Jaromír Tauchen,
David Kolumber (eds.)

EDGE OF TOMORROW 2: THE NEXT GENERATION OF LEGAL HISTORIANS AND ROMANISTS

Collection of Contributions from the 2024
International Legal History Meeting of PhD Students

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Masaryk University
Brno 2024

Vzor citace
TAUCHEN, Jaromír a David KOLUMBER (eds.). *Edge of Tomorrow 2: the Next Generation of Legal Historians and Romanists: Collection of Contributions from the 2024 International Legal History Meeting of PhD Students.* 1st ed. Brno: Masaryk University, 2024, 304 p. Publications of the Masaryk University, Edition Scientia ; File. No. 758. ISBN 978-80-280-0627-3 (print), 978-80-280-0628-0 (online).

CIP - Katalogizace v knize

Edge of Tomorrow 2: the Next Generation of Legal Historians and Romanists: Collection of Contributions from the 2024 International Legal History Meeting of PhD Students. / Jaromír Tauchen, David Kolumber (eds.) – 1st edition. -- Brno: Masaryk University, 2024. 304 stran. – Publications of the Masaryk University, Edition Scientia ; File. No. 758. ISBN 978-80-280-0627-3 (print), 978-80-280-0628-0 (online).

34(091)* 930-051* [80(=13)+908(100)]-051* (062.534)*
- právní dějiny
- historici
- romanisté
- sborníky konferencí

34 – Právo [16]

This collection presents the publication output from the conference entitled "International Legal History Meeting of PhD Students" that took place on 11 and 12 September 2024 at the Masaryk University Faculty of Law.
This conference, as well as the issue of this publication, were funded as part of the Conferences and Workshops in the Theory and History of Law project MUNI/B/1530/2023 with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in 2024.

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ISBN 978-80-280-0628-0 (online ; pdf)
DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024

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Foreword

The *Meeting of PhD Students of Legal History and Roman Law* was established in 2013 by Jaromír Tauchen and Karel Schelle at the Department of the History of the State and Law, Masaryk University in Brno (Czechia). Initially conceived as a platform for Czech legal historians, the conference expanded in 2014 to encompass Czech-Slovak cooperation, recognising the intertwined academic heritage of both nations. By 2022, it had evolved into a genuinely European gathering, bringing together participants from various countries to discuss local and global legal issues. This remarkable progression underscores the foresight of its founders and the international academic community's acknowledgement of the event's importance.

The recently added inaugural international conference edition[1] to the esteemed Web of Science database confirms its ability to generate valuable scholarly contributions. This distinction not only attests to the academic rigour of the event but also highlights its role in fostering innovative and impactful research. Such recognition reinforces the need to sustain this tradition, positioning the conference as an essential forum for scholarly discourse and a driving force for academic advancement.

More than just a series of presentations, the conference provides a vital space for emerging scholars to engage in meaningful networking – a fundamental component of modern academic success. Bringing together PhD candidates from diverse national backgrounds facilitates the formation of personal and professional connections that frequently evolve into long-lasting collaborations. This emphasis on creating a supportive academic community is one of the core strengths of the event, enabling participants to forge relationships that extend well beyond the confines of the conference.

The meeting offers a platform for intellectual exchange and collaborative research each year. The agenda consistently reflects the broadening horizons of its participants, and this year, it incorporates discussions that transcend

1 TAUCHEN, J., KOLUMBER, D. (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*. Brno: Masaryk University, 2022, 304 p. Publications of the Masaryk University, Edition Scientia, no. 728. ISBN 978-80-280-0155-1 (print), 978-80-280-0156-8 (online, pdf).

local legal history to address pressing global challenges. This diversity of perspectives, combined with the opportunity to explore different research methodologies from various legal traditions, significantly enriches the study of legal history and enhances scholarly approaches to the field.

The International Meeting of PhD Students of Legal History and Roman Law is not just about the topics addressed but also about its enduring tradition of uniting the next generation of legal historians and Romanists. The connections and professional networks that take root here continue to shape the future of legal scholarship across Europe and beyond. The lasting impact of these relationships inspires and motivates continued participation.

As we present the second volume of these proceedings, we are reminded of the importance of preserving and building upon the strong foundation established by the many scholars who have contributed to this initiative. The *International Meeting of PhD Students of Legal History and Roman Law* has solidified its place as a pivotal platform for academic networking, and we are confident that it will continue to flourish as a key annual event for emerging legal scholars across Europe and the wider academic world.

Jaromír Tauchen, David Kolumber,
Editors

About the Authors

Jaromír Tauchen (* 1981) is an associate professor of legal history and head of the Department of the History of the State and Law, Faculty of Law, Masaryk University in Brno, Czech Republic. He also practices as a certified judicial interpreter and translator (German/Czech). His research mainly focuses on German legal history, especially the era of the Third Reich, the Protectorate Bohemia and Moravia, the First Czechoslovak Republic and the history of Germans in the Czech lands. He also focuses on the history of legal science. He is the chief editor of the 26-volume Encyclopaedia of Czech Legal History. He is a member of the editorial boards of *Beiträge zur Rechtsgeschichte Österreichs*, *Journal on European History of Law,* and *Časopis pro právní vědu a praxi*.

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Premature Debt Repayment Then and Now. A Comparison of D. 12.6.10 and § 1434 ABGB[1]

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-1

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Abstract

In certain cases, the debtor is not forced to make the payment immediately because either the payment or the obligation is deferred. In such cases, the creditor cannot immediately enforce his claim. However, if the debtor makes a premature payment to the creditor by mistake, it is questionable whether he can claim this payment back from the creditor with a *condictio indebiti*. Such an action seems problematic because after the lapse of the deferral, the debtor would have to pay that which he received from the creditor back to the creditor. In this article, cases with a premature debt repayment in Roman law and Austrian civil law are analysed.

Keywords

Roman Law; Austrian Civil Law; *condicio*; Deferred Payment; Deferred Obligation; *condictio indebiti*; *dolo facit, qui petit quod redditurus est.*

1 Roman Law

1.1 Introduction

In early Roman law, cash purchases had great significance.[2] However, over the course of time, it was permitted that the price for a product could be paid after the purchase,[3] which meant that the creation of the claim and the due date of the claim could differ. Notably, this problem did not only occur in the context of sales *(emptio venditio)*.

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

2 KASER, M. *Das Römische Privatrecht I*. 2. ed. München: C. H. Beck, 1971, pp. 545–547.

3 KASER, op. cit., p. 546.

With regard to a claim (receivable), it is necessary to make a distinction between two points in time. Firstly, there is the date on which the claim is created. This date could, for instance, be the date of the conclusion of a contract. Secondly, there is the due date of the claim; specifically, on this date the creditor can enforce his claim with an action. In the next two sources, a distinction between these two dates is made.

D. 36.3.9 (Paulus *libro* 12 *ad Sabinum)*

> *Non tamen ut statim peti possint: deberi enim dicimus et quod die certa legatario praestari oportet, licet dies nondum venerit.*
>
> *But it does not follow that they are immediately demandable; for what is payable to a legatee at a certain date is said to be due, though the date have [sic!] not yet come.*[4]

Gai. 3.124

> *Sed beneficium legis Corneliae omnibus commune est. Qua lege idem pro eodem apud eundem eodem anno vetatur in ampliorem summam obligari creditae pecuniae quam in XX milia; et quamvis sponsores vel fidepromissores in amplam pecuniam, velut si sestertium C milia se obligaverint, tamen dumtaxat in XX milia tenentur. Pecuniam autem creditam dicimus non solum eam, quam credendi causa damus, sed omnem, quam tum, cum contrahitur obligatio, certum est debitum iri, id est, quae sine ulla condicione deducitur in obligationem; itaque et ea pecunia, quam in diem certum dari stipulamur, eodem numero est, quia certum est eam debitum iri, licet post tempus petatur. Appellatione autem pecuniae omnes res in ea lege significantur; itaque et si vinum vel frumentum aut si fundum vel hominem stipulemur, haec lex observanda est.*
>
> *But all of them have the benefit of the Cornelian Act. This Act prohibits anyone from binding himself on behalf of any one debtor to any one creditor in any one year for a sum of money lent greater than 20,000 sesterces. Even if personal sureties or sureties bind themselves in a large sum, 100,000 sesterces for instance, their liability is still limited to a maximum of 20,000. We define money lent, however, as including not only money which we give on loan but also all money which is certain to be owed at the time when an obligation is contracted – that is, money which there is an obligation to pay with no conditions attached; and so even if we stipulate for money to be paid on a specific day, it is counted, because it is certain that*

4 Translation BARTON, J.L. Book thirty-six. In: WATSON, A. (ed.). *The Digest of Justinian III*. Philadelphia: University of Pennsylvania Press, 1998, p. 268.

> *the money is payable, although action for it is postponed for a time. Note that the term "money" in this Act means everything; and so if we stipulate for wine or corn or a farm or a slave, this Act must be adhered to.*[5]

In this excerpt, Paulus emphasized that the creditor was not immediately able to successfully sue the debtor *(non tamen ut statim peti possint)*. Moreover, similar remarks can be found in the Institutes of Gaius. A *promissor* who promised the *stipulator* a certain amount of money on a certain date did not receive an action at the time the promise was made; in this case, the *stipulator* could sue only after the due date of the claim *(itaque et ea pecunia, quam in diem certum dari stipulamur, eodem numero est, quia certum est eam debitum iri, licet post tempus petatur)*.

However, an error could occur on the part of the debtor. If the debtor paid immediately (i.e., before the due date of the claim), it would be questionable whether the debtor could claim his payment back from the creditor with the *condictio indebiti*. This question is analysed in the following section.

1.2 Premature debt repayment

A *condictio indebiti* can only be considered if no *causa* can justify the transaction, as illustrated in the following example:[6]

A promised to pay 25 sesterces to B, and this promise was made on 1 January. A promised that he would make the payment on 1 December. Due to an error, A made for himself a note that he would have to pay 25 sesterces on 1 March. On 1 March, A paid 25 sesterces to B in order to fulfil his obligation. One day later, A discovered his mistake and realised that the due date of B's claim was 1 December. Therefore, A sued B with the *condictio indebiti* for 25 sesterces.

The *condictio indebiti* is only possible if a transfer of assets took place even though the "debtor" owed nothing to the "creditor" *(indebitum)*.[7] Furthermore,

5 Text and translation GORDON, W. M., ROBINSON, O. F. *The Institutes of Gaius*. 2. ed. London: Duckworth, 2001, pp. 159–160, 335–337.

6 For another example, see FRIER, B. W. *A Casebook on the Roman Law of Contracts*. New York: Oxford University Press, 2021, p. 89.

7 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, pp. 292–293.

this transfer of assets must have been made by mistake.[8] In the example, A only gave B 25 sesterces due to a mistake, but it is questionable whether A already owed 25 sesterces to B on 1 March.

An answer to this question can be found in the agreement of the parties. If A and B agreed on a deferred payment,[9] the obligation was already created on 1 January. Therefore, A could already pay off his debt on 1 March. However, if A and B agreed on a deferred effect of the obligation,[10] there would be no obligation on 1 March, and thus, the payment from A to B would have to be qualified as an *indebitum*. In such a case, no *causa* could justify a transfer of assets from A to B,[11] and thus, A could try to sue B with the *condictio indebiti*.[12]

1.3 Deferred Payment or Deferred Obligation?

1.3.1 Introduction

In most cases, the parties did not further characterise the creditor's claim and, thus, had no agreement on whether a deferred payment or a deferred effect of the obligation should take place. The next source focuses on this problem.

D. 12.6.10 (Paulus *libro* 7 *ad Sabinum)*

In diem debitor adeo debitor est, ut ante diem solutum repetere non possit.

8 BENKE, MEISSEL, op. cit., p. 294.

9 See SIBER, H. Appleton, Aperçus nouveaux sur le terme certain ou incertain en droit romain et moderne (review). *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung.* 1928, Vol. 48, pp. 760–764; KASER, op. cit., p. 258; RODGER, A. Emptio Perfecta Revisited: a Study of Digest 18, 6, 8, 1. *Tijdschrift voor rechtsgeschiedenis*. 1982, Vol. 50, no. 4, p. 343; see further APPLETON, C. *Aperçus nouveaux sur le terme certain ou incertain en droit romain et moderne*. Paris: de Boccard, 1926, pp. 4–22.

10 See SIBER, op. cit., pp. 760–764; RODGER, op. cit., p. 343; see further APPLETON, op. cit., pp. 7–22; KASER, op. cit., p. 258 n. 68.

11 RODGER, op. cit., p. 343; see further SIBER, op. cit., pp. 760–764; WACKE, A. Das Rechtssprichwort. Dolo facit, qui petit quod (statim) redditurus est. *Juristische Arbeitsblätter.* 1982, no. 10, p. 479.

12 For more information about an *exceptio* that B could raise against A, see Section 1.4 *Dolo facit, qui petit quod redditurus est*.

> *A debtor whose debt falls due on a given day is still sufficiently a debtor not to be able to recover a payment made before that day.*[13]

According to Paulus, a premature payment from the debtor to the creditor could not be claimed back by the debtor (*ante diem solutum repetere non possit*), as only the payment was deferred.[14] Therefore, the payment led to a *solutio*. Similar remarks can be found in the next source.

D. 12.6.17 (Ulpianus *libro* 7 *ad edictum)*

> *Nam si cum moriar dare promisero et antea solvam, repetere me non posse Celsus ait: quae sententia vera est.*
>
> *Celsus holds that if I promise that I will give you something when I lie dying and then I hand it over before that, there can be no recovery. And that view is right.*[15]

In cases where a party promises the promisee a payment that the promisee will receive when the party dies but the party makes the payment before his death, it was questionable whether the party could reclaim his payment.

Celsus stated that, in such a case, there was no possibility for *ego* (the party) to claim his payment back from the promisee. Additionally, Ulpianus concurred with the opinion of Celsus. Indeed, according to Celsus and Ulpianus, *ego* could not claim his payment back because only the payment, not the obligation itself, was deferred.[16]

The sources D. 12.6.10 and D. 12.6.17 indicate that, usually, only the payment was deferred, and thus, a premature payment could lead to a *solutio*. Moreover, the debtor could not claim an *interusurium*, which comprises the interest that could have been generated from the payment if the payment had been made when it was due.[17] In the next section, cases in which a premature payment could be claimed back are analysed.

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13 Translation BIRKS, P. Book twelve. In: WATSON, A. (ed.). *The Digest of Justinian I*. Philadelphia: University of Pennsylvania Press, 1998, p. 380.

14 SIMÉON, P. *Das Wesen des befristeten Rechtsgeschäfts*. Berlin: Julius Sittenfeld, 1888, pp. 12–14; KASER, op. cit., p. 258; WACKE, op. cit., p. 479.

15 BIRKS, op. cit., p. 380.

16 See KASER, op. cit., p. 258 n. 68, who argues that an unconditional obligation could only be deferred in case of a *fideicommissum*. Different: LENZ, G. F. *Zur Lehre vom Dies nach römischem Recht*. Tübingen: Heinrich Laupp, 1858, p. 42, who refers to the juristic rule *dolo facit, qui petit quod redditurus est*.
For more information about the *dies incertus* and the juristic rule *dolo facit, qui petit quod redditurus est*, see Sections 1.3.2 *Conditio* and 1.4 *Dolo facit, qui petit quod redditurus est*.

17 LENZ, op. cit., p. 43; see further WACKE, op. cit., p. 479.

1.3.2 *Conditio*

In some situations, it was unclear whether the "debtor" had to make a payment to the "creditor" because the "obligation" depended on a *condicio* (condition). This problem is addressed in the next sources.

D. 12.6.18 (Ulpianus *libro* 47 *ad Sabinum)*

> *Quod si ea condicione debetur, quae omnimodo exstatura est, solutum repeti non potest, licet sub alia condicione, quae an impleatur incertum est, si ante solvatur, repeti possit.*
>
> *When something is owed subject to a condition which is bound at all events to be fulfilled, there can be no recovery if it is paid over, even though a payment beforehand is recoverable in the case of other conditons whose issue is doubtful.*[18]

D. 12.6.16 pr.-1 (Pomponius *libro* 15 *ad Sabinum)*

> *Sub condicione debitum per errorem solutum pendente quidem condicione repetitur, condicione autem existente repeti non potest. 1. Quod autem sub incerta die debetur, die existente non repetitur.*
>
> *In conditional debts, a mistaken payment before fulfillment of the condition can be recovered but not once the condition has been satisfied. 1. Where a debt falls due on an unfixed day, recovery is impossible since the day must come.*[19]

Ulpianus distinguished between two different types of *conditiones*. Firstly, he mentioned a *condicio* that is certain to occur (*condicione debetur, quae omnimodo exstatura est*), which would not qualify as a *condicio* in the modern terminology, because it has only the effect of a deferred payment.[20] In accordance with sources D. 12.6.10 and D. 12.6.17,[21] the debtor could not claim his payment back in such cases *(solutum repeti non potest)*. Secondly, Ulpianus referred to a *condicio* that is uncertain to occur *(condicione, quae an impleatur incertum est)*. In such cases, a mistaken payment could be reclaimed *(si ante solvatur, repeti possit)*.[22]

Similar remarks were made by Pomponius, who reported that a mistaken payment could be reclaimed if it was uncertain whether the *condicio* would

18 Translation BIRKS, op. cit., p. 380.
19 Translation BIRKS, op. cit., p. 380.
20 KASER, op. cit., p. 253; ZIMMERMANN, R. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Clarendon Press, 1996, p. 724; see further RODGER, op. cit., pp. 343–344.
21 See Section 1.3.1 Introduction.
22 KASER, op. cit., p. 256.

be fulfilled *(debitum per errorem solutum pendente quidem condicione repetitur)*.[23] Pomponius referred to a *dies incertus*,[24] which can be compared to a *condicio* that is certain to occur. In the case of a *dies incertus*, a mistaken payment could not be reclaimed *(quod autem sub incerta die debetur, die existente non repetitur)*. In the next section, an "obligation", that depends on a *condicio* is compared to a deferred obligation.

1.3.3 Deferred obligation

In case of an "obligation" that depends on a *condicio*, a mistaken payment could be reclaimed by the "debtor" due to the "debt" being uncertain.[25] If the obligation was deferred, a mistaken payment could be claimed back because no *causa* could justify this payment.[26] In such a case, in contrast to an "obligation" depending on an uncertain *condicio*,[27] it is certain that the debtor would have to make the payment in the future after the lapse of the deferral. An example of a deferred obligation can be found in the next source.

D. 33.1.15 (Valens *libro* 7 *fideicommissorum)*

> *Iavolenus eum, qui rogatus post decem annos restituere pecuniam ante diem restituerat, respondit, si propter capientis personam, quod rem familiarem tueri non posset, in diem fideicommissum relictum probetur et perdituro ei id heres ante diem restituisset, nullo modo liberatum esse: quod si tempus heredis causa prorogatum esset, ut commodum medii temporis ipse sentiret, liberatum eum intellegi: nam et plus eum praestitisse quam debuisset.*
>
> *Javolenus replied that a man who was asked to hand over a sum of money after ten years but handed it over before the due day is in no way released from liability if the fideicommissum is proved to have been left at the end of that period on account of the character of the recipient, because he was unable to look after his property, and the heir restored it to him before the date in the expectation that he would waste it. But if the period was protracted for the sake of the heir, so that*

23 ZIMMERMANN, op. cit., p. 724 n. 54.

24 It is unclear whether, in the case of a *dies incertus*, the obligation (see APPLETON, op. cit., pp. 10–35; SIBER, op. cit., pp. 760–764) or only the payment (see KASER, op. cit., p. 258 n. 68) could be deferred; see further, RODGER, op. cit., pp. 343–344.

25 KASER, op. cit., pp. 255–258.
For more information about a certain *condicio*, see Section 1.3.2 *Conditio*.

26 See Section 1.2 Premature debt repayment.

27 RODGER, op. cit., p. 344, compares the deferred effect of an obligation with a certain *condicio*.

> *he himself might benefit in the interim, it is understood that he is released; for, indeed, he has paid more than he need have.*[28]

This case of Iavolenus, which was mentioned by Valens, deals with a *fideicommissum*. Specifically, the deceased wanted to leave money to the beneficiary, and, thus, ordered his *heres* to give a certain amount of money to the beneficiary. The money had to be paid in 10 years, but the *heres* paid the money earlier *(post decem annos restituere pecuniam ante diem restituerat)*. In this situation, it was questionable whether the *heres* had fulfilled his obligation with this payment.

According to Iavolenus, the *heres* could not fulfil his obligation if the reason for the 10-year payment period was to protect the beneficiary. In such a case, the obligation of the *heres* was deferred.[29] Therefore, a *solutio* was not possible. In the literature, it is fiercely debated whether more cases with a deferred obligation can be found in the Digest of Justinan.[30] The next section analyses the circumstances under which a payment made to fulfil a deferred obligation could be reclaimed.

1.4 *Dolo facit, qui petit quod redditurus est*

In the case of a deferred obligation, no *causa* could justify a payment.[31] Therefore, a mistaken payment could be claimed back with the *condictio indebiti*. However, after the plaintiff receives his payment back, he would need to make this payment again in the future following the lapse of the deferral. Therefore, the plaintiff's action could be considered as frivolous.[32] According to Paulus, the plaintiff acts fraudulently if he claims something from the defendant that he would have to give back to the defendant.

D. 44.4.8 pr. = D. 50.17.173.3 (Paulus *libro* 6 *ad Plautium)*

> *Dolo facit, qui petit quod redditurus est.*
>
> *A person who claims what he will have to return acts fraudulently.*[33]

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28 Translation SEAGER, R. Book thirty-three. In: WATSON, A. (ed.). *The Digest of Justinian III*. Philadelphia: University of Pennsylvania Press, 1998, p. 104.

29 It is indisputable that D. 33.1.15 is an example of a deferred obligation, see APPLETON, op. cit., pp. 11–12; SIBER, op. cit., p. 762; KASER, op. cit., p. 258 n. 68.

30 See APPLETON, op. cit., pp. 11–35; SIBER, op. cit., pp. 760–764; GROSSO, G. Prospettive in materia di termine iniziale e finale e spunti sistematici di Paolo. *Bullettino Dell'Istituto di Diritto Romano*. 1961, Vol. 64, p. 106; KASER, op. cit., p. 258 n. 68.

31 See Section 1.2 Premature debt repayment.

32 See LENZ, op. cit., p. 42; ZIMMERMANN, op. cit., p. 724.

33 Translation BEINART, B. Book forty-four. In: WATSON, A. (ed.). *The Digest of Justinian IV*. Philadelphia: University of Pennsylvania Press, 1998, p. 150.

It is unclear whether the juristic rule *dolo facit, qui petit quod redditurus est*[34] is also applicable if the plaintiff does not have to return what he received immediately. On occasion, this rule is changed to *dolo facit, qui petit quod statim*[35] *redditurus est* or *dolo facit, qui petit quod mox*[36] *redditurus est*.

However, such restrictive modifications of the rule *dolo facit, qui petit quod redditurus est* seem incorrect. Indeed, whether the defendant receives an *exceptio doli* against the plaintiff must be decided on an individual case basis. For example, if the debtor was forced to pay in 10 years, it would be reasonable for the debtor to reclaim his payment if he already paid it in the first year.

The debtor would have a legitimate interest in claiming the money back, because he could invest the money for another 9 years before he would have to pay it back. Therefore, in this case, a *condicito indebiti* could be successful.

In contrast, if the debtor made the payment after 9 years and 11 months and later tried to claim the money back with a *condictio indebiti*, the creditor could likely successfully raise an *exceptio doli* and argue that the debtor acted fraudulently.

2 Austrian Civil Law

Many parts of the Austrian Civil Code are based on Roman law. Furthermore, the problem of premature debt repayment is still relevant in Austrian civil law, and in the Austrian Civil Code, premature debt repayment is explicitly addressed.

34 For more information about this rule, see WACKE, op. cit., pp. 477–479; 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: Böhlau, 2002, pp. 417–420; LAMBRINI, P. *Dolo generale e regole di correttezza*. Padova: Casa Editrice Dott. Antonio Milani, 2010, p. 47; BINDER, M. The Fraudulent Claim of One's Own Fundus (D. 21.2.73). In: TAUCHEN, J., KOLUMBER, D. (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*. Brno: Masaryk University Press, 2022, pp. 14–15.

35 SCHMIDT-OTT, J. *Pauli Quaestiones. Eigenart und Textgeschichte einer spätklassischen Juristenschrift*. Berlin: Duncker & Humblot, 1993, p. 135; REICHARD, I. *Delegation und Novation im klassischen römischen Recht*. Universität Bonn Habilitationsschrift (unpublished), 1998, p. 182 n. 54; WIMMER, M. Fälle des Concursus Causarum von Vermächtnis und Kauf im Römischen Recht. *Tijdschrift voor rechtsgeschiedenis*. 2001, Vol. 69, no. 4, p. 211 n. 30.

36 RÜGER, D. *Die donatio mortis causa im klassischen römischen Recht*. Berlin: Duncker & Humblot, 2011, p. 187.

§ 1434 ABGB (Austrian Civil Code)

> *Die Zurückstellung des Bezahlten kann auch dann begehret werden, wenn die Schuldforderung auf was immer für eine Art noch ungewiß ist; oder wenn sie noch von der Erfüllung einer beygesetzten Bedingung abhängt. Die Bezahlung einer richtigen und unbedingten Schuld kann aber deßwegen nicht zurückgefordert werden, weil die Zahlungsfrist noch nicht verfallen ist.*
>
> *The repayment of the paid amount can also be demanded if the debt is uncertain irrespective of the reason for the uncertainty or if it still depends on the satisfaction of an added condition. However, the payment of a valid and unconditional debt cannot be reclaimed only because the payment period has not yet expired.*[37]

In Section 1434 of the Austrian Civil Code, a distinction is made between a conditional and an unconditional debt. Similar to the legal situation in Roman law,[38] in Austrian civil law, a payment can be reclaimed if the "debt" depends on an uncertain *condicio*. However, in the case of an unconditional debt, no *condictio* is possible. As in Roman law,[39] there are two possible reasons for a *condictio* not being permitted.

Firstly, it would be reasonable to assume that the person who performed the payment had no *condictio indebiti* because of a *solutio*. Secondly, a *condicito* could be denied due to the juristic rule *dolo facit, qui petit quod redditurus est*. In particular, the juristic rule *dolo facit, qui petit quod redditurus est* is a natural legal principle in the sense of Section 7[40] of the Austrian Civil Code.[41]

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37 Translation ESCHIG, P. A., PIRCHER-ESCHIG, E. *Das österreichische ABGB – The Austrian Civil Code*. 2. ed. Wien: LexisNexis, 2021, pp. 512–513.

38 See Section 1.3.2 *Conditio*.

39 See Sections 1.3.1 Introduction and 1.4 *Dolo facit, qui petit quod redditurus est*.

40 § 7 ABGB: *"Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden."*
Translation ESCHIG, PIRCHER-ESCHIG, op. cit., p. 2: *"If a matter can neither be determined by the wording nor by the natural meaning of a law, similar matters which have been regulated by law and the purpose of other related laws must be considered. If the matter still remains ambiguous, it must be decided based on the diligently gathered and thoroughly considered facts in line with the natural legal principles."*

41 KODEK, G. § 1–14. In: RUMMEL, P., LUKAS, M. (eds.). *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit wichtigen Nebengesetzen und EU-Verordnungen. § 1–43 ABGB (Einleitung, Personenrechte)*. 4. ed. Wien, 2015, p. 138, § 7/85.

The juristic rule *dolo facit, qui petit quod redditurus est* is mentioned by legal scholars in the context of Section 1434 of the Austrian Civil Code.[42] However, in the literature,[43] there is often no clear distinction between a deferred payment and a deferred effect of the obligation.

Some scholars advocate for a teleological reduction of Section 1434 of the Austrian Civil Code.[44] According to this doctrine, the premature payment or *interusurium* could be claimed back with the *condictio indebiti* if the debtor would lose a significant amount of money because of the premature payment due to, for instance, not being able to invest and, thus, collect interest on the money.[45]

In my opinion, the distinction between a deferred payment and a deferred effect,[46] which exists in Roman law,[47] should also be made in Austrian civil law. In the case of a deferred payment, no *condictio indebiti* can be considered due to the presence of a *solutio*, and thus, the debtor cannot claim an *interusurium*.[48]

The juristic rule *dolo facit, qui petit quod redditurus est* is only relevant if an unconditional obligation is deferred, and whether the obligation is deferred depends on the agreement of the parties.[49] Examples of deferred obligations can also be found in specific laws.[50]

If the obligation itself is deferred, a *solutio* is not possible. Therefore, the debtor could try to reclaim his payment with a *condictio indebiti*. However, the objection of an abuse of rights could be raised against such a claim, because

42 UNGER, J. *System des österreichischen allgemeinen Privatrechts II*. Leipzig: Breitkopf und Härtel, 1859, p. 90 n. 60; GSCHNITZER, F. *Österreichisches Schuldrecht: Besonderer Teil und Schadenersatz*. 2. ed. Wien, New York: Springer, 1988, p. 397; KERSCHNER, F., GERETSCHLÄGER, B. § 1434. In: FENYVES, A., KERSCHNER, F., VONKILCH, A. (eds.). *ABGB § 1431 bis 1437. Kommentar zum Allgemeinen bürgerlichen Gesetzbuch (Klang)*. 3. ed. Wien: Verlag Österreich, 2018, p. 150 n. 44, § 1434/10.

43 Only UNGER, op. cit., pp. 89–91 seems to be aware of this distinction.

44 GSCHNITZER, op. cit., p. 398; KERSCHNER, GERETSCHLÄGER, op. cit., pp. 150–151, § 1434/10.

45 GSCHNITZER, op. cit., pp. 397–398; KERSCHNER, GERETSCHLÄGER, op. cit., pp. 150–151, § 1434/10–11.

46 UNGER, op. cit., p. 89 n. 6, criticises that the main doctrine (automatically) assumes a deferred payment, not a deferred effect, in the context of a *terminus a quo*.

47 See Section 1.3 Deferred payment or deferred obligation?.

48 SWOBODA, E. § 1431–1437. In: KLANG, H. (ed.). *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch IV. § 1293 bis 1502*. Wien: Österreichische Staatsdruckerei, 1935, p. 481.

49 See further UNGER, op. cit., pp. 89–90.

50 See for example § 12 Teilzeitnutzungsgesetz and § 14 Bauträgervertragsgesetz.

following the lapse of the deferral of the obligation, the plaintiff (debtor) would have to give back that which he received (*dolo facit, qui petit quod redditurus est*).[51] Whether such an objection would be successful depends on the length of the deferral of the plaintiff's obligation to return the payment.[52] If the plaintiff's obligation were only enforceable in the distant future, he would have a legitimate interest to claim back his payment or at least claim the *interusurium*.

3 Conclusion

The situation in which a premature payment has been made causes issues in both Roman law and Austrian civil law. In this context, this article argues that in both Roman law[53] as well as in Austrian civil law,[54] a clear distinction between a deferred payment and a deferred effect of the obligation is necessary.

In the case of a deferred payment, the premature payment leads to a *solutio* and, thus, cannot be claimed back, whereas if the parties agreed on a deferred effect, a mistaken payment generally could be reclaimed with a *condictio indebiti*, because no *causa* could justify the transaction.[55]

After a successful *condictio indebiti* and the expiry of the period covered by the deferral, the plaintiff would have to give back to the defendant what the plaintiff received with the *condictio indebiti*. Therefore, it can be argued the defendant could raise an *exceptio*, based on the juristic rule *dolo facit, qui petit quod redditurus est*, against the plaintiff's *condicito indebiti*.

Whether such a defence could be successful in Roman law or Austrian civil law depends on the circumstances of the individual case. Indeed, when the deferral of the plaintiff's obligation to return the payment is in the distant future, the chances of the defendant successfully defending himself with an *exceptio doli* (based on the juristic rule *dolo facit, qui petit quod redditurus est)* are low.[56]

51 See Section 1.4 *Dolo facit, qui petit quod redditurus est*.
52 See GSCHNITZER, op. cit., p. 398.
53 See Section 1.3 Deferred payment or deferred obligation?.
54 See Section 2. Austrian civil law.
55 See Sections 1.2 Premature debt repayment and 2. Austrian civil law.
56 See Sections 1.4 *Dolo facit, qui petit quod redditurus est* and 2. Austrian civil law.

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Interest on Irregular Deposit in Roman Law

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-2

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Abstract

This article examines the treatment of interest on an irregular deposit in Roman law. D. 16.3.24 and D. 16.3.25.1 by Papinian suggest that the depositee was obligated to pay interest for late payments *(usurae ex mora)*. Additionally, D. 16.3.24 along with D. 16.3.26.1, D. 16.3.28, and D. 16.3.29.1, imply that interest could be due for the entire duration of the payment period if agreed upon by the parties *(usurae ex pacto)*. However, a closer analysis reveals that, under classical Roman law, a depositor was not entitled to receive interest before default *(ante moram)*. This stance evolved by the time of Justinianic law, which permitted interest for the entire duration of the contract, reflecting post-classical legal developments and the convergence of various contractual actions.

Keywords

Fungibles; Custody; Deposit; Irregular Deposit; Bailment.

1 Introduction

Numerous contracts and quasi-contracts allowed for the accrual of interest without the need for a stipulation. These instances often involved *actiones bonae fidei*, wherein the judge could have taken into account also informal agreements of the parties or other circumstances which he saw fit.[1] Even

[1] In D. 17.1.10.3 and D. 17.1.10.8, Ulpian addresses the mandatum, detailing several scenarios in which interest is due without a need to conclude a formal stipulatio: when the procurator lends the money at interest as promised, uses the money for personal purposes, or delays its return. In the case of tutela, a tutor would manage the ward's property, including money. According to D. 26.7.7.4, tutors were required to pay statutory interest if they diverted the ward's funds for personal use. Moreover, under D. 26.7.7.6, if a tutor lent the ward's money at interest, the resulting interest was owed to the ward. C. 4.32.2 provides evidence that purchasers were required to pay interest for late payments. Finally, according to D. 13.7.6.1 and D. 13.7.7, creditors owed the pledgor the surplus of the selling price of the pledge over the owed sum (so called "hyperocha"), including interest for late payment. For more detail on these case cf. KLAMI, H. T. *"Mutua magis videtur quam deposita". Über die Geldverwahrung im Denken der römischen Juristen*. Helsinki: Societas scientiarum Fennica, 1969, pp. 121–125 and the literature therein.

so, one should keep in mind that there were differences between various *bonae fidei iudicia*.[2] It was also sometimes possible to claim interest by *actio depositi,* in spite of its gratuitous nature, because it was a *bona fidei actio*. This article shall focus on the case of so-called irregular deposit, where fungibles, mostly money, were deposited.

2 Texts to be Discussed

The irregular deposit is discussed in D. 16.3.24; D. 16.3.25.1; D. 16.3.26.1; D. 16.3.28 and D. 16.3.29.1 and further also in D. 16.3.7.2 and D. 42.5.24.2. Note that the first group of texts is grouped together, which seems to suggest that Justinianic compilers were aware of this phenomenon.[3] The fragments mentioned in the second one are not important for our purposes as they deal with the insolvency proceedings. They mention that some depositors received interest, and some did not. However, those received it are then treated as normal creditors and not depositors.

Other texts address either a situation where the parties agreed on the interest *(ex pacto)* or where moratory payment based on the late return of the money *(ex mora)*. More precisely, D. 16.3.24 addresses both cases, D. 16.3.25.1 deals only with the interest *ex mora* whereas D. 16.3.26.1; D. 16.3.28 and D. 16.3.29.1 all address just *ex pacto* interest.

In this article, we shall not devote attention to D. 16.3.28[4] and D. 16.3.29.1[5]. The first of the originally probably dealt with a *mandatum*. When it comes

2 BRASIELLO, U. Aspetti innovativi delle costituzioni imperiali. In: *L'aspetto innovativo-interpretativo. Studi in onore di Pietro de Francisci IV*. Milano: Giuffrè, 1956, pp. 491–494; KLAMI, op. cit., pp. 121 and 125, SONDEL, J. Szczególne rodzaje depozytu w prawie rzymskim. In: *Zeszyty naukowe Uniwersytetu Jagiellońskiego. Prace prawnicze*. 1967, Vol. 159, no. 30., pp. 87–88.

3 STAGL, J. F. *Der Tempel der Gerechtigkeit: Zur Morphologie und Hermeneutik der Pandekten*. Paderborn: Brill Schöningh, 2023, pp. 122–127 and Additamentum I; Cf. EVANS-JONES, R. The Prefatory Section of D. 16, 3. Depositi vel contra. In: *La Revue internationale des droits de l'Antiquité*. 1978, Vol. 25, no. 1, pp. 247–259.

4 D. 16.3.28 (Scaevola libro primo responsorium): *"Quintus Caecilius Candidus ad Paccium Rogatianum epistulam scripsit in verba infra scripta: 'Caecilius Candidus Paccio Rogatiano suo salutem. Viginti quinque nummorum quos apud me esse voluisti, notum tibi ista hac epistula facio ad ratiunculam meam ea pervenisse: quibus ut primum prospiciam, ne vacua tibi sint: id est ut usuras eorum accipias, curae habebo'. Quaesitum est, an ex ea epistula etiam usurae peti possint. Respondi deberi ex bonae fidei iudicio usuras, sive percepit sive pecunia in re sua usus est."*

5 D. 16.3.29.1 (Paulus libro secundo sententiarum): *"Si ex permissu meo deposita pecunia is penes quem deposita est utatur, ut in ceteris bonae fidei iudiciis usuras eius nomine praestare mihi cogitur."*

to D. 16.3.29.1, it primarily draws from Sent. 5.12.9 while incorporating some other phrases from the same title of the Sententiae Pauli.[67] The original text was altered to an extent which makes determination of Paulus's original opinion impossible. When did this change happen is unclear. It might have been an effect a postclassical abridgment as well as a work of justinianic compilers. In any case, original text probably dealt rather with conversion of a *depositum regulare* into a *mutuum* so it does not help us with answering our question.[8] There are also some more texts contained either in the Code or other sources which we shall encounter throughout the course of our inquiry.

Let us now undertake an analysis of these texts and try to determine whether the interest was due in both cases already in the classical times, or whether it was a later invention.

3 The Exegesis

After a short glimpse at the texts of Coll. 10.7.7[9] and C. 4.34.2[10] one may thing the question is already answered as these texts unambiguously report that the depositee is bound to pay the interest *ex mora* to the depositor, yet they are too general and do not seem to be applicable to the irregular deposit. Nonetheless, D. 16.3.25.1 by Papinian deals with the irregular deposit and addresses the question of interest *ex mora*.

D. 16.3.25.1 (Papinianus libro tertio responsorum)

> *Qui pecuniam apud se non obsignatam, ut tantundem redderet, depositam ad usus proprios convertit, post moram in usuras quoque iudicio depositi condemnandus est.*

The text is concise and straightforward. It is stated that someone received unsealed money, with the understanding he should return just the same amount. If he then uses them himself and fails to return them, he should be condemned to pay interest for the time since the occurrence of the default.

6 SONDEL, op. cit., pp. 77–79.
7 KLAMI, op. cit., pp. 88–90.
8 These fragments shall, however, be extensively addressed in author's dissertation.
9 Coll. 10.7.7 (Paulus libro secundo sententiarum sub titulo de deposito): *"In iudicio depositi ex mora et fructus veniunt et usurae rei depositae praestantur." (= Sent. 5.12.7).*
10 C. 4.34.2 (Imperator Gordianus A. Celsino Militi): *"Usurae in depositi actione sicut in ceteris bonae fidei iudiciis ex mora venire solent."*

There are numerous suggestions how the text was changed since its beginning sounds unnatural. Niedermeyer[11] and Naber[12] consider *ut tantundem redderet* an interpolation. Longo agrees and adds that "*non obsignatam*" and *"post moram"* were only added by the justinianic compilers and this fragment was originally a case of a regular deposit.[13] This position is then shared by Schulz[14] and Geiger[15]. Sergé[16], then also followed by Collinet[17] and Kübler[18], disagrees with Longo's opinion on both the text and solution given in the fragment.

Bonifacio believes that *"ut tantundem redderet"* was added to stress the will of the parties. He also considers *"ad usus proprios convertit"* to be interpolated.[19] Sondel closely follows Bonifacio's reasoning on the first sentence but points out the text sounds strange if we cross *"ut tantundem redderet"* out. Accordingly, Sondel posits that the original formulation was *"Qui pecuniam non obsignatam apud se depositam"*.[20] This leaves no room for the will of the parties. Sondel and Bonifacio thus both believe the first sentence was somewhat changed, but the changes proposed by them do not really change the meaning of the text as noted by Valmaña.[21]

While Sondel's reconstruction of the original text seems correct, it does not necessarily mean that *"ut tantundem redderet"* was inserted by the compilers to emphasize the importance of the will of the parties. The said phrase

11 NIEMAYER, T. *Depositum irregulare*. Halle: Max Niemeyer, 1889, p. 7.

12 NABER, J. C. Observatiunculae de iure Romano, XCIII, de deposito usuario. In: *Mnemosyne*. 1906, Vol. 34, no. 1, p. 62.

13 LONGO, C. *Corso di diritto romano, il deposito*. Milan: Giuffrè, 1933, pp. 133–137.

14 SCHULZ, F. The postclassical edition of Papinian's "libri quaestionum". In: *Scritti in onore di Contardo Ferrini IV*. Milan: Società Editrice Vita e Pensiero, 1949, p. 261.

15 GEIGER, K. *Das Depositum irregulare als Kreditgeschäft*. München: Schubert, 1962, pp. 50–51.

16 SERGÉ, G. Sul deposito irregolare in diritto romano. In: *Bullettino dell'Istituto di Diritto Romano*. 1907, Vol. 19, no. 1, pp. 227–229.

17 COLLINET, P. *Études historiques sur le droit de Justinien. Tome premier, Le caractere oriental de L›oeuvre législative de justinien et les destinees des institutions clasiques en occident*. Paris: Librairie de la société du Recueil Sirey, 1912, p. 120.

18 KÜBLER, B. Griechische Tatbestände in den Werken der kasuistischen Literatur. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*. 1908, Vol. 29, no. 1, p. 206.

19 BONIFACIO, F. Ricerche sul deposito irregolare in diritto romano. In: *Bullettino dell'Istituto di Diritto Romano*. 1947, Vol. 49–50, no. 1, pp. 114 et seq.

20 SONDEL, op. cit., p. 45.

21 VALMAÑA OCHAÍTA, A. *El depósito irregular en la jurisprudencia romana*. Madrid: Edisofer, 1996, pp. 66–69.

is a simple emendation probably introduced by a postclassical jurist to stress that the same amount and not the same coins should be returned which is also a most probable solution according to Klami.[22] This phrase seems rather useless since the very fact the unsealed money was handed over means the very same coins could hardly be returned.[23] However, what might have seemed obvious to Papinian and his contemporaries, who still experienced relative price stability and therefore did not care for specific specimens of coins, might not have been so obvious in the highly inflationary environment of the third or even later centuries.[24] That is why the said postclassical author might have sought to clarify that the same sum and not the same specimen sufficed in that case.

Since the depositee became the proprietor of money[25] as fungibles, it would be strange to blame him for the use of the thing which is the most natural thing the owner of a thing does. However, the use must be understood in an economic context. The depositor probably demanded his money back and the depositee could not have returned them, since he had spent them and no longer had an equivalent sum at his disposal. Thus, he was unable to return it and defaulted on his debt and was also supposed to compensate the depositor for the late payment by the means of the moratory interest.[26] This scenario is also the only way to confirm that the depositee used the money; if he had been able to return the equivalent sum, it would be impossible to establish his usage of it.[27]

D. 16.3.24

> *"Lucius Titius Sempronio salutem. Centum nummos, quos hac die commendasti mihi adnumerante servo Sticho actore, esse apud me ut notum haberes, hac epistula manu mea scripta tibi notum facio: quae quando voles et ubi voles confestim tibi numerabo." Quaeritur propter usurarum incrementum. Respondi depositi*

22 KLAMI, op. cit., p. 64. GANDOLFI, G. *Il deposito nella problematica della giurisprudenza romana*. Milan: Giuffrè, 1976, p. 158, and SACCOCCIO, A. *Il mutuo nel sistema giuridico romanistico. Profili di consensualità nel mutuo reale*. Torrino: Giappichelli, 2020, p. 90, mostly agree with his reasoning and maintain the substance of the text was not changed by latter emendations.

23 SONDEL, op. cit., p. 44, also agrees on the uselessness of the phrase.

24 Cf. *supra* the subchapter devoted to the topic.

25 Cf. D. 19.2.31, but the discussion on this topic would require whole new article.

26 SONDEL, op. cit., pp. 45–46.

27 As rightly noted by KLAMI, op. cit., pp. 139–140.

> *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. In qua quaestione si depositi actio non teneat, cum convenit tantundem, non idem reddi, rationem usurarum haberi non facile dicendum est. Et est quidem constitutum in bonae fidei iudiciis, quod ad usuras attinet ut tantundem possit officium arbitri quantum stipulatio: sed contra bonam fidem et depositi naturam est usuras ab eo desiderare temporis ante moram, qui beneficium in suscipienda pecunia dedit. Si tamen ab initio de usuris praestandis convenit, lex contractus servabitur.*

The text addresses the issue of interest and whether it can be claimed via the *actio depositi*. Initially, it asserts that claiming interest *ante moram* is contrary to the nature of a deposit. However, it immediately adds that if the parties agreed to interest from the outset, it is due for the entire period *("totius temporis")*. This apparent contradiction necessitates further explanation.

As discernible already from the introductory exegesis, the fragment is self-contradictory in some passages concerning the use of *actio depositi* and the right to claim the interest. This led most of the Romanists to the opinion that it cannot possibly come from one author.[28] The fragment comes from book IX of Papinian's Questiones which according to some authors contained also commentaries by postclassical lawyers.[29] However, some other authors consider the whole work[30] or at least this fragment[31] to be authentic.

There is a minority view that Papinian treated the case in question as a *depositum regulare*[32] or a *mutuum*.[33] However, the decisive majority of authors believe

28 SCHULZ, 1949, op. cit., p. 255, who states that as early as the 11th century, the Byzantine jurist Johannes Nomophylax remarked that this fragment is incomprehensible when interpreted literally.

29 WIEACKER, F. *Textstufen klassischer Juristen*. Göttingen: Vandenhoeck & Ruprecht, 1960, pp. 333 et seq.; SCHULZ, F. *History of Roman Legal Science*. Oxford: Clarendon Press, 1946, p. 234, repeated in SCHULZ, 1949, op. cit., p. 254.

30 BABUSIAUX, U. *Papinians Quaestiones: Zur rhetorischen Methode eines spätklassischen Juristen*. München: C. H. Beck, 2011, pp. 5–19.

31 SCHEIBELREITER, P. Integration durch Abgrenzung? Vom Problem, das depositum irregulare zu "definieren". In: *Index: quaderni camerti di studi romanistici*. 2017, Vol. 45, no. 1, pp. 446–450.

32 LONGO, C. Appunti sul deposito irregolare. In: *Bullettino dell'Istituto di Diritto Romano*. 1906, Vol. 18, no. 1, pp. 131–135, Deposito, pp. 138 et seq.; NABER, op. cit., pp. 62–63.

33 SCHULZ, 1949, op. cit., pp. 254–255 and 261–263.

Papinian considered it a *depositum irregulare* and allowed the use of the action on deposit.[34]

Let us now conduct a more thorough exegesis of the texts concentrating on the question of the interest. While there is a debate as to whether the letter is of Greek[35] or Latin[36] provenience. However, regardless of the conclusion drawn, it seems rather certain that Papinian solved a question as to which action was applicable, and he qualified the situation from the perspective of Roman law. That should also be our perspective.

According to the letter, the money was counted (the verb *adnumerare* is used).[37] Furthermore, as the depositee promised to return the money when and where the depositor wished, so even if the money had originally been sealed, it might have been substituted by a different specimen.[38] Immediately after the letter ends, Papinian responds that the *actio depositi* lies. Notably, the terminology employed in reference to the money utilizes the verb *commendare* rather than *deponere*. However, Papinian poses a rhetorical question implying these two verbs are synonymous. Nearly the same formulation is used by Ulpian in D. 50.16.186 (Ulp. 30 ad ed.) and the same idea is also expressed by Paulus in Coll. 10.7.4.[39]

The subsequent phrase *"Quod ita* […] *non facile dicendum est"* interrupts the flow of the text and it does so in a way rather unscrupulously criticizing the previous statement. Surely, no author would address his own deliberations in such a way. Therefore, it is hardly surprising that most Romanists,

34 SERGÉ, op. cit., pp. 209 et seq.; COLLINET, op. cit., pp. 119 et seq.; BONIFACIO, op. cit., pp. 145 et seq.; MICHEL, op. cit., pp. 82., ADAMS, B. Haben die Römer Depositum irregulare und Darlehen unterschieden? In: *Studia et Documenta Historiae et Iuris*. 1962, Vol. 28, no. 1, pp. 365–366, BRASIELLO, 1954, op. cit., pp. 67–68; BRASIELLO, 1956, op. cit., pp. 499–500, GEIGER, op. cit., pp. 36–37; SONDEL, op. cit., pp. 46–55; KLAMI, op. cit., pp. 46–58, SCHEIBELREITER, 2017, op. cit., pp. 459–465, CHERCHI, A. *Ricerche sule «usurae» convenzionali nel diritto romano classico*. Naples: Jovene, 2012., pp. 88–90 and 175–177 and SACCOCCIO, op. cit., pp. 90–94.

35 SCHEIBELREITER, 2017, op. cit., pp. 453–458.

36 KLAMI, op. cit., pp. 21–23; Cf. VIGNERON, R. Résistances du droit romain aux influences hellénistiques: Le cas du dépôt irrégulier. In: *La Revue internationale des droits de l'Antiquité*. 1984, Vol. 31, no. 1, p. 323.

37 LONGO, 1933, op. cit., p. 140, hypothesizes it is possible that the money was initially counted but it might have been sealed later, but nothing supports this hypothesis.

38 KLAMI, op. cit., p. 52.

39 LONGO, 1933, op. cit., pp. 137 et seq.; LONGO, 1906, op. cit., pp. 131 et seq.

who have examined this fragment, conclude that the said sentence has been inserted by someone other than Papinian himself. Some consider it to be a gloss of Ulpian or Paulus[40] or an unknown postclassical jurist[41] and finally some deem it to come from compilers.[42] The identification of the author of it is not important for our purposes.

Since it has been determined that *"Quod ita* […] *non facile dicendum est"* is an insertion, the original text should be read without it. Then it is much more coherent. Papinian asserts that the *actio depositi* lies and in the good faith actions a judge can adjudicate the interest which in *actiones stricti iuris* would have to be based on a stipulation. However, it is contrary to the good faith and the nature of deposit to expect interest before default *(mora)* as a depositee grants a favour to a depositor and it would be incomprehensible if he were even made to pay for it.[43] Klami is unsure of the original version of the text and therefore Papinian's argumentation, but he seems to be sure enough he refused the *ante moram* interest.[44]

Sondel agrees with this interpretation but believes that the first sentence of the response originally likely read *"Respondi depositi actionem locum non habere"* and the *"non"* was then removed by the compilers. He suggests that Papinian refused to grant an *actio depositi* to claim the interest at the very beginning and then explained why, whereas according to our interpretation, Papinian said that generally the action on deposit would lie, but not in this case and explained why. The substantive disparity between the two interpretations is minimal which is also noted by Litewski.[45]

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40 LONGO, 1933, op. cit., pp. 133 et seq.; NABER, op. cit., p. 64, believes that the part of the text *"Quod ita* […] *non facile dicendum est"* comes from Paulus; SERGÉ, op. cit., pp. 222 et seq.

41 NABER, op. cit., p. 64, for the part *"in qua questione* […] *dicendum est"*. SCHULZ, 1949, op. cit., p. 261; SONDEL, op. cit., pp. 51–52; KLAMI, op. cit., pp. 55–56, though he believes part of the comments might come from Ulpian or Paulus but it is impossible to distinguish them from later postclassical or even justinianic layers; LITEWSKI, W. Le depot irregulier I. In: *La Revue internationale des droits de l'Antiquité*. 1974, Vol. 21, no. 1, pp. 249–253.

42 BONIFACIO, op. cit., p. 261.

43 LITEWSKI, op. cit., pp. 256–259, believes this part of text was not subject to any changes.

44 KLAMI, op. cit., p. 58.

45 LITEWSKI, op. cit., p. 256.

The final part of the text stating that if the interest was agreed upon from the very beginning it is claimable starkly contradicts with the previous argumentation, which states that claiming *ante moram* interest is against *bona fides* and the nature of deposit. It is therefore no surprise that it is generally considered to be a justinianic interpolation.[46] However, there are voices of those who consider it probable it is authentic.[47] Those who believe it is authentic hardly ever bring any substantial argumentation. The exception is Cherchi who claims Papinian sought to instruct a judge how he should evaluate the *pactum* concluded between the parties.[48] However, the sentence does not say that. It rather categorically refutes the previous sentence.

Not only does the last sentence contradict the previous argumentation, but it also responds to a situation which does not correspond to the facts of the case mentioned in the fragment. Note that the interest was only promised in the letter presented in a fragment which just refers to a previously existing contract, so it is obvious it was not part of the original contract. Papinian had therefore no reason to answer such a question. While it is more probable it was added only by justinianic compilers, it might also be a postclassical gloss. The *pacta* concerning interest were considered binding in Justinianic and generally not in classical law, though in the late classical times, we can already see some examples of that.[49] It is questionable, how much compilers intervened with the texts and in case they did so, why would they add a rule that if the parties agreed on it, the interest was due from the very beginning, but they would not include it in the following fragment, that is D. 16.3.25.1? Of course, they might have thought that stating it once is sufficient, but

46 NABER, op. cit., p. 62; LONGO, 1906, op. cit., pp. 131–132; BONIFACIO, op. cit., p. 144; SCHULZ, 1949, op. cit., p. 263; GEIGER, op. cit., p. 37; BRASIELLO, 1956, op. cit., p. 499; MICHEL, J.-H. *La gratuité en droit romain*. ULB: Institut de sociologie, 1962, p. 84; SONDEL, op. cit., p. 53, and VALMAÑA OCHAÍTA, op. cit., p. 77.

47 Rather in favour are SERGÉ, op. cit., pp. 224–225; KÜBLER, op. cit., pp. 205–206; COLLINET, op. cit., pp. 119–121. Strongly in favour of authenticity are FREZZA, op. cit., pp. 156–157; CHERCHI, op. cit., pp. 88–90 and 177, though she admits the text might have been shortened by the compilers in its first part but not here, and SACCOCCIO, op. cit., p. 94. SCHEIBELREITER, 2017, op. cit., p. 450, does not comment specifically on this sentence, but he considers whole text to be original.

48 CHERCHI, op. cit., p. 177.

49 KASER, M. *Das römische Privatrecht: Erster Abschnitt: Das altrömische, das vorklassische und das klassische Recht*. München: C. H. Beck, 1971, pp. 497–498 who mentions D. 22.1.30 Paulus libro singulari regularum and D. 50.12.1pr. Ulpianus libro singulari de officio curatoris rei publicae.

this is just another hypothesis. Nevertheless, this is one of the arguments supporting the view that the sentence was added by a postclassical jurist rather than by the compilers. What seems to be clear is that this sentence was not part of the original text but is part of the text in the Digest.

In conclusion, in this case, Papinian granted an *actio depositi in ius concepta*, but refused that the depositor could use it to claim the interest for the time before the default.

D. 16.3.26.1 *(Paulus libro quarto responsorum)*

> *Lucius Titius ita cavit: Ἔλαβον καὶ ἔχω εἰς λόγον παρακαταθήκης τὰ προγεγραμμένα τοῦ ἀργυρίου δηνάρια μύρια, καὶ πάντα ποιήσω καὶ συμφωνῶ, καὶ ὡμολόγησα, ὡς προγέγραπται. Καὶ συνεθέμην χορηγῆσαί σοι τόκον ἑκαστῆς μνᾶς ἑκάστου μηνὸς ὀβόλους τέσσαρας μέχρι τῆς ἀποδόσεως παντὸς τοῦ ἀργυρίου. Quaero, an usurae peti possunt. Paulus respondit eum contractum de quo quaeritur depositae pecuniae modum excedere, et ideo secundum conventionem usurae quoque actione depositi peti possunt.*

In this fragment, we encounter a document in Greek in which Lucius Titius, the depositee, confirms that he received 10.000 denarii and promises to pay the interest. The question is whether one could claim it. Paulus responds that this convention goes beyond the limits of the deposit of money, and it is therefore possible to claim the interest.

The answer given by Paulus is quite puzzling as the second sentence opposes the first one rather than logically stemming from it in spite of using the conjunction *et ideo* meaning "therefore". What is more, the sentences also the sentences exhibit grammatical disparities, with the former employing the *accusativus cum infinitivo*, while the latter is a direct speech.

This contradictory nature of the fragment gave a rise to number of theories which try to explain it. Let us divide them into three groups:[50]

1. The last sentence *("et ideo* […] *possunt")* was not part of the original text and was only added by the justinianic compilers. The original text also addressed a *mutuum* and not a deposit.[51]

[50] This scheme is inspired mostly by the schema proposed by SCHEIBELREITER, P. Vom "logos" der Verwahrung. Überlegungen zum Vertragstext in D. 16.3.26.1 (Paul. 4 resp.). In: *Index: quaderni camerti di studi romanistici*. 2015, Vol. 43, no. 1, p. 358, who himself was inspired by GEIGER, op. cit., p. 40.

[51] LONGO, 1906, op. cit., pp. 129–130; SCHULZ, 1949, op. cit., pp. 259–260; ADAMS, op. cit., p. 368.

2. One of the last sentences contained a word *non*. This would remove the logical negation between them. There are two variants of this approach:
   a) *depositae pecuniae modum non excedere, et ideo* […] *usurae* […] *peti possunt.*[52]
   b) *depositae pecuniae modum excedere, et ideo* […] *usurae* […] *non peti possunt.*[53]
3. The text is authentic.[54]

Scheibelreiter conducts an analysis of the text stating it is a short part of a paratheke formular called a hypographe which summarises a previously closed contract.[55] Although it is said that money is now held by Lucius Ticius as a paratheke, it is unclear whether the original contract was also a paratheke, a loan for consumption or something else.[56] However, as a paratheke was not interest-bearing[57][58] another sentence containing a promise to pay the interest needs to be added because it would not be a part of a normal paratheke formular.[59]

After the analysis of the Greek text, Scheibelreiter proceeds to explain the answer given by Paulus. Initially, he rightly notes that Paulus was asked only if the interest can be claimed, so he did not deliberate on much else. In his opinion Paulus first says that the question of interest lies beyond the limits of the contract of deposit so to claim it, the parties need to conclude a *pactum* which is concluded in the Greek written document. Thus, it is possible

52 NIEMAYER, op. cit., p. 40; GEIGER, op. cit., p. 41.
53 BONIFACIO, op. cit., p. 136, who proposes a slightly different reconstruction of the second sentence, which, however, does not change its meaning: *usurae quoque actione depositi non peti possunt*. and SONDEL, op. cit., p. 80.
54 BÜRGE, A. Fiktion und Wirklichkeit: soziale und rechtliche Strukturen des römischen Bankwesens. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung.* 1987, Vol. 117, no. 1, p. 548; SCOTTI, F. *Il deposito nel diritto romano. Testi con traduzione italiana e commento.* Torino: Giappichelli, 2009, pp. 196–197; CHERCHI, op. cit., p. 84; SPINA, A. Römisches Recht und lokale Rechtssysteme: der Schutz der hellenistischen parakatatheke in drei Textstellen der Digesten. In: *Beiträge zur Rechtsgeschichte Österreichs.* 2013, Vol. 3, no. 2, p. 564; SACCOCCIO, op. cit., pp. 97–98, considers the passage to be substantially intact, but last sentence to be a summarisation which should explain the illogical text; SCHEIBELREITER, 2015, op. cit., p. 381.
55 SCHEIBELREITER, 2015, op. cit., p. 368.
56 Ibid., p. 370.
57 Ibid., pp. 373–374.
58 MAUER, Q. *Application, adaptation and rejection: the strategies of Roman jurists in responsa concerning Greek documents.* Leiden: Boom juridisch, 2002, p. 108.
59 SCHEIBELREITER, 2015, op. cit., pp. 373–376.

to use *actio depositi* to claim the interest. Scheibelreiter further supports this interpretation of his analysis of D. 16.3.24 which is, however, hardly conclusive.[60]

Though the analysis of the Greek written letter by Scheibelreiter is superb, his conclusions concerning the decision of Paulus are not convincing. To presume the authenticity of the text is a sound point of departure, but one should not forget that it is only a methodological presumption not a default option[61]. In this case, there are good reasons to believe that the text is not authentic for the reasons of grammar and more importantly logic. It is hard to believe that Paulus would write a sentence which is internally contradictory and above that he would alter the grammatic mode in the middle of it. Therefore, other theories seem more probable.

Klami for his part argues that the phrase *"depositae pecuniae modum excedere"* ought to be interpreted as an impossibility to claim anything above the principal, which was the original opinion of Paulus. The compilers then added the text beginning with *et ideo*. Indeed, he is of the opinion that the only reason to change the original text was to render the interest claimable. If already the original version made it possible, there would be no logical reason to change it.[62]

Klami further believes that the text beginning with *et ideo* was added by Justinianic lawyers. However, it might also be a post-classical gloss. It is also most probable that Paulus simply meant that the agreement on the interest goes beyond the limits of the contract of deposit. He did not expressly need to state "and therefore the interest cannot be claimed" because this inference is implicit yet obvious in his statement. Still a post-classical lawyer might have added such sentence to enhance clarity, while another one might have then changed it to negation and added a conjunction to make the interest claimable. This last change might also be the work of compilers. However, such conjecture remains in the sphere of speculation.

60 SCHEIBELREITER, 2015, op. cit., pp. 381–383.

61 CANDY, P. Judging beyond the sandal': Law and rhetoric in D. 19,2,31 (Alf. 5 dig. a Paulo epit.). In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*. 2021, Vol. 138, no. 1, p. 314.

62 KLAMI, op. cit., pp. 93–94.

Regarding alternative theories, those under version 2b seem also plausible albeit to a lesser extent than the aforementioned version. There is also a theoretical possibility of the last sentence being a post-classical gloss which was supposed to stress that the interest was not claimable. It might have been added to the text and then later changed by simply leaving out the word *non*.

The outcome therefore is that in the original text, Paulus most probably simply stated that the agreement on the interest goes beyond the limits of the contract of deposit thereby rendering the interest unclaimable. This interpretation stems from the first part of the sentence which is logical and does not manifest any signs of alteration.

4 Conclusion

We have previously determined that in D. 16.3.25.1 Papinian decided that the depositee that used the money deposited as fungibles was to be condemned to pay the moratory interest from the moment of default. Since the depositee became the proprietor of money as fungibles, it would be strange to blame him for the use of the thing which is the most natural thing the owner of a thing does. However, the use has to be understood in an economic context. The depositor probably demanded his money back and the depositee could not have returned them, since he had spent them and no longer had an equivalent sum at his disposal. Thus, he was unable to return it and defaulted on his debt.[63] This scenario is also the only way to confirm that the depositee used the money; if he had been able to return the equivalent sum, it would be impossible to establish his usage of it.[64]

The subsequent text by Papinian, found in D. 16.3.24, also addresses the issue of interest and whether it can be claimed via the *actio depositi*. Initially, it asserts that claiming interest *ante moram* is contrary to the nature of a deposit. However, it immediately adds that if the parties agreed to interest from the outset, it is due for the entire period *("totius temporis")*. This apparent contradiction necessitates further explanation.

63 SONDEL, op. cit., pp. 45–46.
64 As rightly noted by KLAMI, op. cit., pp. 139–140.

Let us first concentrate on the initial claim. Papinian asserts that although a judge can award interest in bonae fidei proceedings, it is contrary to good faith and the nature of a deposit to claim interest from the depositee before default, as the depositee is providing a service to the depositor. Longo interprets this as evidence that the case must have originally involved a regular deposit, because under an irregular deposit, the depositee would also profit from the arrangement.[65] However, this interpretation is not entirely accurate. As the depositee must always have sufficient funds available to return to the depositor, meaning he cannot truly benefit from the deposited funds.[66] This clarifies Papinian's remark: the depositee should not be forced to pay any interest before the default, because he cannot really benefit from the money.

The last sentence of the rather lengthy fragment is in contrast with previous argumentation. It also addresses a situation where parties informally agreed on the interest, which is contrary to the facts of the case mentioned in the fragment and it is therefore hardly possible that Papinian is the author of it.[67] It is thus improbable that Papinian admitted interest *ex pacto* in this fragment. Consequently, it seems that the last sentence of the D. 16.3.24 which admits interest *ex pacto* was not part of the original text and was only added later. Therefore, we need to look somewhere else if we want to discover whether there is a legal basis for the interest *ex pacto*.

Our analysis of D. 16.3.26.1 led us to conclude that Paulus initially maintained that an agreement on interest exceeded the scope of the deposit and was therefore invalid. It was only later that the text was changed, and the interest was thus deemed claimable.

Finally, D. 16.3.29.1 does not tell us anything about the opinion of Paulus as it is just a compilation of mere phrases rather than ideas contained in Sent. 5.12.5 to Sent. 5.12.9, but it shows us that at the latest under the Justinianic law, the depositee was bound to pay interest if he used money deposited with him.

