomdai Rt., 1911.

GOSZTONYI, G., RÉVÉSZ, M. (eds.). *Jogtörténeti parerga II. Ünnepi tanulmányok Mezey Barna 65. születésnapja tiszteletére*. Budapest: ELTE Eötvös Kiadó, 2018.

HOMOKI-NAGY, M. Megjegyzések a kartellmagánjog történetéhez. In: *Versenytükör*. 2016, Vol. 12, no. 2, pp. 39–52.

JULOW, J. *A választott bíróságokról*. Miskolc: Magyar jövő nyomdaüzem és lapkiadó r.-t., 1926.

KOLOSVÁRY, B. *A magyar magánjog tankönyve*. Budapest: Grill Károly Könyvkiadóvállalat, 1911.

KOVÁCS, M. *A polgári perrendtartás magyarázata*. Budapest: Athenaeum kiadó, 1933.

KRUSÓCZKI, B. The Role of the Budapest Chamber of Commerce and Industry regarding Unfair Competition. In: FRENKEL, D., VARGA, N. (eds.). *Law and History New Studies*. Athens: Athens Institute for Education and Research, 2021, pp. 85–104.

MAGYARY, G. *Magyar polgári perjog*. Budapest: Franklin-társulat, Budapest, 1924.

MENYHÁRD, A. *A jóerkölcsbe ütköző szerződések*. Budapest: Gondolat, 2004.

MESZLÉNYI, A. *A tisztességtelen versenyről szóló törvény magyarázata*. Budapest: Athenaeum, 1936.

MESZLÉNYI, A. *Bevezető a Polgári perrendtartáshoz*. Budapest: Athenaeum irodalmi és nyomdai Rt., 1911.

SZALADITS, K. *Magyar magánjog I. Általános rész*. Budapest: Grill Könyvkiadó, 1941.

Undermining of Legal Certainty in the Decision-Making Practise of the Supreme Court of Czechoslovakia during the Period of the First Republic in Private International Law

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Abstract

This paper aims to introduce to the reader the arbitrary tendencies of the Supreme Court of Czechoslovakia in the field of Private International Law. Attention will be paid to the background of this problem, as well as to the specific judicial praxis on which the described problem will be demonstrated.

Keywords

Private International Law; Supreme Court; Legal Certainty; Natural Principles of Law.

1 Introduction

We encounter a large number of principles in legal theory. Principles can be characterized as rules that form the basis of a particular branch of law, institute, or statute.[1] Principles can be divided according to their scope, the sector, etc. The strongest principles are the legal principles that run through the whole system of law, through all its branches, and both private and public law. One of these principles is the requirement of legal certainty. Legal certainty can also be expressed in one of its intents as the principle of foreseeability, where everyone can reasonably expect courts to decide similar legal cases in the same way and different ones differently.[2]

1 OSINA, P. *Teorie práva*. Prague: Leges, 2013, p. 75.

2 Comparison Act Of Supreme Court No. 89/2012, Coll. Civil Code.

However, this principle was already known to the law in the interwar period, when the requirement of settled case law was laid down in Section 12 of the Act of Supreme Court No. 216-19. The very issue that this article intends to address is the undermining of legal certainty by the Supreme Court and its decision-making in the field of Private International Law. Since this phenomenon has several levels underlying the issue, which are crucial to understanding the alternative decisions and their peculiarities, it is necessary to look at the statutory treatment of Private International Law in general and the one famous section that "enabled" this practice.

2 International Private Law in the Interwar Period

All difficulties begin in the field of the statutory regulation of Private International Law itself. This article does not intend to address the discontinuity in the law, where a dual law came into force after the adoption of the reception norm.[3] The Slovak territory and Subcarpathian Rus will not be dealt with at all, since the Hungarian law applicable in these territories can be omitted. On the other hand, the law applicable in the Czech territory, i.e., the reciprocated Austrian law, will be the key to this article. However, an attempt to find a law on International Private Law would be futile; individual fragmentary provisions could be found in other laws. Since this was private law, the primary source would of course be the "holy grail" of the civil law of the time, the ABGB. There were several separate sections in the code which dealt with the most general principles of Private International Law, such as personal status, reciprocity, obligations, etc.[4] The only procedural rules, such as the exclusivity clause, were to be found in Sections 79–86 of the Execution Code. As can be seen, one cannot speak of any deep regulation of Private International Law.

However, it was the codification efforts in the interwar period that were to change such a state of affairs. In 1920, work began on a new private law codification. The main cause was the effort to unify private law throughout

3 MALÝ, K. *Dějiny českého a československého práva do roku 1945 (Vol. 4)*. Prague: Leges, p. 426.

4 § 4, § 34–38, § 40, § 300 Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie StF: JGS Nr. 946/1811 (ABGB).

the whole territory of Czechoslovakia.[5] The final product was to be the Civil Code, which was to be in principle an authentic translation of the ABGB, but with the removal of obsolete provisions and also taking into account the law in force in Slovakia and the territory of the Subcarpathian Rus.[6] The work was divided into five subcommittees according to the various branches and parts. One of the subcommittees, however, decided to take a somewhat more extensive approach to its task and to include in the draft law a whole separate section devoted to Private International Law to bring Czechoslovak law closer to modern legal systems.[7] The important thing is that the separate sections of Private International Law were inserted into final drafts, which are the Government's Draft Civil Code Bills, particularly from 1931 and 1937. These sections were essentially an authentic translation of the Vienna Draft of the International Private Law Bill of 1912 and 1913.[8] The reason for adopting the Draft was simple, it was a high-quality piece of legal material, and there were very clear links to the same civil Code, i.e., the ABGB.[9] As far as the content was concerned, it was a truly modern, progressive provision compared to the current regulation. The Draft included a comprehensive statutory regulation of Private International Law, there is no space to go into details, but basically, it was already much more similar to, for example, the contemporary Private International Law Act of 20XX as it did not only contain substantive principles but also the high-quality conflict of laws rules and procedural rules.[10] However, none of the aforementioned Outlines ever came into force and are thus only historical Drafts of laws, which are nevertheless of great importance, as they are the basis for, for example, the current Czech Civil Code and the Czech Private International Law Act from 1948, the Vienna Draft of International Private Law Bill of 1912 and 1913 had also a huge impact on legal development since it has been many times used as a model

5 SALÁK, P. et al. *Historie osnovy občanského zákoníku z roku 1937: inspirace. problémy a výzvy*. Brno*:* Masaryk University, Faculty of Law, 2017, p. 17.

6 The Parliamentary Press No. 844. *Vládní návrh zákona, kterým se vydává občanský zákoník. (Důvodová zpráva)*. Prague: Státní tiskárna, 1937, p. 236.

7 KRČMÁŘ, J. *Všeobecná část občanského zákoníka a právo obligační [všeobecná část, darování, smlouva schovací, půjčka, zápůjčka a zmocnění]: Návrh subkomitétu pro revisi občanského zákoníka pro ČSR*. Prague: Ministry of Justice, 1924, p. 104.

8 Ibid. p. 112.

9 Ibid. p. 106.

10 National Assembly of the Czechoslovak Republic. *Vládní návrh zákona, kterým se vydává občanský zákoník*. Prague: Státní tiskárna, 1937, p. 31.

Law to the later published International Private Law Acts in Poland (1926), Austria (1978) and indirectly also Hungary (1979) and Liechtenstein (1996).[11]

3 Natural Principles of Law and the Section 7 of the ABGB

The second phenomenon that needs to be at least briefly introduced is probably one of the most famous sections of the Allgemeines bürgerliches Gesetzbuch, namely Section 7 and in particular its second sentence. This provision states: *"If a legal case cannot be decided either by the words or the natural meaning of the law, it is look to similar cases apparently decided in the law, and to the reasons of others, with the related laws. If a case of law remains doubtful, it must be decided according to the natural principles of law, taking into account the circumstances carefully summed up and maturely considered."*[12] Although the provision itself appears relatively clear, there has been enormous civil and theoretical wrangling over it. However, it is possible to summarize at least the major theoretical currents that analysed this provision in interwar Czech civics. The first problem with the provision was already in the nomenclature and use of the legal concept of vagueness and thus of *natural principles of law*. The ABGB as a civil code was born in the cradle of natural law, headed, for example, by F. Zeiller and others.[13] Therefore, there was no doubt that originally the legislator had in mind a reference to natural law and the vague term natural principles of law should have been principles of natural law.[14] However, the interwar legal theory was already based on the ideas of legal positivism, and the latter naturally rejected natural law as such.[15] Most writers, therefore, granted some importance to natural law in this context, but more

11 PAUKNEROVÁ, M. Prostor pro uvážení v českém mezinárodním právu soukromém: ohlédnutí se za mezinárodním právem soukromým k výročí Antonína Hobzy. *Právník*. 2016, Vol. 155, no. 1, p. 17.

12 § 7 Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie StF: JGS Nr. 946/1811 (ABGB).

13 KUBEŠ, V. *Právní filosofie XX. století: (kantismus, hegelianismus, fenomenologie a theorie myšlenkového řádu)*. Brno: nákladem Čs. akademického spolku "Právník", 1947, p. 97.

14 ROUČEK, F. *Československý obecný zákoník občanský a občanské právo platné na Slovensku a v Podkarpatské Rusi*. Prague: Nákladem "Československého Kompasu" tiskařské a vydavatelské akc. spol, 1926. vol. 1, p. 25.

15 SEDLÁČEK, J. Přirozené zásady práva. *Časopis pro právní a státní vědu*. 1918, Vol. 1, no. 0, p. 154.

from a historical point of view and for a better and more comprehensive understanding of the issue.[16] At the same time, however, they tried to find a new meaning for modern usage of this vague legal concept that would be more in line with the ideas of positivism. In general, it can be stated that Czech civil studies agreed on the concept of natural principles of law as a certain unwritten system of norms, which, however, did not create its superior system of norms, but was based on the legal system. The same social group that is governed by the written law has also created this "secondary law" by its moral and social feeling.[17] However, many authors limit these norms and principles to freedom, equality before the law and justice.[18] Today we might say basic legal principles.

The second issue was the practical use of the provision, however, there was no longer that much controversy and most authors agreed on the meaning and practical use and function of the provision. It was a provision intended to fill a gap in the law, but the authors agreed on a certain sequence of filling. Since most theorists of the time, following the example of positive law, rejected the institution of gaps in the law as such on a theoretical level, the sequence was obvious and given by law.[19] The generally accepted function was summarized in the most famous Czech ABGB commentary by Sedláček and Rouček, several moments were necessary for the activation of the second sentence of Section 7. The first, of course, was the existence of a "gap in the law" (or, in positivist terms, a non-existent written regulation); the second moment was the impossibility of using analogies, both *legis* and *iuris*. Based on this, the judge could then, at his discretion but adhering to natural principles of law, dispose of the legal case.[20]

16 KUBEŠ, V. Pozitivní právo sekundární v občanských zákonících moderních států se zřetelem k osnově československého obč. zákoníka. *Časopis pro právní a státní vědu*. no. 6, 1934, p. 323.

17 SEDLÁČEK, J. Přirozené zásady práva. *Časopis pro právní a státní vědu*. 1918, Vol. 1, no. 0, p. 154.

18 KUBEŠ, V. "PŘIROZENÉ ZÁSADY PRÁVNÍ" A "DOBRÉ MRAVY" V OBECNÉM ZÁKONÍKU OBČANSKÉM. *Randův jubilejní památník*. Prague: Charles University,Faculty of Law, 1934, p. 399.

19 ROUČEK, F. Antinomie. *Všehrd, list československých právníků*. 1926, no. 3, p. 65.

20 ROUČEK, F., SEDLÁČEK, J. *Komentář k Československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi díl 1–6*. Prague: Codex Bohemia, 1935, p. 145.

4 The Decision-making Practice of the Supreme Court of Czechoslovakia

However, the Supreme Court, on occasion, took a rather curious and very creative approach to the use of the second sentence of Section 7. Even the Supreme Court has stated in several of its decisions (contrary to most legal theorists of the time) that legal order rests and stands on moral order.[21] *"The legislator, by referring in Section 7 of the Civil Code to the moral law of the country. to the 'natural law', by which he evidently means the commands of the general human conscience, of practical morality, as the social coexistence of men has evolved since ages, so that they seem innate, so that instead of them we speak directly of the legal sentiment, pointing to this "natural law" as the source of positive law, the source from which it is necessary to draw when its positive norms completely fail, He thus established at the same time a supreme rule of interpretation for cases where his positive norms remain doubtful, and a doubtful case must be decided in a way that corresponds to the general human feeling from which he himself drew his norms."*[22] As we can see, the Supreme Court did not share much of the point of view of leading civil theorists, approaching their conception in the sense of trying to find justice, but not in rejecting natural law. On the contrary, the Supreme Court strongly supported the idea and use of natural law. To some extent, it followed the theorists sharing the historical idea where the meaning of the second sentence of Section 7 was based on natural law ideas and the environment. The crucial difference, however, came with the application, where the Supreme Court frequently recognized natural law and used it as a source of law. Despite all this, there were also deviations in the Supreme Court's decisional practice, as pointed out by Krčmář in his article Law and Decision.[23] These deviations could be classified in essence with two tendencies. The first of these currents was more directed towards natural law and sought to find justice; it was a kind of continental equity adjudication using natural law principles. The second stream was a certain effort to be more coherent with positive law thinking and not to stray from the normative legal systems into the realm of natural

21 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735*. Prague: Právnické vydavatelství, 1927, no. 1660.

