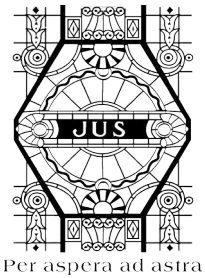

XIVth EUROPEAN FORUM
of
YOUNG LEGAL HISTORIANS

„Turning Points and Breaklines"

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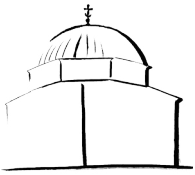


ABSTRACT BOOKLET

Markus J. Prutsch
European University Institute, Italy

The Revision of the French Constitution in the Crisis of 1830

A Turning Point in French Political History and Legal Culture

My presentation aims to highlight the nature of constitutional transformation in France, in particular the regime change from the political system of the Restoration to the July Monarchy, by analysing the revision of the *Charte constitutionnelle* in 1830. This constitutional revision has remained in the shade of the "big" upheavals of 1789 and 1848 respectively and has often been considered to be only of secondary interest in historiography and legal history. Such an understanding, however, following a closer examination of the July Revolution, turns out to be one-sided and underestimates the importance of events in 1830.

Hence, the aim of this presentation is threefold: firstly, to show the constitutional and political basis for the regime change during the July Revolution; secondly, to describe the concrete revision of the constitution and to explain the changes which were made, especially regarding the definition and restriction of monarchical power; finally, to assess the political transformation of 1830 in broader contexts, which can indeed be interpreted as a fundamental turning point in French constitutional history and political culture, but also shows elements of legal continuity.

Thus, the reformulation of the *Charte constitutionnelle* will be critically examined in this presentation, with special reference to the role of the king and the parliament as two crucial protagonists in this process. What will be emphasized in particular are the decisive shifts in the understanding of "sovereignty" and "legitimacy", resulting in that the monarch as a kind of "transcendental" and therefore unassailable constitutional organ became "materialized", what guaranteed his responsibility and liability. In this context, however, also the widespread theses of the Restoration regime as a *monarchie impossible* and the view that the deposition of the old branch of the Bourbon dynasty during the Revolution of 1830 was an inevitable event in French political history will be challenged. This may finally provide some further insights into the character of legal transformation and change on a more general level.

Merike Ristikivi
University of Tartu, Estonia

Latin terms in Soviet and post-Soviet Estonian legal journals during the transition period as expressions crossing the eastern and western legal cultures

The presentation deals with the turning points in Estonian legal terminology from the Soviet period to the integration into Europe, relying on usage of Latin terms in juridical journals. Why is it important to analyse these two disciplines – law and language – together? Law is an area where the linguistic means of expression have a particularly huge impact. It works througth language, as a word or expression acquires juridical power. Thus, law in general cannot be seen as a static system invented in a single act of creation. It is rather a dynamic process changing continuously and adapting to different social needs. The same applies to language. Language must keep up with the developments in society. The legal environment changes; subsequently, language usage must also change. The daily dynamics of the law is carried first and foremost by the jurisprudence. The most dynamic medium of the latter is the juridical journalism.

As regards the legal terminology, we can notice that in language two opposites must exist – on the one hand change, moving forward, renewal, and on the other stability, unchanging condition, the status quo. Change is necessary for dealing with the ever-emerging new tasks that people are faced with in society. Stability is needed because language is a crucial means of preserving social memory and builds a bridge between people who live in different ages. In this respect, one key issue is the abundance of words and expressions originating from Latin and used in legal language as unadapted foreign words. In the Western legal tradition Latin has always had a special role to play. It is the language of Roman law, which is considered the common denominator of European legal systems.

The three major turning points and rearrangements in Estonian legal culture during the 20th century have affected and changed remarkably the legal terminology: 1918 establishment of the Republic of Estonia, 1940/1944 Soviet occupation, 1991 re-establishment of the independence. During all these breaklines, radical legal reforms occurred. Against this background, the material collected during my survey reflects, in the context of the Estonian legal history, the linguistic turning points: integration of one special language, i.e. legal language, into the European, after that into the Soviet and finally again back into the European legal environment. In my presentation the last breakline will be discussed.

The questions in my research are: how the changes introduced by the abovementioned legal reforms are mirrored in the usage of language by Estonian lawyers with regard to Latin terms? What exact period can we consider the turning point back to the European legal environment?

Pablo Avilés Flores
Panamerican University, Mexico

Collections and The French Revolution: a new property regime

The French Revolution unleashed the nationalization of goods from the church, the nobles and those of the crown. All of a sudden, the newborn French Republic found itself with a jumble of goods, most of them of great value, and had to decide which ones had to be destroyed and which ones meant to be kept. The economical problems caused by the war, provoked that many objects were used as precious metals or as armaments.

The preservation of the goods provoked the creation or the affirmation of a new property regime: the public wealth. Within this public wealth, a very well defined part took its place. The gathering of works of art, jewels and other bizarre or antique objects, demanded the legislators and governors a different answer. Obviously, some political uses came soon after. However, just next to these dramatic events upcoming the revolution, a series of historical, philosophical, esthetical and juridical reflections tried to find an answer to the problem that the administration of these goods, totally different from the others, meant.

We suggest, within the framework of this research, to ask ourselves about the role of the law in the management of these goods. Which esthetical, philosophical and historical principles the legislators followed, in order to decide on the preservation of the chosen objects.

This device put into action helped itself from traditions and knowledge already practiced in France: this way, the antique collections and the cabinets gave, in many cases, the model for creating national collections. Same way, some essays of museums such as the Luxembourg Palace, had already given some experience.

Not only is the administration of these goods found within the framework of the management and transfer of national goods which were recently acquired, but around this new legislative system there are reflections of all kind, that had to be translated into laws in order to create or renovate, if necessary, a suitable legal framework. We will pay special attention to the collections (cabinets, libraries) since it is there where we are to find the management of a new property regime that evolved until constitute the artistic heritage of the nation.

Thomas Quentin Mohr
University College Dublin, Ireland

The Birth of the Irish Free State as a Watershed in Legal History

The Irish Free State was among the new European states that emerged in the period immediately after the First World War. The creation of the new state in the south and west of the island of Ireland in 1922 coincided with a desire for a radical overhaul of Irish law. The Common Law legal system inherited from the United Kingdom was unpopular with many Irish nationalists. Consequently, Irish nationalists often looked to continental Europe for guidance in political and constitutional matters. Arthur Griffith, one the leaders of the new state, was the author of a work entitled 'The Resurrection of Hungary'. These considerations ensured that the committee charged with drafting an Irish constitution paid special attention to the constitutions of the new states of Eastern Europe.

Irish nationalists hoped that the creation of their new state would coincide with a radical remodelling of Irish law. The constitution drafted for the Irish Free State contained a number of innovations derived from the continent, in particular from the constitution of Switzerland. The scene seemed to be set for a definite breakline or watershed in Irish legal history. Yet, as this paper will argue, the 'Resurrection of Ireland' did not coincide with the great overhaul of Irish law desired by many Irish nationalists.

The Irish Free State differed from the new states that had emerged elsewhere in Europe in many key respects. First, it was a common law jurisdiction. This rendered the adoption of continental legal models particularly difficult. There was also a strong movement that favoured drawing inspiration from Ireland's ancient past instead of importing legal institutions from continental Europe. In addition, the Irish Free State did not emerge with unimpeded sovereignty in 1922. It came into being as a 'Dominion of the British Empire' with the same status as was then enjoyed by Canada, Australia, South Africa and New Zealand. The British government insisted that the new Irish Free State was bound to adhere to certain legal institutions that were common to all the constituent parts of the British Empire. Yet, as paper will argue the real seeds of failure were latent within the nature of Irish nationalism itself. Irish law did eventually diverge from that of the United Kingdom, but this occurred many decades after the creation of the Irish Free State.

The birth of the Irish Free State represents a legal 'breakline' or 'turning point' that ended in failure. This paper will attempt to explain why this was so.

Pálvölgyi Balázs
Széchenyi István University, Hungary

Événements étonnants à la fin d'une expérience audacieuse

Après la signature le „Protocole final" à 7 septembre 1901, les puissances occidentales se sont mises à partager le butin de guerre. Ayant participé aux manœvres, l'Autriche-Hongrie a fait une tentative pour occuper une territoire à Tien-tsin (ville portuaire de la première importance). Après avoir tracé les lignes de frontière, parmi les autres puissances alliées, on a créé également un certain „settlement" ou „domaine concessionaire" austo-hongorise au bord de la fleuve Pei-Ho (Hai He), à côté du settlement italien, et en face du domaine japonnais.

L'Autriche-Hongrie a donc obtenu un territoire pas très grand, où on a construit des batiments typiquement „k.u.k.", dans lesquelles on a installé les officiers et soldats, en bref l'empire est devenu (mini-)puissance coloniale à l'extrême Orient.

Après l'éclatement de la Grande Guerre, la situation de la ville était de plus en plus délicate. D'une part les alliés de la boxeur-expedition se sont transformés en parties belligérantes, d'autre part, il persistait l'intérêt commun envers la Chine pour détenir les concessions obtenues. Il s'est formé une certaine cohabitation, même si à l'arrière plan – sans coup de fusil – la guerre s'est poursuit également à Tien-tsin.

A 1917 les autorités autrichiens ont dévoilé une série des complots qui auraient pu gravement menacer les territoires de l'empire en Tien-tsin et Sanghai. C'était l'été 1917 , juste avant la déclaration de guerre de la part de la Chine, quand les procès-verbaux ont été prises avec lesquelles on peut jeter un coup d'œil sur cet imbroglio politico-belliqueux plutôt grotesque.

Jaroslaw Kuisz
University of Warsaw, Poland

The legal aspects of the August Agreements (1980) - the Turning Point in the Fall of Communism in the Eastern Part of Europe

The subject of my lecture concerns the famous August Agreements (1980), concluded between the representatives of the communist government and the workers in Poland. Searching for the Turning Points and Breaklines in the XX century history of Europe and even the world, one shall not omit the so-called Polish Revolution of `Solidarity`. In summer 1980 workers went on strikes all over the country. The situation of conflict was solved by the peaceful conclusion of the August Agreements (30th Oct. 1980 in Szczecin; 31st Oct. 1980 in Gdańsk; 3rd Sep. 1980 in Jastrzębie). This meant an opening of the `new era` in many aspects: emerging elites in opposition circles, launching the projects of reforms of the economy, culture, law etc.

The main issue of my lecture is the reflection on legal aspects of the August Agreements. `The legal aspects of the August Agreements` means analysis of the agreements as a part of the non-democratic legal system of the Peoples Republic of Poland. Searching for the `legal aspects` of the event that happened outside the boundaries of communist law can seem controversial, however it is not only justified by the literature of the period of 1980-1981, but also by the fact that today it is a symbol of emerging Polish democracy.

Therefore I would like to present legal aspects of the August Agreements according to the most important analysis made by the representatives of the legal doctrine in the period of 1980-1981. The legal doctrine had to answer to the question if the August Agreements are of the political nature, legal nature or both - political and legal nature, as well as to the question if they could be enforced in law of the Peoples Republic of Poland.

I would like also to present in a few words the work on drafts of the new law initiated by the August Agreements as an example of the process of `regaining the law` by society (according to the idea that `the august agreements are a social contract`). As a try to regain by the society a position of a subject through the possibility of introducing drafts of the new law to the Parliament (elected in non-democratic voting). Moreover, according to the analyzed examples, it results that even outside the boundaries of democratic countries a form of creating law through negotiations is possible.

In conclusion I would like to present the idea that to some extent one can consider the August Agreements as a `non-formal initiative of legislation`. The need of a new act of law was pronounced. This demand was stimulated by the critical examination of the political and social situation in addition to the opinion that one could start a political and social change by introducing a new act of law. On the other hand it is also possible to state that the true sovereign launched a legislative process (an equivalent of a `people's initiative`) in the unusual situation - when this sovereign was deprived of real possibilities of influence on the legislative process.

Nadia Cerasela Dariescu
Petre Andrei University, Romania

The Influence of the Communist Ideology over Romanian Matrimonial Regime

In the Romanian Principalities of Moldova and Walachia, both the customary and written law provided the conventional matrimonial regime. The parents of the bride negotiated with the groom or with the groom's parents the quantum of the dowry as well as the various gifts the bride was entitled before the wedding and in the first morning after the wedding.

In 1865, the Romanian Civil Code was enforced in Walachia and Moldavia (united since 1859 in a new state, denominated since 1862, as Romania). This tcode was inspired after the French Civil Code of 1804.

According to the Romanian Civil Code, the husband was the chief of the domestic partnership. The spouses were allowed to choose, by an antenuptial contract, one of the following matrimonial regimes: the separation of property, the community of property or the dowry. In the same time, the spouses were allowed to create a matrimonial regime other than those provided in the code. If the spouses didn't conclude an antenuptial contract, their matrimonial regime was supposed to be the separation of property.

After the defeat of Romania in the World War 2, the political power was taken in just three years (August 1944-December 1947), by Communists, backed up by the Soviets.

The communist ideology, as developed by Lenin, supported the emancipation of women and the collective property. As a result, the family legal relations were regulated in the Family Code of 1954 according to the principle of the legal equality between husband and wife and according to the principle of the common property of the spouses. The antenuptial contract was abolished as well as the plurality of matrimonial regime. Since 1954, the Romanian spouses have a unique and mandatory matrimonial regime: the community of property.

