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FRANTIŠEK WEYR – DER BEDEUTENDSTE TSCHECHISCHE JURIST DER ERSTEN HÄLFTE DES 20. JAHRHUNDERTS

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Abstract

František Weyr – the Most Important Czech Lawyer of the First Half of the 20th Century

This article highlights the outstanding significance of František Weyr (1879–1951) for legal scholarship in Czechoslovakia in the first half of the 20th century. The focus is on his professional career, his scholarly contributions and his intellectual legacy, with particular emphasis on his role in the development of normative legal theory. Weyr is considered one of the founders of the Brno Normative School and made a significant contribution to the development of legal science in the Czech lands. He was a friend and intellectual partner of Hans Kelsen, whose Pure Theory of Law inspired him, although he developed his own conception of legal normativity. The article also deals with his work at Masaryk University and his public engagement.

Abstrakt

František Weyr – Der bedeutendste tschechische Jurist der ersten Hälfte des 20. Jahrhunderts

In diesem Artikel wird die herausragende Bedeutung von František Weyr (1879–1951) für die Rechtswissenschaft in der ersten Hälfte des 20. Jahrhunderts in der Tschechoslowakei beleuchtet. Der Fokus liegt dabei auf seinem beruflichen Werdegang, seinen wissenschaftlichen Beiträgen und seinem intellektuellen Vermächtnis, wobei insbesondere seine Rolle bei der Entwicklung der normativen Rechtstheorie hervorgehoben wird. Weyr wird als einer der Begründer der Brünner normativen Schule angesehen und leistete einen bedeutenden Beitrag zur Entwicklung der Rechtswissenschaft in den böhmischen Ländern. Er war ein Freund und intellektueller Partner von Hans Kelsen, dessen reine Rechtslehre ihn inspirierte, wobei er dennoch seine eigene Konzeption der rechtlichen Normativität entwickelte. Der Artikel befasst sich

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auch mit seiner Arbeit an der Masaryk-Universität und seinem öffentlichen Engagement.

Schlagworte: František Weyr, Juristische Fakultät der Masaryk-Universität, Brünn, normative Theorie, reine Rechtslehre, Karel Engliš, Hans Kelsen.

1. Einführung

Blick in die Geschichte der tschechischen Rechtswissenschaft im 20. Jahrhundert lässt zwei Persönlichkeiten hervortreten, die für ihre Entwicklung von besonderer Bedeutung waren: František Weyr und Viktor Knapp.

František Weyr (1879–1951), ein bedeutender Vertreter der normativen Rechtstheorie und Gründer der Brünner Rechtsschule, fokussierte sich in der Zwischenkriegszeit auf die theoretischen Aspekte des Rechts und seine Systematisierung. Seine Arbeit trug zur Entwicklung der Rechtswissenschaft und Rechtsphilosophie nicht nur in der damaligen Tschechoslowakei, sondern auch im internationalen Kontext bei.

Viktor Knapp (1913–1996) wird als einer der bedeutendsten tschechischen Juristen der zweiten Hälfte des 20. Jahrhunderts betrachtet. Sein wissenschaftliches Werk zeichnet sich durch ein breites interdisziplinäres Spektrum aus, wobei er sich mit Zivilrecht, Rechtstheorie und Fragen der Rechtsinformatik befasste. Seine Werke haben Generationen von tschechischen Juristen beeinflusst und stellen nach wie vor eine bedeutende Quelle für die Rechtstheorie dar.

Eine Umfrage, die anlässlich des 100-jährigen Jubiläums der Entstehung der Tschechoslowakei im Jahr 2018 durchgeführt wurde, bestätigte die herausragende Bedeutung dieser beiden Rechtsgelehrten. Ziel der Umfrage war es, einen repräsentativen Überblick über die bedeutendsten Persönlichkeiten des tschechischen Rechts der letzten 100 Jahre zu gewinnen. Die Ergebnisse zeigten, dass František Weyr den zweiten und Viktor Knapp den dritten Platz belegten – ein Beleg für den nachhaltigen Einfluss ihrer Arbeit auf das tschechische Rechtsdenken.

Der vorliegende Artikel widmet sich dem Leben, den wissenschaftlichen Beiträgen und dem Vermächtnis von František Weyr, der die Rechtstheorie maßgeblich geprägt und eine Schlüsselrolle bei der Entwicklung des Rechtsdenkens und der Rechtsphilosophie in der Tschechoslowakei eingenommen hat.[1]

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[1] Ein bemerkenswertes Zeugnis von Weyrs Leben sind seine Memoiren, ein umfangreiches autobiographisches Werk in drei Bänden, das mehr als 1.200 Seiten umfasst und praktisch sein gesamtes Leben abdeckt (I. Band: In Österreich /1879–1918/, 2. Band: In der Republik /1918–1938/, 3. Band: Während und nach der deutschen Besatzung /1939–1951/. Weyr arbeitete seit dem Zweiten Weltkrieg bis zu seinem Tod 1951 kontinuierlich an ihnen, wobei der letzte Band unvollendet blieb. Die Veröffentlichung war zwischen 1948–1989 verboten und erfolgte erst um die Jahrtausendwende;

2. Biografie von František Weyr[2]

Am 25. April 1879 erblickte František Weyr in Wien das Licht der Welt. Er entstammte einer Familie von bedeutenden Mathematikern. Sein Vater Emil Weyr (1848–1894) bekleidete von 1875 bis 1894 das Amt des ordentlichen Professors für Mathematik an der Universität Wien und war Mitglied der Wiener Akademie der Wissenschaften. Sein Onkel Eduard Weyr (1852–1903) übte ebenfalls den Beruf des Professors für Mathematik in Prag aus.

Die Familie kommunizierte ausschließlich Tschechisch und hegte tschechische patriotische Traditionen. František Weyr besuchte in Wien die Volksschule und absolvierte einen Teil seines Studiums am Gymnasium. Aufgrund seiner musikalischen Begabung erlernte er den für Wien typischen Dialekt, während sein Deutsch zu dieser Zeit ein höheres Niveau aufwies als sein Tschechisch. Er beherrschte tschechische Sprache, war jedoch weder mit der Rechtschreibung noch der Grammatik vertraut. Als sein Vater im Januar 1894 an Tuberkulose starb, hatte dies weitreichende Konsequenzen für die gesamte Familie. Seine Mutter Marie Weyrová (1860–1934) reagierte auf die schwierige Familiensituation, in der sich die Weyr‘s befanden, mit der Heirat eines Freundes der Familie, Jaroslav Sobička (1949–1922), der als Direktor des Prager Realgymnasiums tätig war. Im Jahr 1898 zog die Familie nach Prag um.

Nach der Matura 1899 am Deutschen Gymnasium in Prag und einem längeren Zögern zwischen Philosophie und Rechtswissenschaften entschied sich Weyr gegen

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siehe dazu František Weyr (Aut.) – Jana Uhdeová (ed.): *Paměti.* [Memoiren, 3 Bände]. Brünn, Atlantis, 1999–2004.

[2] Weitere Einzelheiten über das Leben von František Weyr sind in den folgenden biographischen Medaillons in tschechischer Sprache enthalten: Miloš Večeřa: František Weyr (*1879–†1951). In: Karel Schelle – Jaromír Tauchen – Ondřej Horák – David Kolumber (ed.): *Encyklopedie českých právních dějin, XXV. svazek, Biografie právníků S–Ž.* [Enzyklopädie der tschechischen Rechtsgeschichte, Band XXV: Biographien von Juristen S–Ž]. Plzeň, Aleš Čeněk, 2024. 527–533.; Ladislav Vojáček – Karel Schelle – Jaromír Tauchen: *Dějiny Právnické fakulty Masarykovy univerzity 1919–2019. Díl 2., 1989–2019.* [Geschichte der Juristischen Fakultät der Masaryk-Universität 1919–2019. Teil 2: 1989–2019]. Brünn, Masarykova univerzita, 2019. 410–413.; Jan Filip: František Weyr a československé ústavní právo předválečné doby [František Weyr und das tschechoslowakische Verfassungsrecht der Vorkriegszeit]. In: František Weyr (Aut.) – Ondřej Horák (ed.): *Československé právo ústavní.* [Tschechoslowakisches Verfassungsrecht]. Prag, Wolters Kluwer, 2017. IX–XLVII.; Karolina Adamová: František Weyr. In: Petra Skřejpková (ed.): *Antologie československé právní vědy v letech 1918–1939.* [Anthologie der tschechoslowakischen Rechtswissenschaft in den Jahren 1918–1939]. Prag, Linde, 2009. 523–524.; Miloš Večeřa: František Weyr, právní filozof, státovědec a právník. [František Weyr, Rechtsphilosoph, Staatswissenschaftler und Jurist]. *Časopis pro právní vědu a praxi* 9, 2. (2001), 117–123.; Miloš Večeřa: *František Weyr.* Brünn, Nadace Universitas Masarykiana, 2001. [Večeřa (2001a)] 11–86. Der persönliche Nachlass von František Weyr wird im Archiv der Masaryk-Universität aufbewahrt (B 63). Vgl. Weyrs Nachruf von Adolf Merkl: František Weyr. In: Dorothea Mayer-Maly – Herbert Schambeck – Wolf-Dietrich Grussman (ed.): *Adolf Merkl. Gesammelte Schriften: Dritter Band: Verwaltungsrecht – Zeitgenossen und Gedanken. Zweiter Teilband.* Berlin, Duncker & Humblot, 2009. 467–478. https://doi.org/10.3790/978-3-428-53108-0

eine Verfolgung familiärer Tradition und wählte den Weg der Rechtswissenschaften. Er schrieb sich an der tschechischen Juristischen Fakultät der Karls-Ferdinand-Universität in Prag ein. Während dieser Zeit schloss er auch zwei lebenslange Freundschaften – mit dem späteren Volkswirtschaftler Karel Engliš (1880–1961) und dem Politiker František Peroutka (1879–1962).

Nach Abschluss seines Studiums wurde ihm durch seinen Onkel, den Bezirkshauptmann Heinrich Waniek Ritter von Damyslow (1855–1926), die Aufnahme in die niederösterreichische Statthalterei in Wien ermöglicht. In der Folge kehrte Weyr nach einigen Jahren in seine Heimatstadt Wien zurück und wurde später vorübergehend der Bezirkshauptmannschaft in Mistelbach zugeteilt. In dieser Zeit begann Weyr auch, sich wissenschaftlich zu betätigen und veröffentlichte seine ersten Artikel, insbesondere in der tschechischen Zeitschrift *Právník* [Der Jurist] und den österreichischen *Juristischen Blättern*. Bereits dort begann er, seine neue und spezifische Sicht des Rechts und der Rolle der Rechtswissenschaft zu entwickeln, die er später in seinen rechtsphilosophischen und rechtstheoretischen Werken weiter ausbaute.

Der Fokus seiner Forschungsarbeit lag auf der Erstellung seiner Habilitationsschrift mit dem Titel *Příspěvky k theorii nucených svazků* [Beiträge zur Theorie der Zwangsverbände], in welcher er sich mit dem Wesen der öffentlichen Körperschaften befasste. In seiner Schrift gelangte er zu der Erkenntnis, dass die Unterscheidung zwischen öffentlichem und Privatrecht als unhaltbar zu betrachten sei. Im März 1908 reichte Weyr beim Professorenkollegium der Prager juristischen Fakultät einen Antrag auf veniae legendi für das Fachgebiet des Verwaltungsrechts ein. Im Dezember desselben Jahres absolvierte er erfolgreich das Habilitationskolloquium und die Habilitationsvorlesung und schloss damit das gesamte Habilitationsverfahren erfolgreich ab.

Nach reiflicher Überlegung beschloss Weyr, nach Prag zurückzukehren und eine Stelle im Statistischen Landesamt des Königreichs Böhmen anzunehmen. Gleichzeitig begann er eine Lehrtätigkeit an der tschechischen juristischen Fakultät der Prager Universität. Später erweiterte er seine Habilitation auf das Gebiet der allgemeinen vergleichenden und österreichischen Statistik.

Ein entscheidender Wendepunkt in Weyrs Karriere erfolgte im Jahr 1912, als ihm dank seines Freundes Karel Engliš eine neu eingerichtete Stelle als außerordentlicher Professor für Recht und Staatswissenschaften an der Tschechischen Technischen Hochschule in Brünn angeboten wurde. In dieser Position widmete er sich Vorlesungen zum Verfassungs- und weit gefassten Verwaltungsrecht. Im selben Jahr heiratete er Helena Markesová (1885–1964), mit der er jedoch kinderlos blieb.

Während des Ersten Weltkriegs beteiligte er sich anonym und heimlich an der Ausarbeitung eines Entwurfes für die künftige staatliche Organisation der böhmischen Länder und der Slowakei, der sich auf die Erklärung der tschechischen Abgeordneten des Reichsrats vom 30. Mai 1917 stützte. Später war er der einzige Autor, der öffentlich seine Unterstützung für diesen Entwurf erklärte.[3]

[3] Die Vorschläge basierten auf der Annahme, dass die Habsburger Monarchie in einer reorganisierten Form erhalten bleiben und innerhalb der Monarchie eine Untereinheit geschaffen werden sollte, die die

Nach der Gründung der Tschechoslowakei im Jahr 1918 engagierte sich Weyr in der Politik, wurde Mitglied der Nationalversammlung (der ersten gesetzgebenden Körperschaft) und war als Mitglied des Verfassungsausschusses an der Ausarbeitung der tschechoslowakischen Verfassung von 1920 beteiligt.

In der historischen Kontextualisierung ist festzustellen, dass Weyr und Engliš als Abgeordnete eine Schlüsselrolle bei der Gründung der Masaryk-Universität in Brünn als zweite tschechische Universität einnahmen. Es lassen sich Bestrebungen ausmachen, die Universität in Mähren zu gründen, die bis in die zweite Hälfte des 19. Jahrhunderts zurückreichen, jedoch wurde dies aufgrund politischer Ereignisse (Widerstand der Mährischen Deutschen) sowie des Mangels an den notwendigen finanziellen Mitteln erst nach dem Sturz der Monarchie möglich. Das Gesetz Nr. 50/1919 Slg., mit dem die Nationalversammlung am 28. Januar 1919 die Masaryk-Universität gründete, zählte zu den ersten Gesetzen, die von dieser Legislative verabschiedet wurden. Weyr und Engliš entwarfen gemeinsam den Gesetzentwurf zur Einrichtung der Fakultäten für Rechtswissenschaften, Medizin, Naturwissenschaft und Philosophie.[4] Darüber hinaus beteiligte sich Weyr an der Ausarbeitung der Gesetze zur Errichtung des Obersten Gerichtes, das seinen Sitz in Brünn hatte, sowie des Verfassungsgerichts und des Obersten Rechnungs- und Kontrollhofs.

Nach der Beendigung der Tätigkeit der ersten (provisorischen) Nationalversammlung im Jahr 1920 trat Weyr von der politischen Bühne zurück. Im Gegensatz zu seinem Kollegen und an derselben Universität tätigen Professor Karel Engliš widmete er sich fortan vornehmlich der Lehre sowie seinen wissenschaftlichen Aktivitäten. In den 1920er Jahren war er noch einige Jahre lang im Stadtrat und in der Stadtverwaltung von Brünn aktiv, kandidierte jedoch nicht für ein weiteres Mandat, da diese Tätigkeit für ihn nicht zufriedenstellend war.

Nach der Gründung der Brünner Universität engagierte sich František Weyr in der akademischen Selbstverwaltung. An der neu gegründeten Juristischen Fakultät der Masaryk-Universität wurde Weyr zum ordentlichen Professor für Verfassungsrecht ernannt und zeitgleich für das akademische Jahr 1919–1920 zum ersten Dekan dieser Fakultät gewählt. Es folgten zweimalige Wiederbestellungen als Dekan, in den Jahren 1927–1928 und 1935–1936. Darüber hinaus wurde Weyr 1923–1924 zum Rektor der Masaryk-Universität ernannt.

In seiner Funktion als Dekan nahm Weyr eine entscheidende Rolle bei der Auswahl der Mitglieder des Kollegiums der Professoren ein, die der neu gegründeten juristischen Fakultät beitraten. In dieser Funktion gelang es ihm, einige seiner Anhänger zu gewinnen, die ebenfalls für eine neue Konzeption der Rechtswissenschaft mit einer

böhmischen Länder und die Slowakei vereinigen sollte. Dazu ausführlich Ladislav VOJÁČEK: „Zahozené ústavy“ a jejich záhadní autoři. [Die „verworfenen Verfassungen“ und ihre rätselhaften Autoren]. *Časopis pro právní vědu a praxi* 25, 1. (2017), 5–22. https://doi.org/10.5817/CPVP2017-1-1

4 Zu Weyrs Beitrag zur Gründung der Masaryk-Universität siehe Ladislav VOJÁČEK – Karel SCHELLE – Jaromír TAUCHEN: *Dějiny Právnické fakulty Masarykovy univerzity 1919–2019. Díl 1., 1919–1989.* [Geschichte der Juristischen Fakultät der Masaryk-Universität 1919–2019. Teil 1: 1919–1989]. Brünn, Masarykova univerzita, 2019. 15–43. oder Marie BEDNAŘÍKOVÁ – František JORDÁN (ed.): *Dějiny university v Brně.* [Geschichte der Universität Brünn]. Brünn, Univerzita J.E. Purkyně, 1969. 113–139.

neuen Art des juristischen Denkens eintraten. Diese Konzeption wurde später als „Brünner Rechtsschule“ oder „Brünner normative Rechtsschule“ bezeichnet.[5] Die neu gegründete juristische Fakultät stellte somit die adäquaten Rahmenbedingungen für Weyr zur Verfügung, um jenes neue Paradigma des juristischen Denkens zu konzeptualisieren sowie zu distribuieren.

In den 1920er Jahren bekleidete Weyr zudem die Position des Vorsitzenden des Staatlichen Statistischen Amtes, welche er bis 1929 innehatte. Darüber hinaus war er Mitglied des Internationalen Instituts für öffentliches Recht in Paris, des Internationalen Instituts für Rechtsphilosophie und -soziologie in Paris, des Internationalen Statistischen Instituts in Den Haag oder des Internationalen Komitees für Verfassungsgeschichte. Außerdem war er Mitglied in zahlreichen weiteren Organisationen, darunter der Königlich Tschechischen Gesellschaft der Wissenschaften, der Tschechischen Akademie der Wissenschaften und Künste, des Rumänischen Instituts für Verwaltungsrecht, der Ungarischen Statistischen Gesellschaft in Budapest und anderer Organisationen.

Im März 1939 wurde das Protektorat Böhmen und Mähren errichtet, und im November desselben Jahres folgte die Schließung der tschechischen Universitäten, womit die nationalsozialistische Machtausübung auch den Hochschulsektor erfasste. Im Sommer 1939 hielt sich Weyr in Prag auf, als er die Nachricht aus Brünn erhielt, dass er von der Gestapo gesucht und verhaftet werden sollte. Da er von einer Herzerkrankung betroffen war, war er sich der Tatsache bewusst, dass er eine Internierung in einem Konzentrationslager nicht überleben würde. Er entschied sich daher, in Prag zu verbleiben. Trotz dieser Entscheidung wurde Weyr 1943 verhaftet, verhört und für einen Monat inhaftiert. Es ist jedoch anzumerken, dass ihm großes Glück widerfuhr. Dies war darauf zurückzuführen, dass er vor dem Krieg mit dem Präsidenten des Protektorats, Dr. Emil Hácha (1872–1975), zusammengearbeitet

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5 Zur Brünner normativen Rechtsschule aus auf Tschechisch geschriebenem Schrifttum s. vor allem: Miloš VEČEŘA: Brněnská normativní právní škola. [Die Brünner normative Rechtsschule]. In: Karel SCHELLE – Jaromír TAUCHEN (ed.): *Encyklopedie českých právních dějin, I. svazek A–Č.* [Enzyklopädie der tschechischen Rechtsgeschichte, Band I A–Č]. Plzeň, Aleš Čeněk, 2015. 360–366.; Miloš VEČEŘA: František Weyr a brněnská normativní škola. [František Weyr und die Brünner normative Rechtsschule]. *Právník* 158, 1. (2019), 107–118.; Miloš VEČEŘA: Pojetí práva a právní vědy Brněnskou normativní školou a Brněnskou sociologickou školou. [Das Rechts- und Rechtswissenschaftsverständnis der Brünner normativen Rechtsschule und der Brünner soziologischen Rechtsschule]. In: Tomáš GÁBRIŠ – Ondřej HORÁK – Jaromír TAUCHEN (ed.): *Školy, osobnosti, polemiky. Pocta Ladislavu Vojáčkovi k 65. narozeninám.* [Schulen, Persönlichkeiten, Kontroversen. Festschrift für Ladislav Vojáček zum 65. Geburtstag]. Brünn, The European Society for History of Law, 2017. 566–577.; Miloš VEČEŘA: František Weyr – život a dílo. [František Weyr – Leben und Werk]. In: František WEYR (Aut.) – Ondřej HORÁK (ed.): *Teorie práva.* [Rechtstheorie]. Prag, Wolters Kluwer, 2015. VII–XXX. Aus dem auf Deutsch geschriebenem Schrifttum vgl. vor allem: Vladimír KUBEŠ – Ota WEINBERGER: *Die Brünner rechtstheoretische Schule (Normative Theorie).* Wien, Manzsche Verlags- und Universitätsbuchhandlung, 1980.; Vladimír KUBEŠ: Reine Rechtslehre in der Tschechoslowakei. In: *Der Einfluß der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern*. Wien, Manzsche Verlags- und Universitätsbuchhandlung, 1978. 137–149.; Vladimír KUBEŠ: Reine Rechtslehre und kritische Ontologie in der Tschechoslowakei. *Österreichische Zeitung für Öffentliches Recht*, 25. (1974), 305–331.; Vladimír KUBEŠ: Die philosophischen Grundlagen der Brünner Rechts- und wirtschaftswissenschaftlichen Schule. In: Otakar BORŮVKA (ed.): *Universitas Brunensis 1919–1969.* Brünn, Universita J.E. Purkyně, 1969. 345–354.

und eine enge Beziehung zu ihm aufgebaut hatte. Darüber hinaus war er mit dem Ministerpräsidenten des Protektorats, Dr. Jaroslav Krejčí (1892–1956), bekannt, der vor dem Krieg Privatdozent für Verfassungsrecht an der Masaryk-Universität war und somit ein Kollege Weyrs war. Dank der Intervention dieser Persönlichkeiten erfuhr Weyr eine angemessene Behandlung durch die Gestapo und wurde schließlich freigelassen.

Die Nachkriegsjahre waren für Weyr von signifikanten Veränderungen geprägt, die sich in unterschiedlichen Lebensbereichen manifestierten. Seine gesundheitlichen Probleme, die bereits vor dem Zweiten Weltkrieg präsent waren, wurden in dieser Zeit besonders deutlich. Er litt unter Anfällen von Kurzatmigkeit und Agoraphobie, einer Angst vor offenen, öffentlichen Plätzen, an denen keine Hilfe zu erwarten war. Diese manifestierte sich in Verbindung mit Übelkeit. Dies führte dazu, dass Weyr seine Villa nicht allein verlassen konnte, sondern stets von einem Dritten begleitet werden musste.[6] Zudem war er aufgrund seiner kardiologischen Erkrankung dazu gezwungen, seinen Verpflichtungen an der juristischen Fakultät nur noch im unbedingt notwendigen Umfang nachzukommen. Dies bedeutete, dass er nicht mehr eigenständig zur Fakultät gelangen konnte und daher auf die Hilfe einer Begleitperson angewiesen war. Aus heutiger Sicht war es von besonderem Interesse, dass Weyr in seiner Villa Seminare für ausgewählte Studierende und Kollegen abhielt, um spezifische Themen der Rechtsphilosophie und -theorie zu erörtern.

Aufgrund gesundheitlicher Einschränkungen sah sich Weyr dazu veranlasst, seine Lehrtätigkeit zu reduzieren und sein gesellschaftliches Leben, welches Theaterbesuche und soziale Interaktionen mit Freunden umfasste, maßgeblich einzuschränken. Die durch die nationalsozialistische Besatzung bedingte Zäsur veranlasste Weyr nach dem Krieg dazu, seine wissenschaftliche Arbeit wieder aufzunehmen, seine Memoiren vorzubereiten und sich aktiv in die Gestaltung der neuen Verfassung der Tschechoslowakei einzubringen. Im April 1947 wurde Weyr in Anerkennung seiner Verdienste zum Ehrendoktor der Masaryk-Universität ernannt.[7]

František Weyrs Lebensweise, sein Denken und seine politische Orientierung waren mit den gesellschaftlichen Verhältnissen in der Nachkriegszeit der Dritten Tschechoslowakischen Republik nicht vereinbar, die bereits deutliche Anzeichen einer Hinwendung zum Sozialismus und eine Reihe undemokratischer Tendenzen aufwies, und schon gar nicht in die Zeit nach dem Februar 1948. Weyrs Schüler Zdeněk Neubauer (1901–1956) charakterisierte seinen Lehrer 1939 wie folgt:

> *„Weyr ist ein typischer Aristokrat, sowohl in Bezug auf seine Herkunft, Erziehung, Denkweise, seinen Geschmack, seine Lebensauffassung*

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6 Večeřa (2001a) op. cit. 73.

7 Die Reden der Promotionsfeier sind abgedruckt in František Kop (ed.): *Karel Engliš a František Weyer čestnými doktory Masarykovy univerzity v Brně: slavnostní promoce konaná 21. dubna 1947 v auditoriu maximu právnické fakulty.* [Karel Engliš und František Weyr als Ehrendoktoren der Masaryk-Universität in Brünn: die feierliche Promotionszeremonie am 21. April 1947 im Auditorium Maximum der Juristischen Fakultät]. Prag, Nakladatelství Universum, 1947.

> *als auch seine Einstellung gegenüber anderen Menschen. Er ist ein Individualist und Liberaler, ein Liebhaber des Studiums und der Philosophie, aber auch der Schönheit und der Kunst, ein versierter Musiker, ein Bewunderer der Antike und der Renaissance und gleichzeitig ein Liebhaber der schönen Literatur. Es kann jedoch nicht festgestellt werden, dass Weyr subjektiv in unsere Zeit passt. Er hat sich keiner der neuen Entwicklungen des zwanzigsten Jahrhunderts angeschlossen: weder seinen politischen, sozialen und kulturellen Trends, noch seinen grandiosen technischen Errungenschaften, noch seiner Sportkultur, noch den anderen Privilegien dieses Jahrhunderts gegenüber denen früherer Jahrhunderte. Diese Haltung ist die Ursache für seine grundsätzlich kritische und misstrauische Haltung gegenüber allem Modernen und Modischen“.*[8]

Ein anderer Schüler Weyrs, Václav Chytil (1907–1980), charakterisierte ihn als einen Mann, der den neuen politischen und sozialen Bedingungen nicht gewachsen war:

> *„Weyr entstammte nicht dem Volk, gehörte nicht zu ihm, verbarg seine Herkunft nicht, prahlte nicht damit und schämte sich nicht dafür. Er war sich der angemessenen Umgangsformen mit dem Volk nicht bewusst und handelte unbeholfen, wenn er mit gewöhnlichen Menschen zu tun hatte, jedoch niemals hochmütig, da er sich in seinem Herzen nicht hochmütig fühlte. Er beanspruchte nicht, über den Menschen zu stehen, sondern war anders, was selbst bei einem Bettler keine Beleidigung hervorrufen konnte, wenn er ihm mit einer fast theatralischen Geste ein überaus reichhaltiges Almosen gab“.*[9]

Für eine Beschäftigung nach 1948 war jedoch eine gewisse soziale Herkunft von Relevanz, die als Arbeiterklasse oder bäuerlicher Hintergrund definiert werden kann.

Weyr zeigte ähnliche Züge wie sein großes Vorbild Arthur Schopenhauer in Bezug auf einen lebenslangen Pessimismus.[10] Im Jahr 1948 kam es zu einer Intensivierung dieser Gefühlslage, die mit einer zunehmenden Hoffnungslosigkeit einherging. Ein ausschlaggebender Faktor war in diesem Zusammenhang der Ausschluss Weyrs aus der Fakultät, die Auflösung derselben im Juni 1950 sowie seine Aufnahme in den Kreis

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[8] Zdeněk NEUBAUER: František Weyr. In: Karel ENGLIŠ – Václav CHYTIL – Zdeněk NEUBAUER – Jaromír SEDLÁČEK – Vladimír VYBRAL (ed.): *Sborník prací k poctě šedesátých narozenin Františka Weyra: 25. IV. 1939.* [Festschrift zum 60. Geburtstag von František Weyr: 25. IV. 1939]. Prag, Orbis, 1939. 11–12.

[9] Václav CHYTIL (Aut.) – Ladislav VOJÁČEK (ed.): *Vzpomínám si 2, Z pamětí Englišova žáka.* [Aus den Erinnerungen eines Schülers von Karel Engliš 2]. Brünn, Masarykova univerzita, 2022. 138.

[10] Vladimír KUBEŠ (Aut.) – Jaromír TAUCHEN (ed.): *... a chtěl bych to všechno znovu: filozofické vypořádání s pesimistickým světovým názorem.* [… und ich möchte alles noch einmal: eine philosophische Auseinandersetzung mit der pessimistischen Weltanschauung]. Brünn, Masarykova univerzita, 2. Aufl., 2022. 282.

der Autoren, deren Schriften aus den öffentlichen Bibliotheken entfernt wurden.[11] Nichtsdestotrotz arbeitete Weyr nach seinem Rauswurf aus der Brünner juristischen Fakultät im Jahr 1948 weiter wissenschaftlich, und diese Arbeit resultierte in mehreren Manuskripten.[12]

Die Feierlichkeiten zu Weyers 70. Geburtstag im April 1949 wurden im kleinen Kreis seiner Freunde abgehalten. In der Zeit der Ersten Tschechoslowakischen Republik war Weyr aufgrund seiner Tätigkeit als Universitätsprofessor sowie seiner Mitgliedschaft im Vorstand mehrerer Aktiengesellschaften in der Lage, ein Leben auf hohem Niveau zu führen. Mit der Gründung der Ersten Tschechoslowakischen Republik forderte der neue Staat die Ansiedlung und wirtschaftliche Leitung der Industrieunternehmen in der Tschechoslowakei. Darüber hinaus wurde eine stärkere Vertretung des „tschechischen Elements" in den Vorständen der Unternehmen gefordert.[13] Außerdem bekleidete Weyr für eine gewisse Zeit die Position des Vorsitzenden bzw. stellvertretenden Vorsitzenden des Verwaltungsrats dieser Gesellschaften. In Verbindung mit den Einkünften aus verschiedenen Rechtsgutachten und den Tantiemen aus seiner literarischen Tätigkeit war es ihm so möglich, sich ein Automobil zu leisten. Darüber hinaus konnte er ein Dienstmädchen beschäftigen und regelmäßig Urlaub an der französischen Riviera verbringen. Dort mietete er ein Stockwerk einer Villa und erhielt Besuche von seinen Wiener und Pariser Freunden aus dem wissenschaftlichen und künstlerischen Bereich.[14] Karel Engliš stellte in seinen Memoiren fest, dass *„er Weyr die Mitgliedschaft im Verwaltungsrat der Nordbahn verschafft worden sei, um ihm ein sorgenfreies Leben zu gewährleisten"*.[15]

Im Februar 1948 kam es zu einer dramatischen Änderung der finanziellen Situation Weyrs. Der Verlust der zuvor genannten Einkünfte sowie die Steigerung der Medikamentenkosten führten zu finanziellen Schwierigkeiten, mit denen er bis dahin nicht konfrontiert war.

In seinen Memoiren beschreibt Karel Engliš die letzten Stunden vor dem Ableben Weyrs am 30. Juni 1951 wie folgt:

> *„Weyr verschied in beneidenswerter Weise. Nach seinem Nachmittagsschlaf führte er sein übliches Gespräch, rauchte eine Zigarette und als seine Gesprächspartner um sechs Uhr das Haus verließen, sagte er, er würde vor dem Abendessen noch ein kurzes Nickerchen machen. Er legte sich auf das Sofa und als sie ihn um sieben*

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11 Hynek Bulín: Profesoři Engliš a Weyr – muži v poutech logiky. [Die Professoren Karel Engliš und František Weyr – Männer in den Fesseln der Logik]. *Univerzitní noviny*, 3, 5. (1996), 7–8.

12 Diese Manuskripte wurden im Jahr 2024 veröffentlicht: František Weyr (Aut.) – Jaromír Tauchen (ed.): *Filozofie, politika a právo: studie z let 1948–1951*.[Philosophie, Politik und Recht: Studien aus den Jahren 1948–1951]. Brünn, Masarykova univerzita, 2024.

13 Večeřa (2001a) op. cit. 59.

14 Chytil – Vojáček op. cit. 139.

15 Karel Engliš: *Paměti: kdo sloužíš vlasti, odměny nečekej.* [Erinnerungen: Wer dem Vaterland dient, erwarte keinen Lohn]. Brünn, Masarykova univerzita, 2022. 325. https://doi.org/10.5817/CZ.MUNI.M280-0114-2022

> *Uhr weckten, war er bereits verstorben. Sein Herz hatte in den letzten Tagen nur noch 36 Schläge pro Minute gemacht. Er ist für immer von uns gegangen“.*[16]

Bei Weyrs Beerdigung wurde eine Rede von seinem Schüler Vladimír Vybral (1902–1980) gehalten, die er mit den folgenden Worten schloss: *„... der barmherzige Tod beendete im Schlaf den Lebensweg des großen tschechischen Juristen und bewahrte ihn vor den Sorgen und Nöten, die ihn zwangsläufig weiter erwartet hätten“.*[17]

3. Normative Theorie und Weyrs Beziehung zu Hans Kelsen

Die Grundzüge der später als „normativ“ bezeichneten Theorie wurden in Weyrs Habilitationsschrift *Příspěvky k theorii nucených svazků* [Beiträge zur Theorie der Zwangsverbände][18] sowie in seiner im Jahr 1909 im Fachzeitschrift *Archiv des öffentlichen Rechts* publizierten Studie *Zum Problem eines einheitlichen Rechtssystems*[19] dargelegt.

Diese beiden Publikationen lösten eine kontroverse fachliche Debatte mit Kollegen der tschechischen juristischen Fakultät in Prag aus, insbesondere mit dem außerordentlichen Professor für Verwaltungsrecht und späterem Hauptautor der tschechoslowakischen Verfassung von 1920 Jiří Hoetzel (1874–1961). Während der gesamten 1920er und 1930er Jahre kam es zu fortwährenden Polemiken und Streitigkeiten zwischen den juristischen Fakultäten in Brünn und Prag und ihren Professoren. Diese Auseinandersetzungen eskalierten nicht selten in persönliche Konfrontationen und gegenseitige Anfeindungen.

In der tschechischen Rechtswissenschaft wurde Weyr aufgrund seiner neuen und unkonventionellen Ansichten häufig von einer großen Gruppe von Gegnern konfrontiert. In dieser Isolation der Meinung erhielt er unerwartet Unterstützung aus dem Ausland, als der bedeutende österreichische Jurist und spätere Leitfigur des österreichischen Rechtsnormativismus (der reinen Rechtslehre), Hans Kelsen (1881–1973), im Jahre 1911 seine Habilitationsschrift *Hauptprobleme der Staatsrechtslehre*[20] veröffentlichte. In der vorliegenden Schrift gelangte Kelsen zu denselben Schlussfolgerungen wie

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[16] Ibid. 328.

[17] František Weyr (Aut.) – Jana Uhdeová (ed.): *Paměti. 3, Za okupace a po ní (1939–1951).* [Memoiren. Band 3: Während der Besatzung und danach (1939–1951)]. Brünn, Atlantis, 2004. 213. Zu den letzten Lebensjahren von František Weyr und den Streitigkeiten um seinen Nachlass nach seinem Tod siehe Jaromír Tauchen: I věci mají své osudy. Ke sporům o pozůstalost Františka Weyra. [Auch Dinge haben ihre Schicksale. Zu den Streitigkeiten um den Nachlass von František Weyr]. *Časopis pro právní vědu a praxi* 31, 4. (2023), 783–804. https://doi.org/10.5817/CPVP2023-4-1

[18] František Weyr: *Příspěvky k theorii nucených svazků.* [Beiträge zur Theorie der Zwangsverbände]. Prag, Bursík & Kohout, 1908.

[19] Franz Weyr: Zum Problem eines einheitlichen Rechtssystems. *Archiv für öffentliches Recht* 23, 4. (1908), 529–580.

[20] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre: entwickelt aus der Lehre vom Rechtssatze.* Tübingen, Verlag von J.C.B. Mohr, 1911.

Weyr in Bezug auf die kontroverse Thematik, welche auch Gegenstand von Weyrs Polemik war, sowie zu einer Reihe weiterer Themen.

Dem Kontakt mit Kelsen, welcher dem Ersten Weltkrieg zeitlich vorausging, folgte eine lebenslange, von persönlicher Nähe geprägte, wissenschaftliche Zusammenarbeit der beiden Protagonisten. In seinen Memoiren äußerte sich Weyr zu dieser Begegnung:

> *„Ich traf Kelsen im Gebäude der Wiener Universität und ich erinnere mich sehr deutlich an diese erste persönliche Begegnung mit ihm. Sie hatte zur Folge, dass neben gegenseitiger wissenschaftlicher Sympathie zwischen uns auch eine persönliche Sympathie entstand, die sich im Laufe der Zeit zu einer aufrichtigen und intimen Freundschaft entwickelte. Auf meine weitere wissenschaftliche Entwicklung hatte der um zwei Jahre jüngere Kelsen einen ungemein großen Einfluss, aber auch ich spielte, wie ich annehme, in seinem späteren Leben eine ziemlich wichtige Rolle“.*[21]

Weyr war maßgeblich daran beteiligt, dass Kelsen in der zweiten Hälfte der 1930er Jahre eine Professur an der Prager deutschen juristischen Fakultät erhielt.[22]

Zwischen Weyr und Kelsen herrschte eine Kongruenz der Ansichten bezüglich der Rechtswissenschaft und des normativen Charakters dieser Disziplin. Kelsens Reine Rechtslehre übte Einfluss auf Weyrs Werk aus, dessen eigener Ansatz jedoch als originell zu betrachten ist. In nahezu sämtlichen Schriften und Abhandlungen würdigt und ehrt Weyr Kelsen in hohem Maße und betrachtet ihn als den Begründer der normativen Theorie (der Reinen Rechtslehre), obwohl er in zahlreichen Punkten zu divergierenden Ergebnissen gelangt.

Die erste systematische Darlegung der normativen Rechtstheorie Weyrs ist die 1920 veröffentlichte Monographie *Základy filosofie právní: nauka o poznání právnickém* [Grundlagen der Rechtsphilosophie: Die Lehre vom juristischen Erkenntnis],[23] an der er bereits seit dem Ersten Weltkrieg gearbeitet hatte. In dieser Publikation kopierte er nicht Kelsens Ideen, sondern entwickelte in einer Reihe von Fragen eine eigenständige Rechtsphilosophie. Das zweite Hauptwerk, die 1936 publizierte *Teorie práva* [Theorie des Rechts],[24] sowie eine 1946 herausgegebene, vorwiegend als Studienhilfe gedachte Zusammenfassung der normativen Theorie mit dem Titel *Úvod do studia právnického:*

[21] Vladimír Kubeš (Aut.) – Jaromír Tauchen (ed.): *Hans Kelsens und Franz Weyrs Leben und Werk: einige Skizzen.* Brünn, Masarykova univerzita, 2024. 49

[22] Dazu Thomas Olechowski – Jürgen Busch: Hans Kelsen als Professor an der Deutschen Universität Prag 1936–1938. Biographische Aspekte der Kelsen-Sander-Kontroverse. In: Ladislav Soukup – Karel Malý (ed.): *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek 2.* [Tschechoslowakisches Recht und Rechtswissenschaft in der Zwischenkriegszeit (1918–1938) und ihre Stellung in Mitteleuropa. Band 2]. Prag, Karolinum, 2010. 1111–1139.

[23] František Weyr: *Základy filosofie právní: nauka o poznávání právnickém.* [Grundlagen der Rechtsphilosophie: Die Lehre von der juristischen Erkenntnis]. Brünn, A. Píša, 1920.

[24] František Weyr: *Teorie práva.* [Rechtstheorie]. Brünn – Prag, Orbis, 1936.

normativní theorie [Einführung in das Rechtsstudium: normative Theorie][25] verfestigten die vom Weyr aufgestellten Ideen der normativen Rechtstheorie. Es ist bedauerlich, dass keines dieser drei richtungsweisenden Werke der damaligen tschechoslowakischen Rechtstheorie und Rechtsphilosophie ins Deutsche oder eine andere Fremdsprache übertragen wurde, was einem breiteren Fachpublikum im Ausland den Zugang zu den Ideen Weyrs ermöglicht hätte.

Die normative Theorie wurde von Beginn an als eine eigenständige philosophisch orientierte Richtung der Rechtswissenschaft etabliert. Ihre Genese ist das Resultat der platonisch-kantianischen idealistischen Philosophie in der später von Arthur Schopenhauer geprägten Form. Ihr kritischer Idealismus, der in erster Linie auf die naturwissenschaftliche Erkenntnis angewandt wurde, wurde von František Weyr und seinen Anhängern auf den normativen Bereich übertragen. Ausgangspunkt der normativen Theoretiker war die Beziehung zwischen dem kognitiven Subjekt und dem zu erkennenden Objekt. Im Gegensatz zu Kant gingen sie von der Überzeugung aus, dass es zwei Arten von Rationalität gibt, dass wir die Ereignisse um uns herum aus verschiedenen kognitiven Perspektiven betrachten können, je nachdem, auf welchen Aspekt wir uns konzentrieren wollen. Aus einer bestimmten kognitiven Perspektive wird das, was ist, gesehen (die für die Naturwissenschaften typische kausale Sicht), und aus einer anderen Perspektive wird das, was sein sollte, d. h. die Sphäre der Normen und Pflichten (die normative Sicht) gesehen. Aus noetischer Sicht stellen das, was ist, und das, was sein soll, also zwei unabhängige Komplexe, zwei völlig unabhängige „Welten" dar.[26]

Gemäß der konsequenten Anwendung der normativen Theorie erfolgt eine stringente Differenzierung zwischen den Funktionen von Erkenntnis und Wollen (Intellekt und Wille). Demgemäß wird eine strikte Dichotomie zwischen Rechtstheorie (der Wissenschaft vom Recht) und Praxis etabliert.

In seinen Arbeiten unternahm Weyr den Versuch, einige der bestehenden Dualismen in der Rechtswissenschaft zu reduzieren. Im Rahmen dessen stellte die normative Theorie die traditionell in der Rechtswissenschaft vorherrschenden Dualismen von objektivem und subjektivem Recht, öffentlichem und privatem Recht, dispositiven und zwingenden Normen sowie konstitutiven und deklaratorischen Rechtsakten in Frage.[27]

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[25] František WEYR: *Úvod do studia právnického: normativní theorie.* [Einführung in das juristische Studium: Normative Theorie]. Brünn, Čs. Akademický spolek Právník, 1946.

[26] Ladislav VOJÁČEK – Karel SCHELLE – Jaromír TAUCHEN: *Dějiny Právnické fakulty Masarykovy univerzity 1919–2019. Díl 1., 1919–1989.* [Geschichte der Juristischen Fakultät der Masaryk-Universität 1919–2019. Teil 1: 1919–1989]. Brünn, Masarykova univerzita, 2019. 109–113.

[27] Eine detaillierte Analyse von Weyrs Werk würde den vorgegebenen Rahmen dieser Studie überschreiten. Daher ist es möglich, auf die folgenden Werke zu verweisen, in denen Weyrs Theorie und ihre Gemeinsamkeiten und Unterschiede zu Kelsens reiner Rechtslehre in ähnlicher Weise erläutert werden: Vladimír KUBEŠ (Aut.) – Jaromír TAUCHEN (ed.): *System der Rechtsphilosophie in gekürzter Darstellung.* Brünn, Masarykova univerzita, 2025.; KUBEŠ – TAUCHEN (2024) op. cit.; Tatiana MACHALOVÁ: Předmluva. [Vorwort]. In: Hans KELSEN (Aut.) – Ondřej HORÁK (ed.): *O státu, právu a demokracii: výběr prací z let 1914–1938.* [Über Staat, Recht und Demokratie: Ausgewählte Schriften aus den Jahren 1914–1938]. Prag, Wolters Kluwer, 2015. VII–XXII.; Vladimír KUBEŠ: *Právní filosofie XX. století (kantismus, hegelianismus, fenomenologie a theorie myšlenkového řádu).* [Rechtsphilosophie

Die Publikationstätigkeit von Weyr ist als äußerst umfangreich zu bezeichnen. Er ist der Verfasser einer beachtlichen Anzahl von Monographien sowie einer hohen Zahl an wissenschaftlichen und Presseartikeln zu öffentlichen und sozialen Themen. Einige seiner Artikel wurden in Fremdsprachen publiziert, vornehmlich auf Deutsch,[28] während andere Texte auch in Französisch erschienen sind.

Weyr fungierte als einer der Herausgeber der *Slovník veřejného práva* [Enzyklopädie des öffentlichen Rechts],[29] welche sich auf fünf Bände erstreckte und als das bedeutendste juristische Werk der Zwischenkriegszeit gilt. Darüber hinaus begründete und leitete er gemeinsam mit Hans Kelsen die international hoch angesehene in französischer und deutscher Sprache zwischen 1926–1939 herausgegebene Fachzeitschrift *Revue Internationale de la Théorie du Droit / Internationale Zeitschrift für Theorie des Rechts*, welche offizielles Organ des *Institut international de philosophie du droit et de sociologie juridique* [Internationales Institut für Rechtsphilosophie und Rechtssoziologie] war. Die Herausgeberschaft dieser Zeitschrift wurde in Brünn vom renommierten deutschen Verlag Rudolf Rohrer übernommen, während die wertvollen Beiträge von den bedeutenden Rechtstheoretikern der damaligen Zeit stammten.

Weyr engagierte sich zudem als Organisator des wissenschaftlichen Lebens. Er unterstützte die Publikation von juristischen und wirtschaftlichen Werken und sorgte für die Übersetzung und Publikation der Werke Kelsens in der Tschechoslowakei.

Im April des Jahres 1939, aus Anlass des 60. Geburtstags von František Weyr, wurde seitens seiner Freunde und Schüler die Initiative zur Erstellung einer Festschrift ergriffen. Aufgrund des signifikant hohen Interesses seiner Kollegen und Freunde an einem Beitrag zu „Weyrs Ehre“ wurde seitens der Herausgeber die Entscheidung getroffen, zwei Festschriften zu publizieren: Die erste sollte Studien in tschechischer Sprache umfassen, die zweite Beiträge in deutscher und französischer Sprache. Tatsächlich wurde die erste Festschrift im April 1939 in einer Auflage von tausend Exemplaren veröffentlicht und enthielt ein Vorwort von Karel Engliš sowie Beiträge

des 20. Jahrhunderts (Kantianismus, Hegelianismus, Phänomenologie und Theorie der Denkordnung]. Brünn, Čs. akademický spolek Právník, 1947. 45–62.; Vladimír Kubeš: *Dějiny myšlení o státu a právu ve 20. století se zřetelem k Moravě a zvláště Brnu. Díl druhý.* [Geschichte des Denkens über Staat und Recht im 20. Jahrhundert mit besonderem Blick auf Mähren und insbesondere Brünn. Zweiter Teil]. Brünn, Masarykova univerzita, 1995. 119–231. Vgl. auch die kritische Rezension von Weyrs Werk: Kurt O. Rabl: Teorie práva. [Rechtstheorie]. *Archiv des öffentlichen Rechts* 71, 2. (1941), 169–174.

28 Weyrs auf Deutsch veröffentlichte Werke charakterisierte Robert Walter: Franz Weyr als deutschsprachiger juristischer Autor. In: Jana Dostálová (ed.): *Zum Nachlaß von Prof. F. Weyr: Sammelband der Beiträge der internationalen Konferenz*. Brünn, Masarykova univerzita, 1991. 105–116.

29 František Weyr – Emil Hácha – Jiří Havelka – Antonín Hobza – Jiří Hoetzel – Karel Laštovka (ed.): *Slovník veřejného práva československého. Svazek I–V.* [Wörterbuch des tschechoslowakischen öffentlichen Rechts. Bände I–V]. Brünn, Rudolf M. Rohrer / Polygrafia / Rovnost, 1929–1948.

von 31 Autoren.[30] Die deutsche Besetzung der böhmischen Länder im März 1939 führte zu einer grundlegenden Veränderung der staatsrechtlichen Verhältnisse, wodurch die zweite Festschrift mit zehn Beiträgen – verfasst überwiegend von Mitarbeitern der von Weyr gegründeten Internationalen Zeitschrift für Theorie des Rechts – nicht mehr veröffentlicht werden konnte. Dies war darauf zurückzuführen, dass die Nationalsozialisten Texte von Autoren wie Hans Kelsen, Gustav Radbruch oder Simon Rundstein für unerwünscht hielten. Da der Satz der zweiten Festschrift jedoch bereits abgeschlossen war, ließ der Verlag lediglich ein einziges privates, unverkauftes Exemplar drucken, welches der Herausgeber Václav Chytil Weyr zusammen mit Hans Kelsen bei einem privaten Abendessen zu dessen Geburtstag überreichte.[31]

Verantwortlich für das sehr herzliche Vorwort war Kelsen selbst, dessen Einleitung mit den Worten „Lieber und verehrter Freund" beginnt:

> *„... Zu Deinem sechzigsten Geburtstag haben sich neben den Freunden und Verehrern, die Du im engeren Vaterlande hast, auch im Auslande eine Anzahl von Gelehrten zusammengefunden, die durch ihre Mitarbeit an dieser Festschrift Dir zum Ausdruck bringen wollen, welch hohes Ansehen Dein Name im Bereich der internationalen Wissenschaft genießt. Wenn ich als ihr Wortführer auftreten darf, um in ihrem Namen Dir die herzlichsten Glückwünsche zu entbieten, so darum, weil ich unter ihnen Dein ältester Freund bin und weil mich mit Dir nicht nur wissenschaftliche, sondern auch persönliche Bande verknüpfen. Bewegten Herzens ergreife ich diese Gelegenheit, um Dir in aller Öffentlichkeit zu sagen, was im privaten Verkehr auszusprechen die hier begreifliche Scheu vor großen Worten verhindert.*
>
> *Als ich vor mehr als fünfundzwanzig Jahren das Glück hatte, Dir zu begegnen, hatte ich sogleich das Gefühl: voilà un homme! Und obgleich die alles erschütternden Ereignisse, die seither die Welt und unser beider Leben bewegt haben, wahrhaftig darnach angetan waren, den Charakter eines Menschen auf die Probe zu stellen, hat sich während all dieser Jahre meine Freundschaft für Dich, begründet auf der dankbaren Hochschätzung Deines wissenschaftlichen nicht minder als Deines menschlichen Werkes, stetig vertieft. ... Darum ist es nicht nur im Namen Deiner wissenschaftlichen Freunde im Ausland, es ist im Namen der Wissenschaft, die uns heilig ist, dass ich den Wunsch ausspreche: Du redlicher und tapferer Kämpfer für die Freiheit und Unabhängigkeit der Erkenntnis bleibe uns noch viele, viele Jahren erhalten, damit uns das*

[30] Karel ENGLIŠ – Václav CHYTIL – Zdeněk NEUBAUER – Jaromír SEDLÁČEK – Vladimír VYBRAL (ed.): *Sborník prací k poctě šedesátých narozenin Františka Weyra: 25. IV. 1939.* [Festschrift zum 60. Geburtstag von František Weyr: 25. IV. 1939]. Prag, Orbis, 1939.

[31] CHYTIL – VOJÁČEK op. cit. 140.

> *Bewusstsein, Dich als Mitstreiter zu haben, den Mut nicht sinken lässt in dem ewigen Kampf um die Wahrheit“*.[32]

Die Feierlichkeiten zu Ehren von Weyrs Geburtstag markierten die letzte gemeinsame Begegnung der beiden lebenslangen Freunde und Kollegen.[33]

4. Fazit

In der Geschichte der Rechtswissenschaft nimmt František Weyr, einer der Hauptvertreter der normativen Rechtstheorie und Gründer der Brünner Rechtsschule, eine bedeutende Stellung ein. Sein intellektueller Werdegang war eng mit der österreichischen und tschechoslowakischen Rechtstradition verbunden, und er verstand es meisterhaft, theoretische Überlegungen mit praktischen Fragen des Rechtslebens zu verknüpfen. Obwohl Weyers normative Rechtstheorie im Schatten der Lehren von Hans Kelsen steht, stellt sie einen originellen Ansatz für das Studium von Rechtsnormen und des Rechtssystems dar. Eine Analyse seines Lebens und Werks zeigt nicht nur die Entwicklung des juristischen Denkens in der ersten Hälfte des 20. Jahrhunderts, sondern auch die umfassenderen Veränderungen im rechtlichen Umfeld Mitteleuropas. Die Beziehung zu Hans Kelsen und die Debatte über das Wesen der normativen Theorie verdeutlichen die Bedeutung des internationalen intellektuellen Dialogs in der Rechtswissenschaft.

Obwohl die normative Theorie gegenwärtig als überholt gilt, erfreuen sich Weyrs Werke in wissenschaftlichen Kreisen nach wie vor großer Wertschätzung und werden häufig zitiert. Nach dem Ende des Zweiten Weltkriegs wurde Weyrs treuer Schüler Vladimír Kubeš (1908–1988) zu einem unermüdlichen Verfechter der normativen Theorie und veröffentlichte zahlreiche rechtsphilosophische Werke in Österreich und Deutschland. Sein Vermächtnis ist daher für gegenwärtige Rechtstheoretiker und Rechtshistoriker von Bedeutung. Nach dem Sturz des kommunistischen Regimes im Jahr 1989 knüpfte die Juristische Fakultät in Brünn erneut an das geistige Erbe dieses herausragenden Rechtstheoretikers, Staatswissenschaftlers und Rechtsphilosophen an.[34]

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32 Kubeš – Tauchen (2024) op. cit. 56–58.

33 Obwohl František Weyr seinem Freund Hans Kelsen in seinen Memoiren viel Raum widmete, wird er in der autorisierten Biographie Hans Kelsens kaum erwähnt (Rudolf Aladár Métall: *Hans Kelsen: Leben und Werk*. Wien, Franz Deuticke, 1969.), und dasselbe gilt für die ausführlichste Biographie Kelsens (Thomas Olechowski: *Hans Kelsen: Biographie eines Rechtswissenschaftlers*. Tübingen, Mohr Siebeck, 2020. https://doi.org/10.1628/978-3-16-159293-5). Daraus könnte man den Schluss ziehen, dass Weyr für Kelsen keine so große Rolle gespielt hat, wie es Kelsen für Weyr getan hat.

34 In den 90er Jahren und um die Jahrtausendwende veranstaltete die Juristische Fakultät der Masaryk-Universität Brünn eine Reihe von Tagungen, aus denen die folgenden Tagungsbände hervorgegangen sind: Jana Dostálová (ed.): *Kodkazu prof. JUDr. Františka Weyra: sborník příspěvků z mezinárodní konference.* [Zum Vermächtnis von Prof. JUDr. František Weyr: Sammelband der Beiträge von der internationalen Konferenz]. Brünn, Masarykova univerzita, 1991. und Drahomíra Houbová (ed.): *Normativní teorie práva v kontextu právního myšlení: sborník příspěvků z mezinárodní konference.* [Die normative Rechtstheorie im Kontext des rechtswissenschaftlichen Denkens: Sammelband der Beiträge von der internationalen Konferenz]. Brünn, Masarykova univerzita, 1991.; Tatiana

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JUSTICE UNDER PARTY CONTROL: STRUCTURE AND PERSONNEL OF THE CZECHOSLOVAK SOCIALIST JUDICIARY (1948–1989)

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Abstract

This article explores the judiciary's structure, personnel, and day-to-day operations in socialist Czechoslovakia from 1948 to 1989. Drawing on fragmented archival materials, legislative sources, and select biographical profiles, it reconstructs how judicial authority was subjected to political control, particularly through Party oversight, selective recruitment, and internal discipline mechanisms. The analysis emphasises the regime's strategic approach to institutional memory, characterised by the systematic destruction, displacement, or failure to preserve judicial records. It further examines the evolution of judicial practice – from the ideological extremism of the early 1950s to the more routine yet still tightly regulated legal environment of the normalisation period. Through the careers of prominent court presidents and judges, the article illustrates how professional advancement was determined not by legal merit but by political loyalty and conformity. This study contributes to a deeper understanding of law as an instrument of governance under state socialism. It addresses the methodological challenges inherent in reconstructing legal history in an environment of archival silence.

Keywords: Czechoslovakia, socialism, judiciary, Communist Party, judges, Prosecution

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1. Introduction

Understanding the judiciary of socialist Czechoslovakia[1] presents a significant methodological challenge. Although the courts functioned on the surface, their internal mechanics were influenced by a logic distinct from liberal-legal and authoritarian frameworks. This paper employs a comprehensive approach – integrating institutional analysis, archival research, and biographical studies – to reconstruct the judicial structures, personnel selection processes, everyday practices, and mechanisms of political oversight from 1948 to 1989. Instead of viewing the judiciary as a closed subsystem, this analysis situates it within the broader political-legal framework of the Party-state, emphasising the interconnection of law, ideology, and control.

This investigation employs a methodological framework that includes fragmented archival traces, oral history accounts (when available), institutional records, and a critical examination of Party documentation. The lack or distortion of sources is not viewed as an incidental gap but rather as a structural phenomenon that parallels the intentional suppression of institutional memory. Particular attention is paid to the tension between legal form and political function: how legal institutions maintained their appearance while being rendered ineffectual in practice and how judges adapted to and sustained this duality.

Instead of providing a linear institutional history, this contribution adopts a thematic approach, exploring structural opacity, selection procedures, judicial reasoning, and Party oversight. It culminates in a biographical perspective on prominent judicial figures. This method aims to illuminate the judiciary's functioning and demonstrate how it became functionally unaccountable, politically compliant, and epistemologically obscure. What emerges is not just a depiction of repression but also of normalisation – a judicial culture that has become routinised in its complicity and disciplined in its silence.

2. Why the Judiciary Remains Hard to Study: A Structural Silence

Any researcher delving into the judiciary of socialist Czechoslovakia will likely start with a fundamental question: where can the sources be found? The answer is frustrating and revealing for historians who are used to accessing abundant institutional archives. The types of materials one would typically expect – such as appointment files, internal memoranda, personal records, and daily court agendas – are often missing, destroyed, or never archived in the first place.

This absence is not merely anecdotal; it is a structural issue.

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[1] Zdeněk Kühn: *Aplikace práva soudcem v éře středoevropského komunismu a transformace: analýza příčin postkomunistické právní krize.* [Application of Law by Judges in the Era of Central European Communism and Transformation: An Analysis of the Causes of the Post-Communist Legal Crisis]. Praha, C. H. Beck, 2005.; Michal Bobek – Petr Molek – Vojtěch Šimíček (ed.): *Komunistické právo v Československu: Kapitoly z dějin bezpráví.* [Communist Law in Czechoslovakia: Chapters from the History of Injustice]. Brno, Masarykova univerzita, Mezinárodní politologický ústav, 2009.

2.1. What the Archives Do Not Contain

In theory, court systems are institutions that generate a substantial documentary footprint. However, in post-1948 Czechoslovakia,[2] access to these records is significantly hindered. Some court materials were never transferred to public archives and preserved in internal storage (*spisovna*). Others have been lost over time: routinely shredded to create space, discarded as unnecessary, or recycled during material scarcity.[3] Particularly in the late 1940s and early 1950s, paper shortages resulted in the repurposing of printed forms and official stationery, leading to the irreversible erasure of prior content.

The circumstances regarding personnel records are particularly concerning. No centralised or standardised policy is in place to preserve judges' files or career documentation. Although internal directives occasionally mandated the transfer of such records following retirement, the implementation has been inconsistent. The archives of the Ministry of Justice lack systematic material on judicial appointments from the crucial years following the Communist takeover.[4] Notably, the files of judges trained through the brief 'workers' law schools' established in 1949 – a pivotal group in the transformation of the judiciary – are largely missing from the records.

Natural disasters have exacerbated these losses. The catastrophic floods of 1997 severely impacted internal storage in towns such as Přerov and Uherské Hradiště, leading to the disappearance of a part of judicial collections. However, even in areas untouched by such events, the organisation of archival holdings often lacks logic. The District Court in Zlín serves as a prime example: it does not retain the personal files of its former judges, yet it inexplicably keeps comprehensive personnel records for judicial staff from Napajedla and Bojkovice.[5] These misallocations are likely the result

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[2] Jaroslav Bílek – Lubomír Lupták: Československo 1945–1948: Případ hybridního režimu?. [Czechoslovakia 1945–1948: The Case of a Hybrid Regime?]. *Středoevropské politické studie / Central European Political Studies Review* 16, 2–3. (2014), 188–214. https://doi.org/10.5817/CEPSR.2014.23.188

[3] The archives of individual state districts, where local court records are stored, have, in many cases, disposed of a significant portion of documents related to judicial decision-making over the years. Materials from the so-called administrative register – documents concerning court organization and procedural management – were often not transferred to state archives at all and may have remained in internal court storage. However, access to certain courts has revealed that even these internal collections are frequently incomplete. A particularly illustrative example of the challenges faced by researchers is the approach of the National Archive, which houses the records of the Ministry. One might reasonably expect to find comprehensive materials on the organizational structure of the justice system there. In reality, however, this archive displays a notable reluctance to grant access to its archival materials, and even obtaining access can take several months. The author experienced a four-month wait just for a simple file consultation, only to be redirected to the archive's website. These systemic obstacles clearly highlight the significant difficulties encountered when researching the structure and functioning of the judiciary under socialism.

[4] The sole evidence of any regulatory framework in effect between 1949 and 1952 is found in the repealing provision of Instruction No. 180/56-K/2, issued by the Minister of Justice. Unfortunately, neither the Ministry of Justice nor the National Archive possesses any documentation pertaining to this period.

[5] The author served at the District Court in Zlín from 2012 to 2024. Only a limited number of personal files have been retained at the court itself. For instance, the file belonging to former court president

of ad hoc redistributions that occurred during court reorganisations or administrative reforms – particularly in the 1950s and 1960s – when storage demands took precedence over the principles of provenance.

The result is archival opacity: a fragmented preservation system lacking catalogues and coherent provenance. The archives are incomplete not only due to missing materials but also because the criteria for preservation were inconsistent, fluid, and influenced by political factors.

2.2. Not Just What Is Lost – But What Was Never Remembered

It is tempting to attribute these absences to bureaucratic inefficiency. However, the archive also serves as a reflection of political intent. The regime preserved what it deemed ideologically or administratively essential, allowing the remainder to fade into obscurity. Judges who played significant roles in enforcing the new political order – especially during the purges of 1948–1953 – were often later purged or discreetly removed from service.[6] Their names disappeared from institutional histories, their personnel files were not maintained, and their contributions – regardless of loyalty – were considered expendable.

This selective memory erasure was no accident; it was a crucial aspect of the regime's internal logic. As policies evolved, so did the official narrative concerning those who had enacted them. The Party did not need to undermine these judges publicly – merely to render them invisible. A similar rationale underpinned the absence of documentation regarding the so-called *security fives* – extra-judicial commissions composed of Party and secret police officials that, between 1949 and 1951, dictated sentencing policies in political cases.[7] These influential yet undocumented entities left no structured record in their wake.

2.3. Why Oral History Fails to Fill the Gaps

Could oral history serve as a substitute? In theory, yes;[8] in practice, it proves more challenging. While many former judges and court officials are still alive, few are willing

Jakub Prokop has been preserved solely because it was housed at the Regional Court in Brno, where district court president files are typically maintained. Since Prokop passed away while in office, his file had remained in Brno.

6 Milan Vyhlídal: Jiří Štella (*1907 – †1991). In: Karel Schelle – Jaromír Tauchen – Ondřej Horák – David Kolumber (ed.): *Encyklopedie českých právních dějin. XXV. svazek, Biografie právníků S–Ž.* [Encyclopedia of Czech Legal History. Vol. XXV, Biographies of Lawyers S–*Ž].* Plzeň – Ostrava, Aleš Čeněk, 2024. 281–282.

7 Archiv bezpečnostních složek [Security Services Archive; ABS], fond Sekretariát (ministra národní bezpečnosti) ministra vnitra [Secretariat of the (Minister of National Security) Minister of the Interior], I. díl [Part I], Komise pro bezpečnost [Security Commission], inv. j. [inventory number – inv. no.] 10, sign. [reference code – ref.] A 2/1, folio [fol.] 207.

8 Emma Peplow – Priscilla Pivatto: A Different Approach to Legislative Bodies: Reflections on the History of Parliament Oral History Project and Laws Around Abortion. *Rechtsgeschichte – Legal History Rg* 29, (2021), 157–165. https://doi.org/10.12946/rg29/157-165

to speak openly, and even fewer engage in critical introspection. The psychological and political stakes remain significant. Many individuals involved in politically sensitive proceedings – such as the show trials of the early 1950s – tend to rationalise their roles or claim procedural neutrality. They assert they were not ideologues but merely participants.

Such narratives, while understandable, tend to obscure as much as they illuminate. The professional memory of the judiciary is often shaped by loyalty, silence, and institutional amnesia. Furthermore, oral testimony is harrowing and cannot be verified without archival context. Consequently, the mechanisms of repression and the bureaucratic structures that facilitated them are often remembered only obliquely, if at all.

2.4. The Silence of Everyday Life

Perhaps the most significant casualty of this structural silence is the inability to reconstruct the daily operations of socialist courts. While we possess considerable information regarding ideology, legislation, and political trials, we know little about routine judicial work. How were hearings scheduled? How did judges interact with lay assessors or local Communist Party officials? What was the administrative culture within the courthouse?

Efforts to apply the methods of *Alltagsgeschichte*[9] – the study of everyday life – are hampered by the lack of basic documentation: circulars, work schedules, committee minutes, or procedural notes.[10] In many courts, particularly at the district level, records from before the 1970s are virtually non-existent. Such documents were often deemed unworthy of archiving, even when produced. Consequently, the micro-structures of justice – its rhythms, compromises, and informal hierarchies – remain inaccessible to historians.

2.5. A System Built to Evade Reconstruction

This fragmentation is not merely a result of neglect; it reflects the epistemology of a regime that instrumentalised law while obscuring its inherent logic. The judiciary was not designed as a self-documenting institution but rather as a tool of the Party – a tool that could be discarded without explanation once its purpose was fulfilled.

Between 1948 and 1952, the State Court tried over 29,000 defendants for alleged anti-state activities,[11] yet it was dissolved without a formal archival closure. The trials,

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9 István M. Szijártó: Four Arguments for Microhistory. *Rethinking History* 6, 2. (2002), 209–215. https://doi.org/10.1080/13642520210145644

10 The nature of history of everyday life enables the reconstruction of historical processes within a specific spatial, thematic, and temporal framework. Although this approach is appropriate for examining the judiciary, the surviving records from individual courts are so fragmentary that achieving such a reconstruction is nearly impossible.

11 Jožka Pejskar: *Od boje (proti komunistům) ke kolaboraci: Dokumenty a záznamy o činnosti Československé strany socialistické v letech 1948–89 (Studie).* [From Struggle (Against the Communists)

often pre-scripted by political organs, were not maintained as coherent collections. The investigative phase – conducted entirely by the State Security (*Státní bezpečnost,* StB) following the abolition of examining judges – produced files that were rarely transferred to judicial archives. Even internal discussions among judges, such as those recorded in the now-lost minutes of Party cells embedded within court institutions, have not survived.

What remains is silence, deliberately crafted to resist inquiry. The Czechoslovak socialist judiciary functioned as a mechanism of control and as a structure of impermanence designed to enforce rather than explain. This poses a unique challenge for historians – not merely of interpretation but of reconstruction against the backdrop of intentional forgetting.

3. Selection and Management of Judges

The judicial selection process in Communist Czechoslovakia from 1948 to 1989 experienced various institutional phases.[12] Nevertheless, it consistently remained subordinate to the political dominance of the Communist Party of Czechoslovakia (KSČ). Although the Ministry of Justice formally handled appointments, all significant decisions – particularly at crucial levels of the judicial hierarchy – were explicitly dictated or implicitly coordinated by Party entities, primarily through internal cadres commissions and security structures. The primary requirement for the appointment was steadfast political loyalty; while legal expertise was not entirely irrelevant, it was a secondary and flexible consideration.

3.1. Early Communist Control and Political Prioritization (1948–1950s)

In the immediate aftermath of the February 1948 coup,[13] the new regime initiated a radical restructuring of the judiciary, motivated by two primary objectives: ideological consolidation and personal replacement. A wave of purges ensued, resulting in the dismissal of at least 159 judges and prosecutors by 1950 due to political unreliability or

to Collaboration: Documents and Records on the Activity of the Czechoslovak Socialist Party in the Years 1948–89 (Study)]. Fallbrook, J. Pejskar, 1993. 27.

12 David Kolumber: Ustanovování soudců – česká historická perspektiva. [The Appointment of Judges – A Czech Historical Perspective]. In: Jaromír Tauchen (ed.): *VIII. česko-slovenské právněhistorické setkání doktorandů a postdoktorandů. Sborník z konference.* [VIII Czech-Slovak Legal History Meeting of Doctoral and Postdoctoral Students. Conference Proceedings]. 1st ed. Brno, Masarykova univerzita, Právnická fakulta, 2020. 130–147.

13 There remains no consensus on the constitutionality and legality of the communist seizure of power. The Communist Party adeptly exploited constitutional conventions. As non-communist ministers each submitted their resignations, they gradually diminished the government's quorum. Even though their actions might have pressured the cabinet to resign, they were insufficient to terminate the government's operation as a collective body. Consequently, the change in government was neither unconstitutional nor, by its nature, a coup d'état. However, subsequent developments bore the characteristics of a coup, particularly the deployment of armed forces under communist control and the resulting purges of public officials.

previous affiliations with the legal culture of the First Republic.[14] Most of these officials were not replaced by qualified legal professionals but by judges (and prosecutors) deemed appropriate based on their class background, often with little or no formal education.