22 Ibid.

23 KRČMÁŘ, J. Zákon a rozhodnutí. *Sborník věd právních a státních*. Prague: Bursík a Kohout, 1932, Vol. 32, no. 2, pp. 89–100.

law thought. Nevertheless, this second stream drew inspiration from foreign statutory law and even from draft laws. Although the Supreme Court itself had earlier ruled on the impossibility of such an approach. *"To invoke for the interpretation of Article 4 of the Insurance Conditions the analogy of Sections 28 and 29 of the Law on Insurance. 501 of 23 December 1917. is not applicable. Those provisions have not yet come into force and are therefore not yet in force. They are not applicable at all and cannot therefore be applied by analogy (Art. 7 of the Civil Code to the contrary)."*[24] *"Furthermore, the analogous use of the repealed §§ 630 of the Civil Code is not permitted. and 254 of the Civil Procedure Act, since Section 7 of the Civil Code, insofar as it refers to related* […] *only the laws in force."*[25] This case has spoken quite clearly about the possibility of using Section 7 in the case of analogy, whereby analogy, quite logically and unambiguously, only valid and effective laws can be used, on the contrary, it prohibits and excludes the use of invalid or ineffective laws. However, a possible loophole in this ruling may be recognised in a way, where the court did not explicitly apply natural principles of law or the direction of even the second sentence of the provision. Thus, it would be possible to rule subsequently in a different way and invoke the second part of the provision and arrive to a different result due to natural law principles. However, it was right to point here to the positive jurisprudence of the Supreme Court, which ruled essentially following legal theory, even with Krčmář. These decisions not only promoted legal certainty but also, by the logic of analogy itself, had a sound structure of thought.

These Supreme Court's decisions have tended toward historical-legal interpretation, with the result of understanding natural principles of law as a kind of projection of natural law into the letter of the law.[26] Natural law was understood as general morality and in a way, a supra-legal normative-value rule based on societal standards.[27] *"Positive law must be in harmony with natural*

24 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 6657–7677.* Prague: Právnické vydavatelství, 1927, no. 6691.

25 Ibid. No. 6916.

26 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735.* Prague: Právnické vydavatelství, 1927, no. 1680.

27 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 354–837.* Prague: Právnické vydavatelství, 1927, no. 457, 495.

law, which is a fiction of the universal legal sense! The people."[28] Thus, the Supreme Court spoke of natural principles of law as a kind of "correction or softening of the law´; it spoke of them as equitable rules, rules of justice. It searched for these rules in general morality and a sense of justice that prevailed in the society.[29] Thus, the split with the contemporary theory of its time, which advocated a much more positive legal approach and merely gave the historical-legal interpretation and genesis of the concept its argumentative weight, is understandable. Whereas the Supreme Court, once it had adjudicated the genesis of the concept, subsequently followed it.

From today's perspective, two things are interesting about the Supreme Court's decision-making practice in this way. The first is the practical application of natural principles of law. Regarding the use of natural principles of law according to the text of the statute, it is fairly obvious that they should be used as a guide to deciding in the absence of a statute and the consequent impossibility of using an analogy.[30] According to the theory, and also according to case law in general,[31] it should be the rules of free decision of a judge over a legal case which is not solved by the legal order and cannot be dissected by the legal order and its norms. This view was the basis of the opinion of perhaps all the theorists, commentators and others with whom we have dealt so far. Here, however, jurisprudence has come to a very interesting phenomenon where it has in fact in some cases not only used natural law principles as the last resort and in the alternative, but even in cases where

28 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735*. Prague: Právnické vydavatelství, 1927, no. 1680.

29 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 6657–7677*. Prague: Právnické vydavatelství, 1927, no. 6916, 6691. VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735*. Prague: Právnické vydavatelství, 1927, no. 1680.
VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 354–837*. Prague: Právnické vydavatelství, 1927, no. 457, 495.

30 KRČMÁŘ, J. Zákon a rozhodnutí. *Sborník věd právních a státních*. Prague: Bursík a Kohout, 1932, Vol. 32, no. 2, p. 96.

31 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 6657–7677*. Prague: Právnické vydavatelství, 1927, no. 6916, 6691. VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735*. Prague: Právnické vydavatelství, 1927, no. 1680.
VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 354–837*. Prague: Právnické vydavatelství, 1927, no. 457,495.

there were no gaps in the law at all.[32] These cases varied in their particulars and circumstances, but their unifying element was that either there was no gap at all, but the court "activated" the second sentence of § 7 anyway, or there was a gap that could be easily bridged by analogy, which should have been preferred.[33] The former were decisions where the court found the result reached by a "dry" application of the statute to be unworkable, and decided to put its views on equity and justice to the fore despite the legal certainty. *"The clause in question rests not only on the provisions of §§ 936, 1,052 n. n. and 901 in conjunction with § 863 of the Civil Code, on which it is usually based, as the defendant does, but also, and especially, on the provisions of § 1389 in conjunction with § 7 of the Civil Code, although, if nothing else, this alone would suffice under § 1389 of the Civil Code. the settlement, although it applies generally to all rights disputed between the parties, does not apply to such rights as cannot be settled. The principle is thus laid down that a conciliation does not bind, but imposes a sacrifice on a party who, in the course of the conciliation, is not bound by it, and this principle can and must be applied to every contract, by virtue of Article 7 of the Civil Code, since it is contrary to legal feeling, and in particular to the principle of fidelity and faith, to impose such a sacrifice on a party."*[34] In the cited decision, the Supreme Court even referred to the settled case law and agreed with the defendant that this was how similar legal cases are usually subsumed, but in the same breath, it referred to other provisions falling partly on the subject matter and connected them with Section 7 and invoked good faith, fairness and equity in the contractual relationship. These are the decisions that are problematic with the use of the second sentence of Section 7 and, in effect, a "twisting" of the law that seems to the court to be unhelpful. We have thus intersected with a slight tendency to violate the principle of constant jurisprudence which has advocated *that uniformity of decision and uniformity of findings should prevail.*[35] For the sake of argument, the decision No. 1680 of the Vážný's Collection and the occasional excursus on Law and Decisions will be analysed.[36] The reasoning of mentioned court's

32 Ibid.
33 Ibid.
34 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735.* Prague: Právnické vydavatelství, 1927, no. 1680.
35 § 12 Act of Supreme Court No. 216–19.
36 KRČMÁŘ, J. Zákon a rozhodnutí. *Sborník věd právních a státních*. Praha: Bursík a Kohout, 1932, Vol. 32, no. 2, p. 96.

decision thus already hides several peculiarities in itself. The first is a certain violation of the principle of consistent jurisprudence, and consequently of legal certainty, where it is reasonable to suppose that the same cases will be decided alike and different ones differently, for otherwise, the law would be unpredictable and so unworkable since it would be based on the arbitrariness of the judge and the individual could not be sure whether he was acting by the law.[37] Another peculiarity is the activation of Section 7 in conjunction with another provision, although the law knows the solution per legal case as the cited decision mentions. And even if he decided to deviate from the settled practice and use another provision, still the result is the same, that is, the rule of law applies to the case. Thus, in such a legal case, according to the possible application of the gap-filling rules, such an approach is not possible.[38] However, the Supreme Court approached the solution very creatively, mentioned its contradiction with established case law, instead of arguing over the difference of the case and the necessity to consider the case differently, it chose a truly unconventional option, i.e. combining another provision with the provision on filling gaps and through natural law principles (invoking natural law itself) tried to find a completely new solution, stepping out of the circle of the legal system arguing for justice and expediency.[39] The Court argued natural law through natural principles of law differently from the generally accepted wording and meaning of the second sentence of Section 7, using it rather as a corrective to positive law, but we will discuss this fact later as a second problem. In the discussed decision, the court did not stop at merely modifying both its decisional practice and the provisions of the Civil Law through natural principles of law and the general sense of justice but went a step further. Perhaps out of a desire for a positive law approach and an attempt to find support for its decision in positive law, the court even argued from foreign law. *"The matter must therefore be considered according to the intention of the legislator, which in Section 7 of the Civil Code has come to expression, should be regulated with*

37 KRČMÁŘ, J. Zákon a rozhodnutí. *Sborník věd právních a státních*. Praha: Bursík a Kohout, 1932, Vol. 32, no. 2, p. 96.
Comparison § 12 Act of Supreme Court No. 216–19.

38 ROUČEK, F. Antinomie. *Všehrd, list československých právníků*. 1926, no. 3, p. 65.

39 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735*. Prague: Právnické vydavatelství, 1927, no. 1680.

equal regard for both parties, as the legislator himself would undoubtedly have done if it had been submitted to him for solution (§ 1 of the Swiss Civil Code), i.e. in such a way as to correspond to a sense of justice, and the solution that the municipality should retain the right of redemption is in accordance with this…"[40] Not only did the court, by a historical-legal interpretation, and today we would say a teleological interpretation, invoke the intention of the legislator, this would be perfectly legal and legitimate as an argument, but it crossed this line and put into the mouth of the legislator a solution which he did not choose, which was part of the foreign legal system and which he intended to invoke. By this attempt at a kind of "self-legislation" under the guise of the purpose of the statute, the court attempted to extend the meaning of Section 7 from the loopholes themselves to the general corrective of the fairness of the law. However noble the intent, its legality is debatable, and we can probably agree that it has little to do with legal decision-making, let alone legal certainty.

And all these ills have been combined by the Supreme Court in what is arguably the most controversial decision in the Private International Law field in the inter-war period. From a factual point of view, it was not an interesting case; it was essentially a classic Alimony dispute, and the only interesting variable was that the illegitimate child was of German citizenship, whereas the defendant was Czech.[41] In the proceedings, the defendant then raised the plea of *exceptio plurium concubentium*, which did not exist in Czech law. Although the case should have been and was decided by the lower courts according to Czech law, the Supreme Court activated the second sentence of § 7 and intended to rule according to the natural principles of law. The objection in question existed in the German BGB,[42] but due to the undeveloped Private International Law, the applicable law had not even been decided before, and since the dispute was conducted in the Czech Republic, Czech law was used, neither party objected to it. However, since the Supreme Court saw an opportunity to enforce its vision and idea of justice and use the German objection, it had to deal with the whole issue of applicable

40 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735*. Prague: Právnické vydavatelství, 1927, no. 1680.

41 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 6657–7677*. Prague: Právnické vydavatelství, 1927, no. 7601.

42 Bürgerliches Gesetzbuch [BGB] [Civil Code].

law. Without the existence of an objection to the decision of the applicable law, the Supreme Court took it for granted that if the defendant objected with an objection only existing in German law, it automatically thereby objected and decided the conflict of laws rule. The court justified the need to choose the applicable law when there was, of course, no precise conflict of laws rules. The Supreme Court referred to the second sentence of Section 7 of the ABGB, stating that it was in principle obliged to decide according to natural principles of law, otherwise, it would be arbitrary. It described natural principles of law as `commands of general legal conviction' which were shaped both by the prevailing domestic legal order and by present-day economic, social and moral conditions or opinions. And in the next step, the Supreme Court undermined all its other jurisprudence when it held that it was applying an invalid rule of law: *"In the 1912 and 1913 drafts of Private International Law Act, which were again the subject of deliberations by a special commission expertly constituted for that purpose, the question in dispute was resolved by a separate conflict of law rule, which was then adopted without change as § (36) in the draft of the subcommittee for the revision of the Civil Code for the Czechoslovak Republic. (General Part of the Civil Code and the Law of Obligations, by Dr. Jan Krčmář*[43]*) The proposed norm reads: 'Obligations of an illegitimate father* […] *As regards the determination of illegitimate paternity, the claim of the illegitimate child for maintenance and the claim of the illegitimate mother against the father of the child, the law of the State of which the mother is a national at the time of the child's birth shall apply. If both the father and the mother are domiciled in a domestic state at the time of the child's birth, the domestic law shall apply if it is more favourable to the mother or the child."*[44]

The court decided that the rule must be regarded as objective proof of the general legal belief of the time and must be followed according to § 7 of the Civil Code until the disputed question is regulated by positive legislation. The second paragraph of the proposed rule should be irrelevant to the present case since the mother was living in Germany at the time of the child's birth according to the Supreme Court. The court also decided

43 KRČMÁŘ, J. *Všeobecná část občanského zákoníka a právo obligační [všeobecná část, darování, smlouva schovací, půjčka, zápůjčka a zmocnění]: Návrh subkomitétu pro revisi občanského zákoníka pro ČSR*. Prague: Ministry of Justice, 1924.