In conclusion, classical jurists were only of the opinion that one can only claim the *post moram* interest. Under Justinianic law, it was already possible

65 LONGO, 1933, op. cit., p. 142.
66 SONDEL, op. cit., p. 53.
67 KLAMI, op. cit., pp. 132–133.

to claim interest *ex pacto* as well and that for the whole duration of the contract not only since the moment of default. This change was probably not introduced by them but was a result of a post-classical development of blurring the differences between particular actions and also contractual types.

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Some Problems of Exceptio in Roman Law

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-3

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Abstract

The *exceptio* in Roman Law is an institute, which raises many questions. At first introduced by the praetor in order to protect the interest of the defendant, it becomes a legal remedy of great importance. A lot of different versions and types of exceptions emerge, depending on the *actio* they counter. However, we observe lack of information, concerning the exceptio's nature and characteristics as a whole, and while we owe that to the well-known abstractness of Roman jurists, a need for systematization appears, in order to better our understanding of the Roman law and procedure.

Keywords

Exceptio; Defense; Formulary Procedure; Actio; Exceptiones Civiles.

1 Introduction

The emergence of the institute of *exceptio* is exclusively associated with the praetor's figure and role, and the establishment of the formulary procedure as a regular civil procedure in the place of the ancient legislative process. In the concept of *exceptio* is included the legal protection of the defendant, who opposes a certain circumstance to the plaintiff, thus paralyzing his action. This circumstance may be of a temporary or permanent nature – so, dilatory and peremptory exceptions are distinguished.[1] The Roman Law acknowledges the existence of other classifications of exceptions as well. One of the most important is the differentiation of exceptions in *exceptiones* of *ius civile* and *exceptiones* of *ius honorarium*. This raises the question whether *exceptiones* can and should be classified as a solely praetorian institute, which is the tendency nowadays.

1 ANDREEV, M. *Roman Private Law*. Sofia: Sofi-R, 1992, p. 117.

Furthermore, it appears necessary to examine the connection between what can be considered of material substance and of procedural one, according to Roman jurists' thinking, hence its' influence on the *exceptio.* Given the fact that this connection is extremely fuzzy and also because the defining of whatever institute as one only of substantive or only of procedural nature is perilous, in the current paper *exceptio* is presented not only as *pars formulae,* but as a whole, combining both substantive (material) and procedural elements.[2]

In the literature, the comparison of *exceptio* and *actio* is frequently observed.[3] Consequently, it is considered that the structure of *exceptio* follows that of *actio.* However, despite the fact that there are obvious similarities, it should not be overlooked that *exceptio,* above all, is and represents a means of protection of the defendant against *actio,* precisely. All this requires a brief review of some fundamental texts in this regard.

In order to reach more clarity on the nature of *exceptio,* another problem is also being examined, concerning the classification of exceptions as *"exceptions civiles"* and *"exceptiones honorariae".*

2 The Substantive-Procedural Aspect of *'Exceptio'* – General Information and Theses

In most of the main modern courses of study and literature, dedicated to Roman law, little attention is paid to the general characteristics and

2 D.50.17.202: *"Omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset."* (Available at: https://www.thelatinlibrary.com/justinian/digest50.shtml).

3 See BETTI, E. *Sulla Opposizione Della "Exceptio" All' "Actio" E Sulla Concorrenza Fra Loro*. Parma: Zerbini & Fresching, 1913; PALERMO, A. *Studi Sulla "Exceptio" Nel Diritto Classico*. Milano: A. Giuffrè, 1956, pp. 99–101, and etc. For the relation between *exceptio* and *intentio,* see GOMEZ, C. *Exceptio Utilis En El Procedimiento Formulario Del Derecho Romano*. Madrid: Dykinson, 2016, pp. 55–60; PALERMO, A., op. cit., pp. 89–94.

genesis of *exceptio*. It is considered mainly in procedural aspect, as part of the praetor's formula *(pars formulae)*.[4]

This can be explained by the fact that *exceptio* presumably originates from another part of the formula, called '*praescriptio*', and more specifically - *praescriptio pro reo*.[5] These *praescriptiones pro reo* were also used as a procedural means for expressing a particular defense in favor of the defendant against the action, hence they were also *pars formulae*. In the same manner as *exceptiones,* they had to be asserted in the first phase of the process (*in iure*), in order to be included in the formula, and as a result, considered by the *iudex in apud iudicem*.

Also, because *exceptiones* were firstly introduced by the praetor, who therefore created the right to be used as a legal remedy, the question of their material substance hardly arises.

Although it is undeniable the impossibility of using an *exceptio* in a process where a formula is missing, it should not be overlooked that *exceptio* represents the essence of the defense, based on a particular circumstance, and having an extinguishing or a precluding effect on the *actio*. And while this 'particular circumstance' (as will be noted below) is formally raised as such by the praetor himself, the latter will not raise it unless he considers that it is legally relevant, and accordingly should be granted legal protection.

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4 See ANDERSON, C. *Roman Law*. Dundee: Edinburgh University Press, 2009, pp. 104–105; BUJÁN, A. *Derecho Privado Romano*. 10. ed. Madrid: Iustel, 2017, pp. 130–131; DI PIETRO, A. *Derecho Privado Romano*. 2. ed. Buenos Aires: Depalma, 1999, p. 66; GOMEZ, op. cit., pp. 51–80; GUARINO, A. *Ragguaglio Di Diritto Privato Romano*. Napoli: Jovene, 2002, pp. 97–98; IGLESIAS, J. *Derecho Romano: Historia E Instituciones*. 18. ed., rev. y act. Barcelona: Sello Editorial, 2010, p. 138; MORINEAU IDUARTE, M., GONZÁLEZ, R. *Derecho Romano*. 4. ed. Distrito Federal: Oxford University Press México, 2016, pp. 94–95; POLO, F. *Derecho Romano*. 2. ed. Santiago de Chile: Universidad Catolica de Chile, 2007, pp. 84–85; SANFILIPPO, C. CORBINO, A., METRO, A. *Istituzioni Di Diritto Romano*. 10. ed. Soveria Mannelli: Rubbettino, 2002, pp. 125–127; TOPASIO FERRETTI, A. *Derecho Romano Fundamentos Para La Docencia*. Valparaiso: Ed. Latinclasica, 1992, pp. 135–137 and etc.

5 Gai Inst. IV.133: *"Sed his quidem temporibus, sicut supra quoque notauimus, omnes praescriptiones ab actore proficiscuntur. olim autem quaedam et pro reo opponebantur, qualis illa erat praescriptio: EA RES AGATVR, SI IN EA RE PRAEIVDICIVM HEREDITATI NON FIAT, quae nunc in speciem exceptionis deducta est et locum habet, cum petitor hereditatis alio genere iudicii praeiudicium hereditati faciat, uelut cum singulas res petat; est enim iniquum per unius* [fol. deperd]*".* (Available at: https://droitromain.univ-grenoble-alpes.fr/Responsa/gai4.htm#100).

In this regard, *exceptio* as a *pars formulae* should be viewed as a framework, containing the right of defense of the party.[6]

At the same time, it must be taken into consideration to what extent the need for the protection of the defendant should be so strongly tied to the emergence of the Fomulary procedure. Such conclusion would aggravate too much the already unfavorable position of the defendant, as it would place the idea of the need for protection dependent on the existence (or non-existence) of a procedural remedy, which is contrary to the concept of *aequitas*.

In this sense is one of the foundational works of *Savigny,* who defines the *exceptio* as a form of defense, but also notes that not every form of defense is considered *exceptio.*[7] Therefore the *exceptio* is not just any defense, but a particular type of defense.[8] Although the author acknowledges that it did not exist at the time of the *legis actiones,* he specifically refers to it in its' 'procedural form' and points out that it is unlikely that such an appropriate and natural form was neglected for long.[9] However, *Savigny* does not stop there, but goes even further, defining *exceptio* as arising partly from *ius civile,* partly from *ius honorarium,* according to their classification, made by *Gaius* in his Institutes.[10]

Everything stated so far leads to the consideration of the institute of *exceptio* in two aspects – substantive and procedural.

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6 The term *"the right"* is used in a broad sense, given the fact that according to the prevailing opinion, the exceptions were introduced precisely to give a legal significance to a certain fact, which did not have such under *ius civile* a at the time. Therefore, it would not be accurate to speak of a 'right' in a strict legal sense in compliance with *ius civile.*

7 SAVIGNY, F. *Sistema Del Diritto Romano Attuale. 5. Traduzione Dall'originale Tedesco Di Vittorio Scialoja*. Torino: Unione tipografico-editrice, 1893, p. 189.

8 Also, GIANOLIO, B. *Cenni sulle eccezioni, sulla compensazione e sulla riconvenzione in diritto romano*. Torino: Tip. dell'ordine mauriziano, 1865, p. 5, who points out that it cannot be known for sure with what means is achieved the effect, achieved later through *exceptio,* in the *legis actiones*. See also BARINETTI, P. *Diritto romano: parte generale*. Milano: F. Vallardi, 1864, pp. 257–260.

9 SAVIGNY. F, op. cit., p. 192.

10 See Gai Inst. IV.118. While with *exceptiones* of *ius honorarium* the extinguishing or paralyzing the *actio* facts are established as such on the initiative of the praetor, with *excceptiones* of *ius civile* it is about facts, which were forbidden by *ius civile,* itself. However, no sanction for their violation was provided. In both cases *exceptiones* are granted by the praetor, but in the case of the latter, the ground is based on the provisions of *ius civile.*

Thus, *Puchta,* in his course on Roman law, states that there were no procedural *exceptiones* that were not at the same time also substantive *exceptio*, but there were substantive ones, which were not procedural.[11] Hence, he divides the defense into three categories: 1) *negatio* – a complete denial of the plaintiffs' claim, regardless concerning the legal or the factual basis; 2) *"qualified denial"*, referring to the non-existence of the right in a certain moment, i.e. such fact that leads to destroying the right *ipso iure;* and 3) *exceptio* – when the claimant's right is opposed by an independent right (of the defendant), which destroys the force and effect of the claim.[12]

There is an opportunity for different classifications, as some of the founding theses continue to be debated in the modern literature.[13] In this regard, in one of the most recent works on the subject*, I. S. Goryachev* points out that *Puchta* (contrary to *Savigny* and *Zimmern)* sees the substantive nature of *exceptio* in the effect of destroying the plaintiff's right, i.e. of its' invalidity, as a result of the defendant's statement, even though the existence of such a right was not actually denied.[14] However, despite the otherwise correct analysis, it should be noted for greater precision and accuracy that this concerns the legal effect of *exceptio,* rather than its' very nature.

Kaser examines *exeptio* primarily in a procedural sense, categorizing it as an 'institute of procedure', that gradually developed into a countervailing right, or even an independent right to reject the plaintiff's claim.[15] What

11 PUCHTA, G. F. *Course of Roman Civil law*. I. Moscow: Ripoll Classic, 2013, pp. 259–260.

12 Puchta expressly states that for the Romans such a 'qualified negation' could not have the meaning of a procedural *exceptio.*

13 In general sense, the division of the defense into three categories is most often observed: 1) full denial of the claim of the plaintiff; 2) an assertion of facts from which it follows that the claimant has never had the right of the *actio,* or if he has ever had, does not have in the present; and 3) opposing of another right, paralyzing or impeding that of the plaintiff without denying it. See also MACKELDEY, F., DROPSIE, M. *Handbook of the Roman Law*. Philadelphia: T. & J. W. Johnson & Co., law booksellers and publishers, 1883, p. 182.

14 GORYACHEV, I. Категория "эксцепция" в римской, германской и российской правовых системах [The category "exceptio" in Roman, German and Russian legal system]. In: *Вестник Гражданского Права* [*Journal of Civil Law*]. 2023, Vol. 23, no. 6, p. 25. The author refers to: ZIMMERN S. *Geschichte des römischen privatrechts bis Justinian/Bd. 3. Der Römische Civilprozeß in Geschichtlicher Entwicklung Bis Auf Justinian*. Heidelberg: Mohr, 1829.

15 KASER, M. *Roman Private Law: A Translation*. 4. ed. Pretoria: University of South Africa, 1984, pp. 39–40.

Kaser does is to present *exceptio* in a historical plan by referring to the fact that *exceptio* is granted on the defendant's initiative and rarely *ex officio.*[16] Indeed, the prevailing opinion in the doctrine is that the *exceptio* firstly developed as an institution of the process and then found its' way in the substantive law. *Kaser*'s conclusion appears to be correct at first glance and supported by the sources. However, a closer analysis reveals the following: *Kaser* ties the existence of the substantive aspect of *exceptio* with the rules of the law in force, which would lead to the independent existence of *exceptio* in a procedural sense and putting the substantive aspect of it dependent only on the procedural one. Thus, if the material value of already occurred facts (which could be of legal importance and therefore would be of use to the defendant in a trial) is denied, there emerges the danger of one 'hollow' defense, based solely on the procedural opportunity of asserting an *exceptio.* In addition, in this way the force of some *leges* and *senatusconsulti (lex Plaetoria, lex Cincia and etc.)*, in which the ground of the so-called *"exceptiones civiles"* is found, is denied. These *exceptiones* are created for the exact purpose of providing protection in case of violation of the prohibitions established by those *leges,* for which a sanction was not otherwise provided. Given that, nonetheless, the *exceptiones* were not part of the substantive law for a certain period of time, it cannot be overlooked that in their content is found a particular right, fact or legal provision (in the cases of civil exceptions). Hence that affects their essence in precisely that way.

Therefore, the question to be asked to establish the nature of *exceptio* and the moment of its' emergence in the process is the following one: when does the substantive-procedural unity in its' content occur?

16 The problem of raising *exceptiones ex officio* is disputed in the doctrine, but rather the opposite opinion prevails.

3 *Exceptio – Actio*

Often the structure of *exceptio* is considered along with this of the *actio,* because both appear mutually opposed, given their function. Regarding the nature of *actio,* the following text of *Celsus* is examined:

D. 44.7.51

> *Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi.*
> *An action is nothing else, but the right to recover what is owed to us by means of a judicial proceeding.*[17]

Therefore, the *actio* has two elements: 1) the request for legal protection, addressed to the State *(of public essence)*, and 2) the substantive right, addressed to the defendant *(of private essence)*.[18] This text, indeed, represents the idea that the substantive institutes are inevitably tied to the Roman procedure.

D. 44.1.1

> *Agere etiam is videtur, qui exceptione utitur: nam reus in exceptione actor est.*
> *Anyone who uses an exceptio is also considered to act: in fact, the defendant is a plaintiff in the exceptio.*

Thus, *exceptio* will also contain two elements: 1) the request for legal protection, addressed to the State; and 2) the substantive right, addressed to the plaintiff.

Some authores even consider the *exceptio* as a quasi-claim.[19] They refer to the similarity of *actio* and *exceptio* and to the institute of *replicatio (exceptionis exceptio)*, which the plaintiff could assert, in case *exceptio* was opposed to him.

Also, Ulpian:

D. 44.1.2.1

> *Replicationes nihil aliud sunt quam exceptiones, et a parte actoris veniunt: quae quidem ideo necessariae sunt, ut exceptiones excludant: semper enim replicatio idcirco obicitur, ut exceptionem oppugnet.*

17 For the translation of the text see DEDEK, H. From Norms to Facts: The Realization of Rights in Common and Civil Private Law. In: *Mcgill Law Journal.* 2010, Vol. 56, no. 1, pp. 77–114.

18 ANDREEV, op. cit., pp. 90–91; According to Andreev, in this sense also: WINDSCHEID, K. *Lerhbuch des Pandektenrechts. I B.* 9. ed. 1906, p. 190.

19 GORYACHEV, op. cit., pp. 23–30.

Replications are nothing more than exceptions pleaded by the party plaintiff, which are necessary in order to bar exceptions; really, always a replication is introduced to oppose the exception.

D. 44.1.2.2

Illud tenendum est omnem exceptionem vel replicationem exclusoriam esse: exceptio actorem excludit, replicatio reum.

It should be kept in mind that any exception or replication is barring; an exception bars the plaintiff, and a replication bars the defendant.[20]

On the analysis of these texts, it is found that although there is an undeniable similarity in terms of structural nature and essence of *exceptio* and *actio,* they cannot be considered wholly equivalent. Such a conclusion would lead to a misconception of the idea and function of the *exceptio,* considering it as something more than a means of defense.

Moreover, the existence of *exceptio (*and also *replicatio)*, is dependent on the existence of the *actio* (or respectively *exceptio)*. While the right of an *actio* is an absolute independent right, the right of *exceptio* is impossible to use if there is no action. Therefore, the *actio* appears to be a prerequisite for the *exceptio.* However, while it cannot be considered as an element of the *exceptio*'s nature, the *actio* still reflects in that nature. That is because the Romans did not

20 In the English translation of the Digest, made by S. P. Scott, emphasis in placed on the purpose of *exceptio* and *replicatio* to prevent the opposing party from proceeding further: *"It must be remembered that every exception, or replication, is for the purpose of preventing the opposite party from proceeding further. An exception bars the plaintiff, and a replication bars the defendant."* See SCOTT, S. P. *The Civil Law, Including The Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo.* X. Cincinnati: The Central Trust Co, 1932. Although this translation corresponds to the character and function of the two institutes, it should be noted that it is much more free in meaning, given the fact that nowhere in the Latin text does it speak of 'purpose'. The same is observed in the most recent Russian translation of the Digests, made by Béla Pokol, which, however, is based exactly on the English one: *"Следует помнить, что каждое исключение или репликация служат для того, чтобы помешать противоположной стороне действовать дальше. Исключение препятствует истцу, а репликация препятствует ответчику."* See POKOL, B. *Дигесты Юстиниана в Русском Переводе.* Jogelméleti Szemle (Melléklet), 2022. Available at: https://www.academia.edu/68576895/Дигесты_Юстиниана_в_русском_переводе [cit. 11. 8. 2004]. The translation of D. Tuzov could be considered as more precise: *"Следует иметь в виду, что всякая эксцепция или репликация является препятствующей: эксцепция препятствует истцу, репликация – ответчику."* [It should be kept in mind that any exception or replication is an obstacle: exception bars the plaintiff, replication bars the defendant.]. See TUZOV, D. 44 книга дигест [Book 44 of the Digest]. *Rimpravo* [online]. [cit. 11. 8. 2004]. Available at: https://rimpravo.ru/44-kniga-digest-iustiniana#gsc.tab=0/

have a single concept of *actio,* but many separate actions, due to the inextricable connection between its' constituent elements – the substantive right and the request for legal protection.[21] Whereas the structure of *exceptio* appears to be similar to that of *actio,* as a consequence of its' function as a means of defense and its' depending on the *actio* existence, it can be concluded that precisely the *actio* predetermines its' character, and more specifically – the substantive element of its' character. Thus, the *exceptio* appears to be one legal figure with a dynamic and fluid nature, that changes depending on the particular *actio,* against which it is used. Consequently, *actio* is not only a prerequisite for the emergence of *exceptio,* that determines whether it will exist or not in the litigation, but also dictates its' substantive legal nature.

This thesis finds particular confirmation in the so-called *exceptiones in factum* – exceptions, granted by the praetor in specific cases, although they were not established neither in *ius civile,* nor in the praetorian's edict; and in the *exceptiones utiles* – exceptions, established and created on the basis of already existing exceptions, but with an effect, extended to new different cases.

4 Exceptiones Civiles – Exceptiones Honorariae

It should be noted that the term "civil exceptions"[22], although adopted by many authors, is not actually found in the sources.[23] Given that, in the current paper it will be used primarily with didactic purpose.[24]

21 ANDREEV, op. cit. pp. 90–91. As examples are given different actions, protecting different rights – *actio empti, actio certae creditae pecunia, etc.*

22 This is about *exceptiones,* finding their ground in *ius civile* – *leges, senatusconsulti, plebesciti,* more precisely, the so-called *"leges imperfectae"* – law that does not provide any sanction for the violation of its' rules. Hence, what has been made contrary to them stays valid. This provoked the creating of different *exceptiones* – *exceptio legis Plaetoriae, exceptio legis Cinciae, exceptio SC.ti Velleiani, exceptio SC.ti Macedoniani.* The question about *exceptio iusti domini* is debated. It is an *exceptio,* which *dominus ex iure Quiritium* could assert contrary to *actio Publiciana*. See GOMEZ, op. cit., p. 49.

23 Ibid., p. 50.

24 Gai Inst. IV.118: *"Exceptiones autem alias in edicto praetor habet propositas, alias causa cognita accommodat. quae omnes uel ex legibus uel ex his, quae legis uicem optinent, substantiam capiunt uel ex iurisdictione praetoris proditae sunt."* In the text *"substantiam capiunt"* literally means "take their substance", i.e. the material substratum, the basis of these exceptions, which "take their substance" from the laws or acts that are "like" laws, is emphasized. Gaius continues with: *"ex iurisdictione praetoris proditae sunt"* – "come from the praetor's jurisdiction". Gaius keeps on commenting the basis of *exceptio* and does not mean that the first are established in *ius civile*, only that they find their ground in *ius civile.*

In one of the most recent analyses, *Gomez* pays attention to the fact that the civil exceptions are not subject to a different regime than other exceptions.[25] Thus, *Gomez* as well as *Buján*, accepts that this distinction does not refer to the nature of *exceptio* as a praetorian procedural institute, but only to its' origin and content.[26] As an example, *Gomez* refers to *exceptio legis Cinciae in factum*, which is mentioned in *Vat. 310,* in one fragment of *Paul, libro 23 Ad edictum de brevibus.*[27] The author notes that in this case the praetor does not use the general *exceptio "si quid contra legem senatusue consultum factum esse dicetur",* but instead redacts one *exceptio causa cognita.* According to him, the praetor does so in order to comply with the praescriptions of *lex Cincia,* only hinting at its' substantive content: '*si non donationis causa mancipavi vel promisi me daturum*' *('if I have not mancipated on the base of donation, nor have I promised it will be to donate').*

The text that *Gomez* analyses is the following one:

Paulus, libro XXIII ad edictum de brevibus, Vat. 310–311

> *Perficitur donatio in exceptis personis sola mancipatione vel promissione, quoniam neque Cinciae legis exceptio obstat neque in factum 'si non donationis causa mancipavi vel promisi me daturum': idque et divus Pius rescripsit.*
>
> *The donation in respect of certain persons is made only by mancipatio or promissio because neither exceptio legis Cinciae interferes with it, nor in factum 'if I did not mancipate on the ground of donation, nor did I promise that it will be to donate'; and that is what Pius the Divine wrote in in the rescript.*

25 GOMEZ, op. cit., p. 50.

26 There is an opinion, according to which *exceptio* may refer to *ius civile* in so far as the legislator sees the necessity of introducing justice into *stricti iuris* by way of exceptions, i.e. to weaken it and increase the role of *aaquitas* in the administration of justice. See GORYACHEV, op. cit., p. 18. This opinion is rather an isolated one, due to the fact that precisely the reconciliation of law with the requirements of the *aequitas* was the praetor's main task. His role was to support, supplement and correct *ius civile.* It was at his discretion whether to give an *exceptio* or not. He was not compelled by *ius civile* to do so. This is related to his power to administer justice, conferred upon him by the state itself, by the *populus* itself, not by the *ius civile*.

27 *Lex Cincia de donis et muneribus* (294 B. C.) is a plebiscite, that prohibits *ultra modum* donations, exempting a number of people from the prohibition – the so-called *personae exceptionae*. Due to its' nature as a *lex impefectae*, it does not annulate or invalidate what has been made contrary to its' rules, nor does it establish a sanction.

Firstly, it should be pointed out that *"si quid contra legem senatusue consultum factum esse dicetur"* [if it is said that something has been made contrary to the law or the senatusconsultum] actually was the title of the section, relating to the *exceptiones,* based on *leges imperfectae,* according to the reconstruction of the Edict, made by *Lenel.*[28] Below, he notes that the individual laws and senatusconsults on the basis of which the exceptions were granted were not enumerated in the Edict, but instead was established the general formula: *"si in ea re nihil contra legem (senatus consultum) factum est"* [if nothing has been made contrary to the law/senatusconsult].[29] Hence, in addition to the 'true' *exceptio legis Cinciae,* in *Vat. 310* another *exceptio* is found (which probably is not established in the Edict) *in factum: "si non donationis causa mancipavi vel promisi me daturum".*

The doctrine does not share one opinion concerning the relation between these two exceptions. According to *Biondi* for example, it is not clear when *exceptio in factum* was used.[30] He suggests that the *exceptio in factum* preceded *exceptio legis Cinciae.* In the more recent literature another opinion has arisen, according to which their field of application was different.[31]

The opinion of *Biondi* seems plausible, given the fact that there was a tendency after the granting of a certain *exceptio* by a decree of the praetor,

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28 LENEL, O. *Das Edictum Perpetuum: Ein Versuch Zu Dessen Wiederherstellung.* Leipzig: Tauchnitz, 1883, p. 406.

29 It could be presumed that the usage of *"si quid contra legem senatusue consultum factum esse dicetur"* instead of *"si in ea re nihil contra legem (senatus consultum) factum est"* on p. 49 of GOMEZ's work is due to a technical inaccuracy, because the author, himself, points out as an *exceptio* with a general character *"si in ea re nihil contra legem (senatus consultum) factum est"*, and as a section title *"si quid contra legem senatusue consultum factum esse dicetur"*, when considering the reconstruction of the Edict by Lenel, and also by Rudorff. See GOMEZ, op. cit., pp. 111–112.

30 BIONDI, B. *Successione testamentaria e donazioni.* Milano: Giuffre, 1955, p. 639, as cited in PONTORIERO, I. *I Brevium [Ad Edictum] Libri XXIII Di Giulio Paolo: Saggio Introduttivo, Testo Traduzione E Commento.* Torino: G. Giappichelli Editore, 2023, pp. 60–61.

31 According to Sacconi, *exceptio legis Cincia*e was restricted only to the cases of *stipulatio donationis causa* and *certa pecunia*, and *exceptio in factum* – concerning *certa res* or *incertum.* See SACCONI, G. *Ricerche sulla stipulatio.* Napoli: Jovene editore, 1989, pp. 97–99, as cited in PONTORIERO, op. cit., pp. 60–61. The view of Sacconi is also adopted by Prado Rodríguez. See PRADO RODRÍGUEZ, J. C. Incumplimiento de la donación promisoria y beneficium competen tiae: bases romanistas de su recepción en el Código civil de Bello. In: *Glossae. European Journal of Legal History.* 2020, no. 17, p. 635, nt. 18, as cited in PONTORIERO, op. cit., p. 61.

that this *exceptio* would subsequently be included in the edict on the initiative of a magistrate. As a result of that it could find a place in the subsequent edicts, too.[32] On the other hand, it should not be overlooked the well-known casuistic thinking of the Roman jurists, that leads to the assumption that the praetor rather resorted to *exceptio in factum*, when he considered that *exceptio legis Cinciae* would not have had the necessary effect and the need to provide protection to the defendant appeared probably reasonable.

Whichever view is adopted, the sources speak clearly of the existence of two separate exceptions, essentially related to one law - one categorized in the literature as "civil" *(exceptio legis Cinciae)* and the other as 'praetorian' (*exceptio in factum).* This division, however, did not justify different treatment of the *exceptiones* from a procedural aspect, since the decision whether or not to grant an exception (and what type), belonged to the praetor, always.

Consequently, it would not be possible to speak of the existence of exceptions under civil law, since the exceptions originate from the activity of the praetor. On the other hand, it must be considered the question could the concept of '*exceptio'* be classified and categorized only in respect to the figure of the magistrate in his capacity as a public legal entity, which introduces it.

For now and given everything presented so far, it can be concluded that in the substantive aspect of the so-called 'civil' general *exceptio "si in ea re nihil contra legem (senatus consultum) factum est"* stands one right – the right to not be condemned when something has been done contrary to the law. While the *ius civile,* itself, did not provide a sanction or nullity of the wrongful acts committed, it has implicitly established this right by its' provisions and rules. The *exceptio* appears to be the legal means for its' protection. Moreover, this is how the dynamic character of the *exceptio* is manifested again. It is expressed in the fact that in every individual case, the *exceptio* will look different, depending on the brought *actio: "si in ea re nihil contra legem Cinciam factum est', si in ea re nihil contra senatusve consultum Velleianum factum est"* and etc.

32 CARRELLI, E., ARANGIO-RUIZ, V. *La Genesi Del Procedimento Formulare*. Milano: Giuffrè Editore, 1946, p. 60, as cited in GOMEZ, op. cit., p. 114.

5 Conclusion

Typical for the Roman Law is the principle that the substantive follows the procedural, while in the modern law the opposite is observed.[33] In the analysis of the exceptions, it is evident that the praetor, by granting the *exceptio,* makes the right, the fact or the circumstance, that is part of that *exceptio,* legally recognized and therefore subject to judicial protection. Thus, the praetor also gives legal significance to an occurred fact, thereby turning it into a legal fact. Without his intervention, expressed in granting protection by *exceptio,* containing in itself a certain right or fact, one could not speak of the concepts of 'subjective right' and 'legal fact' in the sense of Roman law. That is because these terms would simply not be legally relevant, since they are not established as such by *ius civile.* However, that does not mean that they essentially are not of potential to be such – the praetor does not recognize every circumstance as one with a legal meaning, Actually, he just gives them legal shape, according to their material value. And that material value is one prerequisite for the praetor's recognition, which does not depend neither on him, nor on *ius civile.*

As a conclusion, the answer of the question when does the unity of substantive and procedural occur (regarding *exceptiones)* is found in the thorough analysis of the nature of *exceptio,* as a whole. Given everything presented so far, this moment of unity appears to occur when the praetor objectifies externally his decision of *dare exceptionem.* Due to the fact that *exceptio*'s existence is based on that of the *actio* and its' nature basically depends on the nature of the latter, firstly the praetor should objectify his decision for *dare actionem.* Then, after he hears the allegations of the defendant, upon him rests the duty to allow or to refuse the *exceptio.* From the moment in which the defendant expresses his request for granting of an *exceptio* on the basis of the facts and circumstances which he has alleged, until the moment when the praetor considers that those facts and circumstances have material value, could and should be of legal relevance, and must be taken into account by the judge when drawing up his decision,

33 In this sense, *Albanese* points out that the legal ие often the legal qualifications were made from a purely procedural point of view. See ALBANESE, B. (ed. by MARRONE, M.). *Scritti Giuridici.* Palermo: Palumbo, 1991, p. 358.

there is only the potential possibility of the existence of an *exceptio*. From a procedural view, it is in a pending state, since it has already been requested by the party, but not given, therefore not existing. However, this procedural aspect of it will appear, only if the magistrate considers that the alleged circumstances are worthy of constituting a legal basis. Therefore, he will create its' substantive aspect by giving legal force to them. In the moment of *dare exceptionem,* the praetor creates both the procedural, and substantive side of the particular *exceptio,* and therefore the *exceptio* itself. And that applies to every individual case, whether or not the *exceptio* is established in edict of the praetor or is one *in factum* or *utilis*. Because the existence of a certain *exceptio* in the substantive law should be distinguished from the existing of its' substantive (material) aspect, contained in a particular circumstance with material value, which circumstance is subject of praetor's recognition. And the praetor's recognition is what transforms it into a legal one. Therefore, this is how *exceptio* in a particular trial is created.

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The Secret Will of Karol Brzostowski: A Contribution to the Reception of French Civil Law in Polish Lands

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-4

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Abstract

The article aims to present the reception of French civil law in Polish lands based on the sources concerning the secret will of Karol Brzostowski (1796–1854) – polish officer, entrepreneur, inventor, constructor and landowner in the Kingdom of Poland. The article is the result of research for a doctoral thesis "The testamentary freedom in the *'mortis causa'* dispositions of Karol Brzostowski". The methodology used in this publication was the diplomatics. The author researched the notarial deeds founded in the State Archives in Suwałki, Poland. Through the analysis of the sources, it was possible to characterise the binding force of the Napoleonic Code in the Duchy of Warsaw and the then Kingdom of Poland based on the law of succession concerning the biography of the testator.

Keywords

Karol Brzostowski; the Napoleonic Code; Secret Will; the State Archives in Suwałki.

The binding force of French civil legislation in Polish lands was initiated by Napoleonic conquests. Thus, one of provisions of the Treaties of Tilsit of July 1807, contained by the French Empire, Russian Empire and the Kingdom of Prussia, was a creation of the Duchy of Warsaw. It was a French client state, consisting of lands, captured by Prussia because of the second and third partitions of the Polish – Lithuanian Commonwealth. The country surface was enlarged in 1809 with the lands conquered by Austria in 1795.[1]

1 DZIADZIO, A. The Constitution of the Duchy of Warsaw 1807: some remarks on occasion of 200 years' anniversary of its adoption. In: *Krakowskie Studia z Historii Państwa i Prawa*. 2008, Vol. 2, p. 165.

Duchy of Warsaw was held in personal union by Napoleon's ally, Frederick Augustus I of Saxony, who became the duke of Warsaw. Following Napoleon's defeat in Russia, its territory was occupied by Russian and Prussian troops. In 1814–1815 in Vienna monarchs decided to divide the Duchy of Warsaw. The east-central territory of this country was transformed into the Kingdom of Poland – the state in personal union with Russian Empire. The western part of the Duchy of Warsaw was transformed into the Grand Duchy of Posen. On the other hand, Cracow was given a status of a free city.[2]

As the Duchy of Warsaw was a client state of the French Empire, the political model from this country has been adopted on its territory. For example, it concerned: the conception of the central government, the organisation of the Council of State and the two – instance administrative legislature.[3] The same applied to the judicial system and law, particularly the private law.[4]

The legal act regulating civil law relations on the territory of the Duchy of Warsaw and the then Kingdom of Poland was the Civil Code of the French, known in Poland as the Napoleonic Code. This normative act was in force in France from 21 March 1804. The legislative work was managed by the four – person committee appointed in 1800 by the first consul Napoleon Bonaparte. He was taking part in a meeting of this collective agency.[5]

The Napoleonic Code was in force on Polish soil from 1 May 1808.[6] What is more, the Article 69 of the constitution of this country, promulgated by Napoleon Bonaparte on 22 July 1807 in Dresden, constituted that the Napoleonic Code would be the civil law of the Duchy.[7] The French Civil Code sanctioned three types of freedom: the freedom of person, the freedom

2 SOBOCIŃSKI, W. *Historia ustroju i prawa Księstwa Warszawskiego*. Torun: Towarzystwo Naukowe, 1964, p. 28.

3 CICHOŃ, P. Wpływy francuskie w administracji Księstwa Warszawskiego. In: *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Historyczne*. 2013, no. 1, pp. 3, 8, 10–15.

4 SMYK, G. Francuskie prawo i instytucje ustrojowe w Księstwie Warszawskim. In: *Annales Universitatis Mariae Curie – Skłodowska*. 2007, Sectio F, Vol. 62, pp. 41–50.

5 SÓJKA-ZIELIŃSKA, K. *Kodeks Napoleona. Historia i współczesność*. Warsawa: LexisNexis, 2008, pp. 53–67.

6 Postanowienie Króla Saskiego, Księcia Warszawskiego z dnia 27 stycznia 1808 r. In: *Dziennik Praw Księstwa Warszawskiego*. 1808, Vol. 1, no. 2, p. 53.

7 Ustawa Konstytucyjna Xięstwa Warszawskiego z 22 lipca 1807 r. In: *Dziennik Praw Księstwa Warszawskiego*. 1808, Vol. 1, no. 1, pp. II–LIV.

of conduct of legal transactions and the freedom of the private ownership. It was inspired by the philosophy of natural law and the achievements of the Great French Revolution. This legal act fully expressed two principles: the principle of the freedom of the will of the parties to a legal relationships and the principle of the absolute character of the right to property. In this way, the Civil Code of the French presented standards of the free – competitive capitalism from the 19th century.[8]

It should be noted that the Napoleonic Code has been amended in Polish lands. For example, in 1818 and 1825 the parliament of the Kingdom of Poland voted two mortgage bills.[9] The same body passed the Civil Code of the Kingdom of Poland – an amending of the Napoleonic Code. What is more, this legal act amended the inheritance law on the territory of this country because it abolished the institution of the *"civil death"* whose decision had the effect of opening up the estate of the convicted person and inheriting his property by way of statutory.[10] Then, the Civil Code of the Kingdom of Poland recognised the spouse of the testator as the necessary heir.[11] This type of heir was guaranteed the part of inheritance which testator could not dispose of a property in contemplation of death. In this way, the legislator wanted to protect the financial interests of the testator's family.[12] Some regulations of the Napoleonic Code, such as the law of obligations, ceased to apply in the Second Polish Republic. This was due to the activities of the Codification Commission. This body tried to unify and codify law on the territory of this country.[13] The Civil Code of the French was in force

8 SÓJKA-ZIELIŃSKA, K. *Wielkie kodyfikacje cywilne XIX wieku*. Warsawa: Wydawnictwa Uniwersytetu Warszawskiego, 1973, p. 98.

9 Postanowienie Cesarza Wszech Rosji, Króla Polskiego z dnia 14 kwietnia 1818 r. In: *Dziennik Praw Królestwa Polskiego*. 1818, Vol. 5, no. 21, pp. 295–387; Postanowienie Cesarza Wszech Rosji, Króla Polskiego z dnia 1 czerwca 1825 r. In: *Dziennik Praw Królestwa Polskiego*. 1825, Vol. 9, no. 40, pp. 355–373.

10 Kodex Cywilny Królestwa Polskiego z dnia 1 czerwca 1825 r. In: *Dziennik Praw Królestwa Polskiego*. 1825, Vol. 10, no. 41, pp. 3–290.

11 BIEDA, J., WIŚNIEWSKA-JÓZWIAK, D. Zasady dziedziczenia ustawowego na ziemiach Królestwa Polskiego po 1826 roku. In: *Czasopismo Prawno – Historyczne*. 2014, Vol. 66, no. 1, p. 105.

12 SZEWCZAK-DANIEL, M. Ochrona praw dziedziców koniecznych na ziemiach polskich w XIX i XX w. In: *Studia Iuridica Lublinensia*. 2016, Vol. 25, p. 897.

13 HAPONIUK, D. Uwagi o pracach nad polskim kodeksem zobowiązań z 1933 r. ze szczególnym uwzględnieniem zasady słuszności. In: *Miscellanea Historico – Iuridica*. 2018, Vol. 17, no. 1, p. 146.

on Polish soil in the 1940s when the civil law in the Republic of Poland was unified and partly codified.[14] The law of succession ceased to apply on 1 January 1947. On that day, the decree of 8 October 1946 on the law of succession came into force.[15]

The main point of this publication is to address the issue of the contribution to the reception of French civil law in Polish lands based on the sources concerning the secret will of Karol Brzostowski. It is therefore worth writing a few words about his biography.

Karol Brzostowski was born on 11 February 1796, in Michaliszki in the Vilnius region in the Russian Empire. His parents were: Ewa Chreptowicz and Michał Hieronim Brzostowski.[16] He had a sister Isabella who was four years older than him. The young Karol was educated under the tutelage of a French teacher.[17] After his mother's death in 1813, Karol Brzostowski and his sister Izabela inherited the estates: Michaliszki, Czechy and Markuny in the Vilnius region in the Russian Empire with the rights to estates of the chief office of a district in Bystrzyca. They also inherited the Krasnybór estate and the Elert's palace in Warsaw in the Duchy of Warsaw and the then Kingdom of Poland.[18]

Karol Brzostowski began his military career in the army of the Kingdom of Poland. In 1815 he became the adjutant to general Aleksander Różniecki. Brzostowski then served on the staff of Russian grand duke Konstanty. On 10 March 1818, captain Brzostowski resigned from service for health reasons.[19]

In 1818, he inhabited the Krasnybór estate in the land of Sztabin. Administratively, this estate was in Dąbrowa district of Augustów

14 LITYŃSKI, A. *Historia prawa Polski Ludowej*. Warsawa: LexisNexis, 2008, p. 197.
15 Dekret z dnia 8 października 1946 r. – Prawo spadkowe (Dz.U. 1946 nr 60, poz. 328).
16 TRACKI, K. *Ostatni kanclerz litewski: Joachim Litawor Chreptowicz w okresie Sejmu Czteroletniego 1788–1792 (z dodaniem dziejów rodu i życia kanclerza w okresie wcześniejszym)*. Vilnius: Czas, 2007, p. 71.
17 CZAPSKI, E. *Pamiętniki Sybiraka*. London: B. Świderski, 1964, p. 130.
18 PIETRUSIŃSKI, L. *Krasnybór czyli Sztabin i Karol Hr. Brzostowski*. Warsawa: Gazeta Polska, 1863, p. 15.
19 BIELECKI, R. *Słownik biograficzny oficerów powstania listopadowego*, *Vol. 1*. Warsawa: Trio, 1995, p. 261.

voivodeship, Kingdom of Poland. Since 1837 it was part of Augustów governorate.[20] His residence was the manor house in the village of Cisów.

In the land of Sztabin, Karol Brzostowski has built the factory settlement called Huta Sztabińska.[21] He was also a very famous inventor and constructor.[22] The son of Ewa and Michał Hieronim carried out many social reforms at the Krasnybór estate. His greatest social reform was the establishment of local criminal law.[23] Karol Brzostowski died on 26 July 1854, in Paris. He was buried in the Montmorency cemetery.[24]

In his olographic will (written on 29 November 1853, in Cisów) the testator granted land ownership to the peasants of the Krasnybór estate. Each peasant acquired as much land as he rented at the time of the testator's death.[25] The remaining part of the estate was transformed into Factories Fund called the Sztabińska Agricultural and Factory Institution. It was an organizational entity which consisted of industrial plants and agricultural estates. The Institution was run by an administrator. A remnant of the Factories Fund in the form of a forest, known as the Sztabin Parcel, was nationalized in 1948.[26] This olographic will together with the appendix and the supplement, known as the travel will, has been published.[27] The original will is stored in the collection of the notary public Teofil Józef Kowalski in the State Archives in Suwałki, Poland.[28]

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20 Postanowienie Namiestnika Królestwa Polskiego z dnia 16 stycznia 1816 r. In: *Dziennik Praw Królestwa Polskiego*. 1818, Vol. 1, no. 1–7, pp. 115–120; Postanowienie Cesarza Wszech Rosji, Króla Polskiego z dnia 23 lutego 1837 r. In: *Dziennik Praw Królestwa Polskiego*. 1837, Vol. 20, no. 68–70, pp. 413–417.

21 BATURA, W. Usytuowanie zabudowań przemysłowych i gospodarczych hrabiego Karola Brzostowskiego w Cisowie i w Hucie Sztabińskiej. In: In: *Biuletyn Konserwatorski Województwa Podlaskiego*. 2017, Vol. 23, pp. 109–117.

22 BATURA, W. Karol Brzostowski – wynalazca. In: *Rocznik Augustowsko – Suwalski*. 2009, Vol. 9, pp. 113–118.

23 BARTYŚ, J. *Czerwony Hrabia Karol Brzostowski*. Warsawa: Iskry, 1978, pp. 277–302.

24 BIERNAT, A., GÓRZYŃSKI, S. *Cmentarz Champeaux w Montmorency. Groby Polskie*. Warsawa: DiG, 2021, pp. 416–417; SKOWRONEK, J. (ed). *Cmentarz polski w Montmorency*. Warsawa: Państwowy Instytut Wydawniczy, 1986, p. 104.

25 UŁANOWICZ, M. Karol Brzostowski i jego Instytucja Rolno – Fabryczna Sztabińska. In: *Miscellanea Historico – Iuridica*. 2021, Vol. 20, no. 1, pp. 159–162.

26 Ustawa z dnia 18 listopada 1948 r. o przejściu na własność Państwa niektórych lasów i innych gruntów samorządowych (Dz.U. 1948 nr 57, poz. 455 i 456).

27 *Wypis urzędowy testamentu ś. p. Karola Hr. Brzostowskiego*. Warsawa: J. Unger, 1855; *Testament Karola Hr. Brzostowskiego - wypis urzędowy*. Warsawa: A. Gins, 1862.

28 APS, Notariusz Wierusz Kowalski Teofil, sygn. 63/255/0/-/16, pp. 945–975.

Following the death of Karol Brzostowski, his will, written on 29 November 1853 in Cisów, produced legal consequences. It was in accordance with the Article 718 of the Napoleonic Code because this regulation provided that succession is opened by natural death.[29] In this publication I would like to characterise the reception of French civil law in Polish lands on the example of sources concerning one of his previous wills. It was the secret will, deposited on 7 December 1830, in Augustów to Kajetan Dąbski, the sub-judge of the Dąbrowa district.[30] It is interesting to note that this type of will was unknown in the Polish - Lithuanian Commonwealth and in other legal systems in force in the Polish lands in the 19th century.[31] What is more, people in the Duchy of Warsaw and the then Kingdom of Poland did not make frequent use of the institution of a secret will. Probably, the main reason for this situation was illiteracy.[32]

The inheritance law was regulated by the third book of the Napoleonic Code titled as *"Of the different Modes of acquiring Property"*. This legal act distinguished two types of succession: testate and statutory. The definition of the will was expressed in the Article 895 of this legal act. According to its contents *"A will is an act by which the testator disposes, for the time when he shall no longer exist, of the whole or of part of his property, and which he is at liberty to revoke"*.[33] Every will should be prepared on a separate document. The failure to comply with this requirement limited the freedom of the revocation of the *"mortis causa"* dispositions.[34] In principle, by Article 976 of the Napoleonic Code the testamentary capacity has been granted to every individual. The limitations were clearly indicated in the Code. The appointment of the heir was not required to validity of a unilateral legal transaction.[35] Accordingly, the

29 SPENCE, G. (ed.). *The Code of Napoleon; or, The French Civil Code*. London: William Benning, 1827, p. 196.

30 APS, Notariusz Dąbski Kajetan, sygn. 63/220/0/-/1.

31 LOUIS, J. T. *Prawo spadkowe : według zasad i przepisów prawa rzymskiego, prawa dawnego polskiego, jak również praw nowożytnych: austryjackiego, francuskiego, Królestwa Polskiego, pruskiego i rosyjskiego historycznie-porównawczo rozwinięte i wykładem o opłatach spadkowych uzupełnione*. Krakow: J. Bensdorff, 1865, pp. 119–140.

32 BIEDA, J. *Testament – prawo a praktyka Królestwa Polskiego. W świetle akt notariuszy zgierskich w latach 1826–1875*, Lodz: Wydawnictwa Uniwersytetu Łódzkiego, 2013, p. 102.

33 SPENCE, 1827, op. cit., p. 244.

34 DELSOL, J. J. *Zasady Kodeksu Napoleona w związku z nauką i jurysprudencyą*, *Vol. 2*. Warsawa: Redakcja Biblioteki Umiejętności Prawnych, 1874, p. 250.

35 Ibid., pp. 250–251.

testator could also dispose of his property by the legacies *"… or under any other denomination proper to manifest his will"*.[36]

The Napoleonic Code distinguished two, basic types of wills: ordinary wills and informal wills which may be expressed in special circumstances which make it impossible to draw up an ordinary will.[37] Article 969 of this legal act divided ordinary wills into: olographic, public and secret. The requirements to which the first type of ordinary will should conform were set out in Article 970 of the Napoleonic Code.[38] It's worth to underline that the legislator determined the criteria of importance of the olographic will in a very general way. In line with this article, the olographic will should be written entirely by the testator. He also had to sign and date the document. According to the Article 970 of the Civil Code of the French *"… it is not subjected to any other formality"*.[39] Doctrine of the civil law pointed out that the high testamentary freedom, guaranteed by the legislator during the procedure of the preparing of the olographic will, posed a risk to falsify the unilateral declaration of will, compiled in case of death.[40]

The Article 970 of the Napoleonic Code was not all regulation for this type of will because the Article 1007 of the legal act provided that after testator's death every olographic will shall be presented to the president of the court of first instance of the cicrle within which the succession is opened.[41] This duty was incumbent on the person holding the document.[42] Then, the official had to draw up a statement of the presentation, of the opening, and of the state of the will. He also had to deposit an olographic will with

36 SPENCE, 1827, op. cit., p. 267.
37 BIEDA, J. Utrata mocy testamentu w świetle ustawodawstwa obowiązującego na ziemiach Królestwa Polskiego. In: *Studia z dziejów państwa i prawa Polskiego*. 2007, Vol. 10, p. 198.
38 SPENCE, 1827, op. cit., p. 265.
39 Ibid.
40 BIEDA, 2013, op. cit., p. 78.
41 SPENCE, 1827, op. cit., pp. 276–277.
42 BIEDA, J., WIŚNIEWSKA-JÓŹWIAK, D. Testament własnoręczny w świetle ustawodawstwa Królestwa Polskiego i praktyki na przykładzie akt kancelarii notarialnych w Zgierzu w latach 1826-1875. In: *Czasopismo Prawno – Historyczne*. 2012, Vol. 64, no. 2, p. 338.

a notary of his choice. This procedure was intended to protect the *"mortis causa"* dispositions from destruction and possible falsification.[43]

The second type of the ordinary will, regulated by the Napoleonic Code, was the public will. As regards this kind of unilateral declaration of will it should be written in the form of a notarial deed. For this reason, it must have been drawn up in accordance with the French Notaries Act from 16 March 1803.[44] This legal act was in force in the Duchy of Warsaw and the then Kingdom of Poland from 23 May 1808.[45]

In line with the Articles 971–975 of the Napoleonic Code the most important trait, characterised the public will, was the communication of the declaration of will in the presence of one or two public notaries.[46] In the first case, the legislator required the appearance of two witnesses, but in the second case, their number should be four. This function could not be performed by devisors of *"mortis causa"* dispositions and their relatives and relations by affinity up to the fourth degree. The witnesses could not also be a notarial trainee who realised their legal training with a notaries public accepted the declaration of will, communicated by the testator.

As far the public will, the performance an act in law consisted in dictating the content of the will by testator while the notary public was writting down his words on the paper. Then, the official had to read him the content of his *"mortis causa"* dispositions with the intercession of witnesses. The validity of the public will was also required to be signed by the witnesses and the natural person, communicated the declaration of will. If the testator was unable to sign the document, the official had to write the note to that effect in the notarial deed. As regards the signatures of witnesses, the Napoleonic Code provided for a relaxation of the requirements when the public will was drawn up in the countryside. In this case, when the declaration of will was accepted by two public notaries, the signature of one witness was sufficient.

43 PLANIOL, M. *Podręcznik prawa cywilnego (o darowiznach i testamentach)*. Warsawa: F. Hoesick, 1922, p. 88.

44 *Organizacya notaryuszów y szkoł prawa : z dodatku do kodexu cywilnego francuzkiego*. Warsawa: Drukarnia Księży Pijarów, 1807.

45 MALEC, D. *Dzieje notariatu polskiego*. Krakow: Wydawnictwo Uniwersytetu Jagiellońskiego, 2007, pp. 54–55.

46 SPENCE, 1827, op. cit., pp. 266–267.

But, if the public will has been written by one official, the obligation to sign included only two witnesses.[47] The reason for the relaxation of requirements for villagers was the frequent cases of illiteracy found among representatives of this community.

The last type of the ordinary will was the secret will, regulated by Articles 976–979 of the Napoleonic Code.[48] Doctrine pointed out that the secret will consisted of two parts: a personal document (declaration of will) and an official document, drawn up by a notary public.[49] The second part of the secret will, just like a public will, was a notarial deed. For this reason, it must have been drawn up in accordance with the French Notaries Act.[50]

The Civil Code of the French constituted that the secret will could only be prepared in writing by an individual with the ability to read. The document containing a declaration of will must have been closed and sealed. Then, the will should be handed over in person to the notary in the presence of at least six witnesses. In case of inability of the testator to sign, it was necessary to appoint the additional witness. Further, the witness could only be a male with full legal capacity. At the same time, the testator must have made a declaration that the document, closed and sealed, was a secret will. Then, it was a duty of the notary to prepare an official document bearing the signatures of the testator and witnesses. In accordance with the Article 976 of the Napoleonic Code: *"All the above shall be done immediately and without diversion to other acts"*.[51] This was primarily to prevent leaving another document rather than the paper with the testator's declaration of will.[52]

As in the case of a olographic will, the Article 1007 of the Napoleonic Code also applied to secret will. However, the difference was that in the case of a secret will because the official act could only take place in the presence

47 SPENCE, 1827, op. cit.
48 SPENCE, 1827, op. cit., pp. 267–268.
49 BIEDA, 2013, op. cit., p. 88.
50 *Organizacya notaryuszów y szkoł prawa : z dodatku do kodexu cywilnego francuzkiego*. Warsawa: Drukarnia Księży Pijarów, 1807.
51 SPENCE, 1827, op. cit., p. 267.
52 OKOLSKI, A. *Zasady prawa cywilnego obowiązującego w Królestwie Polskiem*. Warsawa: S. Orgelbrand, 1885, pp. 400–402.

of the notary who deposited the secret will and six or seven witnesses who were present when the testator was handing over his declaration of will.[53]

After analysing the three types of the ordinary wills, regulated by the Napoleonic Code, it must be stated that legislator provided the highest testamentary freedom in the case of drafting an olographic will. This is confirmed by the absence of any obligation for witnesses to be present during the procedure of the externalisation of the *"mortis causa"* dispositions and by the legislature's definition of the few requirements to be met by an olographic will. However, the lowest testamentary freedom was characterised by the secret will. This was due in part to the fact that this type of will could only be prepared in writing by a natural person with the ability to read. Further, the Napoleonic Code specified the precise conditions to be met by a person serving as a witness. Moreover, the procedure of the deposition and the opening of the secret will was very complicated. It is important to note the similarities that exist between the olographic and secret will. This was manifested in the obligation of the president of the court of first instance to participate in official acts drawn up after the death of the testator.

It should be emphasised that the original of Karol Brzostowski's secret will, deposited on 7 December 1830, in Augustów to Kajetan Dąbski, is unknown. Only a brief note survives, contained in a list of deeds drawn up by the official in question.[54] What is more, this document was submitted to Kajetan Dąbski a few days after the outbreak of the November Uprising. It was an armed rebelion, waged on Polish soil in the years 1830–1831. The uprising was directed against Russian Empire. It is known from Karol Brzostowski's biography that the owner of the Krasnybór estate returned to the ranks of the polish army during this war. For example he was wounded at the Battle of Ostrołęka. Brzostowski was also casting cannons at the Gregoire manufactory in Warsaw. The evidence of his valiant service is the fact he was awarded the Order of War Virtuti Militari on 2 June 1831.[55]

53 SPENCE, 1827, op. cit., pp. 276–277.
54 APS, Notariusz Dąbski Kajetan, sygn. 63/220/0/-/1.
55 WESOŁOWSKI, Z. P. *The order of the Virtuti Militari and its cavaliers 1792–1992*. Miami: Hallmark Press, 1992, p. 150.

Considering the above it can be assumed that Karol Brzostowski decided to hand over his secret will during the November Uprising because he feared death on the battlefield. In the first days of the war, Brzostowski probably served in the armament depots in Suwałki and presumably for this reason, he used the services of Kajetan Dąbski.[56] Besides, he was only thirty - four years old on that day.

It is worth analysing the note written by sub-judge Kajetan Dąbski in terms of Articles 976–979 of the Napoleonic Code. It should be underlined that this source included a reference to "closing" and "sealing" the secret will. Moreover, the official also mentioned the "declaration", made to him by Karol Brzostowski. However, the note does not have any information about the presence of six, required witnesses.[57] It was a significant infringement of the Napoleonic Code regulations because from the content of Articles 976–979 of this legal act, which states that their presence was very important during the procedure of the handing over the secret will to the notary by the testator.[58]

The short note, included in the list of deeds drawn up by sub-judge Kajetan Dąbski is not the only source concerning the secret will of Karol Brzostowski. The State Archives in Suwałki also holds archival material relating to the revocation of this document. To begin with, it should be underlined that the Article 1035 of the Napoleonic Code provided for two methods of *"expressly"* revoking a will. The first method was to make a later will, included the mention about the revocation of the previous will. But the second method was to draw up a notarial deed, containing a declaration of revocation of the dispositions in case of death.[59]

Sources confirmed that Karol Brzostowski's secret will was revoked by the second method. On 3 November 1836, in the manor house in Cisów he made a declaration in the presence of Kazimierz Lutostański, the notary public of the Dąbrowa district. In the content of this document, Karol Brzostowski wanted the revocation of his secret will. The owner of the Krasnybór estate

56 FILIPOWICZ, S. Karol hr. Brzostowski a powstanie listopadowe. In: *Rocznik Augustowsko – Suwalski*. 2004, Vol. 4, p. 291.
57 APS, Notariusz Dąbski Kajetan, sygn. 63/220/0/-/1.
58 SPENCE, 1827, op. cit., pp. 267–277.
59 Ibid.

also demanded that this will would be given to him and declared *"non-existent"*. Witnesses to drawing up this notarial deed were Ludwik Michałowski, and Maciej Ussakowski.[60] I believe Karol Brzostowski destroyed his secret will after it was returned to him by Kazimierz Lutostański. This is the more likely reason why the original of this document is unknown.

In conclusion, it must be written that there are not many sources concerning the secret will of Karol Brzostowski. Nevertheless, the content of the notarial deeds made by Kajetan Dąbski and Kazimierz Lutostański are one of many pieces of evidence of the reception of French civil law on Polish soil. It's exemplified by the institution of the secret will, regulated by the Napoleonic Code. Karol Brzostowski's biography also confirms that this type of will was used to express the last will by citizens of the Duchy of Warsaw and the then Kingdom of Poland.

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60 APS, Notariusz Lutostański Kazimierz, sygn. 63/257/0/-/3, pp. 283–284.

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Subjectivism, Objectivism and Contractual Opportunism: A Pragmatic Explanation of an Age-Old Question

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-5

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Abstract

This paper examines the relationship between the objective and subjective theories of contract interpretation from both historical and teleological perspectives. It introduces the concept of contractual opportunism in this matter and reviews existing legal literature on the topic to elucidate the distinctions and connections between the interpretive theory based on the internal will of the parties and the one which looks at their objectively manifested intentions. By analysing the foundational ideas of W. Paley and R. J. Pothier, it highlights the importance of integrating pragmatic elements into the discussion. The paper concludes that a purely dogmatic analysis is insufficient in this area, and instead we must consider the underlying purpose of the theories: to discourage and prevent contractual opportunism.

Keywords

Subjectivism; Objectivism; Theories; Interpretation; Opportunism; Good Faith; Internal Will; Expressed Will.

1 Introduction

Language is undoubtedly an imperfect means of conveying information. It is an axiomatic truth that the same phrase can have completely different meanings depending on the context in which it is used.[1] Any field of study, as it necessarily relies on language, will require its own rules and theories

1 As another author illustrates, *"Keep off the grass on a sign next to a newly germinating lawn, means something substantially different from the same words in a plaque on a drug counselor's desk."* (See BOWERS, J. Murphy's Law and the Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott. In: *Rutgers Law Review*. 2005, Vol. 57, no. 2, p. 5).

regarding how this language should be perceived and interpreted. In the area of contract law, the risk of exploiting the imperfect nature of language as a means of transmitting the parties' intentions is particularly high, due to the adversarial positions of the parties involved and the natural tendency of one party to act selfishly, without considering the needs of the other. From this perspective, it is important to note that, in practice, interpretation is one of the most frequently used tools in attempts to create an *"imbalance"* in the contract or to deviate it from the way it should have been understood with regard to what was actually agreed upon by the parties.

However, sometimes an actual conflict can arise between the *"real"* internal will and its manifestation. The disagreement between the two and the manner in which the law resolves it[2], ultimately reflects on the execution phase of the contract, where the court is called upon to rule both on the valid conclusion of the contract and on the extent of the parties' obligations. In the legal literature, this discord has taken the form of two major perspectives regarding contractual interpretation that a certain system can adopt, namely the subjective theory, based on *"voluntas"*, and the objective theory, based on *"verba"*.[3] In essence, the objective criterion, already adopted by most legal systems in the matter of contract formation, but specific to those of the Anglo-American tradition, is that which serves to ensure the *"primacy*

2 The literature on the topic is quite vast. See, inter alia, VOGENAUER, S. Interpretation. In: JANSEN, N., ZIMMERMANN, R. (eds.). *Commentaries on European Contract Laws*. Oxford: Oxford University Press, 2018, pp. 755–764; EISENBERG, M. A. *Foundational Principles of Contract Law*. New York: Oxford University Press, 2018, pp. 397–407; MCKENDRICK, E. *Contract Law, Text, Cases, and Materials*. Oxford: Oxford University Press, 2012, pp. 19–44; LEWISON, K. *The Interpretation of Contracts*. 6. ed. London: Sweet & Maxwell, 2015, pp. 29–50.
BARNES, W. The Objective Theory of Contracts. In: *University of Cincinnati Law Review*. 2008, Vol. 76, no. 4, pp. 1119–1158; O'GORMAN, D. P. Learned Hand and the Objective Theory of Contract Interpretation. In: *The University of New Hampshire Law Review*. 2019, Vol. 18, no. 1, pp. 64–107; PERILLO, J. M. The Origins of the Objective Theory of Contract Formation and Interpretation. In: *Fordham Law Review*. 2000, Vol. 69, no. 2, pp. 427–477; BARNES, W. The French Subjective Theory of Contract: Separating Rhetoric from Reality. In: *Tulane Law Review*. 2008, Vol. 83, no. 2, pp. 359–393; GAIARDO, P. *Les Théories objective et subjective du contrat*. Paris: Librairie générale de droit et de jurisprudence, 2020, pp. 21–79; GALBOIS-LEHALLE, D. *La Notion de Contrat, Esquisse d'une Theorie*. Paris: Librairie générale de droit et de jurisprudence, 2020, pp. 281–296.

3 See ZIMMERMANN, R. *The Law of Obligations, Roman Foundations of the Civilian Tradition*. Wetton: Juta&Co, 1990, p. 622. See also, inter alia, CORBIN, A. L. *Corbin on Contracts*. St. Paul Minnesota: West Publishing Company, 1952, p. 156.

of the expressed will over the internal one"[4]. It places emphasis, both in terms of formation and in terms of the interpretation of the contract, on elements that have formed a certain "appearance of will" in relation to the other contracting party, and so elements relating to the "psychological intent" of the issuer of the will tend to become, by and large, legally irrelevant.[5] In the objective view, the emphasis is on "defending the reliance of the addressee of a particular manifestation of the will and on how a reasonable person would have interpreted the issuer's words or actions"[6]. It is, therefore, less relevant how that manifestation of the will was "intended to be received". The criterion is undoubtedly one characterized by pragmatism.[7]

In contrast, adherents of the subjective criterion argue that the essence of the contractual obligation lies in *"the will* of the one who promises to fulfil it" and, accordingly, both in the formation and in the interpretation of the contract we must always tend to find out (i) whether that will had existed at the time when the contract appears to have been concluded. If the answer is yes, one must also determine (ii) what was the "actual will" of the party that committed itself and interpret the contract in relation to it[8]. In other words, the contract is considered valid only if the *"internal wills"* of the parties actually meet and exist at the same time. And if it can be proved that, for example, one party ceased to wish to conclude the contract (because e.g. they had died) at the time when the acceptance took place, the contract lacks the volitional element, which is the "essence of its mandatory nature". Also, in this view, the contract, which is formed by the "agreement of the wills" of the parties, may have no effects other than those contemplated by the parties.[9] The subjective view is tributary to the theory of autonomy of the will[10] *("autonomie de la volonté")*, as an explanation of the contract's

4 See GAIARDO, op. cit., p. 18.
5 See BARNES, op. cit., p. 359.
6 See GAIARDO, op. cit. p. 18.
7 For the justification of the objective criterion, see MCKENDRICK, op. cit., p. 20.
8 For details, see TERRÉ, F., SIMLER, P., LEQUETTE, Y., CHÉNEDÉ *Les Obligations*. 12. ed. Paris: Dalloz, 2019, pp. 684–700.
9 See POTHIER, R. J. *Treatise on the Law of Obligations or Contracts*: *Vol. I*. Philadelphia: William David Evans Esq, 1853, p. 146.
10 For details, see GHESTIN, J., LOISEAU G., SERINET, Y. M. *La formation du contrat. Tome 1: Le contrat–Le consentement*, *4*. ed. Paris: Librairie générale de droit et de jurisprudence, 2013, pp. 147–168. See also GALBOIS-LEHALLE, op. cit., pp. 296–325.

capacity to generate legal obligations, a theory that also seems to represent its historical foundation.[11] The subjective criterion is, undoubtedly, one characterized by dogmatism.

Although the two theories are positioned at opposite poles from a dogmatic standpoint, the surprise for authors who have analysed them from a pragmatic perspective – whether the analyses originated from the common law world[12] or from the area of codified legal systems[13] – has been that the two theories tend to yield similar practical results in most cases, with the real differences in outcomes not being systemic but rather in the nuances of the legal analysis. On the other hand, what is being discovered is that there are numerous objective elements within the subjective theory and some subjective elements within the objective theory, the relationship between them being more akin to a sort of *"yin and yang"* rather than a complete separation. The elements of objectivity within the subjective systems are too many to count, and they are the actual glue that holds the system together, allowing the parties to trust in the words of others, rather than their fickle internal intention.