Lena Foljanty
University of Greifswald, Germany

Rechtstheologie als Antwort auf den Nationalsozialismus? Zur Bedeutung der Religion in der deutschen Rechtsphilosophie der Nachkriegszeit

Unmittelbar nach dem Ende der nationalsozialistischen Herrschaft begann die deutsche Rechtsphilosophie, sich mit dem „Naturrechtsproblem" auseinanderzusetzen. Gegenstand dieser ersten großen Debatte der Rechtswissenschaft der Nachkriegszeit war die Frage, ob es rechtsverbindliche übergesetzliche Werte gebe und – wenn ja – wie diese begründet und erkannt werden könnten. Ein nicht unbeträchtlicher Teil der Autoren bemühte sich um eine Renaissance des Naturrechts auf christlicher Grundlage. Liest man die Texte heute, nur ein halbes Jahrhundert später, so mutet die Vermischung juristischer und religiöser Argumente in der Debatte eigentümlich an. Hermann Weinkauff etwa, der erste Präsident des Bundesgerichtshofs, rief Gott auf der Suche nach dem richtigen Recht an, Walther Schönfeld begründete die Gerechtigkeit des Rechts mit der „Fleischwerdung des Geistes" und selbst nüchterne Wissenschaftler wie Franz Wieacker hielten es für notwendig, sich in einer rechtsw issenschaftlichen Diskussion hinsichtlich ihrer Religiosität zu positionieren.

Um dieses Eindringen religiöser Topoi in die Rechtswissenschaft zu verstehen, muss der Kontext der damaligen Debatte in den Blick genommen werden: Der Nationalsozialismus hatte den Glauben in das Recht gerade auch unter Rechtswissenschaftlern nachhaltig erschüttert. Die Besinnung auf die Religion schien einen Bruch mit dieser jüngsten Vergangenheit zu ermöglichen: Sie bot die Möglichkeit zur Distanzierung von dem nationalsozialistischen Unrecht und zugleich zu einem Neuanfang im Umgang mit dem Recht. Indem man sich auf die „Heiligkeit des Rechts" besann, erklärte man das Recht zu etwas, das über den korrumpierenden Einfluss der Politik erhaben ist. Sollte also gerade durch die religiöse Aufladung des Rechtsbegriffs die Eigenständigkeit des Rechts wiederhergestellt werden?

In dem Vortrag möchte ich dieser Frage nachgehen und die Bedeutung der christlichen Religion in der Naturrechtsdebatte genauer unter die Lupe nehmen. Ich möchte analysieren, wie religiöse und juristische Argumentationen in den Texten der Naturrechtsdebatte verknüpft werden. Um welche Werte wurde gerungen? Unterschieden diese sich von den Werten, die von Rechtswissenschaftlern vertreten wurden, die das Naturrecht eher in eine humanistisch-abendländische Tradition stellten? Und: Handelte es sich bei der christlichen Fundierung des Naturrechts tatsächlich um einen Bruch mit der jüngsten Vergangenheit und um einen radikalen Neuanfang? Oder verbarg sich hinter ihr vielmehr das Bedürfnis, in einer Umbruchszeit an etwas Bekanntes und Bewährtes anzuknüpfen, gekoppelt mit einer gewissen Kontinuität mit dem nationalsozialistischen Rechtsdenken?

Pablo Gutiérrez Vega
University of Seville, Spain

The right to know, the duty to remember. The Spanish 2007 Historical Memory Act in the light of the UN Set of Principles for the protection and promotion of human rights through action to combat impunity

Mainstream Spanish Legal History School has so far paid little if any attention to the most recent adoption in December2007 of Act 25/2007 whereby rights are enfranchised and extended and measures are taken in favour of those who suffered persecution or violence during the [Spanish] Civil War [1936-1939] and the Dictatorship. However, the ensuing passionate ideological battle and the subsequent juridical discussion on the performative potential over the collective memory of our recent, yet almost completely unchallenged, dictatorial past that this unprecedented legal instrument may convey, led to the labelling of the comprehensive process underway as a debate over the 'historical memory'.

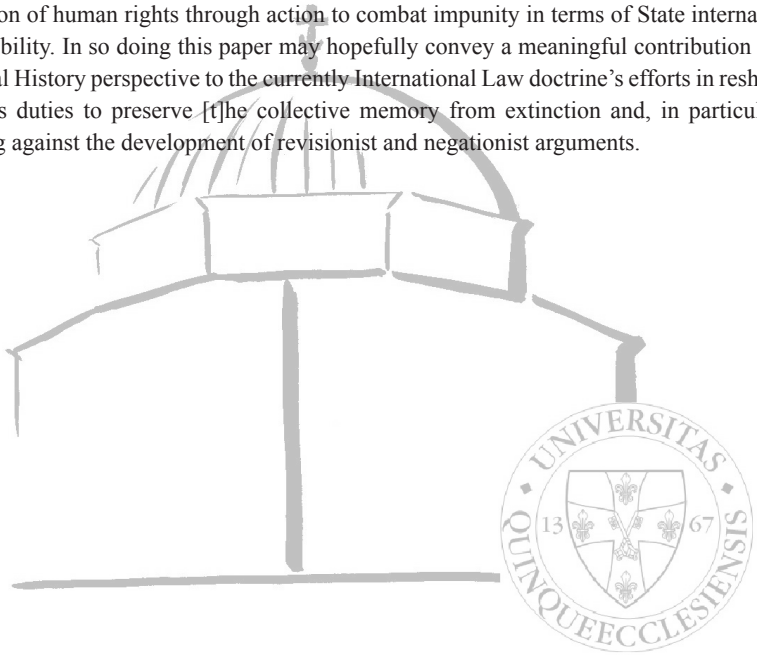
In fact, this Act is popularly referred to today as the Historical Memory Act. The early inception of this undoubtedly breakthrough instrument is preceded by a rather mild 2002 Spanish Parliament's legislative motion and a significantly more straightforward 2006 Council of Europe's Parliamentary Assembly report which explicitly condemned the serious violations of human rights during the Spanish dictatorship [1939-1975] and called for urgent measures to prosecute its perpetrators.

Act 52/2007 stipulates that there is a right to an individual and collective memory which is deeply enshrined in the concept of democratic citizenship. As a guise of public acknowledgement, the Act does generally declare 'unjust' all the judicial and governmental decisions which were unequivocally grounded on ideological or political reasons; it further declares 'illegitimate' the tribunals and juries which during the Civil War and the Dictatorship were created to impose sentences and convictions for ideological, political or religiously driven motivations. On the grounds of its frontal breach of the right to a due process a number of idiosyncratic Franco regime's repressive judicial instances, such as the Tribunal for the Repression of the Masonry and the Communism or the Tribunal of Political Responsibilities, have been declared likewise 'illegitimate' and hence their resolutions are, according to the wording of article 3.3, to be construed, again, as 'illegitimate'.

This breakthrough legal instrument does not only constitute a genuine turning point in our transitional justice -still fully operative- layout but it also encompasses a package kit of public policies to readdress the most (ranging from the removal of fascist memorabilia from public spaces to the nationwide mapping of common graves dating back to the Civil War period and the subsequent forensic identification of the victims of forced disappearances) which is

Pablo Gutiérrez Vega
University of Seville, Spain

likely to be assessed also from a different methodological perspective, a rather uncommon one –we must admit- for legal historians: to what extent does Act 52/2007 comply with the most advanced contemporary human rights standards in the field of the fight against impunity? This essay seeks in the first place to provide a fundamentally descriptive appraisal of the academic Legal History clichés (revisionism, negationism, imprescriptibility…) embedded in the protracted political debates leading to the adoption of the text but it shall also deal with the most direct implications of its ongoing unfolding as far as the renegotiation of Spanish authoritarian [historiografical] account is concerned. Secondly this essay intends to produce a set of educated guesses on the material compliance of Act 52/2207 with the incumbent humans rights' standards and, more precisely, with UN Set of Principles for the protection and promotion of human rights through action to combat impunity in terms of State international responsibility. In so doing this paper may hopefully convey a meaningful contribution -from the Legal History perspective to the currently International Law doctrine's efforts in reshaping of States duties to preserve [t]he collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.



Niamh Howlin
Queen's University of Belfast, Ireland

The Interaction between Law, Culture and Religion: A Case-Study

Individual beliefs are collectively gathered in a jury, which makes decisions about the life and property of individuals members of society. Thus the belief of an individual, considered in the context of a jury trial, affects the rules laid down for the whole community.

A jury trial is an ideal example of the interaction between law, social traditions, ethics and religion:

Law: The trial process itself and the application of agreed norms and rules to individual cases. The rules which have been set down in previous cases, by other juries, but also by lawmakers – such as judges and legislators. These rules range from the general to the specific.

Social Traditions: the 'jury of one's peers': originally juries were intended to decide individual cases on the basis of their own experiences and knowledge of the person(s) in question, and the rules and traditions of the society in which they lived. This is obviously limited by time and place. At the inception of the jury trial, there was no emphasis on being 'representative and impartial' – this is a novel development in the last 100 years or so.

Ethics and Religion: an individual's religious background affects their decision-making – not only as a result of deep-rooted beliefs which affect how they view certain actions and transgressions, but also merely as a result of belonging to a certain group or sect. Their decision can often be seen as a statement of identity. (This was clearly evident in Ireland in the mid- to late nineteenth century).

This paper will focus on the question of whether it is ever possible to separate one's social, religious, moral and ethical background from one's ability to make decisions. As a case-study for this, I will focus on the system of trial by jury in Ireland in the nineteenth century. In the early part of the century, the composition of the jury did not reflect the composition of society as a whole, in terms of social class and religion. However, later on in this period, the composition of the jury underwent a dramatic change, and its composition was significantly altered to reflect the social composition in both urban and rural areas. This in turn affected its religious composition – but did this fundamentally alter the nature of its decisions?

Eliana Augusti
Frederic II University, Italy

Protections and Capitulations: the European language of Garentia in the Ottoman Empire

In the second part of the XIX century, Europe was living a phase of transition. The Jus Publicum Europaeum was changing: Civilization and not more Christianity had become the key-word through which the relationships with not-European people could be settled.

But incongruities remained.

After the Crimea war, the 30 March of 1856, in Paris, for the first time a not-Christian and not or semi-civil state as Turkey took part to the European concert.

Beyond the deepest reasons and the effects of such participation (for some authors an opening of the European law to an international perspective, for the others a return to a new Colonial law) Europe provided to guarantee its identity in front of the "other".

The strong distrust in the Muslim world and the necessity to protect the Christian, and therefore civil, minorities resident in foreign territory, brought the Europeans to create a system of garentia and to reinstate the already known Capitular conventions.

For the exceptional system of capitulations, the foreigner residing on Turkish territory would have to be judged according to the system of justice of his homeland and, in lack, to that of "more favourite nation". In subsidiary way, to fill the gaps the French legal system was called. France, in fact, was the most guaranteed nation in the relationships with the Sultan.

The result was a system of uniform law for all the European citizens, sets under the solid guardianship of the great powers. Such guardianship, often manifested as collective action of the accredited ambassadors near the Sultan, was the external form in which the international nature of the capitular regime manifested itself.

Therefore, capitulations remained the strong «countersign» of inferiority of the not-European states. They were excluded both from the civil juridical society and from the construction and application of the international law, with an evident prejudice to their sovereignty.

Fulya Ilcin Gonenc
University of Marmara, Turkey

Turkey – Europe Relations: The Role of Culture and Law

The objective of this paper is to consider the relation of culture, religion and law within a theoretical frame work and more specifically by reference to the idea of culturel identity according to Turkey – European relationships.

By demonstrating the radical generality of the concept of law it is possible to rediscovery the continuity between culture in law, in other words, the implicit presence of law in culture and culture in law. Law and culture, it will be argued, are inseparable, the one being the conceptual platform of the other.

Today concepts such as culture, religion, civilization, identity have stood out effectively in international relationships. It is not possible to comment on this relationship without examining concepts such as civilization, culture, religion, the West, Westernism, Europe, Europeanism, identity and structural problems coming from the depths of history seriously and impartially. The study assumes that neither the politics nor even the economics of the changing relationshipS can be understood aside from the historical backround and culturel dimension. Therefore in my paper I will argue that the present problems are mainly structurel and rooted in the history of Turkey and Europe. I will discuss three periods of time;

1- The period of Ottoman Empire: Although the Ottoman State, as an Islamic state, was not supposed to have a law apart from Sharia, the Ottoman State, which developed under completely special conditions, formed a jucidial system over time, which exceeded Sharia. Ottomans did not identified themselves with a continent and territory but culture which was a product of multi-religious, multi-racial society.

In this part, we will discuss the the role of the Turkish image in constructing the europen identity.

2- The foundation of the Rebublic of Turkey: The Turks established a modern and secular Republic and declared that they wanted to be a true part of european civilization, however although they welcomed many reforms and the judicial revolution, the Europeans did not see the Turks as Europeans.

In this part, we will try to explore the role of religion and civisational differences between the two sides in the relations.

3- And today, the reforms in Turkish law regarding the harmonization with the European Union Acquis form an important stage of the Turkish legal history.

The reform process which has speeded up with the introduction of the membership perspective to the European Union in Turkey will surely lead to important transformations in societal life, not only in the field of law with the impact of its transformative power.

Maebh Harding
University of Dublin, Ireland

The Fleet Marriages: A Product of Differences between Culture, Religion and Law

Between 1660 and 1753 there was an explosion in the popularity of clandestine marriages performed by disgraced members of the clergy in the chapel of the Fleet prison in London and in the surrounding area.

During that time, under British law there were two ways to legally enter into a marriage. A contract marriage was entered into by both parties in the eyes of God alone without the presence of a clegyman or witnesses. The parties could also be married in facie ecclesiae, this occurred when the marriage was entered into in the presence of a priest after the publication of banns.

According to strict canon law both types of marriages were recognised by the Ecclesiastic Courts. However contract marriages did not enjoy the full benefit of recognition for property benefits in the Common Law courts. In addition such marriages were extremely difficult to regulate. A contract marriage could even nullify a later marriage carried out in a church by a clergyman and resulting in children.[1] However from 1680 to 1733 the Ecclesiastical courts became increasingly hostile to this type of marriage and twisted canon law in order to invalidate such marriages and to encourage parties to marry in public church ceremonies.

