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THEMATIC FOCUS:
*The Rule of Law and Judicial Dialogue in Europe: Continuity and Change*

# BRINGING THE ADMINISTRATION UNDER THE RULE OF LAW IN THE FORMATIVE PHASE OF MODERN STATES

## *A Comparative Analysis*

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professor (University of Wrocław)

**Abstract**

Despite the existing differences, the models developed within the framework of the 'rule of law', the 'Rechtsstaat' or 'l'État de droit' had one thing in common: they all reflect the endeavour to make the administration accountable, predictable, rational and effective institution. The main principle of subjecting administration to the rule of law during the formation of modern states was to guarantee individuals freedom and equality before the law. From this perspective, it's about emphasizing that administrative law is not the law of administration, even that chosen in democratic elections, as is the case with local government bodies. It is the law of the people and for the people, who agree to the administration functioning on their behalf and for the common good, fairly balanced with the good of the individual.

**Keywords:** public administration, rule of law, Rechtsstaat, l'État de droit, ius politiae

## 1. Introduction

The phenomenon of the subordination of the administration to the rule of law should be viewed as a process that did not occur overnight and which, at the same time, suggests that, in historical sequence, public administration emerged first, since without it the exercise of power by a ruler – whether feudal or absolutist – would have been impossible. It was not until the emergence of modern states that the need arose to objectify, rationalize, and standardize the actions of the administration, with the law proving to be the only predestined instrument for this purpose. At the same time, the introduction of the rule of law into the administration means far more than merely

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conferring a legal character upon it – it is a matter of binding the administration to the law. There is no question that the juridification of administration took place on a massive and unprecedented scale in 19th-century continental Europe under the overwhelming influence of the ideas of the Enlightenment and the French Revolution[1], as well as the realization of the principles of the Rechtsstaat[2]. Today, the existence of fundamental connections between administration and law is beyond question. Hans Kelsen had already argued that without law, there simply could be no administration[3]. Law brings the administration into being and determines its structure, its processes and functions, as well as the framework for permissible legal actions. owadays, this is enshrined in the supreme law of every state, which imposes a duty on public authorities to act within the framework of and in accordance with the law (in the case of Poland, this is Article 7 of the Constitution). The fundamental aim of the administration is the implementation of the law. Consequently, the administration should be assessed from the perspective of the implementation of the law.

The subordination of the administration to the rule of law must be viewed in a historical and comparative context, for although the administrations of individual states today are evidently undergoing processes of convergence on an unprecedented scale, exemplary solutions are the result of mutual learning and the adoption of tried-and-tested legal models developed over a long tradition. It is therefore worthwhile to compare the establishment of administrative law in 19th-century continental Europe with a very different model of administration, which is a product of the general common law system. The differences identified appear to be significant, yet taking them into account in the development process allows for a better understanding of the framework conditions and contexts within which today's administration operates. Despite the existing differences, the models developed within the framework of the 'rule of law', the 'Rechtsstaat' or 'l'État de droit' had one thing in common: they all reflect the endeavour to make the administration accountable, predictable, rational and effective institution, particularly in its dealings with individuals.

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1 Diana Zacharias: Der Begriff des Verwaltungsrechts in Europa. In: Armin von Bogdandy – Sabino Cassese – Peter M. Huber (ed.): *Verwaltungsrecht in Europa: Wissenschaft*. Handbuch Ius Publicum Europaeum. Vol. 4. Heidelberg, C. F. Müller, 2011. 543.

2 It's worth noting that in contemporary Polish literature, Robert von Mohl is mainly mentioned as the leading creator of the idea of the Rechtsstaat. The popularity of Robert von Mohl in Poland is shown by the translation of his two-volume encyclopedia in 2003 (see Robert von Mohl: *Encyklopedia umiejętności politycznych*. [Encyclopaedia of Political Skills]. t. 1–2. Antoni Białecki (translation), Adam Bosiacki (ed.), Liber, Warszawa, 2003). It should not be forgotten that R. von Mohl was not alone in his views and belonged to a large group of supporters of the idea of the Rechtsstaat, among whom the publishers of the state lexicon were the first to stand out. (Das Rotteck-Welckersche Staatslexikon) Karl von Rotteck, Carl Theodor Welcker, and Johann Christoph von Aretin, see Michael Stolleis: Rechtsstaat. In: Wolfgang Stammler – Adalbert Erler – Ekkehard Kaufmann (ed.): *Handwörterbuch zur deutschen Rechtsgeschichte*. Vol. 4. Berlin, Schmidt Verlag, 1990. 367.

3 As early as 1925, the famous Austrian administrative scholar Hans Kelsen stated that without administrative law, there is no public administration, and that it is the law that distinguishes administration from all other entities., see Hans Kelsen: *Allgemeine Staatslehre*. Berlin, Springer, 1925. 276.

## 2. Administration under ius politiae

The essence of the 'link' between administration and law is 'administrative law'. The term itself already points to the existence of two unequal components: law and administration, since the grammatical construction (noun and adjective derived from the noun) implies that it is law, in particular, that constitutes the central element determining the structure of administrative jurisdiction. Incidentally, similar terminology is found in most European languages; to name but a few: the French 'droit administratif', with which it all began[4] the Italian 'diritto amministrativo', the Spanish 'derecho administrativo' or even the English 'administrative law', although, as is well known, there was long resistance in the British Isles to recognising administrative law as a distinct branch of law[5]. In German, on the other hand, we find the form of a compound noun: 'Verwaltungsrecht', which, taken literally, is to be understood as 'the law of the administration' – that is, created to meet the needs of the administration – which in turn might suggest an instrumental function of the law in the hands of the administrative authorities[6]. Administrative law is not a branch of law controlled by the administration, yet the notion of placing the administration above the law accurately reflects the power structure that prevailed in continental Europe until the end of the 18th century. Given the multitude of states and administrative cultures, it is difficult to identify common elements, but similarities can undoubtedly be found in the relationships between the ruler, the administration, and the subjects. Before the law as we understand it today – including administrative law – took shape, the administration in continental Europe was regarded as the exclusive domain of the rulers (kings and princes), serving as a means of exercising internal administration and, above all, as a means of exercising power[7]. At the same time, the administration was not structurally separated from the person of the ruler, who viewed it purely as an instrument – a service or executive function carried out for his (the ruler's) benefit – that is, as a category standing above the administration itself.[8]

A common form of communication between the ruler and the administration, on the one hand, and their subjects, on the other, was the promulgation of laws applicable

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4 It's worth noting that the term administrative law (droit administratif) has replaced and taken over from other terms in French doctrine, like common law or political law, which was initially criticized for overly ‚glorifying' the administration, since in reality administrative law was created for the individual and the citizen, not for the administration. See Jean-Louis Mestre: *Introduction historique au droit administratif français*. Paris, Presses universitaires de France, 1985. 166.

5 At this point, it's worth quoting the frequently cited statement of Victorian constitutionalist Albert Venn Dicey addressed to Louis Jean Baptiste Henry Berthélemy – a professor of administrative law at the university of Paris 'In England we know nothing of administrative law, and wish to know nothing about it' – quoted in: William A. Robson: Administrative Law. In: Morris Ginsberg (ed.): *Law and Opinion in England in the 20th Century*. Berkeley, University of California Press, 1959. 193. https://doi.org/10.1525/9780520345331-010

6 Zacharias op. cit. 543.

7 Maria Gromadzka-Grzegorzewska: *Narodziny polskich nauk administracyjnych.* [The origins of Polish administrative sciences]. Warszawa, Uniwersytet Warszawski edition, 1985. 18.

8 Zacharias op. cit. 543.

unilaterally, which were referred to as 'ius politiae' (Policeyrecht)[9]. These consisted of regulations, proclamations, instructions, orders, decrees, edicts, ordinances or mandates which were enacted at the ruler's own and subjective discretion[10]. The concentration of all power in a single hand meant, in effect, that the law was created and applied by the same ruler with whom the administration was equated. The law was regarded as a unilateral instrument in the hands of the policey legislator and not as a means of limiting power. This means that the legal acts, issued according to subjective criteria, imposed numerous duties, commands and prohibitions on individuals, whilst at the same time not being binding on the ruler or the administration[11]. In short, the ius politiae did not originate in parliament; it was usually enacted in ad hoc situations, which deprived it of the character of general applicability (universality) of legal norms[12]; it was not subject to publication in the modern sense; and the informal nature of the enactment of legal acts, as well as the high frequency with which they were issued, made it impossible to invoke ius politiae in court proceedings.

One consequence of equating the ruler with the state[13] was the absence of any structural separation between the ruler and the administration. This, in turn, meant that the administration's actions were attributed to the ruler in the eyes of the outside world. However, the criteria for assessing these actions were not derived from the ius politiae, which was, after all, subject to all too frequent changes and dealt exclusively with the duties of subordinate individuals. At the same time, there was a strong need to articulate the question of accountability for the exercise of power within an ideological context. The rulers of the time therefore sought to legitimise their decisions, relying not on the prevailing ius politiae or on the support of their subjects, but on supernatural categories

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9 Johann Christian Pauly: *Die Entstehung des Polizeirechts als wissenschaftliche Disziplin. Ein Beitrag zur Wissenschaftsgeschichte des öffentlichen Rechts.* Frankfurt am Main, Vittorio Klostermann, 2000. 92.; Thomas Simon: *»Gute Policey«. Ordnungsleitbilder und Zielvorstellungen politischen Handelns in der Frühen Neuzeit.* Frankfurt am Main, Vittorio Klostermann, 2004. 440. As Adam Błaś points out, ius politiae was ‚an expression of the ruler's will and served as an instrument in carrying out internal administration and exercising the ruler's power', see Adam Błaś. In: Adam Błaś – Jan Boć – Jan Jeżewski: *Nauka administracji.* [The study of administration]. Wrocław, Kolonia Limited, 2013. 35.

10 Michał Szczaniecki: *Powszechna historia państwa i prawa.* [A General History of the State and Law]. Warszawa, PWN, 2000. 395.

11 The ius politiae norms only included the duties of the individual, giving them no rights, because they didn't bind the ruler or the administration. The norms set by the ruler didn't meet the standard of universality (generality and overall applicability), weren't of parliamentary origin, and their application wasn't overseen by the courts. See Franciszek Longchamps: *Założenia nauki administracji.* [The principles of administrative science]. Wrocław, Kolonia Limited, 1991. (reprint from 1949). 238.

12 Ibid. 163.

13 As Federico Chabod points out, the basic foundation of the states back then was based on a sense of loyalty and faithfulness to the king. See Federico Chabod: Ya-t-il un État de la Renaissance? In: Federico Chabod (ed.): *Scritti sul Rinascimento.* Torino, G. Einaudi, 1967. 610.

– on natural law[14] and grace bestowed by God[15]. The emphasis on accountability to God stemmed from the fact that Europe in the 16th, 17th and, to some extent, the 18th centuries knew no national patriotism, and people defined their sense of community through the religious identity of their ancestors and their affiliation with the Church[16].

At this point, it is worth examining the concept of the state's aims and functions as it was understood at the time, as these largely reflected the ruler's pre-determined aspirations. In this regard, there was a general conviction that the fundamental function of the state was to ensure the happiness of its subjects. The state was therefore expected to provide comforts and make the lives of individuals more pleasant[17], to promote their inner strength (prosperity) and eternal happiness,[18] to increase population growth – a prerequisite for a happy social existence[19] – and to guarantee security, including moral security.[20] The legitimacy of the ruler and the administration, which justified the state's

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[14] Christian Freiherr von Wolff, theorist of absolutism, professor of mathematics and natural law at the universities of Halle and Marburg, saw in natural law a constant and objective foundation for the state system. Natural law stands above the sovereign and sets limits on their actions. Because of its intangibility, natural law represents an ethical, rather than legal, limitation on the ruler's power and is not associated with any individual claims against the ruler. Additionally, Ch. Wolff pointed to the close connections between the Church and natural law, arguing that giving honor to God is in human nature. See Józef Bohdan Oczapowski: *Policyści zeszłego wieku i nowożytna nauka administracyi: przyczynki do dziejów tej nauki: historya nauki administracyi w XVIII wieku.* [Policey thinkers of the last century and modern administrative science: contributions to the history of this discipline: a history of administrative science in the 18th century]. Warszawa, Drukiem S. Orgelbranda Synów, 1882. 72.

[15] Małgorzata Moras: Reformy Józefa II (1780–1790) a rządy prawa [The reforms of Joseph II (1780–1790) and the rule of law]. *Studia z dziejów Państwa i Prawa Polskiego* 16, (2013), 132–149.

[16] Canon law that was valid across borders was then seen on the continent as a sort of binding factor (koiné). As Gabriel Le Bras demonstrated in his groundbreaking research, there is a strong influence of canon law on administrative law, which today is reflected in the existence of timeless categories in administrative law such as the common good (utilitas publica), public necessity (necessitas publica), or public association (universitas). See Gabriel Le Bras: Les origins canoniques du droit administrative. In: *L'évolution du droit public, études offertes à Achille Mestre*. Paris, Sirey, 1956. 395.

[17] According to Christian Wolff, the state is an institution meant to support people in their pursuit of happiness by making social life easier and sweeter for its individuals, see Christian Wolff: *Jus naturae methodoscientifica pertractatum*. Vol. I–IX. Halle, Francofurti & Lipsiae, Prostat in Officina Libraria Rengeriana 1740 – cited in: Oczapowski op. cit. 95.

[18] Johann Heinrich Gottlob von Justi understood happiness as a concern of the state, outlining broad boundaries of this concept and including citizens' freedom, their security, internal strength, which he equated with prosperity, as well as 'eternal happiness,' which is a continuation of earthly happiness, see Johann Heinrich Gottlob von Justi: *Grundsätze der Policey-Wissenschaft*. Göttingen, Vandenhoeck, 1756. – quoted in: Oczapowski op. cit. 97.

[19] Joseph Freiherr von Sonnenfels saw the main goals of the state in increasing the population, claiming that a large population is a basic condition for a happy social existence, which forms the foundation for security and strength externally, see Joseph Freiherr von Sonnenfels: *Grundsätze der Polizey, Handlung und Finanz – Zu dem Leitfaden des politischen Studiums*. Wien, J. E. von Kurzbeck, 1787. – cited in: Oczapowski op. cit. 149.

[20] The French polcey theorists Nicolas de La Mare (another acceptable spelling of the surname is Delamare) focused on describing the reality he observed, distinguishing eleven areas of administration, mainly in terms of oversight and security guarantees, not excluding public morality, see Nicolas de La Mare: *La Traité de la Police.* Amsterdam, Aux dépens de la compagnie, 1729. – cited in: Oczapowski op. cit. 157.

comprehensive intervention in every sphere of the individual's life, was based on the conviction that human beings are powerless and weak, incapable of securing their all-round development through their own efforts and by their own means[21]. The state's objectives and functions, understood in this way, required intervention in all areas of its subjects' lives in order to avert harm threatening the state[22] It is telling that the achievement of the aforementioned objectives was to be facilitated not so much by a system of social benefits as by a sophisticated system of commands and prohibitions contained within the ius politiae. This, in turn, leads to the conclusion that a significant portion of the responsibility was shifted onto the subjects themselves, whilst the effectiveness of the administration depended entirely on the willingness of individuals to comply with the established rules, commands and prohibitions[23]

When analysing the distinctive features of administration on the European continent prior to the emergence of administrative law in the modern sense, it is useful to broaden the analysis to include a comparative perspective. Whilst on the continent the concept of absolute power united all possible functions and mechanisms for the realisation of the public interest in a single authority, in England at that time we were dealing with a system of the separation of powers. Sovereign power lay with the king and the government, yet administrative tasks were traditionally carried out by local authorities. It is of crucial importance here that no hierarchical or subordinate relationships developed between these two categories of actors, as administration was carried out not on behalf of the king or the state, but on behalf of the original institutions. Consequently, one cannot speak here of a typical subordinate administrative and executive function vis-à-vis the sovereign, as the aim was the realisation of self-government. The role of administrative officials was carried out by Justices of the Peace, who were of aristocratic origin and personally administered counties. Representatives of the same class also sat in the House of Commons and successfully ensured that the interests of local communities were taken into account in the legislative process.[24]

Administrative methods also differed from those customary on the mainland; they were characterised by a high degree of heterogeneity and formed a mosaic of methods applied by parishes, shires, counties, and boroughs. Furthermore, the administrative process took into account the requirements arising from general common law, Acts of Parliament and the Crown's directives. The separation of the judiciary, the legislature and the executive (with a structural distinction between governmental and administrative tasks), as extolled by Charles-Louis Secondat, Baron de Montesquieu[25], was in reality not based on a separation but on a deep symbiosis within these three

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21 Błaś op. cit. 36.

22 Ibid. 36.; Gromadzka-Grzegorzewska op. cit. 18.

23 The aforementioned policey theorists Johann Heinrich Gottlob von Justi openly said that the fulfillment of the state's functions and the policey's goals largely depends on the people themselves, and in this way, he made both the individual and society jointly responsible for the fate of the state, See Oczapowski op. cit. 127.

24 Tim Blanning: *The Pursuit of Glory: Europe 1648–1815*. London, Penguin Books, 2008. 125 ff.

25 Charles de Montesquieu: *De l'esprit des loix*. Genève, Barrillot & Fils, 1748.

powers. As Rudolf von Gneist rightly observed, representatives of a homogeneous class of landowners sat in Parliament, in local government and in the common law courts, which served as a guarantee of the absence of conflict and the harmonious development of England.[26]

Given the different forms of government on the islands, a distinctive model of administration has emerged. In the classical understanding of parliamentary democracy, the administration is accountable to the government, which in turn is accountable to Parliament – meaning there are no direct links between all levels simultaneously. By contrast, the English system at that time featured direct and close links between local government and Parliament. Formally speaking, Parliament in Westminster delegated new powers to local government, but the mechanism in place for drafting 'Acts of Parliament' suggests a high level of involvement by local authorities in parliamentary work[27]. The draft bills were not, in fact, drawn up by the government or on its behalf, but within the framework of a special legislative procedure, the 'Private Bill Procedure', which was conducted under the auspices of the local authorities concerned and was subject to quasi-judicial scrutiny by the High Court of Parliament.[28] The oversight of administrative measures affecting individuals, on the other hand, was ensured by a system of judicial redress exercised in accordance with the applicable common law. The courts' strong position in monitoring compliance with the rule of law in administrative action was so significant that academic literature had already begun to refer not so much to the 'rule of law' as to the 'rule of the judiciary'[29]

The vastly different modes of operation of the administration outlined above are based on opposed mechanisms of exercising power. The system of absolute power prescribes not only the structural and functional unity of the ruler and the administration, but also the functional unity of the state with its subjects (those governed). From this perspective, the legitimacy of power and administration was sought in the worldview and in relation to supernatural forces that lay beyond the scope of action of the ruler, the administration or, even more so, the subjects. As we have seen, traditions, customs and natural law also played a not insignificant role in the common-law system of government. Yet whilst the

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[26] Rudolph von Gneist: *Englische Verfassungsgeschichte*. Berlin, Julius Springer, 1882. 704. https://doi.org/10.1007/978-3-642-52604-6 It's worth quoting Martin Loughlin's accurate observation that the phenomenon and causes of the stabilization of the system in England at that time were first diagnosed by foreign scholars, because local lawyers were too busy dealing with practical problems. See Martin Loughlin: Staat, Verwaltung und Verwaltungsrecht: Großbritannien. In: Armin von Bogdandy – Sabino Cassese – Peter M. Huber (ed.): *Verwaltungsrecht in Europa: Grundlagen*. Handbuch Ius Publicum Europaeum. Vol. 3. Heidelberg, C. F. Müller, 2010. 124.

[27] Before 1835, local government bodies were generally formed by individual Acts of Parliament setting up bodies for specific purposes in specific areas. For example, one Act of Parliament in 1769 created the Birmingham Street Commissioners to manage markets, ensure public safety at night and provide street lighting in Birmingham' – see Victoria County History, A History of the County of Warwick: Volume 7, the City of Birmingham – *Political and Administrative History: Local Government and Public Services*, 1964. – quoted in: Alice Baxter: *History of local government in English towns and cities*. London, House of Commons Library, 2025. 25.

[28] Loughlin op. cit. 122–123.

[29] Ibid. 122.

interpretation and application of the ius politiae on the continent lay exclusively in the hands of kings and rulers, in the British Isles this task fell to the strong and independent courts that applied the common law. Another key feature of the English system is the structural and functional separation of local government, which has developed into a distinctive system of the separation of powers, within which deep harmony actually prevailed due to members' shared status as landowners.

### 3. The emergence of administrative law

The emergence of administrative law in continental Europe in the 19th century fundamentally altered perceptions of the nature and functions of the administration. However, this epoch-making transformation did not happen of its own accord, nor did it occur overnight; rather, it was triggered by a series of key factors that compelled a change in the ways and methods of government and administration. There is no doubt that the driving force behind the changes on the continent was the quest for a fundamental reorganisation of the balance of power between the state and society. Advancing industrialisation necessitated qualitative and quantitative changes in the scope of the state's responsibilities. The administration was no longer to be responsible for ensuring the happiness of its subjects, as had been the case in feudal or absolutist states. Consequently, the previous methods of government – which were based on the issuance of occasional ius politiae regulations prescribing or prohibiting certain behaviours on the part of subjects – proved to be no longer appropriate. Administrative law became the predestined instrument for the transformation of social relations within the state; it was aimed at the self-determination of the individual, who, regardless of class affiliation, strove to realise their own rights and freedoms. This fundamental upheaval was triggered by the achievements of the French Revolution, underpinned by the views of the philosophers of the time, in particular Kant and Humboldt[30].

At the same time, we are seeing a gradual shift in its profile and an increase in public responsibilities, which necessitated an increase in the administrative workforce; this, in turn, led to a rise in the institutional significance of the administration as a distinct category[31]. In this situation, the need arose to establish a civil service law that would, a priori, regulate the functioning of the administration and the conduct of individual

[30] As the well-known Polish administrative scholar Franciszek Longchamps points out, Kant criticized state concepts aimed at achieving individual well-being. According to the philosopher, norms enforced through coercion do not reflect natural law, which is free of coercion. The purpose of introducing compulsory laws should not be the happiness of individuals, but their freedom to pursue their own happiness as they wish, as long as it doesn't infringe on the same freedom of others. See Franciszek Longchamps: Poglądy nauki francuskiej i belgijskiej na prawa jednostki wobec władzy. [Views of French and Belgian scholarship on the rights of the individual vis-à-vis the authorities]. *Acta Universitatis Wratislaviensis* 4, ‚Prawo' (1962), 13.

[31] Gerhard Wielinger emphasizes that the observed patterns already appeared in the final period of the rule of absolute monarchs. For example, the reigns of Empress Maria Theresa or King Frederick II of Prussia were marked by the constant expansion of the administrative state and bureaucratic state, in which nothing could happen without the approval of the bureaucratic machine, see Gerhard Wielinger: Mutmaßungen über einen Zusammenhang zwischen der Denkweise der österreichischen Verwaltung

civil servants, whilst at the same time creating the basis for a certain degree of distance between the administration and the ruler[32]. In this context, it should be noted that the law fulfils important functions in relation to the administration. On the one hand, it establishes the administration as an institution and, at the same time, defines the administration's responsibilities as an independent structural category. Furthermore, the law fulfils a stabilising function, as it objectifies the relationship of dependence between the administration and the ruler by establishing a catalogue of the authority's tasks and duties. Consequently, the criteria for assessing the authority and the civil servant become measurable and neutral.[33]

The patterns outlined above are also partly borne out in the case of England. The changes to the quantitative and qualitative nature of administrative tasks brought about by the process of industrialisation posed a threat to the cultural diversity of the administrative structures on the islands. Over time, it became clear that the heterogeneity of administrative functions and methods did not meet the social and economic demands of industrialisation, which involved the promotion of trade, increased migration of the population to the cities, and the urbanisat 13. ion of formerly rural communities, which had to grapple with problems such as sewerage, waste disposal, crime prevention and the provision of housing. All this heralded the gradual introduction of classical administrative structures, which was initiated by reforms in the social sphere.[34] Consequently, over time, a form of competition or rivalry developed in England between centralised and traditional administrative structures[35]

Despite the gradual emergence of centralised administrative structures on the islands, there is still no administrative law in the sense understood in continental Europe. The decisive difference appears to lie in the undisputed status of common law. The guarantees of administrative accountability, realised through judicial review, remain a defining feature of the system there, despite the emergence of a new type of administration with a hierarchical structure. The philosophical rationale behind the centralisation reforms in the English administration also appears to be of extraordinary importance for understanding the notion of administration in England. Whilst in continental Europe the emphasis was on the administration's duty to act lawfully, and

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und der Wiener Schule der Rechtstheorie. In: Erhard Mock – Csaba Varga (ed.): *Rechtskultur – Denkkultur*. Stuttgart, Franz Steiner Verlag, 1989. 165.

32 Horst Dreier: *Hierarchische Verwaltung im demokratischen Staat: Genese, aktuelle Bedeutung und funktionelle Grenzen eines Bauprinzips der Exekutive*. Tübingen, Mohr Siebeck, 1991. 36.

33 Ibid. 36.

34 A pioneering model solution is considered to be the Poor Amendment Act of 1834, which created a new type of social administration that was centralized and efficient. Other administrative matters were left in the hands of traditional local government structures. However, it soon became clear that, due to the lack of uniform procedures, this system was not efficient. That's why in the following years, following the example of the Poor Amendment Act, the functioning of education and healthcare was reformed. See Kenneth Morgan: *The Birth of Industrial Britain: Social Change, 1750–1850*. Harlow, New York, Pearson Longman, 2004. 66.; David Englander: *Poverty and Poor Law Reform in Nineteenth-Century Britain, 1834–1914: From Chadwick to Booth, 1834–1914*. London, Routledge, 2013. https://doi.org/10.4324/9781315840550

35 Loughlin op. cit. 127.

administrative law was viewed as both an instrument of change and a civilisational achievement, in the British Isles Jeremy Bentham's idea of utilitarianism profoundly shaped thinking. This view saw the administration's duty in the context of the effective, efficient and beneficial management of public affairs in accordance with the rules of the free market economy.[36] It appears that, despite the current processes of convergence among administrative systems in Europe, the observed differences remain relevant even today.

## 4. Parliamentary law

However, the new balance of power between the state and society, the unprecedented qualitative and quantitative increase in administrative tasks, and the ever-growing power of the civil service did not constitute the actual foundation of this new form of administration. It was the triumph of parliamentarism in continental Europe during the 19th century that led to the regulation of state administration being gradually and systematically removed from the jurisdiction of kings and rulers and transferred to that of parliament. There, the parliamentary law was, and remains, the fundamental mechanism for regulating constitutional and social relations within the state.

The parliamentary law created the administration and, at the same time, conferred great importance upon it by removing it from the arbitrariness of the (absolute) ruler and subjecting it to the authority of a normative act valid a priori. Furthermore, the parliamentary law was not confined to mere creation, but became a permanent instrument for steering the administration, which was accompanied by the assumption that the administration could be shaped in accordance with the will of the legislature.

A law is the result of Parliament's legislative activity and thus reflects the special status of the legislative power. And here, significant similarities can be observed between the provisions of the English and French systems of that time. Laws were, and continue to be, regarded there as the embodiment of the will of the sovereign people[37], which is why it was, de facto, out of the question to challenge them or call them into

[36] The basic motto of Jeremy Bentham was to achieve happiness for the greatest number of people, and it was not the compliance of administrative actions with the law, but rather the benefit that should be the only criterion for evaluating public actions. According to the philosopher, everything that contradicted utilitarianism should disappear, especially the heterogeneous traditions of local communities or the strong influence of the landed aristocracy. This initiated many administrative reforms, the most important element of which was the introduction of a single organizational model. Bentham's thinking was thoroughly centralist. Efficient action should be served by a system of hierarchical subordination, supported by a mechanism of punishments and rewards, which is supposed to ensure responsible and effective management of public affairs. Administration should be subject to the rules of the economy; road construction or prison management should be handled by the cheapest bidder, who will then be monitored, Nancy L. Rosenblum: *Bentham's Theory of the Modern State*. Cambridge, Mass., Harvard University Press, 1978. 118. – cited in: Loughlin op. cit. 128.

[37] For clarity, let's point out that while the sovereignty of the nation was the main slogan of the French revolution, in England it stood in a kind of opposition to the widely recognized principle of parliamentary sovereignty. This problem was solved by Albert Venn Dicey, who described the parliament as the legal sovereign and the people as the political sovereign, see Tomasz Wieciech: Normatywny wymiar

question in any way, even by an independent ordinary court of law. On the contrary – it was precisely through the case law of the courts in England that the principle of parliamentary sovereignty was developed and consolidated, effectively ruling out the possibility of challenging laws[38]. In France, by contrast, there is no such far-reaching symbiosis between the legislative and judicial branches as exists in the British Isles, since the doctrine of the French Revolution brought about a strict separation of powers, with the clear stipulation that courts should not interfere in the sphere of law-making. The primacy of Parliament is evidenced by the popular designation of France as the 'État légal', proposed by Raymond Carré de Malberg, which suggested that the laws fully embody the will of the sovereign people (volonté générale), which is not subject to the rule of the judges (gouvernement des juges)[39]

In this context, we note the leading role played by Parliament in shaping the model of public administration, whilst the role of the courts as a supervisory body over the activities of the executive in England and France is significantly weakened[40]. The point is that the ordinary courts in England and the administrative courts in France have, from the outset, focused primarily on monitoring the administration's compliance with the limits of its powers (acting ultra vires)[41]. This, in turn, further strengthened the power of the legislature, as no one other than Parliament defined the limits of the administration's powers of action through legislation.