To facilitate this transformation, the state established 'workers' law schools' (*právnické školy pracujících*) in 1949.[15] These institutions offered accelerated, ideologically driven training programs, lasting one to two years – one year for aspiring prosecutors and two for judges. Admission was frequently granted to candidates lacking secondary education, selected primarily for their class background and perceived loyalty to the Party. Graduates were appointed directly to judicial positions after completing their training, particularly within district-level courts or prosecution offices. As expressly stated by the Ministry of Justice, the intention was to ensure that "*all power in this country comes from the people*" and that the composition of the judiciary reflected the new socialist social order.[16]

In addition, the regime introduced people's judges (*soudci z lidu*) – lay judges who served as full members of judicial panels.[17] Appointed without legal education, their role was not to provide legal analysis but to reinforce political orthodoxy in court decisions.[18] According to Act No. 319/1948 Coll., their selection was based on state reliability, ideological commitment, and personal integrity, while legal competence was explicitly deemed unnecessary. People's judges even presided over the benches of the Supreme Court, illustrating the deep entrenchment of the lay political element within the judicial hierarchy.

3.2. Professionalisation and Contradiction (1960s)

By the early 1960s, the state began to recognise the limitations of a judiciary constructed primarily on ideological grounds. As legal cases – particularly those related to economic, civil, and international matters – became increasingly complex, a minimum

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14 Národní archiv [National Archive; NA], fond *Ústřední dělnická škola* [Central Workers' School], sv. [volume – vol.] 5, a. j. [archival unit – a.u.] 38, fol. 118.

15 Josef Urválek: Deset let československého soudnictví. [Ten Years of Czechoslovak Judiciary]. *Socialistická zákonnost* 3, 4. (1955), 212.

16 NA, fond K. Gottwald, vol. 61, a.u. 940, fol. 130.

17 The Communist regime systematically distorted the traditional Austrian notion of lay participation in the judiciary, which had been in place since the nineteenth century. In the original Austrian model, lay judges served as domain-specific experts lacking formal legal training, providing practical insights into the technical aspects of cases. However, the socialist variant replaced these judges with ideologically vetted 'people's judges', whose primary qualification was loyalty to the Party rather than professional expertise. This politicized interpretation of lay involvement persisted in Czechoslovakia and continued in the Czech Republic until 2024, when legislative reforms significantly reduced the lay element in court proceedings. Since the late 1940s, the lay judiciary had become a prominent example of political indoctrination rather than a source of disciplinary expertise.

18 Ladislav Veleta: Rozšíření a prohloubení účasti soudců z lidu na výkonu soudnictví. [Expansion and Deepening of the Participation of Lay Judges in the Exercise of Justice]. *Socialistická zákonnost* 5, 5. (1957), 273–281.

standard of professional competence became essential. Consequently, the Ministry of Justice gradually refocused its efforts on legal education, with more judicial candidates emerging from law faculties in Prague and Bratislava.[19]

However, this shift towards professionalisation was still politically constrained. The candidacy period (*čekatelská praxe*) – a form of judicial apprenticeship – was often shortened or completely bypassed, especially in rural or under-resourced courts. As a result, the judiciary of the 1960s was a diverse mix: it included formally trained graduates, inadequately prepared Party loyalists, and remnants of earlier appointees. Even the reintroduction of examining judges in the early 1960s failed to achieve complete judicial independence, as investigative powers continued to be subject to oversight by the State security.

The liberalising reforms of the Prague Spring in 1968 briefly created an environment conducive to greater judicial autonomy.[20] Some judges expressed their disillusionment with Party interference, prompting internal discussions about the courts' role in upholding legality. However, the Warsaw Pact invasion in August 1968 and the subsequent normalisation swiftly reversed these advancements. Judicial independence was once again curtailed, and professional competence was subordinated to political conformity.

3.3. Purges and Renewal after 1968

The 1970s commenced with extensive ideological purges throughout all state institutions, including the judiciary. Judges who supported or tolerated the reformist movements of 1968 were dismissed *en masse*.[21] Court presidents were directed to 're-evaluate personnel' based on political reliability, particularly concerning Party membership and public attitudes.

New appointments were made at an accelerated pace to fill the gaps in the judiciary. While a university law degree became a standard requirement, the candidacy process remained inconsistently implemented. Especially in district and provincial courts, new judges were often appointed with minimal practical preparation. The priority was not professional competency but rather ideological loyalty.

During this time, pressure to recruit Party members intensified. The KSČ assigned recruitment quotas to court presidents, encouraging them to 'voluntarily promote' politically reliable individuals to join the Party. Non-members were routinely overlooked for promotions, denied judicial renewals, or excluded from significant cases. In one documented case, a judicial candidate affiliated with the officially

19 Vladimír Hejl: *Zpráva o organizovaném násilí.* [Report on Organized Violence]. Praha, Univerzum, 1990. 184.

20 Andrej Bandura: Výsledky ankety o postavení sudcov. [Results of a Survey on the Status of Judges]. *Právny obzor* 51, 9. (1968), 834–839.

21 David Kolumber: Vznik a další vývoj Okresního soudu ve Zlíně. [The Establishment and Subsequent Development of the District Court in Zlín]. *Právněhistorické studie* 55, 1. (2025), 69. https://doi.org/10.14712/2464689X.2025.4

tolerated Czechoslovak People's Party was barred from judicial service until 1989 despite meeting formal qualifications.

3.4. Internal Control, Appraisal, and Structural Obedience

During the 1970s and 1980s, internal control mechanisms within the judiciary became increasingly institutionalised. Court presidents routinely evaluated judges based on assessments beyond mere performance metrics. These evaluations emphasised political engagement, 'ideological consciousness', relationships with local Party structures, and perceived public behaviour. Judges were expected to actively demonstrate support for the regime by refraining from dissent and visibly endorsing its policies.

These evaluations carried significant consequences. Judicial tenure was limited, with renewals dependent on professional and political assessments. Dismissals were often framed in administrative terms – such as claiming 'no suitable vacancy' existed – but were, in effect, politically motivated exclusions. Formal procedural safeguards were rarely upheld.

Furthermore, internal court hierarchies were leveraged to enforce ideological discipline. Presiding judges controlled case allocation, ensuring that politically sensitive cases – such as those involving high-ranking officials, property disputes, or family law – were exclusively handled by trusted Party members. Judges without Party affiliation were typically relegated to routine or low-profile cases. This informal power structure complemented formal mechanisms, guaranteeing that the political line was consistently upheld throughout the judicial process.

4. Everyday Judicial Practice

A politicised legal framework layered institutional reforms, and ongoing tensions between ideology and professional methodology heavily influenced judicial practice in Communist Czechoslovakia. Over the decades, formal structures adapted, transitioning from dismantling pre-war institutions to establishing 'comrade courts' and, subsequently, federalised layers of authority. Despite these changes, the fundamental characteristics of judicial practice remained notably consistent, characterised by ideological conformity, procedural efficiency, and political oversight.

4.1. Structural Framework of the Judiciary (1948–1989)

To fully grasp the dynamics of everyday judicial life, one must first consider the institutional framework that underpins it. The court system experienced several significant reorganisations during the socialist era.

In the aftermath of the 1948 coup, the Constitution of 9 May,[22] along with several legislative measures – most notably Act No. 319/1948 Coll., which aimed at

[22] Karel Schelle: Ústava Československé republiky (1948). [The Constitution of the Czechoslovak Republic (1948)]. In: Karel Schelle – Jaromír Tauchen (ed.): *Encyklopedie českých právních dějin, XIX.*

popularisation of justice, and Act No. 232/1948 Coll. concerning the State Court – effectively dismantled the interwar legal system. Courts were restructured to include lay participation through people's judges and to introduce ideological oversight. The State Court served as a quasi-political tribunal addressing anti-state crimes, while regional and district courts supplemented the functions of ordinary courts.[23] Ironically, however, it was precisely the State Court that retained a predominantly professional composition, with career judges continuing to dominate its bench – unlike other judicial bodies, which were increasingly subjected to politically motivated lay participation.[24]

During this period, judges were appointed based not on their legal expertise but on their social class and political allegiance. Judicial panels in first-instance courts typically comprised one professional judge and two lay judges. This structure was intended to reflect the 'people's character' of the legal system, but it often resulted in a dilution of technical rigour in favour of ideological conformity.

In 1952, a comprehensive judicial reform was enacted under Act No. 64/1952 Coll. concerning the Courts and the Prosecutor's Office.[25] The reformed system included people's courts (which replaced the former district courts), regional courts, and the Supreme Court. The special courts – primarily military and arbitration courts – were further expanded, while administrative justice was abolished. Local 'comrade courts',[26] introduced in 1959, operated as quasi-judicial bodies, essentially detached from formal procedural oversight, and were dissolved shortly thereafter.[27] These years were marked by extreme politicisation of judicial personnel and decisions. Judges were often 'elected' in managed procedures, and court presidents were ideological gatekeepers. Procedural brevity and ideological tone characterised the language and outcome of judgments.

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svazek U–Ú. [Encyclopedia of Czech Legal History, Vol. XIX U–Ú]. Plzeň, Aleš Čeněk, 2020. 556–561. Karel Schelle et al.: *Ústava a ústavní systém socialistického Československa.* [The Constitution and Constitutional System of Socialist Czechoslovakia]. 1st ed. Ostrava, Key Publishing s.r.o., 2022. 2. Vols.

23 Ladislav Vojáček – Jaromír Tauchen – David Kolumber: *České právní dějiny do roku 1989.* [Czech Legal History up to 1989]. Brno, Masarykova univerzita, 2024. 123–124.

24 Alena Šimánková – Lukáš Babka – Jaroslav Vorel: *Československá justice v letech 1948–1953 v dokumentech*. Sv. 2. [Czechoslovak Judiciary in the Years 1948–1953 in Documents. Vol. 2.] Praha, Úřad dokumentace a vyšetřování zločinů komunismu PČR, 2004. 54–56.

25 NA, fond Předsednictvo *ÚV KSČ 1945–1954* [Presidium of the Central Committee of the Communist Party of Czechoslovakia 1945–1954], vol. 32, a.u. 300.

26 Zdeněk Jičínský: *Právní myšlení v 60. letech a za normalizace.* [Legal Thinking in the 1960s and During Normalization]. Praha, Prospektrum, 1992. 57–66.

27 Vladimír Flegl: Soudružské soudy – nástroj socialistické výchovy pracujících. [The Comrades' Courts – An Instrument of the Socialist Education of Workers]. *Socialistická zákonnost* 8, 2. (1960), 81–89.; John Hazard: *Communists and Their Law.* Chicago – London, University of Chicago Press, 1969. 119–121.; René David – John E. Brierley: *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law.* 3rd ed. London, Stevens and Sons, 1985. 260–261.; Petra Zapletalová: Soudružské soudy jako nástroj socialistické demokracie ve vybraných státech východního bloku. [The Comrades' Courts as an Instrument of Socialist Democracy in Selected Eastern Bloc Countries]. *Právněhistorické studie* 54, 3. (2025), 139–164. https://doi.org/10.14712/2464689X.2024.31

The 1960 Constitution, along with Constitutional Act No. 143/1968 Coll. concerning the Federation,[28] established a federal layer within the judicial system, resulting in the creation of three supreme courts: one for the federation (Czechoslovak Socialist Republic), one for the Czech Socialist Republic, and one for the Slovak Socialist Republic. Beneath these courts were regional and district courts.

Following the abolition of local people's courts in 1969, the judiciary became increasingly centralised and technically standardised. Nevertheless, political influence played a role in case assignments, appointment renewals, and performance evaluations.[29] While legal formalism was more pronounced in its outward appearance – particularly during the normalisation period of the 1970s and 1980s – the notion of judicial independence remained largely illusory.

4.2. Patterns of Legal Reasoning and Judgment Style

Judgments in daily practice tended to be brief,[30] formulaic, and often lacked substantive interpretive reasoning. This was particularly evident in lower courts, where decisions commonly spanned only one or two typed pages. Declarative conclusions were frequently substituted for legal arguments, and references to case law or established doctrine were seldom encountered. In politically sensitive cases, judgments often incorporated ideological language, emphasising themes like 'defending the socialist order' or 'protecting collective property', which echoed Party slogans.[31]

Higher courts sometimes displayed greater technical rigour, especially in civil and commercial matters; however, political considerations continued to influence both procedural pathways and substantive outcomes. In cases involving dissidents, for example, higher courts often upheld lower courts' decisions to maintain uniformity and avoid the appearance of leniency.

4.3. Civil Procedure and the Burden of Proof

The inquisitorial dynamic in civil law has effectively replaced the adversarial model, with the court adopting a proactive role in gathering evidence and clarifying facts, particularly in cases where litigants lack legal representation. The traditional adversarial principle – requiring parties to assert and prove their claims – has been subordinated to the principle of judicial inquiry, wherein the court assumes investigatory

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[28] Nadia Nedelsky: Divergent Responses to a Common Past: Transitional Justice in the Czech Republic and Slovakia. *Theory and Society* 33, 1. (2004), 65–115. https://doi.org/10.1023/B:RYSO.0000021428.22638.e2

[29] Zdeněk Kühn: Socialistická justice. In: Michal Bobek – Pavel Molek – Vojtěch Šimíček (ed.): *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* [Communist Law in Czechoslovakia: Chapters from the History of Injustice]. Brno, Mezinárodní politologický ústav, Masarykova univerzita, 2009. 831.

[30] Hazard op. cit. 103–126.

[31] Mirjan R. Damaška: *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven – London, Yale University Press, 1986. 173.

responsibilities. This procedural paternalism blurs the line between adjudication and intervention.

While the goal of this model is ostensibly to ensure substantive fairness, in practice, it often allows judicial discretion to override party autonomy. Additionally, it reflects broader ideological commitments to collectivism and state oversight.

4.4. Criminal Justice and Political Control

In the context of Czechoslovakia, criminal law closely mirrored the Soviet model,[32] with its development reflecting broader trends seen in other socialist countries. This alignment became particularly evident in the sphere of criminal justice following the denunciation of the personality cult. While the 1950s were characterized by excessive use of criminal repression aimed at suppressing alleged or actual anti-state activities, such politically framed offences significantly declined in subsequent decades. This change did not signify a shift towards liberalization but represented a strategic adaptation. The communist regime increasingly targeted its real or perceived opponents under the guise of ordinary criminal offences, thereby formally separating political motivations from the legal classification of these actions.

Although Czechoslovakia did not formally adopt the East German model of pre-trial authorisations designed to pre-empt judicial independence. Archival records indicate that sensitive proceedings were frequently subject to prior coordination. Trials involving political dissent, members of religious communities, or ideologically deviant conduct were often shaped in advance by the Ministry of Justice, the Communist Party's legal apparatus, or the State Security (StB).[33] Judges were expected to follow prescribed narratives, and hearings were staged to simulate procedural propriety while securing politically acceptable outcomes. This informal pre-structuring was reinforced by institutional mechanisms introduced through the 1952 Act on the Organization of Courts. The reform significantly enhanced the supervisory function of the Supreme Court, which now had the authority to 'attract' any case from lower courts, decide it directly, or reassign it elsewhere. Additionally, the Supreme Court was empowered to issue interpretative guidelines – not formally binding, yet widely observed in practice – which aimed to standardize judicial reasoning in line with socialist legality. These guidelines functioned as a tool of jurisprudential control, shaping outcomes even in the absence of specific cases.[34]

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[32] Samuel Kucherov: *The Organs of Soviet Administration of Justice: Their History and Operation*. Leiden, E. J. Brill, 1970. 343–350. https://doi.org/10.1163/9789004609907

[33] Alena Šimánková – Lukáš Babka – Jaroslav Vorel: *Československá justice v letech 1948–1953 v dokumentech*. Sv. 1. [Czechoslovak Judiciary in the Years 1948–1953 in Documents. Vol. 1.] Praha, Úřad dokumentace a vyšetřování zločinů komunismu PČR, 2004. 16–18.

[34] Zdeněk Kühn: The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts. *Croatian Yearbook of European Law and Policy* 2, (2006), 19–26. https://doi.org/10.3935/cyelp.02.2006.12

4.5. The Role of Prosecutors and Court Officials

Prosecutors played a pivotal role in shaping the narrative and the outcomes of criminal trials. Under the principle of 'socialist legality',[35] the submissions from prosecutors were often effectively binding, especially in contexts where judicial deference to state authority was anticipated. Judges who disregarded prosecutorial recommendations risked negative evaluations, stalled career advancement, or even removal from their positions.

Court presidents wielded significant discretionary power;[36] they assigned cases, approved judicial evaluations, and coordinated with local Party organisations.[37] Their role was primarily administrative and supervisory, ensuring ideological compliance within the court's operations at a granular level.

4.6. Biographical Profiles of Leading Judicial Figures

The leadership of the Supreme Court of the Czechoslovak Socialist Republic from 1948 to 1990 was shaped by the ideological demands of the Communist regime. Following adopting Act No. 319/1948 Coll., which reorganised the judiciary in the spirit of socialist legality, *Igor Daxner* (1893–1960) was appointed as the first post-February president of the Supreme Court. Born on 20 September 1893 in Tisovec, he came from a family with a long legal tradition. After serving in the Czechoslovak legions during World War I, he graduated from the Faculty of Law at Comenius University in 1929. He worked in various judicial positions, including the Slovak Supreme Court. During the Slovak State, Daxner became involved in the resistance, was dismissed from judicial office, imprisoned, and later joined the Slovak National Uprising. After the war, he presided over the National Court and was the sole professional judge in the panel that sentenced President Jozef Tiso to death. His task as president of the Supreme Court after 1948 was to implement the new Soviet-inspired model of justice involving ideological control, lay judges, and the supervision of legality by the General Prosecutor. He resigned in 1953 upon retirement age and died on 18 April 1960 in Bratislava.[38]

His successor was *Josef Urválek* (1910–1979), who led the court from 1953 to 1963. Born 28 April 1910 into a working-class family, he studied law at Masaryk University in Brno and was active in left-wing student movements during the 1930s. After the war, he joined the Communist Party and quickly rose through the ranks of the prosecutorial service. As a state prosecutor, he led the indictment against Milada

[35] NA, fond Předsednictvo ÚV KSČ 1945–1954, vol. 32, a. u. 300.

[36] David Kolumber: Opakování funkčních období soudních funkcionářů prismatem českého ústavního pořádku. [Court Officials' Repeated Performance through the Prism of the Czech Constitutional Order]. *Právník* 160, 9. (2021), 716–717.

[37] Ivan Klíma: *Soudce z milosti.* [A Judge on Trial]. Praha, Academia, 2002.

[38] Stanislav Balík: Igor Daxner (*1893 – †1960). In: Karel Schelle – Jaromír Tauchen – Ondřej Horák – David Kolumber (ed.): *Encyklopedie českých právních dějin. XXIII. svazek, Biografie právníků A–J.* [Encyclopedia of Czech Legal History. Vol. XXIII, Biographies of Lawyers A–J]. Plzeň – Ostrava, Aleš Čeněk, 2022. 353–354.

Horáková and served as chief prosecutor in the infamous trial of Rudolf Slánský and other high-ranking Communist leaders. His conduct during these political show trials, which involved close cooperation with Soviet advisors and acceptance of fabricated evidence and forced confessions, remains emblematic of the judicial terror of the early 1950s. Appointed president of the Supreme Court in October 1953, he ensured its complete alignment with the political line of the Communist Party. Although he later participated in discussions about rehabilitation, his role was largely obstructionist. He was relieved of office in 1963 and continued to work at the Institute of Criminology under the General Prosecutor. He died in Prague on 29 November 1979 without ever being held accountable for his role in political repression.[39]

In March 1963, *Josef Litera* (1918–1978) was unanimously elected president of the Supreme Court by the National Assembly following the 1961 Judiciary Act. Born on 1 May 1918 in Budiměřice, Litera was originally a trained metalworker and acquired formal legal education through a one-year legal course for workers in 1948–1949. He worked as a prosecutor in Náchod and later at the Ministry of Justice, serving as Deputy Minister from 1953 to 1963. His legal and political career was deeply rooted in party structures, and his appointment symbolised the regime's preference for loyal class-background cadres. In his 1968 letter of resignation, he acknowledged the judiciary's responsibility for violations of socialist legality during the 1950s, though he had not personally participated in political trials. Citing declining health and moral considerations, he stepped down in April 1968 and died ten years later in Prague.[40]

He was succeeded during the Prague Spring by *Otomar Boček* (1926–1993), a trained lawyer previously serving as chairman of the Czechoslovak Bar Association. Born on 11 January 1926 in Deštná, Boček initially worked as an attorney in České Budějovice before becoming a judge at the Supreme Court in 1964. He played a significant role in rehabilitation proceedings, including reviewing cases involving Rudolf Slánský and Rudolf Barák. As president of the Supreme Court, elected in April 1968, he openly criticised the deformation of justice in the early 1950s and advocated for judicial reform. He spoke candidly in the press and on television about the political misuse of the judiciary. However, after the Warsaw Pact invasion and the onset of the so-called normalisation, Boček was politically disqualified. On 27 May 1970, the Federal Assembly unanimously removed him from office.

Following his dismissal, *Vojtěch Přichystal* (1909–1972) was appointed president of the Supreme Court. Born on 27 November 1909 in Vanovice, he graduated from Charles University and worked as a criminal judge before joining the Ministry of Justice in 1961. Although he had reached retirement age, he was chosen for his political

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39 František Hanzlík: Josef Urválek (*1910 – †1979). In: Karel Schelle – Jaromír Tauchen – Ondřej Horák – David Kolumber (eds.): *Encyklopedie českých právních dějin. XXV. svazek, Biografie právníků S–Ž.* [Encyclopedia of Czech Legal History. Vol. XXV, Biographies of Lawyers S–Ž]. Plzeň – Ostrava, Aleš Čeněk, 2024. 389–395.

40 Stanislav Balík: Vojtěch Přichystal (*1909 – †1972). In: Karel Schelle – Jaromír Tauchen – Ondřej Horák – David Kolumber (ed.): *Encyklopedie českých právních dějin. XXIV. svazek, Biografie právníků K–Ř.* [Encyclopedia of Czech Legal History. Vol. XXIV, Biographies of Lawyers K–Ř]. Plzeň – Ostrava, Aleš Čeněk, 2023. 776–777.

reliability. In October 1971, he presented a report on the tasks of the judiciary following the 14th Congress of the Communist Party, stressing the importance of protecting the socialist state and suppressing liberal tendencies. He died in office in 1972.[41]

The most enduring figure among the presidents was *Josef Ondřej* (1924–2006), who served from 1972 to 1990. Born on 2 March 1924, originally a house painter and decorator, Ondřej began his legal education through a worker training course and was admitted to Charles University's Faculty of Law. He became politically active in the Communist Party from 1948 and later held positions at the Ministry of Justice. During the Prague Spring, he served as president of the Regional Court in Ostrava and later participated in purges and ideological vetting as a deputy minister. As president of the Supreme Court of the CSSR, elected in 1972, he upheld the strict enforcement of socialist legality. He was a prominent ideologue, repeatedly emphasising the political nature of crimes committed during the 1968–1969 unrest. He was also president of the Union of Czechoslovak Lawyers, a member of the Central Committee of the Communist Party, and a recipient of several state honours, including the Order of Labour and the Order of Victorious February. He resigned from office in January 1990, officially citing retirement, and died in 2006.[42]

After the 1969 constitutional changes and the creation of the federal system, separate republican supreme courts were established. In the Czech Socialist Republic, Josef Ondřej initially served as president from 1970 to 1973. He was followed by *Karel Kejzlar* (1918–1993), who held the position until 1988. Born on 19 November 1918, Kejzlar was a legal professional and member of the Communist Party who had served as deputy minister of justice and as a member of the People's Militia. He was repeatedly praised as a politically reliable and disciplined cadre and received several state decorations. In June 1988, he was succeeded by *Josef Marek* (1929–2010) was a former labourer who had earned his law degree in 1959. He had served as a Supreme Court judge since 1974 and resigned in February 1990.[43]

In the Slovak Socialist Republic, the first president of the newly created republican Supreme Court was *Pavel Király* (1913–1999), who served briefly in 1970 before being appointed Minister of Justice of the SSR. Born in Hnúšťa and a graduate of Charles University, Király had served as a prosecutor, judge and legal academic.[44] He was replaced by *Ján Benčura* (1925–1996), who led the court from October 1971 until 1990. Benčura came from a poor rural background and worked in manual labour before completing his legal education. As president of the Supreme Court of the SSR and chairman of the Slovak Lawyers' Union, he was celebrated by the regime for his

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41 Stanislav Balík: Josef Litera (*1918 – †1978). In: Schelle – Tauchen – Horák – Kolumber (2023) op. cit. 359–360.

42 Stanislav Balík: Josef Ondřej (*1924 – †2006). In: Schelle – Tauchen – Horák – Kolumber (2023) op. cit. 585–586.

43 The biographical accounts of Kejzlar and Marek were compiled using materials from the Czech National Council, specifically in connection with their respective appointments to official positions.

44 Rudolf Manik: Slovenskí povereníci a ministri spravodlivosti z radov advokácie v rokoch 1938–1989. [Slovak Commissioners and Ministers of Justice from the Ranks of Advocacy (1938–1989)]. *Bulletin slovenskej advokácie* 14, 3. (2008), 47.

ideological commitment and role in building socialist legality.[45] He reached retirement age in 1985 but remained in office until after the Velvet Revolution.

These biographies illustrate the deep politicisation of the Czechoslovak judiciary during the socialist era. The office of the president of the Supreme Court was not merely judicial; it was primarily political. Each appointee was expected to safeguard the ideological line of the Communist Party and to enforce its concept of socialist justice. Professional competence was subordinated to political loyalty, and the judiciary functioned as an instrument of power rather than an independent guarantor of rights.

5. Party Oversight and Internal Control Mechanisms

During the socialist era, the judiciary in Czechoslovakia operated within a complex framework of Party oversight and internal disciplinary control. Each court housed a fundamental unit of the Communist Party (*základní organizace KSČ*), typically led by a deputy court president or a senior judge. These units went beyond mere informational roles; they functioned as de facto supervisory bodies, providing ideological guidance, monitoring political conformity, and influencing personnel decisions throughout the judicial hierarchy.

5.1. Party Cells as Instruments of Surveillance and Enforcement

Party cells held regular meetings to assess judges based on their professional performance, 'ideological maturity', and political engagement. Judges were expected to attend educational sessions, engage in Party initiatives, and publicly support Party policies. While attendance at these meetings was officially voluntary, it was effectively mandatory.

The issue of Party membership was paramount. Although not a formal requirement for appointment, judges who chose not to join the Party often faced routine denial of promotions or reappointments. Internal reports frequently questioned a judge's refusal to join the KSČ and evaluated whether their judicial reasoning appropriately aligned with the Party's 'leading role'. This pressure was particularly intense in high-profile courts or politically sensitive areas, where full adherence to the Party line was essential for any position of significance.

5.2. Political Evaluations and Personal Surveillance

Evaluations conducted by Party organisations were both frequent and intrusive. They typically encompassed assessments of political conduct, adjudicative language, relationships with prosecutors, public appearances, and private behaviour. Personal lives were subjected to institutional scrutiny, with judges facing criticism or even dismissal

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[45] Štefan Daniš: Predseda Najvyššieho súdu SSR a predseda Jednoty slovenských právnikov JUDr. Ján Benčura šesťdesiatročný. [President of the Supreme Court of the Slovak Socialist Republic and President of the Union of Slovak Lawyers JUDr. Ján Benčura at Sixty Years]. *Právny obzor* 68, 9. (1985), 891–892.

for actions deemed 'ideologically problematic'. Such actions included engaging in romantic relationships with married individuals, exhibiting passive attitudes toward religion, or displaying a lack of visible political engagement.

One notable case documented in archival records involved a state prosecutor who was dismissed for characterising the actions of the StB as 'Gestapo-like'. Additionally, Judge JUDr. Rudolf Hartych (1907–1959) was sentenced to 18 years for 'refusing to judge class enemies' and resisting direct orders from Rudolf Slánský.[46] These examples illustrate how political discipline overshadowed legal fidelity and how any form of personal dissent – even within the institutional framework – was met with severe punishment.

5.3. Control by Court Presidents and Internal Hierarchies

While the judiciary was formally safeguarded by guarantees of independence under the 1960 Constitution, court presidents wielded significant informal power. They could influence or directly determine case allocations, including excluding non-party judges from politically sensitive matters, nominating judges for renewal or removal, and reporting internally to higher Party or ministerial bodies.

Judicial appointments were time-limited, with periodic renewals contingent upon professional performance and political reliability. The lack of tenure meant that 'non-renewal' became a convenient means for the discreet removal of judges deemed inconvenient or ideologically unreliable. Even without formal disciplinary proceedings, the mere threat of not extending a judge's mandate often sufficed to ensure compliance.

5.4. Security Commissions and Supra-Judicial Oversight

Between 1948 and November 1950, the internal oversight of the courts was further entrenched by the Security Commission of the Central Committee of the Communist Party of Czechoslovakia. This body, which operated from 2 March 1948 to 15 November 1950, acted as a centralized review board for politically significant trials. Comprised of senior officials from the Communist Party (KSČ) and high-ranking security personnel – including Rudolf Slánský, Václav Nosek, Alexej Čepička, and Karel Šváb – the commission functioned outside the judicial system while effectively determining the outcomes of selected cases. Even after its dissolution, its crucial functions were assumed by the Political Secretariat of the Central Committee, ensuring continuous Party oversight and coordination of show trials.[47]

The influence of these bodies extended to the preparation of pre-trial scenarios, where they predetermined the sentence, legal qualification, and even courtroom procedures in political trials. Although such practices were most pronounced in the early 1950s,

[46] Šimánková – Babka – Vorel (2004) op. cit. 16.

[47] ABS, fond *Sekretariát (ministra národní bezpečnosti) ministra vnitra.* [Secretariat of the (Minister of National Security) Minister of the Interior]. I. díl [Part I], *Komise pro bezpečnost* [Security Commission], inv. no. 10, ref. A 2/1, fol. 7.

their legacy persisted as an ingrained political dynamic in judicial processes, shaping attitudes well into the 1980s.

5.5. Enduring Legacy

Following 1989, the close intertwining of judicial authority and political power became a central focus of legal reform. One of the initial constitutional responses was establishing the 'lawful judge' principle (*zákonný soudce*),[48] which mandates that judges be assigned to cases in advance by law rather than at the discretion of court presidents. This provision represented a significant technical improvement and a clear rejection of decades of discretionary, ideologically motivated internal control.[49]

6. Interaction with Prosecution and Security Agencies

The functioning of the judiciary in Communist Czechoslovakia cannot be fully comprehended without considering its integration within a broader network of state institutions, particularly the prosecutor's office (*prokuratura*) and the StB. Although formally distinct, these entities collaborated to ensure that adjudicative outcomes aligned with political objectives.

In the early 1950s, mechanisms for cross-institutional coordination were temporarily formalized through the establishment of 'security triplets' (*bezpečnostní trojky*) and 'security fives' (*bezpečnostní pětky*).[50] These extra-judicial bodies comprised Party functionaries, security commanders, and representatives from the judiciary. While lacking a legal foundation, they wielded significant influence, especially in politically sensitive cases. The members of these bodies – often without formal legal training – pre-approved case outcomes and monitored judicial conduct. Although these structures were dissolved by 1951, their operational principles – early coordination, external oversight, and political scripting – continued to manifest in less formalised ways.[51]

During the 1950s and 1960s, professional overlap and spatial proximity fostered a lasting interdependence among legal practitioners. Judges, prosecutors, and notaries were frequently located within the same buildings, and their careers intersected through shared educational backgrounds or political networks. This situation blurred the lines between legal independence and administrative convenience. Celebrations, commemorations, and official gatherings often served to reinforce these connections. While interactions were formally collegial, they frequently involved informal consultations concerning pending cases, particularly in politically sensitive situations.

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48 Pavel Molek: *Právo na spravedlivý proces.* [The Right to a Fair Trial]. 1st ed. Praha, Wolters Kluwer Česká republika, 2012. 195–196.

49 Jaroslav Bičovský: Pokleslost justice a její obroda. [The Degeneracy of the Judiciary and Its Renewal]. *Soudce* 2007, 7. (2007), 13 ff.

50 Adolf Rázek: *StB + justice: nástroje třídního boje v akci Babice.* [StB + Judiciary: Instruments of Class Struggle in the Babice Case]. Praha, Úřad dokumentace a vyšetřování zločinů komunismu, 2002. 10.

51 Karel Kaplan – Pavel Paleček: *Komunistický režim a politické procesy v Československu.* [The Communist Regime and Political Trials in Czechoslovakia]. Brno, Barrister & Principal, 2008. 168.

The relationship with StB was more complex and hierarchical. Some judges, especially those overseeing trials related to treason, emigration, or religious dissent, gained privileged access to classified information or collaborated in orchestrating courtroom proceedings. In certain regional courts, the presidents exhibited apprehension towards specific judges due to their connections with StB officers, indicating a dynamic where political trust overshadowed formal authority.

In politically sensitive cases, the role of the prosecutor became crucial. Prosecutorial submissions – particularly during the 1950s – were often de facto binding, if not legally so. Investigations were typically controlled by the StB, which, following the abolition of examining judges in 1950, functioned with minimal judicial oversight. Efforts to restore investigatory independence in the 1960s achieved limited success, as the pre-trial phases remained susceptible to manipulation.[52]

7. Stabilisation and Routine in the Late Socialist Period

The 1970s and 1980s marked a period of relative stability within the judicial system. Following the upheavals of 1968–70,[53] where numerous judges were purged for their reformist views, the new judiciary stabilised into a younger, more uniformly educated, and politically compliant body. Judges trained during the 1970s typically held law degrees but often lacked substantial practical preparation. Their induction into the judiciary was rapid, and career advancement relied more on political discipline than meritocratic evaluations.

Procedurally, judicial work became increasingly routinised. Institutionalised training sessions were standardised, and judgments started adopting more uniform formats. There was a modest expansion in referencing higher court jurisprudence, particularly in civil cases. However, decision-making processes remained brief, formulaic, and focused more on procedural aspects than on substantive reasoning.

Despite this formalisation, political considerations remained dominant. Even in the regime's waning years, dissident trials exhibited patterns of advance coordination, selective assignment of judges, and ideological framing. While overt show trials declined, the legal system remained a political instrument veiled in legal pretence.

Furthermore, judicial culture remained hierarchical, with court presidents and Party officials guiding informal policies and case assignments. The threat of non-renewal, internal evaluations, and informal reporting ensured conformity, even when overt coercion was less apparent.

One of the most visible consequences of the judiciary's degradation under communist rule was its significant feminization – a trend evident not only in Czechoslovakia but throughout the broader socialist bloc. This shift was closely tied to judicial work's declining prestige and economic valuation, which gradually diminished its appeal,

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52 NA, fond *ÚV KSČ 1962–1966* [Central Committee of the Communist Party of Czechoslovakia 1962–1966], vol. 46, a. u. 50.

53 Jiří Němec: XIV. sjezd KSČ a úkoly justice. [The 14th Congress of the Communist Party of Czechoslovakia and the Tasks of the Judiciary]. *Socialistická zákonnost* 19, (1971), 385 ff.

particularly among men. Importantly, this feminization should not be misconstrued as a deliberate achievement of gender equality policy. Instead, it reflected the systemic devaluation of the judiciary as a professional field under real socialism.[54]

It is essential to recognize that, prior to the Velvet Revolution, dissenting voices had already begun to emerge that critically examined the predominant role of the Party within the judiciary.[55] The irony in this situation lies in the fact that these critiques found a degree of support from Soviet sources, highlighting a complex interplay between local dissent and external ideological frameworks.[56]

8. Legacy and Continuities after 1989

The democratic transformation of 1989 did not lead to an immediate or thorough break from the judicial past.[57] While the most compromised, publicly discredited, or legally unqualified judges were removed, a substantial portion of the judiciary remained intact. Many judges were not overt perpetrators of repression but had nonetheless operated within – and adapted to – the frameworks of ideological justice.

Some judges left the bench and transitioned to adjacent professions, such as advocacy, insolvency practice, or legal administration. Others chose to stay, arguing that their role had been technical rather than political. However, such claims often overlooked the collective responsibility inherent in decades of institutional conformity.

Post-1989 reforms introduced constitutional safeguards, most notably the entrenchment of the 'lawful judge' principle and the re-establishment of judicial tenure. Nevertheless, the legacy of previous practices – minimalist reasoning, hierarchical deference, and informal decision-making – continued to linger for years.[58] Younger judges, trained in a democratic environment, gradually began to implement new standards, but institutional memory and entrenched habits proved resistant to swift transformation.

In many respects, the judiciary's evolution was a negotiated reinvention rather than a radical rupture.[59] Its infrastructural continuity, personnel overlap, and cultural inheritance warrant ongoing critical examination – not only to comprehend the past but also to evaluate how remnants of that past continue to influence the post-communist legal order.

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54 Kühn (2009) op. cit. 846–847.

55 Eduard Barány: Socialistický právny štát. [The Socialist Rule of Law]. *Právny obzor* 72, 1. (1989), 62–75.

56 Kühn (2009) op. cit. 836.

57 Kühn (2006) op. cit. 19–26.

58 Jaromír Tauchen et al.: *České právní dějiny po roce 1989.* [*Czech Legal History after 1989].* 1st ed. Brno, Masarykova univerzita, 2023. 55.

59 Daniela Piana: *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice.* Farnham – Burlington, Ashgate, 2010. 44., 92., 101–102., 108., 110., 164.

9. Conclusion

The socialist judiciary in Czechoslovakia was not merely an anomaly within an otherwise rational legal framework; instead, it served as a central mechanism for legitimising, routinising, and internalising political domination. While considerable attention has been devoted to political trials and ideological jurisprudence, the deeper narrative lies in the systematic structuring of silence: a judiciary shaped by conformity, institutions marked by deliberate amnesia, and archival practices prioritising control over transparency.

This contribution posits that the historiographical invisibility of the socialist judiciary is neither incidental nor purely a result of archival neglect. It arises from a foundational ambivalence: the legal framework persisted even as its substantive content was hollowed out. Consequently, judicial institutions were highly exposed during show trials, yet their everyday operations remained structurally obscured. A culture of institutional conformity and internalised political discipline permeated judicial conduct and decision-making.

Post-1989 reforms justly prioritised legal protections and institutional independence, yet the more profound epistemic legacy – characterised by minimalist reasoning, political filtering, and informal discipline – has proven to be far more resilient. Comprehending that legacy requires a methodological approach that treats archival absences as deliberate phenomena – artefacts of political processes and key to understanding institutional memory. The historian's role extends beyond merely recovering what was lost; it involves interrogating why and how it became irretrievable.

Understanding the judiciary of the past requires confronting the political logic behind the systematic absence of institutional memory, the conditions under which law serves as an instrument of political will, and the cost of its silence.

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SOZIALE FRAGEN UND DAS UNGARISCHE KARTELLGESETZ VON 1931

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Abstract

Social issues and the Hungarian Cartel Act of 1931

Normal market conditions collapsed as a result of the Great Depression of 1929. This created a number of social problems that the state had to address. The impoverishment of the population caused by the crisis made it increasingly difficult to obtain basic necessities, while the excessively low prices caused mass bankruptcies among producers. The state, through the cartels, introduced price controls. It sought to create price conditions that would allow producers to operate economically but also to provide the population with basic necessities. In this way, social considerations became a key feature of the state's activities.

Keywords: social issues, cartels, price regulation, economic competition, the Great Depression of 1929

Abstrakt

Soziale Fragen und das ungarische Kartellgesetz von 1931

Infolge der Weltwirtschaftskrise von 1929 brachen die normalen Marktbedingungen zusammen. Dies führte zu einer Reihe von sozialen Problemen, die der Staat angehen musste. Durch die krisenbedingte Verarmung der Bevölkerung wurde es immer schwieriger, sich mit dem Nötigsten zu versorgen, und die übermäßig niedrigen Preise führten zu Massenkonkursen unter den Produzenten. Der Staat führte über die Kartelle Preiskontrollen ein. Er versuchte, Preisbedingungen zu schaffen, die es den Produzenten ermöglichten, wirtschaftlich zu arbeiten, aber auch die Bevölkerung mit dem Nötigsten zu versorgen. Damit sind auch soziale Aspekte zu einem dominierenden Merkmal staatlichen Handelns geworden.

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Schlagworte: soziale Fragen, Kartelle, Preisregulierung, wirtschaftlicher Wettbewerb, die Weltwirtschaftskrise von 1929

1. Einführung

Die ungarische Geschichte zwischen den beiden Weltkriegen war mit vielen sozialen Problemen behaftet. In welchem Maße war der Staat in der Lage, zu handeln, und welche Lösungen er anstrebte. Eines der schwerwiegendsten Probleme wurde durch die 1929 einsetzende Weltwirtschaftskrise verursacht. Kaum jemand hätte gedacht, dass der Staat die entstandenen sozialen Probleme zum Teil durch das Kartellrecht zu lösen versucht. In diesem Beitrag versuche ich, dies am Beispiel des ungarischen Kartellgesetzes von 1931[1] zu beweisen.

Wenn wir die Geschichte des Kartellrechts untersuchen, gehen wir davon aus, dass seine Entwicklung von den Etappen der Entwicklung des Verbots geprägt ist. Das Kartell ist ein schädliches Element der Wirtschaft, so dass ein chronologischer Überblick über seine rechtliche Regulierung nichts anderes als immer strengere Beschränkungen bedeuten würde, die schließlich im Verbot gipfelten.

Die Hypothese ist nicht unbegründet, denn die Entstehung einer gesetzlichen Regelung von Kartellen hat zu Einschränkungen geführt. Es ist jedoch falsch anzunehmen, dass das Verbot von Anfang an ein Ziel der staatlichen Intervention war, nur dass der Gesetzgeber nicht den Mut hatte, die Entscheidung sofort zu treffen. Die gesetzliche Regulierung ist seit langem ein Instrument der staatlichen Kontrolle der Wirtschaft. Durch das Kartellrecht konnte der Staat in die Ausübung von Eigentumsrechten eingreifen und diese durch radikalen Einsatz sogar gänzlich beseitigen. In Deutschland wurden Kartelle nach 1933 genutzt, um die gleiche strenge staatliche Kontrolle einzuführen[2] wie die Verstaatlichung in den totalitären Modellen des Ostens.

Historische Beispiele zeigen, dass dieser Rechtsbereich ein sehr mächtiges Regulierungsinstrument in den Händen des Staates war. Dadurch wurde auch sein

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1 Gesetz XX von 1931 über Vereinbarungen zur Regelung des wirtschaftlichen Wettbewerbs.

2 Das Gesetz vom Juli 1933 über die Errichtung von Zwangskartellen ermächtigte den Reichswirtschaftsminister, den Zwangsbeitritt bestimmter Unternehmen zu Kartellen vorzusehen und die Regeln für die Funktionsweise der Kartelle festzulegen, wobei die Mitglieder der Kartelle ihrer Befugnisse beraubt wurden. Wie aus dem Titel des Gesetzes hervorgeht, bedeutet dies, dass die Unternehmen in Kartelle gezwungen werden und der Staat die Regeln für ihre Tätigkeit festlegt. Dies kam einem fast vollständigen Entzug der Ausübung der Eigentumsrechte gleich. [Gesetz über Errichtung von Zwangskartellen. Vom 15. Juli 1933. 2.§; Károly Dobrovics – Endre Kőházi: *Kartel, árelemzés, külföldi törvények.* [Kartell, Preisanalyse, ausländische Gesetze]. Budapest, Monopol, 1938. 30–32.

privater Charakter abgeschwächt und das Kartellrecht an der Grenze zwischen öffentlichem und privatem Recht angesiedelt.[3]

Natürlich war die Regulierung im Ungarn nicht so radikal wie in totalitären Staaten. Eingriffe in die Eigentumsrechte waren lediglich ein Versuch, deren Missbrauch zu verhindern.

Unsere Hypothese lautet. Mit dem Kartellgesetz von 1931 brachte der Reichstag die Preisbildung unter Kontrolle und führte damit im Wesentlichen eine staatliche Preisregulierung ein. Ziel war es, ein Preissystem zu schaffen, das unter den durch die Weltwirtschaftskrise gestörten Marktbedingungen den Lebensunterhalt der Produzenten sichert, gleichzeitig aber auch den ärmeren Bevölkerungsschichten den Zugang zu den grundlegenden Lebensnotwendigkeiten ermöglicht. Die soziale Sicherheit, soweit man von ihr in einer Zeit der Wirtschaftskrise sprechen kann, wurde durch eine Kombination von beidem erreicht. Zu diesem Zweck ließ der Staat zu, dass die Preise, die durch die Überproduktion zu stark gedrückt worden waren, durch eine Einschränkung des Wettbewerbs auf dem Markt korrigiert wurden, wobei er das Ausmaß dieser Korrektur streng kontrollierte.

Im nächsten (2.) Abschnitt werde ich versuchen, das erste Element unserer Hypothese, die preisregulierende Rolle des ungarischen Kartellgesetzes von 1931, mit Fakten zu belegen. Vorab ist zu bemerken, dass Károly Dobrovics bereits im Jahr 1938 unter dem Titel „Staatliches Eingreifen in das Wirtschaftsleben“ über die Preisregulierung schrieb.[4] Im Folgenden (Punkt 3) werden wir die Kriterien für die Bestimmung eines noch akzeptablen Preises untersuchen. Dies war das zentrale Element der sozialen Verantwortung, die Festlegung eines realistischen Preises für Produzenten und Verbraucher gleichermaßen. In Abschnitt 4 werden wir dann anhand eines konkreten Falles untersuchen, wie dies in der Praxis erreicht wurde.

2. Das Kartellgesetz von 1931 und die Preisregulierung

Das erste Element unserer Hypothese ist, dass das Kartellgesetz von 1931 eine preisregulierende Funktion hatte. Dies ist bewiesen, wenn die Aktivitäten der Kartelle in erster Linie auf die Beeinflussung der Preise abzielten und die Kartellaufsichtsbehörden diese Aktivitäten kontrollierten.

Die beiden Faktoren verstärken sich im Wesentlichen gegenseitig. Wenn die Tätigkeit der Kartelle von Natur aus auf die Beeinflussung der Preise abzielt, muss die Kontrollstruktur entsprechend aufgebaut und mit entsprechenden Befugnissen ausgestattet sein. Wenn die Organisation und die Befugnisse so beschaffen sind, beweist dies wiederum, dass dies die vorherrschende Tätigkeit der kontrollierten Parteien ist.

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3 Norbert Varga: Between Public and Private Law: The Foundations of the Regulation of the Hungarian Cartel Law of 1931. *Jogtörténeti Szemle* 19, Sonderausgabe, englischsprachig, (2021), 65–71.; Norbert Varga: The Validity of Cartel Agreements in Hungarian Cartel Law in the Period between the Two World Wars with a European Perspective. *Journal on European History of Law* 16, 1. (2025), 162.

4 Dobrovics – Kőházi op. cit. 320–321.

2.1. Die Rolle von Kartellen bei der Preisregulierung

Kartelle können auf verschiedene Weise gruppiert werden, so dass die Anzahl der Arten von den Kriterien für die Gruppierung beeinflusst werden kann.[5] Es kann mehr als zehn Arten geben,[6] von denen die Preisabsprachen (Preiskartelle) nur eine sind.[7] Ihre entscheidende Bedeutung wird jedoch durch die Tatsache veranschaulicht, dass 93 der 135 nationalen Kartelle, die nach dem Inkrafttreten des Gesetzes im Jahr 1931 angemeldet wurden, die Preisfestsetzung als eines ihrer Ziele hatten.[8] Darüber hinaus können die Preise auch durch andere Ziele des Kartells beeinflusst worden sein. So zielte das Rohhautkartell von 1932 auf die Aufteilung des Marktes ab (ein Territorialaufteilungskartell), was ebenfalls eine eigene Art von Kartell darstellt.[9] Die Lederkäufer einigten sich darauf, dass es in einem bestimmten Gebiet nur einen Vorkäufer geben sollte, aber das monopolistische Kartellmitglied nutzte seine Position, um die Preise zu drücken.[10]

Befindet sich ein Unternehmen allein in einer Monopolstellung, reicht die Kartellvereinbarung aus, um eine Marktaufteilung zu erreichen, und es ist keine Preisabsprache erforderlich. Letzteres ist nur dann erforderlich, wenn sich mehrere Unternehmen zu einem Monopol zusammenschließen. Eine neuere Form des Kartells ist das Quote-Kartell, das die Menge der produzierten Ware regelt,[11] die direkt mit der Produktion der Ware zusammenhängt. Ziel ist jedoch auch die Beeinflussung der Preise, so dass häufig beides kombiniert wird und sowohl die Preise als auch die produzierte Menge reguliert werden.[12]

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5 Zoltán Blaskovits: *A kartellek kialakulása és hatása a kapitalista világgazdaságban.* [Die Entstehung und die Auswirkungen von Kartellen in der kapitalistischen Weltwirtschaf]. Debrecen, Magyar nemzeti Könyv- és Lapkiadó Vállalat, 1932. 27–28.

6 Károly Dobrovics und György Takács haben 13 Arten von Kartellen unterschieden. [Károly Dobrovics – György Takács: *A kartelközigazgatás pénzügyi és gazdasági vonatkozásaiban.* [Finanzielle und wirtschaftliche Aspekte der Kartellverwaltung]. Budapest, Hellas, 1939. 75. / 82.].

7 Dobrovics – Takács op. cit. 74.

8 György Kovács: A kartellkérdés gazdaságelméleti és gazdaságpolitikai háttere. [Der wirtschaftstheoretische und wirtschaftspolitische Hintergrund der Kartellfrage]. II. *Versenytükör* 13, különszám [Sonderausgabe] VI. (2017), 27.

9 Dobrovics – Takács op. cit. 75.

10 MNL (Ungarisches Nationalarchiv) K-184. 1932. 41. 51140/53726.

11 Nándor Baumgarten – Artúr Meszlényi: *Kartellek, trustök: keletkezésük – fejlődésük – helyzetük a gazdasági és jogrendben.* [Kartelle, Trusts: ihre Entstehung – ihre Entwicklung – ihre Stellung in der Wirtschafts- und Rechtsordnung]. Budapest, Grill, 1906. 83.; Dobrovics – Takács op. cit. 75.; Mária Homoki-Nagy: Megjegyzések a kartellmagánjog történetéhez. [Anmerkungen zur Geschichte des Kartellprivatrechts]. *Versenytükör* 12, különszám [Sonderausgabe] II. (2016), 45.; Norbert Varga: A kartellszerződések célja a két világháború közötti időszakban Magyarországon. [Der Zweck von Kartellvereinbarungen in der Zeit zwischen den beiden Weltkriegen in Ungarn]. In: Attila Barna – Gábor Bathó – Gergely Deli – Zsuzsanna Peres – Attila Pókecz Kovács (ed.): *Laudator temporis acti. Ünnepi tanulmányok a 65 éves Horváth Attila tiszteletére.* [Festschrift zu Ehren des 65. Geburtstags von Attila Horváth]. Budapest, Ludovika, 2024. 733. https://doi.org/10.36250/01249_71

12 Dobrovics – Takács op. cit. 74.

Betrachtet man die Definition des Begriffs Kartell in der Literatur, so sind Preisfestsetzung und Gewinnoptimierung ständig präsent. Hier sind einige Definitionen als Beispiel: Das Kartell „ (…) dient der Befriedigung der Gewinninteressen der ihm angehörenden Unternehmen (…)“;[13] „Der eigentliche Zweck von Kartellen besteht darin, die Interessen der Kartellmitglieder durch Beeinflussung der Marktpreise zu fördern.“;[14] „(…) Preise bereitzustellen, die im besten Interesse der Kartellmitglieder sind“;[15] „(…) das Ziel ist kurz gesagt: den unternehmerischen Gewinn zu sichern und zu steigern;“[16] „(…) den unternehmerischen Gewinn zu steigern (…) und der einzige Weg, dies zu erreichen, ist die Erhöhung der Preise.“[17]

Daraus lässt sich schließen, dass die überwiegende Mehrheit der Kartelle in Ungarn zur Festsetzung von An- und Verkaufspreisen gebildet wurde.[18]

3.2. Die Rolle der Kartellaufsichtsbehörden bei der Preiskontrolle.

Das Gesetz weitete die staatliche Aufsicht sowohl auf die Gründung als auch auf die Tätigkeit von Kartellen aus. Es machte die Gründung von Kartellen von der Schriftform und der Meldepflicht abhängig[19] und verhängte eine Geldstrafe für die Nichtmeldung.[20] Dies hat auch zu einer Reihe von Streitfällen geführt,[21] die von den ordentlichen

13 Ferenc Harasztosi Király: *A kartel.* [Das Kartell]. Budapest, Grill, 1936. 195.

14 Nándor Ranschburg: *Karteljog, kartelszervezet. A gazdasági versenyt szabályozó megállapodásokról szóló 1931. évi XX-ik törvénycikk (karteltörvény) magyarázatával és végrehajtási rendeletekkel.* [Kartellrecht, Kartellorganisation. Mit Erläuterungen zu XX des Gesetzes von 1931 über Vereinbarungen zur Regelung des wirtschaftlichen Wettbewerbs (Kartellgesetz) und den Durchführungsbestimmungen]. Budapest, Iparjogvédelmi Egyesület, 1931. 26.

15 Ibid.

16 Zoltán Ráth: *Emlékirat a kartellekről.* [Ein Memoir über Kartelle]. Budapest, Pátria, 1900. 43.

17 Blaskovits op. cit. 39.

18 Mária Homoki-Nagy: Kartellszerződések a gyakorlatban. [Kartellvereinbarungen in der Praxis]. *Versenytükör* 13, különszám [Sonderausgabe] VI. (2017), 6–7.

19 §§ 1-2 des Gesetzes XX von 1931.; István Stipta: Az első magyar kartelltörvény (1931. évi XX. tc.) dogmatikai jellemzői. [Dogmatische Merkmale des ersten ungarischen Kartellgesetzes (Gesetz XX von 1931)]. *Forum: Acta Juridica et Politica* 5, 1. (2015), 119–121., Norbert Varga: Adalékok a kartellmegállapodások ügyleti érvényességéhez az 1931. évi kartelltörvény hatálybalépését követően. [Anmerkungen zur Rechtswirksamkeit von Kartellvereinbarungen nach Inkrafttreten des Kartellgesetzes von 1931]. In: Kinga Bódiné Beliznai – Gergely Gosztonyi (ed.): *Jogtörténeti Parerga III: Ünnepi tanulmányok Mezey Barna 70. születésnapja tiszteletére.* [Rechtshistorische Parerga III: Festschrift zu Ehren des 70. Geburtstags von Barna Mezey.]. Budapest, ORAC, 2023. 388.

20 § 14 Abs (1) Punkt 1 des Gesetzes XX von 1931.

21 Norbert Varga: Lawsuits on Cartel Presentation Omission After the 20th Act of 1931 Came into Effect. *Journal on European History of Law* 13, 1. (2022), 149–155.; Norbert Varga: The Cartel Policy in the Cartel Law Special Attention to the First Cartel Act in Hungary. In: Klára Gellén (ed.): *Honori et virtuti: Ünnepi tanulmányok Bobvos Pál 65. születésnapjára*. [Honori et virtuti: Festschrift zu Ehren des 65. Geburtstags von Pál Bobvos]. Szeged, Iurisperitus, 2017. 464–465.; Norbert Varga: Bírságolási eljárási szabályok kartellügyekben az 1931. évi XX. tc. hatálybalépését követően. [Verfahrensordnung für Geldbußen in Kartellsachen nach dem Inkrafttreten des Gesetzes XX von 1931]. *Versenytükör* 13, különszám [Sonderausgabe] VI. (2017), 46–56.; Norbert Varga: Kartelljog a gyakorlatban: a

Gerichten entschieden wurden,[22] hauptsächlich auf Initiative der Rechtsdirektion des Fiskus. [23] Die Preiskontrolle hatte jedoch nur am Rande mit der Bildung von Kartellen zu tun, sondern eher mit der Überwachung ihrer Funktionsweise. Wie in Abschnitt 3 näher erläutert wird, konnten die Kartellaufseher in den Markt eingreifen, wenn ein Kartell die Produktion, den Umsatz oder die Preisbildung einer Ware zum Nachteil anderer in einer Weise beeinflusste, die nicht durch die wirtschaftliche Lage bedingt war. [24] In diesem Fall kann der Minister um Informationen bitten, Schlichtungsgespräche einleiten, der Regierung vorschlagen, Vorzüge zu entziehen, beim Kartellgericht einstweilige Maßnahmen beantragen oder als letztes Mittel eine Klage im öffentlichen Interesse beim Kartellgericht einreichen.[25] Das Kartellgericht ist ein bei der Kurie angesiedeltes Rechtsprechungsorgan,[26] das nach einer Klage im öffentlichen Interesse die schwersten Sanktionen verhängen kann. Es konnte entweder das Kartell auflösen oder eine Geldbuße verhängen und das Unternehmen zu einem bestimmten Verhalten zwingen. [27]

bemutatási kötelezettség elmulasztása miatt indított eljárás. [Kartellrecht in der Praxis: Verfahren wegen der Nichterfüllung der Vorführungspflicht eingeleitet]. In: Gergely Gosztonyi G. – Mihály T. Révész (ed.): *Jogtörténeti Parerga II: Ünnepi tanulmányok Mezey Barna 65. születésnapja tiszteletére*. [Rechtshistorische Parerga II: Festschrift zu Ehren des 65. Geburtstags von Barna Mezey]. Budapest, Osiris, 2018. 283–289.; Norbert Varga: A bemutatási kötelezettség, mint a kartellszerződések érvényességi kelléke az 1931: XX. tc. hatálybalépését követően. [Die Vorlagepflicht als Voraussetzung für die Gültigkeit von Kartellverträgen nach dem Inkrafttreten des Gesetzes XX von 1931]. *Jogtörténeti Szemle* 21, 2. (2023), 56–58. https://doi.org/10.55051/JTSZ2023-2p53

22 § 15 Abs (1) Punkt 1 des Gesetzes XX von 1931.; Norbert Varga: A törvényszéki eljárás megindítása kartellügyekben az 1931. évi XX. tc. hatálybalépését követően. [Die Einleitung von landesgerichtlichen Verfahren in Kartellfällen nach dem Inkrafttreten des Gesetzes XX von 1931]. *Jogtörténeti Szemle* 18, 4. (2020), 38–44.; Norbert Varga: A rendes bíróságok gyakorlata kartellügyekben a két világháború között. [Die Praxis der ordentlichen Gerichte in Kartellsachen zwischen den beiden Weltkriegen]. In: Nadja El Beheiri – István Szabó: *Viginti quinque annis II., Emlékkonferencia Zlinszky János tiszteletére, a PPKE JÁK 25. tanévében*. [Viginti quinque annis II., Gedenkkonferenz zu Ehren von János Zlinszky, 25. Studienjahr der Juristischen Fakultät der Katholische Universität Péter Pázmány]. Budapest, Pázmány Press, 2020. 463–480.

23 Norbert Varga: The Practice of Supervisory Rights in Hungarian Cartel Law with Special Attention to the Duties of the Minister and the Legal Director. *Krakowskie Studia z Historii Państwa i Prawa* 15, 3. (2022), 401–412. https://doi.org/10.4467/20844131KS.22.027.16175

24 § 6 Abs (1) des Gesetzes XX von 1931.

25 § 6 des Gesetzes XX von 1931.; Norbert Varga: The Procedure and Operation of the Cartel Court. In: Klára Gellén – Márta Görög: *Lege et fide, Ünnepi tanulmányok Szabó Imre 65. születésnapjára.* [Lege et fide, Festschrift zu Ehren des 65. Geburtstags von Imre Szabó]. Szeged, Pólay Elemér Alapítvány, Iurisperitus, 2016. 663–664.; Norbert Varga: Kartel-eljárásjog szabályozása és gyakorlata, különös tekintettel a Kartelbíróság működésére. [Regulierung und Praxis des Kartellverfahrensrechts, insbesondere in Bezug auf die Funktionsweise des Kartellgerichts]. *Versenytükör* 12, különszám [Sonderausgabe] II. (2016), 86–90.; Norbert Varga: Közérdekű per a kartelljogban. [Gerichtsverfahren im öffentlichen Interesse im Kartellrecht]. *Jogtörténeti Szemle* 16, 3–4. (2018), 37–45.

26 § 8 des Gesetzes XX von 1931.

27 § 7 des Gesetzes XX von 1931.

Die wichtigste Rolle spielte jedoch der 11-köpfige Kartellausschuss, der aus Praktikern und Akademikern bestand.[28] Sein Vorsitzender und sein stellvertretender Vorsitzender wurden vom Staatsoberhaupt ernannt, die neun Mitglieder vom Wirtschaftsminister und vom Minister für Soziales und Arbeit. Obwohl der Kartellausschuss nur beratende Funktion hatte, wurde er mehrfach von den Gerichten, die über Entscheidungsbefugnisse verfügten, und vom Wirtschaftsminister konsultiert. Die Sachentscheidungen wurden auf der Grundlage dieser Stellungnahmen getroffen. In einer Reihe von Fällen haben die Kartelle ihre Vorgehensweise geändert, um der Stellungnahme des Ausschusses Rechnung zu tragen, was zu einer Beilegung des Falles in der Schlichtungsphase geführt hat. Ein Beispiel hierfür ist das Bäckereikartell, auf das in Abschnitt 4 näher eingegangen wird.

Die Einzelheiten der Organisation und der Arbeitsweise des Kartellausschusses wurden durch eine Regierungsverordnung vom Oktober 1931[29] auf der Grundlage der gesetzlichen Ermächtigung festgelegt. Im Januar 1933 ergänzte die Regierung diese Verordnung durch die Einsetzung eines neuen Gremiums, des Preisanalyseausschusses, der den Kartellausschuss bei seiner Arbeit unterstützen sollte.[30] Wie sich jedoch bald herausstellen wird, bestand der Ausschuss bereits 1932, so dass der Erlass lediglich seine Existenz bestätigte.

Die herausragende Rolle der Preisanalyse wird durch archivarische Quellen belegt. In den erhaltenen Protokollen der Sitzungen des Kartellausschusses gibt es kaum einen Fall, in dem die Preisbegründung für das untersuchte Kartell nicht geprüft wurde. In den erhaltenen Unterlagen der Sitzung vom 13. Juni 1932 ist die Überprüfung des Mineralölkartells und des oben erwähnten Rohrleder-Kartells festgehalten. In beiden Fällen stand die Überprüfung der Preise im Mittelpunkt.[31] In der Sitzung vom 7. Juli 1932 stand das Pestizidkartell auf der Tagesordnung, begleitet von einer 20-seitigen detaillierten Preisanalyse,[32] und in der Sitzung vom 12. August 1932 wurde auch das Kohlekartell unter dem Aspekt der Preisbildung erörtert.[33] In der Zusammenfassung der Arbeiten des Ausschusses für Preisanalyse im Jahr 1932 wird die Untersuchung der Preise für Mineralöl, Eisen, Auto- und Maschinenschmierstoffe, Schulbücher, Leinöl, Schädlingsbekämpfungsmittel, Leder, Mehl, Brot, Kohle, Baustoffe (Ziegel, Zement, Kalk usw.), Glas, Textilien und Sauerstoff erwähnt bzw. ausführlicher dargestellt.[34]

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28 § 5 des Gesetzes XX von 1931.; Harasztosi Király op. cit. 522–524.; Norbert Varga: A Special Professional Authority of Cartel Supervision in Hungary: The Cartel Committee. *Journal on European History of Law* 13, 2. (2022), 121–128.

29 Regierungsverordnung Nr. 5382/1931.

30 §§ 1-5. der Regierungsverordnung Nr. 1200/1933.; Harasztosi Király op. cit. 525–527.; Norbert Varga: The European Roots of Hungarian Regulation of the Cartels Special Attention to the Foundation of Cartel Supervisory Public Authorities. *Journal on European History of Law* 11, 2. (2020), 115.; Norbert Varga: Regulation and Practice of Hungarian Cartel Law in the 20th Century. *Athens Journal of Law* 5, 2. (2019), 99. https://doi.org/10.30958/ajl.5-2-1

31 MNL (Ungarisches Nationalarchiv) K-184. 1932. 41. 51140/53726.

32 MNL (Ungarisches Nationalarchiv) K-184. 1932. 41. 51140/66312.

33 MNL (Ungarisches Nationalarchiv) K-184. 1932. 41. 51140/88831.

34 MNL (Ungarisches Nationalarchiv) K-184. 1932. 41. 51140/66482.

3. Kriterien für die Festlegung eines akzeptablen Preises

Das zweite Element unserer Hypothese bezog sich auf die Kriterien für die Preisregulierung, die die Kartellaufsichtsbehörden bei der Festlegung des akzeptablen Preisniveaus anwenden mussten. Wie bereits erwähnt, war dies ein zentrales Element der sozialen Verantwortung, ein Preisniveau festzulegen, das den Erzeugern einen angemessenen Lebensunterhalt sichert und gleichzeitig der Öffentlichkeit, die ihre Produkte kauft, den Zugang zu den grundlegenden Lebensbedürfnissen ermöglicht.

Nach dem Gesetz mussten Kartelle jede Markttätigkeit unterlassen, die „[...] das öffentliche Interesse gefährdet, insbesondere wenn sie die Erzeugung, den Umsatz oder die Preisbildung von Waren zum Nachteil der Verbraucher oder Erzeuger oder der Gewerbetreibenden oder sonstigen Unternehmer in einer Weise regelt, die durch die wirtschaftliche Lage nicht gerechtfertigt ist“.[35]

Das Gesetz legte als allgemeinen moralischen Maßstab den Dienst am Gemeinwohl fest, dem es später den Schutz des öffentlichen Interesses hinzufügte.[36] Das öffentliche Wohl und das öffentliche Interesse wurden zu zwei wichtigen Grundsätzen für die Kontrolle von Kartellen.[37] Das Gesetz formulierte dann den eklatantesten Fall ihres Verstoßes, nämlich die Beeinflussung der Produktion, des Umsatzes oder der Preisbildung von Gütern, aber nur, wenn dies zu einem Nachteil für andere führte und nicht durch die wirtschaftliche Lage gerechtfertigt werden konnte. Die beiden letztgenannten Bedingungen waren zudem kumulativ, d.h. es war auch die Verursachung eines Schadens bei einem anderen erlaubt, wenn sie durch die wirtschaftliche Lage gerechtfertigt werden konnte.

Wenn auf einem Wettbewerbsmarkt jemand einen Vorteil erlangt, wird er wahrscheinlich einen Nachteil (Schaden) für den Konkurrenten verursachen. Dies liegt in der Natur des Wettbewerbs und schadet daher nicht dem öffentlichen Wohl oder dem öffentlichen Interesse. Im Wirtschaftsleben (in Bezug auf Konkurrenten) waren die Grenzen der guten Sitten ebenfalls freizügiger als in der allgemeinen öffentlichen Wahrnehmung.[38] Letztere betrachtete jede Form der Schädigung einer anderen Person als sittenwidrig, während es für wirtschaftliche Wettbewerber eine tolerierbare Grenze

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[35] § 6 Abs (1) des Gesetzes XX von 1931.

[36] § 10 Abs (1) des Gesetzes XX von 1931.

[37] Norbert Varga: The Research of Hungarian Cartel Supervision. *Journal on European History of Law* 11, 2. (2020), 211.; Varga (2025) op. cit. 162.

[38] Bence Krusóczki: The First Hungarian Competition Act in the Judicial Practice. *Journal on European History of Law* 14, 1. (2023), 173.; Bence Krusóczki: A Budapesti Kereskedelmi és Iparkamara szerepe a tisztességtelen versenycselekmények kapcsán. [Die Rolle der Industrie- und Handelskammer Budapest bei unlauterem Wettbewerb]. *Forum: Publicationes Discipulorum Iurisprudentiae* 2, 1. (2019), 198.; Bence Krusóczki: A tisztességtelen verseny a Szegedi Királyi Ítélőtábla joggyakorlatában. [Unlauterer Wettbewerb in der Rechtsprechung des Königlichen Oberlandesgerichts von Szeged]. *Forum: Publicationes Discipulorum Iurisprudentiae* 1, 1. (2018), 253–254.; Bence Krusóczki: Magánjogi oltalom vagy tételes versenytörvény – Az 1923. évi V. törvénycikk megalkotásának körülményei. [Privatrechtlicher Schutz oder spezifisches Wettbewerbsrecht – Die Umstände der Schaffung von V des Gesetzes 1923]. *Forum: Publicationes Doctorandorum Juridicorum* 10, 1. (2020), 95–96.; Bence Krusóczki: A jóerkölcs magánjogi megítélése a tisztességtelen verseny vonatkozásában.

gab. Das Kartell überschritt die verbotene Grenze nur, wenn der Markt über das wirtschaftlich vertretbare Maß hinaus beeinflusst wurde. Dies ist zum Schlüssel für die Kontrolle von Kartellen geworden: Beeinflussung des Marktwettbewerbs in einem Ausmaß, das durch die wirtschaftliche Lage noch gerechtfertigt ist.

Wie bereits erwähnt, hat die durch die Überproduktion verursachte Wirtschaftskrise zu einem Markteinbruch geführt, bei dem die Preise weit unter das gerechtfertigte Niveau gefallen sind. Soweit das Kartell dies korrigierte, also lediglich den durch die Wirtschaftskrise verursachten ungerechtfertigten Preisverfall ausglich, handelte es sich um einen Eingriff in den Wettbewerb, der noch durch die wirtschaftliche Lage gerechtfertigt werden konnte. Ging es darüber hinaus, handelte es sich um ungerechtfertigte Gewinnerzielung, die verboten war.