The elements of subjectivity within the objective systems, however, are quite few. They are the so-called *"subjective twist"* and the *"subjective exception"*. The idea of the so-called subjective twist is that, no matter if a reasonable person could have trusted the valid conclusion of the contract, or a certain meaning attached to the words used, if the agent himself would not have done so, the contract shall not be deemed to have been concluded. It stems from the fact that sometimes, the focus of the court is not only on what a reasonable man would have understood, but also on what the applicant would have understood himself.[14] On the other hand, the idea of the subjective exception

11 See, BARNES, op. cit., p. 368. See also CHLOROS, A. G. Comparative Aspects of the Intention to Create Legal Relations in Contract. In: *Tulane Law Review*. 1959, Vol. 33, no. 2, p. 615.

12 See BARNES, op. cit., pp. 390–391.

13 See GAIARDO, op. cit., pp. 23–45.

14 The main case that is referred to when discussing the so-called subjective twist is Embry vs. Hargadine Mckittrick Dry Goods Co., 1907, where the US court held that *"although McKittrick may not have intended to employ Embry by what transpired between them according to the latter's testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year"*. That final *"and Embry so understood it"* is the actual element that led to the idea of the subjective twist.

is that where it is obvious *ex post* that the parties meant different things when they apparently concluded the contract, there will be no contract, because there is no *consensus ad idem*. The case most referred to is *Raffles vs. Wichelhaus*, a case which has been the subject of analysis multiple times.[15]

We will show that the common elements between the two theories, the similar practical results they achieve and even the aforementioned *"subjective intruders"* the objective theory presents can be explained only by their common goal, namely to provide legal practitioners with the necessary means to detect and curb contractual opportunism. This idea emerges from a historical analysis of the two interpretative theories, particularly from the way they were conceptualized by the *"founding fathers"* of their modern guises, namely R. J. Pothier[16] and W. Paley[17]. This paper will briefly define the notion of contractual opportunism as a type of behaviour that is contrary to the general duty of good faith, and will address the issue of the common points that the two interpretative theories share from both a practical and historical perspective, highlighting how they can be reconciled in light of their shared

15 Both parties referred to a different ship named Peerless when they agreed on the sale and transportation of cotton. When the goods arrived in Liverpool, Mr. Wichelhaus refused to pay because, in his view, the delivery had been several months late. The English court ruled that *"there was no consensus ad idem, so it cannot be a binding contract"*. The case is particularly famous and has been analysed multiple times, in quite different ways (see e.g. HOLMES, O. W. *The Common Law*. Boston: Little Brown and Company, 1881, p. 309, ZIMMERMANN, R. *The Law of Obligations, Roman Foundations of the Civilian Tradition*. Wetton: Juta&Co, 1990, p. 584).

16 R. J. Pothier (1699–1772) was a prominent French jurist and legal scholar, known for his influential work in the field of contract law and theory of obligations. His contributions laid the groundwork for modern contract theory. Pothier's writings, notably *"Traité des obligations"* are regarded as foundational in both French civil law and comparative legal studies and were among the main sources of inspiration for the drafters of the *Code civil*. Of course, subjective interpretation does not originate from Pothier, as it has been discussed by other natural law authors before him. For details, see DECOCK, W. *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)*. Leiden, Boston: Martinus Nijhof Publishers, 2013, pp. 192–212. However, since the drafters of the *Code civil* were inspired by Pothier directly, we have chosen to refer to his work as the main source in the matter.

17 William Paley (1743–1805) was an English philosopher and theologian best known for his work in ethics and moral philosophy. His seminal text, *"The Principles of Moral and Political Philosophy"*, laid out his views on the nature of morality, emphasizing the importance of reason and social utility. Paley's contributions to legal theory include insights on the nature of contracts and the role of consent, which have influenced discussions in both legal and ethical contexts. His views on natural law and the moral obligations inherent in human interactions remain significant in contemporary legal theory.

role, namely to prevent purely literal or, as the case may be, purely volitive manners of interpretation that are actual attempts of the agent to covertly reclaim opportunities that should have been considered lost at the formation stage of the contract.

2 Contractual Opportunism: General Aspects

Despite its fluid (we might even say evasive) nature, the general duty of good faith has recently been the subject of a number of significant and valuable works, in the context of (re)discovering its particularly practical role, namely that of regulating, supplementing, or even correcting the application of a legal or contractual norm through interpretation.[18] Its functions have thus been assimilated to those of a *"sword"* and a *"shield"* of private law.[19] However, its general outlines remain quite distant from the pragmatism specific to the science of law, at times possessing the characteristics of a mixed element, or rather a point of connection between morality and law. What is indisputable is that good faith has certain fundamental functions, the ultimate goal of which is to allow the law to evolve through the judge's ability to make it flexible and adapt it to the practical realities of everyday life.[20] From this perspective, good faith appears as a general concept that enables specific doctrines, with their own rules of application, to emerge from its otherwise vague and even somewhat dubious content.[21] Through the general obligation of good faith, the notion of contractual

18 For a historical analysis of the duty of good faith, see, e.g. SCHERMAIER, M. J. Bona fides in Roman contract law. In: ZIMMERMANN, R., WHITTAKER S. (eds.). *Good faith in European Contract Law*. Cambridge: Cambridge University Press, 2000, pp. 63–93; GORDLEY, J. Good faith in contract law in the medieval ius commune. In: ZIMMERMANN, R., WHITTAKER, S. (eds.). *Good faith in European Contract Law*. Cambridge: Cambridge University Press, 2000, pp. 93–118. See also SCHMIDT, J. P. General duties. In: JANSEN, N., ZIMMERMANN, R. (eds.). *Commentaries on European Contract Laws*. Oxford: Oxford University Press, 2018, pp. 108–111.

19 For explanations regarding the ability of good faith to be used in a supplementary or corrective manner (see SCHMIDT, op. cit., p. 114).

20 For doctrinal innovations that are based in the duty of good faith, see ZIMMERMANN, R., WHITTAKER, S. Good faith in European Contract Law: surveying the legal landscape. In: ZIMMERMANN, R., WHITTAKER, (eds.). *Good faith in European Contract Law*. Cambridge: Cambridge University Press, 2000, pp. 26–32.

21 Certain authors refer to this as a fruitless attempt to curtail judicial law-making (see SCHMIDT, op. cit., pp. 141–142).

opportunism can find its own place in legal language. The notion is specific to the law & economics movement, and it has the merit of explaining many of the connections between interpretative theories in contractual matters.

The first attempt to define contractual opportunism that we have managed to identify appears to belong to Oliver Williamson, who states that *"opportunism refers to a lack of candour or honesty in transactions, to include self-interest seeking with guile"*.[22] Naturally, Williamson's analysis of contractual opportunism is intended to be conducted from an economic perspective. However, his work, *"Markets and Hierarchies"*, has had the merit of drawing the attention of theorists in the mixed field of law and economics to the shortcomings that classical doctrines present in the era of the modern contract and to the extremely important impact that the risk of engaging in opportunistic contractual behaviour has on the selection of contractual relationships by participants in business relations. Although useful from an economic analysis perspective, the definition provided by Williamson does not offer much utility for a legal delineation of the concept. Undoubtedly, such an adaptation will depend on many factors, including the significance attributed to the notion of *"guile"*, which will not be independent of the so-called *"interests"* that the agent in question pursues and the extent to which the agent could reasonably expect those interests to be achieved at the time of the contract's conclusion. In any case, although the terms used are not sufficiently practical for a legal analysis of the concept, this version has served as an excellent starting point in this regard. Williamson revisited the topic of opportunism in an impressive work titled *"Transaction-Cost Economics: The Governance of Contractual Relations"*,[23] yet his manner of defining the concept of opportunism did not change. Other authors have also addressed and developed considerations put forth by him.[24] However, in this context, particular emphasis will be placed on the legal delineation

22 See WILLIAMSON, O. E. *Markets and Hierarchies: Analysis and Antitrust Implications, A study in the Economics of Internal Organization*. London: The Free Press, 1975, p. 9.

23 See WILLIAMSON O. E. Transaction-Cost Economics: The Governance of Contractual Relations. In: *Journal of Law and Economics*. 1979, Vol. 22, no. 2, pp. 233–261.

24 See e.g. MASTEN S. E. Equity, Opportunism, and the Design of Contractual Relations. In: *Journal of Institutional and Theoretical Economics*. 1988, Vol. 144, no. 1, pp. 180–195. See also LOVE, J. Opportunism, Hold-Up and the (Contractual) Theory of the Firm. In: *Journal of Institutional and Theoretical Economics*. 2010, Vol. 166, no. 3, p. 483.

of the phenomenon. This approach primarily belongs to Timothy Muris,[25] whose contribution to the development of the legal doctrine of contractual opportunism is very significant,[26] including the distinction between opportunism and mere non-performance, as well as the introduction of the independent condition of the scope that the agent must pursue for their behaviour to be considered opportunistic. Thus, the idea of *"wealth transfer"* is introduced into the equation. The opportunistic agent will seek to enrich themselves at the expense of their contractual partner, fully aware that their actions or claims are unjustified in relation to how the other party understood the content of the contract. This cunning pursuit of one's own interests will result in a net reduction of the advantages that the contract was supposed to generate for both parties.[27] The close connection between immorality, illegality, and the economic inefficiency of such behaviour thus comes to light in the context of contractual opportunism. From an economic perspective, Muris also notes that *"the wealth transfer is significant not because of its mere existence, but because the transferring act itself does not produce a beneficial product nor promote the productive goal of the contract; yet both perpetrating and protecting against such a transfer are costly"*.[28] Finally, perhaps Muris's most important contribution, in the context of this paper, is his observation that one of the means through which contractual opportunism can manifest itself is precisely through the proposal of a certain manner of interpreting of the contract that deviates from what was previously agreed upon by the parties. Interpretation itself, due to its essentially intangible and ideational character, serves as the perfect means by which one can attempt to extract unwarranted resources from the other party or impose upon them responsibilities that should reasonably have been assumed by the opportunistic agent.

25 See MURIS, T. J. Opportunistic behaviour and the law of contracts. In: *Minnesota Law Review*. 1981, Vol. 65, no. 4, pp. 521–590. The examples used by Muris in order to illustrate opportunistic behaviour are particularly eloquent.

26 Muris' work is fundamental in the field of contractual opportunism, as it connects, probably for the first time, the notion to the general duty of good faith. The close relationship between the two was revisited in 2003 by other authors (see MACKAAY, E., LEBLANC, V. The law and economics of good faith in the civil law of contract. *Université de Montréal* [online]. [cit. 3. 9. 2024]. Available at: http://papyrus.bib.umontreal.ca

27 Although Muris does not provide a comprehensive definition of contractual opportunism, he clearly links it to the idea of interpretation from the very first page of the work (see MURIS, op. cit., p. 521).

28 See MURIS, op. cit., p. 526.

The author does not elaborate extensively on this idea, as his work is aimed at contractual opportunism in general rather than a specific case of its application.[29] However, he is not the only author who refers to the idea that contractual opportunism might be a more precise term than bad faith and that it can play an important role in constructing a theory more suited to current practices in the field.[30] The merits of the concept have also been developed in the context of elucidating the parties' will, with some authors convincingly demonstrating the consequences of contractual opportunism in evidentiary matters when it comes to the interpretation of contracts.[31] This not being the place for a detailed analysis of the existing literature on contractual opportunism, we will further propose our own definition of the phenomenon, by highlighting what we find to be its main elements.

First, as a larger category, we can say that contractual opportunism is a *form of strategic behaviour*, as it involves a certain form of cunning premeditation aimed at achieving a more favourable outcome than what was actually bargained for by the agent engaging in such behaviour. The strategic nature does not imply that the premeditation must occur prior to the conclusion of the contract, although it is sometimes possible for things to unfold in that manner. It may also manifest directly during the execution phase of the contract.[32]

29 For details, see MURIS, op. cit., pp. 569–571, specifically the section titled *"bad faith interpretation"*, where some jurisprudential references are provided in this regard. It generally concerns literal interpretations of contractual clauses. E.g. in *McCartney vs. Badovinac*, (62 Colo. 76. Available at: https://www.courtlistener.com/opinion/6687000/mccartney-v-badovinac/ [cit. 3. 9. 2024], Mrs. McCartney was accused of stealing a diamond. Mr. McCartney (the husband) hired detective Badovinac to prove the facts *"to Mr. McCartney's satisfaction"*. When the detective presented evidence that Mrs. McCartney was indeed guilty, Mr. McCartney claimed he was not satisfied and, consequently, owed no sum. The detective sued him, winning the case due to the literal interpretation of the contract that Mr. McCartney had advocated. He was not dissatisfied with Badovinac's performance in establishing the facts, but rather with the facts themselves.

30 For the connection between contractual opportunism and the general duty of good faith, see also MACKAAY, LEBLANC, op. cit., pp. 9–23.

31 See KOSTRITSKY, J. P. Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation. In: *Kentucky Law Journal*. 2007, Vol. 96, pp. 43–98).

32 As an example of the first option, the agent may propose or insist on the insertion into the contract of a particular wording of a clause which could be problematic or ambiguous, with the intention of subsequently invoking a certain manner of interpretation that would be favourable to him. As an example of the second option, the agent may observe, after the conclusion of the contract, the slightly ambiguous nature of a clause or the possibility that it may be interpreted in a literal manner and take advantage of that fact, being fully aware that the clause was not meant to be understood in that way.

Secondly, during the execution phase of the contract, opportunism may manifest either through the agent's attempt to take advantage of a position of superiority they know they hold in relation to the other party, or through the demand of a particular interpretation or supplementation of the contract whereby, taking into account the context in which it was concluded, the manner in which the agent's will was expressed or could have been perceived by the other party, and other similar elements, they seek to achieve an unjustified transfer of resources from the other party or to receive an advantage that was not bargained for.[33]

Thirdly, the purpose of opportunistic contractual behaviour is to alter the contractual balance as it was or could have been reasonably understood by the other party at the moment of the agreement. The opportunistic agent will seek to deceive the legitimate expectations of the other party, thereby obtaining personal advantages that would not rightfully belong to them based on the agreement, as it would be interpreted by a reasonable person that had access to the knowledge possessed by the parties involved.[34]

Finally, from the above, sufficient elements emerge to provide a definition of contractual opportunism as a manifestation contrary to the requirements of good faith in contractual matters. We will therefore consider that *contractual opportunism* is a form of *strategic behaviour* by one party that seeks to *exploit the alleged gaps or ambiguities of the contract*, or a certain legal or contextual position of superiority, with the aim of *deceiving the legitimate, express, or implied expectations* of the other party, or with the goal of *recapturing opportunities that should have been forfeited* at the conclusion of the contract. Having this definition in mind, we will further explore how the notion of contractual opportunism plays an important role in the analysis of the relationship between the subjective and the objective theories in the context of contract formation and interpretation.

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33 There are situations, quite atypical, in which normal market conditions will not apply to the relations between the parties, because one of them ends up depending on the other in a manner that may not have been foreseen at the time of formation of the contract, sometimes referred to as *"idiosyncratic transactions"* (see WILLIAMSON, op. cit., p. 238).

34 The notion of *"recapturing lost opportunities"*, used by prof. Steven Burton, would be preferable here (see BURTON, S. J. Breach of Contract and the Common Law Duty to Perform in Good Faith. In: *Harvard Law Review*. 1980, Vol. 94, no. 2, p. 387).

3 The Path of Subjective Systems: From Textualism to Subjectivism

It is important to keep in mind that at the time that R. J. Pothier was writing his fundamental work, the only actual dogmatic options for contract interpretation available to the authors who inspired the drafters of the Napoleonic Civil Code were the interpretation "according to the will of the parties" (subjective) and textualism. Objective theories, centred around the reference to the reasonable person which still take into consideration the context in which the words were expressed, would only come into the focus of the doctrine at a later time, especially in France. The former Article 1156 of the French Civil Code, stated that *"on doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes"*. The French legislator directly adopted this text from Pothier's treatise on contracts, in which the first rule of interpretation is *"in conventionibus contrahentium voluntas potius quam verba spectari placuit"*.[35] A particularly relevant example provided by Pothier to illustrate the stated rule involves a scenario in which *Primus* rents a small apartment to *Secundus* in the former's house, while Primus uses the rest of the house as his own living space. Upon the expiration of the lease term, they agree to extend the lease for the same rent under the following terms: *"Primus rents his house to Secundus for a number of x years."* Pothier points out that although the expression used by the parties, *"his house"*, when interpreted literally, would signify the entire house, it is evident that the parties' intention was merely to extend the rental of the apartment. That intention, which is beyond doubt, should prevail over the terms of the lease.

Two important aspects deserve to be highlighted concerning Pothier's brief foray into the field of contract interpretation. The first is that the interpretation of legal acts was certainly not one of his primary concerns. This is evident from the extremely concise manner in which he addressed the issue, especially when compared to other private law institutions that

35 See POTHIER, op. cit., pp. 148–149. In Justinian's Digests we also find expressions relating to wills, such as *"quod quidem ex voluntate scribentis interpretandum est"* or *"In testamentis plenius voluntates testantium interpretamur"*. These were probably the result of the famous Causa Curiana (for details see ZIMMERMANN, R. *The Law of Obligations, Roman Foundations of the Civilian Tradition*. Wetton: Juta&Co, 1990, p. 628).

he analyses in much greater detail. In interpretative matters, Pothier limits himself to stating the rule and providing an example, before moving on to the next rule, which indicates that the subject did not present a great deal of interest for the author. Secondly, a crucial aspect is that Pothier does not hesitate to repeatedly refer to the fact that the *"intention of the parties"* in the example he provides was obvious. This was apparent not only from the context in which the contract was concluded (the existence of a previous agreement) but also from intrinsic elements (the unchanged rental price). Moreover, such examples, where the intention of the parties is clear, align perfectly with the modern objective theory based on the reasonable person criterion, and serve to exclude interpretative speculation based on mere drafting errors in the contract. In other words, they counter the ability of one party to interpret the contract in a purely textual manner, in bad faith, to achieve a more favourable outcome than that which was bargained for. I believe that the rule articulated by Pothier could be reformulated as follows: *"a contract is interpreted according to the common intent of the contracting parties when the text of the contract is opportunistically invoked by one party (in bad faith)"*, without undermining anything that the author intended to express in his work.

4 The Path of Objective Systems: From Textualism to Modern Objectivism

Unlike authors in the continental legal doctrine, authors and courts in the common law have observed that, as absurd as a purely textual interpretation may seem in certain cases,[36] a purely subjective interpretation, relying solely on the psychological intent of the issuer, can also lead to inequitable results. The origins of modern objective theory, although not as easily identifiable as those of subjective theory, can be traced back to the English literature of the eighteenth century. The Mongol conqueror Timur promised the garrison at Sebastia that if they surrendered, *"there would be no bloodshed"*. After they complied and surrendered their weapons, Timur ordered that they be buried alive. This example is presented by Archdeacon William Paley,[37]

36 For an example from Roman law, see ZIMMERMANN, op. cit., p. 623. For a more recent example from the common law world, see e.g. PERILLO, op. cit., p. 433.

37 See PALEY, W. *The Principles of Moral and Political Philosophy*, *Vol. I*. Boston: Carter and Hendee, 1832, pp. 91–92.

one of the most remarkable English authors of his time. He illustrates that Timur fulfilled his promise both in the strict literal sense and in the sense he himself intended to convey with his words, but not in the sense in which the garrison at Sebastia perceived his will, nor in the sense that he himself was aware that his words would be received.[38] In light of this aspect, Paley argues that the interpretation to be given to a promise is the one contemplated by the addressee, to the extent that the issuer was aware of this latter meaning,[39] even if this meaning does not correspond to what the issuer intended to convey with his words.

Although Paley's criterion contains a certain *"subjective flavour"*, it is recognized as the precursor to the objective criterion as we know it today,[40] likely because it is the first to consider the addressee's perspective, prioritizing the appearance over the so-called *"reality"* of the psychological intent. This theory was borrowed from Paley by Joseph Chitty and thus came to the forefront of English doctrine.[41] The primacy of appearance over *"actual"* intent is precisely the element that distinguishes objectivism from subjectivism in the realm of contract interpretation. From this perspective, it has been demonstrated that Paley's test was instrumental in bringing to the forefront a criterion that moves away from the almost purely textual interpretation characteristic of common law systems up to that point.[42] This implies that it is only in the eighteenth century that we can identify the first signs of differentiation between the objective criterion of interpretation and strict textualism.

It is very important to understand that, up until then, neither in the English legal literature nor in the continental literature had a truly tempered objective criterion been discussed, the choice being mainly between the purely subjective and purely textual manners of interpretation. The first jurisprudential case in which Paley's test was applied – although the parties

38 See PALEY, op. cit., p. 92.

39 See PALEY, op. cit., p. 91.

40 See for example, PERILLO, op. cit., p. 455, where the author also shows that the subjective elements of Paley's theory were tempered by the regulations of the time regarding evidentiary matters.

41 See also IBBETSON, J. D. *A Historical Introduction to the Law of Obligations*. Oxford: Oxford University Press, 1999, pp. 221–222.

42 See PERILLO, op. cit., pp. 455–456.

were allowed to testify regarding their subjective intent – can only be identified after the second half of the nineteenth century.[43] It is difficult to determine with precision the exact moment when the modern objective criterion of the "reasonable person" perspective has emerged. However, one of the oldest significant cases in which this issue was raised appears to have been *Smith vs. Hughes*, a case from 1871, in which Blackburn stated that, *"if, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."* This additional step, from Paley's criterion to the standard of the reasonable person, seems to have been due to a legislative change in the evidentiary matters[44] of the English legal system, seeing as certain laws enacted between 1843 and 1851 had abolished the rule prohibiting parties and other interested individuals from testifying. It was only at that moment that the *"subjective"* elements of Paley's own criterion began, in a real sense, to cause disruption, because up until then, regardless of the standard used, the evidentiary rules would oppose an outcome that is specific to opportunistic subjectivism. Whatever the cause may have been, the moment when the objective criterion really came into focus in the British legal doctrine and judicial practice can be placed somewhere around the second half of the nineteenth century[45] – a period that, coincidentally or not, aligns with the aforementioned reform in evidentiary matters.

5 Conclusion. In search of lost meaning

What we can deduct from the examples of *"subjectivized objectivism"* and those of *"objectivized subjectivism"*, on the one hand, and, on the other hand, from the considerations and examples provided by the *"parents"* of the

43 See PERILLO, op. cit., p. 456.

44 See PERILLO, op. cit., pp. 457–462.

45 According to some established sources, not even at the end of 19th century can it be said that modern contractual objectivism had become firmly entrenched in English judicial practice. See BEALE, H. *Chitty on contracts*, *Vol. I*. London: Sweet & Maxwell, 2018, pp. 3–17. However, it should be mentioned that the author referred to the application of the modern objective criterion in the matter of the valid formation of the contract, not necessarily in the matter of its interpretation.

two theories, is that a perfect theoretical abstraction formula has not been found and, likely, will not be found, which could prevent bad faith interpretation in all cases. If we accept that a contract should be interpreted solely according to the internal will of the issuer, the opportunistic agent will exploit such a formulation by deviating from the agreed terms or by demanding modifications to the contract at will, and the court will lack the argumentative tools to counter such claims, except by appealing to abstract notions such as good faith. Conversely, if we accept that the interpretation shall be conducted solely according to the reasonable person criterion in all cases, we may encounter issues where, from the evidence presented, it can be deduced that the agent invoking such an interpretation did not genuinely rely on it. This may happen where one of the parties has access to additional information or has a heightened degree of diligence, and yet, they still invoke that manner of interpretation because it would be more favourable to them (an element hindered by the so-called subjective twist of the objective theory referred to above).

From this perspective, it is essential to establish an important link between the objective theory of interpretation and the subjective theory applied in light of the duty of good faith as a standard of behaviour, as well as the danger posed by contractual opportunism. It is precisely the duty of good faith that enables systems that apply an (apparently) subjective theory of interpretation to function effectively and, in general, to arrive at conclusions similar to those found in systems that lean more towards objectivism. In other words, the objective theory of interpretation (the perspective of the reasonable man) and the duty of good faith applied in matters of interpretation of contracts within subjective systems are largely in a position of functional equivalence,[46] with the ultimate role of both being to provide a standard for interpreting the contract that protects each party from the possible opportunistic tendencies of the other. From this viewpoint, asserting that in legal systems inspired by French law there

46 See also ZIMMERMANN, R., WHITTAKER, S. Good faith in European Contract Law: surveying the legal landscape. In: ZIMMERMANN, R., WHITTAKER, S. (eds.). *Good faith in European Contract Law*. Cambridge: Cambridge University Press, 2000, pp. 45–46, where the authors draw a parallel between the general duty of good faith and the interpretation of contracts according to the objective criterion.

is no objective standard of interpretation, but rather a purely subjective one, is fundamentally incorrect.[47] The distinction should be understood as almost purely dogmatic, strictly related to the manner in which the same idea is articulated by Pothier and by Paley. In other words, where a common law practitioner will argue their solution based on the standard of the *"reasonable person"*, a practitioner from a civil law system will tend to base their argument on the subjective "*will of the parties*", but will block opportunistic claims that are contrary to the duty of good faith, either by appealing to a so-called *"common intention"* of the parties or to a so-called *"clarity"* of the contract that would not allow for interpretation. In both cases, the interpreter ultimately relies on an objective standard of interpretation, but a standard that is sometimes hidden behind a dogmatic curtain. Indeed, where the interpretation proposed by the opportunistic agent is a literal one, the court will invoke the idea of the common intention, and where the opportunistic agent attempts to deviate from the agreed terms by invoking their own, (sometimes purely subjective), interpretation of the contract, the court will invoke the rule that a so-called *"clear act"* should not be interpreted *(interpretatio cessat in claris)*. However, behind such reasoning lies precisely a textual interpretation of the contract. What the analysis of the genesis of both theories shows us is that they are mere fictions, for a lack of better word. They conceal an actual attempt by the interpreter to curb one party's effort to deviate from the agreed terms through interpretation, thus preventing strategic opportunistic behaviour.

Moreover, the notion of contractual opportunism is of great value when we look for an explanation for the subjective twist and the subjective exception discussed above. Indeed, with regard to the subjective exception, as illustrated by Embry v. Hargadine, the reason why Embry could not have relied on the objective criterion of interpretation if he himself would not have trusted Hargadine's statements is that, in this case, Embry himself would be acting opportunistically. As we have seen, the role of the objective

47 Or, rather, the idea would not have been valid even regarding Art. 1,156 of the French Civil code before the reform of 2016. At the moment, Art. 1.118 of the Code civil provides for an objective way of interpreting contracts, which is subsidiary to the subjective criterion. The discussion, however, continues for French-inspired legal systems (e.g. Romania), where interpretation continues to be (only apparently) purely subjective.

criterion of interpretation is to allow and promote legitimate trust in the words of the other party, by giving legal effect to the reliance element. If the agent in question has not, at any time, trusted the other person's words, and this fact can be proven, there is no reliance to be protected.

The notion of contractual opportunism may also be a solid criterion for delineating cases in which the contract must be terminated for lack of *consensus ad idem* (the subjective exception). If it is indeed proved *ex post* that such an agreement did not exist from the outset, and that neither party invokes this fact in an opportunistic manner in order to regain opportunities lost at the time of the conclusion of the contract, there is no reason to maintain that contract as valid, since both parties were in error as to the meaning of that agreement in the eyes of the other (honest mistake), and therefore there is no opportunism. If, however, a party invokes a lack of agreement in a situation where the will of the other party should have been clear according to the context, the so-called *"error"* will be considered to be invoked in an opportunistic manner and will be without effect.

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The Rules of Cumulative Sentencing in the Csemegi Code of Hungary

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-6

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Abstract

This study examines the regulation of cumulative sentencing in 19th-century Hungary under Act V of 1878, known as the Csemegi Code. During this period, the term "subsequent fixing of aggregate sentences" was used, which led to interpretative confusion. The regulation had its roots in German law but was adapted with significant modifications that influenced the historical development of this legal institution and continue to impact contemporary interpretations. The presentation will address the historical regulation, the codification process, the clarity of the norms, and the interpretive challenges faced by both legal practitioners and scholars, particularly in relation to joinder and cumulative sentencing. The study aims to demonstrate how a single change in terminology had a profound effect on the evolution of the legal framework. Additionally, it will discuss how Károly Csemegi vividly described the complexity of joinder, comparing the legal uncertainties surrounding it to the disruption caused by an earthquake.

Keywords

Aggregate Sentences, Concurrent Sentences, Joinder, Sentencing, Criminal Law.

1 Introduction

Chapter VIII of the Hungarian Penal Code of 1878 on Crimes and Misdemeanours (hereinafter Csemegi Code or Penal Code) regulated the legal institution of the concurrence of crimes, and this chapter bore the same title. The Csemegi Code aimed to follow the prevailing legal doctrine

of the time. However, Károly Csemegi, the codifier, did not wish to adopt the German regulations verbatim, and thus the law was enacted with some modifications.[1]

The purpose of this study is to present the contradictions related to the regulation of the concurrence of crimes and the questions arising in connection with its interpretation. Section 95 defines the concept of formal or so-called ideal concurrence of crimes – differing from our current understanding of concurrence, and its imprecise wording led to issues in legal interpretation and, consequently, to varying judicial practices, not only in lower courts but also in the practice of the Curia (Supreme Court). Section 96. defines the concept of material concurrence. Section 96 regulates material concurrence, which, compared to formal concurrence, became broader in scope, thus allowing the former to absorb the latter. This led to problems in interpretation and practice.[2]

In relation to the practices concerning the aforementioned sections, I will discuss three crucial issues in this research:

1. How the established principle that a single act can constitute formal concurrence, and multiple acts can result in material concurrence was applied.
2. The impact of the purpose, i.e., how instrumental and target crimes relate to each other.
3. The role of culpability in the context of the concurrence of crimes.

I present a well-known case for each of the first two points from the era and the corresponding legal decision, and for the third point, I support my assertions with several shorter cases that occurred between 1878 and 1904.

My aim to provide an answer to how a change in just one expression was able to have a significant impact on the current regulations. Furthermore, my aim is to explore why Károly Csemegi said in 1880 the following sentence: *"Just as amidst the vast ruptures and upheavals torn open by an earthquake, so does the lawyer feel whenever stepping into the tumultuous terrain of joinder."*[3]

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1 FINKEY, F. *Az egység és többség tana a büntető jogban. (Egy büntetendő cselekmény és bűnhalmazat.) Sárospatak: Nyomtatta Steinfeld Jenő, az ev. ref. főiskola betűivel, 1895, pp. 178–182.*

2 Ibid.

3 CSEMEGI, K. A correctionalisatio. In: *Magyar Igazságügy*. 1880, Vol. 14, no. 6, p. 494.

2 Károly Csemegi, the greatest Hungarian Codifier

As the Csemegi Code, two sections of which I will analyse in this study, is inseparably united the name and person of Károly Csemegi, I would like to take a moment to introduce one of Hungary's most distinguished jurists.

Károly Csemegi was born in Csongrád in 1826. Historical records describe him as a weak, red-haired Jewish boy.[4] Csemegi was multilingual, he spoke German with his mother and learned French from his father. Later, he mastered Latin, Greek, and Italian, and during his imprisonment in Arad, he also acquired English. Károly absorbed knowledge with great passion and possessed an excellent memory.[5]

He served as a lawyer, presiding judge of the Curia, and secretary of state, though his greatest aspiration was to become a minister or the deputy president of the Curia – ambitions that he never fulfilled.[6] Despite his famous courtroom speeches and prominent work as a judge, today we primarily remember him as a codifier.

Károly was known for being an honest, outspoken individual, occasionally gruff, and at times projecting a sense of intellectual superiority. He was highly respected, though not widely liked. One contemporary wrote of him: *"Csemegi was a great scholar, but it is often said that he was an unpleasant man."*[7]

He always had defined opinions, which he was not afraid to voice, even in opposition to his superiors. On political matters, he often argued against prevailing ideas and the intentions of the governing party. He never compromised on his fundamental principles and, during the process of codification, refused to collaborate with others, nor was he able to do so. He frequently offended his colleagues and superiors.[8]

When he was a judge, Jenő Fábry, the then-president of the Curia (Supreme Court), urged him to process his backlog of cases. To this, Csemegi

4 MIKSZÁTH, K. *Az én kortársaim*. Sine loco, Athenaeum Corporation, 1904, p. 146.
5 TÓTH, M. Egy nehéz ember, vázlatok Csemegi Károly portréjához. In: BÁRD, P., BORBÍRÓ, A., GÖNCZÖL, K. (eds.). *Kriminológia és kriminálpolitika a jogállam szolgálatában. Tanulmányok Lévay Miklós tiszteletére*. Budapest: ELTE Eötvös Publisher, 2019, p. 55.
6 MIKSZÁTH, op. cit., p. 146.
7 Ibid., p. 147.
8 TÓTH, op. cit., pp. 58–59.

responded: *"Your Excellency, I took an oath to deliver rightful judgments according to the law, but I did not swear to clear the backlog."* He was equally indelicate in his judgment of his colleagues. György Mailáth once asked Csemegi how the judicial council he led was functioning. Csemegi's reply was that he was the only one in the council whose opinion carried any value. Mailáth retorted that he was unaware the Curia had adopted a system of single-judge councils.[9]

Although Csemegi often criticized Hungarian jurists harshly, his patriotism appeared when, in front of foreigners, he portrayed them as the world's foremost legal experts.[10]

Csemegi was married and had one son, who sadly died at the age of seventeen. Csemegi himself passed away at the age of seventy-two from pneumonia.

Only one word is inscribed on his grave: Csemegi. In Buda, the street named after him is also simply '*Csemegi Street*'.[11] Yet, this is no coincidence, as Mikszáth (a famous Hungarian writer and journalist, and a contemporary of Csemegi) remarked: *"There is no need to write his full name. There was only one Csemegi, with no ancestors and no descendants. He arrived and departed, leaving behind a greater legacy than many who have left their mark"* across centuries with their lineal.[12]

3 Formal and Material Concurrence

The basis for the creation of the provision was Section 74 of the German Penal Code *("Strafgesetzbuch für das Deutsche Reich")*, which came into force in 1872 and followed the prevailing doctrine. The domestic provision also aimed to follow this view – and did so in the case of Section 95 – however, it did not intend to adopt the German rule verbatim. Thus, it omitted the expressions *"durch mehrere selbstständige Handlungen" ("through several independent acts")*. The problem with the concept defined by the Code is that it goes beyond the German definition and provides a definition that encompasses a much broader scope, while at the legislative level it distinguishes between material and formal concurrence. This distinction in the German regulation

9 Ibid., HAJNAL, H. *Csemegi Károly*. Budapest: Gondolat Publisher, 2003, p. 93.
10 Ibid., EÖTVÖS, K. *Magyar alakok*. Budapest: Révai Testvérek, 1901, pp. 181–182.
11 Ibid.
12 MIKSZÁTH, op. cit., p. 145.

is based on the premise that formal concurrence presupposes a single act, while material concurrence presupposes multiple acts. Hungarian criminal law theory also established this principle. Section 95 conforms to this distinction, however, according to the wording of Section 96, both crimes committed by a single act and by multiple acts fall within its scope. As a result, the legislator failed to make an adequate distinction between formal and material concurrence in the regulation. This poses a problem because the distinction between formal and material concurrence – unlike under the current regulations – is not merely a theoretical issue, as different sentencing rules apply to them.[13]

The regulation of the two sections in the law was the following:

> *"Section 95: If an act violates multiple provisions of the criminal law, the provision prescribing the most severe punishment or the most severe type of punishment shall apply.*
>
> *Section 96: If the same person has committed multiple punishable acts, or has committed the same punishable act on multiple occasions, a single cumulative sentence shall be imposed for all the acts together."*

If the court qualifies the defendant's actions as formal concurrence, the punishment is determined by the penalty range for the most serious offense. The lesser offenses are only considered as aggravating circumstance. In essence, formal concurrence was treated as a single offense or a seeming concurrence, since the punishment could not exceed the upper limit of the most serious crime's penalty range.[14]

In contrast, material concurrence could be regarded as an actual concurrence, as the judge operated with an increased penalty range, allowing the imposition of a more severe punishment than that prescribed for the most serious crime.[15]

By increasing the most severe punishment, the maximum duration of the cumulative sentence depended on whether the committed offenses were

13 FINKEY, op. cit., pp. 187–188, BAUMGARTEN, I. A bűnhalmazat. In: *Magyar Igazságügy*. 1886, Vol. 13, no 2, pp. 97–116, FAYER, L. *A Magyar Büntetőjog Kézikönyve. I. Bevezető rész és általános tanok. (Btk. 1–125. §§.)*. Budapest: Franklin-Társulat, 1895, pp. 311–312.

14 Csemegi-Code, Section 95.

15 Ibid., Section 96.

felonies or misdemeanours, but it could be extended by one, two, or even five years. But the maximum duration of the cumulative sentence was 15 years.[16]

It is worth noting that the German legal system still applies this distinction between the two types of concurrence.[17]

4 Decision No. 28: Can Public Officials be Assaulted Without Consequence?

Despite numerous references in the studies of the great legal scholars of the era, as well as in the reasoning of the law itself, stating that *"the law requires multiple offenses arising from a single act to meet the conditions of an ideal concurrence of offenses,"* a significant number of verdicts have been issued where, despite the fact that the perpetrator committed the crimes with a single act, the courts established material concurrence of offenses. Conversely, in cases where the perpetrator acted with multiple acts, the courts established formal concurrence.[18]

In this regard, I aim to present disputed cases, in this and the next chapter, along with their corresponding decisions, wherein the interpretative contradictions arising from broad definitions are evident. I will also highlight the potential miscalculations in the contemporary perspective and how these placed the courts in the uncomfortable position of having to choose between the literal application of the law and the principles of just retribution or proportional punishment.

In Decision No. 28, the Curia examined whether, if the perpetrator obstructs an official procedure by committing the felony or misdemeanour of bodily harm with the intention of preventing the procedure from being completed,

16 Ibid., Section 96–100.

17 BAUMANN, J., WEBER, U., MITSCH, W. *Strafrecht: Allgemeiner Teil Lehrbuch.* Bielefeld: Verlag Ernst und Werner Gieseking GmbH, 2003, pp. 816–817.

18 LÖW, T. (eds.). *A Magyar Büntetőtörvénykönyv A büntettekről és a vétségekről (1878:5. tcz.) és teljes anyaggyűjteménye.* Budapest: Pesti könyvnyomda, 1880, p. 548., HOROVITZ, S. *A magyar büntetőjog rendszeres tan- és kézikönyve különös tekintettel a gyakorlati életre. Általános rész.* Kassa: Bernovits Gusztáv Kő- és Könyvnyomdája, 1891, pp. 313, 315; BAUMGARTEN, op. cit., pp. 99–101, FAYER, op. cit., p. 311, PAULER, T. *Büntetőjogtan. I. kötet. Bevezetés. Anyagi büntetőjog általános része.* Pest: Pfeifer Ferdinánd, 1864, pp. 120–121.

a material or formal concurrence of offenses arises when such acts meet the criteria of Sections 165 or 168 of the Csemegi Code, and any offenses outlined in Chapter XX.[19]

The Curia primarily addressed the legal object and purpose of the offenses, determining that the objective of Sections 165 and 168 is to ensure the enforcement and effectiveness of lawful measures issued by public authorities within their legal mandate. In contrast, the offenses defined in Chapter XX have the sole objective of protecting human health and physical integrity.[20]

Section 165 contains the phrase *"assaults by force"*, but this applies exclusively to acts of simple assault that do not result in bodily harm to the official. Given that offenses classified in separate chapters serve to protect different legal interests, it can be concluded that the legislator did not account for the circumstance that if the assault causes actual injury, the penalties under Sections 165 and 168 would still apply. The same is true for Chapter XX, where cases of bodily harm did not consider whether the perpetrator committed the act with the intent to obstruct or thwart the official procedure, or to coerce the official. On this basis, the Curia established that two separate and distinct legal interests protected under the Csemegi Code were violated, as both offenses fulfilled the statutory elements of the crimes. Furthermore, the Curia added that adopting an opposing view would contradict the principle of proportionality between the offense and the punishment.[21]

The Curia also found that *"this interpretation cannot be justified in light of Sections 95 and 96 of the Penal Code"*. While Section 96 addresses multiple punishable offenses being judged together, Section 95 pertains to cases where a single act violates multiple provisions of the law, and *"the law does not, in any detail, specify the fundamental elements of these contradictory and highly significant distinctions"*.[22]

Although *"the mediation between two distinct intentions and two separate outcomes, while seemingly stemming from a single physical act, does not necessarily merge the two unlawful intentions into one, nor the two results that violate separate legal interests.*

19 *Döntvénytárak. A M. K. Curia, elvi jelentőségű határozatai. Új folyam VII. kötet*. Budapest: Magyar Irodalmi Intézet és Könyvnyomda, 1884, pp. 238–242.
20 Ibid.
21 Ibid.
22 Ibid.

Thus, this is not a case of multiple offenses arising from a single act, but rather a matter of two distinct punishable offenses." Based on this reasoning, the Curia deemed Section 96 applicable, as it found it unacceptable that, under Section 95, the offender would be punished solely for a single offense.[23]

The decision makes it evident that, in practice, cases emerged that demonstrating the reality of formal concurrence of offenses, but despite this, the courts were unable to break away from the prevailing doctrine, which regarded the formal concurrence as quasi concurrence, creating only the appearance of multiple offenses. Consequently, they were unable to resolve the issue that formal concurrence can simultaneously represent multiple offenses and not.[24] For this reason, in some cases, courts were forced to establish material concurrence instead of formal concurrence, even when it was evident that the two offenses arose from a single act. They did so because they were unwilling to dismiss one of the two committed offenses solely because both violations arose from the same act.

The Curia's reference to proportionality was not an accident, as its decision sought to emphasize that, although the text of Section 96 contains the phrase "*multiple punishable acts*", it is impermissible, including in accordance with the principles of the Code, to impose a single punishment under Section 95, nevertheless this section is entirely inappropriate to the case.

The decision was met with varied reactions. Illés Edvi viewed the Curia's statements as progress.[25] On the other hand, Izidor Baumgarten, considering this ruling, advocated for the retirement of Section 95 and for cases of concurrence of offenses to be judged exclusively under Section 96. According to his perspective, if the Curia – in decisions such as the one outlined above – interprets the term *"act"* in Section 95 as equivalent to the *"punishable act"* defined in Section 1 of the Penal Code, then it should always be understood as such.[26] I would add that following Baumgarten's proposal would have been an exceptionally forward-thinking step by the legislator, particularly since, the material concurrence defined under Section 96 was

23 Ibid.
24 FINKEY, op. cit., p. 127.
25 EDVI, I. *A bűnhalmazat, különös tekintettel a magyar B. T. K. 95. §-ára, s a csalás es okirathamisítás eseteire.* Budapest: Lloyd-társulat, 1887, p. 88.
26 BAUMGARTEN, op. cit., pp. 114–116.

more broadly interpreted than Section 74 of the German Penal Code, which served as a basis. Therefore, it would have been entirely suitable to provide a concept of concurrence that aligns with our modern understanding of criminal law.[27]

5 Decision No. 51: The Most Famous Chicken Theft Case

The decision is based on a well-debated chicken theft case. According to the facts, the defendant entered a foreign yard at night through an open door, sneaked up to the coop, opened its door that was tied with a string, and stole three chickens valued at less than 2 Hungarian forints, which is approximately 5 cents if converted at the current exchange rate.[28]

Two solutions were considered by the court: one, that the Curia establishes the offense of trespass and the petty offense against property in formal concurrence; or two, that it only establishes the petty offense against property, thus treating the case as a single unit by arguing that the objective crime, namely theft, absorbed the instrumental crime, that is, the illegal entry into private property.

The Curia decided to establish the concurrence of offenses and further examined the effect of the objective, in pursuit of which a crime is committed, on the formation of the crime, except in cases where the intent forms part of the legal definition and, without it, the criminal act itself could not have been realized.[29]

In this regard, the Curia excellently notes that the objective – apart from the aforementioned exception – *"has no influence on the formation of the crime or on the termination of its punishable nature, and in this respect, the objective is entirely irrelevant"*. Furthermore, accepting a contrary position would lead to the unacceptable consequence that the perpetrator could influence their punishment through

27 Longer comparison about the StGB. Section 74. and the Hungarian Criminal Code Section 96 – FINKEY, op. cit., pp. 187–188.

28 EDVI, I., GYOMAI, Zs. (eds.). *Csemegi Károly művei. II. kötet*. Budapest: Franklin-Társulat, 1904, p. 261.

29 *Döntvénytárak. A M. K. Curia, a Budapesti Kir. Ítélő Tábla és a Pénzügyi Közigazgatási Bíróság elvi jelentőségű határozatai. Új folyam XIII. kötet*. Budapest: Magyar Irodalmi Intézet és Könyvnyomda, 1886. No. 51.

their objective. Such a view would result in the perpetrator's intent–and not the law–determining whether a unity or plurality of offenses has occurred in the case of instrumental and objective crimes. This would lead to injustices, such as in cases where murder committed with the intent of robbery could be absorbed by the much less severe offense of robbery.[30]

However, the Curia established a formal concurrence of offenses instead of a substantive one, even though the trespass was already committed by entering the yard before the act of theft had even begun, as the attempt phase begins with the perpetration of the act, which is the taking. This demonstrates that the two crimes could not have been committed by the perpetrator through a single act. I note that this is only true if a petty offense against property is committed; if the offense had been classified as misdemeanour theft based on the value, then the attempt of theft would have also commenced with the entry, considering one of the qualified circumstances, which constitutes a compound crime combining theft and trespass.[31]

The Curia justified the realization of formal concurrence, as opposed to material concurrence, by explaining that the two violations of law were *"inseparably connected in terms of time and method of execution"*, meaning that the theft could not have been committed without trespass.[32] Károly Csemegi, agreeing with the decision, explained that although the two crimes were not committed by a single act, they should still be considered as formal concurrence because they were committed with a single objective. He then posed the question of whether *"the culpability of one who, knowing that their goal can only be achieved through a dual violation of the law, does not allow themselves to be deterred from committing the act, is any lesser than the culpability of one who, without any connection to such a goal, commits two crimes on separate occasions"*.[33]

In my opinion, not only can it not be considered lesser, but it also requires a greater commitment; furthermore, this view introduces an additional distinction to the concept of concurrence, which cannot be inferred from

30 Ibid.
31 Ibid.
32 Ibid.
33 EDVI, GYOMAI, op. cit., pp. 258–291.

the text of the law or its reasoning. At the same time, the example adequately demonstrates that, in that era, the refined principle that formal concurrence requires a single act, while material concurrence requires multiple acts, was not always applied. It also shows that the perpetrator's intent was considered in cases of concurrence in ways that, under current rules and practices, would not, or only very narrowly, be recognized.

6 The Role of Culpability in Concurrence of Offenses

Section 95 was also applied by the Curia in cases of quasi concurrence, even where the principle of specialty, which is used to resolve the concurrence, should have been implemented. The court resolved such situations by finding the perpetrator guilty of the more serious offense. However, under the principle of consumption, in some instances, the court established formal concurrence, while in other cases, unity due to absorption.[34] For example, verbal abuse of an official authority combined with the use of force forms a unity of offense, whereas causing minor bodily harm during and because of sexual assault constitutes formal concurrence. Similarly, serious bodily harm also constitutes formal concurrence, as, according to the Curia's reasoning, the two cannot constitute separate offenses because *"the defendant's intent was not directed at causing serious bodily harm to the young girl* […] *a single decision of will and the same act underlay the offense."*[35] The infection caused to the victim as a result of the rape also did not constitute a separate offense; the Curia merely considered it as an aggravating circumstance. Although the infection was a consequence of the sexual assault, the court's reasoning stated that it was not an intentional act and, therefore, could not be punished as a separate offense.[36]

These findings are particularly noteworthy because, contrary to the assertions made in Decision No. 51, they once again place considerable influence in the hands of the offenders, as their intent or decision of will affects the offenses they committed and, consequently, their punishments,

34 EDVI, I. (eds.). *Az anyagi büntető törvények és a sajtótörvény*. Budapest: Grill Károly Könyvkiadónhivatala, 1915, pp. 156–157.

35 Ibid, p. 168.

36 *Döntvénytárak. A felsőbíróságok elvi jelentőségű határozatai, jegyzetekkel ellátva. III. folyam X. kötet*. Budapest: Magyar Irodalmi Intézet és Könyvnyomda, 1898, no. 84.

albeit incorrectly. Returning to the case of sexual assault and serious bodily harm, while it is possible that the perpetrator did not intend to cause injury to the victim, they should have been aware that their violent actions could result in serious injuries to a young girl, meaning that in some cases, acts committed with *dolus eventualis* were even evaluated as negligence.

Furthermore, under Section 310 of the Csemegi Code, the law recognized grievous bodily harm committed through negligence. In other words, if the perpetrator's intent was not directed – even conditionally – toward injuring the victim, and thus the occurrence of two criminal offenses can be ruled out, why did the court not establish concurrence based on one intentional and one negligent crime? Alternatively, why did it not interpret the case as quasi concurrence according to the principle of consumption, rather than attempting to explain the non-committed offense through culpability? A definitive answer cannot be given, but in my opinion, the Curia often regarded formal concurrence as a category between material concurrence and unity of offenses.

However, this influence–which the Curia based on the perpetrator's will in terms of intent or purpose–was, in my observation, only transferred to the offender when the offenses in question were of minor significance, or when at least one of the multiple offenses was of lesser severity. As an example of the former, if the offender committed murder with the purpose of taking the victim's money, the Curia unequivocally established material concurrence, regardless of the instrumental relationship between the goal and the act. Moreover, when the offender wounded two people with a single shot, the Curia still found material concurrence between the two crimes, despite their being committed by a single act. However, in a less serious case, where the offender threw a glass at the victim's head, and a shard of glass also injured a person standing nearby, the Curia determined it to be an ideal concurrence. In this judgment, the court established both grievous and minor bodily harm, where the latter could only be considered as an aggravating circumstance concerning punishment, due to the absorption principle under Section 95. It should be noted that the assessment of material concurrence in more severe cases only became evident in the Curia's later rulings, when it declared that *"if multiple people die or are injured as a result of negligence, material concurrence*

arises, with as many offenses as there are wrongful results." This contrasted with its earlier practice, where even in such cases, only one negligent homicide or bodily injury was established.

It is important to note that the Curia evaluated negligence differently, as, as seen from the previous example, it classified both offenses as intentional crimes. Thus, when the defendant caused serious injuries to two individuals through one act, even though they only intended to harm one, the Curia still declared intent with respect to both victims, stating that *"the same act cannot be committed both intentionally and negligently at the same time – both harmful outcomes must be regarded as intentionally caused"*.[37]

I must agree that the same act cannot simultaneously be intentional and negligent. However, it is possible that while the act itself is intentional, it did not produce the result the perpetrator intended to achieve. In a situation where harm is caused to two individuals instead of one, the perpetrator's negligence could extend to one of the victims.

7 Conclusions

In response to the questions, I raised, whether an offense was committed through one or multiple acts did not necessarily have a decisive influence on the determination of the type of concurrence. However, the gravity of the offenses did, and – although not initially – legal practice eventually developed the importance of culpability, as negligence became an excluding factor for formal concurrence. The impact of intent on the type of concurrence also depended on the severity of the offenses. In cases of minor offenses, courts were more willing to apply the rules of formal concurrence, even when the crimes were committed through different acts. However, in serious offenses, material concurrence was established regardless of the unifying link of intent, due to the impact of the offender's purpose.

In some cases, courts assessed negligence as conditional intent, which also led to the application of formal concurrence for lesser offenses, as otherwise, Section 95 could not have been applied in cases of negligence.

37 *Döntvénytárak. A felsőbíróságok elvi jelentőségű határozatai, jegyzetekkel ellátva. III. folyam X. kötet.* Budapest: Magyar Irodalmi Intézet és Könyvnyomda, 1898, no. 84, p. 168.

In summary, the distinction between the two types of concurrence based on the simultaneity of acts was not consistently applied in practice. Conclusions were drawn based on intent that were not rooted in the wording of the Criminal Code, and in my opinion, it was unfounded to exclude the rules of formal concurrence in cases of negligence with respect to culpability.

Despite all this, the Csemegi Code is an outstanding work that has defined not only its era but also Hungarian legal history. It is the result of a total of ten years of professional labour. The code itself consists of 485 sections, and approximately seven hundred pages of ministerial justification were written in two volumes to accompany it. Károly Csemegi, as the state secretary, delivered 101 speeches during the proceedings of the Justice Committee of the House of Representatives regarding the law.[38]

In terms of the law's durability, the general part was in effect for 70 years, while the special part remained in force for 80 years. However, the reason for the creation of a new law was not due to the inadequacy of the norm but rather because of the socialist period.[39] Although Csemegi was not satisfied with his career,[40] his name became intertwined with the history of Hungarian criminal law through his creation.

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38 GYÖRGYI, K. Emlékbeszéd Csemegi Károly születésének 175. évfordulója alkalmából a Magyar Kriminológiai Társaság és Csongrád Város által rendezett emlékülésen. In: *Magyar Jog*. 2001, Vol. 48, no. 8, pp. 503–508, CZINE, Á. "Csemegi csak egy volt". In: *Magyar Jog*. 2024, Vol. 71, no. 7–8, pp. 392.

39 CZINE, op. cit., p. 392, MEZEY, B. "A föltétlen igazság és a társadalom fenntartásának érdeke", Az első magyar büntető törvénykönyv. In: HORVÁTH, A. (eds.). *Tanulmányok a Csemegi-kódex megalkotásának 140. évfordulója tiszteletére*. Budapest: Dialóg Campus, 2020, p. 44.

40 MIKSZÁTH, op. cit., p. 145.

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A Legal-Historical Perspective on Romani Slavery in Wallachia and Moldavia

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-7

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Abstract

The entirety of the Romani community experienced a unique and overlooked chapter in world history through its enslavement in the two Romanian principalities, a status that persisted from their arrival until the mid-19th century. This phenomenon is currently unknown to the larger Romanian society as well as the majority of the descendants of the liberated Romanies. The study presents a brief legal-historical examination of this 500-year period, exploring the emergence of slavery, the various criteria used to classify the Romanies, the legal frameworks regulating slavery, the distinct legal status of slaves, and their eventual legal emancipation at the dawn of the modern era.

Keywords

Romani; Slavery; Wallachia; Moldavia; Legal Status; Emancipation.

1 Introduction

Romani slavery in the Danubian Principalities persisted for more than half a millennium. Although the temporal scope is broad, this study aims to examine this *sui generis* phenomenon as it developed in Wallachia and Moldavia[1] from a legal-historical perspective. It explores how slavery was embedded in the social and economic fabric of these states, focusing on the emergence of slavery, the categorization of slaves, their legal status, and the governing norms that shaped their existence. Special attention is given to key legal developments,

1 As far as Transylvania is concerned, institutionalised Romani slavery never existed there, as it did in the other two larger historical regions which later on formed Romania. However, due to the geographical proximity of these principalities, sporadic mentions of Romani slaves can also be found in some documents from Transylvania. For these, see ACHIM, V. *Cigányok a román történelemben*. Budapest: Osiris, 2001, pp. 25, 33, 58–59.

particularly in the 17th and 18th centuries, when secular codifications and ecclesiastical laws played significant roles in sustaining the institution. Finally, the study discusses the abolition of slavery in the 19th century and its lasting impact on both the Romani community and broader society.

Before delving into the phenomenon of Romani slavery, it is important to address a terminological polemic among historians: can the term "slavery" accurately describe the former condition of the Romani in Wallachia and Moldavia? Historical documents show that the Romanian[2] term *sclavie* (with the current meaning of slavery), derived from French *esclavage* and Italian *schiavo*, emerged only during the linguistic revival, whereas before the Old Slavic term *rob* was traditionally used. *Rob* had a broad meaning, signifying both prisoner and a distinct legal category for the Romani. Scholars like Petre Petcuț and Viorel Achim argue that the term "slavery" should be applied to the latter practice based on the current meaning of the word, challenging the Romanian historiographical convention of calling the phenomenon *robie*. This study will use the term "slavery" in line with their view, noting that pre-19th-century texts often used *țigan*[3] interchangeably with slave, while the term *gavon* was used as another exonym referring to the Romani.[4]

The primary sources for this study are surviving historical documents that record Romani being donated, bought, given as dowry, and bequeathed just as any other asset – constituting the earliest written evidence of slavery. These fragmented records are crucial because no comprehensive legal codification of slavery existed until the early 19th century. The written norms regulating the legal framework of slavery before these are sparse and often confusing, reflecting the priorly established customary law. While these legal norms provide insights into the legal status of the Romani and the nature of slavery, their late origins prevent them from offering a holistic picture of this system of exploitation.

2 For clarity, the term Romanian refers specifically to aspects related to Romania, the country, and is not related in etymology or meaning to the Romani people.

3 This is the Romanian term historically used to refer to the Romani people. While it is sometimes perceived as pejorative today and therefore not used extensively in this study, it appears in certain instances to preserve historical accuracy.

4 For more detailed arguments, see PETCUȚ, P. *Rromii. Sclavie si libertate*: *construirea și emanciparea unei noi categorii etnice și sociale la nord de Dunăre*. Bucureşti: Centrul Naţional de Cultura a Romilor, 2016, p. 9.

It is noteworthy that there is no legal particularism in the regulation of slavery between the two principalities; instead, a homologous set of norms emerges, with rules that complement each other regardless of their place of origin. These norms should be viewed not just as *mutatis mutandis* transpositions, but as parts of a cohesive normative system regulating slavery. In contrast, legal fragmentation is more evident in the specific regulations of monasteries.

Another important source of information comes from the memoirs of foreigners – consuls, advisers, secretaries, and commercial attachés – who spent extended periods in the principalities. These accounts offer insights into the life of the Romanies, the slave villages, their numbers, occupations, dependence on masters, and punishments. It is important to note that, due to limited scholarly interest, archaeological sources are unavailable; no excavations have been conducted in former slave settlements *(țigănie)* to explore this historical phenomenon.

2 On slavery in General and the Emergence of Romani Slavery

Slavery is as old as civilization itself. Even in medieval Europe, people were often seen as economic commodities, with slavery being a social reality, especially in its more localized forms (household slavery).[5] The slave class primarily consisted of prisoners of war and those sentenced to a life of forced labour, with these punishments often extending to their descendants. However, in Christian Europe, slavery had largely disappeared by the 13th and 14th centuries. In medieval Hungary, the rise of Christianity saw the decline of slavery; St. Stephen (975–1038) prohibited the enslavement of people by lords and knights, and Coloman the Learned (1070–1116) banned the sale of slaves abroad, leading to the development of a uniform serfdom by the 14th century.[6] While serfs had limited legal capacity and some rights, they were still regarded as property in many respects.[7]

5 PETCUȚ, 2016, op. cit., p. 45.
6 HORVÁTH, A. Magánjogi jellegű intézmények az Árpád-házi királyok korában. In: MEZEY, B. (ed.). *Magyar jogtörténet*. Budapest: Osiris, 2007, p. 80.
7 Ibid.

In contrast, slavery persisted in the Ottoman Empire into modern times, though it differed significantly from its form in the Romanian principalities, as it was not reserved to an ethno-social group based on skin colour, and some slave groups, like eunuchs, could attain social mobility and climb to the top of the administrative hierarchy. The Mediterranean also saw a significant slave trade driven by large-scale piracy.[8] The Venetians were among the earliest and largest traders, capturing and transporting Greek and Muslim slaves to Western Europe, later joined by the Catalans and Genoese. The fall of Constantinople in 1453 sharply reduced this supply,[9] which may have fuelled the expansion of the slave trade along the northern banks of the Danube.

In the Romanian principalities, slavery developed in the opposite direction compared to the rest of Europe, where slaveholding was declining and falling into disuse *(desuetudo)*. Romani slavery was unique to the Danube region,[10] emerging as a local phenomenon during a time when slavery was fading across Europe. The Romani likely arrived in the Slavic-speaking Balkans by the 14th century,[11] driven by wars and population movements, and began migrating toward Western Europe. The first records of Romani in Wallachia appear in a 1374 chancellery charter,[12] while in Moldavia, their presence is documented later, in 1428.[13] In the latter region, early slavery also included captured Tatars, distinct from Romani as they lived in huts rather than tents. Over time, this smaller group likely merged with the Romani, all collectively identified by the exonym *ţigan*.[14] Romani slaves were highly valued; one

8 PETCUŢ, 2016, op. cit., p. 45.

9 Ibid.

10 Angus Fraser, renowned Romologist, recalls in his book that the Romani deported to the British colonies for convict labour were kept almost enslaved as the colonies suffered from a constant shortage of labour. It is important to note, however, that the fate of those sentenced to forced labour in the colonies did not differ greatly according to the ethnicity of the convicts. FRASER, A. *A cigányok*. Budapest: Osiris, 1996, p. 160.

11 The first written record comes from the time of the rule of Serbian king Stefan Uroš IV Dušan (c. 1308–1355), namely from 1348. ACHIM, 2001, op. cit., pp. 18–19.

12 The Romanian translation of the document can be found at PETCUŢ, P. *Rromii din România: documente I*. Cluj-Napoca: Institutul pentru Studierea Problemelor Minorităţilor Naţionale, 2009, p. 61.

13 ACHIM, 2001, op. cit., p. 19. In the first mention, Alexander the Good (c. 1375–1432) donated 31 Romani dwellings and 12 Tatar huts (*hatâr*) to the monastery in Bistriţa.

14 The last mention of Tatar servants is from 1488. Ibid., p. 27.

example is the 1471 campaign against Wallachia of the Moldavian voivode[15] Stephen the Great (died in 1504), who reportedly captured 17,000 Romanies as spoils of war, although this figure is likely exaggerated.[16]

From the earliest mentions, the Romani in the principalities were documented as donations, indicating their status as slaves from the start. This raises the question: did the Romani arrive as free people?[17] According to the most recent theory by Romologist Petre Petcuţ, the development of Romani slavery is an *ab ovo* local invention, which was consolidated by historical *mimesis* (where initial practices reinforced subsequent ones), making it part of the emerging medieval Romanian feudal hierarchy. The distortion of Christian ideology to serve economic interests also played a key factor in its development.[18] He argues that the Romani likely arrived as free people, as suggested by Moldavian documents from 1428, where their leaders were referred to as "keneses" (chieftains).[19]

Petcuţ also notes the influence of local customary laws, where free peasants could become tied to the land after 12 years, a practice that may have been applied to Romanies, equating land ties with slavery. Thus, Romani were incorporated into the emerging Romanian feudal system as the lowest social class. He emphasizes the Orthodox Church's role in sustaining slavery (he identifies this as the *conditio sine qua non)*, as it accepted donations of people along with land and other resources in the early years after its

15 The concept describes the monarchs of the principalities before being united. For the sake of consistency, this study uses this term to denote the rulers of the regions.

16 CROWE, D. M. *A History of the Gypsies of Eastern Europe and Russia*. New York: St. Martin's Griffin, 1996, p. 108.

17 Several theories have emerged in the Romanian historiography to explain the origins of Romani slavery in the principalities. Nicolae Iorga (1871–1940) suggested it was a legacy of nomadic peoples living in the territory, therefore predating the formation of the principalities. This outdated and ahistorical thesis is reflected in most works of contemporary Romanian legal historiography. ACHIM, 2001, op. cit., p. 38.; CERNEA, E., MOLCUŢ, E. *Istoria statului şi dreptului românesc*. Bucureşti: Şansa, 1994, pp. 113–114. Viorel Achim linked it to Byzantine practices of special taxation on Romanies, with evidence of similar developments in other Balkan states like Serbia and Bulgaria. ACHIM, 2001, op. cit., pp. 41–42. Historian P. N. Panaitescu argued that Romani slavery was a distinctively Romanian phenomenon driven by economic factors, particularly a severe labour shortage following the region's decline after the brief prosperity brought by the Crusades. Ambulant Romani groups, composed mostly of artisans, were therefore of great economic value. Ibid.

18 PETCUŢ, 2016, op. cit., p. 63.

19 Ibid., p. 48.

formation, aligning its interests with maintaining the *status quo*.[20] This institutional acceptance likely drew on the Byzantine Church's legacy, where slavery was well-established, especially in Greek monasteries.[21]

Petcuț further highlights the weakness of voivodal power in the 14th and early 15th centuries, which allowed boyars to enslave small, nomadic groups without state intervention. Once established, the voivode could only confirm the existing status, exercising control over Romani on state lands but not on boyar or monastic estates (he held the *dominium eminens*[22]). Islamic influence also played a role, as it prohibited the enslavement of Muslims, allowing Romani who arrived as Muslims to avoid enslavement.[23]

3 Categorization of Slaves

This study aims to classify and differentiate Romani slaves into distinct groups. Historical documents often refer to these groups by specific names such as *căldar* (smiths/boilermakers), *linguarar* (spoon makers), *aurar* (gold panners / washers), *ursar* (bear trainers), and *vătraș* (settled Roma), rather than using the general term Romani *(țigan)*. Although all Romani were considered slaves, divergent rules and treatments applied to each group based on their common characteristics, often related to their occupation and ownership.

Romani were frequently categorized by their occupations, which served as labels when they were the object of various legal transactions. For example, *aurarii*, gold-washing Romanies, were notable because gold panning remained under voivodal monopoly.[24] These occupational labels could shift, as some groups performed different crafts depending on the season or other circumstances.