44 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 6657–7677*. Prague: Právnické vydavatelství, 1927, no. 7601.

that the first paragraph applied, and therefore the claim and in particular, the objection of *exceptio plurium concubentium* must be assessed under German law. However, the court found another reason for the application of that law, drawn from Section 33 of the Civil Code. This provision granted foreigners the same rights and imposes the same obligations as nationals, but the equality guaranteed to them was subject to the condition that their home State also granted nationals here the same rights as its nationals.[45]

The startling fact is that, for reasons of reciprocity, the Supreme Court, therefore, decided to apply German law, namely Article 21 of the Introductory Act to the German Civil Code[46], which did not have the same legal status for married and illegitimate children, but the rights of illegitimate children were scarce. However, the Supreme Court nevertheless very surprisingly stated that, for reasons of reciprocity, German law would be applied and, pending the adoption of its own collision rules, German law would apply to these circumstances. The most peculiar thing about this reasoning is that the Czech courts would therefore use German law with the rights trimmed, the German courts would thus theoretically use Czech law, but there is a strong possibility that they would trim the rights for reasons of their public policy, but this debate lays beyond the scope of this article.

This decision was a huge breach of legal certainty and the legality of the decision. Not only did it not follow settled case law, but it also completely bent the statutory provision, applying it in an extremely extensive and arbitrary manner and even arriving at a decision under invalid legislation.

There are several requirements for legal certainty, one of which is that the court should rightly expect to decide a legal case according to the applicable law and that it will not depart from settled case law. In these international law cases, the Supreme Court has given priority to its idea of justice. The decision itself and the arbitrariness of the court are interesting from two perspectives, one is of course the extensive use of the second sentence of Section 7,

45 VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 6657–7677.* Prague: Právnické vydavatelství, 1927, no. 7601.

46 *"Die Unterhaltspflicht des Vaters gegenüber dem unehelichen Kinde und seine Verpflichtung, der Mutter die Kosten der Schwangerschaft, derEntbindung und des Unterhalts zu ersetzen, wird nacvh den Kindes angehört; es können jedoch nich weitergehende Ansprüche geltend gemacht werden, als nach den deutschen Gesetzen begründet sind."*

where the court decided to use the provision created to fill in the gaps for its purpose of refining the fall of the law and actually "crowned" itself into the role of the legislator, completely ignoring the statutory obligation to use at most an analogy in this case, but even this solution was not necessary, because the legal case was decided through the statutory rules governing court proceedings. The second equally interesting fact, that can be noted is the difference between statutory regulation of Private International Law and the development of the sector as such. The doctrine of Private International Law was much more developed than its positive regulation, as can be observed in the literature as well as in the Draft laws of Private International Law as discussed above. And the Supreme Court simply decided that through natural law principles, which some authors also understood as unwritten positive law,[47] it could simply rely on invalid legislation as well, as it thus complied with the requirements of positivism, but at the same time decided at will. However, this reasoning is at least arbitrary.

5 Conclusion

In the interwar period, Private International Law was more developed in the Czech territory in the form of theoretical and legal Drafts of Bills than in a written legislative form. Although contemporary applicable law of that period knew answers and solutions to many questions of Private International Law, the Supreme Court was not willing to accept them in some cases. In pursuit of a fairer judgment and equity, the court did not hesitate to go extensively beyond the scope of the second sentence of Section 7 of the ABGB and, instead of using the Section as a provision to fill the gaps, the Supreme court used it as a means to rule at will against the law. In some cases, the court referred to this provision to foreign laws and Acts which it found convenient and in one case the court even explicitly ruled according to the invalid provisions of a law not yet enacted.

47 SEDLÁČEK, J. Přirozené zásady práva. *Časopis pro právní a státní vědu*. 1918, no. 0, p. 154. KUBEŠ, V. „Pozitivní právo sekundární" v občanských zákonících moderních států se zřetelem k osnově československého obč. zákoníka. *Časopis pro právní a státní vědu*. 1934, no. 6, p. 323.

This action of the Supreme Court can be judged from two points of view, one is that as a result decisions in question were indeed more expedient and just. The other side of the coin, however, is the complete undermining of legal certainty, undermining of settled judicial practice and setting dangerous "precedents" for arbitrary decision-making practice.

References

KRČMÁŘ, J. *Všeobecná část občanského zákoníka a právo obligační [všeobecná část, darování, smlouva schovací, půjčka, zápůjčka a zmocnění]: Návrh subkomitétu pro revisi občanského zákoníka pro ČSR*. Prague: Ministry of Justice, 1924.

KRČMÁŘ, J. Zákon a rozhodnutí. *Sborník věd právních a státních*. Prague: Bursík a Kohout, 1932, Vol. 32, no. 2, pp. 89–110.

KUBEŠ, V. „Pozitivní právo sekundární" v občanských zákonících moderních států se zřetelem k osnově československého obč. zákoníka. *Časopis pro právní a státní vědu*. 1934, no. 6, pp. 314–323.

KUBEŠ, V. *Právní filosofie XX. století: (kantismus, hegelianismus, fenomenologie a theorie myšlenkového řádu)*. Brno: nákladem Čs. akademického spolku „Právník", 1947.

KUBEŠ, V. „Přirozené zásady právní" a „dobré mravy" v Obecném zákoníku občanském. *Randův jubilejní památník*. Prague: Faculty of Law Charles University, 1934, pp. 395–422.

MALÝ, K. *Dějiny českého a československého práva do roku 1945 (Vol. 4)*. Prague: Leges, 2010.

National Assembly of the Czechoslovak Republic. *Vládní návrh zákona, kterým se vydává občanský zákoník*. Prague: Státní tiskárna, 1937.

OSINA, P. *Teorie práva*. Prague: Leges, 2013.

PAUKNEROVÁ, M. Prostor pro uvážení v českém mezinárodním právu soukromém: ohlédnutí se za mezinárodním právem soukromým k výročí Antonína Hobzy. *Právník*. 2016, no. 1, pp. 12–28.

ROUČEK, F. Antinomie. *Všehrd, list československých právníků*. 1926, no. 3, pp. 65–67.

ROUČEK, F., SEDLÁČEK, J. *Československý obecný zákoník občanský a občanské právo platné na Slovensku a v Podkarpatské Rusi*. Prague: Nákladem „Československého Kompasu" tiskařské a vydavatelské akc. spol, 1926.

SEDLÁČEK, J. Přirozené zásady práva. *Časopis proprávní a státní vědu*. 1918, Vol. 1, no. 0, pp. 153–158.

The Parliamentary press No. 844. *Vládní návrh zákona, kterým se vydává občanský zákoník. (Důvodová zpráva)*. Prague: Státní tiskárna, 1937.

VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 354–837*. Prague: Právnické vydavatelství, 1927.

VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 1394–1735*. Prague: Právnické vydavatelství, 1927.

VÁŽNÝ, F. *Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských: 6657–7677*. Prague: Právnické vydavatelství, 1927.

The Historical Development of the Legal Profession in the 1950s: Defence Attorney

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Abstract

This contribution is focused on the role and activities of defence attorneys (advocates) in the 1950s in Czechoslovakia. The first part of the text is devoted to the features and changes of the legal profession after the February coup in 1948 and especially in the 1950s. The second part of this contribution deals with defence attorneys during legal proceedings, especially political trials, and focuses on their active or passive participation. The conclusion of the article assesses whether the advocate of the 1950s can be viewed as a passive or an active participant in legal proceedings.

Keywords

The Legal Profession; Defence Attorney; Show Trials; Totalitarianism.

1 Introduction

The period of the late 1940s and then the 1950s was characterised in particular by the transition from democracy to the rule of the proletariat. This brought many changes, not only social. One of the main issues that were being addressed at that time was to determine how to regulate the legal order in Czechoslovakia in a way that would correspond to the necessary objectives of the Communist Party of Czechoslovakia. Similarly, the role of the defence attorney, especially in political trials typical of the 1950s, began to change.[1]

1 See BURSÍK, T. Procesy politické v 50. letech 20. století. In: SCHELLE, Karel and Jaromír TAUCHEN (eds). *Encyklopedie českých právních dějin. 8. svazek: Procesy (do roku 1949)*. Plzeň: Aleš Čeněk, 2017, pp. 763–764.

This contribution is based on the archival research (conducted mainly at the Moravian Provincial Archive in Brno) consisting of an analysis of the court files (of the political trials) of the State Court in Brno.

2 Changes in the Legal Profession after the February Coup in 1948

The February coup in 1948[2] saw not only major changes in the Czechoslovak Republic but especially the rapid dissolution of bar associations.[3] At a press conference soon after the coup, the new Minister of Justice, Alexej Čepička[4], declared that it was necessary to purge the legal profession of capitalism and adapt it to the needs of the people. He also stated the need to redirect the character of advocacy from private to public law.[5] For this reason, Action Committees began to be set up in the bar associations to carry out the above-mentioned cleansing of the bar to a certain extent. The members of the action committees were selected by the Communist Party of Czechoslovakia to be loyal to the regime. On the other hand, persons who were inconvenient for the regime were deprived not only of their positions in the bar associations but in some cases even of the possibility of continuing to practise as an attorney.[6]

An important change came with the new Act No. 322/1948 Sb. on the Bar (hereinafter referred to as "Bar Code 1948") effective from 1 February 1949 which led to the abolishment of the private legal profession.[7] This act dissolved bar associations in Czechoslovakia and set up Regional Associations of Attorneys (hereinafter referred to as "RAA"). These RAAs were set up in each region of Czechoslovakia, but sometimes the Minister of Justice allowed the formation of more than one association in a single region.[8]

2 VEBER, V. *Osudové únorové dny 1948*. Praha: Nakladatelství Lidové noviny, 2008, p. 326.
3 BALÍK, S. Advokacie. In: *Komunistické právo v Československu: kapitoly z dějin bezpráví*. Brno: Masarykova univerzita, 2009, p. 894.
4 PERNES, J., POSPÍŠIL, J., LUKÁŠ, A. *Alexej Čepička: šedá eminence rudého režimu*. Praha: Brána, 2009, p. 142.
5 KOBER, J. *Advokacie v českých zemích v létech 1848–1994*. Praha: Česká Advokátní Komora, 1994, pp. 130–131.
6 Ibid., pp. 129–131.
7 Ibid., p. 135.
8 Section 8 of Act No. 322/1948 Sb., on the Bar (Bar Code).

Before Regional Associations of Attorneys were created, the Minister of Justice temporarily appointed the Administrative Commissions, which had the rights and duties of RAA.[9] The organs of the RAA were: the Members' Meeting, the Committee and the Chairman.[10]

The formation of the RAAs was commented on in the periodical *Právník* ("Lawyer"): *"The anti-progressive state bar associations were abolished, regional associations were created, the purge of persons who absolutely do not belong to the bar was carried out, and economic control was established. Nevertheless, the lawyers, with few exceptions, remained in their entirety businessmen, full of unhealthy collegial considerations; they always saw only their client, whom they wanted to win the dispute at any cost* […]*, and hindered the often good work of the prosecutor and the judge, even in their capacity as defence attorneys"*[11]

The supervision of RAAs was carried out by the Central Association of Attorneys (hereinafter referred to as the "CAA"). The CAA could amend or repeal the measures of individual RAAs or issue binding directives to them.[12] However, the Minister of Justice had primary control over the RAA and the CAA.[13]

One of the reasons for the origin of the Regional Associations of Attorneys was governmental control. Another reason was to reduce the number of attorneys.[14] This was achieved through the obligation of the attorney to be registered with the association. However, a person could become a member only on the basis of an application form and an oath of allegiance to the State establishment.[15] The submission of an application form did not guarantee that a lawyer would become a member of the RAA, because the Communist Party of Czechoslovakia determined the number of admitted members. Moreover, membership was revocable. According to the Bar Code 1948, the RAA was allowed to expel a member provided there was

9 Section 37 of Act No. 322/1948 Sb., on the Bar (Bar Code).
10 Section 9 of Act No. 322/1948 Sb., on the Bar (Bar Code).
11 HERÁF, O. Advokátní právní poradny krajských sdružení – socialistická forma provozování advokacie. *Právník*. 1951, Vol. 90, no. 1, p. 35.
12 Section 18 of Act No. 322/1948 Sb., on the Bar (Bar Code).
13 Section 21 of Act No. 322/1948 Sb., on the Bar (Bar Code).
14 KOBER, J. *Advokacie v českých zemích v létech 1848–1994*. Praha: Česká Advokátní Komora, 1994, p. 135.
15 Section 2, Section 8 of Act No. 322/1948 Sb., On the Bar (Bar Code).