The demand for private marriages was still a very strong cultural need. Many individuals did not want to marry in public church ceremonies and particular offence was taken to the calling of banns. Such public ceremonies were also beyond the means of many impoverished individuals. As no form of secular marriage was available, the result was the emergence of the so-called 'Fleet marriage'. Couples engaged in private ceremonies, conducted by a man who purported to be a minister, following the ritual of the Book of Common Prayer. These marriages occurred without the reading of the banns and were not usually recorded on a public registrar but were valid in law as long as they could be proved.

The Church and State both attempted to strike down these marriages. Under canon law the clergymen performing them were subject to prosecution and the couple themselves to excommunication. Parliament tried to suffocate the marriages due to the lost revenue from tax on marriages and stamp duty on licences. However in spite of the best efforts of the Church and the secular authorities the Fleet marriages continued until Lord Hardwicke's Act of 1753.

This paper will examine how the strong demand for private marriages meant that the public managed to bend the law to a fashion that suited their purposes. It will be submitted that the reason for this extraordinary development lay in the different agendas of the public, the Church and the State. The Fleet marriages are an example of where the tradition of the private marriage deterred both legal and religious rules and norms.

Pervin Somer
Kadir Has University, Turkey

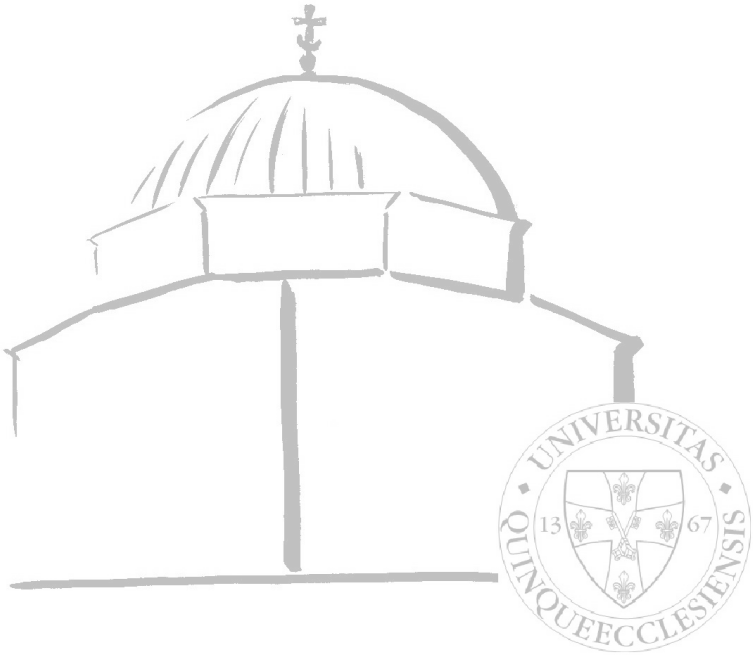
Kultur, Zivilisation und Recht: gegenseitige Beziehungen

Die von einer Nation in wissenschaftlichen und kulturellen Ebene erreichte Entwicklung beeindruckt und beeinflusst notgedrungen andere Nationen und veranlasst diesen dazu an diesen Entwicklungen teilhaben zu wollen. Die Zivilisation ist niemals Eigentum einer Nation und auch kein Produkt von einer Nation alleine.

Die Zivilisation besteht hauptsächlich aus materiellen und technologischen Elementen und ist eine Ebene der höchst erreichbaren Lebensqualität und der Gesellschafsform. Kultur hingegen beinhaltete im Allgemeinen immateriellen Werte einer Nation, kann aber auch sozialer Erbe einer Nation sein. Deshalb ist es unumstritten, dass ein Austausch der kulturellen und wissenschaftlichen Werte zwischen den Kontinenten und Nationen seit der Altertum zur Entwicklung und Zivilisation der Menschheit beigetragen hat. Zivilisation und Kultur sind wie Zwillingsgeschwister. Mit der Zivilisation kann die höchst erreichbare Ebene der gesellschaftlichen Entwicklung ausgedrückt werden. Damit kann aber auch die kulturelle Entwicklung einer Gesellschaft auf höchstem Niveau ausgedrückt werden. Dabei übernimmt jede Generation, der die alte Zivilisation und kulturellen Werte vermischt sie mit eigene Werte und entwickelt daraus entweder neue Werte oder tauscht sie aus; manche Werte werden zurückgelassen, manche werden auf die kommende Generationenübertragen. In dieser Variation ist die Zivilisation eine gemeinsame Schatz und Gedächtnis der Menschheit. Unsere heutige Kultur, Zivilisation und Recht beruht, auch wenn wir die Grenzen nicht eindeutig definieren können, auf die Antikezeitalter.

Wie zuvor erwähnt, beeinflussen wissenschaftliche und kulturelle Errungenschaften einer Nation immer die anderen Nationen und verleiten diesen dazu davon profitieren zu wollen. Im altertümlichen chinesischen Quellen steht es, dass die Türken und Chinesen sich gegenseitig in ihrem Lebensart, Kunst und Spiele beneidet hätten. Alte Griechen bewunderten die Zivilisation in Ägypten; schließlich hat die griechische Zivilisation viel vom nahen Osten gelernt. Die Sumer hatten in Mesopotamien eine Zivilisation aufgebaut, die für andere Nationen in diesem Zeitalter beispielhaft war. Zeitweise war die Arabische Zivilisation und Kultur in der Welt sehr dominant. Europa hat aus dieser Zivilisation vieles übernommen, insbesondere die Zahlen und das Kaffee. Die Entwicklungen im Iran, arabischen Ländern und in Anatolien haben neue wissenschaftliche und philosophischen ansichten hervorgerufen, die die Aufmerksamkeit von Europa auf sich zogen. Mehrere Werke wurden ins Lateinische übersetzt. Araber und Spanier beeinflussten sich gegenseitig. Die Auswirkungen des römischen Kultur und Zivilisation sind heute noch in Europa spürbar. Im 17. Jahrhundert hat Peter der Große große Anstrengungen unternommen um die Russen

an den Westen näher zu bringen und europäische Kleidungsart zu übernehmen, ihre Staats-, und Streitkräfte nach europäischen Mustern zu organisieren. Japan war bis Mitte des 19. Jahrhundert eine geschlossene Gesellschaft. In der Regierungsphase von Kaiser Meiji (1868 – 1922) wurde daraus ein moderner Staat. 1889 wurde in Russland ein Verfassungskonformer System eingeführt. Während die Deutschen in ihrer historischen Zeit auf Engländer und Franzosen schauten, wurden die Franzosen von Engländer und Italiener beeinflusst. Die Hauptprinzipien der Französischen Revolution wurden aus England und Amerika übernommen. Heute beeinflusst die amerikanische Kultur, Erziehungsart und Technologie insbesondere die Europa, aber auch die übrige Welt.



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The Factors of Social Law Development in Czechoslovakia

The history of social law does not reach back for centuries. In fact, it was only in the 2nd half of the 19th century in Germany that the idea of social security taken care for by the state came into its being.

Social law comprises not only the social security law, but also all the mechanisms that provide for the performance of social rights as guaranteed by international agreements and constitutions of individual countries.

My paper concentrates on social rights guaranteed by the Czechoslovak constitutions in the period 1918-1992 in their comparison with the international standards of the period. I am trying to set the development of individual social rights in Czechoslovakia and of their specific content into the wider framework of the development of Europe and Czechoslovakia in the 20th century.

I will analyse the influence of different socio-economic and political factors upon the development of social law – the right to work and its implementation in Czechoslovak reality, similarly the development of right to education, to non-discrimination and to social security.

The period of 75 years of existence of Czechoslovak Republic offers a genuine possibility to study the influence of ideological and political changes, demographic, philosophical, technological and economic factors upon the development of this area of law. It is perhaps the area most sensible to the mentioned changes and offering the best mirror in reflecting their impact upon the society and law.

I believe the law has to be seen in this wider context and the legal history should offer the students (and scholars) insight into these interesting mutual relationships between law and societal changes.

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The Culture of Promises: Promissory Relations Beyond the Legal Imagination

Relying on Victorian novels, perhaps the prominent cultural production of Victorian England, I propose a reconsideration of the central story of the 'Age of Contract' which constructed the essence of promissory relations. Close readings of Victorian novels reveal that the cultural imagination of promissory relations differed markedly from their legal imagination. Legal thought froze on the image of contract as the paradigmatic individualistic project; it was the project of the autonomous individual in atomistic society. The cultural imagination, however, broke with this conceptual framework; novels evoked an intersubjective view of contract, and more broadlypromise, arising from a corresponding view of interdependent selfhood in an interdependent social structure.

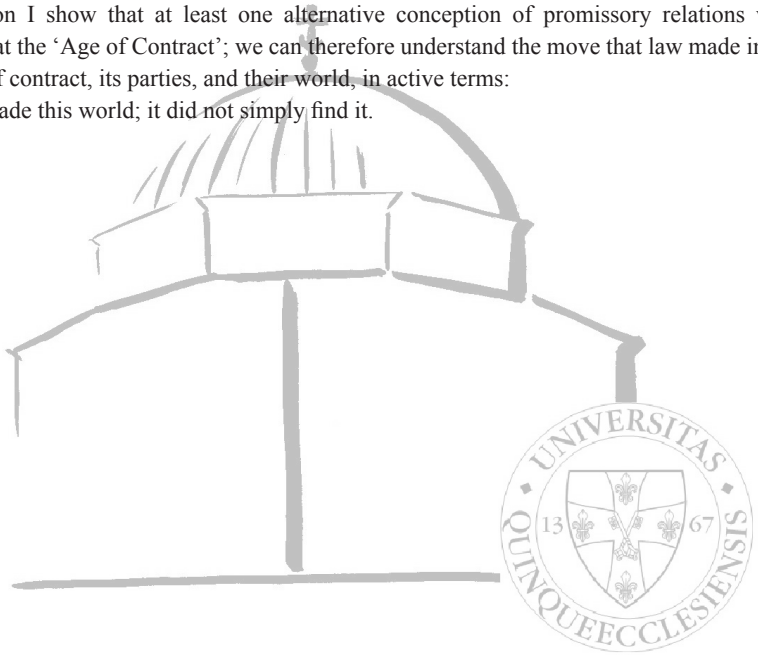
The legal history of contract identifies in the Victorian era the zenith of the 'Age of Contract'. By now a common wisdom, this story is about the way legal thought came to conceive of contract as an individualistic endeavour of central significance, and of promissory liability as the respectful endorsement of the exercise of free individual will. This development of contractual legal thought, so the story goes, was in tune with widely prevalent individualistic notions. This is a point shared by central legal historians of contract, whatever their claim about the origins of contract doctrines. When collectivism rose, its proponents understood the meaning of contract in much the same terms, and therefore moved to narrow its scope, gradually limiting freedom of contract. The legal image of contract remained caught between individualism and collectivism, their contest keeping it intact.

Victorian novels tell a different story. The Victorian literary imagination shared with legal thought its obsession with promissory relations, acknowledging their centrality to Victorian life. Yet, it worked with a wholly different conception of these relations; it viewed promises as instances of intersubjective dependence and accessibility, each a relationship (not to be equated with status) within a greater framework of relationships; in these qualities novels found the significance of promises and the terms for assessing promissory conduct. One upshot of the fact that law and literature employed different conceptions of the promise is that in literature promises were not reified - not treated as a 'thing'; as a result, the individualistic reinforcement of promise keeping is hard to find; the collectivist suspicion of promissory relations as power-schemes was not prevalent either. For the literary imagination, the individual herself was not as autonomous and pre-social as legal thought assumed her to be, and society was not conceived of in atomistic terms. Rather, selfhood was constructed

intersubjectively, and existence was mediated through its communal meanings. A different conception of the individual and society, then, corresponds with the basic discord between the legal and the novelistic imagination of promissory relations.

The legal framing of promissory relations is still with us today, still shaping our outlook on contract. I suggest that the study of Victorian novelistic discourse can tell us something about the legal framing at its determining moments; methodologically, it is a 'means by which fish can discover water by jumping out of it'. The discord between the legal and the novelistic imagination of promissory relations destabilises the suggestion of inevitability underlying the legal story - the suggestion that in shaping the meaning of contract, law was in tune with (individualistic) cultural mores at large and merely played along. In expounding the literary imagination I show that at least one alternative conception of promissory relations was available at the 'Age of Contract'; we can therefore understand the move that law made in its framing of contract, its parties, and their world, in active terms:

law made this world; it did not simply find it.



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The relativity of turning points: labour accident legislation and its 'hidden' prelude

In the 19th century, labour accidents were mostly regarded as pure, simple facts of life and at first sight, a juridical interpretation of labour accidents seems absent: a labour accident was considered to be just a case of bad luck. In contrast, nowadays, every jurist is acquainted with the concept of "labour accident", a well defined juridical concept with specific consequences.

Its origin in Belgium is generally situated in the 1903 Statute on labour accidents, which internationally was far from unique. In fact, Belgium was even one of the last countries in Western Europe to adopt such legislation: for example, Germany already had a national statute on labour accident insurances in 1884! The importance of this kind of legislation can hardly be denied: the well-known French historian-jurist-philosopher François Ewald even considered labour accident legislation to be the caesura between the liberalism of the 19th century and the national solidarity of the 20th century.

On the other hand, looked at more closely, these statutes were just another step, albeit a very important one, in a larger process of juridification of society in general and labour accidents in particularly. Thus, special regulations can be detected in certain sectors of industry, for example the 1813 Decree of Napoleon concerning mining accidents, and later safety regulations for steam engines. More in general, during the 19th century, labour accidents gradually appear as such in civil, criminal and administrative law. This was a two-way process of juridification: on the one hand, law slowly intruded the work floor (for example by the use of safety regulations to prevent labour accidents). On the other hand, the working relationship and labour accidents slowly came to the courts.

