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EDITORIAL NOTE

In accordance with the established manner of the journal, this volume will be partialy dedicated to specific issues, this time those dealing with legal history and comparative legal traditions in the Balkans. Bearing in mind a symbolic importance of Vienna, which has continuously connected scholars from Austria and South-Eastern Europe, the Editorial Board of the *Annals of the Faculty of Law in Belgrade* (*Belgrade Law Review*) is happy to furnish some space to scholars in legal history of Southeastern Europe, who renewed their accademic exchange in that city after many years of perturbed mutual contacts.

The participation of the University of Vienna Faculty of Law, who kindly accepted to co-edit and sponsor a part of this volume of the *Annals* (*Belgrade Law Review*) with the University of Belgrade Faculty of Law, has special significance. It was and still is an institution where many scientists and professors from the region have traditionally acquired their academic titles, contributing in that way to mutual ties and understanding among different nations, getting closer and connecting their intellectual efforts. The goal of this volume is to outline the mainstream topics that lawyers and legal historians from the region are currently working on, to scan the relevant issues, and to provoke further international discussion on various provocative topics dealing with their research and educational studies. There is hope that it may facilitate and foster attempts in creating an interactive academic network in the region and help in renewing scholarly ties after almost two decades of crisis. As one of the oldest and most prestigious law reviews in the region, the *Annals* (*Belgrade Law Review*) offers with pleasure its pages to that goal, particularly as some contributors and many of their teachers have been publishing their articles in it for many years back. In that way this volume may mark a symbolic revival of cooperation among scholars from the region, now available also to a wider scholarly community through *HeinOnline*, where the *Annals* (*Belgrade Law Review*) is enlisted.

The editors are indebted to the *Institut für Rechts– und Verfassungsgeschichte* as well as to the *Institut für Rechtsphilosophie, Religions– und Kulturrecht* of the University of Vienna's Faculty of Law, who were

the chief organizers and hosted the reunion, and to all its professors, assistants and the staff involved. Among these especially MMag. Caroline Fally excelled, bearing the main burden of organization as well as assuming the difficult duty of fundraising and proofreading. We are most grateful to Prof. Dr. Thomas Simon, who undertook most of the task of preparing a part of this volume as guest editor. In addition, our thanks goes to Prof. Richard Potz, Vice-Dean of the Faculty of Law, for his support, to Prof. Dr. Nikolaus Benke from the *Institut für Römisches Recht und Antike Rechtsgeschichte*, as well as to Prof. Dr. Peter Pieler and Prof. Dr. Arnold Suppan, who gave important contributions in person, and all Viennese professors involved in the vivid discussions. We are much obliged to the *Stiftung Living Together in a New Europe*, which with its unusually generous promotion has made the forum possible in the first place. Our thankfulness also belongs to Prof. Dr. Zoran Pokrovac, who leads the project *Rechtskulturen des modernen Osteuropa* within the *Max-Planck-Institut für europäische Rechtsgeschichte*, for all the initiatives and efforts. Finally, the Editorial Board is indebted to the distinguished scholars who accepted to be the co-editors and reviewers of that part of the volume.

Together with the organizers, we express our gratitude to the other supporters, namely the *ERSTE Stiftung,* the *Bundesministerium für Wissenschaft und Forschung,* the *Bundesministerium für europäische und internationale Angelegenheiten,* the *Österreichische Forschungsgemeinschaft,* the Faculties of Law of the Universities of Vienna and Split, the City of Vienna and the *Wiener Rechtshistorische Gesellschaft*, who have generously helped the reunion in Vienna to be successfully held, and to have this volume published.

Also, the Editorial Board hopes that most of other contributions in the volume could be in some accord with the general topic of the issue, as well as that the contributions dealing with legal history could be of ample interest to the wide-ranging public of the *Belgrade Law Review*.

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HOW TO LEASE AN ORPHAN'S ESTATE IN CLASSICAL ATHENS*

A recently discovered new fragment of a court speech by one of the famous ten Attic orators, Hyperides, sheds new light on the Athenian law of guardianship in the fourth century BC. The article focuses on the legal measures to secure orphans' estates. First, the text of the entire fragment is given in English translation; the full Greek text is attached as an Appendix. The second section analyzes the actual guard ianship case: it was a private action of a ward that had come of age, not a public one as recently suggested. He called his guardian to account. In section three new details about leasing an inherited business concern are established. It took place by auction; a law court gave the acceptance to the person who offered the highest valuation of the business concern. Also the guardian himself was allowed to bid. The lessee had to pay interest to sustain the ward and after the ward's coming of age had to return the capital assessed in court. In this case no account of the business had to be ren dered. Section four deals with 'phasis', a denunciation that every citizen was entitled to file when a guardian was suspected of incorrectly administering the ward's busi ness concern. A new conclusion is that the denunciator himself would submit a claim to lease the property and that the phasis would result in an auction.

Key words: *Attic forensic oratory. Hyperides. Ancient Athenian law of guardi anship. Responsibility of the guardian. Private and public ac tions against the guardian.*

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* Lecture given at Harvard Law School, April 15, 2009 and the Forum Roma num, University of Belgrade Law School, July 2, 2010. I thank my hosts, Adriaan Lanni and Christopher Jones, and Sima Avramović, respectively, for having kindly invited me and for helpful comments, and Lene Rubinstein and Jonathan Powell for correcting the English of my print version. In more details I have discussed some topics of this paper in German, see G. Thür, "Zur phasis in der neu entdeckten Rede Hypereides' gegen Timan dros," *Zeitschrift der Savigny Stiftung Rom. Abt.* (*SZ*) 125, 2008, 645 63, and "Zu *mistho sis* und *phasis oikou orphanikou* in Hypereides, Gegen Timandros", *Acta Antiqua Hunga rica* 48, 2008, 125 37.

In antiquity life expectancy was low. War and diseases on the one hand and childbed on the other took their toll. Thus orphans were frequent in everyday life. The Athenians met this problem with sophisticated rules on guardianship. One of the two recently discovered fragments of court speeches of Hyperides[1] deals with this subject. It sheds new light on some institutions of Athenian law. In this paper I will deal with the lease and the denunciation of a ward's property, *misthōsis* and *phasis oikou orphanikou*.[2] First, I will present the new text in English translation,[3] then the guardianship case and finally some new ideas on *misthōsis* and *phasis*.

1. THE TEXT IN TRANSLATION

[Hyperides, *Against Timandros for Guardianship, Supporting Speech for Akademos*]

> [The guardians could have let the property in accordance with the laws, so that] for the children [the capital managed][4] would not be less than the amount realized[5] in court. (2) But should they produce more for

[1] N. Tchernetska, "New Fragments of Hyperides from the Archimedes Palimpsest," *Zeitschrift für Papyrologie und Epigraphik* (*ZPE*) 154, 2005, 1–6 identified a few pages of the famous "Archimedes Palimpsest" as belonging among the court speeches of Hyperides. The full text of the 64 lines' fragment of *Against Timandros* was published by N. Tchernetska, E.W. Handley, C.F.L Austin, L. Horváth, "New Readings in the Fragment of Hyperides' *Against Timandros* from the Archimedes Palimpsest," *ZPE* 162, 2007, 1–4 with some improvements by L. Horváth, "Note to Hyperides in Timandrum," *Acta Antiqua Hungarica* 48, 2008, 121–23; in this paper I shall follow his text. For the exiting story of the "Archimedes Codex", sold at Christies in 1998 and kept now in the Walters Art Museum, Baltimore MD, see R. Netz, W. Noel, *The Archimedes Codex*, London 2007 (German: *Der Kodex des Archimedes*, München 2007).

[2] For other topics see C. Jones, "Hyperides and the Sale of Slave Families," *ZPE* 164, 2008, 19f.; D. Whitehead, "Hypereides' *Timandros*: Observations and Suggestions," *Bulletin of the Institute of Classical Studies*, London (*BICS*) 52, 2009, 135–48 and L. Rubinstein, "Legal Arguments in Hypereides *Against Timandros*," *BICS* 52, 2009, 149–59; see also W. Luppe, "Zwei Textvorschläge zu Hypereides' Rede *pros Timandron*," *ZPE* 167, 2008, 5. The volumes *Acta Antiqua Hungarica* 48, 2008, and *BICS* 52, 2009, 133–252 (*The New Hyperides*. Conference Proceedings, Jan. 2009) are dedicated to this new source.

[3] Text version Horváth (n. 1, above), see Appendix; principally I follow the translation of Tchernetska *et all.* (n. 1, above).

[4] "... so that ‹the profit› for the children is not less than the price it fetches in court" Tchernetska *et all.* (n. 1; above). Exempli gratia I suggest the restoration: [ἐξῆν δὲ τοῖς ἐπιτρόποις μιῶσαι τὸν οἶκον κατὰ τοὺς νόμους, ὥστε τὸ κεφάλαιον τὸ διαχειρισθὲν] τοῦ μὲν εὑρίσκοντος...; see Dem. 27.58; κεφάλαιον Dem. 27.11,66; διαχειρισθὲν *cf.* line 14 of the text.

[5] Similar *part. praes.* coincident to a past tense Aesch. 1.96: ...οὐδὲ τὸ λυσιτελοῦν, ἀλλὰ τοῦ ἤδη εὑρίσκοντος ἀπέδοτο. *Cf.* also Dem. 27.23. I thank Glen Bower

the children, it might be a benefaction on their part.[6] (3) Yet the laws forbid the guardians to lease the property on their own authority.[7] (5) It is possible to argue in court that it is better not to lease the children's inherited estate, and those of you who are appointed by lot to the court are to hear the case and vote for what seems best for the child.[8] (9) Now read me the laws. LAWS. (10) Now, the defendant did none of these things, nor did he register the estate with the archon at all. (11) Now take up the testimony. (12) TESTIMONY. (13) Now you have heard from the laws that this man Timandros did not handle Akademos' property in any legal way whatever, and from the witnesses that he did not lease the estate and, when a third party brought a denunciation (*phasis*) so that the property would be leased out, he prevented it.

(17) But that he did so in order to make away with the money, by Zeus,[9] this I will demonstrate. (18) Indeed it was in order to get the money that he did the same man's sister a wrong worthy of capital punishment. (20) When there were left these two brothers and two sisters, the girls being orphans without mother or father, and all of them small children (the eldest brother Antiphilos, who died, was perhaps ten years old), this man Timandos brought up the youngest sister in his own home, dragging away and taking her to Lemnos when she was perhaps seven. (27) And this no guardian nor a man of good will would do, not even those who hold war captives in their possession: even they sell them as far as possible as a family. (31) Furthermore, those slave-retailers and –traffickers[10] who do anything outrageous for profit, (33) when they trade in children who are siblings or a mother with small children or put up a father with children for sale, they sell them with financial loss, for less, this being the right. (35) For affection between people comes about by close contact and by growing up together rather than by kinship. (38)As evidence of this: neither would all fathers be fond of their children if they were not brought up with them from infancy, if straightaway someone had kidnapped them as little children, nor would children be fond of their parents if they were not brought up by them.

(42) Timandros, then, is responsible for precisely this, that the sisters could not recognize each other on sight in a street or a temple, not having seen each other for more than thirteen years, while it was their brother, Akademos, who recognized his own sister, but when he went to Lemnos, he did not even know her when he saw her. (49) Yet the legislator took the view that orphaned children should not each be brought up separately, nor in any random way, but where it would be best for them to

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sock and Carl Hufman for discussing this passage with me in Princeton at the Institute for Advanced Study.

6 *Cf.* Dem. 27.64; "let this be a credit to them" Tchernetska *et all.* (n. 1, above).

7 "...on their own profit" Tchernetska *et all.* (n. 1, above).

8 "...individual child" Tchernetska *et all.* (n. 1, above).

9 Text Horváth (n. 1, above).

10 Jones (n. 2, above), similarly Thür (both articles quoted in n. *, above).

be brought up. (53) Now read me the law. LAW. (54) Now then, Timandros: if this one girl was well looked after in your charge, why were not these here well looked after in your charge and in the same place? (56) But if they were well looked after, why was she not, and in the same place as her brothers and her elder sister? (58) It was, I suppose, the sheer desire for money that caused you to commit all this illegality.

(60) That was why he took charge of young Akademos here while he was penniless, while now holding[11] resources from his estate worth more than five talents, as I shall demonstrate to you. (62) First of all, right in the first year when the father of the children died, he took the young girl and five..."

A–not exclusively–philological problem, in my view not yet solved, is the title of the speech. Tchernetska (2005) succeeded in identifying the fragment as a Hyperides speech from the word παιδάριον in that very lemma in the Suda; the title of the speech is given there as πρὸς Τίμανδρον. Stephen Todd supplied with a quotation by Harpocration (*s.v. Hephaistia:* ὑπὲρ ᾽Ακαδήμου). All editors have suggested a title [πρὸς Τίμανδρον], following the Suda. Since the case is a private suit against a guardian, a *dike epitropēs*–as I will demonstrate–the title must read [κατὰ Τιμάνδρου], not πρός.[12] According to Dem. 27 the title probably continued with ἐπιτροπῆς. Since the speaker is a *sunēgoros* for the young Akademos who had just come of age, the full title, according to Harpocration, may have continued further with ὑπὲρ ᾽Ακαδήμου συνηγορία. Combining the two lemmata of the lexica I have suggested the full title: [*Against Timandros for Guardianship, Supporting Speech for Akademos*]

2. THE GUARDIANSHIP CASE

My second point is the guardianship case. Unambiguously, the person charged is Timandros. He has been, or still is, guardian (*epitropos*) of initially four orphans, two boys and two girls. Who is the prosecutor or plaintiff? The speaker whose name we don't know may—as *boulomenos* (person willing and qualified to plead)—be prosecuting the actual guardian in a public lawsuit (*actio popularis*) for wrongs against the wards or their property. In *Ath. Pol*. 56.6 Aristotle mentions some *eisangeliai* and *graphai*, which would exactly meet our case.[13] Every Athenian in posses-

[11] The term οὐσίαν ἔχειν is the key indicator that the action was a δίκη ἐπιτροπῆς (see n. 15, below).

[12] Denying the private character of the case, Whitehead recently (n. 2, above) 137 also retains πρός; but see the next section 2.

[13] *AP* 56.6 7: "*Graphai* and *dikai* are instituted before him (the *arkhōn*)...for ill usage of orphans (which lie against their guardians); for ill usage of an heiress (which lie

sion of his full civic rights was entitled to file such an action on behalf of the wards. An argument in this direction could be that Timandros is threatened with death penalty (l. 19/20). But the whole section about the lonesome girl[14] on the faraway island (ll. 17–59, the larger part of the whole fragment) is mere rhetoric to demonstrate Timandros' avaricious character. The speaker recounts some reliable facts, but there is no trustworthy legal information about the action.

Since the guardianship was over (aorist διεχείρισε, l. 14) the lawsuit was most probably a private one. After 13 years of guardianship (l. 46) Akademos had come of age and is advancing a claim for his property, worth more than five talents (l. 61), that Timandros still is holding "in his hands," ἔχει in l. 62. This ἔχειν is the crucial word for a *dike epitropēs*.[15] Therefore Akademos is calling his former guardian Timandros to account for badly managing his affairs over 13 years. Usually, a young plaintiff would be supported by a *sunēgoros*[16] unless he possessed the exceptional ability of young Demosthenes, who was able to undertake his own court speech in his dikē epitropēs well prepared by his teacher Isaeus.

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against the guardians or the relations that they live with); for injury to an orphans' estate (these also lie against the guardians);...(7) He also supervises orphans and heiresses...He grants leases of estates belonging to orphans..."

[14] Rubinstein (n. 2, above) convincingly doubts the existence of an Athenian stat ute prohibiting the separation of orphaned siblings. In fact the *nomos* quoted in l. 53 may have provided that "orphans should be reared where their needs were most likely to be adequately met" (p. 157); the use Hyperides makes of this law "is at least as sophisticat ed and potentially misleading as that which we have long been able to enjoy in his speeches *For Euxenippos* and *Against Athenogenes*" (p. 159).

[15] D. Becker, "Die attische *dike epitropes*," *SZ* 85, 1968, 30 93 (68 78); see the text of the writ cited by Demosthenes in 29.31: ἔστιν οὖν τοῦ μὲν ἐγκλήματος ἀρχὴ ΄΄τάδ' ἐγκαλεῖ Δημοσθένης Ἀφόβῳ ἔχει μου χρήματ' ΄΄Αφοβος ἀπ' ἐπιτροπῆς ἐχόμενα..." (*cf.* also Dem. 27.12,34,37, Lys. 32.2,20,28). Whitehead (n. 2, above) com pletely misunderstands the meaning of οὐσίαν (τινος) ἔχειν (holding, having in one's hand, other people's property or money). In cases of financial damages (*blabē*) and guard ianship the "commonplace word" ἔχειν has nothing to do with sophisticated "*Eigentum* and *Besitz*" (Whitehead, p. 140). It rather points to unjustly holding other people's (*i.e.* the wards') property creating the liability of compensation (for the guardians) easily to be grasped by any Athenian layman judge. The reference to "Continental scholarship", which Whitehead (*ibidem*) underestimates, should not be A. Kränzlein, *Eigentum und Besitz* (Berlin 1963) but H.J. Wolff, "Die Grundlagen des griechischen Vertragsrechts," *SZ* 74, 1957, 26 72 (39, 42, 49). In the Hyperides fragment ll. 17 59 clearly is a digression to demonstrate Timandros' "desire of money" framed by ll. 17 19 and 58/59. Neither the (scarcely reliable) title πρός in the Suda (p. 136f.) nor the "*thanatos* phraseology" (p. 142 45) in l. 19/20 corroborate an *eisangelia* of an ex orphan desiring for revenge. The *timēma* is not death penalty (p. 148) but financial compensation through a *dikē epitropēs*. The double amount of at least five talents (l. 61) is high enough to justify any rhetorical effort, the topos "deserving of death" included.

[16] See L. Rubinstein, *Litigation and Cooperation*, Stuttgart 2000, 67.

The facts of the case are quickly told: an Athenian couple died and left behind four orphans, two boys and two girls. Surprisingly a guardian living in Lemnos was appointed, Timandros. He was an Athenian citizen and most probably *klēroukhos* in the city Hephaistia, one of the two *klēroukhiai* of that island close to the Bosporus.[17] Timandros took the younger of the two girls with him, allegedly by "dragging her away" (l. 25). I think that, for the other three children who stayed in Athens, a co-guardian was appointed, as usual by their father's will, just as there were three guardians of Demosthenes and his sister. My further conjecture is that the father in his will gave the younger daughter to the co-tutor Timandros in marriage. Parallels are again Demosthenes' father (27.5) and maybe Isae. 6.13. This would easily explain why Timandros succeeded in keeping the young woman with him for 13 years without any successful objection up to the present lawsuit.

Now, another accusation against Timandros–and the principal one in the case–is that he conducted the guardianship completely contrary to the laws (ll. 10–17). In detail: 1) he did not register the guardianship with the *arkhōn* (for this request see Isae. 6.36[18]); 2) he didn't have the property let (again Isae. 6.36, which tells us this was to be done by the *arkhōn*), and 3) he prevented a denunciation (*phasis*) to let the property from being filed with the *arkhōn*.

From Dem. 27.58 we see guardians were best off when the estates were let.[19] In these cases, at the end of their duties, they were not called to account. They only had to pay annual interest to sustain the wards and, at the end of their duty, deliver the capital they had taken over at the beginning of the guardianship. I shall come back to the leasing in the following section. For the moment only the arguments of the parties are of interest. Apparently the former guardian, Timandros, holds that the property was let; Akademos, the former ward, contra.

I conjecture that both parties are right up to a certain degree: the speaker can be trusted on the point that no registration or lease took place

[17] See the Harpocration gloss mentioned in section 1, above.

[18] Isae. 6.36f.: "They registered these two boys with the *arkhōn* as being adopted...putting themselves down as their guardians, and they asked the *arkhōn* to lease out the estates as belonging to orphans...and that they themselves might become lessees and obtain the income. (37) And the first time the courts sat, the *arkhōn* put the lease up for auction and they offered to take it on. But certain persons present reported the plot to the relatives, who came and revealed the affair to the jurors, and so they voted by show of hands not to lease out the estates."

[19] Dem. 27.58f.: "He might have avoided all this trouble by letting the estate, pursuant to the laws which I am going to cite. Take and read the laws. LAWS...(59)...Ask the defendant why this has not be done. If he says it was *better* not to let the estate, let him show, not that it has been doubled or trebled, but that the principal (*ta arkhaia*) has been returned to me." *Cf.* Lys. 32.23.

in Athens, and a *phasis* did fail. But Timandros could have countered that he had registered and let the estate in his hometown Hephaestia at Lemnos. We know from inscriptions (one from Samos, for example) that the Athenian *klēroukhiai* had their own boards of magistrates and law courts like Athens herself.[20] If Timandros had correctly fulfilled his duties in Hephaestia, the *arkhōn* in Athens evidently had had no reason to accept any denunciation (*phasis*) to the effect that something was wrong with the guardianship.

One may wonder why Timandros could not easily have won his case simply by presenting witnesses for what he had done lawfully at Lemnos. However, one must take into account what emotions Hyperides was able to arouse in our short fragment. Furthermore, Hyperides may have argued that far away, at Lemnos, Timandros got all his benefits in a completely illegal way.

Whatever the content of the complete speech might have been, in my opinion, the new 64 lines present a precious additional document pertaining to procedural strategies in Athenian courts in a guardianship case hitherto unknown. In the following parts 3 and 4 I shall give the outlines of some new results relating to the Athenian laws of guardianship.

3. THE LEASING: *MISTHOSIS OIKOU ORPHANIKOU*

The crucial point of the case was the question: did Timandros lease the property or not? For the legal historian it doesn't matter if Timandros in fact did so or not. What is important are the new details on leasing the property that the speech reveals. These concern 3.1 the person, 3.2 the object and the procedure, and 3.3 the consequences of the leasing.

3.1. The Person

Scholarship before Wolff, especially Wyse, held that the guardian would conclude a private contract of lease with a third party. Therefore it was logically and legally impossible for the guardian to make the contract with himself; thus the guardian seemed to be excluded from taking over the property as a leaseholder.[21] Taking seriously the story told in Isae. 6.36 Wolff thought that is was not the guardian but rather the *arkhōn* who concluded the contract.[22] Therefore, in his opinion, the guardian, too, was

[20] For Lemnos see G. Reger, "The Aegean," in: M.H. Hansen / Th.H. Nielsen (eds.), *An Inventory of Archaic and Classical Poleis,* Oxford 2004, 732 93 (756 58); *cf. IG* VI 1.262 (Samos, *ca.* 350 BCE).

[21] W. Wyse, *The Speeches of Isaeus*, Cambridge1904, 526f.

[22] H.J. Wolff, "Verpachtung von Mündelvermögen in Attika," in: *FS Lewald*, Ba sel 1953, 201 08; for the text of Isae. 6.36 see n. 18, above.

a possible leaseholder. With the last point I can agree, but not with the first: ll. 5–9 now expressly tell us that the law court, not the magistrate, had the last word.

By translating αὐτοῖς in l. 3 with to lease "for their own profit" (*dativus commodi*) Tchernetska concluded recently: guardians are not allowed to make a profit; this means guardians are not allowed to lease at all.[23] In my view every leaseholder derives the profit–and also takes the risk–of the business, so why not a guardian too? Rather, I understand the dative as *comitativus instrumentalis* "on their own authority", which means: without the *arkhōn* and the *dikastērion* mentioned immediately after.[24] In my opinion, the plaintiff does not say that guardians are excluded from leasing; rather, they have to follow the general rules of appointment which were allegedly not followed by Timandros. To sum up: the active party who let the property was the law court, not the *arkhōn*; the leaseholder could have been any person, the guardian included.

3.2. Object and Procedure of Leasing

Wolff established that with the term *oikos* only a business or an enterprise could be objects of leasing, for example the two factories belonging to Demosthenes' father; *oikos* in this connection never meant the whole estate or a single plot of land.[25] In his first speech against Aphobus the young Demosthenes is claiming only the 54 slaves, raw materials, loans, and a modest dwelling house where, I think, the slaves were living, altogether worth more than 13 talents (in our case Akademos' *ousia*, resources–not *klēros* or *klēronomia*, estate–, was worth more than five talents, ll. 13, 61/62.). To keep a business running for at most 18 years was both a great opportunity for profit and at the same time represented a risk of loss. Much depended on the skill and the trustworthiness of the guardian. By letting the enterprise, under securities on real property given by the lessee,[26] all risk was taken away from the ward and the status quo at the time of the father's death was preserved.

Normally more than one person was interested in leasing a wealthy ward's enterprise, and a kind of auction took place in court. What was the highest bid? One opinion is that the person who offered the highest rate of interest obtained acceptance. But no source tells us about interest rates at all. Probably the rate was fixed by law or by custom. Neither can I fol-

[23] Tchernetska (n. 1, above) 3.

[24] A philological parallel is Plato *Apology* 26a: τὴν γραφὴν ὕβρει...γράψασθαι (out of *hubris*), in Attic also expressed by διά with *acc*. (E. Schwyzer, A. Debrunner, *Griechische Grammatik* II, München 1950, 150).

[25] Wolff (n. 22, above) 205, n. 23.

[26] See H.J. Wolff, "Das attische Apotimema," in: *FS Rabel* II, Tübingen 1954, 243 333.

low the other opinion that the person, who offered the best security, obtained acceptance.[27]

Now, in the first line of the new fragment I see a possible solution: Tchernetska and her co-editors (2007) restore a noun τὸ λῆμμα corresponding with the adjective ἔλαττον: "...so that ‹the profit› for the children is not less than the price it fetches in court." Usually the profit for the ward is called ἡ πρόσοδος or οἱ τόκοι, neither of which agrees with ἔλαττον. In a *dikē epitropēs* it was not the interest payment, but rather the amount of capital that was under dispute; on the basis of that amount, any shortfall in interest payments would in turn be easy to calculate. It was the capital that Akademos was claiming (l. 62). So I suggest the missing noun corresponding to ἔλαττον might have been κεφάλαιον or ἀρχαῖον. This would mean that in leasing out the enterprise the amount of the capital, the value of the enterprise, was achieved (εὑρίσκοντος) or realized in court.[28] Thus the auction was carried out to obtain the highest assessment of the capital, not the highest rate of interest on an unknown amount of capital. The person who offered the highest assessment of the substance received the enterprise to lease.

This result is confirmed also by terminology. The orators always speak of leasing the enterprise, *misthoun*, but the consideration is never called rent, *misthos* or *phoros*, the terms used in land leasing; they use the designation 'interest', *tokoi*, just as in loan transactions.[29] For calculating the interest one must assess the capital exactly. In land leasing the rent, *misthos*, does not automatically correspond to the plot's value; its value is never mentioned in such contracts. In the leasing of an orphan's *oikos*, therefore, the monetary value was essential, rather than the individual items that made up the enterprise.

3.3. The Consequences of Leasing and Non-Leasing

The consequences of the first option, to *lease* the business, are evident: with the value of the enterprise fixed by public auction on the one hand, the ward had a guarantee that he would receive his money–but not the actual items–when coming of age. Demosthenes (27.58)[30] speaks only of paying money, not of returning the items. On the other hand, the leaseholder had a chance to make much more profit than the probably modest interest that he had to pay to sustain the ward. But the leaseholder also took on the full risk of any loss, with his property encumbered to the ward. After leasing, the guardian would not have had any problems of

[27] Both opinions are discussed by A.R.W. Harrison, *The Law of Athens* I. *The Family and Property*, Oxford 1968, 106.

[28] See my suggestion of restoring the beginning of the fragment in n. 4, above.

[29] See Dem. 27 29, Lys. 23.

[30] Text see n. 19, above.

being called to account by the ward (again Dem. 27.58); he just had to pay the amount that he himself had assessed in court to be the worth of the enterprise. Sometimes also the entire interest was paid afterwards, in a single instalment.

The other option was *not* to lease the property. Then the guardians administered the enterprise by themselves, being fully responsible to the wards. That happened in Demosthenes' case despite his father having ordered in his will that the factories be leased. In this matter the guardians had full discretion. Then all profit and loss devolved on the wards, but disputes concerning the guardians' accounts frequently followed. In Athens the general view was that letting an enterprise was the safer option for the wards. And there were some ways to control how the guardians complied with their duties and, when they did not perform them well, to force them to let the *oikos*.

4. THE *PHASIS*

This brings me to my last point, the *phasis* (denunciation).[31] On the basis of my results up to now, the fragment allows new insights here too. Formerly the *phasis* of a ward's enterprise was thought to be a public action brought by a *boulomenos*, but not mentioned by Aristotle in his catalogue in *Ath. Pol*. 56.6.[32] Wolff corrected this opinion, holding that *phasis* was nothing other than a report to the *arkhōn* that there was an orphan's *oikos* to be let (incidentally mentioned in the following section *Ath. Pol.* 56.7).[33] On this basis MacDowell reconstructed the law on *phasis* mentioned in Dem. 27.58 from Dem. 27.59.[34] Now, the whole procedure becomes much clearer: 1) It was not the magistrate but the law court that let the *oikos*. 2) In l. 5/6 Hyperides uses the word ἀμφισβητεῖν. This indicates opposing positions. The word, for example, occurs in cases about ownership, inheritance or public services, *leitourgiai*. In my opinion, we therefore also have opposing claims in a *phasis* about a ward's enterprise: the claim of the guardian, who intends to carry on administering the business by himself, and that of the denunciator, who makes a counter-claim. The counter-claim can only be that the enterprise should be leased to the

[31] Generally on *phasis* see A.R.W. Harrison, *The Law of Athens* II. *Procedure*, Oxford 1971, 218 21; D.M. MacDowell, "The Athenian Procedure of *Phasis*," in: M. Gagarin (ed.), *Symposion 1990*, Köln 1991, 187 98; R.W. Wallace, "*Phainein* in Athenian Laws," in: G. Thür, F.J. Fernández Nieto (eds.), *Symposion 1999*, Köln 2003, 167 81.

[32] Quoted n. 13, above.

[33] Wolff (n. 22, above) 207 with reference to earlier literature.

[34] D.M. MacDowell, "The Authenticity of Demosthenes 29," in: G. Thür (ed.), *Symposion 1985*, Köln 1989, 253 62 (262): 'Εὰν δὲ δόξῃ βέλτιον εἶναι μισθωθῆναι τὸν οἶκον, φαινέτω πρὸς τὸν ἄρχοντα ὁ βουλόμενος 'Αθηναίων οἷς ἔξεστιν, ὁ δὲ ἄρχων μισθούτω ἐν δικαστηρίῳ. (If it seems better that the estate should be leased every Athenian, who is allowed and willing to do so, may denounce to the *arkhōn*; the *arkhōn* has to lease in court.) Text of Dem. 27.58f. see n. 19, above.

denunciator. Thus the *phasis* had the character of a *diadikasia* between two or more parties, clearly expressed by the verb ἀμφισβητεῖν.

Every Athenian in possession of his full civic rights was allowed to file a *phasis* with the *arkhōn*. The magistrate had to handle the case as if the guardian himself had applied for letting the enterprise. He had to bring the case before the court. The auction took place there. After hearing the speeches (ἀκούσαντας, l. 7/8) the *dikastērion* had to decide which of several applicants, the denunciator and the guardian (if he chose to submit a claim) included, would obtain the enterprise for lease.

But at an initial stage the guardian had an opportunity to prevent the leasing at all. In Dem. 38.23 the judges voted against the denunciator and the guardian kept administering the enterprise.[35] Maybe this first vote took place quickly by show of hands as in Isae. 6.37.[36] Thus, only if the guardian did not protest against the *phasis*, or if the judges voted against him, could the auction begin in the shape of a *diadikasia*.

In our new Hyperides fragment both steps are addressed by different provisions: "that it would be *better* for the child" (ἄμεινον l. 6; δέλτιον in Dem. 27.59), meaning the first vote (maybe by show of hands), and "the judges have to vote for what seems *best* for the child" (l. 8/9), referring to the second vote in a *didikasia* procedure. On this basis I have tried to reconstruct the law on *phasis oikou orphanikou* as follows:

"If someone argues that it would be better to lease the property of the ward every Athenian, who is allowed and willing to do so, may denounce (it) to the *arkhōn*; the *arkhōn* has to introduce (the case) to the court. The judges have to hear (the case) and to vote for what seems best for the child".[37]

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[35] Dem. 38.23: " 'They did not let our estate' perhaps our opponents will say. No; because your uncle Xenopeithes did not wish it let, but, after the *phasis* had been instituted by Nikidas, persuaded the jury to allow him to manage it,..."

[36] Quoted n. 18, above.

[37] I would suggest replacing MacDowell's reconstruction of the law (n. 34, above) by the following one: 'Εὰν δέ τις ἀμφισβητὴ βέλτιον εἶναι τὸν οἶκον μισθῶσαι τοῦ ὀρφάνου, φαινέτω πρὸς τόν ἄρχοντα ὁ βουλόμενος 'Αθηναίων οἷς ἔξεστιν, ὁ δὲ ἄρχων εἰσαγέτω εἰς τὸ δικαστήριον· τοὺς δὲ δικαστὰς ἀκούσαντας ψηφίσασθαι ἃ ἄν δοκῇ βέλτιστα εἶναι τῷ παιδί.

APPENDIX

Text established by L. Horváth, "Note to Hyperides in Timandrum," *Acta Antiqua Hungarica* 48, 2008, 121–23.

[ΥΠΕΡΕΙΔΟΥ ΚΑΤΑ ΤΙΜΑΝΔΡΟΥ ΕΠΙΤΟΠΗΣ ΥΠΕΡ ΑΚΑΔΗΜΟΥ ΣΥΝΗΓΟΡΙΑ]

138r τοῦ μὲν εὑρίσκοντος ἐν τῷ̣ δικαστηρίωι μὴ ἔλαττον ἦι
τοῖς παισίν· ἐὰν δὲ πλείω περιποιήσ̣ωσιν̣ τοῖς παι
σίν, τούτων εἶη φιλοτιμί(α). αὑτοῖς δὲ τοὺς ἐπιτρό
πους ἀπαγορεύουσιν οἱ νόμοι μὴ ἐξεῖναι τὸν οἶκον
μισθώσασθαι· ἔξεστι δὲ ἐν τῷ̣ δικαστηρίῳ ἀμφισ 5
βητῆσαι μὴ ἄμεινον εἶναι τὸν οἶκον μισθῶσαι τῶ(ν)
παίδων, ὑμῶν δὲ τοὺς λαχόντας δικάζειν ἀκού
σαντας ψηφίσασθαι ἃ ἂν δοκῇ̣ βέλτιστα εἶναι τῷ̣
παιδί. καί μοι λέγε τούτους τοὺς νόμους. ΝΟΜΟΙ
τούτων τοίνυν οὗτ(ος) οὐδὲν ἐποίησεν οὐδ' ὅλως 10
ἀπέγραψεν τὸν οἶκον πρὸς τὸν ἄρχον(τα). καί μοι λα
βὲ τὴν μαρτυρίαν. ΜΑΡΤΥΡΙΑ
ὅτι μὲν τοίνυν ο̣ὐ̣ κατὰ τοὺς νόμους τὴν οὐσίαν τὴν
Ἀκαδήμου τουτουῖ διεχείρισε Τίμανδρ(ος) οὗτοσί ἀκη
κόατε τῶν νόμων, καὶ τῶν μαρτύρων ὅτι οὔτε ἐ 15
μίσθωσε τὸν οἶκον, ἑτέρου <τε> φήναντ(ος), ἵν(α) μισθω
θῇ̣, ἐκώλυσεν· ὅ̣τ̣ι δὲ τ̣α̣ῦ̣(τα), ἵνα διαφορήσ̣η̣ τὰ χρή
135v μα(τα), οὕτωσὶ ἐποίησε, νὴ Δία, τοῦ̣τ̣ο δείξω. καὶ γὰρ
διὰ τὰ χρήμα(τα) καὶ εἰς τὴν ἀδελφὴν τουτουῖ θα
νάτου ἄξι(α) ἠδίκηκεν· καταλειφθέντ̣ω̣ν γὰρ του 20
τωνὶ δυοῖν ἀδελφοῖν καὶ ἀδελφαῖν δυοῖν ὀρφα̣
ναῖν καὶ μητρὸς καὶ π(ατ)ρ(ὸ)ς καὶ παιδαρίων
πάντων ὄντων ἴσως γὰρ ὁ πρεσβύτατ(ος) ἀδελ̣
φ(ὸς) Ἀντίφιλος ὁ τελευτήσας ἦν δέκα ἐτῶν
τὴν νεωτέραν αὐτῶν ἀδελφὴν ἀποσπάσας οὐ̣ 25
τοσὶ Τίμανδρος ἔτρεφε παρ' αὑτῷ̣ ἀποκομίσ(ας)
εἰς Λῆμνον ἴσως οὖσαν ἑπτὰ ἐτῶν. καίτ̣ο̣ι̣ τοῦ
το μὴ ὅτι ἐπίτροπ(ος) ἦ εὔνους <ἂν> ἄν(θρωπ)ος ποιήσαι, ἀλ
λ' οὐδ' οἱ κατὰ πόλεμον ἐγκρατεῖς γιγνόμενοι τ(ῶν)
σωμάτων, ἀλλὰ καὶ κατ' οἰκίαν πωλοῦσιν ὅτι 30
μάλιστα. οἱ τοίνυν ἀνδραποδοκάπηλ(οι) καὶ ἔμ
ποροι κέρδους ἕνεκα πᾶν πράττοντες ᾳ̣ᴐ̣ε̣λγέ̣[ς],

138v [ἄ]ν ἀδελφὰ π̣αι̣δάρι(α) πωλῶσιν ἢ μητέρα καὶ παιδία
ἢ π(ατέ)ρα̣ [καὶ π]αι̣δά[ρ]ι̣(α) ἐ̣σ̣τ̣ῶ̣σ̣ι, ζημ[ι]ούμενοι ἐλάττονος
ἀ[πο]δίδο̣ν̣τ̣α̣ι̣ [αὐτ]ῶν τι τ̣ο̣ῦ̣τ̣ο̣ τῶν δικαίω(ν) ὄν. αἱ γ(ὰρ)
εὔνοιαι τ̣ο̣ῖ̣ς̣ ἀνθρώποις εἰσὶ διὰ τὴν συνήθει
α[ν] κ̣αὶ τὸ συντρόφους αὐτοὺς εἶναι μᾶλλον ἢ δι
ὰ τ̣ὰ̣ς̣ σ̣υ̣γγενείας. τεκμήριον δὲ τούτ̣ο̣υ̣· οὔτε γὰρ
ἂν π̣(ατέ)ρ(ε)ς [το]ὺ̣ς̣ α̣ὑ̣τ̣ῶ̣ν̣ π̣αῖδ̣α̣ς̣ ἀ̣σ̣πάσ̣α̣ι̣ν̣το, εἰ μὴ [ἐπ’] αὐ
τ̣ο̣ῖ̣ς̣ ἐ̣κ̣ π̣αιδαρί̣ων τ̣ρ̣α̣φεί<η>σ̣αν, εἰ εὐθύς τις αὐ
τῶν μικρὰ ὄ̣[ν](τ̣α̣) ἀ̣π̣ο̣σ̣π̣άσαι, οὔτε [ο]ἱ̣ παῖδες τ̣ο̣ὺ̣ς̣
γ̣ο̣νέας εἰ μὴ ὑπ’ ἐκείνω̣ν̣ τ̣ρ̣α̣φείησαν. Τί
μανδρος τοίνυν τούτου α̣ὐ̣τ̣οῦ̣ γ̣ε̣ αἴτιος γέγον(εν),
ὥστε τ̣ὰ̣ς̣ μὲν ἀδελφὰς ἀλλήλας μὴ ἀναγνῶναι
μήτε ἐν ὁ̣δ̣ῷ̣ μήτε ἐν ἱ̣ε̣ρ̣ῷ̣ ἰδούσας πλεόν
ω̣ν̣ γ(ὰ̣ρ̣) ἐτῶν ἢ τριῶν καὶ δέκα οὐχ ἑωράκασιν
ἑαυτάς τὸν δὲ ἀδελφὸν τουτονὶ Ἀκάδημον
ἀναγνωρίσαι τὴν ἑαυτοῦ ἀδελφήν, ἐλθόν(τα)
δὲ ε̣ἰ̣ς̣ Λ̣ῆ̣μ̣ν̣ο̣ν̣ μὴ γνῶναι ἰδόν(τα). καίτ̣ο̣ι̣ ὁ̣ ν̣ο̣μ̣ο̣
135r θέτ̣ης τοὺς παῖδας τοὺς ὀρφανοὺς οὐ χωρὶς ἕ
καστον τρέφεσθαι ᾠήθη{ν} δ̣εῖν, οὐδ’ ὅ̣π̣ω̣ς̣ ἂν τύ
χωσιν, ἀλλ’ ὅπου ἂν ἄριστα [μέ]λ̣λ̣ω̣σ̣[ι] τ̣ρ̣έφεσθαι.
καί μοι λέγε τὸν νόμον. ΝΟΜΟΣ
εἰ τοίνυν παρά σοι εὖ ἐτρέφετο, ὦ Τίμανδρε, ἡ μία,
διὰ τί οὐ καὶ ο̣ὗ̣τ̣οι εὖ ἐτρέφοντο παρά σοι καὶ ἐν
τῶι αὐτῶι; εἰ δ’ οὗτοι εὖ, διὰ τί οὐχὶ καὶ ἐκείνη
εὖ καὶ ἐν τῷ αὐτῶι τοῖς ἀδελφοῖς καὶ τῆι ἀδελ
φῆι τῆι πρεσβυτέραι; ἀλλ’ οἶμαι ἡ τῶν χρημά
των ἐπιθυμί(α) ταῦτα πάντα παρανομεῖν ἐποίει.
τοιγαροῦν ἐκ πένητ(ος) ἐπιτροπεύσας Ἀκάδημο(ν)
τουτονί, ἐκ τῶν τούτου πλέον ἢ πέντε τ̣αλάν
των οὐσίαν ἔχει, ὡς ἐγὼ ὑμῖν ἐπιδείξω· πρῶτ(ον)
μὲν γὰρ εὐθὺς τῶι πρώτωι ἐνιαυτῶι ᾧ̣(ς) <ὁ̣> π̣(ατὴ)ρ αὐτῶ(ν)
ἐ̣τ̣ε̣λ̣ε̣ύ̣τησεν τήν τε παιδίσκην ἔλαβεν καὶ πέντε

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FROM GENERAL LEGAL HISTORY TOWARDS COMPARATIVE LEGAL TRADITIONS*

The so called Bologna process has incited a kind of "cultural revolution" in law schools' curricula all over Europe. Positivistic and empirical approaches, practi cal specializations and utilitarian demands are given priority by the Bologna re forms. The process compresses the teaching of legal history into fewer courses, em phasizing professional and applied learning outcomes over the traditional liberal arts centered model of legal education. Skills and practical knowledge are favored, sometimes at the expense of gaining a profound comprehension and intellectual un derstanding of the underlying principles of law and the social and historical dy namic through which they developed. I believe that seemingly "impractical" topics like legal history actually strengthen the applied portion of the curriculum. In reality, nothing is as practical, particularly in a time of rapid social and technological change, as a clear appreciation of the historical, moral and ethical principles that form the basis of the modern legal order.

Modernizing legal pedagogy must include, inter alia, major adjustments in the subjects taught. Consequently, at the University of Belgrade Law Faculty, the basic course in legal history that was inherited from the socialist curricula, General History of State and Law, was first updated into General Legal History, and, through a second step, into Comparative Legal Traditions. This evolution is not merely termi

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nological. The modernized courses are more pragmatic (bringing Serbian legal edu cation into conformity with similar classes at universities worldwide), theoretical (emphasizing the inseparable linkage between legal history and comparative law, as stressed by Kaser, Watson, Glenn, Zimmerman and many others) and pedagogical (offering more applied knowledge to students). They conceptualize the subject differ ently in at least two ways: firstly, the focus is transferred from the abstract, universal ist concept of "general (legal) history" (Weltgeschichte) to the more neutral, theo retically less demanding comparative approach. Secondly, the change encompasses a partial shift from history (implying the processes have been completed) to tradition (pointing to living traces of previous legal development, defined by Glenn as „the presence of the past"). The subject is now more oriented towards a better under standing of the roots of current legal doctrine and of the likely shape of future legal changes. The new approach favors understanding of law in the context of legal trans plants, diffusion and harmonization of law, of the interaction and internal dynamics of legal systems, as well as an awareness that the era of autonomous and isolated national legal systems is ending.

The second change in teaching methods, has shifted from formal lectures to interactive learning through Clinical Legal History. Students are engaged by playing roles in historical court cases. Court simulations of cases from ancient Athens or Rome enable students to develop legal reasoning and imagination, train their rhe torical skills, develop their creative understanding of legal terminology, learn about procedural maneuvers, build up argumentation, become familiar with the legal deci sion making processes, and gain an appreciation that legal principles, institutions, rules and judiciary experience do not apply only to ancient courtrooms. Students gain a deeper understanding of how previous societies dealt with legal dilemmas that parallel contemporary legal problems. Acting as an Athenian jury, for example, teaches students both the values and the dangers inherent in a more democratic judi cial system. This broad understanding of legal traditions may build a prospective barrier against the hurricane of positivist and pragmatic challenges that threaten to turn lawyers into mere technical specialists.

Key words: *Bologna process. Comparative Law. Legal Transplants. Diffu sion of Law. Legal Education. Clinical Legal History.*

1. BOLOGNA PROCESS AND LEGAL HISTORY

Along with its beneficial aspects, the Bologna process has deemphasized the role of legal history courses in favor of classes that stress more technical and applied learning outcomes. The traditional educational model, which was oriented toward furnishing students with generalized legal knowledge and a deep intellectual understanding of law is being undermined by an increasing stress on technical legal skills. Classes that lack direct pragmatic content and immediate applied relevance have came under strong pressure to justify their presence in the curriculum. Topics that appear to lack practical significance are downgraded or even completely replaced with more immediately practical ones. Roman law and

subjects dealing with national, as well as with general, legal history and their derivates (such as Cuneiform Law, Ancient Greek Law, Medieval Law, Modern Codifications, and the like) that have been flourishing for decades are being either reduced, turned into optional classes, integrated into the more „practical" courses of private or public law, or eliminated completely.[1] Positivistic approaches, reduction of broad approaches into narrow specializations and other utilitarian demands have gained priority. Specialized legal skills and practical knowledge have become popular, frequently at the expense of fundamental comprehension of law, broad legal background and generalized legal education. The pedagogical dangers of an overreliance on this approach have been noted in ELFA (*European Law Faculty Association*) documents.[2] Many scholars note that without a broad comprehension of legal doctrine, theoretically grounded knowledge and a thoughtful understanding of underlying legal principles, it is not possible to develop profound legal reasoning and understanding of the very essence of law, of its ethical and philosophical dimensions, of its dynamic and social context, peculiarities and of the intersection of different legal systems. The simplified and overly pragmatic approach to legal studies may imperil creative inquisitiveness, genuine implantation of legal-ethical values and intellectual criticism of future lawyers.[3] The

[1] R. Lesaffer, *Law between Past and Present*, points: „In the stretch of a few generations, the study of Roman private law degraded from the backbone of the whole curriculum to an introduction in private law taught at the start. During the final quarter of the 20th century, in many European countries, Roman law disappeared altogether as a separate subject and was, at best, integrated in a general course on European legal history", available at *http://ssrn.com/abstract 1316256*, 5 (last visited October 2009). However, need for understanding and creating the new *ius commune* in Europe based upon common legal heritage excuses a contemporary use and value of Roman law. This is why Roman law has better chances to survive than the broader legal history, particularly if percieved as a source of inspiration for a new common law of Europe, as Zimmermann has pointed out so often. Moreover, comparative legal history is sometimes reduced to Romanist perspective, its possible impact to comparative law and modern legal institutions, particularly in the Western legal thought. Very instructive text on contemporary doctrinal issues on that point offers D. Heirbaut, „Comparative Law and Zimmermann's new *ius commune*: a life line or a death sentence for Legal History? Some reflections on the use of Legal History for Comparative Law and vice versa", *Ex iusta causa traditionis Essays in honour of Eric H. Pool*, Fundamina editio specialis, Pretoria 2005, 136 153.

[2] See particularly statements of the 2005 ELFA Conference held in Graz, available at *http://www.elfa afde.org/PDF/Conferences/Workshops Graz.doc* (last visited October 2009), as well as attitudes expressed in the documents of subsequent Conferences.

[3] The most vibrant testimony on advantages of combined educational model comes by famous Scottish American lawyer and professor Alan Watson in his provocative book A. Watson, *Shame of American Legal Education*, Belgrade 2005, 175: „I state openly and without exaggeration my considered opinion that first year law students at the University of Belgrade, where law is an undergraduate degree, have more sophisticated understanding of the relationship of law to society, the historical underpinnings of the law, the impact of foreign law, and the operation of law in society, than have American law

law is evolving rapidly due to societal changes, globalization and technological advances. If legal experts are to develop the law of the future, they must understand how past societies confronted, or failed to adequately deal with, their own legal crises. Nonetheless, at the higher education table arranged *alla Bolognese*, even at some prestigious university centers within the European Union, there is no more place for Roman law as a compulsory subject in the undergraduate curricula, although the very core of contemporary civil law systems is derived from it.

Fortunately, in former Yugoslavian university centers, as well as in some other Southeastern European countries, the teaching of legal history has not suffered such a dramatic decline.[4] Roman law is still a part of the core curriculum, as are General Legal History and National Legal History.[5] However, it seems that it is only matter of time before the pressure coming from positivist and pragmatic educators will pressure these nations to further „modernize" their curriculum. Legal history, legal theory and other general educational subjects will be attacked as unnecessary burdens to place on law students who much master rapidly evolving fields such as Intellectual Property Law or Environmental Law. Pointing to the fact that some prestigious universities within the European Union have cut back on their liberal arts curriculum will grow to be a favorite argument for abandoning „old fashioned" requirements.

2. TRANSFORMATIONS OF *GENERAL LEGAL HISTORY*

So, what ought to be done? Opposition to the current pedagogical trend must not be based upon particularistic guild interests. Safeguarding and upholding the quality of legal education and its essence is at stake. To

school graduates". Although some may find those statements to tough, combination of traditional legal education with innovative elements may really lead to good results. Sim ilar statement could be applied to the most part of law faculties all over ex Yugoslavia, as they have more or less achieved to save their students of professional onesidedness throughout their curricula.

[4] It might have not always been result of awareness that those disciplines are in evitable for a proper legal educational background, but have rather been consequence of personal authority, prestige and university position of certain distinguished professors in those fields.

[5] Striking example is the first private Faculty of Law (Union University) in Ser bia, being very firmly oriented to practice and business law (well attested by its first of ficial name: Faculty for Business Law). Although they removed Roman Law initially, in the 2008/09 curricula it reappeared again, along with already existing Legal History (which included at first Roman Law, General Legal History and National Legal History in a single small, hardly informative subject), see *http://www.fpp.edu.yu/files/kurikulumi/studijski plan i program 2008 2009.doc* (last visited October 2009).

lament the passing of „the good old days" when educators were independent of market demands is not enough. Changes seems to turn into *conditio sine qua non*. It particularly affects the discipline which was titled *General History of State and Law*, which for more than a half of century in ex-socialist countries was deeply influenced by the Soviet scholarship and by political interests. It was often oriented towards history of state rather than to history of law. Law was perceived as a derivate of the state, and its history had a priority. On the other hand, although legal history as a discipline is usually perceived by the Western scholars primarily as national legal history (particularly in the USA), it was not the case in countries under the Soviet ideological and scholarly influence. *General History of State and Law* tended to explain state and law through a sometimes too simplistic Marxist lens as universal phenomena growing out of economic forces and relations of production. In Southeastern Europe the socialist mark was first removed at the University of Belgrade Law School by modification of the name, methodology and the subject's content, transforming the course into *General Legal History*.[6] Finally, in 2006, more radical change took place. The curricula successor of the old socialist subject emerged as a *Comparative Legal Traditions*, with an innovative content and approach.[7]

The transformation of this legal history course was not a mere change of its title, although in our time labels are not unimportant, both in general and in academic marketing. The rationale for the updated format was not only pragmatic, but it is equaly well theoreticaly grounded. The pragmatic justification can be easily located by googling *General Legal History* or, particularly, *General History of State and Law* on the Internet. With exception of several law faculties from ex-socialist countries, scientific and educational discipline with the later title does not exist in the world's most prestigious universities. However, number of law faculties in former Yugoslavia have still stayed with the „traditional" name. It provides an excellent basis for attacks by aggressive positivists and Bologna process extremists. The subject is not recognizable enough, and one could easily claim that it endangers student mobility, etc.

Theoretical reasons for pedagogical changes are much more important than pragmatic ones. *General Legal History*, as a scientific and, later on, as a didactic discipline, emerged out of the Historical School expansion in the XIX century. Although Savigny, with his rejection of the universal approach to law favored by the natural law scholars and with his „spirit of the people" (*Volksgeist*) theory was a temporary winner over

[6] S. Avramović, *Opšta pravna istorija stari i srednji vek* [General Legal History Ancient and Medieval Times], Beograd 1999.

[7] S. Avramović, *Uporedna pravna tradicija* [Comparative Legal Traditions], Beograd 2006.

Thibaut, the idea of a universal legal history did not die. On the contrary, it was smoldering in the remarkable works of Thibaut's followers like Gans. Paradoxically, it was fed by the flourishing of national legal historical research, as it offered the basis for a synthetic approach to different legal systems, particularly along with Hegel's general philosophy of history. His point that the spirit of a nation (*Volksgeist*) is an intermediate stage of world history as the history of the world spirit (*Weltgeist*), and that the world spirit gives impetus to the realization of the historical spirits of various nations, provided a solid grounding for *General Legal History* to grow up as a separate legal discipline. The objective idea of law developes within mankind as a whole, and therefore its development has to be perceived within the framework of world history, what greatly strengthenes the universalist approach. In so far as national legal histories are a part of world legal development, they get their full sense, understanding and explanation only within a universalist analysis.

Positivists rejected idea of the world spirit and Hegel's metaphysical interpretation of history, but they did not neglect completely the concept of general legal history, although they underestimated importance of legal philosophy and deemphasized legal history and comparative law.[8] Nevertheless, they accepted it as an artificial construction, which builds abstractions from concrete data, but which is still useful in understanding certain regularities in social development. Marxist theory was also open to the idea of general legal history, particularly due to its advocation of proletarian internationalism, world revolution and its tendency to advance a universal model of state and law with a leading role given to members of the communist and socialist ideological community. Therefore *General History of State and Law* became a common core subject in the socialist law schools curriculum. Its aim was to identify and to teach „general rules (laws)[9] in development of state and law", being understood as strict laws of social progress deriving out of changes in „modes of production and means of production", as inevitable consequence of economic base and material conditions of the society.

More recent theoretical tendencies, mostly influenced by sociological and anthropological approach to law, have melted old traditional doctrines. Legal development is more often perceived as a consequence of interaction and contacts among different legal systems and legal families, not as more or less independent, in a way isolated process of internal,

[8] In terms of R. von Jhering, *Geist des Römishen Rechts auf den Verschiedenen Stufen seiner Entwicklung*, Leipzig 1878[4], 15: „Die Wissenschaft ist zur Landesjurispru denz degradiert".

[9] English term „general rule" is not completely adequate translation of the Marx ist phraseology, which implies that society and law are subject to firm, inevitable general *laws* („opšte zakonitosti") of evolution and development, based upon material conditions of the society.

evolutionary and revolutionary legal changes.[10] The controversial writings of Alan Watson, who stresses the importance of legal transplants and legal borrowings in law making, as well as other theories on the diffusion of law, are attracting increasing attention.[11] We are currently witnessing the global impact of multiculturalism, both as a political discourse and as a set of international legal norms. In this context, a comparative approach to legal development becomes more and more essential. Its importance appears not only in understanding the history of a specific legal system, but in the comprehension of its underlying principles as well. Legal history and comparative law inevitably suppliment, and sometimes convene with each other, being very complementary disciplines.

3. LEGAL HISTORY, COMPARATIVE LAW AND COMPARATIVE LEGAL TRADITIONS

One of the most prominent German legal historians and a leading contemporary European comparative scholar, Reinhard Zimmermann, stresses that a legal historical approach can „enable us to take stock of our present legal condition. It may help us to map out, and to become aware of, the common ground still existing between our national legal systems as a result of a common tradition, of independent but parallel developments, and of instances of intellectual stimulation or the reception of legal rules and concepts. At the same time, it will be able to explain discrepancies on the level of specific results, general approach, and doctrinal

[10] Worth mentioning is an old statement by R. H. Lowie, *Primitive Society*, New York 1920, 441 that „cultures develop mainly through borrowings due to chance con tacts“, or the one by R. Pound that „history of a system of law is largely a history of bor rowings of legal materials from other legal system and of assimilation of materials from outside of the law“, as quoted by A. Watson, 22 (see the next note). See also excellent article with a plenty of recent literature on the topic, D. A. Westbrook, „Theorizing the Diffusion of Law in an Age of Globalization: Conceptual Difficulties, Unstable Imagina tions, and the Effort to Think Gracefully Nonetheless“, *Annals of the Faculty of Law in Belgrade Belgrade Law Review* 3/2008, 159 179.

[11] A. Watson, *Legal transplants: an approach to comparative law*, Athens GA 1993[2] (translated in Serbian as A. Votson, *Pravni transplanti pristup uporednom pravu*, Belgrade 2000). A part of important literature on legal transplants and diffusion of law could be reached also at *http://www.alanwatson.org/publications.htm* in the section *Re source Readings on Legal Transplants, the Diffusion of Law and Related Topics*. Watson is commonly attacked by sociologists and Marxists for neglecting social circumstances and economic conditions in law making, although he states clearly: „All legal rules are created by a cause. The cause of their creation is commonly but not always rooted in so cial, economic or political factors important to the life of the society or its leaders“, A. Watson, *Society and Legal Change*, Philadelphia 2001, 7. See also the article A. Votson, „Pravo u knjigama, zakon i stvarnost: uporednopravni pogled“ [Law in Books, Law and Reality: A Comparative Law Perspective], *Anali Pravnog fakulteta u Beogradu* [Annals of the Faculty of Law in Belgrade] 2/2007, 5 18.

nuance. It is this kind of comprehension that paves the way for rational criticism and organic development of the law. The past, of course, does not justify itself; nor does it necessarily contain the solutions for present-day problems. But, an understanding of the past is a first and essential prerequisite for devising the most appropriate solutions. This is as true within a given national legal system as it is for the formation of a European law. And just as legal history informs the development of private law doctrine in the one case, so it constitutes the basis for comparative scholarship in the other. European private law requires a combination of comparative and historical scholarship".[12]

This sounds like a very valid manifesto for all legal historians at European law faculties today! It seems quite useful to keep that passage on hand during debates over curricula at law school faculty meetings. Common legal tradition as the possible basis for a new European *ius commune* sounds like a convincing rationale for legal history. A similar argument for the need for a new synthesis between legal history and legal system, as well as of establishing intellectual link between legal history and comparative law, was expressed more than half a century ago by Max Kaser.[13]

Alan Watson and his followers often stress that classes in comparative law inevitably have (or should have) a strong historical component.[14] He also notes: „Comparative law does not only take from Legal History: it can also give".[15] However, some authors are afraid that the legal history mainly gives, while comparative law takes, stating openly that the joining of the two disciplines may be a dangerous development for the weaker and less popular one – i.e. for legal history.[16]

The question of how widely the mentioned theoretical framework — respecting inter-connection of legal systems in history, as well as the linkage between legal history and comparative law — has spread may be easily tested by searching the the Internet again. One has only to check occurrence of the term *Comparative Legal Traditions*. Many curricula and syllabi at different universities will appear, as well as a significant number of manuals with the same or similar title.

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[12] R. Zimmermann, R., *Roman Law, Contemporary Law, European Law The Civilian Tradition Today*, Oxford 2004, 110.

[13] R. Zimmerman, „Max Kaser und das moderne Privatrecht", *Zeitschrift der Savigny Stiftung (ZS)* 115/1998, 99.

[14] A. Watson, *Legal History and a Common Law for Europe*, Stockholm 2001, 17.

[15] A. Watson (1993), 103. A very interesting article on how comparative law may influence the practice and the study of legal history, see M. Graziadei, „Comparative Law, Legal History, and the Holistic Approach to Legal Cultures", available at *http://www.jus.unitn.it/cardozo/Critica/Graziadei.htm* (last visited October 2009).

[16] Sharp argumentation on that point develops D. Heirbaut, 136.

The key changes that result from this different conceptualization of the traditional curricula subject (*General Legal History*) are mainly twofold. The first one is manifested in the partial transfer of the main focus from the somewhat speculative and risky concept of „general" legal history[17] to the more neutral, theoretically less rigorous comparative approach, although it creates a new challenge, connected to the very notion of „comparative law": the dilemma whether comparative law is a science, separate branch of law, or just a method. The long-standing argument has never been resolved, and many different viewpoints about its character are still being debated.[18] However, in spite of significant differences among comparative scholars in defining comparative law itself, all approaches agree that there is a substantial and indissoluble link between comparative law and legal history. On that point Watson offers an important elaboration:

„The nature of any such relationship, the reason for the similarities and the differences, is discoverable only by a study of the history of the systems or of the rules; hence in the first place, Comparative Law is Legal History concerned with the relationship between systems. But one cannot treat Comparative Law simply as a branch of Legal History. It must be something more. When once comes to trace the growth of these similarities and differences – how, for instance, has it come about that France, Germany and Switzerland, all deriving their law from Justinian's *Corpus Iuris Civilis*, have each different rules on the passing of risk and property in sale? – one finds oneself better able to understand the particular factors which shape legal growth and change. Indeed this may be the easiest approach to an appreciation of how law normally evolves. This

[17] Immanent methodological problem with the concept of „general legal history" is permanent substantial objection on selection of „representative samples", as well as on criteria how far one should go with generalization and abstraction of peculiarities within the selected legal systems.

[18] Famous French comparatist E. Lambert, *La fonction du droit civil comparé*, Paris 1903 represents the attitude that comparative law is more than a simple method of research. He suggested that there are three kinds of comparative law: descriptive com parative law, comparative history of law, and comparative legislation. Quite influential was another threefold division of comparative law by Wigmore comparative nomoscopy (description of legal systems), comparative nomotethics (analysis of the policies, merits and values of legal systems and institutions) and comparative nomogenetics (studying evolution of legal ideas and systems in their relation one to another), see J. H. Wigmore, *Panorama of the World's Legal Systems*, Washington 1936, and, before that, „A New Way of Teaching Comparative Law", *Journal of the Society of Public Teachers of Law*, 1926, 6. Objectives of comparative law were set up at the famous Paris Congress in 1900 pre sided by Lambert, and re examined a century later by the Cambridge Conference in 2000. More on that R. Munday, „Accounting for an encounter", in: P. Legrand, R. Munday, *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003, 3. In Serbian see B. T. Blagojević, „Uporedno pravo metod ili nauka" [„Comparative Law Method or Science"], *Anali Pravnog fakulteta u Beogradu* [Annals of the Faculty of Law in Bel grade] 1/1953, 7.

seems a proper field of study for Comparative Law. So, in the second instance, I suggest that Comparative Law is about the nature of law, and especially about the nature of legal development".[19] Or, in the words of Pringsheim, „comparative law without the history of law is an impossible task".[20]

The very fact that comparative law and legal history are so interwoven and closely tied provides a grounding for their drawing from each other and touch in a particular discipline, in a „combination of comparative and historical scholarship", to quote Zimmerman again.[21] That kind of approach could make sense not only at the doctrinal level, but it is even more indispensable as an academic discipline, due to its educational value. It may help students to understand more profoundly nature of law, paths of its development, to scrutinize differences and similarities, to comprehend the kinds of ties among different legal families and systems, as well as to appreciate the connections among particular legal principles and institutions. In that way the changed focus from „general" to „comparative" legal history, independently of its theoretical meaning, becomes a central discipline that should be mastered by the modern attorney.

The second transformation of the title is about the use of the term „tradition" instead of „history". This is also not a purely terminological switch. History basically implies ended processes, although messages and comprehension provided by *magistrae vitae* have, no doubt, important pedagogic and intellectual value in understanding the present. There are, parenthetically, many proverbs on that point. However, more than that, „tradition" could be understood to entail living traces of former processes, that impact contemporary legal practices.[22] One may say history lasts into the present day. Tradition can be conceptualized as a movie, while history is seen as a completed picture. History is like „the dead" Latin language, tradition is like the continually evolving Italian tongue. It is a vital, active, ongoing system. In the very first chapter of his famous book on comparative legal traditions, Patrick Glen, one of the most prominent of today's comparative scholars, uses a striking title to denote (legal) tradition as „the changing presence of the past".[23] The genuine purpose of

[19] A. Watson (1993), 6 7.

[20] F. Pringsheim, „The inner Relationship between English and Roman Law", *Ge sammelte Schriften I*, Heidelberg 1961, 78.

[21] R. Zimmermann, (2004), 110.

[22] In a recent draft paper H. P. Glenn, *A Concept of Legal Tradition* (Queen's University, Faculty of Law, January 2008), 6 differs „living tradition" as opposed to a „submerged, frozen, or suspended one". The whole text of the working paper is available at *http://law.queensu.ca/facultyAndStaff/facultyProfiles/bailey/baileyCourseMaterials/law650/glennLegalTradition.pdf,* last visited October 2009.

[23] H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Ox ford 2007^2, 22. That phrase can be taken in a double sense (at least), due to the use of the word „presence": it may mean both „existence" of the past, but as well „actuality" of the

historical research is, indeed, to discover and understand the impact of the past on the present not simply to be an intellectual game. It aims to discover authentic, actual living traces of what has been inherited or has been transmitted over time from the past. Tradition is not the „total" history, it does not include all events and outcomes, it is „a living tradition, as opposed to a simple deposit of information", to put it in Glenn's words.[24] In accordance with the original sense of the Latin word *traditio* – to pass over (or, to pass on), it primarily involves that which has been transferred from history to the present. So with legal tradition. „Law is essentially a tradition, that is to say something which has come down to us from the past".[25] While investigating legal past, research should be primarily oriented towards better understanding of different contemporary legal principles, institutions and doctrines, of actual legal systems and legal families, as well as of the patterns of their changes and interaction. Students need to explore the origins and development of law, particularly of the new *common law* of Europe, in order to achieve a better comprehension of the European commonalities of national legal systems and their interactions.

Conceptualized in this manner, the subject acquires its inclusive sense and pragmatic justification.[26] And, as it should be usually taught at the beginning of legal studies, it could strongly contribute to advancing the students' legal reasoning and their more profound understanding of law, of its roots, contemporary form and upcoming solutions. The usual objections against the abstract „historicism" of legal history subjects do not fit, due to the subject's clear practical value and importance – not only in actual legal understanding, but also in the conceptualization of the future path of the law, either through legislation or via judge made law.[27] The comparative legal tradition strongly supports the adoption of legal

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past. However, in a recent paper (footnote above) Glenn steps forward from the „tradi tional" understanding of tradition, as of *Überlieferung* in its dynamic sense, as of a visible link with the past. He offers a more modern, multidisciplinary approach, being shaped through information age lenses, and states that „tradition is information (as opposed to its transmission or reaction to it)". Consequently, he claims that the study of (legal) tradition is therefore the study of the content and flow of large bodies of normative information over time and over space!

[24] H. P. Glenn, (2008), 4. In that prospect, legal history can find its proper place in the law school curricula today, but „it must earn it by producing books that not only re store memories of forgotten jurists, doctrines, and practices, but that also provide different ways of thinking about law", K. Pennington, „The Spirit of Legal History", *University of Chicago Law Review* 64/1997, 1115.

[25] A. W. B. Simpson, *Invitation to Law*, Oxford 1988, 23.

[26] By the way, H. P. Glenn, (2008), 8 claims that inclusiveness is important char acteristic of legal tradition.

[27] „Historicism" in its negative sense may be recognized in many legal subjects and manuals in law schools. Many of them often contain a bit of legal history, particu

transplants, borrowings and harmonization of law as significant methods of legal progress. And these insights are increasingly needed, particularly in drafting contemporary legislation. However, diffusion of law is a relatively recent topic among legal historians, mainly due to lack of a proper comparative approach. Despite the impressive works of Alan Watson on this issue,[28] there is still a lot to be done in developing appropriate methods of evaluation and of understanding the complex correlations between comparative law and legal history, particularly, for example, in explaining the adoption of foreign laws in countries with different social and economic structures or of the current expansion of common law. More and more, legal ideas are spreading all over the world, regardless of political borders or cultural differences, particilarly after the fall of Comunism in Eastern Europe, along with the tendency of many countries to get closer to the European Union or to import American legal institutions.

The comprehension of comparative legal traditions, and the ability to conceptualize solutions deriving from different legal systems has never been more important due to the rapid increase of globalization. New technologies and forms of communication alter social, political and legal realities at a pace never before witnessed in world history.[29] The study of comparative legal traditions facilitates intellectual perceptions of interrelated changes and of the integration processes in legal development, particularly in the interactions and dynamics of contemporary European law. European legal integration can be more easily achieved if national laws

larly in their introductory parts, perceiving it as a collection of facts about the discipline, without profound understanding of the context.

[28] Along with the books allready mentioned, his treatement of legal transplants, borrowings and diffusion of law is particularly valuable in A. Watson, *Sources of Law, Legal Change and Ambiguity*, Philadelphia 1984; *id.*, *The Evolution of Law*, Baltimore 1985; *id.*, *Failures of Legal Immagination*, Philadelphia 1988; *id.*, *Ancient Law and Mod ern Understanding*, *At the Edges*, Athens, GA London 1998; *id.*, *Law Out of Context*, Athens, GA London 2000; *id.*, *Society and Legal Change*, Philadelphia 2001[2]; *id.*, *The Evolution of Western Private Law* Baltimore London 2001; *id.*, *Legal History and a Common Law for Europe*, Stockholm 2001; *id.*, *Authority of Law; and Law*, Stockholm 2003; *id.*, *Comparative Law: Law, Reality and Society*, Lake Mary, FL 2007. It is not pos sible to record here many important articles by Watson. More on A. Watson theory and adversary reactions, see M. Graziadei, „The Functionalist Heritage", in: P. Legrand, R. Munday, *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003, 121 etc.

[29] B. Markesenis, *Comparative Law in the Courtroom and Classroom The Story of the Last Thirty Five Years*, Oxford Portland, Oregon 2003 points in the Foreward that the law today has to accommodate and reflect changes like European integration, world trade, the global recognition of human rights, information technology, the power of the media, social security and modern insurance practices, and many other common problems and chalanges. Therefore, in his view, the primary role of the comparative law is to assist the practitioner, and above all the judge, in the development of the law. See also J. Klab bers, Sellers, M., *The Internationalization of Law and Legal Education*, Springer 2009.

are viewed as a part of great legal families, each shaped by historical dynamics. It becomes easier to understand similarities and differences, to recognize legal imperialism, colonialist and nationalist heritage, influences and transplants among legal systems, either as a donor or receiving society if one has studied legal history. After the rigorous study of legal traditions, it becomes more and more evident that some legal systems could be more adequately defined by introducing new notions, such as *mixed legal systems* or *mixed jurisdictions*.[30] This is the most visible point of common focus of legal history and comparative law. It gives strength to the peculiar process of „comparative law renaissance", as Christian Joerges has put it out.[31] Our time is characterized, more than ever before, by a mutual contact not only between two different legal systems, but among whole „legal traditions" and legal families, particularly in the form of the increasing impact of common law concepts on the civil law system.[32] Certain common background principles survive and perhaps transcend a world of differences. This is why Glenn asserts that knowing only one tradition means having only partial knowledge of another.[33]

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[30] V. V. Palmer, Mixed Jurisdictions of the World: The Third Legal Family, Cam bridge 2001; V. V. Palmer, „Two Rival Theories of Mixed Legal Systems", Journal of Comparative Law, 3/2008. See also R. Zimmermann, *Mixed legal systems in comparative perspective: property and obligations in Scotland and South Africa*, Oxford 2003. The notion of „mixed legal systems" becomes more actual in connection with emerging of European private law, see particularly A. Watson, „A Common Private Law for Europe?", *Maastricht Journal of European and Comparative Law* 9, 4/2002, 329; J. Smits, „A Eu ropean Private Law as a Mixed Legal System", *Maastricht Journal of European and Comparative Law* 5, 4/1998, 328.

[31] C. Joerges, „Europeanization as Process: Thoughts of the Europeanization of Private Law", *European Public Law* 10, 1/2005, 63.

[32] There are many examples of common law institutions influencing rapidly the civil law tradition, only during the last two decades (mediation, protected witness, in former, plea bargaining, etc.). Convergence of legal traditions in constitutional law, tax law, corporate and commercial law, arbitration, as well as in legal education (e.g. intro duction of legal clinics, moot courts, credit system in evaluating students, etc.) is also obvious. Therefore, some authors are speaking of „Americanization" of law, see more M. Langer, „From Legal Transplants to Legal Translations: The Globalization of Plea Barga ining and the Americanization Thesis in Criminal Procedure", *Harvard International Law Journal* 45, 1/2004, 2. Sometimes mixture of legal traditions comes from quite unexpec ted regions, see e.g. Sh. Prakash, „Globalization and the Challenge of Asian Legal Trans plants in Europe", *Annals of the Faculty of Law in Belgrade Belgrade Law Review* 3/2008, 180. See also very instructive voluminous book edited by J. M. Smits et all., *El gar Encyclopedia of Comparative Law*, Cheltenham, UK Northampton, MA, USA 2006, 821 with particularly interesting contributions by P. Glenn, „Aims of comparative law", 57 65; D. Nelken, „Legal culture", 372 381; J. Husa, „Legal families", 382 392; E. Schrage, V. Heutger, „Legal history and comparative law", 393 406; J. Fedtke, „Legal transplants", 434 437; V.V. Palmer, „Mixed jurisdictions", 467 475, etc.

[33] H. P. Glenn, 46. He raises the issue to philosophy and gnoseology level, stating that „human reasoning inevitably turns out to be comparative reasoning", *ibid.*

Therefore, *Comparative Legal Traditions* expands the mastery of multivalent legal logic, both with for students and among the most innovative law makers and judges.

4. EDUCATIONAL VALUE OF COMPARATIVE LEGAL TRADITIONS

Many universities worldwide have recognized for the aforementioned reasons that there is considerable value and importance of the discipline, whether it appears in curricula as *Comparative Law* (including many elements of Legal History)[34] or as *Comparative Legal Traditions*.[35] Notwithstanding certain conceptual differences between *Comparative Law* and *Comparative Legal Traditions*, those two disciplines are very closely attached to each other and they have successfully found their place within the core curricula at prestigious law faculties, including those in the USA, traditionally oriented primarily towards practical knowledge. Harvard University School of Law, for example, in the 2008/09 school year offered two courses with this approach – *Comparative Law: Globalization of Law in Historical Perspective* taught by Professor Duncan Kennedy,[36] and *Comparative Law: Introduction to European Legal Traditions* offered by Visiting Professor Paolo Carozza.[37] The importance of comparative law and legal history is attested, or even explicitly stressed, in every comparatist's manual.[38]

Comparatists often emphasize that the key purpose of comparative law research and teaching should be to help understand what is distinctive (and problematic) about domestic law and to promote an improved comprehension of one's own legal system.[39] In the same way, *Comparative Legal Traditions* not only meets the educational need for a better understanding of history of law and of its origins, but it may be very useful *de*

[34] *Comparative Law* became quite recently a compulsory subject in the law school curricula in Italy, but most comparative law courses introduce students to the historical dimension of comparison, as asserted by M. Graziadei, 14 n. 52.

[35] Probably the most influential book is the one already mentioned by Patrick Glenn, but very important are also M. A. Glendon, M. W. Gordon, P. G. Carozza, *Com parative Legal Traditions*, St. Paul, Minn., 1999[2]; P. Legrand, R. Munday, *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003, etc.

[36] *http://www.law.harvard.edu/academics/courses/2008 09/?id 5379*, last visited October 2009.

[37] *http://www.law.harvard.edu/academics/courses/2008 09/?id 5506*, last visited October 2009.

[38] It is particularly present in one of the most prestigious manual of that kind, K. Zweigert, H. Koetz, T. Weir, *An Introduction to Comparative Law*, Amsterdam Oxford 1998.

[39] M. A. Glendon, M. W. Gordon, P. G. Carozza, 5.

lege ferenda in law reforms – not necessarily by offering concrete solutions, but in the sphere of methodological and intellectual perception of legal problems, in legal reasoning and better understanding of law making processes. It provides solid grounding for the analysis of many important ideas including the necessary connections among legal systems, creating an openness to considering differences and learning from them, awareness of alternatives, the need to overcome legal egocentrism and any foolish assumption of absolute national legal originality, readiness to accept more adequate solutions from foreign legal systems, overcoming any guilty feeling if borrowing or transplanting law, the necessity to understand law in a socio-historical context (instead of traditional positivist or functionalist comparative law approaches), creating a feeling that legal systems have to get closer to each other in creating new *ius commune*, primarily in the integrated Europe. The age of autonomous and isolated national legal systems is passing. Boundaries between internal and foreign law, particularly between national and European communitarian law (primarily among the EU member states, but also among the others) are rapidly becoming less and less rigid. We are facing an era of post-positivist unification, where comprehension of ties among comparative law and legal history becomes indispensable, as is „communication between normative and anthropological methods" in the development of legal history doctrine itself. Of course, knowing different legal traditions does not necessary lead to their acceptance. It is sufficient to be aware of external experience when facing the same or similar problems and issues, keeping in mind, of course, different or similar historical circumstances and backgrounds. „Bridge building between systems and even cultures is a complex and noble task, for the search for the common ground can help create an open mind and foster tolerance at a time when intolerance is again on the increase... and it is also intellectually challenging".[40] If so, the educational value of Comparative Law (with inescapable elements of legal history) and Comparative Legal Traditions is then indispensable and multifaceted.

5. TEACHING METHODS

Along with switch in the character of the historical approach, as a necessary consequence of changes in both the law and society during the last decades, it appears to be very important to improve and revise teaching methods in legal history and analogous subjects. Methodological and pedagogic innovations are not necessary only to „be trendy" by accepting

[40] B. Markesenis, XI. It is strange in a way that Markesinis, who urges „bridge building between systems and even cultures" is challenging in the same time „the contin ued utility of Roman law, arguing, instead, for the centrality of contemporary foreign law" (p. XII), nevertheless the role of Roman law in creating those bridges is undisputable!

elements of Socratic method, so favored within the US law schools, with the aim to acquire more practical learning outcomes. It is also vitally important to develop a sincere interest among the students in subjects dealing with legal history, so that they do not view their classes as a necessary curricula obligation. Learning these disciplines can create real excitement and enjoyment, bringing about a genuine enthusiasm among students. During the many years of experience in organizing „clinical legal history" classes at the University of Belgrade Law Faculty, the faculty have learned how to capture sutdents' interest.[41] I have already exchanged teaching techniques with many colleagues teaching Ancient Greek Law, and also offered my ideas on that issue at the Conference of legal historians in Split.[42] I find it important to share know-how with other legal historians and hopefully inspire them to use that teaching method in other subjects that touch on legal history.

The shift from mere teaching to inter-active learning can be easily achieved, e.g. by the reconstruction of cases from the Athenian court, as preserved in historical records. Students take roles of the parties and other judiciary participants. By playing the „real" role of parties, witnesses, court officials or jurors, the students develop their capabilities in legal

[41] For the first time I tested the idea at the ABA CEELI Congress (*American Bar Association Central European and Eurasian Law Initiative*) in Skopje in December 2002. It appeared to be very interesting not only for legal historians, but for practitioners as well, and the name for new teaching method was then born *Clinical Legal History*. The first academic positive reactions appeared soon, see L. Wortham, *The Lawyering Process,* Clinical Law Review 10/1, Fall 2003, 55. In April 2003 University of Belgrade Faculty of Law has hosted International meeting of legal historians (*Internationales Sommerseminar Antike Rechtsgeschichte*), and demonstration of a case simulation was performed by Belgrade law students. Some colleagues from other European universities have shown quite a vivid interest, announcing that they will also accept „Belgrade teaching method". At the *Internationales Sommerseminar Antike Rechtsgeschichte* held in Sarajevo in May 2005 two simulation of cases from Athenian courtroom were performed, one by Graz law students team trained by Professor Gerhard Thür (Lysias 1, On the Murder of Eratosthenes), and the second by my Belgrade students (Isaeus, On the Estate of Menekles). A very successful Seminar *Clinikum Antike Rechtsgeschichte (forensiche Rhetorik),* titled *Drei Prozesse nach attichen Muster*, gathered international professors' jury at the University of Graz School of Law in 2006. Spreading ancient cases simulation gave imput to its further upgrading. Valuable evaluation and proposals on how to improve the new teaching method was offered by G. Thür, „Clinicum Antike Rechtsgeschichte: Forensische Rhetorik", *Imperium und Provinzen (Zentrale und Regionen)*, Sarajevo 2006, 191 197. The same method in teaching Ancient Greek Law is also accepted at the Harvard University Law School by Professor Adriaan Lanni, see R. London, „The Nuts and Bolts of Ancient Law", *Harvard Law Today*, January 2006, 8.

[42] S. Avramović, „Clinical legal history: simulation of Athenian court a new teaching method", Zbornik radova Pravnog fakulteta u Splitu 3 4/2006, 347 353, see also *http://www.pravst.hr/zbornik.php?p 5&s 34* (last visited October 2009). Article with a similar content was published before as S. Avramović, „Simulation of Athenian Court A New Teaching Method", *Dike, Rivista di storia del diritto greco ed ellenistico. Edizioni Universitarie di Lettere Economia e Diritto*, Milano 5/2002, 187 194.

reasoning and imagination, train their rhetorical skillfulness, adapt to novel legal terminology and understand the importance of the proper use of legal notions in an oral, dynamic face-to-face communication, learn how to exercise procedural maneuvers, build up argumentation skills, become familiar with legal principles and institutions, with rules and judiciary experience belonging not only to the ancient courtrooms.[43] Students discover the dangers of „group think" when they feel the strong psychological pressure to go along with the other members of the jury rather than asserting their own unique insights. The practical value of this educational model is evident, which is an extra argument to use in debates over law school curricula reform. Its convenience and effectiveness is well attested not only in Belgrade but particularly at the University of Graz Law Faculty owing to Professor Gerhard Thür, and at the Harvard University Law School through the efforts of Professor Andriaan Lanni.

This new educational approach is not necessarily connected solely to Ancient Greek Law. Roman law represents a perfect ground for this kind of teaching as well. One of Cicero's speeches, *Contra Verres*, for example, was recently used by Gerhard Thür at the *Internationales Sommerseminar Antike Rechtsgeschichte* 2008 in Leibniz. National Legal History may also employ similar method, not only in the reenactment of past court cases, but also in dealing with parliamentary procedures. A striking example was offered by an excellent simulation of Parliamentary Committee debate on drafting the Serbian Constitution of 1888, which was performed by Professor Nebojša Randjelović and his students at the University of Niš Law Faculty. Every legal historian is able to recall in a moment many topics that are appropriate for a clinical legal history learning exercise.

Labeling the method in terms of the Bologna mantra as *Clinical Legal History*, together with renewed character of the discipline, looks like a favorable tactic in defending legal history subjects and endorsing their pedagogic value. To repeat once more, the principal goal of those changes should not be oriented primarily to save the disciplines as they were, but to make them more actual and modern, to adapt them to the sensibilities and receptiveness of the younger generation, to contribute in developing the general capabilities of students in mastering the reflective understanding of historical processes and legal development, to reveal the development of governing legal ideas and basic legal principles that have come to be part of the reality of the legal world today, and, most impor-

[43] It is particularly striking how enthusiasticaly students accept their roles, often with incredible level of identification with the legal position of „their" party. They are often faced with sincere dissapointment when they loose the case, learning vividly that justice is not granted by itself, but that they have to fight for it and make it visible through clear and convincing argumentation. For more details on advantages of the new teaching method, see S. Avramović, *Dike* 5/2002, 190 etc.

tantly, to boost their actual impact and increase students' interest and passion for creative legal analysis. The quality of legal education is at stake, as well as better understanding of overall legal development and the crafting of law reforms.

6. THE WAY OUT

To conclude. The law schools need to be responsive to the changing legal world if they are to keep their curricula and educational approach relevant and meaningful. New circumstances require serious changes in our perception of how to approach legal history at universities, both in essence and in ways of teaching. The new conceptualization of Comparative Legal Traditions has transformed General Legal History into an alliance with Comparative Law. Creative modes of teaching in order to make this topic more relevant to the needs and interests of contemporary students and their needs provides the chief argument for continuing to require that students be exposed to this discipline. Comparative Legal Traditions can become an important cornerstone in modern legal education, having practical as well as theoretical significance. On the other hand, the objection that Comparative Legal Traditions may endanger the essence of legal history, leading the field to be swallowed by comparitists sounds plausible. It may seem that legal history today is traveling down a dead-end street, having only the choice between two bad ways of survival: either to keep with the clear, pure, contemplative concept of the discipline, as it was, and as it tends to be in many cases today (no matter what social transformations, global challenges and demands of the modern era occur), or to make an „unequal and unhappy marriage" with Comparative Law.

I argue for a third survival strategy: as an educational discipline, legal history needs to adopt the cautiously measured pragmatic and applicative touch of comparative law approach. As a scholarly discipline it has to keep its long-lasting identity and soul, accepting only those changes that will not ruin its overall strengths. Its survival in law schools' curricula may not guarantee its survival as a scholarly discipline, but, vice versa, its disappearance from law schools will at best keep legal history alive only as a „living fossil" in a few scientific institutes. And, the worst scenario: as of now, at least in most ex-communist countries, a serious danger exists that legal curricula may abandon both Legal History and Comparative Law in favor of narrow specialization. Therefore it seems that an unhappy marriage through Comparative Legal Traditions offers better chances for both disciplines. Of course, the survival of legal history in any form within law schools' curricula will depend on diverse elements, including personal ones and idiosyncratic factors. But it is up to us

to modernize the concept, to modify its content (and, let us be impartial, to reduce it to some extent for the students), to actualize it and include a broader European dimension and the new *ius commune* in its scope. And, equally important, we must refresh our teaching methods. Through imaginative pedagogical approaches we can build a prospective barrier to protect the discipline against the still impending hurricane of positivist and pragmatic Bologna challenges. In the short run, at least, our efforts could greatly chances for legal history to stay alive. In the long run...

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VON DER ALLGEMEINEN RECHTSGESCHICHTE ZUR VERGLEICHENDEN RECHTSTRADITION

Zusammenfassung

Der sogenannte Bologna Prozess rief europaweit eine gewisse „Kulturrevolution" der Curricula an juristischen Fakultäten hervor. Das hatte wiederum seine Konsequenzen in Bezug auf die Stellung der rechtsgeschichtlichen Studienfächer. Die daraus ersichtliche Tendenz, dass allem Berufsbezogenen und Fachlichen Vorrang gegeben wird, konfrontierte die Bologna Curricula mit dem hergebrachten Ausbildungsmodell. Der übermäßige Positivismus, die Reduzierung auf Spezialisierung so wie der vulgäre Utilitarismus wurden in den Vordergrund gestellt. Die sogenannten Fähigkeiten (skills) und die praktischen Kenntnisse werden als vorrangig gesehen, und zwar sehr oft auf Kosten eines gründlichen Allgemeinwissens und Rechtsverständnisses, einer breiten rechtswissenschaftlichen Grundlage und der allgemeinen juristischen Ausbildung. Die Beibehaltung der Rechtsgeschichte in Curricula ist notwendig, damit die Grundwerte der juristischen Ausbildung erhalten bleiben. Im Folgenden soll gezeigt werden, auf welche Art und Weise dieses Ziel erreicht werden kann.

Eine Lösung des oben genannten Problems setzt inter alia auch eine Neudefinierung der Studienfächer voraus. Deshalb wurde an der Juristischen Fakultät der Universität Belgrad das ehemalige und von sozialistischen Curricula geerbte Studienfach Allgemeine Staats und Rechtsgeschichte zunächst durch Allgemeine Rechtsgeschichte und dann, in einem zweiten Schritt, durch Vergleichende Rechtstradition ersetzt. Es handelt sich nicht nur um eine terminologische Angelegenheit. Die Gründe dafür sind sowohl pragmatisch (Studienfächer mit ähnlicher Bezeichnung und Bestimmung existieren auch an anderen Universitäten der Welt) als auch theoretisch (Notwendigkeit einer Verflechtung der Rechtsgeschichte und des vergleichenden Rechts, worauf schon Kaser, Watson, Glenn, Zimmermann u.a. hingewiesen haben) und pädagogisch (Vermittlung anwendbarer Kenntnisse an Studierende). Eine solche Neudefinierung des Studienfaches hat wenigstens zwei Folgen in Bezug auf den In

halt: Einerseits wird der gewissermaßen spekulative Standpunkt der „allgemeinen (Rechts)Geschichte“ (Weltgeschichte) zu Gunsten eines eher neutralen und theore tisch nicht so anspruchsvollen vergleichenden Ansatzes verlassen. Andererseits wird der Schwerpunkt von der Geschichte, die einen vollendeten Prozess bedeutet, auf die Tradition verlegt, die ihrerseits die Existenz lebender Spuren der früheren Rechtsent wicklung voraussetzt. Ein auf diese Art und Weise definiertes Studienfach ist nicht nur für das Verständnis des geltenden Rechts, sondern auch für die Rechtsbildung von Bedeutung. Es erleichtert das Verständnis des Rechts in einem breiteren Zusam menhang der legal transplants, der Rechtsdiffusion und Rechtsharmonisierung, der Wechselwirkungen verschiedener Rechtssysteme und ihrer Dynamik, da wir uns des Umstands bewusst sind, dass die Zeiten der autonomen und geschlossenen nationa len Rechtssysteme vorbei sind.

Diese Änderung spiegelt sich auch in einer neuen Unterrichtsmethode wider, der Clinical Legal History. Diese Methode bedeutet einen Übergang zum interaktiven Lernen. Die Studierenden nehmen im Rahmen des Unterrichts an sogenannten Rol lenspielen teil, wobei diese Rollenspiele auf realen Fällen aus der Geschichte beru hen. Diese Methode ist auf alle rechtsgeschichtlichen Fächer anwendbar. Die Simu lation von Gerichtsverfahren auf Grund von hergebrachten historischen Quellen (z.B. des alten Athens oder Roms) ermöglicht den Studierenden, ihr Rechtsverständnis und ihre Fantasie sowie ihre rhetorischen Fähigkeiten zu entwickeln, sich entsprechende Rechtsterminologie zu eigen zu machen, mehr über das Gerichtsverfahren selbst zu erfahren, die Kunst der Beweisführung und Gerichtsentscheidung zu fördern, Rechts grundsätze, Institutionen, Regeln und Rechtsprechung kennen zu lernen, die nicht nur für altertümliche Gerichtssäle kennzeichnend sind. Durch einen innovativen Plan, Inhalt und eine innovative Unterrichtsmethode im Rahmen dieses Studienfaches könnte ein wirksamer Damm gegen die immer noch verhältnismäßig starke Flut des Positivismus und Pragmatismus errichtet werden.

Schlüsselwörter: *Bologna Prozess. Vergleichendes Recht. Legal Transplants. Rechtsdiffusion. Rechtsstudien. Clinical Legal History*.

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JULIAN ACTION AS A LEGAL AND POLITICAL PHENOMENON IN BOSNIA AND HERZEGOVINA*

Julian action (programme) as a legal and political phenomenon in Bosnia and Herzegovina at the turn of the XX century, which occurred in the areas inhabited by Hungarians living abroad. It mostly referred to the establishment of Hungarian schools, cultural societies, religious schools and state railways. There are two opposing opin ions on its main goals: on the one hand Julian action was perceived as a measure of preserving the identity, culture and language of Hungarians abroad, and on the other it was recognised as the political Hungarisation of Slavs, particularly in Bosnia and Herzegovina. The Hungarian government incorporated Julian action into the concept of the Hungarian state idea, aspiring to unite the Hungarian state from the Carpathian Mountains to the Adriatic Sea, with a single Hungarian national language. In that context Hungarians from Bosnia and Herzegovina were observed by other nations as imposed foreign bodies and conquerors, while for Hungary they were a "fortress" de fending them from South Slavic nations who were uniting in their fight against the Monarchy, as well as a means of spreading the Hungarian influence and opposing Austrian aspirations. Julian action was short lived due to the oncoming World War and failed to accomplish the long term goal in Bosnia and Herzegovina.

Key words: *Julian Action. The Idea of Hungarian National State. Hungarian Cultural Policy. Hungarisation.*

Historiography recognizes Julian action (programme) as a political and legal process conducted by the Hungarian government in the regions where Hungarians lived outside their motherland, especially in Croatia and Slavonia, Erdély and Bosnia and Herzegovina.[1] The term *Julian ac-*

* The paper is an elaborated version of the short communication discussed at the Conference *Internationale Rechtswissenschaftlische Tagung, Forschungen zur Rechtsges chichte in Südosteuropa*, held in Vienna on 9 11 October, 2008.

[1] I. Balta, *Julijanska akcija u Slavoniji i ostalim hrvatskim zemljama te Bosni i Hercegovini početkom 20. stoljeća* [Julian Action in Slavonia and other Croatian lands at

tion comes from the title of an Alliance, named after St. Julian,[2] whose fundamental proclaimed political goal was restoration and revitalisation of cultural activities of the people, but it primarily aimed at "restoration of the united empire within its medieval Hungarian borders."

Julian action was conducted in many different ways since the birth of the so-called Hungarian national idea, most frequently by founding Hungarian schools. Since 1904 (in Slavonia and Croatia), and 1908 (in Bosnia and Herzegovina) the Hungarian educational system was incorporated in the Julian agenda, which was conducted not only by means of establishing Hungarian schools, but also by building the railway, and instituting religious and cultural programmes. Due to the range and particularity of its conduction in the so-called "national defence of Hungarians" as reaction to the alleged endangerment, Julian action was sometimes referred to as "Bosnian action". It was also a part of Hungarian policy against Austrian aspirations.

In interpreting the justification of Julian action in Bosnia and Herzegovina, the Hungarian side excused the actions of the *Association Julián* with concern for its people outside of the borders of the motherland (preservation of identity, culture and language), while the other side (e.g. Croatian, Serbian, or Bosnian) visualized the activities of the *Association* as a political form of de-nationalisation and Hungarisation of the local Slavic population. The Hungarian government included the Julian action in the concept of Hungarian national idea, aspiring to unite Hungarian countries from the Carpathians to the Adriatic sea, where all the nations would be incorporated in the Hungarian nation with Hungarian as the official language. In a way, Julian action can be compared to a similar German legal and political project attempting to realise the great German ideas through *Schulverein* in the countries outside Germany, like in Bosnia and Herzegovina.[3] The Italians had similar organisations such as *Dante Alighieri* in Dalmatia, or *Cyrilo-methodian Association* in Istria.[4]

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the begining of the 20th century], Društvo mađarskih znanstvenika i umjetnika u Hrvatskoj [Society of Hungarian Scientists and Artists in Croatia], O tisak, Zagreb 2006; S. Antoljak, *Hrvatska historiografija*, *Historiografija od 1860. do kraja 19. stoljeća i od 1900. do 1914*. [Croatian Historiography from 1860 to the end 19th century, and from 1900 to 1914], Matica hrvatska, Zagreb 2004, 175 766. Main sources: Magyar Országos Levéltár, Budapest [hereinafter referred to as: MOL], Miniszterelnökségi [prime minister / hungar ian government] [ME], K 26 [Archive fond Archive No.], 1909, XVI, no. 64 792.

[2] R. Ivančević, *Leksikon ikonografije, liturgike i simbolike zapadnog kršćanstva i Uvod u ikonologiju* [Lexicon of Iconography and Symbolism of Western Christianity and Introduction to Iconography]. Kršćanska sadašnjost, Zagreb 1990, 307 308.

[3] G. Töködy, *Össznémet Szövetség* (*Alldeutscher Verband*) *és középeurópai tervei 1890 1918* [General or all German pact and its plans in Middle Europe 1890 1918], Bu dapest 1959.

[4] M. Čop, "Odnarođivanje naše djece u riječkim školama nametanjem talijanskog i mađarskog nastavnog jezika u razdoblju mađarske uprave od 1868. do 1918. godine" [Estrangement of our children in the schools of Rijeka and imposing Italian and Hungar

Julian schools could have been founded, organized and run not only according to the Hungarian law, but also according to the local Law on Education (of Croatia, Slavonia, and Bosnia and Herzegovina). The local law permitted, and even enticed establishing of public and private schools, village schools (Hungarian Julian schools), factory schools (Schools of the Hungarian Railways), religious schools (Hungarian Reformist Schools). All of this has created space for activities of Hungarian Julian action in Slavonia (Croatia), Erdély, and Bosnia and Herzegovina. Hungarian administration was interested in territorial integration and perseverance of the greater state role, while Croatian, Serbian and Muslim (Bosnian) political elite were driven by desire for integration of the disintegrated national teritories.[5] In political and legal context, Hungarians settled in Bosnia and Herzegovina were perceived as imposed alien elements in Bosnia and Herzegovina, and as the bridgehead of Hungarian invasive politics, and for Hungary they have been a fort on the border against South-Slavic union and devastation of the Monarchy.