However, the strong position of Parliament did not mean that the courts in either of these states had no influence over the actions of the administration. On the contrary, in England an indirect influence can be observed through the primacy of common law, insofar as any legislative activity had to relate to existing precedents in the

brytyjskiej konstytucji. [The normative dimension of the British constitution]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 74, 2. (2012), 25. https://doi.org/10.14746/rpeis.2012.74.2.2

38 As Tomasz Wieciech points out, 'the principle of parliamentary sovereignty, whose origins go back to the Glorious Revolution of 1688, has survived in Great Britain due to the lack of a constitution in the formal sense. It provided Parliament – it's worth remembering its three-part structure made up of the king, the lords, and the commons – not only with full legislative power but also with legislative omnipotence, meaning that Parliament could make any laws, and its acts could not be effectively challenged by any body or compared under the threat of invalidity with any higher-ranking norms. Even at the end of the 18th century, the prevailing view was that a parliamentary act could not be unconstitutional.'. See Wieciech op. cit. 26.

39 The fear of the realization of judicial rule had already been expressed in literature much earlier, dating back to the Ancien regime, but it was only the principle of parliamentary sovereignty put forward after the revolution that seemed to act as an effective barrier against excessive claims of the judiciary, see Raymond Carre De Malberg: *Contribution à la théorie générale de l'État I.* Paris, Libraire de la Société du recueil sirey, 1920–1922. 493. – cited in: Yoan Vilain: Verfassungsprinzipien. In: Nicolaus Marsch – Yoan Vilain – Mattias Wedel (ed.): *Französisches und Deutsches Verfassungsrecht. Ein Rechtsvergleich*. Berlin–Heidelberg, Springer, 2015. 98. https://doi.org/10.1007/978-3-642-45053-2_3

40 Thomas Würtenberger: Konvergenzen oder Dominanz nationaler Rechtstraditionen in Deutschland und Frankreich. In: Lothar Albertin et all: *Frankreich-Jahrbuch 2001*. Wiesbaden, VS Verlag für Sozialwissenschaften, 2001. 153. https://doi.org/10.1007/978-3-663-10091-1_10

41 Thomas Philip Blunden Rattenbury: The *Ultra Vires* Rule: Its Substance and Significance. In: Stephen H. Bailey et all (ed.): *Public Law within Government*: *From the Post-War Years to the 1980s*. London, Palgrave Macmillan, 2008. 17. https://doi.org/10.1057/9780230583627_2

area of life being regulated[42]. In France, by contrast, administrative law developed primarily through the case law of the Conseil d'État[43], which represented a particular manifestation of the administration's independence not only from the ordinary courts but also from Parliament. The latter aspect highlights the role of the Conseil d'État as a special administrative court with close links to the government[44], which has a significant influence on the nature of the administration in France.

Against the backdrop of the above considerations, the different situation in Germany merits attention. Owing to the lack of democratic legitimacy of the German parliament, the special value of the law could not be derived from the will of the sovereign. Consequently, legal doctrine provided the justification by formulating the concept of the rule of law, which derives the special value of the law not from the 'charisma of parliament' but from the characteristics inherent in the law itself. This concerns, in particular, the law's abstract character, its a priori nature, predictability and verifiability, which in turn constitute the formal prerequisite for effectively guaranteeing the rights of the individual, in particular equality before the law and freedom. Alongside the law, institutional safeguards in the form of review by specialised administrative courts took on particular significance.

The idea of the Rechtsstaat represents the German response to the achievements of the French Revolution**,** adapted to the liberal tenets of the constitutional monarchy[45]. The law thus did not reflect any special status of Parliament vis-à-vis other branches of government; rather, the Rechtsstaat also aimed to restrict the legislature within the

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[42] Describing this relationship, Jan Jeżewski cites the opinion of Henry W. R. Wade, who pointed out that: ‚in England, the principles of administrative law cannot be derived from the constitution, venerated with universal respect; they are found by examining the ways in which courts interpret various statutes and looking for logical connections between different types of judgments'. See Jan Jezewski: Zasada rule of law jako aksjologiczne kryterium działania administracji państw członkowskich Unii Europejskiej. [The rule of law as an axiological criterion for the actions of the administrations of European Union Member States]. In: Janusz Sługocki (ed.): *Dziesięć lat polskich doświadczeń w Unii Europejskiej. Problemy prawnoadministracyjne.* [Ten Years of Polish Experience in the European Union. Legal and Administrative Issues]. Vol. I. Wrocław, Presscom, 2014. 19. See also Hubert Izdebski: *Fundamenty współczesnych państw.* [The Foundations of Modern States]. Warszawa, LexisNexisPolska, 2007. 91.

[43] It's about the issuance by the Conseil d'État of so-called general principles of law, which are not expressed in positive law (principes généraux applicables même en l'absence de texte). In the absence of relevant legal regulations, the Conseil d'État takes on a norm-creating role, classifying a certain principle as part of the general principles, whose binding power comes from being recognized by the judge. See Hubert Izdebski: Francuska Rada Stanu. [The French Council of State]. *Zeszyty Naukowe Sądownictwa Administracyjnego* 1, (2005), 137–140.

[44] In this context, Polish administrative scholar Jerzy Stefan Langrod wrote about the 'praetorian' nature of the Conseil d'État's adjudicative activity, see Jerzy Stefan Langrod: *Zarys sądownictwa administracyjnego: ze szczególnym uwzględnieniem sądownictwa administracyjnego w Polsce.* [An Overview of Administrative Justice: With Particular Reference to Administrative Justice in Poland]. Warszawa, Instytut Wydawniczy 'Bibljoteka Polska", 1925. 119.

[45] The concept of the 'Rechtsstaat' was developed as a German response not only to the achievements of the revolution, but also to the ideas of Jean-Jacques Rousseau. Yoan Vilain rightly observes: ‚Ob nun als formelles oder als materielles Konzept, der Rechtsstaat bildete sich als deutsche Reaktion auf die Rousseauschen Ideen der französischen Revolution vom «Volksstaat» und von der Volkssouveränität', see Vilain op. cit. 95–96.

scope of its lawful activities. As a result, the justification for the law was seen in the mission of self-restraint of the state and all state power. With regard to administration, the law was considered an effective tool to bind the administration to the law and to protect individuals from unjustified interference in their rights and freedoms. According to Otto Mayer, the Rechtsstaat is nothing other than a ‚state of orderly administrative law'[46].

## 5. Final remarks

In summary, it should be noted that a common element in all the countries discussed is the emphasis on the need for the administration to act according to the law, specifically parliamentary law. This indicates a general recognition of the principle of legal order in a formal sense. While, due to cultural differences, the concept of Rechtsstaat at that time cannot be compared to the rule of law, not to mention that in France there was not yet any talk of État de droit, but rather État légal, there was a general belief in the need to create a system of safeguards to make the administration a predictable entity responsible for acting in accordance with the law.

Emphasizing the formal aspects of the rule of law more strongly means an instrumental approach to exercising power through laws (the law-based state) – which is the opposite of the rule of law – and therefore implies an instrumental approach to administration and governance. The central role is taken by the law, which, according to the will of parliament, can carry any content and any values[47]. So even a dictatorship – if it meets the formal requirements – will be called a rule-of-law state[48]. During the period when modern states were taking shape on the continent, the formalistic view of the idea of the rule of law dominated, thanks to the spread of the principles of legal positivism, which in its most radical form was reflected in the so-called pure theory of law (Reine Rechtslehre). In the views expressed by Hans Kelsen at the beginning of the 20th century, the state and law form a single unified whole, which in practice meant an automatic labeling of any state entity as a rule-of-law state.[49]

In this sense, we should be critical of judging administrative actions solely from the perspective of faithfully following parliamentary laws. It's only by emphasizing the

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[46] According to the words of Otto Mayer: ‚Der Rechtsstaat ist der Staat eines wohlgeordneten Verwaltungsrechts', see Otto Mayer: *Deutsches Verwaltungsrecht.* Vol. I. 3rd ed. München, Verlag von Duncker & Humblot, 1924. 58.

[47] Joseph L. De Lolme spoke vividly on this subject, stating – unable to imagine the development of medicine in our times, especially genetics – that 'it is a fundamental principle with the English Lawyers, that Parliament can do every thing, *except* making a Woman a Man, or a Man a Woman. See Joseph L. De Lolme: *The Constitution of England*. 4th ed. London, G. Robinson and J. Murray, 1784. 134.

[48] In this regard, Hubert Izdebski gives the example of the Prussian state, where, despite meeting the formal requirements of the rule of law, the rights of national minorities were discriminated against, see Hubert Izdebski: *Historia administracji* [History of the administration]. 5th ed. Warszawa, Liber, 2001. 95.

[49] Hans Kelsen: *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*. Leipzig-Wien, Franz Deuticke, 1934. 16.

material aspects of the rule of law that we can see the importance of the individual's perspective and the protection of their rights. While in a ius politiae regime, the individual was seen more as a 'subject,' the laws made in parliament should look at authority as serving the individual and take into account the concept of the public interest. From this perspective, the main slogan and guiding principle of subjecting administration to the rule of law during the formation of modern states was to guarantee individuals freedom and equality before the law. We should therefore note that administrative law is not the law of administration, even that chosen in democratic elections, as is the case with local government bodies. It is the law of the people and for the people, who agree to the administration functioning on their behalf and for the common good, fairly balanced with the good of the individual.

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# JUDICIAL ACTIVISM AND THE MULTICENTRICITY OF THE LEGAL SYSTEM

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**Abstract**

Judicial activism arises when a judge makes a choice that reflects his or her own decision rather than a choice determined by the legislator. In judicial activism of a political nature, courts assume responsibility for resolving social problems, often through hidden activism, presenting judicial choices as if they were compelled by legal provisions. Such activism challenges the separation of powers by replacing legislative value judgments with judicial ones while portraying them as constitutionally mandated. It has created a new dimension of legal multicentricity: rather than coexisting, the judicial branch competes with the legislative branch within the same normative space. In this confrontational model, courts effectively displace legislative decisions with judicially created norms claimed to derive from the Constitution.

**Keywords:** judicial activism, multicentricity of the legal system, hidden activism, separation of powers, judicial branch

## 1. Introduction. The contemporary significance of judicial activism

On 20 March 2026, the Polish Supreme Administrative Court issued a judgment ordering the transcription of a marriage certificate concerning a same-sex marriage concluded in Germany[1]. Polish law does not permit same-sex marriages; however, the transcription of a marriage certificate concluded abroad would, in effect, result in the recognition of a same-sex marriage in Poland as well. The judgment of the Supreme

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1 Judgment of the Polish Supreme Administrative Court of 20 March 2026, II OSK 216/21, https://orzeczenia.nsa.gov.pl/doc/CE82955F7B

Administrative Court was delivered with reference to the judgment of the Court of Justice of the European Union of 25 November 2025[2], in which the Court held that the provisions of the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights must be interpreted as precluding legislation of a Member State which, on the ground that the law of that Member State does not allow marriage between persons of the same sex, does not permit the recognition of a marriage between two same-sex nationals of that Member State concluded lawfully in another Member State.

These judgments have generated controversy in Poland, and the Polish government has initially refrained from amending domestic legislation to allow for the technical transcription of a marriage certificate between two persons of the same sex. Following the judgment of the Court of Justice of the European Union, the Polish Prime Minister Donald Tusk, regarded as a liberal and pro-European politician (having served as President of the European Council for five years), stated that *no one will impose anything on us in this matter*, and that issues concerning the status of same-sex unions should be regulated in a manner *that the majority of Poles, through a parliamentary majority, considers appropriate*[3]. After several months, however, this position changed in response to growing socio-political pressure. In May 2026, the Prime Minister instructed that a regulation be prepared to permit the transcription of same-sex marriage certificates[4]. The regulation was subsequently issued by the Minister of Digital Affairs on 22 May 2026[5].

The judgments mentioned above constitute examples of rulings through which courts establish general norms governing issues of social life with strong axiological overtones, generating significant social disputes and controversy. Both in Poland and abroad, such judgments have often concerned matters such as same-sex marriage or the permissibility of abortion. Such judgments include, inter alia:

– the 1973 judgment of the United States Supreme Court in *Roe v. Wade*, according to which the Constitution guarantees a woman's right to terminate her pregnancy[6];

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[2] Judgment of the Court of Justice of the European Union of 25 November 2025, C-713/23, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62023CJ0713

[3] *Premier Tusk o wyroku TSUE: nikt niczego w tej sprawie nie będzie nam narzucał.* [Prime Minister Tusk on the CJEU judgment: no one will impose anything on us in this matter]. 2025. https://www.pap.pl/aktualnosci/premier-tusk-o-wyroku-tsue-nikt-niczego-w-tej-sprawie-nie-bedzie-nam-narzucal. (Accessed on: 12 July 2026).

[4] *Premier o transkrypcji aktów małżeństw jednopłciowych: to nie otwiera możliwości adopcji.* [Prime Minister on the transcription of same-sex marriage certificates: this does not open the possibility of adoption]. 2026. https://www.pap.pl/aktualnosci/premier-o-transkrypcji-aktow-malzenstw-jednoplciowych-nie-otwiera-mozliwosci-adopcji. (Accessed on: 12 July 2026).

[5] Regulation of the Minister of Digital Affairs of 22 May 2026 amending the Regulation on the Standard Forms of Documents Issued for Civil Status Registration, Dz.U.2026.667, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20260000667/O/D20260667.pdf.

[6] Judgment of the United States Supreme Court of 20 January 1973, *Roe v. Wade,* 410 U.S. 113, https://supreme.justia.com/cases/federal/us/410/113/.

- the 2022 judgment of the United States Supreme Court in *Dobbs v. Jackson Women's Health Organization*, according to which the Constitution does not confer a right to abortion[7];
- the 2015 judgment of the United States Supreme Court in *Obergefell v. Hodges*, according to which the Constitution requires a State to license a marriage between two people of the same sex[8];
- the 1997 judgment of the Polish Constitutional Tribunal, according to which unconstitutional was a regulation permitting termination of pregnancy on the ground that a pregnant woman found herself in difficult living conditions or a difficult personal situation[9];
- the 2020 judgment of the Polish Constitutional Tribunal, according to which unconstitutional was a regulation permitting termination of pregnancy on the ground of a high probability of severe and irreversible fetal impairment or an incurable illness threatening the fetus's life[10].

These judgments are commonly regarded as manifestations of judicial activism. For the purposes of this article, judicial activism is understood in accordance with the definition proposed by Lech Morawski, according to which it arises when a judge makes a choice that reflects his or her own decision rather than a choice determined by the legislator[11]. It should be noted, however, that the concept of judicial activism has been defined in a variety of ways in the literature and remains the subject of considerable scholarly debate. A detailed discussion of these definitional issues falls outside the scope of the present analysis.

## 2. Multicentricity as a consequence of judicial activism of a political nature

Judicial activism is a phenomenon that is inevitable and cannot be wholly avoided. At the same time, it is highly diverse. It is difficult to criticize judicial activism consisting in filling legal gaps where the law is silent and a decision must nevertheless be made. Criticism should, however, be directed at judicial activism of a political nature, in which courts assign themselves the role of resolving social problems[12], often assuming

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7 Judgment of the United States Supreme Court of 24 June 2022, *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, https://supreme.justia.com/cases/federal/us/597/19-1392/.

8 Judgment of the United States Supreme Court of 26 June 2015, *Obergefell v. Hodges,* 576 U.S. 644, https://supreme.justia.com/cases/federal/us/576/644/.

9 Judgment of the Polish Constitutional Tribunal of 28 May 1997, K 26/96, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=3100.

10 Judgment of the Polish Constitutional Tribunal of 22 October 2020, K 1/20, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=22412.

11 Lech Morawski: Zasada trójpodziału władzy. Trybunał Konstytucyjny i aktywizm sędziowski. [The tripartite division of powers principle. The Constitutional Tribunal and judicial activism]. *Przegląd Sejmowy*, 4. (2009), 65.

12 Bogusław Banaszak: Aktywizm orzeczniczy Trybunału Konstytucyjnego. [Judicial activism of the Constitutional Tribunal]. *Przegląd Sejmowy,* 4. (2009), 75.

the form of hidden activism, referring to the attitude of a judge who presents his or her decision as deriving from legal provisions while knowing that it is in fact the result of his or her own choice[13]. This type of activism appears to constitute a violation of the principle of separation of powers, according to which the making of generally binding law – often involving axiological choices intended to reflect the will of society – is the role of the legislative branch.

Judicial activism of a political nature appears to have resulted in the emergence of another dimension of the multicentricity of the legal system. The multicentricity of the legal system is generally understood as a situation in which different centers may, in a binding manner, fill through their activity the same legal space[14]. Traditionally, multicentricity has been studied primarily in the context of the same legal space being filled by the domestic legislator and the EU legislator. Unlike this dimension of multicentricity, the filling of the same legal space by the legislative and judicial branches is confrontational rather than coexistential in nature[15]. The judiciary leads to the annihilation of decisions made by the legislature, replacing them with its own norms, while presenting them as allegedly rooted in the Constitution.

## 3. The legal foundations of judgments reflecting judicial activism

It is therefore necessary to examine which constitutional provisions were (allegedly) contradicted by the regulations challenged in the aforementioned judgments.

### 3.1. Judgment of the Supreme Court of the United States of 1973 in Roe v. Wade

The Supreme Court held that:

> *State criminal abortion laws [...] that except from criminality only a life-saving procedure on the mother's behalf, without regard to the stage of her pregnancy and other interests involved, violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy*[16].

In accordance with the the Due Process Clause of the Fourteenth Amendment to the United States Constitution: *nor shall any State deprive any person of life, liberty,*

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13 Morawski op. cit. 66.

14 Ewa Łętowska: Multicentryczność współczesnego systemu prawa i jej konsekwencje. [The multicentricity of the contemporary legal system and its consequences]. *Państwo i Prawo,* 4. (2005), 4.

15 Cf. Artur Kotowski: Zjawisko multicentryczności systemu prawa z perspektywy koncepcji integracyjnej. [The phenomenon of legal system multicentricity from the integrative concept perspective]. *Studia Prawnicze,* 4. (2015), 103–104. https://doi.org/10.37232/sp.2015.4.4

16 Judgment of the Supreme Court of 20 January 1973, *Roe v. Wade,* 410 U.S. 113, https://supreme.justia.com/cases/federal/us/410/113/.

*or property, without due process of law*[17]. This clause has been interpreted by the U.S. Supreme Court as providing numerous protections extending beyond procedural safeguards.

### 3.2. Judgment of the Supreme Court of the United States of 2022 in Dobbs v. Jackson Women's Health Organization

The Supreme Court held that: *The Constitution does not confer a right to abortion*. In the majority opinion, Justice Samuel Alito stated that: *That provision [the Due Process Clause of the Fourteenth Amendment] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty.*[18]*"*

The comparison between 1973 and 2022 clearly demonstrates that, although the constitutional text, including the Fourteenth Amendment and the Due Process Clause, remained unchanged, its interpretation by the Supreme Court differed fundamentally over time.

### 3.3. Judgment of the Supreme Court of the United States of 2015 in Obergefell v. Hodges

The Supreme Court held that: *The Fourteenth Amendment requires a State to license a marriage between two people of the same sex*[19].

Here, too, the Due Process Clause of the Fourteenth Amendment served as the constitutional foundation for the Court's reasoning. The Court's reliance on the Due Process Clause illustrates the extent to which its broad and indeterminate wording may serve as a basis for recognizing virtually any protection the Court chooses to incorporate within its scope.

### 3.4. Judgment of the Polish Constitutional Tribunal of 1997

The Constitutional Tribunal held that a regulation permitting the termination of pregnancy on the grounds that the pregnant woman was in difficult living conditions or a difficult personal situation was inconsistent with Article 1 and Article 79(1) of the provisions of the 1952 Constitution that remained in force[20]. Article 1 provided that:

> *The Republic of Poland shall be a democratic state governed by the rule of law, implementing the principles of social justice*, while the Article

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[17] The Constitution of the United States of America, Amendment XIV (1868), https://www.senate.gov/civics/resources/pdf/US_Constitution-Senate_Publication_103-21.pdf.

[18] Judgment of the Supreme Court of 24 June 2022, *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, https://supreme.justia.com/cases/federal/us/597/19-1392/.

[19] Judgment of the Supreme Court of 26 June 2015, *Obergefell v. Hodges,* 576 U.S. 644, https://supreme.justia.com/cases/federal/us/576/644/.

[20] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=3100.

> 79(1) stated that: *Marriage, motherhood, and the family shall be under the protection and care of the Republic of Poland. Families with many children shall receive special care from the State*[21].

### 3.5. Judgment of the Polish Constitutional Tribunal of 2020

The Constitutional Tribunal held that a regulation allowing termination of pregnancy due to a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life was inconsistent with Article 38 of the Constitution of the Republic of Poland of 1997[22]. Article 38 provides that: *The Republic of Poland shall ensure the legal protection of the life of every human being*[23].

Especially striking was the Tribunal's derivation, in its 1997 judgment, of the prohibition of abortion on the grounds that the pregnant woman is in difficult living conditions or a difficult personal situation from the clause of a democratic state governed by the rule of law. Addressing this issue, Ryszard Bugaj – a member of the Constitutional Committee of the National Assembly that drafted the new constitution adopted in 1997 – stated:

> *had we known that the Tribunal would, on the basis of the article stating that the Republic is a state governed by the rule of law, challenge the provision on the right to terminate pregnancy on so-called social grounds, we probably would not have included this article in the Constitution at all*[24]. Referring to other rulings of the Tribunal that were likewise only tenuously grounded in the constitutional text, Bugaj argued: *When reading the Tribunal's judgments [...], I rubbed my eyes and wondered whether, when voting for the Constitution, I was in full possession of my mental faculties. [...] The content of constitutional norms is of little importance. What matters is who sits on the Tribunal. Strictly speaking, everything depends on the views held by the majority of judges (sometimes a very narrow one)*[25].

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[21] Announcement of the Chairman of the Council of State of 16 February 1976 on the publication of the consolidated text of the Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952, Dz.U.1976.7.36, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19760070036/O/D19760036.pdf. Act of 29 December 1989 amending the Constitution of the Polish People's Republic, Dz.U.1989.75.444, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19890750444/T/D19890444L.pdf.

[22] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=22412.

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[25] Ryszard Bugaj: Trybunał Konstytucyjny, czyli trzecia izba parlamentu. [The Constitutional Tribunal: the third chamber of parliament]. *Rzeczpospolita,* 91. (2011), A15.

## 4. The distinctive features of multicentricity resulting from judicial activism

Each of the judgments discussed above was delivered within a distinct legal and institutional context and could warrant a separate analysis. Such an examination, however, falls beyond the scope of the present article. It is nevertheless worth reiterating that, in my view, these judgments exemplify a broader judicial tendency to invalidate legislative choices and replace them with standards formulated by the judiciary and presented as deriving from the Constitution. From this perspective, they illustrate a form of multicentricity in which the judiciary seeks to occupy the same normative space as the legislaturę, doing so in a confrontational manner.

It is important to recognize that the relationship between the legislative and judicial branches as centres occupying the same normative space is inherently asymmetrical.

(1) The legislative branch possesses direct democratic legitimacy – it is explicitly empowered by the people (the sovereign) to enact generally binding law, which often involves making controversial and axiologically significant decisions. The judiciary lacks such legitimacy.

(2) Statutes enacted by the legislature are the outcome of a legislative procedure in which proposed provisions are subjected to various forms of consultation, enabling different groups and actors in social life to present their views. If proposed solutions are manifestly contrary to public opinion, various forms of social opposition may lead to the abandonment of controversial solutions. Judgments issued by the judiciary, by contrast, are rendered in a manner that excludes or substantially limits the expression of society's voice. This, moreover, follows from the very nature of the judiciary, which renders judgments not on the basis of the will of society but on the basis of determining what (allegedly) follows from legal provisions. This is obvious in the context of resolving individual cases, but not in the context of formulating general norms.

(3) Decisions of the legislature – as noted – may be overturned by the judiciary. Decisions of the judiciary resulting in the formulation of general norms, however, are difficult for the legislature to challenge. The recognition that general norms resulting from judicial decisions are in fact rooted in the Constitution (which is often highly questionable) essentially means that changing them would require constitutional amendment.

(4) Legislative bodies are elected for fixed terms; their members may seek re-election and are politically accountable to voters for their decisions. In courts and tribunals that formulate general norms, judges are sometimes appointed for an indefinite period (the U.S. Supreme Court) or for long, non-renewable terms (the Polish Constitutional Tribunal – 9 years). There is no political accountability, nor should there be – such accountability is, in principle (with some exceptions), incompatible with the judicial branch. The just resolution of disputes may often be unpopular with the public. However, it seems that in a democratic state, those who make decisions on general matters, significantly affecting the functioning of society and the lives of individuals, should bear political responsibility. In his dissenting opinion to the 2020 judgment of the Constitutional Tribunal, Judge Leon Kieres stated: *The Tribunal has a strictly*

> *defined constitutional function. It is not a legislative body and cannot replace members of parliament in making controversial decisions and bearing the associated responsibility before the electorate*[26].

The increasing prominence of judicial activism of a political nature has contributed to a growing perception of courts and tribunals formulating general norms, such as supreme courts and constitutional courts, as political institutions. Consequently, in many jurisdictions, considerable attention is devoted to the appointment of judges with clearly identifiable political or ideological orientations, based on the expectation that their judicial decisions will reflect those orientations. In some instances, politically constituted courts and tribunals are relied upon to resolve issues that would otherwise require legislative action, thereby enabling politically contentious decisions to be made without the electoral accountability ordinarily borne by the legislature. To the extent that courts and tribunals engage in the formulation of general norms, they may be regarded as performing functions analogous to those of a supra-legislature or a de facto third chamber of parliament. From this perspective, such developments raise serious concerns regarding the principle of the separation of powers. Illustratively, information concerning the political affiliation of judges is publicly available in relation to the supreme courts of U.S. states[27].

## 5. Conclusions. Addressing the risks associated with judicial activism

The foregoing considerations raise the question of how the risk of courts and tribunals encroaching upon the domain constitutionally assigned to the legislature may be addressed. At the outset, it should be emphasized that judicial review of the hierarchical conformity of normative acts remains an indispensable component of a constitutional legal order. Review of the constitutionality of statutes and of the legality of executive acts constitutes an essential safeguard of the rule of law.

In my view, however, such jurisprudence should be more balanced. The opposite stance to judicial activism is judicial restraint. As Richard Posner has pointed out, judicial restraint is based on deference and reticence[28]. The deferential approach consists in avoiding conflicts with the decisions of other branches of government, while the reticent approach is founded on the assumption that judges should not be making policy decisions. Accordingly, under judicial restraint, judges respect the decisions of elected representatives, assuming laws are constitutional unless proven otherwise.

At the same time, reliance on judicial restraint alone cannot provide a sufficient institutional safeguard, as such restraint ultimately depends on the interpretive approach

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[26] Dissenting opinion by Judge Leon Kieres to the judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=22412.

[27] *State supreme courts in the United States*. https://en.wikipedia.org/wiki/State_supreme_courts_in_the_United_States (Accessed on: 12 July 2026).

[28] Richard A. Posner: *The federal courts: challenge and reform*. Cambridge, Harvard University Press, 1996. 314 ff.

adopted by individual judges. The central issue, therefore, is whether the legal system can provide institutional mechanisms capable of limiting judicial encroachment upon matters reserved to the legislative branch.

One possible solution might be a regulation that existed in Poland before 1997, that is, before the new Constitution came into force. Under the provisions in force at that time, if the Constitutional Tribunal has issued a ruling that a statute is inconsistent with the Constitution the Sejm (the lower house of the Polish parliament) could:

- recognize a ruling as justified – in which case it would make appropriate amendments to the act covered by the ruling or repeal it in whole or in part;
- recognize the act covered by the ruling as consistent with the Constitution – in which case it would dismiss the ruling of the Constitutional Tribunal[29].

The possibility of dismissing a ruling of the Tribunal allowed the Sejm to prevent unjustified encroachment by the Tribunal into the sphere of establishing general norms.

One possible objection to the foregoing solution concerns the situation in which the legislature itself openly enacts statutes that are inconsistent with the Constitution. Under such circumstances, a legislature unwilling to comply with judgments declaring statutes unconstitutional could effectively deprive the constitutional tribunal (or, in other jurisdictions, the supreme court) of its role in the constitutional system. This objection must, however, be considered in a broader institutional context. A legislature prepared to enact legislation in manifest disregard of constitutional constraints is likely to make every effort to neutralise the constitutional court or the supreme court, primarily by subordinating it. Indeed, comparative constitutional experience suggests that legislatures prepared to disregard constitutional constraints frequently seek not only to circumvent constitutional review but also to capture the institutions entrusted with exercising it. In such circumstances, even the most carefully designed legal safeguards are of limited practical significance if the independence of the judiciary and its constitutionally guaranteed institutional autonomy are not respected.