an important public interest. However, the interpretation of "public interest" was quite broad and many facts leading to the loss of an attorney's membership could be subsumed under this provision.[16]

As noted above, not every attorney was admitted to the Regional Associations of Attorneys. The reasons were various: some attorneys did not apply for membership, because they thought that the Communist Party of Czechoslovakia would not last in power and everything would be returned to the situation before the February coup in 1948. Other lawyers just decided to give up on the practice of law. And then some attorneys applied for the RAA but were not admitted. Names of these people were published in Official Journal No II between the years 1950 and 1951 and next to their names were assigned liquidators. The liquidator was usually another attorney from the RAA who was tasked with liquidating the law firm of the attorney.[17]

Administrative Commissions took care of unadmitted attorneys and had to assign them non-manual work.[18] Not every lawyer got such work and therefore some of them were assigned work under the "Action 77,000 Administration to Production"[19]. This Action was a long-term attempt of the Communist Party of Czechoslovakia to get rid of bureaucratism and it was an effort to supplement the necessary workforce in the economy. Many times, this led to the situation when an attorney worked as a labourer.[20]

RAAs ended the financial independence of attorneys. With the creation of the RAAs, the need to expand the administration arose. However, the expansion of staff has resulted in a reduction in lawyers' fees. From then on, attorneys had to pass all their income to the RAA and the association divided it among all the RAA's attorneys and administrative staff. Although the new political system tried to take the legal profession out of the private

16 KOBER, J. *Advokacie v českých zemích v létech 1848–1994*. Praha: Česká Advokátní Komora, 1994, pp. 134–135.
17 Ibid., pp. 135–136.
18 Ibid.
19 KOCIAN, J. *Tematická příručka k československým dějinám 1948–1989*. Praha: Institute for Contemporary History of the CAS, v.v.i., 2021, p. 30.
20 BALÍK, S. Advokacie. In: *Komunistické právo v Československu: kapitoly z dějin bezpráví*. Brno: Masarykova univerzita, 2009, p. 899. See also KOBER, J. *Advokacie v českých zemích v létech 1848–1994*. Praha: Česká Advokátní Komora, 1994, p. 136.

sphere and into the public sphere, the state did not contribute to building a socialist legal profession. The entire organization was created out of the finances and assets of the lawyers, which were taken over by the RAA. Even the RAA's equipment was taken over from defunct law firms, which were later purchased by the RAA, but at very low appraisal prices, and even the wear and tear caused by the association's long-term use was not compensated for.[21]

The agenda of attorneys went through many changes that led to the narrowing of representation options. One of the first acts was Act No. 319/1948 Sb., on the Popularisation of Justice. For example, a person could not be represented by an attorney if the value of the labour dispute was under CSK 5.000, or an employee could be represented in a labour dispute by another employee who declared himself knowledgeable in the law.[22] Therefore, attorneys were left mainly with the area of criminal law with possible unpaid ex officio representation and with the possibility of defending before the newly established State Court.[23]

The State Court (and the State Prosecutor's Office) was established on the basis of Act No. 232/1948 Sb., on the State Court (hereinafter referred to as the "Act on the State Court"). Both the State Court and the State Prosecutor's Office were located only in Prague, but they had jurisdiction throughout the entire country, which they covered through a branch in Brno and a branch in Bratislava.[24] Some chambers of the State Court, however, did not sit only in the three cities mentioned above, but often travelled throughout the country and sat in smaller towns – most often at the place where the crime under consideration had taken place. The Explanatory Memorandum to the Personal Jurisdiction of the Act on the State Court mentions that persons usually under military jurisdiction and minors are also

21 Section 16 of Act No. 322/1948 Sb., on the Bar (Bar Code); KOBER, J. *Advokacie v českých zemích v létech 1848–1994*. Praha: Česká Advokátní Komora, 1994, pp. 137–138.

22 Section 39, Section 54 Act No. 319/1948 Sb., on the Popularisation of Justice.

23 Political trials were held in the State Court; BALÍK, S. *Dějiny advokacie v Čechách, na Moravě a ve Slezsku*. Praha: Česká Advokátní Komora, 2009, p. 208; Act No. 232/1948 Sb., on the State Court.

24 Section 1 of Act No. 232/1948 Sb., on the State Court; SCHELLE, K., TAUCHEN, J. Úvodem. In: SCHELLE, K., TAUCHEN, J. (eds). *Encyklopedie českých právních dějin. 9. svazek: Procesy (od roku 1950)–Pů*. Plzeň: Aleš Čeněk, 2017, p. 20.

subject to the jurisdiction of the State Court. The Explanatory Memorandum also indicates that the Act on the State Court follows Act No. 231/1948, on the Protection of the People's Democratic Republic.[25]

It must be added that not every attorney could represent a client before the State Court. Only an attorney registered in the special list of defence attorneys could defend a client there. Unfortunately, registration did not always depend on attorneys' knowledge and competence, but sometimes depended mainly on their loyalty to the state establishment and the Communist Party. Even in the Supreme Court, a client could be represented only by an attorney registered in a special list of defence attorneys.[26]

3 Features of the Legal Profession

Bar Code 1948 could be characterized as a transitional law to introduce a new system. Then it was replaced by the new Act No. 114/1951 Sb. on the Bar (hereinafter referred to as "Bar Code 1951") which can be described as the culmination and consolidation of Stalinism. This new Act brought other changes, for example, RAAs were replaced by Legal Advice Rooms (hereinafter referred to as "LAR")[27] which were socialist legal entities and separate economic elements that were represented externally by their supervisor.[28] The workforce consisted of managers, attorneys, law clerks and other associates (administrative staff).[29]

Similarly, the CAA was replaced by the Central Legal Advice Room (hereinafter referred to as "CLAR").[30] The organs of the CLAR were the Plenary Meeting (which was composed of the heads of the LAR or delegates from the LAR), the Committee (for Slovakia, the Regional Committee), the Chairman and his deputies.[31]

25 *See* The Government Proposal and the Explanatory Memorandum to Act No. 232/1948 Sb., on the State Court.

26 BALÍK, S. *Dějiny advokacie v Čechách, na Moravě a ve Slezsku*. Praha: Česká Advokátní Komora, 2009, p. 208.

27 Section 13 of Act No. 114/1951 Sb., on the Bar (Bar Code).

28 Section 4 of Act No. 114/1951 Sb., on the Bar (Bar Code).

29 *See* The Government Proposal and the Explanatory Memorandum to Act No. 114/1951 Sb., on the Bar (Bar Code).

30 Section 11 of Act No. 114/1951 Sb., on the Bar (Bar Code).

31 Section 12 of Act No. 114/1951 Sb., on the Bar (Bar Code); BALÍK, S. (ed.). *Advokacie včera a dnes: vybrané texty z dějin a současnosti advokacie*. Plzeň: Aleš Čeněk, 2000, p. 160.

The Bar Code 1951 emphasized the position of the attorney as a servant to society and the consolidation of socialist legality.[32] Therefore, the new Act brought some changes to the path to becoming an attorney. Since then, to become an attorney, a person had to meet these criteria: he or she had to be a Czechoslovak citizen, have a law degree, have at least two years of practice, successfully pass a professional examination, and be a member of a LAR. Although these conditions seem to be obligatory, except for the last one mentioned, the Minister of Justice could waive them in whole or in part for an individual. This led to situations where a person who was not educated in the law but was loyal to the regime, practised as an attorney. Even the Explanatory Memorandum to Section 13 of the Bar Code 1951 states that a doctorate in law will no longer be required to practice law. There is also a piece of information that proletariat law school would be enough to practise the profession since the aim was to fill the ranks of lawyers with politically mature cadres from the working class.[33]

The new Act regulated the obligation of confidentiality of attorneys and administrative staff. That meant a person (especially an attorney) must not have disclosed facts which they have learned while working unless the originator of the information has released them from this obligation. However, except for the originator, court and state authority, the Minister of Justice could also exempt an attorney from the obligation of confidentiality if there was an important state interest. But the important state interest was not further defined in the law.[34]

4 Defence Attorneys in the 1950s

The status of defence attorneys was during the 1950s often questioned as whether their participation in criminal proceedings was necessary. These questions came up from judges of the people, but even from state

32 Section 1 of Act No. 114/1951 Sb., on the Bar (Bar Code); BALÍK, S. (ed.). *Advokacie včera a dnes: vybrané texty z dějin a současnosti advokacie*. Plzeň: Aleš Čeněk, 2000, p. 159.

33 Section 13 of Act No. 114/1951 Sb., on the Bar (Bar Code); Government proposal and explanatory memorandum to Act No. 114/1951 Sb., on the Bar (Bar Code); BALÍK, S. Advokacie. In: *Komunistické právo v Československu: kapitoly z dějin bezpráví*. Brno: Masarykova univerzita, 2009, p. 902.

34 Section 17 of Act No. 114/1951 Sb., on the Bar (Bar Code); BALÍK, S. (ed.). *Advokacie včera a dnes: vybrané texty z dějin a současnosti advokacie*. Plzeň: Aleš Čeněk, 2000, pp. 161–162.

authorities. The rationale for why a defence attorney was still necessary was very prosaic – because the then-model Soviet Union and Soviet lawyers had incorporated the right to counsel in the Constitution of the USSR. But it was added (among other things) that to omit the principle of guaranteeing the right of defence would be a return to a bygone era.[35] Fortunately, towards the end of the 1950s, the view on defence attorneys changed. There was a realization that the absence of a counsel as a qualified defence attorney would cause a one-sided trial given the nature of the prosecutor.[36]

Alfred Jüttner revealed the image of the ideal attorney in the 1950s in his article in the professional periodical *Právník* ("Lawyer"): *"Like any scientific and intellectual activity, the work of an advocate is largely, if not exclusively, a critical activity.* […] *Even if the criticism is technical in terms of law and concrete in terms of a particular practical case, it must satisfy the general requirements that Marxism imposes on criticism.* […] *The Marxist attorney, in the exercise of his profession, cannot stand ideologically on a different basis from the prosecutor or the people's democratic court. His speeches cannot give rise to the suspicion or impression that he takes a position hostile to socialism,* […] *The criticism of the attorney must demonstrate the same patriotism and devotion to the idea of socialism, the same strictly moral socialist outlook as that of the judge and prosecutor."*[37]

A special area for defence attorneys in the 1950s was representing a client in political trials but as was mentioned above, it could only be done by a registered defence attorney.[38] These trials were held in the State Court. However, the defence attorney representing the accused in the State Court realistically had little opportunity to properly defend him. He rarely had the opportunity to study the case file sufficiently, to consult the case with the accused. Moreover, at the trial, the judge routinely gave the floor only to the prosecutor, while the defence attorney had to wait until the prosecutor had finished his questions. This led to non-objectivity and prolongation of the main trial and shortening of the defence. Also, in the 1950s, it was

35 KUNC, J. Obhájce v trestním řízení. *Soudce z lidu*, 1950, Vol. 1, no. 6–7, p. 86.; *See also* NOVÝ, C. Úloha obhájce v trestním řízení. *Soudce z lidu*, Vol. 8, 1957, no. 3, p. 37.

36 NOVÝ, C. Úloha obhájce v trestním řízení. *Soudce z lidu*, Vol. 8, 1957, no. 3, p. 37.

37 JÜTTNER, A. Socialistický obhájce (Podnět k diskusi). *Právník*. 1952, Vol 91, no. 8, p. 516.

38 BALÍK, S. *Dějiny advokacie v Čechách, na Moravě a ve Slezsku*. Praha: Česká Advokátní Komora, 2009, p. 208.

unusual for a defence attorney to be present during pretrial proceedings. His presence was only made possible by the later Criminal Procedure Code.[39] This fact was also commented on in the periodical *Právní*k ("Lawyer"):

"However, it would be impractical to appoint a defence attorney for an indigent accused in cases where the activities of the defence attorney are not of great importance and where no prejudice can arise from the absence of the defence attorney anyway (especially in pre-trial proceedings, etc.)"[40]

But it should be added that not every defence attorney wanted to properly defend his or her client.[41] It was necessary to look into the archival files to determine the exact activities of the defence attorney in the 1950s, as there is no single publication on the subject.

In the archival files of the State Court in Brno, a lot of political trials can be found where the same defence attorneys' names often appeared.[42] Moreover, many of them represented more than one accused in these proceedings which may have caused the interests of the clients could have been in conflict.

Moreover, there were defence attorneys who offered no evidence on behalf of their client.[43] On the other hand, some of the evidence offered by the defence was not appropriate and perhaps in a way worsened the accused's position.[44] There were also those defence attorneys who proposed evidence in favour of their client, but the Chamber refused to take it. Perhaps it was also because if the defence attorney proposed evidence,

39 Article I, paragraph 30, Section 165 of Act No. 57/1965 Sb., the Act amending and supplementing Act No. 141/1961 Sb., on Criminal Procedure (Code of Criminal Procedure).