Hungarian, Bosnian and Croatian archives and museums are important for the studies of the Julian Hungarian action in Bosnia and Herzegovina, as well as their documents about *Julián Association*s, books and articles published in different magazines. There is no special and unique collection for Julian association in the most important archive, the *Magyar Országos Levéltáru* [Hungarian State Archive, hereafter referred to as: HAS], in Budapest. Archive documents are preserved in different collections, mostly in the archive of the Ministry of Internal Affairs,[6] in the archive of the Prime Minister (K-26, ME) and in the memos of the former Hungarian minister of Education and Religion, Kunó Klebersberg (K-27). The sources of special importance are preserved in the *Széchenyi Könyvtár* Budapest [Library Széchenyi], the collection *Boszniai Hirek – Balkáni Tudósitó* [Bosnian News – The Balkan Reporter] 1910–1916, which became available just recently. Some documents relating to the Julian action in Bosnia and Herzegovina can be found in the Archive of Bosnia and Herzegovina in Sarajevo. As for the literature on the topic, there are only a few important research and works by the Hungarian[7] and Croatian authors.[8]

ian languages during the Hungarian rule from 1868 until 1918], *Zbornik Pedagoškog fakulteta u Rijeci*, 5/1983, 41 49.

[5] L. Katus, *A délszláv magyar kapcsolatok története* [Historical relationship between the South Slavs and Hungarians], Janus Pannonius Tudományegyetem, Pécs 1998.

[6] The crown document of great importance is the Statute of the *Association*, which was amended many times, and can be found in MOL under: MOL, K 26. 1913. XVI. 2 285.

[7] P. Petri, *A Julián Egyesület története* [The history of Julian Society ...] *33 év küzdelme és munkája: Julián barát kutató útjának 700 ik évfordulójára*, Budapest 1937; P. Petri, *A Julián Egyesület története* [The history of Julian Society] *alapító tagjainak, választmányának és titkárságának névsora* [Foundation Members of Society], Budapest 1937; Ferenc Bernics, *A Julián akció* [The Julian Action] *egy "magyarságmentö egyesület"*

The Austro-Hungarian Monarchy annexed the two South-Slavic regions in 1908, as a part of the so-called "Bosnian action." Consequently, migration to these regions increased, and especially the migration of Hungarians from Slavonia and south Hungary, and Germans from central Germany, Galicia, Bukovina and south Hungary. The action was initiated as a part of governmental programme "for balanced immigration of Hungarians at the end of the XIX century", with the purpose of organizing the religious and cultural life of Hungarians, and strengthening ~~of~~ national identity of Hungarian immigrants in the USA, Erdély, Croatia, Slavonia, and Bosnia and Herzegovina. The existing Hungarian minority across the Sava river was supported by the government funds.[9] The planned government legal action started in Bosnia and Herzegovina at the end of 1909, according to the sources from the registry of the Council of Ministers,[10] but it did not produce any significant results as too few Hungarians immigrated to Bosnia and Herzegovina for the next thirty years after the occupation. In 1910 there were 62.541 Hungarians in Bosnia and Herzegovina, who immigrated mostly from Croatia, Slavonia and south Hungary,[11] the areas inhabited mainly with the "mixed" population of administration workers, and the financial and merchant enterprises employees, including those of Serbian, Croatian and German origin.[12] A part of agrarian population immigrated sporadically into Slavonia and south Hungary, but when the news spread that the land in Bosnia and Herzegovina ~~is~~ was being sold cheaply with the support of the Government of

tevékenysége Horvátországban és Bosznia Hercegovinában és a jelen 1904 1992., Pan nónia Könyvek, Pécs 1994; B. Makkai, "Végvár vagy hídfő?: "idegenben élő magyarság nemzeti gondozása Horvátországban és Bosznia Hercegovinában 1904 1920." ["National care for Hungarians in the other countries Croatia and Bosnia from 1904 1920."], *Luci dus*, Budapest 2003.

[8] I. Balta, *op. cit.*

[9] B. Makkai, *op. cit.; id.*, A *Slavoniai actio és horvátországi magyarság*: *1904 1920*. [Slavonian action and Hungarians in Croatia], Kandidátusi értekezés, Budapest 1994; M. Szabados, "Julián" iskolák magyar szórványgondozó működése Horvát Szlavónországban 1890 1918 között" ["Julian Schools in Croatia and Slavonia between 1890 and 1918"], *A Hungarológia oktatása*, np. 7 8, Budapest 1990, 7 19.

[10] MOL, K 27, MT jkv., 1910. szept. 29., I., 28

[11] "Magyar Statisztikai Közlemények" ["Hungarian State Statistics"], *Új sorozat*, 64. Kötet, Budapest 1920, 74 75; J. Margitai, *A horvát és szlavónországi magyarok sorsa, nemzeti vedelme és a magyar horvát testveriseg* [The fate of Hungarians in Croatia and Slavonia, national defense and brotherhood of Hungarians and Croatians], Eggenberger féle könyvkereskedés (Károly Rényi), Budapest 1918.

[12] István Burián közös pénzügyminiszter egy 1906 decemberében készített em lékiratában említette, hogy a közigazgatásban alkalmazott osztrák magyar állampolgárok 82 százaléka szláv nemzetiségű [Istvan Burian, the minister of Finance of the Austro Hungarian Empire, provided financial support to 82 Slavonian children.....], MOL, K 26, ME 713. csomó 1553, 1907, XXXVI. tétel.; F. Bernics, *op. cit.*

Bosnia and Herzegovina,[13] the immigrants accepted the risk to settle down in Bosnian Posavina, Sarajevo (the capital of Bosnia) and Mostar (Herzegovina), where the small community of a couple of hundreds Hungarians already had lived. Prior to the annexation, Hungarians had lived in Sarajevo and Mostar, and also in Brčko, Bjeljina, Zavidovići, and Vučjak near Prnjavor.[14]

It might look strange that the Hungarian government after the annexation initiated an expensive action to the benefit of a small number of Hungarians from South-Slavic countries. The explanation can be found in the Austro-Hungarian stance towards the Balkans. Shortage of population in Bosnia and Herzegovina was caused by migrations and by the fall of the Ottoman Empire. This shortage was dealt with by the newly planned politics of the Monarchy, authorised by the Berlin Congress. The preventive occupation and annexation of Bosnia and Herzegovina was motivated by the possible conflict with Serbia, which thought itself to be the Piedmont of the Balkans. Hungarian political administration emphasized the need that the Austro-Hungarian emperor/king proclaims the annexation of Bosnia and Herzegovina as a territory belonging to the former Hungarian kings by their historical right in his declaration of October 5, 1908. Their wishes stayed unfulfilled, and the rivalry of the dualist Monarchy continued in the annexed region. Relations between the two parts of the Monarchy changed to a certain degree when Béni Kállay became Minister of Finances, and the Hungarians succeeded to turn the course of events to their advantage, but in time of István Burián this trend was stopped.

Hungarian political administration and press had a hard time coping with the fact that Austria was perceived as financially advancing, while the press in autonomous Croatia and Slavonia treated the political presence of the Hungarians in Bosnia and Herzegovina to have been unjustified and overexcessive.[15] The old and famous Croatian-Slavonian newspaper *Hrvatsko pravo* [Croatian law] labelled the presence of Hungarians in Bosnia and Herzegovina "collonization."[16] Meanwhile, the official stance of Budapest was that immigration must be enticed and that the region "that once belonged to the Hungarian sacred crown" can not

[13] F. Günther, *Bosznia Szávamellékén,* Bittermann és Fia, Zombor 1910, 24.

[14] *Tájékoztató a Julián Egyesületről:* Hatodik jelentés a Julián Egyesület 1913. évi működéséről, Budapest 1913, 7; J. Margitai, *A horvát szlavónországi magyarok sorsa, nemzeti védelme és a magyar horvát testvériség* [The fate of Hungarians in Croatia and Slavonia, national defense and brotherhood of Hungarians and Croatians], Budapest 1918, 353.

[15] Kitörő lelkesedéssel fogadták az annexiót, remélve, hogy a "horvát" tar tományok egyesítését, Nagy Horvátország létrejöttét. Ez a kétpólusú monarchia trialista átalakításával jelentett volna egyet.

[16] "Magjarska kolonizatorska politika u Bosni" [Hungarian colonization politics in Bosnia], *Hrvatsko Pravo,* 1909. maj 7.

possibly be perceived as foreign land.[17] Béla Széchenyi, president of the *Association Julián*, emphasised: "until we set foundations to Hungarian influence, Austrians surpassed us greatly with their organization in economics and culture."[18] Thallóczy, a well known expert for Balkans and an influential person of that time, concluded that if the Monarchy wants to hold on to the role of super-power after the Ottoman Empire is gone from south-east Europe, it will have to arm itself materially and spiritually. It demands presence of Hungarians due to their historical intermediary role amongst the neighbouring nations,[19] especially in Bosnia and Herzegovina. In spite of wishes and efforts, Julian action remained to be a modest cultural movement in Bosnia and Herzegovina, not so much because of financial reasons, but mostly due to the unfavourable political standing towards Hungarian expansion.

The preparation of the Julian action in Bosnia and Herzegovina was conducted stealthily, and therefore one can not find a lot of information about it in the archives. *Association Julián*[20] was the one responsible for enforcement of Julian action, and it gathered government officials and scholars. Being an operational organization, *Association* was functioning as an assistant of Hungarian Government, and produced significant effect in Slavonia.[21] Therefore, it was unnecessary to develop new organisational layouts, programmes and strategies. It was sufficient to find a few secretive and experienced officials and get in touch with the leaders of

[17] "Húsvét című mell.", *Dunántúl,* 1913. március 23. ["...még a magyar befolyás alapjait sem raktuk le, és az osztrákok úgy gazdasági, mint kulturális szervezkedés terén messze túlszárnyaltak bennünket."] ["before we have even layed the foundations of Hun garian influence, Austra defeated us with their advanced organization in the fields of cul ture and agriculture."]; I. Balta, "Mađarske škole u hrvatsko slavonskim županijama u sustavu julijanske akcije krajem XIX. i početkom XX. stoljeća" ["Hungarian Schools in Croatian Slavonian areas as part of the Julian Action at the end of 19th and beginning of 20th century"], Osijek, *Život i škola*, 6/2001, 30 45.

[18] MOL, K 26, ME 968. cs. 1013, 1911, XVI. t. 560 a(lap)sz(ám); P. Petri, *A Ju lián Egyesület története* [The History of Julian Society...] *33 év küzdelme és munkája: Julián barát kutató útjának 700 ik évfordulójára* [Foundation Members of Society], Bu dapest 1937.

[19] L. Thallóczy, "A Balkán félszigeten beállott változásokkal szemben Magyaror ság részéről követendő eljárás kulturális és gazdaság politikai téren," *Emlékirat.,* M. Kir. Állami Nyomda, Budapest 1912, 1, 3. OSZK K.t., Fol. Hung./2.

[20] "Az 1904 ben létrehozott szervezet valójában a kormány inkognitójának megőrzését biztosító operatív testület volt. Vezetőségében és tiszteleti tagjainak sorában befolyásos politikusokat, főpapokat és közéleti személyiségeket találunk." Béla Széche nyi, Kunó Klebelsberg, Ignác Darányi, Loránd Eötvös, ifj. Gyula Andrássy, István Tisza stb. "A szakminisztériumok munkatársaiból gonddal kiválasztott referensek (statisztiku sok, gazdasági, oktatásügyi és jogi szakértők), valamint a nyelv és helyismerettel rendelkező tanítói kar szervezte, illetve vitte véghez zömmel mindazt, amit a budapesti kormányzat az akció keretében elérni kívánt."

[21] MOL, K 26, ME 854. cs. 1010, 1909, XVI. t.

Hungarian *Julián Association* in Sarajevo, which was founded in 1905, so that the action in Bosnia and Herzegovina, as an integral part of the action in Croatia and Slavonia, could commence.

The first goal that *Association Julián* wanted to achieve in Bosnia and Herzegovina was to create conditions for learning Hungarian language in Sarajevo, where the majority of Hungarian community have lived. This was necessary as, according to the census of 1910, 80,05 % of population in Bosnia and Herzegovina was illiterate, and only 15 % of pupils attended school even though primary education was compulsory.[22] The children attending Hungarian schools in Sarajevo could learn Hungarian language as an elective course in several educational institutions.[23] József Margitái, the foreman of educational system of *Association Julián*, during his visit to the precincts, recommended forming the schools with 2–3 classrooms, and also studying Serbo-Croatian and German language as mandatory course, if possible.[24] Margitái even founded suitable school building in Sarajevo, and by 1910 the Government authorized 14.600 krunas for the proposed expenses.[25] After the Bosnian Government gave them permission, they rented a two storey building in the centre of the town, which will later be known as the *Hungarian House*.[26]

There are some evidences of the way in which the Julian action was imagined: "It would not be amiss for our national interests if we could find few of good friends among Muslims and Serbs."[27] Due to this attitude, the classes in Hungarian school in Sarajevo were carried out in three languages. However, out of 180 students enrolled in this school, only 68 of them were Hungarian, and the rest were Germans, Serbs,

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[22] A. Benisch, "Bosznia Hercegovina iskolaügye" [Schooling in Bosna and Her zegovina], *Magyar Paedagogia,* Budapest 1914, 558

[23] [A Kranken Verein által fenntartott 5 tanítós német iskolában, Mosztárban, Dol nja Tuzlán és Banja Lukán horvát középiskolákban volt elvi lehetőség a magyarnak, mint választható tárgynak a tanulására] [German groups assigned 5 teachers to the schools in Mostar, Lower Tuzla, and Banja Luka...] MOL, K 26, ME 854. cs. 6119, 1910, XVI. 1010. asz.

[24] Margitai (korábban a csáktornyai tanítóképző igazgatója) gyakorlott tanter vkészítő volt. Ő hozta összhangba a magyarországi 6 osztályos elemi iskolai tananyagot az 5 osztályos horvátországi s a boszniai 4 esztendős képzéssel.

[25] MOL, K 26, ME 854. cs. 94., 1910., XVI. t.

[26] MOL, K 26, ME 854. cs. 1764., 1910., XVI. t. 94. asz.

[27] MOL, K 26, ME 854. cs. 1764., 1910., XVI. t. 94. asz. "A szervezés során az egyesület kieszközölte, hogy a bosznia hercegovinai és magyarországi elemi és középiskolákat egyenértékűnek ismerjék el, mivel mint írták: ... kívánatos volna, ha mohamedán és szerb körökben nemzeti ügyünknek jóbarátokat tudnánk szerezni..." ["In the course of Julian Action, the Sociaty managed to introduce the same standards in bos nian and hungarian primary schools and secondary schools. They wrote:... Our national interests would benefit from finding some Muslim and Serbian friends ..."]

Croats, and Spanish Jews.[28] Religious teaching was provided in the Hungarian schools for four religious groups (Catholic, Muslim, Orthodox, and Judaism). Children that lived in remote places could benefit from the organised transport to school and back.[29] But, the contemporary Croatian newspaper *Novi list* (published in Rijeka) did not attribute such a significant interest of other nations for the Hungarian schools to their fine organisation, but to the fact that these schools did not charge any tuition, and that they offered free textbooks and school outfits. Furthermore, they claimed that a great number of Croatian children were bribed into going to school with various allowances.[30] Although the latter claim was mainly incorrect, newspaper articles like these, having been very common in Croatia and Slavonia, showed that Hungarian schools in Bosnia and Herzegovina did not acquire full understanding. The same was confirmed in the report of the vice president of the *Association Julián* in 1910 after his visit. On that occasion Gyula Vargha said that it is unacceptable to subordinate *Association Julián* to one of Hungarian private schools, because that might sound vulgar. Instead he proposed that society of Hungarians in Bosnia and Herzegovina takes up this duty. He also wanted to found another elementary school for the needs of working class in Novo Sarajevo, and a secondary school, explaining that without expanding the cultural action, all of the invested efforts in Bosnia and Herzegovina will be lost.[31]

Association Julián collaborated with the Bosnian authorities in the beginning, along with the sympathy of the Bosnian minister of finances towards the founding of the new elementary schools. But this was a short-lived phenomenon, because, due to the South Slavs problems, and latter the Balkan Wars, numerous anti-Hungarian tendencies occured. And in spite of this, in January of 1911, *Association Julián* requested permission and support from the Bosnian Government for foundation of the two secondary schools in Brčko (signing up 60 students from Brčko area, and 30 more from Slavonia), and in Zavidovići, where they wanted to found a school for the children whose parents worked in *Gergersen* wood corporation based in Budapest.[32]

At the same time Lajos Thallóczy, foreman of the office of the Joint Ministry of Finances, warned Kunóa Klebelsberg, Chief Executive

[28] MOL, K 26, ME 854. cs. 6029, 1910, XVI. t. 94 asz.

[29] A gyermekek iskolába fuvarozása a horvátországi akcióban bevett szolgáltatás nak számított, de Szarajevóban is megszervezték, hiszen a Boszniai akció 1911. évi költ ségvetési tervében is szerepelt ez a kiadási tétel. [Since 1911, students were increasingly learning hungarian language in Croatia and in Sarajevo ...] MOL, K 26, ME 854. cs. 6135, 1910, XVI. t. 94. asz.

[30] Idézem a Szlavóniai Magyar Újság 1910. október 10 i számából.

[31] MOL, K 26, ME 854. cs. 6319, 1910, XVI. t. 94. asz.

[32] MOL, K 26, ME 968. cs. 560. 1911, XVI. t.

Officer of *Association Julián*, that intervention is necessary, after provincial assembly of Bosnia and Herzegovina denied public aid to Hungarian school in Vučjak, so to prevent assimilation.[33] In Mostar, school was supposed to be founded immediately, but the problem was that the Hungarian community in that area was meagre, and forming a heterogeneous school indicated that the *Association Julián* should withhold from any other action. In Bjeljina, after visiting the precincts, 250 Hungarian families entered into register, but because of their "troublesome" Serbian neighbours, they lived in constant national unrest.[34] Closer cooperation between the school and the *Association Julián* was very much welcome because the statutes of the regional government allowed the local associations to found schools, but not to the *Association Julián*.[35] However, anti-Hungarian, and so-called "great-Croatian" press attacked these multinational schools and described them as "centres of Hungarisation".[36] One of the headlines in newspaper *Obzor* (Zagreb) was titled "Anti-Croatian Hungarian Agents".[37] Another article fiercely attacked Hungarian institution in Mostar, accusing it to be a means of constant Hungarization and denationalization of Croatian territories from Rijeka to Mostar and Zemun.[38]

But, the actual situation in Hungarian school in Sarajevo in the spring of 1911 was quite acceptable. In the neighbourhood of the Catholic Church, in the school that acted within the Hungarian house (Magyar Házban), four teachers knew Hungarian, Croatian and German language. They were teaching all together 194 students, 62 Hungarians, 62 Germans, 42 Croats, 1 Serb, 1 Muslim, and 23 Spanish Jews. This educational institution, where the classes were conducted in several languages, and with enviable level of education, many non-Hungarian parents approved of.[39]

Motivated with success of the school in the centre of Sarajevo, *Association Julián* started to prepare foundation of the school in Novo Sarajevo, inhabited with many workers. While drawing up the budget for the year 1912, Government with Szécheny ahead, urged founding of the four

[33] MOL, K 26, ME 968. cs 1013. 1911, XVI. t. 560 asz.

[34] A szerbiai lapok terjesztették el a hírt, hogy 1906. augusztus 31 én felkelés rob bant ki az osztrák magyar elnyomókkal szemben. A hírt egyébként Burián István em lékiratában teljesen alaptalannak nevezte, MOL, K 26, ME 713. cs. 1553. 1907., XXXVI. t.

[35] MOL, K 26, ME 854. cs. 5650. 1911, XVI. t. 560 asz.

[36] MOL, K 26, ME 968. cs. 5420. 1911, XVI. t. 560 asz.

[37] *Obzor,* 1911. szeptember 8.

[38] *Obzor,* 1911. szeptember 15.

[39] MOL, K 26, ME 968. cs. 2044. 1911, XVI. t. 560 asz. Így nevezték a Fischer József által bérbe adott emeletes épületet, ahol a magyar iskola és a különböző közművelődési csoportok működtek, egészen az iskola "túlfejlés" éig. [Fischer Jozsef, the head of Sarajevo Society infuenced the hungarian schools...]

schools justifying it with a large number of those who wanted to enrol.[40] At the end of 1911, after easily gained working licenses for the schools and kindergartens, *Association* leadership believed that the ice was broken. Still, the projection was a bit too optimistic, as barely three months have passed before the fierce anti-Hungarian press campaign began. Anti-Hungarian press attacks did not surprise *Association Julián*. Therefore, two influential members of the regional political society, leaders of the *Association*, József Fisher and Elek Feichtinger, started to re-publish Hungarian newspapers in Bosnia to neutralise ever-growing anti-Hungarian attitude.[41] The potential editor-in-chief was György Bálássa, high school professor of Hungarian language, with "good connections in other media". On the other hand, Thallóczy expressed concern explaining that Bálássa's activity in politics, and teaching in high school at the same time, could lead to an unpleasant outcome.[42] However, Government backed him up on this matter.

On February 19, 1912 huge anti-Hungarian demonstrations occurred, and one of the main figures protested against was György Bálássa. Newspaper *Hrvatski dnevnik* [Croatian Daily][43] wrote about the brutal intervention of the authorities, dishonourable deeds of Hungarian soldiers and "full-blooded Hungarian" Bálássa, which all transformed into several weeks long student riots. Serbian newspaper *Srpska riječ* [Serbian Word] mentioned that Bálássa's life was in danger, and that principal Kudlich (Bálássa's boss) could be personally responsible for it,[44] while, on the other hand, another Serbian newspaper *Narod* [People] supported Bálássa, saying that Gyula Bako, substitute teacher, along with students, was planning to take Bálássa's place.[45] As a consequence of assimilation, Hungarian schools were put on the spot, and statements about Julian action well known in Slavonia, started to appear in Bosnia and Herzegovina.[46] Austrian newspaper *Sarajevo Tagblatt* entered the campaign in April, fiercely attacking *Association Julián*,[47] which defended itself with Elek

[40] Hiszen 1911 őszén a belvárosi iskolában 192, az óvodában 60 gyermek, a kül városi iskolában pedig 80 tanuló, illetve 50 óvodás oktatását, illetve felügyeletét kellett el lássa az alkalmazott 6 tanító és 2 óvónő, MOL, K 26, ME 968. cs. 5777. 1911, XVI. t. 560 asz.

[41] MOL, K 26, ME 968. cs. 6322. 1911, XVI. t. 560 asz.

[42] Thallóczy Balassa megbízását illetően a közvetlen politizálással szemben a szakmai munkát részesítette előnyben, mint írta: "Én sokkal jobbnak tartanám, hogyha György Balassa a szerb horvát bosnyák iskolák számára jó magyar nyelvtant szerkesz tene és ebbeli hivatását teljesítené, amiért bővebben megérdemelné a neki szánt segélyt."

[43] *Hrvatski Dnevnik,* 1912. február 20.

[44] *Srpska Riječ,* 1912. március 5.

[45] *Narod,* 1912. március 27.

[46] *Hrvatska Zajednica,* 1912. március 20.

[47] "Mert Szlavóniából most már jól tudjuk, hogy milyen (magyarosító !) célt szol gál a Julián." [Through Julian action Slavonia should become more Hungarian in its na ture...], *Sarajevoer Tagblatt,* 1912. április 4.

Fichtinger's articles in *Bosniche Post*.[48] *Association Julián* was forced to revise the situation and its points of view, after realising that their biggest support, Hungarian-Muslim friendship, was not more than a mere slogan: "People watch us: whose friendship is not useful, and whose hostility is not harmful."[49]

Nevertheless, the new Hungarian school in Mostar was opened in 1913,[50] and started to work in the fall of 1914.[51] During the first year it enrolled 39 students, and additional 15 students in the second year (37 Catholics, 13 Jewish, 2 Evangelists, and 2 Muslims). In the meanwhile, three more schools were founded in the southeast Bosnia. The first school to be opened in response to the request of the Julian society of Hungarians in Bjeljina was the school for 82 students of the neighbouring Ljeljanča.[52] The school started to work in 1912, and 75 children declared themselves as Hungarians.[53] Hungarian school was also opened in Brčko in September 1912, in a building shared with *Association Julián*.[54] In 1913 the classes also began in the Hungarian school in Vučjak at Prnjavor,[55] while there are no historiographical information on Hungarian school in Zavidović.

Along with their advanced educational system, Hungarians in Bosnia and Herzegovina also founded prominent cultural and social institutions, associations and literary circles. The most famous one was the Association of Hungarians in Sarajevo, which was founded spontaneously in 1905, well before the Julian action began.[56] The Association changed its

[48] "A közlemény felrótta a német nyelvű lapnak, hogy miért vonja kétségbe mag yar pénzen szervezett iskolák létjogosultságát, miközben a két tartományban 13 német tannyelvű iskola háborítatlanul működik, köztük a Franz Joseffeld i, a tartományi ko rmány pénzügyi támogatását is élvezve" [Hungarians must be financialy stronger, Ger mans have 13 teachers in some places, for example in Franz Joseffeld..."], *Bosnische Post,* 1912. április 30.

[49] MOL, K 26, ME 1120. cs. 160. 1913, XVI/a. t.

[50] "Az egyesület volt[!] tanfelügyelője tudtunk és beleegyezésünk nélkül ígéretet tett a Mosztári Magyar Kultúregyesületnek az iránt, hogy Mosztárban is szervezzünk pol gári iskolai tanfolyamot, s így (...) kénytelenek voltunk Mostarban is kísérletet tenni." állt az Julián Egyesület jelentésében] [Hungarian cultural group in Mostar infuences the state schools, and Mostar itself, through the Julian society...], MOL, K 26, ME 1185. cs. 3580. 1913, XVI./a. t. 3137 asz.

[51] Az intézménybe 29 diák iratkozott. MOL, K 26, ME 1185. cs. 7439. 1913, XVI/a. t. 3137 asz.

[52] MOL, K 26, ME 968. cs. 3224., 1911., XVI. t. 560 asz.

[53] MOL, K 26, ME 968. cs. 7707., 1912., XVI. t. 84 asz.

[54] MOL, K 26, ME 968. cs. 3772., 1913., XVI./a. t.

[55] MOL, K 26, ME 1085. cs. 6961., 1913 XXV./a. t. 832 asz. és 992. cs. 1522. 1914, XVI. t.

[56] MOL, K 26, ME 854. cs. 1010. 1909, XVI. t. Az egyesület társas össze jöveteleket szervezett, közművelődési, jótékonysági, idegenforgalmi és humanitárius tevé kenységet folytatott, és egy könyvtárat is működtetett.

name into the Association of Hungarians in Bosnia and Herzegovina in 1912 out of the practical reasons, so that it could establish the schools in the whole country.[57] The Association of Hungarians in Sarajevo cooperated with the Association of Hungarians in Herzegovina, which was founded in 1910 under a the name of Cultural society of Hungarians in Mostar,[58] and with the Association of Hungarians in Brčko.[59] Development of the Hungarian institutions in Bosnia and Herzegovina ceased with the fall of the Monarchy in 1918.

This is what Béla Makkai had to say on the matters of Julian action in Bosnia and Herzegovina: "Action in Bosnia and Herzegovina represented those Government programmes, which were formed in the beginning of XX century, concerning Hungarians that lived outside of Hungary, in terms of their well being and preventing their assimilation. According to the available historiographical sources, we can ascertain that Julian action in Bosnia and Herzegovina was an extension of such action in Slavonia, which was incited on the same lingual region and with the similar political interests, and supported by the joint financial sources within the societies that were based on the same principles, and equipped with the same human resources... In Croatia, Slavonia and the USA there were about 100.000 Hungarians, but not more than couple of thousands of them in Bosnia and Herzegovina. Such a small number of Hungarians in Bosnia and Herzegovina did not justify initiation of the programme that was so expensive." [60]

The true reasons of Hungarian politics, historically motivated and oriented to increase the influence of Hungary in the Balkans, can be attested in the correspondence of Lajos Thallócy and other leaders of the Julian action. The same motivation was upheld by the Government in Budapest. Other actions, like migration of the Hungarian people accross the rivers of Drava and Sava, was not supported by the Hungarian Gov-

[57] MOL, K 26, ME 968. cs. 1977. 1912, XVI. t. 84 asz.

[58] MOL, K 26, ME 968. cs. 660. 1911, XVI. t. 560 asz. Az egyesület keretei között magyar nyelvtanfolyam, dalárda, tánc és vívótanfolyam és könyvtár is működött.

[59] MOL, K 26, ME 968. cs. 2772. 1913, XVI/a. t.

[60] Költségvetési kimutatásaiban a Julián Egyesület szét sem választotta a két akció tételeit. Margitai a két terület magyar iskoláinak közös tanfelügyelője volt. Mindkét akció kalendáriumát Sándor Ágoston lelkész szerkesztette stb.] [Julian culture must act in dou ble strength ...]; B. Makkai, *A Slavoniai actio és horvátországi magyarság*: *1904 1920*.: Kandidátusi értekezés, Budapest 1994. "A boszniai akció azon kormányprogramok sorába tartozott, amelyeket "az idegenben élő magyarság nemzeti gondozása" címén a határokon túl élő szórványmagyarság beolvadásának meggátolása érdekében indítottak a századelőn. A források ismeretében megállapítható, hogy a boszniai akció a szlavóniai akció szerves folytatásaként bontakozott ki azonos nyelvterületen, sok tekintetben hasonló politikai viszonyok között, közös költségvetési forrásból táplálkozva, egyazon elvek szerint működő szervezeti keretekben és személyi állományi közreműködéssel (lásd: Julián Egyesület). A hasonlóságok és összefonódások ellenére a boszniai akció több szempont ból mégis eltérő fejlődést mutatott."

ernment. The fundamental strategic goal of the Hungarian government was strong Hungarian and German resistance to the South-Slavic separatist tendencies.[61] The most efficient means of keeping the national identity was education in mother tongue, and the Hungarians gained a lot in that respect in Bosnia and Herzegovina, in the ten years of Julian action (1908–1918).[62]

Altogether, Hungarian educational system in Bosnia and Herzegovina consisted of nine institutions,[63] and it was formed by the *Julián Association* and the Minister of Finances, with the help of the Hungarian government and different Hungarian associations. The Regional Government of Bosnia and Herzegovina did not set any obstacles to this action. On the contrary, it had issued the work permits and did not attempt to close down the existing schools. In the eve of the World War I, massive anti-Hungarian demonstrations broke out, and the press attack on Hungarian schools and associations put the survival of the Hungarian schools in danger.[64]

The Julian action in Bosnia and Herzegovina lacked in any coherent financial planning and such deficiency was its major difference comparing to the Julian action in Croatia and Slavonia. The banks represented a rare exception. The only planned and successfully realized economic initiative of the *Julián Association* in Bosnia and Herzegovina was the program of practical education of the craftsmen.[65] Even the most promising part of the Julian action, scholarships for the students, remained inefficient. Regardless of the Hungarian schooling background, Muslims were unable to develop or preserve Hungarian connections in Bosnia and Herzegovina. Julian action in scholarship issues was nothing more than, as Klebelsberg said:[66] "very expensive and infertile cultural-diplomatic effort, which had only that much significance, that today, when we intend to make contacts, we do not have to start from the beginnings of king

[61] "A ...németségnek... éppen az lenne a hivatása, hogy a szlavóniai magyarsággal egyetértve, együtt érezve mindketten védgátul szolgáljanak a mind inkább erősödő délszláv törekvésekkel szemben." írta József Tarkovich egyik 1918 ban kelt levelében, ["The reception of Hungarians in Slavonia, among the South Slavic people, was successful ..." said Jožef Tarković in 1918...], MOL, K 26, ME 1185. cs. 779, 1482. számnál, 1918, XVI. t

[62] MOL, K 26, ME 855, cs. 1004., 1909., XVI. t. és i MOL, K 26, ME 855. cs. 3850. 1910, XVI. t. 3389 asz.

[63] Six elementary schools, one high school and two kindergartens.

[64] Damonja, tartományi képviselőnek a Sarajevoer Tagblatt 1913. szilveszteri számában is közzétett javaslata, [Damonja, a Sarajevo newspaper reporter, on Sylvester day 1913.], MOL, K 26, ME 992. cs. 130. 1914, XVI/a. t..

[65] 1913 ban a Julián Egyesület szervezésében "hazahozott" 64 iparosinasból 20 volt boszniai hercegovinai, [In 1913 Julian society had 64 corporations in the homeland, and 20 in Bosnia and Herzegovina.], MOL, K 26, ME 967. cs. 3592. 1913, XVI. t.

[66] OL, K 26, ME 1185, cs. 4578. 1913, XVI/a. 3137 asz.

Matijas Korvin, but we can start them on foundations of *Bosniai áctio*". According to some contemporary Hungarian authors, *Bosniai áction* of the Hungarian government was oriented towards taking care of Hungarians in the annexed regions and fortifying and expanding the Hungarian influence in Bosnia and Balkans. In spite of their view of the "false accusations of hungarisation," and their conviction that Hungarians were directly affected by assimilation, we would like to call attention to the fact that the results of the Julian action were not lasting. The Julian action was short-lived due to the oncoming World War and it failed to accomplish its long-term goals in Bosnia and Herzegovina.

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DIE JULIANISCHE AKTION ALS RECHTLICH-POLITISCHES PHÄNOMEN IN BOSNIEN UND HERZEGOWINA

Zusammenfassung

Die Julianische Aktion ist ein rechtlich politisches Phänomen in Bosnien und Herzegowina am Ende des 19. und Anfang des 20. Jahrhunderts. Sie war spezifisch für die Gebiete mit ungarischer Bevölkerung außerhalb Ungarns und bezog sich hauptsächlich auf ungarische Schulen, ungarische Kulturgemeinschaften, ungarische Kirchenschulen und auf die staatliche ungarische Eisenbahn. Gegensätzliche Ansich ten über die Rolle der Julianischen Aktion manifestierten sich in der Rechtfertigung ihrer Wirksamkeit in Hinblick auf den Schutz der Identität, der Kultur und der Spra che der Ungarn außerhalb Ungarns beziehungsweise "Madjarisierung" der slawi schen Bevölkerung außerhalb Ungarns, d. h. in Bosnien und Herzegowina. Die un garische Regierung hat die Julianische Aktion in das Konzept der ungarischen Staa tsidee eingeschlossen. Die Idee war ein einheitlicher ungarischer Staat von den Kar paten bis zur Adria, in dem alle Volksgruppen ein Bestandteil der ungarischen Nation werden mit einer einheitlichen ungarischen Staatssprache. In diesem Kontext wurden die bosnisch herzegowinischen Ungarn zu einem aufgedrängten Fremdkörper für Bosnien und Herzegowina, d. h. zu einem "Brückenkopf" der ungarischen Erobe rungspolitik. Für Ungarn waren sie eine Bastion gegen die jugoslawische Vereini gung und die Zerstörung der Monarchie sowie eine Stütze für die Stärkung und Ver breitung des ungarischen Einflusses besonders gegen österreichische Expansionsbe strebungen. In Bosnien und Herzegowina hat die Julianische Aktion kein langfristiges Ziel erreicht und hat sich nicht als dauerhaft erweisen.

Schlüsselwörter: *Julianische Aktion. Ungarische Staatsidee. Kulturpolitik in Bosnien und Herzegowina. Hungarisierung.*

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OFFICIALS SPECIALIZED IN SHARI'AH LAW DURING THE AUSTRO-HUNGARIAN PERIOD IN BOSNIA AND HERZEGOVINA (1878 1918)*

During the Austro Hungarian period in Bosnia and Herzegovina, a number of non Muslim Austro Hungarian officials, as well as Bosnian Muslims themselves, specialized in shari'ah law. Their interest in shari'ah law was motivated by a desire to become acquainted with what formed an integral part of the traditional civilization code of Bosnia and Herzegovina's Muslims. In that way, they correspond exactly to the concept of European orientalists who studied Islamic civilization.

Adalbert Schek, Franjo Kruszelnicki, Mihail Zobkow, Ljudevit Farkaš and Eugen Sladović are among the Austro Hungarian legal practitioners and scholars in Bosnia and Herzegovina who studied shari'ah law, and achieved important results in that field.

Though it may have served the purposes of the occupation, the contribution of Austro Hungarian professionals to the study of shari'ah law cannot be denied. They added to the understanding of shari'ah law from the perspective of the European concept of law, which covers a narrower range of issues than does shari'ah law. Their contribution is particularly marked in the use of a scholarly methodology and in their recognition of and identifying comparisons with similarities between European and shari'ah law. They were merely to confirm the belief among Muslims that orientalists and Islamic jurists have different starting points in their study of shari'ah law. The starting point of orientalists was cultural, economical and political subordination of the Islamic World to the West, while the starting point of the islamic jurists was to secure independancy of the Islamic World through the reform of the Shari'ah law.

Key words: *Shari'ah law. Bosnia and Herzegovina. Muslims.*

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The first shari'ah legal practitioners and scholars who were influenced both by European legal ideology and by late XIX and XX century Islamic modernism, the movement which aspired on one hand to restore the political unity of the Islamic world during the early centuries of Islamic history and, on the other, to combine classic Islamic thought with European modernism, appeared in Bosnia and Herzegovina during the Austro-Hungarian occupation of 1878–1918. The thinkers who had the greatest impact on the Muslims of Bosnia and Herzegovina were, without doubt, Jamaluddin al Afghani (Jamāl al-Dīn al-Afghānī, 1838–1897) and Muhammad Abduh (Muḥammad ʿAbduh, 1849–1905). Following the 1878 Congress of Berlin, at which the European Great Powers gave Austria-Hungary the mandate to occupy and administer Bosnia and Herzegovina after the withdrawal of Ottomans from that territory, Bosnia's Muslims awaited the new occupying power with trepidation, and fears for their identity.

At that time numerous branches of shari'ah law were still not codified in Bosnia and Herzegovina. However, a number of non-Muslim Austro-Hungarian officials, as well as Bosnian Muslim legal practitioners and scholars specialized in shari'ah law. Their interest in shari'ah was motivated by a desire to become acquainted with what forms an integral part of the traditional civilization code of Bosnia and Herzegovina's Muslims. In that way, they corresponded exactly to the concept of European orientalists who studied Islamic civilization for the interests of the European colonial powers which were governing the territories inhabited by the Muslims from the Atlantic to the Pacific (North Africa, the Middle East, the Indian subcontinent and south-east Asia).

Though some orientalists observed Islam and Muslims through the lenses of medieval Christian missionaries and their prejudices, there is no doubt that oriental studies, whatever their original purpose, shed considerable light on the image of the Orient and Islam in the West, and provided the Muslim world with some extremely important works. However, "almost all of them, consciously or unconsciously, were at the service of imperialist advances and the subjugation of the Arab world, and some, like T. E. Lawrence, were even full-blown secret agents".[1]

Some authorities see the orientalists as the forerunners of European hegemonistic policy. Thus Edward Said, a Christian American of Palestinian origin, defines orientalists[2] "as against all 'those' non-Europeans,

[1] M. Hofmann, *Islam kao alternativa* [Islam as the Alternative], Bemust, Saraje vo 1996, 182.

[2] The author (or perhaps the translator into Bosnian of Said's work) slightly mis quotes Said as specifically defining "orientalists" in these terms, whereas Said's text, though clearly adumbrating the "orientalist" mentality, actually refers to " 'us' Europe ans'" in general.

and indeed it can be argued that the major component in European culture is precisely what made that culture hegemonic both in and outside Europe: the idea of European identity as a superior one in comparison with all the non-European peoples and cultures. There is in addition the hegemony of European ideas about the Orient, themselves reiterating European European superiority over Oriental backwardness, usually overriding the possibility that a more independent, or more skeptical, thinker might have had different views on the matter".[3]

There is no doubt that "European colonialists did not conquer Asia and Africa to disseminate their humanist heritage, nor to establish a global tradition of human rights. They sought raw materials and new markets rather than seeking to universalize the values of human dignity. A collateral effect of their conquests was, to use a Hegelian term, *List der Vernunft* ('the cunning of reason'): the dissemination of the European cultural heritage in which human rights are of crucial importance".[4]

Official Austro-Hungarian policy, too, treated Bosnia and Herzegovina as a colonial possession, despite the fact that under the terms of the Treaty of Berlin the country was to remain under Ottoman sovereignty after the occupation. To facilitate the task of administering Bosnia and Herzegovina, therefore, the Austro-Hungarian authorities needed to familiarize themselves with the legal tradition, of which shari'ah law was a part, that had been in force there for more than four hundred years.

[3] E. W. Said, *Orientalism*, Penguin Books, London 1985, 7. "In a quite constant way, Orientalism depends for its strategy on this flexible *positional* superiority, which puts the Westerner in a whole series of possible relationships with the Orient without ever losing him the relative upper hand. And why should it have been otherwise, especially during the period of extraordinary European ascendancy from the late Renaissance to the present? The scientist, the scholar, the missionary, the trader, or the soldier was in, or thought about, the Orient because he *could be there*, or could think about it, with very little resistance on the Orient's part. Under the general heading of knowledge of the Ori ent, and within the umbrella of Western hegemony over the Orient during the period from the end of the eighteenth century, there emerged a complex Orient suitable for study in the academy, for display in the museum, for reconstruction in the colonial office, for theore tical illustration in anthropological, biological, linguistic, racial, and historical theses abo ut mankind and the universe, for instances of economic and sociological theories of deve lopment, revolution, cultural personality, national or religious character", *ibid.*, 7 8.

"Oriental studies world wide are undoubtedly of great scholarly merit, but since they were institutionalized they have been subject to extremely powerful ideological in strumentalization. They have *constantly been in close collusion with colonialism*, and a significant number of orientalist authorities have fostered this kind of methodological approach which defines the Orient as the subject of expertise, *as an object of the hege mony of European culture*" (emphases added E. D.), E. Duraković, "Orijentalistika problemi metodologije i normiranja" [Orientalism problems of metodology and norm], *Znakovi vremena* 9 10/2000, Ibn Sina Institute, Sarajevo 2000, 275.

[4] E. Ihsanoğlu, *et al*., *Zapad i islam ka dijalogu* [The West and islam towards a dialogue], El Kalem Publishing centre of the Rijaset of the Islamic Community of Bo snia and Herzegovina, Sarajevo 2001, 74.

Adalbert Schek, Franjo Kruszelnicki, Mihail Zobkow, Ljudevit Farkaš and Eugen Sladović are among the Austro-Hungarian legal practitioners and scholars in Bosnia and Herzegovina who studied shari'ah law, and achieved important results in that field.

Adalbert Vugrovački Schek was a senior civil servant in the Provincial Government, head of the Justice Department, a Supreme Court judge in Sarajevo and a professor of secular law (which encompassed general civil law, penal law, the legal order of the Austro-Hungarian monarchy and of Bosnia and Herzegovina, the organization of cadastral records, the courts etc.) and shari'ah procedure at the Shari'ah Law school in Sarajevo.

He studied the nature of land ownership in shari'ah law and the way in which it had evolved and been modified in the Ottoman state, comparing it with corresponding institutions in German, Hungarian and European law. What is more, he addressed the problem of translation with respect to the use of appropriate legal terminology. His interpretation of the enforceability of decisions issued by the shari'ah courts in Bosnia and Herzegovina shows his wide knowledge of shari'ah law. His opinion in this regard was sought in cases where Muslim women left their husbands without the husband's approval.

One of the demands of the Muslim movement for autonomy was that "decisions of the shari'ah court become legally binding".[5] This demand was reiterated before the Provincial Government at the time when the Muslim movement for autonomy already started fading out. In the statement of reasons for his demand, the government representative, Adalbert Schek, pointed out that there were no instances of review of decisions by the shari'ah court except when the qadis had not been unanimous in their interpretation of the shari'ah provisions. This was prompted by a case when a district court was uncertain whether to enforce a decision of the shari'ah court, since it was not certain what was required under the terms of the ruling which stated that the defendant, the wife, was required to return to her husband "according to the effects of the shari'ah".

In these circumstances, a request for clarification asking to provide a shari'ah interpretation of the disputed issues had to be submitted to the Supreme Shari'ah Court via Provincial Government. Shortly after receiving such request, the Supreme Shari'ah Court gave its interpretation. Any woman "who without true cause leaves her husband and does not wish voluntarily to return, and whose husband files a complaint against her on that account before the shari'ah court, shall be warned according to the provisions of the shari'ah to return to her husband, and in the event of

[5] *Spisi islamskoga naroda Bosne i Hercegovine u stvari vjerskoprosvjetnog ure đenja i samouprave* [The scripts of the islamic people of Bosnia and Herzegovina on the system of religious education and selfgoverment], Rad, Novi Sad 1902, 137.

failure to comply with the order, shall lose her right to maintenance and shall be declared a fugitive".[6] The explanation provided by the Supreme Shari'ah Court went on to note that such a woman cannot be forced to return to her husband if she is living with relatives or those with whom she cannot enter into marriage (*mahrem* – E.D.). However if such a woman is living with a person with whom she could enter into marriage ("has become involved with or met with another's husband, which could raise doubts as to unseemly behaviour"), in that case the shari'ah court could sentence her to *ta'zir*.[7]

In the specific case, the civil court had jurisdiction over the execution of the punishment, since the woman had left her lawful husband and started living with another person [a man with whom she could enter into marriage, i.e. to whom she was not related – E.D.], which constituted "reasonable grounds for suspecting that she intended to marry him or to live in an adulterous relationship with him". In such cases, the lawful husband would normally file a complaint with the criminal court, and it was therefore only logical that the shari'ah court had no jurisdiction. Even if the complaint was filed with the shari'ah court, such court was bound to forward it to the competent criminal court *ex officio*.

Adalbert Schek, representing the Provincial Government, said in his explanation of the opinion of the Supreme Shari'ah Court in Sarajevo that civil proceedings did not pertain to matrimonial law, and that the civil courts had jurisdiction only over the issues arising out of the property aspects of matrimonial law. Thus, if the civil court had no jurisdiction over the personal aspects of matrimonial law, it could not enforce the decisions rendered by shari'ah courts if they pertained to the personal rights and duties arising from marriage.

In Adalbert Schek's view, all this was strictly a shari'ah affair, and the civil courts should refrain from acting in such matters. As a result, the 1883 Shari'ah Courts Ordinance was seen as "simply requiring the civil courts to enforce shari'ah judgement, [and] the law simply requires the shari'ah courts to include an enforcement clause, while the civil court need not examine the contents and pertinence of the requirement, but [shall] simply enforce the ruling, regardless of whether it derives from marital or family law".[8]

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[6] N. Šehić, *Autonomni pokret Muslimana za vrijeme austrougarske uprave u Bosni i Hercegovini* [The Muslim movement for autonomy during the Austro Hungarian administration in Bosnia and Herzegovina], Svjetlost, Sarajevo 1980, 276.

[7] *Ta'zir*, in shari'ah law, is a punishment administered at the discretion of the judge, as opposed to the fixed punishments known as *ḥadd*. For such a woman, it usually consisted of either corporal punishment or house arrest, "setting apart from [their] bed".

[8] Archives of Bosnia and Herzegovina, Sarajevo (ABH), Muslim Conference, 1908. Minutes of sessions of negotations between the Provincial Government and representatives of the Muslim movement for autonomy, Minutes of 2nd session, 11 January 1908, 4.

The notes from Adalbert Schek's lectures were used in the Shari'ah Law school to teach state law, penal law, civil law and the organziation and functioning of the shari'ah courts, or shari'ah procedure. Schek taught these subjects as a freelance lecturer from 1889 to 1907. The Gazi Husrev-bey Library contains a lithograph copy of a textbook by Schek entitled *The Structure and Jurisdiction of Shari'ah Courts*, published in Sarajevo in 1905.

Eugen Sladović Sladoevički was born in Jelsa on the island of Hvar in 1882, and graduated from law school in Zagreb in 1906. He then joined the civil service in Bosnia and Herzegovina during the Austro-Hungarian occupation. After World War I he returned to Zagreb, where he worked until 1945 as a professor and as dean and rector of the School of Economics and Commerce. While working in Bosnia and Herzegovina he was under-secretary for religious affairs and education in the Provincial Government in Sarajevo. He is the author of an important work entitled *Manual of Law and Ordinances for the Civil Service in Bosnia and Herzegovina*, which was published in 1915.

In his preface to the manual, Sladović noted that "everyone certainly noticed the lack of a handbook which would comprise all the laws and ordinances currently in force". The manual includes numerous aspects of shari'ah law, and was an important reference work for shari'ah judges during the Austro-Hungarian occupation of Bosnia and Herzegovina.

Sladović wrote many other books, monographs and textbooks. His *Administrative Studies and Administrative Law of Bosnia and Herzegovina* and *The Subjective Public Rights of Citizens as Governed by Law in Both States of the Austro-Hungarian Monarchy* were published in 1916 and 1918 in Sarajevo, and were both used as textbooks in the Shari'ah Law school. After World War I, his *Islamic Law in Bosnia and Herzegovina* was published in Belgrade in 1926. He also wrote more than three hundred articles on almost every branch of law.[9]

Of particular importance for the legal history of Bosnia and Herzegovina is his *Matrimonial Law*, published in Zagreb in 1925, in which he elucidates Muslim matrimonial law and the customs pertaining to this branch of the law among the Muslims of Bosnia and Herzegovina. He clearly perceives the difference between the status of shari'ah judges and that of the priesthood of other religions in the matter of the marriage ceremony, along with the right of shari'ah judges (qadis) to intervene in the case of marriages between Muslim men and "people of the Book" (the

[9] For more see: *Pravni fakultet u Zagrebu* [Faculty of Law in Zagreb] *1776 1996* (ed. by Ž. Pavić), vol. IV, Faculty of Law, Zagreb 1996, 591 613.

term used to denote the followers of the revealed religions, in this instance non-Muslims – Christian or Jewish women, – E. D.).[10] He seems to condemn the common practice in Bosnia and Herzegovina of having imams (religious officials) rather than qadis marry Muslims on the basis of an *izunnama* (marriage licence). "In 1919, however, since this practice had led to various predicaments, it was decreed that henceforth qadis may not issue *izunnama*s but must themselves perform the marriage ceremony, as a rule in a shari'ah court. The marriage ceremony may be performed if the parties wish on certain reasonable grounds before an emissary of the shari'ah court or any other place outside the shari'ah court".[11] He also stigmatizes the practice of certain Muslims, residing temporarily away from home, who entered without impediment into further marriages, even though they were already married. Such practice represented the undermining of the shari'ah provision "according to which it is *haram* [prohibited] to enter into a marriage if the *nakih* (bridegroom) is not in a position to perform his marital duties or is unable to maintain his wife". The Supreme Shari'ah Court reacted to this abuse in a circular numbered 480/šer. dated December 4, 1916, requiring qadis not to perform such marriage ceremonies.[12] Sladović made a very pertinent observation that "in the way in which it is performed, a shari'ah marriage ceremony is a purely civil marriage, except that it is entered into before a shari'ah judge and not an administrative body".[13] He ends his work by discussing the issue of polygamy in shari'ah law, citing the provisions of the law in the Republic of Turkey according to which monogamy is the rule and polygamy constitutes an exception permissible only if the bridegroom provides evi-

[10] "In conformity with the distinctive featurs of the religious institutions of Islam and in the light of the state organization of Bosnia and Herzegovina's shari'ah courts, the position of a qadi in regard to religious affairs is not the same as that of the priesthood of other religions to their religious affairs. According to Article 140 of the Islamic Autonomy statute of Bosnia and Herzegovina of April 15, 1909 shari'ah courts cannot be regarded solely as provincial (state) authorities, but the provisions of Article 109 of the Constitution of June 28, 1921 designates them as organs of state", E. Sladović, *Ženidbeno pravo* [Ma trimonial Law], Narodne novine, Zagreb 1925, 43.

[11] The last ordinance issued by the Supreme Shari'ah Court, no. 101/šer. Of 20 February 1919, was issued with the agreement of the presidency of the Ulema Council and the approval of the Government of the National Council of the Kingdom of Serbs, Croats and Slovenes for Bosnia and Herzegovina in Sarajevo, *ibid*, 83.

[12] *Ibid*, 84.

[13] *Ibid*, 85. "The husband must bear all the burdens of married life, and the wife is not required to make any contribution. According to the shari'ah, the wife is not requi red to work in the home (prepare meals, wash, clean) or on the land, and in particular is not required to breast feed her children. All these form part of the wife's moral duties only, not her legal obligations. Under shari'ah law, women enjoy an exceptionally [privi leged] position, except that it must be secured, which can be achieved by a nuptial con tract, which will also secure her future economic position in the event of *ṭalāq* [divorce] or the death of her husband", *ibid*, 85 86.

dence in court that it is essential that he takes another wife and if the first wife agrees to such marriage.

Discussing inheritance law in his *Islamic Law in Bosnia and Herzegovina,* Sladović takes the view that in shari'ah law, inheritance law does not fall within material law but is, rather, the legal basis (titulus) for the acquisition of property rights, and that the position of shari'ah law is more equitable than that of Austrian private law.[14]

Interestingly, on November 11, 1913 the Provincial Government responded to a proposal by the teaching staff of the Law School in Zagreb by forming a Chair of Bosnian Law. The subject was first taught in the academic year 1916/1917 by Ljudevit Farkaš, who continued to teach it until 1921, when he resigned from his post as professor. From then until 1930 the subject was taught by Eugen Sladović. The curriculum for Bosnian law included legal history of Bosnia and Herzegovina, agrarian law, agrarian legal relations in Bosnia and Herzegovina and family law in Bosnia and Herzegovina. At a session held on July 9, 1930 the faculty members of the Law School in Zagreb abolished the subject with the explanation that there was "no need for [these] lectures".[15] Sladović also published about 270 articles, treatises and reviews in various periodicals dealing with shari'ah law, patent law, the law of cheques, reversionary law, bankruptcy law, canon law, matrimonial law and the customary law.

Mihajlo Zobkow (originally Zobkiv), chair of the Senate of the Supreme Court in Sarajevo and long-time professor of Roman and civil law at the Law School in Zagreb, was born in 1864 in Lipica Gorna in Galicia (Ukraine). He studied law in Vienna and Berlin, and gained his doctorate in Vienna. Unable to make a university career for himself in his native land for political reasons, he remained in Vienna, where he was a judge and lawyer, until 1891, when he moved to Sarajevo as a senior court official in the Austro-Hungarian administration. He spent one academic year, 1907/08, teaching at the Law School in Sofia, where he taught Bulgarian civil law. He completed his judicial career as President of the Supreme Court in Sarajevo, where he died in 1928.[16]

Apart from several dozen articles dealing with Roman and civil law, Zobkow also published a number of papers on shari'ah legal issues, such as *The Alienation of mirija*[17] *Landholdings in Bosnia and Herzegovina*[18],

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[14] E. Sladović, *Islamsko pravo u Bosni i Hercegovini* [Islamic Law in Bosnia and Herzegovina], Belgrade 1926, 110.

[15] *Faculty of Law in Zagreb,* Vol. I, 404, and Vol. II, 330.

[16] *Ibid*, Vol. II, 25 and 232.

[17] *Mirija* [*miri*] landholdings were government by separate legal provisions intro duced by the Ottoman Land Law, the *Erazi kanunnamesi* or Ramadan Law, after the month of Ramadan 1274 AH (1858) when it was enacted, under the terms of which these lands belonged to the state and the holder had only limited rights of disposal.

[18] M. Zobkow, "Alijenacija mirijskih zemljišta u Bosni i Hercegovini" [The Alie nation of mirija Landholdings in Bosnia and Herzegovina], *Mjesečnik* 3/1909, 201 216

The Application of the Austrian General Civil Code in Bosnia and Herzegovina[19], *Shari'ah Courts*[20] and *The Right of Option to Purchase/First Refusal in Ottoman Bosnian Legislation*.[21]

Explaining his reasons for publishing *The Application of the Austrian General Civil Code in Bosnia and Herzegovina*, Zobkow notes: "I see the need to publish this paper in Croatian or Serbian, *even though it may appear that Ottoman legislation will soon be of no more than historical relevance to Bosnia and Herzegovina* [emphasis added – E. D.]. On the other hand, however, the literature on Bosnian 'local' law is extremely limited, while German writings are inaccessible on account of their short print runs".[22] In this article he deals mainly with the differences between the *Mecelle* (Ottoman Civil Code) and the Austrian General Civil Code and the practice of the courts in Bosnia and Herzegovina in regard to *erazi miri*, *mülk*,[23] joint ownership, inheritance law, the statute of limitations and so on. In his *Pravo preče kupnje u otomansko-bosanskom zakonodavstvu*, Zobkow concludes that Bosnian legislation had retained cases of the legal right of option or first refusal to purchase as part of material law in Ottoman legislation. The right is treated differently in regard to *mülk* and *erazi miri* landholdings. In Ottoman law, the former is known as the right of *şufe – şefilık*, and the latter the right of precedence or first refusal (*hakkı ruchan*).

Ljudevit Farkaš was born in 1856 in Donje Vidovac in Međumurje. He attended grammar school in Varaždin and Zagreb, and studied law in Zagreb and Budapest. After completing law school he served as a judge in Ivanac and Osijek. He came to Bosnia and Herzegovina in 1879, where he served as a judge in Visoko and Bosanska Kostajnica before gaining a position in the civil service for the Provincial Government in Sarajevo in 1881. This was followed by terms as district prefect in Ljubuški and Jajce, and then as court adviser in the district courts of Travnik, Tu-

and 4/1909, 343 361.

[19] M. Zobkow, "Primjenjivanje Austrijskog općeg građanskog zakonika u Bosni i Hercegovini" [The Application of the Austrian General Civil Code in Bosnia and Herzego vina], *Mjesečnik* 8/1921, 313 334. This latter was originally published in German with the title *Die Anwendung des allgemeinen bürgerlichen Gesetzbuchen in Bosnien und der Hercegowina in Festschrift zur Jahrhundertsfeier des allgemeinen bürgerlichen Gesetzbu chen*, vol. I, Vienna, 1911.

[20] M. Zobkow, "Šerijatski sudovi [Shari'ah Courts]", *Arhiv za pravne i društvene nauke* 1/1923, 49 59.

[21] M. Zobkow, "Pravo preče kupnje u otomansko bosanskom zakonodavstvu" [The Right of Option to Purchase/First Refusal in Ottoman Bosnian Legislation], *Mjesečnik* 5/1926, 196 203 and 6/1926, 176 187.

[22] M. Zobkow, *Primjenjivanje austrijskog općeg građanskog zakonika u Bosni i Hercegovini* [The Application of the Austrian General Civil Code in Bosnia and Herzegovi na], Grafičko nakladni zavod d. d, Zagreb 1921, 3.

[23] In the Ottoman Empire, private property was known as *mülk* or *erazi memluke*, by contrast with *erazi miri* as state owned property.

zla and Mostar. In late 1896 he became senior court adviser, and in 1913 chair of the senate of the Supreme Court of Bosnia and Herzegovina. Not long after this, in 1915, he was pensioned off for political reasons, so he moved to Zagreb where he taught Bosnian law at the Law School until 1921, when he returned to Sarajevo and became president of the Supreme Court. He held this post until 1926, when he was finally retired at the age of 70. He died in Zagreb in 1944.[24]

He began writing and taking an interest in jurisprudence at a very early age. His main sphere of interest was Bosnian law and he published the following articles:

1. *The Law of 7 Ramadan 1274 (1858) on Landholdings (with the laws and ordinances closely associated with it);* [25]
2. *Material and Formal Law on Matters of Inheritance in Bosnia and Herzegovina. With 1 chart;*[26]
3. *Serf-based Agrarian Relations and Agrarian Legislation in Bosnia and Herzegovina;* [27]
4. *On Waqfs and the Management of Waqf Property in Bosnia and Herzegovina;*[28]
5. *Waqf Real Estate in Bosnia and Herzegovina. Is the Cadastral Registration of Real Estate of Waqf Character under Art. 24 of the Cadastre Act of Bosnia and Herzegovina Valid in the Light of the Nature and Character of Waqfs?*[29]

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[24] *Faculty of Law in Zagreb,* Vol. III, 111

[25] Lj. Farkaš, "*Zakon* od 7. ramazana 1274 (1858) o zemljišnom posjedu (Sa za koni i naredbami, stojećimi s njime u tiesnom savezu) [The Law of 7 Ramadan 1274 (1858) on Landholdings (with the laws and ordinances closely associated with it)], *Mje sečnik* 4/1891, 177 184, 5/1891, 227 233, 6/1891, 274 283, 7/1891, 324 331, 8/1891, 376 385, 9/1891, 431 442 and 10/1891, 483 489.

[26] Lj. Farkaš, "Materijalno i formalno pravo u ostavinskim stvarima u Bosni i Hercegovini. Sa 1 tabel. šemom" [Material and Formal Law on Matters of Inheritance in Bosnia and Herzegovina. With 1 chart], *Mjesečnik* 1/1910, 22 32, 2/1910, 127 137, 3/1910, 205 216, 4/1910, 325 342, 5/1910, 401 416, 6/1910, 515 527 and 7/1910, 593 604.

[27] Lj. Farkaš, "Kmetovski agrarni odnošaj i agrarno zakonodavstvo u Bosni i Her cegovini" [Serf based Agrarian Relations and Agrarian Legislation in Bosnia and Herze govina], *Obzor* 1/1920, 3 7 and 13/1920, 1 2.

[28] Lj. Farkaš, "O vakufima i o uređenju uprave vakufskih dobara u Bosni i Herce govini" [On Waqfs and the Management of Waqf Property in Bosnia and Herzegovina], *Arhiv za pravne i društvene nauke* 4/1928, 271 283 and 5/1928, 352 369.

[29] Lj. Farkaš, "Vakuf nepokretnosti u Bosni i Hercegovini. da li je gruntovnički upis nekretnina vakufskog svojstva, po članu 24. Gruntovnog zakona za Bosnu i Hercego vinu, ispravan s obzirom na prirodu i svojstvo vakufa?" [Waqf Real Estate in Bosnia and Herzegovina. Is the Cadastral Registration of Real Estate of Waqf Character under Art. 24

6. *Landholding Legislation in Bosnia and Herzegovina;*[30]
7. *The Inheritance Rights of Muslims in Bosnia and Herzegovina* (in association with Jusuf Zija ef. Midžić),[31] and
8. *The Origins and Development of Serf-Based Agrarian Relations and Agrarian Legislation in Bosnia and Herzegovina*.[32]

Ljudevit Farkaš's deep knowledge and erudition rapidly earned him a considerable reputation among lawyers in Bosnia and Herzegovina. He was particularly well versed in civil law and Bosnian law. This earned him his promotion to the post of president of the Supreme Court in Sarajevo. He was an almost permanent member of the commission of the Provincial Government's Justice Department in Sarajevo, and was involved in drafting of all the laws and ordinances issued by the Provincial Government. In 1908 the Austro-Hungarian authorities decorated him with the Order of the Iron Crown Third Degree in recognition of his assiduity. As a legal practitioner, he did a great deal to promote the law in Bosnia and Herzegovina.

Franjo Kruszelnicki was a senior court adviser to the Supreme Court in Sarajevo. He also wrote a paper on shari'ah procedural law entitled *Proceedings in the Shari'ah Courts in Bosnia and Herzegovina*"[33] and edited the *Penal Code on Crimes and Misdemeanours for Bosnia and Herzegovina with the new Penal Code and Usury Law* "[34] and *Rules of Civil Proceedings for Bosnia and Herzegovina with the new Rules of Civil Proceedings and other Ordinances and Directives for the Courts"*.[35] In his introduction

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of the Cadastre Act of Bosnia and Herzegovina Valid in the Light of the Nature and Cha racter of Waqfs?], *Arhiv za pravne i društvene nauke* 5 6/1925, 321 333.

[30] Lj. Farkaš, "Zemljišno zakonodavstvo u Bosni i Hercegovini" [Landholding Legislation in Bosnia and Herzegovina], *Arhiv za pravne i društvene nauke* 3/1925, 169 182, 4/1925, 266 283 and 5 6/1925, 388 399.

[31] Lj. Farkaš, "Nasljedno pravo Muslimana u Bosni i Hercegovini" [The Inheri tance Rights of Muslims in Bosnia and Herzegovina] (in association with Jusuf Zija ef. Midžić), *Mjesečnik* 7 8/1929, 330 365.

[32] Lj. Farkaš, "Postanak i razvitak kmetovskih agrarnih odnošaja i agrarno zako nodavstvo u Bosni i Hercegovini" [The Origins and Development of Serf Based Agrarian Relations and Agrarian Legislation in Bosnia and Herzegovina], *Mjesečnik* 11 12/1929, 465 503.

[33] F. Krusczelnicki, *Postupak pred šerijatskim sudovima u Bosni i Hercegovini* [Pro ceedings in the Shari'ah Courts in Bosnia and Herzegovina], (in association with Salih eff. Mutapčić, supreme shari'ah judge), Dionička tiskara, Zagreb 1917.

[34] *Kazneni zakon o zločinstvima i prestupcima za Bosnu i Hercegovinu sa objema novelama kaznenom zakonu i sa zakonom o lihvi* [Penal Code on Crimes and Misdemea nours for Bosnia and Herzegovina with the new Penal Code and Usury Law], ed. Franjo pl. Kruszelnicki, senior court adviser to the Supreme Court in Sarajevo, Knjižara Leon Finzi, Sarajevo 1914.

[35] *Građanski parnični postupnik za Bosnu i Hercegovinu s novelom gr. p. p. i drugim naredbama i upustvima za sudove* [Rules of Civil Proceedings for Bosnia and

to *Proceedings in the Shari'ah Courts in Bosnia and Herzegovina*, Kruszelnicki noted that "these regulations do not govern the entire scope of proceedings in the shari'ah courts". He held the view that until the time when the lacunae would be filled by legislation, they should be filled by the regulations governing proceedings in the ordinary civil courts, since the purpose of both shari'ah and civil courts was to protect "rights that are endangered or have been violated. As a result, nothing could be more natural, in cases where changing circumstances have led to lacunae in the legislation, than to apply the provisions of civil proceedings, which have the same purpose as that of proceedings in the shari'ah courts".[36]

Even though shari'ah is essentially religious law, unlike European law, which is secular in nature, the contribution of Austro-Hungarian experts in shari'ah law, though it may have served the purposes of the occupation, is indisputable. They added to the understanding of shari'ah law from the perspective of the European concept of law, which covers a narrower range of issues than does shari'ah law. Their contribution is particularly marked in the use of a scholarly methodology and in their recognition of and identifying comparisons with similarities between European and shari'ah law. They were merely to confirm the belief among Muslims that orientalists and Islamic jurists have different starting-points in their study of shari'ah law. The starting-point of orientalists was cultural, economical and political subordination of the Islamic World to the West, while the starting-point of the islamic jurists was to secure independancy of the Islamic World through the reform of the Shari'ah law.

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BEAMTE DER ÖSTERREICHISCH-UNGARISCHEN VERWALTUNG IN BOSNIEN UND HERZEGOWINA 1878 1918 EXPERTEN FÜR DAS SCHARIA-RECHT

Zusammenfassung

Mit dem Scharia Recht befassen sich während der österreichisch ungarischen Verwaltung in Bosnien und Herzegowina hauptsächlich bosnisch herzegowinische Autoren, die der muslimischen Gemeinde angehören. Neben ihnen befassen sich mit

Herzegovina with the new Rules of Civil Proceedings and other Ordinances and Directi ves for the Courts], ed. Franjo pl. Kruszelnicki, Knjižara I. Finzi, Sarajevo 1918.

[36] F. Kruszelnicki, (1918), 3.

der Scharia auch österreichisch ungarische Beamte, Nichtmuslime. Deren Interesse ist durch ihr verstärktes Wissen über das Scharia Recht, das als ein fester Bestandteil des universellen Zivilisations Codes der bosnisch herzegowinischen Muslime ange sehen wird, motiviert. Sie entsprechen vollständig dem Profil europäischer Orienta listen, die sich mit der islamischen Zivilisation befasst haben.

Von den österreichisch ungarischen Juristen in Bosnien und Herzegowina, die Interesse am Scharia Recht gezeigt haben, sind besonders Adalbert Schek, Fran jo Kruszelnicki, Mihail Zobkow, Ljudevit Farkaš und Eugen Sladović zu nennen.

Der Beitrag der österreichisch ungarischen Experten zur Wissenschaft des Scharia Rechts ist allseits anerkannt. Sie trugen durch ihr europäisches Rechtskon zept zum Verständnis des Scharia Rechts bei. Dieses umfasst einen deutlich weniger umfangreichen Anwendungsbereich als das Rechtskonzept der Scharia. Der Beitrag der österreichisch ungarischen Rechtswissenschaftler zur Scharia Rechtswissen schaft in Bosnien und Herzegowina ist, bezüglich der Nutzung wissenschaftlicher Methoden und Vergleichung ähnlicher Rechtsinstitute des europäischen und des Scharia Rechts, besonders herausragend. Sie bestätigen das Verständis der Muslime, dass Orientalisten und islamische Juristen in den Studien der Scharia zwei unter schiedliche Ziele zur Grundlage nehmen. Das Ziel der Orientalisten war die kulture le, wirtschaftliche und politische Unterordnung der islamischen Welt zum Westen, während die islamischen Juristen, durch die Reform der Sharia, das Ziel der Unab hängigkeit der islamischen Welt verfolgt haben.

Schlüsselwörter: *Scharia Recht. Bosnien und Herzegowina. Muslime.*

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THE VERSAILLES SYSTEM OF PEACE TREATIES AND THE MINORITY PROTECTION IN SOUTHEAST EUROPE THE BULGARIAN-GREEK CONVENTION FOR THE EXCHANGE OF POPULATION OF 1919*

The article provides an analysis of the Convention for an exchange of popula tion concluded between Bulgaria and Greece after the World War I. It compares the Convention with the other legal instruments concerning the protection of minorities, signed by Greece and Bulgaria at the same period of time. An effort is made to de termine the place of these agreements in the wider landscape of the international regulation of minority rights in the aftermath of the Great War. The article also tends to uncover the origins of the idea for an exchange of population in the Treaties with similar content concluded during the Balkan Wars.

Key words*:* *Paris Peace Conference 1919. Minority treaties . Exchange of population. International relations.*

1. INTRODUCTION

Among the profound changes that the Paris Peace Conference of 1919 brought to the international relations, the most notable are probably the new states' borders it has determined. These borders remained largely undisturbed throughout the subsequent decades. They become subject of change only after the occurrence of the events caused by the collapse of the Soviet bloc. The borders were determined in accordance with the

* The paper is an elaborated version of the short communication discussed at the Conference *Internationale Rechtswissenschaftlische Tagung, Forschungen zur Rechtsges chichte in Südosteuropa*, held in Vienna on 9 11 October, 2008.

newly proclaimed principle of self-determination of nations. This principle was complemented with the guarantees for the protection of minority rights. Thus, the protection of minority rights was given an important role and several mechanisms for its implementation were established. It is interesting to inquire into the contrast among these proclamations and the treatment of minorities in the region of Southeast Europe. For that reason, this article centers around the Convention for the exchange of population concluded between Greece and Bulgaria in 1919.

The first part of the paper offers an insight into the general developments with regard to the protection of minority rights during the Paris Peace Conference of 1919. Equally, it inquires into the instruments of the international law concerning the protection of minorities in the region of Southeast Europe. The second part analyzes the relations between Greece and Bulgaria concerning the Macedonian question, and depicts their position during the Peace Conference. The following section concerns the obligations for the protection of the minority rights undertaken by Bulgaria and Greece in the Peace Treaties. Further on, the content of these documents is compared with the provisions of the Convention for exchange of population concluded between Bulgaria and Greece in 1919. The last section examines another layer of the international legal instruments: the Treaties for the exchange of population concluded between Turkey and Greece, as well as between Turkey and Bulgaria in the aftermath of the Balkan Wars.

The article ends with few remarks on the place of the Convention for an exchange of population concluded between Bulgaria and Greece in 1919 in the system of the international law instruments concerning the minority issues. Also, it points briefly to some of its consequences which influenced the treatment of minorities in this region.

2. THE PROTECTION OF THE MINORITY RIGHTS IN THE AFTERMATH OF THE GREAT WAR

The right of self-determination of nations was proclaimed for the first time by Woodrow Wilson, a United States President and a former Professor of Jurisprudence.[1] Due to the political power of the United

[1] The principle of self determination was proclaimed during the World War I. It forms one of the basis of the "progressivism", asserted in the famous "Fourteen Points" declared by Woodrow Wilson in a speech to a joint session of Congress on January 8, 1918. See more P. Renouvin, *Histoire des relations internationales,* Hachette Livre, Paris 1994, 435 461; T. D. Musgrave, *Self Determination and National Minorities,* Oxford University Press, Oxford 2000, 15 31; A. Cassese, *Self Determination of Peoples: A Le gal Reappraisal*, Cambridge University Press, Cambridge 1996, 11 36; M. Jovanović, *Constitutionalizing Secession in Federalized States: A Procedural Approach,* Utreht 2007.

States of America during the Paris Peace Conference of 1919,[2] all of the Allied Powers accepted this right as the leading principle of the international relations. However, once the drafting of the borders began, it proved difficult to implement the right of the nations for self-determination in practice. Namely, the "ancient right of the winners"[3] to obtain favorable borders had also to be taken into account. A challenge was also posed in the areas where the state borders could not match the lines of nationality, due to the mixed character of its population. In those cases the drawing of a just border formed an impossible deed. The Southeast corner of Europe offered an example of a region where a variety of religions and ethnicities have lived since centuries.[4]

The peace makers decided to complement the principle of self-determination of nations with the international mechanisms for the protection of the minority rights. These mechanisms were supposed to be guaranteed by the newly formed League of Nations.[5] Several forms of protection of minority rights were envisaged. With some states, a separate bilateral Minority Treaty has been concluded, such as the Treaty with Poland.[6] A similar form was envisaged for the protection of the minority rights in the Kingdom of Serbs, Croats and Slovenes,[7] as well as

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[2] The Paris Peace Conference has been remembered by its contemporaries as "Ver sailles Conference", as the Treaty with Germany was concluded in Versailles on June 28, 1919. Actually, the Treaty of Versailles was only one in the system of Peace Treaties con cluded after the War, albeit the most famous. M. Dockrill, J. Fisher, *The Paris Peace Confer ence 1919, Peace without Victory,* Palgrave, New York 2001, 7 35; R. Henig, *Versailles and After 1919 1933,* Routledge, London and New York 1995, 1 25; A. Sharp, *The Versailles Settlement Peacemaking in Paris, 1919,* Macmillan, London 1991, 19 41.

[3] This expression has been employed by A. Mitrovic, *Jugoslavija na konferenciji mira 1919 1920* [Yugoslavia at the Peace Conference 1919 1920], Beograd 1969, 80.

[4] The complex ethnic and religious landscape of the Southeast Europe posed a challenge for the policy makers and lawyers since the times of the great empires Aus tria Hungary and Turkey. See more L. Stavrijanos, *Balkan posle 1453. godine* [The Bal kans since 1453], Equilibrium, Beograd 2005, 211 etc.; A. J. P. Taylor, *The Habsburg Monarchy, 1809 1918: A History of the Austrian Empire and Austria Hungary,* The Uni versity of Chicago Press, Chicago 1976, 189, etc.

[5] P. Renouvin, 420 675; A. Sharp, 42 76; R. Henig, 15 16, 45 47.

[6] This Treaty has been remembered as "The Little Treaty of Versailles", as it has been the first Minority Treaty signed in the aftermath of the War. It served as a template for the subsequent Minority Treaties, see C. Fink "The Minorities Question at the Paris Peace Conference: The Polish Minority Treaty, June 28, 1919" in *The Treaty of Versailles: A Reassesment after 75 Years* (ed. M. F. Boemeke at al), Cambridge University Press, Cambridge 1998, 249 274; J. M. Jovanovic, *Diplomatska istorija nove Evrope 1918 1939* [Diplomatic History of New Europe 1918 1939], I, Beograd 1938, 93 etc.

[7] The Treaty of Saint Germain was concluded with the Kingdom of Serbs, Croats and Slovenes on September 10, 1919. M. Stojkovic, *Balkanski ugovorni odnosi, 1876 1996* [Balkan Treaty Relations, 1876 1996], vol. 2, JP Sluzbeni list SRJ, Beograd 1998, document no 220, 34 49. I.J.Lederer, *Yugoslavia at the Paris Peace Conference: A Study in Frontier Making,* Yale University Press, New Haven London 1963, 218 276.

for Romania[8] and Greece[9]. In other cases, separate chapters concerning the minority rights were included in the Peace Treaties. The Peace Treaty with Bulgaria, concluded in Neuilly, contained a chapter regulating the minority rights.[10] Equally, a chapter concerning the minority rights was inserted in the Treaty of Lausanne.[11] Other states, as Albania, submitted declarations on the protection of minorities before they were admitted in the League of Nations.[12] In addition to these legal instruments, all of which had similar content, some states concluded conventions for an exchange of the minority population. Such was the case of the Convention between Greece and Bulgaria for a voluntary exchange of population,[13] and the Convention between Greece and Turkey for an obligatory exchange of population,[14] concluded in the aftermath of the Greek-Turkish War.

All of the legal instruments concerning the protection of minority rights contained provisions obliging the Governments to introduce "an absolute and complete protection of the life and the freedom of all people regardless of their birth, nationality, language, race or religion".[15] They stated that "the difference of religion, creed, or confession shall not prejudice any inhabitant in matters relating to the enjoyment of civil or political rights, as for instance the admission to public employment, functions and honors, or the exercise of professions and industries".[16] Further on, restrictions were forbidden for the free use of any language by any national in the private intercourse, in the commerce, in the religion, in the press or in the publications of any kind, or during the public meetings. Notwithstanding any establishment by the Government of an official language, adequate facilities were promised to all nationals for the use of

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[8] Romania signed the Treaty of Saint Germain, the Treaty of Neuilly and the Minority Treaty on December 9, 1919, see V. Ortakovski, *Megunarodnata polozba na malcinstvata* [The International Treatment of the Minorities], Misla, Skopje 1996, 107 108.

[9] Greece signed the Minority Treaty on August, 10, 1920; M. Stojkovic, docu ment no. 228, 113 119; V. Ortakovski, 118 122.

[10] M. Stojkovic, document no. 222, 63 65, articles 49 57; V. Ortakovski, 144 145.

[11] The Treaty of Lausanne was concluded on July 24, 1923, in the aftermath of the Greek Turkish War (1919 1922); M. Stojkovic, document no. 248, 193; A. Sharp, 168 etc.

[12] M. Stojkovic, document no. 238, 141 144; J. Swire, *Albania*, *A Rise of a King dom,* Williams and Norgate ltd, London 1929, 338 340.

[13] M. Stojkovic, document no. 223, 94 97.

[14] M. Stojkovic, document no. 242, 155 162.

[15] Minority Treaty with Poland, article 2, *Protection of Linguistic, Racial, and Religious Minorities by the League of Nations,* Geneva: Publications de la Societe des Nations, I.B., Minorities, 1927, I.B.2, 39 45.

[16] *Ibid.,* article 7.

their own language, either orally or in writing before the courts.[17] The nationals who belonged to racial, religious or linguistic minorities were promised the same treatment and security in law and in fact. In particular, they were promised an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.[18] The Governments were under obligation to provide in the public educational system, in towns and districts in which a considerable proportion of nationals of other than majority speech were residents, adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such nationals in their own language. The Governments could make the teaching of the official state language obligatory in these schools.[19] These provisions formed "obligations of international importance" and were guaranteed by the League of Nations. They could not be changed "without consent of the majority of the League of Nations Council".[20] In addition, the national minorities could submit their complaints directly to the Council of the League of Nations.

In this way the principle of the self-determination of nations gave way to the system of protection of minorities. Despite of the proclamations, the envisaged measures did not change profoundly the position of minorities. It is interesting to observe that the Treaties avoided to name the minorities. Rather, they refer to the citizens that belong to ethnic, racial, linguistic or religious groups. In this way, it was ensured that the protection would center around the person, and not around the rights of the minority group. The political rights of these groups were not envisaged. The questions of regional autonomy, secession or opting for another state was avoided, as well as the eventual possibility of secession. The list of rights was general and the entire concept remained quite unclear. The implementation in practice proved difficult and there was little possibility for an appeal. The League of Nations could take into consideration only the petitions which derive from a suitable source. These petitions were not supposed to contain any reference to secession and the spirit of loyalty had to prevail in them.[21] The complex nature of the system for the protection of minorities, as well as the complicated procedures it required, did little against the politics of assimilation which suited the Governments. The minorities did not benefit much. The League of Nations did

[17] *Ibid.,* article 7.

[18] *Ibid.,* article 8.

[19] *Ibid.,* article 9.

[20] *Ibid.,* article 12.

[21] Resolution of the League of Nations adopted by the Council on September 5th, 1923. S. Julius, "The Legal Nature of Minorities Petition", *The British Yearbook of International Law* 12/1931, 76 94.

not have at its disposal the kind of political power necessary to guarantee their enforcement.[22]

The reasons for the limitations of the protection of the minority rights were obvious. It was feared that the international regulation concerning the protection of minority rights could easily turn into a pawn of the interstate politics. In this way, the fragile settlement of the post-war Europe could have been severely disturbed. Namely, the minority rights could serve as a pretext for the most sensitive political questions, such as the changes of the states' borders. Thus, it was important to ensure that the protection of minority rights is not going to turn into an instrument weakening the internal coherence of the states and into creation of new political entities.

3. GREECE AND BULGARIA

3.1. Background

The development of the relations among Greece and Bulgaria with regard to the Macedonian question will be outlined here briefly. Then, the position of these powers during the Peace Conference of 1919 will be explained. This brief outline is supposed to show that there was a full consensus with regard to the reciprocal emigration between the signatories of the Convention, as well as among the high representatives of the Allied Powers.

Until the XIX century, both Greece and Bulgaria formed part of the Turkish Empire. They acquired statehood only during the XIX century.[23] Their main point of disaccord was the region of Macedonia, which remained a part of the Turkish Empire until 1912. Apart from Bulgaria and Greece, Serbia was also interested in Macedonia. For several decades, these three states were fighting each other over the possession of Macedonia. Apart of the diplomatic pressure, they sent in Macedonia numerous irregular bands. During the Balkan Wars, they managed to defeat the Turkish army. Soon, the region of Macedonia was divided among them.[24] Bulgaria was discontented, as the territory of Macedonia it acquired was smaller then the gains of the others. The disappointment was emphasized by the fact that in the decades before the Balkan Wars it orchestrated a huge propaganda in order to back its claim that the population of Macedonia is Bulgarian by nationality. Once the World War I began, Bulgaria

[22] See P. Renouvin, 435 461; T.D. Musgrave, 37 59.

[23] B. Jelavich, *The Establishment of the Balkan National States*, University of Washington Press, Seattle and London, Washington DC 1977, 68 84, 158 170.

[24] *Ibid.,* 207 222.

aligned with the Central Powers. She believed that the victory of the Central Powers may provide her with an opportunity to correct her borders in the region of Macedonia. For this reason, during the Peace Conference of 1919, Greece insisted on strengthening its position in the southern part of Macedonia which it has already acquired during the Balkan Wars.[25]

The first analysis of the Convention for an exchange of the population concluded between Greece and Bulgaria in 1919 was provided by Stefan Ladas.[26] His inquiry relies on the Minutes of the "Committee on New States and the Protection of the Rights of the Minorities". Ladas reports that in July 1919 the President of the Greek delegation at the Peace Conference, Venizelos, suggested forming a Mixed Commission entrusted with the task to supervise the reciprocal emigration of the Greeks from Bulgaria and the Bulgarians from Greece. During the 37th and the 38th meeting of the Committee on New States, it was decided that the exchange may involve several Balkan states – Greece, Bulgaria and Turkey. Serbia could not be forced to accept it, although its involvement would be welcomed.[27]

The plan was submitted to the Committee of Five. According to it, the exchange was not supposed to involve only the inhabitants of the territories acquired during the War, but also those who lived in the other regions. The Committee on New States suggested the involvement of Serbia, Bulgaria, Turkey and Greece. Each inhabitant of these states would be able to move to any of these states. The entire process would be supervised by a Commission appointed by the League of Nations. After the approval of the Supreme Council has been obtained, Politis, a Greek representative at the Peace Conference, prepared the text of the Convention. This document was supposed to be signed by the Kingdom of Serbs, Croats and Slovenes, as well as by Bulgaria, Greece and Turkey.[28] After the Kingdom of Serbs, Croats and Slovenes denied its interest in the arrangement, it has been decided to limit temporary the exchange on Greece and Bulgaria. Later, Turkey would also join.[29] The Convention provides the possibility that it may be joined by any state bordering one of the

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[25] N. Petsalis Diomidis, *Greece at the Paris Peace Conference (1919),* Institute for Balkan Studies, Thessaloniki 1978, 135 139; D. Pentzopoulos, *The Balkan Exchange of Minorities and its Impact upon Greece*, Mouton and Co, Paris The Hague 1962, 125 140.

[26] S. Ladas, *The Exchange of Minorities: Bulgaria, Greece and Turkey,* The Macmillan Company, New York 1932. The other accounts on these Conventions encompass: A.Wurfbain, *L'echange Greco Bulgare des minorites ethniques,* Lausanne 1930; A. Devedji, *L'echange obligatoire des minorites grecques et turques en vertu de la Convention de Lausanne du 30 Janvier 1923,* Paris 1929. A recent account: E. Kontogiorgi, *Population exchange in Greek Macedonia The rural settlement of refugees 1922 1930,* Clarendon Press, Oxford 2006.

[27] V. Ortakovski, 157; J. M. Jovanovic, 95 98.

[28] The draft of the Agreement submitted by Mr. Politis in S. Ladas, 32 35.

[29] *bid.*, 36.

signatories, in the course of one year.[30] This opportunity has never been employed. According to the historian of diplomacy Jovan Jovanovic, Greece had proposed it to the Kingdom of Serbs, Croats and Slovenes, but the later refused.[31]

The draft of the Convention suffered very few changes. Soon, a final version was submitted to the Supreme Council. The Bulgarian consent was also obtained.[32] The Minutes show that this Convention was the reason for the last-minute change of the article 56, paragraph 2 of the Treaty of Neuilly. The provision envisaged "mutual and voluntary emigration of ethnic minorities" between Greece and Bulgaria.[33]

It is important to inquire into the political considerations of the signatory states. Namely, after the defeats in 1913 and 1918, Bulgaria believed that this Convention will provide her with guarantees that no unilateral action will be undertaken against her. As it was explained above, the proposal for an exchange of population came from Greece. Namely, Greece wanted to ensure its territorial gains in Macedonia. The long lasting Macedonian struggle, as this problem is named by the modern Greek historiography, made the Greek politicians believe that despite of the provisions of the peace settlement, the gains in southern Macedonia will prove difficult to protect. They considered that the reconciliation with Bulgaria is not possible.[34]

3.2. Greece and Bulgaria: The Treatment of Minorities

The Peace Treaty which the Allies concluded with Bulgaria formed a foundation for the postwar relations between this state and Greece.[35] In 1919, Bulgaria was among the defeated nations. During the Great War, however, it held large portions of Greek, as well as Serbian territories.[36] The Peace Treaty specified that it "renounced in favor of Greece all rights and title over the territories of the Bulgarian Monarchy situated outside

[30] M. Stojkovic, document no. 223, 94, article 16.

[31] J. M. Jovanovic, 98.

[32] M. Stojkovic, document no. 49, 54 55.

[33] *Ibid.*, document no. 222, 55; S. Ladas, 37.

[34] D. Dakin, *The Unification of Greece 1770 1923*, Ernest Benn Limited, London, s.a, 221 224.

[35] It was concluded at November 27, 1919 at Neuilly sur Seine, France. An account on the negotiations leading to the conclusion of this Treaty in: E. Aleksandrov, *Istoria na Blgarite: Blgarskata diplomacia od drevnosta do nasi dni,* [History of the Bulgarians: the Bulgarian Diplomacy since the Ancient Times until Our Time], volume IV, Trud, s. l. 2003, 334 339.

[36] R. J. Crampton, *A Short History of Modern Bulgaria*, Cambridge University Press, Cambridge 1987, 59–71.

the frontiers of Bulgaria".[37] In this way, the territories occupied by Bulgaria during the Great War remained a part of Greece. The Treaty also contained provisions on the treatment of the minorities. It envisaged that the Bulgarian nationals habitually resident on the territories assigned to Greece may obtain Greek nationality and that *ipso facto* they will lose their Bulgarian nationality.[38] However, Bulgarian nationals who became residents on these territories after January 1, 1913, may not acquire Greek nationality without a Greek permission.[39] According to another provision, the Bulgarian nationals who reside on the territories assigned to Greece may freely choose between the Greek and Bulgarian nationality.[40] In this case, they must transfer their place of residence to the state for which they have opted.[41] A further provision states that the Bulgarian nationals "will be entitled to retain their immovable property on the territory of the other state where they had their place of residence before they have exercised their right to opt. They may carry with them their movable property. No export or import duties will be imposed upon them".[42] Further on, Greece declared its agreement to embody in a Treaty with the Principal Allied and Associated Powers "such provisions as may be deemed necessary by these Powers to protect the interests of inhabitants which differ from the majority of the population in race, language or religion".[43] Bulgaria also accepted obligations with regard to the protection of the rights of minorities.[44] These were largely repeating the provisions of the Minority Treaty with Poland.

The Greek obligations toward the protection of the minority rights were embodied in the "Treaty between the Allied Powers and Greece on its Independence and the Rights of Minorities".[45] The Treaty envisaged that Greece was liberated from the obligations toward Britain and France that she undertook in accordance with several Agreements concluded during the XIX century. Her responsibility was transferred toward the League

[37] These provisions concern the territories in Macedonia and Thrace, articles 42 and 48. The new borders of Bulgaria were defined in the article 27. M. Stojkovic, docu ment no. 222, 55 93.

[38] *bid.,* article 44.

[39] *Ibid.,* article 44.

[40] *bid.,* article 45.

[41] *Ibid.,* article 45.

[42] *Ibid.,* article 45.

[43] *Ibid.,* article 46.

[44] *Ibid.,* article 49 57.

[45] It was concluded on the same day as the famous Treaty of Sevres whose provi sions served as one of the immediate causes of the Greek Turkish War (August 10, 1920). After the Greek Turkish War, the Treaty of Sevres was replaced by the Treaty of Lau sanne. M. Stojkovic, document no. 228, 113 119.

of Nations.[46] The provisions of this Treaty had the power of a fundamental law. No other regulation could prevail over them.[47] Greece guaranteed the protection of the minority rights. This provision included the life and the freedom of all inhabitants, regardless of their birth, nationality, language, race or religion.[48] These persons were entitled to equal treatment as the Greek nationals, with an exemption of those who have applied to the Commission for the exchange of population.[49] Similarly as the Treaty of Neuilly, this Treaty envisaged that the persons who have opted for a Bulgarian nationality may retain their immovable property in Greece.[50]

According to the Treaty, Greece was supposed to introduce an electoral system which would take into consideration the rights of the ethnic minorities. This provision concerned only the territories obtained after August 1914.[51] It did not concern Macedonia, as it has been acquired in 1913. The further guarantees for the protection of minorities resembled the provisions of the Minority Treaty with Poland.[52] The Treaty of Sevres and the additional Treaties have never been ratified, due to the beginning of the Greek-Turkish War.[53] Nevertheless, the Treaty with Bulgaria, as well as the Treaty with Greece strongly resemble the features of the Minority Treaty with Poland. Despite of the limited scope of rights they envisage and the difficulties with their application, both Treaties oblige the signatory Governments to undertake some policies in order to protect the persons belonging to minorities.

3.3. Greece and Bulgaria: The Convention for an exchange of population

The provisions of the Convention for the exchange of population between Greece and Bulgaria, concluded in Neuilly in 1919, require particular examination. This Convention has been qualified as the most radi-

[46] V. Ortakovski, 120 122; L. Trnjegorski, *Jugoslovenske manjine u inostranstvu [Yugoslav Minorities Abroad],* Beograd 1938, 112 129; J. M. Jovanovic, 196 198; R. Klog, *Istorija Grcke novog doba [Modern History of Greece],* Clio, Beograd 1996, 103 108.

[47] M. Stojkovic, document no 228, 113 119, article 1.

[48] *Ibid.,* article 2.

[49] *Ibid.,* articles 2 6.

[50] *Ibid.,* article 3.

[51] *Ibid.,* article 7; V. Ortakovski, 118 132; R. Veatch, "Minorities and the League of Nations", in: *The League of Nations in Retrospect: proceedings of the Symposium"* (ed. H. Waldner et al), United Nations Library, Geneve 1983, 369 383.

[52] H. Seton Watson, *Eastern Europe between the Wars 1918 1941,* Cambridge University Press, Cambridge 1945, 268 288.

[53] E. Aleksandrov, 390; Klog, 103–108.

cal of all mechanisms concerning the minorities. According to Ladas, this "transfer of whole populations from the one country to the other as a result of war and by virtue of international agreements is unique, at least in modern times".[54]

The Convention on the exchange of population between Bulgaria and Greece was signed on the same day as the Treaty of Neuilly, November 27, 1919. According to it, the right to emigrate is permitted to the nationals belonging to racial, religious or linguistic minorities.[55] The contracting parties were supposed to facilitate the emigration. The emigration could not influence the property rights of the emigrants.[56] The Governments were obliged to avoid all indirect and direct restrictions of the right to emigrate, including the laws and regulations.[57] Each person above the age of 18 was entitled to voluntary emigration in a period of two years after the forming of a Mixed Commission.[58] It was agreed that the persons who emigrate loose the nationality of the state they leave, but at the same time they could acquire the nationality of the other state. [59] The emigrants were enabled to take with them their entire movable property. [60] The members of the communities (churches, monasteries, schools, hospitals and all kinds of foundations) could also take their movable property, but the community itself was supposed to be closed. [61] The provisions of the Convention regarding the property of emigrants also applied to the persons who have emigrated before the Convention has been concluded.[62]

The envisaged Commission obtained wide discretionary powers. One representative of the signatory states and two representatives of neutral states had to become its members. They were supposed to be appointed by the Council of the League of Nations.[63] The Commission had to ensure that the Governments would be responsible for the payments of the immovable property of all emigrants.[64] The Commission had full competences to execute the Convention and to decide on all issues deriving from it. [65]

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54 S. Ladas, 1.

55 M. Stojkovic, document no. 223, 94 97, article1.

56 *Ibid.,* article 2.

57 *Ibid.,* article 3.

58 *Ibid.,* article 4.

59 *Ibid.,* article 5.

60 *Ibid.,* article 6.

61 *Ibid.,* article 6.

62 *Ibid.,* article 12.

63 *Ibid.,* article 8.

64 *Ibid.,* articles 10 11.

65 *Ibid.,* article 9.

It is remarkable that the spirit of the Convention on the exchange of population between Greece and Bulgaria, and the provision on the protection of minority rights in the Treaties signed with Bulgaria and Greece, are conflicting. It is probably a consequence of the fact that all of the Peace Treaties had identical provisions concerning minorities, copied from the Minority Treaty with Poland. It is still surprising that thorough corrections were not made after the Convention for an exchange of population was drafted. Thus, for example, the Peace Treaties envisaged that the emigrants may keep their property in the state they intend to leave. The article 45 of the Treaty of Neuilly follows this template. On the contrary, the Convention insists on the full liquidation of the property. Equally, the articles 3 and 4 of the Treaty between the Allied Powers and Greece on its Independence and the Rights of Minorities specifically mention that the persons of Bulgarian minority[66] which currently hold a refugee status in Bulgaria, but who were born in Macedonia or Thrace, can freely return to Greece. This is also contrary to the spirit of the Convention for the exchange of population concluded between Greece and Bulgaria. Unlike the Treaty between the Allied Powers and Greece on its Independence and the Rights of Minorities, the formulation it employs is rather general – "ethnic, religious and linguistic minorities".[67] It is also interesting to note that the Convention guarantees the right to emigrate, although it has no provisions concerning the protection of the inhabitants in the opposite case – against the forced migration. In this way, the League of Nations actually formed a legal foundation for massive changes of the demographic map of the region.[68]

3.4. Predecessors

This section aims to discover another layer of the international legal mechanisms in the region of Southeast Europe. It searches the origins of Convention for the exchange of population between Greece and Bulgaria in

[66] The Convention names the population in Macedonia as Bulgarian. The Balkan historiographies largely differ on the issue of the nationality of these people. The Greek historians name them Slavs, or Slavophones, the Bulgarian historiography invariably names them Bulgarians. The Macedonian historiography argues in favor of their distinct Macedonian nationality. According to Misha Glenny, the Macedonian question is "the unyielding philosopher's stone of Balkan nationalism", see M. Glenny, *The Balkans 1804 1999, Nationalism, War and the Great Powers*, Granta Books, London 1999, 156. A recent account on Balkan historiographies R. Carsten, *Religion, Politics and Historiography in Bulgaria*, New York 2002.

[67] M. Stojkovic, document no. 223, 94 97, article 1.