At the same time, it should not be overlooked that the judiciary likewise bears responsibility for preserving the constitutional balance of powers. By refraining from judicial activism of a political nature and respecting the constitutional limits of its own authority, the judiciary contributes to maintaining the integrity of the principle of the separation of powers.

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# BETWEEN AUTONOMY AND OBSTRUCTION

## *A Theoretical Framework for Constitutional Court Independence*

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**Abstract**

This study analyzes the structuaral vulnerabilities of constitutional courts operating between legal doctrine and political power. Protecting constitutional adjudication requiers a dual layer of safeguards: institutional autonomy and personal guarantees to shield the members of the constitutional courts from political pressure. Evaluating comparative appointment models, the paper highlights a key shift in moder autocratization: overt court-packing is increasingly replaced by procedural obstruction, where political actors deliberately leave judicial seats vacant to paralyze the court. Applying a certain methodological technique, the legitimacy algorithm to gridlock-breaking measures, the study concludes that any unilaterl reform bypassing cross-party consensus and independent expert consultation lacks institutional legitimacy, degrading intended constitutional repair into a form of court-packing.

**Keywords:** constitutional courts, judicial independence, appointment models, thwarting strategy, court-packing, legitimacy algorithm.

### 1. Introduction

The institutional design and systemic survival of constitutional courts represent one of the most complex challenges in contemporary comparative constitutional law. Positioned at the critical intersection of law and political power, these bodies act as the ultimate guardians of constitutional democracy and the rule of law. However, because constitutional review inherently operates as a check on political actors, these actors frequently attempt to exert influence over the composition of the court. The structural

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interface through which politics attempts to engage with – or capture – constitutional tribunals is the judicial appointment mechanism. Ensuring that these selection procedures populate the bench with competent jurists without compromising the core independence of the institution remains a delicate balancing act for constitutional democracies worldwide.

While conventional legal scholarship thoroughly explores overt political interventions – such as structural 'court-packing' or radical legislative overhauls – contemporary autocratization and populist governance have given rise to subtler, more sophisticated strategies of institutional subversion. Rather than expanding court seats to alter judicial majorities, non-cooperative political actors increasingly weaponize existing consensus requirements to trigger a 'thwarting strategy.' By deliberately refusing to participate in nominations and keeping judicial seats vacant, political factors can effectively paralyze a constitutional court from within, transforming formal constitutional guarantees into tools of institutional blockade.

To comprehensively unpack these systemic vulnerabilities, this paper provides a multi-layered theoretical and dogmatic analysis. First, it establishes the normative foundations of constitutional adjudication, mapping out the multi-dimensional international recommendations and European standards that define judicial independence. Second, it distinguishes between the institutional, operational, financial, and personal dimensions of independence, assessing how these principles are structurally operationalized within constitutional frameworks. Third, the study explores the comparative landscape of selection mechanisms, developing a typology that synthesizes the 'split', 'collaborative', and 'pure parliamentary' appointment models. Finally, utilizing Kosař and Šipulová's legitimacy algorithm, this paper analyzes the modern paradigm of court-packing and procedural obstruction, offering a normative flowchart to distinguish between pathological political interference and legitimate institutional repair in constitutional democracies.

## 2. The independence of the constitutional courts

Independence of constitutional courts is highly relevant because to understand how these bodies protect constitutional rules from everyday political pressure, we must look at their independence through two distinct layers: how the court is protected as an institution, and how individual judges are shielded from political interference. While international standards provide a general blueprint for these protections worldwide, the actual strength of any court depends on how these two layers are put into practice. To map this out, this chapter analyzes the global standards of judicial independence, details the institutional and financial pillars of high courts, and examines the personal protections and selection mechanisms that keep judges free from political influence.

Regardless of whether a given state's system of constitutional review operates under a centralized or decentralized model, the independence of the body performing this

function from other branches of power is essential.[1] One of the primary reasons for this is that constitutional review is „one of the most important instruments of democracy and constitutionality" within a state structure.[2] Their existence is one of the ultimate guarantees of democratic systems of governance.[3] Imre Takács's thoughts, as cited by Csaba Erdős, further substantiate the significance of the constitutional court's independence, explaining that „after the separation of powers, constitutional review is the most vital guarantee of the rule of law, ensuring that an independent court (or similar body) stands guard[4] over the preservation of constitutionality".[5] As Péter Tilk puts it: „outside the legislative, executive, and judicial branches, this body constitutes the fourth branch of power".[6] This is also expressed by Géza Kilényi, who explains that the court „thinks on a different scale and judges matters differently than a parliament subjected to compromises born of daily skirmishes, or a Government that is not infrequently forced into firefighting mode".[7]

There are numerous dimensions to the independence of constitutional review. Several international organizations and European Union institutions have issued positions regarding the requirements that must be met to consider a constitutional court independent. As shown in the table below (Table 1), these requirements are also incorporated into standards and recommendations formulated by numerous international bodies.

Regarding the cited recommendations, it is important to note that, in line with international literature, these recommendations apply to the independence of bodies performing constitutional review. However, under a decentralized model, this activity is often carried out by bodies belonging to the judicial branch; therefore, certain elements of the recommendations warrant an expansive interpretation, and their substance should be applied to constitutional courts operating within a centralized model as well.

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| Council of Europe[8] | UN High Commissioner for Human Rights[9] | Venice Commission[10] |
|---|---|---|
| Independence of judicial councils. | Impartial decision-making, free from external pressure. | Constitutional-level guarantee of judicial independence. |
| Efficiency of justice and the provision of resources. | Adjudication is performed exclusively by the court. | Legality of appointment and promotion. |
| Adequate system of selection. | As a general rule, judicial decisions are not subject to review. | Term of appointment. |
| Immunity, disciplinary proceedings, and ethics. | Providing adequate resources for the operation of the judicial system. | Irremovability and disciplinary matters. |
| | Conducting judicial proceedings in accordance with the proper rules of procedure | Salaries and allowances. |
| | Freedom to form judicial associations. | Freedom from undue external influence. |
| | Appropriate conditions for qualification, selection, and training. | Independence within the judiciary. |
| | Disciplinary liability, suspension, and removal from office. | Non-interchangeability of judicial and prosecutorial positions. |

*Table 1 - Elements of the independence of constitutional court judges in the recommendations of certain international organizations.*

According to the co-authors Chronowski and Drinóczi, we can distinguish between institutional, operational, financial, and organizational independence regarding the constitutional court as a body, as well as personal, political, and professional independence regarding the individual constitutional court judges.[11]

## 2.1. The institutional independence of the constitutional courts

Most modern constitutions do not necessarily contain an explicit provision that verbatim declares the organizational independence of the constitutional court as a body from other actors within the state structure. At the same time, the framers' intention to this effect can be clearly deduced from the structure of the normative text, provided

8 Rafal Manko: *Standards of Judicial Independence*. Council of Europe. 2021.

9 Basic Principles on the Independence of the Judiciary. General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. United Nations.

10 CDL–JD(2008)002 *European Standards on the Independence of the Judiciary*. Venice Commission, Strasbourg, October 3, 2008.

11 Nóra Chronowski – Tímea Drinóczi: Alkotmánybírói függetlenség Európában. És Magyarországon? [Judicial Independence of Constitutional Judges in Europe. And in Hungary?]. *Közjogi Szemle*, 3. (2010), 26–27.

that the regulations governing the body appear within an entirely separate, autonomous chapter inside the constitution – in a manner similar to how the regulations concerning other supreme constitutional organs are isolated. Statutes detailing the status of constitutional courts usually formally declare that the body, as the supreme interpreter of the constitution,[12] is independent of other constitutional organs and is subject only to the constitution and to its own governing legislation (the so-called principle of external or institutional independence).

The organizational independence of the body is closely linked to this, manifesting itself concretely in institutional and operational autonomy. Accordingly, a constitutional court is entitled – within the framework established by the constitution and the law – to adopt its own rules regarding its organization and operation (rules of procedure).[13] The exercise of administrative and employer authority by the president of the court over the clerk-officer corps and the professional staff serves[14] as another fundamental administrative guarantee, which prevents the executive branch (for instance, via the ministry of justice) from exerting direct influence over the court's internal personnel.

Independence does not, however, imply unrestricted, unchecked activity. Being bound absolutely by the constitution, the binding force of prior decisions (the nature of self-binding precedent or *stare decisis* ensuring legal certainty),[15] and being bound by the scope of the petition strictly delimit the functional room for maneuver of constitutional adjudication. Although the questions of *res iudicata* and precedential effect are regulated differently across various legal systems, constitutional court acts usually maintain strict internal procedural safeguards for instances where the body wishes to depart from its own established jurisprudence; in such cases, the matter must be referred to the full court (plenary session) of the body.[16] This internal mechanism ensures the predictability of legal interpretation and insulates the tribunal from sudden shifts driven by changing political climates.

The fourth, and practically most critical, element of institutional independence is financial autonomy.[17] As anchored in international standards – including the recommendations of the Venice Commission and the Council of Europe – the body must be independent not only legally but also financially, given that its operation requires an adequate and stable budgetary background that ensures the permanent and undisturbed

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12 Cf.: Luis Alejandro Silva Irarrázaval: ¿Es el Tribunal Constitucional el supremo intérprete de la Constitución? *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* 38, 1. (2012), 573–616.

13 László Klicsu – Endre Orbán – Kinga Zakariás: Az Alkotmánybíróság hivatali szervezete. [The Organizational Structure of the Office of the Constitutional Court]. In: Kinga Zakariás (ed.): *Az alkotmánybírósági törvény kommentárja*. [Commentary on the Act on the Constitutional Court]. Budapest, Pázmány Press, 2022. 215.

14 Act CVII of 2019 on Bodies with Special Legal Status and the Status of Their Personnel 22(1).

15 Decision 4/2013 (II. 21) of the Hungarian Constitutional Court. DO. 142.

16 E. g. Act CLI of 2011 on the Constitutional Court 48/A, 49(6b), 50(2f).

17 Chronowski–Drinóczi op. cit. 27.

functioning of the court.[18] According to the relevant theoretical and comparative models, the primary guarantee of this is that the budget of the constitutional court forms an entirely autonomous section within the general state budget act, and furthermore, that it is the legal obligation of the reigning government to provide the funds[19] required for the proper functioning of the body. The main procedural hallmark of this autonomy is that the constitutional court, as a sovereign constitutional organ, drafts and compiles its own budgetary requests. Under the authorization of the president, this task of planning,[20] execution, and accounting is typically carried out by the secretary-general or the court's internal administrative office, while the draft is adopted by the full court under its own authority before it integrates – without substantive alterations – into the annual budget bill presented to parliament.

### 2.2. The personal independence of the members of the constitutional courts

Another critical dimension of ensuring the overall autonomy of constitutional courts is the personal independence of the individual members of the tribunal.[21] This baseline is secured through a matrix of institutional, professional, and financial guarantees designed to buffer judges from external political friction. To mitigate political patron-client dynamics during the selection process, contemporary constitutional frameworks implement strict professional and eligibility criteria. Requiring candidates to possess recognized judicial, academic, or legal expertise alongside a substantial minimum threshold of senior professional experience reduces arbitrary, purely partisan appointments.[22] Once appointed, judicial irremovability acts as the primary shield for personal independence. To preserve this continuity, members are typically appointed for a long, fixed, non-renewable term – commonly ranging from nine to twelve years – which decouples their judicial performance from the political cycles of legislative majorities.[23] Under standard rule-of-law frameworks, the early termination of a judge's mandate cannot be triggered by political bodies. Outside of natural causes such as death or voluntary resignation, any dismissal or suspension must remain strictly within the internal purview of the court itself, typically requiring a high, qualified majority

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18 See: László Sólyom: The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary. International Sociology 18, 1. (2003), 133., 135. https://doi.org/10.1177/0268580903018001008.

19 CCJE(2001)OP2 *Opinion No. 2 (2001) on the Funding and Management of Courts with Reference to the Efficiency of the Judiciary*. Consultative Council of European Judges, Strasbourg, 23 November, 2001. paras. 3–5.

20 CDL-AD(2010)004 *Report on the Independence of the Judicial System: Part I - The Independence of Judges*. Venice Commission, Strasbourg, 13 March, 2010. 53–55.

21 Chronowski–Drinóczi op. cit. 26–27.

22 See András Bragyova: *Az alkotmánybíráskodás elmélete.* [The Theory of Constitutional Adjudication]. Közgazdasági és Jogi Könyvkiadó, Budapest, 1994. 112–115.

23 Chronowski–Drinóczi op. cit. 27.

of the plenary session to adjudicate grounds of physical incapacity or severe ethical conflict of interest.[24]

Functional immunity ensures that constitutional judges cannot be held legally or politically accountable for the legal opinions, arguments, or votes expressed during the exercise of their official duties.[25] This immunity is reinforced by strict incompatibility regimes, under which judges are barred from holding concurrent legislative, executive, or administrative public offices, and are prohibited from occupying leadership or operational roles within political parties, trade unions, or commercial corporate entities.[26] Furthermore, they are generally bound by the same stringent ethical restrictions applied to the ordinary judiciary to avoid even the appearance of partiality. Alongside these ethical boundaries, financial stability operates as an indispensable material guarantee.[27] The remuneration and allowances of constitutional judges must be predefined by general statutory budget acts rather than discretionary executive decrees, ensuring that the executive branch cannot utilize targeted budgetary rollbacks or salary freezes as leverage to sway pending judicial review.

The architecture of the selection phase represents the primary structural interface between judicial independence and political representation, leading many democratic systems to opt for a multi-channel selection procedure. Rather than concentrating selection power within a single branch, appointment prerogatives are balanced across multiple constitutional actors, splitting quotas among political organs – such as the upper and lower houses of parliament or the government – and non-political judicial bodies, including supreme courts or national judicial councils.[28] While the final appointment is frequently finalized through a formal, symbolic act by the head of state, the substantive authority rests within these diverse nominating channels. To modernize this selection pipeline, contemporary organic regulations increasingly introduce procedural criteria, such as diversity metrics to ensure balanced gender representation among nominees,[29] or sub-national consultation mechanisms that integrate regional or state legislatures into the preliminary nomination pool to ensure geographical or federal pluralism.

Despite a well-calibrated legal framework comprising institutional autonomy, strict eligibility criteria, and diverse selection channels, formal rules rarely insulate a high court entirely from political pressure. Because these systems rely heavily on political nominators, the emergence of extra-legal elements, informal negotiations, and party-political quotas remains a persistent systemic risk. When political actors

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24 CDL-AD(2010)004 *Report on the Independence of the Judicial System: Part I - The Independence of Judges*. Venice Commission, Starsbourg, 29 March 2011.paras. 33–35, 43.

25 Ibid.

26 See István Kukorelli (ed.): *Alkotmánytan I.* [Constitutional Law I]. Osiris, Budapest, 2007. 444–446.

27 CCJE(2001)OP2 *Opinion No. 2 (2001) on the Funding and Management of Courts with Reference to the Efficiency of the Judiciary*. Consultative Council of European Judges, Strasbourg, 23 November, 2001. paras. 3–5.

28 See Katalin Kelemen: Appointment of Constitutional Judges in Central and Eastern Europe: A Comparative Analysis. *Acta Juridica Hungarica* 54, 1. (2013), 12. https://doi.org/10.1556/AJur.54.2013.1.2.

29 LOTC 16.1.

weaponize selection procedures – either by enforcing extreme ideological screening or by creating deliberate vacancies – the practical independence of a constitutional court faces challenges that formal rules alone cannot fully counteract. In summary, the rigorous framework governing high courts, comprising institutional autonomy, financial independence, and a multi-channel selection mechanism with strict eligibility and incompatibility criteria, is designed to insulate the tribunal from political encroachment. However, heavy reliance on political nominators and the emergence of informal political dynamics introduce inevitable challenges to the court's practical independence, even when the formal rules seemingly constitute a coherent whole.

## 3. Appointment models and the theory of the political thwarting of the constitutional courts

The institutional design governing the selection and appointment of constitutional judges constitutes one of the most critical junctures in comparative constitutional law. Far from being a mere technicality or a neutral bureaucratic routine, the mechanism of appointment serves as the primary structural interface between the judicial branch and political power. Consequently, the architecture of these systems inherently shapes the baseline of judicial independence, as well as the vulnerability of the court to external political pressures. In contemporary constitutional democracies, the formal rules of appointment have increasingly become ideological battlegrounds. To understand how constitutional courts can be captured, neutralized, or structurally paralyzed, one must first grasp the theoretical frameworks that categorize these selection mechanisms. This chapter provides a comprehensive dual analysis: it establishes a rigorous typology of constitutional court appointment models, and subsequently introduces the modern paradigm of court-packing – specifically focusing on the subtler, non-structural obstruction known as the thwarting strategy. Finally, by utilizing the Kosař-Šipulová legitimacy algorithm, this section provides a normative framework to distinguish between pathological political interference and legitimate institutional repair.

### 3.1. The typology of appointment models for constitutional courts

The appointment of members of a constitutional court can occur according to various models, and distinctions between these models can be drawn in multiple ways. Katalin Kelemen's classification – which is based on the model developed by the author duo Lach and Sadurski regarding Central European constitutional courts[30] – is divided into three parts: the split model (A1), the model termed collaborative appointment (A2), and the parliamentary model (A3), one of the most prominent features of which is the necessity of a multi-party consensus within parliament.[31] The author duo Chronowski

[30] See further: Kasia Lach – Wojciech Sadurski: Constitutional courts of Central and Eastern Europe: between adolscence and maturity. *Journal of Comparative Law* 3, 2. (2008), 212–233.

[31] Katalin Kelemen: Az alkotmánybírák újraválaszthatósága és kinevezési ideje. [The Re-electability and Tenure of Constitutional Court Judges]. *Pázmány Law Working Papers*, 5. (2011), 10–13.

and Drinóczi outlines a fundamentally similar, yet nuancedly different distinction. Similar to Kelemen, they also distinguish the pure parliamentary model (C1) and a model where both parliament and the constitutional court possess the prerogative to elect a certain number of members (C2). They also mention the multi-channel model, dividing it into two sub-types: in the first case, nomination is the procedural stage in which multiple actors participate (C3), while in the second, the act of appointment itself is multi-actor (C4). They speak of two models that specifically highlight the role of the head of state: firstly, one where the head of state approves the parliament's nomination (C5), and secondly, when the judiciary nominates members for the position and the head of state approves it through their appointment (C6). The fourth distinction corresponds to the final group established by Tiede: the situation where, due to a heightened ethnic situation, judges must be appointed within the framework of a quota system (C7).[32] Lydia Tiede distinguishes four types of appointment models. Accordingly, a distinction is made between cases where (i) with the participation of two branches of power, unanimously (B1); (ii) with the participation of three or more branches of power, unanimously (B2); (iii) multiple different branches of power jointly, in such a manner that the nomination of one requires the consent of the other branch of power (B3); furthermore, (iv) when the body is elected in an atypical way – for instance, on an ethnic basis (B4).[33] It is important to consider that Tiede's classification only mentions those models in which the selection procedure involves at least two actors.

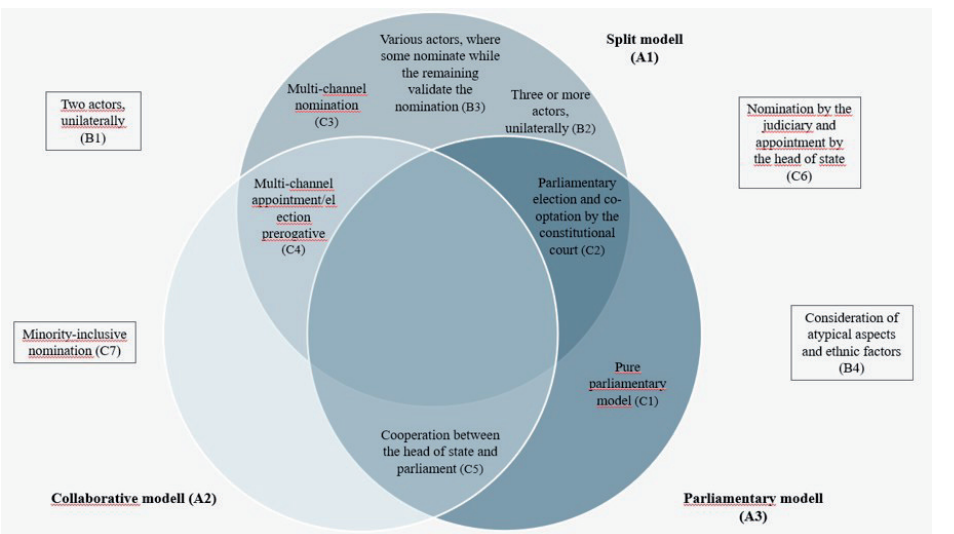



*Figure 1: The System of Constitutional Court Appointment Models. (Author's own elaboration based on the sources used in the thesis.)*

[32] Chronowski–Drinóczi op. cit. 26–32.

[33] Lydia Brashear Tiede: Mixed Judicial Selection and Constitutional Review. *Comparative Political Studies* 53, 7. (2020), 1097. https://doi.org/10.1177/0010414019879961.

The figure clearly demonstrates that the model termed 'split' by Kelemen plays a highly dominant role in the classifications established by other authors. At the same time, it is important to note that one should not draw the conclusion that the multi-channel model is in any way superior, more ideal, or the one that best ensures constitutional judicial independence. A primary reason for this is that Tiede's classification inherently differentiates only within the multi-channel model, which significantly overrepresents the categories classifiable under it. Nevertheless, in order to draw substantive conclusions regarding which model ensures judicial independence to the greatest extent, I will explore the characteristics of each appointment model based on the distinction established by Kelemen, addressing their advantages and disadvantages, as well as their relationship with the independence of the body.[34]

The essence of the split appointment model is that various organs „share the appointment of constitutional judges".[35] One of the two defining characteristics of the model is that the power of appointment is vested in all three branches of power, in most cases through a quota-like system; thus, each entity entitled to appoint can nominate members to a specific number of seats on the body. In numerous cases, quotas are distributed equally among the branches of power; however, there are exceptions, such as Spain, where – owing to the fact that both the Congress of Deputies and the Senate can nominate four members each – the legislative branch is entitled to select two-thirds of the members,[36] though several systems with a similar structure can be found.[37] Additionally, the other important element is that a legitimizing act is required in every case for the validity of the selection. In most cases – especially in parliamentary systems – the head of state possesses this prerogative, arising from their role within the state organization. In the figure above, both models classified purely into this set possess these two main factors: it is a requirement that all three branches of power have a quota for nomination – meaning that co-decision by the branches of power is not required in this case – and that there be a political actor outside the nominating organs to approve the decision made.

The essential element of the collaborative model is that the legislative and executive branches must cooperate in the appointment procedure. In the case of the legislative branch, if there are two chambers, typically both possess appointment prerogatives, whereas the actor proceeding on behalf of the executive branch is most often determined by the form of government: with a few exceptions, the head of the executive branch holds this prerogative. The greatest difference compared to the split model is that, in this case, the legislature and the executive do not receive a quota to appoint a certain number of nominees – about which they could decide independently of other nominating entities according to their internal decision-making mechanisms – but must name the candidate jointly, with the consent of the other branch of power. In practice,

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34 The models of both the classification established by Tiede and that according to Chronowski and Drinóczi can be integrated into one of the categories defined by Kelemen; therefore, I will use this as a baseline.

35 Kelemen (2011) op. cit. 11.

36 CE 159. 1.

37 See further: Kelemen (2011) op. cit. 11.

this model can be implemented in several ways. According to one method, the head of state appoints candidates from a list – or may even put forward their own nominees – which are then approved by parliament (or one of its chambers). The application of staggered appointments is not uncommon – although this is not a specific characteristic of the collaborative model but rather typical of all multi-actor models. In this case, members of the body are replaced not all at once, but in a staggered manner over time.[38] An important feature is that the judicial branch does not participate in this model,[39] and that in numerous cases, a qualified majority is required to confirm the nomination.[40] The multi-channel appointment and election prerogative (C4) described by Chronowski and Drinóczi does not possess all the characteristics of the collaborative model; however, a highly important common element – which places it at the intersection of the split and collaborative models – is that appointment prerogatives in this model are not quota-based either, but rather require the consensus of those entitled to appoint. Nevertheless, in this case, the entity entitled to appoint can be an organ belonging to any branch of power, and specific collaboration between the legislative and executive branches is not required.

In the case of the pure parliamentary model, the right of both nomination and election belongs to the parliament.[41] The model described by Chronowski and Drinóczi, which requires cooperation between the head of state and parliament (C5), incorporates certain characteristics of the collaborative model. However, the final decision is much more permeated by the logic characteristic of the parliamentary model; regardless of whether parliament nominates the members or accepts the nominations of the head of state, it inevitably decides during the process by taking into account the circumstances detailed below. In this model, the political affiliation of the candidate plays an important role in the appointment procedure.[42] Although in Germany it is not uncommon for certain constitutional judges to hold a party card prior to their election,[43] excessive influence can be filtered out through the codification of conflict-of-interest rules, and naturally, during their tenure as constitutional judges, the individuals may not engage in any related activities in order to ensure independence. This is a highly desirable regulatory requirement for the independence of the constitutional court. The existence of such regulation does not eliminate the risk of appointment decisions becoming overly politicized, particularly when a single party or a coalition of parties holds a majority in parliament. At the same time, as Chronowski and Drinóczi highlight, lower-level sources of law reinforce the „requirements of pluralism and professionalism" to

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38 Wojciech Sadurski: *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Springer, Dodrecht, 2014. 30. https://doi.org/10.1007/978-94-017-8935-6

39 Katalin Kelemen: Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal of for a new model for Hungary. *Acta Juridica Hungarica* 54, 1. (2013), 15.

40 Sadurski op. cit. 110., 113., 115.

41 Chronowski–Drinóczi op. cit. 28.

42 Kelemen (2013) op. cit. 18.

43 Louis Favoreu: *Les Cours constitutionnelles*. Presses Universitaires de France, Paris, 1992., cited by Kelemen (2013) op. cit. 17.

protect the democratic character of the system.[44] An important characteristic of the pure parliamentary model is that, similar to the collaborative model, a consensus is required in this case as well, given that a qualified majority is a requirement in almost all instances.

There are no clear correlations regarding the basis on which a state opts for a given model,[45] and appointment models can, of course, change from time to time. How appointment models can change, what reasons guide the legislature when enacting legislation aimed at altering the appointment model, and what consequences this may entail are questions that I will answer in the next chapter through the presentation of the court-packing strategy.

### 3.2. The modern form of *court-packing*: The thwarting strategy.

There is no uniform definition of the concept of 'court-packing' in modern literature; however, comparing various positions, it can be clearly established that the regulations governing the selection of a judicial body are amended in these cases precisely to alter the composition of the body in a manner that allows its decision-making mechanisms to be influenced. At the same time, authors do not hold a uniform view regarding whether there is a legislative intent that renders this type of restructuring inherently illegitimate, or whether there are cases when such reorganization is lawful.

The co-authors Benjamin Garcia Holgado and Raúl Sánchez Urribarri establishes a purpose-based distinction and divides court-packing efforts into two categories. According to them, the objective of court-packing can be either (i) the swifter implementation of a specific policy issue ('policy-driven court-packing') or (ii) the dismantling of democracy ('regime-driven court-packing').[46] Although the former case negatively affects judicial independence, it does not in itself aim to change the existing regime – in contrast to the latter case, where the restructuring's impact on judicial independence exerts a system-wide negative effect on the „various dimensions of liberal democracy", aiming to erode democracy.[47]

A similar position is held by Aylin Aydin-Cakir, who establishes that there is a close correlation between the proliferation of populism threatening liberal democracies and attempts to restrict (constitutional) judicial power, one instrument of which can be the transformation of the appointment system.[48] Cakir distinguishes between formal and informal court-packing. By formal court-packing, she understands any activity that „regulates the appointment and dismissal procedures, tenure, salaries, and review

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44 Chronowski–Drinóczi op. cit. 27.

45 Kelemen (2011) op. cit. 13.

46 Benjamin Garcia – Raúl Sánchez: Court-packing democratic decay: A necessary relationship? *Global Constitutionalism* 12, 2. (2023), 350. https://doi.org/10.1017/S2045381723000011.

47 Ibid. 350.

48 Aylin Adin-Cakir: The varying effect of court-curbing: evidence from Hungary and Poland. *Journal of European Public Policy* 31, 5. (2024), 1179. https://doi.org/10.1080/13501763.2023.2171089.

powers" of members of a higher court.[49] This mechanism is most often underpinned by a solid legal framework, whereas informal court-packing encompasses any action strategy „aimed at curtailing the power and independence of the judiciary".[50] This partially coincides with the concept of regime-driven court-packing mentioned above, given that the infringement of judicial independence can serve as a tool for dismantling democracy. This assertion holds true even if this issue arises not in relation to ordinary courts forming part of the judicial branch, but with respect to a constitutional court; indeed, numerous authors discuss court-packing within this context as well.

Beyond the two conceptual distinctions mentioned above, David Kosař and Katarína Šipulová mention sixteen sub-cases categorized into four major sets regarding illegitimate body transformations.[51] Out of the sixteen cases listed by them, two are closely linked to selection procedures: when judicial selection is obstructed ('thwarting strategy') and when new judges are appointed before the expiration of the current tenure ('premature appointment').