40 DOLENSKÝ, A. Obviněný a jeho obhajoba. *Právník*. 1951, Vol. 90, no. 1, p. 27.

41 KOBER, J. *Advokacie v českých zemích v létech 1848–1994*. Praha: Česká Advokátní Komora, 1994, p. 138.

42 E.g., Moravian Provincial Archive in Brno (hereinafter referred to as the "MPA") ref. C 145, archive collection Státní soud Brno (1948–1952), cart. 173, sign. 1158 Ts II/I 2; MPA, ref. C 145, archive collection Státní soud Brno (1948–1952), cart. 36, sign. 262 Or IIa 225; MPA, ref. C 145, archive collection Státní soud Brno (1948–1952), cart. 170, sign. 1154 Or II/II 68.

43 E.g., MPA, zn. C 145, archive collection Státní soud Brno (1948–1952), cart. 173, sign. 1158 Ts II/I 2, p. 117, 124, 130, 132.

44 E.g., MPA, ref. C 145, archive collection Státní soud Brno (1948–1952), cart. 279, sign. 1431 1 Ts II 56, pp. 96–112.

it happened that the prosecutor recommended to the Chamber to reject this evidence. And the Chamber often did so.[45]

However, the submission of evidence by the defence attorney was not the only tool to protect the interests of the accused. Another important manifestation of the defence attorney's activity was the degree and quality of the questions he directed not only at his client during the examination in the trial. Some defence attorneys asked their clients minimal questions compared to the number of questions asked by the prosecutor.[46] It was rare that the accused was questioned by a different attorney than his own. However, it must be taken into consideration that the accused's testimony may have been sufficient to establish the fact in question and no further questions were necessary.

In addition, there are no verbatim transcripts of the defence attorney's questions, and in some cases, it is not even stated whether the defence attorney asked a question at all. Therefore, in some cases, it is difficult to assess whether or not the defence counsel in question was actively involved.

Unfortunately, even the verbatim transcript of the closing arguments of the defence attorneys was not preserved in the court files in the archives.

To assess the overall performance of the attorney, it is also necessary to take into account how the client himself approached the charges. It can be seen from the files that in many cases the accused pleaded guilty to the charge in whole or in part (regardless of the truthfulness or manner of obtaining the plea). Therefore, it was problematic for the defence attorney himself to speak of his client's innocence when the client himself claimed otherwise when questioned in court. Even if the client pleads guilty, the defence attorney should not unquestioningly affirm the client's guilt or even fully agree with the prosecution.[47]

45 E.g., MPA, ref. C 145, archive collection Státní soud Brno (1948–1952), cart. 36, sign. 262 Or IIa 225, p. 165.

46 E.g., MPA, ref. C 145, archive collection Státní soud Brno (1948–1952), cart. 279, sign. 1431 1 Ts II 56, pp. 96–112.

47 See KOBER, J. *Advokacie v českých zemích v létech 1848–1994*. Praha: Česká Advokátní Komora, 1994, p. 140.

However, studied archival files have shown that it is quite hard to state a uniform conclusion as to whether the attorney was active (or not) in the legal proceedings and was properly defending his or her client/clients. One of the reasons why it is impossible to give a unified view is that the records of court hearings in the archives are scarce on the information. Another reason is that it is necessary to consider whether the defence attorney was appointed by proxy or whether the defence attorney was appointed ex officio.

5 Conclusion

According to the information found, it can be said that defence attorneys appointed by ex officio (representing in the State Court) were essentially passive in their approach to the defence and only formally fulfilled their procedural obligations. They did not question their clients or other parties frequently during the proceedings. Often, they did not even offer evidence in support of their client. On the contrary, defence attorneys appointed by proxy (representing in the State Court) tended to be proactive and tried to properly defend the client. However, there were exceptions on both sides, depending (mainly) on the personality of the lawyer.[48] Therefore, some defence attorneys appointed by ex officio were conscientiously defending not only the interests of the client, but also the interests of justice, and vice versa.

References

BALÍK, S. Advokacie. In: *Komunistické právo v Československu: kapitoly z dějin bezpráví*. Brno: Masarykova univerzita, 2009, pp. 892–910.

BALÍK, S. (ed.). *Advokacie včera a dnes: vybrané texty z dějin a současnosti advokacie*. Plzeň: Aleš Čeněk, 2000.

BALÍK, S. *Dějiny advokacie v Čechách, na Moravě a ve Slezsku*. Praha: Česká Advokátní Komora, 2009.

48 E.g., attorney František Hejný, See TOMAN, P., ŠEBESTA, O. *Advokáti proti totalitě*. Praha: Mladá fronta, 2019, pp. 132–144.

BURSÍK, T. Procesy politické v 50. letech 20. století. In: SCHELLE, K., TAUCHEN, J. (eds). *Encyklopedie českých právních dějin. 8. svazek: Procesy (do roku 1949)*. Plzeň: Aleš Čeněk, 2017, pp. 763–769.

DOLENSKÝ, A. Obviněný a jeho obhajoba. *Právník*. 1951, Vol. 90, no. 1, pp. 25–35.

HERÁF, O. Advokátní právní poradny krajských sdružení – socialistická forma provozování advokacie. *Právník*. 1951, no. 1, pp. 35–38.

JÜTTNER, A. Socialistický obhájce (Podnět k diskusi). *Právník*. 1952, Vol. 91, no. 8, pp. 515–517.

KOBER, J. *Advokacie v českých zemích v létech 1848–1994*. Praha: Česká Advokátní Komora, 1994.

KOCIAN, J. *Tematická příručka k československým dějinám 1948–1989*. Praha: Institute for Contemporary History of the CAS, v.v.i., 2021.

KUNC, J. Obhájce v trestním řízení. *Soudce z lidu*. 1950, Vol. 1, no. 6–7, pp. 86–87.

NOVÝ, C. Úloha obhájce v trestním řízení. *Soudce z lidu*. 1957, Vol. 8, no. 3, pp. 37–38.

PERNES, J., POSPÍŠIL, J., LUKÁŠ, A. *Alexej Čepička: šedá eminence rudého režimu*. Praha: Brána, 2009.

SCHELLE, K., TAUCHEN, J. Úvodem. In: SCHELLE, K., TAUCHEN, J. (eds). *Encyklopedie českých právních dějin. 9. svazek: Procesy (od roku 1950)–Pů*. Plzeň: Aleš Čeněk, 2017, pp. 15–20.

TOMAN, P., ŠEBESTA, O. *Advokáti proti totalitě*. Praha: Mladá fronta, 2019.

VEBER, V. *Osudové únorové dny 1948*. Praha: Lidové noviny, 2008.

Offenders of the Crime of Social Parasitism in Czechoslovakia 1956–1990[1]

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Abstract

The offence of social parasitism was a typical institution of criminal law in socialist Czechoslovakia. Through its criminal regulation, the obligation to work (one of the characteristics of totalitarian states) was enforced. Social parasitism was committed by those who avoided proper work for a long time and who, at the same time, made a living in a way which was back in the time considered unfair or illegal. Typical perpetrators included prostitutes, property crime offenders, beggars, homeless people, gamblers or, last but not least, people who let someone else support them – typically people who had succumbed to alcohol addiction or newly adult individuals who did not enter the workforce and continued to be supported by their parents. To some extent, the communist regime used social parasitism to bully its opponents, taking advantage of the fact that the state was a de facto monopoly employer and could fire people from their jobs and refuse to employ them for no good reason.

Keywords

Social Parasitism; Socialism; Czechoslovakia; Offenders; Crime; Misdemeanour.

1 Introduction

From 1948 until the Velvet Revolution in 1989, the communists held absolute power in Czechoslovakia. Every totalitarian state is characterized

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by the implementation of a work obligation and, where appropriate, the punishment for non-compliance. In socialist Czechoslovakia, the criminal institution of social parasitism served this purpose. People who, for various reasons, did not work and made their living in illegal ways, such as prostitution or property crime, were prosecuted for social parasitism. The state at the time was a monopoly employer, which had the power to decide who was employed and where, and possibly even "fired" from employment, which was abused against dissidents (people who were inconvenient to the regime), who were then at risk of prosecution for social parasitism, as discussed in the last subchapter. Social parasitism had a considerable ideological, economic and social overlap since labour as such was at that time the cornerstone on which the new socialist society was to be built. In this article, attention is given primarily to the question of who was affected by the institution of social parasitism and for what reasons. The presented article uses findings from long-term archival research of historical criminal files from district courts, especially the District Court of Prague 1, obtained from the Prague City Archives.[2]

2 Development of the Institute of Social Parasitism in Czechoslovakia

The institution of social parasitism was enshrined in the Czechoslovak legal system from the mid-1950s until the fall of the communist regime. Its essence was to prosecute persons who avoided work and obtained their livelihood through unfair means. The regime punished such persons appropriately and, wanted to re-educate them through criminal sanctions so that their lives conformed to the ideas of the ideal socialist man of the time.

The obligation to work for the benefit of the whole stemmed from the Constitution of the time,[3] where it was equated with the duty to participate in the defence of the state. The first communist penal code did not include the enforcement of labour duty using criminal sanctions. This was because the proclaimed labour duty was expected to be fully observed

2 Prague City Archives (PCA), State Authorities Fund, Department of the Fund: District Court for Prague 1, mark NAD 106.

3 Constitutional Act No. 150/1948 Coll., Constitution of the Czechoslovak Republic of 9 May 1948.

in the new socialist state and its possible violation would be eliminated by the new social order.[4] Since this did not happen and the introduction of socialism – a society of workers[5] – did not work as imagined, in 1956, we first encounter the term social parasitism.[6] This concept was introduced by an amendment to the criminal code, which introduced a new offence of social parasitism, which read: *"Anyone who makes a living in a dishonest way and avoids honest work shall be punished by imprisonment for three months to two years."*[7] Therefore, the offence also required the element of avoiding work and making a living in a dishonest way. This provision was, according to the perception at the time, intended to punish socially useless persons with a poor attitude to work who fed off the work of other citizens. The main purpose of this amendment was to eliminate phenomena that disturbed or hindered the "building efforts of the people."[8] However, this statutory provision has been interpreted inconsistently and broadly by the courts,[9] causing problems in the fight against this crime.[10]

In 1960, a change in the existing legislation took place, the basis of which was the new Constitution,[11] which proclaimed that work for the benefit of the whole was the first duty in a socialist society and that the right to work was the first right of every citizen. In 1961, a new penal code was also approved, which enshrined the offence of social parasitism in section 203. The specific wording of this statutory provision was changed in 1963 and 1965,[12] when it settled on the wording *"Whoever systematically avoids honest work and lets oneself be supported by someone else, or obtains his means of livelihood by other*

4 BAREŠOVÁ, K. *Příživnictví*. Master's thesis. Praha: Charles University, Faculty of Law, 1972, p. 10.

5 DOBEŠ, M. Příživnictví – právněhistorický vývoj tohoto institutu na našem území. In: TAUCHEN, J. (ed.). *VIII. česko-slovenské právněhistorické setkání doktorandů a postdoktorandů: sborník z konference*. Brno: Masaryk university, 2020, p. 74.

6 VLČEK, M. *Příživnictví v československém trestním právu*. Praha: Academia, 1985, p. 42.

7 §188a of Act No. 63/1956 Coll., the Criminal Code.

8 GLOGAR, R. *Trestní zákon: Komentář*. Praha: Orbis, 1958, pp. 483–484.

9 VÍTEK, S. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1973, p. 22.

10 PRCHLÍKOVÁ, L. *Příživnictví*. Master's thesis. Praha: Charles University, Faculty of Law, 1973, p. 11.

11 Constitutional Act No. 40/1960 Coll., the Constitution of the Czechoslovak Socialist Republic.

12 More on these changes DOBEŠ, M. *Příživnictví – právněhistorický vývoj tohoto institutu na našem území*. Master's thesis. Brno: Masaryk university Faculty of Law, 2020, pp. 38–48.

unfair means, shall be punished by imprisonment for up to three years."[13] The objective aspect of this offence was therefore expressed by two basic qualifying features: the systematic avoidance of honest work and letting oneself be supported by someone else or providing oneself with means of livelihood in other unfair ways. The two qualifying elements constitute two forms of the same conduct and had to be fulfilled simultaneously. Consistent avoidance of work meant a prolonged period. It was not enough to take a short, isolated detour from otherwise proper work.[14] Most of the time, under the interpretation of the Supreme Court of Czechoslovakia, it was said to be three consecutive months of avoiding honest work.[15] Avoiding honest work simply meant not working unless there were compelling reasons to do so.[16] Work was not avoided by those who demonstrably applied for a job.[17] As for the sign of being supported by someone, it meant that the able-bodied but not working offender was supported by someone else. This was a very common form of social parasitism.[18] The most frequent were family members, partners or acquaintances. It was not specified in more detail what form the support could take, mostly it meant money and food. It must have been an act against the principles of socialist morality[19] with a higher, long-term intensity, which was intended to worsen the social situation of the people who provided the means of social parasitism to the "parasite."[20]

The subject – the offender could have been a physical person over 15 years of age at the time of the offence who fulfilled all the elements of the offence by his or her conduct. Other conditions for criminal liability were the ability

13 § 203 of Act No. 140/1961 Coll., the Criminal Code, as amended from 1 August 1965 to 1 February 1990.