[68] S. Nestor, "Greek Macedonia and the Convention of Neuilly", *Balkan Studies* 3/1962, 173 181. J. H. Simpson, "The Work of the Refugee Settlement Commission", *Journal of the Royal Institute of International Affairs*, 8, 6/1929, 583 604; Atle Grahl Madsen "The League of Nations and the Refugees", in *The League of Nations in Retrospect: proceedings of the Symposium* (ed. H. Waldner et al.), United Nations Library, Geneve 1983, 358 368.

similar arrangements among Turkey, Greece and Bulgaria, made after the Balkan Wars 1912–1913.[69] In the aftermath of the Balkan Wars, there was large migration of the Turkish population from the Balkans toward Turkey. Thus, in 1913, Turkey proposed agreements for mutual exchange of populations. Apart from Bulgaria, all of the Balkan states refused to participate in such an agreement. The Annex to the Treaty of Constantinople, which ended the war hostilities in September (16–29) 1913, introduced this idea for the first time. It established the conditions for the exchange of population between Turkey and Bulgaria. It envisaged guarantees for an obligatory payment of the property left by 48.570 Muslims and 46.764 Bulgarians who have migrated and who have previously lived 15 km from the both sides of Bulgarian-Turkish border in Thrace. In the reality, the population has already migrated in huge numbers and the agreement regulated a *fait accompli*.[70] The Government of the Young Turks was satisfied by this arrangement. It hasted to persuade Greece on a similar exchange through a forced migration of the Greek population in Turkey. Soon, an agreement between Greece and Turkey was concluded. This agreement envisaged a voluntary emigration of the Muslims from the Greek part of Macedonia and Epiros, as well as an emigration of the Greeks from Thrace and the vilayet of Smirna. However, the work of the Commissions which were supposed to supervise these migrations was interrupted as soon as Turkey entered the Great War.[71]

4. CONCLUDING REMARKS

A thorough insight into the consequences of the Convention for an exchange of population concluded between Greece and Bulgaria in 1919 would require a further elaboration. In this article, I focused on the provisions of the Convention itself and I compared it with the contemporary legal instruments concerning the minorities. The legal analysis of the provisions of the international agreements had to be complemented with the examination of the political context which permitted the codification of a transfer of an entire population.

It should be pointed out that the Versailles Conference was a deed of the winners in the Great War. The postwar settlement was a result of the compromise among their wider political interests. The ancient princi-

[69] R. C. Hall, *The Balkan Wars 1912 1913: Prelude to the First World War*, Routledge, London New York 2000, 125 127.

[70] The Mixed Commission met in November (2 15) 1913 in Adrianopolis where it signed a Convention on the exchange of population, E.C. Helmreich, *The Diplomacy of the Balkan Wars 1912 1913,* Harvard University Press, Cambridge, Mass. 1938, 409 410, 415 416.

[71] S. Ladas, 20 23.

ples of the rights of the winners and the realities of the mixed ethnic landscape in Europe largely compromised the principle of self determination of nations proclaimed by Wilson. Thus, this value was complemented with the mechanisms for protection of the minority rights. The Minority Treaties, as well as the other legal instruments, guaranteed the observance of certain rights of the minorities. Although the Convention was proclaimed as an instrument for the protection of minorities, in comparison with the Treaty of Neuilly and the Treaty between the Allied Powers and Greece on its Independence and the Rights of Minorities, the solution it proposed is far more radical. In this way, it compromises the entire concept for the protection of minorities declared after the Great War.

The Convention for the exchange of minorities signed by Greece and Bulgaria was deemed as a solution to the painful Macedonian question, which caused lots of difficulties in the international relations throughout the previous decades. Its final aim was stabilizing the postwar relations in this region. Thus, it was not envisaged as an additional pressure for the defeated Bulgaria.

The inquiry into the work of the Committee entrusted with the task of application of the Convention would also require a further elaboration. The Commission was formed in December 1922 and the analysis of its work shows the immediate consequences of the Convention. The available accounts reveal the efforts of the League on the Nations and its bodies to balance the protection of the minority rights with the interests of the two weak and impoverished Balkan states which cared little for the human tragedy happening under their auspices.

It is important to note that a complete insight into the postwar regulation of the protection of minority rights must encompass the developments with regard to Turkey. Namely, after the Greek failure in the war with Turkey in Asia Minor, these two countries concluded a Convention for an obligatory transfer of population. Thus, it is important to read the Conventions Greece signed with Bulgaria and with Turkey together, as their cumulative effect was a thorough demographic change of the Greek part of Macedonia and especially its eastern area. As the emigrants moved to Bulgaria, the Greeks from Turkey populated this region.[72] The Greek state managed to Hellenize the area through concerted efforts of its state apparatus, including the education and a thorough change of the Slavic toponymy.[73] In the following years, the region was pacified.

[72] For a recent account, see E. Kontogiorgi.

[73] A decade ago, the anthropological study conducted in the Greek Macedonia by Anastasia Karakasidou and the violent reactions she encountered, arose a huge interest in the community of the Balkanologists. Karakasidou pursued an inquiry into the ethnical origin of the inhabitants of this region, see A. Karakasidou, *Fields of Wheat, Hills of Blood: Passages to Nationhood in Greek Macedonia 1870 1990,* The University of Chi cago Press, Chicago 1997.

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DER FRIEDENSVERTRAG VON VERSAILLES UND DER MINDERHEITENSCHUTZ IN SÜDOSTEUROPA DAS BULGARISCH-GRIECHISCHE ABKOMMEN ZUM BEVÖLKERUNGSAUSTAUSCH VON 1919

Zusammenfassung

Dieser Beitrag befasst sich mit dem Abkommen zwischen Bulgarien und Grie chenland über einen Bevölkerungsaustausch nach dem Ersten Weltkrieg. Der Beitrag soll die Gemeinsamkeiten und Unterschiede dieses Abkommens mit anderen Ver pflichtungen zum Minderheitenschutz aufzeigen, die von Griechenland und Bulgarien zur gleichen Zeit eingegangen wurden. Dieser Beitrag zielt auch darauf ab, diese Abkommen innerhalb der international geltenden Regelungen für den Minderheiten schutz nach dem Ersten Weltkrieg zu positionieren. In diesem Kontext wird auch auf die Ursprünge des Konzeptes des Bevölkerungsaustausches eingegangen, wie sie be reits in während der Balkankriege geschlossenen Abkommen ähnlichen Inhalts zum Ausdruck kommen.

Schlüsselwörter: *Pariser Friedenskonferenz 1919. Verträge zu Minderheitenfra gen. Bevölkerungsaustausch. Internationale Beziehungen.*

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EINFLUSS DES GEMEINEN RECHTES IN SLOWENIEN AUS DER PERSPEKTIVE DER NEUEREN FORSCHUNGEN*

Einleitend stellt der Autor den aktuellen Forschungsstand auf dem Gebiet der Rezeption im slowenischen Raum vor und kommt zu dem Schluss, dass man diesem Phänomen in Slowenien im Unterschied zu vielen europäischen Ländern zu wenig Aufmerksamkeit geschenkt hat. Deswegen gibt es noch viele offene Fragen, was die Rezeption in Slowenien betrifft. In der Zukunft sollte man mehrere systematische Untersuchungen durchführen, die sich auf bestimmte Rechtsquellen wie auf die Vertrags und Gerichtspraxis konzentrieren. Erst der Vergleich dieser detaillierteren Studien wird gemeinsam ein klares Bild der Rezeption auf dem Gebiet des heutigen Sloweniens ergeben und damit auch die europäische Rechtsgeschichte bereichern.

Im folgenden wird zunächst der bisherige Forschungsstand zur Rezeption in Slowenien, sodann einige die wichtigsten neueren Forschungsergebnisse dargestellt. Letztere bestätigen die Vermutung, dass die Rezeption in Slowenien in einer mit anderen mitteleuropäischen Ländern vergleichbaren Art und Weise und in vergleichbarer Intensität über die Bühne gegangen ist. Der Beitrag wird von einer kurzen Vorstellung der geplanten Untersuchungen auf dem Gebiet der Rezeption abgeschlossen, die in den nächsten Jahren durchgeführt werden sollten.

Schlüsselwörter: *Rezeption. Gemeines Recht. Kontinuität. Römisches Recht. Erbrecht. Strafprozess. Slowenien.*

1. ALLGEMEINE FESTSTELLUNGEN

Die Frage nach der Rezeption des Römischen Rechts im slowenischen Raum hat in der Vergangenheit keine größere Aufmerksamkeit der

* The paper is an elaborated version of the short communication discussed at the Conference *Internationale Rechtswissenschaftlische Tagung, Forschungen zur Rechtsgeschichte in Südosteuropa*, held in Vienna on 9 11 October, 2008.

Rechtshistoriker auf sich gezogen. In den rechtshistorischen Darstellungen zu Slowenien traf man demgemäß bis vor kurzem entweder nur auf ziemlich allgemeine und oberflächliche Darstellungen des Rezeptionsprozesses oder aber auf lediglich fragmentarische Antworten, die keinen umfassenden Einblick in die einzelnen Rechtsgebiete ermöglichten. Einigkeit herrschte bislang jedenfalls über das Folgende:

Auch einzelne Bewohner des heutigen slowenischen Gebiets zog es zu einem Jurastudium an die norditalienischen Universitäten. Davon zeugen zahlreiche Familiennamen der dort immatrikulierten Studenten.[1] Vereinzelte "Krainer" findet man etwa in Bologna bereits im 13. Jh. als Studierende, massenweise aber tauchen ihre Namen in den erhaltenen Universitätsakten Bolognas seit dem Ende des Mittelalters auf.[2] Als an der Universität Wien eine Juristische Fakultät gegründet wurde, hat sich der Studentenstrom dieser Metropole zugewandt; später blieben viele Studenten in Ljubljana und nahmen dort an den Vorlesungen teil. Wenn Ljubljana bis zum frühen 20. Jh. auch keine eigene juristische Fakultät besaß, so wurde das Recht doch spätestens seit 1712 an der Theologischen und Philosophischen Fakultät des Jesuitenkollegs gelesen; schon etwas früher gab es in Ljubljana auch "rechtskundige" Vorlesungen von privater Seite.[3]

Ein Teil der heimischen Juristen, die im Ausland studierten, kehrte nach dem absolvierten Studium allerdings nicht nach Hause zurück. Einige haben sich als wichtige Theoretiker, Praktiker und Lehrer behauptet und haben somit zur Rezeption in einem breiteren Rahmen beigetragen.[4] Einige unter ihnen seien hier erwähnt: Unter den ersten aus dem heutigen Slowenien stammenden Juristen, die an der Juristischen Fakultät in Wien gelesen haben, war Konrad Kladec im ersten Drittel des 15. Jh. sogar zweimal deren Dekan und auch Rektor der Universität Wien. Bernhard Perger (geb. um 1440) war unter anderem Rektor der Universität Wien

[1] S. Luschin von Ebengreuth, *Oesterreicher an italienischen Universitäten zur Zeit der Reception des Römischen Rechts*, Separatabdruck, Wien 1886; *id.*, "Familienna men deutscher Rechtshörer, welche an italienischen Universitäten vor dem Jahre 1630 gehört haben", *Sitzungsberichte der Wiener Akademie der Wissenschaften*, phil. hist. Kl., 127, Wien 1892, S. 87ff.

[2] *Id.*, *Urban Debelack. Eine Geschichte aus dem Studentenleben zu Bologna*, Se parat (Kleinmayr & Bamberg, Laibach) ohne andere Bezeichnungen, S. 1. Siehe auch: S. Simoniti, *Humanizem na Slovenskem in slovenski humanisti do srede XVI. stoletja* [Hu manismus in Slowenien und slowenische Humanisten bis zur Mitte des 16. Jahrhunderts], Ljubljana 1979, S. 119ff.

[3] J. Polec, "Pričetki visokega šolstva v Ljubljani" [Anfänge des Hochschulwe sens in Ljubljana], *Vseučiliški zbornik*, Ljubljana 1902, S. 12.

[4] Dazu siehe: V. Murko, "O starejših slovenskih pravnikih" [Über die älteren slo wenischen Juristen], *Pravnik*, Ljubljana 40/1985, I: 5 7, S. 221ff., II: 8 10, 367ff.; J. Polec, "Slovenski pravni znanstveniki pretekle dobe v tujini" [Ältere slowenische Rechts wissenschaftler im Ausland], *Pol stoletja društva "Pravnik"*, Ljubljana 1939, S. 164f.

und Protonotar der kaiserlichen Kanzlei und wurde sogar Stellvertreter Kaiser Friederichs III. und Maximilians I. Laut Aschbach war es teilweise Pergers Verdienst, das man an der Universität Wien das Römische Recht als ein eigenständiges Fach eingeführt hat. Perger hat nämlich in den Jahren 1492 bis 1501 als Königlicher Superintendent an der Universität an deren Reformierung mitgewirkt. Für die Stelle des Dozenten für Römisches Recht schlug er seinen Bekannten, den venezianischen Humanisten Hieronym Balba vor.[5] Martin Pegius (geb. um 1523 in der Nähe von Ljubljana) wird in den Quellen als der wichtigste Jurist des alten Salzburg erwähnt, wo er als Rat des Erzbischofs und Assessor im Konsistorium tätig war. Unter den späteren Laibacher "Operosi" galt er als der "Krainer Baldus". Seine Werke wurden mehrmals neu aufgelegt und haben die Praxis fast bis zur Durchsetzung der großen zivilrechtlichen Kodifikationen im 18. und 19. Jh. beeinflusst.[6]

Die Mehrheit der im Ausland geschulten Juristen kehrte höchstwahrscheinlich in ihre Heimatorte zurück, da ihr teures Studium vielfach erst von den Stipendien der heimischen, sei es kirchlicher oder weltlicher Obrigkeiten ermöglicht wurde, die sie dann oft auch in ihren Verwaltungen angestellt haben. In der Praxis haben also einheimische Juristen erheblich zur Durchsetzung der Methoden der neuen Rechtswissenschaft und zur Verbreitung des römischen Rechts auf dem heutigen slowenischen Gebiet beigetragen. Das rege intellektuelle Leben der frühen Juristen, die regelmäßig im Ruf standen, hervorragende Humanisten zu sein, wird in einem reichen wissenschaftlichen Opus niedergeschlagen,[7] von dem bereits Valvasor im Anhang zum sechsten Buch seiner *Ehre des Herzogtums Krain* berichtet.[8]

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[5] J. Aschbach, *Geschichte der Wiener Universität im ersten Jahrhundert ihres Bestehens, Festschrift zu ihrer fünfhundertjährigen Gründungsfeier*, Wien 1865, S. 309; *id*., *Wiener Universität und ihre Humanisten im Zeitalter Kaiser Maximilians I.*, Wien 1877, S. 51ff., 102ff., 148ff.

[6] Siehe: J. Polec, *Martin Pegius jurist in astrolog* [Martin Pegius, Jurist und Astrologe], Separatabdruck, Ljubljana 1935; J. Kranjc, "Martin Pegius in njegova razpra va o služnostih" [Martin Pegius und seine Abhandlung über die Dienstbarkeiten], *Zbornik Pravne fakultete Univerze v Mariboru* 2, 3/2007, S. 159 197.

[7] Eine Liste der juristischen Werke aus dem slowenischen Gebiet auf Latein bei: P. Simoniti, *Sloveniae scriptores latini recentioris aetatis: opera scriptorum latinorum Sloveniae usque ad annum MDCCCXLVIII typis edita: bibliographiae fundamenta*, Zagreb Ljubljana 1972, vor allem S. 164f, 183f.

[8] J. W. Valvasor, *Die Ehre des Herzogthums Krain*, Laibach Nürnberg 1689, II. Bd. (Buch V VIII), 2te unveränderte Aufl., (Hgb.: Krajec, Novak, Pfeifer), Rudolfswerth 1877, S. 343ff. Dazu s.: V. Murko, "K dvestopetdesetletnici pomembne narodnogospodar ske knjige I. St. Florjančiča de Grienfeld: Bos in lingua sive discursus academicus de pecuniis vetero novis, Z uvodom o starejši slovenski pravni literaturi" [Zum 250. Jubilä um des wichtigen nationalökonomischen Werkes von I. St. Florjančič de Grienfeld: Bos in lingua sive discursus academicus de pecuniis vetero novis, Mit Einführung zur älteren

Neben den Arbeiten der bereits erwähnten Juristen stellt auch die gesamte juristische Literatur, wie man sie in den Bibliotheken des heutigen Slowenien findet, einen wichtigen Indikator für die Tiefe und Reichweite der Rezeption dar. Man muss bei den Schlussfolgerungen freilich vorsichtig sein, da es möglich ist, dass zumindest ein Teil der Bibliotheksbestände im Laufe der Jahrhunderte seinen Standort wechselte. Unter den mittelalterlichen Handschriften in der slowenischen National– und Universitätsbibliothek stellen die juristischen Texte sogar ein Drittel der Texte dar. Im 13. und 14. Jahrhundert überwiegt hier zwar noch das kanonistische Schrifttum, was man im allgemeinen darauf zurückführt, dass die Klosterbibliotheken besser erhalten geblieben sind als weltliche Bibliotheken.[9] Es könnte dies aber auf der anderen Seite auch ein Indiz für den stärkeren Einfluss der Kleriker in der frühen Phase der Rezeption sein. Das Verhältnis ändert sich in der zweiten Hälfte des 15. Jahrhunderts zu Gunsten der Legistik, denn unter den Inkunabeln finden sich nunmehr wesentlich mehr Titel des römischen Zivilrechts.[10] Im 16. Jahrhundert überwiegt dann die juristische Literatur neben den theologischen und historischen Werken auch in den Privatbibliotheken.[11]

Geschulte Juristen wurden praktisch auf allen Verwaltungsebenen angestellt. Man trifft sie als Funktionäre und Fachleute auf der Ebene der Gesamtstaates und der Länder wie auch auf der lokalen Ebene. Ihre Zahl stieg mit der Zeit je nach Bedarf. In Ljubljana trafen sich die Juristen seit dem Ende des 17. Jahrhunderts im juristischen Verband *Collegium juridicum Labacense*. Auch in der im Jahr 1693 gegründeten Akademie der Operosen (*Academia operosorum*) stellten die Juristen die Mehrheit dar.[12]

Aus dem erhaltenen Archivmaterial ist ersichtlich, dass der Berufsjurist Luka Močnik mindestens seit 1495 in Laibach / Ljubljana tätig

slowenischen Rechtsliteratur], *Zbornik znanstvenih razprav Pravne fakultete v Ljubljani* 21, 1946, 72ff.

[9] S. Vilfan, "Jugoslawien", *Handbuch der Quellen und Literatur der neueren eu ropäischen Privatrechtsgeschichte*, 3, 5. Teilbd., Südosteuropa (Hgb.: H. Coing), Mün chen 1988, S. 384.

[10] A. Gspan, J. Badalić, *Inkunabule v Sloveniji Incunabula quae in Slovenia asservantur* [*Inkunabeln in Slowenien Incunabula quae in Slovenia asservantur*], Ljubl jana 1957.

[11] M. Žvanut, *Knjige iz 16. stoletja v knjižnici Narodnega muzeja* [*Bücher aus dem 16. Jahrhundert in der Bibliothek des Nationalmuseums*], Ljubljana 1988. Für Öster reich stellte etwas Ähnliches H. Baltl fest ("Einflüsse des römischen Rechts in Öster reich", *Ius Romanum Medii Aevi*, V, 7 9, Mediolani 1962, S. 57, Fn. 206), und zwar, dass man auf der Liste der adeligen Bibliotheken aus dem 15. Jahrhundert kaum ein rö mischrechtliches Werk vorfindet, während diesbezügliche Kataloge aus dem 17. Jahrhun dert viele verschiedenartige juristische Werke beinhalten.

[12] S. Vilfan, "Pravniki med operozi" [Juristen zwischen den Operosi], *Academia operosorum*, Ljubljana 1994, S. 73ff.

war.[13] Auch das erste erhaltene Protokoll eines Prozesses vor dem Laibacher Stadtrat aus dem Jahr 1521, in dem sich eine Partei auf das *Senatus consultum Velleianum* berief, zeugt davon, dass die Rezeption des römischen Rechts vor diesem Organ damals höchstwahrscheinlich schon eine selbstverständliche und anerkannte Tatsache war.[14] Hinweise auf die Rezeption finden sich auch in anderen Gerichtsprotokollen aus dem Bereich des heutigen Slowenien; diese bedürfen jedoch noch, wie auch das bereits erwähnte Laibacher Protokoll, einer eingehenderen Untersuchung.[15]

Der Einfluss des gelehrten Rechts zeigt sich aber auch in der Gesetzgebung, wie etwa den Privilegien und Stadtstatuten.[16] Auch über die Gesetzgebung fand das römische Recht der Neuzeit allmählich den Weg in die Praxis. Dieser Prozess stellt sich im Gebiet des heutigen Slowenien nicht viel anders dar, als in den anderen österreichischen Ländern, da die Gesetze normalerweise von den zentralen Organen erlassen wurden. Ein Unterschied läßt sich eigentlich nur bei Beachtung der Besonderheiten in den einzelnen Ländern im zeitlichen Ablauf der Rezeptionsvorgänge feststellen.

Bei der Bewertung der Rezeption auf dem heutigen slowenischen Territorium muss man ganz besonders auf die Tatsache hinweisen, dass in der Primorska-Region an der Küste ganz andere rechtshistorische Entwicklungsverläufe zu beobachten sind, da dieses Gebiet einem ganz spezifischen zivilisatorischen und staatsrechtlichen Raum angehörte. Auf dem Gebiet der Venezianischen Republik begann nämlich die Rezeption bereits im 12. Jahrhundert, d.h. ein ganzes Jahrhundert früher als im Landesinneren.[17] Der Prozess der Rezeption war hier intensiver – ausgeprägter sind jedoch auch die Elemente der Kontinuität. Im Allgemeinen kann man von einer Kontinuität römischen Rechts auf slowenischem Territori-

[13] S. Vilfan, "Odvetništvo na Slovenskem in ljubljanska odvetniška zbornica do razširitve zborničnega območja na jugoslovansko Slovenijo" [Rechtsanwaltschaft in Slo wenien und Laibacher Anwaltskammer bis zur Erweiterung des Kammergebietes auf das jugoslawische Slowenien], *Pravnik* 23, 1968, S. 379.

[14] Dazu s.: S. Vilfan, "K začetkom recepcije rimskega prava na Slovenskem" [Zu den Anfängen der Rezeption des römischen Rechtes in Slowenien], *Zbornik znanstvenih razprav Pravne fakultete v Ljubljani* 50, 1990, S. 334ff.

[15] Einige Beispiele s. bei: M. Kambič, "Vpliv rimskega prava na razvoj silobrana s posebnim ozirom na kranjski sodni red za deželska sodišča iz leta 1535" [Einfluss des römischen Rechts auf die Entwicklung der Notwehr mit besonderer Berücksichtigung der Landgerichtsordnung für Krain aus dem Jahr 1535], *Zbornik znanstvenih razprav Pravne fakultete v Ljubljani* 59, 1999, S. 157.

[16] Hinsichtlich der Privilegien s. z. B.: M. Kambič, "K zgodovini dednega prava za plemstvo na Slovenskem v srednjem veku z ozirom na recepcijo" [Zur Geschichte des mittelalterlichen Erbrechts für den Adel in Slowenien mit Berücksichtigung der Rezepti on], *Zbornik znanstvenih razprav Pravne fakultete v Ljubljani* 65, 2005, S. 225 251.

[17] S. Vilfan, *Rechtsgeschichte der Slowenen bis zum Jahre 1941*, Graz 1968, S. 200.

um nur im Falle der in der Primorska-Region gelegenen Städte sprechen, und auch dies nur in bescheidenem Ausmaß. Immerhin findet sich die Kontinuität des Römischen Rechts jedenfalls im Vergleich mit den anderen Teilen des römischen Imperiums in Istrien überdurchschnittlich stark ausgeprägt. In den anderen slowenischen Ländern ist diese Kontinuität demgegenüber deutlich schwächer. Wirtschaftliche Grundlage des ausgesprochen lebendigen Rechtsleben, wie man es im Küstenlandstrich Sloweniens antrifft, waren die regen wirtschaftlichen Kontakte dieser Gegend; davon zeugen die erhaltenen Notarbücher (imbreviature), die man ebenfalls noch aus dem rechtshistorischen Blickwinkel bewerten müsste. Der Einfluss des Notariats reichte damals deutlich über die Grenze der Venezianischen Republik hinweg auf das benachbarte Gebiet des Herzogtums Krain.[18]

Zahlreiche Indizien deuten jedenfalls darauf hin, dass der Verlauf und die Intensität der Rezeption im slowenischen Raum mit dem generellen Geschehensablauf vergleichbar und insofern der Zeit angemessen waren; die schon von Vilfan geäußerte Vermutung lässt sich insoweit bestätigen.[19] Konkretere Fragen, nämlich wann, wie und in welchem Maße es zur Rezeption kam und was für Folgen dies hatte, bleiben jedoch weiterhin offen. Dazu bräuchte man einzelne ausführliche Studien, die dann zusammen ein klareres Bild der Rezeption auf slowenischem Gebiet abgeben und damit auch die europäische Rechtsgeschichte bereichern könnten.

2. BISHERIGE WICHTIGERE UNTERSUCHUNGEN

Neben der bereits erwähnten Entdeckung Vilfans bezüglich des *Senatus consultum Velleianum* und seiner Einführung in einen Prozess vor dem Stadtrat von Ljubljana, die allerdings eher die Frucht eines glücklichen Zufalls denn das Ergebnis einer geplanten Untersuchung war, gibt es bereits einige speziellere Studien. Zwei davon behandeln konkretere Einzelfragen. Es handelt sich hierbei zum einen um meine Untersuchung zum "Einfluss des römischen Rechts auf die Entwicklung der Notwehr mit besonderer Berücksichtigung der Landgerichtsordnung für Krain aus dem Jahr 1535" / "Vpliv rimskega prava na razvoj silobrana s posebnim ozirom na kranjski sodni red za deželska sodišča iz leta 1535"[20], zum anderen um den ebenfalls von mir verfassten Aufsatz "Die Tötung des auf frischer Tat ertappten Diebes – zwischen Naturrecht und Rezeption" /

[18] M. Verginella, "Vpliv beneške in italijanske notarske civilizacije na slovenskem podeželju" [Einfluss des venezianischen und italienischen Notariats auf die slowenischen ländlichen Gebiete], *Slovenci v Evropi* (Hgb.: Vodopivec), Ljubljana 2002, S. 7ff.

[19] S. Vilfan, K začetkom (o. Fn. 14), S. 338.

[20] M. Kambič, Vpliv (o. Fn. 15), S. 143 162.

"Uboj zalotenega tatu – med naravnim pravom in recepcijo".[21] Beide Untersuchungen kommen zu dem Ergebnis, dass die Bestimmungen zur Notwehr und zur Tötung des ertappten Diebes ein Produkt der Rezeption sind.

Drei andere Untersuchungen sind thematisch breiter angelegt. Die erste bezieht sich auf das Zivilrecht des Statuts von Pettau/Ptuj. Darin stellt der Autor Janez Kranjc Folgendes fest: "In mehreren privatrechtlichen Bestimmungen des Statuts von Pettau aus dem Jahre 1376 sind die Spuren von Kenntnissen des römischen Rechts derartig offenkundig, dass die Vermutung nahe liegt, diese Bestimmungen seien unter dem Einfluss der Rezeption entstanden bzw. durch die Kenntnis des römischen Rechts bei ihrer Entstehung direkt oder indirekt beeinflusst worden."[22] Diese Feststellung relativiert die – von Wesener übernommene – These des österreichischen Historikers Baltl, die Bestimmungen im Statut von Pettau / Ptuj seien "durchaus deutschrechtlich".[23]

Bei der zweiten hier zu nennenden Arbeit handelt es sich um meine vom Zentrum für Wissenschaft und Forschung der Slowenischen Akademie der Wissenschaften und Künste herausgegebene Monographie zur Frage der Rezeption des Erbrechtes im slowenischen Raum.[24] Das Ergebnis dieser Untersuchung lässt sich wie folgt zusammenfassen: Der Prozess der Rezeption des römischen Erbrechts auf dem slowenischen Gebiet verlief ganz ähnlich wie im weiteren mitteleuropäischen Rahmen. Die Vergleichsparameter können sich hierbei sowohl aus dem Gesichtspunkt der zeitlichen Dynamik, als auch aus den Gründen, dem Umfang und der Intensität ergeben. Bestimmte Charakteristika des Rezeptionsvorganges, die auch im slowenischen Raum wiederzufinden sind, können in diesem Rahmen jedoch nicht an Hand der ethnischen Zugehörigkeit, sondern müssen eher als Ausdruck spezifischer gesellschaftlicher Umstände be-

[21] M. Kambič, "Uboj zalotenega tatu med naravnim pravom in recepcijo" [Die Tötung des auf frischer Tat ertappten Diebes zwischen Naturrecht und Rezeption], *Vil fanov zbornik: pravo, zgodovina, narod Recht, Geschichte, Nation*, (Hgb.: Rajšp, Bruck müller), Ljubljana 1999, S. 263 273.

[22] J. Kranjc, "Die Einflüsse des römischen Rechts auf das Statut von Ptuj (Pettau)", *Wirkungen europäischer Rechtskultur*, Festschrift für Karl Kroeschell zum 70. Geb. (Hgb.: Köbler, Nehlsen), München 1997, S. 575.

[23] H. Baltl, Einflüsse (o. Fn. 11), S. 32f.; G. Wesener, *Einflüsse und Geltung des römisch gemeinen Rechts in den altösterreichischen Ländern in der Neuzeit (16. bis 18. Jahrhundert)*, Wien, Köln 1989, S. 34f. Lassen Sie mich dabei nur kurz darauf hinweisen, dass man heute die Einteilung des Rechts nach dem nationalen Prinzip im Mittelalter und im größten Teil der Neuzeit für anachronistisch und damit für bereits überholt hält. Das Recht muss man nämlich als ein Resultat der spezifischen Umstände und der Wechselwir kung vieler Einflüsse betrachten, und nicht als Ausdruck der nationalen Identität.

[24] M. Kambič, *Recepcija rimskega dednega prava na Slovenskem s posebnim ozi rom na dedni red Karla VI.* [*Rezeption des Erbrechts in Slowenien mit besonderer Berück sichtigung der Erbrechtsordnung Karls VI.*], Ljubljana 2007.

wertet werden. Berücksichtigt man die bereits erwähnte Tatsache, dass die Primorska-Küstenregion in der hier zur Rede stehenden Epoche zu einem ganz andersartigen zivilisatorischen Umfeld gehörte als der kontinentale Teil Sloweniens, so lassen sich die unterschiedlichen Entwicklungsverläufe innerhalb des heutigen Slowenien bei der Rezeption unschwer erklären. Primorska genoss die Früchte einer historischen Kontinuität, die die Rezeption des römischen Rechts ohne Zweifel beschleunigt und erleichtert hat. Ihren Gipfel erreichte die Rezeption des Erbrechts in den Kommunen von Primorska bereits im letzten Viertel des 14. Jhs.; dies gilt sowohl für die testamentarische als auch für die Intestaterbfolge.[25] Für die Testamentarische Erbfolge gilt das in besonderem Maße, ist sie doch größtenteils das Resultat einer ausgeprägten Kontinuität, was die Institution des Notariats anbelangt. Im kontinentalen Teil Sloweniens ging die Rezeption des Erbrechtes hingegen langsamer über die Bühne und erfolgte schrittweise.[26] Es sieht so aus, als sei die Rezeption des Erbrechtes hier hinter der Rezeption auf anderen Rechtsgebieten zurückgeblieben. Bei der testamentarischen Erbfolge begannen sich gemeinrechtliche Denkformen nur langsam am Anfang der Neuzeit einzubürgern; eine größere Verbreitung erfuhren sie erst im 17. Jh. Hier kam es also eher inhaltlich und weniger formell zur Rezeption. Bei der gesetzlichen Erbfolge ist eine Rezeption Römischen Rechts noch später anzutreffen. Eine breitere Rezeption wurde hier lange von dem tief verankerten Landesbrauch verhindert. Erst die Erbordnungen, die dann auf der Grundlage der von Karls VI. im Jahr 1720 erlassenen "Neuen Satz– und Ordnung vom Erbrecht außer Testament" in der ersten Hälfte des 18. Jhs. jeweils für einzelne Länder ergingen, so etwa 1729 für die Steiermark, 1737 für Krain, 1747 für Kärnten, sind in der Regel von der alten Tradition abgegangen und haben fast unverändert die justinianische Regelung der gesetzlichen Erbfolge übernommen. Da es sich hier um eine relativ späte Durchsetzung des römischen Rechts handelt, spricht die Theorie in diesem Fall von der Spät– oder auch von Post– oder Nachrezeption.[27]

[25] Siehe: M. Kambič, "Certain aspects of the continuity and reception of Roman inheritance law in the statutes of Slovenian littoral towns", *Slovenian law review* 1/2, 2/2005, S. 87 103; *id.*, "Nasljedno pravo Piranskog statuta u vidu recepcije" [Erbrecht des Statuts von Piran im Lichte der Rezeption], *Zbornik radova Pravnog fakulteta u Splitu* 3/4, 43/2006, S. 501 521.

[26] Siehe: M. Kambič, "L´influence du droit savant sur la réglementation du droit des successions dans les statuts des communautés urbaines au XIV^{e} et au début du XV^{e} siècle en territoire slovène", *Coutumes, doctrine et droit savant* (Hgb.: Augustin, Gazeau), Poitiers 2007, S. 117 136; *id.*, "Primerjalna analiza dinamike recepcije v dednopravnih določilih ptujskega in piranskega mestnega prava" [Komparative Analyse der Rezeption sdynamik in den erbrechtlichen Bestimmungen des Statuts von Pettau und Piran], *Zbornik znanstvenih razprav Pravne fakultete v Ljubljani* 67, 2007, S. 133 158.

[27] Siehe z.B. Wesener, *Einflüsse* (o. Fn. 23), S. 14, 80; *id.*, *Geschichte des Erb rechtes in Österreich seit der Rezeption*, Graz, Köln 1957, S. 109, 192.

Schließlich wären hier meine Untersuchungen zur Rezeption in den Prozessbestimmungen der Laibacher Malefizfreiheiten zu nennen, die mich auf das Gebiet des Strafrechts geführt haben.[28] Es scheint mir, dass der Einfluss der gemeinrechtlichen Doktrin auf die Entwicklung des Strafrechts im Unterschied zum zivilrechtlichen Gebiet bisher allgemein zu wenig betont wurde.[29]

Die Laibacher Malefizfreiheiten aus dem Jahre 1514 stellen eine der ersten eigenständigen Kodifizierungen des Strafrechts in den damaligen niederösterreichischen Ländern und sogar in Europa allgemein dar. Mit ihnen erlangte das Stadtgericht von Laibach alle Rechte eines privilegierten Landgerichts, konnte also Prozesse selbständig führen und Urteile in schweren Strafsachen vollstrecken.[30] Inhaltlich sind sie fast identisch mit der Tiroler Malefizordnung aus dem Jahr 1499 und der Ordnung für Radolfzell aus dem Jahr 1506.[31] Deswegen lassen sich die Feststellungen hinsichtlich der Laibacher Malefizfreiheiten auf die beiden letzteren übertragen. Eine neue Edition der Laibacher Malefizfreiheiten wurde jüngst der Öffentlichkeit vorgestellt; sie ist das Resultat einer Zusammenarbeit zwischen der Universität Graz und den wissenschaftlichen Institutionen in Ljubljana und Maribor.[32] Der Band beinhaltet auch eine Reihe kommentierender wissenschaftlicher Beiträge, die zwar dem materiellen Recht einige Aufmerksamkeit widmen,[33] bei denen die Prozessbestimmungen

[28] Siehe: M. Kambič, "Recepcija rimsko kanonskega postopka v kazensko sod nem privilegiju za Ljubljano iz leta 1514" [Rezeption des römisch kanonischen Prozesses in den Laibacher Malefizfreiheiten aus dem Jahre 1514], *Zbornik Pravne fakultete Uni verze v Mariboru* 3, 2/2007, S. 43 81; *id.*, "Kazenski postopek v zgodnje novoveški Ljubljani" [Strafprozess im frühneuzeitlichen Ljubljana], *Zbornik na trudovi na Pravniot fakultet "Justinijan Prvi"* (Hgb.: Matovski, Novoselec), Skopje, Zagreb 2007, S. 384 395; *id.*, "La poursuite des criminels sur le territoire de la cour provinciale de Ljubljana au début des temps modernes", *Cahiers poitevins d'Histoire du droit* 2, 2009, S. 21 32.

[29] Dazu s.: D. Bock, "Die erste Europäisierung der Strafrechtswissenschaft: Das gemeine Strafrecht auf römischrechtlicher Grundlage", *Zeitschrift für Internationale Strafrechtsdogmatik* 1, 2006: *http://www.zis online.com/dat/2006 1 2.pdf*, S. 7ff.

[30] In der erwähnten Zeitspanne wurde die schwere Straftat, allgemein "Malefiz" genannt, nämlich im Rahmen eines besonderen malefizischen (bzw. peinlichen) Prozesses behandelt.

[31] Der Kaiser stützte sich in diesem Fall auf die Malefizordnung von Tirol aus dem Jahr 1499. Die Texte beider Ordnungen sind inhaltlich fast identisch.

[32] Bibliophile Ausgabe: *Malefične svoboščine Ljubljančanov Deren von Laibach Malefitzfreyhaittn* (Hgb.: Budna Kodrič, Kambič, Golec, Melik, Kocher, Steppan, Bizjak, Kozina), Ljubljana, Graz 2004. Studienausgabe mit beigefügtem CD Rom: *Malefične svoboščine Ljubljančanov Deren von Laibach Malefitzfreyhaittn* (Hgb.: Kambič, Budna Kodrič), Ljubljana 2005. Die Abhandlungen in beiden Publikationen sind gänzlich in slo wenischer und in deutscher Sprache veröffentlicht.

[33] M. Steppan, "Das Strafensystem der Laibacher Malefizfreiheiten von 1514. Ein Vergleich mit den Strafrechtsquellen des ausgehenden 15. und beginnenden 16. Jahrhun derts", *Malefične svoboščine*, Studienausgabe (o. Fn. 32), 83ff.

aber im Hintergrund bleiben, obwohl gerade sie, wie man aus den seltenen erhaltenen Archivquellen weiß, die Strafrechtssprechung in Ljubljana im 16. Jahrhundert entscheidend bestimmt haben und zwar auch noch nach dem Erlaß der *Constitutio Criminalis Carolina* von 1532, die ja bekanntlich nur subsidiär für das gesamte Reich galt. Die prozessrechtlichen Bestimmungen der Laibacher Malefizfreiheiten haben eine ganze Reihe strafprozessualer Grundsätze statuiert, die dann später – wenn auch weiter ausgearbeitet und verfeinert – auch in der Carolina niedergelegt wurden, so dass man die Malefizfreiheiten mit gutem Grund als einen der Vorläufer der reichseinheitlichen Strafrechtsgesetzgebung betrachten kann.[34]

Die *Constitutio Criminalis Carolina* gilt in der Literatur zweifellos als Produkt der Rezeption gemeinrechtlichen Straf– und Strafprozessrechts. Wie bereits festgestellt, kann man die Laibacher Malefizfreiheiten, zusammen mit der Gerichtsordnung für das Landgericht Wolkenstein und den Malefizordnungen für Radolfzell und Tirol, als Vorgänger der *Carolina* betrachten. Um so mehr ist es von Interesse, inwieweit die bereits erwähnten Vorgänger der *Carolina*, insbesondere die Laibacher Malefizfreiheiten, bereits von der Rezeption beeinflusst wurden. Werfen wir also einen kurzen Blick auf die grundlegenden Charakteristika des Strafprozesses, wie er sich in den "Freiheiten" darstellt:

Das Verfahren, das auf die Klage einer Privatperson aber auch schon von Amts wegen eingeleitet werden konnte, lief *ex officio* und auf Basis der Inquisitionsmaxime ab. Das Offizialprinzip war besonders stark betont bei der Verfolgung von Totschlägern, gegen die selbst dann noch Anklage erhoben werden musste, wenn sie sich bereits mit den Verwandten des Opfers versöhnt hatten. Der Prozess war schriftlich und grundsätzlich geheim; im Untersuchungsverfahren war zur Erlangung eines Geständnisses die Tortur vorgesehen. Das Gericht entschied indirekt auf Basis des Untersuchungsprotokolls. Der Richter war an die Beschlüsse des Stadtrates gebunden und hatte grundsätzlich kein Recht, Entscheidungen selbst zu treffen. Das Urteil musste öffentlich verkündet und vollstreckt werden.

Im Gegensatz zu dem bekannten deutschen Rechtshistoriker Eberhard Schmidt, der seinerzeit die Ordnungen von Tirol und Radolfzell behandelt hat,[35] konnte ich herausfinden, dass die prozessrechtlichen Be-

[34] Dabei muss man darauf hinweisen, dass die Ähnlichkeit an sich nicht genügt, um von einem unmittelbaren Einfluss der Malefizordnung von Tirol bzw. der Laibacher Malefizfreiheiten auf die *Carolina* sprechen zu können. Grundsätzlich zu diesem Pro blem: E. Hellbling, *Grundlegende Strafrechtsquellen der österreichischen Erbländer vom Beginn der Neuzeit bis zur Theresiana, Ein Beitrag zur Geschichte des Strafrechts in Österreich* (Bearb. und hgb. von Ilse Reiter), Wien, Köln, Weimar 1996, S. 182.

[35] E. Schmidt, *Die Maximilianischen Halsgerichtsordnungen für Tirol (1499) und Radolfszell (1506) als Zeugnisse mittelalterlicher Strafrechtspflege*, Schloss Bleckede an

stimmungen der Laibacher Malefizfreiheiten – und damit eben auch der vorerwähnten Ordnungen – in der Mehrzahl bereits unter dem Einfluss des Gelehrten Rechts entstanden sind, so dass sie grundsätzlich als Ergebnis der Rezeption betrachtet werden können. Das zeigt sich vor allem in der dominierenden Rolle des Inquisitionsprinzips wie auch bei der Offizialmaxime und der Tortur und der damit verbundenen Geheimhaltung und Schriftlichkeit des Prozesses. Obwohl es in den Malefizfreiheiten noch keine genauer definierten Kautelen zum Schutz des Beschuldigten und keinen deutlich ausgedrückten Grundsatz der Aktenversendung gibt, – beides findet sich dann in der *Carolina* als typischer Ausdruck der Rezeption – kann man die erwähnten Institutionen zumindest ansatzweise auch schon in den zwar spärlicheren, aber begrifflich ähnlichen Bestimmungen der Malefizfreiheiten finden. Das bedeutet sicherlich nicht, dass hier womöglich eine revolutionäre Wende auf dem Gebiet des Strafrechtes vollzogen worden wäre. Vielmehr muss man diese Regelungen als Resultat eines länger andauernden Evolutionsprozesses verstehen. Vieles spricht dafür, dass die Bestimmungen der Malefizfreiheiten in vielen Fällen nur die bestehende gewohnheitsrechtliche Ordnung übernommen haben, die jedoch ihrerseits bereits unter dem Einfluss der frühen Rezeption stand. Das Inquisitionsverfahren und die Tortur sind nämlich im Reich schon viel früher als Ausdruck der frühen Rezeption erwiesen.[36] Auch der Gedanke, die Schwerstkriminalität im öffentlichen Interesse von Amts wegen zu verfolgen, trifft man im Kern bereits in den mittelalterlichen Landfrieden und Privilegien an.

Man muss die Laibacher Malefizfreiheiten im Kontext der Staatsreformen Maximilians I. sehen. Der Kaiser suchte das Recht durch die Reformen inhaltlich und räumlich zu vereinheitlichen; Zentralisierung der Macht und die Abschaffung des Partikularismus stellte ja eines der grundlegenden Ziele der absoluten Monarchie dar. Ohne eine gemeinsame, einheitlich in allen Ländern gültige Rechtsordnung war ein einheitlicher Staat kaum vorstellbar; das galt natürlich in besonderer Weise auf dem Gebiet der strafrechtlichen Verfolgung. Als gemeinsamer Nenner bot sich hier das Gemeine Recht an. An den Vorarbeiten zur Kodifikationen haben naheliegenderweise – sei es indirekt, sei es direkt – auch gelehrte Juristen teilgenommen. Auch hier erweist sich also der Zentralstaat mit seinen bürokratischen Verwaltungsstrukturen als wichtiger Faktor der Rezeption. Dabei muss man aber auch betonen, dass im Strafrecht – anders als im Zivilrecht – die Resultate der Rezeption bzw. die Errungenschaften der

der Elbe 1949, vor allem S. 71 und 79.

[36] Dazu s.: H. Weber, "Die peinliche Halsgerichtsordnung Kaiser Karls V.", *ZRG Germ. Abt.* 77, 1960, S. 288ff, besonders 301; H. Rüping, *Grundriß der Strafrechtsgeschichte*, 3. Aufl., München 1998, S. 46; W. Trusen, "Strafprozeß und Rezeption. Zu den Entwicklungen im Spätmittelalter und den Grundlagen der Carolina", *Strafrecht, Strafprozess und Rezeption. Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina* (Hgb.: Landau, Schroeder), Frankfurt am Main 1984, S. 29ff.

gemeinrechtlichen Wissenschaft schnell Eingang in die Gesetzgebung gefunden haben. Auf dem Gebiet des Prozessrechts war dies das römisch-kanonische Verfahren, das sich in der Gerichtspraxis der norditalienischen Städte, wie auch in der Theorie der Glossatoren und Postglossatoren herausgebildet hatte. Es fließt dann in die im Jahre 1532 als Reichsgesetz erlassene *Constitutio Criminalis Carolina* ein; einzelne Elemente werden jedoch meinen Erachtens schon früher von deren Vorläufern ausgegriffen, wozu man auch, wie bereits ausgeführt, die Laibacher Malefizfreiheiten zählen darf.

3. GEPLANTE AUFGABEN

Zur Rezeption im slowenischen Raum gibt es noch viele offene Fragen. Um sie zu klären, wird man in Zukunft systematische Untersuchungen durchführen müssen, die sich auf spezifische Rechtsquellen, wie auch auf die Vertrags– und Gerichtspraxis konzentrieren müßten. Zwei von mir geplante Projekte sollen in diesem Zusammenhang erwähnt werden, die sich, wie ich hoffe, in den nächsten Jahren Schritt für Schritt verwirklichen lassen.

Die erste Aufgabe bezieht sich auf die Rezeption des Zivilrechts in Ljubljana / Laibach am Anfang der Neuzeit. Hierzu entsteht eine von mir besorgte kritische Ausgabe einer städtischen Zivilgerichtsordnung aus der ersten Hälfte des 16. Jahrhunderts: Gemeiner Statt Laybach Gerichts-Ordnung.[37] Dieses Projekt möchte ich um eine Analyse der praktischen Seite der Zivilgerichtsbarkeit in Ljubljana erweitern und abschließen. Dabei sollen auch die erhaltenen Gerichtsprotokolle untersucht werden, von denen das erste ins Jahr 1521 datiert.[38] Ideal wäre es, wenn man auch diese Protokolle in Form einer kritischen Edition herausgeben könnte. Es handelt sich dabei um ein größeres und mit Sicherheit zeitaufwendiges Projekt, an dem ein größerer Kreis von Forschern mitarbeiten wird.

Die zweite geplante Aufgabe bezieht sich auf die Primorska-Region. Dort gibt es erhaltene Statuten der Stadtkommunen von Koper, Piran und Izola, die bereits in zeitgenössischen Abschriften zusammen mit grundlegenden Begleitstudien veröffentlicht wurden. Die wichtigsten Editionen der Statuten von Piran und Izola sind sogar als bibliophile Aus-

[37] Zgodovinski arhiv Ljubljana [Historisches Archiv der Stadt Laibach] ZAL, Zbirka listin pod letnico 1545 [Urkundensammlung, Jahr 1545]. Höchstwahrscheinlich handelt es sich um die Abschrift einer noch älteren Norm. Ihre reformierte Version ist im 17. Jh. auch im folgenden Druck erschienen: *Gemeiner statt Laybach New Reformierte Gerichts Ordnung*, Grätz 1666.

[38] Zgodovinski arhiv Ljubljana [Historisches Archiv der Stadt Laibach] ZAL, LJU 488, Cod. I, Zapisniki mestnega sveta [Protokolle des Stadtrates], Nr. 1 23 (1521 1786).

gaben in Form eines Faksimile erschienen.[39] Doch beginnt hier erst die eigentliche Arbeit. Ich würde mir wünschen, dass man die lateinischen Originale dieser Statuten ins Slowenische übersetzt und sodann eine tiefere Analyse aller in den Statuten geregelter Rechtsgebiete in Angriff genommen wird. Die Arbeit müsste so konzipiert werden, dass man dabei rechtsvergleichend auch die Statuten anderer istrianischer Kommunen, darüber hinaus aber auch die Statuten anderer adriatischer und norditalienischer Städte einbezieht. Auch hierbei handelt es sich um ein langfristig angelegtes Projekt, das nur in Teamarbeit zu realisieren ist. Der Frage der Rezeption müsste dabei besondere Aufmerksamkeit gewidmet werden. Die ersten Indizien sind jedenfalls vielversprechend.

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INFLUENCE OF *IUS COMMUNE* IN SLOVENIA FROM THE PERSPECTIVE OF RECENT RESEARCH

Summary

The author presents the state of research in the field concerning the reception in the Slovenian territory, concluding that in comparison with many other European countries this phenomenon in Slovenia has not been given enough attention. More systematic studies aiming at the analysis of specific legal sources as well as contrac tual and judicial practice should be carried out in the future. Only separate detailed studies, when combined, will ultimately give a clear picture of reception in the present day Slovenian territory and will thus also enrich the field of European legal history.

The survey of the general evidence on reception is followed by the presenta tion of recent significant discoveries in the field of inheritance and criminal law. The reception of inheritance law for both testamentary and intestate succession in littoral communitiess reached its peak in the last quarter of the 14th century. Reception in the continental part of Slovenia was slower and more graduate. It seems that reception in these regions lagged behind other fields of civil law. Common law principles re

[39] M. Pahor, J. Šumrada, *Statut piranskega komuna od 13. do 17. stoletja I, II [Statut der Kommune von Piran vom 13. bis zum 17. Jahrhundert I, II]*, Ljubljana 1987; L. Margetić, *Statut koprskega komuna iz leta 1423 z dodatki do leta 1668* [Statut der Kommune von Koper aus dem Jahre 1423 mit Nachträgen bis zum Jahre 1668], Koper, Rovinj 1993; D. Kos, *Statut izolskega komuna od 14. do 18. stoletja* [Statut der Kommu ne von Izola vom 14. bis zum 18. Jahrhundert], Koper 2006; D. Darovec, *Statut piranske ga komuna iz leta 1384* [Statut der Kommune von Piran aus dem Jahre 1384], Faksimile, Koper 2006.

garding testamentary succession strengthened rather slowly at the beginning of Mod ern Times and very likely developed more extensively only in the 17th century. In the field of testamentary succession reception had more effect on the contents than the form. Reception in intestate succession happened even later in time, because a sub stantial enforcement of Roman law was held back by the deeply rooted provincial customs.

The focus is then turned to recent findings regarding the Roman Canon Law Procedure in Criminal Justice Freedoms for Ljubljana from 1514. As one of the fore runners to the Criminal Order of Charles V (Constitutio Criminalis Carolina) they represent an important link in the evolution of criminal law in Central Europe. Their procedural provisions marked the criminal justice in Ljubljana considerably. The research of provisions established that they reflect fundamental characteristics of the Roman canon law procedure. An enhanced role of the inquisitorial procedure includ ing the officiality principle, torture and the related secrecy, as well as the indirect ness and the written procedure may be regarded as a basic result of reception. Even though the Freedoms included no detailed safeguards against torture as well as no clearly expressed principle defining that the court records should be sent to legal experts, which were both understood as a typical sign of reception in the Carolina, the idea of these institutes may nevertheless be noticed in the conceptually similar provisions of the Freedoms. Yet, the discussed regulation in Ljubljana is not to be regarded as an important novelty or a sudden turn in the field of criminal justice but should be understood as a result of a long term evolutionary process.

The author states that on the basis of the past and recent research a hypoth esis can be confirmed that the course and intensity of reception in the Slovenian territory were on the corresponding time level, and as such comparable to the situa tion in the wider territory. In view of the fact that during the period in discussion the littoral Slovenian territory belonged to another cultural environment than the conti nental part, the evolutionary characteristics differ, even though they are still in com pliance with general tendencies of the wider territory. The article concludes with a short presentation of planned research in the field of reception to be carried out in the near future.

Key words: *Reception. Ius commune. Continuity. Roman law. Inheritance law. Criminal procedure. Slovenia.*

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FIDUCIA CUM CREDITORE RISK MANAGEMENT AND "DOUBLE OWNERSHIP"*

Credit risk represents one of the many problems that the legal profession is called upon to solve. It has been so from ancient times and the instruments used to deal with it then are applied even today. One of them, experiencing a renaissance in the last 20 years, is fiducia cum creditore. It has been introduced into Croatian law in 1996, followed by discussions about the nature of ownership transfer it is founded on. In an effort to provide a historical basis for further argument, the author investi gated the patrimonial positions of creditor and debtor in Roman law fiducia cum creditore. In these considerations, emphasis is put on the parties' interests and the internal element of risk, especially elaborated in the matter of furtum fiduciae.

Key words: *Fiducia. Fiducia cum creditore. Risk Management. Credit Risk. Divided Ownership. Double Ownership.*

I

One of the very popular terms in modern business world is risk management. The abundant literature on the topic is growing almost daily. One can see all around posters for conferences held by famous manager-gurus. They offer to instruct people involved in decision making processes on how to predict, perceive and handle risk in their businesses. Solutions are sought as the problem becomes ever more prominent with the economic crisis taking its toll on world markets. Among its causes,

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credit risk and its improper handling have often been pinpointed as the prime culprit.[1]

Credit risk is the principal form of risk the legal order is concerned with. It has been so for centuries and is the same nowadays. Legal systems introduced long ago instruments to mitigate it and prevent losses in business operations. Offhand, the instruments by which the obligation is strengthened fall into mind: fiduciary transfer of ownership, pledge, hypothec and surety.

Although they represent elementary tools in providing security for contractual obligations, their importance remains unparalleled up to today. Moreover, one of them, fiduciary transfer of ownership, either in the forms derived from Roman *fiducia cum creditore* or in the form of trust,[2] experienced a renaissance in the last 20 years and is still on the rise.[3] This especially applies in post-socialist countries in Central Europe. With the reinstitution of the Roman law based private law system and private ownership, *fiducia cum creditore* found its way into these systems almost from the outset. Primarily, the process occurred by the scholarly transposition of German *Sicherungsübereignung* as a natural result of the great influence German legal literature and doctrine have had in central Europe. In some countries, it resulted in legislative changes, creating closed and defined set of rules as in Croatia;[4] in others, it relied on accepted practice, with partial regulation in the codes.[5]

The strongest possible security ensured by the transfer of title on the property corresponded with the initial insecurity within the new markets and the need to secure the interests of wanted foreign investors.[6] The

[1] On deficiencies in securitisation practice see e.g. Greenspan Testimony on Sourc es of Financial Crisis (before the House Committee of Government Oversight and Reform), October 23, 2008, *Wall Street Journal*, source: *http://blogs.wsj.com/economics/ 2008/10/23/ greenspan testimony on sources of financial crisis*/, last visited March 19, 2009.

[2] The use of trust for security purposes on the continent is limited to Luxem bourg, one of the European financial centres. Amp. eds. A. Prüm, C. Witz, *Trust & fiducie. La Convention de La Haye et la nouvelle législation luxembourgeoise*, Paris 2005.

[3] It has been in use also outside the continent, e.g in South Africa, in practice, until the judicial decision in 1998. See C.G. van der Merwe, "Modern Application of the Roman Institution of Fiducia Cum Creditore Contracta", ed. L. Vacca, *La Garanzia nella prospettiva storico comparatistica*, Torino 2003, 327 etc.

[4] The Law of Enforcement, *Official Gazette of the Republic of Croatia*, No. 57/96, 29/99, 42/00, 173/03, 151/04, 88/05 and 67/08; see also for Montenegro, Law on the Fiduciary Transfer of Ownership, *Official Gazette of the Republic of Montenegro*, No. 23/96; and Slovenia, with restriction to movables and rights, Law of Property Code, *Of ficial Gazette of the Republic of Slovenia*, No. 87/02.

[5] One example represents Poland, see P. Stec, "Fiducia in an Emerging Econo my", ed. W. E. Cooke, *Modern Studies in Property Law*, vol. 2, Oxford 2003, 43.

[6] To tackle these questions the European Bank for Reconstruction and Develop ment proposed the Model Law on Secured Transactions in 1994 with the single debt se curity instrument (charge). It primarily influenced legislation in Hungary and Slovakia.

financial power and influence of major banks guaranteed its spreading and survival, but the trend was not restricted to new economies. The use of the fiducia model was implemented in European law with the Financial Collateral Directive (47/2002/EC) as well.[7] One of the two modes of security it envisaged was the transfer of title of the financial collateral to the collateral taker (*fiduciary*).

II

The structure, by which the inherent risk of non-payment is diminished to the greatest extent, makes *fiducia cum creditore* such an exceptional instrument. It plays a decisive role in its choice, reflecting the active element in risk management. The selection of specific remedy, *fiducia*, also represents the external element of risk regarding the instrument, as it serves the purpose of security.

On the other side, the rules on the duty to take account of the risk outcome, in regard to the collateral itself, are equally important factors in the overall management policy and represent the internal element of risk. They provide the basis upon which actions can be programmed. They regulate the authority of both parties in regard to the fiduciary property, prior to and after the default.

The key element that defines both risks lies in the nature of the ownership transfer. In Croatian law two approaches to this problem have been applied. The first one, which was introduced through legislation in 1996, and is also valid at the moment, gives the fiduciary unlimited powers in regard to the transferred property.[8] He has the right to sell the object even before default and can also acquire "full" ownership through prescribed procedure in the event of default.

The second approach, closer to the traditional mechanisms of real property law, in force from 2003 to 2005, envisaged fiduciary transfer as more similar to other forms of security rights (pledge and hypothec).[9] It made a shift from greater protection of the creditor to the protection of the debtor with respect to cases of abuse of right in practice. Thus, the

[7] This directive has been implemented in Croatian law by the Law on Financial Securities, *Official Gazette of the Republic of Croatia*, No. 76/97.

[8] See J. Barbić, "Sudsko i javnobilježničko osiguranje tražbine vjerovnika pri jenosom vlasništva na stvari i prijenosom prava" [The Judicial and Notarial Debt Security by the Transfer of the Property and Rights], *Novo ovršno i stečajno pravo*, Zagreb 1996, 99 etc.; M. Dika, *Građansko ovršno pravo* [The Law of Civil Enforcement], I, Zagreb 2007, 797 etc.

[9] See N. Gavella *et al*., *Stvarno pravo* [The Law of Real Property], Zagreb 1998, § 14, 592 etc.

transfer of possession to the fiduciary was forbidden and the possibility of enforcement was restricted to sale.

The change of the Law of Enforcement in 2003, while falling in line with the Law on Ownership and Other Property Rights,[10] and its doctrinal explanations,[11] introduced the division into prior and posterior ownership. The fiduciary held prior ownership, as it was deemed to end after the payment of debt, and the fiduciary debtor had registered posterior ownership, as he was supposed to regain the full title to the object after he would defray the debt. With this, the emphasis in Croatian *fiducia cum creditore contracta* was put on the patrimonial relationship regarding the object of *fiducia*, as opposed to the previously, and subsequently reinstated in 2005, purely obligatory concept of fiduciary agreement.

The arguments put forward in this exchange are however strictly doctrinal and practical. They lack a deeper historical perspective we find indispensable for proper understanding of the institution. With respect to this, our effort is aimed at the inspection of the structure of Roman *fiducia cum creditore* and the mutual relationship of *fiduciant* and fiduciary to find confirmation/refutation on the topic of "double ownership" in *fiducia*. In these deliberations, special attention will be given to the problem of risk which is particularly revealing for the patrimonial positions of the parties. With this said, we turn our attention to the sources of Roman law.

III

Questions regarding the proprietary aspect of fiduciary relationship in Roman law have been rather often argued in the literature.[12] As the

[10] The Law on Ownership and Other Property Rights, *Official Gazette of the Re public of Croatia*, No. 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08 and 38/09.

[11] Main interest was to harmonize the regulation in the Law of Ownership and Other Real Rights, Article 34, and the Law of Land Registry, Article 32, with the rules on fiduciary ownership in the Law of Enforcement. In theoretical conception there is a visi ble influence of German *Anwartschaftsrecht*. See N. Gavella, 604, 610.

[12] Cf. the literature on *fiducia*: H. Dernburg, *Das Pfandrecht nach den Grundsät zen des heutigen römischen Rechts*, I., Leipzig 1860; H. Degenkolb, "Ein pactum fidu ciae", *Zeitschrift für Rechtsgeschichte* [hereinafter ZRG] 9/1871; P. Oertmann, *Die Fidu zia im römischen Privatrecht*, Berlin 1890; R. Jacquelin, *De la fiducie*, Paris 1891; Manigk, "Fiducia", *Pauly Wissova, R.E.*, VI, 2, Stuttgart 1909; C. Longo, *Corso di diritto Romano, La fiducia*, Milano 1933; W. Erbe, *Die fiducia im römischen Recht*, Weimar 1940; M. Kaser, "Geteiltes Eigentum im älteren römischen Recht", *Festschrift Paul Ko schaker*, I., Berlin 1939, 445 etc.; *idem*, "Die Anfänge der manumissio und das fiduzia risch gebundene Eigentum", *Zeitschrift der Savigny Stiftung fur Rechtsgeschichte. Roma nistische Abteilung* [hereinafter SZ] 61/1941; *idem*, "Neuen Studien zum altrömischen Eigentum", SZ 68/1951, 131; *idem*, *Eigentum und Besitz im älteren römischen Recht*,

foundation for classical law seemed firmly established, and widely accepted, in the form of unitary ownership on the side of *creditor fiduciarius*, the focus has mostly switched to the early development of the institution. In the archaic era, the time before and around the enactment of Law of XII Tables, with enough space for various conjectures, the lack of sources spurred the development of a number of different theories. The evidence for the debtor's patrimonial position was sought in the legal protection he would be granted after the payment of debt. Therefore, deciding on the right to sue and the existence of appropriate *actio* defined the outline of legal relationships and proprietary powers.[13] If the debtor could claim the object, missing *remancipatio*, with special *legis actio*, or *rei vindicatio*, it would be a proof of his ownership rights or divided ownership. Also from another angle, the creditor's authority in the case of default, if it is taken that he couldn't take or sell the object without the special clause, would witness the same.[14]

Considering risk, it is extremely difficult to make any propositions concerning cases from classical law. Exception could be made for the possible loss of an object which would fall on the creditors account, specifically in line with older theories on primal *fiducia* as sale-for-repurchase.[15]

Köln Graz 1956; *idem*, "Studien zum römischen Pfandrecht", *Tijdschrift voor Rechtsge schiedenis* [hereinafter TR] 44/1976, 233 289; *idem*, "Studien zum römischen Pfandrecht II, Actio pigneraticia und actio fiduciae", TR 47/1979, 195 345; *idem*, "Besitzpfand und 'besitzloses' Pfand (Studien zum römischen Pfandrecht III)", *Studia et Documenta Histo riae et Iuris* 45/1979, 1 92; *idem*, "Über relatives Eigentum im ältrömischen Recht", SZ 102/1985; A. Burdese, *Lex commissoria e ius vendendi nella fiducia e nel pignus*, Torino 1949; F. Wubbe, "Usureceptio und relatives Eigentum", TR 28/1960, 13 etc.; P. Frezza, *Le garanzie delle obligazioni*, II. *Le garanzie reali*, Padova 1963; G. Diósdi, *Ownership in Ancient and Preclassical Roman Law*, Budapest 1970, 116 etc.; N. Bellocci, *La struttura del negozio della fiducia nell'epoca repubblicana*, I. *Le nuncupationes*, Napoli 1979; *idem*, *La struttura della fiducia*, II. *Riflessioni intorno alla forma del negozio dall'epoca arcaica all'epoca classica del diritto romano*, Napoli 1983; B. Noordraven, *Die Fiduzia im römischen Recht*, Amsterdam 1999; J. P. Dunand, *Le transfert fiduciaire: "donner pour reprendre", Mancipio dare ut remancipetur*, Bâle Genève Munich 2000.

[13] It is surely one of the most debatable questions in the scope of fiducia, although recent authors hold the line of classical approach with strictly morally obligation to re mancipate. Hence, the last big upheaval in the literature was caused almost 50 years ago by Wubbe's article on *usureceptio* and *relatives eigentum*. See F. Wubbe, 2 etc.; B. Noordraven, 286 etc. For older literature and proposed solutions see P. Oertmann, 215 etc.

[14] For so called "Bewahrungs" Theorie see H. Dernburg, 19; A. Pernice, *Labeo* 3/1892, 139; P. Oertmann, 196 etc.; A. Burdese, 10 etc.; J. P. Dunand, 125 etc.

[15] Cf. J. Wigmore, "The Pledge Idea: A Study in Comparative Legal Ideas", III, *Harvard Law Review* 11/1897 1898, 31; *idem*, "The Pledge Mortgage Idea in Roman Law: A Revolutionary Interpretation", *Illinois Law Review* 36/1941 1942; 376 etc.; M. Kaser, (1976), 234, fn. 8.

This development is however temporally limited with the introduction of obligatory *actio fiduciae* and consolidation of procedure, and as we have already tackled the problem in another place, we shall not dwell on it any further here.[16] In regard to the text that follows, as historical continuation of early developments, we can conclude that it seems very probable that in the early stages the debtor kept a high level of rights towards the object of *fiducia*, limiting the creditor in his dispositions, especially after payment.

IV

The other approach to the problem of double ownership relied more on the surviving sources and thus focused on the classical development. It tried to incorporate the implications of obligatory duties on patrimonial positions of the parties. Doing so, it envisaged two sorts of ownership, or more correctly two forms of patrimony – legal and economical.[17] While the person who gave the thing remained the nominee of its economic substance, the other who has accepted it by *mancipatio* or *in iure cessio*, had legal title to it.

At first sight, it resembles the duality existing in common law jurisdictions between legal and equitable title. It even falls in line with Pringsheim's observations on similarities in Roman and English property law and the fact that the notion of ownership, so familiar to us today, defined by classical jurisprudence and transferred to our days by Justinian, was nonetheless actual and lived to its full extent for only a relatively short time in Roman history.[18] Roman *fiducia* however misses the duality of regulation in English law so there couldn't be such strong comparisons, but the economical element of a debtor's position cannot be dismissed.

Consequently, the legal effects and authorities coming from the economical substance pertaining to the debtor will be scrutinized, although with the necessary previous overview of the creditor's stance. The analysis, dealing at the same time with the problem of risk, focuses on the elements of legal relationship between the transfer of ownership in the form of *mancipatio* or *in iure cessio* and its end.

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[16] Cf. T. Karlović, "Oko pravne zaštite fiducije rimskog civilnog prava" [On the Le gal Protection of Fiducia in *ius civile*], *Zbornik Pravnog fakulteta u Splitu* 4/2008, 885 etc.

[17] See, also for earlier literature, J. P., Dunand, 193 etc.

[18] See F. Pringsheim, "Legal Estate and Equitable Interest in Roman Law", *Law Quarterly Review* 59/1943 (reprint: *Gesammelte Abhandlungen*, I., 1961), 244.

V

After the transfer has taken place, the fiduciary acquires *dominium ex iure quiritium* on the object. Accordingly, he is supposed to have all the rights a usual owner has. The first and foremost entitlement is the right to use *rei vindicatio*. It is attested in D. 24.3.49.1. where Paulus writes that the creditor can obtain the possession of the transferred thing with success, even though it has been afterwards given as dowry.[19][20] The formal requirement that stands on the creditor's side, the formal transfer of ownership, will prevail over the debtor's disposition.

Also, the fiduciary has the right to use *condictio furtiva*, pertinent to the owner, witnessed by Ulpianus, D. 13.7.22.pr.[21] It states that the creditor can use not only the *actio furti*, but *condictio* as well. Since it will be seen later on that the debtor can use *actio furti* as well, the second sentence, expressly mentioning *condictio*, points to the right exclusively reserved for the owner.[22]

This text is valuable for the estimation of risk. Even though the creditor is liable for the theft and loss of thing, the debtor will not be absolved from his debt, but has the right to sue the creditor. The creditor has the right to sue the thief and get the fine, because if he doesn't suc-

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[19] D. 24.3.49.1: *Fundus aestimatus in dotem datus a creditore antecedente ex causa pignoris <fiduciae> ablatus est.* The same in *Frag. Vat*. 94, only with words "*ex causa fiduciae*", by which there is no doubt to its authenticity. More on the rest of the text of *Frag. Vat.* 94 see B. Noordraven, 168 etc.

[20] Also, one more text by Paulus can be mentioned in this context. It is the com mentary on the application of *lex Iulia de vi privata* in P.S. 5.26.4. Some older authors, Oertmann and Jacquelin, had held that it proves the right to *rei vindicatio*, but Noordraven elaborately explained to the contrary that it doesn't warrant a right to *rei vindicatio*, but only a physical seizure. See P. Oertmann, 165; R. Jacquelin,173; Manigk, 2306; W. Erbe, 31; E. Levy, *West Roman Vulgar Law, The Law of Property*, Philadelphia 1951, 214 etc.; B. Noordraven, 160 etc.

[21] D. 13.7.22pr.: *Si pignore subrepto <fiducia subrepta> furti egerit creditor, to tum, quidquid percepit, debito eum imputare Papinianus confitetur, et est verum, etiamsi culpa creditoris furtum factum sit. Multo magis hoc erit dicendum in eo, quod ex condic tione consecutus est. ...* For its original relation to *fiducia* see O. Lenel, "Quellenforschun gen in den Edictcommentaren", SZ 3/1882, 108; also, especially on the problem of inter polation regarding "*etiamsi factum sit*", further C. Longo, 802; W. Erbe, 33, 54 etc., 79; H. Kreller, "Formula fiduciae und Pfandedikt", SZ 62/1942, 198; H. Ankum, "Furtum pignoris and furtum fiduciae im klassischen römischen Recht I", *Revue internationale des droits de l'antiquité* [hereinafter RIDA] 26/1979, 127 etc.; *idem*, "Furtum pignoris and furtum fiduciae im klassischen römischen Recht II", RIDA 27/1980, 123 etc.; M. Kaser, "Furtum pignoris" und "furtum fiduciae", SZ 99/1982, 233 etc.; B. Noordraven, 208 etc.; J. P. Dunand, 205.

[22] On the use of *condictio ex causa furtiva* M. Kaser, *Das römische Privatrecht*, I, 618 (also for further literature see fn. 49, 50, 51); W. Pika, *Ex causa furtiva condicere im klassischen römischen Recht*, Berlin 1988; R. Zimmermann, *The Law of Obligations*, Cape Town 1990, 941 etc.

ceed in the proceedings he will have completely lost the security. This follows the reasoning *cuius periculum, eius commodum*, but as Lenel has pointed out, the duty to compensate the amount of punitive damages he received mitigates the application of the rule to prevent an unjust result where the creditor would pay normal damages to the debtor and later collect multiple amounts from the thief.[23] For any such *superfluum*, the debtor would have *actio fiduciae*.[24]

Regarding the position of the fiduciary, it can be furthermore pointed to the texts by Paulus, *Sententiae*, 2.13.6, and Papinianus, D. 33.10.9.2.,[25] confirming the right of the creditor to grant the object of fiducia by *legatum per vindicationem*.[26] Even though the right of legatees is restricted by *actio fiduciae* available to the debtor, this restriction is strictly obligatory in effect. Of the other powers, these are the right to free a slave, D. 19.1.23.,[27] and a disputed right to sell a thing given in *fiducia* before the debt is due, *Fragmenta Vaticana* nr. 18.[28]

VI

Regarding the position of the debtor, if we speak in terms of patrimonial attribution, there is a list of powers he can exercise regarding the object of *fiducia*. The question here is how they reflect his proprietary position. Mainly, even surprisingly taking account of the time of their origin, the sources convey an impression of underlying duality of ownership rights. With settled procedure, it cannot be expected to find expressly stated true divided ownership; however, the authority of debtor is quite wide.

For one, he has the right to sell the object of fiducia, as stated in P.S. 2.13.3.[29] This sale is under condition and will be perfect when the

[23] Cf. O. Lenel, 110; W. Erbe, 54, H. Ankum, (1979), 153, and (1980), 125.

[24] In relation to P.S. 2.13.1.

[25] There is a strong controversy about the underlying range of interpolations in the text. It goes to the mid 19th Century German scholarship, so already Oertmann notifies us about this as contentious matter. See further O. Geib, "Actio fiduciae und Realvertrag", SZ 8/1887, 140; P. Oertmann, 37 etc.; C. Longo, 57; W. Erbe, 14, fn. 6 (exhaustingly on other older literature on the problem); Talamanca, *Rezension of Frezza*, IURA 15/1964, 375 etc.

[26] See P. Frezza, 19.

[27] See Lenel, *Palingenesia iuris civilis*, I, 354 pp; C. Longo, 804.

[28] *Frag. Vat. 18: ...secundum ius in facin<orosos>... <emptores> inquietari, sed actione fidu<ciae>... Valeriano III et <Gallieno II conss>*. This fragment is seriously damaged so it has been mostly taken with great caution and added only as supplementary evidence when speaking of fiduciary's capacities. See FIRA II, 466; C. Longo, 804; W. Erbe, 191; J. P. Dunand, 207; for different reconstruction see P. Oertmann, 164 etc.

[29] P.S 2.13.3: *Debitor creditori vendere fiduciam non potest: sed alii si velit ven dere potest, ita ut ex pretio eiusdem pecuniam offerat creditori, atque ita remancipatam sibi rem emptori praestet*.

debt is paid and the property restored,[30] but the mere fact of regular sale is a clear indication of his authority. On the other hand, the text says that the object cannot be sold to the creditor as he is the owner already. In our opinion, this must not be understood only in relation to inability to buy one's own thing,[31] but more as the limitation imposed in regard to *lex commissoria*.[32]

In the law of succession, the debtor is permitted to grant *legatum per preceptionem* according to Gaius, in *Institutiones*, 2.220,[33] and in D. 10.2.28.,[34] under the condition of the payment of the debt, so the legacy can be effected. In that aspect he controls the economical substance of the transferred object. Additional evidence to this represents his right to compensate the fruits for debt, P.S. 2.13.2. Although without any special clause to this effect, he is in the position as any other debtor who has given security and remained its owner, concerning the progeny and any other income from the object of security, namely slaves.[35]

When speaking of slaves, the debtor is also noxally responsible for crimes committed by those he gave in *fiducia*. It mirrors his patrimonial position and is witnessed by Paulus, D. 9.4.22pr, 1 and 2, where he explained why the debtor is called *dominus*.[36] He has the right to get the thing back, pending ownership, contingent on the payment of the debt. It especially applies, *maxime*, if he has the money, but the same must be

[30] The same could be stated in relation to already quoted D. 24.3.49.1. where the son in law would become an owner if the father got the object of security back. In both situations, the alienation of *res aliena* is valid, as is the rule expressed in D. 18.1.25 and 28, subject to eviction. See e.g. J. Mackintosh, *The Roman Law of Sale*, Edinburgh 1907, 50, 54 etc.

[31] Cf. D. 12.6.37, D. 18.1.16pr. and D.50.17.45. See W. Erbe, 32; B. Noordraven, 166 etc.

[32] In connection with P.S. 2.13.4.

[33] Gaius, Inst., 2.220: *...aliquo tamen casu etiam alienam rem per praeceptionem legari posse fatentur: ueluti si quis eam rem legauerit, quam creditori fiduciae causa mancipio dederit; nam officio iudicis coheredes cogi posse existimant soluta pecunia lu ere eam rem, ut possit praecipere is, cui ita legatum sit*.

[34] The problem of the interpolation is present here as well. The source itself gives no solid indication to fiducia, only the textual interpretation and similarity to previous fragment. See P. Oertmann, 34; Manigk, 2288; M. Kaser, (1979a), 329, fn. 274.

[35] See P. Frezza, 58; J. P. Dunand, 223.

[36] D. 9.4.22pr.: *Si servus depositus vel commodatus <fiduciae datus> sit, cum domino agi potest noxali actione: ei enim servire intellegitur et, quod ad hoc edictum at tinet, in potestate eius est, maxime si copiam habeat reciperandi hominis. 1. Is qui pignori accepit vel qui precario rogavit non tenetur noxali actione: licet enim iuste possideant, non tamen opinione domini possident: sed hos quoque in potestate domini intellegi, si facultatem repetendi eos dominus habeat. 2. Quid est habere facultatem repetendi? Ha beat pecuniam, ex qua liberari potest: nam non debet cogi vendere res suas, ut solvat pecuniam et repetat servum*. He is called *dominus* also in D. 13.7.37 and D. 47.2.14.6. See W. Erbe, 82 etc.; P. Frezza, 22 etc.; B. Noordraven, 178 etc.

deduced if he hasn't. As this applies for the third parties, there must be mentioned Africanus, D.13.7.31, who discussed the risk of *furtum* the slave perpetrated against the creditor. Of the two situations he described, the first one is more significant where the slave has committed a theft without the debtor's knowledge of the slave's nature. The debtor has the possibility to evade the penal action and the penalty by relinquishing the object of fiducia in the interest of creditor.[37] In that way his position is pretty much the same as of any other's owner, only the formal element whereby he doesn't need to transfer ownership is different.

VII

Furtum is the question within which responsibility is mostly explored and explained. It is the primary form of risk in *fiducia*. In this area, the limit of responsibility has been set and the entitlement to the thing and its value can be estimated as well.

Apart from the already cited text D.13.7.22 pr., *furtum fiduciae* is the object of D.47.2.80 and D. 47.2.14.5–7.[38] Thoroughly discussed, in the exchange between Ankum and Kaser, the question is investigated in detail in the text of Ulpianus, D.47.2.14.5–7, with accent on par. 6 and 7.[39] The main problem treated here is to what amount the creditor has the right to sue, and when he will have this right. The rule is that he has the right to sue until the debt is settled. When he obtains the fine by *actio furti*, or restitution by *condictio*, he will have to set the fine off against the debt.

In the cases where the debt is already paid by a previous fine (par. 6), if there were consecutive thefts, he will not have the right to use *actio furti* since he has no interest in that. In that case, the debtor will sue, and in regard to that entitlement he is called *dominus*, the holder of the economical value of the object. The only exception to the benefit of the creditor is that he can sue if he is liable to the debtor by *actio fiduciae*. If he will have to pay the damages for the value of thing, since he is unable to return it and the debt is already settled, he has the right to claim the fine.

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[37] Under different circumstances, when he knowingly, *sciens*, has given in fiducia a stealing slave, he cannot redeem himself simply with *pro noxae relinquere*, but the creditor can additionally use *actio fiduciae contraria* for full interest.

[38] The first text, D. 47.2.80, is quite short and it corroborates the second part of D.13.7.22pr. that the penalty given by debtor thief will not be compensated with his se cured debt. See B. Noordraven, 210.

[39] According to the limited space we shall give only a summary view of conse quences important for the estimation of risk and patrimonial position of debtor. For de tailed analysis see H. Ankum, (1979), 127 etc. and (1980), 95 etc.; M. Kaser, (1979b), 63 etc.; *idem*, (1982), 249 etc.

If there were two objects (slaves) given in *fiducia* for one debt (par. 7), and both were stolen, if taken together, the fiduciary can sue for each proportionally to the debt. If taken separately, the damages received for one, covering the whole debt, restrain creditor from any further actions. Thus, the creditor has the right to sue to the amount of his interest, and the residue should be claimed by the debtor.

The general positions regarding risk are pretty clearly set here. The debtor is considered as *dominus*, whereas the creditor, albeit a formal owner, is limited with the amount of debt he can sue from the thief. The risk for the loss of object is shared between them according to the interest they have in the object. If there is no guilt on either side for the loss (theft), they both lose; the fiduciary the security, and the *debitor* the object, so they can both seek for punitive damages. The important thing is, that opposite to other cases where person *cuius interest rem salvam esse* is the party who holds the object under obligation, here it is the owner whose position is judged by his interest.

VIII

To conclude with, the entitlements of creditor and debtor in *fiducia cum creditore*, reflecting the interplay of two divergent forces, the transfer of ownership and its function as security, show the division of powers pertinent to the owner in two persons. This especially applies for the bearing of risk, most notably elaborated in the matter of *furtum fiduciae*. Here the debtor is also called *dominus*, as having the right to the value of thing surpassing the creditor's interest. In that manner, although the creditor is formal owner of the thing, the debtor's position to its economical substance implies the duplicity of proprietary rights which can be described as "double" ownership.

In contemporary law, the land registry system offers a possibility to formalize and publicize these double entitlements, as to protect the interests of both parties, but also those of third persons. Legal positioning of the debtor as an owner under the condition of payment of his debt, though partially limiting the creditor in his dispositions, could thus ease the problem of taking and managing of risk, especially with regards to the factual situation where the debtor stays in control of the object.[40]

[40] For the problem of responsibility for the damages owed to the third side injured on the slippery sidewalk in front of the fiduciary transferred house see The Decision of the Croatian Constitutional Court U III 10/2003 of 13 March 2008., *Official Gazette of the Republic of Croatia*, No. 50/08.

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FIDUCIA CUM CREDITORE RISIKOMANAGEMENT UND "DOPPELEIGENTUM"

Zusammenfassung

Unter den zahlreichen Fragen aus dem Bereich der fiducia cum creditore sticht besonders das Problem des Risikos und dessen Verantwortung hervor. Die Si tuation wird nur noch zusätzlich kompliziert durch die Dualität der Befugnisse auf Seiten des Fiduzianten und des Fiduziars, die aus der Natur des Rechtsgeschäftes der Übertragung von Eigentum zum Zweck der Sicherung der Gläubigerforderungen ent steht. Die Verknüpfung der zwei Sachenrechte in einem Rechtsverhältnis führte zur Trennung der rechtlichen und wirtschaftlichen Inhalte des Eigentums und der ent sprechenden Befugnisse der beteiligten Parteien. Rechtlich gesehen ist der Fiduziar nach außen, also gegenüber Dritten, als vollrechtlicher Eigentümer dargestellt, mit allen Verfügungsrechten über den Vermögensgegenstand. Zwei Bereiche insbesonde re Schutz des Eigentums und Legat bestätigen die Macht des Fiduziars, wie auch die konkreten Fälle der Anwendung der condictio furtiva und der actio furti, die am plastischsten die Frage des Risikos darstellen. Auf diese haben die römischen Juris ten mit der ihnen eigenen Genauigkeit im Wesentlichen beantwortet, wer denn in einzelnen Situationen das Risiko zu tragen hat. Die Anwendung der actio furti weist auch auf die Lage des Fiduzianten als Träger der "wirtschaftlichen" Macht hin, ge nauer gesagt auf den Fiduzianten als Verfügungsberechtigten über den ökonomischen Wert der Sache, was auch die Möglichkeit der Aussetzung eines Legats per praecep tionem bestätigt, also den Verkauf und die Übergabe der Sache aufgrund eines Scha denersatzanspruchs. Durch die Darstellung und Analyse einzelner Stellen aus den Digesten und Teilen der Sentenzen des Paulus, die sich auf die Stellung der Parteien in einem fiduziarischen Verhältnis beziehen, vor allem die Frage des furtum und der noxalen Haftung, ist das "Doppeleigentum" als Form der Befugnisse des Fiduzian ten über den wirtschaftlichen Wert der übergebenen Sache als einer der Gründe de terminiert, direkt auch als Folge der Teilung des Risikos zwischen dem Fiduzianten und dem Fiduziar.

Schlüsselwörter: *Fiducia. Fiducia cum creditore. Risikomanagement. Kredi trisiko. Geteiltes Eigentum. Doppeltes Eigentum.*

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DIE ROMANISTISCHE FORSCHUNG IN SLOWENIEN*

Römisches Recht war in Vergangenheit ein wesentlicher Bestandteil des Rechtsunterrichts. Die romanistische Forschung ermöglichte seine Entwicklung und Aktualisierung. Auf dem Gebiet des heutigen Slowenien kann man von einer romanis tischen Forschung erst nach der Gründung der Universität im Jahre 1919 sprechen. In der Zeit vor dem Ersten Weltkrieg wirkten allerdings etliche Romanisten sloweni scher Herkunft an den Universitäten im Ausland.

Stichwörter: *Römisches Recht. Romanistische Forschung. Rechtsstudium. Rechtskultur.*

1. EINLEITENDES

Die Erforschung des römischen Rechts deckt sich im gewissen Sinne mit der Entwicklung des modernen Rechtsunterrichtes. Die modernen Universitäten und somit auch das moderne Rechtsstudium haben mit dem intensiven Studium des Gesetzgebungswerks Justinians begonnen. Die Erforschung der justinianischen Kodifikation hat bekanntlich sowohl den Inhalt des europäischen kontinentalen Rechts, als auch die Natur des Juristenberufs weitgehend geprägt.

Deswegen war in der Vergangenheit in praktisch allen Programmen des juristischen Studiums an den europäischen Rechtsfakultäten dem römischen Recht eine bedeutende Rolle zugedacht. Noch am Anfang des 20. Jahrhunderts wäre ein Studienprogramm ohne römisches Recht kaum vorstellbar gewesen. Doch hat schon vor dem zweiten Weltkrieg ein Pro-

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zess begonnen, der zur Folge hatte, dass sich das Rechtsstudium auf Kosten der rechtshistorischen Fächer mehr und mehr auf das geltende Recht konzentrierte. Damit wiederholt sich in gewisser Weise in einem umgekehrten Sinne eine wissenschaftliche Diskussion, die einige Jahrhunderte zuvor im Laufe der Abkehr des juristischen Unterrichts vom sog. *mos Italicus* geführt wurde. Damals hat man nämlich darüber diskutiert, ob und inwieweit es nötig wäre, neben dem römischen und kanonischen Recht auch das geltende Recht zu lesen.

In der Zeit nach dem zweiten Weltkrieg läßt sich in den meisten Studienprogrammen der europäischen Rechtsfakultäten ein zunehmender Abbau des römischen Rechts beobachten. Dabei geht es nicht nur um die Verringerung der Stundenzahl; das römische Recht wird vielmehr darüber hinaus nicht selten zu einem Wahlfach degradiert oder sogar gänzlich abgeschafft. Auf diese Weise engt sich der zeitliche, aber auch der inhaltliche Horizont des Rechtsunterrichts wesentlich ein. Damit stellt sich die Frage, welche Rolle dem römischen Recht im (künftigen) sog. Bologna-Rechtsstudium zukommen wird. Die Aussichten sind nicht besonders ermunternd, obwohl sich die Vorzüge des römischen Rechts für den Rechtsunterricht kaum übersehen lassen.

Die Ziele, die sich mit dem Unterricht des römischen Rechts erreichen lassen, sind im Grunde nach wie vor dieselben:

- Am Beispiel des römischen Rechts läßt sich die Struktur und das System des Privatrechts als eine harmonische Ganzheit darstellen;
- am Beispiel der klassischen Texte läßt sich der Sinn der Studierenden für eine klare juristische Ausdrucksweise und eine präzise Fachterminologie schärfen;
- bei der Exegese römischer Texte können die Studierenden in der Methode der Textanalyse geschult und ihnen die Fähigkeit beigebracht werden, deutlich genug zwischen Tatsachen und Rechtsnormen zu unterscheiden;
- anhand der klassischen Rechtsfälle bekommt der Studierende erste Einsichten in die praktische Anwendung der Rechtskenntnisse und dabei auch die Gelegenheit, das juristische Argumentieren zu erlernen;
- am Beispiel des römischen Rechts läßt sich hervorragend die historische und soziale Dimension des Rechts vermitteln;
- in gleicher Weise vermag das römische Recht die Studierenden für die Wechselwirkungen zwischen dem Recht und den sozialen Umständen sensibilisieren und ihnen dabei vor allem auch die

Tragweite und Auswirkungen konkreter Rechtsregelungen auf die soziale Wirklichkeit zu verdeutlichen;

– am Beispiel römischer Texte kann die Bedeutung einer konzisen, klaren und eleganten Rechtssprache dargetan werden.

Aus all dem läßt sich unschwer erkennen, wie unentbehrlich das Studium des römischen Rechts für eine gute juristische Ausbildung ist; es sich kann sich mit den genannten didaktischen Zielsetzungen hervorragend in die Ziele des sog. "Bologna-Prozeses" einfügen.

2. DIE ROMANISTISCHE FORSCHUNG

Das langsame Verschwinden des römischen Rechts aus den Studienprogrammen wirft die prinzipielle Frage nach dem Sinn einer systematischen romanistischen Forschung auf. Gibt es nämlich niemanden mehr, dem die Forschungsergebnisse auf dem Gebiet der Romanistik dienen könnten, so fragt man sich natürlich nach der Berechtigung, die Zeit und die Finanzmittel für eine solche Forschung in Anspruch zu nehmen.

Die Antwort kann indessen nur positiv sein. Nicht nur, dass man sich bemühen müsste, dass das römische Recht weiterhin ein fester Bestandteil der Studienprogramme juristischer Fakultäten bleibt. Die romanistische Forschung als solche ist vielmehr für eine qualitätsvolle wissenschaftliche Rechtsentwicklung auf dem Gebiet des Zivilrechts äußerst wichtig. Es wäre deshalb übertrieben, ja geradezu unverantwortlich, zu behaupten, man brauche keine romanistische Forschung bzw. kein römisches Recht mehr an den Fakultäten. Beides ist für die kontinuierliche Rechtsentwicklung unentbehrlich.

Jede Rechtsordnung stellt sich dar als Resultat einer langen, kontinuierlichen Entwicklung. Nur Revolutionen versuchten, mit der Kontinuität zu brechen und das Recht in profunder Diskontinuität neu zu gestalten. Die Folgen derartiger Änderungen waren immer katastrophal und sind wohlbekannt.

Die ausgeprägte Kontinuität des Rechts spiegelt sich am deutlichsten in seiner Sprache. Die Rechtsterminologie hat sich in einem ganz langfristig angelegten Prozess entwickelt. Viele Rechtsausdrücke zeugen von dieser Entwicklung und geben Einsicht in die Umstände, die sie geformt haben. Sie weisen auf verschiedene Einflüsse hin, die im Laufe dieser Entwicklung sowohl die Rechtssprache als auch den Inhalt der Rechtssätze geprägt haben.

Die Rechtssprache hat aber noch eine weitere Dimension. Sie ist Zeugnis einer Rechtskultur, die im Laufe der Jahrhunderte einen eigenen Wortschatz und eine eigene Ausdrucksweise hervorgebracht hat. In dieser

Hinsicht spielen die aus dem römischen Recht stammenden Fachausdrücke eine ganz besondere Rolle. Sie ermöglichen eine zeitliche und räumliche Orientierung, sie vermitteln klare Einsichten in die Rechtsentwicklung und knüpfen Verbindungen zwischen verschiedenen, aus derselben Quelle entstandenen Rechtsordnungen. Neben der fachlichen Bedeutung kommt den aus dem römischen Recht stammenden lateinischen Rechtsausdrücken aber darüber hinaus auch ein symbolischer Gehalt zu. Sie deuten auf jene Rechtskultur und das damit zusammenhängende Ausbildungswesen hin, die man am besten mit dem Wort "gelehrtes Recht" bezeichnen kann.

3. DIE ROMANISTISCHE FORSCHUNG IN SLOWENIEN

Als selbständiger Staat existiert Slowenien erst seit 1991. Deswegen ist es in gewissem Sinne unangebracht, von der romanistischen Forschung in Slowenien zu reden. Auch das Gebiet des heutigen Staates Slowenien ist kein geeignetes Kriterium, denn die meisten Juristen, die das römische Recht vor dem ersten Weltkrieg erforscht oder unterrichtet haben, lebten aus heutiger Sicht im "Ausland". Das leuchtet schon deshalb ein, weil es bis 1919 auf dem Gebiet des heutigen Slowenien gar kein regelmäßiges bzw. kontinuierliches Rechtsstudium gab. Will man also von der romanistischen Forschung in Slowenien sprechen, so muss man sie in zwei Epochen teilen. In der Zeit vor dem Ersten Weltkrieg kann man von den Romanisten slowenischer Herkunft reden, die im Ausland gewirkt haben. Für die Zeit nach der Gründung der slowenischen Universität im 1919 kann man indessen das territoriale Prinzip anwenden.

3.1. Die Zeit vor dem Ersten Weltkrieg

Aus verschiedenen Beobachtungen läßt sich schließen, dass es auf dem Gebiet des heutigen Slowenien in den vergangenen Jahrhunderten ein reges Interesse am römischen Recht gab. Zu solchen Beobachtungen zählt nicht zuletzt auch der Anteil der juristischen Werke unter den Handschriften in der slowenischen Nationalbibliothek. Unter den vor allem aus verschiedenen Klosterbibliotheken stammenden Manuskripten sind etwa ein Drittel juristische, und zwar überwiegend kanonistische Schriften. Noch ausgeprägter gilt das für die Inkunabeln, unter denen das Zivilrecht gleichfalls recht gut vertreten ist.[1] Obwohl (wie bereits erwähnt) eine gründliche Untersuchung dieses Phänomens noch fehlt, kann man mit gu-

[1] Mehr dazu P. Simoniti, *Iugoslaviae scriptores Latini recentioris aetatis*. Pars II. *Opera scriptorum Latinorum Sloveniae usque ad annum MDCCCXLVIII typis edita*, Bi bliographiae fundamenta, Zagreb Ljubljana, 1972, ders. *Humanizem na Slovenskem in slovenski humanisti do srede XVI. stoletja*, Ljubljana 1979, ders. *Med humanisti in starimi knjigami*, Ljubljana 2007, v. a. S. 37 ff. und S. 271 ff.

tem Grund vermuten, dass das Ausmaß der Rezeption auf dem Gebiet des heutigen Slowenien im Durchschnitt nicht geringer war, als in den übrigen habsburgischen Ländern, deren Schicksal es insoweit teilte.[2] Das rezipierte römische Recht trug hier wie dort wesentlich zur Entwicklung der Rechtskultur bei. Diese Rechtskultur lebte auch nach der Verabschiedung des ABGB (1811) weiter.

Unter den Juristen, die vor dem Beginn des 19. Jh. auf dem Gebiet des heutigen Slowenien gewirkt haben, ist uns kein Romanist bekannt, d.h. kein Jurist, der sich wissenschaftlich mit dem römischen Recht befasst hätte. Unter den Juristen slowenischer Herkunft, die im Ausland tätig waren, gibt es aber einige Ausnahmen.

Der erste unter ihnen und in seiner Zeit wahrscheinlich auch der bekannteste war Martin Pegius. Er war slowenischer Herkunft, wirkte aber sein ganzes Leben hindurch in Bayern und in Salzburg.[3] Die meisten seiner Werke sind dem gemeinen, d.h. dem rezipierten römischen Recht gewidmet. Er befasste sich auch mit römischen Rechtsquellen und übersetzte einen Teil des *Codex Iustinianus* ins Deutsche.[4]

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[2] Mehr dazu Janez Kranjc, Die Einflüsse des römischen Rechts auf das Statut von Ptuj (Pettau), in: G. Köbler und H. Nehlsen (Hgb.) *Wirkungen europäischer Rechtskultur*, *Festschrift für Karl Kroeschell zum 70. Geburtstag,* München 1997, 575 ff., Marko Kambič, *Certain aspects of the continuity and reception of Roman inheritance law in the statutes of Slovenian littoral towns*, Slovenian Law Review, Vol. 2, 1 2 (2005), S. 87 103, ders. *Recepcija rimsko kanonskega postopka v kazensko sodnem privilegiju za Ljubljano iz leta 1514*, Zbornik Pravne fakultete Univerze v Mariboru, 3, Nr. 2 (2007), S. 43 ff., ders., *Primerjalna analiza dinamike recepcije v dednopravnih določilih ptujskega in piranskega mestnega prava*, Zbornik znanstvenih razprav 67, (2007), S. 133 ff. und *Recepcija rimskega dednega prava na Slovenskem s posebnim ozirom na dedni red Karla VI.*, Ljubljana 2007.

[3] Mehr über sein Leben und Werk J. Polec, *Slovenski pravni znanstveniki pretekle dobe v tujini*, in: Pol stoletja društva "Pravnik", Spominska knjiga, uredil dr. Rudolf Sajovic, Ljubljana 1939, S. 154 ff., ders. *Pegius*, in: Slovenski biografski leksikon (SBL), urejuje Franc Ksaver Lukman, 6 (1935), S. 281 ff. S. auch Vladimir Simič, *Pegius* in: Leksikon CZ, Pravo, Druga, razširjena in spremenjena izdaja, 2003; S. Vilfan, *Pegius* in: Encilopedija Slovenije, 8, 1994, S. 294.

[4] Das Buch umfasst CXCII Folien und schließt die Konstitutionen bis Leo. et Zeno C. 2, 7, 17 nach der Kodexausgabe von Krüger/Mommsen mit ein. Es erschien in Ingolstadt unter dem folgenden Titel: *Codex Ivstiniani*. Das ist Groszbuch der Rechtlichen Satzungen/ des hochloblichen vnd weytberümbten Kaysers vnd Gesatzgebers Iustiniani, in wöllichem gedachtes Rechtsbuchs Tittel/vnd yedes Tittels vnderschydne Gesatz/sampt derselben vorgehende begriff: Auch den fürnembsten vorgestelten fällen/ vnd nutzbarn Rechtsglossen / vnd auszlegungen darbey allzeyt verzaichnet / züfinden.