A promising approach to study this fascinating phenomenon is through the concept of the legal position of the individual labourer. Firstly, this enables the researcher to study the different branches of law. Secondly, it implies the study of the real legal position of the labourer, i.e. a study of law in action, rather than law in the books. A final advantage regards the sources: there are many remains to the struggle for justice of victims of labour accidents and their relatives in courts archives. The documents thereof can be studied case by case, with regards to the judicial procedure and its actors (plaintiffs, defendants, witnesses, lawyers, judges, experts …) and specific circumstances of labour accidents. In doing so, one can detect bit by bit the shifting paradigm from labour accidents as just being unhappy facts of life, towards labour accidents as legal facts with legal consequences. In that perspective, labour accidents legislation is just the final result of a long term evolution.

For a researcher, the Belgian case is a particularly interesting one because labour accident legislation, especially seen from a comparative European perspective, came relatively late to this country. Consequently, the practitioners in Belgium had to improvise in their struggle towards justice for the poor labourers and their families, as a legislative framework was lacking. In short, the Belgian case offers a unique insight into the juridification process concerning labour accidents.

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Contractual theory as a symbol of new European jurisprudence

Modern European legal science differs from Roman jurisprudence in many ways. One of the most noticeable examples provides the contractual theory. It encompasses the general notion of contract, which from the terminological point of view is abstract, universal and uniform, as well as general provisions relevant to all contractual species.

The sources of Roman law lack this general theory of contract because probably the Romans didn't need any. On the contrary, Roman iurisprudentes always operated specific contracts which composed a limited list (numerus clausus) and made an opposition to pacta. The very idea of generalisation contradicted the casuistic mentality of Roman jurisprudents which caused an alert attitude towards any definition (v. D.50.17.202: Omnis definitio in iure civili periculosa est).

General theory of contract, then, is a product of a certain turning point in the development of European jurisprudence. In order to understand its nature, as well as to answer the questions "why" and "when", one must study a historical context in a broad sense. A priori one may take a closer look at such component as law, customs, theology, and philosophy.

From its origins European jurisprudence took as a major object of study Corpus Iuris Civilis Imperatori Iustiniani. It is well known however that one can find there an abundant contractual casuistic and single provisions, but not a general theory thereof. Popular customs did not provide lawyers with theoretical basis as well, for they were particular by essence. Religion and theology gave ground for the idea of obligatory nature of any serious promise or agreement. The contribution of philosophy was somewhat greater. Followed by rebirth of jurisprudence in the West the logical works of Aristotle reached the Occident bearing the idea of general notions (categories) and, what was even more important, the belief in existence of a comprehensive system and the methodology to construct it (that is why the works of Aristotle are commonly known as 'Organon', or a tool).

Thus the rise of contractual theory is due to several 'turning points'. First of them represents the 'discovery' of the Digest of Justinian and other parts of his Corpus Iuris. But the study of the Digest could not succeed without a holistic view that a system must underlie any distinct body of rules. This approach was facilitated by the second turning point, that is the 'discovery' of philosophical works of Aristotle.

Apart from the reconstruction of the essence of this systematical rearrangement of Roman contractual casuistic another relevant issue is to be taken into account: the problem of continuity in the history of European jurisprudence. In other words, on the basis of comparative and contextual research of historical milieu it is to be answered weather there were revolutionary breaklines in the development of occidental legal science or 'evolution' is more appropriate word to describe it.

The eventual report will be based on a close study of legal and philosophical texts of the middle ages concerning contractual theory and is intended to be a diagnosis rather than a cure of some problems of contemporary contractual theory.

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Ut inter bonos bene agier oportet

Dans le cadre de l'expérience juridique romaine concernant les contrats, l'introduction des remèdes du procès édictal contre le dol marque une ligne de fracture profonde entre les règles formelles de la tradition et la discipline juridique du système honoraire.

Les raisons de ce changement dépassent la composante juridique pour atteindre les dimensions d'un phénomène plus étendu où s'intègrent facteurs différents tels que la crise de la libera res publica, l'élargissement des frontières méditerranéens et des relations juridiques et commerciaux avec les pérégrins, l'assimilation de la culture grecque au niveau de la jurisprudence.

Sur le plan juridique, la protection du profil de la volonté des actes juridiques avait réduit la force dominante du formalisme en fragilisant la rigueur des règles du ius civile. Dans le cadre de la culture juridique traditionnelle, qui se reflétait dans un espace géographique et culturel d'ampleur limitée, le control social et juridique sur les comportements juridiques corrects se bornait au respect de règles de régularité formelle des actes. Dès que le réseau des relations inter-subjectives s'était étendu progressivement jusqu'à couvrir le bassin culturel, économique, social et géographique méditerranéen, d'un côté le ius gentium se sédimentait et était largement développé par les édits des préteurs, de l'autre côté, la praxis des commerces demandait des règles plus raffinées et plus capables de réduire l'incertitude dans les échanges.

Au moment où Caius Aquilius Gallus, juriste et praetor peregrinus dans le 66 av. J.-C., proposait les nouvelles formules édictales qui sanctionnaient le dol, le plébiscite cornélien du 67 av. J.-C. liait la iurisdictio praetoria à l'édit. A la même époque le système politique républicain, en crise, était en train de évoluer dans le Principat et la reforme procédurale d'époque augustéenne aurait donné efficacité civile aux procès formulaires. Au cours de la période comprise entre le reforme agraire de C. Gracchus et les ides de mars du 43 av. J.C. la culture romaine et la iurisprudentia s'appropriait de nouveaux modèles culturels grecs à intégrer dans le cadre d'une révolution du savoir juridique et la sanction des vices de la volonté exprimait et traduisait en termes juridiques l'éthique stoïcienne.

À l'aide de l'exégèse des sources juridiques et littéraires et de l'analyse économique du droit, on essayera d'expliquer les raisons de ce tournant. On analysera la tutelle juridique contre le vices du consentement par rapport à la praxis des commerces transméditerranéennes et aux règles aptes à fournir la structure des incitations d'une économie et à réduire les coûts de transaction en déterminant l'orientation du changement économique (croissance, stagnation ou déclin).

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Between codification and decodification – experiences of Roman Law

Until recently structural and methodological aspects of contemporary private law were thought to be the final chapter of a history of the systems and codifications of law. However, since the beginning of the nineties of the 20th century some voices signaling the approach of a sort of turning point in the existence of European private law, have appeared [e.g. Harold J. Berman, Law and Revolution. The Formation of the Western Legal Tradition, Harvard U. Press 1989]. This prognosis is commonly linked with three tendencies which can be observed – as many scholars claim – in connection with a development of modern law. Primo – it is said that a decodfication is in progress which manifests inter alia in the increase of regulations of civil law beyond the code, and which in turn leads to a break of the system founded by the codification [e.g. N. Irti, L'età della decodificazione, Valese 1979]. Secundo – it is pointed out that a so-called "antiformalistic revolution" in private law is necessary and this revolution might lead to the law being less dogmatic and more capable of accomplishment in political, economic, social and cultural aims [Martijn W. Hesselink, The New European Private Law. Essays on the Future of Private Law in Europe, The Hague-London-New York 2002]. And finally – tertio – it is stressed that some changes have been provoked by the European harmonization of private law, which, at the same time, are considered as a breaking off from the previous traditions of main European legal systems [M.W. Hesselink, op.cit.].

Generally speaking, one can say that each of these processes can be – and de facto is – understood as a process which strikes on the vision of cohesion and clarity of the system which is very typical to the order of present and legally binding codes. But, next, it provokes a question of the possibility to introduce a new order into private law. And – because the answer is – more or less by design – affirmative, the following question must arise – how this new order can be still possible, on which base should it be founded and what should be this demanded and sought link.

Among many possible answers, one can quite often find a postulate of the necessary return to the reflection on the tradition of Roman law as a way of restoring the unity of European legal culture. So, some sctholars have and do focus their attention of the decisive community on the values of tradition of Roman law as one of the fields of legal experience which should be considered in the process of the creation of the new legal instrumentation necessary to overcome the effects of decodification. This argument is significant also because of the fact that the scope of 20th century codification, systematization and content were evidently inspired by the notions taken from Roman law.

I do not deny that Roman law has its everlasting values – as a Romanist, how could I – called by some enthusiasts as an "universal ethic metaphor". But it must be observed that in modern legal reality we can find some other important issues, such as:

1/ a certain peculiar exhaustion of inspiring values of several legal notions developed

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in the context of Roman legal tradition; [unless it is only an exhaustion of effectiveness of methods of theirs used by the authors of current codifications]

2/ a fact that as a result of indicated tendencies, we can observe a new, nongovernmental and informal mechanism of the creation of law, which is extremely similar to the methods used by Roman jurisprudence; such autonomic processes of "law-creation" take place outside the domain of positive law and involve a deep, profound re-interpretation of previous interpretations of law; and this is – in my opinion – something what can lead us to the tradition of antiquity in contemporary discussion about law and its characteristics;

3/ and finally – more or less conscious dialogue with the legal tradition of non-European countries, which – even though genetically different – could undoubtedly enrich a dogmatic discussion of nowadays.

It is beyond all doubt that the "codification" and "decodification" so strongly emphasized today – or in my opinion rather a "recodification" and "inflation of law" – were always turning points in the history of law comprehend as sinusoid. Although it is very trendy to talk about them now, they have their place in legal history, and can be proved by the experience of the Roman law already mentioned. In the history of Roman law one can find, time and again, almost the same phases as these used today by legal experts of European legal tradition to stupefy one another. It was in ancient Rome, where, after the early atrophy of the legislation of comitia, the method of creating law by way of interpretation was perfected. This interpretation was at the same time really exceptional. It took place without a formal codification, and it had a creative and constitutive nature. Lasting untill the end of the period of Principate, Roman law developed in such a way, and called a "Jurisprudent law", was next blocked by the results of hypertrophy of the imperial legislation, ended by the attempt of gathering and arranging of all legal material in the form of ancient code. It was of course the famous code of emperor Justinian [528-534]. This codification, or to be more precise – compilation – was next destroyed – at least in the Western part of Europe – by customary barbarian laws made in a spontaneous way, and we can speak about a renaissance of Roman law only after 12th century in Bologna when a period of so-called "first reception of Roman law" had begun. This process was crowned by another compilation Corpus Iuris Civilis, which was in fact unsuitable to the demands of national laws and shortly absorbed by the codes of natural law. And again, in 19th century we can speak about another disintegration [decodification] founded on the base of Roman law ius commune, i.e. European homogenous romanistic legal tradition. Undoubtedly, by a way of this process, a weakness of this communis opinion doctorum as a legal system, [sic!] which was supposed to grant a certainty of law, was exposed. But again – a peculiar legal particularism resulting from this specific decodification – was quickly replaced by two codes, which next became model legal systems – French Code civil of 1804 and – in a lesser degree – Austrian ABGB of 1811. In these codifications a relative unity of principles was reached, at least that is what is commonly said about them. It is a kind of paradox that the

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codes mentioned were an inspiration to the following return to the Roman legal tradition and – thanks to the German Historic School – we can speak about a "second reception of Roman law". An idea of Friedrich Carl von Savigny to use Roman law as a base and instrument for a creation of a new national system of civil law of the Reich, protected Roman law against the total oblivion predicted for the first time by Johann Georg Schlosser in 18th century.

Looking at these following codifications and decodifications of Roman law from the perspective of several dozen centuries, we can put forward the hypothesis that there exists a specific correlation between a positive made law, and jurisprudential, judge-made and academic-made law: the bigger the role of law as an enactment [lex] in the legal system, the smaller the role of interpretation and vice versa. And maybe a historical reflection can be helpful and profitable in comprehending changes in law nowadays, considered by scholars and academics as so dangerous. It seems also possible de predict the next phase of our law.

Certainly, this reflection on signalized issues is not an aim to propose a direct use of Roman law as a fundament of new legal order in private law – although such an attitude is extremely tempting for a Roman law scholar. We can after all point out such an idea as this of Reinhard Zimmerman, who proposes to build the whole contemporary legal system directly on the rules of Roman law [e.g. Roman Law, Contemporary Law. The Civilian Tradition Today, Oxford 2001]; or an academic idea of Theo Mayer-Maly, who claims that the cognition of Roman law and ancient laws is a condictio sine qua non to understand modern codifications [Rechtswissenschaft, Darmstadt 1972]; or an idea of Eugen Bucher of a "subsidiary-inspirational validity of Roman law" [Rechtsüberleferung und heutiges Recht, ZEuP 8.3 / 2000, p. 416 n.]. I think that it is true that we should compare our historical and modern experiences with other – in broad understanding – experiences and methods of legal analysis. However, it is possible that in today's discussion on law and legal order, it is precisely Roman legal experience which can be helpful and which can protect against a temptation to resign to the traditional conception of private law as a law which has an internal logic and at the same time founded on the idea of justice in the name of legal pragmatism, which makes us reduce free-created and free-applied norms and rules of law only to economic instruments.

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The Roman Jurists' Law During the Passage from Republic to Empire

One of the salient features of Roman law is the fact that it was mostly developed by the jurists within the process of drafting documents, advising parties to a suit in procedural matters and responding to legal questions. This so-called jurists' law was extremely rich and fructuous, but often also controversial and intrinsically contradictory. It remained, however, a principal means of legal development from the late Republic deep into the Principate.

Even if the end of the Republic and the beginning of the Principate are regarded as the most significant political break-line of Roman political history, it seems that this change had no impact on the strong position of the jurists as main source of law. Although the political transformation lasted more than a century, as centralistic tendencies were growing, visible in private law in the codification plans of Julius Caesar, whereas Augustus begun his rule as a restitution of the Republic, the change of constitutional system was noticed by the contemporaries: already Cicero warned against the decay of the Republic.

It could be expected, that along with centralization of the political power the harmony and clarity of law would improve. The tendency to dominate law by the political centre can be observed with respect to the ius honorarium in the so-called 'codification' of the pretor's edict, completed under the reign of Hadrian. Similar character must have had for the civil law the institution of ius respondendi ex auctoritate principis which, introduced by Augustus, was one of the legal symbols of the political change. It appears to be a privilege initially assigned on request of a jurist and from the times of Hadrian onwards only on the initiative of the Emperor himself. The mechanism was intended to allow the Princeps a sweeping control over the jurists' law, but it seems that it did not prove effective.