Die Preise setzten sich aus drei Hauptbestandteilen zusammen: den Rohstoffkosten, den Nebenkosten und dem Gewinn.[39] Ziel der staatlichen Kontrolle war es, sittenwidrige Geschäftemacherei zu verhindern, d. h. den dritten Bestandteil (Gewinn) unter Kontrolle zu halten. Die Ermittlung der ersten beiden Posten war jedoch keine leichte Aufgabe, und wenn ein Kartell entweder die Rohstoffkosten oder die Nebenkosten oder sogar beide höher ansetzte als gerechtfertigt, erzielte es einen verdeckten Gewinn. Dies stellte der Kartellausschuss zum Beispiel im Fall des Pestizidkartells fest. Die Fabriken produzierten nicht mit gleicher Effizienz, aber die Produktion einer Fabrik hätte ausgereicht, um den Markt zu versorgen. Hier diente das Kartell lediglich dazu, die Preise hoch zu halten, indem es die Kosten der weniger effizienten Fabrik anführte. Im Falle des fraglichen Kartells kamen zu den Einwänden gegen die Preisbildung noch die hohen Kosten für die Werbung hinzu. Wozu braucht man Werbung, wenn es keinen Wettbewerb auf dem Markt gibt?[40]

Im nächsten Abschnitt werden wir das Preiskontrollsystem anhand eines konkreten Falles im Detail betrachten.

4. Ein konkretes Beispiel für die Funktion der Preisregulierung (Bäckereikartell)

In den archivierten Quellen der Kartellkommission gibt das Ermittlungsmaterial zum Bäckerkartell, das sich auf die Hauptstadt und ihre Umgebung erstreckt, einen breiten Einblick in das von uns behandelte Thema. Für die Zwecke dieses Abschnitts werden wir uns auf diese Quelle stützen.[41]

[Privatrechtliche Beurteilung von guter Sitte im Zusammenhang mit unlauterem Wettbewerb]. *Jogtörténeti Szemle* 21, 2. (2023), 79. https://doi.org/10.55051/JTSZ2023-2p78

39 Dobrovics – Kőházi op. cit. 323.

40 MNL (Ungarisches Nationalarchiv) K-184. 1932. 41. 51140/66312.

41 MNL (Ungarisches Nationalarchiv) K-184. 1934. 41. 28720/71729; MNL (Ungarisches Nationalarchiv) K-184. 1934. 41. 26180/71732.

4.1. Gründung des Kartells

Das Kartell wurde am 25. Januar 1934 gegründet und am 8. Februar angemeldet. Das Ministerium informierte den Kartellausschuss, der sich jedoch nicht mit der Angelegenheit befasste, da der Preisanalyseausschuss die Entwicklung der Brotpreise ständig beobachtete. Die Untersuchung wurde im Herbst 1934 aufgrund einer Beschwerde eines Einzelhändlers (ein Wiederverkäufer) eingeleitet.

Das Kartell erstreckte sich auf Budapest und Umgebung, wo es eine Monopolstellung innehatte. Die Organisation hatte etwa 600 Mitglieder und wurde vom Kartellausschuss als eine Kombination aus Preis-, Konditions- und Käuferschutzkartell beschrieben. Letzteres (Käuferschutz) kann etwas irreführend sein, da es nicht dem Schutz der Kunden diente. In Wirklichkeit handelte es sich um eine Aufteilung der Kunden zwischen den Kartellmitgliedern, die den Interessen der letzteren diente, indem sie einen stabilen Kundenstamm sicherte. Außerdem wurde den Kunden die Möglichkeit genommen, bei anderen Kartellmitgliedern zu kaufen.

Betrachtet man die damaligen Bevölkerungszahlen, so lag die Zahl der Kartellkunden zwischen 1 und 1,5 Millionen. Der Gartenausschuss schätzte, dass die Kartellmitglieder 1.000 Waggons (10.000 Tonnen) Mehl pro Monat verbrauchten und dabei ein ordentliches Betriebseinkommen von etwa 20.000 Pengő pro Monat erzielten. Darin nicht enthalten ist die Höhe der Geldbußen, die den Kartellmitgliedern in Form von Strafgeldern auferlegt wurden.

4.2. Die Aktivitäten des Kartells zur Beeinflussung des Wettbewerbs

Zu den erhaltenen Archivmaterialien gehört auch der Kartellvertrag zur Gründung der Gruppe – betitelt als „Bäcker-Industrieschutzvereinbarung“ [im Folgenden: Vereinbarung] – aus dem sich die wettbewerbsbeschränkenden Maßnahmen gut rekonstruieren lassen.[42]

Der Zweck des Kartells wurde wie folgt definiert: „Ziel des Übereinkommens ist es, unter strikter Wahrung der Interessen des Allgemeinwohls und der gesetzlichen Bestimmungen eine Verschlechterung des Wettbewerbs zwischen den Mitgliedern des Bäckerhandwerks zu verhindern und dadurch eine Verschlechterung des Gewerbes zu verhindern und eine angemessene Lebenshaltung des Gewerbes zu gewährleisten“.[43] Die Vereinbarung entspreche im Grundsatz voll und ganz den Anforderungen des Kartellgesetzes, wie unter Punkt 3 ausgeführt.

Die erwähnten monatlichen Einnahmen von rund 20.000 Pengő boten die Möglichkeit, eine Organisation von beträchtlicher Größe und mit klar umrissenen Aufgaben aufzubauen. Die wichtigsten Befugnisse wurden von der Generalversammlung ausgeübt,[44] und die operative Leitung des Kartells wurde einem Vorstand und einem

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42 MNL (Ungarisches Nationalarchiv) K-184. 1934. 41. 26180/71732.

43 Vereinbarung §1.

44 Vereinbarung § 18.

von der Generalversammlung gewählten Großausschuss versorgt.[45] Die Organisation ähnelte der Struktur einer Aktiengesellschaft. Der Großausschuss musste weitere Ausschüsse einrichten, darunter einen Preisfestsetzungsausschuss, der für unser Thema von Bedeutung ist. Zur Beilegung interner Streitigkeiten organisierten die Kartelle in der Regel ein Schiedsgericht, wie dies auch beim Bäckerkartell der Fall war.[46] Die Ernennung der Mitglieder des Schiedsgerichts war Sache der Generalversammlung.

Die Preisfestsetzung war die zentrale Aufgabe des Kartells, wurde aber, wie damals üblich,[47] die Preise nicht in der Kartellvereinbarung festgehalten. Es wurde, wie bereits erwähnt, ein Preisfestsetzungsausschuss eingesetzt, der die Preise stets an die aktuelle Situation anpasste. Die Kartellmitglieder waren verpflichtet, mit den Wiederverkäufern Verträge abzuschließen, die es ihnen ermöglichten, die Preise laufend anzupassen.[48]

Um die vom Kartell diktierten Preise zu garantieren, wurde ein strenges System zur Bekämpfung des Wettbewerbs geschaffen. Eine wichtige Voraussetzung für eine wirksame Preiskontrolle war die Standardisierung der Produktpalette. Das Kartell definierte genau die Zusammensetzung, das Gewicht und die Bezeichnung der herzustellenden Produkte[49] und setzte die Mindestpreise entsprechend fest. Auch die Zahlungsbedingungen waren standardisiert, mit einer Frist von einem Tag und ausschließlich Barzahlung.[50] Die Kartellmitglieder durften keine Rabatte gewähren oder die beim Wiederverkäufer verbleibenden Produkte in irgendeiner Weise zurückkaufen.[51] Geregelt war auch, inwieweit ein Kartellmitglied ein neues Geschäft in der Nähe des Geschäfts eines anderen Mitglieds eröffnen durfte.[52]

Um ihre Ziele wirksam durchzusetzen, haben viele Kartelle auch versucht, ihren verbundenen Unternehmen Regeln aufzuerlegen.[53] So hat das Bäckereikartell auch die Preise festgelegt, zu denen Wiederverkäufer, die bei ihm einkaufen, ihre Produkte an die Verbraucher weiterverkaufen können.[54] Der oben erwähnte Käuferschutz diente dazu, die Wiederverkäufer unter den Kartellmitgliedern aufzuteilen, wobei jedes

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45 Vereinbarung §§ 5–16.

46 Norbert Varga: A kartellszerződések választott bírósági eljárásra vonatkozó rendelkezései a polgári korban. [Die Bestimmungen der Kartellverträge über Schiedsgerichtsverfahren in der bürgerlichen Zeit]. In: Béla Szabó – Emese Újvári: *Risus cum lacrimis: Könyv Babják Ildikó emlékére (tanulmányok, baráti írások).* [Risus cum lacrimis: Buch zum Gedenken an Ildikó Babják (Studien, Schriften von Freunden)]. Debrecen, Debreceni Egyetem Marton Géza Állam- és Jogtudományi Doktori Iskola, Lícium-Art, 2017. 284–285.; Norbert Varga: Provisions on Arbitration Proceedings Set Down in Cartel Agreements Based on the First Hungarian Cartel Act. *Athens Journal of Law* 7, 1. (2021), 56–57.

47 Norbert Varga: Egy kartellszerződés lényeges elemei egy konkrét példa alapján. [Die wesentlichen Elemente einer Kartellvereinbarung anhand eines konkreten Beispiels]. In: Nándor Birher – Péter Miskolczi-Bodnár – Péter Nagy P. – J. Zoltán Tóth: *Studia In Honorem István Stipta 70.* Budapest, Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar, 2022. [Varga (2022a)] 507.

48 Vereinbarung § 61.

49 Vereinbarung § 47.

50 Vereinbarung § 58.

51 Vereinbarung §§ 57., 62.

52 Vereinbarung § 81.

53 Varga (2022a) op. cit. 507.

54 Vereinbarung § 48.

Geschäft nur bei den vom Kartell benannten Bäckern kaufen durfte.[55] Dadurch wurde dem Kartellmitglied ein garantierter Umsatz gesichert. Die Vereinheitlichung der Einzelhandelspreise war wichtig, weil durch die Anwendung unterschiedlicher Spannen der Umsatz der Wiederverkäufer nicht vorhersehbar war, so dass die Aufteilung der Kunden keine Umsatzgarantie geboten hätte. Der Ausschluss von Rabatten für Wiederverkäufer und die Vereinheitlichung der Zahlungsbedingungen sollten die Nachhaltigkeit des Käuferschutzes gewährleisten. Wenn Wiederverkäufer in großer Zahl einen Anbieterwechsel beantragen, ist das System schwer aufrechtzuerhalten. Dies wird durch die Tatsache veranschaulicht, dass die Kartellvereinbarung dem Wiederverkäufer die Möglichkeit einräumte, eine Neueinstufung zu einem anderen Anbieter zu beantragen. Wurde dem Antrag stattgegeben, war der neue Lieferant jedoch verpflichtet, 5% des Bruttowertes seines Umsatzes mit diesem Wiederverkäufer für ein Jahr an das ursprünglich benannte Kartellmitglied abzuführen.[56]

Da die Kartellvereinbarung Verpflichtungen für Personen sowohl innerhalb als auch außerhalb des Kartells vorsah, war auch das Sanktionssystem zur Durchsetzung der Einhaltung dieser Verpflichtungen zweifach. Das Kartell wurde durch einen Vertrag gegründet, so dass die Kartellmitglieder mit den üblichen Sanktionen für Vertragsbruch belegt werden konnten, was in diesem Fall eine Vertragsstrafe war. Die Standardstrafe (wenn im Übereinkommen kein bestimmter Betrag für den Verstoß gegen die betreffende Vorschrift festgelegt war) betrug 300 Pengő. Für Verstöße gegen Mindestpreise gab es eine gesonderte Strafe von bis zu 1000 Pengő und für Verstöße gegen die Ladenöffnungsvorschriften bis zu 5000 Pengő.[57] Personen, die nicht dem Kartell angehörten, wurden mit einem Lieferstopp bestraft.[58] Da das Kartell eine Monopolstellung innehatte, bedeutete dies den Ausschluss des Einzelhändlers vom Vertrieb von Backwaren. Diese in der Literatur als Boykott bezeichnete Einrichtung war eine sehr harte Sanktion, da sie zur völligen wirtschaftlichen Unmöglichkeit führen konnte.[59] Es ist kein Zufall, dass sich der Kartellausschuss eingehend damit befasst hat.[60]

4.3. Gegenstand und Ergebnis des Kartellaufsichtsverfahrens

Wie wir gesehen haben, war das Hauptziel des Bäckerkartells bei der Beeinflussung des Wettbewerbs die Festlegung der Verkaufspreise, und alle anderen Formen der

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55 Vereinbarung §§ 61–68.

56 Vereinbarung § 72.

57 Vereinbarung §§ 95., 54., 81.

58 Vereinbarung §§ 49., 58.

59 Izsó Szegő: *A tisztességtelen verseny.* [Unlauterer Wettbewerb]. *Az 1923. évi V. és az 1933. évi XVII. tc. magyarázata.* [Erläuterung zu den Gesetzen V von 1923 und XVII von 1933]. Budapest, a szerző saját kiadása [Selbstverlag des Autors], 1936. 109–111.; Ödön Kuncz: A kartell, mint jogi probléma. [Das Kertell als rechtliches Problem]. *Közgazdasági Szemle* 71, 1. (1928), 12–14.; Norbert Varga: *A kartellfelügyelet bevezetése Magyarországon.* [Die Einführung der Kartellaufsicht in Ungarn]. Szeged, Iurisperitus, 2020. 55–61.

60 MNL (Ungarisches Nationalarchiv) K-184. 1933. 41. 31960/92488.

Zusammenarbeit dienten diesem Zweck. Die Untersuchung des Kartellausschusses konzentrierte sich auch auf die Rechtfertigung der Preise, so dass der inhaltliche Teil des Berichts vom Preisanalyseausschuss erstellt wurde. Dessen Empfehlung beschränkte sich auf die Festsetzung des Brötchenpreises auf 5 Fillér. Dieser wurde vom Kartell, wie empfohlen, auf 4,5 Fillér gesenkt. Vor der Gründung des Kartells lag der Preis für ein Brötchen bei 3,5 Fillér.

Die Produktliste des Kartells umfasste auch ein billiges Schwarzbrot für 22 Fillér, das für die ärmeren Bevölkerungsschichten bestimmt war. In dem Bericht des Kartellausschusses an den Minister wurde vorgeschlagen, das Angebot dieser billigen Backwaren zu erweitern, was aber in der Praxis nicht erwartet wurde. Normale Marktbedingungen könnten aufrechterhalten werden, wenn Verbraucher, die es sich leisten können, qualitativ bessere, aber teurere Produkte kaufen. Eine Ausweitung des Angebots an billigeren Produkten und eine zu starke Erhöhung ihres Umsatzanteils hätte zu einer Störung des Systems führen können.

Im Bericht des Kartellausschusses ist von der geplanten Schließung von 60-70 Bäckereien die Rede. Das Kartell kalkulierte, dass durch die Schließung dieser Betriebe die für den Verbrauch erforderliche normale Produktionskapazität geschaffen würde. Dies deutet auch darauf hin, dass die festgesetzten Preise tatsächlich dem für einen rentablen Betrieb erforderlichen Niveau entsprachen, denn selbst bei diesem Preisniveau konnten nicht alle Kartellmitglieder überleben.

Wie wir in Abschnitt 3 gesehen haben, ermöglichte die unterschiedliche Produktionseffizienz der Kartellmitglieder auch Missbräuche bei der Preisfestsetzung. Mit unterschiedlichen Produktionseffizienzen bei einheitlichen Preisen erzielten die Kartellmitglieder unterschiedliche Gewinne, welches Effizienzniveau sollte also für die Preisfestsetzung maßgeblich sein? Die Lösung des Bäckerkartells, die zur Versorgung des Marktes notwendige Produktionskapazität aufrechtzuerhalten, war eine vertretbare Lösung, die nach dem Wortlaut des Gesetzes durch die wirtschaftliche Lage gerechtfertigt werden konnte. Eine Anpassung der Preise an die Kosten des am teuersten produzierenden Kartellmitglieds wäre eine ungerechtfertigte Gewinnerzielung gewesen. Wie wir unter Punkt 3 gesehen haben, hat der Kartellausschuss dies z.B. beim Pestizidkartell festgestellt.

Es lohnt sich auch, die vom Bäckerkartell festgesetzten Preise mit dem Preisniveau vor der Wirtschaftskrise zu vergleichen. Nach Angaben des Ungarischen Statistischen Zentralamtes betrug 1929 der Preis für ein Brötchen in Budapest 5 Fillér,[61] und das Kartell plante, denselben Preis einzuführen. Wie wir jedoch gesehen haben, wurde selbst dieser Preis auf Empfehlung des Kartellausschusses um 10% gesenkt. Diese Zahl zeigt auch, dass die Preisgestaltung des Kartells darauf abzielte, die durch die gestörten Marktbedingungen verursachte Preissenkung zu korrigieren, und nicht darauf, einen unangemessen hohen Gewinn zu erzielen.

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[61] *Magyar Statisztikai Évkönyv 1929.* [Ungarisches Statistisches Jahrbuch 1929]. Budapest, Athenaeum, 1930. 123.

4.4. Andere Indikatoren für das Maß an Wettbewerbsbeschränkung, das noch akzeptabel ist

Die von den Kartellbehörden durchgeführte Preisanalyse ergab, dass das vom Bäckereikartell festgelegte Preisniveau durch die wirtschaftliche Lage gerechtfertigt ist. Die Preiserhöhungen gingen nicht über das Niveau hinaus, das durch den ungerechtfertigten, durch die Wirtschaftskrise verursachten Preisverfall verursacht wurde.

Es gibt aber noch andere Indikatoren als die Preisanalyse, die zeigen, dass der Grad der Wettbewerbsbeschränkung noch akzeptabel ist. Die Erwartung des Gesetzes war, dass der durch Preiserhöhungen erzielte Gewinn das Niveau nicht überschreiten sollte, das den Erzeugern einen angemessenen Lebensstandard sichert. Im Folgenden werden wir zwei dieser anderen Indikatoren im Zusammenhang mit dem Bäckereikartell betrachten, die natürlich auch bei vielen anderen Kartellen bestanden haben können.

4.4.1. Beziehungen zu Unternehmen außerhalb des Kartells

Ein solcher anderer Indikator ist die Beziehung zu Unternehmen außerhalb des Kartells. In dem oben erwähnten Tierhäutekartell zahlte das monopolistische Unternehmen beispielsweise ehemaligen Wettbewerbern eine monatliche Ausstiegsgebühr zwischen 400 und 1 000 Pengő.[62] Dies machte das Kartell von Anfang an verdächtig, da diese Ausstiegsgebühren höchstwahrscheinlich in den Preisen enthalten waren. Auch die von den Aufsichtsstellen durchgeführte Preisanalyse ergab eine erhebliche Preisverzerrung.[63] Das Kartell hat mit seinem Ausschlussverhalten bezweckt, den Wettbewerb auf dem Markt stärker einzuschränken, als es durch die wirtschaftliche Lage gerechtfertigt ist, weil es einen deutlich höheren Gewinn erzielen wollte, als das Kartell mit einem angemessenen Lebensunterhalt erzielen konnte. Wenn daneben ein Unternehmen tätig ist, das nur einen angemessenen Gewinn anstrebt, wird die Öffentlichkeit bei diesem Unternehmen kaufen, und das Kartell wird nicht in der Lage sein, den zusätzlichen Gewinn zu beanspruchen. Um dies zu erreichen, müssten Unternehmen, die noch einen Preis verlangen, der durch die wirtschaftliche Lage gerechtfertigt ist, auf irgendeine Weise vom Markt verdrängt werden. Dies kann natürlich nicht nur durch positive „Anreize“ geschehen, sondern auch dadurch, dass man sie daran hindert, dies zu tun.

Wenn ein Kartell Unternehmen, die nicht zu ihm gehören, nicht einschränken will, kann man daraus schließen, dass es keine Angst vor dem Wettbewerb auf dem Markt hat, keine Angst davor, dass jemand seine Produkte zu einem niedrigeren Preis als dem von ihm festgelegten Preis verkauft. Eine solche Situation entsteht, wenn ein niedrigerer

[62] MNL (Ungarisches Nationalarchiv) K-184. 1932. 41. 51140/53726.

[63] Das Kartell hat die Aufkaufpreise nicht nur erhöht, sondern gesenkt. Der Preis für Kalbfell pro Kilogramm wurde von 1 Pengő 40 Filler zunächst auf 80 Filler und dann auf 35–40 Filler gesenkt. Der Preis für die daraus hergestellten Schuhoberteile hingegen wurde vom Kartell um 58% erhöht. [MNL (Ungarisches Nationalarchiv) K-184. 1932. 41. 51140/53726].

Preis für ein Unternehmen nicht mehr rentabel ist. Was das Backwarenkartell betrifft, so enthält der Bericht der Kommission keinen Hinweis darauf, dass das Kartell versucht hat, Unternehmen außerhalb des Kartells einzuschränken. Die Tatsache, dass das Backwarenkartell nicht versucht hat, Unternehmen außerhalb des Kartells an der Tätigkeit zu hindern, zeigt, dass eine Bäckerei zu Preisen, die unter den vom Kartell festgesetzten liegen, nicht rentabel betrieben werden konnte.

4.4.2. Pauschalbeträge, die wegen der Umbildung des Kundenstamms zu zahlen sind

Wir haben bereits erwähnt, dass das Kartell im Bereich des Käuferschutzes die Wiederverkäufer unter seinen Mitgliedern aufgeteilt hat. Jedem von ihnen wurde festgelegt, bei welchem Kartellmitglied er einkaufen musste, und den anderen Mitgliedern war es untersagt, Waren an andere als die festgelegten Kunden zu liefern. Die Wiederverkäufer durften jedoch das Kartell bitten, einen anderen Lieferanten zu benennen. Das Kartell versuchte, dies zu verhindern, indem es den neuen Lieferanten verpflichtete, dem alten Lieferanten ein Jahr lang einen Pauschalbetrag zu zahlen, wenn der Wiederverkäufer einem anderen Kartellmitglied zugewiesen wurde. Auf diese Weise hatten die Kartellmitglieder kein Interesse daran, Kunden, die einem anderen Mitglied zugewiesen wurden, zu Ihnen zu locken und damit die bestehende Marktaufteilung zu stören.

Interessant ist für uns der Umfang dieser Pauschalbetrag. Inwieweit war das Kartellmitglied bereits nicht mehr daran interessiert, Kunden der anderen Gruppe zu gewinnen. Wie Sie sich erinnern werden, betrug die Höhe des für ein Jahr zu zahlenden Aufschlags 5 % des Wertes der an den vom anderen Kartellmitglied übernommenen Kunden gelieferten Waren. Wenn einem Kartellmitglied 5 % die Einnahme entzogen wurden, war es nicht mehr daran interessiert, einen Kunden zu übernehmen. Daraus lässt sich schließen, dass dies der Gewinnsatz war; wenn dieser wegfiel, war es nicht mehr rentabel zu produzieren. Und die 5 % Gewinn überstiegen mit Sicherheit nicht das, was für den Produzenten notwendig war, um seinen Lebensunterhalt zu bestreiten.

5. Zum Schluss

Gemäß unserer einleitenden Hypothese hat das Parlament mit dem Kartellgesetz von 1931 eine staatliche Preisregulierung eingeführt. Ich hoffe, dass dies in Abschnitt 2 anhand des Zwecks der Kartelle und der Befugnisse der Kartellaufsichtsorgane nachgewiesen werden konnte. Die Kartelle zielten in erster Linie auf die Beeinflussung der Preise ab, während die Befugnisse der Kartellaufsichtsorgane auf die Preiskontrolle konzentriert waren.

Die Mittel zur Preisbeeinflussung waren also vorhanden. Allerdings musste auch festgelegt werden, nach welchen Kriterien die Kartellaufsichtsorgane das akzeptable Preisniveau zu bestimmen hatten. Dies war die zentrale Frage im Hinblick auf die soziale Verantwortung. Welches ist das Preisniveau, das sowohl den Lebensunterhalt der Erzeuger als auch den Zugang der Verbraucher zu den lebensnotwendigen Gütern gewährleistet? Dies wurden wir in Punkt 3 analysiert, wo die Aufsichtsbehörden in die Preisgestaltung eingreifen mussten, wann die Kartelle die Preise in einer Weise festgesetzt hatten, die durch die wirtschaftliche Lage nicht gerechtfertigt war.[64] Im Umkehrschluss bedeutet dies, dass die von den Kartellen festgesetzten Preise akzeptabel waren, wenn die wirtschaftliche Lage sie rechtfertigte. Und die Rechtfertigung der Preise wurde durch eine Formel bestimmt: Rohstoffkosten + Nebenkosten + Gewinn,[65] wobei der dritte Posten nicht überhöht sein durfte.

Unser einleitender Gedanke war, dass die durch die Überproduktion verursachte Weltwirtschaftskrise die normalen Marktbedingungen gestört hat, so dass die Preise auf ein ungerechtfertigt niedriges Niveau gefallen sind. Sie erwirtschafteten nicht nur keinen Gewinn, sondern deckten nicht einmal die Kosten für Rohstoffe und Gemeinkosten. Das Gesetz erlaubte eine Preiserhöhung durch Einschränkung des wirtschaftlichen Wettbewerbs, die jedoch nicht höher ausfallen durfte als der durch die Krise verursachte ungerechtfertigte Preisverfall.

Das Beispiel des Bäckereikartells veranschaulichte diese Situation. Die von den Aufsichtsbehörden durchgeführte Preisanalyse ergab keine größeren Probleme, es wurde lediglich eine Senkung des Brötchenpreises um 10 % gefordert. Die festgesetzten Preise lagen nicht über dem Preisniveau, das vor der Krise für Backwaren galt. Darüber hinaus ging das Kartell nicht gegen Unternehmen vor, die nicht unter die Gruppenfreistellung fielen, und verlangte nur 5 % des Umsatzes für die interne Umverteilung von Kunden.

Über das Beispiel des Bäckerkartells hinaus lässt sich allgemein feststellen, dass nach dem Inkrafttreten von Nr. XX des Gesetzes vom 1931 die Preisanalyse zum zentralen Element der Kartellfrage wurde.[66] Die durch die Krise verursachten erheblichen Preissenkungen brachten die Gefahr mit sich, dass Unternehmen, die durch niedrige Preise in den Ruin getrieben worden waren, zu niedrigen Preisen aufgekauft wurden und so Monopole entstanden.[67] Diese Hypothese führte zur unvermeidlichen Entstehung von Monopolen, die besser staatlich kontrolliert werden sollten.

Niedrigere Preise waren natürlich für eine durch die Krise stark verarmte (und arbeitslose) Konsumgesellschaft gerechtfertigt. Der Abbau von Produktionskapazitäten aufgrund von Konkursen hätte jedoch im Laufe der Zeit zu Preissteigerungen geführt. Der Aufkauf gescheiterter Unternehmen bedeutete nicht die Aufrechterhaltung ihrer Produktionskapazitäten. Das durch die Übernahme entstandene Monopol war nicht daran interessiert, Überkapazitäten durch den Weiterbetrieb von Verlustbetrieben aufrechtzuerhalten. Es war vielmehr daran interessiert, die in Konkurs gegangenen Unternehmen nach dem billigen Aufkauf zu schließen und so die verbleibenden Kapazitäten zu nutzen, um höhere Verkaufspreise zu erzielen. Eine breite Konkurswelle hätte somit im Laufe der Zeit zu drastischen Preissteigerungen geführt.

64 § 6 Abs (1) Gesetz XX von 1931.

65 Dobrovics – Kőházi op. cit. 323.

66 Dobrovics – Kőházi op. cit. 322–323.

67 Harasztosi Király op. cit. 225.

Es sei auch daran erinnert, dass Konkurse schon vor der Wirtschaftskrise von 1929 ein ernstes Problem waren.[68] Der Konkursgesetz wurde 1881 vom Reichstag verabschiedet,[69] die noch eine ausgeglichene Periode war. Die durch den Ersten Weltkrieg verursachten wirtschaftlichen Probleme verstärkten jedoch die staatlichen Eingriffe. Es wurde die Institution der Zwangsvereinbarung ohne Konkurs eingeführt. Dieses sah eine obligatorische Schlichtung zwischen Schuldner und Gläubigern vor der Eröffnung des Konkursverfahrens vor.[70] In der Praxis bedeutete dies, dass der Schuldner nicht die gesamte Forderung bezahlte, sondern sich mit den Gläubigern auf die Rückzahlung eines Prozentsatzes der Forderung einigte.[71] Auf diese Weise konnte der Schuldner die völlige wirtschaftliche Unmöglichkeit vermeiden und die Gläubiger konnten einen Teil ihrer Forderung erhalten. Aufgrund der schlechten wirtschaftlichen Lage gab es keine Möglichkeit, die Schulden vollständig zu begleichen. Diese Sonderregelungen mussten vom Staat auch nach dem Krieg beibehalten werden.

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68 Máté Pétervári: Egy nagy reményekkel induló dunavecsei részvénytársaság gyors bukása az első világháború utáni inflációs válság árnyékában. [Der rasante Niedergang einer Aktiengesellschaft aus Dunavecse, die im Schatten der Inflationskrise nach dem Ersten Weltkrieg mit großen Hoffnungen gestartet war]. In: Attila Barna – Gábor Bathó – Gergely Deli – Zsuzsanna Peres – Attila Pókecz Kovács (ed.): *Laudator temporis acti. Ünnepi tanulmányok a 65 éves Horváth Attila tiszteletére.* [Festschrift zu Ehren des 65. Geburtstags von Attila Horváth]. Budapest, Ludovika, 2024. 731–739.

69 Gesetz XVII von 1881.; Máté Pétervári: The Authority and Liability of the Bankruptcy Trustee Based on the Second Hungarian Bankruptcy Act of 1881. *Krakowskie Studia z Historii Państwa i Prawa* 17, 3. (2024), 311– 325. https://doi.org/10.4467/20844131KS.24.024.21008; Máté Pétervári: Reformtörekvések az 1881. évi csődtörvény megújítására. [Reformbemühungen zur Erneuerung des Konkursgesetzes von 1881]. *Jogtudományi Közlöny* 78, 1. (2023), 23–32.; Máté Pétervári: A második magyar csődtörvény fiumei alkalmazásának szemléltetése. [Die Darstellung der Anwendung des zweiten ungarischen Konkursgesetzes in Fiume]. In: Attila Badó (ed.): *Emlékkönyv Dr. Heka László egyetemi docens 65. születésnapjára.* [Festschrift zu Ehren des 65. Geburtstags von Universitätsdozent Dr. László Heka]. Szeged, Szegedi Tudományegyetem Állam- és Jogtudományi Kar Összehasonlító Jogi és Jogelméleti Intézet, 2024. 92–100.

70 Regierungsverordnung 4070/1915.; Máté Pétervári: Changes in the Hungarian Insolvency Law in the Interwar Period. *Krakowskie Studia z Historii Państwa i Prawa* 15, 2. (2022), 233–237. https://doi.org/10.4467/20844131KS.22.016.15719; Máté Pétervári: A kivételes hatalom magánjogi viszonyokra gyakorolt hatása és a csődönkívüli kényszeregyezség bevezetése Magyarországon. [Die Auswirkungen der Ausnahmegewalt auf privatrechtliche Beziehungen und die Einführung der Zwangsvereinbarung ohne Konkurs in Ungarn]. Ádám Farkas – Roland Kelemen (ed.): *Szkülla és Kharübdisz között – Tanulmányok a különleges jogrend elméleti és pragmatikus kérdéseiről, valamint nemzetközi megoldásairól.* [Zwischen Skylla und Kharübdis – Studien zu den theoretischen und pragmatischen Fragen der Sonderrechtsordnung und ihrer internationalen Lösungen]. Budapest, Magyar Katonai Jogi és Hadijogi Társaság, 2020. 164–170.

71 Máté Pétervári: The Bankruptcy Act in Hungary in the Interwar Period. In: David A Frenkel – Norbert Varga (ed.): *Law and History New Studies.* Athén, Athens Institute for Education and Research, 2021. 78–79.; Máté Pétervári: Egy vendéglős és fűszerkereskedő házaspár csődönkívüli kényszeregyezsége a pengő bevezetését megelőzően. [Die Zwangsvereinbarung ohne Konkurs eines Gastwirts- und Gewürzhändlerehepaars vor der Einführung des Pengő]. In: Kinga Bódiné Beliznai – Gergely Gosztonyi (ed.): *Jogtörténeti Parerga III. Ünnepi tanulmányok Mezey Barna 70. születésnapja tiszteletére.* [Rechtshistorische Parerga III: Festschrift zu Ehren des 70. Geburtstags von Barna Mezey.]. Budapest, Orac, 2023. 311–312.

In Anbetracht dessen kann kein Zweifel daran bestehen, dass es auch im langfristigen Interesse der Verbraucher war, die Preise so festzusetzen, dass sie den Erzeugern ein angemessenes Auskommen sichern. Dadurch wurde eine langfristige und ausgewogene Versorgung sichergestellt.

In der Praxis hat die staatliche Preisregulierung die aus dem Marktwettbewerb resultierende Preisbildung fast vollständig ersetzt. Die Situation wird am besten durch die Aussage von Károly Dobrovics veranschaulicht, dass es in Ungarn keinen wirtschaftlichen Wettbewerb mehr gibt, sondern allenfalls noch zwischen einigen wenigen Kleinunternehmen.[72] Allerdings stellt Dobrovics 1938 auch fest, dass es der Preisanalyse gelungen sei, das Preisniveau unter Kontrolle zu halten,[73] d. h. die mit dem Kartellgesetz von 1931 eingeführte staatliche Preisregelung habe relativ gut funktioniert. Sie hatte ihr Ziel, die gestörten Marktbedingungen zu korrigieren, erreicht.

Der Staat erlaubte den Kartellen, die Preise zu erhöhen, indem er den Wettbewerb auf dem Markt einschränkte, aber das Ausmaß der Preiserhöhung ging nicht über den ungerechtfertigten Preisrückgang aufgrund der Wirtschaftskrise hinaus. Wie bereits erwähnt, musste aus sozialer Verantwortung ein Gleichgewicht zwischen einem angemessenen Lebensunterhalt für die Erzeuger und einer ausreichen. Dieser Zustand diente dem Gemeinwohl, das – wie wir mehrfach angesprochen haben – das wichtigste Grundprinzip war, das vom ungarischen Reichstag verfolgt wurde.

Im Wettbewerbsrecht werden die wirksamen Mittel zur Durchsetzung des öffentlichen Interesses durch das aktuelle wirtschaftliche Umfeld bestimmt. Es ist immer noch ein wichtiges Grundprinzip der staatlichen Regulierung des wirtschaftlichen Wettbewerbs, aber der Inhalt der Maßnahmen zu seiner Umsetzung hat sich erheblich verändert.[74] Um das öffentliche Interesse zu verwirklichen, waren vor hundert Jahren andere Mittel geeignet, meine Studie hat diese untersucht.

[72] Dobrovics – Kőházi op. cit. 322.

[73] Dobrovics – Kőházi op. cit. 324.

[74] Aranka Nagy: Institutional Design of Enforcing. Public Interest Considerations in Merger Control. *Pázmány Law Review* 4, (2016), 185–212. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/19520; David Reader: Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights. *Pázmány Law Review* 4, (2016), 213–269. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/19521 ; Sih Yuliana Wahyuningtyas: Safeguarding Public Interests in Self-Regulating Platform: an Option for Online Transportation Network Industry in Indonesia?. *Pázmány Law Review* 4, (2016), 291–315. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/19523; Maciej Bernatt – Marcin Mleczko: Public Interest and a Place for Non–Competition Considerations in Polish Competition Law. *Pázmány Law Review* 4, (2016), 328–340. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/19525; Tihamér Tóth: The Shadow of the State: Antitrust Liability and State Action in the EU and the U.S. *Pázmány Law Review* 4, (2016), 135–136., 155–162., 166–169. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/19518; Pál Szilágyi: Smashing Pumpkins: Interventions to the Economy in Hungary, from a Competition Policy Perspective. *Pázmány Law Review* 4, (2016), 319., 321–323. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/19524.

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DIE GRENZEN DER PRESSEFREIHEIT IN DEN USA

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Abstract

The Limits of Press Freedom in the USA

Right to information regarding the public is one of the fundamental principles of the American society. The First Amendment to the Bill of Rights of 1791 protects the freedom of the press. Congress shall make no law restricting the freedom either of speech or of the press. Whereas the United States attempts to create a structural framework for the flow of information in accordance with democratic principles, meanwhile the increasing assertion of freedom of expression is historically becoming widespread, a growing number of problems emerge. It is clear from the decisions of the Supreme Court that freedom of expression in the United States is restricted by certain laws and by the courts. Legislators and judges are humans, hence influenced by the public perception, political climate and sentiment surrounding their decisions. Albeit once a model for the free press, the country now ranks the 57th among 180 countries as of the latest press freedom index compiled by

Abstrakt

Die Grenzen der Pressefreiheit in den USA

Das Recht der Öffentlichkeit auf Information ist eines der Hauptgrundsätze der amerikanischen Gesellschaft. In dem ersten Zusatzartikel des „Bill of Rights" vom Jahre 1791 wird die Pressefreiheit geschützt. Der Kongress soll kein Gesetz erlassen, das die Meinungs- oder Pressefreiheit einschränkt. Während die Vereinigten Staaten versuchen, einen strukturellen Rahmen für den Nachrichtenfluss im Einklang mit demokratischen Grundsätzen zu schaffen, und während die zunehmende Behauptung der Meinungsfreiheit historisch gesehen immer weiter verbreitet ist, gibt es eine wachsende Zahl von Problemen. Aus den Entscheidungen des Obersten Gerichtshofs geht klar hervor, dass die freie Meinungsäußerung in den Vereinigten Staaten durch bestimmte Gesetze und durch die Gerichte eingeschränkt wird. Gesetzgeber und Richter sind allesamt menschliche Wesen, die von der öffentlichen Wahrnehmung, der

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the international journalists' organisation (Reporters sans frontières/Reporters Without Borders).

This study attempts to trace the exercise of freedom of expression in the United States by examining changes in the value systems of the legislators and legal practitioners across the eras.

Keywords: Freedom of speech, freedom of the press, laws restricting freedom of speech, laws protecting freedom of information, US Supreme Court rulings, the exercise of the freedom of the press, the limits of the freedom of speech

politischen Stimmung und dem politischen Klima, in dem sie ihre Entscheidungen treffen, beeinflusst werden. Das Land, das einst als Vorbild für eine freie Presse galt, liegt in der jüngsten Rangliste der internationalen Journalistenorganisation Reporters sans frontières (Reporter ohne Grenzen) zur Pressefreiheit auf Platz 57 von 180 Ländern.

Die vorliegende Studie versucht, anhand der Veränderungen im Wertesystem der Gesetzgeber und Rechtspraktiker verschiedener Epochen die Verwirklichung der Meinungsfreiheit in den USA nachzuzeichnen.

Schlagworte: Meinungsfreiheit, Pressefreiheit, die Meinungsfreiheit einschränkenden Gesetze, Gesetze zum Schutz der Informationsfreiheit, Urteile des Obersten Gerichtshofs in den USA, die Verwirklichung der Pressefreiheit, die Grenzen der Meinungsfreiheit

Das Recht der Öffentlichkeit auf Information ist eines der Hauptgrundsätze der amerikanischen Gesellschaft. Die Autoren der amerikanischen Verfassung verabscheuten die strenge Kontrolle, welche die britischen Herrscher in den amerikanischen Kolonien damals über Ideen und Informationen ausübten. Die Autoren der Verfassung legten fest, das die Macht des Wissens in den Händen des Volkes liegen sollte. Um einen ungehinderten und umfangreichen Informationsfluss sicherzustellen, nahmen sie die Pressefreiheit in die grundlegenden Menschenrechte auf. Der Oberste Gerichtshof hat jedoch entschieden, dass die Aufforderung zu illegalen Handlungen oder Obszönität nicht geschützt werden kann.[1]

Die Verfassung der Vereinigten Staaten ist die älteste noch gültige schriftliche Verfassung der Welt. Die Väter der Verfassung dachten nicht nur an die Gegenwart, sondern auch an die Zukunft der Nation. Sie waren sich bewusst, dass die Regierungsstruktur auf die Zeitgenossen, aber auch auf spätere Generationen ausgerichtet sein musste. Sie sahen deshalb in der Verfassung die Möglichkeit der Ergänzung in Form von Zusatzartikeln vor, wenn dies aus politischen, sozialen oder

[1] The First Amendment of the United States Constitution. https://www.law.cornell.edu/wex/first_amendment.

wirtschaftlichen Gründen notwendig sein sollte. Die Flexibilität der Verfassung erwies sich als eine ihrer größten Stärken. Die ersten zehn Zusatzartikel, die sogenannte „Bill of Rights", die 1791 in Kraft traten, enthalten die verfassungsmäßigen Grundrechte der Bevölkerung, unter denen die Pressefreiheit in dem ersten Zusatzartikel geschützt wird.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Die deutsche Übersetzung des 1. Zusatzes zur Verfassung der Vereinigten Staaten lautet wie folgt:

> „Der Kongress soll kein Gesetz erlassen, das eine Einrichtung einer Religion zum Gegenstand hat oder deren freie Ausübung beschränkt, oder eines, das Rede- und Pressefreiheit oder das Recht des Volkes, sich friedlich zu versammeln und an die Regierung eine Petition zur Abstellung von Missständen zu richten, einschränkt."

Kurz formuliert – was mein Thema betrifft –: „Der Kongress soll kein Gesetz erlassen (…), das die Meinungs- oder Pressefreiheit einschränkt…" Obwohl der Artikel im Wortlaut nur den Kongress einschränkt, hat der Oberste Gerichtshof in mehreren Urteilen entschieden, dass diese Einschränkung aufgrund des 14. Zusatzartikels auch für die Bundesstaaten gilt.

In den Anfangszeiten gab es nur wenige und einfache auf Druckerpressen erzeugte Medien - Zeitungen, Pamphlete und Bücher. Heute schließt die Bezeichnung „Medien" auch Fernsehen, Rundfunk, Filme und das Internet mit ein. Der Begriff „Presse" bezieht sich heute somit nicht mehr ausschließlich auf Printmedien, sondern bezeichnet Medienunternehmen jeglicher Art. Noch dazu: Die Vereinigten Staaten bestehen heute nicht mehr aus 13, sondern aus 50 Bundesstaaten.

Zwar gibt es in den USA keine expliziten Gesetze – gerade im Sinne des Ersten Verfassungszusatzes –, die die Ausübung der Rede- und Pressefreiheit im Detail regeln, aber wir sehen, dass es in den USA Gesetze gibt, auf die sich Gerichte berufen haben, um diese Grundrechte einzuschränken. Unter den ersten solchen Gesetzen können wir die „Alien and Sedition Acts"[2] erwähnen. Unter „Alien and Sedition Acts" versteht man 4 Gesetze, die zw. 1798 und 1802 in Kraft traten. Das Gesetz wurde aus Angst vor Agenten der Illuminaten erlassen, die sich zum Ziel gesetzt hätten, nicht nur die gemäßigt-konservative Regierung der Föderalistischen Partei unter Präsident John Adams, sondern gleich das gesamte Christentum in den USA abzuschaffen.

Die „Alien and Sedition Acts" bestanden aus vier einzeln verabschiedeten Gesetzen:

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2 David Klepper: Secret History: Even Before the Revolution, America Was a Nation of Conspiracy Theorists. *Associated Press News* 31, 01. (2024). https://tinyurl.com/yv2mprtt

1./ Der „Naturalization Act” verlängerte die Aufenthaltsdauer für Ausländer, bevor sie die Staatsbürgerschaft beantragen konnten, von fünf auf 14 Jahre. Das Gesetz wurde am 18. Juni 1798 verabschiedet und 1802 aufgehoben.
2./ Der „Alien Friends Act” erlaubte dem Präsidenten, die Abschiebung jedes Ausländers zu befehlen, den er als für den Frieden und die Sicherheit der Vereinigten Staaten gefährlich einstufte. Das Gesetz wurde am 25. Juni 1798 mit einer zweijährigen Gültigkeitsfrist verabschiedet.
3./ Der „Alien Enemies Act” erlaubt dem Präsidenten, die Verhaftung und Abschiebung jedes Ausländers zu befehlen, der Bürger eines Landes war, mit dem sich die Vereinigten Staaten im Kriegszustand befanden. Das Gesetz wurde am 6. Juli 1798 verabschiedet und ist bis heute als Teil des „United States Code” (50 USC 21-24) in Kraft.
4./ Der „Sedition Act” machte die Veröffentlichung „falscher, skandalträchtiger oder boshafter Schriften“ gegen den Staat oder seine Amtsträger strafbar. Das Gesetz wurde am 14. Juli 1798 verabschiedet und lief am 3. März 1801 aus.

Nach der Verabschiedung der höchst unpopulären „Alien and Sedition Acts” kam es im ganzen Land, insbesondere in Kentucky, zu Protesten, aber die Verfassungsmäßigkeit der „Alien and Sedition Acts” wurde nie vor dem Obersten Gerichtshof angefochten. Kritiker argumentierten, dass die Gesetze in erster Linie darauf abzielten, Wähler zu unterdrücken, die mit der Föderalistischen Partei und ihren Doktrinen nicht einverstanden waren, und dass sie gegen das Recht auf freie Meinungsäußerung gemäß dem ersten Zusatzartikel der USA-Verfassung verstießen. Es wurden auch Bedenken geäußert, dass die „Alien and Sedition Acts” der Bundesexekutive im Vergleich zu den Regierungen der Bundesstaaten und anderen Zweigen der Bundesregierung unverhältnismäßig viel Macht verliehen. Als Reaktion auf den öffentlichen Aufschrei machten die demokratischen Republikaner die Ausländer- und Aufwiegelungsgesetze zu einem wichtigen Thema im Präsidentschaftswahlkampf 1800. Während die Regierungsbehörden eine Liste von Ausländern erstellten, die deportiert werden sollten, flohen viele Ausländer während der Debatte über die Ausländer- und Aufwiegelungsgesetze aus dem Land. Einige tauchten unter, verließen das Land aber nie,[3] und Präsident Adams unterzeichnete nie einen Ausweisungsbefehl.

Thomas Jefferson war der führende Kritiker dieser Gesetze.[4] Obwohl er diese Gesetze als Einschränkung der vom ersten Verfassungszusatz garantierten Meinungsfreiheit ansah, lag der Schwerpunkt seiner Kritik in der Verletzung des 10. Verfassungszusatzes, der besagt: Die Machtbefugnisse, die von der Verfassung weder den Vereinigten Staaten übertragen noch den Einzelstaaten entzogen werden, bleiben den Einzelstaaten oder dem Volke vorbehalten.

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[3] James M. Smith: The Enforcement of the Alien Friends Act of 1798. *The Mississippi Valley Historical Review* 41, 1. (1954), 85–104.

[4] Gordon S. Wood: *Empire of Liberty: A History of the Early Republic, 1789–1815.* New York, Oxford University Press, 2011.

Jefferson argumentierte, dass die Bundesregierung mit den Gesetzen ihre von der Verfassung gegebenen Kompetenzen überschritt und den Staaten vorenthaltene Befugnisse ausübte. Diese Meinung wurde nur von den Parlamenten in Virginia und Kentucky geteilt; die anderen verabschiedeten Beschlüsse, die die Gesetze als verfassungsgemäß erklärten und den beiden anderen Staaten das Recht absprachen, die Gesetze zu mißachten.[5]

Unter diesen Gesetzen ist das „Alien Registration Act" zu nennen, besser bekannt unter dem Namen „Smith Act", ein Bundesgesetz der Vereinigten Staaten, das am 28. Juni 1940 verabschiedet wurde. Es stellte Handlungen unter Strafe, die darauf abzielten, die US-Regierung mit Gewalt zu stürzen oder zu unterstützen, und verpflichtete alle erwachsenen Einwohner, die keine Staatsbürger waren, sich bei der Bundesregierung zu registrieren. Etwa 215 Personen wurden auf der Grundlage dieses Gesetzes angeklagt, darunter viele Kommunisten und Sozialisten. Die Verfolgung nach dem „Smith-Gesetz" wurde fortgesetzt, bis der Oberste Gerichtshof der USA 1957 eine Reihe von Verurteilungen nach diesem Gesetz als verfassungswidrig aufhob.[6] Die New York Times beschreibt treffend das politische Klima, die öffentliche Stimmung, in der dieses Gesetz geboren wurde. In dem Bericht heißt es, dass das „Alien Registration Act" nur eines von vielen Gesetzen war, die der Kongress im ersten Anfall von Angst in aller Eile verabschiedete. Den Amerikanern schien es, als stünde der Krieg in Europa kurz vor der Tür, und möglicherweise gab es bereits eine Reihe von Geheimagenten in Amerika. Da die Verabschiedung des Gesetzes unausweichlich schien, unterstützte auch die Verwaltung seine Verabschiedung.[7]

Die Verfassungsmäßigkeit des Gesetzes wurde im Fall „Dennis gegen United States" in Frage gestellt.[8] Der Oberste Gerichtshof bestätigte das Gesetz mit 6 zu 2.[9] (Ein Richter, Tom C. Clark, nahm an der Abstimmung nicht teil, weil er in seinem vorigen Amt als Generalstaatsanwalt die strafrechtlichen Verfolgungen aufgrund des „Smith Act" befohlen hatte.) Der Oberste Richter Fred M. Vinson verließ sich auf die von Oliver Wendell Holmes entworfene Argumentierung auf eindeutige und akute Gefahr, als er für die Mehrheit der Richter sprach:

> "*Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited.*"

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5 Douglas Bradburn: The Citizenship Revolution: Politics and the Creation of the American Union, 1774–1804. Charlottesville, University of Virginia Press, 2009.

6 Jesse DeLauder: The Seattle Seven: The Smith Act Trials in Seattle (1952–1958). In: *Communism in Washington State – History and Memory Project*. University of Washington, 2008. https://depts.washington.edu/labhist/cpproject/SmithAct.shtml.

7 Delbert Clark: Aliens to Begin Registring Tuesday. *The New York Times,* 25 August 1940. 64.

8 Dennis v. United States, 341 US 494 (1951).

9 Bericht über den Alien Registration Act bei www.spartacus-educational.com.

> „Offensichtlich können die Worte nicht bedeuten, dass die Regierung, bevor sie handeln kann, warten muss, bis der Putsch kurz vor seiner Ausführung steht, bis die Pläne gemacht sind und nur noch auf das Signal gewartet wird.“[10]

Vinson zitierte einen anderen Obersten Richter, Learned Hand, der auch eine Mehrheitsmeinung abgab:

> „In jedem Fall müssen [die Gerichte] fragen, ob die Schwere des ‚Unrechts‘, reduziert auf seine Unwahrscheinlichkeit, den Eingriff in die Meinungsfreiheit in dem Maße rechtfertigt, wie es zur Abwehr der Gefahr erforderlich ist.“[11]

Die Richter des Obersten Gerichtshofs definierten die Bedeutung der Worte „klare und gegenwärtige Gefahr“ in allgemeiner Form. Aber Reden der Kommunistischen Partei, die gegen das „Smith-Gesetz” verstießen, wurden vom Obersten Gerichtshof verboten, selbst wenn sie keine unmittelbare Gefahr darstellten.

Das Urteil im Fall „Dennis gegen United States” wurde vom Gerichtshof nie ausdrücklich aufgehoben, aber spätere Entscheidungen haben den Fall praktisch umgekehrt. 1957 änderte das Gericht seine Deutung des „Smith Act”, als die Richter den Fall „Yates gegen United States” behandelten. Der Gerichtshof verfügte, dass das Gesetz auf „die Verfechtung von Taten, nicht von Ideen“ (englisch: *the advocacy of action, not ideas*) abzielte. Somit bleibt die Verfechtung von abstrakten Lehren weiterhin durch den ersten Verfassungszusatz geschützt. Nur Reden, die ausdrücklich zum gewaltsamen Umsturz der Regierung anstacheln, sind weiterhin durch das „Smith Act” strafbar.[12]

Die politische Atmosphäre änderte sich inschwischen. Obwohl Joseph Raymond McCarthy 1957 starb, wurden seine Aktivitäten in der zweiten Hälfte des Jahres 1954 von einem wachsenden Teil der öffentlichen Meinung zunehmend verurteilt, und wurde er vom Senat mit 67 zu 22 Stimmen angeklagt. Die drei Monate lang dauernden Anhörungen endeten mit einer moralischen und politischen Niederlage von McCarthy,[13] der mit seinem Senatsausschuss zur Untersuchung von angeblicher kommunistischer Subversion in Amerika, unzählige Menschen ohne Beweise beschuldigte und beruflich ruinierte.

Unter dem Obersten Richter, Earl Warren erweiterte der Oberste Gerichtshof in den 1960er-Jahren den Schutz der Meinungsfreiheit, obwohl es auch Ausnahmen gab.

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10 Dennis (8. lj.) 509.

11 Dennis 510. / die Quelle des Zitats von Hand: 183 F.2d 201 (2d Cir. 1950), 212/.

12 Yates v. United States, 354 US 298, 327 (1957).

13 Robert Griffith: *The Politics of Fear: Joseph R. McCarthy and the Senate.* Amherst, University of Massachusetts Press, 2007. 101.

Die Pressefreiheit als „eine der großen Bastionen der Freiheit“[14] genießt einen starken verfassungsrechtlichen Schutz. Wegen des starken verfassungsmäßigen Schutzes der Pressefreiheit gibt es in den USA nur wenige Pressegesetze. Bestehende Gesetze bieten vorwiegend zusätzlichen Schutz für Bereiche, die nicht von der Verfassung abgedeckt werden. So regelt z.B. der „Privacy Act” von 1974 das Sammeln und Verbreiten persönlicher Daten, die in Unterlagen der Bundesbehörden enthalten sind; der „Privacy Protection Act” von 1980 schützt Presseredaktionen vor Durchsuchungen durch die Polizei. Es gibt zahlreiche Bundes- und Landesgesetze, die die Informationsfreiheit schützen sollen, so z.B. das sog. „Freedom of Information”- Gesetz.

Das „Freedom of Information Act” ist das Informationsfreiheitsgesetz der Vereinigten Staaten. Es wurde 1966 von Präsident Lyndon B. Johnson unterzeichnet. Das Gesetz ermöglicht sowohl der Presse, als auch der breiten Öffentlichkeit den Zugang zu sämtlichen Dokumenten der Exekutivorgane des Bundes. Auf schriftlichen Antrag müssen die Unterlagen jedem Bürger zugänglich gemacht werden. Davon ausgenommen sind unter anderem geheime Dossiers, die der nationalen Sicherheit dienen, Handelsgeheimnisse oder Informationen, die einen nicht gerechtfertigten Eingriff in die Privatsphäre einer Person darstellen würden.[15] Das Gesetz sorgte für eine Kette journalistischer Enthüllungen. So wurden beispielsweise Details über die polizeiliche Überwachung des Bürgerrechtlers Martin Luther King enthüllt.[16] Mit Hilfe des Gesetzes konnten amerikanische Journalisten außerdem ermitteln, dass eine hohe Anzahl an US-Soldaten im Vietnamkrieg versehentlich von ihren eigenen Kameraden erschossen wurde. Eine Lokalzeitung fand heraus, dass die US-Armee bei den Atombombentests in Nevada die eigenen Soldaten gezielt hoher Strahlung aussetzte, um die Wirkung zu erforschen.[17]

Trotz strengster Geheimhaltung von Seiten der NASA gelang es einer Gruppe von Journalisten, mit Hilfe des „Freedom of Information Act” das Challanger-Unglück von 1986 aufzuklären. Auf Grund der herausgegebenen Dokumente konnte aufgedeckt werden, dass der Absturz auf gravierende Sicherheitsmängel und Planungsfehler zurückzuführen war.[18]

Der gesamte Bereich der Pressefreiheit in den USA wurde hauptsächlich durch Gerichtsurteile geregelt, in denen Nuancen des ersten Verfassungszusatzes ausgelegt wurden.

Bis 1931 fällte der Oberste Gerichtshof keine wichtigen Urteile zum Schutz der Meinungsfreiheit. Der Historiker Richard Labunski führt diesen langen Stillstand auf

[14] Joseph Gales (comp.): *The Debates and Proceedings in the Congress of the United States. Vol. 1.* Washington, Gales and Seaton, 1834. 451.

[15] Anne WellsBranscomb: *Who Owns Information? From Privacy to Public Access.* New York, BasicBooks, 1994.

[16] Michael E. Ruane: „You Are Done”: A Secret Letter to Martin Luther King Jr. Sheds Light on FBI’s Malice. *The Washington Post,* 03 December 2017. https://tinyurl.com/3kwnvb5e.

[17] Carly Sauvageau: Complicated Legacy of Nuclear Testing in Nevada Lives on in Bodies, Politics. *The Nevada Independent,* 17 September 2023. https://tinyurl.com/evpscfju.

[18] Colby Itkowitz: A Challenger Engineer Blamed Himself for 30 Years. *The Washington Post,* 25 February 2016. https://tinyurl.com/3a9e5ebc.

drei Faktoren zurück: Erstens brauchte es Zeit, bis sich eine „Kultur der Toleranz“ entwickelte, d. h. bis die richterliche Gewalt und der Wille der Bevölkerung die Bestimmungen der Bill of Rights bewusst unterstützten; zweitens konzentrierte sich der Oberste Gerichtshof im 19. Jahrhundert weitgehend auf Fragen des zwischenstaatlichen Machtgleichgewichts; drittens galt das Verbot der Gesetzgebung zur Rede- und Pressefreiheit zunächst nur für die Konföderation, eine Einschränkung, die durch die Entscheidung in der Rechtssache Barron gegen Baltimore (1833) bestätigt wurde.[19] Im 20. Jahrhundert jedoch wurden die meisten Bestimmungen des Gesetzes durch den vierzehnten Verfassungszusatz auch auf die Bundesstaaten angewandt.

Im Folgenden sind einige wegweisende Fälle aufgeführt, die zeigen, wie Richter in verschiedenen Epochen die Grenzen der Meinungsfreiheit, insbesondere in Bezug auf politische Inhalte, beurteilt haben.

Die Entscheidung des Obersten Gerichtshofs der USA in der Rechtssache „Gitlow gegen New York”[20] war wegweisend: Der Gerichtshof entschied, dass der Schutz der Rede- und Pressefreiheit durch den vierzehnten Verfassungszusatz auch für die US-Mitgliedstaaten gilt. Der Grund dafür ist, dass der vierzehnte Verfassungszusatz besagt, dass die Bundesstaaten die Pflicht haben, die Rechte ihrer Bürger, die ihnen durch die Bundesverfassung garantiert werden, zu gewähren und zu schützen. Damit wird der Geltungsbereich des Ersten Verfassungszusatzes von der Bundesebene auf die Ebene der Bundesstaaten ausgedehnt. Diese Entscheidung war eines der Urteile des Obersten Gerichtshofs, die den Umfang des Schutzes der freien Meinungsäußerung durch den Ersten Verfassungszusatz definierten und den Standard festlegten, nach dem ein Staat oder die Bundesregierung eine in Rede oder Schrift geäußerte Meinung für unrechtmäßig erklären kann.

Benjamin Gitlow veröffentlichte 1919 ein Manifest in der damals weit verbreiteten Zeitung „The Revolutionary Age”. Wegen des Inhalts des Manifests, den die Regierung als „subversiv“ einstufte, wurde Gitlow später wegen Aufwiegelung verhaftet. Gitlow war Mitglied der Socialist Party of America. In dieser Zeit herrschte in den Vereinigten Staaten eine weit verbreitete Angst vor linksradikalen Bewegungen, Bolschewismus und Anarchismus. Damals wurden viele Mitglieder der örtlichen kommunistischen oder sozialistischen Partei wegen ähnlicher subversiver Handlungen verhaftet. (Gitlow war ebenfalls Mitglied der Socialist Party of America). Der Bundesgerichtshof hatte zu entscheiden, ob das staatliche Gesetz, auf das der Oberste Gerichtshof des Bundesstaates New York sein Urteil stützte, als Verletzung der Rechte des ersten Verfassungszusatzes angesehen werden konnte, da es die Verhaftung einer Person betraf, die lediglich ihre Meinung äußerte.

Die Mehrheit der Richter stimmte darin überein, dass der veröffentlichte Text subversiv war und dass zwar kein Mitgliedstaat die freie Meinungsäußerung verbieten kann, dass es aber Ausnahmen gibt, etwa wenn die Stabilität des Staates bedroht ist, und dass die Einschränkung der freien Meinungsäußerung in New York angemessen

[19] Richard E. LABUNSKI: *James Madison and the struggle for the Bill of Rights.* Oxford University Press, 2006. 258–259.

[20] Gitlow v. New York, 268 US 652 (1925).

war, da Gitlows Manifest eine Gefahr für die öffentliche Sicherheit darstellte. Daher kann der Erste Verfassungszusatz solche Äußerungen nicht schützen.

Richter Edward Sanford erklärte, dass Äußerungen, die die Regierung beleidigen, strafbar sind und dass der Staat Äußerungen bestrafen kann, die eine Gefahr für den öffentlichen Frieden und die Sicherheit des Staates darstellen.[21] Der Oberste Gerichtshof interpretierte den Ersten Verfassungszusatz dahingehend, dass er weitreichende Einschränkungen der freien Meinungsäußerung zulässt. Der stellvertretende Richter Holmes war jedoch anderer Meinung und vertrat die Ansicht, dass die Regierungen der Bundesstaaten und des Bundes die freie Meinungsäußerung nur auf der Grundlage der „offenkundigen und unmittelbaren Gefahr“ einschränken sollten, die früher in der Rechtssache Schenck gegen die Vereinigten Staaten dargelegt wurde.[22]

Der Oberste Gerichtshof wurde zum ersten Mal 1919 im Fall „Schenck gegen United States” ersucht, ein die Meinungsfreiheit verletzendes Gesetz für verfassungswidrig zu erklären. In den Fall war Charles Schenck verwickelt, der während des Krieges Flugblätter verteilt hatte, in denen er das damalige Wehrpflichtsystem angefochten hatte. Der Supreme Court bestätigte in dem Prozess einstimmig Schencks Verurteilung aufgrund der Verletzung des „Espionage Acts”. Nach Ansicht von Richter Oliver Wendell Holmes, jr. wurden die Worte in diesem Fall unter Umständen und in einer Art und Weise geäußert, die eine eindeutige und gegenwärtige Gefahr für die Rekrutierung und den Rekrutierungsdienst der Streitkräfte der Vereinigten Staaten während eines Kriegszustands darstellen, was unannehmbar ist und der Kongress das Recht hat, ein solches Verhalten zu verhindern. Der Supreme Court bestätigte in dem Prozess einstimmig Schencks Verurteilung aufgrund der Verletzung des „Espionage Act”.[23]

Richter Holmes erweiterte den Einwand der offenkundigen und unmittelbar drohenden Gefahr in einem anderen Rechtsstreit erneut.[24] Dabei ging es um eine Rede des politischen Aktivisten Eugene Debs. Debs, der von der Socialist Party of America fünfmal für das Amt des Staatsräsidenten nominiert worden war und 3,41 % der Wählerstimmen erhalten hatte,[25] während er 1920 eine Haftstrafe verbüßte, hatte kein einziges Wort gesagt, das eine eindeutige und unmittelbare Gefahr für das Wehrpflichtsystem darstellte, obwohl er in seiner Rede diejenigen lobte, die wegen Behinderung der Wehrpflicht inhaftiert waren. Richter Holmes wies darauf hin, dass die Rede von Debs eine „klare natürliche Tendenz“ zur Verhinderung der Wehrpflicht hatte. Der einzige Unterschied zwischen einer Meinungsäußerung und einer Aufwiegelung im engeren Sinne sei die Begeisterung des Redners für den Zweck,

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21 Gitlow Loses Fight in Highest Court to Annul Anarchy Law. *The New York Times,* 09 June 1925. https://tinyurl.com/46njvxs5.

22 Schenck v. United States, 249 US 47, 51 (1919).

23 Joe P. Kirby: The Case of the German Socialist Farmers: Joe Kirby Challenges the Espionage Act of 1917. *South Dakota History* 42, 3. (2012), 239–243.

24 Debs v. United States, 249 US 211 (1919).

25 1920, Presidential General Election Results.

d. h. im letzteren Fall sei der Redner auch begeistert, ein Ereignis zu verursachen.[26] Eloquenz kann die Vernunft trüben und die Gemüter erhitzen, aber Debs' Rede hatte keine Chance, einen Feuersturm auszulösen.[27]

Die Argumentation in der Rechtssache Schenck wurde durch die Entscheidung in der Rechtssache Brandenburg v. Ohio weitgehend aufgehoben,[28] die den Umfang der von der Regierung verbotenen Äußerungen auf unmittelbar bevorstehende rechtswidrige Handlungen beschränkte, wie z.B. Volksverhetzung und aufrührerische Reden.[29]

Unter dem Obersten Richter Earl Warren erweiterte der Oberste Gerichtshof in den 1960er-Jahren den Schutz der Meinungsfreiheit, obwohl es auch Ausnahmen gab. 1969 entschied der Oberste Gerichtshof mit 7:2 in dem Fall „Tinker gegen Des Moines", dass die Meinungsfreiheit auch für Schüler gelte. Der Fall involvierte mehrere Schüler, die bestraft worden waren, weil sie schwarze Armbänder getragen hatten, um gegen den Vietnamkrieg zu protestieren. Das Gericht entschied, dass die Schule symbolische Sprache, die keine unangemessenen Unterbrechungen der Schulaktivitäten verursache, nicht verbieten könne. Richter Abe Fortas schrieb: "*state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students [...] are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State*."

> „Öffentliche Schulen dürfen keine Enklaven des Totalitarismus sein. Schulbeamte besitzen über ihre Schüler keine absolute Autorität. Die Schüler […] besitzen Grundrechte, die der Staat respektieren muss, genauso wie auch die Schüler ihre Verpflichtungen gegenüber dem Staat respektieren müssen."[30]

Neben der direkten Gesetzgebung verfügt die Regierung auch über andere Mittel zur Beeinflussung der Presse, beispielsweise über die Besteuerung. Die Gerichtsentscheidung im Rechtsfall "Leathers gegen Medlock" ist zu einem Leitprinzip in dieser Frage geworden. In diesem Fall ging es um die Verfassungsmäßigkeit des Gesetzes über Bruttoeinnahmen in Arkansas, insbesonders um die Ausweitung der Umsatzsteuer auf Kabelfernsehdienste, während andere Medien wie Zeitungen und Zeitschriften davon ausgenommen waren. Die Kabelfernsehindustrie klagte gegen das Gesetz mit dem Argument, es verletze ihre Rechte aus dem Ersten Verfassungszusatz und verstoße gegen die Gleichheitsklausel des Vierzehnten Verfassungszusatzes.

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26 Gitlow (20.lj.) 673.

27 Marc LENDLER: The Time to Kill a Snake: *Gitlow v. New York* and the Bad-Tendency Doctrine. *Journal of Supreme Court History* 36, 1. (2011), 11–29.

28 Brandenburg v. Ohio, 395 US 444 (1969).

29 Richard A. PARKER: Brandenburg v. Ohio. In: Richard A. PARKER: *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions.* Tuscaloosa, University of Alabama Press, 2003. 145–159.

30 Tinker v. Des Moines Independent Community School District, 393 US 503 (1969), 511.

Die rechtliche Argumentation des Gerichts konzentrierte sich auf die Frage, ob die Steuerregelung inhaltsbezogen war, ob sie auf die Presse als Institution abzielte und ob es sich um Zensur oder eine Form der Unterdrückung der Rede handelte. Der Gerichtshof berücksichtigte folgende Aspekte: Er stellte fest, dass die Steuer allgemein anwendbar und nicht ausschließlich auf die Presse ausgerichtet war; das Steuergesetz enthielt keinen Hinweis auf den Inhalt der Medien und war daher inhaltsneutral; es gab keine Anhaltspunkte dafür, dass die Steuer eingeführt wurde, um bestimmte Ansichten zu unterdrücken; die Anzahl der etwa hundert betroffenen Kabelsysteme wurde vom Gerichtshof als zu groß angesehen, um eine auf eine bestimmte Gruppe abzielende Strafe darzustellen. Der Oberste Gerichtshof bestätigte, dass allgemein anwendbare, inhaltsneutrale Steuern das Recht auf freie Meinungsäußerung nicht verletzen. In der Entscheidung wurde jedoch betont, wie wichtig es ist, die Steuersysteme auf mögliche Verletzungen des Gleichheitsgrundsatzes zu prüfen und sicherzustellen, dass eine unterschiedliche Behandlung der Medien nicht zu einer ungerechten Diskriminierung oder Unterdrückung der freien Meinungsäußerung führt.[31]

Im Jahr 1934 schuf der Kongress die Federal Communications Commission, die heutige Regulierungsbehörde für die Rundfunkindustrie. Im Rahmen des Gesetzes wurde diese Kommission nicht nur mit einer „Überwachungsfunktion", sondern auch mit Lizenzierungs- und Regulierungsbefugnissen ausgestattet, die dem „öffentlichen Interesse, der Verbraucherorientierung und der Notwendigkeit" unterliegen. Im Einklang mit diesem Mandat hat der Ausschuss seither sowohl die inhaltliche als auch die geschäftliche Vielfalt im Rundfunksektor weiter gefördert. Das Land, das einst als Vorbild für eine freie Presse galt, liegt in der jüngsten Rangliste der internationalen Journalistenorganisation Reporters sans frontières (Reporter ohne Grenzen) zur Pressefreiheit auf Platz 57 von 180 Ländern.[32]

Der Zugang zu Informationen ist oft schwierig, insbesondere auf lokaler Ebene. Im Jahr 2023 wurden der 24-jährige Journalist Dylan Lyons und ein Kollege erschossen, als sie über eine Schießerei berichteten, die im Jahr 2023 stattfand. Es ist zwar unklar, ob der Mörder wusste, dass Lyons und sein Begleiter Mitglieder der Medien waren, da ihr Fahrzeug nicht gekennzeichnet war, aber Nachrichtenberichte haben bestätigt, dass die Gewalt gegen Journalisten zunimmt.[33]

Die USA hat sich lange weltweit als Vorreiter der Medienfreiheit präsentiert. Doch 2014 die für einen Bericht befragten 50 Journalisten teilten mit, dass sie durch die staatliche Überwachung daran gehindert werden, über Themen von großem öffentlichem Interesse zu berichten. Viele Journalisten hatten den Eindruck, dass die Regierung sie nicht mehr als wichtige Kritiker ihrer Aktivitäten und als Partner für eine gesunde Demokratie sieht, sondern als potentielle Verdächtige. Ein bekannter Journalist brachte

[31] Leathers v. Medlock, 499 US 439 (1991), 454.