14 RICHTEROVÁ, J. *Příživnictví*. Master's thesis. Praha: Charles University, Faculty of Law, 1973, p. 26.

15 Výklad ustanovení § 203 tr. zák., projednaný a schválený presidiem Nejvyššího soudu dne 7. 10. 1964, Prz 102/64. In: ROLENC, O., REPÍK, B. *Nejvyšší soud o trestním řízení soudním: Sborník směrnic, stanovisek a zhodnocení soudní praxe pléna a presidia nejvyššího soudu 1962 až 1968*. Praha: SEVT, 1975, p. 74.

16 For example illness in the family.

17 Judgment of the Supreme Court of 29 May 1969, Case No. 7 Tz 20/1969.

18 SÁBLÍKOVÁ, V. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1978, p. 26.

19 VLČEK, M. *Příživnictví v československém trestním právu*. Praha: Academia,1985, p. 50.

20 STROLENÝ, P. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1977, p. 61.

to work and sanity. Persons caring for children, persons preparing for a future profession (students), persons unable to work due to illness and persons meeting the requirements for old-age and disability pensions were excluded from criminal penalties.[21]

The last, but all the more important, change in the legal regulation of social parasitism occurred in 1969 when a new law on misdemeanours was adopted.[22] This law was passed, among other things, in response to the worsening economic situation, the shortage of workers in some fields, with private workers demanding excessive remuneration[23] for the same work, or the increase in prostitution caused by the alleged increase in tourism. This law contained the misdemeanour of social parasitism, which differed from the offence by lacking the qualifying element of "avoiding honest work"[24] was lacking and the characteristic of the degree of acquiring funds by dishonest means was broadened, which made it possible to prosecute the perpetrator for any acquisition of funds by dishonest means even in a regular employment relationship. This affected, for example, prostitution,[25] so this provision de facto allowed the prosecution of all heterosexual[26] prostitution in Czechoslovakia.[27] An example can be given of a prostitute working in a regular employment relationship as a kitchen helper in a restaurant during the day and earning money through prostitution at night.[28] In practice, it was very difficult for the courts to distinguish

21 MATYS, K. *Trestní zákon: Komentář.* Praha: Panorama, 1980*,* p. 656.

22 Act No. 150/1969 Coll. on Misdemeanours, in force from 1 January 1970 to 1 July 1990.

23 HORÁK, M., ROLENC, O. Důvodová zpráva zákonu o přečinech. *Zákon* o *přečinech, komentář.* Praha: Orbis, 1975, p. 7.

24 The full text of the offence of social parasitism according to Section 10: The offence of subsistence shall be punishable by imprisonment for up to one year or a fine of up to CZK 5 000 or forfeiture of property, whoever procures, even partially, the means of social parasitism in an unfair manner.

25 For more details on the prosecution of prostitution as a form of social parasitism: DOBEŠ, M. Prostitution as a Special Form of the Offence of Social Parasitism in Socialist Czechoslovakia. In*: Journal on European History of Law*. 2022, Vol. 13, no. 1, pp. 80–95.

26 Homosexual prostitution had its own regulation as § 244/2a) in the Penal Code.

27 NOVÁK, J. *Boj s příživnictvím ve formě prostituce*. Master's thesis. Praha: Charles University, Faculty of Law, 1984, pp. 45–46.

28 PCA, fund: District Court for Prague 1, Investigation and Criminal File, sign. 7Ta 188/1972, pp. 21–22, Judgment, 11 September 1972.

whether it was a criminal offence or a misdemeanour of social parasitism because of the unclear wording of the law.

3 Individual Offenders of Social Parasitism

As stated above, the crime of social parasitism required the systematic avoidance of work and being supported or obtaining one's livelihood by unfair means. In the case of the misdemeanour of social parasitism, only partial provision of means by unfair means was sufficient. This section focuses on just what these unfair/illegal means of livelihood were, which also implies who was the perpetrator of social parasitism. The forms of unfair means of livelihood included, in particular, the practice of prostitution, committing property crimes (theft, robbery, fraud, speculation, etc.), various forms of begging associated with vagrancy, casual work for private individuals associated with "unreasonably" high remuneration, and gambling and betting.

According to my archival research, the perpetrators were generally people who had troubled childhoods (coming from troubled families or children's homes), had a low level of education, were mentally handicapped, had been through a correctional facility, had been in contact with individuals who had committed crimes or, last but not least, had a problem with alcohol or other addictions.

3.1 People Engaged in Prostitution

The concept of prostitution was not further defined in Czechoslovak law[29] and therefore its interpretation was not clear,[30] which also meant a certain obstacle in the efforts to suppress this phenomenon.[31] Some definition was provided by a commentary in the Criminal Code, which referred to the crime of pimping: *"Prostitution means sexual intercourse with other persons for remuneration."*[32] The legal dictionary of the time came up with

29 VLČEK, M. K problematice postihu prostituce v československém trestním zákoně. In: *Právník, Teoretický časopis pro otázky státu a práva*. 1975, Vol. 114, no. 10, pp. 923–929.

30 KOUTSKÁ, B. *Boj s příživnictvím ve formě prostituce*. Master's thesis. Praha: Charles University, Faculty of Law, 1984, p. 22.

31 BALAŠ, O. Prostituce a boj proti ní. In: *Socialistická zákonnost*. 1968, Vol. 16, no. 1, pp. 16–22.

32 ROLENC, O. § 243a Kuplířství. In: GLOGAR, R. *Trestní zákon komentář*. Praha: Orbis, 1958, p. 601.

a refinement of this definition to *"the lending of the body for remuneration, usually for sexual intercourse."*[33] Within the ideology of the time, prostitution was considered a relic of the capitalist First Republic,[34] which, like social parasitism, would disappear with the demise of private property.[35] This did not happen,[36] of course, and so it was necessary to fight this phenomenon, which contradicts the principles of socialist morality.[37] In criminal law terms, it was the crime and misdemeanour of social parasitism that was used in this fight. Interestingly, due to prostitution, the offence of social parasitism was the most frequently committed in terms of crimes committed by women.[38]

It is important to note at this point that there were major differences between the prosecution of heterosexual and homosexual prostitution.[39] In comparison to heterosexual prostitution, homosexual prostitution had its legal regulation in the Criminal Code as § 244/2a,[40] where the punishment for sexual intercourse with a person of the same sex for payment was from 1 to 5 years in prison. It follows that homosexual prostitution posed a greater danger to the regime of the time than heterosexual prostitution,[41] as the maximum penalty for social parasitism was 3 years in prison. Another major difference was that both the person providing sexual services and the person who provided payment for those services were prosecuted for homosexual prostitution. For heterosexual prostitution, only the person providing the sexual services was prosecuted (for the offence of social

33 HROMADA, J., MADAR, Z. *Právnický slovník*. Praha: Orbis, 1972, pp. 659–660.

34 BOURA, F. Počasí a zločinnost. In: *SNB – čtrnáctideník sboru národní bezpečnosti*. 1949, Vol. 2, no. 11, pp. 10–11.

35 MARX, K., ENGELS, F. *Spisy 4*. Praha: Svoboda, 1958, p. 341.

36 That prostitution has not disappeared has been partly (unsurprisingly) blamed on the development of foreign tourism from the capitalist West. BALAŠ, O. Prostituce a boj proti ní. In: *Socialistická zákonnost*. 1968, Vol. 16, no. 1, pp. 16–22.

37 VLČEK, M. K problematice postihu prostituce v československém trestním zákoně. In: *Právník, Teoretický časopis pro otázky státu a práva*. 1975, Vol. 114, no. 10, pp. 923–929.

38 TOMÁNKOVÁ, J. Kriminologická a trestně právní problematika výskytu a postihu příživnictví v ČSSR. In: *Universitas: revue Masarykovy univerzity v Brně*. 1986, pp. 19–25.

39 Homosexual intercourse has not been punishable in Czechoslovakia since 1961 without other features (intercourse with a person under 18, intercourse for payment, intercourse causing public outrage).

40 § 244 Offence of sexual intercourse with a person of the same sex.

41 KUPKA, F. K některým problémům boje s příživnictvím. In: *Kriminalistický sborník*. 1971, Vol. 15, no. 5, p. 276.

parasitism).[42] The "customers" of prostituted women were, at most, witnesses in court, and their testimony often led to the conviction of the prostitute. Authors of the time reacted to this injustice and wrote that if it were not for men providing women prostitutes[43] with remuneration, prostitution could not occur and that their activities were equally dangerous[44] to society and should therefore be punished, and the legislation prosecuting homosexual prostitution[45] was held up as an example of such punishment. However, the punishment of these clients never took place.

In the case of homosexual prostitution, in addition to the offence of sexual intercourse with a person of the same sex, the provider of these sexual services also committed the offence of social parasitism, as receiving payment for sexual services fell under the offence of ill-gotten/illegal means. A typical example of such conduct is the case of 25-year-old Gabriel G.[46] This man stopped coming to work due to low pay and personal disputes. For nine months, he wandered around Czechoslovakia in the larger cities (Prague, Brno, Bratislava.) In these cities, he met homosexuals at train stations, then stayed with them overnight and let them feed him. In return, he lent himself to them for sexual purposes, for which he also received the money. According to his own words, he met about thirty homosexuals in this way, most often at Prague's Praha-střed station (today's Masaryk station). The court in Prague sentenced him to three years of imprisonment for the crimes of sexual intercourse with a person of the same sex and social parasitism.[47] It is worth noting that the offender of this case was not homosexual himself. According to the interrogation protocol, homosexual intercourse disgusted him, but he saw no other alternative to make quick

42 HAVELKOVÁ B. Genderová rovnost v období socialismu. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. a kol. *Komunistické právo v Československu: kapitoly z dějin bezpráví*. Brno: MU, 2009, p. 196.

43 In practice, heterosexual prostitution under socialism involved only female prostitutes and male "clients."

44 JELÍNEK, J. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1980, p. 57.

45 KUPKA, F. K některým problémům boje s příživnictvím. In: *Kriminalistický sborník*. 1971, Vol. 15, no. 5, pp. 274–278.

46 All proper names of the offenders have been changed in this article to protect personal data.

47 PCA, fund: District Court for Prague 1, Investigation and Criminal File, sign. 5T 174/1983, pp. 34–36, Judgment, 26 August 1983.

money.[48] According to the authors at the time and according to my archival research, this situation (where the provider of homosexual prostitution was not a homosexual himself) was very common.[49]

Heterosexual prostitution was many times more common than homosexual prostitution. Female prostitutes could be divided[50] into several groups[51] according to how much they earned from prostitution and also according to the location[52] where they provided sexual services. The first group used to include very young women and then older women. Then there were prostitutes who, in addition to prostitution, also committed property crimes.[53] The women in the first category were also united by the fact that they had low intelligence and came from deprived families.[54] They sought out their customers on the street and in the lowest-priced restaurants.[55] In return for sexual services, women of this lowest category only received payment which provided them with the necessities of life (food, drinks, cigarettes, short-term shelter for the night and small sums of money). An example of a prostitute falling into this category is Anna A., a minor of Roma origin, who was taken from her parents and placed in a youth detention centre, from which she escaped and, without financial means, was supported by various men in exchange for sexual intercourse. She was sentenced to six months of imprisonment for the crime of social parasitism, with a conditional suspension of 1,5 years.[56]

48 PCA, fund: District Court for Prague 1, Investigation and Criminal File, sign. 5T 174/1983, pp. 9–11, Protocol of interrogation of the accused, 16 May 1983.

49 ČERNÁ, Š. *Boj s příživnictvím a jeho prevence*. Master's thesis. Praha: Charles University, Faculty of Law, 1984, p. 22.

50 VÍTEK, S. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1973, pp. 11–14.

51 TOMÁNKOVÁ, J. Kriminologická a trestně právní problematika výskytu a postihu příživnictví v ČSSR. In: *Universitas: revue Masarykovy univerzity v Brně*. Brno: Univerzita J.E.Purkyně, 1986, pp. 19–25.

52 SVOBODA, Z. Nechtěla se zapojit. In: *Kriminalistický sborník*. 1984, Vol. 28, no. 6, pp. 380–382.

53 NOVÁK, J. *Boj s příživnictvím ve formě prostituce*. Master's thesis. Praha: Charles University, Faculty of Law, 1984, pp. 73–74.