On the contrary, the Principate became a period of lively discussion between the two juristic schools, the Sabinians and the Proculians, founded at the very beginning of the period. As a consequence, there was not only a growing number of controversies between the schools, but also between individual jurists. Therefore the ius respondendi, did not constitute an efficient means of controlling juristic opinions and improving legal certainty. It did not have a particular relevance neither for the position that a jurist could achieve, for such an influential figure as Labeo, known as a follower of the old Republican system, has never been granted the privilege.

It seems prima facie highly improbable that such an important political change as the passage from Republic to Empire could display no effects on the essence of jurists' law. Therefore I analyze in the present paper the way in which the juristic debate changed during the initial period of the Principate. My hypothesis is that, because of the possibilities of political and bureaucratic career opened by the new political system, the competition among the jurists increased and their law became even more controversial in character.

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Family Relations and the Legal Status of Women in Ancient Rome

It is better to begin with the importance of the familia, as the basic building block of the Roman state. Familia had a form of governance vested in one person a head of the household (paterfamilias) who had extensive and virtually exclusive power over all the property belonging to the household including the slaves. His power also extends to controlling the lives of those of his descendants related to him through his male (sons and daughters, grandchildren through sons, and so on.) that is through what the Romans call an agnatic relationship; and in principle the power of the paterfamilias continues no matter how old these descendants are, unless the pater himself has released them from his power. The power of the paterfamilias could be exercised over other free persons, including the adopted children and also, in the archaic form of Roman marriage, his wife if she did not remain under the power of her own father (if he was still alive) and despite her marriage, she did not fall under her husband's power.

The women's rights under the guardianship, were restricted to all the legally defined areas of society. It was a legal and a sociological phenomenon. Roman women who were sui iuris and had reached puberty were subject to the guardianhip of women which is called tutela mulierum. When a woman was married, she retained her tutor unless and until she entered the manus of her husband. The principal design was to keep the property in the family.

As a rule, women were under guardianship through all their lives. Women were responsable for managing her own affairs, although in practice the guardian gave her assistance. By the end of the 1st century, Lex Iulia and Papia Poppea stated that freeeborn women who had three children and freedwomen who had four, were freed from statutable guardianship.

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L'officium Comme outil au Maintien de la Religion Romaine et de la res Publica

Même si le modus religiosus change selon les moments historiques pour s'adapter aux nouveaux temps, il est intéressant de l'analiser tandis que civilia est. La religion romaine –de caractère culturel et rituel, et lien de cohésion sociale- n'était pas un sentiment intériorisé des hommes, sauf dans ce qui dérivait de comportements et d'attitudes strictement éthiques, moraux ou philosophiques. Dans un premier temps, la famille primitive se développe avec l'accord de la pratique religieuse commune. Celle-ci permet ou interdit certaines choses, définit des droits et des obligations imposés par la volonté divine de justice, et persiste pendant la République. Nonobstant, avec le développement de la Res publica, les inaccomplissements des préceptes et pratiques religieuses affectent avec beaucoup d'intensité les officia de vir bonus puisque ce sont des inaccomplissements aux droits sacrés de la société. Dans ce sens, on ne peut oublier que les comportements du bon citadin servent pour calibrer les devoirs moraux et extrajurídiques des individus dans la société romaine. C'est alors seulement ainsi qu'on comprend les mots de Pomponius, pour qui la religiosité du populus se manifeste dans l'obéissance aux pères et à la patrie (D. 1,1,2).

À Rome, depuis la moitié du IIè siècle avant J.-C., et pendant le Ièr siècle avant J.-C., on vit un panorama de changements, une époque d'anxiété et incertitude, où le domaine religieux est un lieu d'affrontement entre adversaires politiques, et où, face aux partisans du respect des traditions, ceux qui estiment la nécessité de soumettre la religion aux nouvelles categories philosophiques se positionnent. Or, on ne doit pas transgresser les limites, quelque fois imprécises -comme indique Papinien-, de la religio; cette sphère, dans laquelle la religion conflue normalement avec la magie et la superstition. La colère des dieux est provoquée par la degradation des coutumes, c'est-à-dire par le relâchement de l'organisation de la vie religieuse romaine, qui est pensée en fonction de la communité: l'oubli des rites, la recherche du plaisir, de la richesse et le défaut de loyauté, sont des fautes contre l'ordre naturel.

Giorgica Sorin Apetrei
Petre Andrei University, Romania

The Criminal Trial in Present-day Romania

The criminal trial has met, in its historical growth, three different systems from the structural and principled point of view: accusatorial, inquisitorial and mixed.

Legislative changes after the Unification of the Romanian principalities and later on the proclamation of Romania as an independent state took place under the influence of the French legislation so that the criminal procedure, adopted in 1864, was in the from of the mixed criminal trial, the Liberal party conception.

The criminal trial was submitted to some changes during the period of the authoritative state of the royal dictatorship (1938) and military dictatorship (1940). These changes strengthened the criminal repression, beginning with the abolition of the trials by jury and replacing them with criminal departments within the Courts of Appeal (1939) and, during the war, military tribunals to judge common law offences.

The 1949 Bill of Rights and the 1966 International Pact on the Civil and Political Rights influenced the Romanian legislation.

The right to defence was settled in the 1965 Constitution as a basic human right and the 1968 Procedural Code was perceived as a step forward to the right of defence and granted more guarantees for basic human rights.

The 1989 Romanian Revolution proclaimed the separation of powers which determined a change on the settlement of the criminal trial towards the Liberal party conception of the mixed criminal trial.

The 1968 Code of Criminal Procedure is still in force; that is why legislative changes have been made in order to defend the individual interests which had been subordinated to the Communist Party. Thus, beginning with 1993 the old judicial system before 1948 was re-taken into consideration and now two ordinary possibilities of defence are in force: the right to appeal and the right to have a sentence reviewed.

Beginning with the 1st of July 1993 in our judicial system there are three types of jurisdiction: first instance, appeal and the right to have a sentence reviewed.

Mihaela Laura Pamfil
Petre Andrei University, Romania

The Death Penalty – The Past and the Present What about the Future?

The death penalty was constantly regulated by the criminal laws for a long time. The primitive people as well as the people of The Middle Ages widely applied the capital punishment as a "reward" for the crime. All the same, the death penalty was considered as an efficient way (means) to come through the crimes and to ensure the safety of the community and state. The death penalty remained in the largest part of legal systems until the end of the XVIIIth century, but the attempts to oppose it started to be many and important. The discussions about the legitimacy of the death penalty have continued till today.

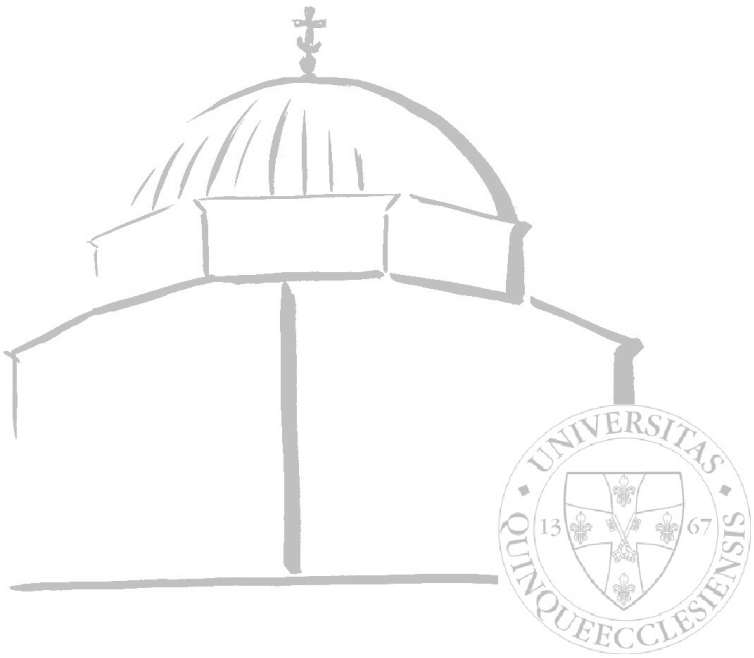
Nowadays, as always, there are people who fight against the application of the death penalty and people who agree to this extreme penalty; each of them may bring multifarious reasons to sustain his own believe.

Those who oppose death penalty do it mostly for moral reasons. Besides the atrocity implied, they think that no man has the right to take another man's life, regardless the gravity of his guilt. Only God has the right to decide who lives and who dies because He is the Creator of the world. There are other two even more significant considerations. First of all, the possibility of miscarriages of justice, that is the not remote at all possibility of killing an innocent, justifies alone the abolition of death penalty. Secondly, death penalty is useless when it comes to fight against the criminal phenomena.

Death penalty supporters think that this penalty has two essential functions: retribution and prevention. According to the first function, the punishment is a "damage" which intervenes as a moral and juridical reaction to the wrong committed with the crime, whose seriousness is proportionate, so that it can be considered as a moral chastisement and not as a revenge; according to the second function, the state doesn't give back wrong with wrong, but it just defends the community from the danger of the criminals, trying to avoid through death penalty that socially dangerous individuals commit other crimes. Kant wrote: "as long as there are people who murder, order or take part in killing other people, the death penalty has to be settled; this is justice" In favour of the death penalty a reason of economic order was also brought; the state should use its money for those who obey the law, not for those who break it. Not to mention that it is cheaper to execute a person than to keep her/his in prison for the rest of her/his life.

The question if the death penalty should or shouldn't be permitted is back on top when the re-echo of a crime frightens or horripilates the community. Is the right to life of the doer more important than public safety or than the necessity of preventing new crimes? Is the settle

of death penalty able to lead to this result or is it necessary not only to settle but to apply the capital punishment? Which are the guarantees should exist to prevent the possibility of the existence of the miscarriages of justice, taking into consideration the irreversible character of the death penalty? These are only a part of the questions that should accompany the more frequent question" are you for or against the death penalty?", and we have tried to answer them in this paper. We have looked at the death penalty not only through the eyes of the jurist, but also through the eyes of a psychologist, a philosopher, or of an ecclesiastic, and have analysed the way in which the death penalty was or still is regulated in other states of the world in order to see if there is or not a future for this penalty.



Bató Szilvia
Field Service of Cultural Heritage, University of Szeged, Hungary

Möglichkeiten der Forschungen der österreichisch-ungarischen strafrechtlichen Beziehungen

Die Forschung der rechtswissenschaftlichen Beziehungen gehören zu den neuesten Fachbereiche der Rechtsgeschichte. Das Max-Planck-Institut für Europäische Rechtsgeschichte (Frankfurt/M) hat ein solches Programm eingeführt. Das Forschungsprojekt beschäftigt sich mit dem „rechtswissenschaftlichen Netzwerk" in den 18.-20. Jahrhunderten. Für die ungarische Rechtsgeschichte ist es sehr wichtig, sich mit den ausländischen – hauptsächlich mit den deutschen – Wirkungen zu beschäftigen.

Wegen der speziellen staatrechtlichen Lage Ungarns kann man annehmen, dass die größte Wirkung vom österreichischen Recht ausgeübt wurde. Die österreichischen strafrechtlichen Kodifikationsarbeiten waren in der zweiten Hälfte des 18. Jahrhunderts erfolgreich, deshalb kann man über einen bedeutsamen österreichischen Einfluss reden.

In der Forschung der Rechtswissenstransfer soll man drei grundlegende „Mittel" prüfen: positives Recht, Fachliteratur und persönlcihe Kontakten. In diesem Vortrag werde ich nur zwei kleine Forschungsgebiet vorführen.

Die erste Möglichkeit ist die Rezeptionsforschung. Wenn man die österreichischen Wirkungen nachweisen will, hat man einige Tatbestände im ungarischen und österreichischen Strafrecht zu untersuchen. Wir können die österreichischen (Strafgesetzbücher von 1768, 1787 und 1803, Jenulls und Eggers Kommentar, Abhandlungen in den juristischen Zeitschriften) und ungarischen (Gesetzentwürfe von 1795, 1830, 1839 und 1843, Handbücher von Vuchetich, Szlemenics, Szokolay und Pauler) Meinungen über die Abtreibung der Leibesfrucht, Kindestötung und Verlassung der Kinder seit der Theresiana bis zur Revolution des Jahres 1848 nach der heutigen Tatbestandauffassung vergleichen.

Die zweite Möglichkeit ist die Forschung der Erscheinung des ungarischen Strafrechtes in österreichischer Rechtsliteratur. Für die Juristen und Ausgebildeten in Österreich war das ungarische Strafrecht nicht ganz fremd, weil man verschiedene Publikationen sowie über interessante Rechtsfälle als auch über die Lage der Rechtswissenschaft und Kodifikationstätigkeit in Ungarn lesen konnte. So vorkamen Rezensionen über lateinsprachige Handbücher, Erwähnungen über das Zusammentreten der neuen Kodifikationskommission und lange, sehr präzise Analyse des Strafgesetzesvorschlags des Jahres 1843.

Bart Coppein
Catholic University of Leuven, Belgium

Edmond Picard, actor and witness of the socialization of law in Belgium at the end of the 19th century

In the second half of the 19th century, Belgian society underwent a beginning democratization. As everywhere in Western Europe, the Industrial Revolution reached its climax and the leading class of society, the bourgeoisie, who possessed the political power and the majority of the material resources, was confronted with the exigencies of the working class. The labourers also wished to join the power and the welfare of the country. In 1885, the Belgian Workers Party was founded and from 1886 onwards, a stream of strikes and violent manifestations took place.

As an inevitable consequence, Belgian law changed importantly. On the one hand, public law became more and more important: administrative law arose and the right to vote was gradually extended, which resulted in the right of plural voting in 1893. On the other hand, private law dissociated more and more from the conservative liberal dogmas (e.g. the absolute guarantee of the contractual freedom and the autonomy of the individual) and began to focus on the protection of the weakest party and on collectivist rights. From 1887 on, politicians promulgated a very prudent social legislation, which limited the exploitation in the manufactories. This so-called 'socialization of law' (socialisation du droit) went hand in hand with a vulgarization of law to the common people.