[32] https://www.reporter-ohne-grenzen.de/weltkarte#map-USA.

[33] Rachel Treisman: Dylan Lyons, a 24-year-old TV journalist, was killed while reporting on a shooting. *KUOW,* 23 February 2023. https://tinyurl.com/mrh67typ

auf den Punkt, was viele empfinden: „Ich will nicht von der Regierung dazu gezwungen werden, mich wie ein Spion zu verhalten. Ich bin kein Spion, ich bin Journalist."[34]

Während die Vereinigten Staaten versuchen, einen strukturellen Rahmen für den Nachrichtenfluss im Einklang mit demokratischen Grundsätzen zu schaffen, und während die zunehmende Behauptung der Meinungsfreiheit historisch gesehen immer weiter verbreitet ist, gibt es eine wachsende Zahl von Problemen. Aus den Entscheidungen des Obersten Gerichtshofs, die ich gelesen habe, geht klar hervor, dass die freie Meinungsäußerung in den Vereinigten Staaten durch bestimmte Gesetze und durch die Gerichte, insbesondere den Obersten Gerichtshof, eingeschränkt wird. Gesetzgeber und Richter sind allesamt menschliche Wesen, die von der öffentlichen Wahrnehmung, der politischen Stimmung und dem politischen Klima, in dem sie ihre Entscheidungen treffen, beeinflusst werden.

Kann man 234 Jahre nach der Verkündung der Bill of Rights eine bessere Lösung finden? Bei vielen Entscheidungen geht es darum, Ideen oder Argumente zu verteidigen, die als falsch oder ungültig angesehen werden. Die zunehmende Akzeptanz der Unwahrheit von Tatsachen ist ein Problem, dessen wirtschaftliche, psychologische, soziologische, kulturelle, wissenschaftliche und politische Dimensionen viel wichtiger sind, als seine rechtlichen und verfassungsrechtlichen Aspekte. Das Recht kann nicht das Heilmittel für alle Informationsprobleme unserer Zeit sein. Jedes Heilmittel ist wesentlich schlimmer, als die Krankheit selbst – schrieb Frederik Schauer in einer Studie,[35] vielleicht könnte er Recht haben.

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DER KLASSISCHE RECHTSSTAAT IM NATIONALSTAAT CONTRA „RECHT OHNE STAAT" IN DER EUROPÄISCHEN UNION

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Abstract

Classical Law in the Nation-State versus "Law without a State in the European Union

The study compares the legal-theoretical foundations of classical rule of law with the specific institutional system of EU law – a supranational community without a state. The sections devoted to the five thematic units are conceived in a legal-dogmatic manner. The first one summarizes the influence of the humanities based on Helmuth Coing's monograph. The contradictions between the universal, perfect order of classical natural law and the "fault lines" of contemporary society; the modern thesis: the legal order is more fundamental than privatization (Milton Friedman's thesis); an outline of the problems of EU law, all these highlight legal-dogmatic issues to be resolved as soon as possible. A clearer designation EU competences hold must be distinguished from those of the Member States. Taking a stance is likewise a must in questions such

Abstrakt

Das klassische Recht im Nationalstaat contra „Recht ohne Staat in der Europäischen Union"

Die Studie vergleicht die rechtstheoretischen Grundlagen des klassischen Rechtsstaats mit dem spezifischen Institutionssystem des EU-Rechts, einer Gemeinschaft ohne Staat. Die Abschnitte zu den fünf thematischen Einheiten sind rechtsdogmatisch angelegt. Der erste fasst den Einfluss der Geisteswissenschaften auf der Grundlage der Monografie von Helmuth Coing zusammen. Die Widersprüche zwischen der allgemeinen, vollkommenen Ordnung des klassischen Naturrechts und den „Bruchlinien" der heutigen Gesellschaft, sowie die zeitgenössische These, dass die Rechtsordnung grundlegender ist als die Privatisierung (die These von Milton Friedmann) zeigen zusammen mit einer Auflistung der Probleme des EU-Rechts die rechtsdogmatischen Fragen auf, die so schnell wie möglich gelöst werden as “the unconscious aspect of lawmaking by the law-applier” [Hayek contra Kelsen / in the Court of Justice of the EU]. As for the European legal sphere, a union of national constitutional courts could be the ultimate guarantor for overcoming the anomalies of the postmodern rule of law.

Keywords: rule of law, Law without a State, EU-Law, natural law, Justice

müssen. Vorrangig behandelt werden sollten eine genauere Abgrenzung der Zuständigkeiten der Union von denen der Mitgliedstaaten, sowie eine Stellungnahme z. B. in der Frage des „unbewussten Aspekts der Rechtsetzung durch den Gesetzanwender.“ [Hayek contra Kelsen/ im EU-Gerichtshof.] Was den europäischen Rechtsraum betrifft, so könnte eine Vereinigung der nationalen Verfassungsgerichte der letzte Garant für die Überwindung der Anomalien des postmodernen Rechtsstaates sein.

Schlagworte: Rechtsstaat, Recht ohne Staat, EU-Recht, Naturrecht, Gerechtigkeit

1. Rechtsphilosophische Grundlegung

Der brillante deutsche Jurist Helmut Coing fasst in seiner ausgezeichneten Monographie „Grundlagen der Rechtsphilosophie“ die Wirkung der von den Geisteswissenschaften gelieferten Erkenntnisse zusammen. Was die Grundlage seiner Position betrifft, schreibt er, dass man berechtigt und verpflichtet sei, Ergebnisse der verschiedenen Geisteswissenschaften gemäß unserer eigenen Position zu akzeptieren.

Recht ist ein Teil der Gesamtkultur, aber es spielt dabei seine eigene Rolle, und zwar wegen seiner eigentümlichen Grundtendenz, die nichts anderes bedeutet, als den Dienst am Frieden, an Sicherheit und Gerechtigkeit durch Schaffung einer Ordnung. Es liegt auf der Hand, dass das Recht eines Staates als Teil einer bestimmten Gesamttradition immer seine eigenen spezifischen Merkmale hat. Dennoch kann die Rolle der wirtschaftlichen Macht – und der Macht im Allgemeinen – bei der Entstehung des Rechts nicht geleugnet werden.

Will man eine Formel für die Entstehung des Rechts finden, ist es am besten, das von Toynbee auf die Entstehung der Kultur bezogene Begriffspaar *challenge* und *response* auch in unserem Fall anzuwenden.

Die soziale Ordnung ist keine vorgegebene und für immer festgelegte Ordnung: Sie muss immer wieder neu geschaffen werden, je nach Situation und Problemen der Zeit.

Die soziale Ordnung entwickelt sich also als Antwort auf eine Herausforderung, und ergibt sich aus der intellektuellen Kreativität des Menschen, aus seiner richtigen oder falschen Beurteilung der Tatsachen, aus seinem richtigen oder falschen Erkennen von Lösungen, die als nützlich, ideal und notwendig erscheinen (z. B. in unserem Thema die auf diese Weise entstandenen „Rechtsstaatlichkeitsverfahren“).

Die Beziehung zwischen Macht und Recht kann immer dazu führen, dass der Machtinhaber die Ermächtigung auch zur Gesetzgebung für sich beansprucht.

Zur stärksten Verbindung zwischen Macht und positivem Recht kommt es, wenn der Machtinhaber das Monopol der Gesetzgebung ausschließlich für sich beansprucht, also keine andere Rechtsquelle außer sich selbst duldet.

Autorität und Gültigkeit der Regeln des Naturrechts sind moralischen Charakters. Das Naturrecht ist als eine Reihe von Gerechtigkeitsregeln zu verstehen, welche die Grundlage des positiven Kulturrechts bilden. In den Naturgesetzen sind die in der menschlichen Umwelt existierenden spezifischen materiellen Zusammenhänge zu erkennen. Kontexte, mit denen wir bei der Schaffung einer gerechten Gesellschaftsordnung konfrontiert werden.

Das Naturrecht ist der Maßstab, an dem das positive Recht gemessen wird. Das positive Recht lebt vom Naturrecht. Sein charakteristisches Merkmal besteht darin, dass bei seiner Legitimation die ewig gültige, statische Weltordnung, wie sie in der klassischen Naturrechtstradition formuliert ist, keine Rolle spielt! Positives Recht muss insbesondere durch den Prozess seiner Entstehung legitimiert werden, d.h. durch den politischen Prozess, in dem die Entscheidungen getroffen werden.

Das klassische Naturrecht war das Spiegelbild einer ewigen Weltordnung. Die Gerechtigkeitsidee setzt eine vollkommene Gesamtordnung voraus. Unter den Bedingungen einer komplexen Gesellschaft können diese Aufgaben jedoch nicht mehr erfüllt werden.[1]

2. Rechtsordnung ist grundlegender als Privatisierung

Die Geschichte der Menschheit ist die Geschichte von Zivilisationen. Zivilisation und Kultur beziehen sich auf die gesamte Lebensweise eines Volkes. Moralische Grundsätze ergeben sich aus gemeinsamen Eigenschaften, aus der universellen menschlichen Natur, und sind in allen menschlichen Kulturen vorhanden. Auch deshalb müssen wir Huntingtons realistische Schlussfolgerung akzeptieren, dass „nicht die Werte einer bestimmten Zivilisation als universell zu verkünden und zu fördern sind, sondern die gemeinsamen Merkmale der ganzen Zivilisation sind zu finden, um eine kulturelle Koexistenz zu erreichen. Eine multizivilisatorische Welt kann nur dann vorankommen, wenn sie auf den Universalismus verzichtet, die Vielfalt anerkennt und sich auf die Suche nach Gemeinsamkeiten begibt."[2]

In unserem Jahrhundert hat sich jedoch das Paradigma des reinen Chaos bewahrheitet. Die Herrschaft des Rechts hat versagt, und die Waffen übernehmen zunehmend die Macht. Es ist klar geworden, dass die Zukunft der Zivilisationen von Zusammenarbeit und Verständnis zwischen den religiösen und spirituellen Führer der großen Zivilisationen abhängt.

Wenn dies so stimmt, kommt der Rolle der Europäischen Union eine besondere Bedeutung zu. Relevant ist dabei auch die Beziehung zwischen den Kernstaaten

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[1] Helmut Coing: *A jogfilozófia alapjai.* [Grundzüge der Rechtsphilosophie]. [Übersetzt von Szabó Béla]. Budapest, Osiris Kiadó, 1996. 42–43., 89–90., 164–165., 189–190., 192., 210.

[2] Samuel P. Huntington: *A civilizációk összecsapása és a világrend átalakulása.* [The Clash of Civilizations and the Remaking of Word Order]. Budapest, Európa Könyvkiadó Kft., 2005.

Westeuropas und den Mitgliedsstaaten in Mitteleuropa, geschweige denn die Problematik der Verantwortung der Entscheidungsträger in Brüssel.

Es lohnt sich, die letzten Jahrzehnte kurz Revue passieren zu lassen. Die „erste“ Revision von Jalta und ihr „Ergebnis“, die Europäische Union, wurden von den wichtigsten Trends der vergangenen Zeit geprägt. Das Gipfeltreffen von Malta 1989 symbolisierte die „Grand Strategy“, die große Wende, die zuvor (1985) von den Vereinigten Staaten entwickelt worden war: Dass sich die Welt nämlich von einer Ära verabschiedet und in eine andere eintritt. Die Grundfrage dieser anderen Welt war, wie sich Mitteleuropa in Westeuropa integrieren sollte. Der Weg von der Version eines sowjetisch-amerikanischen Kondominium über das im Rheinischen Modell verkörperte Wohlfahrtsstaatsideal bis hin zum endgültigen Konsens in Washington bestimmte die gegenwärtigen Verhältnisse. In diesem Prozess wurde die als ungarischer Regimewechsel bekannte Wende im Zeichen der neoliberalen Wirtschaftspolitik von der Umsetzung des Washingtoner Konsenses als Schocktherapie begleitet. Das bedeutete eine nicht durchdachte Privatisierung und die damit einhergehende Deregulierung, d. h. eine massive Verringerung der Rolle des Staates. Inzwischen ist völlig deutlich geworden, dass die damals häufig zitierte Metapher von Lord Dahrendorf mehr als nur ein Irrtum war. Es muss nämlich erst noch schlimmer werden, bevor es besser wird, und die Völker der Region müssen durch das Jammertal gehen, um das Kanaan des Kapitalismus zu erreichen.

Dieser Gewaltmarsch läuft auch heute noch, und es ist kein Zufall, dass die Kombination aus einer vorherrschenden Privatwirtschaft und multinationalen Konzernen, die durch den ungezügelten Abbau von Staatseigentum entstanden ist, die Rolle des Staates geschwächt und in vielen Bereichen unwirksam gemacht hat. Das Hauptproblem dieser Demokratisierungsprozesse, die Ende des 20. Jahrhunderts einsetzten, besteht darin, dass es nicht gelungen ist, die verschiedenen Dimensionen der Staatlichkeit voneinander konzeptionell zu trennen und zu verstehen, wie sie mit der Wirtschaft zusammenhängen. Milton Friedmann, der bedeutendste Vertreter der freien Marktwirtschaft, bemerkte treffend: „Es hat sich herausgestellt, dass die Rechtsstaatlichkeit wahrscheinlich grundlegender ist als die Privatisierung.“[3]

Bekanntlich befindet sich Europa bei der dritten Einigungsstation seiner Geschichte. Das eigentliche Dilemma des neuen Dritten Europas besteht in der Wahl zwischen Sozialstaat und Wohlfahrtsstaat. Die Umwandlung des Rechtsstaats / Verfassungsstaats in irgendeine andere Formation ist das große staatstheoretische Projekt der Gegenwart. Bei der Schaffung eines neuen europäischen Institutionssystems hat die Europäische Union danach zu streben, als eine menschlichere Gesellschaft zu funktionieren, die die Menschenrechte wirklich umsetzt und gleichmäßig ausweitet. Es ist klar, dass die Rolle des Rechts und der Verfassung mehr als zuvor ins Zentrum rücken wird.

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[3] Lajos GECSÉNYI – MÁTHÉ Gábor (ed.): *Sub clausula 1989. Dokumentumok a politikai rendszerváltás történetéhez – A Grand Strategy.* [Sub clausula 1989. Dokumente zur Geschichte des politischen Systemwechsels. Die Grand Strategy]. Budapest, Magyar Közlöny Lapkiadó, 2009.

3. Die Erklärung von Laeken (2003)

Zum 20-er Jahrzehnt des 21. Jahrhunderts ließen Aufmerksamkeit und Verantwortung der EU gegenüber juristischen Fragen allmählich nach. Nicht so war es früher. Schon zur Jahrtausendwende (14-15. Dezember 2001) erkannte der Europäische Rat in seiner Sitzung in Laeken (Belgien), dass die EU zu einem Wendepunkt gelangte, und setzte den Konvent zur Zukunft Europas ein. Der Konvent war berufen, Empfehlungen in drei Themenkreisen zu erarbeiten: ad 1.) Wie könnten das europäische Modell und seine Institutionen den Bürgern nähergebracht werden? ad 2.) Wie kann die Gestaltung der Politik in einer erweiterten Union organisiert werden? ad 3.) Wie kann die Union in der neuen, mehrpoligen Welt zu einem stabilisierenden Faktor werden?

Auf die gestellten Fragen gab der Konvent Antworten, die einen selbst nach zwanzig Jahren zum Nachdenken bewegen.

Werfen wir nun einen Blick auf die wichtigsten, beispielhaften Empfehlungen:

- Eine stärkere Abgrenzung der Befugnisse der Union von denen der Mitgliedstaaten wird besonders behandelt.
- Wie bereits erwähnt, war die Erarbeitung von Lösungen zur besseren Demokratie, Transparenz und Effizienz der EU schon um die Jahrtausendwende eine vorrangige Frage, aber sie fehlt auf Ebene der Rechtsnormen immer noch.
- Anerkennung der nationalen Parlamente als Ausdruck der Legitimität des europäischen Modells, indem die Beschlussfassungsverfahren vereinfacht und die Funktionsweise der europäischen Institutionen transparenter gestaltet werden. Es sei daran erinnert, dass die Erklärung auch die Ausarbeitung der oben genannten Themen vorsah, die die Grundlage für den künftigen Vertrag über eine europäische Verfassung bilden sollten. Sie sollte dem Europäischen Rat in Thessaloniki vorgelegt werden (vorgelegt am 20. Juni 2003, unterzeichnet von Präsident Valery Giscard d' Estaing und den Vizepräsidenten Jean-Luc Dehaene und Giuliano Amato).

4. Problematik des EU-Rechts

Die Theorie des EU-Rechts ist nicht hinreichend ausgearbeitet. Das Recht einer Einheit sui generis, die die Mitgliedstaaten integriert, wird daher im Verhältnis zum nationalen Recht definiert. Die Bezugnahme auf die Rechtsstaatlichkeit kann immer nur eine Bezugnahme auf einen Mitgliedstaat sein.

Die Union ist ein völkerrechtlich organisiertes System verbündeter Mitgliedstaaten, in dem die deklarierten Zuständigkeiten aus den überlassenen Elementen ihrer eigenen Souveränität bestehen. Sie besitzt also keine eigenen Zuständigkeiten und ist von der Formel Kompetenz ohne Kompetenz gekennzeichnet. Es wurde ein System geschaffen, das an die Rechtsordnung der Mitgliedstaaten angepasst ist und sich wie ein Bundesstaat verhält, in dem zum Demokratiedefizit auch noch das Verfassungsdefizit hinzukommt.

In Anbetracht unumgänglich bevorstehender Debatten in den rechtstheoretischen Analysen sei hier auf einige Quellen hingewiesen. Der Schlussteil von Appendix III (Staatstheoretische Fragen der Europäischen Union) im herausragenden und unentbehrlichen Band *Staatslehre. Schriften zur allgemeinen Staatslehre im 20.*

Jahrhundert (Budapest, 2003) von Professor Péter Takács ist für unser Thema relevant. Hier sind von Hermann-Joseph Blanke die Positionen eines Bundesstaates im Vertrag von Maastricht dargestellt, das Schicksal der europäischen Nationalstaaten von Karl Doehring, und schließlich die Studie von Neil MacCormick „Maastricht-Urteil: Souveränität heute". Die unumgängliche Synthese: das Europa der Nationalstaaten ist auf den juristischen, dogmatischen und nicht nur auf zeitgenössischen politikwissenschaftlichen Berufungen aufzubauen.[4]

Im Hinblick auf die Priorität der Rechtsdogmatik soll bereits hier als Erklärung der Überschrift der vorliegenden Studie auf die Dichotomie und zugleich Parallelität von Nationalrecht (ius proprium) und Recht ohne Staat (ius commune) hingewiesen werden.

Die Feststellungen der Analyse *Der Unionsvertrag von Maastricht* über die Souveränitätsfragen sollen hier als essentielle Zusammenfassung festgehalten und für die weiteren Ausführungen als Lehren einer noch nicht abgeschlossenen Diskussion behandelt werden. Hier die Thesen:

a.) Der rechtliche Inhalt, der die Zuständigkeiten der Mitgliedstaaten festlegt, wird infolge der politischen Zwänge, die die Integration vorantreiben, relativiert. Die Kompetenz zur Festlegung von Zuständigkeiten liegt im rechtlichen Sinn eindeutig in Händen der Mitgliedstaaten, aber dies wird überlagert von der vor allem politikwissenschaftlich inspirierten These der „doppelten Souveränität" – die Gemeinschaftsebene einerseits und die Ebene der Mitgliedstaaten andererseits.

b.) Die meisten argumentieren jedoch mit einer entschlossenen Relativierung des umfassenden Charakters des Souveränitätskriteriums, um die Souveränitätsfrage durch Abgrenzung der Rechte der Gemeinschaft von denen des Souveräns inhaltlich zu beantworten. Legt man den im modernen Bundesstaat geltenden Maßstab des Gewaltenteilungsprinzips an, ist die Souveränitätsfrage auch innerhalb der Europäischen Union praktisch als „unentschieden" anzusehen.

c.) Eine auf die Unterscheidung zwischen nationalem und gemeinschaftlichem Souverän gestützte Analyse zeigt, dass – trotz Eingriffs des Vertrags über die Europäische Union in den Inhalt der mitgliedstaatlichen Verantwortung – der Schwerpunkt der Zuständigkeiten, ebenso wie das Wesen des verfassungsgebenden Souveräns in den Mitgliedstaaten, bei den Mitgliedstaaten verbleibt.

d.) Aus dem unvollständigen Inhalt des Souveränitätskriteriums ergibt sich, dass die Frage des Austritts in erster Linie eine rechtliche Frage ist. Eine einseitige Kündigung der übertragenen Hoheitsrechte seitens eines Mitgliedstaates ist rechtlich ausgeschlossen. Solange die verfassungsrechtliche Autonomie des Gemeinschaftssouveräns vom Staatssouverän der Mitgliedstaaten noch nicht

[4] Péter Takács: Államtan. *Írások a XX. századi általános államtudomány köréből. Appendix*. [Staatslehre, Schriften aus dem Bereich der allgemeinen Staatswissenschaft des 20. Jahrhunderts. Appendix]. III. Budapest, Szent István Társulat, 2003. 867–911.

vorhanden ist, können die Mitgliedstaaten jedoch den Gründungsvertrag durch eine gemeinsame, einstimmige Erklärung kündigen.

e.) Angesichts der zerstörenden Wirkung der Integration auf die Mitgliedstaaten wird die Staatlichkeit der Mitgliedstaaten zunehmend umgestaltet, auch wenn der Vertrag über die Europäische Union die Abschaffung der Staaten als Ziel nicht vorsieht. Die Entwicklung supranationaler politischer Räume bleibt weiterhin an nationalstaatlich organisierte Systeme der Interessenbildung und des Konfliktmanagements gebunden.

Zusammenfassend lässt sich feststellen, dass der EU-Vertrag zwar zu einer noch engeren Verflechtung der Staatsgewalt mit der Gemeinschaftsgewalt und zur Stärkung des Systems der „kooperativen verfassungsmäßigen Staatlichkeit” führt, aber er stellt keinen qualitativen Sprung hin zu einer „europäischen Staatlichkeit” dar.

Die Gemeinschaft wird – mit den Wendungen des Arsenals nationalstaatlicher Argumente ausgedrückt – in Staatsnähe kommen, ohne ein „Vollstaat” zu werden.

Da der Vertrag über die Europäische Union die Staatlichkeit der Gemeinschaft nicht herbeigeführt hat, kann eine Bundesstaatlichkeit nicht anerkannt werden.

Im Übrigen ähnelt die Gemeinschaft mit ihrer vierfachen Struktur (Rat, Kommission, Parlament, Gerichtshof) bezüglich der Aufteilung von unitarischen und föderalen Funktionen bereits einem Bundesstaat. Darüber hinaus weisen die Organisationsformen der nationalen und supranationalen Gewalt bereits so viele Merkmale auf, dass es schwierig wäre, von einem Bundesstaat zu sprechen, egal ob er einen kontinentaleuropäischen oder nordamerikanischen Charakter hat.[5]

Schließlich ist auch die allgemein bekannte Tatsache zu erwähnen, dass der Europäische Gerichtshof nicht nur Auslegungs-, sondern auch Gesetzgebungskompetenzen besitzt. In diesem Zusammenhang formulierte Christopher Vajda (ehemaliges Mitglied des Europäischen Gerichtshofs), ein Gastprofessor ungarischer Herkunft am Kings College in London, eine besondere Meinung, indem er betonte, dass „es nicht Sache des Gerichtshofs ist zu entscheiden, in welcher Art von Europa die Europäer leben wollen. Das Problem ist, dass ein Teil des europäischen Rechts nicht niedergeschrieben ist, sondern zu den allgemeinen Grundsätzen gehört, die der Gerichtshof im Laufe einzelner Fälle entwickelt hat… Er konnte nämlich nicht sagen, dass er keine Meinung hat… In Europa ist diese Institution wirklich ein aktivistisches Gericht. Das bedeutet aber nicht, dass nicht die Macht des Rechts vorherrscht.“[6]

Vielleicht ist es nicht uninteressant, hic et nunc auf einen Ausschnitt aus der Aufsatzsammlung des Wissenschaftlers Vilmos Peschka: Anhang Zur Besonderheit des Rechts hinzuweisen. Es geht um einen lehrreichen Auswertungsteil im Artikel Hayek contra Kelsen I, Entstehung und Inhalt des Rechts: „(…) es gibt ein unbewusstes Element in der Rechtsetzung durch den Rechtsanwender; das Bewusstsein des Rechtsanwenders, seine bewusste Tätigkeit ist nicht auf die Rechtsetzung, nicht auf eine allgemeine Rechtsgültigkeit, sondern auf die Rechtsanwendung, auf die

[5] Takács op. cit. 881–888.

[6] Top24, Napi Hírek. [Tagesnachrichten]. 6. Juli 2022.

Entscheidung des Einzelfalls mit einmaliger Rechtsgültigkeit gerichtet.” Es gilt das berühmte Aperçu: „Sie wissen es nicht, aber sie tun es.”[7]

5. Europäischer Rechtsraum - Verband der Nationalen Verfassungsgerichte

Die hier dargestellte Tatsachenlage beweist für alle Juristen (nicht für Politiker, obwohl es auch juristisch ausgebildete Politiker gibt), dass die Europäische Union eines neuen Systems der Rechtsdogmatik bedarf. Es ist gerechtfertigt, neben den neuen Begriffen der Verfassungsmäßigkeit, unter anderen auch die komplementären, parallelen Kompetenzen, in einem neuen Geist zu definieren.

Vor diesem Hintergrund fand die für eine neue Aufgabe mobilisierende Initiative im Manifest von Professor Armin von Bogdandy, Direktor des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht in Heidelberg, mit dem Titel: „Nationale Rechtsprechung im europäischen Rechtsraum“[8] volle Zustimmung. Bogdandys Ziel ist es, den Erfolg der EU als politisches Projekt zu fördern, und zwar auf einer völlig neuen Grundlage, durch die Schaffung eines Europäischen Forschungsraums. Dieser Rahmen könnte durch die Bereitstellung von Ressourcen die Möglichkeit geben, ein völlig neues System der Rechtsdogmatik zu schaffen, das den Bedürfnissen einer globalisierten Welt im Einklang mit den nationalen Rechtswissenschaften gerecht werden kann. Auf diese Weise wird die Europäisierung zu einem Gebot der Stunde, wobei die Identität der nationalen Rechtswissenschaften Berücksichtigung findet. Im Übrigen schreitet die Europäisierung der nationalen Rechtssysteme bereits in einem Ausmaß voran, das sich am besten mit dem Begriff „europäischer Rechtsraum“ beschreiben lässt.

Die Rechtsdogmatik steht damit vor neuen Herausforderungen. Mit der klassischen Methode des Rechtsvergleichs hat jede Generation ihre eigene Rechtsgeschichte zu schreiben, aber auch zu den möglichen Entwicklungspfaden in der Zeitgeschichte, d. h. dem zukünftigen gemeinsamen Rechtsraum, Stellung zu nehmen.[9]

Denke ich über die Prophezeiung von Professor Bogdandy nach, bin ich als Rechtshistoriker der Ansicht, dass der europäische Rechtsraum – mutatis mutandis – bereits seit den Jahrhunderten nach Auflösung des ersten Europas bis zu den Kodifikationen im 18. Jahrhundert bestand. Und das ist das ius commune, die von den Glossatoren entwickelte Rechtsordnung sui generis, die Rechtswissenschaft und

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7 Vilmos PESCHKA: Appendix „A jog sajátosságához”. [Appendix. Zur Eigenart des Rechts]. In: Vanda LAMM (ed.): *Jog és államtudomány 1.* Budapest, Közgazdaságtani és Jogi Könyvkiadó Rt. MTA Állam- és Jogtudományi Intézet, 1992. 25.

8 Ármin von BOGDÁNDY: *A nemzeti jogtudomány az európai jogi térségben.* [Die nationale Rechtswissenschaft im europäischen Rechtsraum]. Ármin von BOGDÁNDY: A nemzeti jogtudomány az európai jogi térségben – Kiáltvány. *Magyar Jog* 59, 4. (2012), 248–255.

9 Die ungarische rechtshistorische Synthese wurde als gemeinsame Arbeit von 18 Rechtshistorikern erstellt. Gábor Máthé (ed.): *Die Entwicklung der Verfassung und des Rechts in Ungarn*. Budapest, Dialog Campus, 2017. [Die Monografie wurde 2020 auch in chinesischer Sprache veröffentlicht]. Gábor Máthé (ed.): *匈牙利宪法与法律的演变与发展.* [Xiongyáli xianfa yu falu de yanbian yu fazhan]. [Die Entwicklung der Verfassung und des Rechts in Ungarn]. Budapest, Ludovika Egyetemi Kiadó, 2020, 896.

Rechtskultur auf Grundlage des kommentierten römischen Rechts, mit Elementen des Kirchen- und Feudalrechts, die in enger Symbiose mit dem ius proprium, dem Ortsrecht, stand.

Das ius commune ist kein Gesetz, sondern ein rechtswissenschaftliches (jurisprudenziales) Gesetz. Der größte Teil des ius commune ist kein durch einen Gesetzgebungsakt geschaffenes Rechtssystem, sondern ein von Rechtswissenschaftlern geschaffenes Gelehrtenrecht. Das damalige Europa ging also nicht den Weg der legislativen, sondern der jurisprudenziellen Rechtsvereinheitlichung. Das ius commune ist ein „Recht ohne Staat", ohne zentrale Normierungsgewalt. Es gibt auch keine zentrale richterliche Gewalt, die über das Problem der Auslegung entscheiden würde, es ist ebenfalls Aufgabe des Juristen – der communis opinio doctorum.[10]

Das ius commune ist subsidiärer Natur, d. h. zunächst ist das lokale Recht, das ius proprium, anzuwenden, und wenn das nicht ausreicht, muss das ius commune herangezogen werden. Das ius commune konkurriert also nicht, es nimmt keine Vorrangstellung ein, wie das heutige EU-Recht, das nicht als dogmatische Gesetzmäßigkeit, sondern heutzutage als autoritativer Faktor dominiert.

Der gemeinsame europäische Raum und das ius commune der Neuzeit scheinen eine hervorragende Lösung für eine zwangsweise Überholung des Rechtssystems, des Machtsystems und der Terminologie des 19. und 20. Jahrhunderts zu sein. Aus diesem Grund lohnt es sich, an den Vorschlag zu erinnern, der von den Plenarteilnehmern auf der Schlusssitzung des 5. Europäischen Juristenforums in Budapest im Herbst 2009 angenommen wurde. Bekanntlich haben Juristen der EU, vor allem Vertreter der deutschen Anwaltschaft, dieses alle zwei Jahre stattfindende Berufsforum nach dem Vorbild des Deutschen Juristentags ins Leben gerufen. Bislang fanden die Treffen in Nürnberg, Athen, Genf, Wien, Budapest und Luxemburg statt. In Budapest wurden die europäische Staatsanwaltschaft, die grenzüberschreitende Kriminalität, der Verbraucherschutz und das Handelsrecht, sowie Fragen der modernen Souveränität diskutiert.[11] Ohne auf Einzelheiten einzugehen, soll hier auf den im Plenum angenommenen Vorschlag verwiesen werden, wonach die Verfassungsgerichte der EU-Mitgliedstaaten jeweils ein Mitglied in das jährlich (im Frühjahr/Herbst) tagende Kollegium der Verfassungsgerichte entsenden sollen, das die bei jurisprudenziellen Problemen zwischen den Mitgliedstaaten und den zentralen Organen der Union auftretenden Fragen erörtert und die rechtlichen Lösungen in einer Stellungnahme veröffentlicht.

Der Initiative des Budapester Juristenforums folgte 2015 eine umfassende, konzeptionell verbesserte Fassung mit dem Titel Verfassungsgerichtsbarkeit in Europa,

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[10] Norbert Kis – Gábor Máthé (ed.): *Az Európai Államok Evoluciója – Államszervezési paradigmák.* [Die Evolution der Europäischen Staaten – Paradigmen der Staatsorganisation]. Budapest, Ludovika Egyetemi Kiadó, 2024.

[11] Gábor Máthé et al.: *Closing remarks.* Panel Meeting of the 5th European Jurists Forum 1–3. October 2009, Budapest. Budapest, Magyar Jogászegylet, 2009.

herausgegeben vom Direktor des Heidelberger Instituts.[12] Einer der Gründe für diese besondere Aufmerksamkeit ist die einzigartige Art und Weise, wie im öffentlichen Recht der EU das primäre Gemeinschaftsrecht, die Europäische Menschenrechtskonvention und die nationalen Rechtssysteme der Mitgliedstaaten miteinander verflochten sind, skizzierte Professor Bogdandy die Komplexität der Probleme des europäischen öffentlichen Rechts.

Die 14 Autoren des Bandes „Verfassungsgerichtsbarkeit im europäischen Rechtssystem” analysierten Rolle und Praxis der Verfassungsgerichte, sowie die daraus zu ziehenden Lehren und machten deutlich, dass diese Institution der letzte Garant für die Überwindung von Anomalien des postmodernen Rechtsstaates sein könnte.[13] Sie unterstrichen ihre Bedeutung und betonten, dass die Verfassungsgerichtsbarkeit die theoretische Grundlage für den Vergleich der Rechtssysteme innerhalb der europäischen Rechtsordnung sei, und dass diese Rolle die Grundlage bilde, auf der die Institution des Verbandes der Verfassungsgerichte zu errichten sei. Ihre Rolle bei Schließung der Rechtsschutzlücke ist von kardinaler Bedeutung, da es sich um eine Kontrolle handelt, die für die rationale Entwicklung gemeinsamer europäischer Lösungen entscheidend ist.

Als zukunftsweisendes Axiom bei der Lösung aktueller jurisprudenzieller Probleme können die europäische Rechtskultur und das europäische öffentliche Recht nicht allein aus dem EU-Recht und der Rechtsprechung des EuGH erwachsen. Dazu bedarf es vielmehr der Vernetzung der nationalen Rechtspflegeorgane, betonen die Redakteure.[14]

Schließlich müssen wir die methodologischen Empfehlungen als Axiome akzeptieren.

> „Die normative Grundstruktur des europäischen öffentlichen Rechts als rechtliche Leitlinie erwartet von allen Akteuren der Rechtsordnung, dass sie auf der Basis gemeinsamer Kenntnisse, Fähigkeiten und Werte agieren, auch wenn sie keine homogene Rechtskultur bilden. Nationale Auslegungen sollten mitsamt ihrem dogmatischen Gehalt aus der Perspektive des europäischen öffentlichen Rechts im Bereich der Rechtspraxis und der Rechtstheorie geprüft werden, wobei keineswegs immer eine Harmonisierung angestrebt werden sollte. Es besteht kein allgemeiner Konsens über den lokalen praktischen und theoretischen Stellenwert von Rechtsakten und Rechtsinstrumenten der verschiedenen Rechtsordnungen.
>
> Da in einem pluralistischen Gefüge eine gemeinsame Verantwortung nur in Form eines Dialogs geltend gemacht werden kann, ist die Annahme

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12 Armin von Bogdandy – Christoph Grabenwarter – Peter M. Huber: *Handbuch Jus Publicum Europaeum Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen.* Heidelberg, C. F. Müller (im Weiteren, Handbuch VI.) 2016.

13 Gábor Máthé: A posztmodern jogállam. [Der postmoderne Rechtsstaat]. *Polgári Szemle: gazdasági és társadalmi folyóirat* 15, 1–3. (2019), 193–203.

14 Handbuch VI, Der horizontaler verfassungsgerichtlicher Verband. 8–10.

> gerechtfertigt, dass es eine vergleichende Bewertung als Baustein für die Entfaltung einer gemeinsamen Normativität gibt.”[15]

Diese Methodik kann mit Nachdruck die Lösung von Rechtskonflikten zwischen den gemeinsamen Organen der EU und den Nationalstaaten herbeiführen, wenn das System der Vereinigung der Verfassungsgerichte der Nationalstaaten entwickelt wird.

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[15] Handbuch VI. Methodische und rechtliche Grundfragen 18–22.

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CURRENT ISSUES:
Challenges of Catholic Legal Education

INFUSING CATHOLICISM IN TEACHING AND WRITING

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Abstract

Catholic law faculty instruct not only the minds of students but also reach their souls. Even during times of crisis, such as the 2020 pandemic, Catholic educators courageously developed solutions to protect the health of students while also nurturing their minds and hearts. This article examines the importance that the Church places on education and research through the guidance offered to Catholic educators by the Gifts of the Holy Spirit received in the Sacrament of Confirmation. By infusing Catholicism in teaching and writing, law faculty share the teachings of Christ with both students and scholars.

Keywords: catholic legal education, faith-based pedagogy, gifts of the Holy Spirit, integrating faith and scholarship, Catholic social teaching

After decades of declining congregations,[1] horrific reports of child abuse,[2] evidence that bishops failed to remove predators from positions of trust,[3] and attempts to

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[1] Kate Selig: With a New U.S. Pope, Here's How the Face of Catholicism in America Has Changed. *New York Times* (Accessed on 9 May 2025), https://www.nytimes.com/2025/04/20/us/us-catholic-identity.html ("For decades, the share of American Catholics declined in the face of broader trends in secularization. But those numbers have stabilized in recent years, according to the latest survey data from the Pew Research Center, buoyed by growing immigrant communities across the West and the South and by broader societal changes that are transforming Catholic identity.").

[2] Sexual Abuse Civil Lawsuits That Have Gone to Trial. *Bishop Accountability,* (Accessed on 6 December 2010), https://www.bishop-accountability.org/legal/civil_trials.htm#Kos ("Thousands of civil suits have been filed in the United States relating to alleged sexual abuse by Catholic priests, but very few have gone to trial. BishopAccountability.org has reviewed the evidence and documented 43 civil suits that have been tried since the mid-1980s.").

[3] Ed Housewright – Brooks Egerton: Plaintiffs awarded $119.6 million in Kos case. *Dallas. Morning News,* (25 July 1997, 2:41 PM), https://www.dallasnews.com/news/1997/07/25/plaintiffs-awarded-119-

marginalize Catholics,[4] a subtle, slow change in American perceptions of the Catholic Church began around 2020. That year, the international COVID-19 Pandemic brought the world to a halt. In the United States, all schools across all grades were shut down in March of 2020.[5] Shortly thereafter, the debate began about when schools could safely re-open. While the government run public school system, dominated by powerful teachers' unions, lobbied for schools to remain closed,[6] Catholic school educators acted courageously.

From the elementary schools to the university level, Catholic administrators and teachers demonstrated both leadership and commitment to students. "Setting an industry standard, more than 90% of Catholic schools opened safely, in person, five days a week with hybrid options during the pandemic. This is compared to approximately

6-million-in-kos-case/ (Kos Jury Awards $ 119 Million Diocese Found Grossly Negligent Sex Abuse Judgment Largest of Its Kind).

4 Alexandra Desanctis: Dianne Feinstein Attacks Judicial Nominee's Catholic Faith. *National Review,* (6 September 6 2017, 9:40 PM), https://tinyurl.com/5an38v4u; *See Also Mitchell v. Helms*, 530 U.S. 793., 828–829. (2000) ("Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." See generally Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992)... In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.").

5 Paul Caron: 100% of Law Schools Have Moved Online Due to the Coronavirus. *Taxprof Blog* (18 March 2020), https://tinyurl.com/jrdzpjcm ("All 199 ABA-accredited law schools in the United States have moved entirely online due to the coronavirus.") [https://perma.cc/22AW-5GMC]. Colleges and universities are sending students home to watch lectures online. Public schools closing. Offices asking people to telecommute. Concerts, parades, festivals and sporting events postponed. Is all of this really necessary for the coronavirus? Are public health officials overreacting to the threat posed by the virus that causes the disease COVID19? It's absolutely necessary, because it's worked in the past, says medical historian Howard Markel, M.D., Ph.D., a University of Michigan expert who has studied the effects of similar responses to past epidemics. "An outbreak anywhere can go everywhere," … And right now, "We all need to pitch in to try to prevent cases both within ourselves and in our communities." It's called "flattening the curve," a term that public health officials use all the time but that many Americans just heard for the first time this week. Kara Gavin: Flattening the Curve for COVID-19: What Does it Mean and How Can You Help? *Mich. Med.: U. Mich.* (11 March 2020, 1:47 PM), https://tinyurl.com/5b5k599u [https://perma.cc/G2L5-2GAX]; see generally The President's Coronavirus Guidelines for America: 15 Days to Slow the Spread, *Coronavirus.Gov,* https://www.justice.gov/doj/page/file/1258511/dl [https://perma.cc/TQF9-J648]; see also Austin Williams, CDC's 'Flatten the Curve' Graphic Shows Why Social Distancing Amid Coronavirus Pandemic is Necessary, *Fox29 Phila.,* https://tinyurl.com/4knj64bh (13 March 2020, 8:50 PM), [https://perma.cc/E66H-AP93].

6 Jon Levine: Powerful teachers union influenced CDC on school reopenings, emails show. *New York Post*, (Accessed on 1 May 2021, 7:08 PM), https://tinyurl.com/mvx8tvkf ("The American Federation of Teachers lobbied the Centers for Disease Control and Prevention on, and even suggested language for, the federal agency's school-reopening guidance released in February. The powerful teachers union's full-court press preceded the federal agency putting the brakes on a full re-opening of in-person classrooms, emails between top CDC, AFT and White House officials show").

56% of public schools."[7] Father John Jenkins, the president of the University of Notre Dame in Indiana, boldly explained the Catholic viewpoint in an op-ed in the New York Times in May of 2020, stating:

The pivotal question for us individually and as a society is not whether we should take risks, but what risks are acceptable and why. Disagreements among us on that question are deep and vigorous, but I'd hope for wide agreement that the education of young people — the future leaders of our society — is worth risking a good deal. Indeed, the mark of a healthy society is its willingness to bear burdens and take risks for the education and well-being of its young.[8]

Catholic educators emerged as role models from the pandemic, demonstrating courage[9] and a true commitment to the education of youth.

The popularity of Catholicism in the United States continues to increase,[10] with Vice President J.D. Vance a high-profile convert.[11] Younger Americans are converting to Catholicism at record rates,[12] perhaps somewhat encouraged by the fact that an American now sits on St. Peter's throne.[13] All of these factors contribute to an increased

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7 The Nation's Report Card Shows Catholic Schools Excelling Post-Pandemic, The National Assessment of Educational Progress (NAEP), a biennial report of the U.S. Department of Education, notes Catholic schools outperforming public school counterparts in almost all categories. *National Catholic Education Association,* (Accessed on 4 August 2025), https://tinyurl.com/y5m56u88

8 John I. Jenkins: We're Reopening Notre Dame. It's worth the Risk: Informed by the best medical advice we can find, we believe we can keep our campus environment healthy. *New York Times,* (26 May 2020), https://www.nytimes.com/2020/05/26/opinion/notre-dame-university-coronavirus.html.

9 Ibid. ("Perhaps what we most need now, alongside science, is that kind of courage and the practical wisdom it requires. Notre Dame's recent announcement about reopening is the attempt to find the courageous mean as we face the threat of the virus and seek to continue our mission of education and inquiry").

10 Emily Sturge: Gen Z flocks to Catholicism in search of 'truth' and 'order' as young people reject leftism. *Campus Reform,* (28 April 2025, 11:25 AM), https://tinyurl.com/ywx32ssw ("A Harvard University survey revealed a significant increase in the percentage of Generation Z identifying as Catholic, with numbers climbing 15 to 21 percent from 2022 to 2023").

11 J. D. Vance: How I Joined Resistance: On Mamaw and becoming Catholic. *The Lamp*, (1 April 2020), https://rb.gy/hc1m2u ("I came eventually to believe that the teachings of the Catholic Church were true, but it happened slowly and unevenly").

12 Rikki Schlott: Young people are converting to Catholicism en masse — driven by pandemic, internet, 'lax' alternatives. *New York Post,* (17 April 2025, 11:00 AM), https://tinyurl.com/2x3r89zd.

13 What it Means for the First American To Be Chosen as Pope. *Georgetown University,* (9 May 2025), https://www.georgetown.edu/news/what-it-means-for-the-first-american-to-be-chosen-as-pope/ ("Cardinal Robert Francis Prevost, a 69-year-old Chicago native, has been chosen as the successor to Pope Francis. Pope Leo XIV, his chosen papal name, will be the first American to lead the Catholic Church in its nearly 2,000-year-old history.

Pope Leo XIV attended Villanova University in Philadelphia, Pennsylvania, and spent more than a decade serving as a missionary, leader of the Augustinian Order and bishop in Peru. For the past two years, he led the Vatican office that selects the next bishops globally"); Danielle Genovese: Pope Leo XIV could boost Catholic church attendance in US, Augustinian says: Pope Leo's roots could create a personal connection with American Catholics amid lower church attendance. *Fox Business,* (18 May 2025, 8:00 AM), https://tinyurl.com/vr6tn2m7 (Pope Leo XIV "being an American, first off, is historic. Then, being from Chicago specifically, I think it appeals to a lot of the people in the Midwest [and] in the interest in and growing respect for the Catholic Church in the United States, reversing the decades-long trend of insults against and disparagement of the Church. Additionally, worldwide interest in Catholicism continues to grow,[14] demonstrated by the one million faithful who attended the Pope Leo's celebration of Mass during the Youth Jubilee in August, 2025 outside of Rome, Italy.[15] Indeed, 2025 may well be remembered as the Year of the Catholic, or at minimum, as a year of good press for Catholicism.

In world history, there has never been a more accessible time to learn about the Catholic Church. The internet provides an especially welcoming format for those interested in Catholicism to find resources.

In an age of instability, people are attracted to ancient traditions; in an age of therapy-speak, there's something appealing about the tough demands of Catholic doctrine... Catholicism also has a visual and aesthetic heritage which has translated well into online culture. Catholics have turned out to be surprisingly good at using the internet to evangelize.[16]

The popularity of Hallow,[17] Word on Fire by Bishop Barron,[18] and the Bible in a Year with Father Mike Schmitz[19] demonstrate vast interest in learning more about faith. The Catholic mission thrives, offering individuals access to its teachings across a wide variety of platforms.

As Catholic academics, we are called to bring the teachings of Christ to our students. St. John Paul II said,

middle of the country," Connor said. "What's significant about that for American Catholics is that… we have a pope that really understands us. And it'll excite interest back in the church. I would suspect more people will start coming to Mass").

14 Luke Coppen: Are more adults becoming Catholic? Statistics for this year's Rite of Election figures are still coming in – but already the picture seems strikingly positive. *The Pillar* (18 March 2025), https://www.pillarcatholic.com/p/are-more-adults-becoming-catholic

15 Associated Press, Pope Leo tells 1 million Catholic youths they are sign 'different world is possible'. *National Public Radio*, (3 August 2025, 8:36 AM), https://tinyurl.com/4duekyay.

16 Madeleine Kearns: How Catholicism Got Cool: Young Americans and people around the world are flocking to the Catholic Church. The Free Press spoke to them to find out why. *Free Press,* (4 June 2025), https://www.thefp.com/p/meet-americas-newest-catholics.

17 Hallow Makes History Taking #1 Spot in App Store. *Hallow*, (15 February 2024), https://hallow.com/blog/hallow-makes-history-taking-no-1-spot-in-app-store/ ("Hallow, the #1 prayer app in the world, made history on Wednesday, becoming the first religious app to reach the #1 spot on Apple's App Store.

Hallow reached the top spot on Ash Wednesday, the start of Lent and the beginning of its Lent Pray40 prayer challenge.

"We're blown away. When we started Hallow, it would've been crazy for us to imagine a thousand people praying together on it, much less 1 million," said Alex Jones, Hallow CEO and co-founder. "God is doing incredible things. All glory and credit and praise belongs to Him."

More than 1 million people joined the 40-day prayer series that features Mark Wahlberg, Jonathan Roumie, Fr. Mike Schmitz, Sr. Miriam James and Sr. Mary Bernice").

18 Bishop Robert Baron: Word on Fire. *Youtube*, (Accessed on 5 August 2025), https://www.youtube.com/user/wordonfirevideo.

19 Ascension Presents: The Bible in a Year (with Fr. Mike Schmitz). *Youtube,* (Accessed on 5 August 2025), https://www.youtube.com/playlist?list=PLeXS0cAkuTPqFMtZQ379qdEmcfxO1SvXc.

The Church needs men and women who are intent on teaching by word and example – intent on helping to permeate the whole educational milieu with the spirit of Christ. This is a great vocation, and the Lord himself will reward all who serve in it as educators in the cause of the word of God.[20]

Teaching by word and example includes both subject matter choices as well as modeling the teachings of Christ in the treatment of others. Even when religion is not the focus of the lesson or writing, faith guides the topics chosen and the choices made in presentation, enabling the infusion of Catholicism into teaching.

In addition to their teaching responsibilities, faculty focus great efforts on developing their areas of expertise. Scholarly research is "important to any law school in enhancing the learning experience of its students."[21] Students and schools benefit from a faculty actively engaged in sharing ideas and analysis.

Faculty scholarship has other direct effects on the quality of the instruction that is offered to students. The faculty member who is a productive scholar in the areas in which he or she is teaching is best able to deal with and convey a sense of the most important contemporary problems in the field. Closely allied to this is the fact that scholarly necessity requires the scholar to be conversant with all of the relevant materials and sources.[22]

In 1968, Pope Paul VI discussed the importance of research as well as the duty of the scholar to follow the teachings of Christ.

The Church, most assuredly, has always the duty to carry on the effort to study more deeply and to present, in a manner ever better adapted to successive generations, the unfathomable mysteries of God, rich for all in fruits of salvation. But at the same time the greatest care must be taken, while fulfilling the indispensable duty of research, to do no injury to the teachings of Christian doctrine.[23]

Thus, whether or not the research focuses on religious topics, the Catholic scholar should be guided by faith.

One way to frame infusing Catholicism into teaching and research is to consider the seven gifts of the Holy Spirit that practicing Catholics receive through the Sacrament of Confirmation:[24] wisdom, understanding, counsel, fortitude, knowledge, piety, and fear of the Lord.[25] In the Spring and Summer of 2014, Pope Francis held public audiences

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20 John Paul II: *Message of John Paul II to the National Catholic Educational Association of the United States. The Vatican*, (16 April 1979), https://tinyurl.com/yeuuh4p6.

21 Charles H. Koch, Jr. – Frederick Schauer: Legal Scholarship and the Mission of a Law Faculty. *William & Mary Law School Scholarship Repository* 11, Spring (1981), 23.

22 Ibid.

23 Paul VI: Apostolic Letter in the Form of Motu Proprio Credo of the People of God of the Supreme Pontiff Paul VI. *The Vatican*, (30 June 1968), https://tinyurl.com/5e5nmmun.

24 Confirmation. *United States Conference of Catholic Bishops* (Accessed on 5 August 2025), https://www.usccb.org/prayer-and-worship/sacraments-and-sacramentals/confirmation ("In the Sacrament of Confirmation, the baptized person is "sealed with the gift of the Holy Spirit" and is strengthened for service to the Body of Christ").

25 Pope Francis: General Audience: St. Peter's Square. *The Vatican,* (9 April 2014), https://tinyurl.com/4amwvjau.

during which he featured one gift each week. This essay examines his explanations of the Gifts of the Holy Spirit in the context of infusing Catholicism into teaching and research.

For the gift of understanding, Pope Francis stated "It is clear then that the gift of understanding is closely connected to faith. When the Holy Spirit dwells in our hearts and enlightens our minds, he makes us grow day by day in the understanding of what the Lord has said and accomplished."[26] There are many daily opportunities to experience the gift of understanding. For example, the gift of understanding is infused into teaching when there is an opportunity to pray together in class.[27] Additionally, offering classes in Canon Law,[28] Catholic Social Thought,[29] or Legal Theology[30] enlightens the mind as it examines our faith, such that there is a growth in the gift of understanding.

The gifts of the Holy Spirit can also be subtly shared, allowing the infusion of Catholicism into the lessons themselves. As St. John Paul II explained, "Catholic education is above all a question of communicating Christ, of helping to form Christ in the lives of others."[31] Sometimes the secular world intrudes on the classroom, even when teaching at a Catholic institution. Concerns about confronting modern secular

[26] Pope Francis: General Audience: St. Peter's Square. *The Vatican*, (30 April 2014), https://tinyurl.com/uwtvvy88.

[27] David A. Grenardo: Improving The Law School Classroom And Experience Through Prayer; An Empirical Study. *Ave Maria Law Review* 13, 1. (2015), 81. ("Prayer certainly has a positive effect on the classroom in fostering a respectful and welcoming environment.2 6 In addition, emphasizing that the professor and students are expected to treat each other with dignity and respect addresses the basic need that individuals have to be treated with respect, which in turn helps to create a safe and positive learning environment. Prayer not only creates an atmosphere in the classroom that is reverent, positive, and cohesive, but it also provides students with some time to reflect and prepare for class itself").

[28] YLPC- Canon Law. *University of St. Thomas Academic Catalog,* (Accessed on 5 August 2025), https://catalog.stthom.edu/ylpccanon-law ; School of Canon Law Course Descriptions. *The Catholic University of America*, (Accesses on 5 August 2025), https://canonlaw.catholic.edu/academics/courses/course-descriptions/index.html (Examples of such courses include YLPC 6201: Introduction to Canon Law and other courses offered at the University of St. Thomas in Texas as well as the school of Canon Law at Catholic University in Washington, D.C.).

[29] Rick Garnett: Catholic Social Thought and Law at Yale. *Prawfsblog*, (26 January 2006, 4:25 PM), https://prawfsblawg.blogs.com/prawfsblawg/2006/01/catholic_social.html ("Eduardo Penalver, my fellow blogger at "Mirror of Justice," is teaching a course this term at Yale Law School on "Catholic Social Thought and the Law." (Several law schools, including Notre Dame's, offer this course, and Villanova's law school just started a new journal on the topic.)").

[30] J.D./M.A. Master of Arts in Catholic Studies. *University of St. Thomas School of Law,* (Accessed on 5 August 2025), https://law.stthomas.edu/jd-program/coursework-options/ma-catholic-studies/ ("At St. Thomas, students interested in pursuing the law while growing in their Catholic faith have an opportunity to pursue a joint J.D. and master's degree program offered by the School of Law and the Department of Catholic Studies. Our university's Catholic Studies program is the oldest, largest program of its kind. And St. Thomas Law is ranked #5 on National Jurist's list of the Most 'Devout' Law Schools (2025)").

[31] John Paul II: Message of John Paul II to the National Catholic Educational Association of the United States. *The Vatican*, (16 April 1979), https://tinyurl.com/yeuuh4p6.

beliefs that are antithetical to Catholic [32] provoke possible confrontations with upholding Catholic values.

Yet, whatsoever the beliefs, statements or appearance of students, the Catholic response is to treat everyone as Christ would have treated them. Recognizing that each one is a child of God. Treating each student with respect and compassion demonstrates the Holy Spirit's gift of wisdom.

And wisdom is precisely this: it is the grace of being able to see everything with the eyes of God. It is simply this: it is to see the world, to see situations, circumstances, problems, everything through God's eyes. This is wisdom. Sometimes we see things according to our liking or according to the condition of our heart, with love or with hate, with envy.... No, this is not God's perspective. Wisdom is what the Holy Spirit works in us so as to enable us to see things with the eyes of God.[33]

Students may reject the teachings of our faith and voice opposition to our beliefs. Law faculty should strive to use the gift of wisdom and consider that even when student comments or appearances are not to our liking or in accordance with our beliefs, Catholic educators never reject the person, just as God would never reject one of us. Such a response may help form Christ in others.

Although the Holy Spirit's Gift of Fear of the Lord sounds more like a warning than a gift, it nevertheless reassures us that God would never reject us, while also empowering us to follow our faith. Pope Francis explained that

Fear of the Lord allows us to be aware that everything comes from grace and that our true strength lies solely in following the Lord Jesus and in allowing the Father to bestow upon us his goodness and his mercy. To open the heart, so that the goodness and mercy of God may come to us. This is what the Holy Spirit does through the gift of fear of the Lord: he opens hearts. The heart opens so that forgiveness, mercy, goodness and the caress of the Father may come to us, for as children we are infinitely loved.[34]

Fear of the Lord allows the Catholic Educator to become fearless of everything else. We can safely open our hearts to mercy and goodness toward others. We can do what we know is right, even in the face of criticism or unpopularity. We do not fear earthy retribution when following the tenants of Catholicism. Instead, we derive strength from following the Lord and battling injustice wherever it is found.

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32 Matthew McDonald: Catholic Schools Tiptoeing the Line on Gender Identity Bishops and educators are seeking to understand how best to love the student and extend pastoral care to families without affirming the crisis. *National Catholic Register,* (2 November 2022), https://www.ncregister.com/news/catholic-schools-tiptoeing-the-line-on-gender-identity ("What happens if a student at a Catholic school declares he is now a she or she is now a he?

The Church's teaching is clear: "Everyone, man and woman, should acknowledge and accept his sexual identity," the Catechism of the Catholic Church states (2333). Pope Francis, in his 2016 apostolic exhortation Amoris Laetitia, said: "Beyond the understandable difficulties which individuals may experience, the young need to accept their own body as it was created …").

33 Pope Francis: General Audience: St. Peter's Square. *The Vatican,* (9 April 2014), https://tinyurl.com/4amwvjau.

34 Pope Francis: General Audience: St. Peter's Square. *The Vatican,* (11 June 2015), https://tinyurl.com/2rx5ve96.

Fear of the Lord empowers us to advocate for the weak and ill, not merely one on one, but also through our research. For example, in the wealthy United States, homeless individuals suffering from mental illness wander our streets, actively experiencing the ravages of their illness on their minds and bodies.[35] Research reveals that it is our legal system – not finances – that has closed the psychiatric hospitals and abandoned the mentally ill to the streets. Research brings these legal issues into the light,[36] and enables the Catholic scholar to propose compassionate, Christ-centered solutions.[37]

Fear of the Lord enables Law Faculty to stand up for the stranger and empowers[38] us to effect change through research and writing. Even laws with good intentions sometimes have negative impacts. For example, laws designed to protect medical privacy have been contorted by regulations that interfere with continuity of care for the sickest among us.[39] Infusing Catholicism into research includes offering solutions to protect those who cannot protect themselves from both physical harm as well as legal difficulties.[40]

Fear of the Lord allows us to protest injustice, and to follow Christ's teaching to help others. The most marginalized among us often wait in immigration detention centers, dwell in our prisons[41] or await their executions on death row.[42] Law faculty train students in clinical programs, teaching future lawyers to offer exemplary representation to the

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[35] Ending Crime and Disorder on America's Streets. *The White House,* (26 July 2025), https://tinyurl.com/mr3sepn7 ("The number of individuals living on the streets in the United States on a single night during the last year of the previous administration — 274,224 — was the highest ever recorded. The overwhelming majority of these individuals are addicted to drugs, have a mental health condition, or both. Nearly two-thirds of homeless individuals report having regularly used hard drugs like methamphetamines, cocaine, or opioids in their lifetimes. An equally large share of homeless individuals reported suffering from mental health conditions").

[36] Joanmarie Davoli: No Room at the Inn: How the Federal Medicaid Program Created Inequities in Psychiatric Hospital Access for the Indigent Mentally Ill. *American Journal of Law and Medicine* 29, 2–3. (2003), 159–183. https://doi.org/10.1017/S0098858800002793

[37] Joanmarie Davoli: Too Little, Too Late? Executive Orders & the Disappearance of Psychiatric Hospitals. *Wayne Law Review,* 69, 2. (2023), 169–242. Judy A. Clausen – Joanmarie Davoli: Alternatives to the Squad Care: A Strategy Providing Hope for People with Mental Illness. *University of Florida Levin College of Law* 93, 4. (2024), 719–810.

[38] John Paul II: Message of John Paul II to the National Catholic Educational Association of the United States. *The Vatican*, (16 April 1979), https://tinyurl.com/yeuuh4p6 (St. John Paul II urged us "Be strong, therefore, in pursuing these goals ['trained to live the newness of Christian life in justice and in the holiness of truth'].").

[39] Joanmarie Davoli: HIPAA'S Hypocrites. *Creighton Law Review* 58, 2. (2025), 127–187. https://doi.org/10.2139/ssrn.5295192

[40] Joanmarie Davoli: Diverting the Mentally Ill Out of the Virginia Criminal Justice System. *George Mason University Civil Rights Law Journal* 11, 1. (2000), 109–124.

[41] Joanmarie Davoli: You Have the Right to an Attorney; If You Cannot Afford One, Then the Government Will Underpay an Overworked Attorney Who Must Also Be an Expert in Psychiatry and Immigration Law. *Michigan State Law Review* 2012, 4. (2012), 1149–1187. (This author wrote articles protesting the treatment of indigent defendants).

[42] Joanmarie Davoli: Playing Politics with Executions: Abuse of Executive Discretion. *George Mason University Civil Rights Law Journal* 30, 3. (2020), 307–350. Joanmarie Davoli: Evolving Standards of Irrelevancy. *Quinnipiac Law Review* 41, 81. (2022), 81–133.

powerless.[43] Research proposes solutions that infuse the teachings of Christ into the proposed recommendations.

Fear of the Lord also calls Law Faculty to protect the innocent. Where great injustice occurs, such as in the mistreatment of the powerless by the hands of the powerful,[44] tenure protects faculty from career repercussions. Even if faced with career retribution, the gift of Fear of the Lord reminds us that with grace, our true strength lies not in career advancement, but with following the teachings of Christ. Fear of the Lord opens our hearts and empowers us to seek justice and mercy.

Law Faculty often experience the Holy Spirit Gift of counsel. In fact, when students express a rejection of religion, teaching gives us the opportunity to respond consistently with Christ's teachings. Pope Francis explained that

Counsel, then, is the gift through which the Holy Spirit enables our conscience to make a concrete choice in communion with God, according to the logic of Jesus and his Gospel. In this way, the Spirit makes us grow interiorly, he makes us grow positively, he makes us grow in the community and he helps us not to fall prey to self-centredness and one's own way of seeing things.[45]

The very expression of disagreement with the lessons of the Church prompt faculty to remember how Jesus dealt with confrontation. Instead of pointless arguments or personal rejection, we should look at the opportunity to consider the viewpoint of others, especially those with whom we strongly disagree. Listening to the speaker and considering the viewpoint does not mean that we must accept ideas contrary to our Faith, but the gift of Counsel encourages us to think more deeply about why we believe, and to share those beliefs with others.

Indeed, the position of a law faculty member often includes the gift of Piety, in which Pope Francis explains how piety impacts our treatment of others.

The gift of piety means to be truly capable of rejoicing with those who rejoice, of weeping with those who weep, of being close to those who are lonely or in anguish, of correcting those in error, of consoling the afflicted, of welcoming and helping those in need. The gift of piety is closely tied to gentleness. The gift of piety which the Holy

43 Clinical Programs: Juris Doctor (JD). *Barry University School of Law*, (Accessed on 5 August 2025), https://www.barry.edu/en/academics/law/jd-law/clinical-programs ("Our Law School is committed to providing legal services that are consistent with the University's mission of making a contribution to the society we are all part of. All of our Clinical Programs are taught by professors, private and public lawyers and trial judges who are focused on assisting our students in developing the skills necessary to succeed after law school. Consistent with this goal, our clinical and externships programs contain an important classroom component which allows students to get the most from their practical experiences").

44 Joanmarie Davoli: Harvesting Humans. *Belmont law Review* 13, (2025), https://doi.org/10.2139/ssrn.5213622, (forthcoming) (Such as the ongoing genocide being committed by the Communist Chinese Government as they kill innocent ethnic minorities and sell their organs to wealthy buyers: "Harvesting Humans" (Forced transplant industry in the PRC)).

45 Pope Francis: General Audience: St. Peter's Square. *The Vatican*, (7 May 2014), https://tinyurl.com/5azjap2w.

Spirit gives us makes us gentle, makes us calm, patient, at peace with God, at the service of others with gentleness.[46]

For to teach is to be at the service of others. We are serving our students by sharing ideas and information, by training their minds in how to approach intellectual ideas and analyze conflicting information. The best teachers are gentle, calm and patient, which also brings us peace with God. The haughty and the rude might frighten or intimidate, but they rarely effectively teach. Infusing Catholicism into our teaching means that Catholic educators learn to truly rejoice with others, mourn with others, correct those in error and act with gentleness.

With the demands of family life and career expectations, Law faculty may often desperately need the Gift of Fortitude, because, as Pope Francis explained,

sometimes we may be tempted to give in to laziness, or worse, to discouragement, especially when faced with the hardships and trials of life. In these cases, let us not lose heart, let us invoke the Holy Spirit so that through the gift of fortitude he may lift our heart and communicate new strength and enthusiasm to our life and to our following of Jesus.'"[47]

Part of that strength and enthusiasm originates with the subjects we teach and research that lead us closer to God. When Catholic educators focus on issues of importance to our Faith, we are less likely to become lazy or discouraged and more likely to feel closer to Christ.

In research, the Holy Spirit's Gift of Knowledge urges the Catholic scholar to search for areas of light and accomplishment. For it is in law that we seek justice, and we believe that justice does exist. Pope Francis reminds us that

if God sees creation as good, as a beautiful thing, then we too must take this attitude and see that creation is a good and beautiful thing. Now, this is the gift of knowledge that allows us to see this beauty, therefore we praise God, giving thanks to him for having granted us so much beauty.[48]

As the Gift of Knowledge teaches us that there is beauty in the human mind, created in God's likeness, that encourages curiosity, creativity, thoughtfulness and kindness. Teaching offers Law Faculty the opportunity to protect freedom of religion so that the rights of everyone to praise God are protected.[49] Knowledge embodies searching for the truth and justice inherent in the law.

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46 Pope Francis: General Audience: St. Peter's Square. *The Vatican*, (4 June 2014), https://tinyurl.com/33t5htmn.

47 Pope Francis: General Audience: St. Peter's Square. *The Vatican,* (14 May 2014), https://tinyurl.com/4a6zuyye.

48 Pope Francis: General Audience: St. Peter's Square. *The Vatican,* (21 May 2014), https://tinyurl.com/y35tec5r.

49 Legal Work. *University of Notre Dame School of Law, Lindsay and Matt Moroun Religious Liberty Clinic*, (Accessed on 5 August 2025), https://religiousliberty.nd.edu/clinic/ ("The Lindsay and Matt Moroun Religious Liberty Clinic is a teaching law practice that educates, forms, and prepares Notre Dame law students to become the rising generation of religious liberty leaders by training students in the practice of the law as they defend religious freedom for all people").

These gifts of the Holy Spirit enable us to understand how to best infuse Catholicism into teaching and research, just as we infuse our faith into every decision in our lives.

I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me, naked and you clothed me, ill and you cared for me, in prison and you visited me.'

Then the righteous will answer him and say, 'Lord, when did we see you hungry and feed you, or thirsty and give you drink?

When did we see you a stranger and welcome you, or naked and clothe you?

When did we see you ill or in prison, and visit you?'

And the king will say to them in reply, 'Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me.'[50]

As the teacher looks out at the classroom filled with students, and as the scholar selects an area to research, the Gifts of the Holy Spirit guide us ever closer to following the teachings of Christ. In our work, we should always consider the hungry, the thirsty, the stranger, the naked, the prisoner, and whomever is treated as the least among us – for we are called to serve them in both our personal and our professional lives.

Finally, Law faculty spend a great deal of their time thinking, and as with everything, there is guidance from God. As Saint Paul wrote, "whatever is true, whatever is honorable, whatever is just, whatever is pure, whatever is lovely, whatever is gracious, if there is any excellence and if there is anything worthy of praise, think about these things."[51] And write on them and teach on them. And recognize that these things that are true, honest, just, pure, lovely, good, and virtuous all come from God. As these things are infused into your thoughts, they will also be infused into your teaching and your research.

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50 *Matthew* 25: 36–40. NABRE – New American Bible Revised Edition. https://www.bible.com/versions/463-nabre-new-american-bible-revised-edition

51 *Phillipians* 4:8. (Saint Paul in his Epistle to the *Phillipians*). NABRE – New American Bible Revised Edition. https://www.bible.com/versions/463-nabre-new-american-bible-revised-edition

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COMMUNITY ENGAGEMENT

A pedagogical model for teaching social justice in Law Schools

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Abstract

This paper explores community engagement as a pedagogical model for teaching social justice in law schools, with a particular focus on Strathmore University in Kenya. Rooted in Catholic social teaching, the university integrates experiential learning into its legal education through service-based learning, community service, and pro bono legal aid. All students at the university, including law students, are required to complete 200 hours of community service. They are further encouraged to participate in the Legal Aid Caravan, one of the many initiatives of the Strathmore Law Clinic, which provides free legal services to marginalised communities. These initiatives enable students to bridge the gap between legal theory and practice while confronting real-world injustices such as land disputes, gender-based violence, and discrimination. The pedagogical model fosters professional skills, including legal research, client care, and leadership, while cultivating moral responsibility, empathy, and a commitment to justice. By engaging with historically underserved populations, students learn to integrate law with moral philosophy, sociology, and economics, thereby deepening their understanding of the rule of law's contribution to the common good. The article argues that experiential learning through community engagement is vital for shaping ethically conscious lawyers who view law not merely as an instrument, but as a tool for advancing justice and human dignity.

Keywords: community engagement, social justice, legal education, experiential learning, law clinics, Strathmore University

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1. Introduction

The most critical task for those governing Christian-inspired universities is to ensure that the institutional mission illuminates and gives meaning to teaching, research, and transfer activity[1].