54 SVOBODA, Z. K problematice prostituce mladistvých. In: *Kriminalistický sborník*. 1984, Vol. 28, no. 3, p. 166.

55 JUNGR, M. Mladá příživnice. In: *Kriminalistický sborník*, 1987, Vol. 31, no. 12, p. 737.

56 State District Archive Pelhřimov, fund: District Court Pelhřimov II, Investigation and Criminal File, signature 1T 276/83, pp. 40–43, Judgment, dated 13 September 1983.

The second group of prostitutes could be characterized by the fact that the consideration was no longer the satisfaction of the necessities of life, but payment in the form of money. This category included, for example, prostitutes who travelled to industrial areas on payday,[57] to holiday resorts or typically major road border crossings with East Germany.[58]

The third (and, for this article, the highest category) category of prostitutes included women seeking out foreigners from whom they obtained "hard" foreign currency, and wealthy local men, especially in the centre of Prague,[59] the capital of Czechoslovakia. What these women had in common was that they were in permanent employment and they were intelligent women with good conversational skills and knowledge of foreign languages.[60] These women were motivated by the possibility of earning several times the average wage at the time.[61] The regime of the time knew about this crime and tried to prevent it by regularly checking nightclubs and hotels.[62] There was even a ban on providing short-term accommodation in Prague hotels to people who had permanent residence in Prague.[63] It is also interesting to note that prostitutes of this highest category were in some cases used to collaborate with the Communist secret police to compromise their customers[64] (foreigners, Western diplomats or even prominent Communists).[65] Such prostitutes were not, of course, threatened with prosecution for social parasitism.[66]

57 JELÍNEK, J. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1980, p. 50.

58 KLIMEŠ, M. Prostituce novým problémem. In: *Kriminalistický sborník,* 1979, Vol. 23, no. 9, pp. 548–550.

59 Between 1962 and 1972, more cases of prostitution were recorded in Prague than in the rest of Czechoslovakia. KUDLÍK, A. K problematice kriminality ve velkoměstském prostředí – v hlavním městě Praze. In: *Socialistická zákonnost*. 1978, Vol. 26, no. 7, pp. 414–430.

60 OPRAVIL, M. Prostituce – její některé projevy a příčiny v současné době. In: *Kriminalistický sborník*. 1963, Vol. 7, no. 7, p. 411.

61 ROLENC, O. Příživnictví. In: *Soudce z lidu*. 1958, Vol. 11, no. 10, pp. 131–132.

62 SVOBODOVÁ, E. *Boj s příživnictvím a jeho prevence*. Master's thesis. Praha: Charles University, Faculty of Law, 1984, p. 34.

63 KOUBEK, V. Kuplíři a prostituce. In: *Kriminalistický sborník*. 1966, Vol. 10, no. 3, pp. 147–150.

64 KAPLAN, K. *Komunistický režim a politické procesy v Československu*. Brno: Barrister & Principal, 2001, p. 253.

65 BÁRTA, M. Prostitutky ve službách StB. In: *Týden*. 2019, Vol. 26, no. 39, p. 10.

66 For more on prostitution as a special form of social parasitism, see DOBEŠ, M. Prostitution as a Special Form of the Offence of Social Parasitism in Socialist Czechoslovakia. In: *Journal on European History of Law*. 2022, Vol. 13, no. 1, pp. 80–95.

3.2 Offenders of Other (Property) Crime

Apart from committing the crime of social parasitism, the offenders in this group committed mainly theft, theft of socialist property,[67] less frequently fraud, embezzlement, forbidden speculation, and in some, rather exceptional cases, violent robbery.[68] Thus, in these ways, they provided themselves with a means of livelihood.[69] These people were generally labelled as parasites, who in the course of their parasitic behaviour sought to make unjust profits and income from dishonest sources.[70] Authors of the time pointed out that it was always necessary to consistently clarify the means of livelihood of persons suspected of parasitism, leading to the detection of more serious crimes against the economic interests of society.[71]

Social parasitism was very common in conjunction with property offences.[72] The most common were non-working thieves and looters of socialist-owned property.[73]

3.3 Offenders Committing Various Forms of Begging

In addition to "beggars", this category also included offenders who borrowed small sums of money or various consumer items that they did not intend to return. They usually borrowed from friends or family members. At the same time, as these offenders consistently avoided honest work, they were not financially well off (not solvent) and were unable to repay their debts. Often, criminal prosecutions were then initiated precisely because they did not pay off their debts and their creditors reported this fact to the police.

67 KOUTSKÁ, B. *Boj s příživnictvím ve formě prostituce*. Master's thesis. Praha: Charles University, Faculty of Law, 1984, p. 35.

68 STROLENÝ, P. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1977, p. 62.

69 VÍTEK, S. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1973, p. 76.

70 VLČEK, M. Příživnictví jako právní a sociologická kategorie. *Právník*. 1983, Vol. 122, č. 8, s. 755.

71 VIESKA, J. O příživnictví v pojetí § 203 tr. zák. *Socialistická zákonnost:* časopis *pro právní praxis*. 1963, Vol. 11, no. 1, p. 39.

72 ŠUSTÁČEK, J. *Příživnictví*. Rigorous thesis. Brno University Jan Evangelista Purkyně, Faculty of Law (Todays Masaryk University), 1977, p. 50.

73 SÁBLÍKOVÁ, V. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1978, p. 47.

These complaints were subsequently included in criminal files – sometimes those were even anonymous reports.[74] This group also included perpetrators who went around to the city's cafeterias and restaurants in price group IV, where they finished leftover meals and drinks. By the standards of the time, they were among *"the most declassed elements leading the most parasitic way of life."*[75]

Today in the Czech Republic, some people remember socialism with nostalgia precisely because they did not meet any beggars or homeless people on the streets. It was not that these people did not exist, but because they were often in prison for the crime of begging, the abolition of which in 1990 is considered one of the reasons for the sharp increase in the number of homeless people.[76]

3.4 Casual Workers in the Private Sector for Disproportionately High Pay

Casual work – temporary jobs were partially allowed. The state, however, wanted to control all work and therefore prosecuted the so-called uncontrollable livelihoods, especially for private individuals – this was the so-called "black labour", which was prosecuted as social parasitism.[77] Here the offenders took advantage of the weaknesses of the then centrally planned economy and carried out work and marketed products that were in short supply and, according to the ideology of the time, "profited from the work of other fellow citizens" thanks to the inadequate remuneration.[78] In particular, there was a shortage of skilled craftsmen at that time (bricklayers, tilers, well-diggers, stonemasons, etc.) and those who knew these crafts earned much more in private employment than in employment for state enterprises.[79] These people were then called indirect parasites

74 Own archival research.

75 STROLENÝ, P. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1977, p. 65.

76 ŠTĚCHOVÁ, M., LUPTÁKOVÁ, M., KOPOLDOVÁ, B. *Bezdomovectví a bezdomovci z pohledu kriminologie: Závěrečná zpráva*. Praha: Institut pro kriminologii a sociální prevenci, 2008.

77 NEZKUSIL, J., CÍSAŘOVÁ, D. K aktuálním otázkám příživnictví. In*: Socialistická zákonnost: časopis pro právní praxi*. 1958, Vol. 6, no. 4, p. 217.

78 STROLENÝ, P. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1977, p. 68.

79 ŠUSTÁČEK, J. *Příživnictví*. Rigorous thesis. Brno University Jan Evangelista Purkyně, Faculty of Law (Todays Masaryk University), 1977, pp. 45–46.

(as opposed to direct freeloaders who fed off state money). Indirect parasitism also included bribery.[80] The most common members of this group of social parasites were unemployed skilled labourers who helped with the construction of family houses.[81]

3.5 Operators and Players of Large-scale Gambling

Of the groups of offenders reported here, the least number of persons fell into this category. That is evident from our archival research and also from the authors of the time. This was also because this crime was difficult to prove and detect.[82] State-organized lotteries were allowed. What the authors of the time said about this group of offenders was that there were some unresolved issues, such as whether to punish even a player who did not win or a player who only won a small amount of money.[83]

During my archival research, a case was found, in which a court in Prague convicted a social parasite who gambled for a living. This was a 26-year-old man who was partly supported by his parents and partly supported himself by organizing a gambling game consisting of three mugs and a ball. The betters were asked to guess which of the mugs the offender had shuffled contained the ball. In this game, the offender earned considerable sums of money. The man was sentenced to five months of imprisonment for social parasitism.[84]

4 Dissidents – People Inconvenient to the Regime

In today's literature, in connection with the offence of parasitism, we always encounter information that this socialist institution of criminal law was used against opponents of the regime. The Communists abused the fact

80 SÝKORA, J. Přežitky minulosti ve vědomí lidí. *Právník*. 1975, Vol. 114, no. 10, p. 917.

81 The specific cases of these perpetrators are discussed in DOBEŠ, M. *Příživnictví – právněhistorický vývoj tohoto institutu na našem území*. Master's thesis. Brno: Masaryk university Faculty of Law, 2020, pp. 84–86 and 99–102.

82 PRCHLÍKOVÁ, L. *Příživnictví*. Master's thesis. Praha: Charles University, Faculty of Law, 1973, pp. 35–36.

83 RIEDLOVÁ, H. Některé problémy při postihu hazardních her. *Socialistická zákonnost:* časopis *pro právní praxi*. 1989, Vol. 37, no. 9, pp. 547–549.

84 PCA, fund: District Court for Prague 1, Investigation and Criminal File, sign. 4T 107/1972, pp. 39–41, Judgment, 12 December 1972.

that the State was the de facto monopoly employer. Following on from this fact, especially after the invasion of Czechoslovakia by Warsaw Pact troops on 21 August 1968 and the emergence of the opposition movement Charter 77, people who opposed the local regime were dismissed from their jobs in large numbers. Later on, these people had great difficulty getting even the most menial jobs.[85] And in many cases, it just so happened that even when they did get such a job,[86] they were not allowed to start working because the job was subsequently filled by someone else.[87] There was also harassment in the sense that the police prevented dissidents from going to work by detaining them and they were subsequently charged with social parasitism.[88] Musicians could also have their state permits to perform revoked – their subsequent concerts were then deemed an illegal source of livelihood and again such a musician was charged[89] with social parasitism.[90]

The fact that the security authorities could accuse any woman of prostitution in the name of combating social parasitism could be considered the worst violation of human integrity. In such cases, without any specific suspicion, women were forced to undergo a two-week stay in a prison-like environment of a specialized venereology ward in a hospital, because any woman suspected of prostitution was automatically suspected of spreading venereal diseases.[91] In addition to humiliating examinations of their private parts, the women had to answer questions about their sex lives. During these two

85 DENČEVOVÁ, I., Osobní rozhovor autorky s Petrem Kadlecem. In*: Underground jako politický fenomén*. Rigorous thesis. Praha: Charles University, Faculty of Philosophy, 2012, pp. 38–40.

86 BLAŽEK, P., LAUBE, R., POSPÍŠIL, F. *Lennonova zeď v Praze: neformální shromáždění mládeže na Kampě 1980–1989*. Praha: Ústav pro soudobé dějiny Akademie věd České republiky, 2003, pp. 284–289.

87 BENDOVÁ, K. Ženy v Chartě 77. Vzpomínky na ty, které vydržely. In: BLAŽEK, P. (ed.). *Opozice a odpor proti komunistickému režimu v Československu 1968–1989*. Praha: Dokořán, 2005, p. 55.

88 Jan Bednář. *Ústav pro studium totalitních režimů* [online]. Paměť a dějiny totalitních režimů: Československý disent 1977–1989 [cit. 9. 17. 2022]. Available at: https://www.ustrcr.cz/uvod/vzdelavaci-projekt-pamet-a-dejiny-totalitnich-rezimu/ceskoslovensky-disent/jan-bednar-1953/

89 ČERNÝ, J. *Sleevnote k albu Země je kulatá*. Praha, 1980.

90 Sdělení č. 466, Proces s písničkářem Josefen Nosem. In Informace o Chartě. *Samizdat*. Praha, 1985, Vol. 8, no. 10, p. 6.

91 BRENNER, C. Líné dívky, lehké dívky? Příživnictví a disciplinace mladých *žen* v době normalizace. In: *Dějiny a současnost*. 2013, Vol. 9, no. 7, pp. 19–22.

weeks, they were not allowed to give a report about themselves to their family or to call a lawyer.[92]

In the trials of "social parasites," the basic procedural principle of criminal law – the presumption of innocence – was distorted, where the accused had to prove in all cases what their sources of livelihood were and that they did not consistently avoid honest work. In this way, the state bullied its opponents into backing down from their anti-state activities – the aim, for example, was to get them to withdraw their participation in Charter 77 or to emigrate abroad, which they did in many cases.