In our PhD research we focus on those changing conceptions in Belgian legal scholarship at the end of the 19th century and particularly on the legal thinking of one of its most interesting and controversial representatives, Edmond Picard (1836-1924). Professionally, Picard was a successful lawyer, first at the Court of Appeal of Brussels and then during forty years at the Court of Cassation. Besides, he was a professor of Law at the 'Université Nouvelle' and a socialist senator (1894-1908). He wrote an extensive legal oeuvre and presented himself as the opinion maker par excellence in Belgian society.

In our lecture for the Forum we want to study the attitude of Picard towards the socialization of law. Did he see this phenomenon as a positive or a negative evolution? Did he support, for instance, the extension of the right to vote? How did he appreciate the upcoming social legislation? How did he act as a senator in the Belgian parliament? Can there also be found conceptual translations in his philosophy of law an in his legal oeuvre? In other words, did Picard adapt his thinking and acting to a society wherein the bourgeoisie lost gradually its central position? Was his attitude representative of the attitude of other Belgian and European legal scholars?

We will argue that Picard must certainly be seen as one of the pioneers of the socialization of law in Belgium, but that his attitude also betrays a certain ambiguity. He always defended the universal right to vote (one man, one vote), but firmly rejected the introduction of that principle in a non-Western context. He elaborated an intriguing philosophic concept of Justice, but saw the realisation of it especially in the long run. Those 'contradictions', however, do not alter the fact that Picard belongs to a broader European tradition of progressive legal scholars, who accepted the democratization of society.

Daniel Rau
University of Heidelberg, Germany

Der Fall Friedrich List – Geschah Recht oder Unrecht?

Friedrich List (1789-1846) – bei diesem Namen denkt man an den Nationalökonomen, den Eisenbahnpionier, den Publizisten. Weniger bekannt ist das, was man den Fall Friedrich List nennt: Der Ausschluss des Abgeordneten List aus dem württembergischen Landtag 1821 und das Strafverfahren gegen ihn 1821-1822 aufgrund einer Petition, die List für die Bürger seiner Heimatstadt Reutlingen verfasste. Während in Deutschland die Reaktion heraufzog, kandidierte List 1819 für den verfassungsgebenden württembergischen Landtag. List wurde gewählt, doch seine Wahl wurde für ungültig erklärt, weil ihm wenige Wochen zum vorgeschriebenen Wahlalter von 30 Jahren fehlten. Die Verfassung, eine der ersten modernen Verfassungen in Deutschland, wurde ohne ihn beraten und am 25. September 1819 erlassen. Bei der Wahl zum ersten Landtag nach dem Erlass der Verfassung wurde List zwar nicht gewählt, 1820 gewann er aber eine Nachwahl. So zog er als Abgeordneter in den Landtag ein. In wenigen Wochen wurde List zum Führer der Opposition. Er einigte die Opposition und brachte sie gegen die Regierung in Stellung.

Die reaktionäre Regierung war beunruhigt; sie suchte nach einer Gelegenheit, List loszuwerden. Für die Bürger seiner Heimatstadt Reutlingen verfasste List 1821 eine Petition, in der er die damaligen Verhältnisse scharf angriff und vierzig Reformforderungen erhob: unter anderem Öffentlichkeit der Rechtspflege, Geschworenengerichte, stärkere kommunale Selbstverwaltung, Abschaffung der Domänen und Monopole, Einführung einer allgemeinen Einkommensteuer. Dies gab der Regierung die Gelegenheit, nach der sie gesucht hatte. Ein Strafverfahren wegen Beleidigung und Verleumdung der württembergischen Staatsdiener wurde eingeleitet. Gestützt auf die §§ 158 I Nr. 2, 135 Nr. 2 der Verfassung forderte die Regierung am 6. Februar 1821 Lists Ausschluss aus dem Landtag. Die Paragraphen bestimmten, dass ein Abgeordneter, gegen den ein Strafverfahren eingeleitet worden war, sein Mandat verlor. Gleichzeitig gewährte jedoch § 184 der Verfassung den Abgeordneten Immunität, also Schutz vor Verfolgung und Freiheitsbeschränkung. Regierung und Opposition stritten fast drei Wochen über die richtige Auslegung der Verfassung. Doch am 24. Februar 1821 schloss der Landtag auf Druck der Regierung List aus. – In meinem Vortrag soll der verfassungsgeschichtlichen Frage nachgegangen werden, ob mit diesem Beschluss Recht oder Unrecht geschah. Am 6. April 1822 wurde List in erster Instanz, am 3. Dezember 1822 in zweiter Instanz verurteilt. Das Urteil lautete auf zehn Monate Festungsarbeitsstrafe. Weniger waren es die zehn Monate als vielmehr die Anordnung der Arbeitsstrafe, die hart

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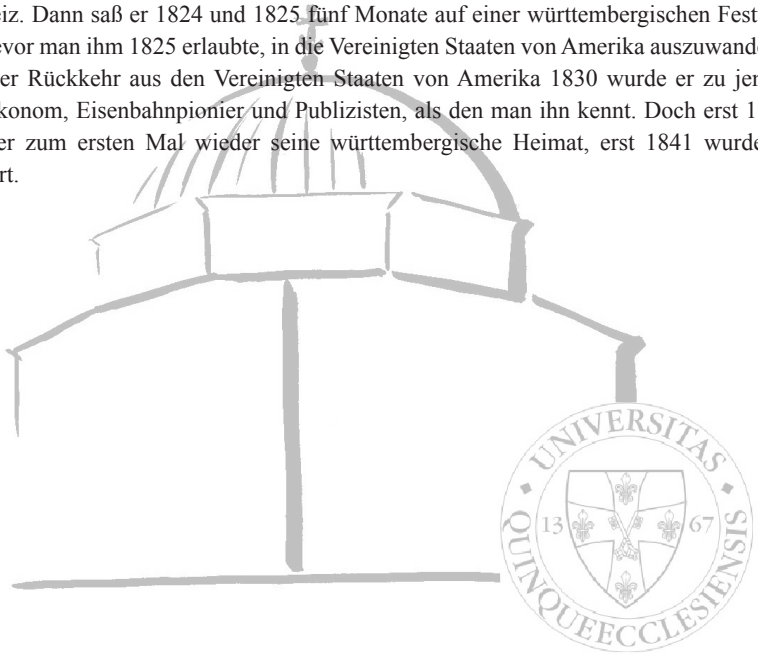
war. Denn Arbeitsstrafe nahm dem Verurteilten die bürgerliche Ehre. Wie beim Beschluss über den Ausschluss soll mein Vortrag auch beim Urteil der Frage nachgehen, ob Recht oder Unrecht geschah. Diese Frage ist nicht nur eine strafrechtsgeschichtliche, sondern auch eine verfassungsgeschichtliche. Denn List wurde unter anderem aufgrund einer Verteidigungsrede verurteilt, die er am 7. Februar 1821 im Landtag hielt. § 185 der Verfassung gewährte den Abgeordneten jedoch Indemnität, also Schutz vor Verantwortung außerhalb des Parlaments für Abstimmungen und Äußerungen im Parlament. Mit dem Ausschluss verlor die Opposition ihren Führer. Sie vermochte es nicht mehr der Regierung zu trotzen; die Reaktion breitete sich in Württemberg aus. Mit dem Urteil begann für List ein Leben ohne Heimat. Der Vollstreckung des Urteils entzog sich List zunächst durch Flucht nach Frankreich, Baden und die Schweiz. Dann saß er 1824 und 1825 fünf Monate auf einer württembergischen Festung in Haft, bevor man ihm 1825 erlaubte, in die Vereinigten Staaten von Amerika auszuwandern. Nach seiner Rückkehr aus den Vereinigten Staaten von Amerika 1830 wurde er zu jenem Nationalökonom, Eisenbahnpionier und Publizisten, als den man ihn kennt. Doch erst 1836 besuchte er zum ersten Mal wieder seine württembergische Heimat, erst 1841 wurde er rehabilitiert.



Jürgen Busch - Kamilla Staudigl-Ciechowicz
University of Vienna, Austria

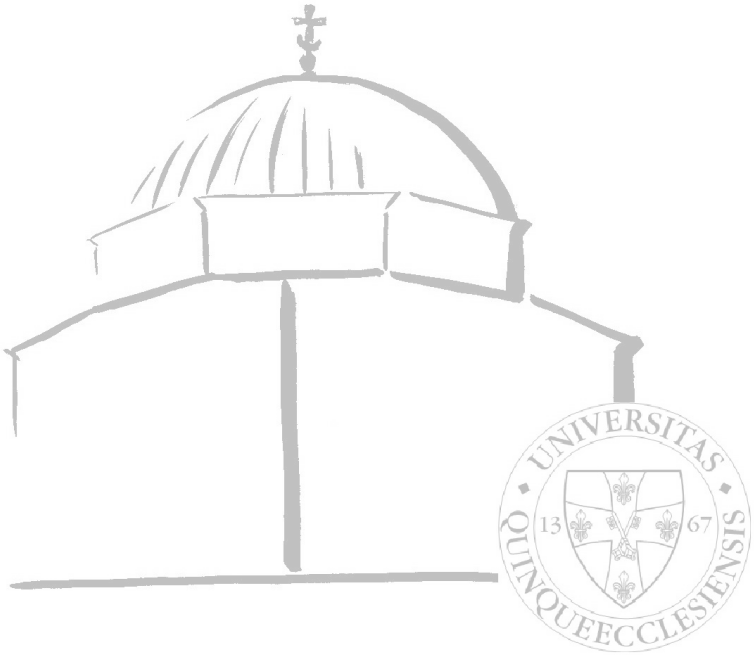
„Ein Kampf ums Recht“: Bruchlinien in Recht, Kultur und Tradition in der Kontroverse zwischen Kelsen und Hold-Ferneck an der Wiener Juristenfakultät

Die Reine Rechtslehre Hans Kelsens gehört über die jüngere juristische Wissensc hafts(zeit)geschichte bis in unsere Gegenwart nach wie vor zu den am Meisten diskutierten rechtstheoretischen Grundentwürfen. Großes Interesse – von wohlwollender Aufnahme über kritische Auseinandersetzung bis hin zu erbitterter Anfeindung und Bekämpfung – ist ihr auch schon in ihrer Formationsphase als Neubegründung der Allgemeinen Staatslehre während Kelsens Zeit in Wien entgegengebracht worden. War seine Habilitationsschrift 1911 (Hauptprobleme der Staatsrechtslehre), die einige Grundaussagen der späteren RR bereits vorweg nimmt, über einen engeren Fachkreis hinaus zunächst noch relativ unbeachtet geblieben, eröffnete sich Kelsens Neudefinition der Staatslehre und mit ihr der theoretischen Neufundierung der Rechtswissenschaft insgesamt mit seiner in allgemeinve rständlicherer Sprache verfassten „Allgemeinen Staatslehre“ von 1925 einem breiteren, auch Fach-Publikum. In diese Zeit (und u.a. als Reaktion darauf) fällt auch eine der zumindest auf fachlicher, in vielerlei Hinsicht aber auch persönlicher Ebene geführten Kontroversen, die Kelsen als Ordinarius in Wien zwischen 1919 und 1930 immer wieder führen musste und die ihm schließlich seinen Abgang nach Köln nahe legten: jene mit Alexander Hold-Ferneck, Professor für Strafrecht und Rechtsphilosophie, zuletzt auch für Völkerrecht. Die Kontroversen zwischen Kelsen und anderen Fachvertretern und Wissenschafterkollegen erfreuen sich gerade in jüngster Zeit großer Aufmerksamkeit.

Geht es in den Kontroversen mit „Gegnern“, die wie Kelsen jüdischer Herkunft sind (Eugen Ehrlich, Max Adler) zumeist um eine gegenseitige kritische fachliche Auseinandersetzung mit den wissenschaftlichen Ansichten des jeweils anderen, lassen sich anhand der Kontroversen Kelsens mit Fakultätskollegen deutsch-nationaler oder katholisch-konservativer Provenienz wie im Falle Holds vielschichtigere Bruchlinien in Rechts(verständnis), Kultur und Tradition der beteiligten Streitparteien ausmachen und aufzeigen! So steht der „Kampf ums Recht“ zwischen Kelsen und Hold nicht als persönliche und fachliche Kontroverse zwischen zwei individuellen Vertretern verschiedener methodischer Grundauffassung für sich allein. Vielmehr ist sie eingebettet in das Umfeld eines komplexen Spannungsfeldes entlang mehrer Bruchlinien: Da gibt es zunächst das Feld (vermeintlicher) konkurrierender methodischer Grundpositionen. Auch prallen hier der Sohn galizischer jüdischer Einwanderer und der Spross altösterreichischen Adels und das jeweils zugrunde liegende kulturelle Hintergrund

aneinander. Dann markiert die Kontroverse auch einen Wendepunkt in der Staatslehre; Kelsens Reine Rechtslehre wird von einem vielfach in der Tradition der bisherigen Lehre stehenden Kollegen bekämpft. Schließlich lässt sich die Kontroverse in die systematischen Versuche einer frühen „Vertreibung“ jüdischer Wissenschafter von der Universität Wien durch national-konservative, antisemitische Kreise im Gefüge der politischen Konflikte der 1. Republik einordnen!

Der Vortrag behandelt die Inhalte der publizistisch zu Tage tretenden Kontroverse zwischen Kelsen und Hold und ordnet sie in die erwähnten Bruchlinien und das Umfeld einer „Achsenzeit“ ein.