### 3.3. The end justifies the means: The legitimacy of *court-packing*

At the same time, Kosař and Šipulová also acknowledge that there are cases where, although political influence cannot be ruled out, it serves a legitimate purpose. Tom Daly also writes about instances where restructuring is a 'remedy' and others where it represents a 'pathological' situation.[52] The authors distinguish five objectives under which restructuring can be considered lawful. Accordingly, a reorganization is deemed legitimate if it is part of a democratization process or democratic transition.[53] The transformation is also lawful if the body becomes corrupt and its members cannot be dismissed through the application of the effective procedural rules. As a third scenario, the authors mention when 'court-packing' occurs due to a prior unlawful restructuring of the body, in order to restore the lawful functioning of the constitutional court.[54] The fourth element they mention is the situation where the restructuring aims to balance a body that is overly polarized from an ideological perspective. There is no scholarly consensus regarding the extent to which the composition of a constitutional court should reflect political and social dynamics; in fact, there are views suggesting that ideologically motivated restructuring results in a kind of retaliatory system – meaning that alternating regimes will always restructure bodies by invoking this justification.[55] There are, however, non-ideological efforts that keep a similar goal in mind – the balance

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[49] Adin-Cakir op. cit. 1180.

[50] Ibid. 1180.

[51] David Kosař –Katarína Šipilová: Comparative court-packing. *International Journal of Constitutional Law* 21, 1. (2023), 89–90. https://doi.org/10.1093/icon/moad012.

[52] Tom Daly: „Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay. *German Law Journal* 23, 8. (2022), 1092–1093.

[53] Kosař– Šipilová op. cit. 112–113.

[54] Ibid. 115–116.

[55] Jeff Shesol: Supreme Power: Franklin Roosevelt vs. the Supreme Court. *Journal of American History* 98, 1. (2011), 240–241. https://doi.org/10.1093/jahist/jar003.

of the bodies – during organizational restructurings. These are mostly attributable to the ethnic composition of a given state, or to characteristics stemming from a historical legacy, religious, or geographical features. The fifth case that legitimizes court-packing is increasing the efficiency of the body's work.[56] Restructuring is accepted in order to address the case backlog weighing on constitutional courts and the protraction of proceedings.

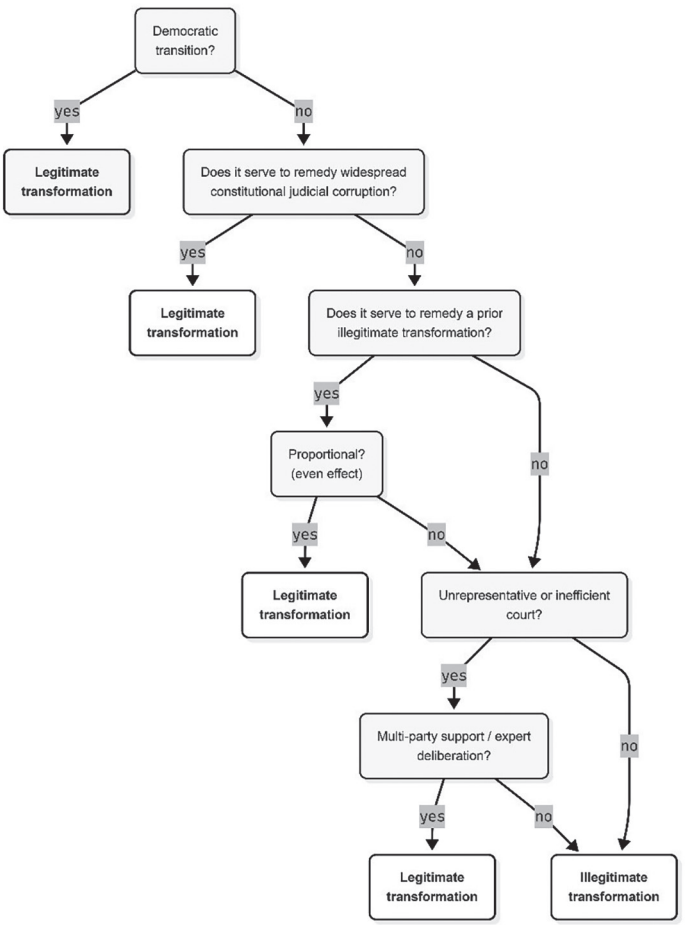



*Figure 2: The Kosař–Šipulová Legitimacy Algorithm*

The purpose of the legitimacy algorithm is to provide a practical set of criteria for the methodology used to achieve the objectives defined in the previous subsection. By following the steps of the flowchart (*Figure 2*), we can qualify whether the restructuring was lawful in a specific case. The algorithm developed by Kosař and

[56] Kosař – Šipilová op. cit. 116.

Šipulová is noteworthy because, as Daly notes, „declaring court-packing legitimate is not without danger" and requires a serious weighing of risks.[57] Such risks include the cyclical recurrence of court-packing and the politicization of the bodies, one consequence of which may be that judges' decision-making is permeated by fear when deciding on politically sensitive cases.[58] The four-step algorithm was designed taking these advantages and disadvantages into account.

In light of this – as shown in Figure 2 – it is essential to examine whether (i) the restructuring is among the measures introduced in the wake of a democratic transition. In the case of a democratic transition, governments have the opportunity to implement policies that would otherwise not comply with the principles of the rule of law.[59] If the transformation takes place as part of a democratic transition, it can fundamentally be considered lawful. If this condition is not met, it must be examined whether (ii) it aims to eliminate widespread judicial corruption. This likewise legitimizes the reorganization; however, if this condition is absent, it must be verified whether (iii) the court-packing serves to restore the body after a prior illegitimate transformation. If this is not the case, the final step is to study whether (iv) a representativeness aspect is prioritized, or if the objective is to increase the efficiency of the body's work. If none of these lie behind the reorganization, then the court-packing is certainly unlawful and will conflict with some democratic legal principle.[60]

In sum, contemporary political manipulation of high courts has shifted from overt structural expansions to informal, procedural blockades. As Kosař and Šipulová demonstrate, the thwarting strategy has become a highly effective tool of subversion, capable of neutralizing a constitutional court simply by intentionally leaving judicial seats vacant and weaponizing consensus requirements against the system itself.

When the legislature attempts to intervene in such gridlocks, the legitimacy of its corrections must be filtered through the Legitimacy Algorithm. In consolidated democracies, any unilateral, non-consensual reform aimed at altering court dynamics inevitably fails the criteria of proportionality and multi-party deliberation, sliding into illegitimate court-packing.

In light of these criteria, the Kosař–Šipulová algorithm provides a vital 'diagnostic tool' for modern constitutional theory. It exposes how contemporary political actors have replaced blunt legislative expansion with subtle procedural blockades, such as the thwarting strategy, to hollow out judicial resistance from within. By shifting the focus from formal structural changes to the underlying systemic intent and procedural context, this framework demonstrates that any unilateral correction of a judicial gridlock must be heavily scrutinized. Ultimately, in a consolidated democracy, skipping

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57 Daly op. cit. 1081.

58 Kosař – Šipilová op. cit. 117–118.

59 Ruti G. TEITEL: *Globalizing Transitional Justice: Contemporary Essays*. Oxford University Press, Oxford, 2014. 149.

60 According to Kosař and Šipulová (op. cit. 107.), court-packing can violate the principle of the rule of law (including the infringement of judicial independence), the separation of powers, democracy, public sensitivity, public trust in the courts, as well as the proper functioning of the judiciary.

multi-party deliberation and proportional necessity strips away institutional legitimacy – transforming what political actors might label as 'constitutional repair' into a clear case of pathological court-packing.

## 4. Conclusion

This paper has provided a comprehensive investigation into the intricate structural configuration and systemic vulnerabilities of constitutional courts operating at the delicate intersection of legal normativity and political power. As the premier guardians of constitutional democracy and the rule of law, these tribunals inherently exercise a counter-majoritarian check that frequently invites intense political friction. By establishing a multi-layered dogmatic framework, this analysis demonstrates that the survival of constitutional adjudication relies on a complex matrix of objective-institutional protections – encompassing robust operational and financial autonomy – and subjective-personal guarantees designed to shield individual jurists from external career friction and political alignment.

The comparative investigation of selection mechanisms reveals that judicial appointment models – categorization based on Kelemen's model: split, collaborative, and pure parliamentary typologies – serve as the primary structural interface between the judiciary and political branches. Far from being a neutral bureaucratic routine, the choice of an appointment model fundamentally dictates a court's exposure to systemic capture. A core finding of this study underscores that contemporary autocratization and populist governance have shifted their tactical focus away from aggressive, formal structural interventions, such as traditional court-packing. Instead, non-cooperative political actors increasingly weaponize existing procedural rules to implement a 'thwarting strategy', deliberately leaving judicial seats vacant to paralyze the tribunal from within and neutralize its review capabilities.

When democratic legislatures attempt to break these political gridlocks, the legitimacy of their interventions cannot rely on mere 'constitutional repair' rhetoric. By filtering these actions through the Kosař-Šipulová legitimacy algorithm, the study demonstrates that any unilateral correction bypassing proportional necessity, multi-party deliberation, and independent expert consultation is stripped of institutional legitimacy. In consolidated democracies, non-consensual procedural overrides inevitably slide into pathological court-packing. Ultimately, while formal rules are designed to secure judicial independence, their practical resilience depends heavily on the prevailing political culture; when that culture shifts toward subversion, formal guarantees alone cannot fully guarantee the stability of constitutional review.

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CURRENT ISSUE
*Investiture Doctor Honoris Causa of Elisabeth Herrmann-Otto*

# LAUDATIO VERLEIHUNG DER EHRENDOKTORWÜRDE AN PROF. DR. ELISABETH HERRMANN-OTTO

Nadja El Beheiri*
Professor am Lehrstuhl für Römisches Recht der Juristischen Fakultät der Katholischen Universität Pázmány Péter
(am 15. Oktober 2026)

Hochwürdiger Herr Rektor, sehr geehrter Universitätssenat, liebe Kolleginnen und Kollegen und natürlich liebe Elisabeth!

Unsere Bekanntschaft mit Elisabeth Herrmann-Otto geht auf den SIHDA-Kongress 2013 in Salzburg zurück. Ich kann mich noch gut daran erinnern, wie wir nach einem Abendessen ein erstes Gespräch über die Zusammenarbeit von Historikern und Juristen bei der Erforschung der römischen Antike führten und wie bereichernd ich dieses Gespräch schon damals empfunden habe.

2015 durften wir Elisabeth Herrmann-Otto dann bei einem Workshop zur Sklaverei mit dem Titel „*Libertas inaestimabilis res est*" begrüßen. Für mich war dieser Workshop eine Gelegenheit, die Zusammenarbeit über die wir in Salzburg auf theoretischer Ebene gesprochen haben, ganz praktisch zu erfahren. Zu meinem Vortrag über Sklaverei und Freiheit bei Theodor Mommsen hielt sie damals gewissermaßen ein Gegenreferat, aus dem ich sehr viel lernen durfte. Letztlich waren wir uns darin einig, dass Mommsens institutionelles Denken und seine Projektion der Verhältnisse seiner eigenen Zeit auf die römische Antike, insbesondere seine Betrachtung der römischen Sklaverei im Licht der neuzeitlichen Sklaverei, dem historischen Phänomen nicht gerecht wurden.

Von da an war sie immer wieder bei uns zu Gast. Besonders hervorheben möchte ich unsere Summer School im Jahr 2023, bei der sie eindrucksvoll unter Beweis stellte, wie gut sie es versteht, auch Studierende, die bisher keinen oder nur wenig Zugang zur Antike hatten, in dieses Fachgebiet einzuführen. So gelang es ihr, sich an die zurückhaltende Mentalität koreanischer Studierenden anzupassen, sie konnte ihnen

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sogar eine Übersetzung einer ihrer Arbeiten ins Koreanische zur Verfügung zu stellen und bei einem Studenten aus Kenia Begeisterung für das antike Recht zu wecken. Bei all unseren Begegnungen war es beeindruckend zu erleben, wie Elisabeth Herrmann-Otto ihr außerordentlich umfangreiches Fachwissen mit Großzügigkeit und Hingabe weitergab, insbesondere auch an die jüngeren Generationen. Sie war und ist immer bereit, Fragen zu beantworten, wertvolle Hinweise zu geben und damit zu zeigen, wie fruchtbar interdisziplinäre Zusammenarbeit sein kann.

Elisabeth Herrmann-Otto war bis zu ihrer Emeritierung Professorin für Alte Geschichte an der Universität Trier. Der Weg dorthin führte über zahlreiche Stationen und war – gerade auch als Elisabeth – nicht einfach. Er ging über einen Lehrauftrag an der Universität Bielefeld, eine Lehrstuhlvertretung in Erlangen und eine außerplanmäßige Stelle in Mainz. 1993 war sie die erste Elisabeth, die sich in ihrem Fachbereich an der Universität habilitierte. Von 1977 bis 2000 war sie wissenschaftliche Mitarbeiterin und Leiterin der Arbeitsstelle „Forschungen zur antiken Sklaverei" an der Akademie der Wissenschaften und der Literatur in Mainz. In diesem Zusammenhang stand sie auch in engem Kontakt mit Wolfgang Waldstein – einem guten Freund von Professor Zlinszky – und ebenfalls Ehrendoktor unserer Universität.

Die wissenschaftlichen Qualifikationsarbeiten von Elisabeth Herrmann-Otto wurden mit bedeutenden Preisen ausgezeichnet und sind bis heute maßgeblich. Ihre Dissertation trägt den Titel *Ecclesia in re publica* und wurde mit dem Johannes-Gutenberg-Preis für die beste Promotion des Jahres ausgezeichnet. Betreut wurde diese Arbeit von Heinz Bellen, mit dem sie auch im Rahmen der Mainzer Akademie der Wissenschaften zusammenarbeiten sollte. In dieser Arbeit beschäftigte sich Elisabeth Herrmann-Otto mit der Übernahme von römischen Institutionen durch die frühe Christenheit, was auf der anderen Seite in einem Verstaatlichungsversuch der kirchlichen Institutionen bei Konstantin mündete.

Ihre Habilitationsschrift trägt den Titel *Ex ancilla natus* und beschäftigt sich mit den hausgeborenen Sklaven und Sklavinnen im Westen des Römischen Reiches. Im Anschluss an eine terminologische Untersuchung zeichnet sie die Lebensphasen eines als Sklaven geborenen Menschen vom Mutterleib bis zum Tod nach, wobei sie besonderes Augenmerk auf die verschiedenen Tätigkeitsbereiche und Ausbildungsmöglichkeiten legt. Dabei unterscheidet Herrmann-Otto zwischen den hausgeborenen Sklaven der *familia Caesaris* und den in Privathaushalten geborenen Sklaven. Besonders anschaulich wird das Spannungsfeld, in dem sich diese Sklaven befanden am Beispiel der *dispensatores*. Ein Beruf, bei dem hausgeborenen Sklaven besonders oft vertreten waren. Dabei handelte es sich um hochqualifizierte Arbeitskräfte, die mit großer Selbstständigkeit und Eigenverantwortung die finanziellen Angelegenheiten des gesamten Haushalts ihrer Herren verwalteten, zugleich aber jederzeit zur Rechenschaft gezogen werden konnten. Finanziell waren sie durchaus in der Lage, sich freizukaufen. Aufgrund ihrer besonderen Vertrauensstellung war dies jedoch häufig schwieriger, als es ihre finanziellen Möglichkeiten vermuten ließen.

Voraussetzung einer Freilassung war eine genaue Rechnungslegung. Mit großer Genauigkeit zeichnet Elisabeth Herrmann-Otto den Werdegang von hausgeborenen *dispensatores* sowohl im privaten Bereich wie auch in der Familie des Kaisers nach. Die

Arbeit wurde mit dem Premio Boulvert ausgezeichnet, einem der wohl begehrtesten Preise auf dem Gebiet des Römischen Rechts. Das ist besonders bemerkenswert, weil im Rahmen dieses Preisverfahrens nur äußerst selten Arbeiten von Forschern, die kein juristisches Fachstudium absolviert haben, ausgezeichnet werden.

Unter den weiteren Publikationen von Elisabeth Herrmann-Otto möchte ich insbesondere ihr umfassendes Buch über Sklaverei und Freilassung in der griechisch-römischen Welt hervorheben, ebenso wie ihre Arbeiten über Armut, Arbeit, Sklaverei und Prostitution in der römischen Kaiserzeit und natürlich auch ihre Arbeit am *Handbuch zur antiken Sklaverei*. Ein Werk, das ohne ihr Zutun wohl nicht Wirklichkeit geworden wäre. Hinzu kommt eine wissenschaftliche Biographie Kaiser Konstantins. Besondere Verdienste kommen Elisabeth Herrmann-Otto auch bei der Herausgabe einer wissenschaftlichen Schriftenreihe zur Sklaverei-Knechtschaft und Zwangsarbeit zu. Wichtig war Elisabeth Herrmann-Otto stets das Streben nach einem Gesamtbild. Dieses erarbeitete sie sich durch die genaue Analyse epigraphischer, papyrologischer, numismatischer und archäologischer Zeugnisse. Genaueste Bearbeitung von Einzelzeugnissen war dabei nie ein Ziel in sich, sondern Elisabeth Herrmann-Otto war immer darum bemüht, die einzelnen Erkenntnisse in einen größeren Zusammenhang zu stellen. Das Römische Recht war und ist dabei für sie einerseits selbst Gegenstand der Forschung, andererseits aber auch ein wichtiges Zeugnis für die Lebenswirklichkeit der antiken Römer.

Wie diese Aufzählung zeigt, handelt es sich durchweg um Themen, die höchste Fachkompetenz erfordern, um nicht in ideologische Deutungsmuster abzugleiten. Im Hinblick auf die Sklaverei wendet sich Herrmann-Otto gegen den Begriff der Sklavenhaltergesellschaft, wie er vor allem im Umfeld von Moses Finley vertreten wurde, ohne dabei in einen Humanitätsromantizismus zu verfallen, wie er wohl von manchen Kritikern Joseph Vogt zugeschrieben wurde. Als wichtiges Merkmal der antiken Gesellschaft betont sie die soziale Mobilität: Jeder Sklave konnte potenziell zu einem freien Menschen werden und jeder Freie zu einem Sklaven.

Für Juristen ist besonders interessant, dass sie den Bogen ihrer Untersuchungen vom öffentlichen Recht bis zum Privatrecht spannt und so auch in die sozialgeschichtliche Perspektive der römischen Antike eindringt. Was die Geschichte der Frauen betrifft, so betont sie, dass Frauen in Rom nicht als Mängelwesen betrachtet wurden. Sie spricht vom politischen Handeln der Frauen *offstage*, im Gegensatz zum *onstage*-Handeln der Männer.

Faszinierend ist auch ihre Darstellung Kaiser Konstantins an der Wende zwischen der heidnischen und der christlichen Welt. Aus theologischer Sicht ist insbesondere ihre Beschreibung des Konzils von Nizäa von großer Aktualität.

Auch die Armutsforschung mit Blick auf die Antike und insbesondere die Frage nach der Rolle des Christentums sind heute von besonderer Bedeutung. Entspricht es nicht ganz der Lehre der letzten Päpste, die christliche Prägung einer Gesellschaft gerade an ihrem Umgang mit der Armut zu erkennen? Hier kommt den Arbeiten von Elisabeth Herrmann-Otto besondere Aktualität zu.

Mir scheint, dass das wissenschaftliche Œuvre von Elisabeth Herrmann-Otto ein Merkmal aufweist, das allen großen Wissenschaftlern eigen ist: die Kontinuität in der Vielfalt. Über viele Jahre hinweg widmet sie sich Themen, die bereits in ihren frühen Arbeiten angelegt waren und die sie immer wieder aufgreift, mit zunehmender Tiefe durchdringt und auf diese Weise zu beeindruckenden Ergebnissen führt. Dafür sind wir ihr dankbar und freuen uns auf eine weiterhin fruchtbare Zusammenarbeit.

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# RÖMISCHES RECHT UND ANTIKE SOZIALGESCHICHTE IM INTERDISZIPLINÄREN GESPRÄCH

## *Ein Blick auf Vergangenheit und Gegenwart*

Elisabeth Herrmann-Otto
Professorin (Universität Trier)
14. Oktober 2026

Reverendissime ac Magnifice Domine Rector, sehr geehrter Universitätssenat, liebe Laudatorin, verehrte Kolleginnen und Kollegen, meine Damen und Herren!

Als Du, liebe Nadja, mir vor einigen Wochen die freudige Nachricht des Ehrendoktorrates überbrachtest, da war ich zunächst völlig sprachlos. Bis auf den heutigen Tag fehlen mir die angemessenen Worte, Ihnen, der Pázmány Péter Universität und ihren Repräsentanten für die ehrenvolle Verleihung der Ehrendoktorwürde im Rahmen einer akademischen Feier zu danken. Wieso ich als Althistorikerin vor Ihrer Fakultät der Rechts- und Politikwissenschaften stehe, möchte ich in meiner (kurzen) Dankesrede erklären.

Seit 2013, als die SIHDA in Salzburg tagte, verbinden mich sowohl fachspezifische Anliegen sowie freundschaftliche Kontakte mit Ihrer Fakultät. In Salzburg lernte ich Prof. János Zlinszky und seine Nachfolgerin Nadja El Beheiri kennen, sowie Viola Heutger und Bastiaan van der Velde, letztere wissenschaftlich mit dem Thema der antiken und modernen Sklavereien befasst. Mit einem Ihrer Ehrendoktoren, dem vor drei Jahren verstorbenen Wolfgang Waldstein, Professor für Römisches Recht und Rechtsphilosophie, habe ich lange Zeit zusammengearbeitet im Rahmen des Internationalen und Interdisziplinären Projektes der Akademie der Wissenschaften und der Literatur in Mainz zur Erforschung der antiken Sklaverei und ihrer Rezeption.

Leitlinie dieses Unternehmens war die interdisziplinäre Zusammenarbeit, vor allem zwischen Juristen, Historikern, Philologen, Theologen und anderen einschlägigen Disziplinen. Diese Methode, die die Grundlage allen wissenschaftlichen Forschens seit je her und heute in einer globalisierten Welt in besonderem Maße ist, eignet sich u.a. in ganz hervorragender Weise auch für die Erforschung gesellschaftlicher Gruppen, ihrer Besonderheiten und Veränderungen in Vergangenheit, Gegenwart und Zukunft. Diese Aufgabe richtet sich nicht allein an die Sozialwissenschaften sondern ganz

fundamental auch an die Rechtswissenschaften in ihren verschiedenen Disziplinen. Ganz konkret möchte ich Ihnen die Anwendung der interdisziplinären Methode auf die komplementäre Auswertung verschiedener Zeugnisse aus dem Römischen Recht mit den zeitgleich entstandenen Quellen historischer, philosophischer und literarischer Provenienz vorführen. Mein Ziel dabei ist, exemplarisch an drei unterschiedlichen gesellschaftlichen Gruppierungen zu zeigen, ein welch komplexes und zugleich differenziertes Bild man auf diesem Wege gewinnen kann, das nicht allein für die Antike gilt, sondern zugleich geeignet ist, Erkenntnisse auch für unsere eigene Zeit zu gewinnen.

Ich habe drei Themenfelder ausgewählt, mit denen ich mich selbst in jahrzehntelangen Forschungen beschäftigt habe, nämlich: Sklaverei und Freilassung, Frauen und Armut.

Beginnen wir mit der Sklaverei.

In der sogenannten Magna Charta des römischen Personenstandsrechts heißt es

> *Die oberste Einteilung im Personenrecht geht dahin, dass alle Menschen entweder Freie* (liberi) *oder Sklaven* (servi) *sind.*[1]
> *Freigeborene* (ingenui) *sind diejenigen, die von einer freien Mutter geboren sind.*[2]
> *Freigelassene* (libertini) *sind solche, die aus* rechtswirksamer *Sklaverei* (ex iusta servitute) *freigelassen sind.*[3]

Das bedeutet, dass man innerhalb der Freien zwei Kategorien unterscheidet, nämlich die von Geburt her Freien, die *ingenui*, und diejenigen, die einmal Sklaven gewesen sind, aber von ihren Herren freigelassen wurden, die *libertini*. Dass aber diese Freilassung gültig ist, dass diese Menschen rechtlich anerkannte Freigelassene sind, beruht auf einer zu Recht bestehenden Sklaverei.

> *Kriege brachen aus und zogen Gefangenschaft* (captivitates) *und Sklaverei* (servitutes) *nach sich, die dem Naturrecht widersprechen* (iuri naturali contrariae). *Nach Naturrecht* (ius naturale) *wurden nämlich am Anfang alle Menschen frei geboren* (liberi nascebantur).[4]

Dieser Aussage zufolge würde die Sklaverei als Einrichtung des Völkergemeinrechts im Gegensatz zum Naturrecht stehen. Im Falle der Sklaverei wären beide Rechte nicht mehr deckungsgleich, was ansonsten der Fall ist.

Kurz zusammengefaßt liegen dem römischen Personenstandsrecht folgende Regeln zugrunde:

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1 Gaius, D. I,5,3.

2 Marcian, D. 1,5,5,2.

3 Gaius, D. I,5,6.

4 Justinian, Inst. I,2,2.

Es gibt freie Menschen, die von einer freien oder freigelassenen Mutter frei geboren sind. Es gibt unfreie Menschen, die als Sklaven von einer Sklavenmutter geboren sind, und später rechtskräftig, d.h. mit voller Freiheit und vollem römischen Bürgerrecht, freigelassenen werden können. Es gibt freigeborene Menschen, die durch Kriegsgefangenschaft in Sklaverei geraten sind und später rechtskräftig freigelassen werden. Nach dem Naturrecht *(ius naturale)* sind alle Menschen jedoch freigeboren. Nach dem Völkergemeinrecht aber *(ius gentium)*, das alle menschlichen Völker kennen und benutzen, sind Menschen entweder durch Kriegsgefangenschaft oder durch unfreie Geburt von einer Sklavin in die vollkommene Gewalt über Leben und Tod von Herren geraten, d.h. in Sklaverei. Nach bürgerlichem Recht *(ius civile)* gelten Sklaven nicht als Personen sondern als Sachen. Danach war die Sklaverei bei den Römern eine widernatürliche aber keine widerrechtliche Institution.

Zu diesen Rechtsregeln, die sich schon früh ausgebildet und immer Bestand hatten (selbstverständlich mit entwicklungsgeschichtlichen Renovationen), möchte ich Ihnen eine kleine Geschichte erzählen, die nicht nur den bestehenden Rechtsrahmen verdeutlicht, sondern zugleich sozialgeschichtlich diesen Rahmen mit Leben erfüllt:

Ein Knabe namens Melissus wurde von seinen Eltern in einem Streit ausgesetzt. Es ging darum, wie man das Kind aufziehen sollte bei der großen Armut, die nach den Bürgerkriegen um Christi Geburt vor allem in Italien herrschte. Außerdem hatte man schon mehrere Kinder, deren Versorgungslage bereits prekär war. Da der Verkauf der eigenen Kinder verboten war, entschieden sich die Eltern für die Aussetzung, ein probates in der Antike stets praktiziertes Mittel der Geburtenkontrolle. Ein Mann fand den Säugling, zog ihn als Sklaven groß und ließ ihn in lateinischer Grammatik ausbilden. Trotz der großen Investitionen, die er in das Kind gesteckt hatte und die sich durch eine entsprechende Berufstätigkeit eventuell als Lehrer für den Herrn und Ziehvater bald amortisiert hätten, schenkte er den ausgebildeten Knaben dem berühmten Maecenas, Freund des Kaisers Augustus. Vielleicht gehörte der Mann zur Klientel des Maecenas und wollte seinem Patronus eine Freude bereiten oder mit dem Sklavenkind seine Schulden bei ihm begleichen. Der gebildete Maecenas erkannte sehr schnell die Fähigkeiten des heranwachsenden Knaben und machte ihn zu seinem Privatsekretär. Als die leibliche Mutter des Melissus auftauchte und seine freie Geburt reklamierte, und drohte, einen Freiheitsprozess anzustreben, lehnte Melissus das Vorhaben seiner Mutter ab. Er zog ganz eindeutig sein Leben und seine intellektuellen Tätigkeiten als Sklave im reichen Haus des Maecenas den ärmlichen Verhältnissen als freier römischer Bürger im Hause seiner Mutter vor. Maecenas ließ den Knaben frei. Als Freigelassener *Caius Maecenas Melissus*, Mitglied der *familia* des Maecenas, eines der angesehensten Geschlechter der Zeitenwende, wurde er auf Empfehlung seines Patrons hin oberster Bibliothekar der neugegründeten *Bibliotheca Octaviana* des Augustus. Im Dienste des Princeps hat der arme Knabe aus Spoleto eine Karriere und einen sozialen Aufstieg durch den Weg in und aus der Sklaverei wieder heraus geschafft, die ihm im Umfeld seiner Herkunftsfamilie als freigeborener Römer nie hätte gelingen können.[5]

[5] Sueton: *De grammaticis.* 21.