In general, in universities, there is more disagreement than consensus on decisions and suggestions: opinions differ, especially when it comes to establishing mechanisms that make the presence of the Gospel message compatible with respect for the freedom of professors, students, and all those involved in academic life[2].

Strathmore University (SU) is a private university in Kenya, with a mission to provide all-round quality education in an atmosphere of freedom and responsibility, excellence in teaching, research and scholarship, ethical and social development and service to society. Being a Christian-inspired university, the above mission statement borrows a lot from Catholic social teaching. This, therefore, means that each engagement the university has with its students and staff has to be an opportunity to impart Catholic social teaching, a task that comes with its challenges, considering the modern-day dynamic world. Many academic centres inspired by the message of the Gospel have not been able to reconcile loyalty to their principles with a commitment to the highest academic quality[3]. SU too has its constant struggle in aligning its mission with the demands of varied stakeholders, ranging from students to the regulatory authorities and industry. As mentioned in the mission of the university, social development and service to society are key aspects of daily life in the university and pervade all departments. In the academic departments and especially the law school, social justice has always been one of its aims. In a world where inequality is getting bigger, it is essential that Christian-inspired universities offer opportunities for their students to engage in Catholic social justice teaching in meaningful ways[4]. Strathmore University has risen to this challenge by providing a framework for social justice in all the core curricula of all degree programmes, which has been of great help. This is a set of humanistic and theological subjects that address the major questions surrounding human engagement and collaboration. On the practical front, all university undergraduate students must give 200 hours of pro bono community service to disadvantaged people after their first academic year. During community service, class theories come to life, and the students get immersed in real-world problem-solving situations that offer them experience in the complex interactions among political, legal, and economic systems.

At Strathmore University's Law School, they go the extra mile by encouraging students to on top of the 200 hours of community service, to join the Legal Aid Caravan,

[1] Alfonso Sánchez-Tabernero: Governance, identity and freedom in Christian-inspired universities. *Church, Communication and Culture* 9, 2. (2024), 260–276.

[2] Ibid.

[3] Michael Rizzi: Defining Catholic Higher Education in Positive, Not Negative, Terms. *Journal of Catholic Education* 22, 2. (2019), 1–25. https://doi.org/10.15365/joce.2202012019

[4] Vincent Rougeau: Reforming the Legal Profession Through Faith-Based Service Learning for Law Students: Notre Dame's "Just Communities" Project. *Journal of College & Character* 10, 7. (2009). https://doi.org/10.2202/1940-1639.1439

whose mission is to address the unfair distribution of legal services and the inequitable access to representation by the most vulnerable in the Kenyan society by providing pro bono legal services all-round the year and at specific camps that go round the country and hence the name caravan. By this, they not only promote access to justice but also contribute to the achievement of social justice.

The Carnegie Report on Legal Education 2007 was concerned over what the authors saw as a tendency in legal education to encourage amorality in students that decoupled their education from a desire to seek justice[5]. The consequence, although perhaps unintended, was the creation of a profession filled with lawyers who viewed the law in purely instrumental terms, fueling an impression among non-lawyers that attorneys were nothing more than hired guns who cared little for the truth.

This paper presents how Strathmore University uses community service (in various forms) at its Law school to firstly, to dissuade students from decoupling morality from legal education and to inculcate in them a desire for true justice and to instil such virtues as altruism in the students. Secondly, the article aims to present how the university teaches students the interface between law and other fields of knowledge, especially moral philosophy, politics, sociology, and economics, in the pursuit of the rule of law's contribution to the common good of society and the promotion of people's freedoms and rights[6].

The article will show how SU is using community service imbued with catholic social teaching on social justice, option for the poor & vulnerable and dignity of work to teach students Property Law, Family Law, Criminal Law and social justice.

1.1. Community engagement as experiential learning

Community engagement as a way of experiential learning provides students with the opportunity to learn from and with communities to bridge the gap between theory and practice. As a result, communities become the laboratories for developing practical learning experiences. Students play a key role in the community projects undertaken by learning institutions, not only as service assistants but also as contributors to the community. The intensity of community engagement depends on the type of higher education institution, its mission, functions, and the priorities of its main stakeholders. One of Strathmore University's core values of service to society, therefore, the university provides support for community engagement both financially and through the professional service of its staff and students. The learning outcomes can be intellectual, social, ethical, civic, spiritual, or moral in nature.

Finally, community engagement can have a wide range of pedagogical and philosophical strategies, and it also has different perspectives such as service-learning,

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[5] Ibid.

[6] Antoinette Kankindi – Victor Chimbwanda: Legal Education and Its Contemporary Challenges in Sub-Saharan Africa. *Strathmore Law Journal* 5, 1. (2021), 145–179. https://doi.org/10.52907/slj.v5i1.143

community-based research, and civic engagement[7]. It provides students with a wide and immersive learning platform.

1.2. Challenges of legal education in Kenya

Legal education in Kenya predominantly centres on the theoretical methods deployed in university education, and therefore, it requires a more practical approach. The lack of adaptation of the curriculum to meet the new market demands and technological advancements is doing a disservice to the profession[8].

Secondly, legal education in Kenya is predominantly theoretical and experiential learning is not prioritised, due to a lack of funds. This, therefore, leads one to ask what the place of experiential learning is in legal education[9].

1.3. The place of experiential learning in legal education

Experiential learning in legal education can be put into three categories: Clinics, Externships and Simulations. These learning opportunities are designed to encourage students to begin to form their professional identities as lawyers, through experience or role-playing with guided self-reflection, so that they can become skilled, ethical, and professional lifelong learners of the law[10]. Experiential learning in legal education provides students with the following benefits:

- Hands-on experience: By participating in real-world legal work, students can gain practical skills and experience that can help them succeed in their future careers.
- Career preparation: Experiential learning programs such as internships and clinics can provide students with valuable connections and experience in a specific area of law, which can be beneficial when seeking employment after graduation.
- Community service: Clinics and other experiential learning programs often provide legal services to underserved communities, which allows students to give back while also gaining valuable experience.
- Increased sense of purpose: Experiential learning can create a sense of purpose and relevance, which can help students to see the value of their education and the impact they can have in the world.

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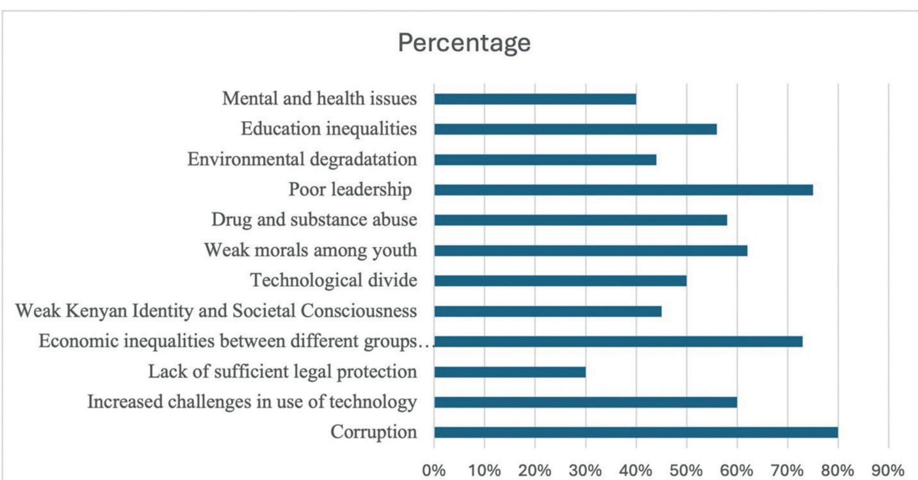
1.4. Nature of Strathmore University Community Engagement

The notion of community engagement as a form of a "scholarship of engagement" has become an accepted part of the nomenclature within higher education. Community engagement, whether in the form of service-learning, public scholarship, or community-based research, is a wonderfully complex and situated practice that forces students to rethink their normal patterns of working. Community engagement has the goal of providing faculty, students, and education managers with an additional set of tools to achieve their ends[11].

At Strathmore University, *Service-Based Learning* (SBL) was started in 2001 and provides students with an opportunity to engage in community service activities that address societal needs, together with opportunities for reflection on the real world for 200 hours.

A study about Strathmore University's SBL concluded that at an institutional level, service-learning enables universities to create connections with communities and community actors, which can promote the university's profile and help achieve the third mission of universities[12]. It provides faculty with more information on issues facing communities and can further enrich learning experiences by bringing the real-world issues facing societies into the classroom. Service-learning contributes to the creation of sustainable and connected communities. Service-learning is a way for universities to contribute to local, regional, and national needs.

Table 1: What kind of challenges have our students been addressing in community engagement?
The challenges students were addressing through service learning



Adopted from Kitawi (2022) – A study of Strathmore University Community Service Learning Programme

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11 Butin op. cit.

12 Samuel Fongwa – Thierry M. Luescher – Ntimi Mtawa – Jesmael Mataga: *Universities, society and development : African perspectives of University community engagement in secondary cities*. 2022.

2. Nature of Strathmore Law School Law Clinic

The Strathmore Law Clinic (SLC) was founded in 2016 and is a student-run, faculty-supervised body dedicated to promoting access to justice in various ways, including representation to individuals and communities that cannot afford private legal counsel, all on a pro-bono basis. Students join SLC voluntarily, and it is not mandatory that every law student join it.

SLC generally runs projects touching on the following three areas: Criminal justice, Human rights, and Entrepreneurship. The SLC provides experiential learning to students by giving them real-life and hands-on experience in legal situations, providing them with opportunities to apply classroom knowledge. The SLC, as a form of experiential learning, deepens students' understanding of the law and also provides valuable legal services to the community, especially the marginalised communities of the three counties where the 2023 and 2024 law clinics were done. According to the Law Society of Kenya, three-quarters of the 20,000[13] registered lawyers in Kenya practice in Nairobi; therefore, the citizens of Nairobi have an excess of lawyers. Therefore, going out to such far flung areas – Isiolo, Samburu and Laikipia- gives the students a great opportunity to meet people who may never access legal services, and this helps the students bring social justice to where it is most needed.

Strathmore Law School started legal aid clinics outside of Nairobi in 2023 to educate and empower the marginalised communities across Kenya. Our analysis of the neediest locations in Kenya revealed that the northern part of the country was most disadvantaged in terms of legal services. For many in these communities, the law is a foreign concept, and the concept of seeking justice seems far beyond their reach. The analysis revealed that:

- Isiolo, Samburu and Laikipia counties have the lowest Advocate-to-Citizen ratio in Kenya (63 advocates serving 1,096,889 people)
- They are marginalised communities, and at the moment, there is no institution offering constant legal clinics there.
- They have the lowest literacy levels in Kenya.
- They have the highest cattle raiding rate in Kenya, at 82%.
- The sidelining of women and the subjugation of women's rights are common.
- Nomadic pastoral lifestyle is the main way of life in this region.

As nomadic pastoralism is the main way of life in this region, it comes with its unique challenges that are different from other urban or sedentary farming areas in Kenya. Therefore, the perspectives and experiences discussed here are of relevance not only to Kenyan nomadic communities but could also be applied to other pastoral nomads in other parts of Africa and the world at large.

[13] Law Society of Kenya Registry 2025

Figure 1: *Map of Kenya showing the locations of Legal Aid Clinics in Kenya: Samburu, Isiolo and Laikipia counties*

Legend:

- Combined population – 1,096,889 people
- Average population density – 20 people per km^2
- Combined area – 55,800 km^2

2.1. A pedagogical model for teaching social justice

The northern part of Kenya is home to various historically marginalised communities. In this regard, the Borana, Turkana, Meru, and Somali communities that reside in Isiolo County grapple with a range of legal challenges, including cattle rustling, banditry, ethnic violence, gender-based violence (GBV), and land disputes. Reports from the Isiolo District Peace Committee underscore the severity of these legal issues. Furthermore, teenage pregnancies, rape, female genital mutilation (FGM), early child marriages, and other GBV are prevalent in Isiolo County. Criminal acts relating to sexual and domestic violence are often settled quietly and swiftly through alternative dispute resolution (ADR), which arguably belittles the retributive aspect of punishment required for crimes of such magnitude. Additionally, statistics from the State Department for Gender and Affirmative Action, 2020, indicate that 65% of girls in the county were reported to have undergone circumcision. The legal issues highlighted above are part of numerous other challenges evident in Isiolo and neighbouring counties. As such, an intervention by SLC with the support of the Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT) and later the Konrad-Adenauer-Stiftung (KAS) Rule of Law Programme, in anglophone Sub-Saharan Africa, is both timely and extremely necessary. In this regard, SLC, IMPACT and KAS envision a Caravan that extends beyond the mere provision of legal aid to guarantee a broader commitment to social justice, empowerment, and community resilience.

The legal aid clinic, as expected, is also an experiential learning opportunity for students. At Strathmore, we utilise it as a platform to teach social justice. Collaboration is a key aspect of experiential learning, and feedback from the law clinics we have held shows that the students learn collaborative skills better when the entire law clinic is based on a collaborative approach, rather than having a special session dedicated to "collaboration." Collaboration and teamwork skills are important when teaching social justice, as most of the problems are not as direct and structured as found in theory. It therefore calls for collaboration and teamwork. As elaborated in this excerpt,

> "The problems people face in their everyday lives, however, are not 'well-structured." They are quite messy and "ill-structured." The information that is needed to solve these problems (the "problem space") is not clearly bounded; there may be more than one solution, and the problem itself may be amorphous and shifting. Individuals experience everyday problem-solving as "ambiguous, convoluted, and spiralling, not as linear, sequential, or governed by specific procedures. Problem-solving theorists have discovered that people solve ill-structured problems quite differently from well-structured problems. Rather than applying memory and logic to the task, everyday ill-structured problems draw on much broader, more diverse aspects of human nature and human relationships[14]."

Therefore, collaboration with both members of the community and fellow clinicians is a key piece of the pedagogical model.

The desktop preparatory stage of the legal clinics happens months in advance, where students need to show mastery of the theoretical content to be applied in practice. The advance team travels to the intended locations and gets a sample of the cases that will be handled during the legal aid clinic, and reviews them through historical context- how has historical issues reinforced some of the injustices, systemic analysis-how systemic inequalities have enabled poverty and other societal ills, and intersectionality-in that

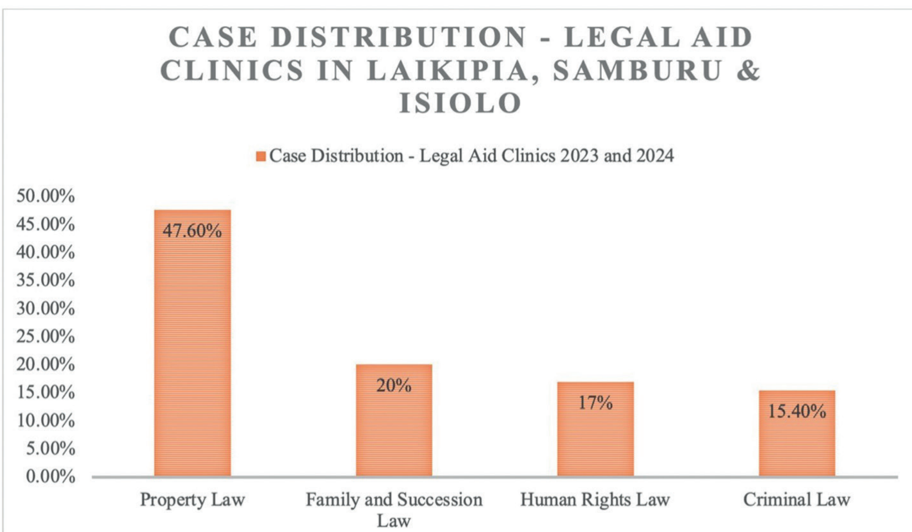
[14] Shin Imai: A Counter-pedagogy for Social Justice: Core Skills for Community A Counter-pedagogy for Social Justice: Core Skills for Community Lawyering. *Clinical Law Review* 9, 1. (2002).

social injustices don't take place in isolation but are rather interconnected. The process followed at the Strathmore legal clinics can thus be summarised as

- Initial contact
- Desktop review of the region to be visited
- Eligibility assessment
- Categorisation
- Case evaluation and advice
- Decision: Proceed to court or ADR
- Daily debrief and discussion of the day's experiences and lessons learnt

Over the years, we have found that the desktop reviews and the reality don't differ by a large margin. In 2023, initial reviews showed that Property Law cases were at 52%, while the reality was at 47.6%, Family and Succession Law cases were at 15% while the reality was at 20%, Human Rights Law was at 17% and the reality happened to be at the same level of 17% and Criminal Law cases as per the desktop review and initial contact reviews were at 16%, however after the clinics, the reality was at 15.4%.

Graph 1: Nature of Legal Aid Clinics in Laikipia, Samburu and Isiolo



The above graph is a representation of the case distribution following legal clinics in 2023 and 2024 in the three counties.

An important aspect of the process for the learners is the daily debrief and reflections. Self-reflection is a critical part of their development and their ethical responsibility to promote justice. Reflection provides the learners with a process to develop professional judgment in their clinics since they are still new in the profession and lack experience, the very thing that allows a professional to exercise professional judgment. The need for self-reflection can be summarised as follows

> "This deliberate process of reflection is necessary because new professionals cannot rely on intuition or "gut" in the same manner as an expert. While the seasoned professional integrates seamlessly through thought and action, the new professional must decouple the action from the thinking about the action; the new professional must consciously activate a process to guide the rendering of professional judgment[15]."

The lecturers and other long-serving clinicians serve as experts in these clinics and help the learners develop self-reflection.

Faculty development and support cannot be emphasised enough in making this pedagogical model a success. To fully understand why faculty development and support is necessary, it is pivotal to appreciate the additional requirements for faculty members in clinical education. In this regard, and based on the teaching model used in Georgetown University clinics, the six truths that embody these additional burdens are summarised as follows:

> "In developing our course, we found that the teaching model used in most of the Georgetown clinics embodied six truths. First, we believe that teaching in a clinic is different from and more expansive than training lawyers in a purely professional setting and different from teaching in a doctrinal course. Second, clinical teaching is goal driven and based on backward design. Third, faculty intervention is intentional and based on making choices that further a student's education. Fourth, clinical education should be based on "Justice" in the most expansive meaning of the word. Fifth, client and student needs are equally important in a clinical program and that neither need be sacrificed for the other. Finally, clinical teaching is personal and designed to accept students where they begin and to maximize their potential to learn[16]."

It is worth noting that faculty members engaged in law clinics, which, as identified above, are already demanding, also perform additional roles and must juggle between these roles. Many studies are in consensus that faculty development and institutional support are indispensable for faculty involved in clinical education[17]. Faculty development and support in pivotal. First, clinical educators require additional special skills beyond lawyering, given the extra burden placed on them. Second, clinical educators' training ensures that they can impart reflective and ethical professional judgment on their students. Third, support to clinical educators prevents burnout

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15 Timothy CASEY: Reflective Practice in Legal Education: The stages of reflection. *Clinical Law Review* 20, (2014), 317–350.

16 Wallace J. MLYNIEC: Where to Begin? Training New Teachers in the Art of Clinical Pedagogy. *Clinical Law Review* 18, 2. (2012), 505–591.

17 Robert R. KUEHN – David A. SANTACROCE: *An Empirical Analysis of Clinical Legal Education at Middle Age*. *Journal of Legal Education* 71, 4. (Summer 2022), 622. Law clinics at African universities. (n.d.).

given their multiple roles as educators, lawyers, supervisors and mentors. Fourth, the development of clinical educators fosters consistency and sustainability through the creation of a common pedagogical language, strengthened supervision practices and established consistent expectations of clinical programs. Lastly, investment by law schools is necessary because clinical programs cannot rely on passion alone[18].

2.2. Case distribution and the learning process

As shown in graph 1 above, when the nature of cases handled during the legal aid clinic is tabulated, the distribution is such that property-related cases are the most at 47.6%, followed by family and succession related cases at 20%, then human rights-related cases at 17% and finally criminal cases at 15.4%. This case distribution helps stratify the learning process for the students as they handle the cases in the following manner: Property law, Family law, Human rights law and Criminal law, respectively.

The legal aid clinics at SLC have been used to teach social justice, as evidenced by their ability to relate theoretical concepts covered in class to practical lessons garnered from interactions with clients and communities discussed below:

In Property Law, students were confronted with cases involving double registration of certificates of title, forceful evictions, trespass, and disputes arising from non-adherence to customary law. In handling double registration, they learned the legal processes available to protect ownership and possessory rights, the importance of due diligence, and the role of the land registry and law enforcement in detecting fraud. These experiences related directly to theoretical concepts such as indefeasibility of title, the doctrine of priority of first-in-time registration, and the position of *bona fide* purchasers for value without notice. Through forceful eviction disputes, students discovered how such acts infringed on constitutionally protected rights to housing, dignity, and property, while also seeing the practical place of community mediation and alternative justice systems. This ties back to theoretical discussions of legal safeguards in eviction, the Bill of Rights, and the tension between customary and formal law. Cases of trespass taught them the difficulties of resolving longstanding disputes over boundaries and grazing rights, as well as the consequences of selling community land to private individuals. These lessons were linked to the tort of trespass, ownership under the Community Land Act, and approaches to resolving community-based conflicts. Finally, disputes over the lack of adherence to customary law helped students grapple with tensions between African Customary Law and statutory law, exposing both the potential for discrimination and the value of alternative dispute resolution. In class, this connected to debates on the role of customary law as a legal source, the repugnancy-to-morality test, and the constitutional guarantee of non-discrimination.

With regards to Family and Succession Law, students handled cases on absentee fathers and maintenance, land inheritance disputes, and wills excluding children born out of wedlock or adopted children. In maintenance disputes, they learned how courts apply the best interests of the child principle, sometimes employing play

[18] Mlyniec op. cit.

therapy to ascertain children's wishes, and they also practised drafting custody and maintenance orders. These experiences reinforced theoretical concepts of equal parental responsibility and the primacy of the child's best interests. In inheritance disputes, students encountered the consequences of dealing with estates without grants of representation, and the discriminatory effects of customary practices on women and children born out of wedlock. Theoretical links here included the right to equality and the constitutional position of customary law. When reviewing wills that excluded children or adopted dependents, students learned how such wills could be declared invalid, and how excluded dependents could pursue legal remedies. They also studied the distribution of estates in polygamous families. These practical lessons reinforced class teachings on the rules of succession and the constitutional and statutory protections of children's rights.

Under Human Rights Law, the students were exposed to land grabbing, women's rights violations, wrongful imprisonments, discrimination against vulnerable groups, and claims for compensation after work-related injuries. Land-grabbing cases demonstrated the institutional gaps that enable such injustices and the challenges faced by indigent Kenyans in accessing courts. Students connected this directly to the concepts of property rights, indefeasibility of title, and the bona fide purchaser doctrine. When handling cases on women's property rights, they observed how cultural barriers and customary practices perpetuate inequality, especially in land ownership and succession disputes. These realities were tied to constitutional provisions on equality and freedom from discrimination, and to debates on the relationship between culture and formal law. Cases of wrongful imprisonment highlighted systemic failures in criminal justice. They gave students hands-on experience in preparing documents for appeals and exonerations, reinforcing class teachings on the presumption of innocence and constitutional remedies. Instances of discrimination against vulnerable groups, such as persons with disabilities, women, and children, gave students insights into the practical barriers to accessing justice, which related to the Bill of Rights and constitutional anti-discrimination protections. Finally, compensation claims for work-related injuries taught students the processes of drafting court documents and the potential for resolution through alternative justice systems. These cases are connected to theoretical concepts of labour rights and occupier liability.

Lastly, in Criminal Law, students handled cases of inter-county cattle rustling, defilement of minors during raids, robbery with violence, and harassment of civilians by police. Through cattle rustling cases, they understood the challenges of providing security in marginalised regions, the link between law and development, and the obstacles in prosecution. These experiences are tied to theoretical discussions on the interplay between law, security, and development, and the institutional role of specialised police units. Defilement cases taught them the legal ingredients of the offence and the difficulties of collecting and preserving evidence, particularly where cultural practices tolerated early marriage. These lessons were connected to the statutory definition of defilement and protections for minors under Kenyan law. Robbery with violence cases highlighted evidentiary challenges in identifying perpetrators, especially in poor lighting, and cultural practices that at times sanctioned violent raids. The students related these lessons to the statutory elements of the offence.

Finally, cases of police harassment exposed them to the legal mechanisms available for accountability, including the role of the Independent Policing Oversight Authority. This reinforced classroom teachings on unlawful use of force, constitutional safeguards, and institutional frameworks for police oversight.

2.3. Learning Outcomes

Upon self-reflection, the students gave feedback on their learning outcomes from the legal aid clinics. Firstly, they learnt the practical application of Property Law, Family Law, Human Rights Law and Criminal Law. They also learnt that client care is an important aspect of social justice. The process of desktop review and eventual documentation after handling the cases, taught them, research and documentation. Since the clinics are student-run, another learning outcome they documented is leadership, and finally and closely related to client care, they learnt how to give personalised attention. At Strathmore University, personalised attention is one of our eight university outcomes.

Other learning outcomes were,

- Insights into upper-class privilege.
- Insights into how bureaucracy affects the delivery of justice.
- Fostering empathy and moral identity.
- Personal initiatives – Pro Bono Legal representation.
- Collective initiatives – Joining local human rights groups.
- Directly addressed inequalities.

3. Challenges and limitations

For staff, the stresses of class and administrative work inhibit the ability to actively pursue social justice as part of the clinical programme, as doing so can be all-encompassing and time-consuming. This therefore reduces the number of staff available to supervise students. Some students find the whole exercise emotionally draining, and this has now made us carry a psychologist for each of the clinics to help manage learners who get emotionally overwhelmed with their cases.

As a university, we have learnt that there is a need for professional translators and interpreters, as in some situations, the details are lost in translation and lead to misinterpretation of case facts. We have also learnt that the pedagogical structure of the curriculum affects how students will behave at the clinic. We have therefore put more emphasis on the social justice and service to society aspects of the process, as it awakens the students' sense of responsibility in the programme. Finally, we have learnt that non-legal skills like tech saviness, a good foundation in humanities, are crucial for a successful clinic.

3.1. What next for Strathmore Law Clinic

Many times, it is assumed that the police don't need legal aid. Following a desktop review of available literature and news sites, the need for a legal aid clinic for the police has become imperative, especially in the recent past, when police have been charged with using excessive force in quelling citizen unrest in Kenya[19]. Legal aid to the police is not only needed in Kenya but also in most sub-Saharan countries[20], as contact between the police and civilians has resulted in legal battles.

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CHALLENGES OF CATHOLIC LEGAL EDUCATION IN CROATIA

The path toward a different approach to studying law

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Abstract

The text examines the current state of legal education in Croatia, identifies its systemic shortcomings, and presents the innovative approach introduced by the newly established Faculty of Law at the Catholic University of Croatia (CUC). The text explains the key elements of modern and innovative legal education, with particular emphasis on the importance of an individual approach to students. The underlying premise is that legal education should not be reduced solely to the transmission of knowledge about positive law and legal regulations; rather, it should aim to shape legal professionals who are also responsible and ethical members of society.

Keywords: legal education, legal profession, practical legal training, ethical values

1. Introduction

This paper was prepared for the Conference *Challenges of Catholic Legal Education in the 21st Century*, organized by the Pázmány Péter Catholic University, Faculty of Law and Political Sciences, on 4 June 2025 in Budapest. During the preparation for the Conference, the author studied John Henry Newman's classic work *The Idea of a University*, and its ideas greatly inspired him in reflecting on what legal education in Croatia should be like.

This paper is dedicated to legal education in Croatia, the problems and challenges it faces, and the specific contributions that Catholic Legal Education brings to the formation of future legal professionals. In order to tackle the challenges of Catholic

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legal education in Croatia, it is first helpful to recall some key reflections on what legal education as such ought to be. Only then can we assess what legal education offers students and clearly identify the challenges we need to confront.

The underlying premise for considering this topic is that legal education should not be reduced solely to the transmission of knowledge about positive law and legal regulations; rather, it should aim to shape legal professionals who are also responsible and ethical members of society. While the acquisition of knowledge is, of course, extremely important, it is not the only decisive element in the formation of future lawyers. Arguably, more important than the mere accumulation of knowledge is to cultivate the minds of students, encouraging critical thinking and deep understanding. It could therefore be argued that the fundamental objective of legal education should be to provide students with comprehensive understanding of the legal system at the national, European, and international levels, while simultaneously developing their abilities for critical analysis and argumentation.

High-quality legal education also entails the systematic development of practical skills, including legal research, drafting of legal documents, communication skills, oral and written argumentation, and solving actual legal problems through practical exercises and professional placements.[1] In addition to its professional dimension, legal education must also include an ethical component, fostering an awareness of professional responsibility, justice, and the protection of human rights. Finally, an individualized approach to students and active faculty mentorship seems important not only for identifying and overcoming challenges during their studies but also for fostering the development of critical thinking.

The paper is divided into five sections. Following the introduction, a brief overview of the history of legal studies in Croatia is provided. This is followed by an analysis of the challenges and shortcomings of the existing system of legal education. The fourth section presents a new approach based on Catholic legal education. Finally, the paper concludes with several key findings.

2. The history of legal studies in Croatia

The tradition of legal education has been present among Croats since the Middle Ages. The drafting of statutes of Dalmatian cities already involved legal experts educated at foreign universities. The proximity of Italian law schools resulted in the presence of Croatian students – and even professors – at some of the most renowned European faculties of law.[2] The first attempt at public legal instruction on Croatian soil appeared

[1] See: Vesna KOVAČ – Antonija ZUBOVIĆ: *Student-Centered Teaching: Planning, Instruction, and Assessment in Legal Studies – A Handbook for Teachers, Providentia Studiorum Juris* – Improving the quality of studying at law faculties in Croatia, Sveučilište u Rijeci, Pravni fakultet, 2021., https://providentia-iuris.eu/#

[2] See: Dalibor Čepulo: Razvoj pravne izobrazbe i pravne znanosti u Hrvatskoj do 1776. godine i pravni fakultet u Zagrebu od osnivanja 1776. do 1918. godine. [The Development of Legal Education and Legal Science in Croatia until 1776 and the Faculty of Law in Zagreb from its Foundation in 1776 to 1918.]. In: *Contributions to the History of the Faculty, Vol. 1,*. Pravni fakultet, Zagreb, 1996. 51.

in Dubrovnik in the second half of the 15th century, but it left no significant trace. It was followed by several other attempts, none of which had the lasting impact, until the Jesuit order eventually became involved in organizing legal education.[3] It is evident from that the beginnings of legal education in Croatia were closely tied to the Church. On September 23, 1669, the Hungarian-Croatian King Leopold I granted university status and privileges to the Jesuit Academy in Zagreb.[4] Within the Academy, a variety of subjects were taught, including philosophy, theology, and the basics of law—such as canon and civil law.

The Academy remained under Jesuit administration for more than a century, until 1773, when Pope Clement XIV suppressed the Jesuit order. In 1776, Empress Maria Theresa issued a decree founding the Royal Academy of Sciences (*Regia Scientiarum Academia*), which included three faculties: Philosophy, Theology, and Law (*Facultas iuridica*).[5] Thus, the Faculty of Law in Zagreb was established in 1776 as part of the higher education reform in the Habsburg Monarchy. The University of Zagreb was finally established in 1874. Initially, it comprised only three faculties: the Faculty of Philosophy, the Faculty of Theology, and the Faculty of Law and State Sciences, while the Faculty of Medicine was founded in 1919.[6]

The Faculty of Law in Zagreb began its work on November 4, 1776. The law programme lasted two years, and enrolment was possible only after completing studies at the Faculty of Philosophy. The first professors were selected through a public competition, and their appointments were confirmed by the Empress. Classes were conducted in Latin, although Croatian was also allowed, and in the early years, Austrian and German textbooks were primarily used. The first handbook in Croatian, focusing on the history of civil law, was published in 1819.[7]

During the communist era, canon law ceased to be taught at the Faculty of Law. This situation continued even after the democratic transition. Only recently has canon law been reintroduced into the curriculum of the Faculty of Law in Zagreb, and even then, only as an elective course. Such treatment of canon law clearly reflects the resistance toward Catholic legal education during the long period of communism in Croatia. The

3 Ibid. 53.

4 See: Hrvoje Petrić: The Origins of the University of Zagreb. *Hrvatska revija* 4, (2019). https://www.matica.hr/hr/605/pocetci-sveucilista-u-zagrebu-30249/

5 See: The History of the University of Zagreb, https://www.unizg.hr/o-sveucilistu/sveuciliste-jucer-danas-sutra/povijest-sveucilista/; See also: Vladimir Bazala: Preteče osnutak i razvoj sveučilišta u Zagrebu do 1918. [The Origins of Establishment, and Development of the University of Zagreb until 1918.]. *Zbornik za historiju školstva i prosvjete*, 2. (1965).; Lelja Dobronić: *Zagrebačka akademija. Academia Zagrabiensis: Visokoškolski studiji u Zagrebu 1633–1874.* [The Academy of Zagreb, Academia Zagrabiensis: Higher Education Studies in Zagreb 1633–1874.] Zagreb, Dom i svijet, 2004.

6 See: https://www.pravo.unizg.hr/fakultet/tradicija/

7 See: Time Capsule: Faculty of Law Day in Zagreb – November 4, 1776, Informator, no. 6495, November 6, 2017. https://informator.hr/strucni-clanci-vremeplov/vremeplov-dan-pravnog-fakulteta-u-zagrebu-4-studeni-1776; See also: Vladimir Bayer: Osnivanje Pravnog fakulteta u Zagrebu (god. 1776.) i njegovo definitivno uređenje (1777. god.). [The Establishment of the Faculty of Law in Zagreb (1776) and Its Definitive Organization (1777)]. *Zbornik Pravnog fakulteta u Zagrebu* 19, 2. (1969), 232. ss.

treatment of canon law clearly reflects the resistance toward *Catholic Legal Education,* as well as toward the very principles upon which legal education ought to be based.

With the establishment of the Faculty of Law at the Catholic University of Croatia on November 12, 2024, and the launch of the new law programme in Croatia, the study of law has returned to its original tradition of Catholic legal education. The initiative to introduce the new law programme in Croatia faced numerous obstacles. Part of the resistance stemmed from a simple desire among some existing law faculties to preserve the *status quo*, as they perceived the emergence of a new law faculty as competition and a threat to their leading positions. Naturally, the arrival of a new player also ment that, in the future, both state funding and influence will have to be shared among five law faculties, instead of the previous four. However, there was also strong ideological opposition from the so-called left-liberal academic circles, who seem to have a growing concern that the new voices and perspectives in the legal education will emerge, bringing along fresh ideas and alternative viewpoints.

3. Challenges and misdirections in legal education

Legal education in Croatia has for years revealed certain characteristics that have caused dissatisfaction among both students and their future employers. Students are expected to master the knowledge, but have only sporadically been taught how to think critically. The knowledge that students acquire during their studies is not accompanied by practical training aimed at the application of that knowledge in practice and the development of relevant skills. Some of the key skills that students should develop during their studies arguably include communication skills, the use of modern technologies in the judiciary, legal writing, and mastery of legal terminology in a foreign language. Upon finishing the existing law programmes, students seem to lack the above mentioned skills as well as capacity of legal reasoning. Many practicing lawyers today will assert that it is only upon completing their studies that their actual legal training has begun, mostly with their first employment.

Today, law students in Croatia rarely get the opportunity to become familiar with the peculiarities of different legal professions during their course of studies. Consequently, it is extremely difficult for them to choose the profession that best suits their interests and capabilities. One of the fundamental shortcomings of the majority of study programmes of law in the Republic of Croatia is that students have very limited opportunities for acquiring practical knowledge with regard to functioning of the courts, as well as other judicial institutions such as the State Attorney's Office and the Office for the Suppression of Corruption and Organised Crime.[8] In addition, law graduates lack practical experience and knowledge on *modus operandi* in law firms

[8] See: Alan Uzelac – Juraj Brozović – Ema Basioli: The Impact of Clinical Legal Education at the Faculty of Law, University of Zagreb, on Employment after Graduation. In: Loris Belanić – Dana Dobrić Jamborvić (ed.): *Proceedings of Co-authored Papers by Professors and Students from the Scientific Conference "Improving the Quality of Studies at Law Faculties in Croatia"*. Sveučilište u Rijeci, Pravni fakultet, Rijeka, 2021. 69–90.

and notary public offices, as well as in different legal positions in private companies where lawyers often play a very important role as in-house legal counsels or managers.[9] Moreover, law students in Croatia infrequently get an opportunity of acquiring adequate knowledge about the functioning of the public administration (State bodies and local and regional self-government units) and other forms of civil (self)organisations such as trade unions and non-governmental organisations (NGOs), where lawyers can often make a significant contribution. Many students seem to lack basic knowledge (let alone practical insight) about functioning and proceedings of different international and European courts (e.g. the International Court of Justice, the European Court of Human Rights and the Court of Justice of the European Union), as well as about the relevance of their jurisprudence for judicial proceedings in Croatia.[10]

With regard to the expected qualifications upon completion of the study programme, law graduates regularly demonstrate insufficient competences in terms of the structure of court proceedings, drafting indictments, applications, appeals or submissions. It is only after being employed as lawyers that they attend court proceedings or prepare and draft the court filings or pleadings for the first time. Furthermore, students are rarely, if at all, familiar with modern techniques of communication with courts (for example, the systems of *e-Communication* with Courts of Law, e-Land Registry, e-Enforcements, and e-Company Register are mostly unfamiliar to them).[11]

One of the most striking problems in today's legal education seems to lie in the approach to and treatment of students – that is, the fact that students are not placed at the centre of legal studies and law learning. It can be argued that several factors contribute to this situation, most notably the high enrolment quotas and the heavy non-teaching obligations placed on faculty members. High enrolment quotas make it nearly impossible to provide individualized attention or proper mentorship to ensure students' progress. Teaching staff often lack the time to mentor students or support those who encounter difficulties in their studies. As a result, students are largely left to steer their education on their own, while faculty members are frequently focused on meeting the criteria for their own academic advancement.

Unfortunately, this problem is not unique to legal education. It is further reinforced by national regulations that set criteria for academic promotion – criteria that largely overlook the importance of teaching. National standards emphasize excellence

[9] See: Ana Đanić Čeko – Iskra Jukić – Matko Guštini: The Role and Significance of Clinical Legal Education at Law Faculties in the Republic of Croatia, with Special Reference to the Law and Economics Clinic of the Faculty of Law in Osijek. In: Belanić –Dobrić Jamborvić op. cit. 183–210.

[10] See: Chapter 1.1.2. Justification for launching the Study of Law at UNICATH vis-à-vis economic and social needs, as reflected in admission quotas and needs in the labour market in Initial Accreditation Procedure Application Form – Study Programme for Integrated Undergraduate and Graduate University Study of Law at the Catholic University of Croatia, Zagreb, 2 May 2024, p. 12.

[11] During the preparation of the study program, employers were surveyed about the competencies required from future lawyers for the labour market. The survey results revealed the main weaknesses in the functioning of legal education in Croatia. See more: Application Form - Study Programme *for* Integrated Undergraduate and Graduate University Study of Law *at the* Catholic University of Croatia Zagreb, 2 May 2024.

in scientific research while losing sight of what truly matters: the formation and development of students.

Law is not value-neutral – it is deeply embedded in questions of ethics and society's moral foundations. The aim of legal education should therefore be to shape lawyers who can think both critically and ethically. The two are not and should not be treated as mutually exclusive. Currently, legal studies do not have focus in developing ethical thinking or the ethical standards of the legal profession in law students. Ethical questions, as well as discussions of justice, human dignity, and moral responsibility, are not included in the existing curricula. This long-term deficiency has had serious consequences for legal profession, as many lawyers arguably lack the ability to distinguish between acceptable and unacceptable behaviour. In a society striving to combat corruption, corruption within the judiciary represents one of the key obstacles to social transformation. Therefore, the development of ethical standards among future legal professionals, as well as strengthening of their personal and professional integrity, seems essential for reinforcing institutional resilience to corruption.[12]

In addition, legal profession carries significant power – law students should be equipped to serve primarily the common good, not merely their own careers.[13] Therefore, a legal education should aim to form not only skilled legal professionals but also socially responsible citizens. During their studies, students should ideally develop awareness of their social responsibility and the importance of participation in societal processes. This, however, is not in the focus of the existing study programs whatsoever.

These are some of the reasons that have led to the negative perception of the current approach to legal studies in Croatia. This negative perception has created a strong need for a different approach – one that, in addition to providing knowledge, also focuses on the development of various practical skills through hands-on learning, as well as the formation of the student's character. More importantly, it calls for a form of legal education that includes an individualized approach and systematic monitoring of students' progress throughout their studies.

4. A new approach to the study of law

The Catholic University of Croatia (CUC) received official approval to launch its law programme on November 11, 2024, the St. Martin's Day. For this reason, St. Martin has been named the patron saint of the Faculty of Law.[14] In developing the new study programme for integrated undergraduate and graduate university study of law, careful consideration was given to models of legal education applied not only in Croatia, but throughout the EU and around the world. Numerous national and international

12 See: Edita Čulinović Herc – Narda Krnetić: Ethics Education as a Response to the Professional Challenges of the Legal Profession in Corporations and Public Administration. In: Belanić – Dobrić Jamborvić op. cit. 1–14.

13 See: Warren E. Burger: 'The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility'. *Cleveland State Law Review* 29, 3. (1980), 377., 377–379.

14 Learn more about Saint Martin of Tours, the patron of the Faculty of Law of the Catholic University of Croatia, on the website: https://www.unicath.hr/en/pravni-fakultet/o-fakultetu/misija-strategija

experts participated in the preparation of the programme. Special attention was given to the perspectives of legal practitioners and potential employers in order to identify as accurately as possible all the competencies required of future legal professionals. Additionally, through discussions with various stakeholders, the shortcomings of the existing approach to legal studies were clearly identified, providing a foundation for the development of the new study programme. In order to understand the new approach to legal studies, it is important to highlight what Catholic legal education entails and what makes the new law programme innovative in its approach.

The mission of the study programme is to prepare students to be able, upon graduation, not only to successfully perform tasks within the legal profession, but also to respond to the increasingly complex legal and ethical challenges of contemporary society. This mission of the university study of law programme is inseparable from the mission of the CUC as a whole, which is grounded in the promotion of values in society and their connection with social morality and justice. The mission of CUC is a continuous pursuit of truth through research, as well as the preservation and transmission of knowledge for the benefit of society, with special emphasis on the formation of the whole person in the Catholic tradition and spirituality,[15] as expressed in the Apostolic Constitution on Catholic Universities *Ex Corde Ecclesiae*.[16]

There are three key determinants that define the new approach to the study of law, namely, the student-centred education, integration of three main pillars in student formation, and international cooperation.

First and foremost, the new approach to legal education at the CUC Faculty of Law places the student at the very centre of both the academic programme and the learning process. This student-centred philosophy guided every stage of planning and development – from designing the structure of the study programme and sequencing individual courses, to organizing the class schedule for each semester, monitoring each student's progress, organizing campus and campus life, and establishing dedicated student support services. An individualized approach is made possible through small enrolment quotas – only 40 students per year – and a substantial number of hours dedicated to one-on-one mentoring and personalized academic support. In every course, students are entitled to receive mentoring hours equivalent to the number of ECTS credits assigned to that course. The university campus is designed to offer students everything they need for a seamless academic experience in one place. Alongside lecture halls and laboratories, the campus includes a library with dedicated reading and study rooms, as well as a TV studio. In addition, it features a dormitory, a canteen, a café, and various spaces for social interaction, fostering both academic growth and a vibrant student community.

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15 See: Statute of the Catholic University of Croatia, April, 2023, https://www.unicath.hr/sites/default/files/2024-10/Status-Hrvatskog-katolickog-sveucilista_2023.pdf

16 See: Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities, https://www.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html

The second aspect focuses on integrating three key pillars in student formation: knowledge, practical training, and ethical values. Students are encouraged to develop critical thinking and, throughout their studies, to grow into well-rounded individuals who embrace responsibility within their social environment. The aim of this approach is to cultivate students' minds, not merely to train legal practitioners.

In terms of both structure and content, the curriculum represents a significant departure from the traditional way law has been studied in Croatia. The curriculum is structured so that it comprises 7 generic compulsory courses, 22 compulsory core courses of positive law, 6 legal practical training courses – *practicums* (4 compulsory and 1 elective positive law courses, 1 compulsory generic course), 7 elective courses (grouped in seven major groups, by fields of law) and one compulsory foreign language course (taught during the first four semesters). In total, these are 43 courses that are distributed over the nine semesters of the study programme. The final, tenth semester, includes a legal research seminar and drafting of the final thesis.[17]

Among the compulsory courses, the study programme covers all the key areas of positive law. It ensures that students acquire fundamental professional legal competencies and a solid foundation of knowledge in essential legal disciplines — knowledge crucial not only for entering the legal profession and beginning a successful career in law but also for passing the bar exam. The core courses, which provide this essential legal expertise, include: Constitutional Law, Family Law, Criminal Law, Criminal Procedure, Civil Law, Civil Litigation, Administrative Law, Labour and Social Law, Commercial and Company Law, Financial and Tax Law, Private International Law, Fundamentals of European Public Law, and International Law. These subjects are also integral components of the bar exam. Additionally, to align with this goal, the programme includes compulsory courses such as Organisation of the Judiciary, Enforcement Law, and a Practicum in Drafting Legal Acts. Notably, this Law programme is the only one in Croatia that, through its mandatory Practicum, trains students not only in drafting legislative acts but also in preparing judicial rulings and judgments – a skill set particularly valuable for the bar exam. Thus, the first pillar of this programme – focused on knowledge – is dedicated to equipping students with the legal expertise required for successfully passing the bar exam.[18]

Furthermore, as the quality of a study programme also depends on the inclusion and quality of the general training courses, compulsory programme includes core generic courses (*Introduction to Law, Legal Sources and Methodology of Legal Research*, *Ethics of the Legal Profession, Legal History, Roman Law, Essentials of Economics for Lawyers, Essentials of Communication Skills in Law*). Unlike all other law programmes in Croatia, the new law programme includes Essentials of Canon Law as one of its compulsory courses.[19]

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17 You can see the study program, its structure, and individual courses at: https://www.unicath.hr/en/pravni-fakultet/prijediplomski-i-diplomski/o-studijskom-programu

18 Ibid.

19 The need for the study of Canon Law derives from a shortage of adequate expertise in the labour market, and a long-standing lack of this course in the study programmes of faculties of law in Croatia so far

The study programme is characterized by a high level of electiveness. Elective courses are gradually introduced in the third year (one per semester) and, thereupon, more intensely pursued in subsequent years. The electives earn 4 ECTS credits each and are grouped according to the following major fields: (1) criminal law, (2) civil law, (3) commercial and financial law, (4) public and status law, (5) international law, (6) ecclesiastical law, and (7) general or generic field.

The second pillar of the study program relates to the development of practical skills and knowledge through envisaged *Practicums* (practical training courses) one of the crucial features differentiating it from the majority of the current university law studies in Croatia. The objective of *Practicums* is to enable students to understand and apply the study programme in practice by means of practical exercises, student internship programmes and educational visits. Six practical training courses are planned during the course of study and are distributed from the second to the fifth year. The curriculum of the study of *Law* at CUC provides four compulsory practical training courses in major fields of law (*Criminal Law, Civil Law, Administrative Law, and European Law*) and one generic course on *Drafting of Legal Acts*. One additional practical training course is elective, in the fourth or fifth year of study (depending on the student's choice). Practicums (on-site training and practical exercises) will be organized in collaboration with a range of stakeholders within the justice system and public administration, including law firms, notary public offices, courts, state attorney's offices, land registry offices, public administration authorities, as well as local and regional government bodies. This approach should enable students to acquire first-hand experience of the professional practice of various legal occupations and to gain an in-depth understanding of the structure and functioning of judicial and administrative institutions during the course of their studies.

The third pillar focuses on the development and acquisition of high ethical standards essential for the practice of the legal profession, as well as for the holistic personal and professional development of future lawyers. Relevant content is embedded both in the compulsory courses specific to the CUC study programme (e.g., *Ethics of the Legal Profession*, *Organisation of the Judiciary*, *Human Rights*) and carefully selected range of electives (e.g., *Human Rights and Social Ethics*, *Rights of the Child*, *Society and Corruption*, *Law and Artificial Intelligence*).

Finally, considering that *Ex Corde Ecclesiae* emphasizes the importance of international cooperation and highlights the duty of a Catholic university to promote collaboration and exchange with universities and institutions around the world, especially those that share similar Christian or humanistic ideals, the study programme has devoted particular attention to creating conditions for international mobility of both students and faculty staff. International cooperation is extremely important in order to systematically and gradually create the institutional conditions for both incoming and

(both at present and, earlier, in the former Yugoslavia). At the same time, many relations in society are governed by the regulation of State and Church (e.g. church marriage, property issues related to the Church, foundation of religious nurseries, schools, universities, etc.). See: European Court of Human Rights case *Travaš v. Republic of Croatia*, application no. 75581/13 of 4 October 2016.

outgoing mobility of students and teaching staff. The study programme is designed to enable and facilitate national and international mobility of both students and faculty, particularly within the EU, especially – but by no means exclusively – in cooperation with Catholic universities in other countries that offer similar or complementary study programmes, whether at the European or broader international level. The study programme is structured in such a way that students are encouraged to participate in both outgoing and incoming mobility from the third year onward. In contrast, faculty members can participate in both outgoing and incoming mobility starting from the very first academic year of the programme (2025/26). Incoming mobility can enable participation in teaching at the CUC by faculty members from universities outside the Republic of Croatia. Exposing students to diverse intellectual environments and different teaching methods can undoubtedly foster the development of critical thinking, intellectual integrity, and a deeper understanding of legal matters.

Therefore, the aim of the new study programme is to train lawyers who will be competitive throughout the entire EU. With this objective in mind, the programme includes intensive foreign language courses, and several courses will be taught in English. This applies to compulsory courses such as Private International Law and the Practicum in European Law, as well as to a total of 14 elective courses.

5. Conclusion

Legal education in Croatia was initiated by the Church, specifically by the Jesuits. The Church played a significant role in the development of legal thought until the rise of communism in the second part of the twentieth century. With the establishment of the communist regime, Catholic thought has been systematically removed from legal education. Canon law was eliminated from the curriculum, and similarly, Catholic social teaching and ethics were given no space in the formation of future legal professionals. With the establishment of the Faculty of Law at the Catholic University of Croatia, Catholic legal education is once again becoming part of the Croatian higher education system and of the formation of future lawyers.

With Faculty of Law at UNICATH, legal thought inspired and enriched by the Catholic teaching is once again becoming a part of the legal education in Croatia, offering a new approach that emphasizes the formation of the whole person, rather than merely functioning as a system for the transmission of knowledge. In line with John Henry Newman's ideas, professors should guide students to appreciate knowledge not only as a stepping stone to employment, but as a lifelong foundation for personal growth, social engagement, and legal wisdom. Legal education must aim to cultivate minds and not just train legal practitioners. Legal education must develop a student's capacity to reason, to understand complexity, to make distinctions, and to engage in critical analysis. The focus of legal education should be on substantive understanding, deep reflection, and intellectual integrity. This can be achieved only through the full dedication of professors to their students and by placing students at the centre of legal education. Limiting enrolment quotas to a small number of students allows for an individual approach and full commitment to each student.

The establishment of the Faculty of Law at the Catholic University of Croatia is one of the indicators of successful completion of the transition of Croatian society from communist uniformity to democratic pluralism. It as well shows that the academic community in Croatia is ready to embrace plurality of opinions in its true meaning. Legal education that in future lawyers develops the capacity to reason and to engage in critical analysis arguably contributes to the emergence of fresh ideas and the advancement of society as a whole. We hope that, in doing so, we have contributed to the much-needed diversity in the approach to studying law—an approach that will inspire others to initiate change and bring new value to social and economic progress in Croatia.

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TEACHING LEGAL ETHICS AT THE CATHOLIC UNIVERSITY

The experience of the Pázmány Law School

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Abstract

Across the world, a wide range of concepts and practical approaches have emerged for teaching legal ethics. The specific method adopted by any given law faculty is largely shaped by external regulations governing legal education and by the institution's own academic traditions. Most commonly, professional ethics are taught within one or more courses dedicated to the ethical standards of the various legal professions.

Catholic universities, however, are guided by an additional framework: the apostolic constitution *Ex corde Ecclesiae* (1990), which directs them not only to provide professional and academic training, but also to help students cultivate and practise moral principles that inform their entire lives, ultimately leading to personal fulfilment. This perspective aligns closely with the Aristotelian view and with pedagogical theories that regard the teaching of professional ethics as a means of fostering students' moral character.

From this standpoint, the primary aim of teaching legal ethics is to prepare future lawyers to adopt a strong ethical mindset, to recognise moral dilemmas in their daily work, and to respond to them with conscious and habitual moral reasoning. At the Faculty of Law and Political Sciences of Pázmány Péter Catholic University, the educational system developed in the mid-1990s reflects this approach. Its curriculum places particular emphasis on virtue ethics, seeking to cultivate and strengthen moral behaviour that shapes and enriches the whole of one's life.

Keywords: legal ethics, virtue ethics, character approach, legal professions, legal education, Pázmány Péter Catholic University

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1. Introduction

In jurisprudence – and consequently in legal higher education – it is almost self-evident that the legal system cannot be separated from the moral order of society. Legal practice is shaped not only by statutory rules but also by the ethical standards that govern the legal professions. Each branch of the profession maintains its own code of ethics, supported by institutional mechanisms designed to uphold professional integrity and sanction unethical behaviour.

In Hungary, the training and outcome requirements for the undivided law degree programme specify that graduates must possess a sound understanding of both general moral principles and the ethical norms of the legal profession. They must also be able to identify ethical dilemmas and respond to emerging moral challenges.

The central question, then, is how a Catholic institution of higher education should integrate these themes into its legal curriculum, and what distinctive value it can offer its students beyond the secular framework and the professional codes of conduct applied in Hungary. In what follows, I first examine the external and internal regulatory frameworks and the expectations they create. I then provide a brief overview of the ethical standards governing the principal legal professions. Finally, I consider how the teaching of legal ethics can take on a specific character within a Catholic university – particularly with respect to its content and pedagogical methods. Drawing on my own experience at the Faculty of Law and Political Sciences of Pázmány Péter Catholic University, I outline the key features of legal ethics education as practised at this institution.

2. External-internal regulators, expectations

The requirements for legal education differ to some extent across countries, reflecting variations in legal culture and professional regulation. In the United States, for instance, the American Bar Association (ABA), acting as the principal accrediting body,[1] establishes the overarching standards for legal higher education.[2] The current Standard 301 stipulates that "[a] law school shall maintain a rigorous programme of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession." Further standards elaborate on additional dimensions of ethical engagement within the legal profession and its teaching. These include duties of ethical responsibility towards clients and the legal system, as well as the expectation that legal ethics should be integrated with doctrinal study, theoretical reflection, and practical skills training.[3]

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1 Gábor Andrási: *Teaching Legal Ethics: What Can We Learn From U.S. Standards and Practices?* (19 January 2013). Available at SSRN: https://ssrn.com/abstract=2203366 or http://dx.doi.org/10.2139/ssrn.2203366 (Accessed on: 20 October 2025).

2 American Bar Association, Section of Legal Education and Admissions to the Bar: *Standards and Rules of Procedure for Approval of Law Schools 2025–2026.* Chicago, American Bar Association, 2025.

3 Standards 302c–d, 304a(1), 702a(7).

In addition to these relatively abstract principles, the American Bar Association (ABA) has also established a set of concrete professional ethical model rules, designed to serve as a template for the ethical codes adopted by individual state bar associations. The *Model Rules of Professional Conduct*[4] set out detailed ethical guidelines governing a wide range of professional relationships and activities. These include interactions between lawyers and their clients, advisory and advocacy work, relations with third parties, and professional conduct within law firms and legal associations. The rules also address lawyers' public service obligations – such as *pro bono* work and holding public office – the communication and advertising of legal services, and the safeguarding of professional integrity. The *Model Code of Judicial Conduct*,[5] which applies to judges and judicial candidates, is structured around four principal areas: (1) independence, integrity, impartiality, and the avoidance of impropriety; (2) the impartial, competent, and diligent performance of judicial duties; (3) personal and extrajudicial activities; and (4) refraining from political or campaign-related involvement. In most American law schools, legal ethics is taught within a course entitled *Professional Responsibility*, in which the *Model Rules* constitute the central component of instruction.[6]

In many countries, it is not professional bodies but state authorities that are responsible for defining the training and qualification requirements of individual higher education programmes, including those in law. In Hungary, for instance, this task was traditionally performed by the minister responsible for higher education through ministerial decrees. Since 2022, however, the training and outcome requirements for bachelor's and master's programmes – including the undivided law degree – have been issued not as legal regulations but as ministerial communications.[7] The current framework for undivided legal education in Hungary[8] stipulates that graduates should:

- possess a sound understanding of both general ethical standards and those specific to the legal profession;
- be able to recognise ethical dilemmas and respond to new moral challenges;
- identify, analyse, and synthesise social, ethical, and professional legal dilemmas;
- assess the social and ethical consequences of their professional activities and decisions;
- demonstrate commitment to legal aid, *pro bono* work, public interest initiatives, and engagement in civil society; and
- uphold the public interest and dedicate themselves to public-interest legal service.

[4] http://bit.ly/49o7k2C (Accessed on: 23 October 2025).

[5] http://bit.ly/43sNUG3 (Accessed on: 23 October 2025).

[6] Andrási op. cit. 11.

[7] See currently on the website of the Ministry of Culture and Innovation: https://kormany.hu/dokumentumtar/kepzesi-es-kimeneti-kovetelmenyek-2 (Accessed on: 20 October 2025).

[8] Ministry of Culture and Innovation: *Training and Output Requirements for Higher Education Vocational Programmes, Bachelor's and Master's Programmes* applicable from the 2025/26 academic year. (Published: 21 March 2025), 1473–1477. (Accessed on: 20 October 2025).

Alongside the expectations specifically related to legal ethics, the framework also sets out additional requirements that reflect moral values and convey a particular ethical attitude.

Catholic universities, moreover, must adhere to the principles of the Catholic Church. The most significant of these is Pope John Paul II's 1990 apostolic constitution *Ex corde Ecclesiae*,[9] which repeatedly emphasises that research conducted at Catholic universities must consider the ethical dimensions of the issues under examination. With regard to the mission of Catholic universities, the document declares that

> "[a] specific priority is the need to examine and evaluate the predominant values and norms of modern society and culture in a Christian perspective, and the responsibility to try to communicate to society those ethical and religious principles which give full meaning to human life".[10]

In line with this, the normative provisions of the document state that

> "[t]he education of students is to combine academic and professional development with formation in moral and religious principles and the social teachings of the Church; the programme of studies for each of the various professions is to include an appropriate ethical formation in that profession. Courses in Catholic doctrine are to be made available to all students."[11]

It is also worth noting that in Part I on the identity of Catholic universities *Ex corde Ecclesiae* affirms that one of their essential characteristics is "an institutional commitment to the service of the people of God and of the human family in their pilgrimage to the transcendent goal which gives meaning to life".[12]

These provisions are not specific to legal education; rather, they articulate the broader expectations that guide the mission and activity of Catholic universities. Consequently, the teaching of ethical principles and professional ethics should aim to impart a sense of moral purpose that gives full meaning to human life and directs individuals towards their transcendent goal – namely, salvation.

3. Ethics of the legal profession in Hungary

In Hungary, the professional ethical standards governing lawyers are set out in regulations issued by the respective professional associations themselves. The

[9] John Paul II: *Ex corde Ecclesiae, Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities.* (15 August 1990), http://bit.ly/4o61l7q (Accessed on: 23 October 2025).

[10] Part I, 33.

[11] Part II, Art. 4. § 5.

[12] Part I, 13. 4.

following section offers a brief overview of the principal thematic areas covered by these regulatory frameworks.

Judges – The *Code of Ethics for Judges* outlines the following key principles:[13]

- Independence and impartiality
- Avoidance of conflicts of interest
- Dignity and equality
- Publicity, social media
- Diligence
- Professional competence
- Honesty
- Respect and cooperation
- Conduct of court administrators
- Responsibilities of members of judicial self-governing and representative bodies

Prosecutors – The *Recommendation of the Prosecutor General on the Ethical Rules of the Prosecutorial Profession* sets out the following key principles and areas of ethical responsibility:[14]

- Fundamental duties (e.g. fair, impartial, consistent, efficient, and timely performance of tasks; respect for human dignity and human rights)
- General professional conduct (e.g. preservation of the dignity of the profession; integrity and diligence; independence from external influence; impartiality and avoidance of bias)
- Ethical practice in criminal proceedings (e.g. ensuring fairness, independence, efficiency, and proportionality)
- Ethical conduct in public law matters (e.g. transparency, effective use of resources, and consideration of broader social consequences)
- Private life and public confidence (e.g. maintaining integrity and impartiality in personal conduct to strengthen public trust in the prosecutorial service)

Lawyers and legal practitioners – The *Ethical Rules and Expectations of the Legal Profession* define the following principal areas of professional ethics:[15]

- The fundamental duties and responsibilities of lawyers

[13] Decision 16/2022. (2 March) OBT of the National Judicial Council, https://birosag.hu/sites/default/files/birak_etikai_kodexe_.pdf (Accessed on: 23 October 2025).

[14] See: https://ugyeszseg.hu/az-ugyeszsegrol/ugyeszi-etika/a-legfobb-ugyesz-ajanlasa/ (Accessed on: 23 October 2025). The recommendation was adopted by the National Executive Committee on 3 December 2014. The National Association of Prosecutors also has a code of ethics adopted on 24 April 2001 (Regulations of the National Association of Prosecutors on the fundamental rights, duties and responsibilities of prosecutors), but this does not constitute official guidance for the prosecutorial organisation, only applying to members of the association, see: https://www.ugyeszek.hu/hu/dokumentumok+-+etikai+kodex.html#1 (Accessed on: 23 October 2025).

[15] Regulation 6/2018 (26 March) of the Hungarian Bar Association (MÜK), http://bit.ly/48Kc3LV (Accessed on: 23 October 2025).

- The obligation to maintain professional privilege and confidentiality
- Avoidance and management of conflicts of interest
- Rules governing client mandates and representation
- Determination of legal fees
- Powers of attorney
- Ethical standards in defence work
- Requirements concerning advertising and external communications
- Professional expectations regarding lawyers' websites
- Relationships with other legal practitioners, opposing parties, courts, and public authorities
- Relations between legal practitioners and the Bar Association
- Ethical standards applicable to legal practitioners

Notaries – The *Code of Ethics of Hungarian Notaries* outlines the following principal themes:[16]

- General principles (e.g. integrity, independence, impartiality, and commitment to continuous professional development)
- Relation with clients
- The notarial office
- Relation with employees
- Membership in the Chamber
- Advertising
- Protection of confidentiality
- Conflict of interest
- Conduct in private life
- The Ethics Committee

Court bailiffs – The *Code of Ethics of the Hungarian Chamber of Court Bailiffs* includes the following key topics:[17]

- Introduction (e.g. conscientiousness, sense of duty, irreproachable conduct, compliance with general moral standards)
- Purpose of the code and concept of disciplinary offences
- Scope of the code
- Rules of ethical conduct: respect for the right of disposal, fair procedure, completion of proceedings within a reasonable time, interpretation and application of the law with regard to the interests of the parties

[16] Regulation 16/2021 (28 June) of the Hungarian Chamber of Notaries (MOKK), http://bit.ly/49jPIF7 (Accessed on: 23 October 2025).

[17] Issued by the Registrar of the Hungarian Chamber of Judicial Officers on 6 June 2016, subsequently approved by the Minister of Justice, see: https://mbvk.hu/wp-content/uploads/2021/09/etikai_szabalyzat.pdf (Accessed on: 23 October 2025).

- Additional rules of conduct (e.g. professional conduct, law-abiding behaviour in the performance of public duties and in private life, patience and courtesy towards the parties, preservation of the dignity of the profession)
- Conflict of interest
- Relations with courts and authorities
- Relations with other court bailiffs
- Relationship between the court bailiff and the Chamber of the Court Bailiffs
- The court bailiff and their employees
- The bailiff's office

Government officials – The *Code of Professional Ethics of Hungarian Government Officials* sets out the following key principles:[18]
- Core principles of professional ethics: loyalty, national interest, commitment, responsibility, professionalism, efficiency, integrity, dignity, impartiality, justice, fairness, proportionality, protection, freedom from prejudice, transparency, cooperation, conscientiousness, setting a positive example, support, accountability, enforcement of professional standards
- Detailed rules of professional conduct: reporting abuses, maintaining impartiality, refraining from activities incompatible with work, not accepting gifts, rejecting offers of unlawful advantages, independence, not taking advantage of one's official position, not misusing data and information, responsible use of official and public resources, increased responsibility in leadership roles, fair procedures when changing jobs
- Unworthy conduct (e.g. defamation of public officials, being drunk or intoxicated in public, sexual abuse)
- Ethical procedures

The typical activities and specific relationships of these professions, which are governed by ethical rules, are broadly outlined in their respective codes of ethics. Each code contains provisions of a fundamental nature, although the degree of abstraction of these rules varies. Certain common elements are evident across the codes; for example, all emphasise the preservation of the dignity of the profession as a moral obligation. Issues such as confidentiality, the management of conflicts of interest, and regulations concerning the advertising of professional services are particularly highlighted in the codes for lawyers and notaries.

At the same time, it is clear that these codes are not intended to constitute a comprehensive moral framework for lawyers that would guide and permeate every aspect of their personal lives. This raises an important question: what should, and indeed must, be taught regarding legal ethics in higher legal education?

[18] Adopted by Resolution 7/2019 (14 December) of the National Assembly of Hungarian Government Officials, https://mkk.org.hu/node/485 (Accessed on: 23 October 2025).

4. What to teach?

In the absence of a consensus, universities offer a variety of approaches to this question. Donald Nicolson identifies three principal models. (1) The *conventional approach* prioritises the teaching of formal ethical rules established by the legal profession for its members. Instruction typically takes the form of lectures or small-group discussions, in which students learn to apply these rules to concrete cases. The primary focus is on understanding and implementing the prescribed standards of professional conduct. (2) The *cognitive approach* emphasises the gradual development of moral reasoning and evaluative skills. Students are placed in dilemmas where their pre-existing beliefs may conflict with their experiences, creating cognitive tension. Such conflicts can be stimulated through Socratic dialogues or role-playing exercises centred on moral dilemmas, allowing students to explore differing perspectives. Additionally, students are introduced to various ethical theories, such as deontology, utilitarianism, and virtue ethics, which they apply to specific situations. This approach equips students with a conceptual toolkit that can guide decision-making in situations where formal ethical rules are absent or insufficient. (3) The *character approach* focuses on the development of students' moral character, aiming to help them cultivate a personal moral identity. Through extensive practical experience and exposure to moral dilemmas, students not only become sensitive to ethical issues and capable of making sound decisions, but also motivated and courageous to act ethically in routine practice. The emphasis is therefore not solely on knowledge or understanding, but on practical engagement and the strengthening of moral character through action.[19]

At its core, the character approach appears to be closely linked to Aristotle's conception of ethics. In the *Nicomachean Ethics*, Aristotle views the purpose of ethics as facilitating the development of one's character in order to become virtuous: "… we are not inquiring into what excellence is for the sake of knowing it, but for the sake of becoming good, since otherwise there would be no benefit in it at all…"[20] This development is achieved through the integration of knowledge with personal experience, practice, and habituation.[21] The objective of cultivating moral character can be likened to the broader aim of ethical education, which seeks to give meaning to life as a whole. This is articulated, for example, in *Ex corde Ecclesiae* regarding Catholic universities: the focus is not merely on the ethical practice of a profession, but on fostering a moral disposition that permeates the entire individual, guiding them towards the pursuit of a fully virtuous life.

At the Faculty of Law and Political Sciences of Pázmány Péter Catholic University, the foundations for the teaching of legal ethics were laid by the faculty's first dean,

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19 Donald Nicolson: Teaching legal ethics: what, how and why. *Revista de Educación y Derecho, Education and Law Review,* 1. (2011), 5–8. https://doi.org/10.1344/re&d.v0i01.2231

20 Aristotle: *Nicomachean Ethics.* Translated by Christopher Rowe, introduction and commentary by Sarah Broadie. Oxford, OUP, 2002. Book II, 2. 1103b27–29, 112.

21 Jan L. Jacobowitz & Scott Rogers: Mindful Ethics – A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility. *St. Mary's Journal on Legal Malpractice & Ethics* 4, 1. (2014), 201.

János Zlinszky (1928–2015). As a university student, Zlinszky was preparing for an academic career; however, during the communist dictatorship, he was expelled from all Hungarian universities in a show trial and was consequently barred from the academic sphere. For many years, he practised as a legal advisor and lawyer, pursuing his scholarly interests without institutional support, primarily through building connections in Western Europe, particularly in the field of Roman law.

It was only during the political liberalisation of the 1980s that he was permitted to return to the university. He subsequently became a professor of Roman law and later served as a constitutional judge at the Hungarian Constitutional Court, established during the political transition.

As a devout Christian, Zlinszky was deeply committed to the pursuit of moral excellence both as an individual and as a legal professional. Drawing on his extensive practical experience and academic expertise, he focused on legal ethics, seeking to identify the moral values inherent in law and to develop the foundations of ethical legal practice grounded in Christian virtue ethics.[22] This virtue ethics approach is by no means unique within legal ethics, particularly when the aim is the cultivation of a moral and virtuous character.[23]

János Zlinszky integrated two courses into the curriculum of the five-year undivided master's degree programme in law at Pázmány Péter Catholic University, launched in 1995. The first, entitled *Christian Morals and Legal Ethics*, adopted a virtue ethics framework to explore the nature of individual virtues in general and their significance within the context of legal practice. The course begins with the theological virtues – faith, hope, and love – followed by the cardinal virtues of prudence, justice, courage, and temperance. It then addresses additional virtues and values, including humility, obedience, perseverance, patience, silence, mercy, conversion, fidelity, and chastity. The book of the same title further includes chapters on freedom of conscience; property and the moral responsibilities of owners; the protection of the vulnerable; a Christian perspective on ageing and illness; the virtues associated with the assumption and exercise of power; and the meaning and importance of peace.