Ownership played a significant role in classification. Romani could be owned by the state trough the voivode *(țigan domnesc)*, boyars[25] *(țigan boieresc)*,

20 PETCUȚ, 2016, op. cit.
21 For concrete examples see ibid.
22 The idea that the monarch was the supreme owner of his subjects' property.
23 PETCUȚ, 2016, op. cit., pp. 49–50.
24 Ibid., p. 54.
25 The boyars were high-ranking noblemen and landowners who held significant political, military, and administrative power in the medieval principalities, often influencing the country's rulers and policies. The term is derived from old Slavonic.

or religious institutions such as monasteries and bishoprics *(țigan călugăresc / mănăstiresc or episcopal)*. Originally, the voivode owned most of the Romani slaves, often nomadic artisans and merchants, due to laws that claimed any ownerless Romani as voivodal property.[26] This also explains the universally accepted rule, that any subsequent change of ownership had to be approved by the voivode.[27] From the earliest times in Moldavia there was also a separate category of slaves of the wife of the voivode, just in her exclusive property.[28] A foreign traveller also records the existence of a small number of castrated slaves, called *scopici,* among the voivodal Romanies, whose main task was to be charioteers for women belonging to the aristocracy.[29]

Already in the 16th century the church emerged as the largest slave owner, benefiting from donations made by voivodes and boyars.[30] The church's settled Romani were assigned various duties, including farming *(vătraș)*, under harsh conditions that often led to attempts to escape. Among these groups were the *lăieș*, a nomadic class that retained a transient lifestyle.[31] A separate category was formed by a stratum called *ciocănași*, whose occupation was salt mining.[32] All church slaves were of course subject to the particular canonical legislation as well.

Boyar slaves could be either peasant slaves or domestic slaves *(țigani de curte* or *de ogor)*, engaged in tasks ranging from household work to animal husbandry. Boyar slaves were subject to various legal transactions such as sale, gift, exchange, or inheritance, which also required confirmation from the voivode.[33] To mark ownership, boyar slaves were often branded,

26 ACHIM, 2001, op. cit., p. 43.
27 Ibid.
28 Ibid., p. 44.
29 CROWE, 1996, op. cit., p. 109.
30 PETCUȚ, 2016, op. cit., p. 59. For such donation letters, testimonies of slavery and trafficking within the church, and the church's role in maintaining these profitable practices, see FURTUNĂ, A. N., TURCITU, V. C. *Sclavia romilor și locurile memoriei – album de istorie socială*. Popești-Leordeni: Dykhta!, 2021, pp. 7, 8, 13, 19, 23, 27, 29, 32, 35, 39, 40, 44, 47, 51, 55–58, 59, 61, 63, 64, 65.
31 ACHIM, 2001, op. cit., p. 47.
32 For example, the monasteries of Cozia and Govora had miner slaves. PETCUȚ, 2016, op. cit., p. 60.
33 ACHIM, 2001, op. cit., p. 45.

tattooed or marked with gunpowder with the owner's initials (around the waist, shoulders or forehead), a practice that further dehumanized them.[34]

Romani were also classified based on their behaviour; they were labelled as good *(țigani buni)* if compliant or bad *(țigani răi)* if prone to escape (fugitive slave). This, of course, affected their price.[35]

According to a typology established by the later scientific literature, Romanies were additionally categorized into nomadic or sedentary groups. Romanies having an ambulant lifestyle typically preserved their language and crafts, remaining distinct from the local population and retaining some judicial autonomy within their communities, overseen by leaders like the *vătaf* or *bulibașă*.[36] Exogamy was explicitly forbidden for nomads, because mixing with other Romani communities could create disputes over property rights regarding the offspring. The nomadic lifestyle was often seen as more attractive because it offered some degree of freedom compared to the more restricted lives of settled Romani.

4 The Norms Governing Slavery

The development of legal norms regulating slavery in the Romanian principalities was a gradual and complex process spanning several centuries. A single, comprehensive legal framework for slavery did not emerge until the early 19th century. Until then, the regulation of slavery was based on a mix of customary laws, sporadic written norms, and specific legal documents, which together formed the backbone for the regulation of slavery.

Before the first law codes, referred to as *pravilă* in old Romanian, the primary legal framework was the *obiceiul pământului* or *legea pământului*, which comprised locally applied legal customs.[37] This customary law was the main source of law in the principalities during the Middle Ages.[38] The term *lege* was used for written laws, while *obicei* referred to unwritten customs. Even after codifications, these customs often took precedence over written laws,

34 OIȘTEANU, A. *Moravuri și năravuri: eseuri de istorie a mentalităților.* Iași: Polirom, 2021, pp. 52–53.
35 PETCUȚ, 2016, op. cit., p. 62.
36 Ibid., pp. 51, 53.
37 CERNEA, MOLCUȚ, 1994, op. cit., p. 98.
38 CERNEA, MOLCUȚ, 1994, op. cit., p. 126.

which served as secondary sources to the varied local practices (written norms basically had a subsidiary character).[39]

In the Romanian principalities, secular and ecclesiastical laws were closely intertwined, influenced by the Byzantine legal tradition, where the separation between secular and canon law was less distinct than in Western countries. This blending of laws is reflected in the concept of the *nomokanon*, which included both secular and ecclesiastical regulations.[40]

4.1 Ecclesiastical Regulation

The Orthodox Church, as a significant slave owner, developed its own set of ecclesiastical laws governing slavery alongside secular laws. The earliest written code in the principalities was likely a church code, such as the *Pravila de la Târgovişte* (Târgovişte Code) from 1452, which regulated certain obligations of slaves near monasteries. Various monasteries, such as the ones from Putna and Bistriţa, developed their own codes, often influenced by Byzantine sources like the *Syntagma kata stoicheion* and other Orthodox canonical texts.[41]

The *Pravila de la Govora* from 1640 addressed slavery in several ways, including penance for adultery involving slaves and severe punishments for those who stole slaves. An internal church rule from 1714, the *Capelete de poruncă ale lui Antim Ivreanu*, prohibited priests from mixing free persons and Romanies and warned against marrying slaves without the written consent of their masters.[42]

4.2 Secular Regulation

Secular regulation of slavery evolved gradually. Before the 16th century, the main source of secular law were voivodal acts known as *hrisoave*, which were individual legal documents issued by the voivode to resolve specific cases.

39 Ibid., pp. 98–99.

40 ŠARKIĆ, S. The Influence of Byzantine Law in East Central Europe. In: SÁRY, P. (ed.). *Lectures on East Central European Legal History*. Miskolc: Central European Academic Publishing, 2022, p. 48. On the reception of Byzantine law by the Danubian Principalities via the South Slavic route, see ibid., pp. 53–54.

41 CERNEA, MOLCUŢ, 1994, op. cit., p. 127.

42 FURTUNĂ, A. N. *Sclavia Romilor în Ţara Românească*. Bucureşti: Centrul Naţional de Cultură a Romilor – Romano Kher, 2019, pp. 18, 20.

These acts sometimes included general rules that began to form the basis of written laws on slavery. These *hrisoave* are perhaps the most important source of law on slavery. From these an early picture of the legal framework regulating slavery can be formed.

From the 17th century, written codes started to appear, such as the *Cartea românească de învățătură* in Moldavia (1646) and *Îndreptarea legii* in Wallachia (1652), which sought to centralize state power and provide a legal framework for slavery.[43] These codes introduced rules for how Romani slaves could be freed and established that intermarriage with a slave resulted in the enslavement of the free partner and their offspring.[44] Certain Old Testament penalties were also extended to the Romani by analogy. In the third book of Moses, sodomy (bestiality or zoophilia) is punished by burning the animal alive. Therefore, according to the codes, if a slave committed rape, he was to be burned at the stake.[45]

During the Phanariot period,[46] starting in the early 18th century, new reforms influenced by Enlightenment ideals and economic pressures, including the emigration of serfs due to poor living conditions, began to take shape; Constantine Mavrocordat (1711–1769), the Wallachian voivode, prohibited the separation of married slaves belonging to different owners, reflecting a shift towards more humane treatment of slave families.[47]

Later, legal codes like the *Codul Callimach* (1817) and *Leguirea Caragea* (1818) began to codify some of the unwritten customary rules regarding slavery. These codes retained the categorization of individuals as free, slave, or freedmen *(slobozîți)*, acknowledging the limited rights of freed slaves compared to free citizens.[48] The codes formally recognized slavery as contrary to natural law (împotriva *firescului dirt al omului)* but justified

43 CERNEA, MOLCUȚ, 1994, op. cit., p. 130.
44 Ibid., pp. 115, 132.
45 PETCUȚ, 2016, op. cit., pp. 71–72.
46 The Phanariot period in the Romanian principalities describes the time from 1711 to 1821 when Phanariots (Greek Orthodox elite from the Phanar district of Istanbul, who were prominent in administrative and diplomatic roles within the Ottoman Empire) were appointed by the Sublime Porte to govern these, influencing their political, administrative, and cultural development while often pursuing their own interests within the Ottoman system.
47 CERNEA, MOLCUȚ, 1994, op. cit., pp. 149–150.
48 CERNEA, MOLCUȚ, 1994, op. cit., p. 156.

it through local customs and entrenched practices.[49] The Caragea Code introduced the rule that children born into unions between slaves and free individuals would be free, challenging previous customary practices.[50] The Callimach Code recognised the limited transactional capacity of the slaves when taking action in the interest of their owners. The sale of slaves was regulated by detailed formalities in the new codes. Unlike other sales that could be conducted orally (consensual contract), the sale of slaves required written contracts (contractual solemnity) and adhered to specific rules of pre-emption and repurchase applicable for the disposal of lands.[51]

5 The Legal Status of Slaves

The legal status of the Romani in the Romanian principalities remains uncertain due to the absence of early written norms defining slavery. Between the 14th and 16th centuries, no documented rules addressed legal disputes involving slaves, leaving scholars with limited evidence on how these issues were resolved. Since slaves were regarded as property rather than individuals, it is difficult to discuss their legal status in terms of personal rights. Instead, the focus was on the rights of their masters, as slaves were rarely recognized as individuals with inherent rights.

Like slaves in Roman law,[52] the Romani were not permitted to own property beyond the tools necessary for their work.[53]

Slaves lacked *locus standi* and minimal rights that would protect them in court. Legal disputes involving slaves were treated as property disputes between the master and the opposing party, rather than between the slave and a free person. Slaves were not held accountable for their actions; rather, their actions were considered extensions of the will of their masters. In severe cases, such as horse theft or murder, the master could surrender the slave to face punishment, including the death penalty.[54]

49 *Codul Callimach* § 27; ACHIM, 2001, op. cit., p. 57; PETCUȚ, 2016, op. cit., p. 69.
50 CERNEA, MOLCUȚ, 1994, op. cit., p. 156.
51 Ibid., p. 158.
52 NÓTÁRI, T. *Római köz-* és *magánjog*. Kolozsvár: Scientia, 2011, p. 191.
53 PETCUȚ, 2016, op. cit., p. 79.
54 PETCUȚ, 2016, op. cit., p. 65.

Despite this, there were three specific types of lawsuits in which slaves could represent themselves. The first was a suit to determine status, where unlike in Roman law, the slave did not need a guarantor. The second involved fulfilling obligations tied to their status. The third category allowed slaves to engage in certain property disputes, though voivodal slaves enjoyed slightly more rights in court than others.[55]

The right of a master to reclaim runaway slaves was absolute and perpetual, often referred to as the "permanent right of ownership" *(dreptul permanent de proprietate)*. This concept, described by Petre Petcuț, reflects the high value of slaves, whose status as property was not subject to any limitation period even if outside the possession of the owner.[56]

The sale and transfer in ownership over slaves were strictly regulated, and any transfer involving a slave required approval from the voivode.[57] This requirement underscored the voivode's role as the ultimate owner of all Romanies (according to the concept of *dominium eminens)*, reflecting the historical notion that all Romani were initially the property of the voivode, who then distributed them as fiefs. Consequently, any change in ownership needed the voivode's confirmation to be legally valid. In sales, the pre-emption right was granted to the seller's family members and neighbours. Two notable exceptions to this right existed: in the case of slaves condemned to death, the buyer was not required to respect the pre-emption rights of others, allowing anyone to "save" the condemned slave by purchasing them. The second exception involved the sale of free Romani from outside the principalities of their own will, often driven by economic necessity, such as debt repayment or starvation prevention (basically enslaving oneself). Disputes arising from the breach of the pre-emption right were resolved by transferring the slave to the aggrieved party at the original purchase price, regardless of any increase in the slave's market value.[58]

By the mid-19th century, the advent of printed press products played a significant role in the slave trade, with advertisements for the sale and

55 Ibid., p. 66.
56 Ibid., pp. 72–73.
57 Ibid., p. 86.
58 Ibid., pp. 84, 87.

capture of runaway slaves becoming commonplace. Interestingly, these ads often omitted details about the number of slaves and their prices but always specified the place and time of purchase. Given the limited circulation of newspapers, their content was frequently disseminated by priests or clerks during public readings after Sunday services.[59]

Regarding punishment and discipline, slaves faced severe penalties for attempting to escape, including whipping, branding, castration, and even death.[60] Although legal texts from the 17th century asserted that masters did not have absolute control over their slaves' lives,[61] such provisions lacked any sanction (basically they were *lex imperfecta)*. There are no surviving records of slave owners being penalised for killing or excessively punishing their slaves, suggesting that these rules were primarily advisory rather than strictly enforced.

5.1 Marriage and *jus primae noctis*

The norms and surviving legislation concerning the Romani are often linked to marriage, reflecting the complex social and legal issues that arose when Romani individuals with differing owners or from different groups entered into marital unions.[62] Slave marriage was seen mainly as a tax and property issue from the perspective of the owner. The regulations that governed these reveal the extent to which slave owners sought to manage every aspect of their slaves' lives, from their marital choices to the offspring they produced, further entrenching the phenomenon of slavery within the broader feudal order.

Questions frequently emerged regarding the implications of marriages between Romani with different property owners, between itinerant and

59 PETCU, M. Publicitatea pentru comerțul cu robi în Țările Române. In: PETCU, M. (ed.). *Studii și cercetări de istorie a publicității*. București: Tritonic, 2015, pp. 15–16.

60 Drowning by tying the legs of condemned fugitives and throwing them into a river was a common penalty, as suggested by the Romanian proverb *s-a înecat ca țiganul la mal*. DUMINICĂ, G. *Despre rasismul din "vorba românului". Sau despre cum poți scoate pe gură prostii cu iz rasist*. Available at: https://adevarul.ro/blogurile-adevarul/despre-rasismul-din-vorba-romanului-sau-despre-1847461.html [cit. 26. 8. 2024].

61 CERNEA, MOLCUȚ, 1994, op. cit., p. 144.

62 For a transcription of 11 historical documents on the subject, see FURTUNĂ, 2019, op. cit., pp. 98–131.

settled Romani, and between free individuals and slaves. These marital unions raised concerns about the status of children born from such marriages and the determination of their ownership. Unlike Roman law, where the offspring of a slave woman were automatically enslaved,[63] the legal status of children born to slaves in the Romanian principalities evolved significantly over time, reflecting a more fluid approach. Jurisprudence in the principalities did not achieve the same level of abstraction as Roman law, which established that the child of a slave could not be legally considered a fruit *(fructus).*

Secular law generally prohibited exogamy among slaves, meaning that Romani were discouraged from marrying outside their community or across different ownership lines, primarily to prevent disputes over slave ownership. The 1780 legal code known as *Pravilniceasca Condică* explicitly addressed these issues, imposing severe penalties on priests who conducted marriages between Romani without the approval of their owners. Priests were strictly forbidden from marrying Romani belonging to different owners unless written permission was obtained from both parties. Similar prohibitions were reinforced in later codes, such as the *Leguirea Caragea* Code of 1818 and laws post-1831.[64]

Among settled Romani, although specific legislation does not survive, historical reports indicate that marriage required the consent of the landlord or the starets (abbot).[65] Romanian boyars often actively managed the marital unions of their Romani slaves, enforcing endogamy (marrying only within the slave group) and, in many cases, forcing very young Romanies, typically between the ages of 13 and 16, into marriages to ensure a steady increase in the slave population. Such forced marriages were primarily motivated by economic interests (increasing nativity), as the birth of more children within slave families directly benefited the owners.[66]

Historical evidence documents the harsh realities faced by Romani children born into slavery, including frequent separation from their parents when they were sold or transferred. Nicolae Furtună has published multiple

63 NÓTÁRI, 2011, op. cit., p. 192.

64 OIŞTEANU, A. *Sexualitate şi societate. Istorie, religie şi literatură. Ediția a II-a revăzută, adăugită şi ilustrată.* Iaşi: Polirom, 2018, p. 62.

65 ACHIM, 2001, op. cit., p. 53.

66 For a description of concrete cases, see OIŞTEANU, 2018, op. cit., p. 63.

records illustrating this inhumane practice, providing clear evidence of the systemic separation of slave families.[67]

Andrei Oişteanu explores the controversial and brutal practice of the right of boyars over Romani slave women, a form of sexual exploitation akin to the medieval concept of *jus primae noctis* (the right of the first night).[68] Although this right was never formalized into law and was explicitly condemned as immoral, contemporary sources suggest that it was widely practised.[69] In later centuries, in place of this practice, a so-called "virginity tax" *(taxă de feciorie)* emerged. This tax, initially thought to have replaced the right of the senior over his slaves, evolved into a separate obligation levied on the marrying parties and their families. Payment could be made in cash, animals, or goods, and the responsibility for collecting the tax fell to the Romani group leader, known as the *bulibaşă* or *vătaf*. Many complaints from the 19th century indicate that the group leaders often misappropriated the tax for personal gain, highlighting another layer of exploitation within the Romani community itself.[70]

5.2 Enfranchisement (Manumission)

Unlike Roman law,[71] which addressed the establishment of slavery, no such norms existed in the principalities for Romanies, who were uniformly considered slaves (as slavery was reserved for this ethnic group). Slavery was uniquely applied to the Romani, with those not owned by boyars or the church being *ex lege* the property of the voivode.

Individual emancipation, akin to Roman practices,[72] was rare and typically occurred through testamentary enfranchisement. Once granted, emancipation could not be contested by heirs. An example exists where a master initially freed a slave with a *carte de iertăciune* but later tried, unsuccessfully, to re-enslave them. Generally, slaves could not redeem

67 For 16 historical documents attesting to this practice, see FURTUNĂ, 2019, op. cit., pp. 53–94.
68 OIŞTEANU, 2018, op. cit., pp. 516–540.
69 For contemporary descriptions, see ibid., pp. 517–518.
70 For contemporary examples, see ibid., pp. 70–71.
71 NÓTÁRI, 2011, op. cit., pp. 192–193.
72 Ibid.

themselves, except in rare cases where denunciation of the master for counterfeiting or high treason (*hiclenie*) led to their freedom.[73]

Despite mentions of free Romani in medieval records, emancipation was uncommon until the mid-19th century, when abolitionist sentiments began to gain traction in Romanian society.[74] Laws from the 18th and 19th centuries, such as the *Codul Callimach* and *Cartea românească de învățătură*, outlined two conditions for the emancipation of slave women: consorts of predeceased masters were to be freed, and slaves forced into prostitution were to be automatically freed and married off by their former owner. The implementation of these laws remains undocumented.[75]

Notably, Stefan Răzvan (died in 1595), a person of likely also enslaved Romani descent, became a unique figure in the principalities' history by being enthroned for ten months in 1595 in Moldavia, despite the rigid social hierarchy that allowed little social mobility.[76]

6 Abolition of Slavery and its Aftermath

The 19th century saw a shift towards the abolition of Romani slavery in the principalities, influenced by Enlightenment ideas which arrived through tsarist Russian channels (from the east). This transformation can be described as a historical *pseudomorphosis* (a process when a younger culture's natural development is distorted and suppressed by the overpowering influence of an older, dominant foreign culture, leading to an inauthentic and conflicted cultural development). In the principalities, this process was fuelled firstly by the policy of the French-speaking tsarist elite and later on by the acquired Francophilia of the Romanian leading stratum.[77]

General Pavel D. Kiseleff played a key role in the early abolition efforts, advocating for gradual emancipation. The *Regulamentul Organic*[78] of 1831 and

73 PETCUȚ, 2016, op. cit., p. 78.
74 ACHIM, 2001, op. cit., p. 51.
75 PETCUȚ, 2016, op. cit., p. 79.
76 Ibid., pp. 82–83.
77 On the Impact of tsarist Russia on the Romanian principalities and of the *Regulamentul Organic*, see DJUVARA, N. *O scurtă istorie ilustrată a românilor.* București: Humanitas, 2019, pp. 238–245.
78 These were quasi-constitutional laws introduced by the tsarist Russian authorities in the Danubian Principalities in 1831 and 1832, respectively.

the Moldavian Penal Code of 1833 introduced reforms such as regulating slave marriages and determining slave values in court.[79] Despite these steps, comprehensive emancipation was slow to materialize.

Mihail Kogălniceanu (1817–1891), a prominent abolitionist, and the 1848 revolution's Proclamation of Islaz both advocated for the end of slavery, but real progress was delayed.[80] Western influences, like Harriet Beecher Stowe's *Uncle Tom's Cabin* (as the first American novel translated into Romanian) further fuelled abolitionist sentiments.[81] Interestingly, even theatre plays were written about the necessity of abolition.[82]

A key argument for Romani emancipation in the principalities was that boyar and church slaves did not pay taxes. Additionally, foreign accounts of the slave trade cast the region in a negative light, making emancipation a necessary step toward the unification of Wallachia and Moldavia and the enhancement of their international standing.[83]

Driven by social expectations and the abolitionist movement, state slaves (the slaves of the voivode) were the first to be freed: in 1843 in Wallachia and 1844 in Moldavia, where church slaves were also liberated. In Wallachia, church slaves were not freed until 1847. The boyars' slaves faced the most resistance and were only emancipated in 1855 in Moldavia and 1856 in Wallachia.[84] Over 250,000 Romanies, about 7% of the population, were freed, with taxes paid by the former slaves funding compensation for the former private owners.[85] The process of gradual emancipation also flooded the courts with petitions from Romanies seeking their freedom, as many boyars lacked legal titles for the specific slaves they owned.

The discrimination and marginalization of the Romani people did not end with their liberation. Legal emancipation was not followed by economic and

79 CROWE, 1996, op. cit., p. 115.
80 DJUVARA, 2019, op. cit., pp. 250–251.
81 ACHIM, 2001, op. cit., p. 118.
82 FURTUNĂ, TURCITU, 2021, op. cit., pp. 88–89.
83 Moldavia and Wallachia united under a personal union in 1859 as the United Principalities of Moldavia and Wallachia. The name Romania was officially adopted in 1866. The country then declared its independence in 1877 and was internationally recognized as an independent state in 1878.
84 ALBU, D. Percepţii asupra minorităţii rome în societatea românească. De la robie la emancipare. In: *Drepturile omului*. 2021, no. 2, p. 44.
85 FURTUNĂ, 2019, op. cit., p. 114.

social emancipation. In many cases, they were worse off after liberation than before. Overnight, they became dispossessed and landless, as agricultural slaves lost their legal title to cultivate land. This situation was further exacerbated by violent attempts at forced sedentarization carried out by the newly-formed Romanian state.[86] These issues contributed to what is known today as the second great Romani emigration.

7 Concluding Thoughts

Romani slavery was a significant historical phenomenon unique to the principalities of Wallachia and Moldavia. It shares notable similarities with slavery in the United States, particularly in how it was reserved for a specific ethnic group, marked mainly by the colour of their skin. Both forms of slavery can be categorized as chattel slavery,[87] where one person had complete control over another's life. This type of slavery was deeply dehumanizing and based on beliefs in the other's inferiority. For example, in both the principalities and the early United States, approximately 10% of the population were enslaved, and slavery was abolished in both regions around the same time – about nine years later in the entirety of the U. S. However, there were differences between the two phenomena. Romani slavery in Wallachia and Moldavia began earlier and lasted much longer than in the U. S. Additionally, there were itinerant slaves in the principalities, unlike the mainly agricultural slaves in North America.

The legacy of Romani slavery still affects the Romanies' position in society today. Despite 150 years since their liberation, the Romani remain systematically marginalized and face significant challenges integrating into Romanian society.[88] Among other things, this is illustrated by the history of the Romani Holocaust, which took place 80 years ago, when this minority

86 ACHIM, 2001, op. cit., pp. 137–141.

87 The terms chattel and cattle are etymologically derived from the same place. This also highlights the legal status of slaves in these societies.

88 This was also underlined by points 18 and 19 of the concluding observations of the last UN country report. *United Nations Committee on Economic, Social and Cultural Rights (2024) Concluding observations on the sixth periodic report of Romania*. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FROU%2FCO%2F6&Lang=en [cit. 26. 8. 2024].

was deported by the wagonloads to Transnistria.[89] Furthermore, slavery is a phenomenon that not only a large part of Romanian society, but also the descendants of the liberated Romanies, are unaware of. This is coupled with an endemic, biased image of the minority. The lack of acknowledgement of Romani slavery as a significant historical phenomenon in Romania, perpetuated by the silence surrounding the issue in the public sphere,[90] reinforces the community's exclusion and prejudice. The greater recognition of historical truth is essential for the development of a healthy sense of identity on the part of the majority society.

To address this, symbolic gestures and legal measures have been introduced. Law No. 28 of 2011 established February 20 as the Day of Romani Liberation. Additionally, Law No. 2 of 2021 was adopted to prevent and combat antigypsyism *(combaterea antițigănismului)*, introducing new criminal offences into Romanian law. Efforts to raise awareness and educate the public include initiatives like Dor magazine's podcast *Obiceiul pământului*,[91] researcher Adrian-Nicolae Furtună's sourcebooks,[92] Radu Jude's film *Aferim*, and Petre Petcuț's curriculum on Romani history.[93] These efforts aim to promote understanding and address the historical and ongoing issues facing the Romani community.

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89 For details, see ibid., pp. 188–216.
90 PETCUȚ, 2016, op. cit., p. 84.
91 *Obiceiul pământului*. Available at: https://www.dor.ro/obiceiulpamantului/ [cit. 26. 8. 2024].
92 FURTUNĂ, TURCITU, 2021, op. cit.; FURTUNĂ, 2019, op. cit.
93 PETCUȚ, P. *Istorie. Valahia și Moldova*. Available at: https://rm.coe.int/valahia-si-moldova-fise-de-informare-despre-istoria-romilor/16808b19c3 [cit. 26. 8. 2024].

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The Movement for Changing the Property Laws of Married Women in England, 1856–1870[1]

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-8

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Abstract

In the middle of the 19th century, all property and earnings of a married woman belonged to her husband, including the property that a woman owned before entering the marriage. In 1856, Barbara Bodichon submitted the first petition to the Parliament of Great Britain that called for changing the property laws *(Married Women's Property Acts)* and the long-lasting efforts to gain property rights and economic and legal independence for married women had begun. The paper will focus on the movement for changing the Property Laws of Married Women in England between the years 1856 and 1870, i.e. from the submission of the first petition by Barbara Bodichon to the first milestone – issuing the law that gave married women in England some property rights, Married Women's Property Act 1870.

Keywords

Women's Rights; Property Rights; Victorian Great Britain; 1870; Barbara Bodichon; Married Women's Property Act.

1 Introduction

Victorian Great Britain, despite being one of the cribs of the modern age, did not grant equal rights to women. According to the 1851 census, 26% of all women in England and Wales were employed.[2] Most of them got married and when they did, they lost their property rights. Before the issuing of the *Married Women's Property Acts of 1870 and 1882* all of woman's property

1 The study was financially supported by the Charles University, project GA UK No. 152624.

2 HIGGS, E. Women, Occupations and Work in the Nineteenth Century Censuses. In: *History Workshop Journal*. 1987, Vol. 23, no. 1, p. 74.

and earnings legally belonged to the husband. By marring, woman became so-called *femme covert,* meaning woman and her husband were, by a fiction of law, considered one person, represented by the husband. The money that was earned by the women belonged to her husband, as well as her real estates and personal property she owned before entering the marriage. Married women also could not enter contracts in their own name or sue or be sued for contracts or conduct their own business. On the other hand, husbands were liable for wives' debts contracted before the marriage.[3] By his will, husband could rule out his wife from inheriting any property and woman's will made before the marriage was revoked by marriage. Prominent philosopher, politician and supporter of women's rights John Stuart Mill (1806–1873) noted that *"… the wife's position under the common law of England is worse than that of slaves in the laws of many countries"*[4], and *"… but no slave is a slave to the same lengths, and in so full a sense of the word, as a wife is."*[5]

Despite being deprived of property rights, most women still got married due to the social and economic pressure and difficulties in earning decent salary on their own. In 1871 almost 90% of women between the ages of forty-five and forty-nine in England were married or widowed.[6] Unmarried women and widows, also called *femme sole*, had almost the same property rights as men did. Neither married, nor unmarried women could not vote in the Parliamentary elections during the 19th century.

One of the options for gaining some property rights for married women and for gaining a mean of protection their property from squandering of their savings by the husband was a proceeding of the court of equity that could place woman's property into a trust fund with designated trustee, most commonly the husband. Women then could dispose with only separate property placed in the trust fund. However, husband still held factual and legal control over property that was not placed in the trust fund. Because of the costliness of the court hearing and limitation of minimal property value of £200, only around

3 LEIGH SMITH, B. *A Brief Summary in Plain Language of the Most Important Laws Concerning Women; Together with a Few Observations Thereon*. London: John Chapman, 1854, pp. 6–7.

4 MILL, J. S. *The Subjection of Women*. London: Longmans, Green, Reader, And Dyer, 1869, p. 55.

5 Ibid, p. 57.

6 SHANLEY, M. L. *Feminism, Marriage, and the Law in Victorian England, 1850–1895*. Princeton: Princeton University Press, 1993, p. 9.

10% of women could obtain marriage settlement creating separate property.[7] Legal status of English married women in the 1850s was associated not only with injustice and degradation, but also with everyday practical problems, especially for the middle class which was gaining wealth, but not enough to be able to afford court of equity hearing for creating the separate property.[8] One of the arguments for need of a reform of the property law then became the fact, as a lawyer and MP Sir Thomas Erskine Perry noted, that it seemed *"that for the rich there was one law, and for the poor another"*.[9]

2 First Impulses for Legal Change

One of the activists who launched the first organised campaign to change the women's property rights was Barbara Leigh Smith Bodichon (1827–1891). She came from a wealthy Unitarian family, she gained her first experience with campaigning in the 1840s during campaign to win repeal of the Corn Laws[10] and later participated in campaigns calling for women's suffrage and education, she also co-founded the first women's college at Cambridge. In 1855 she and circle of her friends-activists such as Bessie Rayner Parkes (1829–1925), Mary Howitt (1799–1888), Elizabeth Sturch Reid (1789–1866) created the first petition calling for better legal protection of married women's property and earnings its misuse by the husband. The petition argued that *"the present law, by which the property and earnings of the wife are thrown into the absolute power of the husband,* […] *the sufferings thereupon ensuing, extend over all classes of society."*[11] Women were more often participating on the labour market, and it was necessary to take that into account and project it into the laws.[12] The existing law was not only unjust to married women but it also offered no protection if the husband did not fulfil his role as the protector

7 HOLCOMBE, L. *Wives and Property: Reform of the Married Women's Property Law in the Nineteenth-Century England*. Toronto: Toronto University Press, 1983, pp. 45–46.
8 Ibid, p. 47.
9 *House of Commons Debate*, 10 June 1856, Vol. 142, c. 1274.
10 HOLTON, S. *Suffrage Days: Stories from the women's suffrage movement*. London – New York: Routledge, 2003, p. 11.
11 [CORNWALLIS, F. C.]. The Property of Married Women: Report of the Personal Laws Committee (of the Law Amendment Society) on the Laws Relating to the Property of Married Women. In: *The Westminster Review*. 1856, Vol. 10, p. 336.
12 Ibid, pp. 336–337.

of the woman that was covered by his legal person in the marriage. Petition stated that *"But that for the robbery by a man of his wife's hard* [won] *earnings there is no redress, – against the selfishness of a drunken father, who wrings from a mother her children's daily bread, there is no appeal. She may work from morning till night, to see the produce of her labour wrested from her, and wasted in a gin-palace; and such cases are within the knowledge of every one."*[13] Women then could not take sufficient care of their children and had *"to leave them to the temptations of the street, so fruitful in juvenile crime."*[14] The law was also unjust to men, petitioners argued, because it made them responsible for the wife's debts contracted before and during the marriage.[15]

Bodichon's circle was able to collect more than 3,000 women's signatures in London.[16] Similar petitions were drafted across the country with 26,000 signatures in total.[17] By limiting the petitioners only to women, the activists wanted to show that women are interested in standing up for their rights and that they are prepared to take part in a public debate on the issues concerning them. The same practice was used in the property rights campaigns from the 1860s to 1880s, as well as in the campaigns calling for women's suffrage during the same time period.[18] The main activists' strategy was bringing evidence of a real-life cases of hardship women had to endure in the hands of their husbands, creating and signing petitions, writing articles, pamphlets stating their arguments and making public speeches on the congresses.

The Bodichon's petition was presented in the Parliament in March 1856 by Lord Henry Brougham in the House of Lords and by Sir Thomas Erskine Perry in the House of Commons, but it did not lead to any legal change.[19] Lord Henry Brougham (1778–1868) was a prominent lawyer, politician and former Lord High Chancellor. In 1857, he founded *Social Science Association (The National Association for the Promotion of Social Science)* which helped to push the women's property reform. Association was a reform society which aimed

13 CORNWALLIS, 1856, op. cit., p. 337.
14 Ibid.
15 Ibid, pp. 337–338.
16 Ibid, p. 338.
17 HOLCOMBE, op. cit., p. 70.
18 See John Stuart Mill's presentation of the Suffrage petition in the Parliament; House of Commons Debate, 17 July 1866, Vol. 184, p. 996.
19 House of Commons Debate, 10 June 1856, Vol. 142, cc. 1273–1277; 1284.

to bring together like-minded people, mainly liberal lawyers, politicians, scientists such as John Stuart Mill, John Ruskin, Edwin Chadwick, John Rusell. The aim of the *Social Science Association* was to enable discussion of various aspects of contemporary life such as education, hygiene standards and public health, penal reform, fusion of common law and law of equity, and to prepare possible reforms. Association was also concerned with issue of women's property and voting rights.[20] Barbara Bodichon was also a member of the Association thanks to her friendship with Lord Brougham. *Social Science Association* enabled women to speak in front of a larger audience which was not common in the 1850s and thanks to that the women activists were able to gain more supporters of their cause.

In 1857, Lord Brougham moved three resolutions for a debate in the House of Lords; affirmation that the law needs to be changed, new rule stating that married women without a marriage settlement should have property rights of unmarried ones, and that until the new laws take effect, the wives should be given lawful protection of their property against *"the exercise of the husband's strict rights by the interposition of a court to which her access is rendered easy."*[21] The proposal reached a dead end.[22] The same fate met proposal *of Married Women Bill* by Sir Thomas Erskine Perry that stated that married women, who had not acquired marriage settlement, would have the same property rights as femmes soles, i.e. being able to acquire, hold and dispose with real and personal property and be liable for her debts.[23] Numerous opponents of the property reform and of women's equality claimed that changing the laws would disturb the existing social order, home stability and relations between the wife and the husband.[24] In 1857, Matrimonial Causes Act was passed, making it easier to obtain divorce but the law was still in favour of men. The early attempts for reforming women's property rights did not succeeded and the activists had to wait for the right time to bring up the cause again.

20 GOLDMAN, L. *Science, Reform, and Politics in Victorian Britain: The Social Science Association 1857–1886*. Cambridge: Cambridge University Press, 2004, pp. 1–4; RODGERS, B. The Social Science Association, 1857–1886. In: *The Manchester School*. 1952, Vol. 20, no. 3, pp. 283–285.

21 House of Lords Debate, 13 February 1857, Vol. 144, cc. 613–614.

22 HOLCOMBE, op. cit., p. 90.

23 House of Commons Debate, 14 May 1857, Vol. 145, c. 272.

24 SHANLEY, M. L, op. cit., p. 91.

3 Attempts for Reform, 1868–1869

The climate of hope for implementation of liberal reforms after passing the Second Reform Act *(The Representation of the People Act 1867)* seemed like a promising time for the women´s movement.[25] In 1867, John Stuart Mill unsuccessfully proposed an amendment to the Reform Act that would enable women to vote,[26] but Mill himself was pleasantly surprised by the amount of support his amendment received.[27] An important role in setting the question of women's property rights again played the *Social Science Association* in cooperation with women's activists Elizabeth Wolstenholme Elmy (1833–1918), Jessie Boucherett (1825–1905) and Josephine Butler (1828–1906). Secretary of the Social Science Association and a friend of Barbara Bodichon, George Woodyatt Hastings (1825–1917), spoke about the need of a reform of married women's property law at the Associations congress held in 1867 in Belfast.[28]

After the congress took place, the women mentioned above prepared a request asking the Association to take up the cause of reform of the married women's property law. Department of Jurisprudence of the Association then drafted a bill which was introduced in the House of Commons by member of the Association and a lawyer George Shaw Lefevre.[29] The bill was based on the principles that Thomas Erskine Perry proposed in 1857,[30] that being that women could dispose with their property as if they were unmarried, if the couple had not conducted marriage settlement. During the second reading John Stuart Mill and Russell Gurney joined as the sponsors. Gurney (1804–1878) was a husband of a suffrage activist Emelia Batten (1823–1896).

To support the *Married Women's Property Bill*, organisation called *Married Women's Property Committee* was established in 1868 in Manchester. Elizabeth Wolstenholme Elmy and Josephine Butler became its secretaries. The

25 HOLCOMBE, op. cit., p. 117.
26 House of Commons Debate, 20 May 1867, Vol. 187, c. 829.
27 PUGH, E. John Stuart Mill and the Women's Question in Parliament, 1865–1868. In: *The Historian*. 1980, Vol. 42, no. 3, p. 411.
28 HASTINGS WOODYATT, G. (ed.). *Transactions of the National Association for the Promotion of the Social Science: Belfast Meeting 1867*. London: Longmans, Green, Reader, And Dyer, 1868, p. 292.
29 HOLCOMBE, op. cit., p. 125.
30 House of Commons Debate, 21 April 1868, Vol. 191, c. 1016.

Manchester Committee became one of the leading bodies during the efforts to amend the laws regarding married women's property. Most prominent members of the Committee were Lydia Becker (1827–1890), its treasurer and editor of Women's Suffrage Journal, a politician and an activist Jacob Bright (1821–1899), a journalist Frances Power Cobbe (1822–1904), or a barrister and husband of Emmeline Pankhurts (1858–1928) Richard Pankhurst (1834–1898).[31] Elizabeth Wolstenholme Elmy established branches of the Manchester *Married Women's Property Committee* in Birmingham, Dublin and Belfast. Between 1868 and 1870, she also collected 100,000 signatures on parliamentary petitions supporting Gurney's and Bright's Bill.[32]

4 Married Women's Property Act 1870

The Bill proposed in 1868 encountered obstacles in the legislative process,[33] Russel Gurney and Jacob Bright had to re-introduce it in 1869,[34] and then the parliamentary committees amended some of the key parts.[35] In 1870, the MPs again discussed the bill proposed in 1868 (which was also the same as in 1857). House of Lord amended it, the law passed and on the 9 August 1870 it received royal assent.[36] However, it was not the law the movement had been fighting for.

Married Women's Property Act 1870 (33 & 34 Vict. c. 93) stated that *"The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money, or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money or property, shall be deemed and be taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and*

31 *Members of the Executive Committee of the Married Women's Property Committee, 1868–1882*. HOLCOMBE, [s. l.].
32 WRIGHT, M. *Elizabeth Wolstenholme Elmy and The Victorian Feminist Movement: the Biography of an Insurgent Woman*. Manchester: Manchester University Press, 2011, p. 78.
33 SHANLEY, op. cit., p. 69.
34 House of Commons Debate, 25 February 1869, Vol. 194, c. 331.
35 HOLCOMBE, op. cit., p. 170.
36 Ibid, pp. 177–178.

property."[37] The law introduced sort of imaginary trust fund which did not grant the equal property rights that unmarried women had possessed. The phrase *"after the passing of this Act"* meant that the money that woman had earned before August 1870 still belonged to her husband if the property was not placed in the fund before that, which resulted in reduced protection of wife's property. Married women became liable for their contracts but only to the extent of their personal property and could not go to the prison for their debts.[38]

According to Elizabeth Wolstenholme Elmy, the *Married Women's Property Committee* alone would not have gained such success with its campaigns without the *Social Science Association* and work of its members.[39] Even through the reform did not meet expectations of most of the activists, it was a (temporary) compromise. The activists grouped in the *Married Women's Property Committee* did not stop their efforts to gain full property rights for married women. Between 1875 and 1882 Committee collected 60,000 signatures on more than 1 600 petitions, printed and distributed leaflets, pamphlets.[40] Their efforts were not in vain. In 1882 Married Women's Property Act was issued and after 25 years of efforts England had a law that stated that a married woman could hold and dispose with property in the same manner as if she were femme sole.

5 Conclusion

The first organized women's efforts to gain equal legal rights began in the middle of the 19th century. Barbara Leigh Smith Bodichon and her circle of activists created the petition that started efforts to amend the women's property law. These efforts bore fruit in 1870 by issuing *Married Women's Property Act* 1870. The law enabled married women to dispose of their property but did not bring them the same property rights as single women and widows had. The emancipation women's movement still wanted equality

37 An Act to Amend the Law relating to the Property of Married Women. *The Public General Statutes Passed in the Thirty-Third & Thirty-Fourth Years of the Reign of Her Majesty Queen Victoria*. London: G. W. Eyre and W. Spottiswoode, 1870, pp. 577–578.
38 SHANLEY, op. cit., p. 71.
39 GOLDMAN, op. cit., p. 126.
40 HOLCOMBE, op. cit., p. 186.

of married and unmarried women, embodied in demand that the law would explicitly state that married woman had the same property rights as if she was *femme sole*. This principle was introduced in *Married Women's Property Act 1882*. Gaining property rights of married women was one of the biggest achievements of the movement in the 19th century but women still did not have the same legal and social position and possibilities as men did.

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Special Court Martial of General Radola Gajda

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-9

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Abstract

Immediately after the Czechoslovak legionnaires got involved in the Russian Civil War, a legal confusion arose in their ranks. Although their own military courts were slowly being established, the Czechoslovak Army Corps was fragmented throughout Siberia into several groups that were in minimal contact with each other and in varying states of organization.

The commander of one of these groups was the ambitious officer Radola Gajda who, depending on whether we believe the testimony of his officers or not, either did not receive or ignored the order to create a unified court system and instead created his own, the so-called Special Court Martial.

This paper deals with the functioning of this specific judicial body, which became known for the arbitrariness of its decisions and draconian punishments. The result of an investigation that was later ordered to clarify the courts legitimacy and mitigate some of the punishments will also be described.

Keywords

Czechoslovak Legion; Military Criminal Law; Military Courts; Russian Civil War; Radola Gajda; Special Court Martial.

1 Introduction

The system of law and courts of the Czechoslovak Legion in Siberia is still a largely unexplored topic. One of the aspects of this period is the fact that the entire court system was created and brought to life in a relatively short time and with very few excesses. Of those that the system did not avoid,

the most prominent was the so-called *Special Court Martial* [Zvláštní válečný soud], created by Captain (later General) Radola Gajda.[1]

This court, which was created in the turbulent period of months after the revolt of the legionnaires against the Bolsheviks in 1918, was characterized by arbitrariness in decisions, severe punishments and complete subordination to the will of General Gajda and his deputy Colonel Ushakov.

The court was promptly abolished by order of the Chairman of the *Legal Department of the Branch of the Czechoslovak National Council in Russia* [Právní odbor Odbočky Československé národní rady v Rusku] at the end of the summer of 1918.

The sources for the research of this court body and its operation are the preserved archival materials, in particular the testimony of its investigating judge Second Lieutenant Bohumil Taufer,[2] an entry in the *Report on the Functioning of the Legal Department of the Branch of the Czechoslovak National Council in Russia*[3] [Zpráva o fungování Právního odboru Odbočky Československé národní rady v Rusku] and two extensive letters of complaint sent

1 Radola Gajda (1892–1948) b. Rudolf Geidl was an officer in the Austrian army when he defected to the Montenegrins in 1915 and joined their army. After the defeat of Serbia and Montenegro, he was transported to Russia, where he first served in the Serbian exile army (he fraudulently obtained the position of medical officer), then transferred to the Czechoslovak Legions, and due to his brilliant tactical skills and good relations with the soldiers, he quickly rose through the ranks. He attained the rank of major general in the legions, the same rank he held later when he served as the army commander of Kolchak's regime in 1919. In the interwar Czechoslovak army, he attained the position of Acting Chief of Army Staff in 1926, but he was stripped of his rank in the same year due to his disputes with politicians and other officers and often radical opinions (the state leadership feared that he might carry out a coup inspired by Pilsudski's coup in Poland). Gajda later profiled himself as a leading Czechoslovak fascist politician, but he rejected German Nazism and in 1938 decidedly stood up for defence against German aggression. Although he did not collaborate with the occupation regime during the war, he was convicted for promoting fascism in the pre-war period and died in 1948. See LÁŠEK, R. *Československá generalita*. Praha: Codyprint, 2013, pp. 77–140.

2 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Doručená pošta.
It is important to note that Second Lieutenant Taufer's testimony is the most direct, but it is also clearly strongly influenced by his efforts to portray the creation and functioning of the court in the best possible light. His report contains a number of inconsistencies and obvious half-truths, therefore primarily the information that is credible in the context of other sources will be used, in other cases such suspicious parts will be pointed out with an explanation.

3 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.

by the Chairman of the Legal Department, Major Viktor Svoboda, to General Gajda.[4]

This article aims to describe the functioning of the mentioned court, its creation and abolition, but also the results of the investigation, which was initiated by the Legal Department of the Branch of the Czechoslovak National Council in Russia in the fall of 1918. The purpose of this investigation was to assess the legitimacy of the court, and the damage caused by its decision-making practice.

2 Czechoslovak Legion in Siberia and its System of Courts

The Czechoslovak Legions were stranded in Siberia at the turn of 1917 and 1918 as a result of the collapse of the Eastern Front of the World War and the Bolshevik coup d'etat in Russia.[5] Due to their status as an autonomous component of the French army,[6] they found themselves in a kind of gray zone, when, especially after the Peace of Brest-Litovsk, they were still a fighting in the rear of a state which was retreating from the First World War. A state on the brink of civil war, from whose territory hundreds of thousands of prisoners of the Central Powers were returning at the same time.[7]

These and many other reasons were the cause of friction between the legionnaires and the Bolshevik power represented by local soviets along the length of the Trans-Siberian highway. Disputes culminated in the outbreak

4 Both in Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Odeslaná pošta.

5 KLÍPA, B., PICHLÍK, K., ZABLOUDILOVÁ, J. *Českoslovenští legionáři (1914–1920)*. Praha: Mladá fronta, 1996, pp. 170–175.

6 MOJŽÍŠ, M. (ed.). *Československé legie 1914–1920*. Praha: Epocha, 2017, p. 76.

7 KLÍPA, PICHLÍK, ZABLOUDILOVÁ, 1996, op. cit., pp. 170–172.

of hostilities in May 1918,[8] which gradually grew into a full-fledged involvement of Czechoslovaks in the civil war on the anti-Bolshevik side.[9] This participation lasted until 1920, when the exhausted Czechoslovak Army Corps was evacuated from Vladivostok.[10]

In the period from March 1918, as a result of the separation from the Russian judicial system, there was an effort to create Legion's own system of courts and basic legal regulations by combining the experience of Russian, French and Austrian law.[11]

The result was a simple system of courts created during the spring of 1918 with the following composition:

- on the first level, regimental and train courts stood next to each other (the only difference was in the determination of jurisdiction – for regimental courts it was determined by personal affiliation to the regiment, for train courts by geographical proximity),[12]
- on the second level there were field courts.[13]

8 On 14 May 1918, there was a rift between prisoners of war of the Central Powers, returning from prison camps, and Czechoslovakian legionnaires, who were waiting at the Chelyabinsk railway station for the opportunity to continue their journey east. One of the prisoners threw a piece of iron from a passing train at a legionnaire of the 6th Rifle Regiment, which hit him in the head and knocked him unconscious. Legionnaires, believing their comrade to be dead, stopped the train and executed the culprit. An unarmed delegation of Czechoslovaks who went to explain the incident to the local soviet were arrested without questioning, as was the officer who went to negotiate their release. After three days without any explanation from the local Bolshevik leadership, the legionnaires occupied the town, freed their captives, and then retreated back to the railway station. Although the incident resulted in no further casualties, it served as a pretext for the Bolshevik leadership in Moscow to arrest representatives of the Czechoslovak National Council and issue an order to shoot any Czechoslovak found with a weapon. This was taken by the legionnaires as a de facto declaration of hostilities. MOJŽÍŠ, M. (ed.). *Československé legie 1914–1920*. Praha: Epocha, 2017, p. 82.

9 ORIÁN, E. *Československá legie v Rusku 1914–1920: Díl I*. Praha: Epoque 1900 a Naše vojsko, 2014, p.13.

10 For more details see e.g. MCNAMARA, K. J. *Dreams of a great small nation*. New York: Public Affairs, 2016.

11 NOVÁK, J. The draft of the Military Criminal Code and the law of the Czechoslovak Legion in Russia. *Annales Universitatis Mariae Curie-Skłodowska: Sectio G (Ius)*. 2024, Vol. 70, no. 3, pp. 49–65.

12 They were established by orders No. 25 of 9 March 1918, and No. 38 of 31 March 1918. See Rozkazy čsl. vojsku na Rusi 1917–1918. *Digitální knihovna* [online]. [cit. 27. 8. 2024]. Available at: https://www.digitalniknihovna.cz/dsmo/view/uuid:8d5a17df-e97b-4772-a926-c42292cbad93?page=uuid:9ceaaf47-fd23-11ea-9758-001b63bd97ba

13 SVOBODA, V. *Soudnictví v čsl. vojsku na Rusi*. Praha: Památník odboje, 1924, p. 17.

There was no appeal, the different levels of courts only dealt with crimes of varying severity.[14]

These courts had sole criminal jurisdiction over Czechs and Slovaks in Siberia, other nationals could only be tried if they were accused of acts against the Czechoslovak army or the Czechoslovak revolutionary movement (Czechoslovak anti-Habsburg resistance).[15]

The regulations according to which these courts made decisions changed over time – the basis was the French[16] (later the legionary's own)[17] disciplinary code, and later there was also an attempt to create a legionary's own criminal code.[18] Due to the lack of written copies of any regulations, however, the courts often decided on the basis of the judges' own discretion (legally educated judges usually tried to use the Austrian criminal code by memory), and their legitimacy was supposed to be given primarily by the fact that a large part of the judges were directly elected by those over whom they then exercised authority.[19]

Next to this system stood the independent disciplinary authority of the commanders.[20]

Legionary justice developed dynamically during the two years of its existence and, in particular, underwent a major reorganization in February 1919,[21] but this is beyond the scope of this article.

3 Special Court Martial[22] of General Radola Gajda

Since the Czechoslovak army was scattered along the entire Trans-Siberian highway in the spring of 1918, the establishment of courts took place

14 NOVÁK, J. Dishonourable discharge in the military criminal law of the Czechoslovak legion in Russia. *Herald of Legal History*. 2024, Vol. 4, no. 1, pp. 47–48.

15 SVOBODA, V. *Soudnictví v čsl. vojsku na Rusi*. Praha: Památník odboje, 1924, p. 19.

16 Code de justice militaire pour l'armée de terre du 9 juin 1857.

17 NOVÁK, J. Omezení sňatků v československých legiích na Rusi a jeho důsledky. *Právněhistorické studie*. 2023, Vol. 53, no. 2, pp. 140–141.

18 NOVÁK, J. The draft of the Military Criminal Code and the law of the Czechoslovak Legion in Russia. *Annales Universitatis Mariae Curie-Skłodowska: Sectio G (Ius)*. 2024, Vol. 70, no. 3, pp. 49–65.

19 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.

20 SVOBODA, V. *Soudnictví v čsl. vojsku na Rusi*. Praha: Památník odboje, 1924, p. 21.

21 Order of the Minister of War No. 588. Its detailed analysis is beyond the scope of this work. See e.g. VÁCHA, D. *Prokletá magistrála*. Praha: Epocha, 2019, p. 115.

22 Special Court Martial of General Gajda – This name commonly appears in the texts of the chairman of the Legal Department, Major Svoboda, which is why it was also chosen for this article.

slowly, unevenly and in some places in a very improvised manner.[23] Soon after the beginning of fight against the Bolsheviks, the Czechoslovak units united into several geographically separate groups, among which was the so-called Eastern or Nikolaev group under the command of (then) Captain Gajda.[24]

Different groups took differently strict measures against the Bolshevik enemy, but Captain Gajda chose strict approach and, in cooperation with the anti-Bolshevik movement, began to proceed forcefully against all destabilizing elements.[25]

Despite the fact that as early as March 1918 individual units were supposed to have courts corresponding to the legionary judicial system, none were created in the units under Gajda's command, and at the turn of the spring and summer of that year (the exact date cannot be read from the surviving documents, but it can certainly be said that no later than the beginning of July)[26] the so-called Special Court Martial (sometimes also called the Special Field Court – apparently to be closer to the nomenclature of other legionary courts) is created.[27]

The court did not correspond in any way to the system established in the rest of the army. It consisted of at the beginning one, eventually three judges (two Czechs and one Russian) and one investigating judge.[28] It itself established authority over all who would

- threaten the Czechoslovak army;
- threaten the White Army;
- threaten the White authorities;
- threaten public order in the group's operational area.[29]

23 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.
24 LÁŠEK, R. *Československá generalita*. Praha: Codyprint, 2013, pp. 84–88.
25 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Doručená pošta.
26 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.
27 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Odeslaná pošta.
28 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Doručená pošta.
29 Ibid.

The decisions of the court were not final in themselves, they always had to be confirmed by Gajda or his representative, the Russian colonel Ushakov. The question of guilt as well as the types and harshness of punishments in the draft judgments relied purely on the discretion of the judges without being based on any regulations and could be changed in any way before their confirmation by Gajda or Ushakov.[30]

Furthermore, it is important to note that there was no independent public prosecutor – this function was performed by the investigating judge, who then usually created the draft judgment by himself or in the senate.[31] The defendants were not allowed to have a lawyer and could not appeal against the verdict.[32]

This is particularly significant because the court routinely handed down draconian sentences, which both General Gajda and Second Lieutenant Taufer later defended by saying that the situation was too tense, and they were overwhelmed with too many cases to adhere to the "rules of modern law."[33]

Decisions were made without a court hearing, only on the basis of written documents and separate questioning of witnesses and defendants by the investigating judge[34] (which was by no means always done properly, again allegedly for "a large number of cases").[35] Finally, it should be added that the files of individual cases were not archived, i.e. they were not preserved – allegedly the files were kept "in the Russian way" most of the time and in the end, they were not preserved.[36]

The court operated between July and September 1918, when reports about the judicial practice of Gajda's group reached the Legal Department

30 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Doručená pošta.

31 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.

32 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Doručená pošta.

33 Ibid.

34 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.

35 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Doručená pošta.

36 Ibid.

of the Branch of the Czechoslovak National Council and the "Special Court Martial" was promptly dissolved.[37]

4 Aftermath

Since the entire existence of the Special Court Martial was a fundamental excess from the prescribed system of legionary law and courts, it was not long before an official, if quiet, investigation was launched to assess its legitimacy and the damage its unusual practice had brought.[38]

General Gajda was at this point transferred to another unit and wasn't prosecuted in any way, his judges were asked to arrive and give an explanation at the headquarters of the Legal Department. However, only Second Lieutenant Bohumil Taufer, who was the first and therefore the longest-serving judge of the Special Court Martial, gave an explanation for all of them. This explanation was given in the form of a lengthy letter and contained a number of arguments defending the necessity and style of the court's operation. At the same time, Second Lieutenant Taufer explained there why he did not appear at the Legal Department in person and why he couldn't do so in the foreseeable future, but that he will make a visit as soon as possible.[39]

General Gajda tried to create a similar court in his new unit for the second time, but this time he was already under a strict supervision of the chairman of the Legal Department, Major Viktor Svoboda, who resolutely interrupted these attempts and strongly warned Gajda against repeating this behavior.[40] Just a few weeks later, Gajda requested a long-term leave from the Czechoslovak army and joined Admiral Kolchak's Siberian Army with the rank of general.[41]

Second Lieutenant Taufer's argumentation defending the existence of the Special Court Martial was based mainly on the alleged necessity of a strict

37 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.

38 Ibid.

39 This never happened and, as far as we know, he was not prosecuted for it.

40 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Odeslaná pošta.

41 LÁŠEK, R. *Československá generalita*. Praha: Codyprint, 2013, p.89.

court in the conditions of the chaos of the civil war. At the same time, he claims in his testimony that *"General Gajda's group moved along the railway in a range of more than 5,000 versts,*[42] *so it was necessary to make decisions quickly and forcefully."*[43]

For these reasons, the court was said to be unable to *"follow the normal principles of criminal procedure,"* but Taufer swore that he *"always followed his best knowledge and conscience and the principles of jurisprudence when making decisions."*[44]

Taufer further claimed that the court was created as an improvisation, as the orders to create a system of courts did not reach the group and when the *Československý denník*[45] arrived, the copies were taken by the soldiers too quickly, thus no copy reached him or General Gajda[46] – it should be noted here that such a claim is extremely doubtful and is most likely just Taufer's excuse.

The legal department faced the difficult task of issuing an official statement on Gajda's court. Although the obvious solution was to strongly distance legionary justice from it and overturn all its judgments, the large number of cases that would thus be overturned was an obstacle.[47] The truth was that many of those convicted in this way would have been sentenced by a legitimate court as well, albeit less severely, and the Legal Department could not afford to let such a large number of criminals escape without punishment.[48] At the same time, public condemnation of this court would open the door to Bolshevik propaganda, as the court also sentenced a number of Russians to prison or death.[49]

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42 Versta (Russian: верста) is an old Russian measure of length, sometimes called Russian mile. 1 versta = 1066.781 meters.

43 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Doručená pošta.

44 Ibid.

45 The main newspaper of the Czechoslovak Legion in Siberia. In addition to normal newspaper content, regulations and some orders were published through it.

46 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Doručená pošta.

47 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Odeslaná pošta.

48 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.

49 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Odeslaná pošta.

It was therefore decided to settle the matter by a not-so-elegant compromise – it was declared that while the court was illegitimate, all those convicted by it would have been sentenced the same even if they had stood before a legitimate court. Those who had not yet served their sentences were given conditional pardons.[50]

It can be read from Major Svoboda's letters to Gajda that, as a lawyer, he was ashamed of his own argumentation and repeatedly pointed out that it was a distortion on his part, denying the principle that no one can be taken away from their lawful judge.[51]

As for the members of the Special Court Martial or General Gajda, none of them were punished for this excess.

5 Conclussion

The existence of the Special Court Martial offers a great opportunity to explore what an undirected effort to enforce order in the field of combat in Siberia might have looked like, in contrast to the highly controlled system established in the rest of the Legion.

On the Special Court Martial, we can observe the randomness of decision–making, the interference of external elements (General Gajda, the commander of the unit, i.e. the person from whom the judges should be independent). We can also observe a whole series of mistakes against the principles of jurisprudence or general administration, such as the absence of oral proceedings in court, failure to keep files or the impossibility of defense.

The fragility of the position of legionary justice in Siberia can be seen in the subsequent investigation and the absence of consequences for those involved in the creation and functioning of the court. Here, too, one can clearly see the unfortunate position of the Legal Department, which, although for most of the time very well followed the rules of modern jurisprudence, was still in some moments forced to act with regard to the political consequences of its decisions.

50 Vojenský historický archiv, f. Sbírka důležitých dokumentů 1. odboje, k. 1, složka Zpráva o činnosti právního odboru.

51 Vojenský historický archiv, f. Odbočka Československé národní rady v Rusku, k. 56, složka Odeslaná pošta.

In conclusion, it should be recalled that the Special Court Martial was the only excess of its kind in the legionary judicial system, and it can thus be said that the Legal Department was generally successful in maintaining order in the courts.

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Establishment of the District Youth Care in Dolný Kubín: the Development of Social Care for Children and Youth in the Years 1930–1945

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-10

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Abstract

The 1930s and 1940s marked a period of significant transformation in social care within the First Czechoslovak Republic. In an effort to unify fragmented legislation and establish an effective social welfare system, particular attention was directed towards the needs of minor children and adolescents, who represented one of the most vulnerable segments of the population. This study examines the establishment and operation of the DistrictYouth Care in Dolný Kubín, focusing on its role in providing social care for minors in one of the poorest regions of Slovakia.

Keywords

Czechoslovakia; District Youth Care; Social Care; Minors.

1 Introduction

The inter-war period brought the need for significant changes in social welfare issues. The hitherto functioning scheme of social care provision, where the primary role was not played by public social care, but rather by private institutions, associations and voluntary social care, proved to be insufficiently effective, especially in the context of the events of the First World War, and especially in the territory of Slovakia. Therefore, it was necessary to implement structures in Slovakia that would result in the unification of the quality and efficiency of the social care provided to minors and adolescents. For this reason, in the first half of the 1930s, a process of establishing district youth welfare services in Slovakia was initiated, which were to ensure an increase in the expertise and quality of social care

provided to minors. In the following text, attention is paid to the process of establishing a specific district youth care in the Dolný Kubín district. The presented paper analyses the activities of the selected district youth care from its inception, through the change of political system to the period of the end of the biggest war conflict in history.

2 Establishment of District Youth Care in the Therritory of Slovakia

In the territory of Slovakia it is possible to observe the establishment and active participation of district youth welfare services in social welfare, especially during the 1930s and 1940s. Unlike in the Czech territory, where the formation of an organised network of these institutions had already taken place a decade earlier, by the 1930s the network of district youth welfare services in Czech countries was anchored, with more than 200 district youth welfare services, which brought together thousands of members. In the period before the establishment of the district youth welfare scheme in Slovakia, public social welfare for minors was mainly carried out through orphan associations, which are described as the forerunners of the later district youth welfare associations. In the period before the establishment of the district welfare boards, individual municipalities played an indispensable role in the issue of public social welfare, and not only for minors. The residence of an abandoned or dependent child was the determinant of which municipality or town had the responsibility and obligation to provide for that child. However, the expertise and quality of the care provided varied according to the financial resources of the municipality or city.[1] The period after the end of the largest war conflict to date brought many changes to the territory of Slovakia. The establishment of a new state formation, the First Czechoslovak Republic, brought with it the need to create and unify the hitherto effective legislation in this territory across all legal sectors. The area of social welfare was no exception and legislative processes were initiated to unify the legal order of the newly developed state in the matter of the social policy of the state.

1 FASORA, L. Centralistic trends in organizing of youth care in historical countries of Czechoslovakia 1918–1938. *Museums and Homeland History Society*, 1999, Vol. 61, no. 2, pp. 156–160.

Social care in the First Czechoslovak Republic can be differentiated into two basic categories, namely private social care and public social care. It was the public component of social care that was to play the primary role in providing social care, but in view of the needs of the war-torn society it was not possible to ensure sufficiently effective provision of this type of care without the intervention of private providers. Private social care was complementary to public social care and consisted mainly of humanitarian institutions set up and supported by private funds from individuals or groups to provide various forms of social assistance. These organisations could operate either locally or nationally. Examples of the above-mentioned organisations with a national scope were the Czechoslovak Red Cross, the Czechoslovak Protection of Mothers and Children or the Association of Czechoslovak Care for Children.[2]

3 Model Statutes for District Youth Care

District youth care, which were legislatively anchored in the early 1920s, were only sparsely regulated in the actual diction of the law. In order to ensure effective and uniform functioning, the adoption of other legal documents was necessary to ensure this goal. The legislator also sought to establish a uniform internal administrative scheme, which was subsequently implemented in the gradually emerging district youth welfare authorities across the Czechoslovak Republic. The creation of this document was characteristically the responsibility of the Ministry of Social Welfare, which in 1921 drew up model statutes for district youth care.[3] The main task of the model statutes was to build a unified structure to ensure continuous activity in the field of child and youth care in the individual districts.

One of the most important competences of the district youth welfare boards was the power to establish institutions to improve the quality of care for children and youth in specific districts. To this end, the district youth welfare authorities had the power to establish counselling centres for mothers with children or for adolescents choosing a career, shelters, children‘s homes

2 NĚMCOVÁ, P. *History of social care for children at risk in Czechoslovakia in the 20th century*. Ostrava: University of Ostrava, Faculty of social studies, 2017, p. 16.

3 Ministry of Social Welfare Decree No. 3188 from 21 March 1921.

as well as kindergartens. In the same way, the district youth care cumulated and covered the agenda of voluntary social activities in the individual districts. Its task was to encourage the participation of society either through financial contributions or by actively taking custody of a dependent child.