Das zeigt, dass die römische Sklaverei nicht ewig sondern transitorisch ist. Jeder Bürger, jeder Nichtbürger jeglichen Status, Alters und Geschlechts kann in die Sklaverei geraten: durch Kriegsgefangenschaft; Menschenraub, Verkauf und Selbstverkauf auf dem Sklavenmarkt, Aussetzung, Verurteilung zur Strafsklaverei. Aber er kann durch Freilassung, Freikauf, Rückkehrrecht *(postliminium)* und Amnestie genauso wieder aus der Sklaverei herausgelangen. Nur das dies nicht immer gelingt. Die grausame Seite der Sklaverei wird dann offenbar. Das ist jedoch meist eine Frage des Schicksals, und nicht der Rechtsordnung. In modernen Sklavereien allerdings war ein solcher Aufstieg, auch auf Grund der Rechtsordnungen, gar nicht oder kaum möglich.

**Fahren wir fort mit den Frauen:**
In den römischen Rechtsquellen lesen wir zur gesellschaftlichen und rechtlichen Stellung der Frauen folgendes:

> *Frauen sind von allen zivilen und öffentlichen Ämtern ausgeschlossen, daher können sie nicht Richter* (iudices) *sein, noch können sie ein politisches Amt* (magistratus) *bekleiden, noch können sie Forderungen vor Gericht erheben* (postulare)*, noch für einen anderen gerichtlich intervenieren* (intervenire), *noch als Finanzverwalter* (procuratores) *tätig sein.*[6]

Der Grund für dieses Verbot ist in der Notwendigkeit zu sehen, zu verhindern, dass Frauen sich in die gerichtlichen Anliegen anderer einmischen, was gegen den weiblichen Anstand *(pudicitia sexus)* verstößt, indem sie männliche Tätigkeiten *(officia virilia)* ausüben.[7]

Das Richteramt auszuüben ist Frauen und Sklaven durch das Herkommen, die Sitten der Vorfahren *(mores maiorum)* untersagt, nicht weil sie keine Urteilskraft *(iudicium)* haben.[8]

Kein ernsthafter Grund scheint dazu geführt zu haben, die erwachsenen Frauen in Vormundschaft *(tutela)* zu halten. Denn der Grund, den man allgemein anführt, dass sie nämlich wegen der Kraftlosigkeit ihres Verstandes *(imbecillitas mentis)*, der Unbeständigkeit ihres Charakters *(levitas animi)* oder geschlechtsbedingter Schwäche *(infirmitas sexus)* meistens getäuscht werden und dass es nur gerecht sei, sie von der Autorität eines Vormundes leiten zu lassen, ist offenbar eher ein scheinbarer als ein wahrer Grund.[9]

*In vielen Artikeln unseres Rechtes ist die Stellung der Frauen schlechter als die der Männer.*[10]

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6 Ulpian, D. 50,17,2.

7 Ulpian, D. 3,1,1,5.

8 Paulus, D. 5,1,12.

9 Gaius, Inst. I, 190.

10 Papinian, D. 1,5,9.

So zusammenfassend der Kommentar des spätantiken Juristen Papinian zur Rechtslage, obwohl aus den Äußerungen früherer Juristen zu erkennen ist, dass die schlechtere Stellung der Frauen gegenüber den Männern nicht zu vertreten ist. Nie nämlich waren Frauen nach römischer Auffassung im Vergleich zu den Männern geistige Mängelwesen, wie dies in anderen Völkern und Religionen in Vergangenheit und Gegenwart vertreten worden ist (bzw. z.T. noch immer wird). Aus diesem Grunde sind in Rom Verbesserungen im Laufe der Zeit erfolgt. Nach dem Tod des Vaters, dessen Gewalt *(patria potestas)* sie unterstanden, wurden sie zu Personen eigenen Rechts *(sui iuris)*. Trotz beiderseitiger Scheidungsmöglichkeiten und trotz Verfolgung politischer Strategien bei den Eheabschlüssen blieben die Frauen aus der Familie des Mannes und aus dem Staatswesen ausgeschlossen. Die fehlende *materna potestas* und die Nicht-Existenz einer *mater familias* sind dafür verantwortlich, dass die römischen Frauen kein Adoptionsrecht, kein Zeugnis- und Klagerecht für andere, keine Gewalt über ihre eigenen Kinder und kein Erbrecht gegenüber ihrem Mann besaßen. Die Asymmetrie des Rechts, die nicht naturbedingt sondern konventionsbedingt war, führte dazu, dass die Frauen privat- und zivilrechtlich schlechter gestellt waren. Befreit zwar von der Vormundschaft *(tutela)* durch das Dreikinderrecht und die abnehmende väterliche Gewalt, die zu wachsender finanzieller und vermögensrechtlicher Unabhängigkeit der Frauen führten, hatten sie trotz Bürgerrecht kein Wahlrecht und kein Anrecht, politische Ämter, wohl aber sakrale Ämter zu bekleiden.

Die Römer klebten jedoch nicht an dogmatischen Bestimmungen, sondern passten sich flexibel den Erfordernissen der Umstände an. Die größte private lateinische Grabinschrift eines römischen Konsuln auf die außergewöhnlichen Verdienste seiner verstorbenen Frau vermittelt uns einen tiefen Einblick, welche Möglichkeiten Frauen in Gesellschaft und Politik in Notsituationen wahrnehmen konnten und auch wahrnahmen.

(Inschrift zwei Platten à 90 Zeilen und je Zeile 70 bis 75 Buchstaben groß. Die Hälfte der Inschrift oder mehr ist uns aber verloren. CIL VI 41062 = ILS 1527).

Als Verlobte des Quintus Lucretius Vespillo, Konsul des Jahres 19 v. Chr. verlor Turia an einem einzigen Tag ihre Eltern durch Mord. Obwohl Verlobter und Schwager wegen dienstlicher Belange in den östlichen Provinzen des Reiches weilten, gelang es ihr, die Mörder ihrer Eltern vor Gericht zu ziehen, wo diese zum Tode verurteilt wurden. An den Mordprozess schloss sich schnell ein zweiter, ein Erbschaftsprozess gegen die Familie ihrer Mutter an, die ihr die Erbschaft ihres Vaters streitig machen wollte. Es gelang ihr, wahrscheinlich mit Hilfe eines öffentlich bestellten als Ersatzvormund fungierenden Anwalts, die Anfechtungen des Testamentes abzuwehren und das Erbe für sich und ihren Verlobten zu erhalten.

Später als Ehefrau unterstützte Turia ihren Mann, der in den Bürgerkriegen verfolgt wurde, in seinen wechselnden Verstecken mit Geld, Sklaven und Vorräten. Die Verwaltung des väterlichen Erbes, das sich die Ehepartner geteilt hatten, lag in dieser Krisenzeit sowieso in ihren Händen, da ihr Vormund, nämlich ihr Ehemann, nicht in Rom war. Marodierende Banden plünderten ihr Haus, indem sie die Lage der schutzlos dastehenden Frau ausnutzten. Turia gelang es, sowohl die Straffreiheit ihres Mannes als auch den Rückzug der beauftragten Banden von Caesar zu erwirken. Nach der Ermordung des Diktators geriet Vespillo erneut in das Räderwerk der tödlichen

politischen Verfolgungen, sodass Turia ihn zwischen den Balken eines Doppeldaches so lange verstecken musste, bis sie von Augustus einen Gnadenerlass und dessen Umsetzung erwirkte.

Obwohl Turia eine couragierte, mutige und sehr kluge Frau gewesen ist, war sie doch keine sogenannte virile, d.h. emanzipierte Frau. Sie handelte klug, wie es die Situation erforderte. Das erkannte ihr Mann ganz öffentlich lobend in dem Grabgedicht an. Sie musste und konnte so handeln in den Ausnahmesituationen der Bürgerkriege und der Abwesenheit ihres Mannes und ihres Schwagers, obwohl ja Frauen vor Gericht keinen Stand hatten, auch privat keine Finanzverwaltung führen durften, ganz zu schweigen von ihren öffentlichen Auftritten auf dem Forum vor den Machthabern. Als aber die Ausnahmesituationen wieder behoben waren, kehrte Turia in die von den Sitten der Vorfahren, den *mores maiorum*, für *matronae* vorgeschriebene Bahnen zurück. Da sie den Kinderwunsch des Ehemannes nicht erfüllen konnte, bot sie ihm im Einklang mit römischen Ehevorstellungen, die Scheidung an. Vespillo lehnte brüsk ab, und nahm als Kinderloser klaglos die Nachteile der augusteischen Ehegesetze, d.h. einer ganz hohen Besteuerung, in Kauf. In Notsituationen wird der Handlungsspielraum der Frauen pragmatisch erweitert, leider nicht nachhaltig, wie wir aus der eigenen Geschichte z.B. in Nachkriegszeiten wissen.

**Damit sind wir beim dritten Themenkreis der Armut angelangt:**
Wie Sklaverei so kann auch Armut jeden Menschen bedrohen, unabhängig von Alter, Geschlecht und sozialem Status. Die römische Gesellschaft war so strukturiert, dass es eine Fülle von (halb) öffentlichen, (halb) privaten sozialen Netzwerken gab, wie etwa das Klientelsystem, die Familie, ein vielfältiges Vereinswesen, die Notsituationen wie Armut, Alter, Krankheit auffingen. Dennoch, wenn ein Mensch aus allen diesen Netzwerken herausgefallen war, wenn er weder eine Familie hatte, noch zu einer *familia* gehörte, noch in einem Klientelverhältnis zu einem reichen Patron und Förderer stand, noch Mitglied eines der vielen Vereine war, dann rutschte er in die absolute Armut ab, dann lebte er als Bettler von Almosen oder als Dieb an den Ausfallstraßen der großen Städte. Nur in Ausnahmefällen alimentierten die Kaiser kinderreiche Familien der oberen Mittelschicht und subventionierten Lebensmittelverteilungen an bezugsberechtigte römische Bürger der großen Städte. Es herrschte das Prinzip des: *do ut des*: „ich gebe dir, damit du mir mehr zurückgibst." Der römische Staat war kein Sozialstaat.

Trotz der ständigen Präsenz von Armut und trotz der Furcht vor allem vor Altersarmut gibt es keinen eigentlichen römischen Armutsdiskurs. Eine differenzierte lateinische Terminologie taucht in philosophischen und poetischen Texten auf, die sich moralisch oder satirisch mit Armut beschäftigen. Die juristischen Quellen schweigen zu dieser Problematik. Wenn Armut mehr oder minder todgeschwiegen wird, bleibt sie aber dennoch präsent. Als Ausweg aus der Armut galten: Selbstverkauf in die Sklaverei, Aussetzung der Neugeborenen, – wir haben am Anfang von dem ausgesetzten Melissus gehört – und der Hungertod. Zu letzteren bemerkt der stoische Philosoph Seneca:

> *„Auf die Sublicius-Brücke versetze mich und verbanne mich unter die* Armen*: dennoch nicht werde ich mich deswegen verachten, weil ich in*

> *der Schar jener sitze, die Hand nach einem Almosen ausstrecken.* Was nämlich ist es von Belang, ob dem eine Brotkruste fehlt, dem es nicht fehlt, sterben zu können?“ [11]

Aus unserer Sicht scheint diese Art Zynismus unüberbietbar, aus der Sicht nicht nur des Stoikers Seneca dagegen nicht. Armut galt den Römern stets als selbstverschuldet, deswegen nie öffentlich unterstützungswürdig, sondern stets in der Nähe von Kriminalität angesiedelt.

Das Problem der Kaiser und ihrer Juristen bestand nicht im Tod durch Verhungern sondern im Verlust der Freiheit, um der Armut zu entgehen. Selbstverkauf in die Sklaverei und Verkauf der eigenen Kinder in die Sklaverei waren verboten, Kindesaussetzung und Suizid erlaubt. Konstantin hat armen Eltern erlaubt, ihre gerade geborenen Kinder in die Sklaverei zu verkaufen mit der Option des Rückkaufs, wenn sie dazu genügend Geld später hätten.

> *Wenn jemand wegen übergroßer Armut und Not einen Neugeborenen, Sohn oder Tochter, wegen des Lebensunterhaltes verkauft, so soll nur in dem einen Fall der Kauf wirksam sein und der Käufer das Recht haben, ihn als seinen Sklaven zu behalten.*[12]

Theodosius der Große hat dieses Gesetz zugunsten der Ingenuität jedoch unter Inkaufnahme von Aussetzung und des oft daraus folgenden Infantizids wieder aufgehoben.[13] Niemand, auch der Vater eines freigeborenen Kindes nicht, konnte durch Verträge den Status seines Kindes ändern.

Verkaufte ein freier erwachsener Römer sich selbst mit Gewinnbeteiligung in die Sklaverei, so konnte er die freie Geburt nie zurückerhalten, höchstens von seinem Herrn die Freilassung erlangen. Das Gut der persönlichen Freiheit ging verloren, wenn ein Mensch in eine gerechte Sklaverei geriet. Durch private Verträge aber konnte ein Mensch selbst nie seinen freien Status ändern. Vielmehr, wenn er das versuchte, wurde er mit dem Verlust der Ingenuität wegen böswilligen Betruges bestraft.

Auf diesem juristischen Hintergrund schreibt Kaiser Valentinian III. im Jahr 451 n. Chr.

> *Ich halte es aber für unbillig, dass die Freiheit deswegen verloren geht, weil das Leben gerettet wird. [...] Denn wer stirbt nicht lieber als Freier als das Sklavenlos zu ertragen? [...] Das kann man nicht als Wohltat* (beneficium) *bezeichnen, wenn man das verliert, was man den Sklaven als höchste Belohnung (nämlich die Freiheit) zugesteht. Daher gestatte ich es nicht, dass dem Status eines Freien ein Nachteil zugefügt wird, auf welchen nach dem Willen der höchst weisen Begründer des Rechts*

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11 Seneca: *De vita beata.* 25,1.

12 C. J. 4,43,2 pr. Konstantin an die Provinzialen J. 329.

13 C. Th. 3,31, J.391.

> (conditores iuris) *und des Gesetzes sorgfältig geachtet werden soll. Daher erneuere ich die Anordnungen der Vorfahren* (statuta maiorum), *und bestimme, dass der Kaufvertrag nicht gültig sein soll, welchen die genannte Hungersnot über Freie erzwungen hat.*[14]

Den großen Paradigmenwechsel im Römischen Reich brachte das Christentum mit seinem differenzierten Sozialprogramm für Witwen und Waisen, Alte und Kranke, Arme und Hilfsbedürftige. (Matth. 25) Es sprang in diese soziale Lücke, die der römische Staat nie hatte ausfüllen können. Dadurch gewann es die Massen, zuerst in den Unterschichten später, aber sehr langsam in den Oberschichten. Wie langsam sich dieses Umdenken vollzog, macht die zuletzt zitierte Novelle aus der Mitte des 5. Jhs. deutlich. Aber das ist eine andere Geschichte, die eines eigenen Vortrages bedürfte.

Ich danke Ihnen für Ihre Aufmerksamkeit.

[14] Novellae Valentiniani 33.

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ARTICLES

# LAW, LEGAL CULTURE AND LEGAL TRADITION

## *Or the Foundational Concepts of Comparative Historical Investigations*

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**Abstract**

Historically, the word 'legal culture' was used to describe the environment of law, then served as a sociological exploration of one of the components of law, more recently as an indicator, and finally as an ideal type. In law, separating any domain "external" from anything "internal" is excluded from the beginning. Legal culture substantiates any legal phenomena along with the specific way of approaching to – whilst thinking and arguing in – them. Within this notional sphere, 'legal tradition' is a species of legal culture in which the past is considered as having some kind of binding or justifying force. Or, 'legal culture' is neither a mere environmental element or a surplus added to law, but an ontic part of the law. In consequence, not even the genuine meaning of law can be explained from within, but from the contextualising positions of its underlying culture only, for "extra culturam nihil datur".

**Keywords:** impossibility of anything "internal" and "external" in law, word/conceptuality, culture as the fulfilment of law, comparative legal cultures, "extra culturam nihil datur"

### 1. Science-philosophical presuppositions

Reality is one and unitary, indivisibly cohesive in its entirety. Man is also one and organic, indivisibly coherent as a whole. Man, in his encounter with reality, intellectually processing his sensory experiences, by means of linguistic means highlights from the context of reality what happens to be relevant to him. At the same time, as he

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builds a community with his peers, he builds institutions from patterns he learnt from appropriate or desirable behaviours, institutions from which to raise additional kinds of a normative superstructure.

In the worldview of some cultures, reality, with man in it, is the same process-like continuum into which any logic based on the exclusion of distinctions or contradictions can only be introduced artificially, which then gets thrown off by the exclusivity of uninterrupted transitions. In contrast to this *Far Eastern* outlook, the *Western* (purely Germanic) philosophical tradition of analysis considers discrete, that is, detached, more precisely separated things[1] in those objects of investigation with names already given, and in their movement it discovers "laws" built into the things themselves. Such a *continental* tradition, when it constructs its namings as a set of concepts, envisions the latter themselves as pieces of reality and perceives their logic as a connexion representing reality, while their levels from the general to the concrete are thought as and formulated in deductive schemas. In contrast, the *English* view, which is, based solely on everyday recurring experience, averse to abstract linguistic operations, sees in conceptuality nothing more than the expression of the result of repeated scientific observations. Accordingly, the logic will simply stand for reasserting the connection between those statements formulated (that is, prepared for the purpose) to draw a conclusion in this area. And finally, once any repetition is called a "law", it is nothing more than a casual linguistic turn to generalise a set of experiments inductively assembled.[2]

Our language, including that of science, is uncertain and diffuse; but its apparent inadequacy is also its strength. As the sole means of human communication and its recording, in the long term and with a view to the universality of its use, its "movement [with the drive for unambigousness and the impossibility of eliminating ambiguity on principle – Cs.V.] becomes in its contradictoriness the basis of the specific and inexhaustible fertility of language."[3] Our terms used in our linguistic communication are always *faute de miex*, that is, in the absence of anything better: not necessarily as conceptualized notions, but necessarily as names that make what is communicated meaningful, intelligible, all in all, understandable to the other party in a given situation. Such a role is played by both fictional and symbolic explanation, and parable and analogy as well.

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1 Philosophically, in English, *discrete* (the Latin *discernere* 'separate' from the Latinic French *discrētus*).

2 For details, see Csaba Varga: *The Paradigms of Legal Thinking.* [Philosophiae Iuris] Budapest, Szent István Társulat, enlarged 2nd ed., 2012. http://mek.oszk.hu/14600/14657/; cf. as well Yiftach Fehige (ed.): *Science and Religion East and West.* Science and Technology Studies. Abingdon & New York, Routledge, 2016.; Fritjof Capra: *The Tao of Physics: An Exploration of the Parallels between Modern Physics and Eastern Mysticism.* 3rd ed. Boston, Shambhala Publications, 1991.; Robert William Bennett: *Philosophy and Quantum Physics East and West.* [Harvard University Thesis] 1962. [Harvard University Library Hollis number 990037711700203941].

3 Quoting from George Lukács's posthumous *On the Ontology of Social Being* in Csaba Varga: *The Place of Law in Lukács' World Concept.* 3rd ed. with Postface. Budapest, Szent István Társulat, 2012. 154. http://mek.oszk.hu/14200/14249/.

Now, by bringing the rethinking of linguistic transmissions, representations, and/or outright embodiments[4] into the realm of law, it is realized that fruitless debates can arise from the ambiguity of different conceptualities hidden by a given set of signs[5] as well as from the fact that although all norms are linguistically expressed, only in some of them the words used represent conceptualized expressions at the same time, and only in the latter can we form an aggregate of norms (which is a logical category) from the rules that otherwise carry norms (which is a linguistic category), that is, an aggregate of norms that can also be treated logically.[6]

So there is no royal way. Our words do not stand alone. We can use a certain (and not another) term to mark the subject of what we have to say in the most understandable way. But we can also use it (and nothing else) because the context or internal logic of our explanation, or its expressive or explanatory force, justifies approach and naming from a given point of view. Or, to sum in principle, the many different uses of 'legal culture(s)' in various works may be equally justified. The only precondition is that the meaning of the use in the given way will be clear in our explanation, and that it is precisely this given use of the term that will best serve us by strengthening the explanatory power of our wording.

However, all this is only about vocabulary. Because, by using a given *word*, however, we express *conceptuality* only if that concept or the object behind it has already been placed, through a series of distinctions standing for logical denial, in the classificatory system of our world' components, composed of the logically consistent separation of logically consistently defined elements. Of course, this will be nothing more than a projected reality, a conceptualized model for describing reality. It does not in any way ensure the full conformity of some given *res* and *intellectus*, and much less their identity, but it can offer a useful tool for further investigation. Therefore we may freely use the words like 'culture' or 'legal culture', and this freedom can of course result in language usage habits or simple fashions as well.

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4 During my university studies, I was interested in the connection, and the possible/impossible overlap, between concept, language, logic, and rhetoric in law, for normativism and Marxist theorising presupposed their identity; all that notwithstanding my presupposition suggested possibly diverging fields. See Csaba Varga: A magatartási szabály és az objektív igazság kérdése. [Rule of behaviour and the quest of objective truth]. [1964]. In: Útkeresés. Kísérletek – kéziratban. [Searching for a path: Papers in manuscript]. [Jogfilozófiák] Budapest, Szent István Társulat, 2001. 4–18. http://mek.oszk.hu/15300/15346.

5 E.g. – in this early time, treating exclusively but sufficiently the positivistic/doctrinal and the historical and current sociological, ending by the synthetic approaches – Csaba Varga: Quelques questions méthodologiques de la formation des concepts en sciences juridiques. *Archives de Philosophie du Droit* 18, (1973), 205–241. & In: Csaba VARGA: *Law and Philosophy. Selected Pepers in Legal Theory.* ELTE "Comparative Legal Cultures" Project, Budapest, 1994. 7–33. http://mek.oszk.hu/15300/15333/#, to which literary encouragement was given by a single commentary in Alf Ross: *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law.* Copenhagen, Munksgaard, 1946. 13.

6 E.g. Csaba Varga: Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law. *Acta Juridica Hungarica* 48, 4. (2007), 401–410. http://real-j.mtak.hu/762/1/ACTAJURIDICA_48.pdf., https://doi.org/10.1556/AJur.47.2007.4.5.

## 2. The early occurences of 'culture'

It is certainly instructive to have a history of ideas look over the antecedents of our subject, and to scrutinize the messages that can be updated today.Well, so to speak it is now a scholarly cliché to recall that connecting *law to culture*[7] has been stimulated primarily by research in comparative studies, anthropology, and sociology.[8] In this context, a single statement (on behalf of a philosophical analyst of comparative legal studies may be sufficient to exemplify the organic encounter of law and culture in greater unity and necessity: "Comparative analysis must take into account that the law is infallibly situated in a language, invariably stems from a tradition – or, in short, inevitably participates in a culture and necessarily manifests itself culturally (for how could law ever be outside culture? *Extra culturam nihil datur*)."[9]

As a derivative of the Latin *colere/cultus*-rooted *cultīvāre* ['cultivate'], standing for cultivation [e.g. ăgrĭcultūra; *agriculture*], the word itself appears in English from 1691, meaning the effect of education, from 1796 and under German influence, meaning the new status achieved thereby, and from 1867, standing for the indication of the assessed level of the latter.[10] The particular German influence appeared in the cult of the *Kultur* by Herder: this is the man-made world, the later Marxian *second nature*, which is culture itself (at least insofar as its being organised by culture borrows coherence within a single vast unit to it, making it a simulacrum of real nature, on the one hand, and at the same time, however, confronted with the enlightenedly extended French universalism of *progrès*, this is the definite defense of the achievements of any place and time.[11]

Montesquieu's classic work still reduced the term to the sense of a land's cultivation or being cultivated [*culture de terre*].[12] In the middle of the 19th century, a Hungarian

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7 For the background notions, see Csaba Varga: Comparative Law and Multicultural Legal Classes: Challenge or Opportunity? In: Csaba Varga (ed.): *Comparative Law and Multicultural Legal Classes: Challenge or Opportunity?* Ius Comparatum – Global Studies in Comparative Law. Cham, Springer, 2020. The General Report, 3–42. Or, as a fine remark defines, "Culture is nothing more than the regulator of a common order" for the cooperation of those belonging to a given community. László Ódor: A nemzet fogalma, avagy multikulturalitás a XXI. századi Európában. [Concept of the nation, or multiculturalism in the 21st century Europe]. *Hitel* 21, 2. (2008), 193–202. http://epa.oszk.hu/01300/01343/00073/pdf/20080227-14758.pdf, 201.

8 Sally Engle Merry: What is Legal Culture? An Anthropological Perspective. *Journal of Comparative Law* 5, 2. (2010), 40–58.

9 Pierre Legrand: *Le droit comparé.* Que sais-je? 3478. 5e éd. Paris, Presses Universitaires de France, 2015. 82. [„L'analyse comparative doit tenir que le droit se situe infailliblement dans une langue, relève invariablement d'une tradition – bref, participe inévitablement d'une culture, se manifeste nécessairement culturellement (comment le droit serait-il jamais hors culture: *extra culturam nihil datur*)."]

10 For the first two data, see Philip Durkin (ed.): *The Oxford Handbook of Lexicography*. Oxford, Oxford University Press, 2016. 243–244., and for the third one, https://www.etymonline.com/word/culture.

11 David Danby: Herder: Culture, Anthropology and the Enlightenment. *History of the Social Sciences* 18, 1. (2005), 55–76. https://doi.org/10.1177/0952695105051126.

12 Nearly three dozen times in Montesquieu: *De l'esprit des loix.* Genève, Barillot & Fils, 1748.

author commenting on the need for legal comparatism notes that in isolation of ancient autochthony any such interest is missing, as "In the earliest age […], when every people had a legal life based on separate national and religious principles, this science lacked the most necessary condition."[13] Savigny, on the other hand, has been reflecting on, among other things, the "parallel path of culture and law" for a decade, which he would the explain in his *Volksgeist* doctrine.[14] And although the French mentality invariably resembles the Germanic romanticism conceived behind *Kultur* (moreover, at the end of the 19th century, therefore, it practically even refused to use the term himself, stubbornly depriving itself of any similar initiative in the absence of an acceptable name for overcoming the institutionally embodied and politically advantageous progress of the German Imperial *Kulturdiplomatie*[15]), by the end of the century a separation will be formulated, as product of Germanic neo-Kantianism, between fact and value, causation and validity, *Sein* and *Sollen*, that is, between *Natur*- and *Kulturwissenschaften*, simply *per definitionem*[16] and not as a product of deeper insight[17] – and law will evidently be classified as a phenomenon of culture.

All of this is by no means underestimated for our interest today, yet it is of subordinate importance. Because those taking part in it did not do much more than search for the place of law (in company of social phenomena in general and all virtual projections by the humanities) in the world of *science* proper or its *simulacra*. Consequently, from today's perspective, it cannot even be considered a prehistory in the strict sense. The task was simply to identify a category – *Kultur*[18] – for objects not classifiable as part of

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13 Gusztáv Wenzel [on comparative jurisprudence]. *Magyar Academiai Értesítő* 10, 5. (1850), 292–296., 293. & 295. [„A' legrégibb korban […], midőn minden népnek külön nemzeti és vallásos elveken alapuló jogélete volt, e' tudománynak legszükségesebb feltétele hiányzott."]

14 [„Parallelgang von Cultur und Recht"] By Friedrich Carl von Savigny: *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft.* Heidelberg, J. C. B. Mohr, 1840. 38. – Einleitung. In: Max Weber: *Wirtschaft und Gesellschaft.* Vol. 3. Recht. (ed. Werner Gephart – Siegfried Hermes) Tübingen, J. C. B. Mohr, 2000. 24. claims this expression as part of a longer quote, but I could not find it in the work –, on the one hand, and Friedrich Carl von Savigny: *System des heutigen römischen Rechts.* Vol. I–VIII. Berlin, Veit und Comp., 1840–1849., on the other.

15 For a lot about the issue, see Aurélien Sauvageot: *Souvenirs de ma vie hongroise.* Budapest, Corvina, 1988.

16 Cf. https://de.wikipedia.org/wiki/Geisteswissenschaft; and more amply Heinrich Rickert: *Kulturwissenschaft und Naturwissenschaft,* 7. durchges. u. erg. Aufl.Tübingen, J. C. B. Mohr, 1926., showing also the context Otto G. Oexla (ed.): *Naturwissenschaft, Geisteswissenschaft, Kulturwissenschaft. Einheit – Gegensatz – Komplementarität?* Göttinger Gespräche zur Geschichtswissenschaft 6. Göttingen, Wallstein Verlag, 1998. and Thomas Gutman: *Recht als Kultur?* Über *die Grenzen des Kulturbegriffs als normativer Argument.* Würzburger Vorträge zur Rechtsphilosophie, Rechtstheorie und Rechtssoziologie 50. Baden-Baden, Nomos, 2015. ch. III, para. 1: »Kulturphilosophie«, 27–32.

17 As perhaps Zoltán Péteri: A jogi kultúrák összehasonlításának előtörténetéhez. [For the prehistory of the comparison of legal cultures]. Állam- és Jogtudomány 48, 4. (2007), 509–526. makes it conceivable.

18 Providing that the surplus created by man in the world of the divine creature can be called second nature, then indeed culture is the product itself. And the mental substance, which in the categorisation of *Natur*- and *Kulturwissenschaften* will replace the latter as *Geisteswissenschaften*, stands perhaps for the producer.

the nature, into which their objects could almost automatically be sampled. Or, their interest was only classifying; not revolving about exploring the nature of the object in question.