Allen denen/ solhrer Amptsgebür vnd pflichten halben/ die Recht zewissen züsthet/ vnd derselben wissenhait ausz dem rechten Quelbrunnen / der Rechtlichen Hauptbüchern vnd Texten /selbs vrsprünglichen züschöpffen /lieb tragenden fast lustig/ nutzbar vnnd notwendig zülesen.

Sampt einem nutzlichen vnd gütten Register versehen.

Martin Pegius war der erste Jurist slowenischer Herkunft, der zu hohem internationalen Ansehen gelangt ist. Seiner Grabinschrift kann man entnehmen, dass er zwischen 1508 und 1523 in Polhov Gradec geboren wurde. Seine Jugend ist großteils unbekannt. Man weiß nur, dass er schon früh seine Eltern verloren hat und dass er von einem Kaufmann in Bayern erzogen wurde. Auch über seine Schulung ist wenig bekannt. Aus der Chronik der Universität Ingolstadt, wo er 1552 zum Doktor beider Rechte promoviert wurde, geht hervor, dass er trotz der breiten theologischen und juristischen Ausbildung zum großen Teil Autodidakt war.[5] Auch Valvasor erwähnt die Gelehrsamkeit von Pegius: "Martinus Pegius, von Geburt ein Krainer, ist ein gar gelehrter Mann und beider Rechten Doctor, auch ums Jahr 1560 Ertz-Bischöfflich-Salzburgischer Rath gewest, den noch heute manche Juristen citiren; sintemal diese nachbenannte vier ansehnliche Bücher ... eine tiefe Erudition in Rechten genugsam ausdrucken".[6]

Pegius war zuerst Rechtsanwalt in Mühldorf am Inn. Im Jahre 1553 ging er nach Salzburg, wo er am fürstbischöflichen Hof eine blendende Karriere gemacht hat. Er wurde Fürstlich-Salzburgischer Rat und Assessor des Consistoriums[7] bis er 1582 verhaftet wurde. Er ist ohne Anklage oder Urteil bis zu seinem Tode 1592 im Kerker gehalten worden. Es gibt keinerlei überzeugende Erklärung für diese Verhaftung. Man vermutet, dass er der Hexerei bzw. der Bestechlichkeit bezichtigt wurde, es ist aber auch nicht ausgeschlossen, dass ihm schlicht sein Ruhm und sein Vermögen zum Verhängnis wurden.

Die meisten juristischen Arbeiten von Pegius sind in der Zeit zwischen 1556 und 1566 entstanden. Danach widmete er sich überwiegend der Astrologie, dem Okkultismus und der Mathematik. Seine Schriften, die er selbst als *parerga*, d.h. als Nebenwerke bezeichnet hat, beziehen

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Solliches alles mit sonderm fleisz / dem Lateynischen büchstaben nach / verteüt scht/ durch den Hochgelehrten Herrn Martinum Pegium, bayder Rechten Doctorn etc.

Getruckt zu Ingolstatt durch Alexander vnd Samuel Weissenhorn / Gebrüder.

Mit Kayserlicher Mayestat Freyhaiten nachzütrucken verbotten.

Anno M. D. LXVI.

[5] Annales Ingolstadt. Acad., 1580, I, 223: *vir, quod admiratione dignum, tam in theologia, quam in iure peritissimus, ac pene etiam autodidaktos* zitiert nach Polec, SBL, S. 282.

[6] S. *Die Ehre des Herzogthums Krain*, von Johann Weichard Freiherrn von Valvasor, Laibach Nürnberg 1689, II. Band, Buch VI, S. 347.

[7] S. Geburtsstundebuch darinen eines jetlichen Menschens Natur und Eigenschafft, samt allerlay zufählen, auss den gewissen Leuffen deren Gestirn nach rechter wahrhafftiger vnd grundtlicher ahrt der Gestirnkunst mit geringer müh aussgereitet vnd derselb vor zufelligem Vnfahl gewarnet..., Getruckt zu Basel bey Sixt Henricpetri Anno M. D. LXX bzw. Anno M. D. LXXII. In dem Buch heisst es, dass es "Durch Martinum Pegium / der Rechten Doctorn / vnnd Salzburgischen Rhat / etc." entstanden sei.

sich auf drei Gebiete. Auf dem Gebiet der Astrologie hat er 1570 das "Geburtsstundebuch" geschrieben, "darinen eines jetlichen Menschens Natur und Eigenschafft, samt allerlay zufählen, auss den gewissen Leuffen deren Gestirn nach rechter wahrhafftiger vnd grundtlicher ahrt der Gestirnkunst mit geringer müh aussgereitet vnd derselb vor zufelligem Vnfahl gewarnet...". Das Buch gilt noch heute als Standardwerk und wurde noch im 20. Jahrhundert zweimal nachgedruckt. Auf dem Gebiet der Rhetorik veröffentlichte Pegius das Buch *De Tropis et schematibus libri octo*,[8] das seine breite klassische Ausbildung sehr deutlich erkennen läßt.

Die meisten Werke von Pegius befassen sich indessen mit verschiedenen Rechtsfragen. Schon 1556 ist sein Buch über das sog. Gantrecht, d.h. die Versteigerung im Wege der Zwangsvollstreckung, erschienen.[9] Es ist noch 1731 nachgedruckt worden. 1556 ist auch das Buch über das Einstandsrecht erschienen.[10] Das Buch erlebte sieben Auflagen, die letzte 1727. Der dritten und vierten Auflage fügte Pegius fünfzehn seiner in lateinischer Sprache verfassten Rechtsgutachten (*Tyrocinia consiliorum*) hinzu.[11] Im Jahre 1558 hat Pegius zwei Werke veröffentlicht: ein Buch über das Mitgiftrecht[12] und ein weiteres über das Erbbaurecht.[13]

Das wichtigste und meist gedruckte Buch von Pegius war aber sein Werk über die Dienstbarkeiten,[14] das elf Auflagen erlebt hat, die letzte 1733.[15] Pegius hat in seinen Werken versucht, die erörterten Rechtsfragen

[8] *De Tropis et schematibus libri octo*, Authore Martino Pegio Iureconsulto. Cum luculenta praefatione ad illustriss. Principem Guilhelmum, iuniorem Bauariae Ducem &c, Ingolstadii Excudebant Alexander & Samuel Vueissenhornij, Fratres. Anno M.D. LXI.

[9] Gantrecht, wie die Kirchen vnd andere Güter im fall der Noth mit freien feylen Gant mögen verkauft werden, Ingolstadt 1566.

[10] *Ius protomiseos sive congrui*, Einstandtrecht. Wie die nächst Gesypten Freund des Verkäufers an die keuff stehen, vnd die verkaufften Gütter so von jrem geschlächt Namen vnd stammen herrürendt ablösen mügen ... Getruckt zu Augspurk 1556.

[11] *Tyrocinia consiliorum Martini Pegij I. V. doctoris*, *consiliarij Salisbur gensis*. Anno M. D. LXVII.

[12] *De Ivre Et Privilegijs Dotium*. Recht vnd Freyhaiten der Heüratguetter. Für die Eheleüt, auch ander personen ... beschrieben / durch Martinum Pegium beeder Rechten Doctorn, Salzburgischen Thumbsindicum ... Getruckt zu Ingolstatt ... 1558.

[13] *De Ivre Emphyteutico*. Bawrecht die man sonst nendt Erbrecht. Darinn ange zaigt wirdt, wie es zwischen dem Grundherrn, vnd dem Bawrechter ... gehalten solle wer den, in Teütsche sprach gegeben, vnd in drey bücher vnderschaiden ... nutzlich, vnd dienstlich / durch Martinum Pegium beeder Rechten Doctorn. Gedruckt zu Ingolstat ...1558.

[14] Dienstbarkhaiten Staetlicher vnd Baewrischer Erbaigen guetter vnnd gründtli cher Bericht ... Solliches alles mit sonderm fleisz verdeütscht ... Durch den Hochgelehrten Herrn Martinum Pegium bayder Rechten Doctorn ec. Gedruckt zu Ingolstatt ... Anno M.D.LVIII.

[15] Das Buch ist in Ingolstadt (1558, 1560, 1566, 1567 und 1614), in Strassburg (1596), in Regensburg (1633, 1718, 1732 und 1733), sowie in Frankfurt und Leipzig (1733) erschienen.

auf eine den Praktikern verständliche Weise darzustellen. Deswegen hat er sich in den meisten Fällen der deutschen Sprache bedient, die zu seiner Zeit noch keineswegs die Sprache der Rechtswissenschaft war.

Neben Pegius haben sich noch einige weitere Juristen slowenischer Herkunft mit dem römischen bzw. gemeinen Recht befasst.

Hier wäre zunächst Jurij (Georg) Wohinz (od. Bohinc – 1618 bis 1684) zu nennen. Er bekleidete an der Universität Wien die Professur für Digesten und für kanonisches Recht. 1675 ist er sogar Rektor der Universität Wien gewesen.[16] Sein Hauptwerk war das 1675 in Wien erschienene Buch *Idea fiscalis seu assertiones de Jure fisci*.

Professor des Rechts war auch der 1666 geborene Janez Josip (Johann Joseph) Dinzl. Er studierte die Rechte in Ingolstadt und wirkte dort auch als Professor. Er hat das *Compendium in quattuor libros Institutionum* und die *Quaestio problematica de ratione status* verfasst. Beide Werke weisen ziemlich deutlich darauf hin, dass er sich mit dem römischen bzw. mit dem gemeinen Recht befasst hat.[17]

Franc Ksaver Jelenc (1749 – 1805)[18] studierte Rechte in Wien. Karl Anton von Martini nannte ihn wegen seines außerordentlichen Gedächtnisses "*monstrum Carnioliae*". Deswegen überrascht es nicht, dass Jelenc schon 1779 zum ordentlichen Professor für kanonisches Recht in Innsbruck ernannt worden ist. An dieser Universität ist er 1780 auch Rektor geworden. 1782 ist Jelenc als Professor für römisches Recht, Zivil– und Kriminalrecht nach Freiburg i. Br. berufen worden. Von dort ist er 1795 nach Innsbruck zurückgekehrt. Dort leitete er die neugegründete juristische Fakultät. Jelenc war Polyhistor. Der Schwerpunkt seines Forschens lag überwiegend im Strafrecht. Unter seinen Werken ist von größter Bedeutung das Buch über die Grundsätze des Kriminalrechts.[19]

Tomaž Dolinar (1760 – 1839)[20] lehrte Staatsrechtsgeschichte, Feudalrecht und Staatsrecht an der Theresianischen Akademie. 1805 ist er zum Professor für Kirchenrecht und 1810 auch für römisches Recht ernannt worden. Er hat bei der Endredaktion des ABGB als Hauptkorrektor

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[16] Mehr über Wohinz J. Polec, *Slovenski pravni znanstveniki pretekle dobe v tuji ni*, in: Pol stoletja društva "Pravnik", Spominska knjiga, (Hrg. Rudolf Sajovic), Ljubljana 1939, S. 164 f.; V. Murko, *Wohin(i)z (Bohinjec) Jurij (Georg)*, in: Slovenski biografski leksikon, 14. zvezek, Ljubljana 1986, S. 712 f.

[17] S. J. Polec, o. c. S. 165

[18] Mehr über Jelenc, S. J. Polec, S. 165 ff.; ders. *Jelenc Franc Ks*. in: Slovenski biografski leksikon, I, Ljubljana 1925 1932, o. c. S. 393 ff.

[19] F. X. Jellenz, *Zwo Reden über die allgemeinen Grundsätze des Kriminalrechts und desselben Literargeschichte*, Wien 1785.

[20] Mehr über Tomaž Dolinar J. Polec, o. c. S. 171 ff.. S. auch J. Polec, *Dolinar Tomaž*, in: Slovenski biografski leksikon, I, Ljubljana 1925 1932, S. 143.

mitgewirkt. Dolinar widmete sich v. a. dem Eherecht. Sein Handbuch des in Österreich geltenden Eherechtes in drei Bänden erlebte vier Auflagen und zählte lange zu den Standardwerken auf diesem Gebiet.[21]

Der erste, welcher auf dem Gebiet des heutigen Slowenien römisches Recht gelehrt hat, war wahrscheinlich Jurij Dolinar.[22] Nach dem Rechtsstudium in Wien unterrichtete er seit 1798 Kirchenrecht und Kirchengeschichte am Lyzeum in Ljubljana. Von 1810 bis 1813 lehrte er römisches Recht und Code Napoléon an der während der französischen Verwaltung gegründeten Universität in Ljubljana. Jurij Dolinar hat keine größeren juristischen Schriften hinterlassen.

Der letzte Professor für römisches Recht slowenischer Herkunft vor der Gründung der slowenischen Universität war wahrscheinlich Janez Kopač (1793–1872).[23] Nach dem Rechtsstudium in Wien war er eine Zeit Supplent für römisches Recht, bis er 1835 zum Professor für römisches Recht, Zivil– und Kirchenrecht an der Universität Innsbruck ernannt wurde. Von Innsbruck wurde er 1850 nach Graz versetzt, wo er u. a. das Amt des Dekans (1851–52 und 1855–56) und des Rektors (1857–58) bekleidet hat. Im Studienjahr 1851/52 hat Kopač auch Vorlesungen zum Strafrecht in slowenischer Sprache gehalten. Er hat viele Manuskripte zum römischen Recht hinterlassen. Sie weisen auf ein sehr hohes wissenschaftliches Niveau hin.

3.2. Die Zeit nach dem Ersten Weltkrieg

Zu intensiverer romanistischer Forschung ist es auf dem Gebiet des heutigen Slowenien erst nach der Gründung der slowenischen Universität in Ljubljana gekommen.

Der erste Ordinarius dort für das römische Recht war Anton Skumovič (1864–1952).[24] Als ehemaliger Richter am Appellationsgericht in Graz befasste er sich überwiegend mit dem bürgerlichen Recht und hat leider keine romanistischen Schriften hinterlassen.

Auch sein Nachfolger Gregor Krek (1875 –1942)[25] war ehemaliger Richter und höherer Justizrat am Obersten Gerichtshof in Wien. Als Schü-

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[21] T. Dolliner, *Handbuch des in Oesterreich geltenden Eherechtes, 3 Bde. Wien 1813.*

[22] Mehr über Jurij Dolinar J. Polec, *Dolinar Jurij*, in: Slovenski biografski leksi kon, I, Ljubljana 1925 1932, S. 142.

[23] Zu Janez Kopač J. Polec, o. c. S. 182 ff. S. auch J. Polec, *Kopač (Kopatsch) Janez*, in: Slovenski biografski leksikon, I, Ljubljana 1925 1932, S. 495 f.

[24] Zu Skumovič, L. Ude, *Slovenski biografski leksikon*, IX, 1960, S. 342.

[25] Mehr über Krek s. in: *Gregor (Gojmir) Krek*, Letopis AZU, 1 (1943), S. 199 ff.; L. M. Škerjanc, *Gregor Gojmir Krek kot skladatelj*, Letopis AZU, 1 (1943), S. 208 ff.; M. Škerlj*, Gregor Krek*, Zbornik znanstvenih razprav, 19 (1942/43), S. 1 ff.; D. Cvetko: *Vlo ga Gojmira Kreka v razvoju novejše slovenske glasbe*, Ljubljana 1977; D. Cvetko, *Gojmir*

ler von Emil Strohal und Ludwig Mitteis widmete er jedoch einen bedeutenden Teil seiner Forschung dem römischen Recht. Zu seinen bedeutendsten romanistischen Schriften gehören: *Entwicklung des Besitzbegriffes* (1898), *Exekutionsausnahmen nach römischem Recht und dem Rechte der leges barbarorum* (1900) und eine umfangreiche Untersuchung über die Rezeption des römischen Rechts bzw. über die moderne Bedeutung des römischen Rechts.[26] Sein Hauptwerk war jedoch das Handbuch des römischen Obligationenrechts (1937).[27] Das Buch war Teil eines Lehrbuchs zum römischen Recht, das er in Zusammenarbeit mit Viktor Korošec geschrieben hat. Krek hat sein Buch rechtsvergleichend konzipiert. Aufgrund der Auswahl der Quellen und der Gründlichkeit der Darstellung kann es zu den besten Lehrbüchern des römischen Rechts gezählt werden, die im 20. Jahrhundert erschienen sind. Wäre es in einer Weltsprache verfasst, so wäre es bestimmt überall bekannt.

Der berühmteste unter den slowenischen Romanisten war Viktor Korošec (1899 –1985),[28] der v. a. als Keilschriftrechtsforscher einen internationalen Ruf genoss. Die erste unter seinen romanistischen Schriften ist seine Habilitationsschrift *Die Erbenhaftung nach römischem Recht,*[29] deren Hauptthese von der Unvererblichkeit der Obligationen im ältesten römischen Recht noch heute zitiert wird.

Zur Zeit ihrer Entstehung waren zwei weitere Abhandlungen sehr aktuell. Die erste widmete er dem Schicksal des römischen Rechts in England,[30] die zweite aber den neu entdeckten Gaius-Fragmenten.[31]

Sein Hauptwerk auf dem Gebiet des römischen Rechts war jedoch das umfangreiche Lehrbuch, das er in Zusammenarbeit mit Gregor Krek geschrieben hat. Korošec hat die historische Einleitung, den allgemeinen

Krek, Ljubljana 1988; I. Klemenič, J. Kranjc: *Gojmir Gregor Krek*, Enciklopedija Slovenije, 6 (1992), S. 1., J. Kranjc, *Gregor (Gojmir) Krek*, in: *Izročilo pravne znanosti*, Ljubljana 2008, S. 617 ff.

[26] G. Krek, *Pomen rimskega prava nekdaj in sedaj*, Zbornik znanstvenih razprav, I (1920/21), S. 116 ff.

[27] *Obligacijsko pravo*, spisal dr. Gregor Krek, Celje 1937.

[28] Mehr zu Korošec s. in: *Viktor Korošec*, Letopis SAZU, 8 (1958), S. 33 ff.; G. Kušej, *Viktor Korošec*, in: Zbornik znanstvenih razprav, 35 (1972), S. 21 ff.; *Viktor Korošec*, in: Letopis SAZU, 36 (1986), S. 165 ff.; J. Kranjc, *Viktor Korošec (1899 1985)*, in: Zeitschrift der Savigny Stiftung, Romanistische Abteilung, 104 (1987), S. 908 ff., ders. *Viktor Korošec*, in: Enciklopedija Slovenije, 5 (1991), 272 f., ders. *Viktor Korošec*, in: Izročilo pravne znanosti, Ljubljana 2008, S. 612 ff..

[29] V. Korošec, *Die Erbenhaftung nach römischem Recht*, Erster Teil, Das Zivil und Amtsrecht, Leipziger rechtswissenschaftliche Studien herausgegeben von der Leipziger Juristen Fakultät, Heft 28, Leipzig 1927.

[30] V. Korošec, *Usoda rimskega prava v Angliji*, Zbornik znanstvenih razprav 9 (1933), S. 208 ff.

[31] V. Korošec, *Novi odlomki Gajevih institucij (PSI 1182)*, Zbornik znanstvenih razprav 10 (1934), S. 54 ff.

Teil, das Sachen-, Familien– und Erbrecht, sowie das Prozessrecht verfasst. Der erste Teil seines Werkes ist 1936 und der zweite 1941 erschienen.[32] Nach dem Krieg hat Korošec das für das Studium zu umfangreiches Buch von Krek durch sein eigenes ersetzt. Dieses neu bearbeitete Lehrbuch ist 1967 erschienen[33] und hat mehrere Auflagen und Nachdrucke erlebt.

Im gewisser Weise kann man Ciril Kržišnik (1909–1999) als Nachfolger von Korošec betrachten.[34] Kržišnik hat sich vor dem Krieg für römisches Recht und für Rechtsgeschichte habilitiert. Als Schüler von Franz Dölger und Leopold Wenger hat er seine wissenschaftliche Aufmerksamkeit v. a. dem griechischen und byzantinischen Recht gewidmet. So hat er u. a. über die Rechtsnatur von Epanagoge,[35] das byzantinische Recht[36] und die *separatio bonorum*[37] geschrieben. Nach dem Krieg durfte Kržišnik aus ideologischen Gründen nicht mehr an der Fakultät bleiben. Er arbeitete in der Praxis, was seiner wissenschaftlichen Forschung ein jähes Ende gesetzt hat. Erst Anfang der 70er Jahre durfte er wieder römisches Recht als Honorarprofessor lesen und prüfen. Wegen seiner Arbeit am Rechtsterminologischen Wörterbuch konnte er sich aber leider nicht mehr der byzantinistischen oder papyrologischen Forschung widmen.

Die neuere romanistische Forschung in Slowenien hat momentan zwei Vertreter: Dr. Marko Kambič und den Autor dieses Beitrags.

Dozent Kambič befasst sich überwiegend mit der Rezeption des römischen Rechts auf dem Gebiet des heutigen Slowenien. Meine Forschungsschwerpunkte galten verschiedenen romanistischen Themen, den lateinischen Rechtsmaximen,[38] der zweisprachigen Ausgabe der Texte zum römischen Recht, d. h. einer Auswahl der römischen Rechtsquellen für das Studium[39] bzw. einem neuen Lehrbuch des römischen Rechts.[40]

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[32] *Zgodovina in sistem rimskega zasebnega prava*, spisala dr. Viktor Korošec in dr. Gregor Krek, Prvi zvezek, 1. snopič: Splošni nauki, viri, osebno in stvarno pravo, Celje 1936, Prvi zvezek, 2. snopič, Rodbinsko, dedno in civilno pravdno pravo, Celje 1941.

[33] *Rimsko pravo*, 1. del: *Splošni del, osebno, stvarno in obligacijsko pravo*, spisal dr. Viktor Korošec, Ljubljana, 1967, 2. del: *Rodbinsko, dedno in civilno pravdno pravo*, Lju bljana 1969. Die zweite Auflage (1972) ist mehrmals nachgedruckt worden, zuletzt 2005.

[34] Mehr über ihn J. Kranjc, *Ciril Kržišnik*, in: Enciklopedija Slovenije Bd. 6 (1992), S. 61.

[35] *O pravni naravi Epanagoge*, Slovenski pravnik 49 (1935), S. 335 ff.

[36] *Bizantinsko pravo*, Slovenski pravnik 54 (1940), S. 328 ff..

[37] *Separatio bonorum*, Zbornik znanstvenih razprav 18 (1941/42), S. 171 ff.

[38] *Latinski pravni reki*, Pravna obzorja 1, Ljubljana, 1994. Nachdrücke 1998, 2000 und 2006.

[39] *Primeri iz rimskega prava*, Ljubljana, 1991. Mehrmals nachgedruckt, zuletzt 2008.

[40] *Rimsko pravo*, Pravna obzorja 36, Ljubljana 2008.

4. DER AUSBLICK

Im gewissen Sinne sind wir heutzutage, ähnlich wie in der Spätantike, Zeugen einer Vulgarisierung des Rechts. Die gegenwärtige Vulgarisierung äußert sich unter anderem im Verlust klarer Rechtsvorstellungen. Die Rechtstexte werden immer weitschweifiger und immer unpräziser. Sprachliche Unklarheit ist nur der sichtbarste Ausdruck einer konzeptuellen Verunsicherung und Desorientierung, die sich auf die ganze Rechtsordnung auswirkt. Das ist eine deutliche Abkehr von der prägnanten und lapidaren Ausdrucks– und Denkweise der römischen Juristen. Will man einen derartigen Verfall verhindern, so darf man den Kontakt mit der Rechtskontinuität der vergangenen Jahrhunderte nicht verlieren. Dazu aber gehört auch das römische Recht und die aus ihm herrührende Rechtsterminologie.

Ohne sie kann man sich eine elegante und präzise Rechtssprache kaum vorstellen: Dabei geht es nicht so sehr um ihre Latinität, sondern um ihren intellektuellen und kulturellen Unterbau. Mit ihrer intellektuellen Tiefe verkörpert sie ein wichtiges Element der Kontinuität europäischer Rechtsentwicklung und Rechtskultur. Ihr Hauptwert liegt nämlich im Streben nach einer klaren, eleganten und konzisen Verbalisierung der Rechtsbegriffe. Dieses Streben, das sowohl intellektuelle Ambition als auch breite Fachkenntnisse voraussetzt, kann wesentlich zur Klarheit und Verständlichkeit der Rechtssätze beitragen.

Es geht also nicht (nur) um das römische Recht, sondern darüber hinaus um die Kontinuität eines bestimmten wissenschaftlichen Niveaus der europäischen Rechtskultur.

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THE RESEARCH OF ROMAN LAW IN SLOVENIA

Summary

The research of Roman law is inseparably connected to the development of legal teaching in Europe. Until the Second World War, Roman law represented an essential part of the legal curricula at European faculties of law. The advantages of studying Roman law were obvious: by understanding the intricacies of Roman law, the student could perceive the legal system as a whole, develop a precise and concise

legal language, learn to comprehensively and precisely analyse legal texts, learn the historical and social dimensions of law, become familiar with the Latin legal terminology, the lingua franca of the learned lawyers, etc.

The teaching of Roman law went hand in hand with its research. As the presence of Roman law in the legal curricula has been considerably diminished during the last decades, so has the research thereof. It would be wrong, however, to abandon further research of Roman law. In some form, both teaching and research of Roman law are essential for the legal studies if we want to educate legal intellectuals and not mere legal technicians.

The research of Roman law in Slovenia can be divided into two periods, with the First World War representing the dividing line. Before the First World War, there was no Slovenian university and because of that no research of Roman law in the Slovenian language.

The paper presents some researchers in the field of Roman law of Slovenian origin who were active at foreign universities. The first among them was Martin Pegius (1508? 1592). He was a counsellor to the Bishop of Salzburg and published some important legal works reprinted several times, stretching all the way to the first half of the XVIII century. Jurij Wohinz (Bohinc 1618 1684) was a professor of Digest in Vienna, Janez Josip Dinzl (1666 1686) was a professor of law in Ingolstadt, Franc Ksaver Jelenc (1749 1805) was a professor in Innsbruck and in Freiburg i. Br., Tomaž Dolinar (1760 1839) was a professor of canon and Roman law in Vienna. Jurij Dolinar (1764 1858) was the first to teach Roman law in Ljubljana at the university founded by the French Provinces of Illyria in 1809. Janez Kopač (1793 1872) was probably the last professor of Roman law of Slovenian origin teaching abroad. He was a professor of Roman law in Innsbruck and in Graz.

The research of Roman law in Slovenian language and in the territory of the present day Slovenia started with the foundation of the Slovenian university in 1919. The main researchers and professors of Roman law in Slovenia after the First World War were Anton Skumovič (1864 1952), Gregor Krek (1875 1942), Viktor Korošec (1899 1985) and Ciril Kržišnik (1909 1999). At present there are two professors and researchers in the field of Roman law in Slovenia: Marko Kambič and the author of this article.

Key words: *Roman law. Research of Roman law. Teaching of Roman law. Legal Culture*

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INTESTATE SUCCESSION OF FEMALE DESCENDANTS ACCORDING TO THE AUSTRIAN GENERAL CIVIL CODE IN THE CROATIAN-SLAVONIAN LEGAL AREA 1853 1946*

Development of the Croatian legal system based on the Austrian General Civil Code (GCC) in the period 1853 1946 made the GCC a watershed of legal tra dition. Founded on liberal principles, and the principle of individuality, it had a significant impact on the society at the time of its introduction it had brought the feudal social and legal system to an end, and facilitated the emergence of a modern civil society. However, the process of transformation was marked by numerous prob lems for which the reasons were found in the GCC, particularly in its provisions on intestate succession.

Introduction of the principle of equality of male and female descendants in the matters pertaining to inheritance was considered particularly controversial, espe cially concerning its application in the matters of land inheritance. Difficulties in the application of the principle of equality of inheritance were justified by the legal con sciousness in some parts of Croatian society, which were opposed to the idea of gender equality in succession. Also, a belief prevailed that (further) partition of pre dominantly small lots of land into even smaller parts, following the disposal of the estate between male and female descendants, would lead to difficult economic cir cumstances and poverty.

Therefore, it became usual to use a dowry as an instrument to avoid using the principle of equality of male and female descendants. According to the GCC, dowry

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was included into the legal portion of inheritance to which the female descendants were entitled. But in practice, dowry became an equivalent to female descendant's legal portion of inheritance. Namely, getting a dowry was, for daughters, the only way of being settled from the parent's estate. Despite disapproval, social and legisla tive progress eventually led to the adjustment to the principle of equality of male and female descendants as an integral part of Croatian inheritance system.

Key words: *Austrian General Civil Code. Intestate succession. Female de scendants. Principle of equality of male and female descendants. Dowry.*

1. INTRODUCTION

The Austrian General Civil Code (GCC) of 1811[1] was introduced in the Kingdom of Croatia and Slavonia by the Imperial Patent in 1852, and entered into force on May 1, 1853. Development of the Croatian legal system based on the GCC continued over the next hundred years, making it an important part of the Croatian legal tradition. Despite the fact that the development of the Croatian state and its legal system was influenced by three different states context (Habsburg/Austro-Hungarian Monarchy, the Kingdom of Serbs, Croats and Slovenes/Yugoslavia, and duality of government during the World War II) the system of the civil law remained unchanged. The enforcement of the GCC, after the abolishment of feudal rule in 1848, had a significant impact to the economy and the society as it was at the time of the enforcement. It had facilitated a break with feudal social and legal system, and fuelled the modernization of both the civil society, and the legal system, and largely contributed to the process of modernization of Croatia as a whole. The social tranformation was overshadowed by many problems, the origin of which was sought in the GCC, allegedly holding no regard for the particularities of the Croatian social and economic circumstances. Rules of inheritance

[1] The General Civil Code constituted a codification of civil law, decreed by the Imperial Patent in 1811 in the Austrian hereditary lands of the Habsburg Monarchy. It was gradually introduced in other parts of the Monarchy, and in the period between 1812 1820 enforced on the territory of the Military Frontier, Istria and Dalmatia. In 1852, the GCC entered into force in the Kingdom of Hungary, Croatia and Slavonia, in the Serb Vojvo dina, and Tamiš Banat. With the abolishment of the Bach`s absolutism (1859) and the introduction of the October Diploma (1860) the enforcement of the GCC continued, evolving into a Croatian Civil Code in its own right, independent of the Austrian model. Following the secession of Croatia from the Monarchy in 1918, the GCC remained in force, and the attempts to replace it with the Preliminary Principles of the Yugoslav Civil Code (1934) and the Principles of the Civil Code for the Independent State of Croatia (1943) were not successful. The GCC remained part of the Croatian legal system until the passing of the Law on Invalidity of Legal Acts Passed Prior to 6 April 1941 and During the Occupation (1946), whereupon single legal rules could be applied subject to legally prescribed provisions.

came under particular criticism, having been considered inappropriate in the context of the Croatian tradition, and one of the causes of slow economic growth.[2]

There is no doubt that intestate succession, due to its link with ownership rights and family relationships, has a strong bearing on the fundamental rights and economic and social features of any society. Due to the fact that provisions on succession were based, among other provisions, on the existence of private property and the principle of equality of male and female heirs, solutions comprised in the GCC regarding the rules of succession, meant inevitable conflict with the traditional way of life, centered around communal joint family and joint ownership, and rejection of equality of male and female heirs. Difficulties associated with the implementation of the rules of succession in matters concerning cooperatives resulted in the issue of the Order of the Austrian Minister of Justice dated in April 7, 1857, pronouncing the succession provisions of the GCC and related provisions of Non-contentious proceedings (1854) null and void. Prior to the final regulation of the issue of cooperatives, probate proceedings adhering to the GCC provisions could only be conducted in cases concerning the protection of orphans and minors.[3] The issue of cooperatives and cooperative property was regulated by separate legislation.[4]

Eventually, the significance of the GCC became indisputable, and after much perturbation and with numerous modifications, the principle of equality of successors regardless of gender was more or less accepted.

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[2] M. Derenčin, *Tumač k općemu austrijskom gradjanskom zakoniku* [Commen tary on the Austrian General Civil Code]*, I,* Zagreb 1880, 30.

[3] The main difficulties with the application of the GCC to the cooperatives lay in the fact that, according to the GCC, joint ownership with unlimited share in ownership by individulas did not exist, but co ownership with limited individual share. The Ban's Court in Zagreb issued warnings regarding the matter, stating that probate proceedings which inlcude a decedent member of the cooperatives could not be carried out without a clear position on the distribution of the estate, whether it should be executed *per capita* or *per stirpes.* This position was in accordance with the opinion of the Ban's Court that the prop erty of a cooperative was inalienable, common, undivided and, in fact, joint and several, and as such had no common traits with the co ownership according to the GCC. At the same time, the Supreme Court in Vienna took the position of granting the application of the provisions on co ownership to cooperatives. Not going into further detail on the ques tion of cooperative ownership, suffice it to say that the Minister of Justice Krauss, en dorsed the position of the Ban's Court, and brought the said Order of suspension of further probate proceedings. For further details see M. Gross, *Počeci moderne Hrvatske* [The Beginnings of Modern Croatia], Zagreb 1985, 213 217.

[4] The first Law on cooperatives was passed in 1870, and the last one in 1889, significant because it was in force on the entire territory of the Kingdom of Croatia and Slavonia, including the area of demilitarized, acceeded Military Frontier.

2. INTESTATE SUCCESSION AT THE CROATIAN-SLAVONIAN TERRITORY PRIOR TO THE IMPLEMENTATION OF THE AUSTRIAN GENERAL CIVIL CODE

Prior to the implementation of the GCC, various rules of succession existed within the Croatian-Slavonian territory regarding the type of property inherited. Also, different rules of succession existed for individuals of different estates of the realm. Such state of affairs was the consequence of the estate differentiation existing in the society, of the differentiation of the object of succession regarding the means of its acquisition, as well as the distribution of such assets according to a range of various criteria. It was relevent for the process of succession whether the property inherited was hereditary property (*bona hereditaria)* or acquired property (*bona acquisitia)*; whether it was immovable, or movable property, and finally, whether the nobility, citizens or tenant peasants were concerned. The rules of succession for the nobility and the tenant peasants were mostly comprised in the *Tripartitum*,[5] while the rules of succession for the citizens were regulated by separate legislation.[6]

2.1. Female descendants and intestate succession

Inheritance law was regulated in accordance with the ground provisions of the Hungarian-Croatian law, observing the distinction between hereditary and acquired, movable and immovable property. To win the entitlement to succession, the question of the gender of a potential heir was also significant, particularly with the families of the nobility. There

[5] *The Tripartitum* (*Tripartitum opus iuris consuetudinarii inclyti regni Hungari ae, 1517*) by Stephen Werböczy, is the most important source for the study of the Hungar ian Croatian law, depicting vividly the laws and legal customs at the beginning of the 16th century. The Croatian translation of *The Tripartitum* was edited by Ivan Pergošić in 1574, and was in force until the implementation of the GCC. However, it should be noted that certain differences existed between the legal systems of Hungary and the Croatian territo ries, which is also underlined by Werböczy: "Because we see that the long established laws and customs of the aforesaid kingdoms of Dalmatia, Croatia, Slavonia, and [of] Transylvania vary in certain terms and articles from the laws of our country, namely this kingdom of Hungary..." (Trip. III, 2). J. M. Bak, P. Banyó, M. Rady (eds.), *Stephen Werbőczy: The Customary Law of the Renowned Kingdom of Hungary: A Work in Three Parts Rendered by Stephen Werbőczy (The "Tripartitum")*, Idyllwild CA Budapest 2005, 377.

[6] The royal free cities of Croatia and Slavonia had a special status because they were granted the royal charter. Granting of the royal charter to the cities and their inhabit ants meant better economic, social and legal status, and the confirmation of their influence on the political affairs came when they acquired the status of the fourth estate of the realm in the Hungarian Croatian state union. The most prominent royal charters were those granted to the cities of Varaždin (1209) Vukovar (1231) Virovitica (1234) Petrinja (1240) Samobor (1242) Križevci (1252) and Zagreb (1242).

was a distinction between the principle of equality of entitlement (*aequalitas iuris),* the entitlement to equal succession of both the male and female line, and the principle of inequality of entitlement (*inaequalitas iuris*) denying entitlement to the female line. Thus, the general rule applied in the matters concerning the inheritance of movable property was equality of entitlement, whereas immovable property was inherited subject to the principle of inequality of entitlement. However, certain modifications of the general rules existed, subject to the origin of the property of the nobility. Property acquired by the charter of enfeoffment was inherited as stipulated by the charter, generally, according to an unequal entitlement status, unless the charter contained a clause granting succession to the female line, such as *clausula heredibus et posteritatibus utriusque sexus universis* – the clause regulating equal right of succession of both the male and female lines,[7] or the *clausula heredibus et posteritatibus masculini, ac post horum defectum foemini etiam sexus universis* – the clause granting transfer of entitlement to succession to the female line upon the extinction of the male line. Property for which the inheritance right was granted to the male line only, the female line had the so-called special inheritance rights, such as the filial quarter (*quarta puellaris*). A very important legal instrument was prefection (*praefectio*) stipulating that in case of the extinction of the male line, the estate of a nobleman, inherited through the male line, could be adapted via royal privilege to grant the inheritance rights to the successors of the female line and their male descendants. Royal privilege could be requested by the last male holder over the estate, to the benefit of a daughter (or sister) or by an interested female party. Even if a contractual or testamentary charge of the estate existed to the benefit of a female party, subsequent grant could be requested from the king. A daughter to which such provisions applied, inherited under the same terms as a male successor (because she was "promoted" to a son), and subsequent order of succession followed the previously established model, whereby the daughter was succeeded by her male descendants. Property not acquired by means of a charter of enfeoffment but through purchase was inherited according to the princi-

[7] Cases were not rare where the original charter granting succession exclusively to the male line (*heredibus et posteritatibus masculini sexus)* was replaced by the charter granting equal succession to the female line, i.e. to both lines (*heredibus et posteritatibus utriusque sexus universis).* An example is evident in the case of the Susedgrad Stubica nobility, granting succession to male heirs only as late as mid 15th century. Subsequently, the last male member of the family, Ivan Tot of Susedgrad, was granted a new royal char ter by King Albrecht von Habsburg in 1439, allowing the heirs of the female line to in herit the estate, in this particular case, his daughter Dorothea and her heirs. J. Adamček, *Agrarni odnosi u Hrvatskoj od sredine XV do kraja XVII stoljeća* [Agrarian relationships in Croatia from the middle XV century until the end of the XVII century], Zagreb 1980, 430 432.

ple of equality of entitlement, although the female line could be excluded even under these circumstances, subject to the first acquiring party's discretion.[8]

Unlike the daughters of the nobility, citizens' daughters had a better legal status regarding inheritance, as the descendants of the deceased had equal inheritance rights regardless of gender. Each family member (including the surviving spouse) was entitled to an equal share of movable and immovable property, and, as a rule, no distinction was made between the hereditary and the acquired property. However, if a married daughter participated in the disposal of the estate, unmarried children received a portion of the estate equal to that received by the daughter upon her marriage, with subsequent distribution of the remaining share of the estate.[9]

According to the inheritance rules for the tenant peasants, their moveable and immovable, hereditary and acquired property was inherited by their children, sons and unmarried daughters, in equal portions. Married daughters of the tenant peasants had equal rights of entitlement to the hereditary property, both movable and immovable. However, married daughters were not entitled to a share of the estate classed as acquired property if, upon marriage, they received a certain share of that property as dowry from their father. This rules of inheritance comprised in the *Tripartitum* were applied, unless other legal customs existed and were expected to be observed, because "nevertheless, just as the conditions of tenant peasants are diverse, so are the legal customs that have to be kept according to the ancient usage of the place" (*Trip.* III, 30, 6).[10] In accordance with the status of his authority, a landlord would create individual local customs, and they had undoubtedly been directed towards the limitation of tenant peasants' inheritance rights. Indirectly, the problem of the exercise of the broadly defined tenant peasants' inheritance rights, as stipulated by the *Tripartitum*, was prominent in the terriers regulating the size of a serf's land, and prohibiting its partition beyond the set minimum, with aim to equalize the size of serf`s land, and enhance their economic exploitation. Another important fact should be underlined regarding the inheritance practice of tenant peasants: these inheritance rules, when and if applied, were only applied to tenant peasants not members of a cooperative. Namely, the institution of succession did not exist within communal households, particularly with regard to immovable property, which,

[8] V. Graber, *Prava djece s osobitim obzirom na brak, obitelj i nasljedstvo* [Children´s Rights considering marriage, family and succession], Zagreb 1893, 300 310; M. Lanović, *Privatno pravo Tripartita* [Private Law of *Tripartitum*], Zagreb 1929, 104 108,119 120, 226 228.

[9] L. Margetić, *Hrvatsko srednjovjekovno obiteljsko i nasljedno pravo* [The Croa tian Medieval family and Succession Law], Zagreb 1996, 286 294; V. Graber, 322 323.

[10] J. M. Bak, P. Banyó, M. Rady, 416.

as a rule, remained under joint ownership of the male members of the cooperative. Inheritance rules for the tenant peasants were revised by the Act VIII, 1840 "On the succession of subjects" (*De succesione colnorum*) of the Hungarian-Croatian Diet, whereby the tenant peasants were to dispose of their movable and immovable property, by means of *inter vivos* and *mortis causa* provision, freely and without hindrance, while hereditary property was inherited by children born in marriage, regardless of gender, in equal share. The same principle of inheritance was applied to inheritance of acquired property if the decedent did not dispose of it *mortis causa,* however, assets given to descendants upon marriage or at a later time were included in their portion of inheritance.[11] Described legislation on intestate succession was in force on the territory of Croatia and Slavonia prior to 1853, when the GCC came into force.

3. BRIEFLY ON INTESTATE SUCCESSION ACCORDING TO THE AUSTRIAN GENERAL CIVIL CODE

The GCC made a distinction between succession by will, intestate succession, and inheritance contract (§533). Intestate succession included entire estate of the deceased person (*de cuius*) or a part of it: a) if the deceased did not leave a will; b) if he included only a portion of the estate in the will and c) if the testamentary heir could not or declined to endorse the inheritance (§727). Furthermore, the GCC provisions on succession, unlike previous regulations, did not recognize the distinction between inherited and acquired, movable and immovable property. Therefore, the entire estate was inherited in the same manner, defined as a set of rights and obligations of the deceased, provided the rights and obligations were not based on purely personal relationships (§531). The circle of potential heirs was broadly defined based on kinship and marriage, regardless of the gender of the heir, but with a distinction between legitimate and illegitimate children. Illegitimate children were granted inheritance rights exclusively through the maternal line, not through the paternal line or any other family line (§754). The surviving spouse, if the decedent had heirs, was entitled to right to use of the ¼ of the estate (§757). Through the GCC, a system of inheritance was adopted whereby the time of acceptance (*delatio*) and the time of administration (*acquisition*) of the estate were temporally divided. Therefore, the rights and obligations deceased person from the time of death until the time of acceptance by successors, were considered estate in abeyance, i.e. *hereditas iacens*, influenced by the Roman law tradition. The position of the estate as a separate legal

[11] L. Margetić, 335 336; V. Graber, 327 328

entity existed until the court decision was served to confer the estate to legitimate heirs.

3.1. Intestate inheritance of children

According to the GCC, potential legal heirs were individuals related to the *de cuius* through legitimate birth in a valid marriage (§730). Heirs were classed in six orders of succession, according to the proximity of kinship, whereby the existence of heirs of closer degree of kinship excluded other relations from succession (§731). Heirs of the first order of succession were the children of the deceased born in a valid marriage, regardless of the gender, born during his life, or after his death. Although, according to §42, the term children, as a rule, comprised all relations of the deceased line, one of the exceptions to such broad definition was comprised in the provisions on intestate succession, whereby the term children incorporated exclusively the sons and daughters sharing the estate *per capita* (§732). The grandchildren and grand-grandchildren of the deceased were not successors if their parents were alive. However, if the child of the *de cuius* died before he left heirs, the share to which the deceased child of the *de cuius* would have been entitled would be awarded to his descendant or descendants in equal shares. If a grandchild or grandchildren had died, leaving one or more descendants, the associated share of the estate would be distributed in equal parts (§733). The described manner of disposition of the estate, *per stirpes*, was applied in cases where the grandchildren shared the estate with the surviving children of the deceased, and in cases where the estate was shared between the grandchildren or grand-grandchildren descending from various heirs. Ultimately, the grandchildren or grand-grandchildren were not entitled to inherit a share greater than that their ancestors would have inherited as the direct descendants of the deceased (§734). If the *de cuius* had children from multiple marriages, they had equal inheritance rights. As the unborn child of the deceased was entitled to inheritance equally as a born child from the time of its conception, (§22) disposal of the estate followed upon the birth of the child, since the designation of respective shares of the estate could not be executed prior to the child's birth.

3.1.1. On the intestate succession of female heirs

Following the described regulation of the inheritance rights of the potential heirs of the first line of succession, the equality of both male and female descendants as successors was introduced. Adoption of gender equality regarding succession is a product of the development of the society as a whole, with the equality of men and women continuously improving. However, it should be noted that even the GCC contained provisions which perpetuated gender inequality. This was particularly

evident in the regulation of the legal status of women, who were, for instance, denied the right to serve as witnesses of the will, or become custodians of their own children upon the death of a husband.

In practice, inheritance rights of female heirs to an equal portion of the estate caused a great stir, particularly among some classes of the society, as this practice was considered unjustified, and a cause of great adversity. Or perhaps it was easier to justify these issues, particulary economical ones, by the right of female heirs to an equal share of inheritance. Difficulties with the application of this principle, however, should be defined even more narrowly. The general lack of support for the entitlement of female heirs to a share of the estate was not at the heart of the dispute. It was, in fact, the reluctance of the *de cuius*, but also of other (male) members of the family, to consign to the daughters (family) property, thus preventing the transfer of immovable property outside the family. This was particularly the case where land was concerned.[12] Therefore, the question remains to what degree had female descendants managed to exercise their inheritance rights in practice.

Provisions of the GCC removed the distinction between movable and immovable property. However, in practice, previous understanding of their distinction remained, and consenquently, and so did their influence on the rules of inheritance. Inheritance of movable property, or equal disposal of the estate after death of the *de cuius*, regardless of the gender of the successor, was not contested. On the other hand, female descendants had difficulties in exercising their right to an equal share of immovable property, particularly land. Still, not all cases of land inheritance by female descendents were contentious. If the decedent only had female children,[13] the entire estate, including land, was disposed of in equal shares, unless

[12] The dispute over succession of the land and its distribution among all heirs, regardless of the gender, was not an issue particular to Croatia. In the western parts of the Habsburg Monarchy, prior to the introduction of the GCC, the system of impartible inher itance prevailed in the hereditary laws, according to which a peasant's lot would be left to one heir, usually male the oldest, or the youngest son. As the GCC, §761 left the option of modification of the hereditary rules for the peasants, for the Austrian part of the Mon archy the existing rules did not change until 1868, when an Act was passed on the 27 June introducing the equality of succession regardless of gender. The standard procedure re garding inheritance practiced previously could not be easily removed, or ignored, so in 1889 countries represented in the Imperial Diet were granted the right to regulate inde pendently matters of succession for medium size farms, which was subsequently effected. Tirol (1900), Carinthia (1903) and Bohemia (1908), introducing the so called *Anerben recht.* For further details on the implementation of the *Anerbenrecht* in Tirol, see M. Lan zinger: "Toward Predominant Primogeniture: Changes in Inheritance Practices in In nichen/San Candido, 1730 to 1930.", P. Heady, H. Grandits, (eds.) *Distinct Inheritances,* Münster 2003, 125 144.

[13] According to some estimates, cca. 20% of European families has exclusively female children, whereby the issue of the equality of inheritance does not arise regarding the gender. J. Goody, "Inheritance, property and women: some comparative considera

otherwise specified. Disputes did not occur if the *de cuius* was the mother, and the land in question was her property. The GCC did not make a distinction whether the land was the property of the mother or the father. However, a custom remained from the previous legal period, whereby all children, regardless of gender, were entitled to mother's property, whereas father's property, as a rule, was bequeathed to the sons. Mother's immovable property served as a guarantee of a daughter's share in the disposal of immovable property without family disputes. Finally, if the deceased was survived by minor descendants, the courts would execute a probate proceeding with no regard to gender distinction. Namely, according to the GCC, independent action of a potential heir was prohibited regarding the matter of "appropriation" of the estate (§797) with the probate proceedings commencing *ex offo*, and the courts observing the principle of equality. The application of this principle could be avoided by the disposition *inter vivos* or *mortis causa*. *Mortis causa* manner of disposal of the estate enabled the deceased, subject to compliance with the provision on compulsory portion, to avoid equal disposal of the estate, particularly land.[14] Furthermore, the principle of equality could also be eschewed by means of a waiver of inheritance rights by female descendants to the benefit of the male descendants (brother or brothers) as well as disclaiming her entitlement in the estate. In all these cases, female descendants were assuaged by dowry to which they were entitled by law and customs. According to the general opinion at the time, a daughter was no longer entitled to participate in the disposal of the parental estate upon marriage and departure from the family home, and upon receipt of dowry.

3.1.2. Accounting of the assets into the inheritance portion

A very important inheritance instrument aiming to put to equal footing different successors was accounting of all the assets aquired by the deceased during his life into their inheritance portion (hotchpot). It comprised: a) daughter's or granddaughter's dowry, b) son's or grandson's assets, c) funds obtained upon the taking of an office or inititation of an undertaking, and d) assets granted to children of age for the settlement of debt (§788). Furthermore, into the portion of the estate to which grandchildren were entitled, included were not only the assets they were granted, but also those granted to their parents which they acquired from

tions", J. Goody, J. Thirsk, E.P. Thompson (eds.) *Family and inheritance: Rural Society in Western Europe 1200 1800,* Cambridge 1976, 10.

[14] During the disposal of the will, as a rule, fathers as decedents bequeathed a major portion of the estate to the son who remained in the house, or on the land. Son(s) leaving the household received a smaller share, and the daughter received even less. S. Leček, "Dobila je kulike su roditelji davali, ni po zakonu!" ("She got as much as her parents gave her, and not according to the law"), *Povijesni prilozi* 21/2001, 233.

them through subsequent succession, pursuant to the application of the principle of representation. All goods and assets acquired by descendants from their parents, by means other than previously described, were considered a gift, and were not included into the share of the inheritance (§791). The accounting was carried out in the manner that each of the decedent's children, prior to the disposal of the estate, was entitled to an equal portion as the child discriminated in favour. The remaining shares of the estate could only be disposed of after the execution of this procedure. If, during the life of *de cuius*, children acquired unequal shares respectively, the largest acquired amount was used as a measure of accounting. However, if the estate was insufficient to satisfy each child's legitimate claim through accounting, the child discriminated in favour was not entitled to inheritance, however, he/she could not be forced to make a restitution of the assets previously acquired (§793). If the object of accounting was not cash, but movable or immovable property, their value was calculated in such manner as to estimate the value of the property at the time of its acquisition, and the value of an item of movable property at the time of inheritance (§794).[15]

3.1.3. Dowry and intestate succession

According to the GCC, dowry was included into the legal portion of inheritance to which the female descendants were entitled (§788). However, the payment of dowry was often used to avoid subsequent claims to inheritance by female descendants. The GCC stipulated that dowry included the assets given or promised to the husband by the wife or a third party, for the purpose of easier management of the cost of marriage (§1218). As a rule, estimable assets were involved, which provided opportunity for financial gain (§§1227–1228). Dowry also had to be appropriate (§1220). Although the term "appropriate dowry" was not legally defined, accepted notion was that it was a dowry befitting the class and property status of the parties obliged to provide it.[16] Pursuant to the provi-

[15] Regarding the issue of inclusion of movable and immovable property [in the distribution of the estate] the position prevailed in the Croatian legal practice whereby movable property was not included which, through no fault of the successors, came into disrepair or was destroyed. Also, the value an object acquired through processing or im provement performed to the cost of the successor during the period in which the object was in the successor's possession, because this would lead to unlawful gain by those suc cessors. Furthermore, instead of an alienated object, purchase price gained was calculated. Where immovable property was concerned, if the decedent had designated the value of a piece of immovable property, such value was taken as relevant for inclusion, however, the successor was entitled to prove the decedent's excessive designation of value to the prop erty, i.e. successors to whose benefit the inclusion was calculated were entitled to prove that the decedent had undervalued the property. A. Rušnov, S. Posilović, *Tumač obćemu gradjanskom zakoniku* [Commentary on the General Civil Code],II, Zagreb [1910?], 199.

[16] A. Rušnov, S. Posilović, 562

sions of the GCC, items constituting bridal accoutrements, such as clothes, bedclothes and furniture, were not considered part of the dowry.[17] In practice, however, dowry presented to the daughter consisted of those very items – clothes, bedclothes, furniture, various "lady's tools", such as kitchen utensils, looms, etc., while daughters from the wealthy families would be presented with a sewing machine. As part of the items presented to the daughters upon marriage, costs or part of the costs of the wedding were included, and, subject to the financial status, livestock and cash were also presented as part of the dowry, although rarely. If land was part of the dowry (more an exception than a rule) it was not extracted from the existing (family) property, but acquired specifically for this purpose.[18] Considering the inclusion of dowry in the inheritance share, dowry was inventoried and evaluated. As dowry could be paid in cash, movable or immovable property, its value was determined, as previously stated: the value of immovable property was estimated at the time of receipt, and the value of movable property at the time of inheritance (§794). It would be of interest to see what the actual value of dowry was, and in what relation it stood against the daughter's portion of inheritance. If the value of the dowry was lower than the portion of the estate the daughter was entitled to based on equal inheritance rights, did the value of the dowry at least cover the compulsory portion?

What were the cases in practice where dowry of the female descendants could be accepted as the exclusive portion of the estate based on the law? Primarily, those were the cases which could be classified as the 'ancitipated waiver of a potential successor' category. This meant the waiver of entitlement to any future inheritance, during the decedent's life (§551) and the person waiving the inheritance would lose the entitlement to inherit (§538). According to its content and volume, the waiver could be diverse – inheritance could be waived in full, or partially; unconditionally or conditionally; including or excluding compensation. There are strong indications that waivers subject to compensation were indeed largely covered by the amount received through dowry. However, it was not rare that, along with dowry, a certain amount in cash was paid, which was to compensate for the ommission of inclusion of land in the estate, the family's financial affairs permitting. Considering that the waiver was most frequently directed at the waiver of the right to inheritance of land, for male descendants this meant that the payment to sisters guaranteed their waiver of inheritance right, or that they would not dispute the male descendants' entitlement to land.[19] Pursuant to the GCC provisions, special form was not required for the waiver, and the Decision of the Su-

[17] A. Rušnov, S. Posilović, 561, 570.

[18] S. Leček, 230 232; S. Klopotan, "Miraz" ["Dowry"], *Etnološka tribina* 22, 29/1999, 90 91.

[19] S. Leček, 234.

preme Court of Croatia and Slavonia, the Table of Seven, further emphasized that a waiver contract with a decedent was not required. However, since the waiver applied to the descendants of a potential heir submitting the waiver, the decedent was obliged to accept the waiver of inheritance in a valid form (§861). Therefore, unilateral waiver of inheritance, i.e. waiver not endorsed by the decedent, did not produce any legal consequences. [20]

Thus, female children, upon entering marriage, often signed a nuptial agreement, containing the inventory of dowry and their waiver of inheritance rights to the property of their father, or both parents. Upon the introduction of the Law on Notary Public of the Kingdom of Yugoslavia (1930), waiver of inheritance was to be filed as a public notary document, or by means of a statement entered into a court register. Furthermore, dowry was accepted as a sole legal portion of the estate, in the context of the disclaiming the inheritance during the probate proceeding, where the female descendants did not want to accept the inheritance. By disclaiming the inheritance, female descendants' claims were satisfied by previously received dowry, i.e. their potential share of the estate had already been settled out of the parental property, primarily that of the father. Once stated, the disclaim of inheritance was irrevocable (§806). The significance of the disclaim of inheritance lies in the fact that this act opened the inheritance to the nearest potential successor, and in this case that would be a male descendant of the decedent. Thus, by disclaiming the acceptance of her portion of the estate, a daughter would in fact disclaim her rights to the benefit of her brother/s. However, it is evident from the minutes of a probate proceeding that, as a rule, daughters of the decedents did file an accept to the inheritance, and then renounced her legal portion to the benefit of brothers. Although the direct link between the dowry received and the waiver/disclaiming of inheritance was not always unclear from the minutes, there is no reason to doubt that a link existed between the two.

4. LEGAL PRACTICE CASE

A case of a probate proceeding from 1918 shows the bulk of the traits common to the inheritance of female descendants discussed previously – dowry as a constituent or exclusive part of the inheritance, non-inheritance of family's immovable property or purchase of a separate piece of immovable property, pay off of female descendants in order to prevent their further claims to parental property, all with aim to evade intestate succession of the female descendants, i.e. to evade the equality of entitlement to inheritance.

[20] Decision of the Table of Seven of 16 May 1923, No. 1199, *Mjesečnik* 1924, 127 128.

Upon the death of *de cuius* in 1918, a probate proceeding was initiated at the Royal District Court in Velika Gorica, with a "gift deed" submitted, composed in 1911, between deceased and his sons.[21] Apart from his three sons, the *de cuius* also had two daughters. By means of the gift deed, the deceased bequeathed his entire movable and immovable property to his sons, divided into three equal portions, which they accepted with gratitude. Transfer of ownership of the bequeathed property could only be legally affected upon the death of *de cuius*, subject to enclosure of the gift deed, and of a copy of a death certificate. At the same time, the deceased obliged his sons to pay to J., their sister, the amount of 500 kruna in cash upon his death to the effect of "dowry and all-inclusive compensation and pay-off, using movable and immovable property bequeathed to them". To B., the other sister, brothers were not obliged to effect any payment at all, as a piece of real-estate was purchased for her on the day of drafting of the gift deed, in the value of 900 kruna. The deceased had furthermore stipulated that sister B. was to pay her sister J. the amount of 200 kruna. Under these terms, each daughter received 700 kruna, with their father limiting them from any further claims to any part of his estate, or that bequeathed to the three brothers. The brothers, as the sole recipients of the father's entire property, "took upon themselves to adhere to thereby stated terms". According to the grant of probate, dated September 22, 1919, this was a case of testamentary disposition. Also, in the grant of probate the net value of the estate was established to be 21,400 kruna, divided among the three sons, each receiving a portion of the estate in the value of cca 7,000 kruna. This calculation indicates that the value of the portion of the estate received by each brother is ten times that of the amount received by the daughters of *de cuius*. Disproportion is evident in the disposal of the estate; therefore, there can be no talk of equality in succession of descendants regardless of gender. Not only had the daughters not received the portion of the estate they were legally entitled to, but what they had received was even significantly less than the statutory portion of the estate. Furthermore, such manner of disposal of the estate was on obvious instance of the lack of intent of the *de cuius* to designate items of the family immovable property to female heirs, with new property purchased and cash payment effected instead. Neither of the sisters contested such disposal of the estate.

5. CONCLUSION

The female heirs of the *de cuius* encountered various obstacles preventing them from exercising their inheritance rights, particularly con-

[21] State Archive in Zagreb: HR DAZg 86, Royal District Court in Velika Gorica (1853 1918), probate series, reg. no. 598, Os 130/1918.

cerning the inheritance of land. Difficulties in the application of the principle of equality of inheritance were justified by the knowledge of law, which was opposed to the idea of gender equality in succession. Also, a belief prevailed that (further) partition of predominantly small lots of land into even smaller parts, following the disposal of the estate, would lead to difficult economic circumstances and poverty. It can hardly be denied that the idea of the position of women in the society at the time was not in compliance with the principle of equality. The mentality of "what will the village say if you take land from your brother" prevailed, and the intention of women to claim their portion of the parental estate was considered highly inappropriate. Regardless of this position, and the appeal to the opinion of the people, the principle of equality had to be accepted in practice, albeit with varying moderations. Furthermore, the problem of the reduction of the lots of land as a consequence of succession was not exclusively tied to the equality of inheritance regarding gender, but depended on the total number of successors within a family. Even two brothers as heirs of a parent's estate meant partition of the estate. Therefore, the claim that female heirs were to be blamed for the reduction of farmland and poverty could not stand. On the contrary, female heirs brought dowry and/or inheritance and thus, in fact, augmented the property of their new families, and "in a sense women were more valuable as wives than they were as daughters, since in the latter capacity they had to share in the estate".[22] Although a daughter would take a portion of property through inheritance, as a daughter-in-law she was augmenting (her new family's) assets, thus filling in the newly created property "gap".

During the process of unification of civil law in the Kingdom of Serbs, Croats and Slovenes/Kingdom of Yugoslavia,[23] the issue of equality of male and female descendants in the matters of succession was a very hot and important issue. A large number of jurists and legal scholars were aware of its social importance and significance. However, in drafting the civil code (which was never adopted) of the then state, there were proposals for the regulation of intestate succession not granting equality of inheritance of immovable property to female descendants from rural families. Still, the idea of reinstating discrimination in the matters of succession did not take root. The principle of equality of male and female heirs remained in force in the Croatian legal territory, until the GCC ceased to be in force (1946), and was later incorporated in subsequent legislation.

[22] J. Goody, 11.

[23] For more see M. Krešić, "Yugoslav Private Law between the Two World Wars", T. Giaro (ed.), *Modernisierung durch Transfer zwischen den Weltkriegen,* Frankfurt am Main 2007, 151 168.

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DIE GESETZLICHE ERBFOLGE DER WEIBLICHEN NACHKOMMEN NACH DEM ÖSTERREICHISCHEN ALLGEMEINEN BÜRGERLICHEN GESETZBUCH AUF KROATISCH-SLAWONISCHEM RECHTSGEBIET 1853 1946

Zusammenfassung

Die Ausgestaltung der kroatischen Rechtsordnung auf der Grundlage des österreichischen Allgemeinen bürgerlichen Gesetzbuches (ABGB) von 1853 macht das ABGB zu einem wichtigen Bestandteil der kroatischen Rechtstradition. Entstanden nach den Grundsätzen des Liberalismus und Individualismus hat es bedeutend auf die gesellschaftlichen Verhältnisse zur Zeit seiner Einführung eingewirkt. Es hat die Trennung der feudalen Gesellschaft und Rechtsordnung und somit den Entwicklungsbeginn einer modernen, bürgerlichen Gesellschaft ermöglicht. Allerdings hat der Verwandlungsprozess eine Vielzahl an Problemen nach sich gezogen, insbesondere die Bestimmungen der gesetzlichen Erbfolge, die auf das ABGB zurückzuführen sind.

Die Einführung des Prinzips der Gleichberechtigung zwischen den männlichen und weiblichen Erben galt als besonders problematisch, vor allem beim Erben von Liegenschaften. Das wurde durch das Rechtsbewusstsein des Volkes rechtgefertigt, das gegen die Gleichberechtigung zwischen den männlichen und weiblichen Erben war. Außerdem war man der Auffassung, dass die Aufteilung kleiner Besitztümer zwischen den beiden Geschlechtern infolge von Erbschaft noch kleinere und wirtschaftlich nicht lebensfähige Betreibe, aber auch eine schlechte Wirtschaftslage und Armut mit sich bringt. Deswegen vermied man dieses Prinzip und verwendete stattdessen das Institut der Mitgift. Obwohl die Mitgift gemäß den Bestimmungen des ABGB in den gesetzlichen Erbteil der weiblichen Nachkommen eingerechnet wurde, wurde diese Mitgift in der Praxis mit ihrem gesetzlichen Erbteil gleichgesetzt. Für die weiblichen Nachkommen war die Mitgift demnach die einzige Vergütung aus dem Nachlass ihrer Eltern. Trotz vieler Widerstände führte die gesellschaftliche und rechtliche Entwicklung zur allmählichen Anpassung an das Prinzip der Gleichberechtigung zwischen den männlichen und weiblichen Erben, das ein Teil der kroatischen Erbrechtsordnung geblieben ist.

Schlüsselwörter: *Österreichisches Allgemeines Bürgerliches Gesetzbuch. Gesetzliche Erbfolge. Weibliche Nachkommen. Prinzip der Gleichberechtigung zwischen den männlichen und weiblichen Erben. Mitgift.*

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CICERO ALS JURIST UND THEORETIKER*

Der Autor geht im folgenden der Frage nach, ob Cicero nur Rhetoriker oder auch Jurist gewesen ist. Dabei sucht er die spezifische Beziehung zwischen Rhetorik und Jurisprudenz zu klären. Besondere Beachtung schenkt er hierbei den rhetori schen Argumentationsformen. In diesem Zusammenhang wird auch die philosophisch juristische Frage nach der erstmaligen Grundlage des römischen Rechts und dessen Bezug zum ius gentium aufgegriffen.

Bei Cicero umfasst das römische Recht die Pluralität der damals gültigen Rechtssysteme. Die parallelen Wertauffassungen des griechischen und römischen Rechts werden hierbei vorausgesetzt. Ciceros spezifischen Beitrag zur Rechtspraxis sieht der Autor vor allem in dessen Definitionen einzelner rechtlicher Begriffe. Auch die Grundlagen einer ersten Systematisierung des Rechts lassen sich auf Cicero zu rückführen. Trotz der Kontroversen Ciceros mit einzelnen römischen Rechtsgelehrten fanden seine Texte dann allmählich doch die Zustimmung gerade auch seiner Oppo nenten.

Im Opus Ciceros wird die Tendenz sichtbar, Rechtsprobleme auch aus einer stärker theoretischen Sicht heraus anzugehen. In diesem Zusammenhang kommt dem terminologischen Problem einer Unterscheidung zwischen ius naturale und ius gen tium besondere Bedeutung zu.

Schlüsselwörter: Rechtsphilosophie. Cicero. *Iurisconsulti. De re publica. De legibus. Ius naturale. Recta ratio.*

Die Rechtsgeschichte kann ohne die Verbindung mit der Rechtsphilosophie und der Rechtsdogmatik nicht auf ihrer Wissenschaftlichkeit bestehen. Die Rechtsphilosophie stellt die Frage nach dem Wesen und der Herkunft des geltenden Rechts. Sie fragt, warum und unter welchen Umständen eine bestimmte Rechtsregel verpflichtet, und nach dem Verhältnis

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der Rechtsregeln zu anderen für die Menschen verbindlichen Normen, wie etwa den Normen der Religion, der Moral und der Gewohnheit. Die Rechtsphilosophie erschöpft sich jedoch nicht nur in der Bewertung des bestehenden Rechts, sie strebt vielmehr nach einem besseren und dem besten Recht, so wie bereits Platon und Aristoteles und viele vor und nach ihnen nach der besten Form der Staatsorganisation und dem ihr entsprechenden Recht gesucht haben.[1] Um eine Frage als rechtsphilosophisch zu bezeichnen, muss diese nicht immer die größten und höchsten Rechts- und Staatsprobleme behandeln. Unter die Rechtsphilosophie fällt vielmehr jedes rechtliche Bewerten, egal ob es sich um die Verfassung, das Strafrecht,[2] um ein familien-, erb-, schuld-, prozessrechtliches oder um ein anderes Rechtsproblem handelt. Dies gilt insbesondere für die Suche nach rechtlichen Lösungen für solche Konflikte, für die es noch keine einschlägige rechtliche Antwort gibt, die also erst noch einem Rechtsverhältnis zugeordnet werden müssen.

Die römischen Juristen haben die Frage nach den ursprünglichen Grundlagen des Rechts noch nicht gestellt, da sie größtenteils als praktische Juristen tätig waren. Sie haben die großen philosophischen Prinzipien über das ius naturale durch Cicero von den Griechen übernommen und aufgrund dessen sowohl ein im Einzelfall gerechtes Recht (ius aequum) als auch ein internationales, für Bürger und Peregrine anwendbares Recht (ius gentium) geschaffen. Die römischen Juristen waren Künstler der Rechtsschöpfung.[3] Auf ihrer Tätigkeit beruht das stolze Gebilde des Römischen Rechts. Sie selbst haben ihre Tätigkeit als *ars boni et aequi* bezeichnet (*D. 1,1,1, pr.*). In diesem Zusammenhang sollte man das immer noch aktuelle Verhältnis zwischen Rhetorik und Jurisprudenz in die Betrachtung miteinbeziehen. In der Literatur finden sich hierzu ganz gegensätzliche Auffassungen. Teils wird jeglicher Einfluss der Rhetorik auf die Jurisprudenz geleugnet, teils geht man von einem Zusammenhang aus, wobei die Meinungen auseinander gehen, was das Ausmaß und die Qualität des Einflusses anbelangt.[4] Dass es im Grundsätzlichen einen Einfluss der Rhetorik auf die Jurisprudenz sowohl in sprachlicher als auch in inhaltlicher Hinsicht gegeben haben muss, lässt sich mit der Interpolationenforschung belegen. Sie zeigt, dass die Begriffe *voluntas, aequitas, clementia, humanitas*, *pietas* erst das Resultat der postkonstantinischen Jurisprudenz sind, welche in die Werke der klassischen Juristen eingefügt wurden. Geblieben ist aber ein tatsächlicher Parallelismus zwischen den Rhetorikern und den Juristen, der auf die Abhängigkeit der späteren Juris-

[1] P. Bonfante, *Scritti giuridici varii*, IV, Studi generali, Roma 1925, 70 89.

[2] J. Lengle, *Roemisches Strafrecht bei Cicero und den Historikern*, Leipzig, 1934, sehen auch die Anzeige H. Niedermeyer, *ZSS, Rom. Abt.,* 57/1937, S. 434 438.

[3] P. A. Vander Waerdt, "Philosophical influence on roman jurisprudence?", *Auf stieg und Niedergang der Roemischen Welt*, Berlin New York, 36/1994, S. 4856 4883.

[4] L. Wenger, *Die Quellen des Roemischen Rechts*, Wien 1953, S. 236.

ten von den früheren Rhetorikern hinweist. Der Wert der rhetorischen Werke für rechtshistorische Untersuchungen sollte also nicht unterschätzt werden. Die kasuistischen Fragen der Praxis, die richtige Beurteilung und Entscheidung des Einzelfalls, waren allerdings immer schon die Domäne der Juristen. Gerade hierin zeigt sich ja auch die Größe der römischen *iurisprudens*, in jedem konkreten Fall die richtige Lösung zu finden. Die Rolle des Rhetorikers war es demgegenüber, die grundlegende Rechtsfrage und den juristischen Kern des Falles darzulegen. Er sollte die bis ins Detail gehende Kette der allgemeinen Argumentationsformen entwickeln, welche auf den einzelnen spezifischen Fall angewendet werden konnten.[5]

Es sind vier Fragestellungen bekannt, anhand derer sich die rhetorische Auslegungstheorie darlegen lässt. Man geht dabei von folgenden angenommenen Situationen aus:

1. Eine Partei stützt sich auf das Gesetz in der strikten Bedeutung seines Wortlauts, die andere hingegen auf den Sinn des Gesetzes und den Willen des Gesetzgebers.
2. Die Parteien beziehen sich jeweils auf sich widersprechende Gesetze (*antinomia*, *leges contrariae*).
3. Beide Parteien berufen sich jeweils auf unterschiedliche Interpretationen eines mehrdeutigen Gesetzes (*amphibolia ambiguitas*),
4. Eine Partei beruft sich auf den sprachlichen Umfang des Gesetzes, die andere vertritt hingegen die Meinung, dass es eine Regelungslücke im Gesetz gebe, welche im gerichtlichen Verfahren aufgefüllt werden müsse (*syllogismus, ratiocinatio, collectio*).

Alle diese Argumentationsfragen finden sich detailliert in Ciceros Jugendwerken *De inventione* 2,121–143, 144–147, 148–153 und *Inst. orat*. 7,6.7.9. erläutert.

In den ersten Jahrhunderten v. Chr. war der Juristenberuf noch nicht getrennt von den anderen Formen geistiger Arbeit und Schöpfung. Cicero wurde von seinen Zeitgenossen als *traichos kai scolasticos* bezeichnet. Die Vertreter der noblen Kreise haben sich für Rhetorik und Rechtswissenschaft interessiert. *Ars oratoria* und Jurisprudenz *(iurisprudentia)* waren noch eng miteinander verbunden, wenngleich die Rhetorik dann später mehr und mehr an Gewicht verlor. Cicero wurde auch als Enzyklopädist bezeichnet. Zu seiner Zeit waren Juristen im Allgemeinen noch keine Träger bedeutender Staatsfunktionen. Eine solche Praxis setzt erst zur Zeit Vespasians ein. Cicero weist in seinen Werken auf die Vielfalt menschlicher Verhältnisse hin; insbesondere in seinen *Orationes* führt er

[5] F. Bona, "Sulla fonte di Cicero, De oratore 1,56, 239 240 e sulla cronologia dei decem libelli di Q. Mucio Scevola", *SDHI* 39/1973, S. 425 470.

aus, wie vielfältig sich die Vorgänge auf dem Gebiet der *vita activa* darstellen.

Folgt man Cicero, so nimmt die Rednerkunst in der Rechtssphäre eine äußerst bedeutsame Rolle ein. Bei der Charakterisierung wichtiger Persönlichkeiten des öffentlichen Lebens hebt Cicero immer deren rhetorische Fähigkeiten hervor; *eloquentium iuris peritissimus* lautet die respektvolle Bezeichnung, die er solchen Zeitgenossen zukommen lässt. Aber Cicero kritisiert auch diejenigen, die ohne juristische Ausbildung vor den Magistraten und den Gerichten auf dem Forum auftreten. Nach Ciceros Auffassung sollte jeder Redner das Recht gut kennen. Die Kenntnis des *ius civile* ist mit *honor, gratia* und *dignitas* verbunden.

Cicero war von der Wichtigkeit der Rechtskenntnis als Teil der *scientia omnium rerum* tief überzeugt. Auch sich selbst hielt er durchaus für einen großen Kenner der Jurisprudenz. Dabei ist es nicht ohne Bedeutung, dass er die wichtigsten Werke der griechischen "politischen und rechtlichen Kultur" kannte.[6] Er war der Depositar der *sciencia omnium artium* und anhand dessen war er zur vergleichenden Analyse der griechischen Polis und der Römischen Staatsorganisation wohl befähigt.[7]

Obwohl er dem Römischen Recht als einer Art *ius naturae* den Vortritt gab, benutzt Cicero in seinen Analysen auch oft Elemente anderer Rechtssysteme. Er hat im Grunde auf dem Gebiet des *Imperium Romanum* die Pluralität der geltenden Rechtssysteme anerkannt (*Epist. Ad Att. 6,1,15*). Als weiteres Dokument für sein Interesse am ausländischen Recht kann man *De legibus 2,59* sehen, wo die Vorschriften der Zwölf Tafeln über das Begräbnisritual in gewisser Weise mit Solons Gesetzen verglichen werden. Cicero hat die charakteristischen Merkmale der ausländischen Rechtsysteme für die Erklärung der Eigenarten der Römischen Rechtsschöpfung benutzt. Das kommt sehr deutlich etwa in *De re publica 21,2* zum Ausdruck. Seine Sichtweise beim Vergleich unterschiedlicher Rechtssysteme könnte durchaus auch diejenige der römischen *iurisconsulti* gewesen sein, da er jenen sehr nahe stand. Unterschiede könnten sich allerdings daraus ergeben, dass sich bei Cicero das Interesse an der Erforschung der philosophischen Rechtsgrundlagen sehr stark betont findet.

Bisherige Untersuchungen bestätigen den Einfluss der Philosophie auf die klassischen römischen Juristen.[8] So gibt es beispielsweise keinen

[6] G. Hamza, "Einige Anzeichen der rechtsvergleihenden Analyse bei Cicero", *La beo* 36, 1/1990, S. 41.

[7] S. Perović, "Prirodno pravo kao neophodno svojstvo pravne države" [Das Na turrecht als unentbehrliche Eigenschaft des Rechtsstaates], *Pravna riječ Časopis za pravnu teoriju i praksu*, Banja Luka, 1, 1/2004, S. 28.

[8] M. J. Schermaier, *Beitraege zur Frage der Naturphilosophie im klassischen ro emischen Recht*, Wien Koeln Weimar 1992, S. 40.

Text römischer Juristen, der bei der Bestimmung und der juristischen Differenzierung des Begriffes *materia* nicht die philosophische Terminologie zu Hilfe nähme, wie man es etwa in *D. 41,3,30 pr.* (Pomp. 30 ad Sab) oder in *D. 5,1,76* (Alfen 6 Digest.) findet, völlig abgesehen von jenen Textstellen, die ganz allgemein auf philosophische Werke verweisen (*ut philosophi dicerent*).[9]

Bei den klassischen Juristen finden sich viele Stellen, in denen auf sog. nicht rechtliche Regeln Bezug genommen und Autoren zitiert werden, die keine Juristen sind. Dabei denkt man in erster Linie an die Berufung auf bekannte Dichter, Schriftsteller, Wissenschaftler und Philosophen. Originalität, Unabhängigkeit, Effizienz waren jene Faktoren, die zur Entwicklung des Rechts und der Rechtswissenschaft in Rom beigetragen haben, indem sie den römischen Juristen ermöglichten, mit traditionellem Stolz auf andere Wissenschaften außerhalb des Rechts, etwa griechischer Provenienz, als Vergleichsgröße zurückzugreifen. So hat Cicero in *De oratore* 1,195 sagen können, *quantum praestiterint nostri maiores prudentia ceteris gentibus,* wobei er die Vorteile des römischen Rechts dem griechischen gegenüber hervorgehoben hat. Andererseits spricht Cicero in *De legibus* 1,17 davon, dass die Rechtswissenschaft nicht auf dem Gesetz der Zwölf Tafeln und dem prätorischen Edikt basiert, sondern vielmehr auf *ex intima philosophia*. Dieser radikale Ansatz erhält noch weitere Schärfe, wenn man die grundlegenden rechtsphilosophischen und rechtspolitischen Tendenzen von *De legibus* berücksichtigt, mit denen Cicero an Platons Gesetze anknüpfen wollte.[10]

Für die selbständige Einschätzung der Juristen und die Bewertung ihrer Tätigkeit ist die Meinung Ulpians in *D. 1,1,1, pr–1* von erheblicher Bedeutung, demzufolge jeder *iurisperitus* zur Philosophie neigen sollte.

Aus diesem Text lassen sich einige Schlüsse ziehen, was die Bewertung außerjuristischer wissenschaftlicher Disziplinen seitens der römischen Juristen anbelangt. Die Anerkennung der *Iustitia* als der höchsten Weisheit ist Bestandteil einer alten philosophischen und ursprünglich viel weniger einer rechtswissenschaftlichen Tradition. Es mag sein, dass Ulpian die Tätigkeit der *iusperiti* selbst als *vera philosophia* bezeichnet hat *(iustitiam namque colimus*); auch könnte sein Hinweis auf die *simulata philosophia* in eine andere Richtung deuten. Aber wenn man das Verhältnis der römischen Rechtswissenschaft zur griechischen Philosophie betrachtet, so zeigt sich hier keinerlei programmatische Ablehnung der griechisch-hellenistischen Theorien. Einzelfälle wie man sie etwa in den

[9] Die Texte aus dem Fragment 1 4 aus D. 1, 3 *De legibus senatusque consultis et longa consuetudine* sind nach dem Vorbild u. A. des Demosten, Hrisipus und Teofrast verfasst.

[10] B. Kuebler, "Zu *Cicero de legibus* II, 19 21", *ZSS, Rom. Abt.,* 9/1888, S. 286 330.

Texten *D. 5,1,76* (Alf.6 Dig.) und *D. 41,3,30* (Pomp. 30 ad Sab.) findet, zeigen deutlich, dass die römischen Juristen bei Bedarf auf die naturrechtliche Argumentation zurückgreifen. Und viele andere Texte bezeugen eine naturphilosophische gemeinsame Interaktion.

Für romanistische Untersuchungen des Römischen Rechts als Ganzem wie auch einzelner seiner Institute und Begriffe ist das Werk Ciceros von größter Bedeutung. Es kann dazu dienen, den Grad der Anwendbarkeit einzelner Rechtsregeln einzuschätzen, die in der Zeit des großen Redners entstanden sind. Es taugt auch als Leitfaden für die Entdeckung von Interpolationen und Glossen in juristischen Texten und kann die Basis für die inhaltliche Rekonstruktion einzelner Gesetze abgeben. Nicht nur seinen juristischen, sondern auch den philosophischen und rhetorischen Werken lassen sich viele Informationen rechtlicher Natur entnehmen.[11] Auch für die Klärung einzelner Rechtsbegriffe lassen sich Ciceros Aussagen dienstbar machen. Er war zu einer Zeit tätig, zu der die Elemente formlosen Charakters den Sieg über den strengen Formalismus des alten *ius civile* davon trugen, und Cicero war einer der Hauptträger dieser Entwicklung.

Cicero trat vor allem auch mit seiner Befürwortung einer freieren Auslegung rechtlicher Vorschriften hervor.[12] Bei vielen seiner Falllösungen lässt sich dies erkennen: So hat er sich in der Rede *Pro Caecina 18,51,27,78* einer buchstäblichen Auslegung einzelner Worte widersetzt und sich stattdessen für die Ermittlung des Sinnes der Rechtsregel stark gemacht. Er kritisiert die älteren Rechtsgelehrten, die sich über Kleinigkeiten, wie etwa einen Buchstaben oder ein Interpunktionszeichen, stritten und dabei die wahre Absicht des Gesetzgebers vernachlässigten. Bei Cicero finden wir auch die berühmte Wendung *summum ius summa inuria (De officiis 1,10,33)*, mit der er die ungerechten Konsequenzen brandmarken möchte, die sich bei Anwendung des Prinzips der buchstabengetreuen Interpretation einstellen können.[13]

Cicero hatte großen Einfluss auf das Recht seiner Zeit, und zwar nicht nur in jenen Fällen, an denen er selbst unmittelbar beteiligt war, sondern ganz generell auf das Rechtsdenken. Seine Ansichten trafen keineswegs immer auf Zustimmung bei den römischen Juristen; manches Mal ist er mit ihnen in Konflikt gekommen, was in gewisser Weise für seine Originalität spricht[14]. So haben die römischen Juristen seine Ansicht, Gerichtsentscheidungen und *aequitas* seien eigenständige Rechts-

[11] C. S. Tomulescu, *Der juristische Wert des Werkes Ciceros Gesellschaft und Recht im griechisch roemischen Altertum*, I, Berlin 1968, S. 227.

[12] J. F. Levy, "Ciceron et la preuve judiciaire, Droits de l'antiquité et sociologie juridique", *Mélanges Henri Levy Bruhl*, Paris 1959, S. 187 196.

[13] M. Fuhrmann, "Philologische Bemerkungen zur Sentenz *'summum ius summa iniuria'"*, *Studi in onore di Edoardo Volterra*, II, Milano 1971, S. 53 70.

[14] M. Bretone, "Pomponio lettore di Cicerone", *Labeo* 16, 2/1970, S. 177 182.

quellen, nicht geteilt *(Cic.Topica 5,28; Gai Inst. 1,2; D. 1,1,7 pr.; Inst. 1,2,3)*. Die Einteilung des Rechts in Gesetze, Gewohnheitsrecht und *aequitas*, welche Cicero vertrat, war den römischen Juristen unbekannt *(Cic. Topica 7,31)*. Cicero hat ein Buch geschrieben, *De iure civili in artem redigendo*, welches uns nicht erhalten ist, welches aber wahrscheinlich einen Versuch der Vereinheitlichung des Zivilrechtes in einem System darstellte. Ihm waren auch das Definieren einzelner Begriffe und deren Klassifikation keineswegs fremd. Die Juristen ahmten ihn nach. Auf diese Weise hat *Q. Mucius Scaevola* sein Buch der Maximen und Definitionen und später seinen berühmten Traktat über ZivilRecht geschrieben. Man könnte sagen, dass Cicero die römische Rechtswissenschaft mit seinen Werken *De oratore, De re publica* und *De Legibus* auf den Weg der Entwicklung systematischer Rechtsregeln gebracht hat.

Schon lange wird die Frage gestellt, ob Cicero lediglich Anwalt oder auch Jurist gewesen ist. Die Meinungen sind geteilt. Als entscheidendes Argument dafür, dass Cicero kein Jurist gewesen sein kann, nahm man die oft zitierte Aufzählung berühmter römische Juristen von Pomponius, der dort nicht den Namen Ciceros erwähnt (*D. 1,2,2.36–59*). Andererseits wurde Cicero von seinen Zeitgenossen und denen, die nach ihm lebten und arbeiteten, oftmals als Jurist bezeichnet. Er selbst pflegte zu sagen, dass er im Zweifel die Meinung des Juristen *Tebacius* einholen würde (Epist. Ad familiares 7,17 und 7,21). Ciceros oft ironische Aussagen bergen in dieser Hinsicht manche Unsicherheiten in sich. In einer Rede *(Pro Cluentio 50,139)* sagt er, die Aufgabe eines Anwalts sei nicht, die Wahrheit zu finden, sondern sich so zu stellen, dass die Interessen seines Klienten gewahrt werden. Das sind Worte, die auf eine vergleichsweise geringe Wertschätzung von Rechtskenntnissen hinweisen könnten. An einer anderen Stelle (*Pro Muren 13,2*) sagt er überdies, drei Tage seien ausreichend, um Jurist zu werden; die Kenntnis einiger Formeln mache auch schon das gesamte Rechtswissen aus. Cicero war also kein Jurist im technischen Sinne dieses Wortes, aber er war sicherlich mehr als nur ein oberflächlicher Kenner des Rechts. Er war zwar kein Jurist im Sinne einer Profession, obwohl er sich selbst oft als solcher definierte (*De oratore 1,48,212*). Aber vieles deutet darauf hin, dass er ein ausgesprochener Kenner des Rechts war.

Es ist bekannt, dass es im Römischen Recht möglich war, gleichzeitig als Privatperson, Anwalt, Richter, Ädil oder Prätor, Konsul und Provinzverwalter tätig zu sein. Die einzelnen Lebens- und Arbeitsbereiche waren damals sehr eng miteinander verbunden. Die Jurisprudenz hat mit wahrlich römischem Konservatismus viele gesellschaftliche Beziehungen durch Sitten und Ethik als selbstverständliches und unsichtbares Fundament der Lebensorganisation erschaffen.[15]

[15] U. Lubtow, "Cicero und die Methode der roemischen Jurisprudenz", *Festschrift fuer Leopold Wenger*, I, Muenchen 1944, S. 228.

Cicero war ein eher untypischer, ja singulärer Geist. Seine häufigen Streitigkeiten mit dem Juristen *Trebacius* zeigen, dass er über ausreichendes juristisches Wissen verfügte, um einem Juristen solchen Ansehens zu widersprechen. Cicero besaß eine bedeutende Bibliothek, in der sich auch Werke fanden, die selbst viele Juristen nicht besaßen. Oft hat er die Zwölf Tafeln zitiert *(De inventione 2,50,148)*. Die Formeln, die sich in Ciceros Werken finden, sind exakt und entsprechen den rechtlichen Texten. Beispielsweise lautet bei Cicero die Formel für *cretio vulgaris* in *De oratore 1,22,101*: *Quibus sciam poteroque*; bei *Gaius Inst 2,165* heißt es: *Quibus scies poterisque*. Dieselben Ähnlichkeiten finden wir bei den Formeln der *actiones in rem* und der *actio auctoritatis.* Die Texte Ciceros werden durch die Werke der Juristen bestätigt.[16] Die Tatsache, dass sich Cicero von Zeit zu Zeit in Widerspruch mit den Texten römischer Juristen befindet, lässt sich mit den Interpolationen der Texte klassischer römischer Juristen erklären.

Aus Ciceros Opus lässt sich eine bemerkenswerte Vielfalt äußerst wichtiger juristischer Informationen gewinnen. So etwa die Regeln über das Verbot von Privilegien (*De legibus 3,4,11,3,19,44* und *45)*, Regeln über die Einschränkung der Ehescheidungen (*De legibus 1,21,55)*, die Rechtsregel *adversus hostem aeterna auctoritatis esto (De officiis 1,12,37)*, die Regel über den bindenden Charakter des Eides (Cic. *In Verrem 3,31,111)* und die Haftung für Mängel des Verkaufsgegenstandes (Cic. *In Verrem* 3,16,65). Wir erfahren, dass die *Lex Iulia de repetundis* vom August oder September des Jahres 59 v. Chr. stammt (*Pro Flacco* 13), dass das erste Gesetz der Centuriatsversammlungen *de provocatione* war *(De re publica 2,31,53),* dass die *Lex Voconia* 169 v. Chr. und die *Lex Cincia* im Jahre 204 v. Chr. erlassen wurde. Wir hören etwas über die *actio rei uxoriae (Topica 17,66)* und die Formel *petitoria* für die *rei vindicatio* (Cic. *In Verrem* 2,2,12); schließlich die Formel für die *actio de dolo (De natura deorum 3,30)*.

Cicero hat aktiv an der Lösung sehr wichtiger und zu seiner Zeit überaus strittiger Rechtsfragen mitgewirkt.[17] Als Parteivertreter auch in den schwierigsten Fällen[18] hat er oft Fragen aufgeworfen, die erst später rechtlich gelöst worden sind. So wird etwa in *De inventione 2,50,149* die

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[16] *Pro Caecina* 26,74 *Gai Ins*t. 2,44*; De inventione* 2,40,116 D. 1,3,32,1*; De inventione* 2,41,120 *Gai Inst*. 2,201; *Topica* 5,26 *Gai Inst*. 2,12*; pro Balbo* 16,35 D. 49,15,7,1; *De finibus* 5,23,65 *Inst.* 1,1 pr.; *pro Cluentio* 11,32 D. 48,19,39; *De oratore* 1,56,237 *Gai Inst*. 3,154a.

[17] E. Costa, *Cicerone Giureconsulto*, I, Bologna 1922, S. 32 40.

[18] C. J. Classen, *Ciceros Rede fuer Caelius, Aufstieg und Niedergang*, III, Berlin 1973, S. 60 94; J. Baron, "Der Process gegen den Scauspieler Roscius", *ZSS, Rom. Abt.,* 1/1880, S. 118 151; B. Kupisch, "Cicero ad Atticum 16,15,2", *ZSS, Rom. Abt.*, 96/1979, S. 43 64; G. Pugliese, "Aspetti giuridici della pro Cluentio di Cicerone", *IURA* 21/1970, S. 155 180; C. Cantegrit Moatti, "Droit et politique dans le 'Pro Murena' de Ciceron", *Revue historique de droit francais et etranger* 4/1983, S. 515 530.

Frage nach der Gültigkeit des Testaments eines zum Tode Verurteilten aufgeworfen, die dann erst später in negativem Sinne beantwortet wurde (*D. 28,3,6*). Gleiches gilt für die Frage, ob die *substitutio popularis* auch eine *substitutio vulgatis* einschließt, was später in der *Causa Curiana* positiv beantwortet wurde (*De inventione 2,21,62* und *2,42,122*). In *De oratore 1,40,182* findet sich die Frage behandelt, ob ein Freigelassener durch den Censor sofort nach der Einschreibung in das Register oder erst nach der abgeschlossenen Volkszählung frei wird. In *Epist. Ad familiares; Gai Inst. 2,119* und *120* geht er dem rechtlichen Schicksal eines Testaments nach, das von einer Frau ohne *tutoris auctoritas* errichtet wird und daher dem Zivilrecht nach nichtig ist.

Ciceros Einfluss auf die römische Jurisprudenz ließe sich an zwei Punkten in besonderer Weise hervorheben: Zum einen lassen sich die Vorbedingungen, die den Übergang des Römischen Rechts von der Kasuistik zu dessen stärkerer Systematisierung ermöglicht haben, wesentlich auch auf Cicero zurückführen. Hinzu kommt der Umstand, dass er es war, der das Recht auch für diejenigen zugänglich machte, die nicht zu den Rechtskundigen im strengen Sinne zählten. Es ist sehr schwer festzustellen, welchen Einfluss Cicero auf die Juristen nach ihm ausgeübt hat. In den *Digesten* wird Cicero häufig als Garant wichtiger rechtlicher Aussagen bezeichnet.[19] Allerdings wird er nur zwei Mal als eigentliche Autorität bezeichnet, auf die sich Juristen berufen: Ulpian bezieht sich in *D. 42,4,7,4* bei der Auslegung des Wortes *latitare* auf Ciceros Definition (*ut Cicero definit*), wobei er diesen Begriff als eine Art "schamhaften Versteckens" deutet. Celz zitiert Cicero in *D. 50, 16, 96* bei der Definition der "Meeresküste". Obwohl sich bei den Juristen einige Definitionen finden, die Entsprechungen zu den Texten Ciceros aufweisen, lässt sich kaum etwas darüber aussagen, inwieweit die späteren Juristen unter dem Einfluss Ciceros standen.[20] Im Licht des bisher Angeführten scheint mir aber ein solcher Einfluss sehr wahrscheinlich, denn Ciceros Werke sind von ausgesprochener juristischer Originalität.

Damit bleibt die Frage nach dem Verhältnis der römischen Juristen zum Phänomen des natürlichen Rechts, zum *ius naturale,* insbesondere die Frage, inwieweit dieses Verhältnis unter dem Einfluss Ciceros stand. Haben die römischen klassischen Juristen das *ius naturale* überhaupt, und wenn ja, auf welche Weise, als die entscheidende Grundlage der Geltung des gesamten Rechts angenommen? Die Beantwortung dieser Frage begegnet manchen Schwierigkeiten.[21] Am schwierigsten ist dabei das termi-

[19] D. 1,2,2,40; D. 1,2,2,43; D. 1,2,2,46; D. 48,4,8; D. 48,19,39.

[20] V. Radovčić, "Retoričko učenje o definiciji i rimski pravnici" [Die Rhetorikle hre über die Definition und den roemischen Rechtsgelehrten], *Zbornik Pravnog fakulteta u Zagrebu* 5 6/1986, S. 717.

[21] W. Waldstein, "Entscheidungsgrundlage der roemischen Juristen", *Aufstieg und Niedergang*, 15/1973, S. 79.

nologische Problem der Differenzierung von *ius naturale* und *ius gentium*, da diese Begriffe sehr breit verwendet werden.[22] Hinzu kommt, dass der Begriff des *ius naturale* keineswegs in einem einheitlichen Sinne verwendet wird, was auch daran liegen mag, dass die klassischen Juristen kein Interesse an einer Systematisierung dieses Begriffes zeigten. Auch ist nicht völlig klar, auf welche Verhältnisse genau dieser Begriff angewendet wird.

Die Anfangsstellen der Digesten und der Institutionen in der Kodifikation Iustinians vermitteln, was die Herkunft des juristischen Konzeptes vom natürlichen Recht anbelangt, nur ein fragmentarisches Bild. Immerhin wird, Hand in Hand mit der Entwicklung der Kasuistik, auch der Versuch greifbar, das Recht in einem ethisch-philosophischen Sinne zu begreifen und damit gleichzeitig einer gewissen Systematisierung zu unterwerfen. Repräsentative Aussagen römischer Juristen über das *ius naturale* finden wir in den folgenden Texten:

In den einleitenden Fragmenten *"De iure et iustitia"* und *"De iure naturali"* kommt der Geist griechischer Philosophie und römischer Rhetorik zum Ausdruck, die durch die abstrahierende geistige Kraft der römischen Klassiker und die eklektische Arbeit byzantinischer Kompilatoren umgestaltet wurden. Aus den Digesten kann man wegen der vielen Interpolationen die wahre Meinung der römischen Juristen hingegen kaum erfahren. Das Problem des *ius naturale* muss in der klassischen Rechtswissenschaft in Verbindung mit der Geschichte und der Rechtsentwicklung studiert werden, damit seine genetischen und konstitutiven Faktoren konstruiert werden können. In den Digesten sind es *Ulpianus, Paulus* und *Gaius*, die sich als die größten Vertreter der so genannten normativen naturrechtlichen Lehren präsentieren. Die Elemente eines solchen Zugangs finden wir nicht nur in den Lehren über die Rechtsquellen, sondern auch im inhaltlichen Ausdruck seiner Konkretisierung in bestimmten Rechtsinstituten. Die Einflüsse der stoischen Philosophie verbinden sich mit der Tendenz dieser Juristen zu einer gewissen Theoretisierung. Der abstrakte naturrechtliche Begriff war für ihre methodischen und praktischen Zwecke geeignet. In Einzelheiten unterscheiden sich die klassischen Lehren vom *ius naturale* von den Lehren der Juristen des V. und VI. Jahrhunderts, die in den Quellen Iustinians auftreten. Auch hatte die Patristik schon sehr früh Einfluss auf die Verchristlichung einzelner rechtlicher Prinzipien, sodass ihr zur Zeit der so genannten christlichen Kaiser eine beträchtliche Bedeutung in den allgemeinen Ansichten über das Recht zukam.[23]

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[22] P. Frezza, "Ius gentium", *Revue internationale des droits de l'antiquite*, *Melan ges Fernand De Vischer*, I, Bruxelles 1949, S. 301.

[23] W. E. Voss, *Recht und Rhetorik in den Kaisergesetzen der Spaetantike eine Untersuchung zum nachklassischen Kauf und Uebereignungsrecht*, Frankfurt/Main 1982, sehen auch die Anzeige L. Huchthausen, *ZSS, Rom. Abt.,* 102/1985, S. 637 729; V. Pola

Die am meisten verbreitete Referenzstelle dürfte wohl Ulpians berühmte Definition des Naturrechts sein (oben bereits zitiert), die auch in Iustinians Institutionen 1,2 pr. übernommen wurde. Ulpian spricht hier zuerst über die bekannte Dreiteilung des Rechts und kommt dann auf den Begriff des *ius naturale*. Die Glaubwürdigkeit dieses Textes wurde allerdings verschiedentlich in Frage gestellt. Denn Ulpians Konzept finden wir bei anderen Juristen nicht. Er begreift das *ius naturale* als eine Rechtsquelle und als einen grundlegenden Faktor des geltenden Rechts. Seiner Meinung nach kann das *ius civile* den Normen des *ius naturale* nicht derogieren. Für Ulpian sind die natürlichen Gesetze Quellen des *ius naturale*, dessen Gültigkeit er auch auf andere Lebewesen erstreckt, während er für die einzelnen Fähigkeiten des "irrationalen Tieres" den Begriff *"iniuria facere"* gebraucht.