In 1930, a government decree was adopted implementing Act No. 256/1921 on the protection of children in the custody of others and children born out of wedlock. The wording of the Government Decree stipulated that the supervision of children enjoying protection under the aforementioned Act was carried out in the Slovak and Subcarpathian-Russian lands by the guardianship (orphan) authorities of the First Capital, whose jurisdiction depended on the child's place of residence. However, the exercise of the supervision in question could be delegated to specific distrct youth care if they were established in the district. However, this was only feasible if the specific district youth care centre had consented to the transfer, the transfer of competence had been carried out in accordance with the directives issued by the Ministry of Social Welfare and it was reasonable to assume that the district youth care centre would carry out the task properly.[4] Where the above authority was transferred to the district youth care, it supervised minor children placed in the care of others, as well as illegitimate children who were subject to supervision under the dictates of the government regulation. Minors, however, were not the only group subject to the supervision of the district youth care. It was also responsible for the supervision of persons who were found competent to have a minor child in their personal custody. Last but not least, the county youth welfare supervised the trustees providing supervision in a particular district.[5]

The government regulation envisaged close cooperation between the supervising authorities, which could be district youth welfare offices and local authorities. The latter were to provide cooperation in particular in the provision

4 See the provision of §3(1) of Government Decree No. 29/1930 implementing Act No. 256/1921 on the protection of children in the custody of others and children born out of wedlock (Vládne nariadenie č. 29/193. Sb. ktorým sa vykonáva Zákon č. 256/1921 Sb. o ochrane detí v cudzej starostlivosti a detí nemanželských).

5 See the provisions of § 10 of Government Decree No. 29/1930 implementing Act No. 256/1921 on the protection of children in the custody of others and illegitimate children (Vládne nariadenie č. 29/193. Sb. ktorým sa vykonáva Zákon č. 256/1921 Sb. o ochrane detí v cudzej starostlivosti a detí nemanželských).

of records of children placed in the care of others, illegitimate children and reports on such persons. The reporting obligation was also extended to schools, which, like the municipalities, had a reporting obligation established by the regulation in question in the event of a reasonable suspicion of the need for intervention.[6] District youth care carrying out supervisory activities were obliged to produce an annual report on their activities for the previous year within the first month of the calendar year. In special cases, it was possible to request that a report on the activities of a youth welfare district also be drawn up during the year. The government regulation referred to a special situation in which it was possible to request a report on the activities of a district youth care, for example, a change in the person of the public guardian in the district.[7]

In order for the various district welfare offices to effectively carry out their respective powers and tasks, it was necessary to create a staffing substrate that would support the functioning of the public administration in the field of child and youth welfare. To this end, so-called trustees were appointed for each municipality and town in the district. If a municipality did not have the financial resources or a suitable person could not be found to perform the above function, it was possible for one person to act as a trustee for several municipalities at the same time. However, this situation was not desirable as it increased the workload of the individual trustee, which affected the quality of the work carried out. On the other hand, it was possible to appoint several trustees for larger towns and municipalities with a larger population and sufficient financial resources. The job of the trustee was to take care of the healthy development and sufficient social security of children and young people in the designated municipality or town.

Citizen participation in the districtɔs youth welfare agenda was made possible through membership. A natural person could become a member, and so could a legal person, while members were mostly natural persons. These

6 See the provision of § 22 of Government Decree No. 29/1930 implementing Act No. 256/1921 on the protection of children in the custody of others and illegitimate children (Vládne nariadenie č. 29/193. Sb. ktorým sa vykonáva Zákon č. 256/1921 Sb. o ochrane detí v cudzej starostlivosti a detí nemanželských).

7 See the provision of § 26(2) of Government Decree No. 29/1930 implementing Act No. 256/1921 on the protection of children in the custody of others and children born out of wedlock (Vládne nariadenie č. 29/193. Sb. ktorým sa vykonáva Zákon č. 256/1921 Sb. o ochrane detí v cudzej starostlivosti a detí nemanželských).

members were further differentiated into several groups namely honorary, active, founding and contributing members.[8]

Table no. 1: Number of members of the district youth care in Dolný Kubín for the years 1934–1936

Year	Total	Of which			
		Honorary	Founding	Contributors	Active
1934	108	3	/	/	105
1935	120	3	/	95	22
1936	153	/	6	147	36

Each district youth care also set up administrative bodies to ensure the running and administration of these institutions. These were the general assembly, the administrative committee and the presidency.[9] The number of members in each governing body was not identical from year to year and the number of members changed frequently. In the case of the administrative committee members could be elected or delegated.

The main powers of the General Assembly include the agenda related to the management of the youth care district, namely the approval of the budget or the review of the final accounts. Likewise, the General Assembly elected the members of the Administrative Committee and, together with the Administrative Committee, decided on the granting of honorary memberships.

8 Honorary membership was awarded to persons for merit in their long-standing work in the field of social care for children and young people. Founding and contributing members were differentiated based on the amount of funds they periodically contributed to the activities of a particular youth welfare district. The category of active members primarily included trustees and persons appointed by the board of directors of a youth welfare district. In: State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

9 On the basis of the annual report of the District Youth Care in Dolný Kubín for the year 1934, the General Assembly consisted of 15 members, the Administrative Committee consisted of a total of eight members, six of whom were elected and two delegated. In: State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

Work groups were also created with a more specific and narrower focus on a particular area of social care for children and adolescents. In 1934, the district youth care in Dolný Kubín established two work groups, work group focused on meal providing to children in need and thework group responsible for clothing provision.[10] The legislator did not stipulate in the regulations the obligation for the district care to establish specific working departments. Their existence and the area they targeted depended on the specific needs of a particular district. The activities of the work groups were supervised by an administrative committee, which periodically submitted a report on their activities to the committee.

As we have already mentioned above, the trustees were an integral part of the internal structure. These were persons belonging to the membership of the District Youth Welfare Boards who were appointed to office by the Board of Trustees. The trustees of the individual district youth welfare organisations were organised into a ‹trustee body›, which was obliged to meet at least once a year. Elected members of the trustee body also attended the board of trustees. The main task of the trustees was to seek out minors in the designated municipality or town who were in need of social care and protection. Therefore, it was the desire of the district caretakers to fill these positions with citizens coming into contact with children and youth on a regular basis. The most suitable candidates were therefore considered to be teachers, with whom the various youth welfare districts worked closely.

4 District Youth Care in Dolný Kubín

While in the Czech lands and Moravia, district youth welfare services were established and actively provided social care from the 1920s, in Slovakia and Subcarpathian Rus they were established later. The activities of the district youth care started a year before its official establishment in 1932. Due to the need to increase the efficiency and quality of the social care provided, a reorganisation process of youth care was initiated, which was completed for

10 In 1934, the work group for meal providing consisted of a total of five members, and meetings were held five times a year. In: State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

the northern region of the territory of Slovakia with the creation of district youth care for all three district towns in Orava region.[11] The tasks of the district youth care were broadly conceived. They were to provide food and clothing for poor children, to place abandoned or orphaned children in state orphanages, and to arrange holiday convalescence for sick minors. They were also to provide preventive and counselling activities for mothers with children and unemployed adolescents and, last but not least, to arrange for the distribution of medicines in the district.

The above-mentioned extensive list of functions of the district youth welfare offices could not be fulfilled in its entirety since the beginning of the active activity of the district youth welfare offices, mainly due to financial and personnel underdimensioning. The most prominent problem that fell within the agenda of the district youth welfare was the issue of meal prividing for minors.[12] Minor children were often not provided with adequate nutrition, which had a negative impact on the development of the children and therefore required intervention by the district youth welfare. With funds from the district welfare, six feeding stations were set up across the district in 1931, which provided meals to an average of 400 minor children on a daily basis. At this time, however, the district youth care was not yet in proper operation and was struggling mainly with staffing problems, which were evident in the shortage of trustees in the district.[13]

A total of 36 municipalities were brought together under the auspices of district youth care, which jointly provided social care for children and

11 In the course of 1932, district youth welfare offices were established in all three Orava district towns: in Dolný Kubín, Námestov and Trstená. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

12 The annual report of the District Youth Care in Dolný Kubín pointed out the fact that the normal diet of minors consisted mostly of potatoes and cabbage, which were not sufficiently nutritious for the healthy development of minors. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

13 The District youth care in 1931 did not associate with any other institutions providing social care for children, nor had established any societies, institutes, or institutions of any other kind contributing to the improvement of the quality of social welfare for underaged children and youth in the district. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949, (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

youth in the district. The membership base of the district care consisted of 135 contributing members whose contributions accounted for a significant portion of the district youth care funds.[14] The annual report for year 1931 also recorded 22 active members who took an active part in the provision of welfare for the minor children and youth living in the district. The District Youth Welfare was housed in the premises of the District Court in Dolny Kubin, and two office days per week were established.[15]

Since 1932, for the first time, it was possible to observe the registration of two founding members. The activities of the District Welfare continued to be mainly oriented towards the question of feeding minors, and in the first year of proper operation the number of feeding stations was increased to seven. Not only were the funds of the district youth care spent on this activity, but also a state subsidy of 8,000 CZK was provided, which represented more than 60% of the total costs incurred in the operation of the feeding stations in the district. Subsidies were not the only way in which the state financially assisted the running of district youth welfare. By decree of the Ministry of Finance, all official activities of the district youth welfare services were exempted from fees.[16] A persistent problem was the shortage of trustees, with 34 citizens serving as trustees for the 36 municipalities grouped under the umbrella of the Dolný Kubín District Youth Welfare. This fact reduced the quality and efficiency of youth welfare in the Dolný Kubin district. The number of trustees was increased to the necessary 36 only in 1934 after the intervention of the school inspectorate, on the basis of which two teachers were appointed as trustees from the respective municipalities where trustees were absent.

14 The membership fee was voluntary, but there was a minimum amount each member was required to pay annually. The minimum annual fee for members was set at 6 CZK. This amount was calculated to cover the coasts for providing a hot meal for one minor for the duration of 10 days. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

15 State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

16 See Decree of the Ministry of Finance from 30 January 1929 No. 4241/29-V/16 and Decree of the Ministry of Finance from 9 January 1930 No. 15409/27-II-14.

5 Internal Organization of the District Youth Care in Dolný Kubín

The District Youth Welfare in Dolný Kubín had internal bodies, namely: a general assembly, an administrative committee, a presidency and a board of trustees. These bodies were to ensure an efficient and transparent functioning resulting in quality social care for minors and youth in the district.

The General Assembly elected twelve members of the Administrative Committee, whose term of office was fixed at three years. The General Assembly also had the power to elect two auditors of the accounts and the treasury, together with two alternates. The amount of the membership fee was fixed annually by a decision of the General Assembly. The general meeting itself was convened on the initiative of the management committee, usually once a year at the beginning of the calendar year. If necessary, an extraordinary general meeting could be convened, but only if at least 20 members requested it.[17]

Another invaluable body was the Administrative Committee. As mentioned above, some of the members of the Administrative Committee were subject to election by the General Assembly, but the remaining members were delegated from offices and corporations in the district. Delegated as members of the administrative committee were representatives of the district political administration, the district committee, the orphan/guardianship office of the first stool,[18] doctors, notaries, teachers and the church. Associations active in the field of social welfare, such as the Czechoslovak Red Cross, the Masaryk League against Tuberculosis and Živena, were also represented on the administrative committee. The main function of the administrative committee was the election of a chairman and a vice-chairman for a three-year term of office. It was also responsible for approving the regulations of procedure and organisation.

17 State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

18 See Act No. 246/1922 on the Provisional Regulation of the Guardianship and Guardianship Agenda in Slovakia of Subcarpathian Rus (Zákon č. 246/1922 Sb. o dočasnej úprave poručenskej a opatrovníckej agendy na Slovensku a v Podkarpatskej Rusi).

The Board of the district youth care consisted of the President and Vice President, two selected members of the Board of Directors, and the Treasurer of the Youth Care District.[19] The post of Secretary of the District Youth Welfare was an important position, largely held by the principals of the schools in the district.

As we have already pointed out in the text above, the district youth welfare was responsible for several sectors of social welfare, and it was in order to deal more efficiently with a particular agenda that the work groups were created. In the first years of the activity of the district youth care in Dolný Kubin, the work group focused on meal prividing and clothing provision were created, the establishment of which was conditioned by the alarming state of nutrition and material security of underage children across 36 municipalities grouped under the district youth welfare. Over the period of the district care, the list of working departments was expanded to include a department for the protection of mothers and infants, a department for the care of adolescents and apprentice youth, a department for the legal protection of youth, and a department for economic and financial agenda.[20]

In the mid-1930s, the county›s juvenile welfare begins to establish cooperation with other institutions and organizations involved in the provision of social services to juveniles. These included cooperation with the school inspectorate, which helped to fill the posts of trustees from among the teaching staff, with parish authorities or the district hospital and the insurance company. The district›s youth welfare agenda expanded to include new issues as it continued to operate, and this was reflected in the extension of office hours from the original two days a week to three days a week.

The district was primarily focused on agricultural activities, as there was no industrial infrastructure. This resulted in a higher unemployment rate negatively affecting the quality of care for minors. The high incidence of tuberculosis, which was a common cause of mortality in the first half

19 The body met on a periodic basis, usually once a month. The content of the meetings was to discuss points raised by the Administrative Committee. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

20 State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1, p. 11.

of the 1930s, was also a problem. High mortality was also detected in the population group of children under one year of age, which accounted for up to 20% of the total mortality in the district in 1934, exceeding the national average for mortality among minors.[21] This fact was attributed to the poor quality and only sporadically carried out preventive care, especially for minors under one year of age. During this period there continued to be no public guardian in the county, who was not appointed until 1935, when a public guardian was established under the county juvenile guardianship as of 1 February 1935.[22]

Table no. 2: Number of trustees as of 31 December, years 1935 and 1936

Year	Total	Of which		Place of location			
		Matrimonial	Non-marital	Placed with mother	Placed with relatives	Placed in foster care	Placed in institutional care
1935	1 304	1 125	179	1 164	37	0	103
1936	1 258	1 070	188	1 106	40	1	111

The second half of the 1930s saw a boom and increased support for social and health care facilities that also focused on prevention. The above-mentioned purpose was served in particular by facilities for the preventive care of children in families and counselling centres for mothers and children. The district youth welfare also extended its support activities to care for children in families, which it supported by distributing food, clothing, funds or placing children in holiday care.[23] Minors whose social background was

21 Data from the Statistical Office gathered for the year 1934 declared a total of 750 deaths in the Dolný Kubín region. Of the total, 151 of the deaths were cases of minor children under one year of age. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

22 State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

23 A total of 757 children in the district were provided with support care during the year 1935 in the various above mentioned forms. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

assessed as insufficient for healthy development were placed in substitute custody in state care facilities provided through the District Youth Care.

In 1936, minors were placed in institutional care in state facilities in Liptovský Mikuláš, Rimavská Sobota, Bratislava and Košice. The public guardian maintained a register of orphaned children as well as half-orphans in the district who needed to be provided with an increased level of social care. In 1936, 1,258 orphans and half-orphans were registered by the public guardian in the district. The regional office synchronized the activities of the district youth guardianships, and by decree fundrasor for collecting supplies for minors in need was also organized in the Dolný Kubín district, the proceeds of which were used to help protect children in need.[24] The collected funds were primarily used to support children placed in orphanages, vocational institutions or foster families. The regional youth care center in Bratislava[25] also contributed subsidies for the purpose of providing food and clothing. Also on the basis of the support received, an average of 300 children were fed daily in the district under the auspices of the district youth welfare and it was possible to build feeding stations in other villages. The clothing subsidy was used to provide clothing to 450 underage children in the district.

6 Cooperation of the District Youth Care in Dolný Kubín with the Czechoslovak Red Cross

In the first half of the twentieth century, the Czechoslovak Division of the Red Cross was an integral part of the structure of social care for minors in Czechoslovakia. The organisation›s activities extended into several areas of social protection and security for minors. One of the areas of social

24 See Decree of the Regional Youth care center No. 287.970/1936-8 (Výnos krajinského úradu č. 287.970/1936-8), on the basis of which it was from 1 October to 3 November 1936 a *proces of* collecting donations for children in need was organized. In: State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

25 In 1936, the Regional Youth Care Center in Bratislava provided the District Youth Care in Dolný Kubín with a financial suppost of 10,000 CZK for a food providing operation and a financial aid of 5,000 CZK for a clothing alocation for minors in need. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

welfare in which the organisation played a significant role for the territory of Slovakia was the establishment and operation of counselling centres for mothers with children. This state of affairs persisted until the second half of the 1930s, since when it is possible to observe increased state intervention in the agenda in question. During this period, negotiations were initiated between the Czechoslovak Red Cross Division and the Ministry of Social Welfare, which resulted in an agreement to take over the administration of counselling centres for mothers with children to the district youth welfare[26]. The takeover of the counselling centres into the administration of the district youth welfare services was suppose to start at the beginning of 1937, but financial subsidies were needed to enable the counselling centres to continue their activities.[27] As a result of the agreement in question, the competence framework for the protection of mothers and children was completely taken over by the provincial and district youth welfare authorities. For this purpose, all the previously established workplaces and facilities serving the counselling centres for mothers and children were also transferred free of charge. The transfer of competences was not to be carried out in a one-off procedure, quite the contrary. The process was planned to take place over a period of several years, with an agreement to be reached in the first half of the year on which facilities would be transferred to the provincial and district administrations in the following year. For the region of Orava, this involved a total of nine counselling centres for mothers with children transfered to the three district youth care actively operating in Orava region up to the year 1945.

26 By an addendum to Decree No.A 3112-12/11-35 from 6 December 1935 (Dodatok k Výnosu č. A 3112-12/11-35 zo dňa 6. Decembra), the Ministry of Social Care announced that it had concluded an agreement with the central directorate of the Czechoslovak Red Cross Society in the matter of counselling for mothers and infants in Slovakia and Subcarpathian Ruthenia. In: State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

27 District youth care in Dolný Kubín also provided for this purpose from regional fund in the amount from 10,000 CZK. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 1.

7 Activities of the District Youth Care in Dolný Kubín since 1940

The 1940s were marked by the need for increased protection of minors whose living conditions had been worsened by wartime. Many children were left dependent, either because family members had gone to the front, because they had died or because their relatives had been unable to provide suitable conditions for their development. The responsibility for providing basic necessities for the rapidly increasing number of unaccompanied minors fell to the district youth care office. Its activities in the first half of the 1940s focused mainly on the issues of feeding, clothing and the provision of basic health care for underage children and adolescents.

In the winter months at the turn of 1941 and 1942, a feeding operation was organized in the Dolný Kubín district, which resulted in the provision of nutritious food for 380 minors for 65 days.[28] The financial subsidies for the feeding action, however, were insufficient to adequately provide food for the minors in the district, whose diet consisted mainly of cabbage and bread substitutes. Despite the largest feeding campaign organized by the Dolny Kubin district youth care to date since its establishment, the situation in the district in the area of feeding minors was acute, which was reflected in the duration of the feeding campaigns in the following years. Meal actions were re-initiated in the winter months of 1943 and 1944, as the winter months proved to be the most problematic for the provision of subsistence for the children. The feeding campaign lasted a total of 91 days, during which an average of 360 children were fed on a daily basis.

In addition to food, minors often needed to be provided with clothing. To this end, clothing operations were organised by the district youth welfare department, which took place at the same time as the feeding operation. In 1942, a total of 10 villages of the district participated in the clothing actions, with the help of which it was possible to clothe and provide shoes

28 A total of 25,433 servings of warm, nutritious meals were distributed to minors in the Dolný Kubín region by the county's Youth Services during the winter food providing program. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 2.

for 42 children.[29] In the following year, unlike the feeding action, the number of villages involved in the action and the number of children assisted by the action did not increase. On the basis of the annual report on the activities of the district youth care in Dolny Kubin, 8 municipalities were involved in the processes and 34 children were provided with clothing. A significant increase in interest can be observed in 1944, when the largest number of municipalities were involved in the action, on the basis of which material assistance was provided to the largest number of underage children in the district so far.[30] However, in spite of the abov mentioned factse, the annual report on the activities of the district youth welfare in Dolny Kubin for 1945 stated that of the total number of children under 14 in the district, up to 70% were poorly clothed and or barefoot.

Procuring medication for minors was also one area in which the county›s youth services was involved. Since medicines were not easily available and were often too expensive for families to provide for their children on their own, the district youth welfare was able to fund this cost from its allocated resources. In 1943, medicines for nine minor children were funded in this way.[31] Social welfare was also provided to adolescents, mainly in the form of arranging a job for an adolescent, providing clothing, or allowing them to participate in recreation. Voucher campaigns were also organised, distributing vouchers for milk, food and coal to families.[32]

The war conflict had a negative impact on the activities of the district youth care, especially in the area of counselling, which had to be completely suspended in the villages due to poor accessibility. The counselling rooms were mostly open once a month, but their facilities were inadequate

29 State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 2.

30 During years 1944 and 1945, a total of 15 villages participated in the fundrasing for clothing provision of the district youth care in Dolný Kubín whitch resulted in providing suitable clothing and footwear for total of 68 children in thhe region. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 2.

31 State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 2.

32 Sixty families were issued vouchers for coal with a total value of 3002 Ks, twenty-six families received vouchers for food and milk with a total value of 1605 Ks. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 2.

and the counselling sessions were held in the premises of the municipal school. Counselling was maintained on a regular basis in Dolný Kubín, where counselling was provided one day a week, but attendance was low. A rapid decline was also registered in the number of visits by social workers to families, as it was necessary to obtain a pass from the German military units stationed in the region before they could travel to near by villages in the district.[33] The low activity or, in the case of several municipalities, the complete suspension of counselling centres for mothers with children had negative consequences on the already unfavourable situation in the Orava region. The district of Dolný Kubín in statistical reports showed one of the highest infant mortality rates in the state, and the absence of counselling centres, whose task was not only to register infants but also to monitor their health status, contributed to exacerbating the high mortality rate of this population group in the district.

Table no. 3: Extract from the birth and death records of children under 1 year of age in the Dolný Kubín district for the years 1940–1945

Year	Children born		During the year, the following died	Total deceased
	Live	Dead		
1940	516	11	78	89
1941	500	10	59	69
1942	535	4	93	97
1943	528	6	98	104
1944	516	5	93	98
1945	525	2	116	118

The Public Guardian also carried out his agenda during the war, and in 1941 a total of 753 minors were recorded in the Public Guardian›s records, of whom 7% were illegitimate children. The children registered were placed with parents, relatives, foster parents, and in 15 cases minors were placed in institutional care. The Public Guardian made *ad hoc* visits to children placed

33 State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 2.

in out-of-home care and carried out on-site intervention when necessary.[34] However, if the situation could not be resolved, the Public Guardian referred the complaint to the competent court. An important agenda of the Public Guardian was the performance of the Youth Court Auxiliary, which he carried out together with one attorney.[35] The cooperation of the Public Guardian with the courts was intense. The Public Guardian was also involved in the area of alimony, which was evident in the filing of a total of 16 alimony actions in 1941. Likewise, he conducted investigations in cases where it was necessary to examine the social circumstances of minors, parents, relatives or foster parents who were responsible for the provision and upbringing of minors.

Table no. 4: Legal protection of youth, 1943–1945

Assisting in youth courts		In the year		
Total number of registered juvenile offenders		1943	1944	1945
		42	22	25
Judged by the Youth Court	By District	40	12	10
	By county	12	9	15
Left unattended in their current environment		41	21	25
Removed from their existing environment or placed under supervision		1	/	/

The period of the Slovak state brought updates to the legislative regulation of the agenda of public protection of youth, public guardianship and protective supervision through the law,[36] which came into force on 1 January 1942. The explanatory memorandum to the Act in question shows the

34 Based on the annual report on the activities of the District youth care in Dolny Kubin for the year 1941, the public guardian made a total of 68 visits to children placed in foster care. In: State Archive in Žilina, worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 2.

35 State Archive in Žilina, Worksite Archive Dolný Kubín, fund District Youth Care Dolný Kubín 1930–1949 (Okresná starostlivosť o mládež Dolný Kubín 1930–1949), box no. 2.

36 Act No. 213/1941 Sl.z. on public protection of youth, public guardianship and regulation of protective supervision (Zákon č. 213/1941 Sl.z. o verejnej ochrane mládeže, verejnom poručenstve a úprave ochranného dozoru).

legislators concern to reflect the negative situation caused by the high mortality rate of underage children.[37] The newly adopted law was intended to achieve unification of the hitherto fragmented legislation in the field of social welfare for minors. The changes were particularly noticeable in the conditions imposed on the persons who were to be appointed as public guardians. Religion became an important aspect in the selection of a public guardian. This could be seen in the explanatory memorandum to the Act in question, but also in the wording of the Act itself, as exemplified by the provision of Section 4(4).[38]

The wording of the law extended public protection to all minor children, in need of protection until the age of adulthood and thus protection was also granted to children of divorced, separated or those who dissolved their cohabitation without divorce. However, owing to the unfavourable financial situation, it was not possible to establish the function of public guardian as a separate office. The report of the Budget Committee on the Act in question envisaged that the function, with low remuneration, would initially be carried out by qualified persons of retirement age, which necessitated changes to other legislation.[39]

37 We need to pay even closer attention to this most important issue, because even with the current care for the youth, our nation has declined in population, as the university professor MUDr. Alojz J. Chúra proves in his work Slovensko bez dorastu? In Social and Health Committee on proposal Act No. 213/1941 Sl.z. on public protection of youth, public guardianship and regulation of protective supervision (Zákon č. 213/1941 Sl.z. o verejnej ochrane mládeže, verejnom poručenstve a úprave ochranného dozoru), p.1.

38 The Social and Health Committee expressly demands that all guardians for the public protection of the minors and youth be theoretically and practically skilled in the religious-moral principles of Christianity. In: Report of the Social and Health Committee on proposal Act no. 213/1941 Sl.z. on public protection of youth, public guardianship and regulation of protective supervision (Zákon č. 213/1941 Sl.z. o verejnej ochrane mládeže, verejnom poručenstve a úprave ochranného dozoru), p. 2.

39 In the opinion of the Financial Committee, there are conscientious and experienced workers who, due to their age or for other reasons, are already retired, however who are willing to devote their life experience and further working capacity, allbiet for a modest remuneration, to the nation and to the education of its youth for some time to come, when the acceptance of the remuneration was not prevented by Government regulation No. 380/1938 l. In: Report of the Committee on Budgets on the proposal of Act No. 213/1941 Sl.z. on public protection of youth, public guardianship and regulation of protective supervision (Zákon č. 213/1941 Sl.z. o verejnej ochrane mládeže, verejnom poručenstve a úprave ochranného dozoru), p. 2.

8 Conclusion

District youth care centres constituted a unit of the regional structure of social care for minors and adolescents in Czechoslovakia. The district youth care in Dolný Kubín, established in 1932, was one of three district youth care services in the Orava region. From its earliest days, the districtɔs youth welfare struggled with problems associated with the terrain, resulting in low fertility, poor infrastructure and low levels of industrialisation, which caused parents to leave frequently for work. In the early years of its operation, the activities of the District Youth Welfare Office were primarily focused on the issues of feeding and clothing minors, as the food provided did not meet the necessary nutritional parameters for the healthy development of children, who, based on data from the annual reports of the District Youth Welfare Office, were not only malnourished but often also badly clothed and barefoot. A network of trustees was built up whose main job was to seek out children in need of social protection and assistance in providing for their basic needs.

In the second half of the 1930s, the district youth care in Dolný Kubín became responsible for counselling activities, which were intended to act mainly preventively and to improve the level and quality of care for infants in the district, whose mortality rate was one of the highest in the whole country. After the establishment of the Slovak state, new legislation was adopted regulating not only the care of children in the care of others, but especially the activities and appointment of the public guardian, which brought a new religious requirement for the person appointed to the position of public guardian.

It can be concluded that during its active operation, the district youth care in Dolný Kubín has positively intervened in various areas of social care provided to minors and adolescnets. From feeding, clothing, medical care to counselling activities, whether for mothers with children or adolescents. The District Youth Welfare brought together persons and associations involved in the provision of social welfare for the most vulnerable group of the population, which were the underage children.

The district youth care were active in their functions and duties as separate organizations until 1950. Subsequently, in 1950, departments were created at the district national committees and the district youth cares were integrated into the respective social affairs departments of the district national committees.

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Conflict of Laws, the Ordre Public Reservation and the Nuremberg Laws in British Jurisprudence in the 1930s and 1940s

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-11

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Abstract

The article presents the case law of the British courts in the 1930s and 1940s, that dealt with the law applicable and, where appropriate, the forum. Specifically, cases in which the application of the Private International Law and its principles pointed to German (Nazi) law as the law applicable or referred the forum to Germany (the then Third Reich). The article presents a summary of these decisions through the eyes of the British courts and how they dealt with the issue.

Keywords

Nazi Law; Private International Law; Law Applicable; Forum; Penalty Provision; Ordre Public; Racial Legislation; Nuremberg Laws; Case Law; United Kingdom.

1 Introduction

One of the fundamental tasks of private international law is to determine the law applicable and forum for the subsequent determination of a legal case with an international element. It is now a well-developed branch of law with a rich body of case law. In the past, and particularly in England, where it was a new branch of law without a long tradition, interesting situations have occurred. One of these situations happened undoubtedly in the 1930s (and even the 1940s), after the adoption of the so-called Nuremberg Laws in Germany. Life for Jews became extremely difficult, and the impact of the laws reached far beyond German Reich´s borders. What would happen, in the case of a dispute between two parties in Britain with an international element,

if German law would have been law applicable and one of the parties was Jewish? Would a British court use Nazi law and apply the discriminatory provisions of Nazi law?

This question will be addressed in the article, briefly touching on the case law of the British courts in the 1930s and 1940s dealing specifically with the private international law and Nazi law.

2 Nazi Private Law

The Nazi concept of law could be simplistically characterized as *"law is what benefits the German nation"*.[1] Although this short sentence does indeed characterize the whole of Nazi law in principle, let us take a closer look at its basic premises. According to Knapp[2], it was possible to retrospectively characterize Nazi legal philosophy under the unified concept of racism, which concealed the basic pillars of the totalitarian state, the mystique of the national community, and the racial principle.[3] Another peculiarity of Nazi law was the question of voluntarism, which was very closely linked to the will of the *führer*.[4] Nazism tended towards the law of the stronger, natural selection and the mystical embodiment of the spirit of the nation *(Volksgeist)*, which was the *führer*.[5]

If, however, we consider purely civil law (although Nazi law blurred the distinction between private and public law),[6] Nazi private law denied most traditional values. The main difference from the traditional conception of private law was the rejection of individual rights for the purposes of individualism. Nazi law gave

1 TAUCHEN, J. *Vývoj trestního soudnictví v Německu v letech 1933–1945*. Brno: The European Society for History of Law, 2010, pp. 34–37.

2 One of the most important figures of Czech legal theory of the 20th century.

3 KNAPP, V. *Problém nacistické právní filosofie*. Dobrá Voda: Aleš Čeněk, 2002, p. 31. The three principals were made by Marcek; however, Knapp subsequent those under the term racism.

4 TAUCHEN, J. Prosazení vůdcovského principu ve státním aparátu Třetí říše. *Časopis pro právní vědu a praxi*. 2007, Vol. 15, no. 2, pp. 159–164. Available at: https://journals.muni.cz/cpvp/article/view/7175

5 KOLMAN, A. *Ideologie německého fašismu*. Praha: Vydavatelství Svoboda, 1946, p. 93.

6 TAUCHEN, J. Nacistické „soukromé" právo jako vzor pro právo protektorátní: analýza jednotlivých právních odvětví. In: *Acta historico-iuridica Pilsnensia 2011*. Plzeň: Aleš Čeněk, 2012, p. 264.

priority to the interests of the whole.[7] Thus, the protection of private property was weakened, as was the autonomy of the will and freedom of contract.[8] The classical reference to Roman law was also condemned by Nazi ideology. From Ulpian's theory of the distinction between public and private law to classical Roman law concepts, Nazi law reserved itself against Roman law influences.[9] The Nazis saw the main problem with Roman law as its lack of racial criteria and connection to the national community, and precisely its over-protection of the individual as opposed to the interests of the whole.[10]

The application and interpretation of law was also to be subordinated to the ideological concept of law. Judges were to interpret the law according to a national social interpretation through new general clauses and vague concepts.[11] Thus, the interpretation of traditional concepts such as good faith or good morals was changed so that these were understood to serve the interest of society, not individualistic private interests.[12] According to Carl Schmidt, in this way it was possible to change the entire law to be interpreted according to Nazi ideology without changing the laws themselves. We can therefore summarise that Nazi law did not recognise the classical concept of private law and sought to prioritise the interests of the Nazi community through ideology and vague concepts.

We will not go into Nazi private law in detail, as much has already been written about it and this brief introduction will suffice for our purposes.[13]

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7 LEICH, H. *Der Begriff des Gemeinwohls*. Würzburg: Druckerei u. Verlag wissenschaftliche Werke Konrad Triltsch, 1937, p. 1; GUTMANN, T. Ideologie der Gemeinschaft und die Abschaffung des subjektiven Rechts – Recht und Rechtswissenschaft im Nationalsozialismus. *Rechtswissenschaftliche Fakultät WWU Münster* [online]. 2018. [cit. 13. 8. 2024]. Available at: https://www.jura.uni-muenster.de/de/institute/lehrstuhl-fuer-buergerliches-recht-rechtsphilosophie-und-medizinrecht/studieren/recht-und-rechtswissenschaft-im-nationalsozialismus/

8 SCHELLE, K. et al. *Právní dějiny*. Plzeň: Aleš Čeněk, 2007, p. 289.

9 ARNOLD, W. *Die Eingliederung in die Gemeinschaft als Verpflichtungsgrund im künftigen Schuldrecht*. Gießen, 1937, pp. 18–19.

10 TAUCHEN, J., OBROVSKÁ, L. *Římské právo ve Třetí říši. In: Res – věci v římském právu*. Olomouc: Faculty of Law, Palacký University Olomouc, 2008, pp. 53–66.

11 TAUCHEN, J. Doložky veřejného blaha a neurčité právní pojmy v nacistickém smluvním právu. In: *Cofola: the conference proceedings*. Brno: Masaryk University, 2011, p. 221.

12 GUTMANN, 2018, op. cit, p. 18.

13 See ARNOLD, 1937, op. cit., TAUCHEN, J. Základní ideologická východiska nacistického „práva soukromého" jako vzoru pro právo protektorátní. In: *Days of Law*. Brno: Masaryk University, 2010.

2.1 Racial Legislation

The infamous race laws had an undeniable impact on Nazi (not only) private law. As part of the preparation of the new civil code, which was mainly composed by Nazi academics, the first book was published as a draft of the *Volksgesetzbuch des Großdeutschen Reiches* (People's Code of the Great German Reich).[14] The code was never completed, but the basic principles on which civil law was to be based were already established in the first draft. These principles included:

- The welfare of the German nation is the supreme law.
- Pure German blood, German honour and hereditary health must be protected and preserved. These form the basis of German national law.
- The highest goal is the welfare of the German national community as a blood union of racially pure and honest German men and women.[15]

From the very maxims contained in this forthcoming regulation, one can already get an idea of the direction of Nazi law.

However, the racial laws themselves, which were part of the Nuremberg Laws of 1935, had an even greater impact. With these laws came the principle of national inequality *(völkische Ungleichheit)*.[16] Although this principle was one way of enforcing arbitrariness disguised as a veneer of legality rather than a real legal principle.[17]

The Nuremberg Laws were adopted on 15 September 1935. The most important of these were the two constitutional laws, the Reich Citizenship Act *(Reichsbőrgergesetz)* and the Act for the Protection of German Blood and German Honour *(Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre)*.

14 HEDEMANN, J. W. *Das Volksgesetzbuch als Fundament Großdeutschen Rechtslebens*. Berlin: Industrieverlag Spaeth & Linde, 1942, p. 23.

15 EBEL, F., THIELMANN, G. *Rechtsgeschichte Von der Römischen Antike bis zur Neuzeit*. Heidelberg: C. F. Müller Verlag, 2003, p. 444.

16 MAJER, D. *Nationalsozialismus im Lichte der Juristischen Zeitgeschichte*. Baden-Baden: Nomos Verlagsgesellschaft, 2002, p. 14.

17 Between 1933 and 1936, 636 anti-Jewish laws, regulations or administrative provisions were issued, and between 1936 and 1939, 230 more laws were issued. During the war, 525 more individual provisions were issued. The last instruction was issued on 16 February 1945 and concerned the destruction of Jewish files. More on this: MAJER, D. *Grundlagen des nationalsozialistischen Rechtssystems*. Stuttgart: Verlag W. Kohlhammer, 1987, p. 175. TAUCHEN, 2010, op. cit., p. 18.

The Reich Citizenship Act basically divided the German population into two groups, nationals and citizens of the Reich.

According to Section 1, the citizens of the empire were the inhabitants of the so-called nation of foreign blood *(artfremden Blutes)*.[18] The Nazis divided all peoples into the nation of German blood *(deutsches Blut)* and all other peoples were considered inferior, the next defined being the nation of related blood *(artverwandten Blutes)*, e.g. the French, Italians, etc. Section 2 then defined the Reich's citizens: *"Only a citizen of German or related blood who proves by his conduct that he is willing and able to serve the German nation, and the Reich faithfully is a citizen of the Reich."*[19] The Reich citizen was the only inhabitant of the German Reich who was the holder of all political rights. This law thus completely excluded the Jewish population from civil, economic and political rights.

Act on the Protection of German Blood and German Honour *(Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre)* was much more special than the Reich Citizenship Act. The Law on the Protection of German Blood directly targeted Jews and regulated specific restrictions on their rights. The law forbade mixed marriages, i.e. marriages of a member of German blood or related blood with Jews. Such marriages would be void from the outset, and marriages contracted abroad to circumvent the law were also void.[20] However, the law did not stop at marriage alone, but also persecuted extramarital intercourse between members of German or related blood and Jews.[21]

The last of the Nuremberg laws was the Reich Flag Law *(Reichsflaggengesetz)*. This law is not relevant to this article but should be mentioned for the sake of completeness.[22]

The German Supreme Court in a decision of 23 February 1938, held that the Nuremberg Laws have extra-territorial effect and therefore, that

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18 Reich Citizenship Act (*Reichsbürgergesetz*) of 15 September 1935 (RGBI I., S. 1146). BEYER, R. *The Nuremberg Laws of 15 September 1935 (Reich Flag Law, Reich Citizenship Law, Law for the Protection of German Blood and German Honour) and the Healthy Marriage Law of 18 October 1935*. Translated from the 6th German edition. Prague: Atlas 1939, p. 23.

19 BEYER, 1939, op. cit., p. 23.

20 SCHORN, H. *Die Gesetzgebung des Nationalsozialismus als Mittel der Machtpolitik*. Frankfurt am Main: Vittorio Klostermann, 1963, p. 87.

21 Thus, sexual intercourse according to Section 11, comparison ŠIMUNEK, M. *Health, Heredity and Race*. Prague: Terezin Initiative Institute Publishing House and Sefer, 2006, p. 12.

22 An Act about the Nazi symbols.

punishment can be inflicted within Germany for infringements committed outside Germany.[23]

3 Principles of Private International Law

At the beginning of the last century, private international law was, so to speak, still in its infancy (in terms of its legal form). In continental Europe, Private International Law had already had a long development (the doctrine of Private International Law and its use), whereas in the Anglo-American legal family it was still a new legal discipline at the beginning of the 20th century. The reasons for this are relatively obvious, be it the geographic isolation of the islands and the different state-legal development compared to the feudal Middle Ages in continental Europe.[24]

The basic principles of English Private International Law regarding the applicability of foreign law were as follows (in the period in question and particularly relevant to our work):

1. Where the court has recourse to the law of foreign country it may only apply the law which is in force there at the time.[25]
2. The court must apply the law of foreign country just as the courts of that country would apply it.[26]
3. Foreign penal law will not be applied.[27]

It was then decided whether the provision was penal or not, according to the place of judgment. British courts then interpreted "penal" cases relatively broadly. It is relevant to this thesis that, for example, the confiscation laws associated with the Russian and Spanish revolutions were generally considered criminal by the British courts and not applied.[28] Discriminatory provisions that specified certain personal rights according to religion

23 See *Annual Digest of International Law Cases*, 1938–1940, p. 294.

24 The first references to Anglo-American doctrine did not appear until the first half of the 19th century.

25 (1937) 1 AII E. R. 23.

26 (1939) 4 AII E. R. 16, Chancery Court.

27 (1941) 2 AII E. R. 29. Cf. The Scottish case of *Wciss vs. Weiss* (1940).

28 A. M. Luther v. Svgor (fCo., [19213 1 S. B. 456, [1922] 3 IV. B. 532. See BENWITCH, N. The Soviet Government and Rural-Property in Foreign Countries. *British Yearbook of International Law*. 1924, Vol. 6, p. 78. Similar American view we cand find in *U. S. vs. Belmont* (1937).

or race were also regarded as criminal.[29] Ordre public, or public policy, may also be mentioned as another principle. When these are relatively similar concepts, both concepts function as a kind of insurance against the use of someone else's law that would be against public order, morality, and general legal feeling.[30]

4 Case Law – Nazi Law as the Law Applicable?

In the post-war period, and indeed during the war, there were different views of Nazi law as such. We can mention, for example, the debate between Hart and Fuller. Hart argued that morally bad law is still law and is a legal problem, whereas Fuller argued that Nazi law is not even law.[31] The post-war need to deal with Nazi law in occupied territories and to deal with judgments based on that law is a well-known phenomenon. From this perspective, then, the problem could not even arise.[32]

From today's perspective, of course, it is unthinkable to use Nazi law, which would always run into at least ordre public reservation or prohibition of the use of criminal law, reciprocity, etc.

But the British courts (and not only those) in the 1930s and 1940s did not always arrive at such an unequivocal rejection of Nazi law. In the following lines, we will present some of the more famous decisions of the British courts that did not reject Nazi law a priori.

The most interesting cases are, of course, those where one party was Jewish, in which case the application of Nazi law had the most extreme effects on the litigants. These cases will also be discussed. These are cases that were

29 ROWSON, S. W. D. Some Private International Law Problems Arising out of European Racial Legislation, 1933-1945. *The Modern law Review*. 1947, Vol. 10, no. 4, p. 347.

30 MURPHY, K., The Traditional View of Public Policy and Ordre Public in Private International Law, *11 Ga. J. Int'l & Compar. L*. 1981, p. 594.

31 We will not go into the British Private International Law in more detail, as the purpose of this article is not to present the development and history of the British Private International Law, but rather a specific problematic aspect. Thus, basic contemporary principles relevant to our issues have been presented.

32 HART, H. L. A. Positivism and the Separation of Law and Morals. *Harvard Law Review*. 1958, Vol. 71, no. 593, p. 601. FULLER, L. L. Positivism and Fidelity to Law: A Reply to Professor Hart. *Harvard Law Review*. 1958, Vol. 71, no. 4, pp. 630–672.

tried in British courts, but the subjects of the legal relationship or other legal facts tended to point to the application of German law.[33]

4.1 Matrimonial Law

In the case of *Igra vs. Igra*, the British court had to decide the validity of a divorce that had been pronounced by a court in Berlin in 1942. In the present case the husband was a Polish Jew living in Germany, his wife was a Reich citizen. In 1938 the husband was deported to Poland. His wife began living with another man and applied for a divorce in Berlin in 1942; her husband did not attend the court proceedings, and the court dissolved the marriage on grounds of racial illegality.

The issue facing the English court was thus the validity of the divorce, where it had to deal with the legal basis for the divorce. The proceedings established that the wife had been advised by the Gestapo to divorce, at the same time the German Blood and Honour Act was already in force.[34] The divorce was therefore carried out without the participation and knowledge of the other party and was motivated not by separation and the wife's will, but by coercion and racial laws. But the English court gave full effect to the divorce, which was based on racial laws and racial coercion. Of course, in its reasoning, it did not admit the direct effect of these laws and principles. It used Control Council Law No. 16, which provided for the difficulties of family life, but in this case caused by racial laws. The court was essentially deliberating whether to use the Nazi law and give it effect. It concluded that it would not be appropriate for a woman to be divorced in Germany and married in England.

At the same time, the court recognized that different legal systems have different standards of justice, and it is not competent to question that. Thus,

33 ROWSON, S. W. D. Some Private International Law Problems Arising out of European Racial Legislation, 1933–1945. *The Modern Law Review*. 1947, Vol. 10, no. 4, pp. 345–362. This article was one of the first motivations for me to write this paper. Althoutgh Rownson focuses only on the repeal of the Nazi Law in the British courts just after the war. This side of law is very underdeveloped. There is only one more paper focusing on subject which is FRASER, D. *"This is not like any other legal question": A Brief History of Nazi Law Before UK and US Courts*. London: Brunel University, 2003. Fraser's article focuses more on the theoretical question of whether Nazi law is law and therefore should have effect but does not address the private international law side of the issue at all.

34 Since the 1935, see above.

although the British court did not explicitly apply Nazi law, it recognized its validity and found the divorce to be valid in England, even though it was motivated by Nazi racism. The very issue of Nazi-tainted family law was a common phenomenon and problem that Western courts had to deal with when the governing law was Nazi and called for a decision according to Nazi ideology, even more so in the case of Jewish litigants. Thus, there are more similar decisions to be found, and not only in the jurisprudence of the British courts.[35]

Legal scholarship has also commented on the issue from a theoretical perspective. One side proclaimed that intermarriage of Germans in Britain would probably be permitted. However, the other part of the legal profession, e.g. Cheshire, considered that the question of matrimonial law would be purely a matter for the applicable German law, and therefore the mixed marriage of Germans divorced in Germany could never stand in Britain.[36]

4.2 Confiscations

Another phenomenon that the British courts had to deal with was confiscation of property. There are more of these decisions, of course, but the ones closest to me are the decisions about the fate of Czechoslovak citizens, so I have chosen this case as an example (there were more of these, and again not only in England).[37] Usually, these cases involved the confiscation of the property of Jews, but also of non-Jewish citizens who had emigrated from occupied Czechoslovakia.

35 However, the application of Nazi law within matrimonial law was not only perpetrated by the British courts. For example, the decision of the Dutch court. Although the Netherlands was a signatory to the 1902 Hague Convention (The Hague Convention on Conflict of Laws in respect of marriages), which, among other things, prohibited domestic obstacles to marriage on religious grounds. In 1936, the District Court of Dondred found that the Nuremberg Laws established racial discrimination, not religious discrimination, which was not contrary to the Hague Convention. It ruled that the Dutch registrar had to respect this obstacle, in the case of the applicable German law. Nederlandsehe Jurisprudentie and Weekblad van het Rechf (N. J. & W.), 1936, no. 455, p. 174.
In British case law is also quite interesting the case In re Meyer from the opposite point of view.

36 CHESHIRE, G. C. The International Validity of Disorces. *Law Quarterly Review*. 1945, Vol. 61, p. 352.

37 [1939] 4 All ER 16.

These cases included, for example, Kahler v. Midland Bank. Kahler purchased securities in 1938 through his Živnostenská Bank, which dealt directly with Midland Bank as the seller. The bank then deposited the securities in London for Kahler. Kahler subsequently wanted to leave occupied Czechoslovakia, which he was allowed to do, but on the condition that he transfer all his securities to Bohemian Bank, which was controlled by the Nazis. Kahler had no choice but to do so and subsequently emigrated. The Trade Bank wrote to Midland requesting that Kahler's securities be transferred to the Bohemian Bank. Before this happened, Kahler emigrated and in turn demanded that the securities be released to him, claiming that the Bohemian Bank's confiscation claim was illegal and based on racial laws.

This was thus a question of a legal claim to ownership of the securities, when, however, the Bohemian Bank's right was based on legislation restricting the flight of property and on Jewish property.[38] The applicable law was found to be Czechoslovak law, since both the plaintiff and the defendant, as well as the original securities contract, were of Czechoslovak domicile and governed by Czechoslovak law. The House of Lords was faced with the question of whether to apply the confiscation laws of the Protectorate of Bohemia and Moravia, which arose out of the Nazi occupation. In the end, a narrow majority found Kahler's claim to be unjustified and recognised the Nazi confiscation law as valid and ruled accordingly. Although this case was not settled until after the war and some Lords argued at the trial the (then widespread) view that the Nazi right was not a right and could be given no effect,[39] in this case the British court did not dispute its validity and decided accordingly.[40]

Lord Simonds, in the course of his decision, said that he was well aware that the law under which they were deciding was criminal, discriminatory, but that Kahler had erroneously invoked Czechoslovak law as the applicable law, and therefore could not then plead its invalidity, since law is law, moreover, when he himself signed the transfer and only subsequently pleaded its

38 Order of the Reich Protector in Bohemia and Moravia on Jewish property of 21 June 1939.

39 With this opinion was subsequently agreed by a large number of legal scholars lately.

40 [1943] A. C. 23.

invalidity.[41] Simonds completely ignored Kahler's situation when he signed the transfer and described the situation in purely formalistic terms. Lord Normandy, in his reasoning, even points out directly that Kahler's will to transfer was clearly influenced by intimidation and cannot be relied on too much. However, he went on to say that the governing law of the relationship between the applicant and Bohemian Bank must be the same as that between the applicant and Živnostenská Bank, so that it was not the British court which recognised Nazi law but the applicant himself when he chose Czechoslovak law as the law of the original relationship.

He further apologized to the court, saying that Nazi law is not law and cannot have an effect, but the plaintiff himself, according to him, freely decided and thus recognized it, therefore the court must also recognize it and decide according to it.[42]

There are then more similar decisions, generally involving the application of confiscation laws (or not challenging such confiscation) to emigrants or Jewish property, where the English courts were not shy about recognising confiscation as lawful.[43] Whether these were decisions where the governing law was Nazi German law itself, or the law of the occupied territories, where the laws in question were enacted under the pressure of the occupation and under the influence of Nazi law, where there was an attempt to harmonise with Nazi law.

Other areas of problematic decisions are readily apparent. These were the inheritance rights of Jews as seen through the eyes of Nazi law and the laws on Jewish property and citizenship.

4.3 Citizenship

We will at least introduce the cases of forfeiture of citizenship. The 1943 wartime decision will serve as an example, but we will depart from British jurisprudence and discuss the case of United States ex rel. Schwarzkopf. Schwarzkopf[44] was a Prague-born Jew who was detained

41 [1943] A. C. 23.
42 *Igra vs. Igra* case.
43 *Kahler vs. Midland Bank* [1950] A. C. 24.
44 United States ex rel. Schwarzkopf. Schwarzkopf, 137 F. 2d 898 (1943).

in the US as an enemy combatant. Schwarzkopf originally had German citizenship but changed his citizenship to Austrian in 1933. As a result of Nazi racial laws, he lost his status as a German citizen. He emigrated to the USA under the quota of Czechoslovak migrants and tried to become an American citizen in 1938. Although Schwarzkopf was an Austrian citizen, he was also a German citizen. Also, after the Anschluss of Austria in 1938, Austria became part of the German Reich, which resulted in the Germanization of Austrian citizens. The US court argued that Austrians who left the country and involuntarily accepted the effectiveness of the 1938 Nazi law should be treated as stateless. However, the Court went one step further in its reasoning, accepting the Reich Citizenship Act as controlling. The court literally recognized the 13th regulation under the Nuremberg laws, which stripped Jews of their Reich citizenship, and recognized that Schwarzkopf was not really a German citizen, since he had lost his citizenship as a Jew under the Reich Citizenship Act.[45] Thus, in effect, for a Jewish German, the racial law had a beneficial effect on U. S. soil, but on the positive side it was nothing more than a very clear recognition of the effectiveness of a racially discriminatory law.

The question of citizenship was a frequently litigated issue, with a similar result in *R. vs. Home Secretary, Ex. P. L.*[46] This was the Hirsch family, a Jewish family domiciled in Austria, who had immigrated in 1936 to France from where they had gone to South America in 1941. However, they were detained by the British in Trinidad as enemy citizens and taken to the UK. In the end, however, the British court reached the same decision as the American court in the previous example and set them free.

It was the question of citizenship that the British courts (and, as has been shown, the American courts as well) often decided after the war under Nazi law, because they saw it as an easy way to strip a person of German citizenship.

Thus, as can be seen, the English courts had no greater difficulty in recognising and applying Nazi law. Of course, these were not the harshest

45 137 F. 2d 898 (1943).

46 EGERTON, R. Historical Aspects of Legal Aid. *Law Quarterly Revue*. 1945, Vol. 61, p. 126.

possible persecutions and discriminations against Jews, but especially in the case of inheritance and confiscation, they were still clearly discriminatory decisions against Jews.

5 Dealing with Nazi Law

Although, from today's perspective, a conflict with public order or the penalty of a provision that is not punishable in the country of the court appears to be a perfectly clear and compelling reason for rejecting Nazi law, as we can see, the courts did not always approach it in this way.[47]

However, during and especially after the war, there was a growing tendency to deal with Nazi law. Both from a political and ideological point of view and from a legal point of view.

We can also notice in the case law, that it gradually began to deal with Nazi law in cases where German law was chosen as the applicable law.

These decisions began to appear already during the war. Often, however, they were not decisions of lower courts, which relatively mechanically took the applicable law as their own and decided according to it, regardless of whether the applicable law pointed to Nazi racial laws. The higher courts, however, felt the need to deal with the issue.

The big argument at first was not so much a conflict with public policy or a prohibition on the use of criminal provisions, but rather the protection of individual rights and equality before the law. The British higher judiciary rejected reference to German law and possibly reference to the German courts precisely on the grounds that one of the parties was a Jew or other discriminated group and as such would not receive a due process/fair trial, and the use of Nazi law would always be against his advantage in manifest injustice.[48]

The origins of these decisions can be traced back to the 1930s. As we have outlined, however, in general the British courts had no problem using race laws. Most of the decisions, so in the first instance, ended the same way, with the court simply stating the use of Nazi law, or the courts in Germany.

47 EGERTON. 1945, op. cit., 87.
48 4 [1937] 1 All E. R. 2Q3. One of the older cases.

These decisions include the now relatively famous *Oppenheimer vs. Rosenthal*, a case which involved the firing of a German Jew by a German company but who lived in England where he worked for the company as a manager. The lower court held that in this case all the elements of the relationship of the parties, both the subjects and the legal action, related to Germany, where even the notice was given in Germany but served in Britain. The lower courts simply directed the plaintiff to a court in Germany and ignored the fact that as a Jew he would not receive a fair trial, including the application of discriminatory substantive provisions.

The court of appeal, however, overturned the lower court's decision and, through reasoning on the right to a due process, determined the forum in England using British law.[49] Thus, although it is not directly the law applicable, but rather the forum and the law after that law applicable, the reasoning is strong and precedential. And after all the court of appeal determined the law applicable as well.

There are more such decisions to be found, generally the court argued equity, the penalty of the provision etc, but these were mostly decisions of higher courts and did not set precedent which the courts subsequently followed. These decisions subsequently completely prevailed and Nazi law was rejected and not used as law applicable.[50] We will also not discuss the retroactive treatment of Nazi law, since much has already been written about it. We will also not go further into the decisions that ultimately rejected the use of Nazi law as applicable law, as this is a question for further investigation.

6 Conclusion

Along with the adoption of the Nuremberg Laws, many problems arose that affected private international law relations. One of these problems was the determination of the law applicable under private international law. Situations where the conflict of laws rules pointed to German law as the law applicable and within that framework the Nuremberg Laws would then apply.

49 Ibid., it is also relevant to mention the case *Ellitlger vs. Gatnness, Afahon * Co., Frankfurter Bank A. G. and Afetall Gesellschaft A.G* [1939] 4 All E. R. 16, Chancery Collrt.

50 Most of the cases mentioned above.

British courts have encountered the issue repeatedly but have not always decided the same way. Not as to the substantive assessment of the case, but rather as to the application of Nazi law. The first cases were encountered in the early 1930s after the Nuremberg Laws were passed. In individual cases, the British courts then, where they found the applicable law to be German (Nazi) law, recognised and applied that law and, where appropriate, recognised its validity and the validity of legal relationships based on it. These were cases where the application of Nazi law affected one party in particular because of its Jewish origins and the application of the Nuremberg Laws. These were typically decisions in the field of matrimonial and inheritance law, as well as confiscations and, where appropriate, citizenship. Thus, although Nazi law clearly disadvantaged one side, the British courts found it applicable.

During the war, however, the trend of decisions began to change, and the courts began to reject the application of Nazi law. Interestingly, however, they did not primarily apply ordre public. Rather, they argued for justice and the right to due process, and then only for the penalty of the provisions. Notably, the Citizenship Protection Act was applied after the war, with British (as well as American and other) courts applying the Act as the law applicable.

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The Disciplinary Cases of the Judges Regarding the Judicial Practice of the (Royal) Court of Appeal of Budapest (1936–1950)

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-12

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Abstract

At the beginning of the indicated time period the disciplinary liability of the judges was governed by Act III of 1936 in Hungary. In the course of my research, I analyse the corresponding judicial practise from 1936 to 1950 based on the sources in the Capital Archives of Budapest. I observed the judicial practice of the disciplinary council of the Royal Court of Appeal of Budapest. During the processing of the cases, I categorized the disciplinary cases according to the subject of the proceedings. As per this categorization, the following ones shall be highlighted: breach of official duty, insulting or endangering the authority of the judges, cases initiated by private prosecution, cases remained in the supervisory inquiry stage, and the cases of judges who were sentenced to loss of office. Act XXII of 1948 entered into force introducing changes in the disciplinary liability that reflected to the transforming zeitgeist. According to several literature standpoints, the disciplinary offence and disciplinary sanction ceased to exist from this point. Therefore, during my research I paid particular attention to the disciplinary cases initiated between 1948 and 1950.

Keywords

Disciplinary Cases of the Judges; History of the Judicial Profession; Hungarian Legal History.

1 Introduction

The disciplinary liability of judges[1] was initially regulated by Act VIII of 1871 which was in force until 16 January in 1936.[2] Section 20 of Act VIII of 1871 defined the offence of disciplinary misconduct.[3] Section 20(a) covered misconduct in office, while Section 20(b) covered scandalous conduct. The new rules have removed the phrase *"scandalous behaviour"*. The disciplinary offence under Section 5 of Act III of 1936 is committed by:

> *"1) who breaches his official duties through negligence wilfully and seriously,*
> *2) who by his conduct or behaviour seriously injures or endangers the authority of his position, whether intentionally or through negligence."*[4]

Act VIII of 1871 also provided for the category of administrative offences, as there was no penal code in force at that time. However, Act III of 1936 no longer dealt with misconduct in office, as the Code of Criminal Procedure had come into force which laid down the detailed rules of criminal liability.[5]

According to Article 22 of Act VIII of 1871, the following types of punishment were to be applied in the case of disciplinary offences: censure, reprimand, fine and loss of office. Besides, Article 8 of Act III of 1936 provided for the following types of punishment: censure, fine, loss

1 On the topic of legal profession research and disciplinary liability, see also: SALLAI, B. A fegyelmi ügyek forrásértéke egyes hivatástörténeti kutatásokban, különös tekintettel a bürokráciatörténetre. In: *Jog-Állam-Politika*. 2023, Vol. 15, no. 4, pp. 189–211.

2 See in detail: MATHÉ, G. *A magyar burzsoá igazságszolgáltatási szervezet kialakulása. 1867–1875*. Budapest: Akadémiai Kiadó, 1982, pp. 54–60; MÁTHÉ, G. A bírói felelősség és a bírákra vonatkozó főbb rendelkezések törvényi szabályozása a dualizmus első éveiben. In: *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. Tom. 14*. Budapest: Tankönyvkiadó, 1972, pp. 175–187; MÁTHÉ, G. A bírói hatalom gyakorlásáról szóló 1869:4. tc. létrejötte és jelentősége a dualizmus jogrendszerében. In: MEZEY, B. (ed.). *Ünnepi tanulmányok Kovács Kálmán egyetemi tanár emlékére*. Budapest: Gondolat Kiadó, 2005. pp. 37–70; STIPTA, I. *A magyar bírósági rendszer története*. Debrecen: Debrecen University Press, Multiplex Media Debrecen University Press, 1998, p. 124; BALOGH J. A bírák jogállása az állami (királyi) bíróságokon. In: BÓDINÉ BELIZNAI, K., MEGYERI-PÁLFFI, Z. (eds.). *300 éves a Kúria*. Budapest: Kúria, 2023, pp. 178–179.

3 See in detail: HOMOKI-NAGY, M. A bírói felelősség kérdésének megítélése a gyakorlatban. In: *Pro Publico Bono*. 2020, Vol. 8, no. 3, pp. 208–237; HOMOKI-NAGY, M. A bírói felelősség az 1869:IV. tc. alapján. In: *Forum: Acta Juridica et Politica*. 2017, Vol. 7, no. 1, pp. 56–65.

4 Section 5 of Act III of 1936.

5 BELINZANI, K. A bírák és a bírósági tisztviselők felelősségének szabályozása (1936). In: *Kúriai Döntések Bírósági Határozatok*. 2022, Vol. 70, no. 2, p. 305.

of office. Censure was removed from the new legislation because it was merged with the offence of reprimand due to the same moral content.[6]

The Act also regulated the possibility of transfer which was previously regulated by a separate norm, Article 9 of Act VII of 1912 amending certain rules of judicial organisation and procedure. If it was found during the course of disciplinary proceedings that the employment of the accused at the place where he had been employed was incompatible with the interests of justice, the disciplinary court could, in its judgment, order him to be transferred to another place of employment or to another court.[7] The transfer could be ordered without a finding of a disciplinary offence.

2 Breaches of Official Duty

The typical examples for breach of official duty: writing the judgements with delay, entering false information in the trial diary, procedural errors (for example determining a wrong amount of litigation fee). In this paper I present the specific case of Dezső László as an example for a breach of official duty.[8] Dezső László carried out his duty as a judge at the Royal Criminal Court of Budapest. According to the facts, the accused had written his judgments in 23 cases with a delay of several months and had entered false information in the trial diary concerning the writing of the judgments. The report of the President of the Royal Tribunal of Budapest also contains the confession of the accused, which clearly shows that in the monthly reports submitted to the President of the Tribunal, he made statements that he had no unwritten convictions for more than 15 days, which were untrue. According to the reasons given by the disciplinary court:

> *"The accused neglected his official duty by writing the judgements with significant delay in 23 cases, even it took several months in certain cases. However, the disciplinary court established the disciplinary liability of the judge in question*

6 Explanatory memorandum to Act III of 1936 on the disciplinary liability, transfer and retirement of royal judges and members of the royal prosecutor's office, and on the disciplinary liability of royal court and royal prosecutor's office officials. Laws of the Thousand Years (hereinafter referred to as the Explanatory Memorandum of Act III of 1936).

7 Article 15 of Act III of 1936.

8 Budapest Capital Archives (Hereinafter "BCA") VII.1.b. carton 84 (1938), 18/1938. Dezső, L.

on the basis of concealing the delays by entering false information in the trial diary and the reports submitted to president of the tribunal. By this unworthy conduct he had consistently misled the disciplinary authority which is tantamount to the wilful breach of the official duties."[9]

The disciplinary tribunal therefore sentenced him to reprimand. The accused appealed the judgement but as per the decision of the Royal Curia of Hungary delivered on the 25 February 1939 the first instance judgement was upheld.

3 Insulting or Endangering the Authority of the Judges

Cases of injuring or undermining the authority of the judicial profession are essentially related to the private behaviour of judges. One of the examples is the case of Lajos Spolarich who was the vice-president of the Royal Central District Court of Budapest. The disciplinary council of the Royal Court of Budapest found the judge guilty of the disciplinary offence defined in Article 5(2) of Act III of 1936. Therefore, he was sentenced to reprimand on the 27 April 1944.[10]

According to the facts if the case, the neighbour of the judge had been regularly hosting events for his friends that which of the judge was notified as well. And so it was on the 20 March 1943, when a group of 20–25 persons and a band of 3 appeared in the premise to attend one of the beforementioned events. During the event, the participants were dancing to radio, gramophone and band music. Around midnight, the accused had knocked on the wall from the next door whereupon the band stopped playing and the party moved to other two rooms of the apartment, and the door of the room next to the accused's flat was closed.

In the other two rooms, the people continued the merriment. Around 2 or 3am, the accused slammed and opened the door of the hallway left partly opened with his walking cane, and he rushed in the room in his grey-striped sleeping clothes swinging his walking cane at the participants while he was shouting: *"what a brothel is this?"*.[11] After that, he was about

9 BCA. VII.1.b. carton 84 (1938), 18/1938. Dezső, L.
10 BCA. VII.1.b. carton 86 (1944), 2/1944. Spolarich, L.
11 Ibid.

to leave, but during his way out he slammed on the chair in the hallway with the curved part of his walking cane that its sitting compartment was pierced through by such power.

The accused denied that he was shouting *"what a brothel is this?"*[12] or had broken the chair intentionally. Otherwise, he essentially admitted the facts. He also add a remark that he was shouting *"What a piggery is this that after 4am it is impossible to sleep, is it a public house that even the door is left open?"*.[13]

The disciplinary court elaborated that:

> *"A judge, both in his private life and during his social interactions, has to always pay attention to set an example by his conduct, offend none without just cause, first and foremost not to upset others. He has to keep his temper at bay, even in such situations when it would be acceptable from a humane perspective, and abide the norms and expectations of the society, especially in the company of women, in order to preserve the respect and dignity deriving from his position, to avoid any doubts that would arise considering his gentleman behaviour. The authority of the judicial profession is endangered by any opposing conduct that would result in the loss of public confidence in laid in the judge.* […] *The conduct of the accused described in the facts of the case, that he rushed in an stranger's apartment where gentlemen and ladies were having a merriment and he was swinging his walking cane while he was shouting offensive words, then he broke the sitting compartment of a chair which was a foreign movable property, is a scandalous behaviour without a doubt that is unworthy of a judge and can undermine the authority of his profession and cause doubts about his education that is otherwise unquestionable."*[14]

The disciplinary council of the Royal Curia of Hungary upheld the first instance decision considering the establishment and classification of the described misconduct. However, it overturned the judgement considering the sanction based on Section 46 of Act III of 1936 and sentenced the judge in question to a fine of 300 pengo.