Frey Dóra
Eötvös Loránd University, Hungary

Völkerrechtliche Vorgaben und ihre Verwirklichung zur Vollziehung des Bevölkerungsaustausches im Mitteleuropäischen Raum – mit besonderer Berücksichtigung von Ungarn

Das zwanzigste Jahrhundert ist durch große, teils unfreiwillige Bewegung der Bevölkerung im Mittel- und Osteuropa gekennzeichnet, die die ethnische Landkarte Europas völlig neu zeichnete. Das Problem der Flüchtlinge war schon nach dem ersten Weltkrieg präsent, ein besonders großes Ausmaß nahm aber der staatlich inszenierte Austausch und Vertreibung nach dem zweiten Weltkrieg – dieses Vorgang soll in meinem Vortrag aus rechtshistorische Gesichtspunkt näher untersucht werden.

Ausgangspunkt für die Rechtsakten bezüglich dieses Problembereiches ist auch politischer Natur, die Beschlüsse der Alliierten Mächte, vor allem die in Potsdam (2. August 1945), wo die Zwangsumsiedlung der Deutschen aus Osteuropa beschlossen wurde. Nach Wiederherstellung der alten oder Ziehung der neuen Grenzen wurden zehntausende Polen und Ungarn faktisch gezwungen ihre Heimat zu verlassen, oder entschieden sich selber, die Flucht zu ergreifen – es betraf fast alle in Mitteluropa lebende Volksgruppen.

Es folgten die Friedensverträge, formelle völkerrechtliche Rechtsakten, die auch bilaterale Verträge vorsahen – ein Beispiel dafür ist das Friedensvertrag von Paris mit Ungarn (10. Februar 1947), die die Bevölkerungsaustauschabkommen mit der Tschechoslowakei vorsah. Abweichend von den Friedensverträgen nach dem ersten Weltkrieg enthielten die neu abgeschlossenen Verträge keine Bestimmungen zu Minderheitenschutz. Die Abkommen über Bevölkerungsaustausch erscheinen aus heutiger sicht auch problematisch.

Im innenstaatlichen Recht folgte die Umsetzung von völkerrechtlichen Vorgaben oft verspätet und an den aktuellen, oft innenpolitischen Bedürfnissen angepasst. In Ungarn waren die größeren Bevölkerungsbewegungen bis zum Friedensvertrag nahezu abgeschlossen. Die Leitmotive waren aber teilweise ganz andere, als im Völkerrecht vorgesehen.

Die Aussiedlung der deutschen Bevölkerung aus Ungarn wurde bereits im Dezember 1945 beschlossen, die Vorgänge durch Verordnungen der Regierung geregelt – eine formell gesetzliche Regelung kam nie zustande. Kriterien waren neben nationale Zugehörigkeit (laut Volkszählung 1941) vor allem Mitgliedschaft in deutschen Organisationen oder Dienst in den deutschen Streitkräften. In der Tat wurden aber Besitzverhältnisse auch mitberücksichtigt, die rechtlichen Vorgaben wurden von der lokalen Verwaltung weit ausgelegt. Es erklärt sich damit, dass Ungarn viele ungarische Flüchtlinge – vor allem aus dem Oberland und Sekler aus Bukowina – unterbringen musste und auch die von der Regierung versprochene Landverteilung in Gange gesetzt werden musste.

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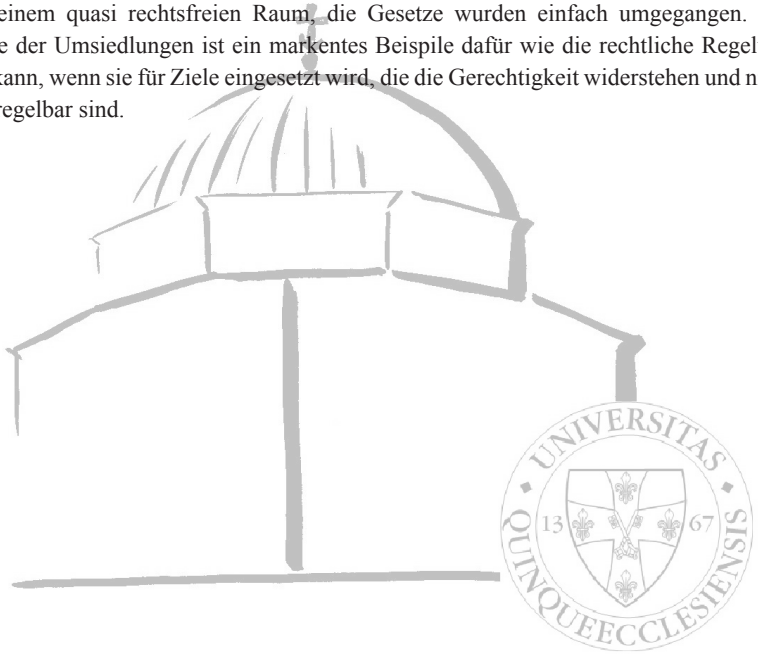
Der Austausch der Bevölkerung und die Ansiedlung der Flüchtlinge wurde von Regierungsbeauftragten geleitet, die grösste Rolle dabei spielte die Verwaltung vor allem auf lokaler Ebene – weit entfernt von Völkerrecht und internationale Politik.

Nach der vollgezogene Aus- und Ansiedlung folgten weitere rechtliche Probleme, die die durch der Verwaltung gelöst werden mussten: Versorgung der neu Angekommene mit Dokumenten, Verteilung des vorhandenen Wohnraumes. Die Klärung der (Land)Besitzverhältnisse verlor wegen der Zwangskollektivierung der Landwirtschaft früh an Bedeutung.

Der ganze oben skizzierte Vorgang war formell-rechtlich geregelt, der Gang der Ereignisse überholte aber oft die Rechtsakten – an allen Ebenen der Rechtsetzung. Vieles gesah in einem quasi rechtsfreien Raum, die Gesetze wurden einfach umgegangen. Die Geschichte der Umsiedlungen ist ein markentes Beispile dafür wie die rechtliche Regelung versagen kann, wenn sie für Ziele eingesetzt wird, die die Gerechtigkeit widerstehen und nicht normativ regelbar sind.



Tomislav Karlovic
University of Zagreb, Croatia

Retroactivity in Preclassical Roman Law

It is generally accepted that most of the modern legal principles derive from the sources of Roman law. With regard to this, some of the principles have received more attention and their historical backgrounds have been more thoroughly researched, but for some, the tracing did not go far enough, and their ancient sources have not been properly recognized. One such rule that falls in the latter class is the prohibition against retroactivity. It is also referred to as the prohibition of ex post facto laws, and is most notably expounded in the criminal law under the sentence "Nullum crimen, nulla poena sine lege." In this form, it is also a part of the common European law as expressed in the article 7(1) of the European Convention on Human Rights.

Nonetheless, as it is one of the cornerstones of criminal law, it also occupies an important place in the private law, principle by itself and the safeguard of vested rights. In this virtue, we shall point to the age of preclassical Roman law as formative breaking point for the development of the rule. Its emergence in this era, indicative even through very scarce legal sources of the time, reflects the beginnings of the legal science faced with the multileveled legal production and the need for the resolution, in our case, the conflict of laws in time.

The hints of the temporal aspect of the early Roman legislation can be traced to certain expressions in the texts of republican laws, as "post hanc legem", and non-legal texts, but the key source in which interpretation lie the arguments for the establishment of the principle on prohibition of retroactive laws is Cicero's speech, In Verrem, 2, 1. Here, in one specific part of the case, he argued against the retroactive application of praetor's edict against the rules laid down by Lex Voconia. He presented the case against Verres with terseness and as concisely as possible, mentioning only the most significant offenses, but he stopped and put on the praetor's sheet of crimes specifically, showing its importance, the obstruction of the rule against retroactivity. In explaining it, he vividly and very clearly set forth the principle and reasoning behind it. The problem was approached from different angles, showing that Verres's edict was at variance with laws, the usage and the equity.

Furthermore, not only standing in the defence of vested rights in the sphere of private law, he expressed the relevance of the principle to the criminal law specifying its exceptions, familiar even today (e.g. Art. 7(2) European Convention on Human Rights). Taken all that in the consideration, the analysis of the Cicero's text, supplemented and compared with the other republican sources, offers enough evidence for the conclusion that the retroactivity was already seen in the preclassical Roman law as a violation against the vested rights in private law and also against the legal order and legal certainty. As such, its prohibition formed the principle of law, underlying Roman as well as modern lawmaking process.

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Lineal Inheritance and the Hungarian Civil Law

Aviticitas (entail) had been one of the most significant features of traditional Hungarian law for decades. Its rules had been constituted on the theory of common ownership of all – including the past and the future - members of the family, hence the current owner had no right to dispose the land he inherited neither by last will nor by inter vivos conveyance.

Based on the freedom of property and alienation, modern legal systems of continental Europe secure the conflicting interests of the possible heirs against the owners right of free testation with the legal institution of forced heirship (legitime). The traditional Hungarian law of succession which existed until 1848, had no rules of forced heirship, since according to the strict rules of the aviticitas it only allowed devise of land granted.

The traditional Hungarian civil law unable to keep pace with transformation of society and economics became antiquated when confronted with modern ideas of liberal opposition in the 19th century Hungary. The revolutionary legislation of 1848 abolished the system of entail as well as feoffment and socage, which were the fundamental institutions of real property, with one stroke of pen. After the fall of Hungarian independence, Austrian government introduced the Austrian Civil Code (ABGB) and the imperial patents about abolishment of entail.

Entail as a legal principle, a legal idea of protection of inherited property lived on these years and reemerged as the judicial autonomy was restored to the country in 1861. The Conference of the Judex Curiae (a special conference composed of the members of the Royal Curia and other jurists of note) drew up a framework called „Provisional Rules of Jurisdiction" which reconstructed, in a modern shape, the traditional institutions of Hungarian law. Regarding the field of law of succession this meant sustaining the Austrian Civil Code's principle of freedom of testation restricted by forced heirship, but also constructing new statutory rules of succession.

This is the so-called lineal inheritance, the reversion of inherited property to the lineage it descended from. This new rule of Hungarian civil law is clearly based on the same principles as the entail: preventing dispersion of the inherited family estate According to the rules of inheritance for ancestral property in the absence of descendants and testamentary disposition, property which devolved upon the decedent of his ancestor must be returned to the line of the ancestor from whence it came.

This rule of lineal inheritance has been part of Hungarian civil law even though it was exposed to attacks on behalf of the „modern, European" ideas of radical lawyers in the late 19th century as well as the socialist legal order in the 20th century being labelled by both as „anachronistic feudal relics of ancient Hungary". Despite all these attacks this institution remained a part of the system of the law of succession in the drafts of the Hungarian civil code in the early 20th century as well as of the Civil Code enacted in the socialist era. The codification team of the currently drafted Civil Code also decided to uphold this institution.

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The codification of civil law in Spain

The civil law (Código civil) was proclaimed in 1889. So, during almost all 19th century, the rules of civil law were contained in medieval compilations like Partidas, Ordenamiento de Alcalá, Leyes de Toro and Novísima Recopilación. All of them were Castilian rules, but there were other local orderings in Catalonia, Aragon, Mallorca, Navarre, Basque Country and Galicia. For this reason, the codification of civil law came too late and a single civil legislation for all Spain never existed. During 19th century the resistance to the codification was built on different points: the feeling of nationalism of Spain regions, uniform and central ideas of the government and the thought of the Historical School of Law founded by Savigny.

At the beginning, the codification system consisted in suppressing all local civil law. Consequently, all civil law projects (Project of civil law in 1821 and Project of civil law in 1851) failed.

After the failure of the Civil law Project in 1851, the practicability of the codification in civil law was always questioned in connection with the problem of failing or to respect the local civil laws. With respect to local civil law three points of view were born. First of all, there was a group of jurists who wanted to write a civil law to take effect in all Spain. This thesis was defended in a congress of jurists which took place in 1863. But, their thesis didn't consist in creating one only code which reflected only Castilian law, they wanted a code which showed the different existing civil traditions in Spain.

The second point of view was defended by different jurists of the Catalan Law School: Joaquín Rey, Ferrer Subirana, Reynals i Rabassa, Francisco Permanyer and specially Manuel Duran i Bas. The latter knew the thought about Historical School of Savigny, so he thought that the codification was not necessary and timely for Spain, because there were different prospering law traditions.

The third point of view was defended by Allende Salazar, who was an excellent Basque jurist. So, in 1878 Allende looked for conciliation between the uniform school and the school against the codification. He underlined the existence of five law traditions in civil law in Spain: Castilian, Aragon, Catalonia, Navarre and Viscaya traditions. For this reason, he asked for the formation of five civil codes, which would be a long scientific process and would allow the survival of different law traditions. After writing all five codes, Allende thought that it would be easier to form one Spanish civil code which contained the different systems.

In 1880 the last stage of civil codification began. The minister Alvarez Bugallal proclaimed an important Order, which expressed the agreement to respect local civil law within the future civil law, not in its entirety, but particularly those law institutions which deserved to continue acting in their own territory.

Finally, the civil code was published in 1888, but there were some amendments, which meant that the official civil code was proclaimed in 1889.

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From individual debt recovery to collective liquidation procedures. New ideas on creditors' rights in sixteenth-century Antwerp

The first two decades of the sixteenth century marked a decisive turn in the economic position of Antwerp. In this period, the city changed into an international commercial centre, which drew large groups of foreign merchants to its markets. As commercial relations became connected and intertwined, the idea took root that a debtor's assets should belong to all his creditors. In two ordinances, of 1516 and 1518, the Antwerp City Council ordered a collective liquidation procedure against bankrupts and insolvent inheritances.

This development was new compared to the legal procedures, which had been applied thus far. According to fifteenth-century customs, a creditor could start a liquidation procedure without involving fellow merchants who had outstanding debts with the same debtor. 'First come, first served' was the common rule. Creditors were allowed to join in after liquidation had started, but the proceeds were distributed according to the date of the participation. Following the fifteenth-century Antwerp law, the assets were sold publicly and the proceeds were used firstly to compensate the debt of the creditor who had applied for liquidation. The rest — if there was any — was given to the next claimant and so on.