Hier stellt sich nun das Problem des Verhältnisses zwischen *ius naturale* und *ius gentium*. Die Unklarheiten bezüglich des Inhaltes und der Bedeutung dieser beiden Begriffe dürften wohl darauf zurück zu führen sein, dass Cicero sie nicht ganz klar und präzise angewendet hatte, was dann später zu einer gewissen terminologischen Verwirrung führte (*De finibus 3,20,67; De re publica 3,11,18 – ius naturale* als spezifisch menschliches Naturrecht; *De officiis 3,5,23*): Es kann auch nicht mit Sicherheit nachgewiesen werden, dass Ulpian den Begriff *ius gentium* im Sinne eines der menschlichen Art eigenen gemeinsamen natürlichen Rechtes benutzte.[24] Bei anderen Juristen wird der Terminus *ius gentium* jedenfalls vielfach gerade nicht in dieser Weise verwendet. Vielmehr werden die Ausdrücke *ius naturale* und *ius naturae* benutzt, um das der menschlichen Natur entsprechende Recht zu bezeichnen (*D. 50,17,206; D. 23,2,14,2; D. 50,16,42; D. 50,17,32*). Das Problem der Terminologie und der Interpolation blieb für die klassische Rechtswissenschaft auch weiterhin aktuell und wurde wahrscheinlich aus der römischen Philosophie und Rhetorik übernommen.

Ulpians Auffassung steht deutlich unter dem Einfluss römischer und griechischer Denker, bei denen die Idee eines umfassenden Naturrechts konkrete Gestalt annahm.[25] Es war die griechische Philosophie, welche die Überzeugung von der Existenz eines allgemeinen, universellen und der Natur entsprechenden Gesetzes entwickelt hat. Das war nichts anderes als die pure *recta ratio*, die sich durch das gesamte Universum

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ček, "Zum Gerechtigkeitsgedanken im roemischen Recht", *ZSS, Rom. Abt.,* 77/1960, S. 160 181; G. Nocera, *Jus naturale nella esperianza giuridica romana*, Milano 1962, S. 51 138.

[24] R. Voggensperger, "Der Begriff des 'ius naturale' im Roemischen Recht", *Ba sler Studien zur Rechtwissenschaft* 32/1952, S. 69.

[25] T. Honore, *Ulpian Pioneer of Human Rights*, Oxford University Press, 2002^2, S. 76 94; D. Daube, "Greek and Roman reflections on impossible laws", *Natural Law Forum* 12/1967, S. 17 23.

verbreitet und sich vom höchsten, über alle Erscheinungen waltenden Gott selbst nicht unterscheiden lässt. Die Gottheit erschafft einen universellen Kosmos, dessen Gesetz, bestimmt durch die Natur, einzelne Regeln festsetzt. Aus dem stoischen Konzept der Natur werden Lebensregeln abgeleitet. Cicero, der große Befürworter stoischer Philosophie, hat die sozialphilosophische naturrechtliche Lehre für die römische Rechtswissenschaft fruchtbar gemacht.

Cicero sagt in *De finibus 3,19,62*, die Natur vereine Mensch und Tier. Auch in *De officiis 1,4,11* betont er die Einheit aller Lebewesen. Wie wir aus dem zitierten Text ersehen können, sind die Zugehörigkeit zu einer bestimmten Art (*coniunctio*), die Fortpflanzung (*procreatio*) und die Sorge für die Erhaltung der Nachkommen (*educatio*) Gegebenheiten, die jeder Art ihren jeweiligen Lebensschutz- und Verteidigungs mechanismus verleiht. Dies ist der Überzeugung von der Herrschaft der Menschen über alle Tierarten ebenso klar entgegengesetzt wie der Annahme, die menschliche Gattung habe bei der Rechtsschöpfung mitgewirkt. Den stoischen Lehren nach ist die spezifisch menschliche Natur mit dem Verstand, der *ratio*, ausgestattet, womit sie sich im Prozess der Erfahrung des Göttlichen über die Tierarten erhebt. Die Quelle des der menschlichen Natur entsprechenden *ius naturale* liegt deshalb nach Cicero in der *recta ratio*, die er allen Menschen eingepflanzt sieht. Ulpians Definition des Naturrechts stützt sich also augenscheinlich auf Ciceros Lehre, in der sich wiederum Elemente der Lehren Platons, Aristoteles', der Pythagoras-Anhänger und der Stoiker vereinigt finden.[26]

Wenn man Paulus' Definition des *ius naturale* in *D.1,1,11 pr*. mit der des Ulpian vergleicht, so lässt sich rasch bemerken, dass es sich hierbei um tiefgründigere Prinzipien handelt. Die Gegenüberstellung des über dem "*semper aequm et bonum*" erreichten *ius naturale* mit dem *ius civile*, dem die *utilitas* zu eigen ist, überschreitet zweifelsohne die Abstraktheit und den philosophischen Inhalt aller anderen klassischen Versuche der Einbindung des *ius naturale* in das Römische Naturrecht und die Rechtstheorie. Bei Paulus ist die philosophische Erziehung mit der juristischen und mit der zur Geistesschärfe verbunden. Auch Paulus hat keine festen Grenzen zwischen dem *ius naturale* und dem *ius gentium* gezogen. Bei ihm treffen wir den Ausdruck *ius aequm* als eine besondere Bezeichnung für *ius gentium*, als eine Art *ratio scripta*, an.

Eine zentrale Stelle in seiner Definition nimmt dabei die Sentenz "*semper aequm et bonum*" ein. Das sind vor allen Dingen moralische Begriffe der Gerechtigkeit und der Billigkeit. Die Wurzeln dieser Begriffe finden wir in der stoischen Ethik, *aequm* als Teil der Gerechtigkeit im Sinne proportionaler Gleichheit, das sogenannte Proportionalitätsverhält-

[26] A. G. Anselmo, *"Ius publicum" "Ius privatum" in Ulpiano, Gaio e Cicerone*, Palermo 1983; sehen auch G. Lombardi, *IURA* 34/1983, S. 130 139.

nis (*suum cuique ius*). Es handelt sich um einen gemeinsamen Maßstab für alle einzelnen Rechte – um ein Recht in allgemeinem Sinne, das Anwendung in allen einzelnen Rechten findet. Die Gerechtigkeit als eine Tugend setzt das Kennen von *aequm et bonum* voraus und verlangt ihre Anwendung, was aus der Sicht des Willens heißen würde, jedem sein Recht zu gewähren. Das Recht, durch welches sich das Prinzip *aequm et bonum* verwirklicht, entsteht aus der Natur und kann als *ius naturale* bezeichnet werden. Der tiefste Sinn der Definition des natürlichen Rechts von Paulus liegt gerade darin, dass *aequm et bonum* im Einklang mit dem höchsten Prinzip der Gerechtigkeit und der Natur liegt. Das ist die Wurzel der inneren Substanz des Rechts, die als *interpretatio prudentium* die Grundlage aller Formen des Rechts darstellt.

Ein Vorbild für eine solche Definition kann Paulus bei Aristoteles gefunden haben, der in der Rhetorik 1375a den Begriff des *aequm* bestimmt hat. Cicero hat damals sein gesamtes Werk in den Dienst der Ideale von Humanität und Gerechtigkeit gestellt. Er definiert das Recht als *"quaesitum aequabile" – De officiis 2,12,42*. Ihm zufolge war der Begriff *aequitas* vom Ende der Republik an in allgemeinem Gebrauch (*De finibus 2,23,42*), und er betrachtet ihn als die Grundlage des gesamten Rechtslebens und der Rechtsinterpretation (*De re publica 5,3; Topica 9; Brut.145; De oratore 1,142; De officiis 1,19,62; De inventione 2,22,54*).

Auch bei anderen römischen Autoren nimmt der Begriff der *aequitas* eine bedeutende Rolle ein. Bei *Enius, Plautus* und *Terencius* ist die *aequitas* das Prinzip, auf dem auch die allgemeine Formulierung des *aequm et bonum* beruht, die mit dem *ius honorarium* entstand. Cicero spricht in *De re publica 2,61* über die Billigkeit der Zwölf Tafeln und Tacitus bezeichnet dieses Prinzip als das Ziel des gerechten Rechts *aequi iuris*" – Tacitus Ann. 3,27. Seneca geht in seinen philosophischen Ausführungen von den Gedanken Ciceros ans: Für ihn hat die *lex naturae* die Bedeutung *iusti iniustique regula* im Sinne der Gleichstellung mit *aequitas* – Seneca Epist. 95 und 107. Quintilian gibt in voller Klarheit die Definition *iustum natura*: "*quod secundum cuiusque rei dignitatum es" – Inst.orat. 7,4,5–6*, wobei die innere gegenseitige Abhängigkeit zwischen der Natur des Gerechten und dem Wesen der Gerechtigkeit erörtert wird. Bei ihm bemerkt man auch den starken Einfluss der Theorie Ciceros über die höchsten Rechtsprinzipien *pietas, fides, continentia, talia,* die das Fundament des Wesens der Gerechtigkeit darstellen.

Im geltenden Recht bildet die *aequitas* bei der Konkretisierung des Begriffes *aequm et bonum* juristisch betrachtet den Maßstab der Kritik des geltenden Rechts. Die römische Rechtswissenschaft hat die Formel der Gerechtigkeit bei *iudiciae bonae fidei*, *actiones in aequm et bonum conceptae* in die *iudiciae* Formel, *exeptio doli* und in andere eingeführt.

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CICERO AS A LAWYER AND THEORETICIAN

Summary

Cicero's entire opus carried out a great influence to the development of Ro man law in different ways, and to the modern continental legal systems throught it. Not only his legal writing, but also his philosophical contribution enabled the basic Greek philosophical principles cosidering ius naturale to be integrated into the Ro man way of legal reasoning. That idea made a latter impact in formation of positive law on particular issues, strenghting the concept of ius aequum.

The author calls attention to parallelism and close relationship between Cic ero's rhetoric and jurisprudence. Particular attention is paid to the role of his rheto ric in developing judicial argumentation. According to Cicero, an orator was ex pected to be well informed in law, since the knowledge of ius civile was tightly con nected to honor, gratia and dignitas, which are basic demands considering orator's caracter and value of argumentation. Through analysis of Roman law, Cicero pays attention to a variety of legal systems existing within the Imperium Romanum. He also contributed on that ground to the formation and development of particular legal terms and institutions, so that study of his works helps in detecting interpolations in the legal sources. The author therefore concludes that Cicero is worthy of being seen as one of the most influential and important figures not only in ancient rhetoric, as he is usualy percieved, but in law as well, particularly due to the firm and deep ties between the two disciplines that he mastered.

Key words: *Legal Philosophy. Iurisconsulti. De re publica. De legibus. Ius naturale. Recta ratio*.

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DIE ANFÄNGE DES RECHTSSTUDIUMS IM SERBIEN DER NEUZEIT UND DIE JURISTENAUSBILDUNG IN DER HABSBURGERMONARCHIE (EIN BEISPIEL DES RECHTSTRANSFERS)*

Im Folgenden geht es um die Grosse Schule, die im ersten serbischen Auf stand gegründet worden war, und zwar genau am 1. September nach dem alten bzw. am 13. September nach dem neuen Kalender im Jahr 1808. Demnach läßt sich dieses Jahr das 200jährige Jubiläum dieser "Grossen Schule" begehen. Welcher Art war diese Schule? War sie ein Gymnasium, eine Fachschule oder eine Fachhochschule?

Das aufständische Serbien musste an Stelle der osmanischen Feudalherrschaft einen neuen Staatsapparat aufbauen. Der Aufbau eines Beamtenkaders war daher eine der größten Herausforderungen für den neuen Staat. Der Gründer und erste Professor der Grossen Schule war Ivan Jugović. Er war seiner Ausbildung (er been dete das Jurastudium in Pest), seiner politischen Rolle sowie seiner Neigung nach dem Ausbildungssystem der Habsburgermonarchie eng verbunden.

Vergleicht man die Belgrader Grosse Schule mit entsprechenden Ausbildungsin stitutionen jener Zeit in der Habsburgermonarchie, also mit den sog. "königlichen Aka demien" in den ungarischen Ländern der Habsburgermonarchie bzw. den "Lyzeen" in den anderen Teilen der Monarchie, unter dem Gesichtspunkt der dort jeweils gelehrten Fächer, der Dauer der Vorlesungen, der Zahl der Lehrkräfte sowie der akademischen Titel, so ergibt sich folgendes Bild: Das in der Belgrader Grossen Schule angewandte Modell (1808 1813) war das modifizierte System der ungarischen königlichen juris tischen Akademien, das in der Ratio educationis totiusque rei litterariae per regnum Hungariae et provincias eidem ad nexas von 1777 und in der Ratio educationis von 1806 niedergelegt worden war. Ein ähnliches System war in den "Lyzeen" anzutreffen.

Später, im Jahr 1838, wurde in Serbien das Lyzeum gegründet. Ab 1840 be gann die dritte juristische Klasse, wieder nach dem Muster der Juristenausbildung in

* The paper is an elaborated version of the short communication discussed at the Conference *Internationale Rechtswissenschaftlische Tagung, Forschungen zur Rechtsges chichte in Südosteuropa*, held in Vienna on 9 11 October, 2008.

der Habsburgermonarchie, weil die ersten Professoren wiederum von dort gekommen waren.

Schlüsselwörter: *Rechtsstudium in Serbien. Belgrader Grosse Schule. Rechts akademie. Lyceum. Juridische Fakultät. Universität zu Bel grad.*

I

Für das aufständische Serbien (1804–1813) lag eine der wichtigsten administrativen Herausforderungen darin, einen Staatsapparat zu organisieren, um auf diese Weise die Resultate des Kampfes für die nationale Befreiung aufrechterhalten zu können. Die serbische Staatsverwaltung, die an die Stelle der türkischen Feudalherrschaft getreten war, musste auf neuen Prinzipien aufgebaut werden und es brauchte Leute, die des Schreibens kundig waren, um administrative Aufgaben übernehmen zu können. Der Aufbau eines Ausbildungssystems für den Beamtenstand war daher eine der wichtigsten Aufgaben für den neuen Staat. Demgemäß kam der Eröffnung der Grossen Schule (Velika škola) in Belgrad im kulturellen und politischen Leben Serbiens auch sehr große Bedeutung zu.

Diese "Grosse Schule" nahm ihre Tätigkeit am 1./13. September 1808 auf. An diesem Tage fand eine feierliche Eröffnungszeremonie statt, bei der Dositej Obradović eine Rede hielt zu dem Thema "Von der erforderlichen Achtung der Wissenschaften". Der Gründer und erste Professor der Grossen Schule war Ivan Jugovic. Er war seiner Ausbildung (er beendete das Jurastudium in Pest), seiner politischen Rolle sowie seiner Neigung nach dem Ausbildungssystem der Habsburgermonarchie eng verbunden.[1] Was war dies nun für ein Modell?

Zur Zeit der Kaiserin Maria Theresia (1740–1780) wurde im Bildungswesen eine Reihe von Reformen nach den Prinzipien des aufgeklärten Absolutismus durchgeführt. Das Bildungssystem wurde dabei unter

[1] S. Novaković, *Vaskrs države srpske* [Die Wiedergeburt des serbischen Staates], Beograd 2000, S. 337; L. Arsenijević Batalaka, *Istorija srpskog ustanka* [Die Geschich te des serbischen Aufstandes], I Teil, Beograd 1898, S. 388 389, 394; L. Arsenijević Batalaka, *Istorija srpskog ustanka* [Die Geschichte des serbischen Aufstandes], II Teil, Beograd 1899, S. 870; Siehe M. Ristić, Jovan Savić Ivan Jugović, Arhivski Almanah [Jovan Savić Ivan Jugović, Archiver Almanach], N. 2 3, Beograd 1960, S. 263 264. "Govor Ivana Jugovića u Praviteljstvujušćem Sovjetu 24. februara 1810" [Die Rede von Ivan Jugović im regierenden Rat am 24. Februar 1810], *Građa za istoriju Prvog srpskog ustanka* (Redakteur R. Perović), Beograd 1954, S. 200 206.

Siehe: Z. Mirkovic, *Pravne studije krajem XVIII i početkom XIX veka i beogradska Velika škola 1808 1813. godine* [Das Rechtsstudium am Ende des XVIII. und am Anfang des XIX. Jahrhunderts und die Belgrader Grosse Schule 1808 1813], *Anali Pravnog fa kulteta u Beogradu*, N. 1, Jahr LVI, 2008, S. 126 149.

staatliche Aufsicht gestellt. Die Aufhebung des Jesuitenordens, der in vielen europäischen Ländern das Schulwesen beherrscht hatte, hatte hier neue Möglichkeiten eröffnet. Die Herrscherin nutzte sie, indem sie damit begann, das Schulwesen den Bedürfnissen der absoluten Monarchie gemäß umzuorganisieren, um auf diese Weise kompetente und loyale Beamte heranziehen zu können. Die Neuordnung des Schulwesens einschließlich der Hochschulen war dabei lediglich Teil eines größeren Plans zur Neuordnung des ganzen Staates, bei dem es in erster Linie darum ging, die "Idee des souveränen Gesamtstaates" gegenüber den bisherigen "korporativen Strukturen" durchzusetzen. Denn der entstehende absolute Staat hatte es sich zum Ziel gesetzt, unter Ausschaltung der partikularen Kräfte allein die Entscheidung des Herrschers und der neu geschaffenen Zentralämter für alle Staatsgeschäfte maßgeblich zu machen.[2]

Das unmittelbare Vorbild für den Aufbau des Hochschulwesens in Serbien findet sich augenscheinlich in den ungarischen Teilen der Habsburgermonarchie. Die gebildeten Serben nahmen dort in der Regel ihre Studien auf und begegneten hierbei dem reformierten Hochschulwesen. Kaiserin Maria Theresia hatte das gesamte Schulwesen in den ungarischen Ländern durch die *Ratio educationis totiusque rei litterariae per Regnum Hungariae et provincias eidem ad nexas* von 1777 neu geordnet. In dieser Ausbildungsordnung waren neben den Gymnasien und der Universität die königlichen Akademien *(Regia scientiarum Academia)* geregelt. An den königlichen Akademien gab es zwei Lehrgänge, die jeweils zwei Jahre dauerten: einen philosophischen (*cursus philosophicus*) und einen juridischen Lehrgang (*cursus iuridicus*); daneben gab es allerdings auch noch das theologische Studium. Erst nach dem Abschluss des philosophischen Kurses konnte der juridische Kurs besucht werden.[3] Die einzige Universität (von 1777 bis 1784 in Buda, dann in Pest) war für die Studenten aus den entlegeneren Teilen Ungarns nur schwer zu erreichen; dies mag auch ein Grund für die Schaffung der königlichen Akademien gewesen sein. In erster Linie aber schuf Kaiserin Maria Theresia diesen zweiten Typus einer juristischen Ausbildungsstätte mit dem Ziel, eine grössere Anzahl loyaler und kompetenter Juristen auf den Beamtendienst vorbereiten zu können. An den Akademien sollten die Studenten im Geiste des aufgeklärten Absolutismus geschult werden.[4] Gemäß der *Ratio*

[2] R. Meister, *Entwicklung und Reformen des österreichischen Studienwesens,* Teil I: Abhandlung, Österreichische Akademie der Wissenschaften, Philosophisch historische Klasse, Sitzungsberichte, 239. Band, 1. Abhandlung/I, Wien 1963, S. 23.

[3] *Ratio educationis totiusque rei litterariae per Regnum Hungariae et provincias eidem ad nexas,* Vindobonae 1777, S. 276 285, 304 317, 330 347.

[4] K. Gönczi (Budapest/Frankfurt a. M.), "Die Juristenausbildung in Ungarn vom aufgeklärten Absolutismus bis zum Ende der Habsburgermonarchie", *Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg, Rechtskulturen des modernen Osteuropa. Traditionen und Transfers*, 3 (herausgegeben von Z. Pokrovac), Frankfurt am Main 2007, S. 48 49.

educationis von 1777 wurden in den ungarischen Ländern fünf derartige königliche Akademien eingerichtet, und zwar in jedem der fünf Regierungsbezirke eine: Somit gab es in Agram (Zagreb), in Raab (Györ) von 1785 bis 1802, in Fünfkirchen (Pecs), in Kaschau (Košice) sowie in Tyrnau (Trnava) eine Akademie; letztere wurde 1784 nach Pressburg (Pozsony, heutige Bratislava) und Grosswardein (Oradea) umgesiedelt.[5]

Eine zweite *Ratio educationis publicae totiusque rei litterariae per Regnum Hungariae et Provincias eidem adnexas* aus dem Jahre 1806 (im folgenden: *Ratio educationis 1806*) bestätigte dieses Ausbildungssystem mit einigen Änderungen vor allem für den Rechtsunterricht. Im Vergleich zur *Ratio educationis* von 1777 waren hier die philosophischen Fächer nur noch in einer vereinfachten Form vorgeschrieben; sie waren hier auf Philosophie, Mathematik, Physik und Geschichte beschränkt. Die *Ratio educationis 1806* basierte auf dem System der Restauration und wirkt im Vergleich zu der *Ratio educationis 1777* rückständig. Sie hatte allerdings einige positive Auswirkungen für den Rechtsunterricht. Der Rechtsunterricht an der königlichen Akademien dauerte nun drei statt wie zuvor nur zwei Jahre. Die Fächer "Allgemeine Geschichte" und "Geschichte der Stände" waren weggelassen worden; statt dessen kamen die Statistik (Staatenkunde) sowie das Handels –, das Wechsel – und das Bergbaurecht als neue Fächer hinzu.[6]

So also stellt sich der Stand der Juristenausbildung in den ungarischen Ländern der Habsburgermonarchie am Ende des XVIII. und am Anfang des XIX. Jahrhunderts dar. Indessen gingen auch in den anderen Teilen des Reiches zahlreiche wichtige Änderungen im Bildungswesen über die Bühne. Die Schulreformen Joseph II. wurden gleichfalls im Sinne der Aufklärung durchgeführt. Mit dem *Toleranzpatent* von 1781 wurde die Säkularisierung des Schulwesens durchgesetzt, was die Öffnung der Schulen für Nichtkatholiken mit sich brachte.[7] Der Kaiser hat auch die Anzahl der Universitäten reduziert, so dass nur die Universitäten in Wien, Prag und Lemberg (Lavov) bestehen blieben. Die anderen Hochschulen und Universitäten wurden in Lyzeen mit einem beschränkten Studienpro-

[5] Über den Beginn des Rechtsstudiums an der Juridischen Fakultät in Zagreb und in Kroatien siehe V. Bayer, "Osnivanje Pravnog fakulteta u Zagrebu (god. 1776) i njegovo definitivno uređenje (1777. god.)"[Die Gründung der Juridischen Fakultät in Zagreb im Jahr 1776 und ihre Einrichtung im Jahr 1777]*, Zbornik Pravnog fakulteta u Zagrebu*, 19, 2/1969, S. 21 288 (mit Beilagen); D. Čepulo (Zagreb), "Legal education in Croatia from medieval times to 1918: institutions, courses of study and transfers", *Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg*, S. 81 151.

[6] *Ratio educationis publicae totiusque rei litterariae per Regnum Hungariae et Provincias eidem adnexas,* Budae, 1806, Tab. IX (Siehe auch Seite 94 95 и 120 121).

[7] R. Kink, *Geschichte der kaiserlichen Universität zu Wien,* Zweiter Band (Statu tenbuch der Universität), Wien 1854, S. 589 (Dokument Nummer 186 von 13. Oktober 1781).

gramm umgewandelt.[8] Die Universität zu Innsbruck wurde am 29. November 1781 zum Lyzeum reduziert, die Karl–Franzens Universität zu Graz wurde im Herbst 1782 in ein Lyzeum umgewandelt. Im Grazer Lyzeum gab es danach noch das philosophische Studium, das als Propädeutikum und "Durchgangsstudium" für andere Studien betrachtet wurde, sowie das juridische, medizinische und schließlich theologische Studium. Die Dauer des theologischen Studiums war auf vier, jene des philosophischen, juridischen und medizinischen Studiums auf zwei Jahre bemessen.[9] "Die Juristenausbildung ist während der Regierung Joseph II. im Sinne der 'Gesamtstaatsidee' bürokratisiert worden; die Universität mutierte zur Ausbildungsstätte für Beamte."[10]

Die Lehrfächer und die Dauer der Vorlesungen, die Zahl der Lehrkräfte und die gebräuchlichen akademischen Titel, schließlich die Art der Vorlesungen sollen im folgenden die Kriterien abgeben für einen Vergleich zwischen der Belgrader Grossen Schule und den entsprechenden Ausbildungsinstitutionen in der Habsburgermonarchie, also den königlichen Akademien in den ungarischen Ländern und den Lyzeen in den anderen Teilen des Reiches.

Zu den Lehrfächern: Der Gründer und die Professoren der Grossen Schule haben anscheinend die Lehrfächer aus der *Ratio educationis 1777* und diejenigen der *Ratio educationis 1806* miteinander kombiniert. Schon auf den ersten Blick ist zu bemerken, dass die Fächer des philosophischen Kurses an den königlichen Akademien in vereinfachter Form in das Programm des ersten und teilweise auch des zweiten Studienjahres der Grossen Schule aufgenommen wurden. Geschichte, Allgemeine Geografie, Rechnen und das Anfertigen von Kartenskizzen (Mathematik), die als Fächer das ganze erste und die Hälfte des zweiten Studienjahres in Anspruch nahmen, waren mit der Philosophie auch die Hauptfächer an den königlichen Akademien der Habsburgermonarchie gewesen. Die deutsche Sprache wurde die ganzen drei Jahre hindurch unterrichtet, was deutlich erkennen läßt, welche Orientierung damals vorherrschend war.

Zu den rechtswissenschaftlichen Fächern an der Belgrader Grossen Schule zählten damals im zweiten Jahr die "Statistik Serbiens"[11], die "Stilistik" und sowie die "Geografisch–statistische Geschichte" von Öster-

[8] Siehe P. Skrejpkova (Prag), "Die juristische Ausbildung in den böhmischen Ländern bis zum Ersten Weltkrieg", *Juristenausbildung in Osteuropa bis zum Ersten Welt krieg*, S. 163 164.

[9] *Geschichte der Karl Franzens Universität in Graz,* Festgabe zur Feier ihres dreihundertjährigen Bestandes, verfasst von Dr. Franz von Krones, O. Ö. Professor, Graz 1886, S. 465 470. Siehe auch Seite 474, 504 505, 588 589.

[10] K. Gönczi, S. 52.

[11] Im damaligen Lehrfach Statistik wurden ganz andere Inhalte gelehrt als heute in diesem Fach. Der Rechtsprofessor an der königlichen Akademie in Zagreb und in *Raab* (Đur), und dann an der Universität Pest (wo er im Jahre 1786 Rektor wurde), Adalbert Adam Barić, im Buch *Statistica Europae* im Jahre 1792, schrieb: "<1.1> Statistica com

reich und Ungarn, Russland, England, Frankreich, Preussen sowie des Osmanischen Reichs, im dritten Jahr wiederum die Stilistik und die Geografisch–statistische Geschichte der erwähnten Staaten; dazu kam Völkerrecht, Staatsrecht sowie Straf– und Strafprozessrecht. Lj. Kandić kommt nach einer Analyse dieses Programms zu dem Ergebnis, dass der Inhalt der rechtswissenschaftlichen Fächer an der Belgrader Grossen Schule "komplex und durchaus auf theoretischen Grundlagen gegründet war".[12] Stellt man die rechtswissenschaftlichen Fächer an der Belgrader Grossen Schule denjenigen an den königlichen Akademien der Habsburgermonarchie gegenüber, so zeigen sich die folgenden Entsprechungen: Die "Statistik Serbiens"[13] entspricht der "Statistica Hungariae et Ditionum hereditariarum Caesareo-Regiarum" der *Ratio educationis 1806*, die "Stilistik" (im zweiten und dritten Jahr) entspricht dem "Stylus Curialis", die "Geografisch–statische Geschichte" europäischer Staaten findet ihr Pendant in der "Historia provinciarum europearum, Historia universalis et Collegium novorum publicorum" der *Ratio educationis* von 1777,[14] das

muniter dicitur notio praesentis constitutionis alicuius regni. <2> Per constitutionem intel ligimus complexum iuris publici et obligationum inter subditos et imperantem...

<2.1> Hinc nos dicimus statisticam esse cognitionem status uniuscuiusque regni; per statum vero intelliguntur omnes qualitates et objecta; sic in omni civitate debet esse territorium, debent adesse cives illud incolentes; iam nomine qualitatum intelligimus me morabiles qualitates, quae scilicet ad finem totius civitatis concurrunt, sive dein bonae sint qualitates sive malae.

<3.1> Complexus ergo harum cicumstantiarum erit statistica...

<5.1> Triplex ergo statisticae est studium, nempe 1 o Historia regnorum; 2 o enar ratio status praesentis regnorum; 3 o complexus propriorum quae docent quid felicitati civium prosit sive obsit."

Der Verfasser betont die Wichtigkeit und Nützlichkeit der Statistik: "<3> Studium hoc eminentioribus dignitatibus summe necessarium est, uti ipsis principibus, ministris, legatis populorum. <4> Utilissimum autem est praesidibus dicasteriorum, consiliariis qui saepe consilia suppeditare aulae debent in diversis negotiis belli et pacis, sed unde dabit consilium sine notitia statisticae? <5> Imo in ipsa vita privata civili summe necessaria est pro homine litterato, et figuram facere volente, notio statisticae", A. A. Barić, *Statistica Europae 1792,* Vol. 1 (Redakteur Željko Pavić i Stjenko Vranjican, Übersetzung von La tein Neven Jovanović, Maja Rupnik, Margareta Gašparović), Zagreb 2001, S. 4 7. Siehe auch Š. Kurtović, "A. Barić: Statistika Europe, II dio" [A. Barić: Statistik Europe, II Teil], *Statistica Europae 1792,* Vol. 2*,* Zagreb, 2002, S. IX XXIII.

[12] Lj. Kandić, J. Danilović, *Istorija Pravnog fakulteta (1808 1905)* [Die Ge schichte der Juridischen Fakultät (1808 1905)]*,* I Buch, Beograd 1997, S. 16 27, 28.

[13] L. Arsenijević Batalaka, (1899)*,* S. 870 871, schrieb, dass im Fach Statistik Serbiens die neue Verfassungsordnung Serbiens aus dem Januar 1811 gelehrt wurde. Das ist ein wichtiger Hinweis auf den Inhalt dieses Lehrfachs, das L. Arsenijević Batalaka am Anfang des Jahres 1811 in der zweiten Klasse unterrichtete.

[14] A. Gavrilović, *Beogradska Velika škola 1808 1813* [Die Belgrader Grosse Schule 1808 1813], Beograd 1902, S. 32 42, erwähnt, dass im Manuskript für das Lehr fach Geografisch statistische Geschichte der erwähnten Staaten Geschichte und die aktu ellen Geschehnisse (eben wie in Collegium novorum publicorum) als Lehrinhalte ange führt sind.

Völkerrecht entspricht dem "*ius gentium et ius publicum universale*" der *Ratio educationis* von 1777 wie auch von 1806, das Staatsrecht kehrt wieder im "Ius Publicum" und das Straf– und Strafprozessrecht schließlich im "Ius Criminale" der *Ratio educationis 1806*. Diesen unzweifelhaft spezifisch rechtswissenschaftlichen Fächern kann man noch das Manuskript der Vorlesungen über "Allgemeine Geografie" (Teil II) zu Seite stellen, welches den zweiten Teil des Faches "Allgemeine Geografie" darstellte (im zweiten Jahr), sich aber größtenteils gleichfalls mit dem Staatsrecht befasste.[15] Dadurch wird der juridische Charakter der Grossen Schule und ihre Ähnlichkeit mit den königlichen Akademien der Habsburgermonarchie noch zusätzlich verstärkt.

Vergleicht man die juridischen Gegenstände an der Grossen Schule mit jenen der Lyzeen zu Beginn ihrer Wirksamkeit, so erhält man ein interessantes Resultat: An den Lyzeen wurden die juridischen Gegenstände nur ein Schuljahr lang gelehrt, nämlich in der dritten Klasse[16], und es gab dort in der Regel nur drei juristische Gegenstände,[17] wohingegen in der zweiten und dritten Klasse der Großen Schule sechs juridische Fächer unterrichtet wurden. Damit tritt der juristische Charakter der Grossen Schule noch schärfer hervor.

Zur Dauer des Unterrichts: Die Lehrkräfte der Grossen Schule hielten drei Stunden Unterricht vormittags ab und zwei Stunden nachmittags, "aber mehrmals auch sechs Stunden". An den königlichen Akademien dauerte der Unterricht hingegen vier Stunden täglich – zwei Stunden vormittags und zwei Stunden nachmittags. Dort wurde zwei Jahre lang wöchentlich an fünf Werktagen unterrichtet (außer donnerstags), während der Unterricht an der Grossen Schule an sechs Tagen der Woche abgehalten wurde.[18] Daraus kann man entnehmen, dass sich**,** gemessen an den Schulstunden und der Belastung der Studenten, der dreijährige Unterricht der Grossen Schule an den dreijährigen Unterricht der königlichen Aka-

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[15] Siehe R. Perović, S. 250 260.

[16] Für die Geschichte der serbischen Rechtswissenschaft hat das große Bedeutung, denn die Juristische Fakultät der Universität zu Belgrad hat bis dahin das Jahr 1841 als Beginn ihrer Tätigkeit gefeiert. (Es ist das Jahr, in dem das Lyzeum aus Kragujevac nach Belgrad verlegt wurde.)

Einige Verfasser verglichen die Studienprogramme des Lyzeums mit dem Studien programm der Grossen Schule. Aber diese Studienprogramme des Lyzeums wurden in Wirklichkeit nicht durchgeführt: R. Ljušić, "Od Velike škole do Liceja (1808 1838)"[Von der Grossen Schule bis zum Lyzeum], *Univerzitet u Beogradu 1838 1988,* Beograd 1988, S. 16; V. Grujić, *Licej i Velika škola* [Das Lyzeum und die Grosse Schule], Spomenik SANU, CXXVIII, Beograd 1987, S. 36 37; P. Slankamenac, "Osnivanje i karakter beo gradskog Liceja" [Die Gründung und der Charakter des Belgrader Lyzeums] *Savremena škola (časopis za pedagoška pitanja)*, godina VII, Beograd 3 4/1952, S. 19 20.

[17] Zählt man noch das Fach "Kurialstil" hinzu, das fakultativ von J. S. Popović unterrichtet wurde, so wären es vier Gegenstände.

[18] L. Arsenijević Batalaka, (1898), S. 396 397.

demien annäherte. Die eineinhalb Jahre des juridischen Studiums an der Grossen Schule entsprachen fast dem zweijährigen Studium an den königlichen *Rechtsakademien*. Dass die Anzahl der Schulstunden und "die Belastung der Studenten" damals ein wichtiges Kritrium war, bestätigt eine Vorschrift der Juridischen Fakultät der Wiener Universität aus dem Jahr 1753, der gemäß die Studierenden die juridischen Studien in vier Jahren absolvieren konnten, wenn sie täglich drei Stunden hörten, und in fünf Jahren, wenn sie täglich zwei Stunden hörten.[19]

Zur Professorenschaft: Jede Klasse der Grossen Schule hatte einen eigenen Professor – es gab also insgesamt drei Professoren. Mangel an Professoren herrschte aber auch an den königlichen Akademien der Habsburgermonarchie. "This was almost customary at the beginning of the 19th century and up to the 1830s", so schreibt darüber D. Čepulo in Bezug auf die Zagreber königliche Rechtsakademie. "In 1810/1811 Imbro Domin was the only professor at the Faculty of Law, while in 1825 two professors held lectures in all disciplines."[20] Eine ähnliche Situation war anfänglich auch an der juridischen Fakultät zu Graz anzutreffen; auch zur Zeit des Lyzeums vom Schuljahr 1782/1783 bis 1810/1811 lehrten dort nur zwei Professoren.

Zu den Akademischen Titeln: Weder die Belgrader Grosse Schule noch die königlichen Akademien und Lyzeen in der Habsburgermonarchie haben akademische Titel, wie *baccalaureus*, den *magister* oder den *doktor* verliehen, denn ihre Hauptaufgabe und Zielsetzung bestand ja in der Ausbildung eines fähigen Beamtenkaders. An den königlichen Akademien haben die Studenten nur Zeugnisse über den Besuch der Lehrveranstaltungen und die erfolgreich abgelegten Prüfungen erhalten, was, wie es scheint, auch an der Belgrader Grossen Schule praktiziert wurde.[21]

Zu den Lehrmethoden: Die Lehrmethoden waren praktisch identisch, denn die Professoren der Belgrader Grossen Schule hatten entweder an den königlichen Akademien oder an der Juridischen Fakultät der Universität zu Pest studiert, wo "das Niveau des Rechtsunterrichts" maßgeblich durch die "absolutistische Hochschulpolitik" bedingt war, bei der "das Diktieren und Repetieren des Lehrbuchs und nicht die Erarbeitung weiterführender Gedanken die herrschende Methode der Didaktik war".[22] Dass eben diese Lehrmethoden auch an der Belgrader Grossen Schule praktiziert wurde, bezeugt L. Arsenijević–Batalaka.[23]

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[19] R. Kink, *Geschichte der kaiserlichen Universität zu Wien,* Erster Band (Ge schichtliche Darstellung der Entstehung und Entwicklung der Universität bis zur Neuzeit. Samt urkundlicher Beilagen), I Teil (Geschichtliche Darstellung), S. 467.

[20] D. Čepulo, S. 113.

[21] L. Arsenijević Batalaka, (1898), S. 398.

[22] K. Gönczi, S. 59.

[23] L. Arsenijević Batalaka, (1898), S. 388 389.

Aus der Zeit des ersten serbischen Aufstands ist ein Gerichtsdokument erhalten geblieben, das nach dem Modell der österreichischen Strafprozessordnung verfasst worden war. Sein Editor R. Perović war der Meinung, dass es sich hierbei möglicherweise um Übungsmaterial für das Lehrfach "Strafprozessordnung" handle und dass Professor L. Vojinović als dessen Verfasser zu betrachten sei. Wenn dem so wäre, dann hätte Vojinović, ein in der Habsburgermonarchie ausgebildeter Jurist, die Strafprozessordnung nach dem österreichischen Modell gelehrt.[24] Das spricht dafür, dass hierbei auch Inhalte des österreichischen Strafprozessrechts als "Rechtstransplantat" (A. Watson) übernommen wurden.[25]

Die Juristenausbildung an der Belgrader Grossen Schule (1808–1813) war demnach nichts anderes als ein modifiziertes System der ungarischen königlichen juristischen Akademien, wie es in der *Ratio educationis 1777* und *1806* niedergelegt war. Ein ähnliches System war in den anderen Teilen der Habsburgermonarchie anzutreffen, wo es Lyzeen mit reduziertem juridischem Studienprogramm gab. Das Hauptziel dieser juristischen Ausbildungsstätten lag darin, gebildete und loyale Beamte heranzuziehen. Nicht anders waren die Absichten, die der Gründer der Grossen Schule, Ivan Jugović, und die Professoren M. Radonić und L. Voinović verfolgten, nämlich im ehemaligen Belgrader Pashalik bzw. dem sich formierenden serbischen Staat eine höhere Ausbildungsstätte aufzubauen, die den notwendigen Beamtenstand ausbilden sollte.

Dass die Belgrader Grosse Schule nach dem Vorbild der königlichen Akademien in den ungarischen Teilen der Habsburgermonarchie gegründet wurde, ergibt sich aber am klarsten aus den Aussagen der Zeitgenossen: Der hervorragende Professor der Grossen Schule, Lazar Voinović, hat im Manuskript des Vortrags "Die Erdkunde" geschrieben: "Alle Wissenschaften, in denen die jungen Leuten unterrichtet werden, werden in zweierlei Ausbildungsstätten gelehrt: die einen sind hoch, die anderen sind klein; die ersten werden Universitäten und Akademien genannt, die anderen werden kleine Schulen genannt". Dann zählt er die Unterschiede zwischen der Universität und der Akademie[26] auf, die ganz im Sinne der hier vorgelegten Analyse sind, dass nämlich die Belgrader Grosse Schule nach dem Vorbild der ungarischen königlichen Rechtsakademien geschaffen wurde. Die Tätigkeit der Grossen Schule mußte allerdings nach der Niederschlagung des ersten serbischen Aufstands wieder eingestellt werden.

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[24] Siehe R. Perović, (1954), 274 306, 337 339; R. Perović, *Prilozi za istoriju Prvog srpskog ustanka* [Beilagen zur Geschichte des ersten serbischen Aufstands], Beo grad 1980, S. 98, Fußnote 3.

[25] A. Votson, *Pravni transplanti pristup uporednom pravu* (serbische Überset zung von S. Mitrović, Vorwort von S. Avramović), Beograd 2000 (A. Watson, *Legal transplants: an approach to comparative law,* Athens GA 1993).

[26] R. Perović, (1954), S. 255. Die Besucher der Grossen Schule, Vuk S. Karadžić und Lazar Arsenijević Batalaka unterschieden in ihren Schriften klar die kleine Schule von der Grossen Schule.

II

Das Lyzeum wurde in Kragujevac, dem damaligen Zentrum des Fürstentums Serbien, gegründet. Zu Beginn, in den ersten zwei Schuljahren 1838/39, gab es dort nur die Philosophische Abteilung. Die Abteilung für Rechtswissenschaften wurde erst im Herbst des Jahres 1840 eröffnet. Aufgabe des Lyzeums war es, die Beamten zur Ausübung administrativer und juristischer Dienste heranzubilden. Der Name "Lyzeum" hat mit den ersten Professoren – österreichischen Serben aus der heutigen Vojvodina – Eingang in das Fürstentum Serbien gefunden. In der Habsburgermonarchie wurde der Name "Lyzeum" in dreifacher Bedeutung verwendet: erstens für ehemalige Universitäten, zweitens für konfessionelle Lyzeen und drittens – gemäß der *Ratio educationis 1806* – für die philosophische Abteilung der königlichen Akademien; im Gegensatz dazu wurde die juristische Abteilung schlicht "die Akademie" genannt. Beide Abteilungen bildeten eine Einheit und wurden "die Zwillinge" genannt.[27]

Im Jahr 1841 wurde das Lyzeum aus Kragujevac nach Belgrad verlegt. Zunächst gab es nur die Philosophische Abteilung, die als allgemeine Abteilung betrachtet wurde.[28] Das zeigte sich insbesondere nach der Gründung der Juridischen Abteilung im Jahre 1840. Ein Besuch der Juridischen Ausbildung wurde nur jenen Studenten ermöglicht, die vorher ihr Studium an der Philosophischen Abteilung abgeschlossen hatten. Letztere wurde im Verhältnis zur Juridischen Abteilung als die rangniedrigere betrachtet. Erst mit der Einführung höherer juridischer Fachkenntnisse konnte man von einer Fakultätsausbildung, wenn auch nur in einem bescheideneren Ausmaß, sprechen.

Die Juridische Abteilung war eine höhere Berufsfachschule zur Ausbildung der Bürokratie. Zu Beginn gab es dort nur zwei Professoren: Jovan St. Popović und Ignjat Stanimirović. Ersterer lehrte Naturrecht, letzterer Statistik. Im Schuljahr 1840/41 fanden sich im Lehrplan daneben noch der "Kurialstil" sowie Französisch. Der Kurialstil wurde im zweiten Semester dieses Schuljahres von J. St. Popović unterrichtet.

Die juridischen Gegenstände waren zunächst nur von bescheidenem Umfang, denn es gab ja, wie bereits erwähnt, insgesamt nur drei bzw. vier juristische Gegenstände. Erst im Schuljahr 1843/44 wurden dann drei neue Gegenstände im Lyzeum eingeführt und das Rechtsstudium damit auf zwei Jahre verlängert. Damals begann sich das Rechtsstudium am Lyzeum demjenigen der *Ratio educationis 1806* bereits anzunä-

[27] *Ratio educationis 1806,* S. 82.

[28] Siehe V. Grujić, Nastava Filozofskog fakulteta Liceja od osnivanja do polovine prošlog veka [Das philosophische Studium am Lyzeum von seiner Gründung bis zum Mitte des XIX. Jahrhunderts], Godišnjak Muzeja grada Beograda, IV Buch, 1957, S. 295 312; V. Grujić, (1987), S. 15 35.

hern; ab dem *Schulgesetz* von 1844 stimmen beide überein.[29] Das erste Schulgesetz des Fürstentums Serbien vom 23. September (5. Oktober) 1844 enthält auch einen Abschnitt über die juridische Ausbildung am Lyzeum. An der juridischen Abteilung des Lyzeums sollten in zwei Studienjahren zwölf Gegenstände gelehrt werden. Das war das Naturrecht, das Kanonische Kirchenrecht der Ostkirche (es entspricht in der *Ratio educationis 1806* dem "Ius Ecclesiasticum publicum et privatum"), das öffentliche Recht und das öffentliche Recht Serbiens (*Ratio educationis 1806*: Ius Publicum, Universale, et Gentium; et horum in nexu Ius quoque publicum Hungariae et Ius Ecclesiasticum), "Policija" (*Ratio educationis 1806*: "Politia"), Volkswirtschaft und Finanzen (*Ratio educationis 1806:* "Scientiae Camerales"), das "serbische Bürgerrecht" (*Ratio educationis 1806*: "Institutiones Iuris Civilis Romani und Ius Feudale in compendio und Ius privatum Hungariae"), das Strafrecht (*Ratio educationis 1806*: "Ius Criminale"), "Statistik der wichtigsten Staaten Europas – vor allem Serbiens" (*Ratio educationis 1806*: "Statistica Hungariae, et Ditionum hereditariarum Caesareo-Regiarum, nec non aliorum Europae Regnorum") und schließlich das Zivil– Strafprozessverfahren (das entspricht in der *Ratio educationis 1806* noch dem "Stylus Curialis"[30]). Abgesehen von diesen Gegenständen war noch die französische Sprache vorgeschrieben.

Hier zeigt sich ein weiteres Mal, wie die ungarischen königlichen Akademien der Habsburgermonarchie bei der Gründung sowohl der Grossen Schule (1808–1813) als auch des Lyzeums (ab 1838) das Vorbild abgaben. Die Hauptaufgabe und Zielsetzung dieser Akademien bestand darin, Beamte auszubilden. Dem sollten auch die Grosse Schule und das Lyzeum im Fürstentum Serbien dienen. Der praktische Ausrichtung dieser Ausbildung entsprach den Bedürfnissen des jungen serbischen Staates. Es muss aber betont werden, dass diese Anfänge der Juristenausbildung in Serbien nicht nur für die Entwicklung einer modernen Bürokratie entscheidend, sondern gleichermaßen von großer allgemeiner kultureller Bedeutung für das Land waren.

[29] Über die Juridische Abteilung des Lyzeums zu dieser Zeit siehe unter anderen R. Ljušić, S. 16; V. Grujić, (1987), S. 35 50; P. Slankamenac, S. 19 20.

[30] *Ratio educationis* 1806, Tab. IX. Siehe Lj. Kandić, J. Danilović, S. 55.

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ESTABLISHMENT OF LEGAL STUDIES IN MODERN SERBIA AND LEGAL EDUCATION IN HABSBURG MONARCHY (AN EXAMPLE OF LEGAL TRANSPLANTS)

Summary

The Higher School (La Haute École) was founded in Belgrade on 1st (old calendar), i.e. 12th of September 1808 (actual calendar). Despite the fact that the School has already been a subject of research, some of the questions remained dis putable. One of them relates to its character, that is to the issue of whether it is ac ceptable to consider the School to be a predecessor of the University of Belgrade, and especially of its Faculty of Law, or not. In order to review that controversy, the author compares the system of higher education and the legal studies in the region of that time.

The founding fathers of the Higher School and its first professors completed their legal studies in the Hapsburg Monarchy, so the author pays special attention primarily to the Austrian system of legal education after the educational and univer sity reforms performed by Maria Theresia, expecting that it may explain the chief influences upon the Belgrade Higher School profile. He also points to social circum stances and needs of the rising Serbian state to obtain educated officials and pubic servants, as it barely missed them after the long lasting Turkish occupation. The au thor determines the comparison criteria: curricula, length of schooling, number of teachers, academic titles and methods of lecturing, and finds many elements in com mon with the legal educational model at Austrian Royal Academies. He comes to conclusion that the Belgrade Higher School was shaped according to the modified system of Hungarian legal academies, regulated by the Ratio educationis totiusque rei litterariae per regnum Hungariae et provincias eidem ad nexas of 1777 and Ratio educationis of 1806.

In addition, the author uses these criteria to compare the Belgrade High School (1808 1813) with the Lyceum in which it was transformed in 1838, showing that the curricula of the later legal studies were not essentialy different nor more developed than in 1808.

Keywords: *Legal studies in Serbia. Belgrade Higher School Royal Academy. Lyceum. Faculty of Law. University of Belgrade.*

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IUS COMMUNE AND CROATIAN PROPERTY LAW*

The purpose of paper is to analyse the significance of the ius commune in the contemporary Croatian property law system and the potential role of its rules in the Europeanization of national property law. The first part of the paper will prima facie comment on the use of ius commune rules as an indirect source of property law, par ticularly in the Croatian judicial practice. Subsequently, the paper explores the pos sibility of treating the ius commune rules as a direct source of property law in the contemporary Croatian legal system. Author concludes thet ius commune rules, ac cording to the provisions of the Law on the Application of Legal Rules passed before April 6, 1941 (Zakon o načinu primjene pravnih propisa donesenih prije 6. travnja 1941. godine), can have the status of a source of contemporary Croatian property law. Their application is possible, as it was seen, primarily owing to the fact that ius commune was in force on 6 April 1941 as a subsidiary law on the territory of Croatia in the areas belonging to the former Hungarian legal area. The final part of the pa per especially questions can a more intense application of those ius commune rules that contain principles of property law common to almost all European legal systems contribute to a further Europeanization of the contemporary national property law. In the view of author, one of the possible ways to improve the process of Europeiza tion of the national property law systems is to recognize the harmonising effect of property law rules of ius commune which are to be found in the judicial acts of the European Court of Justice or the European Court of Human Rights (e.g. accesorium sequitur principale; beatus possidens; bona fides praesumitur; in pari causa melior est condicio possidentis; *nemo plus iuris ad alium transferre potest quam ipse habet; prior tempore potior iure; superficies solo cedit) and to use them systematically in the national judicial practice. Such an approach could prove in concreto that one '... can use the results of the legal historical analysis as a starting point for harmonisa tion in areas where there exists a clear need for a European system of propety law'.*

Key words: *Ius commune*. Property Law. Croatia.

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1. INTRODUCTORY REMARKS

The purpose of this paper is to analyse the significance and role of the *ius commune* tradition as a source of contemporary property law in the Republic of Croatia.

As it is generally known, the term *ius commune* denotes the legal system that was source of law in almost entire Europe in the medieval and early modern times. That system was formed through the reception of Roman Law, i.e. the process of gradual acceptance of the rules of Roman law contained in Justinian's code (*Corpus iuris civilis*) as a positive law and their integration with the certain elements of canon law and costumary laws, with the adjustment of these rules to the needs of life and legal practice of the aforementioned periods.[1] Although *ius commune*, after the centuries of continuous validity, ceased to be a formal source of law in most European countries due to the passage of modern civil codes in the 19th and 20th century, in their very essence the aforementioned codes actually represented different codifications of received Roman law, i.e. the national variations of the common European topic. Thus, in these codified forms the tradition of *ius commune*, with all the principles, institutes and solutions belonging to it, has continued to have a crucial impact on the overall European legal development to the present day.[2] Moreover, it should be emphasised that the tradition of *ius commune* experienced its ultimate culmination during the period in which the idea of codification dominated, owing to the German pandectistic school, the doctrines of which significantly influenced the legislation, science and practice of private law in practically all European countries in the second half of the 19th century and in the 20th century. These doctrines still form the basis of the common European private law dogmatics.[3] In addition to that, in the most recent times the process of the European integration and of making uniform European legal

[1] For general information on *ius commune* as a legal system, see e.g. F. Calasso, *Introduzione al diritto commune*, Milano 1970; H. Coing, *Die ursprüngliche Einheit der europäischen Rechtswissenschaft,* Wiesbaden 1968; *idem*, *Europäische Grundlagen des modernen Privatrechts*, Opladen 1986; M. Bellomo, *L'Europa del diritto comune*, Roma 1998; R. Van Caenegem, *European Law in the Past and the Future*, Cambridge 2002, 13 etc.

[2] See e.g. P. Stein, *Roman Law in European History*, Cambridge 1999, 104 etc.; R. Zimmermann, "The Civil Law in European Codes", in: D. Carey Miller/ R. Zimmer mann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, Ab erdeen 1997, 259 etc.

[3] For general information on the German pandectistic doctrine in the second half of the 19th century and the creation of the Pandect law system see e.g. F. Wieacker, *Pri vatrechtsgeschichte der Neuzeit*, Göttingen 1996, 430 etc., with references to numerous further reading.

system largely renewed the interest in *ius commune* as a predecessor of this process in itself, whereby Roman legal tradition, as a common denominator of the European legal culture, became an important factor in the formation of contemporary European identity.[4]

Within this context, the purpose of paper is to analyse the significance of the *ius commune* for the contemporary Croatian property and the potential role of *ius commune* rules in the process of its Europeanization, starting from the point of view that fruitful and continuous academic discussion on the possibility of creating the European property law system started more than fifteen yers ago.[5] Before focusing on the topic of *ius commune* as a source of law in the contemporary Croatian property law system, it is necessary to briefly explain what exactly the notion of '*ius commune* rules' refers to in the context of this paper. It primarily refers to maxims or brocards of property law contained in the sources of ancient Roman Law (*dicta et regulae iuris*) or formulated in the medieval and early modern Roman legal tradition on the basis of those ancient sources. These maxims are particularly important due to the fact that they concisely express the millenarian Roman and European experience in the field of property law, ranging from the fundamental legal principles to concrete solutions, and their content is incorporated into the modern systems of property law in Europe to a large extent even today.[6]

Starting from the statement above, and bearing in mind the usual division of the sources of law to direct and indirect sources,[7] the following part of the paper will *prima facie* briefly comment on the use of *ius commune* rules as an indirect source of property law, particularly in the

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[4] For general information on Roman law tradition as a "common denominator" of European (private) law systems in the context of the creation of the European civil law legislation see e.g. F. Sturm, "Droit romain et identité européenne", in: *Droit romain et identité européene*, RIDA. Supplément au tome XLI (1994), 147 etc.; R. Knütel, "Römis ches Recht und Europa", in: *Droit romain et identité européene*, op. cit., 185 etc.; R. Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, Oxford 2001.

[5] One of the starting points was undoubtly the *opus magnum* of W. J. Zwalve, *Hoofdstukken uit de Geschiedenis van het Europese Privaatrecht I: Inleiding en zaken recht*, Deventer 1993; for the further discussion see e.g. special issue on European prop erty law of *European Review of Private Law* (vol. 11, no. 3/2003), edited by R.van Rhee & S. van Erp.

[6] On the significance of Latin legal maxims as one of the basic elements of the European legal tradition and legal culture see *amplius* A. Wacke, "Sprichwörtliche Prin zipien und europäische Rechtsangleichung"*, Orbis iuris romani* 5/1999, 174 *etc.*; cf. D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, München 1991, 9 *etc.*; J. Kranjc, *Latinski pravni reki* [Latin Legal Proverbs], Ljubljana 1998, 5 etc.

[7] On the division in question, see e.g. M. Alinčić et al., *Obiteljsko pravo* [*Family Law]*, Zagreb 2001, 8 *etc.*

Croatian judicial practice. Subsequently, the paper explores the possibility of treating the *ius commune* rules as a direct source of property law in the contemporary Croatian legal system. The final part of the paper especially questions can a more intense application of those *ius commune* rules that contain principles of property law common to almost all European legal systems contribute to a further Europeanization of the contemporary Croatian property law.

2. *IUS COMMUNE* RULES AS AN INDIRECT SOURCE OF CROATIAN PROPERTY LAW

In order to analyse the use of *ius commune* rules as an indirect source of the contemporary Croatian property law, the author has conducted a brief research of the application of these rules in the judicial practice, starting from 1991, i.e. the year when Republic of Croatia is recognized as an independent state. Based on such a research, conducted exclusively through researching the electronic bases of the judicature available on the Internet, only those decisions will be mentioned in which the court literally cites in the Latin language an individual *ius commune* rule.

In the judicature of Croatian courts, from 1991 to date, in the alphabetical order, the following five property law rules that belong to the *ius commune* tradition are mentioned in their Latin formulation in the reasons for judgments or decisions: *accessorium sequitur principale*;[8] *nemo plus iuris ad alium transferre potest quam ipse habet*;[9] *petitorium absorbet possessorium*;[10] *prior tempore potior iure*;[11] *superficies solo cedit.*[12]

[8] See e.g. Municipial Court of Varaždin, Case P 1799/98 47; on the rule *acces sorium sequitur principale*, formulated in *Liber Sextus*, 5,13,42 and based on Gai. D. 33, 8, 2 and Paul. D. 50, 17, 129, 1 and 178, see D. Liebs, 22.

[9] See e.g. Constitutional Court of the Republic of Croatia, Cases U III 1107/1994; U III 919/1997; Supreme Court of the Republic of Croatia, Cases Rev 26/1993 2; Rev 1822/1993 2; Rev 2749/1993 2; on the rule *nemo plus iuris ad alium transferre potest quam ipse habet*, originally contained in Ulp. D. 50, 17, 54, see D. Liebs, 132; J. Kranjc (n. 7), 165.

[10] See e.g. Supreme Court of the Republic of Croatia, Cases Rev 892/1990 2; Gzz 30/1999 2; Gzz 91/00 2; on the rule *petitorium absorbet possessorium*, see D. Lie bs, 154.

[11] See e.g. Commercial Court of Zagreb, Case P 2/2002; on the rule *prior tempore potior iure*, formulated in *Liber Sextus*, 5,13,54 (cf. already Ant. C. 8, 17, 3), see D. Liebs, 162; J. Kranjc (n. 7), 191.

[12] See e.g. Constitutional Court of the Republic of Croatia, Case U III 3214/2005; Supreme Court of the Republic of Croatia, Case Rev 1584/1997 2; on the rule *superficies solo cedit* rule, originally contained in Gai. 2, 73., see D. Liebs, 204; J. Kranjc, 236.

The theme of the referral of the Croatian courts to the *ius commune* rules, including the rules of property law, would definitely deserve a special monographic analysis. Such a research would have to take into consideration all the decisions of the Croatian courts, regardless of their instance, which explicitly mention the *ius commune* rules in the Latin language; the decisions in which the courts implicitly referred to particular *ius commune* rules; and finally, based on the sources obtained, analyse in detail every such case of referring to the *ius commune* rules in the Croatian judicial practice, i.e. precisely determine the legal context in which they were used, and compare the original meaning of a particular rule with its contemporary use for the purpose of providing a critical analysis of all the cases of the application of the '*ius commune* substratum' in the Croatian judicial practice. It is understandable that such a comprehensive research cannot be conducted within the framework of this paper, but it is believed that even on the basis of the modest property law fragment of this future research that was presented here, it is possible to point out that referral to the property law rules of *ius commune* in the Latin language is not a rare or unusual occurrence in Croatian judicial practice. It leads to the conclusion that certain property law rules of *ius commune* are accepted as valid normative contents in the Croatian legal practice.

In that context, it is interesting to emphasise that there are also cases in which the Cabinet of the Republic of Croatia as a sponsor of a bill, or individual Members of Croatian Parliament in the legislative procedure directly refer to property law rules of *ius commune*. Thus, for example, in the argumentation of the final version of the *The Law on Ownership and other Real Property Rights* of July 1996, the sponsor explicitly mentions the principle *superficies solo credit* in the Latin language, explaining the necessity of its reintroduction into the Croatian real property law system with the reasons of "following the European legal tradition" and the needs of "entrepreneurship and market economy". The principle in question has been incorporated in the Article 9, Par. 1 of the aforementioned Law.[13]

Taking the comparative law perspective, it should be pointed out that the direct application by the contemporary legal practice of the *ius commune*, including its property law aspects, represents by no means an *unicum* on the European, or the world scale. Indeed, *ius commune* today represents a subsidiary source of law in a dozen European and non-European countries, and the judicial practice in those countries often bases their decisions directly on the sources of that law, starting from the Justinian's codification.[14] Additionally, in the countries in which *ius commune*

[13] See the argumentation of the final proposal of the Law on Ownership and Oth er Real Property Rights, in: M. Žuvela (ed.), *Zakon o vlasništvu i drugim stvarnim pravi ma* [Law on Ownership and Other Real Property Rights], Zagreb 1997, 312.

[14] Thus with regard to the European countries, *ius commune* is a subsidiary source of law in individual parts of the United Kingdom (Scotland, Channel Islands), Malta, San

no longer represents a source of law in the formal sense, the judicial practice frequently refers to the numerous *ius commune* rules, including the property law ones, particularly in the meaning of legal principles.[15] In the aforementioned context, it is particularly interesting to point out that the EU judicial bodies directly refer to the legal principles of *ius commune*, not excluding the property law ones, in a relevant number of their cases.[16] Therefore it is indisputable that the Croatian legal practice, as is the case, can creatively apply the *ius commune* rules in concrete cases, especially those rules that contain principles and generally accepted legal rules. However, unlike the legal systems in which *ius commune* still represents

Marino, Andorra, and in a strictly limited scope in Spain and Germany. With regard to non European countries, *ius commune* is *in subsidio* applied in the entire area of South Africa (South African Republic, Zimbabwe, Botswana, Lesotho, Swaziland, Namibia), as well as in Sri Lanka and Guiana; generally on *ius commune* as a source of contemporary law in the form of a survey according to individual countries of the world see J. M.J. Chorus, "Romeins Recht op de Zuidpool en Elders", in: J. E. Spruit, (ed.), *Coniectanea Neerlandica Iuris Romani. Inleidende Opstellen over Romeins Recht*, Zwolle 1974, 139 *etc.*; see also R. Evans Jones (ed.), *The Civil Law Tradition in Scotland*, Edinburgh 1995 (for Scotland); W. Zwalve, *Snell v. Beadle. The Privy Council on Roman law, Norman customary law and the ius commune*; in: L. de Ligt (ed.), *Viva vox iuris romani. Essays in honour of J.E. Spruit*, Amsterdam 2002, 379 *etc.* (for Channel Islands); M. Reinkenhof, *Die Anwendung von ius commune in der Republik San Marino. Einführung in die Grund lagen und Erbrecht*, Berlin 1997 (for San Marino); F. Reinoso Barbero, "España y el de recho romano actual", *Labeo. Rassegna di diritto romano* 32/1986, 310 *etc.* (for Spain); M. Kaser & R. Knütel, *Römisches Privatrecht*, München 2003, 14 *etc.* (for Germany); R. Zimmermann, *Das römisch holländische Recht in Südafrika. Einführung in die Grundla gen und usus hodiernus*, Darmstadt 1983 (for South Africa); M. H. J. Van den Horst, *The Roman Dutch Law in Sri Lanka*, Amsterdam 1985 (for Sri Lanka); J. M. Smits, *The Ma king of European Private Law. Towards a Ius Commune Europaeum as a Mixed Legal System*, Antwerpen 2002, 139 (for Guiana).

[15] See e.g. J. Carbonnier, "*Usus hodiernus Pandectarum*", in: *Festschrift für I. Zajtay*, Tübingen 1982, 107 *etc.* (for France); G. Micali, "Il diritto romano nella giurispru denza della Corte Suprema di Cassazione", *Giurisprudenza italiana*, Parte IV, 145/1993, 498 *etc.* (for Italy); W. Wolodkiewicz, *Czy prawo rzymskie przestało istnieć?*, Kraków 2003 (for Poland); cf. S. J. Astorino, "Roman Law in American Law: Twentieth Century Cases of the Supreme Court", *Duquesne Law Review* 40/2001 2002, 627 *etc.* (for the USA); for general information on *ius commune* rules that incorporate general principles of law and their function in contemporary law systems see *amplius* S. Schipani, *La codi ficazione del diritto romano comune*, Torino 1999, 83 *etc.*, with references to further read ing; cf. F. Reinoso Barbero, "El derecho romano como desideratum del derecho del tercer milenio: los principos generales del derecho", *Roma e America. Diritto romano comune. Rivista di diritto dell'integrazione e unificazione del diritto in Europa e in America Lati na*, 3/1997, 23 *etc.*

[16] On the application of the Roman legal rules or *ius commune* rules and the legal principles contained in them by the judicial bodies of the EU see *amplius* R. Knütel, "*Ius commune* und Römisches Recht vor Gerichten der Europäischen Union", *Juristische Schulung* 36/1996, 768 *etc.*; J. M. Rainer, "*Il Diritto romano nelle sentenze delle Corti europee", in: D. Castellano (ed.), L'anima europea dell Europa*, Napoli 2002, 45 *etc.*; F. J. Andrés Santos, "Epistemological Value of Roman Legal Rules in European and Com parative Law", *European Review of Private Law* 12/2004, 347 *etc.*

a source of law or the national and supranational legal systems in which the legal basis for the application of the general principles of law as the source of law is explicitly defined (including the *ius commune* rules which incorporate those principles), the Croatian courts have not explicitly mentioned some positive Croatian regulation as the legal basis for the application of the *ius commune* as a relevant normative content. We consider that the Croatian practice of referring to the rules of *ius commune*, including the property law ones, as the legal principles or normative contents – which serve to fill in the legal gaps or provide a more precise interpretation of the existing legal norms – is completely justified and unquestionable. However, in order for that practice to expand to even wider and more precisely defined proportions with the purpose of improving the Croatian law system, taking into consideration its further Europeanization,[17] it is our belief that it would be useful to attempt to answer the question is there a legal basis for the direct application of *ius commune* rules in the Croatian legal system.

3. *IUS COMMUNE* RULES AS A DIRECT SOURCE OF THE CROATIAN PROPERTY LAW

In order to provide an adequate answer to that question, the only possible way is to start from the text of the *Law on the Application of Legal Rules passed before April 6, 1941* (*Zakon o načinu primjene pravnih propisa donesenih prije 6. travnja 1941. godine*) (hereinafter: ZNPP), which came into force on 31 December 1991.[18] According to the provisions of the ZNPP, legal regulations that were in force on April 6, 1941 are to be applied in the Republic of Croatia as legal rules in the relations that are not regulated by positive legal order of the Republic of Croatia, provided that they are in conformity with the Croatian constitution, and if they have been applied in the Republic of Croatia until the day on which the ZNPP came into force (Arts. 1–2 ZNPP). The basic ratio of the ZNPP is to fill in the legal gaps that exist in the legal system of the Republic of Croatia by the application of legal rules that were in force on the present-day territory of the Republic of Croatia on 6 April 1941.[19] The ZNPP actually defined that all legal regulations from all legal orders that were

[17] On the application of the property law rules of *ius commune* as a manner of Europeanization of the contemporary national property law see *infra* under 4.

[18] *Narodne Novine* [The Official Gazette of Republic of Croatia] 73/91.

[19] 6 April 1941 was the day when the Second World War started on the territory of Croatia, causing the legal discontinuity in the occupied territories; on ZNPP see P. Klarić & M. Vedriš, *Građansko pravo* [*Civil Law*], Zagreb 2006, 19 *etc.*; N. Gavella (ed.), *Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug* [*Croatian Civil Law Order and Continental European Legal Family*], Zagreb 1994, 170 *etc.*

in force in Croatia on 6 April 1941 can become a subsidiary law if they fulfil the following three conditions: 1) that they were applied on the territory of the present-day Republic of Croatia until 31 December 1991; 2) that there is a legal gap on which an individual legal regulation can be applied; 3) that they are in conformity with the Constitution and the laws of the Republic of Croatia.

Out of these three conditions, only the meaning of first of them seems to be disputable. In our opinion, the only sensible interpretation is that all the rules that were positive law on April 6, 1941 can be applied as a subsidiary source of law if they were in force in any period of time between 6 April 1941 (*dies a quo*) and 31 December 1991 (*dies ad quem*) on the territory of the present-day Republic of Croatia. Through the application of any other criterion, as it was explained in more detail elsewhere,[20] the ZNPP could not fulfil its purpose at all.

However, with regard to the central subject of the paper, i.e. the question can the *ius commune* rules be a source of property law in the Republic of Croatia, either for the purpose of filling in the legal gaps or to enable a more precise interpretation of the existing legal norms, it is of far greater importance to consider the issue does the ZNPP enable the application of the property law rules of *ius commune* as the source of law in any way?

In the aforementioned context, the attention should primarily be drawn to the fact that the traditional Hungarian legal system – based on Werbözy's *Tripartitum* from 1514, as well as on the numerous later regulations that together formed *Corpus iuris hungarici*, as a collection of entire Hungarian law[21] – was still law in force in certain areas (Međimurje, Baranja) of the present-day Republic of Croatia on 6 April 1941.[22] In the time of socialist Yugoslavia (1945–1991), owing to the acceptance of the legal-political principle of 'the unity of law',[23] individual segments of

[20] See *amplius* M. Petrak, "Rimska pravna pravila kao izvor suvremenog hrvatskog obiteljskog prava" [Roman Legal Rules as a Source of Contemporary Croatian Family Law], *Zbornik Pravnog fakulteta u Zagrebu* [*Collected Papers of the Faculty of Law in Zagreb*] 55/2005, 602 *etc.*

[21] On the origin, significance and structure of the *Corpus iuris hungarici* see M. Lanović, *Privatno pravo Tripartita* [*Private Law of Tripartitum]*, Zagreb 1929, 93 *etc.*

[22] On the six different legal areas in interwar Kingdom of Yugoslavia, see G. Benacchio, *La circolazione dei modelli giuridici tra gli Slavi del sud*, Padova 1995, 126 *etc.*; generally about the sources of Hungarian law applied in certain areas of interwar Yugoslavia, see e.g. I. Milić, *Pregled madžarskog privatnog prava u poredjenju sa austrijskim građanskim zakonikom* [*A Survey of Hungarian Private Law in Comparison with the Austrian Civil Code],* Subotica 1921, 7 *etc.; D. Nikolić, Uvod u sistem građanskog prava [An Introduction to the System of Civil Law], Novi Sad 2007, 99 etc.*

[23] On the principle of 'the unity of law', see M. Konstantinović, "Stara 'pravna pravila' i jedinstvo prava" [*Old "Legal Rules" and the Unity of Law*], *Anali Pravnog*

Hungarian law were applied as subsidiary law on the entire Croatian territory until the independence of the Republic of Croatia in the year 1991. Following the Croatian independence, the judicial practice continued – based on the ZNPP – to apply certain rules of Hungarian law as the subsidiary law (e.g. in the area of land-registry law), still using the principle of 'the unity of law' as the relevant criterion.[24] In this context, it is interesting to note that the Republic of Croatia is the only state in which it is still possible to apply *Corpus iuris hungarici*, since regulations contained in the collection in question have been derogated long ago in Hungary and Slovakia by the codifications passed after World War II.[25]

Where lies the connection between the fact that the old Hungarian law can still be applied as Croatian *ius in subsidio* and our quest of a legal basis for the applicability of the property law rules of *ius commune* in the contemporary Croatia? Although Hungarian law resisted the direct reception of Roman law for several centuries,[26] the Hungarian judicial practice and doctrine has since the second half of the 19th century onwards – due to the withering away of the feudal relations and consecutive failed attempts to pass modern national civil code[27] – gradually elevated *ius commune*, including its property law elements, to the level of a subsidiary source of law.[28] The Croatian doctrine between the two World Wars also supported the understanding that *ius commune* is a subsidiary source of

fakulteta u Beogradu [Annals of The Faculty of Law in *Belgrade] 3 4/1982, 540 etc.;* N. Gavella, "*Građansko pravo u Hrvatskoj i kontinentalno europski pravni krug*" [*Civil Law in Croatia and Continental European Legal Family], Zbornik Pravnog fakulteta u Za grebu* [*Collected Papers of the Faculty of Law in Zagreb*] 43/1993, 358 *etc.*

[24] N. Gavella (ed.), 130, note 354.

[25] Civil code was passed in Hungary in 1959, and in the Czechoslovakia in 1950; cf. G. Hamza, *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn*, Budapest 2002, 139 *etc.* & 184.

[26] On the reasons for resisting the reception of Roman Law in Hungary, see e.g. I. Zajtay, "Sur le rôle du droit romain dans l'évolution du droit hongrois", in: *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, Vol. II, Milano 1954, 183 *etc.*; G. Bónis, *Einflüsse des römischen Rechts in Ungarn*, *Ius romanum medii aevi*, Pars V, 10, Mediolani 1964, 1 *etc.*, especially 111 *etc.*; A. Földi, "Living Institutions of Roman Law in Hungarian Civil Law", *Helikon* 28/1988, 364 *etc.*

[27] On different attempts to codify Hungarian civil law in the 19th century and the first half of the 20th century, see e.g. J. Zlinszky, "Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert", in: *Studia in honorem Velim irii Pólay septuagenarii. Acta universitatis Szegediensis. Acta juridica et politica, Fas ciculus 1 31,* 33/1985, 433 *etc.*; cf. E. Heymann, *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn*, Tübingen 1917, 9 *etc.*; G. Hamza, 135 *etc.*

[28] On the gradual acceptance of *ius commune* as subsidiary law in the Hungarian legal system, see e.g. G. Hamza, "Sviluppo del diritto privato ungherese e il diritto ro mano", in: *Ivris vincvla. Studi in onore di M. Talamanca*, Napoli 2001, 357 *etc.*; cf. E. Heymann, 12 *etc.*; A. Földi, 366 *etc.*; G. Hamza, 134 *etc.*

law in the former Hungarian legal area, and this fact should be especially emphasised in the context of determining the scope of the possible application of the property law rules of *ius commune* in the Republic of Croatia today. Thus, for example, Ivo Milić, the well-known legal scholar of the time, resolutely pointed out in the year 1921 that where '... there are no positive regulations, the principles of *ius commune*, i.e. pandect law should be applied without hesitation ...'.[29] Such a situation with regard to the legal sources of the Hungarian law did not change until 6 April 1941.

Since the ZNPP makes no difference between the primary and secondary sources of the law in force on 6 April 1941, and proceeding from the fact that the *ius commune* was a subsidiary source of law in the former Hungarian legal area of Croatia, it should be concluded that the entire corpus of property law rules of *ius commune* – under the conditions defined by the ZNPP – can represent a potential source of contemporary Croatian law.

4. CONCLUDING REMARKS

Based on the conducted analysis, it seems that sufficient arguments were offered to statement that the *ius commune* rules, according to the provisions of the ZNPP, can have the status of a source of contemporary Croatian property law. Their application is possible, as it was seen, primarily owing to the fact that *ius commune* was in force on 6 April 1941 as a subsidiary law on the territory of Croatia in the areas belonging to the former Hungarian legal area. Although the property law rules of *ius commune* have, in the formal sense, only the status of a subsidiary source of law, in the terms of the content they can be of fundamental importance for the contemporary property law system, as a series of these rules contain in themselves the basic principles on which a range of the most important institutes of property law are founded on. Therefore the reception of the property law rules of *ius commune* as a subsidiary law by the judicial practice and legal doctrine could to a relevant extent contribute to a correct interpretation and application of contemporary regulations, and the legal practice could directly apply the principles of property law contained in these rules to a much larger and more precisely defined extent than it was the case so far. Such an application of the property law rules

[29] I. Milić, 1; cf. D. Nikolić, 100; on the life and work of Ivo Milić (1881 1957), professor of Roman Law, Private International Law and Civil Procedural Law at the Fac ulties of Law in Subotica and Zagreb, see M. Apostolova Maršavelski, "Rimsko i pan dektno pravo na Pravnom fakultetu u Zagrebu" [Roman and Pandect Law at the Law Faculty in Zagreb], in: Ž. Pavić, *Pravni fakultet u Zagrebu II* [*Law Faculty in Zagreb II*], Zagreb 1996, 237 *etc.*

of *ius commune*, as it was already said – should by no means represent a *unicum* in the European or global context.[30] It is to point out that some of the leading authorities of property law doctrine and practice in Croatia recently accepted these arguments – explained in more detail elsewhere[31] – on applicability of *ius commune* rules in Croatian context.[32]

Proceeding from the fact that the *ius commune* rules formulated as the Latin legal maxims represent a traditional concise expression of the very essence of the European legal tradition and culture,[33] the final question arises to what an extent could more extensive application of *ius commune* contribute to the further Europeanization of the Croatian property law system? In the recent detailed analyses of the application of the *ius commune* rules by the European judicial bodies, both in the cases of the existence of legal gaps in the European legal order, as well as with the aim of providing a more precise interpretation of its existing legal norms, it is particularly emphasised that a systematic application of those rules as general legal principles common to all national European legal systems that belong to the *ius commune* tradition represents, together with the different types of legislative acts, one of the ways to further harmonisation and/or unification of the European legal area.[34]

With regard to the property law structures of *ius commune*, it was already pointed out that "....underneath the historical differences between common law and civil law and hidden behind their wholly different legal techniques there is more common ground than one might think".[35] For example: "in both civil and common law, two leading maxims are applied: *nemo plus juris ad alium transferre potest quam ipse habet* and *qui prior est tempore potior est jure*".[36]

In our view, one of the possible ways to improve the process of Europeization of the national property law systems is to recognize the harmonising effect of property law rules of *ius commune* which are to be found in the judicial acts of the European Court of Justice or the Euro-

30 See *amplius supra* under 2.

31 See *amplius* M. Petrak, 602 *etc.*

32 See M. Žuvela, *Vlasničkopravni odnosi* [Property Law Relations], Zagreb 2009, 5 etc.

33 Cf. e.g. J. Kranjc, 5; A. Wacke, 174 *etc.*

34 R. Knütel, 768 *etc.*; J. M. Rainer, 2002, 45 *etc.*; F. J. Andrés Santos 2004, 347 *etc.*, which papers provide further analyses of the individual cases in which the *ius com mune* rules were applied in the judicial practice of the EU; cf. also A. Wacke, 174 *etc.*, who particularly emphasises the role of Latin legal maxims and the legal principles con tained in them in the process of the harmonisation and/or unification of the European legal area.

35 Cit. S. van Erp, "Different Degrees of Convergence: A Comparison of Tort Law and Property Law", *Electronic Journal of Comparative Law* 63/2002, 5.

36 Cit. S. van Erp, 6.

pean Court of Human Rights (e.g. *accesorium sequitur principale*;[37] *beatus possidens*;[38] *bona fides praesumitur*;[39] *in pari causa melior est condicio possidentis*;[40] *nemo plus iuris ad alium transferre potest quam ipse habet*;[41] *prior tempore potior iure*;[42] *superficies solo cedit*[43]) and to use them systematically in the national judicial practice. Such an approach could prove *in concreto* that one '...can use the results of the legal historical analysis as a starting point for harmonisation in areas where there exists a clear need for a European system of propety law'.[44]

Taking into consideration all the aforementioned facts, a possible wider scope of the application of the property law rules of *ius commune* in the Croatian judicial practice would not represent just a nostalgic quest for the hidden treasure of the European legal tradition, but a part of a long-term creative effort for the Europeanization of the contemporary national property law systems on the firm foundations of the common legal culture.

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IUS COMMUNE UND KROATISCHES SACHENRECHT

Zusammenfassung

Gegenstand des folgenden Textes ist die Rolle und Bedeutung des ius commu ne als Quelle des heutigen Sachenrechts in der Republik Kroatien. Im einleitenden

[37] See e.g. judgment of the Court of Justice, Case C 6/01; cf. *supra* note 8.

[38] See e.g. judgment of the European Court of Human Rights, Case *Nuutinen v. Finska*, No. 32842/96; on the rule *beatus possidens*, based on Horatius, Carmina, 4, 9, 45, see D. Liebs, 33.; J. Kranjc, 36

[39] See e.g. judgment of the European Court of Human Rights, Case *Florescu* v. *Romania*, No. 41857/02.; on the rule *bona fides praesumitur,* originally contained in Glo ssa *Qui bona fide* on Inst. 2, 6, pr. (Accursius), see D. Liebs, 34.; J. Kranjc, 38.

[40] See e.g. dissenting opinion of Judge Ferrari Bravo on judgment of the European Court of Human Rights, Case *Beyeler* v. *Italy*, No. 33202/96; on the rule *in pari causa melior est condicio possidentis*, based on Ulp. D. 50, 17, 126, 2. and Paul. D. 50, 17, 128, see D. Liebs, 95.

[41] See e.g. order of the Court of Justice, Case C 174/96; cf. *supra* note 9.

[42] See e.g. opinion of Advocate General Trstenjak C 569/08; cf. *supra* note 11.

[43] See e.g. decision of the European Court of Human Rights, Case *Rogoziński and others v. Poland*, No. 13281/04; cf. *supra* note 12.

[44] Cit. R.van Rhee & S. van Erp, "Introduction to the Special Issue on Property Law", *European Review of Private Law* 11/2003, 281.

Teil wird zunächst die Anwendung der Rechtsregeln des ius commune seitens der kroatischen Rechtspraxis als indirekte Quelle des Sachenrechts untersucht. Dabei wird gezeigt, dass einige Prinzipien des ius commune auf dem Gebiet des Sachen rechts in der Rechtspraxis zweifellos als geltendes Recht betrachtet wurden. Sodann wird die Anwendbarkeit des ius commune als einer direkten Quelle des heutigen kroatischen Sachenrechts analysiert. Der Autor kommt zu dem Ergebnis, dass die Anwendung gemeinrechtlicher Prinzipien nach Maßgabe des Gesetzes über die Art der Anwendung der Rechtsvorschriften vom 6. April 1941 möglich ist, und zwar vor allem auf Grund des Umstandes, dass das ius commune in Kroatien an diesem Stich tag jedenfalls in den Gebieten, die zum ehemaligen ungarischen Rechtskreis gehör ten, als subsidiäres Recht in Geltung war. Anschließend wird die Anwendbarkeit der konkreten Rechtsgrundsätze des ius commune innerhalb des kroatischen sachenrecht lichen Systems (e.g. accesorium sequitur principale; beatus possidens; bona fides praesumitur; in pari causa melior est condicio possidentis; *nemo plus iuris ad alium transferre potest quam ipse habet; prior tempore potior iure; superficies solo cedit usw.) anhand von Beispielen im einzelnen vorgeführt. Der Autor kommt zu dem Schluss, dass die Zugrundelegung bestimmter Rechtsprinzipien des ius commune als subsidiäres Recht zur richtigen Auslegung und Anwendung der heutigen sachenrecht lichen Vorschriften beitragen könnte. In einigen Fällen wäre sogar die direkte An wendung solcher Prinzipien bei den Bemühungen um eine Europäisierung des kroa tischen Sachenrechts nützlich.*

Schlüsselwörter: *Ius commune*. Sachenrecht. Kroatien.

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JEROLIM MIČELOVIĆ MICHIELI, A PENOLOGIST FROM THE XVII CENTURY AND HIS *PRATICA CRIMINALE*[*]

The author reports on the insufficiently known handbook Pratica criminale pei cancelieri, which was written in the mid XVII century in Venice by Croatian law yer and scholar Jerolim Mičelović Michieli. There are indications that the work influenced criminal legal practice to a certain extent, and that it contributed to alle viate the severity of the inquisitorial procedure and criminal system, at least in some parts of the Venetian Dominium. Pratica criminale pei cancelieri is the subject of a research project being implemented at the Faculty of Law in Split, with the the task to explore in more details that estimation. Pratica criminale pei cancelieri is basi cally a theoretical text, but it is written in a dialogue form, and it probably had influ enced future officials in some parts of the Venetian Dominium. The author launches some hypothesis considering that texts and its impact in legal practice, with the goal to provoke further discussion.

Key words: *Venetian Republic*. *Pratica criminale*. *Chancellor*. *Inquisitorial criminal procedure*.

The history of Venetian criminal law and procedure should be entirely re-written, taking into consideration not only recent publications of numerous sources and documents but also those equally numerous, which are still scattered and forgotten in various public and private archives and libraries. These words by the famous Italian legal historian Claudio Schwarzenberg,[1] having been said for more than 40 years ago, are just as valid today as they have been nearly a half century before.

[*] The paper is an elaborated version of the short communication discussed at the Conference *Internationale Rechtswissenschaftlische Tagung, Forschungen zur Rechtsges chichte in Südosteuropa*, held in Vienna on 9 11 October, 2008.

[1] C. Schwarzenberg (a cura di), *Pratica del Foro veneto*, Camerino 1967, 15.

A forgotten document which would certainly contribute to a wider knowledge and a better understanding of criminal procedure in the Venetian Republic is, beyond doubt, the treatise, actually the handbook, entitled *Pratica criminale pei cancelieri* (Practical Handbook of Criminal Law for Chancellors), which was compiled around 1650 in Venice by the still today not so well known Croatian lawyer and scholar Jerolim Mičelović – Michieli. That document was just a part of a range of handbooks dedicated to various segments of legal organisation of the Venetian Republic (together with criminal, most often also civil law, notary system, and the like). They were aimed mostly at legal practitioners.[2]

The Faculty of Law of the University of Split is actually running a research project on Mičelović and his *Pratica*. This papers rather aims at announcing main issues waiting to be investigated, than to report on the final conclusions, hoping that it may incite fruitful discussion and bring new imputs.

The basic bio-bibliographical details about Mičelović are presented in the two works by Andrija Ciccarelli, a Dalmatian historian and writer coming by the end of the XVIII and the beginning of the XIX century.[3] Antun Cvitanić also wrote about Mičelović, and tried at least twice to awaken a scientific interest in his contribution to criminal and procedural doctrine of the time.[4] Valuable biographical details about Jerolim Mičelović were given also by Andre Jutronić and Jakov Jelinčić on the basis of analysis of the oldest registry in the municipality of Mičelović's birth.[5]

Jerolim Mičelović was born in Postira on the island of Brač in 1600, and died in Trogir 66 years later, where he, as a person of note, was

[2] S. Gasparini, *Tra fatto e diritto; Avvocati e causidici a Venezia nell'età moder na,* Padova 2005, 85; S. Gasparini *et al.*, *Spazi di lettura. Rassegna bibliografica di testi e documenti per la ricerca e la didattica giuridica del Seminario di Storia del diritto me dievale e moderno*, Padova 2003, 9 25.

[3] A. Ciccarelli, *Opuscoli riguardanti la storia degli uomini illustri di Spalato, e di parecchi altri Dalmati*, Dubrovnik 1911, 55 57; A. Ciccarelli, *Osservazioni sull'isola della Brazza e sopra quella nobilita,*Venezia 1802, 18.

[4] A. Cvitanić, "Tragom rada jednog našeg pravnika praktičara iz XVII stoljeća" [*In the Footsteps of an Our Criminal Lawyer from 17th Century*], *Zbornik radova Prav nog fakulteta u Splitu* [*Collected papers of theLaw Facultyx of the University of Split*], 8/1971, 71 80; A. Cvitanić, "Jerolim Mičelović Michielli, hrvatski pravnik XVII stoljeća: "Preporuka za znanstvenu obradu i vrednovanje njegova djela *Pratica criminale pei cancelieri*" [Jerolim Mičelović Michieli, *A Croatian Lawyer from 17th Century*: *Recommendation for scientific research and evaluation of his work* Pratica criminale pei cancelieri], *Hrvatski ljetopis za kazneno pravo i praksu* [*Croatian annual of criminal law and practice*], 4, 2/1997, 747 752.

[5] A. Jutronić, "Naselja i podrijetlo stanovništva na otoku Braču" [*Settlements and Origin of Population on the Island of Brač*] *Zbornik za narodni život i običaje Južnih Slavena* [*Collected papers on people's life and customs of South Slavs*], Zagreb 34/1950, 145; J. Jelinčić, *Na postirskim vrelima* [*On Origins of Postira*], Postira 2004, 73 78.

buried in the tomb at the main altar of the cathedral. Therefore, it is not surprising that one of the three handwritings of the famous Mičelović's *Pratica* was found in the Library of the Trogir cathedral. The other two manuscripts are kept in Italy: one in the National Library of St. Marco in Venice (*Marciana*), and the other in the Communal Library in Udine. According to our examination, not a single one of those handwritings was originally written by Mičelović. The Udine handwriting is at first glance uttermost removed from the original writer. That is the somewhat shortened later version, indicated by the characteristics of language and writing, as well as by the occasional omissions which are contained in the use of inappropriate terms, produced by mistake in invalid reading of the original handwriting. The other two manuscripts are most probably only copies of the original work. Both were written by at least two different people, and each one of them have gaps in content which do not overlap with the other one, and which have been probably caused by voluntary omission or by careless re-writing of the original. A comparative argument also suggest such a proposition, as all other known and preserved Venetian practical handbooks were normally not more than copies.[6]

Mičelović studied law at the University of Padua, where he was awarded a doctoral degree in laws (*doctor utriusque iuris*). He held various positions in the public service of the Venetian Republic. He was, among other positions, an auditor[7] and advisor to the general commanders and rectors in certain inferior towns in Italy, Dalmatia and Crete. For a period of time he performed the duty of chancellor. However, it was not a position of the main or great chancellor (*canceliere grande*), which was held by the Duce office in the very town of Venice,[8] but rather a local chancellor function having been performed in other places, cities and provinces of the Venetian Republic.[9]

According to Ciccarelli, Mičelović was considered as a famous criminologist (*criminalista famoso*), whose *Pratica* was unstintingly used by candidates who were preparing for the chancellor service.[10] To that aim, it was useful as it was informative enough, but also as it was attractive, as it was composed in the form of a dialogue between a chancellor and coadjustor (candidate for chancellor service).[11]

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6 A. Cvitanić (1997), 749.

7 On the service as auditor *cfr*. C. Milan, A. Politi, B. Vianello, *Guida alle mag istrature; Elementi per la conoscenza della Repubblica Veneta*, Verona 2003, 79 80.

8 C. Milan, A. Politi, B. Vianello, 71 73.

9 A. Cvitanić (1997), 750.

10 A. Ciccarelli (1802), 18.

11 Dialogue form was not otherwise unusual at that time in similar works. The same idea can be met in Arcangelo Bonifaccio, *Nuova e succinta pratica civile e crimi nale,* Venezia 1739.

The work is divided into ten chapters-dialogues and each analyses a central issue. However, within the same chapter different issues of criminal substantive law and procedure were often intertwined. Although substantive and procedural criminal law were in principle differentiated already in the XVI century,[12] the Mičelović's text shows that the process of emancipation of criminal procedure from criminal substantive law was quite slow.[13] It is easy recognizable in the author's observation that criminal law belongs to the category of *ars*, rather than to the world of science.[14] The subject of that *ars* are not only offences and people, prosecutors and injured parties, but also law suits initiated by a criminal action (*querella*) and other forms of procedural remedies.[15]

Briefly, the content of Mičelović's *Pratica* has a following structure. In the first chapter (*Criminalità*), certain types and categories of offences are defined, wherein the author relies on classification of the XVI and XVII century *ius comune*.[16] Most important are the divisions of offences into: a) public and private, b) regular and extraordinary, c) summary, seriously and more seriously indictable, and d) ecclesiastical, secular and mixed. Such a categorisation of offences basically was kept even up to the XVIII century literature.[17] Then the typical scheme for practical handbooks follows, that is a description of the various phases of criminal procedure.[18]

The second chapter (*Quali cause sono criminali, civile e miste*) discusses the concept and different characteristics of criminal, civil and mixed law suits, beginning with the double criteria of the types of offences and punishments. Particular attention is paid to the differentiation of ordinary and extraordinary punishments typical for the criminal doctrine of the time.[19] The first are, according to Mičelović, punishments determined precisely by the law or statute, while the others are punishment according to the arbitrary assessment of the court, such as deprivation of office, benefits or honour, etc.

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[12] It was firstly suggested by the great criminologist Tiberio Deciani in his work *Tractatus criminalis. Cfr.* A. Marongiu, *Tiberio Deciani (1509 1582) lettore di diritto, consulente, criminalista*, Bologna 1934, see more in A. Cavanna, *Storia del diritto mod erno in Europa*, I, Milano 1979, 146 152.

[13] See also S. Lessi, *Benedetto Pasqualigo e la Giurisprudenza criminale teorica e pratica*, Padova 1999, 21 23.

[14] (...) *è da concludersi che medesima sia più tosto arte, che scienza... la criminal ità nel caso nostro si può chiamar con maggior ragione arte, che scienza.*

[15] *Il soggeto di quell'arte sono i medesimi delitti, le persone, cioè li querellanti, et offesi, e l'actioni loro, cioè le querelle, ò altro modo di procedere.*

[16] A. Cavanna, 147.

[17] S. Lessi, 25 44.

[18] *Ibid.*, 22.

[19] *Ibid,* 33.

The third chapter (*Dei modi e delle forme di procedere*) analyses the different ways of initiating criminal proceedings. Procedures are determined as *per accusationem, per denuntiationem* for barbers, doctors and heads of certain areas (*contrata*), and *per expositionem* – according to reports of military officers. However, the court is eligible to initiate procedure by virtue of its office (*per inquisitionem*), without any initiative vested into the previous forms.

The fourth chapter (*Varie circostanze circa le querelle*) deals with different aspects according to criminal action taken by the injured party (*querella*), different than a civil one. The fifth chapter (*Delle diligenze che deve usare la Giustitia doppo la notitia de dellitti, e che in primo luogo deve constare del corpo d'essi*) discusses procedural steps which were supposed to be undertaken after the information that the criminal act was performed. Firstly it was determined whether the crime actually took place, and particularly to determine *corpus delicti*. Without those elements, the charge could not be passed and neither could torture be applied in the proceeding. Mičelović distinguishes between the so called permanent offences (*delitti permanenti*) and passing offences (*delitti transeunti*), which was a routine division in the criminal doctrine of the XVII and XVIII century.[20] The first category encompasses offences committed by some act (*fatto*) having left obvious material traces, while the others were performed by words (*detto*) or omission (*omissione*), and did not leave observable traces. To this, close causality was linked in order to determine the existence of certain types of offences. The similar topic is continued in the sixth chapter (*Avertendo che secondo la qualità de casi devono anco esser usati li modi, così per far constar i delitti, come anco per inquirer i delinquenti*).

The seventh chapter (*De testimonii, et altre considerationi circa l'informationi necessarie contro a rei*) exposes the complex system of witnesses interrogation, while the eighth chapter (*Delle deliberationi di processi*) discusses forms of different procedural decisions (*decreti*). These are not decisions on the merit, but rather the procedural remedies aimed at enabling the main process. The most important of these were calls to the accused to present his defence, an order to appear for an informative discussion, decision to prevent accused to get away, and calls to put someone on the list of wanted defendants, all in the form of public proclamations (*proclama*). *Proclama* was a public call *ad carceres*. On that basis the elusive accused person could be arrested wherever he was found. If he refused to go to court within the deadline given in the warrant for arrest, he was officially pursued in his absence (*bando*).[21] The ninth chapter (*Della retentione e captura*) analyses the reasons, ways and legal requisites for the preventive arrest of the accused. The last, tenth

[20] *Ibid.* 46.

[21] M. Ferro, *Dizionario del diritto comune e veneto*, vol. II, Venezia 1845, 531 532.

chapter (*De proclami*) deals with proceedings against the accused who has been listed within the record of wanted persons (the so called *reo proclamato*), as well as different procedural issues and remedies, including the torture as a means of securing evidence.

Ciccarelli emphasises that Mičelović's *Pratica*, although it was never published up to "our time" (that is until the fall of the Venetian Republic),[22] served as a standard and example to the chancellors of the Venetian Republic, and that it helped greatly to allieviate in practice the severity of criminal sanctions as well as to ensure that their implementation was based on more correct questioning of relevant factors.[23]

However, for the contemporary analysis it is necessary to take into account the whole social and historical context of Mičelović's work in order to evaluate and understand its goals and results properly. It leads us to the political settings and peculiarities of criminal legal institutions, as those circumstances shaped a fundamental profile of Venetian history in the last centuries of the Republic.[24]

After centuries of prosperity and stability, in the XVI century many indicators of the crisis have appeared, in proportion to the economic rise and political influence of other European countries. They started to make better use of their own national resources and more favourable geographical position, particularly in regard to the relocation of the main commercial routes from the Mediterranean to the Atlantic, while Venice remained not active enough in those global processes.[25] In the XV century, while it was at the height of its power, the Venetian Republic skilfully wanted to maintain political balance in the capital as well as regarding subordinate towns and areas.[26] Even though the Venetian state transformed itself over the centuries from a communal entitiy, via the city-state, to the mighty, expanded, well organized state in a form of the Republic with lots of territories (*Dominium* or *Signoria*), it has basicaly preserved in an unchanged form its old political and administrative structures, having been created in the previous times.[27] However, when the crisis started to erode the economic and political power of the state and the morale of the governing

[22] See also A. Cvitanić (1997), 749.