The second course, *Problems of Legal Ethics*, initially covered topics selected jointly by Professor Zlinszky and the students, based on contemporary legal and public issues. These topics were analysed during lectures from both legal and ethical perspectives. Over time, the course has developed a largely fixed curriculum, while remaining responsive to issues proposed by students at the start of each semester. Core topics include professional ethics rules for judges, prosecutors, and lawyers; bioethical issues such as euthanasia, physician-assisted suicide, and abortion; migration; war and armed conflicts; the death penalty and life imprisonment; direct democratic institutions; and the ethical evaluation of political activity. More recently, issues related to social media

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22 See in particular: János Zlinszky: A jogász erkölcse. [The Ethics of the Lawyer]. *Magyar Jog* 45, 1. (1990), 17–26.; Zlinszky: *Keresztény erkölcs és jogászi etika. [Christian Morals and Legal Ethics].* Budapest, Szent István Társulat, 1998.

23 Lauren Traczykowski: Effective teaching of legal ethics: use an applied ethicist. *Legal Ethics* 27, 1. (2024), 37–38. https://doi.org/10.1080/1460728x.2024.2399919.

and artificial intelligence have been added at the suggestion of students. In all cases, lectures present and discuss the relevant legal framework, any pertinent aspects of Catholic social teaching, and the typical moral dilemmas associated with the topics.

5. How to teach?

There is no single answer to the question of "how to teach legal ethics," just as there is no single answer to the question of "what to teach in legal ethics."[24] The question of *how* encompasses issues of educational organisation, scheduling, human resources, and teaching methodology. Consequently, approaches can vary widely, including one or more dedicated courses, clinical legal education, compulsory or optional modules, simulated practice, case studies, Socratic dialogue, video and film presentations, lectures, and other methods.[25] Some scholars argue that the teaching of legal ethics is most effective when it involves the collaboration of different disciplines and professions – for example, philosophy and law – through multidisciplinary co-teaching involving both philosophers and lawyers.[26] Others emphasise that legal ethics should not necessarily be treated as a separate subject, but rather integrated across the entire curriculum (*pervasive ethics* or *whole-of-curriculum approach*),[27] potentially with the support of an applied ethicist who assists law professors in addressing ethical issues within their individual legal subjects.[28]

An ethical approach that permeates the entire curriculum closely aligns with the Catholic educational perspective. At Catholic universities, instructors are expected to integrate the content, aims, and outcomes of their research within their respective disciplines into a coherent Christian worldview, which is inherently connected to an ethical outlook. At the same time, they are called to be authentic witnesses to, and teachers of, Christian life, combining professional expertise with Christian wisdom.[29]

In the law programme at Pázmány Péter Catholic University, ethical and worldview content is naturally embedded across various subjects. For example, in the fundamental rights section of the Constitutional Law course, when addressing human dignity, it is essential to explain that this dignity is grounded in the Christian faith, specifically in the belief that God created humanity in His image, loves humanity, and redeemed it. In the medical law component of the Civil Law course, it is likewise unavoidable for lecturers to consider legal rules concerning euthanasia and abortion from the perspective of Christian moral values. Similarly, when teaching marriage law, the distinction between

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24 Susan Burns: Teaching Legal Ethics. *Legal Education Review* 4, 1. (1993), 22. https://doi.org/10.53300/001c.5991.

25 Ibid. 7–15.

26 Katalin Szoboszlai-Kiss – Gábor Andrási: The best of two worlds: Multidisciplinary co-teaching of legal ethics. *Hungarian Journal of Legal Studies* 64, 2. (2023), 308–321. https://doi.org/10.1556/2052.2023.00466.

27 Michael Robertson: Providing Ethics Learning Opportunities throughout the Legal Curriculum. *Legal Ethics* 12, 1. (2009), 59–60. https://doi.org/10.1080/1460728X.2009.11423921.

28 Traczykowski op. cit. 43.

29 Cf. John Paul II op. cit. Part I. 22.

civil and church marriage is explained, along with the additional moral significance attributed to the latter. Numerous further examples could be cited to illustrate how ethical and worldview considerations are integrated throughout the curriculum.

Regarding the two courses specifically devoted to legal ethics, their primary aim is to cultivate and shape students' moral character. The *Christian Morals and Legal Ethics* course, adopting a virtue ethics framework, seeks to encourage students to aspire to virtuous and ethical behaviour – both in their future private lives and in the practice of law – reflecting the character-based approach. In contrast, the *Problems of Legal Ethics* course focuses on particular ethical issues and dilemmas that emerge within legal practice.

Both courses are semi-mandatory, meaning that they can be chosen from a group of courses, with a certain number of courses from that subject group being compulsory. Average class sizes exceed one hundred students.

During the 90-minute sessions, the instructor frequently employs interactive tools to place students in real or hypothetical scenarios and poses quiz questions. Students respond using an online application, selecting from predetermined options (with an "other" option available) or providing free-text answers. The aggregated responses are then projected for the class, followed by a collective reflection or discussion. During this phase, participants explain the reasoning behind their answers and engage with the perspectives and arguments of their peers. This method is designed to ensure active student participation, sustain attention in relatively large classes, and train students to recognise ethical dilemmas and respond in a thoughtful and reasoned manner.

Assessment in both courses is based on the submission of an essay in which students are required to reflect on a particular life situation and provide an argument-based response to the moral questions that arise, according to predefined criteria. Neither in-class discussions nor the essays aim to elicit a single "correct" answer; rather, the objective is for students to formulate an individual response grounded in a well-considered set of criteria and logical, ethical reasoning.

Naturally, the precise effectiveness of this system of legal ethics education is difficult to measure. Instructors may easily observe that the development of students' moral character depends to a significant degree on their pre-existing moral attitudes, values, and motivations. The most encouraging outcomes occur when students demonstrate a genuine interest and a desire to live their lives and pursue their professions as a form of service and as a means of realising values. Within the framework provided by the curriculum, the teacher's role is akin to sowing a mustard seed, while the ultimate growth remains in God's hands (cf. Mt 13:31–32; 1 Cor 3:6–7).

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ARTICLES

“HOW DO I RECOGNIZE WHAT IS RIGHT?“

Pope Benedict XVI.‘s suggestions on the doctrine of natural law

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Abstract

In the light of the plea for a greater utilisation of Natural Law, as was particularly evident in Pope Benedict XVI’s address to the German Bundestag in 2011, this article examines the understanding and significance of Natural Law in the law of the Catholic Church (Canon Law). On the one hand, specifics are developed using the examples of religious freedom and the protection of life, and on the other, their significance from the perspective of the Church’s social doctrine is examined. The aim is to outline the internal relationship between Natural Law, Canon Law and the Church’s social doctrine.

Keywords: Roman law, natural law, canon law, religious freedom, protection of human life

The three technical terms “natural law”, “canon law” and “ecclesiastical social teaching” are central points of reference in philosophy and theology as well as in Christian social sciences and law. They often overlap in thematic contexts, but primarily represent separate and independent academic disciplines. The motive and aim of the following considerations under the title *„How do I recognize what is right?“ – Pope Benedict XVI’s suggestions on the doctrine of natural law* is to bring them into dialogue with one another and to shed light on their relationship to each other with the help of exemplary questions. It must be expressly stated at this point that, due to the limited scope of this paper, these considerations represent only a first initial outline of the content.

1. Plea in favour of natural law

Initially, we have to examine Pope Benedict XVI's plea for the rehabilitation of natural law. Benedict XVI responds to the central question, which similarly is the title of this article, in a pointed way in his address to the German Bundestag in Berlin on September 22th, 2011. Starting with Solomon's plea for a listening heart to discern between good and evil (1 Kings 3:9), he elaborates the clear commitment to „nature and reason as the true sources of law"[1], within the history of Christianity. In contrast to a divine law of revelation, which endeavours to impose a legal order on the human community from this very revelation, Christianity sees the legal culture of humanity, especially in Christian-shaped societies founded in a coexistence of nature and reason. This interdependency is founded itself by „the creative reason of God"[2], albeit interpreted in the light of faith.

In this way, human nature and reason form the independent source of determining what is right. This understanding is reflected by St. Paul in his well-known statement within the letter to the Romans: „If Gentiles who do not have the law (the Torah of Israel) do by nature what is required by the law, they are ... a law to themselves. They show that the requirement of the law is written in their hearts; their conscience bears witness to it" (Rom 2:14 f.) The ability to discern between right and wrong is written in a person's heart and recognized in their conscience as well as testified by their actions.

This revolutionary thought, which was ultimately able to unfold in a unique combination of Greek philosophy and Roman law, the Pope sees a connection with the Judeo-Christian belief in God as leading „via the Christian Middle Ages and the juridical developments of the Age of Enlightenment all the way to the Declaration of Human Rights and ... the German Basic Law"[3], in which its founders testified to the „inviolable and inalienable human rights as the foundation of every human community, and of peace and justice in the world"[4].

This idea is linked to the leitmotif of „natural law", which Joseph Ratzinger wants to bring out of a Catholic shadowy existence. In doing so, he is fully in tune with Wolfgang Waldstein.[5] Pope Benedict XVI. sees this classical idea as an appeal to the

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[1] BENEDICT XVI.: Gut und Böse unterscheiden und so wahres Recht setzen. Ansprache vor dem Deutschen Bundestag in Berlin vom 22. September 2011. *L'Osservatore Romano dt* 41, 39. (2011), 4–5.; in English translation: https://tinyurl.com/j7ev2fkz (Accessed on: 29 May 2025).

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] See Wolfgang WALDSTEIN: *Ins Herz geschrieben. Das Naturrecht als Fundament einer menschlichen Gesellschaft.* Augsburg, Sankt Ulrich Verlag, 2010. Comp.: BENEDICT XVI.: Enc. „Deus caritas est" (12/25/2005). *Acta Apostolicae Sedis* 98, 3. (2006), 217–252., here No. 28.; BENEDICT XVI.: Enc. „Caritas in veritate" (06/29/2009). *Acta Apostolicae Sedis* 101, 8. (2009), 641–709. See also for example: Franz-Josef BORMANN: *Natur als Horizont sittlicher Praxis. Zur handlungstheoretischen Interpretation der Lehre vom natürlichen Sittengesetz bei Thomas von Aquin.* (Münchener Philosophische Studien. Neue Folge 14), Stuttgart-Berlin-Köln, Verlag W. Kohlhammer, 1999.; Franz-Josef BORMANN: Naturrecht. In: Armin G. WILDFEUER – Petra KOLMER (ed.): *Neues Handbuch philosophischer Grundbegriffe.* Freiburg, Verlag Karl Alber, 2011. 1592–1601.; Sascha MÜLLER: *Menschenwürde und Religion. Die Suche nach*

reason common to all people, associated with the ability to reach a common ground about fundamental ethical principles of law in a secular and pluralistic society. This understanding not only serves peace, but also justice as its indispensable prerequisite.

However, to achieve this, it is necessary to overcome the now predominant positivist understanding of nature and reason, in which both entities are understood purely functionally and therefore unconnected with ethics and law, or at least to relativise them in their absolutised forms. As much as the positivist concept is to be appreciated as „a most important dimension of human knowledge and capacity", its extreme forms also harbours the danger of reducing man, nature and culture. They are sufficient unto themselves without perceiving the greater meaning and openness of their existence.

The consequences are already visible, especially considerating the formation of law in Europe. Law is often based on purely positivist, i.e. purely pragmatic reason orientated towards the supposed requirements of reality, without being aware of its ethical implications. The issues of human dignity and its protection at all stages of human life are pressing examples, particularly in light of the attempt to expand human rights at will, for example to include the so-called „right" to abortion or for an assisted suicide. Pope Benedict repeatedly warned of this ultimately limitless expansion of human rights during his time as Bishop Emeritus of Rome.

Pope Benedict XVI. sees the prerequisite for a rehabilitation of the doctrine of natural law, which could overcome the mentioned lost connection and speechlessness between reason and faith, in the recognition of a given reason: „Is it really pointless to wonder" – he asks acknowledging Hans Kelsen's theses – „whether the objective reason that manifests itself in nature does not presuppose a creative reason a Creator Spiritus?"[6]

As a result of this question, Joseph Ratzinger sees reason and faith, Theology and philosophy as a „strange pair of twins, in which neither of the two can be totally separated from the other, and yet each must preserve its own task and its own identity".[7] The relative independence of nature and reason, which in their relationship to each other represent the „the true sources of law"[8], and faith, which knows how to penetrate the law in a rational and purifying way, enter into a creative relationship of mutual help.

This is why Benedict XVI can appeal to the creative preservation of both elements by stating: „The culture of Europe arose from the encounter between Jerusalem, Athens and Rome – from the encounter between Israel's monotheism, the philosophical reason of the Greeks and Roman law. This three-way encounter has shaped the inner identity of Europe. In the awareness of man's responsibility before God and in the acknowledgment of the inviolable dignity of every single human person, it has

der wahren Freiheit – metaphysische Wegweiser von Platon bis Hegel. (Münchner Philosophische Beiträge 23). München, Utz Verlag, 2012.

6 Benedict XVI. (2011) op. cit.

7 Benedict XVI.: Lecture at the university of Rome „La Sapienza" (01/17/2008, cancelled 01/15/2008). *Acta Apostolicae Sedis* 100, 2. (2008), 107–114.; in English translation: https://tinyurl.com/4py567sd (Accessed on: 29 May 2025).

8 Ibid.

established criteria of law: it is these criteria that we are called to defend at this moment in our history".[9] Only from this creative combination of nature, reason and faith can a sustainable and effective law be created and realised; only in this way can it ultimately serve justice, peace and human dignity.

2. Consequence: Injustice is not a path to justice

From this fundamental pont of view, a decisive consequence already emerges in the papal address to the Bundestag. A right that is deprived of its basis of reasonableness by an arbitrary decision of power always becomes injustice, which does not liberate people but makes them unfree.

Every totalitaristic political system bears witness to this axiom in the history of mankind. Injustice is countered by the fundamental christian conviction that justice cannot be achieved through injustice. As Joseph Ratzinger emphasised in 1979: „Injustice is never a path to justice, violence is never a path to freedom, barbarism is never a path to humanity".[10] Nevertheless, for Christians in such situations, the „self-evident rule is to observe all those parts of state law that do not contradict God's commandment; everything retains its legal character for them, even if it is set by unjust power".[11] But the Christian „refuses to do wrong, even if state authority declares it to be right; he is prepared to become a martyr for it and thus once again stand up for the inviolability of the law".[12]

Pope Benedict XVI used this conviction to remind the Bundestag of the Christian resistance fighters against the Nazi regime, who in their actions kept alive the sense of what is given in the law and in this way where a lighting example for all mankind.

With regard to the „dictatorship of relativism that does not recognize anything as definitive and whose ultimate goal consists solely of one's own ego and desires", as described by Cardinal Ratzinger in his homily before the opening of the conclave[13], the dangers of injustice also exist in democratic states, especially where human dignity is exposed to the risk of being violated due to purely positivist-functional thinking and judgement. This is why nature and reason, as independent source of law, require an inner orientation that opens them up to their origins and therefore knows how to purify them. Faith serves this necessity, i.e. through the guidance of the Ten Commandments. They contain the „fundamental legal relationships of human beings – family, marriage, property, honour – in a way that precedes state law" and provide the law itself „as the fundamental order of human life".[14]

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[9] Ibid.

[10] Joseph Ratzinger: *Dienst am Recht ist Dienst an der Freiheit.* München, Pressereferat der Erzdiözese München und Freising, 1979.; own translation.

[11] Ibid., 4.; own translation.

[12] Ibid., 4.; own translation.

[13] Joseph Cardinal Ratzinger: Homily in the Mass „Pro Eligendo Romano Pontifice" (04/18/2005). *Acta Apostolicae Sedis* 97, 5. (2005), 685–689.; in English translation: https://tinyurl.com/2s375u8y (Accessed on: 29 May 2025).

[14] Ratzinger (1979) op. cit. 6.; own translation.

Pope Benedict XVI sees this predetermination confirmed in the fact that the ten statements of God in the biblical creation narrative („God spoke") are the foundation for the creation oft the Ten Commandments (Decalogue): „The ten-word of the Ten Commandments is, so to speak, only interpretation of the inner word of creation itself and of the action from it, which is there in it and does not eliminate our action".[15] In terms of natural law and the theology of revelation, the Ten Commandments lead people to those predetermined conditions that constitute the individual and communitarian life of human beings. As such, they remind people of the „pre-political and ethical foundations of the liberal-democratic constitutional state, according to which the task of politics is to place power under the measure of the law and thereby organise its meaningful use: 'Not the law of the strongest, but the strength of the law must prevail'".[16] In this way, law becomes the guarantee of human freedom and justice, which are the precondition of the first, and therefore independent of current developments.

3. Classification of natural law in canon law

Regarding the preceded deliberations, we finally can take a third look at canon law and the associated social doctrine of the Church. In the field of canon law, the discourse of natural law is deeply linked to the question of the sources of canon law, more precise, what sources canon law refers to for the legal structure of the Church. To cursory answer this question, we first need to distinct between material and formal sources.[17] On the one hand, the material sources characterise the origin of the respective legislation. According to church doctrine, this can be done by God himself or by the ecclesiastical authority, either when it acts as a legislator (c. 7 CIC) or when it approves a customary law that has become law (cc. 23-28 CIC). Formal sources, on the other hand, include all written records from which this right can be recognized, for example, the currently valid ecclesiastical codes such as the *Codex Iuris Canonici* or the *Codex Canonum Ecclesiarum Orientalium*.

Of course, from the perspective of creation theology, all law, both secular and ecclesiastical, is ultimately founded in God.[18] God, as the origin of all creation, inspires and legitimises the law. However, canon law has a deeper connection to divine norms because it is based on the revelation of God, and in particular on the Gospel of the incarnate Son of God. This gives canon law a significant distance from secular law, because the first mentioned is „the communal (or congregational) order of the new people of God and therefore a visible sign of an invisible reality founded in God".[19]

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[15] Joseph Ratzinger, Benedikt XVI.: *Gottes Projekt. Nachdenken über Schöpfung und Kirche.* Regensburg, Verlag Friedrich Pustet, 2009. 39.; own translation.

[16] Kurt Koch: Gott ist Logos und Liebe. Versuch eines theologischen Porträts von Papst Benedikt XVI. In: Kurt Koch: *Das Geheimnis des Senfkorns. Grundzüge des theologischen Denkens von Papst Benedikt XVI. (Ratzinger Studien 3).* Regensburg, Friedrich Pustet, 2010. 14–44., here 20 s.; own translation.

[17] See Winfried Aymans – Klaus Mörsdorf: *Kanonisches Recht I.* Paderborn, Verlag Ferdinand Schoeningh, [13]1991. 25–57., espec. 32–37.

[18] See Ibid 32. s.

[19] Ibid. 33.; own translation.

Canon law is therefore sacred law, *ius sacrum*, not only in the sense that it seeks to serve the establishment of the kingdom of God on earth and thus the sanctification of the world, but also and precisely because it is linked to the sacramental life of the Church and is embedded in the sacramental nature of the Church.

This definition of the Church as a sacrament was emphasised to the people of God once again by the Second Vatican Council in the Constitution „Lumen Gentium", as Joseph Ratzinger emphasised many times. According to this, the Church is to be understood as a visible assembly and at the same time a spiritual community that has grown out of divine and human elements and that forms a *„single complex reality" (una realitas complexa)* consisting of external (human) and internal (divine) dimensions.[20] Consequently, even if canon law arises from the nature of the Church, a distinction must be made between divine and purely human law. This classical legal distinction is therefore theologically based. But what exactly is meant by divine and human canon law?

3.1. Ius divinum

Traditionally, *ius divinum* is understood to be twofold: Natural law *(ius divinum naturale),* which is linked to the idea of creation and can be recognized by reason, and the right of revelation *(ius divinum positivum)*, which in itself cannot be derived from reason. According to Joseph Höffner, natural law in the above-mentioned sense encompasses all human rights that are inextricably linked to the nature given to us as human beings by the Creator himself[21], including fundamental, timeless, supreme and general legal provisions. Irrespective of faith and culture, they are already recognisable through man's own reason. These include, for example, the right to life, the right to physical integrity and the right to freedom of religion and conscience. In this sense, we can find a number of such natural law provisions listed in the Decalogue of the Old Testament (Ex 20:2-17; Deut 5:6-21), since according to the Catholic view, this natural law as part of the natural moral law is ultimately founded in the eternal law *(lex aeterna)* of the Creator's Logos and binds man as a rational creature in conscience.[22]

According to the Declaration *Dignitatis Humanae* of the Second Vatican Council, the Church's Magisterium has the task of „to declare and confirm by her authority those principles of the moral order which have their origins in human nature itself"[23]. In a similar way, c. 747 § 2 CIC has taken this up when it grants the Church the right „to

[20] Vat II, LG art. 8, also LG art. 1. See Christoph Ohly: Inkarnation und Kirche – Eine Analogie und ihre Konsequenzen. In: Katholisches Säkularinstitut Cruzadas de Santa María (ed.): *Kriterien der Wahrheit christlicher Glaubenserfahrung.* (Pasinger Philothea 1), St. Ottilien, EOS-Verlag, 2006. 77–104.

[21] See Joseph Höffner: *Christliche Gesellschaftslehre*. New edition published by Lothar Roos. Kevelaer, Verlag Butzon & Bercker, 1997. 63.

[22] See Heinrich de Wall – Stefan Muckel: *Kirchenrecht: Ein Studienbuch.* München, Verlag C. H. Beck, 2009. 101.

[23] Vat II, DH 14.

render judgment concerning any human affairs insofar as the fundamental rights of the human person or the salvation of souls requires it".

Positive divine law, au contraire, is derived from the specifically christian revelation in Scripture and tradition. However, the law of revelation cannot be misunderstood as a self-contained corpus of formulated legal propositions. Rather, it is a matter „of certain statements contained in Holy Scripture, which have been and are understood in the tradition of the Church as binding instructions for concrete full realisation".[24] In this form, divine law is already embedded in the tradition of the Church. Not all biblical directives are to be understood as divine law without further ado. Time-related statements must be distinguished from essential directives. Which biblical statements are to be understood as directives of divine law is primarily decided by the church tradition itself. Thus, positive divine law can also be described „as a right of revelation made recognisable or visible by tradition".[25] In the *Codex Iuris Canonici*, explicit references to the respectively understood right of relevation can be found again and again. In addition to the not frequently used term *„ius divinum"*[26], a number of other expressions also serve this reference. For example, c. 330 CIC emphasises that Peter and the other apostles *„statuente Domino"* form a single college, which becomes visible in the communion of pope and bishops. Similarly, c. 375 CIC states that the bishops take the place of the apostles *„ex divina institutione"*. In sacramental law, c. 840 CIC emphasises that the sacraments are *„a Christo Domino instituta"* and have been entrusted to the Church. Similarly, analogous references such as *„ex ipsa ordinatione divina"* (c. 113 § 1 CIC) or *„divinitus missio concredita"* (c. 794 CIC) are also repeatedly found in the Code.

Divine law always needs to be concretised in the historical conditions of the Church.[27] It is not a fixed quantity, for just as the realisation and appropriation of revelation itself takes place under the assistance of the Holy Spirit in the particular historical and cultural context and is co-determined by it without contradicting itself, this applies in the same way to divine law. The historical dimension relates to the ius divinum neither as an inherent deficiency nor simply as a constant process, instead the contextualisation and interpretation is a task of the Church, namely the supreme magisterium of the Pope and the College of Bishops.[28]

3.2. Ius mere ecclesiasticum

Finally, purely ecclesiastical law *(ius mere ecclesiasticum)* is understood to mean all legal principles that have their origin in the legislative will of an ecclesiastical legislator or in the authorised recognition of an approved custom. It is related to the process of concretisation of divine law. Its task is to develop divine law into an order of life in

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[24] Aymans–Mörsdorf op. cit. 35.; own translation.

[25] De Wall – Muckel op. cit. 102.; own translation.

[26] See cc. 22, 24 §1, 1059, 1075 § 1, 1163 § 2, 1165 § 2, 1290, 1692 § 2 CIC.

[27] See Aymans–Mörsdorf op. cit. 36.

[28] See ibid.

such a way that divine law is a *de facto* manageable law in its respective temporal and cultural context. Human canon law must be able to answer and respond to the resulting legal questions.

The totality of divine and human canon law proves to be a unified law that is, however, characterised by an immanent qualitative difference. This means that not all norms of canon law are equally close to the centre of the mystery of the Church; not all norms have the same significance in the nature of herself. And yet they should all be orientated towards her described nature and goal.

The Church‘s law on marriage can be cited as a relevant example. The Church must provide a legally qualified answer to the question of how a sacramental and consummated marriage between two baptised people, which is subject to the requirement of absolute indissolubility in accordance with c. 1141 CIC, is validly established by means of its own marriage law. This makes the divine law (i.e. indissolubility of marriage) manageable and verifiable. With the help of specific norms, it determines when and how this sacramental marriage comes about. At the same time, ecclesiastical marriage procedural law opens the possibility of examining the validity of the marriage within the framework of marriage annulment proceedings if the marriage could only have existed in appearance.[29]

Consequently, human canon law is always about making divine law legally effective in the best possible way. Even if human canon law may contain norms that are not explicitly connected with divine law but find their legitimation in the social constitution of the Church according to LG Art. 8, purely human canon law cannot be characterised as arbitrarily changeable in contrast to divine law. Human canon law is not a purely variable law, but a law which, as human law, must be governed and executed by the spirit of divine law. In this sense, the triad formulated by Erik Wolf applies: divine law legitimises, limits and standardises human canon law.[30] As a tiered legal order, human canon law finds its legitimation, its limitation and its internal and external orientation (standardisation) in the *ius divinum*. The theological stipulation of the axiom that the supreme law in the Church is the salvation of souls (human beings) is to be understood in this sense.[31]

3.3. Natural Law in canon law

In addition to these important distinctions, we must examine – especially regarding the occasion of this lecture – the special significance of natural law in canon law. A

29 See cc. 1671–1691. CIC. Pope Francis: Motuproprio „Mitis Iudex Dominus Iesus“ (08/15/2015). *Acta Apostolicae Sedis* 107, 9. (2015), 958–970.; See Winfried Aymans – Klaus Mörsdorf – Ludger Müller – Christoph Ohly: *Kanonisches Recht IV.* Paderborn, Verlag Ferdinand Schoeningh, [13]2013. 533–550.; Ludger Müller: *Das kirchliche Ehenichtigkeitsverfahren nach der Reform von 2015 (Kanonisches Recht. Ergänzungsband).* Paderborn, Verlag Ferdinand Schoeningh, 2017. https://doi.org/10.30965/9783657785971

30 Erik Wolf: *Ordnung der Kirche.* Freiburg i. Br., 1961. 469., quoted from Aymans–Mörsdorf op. cit. 36.; own translation.

31 See c. 1752 CIC: *salus animarum suprema lex.*

statement by two important German-speaking canon lawyers, Klaus Mörsdorf (1909-1989) and Winfried Aymans (1936-2023), expresses the increasing distance from natural law within canon law in the 20th century. Although they believed that „natural law is not of such decisive importance for canon law because the Church itself is not a product of nature; the Church did not emerge from a natural process, but from the unfathomable counsel of God"[32], but it is true that the communal life of the Church also affects people as natural persons, primarily in the area of marriage and matrimonial law.[33] However, this basic norm complex in canon law based on natural law cannot conceal the fact that ecclesiastical law essentially arises from the mystery of the Church and is therefore at the service of the law of revelation and secondary to the latter.

Both a naturalistic interpretation of natural law as a direct and only source to matrimonial law and an anti-authoritarian criticism of the idea that the Church's magisterium could decide how and what belonged to natural law increasingly intensified the criticism of natural law in the canon law debate. At the present time, canon law textbooks still place it under *ius divinum* as a formula, but its possible significance for the service of faith, which also includes canon law, is largely ignored. In my own academic orientation, I'm deeply aligned to the basic approach of the theological foundation of canon law in the mystery of the Church, as Mörsdorf and Aymans established it. And I have tried – also following the two great encyclicals of Pope Benedict *Deus caritas est* and *Caritas in veritate* – to prove that the law of the Church can be derived and founded not only from the basic acts of the word and the sacrament (Mörsdorf-Aymans), but also and especially from the act of charity *(caritas).*[34] Insofar, the law of revelation is the determining source of ecclesial legislation.

However, I am convinced that the idea of natural law in church law must be riveted insofar as it can be „connectable" to areas that go beyond the boundaries of the ecclesiastical constitution and thus be able to express common fundamental convictions more strongly. I am convinced that this can be of great help to the proclamation of the Church in the dialogue with other religious and ideological views in the context of truth and tolerance to set legal norms in its own area based on natural law. To do this, however, it is necessary to free the concept as well as the reality of natural law from the naturalistic close into which they obviously haved fallen in canon law studies.[35]

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32 Aymans–Mörsdorf op. cit. 37.; own translation.

33 See ibid. 35. with reference to the impediments to marriage based on natural law in the doctrine, such as the impediment of *impotentia coeundi* (c. 1084 CIC), consanguinity in the straight line and in the collateral line up to the third degree (c. 1091 CIC) and in-laws (c. 1092 CIC).

34 See Christoph Ohly: Deus caritas est. Die Liebe und das Kirchenrecht. In: Michaela C. Hastetter – Christoph Ohly – Georgios Vlachonis (ed.): *Symphonie des Glaubens. Junge Münchener Theologen im Dialog mit Joseph Ratzinger / Benedikt XVI.* St. Ottilien, EOS-Verlag 2007. 103–129.; also Christoph Ohly: Caritas et Ius. Un impulso para la fundamentación teológica del derecho canónico. In: Juan José Pérez-Soba Diez del Corral – Andrés García de la Cuerda – Ángel Castaño Félix (ed.): *En la escuela del Logos. A Pablo Domínguez in memoriam.* (Collectanea Matritensia 6.II), Madrid, 2010. 563–577.

35 See Wolfgang Waldstein: Naturrecht und naturalistischer Fehlschluß. In: Winfried Aymans – Anna Egler – Joseph Listl (ed.): *Fides et Ius. Festschrift für Georg May zum 65. Geburtstag.* Regensburg, Verlag Ferdinand Pustet, 1991. 33–58.

3.4 Suggestion and ideas from Pope Benedict XVI.

Pope Benedict's speech in the Bundestag in Berlin opens a path towards this. In response to the question „How do we recognize what is right?", he says in accordance to Wolfgang Waldstein that we need to „listen to the language of nature", specifically, he explains: „Man is not merely self-creating freedom. Man does not create himself. He is intellect and will, but he is also nature, and his will is rightly ordered if he respects his nature, listens to it and accepts himself for who he is, as one who did not create himself. In this way, and in no other, is true human freedom fulfilled".[36]

But how can we understand the language of nature correctly? This requires criteria based of reason and can judge and order natural inclinations. In this context, Martin Rhonheimer assesses Benedict XVI's reminder „of the ultimately transcendent origin of all reasonableness that justifies law"[37] as an inadequate response to the statements of the legal scholar Hans Kelsen as a representative of radical legal positivism. Although this reference testifies to the „specifically Christian tradition of the moral natural law as participation in the eternal law in the rational creature", as a position that assumes a theonomic justification of natural law and thus also of human rights, it hardly allows for an understanding with non-believers.[38] Rather, with Thomas Aquinas, natural law must be understood as the light of understanding in the sense of moral reason.[39] This enables man to recognize what is right.

Although, according to christian theology of creation, all natural realities manifest God's wisdom and will, but only man's natural reason realises this in a morally ordering and normative way for himself and the world. To do this, however, it must be free from the disorder caused by vices and passions. Accordingly, the virtues are the breeding ground for the right functioning of natural reason. Man is able to recognize and formulate the first and fundamental principles of natural law (e.g. the prohibition of killing, the right to physical integrity, ...), which are therefore valid independently of a concrete positive law. Legal positivism, which denies the existence of a natural law and its coordinates, must therefore be countered by the competence of natural human reason, which is capable of setting universally applicable ethical standards.

3.5 Examples in canon law

By incorporating fundamental convictions based on natural law into its legislation, canon law, which is initially focussed on the internal ecclesiastical sphere, also establishes possible connections to a non-ecclesiastical sphere. The relevance of this

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36 Benedict XVI. (1979) op. cit.

37 Martin Rhonheimer: Benedikt XVI. über Rechtsstaat, Demokratie und Naturrecht. Die Reden in Berlin und London. In: Jan-Heiner Tück: Der Theologenpapst. Eine kritische Würdigung Benedikts XVI. Freiburg i. Br., Verlag Herder, 2013. 135–157., here 149.; own translation.

38 Ibid. 149. s.; own translation.

39 See also Martin Rhonheimer: Recht und Politik. Benedikts Auseinandersetzung mit Demokratie und Rechtspositivismus. In: Stephan O. Horn – Wolfgang Schmidt: *Hoffnung und Auftrag: die Reden Benedikts XVI. zur Politik.* Freiburg-Basel-Wien, Verlag Herder, 2017. 62–89.

connection can be illustrated with two exemplary provisions in the current Code, which also stand for fundamental convictions in the Church's social doctrine.

Firstly, there is *religious freedom.* In c. 748 CIC, the Church professes both the fundamental duty of man to seek the truth in matters concerning God and his Church, and the freedom of man and his conscience from any coercion that could be exercised to accept the faith. Both elements are equivalent to human rights. It is part of the dignity of the human person that nobody should lose himself in the penultimate questions and be content with penultimate answers, but should face the entirely meaning of its existence.

This inner obligation of every human being, which is recognized by human reason as a natural right (human right) and is formulated both in the declarations of human rights and in canon law, corresponds to the tolerance towards the search for answers. There are different answers to the questions, which are respected in the sense of religious freedom. However, the Church sees this human obligation as the basis of its right to give strong testimony of the revelation given in its fullest sense in Jesus Christ. The acceptance of the truth does not happen through coercion, but through the power of the proclaimed word and the testimony given by those who have accepted the truth (baptism and acceptance of faith).

Religious freedom based on conscience must therefore be appreciated from two perspectives and recognized as justified by „natural law" – even if it can also be legitimised theologically: externally and internally.[40] The proclamation of the Gospel in all nations does not arise from human decision. Rather, it follows from the mission of the Lord, in whose mandate the Church acts. To fulfil this basic duty appropriately, the Church requires the necessary freedom to do so. This legal claim to freedom must not be understood as a privilege. The Church claims for itself the right to proclaim the Gospel as an innate right vis-à-vis all human authority. At the same time, it corresponds to the individual right of every person to religious freedom. In material terms, the right to free proclamation means freedom from any influence of human power on the content; in formal terms, it means the unhindered use of the legitimate methods and instruments (means of communication) available to the Church. In the context of greater respect for natural law in the sense described above, this norm therefore plays a key role in canon law.

In a similar, albeit qualitatively different way, this also applies to two provisions of ecclesiastical criminal law regarding the *protection of human life.* According to c. 1397 *§ 1* CIC, anyone who kills a person or abducts, detains, mutilates or seriously injures a person by force or deception must, in addition to state criminal prosecution measures, be subject to corresponding internal ecclesiastical penalties. In the case of an abortion, the person performing the procedure (woman, doctor, man) is subject to self-imposed excommunication in accordance with c. 1397 *§ 2* CIC, while the German state currently provides for impunity after counselling in accordance with *§ 218* StGB (Criminal Code). In both legal provisions, the right to life and the integrity of life are at the centre of the codified normative statement, albeit with different emphases.

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40 See Aymans–Mörsdorf op. cit. 8.

In both legal systems, this is based on natural law and expresses the non-availability of human life. The ecclesiastical norms deliberately refer to the legal sphere within the Church and State the withdrawal or reduction of certain rights within the Church to illustrate – at least for a corresponding period of time until the church sanction is lifted – the damage that the believer has caused to the community of the Church and its witness to the integrity of life by committing the offence.

These two examples from the current ecclesiastical code are two norms that harbour a quite remarkable approach for a stronger consideration of the idea of natural law. As it is shown, human reason, in which the image of God is revealed, formulates as law and justice what it can distinguish as good and evil, as right and wrong. Without doubt, it also does this in the light of faith, which becomes its source of knowledge, but at the same time human reason opens the bridge to those other religious or non-religious traditions to bear joint witness with them in these areas and to create universally applicable law.

The future will show to what extent there are further opportunities for development – also and especially in canon law. This is conceivable and possible with the help of renewed natural law thinking in this very discipline, for which Wolfgang Waldstein and Joseph Ratzinger have made fundamental contributions.

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THE APPEARANCE AND ROLE OF RERUM NATURA IN THREE DIGEST TEXTS

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Abstract

This paper explores the role of *rerum natura* in three pivotal texts from the Digest, demonstrating its function as an interpretative and normative principle in Roman legal thought. By analysing cases involving usufruct, property conflicts over the newborn child of a female slave, and *immissiones*, the study highlights how Roman jurists integrated objective reality into their legal reasoning. The investigation reveals that *rerum natura* provided a conceptual bridge between objective reality and positive law, aiding in the resolution of legal disputes. Through exegetical analysis, the paper enhances our understanding of how natura, natural law thinking and positive law eventually intersected in classical jurisprudence, offering valuable insights into the foundational principles of Roman legal tradition.

Keywords: *rerum natura*, Roman law, Digest, usufruct, *ususfructus*, *servitutes*, *immissiones*, ownership, *partus ancillae*, *fructus*, *natura loci*.

The analysis of prepositive norms has consistently been a central focus of Wolfgang Waldstein's work. His comprehensive paper on the cornerstones of Roman jurists' decision-making was published in 1976 in volume 15, series 2 of *Aufstieg und Niedergang der Römischen Welt*.[1] Alongside the concepts of *natura*, *ius naturale*, and *fides*, he also elaborates on the topic of *rerum natura*.

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1 Wolfgang Waldstein: Entscheidungsgrundlagen der klassischen römischen Juristen. In: Hildegard Temporini – Wolfgang Haase (ed.): *Aufstieg und Niedergang der römischen Welt.* II, 15. Berlin – New York, 1976. 3–100.

This paper intends to examine three principal texts from the Digest intimately associated with the concept of *rerum natura*. The analysis of these texts will improve and facilitate the comprehension of the significance and function of *rerum natura* as a 'Grenzbegriff' in the decision-making processes of Roman jurists. The initial text to analyse will demonstrate how *rerum natura* served to determine the specific justice of the particular case in connection with the legal status of a female slave's newborn child while the mother was transferred to a third-party usufructuary. The other texts depict *rerum natura* as the representative of objective reality, highlighting the connection between positive rules of law and 'prepositivische Ordnungselemente' within the framework of the *actio aquae pluviae arcendae* and the *taberna casiaria*. These source texts are well-known and described by many.

The present work does not seek to provide a comprehensive overview of the sources of *rerum natura*; the author of these lines has attempted to accomplish this task in a previously published monograph. The primary objective of this paper is to enhance the understanding of the fundamental legal issues of *rerum natura* through an exegetical analysis of the most prominent texts. To this end, secondary literature will be cited as necessary.

1. Partus ancillae in fructu non est

According to the renowned Gaian report, the child of a female slave (*partus ancillae*) is not considered profit (*fructus*) and, therefore, belongs to the slave's master.[2] The initial reactions to this case are exhilarating. We predominantly observe these reactions when collaborating with students on this case. The initial reactions typically deem the Roman attitude inhumane because the decision is generally interpreted as if the lawyer had suggested separating the baby and the mother. Nonetheless, we encounter a methodological pattern akin to the case related to compensation for damage inflicted by an escaped bear.[3] The distinctive feature of this methodological scheme lies in the recognition that Roman jurists did not establish the cornerstones of the case assessment in the same manner as a layperson would.

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2 Cf. Max Kaser: Partus ancillae. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 75, (1958), 156.; Fritz Sturm: Zur ursprünglichen Funktion der actio Publiciana. *Revue Internationale des Droits de l'Antiquité* 9, (1962), 405.; Georg Thielmann: Produktion als Grundlage des Fruchterwerbs. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 94, (1977), 76–77., and 98. For more information see also Elisabeth Herrmann-Otto: *Ex ancilla natus. Untersuchungen zu den „hausgeborenen" Sklaven und Sklavinnen im Westen des Römischen Kaiserreiches*. Stuttgart, Steiner, 1994. 268. skk., Theo Mayer-Maly: Romanistisches über die Stellung der Natur der Sache zwischen Sein und Sollen. In: Pietro De Francisi (ed.): *Studi in onore di Edoardo Volterra II*. Milano, Giuffrè, 1971. 118–119.

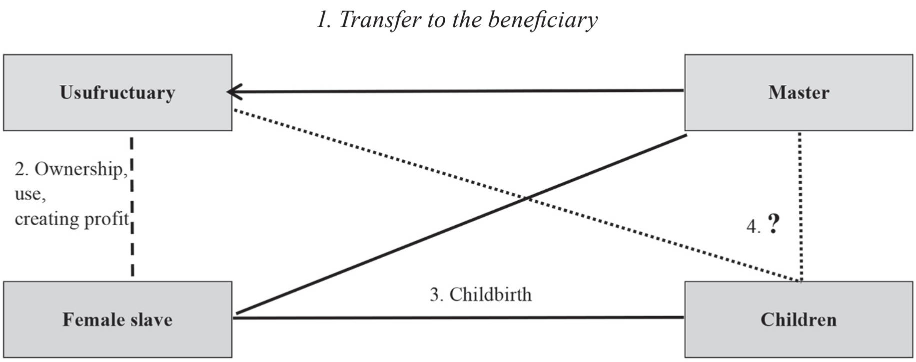
3 Cf. Ulp. D. 9, 1, 1, 10 (18 ad ed.): *In bestiis autem propter naturalem feritatem haec actio locum non habet: et ideo si ursus fugit et sic nocuit, non potest quondam dominus conveniri, quia desinit dominus esse, ubi fera evasit: et ideo et si eum occidi, meum corpus est*. See also Nadja El Beheiri: Actio de pauperie. El caso del oso escapado. *Revista de Estudios Histórico-Jurídicos* 43, 1. (2021), 39–55.

Gai. D. 22, 1, 28, 1 (2 rer. cott.)

Partus vero ancillae in fructu non est itaque ad dominum proprietatis pertinet: absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparaverit.

The most recent English translation of the Digest interprets the text as follows: "But offspring of a female slave are not fruits; so they belong to the owner. It seemed absurd that a human being should count as fruits, since nature provided all fruits for man."[4]

The protagonists and their connections are illustrated in the following figure.



The events are the following in chronological order. First, the female slave as the object of the usufruct is transferred to the beneficiary. The second step is to point out that the beneficiary has the right to possess, use and gain the profits of the object of the usufruct but is also obliged not to impair its substance. In contrast, the ownership (*nudum ius*) of the item resides with the owner.[5] Thirdly, during the usufruct, the female slave delivers a child. The *responsum* in the Digest that the child of the female slave woman is not a profit, consequently, belongs to the master of the female slave.

The protagonists are the master (owner) of the female slave and the usufructuary. The latter claims the child, while the female slave's master contends that the child belongs to him. A text by Ulpian in Book 7 of the Digest covers all possible scenarios concerning the legal status of a female slave's child in connection with usufruct.[6] First, Ulpian outlines a case analogous to the one documented by Gaius. In this case, Brutus's

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4 Cf. Alan Watson: *The Digest of Justinian*. Volume 1. Philadelphia, University of Pennsylvania Press, 2009. 182. https://doi.org/10.9783/9780812205510

5 Cf. Paul. D. 7, 1, 1 (3 Vitell.): *Usus fructus est ius alienis rebus utendi fruendi salva rerum substantia.*

6 Ulp. D 7, 1, 68 pr. – 2 (17 ad Sab.): *[pr.] Vetus fuit quaestio, an partus ad fructuarium pertineret: sed Bruti sententia optinuit fructuarium in eo locum non habere: neque enim in fructu hominis homo esse potest. Hac ratione nec usum fructum in eo fructuarius habebit. Quid tamen si fuerit etiam partus usus fructus relictus, an habeat in eo usum fructum? Et cum possit partus legari, poterit et usus fructus eius. [1] Fetus tamen pecorum Sabinus et Cassius opinati sunt ad fructuarium pertinere. [2] Plane si gregis*

opinion prevailed, and the rules related to usufruct are inapplicable to such a case. This exception arises from the principle that a human being cannot be treated as a profit of another. Consequently, the usufructuary will not acquire the child since a usufructuary is entitled to acquire property of profits via levy. Another possible case is when the usufruct of a female slave's unborn child is bequeathed. In this case, the beneficiary acquires the usufruct of the unborn child, not the property. Ulpian also references a distinction made by Sabinus and Cassius, who held that the young cattle belong to the usufructuary. If the usufruct of a flock or herd is left as a legacy, the usufructuary will be obliged to keep up the numbers of the flock out of the young that are subsequently born into it.[7]

At this stage, numerous legally relevant questions may be raised. What does *nudum ius* encompass? How does the usufructuary acquire the property of profits? Upon addressing these enquiries, we are left with a singular issue to resolve: Who is the master of the female slave's child? This inquiry prompts us to investigate the meaning and significance of *rerum natura* in this argument.

First, it is worth noting that Gaius uses the word *partus*, which has evolved into a noun from the *supinum* form of the verb *parere*. In this context, he denotes the child as an offspring, a progeny.[8] Gaius argues that a child is not a profit: it is absurd to consider man as a profit since *rerum natura* produces all profits for the sake of man, for man's benefit.[9]

Max Kaser analyses both Gaius' and Ulpian's texts. He emphasises that Ulpian's perspective presupposes a concept wherein the profit and the source from which it originates belong to the same *species*. However, this should mean that the child of a female slave could also be considered as profit. Nevertheless, Ulpian explicitly claims otherwise.[10] By comparison, Gaius emphasises that *rerum natura* created all profit for

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vel armenti sit usus fructus legatus, debebit ex adgnatis gregem supplere, id est in locum capitum defunctorum.

7 Cf. Kaser op. cit. 156. For Sabinus and Cassius, see Cicero's *De finibus* (cf. Cic. de fin. 1, 4, 12). Cf. Sturm op. cit. 404. He notes that Cicero's reference to the opinion by Brutus ("*ab iisque M. Brutum dissentiet*") implies that it was a minority opinion.

8 Ulpian (Ulp. D. 7, 1, 68 pr. [17 ad Sab.]) also uses this term, whereas Julian prefers circumlocution ("*[q]ui in utero sunt [...]*", "*[...] id quod natum erit [...]*", Iul. D. 1, 5, 26 [69 dig.]).

9 The last phrase of the Gaian text (*omnes fructus rerum natura hominum gratia comparaverit*) aligns with the Stoic anthropocentric view that man is the reference point of all that exists in the universe. See also Paul von Sokolowski: *Die Philosophie im Privatrecht. Sachbegriff und Körper in der klassischen Jurisprudenz und der modernen Gesetzgebung*. Halle, Verlag Niemeyer, 1902. 446–447.; Kaser op. cit. 158–159.; Mayer-Maly op. cit. 118. D. 33, 2, 42 (2 ex post. Lab.): *In fructu id esse intellegitur, quod ad usum hominis inductum est* [...]), an argument which is based on the premise that it would be absurd to regard man as fruit or as a beneficiary, as well as the holder of this benefit at the same time. Cf. Dario Mantovani: I giuristi, il retore e le api. Ius controversum e natura nella Declamatio maior XIII. In: Dario Mantovani – Aldo Schiavone (ed.): *Testi e problemi del giusnaturalismo romano*. Pavia, IUSS Press, 2007, 358. For the interpretation of fructus, see also Varro r. r. 2, 1.; for this Vsevolod Basanoff: *Partus ancillae*. Paris, Sirey, 1962. 223–225., with special reference to etymological considerations.

10 Kaser op. cit. 156–157. The contradictory nature of the fruit concept is also referred to by Stein, who, however, refers in this connection only to one of the Ulpian texts (Ulp. D. 7, 1, 68 pr.). Cf. Peter Stein: *Regulae iuris*. Edinburgh, Edinburgh Universit Press, 1966. 28.

the benefit of man. Consequently, he denies that the child of a female slave could be a profit.[11] The idea that man can enjoy all the advantages of the surrounding world is rooted in Ciceronian and Aristotelian thought.[12] Kaser points out that Gaius was more susceptible to the influence of philosophy than the mature classics; therefore, their ideas also influenced him more.[13]

In his text, Gaius invokes the concept of *rerum natura* to underpin his perspective concerning the child's legal status. *Rerum natura* reflects the objective reality of the external world, in which there are human beings on the one hand and profits (*fructus*) on the other. The purpose and essence of profits is to be of use to man.[14]

Regarding our case, *rerum natura* serves to resolve the conflict of interest between the owner and the usufructuary. As we have already seen, the usufructuary seeks to retain the child and argues that he has acquired ownership of the reproductive property through levy. He implies that the childbirth occurred in his residence; he may have even assisted with it. Ultimately, he contends that he will not be required to relinquish the child once the usufruct terminates. Conversely, the owner of the female slave intends to reclaim both the female slave and her child as his property. Based on the Paulian definition of usufruct, usufructuary is permitted to use the property and draw its profits. Thus, the question emerges as to whether the child of the female slave falls into the category of "profit". Gaius refutes the claim and refers to *rerum natura* as a guideline to substantiate his argument. What is also paramount to emphasise is that this *responsum* by Gaius does not automatically imply that the child must be immediately handed over to the slave's master. The mother and child could stay together, and upon the termination of the usufruct, the beneficiary will be obliged to return them to the original master.

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11 Wieacker sees the explanation for this distinction in the fact that human dignity does not allow the child of the slave woman to be equated with the child of the animal. Cf. Franz Wieacker: Offene Wertungen bei den römischen Juristen. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 94, (1977), 21.; Kaser op. cit. 158. See also Arist. Pol. 1256b: "εἰ οὖν ἡ φύσις μηθὲν μήτε ἀτελὲς ποιεῖ μήτε μάτην, ἀναγκαῖον τῶν ἀνθρώπων ἕνεκεν αὐτὰ πάντα πεποιηκέναι τὴν φύσιν – If therefore nature is not imperfectly, nor ill-conceived, it necessarily follows that all these creatures were created for man's use." The Greek text is from *Aristotle*. ed. W. D. Ross: *Aristotle's Politica*. Oxford, Clarendon Press. 1957.

12 See above Cic. de fin. 1, 4, 14, and in the previous note Arist. Pol. 1256b; Kaser op. cit. 158.

13 Kaser op. cit. 159.; correspondingly Wieacker op. cit. 21., who sees an explicitly Stoic influence in Gaius' opinion. Thielmann considers Gaius' and Ulpian's opinions hypocritical, moralising and a simple intellectual game. He believes that a philosopher's approach is not worthy of a jurist. Cf. Thielmann op. cit. 98–99. Fortunately, Wieacker considers his view untenable. See Wieacker op. cit. 21.

14 For a similar approach, cf. Max Kaser: *Ius gentium*. Forschungen zum römischen Recht 40. Köln–Wien–Weimar, Böhlau, 1993. 79–80. The Stoic origin of the idea that humanity as a trait is based on man's innate nature. See also the view of Cuena Boy, who argues that in some texts, the reference to *natura* or *rerum natura* does not necessarily have a direct connection with objective reality. Their purpose is to underpin the juridical *responsa*. In details cf. Francisco Cuena Boy: La idea de rerum natura como criterio básico de la imposibilidad física de la prestación. *Revue Internationale des Droits de l'Antiquité* 40, (1993), 232., and especially footnote 13. Contrary to these views, see Mayer-Maly op. cit. 119., who argues that a prepositive Sollen and a real Sollen confront here; therefore, the case does not involve any factual element.

2. Cerellius Vitalis and the cheese workshop

The notable case of the cheese workshop revolves around *immissiones*, a concept primarily addressed by classical jurists. This distinctive approach introduced innovation to the concept of *servitus*.[15] This perspective defers from the preclassical standpoint, where a *servitus* allowed the entitled neighbour to utilise the servient estate to satisfy an essential economic need of his estate. In instances of *immissiones*, the right to utilise a particular estate is spatially broadened and extended; consequently, this right may result in an intrusive use of that property due to this extension.[16]

> Ulp. D 8, 5, 8, 5 (17 ad ed.)
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> *Aristo Cerellio Vitali respondit non putare se ex taberna Casiaria fumum in superiora aedificia iure immitti posse, nisi ei rei servitutem talem admittit. Idemque ait: et ex superiore in inferiora non aquam, non quid aliud immitti licet: in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat, fumi autem sicut aquae esse immissionem: posse igitur superiorem cum inferiore agere ius illi non esse id ita facere. Alfenum denique scribere ait posse ita agi ius illi non esse in suo lapidem caedere, ut in meum fundum fragmenta cadant. Dicit igitur Aristo eum, qui tabernam Casiariam a Minturnensibus conduxit, a superiore prohiberi posse fumum immittere, sed Minturnenses ei ex conducto teneri: agique sic posse dicit cum eo, qui eum fumum immittat, ius ei non esse fumum immittere. Ergo per contrarium agi poterit ius esse fumum immittere: quod et ipsum videtur aristo probare. Sed et interdictum*

In the case in question, Cerelius Vitalis leases a cheese workshop from the community of Minturnae and commences using it for its intended purpose, i.e., producing cheese.[17] The smoke generated during the cheese production process ascends from the workshop without any equipment to clear it. A resident of a higher building in the vicinity, presumably also using his property for its intended purpose, is disturbed at one point by the smoke emission.[18] As a result, the resident enquires with

[15] Cf. Cosima Möller: *Die Servituten. Entwicklungsgeschichte, Funktion und Struktur der grundstückvermittelten Privatrechtsverhältnisse im römischen Recht mit einem Ausblick auf die Rezeptionsgeschichte und das BGB*. Quellen und Forschungen zum Recht und seiner Geschichte 16. Göttingen, Wallstein Verlag, 2010. 272. Contrary to this view cf. Max Kaser: *Das römische Privatrecht*. Bd. 2. Die nachklassischen Entwicklungen. Handbuch für Altertumswissenschaft. 10. Abteilung, Rechtsgeschichte des Altertums. München C.H. Beck, 1975. 2. Aufl., 217., with further literature.

[16] Correspondingly, cf. Möller op. cit. 272.

[17] See also Johannes Michael Rainer: *Bau- und nachbarrechtliche Bestimmungen im klassischen römischen Recht*. Graz, Leykam, 1987. 104.; Antonio Palma: *Iura vicinitatis*. Torino, Giappichelli, 1988. 186.

[18] Correspondingly, cf. Hugo Burckhard: *Die cautio damni infecti*. Erlangen, Palm & Enke, 1875. 215.; Palma op. cit. 186.

the jurist Titius Aristo about whether any measures may be taken to address this issue. As Ulpian reports on Aristo's *responsum*, he points out that emitting smoke from a cheese workshop towards taller edifices is typically unlawful. He mentions only one exception to this rule: the existence of a *servitus* granting rights to the manager of the cheese workshop. At this point, the jurist remarks that the higher elevation of the disturbed building is only necessary because smoke rises upwards. Aristo concludes that the actual resident of the higher property can sue the actual manager of the cheese workshop because the manager has no right to such invasion (*immissio*) into the higher property.[19] Consequently, Cerelius Vitalis, though he is the rightful tenant of the cheese workshop, may be prevented from emitting smoke by the resident above the workshop. As a result, Cerelius Vitalis may sue the community of Minturnae with *actio conducti* based on their *locatio conductio*.[20] The jurist Aristo additionally mentions *actiones negatoria* and *confessoria*, as well *interdictum uti possidetis*, as potential further legal remedies in this case.[21]

The secondary literature regards this text as the most renowned case of *immissiones*.[22] It comprises two fundamental statements. The first one is related to the general concept of property: every individual is entitled to utilise their property provided they do not infringe upon the rights of others.[23] According to the second statement, water or other substances cannot be lawfully discharged from a higher property to another lower one. Based on these two statements, the concepts of *facere in suo* and *in alienum immittere* can be outlined.[24] The second concept, *immittere in alienum*, occasionally expressed as *facere in alienum*, primarily emerges within the context of servitudes.[25]

19 Correspondingly, see Pietro Bonfante: *Corso di diritto romano. La proprietà*. II, 1. Milano, Giuffrè, 1966. 363.

20 Similarly Bonfante op. cit. 364.; Palma op. cit. 186–187. According to Robaye, *action conducti* is also available to the tenant if the smoke is released due to the poor construction of the building (cf. "[...] le bâtiment, mal construit, laisse s'échapper la fumée [...]"). In detail cf. René Robaye: Remarques sur le concept de faute dans l'interprétation classique de la lex Aquilia. *Revue Internationale des Droits de l'Antiquité* 38, (1991), 352.

21 Cf. Burckhard op. cit. 216. Correspondingly, see Luigi Labruna: *Vim fieri veto. Alle radici di una ideologia*. Pubblicazioni dell'Univ. degli Studi di Camerino Napoli, Jovene, 1971. 226.; Alan Watson: *The Law of Property in the Later Roman Republic*. Oxford, 1968. 177sqq. Similarly see also Luigi Capogrossi Colognesi: *La struttura della proprietà e la formazione dei « iura praediorum » nell'età repubblicana*. Milano, Giuffrè, 1976. 503., footnote 2. Rainer mentions only the *actio negatoria* concerning this text. The mention of *actio confessoria* only makes sense if the following text is also considered. In this text (Ulp. D. 8, 5, 8, 6 [17 ad ed.]), Ulpian, referring to Pomponius, deals with the question of who is entitled to sue for the emission of smoke. What if the smoke emitted is not excessive, such as from a stove? In this dimension of active legitimacy, the relevant question is whether the right to emit smoke exists. Cf. Burckhard op. cit. 216.

22 Cf. Möller op. cit. 280.

23 Cf. in the Digest text: "*[...] in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat [...]*". In the English translation: "[…] a man is only permitted to carry out operations on his own premises to this extent, that he discharge nothing onto those of another […]". Cf. Watson op. cit. 269–270.

24 On this, see also Burckhard op. cit. 199.

25 See also Bonfante op. cit. 361sqq.; Schahin Seyed-Mahdavi Ruiz: *Die rechtlichen Regelungen der Immissionen im römischen Recht und in ausgewählten europäischen Rechtsordnungen unter besonderer*

Thus, *immissio* denotes the physical intrusion of one corporeal thing into the spatial domain of another, thereby affecting its legal status.[26] It should be emphasised that any incursion by an incorporeal object does not immediately constitute an *immissio*. These *immissiones* represent a right to access the property of another in the broadest sense, whereas 'entry' as the foundation stone of this concept is most narrowly defined and, therefore, restricted only to corporeal objects.[27] If the 'entry' is physical and direct, then a violation of property occurs. However, the classical jurists were hesitant about whether the physical invasion invariably constitutes a violation of property.[28] In the case of *taberna casiaria*, Aristo asserts that the tenant of a cheese workshop lacks the right to emit smoke (*non putare [...]iure immitti posse*) unless he is entitled to it by a *servitus*.[29] In other words, the *servitus* is necessary for a legitimate physical intrusion. [30]

Furthermore, when the tenant utilises the cheese workshop to produce cheese, he uses the facility for its intended purpose. It also includes smoking the cheese as a means of preservation. The resident lives habitually in the property situated above; thus, he also utilises the estate for its intended purpose. Smoke emission is also a regular activity, so it appears to be a nuisance in this case. Two typical and regular uses of property collide in this case. The jurist offers a conflict resolution pattern, which favours the resident. The cheese workshop manager can only access an *actio in personam* against his contractual partners. Nevertheless, the jurist fails to give a reason for his decision. The concept of *rerum natura* as a ground for the decision appears in another text, which is associated with the case of the cheese workshop.

> Paul. D. 39, 3, 2pr. (49 ad ed.)
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> *In summa tria sunt, per quae inferior locus superiori servit, lex, natura loci, vetustas: quae semper pro lege habetur, minuendarum scilicet litium causa.*

The English translation of the text is as follows: "In short, there are three ways in which a lower site can become under servitude to a higher one, that is to say, regulation imposed, the nature of the site, and established custom, which last is always regarded as having the force of law, for the purpose, of course, of reducing litigation."[31]

The jurist identifies three reasons a lower tract of land may be submitted to an upper one: *lex*, *natura loci* and *vetustas*. *Natura loci* refers to the location of a property;

Berücksichtigung des geltenden deutschen und spanischen Rechts. Quellen und Forschungen zum Recht und seiner Geschichte 7. Göttingen, Wallstein Verlag, 2000. 16.; Möller op. cit. 273.

26 Cf. mainly Seyed-Mahdavi Ruiz op. cit. 16.; Möller op. cit. 272., with literature.

27 Cf. in the primary sources Cic. Top. 5, 26–27. and Sen. Ep. ad Luc. 6, 58, 11.

28 Cf. Bonfante op. cit. 362. On the question of the *servitus lapidem caedendi, ut in meum fundum fragmenta cadant*, see also Bonfante op. cit. 363–364.; Capogrossi Colognesi op. cit. 512.

29 Correspondingly, see Bonfante op. cit. 363.

30 Essentially in agreement with Seyed-Mahdavi Ruiz op. cit. 16.; Möller op. cit. 272.

31 Watson op. cit. 397.

vetustas denotes an extended period developed by the lapse of time.[32] Waldstein underscores that the text is structured so that *natura loci* is positioned between *vetustas* and *lex*. The conclusion is that if a case cannot be solved based on *lex* or *vetustas*, the ground's natural place is decisive. Concerning rainwater, these three cornerstones indicate that in the absence of *lex dicta* or an extended period defined by *vetustas*, the locations of the estates in question as a natural characteristic are to be observed. It means that lower-located estate must absorb the water that enters from the higher-located estate without human intervention.[33]

As a result, the actual possessor of the lower land must tolerate the flowing rainwater due to *natura loci*. Waldstein points out that the jurists relied on the nature of the ground as a departure point in decision-making.[34] In other words, *natura loci* is cited in the text because *lex* and *vetustas* were otherwise ineffective in solving cases. Observing *natura loci* renders the rules in the Law of the XII Tables (7, 7a) comprehensible. That is why Waldstein deems this text as an example of (rerum) natura expressing a specific nature or character of things.[35]

3. Summary

The present paper intended to examine the significance of the concept of *rerum natura* in three fundamental Roman legal texts from the Digest. The paper is centred around how *rerum natura* functioned as a principle in the decision-making of Roman jurists, particularly as a 'Grenzbegriff' in legal interpretation.

The first analysed text concerns the legal status of a female slave's newborn child when the mother is transferred to a third-party usufructuary. Gaius' *responsum* establishes that the child is not considered a profit (*fructus*) and thus belongs to the master rather than the usufructuary. This conclusion is grounded in the principle that human beings cannot be classified as profits since *rerum natura* dictates that all profits exist for human benefit. This case is the first indication how Roman jurists delineated objective reality and positive law norms based on this objective reality.

The second case involves a legal dispute over *immissiones* in the context of a cheese workshop. In this scenario, the tenant of a cheese workshop emits smoke that disturbs the resident of an upper-level estate. The jurist Aristo determines that such emissions are unlawful unless a *servitus* permits them. This case illustrates how the principle of *rerum natura* was invoked to balance ownership and resolve conflicts between two

32 Cf. *Oxford Latin Dictionary*. Oxford, Clarendon Press, 1968. s. v. "vetustas". Waldstein describes it as "*quae semper pro lege habetur*"; see in detail Waldstein op. cit. 39.

33 On the basis of another text (Cels. D. 50, 17, 188, 1 [17 dig.]) Mayer-Maly concludes similarly that the Romans referred to *rerum natura* as a principle when only one possible solution existed to a particular issue: "Auf die *natura rerum* beriefen sie sich dagegen, wenn aus irgendwelchen Gründen – sei es aus physiologischen, sei es aus socio-kulturellen – für ein Problem nur eine Lösung denkbar schien." cf. Theo Mayer-Maly: Juristische Reflexionen über ius I. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 117, (2000), 11.

34 Cf. Waldstein op. cit. 39–40.

35 Cf. Waldstein op. cit. 37sqq.

legitimate but conflicting possessors. The decision affirms that ownership rights are restricted by the impact one's property use has on others.

The third case, as outlined by Paul, concerns the principle that a lower-lying property must tolerate natural rainwater runoff from a higher-lying property unless a legal provision dictates otherwise. The jurist identifies three factors that establish *servitus* in such cases: *lex*, *natura loci*, and *vetustas*. This case highlights how Roman jurists used *rerum natura* as a means of interpretation to supplement positive law, reinforcing the idea that the natural characteristics of a property could affect legal consequences.

Throughout the analysis, the study emphasises that *rerum natura* served as a fundamental concept in Roman legal thought, channelling prepositive norms (prepositive Ordnungselemente) into positive law. It provided jurists with a "toolkit" to resolve disputes based on objective principles rather than mere formalistic application of legal norms. In conclusion, it could be emphasised that understanding the role of *rerum natura* plays an essential role in the comprehension of the broader conceptual and theoretical framework of Roman legal theory.

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REGULATING THE USE OF AI IN CIVIL PROCEEDINGS*

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Abstract

The paper addresses several current issues regarding the use of AI in civil justice. It starts from theoretical foundations and addresses the question of how we can define AI, what is the role of AI in today's civil justice system, and what challenges must be overcome when creating legal regulations. The starting point is the need for a clear regulatory framework for the use of Artificial Intelligence systems in civil justice. It presents several legislative techniques (rules granting and/or governing rights; rules establishing prohibitions; rules setting out conditions, requirements and/or obligations.) and the types of legal sources or forms of regulation that can be used in the process of legislation (self-regulation and codes of conduct; soft law; hard law). It also includes a comparative legal perspective (with Spanish and English examples).

Keywords: AI, Artificial Intelligence, civil justice, civil litigation, civil proceedings, regulation of AI

1. The starting point: the need for a clear regulatory framework for the use of artificial intelligence systems in civil justice

It has become a cliché to point out how developments in Artificial Intelligence (AI) in the legal sphere are already having an impact in the field of litigation and, more specifically, in the field of civil litigation. It is equally common to predict that many of the activities inherent to a judicial process or related to it may be entrusted to AI

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systems in the future.[1] These predictions are underpinned by a high confidence in the ability of technologists to develop tools that perfectly fulfil what non-technologists like to imagine.[2] The proposal to introduce them into civil justice is basically based on postulates of efficiency, which are also usually associated with improving access to justice. Indeed, it is common to read that, as soon as certain AI-operated tools become available, the processing of legal proceedings will be faster, their cost will be much lower, there will be more tools to avoid them or to end them in advance by agreement between the parties, among many other beneficial effects. This will ultimately translate into better access to justice for all those involved in a legal dispute.[3]

Of course, there is also a strong warning of the dangers that AI brings with it and that efficiency cannot be promoted at any price.[4] On the one hand, emphasis is placed on the fundamental rights that may be undermined, both from a purely material perspective – such as the right to data protection or non-discrimination – and in the procedural field – the right to an impartial tribunal or to reasoned decisions, among others. On the other hand, and in relation to the latter, one cannot overlook the challenges that the implementation of certain AI systems in relation to certain procedural activities –singularly those that are decisive or those that significantly condition the judicial decision- pose from the perspective of traditional notions of justice and of the safeguards of a fair trial, also in a more abstract or general way.

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[1] On this, among many others, see Jordi Nieva Fenoll: *Inteligencia artificial y proceso judicial*. Madrid-Barcelona, Marcial Pons, 2018. https://doi.org/10.2307/jj.26844203; Giovanni Sartor – Karl Branting (ed.): *Judicial Applications of Artificial Intelligence*. Dordrecht, Springer, 1998. https://doi.org/10.1007/978-94-015-9010-5; Richard Susskind: *Online courts and the future of Justice*. Oxford, OUP, 2019. https://doi.org/10.1093/oso/9780198838364.001.0001; Benedict Heil: *IT-Anwendung im Zivilprozess Untersuchung zur Anwendung künstlicher Intelligenz im Recht und zum strukturierten elektronischen Verfahren*. Tübingen, Mohr Siebeck, 2020.; Jan De Bruyne – Cedric Vanleenhove (ed.): *Artificial Intelligence and the Law*. Cambridge, Intersentia, 2021. https://doi.org/10.1017/9781839701047; Horst Eidenmüller – Gerhard Wagner: *Law by Algorithm*. Tübingen, Mohr Siebeck, 2021. https://doi.org/10.1628/978-3-16-157509-9; Silvia Barona Vilar: *Algoritmización del Derecho y de la Justicia. De la Inteligencia Artificial a la Smart Justice*. Valencia, Tirant lo Blanch, 2021.

[2] For an accurate and realistic explanation of the legal capability of algorithmic tools – aimed at preventing over-reaction –, see Carla L. Reyes – Jeff Ward: Digging into Algorithms: Legal Ethics and Legal Access. *Nevada Law Journal* 21, 1. (2020), 325–378.; Jordi Nieva Fenoll: Inteligencia Artificial y proceso judicial: perspectivas tras un alto tecnológico en el camino. *Revista General de Derecho Procesal,* 57. (2022).

[3] See, among many others, Darin Thompson: Creating new pathways to justice using simple artificial intelligence and online dispute resolution. *International Journal of Online Dispute Resolution* 2, 1. (2015), 4–53. https://doi.org/10.5553/IJODR/2352-50022015002001002; John Zeleznikow: Can artificial intelligence and online dispute resolution enhance efficiency and effectiveness in courts. *International Journal for Court Administration* 8, 2. (2017), 30–45. https://doi.org/10.18352/ijca.223; Ray W. Campbell: Artificial intelligence in the courtroom: The delivery of justice in the age of machine learning. *Colorado Technology Law Journal* 18, 2. (2020), 323–350.; Lisa Toohey – Monique Moore – Katelane Dard – Dan Toohey: Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centred Design. *Macquarie Law Journal*, 19. (2019), 133–156. https://doi.org/10.2139/ssrn.3438538

[4] An excellent synthesis can be found in the report of the French *Commission Nationale Consultative des Droits de l'Homme*, given on 7 April 2022 (JORF nº 91, 17 April).