5 Conclusion

Social parasitism was a broad institute of criminal law, typical for the socialist Czechoslovakia, which significantly affected the whole society. The communists wanted to build a new and better society based on universal labour duty. Its non-observance was enforced by criminal sanctions based on the facts of the crime and the misdemeanour of social parasitism. As part of the fight against social parasites, people who avoided work for long periods and who obtained their means of livelihood in a way that was unfair from the point of view of the time were prosecuted. Among the unfair and illegal ways were prostitution and gambling, begging, "black labour" and, of course, committing property crimes. In general, the perpetrators were thought to be less intelligent people with troubled childhoods and problems with alcohol addiction. In addition to the typical offenders, social parasitism also affected people who were inconvenient for the regime. The communists abused their dominant position in society and bullied their opponents by firing them from their jobs, putting them at risk of prosecution for social parasitism. So, it can be said that the institute of social parasitism was also one of the ways the regime fought its opponents.

92 HAVELKOVÁ B. Genderová rovnost v období socialismu. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu: kapitoly z dějin bezpráví*. Brno: MU, 2009, p. 196.

References

BALAŠ, O. Prostituce a boj proti ní. *Socialistická zákonnost*. 1968, Vol. 16, no. 1, pp. 16–22.

BAREŠOVÁ, K. *Příživnictví*. Master's thesis. Praha: Charles University, Faculty of Law, 1972.

BÁRTA, M. Prostitutky ve službách StB. *Týden*. 2019, Vol. 26, no. 39, pp. 9–12.

BENDOVÁ, K. Ženy v Chartě 77. Vzpomínky na ty, které vydržely. In: BLAŽEK, P. (eds.). *Opozice a odpor proti komunistickému režimu v Československu 1968–1989*. Praha: Dokořán, 2005, pp. 54–67.

BLAŽEK, P., LAUBE, R., POSPÍŠIL, F. *Lennonova zeď v Praze: neformální shromáždění mládeže na Kampě 1980–1989*. Praha: Ústav pro soudobé dějiny Akademie věd České republiky, 2003, pp. 284–289.

BOURA, F. Počasí a zločinnost. *SNB – čtrnáctideník sboru národní bezpečnosti,* 1949, Vol. 2, no. 11, pp. 10–11.

BRENNER, Ch. Líné dívky, lehké dívky? Příživnictví a disciplinace mladých žen v době normalizace. *Dějiny a současnost*. 2013, Vol. 9, no. 7, pp. 19–22.

ČERNÁ, Š. *Boj s příživnictvím a jeho prevence*. Praha. Master's thesis. Praha: Charles University, Faculty of Law, 1984.

ČERNÝ, J. *Na bílém 4: Sleevnote k albu Země je kulatá*. Praha: Galén, spol. s r.o., 1990.

DENČEVOVÁ, I., *Underground jako politický fenomén*. Rigorous thesis. Praha: Charles University, Faculty of Philosophy, 2012.

DOBEŠ, M. Příživnictví – právněhistorický vývoj tohoto institutu na našem území. In: TAUCHEN, J. (ed.) *VIII. česko-slovenské právněhistorické setkání doktorandů a postdoktorandů: sborník z konference*. Brno: Masaryk university, 2020, pp. 72–86.

DOBEŠ, M. Prostitution as a Special Form of the Offence of Social Parasitism in Socialist Czechoslovakia. *Journal on European History of Law*. 2022, Vol. 13, no. 1, pp. 80–95.

DOBEŠ, M. *Příživnictví – právněhistorický vývoj tohoto institutu na našem území*. Brno. Master's thesis. Brno: Masaryk university, Faculty of Law, 2020.

GLOGAR, R. *Trestní zákon: Komentář*. Praha: Orbis, 1958.

HAVELKOVÁ B. Genderová rovnost v období socialismu. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.) *Komunistické právo v Československu: kapitoly z dějin bezpráví*. Brno: Masarykova univerzita, 2009, pp. 179–206.

HORÁK, M., ROLENC, O. *Zákon o přečinech, komentář*. Praha: Orbis, 1975.

HROMADA, J., MADAR, Z. *Právnický slovník*. Praha: Orbis, 1972.

JELÍNEK, J. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1980.

JUNGR, M. Mladá příživnice. In: *Kriminalistický sborník*. 1987, Vol. 31, no. 12, pp. 736–738.

KAPLAN, K. *Komunistický režim a politické procesy v Československu*. Brno: Barrister & Principal, 2001.

KLIMEŠ, M. Prostituce novým problémem. *Kriminalistický sborník*. 1979, Vol. 23, no. 9, pp. 548–550.

KOUBEK, V. Kuplíři a prostituce. *Kriminalistický sborník*. 1966, Vol. 10, no. 3, pp. 147–150.

KOUTSKÁ, B. *Boj s příživnictvím ve formě prostituce*. Master's thesis. Praha: Charles University, Faculty of Law, 1984.

KUDLÍK, A., K problematice kriminality ve velkoměstském prostředí – v hlavním městě Praze. *Socialistická zákonnost*. 1978, Vol. 26, no. 7, pp. 414–430.

KUPKA, F. K některým problémům boje s příživnictvím. *Kriminalistický sborník*. 1971, Vol. 15, no. 5, pp. 274–278.

MARX, K., ENGELS, F. *Spisy 4*. Praha: Státní nakladatelství politické literatury, 1958.

MATYS, K. *Trestní zákon: Komentář*. Praha: Panorama, 1980.

NEZKUSIL, J., CÍSAŘOVÁ, D. K aktuálním otázkám příživnictví. *Socialistická zákonnost: časopis pro právní praxi*. 1958, Vol. 6, no. 4, pp. 210–222.

NOVÁK, J., *Boj s příživnictvím ve formě prostituce*. Master's thesis. Praha: Charles University, Faculty of Law, 1984.

OPRAVIL, M. Prostituce – její některé projevy a příčiny v současné době. *Kriminalistický sborník*. 1963, Vol. 7, no. 7, pp. 409–412.

PRCHLÍKOVÁ, L. *Příživnictví*. Master's thesis. Praha: Charles University, Faculty of Law, 1973.

RIEDLOVÁ, H. Některé problémy při postihu hazardních her. *Socialistická zákonnost: časopis pro právní praxi*. 1989, Vol. 37, No. 9, pp. 547–549.

RICHTEROVÁ, J. *Příživnictví*. Master's thesis. Praha: Charles University, Faculty of Law, 1973.

ROLENC, O. Příživnictví. *Soudce z lidu*. 1958, Vol. 11, no. 10, pp. 130–134.

ROLENC, O., REPÍK, B. *Nejvyšší soud o trestním řízení soudním: Sborník směrnic, stanovisek a zhodnocení soudní praxe pléna a presidia nejvyššího soudu 1962 až 1968*. Praha: SEVT, 1975.

SÁBLÍKOVÁ, V. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1978.

Sdělení č. 466, Proces s písničkářem Josefen Nosem. In: *Informace o Chartě*. 1985, Vol. 8, no. 10, pp. 5–7.

STROLENÝ, P. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1977.

SVOBODA, Z. K problematice prostituce mladistvých. *Kriminalistický sborník*. 1984, Vol. 28, no. 3, pp. 164–168.

SVOBODA, Z. Nechtěla se zapojit. *Kriminalistický sborník*. 1984, Vol. 28, no. 6, pp. 379–383.

SVOBODOVÁ, E. *Boj s příživnictvím a jeho prevence*. Master's thesis. Praha: FL CU, 1984.

SÝKORA, J. Přežitky minulosti ve vědomí lidí. *Právník*. 1975, Vol. 114, no. 10, p. 917.

ŠTĚCHOVÁ, M., LUPTÁKOVÁ, M., KOPOLDOVÁ, B. *Bezdomovectví a bezdomovci z pohledu kriminologie: Závěrečná zpráva*. Praha: Institut pro kriminologii a sociální prevenci, 2008.

ŠUSTÁČEK, J. *Příživnictví*. Rigorous thesis. Brno: University Jan Evangelista Purkyně, Faculty of Law (Today's Masaryk University), 1977.

TOMÁNKOVÁ, J. Kriminologická a trestně právní problematika výskytu a postihu příživnictví v ČSSR. *Universitas: revue Masarykovy univerzity v Brně*. 1986, pp. 19–25.

VIESKA, J. O příživnictví v pojetí § 203 tr. zák. *Socialistická zákonnost: časopis pro právní praxi*. 1963, Vol. 11, no. 1, pp. 35–40.

VÍTEK, S. *Příživnictví*. Rigorous thesis. Praha: Charles University, Faculty of Law, 1973.

VLČEK, M. K problematice postihu prostituce v československém trestním zákoně. *Právník*. 1975, Vol. 114, no. 10, pp. 923–929.

VLČEK, M. Příživnictví jako právní a sociologická kategorie. *Právník*. 1983, Vol. 122, no. 8, pp. 752–758.

VLČEK, M. *Příživnictví v československém trestním právu*. Praha: Academia, 1985.

Resumé

This publication is an output from a conference of PhD students of legal history and Roman law. The International Legal History Meeting of PhD Students followed up from similar meetings of Czech and Slovak PhD students that commenced back in 2013 on the instigation of Karel Schelle and Jaromír Tauchen, lecturers at the Masaryk University Faculty of Law in Brno. The progressive approach so typical for the Faculty of Law in Brno resulted in the decision to organise a similar international supra-regional meeting of PhD students in which 30 PhD students from ten countries eventually participated. The conference participants thus demonstrated not only an interest in the material addressed but also an active approach, openness, friendliness and curiosity. One objective of the conference was to symbolise a certain milestone in cooperation among the youngest generation of legal historians and Romanists, who are prepared not only to present their topics and their professional interest, but also to demonstrate their range of knowledge through listening to, and actively discussing, all the presented topics, which touched on almost every conceivable field.

The published collection actually presents only a selection of the papers presented at the Brno conference in September 2022. It was decided to present them chronologically in view of their wide-ranging focus. **Michael Binder** (at) examines whether the *exceptio doli* referred to in D. 21.2.73 is a consequence of *dolo facit, qui petit quod redditurus est*. The paper by **Vid Žepič** (si) outlines the evolution of the closely related provisions in the Code of Hammurabi, the Decalogue, the Code of Gortyn, and Roman Imperial Constitutions, and considers the underlying motives for their enactment. **Václav Dvorský** (cz/be) presents the opinions of three medieval and early modern civil lawyers on the deposit of fungibles. **Tamas Hontvari** (hu) deduces in his article that the Diocletian Edict on Maximum Prices and the Hungarian government decrees introducing price caps are very similar, both in their root causes, their legal policy aims, their technical solutions, as well as in the sanctions they impose on those breaching the law. **Igor Hron** (sk) aims to track the traces of moral rights in the common law. **Danilo Brajović** (at) focuses on the conflictual relationship between theoretical and practical influences and factors affecting the legislative

activity of the Habsburg Monarchy using the example of the South-Slavic collective property. **András Biczó** (hu) summarizes some observations regarding the new first-instance courts erected in the Hungarian Kingdom and Transylvania in 1787 as a consequence of the judicial reforms carried out by Joseph II. **Kristóf Mihály Heil** (hu) introduces the work of national and county committees in terms of constitutional history and emphasises its importance. **Bernhard Gollob** (at) remarks, *inter alia*, that although Austria perceives itself as a "cultural superpower" its fundamental rights provision to protect the arts was enacted only in 1982. **Petr Vilém Koluch** (cz/nl) dedicates his paper to the Czech-Austrian constitutional lawyer and politician Josef Redlich. **Enikő Kovács-Szépvölgyi** (hu) focuses on the multi-jurisdictional regulation of child protection in Hungary that emerged during the Austro-Hungarian Monarchy. The criminal prosecution of public officials of the Hungarian Soviet Republic is the topic of the paper by **Borisz Bendegúz Burger** (hu). **Jan Kabát** (cz) addresses the historical development of the phenomenon of the Czech, and later also Slovak, meetings of lawyers in the first half of the 20th century in the Czech lands. The conceptualisation of ideas on the codification of criminal law in the early period of the Second Polish Republic is analysed by **Paulina Kamberov** (pl). **Bence Krusóczki** (hu) presents the Hungarian arbitration system and unfair competition with sources from the 1920s. **Lukáš Maliňák** (cz) introduces the arbitrary tendencies of the Supreme Court of Czechoslovakia in the field of private international law. The historical development of the Czechoslovak defence attorney in the 1950s is analysed by **Petra Zapletalová** (cz). **Milan Dobeš** (cz) dedicates his paper to the crime of social parasitism in Czechoslovakia.

Although the presented collection does not include all the papers presented in Brno in September 2022, we believe that it will provide its readers with an idea of the areas of interest for the coming generation of legal historians and specialists in Roman law.

EDGE OF TOMORROW: THE NEXT GENERATION OF LEGAL HISTORIANS AND ROMANISTS

Collection of Contributions from the 2022 International Legal History Meeting of PhD Students

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