[23] *Servì molto a mitigare le pene criminali, e per far che precedano le più esatte cognizioni all'esecuzione; qual pratica fino a dì nostri serviva di norma ai Cancellieri dello Stato Veneto, sebbene non pubblicata con le stampe* (1811, 55).

[24] G. Cozzi, *Politica e diritto nella riforma del diritto penale veneto nel settecen to*, Padova 1966, 1.

[25] G. Zordan, *L'ordinamento giuridico veneziano*, Padova 2005, 111; G. Cozzi, M. Knapton, G. Scarabello, *Povijest Venecije* [*History of Venice*], vol. II, (Translation V. Begić *et al*.), Zagreb 2007, 266; F. C. Lane, *Povijest Mletačke Republike* [*Venice. A Mar itime Republic*] (Translation T. Mršić), Zagreb 2007, 428.

[26] G. Cozzi (1966), 11.

[27] G. Zordan *et al*., *Società, economia, istituzioni. Lineamenti per la conoscenza della Repubblica Venetta,* vol. I, *Istituzioni ed economia*, Verona 2002, 23.

nobility, the old city-state institutions demonstrated their impotence. Incapable in implementing necessary reforms, the Venetian Republic turned to a range of restrictive political measures, attempting to strengthen constitutional and political institutions. One of the main instruments of that political goal was the inquisitorial procedural system.[28]

It was the new, "special" procedural regime (*rito*), which increasingly suppressed traditional criminal court procedure, known as ordinary, which was used by the older judiciary bodies, particularly by the Council of Forty,[29] as a system mixed in character with accusatorial elements,[30] where representatives of the accusation and of the defence contradicted verbally in the presence of the accused. Such a procedure was different from the new inquisitorial one considering wider possibilities for the defence. Although numerous formalities complicated the procedure, they obtained in the same time more guarantees for the protection of the rights of the accused, by the publicity of the procedure and finally by the inclusion of *Avogador de Comun* at any phase in the process. *Avogador* represented the public charge and suggested the verdict. On the other side such a procedure was longwinded and slow, and lead to the increase of cases (of which many were never resolved), while the accused persons were often in custody awaiting the end to the proceedings.[31]

Affirmation of the inquisitorial criminal procedure was connected to the Council of Ten and its two dependant magistrate bodies. These were the Executives Against Blasphemy (*Esecutori contro la bestimmia)* and the State Inquisitors (*Inquisitori di Stato*).[32] Despite the obvious disadvantages of the ordinary procedure mentioned above, implementing the new regime of procedure never entailed just a simple technical change. The inquisitorial regime allowed the court to lead proceedings even when the accusation party was not present (*accusator*), to question the witnesses and pass sentence. *Accusa*, with a litteral meaning of law suit filed by a private party disappeared completely, so the in the XVI century there was practically no more traces left.[33] That is what Mičelović confirmes himself, observing the ways of how the criminal proceedings were initiated in his time, and stating that "modo dell'accusatione non è più in uso".

A further consequence of the inquisitorial procedure was the implementation of torture as of a regular method of investigation.[34] Differently

[28] G. Cozzi (1966), 4 12.

[29] C. Milan, A. Politi, B. Vianello, 57 58.

[30] G. Cozzi (1966), 10; S. Lessi, 100.

[31] S. Lessi, 100.

[32] G. Zordan (2005), 72; C. Milan, A. Politi, B. Vianello, 58 66; G. Cozzi (1966), 12; S. Lessi, 75.

[33] G. Cozzi (1966), 1 4.

[34] *Ibid.*

than the earlier ordinary procedure, it did not allow representation of the accused by a representative (lawyer) during the process, although both legislation and doctrine of the XVII century, have softened that approach.[35] Summary and secret accussations were the main characteristics of the inquisitoral procedure. It was much more based on practice (*practica*) rather than upon precise and comprehensible norms, so that the accused was often at the mercy of the state inquisitor. The individual was also exposed to the arbitrariness and misuse of a wide network of state stalking and spying.[36] By the anxiety which it instilled, by its rigidity, and the lack of serious procedural guarantees for the protection of the rights of the accused, the inquisitorial procedure became truly a powerful political instrument of the governing noble oligarchy.[37] Therefore it was not surprising that such an organisation of criminal justice was not only subject of the Venetian public animosity, including the majority of the nobility, who did not belong to the small class of the governing oligarchy, but it also received serious condemnation and critics by the theory, particularly by the Enlightment thinkers and scholars.[38] However all attempts at reform and humanization of criminal law and procedure were unsuccessful, partly as innovative idea of the Enlightment hardly touched the Venetian Republic,[39] as well as the success of such a project depended on serious reforms of the state apparatus, which was nearly an impossible task.[40]

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Ciccarelli was of opinion that Mičelović's contributed greatly the practice to alleviate severity of punishments, and that before the implementation of criminal sanctions, precise and correct examination of facts has to be performed. It gives foundation to Cvitanić's conclusion that the intention of Mičelović was to alleviate inhumanity of the inquisitorial procedure. Even more, given the above, *Pratica criminale* by Mičelović can be understood in that context as a critique of the politics of the Venetian aristocratic oligarchy, and as one of the first voices in favour of modernization of criminal law and procedure.

35 S. Lessi, 155.

36 G. Cozzi (1966), 20 21; C. Milan, A. Politi, B. Vianello, 58 59.

37 A. Cvitanić (1997), 749.

38 Venetian inquisitorial procedure was also criticised by the influential Italian le gal writer Cesare Beccaria in his famous work *Dei delitti e delle pene* (1764). *Cfr*. C. Beccaria, *O zločinima i kaznama* [*On Crimes and Punishments*], (2nd ed., Introductory and translation A. Cvitanić), Split 1990; *Id*., "Beccaria i mletački inkvizicioni postupak" [*Beccaria and Venetian Inquisitorial Procedure*], *Zbornik radova Pravnog fakulteta u Splitu* [*Collected papers of Law Faculty of Split*], Split 1978; G. Cozzi (1966), 15.

39 G. Zordan (2005), 111.

40 See more A. Cvitanić (1997), 751.

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JEROLIM MIČELOVIĆ-MICHIELI, EIN STRAFRECHTLER AUS DEM 17. JAHRHUNDERT UND SEINE *PRATICA CRIMINALE PEI CANCELIERI*

Zusammenfassung

Der Verfasser berichtet über das wissenschaftliche Projekt Jerolim Mičelović Michieli, ein kroatischer Strafrechtler aus dem 17. Jahrhundert, das an der Juristischen Fakultät der Universität Split realisiert wird. J. Mičelović (Postira, Insel Brač, 1600 Trogir, 1666) hat in Venedig um 1650 das strafrechtliche Handbuch Pratica criminale pei cancelieri verfasst. Obwohl sein Werk nie gedruckt wurde, hat man es wahrscheinlich für die Ausbildung von Kandidaten für das Amt des canceliere verwendet. Es gibt sogar Indizien dafür, dass dieses Werk zur Milderung der Härte des venezianischen Inquisitionsverfahrens und der strafrechtlichen Repression im Allgemeinen beigetragen hat. Es ist die Aufgabe des Projektes zu erforschen, ob und in wieweit diese Indizien begründet sind.

Die Pratica criminale wurde als Dialog in zehn Kapiteln zwischen einem Lehrer (canceliere) und einem Schüler (coadiutore) verfasst. Erhalten sind drei handschriftliche Exemplare (Venedig, Udine, Trogir), für die man mit guten Gründen vor aussetzen kann, dass alle drei die Abschriften des Autografs von Mičelović sind.

Schlüsselwörter: *Republik Venedig. Pratica criminale. Canceliere. Inquisitionsstrafverfahren.*

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RE-EMERGENCE OF THE DOWRY AMONGST SERBS*

The dowry (miraz) was not originally a Slavic custom. It has entered the me dieval Serbian law primarily through Byzantine influences, under the name prikija. At approximately the same time, it has entered the Croatian law through Byzantine, Venetian and Hungarian channels, and its Roman roots were reflected in its name, dote. While the Turkish conquest of Serbia has caused the disappearance of dowry, it has been preserved in Croatia.

Dowry re emerged in the XIX century Serbia from two sources. The first one was customary law, which adopted the Turkish term for inheritance, miras. The other source was the Serbian Civil Code of 1844, which was modeled after Austrian influ ence, thus transplanting the Austrian concept of dowry (based upon Roman law) to Serbian soil. Nevertheless, Serbian and Austrian Civil Codes were slightly different regarding the character or dowry. The coexistence of customary and legislative con cept of dowry continued their lives in the Kingdom of Serbs, Croats and Slovenes formed after World War I, as well as later on in the Kingdom of Yugoslavia.

Although the communist regime abolished dowry after the World War II by legislation, yet it survived in the rural areas. This particular conflict of legislation and customary law serves as an example of the mutual influence of facts and norms, wherein the facts could often develop contrary to the norms, which has to be resolved by the legislative reform.

Key words: *Dowry. Legal Transplants. Customary Law*.

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1. INTRODUCTION OF DOWRY IN THE MEDIEVAL LAW OF SERBS AND OTHER SOUTHERN SLAVS

The ancient Slavs did not originally use the dowry. It was critically observed by famous XIX century legal historian Valtazar Bogišić: "What was used by the other peoples would be good for Slavs to use it, too".[1] Besides the primitive abduction as a means to find women, the marriage by bride purchase was a generally accepted way to accomplish marriage, followed with the bride price which was called *veno*.[2] One of remarkable linguistical traces of such a practice in medieval Russia is that a girl old enough for marriage was called *kunka*, by the term which derived from Russian expression for marten – *kuna*, as the bride price was habitually paid in marten fur.[3] In those circumstances there was not much place for the dowry.

However, at some point in time, the part of the received bride price was starting to be used by the girl's father in order to support his daughters marriage, as with Velikorussians.[4] In that way, a part of the money that was given by the groom and his family for the bride, or the whole sum, was being returned to the groom through the value which was brought by the bride to her new home, as a consequence of the above-mentioned desire to facilitate her new life in marriage. That practice, although well attested only by Velikorussians, might be considered as an authentic root of dowry among the Slav tribes.

Only later, with the introduction of Christianity, the marriage with dowry has started to be used more widely.[5] Therefore, there has never been a specific Slavic term for dowry, which signifies in addition that dowry has not originally been a Slavic custom. Simply, the new marital giving, regardless of its source on the side of the bride and not of the groom, has been referred to as *veno* – the old Slavic term for the bride

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[1] V. Bogišić, *Pravni običaji u Slovena* [Legal Customs amongst Slavs], Zagreb 1867, 118.

[2] The term might have its origin in the Latin *vendere* to sell (M. Kovalevski, *Pervobitnoe pravo*, Moskva 1886, 145). The term *veno* has signified the bride price, and was later replaced with the Ancient Slavic term *ruho* or *rucho*, which remained until to day.

[3] E. Westermarc, *The History of Human Marriage*, London 1921, 413; W. J. Fielding, *Strange Customs of Courthsip and Marriage*, London 1961, 262.

[4] Š. Kulišić, "Nekoliko podataka o običaju miraza u Boki Kotorskoj" [Minutes on Custom of Dowry in Boka kotorska], *Glasnik Etnografskog muzeja u Beogradu* [Ga zette of the Ethnographic Museum in Belgrade] 20/1956, 55; M. Kowalevsky, *Coutume contemporaine et loi ancienne droit coutoumier ossetien*, Paris 1893, 166.

[5] K. Kadlec, *Prvobitno slovensko pravo pre X veka* [Ancient Slavic Law before the X Century], Beograd 1924, 80.

price.[6] Even St. Sava mentions this old term in his *Nomokanon* in the XIII century, but he identified it with the term *prikija* – Serbian term used for dowry.[7] The perplexity of different institutions was complete.

The first written law was brought to Slavs by the missionary priests as they, by spreading the Christianity, not only eradicated the Slavic paganry, but also educated the Slavs, and were introducing, among other novelties, changes in their legal practice. This new, in a way imposed law, was embodied in mixed sets of civil (*nomoi*, laws) and church (*kanoni*) regulations – the *nomokanons*.[8] That was the case in Serbia, as well, and in that way, along with the Byzantine law, the dowry entered in Serbia. Some provisions regulating to the dowry, as prescribed in one of the most important Byzantine law codifications – *Procheiron* (*Zakon gradski* [*City Code*] – as it was called in Serbia), were introduced firstly through the XIII century *Nomokanon of St. Sava*, and later on through the shortened version of *Syntagmate of Matthew Blastares* and the s.c. *Law of the Emperor Justinian* in the time of tzar Dushan.[9] However, the most important Serbian medieval legal source, *Code of Emperor Dushan* (*Dushanov zakonik*) from the middle of the XIV century, did not define dowry neither paid a particular attention to it.[10] Many authors explain it by the fact that the two contemporary aforementioned legal collections (shortened *Syntagmate* and s.c. *Laws of Justinian*) form alltogether an integral parts of the legislation of Emperor Dushan (1331–1355), s.c. *codex tripartitus*, and that therefore no need existed for the *Code* itself to regulate the dowry in details, as well as it was the case with pledge, will, inheritance, etc.[11] Before the legislative reception, the expansion of Serbian state, especially

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[6] P. Skok, *Etimološki rječnik hrvatskoga ili srpskoga jezika* [Ethymological Dic tionary of Croatian or Serbian Language], IV, Zagreb 1974, 587: "*Vieno* n. *veno*, n. *dote*, is not a word used in everyday speech. Ancient Slavic and Proto Slavic word (Czech *veno*, Polish *wiano*, Russian *veno*, Slavic *veniti*, 'to sell') is interesting from the semantic as pect. It has meant: 1. Brautkaufpreis, 2. Morgengabe, 3. Mitgift, 4. Bezahlung. The first meaning was 'the purchase of the bride before she is brought home'. There is no unique etymology".

[7] S. V. Troicki, *Kako treba izdati Svetosavsku Krmčiju (Nomokanon sa tumačenjima)* [How Should *Krmčija* of St. Sava Should be Published (*Nomokanon* with Interpetations)], Beograd 1952, 47.

[8] About that practice see particularly Ch. Papastathis, *To nomothetikon ergon tis kyrillomethodianis ierapostolis en megali Moravia*, Thessaloniki 1978.

[9] *Nomokanon* regulates the dowry in Section 55.8 9, while *Syntagmate* mentions dowry in Articles 160 1, 170, 172, 183 7, 207 and 214.

[10] Dowry is mentioned only in two articles of the Code: Art. 44 prescribes a ban to provide dowry by granting slaves, while Art. 174 explicitely alows free peasants to give as a dowry the land that they own as private property (*bastina*).

[11] E. g. D. Janković, *Istorija države i prava feudalne Srbije* [History of State and Law of Feudal Serbia], Beograd 1953, 7 8.

as early as during the reign of King Milutin and later on of Emperor Dushan, has resulted in the takeover of numerous territories that were under Byzantine rule and law for centuries, where the marriage with dowry was used. In that way, a wider penetration of marriage with dowry into Serbian law was prepared, eased and in a way fostered.

It seems that the wealthiest medieval Serbian families were amongst the first to accept this novelty in Slavic marital law.[12] According to many sources, king Milutin has rightfully retained all the territories which were taken over from Byzantium as a dowry of the young, five years old princess Simonida, born as Simonis Palaiologina, daughter of Byzantine Emperor Andronikos II, who gave her in marriage to the Serbian ruler (despite her age and the objections of the Church, as it was king Milutin's fifth marriage). Therefore, the first Serbian medieval Charter mentioning the term dowry, the Charter of the King Milutin to the Church of St. George in Skopje, dating back to 1300, brings no surprise.[13] Dowry is mentioned latter on in other Serbian medieval charters (*hrisovulje*) under the name *prkija* or *prćija* (deriving from ancient Greek *proix* – dowry).[14]

However, it seems that, regardless of the provision in Tzar *Dushan's Code* allowing particular sort of inhabitants – *meropsi* (free peasants) to use immovables as dowry, the dowry was relatively unpopular in medieval Serbia, and that it was mainly a prerogative of higher classes.[15] Famous Serbian medievalist Alexander Solovjev, regarding the provisions of the *Syntagmate of Matthew Blastares* that regulate the dowry, concludes: "These provisions of the family law are very much remote from the Slavic customs, based on which the girl either does not get the dowry

[12] The similar happened with Hungarians. At first, upon the conquest of the Pan nonian Plain, they accepted the marriage by buying the bride. Persian writer Gardizi in 9th century informs that Hungarians still pay hefty *kalim*, the bride price. However, the dow ry, which is mentioned in the *Golden Bull* of Andras II from 1222, has been widely used by the Hungarian ruling families during 13th century. See A. Csizmadia, D. Alajos, S. E. Filo, *Etudes sur l'historie du droit de marriage de Hongrie*, Pecs, 1979, 5 and 14; V. Honemann, "A Medieval Queen and Her Stepdaughter: Agnes and Elizabeth of Hungary", in Duggan A. (ed.), *Queens and Queenship in Medieval Europe*, Woodbridge 1997, 110 and 114.

[13] A. V. Solovjev, *Zakonodavstvo Stefana Dušana, cara Srba i Grka* [Legislation of Stefan Dušan, Emperor of Greeks and Serbs], Skopje 1928, 131.

[14] E.g. in the Emperor Dushan Charter granted to the Monastery of St. Archangels in Prizren. See T. Taranovski, *Istorija srpskog prava u nemanjićkoj državi, III deo: istor ija građanskog prava* [History of Serbian Law in Nemanjić State: History of Civil Law], Beograd 1935, 49 51.

[15] Art. 174 of the Tzar Dushan's Code. In her will, Lady Jelena, daughter of the Duke Lazar, determines: "My girls that are present at the time of my death, should be given the appropriate dowry, in order to find a new home...", *Pisah i potpisah* [*Signed and Sealed*], Beograd 1996, 209.

at all, or gets only some clothes and jewels".[16] Indirectly, it could be seen in a will which dates back to 1470. The son of certain Junije Bunić from Dubrovnik, Marin, has left 700 *perpers* to his non-married matrimonial sister in Serbia, if she decides to be married in Dubrovnik, specifying that, if she stays in Serbia, that ammount of money will be used for the marriage of the noble girl from Dubrovnik. This arrangement would imply that "the dowry, as commonly used in Dubrovnik and other coastal communes, was not accepted and recognized in Serbia".[17]

Still, the aristocracy (*vlastela*) has taken over the Byzantine institute of dowry, which was in accordance with the concept of the separate property of the women,[18] accepted earlier, and with the overall influence of Byzantine inheritance law,[19] which already occurred. Nevertheless, it was somewhat adjusted to the Serbian conditions. Another famous Serbian medievalist with Russian origin, Teodor Taranovski, noted: "*Prikija* (dowry) is mentioned in many charters. These texts however do not indicate individual or separate rights of the married woman, but they put *prikija*, or *tastnina*, as it is sometimes called, to the disposal of the husband as his property".[20]

The women who were professionally and economically independent enough lived only in the most developed trade and mining centers, notwithstanding the aristocracy. Therefore, it was possible to meet dowry documents in some of those cities, such as those found in Novo Brdo, dating from the XIV and XV century.[21]

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[16] A. V. Solovjev, 1928, 130 1

[17] D. Dinić Knežević, *Migracije stanovništva iz južnoslovenskih zemalja u Du brovnik tokom Srednjeg veka* [Migrations of Population from Southern Slavic Countries to Dubrovnik during Middle Ages], Novi Sad 1995, 149.

[18] T. Taranovski, 48 49.

[19] A. S. Jovanović, *Nasledno pravo u starih Srba*[Inheritance Law of Ancient Serbs], Beograd 1888. The aristocrats have frequently left the part of their inheritance to their daughters as legacy. See more in S. Novaković, *Ustavno pitanje i zakonici Karađorđevog vremena* [Constitutiional Question and Codes of Karađorđe's Time], Be ograd 1912, 312 313 and 317 318.

[20] T. Taranovski, 49 50. "The cadastre of the monastery Hilandar 1357 1372 serves as proof of the allocation of prikija: 'The Widow Zoje, wife of Roman the black smith, has a son Nikola the blacksmith, his wife being Anna, and one ox, two cows, four pigs, one and a half barrel of grapes, and another barrel in Podavce, brought as *prikija*...', 'The widow Teodora, wife of Kopil Teodor, has sons Kuman and Panagiot, one ox, five pigs, three barrels, a barrel and a half in Podavce, and another in Kruševo as her *prikija*'". As it could be seen, the *prikija* is not owned by the woman (Ana), who brought her, but to the husband (Nikola the blacksmith); only when the husband (Kopil Teodor) dies, the prikija belongs to the woman widow (Teodora)

[21] D. Dinić Knežević, "Ograničenja luksuza u Dubrovniku krajem XV i početkom XVI veka" [Limitations to Luxury at the End of the XV and Beginning of XVI Century],

The term *dote* has also been introduced to these regions through reception of Roman law. In the XIII century, Deversius, the master of Konavle, has given to his daughter Dragoslava and son-in-law Mikac the land in the parish (*župa*) of Žrnovica *pro dote*.[22] *Dote* is also mentioned by the Despotes Stefan Lazarević in 1423, in the peace treaty between Serbia and the Venetian Republic.[23]

However, after the Turkish conquest of Serbia, as was noted by Nedeljković, "the Serbian medieval society lost almost all of its class differences and everybody was scaled down to the level of *raja* (common people)".[24] As the wealth diminished, and Serbia began to decline economically, the dowry was on his way to fade out. There were no more rich or aristocratic families, those who were the only ones practicing dowry, so that the very institution dissapeared along with them.

Montenegro has retained the customary rules of its tribes longer and with more persistence. None of these tribal laws accepted the dowry. The only exception was the small near-coastal region, mainly inhabited by the Paštrovići tribe.[25] Paštrovići commonly used in their documents the term *prćija*[26] of Greek-Byzantine origin, instead of the latinized term *dos, dote*, which was circulating in the costal areas. It might support in a way Solovjev's presumption that a major part of tzar Dushan's legislation was applied by Paštrovići even in the XVIII century, especially the first part of the *codex tripartitus*, the s.c. *Laws of the Constantine Justinian*.[27]

Godišnjak Filozofskog fakulteta u Novom Sadu [Yearbook of Philosophical Faculty in Novi Sad], XVIII 1/1974, 93. Katarina from Novo Brdo, daughter of Nikola Đurđević, has brought to her husband 1000 *dukats* (VS:golden coin) and 100 *ahsađs* (VS: a measure of gold) of gold as dowry. Larger towns in Serbia were inhabited by a great number of traders from Dubrovnik, and they could have contributed, presumably, to the spread of dowry in these regions, especially regarding the practice of preparation of dowry docu ments. See more in D. Dinić Knežević, (1995),148 150.

22 Cited according to A. V. Solovjev, *Odabrani spomenici srpskog prava* [Selected Historical Documents of Serbian Law], Beograd 1926, 1.

23 Cited in S. Novaković, 280 281.

24 B. M. Nedeljković, *Istorija baštinske svojine u novoj Srbiji od kraja 18. veka do 1932* [History of *Baština* Property in New Serbia since the End of the XVIII century until 1932], Beograd 1936, 56.

25 J. Danilović, "O mirazu u Paštrovskom običajnom pravu" [About the Dowry as a Part of Customary Law of Paštrović Tribe], *Srednjovekovna istorija Crne Gore kao polje istraživanja* [Medieval History of Montenegro as a Research Field], Beograd, 1999.

26 J. Danilović, 352: *Depending on the writer, terms such as* prt*, or sometimes* prat *(*pert*) were used. Latin term* dos *is rarely used in the documents.*

27 A. V. Solovjev, "Dušanov zakon kod Paštrovića" [Emperor Dušan's Code with in Paštrović Tribe], *Arhiv za pravne i društvene nauke* [Archive for Legal and Social Sci ences] 27/1933, 25 26.

On the other side, all Southern Slavic city communes on the Adriatic coast have accepted dowry under Byzantine and Venetian influence. Even though, as it is frequently pointed out, the *Statute of Budva* was mainly just a modification of customary rules, "only when it comes to the goods encompassed by the woman's dowry, legal regime similar to the one in Justinian's law applied".[28] Kulišić points out that the custom of giving dowry in Boka Kotorska was introduced under the influence of the *Statute of Kotor*.[29]

The *Statute of Dubrovnik* from 1272 dedicates to the dowry a whole section. It begins with the provision titled *De dote et perchivio* (IV, 1), implying that these are two very different concepts. However, the wording of the provision makes it clear that the two terms are actually synonyms for dowry. The issue is that it only reflects perplexity of the two terms by different origine: the first one was by Latin origin – *dos*, while the second was basically a Greek word domesticated in the medieval Latin – *perchivium*.[30] This is probably a further proof of the apparent influence of the Byzantine Empire, which had come from Apulia, i.e. from the Southern Italy, and which was most evident in the statutes of the nearby coastal cities on the other side of the Adriatic Sea (Budva, Kotor, Dubrovnik), as many legal historians assert. Numerous trade and marital alliances of Dubrovnik with the cities in the hinterland, as well as in Serbia, transferred the concept of dowry from the Adriatic coast to the provinces. This occurred in Konavle, Trebinje, Zahumlje, Novo Brdo, Prijepolje, Bosnia and Drač.[31]

The Croatian prestigious authors, predominantly Margetić and Cvitanić, have shown that the origin of the marital property law in the Dalmatian cities was Croatian, i.e. Slavic in general, mainly forming their

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[28] Ž. Bujuklić, *Pravno uređenje srednjevekovne Budvanske komune* [Legal Order of Medeeval Commune of Budva], Nikšić 1988, 264.

[29] Š. Kulišić, 81.

[30] *Lexicon Latinitatis Mediiaevi Iugoslaviae, fasc. V,* Zagrabiae 1975, 834; V. Mažuranić, *Prinosi za hrvatski pravno povjestni rječnik* [Additions to the Croatian Legal Historical Dictionary], II, Zagreb 1908 1922, 911; V. Bogišić, "Glavnije crte porodičnoga pisanoga prava u starom Dubrovniku" [Main Characteristics of Family Written Law in Ancient Dubrovnik], *Pravni članci i rasprave* [Legal Artciles and Debates], I, Beograd 1927, 147 149; N. Nikezić, "Miraz u kotorskom pravu u prvoj polovini 14. veka" [Dowry in Law of Kotor in the First Half of 14th Century], *Istorijski zapisi* [Historical Writings] 1/1995, 5; I. Sindik, *Komunalno uređenje Kotora od druge polovine XII do početka XV stoleća* [Communal Orderof Kotor since Second Half of the 12th century until the Beginning of the 15th century], Beograd 1950, 130.

[31] D. Dinić Knežević, (1995), 148 165; Đ. Petrović, "Dubrovačke arhivske vesti o društvenom položaju žena kod srednjevekovnih Vlaha" [Archive News from Dubrovnik on the Social Position of Women within Medieval Vlah People Society], *Istorijski časopis* [Historical Magazine] 32/1985, 13 21; J. Vukmanović, *Konavli antropogeografska i etnološka ispitivanja* [Konavli Anthropogeographic and Ethnological Research], Beograd 1980, 262.

opinion on the oldest coastal statute of Korčula from 1214.[32] However, the *Statute of Korčula* regulated the dowry, which was not, as mentioned above, an autochthonous Slavic custom, not as a novelty, but rather as already highly developed and accepted legal institute. This further goes to indicate that there was an influence of the post-classical Roman law not only in Bar, Budva, Kotor and Dubrovnik, but also in Dalmatia, coming from the Byzantine Empire, and later from Venice.[33] Dowry was common feature of the statutes of the coastal cities, and was present in all of the Adriatic coastal communes with many similiraties, regardless of the predominant marital property regime.

2. CONTINUITY OF DOWRY AMONG CROATS

In the larger cities of the continental Croatia, the custom of giving dowry was widespread even in the medieval times.[34] The usual amount of dowry to be given on the occasion of marriage of the daughters from noble families was 100 *florins* in Croatia, 200 in Hungary, and 60 in Er-

[32] L. Margetić, "Nasljedno pravo descendenata po srednjevekovnim statutima Šibenika, Paga, Brača i Hvara" [Inheritance Law According to the Medieval Statutes of Šibenik, Pag, Brač and Hvar], *Zbornik Pravnog fakulteta u Zagrebu* [Compendium of Faculty of Law in Zagreb] 3/1972, 363, and "Bizantsko bračno imovinsko pravo u svjetlu novele Lava XX Mudroga (s osobitim obzirom na razvoj bračnoga imovinskoga prava u srednjevekovnim dalmatinskim gradskim općinama)" [Byzantine Marital Property Law in the Light of Novella of Leo X the Wise (with Particular Attention to the Development of Marital Property Law in medieval Dalmatian Communes)], *Zbornik radova Vizantološkog instituta* [Compendium of the Byzanthological Institute] 18/1978, 45 46; A. Cvitanić (ed.), *Korčulanski statut* [Statute of Korčula], Zagreb Korčula 1987, XXXII.

[33] "If we bear in mind that the woman in Rome and Byzantium has reached almost full commercial capacity and independence of her property, and that she has enjoyed similar treatment in Venetian law, it might be concluded that the marital law of Trogir is, similar to the law in rest of Dalmatia, basically Slavic law which was applied on the con tinent around urban territories. Only dotal forms, i.e. dowry would be innovation akin to Roman legal concept", A. Cvitanić, Foreword to *Statute of the City of Trogir*, Split 1988. L. Margetić, (1978), 154 is even more explicit: "It seems that since XIII century, under the influence of Venetian law, principles of Justinian's Roman law have been introduced on the Adriatic coast, modified not only according to the Venetian specifics, but also to the local conditions of each commune. Basic characteristic of this newer layer of the legal concepts, regulating the marital property relations, is that the property mass consists of dowry, which has become, in accordance with the evolution of Roman law until Justinian, as well as the influence of the Justinian's law in its final shape women's property with specific intention and special legal regime".

[34] *Law of the League of Nin* (presumably dating from 1108) has prescribed in the Article 69 that the rapist shall take the raped girl for his wife, while the one who has helped him shall ensure the *ruho* (fr. *trousseau*) for the girl, V. Mažuranić, (1922), II, 1271.

dely.[35] The influence that the Byzantine and Venetian law, and through them the Roman law, had on the Croatian coastal cities was not transferred to the continental Croatia, whose law was heavily influenced by the Hungarian one. This influence will especially become apparent when the Verbetius' *Tripartitum* was adopted, which appeared in the translation by Ivan Pergoshić in 1574, in Kajkavian dialect of Croatian language. *Tripartitum* has regulated the dowry, stressing that daughters shall get the dowry according to the status of their fathers.

Even though there were undeveloped parts of the country which held on to the custom of bride purchase until the late XIX century,[36] dowry has prevailed in the larger part of the territory. Due to stronger foreign influences the modern economy was developed in Croatian areas earlier than in other parts of the Balkans. Some authors are therefore of the opinion that this is the reason for the faster spreading of dowry in Croatia.[37] In addition to that, in the XIX century the provisions of the Austrian Civil Code (ABGB) were applied directly (including those regarding the dowry and the elimination of differences of the male and female relatives in the inheritance law). The custom of *dote* was retained in numerous coastal cities and the surrounding countryside from the medieval times. Due to these circumstances, the amount of dowry was usually equal to the total portion of the daughters' inheritance, although the dowry mostly consisted of movable property.[38]

Alltogether, unlike in Serbia, the dowry has been preserved on the larger part of the Croatian territory since the medieval times.

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[35] See V. Mažuranić, (1908), I, 267 270; P. Skok, I, 427; D. Dinić Knežević, (1974), 91.

[36] M. Kurjaković, "Ženidbeni običaji iz Vrbove (kotar Nova Gradiška) u Slavoni ji" [Marital Customs from Vrbova (kotar of Nova Gradiška) in Slavonia], *Zbornik za narodni život i običaje južnih Slavena* [Compendium for Common Life and Customs of Southern Slavs] 1/1896, 152 159; L. Horak, "Hrvatski ženidbeni običaji Ovčarevo kod Travnika" [Croatian Marital Customs Ovčarevo near Travnik], *Zbornik za narodni život i običaje južnih Slavena* [Compendium for Common Life and Customs of Southern Slavs], XXXII 1/1939, 204; A. Sekulić, "Svadbeni običaji bačkih Bunjevaca" [Marital Customs of Bunjevci People from Bačka Region], *Zbornik za narodni život i običaje južnih Slave na* 48/1980, 155 [Compendium for Common Life and Customs of Southern Slavs].

[37] V. St. Erlich, *U društvu s čovjekom* [In Society with Man], Zagreb 1978, 193 i 195; T. Đorđević, "Plodnost u braku" [Fertility in Marriage], *Naš narodni život* [Our Common Life], Beograd 1984, 39; V. Bogišić, "O položaju porodice i naslijedstva u pravnoj sistemi" [On the Position of Family and Inheritance in Legal System], *Pravnik* [Jurist] 2/1892 i 3/1893, 717.

[38] A. Koludrović, "Nekoliko isprava o mirazu is Kaštel Gomilice" [Few Docu ments on Dowry from Kaštel Gomilica], *Anali Historijskog instituta Dubrovnik* [Annals of the Historical Institute Dubrovnik], Dubrovnik 1953, 283.

3. TWO SOURCES OF THE RE-EMERGENCE OF DOWRY IN THE XIX CENTURY SERBIA

The medieval Serbian law, very much penetrated and inspired by the Byzantine, strengthened firstly by the military and political skills of King Milutin, King Stefan Dečanski and especially Emperor Dushan, and subsequently by the economic prosperity under Despote Stefan Lazarević, was forgotten after centuries of weary Turkish rule. Writing about the status of women in Serbian inheritance law, Perić noted: "... the fact that the Serbs were under the rule of the Turkish Empire for four centuries had a prolonged influence on the their concepts in general, especially on their social and legal concepts".[39] Although the medieval Serbian law was partialy familiar with dowry, although mainly limited within the higher social structure, Serbia entered the modern times without it.

The dissolution of the *zadruga* (joint family) in the XIX century Serbia, the formation of individual families in large numbers, as well as frequent wars, lead to the occurrence of the once-hypothetical problems in everyday life. Sometimes, the families would come down to be comprised only of females. The ties with the kin had deteriorated enough, therefore disqualifying it from becoming a successor to the inheritance, and fathers desperate to find a successor were bringing *domazets* (sons-in-law who came to live on the father-in-law's property). *Domazets* assured them a matrimonial successor of their material as well as immaterial (being more important) assets.[40] Afterwards, new heiresses should have been properly named. It did not take a long time to find the new term. The law of the Turks and other Muslims who lived on Balkans granted to women the right of inheritance, even though their inheritance amounted to a part smaller then the men's part. This is how these brotherless girls (*bezbratnice*) got the name *miraždžijke*, by applying the Turkish term for inheritance – *miras*. This clumsy legal transplant paved the way for the dowry in Serbia. The first written mention of dowry, wherein "dowry" signifies the inheritance, dates back from 1748.[41] The heiresses,

[39] Ž. Perić, *Žena u srpskom naslednom pravu* [Woman in Serbian Inheritance Law], Beograd 1927, 351. For Albanians, see M. Đuričić, "Uticaj albanskih običaja na imovinsku slobodu žena" [Influence of Albanian customs upon property freedom of women], *Anali Pravnog fakulteta u Beogradu* [Annals of the Faculty of Law in Blegrade] 5/1988, 565 etc.

[40] Similar situation was often in Russia: "As early as the seventeenth century, Russian peasants, in the absence of direct mail heirs, adopted a son usually a prospective son in law for a marriageable daughter. Adoption assured a household that is patrimonial property would be preserved intact for subsequent generations and would not devolve to distant relatives or, in the post emancipation era, revert to the commune", C. C. Worobec, *Peasant Russia*, Princeton 1991, 58.

[41] V. Mihajlović, *Građa za rečnik stranih reči u predvukovskom periodu* [Materials for a Dictionary of Foreign Words before Vuk], Novi Sad 1974, II, 390; even more,

according to the term that was accepted for the women's inheritance, were called *miraždžike*,[42] somewhere *blagarice*[43] or *taloshkinje*,[44] and a while later, with the influences of legal terminology and the occurrence terms like *inheritance mass* in common language, *masalke* or *masanke.*[45]

Almost at the same time, urban settlements began to develop and flourish. Social differences, relatively small during past centuries, became sharper. Rich merchants have quickly capitalized their courage shown during the First and the Second Serbian Uprising. The desire for higher social ranking caused the parents to give larger and richer presents to their daughters in order to demonstrate their wealth. That way, the brothers were not deprived of their inheritance "because they are wealthy enough", or they would at least try to "buy" a successful and prominent son-in-law. As time went by, such well-endowed daughters were referred to as daughters with dowry, because the entire patrimony of a common person could often be smaller than the dowry of the city girls (*prćije varošanki*). Since the daughters always inherited lots of land and other immovables, the term dowry was often associated with possession i.e. inheritance of immovables. Finally, when the patriarchal moral started to decline and when *domazets* were not treated like vultures anymore (and certainly most people regarded them as vultures out of sheer spite), no obstacle remained for the further development of dowry. The desire for wealth was stronger than the attitudes of the patriarchate. *Miraždžijke* went from being avoided to becoming the most desired brides.[46]

When one third of the male Serbian population was swept away in the Balkan Wars and in the World War One, the daughters could get married only if their parents prepared them well for the wedding. Their

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Vuk Karadžić in his *Serbian Dictionary* (1852 edition) translates dowry as *hereditas*.

[42] N. Pantelić, *Nasleđe i savremenost čačanski i gornjemilanovački kraj* [Inherit ance and Modernity Čačak and Gornji Milanovac Area], Beograd 1991, 46.

[43] V. Bogišić, (1867), 120.

[44] V. St. Erlich, (1978), 187.

[45] J. Pavlović, "Narodni život u kragujevačkoj Jasenici" [Common Life in Jaseni ca near Kragujevac], *Srpski etnografski zbornik* [Serbian Ethnological Compendium] 22/1921, 117 118.

[46] S. M. Mijatović, "Običaji srpskoga naroda iz Levča i Temnića" [Customs of Serbian People from Levče and Temnić], *Srpski etnografski zbornik* [Serbian Ethnological Compendium] 7/1907, 6 7; V. M. Nikolić, "Etnološka građa i rasprave iz Lužnice i Nišave" [Ethnological Materials from Lužnica and Nišava], *Srpski etnografski zbornik* [Serbian Ethnological Compendium] 16/1910, 183 185; D. M. Đorđević, *Život i običaji narodni u Leskovačkoj Moravi* [Common Life and Customs in Leskovačka Morava], Beo grad 1958, 436. For vivid descriptions of the cousins guarding the girls from the guys trying to marry them in order to get their wealth in Leskovačka Morava, Boljevac and Homolje, see Milan T. Vuković, *Narodni običaji, verovanja i poslovice kod Srba* [Com mon Customs, Beliefs and Proverbs of Serbian People], Beograd 1981, 34; T. Đorđević, 37; *Naš narodni život* [Our Common Life], Beograd 1984, 146 147 and 207.

chances were much better if they had some lots of land or a greater amount of money. Such a gift would definitely deprive the daughters (still not used to the new situation) of any idea of inheriting their father's estate, which was a relief for their brothers. As the notion *prćija* became quite different from the previous one, regarding both quantity and quality, it also started to represent a consideration for the renouncement of the parents' inheritance. Still, all the daughters kept in mind the original *miraždžijke*, in spite of their lack of education, and understood the meaning of inheritance. On the other hand, the term "dowry" expanded to all the cases were a woman entered into marriage with valuable property, therefore becoming an equal partner to her husband, despite the fact that he managed the property, and regardless of whether she stayed to live in her home, moved into her husband's family, or if the newlyweds began to live in their own home. At that moment, the dowry in its original Islamic meaning of inheritance or *miras* disappeared, and medieval *prkija* or *dota* (*dos*) revived.

This shy emergence of dowry in the most prestigious families of the larger cities in Serbia has probably started in the late 1820s, but certainly before the implementation of the *Serbian Civil Code* (SCC)*,* since the term *dowry*, which was the technical expression used by the SCC to indicate the part of the property that the women brought with her in the marriage, was evidently used among the people to signify *prikija,* and not only the daughter's inheritance.[47] The dowry as a constituent of the new customary law has prevailed over the dowry officially introduced by the legislation of the new-formed Serbian state.

The other way of introduction of dowry was the reception of Roman law through Austria. Dowry was officially introduced to the modern Serbian law, which was strongly influenced by the ABGB, as a "backdoor entry". Regarding the dowry the ABGB uses the well-known Austrian concept, based on the postclassical Roman law. On the other hand, the SCC introduced a new legal concept in a fearful, careful and touchy manner. The inept adaptation of the ABGB to the Balkans and the unsuccessful alteration of its articles would result in few major differences between the Austrian and Serbian concept of dowry. One of the most important deviations of the SCC from the ABGB is related to the character of dowry in Serbia, which was, contrary to the ABGB (Art. 1217–1224), not compulsory. Article 762 of the SCC prescribed, as a way to redeem the legislator from the introduction of dowry: "If the dowry was not agreed upon and compulsory according to the contract, the husband has no right to ask for the dowry along with the spouse". This difference in the compulsory character of the dowry does not imply that, according to the Aus-

[47] Art. 397 of the SCC prescribes that brothers are obliged, after the death of the parents, to ensure their sisters a *decent housing in accordance with the existing customs*.

trian law, the husband was authorized to ask for dowry in any case. Article 1225 of the ABGB clearly states that the husband cannot demand the dowry if it was not agreed upon before the marriage. This difference relates to the obligation, prescribed by the Austrian law, of the parents to give their daughters a dowry, while the SCC did not stipulate this obligation.

The first ruling regarding the dowry was mentioned and commented by Niketić.[48] Since then the rulings on dowry have become unavoidable in the published jurisprudence collections. This might be the case due to the popularity of dowry; however it might also be due to the confusion of the courts and different interpretations of the SCC.

4. CUSTOMARY VS. CIVIL LAW

After the World War I, the Kingdom SCS (Kingdom of Serbs, Croats and Slovenes) was created, and afterwards renamed to Kingdom of Yugoslavia in 1929. This state, created full of differences, compromises and frictions, was divided into six diverse legal regions, each with its separate legal sources. Although different laws with the rules on dowry were in effect in most parts of the Kingdom of Yugoslavia, it did not imply that the dowry was automatically accepted in all the regions. The dowry has nested pretty fast in urban areas, notwithstanding its adjustments to the urban customs, but it was not accepted and added to the body of local customs in the lesser developed regions.[49] However, in the decades between two World Wars, dowry has finally become a major marital custom in larger part of the Kingdom.[50] That was, as long as Serbia is considered, due to huge losses that Serbian army suffered during the Balkan Wars and World War I, which created female majority within the population.[51] There have been also other influences that contributed to

[48] G. Niketić, *Bilten Kasacionog suda 1866 1878* [Bulletin of the Court of Cassation 1866 1878], Beograd 1908.

[49] "Legal norms did not significantly influence the customs and the practice of dowry and inheritance. Patriarchy has been especially immune to the modern provisions of the law which are considered as of foreign nature and do not take into account the stage of development of the rural households and factual family relations. The attitude of the people from patriarchal regions towards dowry was single minded and independent from all eight inheritance laws: the daughter does not get any dowry or inheritance", V. St. Erlich, *Jugoslavenska porodica u transformaciji* [Transformation of Yugoslav Family], Zagreb 1971, 188.

[50] J. Pavlović, 115; T. Đorđević, "Poligamija" [Poligamy], *Naš narodni život* [Our Common Life], Beograd 1984, 39. Traces of the bride purchase have remained in the undeveloped parts of Yugoslavia, such as Kosovo and Macedonia.

[51] P. Ž. Petrović, *Život i običaji narodni u Gruži* [Common Life and Customs in Gruža], Beograd, 1948, 94.

the acceptance of dowry, including the rise in numbers of families that should be supported from both sides, especially during the great economic crisis in 1930s.[52] Pavković also points out the influence of processes that were initiated by the law in force, namely, the transformation of collective family ownership into private property, and gender equality in inheritance law.[53]Anyhow, ethnologists have noticed the existence of dowry in their studies of certain regions, especially the rural areas, although they have been frequently pointing out that the dowry is "a *newer* concept".[54]

Until the end of the World War II the dowry in customary and in civil law have been peacefully coexisting. The customs have somewhat modified the dowry in accordance with the regional differences, and if the dispute would arise, the court would deliver the ruling based on the civil law. However, this harmonious coexistence has been abruptly breached. Right after the establishment of the communist government, dowry has been abolished, envisaged to have been opposing to the gender equality principle and socialist moral.

However, even it was attested mainly by the foreign scholars,[55] the dowry in Yugoslavia has showed again that "no solemn declaration on the rupture with the past could not defeat the persistence of the custom as an addition, interpretation or abrogation of the law, which sometimes returns to the custom its old glow".[56] Therefore, the legislator has recognized the troubles of coping with the dowry when explicitly prescribing in the Article 413 of the *Law on Marital and Family Relations* from 1980 that the dowry is a separate asset of the woman. If there was no dowry, there would be no such provision.[57]

Vasić rightly points out: "the custom of non-application of the law or reasonable custom that is applied contrary to the law is a fact that sig-

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[52] V. St. Erlich, (1978), 187 and 194.

[53] N. F. Pavković, "Tradicijsko pravo i savremena seoska porodica" [Tradtitional Law and Contemporary Rural family], *Glasnik Etnografskog instituta* [Gazette of the Eth nographic Institute], 32/1983, 42.

[54] V. Nikolić Stojančević, "Vranjsko Pomoravlje", *Srpski etnografski zbornik* [Serbian Ethnological Compendium] 86/1974, 358; J. M. Halpern, *A Serbian Village*, New York, Evanston, London 1967, 192; C. B. Brettell, "Property, Kinship, and Gender: A Mediterranean Perspective", in D. Kertzer, E. Saller (eds.), New Haven, London, 1991, 343.

[55] D. B. Rheubottom, "Dowry and Wedding Celebrations in Yugoslav Macedo nia", in J. L. Comaroff (ed.), *The Meaning of Marriage Payments*, London 1980; J. F. Gossiaux, "Prix de la fiancée et dot dans les villages yugoslaves", in G. Ravis Giordani, *Femmes et patrimonie*, Paris 1987.

[56] R. Vasić, *Pravna obaveznost običaja* [Custom and its Legaly Binding Charac ter], Beograd 1989, II.

[57] *Službeni glasnik SR Srbije* [Official Gazette of Socialist Republic of Serbia], 22/80.

nifies the inevitability of revision of the law based on the obviously changed needs of the society".[58] Regarding the *reasonable custom*, one could ask who shall judge (and who shall have enough authority to do so) the reasonability of the custom. What if there was a *non-reasonable custom which is applied contrary to the law*, signifying the inevitability of revision of such laws that are not applied because of the obviously unchanged concepts and needs of the society? Tasić might answer these questions in a simple manner: "The most important thing is when the people believe in the legitimacy of a rule and live in accordance with that rule (as proven by customs)".[59] Each custom that is applied in the society contrary to the law must have the base of its effectiveness, its social legitimacy, causes of survival and its functions (both latent and manifest),[60] which need not to be logical and understandable to the legislator. The same applies to dowry.

There are few reasons for the survival of dowry in rural areas. More men than women were killed in the World War II. The census of 1960 and 1969 testifies on the rise of the number of women settled at the family property, while the number of men decreases, as well as the number of male agricultural workforce.[61] The surplus of women might have caused the use of dowry, similarly as seen in Serbia after the World War I.

Also, legal limitation at landed property in 1953 has contributed to the dissolution and division of *zadruga* families, as partition of large estates was the only way for family to keep its property due to communist limitations in landed ownership quantity.[62] It has influenced the inheritance system in the villages, thus keeping it closer to the custom than it was the case in the urban areas. The inheritance customs have been contrary the law before,[63] and the SCC did have to differ from its model because of the influence of the traditional concepts[64].

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[58] *Ibid*., 159.

[59] Đ. Tasić, *Uvod u pravne nauke (enciklopedija prava)* [Introduction to Law (En cyclopaedia of Law)], Beograd 1941, 80.

[60] For latent and manifest functions of the bride purchase in Africa, see R. F. Gray, "Sonjo Bride Price and the Question of African 'Wife Purchase'", *American Anthropolo gists* 62/1960, 45 46.

[61] R. First, "Žena u ruralnom i agrarnom razvoju" [Woman in Rural and Agrar Development], *Sociologija sela* [Rural Sociology] 17/1979, 14.

[62] L. Gavrilović, "Običajno regulisanje pravnih odnosa" [Customary Regulation of Legal Relations], *Glasnik Etnografskog muzeja u Beogradu* [Gazette of the Ethnogra phic Museum in Belgrade] 52 53/1989, 66.

[63] V. Bogišić, (1892 1893), 713.

[64] The SCC did not accept the equality of male and female inheritors, nor did it prescribe the dowry as mandatory. Likewise, the SCC kept the notion of large *zadruga* family, which was not mentioned in the ABGB.

Therefore, regardless of the gender equality proclaimed in Yugoslavia after the World War II, "in the reality much is still going on according to the old rules: neither the parents give equal parts of the inheritance to their daughters and sons, nor sisters ask their brothers for the part of inheritance that is rightfully theirs. It is like that in Montenegro, and, according to our research, also in Šumadija and Metohija".[65]

However, this custom has its rational explanation in rural areas, as explained by the same ethnologist: "When the sister waives her part of inheritance to the benefit of her brother, that does not only prove the force of the patriarchal tradition, but also the economic rationality understandable to each peasant, wherein the recognition of equal inheritance rights for each gender means further partition of already diminished properties".[66]

Gender equality has had to wait better times in the rural areas, establishing the legal dualism in marital and inheritance law in Yugoslavia.[67] The most important family goods, including most of immovables and equipment, have been inherited by sons, and parents would give their daughters either dowry or the "right to remain in family house, if they are not married".[68] That way, the daughters would be settled, and deemed to be waived any further inheritance right to the benefit of their brothers, which was frequently court-certified.[69] The jurisprudence of the district court in central Serbian city Aranđelovac serves as a proof that one fifth of the women (sisters) from this region waive their part of inheritance to the benefit of their brothers.[70]

The ordinary people, unlike the law, have found the reason to retain the dowry. Its different functions have made it the integral part of the conduct of the marriage in entire ex-Yugoslavia, from Triglav (Slovenia) to Gevgelia (Macedonia). The explanation of dowry is therefore not to be found in the law, but in the customs and society.[71] Only in last few dec-

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[65] N. F. Pavković, 43.

[66] N. F. Pavković, "Etnološka koncepcija nasleđivanja" [Ethnological Concept of Inheritance], *Etnološke sveske* [Ethnological Volumes] 4/1982, 34.

[67] Lj. Gavrilović, 1989: 65.

[68] N. F. Pavković, (1983), 43.

[69] M. S. Filipović, "Život i običaji narodni u Visočkoj nahiji" [Common Life and Customs in *nahija* of Visoko], *Srpski etnografski zbornik* [Serbian Ethnological Compen dium] 61/1949, 90.

[70] N. F. Pavković, (1982), 34.

[71] Similar situation occurs in Greece: "The fact that the institution of the dowry continues to regulate, to a great extent, the property relations between Greek men and women cannot then be explained in terms of the power of its legal norms; the explanation probably lies in the power of its social norms, which render this institution a highly valued

ades the dowry has been squeezed out, first from the urban, and then from the rural areas. It has become a simple gift to the young couple, caused by the rising costs of living of the modern life, which directs the parents, family and friends to jointly help the establishment of the new family, thus showing the much-needed solidarity.[72] Young couple separated from the parents and trying to establish a family in new home is helped by both sides, and dowry as a gift of bride's parents is complemented with the gift (of same or similar value) that is given by the groom's family.[73]

That way, the people itself changes its customs from within, relating it not to the law, but to the changed circumstances in the society. The society, on its part, contributes to the gender equality, by making the marital givings coming from both sides equal.

Furthermore, the example of dowry proved that, contrary to the dominant understanding on the supremacy of law over custom, dowry that has arisen from the customary law has been more immune and flexible than the dowry that has been introduced to the Serbian legislation as a transplant from Austrian law, as a specific reception of Roman law. Supposedly illogical and awkward legal transplant – *miras* has justified, by the fact of its long existence, the complexity of the customary law that could not be simply wiped out by the legislation of any kind and its declaratory norms, or at least not before the causes of its existence were wiped out first.

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good that each family must at all costs offer to the daughter, and each woman to her husband", J. Lambiri Dimaki, "Dowry in Modern Greece: A Traditional Institution at the Crossroads Between Persistence and Decline", *Social Stratification in Greece 1962 1982*, Athens 1985, 169.

[72] Similar process has been developing in Poland in the XX century: "The dowry requirements that are less and less specified and its differentiation to the elements that must be given by the man and the woman respectively represent the sign of equality of social roles in marriage and decreased importance of economic functions of the family. That fact could be proven by the prolonged economic responsibility of the parents towards the child", Z. Staszczak, "Porodični ritual kao izraz promena običaja na selu" [Family Ritual as the Sign of Change of Customs in Rural Areas], *Promene u tradicionalnom porodičnom životu u Srbiji i Poljskoj* [Changes in Traditional Family Life in Serbia and Poland], Beograd 1982, 31.

[73] V. Stanimirović, *Ustanova miraza u našoj tradicijskoj kulturi* [Concept of Dowry in Our Traditional Culture], Beograd 1998, 64.

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DIE NEUENTSTEHUNG DER MITGIFT BEI SERBEN

Zusammenfassung

Den Slawen war ein der Mitgift (miras) entsprechendes Rechtsinstitut ur sprünglich fremd. Im serbischen Mittelalter findet man die Mitgift unter dem Namen prikija, was auf einen oströmischen Einfluss schließen lässt. Im alten kroatischen Recht entstand dieses Rechtsinstitut ebenso unter dem oströmischen, aber auch unter dem venezianischen und ungarischen Einfluss und wird nach dem romanischen Vor bild als dote bezeichnet.

Unter der osmanischen Herrschaft scheint die Mitgiftgabe in der ehemaligen serbischen Gebieten verschwunden zu sein. Zu ihrer doppelten Wiederbelebung kam es im 19. Jahrhundert, einmal in dem autonomen Gewohnheitsrecht unter der Be zeichnung miraz (türkisch "Erbschaft"), und zweitens im serbischen Zivilgesetzbuch aus dem Jahr 1844. Das letztere wurde allgemein und hinsichtlich der Mitgiftrege lung stark von der romanischen Konzeption des österreichischen ABGB beeinflusst. Freilich wurde im serbischen Zivilgesetzbuch das Wesen der Mitgift anders als im ABGB bestimmt.

Sowohl als Gewohnheit, wie auch als Regelung des (serbischen) Zivilgesetz buches findet man die Mitgift auch nach dem Ersten Weltkrieg in der Rechtswirklich keit des neuentstandenen Serbisch Kroatisch Slowenischen Königreichs Jugoslawi en. Nach dem Zweiten Weltkrieg bemühte sich die kommunistische Regierung die Mitgiftgabe abzuschaffen. Trotzdem blieb die Mitgift auf dem Lande oft eine ver pflichtende Gewohnheit. Der Gesetzgeber müsse sich in der Zukunft bemühen, die aus ideologischen Gründen entstandene Diskrepanz zwischen dem geltenden Recht und der Rechtswirklichkeit abzuschaffen.

Schlüsselwörter: *Mitgift. Legal Transplants. Gewohnheitsrecht.*

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ÜBER DIE BEDEUTUNG DES WORTES *RUKA* (HAND) IM SERBISCHEN MITTELALTERLICHEN RECHT*

Neben seiner Hauptbedeutung hat das serbische Wort Ruka (die Hand als Teil des Körpers) in den serbischen Rechtsquellen des Mittelalters auch die Bedeutung "Garantie" oder "Schutz für eine Person", die vor Gericht gefordert wird. Später nahm das Wort Ruka (Hand) eine neue Bedeutung an: Es bedeutete dann so etwas wie "illoyaler Gerichtschutz" beziehungsweise die Möglichkeit, dass eine vor Gericht geforderte Person vom Gericht freigesprochen werden kann. Um einen derartigen Schutz zu verhindern, wurde eine Geldstrafe statuiert, die gleichfalls Ruka (Hand) genannt wurde. Weil diese Ruka (hier im Sinne von "Schutz") von der Kirche und mächtigen Edelleuten häufig geleistet wurde, hat das auf Dauer die Autorität des Kaisergerichts untergraben. Deswegen hat das Gesetzbuch von Stefan Dušan derar tigen "Schutz" (eben die sog. Ruka) auch kategorisch abgeschafft.

Schlüsselwörter**:** *Ruka (Hand). Schutz. Gericht. Urkunden. Gesetzbuch von Stefan Dušan.*

In den serbischen Rechtsquellen des Mittelalters kann man sehr viele Ausdrücke finden, die man zwar auch heute noch verwendet, aber mit völlig andersartiger Bedeutung. Zum Beispiel bedeutet das Wort *Dug* in der modernen serbischen Sprache *Schuld*, *Obligo*, oder auch *Debet* (*Debitum* im römischen Recht). Im Mittelalter war *Dug* hingegen ein Zivilprozess oder eine strafbare Handlung in der Zuständigkeit eines Gerichts. Mit dem Wort *Krv* (Blut) wurde früher nicht die rote Körperflüssigkeit bezeichnet, sondern eine Körperverletzung mit blutenden Wunden. Auch das Wort *Zabava* (Vergnügen) hatte eine andere Bedeutung als heute, nämlich Störung oder Belästigung. *Kotao* (Kessel) war nicht ein Kes-

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sel, sondern eine Art von Gottesurteil: Wenn jemand des Diebstahls verdächtigt wurde, musste der Beschuldigte in einen mit heißem Wasser gefüllten Kessel greifen und ein Stück Eisen oder Stein herausholen ("Probe des glühenden Eisens und heißen Wassers", *iudicium candentis ferri vel aquae*).[1] Beispiele gibt es viele, doch wollen wir uns in diesem Beitrag an den Begriff *Ruka* halten: Welche Bedeutungen kamen diesem Wort in den mittelalterlichen Rechtsquellen genau zu?

Natürlich findet sich das Wort *Ruka* (Hand) in Quellen auch in seiner Grundbedeutung wieder, nämlich als anatomische Bezeichnung eines Körperteils: Die Hand (med/lat: *manus*) ist das Greifwerkzeug der oberen Extremitäten (Arme) des Menschen. In dieser Bedeutung trifft man das Wort am häufigsten in Dušans Gesetzbuch, insbesondere in den strafrechtlichen Teilen. Dort ist die Abtrennung der Hand als Strafe vorgesehen. In Artikel 21 etwa findet sich die Bestimmung, dass man demjenigen, der einen Orthodoxen an einen Katholiken verkauft, die Zunge und die Hand abschneidet (*i kto proda hristijanina u inu nevernu veru, da mu se ruka odseče i jezik ureže*). Artikel 53 schreibt vor, einem Adeligen, der eine Adelige, und einem Bauern,[2] der eine Bäuerin vergewaltigt hat, beide Hände und die Nase abzuschneiden (*i koji vlastelin uzme vladiku po sile, da mu se obe ruke odseku i nos ureže...ako li* [*sebar*] *svoju drugu uzme po sile, da mu se obe ruke odseku i nos ureže*). Gemäß Artikel 54 wird eine Adelige (= ein Mädchen oder eine Witwe), die ein sexuelles Verhältnis mit einem Angehörigen eines niederen Standes hat, mit dem Abschneiden von Händen und Nase bestraft (*ako li vladika blud učini sa svojim človekom, da im se obema ruke odseku i nos ureže*). Artikel 87 schreibt vor, einem vorsätzlichen Mörder die Hände abzuhacken (*ako li bude prišal nahvalicom, da mu se obe ruce odseku*). In Artikel 94 ist für einen Bauern, der einen Adeligen ermordet, eine Geldstrafe von 300 Perper (*Hyperperum,* byzanthinische Goldmünzen), darüber hinaus aber auch das Abhacken der Hände vorgesehen (*ako li sebar vlastelina ubije, da mu se obe ruce odseku i da plati 300 perper*). Nach Artikel 162 sollen einem Gerichtsbeamten,[3] der das Gerichtsurteil verfälscht hat, beide Hände und

[1] Siehe: *Leksikon srpskog srednjeg veka* [*The Lexicon of Serbian Middle Ages*], (herausgegeben von S. Ćirković und R. Mihaljčić), Beograd 1999, Artikel *Dug* (B. Marković), S. 171 172; *Krv* (B. Marković), S. 325; *Kotao* (S. Ćirković), S. 316 317; *Zabava* (S. Bojanin), S. 201.

[2] Das serbische Wort ist *Sebar,* die Übersetzung des griechischen Wortes ευτελει Rüpel, Lümmel. *Sebar* wird als Gegensatz von *Vlastelin* (Edelmann) gebraucht. Über die Bedeutung des Wortes *Sebar,* siehe S. Novaković, "Die Ausdrücke себрь, поч'тень und мьроп'шина in der altserbischen Übersetzung des Syntagma von M. Blastares", *Archiv für slavische Philologie* IX /1886, S. 521 523.

[3] Das serbische Wort lautet *Pristav* (*Pristaw*). Die Pristawe sind Personen öffentlichen Glaubens, deren mündliche Aussagen den Schutz des öffentlichen Glaubens genießen. In diesem Sinne kann man sagen, dass die Pristawe rechtsbezügliche Tatsachen

die Zunge abgeschnitten werden (*ašte li se obrete jere su inako pretvorili sud, da mu se ruce odseku i jezik ureže*). Artikel 166 beinhaltet die Strafe für einen Betrunkenen, der einem anderen eine schwere Körperverletzung zugefügt hat: Beide Hände sollen ihm abgehackt und die Augen ausgestochen werden (*pijanica otkuda grede i zarve koga, ili poseče, ili okrvavi a ne dosmrti, takovomu pijanici da mu se oko izme i ruka odseče...*).[4]

Im Artikel 119 der Handschrift von Prizren[5] trifft man das Wort *Ruka* demgegenüber mit einer völlig anderen Bedeutung an: Dort ist die Rede vom *Tuch*[6] *der kleinen und großen Hand* (*male i velike ruke*), das die Kaufleute aus Dubrovnik[7] frei und ohne Störung kaufen und in Serbien verkaufen können (*Skrlata i male i velike ruke potrebna trgovci da gredu svobodno bez zabave po zemlji carstva mi, da prodaju i kupuju i trguju kako komu trg donosi*).[8] In den Handschriften der Athos-Gruppe findet sich stattdessen die Formulierung *kleiner und großer Verkauf* (*male i velike kuplje*). Insofern darf man davon ausgehen, dass die Ausdrücke *mala i velika ruka* (*kleine und große Hand*) soviel bedeuten wie "Großhandel" und "Einzelhandel".[9]

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mit der Kraft des öffentlichen Glaubens bezeugen. Siehe M. Kostrenčić, *Fides publica (javna vera) u pravnoj istoriji Srba i Hrvata do kraja XV veka* [Fides publica (öffentlicher Glaube) in der Rechtsgeschichte der Serben und Kroaten bis zum Ende des XV. Jahrhun derts], Beograd 1930 (Zusammenfassung auf Deutsch).

[4] S. Novaković, *Zakonik Stefana Dušana cara srpskog 1349 1354* [Das Gesetz buch des serbischen Zaren Stefan Dušan 1349 1354], Beograd 1898 (Nachdruck Beograd 2004), S. 24 und 160; 46 und 180; 68 und 198; 70 und 202; 128 und 244; 131 und 245. N. Radojčić, *Zakonik cara Stefana Dušana 1349 i 1354* [Das Gesetzbuch des Zaren Ste fan Dušan 1349 und 1354], Beograd 1960, S. 47, 53, 59, 61, 75, 76.

[5] Stadt im Kosovo, wo die Handschrift gefunden wurde.

[6] Das serbische Wort lautet *Skrlat,* vom Lateinischen *scarlatum,* wertvolles Tuch von roter Farbe. In König Vladislavs Vertrag mit Dubrovnik aus dem Jahre 1234 ver spricht der Fürst von Dubrovnik dem serbischen König aus Freundschaft 1000 Perper und 50 Ellen des Tuches (*skrlata čistoga i črlenoga, kogare ti sam gospodin obljubiši*). Später garantiert der serbische König Milutin den Kaufleuten von Dubrovnik in einem weiteren Vertrag aus dem Jahre 1302, dass ihnen niemand ihr Tuch und andere Waren gewaltsam wegnehmen darf (*da im se ne uzima po sile ni skrlato, ni med, ni muka, ni koja kuplja).* S. Novaković, *Zakonski spomenici srpskih država srednjega veka* [Juristische Quellen der serbischen Länder im Mittelalter], Beograd 1912, S. 140 und 162.

[7] Die Verträge mit Dubrovnik stellen eine wichtige Rechtsquelle des mittelalterli chen serbischen Rechts dar, weil sie die Privilegien der Kaufleute aus Dubrovnik regulie ren. Den ersten Vertrag mit Dubrovnik schloss der Dynastiegründer Groß Župan Stefan Nemanja (1168 1196) am 27. September 1186. Nach dem Vorbild Nemanjas schlossen alle serbischen Herrscher Verträge mit Dubrovnik. Siehe S. Šarkić, *Quellen des mittelal terlichen serbischen Rechts, Zbornik Pravnog fakulteta u Zagrebu* 2 (1989), S. 178 179.

[8] S. Novaković, *Zakonik,* S. 92 und 217.

[9] Nach Auffassung A. Solovjevs, *Zakonik cara Stefana Dušana 1349. i 1354. godine* [Das Gesetzbuch des Zaren Stefan Dušan 1349 und 1354], Srpska Akademija

Wieder eine andere Bedeutung findet sich in den Urkunden, die vor dem Gesetzbuch des Zaren Stefan Dušan erlassen wurden: Hier bedeutet das Wort *Ruka* soviel wie "Garantie" oder "Schutz" für eine Person, die vor Gericht gefordert wird.[10] Später nahm das Wort *Ruka* (Hand) auch in diesem Kontext nochmals eine andere Bedeutung an, nämlich "illoyaler Gerichtsschutz" beziehungsweise die Möglichkeit, dass eine Person, die vor Gericht gefordert wurde, vom Gericht freigesprochen werden kann. Solche *Ruka* (Schutz) versuchte die Kirche zu verbieten und es wurde demzufolge eine Geldstrafe eingeführt, die nun gleichfalls *Ruka* genannt wurde. Die Entwicklung des Wortes und seine Bedeutungen sollen im folgenden anhand der genannten Quellen erläutert werden:

Zum ersten Mal trifft man auf das Wort *Ruka* in der goldversiegelten Urkunde (*Chrysoboullon,* χρυσόβουλλον) von Stefan Nemanjić, des ersten serbischen Königs (sog. *Prvovenčani*), die 1220 dem Kloster Žiča übergeben wurde: *Iže pozivajut se pred svetitelje, jere po ruku svetiteljem jemut se, to takove rouke i pečati svetitelie da uzimajut.*[11] Hier bedeutet

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Nauka i Umetnosti, Odeljenje društvenih nauka, Izvori srpskog prava 17, Beograd 1980, S. 275, sind die Handschriften der Athos Gruppe (*kleiner und großer Verkauf, male i ve like kuplje*) präziser formuliert, als die Handschriften der Prizren Gruppe (*kleine und große Hand, male i velike ruke*). Als Argument, dass es in Serbien einen Unterschied zwischen Großhandel und Einzelhandel gab, zitiert Solovjev einen Abschnitt von König Urošs Vertrag mit Dubrovnik aus dem Jahre 1254; dort findet sich die Passage: *i da gredu s velim trgom na trge kralevstva mi, emše od kavada dori do svil; a što e mala kupla, da si ju prodaju po zemli kralevstva mi* (S. Novaković, *Zakonski spomenici,* S. 152). Folgt man S. Novaković, *Zakonik,* S. 218, so bedeutet die Wendung *male i velike ruke* (*kleine und große Hand*) soviel wie "bessere und ärgere Sorte" (*Trgovci koji prodaju skrlat bolje i gore vrste da putuju slobodno bez smetnje po mojoj carskoj zemlji i da prodaju i kupuju slobodno*). N. Radojčić, *Zakonik,* S. 122 übersetzt die Wendung *kleine und große Hand* (*male i velike ruke*) mit "kleine und große notwendige Ware" (*Trgovci i male i velike potrebne robe skrlata da idu bez smetnje po zemli carevoj, da prodaju i da kupuju, kako komu trg donosi*).

[10] Zum Vergleich sei hier auf die Bedeutungen des Wortes *Hand* (*manus*) im römischen Recht verwiesen: In der römischen Rechtsterminologie ist *manus* das Symbol der Macht; es ist in vielen juristischen Ausdrücken anzutreffen. Zum Beispiel gibt es die Ehe unter *manus,* wenn die Frau nach der Heirat unter die Macht (*manus*) ihres Mannes kommt. Unter der *manus* sind auch die Kinder. Die Entlassung des Sohnes oder der Tochter aus der Macht des Vaters (*manus*) nennt man *emancipatio.* Freilassung des Sklaven nannten die Römer *manumissio* (*manus* Hand und *missio* Entlassung). Die älteste Art, Eigentum zu erwerben, war die *mancipatio* (*manus* Hand und *capere* erwerben). Sachen, die im Zuge einer *mancipatio* erworben wurden, nannte man *res mancipi.* Wenn der Ankläger während der Vollstreckung eines Urteils die Hand auf den Anklagten legte, wurde letzterem dadurch die Rechtsfähigkeit aberkannt. Das nannte man *manus iniectio* (*manus* Hand und *iniectio* Legen). Ein Vertrag, bei dem sich eine Seite verpflichtet, im eigenen Namen, aber zu Gunsten einer anderen Person, ein Geschäft abzuschließen, nannte man *mandatum* (*manus* Hand und *datúm* geben).

[11] S. Novaković, *Zakonski spomenici,* S. 575, XXIX. Der Vertrag des Herrschers (*ban*) Stefan von Bosnien mit Dubrovnik am 23. Oktober 1332 spricht von *Ruka* als einem Schutz, um den der Schuldner aus Bosnien beim *ban* ersucht. Der Text lautet: *I ako*

Ruka so viel wie "Schutz" und man betrachtete es als ein Ersuchen um Schutz, wenn man sich an das Kirchengericht wandte. Für einen solchen Schutz verlangte der Bischof eine Gebühr von der Person, die Schutz erbeten hatte.

Neben dem Wort *Ruka* erwähnt die Žiča Urkunde auch *Pečat* (*Stempel*). Auf dieses Wort stößt man in zwei Urkunden, die von König Milutin an die Klöster Svetog Đorđa (Heiliger Georg) bei Skoplje (1300) und Svetog Stefana (Heiliger Stefan) in Banjska (1313–1316) verliehen wurden:[12] Wenn wir die Steuern und Geldstrafen ins Auge fassen, die von der Kirche eingetrieben werden, so finden sich hier *Ruka* und *Pečat* nebeneinander. *Ruka* heißt in diesem Fall "Gerichtssteuer"; sie ist von demjenigen zu bezahlen, der den Gerichtsschutz erbeten hat. *Pečat* meint demgegenüber eine Geldstrafe für jemand, der nicht vor Gericht getreten ist.[13]

In den Urkunden von Gračanica (1321), Dečani (1330) und Htetovo (1337–1366) wird *Ruka* im Zusammenhang mit *Posluh* erwähnt.[14] Weil *Posluh* unter anderem auch die Gerichtsgebühr für die Anhörung eines Zeugen bedeutet,[15] wird *Ruka* in diesen Texten auch als Anklage im Prozess definiert. Dass *Ruka* auch die Geldstrafe für Kirchenleute bezeichnet, die sich gerichtlicher Verfolgung wegen eines von ihnen begangenen Diebstahls zu entziehen versuchten (*...a nikako da nest pogibeli crkovnomu licu ni is tuge zemlie da mu nest ruke*),[16] ergibt sich aus einer Urkunde des Königs Milutin im Kloster Svetog Đorđa: *Ni udava opadanija pred vladalci, ni ruke, ni pečati, ni otboja, ni prestoja, na vsaku globu da uzima crkv malu i veliku.*[17] In derselben Urkunde, aber an anderer Stelle, steht *Ruka* neben *Odboj*: Das ist eine Strafe, die bei Widerstand gegen die Vollstreckung eines gerichtlichen Urteils ausgesprochen wurde.[18] Ein interessantes Beispiel hierzu findet sich in einer für das Kloster Svete Bogorodice in Htetovo von König Dušan und seinem Sohn Uroš ausgestellten Urkunde: Im Artikel 23 steht *Ruka* der Geldstrafe gegenüber: *I što se pre crkovni ljudije na dvoru kraljevstva mi, ili pred sudija-*

Bošnjanin bude dužan, a pobegne iz Bosne z dugom, da mu nie viere ni ruke od gospo dina bana (*Zakonski spomenici,* S. 165, VIII).

12 *Ibid*., S. 609, VII; 616, XL; 628, LXXVI.

13 T. Taranovski, *Istorija srpskog prava u nemanjićkoj državi, IV deo, Istorija sud skog uređenja i postupka* [Geschichte des serbischen Rechts in dem Staat Nemanjićs, der IV. Teil, Geschichte der Gerichte und Prozesse], Beograd 1935, S. 186 187 *Klasici ju goslovenskog prava,* knjiga 12, Beograd 1966, S. 744.

14 S. Novaković, *Zakonski spomenici,* S. 636, XXIX XXX; 652, XLVI; 659, XXI II; 671, X.

15 Siehe Artikel *Posluh* (B. Marković) in *The Lexicon of Serbian Middle Ages,* S. 561.

16 S. Novaković, *Zakonski spomenici,* S. 619, XL.

17 Ibid. S. 609, VII.

18 Ibid. S. 614, XXXII (*ni ruku, ni odboi*).

mi, ili pred inemi vlasmi, ili je ruka, ili je globa koja libo, da uzima vse crkov, rekše igumen.[19] Aber bereits in Artikel 26 derselben Urkunde wird *Ruka* zu den Geldstrafen gezählt; dem Wort kommen also beide Bedeutungen zu.[20]

Weil *Ruka* (Hand [hier: Schutz]) von der Kirche und mächtigen Edelleuten gewährt wurde, hat diese Institution allmählich die Autorität des Kaisergerichts untergraben. Im Gesetzbuch von Stefan Dušan wurde dieser "Schutz" (sog. *Ruka*) daher ohne Ausnahme abgeschafft (Artikel 84). Im Artikel 84 besteht das Gesetzbuch vielmehr auf einem Urteil nach dem Gesetz.[21]

Artikel 92 von Dušans Gesetzbuch verwendet das Verb *zaručiti*, abgeleitet vom Wort *Ruka*, in der Bedeutung von "garantieren" oder "bewahren".[22]

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ON DIFFERENT MEANINGS OF THE WORD *RUKA* (HAND) IN SERBIAN MEDIEVAL LAW

Summary

Serbian word ruka literally means hand, i.e. part of the human arm beyond the wrist. The word could be found in its basic meaning in the Law Code of Stefan Dušan, in the articles ordering the cutting off of hands, as a corporal punishment for different crimes. But, in some charters issued before the Code, ruka means a guaran tor when the first trial fails to reach a decision, in which case recourse was had to compurgators on oath.

Key words: *Ruka (Hand). Protection. Court. Charters. Trial. Dušan's Law Code.*

[19] Ibid. S. 659, XXIII.

[20] Ibid. S. 659 660, XXVI: *I što se pre crkovni ljudije na dvoru kraljevstva mi ili pred inemi sudijami, ili pred inemi vladuštimi, malimi i velikimi, v oblasti kraljevstva mi, što se čini globa na crkovnih ljudeh, mala i velikaa, vse da uzima svetaja crkvi, ili je kraga, ili je ruka, ili je otboj, ili je udava, ili je prestoj, vse da je crkovno.*

[21] *Ruke na sude da nest... takmo da se sude po zakonu.* S. Novaković, *Zakonik,* S. 66 und 196; N. Radojčić, *Zakonik, Zakonik,* S. 59. Siehe Artikel *Ruka* (S. Šarkić) in *The Lexicon of Serbian Middle Ages,* S. 634.

[22] S. Novaković, *Zakonik,* S. 72 und 201: *Ako kto pozna lice pod človekom, a bude gore, u pustoši, da ga povede u predprvnje selo i zaruči selu i pozove da ga dade pred sudijami; ako li ga ne da selo pred sudijami, što pokaže sud, da plati selo to zi.*

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THE KOSOVO ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE

The author claims that the ICJ issued a very narrow Advisory Opinion regarding the unilateral declaration of independence, in respect of Kosovo finding that the making of the declaration was not in itself an act contrary to international law. He also stresses that, at the same time, the ICJ did not find that Kosovo had a right to secede, that Kosovo's declaration was legally effective, that the attempted secession was successful, or that Kosovo is otherwise an independent state. His opinion is that this finding merely cuts off one possible avenue for arguing that the attempted secession is unlawful, and analyses the manner in which the ICJ navigated through the political morass by recasting the question posed by the UN General Assembly.

Key words: *International Court of Justice. Serbia. Kosovo Independence. Lotus Principle.*

As expected, the International Court of Justice issued a very narrow Advisory Opinion in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*. The Court simply found that the making of the declaration was not itself an act contrary to international law. Similarly, if I were to stand in my living room and declare it to be an independent state, I would have violated no rule of international law. Even if I were to broadcast that declaration to the world, it would still not be unlawful. It would also not have any legal effect.

It is essential to clarify what the Court did not find. The Court did not find that Kosovo had a right to secede. It did not find that Kosovo's declaration was legally effective, that the attempted secession was successful, or that Kosovo is otherwise an independent state. It did not find that other states acted lawfully in recognizing Kosovo as an independent

State. Indeed, the Opinion does not in any way support Kosovo statehood. It merely cuts off one possible avenue for arguing that the attempted secession is unlawful.

As for what the Court did find, there are few noteworthy legal points. More interesting is the manner in which the Court navigated through the political morass by recasting the question posed by the General Assembly.

The first section of this article provides an analysis of the Court's noteworthy legal findings. The second section examines the Court's reconstruction of the General Assembly's request for an advisory opinion. The third section analyzes Judge Simma's claim that the Court embraced the so-called *Lotus* principle. The article concludes with observations about the proper role of the Court, and whether the Court abdicated its responsibilities in this instance.

1. NOTEWORTHY LEGAL FINDINGS

After satisfying itself of jurisdiction, and declining to exercise its discretion to refrain from rendering an opinion,[1] the Court turned to the question posed and gave it a narrow read. It interpreted the question as not including an examination of the legal consequences of the declaration, such as the issue of whether Kosovo had achieved statehood or "the validity[2] or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."

The Court then proceeded to assess whether the making of the declaration was in violation of general international law or of the *lex specialis* of Security Council Resolution 1244 and the Constitutional Framework promulgated pursuant thereto.

1.1. General International Law

In its analysis of general international law, the Court reaffirmed the traditional understanding of the principle of territorial integrity as operating between states. According to the Court, the scope of this principle is "confined to the sphere of relations between States".[3] Thus, it does not

[1] This is unsurprising, as the Court has never declined to render an opinion where it has found that a request had been properly made.

[2] Interestingly, the Court does not refer here to the "legality" of acts of recogni tion, but merely to their "validity or legal effects."

[3] Para. 80.

bind non-state actors, in particular secession seeking groups. According to this line of reasoning, any general legal prohibition on secession arises, if at all, under domestic law.

As there is no general prohibition on declaring independence, the Court opines that there is therefore no need to examine whether there is a right to secede in this case. It thus avoids tackling the issue of self-determination. Given the state of international law on this issue, it was best avoided. More guidance is required from political organs to give this right legal content. At its present stage of development, the Court would likely have found it to be *non liquet*.

1.2. Security Council Resolution 1244 and the Constitutional Framework

Before assessing the legality of the declaration of independence with the *lex specialis* of Resolution 1244 and "measures adopted thereunder", the Court addresses the issue of the identity of the authors of the declaration. It finds that the authors of the declaration were not, contrary to the apparent assumption underlying the question posed by the General Assembly, the Provisional Institutions of Self-Government (PISG), but rather were "persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration".[4] This of course makes its analysis much simpler.

The Court then concludes that as these "persons" were not legally constrained by Resolution 1244 or measures adopted thereunder, their making of a declaration of independence was not in violation of this *lex specialis*. The Court also points out that Resolution 1244 was focused on process, and not outcome, and that, as such, independence was not precluded by Resolution 1244.

In the course of its analysis, the Court makes a few interesting observations. The first is its affirmation that the Security Council has the power to legally bind non-state actors. The second is its finding that UNMIK Regulations promulgated by the Special Representative of the Secretary General, and the Constitutional Framework in particular, while operating within the internal legal system of Kosovo, have an international character, and thus comprise part of the international law applicable in this context.

[4] Para. 109.

2. RECASTING THE QUESTION

Perhaps the most interesting facet of the Opinion is the manner in which the Court recasts the question posed by the General Assembly.

After affirming its right to reformulate the scope of questions posed by the General Assembly, the Court expressly declines to do so.[5] Ironically, the Court then proceeds to do just that.

The question posed by the General Assembly was: "Is the unilateral declaration by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?". It would seem that the one thing the General Assembly did make clear was the lawfulness of whose conduct it sought to be assessed.

Nonetheless, the Court did not consider that "the General Assembly intended to restrict the Court's freedom to determine this issue [i.e. the identity of the authors of the declaration] for itself".[6] That may well be true. But if that was the case, then perhaps the Court's analysis should have stopped as soon as it determined that the authors were other than those expressly inquired about by the General Assembly.

Further on in the opinion, the Court addresses the question of who authored the declaration. Its analysis is suspect. It finds, essentially, that since the PISG were not empowered to declare independence, they could not have been acting in the capacity of the PISG when they did so. This runs counter to the general principle of law, equally recognized in international law,[7] that an organ may commit *ultra vires* conduct while still acting in official capacity.

The Court notes that the authors were instead "persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration". By what process did they become "representatives of the people of Kosovo"? These representatives identified themselves in the declaration as "democratically-elected

[5] Para. 51.

[6] Para. 53. It is also interesting to note that the case caption used by the ICJ changed with the rendering of the opinion. The caption on the opinion is "Accordance with international law of the unilateral declaration of independence in respect of Koso vo". On all of its previous documentation, including its Order of 17 October 2008, the caption reads, "Accordance with international law of the unilateral declaration of inde pendence by the Provisional Institutions of Self Government of Kosovo". Indeed, in paragraph 4 of that same order the Court "tak[es] account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self Government of Ko sovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion."

[7] Indeed, the logic of state responsibility rests upon this notion. See, e.g., article 7 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts.

leaders", elected to positions in the PISG pursuant to the legal framework put in place by UNMIK.

It could perhaps be argued that these individual acted simultaneously in more than one capacity, but to say that they were not acting at all in the capacity of the PISG strains logic. Perhaps most unfortunately is that even had the Court acknowledged that the authors were at least partially acting as the PISG, it could still have reached the same result – that the making of the declaration was not unlawful.[8]

3. THE *LOTUS* PRINCIPLE

One other aspect of the Opinion is worth mentioning – the extent to which the Court embraced the *Lotus* principle.

According to the Separate Opinion of Judge Simma, "The Court's reading of the General Assembly's question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called Lotus principle".[9] However, it is far from clear that the Court applied the *Lotus* principle.

First, in its strict construction, that "restrictions upon the independence of states cannot ... be presumed," the *Lotus* principle is applicable only to states, and thus is not implicated by the conduct of non-state actors. However, read more broadly, the *Lotus* principle stands for the proposition that the only international law that exists is that which is positively created by states, and that in the absence of a rule to the contrary, conduct is permitted (whether of a state or non-state actor).

Did the Court apply this broader construction of the *Lotus* principle? It is more likely that the Court simply interpreted the General Assembly request as disposing of the issue. The Court read the question of whether the making of the declaration was in accordance with international law as equivalent to the question of whether it was in violation of a rule of international law. This is a reasonable interpretation of the question asked, particularly in light of the Court's prior practice of avoiding addressing head-on the *Lotus* question. Indeed, this interpretation comports with the presumed intent of the General Assembly. If the General Assembly wanted the Court to address the *Lotus* question, it could have asked the question explicitly. The Court is probably also aware that it is highly unlikely that the General Assembly would want the Court to opine on the *Lotus* issue.

[8] J. Cerone, "The Legality and Legal Effect of Kosovo's Purported Secession and Ensuing Acts of Recognition," *Annals of the Faculty of Law in Belgrade / Belgrade Law Review* 3/2008, 60 71.

[9] Separate Opinion of Judge Simma, para. 8.

4. CONCLUSION: THE PROPER ROLE OF THE COURT

This highly sensitive case subjected the Court to strong political forces. The process of requesting the opinion was heavily negotiated, and dozens of states made submissions to the Court on the question. Was the question poorly formulated? Presumably states knew that they were asking a very narrow question, and perhaps all states' political interests were ultimately served by this formulation.[10]

It is beyond question that the Court is used by states as a policy tool. This is unproblematic as far as it goes. It is up to the Court to ensure the integrity of its process. Its function is adjudication, and the Court must not allow this function to be inappropriately influence by politics. Indeed, the Court goes out of its way to expressly affirm this responsibility. Whether it succeeds in fulfilling this responsibility is a matter of some debate.

Concerns have already been raised about the potential effects of the Opinion on separatist movements around the globe. Should the Opinion have any knock-on effect? No. It states nothing unusual; virtually nothing has changed as a legal matter. Will it have a knock-on effect? That depends on how the decision is spun by the various stake-holders.

If the Opinion simply maintains the legal *status quo* on the question of Kosovo's independence, does this mean that the Court has in some sense abdicated its responsibility? The Court's restrictive interpretation of the question posed, and its preservation of the legal status quo, is appropriate in this area of the law – one which is driven primarily by political reality. If the overwhelming majority of states endorse Kosovo's accession to sovereignty, its factual independence will be given the imprimatur of international law. That is not to say that the Court should eschew matters that are politically sensitive. It has, rightfully, consistently rejected such arguments. But where, as here, the law leaves its conclusions to the political process, the Court should sit back and allow that process to come to resolution.

[10] It is not uncommon for states to have recourse to the ICJ for political cover for decisions that would be politically unpopular with their domestic constituencies.

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HABEAS CORPUS IN THE AGE OF GUANTÁNAMO

The purpose of the article is to examine the meaning of habeas corpus in the age of the war on terror and the detention camps at Guantanamo Bay. Since the war on terror was declared in 2001, the writ has been invoked from quarters not nor mally considered within the federal courts' domain. In this article, I set out to do two things: first, I provide an overview of the writ's history in the United States, and ex plain its connection to federalism and unlawful executive detention. I then set out to bridge the two meanings of habeas corpus. Second, then, I examine the cases that came out of Guantanamo Bay, and explain their connection to the writ's true mean ing. In conclusion, I find that there is no discrepancy between habeas as a tool of liberty for the guilty and for the detained.

Key words: *Guantanamo Camps. Habeas Corpus. Terrorism. Unlawful De tention.*

1. WRIT'S HISTORY IN THE UNITED STATES

The writ of habeas corpus "provides a mode for the redress of denials of due process of law."[1] In more prosaic terms, under United States federal law, the writ allows state prisoners, following conviction, to appeal to a federal district court and contest the reasons for the judgment.[2] The law on habeas corpus commands courts to act "within their respective jurisdictions," but is also "directed to the person having custody of the person detained."[3] In other words, a federal habeas court must have

[1] *Fay v. Noia*, 372 U.S. 391, 402 (1963).

[2] The Habeas Corpus Act of Feb 5, 1867, ch. 28 14 Stat. 385.

[3] 28 U.S.C. secs. 2241(a), 2243 (2000).

jurisdiction over a case to hear it and decide on the merits. But if a federal court finds for the defendant, the power of the federal court is supreme: the case is either sent back to the state court in accordance with the court's ruling, or the prisoner is set free.

Under English common law practice that held constant in the U.S. until the middle of the nineteenth century, habeas corpus was used by those held in jail prior to conviction.[4] After the Civil War, however, the writ has been almost exclusively a post-conviction remedy. A person, duly convicted by a state court, can petition a federal court on a writ of habeas corpus for relief. And here lies the problem. As the United States has a dual system of criminal justice, state and federal, the writ's power to reach into a state court's decision is a cause for concern among state judges because a granted federal writ means that the state court erred on an important constitutional matter. A convicted murderer could go free. Rather than extending power over state court decisions, federal courts have largely refrained from issuing habeas corpus to prisoners who have not exhausted all possible state remedies before applying for the writ in a federal court. "It would be unseemly our in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."[5]

Because of the inherent tension between the states and the federal government regarding the administration of criminal justice, the Supreme Court has also preferred to emphasize deference to state court decisions in habeas corpus cases, while preserving in principle the federal government's power to set criminals free, as the circumstances demand. Although concerns over federalism and, more broadly, criminal justice policy, have long constrained the writ's reach in the U.S., as the conception of due process widened in the twentieth century to include the rights of the accused at every stage of the administration of criminal justice, the Supreme Court increasingly came to see the limitations on the writ of habeas corpus as less important than the application of justice to one who was unlawfully confined. As Justice Felix Frankfurter wrote in *Brown* v. *Allen* (1953), "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."[6]

The purpose of the article is to examine the writ's meaning in the age of the war on terror and during a time when prisoners of war are held, without trial, at Guantanamo Bay, Cuba. Since President George W. Bush

[4] See *Harris* v. *Nelson*, 394 U.S. 286 (1969); *Ex parte Royall*, 117 U.S. 241 (1886); W. Duker, *A Constitutional History of Habeas Corpus*, Greenwood Press, West port 1980.

[5] *Darr* v. *Burford*, 339 U.S. 200, 204 (1950).

[6] *Brown* v. *Allen*, 344 U.S. 443 (1953).

declared a "war on terror," following the attack against the United States on September 11, 2001, the writ has been invoked from quarters not normally considered within the federal courts' domain. Habeas corpus in the United States is largely a tool of the criminal justice system, and involved in questions of federal-state criminal justice. Since 9/11, however, the writ has been called into use from those being detained in Guantanamo Bay, Cuba, claiming unlawful executive detention. Can these two forms of habeas corpus be reconciled?

In this article, I set out to do two things: first, I provide an overview of the writ's history in the United States, and explain its connection to federalism. I also highlight the writ's connection to executive power.[7] At the writ's core is a check on unlawful executive detention. But this is not how it is presented. It is, rather, seen by critics as a get out of jail card for convicted felons.[8] How, then to make the connection between a tool of criminal justice and a method of release from Guantanamo Bay, Cuba? Second, I examine the cases that came out of Guantanamo Bay, and explain their connection to the writ's true meaning. In conclusion, I find that there is no discrepancy between habeas as a tool of liberty for the guilty and for the detained.

The Constitution imposes certain limitations on federal power that countries with more unified systems of government do not have. In particular, the first ten amendments to the United States Constitution did not, from their inception, apply to the states.[9] This meant that the prohibitions mentioned (protection of counsel; the necessity of warrants, and the like) could only be enforced against the federal government. The states were free, within the boundaries of their own constitutions, to set the limits on the administration of justice. Indeed, even after passage of the Fourteenth Amendment, in 1868, which states that "No state shall deny to any person life, liberty, and property without due process of law," the federal government's reach into the states' administration of criminal justice remained circumscribed by policy matters. In the post-war environment of comity between levels of government, the Supreme Court coupled a regard for the states' abilities to govern crime in a manner complicit with a regard for individual liberties and good sense with an ideological understanding of the limitations on the federal government's powers in areas that it had not been given explicit grants of power under the Constitution, and maintained that the meaning of due process was different from the content of

[7] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 218 219 (1953) (dis senting opinion); G. Neumann, "Anomalous Zones," *Stanford Law Review* 48/1996, 1197 1234.

[8] R. Posner, *Rethinking the Fourth Amendment*, 1981 Supreme Court Review 49 (1982).

[9] *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

the protections outlined in the Bill of Rights.[10] In the words of Justice Stanley Reed, "the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states."[11]

It is clear that both the framers of the Constitution and the justices of the Supreme Court (both past and present) feared the writ's effects on the states' criminal procedures. Consequently, they chose to filter habeas corpus through the federal structure of the new American state. Notably, the Judiciary Act of 1789[12] prohibited state prisoners from petitioning federal courts for habeas corpus.[13] However, following a series of antebellum sectional crises in which various states arrested (or threatened to arrest) federal revenue officers (in 1815 and 1833), a foreign national (1842), and military personnel (1863), Congress extended federal habeas corpus to the state level.[14] Although explicitly temporary in nature, and designed to protect federal officers not state convicts, these various removal and habeas corpus statutes created "a pathway to the states,"[15] that eased passage of the Habeas Corpus Act of 1867.

The 1867 Habeas Corpus Act states, in part, that:

> the several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law [the 1789 act], shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.[16]

The 1867 Act stands as an example of post-Civil War statemaking. With a statutory command to the federal courts to "have the body" of any prisoner seeking relief, Congress ignored state sovereignty concerns regarding finality of punishment and codified the budding relationship prisoners would have with the national judiciary under the fourteenth amendment.

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[10] *Palko* v. *Connecticut*, 302 U.S. 319 (1937).

[11] *Adamson* v. *California*, 332 U.S. 46, 51 (1947).

[12] Judiciary Act of 1789, Ch. 20, 1 Stat. 73 93 (1789).

[13] *INS* v. *St. Cyr*, 533 U.S. 289 (2001).

[14] The acts in question: Act of Feb. 4, 1815 (removal), c. 31, 3 Stat. 105; Act of March 3, 1815 (same), c. 94, 3 Stat. 231; Act of March 3, 1817 (same), c. 109, 3 Stat. 396; Act of March 2, 1833 (removal and habeas corpus), c. 57, 4 Stat. 632; Act of Aug. 23, 1842 (habeas corpus), c. 188, 5 Stat. 516; Act of March 3, 1863 (habeas corpus), c. 81, 12 Stat. 755; Act of March 7, 1864 (same), c. 20, 13 Stat. 14; Act of Jan. 13, 1866 (both), c. 184 Stat. 98; Act of May 11, 1866 (both), c. 80, 14 Stat. 46; Act of Feb. 5, 1867 (habeas corpus), c. 27, 14 Stat. 385. The debates in 1863 specifically refer to the 1815 removal statute. *Congressional Globe*, 37th Congress, 3d session (Jan. 27, 1863), p. 534.

[15] P. Lucie, *Freedom and Federalism: Congress and Courts, 1861 1866,* Garland Press, New York 1986, 156.

[16] The Habeas Corpus Act of Feb 5, 1867, ch. 28 14 Stat. 385. Italics added.

Despite Congress' boldness in the face of a history of state control over punishment, the wording of the 1867 Habeas Act does not establish a bright-line relationship between the incarcerated and the federal courts that bypasses the state court system.[17] The Supreme Court in the post-Reconstruction era (i.e., after 1877) ignored the nationalist intent of the legislation and focused on the writ's common law legacy in the US.[18] The problem with the 1867 Habeas Act is that, if used as a postconviction remedy, the determination of equitable relief falls not to Congress or to the states but to Supreme Court justices and federal court judges, who presumably are free to investigate the prisoner's complaints and set him free. Crime is no longer a local matter, but a constitutional question, despite the legal fiction that habeas relief does not overturn state court decisions; it releases individuals from unlawful confinement. But the idea persists that the decision to release a prisoner on habeas corpus upsets the federal-state balance cultivated over time by congressional leaders and Supreme Court justices.[19]

Rather than accept the burden of acting like a clemency commission or a supervisor of state court criminal justice decisions, the Supreme Court, in its first important habeas corpus decision after Reconstruction ended, held in *Ex parte Royall* (1886) that any constitutional infraction of a defendant's rights (such as they were in the nineteenth century) could be dealt with by state courts, in an effort to nurture federal-state comity relations in the post-war period.[20] Apart from the stated belief that it was best not to meddle in the states' affairs, a policy of deference on criminal matters would provide the federal courts with sufficient time to deal with property claims arising from the Supreme Court's decisions equating property with persons.[21] In short, in *Royall*, the Court considered federal review of state prisoners' claims wasteful of important (and limited) judicial resources, as well as constitutionally unnecessary, given the dual nature of the judicial system and the historic reliance on state courts to dispense justice to criminals. The post-Reconstruction Supreme Court considered state habeas petitioners convicted criminals, and therefore were reluctant to release prisoners found guilty of crimes, ranging from forgery to murder.[22]

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[17] *Wade* v. *Mayo*, 334 U.S. 672 (1948).

[18] D. Oaks, "Habeas Corpus in the States 1776 1865," *University of Chicago Law Review* 32(2)/1965, 243 288; M. Arkin, "The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners," *Tulane Law Review* 70/1995, 1 73.

[19] *Darr* v. *Burford*, 339 U.S. 200 (1950); P. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," *Harvard Law Review* 76/1963, 441 528.

[20] *Royall* at 248 249.

[21] *County of Santa Clara* v. *Southern Pacific Railroad*, 118 U.S. 394 (1886).

[22] *In re Wood*, 140 U.S. 278 (1890); *In re Shibuya Jugiro*, 140 U.S. 291 (1891); *In re Frederich*, 149 U.S. 70 (1893); *Andrews* v. *Swarts*, 156 U.S. 272 (1894).