The disciplinary council of the Royal Curia of Hungary found that the appeal of the Royal Prosecutor General Office was duly reasoned in terms of the type of the sanction. The court of first instance established duly the mitigating and aggravating circumstances, however, the conduct

12 BCA. VII.1.b. carton 86. (1944), 2/1944. Spolarich, L.
13 Ibid.
14 Ibid.

of the accused was assessed as an additional aggravating circumstance because not only was it a disciplinary misconduct, it had violated more sections of the Criminal Law Codex as well.

4 Cases Initiated by Private Prosecution

Article 27 of Act III of 1936 also regulated the private prosecution. According to the explanatory memorandum of the statute, it regulates private prosecution in the form of substitute private prosecution, in the form in which the provisions of the Code of Criminal Procedure[15] and the disciplinary law are structured. In essence, the justification for the right of private prosecution was to ensure that the victim of a real injury is not left without a legal remedy. The law provided for a right to make a supplementary private prosecution where the disciplinary offence constituted an individual offence.[16] An important measure of Act III of 1936 was the possibility of a substitute private prosecution, in which the disciplinary court looked for individual legal injury in all elements of the facts. Based on the sources in the Archives, I have found only one case of private prosecution so far, but the disciplinary court did not find that there were grounds for disciplinary proceedings.

The defendant in the case was Ferenc Szemesy[17], the royal district judge of Szentendre. The complainant made a total of 32 points of complaint, but the disciplinary court did not find that any of the complaints could have served as grounds for disciplinary proceedings, either because there was no individual violation of rights or because the conduct of the defendant did not provide grounds for disciplinary proceedings according to the disciplinary court's view.[18]

15 Pursuant to Article 43 of Act XXXIII of 1896 on the Code of Criminal Procedure, the chief and the substitute private prosecutor shall exercise the rights of the public prosecutor's office in general in the representation of the prosecution, and pursuant to Article 99 the substitute private prosecutor may in all cases only file a motion for the ordering of an investigation.

16 Explanation of Act III of 1936.

17 See in detail SCHLACHTA, B. L. Szemelvények a Budapesti Királyi Ítélőtábla fegyelmi ügyeiből (1938–1944). In: *Jogtörténeti Szemle*. 2022, Vol. 20, no. 3, pp. 50–51.

18 BCA. VII.1.b. carton 84 (1938), 13/1938. Szemesy, F.

5 Cases Remained in the Supervisory Inquiry Stage

Act III of 1936 made it compulsory to conduct a judicial supervisory investigation in the course of disciplinary proceedings.[19] According to the explanatory memorandum of Act III of 1936, the purpose of the supervisory inquiry was to reveal the facts of the disciplinary offence. In line with this principle, it gave the supervisory authority the same powers to obtain evidence as the investigating judge under the Code of Criminal Procedure.[20]

On the basis of the documents examined so far, it can generally be said that in contrast to the case presented, there were more disputes in the supervisory inquiry phase which were initiated by lawyers because of a decision which was unfavourable to them, but which could not be the basis for disciplinary proceedings. In these cases, the lawyers often used the complaint as an *"appeal"* against the decision of the judge in the interest of their clients. In most of these cases, the disciplinary court rejected such requests. Such decisions were usually justified by the disciplinary court on the grounds that the judicial interpretation of the law could not serve as a basis for finding a disciplinary offence.[21]

A typical example is the disciplinary complaint by lawyer Ágoston Schubert, who complained that the first instance decision in his favour had been overturned by the second instance panel and the judgment consisted of easily avoidable *"legal errors"*. Therefore, he filed disciplinary proceedings against the whole panel. In its decision delivered on the 7 June 1944, the Disciplinary Court found that:

> *"the judgment given by the complainants* […] *is not self-contradictory, does not contain any nonsense and gives detailed and explicit reasons for the legal position taken: the question of whether the decision of the court is correct on the merits*

19 Article 32 of Act III of 1936: *"Disciplinary proceedings shall always be preceded by a supervisory inquiry."*

20 Explanation of Act III of 1936.

21 NAVRATIL, Sz. *A jogászi hivatásrendek története Magyarországon (1868/1869–1937)*. Budapest: ELTE Eötvös Kiadó, 2014, pp. 131–132; ANTAL, T. *Fejezetek a Szegedi Ítélőtábla történetéből III. A Szegedi Királyi* Ítélőtábla *története 1921–1938 között*. Budapest-Szeged: Országos Bírósági Hivatal, 2017, p. 42; HOMOKI-NAGY, M. Történetek a Szegedi Törvényszék működéséről. In: HOMOKI-NAGY, M., VARGA, N., PÉTERVÁRI, M. (eds.). *A Szegedi Törvényszék története*. Szeged: Szegedi Törvényszék, 2019, p. 11.

is outside the scope of disciplinary proceedings, because the correctness of a decision of the court which is duly reasoned and not manifestly contrary to the law cannot be subject to review in disciplinary or supervisory proceedings."[22]

From judicial practice, we can highlight that *"The disciplinary tribunal must decide the question whether the conduct described by the complainant can be classified as intentional or negligent serious misconduct"*[23], and that the determination of whether *"… the decision of the disciplinary tribunal is correct on the merits is outside the scope of disciplinary proceedings."*[24] So these types of cases were closed during the supervisory inquiry phase.

6 The Cases of Judges who were Sentenced to Loss of Office

6.1 Case of Albert Tomcsányi

Among the cases in which the judges were sentenced to loss of office, the first one belongs to Albert Tomcsányi who was a royal court judge in the Pest region.[25] The disciplinary case of Tomcsányi dates back to a letter dated on the 5 November 1936, addressed by Mrs Béláné Mesterházy to the President of the Pest Region Royal Court. In the letter, the woman claims that she met Tomcsányi three years ago and they have been living in a *"wild marriage"* for seven months.[26] Tomcsányi had put her into debt over the years, to the point where she had lost her house. Mrs Mesterházy lent money to Tomcsányi several times, but never returned it. She also wrote that Tomcsányi owed large sums of money to other women and was having affairs with several women at the same time. The letter is interesting since

22 BCA. VII.1.b. carton 86 (1942–1944), 9/1943. Gémesi, I., Sajó, L., vitéz Szent-Iványi, Á.
23 BCA. VII.1.b. carton 86 (1942–1944), 6/1942. Zsöllei, K.
24 Ibid.
25 See in detail SCHLACHTA, B. L. A hivatalvesztés, mint fegyelmi büntetés: Esettanulmány az ítélőbírák fegyelmi felelősségének köréből. In: SZABÓ, P. B. (ed.). *Scientia est inaestimabilis*. Debrecen: Debreceni Egyetem, Állam- és Jogtudományi Kar, 2023, pp. 67–74.
26 BCA. VII.1.b. carton 82 (1937), 10/1937. Tomcsányi, A.

the letter writer did not approach the President of the Tribunal to initiate disciplinary proceedings. As she wrote:

> *"I turn to the President with the same trust I had in my sweet parents. My aim is not to get him suspended from his job, but to get him on the straight and narrow and make him an honest man."*[27]

However, the President considered the contents of the letter to be a serious breach of judicial authority and a threat to it, and therefore initiated disciplinary proceedings ex officio. This disciplinary procedure was extremely intense, as the supervisory phase was crucial in order to establish the facts and evidence. This was illustrated by the 13 witness statements, which were recorded in a 145-page report, the confrontation of witnesses and the complainant, and the photocopies of documentary evidence which were presented at the hearing. The guilt of the accused was established as stated in the letter, and the disciplinary court decided to impose the most severe penalty.

6.2 Case of Sándor Gágyor

The defendant in the next case was Sándor Gágyor, a criminal court judge in Budapest.[28] The facts of the case can be divided into two parts: *"in the criminal case before him, the district judge behaved in an intrusive manner and in a manner offensive to the woman's modesty and self-esteem towards the victim, who was a young woman, in the office premises on several occasions, and visited her in the evening hours at her home a few days before the hearing, and there he behaved in a similar manner towards her."*[29]

In addition, *"the defendant, who had been sentenced to imprisonment by a final judgment, and to whom he had also granted a deferment of the commencement of his sentence, had asked on several occasions for and received food, had consumed food and drink in a pub in the company of persons of controversial reputations, had accepted payment of his pub bill from them in a public place, he had removed his shoes in a pub and remained there without shoes until they were repaired."*[30]

27 BCA. VII.1.b. carton 82 (1937), 10/1937. Tomcsányi, A.
28 BCA. VII.1.b. carton 89 (1948), 13/1948. Gágyor, S.
29 Ibid.
30 Ibid.

The judge's conduct clearly falls under the second section of the disciplinary offence, and both the Court of Appeal and the disciplinary panel of the Curia decided to impose a suspension.

6.3 Case of Béla Markovits

The beforementioned two cases were similar in nature, but the disciplinary case of the Budapest criminal court judge, Béla Markovits in 1950 was of a political-ideological nature. According to the facts of the case, on the 20 June 1950, after the start of official working hours, the accused told in his chamber, in the presence of the president of the panel, a judge and a secretary, that his 14-year-old daughter had taken part in a political parade carrying a sign reading: *"It is a woman's duty to bear children, and it is a daughter's glory"*.[31] The disciplinary court established the facts of the case as it follows:

> *"Béla Markovits was aware that the display of such a sign in a democratic march could provoke hatred, contempt and hostility against our people's democracy, even if such a sign was actually displayed in a march. Markovits' statement was also intended to arouse hostile feelings against our democratic system of government in the persons being present. The disciplinary court concluded this by introducing Markovits' words: 'What do you say?'* […] *if he had not wanted to arouse a feeling of hostility towards our people's democracy in his listeners, but on the contrary had asked them for help and guidance in exposing hostile and harmful behaviour, he should have expressed this intention and purpose in some way to those who were present…"*[32]

The disciplinary tribunal also found that the behaviour of the accused was deliberate and seriously undermined the authority of the judicial profession, and therefore decided to impose the most severe penalty, the loss of office.

7 Disciplinary Cases after 1948

From 1945 the independence of judiciary began to be abolished[33] that had a significant impact on the disciplinary liability of the judges. At that time, Act III of 1936 was still in force but practically it was less likely to be applied.

31 BCA. VII.1.b. carton 90 (1950), 25/1950. Markovits, B.

32 Ibid.

33 See in detail PERES, Zs. A bírói függetlenség felszámolása (1945–1989). In: *Kúriai Döntések, Bírósági Határozatok*. 2023, Vol. 71, no. 5, pp. 952–965.

As György Uttó said: *"Its maintenance in force can be considered more of a formal legal fact"*.[34]

The composition of the disciplinary court regulated by Section 19 of Act III of 1936 was amended by Section 1 of Decree 6.760/1945. ME. on the amendment of the organization of the Supreme Disciplinary Court[35] whereas Section 23 of the Act was abolished by Section 2 of the Decree. It entered into force on the 22 August 1945.

Act XXII of 1948 temporally regulated the transfer of the judges and also included the retirement of the judges and state prosecutors.[36]

According to the first section of the Act, The Minister of Justice is entitled to transfer any of the judges under his supervision – without the consent of the certain judge – to another court.

As per the justification of the Act: *"In time of significant organizational changes, the need to temporarily suspend the non-transferability of the judges has already arisen in the past. This need – considering the territorial changes and the aspects of the democratic transformation – still exists…"*[37]

The Minister of Justice was allowed to carry out transfers until the 31 December 1949.[38] The judge who already turned 50 years old when he was informed about his transfer, was allowed to request retirement within 30 days from receiving the notice instead of undertaking the appointed position.[39] The judge who had not turned 50 years old when he received the notice of transfer and did not undertake the newly appointed position, shall

34 Uttó, Gy. Az igazságügyi alkalmazottakkal szembeni fegyelmi eljárás múltja, jelene és jövője. In: *Magyar Jog*. 2011, Vol. 58, no. 10, p. 584.

35 *"According to section 19 of Act III of 1936, the Supreme Disciplinary Tribunal shall consist of thirty-six members in addition to the President, namely the eighteen most senior Presidents of Chambers or Judges of the Curia and the Administrative Court."* Decree No. 6.760 M. E. 1945 of the Provisional National Government amending the organisation of the Supreme Disciplinary Court Section 1. List of decrees, 1945, 635.

36 BELIZNAI, K. A bírói függetlenség és garanciái (1848–1948). In: *Kúriai Döntések, Bírósági Határozatok*. 2023, Vol. 71, no. 5, pp. 946–948; BELIZNAI, K. A bírói fegyelmi felelősség szabályozása 1945 után. In: BIRHER, N., MISKOLCZI-BODNÁR, P., NAGY, P., TÓTH, J. Z. (eds.). *Studia in honorem István Stipta*. Budapest: KRE ÁJK, 2022, pp. 123–125.

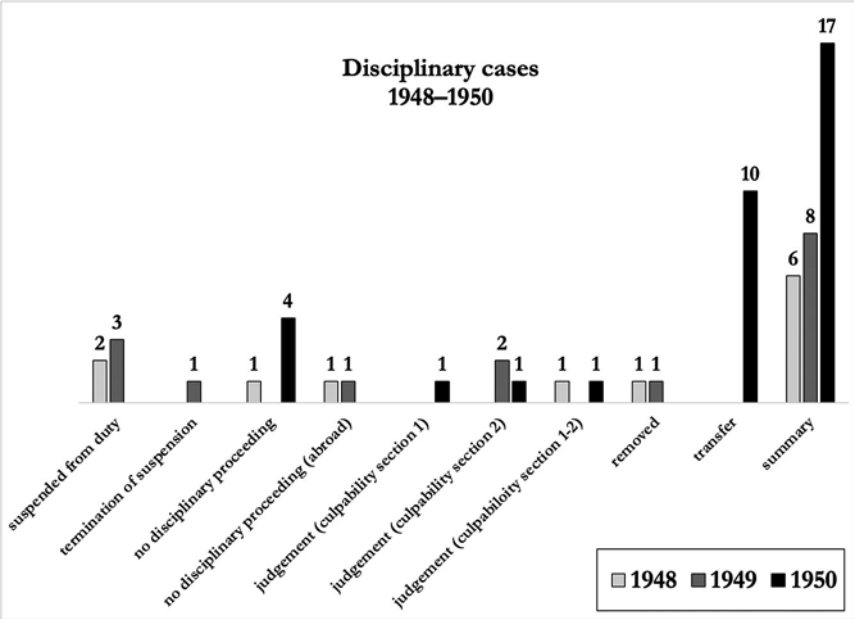
37 The justification of Section 1 of Act XXII of 1948.

38 Section 1 point 4 of Act XXII of 1948 on the temporary regulation of the relocation of the judges and the retirement of the judges and state prosecutors.

39 Section 2 point 2 of Act XXII of 1948.

be considered as if he renounced his public employment and need for care, and all claims based on duty.[40]

Disciplinary misconduct and disciplinary punishment, according to authoritative literature, did not really exist from the entry into force of the law, but only the retirement and resignation, which gave room to state tyranny, undermining the independence of the judiciary.[41] In my research, therefore, I paid particular attention to disciplinary cases between 1948 and 1950, and more specifically to the proportion of disciplinary proceedings conducted under the 1936 Act.



Source: author

40 Section 2 point 3 of Act XXII of 1948.

41 Confer PATYI, Zs. A bírák fegyelmi felelősségének bő évszázados alakulása 1868–1954. In: *Acta Universitatis Szegediensis. Forum: Publicationes Doctorandorum Juridicorum*. 2016, Vol. 6, pp. 160–161; 163; UTTÓ, GY, op. cit., p. 584; BELIZNAI, K. A bírói fegyelmi felelősség szabályozása 1945 után. In: BIRHER, MISKOLCZI-BODNÁR, NAGY, TÓTH, op. cit., p. 126.

In the period covered by the research, there were a total of 74 disciplinary proceedings, of which 31 were brought against judges. The cases can be divided into the following groups (the figures are shown on the column chart):

- suspension or termination of his judicial office in the context of a supervisory inquiry procedure,
- no disciplinary proceedings,
- no disciplinary proceedings on grounds of residence abroad,
- complete disciplinary proceedings with a finding of guilt,
- removal from the judiciary,
- transfer of a disciplinary case.

The transfers took place because of the entry into force of Decree Law No. 46 of 1950. Article 14 of the decree stated that *"the disciplinary proceedings filed against the district court president, vice-president and district judge shall be heard in the first instance by the disciplinary panel of the county court"*, so from then on disciplinary proceedings were heard by the disciplinary panel of the Pest Province Tribunal. The record shows that the highest number of disciplinary proceedings was in 1950.

8 Conclusion

The disciplinary liability constitutes a special kind of liability, especially in terms of the judicial profession. Because we have higher ethical standards for the judges, even in a historical approach. Therefore, in every disciplinary case the question is what is the limit that a judge shall not exceed which is particularly true, as we saw through the presented cases, under Section 2 of Article 5 of Act III of 1936. This study is meant to explain, through practical examples, how the disciplinary prosecution changed from an ethical approach, which focused primarily on protecting the authority of the judiciary, to a political and ideological procedure, which resulted in judgments that even led to the removal of judges from office. Nevertheless, it may be noted that the legislative changes of 1948 did not completely abolish the '*ordinary disciplinary proceedings*' under the 1936 Act.

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Budapest Capital Archives. VII.1.b. carton 89. (1948), 13/1948, Gágyor, S.

Budapest Capital Archives. VII.1.b. carton 90. (1950), 25/1950. Markovits, B.

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The Judicial Practice of Hungarian People's Courts in the Trials of Certain Administrative Officials 1945–1950

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-13

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Abstract

This study aims to present some of the proceedings against public officials in the Hungarian People's Court and examine whether the jurisprudence of the People's Court panels in these cases differed significantly.

Numerous excellent academic works have been written on the general perception of People's Courts, the dogmatic analysis of the judiciary, and the most famous trials. What is lacking, however, is an analysis of the trials of the people's courts from the perspective of proceedings against civil servants of the *"ancien régime"*, which were specifically used as a tool for communist positioning.

In this study, I will explain the development of the Hungarian People's Courts and its procedural rules. I will describe and examine the essence of some criminal cases brought against Horthy-era public officials in the People's Court, highlighting typical procedural violations and political decisions. I have classified the trials covered by this research into two categories: trials against municipal officials and chief bailiffs.

Keywords

People's Courts; Hungary; Communism; Show Trials; Public Officials.

1 Introduction

This study aims to present some of the proceedings against public officials in the Hungarian People's Court and examine whether the jurisprudence of the People's Court panels in these cases differed significantly.

At the end of the war, the provisional government in Debrecen established the organizational and procedural rules of the People's Courts, an institution that was foreign in origin and unknown in the Hungarian legal system. Although this institution was created for understandable reasons, it soon became a 'class court' and the venue for show trials.

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In this study, I will explain the development of the Hungarian People's Courts and its procedural rules. I will describe and examine the essence of some criminal cases brought against Horthy-era public officials in the People's Court, highlighting typical procedural violations and political decisions. I have classified the trials covered by this research into two categories: trials against municipal officials and chief bailiffs. I have created categories according to the defendants' office, mandate or service at the time of the offence. The archival research and processing were motivated by the fact that no comparative study of sentencing practice had yet been undertaken.

2 The Development of the Hungarian Model

After the front retreated, representatives of the political parties arriving in Szeged adopted the programme and established the Hungarian National Independence Front. According to Part II, point 2 of the document, *"The traitors, the responsible war criminals, must be arrested and handed over to the people's courts. Their property shall be confiscated."*[1]

Although codification was months away, the press – mainly left-wing newspapers – wrote extensively about the urgent need to set up People's Courts and the likely large number of defendants.[2]

1 Magyarország demokratikus újjáépítésének és felemelkedésének útja. In: *Délmagyarország.* 3. 12. 1945, p. 3.

2 HALPERN, R. Háborús bűnösök. In: *Néplap.* 30. 12. 1945, p. 5.

On 22 December 1944, the Provisional National Government, led by Béla Miklós de Dálnok, committed in a declaration to bring war criminals and those who were guilty of crimes against the people to trial. At that meeting, the Communist Party's chief spokesman, József Révai, said: *"Now the government itself must take in hand the organization of democratic people's courts to try traitors to the country."*[3]

The signing of the Moscow armistice put the government under even more pressure: not only the impatient tone of the left-wing press, but also the need for other nations to recognise its sovereignty made it urgent to pass the legislation as soon as possible.[4]

Decree No. 81/1945 M. E. (hereinafter "Nbr.") was published in the Hungarian Gazette on 5 February.[5]

3 How the People's Courts Worked

3.1 The Legal Background

The legal basis of the People's Court was based on Decree No. 81/1945 M. E. and its supplementary Decree No. 1440/1945 M. E., Decree No. 5900/1945 M. E. and Decree No. 6750/1945 M. E., and by the amending Act No. XXXIV of 1947, which was enacted as Act No. VII of 1945.

In total, 68 sections of the Nbr. contained organisational, procedural and substantive rules. The major novelty of the legislation was the breakthrough of the principle of nullum crimen sine lege, with Section 1 declaring that criminal offences could be punished even if the act had already been completed at the time of the enactment of the legislation and was not punishable under the legal provisions existing at the time of its completion. This technical legal solution, although also used in the Nuremberg Charter, has been the subject of sharp criticism. Rustem Vámbéry, for example,

3 PAPP, A. Néptörvényszék, Népbíróság és népbírósági jog Magyarországon. In: *E-tudomány* [online]. 2011, Vol. 9, no. 4, p. 10 [cit. 10. 9. 2024]. Available at: http://www.sze.hu/~kallay/letolt/2011/februar/Papp_Attila__Nptrvnyszk_Npbrsg_s_npbrsgi_jog_Magyarorszgon.pdf

4 Ibid., p. 10.

5 Act V of 1945 concerning the armistice agreement concluded in Moscow on 20 January 1945. Hungary, Budapest: Hungarian Gazette. In Hungarian.

expressed his concerns about the decree: *"even if we name the court a people's court, it cannot be considered a legal quibble if we wish the rule of law to prevail"*.[6]

Acts penalised by the law of the people's courts can be classified as political crimes. They are political because the instigator or the object (sometimes both) of the act is political.[7]

The flexible definitions allowed the court to include other types of offences in its jurisdiction because of their political nature. The conclusion to be drawn from the preamble of the decree is that the Hungarian people were collectively considered the victims of the offences.[8]

The decree divided war crimes and crimes against the people into two groups. The most serious war crimes (Section 11) were punished to the maximum extent (death penalty, hard labour for life) and there was no possibility of appeal.[9]

Crimes against the Hungarian people (Section 15 and Section 17) were committed against the Hungarian people or certain groups of the Hungarian people. The name of the category of offence *"anti-people"* comes from László Réczei, Ministerial Advisor, who introduced the term *"vrag narodov"*, i.e. *"enemy of the people"*, a mirror translation from the notorious Moscow proceedings of the 1930s.[10]

The offence under Section 15.3 is relevant to the subject of this essay. It punished a public official with jurisdiction who consistently engaged in anti-people, pro-fascist activities. In the following chapter, we will read in several indictments how creatively it was used by the people's prosecutors in the indictments of former public officials…[11]

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6 VÁMBÉRY, R. Jogászi finomkodás vagy történelmi realitás. In: *Harc*. 10. February 1945, p. 1.

7 SZÚCS, J. Politikai bűntett. In: *Ítél a nép… Népbírósági kiadvány*. 1945, Vol. 1, no. 1, p. 6.

8 LUKÁCS, T. A népbírósági jogról: négy évtized múltán. In: *Jogtudományi Közlöny*. 1985, Vol. 40, no. 4, p. 191.

9 RIES, I. *A Népbíráskodásról szóló 81/1945. M. E. számú* és *az ezt kiegészítő 1440/1945. M. E. számú rendelet szövege* és *magyarázata*. Budapest: Politzer Zsigmond és fia, 1945, pp. 25–26.

10 ZINNER, T. "éjjel-nappal jó hangulatban dolgozunk és igyekszünk igazolni a belénk vetett reményeket". Szembenézés- a népbíróságokról feketén- fehéren. In: *MTA Law Working Papers*. 2016, no. 6, p. 26.

11 RIES, 1945, op. cit., p. 32.

Each People's Court council was composed of people's judges (lay judges) delegated by the five political parties. A qualified judge, whose only task was to inform the people's judges of the law, was appointed by the Minister of Justice.

The National Council of People's Courts (NOT), composed exclusively of qualified lawyers, acted as a second instance court.[12]

3.2 Investigation and Prosecution

3.2.1 Investigation

The search for war and anti-people criminals and the investigation of their acts was the task of the Political Police Departments of the Hungarian State Police, and from October 1946 of the nationally unified political police (ÁVO).[13]

The political police were the cornerstone of the functioning of the People's Court system. Their task was "to arrest the fascists, and to liquidate all organizations and movements opposed to democratic Hungary."[14] For this reason, torture and the coercion of confessions during interrogations became a daily practice.

After internment was excluded as a form of punishment by the May amendment, the Minister of the Interior issued a secret decree in June 1945 (No. 138000/1945 BM) allowing internment to be used only based on a political decision, without a court order. From July 1945, the authorities were obliged to send all decisions of the People's Prosecutors and all acquittals to the political police. The "recall technique" was then developed, with the political police "overruling" the verdict of the People's Court and often interning those who had been acquitted.[15]

12 MIKÓ, Zs. *A Legfelsőbb Bíróság Népbírósági Tanácsa működése és ügykezelési gyakorlata (1957–1963)*. PhD thesis. Budapest: Eötvös Loránd University, Doctoral School of History, 2011, p. 34.

13 PAPP, A. Ügyészség, *Népügyészség, 20. század*. Nagykanizsa: Private edition, 2012, p. 157.

14 HORVÁTH, A. A szovjet típusú diktatúra büntetési rendszere. In: MÁTHÉ, G., RÉVÉSZ, T. M., GOSZTONYI, G. (eds.). *Jogtörténeti Parerga*. Budapest: ELTE Eötvös Kiadó, 2013, p. 153.

15 Ibid., p. 153.

3.2.2 Prosecution

The prosecution function in the People's Court proceedings was performed by the People's Prosecutor's Offices. The People's Prosecutor could be a qualified lawyer, and his appointment and dismissal could be decided by the Minister of Justice.[16]

office

4 Judicial Practice in the Trials of Certain Administrative Officials

I have based the selection of the trials on the definition of Act XVIII of 1940. According to this definition, a public official is any person who, by virtue of his office, service or special assignment, is required to perform the administrative, judicial, educational, defence or managerial functions of the State, municipality or commune.[17]

4.1 Municipial Officials

4.1.1 The Case of Dr. József Betlehem

In December 1945, Dr. József Betlehem, the deputy notary of the city of Zalaegerszeg, was accused by the People's Prosecutor's Office of committing crime against the people under Section 15.3. of the Nbr.

According to the indictment, the defendant, as a public official with jurisdiction, consistently engaged in anti-people and pro-fascist activities, and as an industrial authority clerk, discriminated against Jewish customers in granting of industrial licences.

The People's Court of Zalaegerszeg found the accused guilty of the crime against the people under Section 15.3 and sentenced him to 3 years imprisonment, loss of office and 5 years suspension of his political rights.

According to the reasoning, *"Wherever he could, he blackmailed the community, even provoking the proceedings himself. This unlawful and immoral conduct was particularly*

16 RIES, 1945, op. cit., pp. 41–43.

17 Act XVIII of 1940 on the punishment of certain acts endangering the security and international interests of the Hungarian State. Hungary, Budapest: Hungarian Gazette. In Hungarian.

directed against the Jews, because the accused knew that the Jews, who were then oppressed and persecuted, would not dare to complain."[18]

4.1.2 The Case of Dr László Temesváry

Dr. László Temesváry, the deputy notary of the city of Szeged, the legal clerk of the industrial authority and housing office, was charged by the Peoples Prosecutor's Office in February 1945 with the crime against the people under Section 15.2.

According to the indictment, because of the owner's Jewish origin, he forbid the Pick cannery from obtaining an industrial licence, despite the legal provisions.

At the trial in August, the people's prosecutor extended the charges to include the crime against the people under Section 15, because the accused had insulted Jews, accepted money and created difficulties in issuing trade licences.

The defendant was found guilty of the crime against the people under Section 15.3 and sentenced to one year's imprisonment, loss of office and a five-year suspension of his political rights.

The People's Court considered as a mitigating circumstance the fact that the accused, of his own free will, a few months later in Budapest, helped the people in need and participated in the underground resistance movement by issuing false certificates. Therefore, the lowest possible penalty for his offence would be disproportionately severe and the court sentenced him only for 1 year of imprisonment.[19]

4.2 Chief Bailiffs

According to Section 71 of Act XXI of 1886, the chief bailiff was the first official of the district and supervised the municipalities belonging to his district. In addition to his administrative functions in the fields of transport,

18 *Magyar Nemzeti Levéltár Zala Vármegyei Levéltára* (HU-MNL-ZML) XXV. 17. 7. d. NB 4/1946. A jogszolgáltatás területi szervei. A Zalaegerszegi Népbíróság iratai. dr. Betlehem József népellenes bűntette.

19 *Magyar Nemzeti Levéltár Csongrád- Csanád Vármegyei Levéltára.Központi Levéltára* (HU-MNL-CsML- KL) XXV. 8. 3.d. NB 84/1945. dr. Temesváry László népellenes bűntette.

public health and industry, he was the first police authority in charge of the gendarmerie and could decide on police custody and detention. It could decide on the issue of industrial licences and certificates.[20]

4.2.1 The Case of Count dr. György Széchényi

Count dr. György Széchenyi, the chief bailiff of the district of Balatonfüred, was accused by the People's Prosecutor's Office of Budapest in September 1945 of, among other things, limiting the amount of firewood and meat that could be distributed to the Jewish population, despite the legal provisions; He had several people expelled from Balatonfüred because of their Jewish origin, so that in his public office he violated or endangered personal freedom and physical integrity in the execution of laws and decrees against the population, and thus violated the provisions of Section 15.2. of the Nbr.

The People's Court of Budapest found Count György Széchenyi guilty of all charges of the crime against the people under Section 15.2. of the Nbr., sentenced him to three years' imprisonment, 5 years' suspension of his political rights, loss of office and forfeiture of his pension right.

As mitigating circumstances, the court considered that he had tried to atone for his mistakes, which he had realised in the meantime, by resigning from his job during the Szálasi coup and then guarding sheltered houses and helped the persecuted.[21]

4.2.2 The Case of Dr. Béla Buzás

Dr. Béla Buzás, the chief bailiff of the district of Keszthely, who was still in office, was interned on 1 August 1946. The Minister of the Interior lifted the police custody in October, on the grounds that he was a democratic-minded individual and certainly did not committ any crime.

On 12 October the People's Prosecutor's Office in Nagykanizsa charged the accused with an anti-people crime under Section 15.3. of the Nbr. According to the indictment, in 1941 the accused had interned three persons for public

20 Act XXI of 1886 on Municipalities. Hungary, Budapest: Hungarian Gazette. In Hungarian.

21 *Budapest Főváros Levéltára*. (HU-BFL) VII. 5.e. NB 1949/21738 A jogszolgáltatás területi szervei. Budapesti Királyi Büntetőtörvényszék iratai. Népbíróságtól átvett peres ügyek iratai. gróf dr. Széchenyi György népellenes bűntette.

trespassing and anti-war statements. After the German occupation he had interned several people from the left-wing parties.

The People's Court found Dr. Béla Buzás not guilty of the crime, finding that the chief bailiff had sabotaged the internment decrees and that no actual action had been taken against any of the person named in the gendarmerie's list. In the case of Jewish ghettos and Polish refugee camps in his district, he tried to be as humane as possible: he hid foreign Jews in the camp and set up a secret radio transmitter.[22]

5 Summary

The legitimate functioning of the Hungarian People's Courts was influenced not only by the imperfections of the law but also by the underqualification of some of the people's judges and political pressure from various sides. The revenge of witnesses may also have contributed to this.

The legitimacy of the trials was further undermined by the tone of the communist press, which branded the entire Horthy era as criminal and fascist. Later, public opinion came to believe that *"the people's court is a court without the people, against the people"*.[23]

In the first period of the People's Courts, the public administration was largely composed of public officials appointed during the Horthy era. These officials, due to their outlook and political orientation, became enemies of the communists, who aimed to occupy key positions in the administration and used every opportunity to remove them. Those who were allowed to retain their jobs after the war could soon expect to be interned and brought before the People's Court.

The conclusion to be drawn from the trials examined here is that not all of them were "an episode of class struggle"[24], that there were legitimate convictions and that there were real criminals against the people. Former

22 *Magyar Nemzeti Levéltár Zala Vármegyei Levéltára* (HU-MNL-ZML) XXV.16. b. 15. d. NB 99/1947. A jogszolgáltatás területi szervei. A Nagykanizsai Népbíróság iratai. Népbírósági perek iratai. dr. Buzás Béla népellenes bűntette.

23 BERNÁTH, Z. *Justitia tudathasadása*. Budapest: Püski Kiadó, 1993, p. 18.

24 CSERÉNYI-ZSITÁNYI, I. *A Rákosi-korszak bányamérnök-perei Különös tekintettel Vargha Béla és társai ügyére*. PhD thesis. Budapest: Pazmany Peter Catholic University, Doctoral School of History, 2016, p. 43.

civil servants with legal qualifications made extensive submissions denying the acts they were accused of committing, in some cases completely undermining the charges against them. The trials were conducted with severe restrictions on the rights of the defence, often in violation of their rights. Only exceptional mitigating circumstances were taken into account in the judgments.

Despite the assistance of qualified judges, there was a huge inconsistency in the severity of the penalty imposed. Some courts did not remand in custody those accused of serious crimes, and those suspected of lesser offences against the people ended up serving the full sentence in custody during the proceedings.

It is true that, compared to the overall jurisprudence of the People's Court, it is not public officials who have been the most severely sentenced. However, a light sentence or acquittal could end the careers of talented but mostly right-wing-minded individuals.

Not neglecting the fact that there were in fact guilty persons, collaborators among the accused, we can say that, despite their differences and differences, the criminal trials in the People's Court became instruments of the Sovietization of the administration and their jurisprudence was far from uniform.

The cases examined in this study involve a large segment of society. In my subsequent research, I have also highlighted the systematic process by which the new political power used both the economic downsizing of administrative posts and other technical procedures to alter the composition of the civil service, in addition to the trials in the People's Courts.

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The Struggle for Justice: Post-WWII Restitution of Richard Morawetz' Art Collection

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-14

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Abstract

This paper examines the post-WWII restitution efforts for the significant art collection of Richard Morawetz, which was deposited in the National Gallery Prague in 1939. Following the family's escape from Czechoslovakia to avoid Nazi persecution, Richard Morawetz engaged in a legal battle after the war to reclaim his art collection. Although his ownership was legally recognised, the artworks remained in the gallery's vaults and were officially confiscated by the state in the 1960s. This research paper focuses on the immediate post-war restitution efforts, detailing the court proceedings and illustrating how state institutions misused laws, specifically Restitution Act No. 128/1946 Coll. and Standing Committee Measure No. 255/1938 Coll., along with alleged tax arrears, in order to retain control over the art pieces. The paper is part of the Charles University SVV No. 260 621 and contributes to a dissertation project on looted art restitution in the Czech Republic.

Keywords

Nazi Looted Art; Restitution; Standing Committee Measure No. 255/1938 Coll.; Restitution Act No. 128/1946 Coll.; Beneš Decrees.

1 Introduction

This article examines the restitution effort of Richard Morawetz, who, in 1939, deposited his renowned art collection in the then National Gallery in Prague (hereinafter "NGP").[1] The article builds on the previous examination

[1] In the time, when Richard Morawetz deposited his art collection in the NGP, the institution was officially called the *"State Collection of Old Masters"*. Since it was the direct legal predecessor of the current NGP, I use, for clarity's sake, the same designation throughout the text.

of the restitution case law according to the Act No. 128/1946 Coll, on the nullity of certain property-law acts from the period of non-freedom and on claims arising from such nullity and from other interference with property (hereinafter "Restitution Act"), which was published earlier.[2] The aim of this paper is therefore not only to show how complex the restitution proceedings regarding cultural objects after the WWII were, but to apply the specific case law that I collected in previous papers to show considerable discrepancies. For, as you will see, the judicial decisions of that time were not strictly followed and the negative outcome of this specific case was rather defined by subsequent administrative decisions than the actual ruling of the court.

This article is based on extensive research in the Archives of the National Gallery in Prague,[3] the National Archives[4] and the Prague City Archives.[5] Quotes used in the text were translated by the author.

2 Richard Morawetz and his Collection

Richard Morawetz' family came from Úpice and traditionally worked in the textile industry.[6] Richard (1881–1965) was involved in the management of the textile business from his youth, but it was assumed that his older brother Moritz would take the main responsibility for the family business. This allowed Richard to pursue his hobbies – culture and travel – alongside his work.

2 The research was part of the Charles University SVV No. 260 621 and published as a Chapter VI in ŠOUŠA, J. *Zákony, zákoníky a jejich aplikační praxe v 18.–20. století v českých zemích*. Praha: Univerzita Karlova, 2023.

3 Fond NG 1958–1964, kart. 20, Acquisition – socialization Richard Morawetz (merged file 1939–1961), ref. No. 141/61.

4 Fond MF, Canada, kart. No. 191, 235 and 236 and Fond ÚRŘSLS I_inv. č. 941_872.

5 Fond District Civil Court for the inner Prague, ref. No. 87, Nc L 121/49.

6 For more information on the Morawetz family business, see HOŘEJŠ, M. Arizace pozemkového majetku židovských elit v Protektorátu Čechy a Morava na příkladu rodiny Morawetzů. In: *Šlechticův žid – žid šlechticem: židovské elity a židovská šlechta v novověku a moderní době*. Ostrava: Ostravská univerzita v Ostravě, 2015, pp. 183–199.

As Kábrt explains in his study,[7] Richard *"travels /to Ceylon, India, Japan, North America, England/. He gives numerous lectures in almost all towns of the Czech Northeast with colour slides made from his own photographs* […] *M. also participates diligently in the theatre activities in the Úpice amateur association not only as an excellent actor, but also as a director, lecturing on masking and theatre directing."* After his brother's death in 1922, when the complete care of the family estate passed onto him, as well as the guardianship of his brother's children,[8] he had to curtail some of his cultural activities, but remained a generous patron and avid collector.[9]

Richard Morawetz began his collecting activities as early as 1908, when he purchased a large part of the so-called Donebauer collection. He then expanded this collection with other archival documents, rare books, as well as prints and drawings. Nowadays, the collection is known not only for its excellent 17th century Dutch paintings, but also for its valued paintings by Czech masters such as Jan Kupecký and Norbert Grund. A special place in the collection was occupied by St. Christina by Lucas Cranach the Elder, which is now displayed in the permanent exhibition of the Old Masters in the NGP. It is not surprising, therefore, that the collection itself has been and continues to receive considerable attention in art historical circles.[10]

3 The Fate of the Collection during the Time of the Protectorate of Bohemia and Moravia

Although Richard Morawetz' family claimed Czech nationality, they were of Jewish religious affiliation. Richard himself was in danger after

7 See The development and fate of the Prague collection of bohemian works by the factory owner Richard Morawetz from Úpice stored in Archives of the National Gallery in Prague (hereafter "KÁBRT, 1965"), p. 19, Jan Kábrt (1901–1985), card 91, AA 2887, AA 3030. Jan Kábrt worked in Úpice as an archivist, but also as *"my father's devoted secretary, who collaborated with him on his literary collections"* (see MORAWETZ, H. *Mých devadesát let*. Praha: Academia, 2008, p. 193). It was he who arranged for the placement of the collection in the NGP in 1939. Kábrt's writing should therefore be taken, especially in the parts describing the personality of Richard Morawetz, with a grain of salt, taking into account Jan Kábrt's very personal relationship with Richard Morawetz.

8 See NĚMEČKOVÁ, L. Příběh Alice Morawetz a Elsy Oliven. In: *Terezínské listy*. 2022, p. 27.

9 See HOŘEJŠ, 2015, op. cit., p. 186.

10 See e.g. SLAVÍČEK, L. *„Sobě, umění, přátelům": kapitoly z dějin sběratelství v Čechách a na Moravě 1650–1939.* Brno: Společnost pro odbornou literaturu Barrister & Principal, 2007; KONEČNÁ, M. *Sbírka obrazů Richarda Morawetze*. Bakalářská práce. Brno: Masaryk University, Filozofická fakulta, 2016, vedoucí prof. PhDr. Lubomír Slavíček, CSc.; or NĚMEČKOVÁ, 2022, op. cit.

the German occupation had begun, not only for racial reasons, but also for his long-held political views[11] and his key role in the so-called Jute Cartel and the associated foreign trade.[12] Nevertheless, according to the testimony of his contemporaries, he refused to leave Czechoslovakia for a long time[13] and only decided to flee on 30 March 1939, after the declaration of the Protectorate of Bohemia and Moravia.[14]

Morawetz' collection was saved thanks to the quick action of Prof. Josef Cibulka, then director of the NGP, and Jan Kábrt. On 22 April 1939 the NGP registered a written confirmation of the loan under No. 535/39, which was concluded on the basis of *"an oral agreement between Mr. Richard Morawetz* […] *on 14th March 1939 held in the rooms of the State Collection of Old Masters in Prague with its director…"*

The terms of the loan were as follows:

- it was emphasised that the title to the artworks remained with Richard Morawetz, and that the loan could be terminated *"against the half year's notice* […] *either in whole or in part regarding individual objects"*;
- NGP took over the complete management of the collection – its individual objects were authorised to be exhibited, stored in the depository, reproduced and lent;
- NGP undertook to manage the works with the same care as the works in its own collections, but was not responsible for any damage or loss;
- NGP was entitled to carry out minor conservation and restoration works on the collection objects without the owner's consent, while major restoration works were to be carried out only with the owner's consent and at the owner's expense;

11 Richard Morawetz was a well-known supporter of Tomáš Garrigue Masaryk, with whose family he was already in contact at the beginning of the 20th century. See HOŘEJŠ, 2015, op. cit., pp. 185 ff.

12 See MORAWETZ, 2008, op. cit., e.g. p. 32 or 85. Richard Morawetz was alleged to have damaged the German economy by, among other things, diverting the entire overseas shipping of the jute cartel from Hamburg to Trieste.

13 According to the recollections of his son Herbert, he even refused to send some of the paintings from his collection to an exhibition in Holland, as other collectors had done, because it could be seen as a hint that he was considering leaving Czechoslovakia. See MORAWETZ, 2008, op. cit., p. 79.

14 See KÁBRT, 1965, op. cit., p. 36.

- Richard Morawetz was not to sell any of the works abroad, and NGP had a right of first refusal for a period of one month in the event of a domestic sale.

The NGP's written acceptance of the aforementioned arrangement was made on 24 April 1939 and, as in the case of the written confirmation of the loan, it also included a sixteen-page list of the loaned collection items, accompanied by a price estimation as of 1 January 1939. However, this estimation was given only for paintings, drawings and prints. Collections of books and archival material, which were also lent, were without any further written specification, as everything according to Jan Kábrt was packed in a hurry and *"actually under the windows of the Gestapo in the Petschek Palace* […] *without enough time to make a list…"*[15] The Archives of the National Gallery in Prague then contain the application form of the Jewish collection dated 12 October 1940, which includes a Czech-language inventory of the works of art whose value exceeded 10,000 K.[16] The form is accompanied by a note that these works were permanently loaned to the NGP for exhibition purposes. In addition to this, the archives' file contains another list, this time written in German, which includes sections of manuscripts, books and carpets. However, the collection items in this list are described in very general terms, making it impossible to identify them for potential restitution claims at a later date.

We learn about the fate of the collection during the Protectorate both from Jan Kábrt's text and from the timeline captured on the file ref. no. 535/39.[17] The latter shows that already on 17 May 1939 some objects were handed over to the Museum of Decorative Arts and on 29 August 1941 the National Museum took over the manuscripts and autographs. The Gestapo also took an interest in the collection and a list of its contents was sent to them on 3 August 1941. According to Janatková and Vlnas, the collection was confiscated by the Gestapo in favour of the Vermögensamt on 16 June 1942,

15 See KÁBRT, 1965, op. cit., pp. 36–38.

16 This is an application for Jewish property in accordance with the Ministry of Finance's Decree No. 63.048/40-VI of 13 September 1940. The surviving form was used to declare items made of gold, platinum, silver, precious stones and pearls, as well as other *"precious and artistic objects, if the value of a single object or collection exceeds the amount of K 10,000"*.

17 Unfortunately, the content of the file has only been preserved partially and often lacks documentation relating to the events recorded in its timeline.

and *"just two days later* […] *Karl Maria Swoboda informed the relevant department of the Reich Protector's Office that he had professionally examined the collection and recommended that it stays as a permanent loan from the Reich's property in the National Gallery and the Museum of Decorative Arts. The collection retained this status until the end of the occupation."*[18] Not only was the integrity of the collection disturbed by the transfer of some objects to the Museum of Decorative Arts and the National Museum, but according to the aforementioned file ref. no. 535/39 some of the works of art were also transferred to the André, a – in that time – well known auction house. Moreover, some paintings were chosen for the so-called Sonderauftrag Linz[19] and according to Kábrt didn't return after the war.[20] Other losses include rare books and some other collection items that were picked up by Richard's sister-in-law, Mrs. Alice Morawetz.[21] She requested these works, probably with the intention of removing them from the country, or to better preserve some of them with JUDr. Josef Růžička.[22] However, according to Kábrt, only Comenius' Praxis Pietatis came into the hands of Richard Morawetz, everything else was lost after Růžička's arrest.[23]

18 See JANATKOVÁ, A., VLNAS, V. *Pražská národní galerie v protektorátu Čechy a Morava*. Praha: Národní galerie v Praze, 2013. The authors discuss the model case of Richard Morawetz' collection on pp. 109–112. Although the Gestapo's and Vermögensamt's decree, on the basis of which the art collections were allegedly confiscated, has not survived in the Archives of the National Gallery in Prague, it is described in the request for its cancellation, which was addressed to the Ministry of Education and National Enlightenment (hereinafter "Ministry of Education") on 2 May 1947. According to internal documents, this decree was not in the NGP files even on 3 October 1950. Even though it is referred to in several documents, I find it questionable, whether such a decree has ever been issued.

19 The so-called Sonderauftrag Linz was an informal organisation with a special task of collecting works of art for a Führer Museum, which was about to be built in Linz. The first representative and main figure of the Sonderauftrag was Hans Posse, the then director of the Staatliche Kunstsammlungen Dresden.

20 See KÁBRT, 1965, op. cit., p. 40.

21 Alice Morawetz was a remarkable person, who unfortunately did not survive the war. For more on her fate, see NĚMEČKOVÁ, 2022, op. cit.

22 JUDr. Josef Růžička was a prominent lawyer in Prague and honorary consul of Panama who saved countless Jewish families by issuing Panamanian visas. During the Protectorate, Alice Morawetz lived in his house in Mala Strana, which is now the seat of the Swedish Embassy.

23 See KÁBRT, 1965, op. cit., p. 36.

4 Pre-trial Proceedings

The first surviving document relating to the restitution of the art collection is dated 13 May 1946, so before the Restitution Act entered into force. It is a repeated request by the lawyer of Richard Morawetz, JUDr. Miloš Kočka,[24] for an inventory list of the collections deposited in the NGP. The gallery staff then actually hurried up with the inventory and on 20 May 1946 the document was sent to JUDr. Kočka.

A request for restitution, which didn't preserve, was submitted to the Ministry of Education through the NGP. The response to this request was not an expected restitution decree, but a formal writing no. B-75 959/47-III/4 from 15 April 1947 containing an instruction to further negotiate directly with the NGP Directorate. The position of the NGP, which (at that time) had no objection to the restitution *"since it is actually a loaned property"*, was reiterated, and it was pointed out that *"it is desirable to duly submit a complete restitution application for all works of art seized and exported by the Germans, if this has not already been done"*. This additional application was submitted to the Ministry of Education on 2 May 1947 in the form of a request *"for the annulment of the invalid confiscation notice, issued by the Gestapo and Vermögensamt, in accordance with the Government Order No. 110/46 and the Act No. 12/46, and for the return of these artworks in accordance with the Presidential Decree No. 5/45 and Act No. 128/46"*. What is interesting about this additional restitution application is that Richard Morawetz not only asked for the return of his art collections, including the missing objects, but also explicitly asked for the annulment of the Gestapo's and Vermögensamt's confiscation notice *"by which my aforementioned art objects were confiscated on 15th June 1942"*. This was done even though his claim was arising from property transfers made after 29 September 1938 by official decree, which was based on legislation that had already been declared invalid. However, under Section 2 of the Restitution Act, revocation or amendment of the official decree was only necessary if the official decree had been issued on the basis of legislation, which had not been declared invalid or revoked. This was not only clear from

24 JUDr. Miloš Kočka was one of the other interesting personalities involved in the Morawetz case. He was not only a very capable lawyer, but later also a writer of biographical novels about Caravaggio or Vinzenz Priessnitz.

the grammatical interpretation of the text of Section 2 in conjunction with Section 15 of the Restitution Act, but was also confirmed by the Supreme Court's decision in Case R I 253/46. If, according to this Supreme Court's decision, the annulment of the notice of the Zentralstelle's assessment was not required as a precondition for restitution, neither, per analogy, should the annulment of the property confiscations of the Gestapo and (most of all) the Vermögensamt have been required in the case of Morawetz' collection. On the other hand it seems as if JUDr. Kočka submitted petitions on the annulment of confiscation notices in every partial Morawetz restitution case. This explains why on 29 November 1947 the Ministry of Finance, with the approval of the Ministry of the Interior and the Ministry of Labour, issued a notice No. 175709/47-II/4, on the basis of which *"Gestapo notice No. 1040/39-IV-2, by which the property of Richard Morawetz was declared forfeited to the Reich as a result of deprivation of his Protectorate citizenship* […] *and the notice of the former Vermögensamt of 6th February 1942* […] *by which a Treuhänder was placed in the* […] *company"* were declared invalid. This notice of the Ministry of Finance from 1947 played a key role in the later court proceedings which I describe below.

Another peculiarity of the aforementioned additional application was that it was addressed to the Ministry of Education and not to the Ministry of Labour. Morawetz' collection was to be placed as a Reichseigentum under the so called Nation Property Administration (hereinafter "NSMP") immediately after the war. However, it seems that in 1947, when the first restitution claim was filed with the Ministry of Education, it was not clear who officially had the Morawetz' collection in his custody, and the claim was based on the de facto possession of the NGP according to the loan agreement. Later, during the court proceedings, another restitution application was filed, this time with the Ministry of Labour. This application was, as expected, declined and the applicant was referred to court proceedings. I assume this new restitution application was made just to assure that all the requirements of the Restitution Act were fulfilled, including the claim with the competent authority.[25]

25 See Section 9 of the Restitution Act.

Going back to the negotiations of JUDr. Kočka with the NGP in spring of 1947, it is obvious that – considering the value and importance of the collection – a declaration of important public interest under the provisions of Section 6(1) of the Restitution Act was already being considered. At that time, the NGP was clearly of the opinion that its task was primarily to preserve the art collections under its protection as far as possible in their entirety, thus ensuring their accessibility and impact on the general public. Negotiations on the release of the collections were therefore protracted. Moreover, according to the NGP's request of 2 October 1947 to the Ministry of Education, the request for permission to export the collection abroad may also have played a role.[26] Among other things, the NGP requested the Ministry of Education to set up a five-member committee to assess the cases of valuable private collections held by the NGP.[27] On 7 January 1948, the Ministry of Education gave its consent to the establishment of the requested committee, which should *"study the question of additions to the collections of your Institute which occurred during the war period and to make proposals for the disposal or permanent acquisition of such additions for the National Gallery."* As committee members were appointed the then director of the NGP, Dr. Vladimír Novotný, as well as Prof. Dr. Antonín Matějček, Prof. Dr. Jan Květ and the attorney JUDr. Josef Morák. The Ministry of Education was represented by Dr. Kamil Novotný. However, the committee's deliberations did not bring any breakthrough in Morawetz' case and the restituent had no choice but to take his claim to court.

5 Court Proceedings under the Restitution Act

The petition pursuant to the Restitution Act was delivered to the District Civil Court for the inner Prague on 16 June 1949 and was filed under No. Nc L 1218/49. If we adopt the interpretation of the law according to which there was no need to abolish or amend the official confiscation decree in this case, this petition was filed just one day before the expiry of the time limit laid down in Section 8 of the Restitution Act. Both the Czechoslovak State *("the Ministry of Education, Sciences and Arts in Prague*

26 Although this application for an export permit has not been preserved anywhere.
27 Among which were for example the Morawetz' collection and the Waldes' collection.

in the matter of the National Gallery in Prague and the National Cultural Commission for the Administration of State Cultural Property in Prague"[28] and, "out of an abundance of caution", the National recovery fund (hereinafter "FNO")[29] are named as respondents in the application. There could have been several reasons for the passive legitimation of FNO. As mentioned above, the collection objects were most likely part of the confiscated mass, which was disposed of by the FNO, or later by the National Cultural Commission. In addition to this caution due to the uncertainty as to who was in charge of the collection at the time the restitution petition was filed with the court, the choice of FNO as a party to the proceedings may have reflected the amended wording of Article 11(1) of the Restitution Act, according to which the consent of FNO was required for any agreement between the parties to be effective. Its participation could have accelerated the process of granting consent to the parties' agreement. Both respondents were represented by the Financial Prosecutor's Office in Prague.

The restitution proposal included a list of the loaned works, subject to their further addition. This was supplemented on the following day, 17 June 1949, by a list of engravings, arts and crafts (which were stored in Museum of Decorative Arts in Prague) and books (which were presumably handed over to the National Museum). Morawetz proposed not only the release of precisely specified objects, but, again, also the annulment of the notice, under which the ownership of the collection passed to the German Reich. In contrast to the additional application to the Ministry of Education of 2 May 1947, the notice to be annulled was not specified in the proposal. The text did not even mention the confiscation of June 1942, on the contrary, it was explicitly stated that the collections had been confiscated on the basis of the Gestapo's assessment of 9 September 1939, No. 1040/39-IV/2, which was already annulled by the aforementioned notice of the Ministry of Finance assessment No. 175709/47-II/4 of 29th November 1947.

28 Hereinafter referred to as the "National Cultural Commission". This institution was established according to the Act No. 137/1946 Coll. Its task was mainly to take care of confiscated cultural property.

29 FNO was a state fund established by the Presidential Decree No. 108/1945. This decree confiscated the property of enemies of then Czechoslovakia without compensation and entrusted the FNO with its administration and distribution.

The state reliability of Richard Morawetz was further alleged. The court petition provided that he and his entire family had declared their Czech nationality in the 1930 census and that during the war he had been commissioned by the government-in-exile as the Czechoslovak representative to the International Labour Organisation, to whose board he had been elected in 1944. Although the certificate of the state reliability is not preserved in the file, I assume that it was the certificate issued by the Consulate General in Montreal on 8 January 1946, that had been submitted earlier. However, this certificate was not issued by the authority provided for in Section 5(3) of the Restitution Act, which caused later evidentiary problems.

It is important for the examination of this legal proceeding that documents illustrating the behind-the-scenes negotiations of the institutions concerned, whose common goal was the preservation of the collection in the NGP, have been preserved in the Archives of the National Gallery in Prague. Even though the simplest way to achieve this goal would have been the declaration of an important public interest under the provisions of Section 6 of the Restitution Act,[30] the concerned institutions apparently tried to find another way to keep the collection. For example, in a letter dated 5 December 1949 addressed to the FNO, the Financial Prosecutor's Office suggested that the FNO should negotiate with the National Cultural Commission to issue a decree according to which the collection should be administered by NGP. However, pursuant to a statement of the National Cultural Commission dated 25 May 1950, the collection had already been placed under the administration of the NGP in 1947 for exhibition purposes,[31] so that a new decree wouldn't have an additional effect in this regard. It is hard to say whether such a statement was true or whether the employees of the National Cultural Commission just ex-post tried to cover the discrepancies in the collection's administration. However, if it were true, it would mean that the original application for restitution should have been filed by the Ministry of Labour, not the Ministry of Education. Most probably, this was

30 However, it should be pointed out the declaration of the important public interest was always connected with a monetary compensation, which in this case had to be assumed as highly cost-intensive.

31 Most probably it was an administration according to Section 4 (2) of the Act No. 137/1946 Coll.

the reason, why JUDr. Kočka in 1950 filed a new restitution application, as mentioned above. By this he managed to avert the threat of losing the case on ground of not fulfilling the formal requirements of the Restitution Act.

The NGP then tried to win the case by pointing out the ambiguity regarding Morawetz' nationality. In this connection, on 19 December 1949, the NGP submitted a request to the Ministry of the Interior to conduct an investigation as to *"whether Richard Morawetz is still a Czechoslovak national and, if so, to find sufficient grounds to invite him to return to Czechoslovakia."* As I noted in my previous research,[32] after February 1948 there was increased pressure to reject restitution claims by citizens residing abroad because in doing so they were considered unreliable to the state. In addition to that, in December 1949, the question of Morawetz' nationality was taken up by the court on its own initiative, ostensibly in order *"to complete a statement for the Ministry of Justice, which intends to settle the restitution claims of certain foreign citizens in the aggregate"*.[33] In response to this enquiry, Richard Morawetz advised that he had acquired Canadian nationality on 3rd February 1947. This fact was then argued several times in the course of the proceedings (see below), but ultimately played no part in the decision of the case.

Another argument used against Morawetz was that, in the 1950s, as during the Protectorate, the petitioner's tax arrears were almost automatically investigated, for the satisfaction of which the collection could be seized by execution. Pursuing this praxis the Ministry of Finance, by its decision of 6 March 1950, no. 217/41.616/50, ordered the immediate foreclosure of the collection even though the tax to be paid had not been assessed yet.[34] It was then suggested to the court, together with a third application for an extension of time to make representations, that the restitution proceedings should be stayed until a report on the extent of the foreclosure could be made to the court. Although the court extended the time for

32 See ŠOUŠA, 2023, op. cit., pp. 110 ff.

33 Some of Richard Morawetz' claims were resolved under the Foreign Claims Settlement Regulation, which was entered into with Canada. However, the art collection was not included in this settlement and was thus subject to restitution in the 1990s.

34 Please see the document No. 816/49-19.3.1950-VII/7, prepared by the financial department of the ÚNV (Central National Committee) of the capital city of Prague addressed to the financial department of the ONV (District National Committee) Prague.

making representations, this time *"only"* until 1 June 1950[35], it did not sustain the motion to stay the restitution hearing *"because it lacks any support in the statutory provisions. The conduct of an execution, i.e. a satisfaction proceeding, can make no difference to a restitution proceeding, which has a determining function. On the contrary, the execution should wait until the decision on the restitution is made"*.[36] It is thus positive to see that the district civil court for inner Prague, or at least some of its departments, still ruled in accordance with legal principles in the beginning of the 1950's, even when pressured by other state institutions.

On 1 June 1950, the Financial Prosecutor's Office sent to the court the respondents' representations. The Financial Prosecutor's Office proposed, first of all, to verify whether Richard Morawetz were a Czechoslovak citizen and, if not, to order him to post a bond in the amount of 10,000 Kčs. The Financial Prosecutor's Office also stated that it is essential to establish the state reliability of the petitioner by means of an assessment by the competent district national committee pursuant to Article 5(3) of the Restitution Act. If the petitioner's state reliability were not verified in this way, his active legitimacy would not be established and the petition should be rejected. This position was in line with the then decisions of the Supreme Court in Case Nos R I 552/47 and R I 263/47.[37]

35 It is worth mentioning at this point that although the petition was filed in June 1949, the first internal communication concerning the court proceedings is not preserved until December 1949. On 21 December 1949, the Financial Prosecutor's Office applied to the court for an extension of time until 15 February 1950, because of the need for an extensive investigation. It then packed its application on 8 March 1950, this time referring to the reorganisation of the Financial Prosecutor's Office and the continuation of the investigation. The last request for extension of time, dated 28 April 1950, was coupled with a motion for stay of proceedings. In refusing it, the court stated, inter alia, that *"the time limit of about ¾ year from the delivery of the restitution petition is adequate for obtaining the necessary information, and the court is moreover bound by the standards for dealing with backlogs"*.

36 See Resolution of the District Civil Court in Prague I, sec. IX, dated 6. 5. 1950, no. NcIX. 302/50 11.

37 This change in practice is also pointed out by KNAPP, V. *Nové předpisy o restituci: (Systematický výklad zák. č. 79/1948 Sb., t. zv. restituční novely): Nezbytný doplněk knihy „Vrácení majetku pozbytého za okupace (Restituční zákon)"*. Praha: V. Linhart, 1948, p. 64. In the original commentary (see KNAPP, V., BERMAN, T. *Vrácení majetku pozbytého za okupace: (restituční zákon: výklad zákona č. 128/1946 Sb. o neplatnosti některých majetkově-právních jednání z doby nesvobody a o nárocích z této neplatnosti a z jiných zásahů do majetku vzcházejících, t. zv. zákona restitučního)*. Praha: V. Linhart, 1946), it was written that the Restitution Act had in mind in its provisions of Section 5(3) the doubts of the court, which could thus decide for itself what evidence it would accept as sufficient to make a finding of state reliability. As KNAPP, 1948, op. cit., p. 64, writes, such a change of legal opinion *"is* […] *a consequence of the fact* […] *that the Restitution Act was based on the erroneous concept of mechanical and linear restitution and that it did not correspond to the factual conditions and relationships and needs of society. Therefore, practice has sought to correct this error by interpretation and at least to bring the law closer to actual economic conditions. In order to achieve this purpose, practice has often resorted to an interpretation that is legally questionable but sociologically justified."*

An essential part of the above-mentioned statement of the Financial Prosecutor's Office was a reiteration that the collection could not be released since it was a part of the national cultural property, and therefore a declaration of the Ministry of Justice would be submitted in accordance with the provision of Section 6(1) of the Restitution Act. The Ministry of Justice took immediate action and requested the court file for the examination of the case, which was to be returned by 23 June 1950, the date on which the court hearing was scheduled. However, the hearing could not take place because of the failure to return the court file, and the parties were told on the spot that a new date would be set after the file was returned to the court. Negotiations on the Section 6 declaration again dragged on[38] and Richard Morawetz himself did not send his statement to the Department of Justice on the matter until 21 October 1950. Morawetz first commented on the legal nature of the deposit of the collections with the NGP and argued that the collections were his property because of the annulment of the Gestapo confiscation order of 9 September 1939. This fact had been acknowledged by the NGP itself after WWII when it had dealt with Morawetz as the owner. In his opinion, the contract of 24 April 1939 corresponded to the same purpose as a declaration of important public interest, which was about to be issued. The artworks had been exhibited and loaned to guarantee their accessibility to the public. The works of art also could not have been sold abroad and a pre-emption right still was reserved for the NGP in the event of a sale in the Czechoslovakia. Importantly, Morawetz noted: *"I do not intend to use the right of a half year's notice* […] *because the collections in the National Gallery are best and most professionally cared for."*

This statement by Morawetz was forwarded to the Financial Prosecutor's Office on 26 October 1950 with the question of whether the same purpose could not be achieved by interventions under Section 3 of Standing Committee Measure No. 255/1938 Coll. At this point, I will allow a longer

38 In this context, it is worth recalling that the amendment to the Restitution Act by Act No. 79/1948 Coll. abolished the three-month period during which the Ministry of Justice had to issue a declaration that important public interests were in existence. As of 28 April 1948, the Ministry of Justice was not bound by any time limit.

quotation of the NGP statement to this proposal, which in the rhetoric of the time speaks for itself:

> *"… By these applications Richard Morawetz seeks the restoration of his right of ownership in its integral extent to all the objects to which his restitution application relates. And here the personal, individualistic interest of a private owner clashes with the public interest, which the National Gallery is seeking to declare. According to the private-capitalist conception of private property, the private owner is free to dispose of the objects of art which are his property; the restrictions which the applicable law can impose on him … contain only a few effective and often violated or circumvented regulations restricting the export of objects of art abroad (§ 1), and the possibility of orders and prohibitions 'for the purpose of security, protection and registration' (§ 3), i.e. for a very narrowly limited purpose. Otherwise, the private owner of an art object is not restricted in his right of disposition; his private ownership allows him to refuse state interference if the state wishes to use his works of art for purposes of study, exhibition, reproduction, etc., since the consent of the private owner is required for any such measure. The prohibitions and orders which may be issued pursuant to Section 3 of Standing Committee Measure No. 255/38 Coll. do not, for example, prevent the alienation (domestical) of works of art to unsuitable purchasers; they do not prevent the division and thus the artistic depreciation of art collections due to alienation and in probate proceedings; they do not order that a work of art in private ownership shall be lent for study, exhibition or reproduction, etc.*
>
> *The state, which is the supreme organ of the nation's commonwealth and is supposed to be the guardian of its cultural goods, is almost powerless against the nearly unlimited dispositive right of the private owner of a work of art.*
>
> *…*
>
> *As far as the art objects Richard Morawetz is asking for are concerned, the National Gallery stresses that they are cultural assets of great value. Their general price is several million crowns, but this general price is not commensurate with their artistic, i.e. ideal, value. Only by not returning these cultural goods to private ownership, but by keeping them at the unrestricted disposal of the State and its expert institutes, can the mission of the people's democratic State in the field of its cultural policy be fulfilled, and only in this way will the unambiguous stipulation of Article 19(2) of the Constitution of the Czechoslovak Republic, which states: 'Cultural goods are under the protection of the State. The State shall ensure that they are accessible to all' be accomplished."*

It is obvious that such a statement was submitted by a completely different institution than the one that accepted the artworks under its protection. This clearly reflects a reversed narrative, in which extreme emphasis is placed on the social impact of the artworks, but which is at the same time corrected by political interests. However, if we put aside the ideological content of the statement above, we should objectively point out that the state at that time missed an effective instrument for the protection and use of cultural monuments located on its territory. The prepared Monuments Act was not adopted because of obstruction by private owners during the First Czechoslovak Republic, and neither the Standing Committee Measure No. 255/1938 Coll. nor the establishment of the National Cultural Commission could replace it. The first Czechoslovak monument law was eventually adopted in 1958,[39] that is at a time when the situation of Czechoslovak monuments had already partially stabilised after the WWII, but stabilisation came at the cost of huge losses. Even the current legislation under the amended Act No. 20/1987 Coll. is not ideal.