## 3. 'Legal culture' as a simply visual expression

This or similar tradition may fit into the use of 'legal culture' as a more expressive rather than theoretically elaborated term, so in want of better, but, I think, completely satisfactory and defensible.

### 3.1. As a cultural history of law

One branch of this practice, known as cultural history in its cultivaton for several decades, may have been given a legal specification at a further breakdown. When it came to fashion, weird lawsuits and strange legal customs were recorded as *legal cultural histories*. Already in the period between the two world wars, their eccentricities[19] led to a genuine interest in the past, just as the wealth of the Storno collection at Sopron (Hungary) or the Esterházy collection in the Forchtenstein Castle at once Fraknó (now in Burgenland, Austria) gave way to the real natural or artistic values of humanity. For these were mostly the useless testimonies of natural oddities, of infinite human *trouvaille*, or of the pride and arrogance of immeasurable wealth.[20]

At first, these legal memories were only collected and then purposefully treated,[21] whereas recently specialization in the field of architecture, art, signs and symbols, and ritualism has been undertaken to map and process the legacy of our heritage. As there is a call for "*legal cultural history* [...] to analyse law in culture and culture in law",[22] it will examine both governmental and court architecture and behavioural culture, including professional and lay (moreover, so-called folk) legal style.[23] It is the examination of the

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[19] See, e.g., the huge corpus collected only from oddities, extremes, curiosities and rarities of István Ráth-Végh (1870–1959); as background also Istvánné Ráth-Végh: *Férjem története.* [My husband's story]. Budapest, Gondolat, 1970.

[20] E.g., the kinds of https://en.wikipedia.org/wiki/Fabergé_egg as "symbols of the splendor, power and wealth of the Romanov dynasty and the Russian Empire"; and also https://en.wikipedia.org/wiki/Forchtenstein_Castle and https://esterhazy.at/en/forchtenstein-castle.

[21] E.g. Jacob Grimm: *Deutsche Rechts Alterthümer.* Göttingen, Dieterichen Buchhandlung, 1828. https://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10623104_00005.html and Hans Fehr: *Das Recht im Bilde.* Kunst und Recht I. Erlenbach-Zürich, etc., E. Rentsch, 1923.

[22] István Kajtár: Jogi stílusunk kultúrtörténeti gyökereiről. [On the cultural-historical roots of our legal style]. In: Gábor Hamza – István Kajtár – János Zlinszky (ed.): *»Exige mentis opus doctae, Methodoque reducta...«. Tanulmányok Benedek Ferenc tiszteletére.* [Studies in Honour of Ferenc Benedek]. [Acta Iuridica auctoritate Universitatis Pécs publicata 123]. Pécs, 1996. 124.

[23] As an outstanding oeuvre, see István Kajtár: *Bevezetés a jogi kultúrtörténetbe.* [Introduction to the law's cultural history]. [Dialóg Campus szakkönyvek / Institutiones juris I] Budapest–Pécs, Dialóg Campus, 2004.

various manifestations of legal socialisation, somewhat in mutual complementation of the movements dedicated to law and literature or law and art.[24]

### 3.2. As the fulfilment of law

By ensuring social order, law is also a humaniser of social existence. However, in terms of actual functioning, the self-image of law, abstracted by formal features, and the reality of its practice, may differ. As a result – I wrote three decades ago –

> "If 'legal culture' is not a contentless concept denoting its absence as well, the bare fact of issuing texts with the stamp of positive law and the extent to which it effectively builds a legal culture can be largely divorced. For the basic issue is not simply how much does the law raise a filter enforced in the name and for the sake of the ruling power but how much can it transform into a genuine social institution that may frame, mediate and measure in all directions. At the same time, 'legal culture' does involve the practical entourage, i.e., the sociological components of law and, as a specific culture of a particular sub-field, it refers directly to the general culture of political and human (etc.) relations in society."[25]

Well, I put it this way in 1988, in the dictatorship called Socialism, when I received the honourable invitation to give a plenary presentation to around a thousand participants at the XIVth World Congress of the International Association for Philosophy of Law and Social Philosophy to be held in Edinburgh in August of the following year. I was already thinking that I will talk about the rudimentary and degenerate nature of what is juridicity in socialist law, hesitating, of course, considering our political position and my own delicate situation if such a topic is taken. Because our so-called law is, from the outset, a cover-up scenery of all-pervading interest-driven politics, and thus largely a misleading lie, a mere disguise, it separates formal from substantive legal reality.[26]

However, the idea may have seemed attractive in conceptual terms, as it had proved productive after a decade, under balanced circumstances. Because a German philosopher, Georg Mohr, has resonated with this 'legal culture' idea that it is nothing

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[24] Overviewed by Csaba Varga: Irodalom? Jogbölcselet? [Literature? Philosophy of law?]. *Magyar Napló* 19, 8. (2007), 17–22. as well as *Iustum Aequum Salutare* 3, 2. (2007), 119–132. https://ias.jak.ppke.hu/20072sz/11.pdf.

[25] Csaba Varga: Rechtskultur – Denkkultur: Einführung zum Thema. In: Erhard Mock – Csaba Varga (ed.): *Rechtskultur – Denkkultur*. [Archiv für Rechts- und Sozialphilosophie, Beiheft 35] Stuttgart, Franz Steiner Verlag Wiesbaden, 1989. 9–13., 12–13., quoted by Georg Mohr: Zum Begriff der Rechtskultur. In: Werner Goldschmidt (ed.): *Kulturen des Rechts*. Hamburg, Meiner, 1998. = *Dialektik,* 3. (1998), 9–29., 14.: [„allgemeine politische und Alltagskultur der Gesellschaft" „als eine eigene Kultur eines spezifischen Teilgebietes […] auch unmittelbar auf eine allgemeine politische (usw.) Kultur der Gesellschaft" as a „gemeinsames gesellschaftliches Unternehmen"].

[26] Csaba Varga: Liberty, Equality, and the Conceptual Minimum of Legal Mediation. In: Neil Maccormick – Zenon Bankowski (ed.): *Enlightenment, Rights and Revolution. Essays in Legal and Social Philosophy.* Aberdeen, Aberdeen University Press, 1989. 229–251.

more than the "integrative overall connection of all behaviour-regulating norms, insofar as they are under the demand of just social organization or are at least relevant in this respect",[27]

### 3.3. As the sign of being cultured in law

There is also a viable use of the concept of legal culture marking the state or quest of being cultured in law,[28] whereby the term refers to basic legal literacy as, frequently, in titles of publications that are intended to provide it in form of popular handbook or legal encyclopedia.[29] For instance, in our socialist era, it was especially fashionable to understand thereby the differentiatedly structured state of the law's environment like legal awareness and knowledge of law, obediance to law, legal dogmatics, etc.

### 3.4. As the status of law and of its use

Finally, in want of any other classification, we can include those uses here that simply describe the spirit of some legal order,[30] compare entire legal systems[31] – sometimes showing the difference between extremes such as the one between legal nihilism and the ethos of a "nation of lawyers"[32] – or analyse, within a given culture, some perhaps

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[27] Mohr (1998) op. cit. 42–43. („integrative Gesamtzusammenhang aller verhaltensregulierenden Normen, sofern diese unter der Forderung gerechter sozialer Organisation stehen oder wenigstens im Hinblick darauf relevant sind."). However, the infertility of this approach has already stifled its author in a utopia of the global domination of human rights a decade later, when, as he believes, the legal culture will indeed be in its own place. Cf. by Georg Mohr: Was ist eine Rechtskultur? In: Hans Jörg Sandkühler (ed.): *Recht und Kultur. Menschenrechte und Rechtskulturen in transkultureller Perspektive.* Philosophie und Transkulturalität 13. Frankfurt am Main, etc., Peter Lang, 2011. 9–20. and – offering a catalog of the various uses of the term – Rechtskultur. https://www.unesco-phil.uni-bremen.de/Texte%20zur%20Vorlesung/Rechtskultur.pdf {In: Stefan Gosepath – Wilfried Hinsch – Beate Rössler (ed.): *Handbuch der Politischen Philosophie und Sozialphilosophie.* Vol. II. Berlin & New York, de Gruyter, 2008. 1980–1987}.

[28] https://moly.hu/konyvek/h-szilagyi-istvan-fekete-balazs-nagy-tamas-szerk-iustitia-mesel as well as Ernő Király: Jogi kultúra és kulturált jog. [Legal culture and cultured law]. *Korunk* 39, 6. (1980), 401–404. http://epa.oszk.hu/00400/00458/00510/pdf/EPA00458_Korunk_1980_06_401-404.pdf.

[29] As a representative publication of the Institut Michel Villey (Paris), see, e.g., Denis Alland – Stéphane Rials (dir.): *Dictionnaire de la culture juridique.* [Quadrige-Lamy] Paris, Presses Universitaires de France, 2003.

[30] Dominique Lefèbvre: L'esprit de la culture juridique française. *Revue Juridique Themis* 12, 44. (1962), 255–271.

[31] E.g., Koichiro Fujikura: A Comparative View of Legal Culture in Japan and the United States. *Law in Japan* 16, (1983), 129–134. or Herbert Küpper: A magyar jogi kultúra egyes jellegzetességei összehasonlító perspektívából. [Characteristic features of Hungarian legal culture in a comparative perspective]. In: András Jakab – György Gajdischek (ed.): *A magyar jogrendszer állapota*. Budapest, MTA TK JTI, 2016. 131–141. https://jog.tk.mta.hu/uploads/files/06_Herbert_Kupper.pdf.

[32] Hungary from her time of Habsburg subjection is used to be called a *Juristennation*, perhaps commemorating the fact that domestic sovereignty could only be defended against imperial limiting manipulations by arguing in terms of conventions between the two sides. Cf., among others, Angelika Nussberger: Rechtsstaatlichkeit und Rechtskultur: Zu unterschiedlichen Leitbildern und Traditionen

productive contradiction stretching at a particular stage of its development,[33] or specify, within a dominant culture, a subculture to be considered and managed in one way or another because of the stubborn presence of something that – either needing to be protected[34] or remaining problematic[35], but – is ubiquitous.

## 4. The concept of 'legal culture' as a component of a given legal system

According to his profession and basic oeuvre, Lawrence W. Friedman is an American legal historian, well-entrenched in both sociological and theoretical approaches to law, who owes the first and still valid formulation of the 'legal culture'.

For the first time in 1969, he spoke of the (1) cultural, (2) structural, and (3) substantive components of any functioning legal system, which, according to him, is composed of (*1*) "values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole", (*2*) "[t]he institutions themselves, the forms they take, the processes that they perform", based upon "laws themselves", of course, as well as (*3*) the law stuff itself – all of them adding up to "a totality which […] we will call the legal system […] in which structural, cultural, and substantive elements interact with each other".[36] In his monographic work in 1975, confirming the foregoing, he writes of legal culture as an endless process of input/output interactions that already borrow law "life and reality".[37] Then, from the 1990s onwards, he begins to refine it. According to him, he adds to what he opined

bei der Umgestaltung der Rechtssysteme in Russland und Ungarn. *Studia Iuridica Auctoritate Universitatis* Pécs *publicata* 135, (2005), 116–130.

33 E.g. Paul-Ludwig Weinacht: Montesquieu und die Doppelte Rechtskultur im Alten Frankreich: Gewohnheitsrecht und Gesetzesrecht. *Der Staat* 36, 1. (1997), 118–132., presenting the conflict between the regime of customary laws and legislation serving the centralisation of the state.

34 Such is, e.g., Harvey J. Kirsh: Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court. *Osgoode Hall Law Journal* 9, 2. (1971), 335–357., 357., concluding that "The role remaining for State-law is to encourage the development of legal sub-systems which are solidly grounded in value structures sufficiently recommended to sub-system participants, to permit the legal sub-system to function in its integrating-reinforcing role." https://doi.org/10.60082/2817-5069.2321

35 Such is, e.g., Keith S. Rosenn: Brazil's Legal Culture: The Jeito Revisited. *Florida International Law Journal* 1, 1. (1984), 1–44. Its description is given by Phenor J. Eder: Law and Justice in Latin America. In: *Law: A Century of Progress 1835–1935: Contributions in Celebration of the Anniversary of the Founding at the School of Law of New York University*, vol. I. New York, New York University Press, 1937. 39–82., 42–43.: "civil servants, be they small or powerful, create their own law. Although this law does not happen to correspond with the original law, it meets with general approbation, provided that it is dictated by common sense." And Charles Morazé: *Les trois* âges *du Brésil: Essai de politique.* Cahiers de la Fondation nationale des sciences politiques. Paris, Colin, 1954. 195. will also add that it is "an ingenious maneuver that renders the impossible, possible; the unjust, just; and the illegal, legal."

36 Lawrence W. Friedman: Legal Culture and Social Development. *Law & Society Review* 4, 1. (1969), 29–44., 34. https://doi.org/10.2307/3052760

37 Lawrence M. Friedman: *The Legal System: A Social Science Perspective.* New York, Russel Sage Foundation, 1975., passim, ill. 15. Or, https://en.wikipedia.org/wiki/Legal_culture will define legal culture as "temporary outcomes of interactions and occur pursuant to a challenge and response paradigm".

back in 1990, "legal culture […] acts as the immediate source of law, the impetus for legal stasis or change."[38] In 1992, however, in order to capitalise on this insight by helping sociological investigations, he distinguishes between internal (professional) and external terrains of "opinions, attitudes, values, and expectations with regard to law and legal institutions".[39] He confirms the quantifiability of empirical data that can be drawn, for, as he continues 1994, "We can measure [legal culture] directly, by asking people questions; or indirectly, by watching what people do and inferring their attitudes from what we see."[40]

But in the end, he virtually renounces it because, as he expresses his failure, the definition of 'legal culture' as an object of inquiry is too general and ambiguous; it cannot help having various uses. Having no proper criteria, it cannot be defined and used in empirical research for operational purposes; as to a final judgment, it covers "a troublesome concept".[41]

At the same time, this practically self-defeating morphosis, expressive of developments in the history of ideas, is apt to explore the possibilities – as well as the limitations – of using the term 'legal culture' itself. Because in our case a historian studied the formation of American law, wherein he perceived the determinative or shaping force of the play of various factors and interactions repeatedly. By generalisation, he set up a three-component concept of law with an infinite and never-ending inner dynamism, independent of whether or not some temporary apparent immobility of equilibrium or just the opposite, an express change may have been the case. However, once all of this from the ontic of law itself was exposed to the legal environment in order that, by accepting the duality of "law and society", he may quantify from the side of the latter, quite rightly he became uncertain of the benefit of using the term 'legal culture' any longer.

So, is that what is at stake here really a simply "unreflected" term,[42] that is, an expression used as a word for denoting a subject rather than a concept? Or, rather, an "umbrella term"[43] taken as a *Mädchen für alles* typed all-encompassing panacea with some Jolly Joker role, extended to infinity by all sorts of the -isms enthusiasts?

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[38] Lawrence M. Friedman: The Concept of the Self in Legal Culture. *Cleveland State Law Review* 38, 4. (1990), 517–534., 534.

[39] Lawrence W. Friedman: Legal Culture. (1992.) https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/legal-culture.

[40] Lawrence Friedman: Is There a Modern Legal Culture? *Ratio Juris* 7, 2. (1994), 117–131., 119. https://doi.org/10.1111/j.1467-9337.1994.tb00172.x

[41] Lawrence Friedman: The Place of Legal Culture in the Sociology of Law. In: Michael Freeman (ed.): *Law and Sociology*. Oxford, Oxford University Press, 2006. 185–199. https://doi.org/10.1093/acprof:oso/9780199282548.003.0011

[42] Balázs Fekete: A kortárs »jogi kultúra« fogalom eredete: Lawrence M. Friedman a jogi kultúráról. [Origins of the contemporary notion of »legal culture«: Lawrence M. Friedman on legal culture.] *Iustum Aequum Salutare* 13, 1. (2017), 37–53., 37.

[43] Balázs Fekete: Inconsistencies in the Use of Legal Culture in Comparative Legal Studies. *Maastricht Journal of European and Comparative Law* 25, 5. (2018), 551–564. https://doi.org/10.1177/1023263X18796978

## 5. 'Legal culture' as a sociological indicator

By examining how society is built up with the prevalence of which interrelations, sociology is based on the presentation and analysis of structural and behavioural patterns, and thus uses the term 'culture' as a key concept. Though all symbolic, 'culture' does not stand for a closed and formalisable system of code or norms but for a network of meanings whose research is interpretation. After all, it is nothing more than [part of a distinctive way of imagining the real".[44] It is not by chance, therefore, that it has been used as an indicator in descriptions and explanations, for example in the legal field as "the entirety of practices and values related to acceptance, evaluation, criticism, and implementation of the legal system in force".[45]

In sum, it is clear that we are speaking here on what interrelationship can be found between the two subjects reflected to one another, or, otherwise speaking, on the way in which individuals in society relate to the law that defines society as a whole, while working with a degree of autonomy and automatism.

### 5.1. Erhard Blankenburg

As a prominent figure in the cultivation of his interest, a German legal sociologist in Amsterdam,[46] Erhard Blankenburg, began to use legal culture as an indicator to compare legal systems by developing appropriate correlations.[47] Sample With a companion, he soon built a set of criteria from which he could describe his own legal culture with quite diverse components, such as norms and institutions, compliance with law, and legal/non-legal consciousness.[48] For a later comparative analysis he have already categorised those specific elements like legal consciousness and legal behavior, as well as institutional features and substantive law.[49] Over time, he completely re-profiled the potential constituents in a now truly broader but commensurable (Central

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[44] By Clifford Geertz: *The Interpretation of Cultures: Selected Essays.* Harper Torchbooks. New York, Basic Books, 1973. and Clifford Geertz: *Local Knowledge: Further Essays in Interpretive Anthropology.* New York, Basic Books, 1983. 184.

[45] Adam Podgórecki: *Prestiż prawa.* [The prestige of law]. Warszawa, Książka i Wiedza, 1966. 179–180.

[46] The recently deceased philosopher of law, Werner Krawietz informed me at Münster years ago that as heralds of the New Left, German legal sociologists had succeeded to earn recognition of this specific quality as a general guideline of university accreditation. However, individual universities as autonomous units resisted to receive them, so legal sociologists had to go abroad if they were to get professorial stall.

[47] E.g., Erhard Blankenburg: Cultures juridiques comparées. *Droit et Société,* 16. (1990), 321–330. https://www.persee.fr/doc/dreso_0769-3362_1990_num_16_1_1093 shows marked differences indeed, with Austria and Belgium having a tenfold increase in the frequency of litigation and the size of the legal profession, and a thirtyfold surplus in terms of appeal, as compared with Japan. https://doi.org/10.3406/dreso.1990.1093

[48] Erhard Blankenburg – Freek Bruinsma: *Dutch Legal Culture.* Deventer & Boston, Kluwer Law and Taxation, 1991. 52.

[49] Erhard Blankenburg: Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany. *American Journal of Comparative Law* 46, 1. (1998), 1–42. https://doi.org/10.2307/841077

European) context, in which he was specifically interested in law-related training and vocation, as well as legal aid, in addition to civil, criminal, administrative, and constitutional justice.[50]

### 5.2. David Nelken

David Nelken, a legal sociologist based in England and Italy, took a more theoretical course. He also began to use legal culture as an indicator, selecting key concepts – like the role of judges/lawyers, the understandings of rule of law and due process, or the notion of contract – "to construct a typology of »ideal types« of relevant features of legal culture".[51] In his further work, he clarified that "legal culture [...] points to differences in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society".[52] Accordingly – he concluded – "Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes."[53]

But once "break up the concept" is needed[54] as it has been emphasised in the ensuing debate, why is it at all, why are we talking about it, and what good is it? Well, these discussions have already warned the author of the inherent weakness of the concept he developed, namely that

> „The concept of culture is not so much a way of identifying highly specified and tightly bounded units of analysis, then, as a heuristic device for suggesting how individual decision-making is conditioned by the language of normative discussion, the set of historical reference points, the range of solutions proposed in the past, the institutional norms taken for granted, given a particular context of repeated social interaction."[55]

That is, the 'legal culture' he has introduced can be used, suggests some meaningful connection as well; in practice, moreover, it has become fashionably suggestive of deeper meanings; but it can do so too loosely in occurrences so that, by now, „similar

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[50] Erhard Blankenburg: *Legal Culture in Five Central European Countries.* The Hague, 2011. [wrr Working Documents W111] https://www.wrr.nl › binaries › wrr › documenten › publicaties › 2000/12/18 – with the present author also contributing to it.

[51] David Nelken: Disclosing/Invoking Legal Culture: An Introduction. *Social & Legal Studies* 4, 4. (1995), 435–452., 443. https://doi.org/10.1177/096466399500400401

[52] David Nelken: Towards a Sociology of Legal Adaptation. In: David Nelken – Johannes Feest (ed.): *Adapting Legal Cultures*. Oñati International Series in Law and Society. Oxford & Portland, Or., Hart Publishing, 2001. 7–54., 25.

[53] David Nelken: Using the Concept of Legal Culture. *Australian Journal of Legal Philosophy* 29. (2004), 1–26. http://www.austlii.edu.au/au/journals/AUJlLegPhil/2004/11.pdf 1.

[54] Franz Von Benda-Beckmann – Keebet Von Benda-Beckmann: Why Not Legal Culture. *Journal of Comparative Law* 5, 2. (2010), 104–117., 105.

[55] Jeremy Webber: Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken. *Australian Journal of Legal Philosophy* 29, 17. (2004), 27–36., 32. http://www.austlii.edu.au/au/journals/AUJlLegPhil/2004/17.html

concepts are used in different contexts of meaning in different disciplines of the legal science."[56] In other words, it meant a lot by having meant less and less in any genuine sense. From which Nelken had to draw the lesson that his concept proved to be, again, "highly controversial".[57]

### 5.3. Roger Cotterrell

However, the ultimate blow to the idea of a 'legal culture' to be usable in sociological contexture was stroken by the excellence of English macrosociological legal theory, Roger Cotterrell. Because, however, he sees the effort itself at naming the entire environment of law by 'legal culture' as an impressionistic total visualisation, the fact notwithstanding that by definition it involves "underlying values or principles of legal system [...], traditions, shared beliefs, common ways of thinking, constellations of interests or patterns of allegiances of lawyers, lawmakers, and citizens".[58] And as if he were exclaiming the king naked, he identifies that this is, in fact, 'legal ideology' behind the law, some elements of which, in order to give it meaning, might be best approached through ideal types.[59]

So, if I consider the law itself and the social environment interacting with it as separate entities, then the latter, expressed by the category of 'legal culture', will prove to be both uncertain and tautologic[60] – only provided that this latter is intended to cover

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[56] Anna Kociołek-Pęksa – Władysław Pęksa: Between History and Sociology: Remarks on Differences in Perceiving legal culture as a Subject of Interest by Various Disciplines of Jurisprudence, Particularly Sociology of Law and the Disciplines of the History of Law. *The Lawyer Quarterly* 6, 4. (2016), 209–225. https://tinyurl.com/ykjbc9da 225.

[57] David Nelken: Thinking about Legal Culture. *Asian Journal of Law and Society* 1., 2. (2014), 255–274. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466424 255., https://doi.org/10.1017/als.2014.15

[58] Roger Cotterrell: Comparative Law and Legal Culture. In: Mathias Reimann – Reinhard Zimmermann (ed.): *The Oxford Handbook of Comparative Law*. Oxford, Oxford University Press, 2008. 709–752., 710. https://doi.org/10.1093/oxfordhb/9780198810230.013.22

[59] Roger Cotterrell: The Concept of Legal Culture. In: Roger Cotterrell: *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory.* Burlington, Ashgate, 2006. 81–96., 83. and 89–91. https://doi.org/10.4324/9781351217989-6

[60] Benda-Beckmann – Benda-Beckmann op. cit.

the other side of the law's total presence[61] or to fulfil the role of an indicator, that is, an analytical concept[62] in sociological description.[63]

I am to note that the genuine quest here is not entirely new: it has already been answered once, about four decades ago, Moreover, in a domestic debate, when the issue of conceptual unity versus separability has been raised in terms of the dilemma of how to interprete the domains 'within the law' and 'outside the law'.[64] And the answer was definite in so far as it referred to the although differentiable but inseparable unity of the entire field operated, influenced or suffered by law.[65]

"Legal cultures" as expressions of the order ideal behind the use of the instrument of law.

## 6. 'Legal cultures' as expression of the various ideals of order that may stand behind resorting to the means of law

When as a result of readings and study trips abroad, the richness of the variety of laws and legal regimes opened up to me and I could not only intellectually encounter historical layers of them as superimposed from the past in their "progress" towards future (as French and Soviet revolutionary utopianism dictated[66]), but also take notice

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61 Towards the end of communism in Hungary, humanisation of socialist law was promoted via legal policy and legal culture projects in the Budapest university. Doing so, Mihály Samu: A kultúra és a jog: a jogi kultúra. [Culture and law: legal culture]. *Jogtudományi Közlöny* 42, 8. (1987), 405–414., 408., 409. & 410–411. wrote that "law and legal culture form an integral unity, not in relationship of the whole and the part, but as two sides of reality".

62 E.g. Thomas M. Franck: The Legal Culture and the Culture Culture. *Proceedings of the American Society of International Law Annual Meeting* 93, (1999), 271–278. https://doi.org/10.1017/S0272503700067768. H. Patrick Glenn: Are Legal Traditions Incommensurable? *American Journal of Comparative Law* 49, 1. (2001), 133–146. https://doi.org/10.2307/840924.; H. Patrick Glenn: Concept of Legal Tradition. *Queens Law Journal* 34, 1. (2008), 427–445.; Menachem Mautner: Three Approaches to Law and Culture. *Cornell Law Review* 96, 4. (2011), 839–867. https://scholarship.law.cornell.edu/clr/vol96/iss4/25/; Ralf Michaels: Legal Culture. In: Jürgen Basedow – Klaus J. Hopt – Reinhard Zimmermann – Andreas Stier (ed.): *Max Planck Encyclopedia of European Private Law.* Oxford, Oxford University Press, 2012. 7. http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3012&context=faculty_scholarship

63 Nevertheless, its unspecified use is still alive today, for example in a problematization according to which "Legal culture is functionally equivalent to a virtual bridge that makes it possible to analyse the fundamental subject matter of sociology of law: the reciprocal connections between law and society." Alberto Febbrajo: Introduction. In: Alberto Febbrajo (ed.): *Law, Legal Culture and Society: Mirrored Identities of the Legal Order.* Studies in the Sociology of Law. London, Routledge, 2018. i.

64 Gyula Eörsi: Jogelméleti torzó. [A torso of legal theorising]. Állam- és Jogtudomány 23, 3. (1980), 353–380. attempted to conceptualise mechanisms of action inside and outside the law, while Vilmos Peschka: Lehet-e a jognak ontológiája? [Can there be an ontology of law?]. Állam- és Jogtudomány 23, 3. (1980), 382–406. argued for law as a single ontic entity.

65 Csaba Varga: Domaine »externe« et domaine »interne« en droit. [trans. François OST]. *Revue Interdisciplinaire d'Études Juridiques* 14, 1. (1985), 25–43. https://tinyurl.com/2p3vaupd

66 See, among others, Pál Angyal: A haladás problémája az emberi gondolkodás történelmében. [The quest for progress in the history of human thought. *Társadalomtudomány* 8, 3–5. (1928), 140–161.; Jules Delvaille: *Essai sur l'histoire de l'idée de progrès jusquà la fin du XVIII^e siècle.* Paris, Alcan,

of their diversity in our present world, I began to look for the genuinely real and deep roots of differences and also of the conceptualisation of which I could assume that it might give account of this richness as the embodiment of own variations.

Initially within the circle of legal theory purely, I tried to unravel the mystery of the distinction between Civil Law and Common Law as a difference between legal methods.[67] Then it turned out that the real and quested subject here is neither simply law nor thinking *in* law but also–and above all – thinking *on* and *about* law.[68] It means that we are to face a notion of the idea and ideal of social order – including underlying philosophies with manners of conceptualisation, understandings of logic with apperception of human experience, and involving also where and how the people concerned may or must operate by generalisation, speak of laws and act sharply or in a rounded way – that ultimately dominates the whole outlook of various peoples' various cultures.[69]

Once we look over the families of Civil Law and Common Law as great heirs of the once Bologna reception of Roman law and start examining those enormous blocks of legal arrangements that have historically appeared and/or are emerging anywhere in the world, what we can learn therefrom can only be clearly expressed by the idea and ideal of what order is meant to be served and secured, and which way it needs to be formulated.[70]

In addition to the views formed about society and the order that can be desired and ensured in it, whole *worldviews* are placed on a common platform of investigation here. Their most common feature is their mutual difference, which precludes commensurability and even contrasted evaluation, for what they can represent cannot be more than their *autochthonous* nature: as part of world civilizations at a given place and time, it is the concerned peoples' particular conditions and individual experiences that have formed their ideas of order; and any effect of interaction or learning process, which nevertheless can perhaps be detected in their formation, cannot be more than of subordinate importance to their root nature's autochthonality at the most.[71] This

1910.; Bernard James: *The Death of Progress.* New York, Knopf, 1973.; Pierre-André Taguieff: *Le sens du progrès: Une approche historique et philosophique.* Paris, Flammarion, 2004.; Sylvie Mullie-Chatard: *De Prométhée au mythe du progrès: Mythologie de l'idéal progressiste.* L'ouverture philosophique. Paris, Harmattan, 2005.