> [A] habeas corpus proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or a sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment of sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's exceeding its jurisdiction.[23]

From the end of Reconstruction to the middle of the twentieth century, purposeful congressional forbearance from civil rights violations at the state level, and pressing property cases at the national, allowed the Supreme Court to give a narrow and procedural meaning to the Due Process Clause of the Fourteenth Amendment in criminal matters as well as to habeas corpus.[24] The Supreme Court's extension of property rights under the Fourteenth Amendment shaped habeas's development in the nineteenth and early twentieth centuries by squeezing out civil rights claims in the federal judiciary.[25] The Court's propertarian understanding of due process rights created an underlying pattern of chaos within American civil rights development.[26] Throughout the nineteenth century, and well into the twentieth, claims of constitutionally questionable arrests, confessions, and trials went unheeded in the state appellate courts while the federal judiciary's defense of property regularized the American state.[27]

Slowly, however, the idea of selectively incorporating the Bill of Rights showed signs of strain.[28] In *Palko* v. *Connecticut*, Justice Benjamin Cardozo held that, in a case involving double jeopardy, the Fourteenth Amendment's Due Process Clause protected only those rights that were "of the very essence of a scheme of ordered liberty."[29] The Court refused to incorporate the Fifth Amendment's Due Process Clause into the Fourteenth Amendment. But it opened the door to reconsidering the restrictions on incorporating the Bill of Rights, perhaps with a different calculus than sheer imposition of will.[30] Indeed, as it became more than apparent by the 1930s and 1940s that the states could not contain the

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[23] *In re Friedrich* at 76.

[24] *Hurtado* v. *California*, 110 U.S. 516 (1884); *In re Kemmler*, 136 U.S. 436 (1890); *Twining* v. *New Jersey*, 211 U.S. 78 (1908).

[25] *Hale* v. *Henkel*, 201 U.S. 43 (1906).

[26] *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897).

[27] *Wabash, St. Louis and Pacific Railway Co. v. Illinois, 188 U.S. 557 (1886); Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940)*; J. Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madiso nian Framework and Its Legacy,* University of Chicago Press Chicago, 1994, 8.

[28] *C. Fairman,* "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review* 2/1949, 5 139.

[29] *Palko* at 325.

[30] *Adamson* v. *California* at 70 71 (J. Black, dissenting).

worst impulses of majority enmity toward minorities,[31] and the content and meaning of ordered liberty underwent a rethinking.

The Court incorporated the First Amendment's speech and association clauses early in the twentieth century.[32] During the 1960s, the Supreme Court, under Chief Justice Earl Warren, embarked on a program to expand due process for criminal defendants. In short order, the Court expanded the rights of the accused regarding warrant requirements for searches,[33] protections against cruel and unusual punishment,[34] the right to counsel,[35] and the right to remain silent.[36] "By reinterpreting the major provisions of the Bill of Rights to comply with the due process demands of 'fundamental fairness,' the Court's criminal justice cases created a constitutional revolution in due process."[37] But this revolution, precisely because it was a radical break with the constitutional past, came at a cost.

By the end of the decade, Justice Hugo Black, writing in dissent in *Kaufman* v. *U.S*., expressed his concern that "not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus."[38] That is, the fact that habeas corpus, as a postconviction remedy for unlawful confinement, could, in principle, set a convicted criminal free on something less than a substantive claim of innocence (a faulty jury pool, or a less-than-stellar defense by counsel), caused the federal judiciary to rethink the effects of a liberal habeas corpus policy that interfered with the administration of criminal justice at the state level. In the decades that followed, the Supreme Court, under Chief Justices Warren Burger and William Rehnquist, returned to the themes of the nineteenth century that the Warren Court had abandoned: deference to state court convictions, barring substantive claims of procedural violations. In the name of federalism, or what the Court called "federal-state comity," the Supreme Court largely rescinded the Warren Court's expansive reading of habeas corpus.[39]

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[31] *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152 (1944).

[32] *Gitlow* v. *New York*, 268 US 652 (1925); *Near* v. *Minnesota*, 283 US 697 (1931); *Cantwell* v. *Connecticut*, 310 US 296 (1940).

[33] *Mapp* v. *Ohio*, 367 US. 643 (1961).

[34] *Robinson* v. *California*, 370 U.S. 660 (1962).

[35] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[36] *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Griffin* v. *California*, 380 U.S. 609 (1965).

[37] C. Federman, *The Body and the State: Habeas Corpus and American Jurisprudence*, State University of New York, Albany 2006, 100; *Brown* v. *Mississippi* at 285.

[38] *Kaufman* v. *United States*, 394 U.S. 217 (1969).

[39] *Stone* v. *Powell*, 428 U.S. 465 (1976); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Rose* v. *Lundy*, 455 U.S. 509 (1982); *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Teague* v. *Lane*,

The meaning and extent of the writ of habeas corpus belongs to the judiciary. But the federal judiciary is unelected, and as such, poses certain problems for democratic theory. Habeas corpus allows life-tenured judges to overturn the decision of twelve jurors, who, presumably, understand crime from a far different perspective than a life-tenured judge. Congress, the most democratic of the branches of government, has largely refrained from interfering with habeas corpus, but in the late 1940s it did so, amid criticisms from state judges that the increasing application of habeas corpus to cases contesting confinement interfered with the states' administration of criminal justice.[40] In 1948, Congress passed an act to enforce a Supreme Court-created rule that forced all state prisoners seeking habeas relief first to exhaust all possible state remedies, before pursuing federal habeas corpus.[41] After the 1948 reforms, there were further attempts to restrict the writ's reach, but all failed to pass either one house of Congress or both. In 1996, however, one year after the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, was destroyed by a car bomb in a terrorist attack, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA).[42] Titles II through VIII address various aspects of domestic and international terrorism. Title I is concerned with habeas corpus and the rights of prisoners to attack their convictions in federal courts, an issue that had no relation to the events in Oklahoma. The AEDPA created a number of difficulties for state prisoners seeking federal relief.[43] Prior to the passage of AEDPA, state prisoners seeking to attack their convictions in federal courts on habeas corpus were allowed to do so without time limits. The AEDPA, however, contains a one-year time limit on filing a writ, starting from the date of conviction. Prior to AEDPA, habeas petitioners could file multiple habeas writs over time. Now, state prisoners have a much more difficult time filing more than one writ.[44] Furthermore, under the AEDPA, a federal judge must dismiss any claim previously made in a prior petition; new claims are subject to a "clear and convincing evidence" standard that the claims can set the prisoner free.[45] The AEDPA also greatly restricts the conditions under which a federal

489 U.S. 288 (1989).

[40] *Brown* at 498; J. Parker, "Limiting the Abuse of Habeas Corpus", Federal Rules Decisions 8:171 (1948); W. Speck, "Statistics on Federal Habeas Corpus," *Ohio State Law Journal* 10/1944, 337.

[41] *Ex parte Hawk*, 321 U.S. 114 (1944).

[42] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104 132, 110 Stat. 1214.

[43] L. Adelman, "The Great Writ Diminished," *New England Journal on Criminal and Civil Confinement*," 35/2009, 3 36.

[44] The Habeas Corpus Statute is codified at: 28 U.S.C. sections 2241 2254. See, 28 U.S.C. 2244(d)(1) and 2244(d)(1)(A).

[45] 22449b)(2)(A), (B)(i) (ii).

habeas court can convene an evidentiary hearing, as well as altering substantially the exhaustion requirement. Finally, the AEDPA limits the reasons for granting the writ.[46]

The destruction of the Murrah Federal Building gave Congress the impetus it needed to restrict the right of prisoners under the guise of limiting the ability of terrorists to attack their convictions in the federal courts.[47] In many ways, the AEDPA tracked the Supreme Court's most restrictive decisions regarding habeas corpus from the 1970s onward. But by mingling the rights of prisoners with terrorism concerns, the AEDPA also brought to light the historic aspects of habeas corpus – that the writ is not only about "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."[48] Habeas corpus is also a writ that protects against all manner of arbitrary arrest, beginning with, most basically, the right of the executive to hold those who he deems pose a threat to the safety and security of the nation. The writ, in other words, is a check not on executive power only, but on any arbitrary use of power by an executive, whether it is the cop on the street, the state prosecutor, or the president of the United States. The kind of history that encompasses the writ's largest purview, I suggest, leads to the conclusion that habeas is only partly about rights, but mostly about power – institutional power – the power, that is, to decide "who has the body".

The purpose of the preceding was to lay out the significant factors that habeas corpus has labored under as it made its way to Guantanamo Bay, Cuba, following the creation in 2002, by the United States, of a penal colony for terrorists that was intentionally designed to prevent prisoners from obtaining judicial relief.[49] Although used mainly today by state prisoners alleging constitutional violations in the administration of criminal justice, habeas corpus derives its power from attacking unlawful executive power, in whatever guise it assumes. At bottom, what is the administration of criminal justice but executive power? The leap from a tool of state prisoners seeking to deny final judgment to a way for suspected terrorists to attack their detention by the full force of the American army is not as large as it appears.

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[46] 2254(e)(2) and 2 3; and 2254(d)(1) (2).

[47] S. Labaton, "New Limits on Prisoner Appeals: Major Shift of Power from Unit ed States to states," *New York Times*, April 19, 1996, B8; M. Wines, G.O.P. Has Tentative Deal on Terrorism Bill," *New York Times*, April 13, 1996, 10.

[48] *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

[49] J. Yoo, *War By Other Means: An Insider's Account of the War on Terror*, Atlan tic Monthly Press, New York 2006.

2. HABEAS CORPUS AND THE WAR ON TERRORISM

On October 26, 2001, just six weeks after the events of September 11, 2001, President George W. Bush signed the USA PATRIOT ACT, which apart from its antiterrorism provisions also restricts the writ of habeas corpus for resident aliens.[50] The thrust of the act was to plug up the holes in the assortment of anti-terrorist laws Congress had passed in the previous decade, including AEDPA. Section 411 of the Patriot Act allows the government to deport resident aliens who have unknowingly associated with a "terrorist organization." Section 412 gives the Attorney General the power to determine who is a terrorist. Before the Patriot Act passed Congress, only persons associated with groups designated as terrorist organizations by the State Department could be deported. Section 412 also gives the Attorney General the power to detain "any alien" whom the Attorney General has "reasonable grounds to believe" may pose a danger to U.S. security. The Attorney General can hold the alien for seven days without charging him or her with a crime. In the event that no country takes the alien, the alien can be held indefinitely and without trial.[51] No judicial review is allowed by section 412, though the right to petition for habeas corpus remains intact. Indeed, the Supreme Court has declared, in *INS v St. Cyr* (2001), that aliens detained in the United States have a constitutional right to petition a federal court for habeas corpus.[52] It is difficult, however, to say what this really means. If an alien can be held incommunicado and without an attorney, how will the habeas petition be filed? And at what point?

Sections 411 and 412 are important parts of the Patriot Act that call into question the degree to which civil liberties will be protected during wartime. But they are not the core of the government's challenge to civil liberties or part of the dilemma the Supreme Court encountered in the cases arising out of Guantánamo Bay, Cuba, where the government keeps "enemy combatants" captured during the war in Iraq and Afghanistan. President Bush's declaration, on November 13, 2001, declaring an "extraordinary emergency" that arose out of the attack against the United States on September 11th, 2001, has had important ramifications for civil

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[50] The full name of the USA PATRIOT ACT is Uniting and Strengthening Ameri ca by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001, Pub. L. No. 107 56.

[51] J. Zelman, "Recent Developments in International Law: Anti Terrorism Legis lation Part Two: The Impact and Consequences," *Journal of Transnational Law & Policy,* 11(2)/ 2002, 421 441.

[52] *INS v. St. Cyr, 533 U.S. 289 (2001); Hiroshi Motomura,* "The Rights of Others: Legal Claims and Immigration Outside the Law," *Duke Law Journal* 59/2010, 1723 1786.

liberties and habeas corpus.[53] President Bush's speech in November 2001, targeting terrorists all over the world – "If anybody harbors a terrorist, they're a terrorist. If they fund a terrorist, they're a terrorist. If they house terrorists, they're terrorists. . . . If they develop weapons of mass destruction that will be used to terrorize nations, they will be held accountable"[54] – was of a piece with his military order of November 13, 2001, allowing the secretary of defense to hold and later try under military commission any "individual subject" who is not a United States citizen but who is a member of Al Qaeda, or who has "engaged in, aided or abetted, or conspired to commit, acts of international terrorism," or who aims to cause injury to American citizens, or who has "knowingly harbored one or more individuals".[55]

The President's declaration defined "individuals subject to this order" as any individual who is "not a United States citizen" as determined by the President. The President's declaration also created special military tribunals to try non-citizens suspected of terrorism. The military order gives the President and the Secretary of Defense various powers over detainees, such as identifying the persons subject to the military order; the creation of the rules and procedures under which the trial will be conducted; the appointment of the judges and lawyers for both sides; the power to determine both the sentence and the grounds for appeal; and to conduct the trial in secret. Most importantly, the military order is directed at non-U.S. citizens, which could include permanent legal aliens, as well as those entitled to citizenship who have not yet received it. The military order clearly interferes with aliens' rights to counsel, to self-incrimination, and to habeas corpus. Perhaps even more importantly, two laws, the Detainee Treatment Act (DTA) (2005)[56] and the Military Commissions Act (MCA) (2006),[57] prevent alien detainees from petitioning for the writ of habeas corpus, though they are allowed to petition the United States Court of Appeals for the District of Columbia for review of their status, following a judgment of conviction by a military tribunal. This means that some detainees can be held indefinitely, without a court ever reviewing the case. Habeas corpus would provide a different protection.

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[53] "Second Circuit Rejection of Presidential Power to Declare U.S. National 'En emy Combatant'," *The American Journal of International Law*, 98(1)/2004, 186 188.

[54] Quoted in C. Pena, "Axis of Evil: Threat or Chimera?" *Mediterranean Quar terly* 13(3)/2002, 40 57, 39 40.

[55] "President Issues Military Order" (November 13, 2001). Online at the Avalon Project: Military Order Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism; November 13, 2001 (*http: www.yale.edu/lawweb/avalon/sept 11/ mil ord?001.htm*).

[56] Pub. L. No. 109 148.

[57] Pub. L. No. 109 366, 120 Stat. 2600.

3. THE GUANTANAMO CASES

The cases arising from Guantanamo Bay were not, by American experience, typical habeas corpus cases. They did not involve federalism issues. But much of the language regarding balancing interests was present. Rather than state versus federal interests, however, the cases tried to balance questions of U.S. law versus international treaties and executive power versus the judicial enforcement of rights. How, then, to conceive of habeas corpus under a regime of law now – and for the foreseeable future – dominated by terrorism?

The key questions of the four Guantanamo Bay cases – *Hamdi* v. *Rumsfeld* (2004),[58] *Rasul* v. *Bush* (2004),[59] *Hamdan* v. *Rumsfeld* (2006),[60] and *Boumediene* v. *Bush* (2008)[61] – all involve access to habeas corpus brought on by executive detention over the wars in Afghanistan and Iraq. Another case, *Padilla* v. *Rumsfeld* (2004), along with *Rasul*, held that detainees with American citizenship could seek habeas relief in federal courts, even though captured abroad and held in military prisons in the United States.[62] But those two cases were immediately overshadowed by the cases that came after 2005. *Hamdan* and *Boumediene,* in particular, provide interesting insight into the Supreme Court's understanding of habeas corpus in the age of terror. To understand the Court's ruling in *Boumediene*, it is necessary to provide background on the two congressional acts mentioned above, as well as to explain what the Supreme Court's ruling in *Hamdan* v. *Rumsfeld* meant.

After September 11, 2001, President Bush issued a military order that authorized the use of military tribunals for those captured in Afghanistan or Iraq.[63] From the standpoint of military history, the creation of military tribunals for those detained in Guantanamo Bay seems aberrational. In general, "military commissions have been employed where U.S. armed forces have established a military government or martial law, as in the war with Mexico, the Civil War, the Philippine Insurrection and in occupied Germany and Japan after World War II."[64] The Supreme Court took note of the idiosyncratic uses of military commissions at Guantanamo Bay in its opinion in *Hamdan* v. *Rumsfeld*, noting that "Exigency alone ... will not

[58] *Hamdi* v. *Rumsfeld*, 542 507 (2004).

[59] *Rasul* v. *Bush*, 542 U.S. 466 (2004).

[60] *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006).

[61] Boumediene v. Bush, 128 S.Ct. 2229.

[62] *Padilla* v. *Rumsfeld*., 542 U.S. 426 (2004).

[63] Detention, Treatment, and Trial of Certain Non Citizens in the War against Ter rorism, sec. 1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[64] J. Elsea, "The Military Commissions Act of 2006: Background and Proposed Amendments", *Congressional Research Report for Congress*, 1 51, 2.

justify the establishment and use of penal tribunals not contemplated by Article I, §8 and Article III, §1 of the Constitution."[65] The Court, however, refrained from deciding the question whether it was within the President's powers to create military tribunals in this instance. Instead, it held that military tribunals are subject to the laws of war, and the Uniform Code of Military Justice and the Geneva Conventions bracket the laws of war. The Court, moreover, finding that the charge of conspiracy against Hamdan "must have been committed both in a theater of war and *during*, not before, the relevant conflict,"[66] held that the military commissions established by the Bush administration for use in Guantanamo Bay, Cuba, lacked "the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949."[67] Insofar as the commissions do not faithfully and accurately adhere to the wording in these documents, the military commissions in place to try Hamdan were declared unconstitutional.

In 2005, Congress passed the Detainee Treatment Act (DTA).[68] Although the act prohibits American officials from treating inhumanely detainees in the war on terror,[69] section 1005(e) of the DTA prohibits aliens detained in Guantanamo Bay from applying for a writ of habeas corpus. It states, in part: "[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba".[70]

Congress passed this law in part at the instigation of the members of the *Hamdan* opinion who were not fully in agreement with the Court's majority opinion. Concurring in *Hamdan*, Justice Steven Breyer wrote: "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."[71] Congress took up Justice Breyer's argument, and in 2006, passed the MCA.[72] Section 948(b) states: "the President is authorized to establish military commissions under this chapter for offenses triable by

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[65] *Hamdan* at 591.

[66] *Hamdan*, at 563, italics in original.

[67] *Hamdan* at 613.

[68] Detainee Treatment Act of 2005, Pub. L. No. 109 148, §§ 1001 1006 (2005). available at *http://thomas.loc.gov/cgi bin/cpquery/T?&report hr359&dbname 109&*.

[69] P.L. 109 148. Title X, section 1002 (2005); P.L. 109 163, Title XI, sec. 1402 (2006).

[70] §1005(e)(1), 119 Stat. 2742.

[71] *Hamdan* at 636.

[72] Pub. L. No. 109 366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of title 10 of the United States Code (as well as amending section 2241 of title 28).

military commission as provided in this chapter." Section 948(c) states: "Any alien unlawful enemy combatant is subject to trial by military commission under this chapter." Section 948(a) states:

> The term "unlawful enemy combatant" means –
>
> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida or associated forces); or
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.
>
> The term "lawful enemy combatant" means a person who is –
>
> (A) a member of the regular forces of a State party engaged in hostilities against the United States;
>
> (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
>
> (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.[73]

In *Boumediene*, Justice Anthony Kennedy acknowledged that the MCA was a legitimate expression of congressional power. "[W]e cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases.[74]

Although the idea that the Supreme Court may not have jurisdiction over detainees held by U.S. armed forces was considered a "threshold question," one that the Court must answer before proceeding to analyze the merits of the petitioner's case, the Court in fact turned the decision into a history lesson on the subject of habeas corpus.

In October 2001, Lakhdar Boumediene, an Algerian-born citizen of Bosnia was arrested in Bosnia, with five other Algerians (four of whom had Bosnian citizenship), for planning to bomb the American Embassy in Bosnia. After an investigation by the Bosnian police, the Bosnian Supreme Court ordered the six men released and not to be deported. In fact, right after their release from jail, they were seized and sent to Guantanamo Bay. "It was alleged in a tribunal hearing that an unidentified source

[73] MCA, chapters 47A, sections 948a.

[74] *Boumediene* at 2243.

had said Mr. Boumediene 'was known to be one of the closest associates of an al-Qaeda member in Europe'."[75]

Justice Kennedy began his opinion in *Boumediene* by noting that "freedom from unlawful restraint" is a "fundamental precept of liberty" and that the writ of habeas corpus "is a vital instrument to secure that freedom."[76] He noted that the history of the writ in England was "painstaking"[77]; that it involved a classic struggle between kings and parliaments over the jurisdiction of subjects. He quoted Blackstone: that the arbitrary use of the power to deprive a man of liberty is tyranny.[78] The careful student of habeas's history could see in which direction Justice Kennedy was headed.

In the American context, Justice Kennedy turned not to the law governing habeas corpus in the congressional statutes, riddled as it is with concerns over crime and federalism, but to the Constitution's suspension clause, Article I, section 9, which states: "The privilege of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The clause has rarely been used in American constitutional law because Congress and the President have only rarely suspended the writ.[79] More troubling, however, is that the Suspension Clause may not have real, judicial meaning. As Paul Halliday and G. Edward White have written, "the Suspension Clause does not itself confer jurisdiction on any court to enforce the 'privilege of the writ'."[80] But the Court held that the Suspension Clause's meaning is tied to the historic events that took place in England during the seventeenth century, and as such, it is an instrument of power against unlawful executive detention. Thus, in *Rasul* v. *Bush*, the Court made it clear that the habeas writ that Rasul was applying for was not the statutory kind, with its lawful restrictions on jurisdiction and the rights of prisoners, but the constitutional version – the one that cannot be suspended unless Congress or the President declares a rebellion – and that therefore held that, as a non-U.S. citizen captured in Afghanistan but held in Guantanamo Bay, Rasul could rightfully apply for the writ.[81] For Kennedy, then, quoting from the

[75] Quoted in BBC News, online, "Profiles: Odah and Boumediene." *http://news.bbc.co.uk/2/hi/7120713.stm*.

[76] *Boumediene* at 2244.

[77] *Boumediene* at 2244.

[78] *Boumediene* at 2246.

[79] See S.G. Fisher, "Suppression of the Writ of Habeas Corpus During the War of the Rebellion", *Political Science Quarterly*, 3/1888, 454 488.

[80] P. Halliday, G.E. White, "The Suspension Clause: English Text, Imperial Con texts, and American Implications," Social Science Research Network, *http://papers.ssrn.com/sol3/papers.cfm?abstract id 1008252*.

[81] *Rasul* at 475 477; K. Roosevelt III, "Application of the Constitutions to Guan tanamo Bay," *University of Pennsylvania Law Review* 153/2005, 2017 2071.

Court's decision in *Hamdi*, the meaning of the Suspension Clause is that "it ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[82]

Having established that the judicial branch of government has final say on unlawful detentions not covered by the habeas statute, Justice Kennedy turned to the arguments at hand. Is the law denying detainees of the right to petition for habeas corpus with an American federal court constitutional? At about the time the Constitution was being written, Justice Kennedy wrote, the law regarding habeas corpus in Scotland, for example, was that English courts lacked the power to issue writs because Scotland was a "foreign" entity for legal purposes. Was the situation the same with cases from Guantanamo Bay? Justice Kennedy dismissed the connection, raised by the Government, that the limitations on habeas in one historical instance applied, *mutatis mutandis*, to the situation in Guantanamo. According to Justice Kennedy, the lack of power to issue the writ in Scotland was not a formal legal prohibition as much as it was a practical one: "prudential considerations would have weighed heavily when courts sitting in England received habeas petitions from Scotland."[83]

Having dismissed the argument that courts in the United States cannot be barred from issuing writs from Guantanamo Bay, Cuba,[84] Justice Kennedy turned to the legal status of Guantanamo Bay. "Guantanamo Bay is not formally part of the United States," he wrote. Cuba retains "'ultimate sovereignty' over the territory while the United States exercises 'complete jurisdiction and control'."[85] Indeed, "for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay."[86] But this acknowledgement did not prevent a majority of the Court from concluding that writs emanating from Guantanamo Bay have judicial status.

What is the status of those non-American detainees held in domains that are not part of American sovereignty but in which the U.S. exercises sole prerogative powers? Regarding American citizens, the Court declared, in *Hamdi* v. *Rumsfeld*: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[87] But few of the cases from either

[82] *Boumediene* at 2247.

[83] *Boumediene* at 2250.

[84] *U.S.* v *Bitty*, 208 U.S. 393 (1908); J. Elsea, "Guantanamo Detainees: Habeas Corpus Challenges in Federal Court," *Congressional Research Service for Congress*, 1 25, 22.

[85] *Boumediene* at 2252.

[86] *Boumediene* at 2253.

[87] *Hamdi* at 536.

Guantanamo Bay or Afghanistan involve American citizens, and the Court has been clear that American citizens are entitled to the full protections of the Constitution.[88]

The real meaning of the writ in the age of Guantanamo, then, comes down to the question of the rights of non-American detainees held in distant lands. For the potential quagmire cannot be ignored: "if habeas were available to non-citizens worldwide, it could in theory (if not always in practice) be pressed in both conventional wars, in which their might be thousands of alien captives, and with respect to such sensitive activities as foreign espionage."[89]

In two cases from World War II, *Eisentrager* v. *Johnson* (1950) and *Ex parte Quirin* (1942), the question of jurisdiction and foreign citizenship were present. In *Eisentrager* v. *Johnson*, some German nationals, captured by U.S. forces in China during World War II, petitioned a District Court in Washington, D.C. for habeas corpus. The military had already tried them by military commission, where they were found guilty of war crimes and repatriated to Germany. The Court of Appeals reversed the District Court's denial of the writ, declaring that enemy aliens, held by U.S. forces, are entitled to the writ. But the Supreme Court reversed the Court of Appeals. The question before the Supreme Court was whether "enemy aliens" can petition for habeas corpus, even though they were not U.S. citizens, were captured outside of the territory of the United States, and remained imprisoned outside the United States. In *Ex parte Quirin*, seven German nationals and one German with an American passport, entered the United States from a submarine, parked off the coast of Florida. They were captured and tried by military tribunal. The Supreme Court upheld the right of the government to try these spies by military commission, based on congressional approval of the military commissions. "*Ex parte Quirin* stands for the proposition that enemy combatants can be tried by military commissions created by executive decree, regardless of whether they are American citizens."[90] In rejecting the petitioners' habeas petitions in both cases, the Court held that, to extend habeas's reach to those not held in the United States would confer Fifth Amendment rights "on all the world".[91]

When non-American detainees in Guantanamo Bay began to petition federal courts in the United States for writs of habeas corpus, *Eisentrager* became the case to look to, as its holding that foreign nationals held abroad have no right to habeas corpus is exactly what the Bush administration was attempting to do with the Guantanamo detainees and

88 *Padilla* v. *Rumsfeld*, 542 U.S. 426 (2004).

89 R. Fallon and D. Meltzer, "Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror," *Harvard Law Review* 120, 2007, 2029 2112, 2057.

90 Federman, *The Body and the State*, 170.

91 *Eisentrager* v. *Johnson*, 339 U.S. 763, 784 (1950).

those held in Afghanistan and Iraq. Thus, the question in *Rasul* v. *Bush* was: "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[92] While the Supreme Court was a far more conservative Court than the fairly liberal Stone Court that ruled in *Eisentrager*, and therefore more willing to defer to the president during wartime, the times had changed, and so had the circumstances of detentions. There are important differences, the Court noted in *Boumediene*, between *Rasul* and *Eisentrager*:

> The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager,* there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.[93]

The Supreme Court in *Rasul* had a different set of facts, and ruled differently. As Justice John Paul Stevens noted, on the facts established in *Eisentrager*, "no right to the writ of *habeas corpus* appears."[94] But the facts are now different. The Court held in *Rasul* that *Eisentrager* was not directly applicable to the facts in *Rasul* because in *Eisentrager*, the detainees were at war with the U.S., but that that was not the case with the detainees in *Rasul*, not all of whom belonged to a country at war with the U.S. Moreover, in *Eisentrager*, the detainees were given some access to a hearing and charged with their crimes, which the detainees in *Rasul* were not.[95] Perhaps most critically, the difference between *Eisentrager* and *Rasul* was that the statutory "gaps" that existed to bestow habeas corpus on foreign nationals held outside the U.S. – on the basis of the Suspension Clause's understanding that habeas corpus is always available, barring suspension during times of rebellion – were filled in during the ensuing years. In *Braden* v. *30th Judicial Circuit of Kentucky* (1973),[96] a case

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92 *Rasul* at 475.

93 *Boumediene* at 2260. Footnotes omitted.

94 *Rasul* at 476.

95 *Rasul* at 467.

96 *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U. S. 484 (1973).

that came after *Eisentrager*, the Court held that because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of §2241 as long as "the custodian can be reached by service of process."[97] The writ, it should be recalled, works against the person holding the detainee; it does not work for the detainee. By this logic, the writ can reach Cuba by way of the person or persons responsible for managing the detention of those held at Guantanamo Bay. To be sure, the *Rasul* opinion is not clear just how far habeas corpus can reach – to Cuba because of Guantanamo Bay, or beyond? Justice Stevens therefore held in *Rasul*, for the Court, that "aliens held at the base, no less than American citizens, are entitled to federal courts' authority under section 2241".[98]

The Court in *Boumediene* did not offer an alternative set of proposals for a habeas corpus substitute for detainees. The tribunals, insofar as they are constitutional, must conform to the demands of the habeas statute as set forth by congressional law. Those held in Guantanamo Bay and elsewhere by U.S. forces must be subject to the requirements of international law and the basic liberties of all Americans held in prisons. "We do consider it uncontroversial," Justice Kennedy wrote in conclusion, "that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[99] The determination of unlawful detention remains a judicial function, not an executive prerogative. A "habeas court must have the power to order the conditional release of an individual unlawfully detained," while noting that release does not have to the exclusive remedy for the writ's success.[100]

4. CONCLUSION

Under the Constitution, habeas corpus is inert. To give it life, it requires a live person, an accused person or a convicted rights violator, someone, in other words, who has interfered with the working of the law. The writ lives off those who seek its power, gaining meaning not from one source, but from any source: the prisoner, wherever he may be, has, at the end of the line, the right to petition a court for review. At that point, with dirty hands, habeas corpus gains meaning. "Remote in time it may be; irrelevant to the present it is not",[101] Justice Kennedy wrote in *Bou-*

[97] *Braden* at 494, 495.

[98] *Rasul* at 480.

[99] *Boumediene* at 2266.

[100] *Boumediene* at 2238.

[101] *Boumediene* at 2276.

mediene. The Guantanamo Bay cases, despite their differences, have brought habeas corpus back to its roots, as a check on unlawful executive power. One may quibble with the Court on a number of issues raised from Guantanamo, but at its historical core, the writ of habeas corpus serves "as a means of reviewing the legality of executive detention".[102]

[102] *St. Cyr* at 301.

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CASUISTRY AND GENERAL RULES PROBLEM OF RISK BEARING IN ROMAN *SOCIETAS*

*The author discusses the question of division of losses among partners oc curred without anyone's fault (*periculum*,* damnum commune*). She analyses three situations in which this problem is solved differently. The first one is concerned with* socii *holding goods in common as co owners. The analysed sources are Ulpian, D. 17.2.58.pr (quadriga case) and D. 17.2.58.1. The second situation is concerned with partners contributing their property into the partnership for the purpose of use and damage occurring to the goods owned by one of the* socii *(sources: Ulpian, D. 17.2.52.4, Pomponius/Labeo D. 17.2.60.1 and Ulpian/Iulian D. 17.2.61). The third is the case of the so called mixed* societas *in which one* socius *contributes with capital and the other only with his work (sources: Ulpian, D. 17.2.52.2, and D. 17.2.52.3). The author stresses that rich casuistry with different solutions and even contradic tions prevails, so general principles and concepts are not very helpfull. However, the rule* casum sentit dominus *is of great importance here and should not be underesti mated.*

Key words: *Casuistry. Roman Law. Risk. Societas. Quadriga case.*

I

Considering that partnership is established, as a rule, for the purpose of gaining material advantage, the issue of profit distribution among the partners (*lucrum, commodum*), as well as the distribution of eventual loss (*damnum, incommodum)*, is one of the most important questions in the legal system allowing for *societas*. The expressions *damnum* and *incommodum* should be understood here as the material loss incurred by a partnership without anybody being at fault. Hence, the appropriate term

for a situation of this kind is also risk, *periculum,* considering that the question is how to distribute the burden of loss that cannot be ascribed to anybody as his fault.[1] Although risk sharing is an issue characteristic of *societas* and one by which it is distinguished, there are not many papers in charge with this subject. However, two studies may be singled out: Giuseppe Gandolfi in his article "Damnum commune" published in 1971, focuses two well known fragments from the *Digest* title *pro socio*[2] trying to solve an existing contradiction[3]. The contribution by Karl-Heinz Misera[4] is particularly worthy of praise, given the fact that it represents an unsurpassed attempt to put together a mosaic of this complicated issue. He has shown with reason that general rules and theories are not very helpful here. However, it seems that he has underestimated the importance of the rule casum sentit dominus. It should be noted that Franz-Stefan Meissel, the author of the most recent book on Roman *societas*,[5] although he dicusses many important texts related to the problem of *periculum,* does not treat this issue as a separate topic. It seems that there is still room for a contribution to this subject.

II

In principle, it can be said that partnership is a community of profit and risk, but this does not say much in itself, because solutions in different cases depend on different circumstances. Some criteria are general and may be reduced to certain legal rules (*regulae iuris*), while on the other hand in many cases, solutions derive from the circumstances of the specific case.

[1] Still, it has to be noted that the term *periculum* cannot be assigned one single meaning in Roman law, as the modern theory of risk tried to do. It does not signify only a situation where damage has resulted without anybody's fault. It is sometimes used as a synonym for contractual liability for damage. This meaning of the above expression can also be found in the context of Roman partnership (Paulus, D. 17.2.25). The most pro found analysis of different meanings of the term *periculum* can be found in two articles by G. MacCormack, "Periculum", *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Romanistische Abteilung* (ZSS RA) 96/1979, 129 172 and "Further on "Periculum", *Bu letino internazionale di diritto romano* (BIDR) 82/1979, 11 37. See also C. A. Cannata, "Sul problema della responsabilità nel diritto privato romano", IURA 43/1992, 63 etc; P. Voci, "Diligentia", "custodia", "culpa". I dati fondamentali", *Studia et documenta histo riae et iuris* (SDHI) 56/1990, 131 etc.

[2] Pomponius, D. 17.2.60.1 and Ulpianus, D. 17.2.52.4.

[3] G. Gandolfi, "Damnum commune", *Studi in onore di Eduardo Volterra* III, Mi lano 1971, 527 543.

[4] K H. Misera, "Zur Gefahrtragung bei der römischen societas", *Iuris professio. Festgabe für Max Kaser zum 80. Geburtstag,* Wien 1986, 201 210.

[5] F S. Meissel, *Societas. Struktur und Typenvielfalt des römischen Gesellschafts vertrages*, Peter Lang, Frankfurt am Main 2004.

First of all, regulation of this issue depended on the partners' autonomy of will, and judging by the sources, the principle of freedom of contract had gained a strong reaffirmation here. The position of partners with regard to the distribution of profit and risk could be mutually unequal, i.e. certain partners could have different shares in the distribution of profit and loss.[6] Also, individual partners could have a different share in the profit as compared to the risk.[7] Finally, the individual partners could be fully excluded from the distribution of risk if their share comprised exclusively labour,[8] and they could only have a share in the distribution of profit. The only obstacle to achieving full freedom of the autonomy of will was the prohibition of the so-called *societas leonina,* which was a partnership where one of the partners could be excluded from sharing in the distribution of profit, while still bearing the loss.[9] Such a partnership would be null and void. If the parties failed to expressly stipulate the way of distributing the profit and risk, the applicable rule would be distribution based on equal shares regardless of the size of the contribution.[10] Such a liberal position of Roman classical jurisprudence was the result of a fierce clash of opinions between the influential pre-classical jurists Quintus Mucius Scaevola and Servus Sulpicius, which is referred to in the sources as *magna questio*.[11] This clash of opinions ended in the victory of the liberally minded position of Servius Sulpicius, which probably also marked a departure from the traditional view.[12] An aspect that certainly deserves attention is the special position of the partner whose share consisted of labour exclusively. This partner could be completely excluded from sharing risk, however, only up to the value of his labour.[13]

III

The second criterion affecting the issue of distribution of profit and risk was the system of ownership of the shares contributed to the partnership. Partners could contribute their shares based on co-ownership, whereby in addition to creating an obligation-based partnership they could

6 *Gai Inst.* 3.150.

7 *Gai Inst.* 3.149, Inst. 3.25.2.

8 Ulpian, D. 17.2.29.1.

9 Ulpian/Aristo/Cassius, D. 17.2.29.2.

10 *Gai Inst.* 3.150.

11 *Gai Inst.* 3.149.

12 With more details on this problem M. Polojac, "Podela dobiti i gubitka među ortacima rimsko pravo i moderna rešenja" [Distribution of profit and risk Roman law and modern solutions], *Anali Pravnog fakulteta u Beogradu [Annals of the Faculty of Law in Belgrade]* 2/2005, 130 144.

13 Ulpian, D.17.2.29.1.

also create a property law community (*communio*). This type of partnership was named *societas quoad sortem* in the medieval period. Partners could contribute their shares for common use only – *societas quoad usum.* The prevailing view among German Romanists recently, problably under the influence of Wieacker's works, was that this distinction was not sufficient for covering all the options of ownership relations in a partnership specified in Roman sources, and therefore, a trichotomy was established by introducing a new name – *societas quoad dominium* – which was opposed to the *quoad sortem* type of partnership.[14] The first is based on co-ownership. In the second case, there was a community of property based on the law of obligations, without the need for establishing a community based on property law, with partners assuming the risk of eventual tortless property loss, in the proportion stipulated in the contract. What we are concerned with here is, therefore, primarily a community of risk-bearing based on the law of obligations. By creating a new distinction of this kind, it seems that the intention was to eliminate the difference between partnerships based on the law of obligations on one side, and co-ownership on the other side, and to reduce to a minimum and even eliminate the effect that the *casum sentit dominus*-rule had on partnership contracts. Apart from this, by introducing the *quoad sortem* type of partnership as a community of risk-bearing based on the law of obligations, another type of confusion was caused, because it could lead one to conclude that *societas quoad usum* did not imply any sharing of profit and risk – which was a wrong inference.

Certainly the best example of the impact of the ownership system on the problem of risk distribution is the well-known case of the four horse team (*quadriga*):

> D. 17. 2. 58. pr. (Ulpianus, 31 ad edictum): *Si id quod quis in so cietatem contulit exstinctum sit, videndum, an pro socio agere possit. tractatum ita est apud Celsum libro septimo digestorum ad epistulam Cornelii Felicis: cum tres equos haberes et ego unum, societatem coimus, ut accepto equo meo quadrigam venderes et ex pretio quartam mihi red deres. si igitur ante venditionem equus meus mortuus sit, non putare se Celsus ait societatem manere nec ex pretio equorum tuorum partem de beri: non enim habendae quadrigae, sed vendendae coitam societatem. ceterum si id actum dicatur, ut quadriga fieret eaque communicaretur tu que in ea tres partes haberes, ego quartam, non dubie adhuc socii sumus.*

In this famous text by Ulpian which has been the subject of different interpretations, Ulpian, citing the opinion of his predecessor Celsus, speaks about two partnership variants where two persons contributed their horses to form a four horse team. In the first variant *ego* contributed one horse and *tu* contributed three. Their purpose was to sell the horses as a

[14] F S. Meissel, 227 fn. 2.

four horse team (*vendere quadrigam)* and thus get a better price than if they sold each horse individually, and then, to divide the profit in the proportion of 1/4 to 3/4. The horse of the *ego* person, however, died before the sale, and according to Celsus the risk was to be borne by *ego.* It seems correct to conclude that the key reason for presenting this solution regarding the assumption of risk was the fact that in this partnership *ego* remained the owner of the dead horse *(ante venditionem equus meus mortuus sit*) having contributed it to the partnership just for the purpose of its being used (*societas quoad usum*) i.e. for the purpose of selling it. In order to clarify the situation Celsus presents another possible option where the four horse team could be formed for a lasting purpose, i.e. for common use of the four horse team (*habere quadrigam*). The community of property would be such that *tu* would have three quarters of the four horse team, while *ego* would only have one quarter. A formulation of this kind points to the fact that the partners *ego* and *tu* were co-owners of the *quadriga* in aliquot parts of 1/ 4 to 3/4, and that they would bear the risk jointly in that proportion. This interpretation still seems to be the prevailing one, and its advocate has been F.-S. Meissel.[15]

However, Misera considers that the text gives no reason for making a distinction in terms of the ownership system. He says: *in beiden Varianten hat ego sein Pferd nicht an tu übereignet oder sonst sein Alleineigentum verloren, sondern er ist Eigentümer geblieben*.[16] According to him, the key difference is in the aim of the community; *vendere quadrigam* as opposed to *habere quadrigam.* Apart from this, he, just like Drosdowski who shares his opinion, denies that the part of the text discussing possession of the four horse team in the proportion of 3/4 to 1/4 (*ut quadriga fieret eaque communicaretur tuque in ea tres partes haberes, ego quartam)* points to the formation of co-ownership of the four horse team, believing that the case involved is more likely a community based on the law of obligations, of the *quoad sortem* type, which also implied the joint assumption of risk.[17]

Another text by Ulpian, i.e. the next paragraph in the same fragment, appears to follow the same reasoning:

> D. 17.2.58.1 (Ulpianus, 31 ad edictum): *Item Celsus tractat, si pe cuniam contulissemus ad mercem emendam et mea pecunia perisset, cui perierit ea. et ait, si post collationem evenit, ut pecunia periret, quod non*

[15] F S. Meissel, 274. Also, M. Kaser, "Neue Literatur zur 'Societas'", SDHI 41/1975, 294 fn. 60. He considers that co ownership of the *quadriga* as *universitas rerum* was created by *accessio.*

[16] K H. Misera, 205; Also T. Drosdowski, *Das Verhältnis von actio pro socio und actio communi dividundo im klassischen römischen Recht*, Berlin 1998, 152.

[17] The infuence of Franz Wieacker is evident. He interprets *communicare* in this text as "zum gemeinschaflichen Gebrauch bereitstellen", F. Wieacker, "Das Gesellschaf terverhältnis des klassischen Rechts"*, ZSS RA* 69/1952, 335.

fieret, nisi societas coita esset, utrique perire, ut puta si pecunia, cum peregre portaretur ad mercem emendam, periit: si vero ante collationem, posteaquam eam destinasses, tunc perierit, nihil eo nomine consequeris, inquit, quia non societati periit.

This text is similar to the previous one primarily as it also discusses two variations, two possible situations, raising the issue of the assumption of risk. It discusses a partnership involving two persons who contributed their money for the purpose of jointly purchasing goods, however, the stake – i.e. the money of one partner – was lost. This text also lends itself to different interpretations. However, the first thing that may be noted regarding the criterion for the assumption of risk in Celsus's opinion is whether the money was lost after it had been contributed (*post collationem*) or before it was contributed to the partnership (*ante collationem*). In the first case, both partners' money was lost (*utrique perire*), while in the second, the risk was borne by the partner who lost the money, even though the partner had already earmarked and intended the money for the partnership (*destinatio*). It seems that the crucial reason for such a solution is the issue of ownership of the money. In the first option, *post collationem,* co-ownership was most likely created.[18] Partners created a joint fund or one partner handed over his money to the foreman who was to carry out the purchase on their joint behalf and with their common money. In technical terms, the way of acquisition could be *traditio* or *commixtio.* In the second case, the money was not contributed, i.e. it was not handed over even though it had been earmarked for the partnership, and therefore, it had remained the partner's property.

Celsus states that for joint assumption of risk, the loss of money had to have occurred in a situation directly related to the activity of the partnership, and therefore it is important for the loss not to have occurred in a way unrelated to the existence of the partnership. He provides an example presenting a case where money intended for the purchase of joint goods was lost during a trip abroad (*ut puta si pecunia, cum peregre portaretur ad mercem emendam periit*). Thus, if an *argumentum a contrario* is presented, joint risk would be excluded in the event where joint money had been lost, for instance, because of a fire that had broken out before the partners set out on the trip, as the loss of the money would not be directly related to the activities of the partnership. It seems that such a solution would be hard to be implemented, because after handing over the money it was normally impossible to identify whose money had been

[18] In his interpretation of this and the previous text, Misera insists on the point that creation of co ownership is not neccessary, which is acceptable, but also not likely, which is not. K H. Misera, 206 207. Talamanca with reason states: "non era certamente neces saria la crazione di una *communio,* anche se, evidentemente, tale crazione risolveva *radic itus* il problema", M. Talamanca, "Società (Diritto romano)", *Enciclopedia del diritto*, Mailand 1990, 857 fn. 469.

lost. *Nota bene*: if it was handed over in a leather bag it could still be identified and even reivindicated; only once it was mixed with the receiver's money – as was usual in case of partnership – did it become impossible to identify it. Thus, it seems right to conclude that in this example the issue of ownership of money in a partnership was crucial in determining the manner of bearing the risk.

However, there are also certain specific solutions in case of partnerships other then *societates omnium bonorum*. Where one of the partners lends the partners' common money to another person on interest *suo nomine*, he alone bears the risk; however, he is entitled to the interest which he does not have to share with the other partners. On the other hand, where the money is lent on behalf of all the partners, the profit and the risk deriving from it are shared by all the partners.[19]

IV

Risk was joint (*damnum commune)* in the event where there was neither a property law community (*communio*) among the partners, nor a previously stipulated risk-bearing community based on the law of obligations. The partners shared the risk also when damage had been caused to the property which was the exclusive property of one partner, under certain conditions that could be very hard and severe. In Roman casuistry, there is a well-known example of partnership for this situation concerning a textile merchant (*sagaria negotio*) in the Ulpian's text citing Julian's opinion:

> D. 17.2.52.4 (ULPIANUS, libro trigesimo uno ad edictum): *Qui dam sagariam negotiationem coierunt: alter ex his ad merces comparan das profectus in latrones incidit suamque pecuniam perdidit, servi eius vulnerati sunt resque proprias perdidit. dicit Iulianus damnum esse com mune ideoque actione pro socio damni partem dimidiam adgnoscere de bere tam pecuniae quam rerum ceterarum, quas secum non tulisset socius nisi ad merces communi nomine comparandas proficisceretur. sed et si quid in medicos impensum est, pro parte socium agnoscere debere rectis sime Iulianus probat. proinde et si naufragio quid periit, cum non alias merces quam navi solerent advehi, damnum ambo sentient: nam sicuti lucrum, ita damnum quoque commune esse oportet, quod non culpa socii contingit.*

A partnership was contracted for the purpose of trading in textiles. One of the partners went to buy the goods, but was ambushed and lost his money. His slaves were wounded and he lost some of his belongings. Julian says that the loss was joint and that the other partner had to bear

[19] Paulus, D. 17.2.67.1.

half the damage based on the *pro socio* claim, with regard to both the money and the other things that the other partner would not have had with him if he had not needed them for the purchase that was in their common interest. If any costs of medical treatment were involved, Julian rightly considers that the other partner was to bear (an equal) part of the costs. Moreover, if something had been lost in a shipwreck, provided the only goods on board the ship were those that were usually transported, the damage had to be borne by both of them, as damage had to be joint unless a fault by one of the partners was involved.

In this case, there are several limitations to be singled out, under which the partner whose things had been lost or damaged could expect the participation of the other partner in their joint risk-bearing. The text describes the case of an attack by robbers on a trip undertaken in the interest of the partnership (*latrocinium, incidere in latrones*). Later, the text also discusses the case of a shipwreck (*naufragium*) which happened during a business trip. Even though these individually mentioned cases were not the only possible situations where common risk-bearing was involved, it seems impossible to draw the conclusion that the rule on joint risk-bearing applied to all cases that could be characterised as force majeure (for instance, the case of natural death of slaves or animals that had been taken on the trip). Apart from this, such an irreversible contingency had to have happened on a trip undertaken in the common interest of the partners. Also, common bearing of any damage was not provided for. Thus, for instance, the rule on joint damage refers to things owned by partners, which were necessary for their joint enterprise, but it does not refer to other things (*quas secum non tulisset socius nisi ad merces communi nomine comparandas proficisceretur*). Also, the costs of medical treatment of a slave were recognised, but this did not apply to a free man, as can be seen from the text below.[20]

In the well-known case of slave merchants partnership (*societas venaliciaria*), the condition regarding risk-bearing is even more strict:

> D. 17.2.60.1 (Pomponius, 13 ad Sabinum): *Socius cum resisteret communibus servis venalibus ad fugam erumpentibus, vulneratus est: im pensam, quam in curando se fecerit, non consecuturum pro socio actione Labeo ait, quia id non in societatem, quamvis propter societatem impen sum sit...*

According to Labeo, a partner who suffered injuries in an attempt to prevent the escape of common slaves intended for sale, could not request the sharing of other partners in the costs of his own medical treatment, as the costs were not directly invested in the partnership, but were

[20] The problem is profoundly discussed by G. Gandolfi, 527 etc; see also K H. Misera, 202, R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civil ian Tradition,* Oxford 1996, 461; F. S. Meissel, 135 etc.

spent because the existence of the partnership caused them to be spent (*quia id non in societatem, quamvis propter societatem inpensum sit*). It is hard to accept this explanation by Labeo.[21] It is possible that such a strict position derives from the fact that the partner appeared not to have been successful in his action aimed at preventing the slaves from escaping. In a certain way, this can be ascribed to his fault in the specific form of recklessness (*infirmitas, imperitia*), considering the specific activity of this type of partnership. Another explanation for such a strict solution could be the fact that the costs of medical treatment of a free man were concerned here. It is well known that in Roman law it was difficult to introduce these costs in the concept of material damage (*damnum*). However, one must bear in mind that the next very short fragment provides an opposite view.[22] It is important to note that Pomponius, citing Labeo, does not discuss the problem of damage caused by the escape of common slaves. This situation does not produce any complicated problems. If that loss was tortless, the *casum sentit dominus* rule applied.

V

There is a specific situation regarding risk-bearing also when one partner has contributed only property and the other one exclusively labour. An example of such a community is usual in agriculture, and there is a well-known partnership case discussed by Cicero (*Pro Roscio comoedo*), where the owner of a slave Q. Roscius Gellius and the actor C. Fannius Chaerea formed a partnership in order to teach the slave Panurgius the art of acting. Let us try to get a full insight into the problem by discussing the example of partnership in agriculture:[23]

> D. 17.2.52.2 (Ulpianus, 31 ad edictum): *Utrum ergo tantum dolum an etiam culpam praestare socium oporteat, quaeritur. et Celsus libro septimo digestorum ita scripsit: socios inter se dolum et culpam*[24] *praes*

[21] See G. Gandolfi, 530 etc; also F S. Meissel, 136 etc.

[22] Ulpian, D. 17.2.61: *secundum Julianum tamen et quod medicis pro se datum est recipere potest.*

[23] More about this issue G. Santucci, *Il socio d'opera in diritto romano,* Mailand 1997.

[24] *Et culpam* is under suspicion of being an interpolation of post classical origin. Arangio Ruiz explains the prevailing view in doctrine till the middle of the last century according to which the dolus liability was the only standard of liability in the early period and also in time of classical law, and the liability for culpa is of post classical origin. V. Arangio Ruiz, *La società in diritto romano,* Napoli 1950, ristamp. 1965, 190 etc. Al though the question is still the subject of scholarly dispute, the prevailing view today considers the concept of *culpa* to be classical. See for example C. A. Cannata, 1 etc., H. Ankum, "La responsabilità contrattuale nel diritto romano classico e nel diritto giustini aneo", *Diritto romano e terzo millennio, Radici e prospettive dell'esperienza giuridica*

tare oportet. si in coeunda societate, inquit, artem operamve pollicitus est alter, veluti cum pecus in commune pascendum aut agrum politori damus in commune quaerendis fructibus, nimirum ibi etiam culpa[25] *praestanda est: pretium enim operae artis est velamentum. quod si rei communi so cius nocuit, magis admittit culpam quoque venire.*

The text discusses the partnership involving the owner of a herd and an expert in pasture, in other case an expert in crop breeding (*politor*). In both cases, according to general provisions, profit from the transaction as well as eventual loss were borne by the partners according to their agreement, and if no agreement had been made, then it was borne in equal parts. As opposed to other partnership types, an agreement could contain the provision specifying that a partner, whose share consisted exclusively of labour, could be excluded from bearing risk. That exception, however, was not absolute, and the value of the labour the partner had contributed as his only contribution to the partnership would be compensated against the damage – *si tanti sit opera quanti damnum est*.[26] This atypical system in the so-called mixed *societas* can be explained in the following manner: Although this is in the domain of a hypothesis that cannot be explained here in detail,[27] in early Roman Law it was most likely impossible to enter into a partnership when the contribution of one partner consisted exclusively in his labour. The possible reason could be that a partner who had contributed only his labour had a specific position, especially in respect of risk. On the other hand, it was fairly unusual for a contribution in a partnership to comprise solely assets, as was the case here. Namely, partners were expected to work together towards achieving the aim of the partnership, and management belonged to all the partners jointly. It was not unusual for one of the partners to distinguish himself by his contribution in the form of labour for which he could be rewarded in different manners. However, it was not usual for a partner not to contribute any form of labour. This is why a partnership set up in this form

contemporanea, relazioni del convegno internazionale di diritto romano, Copanello 3 7 giugno 2000, Napoli 2004, 144.

The paragraph is considered genuine by Talamanca: "Sarebbe ingiustificato un gen erale sospetto sul passo, soprattutto perché la discussione vi procede in base al metodo casistico, lasciando cogliere le tracce di possiblili contraddizioni tra i *prudente*", M. Tala manca, 856, fn. 452. The existing dilemma in the text could probably be ascribed to Cel sus and not to Ulpian. Celsus refers only to two particular cases because in his time *culpa (in abstracto*) as general standard of liability still did not exsist. In this sense F S. Meissel, 292, fn. 194.

[25] Arangio Ruiz replaced *culpa* with *custodia:* "invece delle parole *nimirum etiam culpa praestanda est,* Celso (e con lui Ulpiano) aveva scritto *etiam custidia prae standa est."* V. Arangio Ruiz, 192. In this sense also R. Zimmerman, 464; E. Laffely, *Responsabilité du "socius" et concours d'actions dans la société classique* (*thèse de li cence et de doctorat*), Lausanne 1979, 27 etc., also 53 etc.

[26] Ulpian, D. 17.2.29.1.

[27] More details about this issue M. Polojac, 135 etc.

can be qualified under certain circumstances as another contract, most often as *locatio conductio*[28]*, depositum, commodatum* or as an innominate contract.[29] The fact that the parties shared profit and risk speaks in favour of partnership.[30]

It is necessary to note some other specifics. A partner contributing his labour was an expert. Ulpian's text states that he was liable for *dolus* and *culpa*. It appears that the contractual liability of this partner was not subject to the general rule as formulated by Gaius, and later Justinian.[31] In this text, *culpa* does not mean a lack of diligence that a partner shows towards his things (*diligentia quam in suis*).[32] The general rule about the responsibility of partners here is modified in accordance with the nature of the contract. In this case, *culpa* certainly means a lack of what is referred to in the sources as *exactissima diligentia,* and it can also have specific meanings, such as for instance, lack of skill (*imperitia*) and the like.[33] In any case, the responsibility of a partner who invested only his labour was more strict than that of a "common" partner, and that is why the area covered by *periculum* is more narrow.

Considering that the situation here involved damage caused to things owned exclusively by one partner, it is possible to apply the analogy with the previously mentioned cases, particularly that of the partnership involving textile merchants. This is, nevertheless, under a questionmark, as the situation is not identical. Here, the thing was damaged while it was with the pasture expert who was the foreman, but not the owner, whereas in the textile merchants case, damage occurred to things owned

[28] Ulpian/Celsus D. 19.2.9.5.

[29] F. S. Meissel, 181 etc.

[30] D. 19.2.25.6 (GAIUS libro decimo ad edictum provinciale): *Vis maior, quam Graeci θεοῦ βίαν appellant, non debet conductori damnosa esse, si plus, quam tolerabile est, laesi fuerint fructus: alioquin modicum damnum aequo animo ferre debet colonus, cui immodicum lucrum non aufertur. apparet autem de eo nos colono dicere, qui ad pecuniam numeratam conduxit: alioquin partiarius colonus quasi societatis iure et damnum et lu crum cum domino fundi partitur.*

[31] D. 17.2.72 (GAIUS libro secundo cottidianarum rerum):*Socius socio etiam cul pae nomine tenetur, id est desidiae atque neglegentiae. culpa autem non ad exactissimam diligentiam dirigenda est: sufficit etenim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet, quia qui parum diligentem sibi socium adquirit, de se queri debet.* The text is incorporated into *Inst*. 3.25.9.

[32] It seems that Gaius took over the idea from Celsus and his text related to de positum (D. 16.3.32) and apply it in case of *societas.* In the fragment of Celsus, *diligentia quam in suis rebus* is opposed to *dolus* (and *culpa lata*) as a kind of its extension. Gaius, however, compares the *diligentia quam in suis* with the *exactissima diligentia.* In this case, so called *culpa in concreto* could be understood as alleviation of a more severe lia bility i.e. *culpa in abstracto*. More about the discussion in literature E. Laffely, 33 etc., F. S. Meissel, 293 etc.

[33] Cannata calls this type of culpa "la colpa imperizia" in case of *fullo, sarcinator, textrix, mulio, politor agrorum*, C. A. Cannata, 44; H. Ankum, 144 145.

by the partner-foreman. Still, resorting to analogy, one have to apply the already known criteria that narrow down the domain of joint risk-bearing, such as for instance, the request that damage be directly related to the activities of the partnership. Thus for instance, the natural death of the herd would not imply joint risk, whereas it would in the case of an attack by robbers that took place while the herd was grazing, and the like.

Some more light is shed on this problem by the next paragraph from a fragment by Ulpian (D. 17.2.52.3): *Damna quae imprudentibus accidunt, hoc est damna fatalia, socii non cogentur praestare: ideoque si pecus aestimatum datum sit, et id latrocinio aut incendio perierit, commune damnum est, si nihil dolo aut culpa acciderit eius, qui aestimatum pecus acceperit: quod si a furibus subreptum sit, proprium eius detrimentum est, quia custodiam praestare debuit, qui aestimatum accepit. haec vera sunt, et pro socio erit actio, si modo societatis contrahendae causa pascenda data sunt quamvis aestimata.*

The text is about a variant of the previous contract between the owner of a herd and a pasture expert, to the extent that the herd was entrusted to a pasture expert based on an estimate of its value (*pecus aestimatum datum*). The difference in relation to the previous contract is reflected in the even stricter liability of the expert. As it apeaars from the source, he is also responsible for *custodia* (*custodiam praestare debuit*) in the event of a theft of the herd. However he is not liable for contingencies that cannot be avoided while the herd was with him, such as an attack by robbers (*latrocinium*) or fire (*incendium*), and so, in these cases the risk is borne jointly (*damnum commune*), unless stipulated otherwise.[34]

The above cases are specific in that the contractual liability of the partner who contributed his labour was stricter, and hence, the domain of joint risk was narrowed. This domain was narrowed down also when, by applying analogy with the previous related but not identical cases, stricter criteria are applied to joint risk-bearing, such as the rule based on which damage must be directly related to the activities of the partnership. A fact that needs to be highlighted particularly is that the partner who contributed only his labour could be excluded by contract from bearing risk, which can be understood as a type of offset for the stricter criteria of his contractual liability.

To conclude. As for the issue of risk-bearing in *societas*, we are faced with rich casuistry with different solutions and even contradictions. In order to expose the problem – unlike the sources do – in a kind of system, three situations are singled out in which the problem of division of losses among partners is solved differently: the first one is about *socii* holding goods in common as co-owners, the second is concerned with partners contributing their property to the partnership for the purpose of

[34] K. Misera, 204.

use and damage occurring to the goods owned by one of the *socii* and the third is the case of the so-called mixed *societas* in which one *socius* contributes his capital and the other only his work. With this kind of systematic approach, the problem was neccessarily simplified. Although general principles and concepts are not very helpful here, still there is a rule of great importance, and that is *casum sentit dominus.* Additional requirements and criteria applied in determining whether the partners will jointly share the risk depend on whether they are co-owners or exclusive owners of the property contributed to the partnership, and whether they eventually contributed only their labour. Of course, all this applies unless the partners have agreed otherwise.

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THE RULE OF RECOGNITION AND THE WRITTEN CONSTITUTION

> "A law, to have any authority, must be derived from a legislature, which has right. And whence do all legislatures derive their right but from long custom and established practice?"[1]

In this article the author deals with two concepts and with their relationship to each other. These are the Rule of Recognition and the written Constitution. One of the key concepts of Hart's jurisprudence is the idea that all legal rules are interconnected in a unified whole a system of primary and secondary norms. The status of one rule as a part of that system is determined by a special category of social rules, called Rules of Recognition. The rule of recognition is the master rule that exists by virtue of the fact of social acceptance and which establishes criteria of validity for other legal rules. In the first part of this article, some of the essential properties of the rule of recognition as a theoretical concept are listed. The second part of the article outlines an account of the most important features of the concept of a written Constitution. Among these the most significant are supremacy, judicial protection, durability and rigidity. Finally the author offers a summary analysis of possible and necessary relations between the two concepts. Some concluding remarks refer to the problems concerning the validity of laws, the legitimacy and authority of a Constitution and to the overarching explanatory power of theoretical concepts.

Key words: *Rule of recognition (RR). Constitution. Legal Validity. Normativity.*

[1] D. Hume, *The History of England*, vol V, Liberty Fund, Indianapolis 1983, 194.

1. INTRODUCTION

One of the key insights of Hart's jurisprudence is the idea that legal systems are not only comprised of rules, but also grounded on them. Instead of Bentham's and Austin`s idea of an unlimited Sovereign who makes all of the legal rules, Hart proposed a thesis that the rules actually make the Sovereign.[2] Consistent with this theoretical U-turn, he also proposed a concept he described as the Rule of Recognition (RR). RR is a special sort of social rule which determines the status of every rule as a part of a particular legal system. Consequently, the RR is the master rule that exists by virtue of the fact of social acceptance, and it establishes criteria of validity for all other legal rules. In the first part of this article, some of the essential properties of the RR as a theoretical concept are listed, specifically those most relevant to the topic.

In a system with a written Constitution, the RR as a criterion of law's validity commonly and at least in part provides that norms which are duly enacted according to the constitutional procedure are valid laws. Therefore, it is clear that the two concepts while closely related are also distinct. The second part of this article outlines the most important features of the concept of a written Constitution. Among them, the most striking are supremacy, judicial protection, durability and rigidity.

The third part offers a summary analysis of possible and necessary relations between the two concepts. Some provisional theses are discussed concerning the problem of the validity of laws, the importance and contribution of a written Constitution to the fulfillment of the function of the RR, and the legitimacy and authority of a Constitution.

Finally, the last part is some sort of a reminder about the value of theoretical concepts in improving our understanding of practical legal concepts.

2. WHAT IS THE RULE OF RECOGNITION?

Ever since Hart and his followers theorized about the RR, it has been under the attentive scrutiny of many critics, although there is no uncontroversial or widely accepted claim about the RR. Among the various challenges critics have asked if it is a rule at all? If it is, what kind of a rule is it – conventional or social? If it is a conventional rule, what kind of convention? Is it duty-imposing or power-conferring? Is there one, a few or maybe more than few RRs? Whose practice is regulated by the RR? And there are more. So, what actually is the Rule of Recognition?

[2] S. Schapiro, "What is the Rule of Recogniton (and does it exist?)", 2009, *http://papers.ssrn.com/abstract#1304645*.

Instead of answering directly, we are going to list and describe some of the distinctive features of the RR, but only those which are important for the subject of the article. It will be neither a comprehensive review of the concept, nor of Hart's original thesis.[3] It is clear that although these distinctive features of RR are well defended and grounded, they are not uncontroversial nor immune to scrutiny.

2.1. Definition of the RR

However, first something must be said which may sound like a provisional definition of the RR. The rule of recognition may be described most simply as a *social rule*[4] which is used to identify rules that are valid as law in a legal system. The RR is on the apex of a legal system's rules: all other rules ultimately owe their validity, i.e. their *legal* status to the RR. On the other hand, the RR is not valid at all as the ultimate or supreme rule of the system.[5] For its existence is a matter of fact: there are two necessary conditions, namely, legal officials must *accept* and *follow* this rule. But what does "accepting and following" the RR actually mean? First, officials *follow* the RR when there exists a common practice of identifying certain rules as a valid legal rules. And second, officials *accept* the RR when they demonstrate a normative attitude towards that common practice, or, as Hart says, the "internal point of view"[6] with regard to what they are practicing, when applying the RR as the ultimate criterion of validity, and criticize deviations from it by using normative terminology".[7]

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[3] Hart fully elaborated the concept of RR in ch 6. of *The Concept of Law* (H. L. A. Hart, *The Concept of Law*, Second Edition with Postscript, Raz & Bulloch eds., Oxford 1994[2], 97 120).

[4] Social rule can be accepted for various reasons, which must not be identical for all the members of a social group. It is only important that there exists convergent social behavior and spreaded acceptance of the rule from whatever reasons, by most members of the group. On the other side, social rules are conventional when the general conformity of the members of a group to them is part of the reasons which every member of the group has for acceptance (H. L. A. Hart, 255).

[5] Because of that, the RR is of utmost importance to the legal world. As Hart says, it "deserves, if anything does, to be called the foundations of legal system" (H. L. A. Hart, 100). Hart claims that a legal system exists if (1) officials accept an ultimate rule of recognition, and if (2) citizens by and large obey the rules it validates (H. L. A. Hart, 112 114).

[6] The internal point with regard to a certain constant pattern of behavior makes this pattern not only regular, but regulated as well (by the accepted rule). The internal point makes a difference between two widespread social practices: social habit and social normative practice.

[7] But it should be remembered that on Hart's opinion, accepting does not mean (morally) *approving* (H. L. A. Hart, 55 7; 83 91; 102 3)

Now, we will return to the essential properties of the rule of recognition as a theoretical concept to highlight some of the Rule's distinctive and striking characteristics. This may be done by posing two questions; first, whose behavior is regulated by the RR and second, what does the RR represent for those whose behavior it regulates? Is it only a reason for action, or a duty-imposing social (or conventional) rule? The second question implies a preceding one namely, what "sort" of social behavior is the object of the RR?

2.2. Whose practice is crucial for existence of the RR?

As we have seen, there is no RR without it being practised. After all, it is the existence condition of every social (conventional) rule. But who constitute the group which practices the RR? Who are the members of the so-called recognitional group? Usually it is said that we identify the RR by observing the practice of legal officials. But, who are *the* officials? Hart claimed that the rule of recognition is "*a customary judicial rule*",[8] in other words, that reference to actual practice actually implies the "way in which *courts* identify what is to count as law...".[9] Thus, if doubts arise as to what is the RR of a given system, the answer lies in "the way in which courts identify what is to count as law...".[10]

But as Kenneth Himma (et al.)[11] points out, legal officials who are observed are not only judges, they include others who play a part in the functioning of a state's machinery. This is because the extent of a court's authority is limited, for example, by the acquiescence of those officials who have authority to enforce the law. If officials decline to support and enforce the court's decisions, for example, with the use of state-sanctioned physical force, then the court's decisions lack the normative consequences that law, as a conceptual matter, must have *if it is to count as law* (at least, in the positivist's sense of the word).[12]

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[8] H. L. A. Hart, 256.

[9] H. L. A. Hart, 198.

[10] H. L. A. Hart, 108. In fact, Hart's answer to the question, "what is recogni tional community?" is not such a straightforward one. Considering all secondary rules it seems that he took all the officials to be the relevant group (Hart, 117). But when he talks about the RR then his answer is less determinate.

[11] See M. Adler, "Popular Constitutionalism and the Rule of Recognition: whose Practices Ground U.S. Law?"*, Northwestern University Law Review* 100, 2/2006, 719 805; L. Alexander, F. Schauer, "Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance", 2008, *http://ssrn.com/abstract 1235202*; S. Carey, "What is the Rule of Recognition in the United States?", *University of Pennsyl vania Law Review* 157/2009, 1161 1197.

[12] K. E. Himma, "Understanding the Relationship between the U.S. Constitution and the Conventional Rule of Recognition", 2009, *http://ssrn.com/abstract 1269748.*

Also, Hart claims that when the suggested rule possesses some features specified by the RR, this rule becomes a rule of the group which must be reinforced within the group *by the social pressure it exerts*.[13] If as Waldron suggests,[14] we replace these emphasized words with *organized (institutionalized) social pressure* (what we believe Hart had in mind) then what is the meaning of the RR if, for instance, it points to some other rules which are never enforced by executives? Such a RR would be pointless. Actually, such a rule would not be a social rule at all. Because a necessary condition for the existence of the RR, as of any social rule, is its expression in practice, Himma is right to assert that "the existence and content of the RR depends on the joint practices of both judges and other officials".[15]

2.3. What "sort" of social behavior is the object of RR?

A further step in our attempt to determine the nature of the RR is to describe the behavior which is regulated by the RR. To answer the question about the nature and especially about the bindingness of the RR, it will be helpful to look at the structure of relevant practice. If we have a clear answer to that question, then whether the RR is social or conventional rule and if conventional what sort of convention it is, becomes less important and simply a matter of terminology.

The nature of a group whose practice demonstrates the existence of the RR has already been discussed. But what are the broad characteristics of such groups? For any such group to exist, its members must *coordinate* their actions to achieve one or more common goals. Such groups achieve coordination through reciprocal action between members, by *interaction*.[16] Coordination through interaction is the normal way of operation of any group. Interaction between A and B exists when an act of A prompts

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[13] H. L. A. Hart, 94.

[14] J. Waldron, "Who Needs Rules of Recognition?", 2009, *http://ssrn.com/abstract 1358477*.

[15] However, this statement must be qualified, because the officials do not often make one uniform, homogeneous group. For instance, sometime in the USA there are strong divisions amongst the executive and justices about what is valid law. This implies that all officials do not share one and same RR (S. Carey, 2009). As Adler convincingly explains, various groups of officials can practice various RR under one ultimate or su preme RR which is usually widely accepted, not only amongst officials, but also amongst the majority of the people (M. Adler, 767 8).

[16] This might suggests that on my opinion the RR regulates the so called shared cooperative activity (SCA). But, I am not sure about that. And this is a very intriguing problem, but the one I am not concerned with here. I only want to emphasize the coop erative nature of official practice, or that in such a practice members happen to be com mitted to the joint activity. Existence of this commitment, as Himma pointed out, induces reliance and a justified set of expectations, that can give rise to duties.

an act of B, and an act of B prompts an act of A.[17] Simple examples include Hume's two rowers having a common goal, to propel the boat[18] or Margaret Gilbert's two walkers going for a walk together.[19]Although the practice which is regulated by the RR has some idiosyncrasy[20], it is beyond doubt one common activity which demands cooperation and interaction of its members. In such activities, group members watch each others' actions, interpret them and adjust their own actions in response to the actions of others. It is clear, for instance, why one judge is likely to follow a RR which is being followed by his colleagues: he has no motive or incentive to abandon this RR because it would be obtuse to follow some "rule of recognition" which none of his fellow judges follows. Notwithstanding the other possible reasons for acceptance of the RR, there is always one explanation which is always the same: the RR is accepted and followed by other members of the group. If they do not accept it, then the rule can not exist nor can establish certain practice.

Although it is clear what kind of behavior the RR regulates and how the RR operates to influence officials' practice, it is a mistake to think of a RR only as some sort of coordination convention.[21] It is generally accepted that every such convention is characterized by the so-called "arbitrariness".

A conventional rule is arbitrary when the reasons for having such a convention are more important to the members of the group than the reasons for preferring an alternative course of action .[22] However, several authors[23] argue strongly in favor of the view that the RR as a conventional rule is not arbitrary, in Lewis's[24] sense of the word. For instance, Scott Shapiro argues that "[M]ost Americans would [not] view the United States Constitution as an arbitrary solution to a recurring collective action problem....many would believe that they had a moral obligation to heed a

[17] T. Honoré, *Making Law Bind*, Clarendon Press, Oxford 1987, 59.

[18] D. Hume, *A Treatise of Human nature*, (I, ii. 2), *http://www.gutenberg.org/files/4705/4705 h/4705 h.htm*

[19] J. Coleman, *The Practice of Principle*, Oxford University Press, Oxford 2001, 91.

[20] Certainly, officials are not as a rowers or walkers, and mutual relations between them are much more complicated.

[21] It is the concept introduced by David Lewis' famous book about conventions (D. Lewis *Convention: a Philosophical study*, Harvard University Press, Cambridge MA 1968). About coordination conventions see J. Postema, "Coordination and Convention at the Foundation of Law", *Journal of Legal Studies* 11, 1/1982, 165.

[22] A. Marmor, "Legal conventionalism", *Hart's Postscript: Essays on the Post script to The Concept of Law* (ed. J. L. Coleman), New York Oxford 2001, 204.

[23] J. Coleman, 94 5; M. Adler, 750; J. Waldron, *passim*, etc.

[24] D. Lewis, 10.

text that had been ratified by the representatives of the people of the United States, regardless of what everyone else did".[25]

Usually, the rule is not arbitrary if a preference for a particular form of the RR (one which also always solves coordination problems) is stronger than the preference for uniform conformity to any other possible RR. Also, it means that such a RR can be accepted by officials both because of some substantive personal convictions and out of their desire and need to act in coordination with other officials. So, here we approach one of the key questions about the RR: is it a so-called duty-imposing rule?

2.4. Is RR duty-imposing, after all?

First a caveat: to claim that the RR is duty-imposing does not mean that the RR can not also be power-conferring.[26] Specifically, a non-supreme RR can be such a rule, when the RR includes (as it usually does) some sort of rule of change.[27] An important example is the power of the U.S. Supreme Court's Justices to invalidate every unconstitutional law, and moreover, to permanently dissent, for instance, in some matters they consider important (Himma, 2009). Only a non-supreme RR is mentioned, because the ultimate RR must be duty-imposing. It is self-evident that if it is not, the RR does not fulfill its function, to bring certainty to a legal order. If every official has only an inclination, or a preference for one criterion of validity, if they are not bound by the rule which establishes such a criterion, then in that society there is no reliable "landmark" to determine what is and what will be and what will not be law. Consequently, one of the purposes of RR, that it provides a specific legal system with a measure of certainty – vanishes!

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[25] S. Shapiro, "Law, Plans, and Practical Reason", *Legal Theory* 8/2002, 387, 426.

[26] The fact that in a legal community there can exist several RR, arises also from the fact that often there are different subgroups of officials. For every group we can imag ine the existence of one sub rule of recognition.

[27] One legal rule can be valid if it satisfies the conditions set forth in RR. But it can be *immediately* valid under RR, and it can be validated by these immediately valid rules. For instance, constitutional rules of change are validated immediately by the RR itself, but a rule enacted in accordance with rule of change is valid under this rule. Some points must be made about the difference between the RR and rules of change, a distinc tion which is blurred for some (J. Waldron, 2009). Although there is only contingent identity of content between two sorts of rules, so long as it is possible, we must explain the difference between them. To discover this difference, we must understand not only the content but their nature and the place these rules have in a legal system. Above all, I have in mind two properties of the rule of recognition not found in the rules of changes. First is its conventionality. The RR is a conventional and not a valid legal rule. Moreover, it validates rules of change themselves. The second is that the RR is first of all a duty im posing rule, while rules of change are always power conferring rules.

However, the real issue is this: how is it possible that the existence of a particular practice (no matter how widespread), gives rise to the duty to abide by that practice?

Hart has given a simple answer: the internal, personal commitment to certain practices transform those practices into rules. Coleman has highlighted a problem with this solution, that in fact the internal point of view alone cannot do the job, namely it can not explain the duty-imposing character of the RR. It is sufficient to explain how some convergent practices become rules and as such, how they becomes a reason for action for those involved in those practices. But, not every reason for doing something in a particular way amounts to a duty. As Coleman explains, "if each of 1.000 individuals separately apply criteria of validity comprised in RR, those separate acts do not impose any duty...It is not just that different judges decide individually and separately to evaluate conduct in the light of standards that satisfy certain criteria, thereby creating reasons for themselves that they can unilaterally extinguish. Rather, they are engaged in a practice that has a certain specific, normative structure where among other things, the fact that some judges apply criteria of legality is a reason for others do so".[28] Thus, such a practice is capable of creating not only reasons for action, but duties as well. While the nature of this conventional duty is a question for ethics and not for positivisticaly orientated jurisprudence, it is important to emphasize again the *non-arbitrariness* of the RR. The non-arbitrary RR is generally justified in practice because it possesses some particular qualities which in the minds of most officials prevail over the qualities of other potential Rules of Recognition. It may promote the smooth functioning of state machinery or it might solve coordination problems amongst officials. But as for the question, why *any one specific RR* is binding, the answer is not to be found simply in these characteristics. It is suggested that at least for some officials and perhaps for most, the duty-imposing character of the RR will be based upon more substantive justification than the need to coordinate mutual actions. It is likely ultimately to be grounded in some normative principles, which means that a *moral duty* to follow the specific RR must ultimately come from somewhere external to the practice itself.[29]

EXCURSUS: HART AND KELSEN RULE OF RECOGNITION AND GRUNDNORM (SHORT COMPARISON)

Both of these views are very similar in that they both claim that there is some kind of a master norm that determines what counts as law

[28] J. Coleman, 91 2

[29] The question of the normativity of RR is of course much complicated than my brief sketch might suggest and my conclusion presented here is only provisional. But even in such undeveloped form, it can serve as a useful "device" for some further conclusions about the topics I have discussed.

in any given legal order. The disagreement is about the nature of this master norm. But in this case the disagreement appears to be insightful.

Kelsen`s well-known concept may be summarized in a few lines as follows. He says that always when we are "confronted" with valid legal norms "we presuppose a norm according to which (a) the act whose meaning is to be interpreted as "constitution" is to be regarded as establishing objectively valid norms, and (b) the individuals who establish this act as the constitutional authorities".[30] This norm – the basic norm (*Grundnorm*) of legal system is not and can not be *posited*, i.e. created by authority entitled to enact the laws by some other, higher norm, because such an authority does not exist. This norm must be *presupposed*.[31] Kelsen stresses that basic norm is not arbitrarily chosen by anyone.[32] It gives authority only to those constitutional rules which are effectively accepted and applied. Simply expressed, when we ask the question "why the specific basic norm is supposed"?, the answer is "because there is standing effectiveness of a legal system, which is grounded by this specific basic norm". So, the content of the basic norm crucially depends of that state of affair which engendered effective legal system, system which is by and large effective.[33] Even according to Kelsen's own account of the basic norm, one can see that there must be more to it than a presupposition, because the content of any such a norm is mainly determined by actual practice.[34]

What kind of lesson we can learn from this short digression about Kelsen's concept of basic norm and its reference to official legal practice? First of all, though a basic norm is in certain respect determined as a presupposition, its content always depends on practice. Although these claims threaten the purity of his theory, Kelsen could not escape from the practice of legal system, eventually from facts, notwithstanding how they are included in his picture of legal system.

But, this leads us to the second point: once we see that *this practice* is rule-governed, namely, that in applying the criteria for determining validity of the laws in their legal systems, the officials follow certain rules,

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[30] H. Kelsen, *Pure Theory of Law,* Los Angeles 1967, 46.

[31] H. Kelsen, (1967), 200; H. Kelsen, *Théorie pure du droit,* Neuchatel 1953, 37, 117.

[32] H. Kelsen, (1967), 201.

[33] H. Kelsen, (1967), 200 201; H. Kelsen, (1953), 118.

[34] Marmor points out that Kelsen's account of the basic norm violates his own antireductionis viewpoint. However, he finds this failure of Kelsen's antireductionism il luminating, because it shows that the idea of the basic norm avoids a reduction of legal validity to social facts (precisely of the kind that Hart later suggested in the form of the rules of recognition) is not viable, A. Marmor, "How Law is Like Chess", *Legal Theory* 12/2006, 349 350.

it becomes clear that there are rules of recognition along the lines suggested by Hart and not only some fictional presupposition about normativity and validity of specific legal system.

3. PROPERTIES OF WRITTEN CONSTITUTION

The reason for referring in this article only to a *written* Constitution is that usually, there is a strong connection and interdependence between the RR and this form of constitution which does not exist between the RR and unwritten constitution.[35] This reason is discussed by Raz, at least implicitly, when he points out that some central features of a written Constitution "give rise to theoretical questions that do not apply, at least not to the same degree, to other law"[36] (and it may be added of an unwritten constitution too[37]). His is precisely the kind of insight that motivates an analysis of the conceptual connections between a written Constitution and the RR.

A written Constitution is a document (or several documents) that contains canonical or codified formulation of what is usually named as a *thin* constitution[38] or *materiae constitutionis*.[39] Usually, *materiae constitutionis* encompasses rules that determine who enacts laws and how, what is the structure and general principles of government, and today in particular, general principles which establish human rights and restrain overall Government power. A written Constitution possesses some characteristics which an unwritten constitution doesn't have so the fact and nature of these characteristics must be taken into account by those who want to understand the relationship between the RR and a written Constitution. Therefore, we must look at the "central features" of A written Constitution.

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[35] Moreover, the distinction between the RR and customary, unwritten form of constitution is unclear or these two types of rules sometimes follow parallel lines, as is shown by the example of the English constitutional conventions (E. C. S. Wade, *Consti tutional Law*, Longmans, London 1960[6], 74).

[36] J. Raz, "On the Authority and Interpretation of Constitution: Some Preliminar ies", *Constitutionalism: Philosophical Foundations* (ed. L. Alexander, G. Postema), Cam bridge University Press, Cambridge 2001, 154.

[37] Because an unwritten constitution is not always customary or common law. Usually, part of it is a written law. In other words, "unwritten" does not mean litteraly unwritten, but only when written, it is in the same way as other written laws, statutes, by laws and so on.

[38] J. Raz, 153.

[39] A. Marmor, "Are Constitutions Legitimate?", *Canadian Journal of Law and Jurisprudence* 1/2007, 69.

The first characteristic of a written Constitution, and probably the most important one is its *normative supremacy*. It means that constitutional provisions prevail over ordinary legislation, i.e. the ordinary laws which conflict with these provisions are invalid. However, it does not mean, as will be reemphasised in the next section, that all laws derive their legal validity from the constitution.

Second, this supremacy must be, as it were, institutionally strengthened. Usually, this is done by entrusting the interpretation of a written constitution to the judiciary, either to specialized constitutional courts or to the regular court system. The essential point here is that there is one court that determines what the constitution means and which law is invalid due to its unconstitutionality.

Further, at least in aspiration, a written Constitution is meant to be of *long duration*. Since, every constitution sets the basic structure of legal and political system of the land, it must be stable and intended to preserve continuity in political structure and therefore, to apply well beyond the generation that created it. Owing to this aspiration, amending a constitution is a more difficult task then enacting and changing ordinary legislation. The more difficult it is to change the constitution, the more rigid the constitution is. *Rigidity* is closely tied to durability. If the constitution should be a long lasting document, than it must be relatively difficult to amend it. Also, *judicial review* and the extent of its authority regarding constitutional interpretation depend considerably on the constitution's rigidity. The more rigid the constitution is, the more lasting power of the judges is in determining its content.

As one can see, all the adduced features of written constitution are in some way interconnected. And they all, as a whole, make a concept of written Constitution important to legal practice. But also, they make the study of conceptual connections with the concept of RR interesting and fruitful.

4. CONCEPTUAL RELATIONS BETWEEN THE TWO CONCEPTS

Now these two concepts will be compared. The intention is not to offer any empirical analysis or a description of the content of the RR in some specific legal system, nor is it intended to assess the potential influence of that system's written Constitution on its RR. To compare rather than to analyze the two concepts is a conceptual not an empirical work and comparison will reveal and highlight some interesting conceptual relations.

4.1. Constitution and the RR: identity or just overlapping?

It is perhaps a trivial but sometimes forgotten fact that RR and a written Constitution cannot be identical. Conceptually, the RR can provide criteria that the criteria of validity of legal rules is their accordance with some provisions of a Constitution, and that these constitutional provisions are in some way superior legal norms. But a rule which set some constitutional rules as superior legal rules can not itself be a constitutional rule. Moreover constitutional rules, unlike the RR, are always *valid* rules.[40] As a matter of a linguistic convention, we say that a Constitution is valid (or it was valid once). As with all other valid laws, constitutional provisions are amended, changed or repealed by a well-defined procedure for constitutional revision and not by less structured or informal processes as is the case with social rules like RR. And yet, the provisions of a written Constitution more often than not reflect and describe some of the principles of the RR. A good example is the U.S. Constitution and the same process can be seen at work on other Constitutions. Article VII. (or so-called ratification clause) of the US Constitution validates the document[41] so it looks as if Article VII validates itself. However, although the Article's text is in the written Constitution, its status as the (original) rule of recognition is external to the document and "rests on its acceptance as the validating rule, not on its validation by having been ratified in accord with its terms." So the ratification clause itself *is not* the rule of recognition, but rather it *records* or *describes* the rule of recognition.[42]

Further, conceptually a Constitution and the rule which is a *supreme*, *valid* rule must not be identical.[43] The RR can refer to some other document as supreme in relation to the written Constitution, for instance the Bill of Rights.[44] Also, it means that it is not the case that *every valid legal rule* is valid on the basis of the provisions of Constitutions. This is clearly the case in the USA (and elsewhere) where the authority over other officials, carried by a decision of the Supreme Court is not immediately based on any constitutional provision, but directly on the conventional rule of recognition.[45]

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[40] And always valid immediately under the RR itself.

[41] "*The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same*".

[42] L. Alexander, F. Schauer, 2008.

[43] D. Priel, "Farewell to the Exclusive Inclusive Debate", *Oxford Journal of Legal Studies* 4/2005, 686.

[44] Although, if the constitution does not have normative supremacy, we could ask the question ...what is the good of the written constitution at all? And in that case, is there a document which we could denominate as a written constitution?

[45] It is one more advantage of Hart's idea over Kelsen's. Namely, Kelsen's basic norm confers validity to all legal norms which are members of a legal system founded on

Finally, it is acknowledged that there may be rules of a *constitutional character* which are not valid rules, rules in accordance with a RR. Thus, the conventions of the English constitution are examples of social rules. If we bear this in mind, I think we can more easily explain the concept of the conventions of the English constitution and their presumed or actual legal status.

4.2. The RR is a remedy for indeterminacy of the pre-legal order

Hart extended his argument about secondary rules, concentrating on explaining some defects of a simple or primitive order which does not contain the so-called secondary rules. Such a system has only primary rules of conduct and secondary rules are introduced to remedy these defects. The most important of these secondary rules, rules of recognition, reduce or eliminate uncertainty about rules of conduct giving us criteria for recognizing these rules and setting the conditions for their validity.

A written Constitution strengthens this important property of the RR, bringing certainty in social order and human relations. When a legal system acquires a written Constitution, which usually *is,* at least in part, an effective social rule (i.e. rule of recognition), then this "strengthens" the function of the RR – at least that part of the Constitution which, as has been said, "records" the content of *the* RR. The fact is, that when some elements of RR appear in a written form (through the Articles of the Constitution) the capacity of the RR to diminish uncertainty and indeterminacy in the legal order is almost certainly improved. It should not be forgotten that one of the functions of legal rule as authoritative verbal formulation is to rescue us from the uncertainty which different and perhaps competing ideas of Good or Justice engenders.[46]

A written Constitution has another important function, to set limits on the power of all branches and agents of government. 'Constitutionalism' gave rise to the movement for limiting the absolute power of the Ruler. In the absence of an absolute ruler, this objective of a contemporary written Constitution is likely to have been modified but the core function, to impose limits on power, is still extremely important. Even the

this very basic norm. There are no exceptions. A norm can not be validated "outside" the framework established by the Constitution, nor can any norm in the system lose validity because it does not possess some characteristic which is not specified in the basic norm, in fact in the Constitution. But as I have said, provisions of a written Constitution which are part of the RR do not necessarily validate all the rules of the legal system, nor are all valid rules necessarily in compliance with these constitutional provisions.

[46] By their formality, simplicity and determinacy, rules help us avoid the huge costs of moral and political controversy. Instead of being told "do the right thing," the rule subject is told "in circumstance C, do X," where C and X are relatively easy for rule sub jects to comprehend and ascertain, L. Alexander, F. Schauer, 2008.

courts, which have a distinct responsibility for the interpretation and "protection" of constitutionality, are limited in their decision-making. Usually, their discretion is to some extent limited by the written Constitution itself. We can see this if we look at one version of the RR in the USA, as formulated by Kenneth Himma: "Supreme Court Justices are obligated to decide the validity of duly enacted norms according to what is, as an objective matter, the morally best interpretation of the [substantive norms] of the Constitution.".[47] This means that although the Supreme Court has some discretionary powers to decide what is and what is not a valid law, its discretion is substantially constrained by the constitutional provisions. Moreover, it also draws attention to the importance of interpretative practice of the Constitution. Kent Greenawalt for instance, thinks that if judges are bound to follow some standards of interpretation[48] in deciding what the Constitution means, these standards need to be accorded some place among the ultimate or derivative criteria for determining the law.[49]

In any case, and in spite of the dilemma about bindingness of specific standards of interpretation, Himma's formulation of the RR is very telling. It shows some sort of "synergy" between the RR and the Constitution. They do the same job, and they do it well in mutual combination.[50] So, the Constitution will accomplish the task if and only if the RR generally works and fulfills its function of bringing certainty to legal order. It is clear therefore, that *without the RR*, the Constitution alone can do little or nothing to limit the discretionary power of officials. As Himma concludes, the officials might not view the written constitution as binding at all, and that is why, in order to understand the role which a written Constitution plays in determining what counts as law, we have to observe all

[47] This does not mean that the Court must reach the objectively correct decision that reflects the morally best interpretation in a given case, or even in any case. The Court must merely ground its decisions in an attempt to determine the morally best interpreta tion. The Court's discretion is constrained, "by what the other officials are prepared to accept from the Court in the way of validity decisions", S. Carey, 1182.

[48] These "standards of interpretations", although never codified by the legislature, may be said to be "law" because they are applied by courts in the interpretation of the constitution and statutes. Cuss Sunstein explains that these standards (canons) include, but are not limited to, principles that derive "from policies that have a firm constitutional pedigree" that may thus be treated as a form of "'constitutional common law'" that has "a kind of constitutional status", C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, Harvard University Press, Cambridge MA 1990, 155.

[49] K. Greenawalt, "The Rule of Recognition and the Constitution", *Michigen Law Review*, 85/1987, 655 6.

[50] Indeed, I think that the RR alone, as a matter of fact and without a written con stitution, can be a proper "device" for limiting the power of rulers (I emphasize, *can be*), but at the moment it doesn't matter. What it does matter is that without the RR, a constitu tion alone can not accomplish the task. This point is very clearly put forward by Himma, Alexander and Schauer (see text below).

the relevant practices of officials.[51] Larry Alexander and Fred Schauer draw a similar conclusion. After a scrupulous analysis of constitutional controversies in the USA and dependence of the legal rules on acceptance, they assert that "...once we appreciate the unavoidable fragility of a legal system's non-legal foundations, we discover that the security and stability that constitutionalism is alleged to bring depends less on constitutionalism itself than on the pre-constitutional understandings that make constitutionalism possible. Some such understandings will make constitutionalism more stable than others... It will be a useful reminder that constitutionalism of any sort resides not in a constitution, but in the pre-constitutional commitments that make any form of constitutionalism possible".[52]

4.3. Authority of the Constitution and the Rule of Recognition.

The rule of recognition in some sense helps the constitution fulfill its function. And as the RR can be seen as duty-imposing, and in some sense normative practice, so it is the case with the Constitution. The written Constitution has the potential to be normative (*i.e. to be the reason for the actions of officials*) thanks to the normativity of the RR itself and this normativity of the RR is explained in one of the previous sections Yet, a very important and frequently posed political and jurisprudential question asks if the Constitution can have *legitimate authority* over officials and broadly over the citizenry? Perhaps the concept of the RR hints at an answer to this question?

First of all, it should be emphasized that the RR cannot transmit to written constitution what it itself does not possess, that is, moral justification for the legal system for which the RR is the existence condition. The moral reasons for obeying the constitution cannot be derived from the rules that determine what the law is. If there is a moral imperative to respect and obey the specific RR, then this imperative cannot be expected to come from the function which the RR serves, because every imaginable RR can do it. The moral obligation to respect and obey the specific RR or in other words, to follow the valid law, must come from other types of consideration.

However, we need some qualification here. It is important to remember what has been said about the nature of the RR. Conventions like these are not arbitrary conventions and they have their own value, not least for those whose practice reflects the RR. Such conventions not only give the answer, as Marmor say, about "how" such a practice must proceed, but they also go some way towards explaining, "why" *this* practice

[51] K. E. Himma, 2009.

[52] L. Alexander, F. Schauer, 2008.

is more valuable than any other. In an activity in which participants accept the specific RR for the values it offers them, specifically for some kind of normative, substantive reason (not simply because others accept and follow it), the RR can occupy the moral and political arena. In other words, it may be cited to support, justify and perhaps even legitimise aspects of the Constitution itself. Even so, this does not mean that all and every RR can be used in this way. In fact, this process of justification is always done by reference to some normative theory which stands in the background of both the RR and the Constitution.

5. CONCLUSION

Debates in legal philosophy often involve highly theoretical and abstract arguments about conceptually possible legal systems, while seldom concerning themselves with the mundane problems of actual legal systems. However, it may prove useful both for legal philosophers and the legal community to drag theoretical concepts down from this philosophical high ground into the profane legal world. Generally, there are two ways to accomplish such a task.

First, theoretical concepts may serve practical functions. They can be adapted to describe and explain the actual legal system or to give us *practically* important answers. For instance the RR can help us find answers to questions such as:...which legal system are we to acknowledge when some revolutionary change occurs? ...in transition countries how can we understand and explain why some pre-transition laws persist while others do not? ... should courts draw on sources of law from other nations?, etc.[53]

A second way to do the same thing is to follow Hart`s idea, that theorizing about law means "elucidating *the concepts* that constitute the framework of legal thought"[54] and this is the route chosen to be followed. There is one relatively simple question to be asked: what is the role of the RR, as *a theoretical* concept[55] in explaining one of our important practical legal concepts, the concept of written Constitution?

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[53] L. Alexander, F. Schauer, 2008.

[54] It is well known that Hart has accorded central place in such elucidation and clarification to his idea of legal system as union of two types of rules (H. L. A. Hart, 81).

[55] It seems that there is no doubt about the clasification of the concept of RR as a theorethical one. According to the taxonomy of Robert Summmers, it belongs to a group of highly theorethical concepts (precisely, to "concepts used in formulating theories of law", R. Summers, "Legal Philosophy Today An Introduction", *Essays in Legal Phi losophy*, Basil Blackwell, Oxford 1968, 2), which are neither known to any "educated person", if I can borrow this phrase from Hart, nor used by legal practitioners or legisla

By examining the connections between the two concepts we have highlighted some interesting conceptual explanations which perhaps add something new to our understanding of the properties and concept of a written Constitution. First, it is the insight that although a written Constitution possesses normative supremacy, in fact the constitution *as a whole* is not the supreme rule of a legal system, it is not even necessarily a *supreme valid* rule. Second, it has been demonstrated that in a sense, the crucial and original functions of a written Constitution and the function of the RR are complementary although the Rule of Recognition takes primacy. Finally, it has been argued that the perennial problem of the legitimacy of a written Constitution can not be resolved solely by reference to the Rule of Recognition. Even for officials, the authority of the Constitution and also, at least in part, their reasons for accepting the RR are likely to be found in the normative field. Thus again the "destiny" of the RR and of the written Constitution overlap and remind us that they are closely related not only as concepts, but also as phenomena.

tors, S. Perry, "Hart's Methodological Positivism"*, Hart's Postscript: Essays on the Post script to The Concept of Law* (ed. J. L. Coleman), Oxford University Press, Oxford 2001, 329.

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SPECIFIC TREATMENT OF TRADITIONAL CHURCHES AND RELIGIOUS COMMUNITIES PROVIDED FOR IN THE ACT ON CHURCHES AND RELIGIOUS COMMUNITIES OF THE REPUBLIC OF SERBIA*

Legal comparison shows that European states provide for a variety of status of religious communities in their legal systems. Such differences, based in valid reasons, are consistent with international law. States use more specified terminology in ordinary law than is used in their respective constitutions in concretizing the perspectives set by their constitutions; this is not discriminatory and is consistent with international law. Differences between traditional churches and religious communities and other religious organizations in information required for registration are based in valid reasons; these differences are not discriminatory and are consistent with international law. Such differences are in accordance with the principle of a secular state.

The Traditional Churches and Religious Communities of Serbia have asked me to provide my opinion on the following issues:

1) Is the legal distinction between Traditional Churches and Religious Communities, on the one, and other Churches and Religious Com-

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munities in the Republic of Serbia on the other hand, in itself, and in substance of the Law on Churches and Religious Communities which determines the legal status of Churches and Religious Communities in Serbia, in accordance with the Constitution of the Republic of Serbia and international and European standards, and particularly is it in accordance with the European Convention on the Protection of Human Rights and Fundamental Freedoms?

2) Is the distinction, in the issue of registration of Churches and Religious Communities prescribed by Article 18 of the Law, between Traditional Churches and Religious Communities, on the one hand, and other Churches and Religious Communities, on the other hand, discriminatory in substance of the Constitution of the Republic of Serbia and international and European standards, and particularly from the perspective of the European Convention on the Protection of Human Rights and Fundamental Freedoms?