1.1. The relevance of a legal definition of Artificial Intelligence

The discussion is also surrounded by some confusion as to its purpose, as it is also apparent that the advantages and disadvantages of the digitisation of justice, in a broad sense, are often not properly distinguished from those associated with the use of AI in this field. It is clear that the use of AI tools is a manifestation of the digitisation of justice; but it is only one part of this phenomenon, which has very unique nuances and edges, associated with what should be understood as the core or essential content of the notion of AI. The use of AI in the judicial proceedings cannot be identified with the mere 'technologisation' of the conduct of the proceedings, but is characterised by the unique way, based on advanced mathematics, through which content or results are reached – in the present case, intended to deploy effects within the framework of a process. It has been stressed, therefore, that the very term 'artificial intelligence' may be inappropriate, as it contains an excessive anthropomorphisation of the phenomenon, the psychological impact of which would also serve to promote an exaggerated and therefore unjustified trust and acceptance.[5] For this reason, proposals have been made to use a more neutral terminology, such as the one made by the French *Commission Nationale Consultative des Droits de l'Homme*, which suggests speaking of «algorithmic decision support systems» (*systèmes algorithmiques d'aide à la décision*, SAAD).[6]

It is not the purpose of these pages to try to offer an innovative definition of what is to be understood by artificial intelligence.[7] Rather, I intend, in a different way, to stress the need to provide its use in the procedural sphere with its own specific regulatory framework. And precisely because it is a question of influencing the regulatory sphere, the most appropriate thing to do is to operate with a legal definition of artificial intelligence, that is to say, to start from the way in which the legislator itself has defined it or will define it in the future. This is basically a task for the legislator, who must, on the basis of a review of the state of the art at a technical and academic level, establish what should be understood as artificial intelligence in order to regulate it.

In the case of EU Member States, national legislators are spared the trouble of providing a legal definition of AI, as this has been assumed by the European legislator

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5 Again the report of the French *Commission Nationale Consultative des Droits de l'Homme* sums it up very clearly (§2): *« A titre liminaire, la Commission nationale consultative des droits de l'homme (CNCDH) tient à exprimer ses réserves à l'égard de la terminologie usitée en la matière. Elle observe en effet un excès d'anthropomorphisation dans les termes employés, à commencer par celui de l'» intelligence artificielle «, mais également lorsqu'il est question de « réseaux de neurones «, d'» apprentissage profond «, etc. Cela engendre des confusions sur les possibilités réelles offertes par des systèmes de traitement de données, qui reposent sur des procédures codées dans des systèmes informatiques : il s'agit avant tout de mathématiques. L'ensemble des acteurs, tant du secteur public que du secteur privé, devrait donc s'affranchir de cette expression en raison de son impact psychologique, source de réticences ou au contraire de confiance et d'acceptation exagérées.»*

6 Again, the report of the *Commission Nationale Consultative des Droits de l'Homme* (at §2).

7 See, with much more detail, Nieva Fenoll (2018) op. cit. 20. ff.

in the so-called Artificial Intelligence Act[8] (AI-Act, hereinafter). According to Article 3(1), the definition is simple and descriptive:

> «For the purposes of this Regulation, the following definitions apply:
>
> (1)‘AI system’ means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments».

This definition is clearly aligned with the one offered by the Council of Europe, which on 17 May 2024 approved the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law.[9] Article 2 of the Convention reads as follows:

> «For the purposes of this Convention, “artificial intelligence system” means a machine-based system that for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment».

What is important about both ‘European’ definitions, at least when it comes to addressing the consequences of the use of AI in the field of justice, is that they both focus on the results it is capable of producing. By working with data and algorithms, and applying to them the techniques and strategies deemed acceptable at any given time, it is possible to arrive at ‘predictions, content, recommendations or decisions’ that are called upon to produce some kind of effect in the framework of a specific judicial proceeding – this, in my opinion, is where the influence on the environment with which the AI system interacts must be reflected.

These definitions, in any case, open up enormous possibilities for the use of AI in the field of justice, as the notions of content, recommendation, prediction and decision fit within what is usually done, generated or used in the framework of a judicial proceeding.

The category of *content* includes heterogeneous elements, such as written pleadings, documents of all kinds, minutes reflecting the proceedings of an oral hearing or, to

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8 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). OJ L 12.7.2024.

9 CM(2024)52-final.

close the list of examples, reports which, if they had been drawn up by individuals, would have deserved to be classified as expert reports.

When referring to *decisions*, it is inevitable to think of the possibility of an AI system passing judgement at the end of a procedure. But, without going that far, it cannot be forgotten that the development of any judicial proceeding involves a number of decisions, which condition its progress and, therefore, its outcome: the clearest example is the decision on the admission of evidence proposed by the parties

Finally, there are predictions and recommendations.

Predictions can be imagined first and foremost from the side of the legal – and paralegal – professions: AI systems make predictions about the most likely outcome of a case based on the results of previous cases. It is common, at this point, to refer to the AI system that is said to have predicted with an allegedly high accuracy rate (79%) the outcome of claims brought before the European Court of Human Rights, implemented by researchers at University College London and the Universities of Sheffield and Pennsylvania.[10] These predictions are often accompanied by *recommendations*, usually about whether to go to court, to be open to negotiation or even to acquiesce in a lawsuit already filed.

But predictions directly associated with judicial activities and functions in the strict sense are also conceivable. The most famous ones (COMPAS, Hart, VioGén)[11] have been developed in the criminal field in relation to the risk of recidivism, and can be used to make decisions on the granting of prison benefits, but also on the adoption of pre-trial detention or other measures with an impact on the liberty of the person undergoing criminal proceedings.

In short, a legal and functional definition of AI, such as the one used by the European legislator and the Council of Europe, is useful for a realistic and critical approach to its use in the field of justice. Within this notion of artificial intelligence systems, we can include a set of tools that have in common the fact that, working with data, they are capable of algorithmically generating content that can influence a judicial proceeding. And everything that influences the proceedings can influence their outcome, i.e. the material rights of the litigants.

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10 The judicial decisions of the European Court of Human Rights (ECtHR) have been predicted to 79% accuracy using an artificial intelligence (AI) method developed by researchers in UCL, the University of Sheffield and the University of Pennsylvania" (https://www.ucl.ac.uk/news/2016/oct/ai-predicts-outcomes-human-rights-trials). See Nikolaos Aletras – Dimitrios Tsarapatsanis – Daniel Preoţiuc-Pietro – Vasileios Lampos: Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective. *PeerJ Computer Science*, 2:e93. (2016), available at: https://doi.org/10.7717/peerj-cs.93

11 COMPAS (*Correctional Offender Management Profiling for Alternative Sanctions*), used in the USA; HART (*Harm Assessment Risk Tool*), in the UK; VioGén, in Spain, is focused in gender violence cases.

1.2. The relevance of regulatory challenges

This being said, the purpose of these pages is to draw attention to the regulatory challenges involved in the incorporation of AI systems into judicial proceedings – particularly civil proceedings. Procedural Law is essentially 'artificial', that is, a creation of the legislator; therefore, it cannot live on the fringes of a legal regulation that defines the way in which each society wants judicial processes to be articulated and developed in all their facets. Introducing AI tools or systems in civil justice involves influencing the rules of the game and, therefore, its legal regulation.

This aim of addressing the regulatory challenges, moreover, is based on an implicit postulate: there is a need for special regulation of the use of AI systems in judicial proceedings – in what matters now, in civil proceedings.[12] In other words, the challenges posed by the use of AI in the procedural sphere cannot be solved by simply applying the existing regulation or the general theory of process and justice. It is true that national Constitutions and supranational texts for the protection of human rights contain rules that may place brakes or limits on certain uses of AI in the process. But these brakes or limits are not clearly defined and, in any case, they are not sufficient to provide legal operators with a playing field endowed with sufficient legal certainty.

Before moving on, it is important to point out that there are two possible regulatory areas to focus on, as the relationship between AI and the judicial function can be seen from two different angles, posing different challenges.

1.2.1. Artificial Intelligence on the periphery of the judicial process: the challenge of rebalancing and limits to privatisation

There are AI systems located – to put it graphically – on the periphery of the judicial process: they are not called upon to produce direct effects in judicial proceedings – they do not interact with them, if we follow the terminology of the AI-Act –, but they do affect the notions of jurisdiction and jurisdictional function, at least in their dimension as a tool for dispute resolution. At least three main types of IA systems fit here:[13]

I) Firstly, it is worth considering the AI systems that support so-called smart contracts or self-executing contracts, some of which are supported by the Internet of Things. These systems allow certain consequences to be automatically associated with the debtor's non-performance and thus serve to satisfy the creditor without the need to seek any form of judicial relief. A simple example is provided by contracts that provide for the automatic transfer

[12] See also Giampiero Lupo: Regulating (Artificial) Intelligence in Justice: How Normative Frameworks Protect Citizens from the Risks Related to AI Use in the Judiciary. *European Quarterly of Political Attitudes and Mentalities* 8, 2. (2019), 75–96.; Thomas Wischmeyer – Timo Rademacher (ed.): *Regulating Artificial Intelligence*. Dordrecht, Springer, 2020. https://doi.org/10.1007/978-3-030-32361-5; Woodrow Barfield*: The Cambridge Handbook of the Law of Algorithms*. Cambridge, Cambridge University Press, 2020. https://doi.org/10.1017/9781108680844

[13] See, on this, Horst Eidenmüller – Gerhard Wagner: Digital Dispute Resolution. In: Eidenmüller – Wagner (2021) op. cit. 223–260.

of an amount from the debtor's account – or the account of a trustee – to the creditor's account in case the system has not registered the payment when it is due, without any human order or command. A second, somewhat more sophisticated example is the one that provides that, in case the system does not register the payment of the rent due, access to the rented property or vehicle is blocked, again automatically, which is possible because both objects are connected to the network from which the order is processed and commanded to be executed. These appear to be manifestations of self-protection, but the truth is that they are based on the contractual autonomy of the parties, who can consent a priori to the triggering of these effects if the situations of non-compliance described when the legal transaction in question was concluded occur, providing, where appropriate, the relevant codes and/or authorisations so that the contractual execution is possible[14]. The incorporation of these systems into contracts is designed to avoid the usual scheme of dispute resolution, by generating a reversal of the burden of initiative: it is not the unsatisfied creditor who has to activate any mechanisms of judicial relief to achieve the performance due, but the debtor who, if necessary, will have to react to an automatism that in the specific case was not justified.[15]

II) Secondly, there are the IA systems underpinning the automated complaint resolution mechanisms used by big companies. Good management of consumer complaints and claims undoubtedly prevents the 'crystallisation' of many disputes, to the benefit of the parties and of the judicial system itself. It should be noted, however, that the algorithms used for this purpose are not designed to take into account the variables and parameters of consumer law, but rather commercial criteria, which, for example, favour the regular customer, who buys frequently and does not usually complain, over the occasional buyer or the one who recurrently requests the return of the purchased goods.[16]

III) Finally, alternative and online dispute resolution (ODR) mechanisms are also supported by AI systems. Examples of online dispute resolution systems are becoming increasingly numerous and, similar to what happens with the management of complaints and claims, they make use of algorithms that do not necessarily take into account the parameters of consumer law – the simplest ones, e.g., offer an amount of money that is determined on the basis of what

[14] Guillermo Schumann Barragán: *Derecho a la tutela judicial efectiva y autonomía de la voluntad: Los contratos procesales*. Madrid-Barcelona, Marcial Pons, 2022. 397. ff.; Guillermo Schumann Barragán: *Smart contracts* y tutela judicial. La incidencia de los contratos autoejecutables en la tutela judicial de los derechos y los intereses materiales de los justiciables. *Justicia: Revista de Derecho Procesal*, 2. (2021), 309–338.

[15] See Eidenmüller – Wagner: (2021) op. cit. 228–235.: as for the advantages, "[i]magine how much simpler and more efficient the repayment of flight costs for flights cancelled during the COVID-19 could have been had such a scheme been in place" (at note 35); see also Schumann Barragán (2022) op. cit. 397. ff.

[16] See also Eidenmüller – Wagner: (2021) op. cit. 235–243. (using the example of Amazon's complaints-handling mechanism).

> the party making the complaint asks for and what the party against whom the complaint is made is willing to offer. As can happen with the former, ODR mechanisms, which present themselves to their users as sophisticated tools supported by AI, can create a feeling among consumers who complain that they are not entitled to more than what they are offered – or, indeed, that they are not entitled to complain at all, if that is the outcome of the system. And this, in turn, generates a clear deterrent effect, which serves to consolidate unfair situations of infringement of subjective rights.[17]

All these AI systems that are on the periphery of the judicial process influence it to the extent that they make it unnecessary, replace it or, more simply, discourage many citizens – often consumers – from resorting to it. What underlies them, in short, is a use of AI that generates – voluntarily or not – a strong privatisation in the management of disputes, which marginalises the role of jurisdiction and the value of the law as the parameter on which its resolution must be based. Therefore, in relation to these AI systems, the regulatory challenge consists of ensuring the existence of a real will on the part of those involved in their use, in order to avoid situations of abuse and imposition.[18] Thus, for example, it is worth considering to what extent it may be legitimate to impose on a consumer the acceptance of contractual clauses that give rise to the automation of payments or the automated blocking of the use of a financed or leased good. And it is equally necessary to ensure adequate levels of information for those who use complaint management systems or AI-assisted ODR mechanisms, so that they are aware that their proposals have no predictive value with respect to the possible outcome of a court proceeding.

The regulatory challenge, in short, must be taken up by the legislator from the perspective and within the parameters of private law, since its objective is to ensure contractual balance and information for the weaker party, so that its legal position is not unduly prejudiced. These regulatory actions should also form part of a more general strategy to overcome the digital gap, avoiding the exclusion of those citizens who do not have access to technological tools or who lack the skills to operate safely in digital environments.[19]

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[17] On this, see also Eidenmüller – Wagner: (2021) op. cit. 243–248.

[18] In a similar vein, Eidenmüller – Wagner: (2021) op. cit. passim.

[19] In this vein, it is worth recalling the ECtHR judgment in *Xavier Lucas v. France* (Application 15567/20, 9 June 2022). The Court considered that the applicant's right of access to justice had been infringed as a court of appeal failed to admit an appeal that had not been lodged using the mandatory platform, disregarding the practical and technical problems encountered by the applicant as he tried to do it. Such an excessive and disproportionate formalism was not, in the case at hand, compatible with the Convention.

1.2.2. Artificial Intelligence in the core of the judicial process: the challenge of legal certainty

In addition to the above, there are – and can be imagined – AI systems designed to be applied directly in the core of judicial activity, either to help or assist decision-makers or to replace them. A complete replacement of judicial decision-making by AI systems is at present technically impossible and legally unacceptable: this can be deduced from Article 22(1) of the European General Data Protection Regulation and is also advocated in the EU Proposal for a Regulation, as will be seen below.

Help and assistance tasks, on the other hand, can be developed in different ways and in many areas, as mentioned above. One can think of systems that generate content to be made available to courts, such as the *DataJust* project launched by the French Ministry of Justice, which aimed to create an algorithm capable of extracting and exploiting in an automated way the data contained in court decisions on personal injury compensation, including the amounts requested and finally obtained and the valuations made in the framework of consensual dispute resolution procedures.[20] AI systems that automate binary type decisions can also be envisaged, as may be the case where the order for payment procedure does not require documentary support; or decisions in relation to procedural issues that depend on simple and/or uncontroversial factual points.[21] And, of course, the use of predictive systems, such as those mentioned above to help gauge the risk of recidivism – or others that could be developed for other purposes, such as the danger that the abducted child, if returned, would suffer serious harm – is increasingly being considered.

These uses of AI at the core of judicial activity are those referred to in the praises as well as in the calls for attention and warnings referred to at the beginning of this paper. And, as has already been said several times, their impact on the proceedings may affect the fundamental rights of the litigants and end up having consequences for their outcome, while at the same time implying a paradigm shift in basic notions of the rule of law, such as those of jurisdictional, judicial power and fair trial. In relation to these uses of AI, the regulatory challenge is also clear: it is a matter of drawing clear and precise lines, in order to ensure legal certainty, which grant a defined status to the litigants, so that their rights are defined, but also what can be validly imposed on them in the interests of the efficiency of the system.

The inadequacy of the current regulatory framework to meet these challenges makes the need for rules imperative. Some of them must be purely procedural rules, others certainly not. What kind of rules and with what content? That is, of course, the difficult

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[20] The project was approved by decree n°2020-356 of 27 March 2020 (Journal Officiel n°77 of 29 March 2020). In January 2022, however, it was abandoned due to the difficulty and complexity of the work to be carried out.

[21] See In this regard, the interesting proposal to automate the decision on the existence of jurisdiction, defences, and applicability of the US Alien Tort Claims Act and Torture Victims Protection Act, In: Eric A. Engle: An Introduction to Artificial Intelligence and Legal Reasoning: Using xTalk to Model the Alien Tort Claims Act and Torture Victims Protection Act. *Richmond Journal of Law & Technology* 11, 1. (2004). https://jolt.richmond.edu/vol-xi-issue-1/.

part. Apart from the fact that it is always costly to legislate properly, there are two additional complicating factors in this area.

The first challenge is the multidisciplinary approach that any regulation in this field must have. Even if the rules primarily concerned with defining everything that concerns the (proper) functioning of judicial processes have to be procedural rules, it is clear that the rules on the use of AI in the field of civil justice have to be consistent with the set of rules on the use and development of AI in general.

The second challenge has to do with the timeliness of regulation, insofar as we are largely considering the need to regulate the impact on the civil process of AI systems that do not yet exist, but which we think may end up existing if we take into account the development capacity of technology in this field, but which in any case are not yet operational and whose uses, capacities and shortcomings have not yet been tested. Can we regulate non-existent realities? It is a classic problem, the legislator always lags behind reality. Now, on the contrary, there seems to be an aspiration for the legislator to be ahead of reality. But here with a speciality: the reality on which lawmakers are called to operate is a reality that is being built by AI developers, who are aware that they will be the addressees of many of the rules that have to regulate it.

In order to address these issues, it is important to draw attention to two distinct questions: firstly, the angles or perspectives from which to approach the regulation of the use of AI systems in civil proceedings; secondly, and related to this, the best way – or legislative formula – to do so.

2. Angles or perspectives of regulation

When we talk about AI and civil proceedings, we may be talking about very different issues, depending on the subject we are looking at and what that subject expects from the legislator. The rules that are to regulate the use of AI systems in civil proceedings, in other words, have to cover a series of regulatory needs, which are a reflection of the expectations of those to whom they are addressed. We should aim for a use of AI systems in civil proceedings that meets the expectations of their supporters and, at the same time, does not cross certain 'red lines' associated with the requirements of the rule of law and essential procedural safeguards. To this end, up to three angles or perspectives need to converge in the regulation:

- The legislator can be expected to establish and regulate rights, especially in favour of litigants.
- It is also to be expected to impose certain prohibitions, either in relation to the development of certain AI utilities in general, or in relation to their use in a certain way or for a certain purpose.
- Finally, and above all, a number of duties and obligations have to be established, affecting not only litigants or courts, but also the designers and developers of AI systems focused on the civil process.

2.1. Rules granting and/or governing rights

A proper balance between efficiency and respect for essential procedural values requires, first and foremost, that a number of rights vis-à-vis the State (i.e., the court system) be recognised for the litigants, when the State intends to use AI systems in civil proceedings, in whatever dimension this is possible.

What those rights should be is, of course, up for debate. This is an apparently peaceful debate if the discussion is kept at a very superficial level, but it undoubtedly becomes polemic when it gets down to detail, as the recognition of certain rights may undermine in practice certain AI functionalities that, without those limitations, would result in greater efficiency.[22]

Without wishing to be exhaustive, we can think of some examples of possible rights of claimants and defendants that are often referred to and of the consequences of their recognition (or not) and of the concrete terms in which this is performed:

I) There is talk of the right of citizens to have AI mechanisms that ensure the rapid and 'blind' processing of simple and repetitive disputes, as a way of reducing costs, speeding up time and ensuring access to justice.[23] It is obvious that such formulations do not entail the recognition of genuine rights, but only a hypothetical duty of the State to design judicial processes assisted by AI systems, within which it would be necessary to determine precisely what rights the parties have.

II) It is also common to refer to a right of the litigant to know that an AI system is being used in a certain aspect of the proceedings.[24] While regulating such a right should not be problematic, the need to do so is the best evidence of the need for special rules and the inadequacy of general procedural rules. Article 15(2) of the Council of Europe Convention expressly gives the States the duty to ensure that, 'as appropriate for the context, persons interacting with artificial intelligence systems are notified that they are interacting with such systems rather than with a human'.

III) It is also proposed to recognise the 'right to a human judge', which can also be seen as a manifestation of the so-called "refusal of care", i.e. the right of a citizen to refuse to allow an automated decision driven by an AI system to

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22 Among many others, André Dao: Human Dignity, the Right to be Heard, and Algorithmic Judges. *The British Yearbook of International Law*, (2020), 1–38. https://doi.org/10.1093/bybil/braa009; Tania Sourdin: Judge v. robot: Artificial intelligence and judicial decision-making. *University of New South Wales Law Journal* 41, 4. (2018), 1114–1133. https://doi.org/10.1007/978-94-015-9010-5

23 Jordi Nieva Fenoll: Online dispute resolution for small claims: is this the only realistic solution?. *Revista Ítalo-española de Derecho Procesal*, 1. (2022), 25–36.

24 Most soft-law texts on this issue insist on this: see, for instance, the *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, elaborated by the CEPEJ (available at http://bit.ly/3W4dfSw); the *CCBE Considerations on the Legal Aspects of Artificial Intelligence*; or the *Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings*, that expressly state at 6: «Parties should be notified when it is intended that their case will be processed with the involvement of an AI mechanism» (available at https://tinyurl.com/35f6yuyn).

affect the process.[25] The recognition of such a right may represent a 'torpedo in the waterline' for the implementation of AI in civil proceedings. It would possibly also be unjustified, as it does not seem reasonable to recognise the right to reject the use of AI-based tools for any decision making, but only for some – those with the greatest impact on the substantive legal position of the litigants. One modality can be read in Article 22(1) of the European General Data Protection Regulation[26] (GDPR) according to which:

> «The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.»

Given the general scope of the Data Protection Regulation, it is unclear whether this rule could be directly applicable to the field of civil justice and what its specific scope would be: would it serve, e.g., to oppose the quantification of the personal injury suffered in a traffic accident to be carried out in a fully automated way with the support of an AI system?

In any case, the provision is clearly indicative of a restrictive approach to a nuclear issue. But, on the other hand, the terms in which it is drafted also contain the 'trick' to avoid its full application: the use of the adverb 'solely'. Indeed, in practice it is difficult to imagine a judicial decision being presented as founded or based solely on the application of an AI system, although in many cases the human/judicial intervention will be more formal than real.[27]

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25 As suggested, for instance, by the *European ethical Charter* of the CEPEJ: "The user must be informed in clear and understandable language whether or not the solutions offered by the artificial intelligence tools are binding, of the different options available, and that s/he has the right to legal advice and the right to access a court. S/he must also be clearly informed of any prior processing of a case by artificial intelligence before or during a judicial process *and have the right to object, so that his/her case can be heard directly by a court within the meaning of Article 6 of the ECHR*." (emphasys added). There is also a reference to it in the *Guiding Principles for Automated Decision-Making in the EU* of the *European Law Institute*, who insist in the need to offer an alternative human-based route to exercise rights (Principle 8) (available at https://tinyurl.com/4rmkdecx.

26 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, 1–88).

27 In other legal systems, however, more rigid rules have been adopted, avoiding adverbs such as 'solely' or 'exclusively' and the escape valve they open. This is the case of France, for instance, where, pursuant to Article 47 of Law n° 78–17 of 6 January 1978 relating to data processing, files and freedoms, as amended in 2018, «aucune décision de justice impliquant une appréciation sur le comportement d'une personne ne peut avoir pour fondement un traitement automatisé de données à caractère personnel destiné à évaluer certains aspects de la personnalité de cette personne» («no court decision involving an assessment of a person›s conduct may be based on automated processing of personal data intended to evaluate certain personal aspects relating to that person»).

There is an additional factor, of a human and psychological nature, associated with the intrinsic difficulty of making decisions in complex scenarios. In general terms, there is an understandable human tendency to try to delegate complex decisions, or at least all or part of the bases for these decisions, to a third party – the increasingly frequent submission to the judgement of experts is a manifestation of this phenomenon. This tendency is accentuated in times like the present, when media pressure and hasty criticism of judicial decisions undermine judicial independence. And if the third party to whom the decision making is delegated, in whole or in part, is not another person – who could perhaps reject the assumption of responsibility – but a 'machine' or an 'AI system', the consequences may be obvious: predictions made by artificial intelligence systems will eventually be integrated into the decision-making process in complex cases, as those, for example, linked to the risk of criminal recidivism. And they will not necessarily do so in an equanimous or neutral way, but with a certain 'appearance of a better condition', precisely because of this claim to objectivise what is intrinsically not objectivisable. It can always be said that there are no automatisms and that, for example, the risk of recidivism offered by the system is just one more factor to be taken into account when a judge makes his or her decision. But the danger that they may end up having a greater weight than is openly acknowledged by the judge in his or her decision cannot be ignored or disregarded.

Imagine, by way of example, a case of gender-based violence in which the AI system would have shown a high – or even medium – probability of repetition: the specific judge who decides to depart from that result and chooses not to adopt severe protective measures exposes himself to a clear risk in case his own assessment turns out to be incorrect and a new criminal act against the victim occurs; from a media – even disciplinary – point of view, his lack of diligence and his lack of 'sensitivity' may end up being sustained, given his departure from the result offered by the AI system.... Faced with a generalisation of reasoning of this kind, there is a clear danger for the effectiveness of the right of defence, which will have to adapt to the data and indicators handled by the artificial intelligence systems. Thus, e.g., when facing the hearing for the decision on the personal situation of the person under investigation, it will be necessary to know the parameters on which the artificial intelligence systems handled by the judge are based, in order to be able to formulate allegations and offer evidence to try to refute possible appearances considered as negative by them. It should be noted, however, that this defensive approach ends up being underpinned by a certain reversal of the burden of proof, without overlooking the fact that what cannot easily be questioned in a specific case is the scientific or empirical basis of the artificial intelligence system.

IV) As an intermediate option, the right to human oversight is mentioned, for instance, by Article 14 of the European AI-Act: AI systems in the field of justice shall be designed and developed in such a way that they can be effectively overseen by natural persons during the period in which they are in use, in order to prevent or minimise the risks to fundamental rights that may emerge.

The natural person in charge of the oversight should be the judge or a qualified court officer.

V) As a possible evolution of human oversight, some texts allude to the right of a human judge to review a decision taken by an AI system;[28] but this is still not a perfect solution –from the point of view of efficiency, of course–, as, at the very least, the speed of automated decision making is lost. It is also worth noting the great paradox involved in transferring the notion of recourse to the field of automated decisions, since it has traditionally been held that the basis of the recourse system is precisely human fallibility. Obviously, there is always room for human error in the judicial decision assisted by an AI system. And, in the case of a hypothetical decision that is completely automated and outside the human will, the human review that is advocated may not obey the traditional logic of appeals, but it is the expression of a basic safeguard: it is the person who controls the machine.

The Council of Europe Convention addresses this problem from the perspective of remedies: pursuant to Article 14(1) accessible and effective remedies should be available for violations of human rights resulting from the activities within the lifecycle of artificial intelligence systems; these 'remedies' may not need to be adjusted to the notion of appeal, but in that case national lawmaker should design an equivalent alternative.

The European AI-Act, in a related manner, enshrines in Article 86 the 'Right to explanation of individual decision-making': a person adversely affected on their fundamental rights by a decision taken on the basis of the output of an AI system shall have the right to obtain from the deployer [i.e., by the court] clear and meaningful explanations of the role of the AI system in the decision-making procedure and the main elements of the decision taken. This right could be, at least in some cases, the ground or the first step on which to sustain an appeal against the decision.

VI) It is also proposed to recognise the litigant's right to know how the AI system works and, in particular, its various 'ingredients' (algorithm, data), their relative weight and how they have been obtained, as a way of being able to defend oneself and to challenge the results[29] (e.g. when the system offers a certain quantum of compensation). The realisation of this right, however, may conflict with the intellectual property rights of the company that has developed the system and may lead to a loss of interest in the private sector in developing

[28] See, among others, section 20 of the *Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings*: 'Where national law allows for purely automated decisions, such decisions should be open to review before a judge' (available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a2cf96); see also Principle 10 of the *Guiding Principles for Automated Decision-Making in the EU* of the *European Law Institute*, envisages a right to human review of selected significant decisions on the grounds of the relevance of the legal effects, the irreversibility of their consequences, or the seriousness of the impact on rights and legitimate interests.

[29] On this, Hannah Bloch-Wehba: Access to Algorithms. *Fordham Law Review* 88, 4. (2020), 1265–1314.

AI systems in the service of civil justice. On the other hand, this right is not really effective if the litigant is not assisted by a competent expert to evaluate the information obtained in relation to the functioning of the system, the costs of which can be high – and this, in turn, may compromise the principle of equality of arms and the right of defence.[30]

[30] In criminal matters, the European Court of Human Rights seems to have given support to an additional right, linked to the right of defence, consisting of being able to know the criteria used by the criminal prosecution authorities to manage, through AI systems, the information resulting from massive data searches. In this regard, see, for example, the judgment of 4 June 2019 in the case of *Sigurður Einarsson and Others v. Iceland* (Application no. 39757/15):

«90. The Court accepts that by its nature the "full collection of data" inevitably included a mass of data which was not *prima facie* relevant to the case. Moreover, it can accept that when the prosecution is in possession of a vast volume of unprocessed material it may be legitimate for it to sift the information in order to identify what is likely to be relevant and thus reduce the file to manageable proportions. It considers nevertheless that in principle an important safeguard in such a process would be to ensure that the defence is provided with an opportunity to be involved in the definition of the criteria for determining what may be relevant. In the present case, however, the applicants did not point to any specific issue which they suggested could have been clarified by further searches, and in the absence of such specification – which was open to them under section 37 § 5 of the Criminal Procedures Act – the Court has difficulty in accepting that a "fishing expedition" of this kind would have been justified. In that respect, the data in question were more akin to any other evidence which might have existed but had not been collected by the prosecution at all than to evidence of which the prosecution had knowledge but which it refused to disclose to the defence. Thus, while the Court reiterates that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused, and indeed the prosecution in the present case had a duty under domestic law to take into consideration facts both for and against a suspect – in line with the Court's own case-law –, the prosecution was not in fact aware of what the contents of the mass of data were, and to that extent it did not hold any advantage over the defence. In other words, it was not a situation of withholding evidence or "non-disclosure" in the classic sense.

91. The situation is different with regard to the data "tagged" as a result of the initial Clearwell searches. These data were reviewed by the investigators, both manually and by means of further Clearwell searches, in order to determine which material should be included in the investigation file. While here again the excluded material was *a priori* not relevant to the case, this selection was made by the prosecution alone, without the defence being involved and without any judicial supervision of the process. In that connection, the Court recalls that "a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1" (*Rowe and Davis*, cited above, § 63). Moreover, the defence was denied lists of the documents – and in particular the "tagged" documents – on the ground that they did not exist and that there was no obligation to create such documents, and reference was also made to the technical obstacles to remigrating the data and conducting new searches, given the volume in question. As to the denial of lists, the Court has no reason to question the finding of the Supreme Court that under domestic law there was no obligation on the prosecution to create documents which did not already exist. It notes, however, that it appears that further searches in the data would have been technically rather straightforward and it considers that in principle it would been appropriate for the defence to have been afforded the possibility of conducting – or having conducted – a search for potentially disculpatory evidence. While it is sensitive to the privacy issues raised by the Government, the Court does not consider that there were insurmountable obstacles in that respect. It thus finds that any refusal to allow the defence to have further searches of the "tagged" documents carried out would in principle raise an issue under Article 6 § 3(b) with regard to the provision of adequate facilities for the preparation of the defence.»

VII) An extension of the use of AI systems in the judicial sphere must go hand in hand with increased competence of the lawyers who have to assist the parties.[31] Consequently, the duties of lawyers must be strengthened when dealing with this type of environment and, to that extent, we could even talk about the right to a 'technologically competent lawyer', which is reflected in the requirements imposed by professional associations for access to the profession, as is happening in the United States, where in more and more states technological competence is being imposed among the obligations of members.[32]

VIII) To close this list of examples, there is also talk of the right to compensation in the event of damage resulting from the malfunctioning of an AI system, which can also occur in the context of a procedure. At this point, there are some proposals for regulation,[33] which take on board the difficulty of establishing the limits between strict liability and fault liability, and the indirect consequences that this can have: if the system developer is held liable, it can discourage innovation or increase the cost of the systems; if the judiciary is liable, then its use can also be discouraged.

In short, it is going to be complicated from the outset to select which rights are finally recognised for litigants and the extent to which this is done. But it cannot be left undone, because the determination of these rights is essential in order to concretely determine how the 'red lines' deduced from the Constitutions and supranational texts on the protection of human rights are materialised. Squaring the circle between efficiency and guarantees is not always possible. After all, these are legislative policy decisions that must be taken by the State, otherwise they will operate according to market parameters and technological availability.

2.2. Rules establishing prohibitions

The introduction of AI systems in the area of civil justice in a way that is compatible with due process and the principles of the rule of law also requires the establishment of prohibitions. These prohibitions define the red lines that a given society does not want to cross when assessing the degree in which it considers automation of justice acceptable.

[31] On this, see Angelo Dondi: Processo civile, new technologies e implicazioni etico-professionali. *Rivista trimestrale di diritto e procedura civile*, 3. (2019), 863–881.; see also Reyes – Ward (2020) op. cit.

[32] This has been the case, for instance, of California. Since March 2021, the comments to California Rule of Professional Conduct 1.1 provide that competent legal services includes "the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."

[33] See, e.g., the European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). On this, see Horst Eidenmüller – Gerhard Wagner: Liability for Artificial Intelligence: A Proposal of the European Parliament. In: Eidenmüller – Wagner (2021) op. cit. 127–156.

In many cases these prohibitions can be seen as a reflection of certain fundamental rights, which can be recognised and attributed on an individual basis. A good example is again provided by some of the data protection rules: a prohibition on the use of certain data by an AI system can be seen as the flip side of the right of data subjects not to have some of their data used without their consent –or for certain purposes or in certain fields.

In this vein, Article 9(1) of the European GDPR establishes the following:

> «Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person›s sex life or sexual orientation shall be prohibited».[34]

While there are some exceptions, it is clear that this type of data, e.g., could not be used in an AI system designed to determine, under Article 13(b) of the 1980 Hague Convention on Child Abduction, that 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.[35] It shall be borne in mind, in addition, that the same Article 13 adds the following provision:

> «In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence».

This is something that in abstract could make it amenable to processing by an AI system, analogous in some respects to COMPAS, HART or VioGen –i.e., AI systems whose purpose is to determine the level of risk of recidivism of an offender – systems that also take into consideration the social environment of the person to whom they refer.

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34 In a similar vein, see also Article 11(1) of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89–131):

«Member States shall provide for a decision based solely on automated processing, including profiling, which produces an adverse legal effect concerning the data subject or significantly affects him or her, to be prohibited unless authorised by Union or Member State law to which the controller is subject and which provides appropriate safeguards for the rights and freedoms of the data subject, at least the right to obtain human intervention on the part of the controller.»

35 See Paul Beaumont – Peter McEleavy: *The Hague Convention on International Child Abduction*. Oxford, OUP, 1999. https://doi.org/10.1093/oso/9780198260646.001.0001

Prohibitions, however, need not necessarily reflect a subjective right. In many cases, their basis will be broader and associated with the constitutional requirement of respect for fundamental human rights principles and to the rule of law itself. Again, some examples will be of help:

The ability of some AI systems to predict the outcome of a court case based on data extracted from previous court decisions has been talked about for a number of years now. These applications are of particular interest to law firms and their clients, for obvious reasons, as they influence strategic decisions when litigating or negotiating.

This potential of AI also has its drawbacks and, in fact, it is notorious that somewhere there has been a desire to curb this practice. I am referring to France, where as a result of a law of 2019[36], both the Code of Administrative Justice (art. L. 10) and the Code of Judicial Organisation (art. L. 111–13) were amended, which now include the following provision:

> «The identity data of judges and court officials may not be re-used for the purpose or effect of evaluating, analysing, comparing or predicting their actual or supposed professional practices. Violation of this prohibition is punishable by the penalties provided for in Articles 226–18, 226–24 and 226–31 of the Criminal Code, without prejudice to the measures and penalties provided for by Law No. 78–17 of 6 January 1978 on information technology, files and freedoms.»[37]

The explanation is offered by the Act itself in a very simple and straight way: 'Profiling of judges and court officials will also be prohibited so as not to undermine the proper functioning of justice'. [38]

Another example of a ban is found in the European AI-Act. The AI-Act does not have a sectoral but a horizontal approach: it does not therefore focus specifically on the use of AI in the field of justice, but analyses it as a global phenomenon, with potential impacts on many areas of economic and social life.

Following a risk-based approach, common requirements are laid down for the placing on the market, the putting into service and the use of AI systems in the Union; namely, specific requirements for high-risk AI systems and obligations for operators of such systems, harmonised transparency rules for certain AI systems intended to interact with natural persons, as well as rules on market monitoring and surveillance.

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36 *Loi n° 2019–222 du 23 mars 2019 de programmation 2018–2022 et de réforme pour la justice* (see, more specifically, Article 33). Available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000038261631/.

37 «Les données d›identité des magistrats et des membres du greffe ne peuvent faire l›objet d›une réutilisation ayant pour objet ou pour effet d›évaluer, d›analyser, de comparer ou de prédire leurs pratiques professionnelles réelles ou supposées. La violation de cette interdiction est punie des peines prévues aux articles 226–18, 226–24 et 226–31 du code pénal, sans préjudice des mesures et sanctions prévues par la loi n° 78–17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés»

38 Rapport annéxé, at 1.2.7 : «Une justice plus prévisible» : «Le profilage des magistrats et des fonctionnaires du greffe sera également interdit afin de ne pas porter atteinte au bon fonctionnement de la justice.»

Nevertheless, and backing on this risk-based approach, certain AI practices are prohibited: the EU considers as potentially causing an unacceptable risk those AI systems considered a clear threat to the safety, livelihoods and rights of people, which shall be banned. This includes AI systems or applications that purposefully manipulate human behaviour to circumvent users' free will (e.g. toys using voice assistance encouraging dangerous behaviour of minors) and systems that allow 'social scoring' by governments. More specifically, Article 5(1)(c) of AI-Act prohibits, among other unacceptable-risk AI practices:

> «(c) the placing on the market, the putting into service or the use of AI systems for the evaluation or classification of natural persons or groups of persons over a certain period of time based on their social behaviour or known, inferred or predicted personal or personality characteristics, with the social score leading to either or both of the following:
> (i) detrimental or unfavourable treatment of certain natural persons or groups of persons in social contexts that are unrelated to the contexts in which the data was originally generated or collected;
> (ii) detrimental or unfavourable treatment of certain natural persons or groups of persons that is unjustified or disproportionate to their social behaviour or its gravity.»

This prohibition, which ties in with Art. 9(1) of the GDPR, would oblige the justice systems of EU Member States to prohibit the use of such systems in matrimonial matters, for example, to decide on the custody of children or, again, in international child abduction cases, when determining whether there are exceptional circumstances justifying the refusal to return the child to the place from which he or she was removed.

Defining the scope of the prohibitions is also an exercise in legislative decision-making and in the drawing of red lines. The French legislator's decision regarding the use and re-use of the identity of judges and court officials has been widely questioned, possibly because it involves an exercise of preference between two options that, in the abstract, would have been constitutionally legitimate.

The exclusion established by the European legislator, on the other hand, is much easier to explain in a socio-political context such as the European one, which places absolute value on human rights. But it will probably have to coexist with the use of systems prohibited in Europe by the judicial or administrative authorities of other countries that have a different vision of the limits to the use of AI. To follow the example, it is possible that the authorities of a third State refuse to return an abducted child to a EU Member State on the grounds that their IA system for predicting the risk of physical or psychological harm to the child gives a high result – although it is a system that takes into account sexual orientation, race or religious beliefs for this purpose. And, in a case like this, the paradox could not be avoided, even if the Regulation applies to «providers and deployers of AI systems that have their place of establishment or are located in a third country, where the output produced by the AI system is used in the Union » [Article 2(1)(c)].

Prohibitions must in any case be accompanied by measures to ensure compliance: and this is again an area where the legislator must be effective. French law punishes re-use of the data with criminal and administrative sanctions, because the potential offenders are companies that are not involved in litigation. In other cases, however, procedural consequences cannot be avoided, and in particular the absolute nullity of decisions taken under the possible influence of a prohibited AI system.

2.3. Rules setting out conditions, requirements and/or obligations

As in many other areas, the balance between the advantages and risks of the use of AI systems in civil proceedings is in most cases a question of limits, which can be set by imposing conditions, requirements and/or obligations on certain subjects. An adequate regulation of AI in civil justice therefore requires the introduction of rules that, through a definition of these conditions, requirements and/or obligations, make it possible to outline the range of action that a society wishes to offer AI and the relative weight it attributes to its advantages and the values it endangers.

It is precisely this approach to the regulation of AI and its impact on the civil process that emerges very clearly from the European AI Act: the aim is to direct regulatory action primarily at the providers and deployers/users of AI systems. The Regulation, along with the prohibition of the most offensive AI practices, identifies a number of AI systems that can be considered high-risk and subjects them to strict obligations before they can be put on the market and used.[39]

Among the AI systems identified as high-risk, Annex III of the Act includes some of interest, due to their (potential) link to (civil) justice:

In the field of 'Access to and enjoyment of essential private services and essential public services and benefits', the Proposal mentions, among others, in paragraph 5:

> «(a) AI systems intended to be used by public authorities or on behalf of public authorities to evaluate the eligibility of natural persons for essential public assistance benefits and services, including healthcare services, as well as to grant, reduce, revoke, or reclaim such benefits and services».

This label could include, for instance, potential AI systems that may be used by legal aid public providers when assessing factors such as whether or not the claim for which a person is seeking financial support is sustainable – provided that legal aid could be considered as an 'essential' public assistance benefit –; if so, its potential impact on the fundamental right of access to justice would be clear.

[39] A similar approach appears to be followed in Canada, where a new law is currently before Parliament that, among other objectives, seeks to regulate the activity of developers and users of AI systems (Bill C-27: An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts: https://www.parl.ca/legisinfo/en/bill/44-1/c-27).

In a more obvious manner, the Proposal also envisages in paragraph 8 a block of high-risk AI systems related to ‘Administration of justice and democratic processes’, which includes

> «(a) AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution».

This easily includes most of the AI systems already in existence and, above all, those that are currently only projects or mere lucubrations. By including all of them in the notion of high-risk systems, the European legislator underlines their consideration, in any case, as elements of possible distortion of the usual schemes for the functioning of justice and the proceedings. On the other hand, the reference to high-risk systems being those that are intended to ‘assist’ a judicial authority in its task of applying the law to the specific case suggests that those that seek to replace it must be considered prohibited. However, it has already been noted above that the boundaries between replacement and assistance are blurred, something that probably also explains the general classification as high-risk systems of all those that may have an impact on the development of the process and the decision that brings it to an end.

This is not the place to analyse in detail the requirements and obligations for the authorisation to market and use this type of AI systems. In summary, the AI-Act includes the following:

- Adequate risk assessment and mitigation systems.
- High quality of the datasets feeding the system to minimise risks and discriminatory outcomes.
- Logging of activity to ensure traceability of results.
- Detailed documentation providing all information necessary on the system and its purpose for authorities to assess its compliance.
- Clear and adequate information to the user.
- Appropriate human oversight measures to minimise risk.
- High level of robustness, security and accuracy.

In addition, the AI-Act creates a complex institutional set-up to ensure adequate market monitoring and surveillance, at a European level (with the European AI Office,[40] a European Artificial Intelligence Board and the reinforcement of the role of the European Data Protection Supervisor), but also at the Members States national level, which shall have ‘IA market surveillance authorities’ which, among other, should investigate compliance with the obligations and requirements for high-risk AI systems

[40] According to Article 3(47), the AI Office is the Commission’s function of contributing to the implementation, monitoring and supervision of AI systems and general-purpose AI models, and AI governance.

already placed on the market, as well as compliance of operators –including court systems– with their relevant obligations under the regulation.

The focus of these rules is therefore on requirements, certifications, authorisations, supervisions and sanctions. In short, a more administrative than procedural vision prevails. But the regulation is done, in any case, taking into account the rights to be promoted and the prohibitions or limits that cannot be exceeded.

These rules, which establish requirements and obligations for providers and deployers/users of AI systems, are an essential tool for an adequate regulation of AI in proceedings, even if the rules themselves are not procedural in nature. They are, in other words, an effective formula to ensure respect for the procedural rights that may be recognised to litigants and to ensure that prohibitions are also upheld.

But this does not mean that any AI system that respects them should necessarily be capable of being used by the judicial system without further ado. In some cases, a further weighing of the advantages and disadvantages will be necessary, which should be left to the procedural legislator in view of its impact on the rights of the litigants and, more generally, in view of the possible medium to long-term consequences on the system as a whole.

3. Forms of regulation

In this diffuse and malleable field of new technologies and their impact on the legal sphere, it is common to hear reminders of the limitations of 'traditional', 'national' legislation to achieve certain objectives. It is therefore useful to think about possible ways of recognising rights, setting prohibitions and establishing requirements and/or obligations. Again, there are several options, which need not be (mutually) exclusive: self-regulation, soft-law and hard-law.

3.1. Self-regulation and codes of conduct

Self-regulation by those involved in the development and marketing of AI systems is conceivable and is often articulated through codes of conduct or codes of ethics. Some companies offering – not necessarily legal – services based on AI systems advertise their ethical commitments. The European AI-Act itself aims to promote the creation of codes of conduct, in order to encourage providers of non-high-risk AI systems to raise their standards and apply on a voluntary basis (some of) the mandatory requirements and obligations laid out for high-risk AI systems (Article 95).

Self-regulation must undoubtedly be very important and can serve to strengthen confidence in non-high-risk AI systems that can also be used in the field of civil justice. But it is also clear that:

a) It needs an external frame of reference: this is clearly visible in the European Regulation, which links the content of codes of conduct to the requirements imposed for the development of high-risk IA systems.
b) Their lack of external enforceability does not ensure respect for the rights of users or recipients (including litigants), nor does it guarantee that, in the face of

a given conflict of interest, the company does not end up overstepping its own self-imposed limits.

3.2. Soft law

In recent years, there has been a proliferation of studies, recommendations or guidelines from supranational institutions or professional organisations on 'ethical uses' and 'appropriate uses' of AI, in general terms, although many of them also warn of its repercussions on civil justice and, even more significantly, on criminal justice and law enforcement. Without wishing to be exhaustive, and focusing on those that deal more specifically and directly with the field of Justice, the following can be recalled:

– The *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, adopted in December 2018 by the Council of Europe's CEPEJ (European Commission for the Efficiency of Justice).[41] The Charter enshrines five principles: respect for fundamental rights; non-discrimination; quality and security; transparency, impartiality and fairness; and 'under user control', precluding a prescriptive approach and ensuring that users are informed actors and in control of the choices made. Many of these principles have been developed in the 2024 Council of Europe Framework Convention.
– The *CCBE Considerations on the legal aspects of Artificial Intelligence*, approved in 2020 by the Council of Bars and Law Societies of Europe.[42] Although it does not take the form of a normative instrument, a number of recommendations and limits that should guide legislative action in this area can be clearly deduced from its reading.
– The *Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings*, adopted in June 2021,[43] which are aimed 'to serve as a practical tool for the member States, to assist them in adapting the operation of their online dispute resolution mechanisms to the provisions of Articles 6 and 13 of the European Convention on Human Rights and the principles developed thereto in the case law of the European Court of Human Rights'. Although they are not exclusively concerned with AI, some of the guidelines refer directly to it.[44]
– The proposal for *Guiding Principles for Automated Decision-Making in the EU* published by the European Law Institute in the form of an ELI Innovation

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41 See n. 24.

42 See n. 24.

43 See n. 28.

44 For example, the guidelines on fair procedure include three relevant provisions: '6. Parties should be notified when it is intended that their case will be processed with the involvement of an AI mechanism'; '18. Sufficient reasons should be given for decisions reached using ODR or with the assistance of ODR, in particular the decisions reached with the involvement of AI mechanisms'; '20. Where national law allows for purely automated decisions, such decisions should be open to review before a judge.'

> Paper in spring 2022.[45] These principles crystallise many of the ideas that have been proposed by other bodies, with a clear focus on human control.

These guidelines and recommendations have a heterogeneous content. In some cases, they are a reminder of certain limits that can already be deduced from human rights. In others, however, they go a step further and involve a choice in relation to an aspect that is dubious or controversial, insofar as it may constitute an obstacle to the supposed 'efficiency' (e.g., when it is proposed to recognise the right for an automated decision to be reviewable in any case by a human judge).

Such instruments are proving to be very useful at this early stage, when regulation is more of a necessity and a project than a reality. Their main drawback is obvious: although they are focused on the justice sector, they are very generic, even when they involve taking sides on a controversial issue. As a result, they fall short of meeting the requirements of legal certainty that are needed in an area such as this, where the rules of the game must be very clear.

3.3. Hard law

It is clear, therefore, that hard law rules – traditional rules, if preferred – will be needed to adequately address the challenges that the implementation of AI systems in civil justice will entail. Even though technological developments know no borders, it is up to national legislators – or supranational legislators with competences, such as the European Union – to make the big decisions: to decide what is prohibited and what is not; to determine what rights are attributed to litigants and, reflexively, what limits are imposed on AI; and, of course, to regulate in great detail the requirements and obligations to which AI systems that may have an impact on the development of the process and on decision-making must be subject.

The European AI-Act is a good example of a hard law standard for tackling the regulatory challenge from the perspective of certification and public control and, to that extent, it can serve as a model for other national legislators outside the EU.[46] Its content may undoubtedly be debatable, but the regulatory technique is interesting, because it establishes a homogeneous horizontal regime that can also be transferred to the field of justice. The same could be say regarding the Council of Europe Framework Convention, which has the advantage of being more specific in its scope – the impact of AI systems on human rights, democracy and the rule of law –, although its content remains vague and general.

It is therefore illusory to think that a regulation such as the one offered by the AI Act or the Council of Europe Convention will be enough to solve the regulatory problem. National procedural legislators have to make much clearer and more specific regulatory decisions for the sector of AI in Justice, because the provisions that can be deduced from the AI-Act or the Convention in this area are limited to establishing a very

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45 See n. 25.

46 As already pointed out, Canada seems to be following a similar path (cf. *supra*, n. 39).

general framework, and constitutional rules will be insufficient to resolve the practical difficulties that could arise from the use by courts of AI systems without clear legal support. The case of *Loomis v. Wisconsin*[47] is a very clear illustration of the difficulties of dealing with these issues without specific regulation. And, no doubt, many other examples could arise in judicial practice for whose solution it would not be sufficient to simply verify that the AI system complies with the requirements established by the EU AI-Act.

4. A conclusion and two examples

The use of AI in civil proceedings affects procedural rights and safeguards and has an impact on the outcome of proceedings and thus on the material rights of citizens. National legislators have a big amount of work ahead of them and, above all, a big amount of decisions to make about what they want and what they do not want. Because AI promises a lot of efficiency, but at the price of costs and sacrifices. Good procedural law needs a legislator who knows about rights and safeguards, but also about how AI systems work. Two recent examples show the first attempts of domestic legislators to tackle these challenges.

4.1. The English Example

In England and Wales a soft law approach has been preferred to begin with. On 12 December 2023, the Courts and Tribunals Judiciary published a Judicial Guidance document, entitled *Guidance for responsible use of AI in Courts and Tribunals*.[48] The document aims to assist judicial office holders in relation to the use of AI. On the one hand, it identifies risks and issues, and provides suggestions for minimising them. On the other hand, the document includes potential (admissible) uses, recalling the judiciary's overarching obligation to protect the integrity of the administration of justice.

The guidance is focused on seven main areas of recommendation:

1. Understand AI and its applications
2. Uphold confidentiality and privacy
3. Ensure accountability and accuracy
4. Be aware of bias
5. Maintain security (e.g., using work devices and work email address to use AI tools).
6. Take Responsibility. The Guidance reminds judicial office holders that they are personally responsible for material produced in their name, even if an AI systems was used. But it also acknowledges that generative AI could be 'a

[47] 881 N.W.2d 749 (Wis. 2016), cert. denied, 137 S.Ct. 2290 (2017).

[48] Available at https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/.

potentially useful secondary tool' in judges' preparatory work to produce a judgment

7. Be aware that court/tribunal users may have used AI tools (some indications that work may have been produced by AI are included)

In addition, guidance is provided in distinguishing potentially useful tasks and AI performed tasks that are not recommended. Among the first ones (potentially useful), the following are mentioned: summarising large bodies of text (taking care to ensure that the summary is accurate), writing presentations, and composing emails and memoranda. The Guidance, however, does not recommend using AI tools to carry out legal research or legal analysis.

The main goal, therefore, is to guide 'institutional users' of a AI systems and not to establish clear rules. It is probably just a first step, where the focus on the rights and safeguards of litigants is secondary: they are to be considered in an indirect manner, as a consequence of the recommendations and the rationale lying behind them.

4.2. The Spanish Example

Just a week later, the Spanish lawmaker followed the hard-law path in the Act regulating the use of ITC in the justice system (*Real Decreto-ley* 6/2023, of 19 December 2023),[49] in force since 20 March 2024. The scope of the Act is very broad and is primarily focused on electronic case management and virtual hearings, but the new Act has expressly admitted making recourse to AI technology in support of a swifter development of court proceedings, distinguishing between 'automated', 'proactive' and 'assisted' activities.

(i) 'Automated' activities are defined as procedural activities carried out by a computer system without the need for human intervention (Article 56 of the Spanish Act). They are foreseen mostly for simple tasks related to the management of electronic court files (e.g., numbering or paging documents, generating copies or certificates, declaring that a decision is final because it has not been appealed within the legal time limit).

(ii) Automated actions are labelled as 'proactive' when they are self-initiated by the system, without human intervention, taking advantage of the information in an electronic judicial file for a specific purpose (Article 56 of the Spanish Act), such as generating a notice that is automatically served on a party.

Automated and proactive activities aim to optimise the internal management of the court's more bureaucratic tasks, although even the most 'innocent' administrative task may end up having an impact on the parties. Therefore, the Act imposes three requirements on these automated and proactive activities:

[49] Real Decreto-ley 6/2023, de 19 de diciembre, por el que se aprueban medidas urgentes para la ejecución del Plan de Recuperación, Transformación y Resiliencia en materia de servicio público de justicia, función pública, régimen local y mecenazgo, *Boletín Oficial del Estado* 20 December 2023, available at https://www.boe.es/boe/dias/2023/12/20/.

- They must all be identifiable as such, traceable and justifiable.
- It must be possible to carry out the same actions in a non-automated form.
- It must be possible to disable, revert or render ineffective the automated actions that have already taken place.

These provisions are in line with some of the rights that have been addressed previously and reflect, thus, the choices made by the Spanish lawmaker regarding 'low profile' use of AI in court proceedings. They all reflect the general idea of 'human supervision' or 'human in command': AI generated activities need to be traceable for the parties, in order to allow them to react against them and, where appropriate, to have them revoked or replaced in a non-automated manner.

(iii) The third category are 'assisted' procedural activities, representing an additional step: the system generates a full or partial draft of a complex data-driven document, which may be produced by algorithms, and may form the basis or support for a court decision (Article 57 of the Spanish Act). The description is very abroad and may encompass, among other examples, the drafting of an order for payment in order for payment proceedings or of a judgment upholding the claim in a simple eviction case. Most decisions could, at least in theory, undergo this first level of AI-generated draft, if the system has the data needed by the algorithm to produce it; and another aim of the new Act is having a data-oriented justice system, where the documents in all electronic court files are able to provide this sort of additional information.

As the qualitative impact is bigger, the safeguards imposed are larger:

- These drafts shall not be generated in a proactive manner, even if this could be technically possible: the draft will only be generated at the will of the user.
- The draft, additionally, has to be fully editable, i.e., they user shall be able to modify it freely and completely.
- In no case shall the draft in itself constitute a judicial decision, but shall require validation by the competent authority.

Once again, the 'human oversight' and 'human on command' approach prevails, as a clear policy choice by the Spanish lawmaker. These provisions do not eliminate completely the risk – perhaps the temptation – that the competent authority might tend to validate algorithmically generated drafts without further analysis, but at least they link decisions to specific individuals, not to 'computer systems' for which no one would ultimately be held responsible. It is part of the (legal and ethical) responsibility of 'users' to rigorously review drafts before validating them. And it is imperative to avoid that something similar to the examples of lawyers sanctioned for providing documents produced with generative artificial intelligence incorporating non-existent decisions could happen.

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DIGITALIZATION OF CIVIL PROCEDURE AND AI: THE EUROPEAN PERSPECTIVE

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Abstract

The study is a written version of the author's presentation given at the international conference "AI and Law" organized at Pázmány Péter Catholic University on January 26, 2024. The author explains the current initiatives of the EU in the field of digital justice and how the Commission has been able to take the technological lead in cross-border digital judicial cooperation. The paper demonstrates a parallel development, closely related to judicial cooperation in civil and commercial matters, where a newly established international court in patent matters is offering a modern, totally digitalized procedure that has been immediately accepted by stakeholders from all parts of the world. Finally, the author looks at the prospects of the future developments of the usage of AI in the settlement of civil and commercial disputes in the EU.

Keywords: digitalization, AI, artificial intelligence, cross-border cases, European Union, civil justice, judicial cooperation

1. Digitalization in the European Union: the state of affairs

In the contemporary societies, digitalization offers large prospects of modernization, but also entails big challenges to the existing infrastructures.[1] This dichotomy also applies to the justice systems. Since at the last decade, digitalization invades the civil procedures of the EU Member States and transforms the communication within and among the judicial systems and the parties. However, the European Union is not a

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[1] Cf. on "disruptive effects of digitalization" Horst EIDENMÜLLER – Gerhard WAGNER: *Law by Algorithm.* Tübingen, Mohr Siebeck, 2020. 223. ff. https://doi.org/10.1628/978-3-16-157509-9

strong actor in civil procedure, as the Union only disposes of limited competences in this field.[2] Nevertheless, as I would like to demonstrate in my following presentation, the European Commission has been able to take the lead in some of the critical fields as the latest developments demonstrate: the Regulation (EU) 2023/2844 of December 13, 2023, on the digitalization and access to justice in cross-border civil, commercial, and criminal matters was published on 27 December 27 2023 in the Official Journal.[3] A few days earlier, on December 8, 2023, the EU-Commission, Council and Parliament reached an agreement in their tripartite negotiations on the EU Regulation on Artificial Intelligence.[4] At present, the publication of the regulation in the OJ is being prepared. Both instruments will considerably influence the future development of digitalization in civil litigation.

My presentation of today will address the following issues: First, I would like to explain the current initiatives of the Union in the field of digital justice and how the EU Commission has been able to take the technological lead in cross-border digital judicial cooperation. Secondly, I will demonstrate a parallel development, closely related to judicial cooperation in civil and commercial matters, where a newly established international court in patent matters is offering a modern, totally digitalized procedure that has been immediately accepted by stakeholders from all parts of the world. Finally, I would like to look at the prospects of the future developments of the usage of AI in the settlement of civil and commercial disputes in the European Union.

1.1 e-CODEX: direct digital communication between judicial authorities and parties within the European Union

The so-called e-CODEX project has become a major success of the EU-Commission in the field of cross-border digitalization.[5] Already in 2009, the Commission had adopted a first formal four-year action plan on digitalization, which got several follow-ups. More importantly, the EU Commission provided funding for pilot projects to enhance digital cooperation. In this regard, the so-called e-CODEX project was most successful.[6] Initially developed by some stakeholders in a couple of Member States and (financially) supported by the EU Commission, it has finally become the technical solution for the interconnection of the different domestic IT systems of EU Member States.

The e-CODEX system is a decentralized secured communication system. It consists of several software tools aimed at setting up so-called "access points for secure

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2 Burkhard Hess: *Europäisches Zivilprozessrecht.* Berlin, de Gruyter, 2nd ed., 2021. chap. 2 V, paras 2.105. ff. https://doi.org/10.1515/9783110715156

3 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202302844 (Accessed on: 22 January 2024).

4 Financial Times, 8.12.2023, EU agrees landmark rules on artificial intelligence, https://www.ft.com/content/d5bec462-d948-4437-aab1-e6505031a303 (Accessed on: 22 January 2024).

5 Digitalization is one of the six political priorities of the EU Commission for the period of 2019–2024. Furthermore, the Commission declared the decade between 2020 and 2030 the "digital decade", https://ec.europa.eu/info/strategy/priorities-2019-2024_en (Accessed on: 22 January 2024).

6 Cf. the description of e-Codex by the EU Commission, COM(2020) 710 final, 5.

communication". Access points using e-CODEX can communicate with other access points over the internet via a set of common protocols, with no central system involved. Each access point can be linked to a national case management system in order to allow it to exchange documents securely with other similar systems.[7] It seems that, at present, no other competing IT system is working with the same degree of maturity.[8] As a result, the European Union (or, to be more explicit, the EU Commission) has taken the lead in the cross-border digitalization of civil procedures.

Consequently, the EU lawmaker recently took up these technological progresses and proposed to consolidate them within a comprehensive legal framework. In October 2020, the European Council adopted Conclusions on "Access to justice – seizing the opportunities of digitalization", where it called the Commission to take concrete action to comprehensively digitalize justice and to "examine the potential for modernizing the core provisions of instruments in civil and commercial matters in line with the 'digital by default' principle."[9] This action plan was already in the making. On 2 December 2020, the EU Commission published a Communication on the Digitalization of Justice in the European Union – a toolbox composed of "a comprehensive set of legal, financial and IT instruments.[10] This document summarizes the current strategy of the Commission in the field by highlighting several priorities: (1) the provision of financial support for Member States to start the "true digital transformation" of their justice systems;[11] (2) making the digital channel the default option in EU cross-border judicial cooperation. Other priorities are better interconnect registers (3), including the e-Justice portal (4), and e-Codex shall become the "gold standard" for digital communication in cross-border judicial proceedings.[12]

The practical implementation of the Communication was found in a proposed regulation on the e-CODEX system published the same day.[13] This proposal was adopted (without any substantial political opposition) by the Regulation (EU) 2022/850.[14] Article

7 E-CODEX was developed by 21 Member States with the participation of other third countries/territories and organisations between 2010 and 2016. The total costs of developing the system was about 24 million Euro, of which 50% were funded by the EU and 50% by the participating Member States. Cf. the Explanatory Report of the EU Commission of 2 December 2020 regarding the proposed Regulation on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726, COM(2020) 712 final, 5.

8 The functioning of the system has been tested in various pilot projects related to various existing instruments of cross-border cooperation.

9 Council Conclusions 'Access to justice – seizing the opportunities of digitalization' 2020/C 342 I/01.

10 Communication from the Commission on the digitalization of justice in the European Union – a toolbox of opportunities, 2 December 2020, COM (2020) 710 final, 2.

11 Projects were started in Croatia in 2016, in Cyprus in 2017, in Belgium in 2018 and in Greece in 2020, COM (2020) 710 final, 6.

12 The Communication also proposed to set up a Joint Research Centre of the Commission and the Member States aimed at monitoring the existing and developing new IT technologies COM (2020) 710 final, 18 ff.

13 Proposal for a Regulation on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726, COM (2020) 712 final.

14 OJ 2022 L 150/1 ff.

7 of the Regulation integrates the e-CODEX system into the technical responsibility of eu-LISA,[15] an agency for the development and maintenance of EU IT communication systems in the Schengen area and in the area of criminal cooperation.[16] In addition, it is important to mention the financial dimensions of the project. Until now, the e-Codex consortium spent 24 million Euro for the establishment of the system; an annual budget of 1.660 million Euro shall be spent per year until 2026.[17] As a result, the standardization of IT cross-border exchanges shall operate in the technical framework of e-Codex, provided, funded, and monitored by the European Union. As a result, the Union (led by the Commission) has taken the lead in establishing the technical framework for cross-border communications in the Judicial Area.

1.2 The 2023 Digitalization Regulation

The latest development is the Digitalization Regulation (EU) 2023/2844 of December 27, 2023 (DigReg). It does not only establish the rules (and standards) for the use of electronic communication between competent authorities within the judicial cooperation in civil, commercial, and criminal matters, but also for the use of electronic communication between natural or legal persons and competent authorities in cross-border procedures (Art. 1 DigReg). The Regulation applies to all EU-instruments of judicial cooperation in civil and commercial matters.[18] This communication shall be accomplished through the decentralised IT system (Art. 3 DigReg) and the European electronic access points (Art. 4 DigReg). All communications shall operate through a secure, efficient, and reliable decentralized IT system (Art. 4 (1) DigReg). As a result, Reg. (EU) 2023/2844 shifts from the use of paper (including fax) documents to the immediate usage of electronic communication and facilitates the establishment and interchange of electronic documents in cross-border settings. Here, the regulatory approach of the EU Commission appears quite clear: By developing an operational system to interconnect the national justice IT systems, the Commission sets an uniform IT-standard for cross-border cooperation. Technically, the system is based on the tools and the practice of cross-border interconnectivity of national IT systems operating within the Schengen-system. In addition, the Union provides for support to EU member states to modernize their justice systems according to EU standards. This also includes financial support.

Yet, the new framework will not apply immediately: The Regulation will enter into force on 1 May 2025. Furthermore, the EU-Commission will enact implementing acts related to each instrument as scheduled by article 26 DigReg. Thus, the implementing

15 European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, mainly located in Estonia.

16 *Richard*, La refonte du règlement sur l'obtention des preuves en matière civile, Rev. Crit. DIP 2021, 67, 70 ff.

17 EUR-lex. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A712%3AFIN (Accessed on: 22 January 2024).

18 The pertinent instruments are listed in Art. 2 DigReg and in its Annex I.

period will finally last from 2026 until 2029. Nevertheless, the Regulation clearly establishes a legal and a technical framework for digital communications in the European Judicial Area – the scene has been set.[19]On their side, EU-member states (via the Council) primarily tried to push back the obligations of using IT tools in order to get more time for the implementation.[20] Yet, the interests of parties getting a framework for effective digital litigation asap did not play a substantial role in the negotiations.[21]

2. Fully digitalized procedures in the Unified Patent Court

The second actual development to be mentioned here is the establishment of the Unified Patent Court that started its activities on 1 June 2023. The Unified Patent Court is based on an Agreement of its 17 Contracting States[22], it operates as a common court of the participating EU Member States and is fully integrated into the Brussels I^{bis} Regulation.[23] The court provides for regional, central, and local divisions, including an appellate division in Luxembourg. Since its start of operations 1 June 2023, the Court of First Instance has received a total number of 160 cases of which 67 are infringement actions, 24 revocation actions, and 48 counterclaims for revocation.[24] These cases were already filed in the new litigation system, not only by European parties, but by parties coming from all parts of the world. As far as I can see, this immediate acceptance of a new dispute resolution system has been a unique success in cross-border dispute settlement despite the possibility that parties opt out of the system.[25]

One reason for this achievement is the fully digitalized procedure of the court based on a case management system (CMS)[26]: Standardised types of lawsuits[27] are brought online, communication takes place on a secured platform, hearings take place onsite but videoconferencing and the taking of digital evidence is fully used. Parties can agree

[19] Same opinion: Mayela Celis: *Conflict of Laws.* (Accessed on: 22 January 2024).

[20] As a result, the European Commission send a clear signal to the EU member states that the digitalization of the justice systems has become a political priority.

[21] More positively: Celis op. cit.

[22] Agreement on a Unified Patent Court of 19 February 2013 (UPCA), OJ EU C 2013/175, p. 1–40. 24 Member States have signed the UPCA so far (not Spain, Poland and Croatia).

[23] Cf. Article 31 UPCA, articles 71a – 71d of Regulation Brussels 1bis, Lena Hornkohl: Article 71a– 71d. in: Marta Requejo Isidoro: *Regulation Brussels Ibis.* Cheltenham, Edward Elgar, 2022, article 71a, paras 71a.04 ff. https://doi.org/10.4337/9781789908176.00106

[24] Press release of 21st December 2023, https://www.unified-patent-court.org/en/news/case-load-court-during-2023 (Accessed on: 22 January 2024).

[25] According to Article 83(3) UPCA, applicants for and proprietors of a "classic" European patent, as well as holders of a supplementary protection certificate (SPC) issued for a product protected by a "classic" European patent, can opt out their application, patent or SPC from the competence of the Court. As a result, the UPC will have no jurisdiction concerning any litigation related to this application, patent or SPC. Parties can opt out via the case management system of the UPC.

[26] The Procedural Rules of the Court were elaborated with the view of their immediate implementation by the case management system, cf.