67 For the first time in Csaba Varga: A »*Jogforrás és jogalkotás«* problematikájához. [To the problem of {Vilmos Peschkas} »Source and the making of law«]. *Jogtudományi Közlöny* 24, 9. (1970), 502–509. (http://mek.oszk.hu/14500/14525/, 215–222.)

68 This is the difference and ultimate unity of thinking in and on law, cf. Varga (2012) op. cit.

69 Ibid.

70 Csaba Varga (ed.): *Comparative Legal Cultures*. The International Library of Essays in Law & Legal Theory, Legal Cultures 1. Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York, The New York University Press, 1992.

71 With H. Patrick Glenns introduction of the concept of autochthonity [from the Greek composition of *auto-* + *chthőn* [the land] into legal comparatism, professional interest has shifted to the originality inherent in any culture, however latent. A few decades earlier, Alan Watsons legal history research (which I was well acquainted with, as he started a correspondence with me during his professorship at Edinburgh on the possible rationale for the codification/non-codification of English law) drew attention

implies that the very scale by which we can measure their success is provided by criteria they will have supplied themselves, regardless of how much differentiated and/or autonomous they are – albeit, as recent anthropological micro-analyses are used to reveal, even their most ancient and prototypal forms may have developed surprisingly complex an internal structure and feedback capability. Moreover, typically we can find in each of them some approach, combination or technical solution to be so surprisingly original and prodigiously effective that we shall be easily inclined to generalize it as the specific genius of the given arrangement.[72]

In my own research, I have called such large units legal cultures. Neither what I may study in close proximity nor what I perhaps compare with some neighboring phenomenon, but the individual carriers of whole sets produced so far by universal human development to serve as fundamental legal patterns.[73] The characterization of these 'legal cultures' is thus done by generalizing or exemplificative description[74] of features identifiable as ideal types.[75] That's why I was able to record sometime around 1990 that "Comparative legal cultures are examined by a field of scholarship, which is situated at the line bordering comparative law and historical jurisprudence."[76] However, these are not only products, that is, mere outcomes or imprints of other phenomena, but also productive forces able to create social reality. That is, they have an *ontological* status as well, serving also as *epistemological* filters for the law's cognition.[77]

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to the generality of human pattern *imitatio* and, owing to this, the possibility of an "always the same while always different" kind of legal development. Cf. Csaba Varga: Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező. [Transplantation of law, or borrowing as a universal pattern of developing the law]. *Állam- és Jogtudomány* 23, 2. (1980), 286–298. (http://mek.oszk.hu/14500/14525/, 191–203.)

72 Cf. Varga (2020) op. cit. https://doi.org/10.1007/978-3-030-46898-9

73 The expression *mentalité juridique* is used in this sense by Pierre Legrand: À propos d'une réflexion sur la comparaison juridique. *Revue internationale de droit comparé* 45., 4. (1993), 879–888. https://www.persee.fr/doc/ridc_0035-3337_1993_num_45_4_4773 and Pierre Legrand: European Legal Systems are not Converging. *International and Comparative Law Quarterly* 45, 1. (1996), 52–81. https://pierre-legrand.com/european-legal-systems.pdf, 60. et seq. According to his definition – Pierre Pierre Legrand: *Fragments on Law-as-Culture.* Deventer, Kluwer, 1999. 27. – this is "the framework of intangibles within which an interpretive community operates, which has normative force for this community [...] and which, over the *longue durée*, determines the identity of a community *as community*."

74 As acknowledged by Jaakko Husa: Legal Culture vs. Legal Tradition – Different Epistemologies?. *Maastricht European Private Law Institute Working Paper,* 18. (2012), 1–30. https://ssrn.com/abstract=2179890 22. as well: it is not a legal culture described in itself, but a "concept of legal culture (or rather cultures)" is the case here.

75 These are "historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system". John Henry Merryman – David S. Clark: *Comparative Law, Western European and Latin American Legal Systems: Cases and Materials.* Contemporary Legal Education. Indianapolis, Bobbs-Merrill, 1978. 29.

76 Csaba Varga: Introduction. In: Varga (ed., 1992) op. cit. xv–xxiv, xix, quoted in https://en.wikipedia.org/wiki/Legal_culture.

77 "In short, we create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real." Lawrence Rosen: *Law and Culture: An Invitation.* Princeton, N.J., Princeton University Press, 2004. 4. Thereby also "the collective programming of the

And what was all of such use for? In order to be able to outline the potentials of law known so far – ideals of order, ways of proceeding and thinking, adequate language and objectification, among others – for elaborating a genuinely *general theory of law* and – by transcending the hitherto narrow and formal representation of law in legal comparison, reduced to the linguistic form of mere rules – to show why in some cultures it is worth talking about the rule-based nature of law, while in others it is not.

As has been voiced more than two decades ago by the French specialist David Bell of Oxford and Cambridge – to whom legal culture is "a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts"[78] – the problematization of David Nelken is hardly more than resuming "The work […] which Varga, in particular, is developing and whose work is being published by the same publisher […], though is not referred to directly in the work under review."[79]

Instead of the image Nelken had advised as a targeted sociological indicator, the comparative theoretician Jaakko Husa continued the debate by explaining that

> "However, not all the uses of 'legal culture' or definitions of it are stemming from sociological legal world-view purely. There are also more demanding and more subtle ways to understand the concept. Varga has also connected uses of up-to-date comparative concepts, as 'legal culture' and 'legal tradition', with transcending the limits of legal positivism so that law's internal description of itself is replaced by an external description of law. To simplify a great deal, epistemic point of view from which law is conceived has shifted from inside to outside. Here we find different socio-historical, sociological, and cultural anthropological frameworks. For Varga the shift in comparative law seems to be, rightly so, a shift from positivistic epistemology into wider socio-historical framework. He defines 'legal culture' in a manner that seems to contain elements from multiples fields that study law, not just juristic studies, but sociology, philosophy, history, and philosophy."[80]

For, as he quotes from me for furthering his exposition,

> "the law's formal objectification (enactments, decided cases, etc.) can be meaningfully interpreted only within its informal contexture. This

mind which distinguishes the members of one group or category of people from another" is achieved. Geert Hofstede: *Cultures and Organizations: Software of the Mind.* New York, McGraw-Hill, 1991. 5.

78 John Bell: English Law and French Law: Not so Different? *Current Legal Problems* 48. (1995), 63–101., 70. https://doi.org/10.1093/clp/48.Part_2.63

79 John Bell: [review on David Nelken: *Comparing Legal Cultures*]. *International & Comparative Law Quarterly* 47, 1. (1998), 246–248., 248., quoting both Varga (ed.,1992) and Volkmar Gessner – Armin Hoeland – Csaba Varga (ed.): *European Legal Cultures*. Tempus Textbook Series on European Law and European Legal Cultures I. Aldershot, Brookfield USA, Singapore, Sydney, Dartmouth, 1996.

80 Husa (2012) op. cit. 7.

> environment is called legal culture; it is embedded in general societal culture. Legal cultures include ethos, values, conceptual and referential frames related to law, judicial skills and habits, as well as ideology and deontology of the legal profession, among others. It is this component that gives law a life, makes it dependent from local histories and domestic culture, defines its orientation, shapes its receptiveness and responsiveness, and, in case of eventual reform, backs or withstands to it."[81]

According to such a "broad definition",

> "'legal culture' conceived in this manner is not rigid, it is rooted in social habits, it describes how law is felt, it is not only descriptive because it contains the element of potential (in objectified elements of law i.e. enactments, decided cases etc.), it is formed in social co-operation, it is conceptualisation of law in broad sense, it tells about the legal *mentality* of a society or a group."[82]

All in all, then, he continues, quoting from me again,

> "the comparative study of legal cultures has from the very start been interested in the genesis and formation of the law's various phenomena and operations, that is, in how law evolved within various civilisations, producing various cultural responses in human efforts at problem solving, with varying moral and religious foundations and value preferences in successive ages in a way rebuilding again and again. Or, this is also an interest in the history of ideas, manifesting itself in the general frame of the history of civilisations, dedicated to societal problem-solving capacity even when we are making formal and homogenised instruments and institutions"[83] as any such intellectual reconstruction is done "in the context of the cultural response we offer in law to the various challenges, characteristic of the given human community and civilisation".[84]

More specifically, "the term 'legal cultures' […] stands for an operative and creative contribution, through social activity rooted in underlying social culture, to express how people experience legal phenomenon […], how and into what they form it through

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[81] Csaba Varga: *Transition to Rule of Law: On the Democratic Transformation in Hungary.* Philosophiae Iuris. Budapest, ELTE "Comparative Legal Cultures" Project, 1995. & http://mek.oszk.hu/14700/14760/, 85, quoted (in a shortened form) by. Husa (2012) op. cit. 7. note 28.

[82] Husa (2012) op. cit. 22., 23.

[83] Csaba Varga: Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline. *Acta Juridica Hungarica* 48, 2. (2007), 95–113., 104. http://real-j.mtak.hu/762/1/ACTAJURIDICA_48.pdf https://doi.org/10.1556/AJur.47.2007.2.1 quoted by Husa (2012) op. cit. 12. note 51.

[84] Varga (2007) op. cit. 99. quoted by Husa (2012) op. cit. 14. note 64.

their co-operation, how and in what way they conceptualise it, in what a spirit, frame and purpose they make it the subject of theoretical representation and information."[85]

Thus, *legal culture* is ultimately nothing more than the ideal of order (involving the due mentality) upon the basis of which (*a*) as a global force within the given society as a whole and (*b*) by resolving basal conflicts (*c*) in its quality of standing for the supreme and ultimate regulator and pressuring power within the given society,[86] law is created, maintained and managed.

Owing to the above, on the one hand, the discipline of comparative investigations into legal cultures is indefinable, but, on the other, it has the virtue of being ready to identify the organizing core (or specific genius) of each variant differently in differing cultures, as one of the distinctive features by which individual legal cultures may have contributed to the almost endless variety developed in and by law. After all, as a further author[87] also quotes from me,

> "the starting point is no longer either the law of a nation or its sectoral history, but the cultural medium in continuous formation, in which references, as the fixed and fixing points of human thinking and action – beliefs and values, preferences and aims, traditions and skills, methods and procedures – may have developed in a given (and not another) way, that is, the medium in which a certain (and not another) notion of order and the associated (and not another) store of instruments (with a proper conceptual scheme and the role it may attribute to abstract logic) could evolve. If, in an inverse move, we start thinking from the endpoint, this explains why the comparative study of legal cultures neither supposes any kind of codified list, nor any set of questions, nor taxonomy, nor previously established methodology, regarding (or following) which the discipline of comparative legal cultures and its focus on the whole variety of cultures and ages should provide a response. Just to the contrary. According to its inherent approach, out of itself and through its in-built learning processes, each culture generates proper (general and sectoral) formations, frameworks and schemes, often ones and in manners characteristic exclusively of it – approaches and problem-sensitivities, organisational principles and notional distinctions, institutionalisations

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85 Csaba Varga: Legal Traditions? In Search for Families and Cultures of Law. *Acta Juridica Hungarica* 46., 3–4. (2005), 177–197., 182. https://doi.org/10.1556/AJur.46.2005.3-4.2. The same development of mine is quoted by Husa (2012) op. cit. 7.

86 For the first such formulation of this threefold criterion – and, at the same time, universal – definition of law, see Csaba Varga: Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures. In: Institute of Comparative Law, Waseda University (ed.): *Law in East and West. On the Occasion of the 30th Anniversary of the Institute of Comparative Law, Waseda University.* Tokyo, Waseda University Press, 1988. 265–285. (http://mek.oszk.hu/15300/15333/#, 437–457.)

87 Fernanda Mambrini Rudolfo: *O modelo garantista na interpretação e na aplicação dos direitos fundamentais: Um estudo comparado do posicionamento processual penal do Supremo Tribunal Federal Brasileiro em 2015 e 2016.* Florianópolis, Universidade Federal de Santa Catarina, 2017. 322.

and procedural paths, methods and skills –, which are suitable, in their systemic totality, to define the specific character of an order which is going to be described by us *a posteriori* as a legal one, particular to the given culture."[88]

## 7. 'Legal cultures' or 'legal traditions'?

It was at the turn of the millennium that the great old figure of comparatism, H. Patrick Glenn, published not only the most modern, but at the same time perhaps the most comprehensive and in-depth overview of the legal systems and their thought patterns that ever existed under the title of 'legal traditions'[89] – certainly as not the first using such title, but definitely creating a naming fashion. Considering his chosen subject, he opines that "A given tradition emerges as a loose conglomeration of data, organized around a basic theme or themes, and variously described as a 'bundle', a 'toolbox', a 'language', a 'playground', a 'seedbed' a 'ragbag' or a 'bran-tub." As to its character, "Tradition is unquestionably normative. It tells us how we should act. Its normativity derives from the collective judgment, exercised over time, that the content of the tradition is of value and should be of contemporary application."[90]

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88 Varga (2007) op.cit. 5–113. http://real-j.mtak.hu/762/1/ACTAJURIDICA_48.pdf) {reprint in Csaba Varga: *Comparative Legal Cultures: On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism.* Philosophiae Iuris. Budapest, Szent István Társulat, 2012. http://mek.oszk.hu/15300/15386, 34. [„No entanto, nem todos os usos ou definições da »cultura jurídica« são decorrentes puramente da visão sociológico-jurídica do mundo. Há também maneiras mais exigentes e sutis de se entender o conceito. Varga também conectou usos de conceitos comparativos atualizados, como »cultura jurídica« e »tradição jurídica«, que transcendem os limites do positivismo jurídico, de modo que a própria descrição interna do direito seja substituída por uma descrição externa do direito. Para simplificar uma grande questão, o ponto de vista epistêmico a partir do qual a lei é concebida mudou de dentro para fora. Aqui encontramos diferentes quadros antropológicos, social-históricos, sociológicos e culturais. Para Varga, a mudança no direito comparado parece ser, com razão, uma mudança da epistemologia positivista para o quadro social-histórico mais amplo. Ele define a »cultura jurídica« de uma maneira que parece conter elementos de múltiplos campos que estudam o direito, não apenas estudos jurídicos, mas sociologia, filosofia, história e filosofia."]

89 H. Patrick Glenn: *Legal Traditions of the World: Sustainable Diversity in Law.* Oxford & New York, Oxford University Press, 2000. [5th ed. (2014)].

90 H. Patrick Glenn: *Legal Traditions of the World: Sustainable Diversity in Law.* Oxford & New York, Oxford University Press, ²2004. 15. and H. Patrick Glenn: Legal Traditions and Legal Traditions. *Journal of Comparative Law* 2, 1. (2007), 69–87., 73.

The term 'tradition' itself derives from the concept of *traditio* in Roman law.[91] Its usual undertandings emphasize, on the one hand, its value for a group's ability to define its identity[92] and, on the other, its being activated by a retrospective confirmation.[93]

The difference between *legal culture* and *legal tradition* is often blurred[94] or narrowly interpreted, as if any tradition could be universal as a historical generality, that is, one from which culture could emerge only occasionally, in the case of expedient construction, and as a result.[95] However, the situation is exactly the opposite and, especially in terms of law, "'culture' is within the womb of that which we interpret ourselves and our world, whereas 'tradition' is only one form of culture, the one in and for which the past has strong significance for the acceptance – or, obliquely, the justification – of any direction/contents taken."[96]

Well, appearing together at the *Epistemology and Methodology of Comparative Law* conference at the European Academy of Theory (Brussels) in the fall of 2002, Glenn came to me before my presentation as a friend, but during our conversation he strongly objected to my use of the term for it is, so to speak, divisive, and not politically correct, for growing out of Germanic romance, it served as one of the fetishes of the Third Reich. Yet for both of us, one of our great American ancestors of our father's age made it clear for quite a few decades then that these are two concepts that are not equivalent, not even assigned to one another, but coming to a possible variety. Because – writes Merryman – "The legal tradition relates the legal system to the culture of which it

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91 According to https://www.thefreedictionary.com/tradition, "from Old French, from Latin trāditiō, trāditiōn-, from trāditus, past participle of trādere, *to hand over, deliver, entrust*: trā-, trāns-, *trans-* + dare, *to give*".

92 "[T]he traditions are above all not simple routines […], but knowledge or actions that carry value and meaning for a particular human group." https://www.scienceshumaines.com/culture-et-tradition_fr_12538.html (mars/avril/mai 2002). [„[L]les traditions ne sont surtout pas des routines quelconques […], mais des savoirs ou des actes porteurs de valeur et de signification pour un groupe humain particulier."]

93 "What we call tradition is therefore not simply a given but ultimately the product of a recreation: each heir thus constructs retrospectively what has been transmitted to him. In this respect, we could say that the tradition was presented on the model of »reverse filiation«, the son begetting and choosing his own father." Philippe Simay. In: Michel Bley (dir.): *Grande dictionnaire de la philosophie*. Paris, Larousse, 2003. https://gallica.bnf.fr/ark:/12148/bpt6k1200508p/f1054.item.r=tradition. [„Ce que l'on nomme tradition n'est donc pas simplement un donné mais *in fine* le produit d'une recréation: chaque héritier construit ainsi rétrospectivement ce que lui a été transmis. On a pu dire à ce titre que la tradition se présentait sur le modèle de la »filiation inversée«, le fils engendrant et choisissant son propre père."], referring to Jean Pouillon: *Fétiches sans fétichisme.* Bibliothèque d'anthropologie. Paris, Maspero, 1975.

94 According to https://fr.sawakinome.com/articles/public/difference-between-culture-and-tradition.html and http://www.differencebetween.net/miscellaneous/difference-between-culture-and-tradition/, „Rechtskultur steht in gesellschaftlichen, religiösen und ideologischen Traditionen."

95 H. Patrick Glenn: The Nationalist Heritage. In: Pierre Legrand – Robert Munday (ed.): *Comparative Legal Studies: Traditions and Transitions.* Cambridge, Cambridge University Press, 2003. 76–99., 78. et seq. will connect the concept of legal culture to the Western idea of the state. https://doi.org/10.1017/CBO9780511522260.004

96 Varga (2020) op. cit. 23., note 97. https://doi.org/10.1007/978-3-030-46898-9

is a partial expression. It puts the legal system in to a cultural perspective".[97] For, in contrast to him, in my lecture material, which Glenn may have read in advance, I spoke exactly about the fact that

> "'*Legal tradition*' as a concept can be interpreted exclusively within legal culture. Tradition is the awareness of an earlier inherent pattern of culture, taken as the source of and inspiration to community identification, with the demand for continuity as an encouraging or justifying power. Thus, 'legal tradition' itself is a relational concept, the issue of a specific relation. For tradition as such is neither a piece nor an aspect of the past. Moreover, in itself it is not a longing for external or internal certainty, nor a search for confirmation nor showing of a way out. It is just the encounter of the two sides involved, notably the selection of a segment of the past or the qualification of a feature attributed to it, in order that the present, viewed from a future's perspective, can be linked to the past as worthy of continuation, because of the latter's inherent values."[98]

Interestingly, as a summary of his problematising at the same conference, the renown comparative legal historian, Alan Watson, happened to conclude a categorical identity between 'legal culture' and 'legal tradition'.[99] A decade later, the aforementioned Finnish Jaakko Husa had devoted a separate paper to resolving the hidden polemics between me and formerly Nelken and then Glenn, moreover, he defended my position in the end. Accordingly – he draws the conclusion now – "it seems even viable to conceive 'legal tradition' as a part of 'legal culture' so that it is – quoting again from me – »awareness of an earlier inherent pattern of culture, taken as the source of and inspiration to community identification«".[100]

We may have to find it amusing, but Husa – realising Glenn's self-guided sensitivity to political correctness – ultimately even feels motivated to protect me, without the

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97 John H. Merryman: *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America.* Stanford, Stanford University Press, 1969. 2.

98 Csaba Varga: Legal Traditions? In Search of Families and Cultures of Law. *Acta Juridica Hungarica* 46, (2005), 3–4., in his *Comparative Legal Cultures* On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism (Budapest, Szent István Társulat, 2012.) 253. [Philosophiae Iuris]. https://mek.oszk.hu/15300/15386/ 83–84.; továbbá Елена Николаевна Трикоз: Всемирный конгресс компаративистов в Японии. [World Congress of Comparative Law Scientists in Japan]. (г. Фукуока, The IACL World Congress – 2018): тематический обзор Вестник Российского университета дружбы народов Серия: Юридические науки 22, 4. (2018), 602–609., 608–609. https://doi.org/10.22363/2313-2337-2018-22-4-602-609.

99 Alan Watson: Legal Culture v Legal Tradition'. In: Mark Van Hoecke (ed.): *Methodology and Epistemology of Comparative Law.* Oxford & Portland Oregon, Hart Publishing, 2004. 1–6.

100 Husa (2012) op. cit. 25., quoting the definition of Varga (2005) op. cit. 185. It seems that later it has also been accepted internationally beyond the disciplinary sphere of law, according to which "traditions are part of the culture"; cf. https://fr.sawakinome.com/articles/public/difference-between-culture-and-tradition.html and http://www.differencebetween.net/miscellaneous/difference-between-culture-and-tradition/.

slightest sign of narcissism. So he poetically asks, addressing Glenn, "Moreover, why could this sort of 'culture' not be handed down like a tradition or why it could not be tolerant in its relation to other cultures?" And the answer will be given in a note, according to which

> "E.g., in Varga ('Comparative Legal Cultures?' [2007]) it is easily read that »comparative legal cultures« approach is openly critical against »ethnocentrism in scholarship, cultural imperialism in politics, and neo-colonialism in practices«. This approach appears sincerely to be, too, tolerant: since »we also have to recognise individual and collective accomplishments in all human attempts at creating order, and provided they have produced values, we have to appreciate and try to preserve these as such«".[101]

By this development we have come forth and back to the simplest basic truth of a sober approach capable of seeing things as they are.

Our summary is thus: law is a cultural product; its features and modes of operation are both cultural and culturally dependent; its actual meaning, and thereby its very existence as well, cannot be explained from within, but derives from the underlying culture, from its contextualizing positions; as a result, its identity, its change, its relation to other phenomena is nothing but the outgrowth of culture-created connections; or, in short, *„extra culturam nihil datur"*.[102] In consequence, only provided that it is carried on by the law, whatever legal culture conceived in whatever way can be nothing more or else than a part of the law's ontological being.

## 8. Conclusion

The names, understandings, and uses taken as terms in the context of 'legal culture' / 'legal cultures' in this paper may, in principle, be appropriate and defensible in their own approach, interpretation and scope of application in so far as they were grounded in depth and with sufficient clarity and unambiguity in the given subject matter.

After all, it is not reality that has names and concepts, but it is our naming, ending by conceptualization,[103] by the medium of which we can look at some manifestation of reality – highlighted from its infinite and inexhaustible depth and variability for the

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[101] Husa (2012) op. cit. 23. & note 97., (Varga (2007) op. cit. 95–113. http://real-j.mtak.hu/762/1/ACTAJURIDICA_48.pdf) in Varga (2012) op. cit. 48.

[102] This is used recurring by Pierre Legrand: The Impossibility of »Legal Transplants«. *Maastricht Journal of European & Comparative Law* 4, 2. (1997), 111–124., 120. https://doi.org/10.1177/1023263X9700400202 and also in Legrand (2015) op. cit. 82.

[103] By definition, a *concept* is nothing else than a word denoting an element definitively contradistinguished in a system of thought that in principle encompasses the totality of the world. It is opposed to any other naming which cannot be but a mere *word* or *designation* that, in absence of anything better, still results in conventionality in communication. Even often in philosophical treatises, this difference is not necessarily made in English.

sake of our analysis only – for that we can describe this manifestation and possibly highlight other manifestations and aspects as well.

This is an issue already answered philosophically on some conceptual foundations. Accordingly, on the one hand, there are pieces of reality which are artificially separated, between which we can draw sharp delimitations in relation to each other and thus we can live with clear-cut definitions, and these are the so-called *class concepts*, and on the other hand, there are also so-called *order concepts* that can be characterised only and at most, in the depth required by the given study.[104] Or, concepts we use can be used either in classification or exclusively for ordering. In another attempt at separation, the former is considered *postulation*, as opposed to the latter as a directly conceived *concept of intuition*, in which the hoped-for success of the transmission of an idea communicated primarily in communication will be a decisive factor in its selection or use.[105]

The development of science most often follows one of the most central elements of any scholarly work, *analysis*, that is, experimental conceptualisation following new realisations, and, then, cumulative notional differentiation drawn from the verification/falsification of the said experimental conceptualisation from various sides. It was once a new insight to construct link between law and culture, but the assumed approach to and perception of its self-existence proved unsustainable, despite attempts to break down its unspecified generality into components assessed as sociological factors.[106] With regard to the present subject, thus, a conceptualisation is proved to be operatively usable at the present time, which sees no more than the historical and developmental group characteristic of given regimes of law, specifying them in contradistinction to any other legal arrangement.[107]

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104 Carl G. Hempel – Paul Oppenheim: *Der Typusbegriff im Licht der neuen Logik: Wissenschaftstheoretische Untersuchungen zur Konstitutionsforschung und Psychologie.* Leiden, Sijthoff, 1936.

105 Filmer Stuart Cuckow Northrop: *The Logics of the Sciences and the Humanities.* New York, The Macmillan Co., 1947. & https://archive.org/details/in.ernet.dli.2015.46373, 82.: "meaning proposed for it theoretically by the postulates of the deductive theory in which it occurs."

106 At the end of the 19th century and in parallel with the problematisation on *Recht und Kultur*, the widely overused term *Volksgeist* also arrived at a dead end. Namely, in want of specification it become a mere reference to the laws background without any descriptive force as, in the eyes of the late 19th-century German classic – Rudolf Stammler: Über die Methode der geschichtlichen Rechtstheorie. In: Rudolf Stammler – Theodor Kipp: *Festgabe zu Bernhard Windscheids fünfzigjährigem Doctor-Jubiläum. Zwei Abhandlungen.* Halle, M. Niemeyer, 1888. 1–63., 6. –, outright "mysticism". Some authors experimented with making the concept legal culture operational. As a modern legal historian – Hans-Peter Haferkamp: Pandectists between Norm and Reality. In: Yasutumo Morigiwa – Michael Stolleis – Jean-Louis Halperin (ed.): *Interpretation of Law in the Age of Enlightenment: From the Rule of the King to the Rule of Law.* Law and Philosophy Library 95. Cham, Springer, 2011. 107–121., 114–115. explains, it was Wilhelm Arnold by his *Cultur und Rechtsleben.* Berlin, Ferdinand Dümmler, 1865. and *Cultur und Recht der Römer.* Berlin, Ferdinand Dümmler, 1868. who brake it down into factors. The *Vorrede* and *Einleitung* to his first work based on the undoubtable fact that choice for law are in principle infinite, but in the end some choice still will made. And what will it be? Well, nothing more than what the underlying living conditions [*Lebensverhältnisse*] dictate.

107 For an earlier version of the present paper, see Csaba Varga: Jog, jogi kultúra és jogi hagyomány, avagy az összehasonlító történeti vizsgálódás kulcsfogalmai. [Law, Legal Culture and Legal Tradition, or the

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Csaba Varga: Rechtskultur – Denkkultur: Einführung zum Thema. In: Erhard Mock – Csaba Varga (ed.): *Rechtskultur – Denkkultur.* [Archiv für Rechts- und Sozialphilosophie, Beiheft 35] Stuttgart, Franz Steiner Verlag Wiesbaden, 1989. 9–13., 12–13.

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# WOLFGANG WALDSTEIN

## *Das Projekt zur Erforschung der Antiken Sklaverei an der Akademie der Wissenschaften und der Literatur in Mainz (Deutschland)*

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**Abstract**

The article examines Wolfgang Waldstein's collaboration with the Mainz Academy of Sciences and Literature's research project on ancient slavery and its influence on his scholarly work. Drawing on his correspondence with Joseph Vogt, Heinz Bellen, Heinz Heinen and Peter Gröschler, it traces his long-standing involvement. It focuses on his monograph *Operae libertorum* on Roman freedmen's service obligations and legal protections, his work on the *Corpus of Roman Legal Sources on Ancient Slavery*, and his contributions to the *Encyclopaedia of Ancient Slavery*. These studies are linked to his views on natural law, justice and *humanitas* and to the debate over the progressive humanisation of Roman slavery. While Waldstein attributes this development chiefly to a concept of *humanitas* shaped by Greek philosophy, the article emphasises the decisive role of *utilitas publica*.

**Abstrakt**

Der Beitrag untersucht Wolfgang Waldsteins Zusammenarbeit mit dem Mainzer Akademieprojekt zur Erforschung der antiken Sklaverei und deren Einfluss auf sein Werk. Anhand seiner Korrespondenz mit Joseph Vogt, Heinz Bellen, Heinz Heinen und Peter Gröschler zeichnet er seine Mitarbeit nach. Im Mittelpunkt stehen seine Monographie *Operae libertorum* über Dienstpflichten und Schutzrechte römischer Freigelassener, seine Mitwirkung am *Corpus der Römischen Rechtsquellen zur Antiken Sklaverei* und seine Beiträge zum *Handwörterbuch der Antiken Sklaverei*. Der Beitrag zeigt die Verbindung dieser Arbeiten mit Waldsteins Überlegungen zu Naturrecht, Gerechtigkeit und *humanitas* und behandelt die Kontroverse über eine zunehmende Humanisierung. Während Waldstein sie vor allem auf den durch die griechische Philosophie geprägten humanitas-Begriff zurückführt, hebt der Beitrag die herausragende Rolle der *utilitas publica* hervor.