This opinion is based primarily on the European Convention on the Protection of Human Rights and Fundamental Freedoms and on legal comparison; from this viewpoint and with the perspective of a non-Serbian lawyer, the issues raised in relation to the compliance with the Serbian constitution are looked into.

1. THE LAW

1.1. The most relevant provisions of the Act on Churches and Religious Communities of the Republic of Serbia

Holders of religious freedom

Article 4

Holders of religious freedom according to this Act are traditional Churches and religious communities, confessional communities and other religious organizations (hereinafter: Churches and religious communities).

Legal personality of Churches and religious communities

Article 9

Churches and religious communities registered in accordance with this Act have the capacity of a legal person.

Organizational units, bodies and institutions of a Churches or religious communities may acquire the capacity of a legal person in accordance with autonomous regulations of the pertinent Church or religious community, and based upon a decision of the competent authority of the pertinent Church or religious community.

Churches and religious communities may alter or terminate their organizational units, bodies and institutions with the capacity of a legal

person by their internal decisions, and demand that they be erased from the Register.

Churches and religious communities, as well as their organizational units and institutions possessing the capacity of a legal person, shall use in public exclusively the official name under which they are registered.

Traditional Churches and religious communities

Article 10

Traditional Churches are those which have had a historical continuity within Serbia for many centuries and which have acquired the status of a legal person in accordance with particular acts, that is: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church (a.c.), the Christian Reformed Church and the Evangelical Christian Church (a.c.).

Traditional religious communities are those which had a historical continuity within Serbia for many centuries and which have acquired the status of a legal person in accordance with particular acts, that is: the Islamic Religious Community and the Jewish Religious Community.

The Serbian Orthodox Church

Article 11

The continuity of legal personality acquired by virtue of the Document on Spiritual Authority (Decree of the National Assembly of the Principality of Serbia of May 21, 1836) and of the Act on the Serbian Orthodox Church ("The Official Gazette of the Kingdom of Yugoslavia", No. 269/1929) is recognized to the Serbian Orthodox Church.

The Serbian Orthodox Church has had an exceptional historical, state-building and civilizational role in forming, preserving and developing the identity of the Serbian nation.

The Roman Catholic Church

Article 12

The continuity of legal personality acquired by virtue of the Act on the Concordat between the Kingdom of Serbia and the Holy See (Decision of the National Assembly of the Kingdom of Serbia of July 26, 1914, "The Serbian Gazette", No.199/1914) is recognized to the Roman Catholic Church.

The Slovak Evangelical Church (a.c.), the Reformed Christian Church, the Evangelical Christian Church (a.c.)

Article 13

The continuity of legal personality acquired by virtue of the Act on Evangelist-Christian Churches and Reformist Christian Church of the Kingdom of Yugoslavia ("The Official Gazette of the Kingdom of Yugoslavia", No. 95/1930) is recognized to the Slovak Evangelical Church (a.c.), Reformed Christian Church and Evangelical Christian Church (a.c.).

The Jewish Community

Article 14

The continuity of legal personality acquired by virtue of the Act on Religious Community of Jews in the Kingdom of Yugoslavia ("The Official Gazette of the Kingdom of Yugoslavia", No. 301/1929) is recognized to the Jewish Community.

The Islamic Community

Article 15

The continuity of legal personality acquired by virtue of the Act on Islamic Religious Community of the Kingdom of Yugoslavia ("The Official Gazette of the Kingdom of Yugoslavia", No. 29/1930) is recognized to the Islamic Community.

Confessional communities

Article 16

Confessional communities are all those Churches and religious communities whose legal position was regulated on the grounds of notification in accordance with the Act on Legal Position of Religious Communities ("The Official Gazette of the Federal National Republic of Yugoslavia", No. 22/1953) and with the Act on Legal Position of Religious Communities ("The Official Gazette of the Socialist Republic of Serbia", No. 44/1977).

Procedure of registration of religious organizations

Article 18

For the entry of Churches and religious organizations into the Register, a notification is filed to the Ministry containing:

1) name of the Church or religious community;

2) address of the seat of the Church or religious community;

3) name, surname and capacity of the person authorized to represent and act on behalf of the Church or religious community.

Religious organizations, excluding those mentioned in Article 10 of this Act, for the entry into the Register need to file an application with the Ministry, containing the following:

1) decision by which the religious organization has been established, with names, surnames, identification document numbers and signatures of founders of at least 0,001% adult citizens of the Republic of Serbia having residence in the Republic of Serbia according to the last official census, or foreign citizens with permanent place of residence in the territory of the Republic of Serbia;

2) statute or another document of religious organization containing: description of organizational structure, governance method, rights and obligations of members, procedure for establishing and terminating an organizational unit, list of organizational units with the capacity of a legal person and other data relevant for the religious organization;

3) presentation of the key elements of the religious teaching, religious ceremonies, religious goals and main activities of the religious organization;

4) data on permanent sources of income of the religious organization.

1.2. The most relevant provisions of the Constitution of the Republic of Serbia of 2006

Article 1

Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values.

Article 11

The Republic of Serbia is a secular state.

Churches and religious communities shall be separated from the state.

No religion may be established as state or mandatory religion.

Article 21

All are equal before the Constitution and law.

Everyone shall have the right to equal legal protection, without discrimination.

All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.

Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination.

Article 43

Freedom of thought, conscience, beliefs and religion shall be guaranteed, as well as the right to stand by one's belief or religion or change them by choice.

No person shall have the obligation to declare his religious or other beliefs.

Everyone shall have the freedom to manifest their religion or religious beliefs in worship, observance, practice and teaching, individually or in community with others, and to manifest religious beliefs in private or public.

Freedom of manifesting religion or beliefs may be restricted by law only if that is necessary in a democratic society to protect lives and

health of people, morals of democratic society, freedoms and rights guaranteed by the Constitution, public safety and order, or to prevent inciting of religious, national, and racial hatred.

Parents and legal guardians shall have the right to ensure religious and moral education of their children in conformity with their own convictions.

Article 44

Churches and religious communities are equal and separated from the state.

Churches and religious communities shall be equal and free to organize independently their internal structure, religious matters, to perform religious rites in public, to establish and manage religious schools, social and charity institutions, in accordance with the law.

Constitutional Court may ban a religious community only if its activities infringe the right to life, right to mental and physical health, the rights of child, right to personal and family integrity, public safety and order, or if it incites religious, national or racial intolerance.

1.3. The European Convention on Human Rights and Fundamental Freedoms

Freedom of thought, conscience and religion

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Prohibition of discrimination

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. EVALUATION

2.1. Legal comparison

Many, if not most, European states provide for more than just one status for religious organizations. They do so in view of the impact of religious communities in terms of tradition, identity of the country, historical role of religions, religious demography, and the needs and wishes of religious communities themselves. This is independent from differences in basic structures such as systems with a state church, separation of state and religious communities or closer cooperation between the two spheres

The systems of England, Denmark, Norway and Finland that have state churches attribute a special status to this state church. The European Court of Human Rights has upheld the system of state churches with special positions of individual churches and declared them consistent with the European Convention of Human Rights. Also separation systems and those promoting cooperation between state and religions provide for differentiation in status of religious communities or their respective legal persons. The most prominent example is France which therefore is examined in more detail below.

(1) In France, being the prototype of separation in Europe, the 1905 law of separation proclaims separation of state and church and prohibits any funding of religious communities; these basic principles have the status of constitutional law.[2] The 1958 French constitution defines the country as a 'république laique'.[3]

The French idea of separation has for long developed into positive accommodation of religious needs.[4] In France, laïcité as a legal principle, today, means neutrality and tolerance, that the state does not make any difference between individual religious beliefs and does not intervene into religious institutions.[5]

[2] Loi de la séparation of 09.12.1905; see Brigitte Basdevant Gaudemet, "State and Church in France", in: Gerhard Robbers (ed.), *State and Church in the European Union*, Nomos, Baden Baden, 2005[2], p. 157 et seq.; Maurice Barbier, *La laïcité*, Paris 1995; Jean Paul Durand, "Droit public ecclésiastique et droit civil ecclésiastique fran çais", in: Patrick Valdrini et alt., *Droit canonique*, Paris 1999[2], p. 427 et seq.

[3] See Article 1 Sentence. 2 Constitution1958; Preamble Constitution 1946; Arti cle 10 Declaration of Human and Citizens' Rights of 1789; for the norms see Bernard Jeuffroy, François Tricard (ed.), *Liberté religieuse et régime des cultes en droit français. Textes, pratique administrative, jurisprudence*, Paris 1996; Jean Boussinesq, *La laïcité française*, Paris 1994.

[4] See Jean Morange, "Le droit et la laïcité", *Revue d'éthique et de théologie mo rale*, le Supplément, 1988, No 164, p. 53 et seq.; Jean Rivero, *La notion de laïcité*, D. 1949, chr., op. 137 et seq.

[5] A. Boyer, *Le droit des religions en France*, Paris 1993, p. 105 f.

The French law provides a variety of different forms of associations by which religious communities can have access to legal entity status according to their specific religious needs[6] and by which tax privileges and public funding become possible.[7] The legal status of religious buildings marginalizes the prohibition of state funding of religious communities:[8] The state is the owner of all religious buildings of the Roman Catholic Church that were constructed before 1905,[9] it is responsible for their maintenance[10] and makes them available for use by the Roman Catholic Church free of charge;[11] the local parish priest receives a (small) remuneration by the state for looking after the building.[12]

The state must not directly fund the construction of new religious buildings; however, the state can guarantee for loans by religious communities and demise plots of land at a symbolic interest rate for the construction of religious buildings.[13]

Large amounts of state subsidies support cultural activities of religious communities and pay for community rooms attached to the cult rooms, based on a dictintion between cult and culture. This laicist reduction of the religious to the ritual has made possible far reaching funding, not only of the Roman Catholic Cathedrale of Evry, but – foremost – of the mosque of Paris as early as 1921, and more recently the mosque of

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[6] See Loi de la séparation of 09.12.1905 with additions by the laws of 02.01.1907, 13.04.1908, and 31.12.1913; see Brigitte Basdevant Gaudemet, "A propos des associa tions cultuelles. Etapes d'une législation", in: *L'année canonique* 33, 1990, p. 101 et seq.; Jean Gueydan, "Les religions face au droit d'association français", in: *Praxis juridique et religion* 1987, p. 117 et seq.; Brigitte Basdevant Gaudemet, Francis Messner, "Statut juri dique des minorités religieuses en France", in: *European Consortium for Church State Research* (ed.), *The Legal Status of Religious Minorities in the Countries of the European Union*, Milan 1994, p. 115 et seq.; A. Boyer, p. 143.

[7] See A. Boyer, p. 104.

[8] See M. Flores Lonjou, F. Messner (eds.), *Les lieux de culte en France et en Europe Statuts, pratiques, fonctions*. Peeters, Leuven 2007; Magalie Lonjou, "Les lieux des cultes", in: *Actes, les cahiers d'action juridique*, Nr. 79/80, "Les religions en face du droit", April 1992, p. 25 et seq.

[9] Circulaire du ministre de l'Intérieur, 13.08.1959, Nr. 388.

[10] Article 5 Law of 13.04.1908 and Law of 25.12.1942; CE 22.01.1937, *Ville de Condé Sur Noireau*; CE 26.10.1945, *Chanoine Vaucanu*, Lebon, p. 212.

[11] Article 5, 1 Law of 20.01.1907; Article L 131 2.2° Code des communes; Arti cle 26 Law of 1905.

[12] On the remuneration paid to guardians of church buildings see Circulaire of 07.02.1990.

[13] Law of 25.12.1992; Réponse ministère de l'Intérieur, JO, Débats Assemblée nationale, 18.04.1988, p. 1674; Article 11 Law of 29.07.1961; Rapport Marchand (Rap port d'information déposé en application de l'article 145 du règlement sur l'intégration des immigrés), Assemblée nationale, No 1348, 2e session ordinaire, 1989/90, p. 77.

Rennes.[14] This dynamic limitation of the prohibition of funding religion is based in an understanding of the positive, providing nature of human rights, also of freedom of religion or belief. It serves to compensate for a factual inequality of religions that have only recently come into the country and thus have had no worshipping places in 1905. It is an expression of a new, compensating laïcité that promotes public peace, regulates religion, and aims at integration.[15]

There is a lot of variety within the dominant laicist system in France. Local law that still is based in the 1801 Napoleonic concordat governs the status of religions in the three eastern departments of Alsace-Lorraine.[16] The Catholic, Protestant and Jewish communitites have the status of public law corporations, organized by acts of state; their clergy is directly paid by the state, and the crucifix is exhibited in school rooms and other public buildings.[17]

These general observations lead to more specific details of differentiation in organizational status provided for religious communities. These differentiations follow historical developments and special needs of individual religious organizations, often based in their specific theology and teaching.:

Despite the principle of non recognition of churches, religious groups are subject in French law to some special rules.[18]

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[14] On the support of church hospitals, care for the elderly, youth care, church schools, and universities see A. Boyer, p. 131, 158.

[15] Jean François Flauss, "Le principe de laïcité en droit français. Evolutions récen tes", *Le quotidien juridique*, 20.12.1990, No 150, p. 10; Rapport Marchand (Rapport d'in formation déposé en application de l'article 145 du règlement sur l'intégration des immi grés), Assemblée nationale, No 1348, 2e session ordinaire, 1989/90, p. 77, p. 78.

[16] A. Boyer, p. 131, p. 197; see also Francis Messner, "Le droit local des cultes alsacien mosellan en 1996", in: *European Journal for Church and State Research* 1997, p. 61 et seq.; Francis Messner, "Les associations cultuelles en Alsace Moselle", in: *Praxis juridique et religion* 1988, p. 60 et seq.; the provisions of the Napoleonic concordat have to be seen together with the Organic Articles unilaterally introduced by Napoleon about the Catholic and Protestant churches of 1802 and the provisions concerning the Jewish cult communities, in substance the French laws on religion in force before 1871, in addi tion to that numerous German modifications from the time when Alsace Lorraine be longed to the German Reich of 1870/71. On the development of the concordat see Bri gitte Basdevant Gaudemet, *Le jeu concordataire dans la France du XIXe siècle*, Paris 1988; Jean Julg, *L'Eglise et les Etats Histoire des concordats*, Paris 1990, p. 81 et seq., 133 et seq.

[17] Imperial Decree of 22.04.1902 in conjunction with Decree of 26.11.1919; *A. Boyer,* Le droit des religions en France, Paris 1993, p. 192.

[18] For the following see Brigitte Basdevant Gaudemet, "State and Church in France", in: Gerhard Robbers (ed.), p. 162 et seq.

a) *Religious Associations (associations cultuelles)*. Article 4 of the Law of 1905 provides for the formation of associations cultuelles, capable of receiving the property of the former public church establishments suppressed in 1905. The relevant associations are subject to the Law of 1 July 1901, which governs all associations, and must comply with some additional rules set out in the Law of 1905: article 19 requires them to be "exclusively for the pur-pose of the church". These associations cultuelles have benefited progressively from advantages under tax law, which means that the status is now sought after. Since 1905, Protestants and Jews have made use of the law and established associations cultuelles, which remain active today, in accordance with all the provisions of the Law of 1905.

b) *Diocesan Associations (associations diocésaines)*. The Roman Catholic Church refused to put the Law of 1905 to use. To fill the legal void, the Law of 2 January 1907 provided that the public exercise of religion could be advanced by associations conforming simply to the Law of 1901, or by meetings, called on an individual initiative, under the Law of 1881 on the freedom of public assembly.

Since 1924 the French bishops have put into place associations diocésaines which are associations cultuelles, complying with the Laws of 1901 and 1905, even if meeting the expenses of the Church is no longer mentioned as the "exclusive" object of the association. The rules of Canon Law are also followed, the associations acting "under the authority of the bishop, in communion with the Holy See and in conformity with the constitution of the Catholic Church" (article 2 of the model statutes).

This development had repercussions on the legal status of the Catholic religion, as the new bodies had as their purposes the organisation of the exercise of the religion and the management of the property used for that purpose. So, in the matter of the ownership of church buildings, following the Law of 1905 the buildings of the Protestant churches and of the Jews were vested in the relevant associations cultuelles. The Laws of 2 January 1907 and of 3 April 1908, on the other hand, transferred the ownership of existing Catholic church buildings, and responsibility for their repair, to the State (cathedrals and bishops' houses to the state; parish churches and presbyteries to the communes). By contrast, after 1924 it fell to the associations diocésaines to decide upon and to finance the construction of new places of worship, and as owner to ensure their good repair.

These vicissitudes of history explain the coexistence of associations cultuelles under the Law of 1905, associations for the purposes of a church under the terms of the Law of 1907 and which conform to the requirements of the Law of 1901, and also associations diocésaines, complying with the Laws of 1901 and 1905 but also meeting additional crite-

ria. In addition, the freedom of association provided under the Law of 1901 has allowed the development of a multitude of associations, notably for charitable and educational purposes, which work in liaison with the religious authorities but which do not have exclusively religious purposes and are therefore not "cultuelles". The Muslims currently use this legal form of the Law of 1901: the presence of a Koranic school justifies the qualification as "cultural" notwithstanding the fact that alongside the school there is the mosque, managed by the same cultural association. The distinction between an association which is cultuelle and one which is cultural reflects an essentially legal distinction: the former is governed by the Law of 1905, the latter by the Law of 1901. The financial and fiscal régimes differ.

The State can guarantee sums borrowed by associations cultuelles or associations diocésaines for the construction of new places of worship. In the same spirit is the appearance since 1930 of a form of mortgage funding by the commune to an association cultuelle, generally for a term of 99 years with a peppercorn rent of 1 franc a year. First used for the construction of churches in the Paris area, the practice has spread, without administrative objection.

The tax régime applying to associations cultuelles and diocésaines is favourable. Article 238 bis of the General Tax Code allows enterprises and individual taxpayers to deduct, up to a certain limit, donations to the work of organisations serving the public interest. The Conseil d'État, in an opinion of 15 May 1962, held that this applied to associations cultuelles in respect of funds devoted to the construction and maintenance of church buildings, or to certain works of a philanthropic, educational, social or family nature.

Failing being an association cultuelle, a group working in the Church field is generally constituted as an association under the Law of 1901, authorised to solicit subventions from the State, local authorities, and other public bodies. These associations can only receive donations from individuals, who benefit from no tax exemption. Donations in favour of associations recognised as of utilité pratique enjoy tax exemptions.

(2) England has the Anglican High Church of England; church measures have to pass through state parliament for adoption, and Her Majesty the Queen appoints the bishops of the church on the suggestion of the Prime Minister. However, there is no state financing of the Established church; it must rely completely on her own means, but on the other hand the High Church of England has never been expropriated in history.[19]

[19] David McClean, "State and Church in the United Kingdom", in: Gerhard Robbers (ed.), p. 553, et seq.

(3) Denmark has the Lutheran Church as the "Peoples Church"; state parliament or the government takes all legal decisions within the church, while being obliged to respect the status of the Evangelical-Lutheran Church and its doctrine.[20]

(4) Finland has two churches with a specific status, the Lutheran Church and the Greek Orthodox Church. The Church Act of the Lutheran Church with its clearly denominational provisions is an Act of (state) Parliament; an Act of Parliament also regulates the confession and structure of the Orthodox Church.[21]

(5) In Greece, the state constitution guarantees that the dogma of the Greek Orthodox Church is the prevailing religion, the Church of Greece remains inseparably united in doctrine with the Ecumenical Patriarchate of Constantinople and with all other Orthodox Churches, the Church is self-governing and it is autocephalous. The term "prevailing religion" means that the Orthodox Christian faith is the official religion of the Greek State, and the Church, which embodies this faith, has its own legal status as a legal person under public law, the state treats this church with special concern and in a favorable manner, which does not extend to other faiths and religions.[22]

(6) Norway has a state church with a special status. In Sweden, after disestablishment of the Church of Sweden, the Lutheran Church still has a special status.

(7) Austria is another example of different categories of religious organizations.[23] This system has been examined by the European Court of Human Rights.[24]

The Austrian Basic Law of 1867 (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger) uses in its Article 15 and 16 the term "recognized churches and religious communities" without mentioning any further terminology. The Austrian ordinary law, however, also speaks of "publicly-registered religious communities" that have a different status.[25] The ordinary law distinguishes recognized religious communities,

[20] Inger Dübeck, "State and Church in Denmark", in: Gerhard Robbers (ed.), p. 55, et seq.

[21] Markku Heikilä, Jyrki Knuutila, Martin Scheinin, "State and Church in Fin land", in: Gerhard Robbers (ed.), p. 519, et seq.

[22] Charalambos Papastathis, "State and Church in Greece", in: Gerhard Robbers (ed.), p. 117, et seq.

[23] For the following see Richard Potz, "State and Church in Austria", in: Gerhard Robbers (ed.), p. 396 et seq.

[24] See below.

[25] Act on the Legal Status of Registered Religious Communities (Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften), Federal Law Gazette BGBl I 1998/19.

publicly registered religious communities, and religious communities forming private law associations according to the Association Law (Vereinsgesetz).

The European Court of Human Rights has found no violation of the European Convention of Human Rights in this terminology.[26]

Under Article 14 of the Basic Law 1867 everybody is granted freedom of conscience and belief. The enjoyment of civil and political rights is independent from religious belief; however, the manifestation of religious belief may not derogate from civic obligations.

Article 15 Basic law provides that recognized churches and religious communities have the right to manifest their faith collectively in public, to organize and administer their internal affairs independently, to remain in possession of acquired institutions, foundations and funds dedicated to cultural, educational and charitable purposes, however, they are, like all other societies, subordinated to the law.

Article 16 Basic Law entitles the supporters of non-recognized religious communities to domestic manifestation of their faith unless it is unlawful or contra bones mores.

The Act of 20 May 1874 concerning the Legal Recognition of Religious Societies[27] provides in its Section 1 that all religious faiths which have not yet been recognized in the legal order may be recognized as a religious society if they fulfill the conditions set out in the Act. Section 2 provides that if the above conditions are met, recognition is granted by the Minister for Religious Affairs. Recognition has the effect that a religious society obtains legal personality under public law and enjoys all rights which are granted under the legal order to such societies.

Examples of recognized religious societies show a variety of recognition acts:

Recognition by international treaty: The legal personality of the Roman Catholic Church is, on the one hand, regarded as historically recognized, and, on the other hand, explicitly recognized in an international treaty, the Concordat between the Holy See and the Republic of Austria (Federal Law Gazette II, No. 2/1934 – Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich, BGBl. II Nr. 2/1934).

Recognition by a special law: The following are examples of special laws recognizing religious societies:

(a) Act on the External Legal Status of the Israelite Religious Society, Official Gazette of the Austrian Empire, No. 57/1890 (Gesetz über

[26] Case of Religionsgemeinschaft der Zeugen Jehovas and others v. Austria, Application no. 40825/98, 31 July 2008.

[27] Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften), RGBl (Reichsgesetzblatt, Official Gazette of the Austrian Empire, 1874/68.

die äußeren Rechtsverhältnisse der Israelitischen Religionsgesellschaft, RGBl. 57/1890);

(b) Act of 15 July 1912 on the recognition of followers of Islam [according to the Hanafi rite] as a religious society, Official Gazette of the Austrian Empire No. 159/1912 (Gesetz vom 15. Juli 1912, betreffend die Anerkennung der Anhänger des Islam [nach hanefitischen Ritus] als Religionsgesellschaft, RGBl. Nr. 159/1912);

(c) Federal Act on the External Legal Status of the Evangelical Church, Federal Law Gazette No. 182/1961 (Bundesgesetz vom 6. Juli 1961 über die äußeren Rechtsverhältnisse der Evangelischen Kirche, BGBl. Nr. 182/1961);

(d) Federal Act on the External Legal Status of the Greek Orthodox Church in Austria, Federal Law Gazette No. 229/1967 (Bundesgesetz über die äußeren Rechtsverhältnisse der Griechisch-Orientalischen Kirche in Österreich, BGBl. Nr. 182/1961);

(e) Federal Act on the External Legal Status of the Oriental Orthodox Churches in Austria, Federal Law Gazette No. 20/2003 (Bundesgesetz über äußere Rechtsverhältnisse der Orientalisch-Orthodoxen Kirchen in Österreich, BGBl. Nr. 20/2003).

Recognition by a decree (*Verordnung*) under the Recognition Act 1874: Between 1877 and 1982 the competent ministers recognized a further six religious societies.

Registration of religious communities is in addition regulated by the Act on the Legal Status of Registered Religious Communities[28].

While the European Court of Human Rights has insisted that the State has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs, it has found no violation of the Convention of Human Rights by the mere fact of providing for a variety of status for religious communities as such.[29]

(8) Belgium also has a system of variety of status.[30] Belgian law recognizes equality between all religions, this does not hinder that some religious communities receive different treatment from others. Several religions have obtained official recognition by, or by virtue of, a law. The

[28] (Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften), Federal Law Gazette BGBl I 1998/19. The Religious Communities Act entered into force on 10 January 1998.

[29] Case of Religionsgemeinschaft der Zeugen Jehovas and others v. Austria, Application no. 40825/98, 31 July 2008, § 97; .see also Metropolitan Church of Bessarabia and Others, Application No. 45701/99, 13 December 2001, § 116).

[30] For the following see Rik Torfs, "State and Church in Belgium", in: Gerhard Robbers (ed.), p. 13 et seq.

main basis for such recognition is the social value of the religion as a service to the population. Currently, six denominations enjoy this status: Catholicism, Protestantism, Judaism, Anglicanism (Law of 4 March 1870 on the organization of the temporal needs of religions), Islam (Law of 19 July 1974 amending the law of 1870) and the (Greek and Russian) Orthodox Church (Law of 17 April 1985 amending the same law of 1870). A change to the Constitution on 5 June 1993 has added groups of non believing humanists to the financial responsibilities of the State.

As well as the six recognized religions, there is a whole range of unrecognized ones.

(9) Germany, in its federal constitution, has established a system of religious organizations that distinguishes between various types of religious organizations and attributes different rights and obligations to them. The law distinguishes between religious societies with private law status and religious societies with the status of a corporation of public law. In addition, there are also associations whose purpose is to foster a philosophical creed ("Weltanschauungsgemeinschaften").

Art. 140 GG (*Grundgesetz* – Basic Law of 23 May 1949) in conjunction weith Art. 137 WRV (*Weimarer Reichsverfassung* – Constitution of the German Reich of Weimar of 11 August 1919) provides:

Article 137

(1) There shall be no state church.

(2) The freedom to form religious societies shall be guaranteed. The union of religious societies within the territory of the Reich shall be subject to no restrictions.

(3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.

(4) Religious societies shall acquire legal capacity according to the general provisions of civil law.

(5) Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organization, it too shall be a corporation under public law.

(6) Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with Land law.

(7) Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies.

> (8) Such further regulation as may be required for the implementation of these provisions shall be a matter for Land legislation.

Religious organizations with the status of a public law corporation have a number of special rights and special duties specified in ordinary law. Neither the German Federal Constitutional Court nor the European Court of Human Rights has ever challenged this system.

(10) European Union law, in its developing law on religion, and in addition to the many systems that provide for a variety of status for religious communities, supports the idea of variety. The Treaty on Functioning of the European Union provides in its Article 17:

> 1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
>
> 2. The Union equally respects the status under national law of philosophical and non-confessional organizations.
>
> 3. Recognizing their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organizations.

This provision shows that the European Union, while insisting in non discrimination and equal treatment, respects the differences in status of religious communities in its Member States. The European Union law itself uses different terms for different religious and belief communities. It does so for the very reason that the identities and specific contributions of religious communities have to be recognized. This includes the respect for the differences in cultures and traditions in the Member States and the contributions that the very different religious communities have made to the development of theses cultures and traditions.

(11) OSCE Requirements can be found in the OSCE/ODIHR Guidelines for Review of Legislation Pertaining to Religion or Belief that state: "In many countries, a variety of financial benefits ranging from tax-exempt status to direct subsidies may be available for certain types of religious entities. In general, the mere making available of any of the foregoing benefits or privileges does not violate rights to freedom of religion or belief. However, care must be taken to assure that non-discrimination norms are not violated".[31]

The OSCE/ODIHR Guidelines thus do not object to differential treatment of churches and religious communities as such. Different treat-

[31] *Guidelines For Review of Legislation Pertaining to Religion or Belief* prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in Consultation with the European Commission for Democracy Through law (Venice Com mission), Adopted by the Venice Commission at its 59th plenary session (Venice, 18 19 June 2004), welcomed by the OSCE Parliamentary Assembly at its annual session (Edin burgh, 5 9 July 2004), p. 18.

ment may relate to substantive issues like tax exemptions and state subsidies.

As to equality and non-discrimination, the OSCE/ODIHR Guidelines state: "States are obliged to respect and to ensure to all individuals subject to their jurisdiction the right to freedom of religion or belief without distinction of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national or other origin, property, birth or other status. Legislation should be reviewed to assure that any differentiations among religions are justified by genuinely objective factors and that the risk of prejudicial treatment is mini minimized or totally eliminated. Legislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for discrimination".[32]

2.2. Application of principles

2.2.1. Use of different terminology

Objections could arise from the fact that the Act on Churches and Religious Communities uses terms in respect of religious organizations that are not used by the Constitution of the Republic of Serbia. However, constitutional law in general does not predetermine the specific language that is used by ordinary law. This would also not possible, because constitutions cannot foresee all the many different issues and needs that come up in ordinary law; they must restrict themselves to the basic lines and principles. What ordinary laws do in this respect when they introduce more specific language and categories is that they fulfill their constitutional task of "concretization". They provide more concrete structures for taking up the needs of specific fields of life in applying and specifying the broader principles laid down by the constitution.

It is not objectionable that ordinary laws use more specific language and distinctions than is explicitly provided for in constitutional law. This result is supported by examples in many states. The examination of the variety of different systems provided above has shown in some detail that European states do in fact use language and terminology in ordinary law that differ form the terms given in their respective constitutions. They do so in organizing in more concrete detail within the perspectives set by their constitutional law.

[32] *Guidelines For Review of Legislation Pertaining to Religion or Belief* prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in Consultation with the European Commission for Democracy Through law (Venice Com mission), Adopted by the Venice Commission at its 59th plenary session (Venice, 18 19 June 2004), welcomed by the OSCE Parliamentary Assembly at its annual session (Edin burgh, 5 9 July 2004), p. 10.

2.2.2. Differences in status

a) Articles 4, 9 to 16 Act on Churches and Religious Communities make explicitly reference to the historical role of the respective churches and religious communities.

This is in accordance with the aforementioned statement of the OSCE/ODIHR Guidelines. The provisions do not exclude any other religious community or church from the specific mentioning that have a historical role or impact equivalent to those institutions that are especially mentioned in the Act.

b) Distinctions between a variety of categories of religious organizations are in accordance with the European Convention of Human Rights and comparative international standards. I can also see no violation of the Constitution of the Republic of Serbia. There is no legal obligation to use only the terms and categories mentioned in the constitution.

States can introduce different categories of religious organizations and attribute to them different rights and obligations. Such differentiation must be based in valid reasons. The different treatment of traditional Churches and religious communities, confessional communities and other religious organizations provided for in the Act on Churches and Religious Communities is based on valid reasons. It is in accordance with the European Convention of Human Rights and comparative international standards. I can also see no violation of the Constitution of the Republic of Serbia.

2.2.3. Procedure of registration of religious organizations

Article 18 Act on Churches and Religious Communities provides for the registration process of religious bodies. The provision states that Traditional Churches and religious communities for the entry into the register have to file a notification containing 1) name of the Church or religious community; 2) address of the seat of the Church or religious community; 3) name, surname and capacity of the person authorized to represent and act on behalf of the Church or religious community. This applies to the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church (a.c.), the Christian Reformed Church and the Evangelical Christian Church (a.c.), the Islamic Religious Community and the Jewish Religious Community.

Other churches and religious communities have also to indicate further information. This includes: 1) decision by which the religious organization has been established, with names, surnames, identification document numbers and signatures of founders of at least 0,001% adult citizens of the Republic of Serbia having residence in the Republic of Serbia according to the last official census, or foreign citizens with per-

manent place of residence in the territory of the Republic of Serbia; 2) statute or another document of religious organization containing: description of organizational structure, governance method, rights and obligations of members, procedure for establishing and terminating an organizational unit, list of organizational units with the capacity of a legal person and other data relevant for the religious organization; 3) presentation of the key elements of the religious teaching, religious ceremonies, religious goals and main activities of the religious organization; 4) data on permanent sources of income of the religious organization.

This unequal treatment must be justified by valid reasons. If valid reasons for different treatment exist, no violation of equal treatment clauses and non-discrimination provisions takes place. Such reasons can be found in the fact that the traditional churches and religious communities have already been recognized by specific laws in the past. In relation to these bodies it is clear for the Serbian legal order that they fulfill the requirements which justify the conditions set out in Article 18 Section 2 Act on Churches and Religious Communities. These conditions can be seen in a guarantee of permanent existence, stable organizational structure, religious character of the organization, and loyalty to the basic legal order of the country. Such conditions lay at the very basis of registration and recognition of religious organizations throughout Europe and beyond. They are not discriminatory.

Article 11 Section 2 Act on Churches and Religious Communities states in specific relation to the Serbian Orthodox Church: "The Serbian Orthodox Church has had an exceptional historical, state-building and civilizational role in forming, preserving and developing the identity of the Serbian nation." This provision recognizes a role of this church in the development of the culture of the Serbian nation. It relates exclusively to the past. In doing so, the provision acknowledges a mere fact. This fact can hardly be disputed in its factual truth. This acknowledgement does not bring about any special privilege. It is not discriminatory.

2.2.4. The secular state

Article 11 Constitution of the Republic of Serbia does not lead to any other result. According to that provision, the Republic of Serbia is a secular state.

The term secular has a variety of meanings in the legal orders in Europe and throughout the world. Comparing these manifold meanings one can say with good reasons that secular does not mean any anti-religious affection. Rather, the term secular signifies the idea that there is no state church, no identification of the state with a specific religion or with religion as such, and that the state does not unduly intervene into the affairs of religious communities. In this meaning, the term also stands for

neutrality of the state in religious matters and for the autonomous existence of religious communities. This understanding is supported by the following two sections of Article 11 Constitution of the Republic of Serbia. This understanding mirrors a European-wide principle of state-religion relationship shared by the large majority of European legal systems. It is supported also by the standing practice of the European Court of Human Rights in respect of religious state neutrality and autonomy of religious communities. The description of European systems outlined above shows that different treatment of religious communities which is based on valid reasons does in no way contradict these basic principles. It has been shown above that for the different treatment provided for in the Act on Churches and Religious Communities and examined above valid reasons exist. Seen from a comparative perspective, the notion of a secular state does allow for the different treatment as examined.

3. RESULT

1) The legal distinction between Traditional Churches and Religious Communities, on the one, and other Churches and Religious Communities in the Republic of Serbia on the other hand, in itself and in substance of the Law on Churches and Religious Communities is in accordance with the Constitution of the Republic of Serbia and international and European standards, and particularly in accordance with the European Convention on the Protection of Human Rights and Fundamental Freedoms.

2) The distinction, in the issue of registration of Churches and Religious Communities prescribed by Article 18 of the Law, between Traditional Churches and Religious Communities, on the one hand, and other Churches and Religious Communities, on the other hand, is not discriminatory in substance of the Constitution of the Republic of Serbia and international and European standards, and particularly in the perspective of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

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SOME PARADIGMS OF REGULATION OF RISKS TO SOCIETY*

Regulation of risks to society is one of the most important spheres of action of a modern state, and an important theme in discussions about the role of the state and public administration. The author attempted to identify several paradigms underlying risk regulation by pointing to socio legal challenges for risk regulation in the era of regulatory capitalism.

Risk regulation is a multidisciplinary issue, and legal aspects are not the only source of concern. The study of law in the governance of risk highlights the need for a critical and conceptual approach to risk governance. Each paradigm may have an impact on legal issues in technological risk regulation, and their better understanding should lead to a better understanding of the role of law in the process of risk regula tion. Being focused on paradigms as generalisations, this article has been largely cast at a conceptual level; empirical conclusions mostly remained out of its sphere.

Key words: *Regulation. Governance. Risk Regulation. Technological risks.*

1. MULTI-PARADIGMATIC NATURE OF REGULATION OF RISKS TO SOCIETY

We live in a risk society and risks arising from human activities are affecting our everyday life.[1] Regulation of risks to society has a long his-

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tory and expanding scope in areas such as environmental protection, health and safety issues, financial regulation etc. The risk is the driver of the regulatory role of a modern state and governments have always relied on regulation to protect citizens from various risks. Risk is also a major theme in discussions about the role of the state in regulating economic activities. Improvements to regulation of risks improve social welfare of citizens as consumers and can also reduce costs to businesses.

'Public' regulation consists of legislative and administrative measures by which the state or the other entity, determines, controls or influences the behaviour of the regulated in order to prevent behaviour which could harm legitimate interests of the society.[2] The process of regulating any aspect of the economy is based on three main elements: the setting of standards, rules or other norms; monitoring or determining feedback for compliance with the norms; and a mechanism aimed to correct the behaviour which deviates from the norms. Regulation of risks to society assumes the process of risk identification and the regulatory response, notably the introduction of a piece of legislation and/or a set of regulatory measures and approaches which regulators adopt and pursue. In a formal sense, regulation of risks to society is understood as the setting and enforcing product or behavioural standards to control risks.[3]

In a broader context, risk regulation may be based on an assessment of the impact of risk and risk based systematised decision making procedures that prioritise regulatory activities. A risk-based approach to regulation acknowledges that governments cannot prevent all risks or reduce them to the minimum and that their actions have to be targeted and based on the nature and probability of occurrence of risks.[4] Risk-based regulation does not only characterise public management framework in assessing the risks that regulated subjects pose to regulator's objectives and are not applied only in the formulation of regulatory proposals. It also induces the regulated to develop compliance strategies and adopt internal approaches to identify, monitor and manage risks.[5]

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[1] U. Beck, *Risk Society: Towards a New Modernity*, Sage Publications, London 1992.

[2] A.C. Dos Santos, M. E. Gonçalves, M. M. Leitão Marques, *Direito Económico*, Almedina 2001, 191.

[3] C. Hood, H. Rothstein, R. Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes*, Oxford University Press, Oxford 2001, 3.

[4] B. M. Hutter, *The Attractions of Risk based Regulation: Accounting for the Emergence of Risk Ideas in Regulation*, CARR Discussion Paper No. 33, LSE, London 2005.

[5] R. Fairman, C. Yapp, "Enforced Self Regulation, Prescription and Conceptions of Compliance within Small Businessess: the Impact of Enforcement", *Law and Policy* 27(4)/2005, 491.

The state has limited resources to address market failures and to achieve policy goals, but bears the ultimate responsibility for risk regulation.[6] In a risk society, not all risks can be reduced to zero and trade-offs in risk regulation are inevitable.[7] This is one of the underlying paradigms of risk regulation. New approaches to risk regulation have become pervasive in recent years and have contributed to better policy-making. The recent financial crisis unveiled important policy challenges that have been underscored: the pitfalls of reactive regulation and the need to ensure a balance between efficient market regulation and the protection of the public welfare. This balance might be ensured by a shift from interventionism to 'regulatory governance', the interaction among multiple state and non-state actors.[8] The multitude of interests and regulators is urging for an approach capable of facilitating harmonization of private and public interests through 'collaborative governance'. The central role still belongs to administrative decision makers, who are acting in the environment marked by competing paradigms. The nagging question is how to keep their actions within the limits of legality or what is the optimal degree of regulation of administrative power. Too much restriction would restrain decision-making with complex procedures and limit the ability of administration to intervene, while too little restrictions could lead to arbitrary and inconsistent decision-making.

In a globalised world, challenges of risk regulation go beyond specific industries and geographical constraints, and transcend the borders between science and the legal order. Global nature of risks is increasingly calling for a convergence in risk regulation and is promoting its transnational character. Due to different legal and cultural contexts, science might serve as a uniform parameter. However, due to scientific uncertainty it is difficult to draw a clear line between scientific and political aspects of decision making. Hence, it appears that technological risks regulation is, albeit faultily, marked by a dichotomy between science (expertise) and democracy, and ultimately between technocracy and participatory democracy.[9]

The paradigms to be considered relate to regulation of risks to society, that is to say issues pertinent to 'risk regulation', and not specifically to the concept of risk-based regulation. The analysis is further lim-

[6] U. Beck: "Risk Society and the Provident State", in: S. Lash, B. Szerszynski (eds), *Risk, Environment and Modernity: Towards a New Ecology*, Sage Publications, London 1996, 27.

[7] W. K. Viscusi, *Rational Risk Policy*, Clarendon Press, Oxford 1998.

[8] OECD, *Regulatory Policies in OECD Countries: from Interventionism to Regu latory Governance*, OECD, Paris 2002.

[9] E. Fisher, *Risk Regulation and Administrative Constitutionalism*, Hart Publish ing, Oxford 2007, 11 13.

ited to issues facing the regulation of technological risks, which are scientifically uncertain, and will exclude business risks and risks to which financial systems are exposed. Being focused on paradigms, this article has been largely cast at a conceptual level, empirical conclusions remaining out of its sphere.

Like all paradigms, the paradigms of risk regulation are both prescriptive and descriptive. As general attitudes on the essence and structure of reality, some of them will reflect more general attitudes towards the role of state and the role of law in a society. The others derive from meta-paradigms and are less abstract and as such favourable to be transposed into a range of principles. Each paradigm may have an impact on legal issues in technological risk regulation, and their better understanding can lead to better understanding of the role of law in the process of risk regulation. Like all paradigms of social sciences, the axioms of which are always the presumptions under scrutiny, they should not be taken for granted. They are neither universal, nor stable, but changeable and evolving. The socio-legal approach to regulation is characterised by a whole range of paradigms,[10] and so is the nature of regulation of risks to society obviously multi-paradigmatic.

2. THE CONCEPT OF RISK AND RISK REGULATORY CONCEPTS

A technological risk is a potential unpredictable outcome. The notion of risk depends on the sphere of its potential manifestation.[11] In a formal sense, risk is often defined as a probability of adverse consequences,[12] or the measurable probability that the actual outcome will deviate from the expected (or most likely) outcome.[13] From an economic perspective, risk may be considered as a public good that needs government intervention.

[10] On the multi paradigmatic nature of social sciences see: I. Lacatos, A. Mus grave (eds), *Criticism and the Growth of Knowledge*, Cambridge 1972. On the multi paradigmatic nature of the sociology of law: S. Bovan, *Paradigmatski koreni sociologije prava osnovi biološke teorije prava* [*The Paradigmatic Origins of Sociology of Law The Basis of Biological Theory of Law*], Beograd 2004, 32 70.

[11] For example, in agro food sector, the risk means "*a function of the probability of an adverse health effect and the severity of that effect, consequential to a hazard*", Article 3(9) of the Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in mat ters of food safety.

[12] C. Hood, H. Rothstein, R. Baldwin, 3.

[13] OECD, *Public Private Partnerships: In Pursuit of Risk Sharing and Value For Money*, OECD Publishing, Paris 2008, 48.

Operational definitions of risk vary so as the determinations of risk regulation concepts. Many conceptual approaches to risk and its management have been developed over the past three decades. Risk analysis and risk management techniques, as complex regulatory constructs, are being employed in different contexts. For some authors**,** *risk analysis* is about "identification of potential hazards to individuals and society and the estimation of the likelihood of any particular hazard occurring, using data, statistical analysis, systematic observation, experiment and intuition."[14] Despite of the obvious contextual differences, countries share methodological approaches to risk regulation. One of them is the three-pillar approach of risk analysis, which is common in OECD countries. This analytical model distinguishes three sequential pillars of risk policy: risk assessment, risk management and review, all being linked to risk communication.[15]

Risk assessment is based on scientific process of identification and characterization of risks and hazards, assessment of the probability of occurrence of certain events and exposure to them. Risk assessment is about defining the components of risk in precise, usually quantitative, terms. In assessing risk exposures and potential loss to its occurrence, quantitative methodology is often used within the framework of cost-benefit analysis and regulatory impact assessments to ensure cost-effectiveness of risk reduction. The objective of the first pillar is to identify those actions which could *minimize* risks as much as possible. Particularly important elements of the assessment phase are comparative risk assessments used in determining remediation strategies, where risk assessment is used to point to tradeoffs which emerge when the reduction of one risk induces an increase of another (*risk versus risk tradeoff*).[16] Once risk assessments have been made, they can then be compared and evaluated (risk evaluation).

Risk management assumes the identification and assessment of policy alternatives and the development of strategies to prevent and control risk, primarily in order to decide which is the best option from a standpoint of the society.[17] It means reducing the risks to that level the

[14] O. Renn, "Risk Analysis Prospects and Limitations", in: H. Otway, M. Peltu (eds), *Regulating Industrial Risks*, Butterworths, London 1985, 111, at p. 113.

[15] OECD, *Risk and Regulation: Issues for Discussion*, GOV/PGC/REG(2006)1, Paris 2006.

[16] J. Graham, J. Wiener, *Risk Versus Risk: Tradeoffs in Protecting health and the Environment*, Harvard University Press, Cambridge MA 1995.

[17] A range of responses could be classified as follows: a) risk avoidance: not per forming an activity that would create the risk (proscription, prohibition); b) risk reduction: developing a strategy to reduce the probability and severity of the impacts of a risk event (licensing, codes and standards, enforcement and compliance strategies); c) risk retention: accepting the loss arising from the risk event (by way of a self insurance, retaining re

society would tolerate, ensuring control, monitoring and public communication of its real consequences.[18] While risk assessment is based on scientific research to define the probability of risk realisation, "risk management, in contrast, is the public process of deciding what to do where risk has been determined to exist".[19] *Risk review***,** based on evaluation, is an essential element of risk policy. Ex post evaluation of the effectiveness of adopted solutions is necessary for future risk analysis, as well as the adaptation of risk management actions.

Risk communication is based on a dialogue with the stakeholders and the society at large. It does not refer only to the phase when risk occurs, but is also of a crucial importance through two previous pillars, to ensure the consistency and transparency of the regulatory process. Information on the nature and extent of risks and its management is fundamental for shaping public opinion and helps to build trust in the proposed responses and in those who are entrusted with the mission to manage them.

Risk regulatory concepts are being used in many different contexts.[20] The above listed were predominantly introduced to control public administration and restrain administrative discretion. *Risk regulatory concepts* range from governmental to private regulation. In governmental regulation, a governmental agency is given the mandate to determine an acceptable risk level, which is binding both for those who cause and those who bear risks. On the other end of the spectrum, the private regulation of risk refers to the process where the industry sets the acceptable risk level or the market approach to risk management. In the latter case of the private approach, tort law is used as an instrument of ex-post compensation.[21] Between the two extremes mixed regulatory concepts assume the combined role of affected parties, government and experts. Acceptable risk level may be negotiated between risk producers and potential bearers; the participants may agree to reduce or internalize risks. Here the

sponsibility for functions within government, etc.); d) risk transfer: another party accepts the risk by contracts (compulsory insurance, derivative transactions, public private part nerships). G. Bounds: "Challenges to Designing Regulatory Policy Frameworks to Man age Risks", in OECD, *Risk and Regulatory Policy Improving the Governance of Risk*, OECD, Paris 2010, 15, at p. 19.

[18] O. Renn, "Three Decades of Risk Research: Accomplishments and Challenges", *Journal of Risk Research* Vol 1., 1/1997, 12, at p. 14.

[19] W. D. Ruckelshaus, "Risk in a Free Society", *Risk Analysis* 4/1984, 157, at p. 157.

[20] For an overview of different contexts see: E. Fisher, "Risk Regulatory Concepts and the Law" in: *OECD, Risk and Regulatory Policy Improving the Governance of Risk*, OECD, Paris, 2010, 45, at p. 51 55.

[21] D. Dewees, M. J. Trebilcock, "The Efficacy of the Tort System and its Alterna tives: A Review of Economical Evidence", *Osgoode Hall Law Journal* 30/1992, 57.

government may determine the legal conditions for negotiating, but is not capable of fixing the strategy of risk management. Risks may be assessed and evaluated by experts, which may be empowered to set standards or to define the minimum acceptable risk levels. The 'discursive' concept of risk regulation emphasizes democratic decision making and fair representation of scientific expertise and social interests and values. Opposed to private regulation based on the market approach, this approach is not attempting to weight the different interest, but is committed to developing a common solution to risk.

3. RISK, REGULATORY POLICY AND THE ROLE OF LAW

Risk regulation is a multidisciplinary issue, and legal aspects are not the only source of concern. Although in the era of regulatory governance the law seems to have a marginal role,[22] the study of law in the governance of risk highlights a need for a critical approach to risk governance concepts. The governance of risk is the essential part of good governance arrangements and better regulation, and risk regulatory concepts have an important place in good governance arrangements.[23] *Vice versa*, good governance arrangements are fundamental to promoting the successful risk regulation and risk governance.

The need to account for specific regulatory regimes in relation to specific risks, as well as national specificities, should be taken into account when developing principles of governance in the phases of risk assessment and management. Risk regulatory regimes are not directly observable; they represent analytic constructs consisting of two dimensions: the regime context and content.[24] Regime context is the broad setting in which regulation takes place, such as types and levels of risk being scrutinised, public preferences and attitudes towards risk and the way the various actors who produce or are affected by the hazard are organised. Regime content is about policy settings, the configuration of state and other organizations directly engaged in regulating the risks. In the given context, the function of law is to shape the content of the regulatory regime.

Even though there is "no integrative theory that provides guidelines on how to model and measure the complex interrelationships among

[22] E. Fisher, (2007), 17.

[23] United Kingdom Better Regulation Commission, *Risk Responsibility and Regu lation Whose Risk is it Anyway?*, London, October 2006. United Kingdom Better Regu lation Commission, *Public Risk: The Next Frontier for Better Regulation*, London, Janu ary 2008. For a pan European approach see: EC Commission, *White Paper on European Governance*, COM(2001) 428 final.

[24] C. Hood, H. Rothstein, R. Baldwin, 20 21.

risk, risk analysis, social response, and socio-economic effects", it is obvious that social factors and interests play a significant role as features of regulatory regimes.[25] For example, risk regulatory concept in the United States is characterized by a strong participation of interest groups, while European risk policy has been developing as highly paternalistic, in favour of consumers.

Institutions and legal culture are also affecting risk governance concepts. The function of law in risk regulation is not solely to establish rules ordering or prohibiting certain activities; legal order also consists of institutions and practices. Legal culture, which also refers to ideas, values, aspirations and mentalities,[26] has been affecting risk governance. When the law introduces a concept of risk, the legal culture determines its environment. This contrast in cultures and institutional settings on risk governance may again be illustrated by comparing the institutional settings in the US and EU.[27] It is often said that there is a culture of adversarial legalism in the United States.[28] It appears that the accent is put on *ex post* mechanisms: judicial reviews are frequent, and courts as institutions play a major role in litigation. On the other side, Europeans are considered to be more concerned with risks and more in favour of *ex-ante* approach.[29] There are differences in the decision-making process as well, and some of them would be addressed further.

Regulating risks is central to the role of a modern government. From a legal perspective, the function of law in regulating risks is primarily centred on two interwoven issues: how to minimise risk and its consequences and how to regulate the administrative power in regulating risks to society, including the judicial review of administrative decisions. The law has been constituting and limiting public administration through the establishment of competences of a regulator, limiting regulatory discretion and regulating the decision-making procedures.

The subject matter of the regulation of the former is risk. Central task of a modern Economic Law as Regulatory Law is to prevent the

[25] R. E. Kasperson *et al*., The Social Amplification of Risk: A Conceptual Frame work, *Risk Analysis* 8 (2) /1988, 177.

[26] D. Nelken, "Using the Concept of Legal Culture", *Australian Journal of Legal Philosophy* 29/2004, 1, at p.1.

[27] Most obvious example is food safety regulation. With respect to this see: M. A. Echols, "Food Safety Regulation in the European Union and the United States: different cultures, different laws", *Columbia Journal of European Law* 4/1998, 525; A. Alemanno, *Trade in Food Regulatory and Judicial Approaches in the EC and the WTO*, Cameron May, London 2008.

[28] R. Kagan, *Adversarial Legalism: The American Way of Law*, Harvard Univer sity Press, Cambridge MA 2003.

[29] This applies to Continental Europe. The UK administrative law seems to be dominated by the idea of negotiation and informal agreements. C. Harlow, R. Rawlings, *Law and Administration*, Cambridge University Press, Cambridge 2009.

anomalies of the market mechanism, ensure its stable functioning and protect market participants from the unwanted effects. In terms of risk regulation, market relationships in a modern economy are more complex than at the beginnings of capitalism, as well as the rules regulating them. The production process has become more complex, and so are the goods as the output of this process and the production standards. But the role of law in risk policy is not only about standard-setting, it includes the relationship among different parts of the regulatory system. There is often a mismatch between technical, scientific and policy analyses of risk and the legal institutions and procedures through which the responsibility for risk is allocated.[30]

To regulate risk, first, the risk should be identified. Risks, notably technological, are assessable only through scientific analysis, and not by direct observation.[31] In assessing whether the risk exists and how it should be treated, the law should determine risk assessment and management methodologies, and set parameters of a 'good decision making'.[32] In risk regulation there are no universally acceptable options, risk levels are often flexible and the policy choices are not irreversible. Hence, the risk regulatory process assumes an evolving strategy, through which the law itself evolves, the process which is known in theory as 'proceduralisation of regulation'.[33] As the technical nature of the regulated areas is increasing and requires a specific knowledge, the law should also facilitate collaboration between regulators and professionals in the lawmaking process and risk evaluation. This would contribute to better understanding of the issues at stake and facilitate compliance with the rules. The distinction between purely technical assessment of risks by the experts and actions undertaken by decision-makers is increasingly being questioned.[34] The law must acknowledge the importance of science in risk analysis and decision-making, but also has to set parameters framing the recourse to science in administrative decision-making.

As risk prevention and reduction is the goal of regulators, regulation of risks is inevitably interlinked with regulation of administrative power and the establishment of foundations for a judicial review. The law

[30] G. C. Hazard, "The Role of the Legal System in Response to Public Risk", in: E. J. Burger (ed), *Risk*, University of Michigan Press, Ann Arbor 1993, 229, at. p. 236.

[31] C. Hood, H. Rothstein, R. Baldwin, 4.

[32] For example, stipulating which factors would be taken into account, prescribing that the decisions should be based on a comparative risk analysis, the precautionary prin ciple, cost/benefit analysis etc.

[33] J. Black, "Proceduralizing Regulation: Part I", *Oxford Journal of Legal Studies*, Vol. 20, 4/2000, 597.

[34] C. Noiville, N. De Sadeleer, "La gestion des risques écologiques et sanitaires à l'épreuve des chiffres Le droit entre enjeux scientifique et politiques", *Revue du droit de l'Union européenne* 2/2001, 406.

sets standards for the accountability of administrative decision-makers. In defining the role and power of public administration, and establishing the standards of accountability, risk governance concepts should be in line with pre-existing institutional frameworks.

Defining the competence of regulators and referring to specific tasks and procedures that have to be followed with regard to risk identification, management and risk communication, the law attempts to limit administrative discretion. Judicial scrutiny of agency's risk assessment usually occurs when a court is reviewing an agency's regulation or decision for which the assessment was done. Often the general administrative procedure rules specify the conditions for setting aside agency's action. Of these, the court most often refer to agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" and when the court determines that the agency undertook the action "without observance of procedure required by law."[35] In judging the agency's scientific risk assessment the courts in general lack the risk analysis expertise, and law often fails to set specific criteria for the courts in evaluating risk assessment. This is why courts, notably in the US (but also increasingly in the EU) often defer to the agency's expertise.[36] One of the reasons is the blurring of the line between science and policy**,** when the court cannot separate science from policy decision which is imbedded into the risk assessment. This opens a paradox of (de)stabilisatory function of science which will briefly be discussed in relation to the preventative paradigm.

4. REGULATION AS A PARADIGM OF REGULATORY CAPITALISM

The market alone cannot properly address the problem of risk. An extremely liberal concept of the market, essentially based on a hypothesis of a perfect and competitive market, obviously does not always function in the best and the most effective way. Therefore it is necessary to identify and correct negative effects of market failures, which is often interpreted as an interference of the state in certain activities of private parties.[37] Excessive interference of the state has been restrained and intervention of the state was suppressed and displaced.[38] 'Deregulation' movement is an elusive concept, as its essence is the process of reducing state

[35] The standard prescribed in the United States Administrative Procedure Act of 1949 (5 U.S.C. Sec 706(2)2(A)).

[36] R. A. Merrill, "Science in the Regulatory Process", *Law and Contemporary Problems* 66/2003*,* 1.

[37] B. Mitnick, *The Political Economy of Regulation*, New York 1980, 2, 7.

[38] P. Genschel, B. Zangl, "Die Zerfaserung von Staatlichkeit und die Zentralität des Staates", *Aus Politik un Zeitgeschichte* 20 21/2007, 10.

control over an industry or activity to make it structurally more responsive to market forces.[39] Essentially, deregulation of the market strengthened regulatory role of the state[40] and created a paradox that the role of state is limited, but it has actually been augmented.[41]

The process of regulation of a modern economy does not represent self-denial of the role of the state, but the state's attempt to discover the most suitable means of influencing the market and participants to achieve socially acceptable goals.[42] Therefore, the concept of ‗Regulation' itself is one of the paradigms. For a long time, the notion of 'regulation' was used as a synonym for 'legislation' (French *réglementation,* German *Regelung*),[43] as legal rule or the activity of legislating. That distinction between a narrow concept of regulation as legal or at least legally sanctioned rule-making and a broader concept of regulation has lead to all sorts of conceptual misrecognitions and confusions.[44] The concept of regulation itself is a scientific paradigm, which was adopted in social sciences later than in natural sciences. On the basis of the notion of 'regulation' in natural sciences,[45] the essence of market regulation is to maintain an equilibrium, as well as to construct and promote such equilibrium.[46] Regulation implies the possibility of balancing a unity of heterogeneous elements, the possibility to ensure a harmony of interests, from individual to collective.[47] As such, regulation is the process of systematic, legitimate, influence on subjects and events, through a combination of ordering devices and mechanisms,[48] a purposive attempt to influence and con-

[39] R. Baldwin, C. McCrudden (eds), *Regulation and Public Law*, Weidenfeld and Nicholson, London 1987, 24.

[40] R. Cranston, "Regulation and Deregulation: General Issues", *University of New South Wales Law Journal* 5/1982, 1.

[41] G. Majone, "The Rise of Statutory Regulation in Europe", in: G. Majone (ed), *Regulating Europe*, Routledge, London 1996, 47, at p. 54.

[42] T. Daintith, "Regulation", *International Encyclopedia of Comparative Law*, Vol. XVII, Martinus Nijhoff, 1997, Leiden Ch. X.

[43] However, in the broad sense *régulation* (French), *Regulierung* (German).

[44] N. Walker, "Epilogue: On Regulating the Regulation of Regulation", in: F. Caf aggi, *Reframing Self Regulation in European Private Law*, Kluwer Law International, 2006, 347.

[45] For an overwhelming overview of the concept of regulation in natural sciences see: A. Lichnerowicz *et al.*, *L'idée de régulation dans les sciences*, Maloine Doin, Paris 1977.

[46] M. A. Frison Roche, "Le droit de la régulation", *Recueil Dalloz*, Paris 2001, 601, at p. 613.

[47] J. Chevalier, "De quelques usages du concept de régulation" in M. Maille (ed), *La regulation entre droit et politique*, L'Harmattan, Paris 1995, 71, at p. 87.

[48] In light of the approach adopted by C. Parker, J. Braithwaite, "Regulation", in: P. Cane, M. Tushnet (eds), *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford 2003, 119, at p. 119.

trol economic and social activity.[49] Actions of the modern regulatory State, which nowadays guarantees the welfare of the society,[50] rather than imposes interventionist measures, are based on those rules which aim to ensure the balance between private interests of individual market parties and their associations and those in charge of safeguarding the general interest. Opposed to control, the primary role of the modern state is to oversee and 'regulate' the market.[51]

In the 'regulatory state', legal rules do not only have imperative character, but to a certain extent the character of incentives directing the behaviour in a socially accountable way. As traffic signs regulate road traffic with a wide range of signs of prohibition or of informative nature, not every sign has the character of a rule that triggers sanction.[52] The role of law is not only to order or ban, but to create incentives, to direct, and harmonise interests of the stakeholders. This balancing of partial interests and the general interest to preserve the order of capitalism is in the essence of 'regulatory capitalism'.[53]

The strategy of risk regulation in the era of regulatory capitalism must be tailored in line with the public interest, in creating optimal environment from the standpoint of the regulated and the beneficiaries of risk regulation. Regulatory process is therefore linked to various broad strategies, including rules of a different kind and an array of adjudicative processes and institutional arrangements, characterised by 'nodal' role of the regulatory state and public administration. The linkage of process to strategy is inevitably close, and therefore it would be difficult to claim legitimacy for the risk regulation process if the overall strategy is not legitimate.[54] The process of scientific risk assessment is marked by numerous technical and normative weaknesses, hence requiring that public partici-

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[49] B. Morgan, K. Yeung, *An Introduction to Law and Regulation*, Cambridge University Press, Cambridge 2007, at p. 1.

[50] G. F. Schuppert, "Der moderne Staat als Gewährleistungsstaat", in: E. Schröter (ed): *Empirische Policy und Verwaltungsforschung*, Opladen 2001, 399.

[51] Using Osborne and Gaebler's famous metaphor "*steering, but not rowing*", Majone described the modern state as "regulatory state". G. Majone, "The Rise of the Regulatory State in Western Europe", *West European Politics* 17/1994, 77; On the concept 'regulatory state' see also J. Chevallier, "L'État régulateur", *Revue française d' administration publique* 111/2004, 473.

[52] For an excellent overview of controversies of the use of legal rules in regulatory policy: J. Black, "Which Arrow: Rule Type and Regulatory Policy", in: D. J. Galligan (ed), *A Reader on Administrative Law*, Oxford University Press, Oxford 1996, 166 167.

[53] D. Levi Faur, "The global diffusion of regulatory capitalism", *Annals of the American Academy of Political and Social Science* 598/2005, 12; J. Braithwaite, *Regulatory Capitalism How it works, ideas for making it work better*, Edward Elgar, Cheltenham2008.

[54] R. Baldwin, *Rules and Government*, Oxford University Press, Oxford 1995, 291.

pation in the regulatory process discipline the use of these technocratic tools to ensure the fulfilment of legitimate interests of citizens. A risk society "can remain a democratic one only by remaining conscious of democratic values and by searching for institutional measures that will promote those values in social decision-making."[55] Designing an appropriate institutional division and balance between regulators, politicians, courts, regulated and the public is one of the most important challenges of regulatory capitalism.

5. TWO PARADIGMS OF ADMINISTRATIVE CONSTITUTIONALISM IN TECHNOLOGICAL RISK REGULATION

The abandonment of an illusion of a completely liberal market, especially in the context of the existing financial crisis, opens a wide sphere of balancing of individual and joint interests and changes in a role of the executive function, which represents a basis of mechanism of social regulation in a regulatory state. The executive branch of government and public administration represent intermediaries between a goal of the legal norm and its implementation, while judiciary function is essentially *ex post* regulation.[56]

Due to increased complexity of a post-industrial society, there is a tendency to farm off regulatory functions to independent regulatory agencies, for various reasons.[57] The increase in a number of agencies and policy makers and their powers brought 'risk bureaucracies' themselves at the heart of a concern. Being entrusted with the mission to assess, prevent and manage risks, the administrative apparatus may enact implementing legislation and has wider adjudicative powers. As far as the executive function acts in line with its statutory powers, taking an action in line with applicable rules formally discharges the regulator from responsibility. But in a risk society, marked by uncertainty, the regulator is tempted to fill in regulatory gaps and to adopt a more flexible approach. Hence, the role of public administration in regulating risk, which definitely dominates the area of decision making, is inherently paradoxical and risk regulatory concepts reflect that fact.

[55] D. J. Fiorino, "Environmental Risk and Democratic Process", *Columbia Jour nal of Environmental Law* 14/1989, 501, at p. 523.

[56] In regulating the markets, the main difference between a judge and a regulator is that the judge intervenes *ex post*, while regulator predominantly *ex ante*. B. Arrunaba, V. Andonova, "Market Institutions and Judicial Rulemaking", in: C. Menard, M. M. Shirley (eds): *Handbook of New Institutional Economics*, Springer, Berlin Heidelberg 2005, 229.

[57] M. Thatcher, "Delegation to Independent Regulatory Agencies: Pressures, Func tions and Contextual Mediation", *West European Politics* 25/2002, 125.

Although there is a multitude of models of administrative constitutionalism, which refers to constituting, limiting and holding public administration to account, Fisher has identified two dominating models – the deliberative-constitutive and rational-instrumental model. [58] On one side, the needs of a complex society are urging for an open process of ongoing, expert-based decision making by non-elected decision makers. The former model conceptualises public administration as a body which exercises a flexible discretion in solving multifaceted problems. The latter, the rational-instrumental model, conceptualises public administration as an 'agent' of the legislative branch, an 'instrument', constrained as much as possible and entrusted to perform the predetermined tasks with as little discretion as possible.[59]

Neither model offers perfect public administration. Criticisms of risk regulatory concepts are essentially criticisms of the models and legitimacy of public administration. Whatever the context, the law should provide the framework for public administration in three main ways: by defining the competence of institutions; by placing limits on the discretion of decision makers; and by defining the procedures a decision maker must follow.[60] The deliberative-constitutive model is based on a wide, albeit not unfettered discretion. In a world of uncertainty, the decision making about risk is highly uncertain and thus more substantive and constitutive role for public administration is needed. In contrast, the rational-instrumental model could be based on legislative provision setting out how discretion should be exercised.[61] Risk and expertise are kept under control by limiting the role of the regulator to the application of the facts in a process regulated by the rigour of risk assessment and other operations. However, what is considered a reasonable exercise of discretion varies significantly from country to country. The discretion often involves a choice among various options based on scientific data and/or social values. That is why the issue of risk decision making has often been depicted as being the choice between science on one side, and democracy and ethical values on the other side. But both paradigms simultaneously exist, and this distinction is false. It is the law which is called to authoritatively define the role of science and the conditions for risk-decision making.

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[58] E. Fisher, (2007), 26 47.

[59] The most obvious expression of the rational instrumental theory is the Weberian model of bureaucracy. M. Weber, *From Max Weber: Essays in Sociology*, Routledge, Lon don 1991, chapter 7.

[60] E. Fisher, 'Risk Regulatory Concepts and the Law' in OECD, *Risk and Regula tory Policy Improving the Governance of Risk*, OECD, Paris 2010, 45, at 66 69.

[61] An illustrative example found in the US is a detailed legislative provision in para. 655(b)(5) of the US Occupational Safety and Health Act.

6. A PUBLIC-PRIVATE PARTNERSHIP AND TRANSNATIONAL GOVERNANCE OF RISKS IN A GLOBALISED RISK SOCIETY

The issue of public-private collaboration in risk management is one that is increasingly gaining the importance. Public or private, the role of regulation is to enable co-existence of legitimate interests of participants and the market in its totality.[62] Narrower concepts of regulation centre on state's attempts to influence socially valuable behaviour by establishing and enforcing legal rules. In that sense, 'regulation' is a modality or type of participation of the state in institutional operations and alternative to other modalities.[63] However, a social essence of the concept of 'regulation' is its social nature: it belongs to all market factors, not only to the state. Therefore, regulation is a *divided function*.[64]

This broader concept of regulation sets the agenda for a research into new methods of delegated governance in regulating risks. Based on a social 'concert' of regulators,[65] the modern, responsible and reflexive law, should not accept the *status quo* represented by conventional forms of command-and-control regulation, but go further in search for better solutions, identification of surrogate regulators and tools of a new governance. It should aim to leverage the private sector and encourage the internalisation of the regulatory function and compliance.[66]

That process of 'social interactions' is complicated because it assumes multiple manifestations of the immediate regulatory activities of state, para-statal and private institutions.[67] The 'new public management' in implementation and enforcement is based on interactions between market institutions, non-governmental organisations and organisations established to protect the private interest, under the coordinative role of the administrative apparatus.[68]

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[62] M. A. Frison Roche, "Définition du droit de la régulation économique", in: M. A. Frison Roche, *Les regulations économiques légitimité et efficacité,* Vol. 1, Presses de Sciences Po et Dalloz, Paris 2004, 7.

[63] A. Jemmaud, "Normes juridiques et action" M. Maille (ed.): *La regulation entre droit et politique*, L'Harmattan, Paris 1995, 95, at. p. 97.

[64] G. Marcou, "Introduction" G. Marcou, F. Moderne, *Droit de la régulation, ser vice public et intégration régionale*, L'Harmattan, Paris 2005, 21.

[65] M. M. Leitão Marques, A. Casimiro Ferreira, "A concertaçao económica e so cial", *Revista Crítica de Ciências Socialis*, 1991, 31.

[66] C. Coglianese, J. Nash (eds), *Leveraging the Private Sector: Management Based Strategies for Improving Environmental Performance*, Resources for the Future Press, Washington DC 2006; J. Freeman, "The Private Role in Public Governance", *New York University Law Review* 75/2000, 543.

[67] G. Becker, "A Theory of Social Interactions", *Journal of Political Economy* 82/1974, 1063.

[68] The literature is considerable. For example: C. Hood, C. Scott, *Bureaucratic Regulation and New Public Management in the UK: Mirror Image Developments?* Lon

The regulatory process infiltrates more and more into private law domain and enhances the role of private actors in the regulatory arena.[69] 'Privatisation of regulation' supports the thesis that risk regulation can not be divided into the 'public' and the 'private' sphere. In regulating risks to society, modern Economic Law transcends the public-private dualism,[70] which is commonly associated with liberal political theory.[71] As the role of the state in today's world is much more concerned with individual utility, new dimension of the action of the state through public administration, as a partner in the regulatory process, has a different logic than that of having a monopoly over the regulatory processes. With the enduring global financial crisis, one may be concerned about advocating institutional solutions other than a traditional central regulatory authority. However, the current economic crisis, attributed by many to a lack of central regulatory vigour, does not diminish the need for the new governance. Completely different, the crisis calls for a proactive regulation. More than ever, the law is facing a challenge of how to alter the incentives of private actors so that they better ensure the public goal of stable and efficient markets.

Returning to the public/private distinction, change in the role of the administrative apparatus, change in the regulatory processes and new techniques of regulation have clearly erased the stereotype of a classic division between administrative and civil law on the national,[72] as well as

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don School of Economics, London 1996; P. Bayne, "Administrative Law and the New Managerialism in Public Administration", *Australian Law Journal* 62/1988, 1040; C. Har low, "Back to Basics: Reinventing Administrative Law", *Public Law* 8/1997, 245; A. Vokβkuhle, "Neue Verwaltungsrechstswissenshaft", in: W. Hoffman Riem, E. Schmidt Aβmann, A. A. Vokβkuhle (eds), *Grundlagen des Verwaltungsrechts*, Vol I, München 2006, 21.

[69] F. Cafaggi, "Le rôle des acteurs privés dans le processus de régulation: partici pation, autorégulation et régulation privée" in La régulation, noveaux modes? Noveaux territoires, *Revue française d' administration publique* 109/2004, 23.

[70] D. Truchet, "La distinction du droit public et du droit privé dans le Droit Éco nomique" J. B. Auby, M. Freedland (eds), *The Public Law/Private Law Divide: Une en tente assez cordiale?* Panthéon Assas, LGDJ Diffuseur, Paris 2004, 57.

[71] P. Cane, "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in: J. Eekelaar, J. Bell (eds), *Oxford Essays in Jurisprudence*, Third Se ries, Clarendon Press, Oxford 1987, 57.

[72] C. Parker, J. Braithwaite, 125 126; D. Oliver, "Pourquoi n'y a t il pas vraiment de distinction entre droit public et droit privé en Angleterre?", *Revue internationale de droit comparé* 53/2001, 327; F. J. Säcker, "Regulierungsrecht im Spannungsfeld zwischen öffentlicher und privater Rechtsdurchsetzung" M. Ronellenfitsch, R. Schweinsberg, I. Henseler Unger (eds), *Aktuelle Probleme des Eisenbahnrechts*, Verlag Dr. Kovac, Ham burg 2009, 159; H. Woolfe, "Public Law Private Law: Why the Divide? A Personal View", *Public Law* 86/1986, 220. M. Freedland, "The evolving approach to the Public/ Private distinction in English Law", in: J. B. Auby, M. Freedland (eds), 101.

on international level.[73] The idea of internalisation of the regulatory function places greater emphasis on the evolving nature of regulatory strategies and the role of private parties in developing the regulatory framework.[74] An obvious example is found in the EU, where new modes of regulation, ranging from co-regulation to self-regulation, have emphasised the role of private law in the European multilevel regulatory architecture.[75]

Internalisation of regulatory function at the level of market subjects signifies that the regulatory process is becoming decentralised through a hybrid, heterarchial, relationship, through collaborative governance between public administration, the regulated and the stakeholders.[76] As already emphasised, the law is calling for the involvement of other regulatory actors by regulating the basis for their involvement.[77] This new public management leads towards a new governance compromise, which includes a process of 'negotiating a law' and the co-existence of various private and public instruments of regulation.[78]

As chains of production and supply are becoming more dispersed in the global economy, with materials and ingredients from various countries with different risks and regulatory systems, risk management was getting more complicated and costly, urging for convergence on common standards and principles of technological risk assessment and management. In transnational risk regulatory networks and international forums the trend towards private market governance and global governance is gaining the importance.[79] In addition to regulators, the private

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[73] E. Benvenisti: "The interplay between actors as determinants of the evolution of administrative law in international institutions", *Law and Contemporary Problems* 68/2003, 319.

[74] G. Teubner, *Autopoietic Law: A New Approach to Law and Society*, Walter de Gruyter, Berlin 1988; G. Teubner, "Regulatory Law: Chronicle of Death Foretold", *Social and Legal Studies* 1/1992, 451.

[75] F. Cafaggi, "New Modes of Regulation in Europe: Critical Rethinking of the Recent European Paths", in: F. Cafaggi, *Reframing Self Regulation in European Private Law*, Kluwer Law International, 2006, Preface.

[76] J. Freeman, "Collaborative Governance in the Administrative State" *UCLA Law Review* 45/1997, 1; J. Black, "Decentring Regulation: Understanding the Role of Regula tion and Self Regulation in a post Regulatory World", *Current Legal Problems* 54/2001, 103.

[77] L. McDonald, "The Rule of Law in the 'New Regulatory State", 33 *Common Law World Review* 33/2004, 33.

[78] A. Pirovano, *Changement Social et Droit Negocié*, Economica, Paris 1988, 5.

[79] J. Rugie, "Global markets and global governance the prospects for conver gence", S. Bernstein, L. Pauly, (eds,) *Global liberalism and political order: Towards a new grand compromise*, NY State University Press, New York 2007, 23 50; D. Vogel, "Private global business regulation", *Annual Review of Political Science* 11/2008, 261.

sector could be entrusted to oversee private entities. One example is a private standard-setting, which represent an important mechanism of risk management in many spheres of market activities. Many such standards exist nowadays, and many forums have been established to ensure private standard harmonization. Private standards may be developed by individual firms, or even by non-governmental organisations such as consumer associations and associations promoting environmental issues and sustainable consumption. Private standards have often developed as a collective action of large firms sharing common interests, and/or as a response to actions of public regulators.[80] Regulators may mandate the use of such standards and make them legitimate, for instance through accreditation.

Private standard setting and monitoring as a tool of modern risk regulation has many benefits. Most of all, the private sector may mobilize resources and design standards more dynamically than the pubic sector, improving the overall efficiency of risk management. However, there are challenges to private standard settings and enforcement, mostly related to their responsibility.[81] The main challenge is whether regulators have enough resources to identify and sanction violations of private standards. This problem points to another concern: a political risk for failure of the risk management system. In the end, it is the government to be blamed for the regulatory failure if the private means of risk regulation fail. Therefore, the delegation of responsibilities to private parties raises questions about transparency and accountability in modern, polycentric, regulatory regimes.[82] Since the government would be blamed for the failure of a private risk regulatory approach, more attention needs to be given to questions of implementation and accountability. But the power in a regulatory state is now fragmented, spread between public, private and hybrid actors. Hence, the role of traditional public accountability mechanisms characterizing hierarchal regulatory structure are diminishing and being replaced by broader and more complex "accountability networks".[83]

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[80] One of the best examples is the HACCP process, which is the main method for assessing and managing food safety risks in agro food processes, a set of pro active ac tions in the supply chain, aiming in particular to ensure traceability and responsibility of suppliers. On the legislative challenges it poses see in particular: J. Vapnek, "Legislative implementation of the food chain approach", *Vanderbilt Journal of Transnational Law* 40/2007, 987.

[81] F. Cafaggi, "Responsabilité et gouvernance des régulateurs privés*", Revue In ternationale du Droit Economique* 2005, 111.

[82] J. Black, "Constructing and Contesting Legitimacy and Accountability in Poly centric Regulatory Regimes", *Regulation & Governance* 2/2008, 137.

[83] C. Scott, "Accountability in the Regulatory State", *Journal of Law and Society* 27/2000, 38.

7. THE PREVENTATIVE PARADIGM AND (DE)STABILIZATORY FUNCTION OF SCIENCE

In a risk society, the public concern is shifted from remediation of damages to the prediction of risk.[84] The science has become a tool of rational risk analysis, and, as a rule, precedes policy decisions about measures to prevent or reduce risks. The legal system increasingly recognizes the use of scientific data and evidence as a basis for policy making and formulation of regulatory measures.[85]

The process of risk analysis should therefore be based on scientific expertise which should provide a value-neutral assessment. For this reason it would be necessary to develop several key principles governing the use of science as a basis of policy. Although it is not possible to define the level of risk at the global level due to different social context of each country, science-based principles of risk assessment may enhance its transnational consistency, where social and economic considerations are not shared in national risk management policies.[86] However, the existing principles of the use of scientific expertise in risk analysis are not coherent, and there is no single set of rules governing the use of science in decision making, although in the area of international trade and environmental law there are examples of rules and principles on scientific risk assessment as a basis for measures in relation to risks to the environment, human, animal and plant life and health.[87]

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[84] N. De Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules*, Oxford University Press, Oxford 2002, 91.

[85] An example is the EU Treaty which refers to the use of science in formulating internal market measures in Article 14 "*The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protec tion, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts*".

[86] The culture should be sufficiently powerful to generate multiple scientific con sensuses across nations. J. Atik, "Science and International Regulatory Convergence", *Northwestern Journal of International Law and Business* 17/(1996/1997), 736, at p. 738.

[87] *Agreement on Sanitary and Phytosanitary Measures*, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, General Agreement on Tariffs and Trade, Annex 1A, April 15, 1994. The Cartagena *Protocol on Biosafety to the Convention on Biological Diversity* which entered into force on September 11, 2003; the *Stockholm Convention on Persistent Organic Pollutants*, entered into force on May 17, 2004. Setting of horizontal risk analysis principles in legislation and practice in the EU are worth to be mentioned. The communication on consumer health and food safety (COM(97) 183 final), as a response to the BSE crisis set up a number principles which are applicable beyond the agro food sector and systematically applied in creation of European (*regulatory*) agencies and scientific committees, while the Commission's Communication on the collection and use of expertise of (COM(2002) 713 final) relates to scientific risk assessment.

The choice of the acceptable level of risk is a political decision. However, the politics of safety is afflicted by the problem of uncertainty in defining and characterising risks, the scientific approaches to risk measurement, the perceptions about risk and ultimately the decisional criteria used to manage risks. Scientific progress is a result of a gradual accumulation of knowledge and science can never provide absolute certainty. *Science cannot respond* to all unanswered questions of risk policy because scientific knowledge used in risk assessment is affected by uncertainty.[88] The limiting factor is not solely the existence of scientific uncertainty, but as well the insufficiency of scientific evidence. Moreover, many of the issues which arise in the course of the interaction between science and society cannot be answered by science.[89] This makes it difficult to maintain a clear line between scientific and political aspects of decision-making.

The problem of uncertainty requires consent in deciding whether an action is necessary and, if so, which alternatives ought to be considered. Decisions on measures to address risks to health and safety inevitably involve personal social value judgments as to the significance of a particular risk.[90] The modern regulatory systems are moving towards a more integrated approach to risk analysis that acknowledges the influence of policy choices and the democratization of the process of risk regulation by taking into account non-scientific considerations influencing public perception about risk.[91] As a tool of risk management, science has a high potential to discipline the politics of risk regulation, but there should be a point where social value judgments prevent scientifically evidenced policy choices which might not be considered as acceptable by the society.

From a legal standpoint, the most difficult issues are the separation between scientific advice and decision-making, and the judicial review of science-based risk regulatory measures. The latter issue is an ex post valuation of scientific expertise through control of regulatory powers of the regulators. When scientific data, as the outcome of scientific research, served as a basis for a legislative act or an individual decision, courts (usually made up of non-scientifically trained persons) are asked to determine whether risk regulatory measures pursue legitimate objectives. A fading border line between scientific and policy decisions in regulating

[88] B. Wynne, Uncertainty and Environmental Learning: Reconceiving Science and Policy in the Preventative Paradigm, *Global Environmental Change,* June 1992, 111.

[89] Issues known as 'trans scientific'. G. Majone, Science and Trans Science in Standard Setting, *Science, Technology & Human Values* 9/1984, 15.

[90] W. W. Lowrance, *Of Acceptable Risk: Science and the Determination of Safety*, William Kaufmann, Los Altos 1976, 8.

[91] J. A. Tickner, S. Wright, "The Precautionary Principle and Democratising Ex pertise: a US Perspective", *Science and Public Policy* 30/2003, 213, at p. 217.

risks has made it difficult for judges to determine when they were looking into areas of agency expertise, which essentially falls within the issue of conflicting paradigms of administrative constitutionalism.

Ex ante valuation of scientific expertise in policy decision making is the authorisation to rely on scientific expertise in policy making. To this end, the law sets standards and principles relating to risk analysis and establishes institutional arrangements between scientific expertise and policy-making, which also serve as a basis for judicial review, as referred to above. The judicial approaches differ in terms of valuation of scientific expertise. Approach in the US is known as the 'frontiers of science doctrine',[92] while European risk regulation concept is more based on the 'precautionary principle.'[93]

Hence, to address the problem of uncertainty, the law may mandate risk assessment as a prerequisite to the adoption of precautionary measures. As mentioned above, some jurisdictions, such as the US, insist on a 'sound science' approach, while the others, such as the EU as the most prominent representative, insist on the necessity for precaution.[94] That is to say, where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent hazards.[95] As a rule, measures addressing risks should not be maintained without sufficient scientific evidence. However, when the relevant scientific evidence is insufficient, the law may authorize adoption of provisional measures in the course of obtaining the additional information necessary for a more objective assessment

[92] M. Shapiro, 'The Frontiers of Science Doctrine: American Experiences with the Judicial Control of Science Based Decision Making', in: Joerges, Ladeur and Vos (eds), *Integrating Scientific Expertise into Regulatory Decision Making*, Nomos Verlagsgesells chaft, Baden Baden 1997, 325.

[93] R. E. Löfstedt, D. Vogel, "The Changing Character of Regulation: a Compari son of Europe and the United States", *Risk Analysis* 21/2001, 399.

[94] This diverging approaches manifested especially in trade disputes regarding the restriction of imports between the US and the EU before the Appellate Body of the World Trade Organisation (the most prominent '*Beef Hormones*' case, EC *Measures Concern ing Meat and Meat Products, Report of the Appellate Body*, WT/DS26/AB/R & WT/ DS48/AB/R, 16 January 1998). Interestingly, the essential element of many American statutes regulating health and environmental risks at the beginning of the second half of the last century was precaution, such as the *Clean Air Act of 1963*, 42 U.S.C. §7401 7671q. The current public opinion of risk regulatory approach in the EU has been com mented to resemble the US approach in 1960s 1970s when regulatory agencies sought to gain public trust through pursuing precautionary health and environmental policies. R. E. Löfstedt, D. Vogel, 403 404. On the similarities between judicial approaches to review of risk regulatory measures in the US and EU see: J. B. Wiener, 'Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems', *Duke Journal of Comparative and International Law* 13/2003, 207.

[95] Based on definition of the precautionary principle in *the Rio Declaration on Environment and Development*, Principle No. 15.

of risk.[96] If the law allows for a too much leeway to agencies to interpret scientific data, they may be tempted to introduce regulatory measures on the basis of a mere speculation about uncertain risks and try to justify it by referring to their regulatory objectives.[97] As Shapiro noted, courts will be at their most deferential in cases where an agency is operating 'at the frontier', when it has made a policy choice among a range of options left open by scientific uncertainty.[98]

To ensure preventative character of risk regulation and limit the power of administration in the same time, the law also plays a role in setting out the procedures that regulators must follow. In some cases these procedures are minimal, but in other cases they are quite substantive. The procedures may be related to the steps which must be taken in making decisions, the type of information and factors that must be taken into account, the procedures on how a specific body must conduct itself etc. Risk assessment bodies consisting of experts could be institutionally separated from policy-making instances. That is the case in the EU, where a number of European (quasi) regulatory agencies which are contributing to risk regulation in the internal market are aided by various independent scientific committees or expert panels. On the other side, in other OECD countries, particularly in the United States, regulators are predominantly involved both in assessing risks and policy making. As a rule, in these countries risk assessment and policy making are functionally separated, even under the same roof. Otherwise, in addition to public administration often referred to as the 'fourth branch' of government, the scientific community made of policymakers is pretending to constitute the 'fifth branch'.[99]

8. CONCLUSION

In this article the author attempted to identify several paradigms underlying risk regulation in a globalised risk society and pointed to the important socio-legal challenges for risk regulation in a regulatory state,

[96] See article 5.7. (as an exception to article 2.2.) of *the Agreement on Sanitary and Phytosanitary Measures*.

[97] For an extensive critique of this phenomenon see S. Breyer, *Breaking the Vicious Circle: Towards Effective Risk Regulation*, Harvard University Press, Cambridge MA 1993.

[98] M. Shapiro, 'The Frontiers of Science Doctrine: American Experiences with the Judicial Control of Science Based Decision Making', in: C. Joerges, Ladeur, E. Vos (eds), *Integrating Scientific Expertise into Regulatory Decision Making*, Nomos Verlagsgesellschaft, Baden Baden 1997, 325, at p. 334 338.

[99] S. Jasanoff, *The Fifth Branch: Science Advisors as Policymakers*, Harvard University Press, Cambridge MA 1990.

which is becoming increasingly focused on legal and policy issues of risk detection and management.

Regulation is a divided function. Global economy undoubtedly requires new modes of polycentric regulation that encourage the involvement of a private sector while still preserving role of the government. The law must acknowledge that governments and the private sector could negotiate and jointly act in the interest of private parties and the market. The new paradigms of governance, and the need for a proactive regulatory strategy and reflexive regulation in a globalised world, transformed the role of law in regulating risks to society. Law is no longer considered an intrusive element of regulation, in a sense that it only creates limitations. The law is no longer construed in instrumental terms as a tool for enhancing either the scientific or democratic aspects of risk regulation; it authoritatively defines and influences these concepts and creates the conditions for risk regulation.[100] The law should not only be considered a set of rules, but a complex culture which interacts with the operation of any risk regulatory concept, and provides a discourse for challenging decisions about risk.

Regulators as decision-makers are faced with the task of assessing the legitimacy of risk regulatory objectives on the basis of scientific evidence, and the tasks taken to address risks are complicated by the prevalence of scientific uncertainty and divergences of views over acceptable levels of risk. Although science lacks its own normative component, it may be taken as one of the parameters in assessing the validity of risk regulatory measures. Uncertainty is inherent in risk assessment and there seem to be no viable alternatives, so the challenge for law is to deal effectively with science and uncertainty.

In modern democracies, the process of risk analysis and management will be mistrusted if it is not designed in line with principles of good public administration. No matter to which extent the risk assessment and management function is outsourced, public administration will always remain a facilitator in the governance of risk. The democratic process must be disciplined by the introduction of technocratic tools such as science and cost-benefit analysis. And *vice versa*, the use of these technocratic tools must be disciplined by the democratic, deliberative, process.

[100] E. Fisher, (2007), 14 17.

Dr. Vladan Petrov*

Vladan Kutlešić, *Les constitutions postcommunistes européennes. Étude de droit comparé de neuf états*, Bruylant, Bruxelles 2009, p. 202.

First, a clarification: *The Constitutions of Former Socialist European Countries – Comparative Study* is a book by Vladan Kutlešić, a distinguished Serbian constitutional lawyer, which appeared for the first time in Serbian language in 2004. As the book attracted international attention, it was published in French five years later by an eminent Belgian publishing house Bruylant.

Comparative constitutional legal studies were extensively developed mostly during the second part of twentieth century. That type of studies have been somewhat rare beforehand, and limited mostly to the research of the so called "great legal systems" (the analysis of English, United States and French constitutions). In the beginnings, the approach typical for political sciences prevailed over the methods of constitutional law. This can be well illustrated by the famous comparative study *Modern Democracies* by James Bryce, in which the author examines six famous democracies in the first half of twentieth century. The wave of new constitutionalism and rapid increase in number of formal constitutions all around the world, enhanced the interest in comparative research. Comparative constitutional law studies became, little by little, more or less, separated from the predominant method of political sciences. Another study, *Modern Constitutions* (1951) by Kenneth Wheare, represented a pioneering endeavour in this direction, and made a powerful influence on Miodrag Jovičić, Serbian "coryphaeus of constitutional comparativism", as Kutlešić identifies him. The books *On the constitution* (1977) and *Great Constitutional Systems* (1984) by Jovičić still represent the highest achievement of comparative constitutional law in Serbian legal science. By all accounts, Vladan Kutlešić has decided to carry on a mission initiated by academician Jovičić.

The book *Les constitutions postcommunistes européennes – etude de droit comparé de neuf etats* (the title of the book in French is some-

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what modified version of the title of the aforementioned Serbian edition) presents, according to the author, the product of his several-years study of the post-communist European countries constitutions. Earlier studies were usually limited to particular constitutional issues or to particular states. A welcome feature of the work is that the author depicts, in a comprehensive and systematic manner, constitutional acts of nine post-communist countries. This makes the work especially handy for reference. He discloses a number of motivating and controversial constitutional topics. The structure of the book reveals some of these issues, as it is well reflected by the chapters' titles: I. Contents, volume and architectonics of the constitutions; II. Preambles; III. Main provisions; IV. Freedoms, rights and duties; V. Constitutional organization (Parliament, President of the Republic, Government, Constitutional Court, courts and public prosecution, other constitutional bodies); VI. Local self-government; VII. Amending the Constitution; VIII. Conclusions.

There is basically no important dissimilarity between Serbian and French edition of the book when it comes to its content, offering a welcome work of synthesis, survey, and fresh observations on many constitutional problems. However, the French edition is more articulated and apparent. Within the chapters there are subtitles indicating clearly to what subject and to what institution they refer to. It makes the text easier to follow, enabling the reader to go directly to the issues he is interested in. Slobodan Milačić, Professor Emeritus at the Montesquieu Bordeaux IV University, who is the author of the preface, considers Kutlešić's selection "not solely extensive, considering the countries he has covered, but also prolific, having in mind the diversity of the cases he unifies" (*Préface*, p. X).

Why did the author select nine post-communist countries (Bulgaria, Croatia, Hungary, Poland, Check Republic, Romania, Russia, Slovenia, Slovakia and Slovenia), avoiding the analyses of the Constitution of his own country? Kutlešić provides a simple answer. The book deals with the countries which "have been stable with regards to constitutional law, as this makes it possible to draw lasting conclusions regarding their constitutional solutions" (*Avant-propos*, p. XVIII). As for the Constitution of the Republic of Serbia, at the time when the initial study in Serbian was written, the 1990 Constitution was in force, pending the adoption of a new Constitution. Certainly, the 2006 Constitution of the Republic of Serbia could have been included in the French edition of the book. The chance to draw up a high-quality analysis of constitutional law with regards to both post-communist Serbian Constitutions (1990, 2006), and to perform their comparison, might have been missed. It could have been a separate part of the study, placed at the very end. Almost certainly, it would not jeopardize the author's basic criterion of selection. It was a good chance to offer the European readers with a possibility to find out, and more importantly to accept, the fact that the 1990 Constitution of

Serbia was in many respects the first post-communist Constitution reverting to the attainments of liberal democratic constitutionalism. In other words, Serbia was not the last post-communist country to adopt a democratic constitution in 2006, as it is usually perceived.

Nevertheless, the study written by professor Kutlešić will present an intriguing piece for the readers from Western Europe, as it is one of the first comparative studies referring to the post-communist countries composed by the author originating from these areas, as Milačić rightly stresses. Milačić also suitably points out that the author confined himself to the "formal comparison" (*les comparaisons formelles*). Followers of the idea of "real" ("live") constitution, as well as those who claim that it is not possible to draw a line between the norms and reality, might protest that this book does not deal with the actual life and scope of the constitutional institutions. Those who are interested in the real functioning of constitutional institutions in the analyzed countries, will have to search for another book.

This is not a "scrapbook", but a fine, systematic and informative study relating to the formal constitutions of nine interesting countries. It was written by the constitutional lawyer with a talent for legal reasoning, a researcher who does not wander, but who knows always where he goes. The stated qualities are particularly evident in the French edition. Hence, the praise should be given also to the translator, Mr. Pascal Donjon. Slobodan Milačić, Professor Emeritus of the Montesquieu Bordeaux IV University, also did his best to make the French edition representative and accessible by writing an inspired preface.

French edition of Kutlešić's book is not only an informative lecture for European readers, but it also represents a strong incentive for new researches of comparative constitutional law in Serbia. The study gives a good example of how a single attempt may serve well to a multiple results – both in the international and national legal science. The book reflects years of serious research and efforts, showing that the way in gaining scientific reputation is not paved mainly by taking part in more or less prestigious international conferences using the same papers (with different titles), or not having them at all. There are therefore only a few fresh and valuable comparable books on the topics of constitutional law in the recent Serbian literature. The author of this review himself feels a bit awkward having to direct a diligent student, looking for the latest books of that kind written by Serbian writers, to the editions written twenty or more years ago. Therefore, there is a hope that some new studies by professor Kutlešić, but also by other renowned connoisseurs of constitutional law, would fill the gap in Serbian constitutional literature, and that they will also gain an international recognition as this one did.

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Example: H.L.A. Hart, *Concept of Law*, Oxford 1997, 254 fn. 41.

2. Articles: first letter of the author's name (with a period after it) and author's last name, article's title in recto with quotation marks, name of the journal (law review or other periodical publication) in verso, volume and year of publication, page number without any supplements (as in the book citation). If the name of a journal is longer than usual, an abbreviation should be offered in brackets when it is first mentioned and used later on.

Example: J. Raz, "Dworkin: A New Link in the Chain", *California Law Review* 3/1995, 65.

3. If there is more than one author of a book or article (three at most), their names should be separated by commas.

Example: O. Hood Phillips, P. Jackson, P. Leopold, *Constitutional and Administrative Law*, Sweet and Maxwell, London 2001.

If there are more than three authors, only the first name should be cited, followed by abbreviation *et alia* (*et al.*) in verso.

Example: L. Favoreu *et al*., *Droit constitutionnel*, Dalloz, Paris 1999.

4. Repeated citations to the same author should include only the first letter of his or her name, last name and the number of the page.

Example: J. Raz, 65.

4.1. If two or more references to the same author are cited, the year of publication should be provided in brackets. If two or more references to the same author published in the same year are cited, these should be distinguished by adding a,b,c, etc. after the year:

Example: W. Kymlicka, (1988a), 182.

5. If more than one page is cited from a text and they are specified, they should be separated by a dash, followed by a period. If more than one page is cited from a text, but they are not specifically stated, after the number which notes the first page and should be specified "etc." with a period at the end.

Example: H.L.A. Hart, 238–276.

Example: H.L.A. Hart, 244 etc.

6. If the same page of the same source was cited in the preceding footnote, the Latin abbreviation for *Ibidem* should be used, in verso, followed by a period.

Example: *Ibid.*

6.1. If the same source (but *not* the same page) was cited in the preceding footnote, the Latin abbreviation for *Ibidem* should be used, in verso, followed by the page number and a period.

Example: *Ibid.*, 69.

7. Statutes and other regulations should be provided with a complete title in recto, followed by the name of the official publication (e.g. official gazette) in verso, and then the number (volume) and year of publication in recto. In case of repeated citations, an acronym should be provided on the first mention of a given statute or other regulation.

Example: Personal Data Protection Act, *Official Gazette of the Republic of Serbia*, No. 97/08.

7.1. If the statute has been changed and supplemented, numbers and years should be given in a successive order of publishing changes and additions.

Example: Criminal Procedure Act, *Official Gazette of the Republic of Ser bia*, No. 58/04, 85/05 and 115/05.

8. Articles of the cited statutes and regulations should be denoted as follows:

Example: Article 5 (1) (3); Article 4–12.

9. Citation of court decisions should contain the most complete information possible (category and number of decision, date of decision, the publication in which it was published).

10. Latin and other foreign words and phrases as well as Internet addresses should be written in verso.

11. Citations of the web pages, websites or e-books should include the title of the text, source address (URL) and the date most recently accessed.

Example: European Commission for Democracy through Law, Opinion on the Constitution of Serbia, *http://www.venice.coe.int/docs/2007/CDLAD(2007)004 e.asp,* last visited 24 May 2007.

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