However, the historical example shows us the importance of finding a consensus and a balance between the interests of private owners of cultural property and the public interest in its protection, that is widely accepted and respected. Otherwise, we are again in the danger of drifting to one of the extreme positions – no restrictions to the property handling of private owners or unchallenged expropriation by the state –, which, as I described above, are both equally harmful to the society.

With this in mind, we return to the Richard Morawetz' struggle for justice. The Financial Prosecutor's Office took full advantage of the NGP's position towards Moratwetz' collection and submitted a statement of almost identical wording on 17 November 1950. However, the Ministry of Justice was still reluctant to issue a certificate of public interest and in December 1950 checked again with the Financial Prosecutor's Office whether it would not be sufficient to take an action under Section 3 of Standing Committee Measure No. 255/1938 Coll. On 3 January 1951 the court file was finally returned to the court, with a short notice that the court should first decide on the merit of the restitution claim. The file was to be resubmitted to the

39 This was Act No. 22/1958 Coll., on cultural monuments.

Ministry of Justice for decision under Section 6 only if the court finally decided that the restitution claim was justified. Such a decision, however, clearly went against the nature of the declaration of an important public interest, which, as Knapp also provides,[40] is a preliminary legal question.

As the file was finally returned to the court, a hearing was scheduled for 21 March 1951. Just before the hearing, JUDr. Kočka sent a rejoinder to the court, in which he repeated his previous arguments and added documents to support the conclusions about Morawetz' state reliability - a certificate from the ÚNV of the Capital City Prague confirming that Richard Morawetz was not on the list of those convicted under the so-called Small Retributive Decree,[41] and the confirmation of the District Prosecutor's Office that no criminal proceedings have been brought against his client before the Extraordinary People's Court (that is under the so-called Great Retributive Decree[42]). He did not comment on the lack of a certificate from the relevant authority. In his rejoinder, Kočka also rejected the motion of the Financial Prosecutor's Office for the imposition of procedural security, arguing that Richard Morawetz, although a Canadian citizen, had sufficient assets in Czechoslovakia.

According to the minutes of the trial, the hearing was rather short. Counsels for the petitioner and the respondent made submissions in agreement with their written submissions and the Trial Chamber[43] unanimously adopted[44] a decision. The petition was dismissed on the ground that restitution had already been made on the basis of the aforesaid notice of the Ministry of Finance of 29 November 1947, No. 175709/47-II/4, which annulled, inter alia, the Gestapo notice of 9 September 1939, no. 1040/39-IV-2. The petitioner was ordered to reimburse the Financial Prosecutor's Office for the costs of the proceedings in the amount of 5,000 Kčs. The application

40 See KNAPP, 1948, op. cit., p. 40.

41 See Presidential Decree No. 138/1945 Coll., on the punishment of certain offenses against national honour.

42 See Presidential Decree No. 16/1945 Coll.II, on the punishment of Nazi criminals, traitors and their helpers as well as on extraordinary people's courts.

43 The judges from the people were Kristina Vandasová and Marie Stachová, the president of the Senate was JUDr. František Korte. It is perhaps ironic that this *"artistic"* court case brought together two excellent lawyers, each of whom was kissed by a different muse. Although JUDr. František Korte was a judge by profession, he also had studied music composition and made a name for himself as a conductor and choirmaster.

44 As can be seen from the minutes of the meeting and vote, which had remained sealed until my visit to the archives.

for deletion of the notice *"Reichseigentum"* from the inventory lists of the public institutions was not granted, since *"if the notice is still there, it is only as a result of the fact that the restitution was not administratively implemented"*. The court did not deal with the lack of formal proof of state reliability. The decision was not appealed[45] and became final[46] no later than 19 May 1951.

On 24 April 1951, both the NGP and the National Cultural Commission received a request from JUDr. Kočka to remove Richard Morawetz' collection from the lists of Reicheigentum. Both these institutions handled this request with a laconic note – the National Cultural Commission noted that it is no longer in direct custody of the collection and NGP stated that there are no Reichseigentum notices in the inventory lists, which should be deleted.

As you see, Richard Morawetz celebrated a Pyrrhic victory – although, after a long and exhausting legal struggle, he had indeed managed to establish his ownership of the collection, the collection itself remained in the NGP. As early as 21 March 1951, that is immediately after the end of the court hearing, the NGP applied for injunctions and orders under Sections 1 and 3 of Standing Committee Measure No. 255/1938 Coll. Contrary to the court proceedings, which dragged on, the injunctions and orders were issued promptly. In the Archives of the National Gallery in Prague a draft notification to JUDr. Kočka has been preserved, dated already 5 April 1951, according to which the following restrictions were issued:

- it is forbidden to export the collection or its individual parts abroad;
- in the event of termination of the loan agreement, it is forbidden for the collection or its individual parts to be handed over to the owner without the prior consent of the Ministry of Education.

Thus in April 1951 the communist regime effectively nationalized his unique art collection, in fact via extensive interpretation of Section 3 of Standing Committee Measure No. 255/1938 Coll. In the end, the artworks were also legally confiscated in the early 1960s. The long-negotiated decision on the public interest under the provisions of Section 6(1) of the Restitution Act was never issued.

45 Which is peculiar, given the Court's departure from contemporaneous decisional practice on the issue of state reliability.

46 See pro domo Opinion No. 1922/51, which is preserved in the Archives of the National Gallery in Prague.

6 Conclusion

The struggle for justice in the Morawetz-case was incredibly demanding. Although the case was legally clear, the high estimated value of the art collection meant that the decision dragged on and, even though it was in the end decided in favour of Richard Morawetz, the artworks stayed in the NGP's vaults. In fact, the institutions, which took care of the cultural heritage, became the driving force in the case and eventually determined the outcome de facto regardless of the court's ruling.

As far as the application of the Restitution Act is concerned, there were several peculiarities in this case. Firstly, the fact that the restitution claimant initially sought the annulment of the property confiscations carried out by the Gestapo and the Vermögensamt, which was contrary to the case law of the time. On the other hand, and in Richard Morawetz' favour, was the fact that the court didn't follow the strict jurisprudence according to which the state reliability had to be proven by a certificate issued by the competent authority. Although this discrepancy was brought to the court's attention several times, the court left this legal question unanswered and ruled in favour of the petitioner. In fact, the court documents give the impression that the judge was trying to find a fair solution for Richard Morawetz rather than another obstacle for him to overcome.

However, the most appalling illegality in the case was the procedure for reaching a decision on important public interest according to Section 6(1) of the Restitution Act. Although the public bodies concerned (including the NGP) requested such a state declaration, which would have been connected with compensation, the Ministry of Justice was extremely reluctant and in the end allowed the court proceedings to continue without making a decision. The absence of such a declaration was filled by orders issued according to the Standing Committee Measure No. 255/1938 Coll., which let to the de facto nationalization of the art collection. In addition to that, the artworks were still halted due to alleged tax arrears, and the story continued even into the 1960s, when Morawetz' property was finally confiscated as property of a traitor, according to the Presidential Decree No. 108/1945 Coll. However, this part of the story is beyond the scope of this article and will be dealt with in my dissertation.

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Lay Participation in the Law-Making on the Example of Czechoslovak Codification during the Legal Biennial[1]

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-15

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Abstract

This contribution examines the involvement of laypeople in the legislative process in Czechoslovakia during the Legal Biennial, which was the recodification process after the 1948 Czechoslovak coup d'état to implement the new people's democratic law. The contribution focuses on how laypeople, particularly workers and members of mass organizations, were integrated into the drafting of new laws under the newly established communist regime. It explores the ideological motives behind this inclusion, aimed at reflecting the class-based nature of socialist law, while also highlighting the practical challenges faced during the codification process. Despite these challenges, the involvement of laypeople brought benefits that directly impacted the legislative quality of the recodified laws.

Keywords

Laypeople; Legislative Process; Legal Biennial; People's Democracy; Czechoslovakia.

1 Introduction

In modern legal systems, it is common for citizens without any formal legal expertise, often referred to as laypeople, to participate in various capacities. These laypeople typically engage in the decision-making process, serving

1 This publication was written at Masaryk university as part of the project *Aktuální problémy teorie a dějin práva,* number MUNI/A/1504/2023, with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2024.

as jurors or lay judges. However, this contribution will not focus on such participation; instead, it will examine the institutionalized involvement of lay citizens directly in the law-making process on the example of legislative preparation of the new Czechoslovak people's democratic law after the 1948 Czechoslovak coup d'état.

While the primary participants in the legislative process are typically elected members of the legislative branch, the drafting of legal statutes also involves a diverse range of individuals. These include members of official consultative bodies and experts in relevant legislative fields. Moreover, laypeople, who may lack any expertise in legal norms, principles, and techniques, also contribute to the legislative process. This was notably evident during the "Legal Biennial" from 1948 to 1950 in socialist Czechoslovakia, where workers and members of mass organisations actively participated (also referred to as "laypeople" or similarly).

The primary aim of this contribution is to explore the potential consequences of lay participation in the legislative process during Legal Biennial and to analyse how the involvement of non-experts may have influenced the quality of legislation at the time. By examining the involvement of laypeople in legislative preparation, this contribution seeks to uncover the extent to which it shaped the laws and how this practice aligned with the broader political goals of the emerging people's democracy.

The contribution is divided into four chapters. After the introduction to the topic, Chapter 2 present lay participation in law in general with a gradual reduction to legislative practice in contemporary socialist Czechoslovakia. Chapter 3 examines the legislative process with lay participation during the Legal Biennial. Chapter 4 concludes with a summary of findings.

2 Lay Participation in Law-making in General

Laypeople from among citizens regularly participate in the law-making process within parliamentary systems, where their involvement is generally desired. Democratic parliaments, key bodies of legislative power, engage the public to ensure that laws reflect genuine public interest and societal needs. This participation involves the parliament consulting with individuals,

groups, associations, organizations, and the broader civil society. Such collaboration can be fundamental to the functions of parliamentary systems. This participation can be defined as a process in which the parliament conducts consultations with interested individuals, groups, associations, organizations, and members of civil society at large.[2]

While lay engagement in law-making is viewed positively in democratic states for reflecting public interests and needs, citizens in totalitarian regimes typically lack the freedom to participate in shaping laws. Despite its totalitarian nature, Czechoslovakia incorporated lay participation in its legislative process during the Legal Biennial from 1948 to 1950. This involvement of laypeople was not driven by a genuine desire to understand public legislative preferences but was primarily used for ideological purposes, serving as a tool for propaganda. The Czechoslovak Communists aimed to underscore the class-based nature of communist law through lay participation.[3] However, this approach also led to various other consequences, which will be explored in subsequent chapters.

3 Legal Biennial

The new people's democratic law in Czechoslovakia was developed through a swift legislative process known as the Legal Biennial. Briefly, during the period from 1948 to 1950, Czechoslovakia undertook an almost complete recodification of key laws to align with the political, economic, and social conditions of the people's democratic state as established by the Ninth-of-May Constitution from 1948.[4] On 1 June 1948, Prime Minister Antonín Zápotocký declared in a parliamentary statement that the government was committed to creating a legal system adapted to the aforementioned circumstances.[5] Subsequently, on 7 and 14 July 1948, the government passed a resolution

2 LESKO, N. V. Civil Society Participation in the Legislative Process. *Scientific and Information Bulletin*. 2021, Vol. 11, no. 23, pp. 72–73. See also ONUFREICIUC, R., OLARIU, O. Citizen Law Making vs. Legal Illiteracy. *Logos, Universality, Mentality, Education, Novelty Section Law*. 2019, Vol. 7. no. 2, pp. 5–6.

3 See HUNT, A. Problems of the State: Law, State and Class Struggle. *Marxism today*. 1976, Vol. 20, pp. 176–187.

4 PETRŽELKA, K. Právnická dvouletka. *Věstník ministerstva spravedlnosti*. 1948, Vol. 30, no. 5, pp. 43–44.

5 MATES, P. 30. výročí právnické dvouletky. *Právny obzor*. 1980, Vol. 63. No. 8, p. 725.

mandating that the codifications be implemented by 1 September 1950[6] to replace the existing laws from the Austro-Hungarian monarchy era and to definitively resolve the legal dualism that had plagued the interwar Czechoslovakia. The Ministry of Justice (hereinafter "MoJ") was assigned to carry out this resolution.[7]

The organizational work for the recodification was handled by the Fifth Department for the Accelerated Codification of Law of the MoJ, which was established on 1 September 1948. In addition to the legislative department, the Political Commission, which had the final say, and two specialized expert commissions were formed within the MoJ, one for civil law and another for criminal law. Later, both commissions were further divided into commissions for substantive law and procedural law. Each commission was further divided into several subcommissions based on the subject matter of each codification during the biennial.[8] Within the Department, three personnel principles were integrated: expertise, political alignment, and public participation in legislation.[9] That is why the commissions and subcommissions were composed of officials of the MoJ, invited legal experts, members of the National Assembly, and finally of lay representatives from mass organizations[10] and worker representatives.

3.1 Forms of Lay Participation during Legal Biennial

As previously mentioned, alongside experts, laypeople also participated in the drafting of new laws, typically representatives of mass organizations and workers' representatives. The main purposes of this participation were

6 Given the set deadline, the entire process became known as the Legal Biennial.

7 PETŽELKA, K. K současným kodifikačním úkolům. *Právník*. 1950, Vol. 89, no. 4, pp. 138.

8 To give an idea on example of civil law, a total of 16 commissions and sub-commissions with roughly 200 members participated in the recodification and held 500 meetings. See BLÁHOVÁ, I, BLAŽEK, L., KUKLÍK, J., ŠOUŠA, J. *Právnická dvouletka: rekodifikace právního řádu, justice a správy v 50. letech 20. století*. Praha: Auditorium, 2014, p. 16.

9 MATES, P. 30. výročí právnické dvouletky. *Právny obzor*. 1980, Vol. 63, no. 8, p. 726.

10 According to communist ideology, mass organization reaches out to the masses of people with a program to meet their needs and to accomplish its goals. Mass organizations are entities that try to be inclusive of all members of a social group. The largest of the mass organizations in capitalist society are typically the labour unions. See SCHEPERS, E. The vanguard vs. the mass organization. *cpusa.org* [online]. 1. 6. 2024 [cit. 30. 8. 2024]. Available at: https://www.cpusa.org/contribution/the-vanguard-vs-the-mass-organization/

to ensure a popular element in the entire process of the Legal Biennial[11] and to emphasize the class-based nature of socialist law. The purpose was also to prepare legislation that every working person would understand.[12] The regime of the time sought to promote this involvement of laypeople through numerous reports in both the daily press and specialized publications, portraying it as a new approach to law-making that, unlike the previous democratic regime of the democratic interwar Czechoslovak Republic, directly considered the interests of the working-class during codification.[13]

The participation of laypeople during the codification process took essentially two forms. The first and more common form was their direct involvement in the codification commissions, where laypeople attended meetings typically held at the MoJ. The second form involved discussions about the draft legal texts with workers directly within mass organizations or large factories.

Regarding the first form of lay participation, the MoJ, in collaboration with the Legal Council of the CC CPCS, reached out to large national enterprises, the Central Council of Trade Unions,[14] and other social organizations of the National Front[15] to select individuals – typically Prague workers and members of mass organizations – from among their ranks to participate in the codification commissions.[16] It was expected that these individuals would serve as equal members of all commissions alongside experts, contributing to the drafting of laws by providing feedback on the specialized

11 BLÁHOVÁ, I, BLAŽEK, L., KUKLÍK, J., ŠOUŠA, J. *Právnická dvouletka: rekodifikace právního řádu, justice a správy v 50. letech 20. století*. Praha: Auditorium, 2014, pp. 15.

12 See Explanatory Memorandum to Act No. 141/1950 Coll., Civil Code. *psp.cz* [online]. [cit. 1. 9. 2024]. Available at: https://psp.cz/eknih/1948ns/tisky/t0509_09.htm

13 As an example of a professional magazine, the magazine *Právník* [Lawyer] published a message in the form of a short narrative about participation of workers during preparation of new codes by worker Jan Veselý from the company Avia (state automobile enterprise in Prague) who was a member of the codification committees. See VESELÝ, J. Účast dělníků při tvorbě nového právního řádu. *Právník*. 1950, Vol. 89, pp. 1–2. As an example of a daily newspaper the following: See ROLENC, O. Právnická dvouletka skutkem. *Lidová demokracie*. 1950, Vol. 6, no. 235 of 6 October 1950, p. 5.

14 In Czech: Ústřední rada odborů, unified trade union organisation in Czechoslovakia after 1945.

15 In Czech: Národní fronta, an association of political parties that served as a political instrument of absolute power in Czechoslovakia after 1948.

16 BLÁHOVÁ, I, BLAŽEK, L., KUKLÍK, J., ŠOUŠA, J. *Právnická dvouletka: rekodifikace právního řádu, justice a správy v 50. letech 20. století*. Praha: Auditorium, 2014, pp. 15.

reports discussed during commission meetings.[17] Typically, in commissions that consisted of around 20–30 members, there were up to 40% laypeople seated alongside the experts.[18]

Regarding the second form of lay participation, the MoJ organized discussions with workers and trade union members directly in factories to debate the specifics of particular laws. In practice, these consultations worked by appointing a selected official from the MoJ to act as the discussion leader in a specific large Prague enterprise where they would then organize the meeting. Typically, 14 days before the meeting, a notice was posted announcing that a discussion organized by the Ministry would take place whereby these discussions were held during working hours.[19]

3.2 Practical Consequences of Lay Participation during Legal Biennial

The involvement of laypeople in the codification process of the new Czechoslovak people's democratic law had several consequences, which can be distinguished based on the intended purposes and expectations of this approach as positive and negative.

Regarding the negative consequences of involving laypeople in the Legal Biennial, it must be noted that this approach soon led to complications during the codification process, which of course remained internal and have never been disclosed to the public. After the respective organizations had delegated their members and workers to the legislative committees, these lay participants often did not attend the scheduled meetings, and when they did, they were unprepared and frequently had no understanding of the topics being discussed. As early as January 1949, this issue was highlighted

17 The basic working principle of each commission was that a selected legal expert prepared a paper on a given topic, which was then discussed by the relevant commission. Based on these discussions, the final principles and the form of each code were determined. Over 1600 papers were prepared. See MATES, P. 30. výročí právnické dvouletky. *Právny obzor*. 1980, Vol. 63, no. 8, p. 727.

18 Ibid., p. 727. However, there were only one or two laymen sitting on some of the committees. See NA, Ministerstvo spravedlnosti (unprocessed) – Overview of the participation of representatives of workers and mass organisations in codification commissions.

19 NA, Ministerstvo spravedlnosti (unprocessed) – Brief report on the discussions in the large Prague factories.

by the chairman of the Political Commission, Alfred Dressler.[20] Consequently, on 31 January 1949, the Political Commission passed a resolution instructing commission member Karel Petrželka[21] to implement adequate measures to resolve the situation.[22]

To evaluate lay participation, Petrželka prepared a report that showed some laypeople had never attended a commission meeting. On 7 February 1949, he presented his findings to the Political Commission, highlighting the issue with the unclear compensation rules for lost work time. Compensation was provided only if lay participants attended enough to accumulate 500 Kčs monthly; otherwise, they received nothing. Despite recognizing the vaguenesses in the compensation system, the Political Commission chose not to modify it. Instead, they decided to send letters to each absent lay participant, reminding them of their non-attendance and requesting explanations. These letters also reiterated the details of the compensation system.[23] Those who remained inactive were to be removed from the commission. However, even after this measure, the problem persisted, as evidenced by the commission's continued discussions on this issue in June 1949.[24]

Additionally, holding meetings directly in the factories proved also problematic. The meetings were poorly organized and failed to yield the desired outcomes, as indicated by a ministerial report on the discussions in major Prague factories. It became evident that the participating workers did not understand the subject matter being discussed.[25]

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20 Alfred Dressler (1909–unknown) was a lawyer, attorney and deputy Minister of Justice who was originally from Brno, investigated for informing the Nazis in the 1950s.

21 Karel Petrželka (1907–1981) was a lawyer and judge who was originally from Brno and later ambassador of Czechoslovakia in the USA, Austria and Cambodia. See DEJMEK, J. *Diplomacie Československa, Díl II. Biografický slovník československých diplomatů (1918–1992)*. Praha: Academia, 2013, s. 534.

22 NA, Ministerstvo spravedlnosti (unprocessed) – Minutes of the 18th meeting of the Political Commission held at the MoJ on 31 January 1949.

23 NA, Ministerstvo spravedlnosti (unprocessed) – Minutes of the 19th meeting of the Political Commission held at the MoJ on 7 February 1949.

24 NA, Ministerstvo spravedlnosti (unprocessed) – Overview of the participation of representatives of workers and mass organizations in codification commissions and subcommissions, indicating the percentage of absentees.

25 NA, Ministerstvo spravedlnosti (unprocessed) – Brief report on the discussions in the large Prague factories.

Despite challenges in involving laypeople in the codification process, valuable insights emerge from meeting records about lay participants' objections. Common complaints included a lack of understanding of the documents and proposed legal solutions. Lay participants often struggled to follow expert discussions, particularly objecting to the use of foreign, especially Latin, terms in prepared papers. To address these issues, among others, a joint meeting of workers, members of mass organisations, and legal experts from the MoJ's codification department was convened on 11 November 1949.[26] At this meeting, it was resolved that foreign terms would be used only when necessary. If foreign or Latin terms were to be used, each term was to be accompanied by a corresponding explanation in Czech. Complex sentence structures in the reports were to be clarified, and the text of laws simplified.[27]

Despite its drawbacks, this practice significantly simplified discussions and enhanced the clarity and comprehensibility of the laws passed. This is particularly evident in the Civil Code (Act No. 141/1950 Sb., known as the "Middle Code"), a key outcome of the Legal Biennial. As explained in the Explanatory Memorandum to the Code: *"unlike the old Civil Code, clear, understandable diction is used to make the new Civil Code accessible to all and to contribute to raising the ideological level of the broadest masses of procurers. This task was guaranteed by the fact that the effective participation of non-lawyers and, in particular, the broader representatives of the working class in the drafting work was guaranteed."*[28] Contemporary legal historians concur that the 1950 Civil Code characterised by a high degree of clarity.[29] It was simplified and stripped of foreign terminology compared to the previously applicable ABGB. This simplification also applies to other key statutes enacted during biennial, such as the Criminal Code, Criminal Procedure Code, Family Law Act, and People's Judiciary Act, which form the cornerstone of the entire recodification.

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26 Joint meetings of workers and experts were held very irregularly to coordinate problems within the deliberations of the various commissions and sub-commissions.

27 NA, Ministerstvo spravedlnosti (unprocessed) – Minutes of a meeting of workers and members of mass organisations held on 11 November 1949 at 4pm in the building of the MoJ.

28 See Explanatory Memorandum to Act No. 141/1950 Coll., Civil Code. *psp.cz* [online]. [cit. 1. 9. 2024]. Available at: https://psp.cz/eknih/1948ns/tisky/t0509_09.htm

29 See VOJÁČEK, L., SCHELLE, K., KNOLL, V. *České právní dějiny*. 3. revised ed. Plzeň: Aleš Čeněk, 2016, s. 578.

4 Conclusion

The involvement of laypeople during the Czechoslovak Legal Biennial highlights a unique example of participatory law-making within a socialist regime, promoted as aligning with working-class interests but also serving as ideological propaganda. The engagement of workers and mass organization members aimed to showcase a class-based legal framework, contrasting with the elitism of the former democratic regime. However, outcomes were mixed, offering insights into the complexities of lay participation in law-making.

Efforts were made to simplify legal language and enhance text clarity, significantly shifting from the Austro-Hungarian legal traditions to a more straightforward style as seen in the new Civil or Criminal Codes. Yet, the practical implementation faced significant hurdles. Frequent absences, lack of preparation, and a poor grasp of legal discussions among lay participants impeded their effective involvement. Additionally, logistical challenges in organizing meetings and inadequate compensation led to low participation.

Despite these challenges, the initiative's broader impact on legal modernization and its lessons on public participation in law-making are significant. In conclusion, the Czechoslovak Legal Biennial offers valuable lessons for contemporary use of public participation in law-making. While the specific context and motivations of the Czechoslovak experiment were unique to its political environment, the experience underscores the potential benefits of involving laypeople in legislative processes. Lay participation in law-making among others can improve the quality of legislation by enhancing the clarity and comprehensibility of norms for the citizens and other people to whom the rules are primarily addressed.

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Legal Regulation of Collectivisation and its Implementation on the Example of a Particular Family

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-16

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Abstract

In everyday life, one encounters the term *farmer* or *peasant* mainly in the designation of quality products or when referring to something as wise or clever. However, few people realize the turmoil of the fate of the original bearers of this designation stemming from the peasant class. Today, more than 60 years after the end of the most intense persecution of its members, we still know very little about the tragedy. However, this is not due to a lack of professional or popular bibliography, this chapter of our history has simply been forgotten. The eye of the 21st century has already become accustomed to the large cooperative complexes on the outskirts of villages, as well as to the many hectares of fields that make up our countryside. And yet our grandmothers still experienced getting up early every day to the cows or manually cultivating the land, most rural families worked in agricultural production. A few decades later, the Moravian and Czech countryside is completely different. The trauma that the generation of persecuted people has passed on from generation to generation has had a significant influence on this, as has the stubbornness of the former initiators of the persecution.

Keywords

Collectivization; Farmer; Kulak; Communist Party of Czechoslovakia; Countryside; Unified Agricultural Cooperative; Persecution; Law; Injustice; Antonín Šplíchal; Moravské Budějovice.

1 Introduction

At the end of the Second World War, a large debate over land ownership again swirled in the Czech lands. The expulsion of the German-speaking population

from the border areas and inland language islands freed up thousands of hectares of agricultural land. In addition to this released property, the land reform from the beginning of the First Republic,[1] or its revision and the need for a new land reform, became a major topic of discussion. It was from the First Republic reform that more than half of the original occupation still remained to be settled, which, in combination with the approaching expiration of the deadlines for temporary use[2], formed a non-conformist combination, creating considerable uncertainty in the Moravian and Czech countryside. This was also due to the post-war state of supply, which was embodied for private farmers by a system of compulsory supplies of agricultural commodities or a persistent rationing system. The imaginary umbrella for these fears was ensured by the overall shift of Czechoslovak society in a left-wing direction, when the development of private enterprise in Czechoslovakia aroused concerns in the predominantly conservative-minded farmers and peasants. The social tension was also illustrated by fears of the possible rise of a totalitarian power regime modelled on the Soviet Union, which had gained considerable influence in the restored republic. In addition to pessimistic prospects, however, the peasant class also had a determination to use the post-war period to develop their farms, and not only in terms of mechanization. This was also supported by the agricultural policy of the Košice government of Zdeněk Fierlinger,[3] which was characterized by positive measures for farmers, such as subsidized offers of domestic and foreign agricultural machinery, state intervention in the prices of agricultural products or land allotments of up to 13 hectares of land.

2 The Political Background

After the war, farmers and practically most of the Moravian and Czech countryside found themselves in another difficult situation – political.

1 Act No. 215/1919 Coll., on the Seizure of Large Land Property.

2 The temporary use of land until 1955 or 1965 was agreed upon by so-called general agreements between the former landowners and the Czechoslovak Republic.

3 Zdeněk Fierlinger (*11. 7. 1891 – +2. 5. 1976 Prague) was the Prime Minister of Czechoslovakia in the first two post-war governments from 1945 to 1946. He made his mark in history most significantly with the post-February merger of his home ČSSD with the Communist Party. There is no certainty about his potential work as an agent of the Soviet NKVD.

In the new Czechoslovakia, there was no longer a place for the First Republic hegemon of the political scene and the majority representative of the countryside – the Republican Party of Agricultural and Small Peasant People, also called the Agrarian Party. It was in the head of IX. Košice government program on the grounds of *"such a grave offense against the interests of the nation and the republic"*.[4]

All parties of the National Front were aware of the released voter potential, but the Communist Party of Czechoslovakia (hereinafter "KSČ") in tandem with the Communist Party of Slovakia (hereinafter "KSS") took the most initiative in the "abandoned" countryside. The aforementioned Košice government agricultural policy was personified in the person of the Minister of Agriculture Július Ďuriš of the Communist Party of Czechoslovakia. In the post-war months, he played an important role in the implementation of the decree of President Edvard Beneš of 21 June 1945.[5] It was Ďuriš who was the face of handing over the land decrees, by which the land stolen by the Germans and collaborators was to be returned to reliable hands.

Despite the declared unity of the National Front[6], differences began to appear, among other things, in the election campaign of 1946. The initiative communists relied on the grateful masses of the new farmers, and above all on the authority of the USSR. The elections to the Constituent National Assembly (hereinafter "NS")[7] ended with the victory of the Communist Party of Czechoslovakia in the Czech lands.

3 The National Way?

After the formation of a government under the leadership of Klement Gottwald, the old-new Minister of Agriculture J. Ďuriš again became the head of the agricultural policy of the Czechoslovak Republic. In October 1946, the so-called S. The main principles of the new laws prepared by the

4 *Košický vládní program*. Praha: Svoboda, 1984, p. 24.
5 Decree of the President of the Republic No. 12/1945 Coll., on the Confiscation and Accelerated Distribution of the Property of Germans, Hungarians, as well as Traitors and Enemies of the Czech and Slovak Nations.
6 *Svobodné slovo*. 1946, Vol. 2, no. 72, p. 1.
7 Article I par. 1 of Constitutional Act No. 65/1946 Coll., on the Constituent National Assembly.

Ministry of Agriculture[8] and six months later the famous Hradec Program. In the first case, these were drafts of the later so-called Ďuriš laws.[9] The principles of the Hradec Králové Programme,[10] proclaimed by J. Ďuriš at the multi-thousand-strong assembly of the United Union of Czech Farmers[11] in Hradec Králové he on April 4, 1947. The program was intended to win over small and medium-sized farmers to the side of the government's agricultural policy, on whom the Communist Party of Czechoslovakia wanted to base its efforts in the field of agriculture. On less than thirty pages, the peasant commissions were presented with the solution of burning questions, such as the allocation of forests and the solution of the question of the redistribution of land. Other goals that the Communist-controlled Ministry of Agriculture (hereinafter "MoH") wanted to achieve were the enactment of compulsory purchase of agricultural products, support for the mechanization of agriculture, credit and tax policy and the introduction of insurance for farmers. An important point was the demand for a new cooperative law. It should be based on the principle of "every person has a vote", where the cooperative shares would be as small as possible, or none at all, with each member of the cooperative, regardless of the size of the contribution, having the same strong vote.[12]

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8 MINISTRY OF AGRICULTURE. *The main principles of the new laws prepared by the Ministry of Agriculture*. Prague: Ministry of Agriculture, 1946.

9 Act No. 43/1948 Coll., on Agricultural Credit. Act No. 44/1948 Coll., amending and supplementing the Act on the Revision of the First Land Reform. Act No. 45/1948 Coll., on the Division of Estates with Agricultural Holdings and on the Prevention of the Fragmentation of Agricultural Land. Act No. 46/1948 Coll., on the New Land Reform (permanent regulation of ownership of agricultural and forest land). Act No. 47/1948 Coll., on Certain Technical and Economic Adjustments of Land (Consolidation Act). Act No. 49/1948 Coll., on Agricultural Tax.

10 ĎURIŠ, J. *Hradecký program*. Praha: Ministerstvo zemědělství, 1947.

11 The Unified Union of Czech Farmers (JSČZ) was a unified branch organization in the field of agriculture for the territory of Bohemia and Moravia This organization united farmers regardless of their political affiliation or property status. Its establishment was based on Decree No. 11 of 28 May 1945 of the Minister of Agriculture, Július Ďuriš, which ordered the abolition of the Protectorate Union of Agriculture and Forestry (Verband für Land – und Forstwirtschaft für Böhmen und Mähren), which operated between 1942 and 1945.

12 ROKOSOVÁ, Š. Administrativní opatření – jedna z forem perzekuce sedláků komunistickým režimem. In: TÁBORSKÝ, J. et al. (eds.). *SECURITAS IMPERII 10 Sborník k problematice vztahů čs. komunistického režimu k „vnitřnímu nepříteli"*. Praha: Úřad dokumentace a vyšetřování zločinů komunismu, 2003, p. 148.

A combination of an initiative in agricultural policy and assurances to the public about their own Czechoslovak path, when the communist leadership headed by Minister Ďuriš and Prime Minister Klement Gottwald claimed that *"In order that our peasants can live peacefully on this land after this final arrangement of land ownership, the Ministry of Agriculture insists that the ownership of land up to 50 hectares be constitutionally ensured in the new constitution of our republic, which is currently being prepared. That will put an end to the anxiety that we want to make kolkhozes*[13] *and sovkhozes*[14]*."*[15]*,* brought the desired result, when at the end of February 1948, at a national congress of peasant commissions, a crowd of hundreds of thousands declared their support for the government's agricultural policy, which was already communist at that time.[16]

After the communist coup d'état at the end of February 1948, events, not only in the field of agriculture, took a rapid turn. The government and Parliament quickly adopted a number of laws based on the Hradec Králové Programme and the above-mentioned draft Ďuriš laws. An important turning point was the adoption of the new Constitution.

In the agricultural area, Constitutional Act No. 150/1948 Coll. of 9 May 1948 (hereinafter "Constitution") provided, among other things, a legal basis for interference with property rights, enshrined the protection of small and medium-sized enterprises, the inviolability of property, etc. The Constitution also *de jure* resolved the uncertainty regarding the permitted maximum area of land, when it enshrined the 50 hectare limit.[17] In addition, new legislation on cooperatives has been enshrined.[18] The performance of state administration in the field of agriculture was to be carried out through the National Committees (hereinafter "NV"),[19] where the exercise was usually

13 Kolkhoz (Russian: kolektivnoye khozyajstvo) was a Soviet cooperative organization, socialistically managing state-owned land, which was allocated to it for permanent free use.

14 Sovkhoz (Russian: sovietskoye khozyaystvo), literally "Soviet farming", was the name given to large agricultural enterprises on the territory of the USSR.

15 DURIŠ, J. *Hradecký program. Projev ministra zemědělství Julia Ďuriše v Hradci Králové 4. 4. 1947.* Praha: Ministerstvo zemědělství, 1947, p. 6.

16 JECH, K. *Kolektivizace a vyhánění sedláků z půdy.* Praha: Vyšehrad, 2008, p. 53.

17 Section 159 of Constitutional Act No. 150/1948 Coll., Constitution of the Czechoslovak Republic.

18 Ibid., § 157.

19 Ibid., § 124.

carried out by plenums, councils, agricultural commissions and agricultural departments headed by an agricultural officer, who was also a member of the NV council. According to the rule of dual subordination, their superior bodies became district authorities, or agricultural departments of regional NVs, which were established by the government at the beginning of 1949[20] and which were directly subordinate to the Ministry of Agriculture.

4 The Turnover

In the autumn of 1948, the leadership of the Communist Party of Czechoslovakia decided to definitively duplicate the socialist model of collectivization and large-scale production according to the Soviet model, thanks to the tensions within the Eastern Bloc between the Soviet Union (hereinafter "USSR") and the Federal People's Republic of Yugoslavia. Despite knowing the disastrous results of the "Soviet path", the leadership of the Communist Party of Czechoslovakia, fearing similar ostracism, expressed its unequivocal agreement with the resolution as early as 28 June 1948.[21] A clear signal was thus sent to the Moravian and Bohemian countryside that the assurances that had been given to them so many times were a thing of the past.

Agricultural policy became a widely discussed topic at the meetings of the Presidium of the Central Committee (hereinafter "Central Committee") of the Communist Party of Czechoslovakia in October and the plenum of the Central Committee of the Communist Party of Czechoslovakia in November of the same year, where it provoked passionate debates. Even the top leadership of the Communist Party of Czechoslovakia was not sure about the solution of the agricultural issue until the last moment.[22] In October, after returning from a meeting with J. V. Stalin in the USSR, K. Gottwald let himself be heard on the question of collectivization: *"But how to start, how to do it? I don't know exactly yet.* […] *I told Stalin explicitly that*

20 Government Decree No. 12/1949 Coll., on agricultural departments of regional national committees.

21 BLAŽEK, P. et al. *Kolektivizace venkova v Československu 1948-1960 a středoevropské souvislosti.* Praha: Česká zemědělská univerzita v Praze, 2008, p. 84.

22 KAPLAN, K. *Utváření generální linie výstavby socialismu v Československu: (od Února do IX. sjezdu KSČ).* Praha: Academia, 1966, p. 247.

we would not talk about collective farms, that we would do them. To liquidate the old forms…"[23] In November, K. Gottwald formulated the process of socialization of the countryside, among other things, by building state tractor stations (hereinafter "STS") and common feedlots, supporting cooperatives and getting rid of the influence of the rural rich.[24] A month later, in December 1948, the organizational forms of cooperatives of the JZD were approved and the Ministry of Health was entrusted with the preparation of the law.

The application of purposeful lies, which the Communist Party had already abandoned at that time, was eloquently summed up by a member of the Central Committee of the Communist Party of Czechoslovakia, Božena Machačová-Dostálová: *"Until February 1948, we had to stroke the peasants. Immediately after February, it was not possible to turn around at once. But now there is a situation for that."*[25]

5 A Family Destined for Disposal

The first preserved mention of the farming of the Šplíchal family in Moravské Budějovice dates back to 1750.[26] Belonging to the peasant class is gradually evidenced by several registry records, both from baptismal and marriage and death records.[27] Over the centuries, the small farm became the largest largest farm in Moravské Budějovice. The family was actively involved in the social life of the town and the individual personalities of the family had a significant influence not only on the agricultural life of the entire district. During the war, the family kept valuables of the local Jewish community,

23 KAPLAN, K. *Utváření generální linie výstavby socialismu v Československu: (od Února do IX. sjezdu KSČ)*. Praha: Academia, 1966.

24 KRILEK, J. *Sborník vybraných usnesení strany a vlády k zemědělské politice I. díl (1948–1971)*. Praha: Vysoká škola politická ÚV KSČ, 1972, p. 14.

25 KAPLAN, K. *Nekrvavá revoluce*. Toronto: Sixty-Eight Publishers, 1985, p. 109.

26 Moravian Land Archives (MZA), Collection of Registers. Register of Births and Marriages XLVII No. 10658. *ACTA PUBLICA Moravian Provincial Archives* [online]. [cit. 16. 9. 2024]. Available at: https://www.mza.cz/actapublica/matrika/detail/7225?image=216000010-000253-003376-000000-010658-000000-00-B02648-01100.jp2

27 These are, for example, Vavřinec (Laurentius) Šplíchal, born on 9 August 1754 and married on 5 September 1779. In the note, the suffix *"peasant of Budov"* was added to his name. His father was, according to the record, Jakub Šplíchal *"a farmer from Dolní Viska"*. Another record concerns Šimon Šplíchal, born on 10 October 1816, when he is mentioned in the note as a *"half-farmer"*. He was married on 8 January 1837 by Roman Catholic priest Klement Gottwald.

which "temporarily" kept them with them at the beginning of the war. The family was also actively involved in resistance activities within the SPELTER LENKA-JIH operation.

After the end of the war, nothing prevented the further prosperity of the farm. In the 1946 elections, Antonín Šplíchal Jr. was elected a town councillor. However, the prospects of a hopeful future were ended in 1948. As a result of the onset of persecution, the families of brothers Antonín and Jan Šplíchal had an agreement to emigrate in 1949, via Austria to Great Britain and then to South America. However, due to the care of Antonín Šplíchabs wife, Jiřina, for her elderly parents, the plan was abandoned. The fate of the whole family was thus decided.

The imaginary tightening of the screws can be read from the archival sources of the State District Archives Třebíč (hereinafter "SOkA"). On 4 January 1949, the so-called national administration (hereinafter "NrS") was introduced over all the movable and immovable property of the spouses, by the ONV assessment[28] in MB No. 1.308-III-1948. It was introduced in accordance with the provisions of Section 2 para. 1 of the Decree of the President of the Republic No. 5/1945 Coll., on the invalidity of certain property-legal acts from the period of oppression and on the national administration of the property values of Germans, Hungarians, traitors and collaborators and some organizations and institutes.[29] As the name of the decree implies, the relevant measures were to be applied to persons with a problematic wartime past, usually Germans and collaborators. It is therefore surprising that the provision of § 2 para. 1 of the Decree was interpreted so extensively that it also affected persons who did not commit anything *state-unreliable during or after the war*. The original purpose of the decree, which was to secure property for unreliable persons during the war, was therefore abused by the new regime to confiscate property from persons *unreliable by the regime*.

28 Section 7 para. 1 lit. d) bb) Decree of the President of the Republic No. 5/1945 Coll., on the Invalidity of Certain Property-Legal Acts from the Period of Oppression and on the National Administration of the Property Values of Germans, Hungarians, Traitors and Collaborators and Certain Organizations and Institutes.

29 MZA, collection Regional National Committee Jihlava, B 126 Inspection Department, carton number 3260. Antonín Šplíchal, agricultural plant, Moravské Budějovice, documents 1949–1951.

On 17 June, the Regional Headquarters of the State Security (hereinafter "Regional Headquarters of the StB") in Jihlava, under number 121/5031, issued an arrest warrant. Along with the arrest, a house search was also to be carried out in the apartment at Čechova 622.[30] On the same day at 8 p.m., Antonín was admitted to the prison of the Regional Court in Jihlava. After an unsuccessful attempt to arrest him at Čechova 622, he was arrested in the Chvalatice Bay of the Vranov Dam, where he was taking a boat as a driver of the MB municipal services. According to personal memories, he noticed on the way that two cars were driving behind him, a typical Tatra 600 model for the StB. He used his knowledge of the surroundings of the Vranov Dam and escaped the StB. They found him only after two hours smoking on the pier. He was arrested in the company of other employees of the municipal enterprise Cidlinsky, Silvestr and Němec with their families. According to the report on the arrest, Antonín Šplíchal testified with handcuffs on his hands and blinders, *"… that he and his wife longed for a ride in the Tatraplan, it came true for him, but not for his wife."*[31]

During his time in custody, he went through the greatest horrors that the StB practice allowed. He spent the entire nine months in solitary confinement, during which time, except for interrogations, he did not see any person. During these years, he was subjected to torture in the form of sadistic beatings, when *"It was a holiday for him when he could go to the dentist. He saved it to pull the root out of his knocked out tooth. It was such a holiday, such a beauty – he could look out of the window in the office and see the tree and the sky."*[32] In addition to this form of physical torture, he was tortured by cold, lack of sleep, and physical punishment. For days he had his hands tied behind his back, so he was forced to eat food from the ground, pins were stuck under his fingernails, his teeth were knocked out, or he was subjected to torture in the form of standing in a room where he had down down his chin.

30 MZA, collection Regional National Committee Jihlava, B 126 Inspection Department, carton number 3260. Antonín Šplíchal, agricultural plant, Moravské Budějovice, documents 1949–1951, p. 93.

31 Security Services Archive (ABS), collection V/BN (Shelf mark V-1579 Brno), Investigative file No. B/4-v-710/51, Collection of the StB Investigation Administration – investigative files (V): arch. no. V-1579 BN 004, fol. 198.

32 NOVOTNÁ, P. Pan Zdeněk Šplíchal z Moravských Budějovic. In: ČELKO, V. et al. (eds.). *Sám proti moci. Výběr prací středoškolských studentů v dějepisné soutěži EUstory*. Praha: Ústav pro soudobé dějiny AV ČR, 2002, p. 24.

All the time, his wife Jiřina with three small children and mother Antonia did not receive any news, except for one information about his whereabouts, they did not know whether Antonín was still alive or not. The family was also not allowed to receive family allowances.

On 4 December 1951, the "state security" investigation of Antonín was completed.[33]

Before Christmas of the same year, by a resolution of the Deputy Public Prosecutor of 20 December, all of Antonín Šplíchabs property was confiscated, pursuant to the provisions of Section 283 par. 1 of the Code of Criminal Procedure (hereinafter "Criminal Procedure Code"),[34] including the increase and proceeds therefrom.[35] On 25 January 1952, the Moravské Budějovice District Court also confirmed the seizure of the property in its resolution, when,[36] at the request of the Financial Prosecutor's Office in Jihlava, it allowed, pursuant to Section 285 of the Criminal Procedure Code and Section 219 of the Code of Civil Procedure (hereinafter "CPC"), a preliminary injunction prohibiting the alienation, encumbrance or pledge of property.[37]

On 2 February, the State Prosecutor's Office in Brno filed an indictment against Josef Jenerál,[38] Jaroslav Slezák,[39] Milan Domanský,[40] Josef Cah,[41]

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33 ABS, collection V/BN (Shelf mark V-1579 Brno), Investigative file No. B/4-v-710/51, Collection of the StB Investigation Administration – investigative files (V): arch. no. V-1579 BN 002, p. 109.

34 Section 283: *"(1) If the accused is suspected of a criminal offence for which the penalty of forfeiture of property may be pronounced under the law, and there is a reasonable fear that the execution of the forfeiture of property will be somehow thwarted or hindered, the prosecutor and the court may seize the property of the accused person in court proceedings. A complaint is admissible against the detention decision, which does not have a suspensory effect."*

35 ABS, collection V/BN (Shelf mark V-1579 Brno), Investigative file No. B/4-v-710/51, Collection of the StB Investigation Administration – investigative files (V): arch. no. V-1579 BN 002, p. 110.

36 Signed by Dr. Jaroslav Černý.

37 ABS, collection V/BN (Shelf mark V-1579 Brno), Investigative file No. B/4-v-710/51, Collection of the StB Investigation Administration – investigative files (V): arch. no. V-1579 BN 002, p. 111.

38 Josef Jenerál (* 27. 1. 1890) formerly a roadman and at the time of the lawsuit a pensioner in Vesec (Moravské Budějovice district).

39 Jaroslav Slezák (* 22. 4. 1925) worker, last lived in Rohatec (Hodonín district).

40 Milan Domanský (* 15.4. 1922) vulganiser, last living in Hodonín.

41 Josef Caha (* 21. 11. 1912), farmer from Loukovice (Třebíč district).

Zdeněk Holpuch[42], Tomáš Hofman[43] and Antonín Šplíchal. It was approved on 23 January of the same year by the State Prosecutor's Office in Prague, represented by Dr. Ziegler.[44]

The Deputy State Prosecutor prosecuted the above-mentioned men for criminal association against the people's democratic system, when this group was supposed to try to destroy or subvert the new Czechoslovak system from the end of 1948 to April 1951. The group was supposed to prepare terrorist actions against members of the people's administration and "progressive citizens". At the same time, Jenerál, Slezák and Domanský were supposed to operate with an illegal transmitter through which they were supposed *to "broadcast inflammatory and outrageous shortwave broadcasts"*.[45] The founder of the group was supposed to be pensioner Jenerál. The group was also supposed to accumulate weapons and ammunition to commit the murder of, among others, the manager of the mill in Lukov (district MB), Vokl. By the above-mentioned acts, they are alleged to have committed the crime of high treason under Section 78 para. 1 lit. c) and par. 2 lit. a) TrZ. Jenerál and Slezák are also alleged to have committed the crime of attempted murder under Section 5 para. 1, § 216 par. 1 and par. 2 lit. b) TrZ.[46] According to the lawsuit, a member of the group was miller Jaroslav Melkus, who was supposed to be recruited for the group by Antonín Šplíchal.[47]

In conclusion, the Deputy Public Prosecutor characterized the defendants as follows: *"were made up of the rural rich, mostly former exponents of Beran's Agrarian Party, who during the period of oppression performed the functions of mayors of municipalities to the full satisfaction of the Nazi occupiers, as well as spineless persons who shunned honest work…"*[48]

42 Zdeněk Hlouch (* 30. 8. 1912), farmer from Klučov (Třebíč district).
43 Tomáš Hofman (* 5. 12. 1898) farmer from Lažínek (Moravské Budějovice district).
44 National Archives (NA), fond State Prosecutor's Office, Prague, mark SProk Main mark: Archivní jednotka file no. 4 SPtII163/51, NAD: 1038, fol. 28.
45 MZA, fond State Court Brno C 145 carton 263 mark 1Ts II 23, fol. 327, p. 1.
46 Ibid., fol. 327, p. 2.
47 J. Melkus was tried in the "PAVEL" operation, together with Gustav Smetana, Josef Černohous, Antonín Plichta Sr., Josef Masařík, František Dvořák, Jan Nečes, P. Jan Opletal, Karel Suchna, Antonín Bulička, Jan Nevoral, Bedřich Pánek and P. Jan Podveský. J. Melkus and G. Smetana were sentenced to death in MB on 21 May 1952 and subsequently executed on 28 March 1953 in Prague's Pankrác prison.
48 MZA, fond State Court Brno C 145 carton 263 mark 1Ts II 23, fol. 329.

In their pre-memorized testimonies, all of the accused testified before the court that they felt guilty to the full extent of the prosecution. They also stated that the main motivation for their illegal activities within the group named "AMERYKAN PARÁFYS" was the desire for property and hatred of the people's democratic establishment.

All of them were sentenced to imprisonment with regard to Section 19 of the Criminal Code as follows: J. Jenerál to 24 years, J. Slezák to 17 years, J. Caha to 18 years, M. Domanský to 6 years, Z. Hlouch to 16 years, T. Hofman to 14 years, A. Šplíchal to 14 years. In addition, Caha, Hlouch, Hofman and Šplíchal were fined under Section 48. In the case of Antonín Šplíchal, it was CSK 40,000. In the event of irrecoverability, the sentence was to be commuted to 4 months in prison.[49] According to § 43 and 44, he forfeited all honorary civil rights for 10 years. Subsequently, according to § 47, all property was forfeited.

At the end of the reasoning of the judgment, the presiding judge, A. Pisk, stated: *"The result of the case at hand makes it clear that in order to build a just socialist order, it is necessary to neutralize all its arch-enemies, whether they be the hostile bourgeoisie or the kulaks in the countryside, since they use all criminal means against the very essence of the state. They speculate on war, foreign intervention, and often on those who, although not direct enemies, have succumbed to their influence and to the inflammatory foreign radio, in order to be put at the forefront of their interests in their political ignorance and behind whom they could hide."*[50]

Antonín Šplíchal was thus forcibly transformed into prisoner A03552 for almost a decade.

The conviction had a direct impact on the entire family. According to TRMNB[51], the convict's family was forced to be evicted. This fact was announced to the family on March 21, 1952 by the chairman of the ONV, Jaroslav Svoboda. The next day at 7am, two trucks were to be brought in and the whole family was to be transported to a predetermined place of new residence. The next morning, only one load was delivered. A car with a load capacity of only 3.5 tons. Jiřina Šplíchalová with her mother-in-law Antonia

49 Section 49 of Act No. 86/1950 Coll., the Criminal Code.
50 MZA, fond State Court Brno C 145 carton 263 mark 1Ts II 23.
51 See p. 34.

and brother Josef Drexler had to quickly reconsider which things to take with them and which not: *"At that time, it was quite seriously decided whether to take a tin bathtub, because it would take up too much space."*[52] The cruelty of the regime can also be illustrated by the approach of the chairman of the ONV to the transport of the youngest son Zdeněk, who, as a result of the overall strain of his body, fell ill with 40 °C fever, when his mother Jiřina took him with her to all interrogations and court hearings as a kind of insurance so that she would not be arrested. Chairman Svoboda wanted to send his five-year-old son on a journey of several hundred kilometers in the freezing season. After lengthy negotiations, his mother and uncle insisted that Zdeněk be transferred to his uncle Josef Drexler in the Slavětice mill.

Due to the lack of knowledge of where the women with their two small children would be taken, her brother Josef decided to go with them. Due to the lack of seating, he was forced to sit on the back of the car all the way in freezing weather. On their departure, a crowd of locals said goodbye to the family on the square, bidding farewell to the expelled family. Together with the Šplíchals, the Hofman family from Lažínek was also displaced that day.[53] The two-member convoy eventually arrived at its new designated residence in Brozany near Roudnice nad Labem. Originally, Jiřina was supposed to live with her two children and mother-in-law Antonia in the village of Hostěnice, but Mrs. Hofmannová, who had an almost adult son, offered to leave the more affordable residence in Brozany to a young family. In the freezing weather, the family was moved into a 1+1 apartment, without water supply, toilet and with broken windows. Jiřina was assigned to work in a poultry farm with a wage of 800 Czechoslovak crowns of the old currency[54], as enemies of the people's democratic system, they also, according to her memories, did not receive food stamps. For this reason, two loaves of bread were sent to them every week from Brother Joseph across the country.

52 NOVOTNÁ, 2002 op. cit., p. 25.

53 Tomáš Hofman was convicted together with Antonín Šplíchal in the same trial to 14 years in prison and a fine of CSK 50,000.

54 On the open market, it was possible to buy 1 kg of butter for this amount.

The only entry in the Memorial Book of the town of Mor. Budějovice from the day of the eviction is information about a party held in the clubhouse of the MNV.[55]

As far as the family's contact with Antonín was concerned, she was able to send one letter a month for the first five years, then every week, with a maximum of two sheets of evenly written paper. Within the correspondence, permitted topics were determined in advance and the letters were always checked by the State Security and the TNP administration. Once a year, a visit was allowed. In a situation where the family wanted to visit the imprisoned Antonín, they were forced to change to an express train to Karlovy Vary in MB. However, due to the ban on staying in the city, she was forced to submit an application to the MNV for permission to enter. According to the memories of the youngest son Zdeněk, the visit took place in such a way that the family arrived in Karlovy Vary, where they were forced to arrange accommodation. This was followed by a trip to Ostrov, where TNP Jáchymov-Rovnost was located. Upon arrival, everyone waited at the wooden barracks, where they waited for the arrival of the prisoners.[56] They arrived, tied together with a chain. The visit, which lasted only ten minutes, took place in a partitioned room, where people were not even allowed to shake hands with each other. On each side of the prisoner stood a member of the prison service.[57]

However, the eviction of the family was not the only form of persecution. Antonín's wife, Jiřina, was regularly summoned by the State Security to give an explanation. The StB officers usually left her waiting in the corridor for several hours until she missed the last public transport connection. On her return home, when she was walking home with her small children in the dark, they were chased by cars with their lights off, when they overtook them after a few meters and stopped. Out of fear, the family then crossed to the other side of the road. This was repeated until they came home.

The State Security also tried to lure Jiřina by sending anonymous letters to her home asking her to come to a certain date at a certain place, to be told

55 SOkA Třebíč, collection Municipal National Committee of Moravské Budějovice, Memorial Book III, p. 482.

56 MUKL (Man Designated for Liquidation) was an abbreviation for political prisoners imprisoned in the 1950s, popularized mainly in the 1960s by the prisoners themselves.

57 NOVOTNÁ, 2002 op. cit., p. 27.

information about her imprisoned husband by an anonymous person etc. Jiřina never went to these meetings.

Another form of persecution was the impossibility of a higher form of children's studies.

Executions imposed on convicts and their families also became a widely used tool by the regime.

6 The Imprisonment

Antonín Šplíchal began serving his sentence on the day the verdict came into force on 12 March 1952. The order for the sentence to be carried out was issued by Deputy Prosecutor Dr. Handle on 20 June. He remained in Jihlava prison until 2 April 1952, when he was transferred to TNP Rovnost[58] in Jáchymov near Karlovy Vary. During his stay at TNP Rovnost in Jáchymov, West Bohemia, Antonín worked from 2 April 1955 to 16 September 1958 as a uranium ore mining worker. Experience with hard work is also evidenced by the record card of work performance. In 1956, its average monthly output was 114%, in 1957 it was even 158.5%.[59]

On 16 September 1958, he was[60] transferred to the prison in the former Carthusian monastery of St. Bruno in Valdice[61] for health reasons. On 26 January 1959 he was transferred to Leopoldov prison.[62]

58 The Rovnost camp, codenamed "P", became famous for the cruelties committed against the prisoners by, among others, the camp commander Albín Dvořák, nicknamed Paleček.

59 NA, collection Administration of the Correctional Education Corps, Prague – personal files, SSNV mark, main mark Archival unit Šplíchal Antonín, NAD 1041/0/1, *Registration card of work performance in percentage for individual months.*

60 The proposal for transfer to a fixed prison shows that Antonín suffered from insufficient venous circulation in the lower limbs, the secretions of both lower legs, haemorrhoid surgery and fungal eczema on his legs.

61 Among others, Army General Bohumil Boček and Jesuit Provincial Antonín Zgarbík died in the Valdice prison as political prisoners. In 1950, P. Josef Toufar was also tortured here.

62 Leopoldov Prison, together with TNP in Jáchymov, is one of the most brutal prison facilities in Czechoslovakia. The treatment of prisoners here was of a liquidating nature, when they were often denied acute medical care, medicines, etc. Among the most famous political prisoners of the 1950s are Pravomil Raichl, Štěpán Gavenda, Gustáv Husák, Karel Janoušek, Rudolf Beran and Adolf Kajpr.

On 21 March 1960, the Central Commission in Prague decided on Antonín's participation in the amnesty of the President of the Republic on 9 May 1960.[63] A day later, the Regional Commission in Nitra informed the KS in Brno. He was pardoned from his sentence of 5 years, 1 month and 17 days, on the condition that he did not commit a deliberate crime by 9 May 1970. At the same time, he was pardoned for the ancillary punishment of the loss of honorary civil rights.[64]

Antonín Šplíchal was released on 10 May 1960.[65]

7 The Reunion

"It was a May day. The teacher told me at school that my mother had come, that I could go to the hallway. And next to her stood her father. After all those years of separation, he was actually a stranger to me."[66]

After his release from the prison in Leopoldov, Antonín was under constant surveillance by the National Security Corps and the State Security. According to his memories, a listening device was installed in the house where the family lived, and house searches were no exception: *"In the middle of the night, they bombarded the mill with flares, banged on the door – house search. My uncle had to show us all to the plainclothes policemen. However, when they came to the room where my father and mother were sleeping, they said, 'Yes, we won't go there.' That was the only room they didn't go to. They talked to each other that they had a message to watch out for him, he was said to be extremely strong. So they respected him, they were afraid of him. Later I learned that the whole mill was surrounded by the SNB and local hunters. Incredible theatre."*[67] Antonín gradually worked as a temporary worker in the collective farm in Slavětice, later with his son Antonín at the Znojmo building constructions.

63 NA, collection Administration of the Correctional Education Corps, Prague – personal files, SSNV mark, main mark Archival unit Šplíchal Antonín, NAD 1041/0/1, fol. 7.
64 Ibid., fol. 6.
65 Ibid., fol. 650.
66 From the Audio Memories of Zdeněk Šplíchal (2000).
67 NOVOTNÁ, 2002 op. cit., p. 31.

Due to poor health, Antonín Šplíchal died prematurely on 5 July 1969 in Valeč (Třebíč district) and was buried in the family tomb in Moravské Budějovice.[68]

8 The Restoration

More than twenty years later, on 16 January 1991, pursuant to § 2 para. 1 lit. c) of Act No. 119/1990 Coll., on Judicial Rehabilitation, was rehabilitated by the Regional Court in Brno, where pursuant to § 2 para. 2 sentence 3, his criminal prosecution was definitively discontinued.[69] At that time, his youngest son Zdeněk also managed to restore the family tradition thanks to the post-revolutionary restitutions and in the course of the following years, together with his sons, expanded the farm from 70 ha to 450 ha.

Despite the fate that the communists assigned to them, the Šplíchal family was able to continue the work of their ancestors despite hatred, which they still do today.

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Svobodné slovo. 1946, Vol. 2, no. 72.

The Criminal Commissions at the National Committees in Czechoslovakia[1]

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-17

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Abstract

This contribution aims to describe and analyse the criminal commissions at the national committees in Czechoslovakia during the socialism. The first part of the text is devoted to the features and various parts of the National Committees, especially in the 1950s to 1970s. The second part of this contribution defines the Criminal Commissions at the National Committees with the focus on the importance of their existence and their criminal administrative proceedings against citizens. The next part of the paper presents a selection of cases that were adjudicated by the local national committee in the Brno-venkov district. The conclusion of the article considers the questions of whether the Criminal Commissions at the National Committees properly and lawfully sanctioned offences and may be regarded as the appropriate authorities for the protection and education the socialist society in Czechoslovakia.

Keywords

Administrative Offence; Criminal Administrative Law; Criminal Administrative Proceedings; Criminal Commissions; Czechoslovakia, National Committees.

1 Introduction

From the outset of human society, it has been in the collective interest to avoid actions that would cause harm to the individual and, subsequently, to society at large. These circumstances have resulted in the establishment

1 This publication was written at Masaryk university as part of the project *Aktuální problémy teorie a dějin práva,* number MUNI/A/1504/2023, with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2024.

of a state apparatus that supervises its citizens through a range of mechanisms, depending on the severity of the offenses in question. During the socialist era, the criminal commissions *("trestní komise")* at the national committees *("Národní výbory")* represented one such mechanism. These organs exercised the powers conferred by criminal administrative law and dealt with acts of lesser social harm. However, it is debatable to what extent these commissions protected the interests of society regarding the safeguarding of fundamental rights.

2 National Committees

National Committees were organs of state power that exercised the authority of state administration[2] at various levels, namely municipalities, towns, districts, countries and, following the abolition of the latter, regions. According to contemporary literature, they were a fundamental pillar of socialist society.[3] The official establishment of the National Committees can be dated back to 1945, when they were created on the basis of Government Decree No. 4/1945 Coll., on the Election and Powers of National Committees, issued in connection with Constitutional Decree No. 18/1944 Coll., and Presidential Decree No. 121/1945 on the Territorial Organisation of the Administration Exercised by National Committees.

The legislation that is most relevant to this article and to the period of time during which the National Committees can be referred to as the people's organ of each province for the administration of the State is the Constitutional Act No. 150/1948 Coll., Constitution of the Czechoslovak Republic (hereinafter "Constitution of 9 May").[4] In its Article X, it was defined that the National Committees were *"the bearers and executors of State power in the towns, districts and regions, and the guardians of the rights and freedoms of the people"*. In contrast to the previous regulation, the provincial national committees were thus abolished. Articles 123–133 of the Constitution of 9 May dealt with the national committees in more detail, stating that the

2 HENDRYCH, D., ŠRÁMEK, A. *Československá státní správa*. Praha: Orbis, 1973, p. 21.
3 MALÝ, M., FRIEDL, A. *Národní výbory a občan*. Praha: Orbis, 1973, p. 7.
4 VEDRAL, J. Správní právo. *Komunistické právo v Československu: kapitoly z dějin bezpráví*. Brno: Masaryk University, 2009, p. 627.

national committees, as organs of the unified people's administration, had the task of protecting the people's democratic system, ensuring national security, encouraging the people to preserve and improve national property, and exercising the punitive powers provided for by law.

The Constitution of 9 May provided for three levels of national committees. Local National Committees *("místní národní výbory")* exercised public administration in all its branches on the territory of municipalities or towns, District National Committees administered districts (a set of defined municipalities and towns; *"okresní národní výbory")* and Regional National Committees exercised their jurisdiction in regions (a set of defined districts; *"krajské národní výbory")*. In order to delineate the various territories, it is necessary to refer to the legislation, which, however, was subject to change during the defined period. The most important act was Act No. 36/1960 Coll., on the Territorial Division of the State, which was in force from 11 April 1960 to 1 January 2021. Among the previous regulations, we can mention the Presidential Decree No. 121/1945 Coll., on the Territorial Organisation of the Administration Exercised by the National Committees, or the Act No. 280/1948 Coll., on the Regional Establishment, which abolished the countries and created the regions. It is also worth mentioning the Government Decree No. 3/1949 Coll., on the Territorial Organisation of Districts in the Czech Lands, which unified the administrative and judicial districts. By Presidential Decree No. 121/1945 Coll., the administrative districts were restored to their status before 29 September 1938 and the district offices were renamed District National Committees.[5]

The executive organs of the national committees were constituted by the Departments *("odbory")*, the Council Administrations *("správy rad")* and the Council of the National Committee *("rada")*.[6] The Council of the National Committee comprised the Chairman of the National Committee, his

5 The above-mentioned territorial organisation took over the administrative organisation regulated by Imperial Decree No. 255/1848 RGBl. (Imperial Law Gazette) and Imperial Patent No. 170/1848 RGBl. of 17 March 1849. Until then, administrative districts and judicial districts had been in operation in the Czech lands, whereby administrative districts were usually made up of several judicial districts – KOLUMBER, D. Rok 1848 i jego znaczenie dla narodzin nowoczesnego państwa: przykład czeski. *Wschodni Rocznik Humanistyczny*. 2024, Vol. 21, no. 3, pp. 98–100.