[27] The main types are infringement actions, actions for revocation and corresponding *counterclaims* for revocation against infringement actions.

on the language of the proceedings. The procedure is based on the obligation of the parties to cooperate in the proceedings and the corresponding obligation of the court to use case management techniques and tools.[28]

The procedure in the first instance consists of three parts: It starts with a written exchange of claims, defences, and counterclaims under the control of a judge rapporteur. This part of the proceedings shall not last longer than 4 to 6 months. The judge rapporteur decides on procedural objections (regarding the jurisdiction) and applications (regarding the provision of a security), he convenes with the parties (usually online) in a preliminary conference to structure the proceedings and to prepare the hearing. The main and public hearing takes place before the full court (3 judges from different jurisdictions), it shall not last longer than a day. Fixed time limits structure all parts of the proceedings. All in all, the dispute shall be settled within months. The appellate proceedings follow the same principles of case management and the obligation of the parties to cooperate. So far, the appellate division dealt with appeals regarding the inadmissibility of the lawsuit and procedural orders.[29]

All decision taken by the different divisions of the UPC are available in an online data base, accessible via the website of the Court.[30] This comprehensive collection of data may permit the use of AI tools in the future as this collection of data is done comprehensively. Yet, there is a need to present the case-law of the court in a more systematic manner. The UPC demonstrates the advantages of a procedure that is entirely based on a case management system in complex cross-border proceedings. In addition, the judges of the UPC started a practice that supports parties to get familiar with the system providing a service to litigants. Still, it remains to be seen whether the UPC will continue to operate smoothly – the start of the new system has been very promising.

3. Perspectives: AI in court proceedings

In the last part of my intervention, I would like to address the initiatives of the European Union regarding the regulation of AI, especially in the context of dispute resolution. Here, state courts are not in the focus of the law-making activities as AI is currently being used mainly in complaint handling mechanisms, in ODR proceedings, and by lawyers, especially when dealing with large scale, but similar claims (flight rights, diesel cases, etc.).[31] Yet, in the present situation, it is undisputed that AI may

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[28] Holger Kircher: Grundlagen des Verfahrensrechts. In: Thomas Bopp – Holger Kircher (ed.): *Handbuch Europäischer Patentprozess.* München, C.H.Beck, 2nd ed. 2023. § 10, paras 18–21.

[29] Example: Order of 11 January 2024 regarding the limits of judicial discretion under Rule 333 RoP, https://tinyurl.com/2u49ak6d (Accessed on: 22 January 2024).

[30] https://www.unified-patent-court.org/en/decisions-and-orders (Accessed on: 22 January 2024).

[31] Eidenmüller – Wagner (2020) op. cit. 223. ff.

also support judicial activities, especially in large scale and similar disputes. However, compared to the private sector, the justice systems are largely lacking behind.[32]

Before discussing the use of AI in litigation, a working definition of the phenomenon seems necessary. In the current debate, the 2021 EU Commission's proposal for a legal framework on AI (AI Act)[33] provides for important guidance. Art. 3 (1) defines AI:

> "(1) 'artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with…"[34]

The proposal classifies AI according to the risks generated by its application, into three different categories: the prohibited AI applications (art. 5 Draft), the high-risk applications (articles 6 – 51 Draft, establishing an elaborated framework of controls) and other applications that are subject to transparency requirements. The application of AI in judicial proceedings is qualified as a high-risk AI (Annex III no 8[35]). This does not exclude its usage, but articles 13 and 14 of the Draft require a high degree of transparency and a genuine control of the processing by natural persons.[36]

The EU AI Act does not explicitly address the application of AI within court proceedings, but rather addresses the possibilities of offering and using AI as a service within the Internal Market. Yet, by setting some minimum standards for the marketing of and the liability for AI, the future legal framework paves the way for a regulated development of technological progress. Although the "robot judge" is not imminent, supportive functions of AI within the judiciary need to be explored[37]. With the AI Act, the European Union has established a legal regime on new developments that

[32] Eidenmüller – Wagner (2020) op. cit. 225. f.; Stefan Huber: Entscheidungsfindung im Zivilprozess durch künstliche Intelligenz. In: Christoph Althammer – Herbert Roth (ed.): *Prozessuales Denken und künstliche Intelligenz.* Tübingen, Mohr Siebeck, 2023. 43., 52. ff.

[33] COM (2021) 206 final: Proposal for a Regulation of the European Pariament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts.

[34] This definition primarily addresses the impacts of AI on contents and decisions, cf. Fernando Gascón Inchausti: Quelques propositions pur réguler l'utilsation de l'intelligence artificielle dans la procedure civile. In: *Mélanges en l'honneur du Professeur Loic Cadiet*. Paris, Lexis Nexis, 2023. 617., 619.

[35] It reads as follows: "High-risk AI systems pursuant to Article 6(2) are the AI systems listed in any of the following areas.(…) 8. Administration of justice and democratic processes (a) AI systems intended to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts…"

[36] Huber (2023) op. cit. 43.; Inchausti (2023) op cit. 617. ff.

[37] There is a considerable danger that the application of AI in court proceesings is considered as belonging to the organization of the judicary to be organized by national ministries without being subject to democratic control by parliaments.

transgresses the fragmented approaches in the EU Member States.[38] With regard to the IT developments, the EU lawmaker has demonstrated its ability of setting the fundamental structures for future technological development in the relevant fields: within the Internal Market and within the European Judicial Area.

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[38] In almost all EU member states, a specific regulation of AI (in court proceedings) is missing, cf. Inchausti (2023) op cit. 617., 620.

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ARTIFICIAL INTELLIGENCE-GENERATED WORKS AND PATENT LAW

Analysis of the DABUS Case in the European Union, South Korea and Proposal for Vietnam

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Abstract

The development of generative Artificial Intelligence has created several legal implications in intellectual property law. The most prominent example is DABUS case, in which DABUS – the AI invented by Stephen Thaler created a food container and a light by itself. Afterwards, Thaler tried to name the AI as the inventor of the product and claim the patent by being an employer of the AI. The case was trialled in 16 countries, including the European Union (EU) and South Korea, creating a major debate on the matters of inventorship and patentability. In Vietnam, since the invention of ViGPT, there has also been debates on similar issues. The aim of this paper is to provide Vietnam with solutions to this issue, thus the country can prepare for the phenomenon. This research will analyse and evaluate the DABUS decisions from the EU and South Korea, with comparison to Vietnamese law to answer questions on the inventor of AI-generated works and its patentability. The finding revealed that despite the differences in the law, the interpretation concluded similarly. However, as the direction of legislation in the European Union and South Korea were divergent, it can be beneficial for Vietnam to learn from the experience of both.

Keywords: intellectual property, patent, artificial intelligence, DABUS, inventorship

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1. Introduction

Artificial Intelligence (AI) is one of the main focuses in the world, as it is changing many aspects of our daily lives. One type of AI – generative AI – has been creating numerous legal implications since its appearance due to its ability to construct new products without the help of human. As generative AI is not only capable of improving the quality of content, image or videos[1], it also can manufacture things by itself, the intellectual property (IP) right of the work generated by them has been an extremely controversial topic, especially the patent right of the inventor. Generally, human involves the help of AI in order to work more efficiently, however, when AI makes new products without their help, it is unsure whether the legal inventor in this case should be the human or the machine. This issue was demonstrated through a famous case titled the DABUS case which was filed in 16 countries, and each country had given their ruling based on their law.

In Asia, Vietnam is one of the countries with the fastest development speed. The country is executing out a plan called 'National Development Plan until 2030' which specified AI as the top priority of development in the next five years[2]. According to the World Intellectual Property Office (WIPO), Vietnam is within the fastest 'risers' in the last 10 years around the globe in terms of innovation[3]. Many technology companies within the nation are researching and expanding on AI, most notably the establishment of ViGPT – the Vietnamese version of the world-famous generative AI – ChatGPT. Despite not being in the 16 countries the DABUS was submitted to, the matter surrounding generative AI and patent is also being actively discussed among the legislators. In order to provide the country with the most optimal solution, it is suggested that Vietnam studies the decisions of other states before beginning drafting. One of the most detailed rulings for the DABUS case is from the European Patent Office (EPO) in 2020, which would be relevant to the law of Vietnam as a country with civil law system. Since the signing of the European Union (EU) – Vietnam Free Trade Agreement (EVFTA) in 2020, harmonisation with the law in the EU can also help companies in Vietnam to implement the rules of the agreement more smoothly. On the other hand, along with the Vietnam – Korea Free Trade Agreement (VKFTA), the decision of South Korea would be appropriate for Vietnam to analyse as it is a country relatively close to Vietnam in terms of location and development direction. The two nations recently held a forum together on cooperating in the new era titled 'Vietnam – South Korea: Partners in the AI generation' in which former clearly mentioned the

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1 János Tamás Papp: Adapting to Change: AI's Potential Impact on Journalism. *Pázmány Law Review* XI, 1. (2024), 17–31. https://doi.org/10.55019/plr.2024.1.17-31.

2 Giang Hoang: Trí tuệ nhân tạo là ưu tiên hàng đầu. [Artificial Intelligence is the first priority]. *Báo Chính phủ Việt Nam (Journal of the Government of Vietnam).* (2022). https://tinyurl.com/4rz2b58b (Accessed on: 15 May 2024).

3 World Intellectual Property Office (WIPO): Global Innovation Index 2024: Switzerland, Sweden, US, Singapore, UK Top Ranking; China, Türkiye, India, Viet Nam, Philippines Among Fastest 10-Year Risers; Dark Clouds for Innovation Investments. (2024). https://www.wipo.int/pressroom/en/articles/2024/article_0013.html (Accessed on: 20 November 2024).

experience learned from the latter in legislation such as the consultation on drafting the Electronic Transaction Law and High Technology Law[4]. It is also interesting to spot the differences in the law on patent in two of the most innovative regions in the world in civil law, representing two continents with distinct perspectives; therefore, providing not only Vietnam but other developing countries with the effective solution to this matter.

Generative AI is a type of AI which has the ability to generate works such as text, images, sounds, product, etc. after being fed data on the applicable subjects[5]. Its products are titled AI-generated works, regardless of human involvement in the process. The DABUS case has raised two questions about patent law which need thorough examination. The first one is the one named as the legal holder of the patent of the AI-generated work when it is created partially or without the involvement of human, whether the AI can be considered as the inventor or should the human obtain the right to the patent. The second question is the patentability of AI-generated work and if it is possible for the work to be patented without a legal inventor.

The paper will apply case study method along with doctrinal method to review the decisions of the DABUS case from the EPO, the court of South Korea and the law of Vietnam. Comparative method will also be used to make relevant comparisons between the rules of these jurisdiction before providing proposals for Vietnam in the final section.

2. Background of the study

2.1. AI and its relationship with patent

Currently, there is no harmonised definition on AI and it is usually understood as machine or robot with the ability to learn and mimic the "intelligence" of the human brain. AI is divided into two types including "strong" and "weak" AI.[6] While the strong AI is the type that possesses the capability to solve problems by itself – an actual human-like mind, weak AI can only execute simple tasks such as chatbot, information searching, etc.[7] Most of the AI in the market at the moment is the latter one since the former one involves a complex system requiring more research. These kinds of AI are relevant as some countries consider strong AI to be one of the conditions to reward the patent or not. Generative AI is a more recent type of AI which utilises the large language models (LLMs) to train the machine to provide materials based on the

[4] Hien Minh: Việt Nam – Hàn Quốc đồng hành hướng tới thời đại AI. [Vietnam – South Korea heading together towards AI generation]. *Báo Chính phủ Việt Nam. [Journal of the Government of Vietnam].* (2024). https://tinyurl.com/5d7zzjw4 (Accessed on: 24 November 2024).

[5] Stefan Feuerriegel – Jochen Hartmann – Christian Janiesch – Patrick Zschech: Generative AI. *Business & Information Systems Engineering* 66, 1. (2024), 111–126. https://doi.org/10.1007/s12599-023-00834-7.

[6] Jonathan Charles Flowers: Strong and Weak AI: Dewayan Considerations. *CEUR Workshop Proceedings* 22, 87. (2023). https://ceur-ws.org/Vol-2287/paper34.pdf.

[7] Ibid.

written request of the user[8]. This is more widely used form of technology during this generation, including ChatGPT, DALL-E, etc. DABUS is also a generative AI with the ability to create its own work after receiving the knowledge fed by the owner.

When working with AI, human can involve it in the process by different methods and different proportion. There are five levels of interaction that are accepted: human only invention, AI-assisted human invention, joint invention between human and AI, human-assisted AI invention and AI only invention[9]. Based on the level of involvement, the right to the patent can be different due to the requirement of disclosure. DABUS's creation in this case is placed in the human-assisted AI invention – where the human contribution is not substantial to the process of generating and AI is the one who participates the majority of the time.

In patent, the inventor is always the most important person in registering since they are the one who will directly benefit from the right of the patent. Before, there were some distinctions between the inventor and the patent holder. The inventor is the one who invents or creates the product; however, the patent holder can be the successor who only inherits it from the inventor. This is demonstrated in the law of many countries, for example, in Article 60 of the European Patent Convention (EPC), stating that 'the right to a patent shall belong to the inventor or his successor in title'[10]. Nonetheless, in the modern age, these two definitions are becoming more and more related owing to the fact that the successor is assigned by the inventor. For the patent right holder, their most important rights include moral and economic rights. Moral right is the right of the holder to be mentioned in the patent, regulated in Article 4ter of the Paris Convention[11]. In the DABUS case, both the issue of the inventor and his successor will be analysed to determine the one who has the right to be named in the patent.

2.2. Background of DABUS case

The DABUS case is one of the landmark cases regarding AI and patent law. This case was not only filed at the EPO but also in 16 others including courts of the United States, the United Kingdom, Australia, South Korea, China, etc. but only one of them concluded differently than the rest, in the court of South Africa.

In the United States, a man named Stephen Thaler invented an AI called DABUS. Afterwards, this AI created an invention which is a plastic food container[12] and a device to 'attract enhanced attention'[13] without the help of any human. Thaler filed

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[8] Feuerriegel op. cit. 112.

[9] World Intellectual Property Organization (WIPO) Standing Committee on the Law of Patents: Artificial Intelligence (AI) and Inventorship'. [2023] Thirty-Fifth Session. (2023), 5–6. https://www.wipo.int/edocs/mdocs/scp/en/scp_35/scp_35_7.pdf.

[10] European Patent Convention, Article 60 (1).

[11] *Paris Convention for the Protection of Industrial Property,* signed 20 March 1883, amended 28 September 1979, 21 U.S.T. 1583; 828 U.N.T.S. 305 (entered into force on 7 July 1884), article 4ter stated that: 'The inventor shall have the right to be mentioned as such in the patent'.

[12] J 0008/20 (Designation of inventor/DABUS II) 21-12-2021 [ECLI:EP:BA:2021:J000820.20211221].

[13] J 0009/20 (Designation of inventor/DABUS II) 21-12-2021 [ECLI:EP:BA:2021:J000920.20211221].

a patent application to the EPO in 2018 claiming DABUS to be the inventor, and he would also be assigned the patent as DABUS is considered to be his employee. This was denied in 2019 by the EPO before getting appealed by Thaler. Nevertheless, this application ultimately led to two questions of the person can be named as the inventor of AI-generated works and whether AI-generated work is patentable.

At the EPO, the original applications number EP18275163 and 18275174 were filed but were rejected. Afterwards, the applicant appealed and the Board of Appeal of the EPO reviewed the DABUS case in cases J08/20 and J09/20. Since these two cases are identical in reasoning, case J08/20 would be chosen as the example for this study. Similarly, in South Korea, it was first filed in the application number 1020207007394 to the Korean Intellectual Property Office (KIPO) on 28 September, 2022. This application was denied and the applicant, again, appealed the decision. Consequently, the Seoul Administrative Court had to trial this case and came to the decision upholding the nullification from the KIPO, resulting in the ruling number 2022Guhap89524[14] on 30 June, 2023 will also be examined in comparison with its counterpart in Europe.

3. AI-generated works and patent law in the EU, South Korea and Vietnam

3.1. The legal inventor of AI-generated works

3.1.1. The AI as the inventor

Regarding this, the EPO stated that DABUS cannot be the legal inventor because the inventor needs to be a natural human. Firstly, Article 81 of the EPC has regulated that it is mandatory in the application that an inventor to the work must be stated, and a statement explaining the origin of the right should also be included when there is more than one inventor. In this case, Thaler has indicated that the inventor is DABUS – the AI, and he is also entitled to the patent by being DABUS's employer. According to Rule 19 of the EPC, the owner of the patent shall state 'the family name, given names and full address of the inventor, contain the statement referred to in Article 81 and bear the signature of the applicant or his representative'[15]. Therefore, the inventor needs to be a human in order to have a full name and signature. Moreover, the EPC was originally made for legal and natural human only, the scope of the law does not cover non-human identities. Thirdly, all of the preparatory documents (travaux préparatoires) of the EPC also referred to the owner of the patent as a natural person, which leaves no room for AI or machines to be the inventor. Lastly, the decision cited identical international standards on the requirement to be the inventor.

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[14] Seoul Administrative Court, Thaler v. Commissioner of the Korean Intellectual Property Office, No. 2022Guhap89524 (June 30, 2023). After this, Thaler submitted an appeal to request the cancellation of the decision above but was rejected by Seoul High Court on 18 April, 2024, written in decision number No. 2023Nu52088, published on 16 May 2024.

[15] European Patent Convention, Rule 19 (1), third sentence.

Similar to the decision of the EPO, the Seoul Administrative Court also based the ruling on Article 42[16] and Article 203[17] of the Korean Patent Act (KPA) which stated that the inventor had to register the name and address when applying for a patent. This regulation is similar to Rule 19 of the EPC above which emphasizes that the inventor has to be a legal person with a name. However, the law of South Korea also allows legal entities to own the patent, which opens more opportunities for non-person owner than in the EU. In South Korea, there is no definition of inventor, but invention is defined in Article 2 of the KPA as 'the highly advanced creation of a technical idea using the rules of nature'[18]. The term 'technical idea' and 'highly advanced' refer to the high level of intellectual which only a human is capable of. Furthermore, article 3 and 4 of the Korean Civil Act only permit a natural or legal person to have legal capacity. Therefore, since the inventor has to possess legal capacity to inherit the right of patent, AI cannot be an inventor under the law of South Korea. The Court of South Korea made one more point by emphasising that DABUS in this case is not a "strong" AI – a machine which can decide and act on its own. It was ruled that in the process of creating the food container, significant contribution by human had been made to DABUS's learning process, therefore, it did not generate the work by itself. The South Korean government believed that there were not sufficient reasons to allow AI the right to be inventor, even though it did motivate the AI and technology market, it could affect human creativity negatively, leading to the disruption of the research market.[19]

The law of Vietnam has the same approach with South Korea in using clear language in the law to regulate both natural person and organization can be the owner of a patent. This was demonstrated through many articles in the Vietnamese Intellectual Property Law, including Article 86[20], 121[21], 125[22], etc. In clause 12, Article 4 of the

[16] Korean Patent Act, Article 42 (1) and (4) (i) regulated that a person who is seeking to apply for patent must state in the application 'the name and address of the applicant' and 'the name and address of the inventor'.

[17] Korean Patent Act, Article 203 (1) and (4) (i) provided that an applicant has to state in their application for an international patent 'the name and address of the applicant' and 'the name and address of the inventor'.

[18] Korean Patent Act, Article 2(i).

[19] Min SON: Can AI be named as an inventor in Korea? *Managing IP.* (2024). https://tinyurl.com/mujzjh3s (Accessed on: 9 June 2024).

[20] Intellectual Property Law of Vietnam 2005 (amended 2022), Article 86 (1) stated that the these subjects are able to apply for a patent : 'a) Authors who have created inventions, industrial designs or layout-designs with their own efforts and expenses' and 'b) Organizations or individuals who have supplied funds and material facilities to authors in the form of job assignment or hiring unless otherwise agreed by the involved parties whose agreements are not contrary to the provisions of Clause 2 of this Article.'

[21] Intellectual Property Law of Vietnam 2005 (amended 2022), Article 121 (1) regulated that owners of inventions can be 'organizations or individuals that are granted by the competent agency protection titles for respective industrial property objects.'

[22] Intellectual Property Law of Vietnam 2005 (amended 2022), Article 125 (1) provided that: 'Owners of industrial property objects as well as organizations and individuals granted the right to use or the right to manage geographical indications may prevent others from using such industrial property objects unless such use falls into the cases specified in Clauses 2 and 3 of this Article.'

IP Law of Vietnam defined an invention as ‘a technical solution in form of a product or a process which is intended to solve a problem by application of laws of nature’[23]. It is also similar to the law of South Korea including the words ‘technical’ and ‘the rules of nature’. However, the term ‘highly advanced’ in the South Korea law further accentuates the role of the human in the process of creating an invention. On the other hand, the law of Vietnam also includes the definition of an inventor as the one who directly creates the invention[24]. This is a relatively ambiguous description since it can be interpreted differently in different circumstances. Moreover, in comparison with the other two jurisdictions, this definition only exists in the law of Vietnam. In contrast, the law of the South East Asian country does not possess a rule about registering a name and address despite mentioning the right to amend the name and address of the inventor in the patent certificate[25]. Even though the vague definition along with the lack of provision on the name of the inventor cannot overrule the fact that the inventor has to be either a natural person or an organization, it is foreseeable that it can create more complication for the country when dealing with AI as an inventor. To conclude, in Vietnam, an AI such as DABUS will not be considered to be a legal owner of the patent; however, with the current law, the country is expected to face some problems when dealing with this phenomenon.

3.1.2. The human as the inventor

In the case, the human – Thaler stated that he had the right to the patent by being the employer of DABUS and he should be assigned the patent according to Article 60 (1) of the EPC: ‘The right to a European patent shall belong to the inventor or his successor in title’[26]. As Thaler was not the inventor, the only way he could obtain the right was through being a successor. However, the EPO’s President commented that he could not be the owner of the patent by this method due to the fact that an AI did not have legal personality, therefore, could neither be an employee or transfer him any rights. This was partly admitted by the applicant also in the addendum, stating that: ‘They do not have legal personality or independent rights and cannot own property’[27]. Therefore, the owner of the AI also was not acknowledged as the appropriate assignee of the patent in the law in the EU.

The law of South Korea has a similar perspective with the EU when the Court also ruled that under the first sentence of Article 33 (1) of the KPA, the inventor or his successor could claim the right to the patent[28]. From the argument above, the Court

[23] Intellectual Property Law of Vietnam 2005 (amended 2022), Article 4 (12).

[24] Intellectual Property Law of Vietnam 2005 (amended 2022), Article 122 (1) defined authors of inventions as ‘persons who have personally created such industrial property objects.’

[25] Intellectual Property Law of Vietnam 2005 (amended 2022), Article 97 (1) (a).

[26] European Patent Convention, Article 60 (1), first sentence.

[27] [ECLI:EP:BA:2021:J000820.20211221] para XV (b).

[28] Korean Patent Act, Article 33 (1), first sentence stated that: ‘A person who makes an invention or the person’s successor is entitled to obtain a patent under this Act’.

held that because AI was not neither a natural or legal person, hence, could not be considered as an inventor and could not have any successor in title. As a result, the conclusion did not contradict with the EPO's.

In comparison, Article 121 (1) of the Vietnam IP Law defines the owner of the patent as 'organizations or individuals that are granted by the competent agency protection titles for respective industrial property objects.'. Meanwhile, Article 86 (1) lists the ones who can apply for the patent, including:

'a) Authors who have created inventions, industrial designs or layout-designs with their own efforts and expenses; b) Organizations or individuals who have supplied funds and material facilities to authors in the form of job assignment or hiring unless otherwise agreed by the involved parties whose agreements are not contrary to the provisions of Clause 2 of this Article.'

Thaler's circumstance does not fall under point a of this rule; thus, he can only claim the patent through point b. As DABUS is not recognized as an author, Thaler also cannot obtain the right under this provision. In Article 3 (4) of the Labour Code of Vietnam, an employee is understood as 'a person who works for an employee under an agreement, is paid, managed and supervised by the employer.'[29], emphasizing that in order to be in a labour relationship, the employee is required to be a natural person, which DABUS also does not satisfy. In conclusion, although the law of Vietnam does not contain any provisions stating about the successor of the right like the former two, the human owning the AI is also unlikely to be able to obtain the patent in this jurisdiction.

3.2. Patentability of AI-generated works

Based on the previous decisions, in the legal framework of the three countries, both AI and its human owner cannot claim the right to the patent. This raises the question of whether the work is protected by patent law when there is no patent owner and if this circumstance will go against Article 27 of the TRIPS Agreement: 'patents shall be available for any inventions, whether products or processes, in all fields of technology'[30].

In the EPO decision, the Board agreed with the argument that any invention was patentable as long as they satisfied three requirements: novelty, industrial applicability and the involvement of an inventive step or the non-obvious test under Article 52 of the EPC. These are the general obligations for patent around the world, and it is not different when it comes to non-human inventors. However, if this interpretation is accepted, an invention would be patentable, meanwhile no right would be provided to the inventor. According to Bonadio, McDonagh & Dinev[31], it is important to distinguish between

[29] Labour Code of Vietnam 2019, Article 3 (4).

[30] *The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* signed 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (entered into force 1 January 1995), article 27 (1), first sentence.

[31] Enrico Bonadio – Luke McDonagh – Plamen Dinev: Artificial Intelligence as Inventors: Exploring the Consequences for Patent Law. *Intellectual Property Quarterly* 1, (2021), 48–66.

the AI itself and its output, due to the fact that the abstract mathematical algorithms in the AI may lead to unpatentability, while the output, which has technical purpose, may not be excluded from patentability. This is a reasonable argument, in line with the European Parliament resolution on IP rights for the development of AI technologies (2010/2015 (INI)) Resolution No. P9 TA (2020) 0277, stating that: 'Takes the view that technical creations generated by AI technology must be protected under the IPR legal framework … they are among the main users of AI technologies for the time being […]'[32].

Afterwards, the court of South Korea did not mention explicitly whether they accepted an invention to be patented without an inventor or not. However, under Article 29 (1), (2), (3) of the KPA, the East Asian country also has the identical requirements for patentability as the EU despite the difference in wording. The court decision also stated that as long as there is a human involved in the listing in the registration, the work could be patented and this was perceived as the method with the most potential to protect AI-generated works. Moreover, the ruling cited trade secret as another way to protect the inventions[33]. An amendment in the law was also considered in South Korea if there was an emergence of a "stronger" AI which could affect the life of human much more significantly.

Lastly, in Vietnam, the same conditions to patent are also applied, stated in Article 58 of the Vietnamese Intellectual Property Law 2005, amended 2022[34]. The law of Vietnam does not mention if an inventor is needed for the invention to be patented, thus, AI-generated works can be patented in Vietnam as long as they satisfy the three requirements listed above. This approach is similar to the EU, demonstrating the compliance to international law.

3.3. Evaluation of the approaches

Despite the similarities in the decisions from three regions regarding dismissal of the idea of a non-human inventor, there exists some differences in the approaches in regulations. While the EU mainly interpreted the wording from the EPC to apply to the case, South Korea and Vietnam used the clear wording written in the Patent Act. The EU opted for a broader explanation of the traditional principles of patent law, which was well-demonstrated in the EPC, along with authoritative reasoning, outlining a sharp route for future cases in the same field. However, reliance on legal principles, and less on written laws can lead to room for ambiguity in interpretation, especially in a multi-state authority such as the EU.

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[32] European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)), point 15.

[33] Young-bo Shim – Dong-Hwan Kim: South Korea: IP Office's DABUS Nullification Highlights Stance Towards AI Inventors. *I AM.* (2024). https://tinyurl.com/5e2uev64 (Accessed on: 23 November 2024).

[34] Intellectual Property Law of Vietnam 2005 (amended 2022), Article 58 (1) listed the conditions for patent protection: 'An invention shall be protected by mode of grant of invention patent when it satisfies the following conditions: a) Being novel; b) Involving an inventive step; c) Being susceptible of industrial application.'

On the other hand, the Asian countries chose the statutory method to resolve the issue. South Korea showed great consistency in the legislation process, showcasing precise language in the official case and all related documents. The most prominent drawback of this approach is the lack of flexibility in dealing with diverse cases, particularly in the field of technology which is changing every day. AI and novel inventions are not conventionally regulated in legal documents, which was published years ago; therefore, minimal flexibility would create countless debates when new technology starts entering the market. Vietnam is on the same page with South Korea in utilising clear-cut expressions in the law, in spite of the possible restrictions. However, the absence of further guidelines in Vietnam, unlike in South Korea, is causing several problems in implementing and enforcing the law on AI and their generated works. Nonetheless, the fact that Vietnam recently amended their law in 2022 illustrated the country's willingness to adapt to the innovative wave of the near future.

4. Experience from the EU, South Korea and proposal for Vietnam

4.1. The solution of the EU

After the EPO's decision, another country in the EU – Germany also published their ruling, which was in line with the former, determining that patent cannot be granted to AI in this case[35]. This not only consolidated the unity of IP law in the region, but also demonstrated Germany's homogenous opinion with most countries.

In 2023, the announcement of the world's first AI Act in the EU created great discussion among patent law legislators. Since the law clearly distinguished the difference in the level of risk, it was predicted that this regulation would affect IP law. The members are also allowed to interpret this law into their domestic patent law in a suitable way. As a result, a number of technology inventions are expected to be excluded from patentability as the requirement for transparency would be raised, similar to the effect of the Biotech Directive[36].

In March 2024, the recently issued Guidelines for Examination in the European Patent Office became the latest development in the legal system of the EU surrounding AI and patent law. AI was included in section 3.3.1 titled 'Artificial Intelligence and Machine Learning' in the list of exclusions under Article 52(2) and (3) of the EPC. In this guideline, AI and machine learning are considered to be part of 'computational models and algorithm' which is not granted patentability unless it possesses any technical mean[37]. This changes when the abstract mathematic methods are subjected

[35] Case 11 W (pat) 5/21, decision of 11 November 2021 [ECLI:DE:BPatG:2021:111121B11Wpat5.21.0 – Food container].

[36] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions. See more at: Terence BRODERICK: EU AI Act – What will this mean for Patent? *Murgitroyd.* (2023). https://www.murgitroyd.com/insights/patents/eu-ai-act-what-will-this-mean-for-patents (Accessed on: 20 November 2024).

[37] Guidelines for Examination in the European Patent Office (March 2024 edition), Part G, Chapter II, Section 3.3.

to the use of a device which provides it with technical character to overcome the requirement. Additionally, it is also essential for AI-generated works to address a specific issue. Therefore, in order for AI to be patentable within the rules of the EPO, regulations regarding inventive step must be carefully assessed. As one of the primary requirements for patentability which was created to ensure only relevant innovations would be protected, the examination of inventive step in AI-related patent would demand inventors to underscore the practical implementation of AI technology in real life, on top of its abstract description. A number of examples are listed by the EPO in the website such as the use of network in a heart monitoring system to identify irregular heartbeats. Moreover, this would also affect the condition of disclosure. The updated rules request that the company reveal sufficient information about the AI model and its training process, which oblige AI developers to balance between transparency and trade secret. Despite the expected difficulties in patentability for AI in the EU regarding the updated guideline, it has outlined a more detailed and specific method for developers to obtain patent for AI, partly opening a new road for the new technology to be patentable, while upholding the previous judgments on the patent holder being a natural person.

4.2. The solution of South Korea

According to the EPO, South Korea in 2018 has become the world's fifth most innovative region, after the USA, the EU, Japan and China[38]. In the Global Innovation Index 2024, the nation was also placed at number 6[39], leading to the call for urgent administration in technology-related legal issues. The country's legislators reacted appropriately to this situation and became one of the first countries in the world to regulate this matter on a policy level.

As mentioned above, the court of South Korea stated that they were ready to change the law to adapt to this new situation with AI. This is in line with the 'National Strategy for Artificial Intelligence' published in 2020 by the country which stated that the legal system should be amended in order to 'allow all innovative attempts to create new services and accelerate the spread of innovation'[40]. To prepare for this scenario, the Korean Intellectual Property Office conducted a survey on almost 1500 people, including 1204 citizens and 292 experts[41] on the field of inventorship of AI. This was a remarkable move from the government of the east Asian country, making it one of

[38] EPO: Fourth Industrial Revolution. https://www.epo.org/en/news-events/in-focus/ict/fourth-industrial-revolution (Accessed on: 22 November 2024).

[39] World Intellectual Property Office (WIPO), Global Innovation Index 2024. (2024). https://www.wipo.int/web-publications/global-innovation-index-2024/en/index.html.

[40] National Strategy for Artificial Intelligence of South Korea 2020, Section 1.3. https://shorturl.at/vXWd9

[41] Korean Intellectual Property Office: Public survey regarding AI an AI inventor. *KIPO,* (2024). https://www.kipo.go.kr/en/HtmlApp?c=92008&catmenu=ek03_08_01> (Accessed on: 10 June 2024).

the first nations in the world to publish a law on IP law and AI – generated works – the White Paper on AI and IP in 2022[42], not to mention a public opinion questionnaire.

On the topic of AI being the inventor, 60,8% of the respondents (177 people) did not agree with this idea, while 35,3% of the people believed that AI should only be allowed as an inventor when it contributed greatly to the inventive process of the invention, and another 33,3% assumed that AI could only be an inventor when it was named in the patent with a natural person[43]. This was an interesting take on this issue, when this could open the opportunity for a joint inventorship between the AI and the human on a patent, which was proposed by a few scholars, however, had yet to be implemented. Additionally, the survey also discovered that 70% of the people considered AI to be an "invention partner" instead of just a tool, hence, making it possible for AI to be one of the inventors.

When it came to patent protection, 75% of the public and 65% of experts stated that if the work was patentable, the term of protection should be shorter than general, standing at 10 years or less. This is only half of the term for an invention, illustrating the concern of the people that with the help of AI, the world could be filled with new inventions, creating a lot of challenges in the market when the exclusive right granted by patent could last up to 20 years.

Lastly, on the human who should inherit the right of the patent of AI-generated works, 50,5% of the respondents voted for the AI user, while less than half of that believed that the right should go to the AI developer at 22,7%, and 16,2% agreed that the patent should belong to the company which owned the AI. This study partly solved the debatable question about the human owner of the patent that many countries in the world were having, and at the same time, guided the path for the government of South Korea to head towards in this situation.

As one of the most developed countries in Asia, especially in the field of technology development, South Korea has truly pioneered in the journey towards harmonising the law on AI. This strategy would be an example for developing countries to study in order to facilitate the law on AI in their own land, especially countries such as Vietnam in the race for the Fourth Industrial Revolution.

4.3. Proposal for Vietnam

Taking from the EPO and South Korea, it is important for Vietnam to learn from their decisions to draft regulations in their own legal framework. From the two previous cases, the most prominent issue presented is the fact that when there is no inventor, an invention can be refused protection, which goes against international standards

[42] Korean Intellectual Property Office: 인공지능(AI)과 지식재산백서. [White paper on Artificial Intelligence and Intellectual Property]. (2022). https://tinyurl.com/57cs359r (Accessed on: 11 December 2024).

[43] Korean Intellectual Property Office: KIPO finds that AI cannot be a legal 'inventor' under the Korean Patent Act. (2022) https://shorturl.at/OAPYr (Accessed on: 11 December 2024).

in Article 27 of the TRIPS Agreement. Therefore, this paper would provide three proposals to the law of Vietnam to resolve this problem in the near future.

Firstly, since the law of Vietnam does not allow neither AI or the human to be the patent holder of AI-generated works, it is recommended that the country should follow the current regulations. Out of the 16 countries which the DABUS case was submitted to, only South Africa went down another direction from the other 15 to recognize AI as the inventor in July 2021[44]. However, it is suggested that Vietnam kept the current approach and ruled towards inventorship with the involvement of a natural person to observe relevant international precedents. Going against the decisions of developed countries and the trend of the world at the moment is not exactly the best choice since it can create various difficulties and risks in trade or in attracting investment and funding for the technology industry. This is also the direction which South Korea is heading towards, which was highlighted in the White Paper of AI and IP Law, stating that: 'there is no immediate need for South Korea to be ahead of other countries in legislating to allow inventors other than natural persons'[45]. One of the methods to implement this is to supplement a rule which is similar to Rule 19 of the EPC for the inventor to register a name and address to further clarify the requirement of the inventor being a natural human. In addition, amending the definition of the 'author of invention' within the meaning of Article 122 of the IP Law can also help in keeping this regulation in line. It is recommended that the country should first seek to change this term into 'inventor' to harmonise with international laws[46]. Clarity, consistency and timelessness in the law should be the priorities for the country in this period.

Secondly, learning from the experience of the two jurisdictions, it is suggested that Vietnam fast-track the process of drafting a clause or a soft law document to clarify the circumstance when there is no legal patent holder to an invention. While it can be patented under the law, in the case where no legal person or organization would benefit from the right, it is possible that the invention be excluded from protection, creating a breach of Article 27 of the TRIPS Agreement, which Vietnam is also a party member. Therefore, it is an urgent requirement to research and quickly provide a regulation to state evidently who would be the beneficiary when all people in the application are not accepted as patent holders, even better if there is clause exclusively on the matter of AI-generated works. Regarding this, Vietnam can consider balancing between the principle-based and the statutory-based approaches of the two regions to find the appropriate response for the country. Moreover, it is also important to evaluate the fine lines between encouraging innovation, protecting human's right and optimising risks

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44 Desmond Osaretin Oriakhogba: DABUS gains territory in South Africa and Australia: Revisiting the AI-inventorship question. *South African Intellectual Property Law Journal,* 9. (2021), 87–108. https://doi.org/10.47348/SAIPL/v9/a5.

45 인공지능(AI)과 지식재산백서. [White paper on Artificial Intelligence and Intellectual Property]. chapter 1, section 3.

46 Kim Hoang Nguyen Ngo – Hong Quan Doan: Artificial intelligence and inventorship under the patent law regime: practical development from common law jurisdictions. *Vietnamese Journal of Legal Studies* 8, 1. (2023), 25–54. https://doi.org/10.2478/vjls-2023-0002.

in legislation to avoid overlooking the basis of patent law in exchange for economic gains.

Lastly, Vietnam can consider the approach of South Korea – an Asian nation which has a number of similarities in term of development direction and currently one of the biggest investors in the country. The public survey method is a quite appropriate response in this situation, when it can collect the public opinion on the topic and at the same time, lessen the hardship for legislators in the process of drafting new law. As the AI market in Vietnam is growing at a fast speed, it is predicted that the country will run into problems regarding its IP ownership in the near future, thus, a suitable solution should be implemented as soon as possible to mitigate the foreseeable gaps. It is also recommended for Vietnam to research and publish soft law instruments such as the White paper on AI and IP of South Korea. An official document would emphasize the country's stand clearly on the issue and relieve the pressure on the law-making bodies and courts. Furthermore, it is crucial that the country actively tracks international cases and development in legislation to ensure harmonisation and prevent future conflicts.

In the period when Vietnam is in the race for innovation within the South East Asia region, it is essential that the country foresees the development speed of AI to propose legal documents on the issue of AI in general, and with IP law in particular. The law of the country despite having amended three times and the latest one is in 2022, a number of gaps and irrationalities are yet to be resolved in the technology generation. Many developed nations have drafted their own law regarding AI such as the EU AI Act, the South Korea White Paper on AI and IP and the under-revision Act on Promotion of AI Industry and Framework for Establishing Trustworthy AI, the draft AI Law of China, China's Notice on Issuing the 'Measures for Identifying Synthetic Content Generated by Artificial Intelligence' on 14 March, 2025, etc.; thus, making now the appropriate time for a future AI economy such as Vietnam to publish the law on this as well. Due to the lengthy the process to publish a legal document or amend a law in the civil law jurisdiction, it is proposed that Vietnam begins this procedure as soon as possible. As of 2024, the country has published a draft for Digital Technology Industry Law which partly addressed the role of AI in the next development phase[47], nevertheless, this law would only address AI in a general sense, with only 11 Articles in one chapter. In spite of that, with Vietnam's great commitment in amending the system by publishing the Personal Data Protection Law in June, 2025, and will enter into force on 1 January, 2026[48], it is observable that the country is ready to implement laws on technology to adapt to the current trend of the world.

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47 Quy Hoang: Luật Công nghiệp công nghệ số tạo môi trường thuận lợi để phát triển doanh nghiệp công nghệ số. [Digital Technology Industry Law creates a favourable environment for business to develop digital technology]. *Báo dân tộc và phát triển. [Journal of Ethnicity and Development],* (2024). https://tinyurl.com/bdftbewt (Accessed on: 25 November 2024). See more at: Lawmakers approve Law on Digital Technology Industry. https://tinyurl.com/yc64u4vd.

48 Personal Data Protection Law of Vietnam. https://tinyurl.com/388jfzt6 (Accessed on: 10 September 2025).

5. Conclusion

While some scholars believe that AI inventorship should be recognised due to the natural rights theory, others opposed that this exposed a lot of risks to the current system because it may discourage human creativity and innovation, at the same time, expose gaps in legal framework. It is true that giving AI the right of patent can be beneficial in preventing dishonest application and raising the position of real human-only invention, but it can also disturb the market with the ability of generating at high speed of AI. Joint inventorship is also a promising solution to this, being mentioned in the South Korea decision.

In the current generation when technology development is always growing faster than the law, instead of nullifying the AI related applications, law-makers ought to find a solution to minimise the gap in the law, while still allowing technology to surge. This is also the direction the world is following, in which countries are drafting their own law according to their economic situation. Hence, it is urgent that Vietnam – a greatly AI-concentrated nation to learn from the experience of others and establish regulations to control technology development effectively and simultaneously maintain legal stability.

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DILEMMAS OVER THE OFFICIAL STATUS OF ASTURIAN LANGUAGE

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Abstract

The Asturian language does not have official status in Asturias, although the Statute acknowledges its regional significance. The issue of official status is a subject of lively social and political debate. Supporters view recognition as crucial for the language's survival, while opponents highlight economic burdens and compulsory measures. The debate is situated at the intersection of political interests and linguistic rights.

This study explores the potential impacts of official status, institutional and legal obstacles, and the main arguments in the discourse.

Keywords: Asturias, Spain, minority rights, language rights, official language

1. Introduction

The status of the Asturian language has been the subject of debate in Spain for decades. Although the language is spoken by a large part of the region's population, its legal status remains uncertain: it currently lacks official status and is only recognised as part of the cultural heritage. The question of the co-official status of Asturian goes beyond the issue of language rights: it is also a deeper political and social dilemma.

The issue of official language recognition is sharply dividing public opinion and political parties. While some see it as an affirmation of cultural identity and the right to use one's mother tongue, others fear that official status would reinforce regional nationalism and place an economic and administrative burden on public institutions.

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2. Languages of Asturias

Asturias is an autonomous community in the northwestern region of Spain. It has a population of 1 012 117 people, of whom more than 350 000 speak Asturian.[1] In addition to Asturian, it is worth mentioning the presence of Galician in Asturias, which is known in the region as Eonavian-Galician or Galician-Asturian. The name Eonavian-Galician refers to the geographical and cultural roots of the language. The Eo-Navia region is located on the western border of Asturias, in the neighbourhood of Galicia. This area gave the name to the variety of the language spoken here. *The Eo* and *Navia* denote two rivers, which are the dominant geographical features of the region, and thus symbolically link this variety of Galician to the region. It is home to the largest Galician-speaking community outside Galicia, with around 50 000 people. The dialect spoken here has many unique features that distinguish it from Galician.[2]

Asturian is the result of the development of Latin in the Iberian Peninsula, along with Galician, Portuguese, Castilian, Catalan and Aragonese. It is spoken mainly in Asturias, but is also present to a lesser extent in León and Zamora. In the Portuguese municipality of Miranda do Douro, the language spoken is Mirandese, a variety of the Astur-Leonese linguistic group. Miranda has recently been recognised as an official language in Miranda do Douro.[3] This is particularly noteworthy given that Portugal has traditionally followed a unifying language policy, recognizing only Portuguese as the official language. As a result, the recognition of minority languages remains rare. By contrast, Spain, which proclaims in its constitution that it is a multilingual country and that it protects cultural and linguistic diversity, does not grant official status to Asturian.

Asturian was the official language of the Kingdom of Asturias in the 8th–10th centuries. In the 13th-14th centuries, it was used as the language of administration for drafting various laws, regulations, decrees and notarial deeds. Due to the growing dominance of the Kingdom of Castile, Castilian exerted increasing pressure on the highly educated classes, which intensified by the 14th and 15th centuries. However, this influence did not reach the lower classes, who continued to express themselves in Asturian. The rise of Castilian and the decline of Asturian was a long-term process, caused by modernisation, urbanisation and the centralising language policy of the Spanish state. The dominance of Castilian steadily increased as it became the exclusive language of education, administration and economic life, while Asturian was increasingly relegated to a narrow sphere of private life, especially in rural communities.[4]

1 Instituto Nacional de Estadística, 2021. https://www.ine.es/ (Accessed on: 20 February 2025).

2 Xavier Frías Conde: A brief outline of current and historical sociolinguistics of the Galician language. In: Roberto Bolognesi (ed.)*: Le convergenze parallele*. Condaghes, Cagliari, 2007. 55–69.

3 Law No 7/99 of 29 January 1999 on the official recognition of the linguistic rights of the community of Miranda https://diariodarepublica.pt/dr/detalhe/lei/7-1999-182838 (Accessed on: 17 February 2025).

4 Ramón D'Andrés Díaz – Xulio Viejo Fernández: Rapport about the institutional obstacles to the normalisation of the Asturian language. In: Lorenzo Suárez et. al. (ed.): *Bilingual socialization and*

3. The rise of the Asturian language

In the first half of the 20th century, Spain was marked by political instability and social tensions, which eventually led to the outbreak of civil war in 1936. The conflict lasted three years and ended in victory for the nationalist forces led by General Francisco Franco. From 1939, Franco imposed an authoritarian dictatorship aimed at Spanish unity and the consolidation of central power. Franco's dictatorship (1939–1975) was characterised by severe repression of minority languages and their associated cultures. During this period, the public use of any minority language was prohibited, and violations were punishable by fines.[5]

The early 1970s saw the emergence in Spain of movements for social change, promoting democratic reform and the recognition of cultural identity. These events coincided with the decline of General Franco's regime and the struggles of the various nationalities for autonomy. This included a renewed interest in the Asturian language. Initiatives were launched to strengthen the Asturian language in the fields of literature, education and culture.[6] A series of events in the early 1970s contributed to the social and cultural development of Asturias. In 1969, *Los Amigos del Bable*[7] was founded, whose activities were mainly limited to the collection of literary proposals and traditional songs, but one of its leaders, Lorenzo Novo, initiated the first Asturian Regional Language Assembly in 1973, which brought together language users and researchers, laying the foundations for the later language movement. In 1974, a section on *Conceyu Bable* was published in the Asturian Weekly, which won considerable support. This led to the creation of the legally recognised Asturian Language Council[8] , which, together with other Asturian associations, became the driving force of the Asturian language movement. The organisation saw language as a fundamental element of Asturian identity. It launched campaigns to promote the language in education, encouraged the press to use it, and promoted the literacy and cultural recognition of Asturian.[9]

In 1976, the Asturian Language Council also made political demands, such as the creation of a statute of autonomy. The movement resulted in the partial integration of the language into the education system and the emergence of a new generation of writers, known as the Rise. The process culminated in the establishment of the Asturian Language Academy in 1980, which became the institution responsible for language planning. The Academy's outstanding achievements include the creation of the Asturian Grammar (1998) and the Asturian Language Dictionary (2000). The most

bilingual language acquisition: Proceedings from the Second International Symposium on Bilingualism. University of Vigo – Galicia, 2002.

5 Jose Ignacio Hualde et al.: *Introducción a la lingüística hispánica.* Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511808821

6 Díaz – Fernández op. cit.

7 The English translation is *Friends of the Asturian language*. The term 'Bable' in the name of the organisation refers to the Asturian language.

8 *Conceyu Bable: Asturian Language Council*, own translation.

9 Xosé Lluis García Arias: Breve reseña sobre la lengua asturiana. In: *Informe sobre la llingua Asturiana*. Academia de la Llingua Asturiana, 2002. 15–25.

important achievements of the movement are the recognition of Asturian in the Statute of Autonomy and the establishment of the scientific basis and literacy of the language.[10]

4. On the road to democracy: The language provisions of the Spanish Constitution

The arrival of democracy in Spain created politically favourable conditions for the protection and promotion of minority languages. The Spanish Constitution of 1978 recognises Castilian as an official language, while allowing autonomous communities to declare other languages as co-official in their own territory. Languages such as Catalan, Galician and Basque were then granted official status in their respective territories.[11] The Spanish Constitution names Castilian as the official language of the State and then states in the second paragraph of Article 3: *"The other Spanish languages will be official in the corresponding autonomous communities, according to the statutes of those communities."*[12] The Statute of Autonomy of Asturias, however, does not recognise the official linguistic status of Asturias in its Article 4, stating instead that *"The Asturian language will be protected. Its use, dissemination in the media and teaching shall be promoted, always respecting local versions and the voluntary nature of learning. Asturias will regulate the protection, use and promotion of Asturian by law."*[13]

In Asturias, Castilian (Spanish) is therefore the only official language, while Asturian is protected but does not have official status.

5. Reform of the Statute

In 1998, the Statute of Autonomy was amended, and the demand for the officialisation of the Asturian language once again became a central issue in the political arena, accompanied by mass demonstrations. In the end, the introduction of official status was not included in the new statute. In 1998, however, the Law on the Use and Promotion of the Asturian Language was adopted, which follows a more moderate approach.[14]

Article 4 of the Language Use Law states that *"Every citizen has the right to use and express himself or herself in the Asturian language, orally and in writing. " (...) "The use of the Asturian language shall be considered valid in oral and written communication between citizens and the Autonomous Community of Asturias."*[15]

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[10] Xulio Viejo Fernández: Asturian: Resurgence and impeding demise of a minority language in the Iberian Peninsula, *International Journal of the Sociology of Language* 170, 1. (2004), 169–190. https://doi.org/10.1515/ijsl.2004.2004.170.169

[11] Fernández op. cit. 169–190.

[12] Constitution of Spain, 1978.

[13] Statute of Autonomy of Asturias, 1981.

[14] Academia de la Llingua Asturiana: *Informe sobre la represión y non reconocencia de los drechos llingüísticos n'Asturies*. 2013. https://lafozdelpielgu.org/spip.php?article562 (Accessed on: 17 February 2025.)

[15] Law on the Use and Promotion of the Asturian Language. BOE-A-1998-10126 https://www.boe.es/buscar/pdf/1998/BOE-A-1998-10126-consolidado.pdf (Accessed on: 21 January 2025).Emphasis mine.

6. Asturian as an official language: Arguments for and against

The question of the official status of the Asturian language is a highly divisive issue for public opinion and political actors. Proponents argue that official status would ensure the survival of the language, enhance its prestige and strengthen regional identity. They also believe that recognition is an important means of protecting cultural diversity, in line with the Council of Europe's European Charter for Regional or Minority Languages. However, opponents point mainly to the economic consequences of official status, such as the high costs of bilingual administration and education. They are also concerned that the compulsory use of the language could impose a burden on non-Austurian speakers, which could fuel tensions in the region. Another argument against co-officialism is that Spain already recognises five co-official languages: Catalan, Basque, Galician, Valencian and Aranese. If Asturian joins them, other minority languages, such as those of Aragon and León, and the Romani (Caló) language could claim similar status. In October 2022, a major public demonstration took place in the Asturian capital Oviedo, where 10 000 people took to the streets to demand official recognition of Asturian.[16] This event shows that the language remains a subject of intense debate and social discourse. While official status is seen by many as a pledge for the survival of the language, the everyday use of the language by the Asturian population is contested: it is not clear how many people actually use Asturian on a daily basis.

According to the Asturian Academy of Languages, official recognition is an essential condition for the preservation of the language, and this level of protection is essential for its long-term survival.[17] The Asturian Initiative was founded to build social and political consensus for the recognition of the official status of Asturian. The association emphasises its independence: it does not accept state support and adopts a positive, constructive approach. The aim is to recognise the rights of the Asturian language within a constitutional framework.[18]

However, the fight for the official status of the language is not universally supported. The opposition is mainly represented by the Vox party, which is strongly opposed to state support for minority languages. In their campaigns, they often criticise the Asturian language issue on nationalist grounds, further polarising the social debate.[19]

The Platform Against Co-officialism is a movement against the co-officialism of Asturian and Galician-Austurian languages, which they consider to be an 'artificial

[16] Stephen Burgen: 'It's my mother tongue': the fight for a fifth co-official Spanish language. *The Guardian,* (2022). https://tinyurl.com/2s48pk4d (Accessed on: 21 January 2025).

[17] Alicia Hernández: Dónde se habla el bable y por qué dicen que es un idioma "en peligro". *BBC News Mundo,* (2022). https://www.bbc.com/mundo/noticias-internacional-59547573 (Accessed on: 18 February 2025).

[18] Iratxe Rojo: Hay un conflicto lingüístico en Asturias porque existen casos de discriminación. *El Mundo,* (2021a). https://www.elmundo.es/espana/2021/11/10/618649afe4d4d818068b45d9.html (Accessed on: 21 January 2025).

[19] Burgen op. cit

language regulation' that would be imposed on the Asturian population by force.[20] There has been peaceful coexistence among Asturians between those who speak the language and those who do not, but they perceive the reform as 'forced learning' and 'compulsory use'.[21]

6.1. Support for the officialisation of Asturian

According to a study entitled *Youth and the Asturian language*, carried out by Isabel Hevia on behalf of the *Federation of Youth Associations*, 86% of young people in Asturias would support the official status of Asturian. Of the 114 408 young people aged between 16 and 29, 416 were interviewed in 53 municipalities.[22] According to the research leader, the positive results show that young people play a key role in the survival and renewal of the Asturian language.

Another poll, commissioned by the Citizenship Party, found that 66% of Asturians do not support the officialisation of the Asturian language. Of the 1 004 people surveyed, 51% said that granting official status was completely unnecessary, while 15% said it was 'not worth it' because of the expected economic costs. Overall, the results show that two thirds of Asturians are somewhat opposed to the officialisation of Asturian. Detailing the results, only 11% support official status wholeheartedly, while 23% think that although it could be supported, it is not timely at the moment. When analysed by political affiliation, 52% of socialist voters oppose the official recognition, while 35% do not think it is the right time. Among the Citizenship Party voters, the proportion of those who oppose the introduction of the official status reaches 79%. Party representatives stress that the results support their view that there is no social demand for the introduction of the official status.[23]

According to data from the *3rd Asturian Socio-Linguistic Survey* (Euskobarómetro) in 2017, 53% of Asturians support the recognition of the language as an official language. Of these, 40% fully agree, while 13% are partially in favour. The percentage of those opposed is 25%, of which 18% strongly oppose and 7% are partially opposed.[24]

The different figures on the support for the officialisation of Asturian can be attributed to several factors. It is worth considering who carried out the data collection. The

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[20] Iratxe Rojo: Plataforma contra la Cooficialidad del asturiano: "No queremos llegar a los enfrentamientos que vemos en otras comunidades. *El Mundo,* (2021b). https://www.elmundo.es/espana/2021/11/01/617e64c321efa0636d8b45de.html (Accessed on: 21 January 2025)

[21] Rojo (2021b) op. cit.

[22] El Comercio: Un estudio refleja que el 86% de los jóvenes asturianos apoya la cooficialidad. *El Comercio,* (2018). https://www.elcomercio.es/asturias/estudio-refleja-jovenes-asturianos-apoya-cooficialidad-20181023153831-nt.html (Accessed on: 15 July 2025).

[23] Josu Alonso: Un 66% de los asturianos no quiere la oficialidad, según una encuesta de Ciudadanos. *Candenaser,* (2021). https://cadenaser.com/emisora/2021/09/21/ser_gijon/1632243596_863542.html (Accessed on: 21 January 2025).

[24] Jordi Palmer: Los datos: un 53% a favor de la oficialidad del asturiano. *El National.cat,* (2018). https://www.elnacional.cat/es/politica/datos-favor-oficialidad-asturiano_238074_102.html (Accessed on: 21 January 2025).

results may be influenced by whether a political party or an independent organisation commissioned the poll. In the former case, the wording of the questions or the sampling may be biased. The size and representativeness of the sample also play a role in shaping the results: a sample of 400-500 people, such as in the youth study, may not reflect the views of the whole population, while a survey based on a representative sample of more than 1000 people may be more representative.

6.2. Report on co-officialism

Asturian President Adrián Barbón's top political priority is to make the Asturian and Eo-Navian languages official, which has recently caused the administration serious problems. A report commissioned by the Asturias government has been made public, but has been kept secret since December 2020, despite requests from several parties to see the data. The report was produced at a time when the reform of the Statute of Autonomy was being discussed.[25]

The report, prepared by eminent jurists and academics, states that the formalisation would oblige all public administrations to administer their affairs in Asturian and would make the language compulsory at various levels of education. This clearly contradicts Barbón's promise of 'moderate officialism'.[26] Barbón had previously referred to a kind of 'uncoerced', 'flexible' bureaucracy. He stressed that the bureaucracy he wanted to introduce would not oblige the population to use the language and would take account of social needs.

The report also analyses the economic impact of the measure under three possible scenarios: depending on the degree of formalisation, the costs could range between €18.1 million and €172.7 million, while the number of jobs created could vary between 394 and 4 114.[27]

According to the government, the report is only an information document, not a formal action plan, and therefore has not been communicated to parliamentarians. Adrián Pumares, representing the Asturias Forum, sharply criticised Barbón, accusing him of not having acted with sufficient transparency, as he said the report would have been key to the negotiations. People's Party leader Teresa Mallada went further, saying Barbón had 'deceived Asturias' and that the government had concealed the existence of the document because it proved that the idea of 'moderate officialism' was not feasible. The People's Party has therefore called for a parliamentary inquiry into the matter. The Vox party, which most strongly opposes granting official status to the language, has even spoken of treason and called for Barbón's immediate resignation. Although it proposed a motion of censure to the People's Party, the party rejected it because it did

25 Iratxe Rojo: El informe secreto sobre la oficialidad de la lengua asturiana se vuelve contra Adrián Barbón. *El Mundo,* (2022). https://www.elmundo.es/espana/2022/02/16/620be6bfe4d4d8f9018b45ad.html (Accessed on: 21 January 2025).

26 In the original language, it is called *oficialidad amable*. Translated into English as 'flexible' or 'moderate' official recognition/status. It denotes an official status that is not coercive or imposing, but flexible and adaptable.

27 Rojo (2022) op.cit.

not have the necessary majority. Nor were the supporters of officialdom satisfied. The Podemos party said that the content of the report was very positive, especially in terms of job creation, but they were puzzled by the silence. The United Left recognises that officialism will require economic sacrifices, but would be beneficial in the long term. However, they consider the publication of the report to be bad timing.[28]

6.3. Consequences

The publication of the report has further polarised the political scene in Asturias, deepening the divisions between pro- and anti-establishment parties. The government's explanation has not dampened tempers, and the debate has become a central issue in the 2023 elections. Although President Adrián Barbón had earlier promised that Asturian language skills would not be a condition for the competitive exams for doctors and nurses.[29] The report says that Asturian language skills should be recognised in public service competitions. The teaching of Asturian would become compulsory at different levels of education. This would require adequate language training for teachers, which is not currently provided. A transition period of five years is proposed to achieve the required level. At least 50% of content in public media should be provided in Asturian. Institutions and their subordinate companies must publish all documents – decisions, regulations, autonomous legislation – in bilingual form. As regards the economic impact, three possible models have been outlined. The maximum model is estimated to cost €172.7 million and create 4 114 new jobs. The minimum model outlines a cost of €18.1 million and 394 jobs, which is close to the government's plans. Under the moderate model, the official Asturian language would cost €55 million and create 1 300 jobs.[30]

7. Case studies on the use of Asturian

Case studies of Asturian language use highlight the legal, political and social situation of the language, as well as the obstacles and opportunities that arise in everyday use.

According to the Asturian Academy of Languages, there have been several occasions when NGOs have been unable to formalise the Spanish government's delegation in Asturias because they have submitted their documents in Asturian. For example, in 1985 the Association for the Defence of the Asturian Language, in 1987 the National Students' Council, in 1989 the Language and Education Group, several theatre groups

[28] Rojo (2022) op.cit.

[29] A competition (*oposición* in Spanish) is a selection procedure for a public sector job, used in Spain and other countries. The aim of the competition is to ensure the selection of the most suitable candidates in a fair and transparent way.

[30] Rojo (2022) op.cit.

and cultural associations were unable to register. In addition, documents written in the Asturian language were not accepted in the Delegation's register.[31]

These cases are reported only by the Asturian Language Academy and are neither confirmed nor denied by other sources. No information is available on what developments in the cases have taken place or whether there have been any further consequences.

7.1. Use of Asturian in public administration

In Case 27/2010 of 25 February 2010, the Constitutional Court ruled on the use of Asturian in public administration. The proceedings were initiated by the Council of the Administrative Court of Oviedo, following a complaint by an Asturian government employee. The complainant complained that his application for a staff permit, which he had submitted in Asturian, had been rejected. The application was lodged with the council in charge of the presidency, where he worked.[32]

The administration justified the refusal on the grounds that Article 4(2) of the Law on the Use and Promotion of the Asturian Language only applies to communication between citizens and Asturias. It does not, according to them, cover civil servants when they contact the administration on official matters. The first paragraph of the article states that *"Every citizen has the right to express himself or herself in the* Asturian *language, orally and in writing".* The second paragraph states that*"The use of Asturian in oral or written communication between citizens and Asturias shall be considered valid for all purposes."*[33]

According to the legal challenge body, the second paragraph of Article 4 of the law does not comply with the regulatory framework on language rights. This is because, without the recognition by law of the co-official status of Asturian, the autonomous community cannot regulate an essential element of that status. According to the judiciary, this provision would create a kind of 'de facto co-officiality', as it would recognise Asturian as having full legal validity in communication between the administration and citizens. The Constitutional Court finally concluded that the objection was unfounded. The law does not grant citizens the right to choose the language of administrative proceedings, but merely obliges the Asturian administration to process documents received in Asturian.[34]

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31 Academia de la Llingua Asturiana: Informe sobre la represión y non reconocencia de los drechos llingüísticos n'Asturies. *La Foz del Pielgu,* (2013). https://lafozdelpielgu.org/spip.php?article562 (Accessed on17 February 2025).

32 Nicolás Bartolomé Pérez: The jurisprudence on the Asturian language. *Lletres Asturianes,* 131, 1. (2024), 116–123. https://doi.org/10.17811/llaa.131.2024.116-123

33 Law on the Use and Promotion of the Asturian Language. BOE-A-1998-10126 https://www.boe.es/buscar/pdf/1998/BOE-A-1998-10126-consolidado.pdf (Accessed on: 17 February 2025).

34 Alberto Arce Janáriz: *Sinopsis del Estatuto de Asturias*. 2003. https://app.congreso.es/consti/estatutos/sinopsis.jsp?com=65 (Accessed on: 18 February 2025).

7.2. Use of Asturian in elections

The Central Election Commission has rejected a complaint by the political party *Andecha Astur* against an earlier decision by the Asturias Election Commission. The party had wanted to ensure that in the 2019 elections in Spain, the ballot counting commissions were informed that voters could vote in Asturian, in order to avoid the unjustified invalidation of votes. However, the electoral commission refused to do so because the application was not submitted in the official language. According to the reasoning of the commission, the use of languages by the electoral commissions is regulated by Law 39/2015 of 1 October[35] , which states that the official language in public institutions is Spanish. Co-official languages may be used in autonomous communities, but in the case of Asturias, Asturian does not have such status. According to the Statute of Autonomy, the language must be protected and promoted, but its use is not compulsory and it is not an official language. The Electoral Commission also referred to the fact that Asturian is only considered valid for communication between citizens and Asturian institutions under the 1998 Law on the Use and Promotion of the Asturian Language. The Commission also decided that the party's application could not be accepted because the document submitted was long and difficult for the Election Commission to understand.[36]

7.3. Use of Asturian in the Legislative Assembly

The legal status of the Asturian language has also been on the agenda recently. An important milestone was the Constitutional Court ruling 75/2021 of 18 March 2021, which declared the 2020 reform of the Legislative Assembly of the Principality of Asturias constitutional. The amendment was adopted by the plenary session of the Council on 1 July 2020. It allows the use of the Asturian language in the Asturian Legislative Assembly, so that members of the Government Council, officials, civil servants and everyone else can freely use the language in the Assembly.[37]

The Parliamentary Group of the political party Vox challenged the new wording of Article 3 of the Statute before the Constitutional Court, considering it unconstitutional for two main reasons. Firstly, it was claimed that the amendment violated Article 3.2 of the Spanish Constitution and Article 4 of the Statute of Autonomy of Asturias by attributing to Asturian a status similar to that of a co-official language, thus allowing its widespread use in the Assembly. Second, it pleads infringement of the second paragraph of Article 23, according to which, for those Members who do not understand Asturian, the amendment prevents them from exercising their parliamentary control

[35] Act No 39/2015 on the Common Administrative Procedure of Public Institutions, 1 October 2015 BOE-A-2015-10565 https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565 (Accessed on: 18 February 2025).

[36] La Vanguardia: *La Junta Electoral Central desestima un recurso de Andecha Astur sobre el derecho al voto en asturiano*. 2019. https://tinyurl.com/yjvwfkhn (Accessed on: 18 February 2025).

[37] Judgment No 75/2021 of 18 March 2021. BOE-A-2021-6621. https://www.boe.es/boe/dias/2021/04/23/pdfs/BOE-A-2021-6621.pdf (Accessed on: 18 February 2025).

and supervisory functions. This article states that the functions of the Assembly include legislative work and control of the government. Vox argues that if the use of Asturian is allowed in the Assembly, it could create problems for those members who do not understand the language. According to their interpretation, this could hamper the efficiency of parliamentary work, in particular the performance of control and oversight functions.

The Constitutional Court rejected the appeal and ruled that the reform is in line with the Spanish Constitution. In its reasoning, it explained that Asturian is not an official language and that the amendment to the Statute does not confer this status on it, as its use is limited to the Assembly. The Constitutional Court's reasoning is based on the recognition of the Asturian language in the Statute (Article 4) and its development by law (Law on the Use and Promotion of the Asturian Language), as well as on Article 3(3) of the Constitution.[38]

The Constitutional Court also referred to the provisions of Articles 7 (Part II) and 10.2 (Part III) of the European Charter for Regional or Minority Languages of the Council of Europe. Article 7 contains objectives and principles for the protection and promotion of regional and minority languages, such as taking firm action to preserve and promote them and encouraging the use of minority languages in public and private life, both orally and in writing. The second paragraph of Article 10 provides that regional and local authorities should ensure the use of minority languages in official documents, in disputes and in various areas of public administration, where the number of speakers so justifies.[39]

The court also found that the amendment of the Statute did not violate Article 23.2 of the Statute, as it requires the Bureau of the Assembly to ensure the conditions of accessibility for the exercise of the rights of Members. An important element of the judgment is that it recognises Asturian as the native language of Asturias. While this may seem self-evident, it was not previously explicitly addressed in the Statute or the Law on the Use and Promotion of the Asturian Language. The Statute does, however, refer to the Asturian language and contains the basis for the regulation of its protection, use and promotion. The recognition of multilingualism in the Statute of Autonomy does not necessarily imply the granting of official status to the local language.

This judgment confirms the possibility that there may be languages in Spain which, although they do not have official status, have a legal basis which gives speakers certain linguistic rights.

7.4. Use of Asturian in local government

Article 8 of the Law on the Use and Promotion of the Asturian Language gives local governments in Asturias the opportunity to ensure the linguistic rights of citizens and to

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[38] Article 3(3) of the Constitution states that *"the richness of the different linguistic modalities of Spain is a cultural heritage that will be the object of special respect and protection."* Emphasis mine.

[39] The European Charter for Regional or Minority Languages adopted by the Council of Europe in 1992. https://rm.coe.int/1680695175

develop specific plans for the local use of Asturian. In this context, some municipalities have for decades been implementing language policies that promote Asturian and Galician-Asturian languages. A good example is the regulation of the municipality of Nava, which adopted a local decree in 2001 on the official status of Asturian.[40]

However, the term 'official nature of the Asturian language' does not comply with the requirements of the second paragraph of Article 3(2) of the Spanish Constitution. In addition, the fact that some municipal regulations were drafted exclusively in Asturian posed a problem. Judgment 902/2005 of 3 June 2005 of the Supreme Court of Justice of Asturias clearly stated this, and this was later confirmed by Judgment 4171/2008 of 4 July 2008, following an appeal against the original decision.[41]

These judgments have also annulled local language policy regulations in several municipalities. As a result, the declaration of the official status of Asturian in the municipalities of Morcín, Llaviana, Bimenes, Llanera, Casu, Castrillón and Llangréu was annulled. These declarations of official language status at local level were of symbolic rather than practical importance. However, on the basis of the second paragraph of Article 3 of the Constitution and Article 4 of the Statute of Autonomy of Asturias, these decrees were annulled. According to the reasoning, only the Statutes of Autonomy are empowered to grant official status to a language and therefore the municipalities did not have the power to take such decisions.

8. Conclusion

The question of the official status of the Asturian language goes beyond the linguistic dimension: it is closely intertwined with regional identity, economic planning and political strategy. Proponents stress the importance of protecting cultural heritage and preserving minority languages, while opponents point to the high costs of bilingual administration and education, as well as legal obstacles. The issue is creating political tensions and presents a major challenge to the Asturian government. Officialising the language would require substantial institutional reform, but in the long term, it could enhance the prestige of the Asturian language. However, public support remains uncertain: opinion polls have produced mixed results, making it unclear what proportion of the population would support granting the language an official status.

Regarding the use of language in public administration, the Constitutional Court has ruled that citizens do not have the right to choose the language of administrative procedures, although documents submitted in Asturian must be processed by the authorities. Although some local authorities have supported the use of the language for decades, they cannot legally declare its official status. Initiatives to expand language use often face institutional obstacles. A good example is the rejection of an initiative that would have allowed voters to vote in Asturian. This case also shows that the current status of the language severely limits its use in official fora. On a positive note,

[40] Bartolomé Pérez op. cit.

[41] Unfortunately, judgments are only available from secondary sources. Bartolomé Pérez op. cit.

the recognition of the use of Asturian in the Assembly is a positive development. This is a step towards preserving linguistic diversity and making it more visible.

The status of the Asturian language remains precarious and politically divisive. Although measures have been taken to protect and promote the Asturian language, legal and political obstacles to its official recognition remain in doubt.

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