According to the new approach, the assets had to be divided among the non-privileged creditors. The proceeds were distributed among the claimants on a rateable basis. If the funds were not sufficient to compensate all debts, the individual returns were limited in relation to the available sums.

Yet, following some inadequate definitions in the Antwerp legislation, the 'lone rider principle' persisted for some debt recovery techniques. As the sixteenth century went on, these deficiencies were adapted to the idea of shared assets.

The introduction of these collective procedures was a breakthrough in many ways. It was one of the earliest examples of market regulation in Antwerp. The 1516 and 1518 ordinances marked the beginning of a continuing interference of the city's rulers in commercial relations. Furthermore, the new solutions were clearly adopted from the ius commune and even are the first case of infiltration of civil law concepts into Antwerp legislation. For the first time, the City Council left commercial customs and replaced them with new rules.

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Industrialisation and liberalism; consequences for the performance of obligations in the German territorries and the Netherlands

Socio-economic changes reflected in the performance of trade sales, engagements and labour contracts in German territories and the Netherlands during the nineteenth century

Introduction

Industrialisation and liberalism profoundly influenced the society during the nineteenth century. Can these social changes be traced back in legal changes? Do they also represent cultural changes?

Law of obligations: the right to performance in natura

The influence of liberalism and industrialisation will be illustrated by the changing opinions about the right to performance in natura of obligations, and the subsequent legal changes in German territories and the Netherlands. Sources will be amongst others civil codes, handbooks, but especially legal decisions.

German territories

The visibility of these changes depends on the legal system in which they occur. The Prussian civil code with its clear, enligthed, Natural law rules and principles, was difficult to adapt to the new socio-economic changes. Therefore, industrialisation and liberalism are clearly reflected in legal decisions about trade sales, labour contracts and engagement, and the various codifications during the nineteenth century, like the Allgemeines Deutsches Handelgesetzbuch.

The Netherlands

The Dutch civil code, and other clones of the Code civil, like the Badisches Landrecht, appeared to more flexible, and adapted these social changes with less visible traces. Nevertheless, also in the Netherlands the influence of the liberalism is visible; despite some drafts which again contained the engagement as an actionable agreement, the new Burgerlijk Wetboek of 1838 followed the Code civil, and refused to give the engagement any legal consequences. In trade sales damages became the rule, and performance in natura the exception.

Conclusion

The idea that obligations always has to be performed in kind eroded during the nineteenth century. On the one hand liberalism emphasised personal integrity, which resulted in a diminishing possibilities to enforce the performance of obligations. On the other hand industrialisation shifted the emphasis from the actual performance to a timely performance. Moreover, more and more goods turned into fungible goods, which made them interchangeable. The (monetary) value replaced the performance itself.

Irina Apetrei
Petre Andrei University, Romania

The Settlement of Reproduction Health and Medically-assisted Human Reproduction - a Turning Point in the Romanian Legislation of Family Law

Twenty-nine years ago, under the assistance of doctor R.G. Edwards, the first child conceived outside the human body was born in England.

The method known today as "fertilization in vitro" represented a turning point in medical sciences and it grew throughout the world very rapidly, a fact which led to the settlement of different techniques of medically-assisted procreation.

In Romania dr. Ioan Munteanu officially opened in 1995 the "Centre of Fertilization in Vitro" in Timisoara and a year later Daniel Ioan, the first Romanian child conceived by fertilization in vitro was born.

Romania does not have yet a law on medically-assisted procreation. A draft[1] on such a law existed in the previous legislature as well as a foreseen settlement of medically-assisted procreation in the Draft on the New Romanian Civil Code.

The text of the future law regarding the reproduction health and medically-assisted human reproduction, as it was adopted by the inferior Chamber of Parliament in the previous legislature, provides the following legal techniques of medically-assisted procreation: artificial insemination, fertilization in vitro, embryo transfer. The following are forbidden: artificial insemination and embryo transfer after death, operations in cases of infertility due to old age as well as in cases of couples where a stable life together cannot be proved. As a gap of the future settlement we may mention that the draft does not provide clearly the sanctions or penalties of the forbidden practices according to the criminal law.

From the point of view of the Romanian Orthodox Church[2], the Bioethical Commission of the Romanian Orthodox Church Synod agree to fertilization in vitro, pointing out some restrictions regarding some anomalies such as: sperm donated by relatives or individuals outside the couple. The Church also disagree on the sperm banks, but support the procreation inside the couple.

Beke-Martos Judit
Eötvös Loránd University, Hungary

Is Protocol a Fictio Iuris?

Introduction and aims:

Literature both in Hungary and all around the world suggests that protocol has both its written and unwritten sets of rules. Since the majority of these articles and books are written by professionals who are not lawyers, the importance of wording often gets neglected. In legal writing and research terminology is vital – since a rule is not the same as a norm or a law or a resolution, etc. – therefore this study sets out the aim to analyze what protocol is and whether it has a structured place within the system of law.

Methodology:

In order to be able to categorize protocol it is necessary to address the notion of the hierarchy of various bodies of law in Hungary based primarily on the structure laid down by the Legislative Act (XI of 1987). There are formal and informal rules of law as well as binding and non-binding regulations. The main focus however, is on the boundaries of law: custom is generally not accepted as part of the legal system, but it does play an important role in everyday life and practice, notwithstanding the fact that it is considered as a source of international law.

Having assessed the legal system, protocol needs to be defined. The term differs whether it is used in the Anglo-Saxon legal system or the Hungarian one, but most of the explanations include a meaning relating in one way or the other to regulation of relationships. It is often understood that the international form of protocol is the diplomatic etiquette, therefore the 1961 Vienna Convention on Diplomatic Relations is a governing document for this study.

Results:

The current research encountered numerous challenges relating primarily to the lack of written rules or regulations of protocol. Based on the existing body of literature in this field protocol was observed to be most likely a fictio iuris, something that every culture relates to, that everybody tries to act on and in accordance with. In reality, however, most of these rules do not exist. The issues addressed in this study needed to be divided into very small areas in order to be able to be classified as legally relevant or irrelevant. Various examples were cited both from the Hungarian and other European legal histories to buttress these points.

Conclusion:

The current study reached the conclusion that the general area of protocol can only be considered like a ‘ghost of law’, something that regulates without existing and determines relationships it does not acknowledge. It was necessary to look at numerous historic events that were believed to be regulated by protocol in order to analyze whether it fits into the system of law. However, only some small specific parts of these rules can be categorized within the framework of the traditional legal system. Whether this fact needs to be changed or not constitutes the basis of further research.

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Rechtshistorische Bemerkungen zur Conversio Bagoariorum et Carantanorum

Die Conversio Bagoariorum et Carntanorum, „das Haupt- und Glanzstück der ruhmvollen Salzburger Historiographie", wie sich über sie bereits Alfons Lhotsky in den Tönen höchster Anerkennung äußerte, verdient unter anderen schon aus dem Grunde die besondere Beachtung der ungarischen Mediävisten, daß sie – neben der Vita sancti Severini des Eugippius und der Getica des Iordanes – zu jenen schriftlichen Quellen gehört, die uns koherente Informationen und feste Anhaltspunkte zur Geschichte des Gebietes des späteren Ungarns nach der Völkerwanderungszeit und vor der Landnahme des Árpád bieten. Die Conversio wurde nach den neusten Datierungen im Jahre 870 als Legitimationsschrift des Erzbistums Salzburg verfaßt, gerichtet an Ludwig den Deutschen, anläßlich des Verfahrens gegen den Slawenapostel Methodius an der Regensburger Synode, und gewährt uns Einblicke sowohl in die Großmachtpolitik ihrer Entstehungszeit, als auch in die Regionalgeschichte und örtliche Kirchenorganisation des achten und neunten Jahrhunderts.

Neben den rechtshistorischen Aspekten sollten die philologischen keineswegs in den Hintergrund gedrängt werden, da dieses für Salzburg so charakteristische genus mixtum eine hervorrangend durchdachte und in einem bemerkenswerten, sich an den besten Tradtionen ordientierenden, der Eigenständigkeit jedoch nicht entbehrenden Latein verfaßte Kompostition darstellt.

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Pázmány Péter Catholic University, Hungary

Elements of Religional and Moral Norm Systems in the Works of Classical Roman Jurisconsults

The norm system of ancient Rome in which sacral rules were dominant, began to differentiate starting from times of the XII tables. In the course of this process religious, moral and secular norms separated from each other. The former two were confined to a smaller field, while the latter gradually took on the large sphere of different human relations. Based on Digest-fragments the essay examines what is left of the old sacral (fas) and moral (mos) rules until the classical period of Roman Law. The sacral fas is rarely mentioned in the Digest: i.e. in some cases of narration about ancient history, in connection with constitutional law, partly in questions of marriage and family life, which were previously regulated by religious and moral rules. In the fields mentioned above however – and in some other cases – the old term fas no longer has its original meaning („not offensive to the Gods"), it can be translated as a moral or legal permission. Mos is mentioned much more frequently, it refers sometimes to the custom, sometimes to moral norms.

In the last meaning mos, is referred to most commonly as an ethical norm system in connection with internal relations of family, in some cases of personal injury, in ethical examination of wills and other legal transactions (any condition which offends good morals is invalid). In the field of family a strong moral attitude from the ancient and pre-classical period was kept; good morals complete the law in certain cases, because human law is always incomplete. It also serves as a criterion to making the right decision, in other words it represents social valuation. Moral aspects are accordingly characteristics of Roman Law in its classical period as well.

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Alexandru Ioan Cuza University, Romania

Jurisdiction over Marriage in the Romanian Principalities: from the Eclesiastical Court to the Secular Tribunal

In the Romanian principalities, Wallachia and Moldavia, the dominant religion was the Christian Orthodox faith. According to the Byzantine tradition, between the Orthodox Church and the Prince there was a strong alliance and the Metropolitan Bishop was the second important man in the state after the ruler.

The Orthodox Church brought in Wallachia and in Moldavia the first written laws. They were Byzantine nomocanons (that is collections of Canon law and Secular law) that arrived from Constantinople through the medium of the South Slavs. In the 17-th century, the Orthodox Church in Moldavia and in Wallachia translated into Romanian language these nomocanons and combined them creatively into the first Romanian written laws.

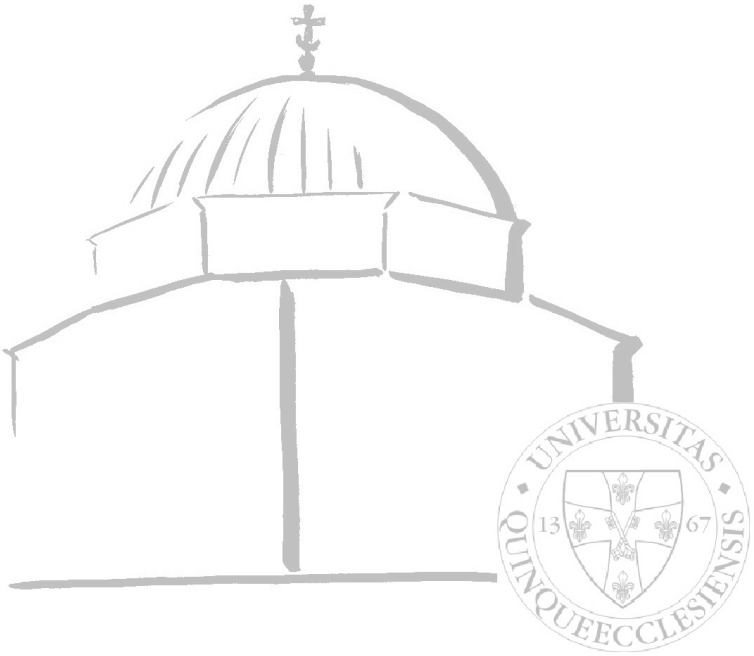
Therefore, the Orthodox Church had in both principalities, an extensive jurisdiction over clerics and laics. The ecclesiastical courts were: the bishops and the Metropolitan Bishop (when he judged he was assisted by other clerks and all this assembly was named dicasteria or the Tribunal of the Metropolitanate).

Because marriage is one of the seven mysteries of the Christian Church (Catholic or Orthodox), the Tribunal of the Metropolitanate was the only court in Moldavia and Wallachia which could rule over matrimonial litigations. This position is certified by documents of the 18-th century and by the law codifications from the first half of the 19-th century. The other bishops restrained themselves from deciding in matrimonial litigations. They made only the judicial investigation and sometimes they suggested a solution. However, only the Metropolitan Bishop with his tribunal decided in such cases with the approval of the Prince, who was the supreme judge.

The Constitutional Regulations of Wallachia and The Constitutional Regulations of Moldavia (both enforced under Russian occupation in 1831, respectively 1832) tried to separate the jurisdictional power from the executive one and in Article 240 (298 for Moldavia) provided that the Metropolitan bishop and the other bishops had jurisdiction only over ecclesiastical and spiritual matters. According to Article 7 of the Constitutional Convention of the United Principalities (Paris, 1858), the judicial power had to be entrusted by the Prince to magistrates (whose appointment and promotion had to be regulated by a special law based on the gradual enforcement of the immovability principle).

But the clerical jurisdiction over marriage survived. Thus, the Law for the establishment of the Court of Cassation and Justice of January 12, 1861 provided in Art. 2 that the clerical courts which in fact had some attributions in matrimonial matters were subjected to the jurisdiction of the Court of Cassation and Justice, as well as all the tribunals and courts of appeal from the United Principalities of Moldavia and Wallachia.

The clerical tribunals lost their jurisdiction over matrimonial litigations only through the Law for the judicial organization of April 11, 1864. The clerical tribunals were not enumerated in Article 3 among the courts that served justice in Romania (the new name taken in 1862 by the United Principalities). Thus, the Orthodox Church lost completely its civil and criminal jurisdiction over Romanian citizens. The Orthodox Church kept only the disciplinary jurisdiction over clergy.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