6 Government Decree No. 23/1954 Coll., on the Organisation of Executive Bodies of National Committees.

deputies, the Secretary, and other members of the Council.[7] The members of the national committee elected them. The Council was responsible for ensuring the performance of the national committee's tasks, implementing the resolutions of the National Committee, and managing and controlling the departments of the national committee. Additionally, it made decisions and implemented general measures and measures based on legislation. The departments and the council administrations of the councils were composed of politically and professionally qualified employees. These two executive bodies were not established in smaller municipalities.[8]

National committees established commissions *("komise")* to ensure the functioning of the municipality, district or region in various sectors, including culture, finance, education, planning construction and the protection of public order.[9] The commissions became the controlling and initiative organs of the national committee because of the Act No. 13/1954 Coll., on National Committees (hereinafter "Act No. 13/1954 Coll."). However, following the enactment of the Act No. 65/1960 Coll., on National Committees (hereinafter "Act No. 65/1960 Coll."), the commissions assumed the role of executive bodies, thereby acquiring decision-making powers for the departments for which they were established.[10]

In accordance with the Act No. 13/1954 Coll., the commissions were constituted by a minimum of three members. At their initial convening, the members proceeded to elect the chairman of the commission, and alternatively, they could elect a secretary and deputy chairman. In exceptional circumstances, a non-member of the national committee was also eligible to become a member of the commission.[11]

A later regulation, namely the Act No. 65/1960 Coll., required that two-thirds of the members of the commission be deputies (members) of the national

7 Section 20(1) of Act. No. 13/1954 Coll., on National Committees; The council administrations later ceased to exist, Section 25 and 42 of Act No. 65/1960 Coll., on National Committees, Section 46 a Section 61 of Act No. 69/1967 Coll., on National Committees.

8 Section 20 et seq. of Act No. 13/1954 Coll.; Section 25 et seq. of Act No. 65/1960 Coll.; Section 46 et seq. of Act No. 69/1967 Coll.

9 BALÍK, H. *Národní výbory a politika KSČ: úloha národních výborů v politickém systému ČSSR a jejich struktura*. Praha: Horizont, 1979, pp. 108–109.

10 Ibid., p. 107.

11 Section 14 of Act No. 13/1954 Coll.

committee. The remaining one-third were to be elected from among the certified workers of factories, individual agricultural cooperatives, and others.[12] The ratio of commission members was later (by the Act. No. 69/1967 Coll., on National Committees) modified to require a supermajority of the deputies of the national committee.[13] The commissions of the national committee convened as necessary.[14]

3 Criminal Commissions at the National Committees

The criminal commissions, which operated at all levels of the national committees, were intended to *"educate the workers to respect socialist legality, to observe the principles of civil coexistence and to consolidate socialist morality"*.[15] It should be noted that the punitive power of the national committees was not the main agenda; as mentioned earlier, the national committees mainly exercised administration in the fields of construction, economy, culture, development, etc.[16]

The criminal jurisdiction of the national committees was established anew only by the enactment of Act No. 88/1950 Coll., the Criminal Administrative Act (hereinafter "Criminal Administrative Act") and Act No. 89/1950 Coll., on Criminal Administrative Procedure (hereinafter "Criminal Administrative Procedure Code"), which were created during the period of the so-called "legal biennial".[17] In the first place, offences were decided by the criminal commissions of the district national committees; later, the legislation made it possible for the criminal commissions of the

12 Section 34(1) of Act No. 65/1960 Coll.
13 Section 55(1) of Act No. 69/1967 Coll.
14 Section 34(3) of Act No. 65/1960 Coll.; Section 55(3) of Act No. 69/1967 Coll.
15 SSA, Collection Organizational and Internal Administration of the Federal Ministry of the Interior, Organizational and Internal Administration of the Federal Ministry of the Interior – Legal Department, Part II, Vnitřní správa MV, Vládní komise pro národní výbory – návrhy na zřízení, Archive Reference A 6/2, Inventory Unit 236, p. 164.
16 HENDRYCH, D., ŠRÁMEK, A. *Československá státní správa*. Praha: Orbis, 1973, pp. 69–71.
17 The term *"legal biennial"* is used to describe the period between 1948 and 1950, during which Czechoslovakia underwent a significant process of legal codification and unification. This involved the establishment of a unified legal system across the Czech lands and Slovakia; See NEUMAN, A. *Nový právní řád v lidové demokracii*. Praha: Orbis, 1953, pp. 100–101, or VOJÁČEK, L., TAUCHEN, J., KOLUMBER, D. *České právní dějiny do roku 1989*. Brno: Masaryk University, 2024, pp. 217–219.

local national committees to deal with offences.[18] In accordance with the Criminal Administrative Procedure Code, the offences in question were excluded from the jurisdiction of the Criminal (Justice) Act.[19] For purposes of clarification, an offence may be defined as a socially harmful illegal act that is subject to punishment by the administrative authority on the basis of an administrative norm.[20]

The offences punishable by criminal administrative law include, for example, violations of work ethics, disruption of healthcare, illicit business, false statements to public authorities, disruption of civil coexistence (threats, slander) and even alcoholism.[21] In order to establish the basic framework for the criminal jurisdiction of the local national committees, Government Decree No. 78/1951 Coll., on the Criminal Jurisdiction of Local National Committees was issued. This defined the possibilities of how and what offences the lowest administrative authorities could deal with. These included offences in the field of hunting, fishing, public ordinances, birds and animals useful for agriculture, as well as the protection of public entertainments.[22]

This narrow definition was eventually deemed to be counterproductive, which is why Government Decree No. 65/1957 Coll., on the Criminal Jurisdiction of Local National Committees was enacted. This decree permitted some local national committees to rule on offenses related to violations of socialist coexistence, the fight against alcoholism, and violations of work ethics.[23] The expansion of the authority of local national committees is documented in archival materials housed in the Security Forces Archive:

> *"The regional national committees exercised this authority in a responsible manner, differentiating appropriately between the local national committees. In the Brno region, for instance, all criminal commissions of the local national*

18 Section 7(1) of Criminal Administrative Procedure Code; Section 41 of Act No. 60/1961 Coll., on the Duties of the National Committees in Maintaining Socialist Order; BÍLEK, F., ČERNÝ, J., PANÝREK, J., PIPEK, J. *Správní řízení: komentář ke správnímu řádu č. 91/1960 Sb.* Praha: Orbis, 1961, p. 368.

19 Section 2 Criminal Administrative Act.

20 See SLÁDEČEK, V. *Obecné správní právo*. 4. ed. Praha: Wolters Kluwer, 2019, p. 199.

21 Section 72 et seq. of Criminal Administrative Act.

22 Section 1 of Government Decree No. 78/1951 Coll., on the Criminal Jurisdiction of Local National Committees.

23 These local national committees were appointed by regional national committees; Section 2 Government Decree No. 65/1957 Coll., on the Criminal Jurisdiction of Local National Committees.

> *committees were entrusted with extended criminal powers to the full extent. This was done effectively, without any substantial or mass defects manifesting themselves. The assistance provided by the executive bodies of the superior national committees was substantial in this regard."*[24]

Towards the end of the 1950s, however, the establishment of the Comrades' Courts *("soudružské soudy")* commenced.[25] These institutions were established within social organisations, particularly within the revolutionary trade union movement *("Revoluční odborové hnutí" – "ROH")*,[26] and were not governed by any legal framework. To some extent, they assumed responsibility for the agenda of the criminal commissions and addressed cases that were disruptive to civil coexistence. Despite their relatively brief tenure, the comrades' courts were ultimately replaced by Local People's Courts *("místní lidové soudy")* in mid-1961. These latter courts were in many ways like the comrades' courts. The new legislation on local people's courts also had the effect of revoking the government decree on the criminal jurisdiction of local national committees,[27] which had been in force until 1 July 1961. The local people's courts constituted an important component of the judicial system in Czechoslovakia until 1 January 1970. Their jurisdiction included the prosecution of offences and minor crimes,[28] as well as the settlement of civil disputes.[29] It should be noted, however, that this delegation of powers did not occur throughout the Czechoslovak Socialist Republic. In accordance with Section 33 of Act No. 60/1961 Coll., on the Duties of the National Committees in Maintaining Socialist Order, in areas where the local people's court was not established, the criminal commissions retained their original agenda – this led to inconsistency in decision-making and breach of legal

24 SSA, Collection Organizational and Internal Administration of the Federal Ministry of the Interior, Organizational and Internal Administration of the Federal Ministry of the Interior – Legal Department, Part II, Act on administrative liability, Archive Reference A 6/2 Inventory Unit 91, p. 551.

25 DOČKAL, M. K historii soudružských soudů. In: *Sborník prací Filozofické fakulty Brno*. Brno, 1962, pp. 104–105.

26 The ROH was the monopoly trade union organisation uniting employees throughout Czechoslovakia; See ÚRO. *Stanovy a organisační řád ROH*. Praha: Práce, 1951.

27 Goverment Decree No. 65/1957 Coll., on the Criminal Jurisdiction of Local National Committees.

28 NEUMAN, A. *Lidově demokratický právní řád ve službách pracujícího lidu*. Praha: Orbis, 1955, p. 143.

29 Section 11 of Act No. 38/1961 Coll., on Local Peoples' Courts.

certainty.[30] Following the abolition of the local people's courts by Act No. 150/1969 Coll., on Offences, their jurisdiction was redistributed between the district courts and returned to the national committees.[31] The amended Act No. 60/1961 Coll., on the duties of the national committees in maintaining socialist order remained in force until 1 July 1990.

4 The Criminal Administrative Proceedings

In order to introduce the subject of criminal administrative proceedings, it is first necessary to provide an explanation of the concept of criminal administrative law.

Criminal administrative law and procedural criminal administrative law represent a subcategory of administrative law. The former comprises a set of criminal administrative norms that define the criminal jurisdiction of administrative bodies,[32] in this case national committees. The latter comprises a set of norms regulating the procedure for (administrative) offences. The focus on these branches of law began to emerge in Czechoslovakia during the 1930s.[33] The theoretician Jaroslav Pošvář discussed how the difference between criminal administrative law and criminal (judicial) law could be characterised, concluding that:

> *"I cannot find any other difference between criminal administrative law and judicial criminal law, except for the difference in competence and the consequences arising from it* […] *The norms whose violation is punished by the administrative authorities are classified under administrative law, norms whose violation is punished by the courts are classified under criminal law."*[34]

Following the communist takeover of the government and the related changes in society, criminal administrative law was prioritised to a considerable extent.

30 SSA, Collection Organizational and Internal Administration of the Federal Ministry of the Interior – Legal Department, Part II, Internal Administration of the Ministry of the Interior, Principles of the Constitutional Act on Courts and Prosecutors in the Czechoslovak Socialist Republic, Archive Reference A 6/2 Inventory Unit 1125, p. 546.

31 Ibid., Misdemeanour Act – Draft Principles, Archive Reference A 6/2 Inventory Unit 1165, p. 45.

32 PULPÁN, O. *Trestní právo a řízení správní: (Přepracováno podle nejnovějších předpisů z oboru vyživovacího, zásobovacího a cenového, předpisů o provinění proti národní cti, o očistných komisích, obnově pořádku atd.)*. Praha: Orbis, 1947, p. 21.

33 POŠVÁŘ, J. *Nástin správního práva trestního*. Praha-Brno: Orbis, 1936, pp. 1, 36.

34 Ibid, p. 35.

This is evidenced by the fact that two fundamental laws defining criminal administrative law (Criminal Administrative Act, Criminal Administrative Procedure Code) were enacted during the legal biennium.

The criminal administrative proceedings before the national committees were, in many ways, similar to court proceedings. However, they were also characterised by their simplicity. This was undoubtedly due to the fact that the offences were of minor gravity[35] and the principle of informality. The latter meant that a minimum of formalities was prescribed for administrative proceedings and was thus intended to encourage the administrative authorities to take their own initiative in choosing the most appropriate, cheapest and quickest type of procedure. Further details on the procedure before the national committees can be found below:

> *"The proceedings are guided by an attempt to educate the offender in a new attitude towards society and to convince him of the wrongness of his behaviour. This is done with the intention of enabling him to join the workforce as a conscious member of the work team after serving his sentence."*[36]

As previously stated, the district national committee initially held jurisdiction over offences, while the local national committee exercised authority in instances where a government regulation specified otherwise. The national committees were responsible for prosecuting offences that occurred within their districts. In cases where the location of the offence was unclear or if the offence occurred abroad, the committee in which the accused was resident held jurisdiction.[37]

The proceedings were initiated ex officio, as well as on the basis of a complaint against an individual who was over the age of 15. Once proceedings had been initiated, the criminal committee of the national committee was obliged to ascertain the material truth, which implied that it was necessary to secure all the facts that were decisive for the case under consideration.[38] Evidence was secured through a variety of means, including on-site investigations,

35 CÍSAŘOVÁ, D. *Československé trestní řízení*. Praha: Orbis, 1958, p. 13.

36 NEUMAN, A. *Lidově demokratický právní řád ve službách pracujícího lidu*. Praha: Orbis, 1955, p. 143.

37 Section 8 of Criminal Administrative Procedure Code.

38 MINISTERSTVO VNITRA – VNITŘNÍ SPRÁVA NÁRODNÍCH VÝBORŮ. *Ochrana veřejného pořádku: pomůcka pro práci národních výborů a komisí pro ochranu veřejného pořádku*. Praha: TEPS místního hospodářství, 1965, p. 14.

case examinations, witness examinations, expert reports, and the review of other pertinent documents. Concurrently, the parties were bound by law to collaborate with the criminal commission in order to obtain the requisite evidence for the decision. However, it is important to note that each party, and particularly the accused, was entitled to inspect the case file and provide commentary on the case, the manner in which it had been established, and, where appropriate, to propose additions to the file before the decision was taken.[39]

It was the responsibility of the national committee's criminal commission to guarantee that every offence was heard and that the hearing itself served an educational purpose. If the hearing was deemed insufficient to rectify the offence, the national committee's criminal commission was empowered to impose a range of sanctions, including a warning, a public reprimand, a fine, or the forfeiture of property.[40] An appeal could be submitted against the decision of the criminal commission. This appeal could be submitted by the relevant parties. If the appeal was submitted by an individual who was not a party to the proceedings, such an action was considered a complaint or a warning. The appeal had suspensive effect.[41]

It is also relevant to note that the period of prescription for an offence was set at one year, calculated from the date of the offence's commission. This was done for the reason that, following a later hearing of the case, the punishment already imposed would lose its meaning, namely the correction and education of the offender.[42] It is also of interest to note that the period of prescription for many offences in the currently effective and valid legal system in the Czech Republic is also one year.[43]

5 Cases

In this part of the paper are presented the cases that were dealt with by the criminal commissions of the local national committees in the South Moravian Region, especially in the Brno-venkov district.

39 Ibid., p. 15.
40 Ibid., p. 17.
41 Ibid., p. 18.
42 Ibid., p. 16.
43 Section 30(a) of Act No. 250/2016 Coll., on Liability for Offences and their Proceedings.

Offences against socialist coexistence had always been defined very broadly to prevent any disturbance of the peaceful environment of society. However, the most frequent offences were defamation, slander or minor damage to personal property. This type of offence is the most frequently encountered in archival documents. A few cases may be cited to illustrate the situation.

On 20 April 1958 was an oral hearing of the complaint filed by a woman B. She stated that on 20 March 1958 she had been assaulted in the yard of the agricultural cooperative by a woman C. Woman B should have shouted at woman C that the hay she was taking was not hers but was in the ownership of the cooperative. Furthermore, woman B should have called her a thief. In response, Woman C physically assaulted Woman B and then run away. At the oral hearing, the accused woman C defended herself by saying that woman B kept chasing her but did not hit her. On the contrary, Woman B had spat in Woman C's face. In the end, the case was resolved through the imposition of a fine of 15 CSK (Czechoslovak crown) on Woman C and a reprimand of Woman B.[44]

On 2 June 1958, a meeting of the Criminal Commission was held in the office of the Local National Committee in Rudka, at which the oral hearing of the criminal administrative proceedings took place. Mrs Z. complained that her garden had been damaged because her neighbour's chickens had been grazing in the garden and had picked up the seeds she had sown. Before the hearing, the Agricultural Commission of the local national committee carried out an on-site investigation and found that 25% of the damage had occurred and that the damage to the garden was estimated at 40–50 kg of seeds. The accused neighbour pleaded guilty and was willing to pay for the damage, which was estimated at 68 CSK. However, after the amount had been determined, the neighbour asked the criminal commission to reduce the amount on the grounds because she was a widow and did not have enough money. In the end, the complainant, Mrs Z., waived her right to compensation.[45]

44 State District Archive Brno-venkov, Collection N-102 MNV Čebín, inventory No. 23, Record of the Criminal Commission dated 20. 4. 1958.

45 State District Archive Brno-venkov, Collection N-22 MNV Rudka, inventory No. 11, Record No. 1 of the Meeting of the Criminal Commission of the Municipal National Committee Council in Rudka on 2. 6. 1958.

The case discussed on 17 November 1961 by the Criminal Commission of the Rudka, when a Woman H, poured urine on a soldier and a Woman J. The resolution of the criminal commission was as follows: *"Woman H must clean the soldier so that he does not smell, that is, wash, dry and iron him. Woman H must buy a new coat for woman J at the cost of the coat that was poured on."*[46]

On 4 November 1964, a case was heard in which the accused R. allegedly hit a Man K., several times and even drew blood from his nose so that he had to seek medical help. This was denied by the accused Man R. In this case, it is interesting to note that, although the Commission noted that it could not be proved that Man R. had assaulted Man K., the accused was given a warning.[47]

In the archival records, it is also possible to find evidence of offences committed in the context of the fight against alcoholism. The issue of alcoholism in Czechoslovakia was a constant topic of discussion throughout the previous political regime.[48] The issue of alcoholism was not exclusive to hearings before the criminal commission; it was also present in other institutions, such as the Comrades' courts and local people's courts, as a factor in the commission of illegal acts.[49]

On 19 June 1963, a young woman named P. appeared before the criminal commission with her mother. The commission received a complaint against P. that she socialised with older men, smoked heavily and often drove herself into a state of drunkenness. After the criminal commission had spoken with her, the young woman P. promised to avoid bad company so that no further

46 It is of interest to note that the woman H was the mother of the woman J; State District Archive Brno-venkov, Collection N-22 MNV Rudka, a) Books, inventory No. 12, Record dated 17. 11. 1961.

47 As previously stated, a warning was a kind of punishment imposed by the criminal commission; State District Archive Brno-venkov, Collection N–76 MNV Zastávka u Brna, inventory No. 43, Record of the 7th Meeting of the Commission for the Protection of Public Order dated 4. 11. 1964.

48 ZBORNÍK, F., LOUDA, V. Trestní právo v boji proti alkoholismu. *Socialistická zákonnost*. 1977, Vol. 25, No. 3, p. 144.

49 SSA, Secretariat of the Federal Ministry of the Interior, Secretariat of the Minister of the Interior, Part II, Meeting of the Minister's Collegium, 3rd Meeting on 20. 1. 1961, Archive Reference A2/2 Inventory Unit 1181, p. 117; SSA, Collection Organizational and Internal Administration of the Federal Ministry of the Interior, Organizational and Internal Administration of the Federal Ministry of the Interior – Legal Department, Part II, Act on administrative liability, Archive Reference A 6/2 Inventory Unit 91, p. 450.

complaints would be made against her. Her mother promised to pay more attention to her daughter.[50]

A man H was summoned to participate in an oral hearing on 13 January 1965. On 27 June 1964, he provided assistance and encouragement to the offence of drunkenness by offering and paying for beer on the evening of that day to Mr C, who was on military basic service, despite being aware that Mr C was the driver of the vehicle and would continue to drive it. Mr. C continued to consume alcohol and subsequently caused an accident while drunk. Mr. H. pledged to avoid such actions in the future. The criminal commission imposed a fine of 100 CSK on him.[51]

Furthermore, instances have been documented where individuals have improved their living situation by utilising the property of others, including neighbours, random members of the public, and even property belonging to state-owned enterprises or cooperatives. Theft of wood in the woods, grass in the meadow, or theft from the workshops of state-owned enterprises were frequently discussed. However, it should be noted that the protection of socialist property was regarded as one of the most fundamental interests of society. Indeed, there were even suggestions that unless socialist property (ownership) was protected and the people were educated to protect it, it would be impossible to achieve communism.[52] The draft Directive on the Implementation of the Law on the Disciplinary Prosecution of Theft and Damage to Socialist Property notes that:

> *"The protection of socialist property as the inviolable source of the wealth and strength of the republic and of the welfare of the working people is of paramount importance to all workers* […] *The strengthening of the protection of socialist property is not only a matter of strict criminal prosecution of those who plunder national property and are enemies of our socialist construction. In order to fulfil the task set out at the XI. Party Congress (of the Communist Party*

50 State District Archive Brno-venkov, Collection N–76 MNV Zastávka u Brna, inventory No. 42, Record of the Meeting of the Commission for the Protection of Public Order dated 19. 6. 1963.

51 State District Archive Brno-venkov, N-76 MNV Zastávka u Brna, inventory No. 43, Record of the 12th Meeting of the Commission for the Protection of Public Order dated 13. 1. 1965.

52 Referát odborářské výchovy. *Osnovy základního školení funkcionářů ROH*. Praha: Práce, 1951, sv. 4, p. 42.

of Czechoslovakia), it is also necessary to apply and develop all forms and methods of workers' education."[53]

For example, on 7 December 1962, a woman named M was summoned for the alleged theft of meat from the supermarket of the national enterprise Masna Brno. The notes of the hearing indicate that she was only reprimanded because this was her first offence.[54]

6 Conclusion

The importance of the criminal commissions of the national committees cannot be denied. For several decades until 1990, the criminal commissions of the national committees controlled and shaped socialist society in Czechoslovakia. However, their practice could be characterised as controversial. There is need to state, that the members of the criminal commissions of the national committees normally were not lawyers, they were members of the national committee or ordinary citizens who were entrusted with the power to rule over the misconduct of others. It is thus noticeable that the commission did not, for example, classify individual offences under sections of the law.

A study of the archival documents that record cases heard by criminal commissions across the Brno-venkov district reveals that offences against socialist coexistence were frequently encountered in Czechoslovakia during socialist era. The broad definition of offences, especially against socialist coexistence, made it simple for criminal commissions and citizens alike to apply to a variety of inappropriate behaviours. Even disputes between neighbours, families or family members were often classified as offences against socialist coexistence.[55] However, the decisions of the commissions on these offences were frequently based on a non-expert understanding

53 SSA, Collection Organizational and Internal Administration of the Federal Ministry of the Interior – Legal Department, Part II, Legislative Measure on the Prosecution of Minor Cases of Property Theft, Archive Reference A 6/2 Inventory Unit 28, p. 117.

54 State District Archive Brno-venkov, Collection N–82 MNV Chudčice, inventory No. 20, Record of the Meeting of the Commission for Public Order dated 7. 12. 1962.

55 See State District Archive Brno-venkov, Collection N-22 MNV Rudka, inventory No. 11, Record No. 1 of the Meeting of the Criminal Commission of the Municipal National Committee Council in Rudka on 2. 6. 1958; State District Archive Brno-venkov, Collection N-22 MNV Rudka, a) books, inventory No. 12, Record dated 17. 11. 1961.

of the law, resulting in infringements of the principles of administrative and criminal law. For example, the principle of *"nulla poena sine lege"* was breached, because some imposed punishments were not defined in the Criminal Administrative Procedure Code (nor in subsequent legislation). Also, the principle of disposition and the principle of officiality could be mentioned,[56] which the first one means that the administrative organ (e.g. criminal commission) should be bound only by the complaint made and thus decide only to that extent, the second means that the organs perform actions in accordance with their official duties (ex officio). In one of the mentioned cases, it is evident that the criminal commission ultimately imposed a punishment on the complainant as well in one proceedings.[57] The principle of *"nullum crimen sine lege"* was also breached, as the acts in question were not defined in the Criminal Administrative Procedure Code or any other legislation. Last but not least, it is worth to mention that sometimes the principle of *"in dubio pro reo"* was also violated, because occasionally a sentence could be passed even if it was not proven in the proceedings whether the accused had committed the act or not. While the sentences were not as severe as those handed down in ordinary criminal proceedings, it is evident that the criminal commission of the national committees overstepped its authority.

However, may be noted that the hearing of the offence by the local national committee did, to some extent, fulfil its educational and corrective purpose. It seems probable that the members of the commission and the accused knew each other and this hearing of their offence was, in some cases, already sufficient punishment. In some documents of the archives of the various municipalities, it becomes evident that there are numerous cases in which the educational and corrective purpose was not achieved, because some names of the accused were repeated.

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56 LUKEŠ, Z. *Československé správní právo, [1.]: Obecná část*. Praha: Panorama, 1981, p. 256.

57 In a sudden occurrence, two separate criminal administrative proceedings were merged, one initiated at the complaint and the other ex officio.

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SSA, Collection Organizational and Internal Administration of the Federal Ministry of the Interior, Organizational and Internal Administration of the Federal Ministry of the Interior – Legal Department, Part II, Legislative Measure on the Prosecution of Minor Cases of Property Theft, sign. A 6/2 i.j. 28.

SSA, Collection Organizational and Internal Administration of the Federal Ministry of the Interior, Organizational and Internal Administration of the Federal Ministry of the Interior – Legal Department, Part II, Internal Administration of the Ministry of the Interior, Principles of the Constitutional Act on Courts and Prosecutors in the Czechoslovak Socialist Republic, sign. A 6/2 i.j. 1125.

SSA, Collection Organizational and Internal Administration of the Federal Ministry of the Interior, Organizational and Internal Administration of the Federal Ministry of the Interior – Legal Department, Part II, Act on administrative liability, Archive Reference A 6/2 Inventory Unit 91.

SSA, Collection Secretariat of the Federal Ministry of the Interior, Secretariat of the Minister of the Interior, Part II, Meeting of the Minister's Collegium, 3rd Meeting on January 20, 1961, Archive Reference A2/2 Inventory Unit 1181.

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State District Archive Brno-venkov, Collection N–82 MNV Chudčice.

State District Archive Brno-venkov, Collection N-102 MNV Čebín.

The Specifics of the Crime of Defamation of Nation, Race and Beliefs in Socialist Czechoslovakia (in Contemporary Application Practice)[1]

DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024-18

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Abstract

The crime of defamation of nation, race and belief is still one of the institutions by which states ensure peaceful coexistence between their citizens. This offence was similarly regulated in the criminal legislation of socialist Czechoslovakia. One of its most distinctive features, characteristic of the entire communist rule, was the protection of supporters of the socialist social and state system. This regulation also de facto ensured the criminalization of public criticism of the Communist Party, its policies and also their representatives. This paper summarizes the normative regulation of this criminal offence from the communist seizure of power in 1948 to the fall of this totalitarian regime and the changes that occurred in Czechoslovak criminal law in 1990. The paper also uses examples from the contemporary application practice of the District Court for Prague 1.

Keywords

Crime; Defamation of Nation, Race and Beliefs; Socialism; Czechoslovakia; Criminal Law; Defamation of Supporters of the Socialist Social and State System.

1 Introduction

At the beginning of 1948, Czechoslovakia was the last state within the Soviet Union's sphere of influence in which the communists did not yet

1 This text was written at Masaryk University as part of the project *Aktuální problémy teorie a dějin práva,* number MUNI/A/1504/2023, with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2024.

hold absolute power. This changed at the end of February that year when they gained a majority in the government.[2] Subsequently, the Communists drafted a new constitution which the existing democratically elected president Edvard Beneš refused to countersign. He therefore abdicated and the then-Communist prime minister Klement Gottwald subsequently became president.

As a part of this gradual takeover of all power by the communists in 1948, one of the objectives was to reshape the legal system so that it would be compatible with the newly established regime. This transformation took place in Czechoslovakia over the next two years or so, which is why this period is often referred to as the Legal Biennium.[3] Its purpose, apart from the unification of the legal system throughout Czechoslovakia (because until then, there were separate legal systems for the Czech lands and Slovakia), was also the elimination (according to the ideology of the time) of *"exploitative bourgeois law serving the rule of the minority over the working majority"* and the establishment of new laws serving, on the contrary, *"the interests of the vast majority of the nation against the remnants of capitalism and its consequences"*.[4]

This paper examines an institution used in criminal law. In general, criminal law is intended to protect the state, the constitutional establishment, the interests of society, and the legitimate interests of natural and legal persons. It is evident that the value orientation of this branch of law still varies to some extent in different states. Criminal law is most pronounced in totalitarian states, which was also the case in socialist Czechoslovakia (socialism in Czechoslovakia refers to the period between 1948–1989), where criminal law *"did not fulfill the essential role of being based on the rule of law with reasonable interference with the fundamental rights and freedoms of the offender"*.[5]

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2 BRENNER, C. *Mezi Východem a Západem: české politické diskurzy 1945–1948*. *Historické myšlení*. Praha: Argo, 2015, pp. 331–336.

3 ŠVANTER, V. Právnická dvouletka. In: SCHELLE, K., TAUCHEN, J. (eds). *Encyklopedie českých právních dějin, V. svazek Pa – Právní*. Plzeň: Aleš Čeněk, 2016, pp. 799–819.

4 Explanatory report to Act No. 86/1950 Coll., the Criminal Law. Joint Czech-Slovak Digital Parliamentary Library. Prints. NS RČS 1948-1954. Available at: https://psp.cz/eknih/1948ns/tisky/

5 GŘIVNA, T. Trestní právo hmotné. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví*. Brno: Masaryk University, Mezinárodní politologický ústav, 2009, pp. 553–555.

Quite the opposite. During this period, criminal law was often misused to punish individuals inconvenient to the regime, to achieve the ambiguously defined goals of the then-socialist legality, or to openly differentiate between perpetrators by class.[6] According to the view of the time, *"it was natural that the subjective aspect of the crime should be judged quite differently in the case of members of the bourgeoisie and in the case of workers or working peasants"*.[7]

The distortion of criminal law occurred mainly in the interpretation of the written law and its application by authorities in criminal proceedings, as well as in the vaguely defined elements of criminal offences[8] in specific parts of the Criminal Codes.

This paper deals with a part of criminal law intended to protect society from defamation directed at a group of people based on their nationality, race, or beliefs. Such an offence also exists in modern criminal law. A specific feature of this offence during the period of Czechoslovak socialism was the protection of supporters of the people's democratic order (according to the Criminal Law of 1950) or, in other words, the supporters of the socialist social and state system (according to the Criminal Law of 1961). This article also examines contemporary court cases related to the crime in question, handled by the District Court for Prague 1, the court responsible for dealing with crimes in the center of the capital. This court saw cases involving individuals from all over the country, including foreigners, thus creating a setting prone to various criminal activities, including the defamation of foreign nations, languages, and races. The court files used in this paper were obtained from the Prague City Archives. For the sake of authenticity, some expressive language from the criminal files has been retained in the text, as it was often considered a conceptual feature necessary to fulfill the elements of the crime under investigation, which led the court to conclude that the crime had actually occurred.

6 NEDVĚDICKÝ, K. Třídní justice a dělnická třída. In: PETRÁŠ, J., SVOBODA, L. (eds.). *Osm let po válce. Rok 1953 v Československu*. Praha: Ústav pro studium totalitních režimů, 2014, p. 16.

7 ROLENC, O., MÁLEK, A. *O socialistické spravedlnosti: (zásady našeho nového trestního práva). Edice přednášek pro osvětové besedy*. Praha: Osvěta, 1952, p. 17.

8 GŘIVNA, T. Trestní právo hmotné. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví*. Brno: Masaryk University, Mezinárodní politologický ústav, 2009, p. 554.

2 The Crime of Defamation of Nation, Race, and Belief: Its Normative Anchorage and Reflection in Judicial Practice after 1948

As mentioned in the introduction, Czechoslovakia underwent a significant reconstruction of its legal system between 1948 and 1950, during which the various branches of law were unified. This unification was necessary because, until that time, there existed a legal dualism: Austrian law was applied in the Czech lands, while Hungarian law was reciprocated in Slovakia. The goal of this legal reconstruction was also to align the Czechoslovak legal system more closely with the Soviet legal system and to incorporate key elements of socialism into all branches of law.

Criminal law played a crucial role during this period, as significant criminal repression followed immediately after the communist takeover.[9] This branch of law therefore served largely political purposes in the early 1950s, under the euphemistic objective that the law should serve the workers.[10] In substantive criminal law, the so-called retributions[11] under the Great Retributive Decree[12] (intended to punish traitors and collaborators) were reinstated, and the law for the protection of the people's democratic republic No. 231/1948 was also adopted. This ideologically driven legislation was designed to protect the state and its people's democratic establishment, and it was one of the first manifestations of the political nature of the newly emerging regime.[13] This law served as the basis for the persecution of domestic opposition and individuals who attempted to flee abroad.[14]

9 DOBEŠ, M. Offenders of the Crime of Social Parasitism in Czechoslovakia 1956–1990. In: TAUCHEN, J., KOLUMBER, D. *Edge of tomorrow: the next generation of legal historians and novelists*. Brno: Masaryk University, 2022, p. 280.

10 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, p. 81.

11 For more on retributions see KUKLÍK, J., NĚMEČKOVÁ, D. Retribuce In: SCHELLE, K., TAUCHEN, J. (eds.). *Encyklopedie českých právních dějin. X. svazek, R – Říš.* Plzeň: Aleš Čeněk, 2017, pp. 542–550.

12 For more on the so-called Great Retributive Decree, see KUKLÍK, J. *Mýty a realita takzvaných Benešových dekretů*. Praha: Linde, 2002.

13 KUKLÍK, J. *Vývoj československého práva 1945–1989*. Praha: Linde, 2009, p. 189.

14 BLÁHOVÁ, I. Historické souvislosti politických procesů 50. let. In: BLÁHOVÁ, I., BLAŽEK, L., BOŠTÍK, M., STARÁ, T. *Jménem republiky!: osm případů zvůle komunistické justice*. Praha: Auditorium, 2015, p. 25.

It was also under this criminal law that the largest political show trials in Czechoslovak history took place.

These political trials were generally conducted under the first title of this law, which contained provisions on crimes against the state, including the crimes of treason, association against the state, sedition against the republic, and defamation of the republic.[15] Treason was the most frequently charged offence, and even the mere attempt or preparation for such crimes, in the form of conspiracy, was punishable.[16] In certain circumstances, the death penalty was threatened, and was carried out, for example, against one of the most famous Czechoslovaks executed for treason, the lawyer Milada Horáková.[17]

This law is relevant to this paper because it included, under its third title (which regulated crimes against the internal security of the state), Section 27 which addressed the crime of defamation of the nation. According to this provision, whoever *"publicly or in front of more than one person defames any nation, its language, or any race, so that it may excite public indignation or endanger the general peace, shall be punished for the offence by rigorous imprisonment from one month to one year."*

It is noteworthy that the commentary on this law was written by Juraj Vieska, one of the main prosecutors who proposed draconian punishments in political trials. According to the commentary on this provision, even this offence could be interpreted broadly; it was sufficient to "only potentially" arouse public indignation or endanger the general peace of the republic.[18] Defamation in the context of the Act for the protection of the people's democratic republic was intended to include speech aimed at deliberately lowering the esteem of a nation, its language, or race, thereby bringing it into disrepute or contempt. Only nations located within the Czechoslovak Republic were protected against such defamation. Another part of this

15 Furthermore, the crimes of unauthorized departure from the Republic, sedition against the Republic and spreading a rumour. GEBAUER, F. *Soudní perzekuce politické povahy v Československu 1948–1989: (statistický přehled). Sešity Ústavu pro soudobé dějiny AV ČR*. Praha: Ústav pro soudobé dějiny AV ČR, 1993, p. 117.

16 RŮŽEK, A. Ochrana lidově demokratické republiky, zákon č. 231/1948 Sb. s důvodovou zprávou a poznámkami. In: *Právní prakse*. 1948, Vol. 12, no. 1, pp. 218–224.

17 For more on the trial of Dr. Milada Horáková and Co. see e.g. IVANOV, M. *Milada Horáková: justiční vražda*. Praha: XYZ, 2018.

18 VIESKA, J. *Zákon na ochranu lidově demokratické republiky*. Praha: Naše vojsko, 1949, p. 60.

law[19] protected the so-called "allied state"[20] from defamation, including that of its leaders or state symbols, even outside the republic. According to the commentary on this law, such defamation *"was very often attempted by enemies of the people's democratic establishmen"*.[21] The era and its ideology are illustrated by the fact that this provision effectively excluded states or nations other than those allied with the Republic from protection against such defamation.

2.1 The Criminal Law of 1950

The Law for the Protection of the People's Democratic Republic was in force for less than two years,[22] yet nearly 26,000 people were convicted under its provisions.[23] It was superseded by the new Criminal Code, which was adopted as Act No. 86/1950 Coll. According to contemporary authors, this code was not entirely of good quality due to the excessive speed of its drafting, the broad wording of some provisions, and the high penalty rates.[24]

The offence of defamation of nation, race, and beliefs was included in the first title of the code, which regulated offences against the Republic, specifically in its fifth section, among offences particularly threatening public order. The object of protection here were *"the most important relations in the sphere of social life and public order"*.[25] An interesting aspect of this regulation is that the crime of defamation of nation, race, and beliefs was regulated in this section in two different ways.

19 Specifically, it was Section 42, which read: *"Whoever, in public or in front of several people, defames an allied state, its head or other representative or its representative recognized by the Government of the Republic, disgraces the name or symbol of an allied state, in particular its emblem, flag, colours or national anthem, or destroys, damages or removes the symbol of an allied state, in particular its emblem, flag or colours, or a representation of the head of the Allied State or any other representative thereof, with the intention of showing contempt for or hostility towards the Allied State, shall be punished for the offence by rigorous imprisonment from three months to two years."*

20 In this context, these were the states with which Czechoslovakia had an alliance treaty on 1. 1. 1949 – namely the USSR, Poland, Romania, Bulgaria and Yugoslavia. VIESKA, 1949, op. cit., p. 39.

21 VIESKA, 1949, op. cit., p. 75.

22 KOLUMBER, D. Protistátní trestné činy v moderních kodifikacích. In: TAUCHEN, J. *Protistátní trestné činy včera a dnes*. Brno: Masaryk University, 2021, p. 56.

23 GEBAUER, op. cit., p. 119.

24 KOLUMBER, D., Socialistické právo (1948/1950–1989). In: VOJÁČEK, L., TAUCHEN, J., KOLUMBER, D. *České právní dějiny do roku 1989*. Brno: Masaryk University, 2024, pp. 249–250.

25 VYBÍRAL, B. *O objektu trestného činu*. Praha: Orbis, 1953, pp. 22–25.

First, it was included as part of multiple offences subsumed under a broader category called "Attacks Against Groups of the Population."[26] Here, it was listed under Section 119, which prosecuted the one *"who publicly defames a group of inhabitants of the Republic because of their nationality, race, or religion, or because they are without religion or followers of the People's Democratic Order, shall be punished by imprisonment for up to one year"*.

The second provision that prosecuted defamation of nation, race, and beliefs under the 1950 Criminal Law appeared a few paragraphs later as a separate offence under Section 126, entitled "Defamation of Nation and Race." This provision stated: *"Whoever publicly defames any nation or its language or any race so that it may arouse public indignation shall be punished by imprisonment for a term up to one year."*

The formal difference between these two provisions was that Section 119 protected a narrower social category – the population of the Czechoslovak Republic – whereas Section 126 protected the nation and race as a whole, *"whether these members live within or outside the territory of the Republic"*.[27] The second difference was that Section 126 dealt with the consequence – the possibility of arousing public outrage.[28] Public outrage was defined as causing an unfavorable response (indignation) from two or more people who would express disapproval and/or moral condemnation[29] in a place accessible to the public, and according to contemporary jurisprudence, also "loud enough".[30]

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26 These offences included physical violence or the threat thereof against a group of inhabitants of the Republic because of their nationality, race, religion or because they were adherents of the People's Democratic Order, injury to property because of enumerated aspects of a group of inhabitants, incitement to violent or other hostile acts against such a group of inhabitants and, finally, defamation of a group of inhabitants of the Republic because of their nationality, race, religion, because they were without religion and because of their adherence to the People's Democratic Order.

27 Collective of staff of the Departments of Criminal Law of the Law Faculties of Charles University in Prague and Comenius University in Bratislava. Criminal offences particularly threatening the order in public affairs. In Trestné činy zvláště ohrožující pořádek ve věcech veřejných. In: SOLNAŘ, V. *Československé trestní právo vysokoškolská. učebnice sv. 2. Zvl. Část.* Praha: Orbis, 1959, pp. 68–69.

28 VIESKA, J. Trestné činy zvláště ohrožující pořádek ve věcech veřejných. In: GLOGAR, R. *Trestní zákon komentář.* Praha: Orbis, 1958, p. 354.

29 Ibid., p. 366.

30 ŠIMÁK, J., CIRKL, B., DOLENSKÝ, A., PINDRYČOVÁ, L. *Trestní zákon, komentář k zákonu ze dne 12. července 1950, č. 86 Sb.* Praha: Orbis, 1953, p. 119.

In both cases, the legislator used the concept of defamation, which at the time was interpreted as "speech aimed at gross disparagement" by means of crude statements or other offensive acts. The offensiveness was derived from the content, the manner of presentation, the reaction of the persons who observed the speech[31] and, last but not least, the circumstances under which such disparagement occurred. In all cases, the intention of the perpetrator was required.[32]

The offence of defamation of nation, race, and beliefs was, according to the authors of the time, considered – along with some other offences[33] – as a means of applying the idea of "proletarian internationalism,"[34] because it was intended to protect against attacks on other states of the world socialist system.[35]

In one case, the court found a statement to be defamatory of a group of people, and the defendant was charged with committing this offence under Section 119 because he had offended several of his relatives by saying that *"they are a communist bunch who will at one point get what they deserve"*.[36] In this instance, he defamed their potential adherence to the People's Democratic Order or, in other words, their affiliation with the Communist Party of Czechoslovakia.[37]

The division of this offence into two distinct sections, while maintaining the same penal rate, appears from today's perspective to be one of the shortcomings that may have resulted from the excessive speed with which the criminal legislation was drafted during the legal biennium. This is evident

31 VIESKA, J. *Ochrana lidově demokratické republiky Komentář k § 78–129 trestního zákona č. 86/50 Sb.* Praha: Orbis, 1950, pp. 251–252.

32 Trestné činy proti ústavním činitelům. In: GLOGAR, R. *Trestní zákon komentář.* Praha: Orbis, 1958, pp. 344–345.

33 E.g. Harm under § 95, espionage under § 105, support and promotion of fascism and similar movements under § 260.

34 VYBÍRAL, B. *Základy československého socialistického trestního práva*. Praha: Státní nakladatelství politické literatury, 1959, p. 14.

35 NOVOTNÝ, O. *Boj s trestnými činy a trestní právo.* Praha: Nakladatelství politické literatury, 1965, pp. 13–14.

36 Archives of the City of Prague (AHMP), State Bodies Fund, Department of the Fund: District (People's) Criminal Court for Prague (OST), NAD 94. Criminal file, signature 6T 60/1955, fol. 16–18.

37 This particular offender was ultimately acquitted of this charged offence due to insufficient evidence.

because the offence of defamation of nation, race, and beliefs was not divided in this way in any other subsequent legislation but was instead combined into a single offence under Section 198, as discussed in the following chapter.

3 The Regulation of the Crime of Defamation of Nation, Race, and Belief after 1960 and Its Reflection in Judicial Practice

Before the new Criminal Law was adopted in 1961, a major amendment to the Criminal Law was issued in 1956,[38] which significantly modified the major deficiencies of the 1950 Criminal Law. One of the most significant changes was the introduction of a new crime of social parasitism, which targeted individuals who did not work and made a living in an unfair manner, thereby effectively enacting universal labor law in Czechoslovakia,[39] which was only abolished in 1990. However, the amendment did not affect the crime of defamation of nation, race, and beliefs. Among the offences related to attacks against a group of the population, only Section 118, which dealt with incitement to violent or hostile acts against a group of the population because of their nationality, race, or beliefs, was abolished. This was justified by its redundancy, as, according to contemporary commentary on the Criminal Code, such acts could be precisely classified under the offence of defamation of nation, race, and beliefs or under the offence of incitement as set out in Section 167.[40]

At the beginning of the 1960s, it was declared that socialism had triumphed in Czechoslovakia. This ideological proclamation was included in the preamble of the new constitution.[41] This new basic law of the Czechoslovak state also initiated a new wave of major codifications, which included

38 As Act No. 63/1956 Coll.

39 DOBEŠ, M., Vynucování pracovní povinnosti v socialistickém Československu prostřednictvím trestního práva po roce 1961. In: PIŠTĚJOVÁ, L., SVATUŠKA, I. *Míľniky právneho vývoja v Európe po prvej svetovej vojne*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2022, pp. 25–40.

40 VIESKA, J. Trestné činy proti republice. In: GLOGAR, R. *Trestní zákon komentář*. Praha: Orbis, 1958, pp. 293–294.

41 ŠIMÍČEK, V., KYSELA, J. Ústavní právo. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví*. Brno: Masaryk University, Mezinárodní politologický ústav, 2009, p. 303.

the adoption of the new Criminal Law No. 140/1961 Coll.[42] According to contemporary authors, the specificity of this criminal law lay mainly in the declared strengthening of the educational function of criminal law and, to a certain extent, the emphasis on the idealizing element referring to the so-called rules of socialist coexistence.[43] Compared to the 1950 Criminal Law, the new Criminal Law also introduced, among other things, a partial reduction of the statutory penalty rates, justified by the fact that the completion of socialism led to a decrease[44] in crime, particularly between 1952 and 1959.[45]

The offence of defamation of nation, race, and beliefs was newly included in Title 5 of the Special Part of the Criminal Code among the so-called offences grossly disrupting civil coexistence, created with this new criminal law. Thus, the offence under review was classified among the offences of violence against a group of citizens (including threats of violence), spreading alarm, drunkenness, disorderly conduct, social parasitism, pimping, endangering morality, slander, failure to provide assistance, damage to the rights of others, or later, the offence of illegal use of another's vehicle. These offences accounted for approximately 15% of all crime in Czechoslovakia.[46] The most frequently recorded offences were drunkenness, social parasitism, disorderly conduct, and unauthorized use of another person's vehicle.[47]

In the new legislation, the legislator no longer divided the defamation of nation, race, and belief into two separate offences but combined them into one separate offence under two parts: a) and b). The new offence

42 GŘIVNA, T. Trestní právo hmotné. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví*. Brno: Masaryk University, Mezinárodní politologický ústav, 2009, p. 567.

43 KUKLÍK, J. Trestní právo 1960–1989. In: *Dějiny československého práva: 1945–1989*. Praha: Auditorium, 2011, p. 252.

44 NEDVĚDICKÝ, K. Ústava a velké kodifikace první poloviny 60. let – dovršení sovětizace čs. práva. In: PETRÁŠ, J., SVOBODA, L. (eds.). *Československo v letech 1954–1962*. Praha: Ústav pro studium totalitních režimů, 2015, p. 268.

45 KARABEC, Z. *Vývoj kriminality v ČSSR*. Praha: Výzkumný ústav kriminologický při Generální prokuratuře ČSSR, 1973, p. 138.

46 OBZINA, J. *Příčiny a podmínky trestné činnosti*. Praha: Academia, 1983, p. 96.

47 TOCHÁČEK, A. Zvláštní část trestního zákona. In: EYSSELT, E., TOCHÁČEK, A., HRADIL V. *Zprávy pro soudce z lidu: Československé trestní právo*. Praha: Ministerstvo spravedlnosti, 1972, pp. 46–48.

was: *"Whoever publicly and in a contemptuous manner defames (a) a nation, its language, or a race, or (b) a group of inhabitants of the* Republic *because they are adherents of the socialist social and state system, because of their religion, or because they are without religion, shall be punished by imprisonment for up to one year or by corrective measures."*

The declared transition from the people's democratic system also related to the change in the facts of the crime under investigation, where the second part of the crime no longer referred to supporters of the people's democratic system but to supporters of the socialist social and state system. In practice, however, it was essentially the same.

In contrast to the previous regulation, the new condition that the defamation must have occurred in both cases in a so-called "outrageous manner" was incorporated into the observed facts. In addition to the fact that the defamation was committed publicly (in a printed publication, in a file, in a public speech, or in front of more than two persons[48]), the offence had to be committed in a way that was likely to cause outrage (resentment, indignation, expressions of disapproval, and moral condemnation) among the persons who witnessed the act, irrespective of whether the outrage was actually caused by the speech. Any resonance was intended only to assess the degree of social danger.[49] For example, the utterance of particularly crude insults was considered to be particularly offensive and outraging.[50]

The penalty rate remained the same as the provisions in the 1950 Criminal Law – except for a one-year prison sentence, only the possibility of granting the offender a correctional measure was added. The essence of this measure was to impose for a few months (2 months to 1 year) deductions from the remuneration for work in the range of 10–25%, with this money going to the state.[51]

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48 PŘICHYSTAL, V. Hlava osmá, společná ustanovení obecné části trestního zákona. In: BREIER, Š., BURDA, A., FARKAŠ, Z. *Trestní zákon – komentář.* Praha: Orbis, 1964, p. 253.

49 NEZKUSIL, J., ČAPEK, J. Trestné činy hrubě narušující občanské soužití. In: BREIER, Š., BURDA, A., FARKAŠ, Z. *Trestní zákon – komentář.* Praha: Orbis, 1964, p. 523.

50 ROLENC, O. Trestné činy hrubě narušující občanské soužití. In: MATYS, K. et al. *Trestní zákon, komentář.* Praha: Orbis, 1975, p. 670.

51 ČIČ, M. Tresty a ochranná opatření. In: ČIČ, M. et al. *Trestní právo hmotné.* Praha: Panorama. 1984, pp. 179–180.

As an example of a perpetrator receiving such a punishment from the court, we can cite the case of a 31-year-old man who committed the crime of defamation of a nation's race and beliefs by drunkenly insulting three other men in a restaurant after a mutual argument by saying that they were *"red whores, that they will vote for the Bolsheviks again and that you will fuck it all up with their government"*.[52] With this statement he defamed the supposed affiliation of the three men with the supporters of the socialist state and social order.

A closer examination of the facts reveals that the first part, listed under (a) in this criminal statute, protected the nation, language, and race as a whole, whereas the second part focused "only" on the protection of a group of people. The group, in this sense, consisted of at least three people or even the various branches of the National Front,[53] including, for example, the Central Committee of the Communist Party of Czechoslovakia.[54]

In the first part, in contrast to the criminal legislation of 1948 and 1950, marked by letter (a), it no longer mattered whether it was the nation, language, or race of persons living within the territory of Czechoslovakia or outside.[55] An example of such conduct was the case of a 60-year-old man who abused and provoked a dark-skinned Congolese national who was studying in Prague at the time. He insulted him by saying: *"… you whores with black mouths just roll around* […] *and get away from me, I don't want to get dirty."*[56] He confessed to these actions in court, and also admitted that he did not like foreigners talking to Czech girls, especially black boys.[57] The court *"took into account the social danger of the defendant's conduct, since it cannot be permitted in the*

52 Archives of the City of Prague (AHMP), State Bodies Fund, Department of the Fund: District Court for Prague 1 (OS Praha 1), NAD 106, Investigation and Criminal File, sign 4T 185/1981, fol. 26–27.

53 The National Front was an association of all permitted political parties and legal social organisations in Czechoslovakia between 1945 and 1990, including, for example, trade unions and leisure clubs. For more on the National Front of Czechs and Slovaks see e.g. KAPLAN, K. *Národní fronta 1948–1960. Historie*. Praha: Academia, 2012.

54 NEZKUSIL, J. Trestné činy hrubě narušující občanské soužití. In: NEZKUSIL, J. et al. *Československé trestní právo, svazek II. zvláštní část*. Praha: Orbis, 1969, pp. 159–162.

55 MATYS, K. et al. *Trestní zákon, komentář, II. Část zvláštní*. Praha: Panorama, 1980, p. 647.

56 Archives of the City of Prague (AHMP), State Bodies Fund, Department of the Fund: District Court for Prague 1 (OS Praha 1), NAD 106, Investigation and Criminal File, sign 4T 158/1963, fol. 9.

57 Ibid, fol. 4. Protocol of the interrogation of the accused, 10. 7. 1963.

Czechoslovakia that foreign citizens should be attacked in this way because of the colour of their skin. In view of the fact that the defendant is otherwise of good character and regrets his conduct and wishes to apologise in a proper manner, the court finds that a correctional measure within the meaning of section 43(1) of the Criminal Code may be imposed, since the imposition of this penalty appears to the court to be sufficient".[58] Thus, the named offender received only a cumulative sentence of five months of corrective action, during which 10% of his remuneration accrued to the State.

Of course, it was also possible to encounter a case in which a foreigner slandered Czechoslovakians or the Czechoslovak nation. Such as in the case of a 41-year-old Bulgarian national who, in a drunken stupor, shouted that Czechs were cattle and that the intervening police officers were behaving like Gestapo. He also threatened that he *"has the opportunity to show everyone present through the embassy that they will regret it!"* He further stated that when he is able to, he will kill the VB officers and deal with some of the witnesses to his actions.[59] For these actions, he was sentenced to a prison term of eight months, suspended for two years, and was also ordered not to consume alcoholic beverages to any significant extent for two years. In the event of a breach of this condition, the court would order the execution of the sentence imposed.[60]

It should be noted that the offence under Section 198(a) – that is, defaming another nation – was also possible in socialist Czechoslovakia between Czechs and Slovaks. In the course of archival research for this article, several such writings were found in which a Slovak citizen defamed the Czech nation, as well as the reverse, in which a member of the Czech nation grossly insulted Slovaks and the Slovak nationality. For example, a 30-year-old worker received an unconditional prison sentence of one year from the court for insulting guests present in a drunken state because of their Slovak nationality. These insults were reportedly preceded by a warning from the Slovaks to the defendant not to behave like a hooligan when he broke

58 Ibid, fol. 24. Reasons for judgment of 1. 10. 1963.

59 Archives of the City of Prague (AHMP), State Bodies Fund, Department of the Fund: District Court for Prague 1 (OS Praha 1), NAD 106, Investigation and Criminal File, sign 1T 77/1963, fol. 8-11. Protocols of witness interviews, 19. 2. 1963.

60 Archives of the City of Prague (AHMP), State Bodies Fund, Department of the Fund: District Court for Prague 1 (OS Praha 1), NAD 106, Investigation and Criminal File, sign 1T 77/1963, fol. 26–28.

a wine glass in his hand, which he also cut himself with. The Slovak citizens sat down at another table, reasonably fearing that the defendant would throw glasses at them and therefore preferred to leave the establishment. Witnesses to the incident described the Slovaks as behaving politely. After evaluating all the evidence, the court concluded that the accused man had committed the offence of defamation of a nation's race and beliefs under Section 198(a). The unconditional sentence was also imposed on the grounds that the accused had already been convicted nine times, the last time serving an unconditional 15-month prison sentence for the offence of sexual abuse.[61]

In another case, two women of Slovak nationality, who worked as crane operators in Prague, got into a drunken argument with a waiter in a wine bar in the center of Prague. They insulted the waiter, including calling him names because he belonged to the Czech nation.[62] When the police arrived, the two women attacked the officers who intervened with very vulgar insults: *"you fascist swine, police swine, communist whores"*. And after being forced into the official vehicle, they began to demolish its interior and spit on passing citizens, whom they insulted with words such as *"You fucking Czech bitches, you communist bitches"*.[63] Consequently, a service baton was used against them, but the defendants did not stop and continued to attack the patrol with words: *"You fucking whores, you Czech bitches, you can lick my cunt, but only when I'm dripping red!"* and the other woman: *"You can kiss my ass, you fucking Czech cops."* They were then taken to the Alcoholics' Detention Centre to sober up.[64]

The court found that the perpetrators had acted in a manner that fulfilled both the objective and subjective elements of the offence of defamation of the nation, race, and beliefs under Section 198(a) and (b) of the Criminal Code, because they had defamed police officers and others based on their alleged

61 Archives of the City of Prague (AHMP), State Bodies Fund, Department of the Fund: District Court for Prague 1 (OS Praha 1), NAD 106, Investigation and Criminal File, sign 1T 176/1963, fol. 33-34. Judgment of 22 October 1963.

62 Archives of the City of Prague (AHMP), State Bodies Fund, Department of the Fund: District Court for Prague 1 (OS Praha 1), NAD 106, Investigation and Criminal File, sign 4T 246/1981, fol. 48-51.

63 AHMP, fond: OS Praha 1, Investigation and criminal file, sign. 4T 246/1981 fol. 4, Official record of the arrest of suspects, dated 15 September 1981.

64 Ibid. fol. 5.

affiliation with the Communist Party of Czechoslovakia and their affiliation with the Czech nation. They also committed the offence of insulting a public official in the exercise of his powers under Section 156(2) of the Criminal Code. Both defendants' sentences were aggravated by the fact that they committed several offences simultaneously. However, the court's assessment in this case is noteworthy, as the judge stated that, after evaluating all the facts, the purpose of the sentence could only be achieved by imposing an educational correctional measure. This sentence was set at 6 months, with a 10% deduction from salary in favor of the State.

The second part of the offence, i.e., Section 198(b), was aimed at punishing those who defamed a group of people because they were supporters of the socialist social and state system. This type of offence was generally much more common than defamation of a nation, language, or race under Section 198(a), but even so, it was generally a low-level offence, occurring in only a few dozen cases a year throughout Czechoslovakia.

The offence of defamation of supporters of the socialist state and social system under Section 198(b) was mostly committed by individuals in a drunken state through crude vulgar insults after a previous quarrel or following a police patrol intervening in their other criminal activities. It was also typically a crime that did not occur alone but was committed in conjunction with other crimes such as disorderly conduct or assault on a public official (police officer).[65]

4 Change in the Facts of Defamation of Nation, Race, and Beliefs after the Fall of the Communist Regime

After 1989, when the communists lost absolute power in Czechoslovakia, significant structural changes occurred, which naturally extended to the legal system.[66] In 1990, as part of a major amendment to the Criminal Code No. 140/1961 Coll., the facts of the offence of defamation of nation, race, and beliefs were amended by removing the possibility of punishing

65 Own archival research.

66 For more on legal changes in Czechoslovakia after 1989, see e. g. TAUCHEN, J., VOJÁČEK, L., KOLUMBER, D. et al. *České právní dějiny po roce 1989*. Brno: Masaryk University, 2023.

the perpetrator with corrective measures and, most importantly, by eliminating from the second part of the Act the special provision for punishing perpetrators who defamed a group of people because they were supporters of the socialist and state system. The protection of national, linguistic, and racial minorities was thus preserved.

The provision of § 198/2(b) (defamation of a group of people because they were supporters of socialism) is also linked to the possibility of retrospective reversal of a court decision in the context of rehabilitation, which was introduced in Czechoslovakia in 1990 by Act No. 119/1990 Coll. on judicial rehabilitation. Under this law, the convicted person (or their relatives or close persons) could file a motion for the reversal of the decision, and the court could then revoke the judgment in a review procedure.[67]

5 Conclusion

In socialist Czechoslovakia, the offence of defamation of nation, race, and beliefs served as a tool for maintaining peaceful civil coexistence and, at the same time, protected the Communist Party of Czechoslovakia, its members, and, where appropriate, its policies from criticism. Defamation of nation, race, and beliefs was initially prosecuted under the infamous Law for the Protection of the People's Democratic Republic, which was later replaced by the Criminal Code of 1950. This code, somewhat illogically, listed the offence twice, primarily protecting the inhabitants of the republic from gross insults. This relic was "corrected" by the Criminal Code of the early 1960s, which consolidated the offence into a single unified regulation.

A specific feature of the socialist era under this criminal legislation was the prosecution of offenders who committed defamation against persons who were supporters, first of the people's democratic social and state system, and later, after the declared completion of socialism, of the socialist social and state system. These acts were most often committed by individuals in a drunken state who generally swore at the regime of the time and/or at the communists as such.

67 For more on judicial rehabilitation in Czechoslovakia after 1989, see e.g. KAPLAN, K. *Druhý proces. Milada Horáková a spol. – rehabilitační řízení 1968–1990*. Praha: Karolinum, 2008.

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Resumé

This publication is the outcome of the International Legal History Meeting of PhD Students. This conference began as a national event for Czech PhD students in 2013 and has since grown into an international platform. Initially focused on fostering collaboration between Czech participants, the conference soon expanded to include Slovak scholars, reflecting the close academic ties between these two countries. By 2022, the event had fully evolved into an international forum, welcoming young legal historians and Roman law specialists across Europe. The 2024 edition in Brno brought together 26 participants from eight countries, continuing the tradition of providing a venue for rigorous academic exchange and professional development.

The papers selected for inclusion in this volume represent a thoughtful cross-section of the work presented at the conference. Each contribution underwent a blind peer-review process, ensuring that only those meeting the highest standards of scholarly rigour were included. The papers are arranged in chronological order, reflecting the structure of the conference itself and allowing readers to follow the progression of ideas and discussions that took place over the course of the event.

Michael Binder presented a study focusing on the premature repayment of debts in Roman and Austrian civil law. **Václav F. Dvorský** explored the issue of interest on irregular deposits in Roman law, while **Ivona Encheva** examined the legal concept of "exceptio" and its evolution in Roman legal practice. **Mateusz Ułanowicz** delved into the testamentary freedom in Polish lands influenced by French civil law, specifically in the "mortis causa" dispositions of Karol Brzostowski. **Cristian-Codrin Botu** offered an analysis of the objective and subjective theories of contract interpretation, focusing on preventing contractual opportunism. **Zsanett Dorang**'s research addressed the regulation of cumulative sentencing in 19th-century Hungary, highlighting historical roots and interpretative challenges. **Bence Zsolt Kovács** provided a legal-historical analysis of Romani slavery in the Romanian principalities, tracing its legal framework and eventual emancipation. **Eva Bažantová** discussed the movement for reforming

the property rights of married women in 19th-century England, leading to the Married Women's Property Act of 1870. **Jakub Novák** examined the operation of a special court-martial within the Czechoslovak legionnaires during the Russian Civil War. **Frederika Vešelényiová** explored social care development for minors in Slovakia in the early 20th century. **Lukáš Maliňák** reviewed British court rulings from the 1930s dealing with the application of Nazi laws under private international law principles. **Boglárka Lilla Schlachta** analysed disciplinary cases involving Hungarian judges between 1936 and 1950. **Fábián László Horváth** highlighted proceedings against public officials in Hungary after 1945, emphasising procedural violations and political influences in court decisions. **Zuzana Löbling** examined post-WWII restitution efforts concerning Richard Morawetz's art collection in Czechoslovakia, investigating how state institutions misused laws to retain control over confiscated artworks. **Jan Kabát** analysed the role of laypeople in the legislative process during the communist era in Czechoslovakia, particularly in the aftermath of the 1948 coup. **Adam Šplíchal** contributed a study on the legal regulation of collectivisation in socialist Czechoslovakia, illustrating broader historical trends through case studies. Finally, **Petra Zapletalová** focused on the functioning of criminal commissions at the national committees in socialist Czechoslovakia. At the same time, **Milan Dobeš** explored the criminalisation of defamation against supporters of the socialist regime during communist rule in Czechoslovakia.

While not all presentations from the 2024 conference are included in this collection, the selection presented here offers valuable insight into the research interests and intellectual pursuits of the next generation of Romanists and legal historians. This second volume builds on the foundations laid in 2022. It provides a window into the evolving scholarly landscape, showcasing the diversity of topics and approaches shaping the field today. By offering this space for emerging scholars to publish their work, the conference plays a crucial role in the ongoing development of legal history and Roman law as dynamic areas of academic inquiry.

EDGE OF TOMORROW 2: THE NEXT GENERATION OF LEGAL HISTORIANS AND ROMANISTS

Collection of Contributions from the 2024 International Legal History Meeting of PhD Students

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Published by Masaryk University
Žerotínovo nám. 617/9, 601 77 Brno
in 2024

Publications of the Faculty of Law of Masaryk University
Edition Scientia, no. 758

1st electronic edition, 2024

ISBN 978-80-280-0628-0 (online ; pdf)
DOI https://doi.org/10.5817/CZ.MUNI.P280-0628-2024
www.law.muni.cz

This volume gathers the proceedings of the International Legal History Meeting of PhD Students, a conference that began in 2013 as a platform for Czech and Slovak PhD students and has since expanded into a significant international event. The 2024 conference, hosted by the Faculty of Law at Masaryk University, brought together 26 PhD students from eight countries, offering them an opportunity to present their research and engage in meaningful exchanges with peers from different legal traditions.

Each of the papers in this collection was selected through a blind peer-review process, ensuring that only work meeting rigorous academic standards was included. The breadth of topics covered in these contributions reflects the rich diversity within the fields of legal history and Roman law. From studies of ancient legal systems to more modern historiographical debates, the collection showcases both the depth of specialized research and the broader trends shaping contemporary scholarship.

This second volume in the series goes beyond a mere collection of conference papers. It offers a clear view into the concerns and directions currently driving the work of emerging scholars in legal history and Roman law. The International Legal History Meeting of PhD Students has become a space for productive dialogue and critical engagement, and this publication is a testament to the collaborative spirit and intellectual rigour that defines the event.

MASARYK UNIVERSITY PRESS

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ISBN 978-80-280-0628-0