**Keywords:** Wolfgang Waldstein, *operae libertorum*, Roman freedmen, *humanitas*, *utilitas publica*

**Schlagworte:** Wolfgang Waldstein, *operae libertorum*, römische Freigelassene, *humanitas*, *utilitas publica*

## 1. Einleitung

*Inprimisque hominis est propria veri inquisitio atque investigatio*
(Cic. off. 1,13)

Mit diesem Zitat aus Ciceros *De Officiis* als persönlicher Widmung schickte mir Wolfgang Waldstein seine Autobiographie unter dem Titel *Mein Leben. Erinnerungen* zu, die er 2013 veröffentlicht hat. Hiermit brachte er seinen persönlichen Dank für die gute, mehr als drei Jahrzehnte währende Zusammenarbeit im Mainzer Akademieprojekt zur Erforschung der Antiken Sklaverei zum Ausdruck.

Am 14. Juni 2024 hat der Lehrstuhl für Römisches Recht unter der Leitung von Univ. Prof. Nadja El Beheiri ein Symposium zum Gedenken an den am 17. Oktober 2023 in Salzburg verstorbenen Wolfgang Waldstein ausgerichtet. Schüler, Kollegen, Mitarbeiter und Weggefährten beiderlei Geschlechts, haben in persönlichen Erinnerungen oder gestützt auf einen breiten sehr vielfältigen Nachlass, seines wissenschaftlichen Wirkens und seiner von hohen ethischen Werten geprägten Persönlichkeit gedacht. Auch an seine künstlerischen Begabungen und seine Liebe zur Natur als Bergsteiger wurde erinnert.[1]

Im Mittelpunkt des folgenden Beitrages steht der Wissenschaftler Wolfgang Waldstein in seiner Zusammenarbeit und Bedeutung für das Mainzer Projekt. Im Umkehrschluss dazu wird der Frage nachgegangen, welchen Stellenwert die Erforschung von Sklaven und Freigelassenen in der Antike, ein Teilgebiet seiner vor allem rechtsphilosophischen Forschungen, im Laufe eines langen Forscherlebens für den Salzburger Rechtshistoriker selbst eingenommen hat. Nadja El Beheiri danke ich für die Möglichkeit, meinen auf dem Symposium gehaltenen Vortrag in erweiterter Form und mit Fußnoten versehen in dieser Zeitschrift veröffentlichen zu dürfen.[2]

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[1] Zu dem Wissenschaftler und Menschen Wolfgang Waldstein s. Michael Rainer: Nachruf: In memoriam Wolfgang Waldstein. *Seminarios Complutenses di Dereccho Romano* 36, (2023), 385–390., bes. 385–387., 389.; ebenso Martin J. Schermaier: Wolfgang Waldstein: 27. August 1928 – 17. Oktober 2023. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung.* 141, (2024), 704–727., bes. 704., 714/5. https://doi.org/10.1515/zrgr-2024-0040

[2] Dabei stütze ich mich vorrangig auf den Nachlass Wolfgang Waldsteins, der in Budapest in der Juristischen Fakultät der Katholischen Universität Pázmány Péter liegt. Mein Dank gilt sowohl Nadja El Beheiri wie Priv. Doz. Dr. Viola Heutger (Universität Heerlen), die die Korrespondenz Waldsteins mit den jeweiligen Projektleitern, den Althistorikern Joseph Vogt (1972–1977), Heinz Bellen (1978–2002), Heinz Heinen (2003–2009) und mir als ehemaliger Leiterin der Mainzer Arbeitsstelle (1978–2000) mehrmals durchgesehen und mir digital zur Verfügung gestellt haben. Außerdem danke ich meinem

## 2. Die Zusammenarbeit Wolfgang Waldsteins mit dem Mainzer Akademieprojekt zur Erforschung der Antiken Sklaverei

Einleiten möchte ich dieses Kapitel mit der Darstellung Wolfgang Waldsteins selbst in seiner Autobiographie:

> „Bereits 1972 hatte Joseph Vogt mich brieflich eingeladen, an dem Mainzer Projekt der Forschungen zur antiken Sklaverei mitzuarbeiten. Mein eigenes Projekt (scil. nämlich das der Erforschung des Einflusses der griechischen Philosophie auf die römische Rechtswissenschaft) schien mir dies auszuschließen, daher konnte ich Joseph Vogt nicht zusagen. 1978 brachte mich jedoch Heinz Bellen mit seiner Hartnäckigkeit und mit dem Argument, dass er nach der Lektüre meines Buches über das römische Begnadigungsrecht der Überzeugung sei, ‚dass niemand anderer geeigneter sei, das Material über die *operae libertorum* neu aufzuarbeiten', zum Nachgeben. Etwas naiv ging ich davon aus, dass nach meiner damaligen Kenntnis der Quellen und der Literatur zu dieser Frage die Arbeit in zwei bis drei Jahren bewältigt werden könnte, und das, dachte ich, würde mein Projekt nicht zu sehr beeinträchtigen. Also sagte ich schließlich zu."[3]

Als der Tübinger Althistoriker Joseph Vogt sich 1972 an den Salzburger Rechtshistoriker Wolfgang Waldstein wendete, war das Mainzer Projekt bereits 22 Jahre alt. Begründet 1950 in der Zeit des Kalten Krieges, sollte in Auseinandersetzung mit dem Historischen Materialismus dessen ideologisch begründete Monopolstellung im Bereich der sozialen Fragen durch eine differenzierte Untersuchung aller zur Verfügung stehenden antiken Quellen zur griechisch-römischen Sklaverei zumindest hinterfragt, eventuell sogar widerlegt werden. Über diesen politisch aktuellen Auftrag hinausgehend, versprach sich Vogt von diesem Forschungsprojekt, die damals noch ungeklärte Bedeutung der Sklaverei für die Antike aufzuhellen und vor allem das Problem zu lösen, wie diese Schattenseite der antiken Gesellschaft mit ihren kulturellen und politischen Leistungen zu vereinbaren war.[4] Da Vogt von Anfang an einen

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Nachfolger im Mainzer Projekt Dr. Johannes Deißler, der mir aus dem Archiv der Akademie die dort vorhandenen Briefwechsel digital zugemailt hat. Für den nur lückenhaft überlieferten Beginn des Kontaktes (1972–1977) konnte ich den Nachlass von Joseph Vogt in der Abteilung Handschriften und Alte Drucke, Referat Nachlässe und Autographen in der Bayerischen Staatsbibliothek München vor Ort einsehen. Mein besonderer Dank dort gilt Herrn Alexander Boß, der mir wertvolles, schwer zugängliches Material hilfsbereit und fachkundig zur Verfügung gestellt hat. Für das Ende der Zusammenarbeit Waldsteins mit dem Projekt (2005–2017) danke ich Prof. Dr. Peter Gröschler (Universität Mainz), Fachgebietsherausgeber der juristischen Lemmata des HAS. Er hat mir seinen Briefwechsel mit Waldstein ebenfalls digital zugänglich gemacht. Des Weiteren stütze ich mich auf die bereits erwähnte Autobiographie Waldsteins.

3 Wolfgang Waldstein: *Mein Leben. Erinnerungen*. Illertissen, Media Maria Verlag, 2013. 196.

4 Volker Losemann: s.v. Forschungen zur antiken Sklaverei. In: Heinz Heinen † – Ulrich Eigler – Peter Gröschler – Elisabeth Herrmann-Otto – Henner von Hesberg – Hartmut Leppin – Hans-Albert

interdisziplinären Ansatz verfolgt hatte, umwarb er den Rechtshistoriker Waldstein neben Archäologen, Altphilologen und Althistorikern zur Mitarbeit am Projekt.

Aus dem nur lückenhaft vorliegenden Briefwechsel der beiden Professoren geht hervor, dass Vogt im Zusammenhang mit seiner Festschrift *Aufstieg und Niedergang der R*ömischen *Welt* (ANRW) Band I, 2 mit den juristischen Kollegen in engeren Kontakt gekommen war und u.U. durch seine Schülerin und Mitarbeiterin Hildegard Temporini auf Waldstein aufmerksam gemacht wurde.[5] Denn als ANRW Bd. II, 15 bereits 1976 publiziert vorlag, bedankte sich Vogt mit einem ausführlichen lobenden Schreiben bei Waldstein für seinen bahnbrechenden Artikel in diesem Band.[6] Er umwarb den Romanisten erneut, Mitarbeiter am Sklavereiprojekt zu werden. Waldstein wies auch dieses Mal höflich, aber bestimmt die Werbung in seinem Antwortschreiben an Vogt vom 12.10.1976 mit den Worten ab: „Wie ich Ihnen schon vor längerer Zeit auf eine frühere Frage hin mitteilte, hat das Problem der Sklaverei mich selbst in verschiedener Hinsicht sehr interessiert. Dieses Interesse hat auch nicht nachgelassen. Ich habe nur leider einsehen müssen, daß die Kräfte ungleich beschränkter sind als der Rahmen der Interessen es ist." Dies ist der letzte bisher bekannte briefliche Kontakt zwischen den beiden Wissenschaftlern.[7] Die eigentliche Begründung für die Absage kennen wir bereits aus der oben zitierten Autobiographie, nämlich Waldsteins eigenes Projekt zur Erforschung des Einflusses der griechischen Philosophie auf die römische Rechtswissenschaft. Hinzufügen möchte ich allerdings bereits an dieser Stelle, dass es eine gewisse geistige Verwandtschaft zwischen Vogt und Waldstein gegeben haben muss, auch wenn es damals noch zu keiner Zusammenarbeit gekommen ist. Denn Waldstein schreibt Jahrzehnte später in seinem Artikel „Humanitas", dass Vogts Studien zum Verhältnis von Sklaverei und *humanitas*, die Waldstein von der griechisch-hellenistischen Stoa beeinflusst sah, den Anstoß und die Grundlage des Mainzer Projektes gebildet hätten.[8] In den 1970er-Jahren allerdings waren beide Forscher noch

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Rupprecht – Winfried Schmitz – Ingomar Weiler – Bernhard Zimmermann (ed.): *Handwörterbuch der Antiken Sklaverei.* I. Stuttgart, Franz Steiner Verlag, 2017. Sp. 976–1008., bes. 976/7.; Volker Losemann: s.v. Vogt, Joseph. In: *Handwörterbuch der Antiken Sklaverei.* III. 2017. Sp. 3222–3232.

5 Hildegard Temporini (ed.): *Aufstieg und Niedergang der Römischen Welt. Geschichte und Kultur Roms im Spiegel der Neueren Forschung.* I. *Von den Anfängen Roms bis zum Ausgang der Republik. Bd.2: Recht, Religion, Sprache und Literatur.* Berlin, New York, Walter De Gruyter, 1972. Ursprünglich als Festschrift für Joseph Vogt konzipiert, wuchs dieses als Enzyklopädie der altertumskundlichen Forschungen geltende Compendium später auf mehr als 90 Bände an.

6 Wolfgang Waldstein: Entscheidungsgrundlagen der klassischen römischen Juristen. In: Hildegard Temporini – Wolfgang Haase (ed.): *Aufstieg und Niedergang der Römischen Welt.* II. 15. *Prinzipat: Recht (Methoden, Schulen, einzelne Juristen).* Berlin, New York, Walter De Gruyter, 1976. 3–100. https://doi.org/10.1515/9783110854497-002

7 Waldstein bezieht sich hier auf den ersten Brief von Vogt an ihn vom 8. Mai 1972. Beide Briefe befinden sich heute im Nachlass Waldstein in Budapest. S.o. Anm.2. Das Antwortschreiben Waldsteins auf die erste Anfrage Vogts im Jahr 1972 ist bisher noch nicht aufgetaucht, aber existent, weil Waldstein selbst auf diesen Brief verweist.

8 Wolfgang Waldstein: s.v. Humanitas. II. Humanitas im römischen Recht. In: *Handwörterbuch der Antiken Sklaverei.* II. 2017. Sp. 1455–1457. bes. 1455.

in den Anfängen ihrer jeweiligen Projekte begriffen, sodass konkrete rechtshistorische Vorschläge noch nicht erfolgt sind.

Das sollte ganz anders werden mit der Übernahme des Mainzer Projektes 1978 durch den Mainzer Althistoriker Heinz Bellen. Dieser hatte nicht nur Waldsteins Habilitationsschrift *Zum Römischen Begnadigungsrecht* gelesen,[9] sondern brachte selbst juristische Kenntnisse aus seinem Studium bei Erwin Seidl, Professor für Römisches Recht an der Universität zu Köln mit.[10] In seinem ersten Brief an Wolfgang Waldstein bemerkte er: „Sie wissen, dass ich mich zu einem Teil selbst als Jurist fühle. Ich möchte gerne den juristischen Aspekt der Sklaverei stärker in den Vordergrund rücken." Deswegen schlug er vor, „dass jemand das Material über die *operae libertorum* neu aufarbeitet" und dass „der Zugriff […] sowohl von der juristischen als auch von der sozialgeschichtlichen Seite […] erfolgen müsse." (Brief Bellen an Waldstein vom 20. Juli 1978). Darüber hinaus sagte er Waldstein alle Hilfen von der neu in der Mainzer Akademie eingerichteten Arbeitsstelle zu. Mit der Zusage war die Aufnahme in den interdisziplinären Kreis von damals 19 freien Mitarbeitern verbunden, unter denen sich bereits zwei Österreicher, der Jurist Gerhard Thür (Universität München) und der Althistoriker Fritz Gschnitzer (Universität Heidelberg) befanden. So war Wolfgang Waldstein bereits bei der ersten Mitarbeitertagung am 12.10.1978 in Mainz anwesend, die in Zukunft alle zwei Jahre stattfinden sollte.[11]

In seiner Autobiographie beschreibt der Forscher, wie er sich in dem Umfang der zu leistenden Forschungsarbeit an den „Tagwerken der Freigelassenen" den *Operae libertorum* verschätzt hat:

> „Als ich dann die Arbeit begann, erkannte ich schnell, dass ich die bis dahin erschienene Literatur zu dieser Frage nicht als Hilfe heranziehen konnte. Ich musste wirklich alles aus den Quellen von vorne neu aufarbeiten. Bis das Buch […] tatsächlich im Jahr 1987 herauskam, hatte ich fast neun Jahre daran gearbeitet. Erst im September 1986 konnte ich die Umbruchkorrektur an den Herausgeber senden."[12]

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[9] Wolfgang Waldstein: *Untersuchungen zum römischen Begnadigungsrecht. Abolitio-Indulgentia-Venia.* (Commentationes Aenipontanae XVIII), Innsbruck, 1964.

[10] Prof. für Römisches Recht und Bürgerliches Recht an der Universität zu Köln 1958–1971, Papyrologe, Jurist und Rechtshistoriker s. Arnold Kränzlein: In memoriam Erwin Seidl (1905–1987). In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 106, (1989), 766–773. https://doi.org/10.7767/zrgra.1989.106.1.766

[11] S. hierzu Elisabeth Herrmann-Otto: s.v. Forschungen zur antiken Sklaverei. In: *Handwörterbuch der antiken Sklaverei*. I. 2017. Sp. 1008–1014.; Elisabeth Herrmann-Otto: Bellen, Heinz. In: *Handwörterbuch der antiken Sklaverei.* I. 2017. 360–362. Spätestens seit 1973 scheint ein Austausch von Sonderdrucken zwischen den beiden fast gleichaltrigen jungen Professoren bestanden zu haben, wie erst kürzlich entdeckte Briefe aus dem Nachlass Waldsteins nahelegen (7.11.1973 Bellen an Waldstein; 21.12.1973 Waldstein an Bellen).

[12] Waldstein (2013) op. cit. 196.

Diese kurze Zusammenfassung umreißt einen entsagungsvollen und langwierigen Entstehungsprozess zwischen 1979 bis 1986, der schließlich von der erfolgreichen Publikation der *Operae Libertorum* als 19. Band der Reihe „Forschungen zur Antiken Sklaverei" (FAS) im April 1987 gekrönt war.[13]

In einer Art Selbstanzeige konnte der Salzburger Rechtshistoriker in der Frankfurter Allgemeinen Zeitung (FAZ) vom 4. Februar 1987 sein im Erscheinen begriffenes Buch selbst vorstellen. Die Zeitung warb bei ihrer Leserschaft für dieses hoch wissenschaftliche Werk mit dem Aufmacher: „Preis der Freiheit: Im antiken Rom gab es bereits soziale Schutzrechte." Sie betonte damit, dass soziale Schutzrechte keine Errungenschaft der Neuzeit sind, sondern bereits im Römischen Recht verankert waren.

17 positive bis kritische Rezensionen liegen vor, auf die ich später noch in einem eigenen Kapitel zu sprechen komme (s.u.4). Die wenigen inhaltlichen Diskussionen zwischen Waldstein und Bellen, die im Nachlass bisher aufgetaucht sind, beziehen sich stets auf das Anliegen von Bellen an Waldstein, alle Polemiken in den akademieeigenen Publikationen zu vermeiden. Dieser Maßgabe ist der Rechtshistoriker stets nachgekommen. Grundlegendere Diskussionen scheinen – bis zum gegenteiligen Beweis – wohl eher telefonisch geführt worden zu sein.[14] Dagegen wissen wir, dass Waldstein in Salzburg in einem sogenannten Professoren-, Mitarbeiter-, Doktorandenkolloquium alle einschlägigen juristischen Texte zu den *operae* vorgelegt und durchdiskutiert hat.[15] Daran waren u.a. die Kollegen Theodor Mayer Maly als Arbeitsrechtler, Max Kaser als Rechtshistoriker sowie Heinrich Honsell und Karl Hackl beteiligt, die sich teils auch schriftlich nach der ersten Lektüre des Manuskriptes zustimmend geäußert haben.[16]

Daneben sind im Nachlass viele andere positive Bewertungen aus dem Kreis der Fachkollegen auch außerhalb von Salzburg zu finden. Nur zwei von ihnen möchte ich an dieser Stelle kurz zitieren:

Franz Wieacker[17] schreibt in einem an Wolfgang Waldstein privat gerichteten Brief aus Göttingen vom 15.10.1988 nach der Lektüre der bereits publizierten *Operae*:

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13 Wolfgang Waldstein: *Operae Libertorum. Untersuchungen zur Dienstpflicht freigelassener Sklaven.* (Forschungen zur Antiken Sklaverei 19) Stuttgart, Franz Steiner Verlag Wiesbaden, 1986. 476. S.

14 Sowohl in den *Operae* wie in dem Beitrag *Zum Menschsein von Sklaven* ist Waldstein dem Wunsch Bellens nachgekommen. (Briefe von Waldstein an Bellen 13.8.1985; Bellen an Waldstein 6.9.1985; Deißler im Auftrag von Bellen an Waldstein 19.7.2001).

15 S. hierzu Nadja El Beheiri: Wolfgang Waldstein: Ein wissenschaftliches Porträt im Diskurs mit Kollegen und Dialogpartnern. *Pázmány Law Review* 1, (2013), 211–237., speziell: 224–227.

16 Brief von Mayer-Maly an Waldstein vom 14.7.1985: „Ich kann Dir eigentlich zu diesem Werk nur gratulieren. […] In der Hauptsache zeigt mir schon der erste Teilband, daß es Dir gelungen ist, ein überaus wichtiges Problem völlig neu zu durchdenken und durchschlagend überzeugenden Lösungen zuzuführen." Waldstein hat diese positiven Bewertungen nach Mainz übermittelt. Briefe vom 13.8.1985 an Bellen und Herrmann-Otto.

17 Zu Wieacker und Waldstein s. El Beheiri (2013) op. cit. 221–224. Genauer s.u. Kap. 4.

> „Die romanistische Bearbeitung des Themas durch Sie ist der beste und sicherste Zugang zur Gesamtfrage der antiken Unfreiheit und den Problemen, die heute aus moral- und sozialgeschichtlichen, freilich gelegentlich auch modischen Aspekten die allgemeine und die Fachliteratur so sehr beschäftigen."

Der Athener Jurist Johannes Triantaphyllopoulos bemerkt handschriftlich am 6. Januar 1988 seinem Salzburger Kollegen gegenüber:

> „Darüber hinaus sprengt Ihr Buch den rein juristischen Rahmen: es ist eine wahre Kulturgeschichte einem rechtshistorischen Werk einverleibt oder umgekehrt: die Kulturgeschichte als Ausfluss der Rechtsgeschichte."

Damit möchte ich die Widergabe des Entstehungsprozesses der *Operae* abschließen und mich der weiteren Zusammenarbeit Wolfgang Waldsteins mit dem Mainzer Sklavenprojekt zuwenden.

## 3. Wolfgang Waldstein und die Sklavenforschung in- und außerhalb des Mainzer Akademieprojektes

Die nun folgenden Ausführungen beruhen allein auf dem Archivmaterial der Akademie in Mainz und dem Nachlass Wolfgang Waldsteins in Budapest.

Ein neuer Abschnitt der Beziehungen im Blick auf ein Teilprojekt des Mainzer Akademie-Unternehmens kündigte sich zu Beginn der 90er-Jahre an, das in der Korrespondenz erstmalig in einem Brief Bellens vom 30. Januar 1991 fassbar wird. Vorausgegangen war ein Telefonat zwischen den beiden Professoren. Es handelt sich um das *Corpus der Römischen Rechtsquellen zur antiken Sklaverei*, für das als Vorbild das *Corpus der Papyri zum Ptolemäischen Sklavenrecht* diente, das in der neuen *Beiheft-Reihe* der *Forschungen zur Antiken Sklaverei* als erster Band 1990 erschienen war. Ziel des Unternehmens sollte und soll sein, vor allem den Nicht-Juristen (Historikern und Philologen) die juristische Quellengattung durch Übersetzungen und Kommentare zugänglich zu machen, um sie zur weiteren Auswertung erschließen zu können. Wolfgang Waldstein stellte sozusagen zur fachinternen Rückversicherung des neuen Projektes dieses auf der Tagung der deutschsprachigen Romanisten in Baden bei Wien am 10./11. Juni 1991 vor, um bei Zustimmung eventuell bereits dort neue juristische Mitarbeiter einzuwerben. Diese Aktion war ein voller Erfolg (Brief Waldsteins an Bellen vom 21.6.1991). Alle Teilnehmer der Tagung stimmten dem neuen Projekt zu. Franz Wieacker hatte seine Bedeutung gleich erkannt und hob sie entsprechend hervor (späterer Brief Waldsteins an Bellen vom 31. Juli 1999). Als Mitarbeiter konnte Waldstein neben Frau Johanna Filipp-Fröschl (Salzburg) die Herren Juristen Richard Gamauf (Wien), Janez Kranjc (Ljubljana), Martin Pennitz (Graz), Johannes Michael

Rainer (Graz, Salzburg), Hans Wieling (Trier) und Reinhard Willvonseder (Wien) gewinnen.[18]

Die Vorbereitungen des neuen Teilprojektes hat Wolfgang Waldstein in den Jahren 1991–1994 mit Rat und Tat in Abstimmung mit Heinz Bellen begleitet. U.a. wurde ein Arbeitspapier für die nächsten Mitarbeitertagungen erstellt und die editorischen Formalien für die spätere Drucklegung der einzelnen Faszikelbände festgelegt.[19] Als beim zweiten Treffen der juristischen Mitarbeiter in Mainz am 15. September 1994 das Projekt startklar war, alle Disketten mit den sklavereirelevanten Texten vorlagen und fast alle zehn Sachgebiete mit deren Unterteilungen an freie überwiegend juristische Mitarbeiter verteilt waren, da hat Wolfgang Waldstein die Leitung des Corpus-Projektes an seinen Schüler und Nachfolger in Salzburg, Johannes Michael Rainer, weitergegeben.[20]

Zwischenzeitig hatte der Salzburger Professor nach mehr als 40 Dienstjahren seine vorzeitige Versetzung in den Ruhestand beantragt (7. Juni 1991), die zum 31. März 1992 erfolgte. Die Gründe, die der Rechtsgelehrte geltend machte, waren unterschiedlicher Natur. Vor allem wollte er sein großes Projekt der Erforschung des Einflusses der griechischen Philosophie auf die Römische Rechtswissenschaft nun endlich störungsfrei durchführen. Das hätte durchaus gelingen können, nachdem er von universitären Belastungen und dem Sklavereiprojekt befreit war und sich außerdem aus der Betreuung des Rezensionsteiles der Savigny-Zeitung für Rechtsgeschichte zurückgezogen hatte (1988–1995). Aber bereits ab 1994 bis 2016 wirkte er als Mitglied in der päpstlichen Kommission für das Leben mit und erhielt 1996-1998 nochmals eine ordentliche Professur für Römisches Recht an der päpstlichen Lateranuniversität in Rom. Mit Ende seiner dortigen Lehrtätigkeit wurde ihm der Orden des Heiligen Gregor des Großen verliehen.[21]

Trotz dieser vielfältigen Tätigkeiten ist Wolfgang Waldstein bis in sein hohes Alter dem Mainzer Projekt verbunden geblieben. So hat er sich mit einem Beitrag *„Zum Menschsein von Sklaven“* am Jubiläumsband zum 50-jährigen Bestehen der „Forschungen zur Antiken Sklaverei“ im Jahr 2000 beteiligt.[22] Das war die letzte Publikation, die Waldstein unter der Projektleitung von Heinz Bellen veröffentlichte.

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[18] Heinz Bellen: Vorwort. In: Johannes Michael Rainer (ed.): *Corpus der Römischen Rechtsquellen zur Antiken Sklaverei. Prolegomena,* Stuttgart, Franz Steiner Verlag, 1999. VII–IX.

[19] Im Nachlass: 12.8.92 Rundbrief Waldsteins zur Vorbereitung und Vorlage für die erste Tagung der juristischen Mitarbeiter am 5. Oktober 1992. Protokoll der Sitzung vom 5. Oktober 1992. Protokoll der 2. Tagung der juristischen Mitarbeiter am 15. September 1994.

[20] Herrmann-Otto: s.v. Forschungen zur antiken Sklaverei. In: *Handwörterbuch der antiken Sklaverei*. I. 2017. Sp. 1010–1011.

[21] Verschiedene Gründe s. Nachlass: Briefe Waldsteins an Hans Wieling vom 4.6.1996, an Heinz Bellen vom 24.7.1997 u. 4.11.1999 und nach dessen Tod 2002 an den Nachfolger im Projekt Heinz Heinen vom 19.11. 2003 u. 2.8.2005. Lehrtätigkeit und Akademiemitgliedschaft am Vatikan: Rainer (2023) op. cit. 386/7.; Schermaier (2024) op. cit. 714.; Waldstein (2013) op. cit. 197–209. mit weiteren Ehrungen und Mitgliedschaften, u.a. dem Ehrendoktorat der Péter-Pázmány-Universität Budapest 2012.

[22] Heinz Bellen – Heinz Heinen (ed.): Fünfzig Jahre Forschungen zur antiken Sklaverei an der Mainzer Akademie 1950–2000. Miscellanea zum Jubiläum. *Forschungen zur antiken Sklaverei* 35, (2001), 31–49.

In einem sogenannten Abschiedsbrief vom 15. März 2002 bedankte sich der schwer erkrankte Althistoriker für die seit 1978 bestehende vertrauensvolle Zusammenarbeit bei seinem juristischen Kollegen.[23]

Heinz Heinen, der Nachfolger von Heinz Bellen in der Leitung des Akademieprojekts hat in einem Brief vom 14.12.2008 seiner großen Freude Ausdruck verliehen, dass Wolfgang Waldstein, mittlerweile 80-jährig, weiterhin aktiv am Sklavenprogramm teilnahm und ihm jährlich seine neuesten Publikationen zum Thema für die Aufnahme in den Jahresbericht der Akademie mitteilte. In der Publikationsliste, die Martin Schermaier dem Nachruf auf seinen akademischen Lehrer Wolfgang Waldstein angehängt hat, entfallen auf das Thema Sklaverei und Freilassung 12 Titel, d.h. die große Monographie zu den *Operae Libertorum*, 9 Aufsätze und 2 Rezensionen. Außerdem lassen sich neben den 8 Lexikonartikeln für das Handwörterbuch der Antiken Sklaverei (HAS) mindestens noch weitere 10 Artikel in anderen Lexika zur Thematik auflisten. Da es fast keinen Bereich in der antiken Welt und ihren Rechten gibt, in dem es keine Sklaven und Freigelassenen gab, ist diese Thematik noch in vielen anderen Publikationen des Salzburger Rechtshistorikers stets präsent. Auch hat er sich nicht nur im Rahmen des Akademieprojektes mit den gesellschaftlichen Gruppen von Sklaven und Freigelassenen und der Institution Sklaverei auseinandergesetzt. Auch in seinem Haupt- und eigentlichen „Lieblingsthema", seinen Forschungen zur Rechtsphilosophie, waren die Fragen von Freiheit, Sklaverei, Arbeit und Gerechtigkeit weit über den Rahmen des Akademieprojektes hinaus stets präsent.[24]

Bevor ich mich diesen gegenseitigen Beeinflussungen zuwende, möchte ich die Mitarbeit des schon lange emeritierten Professors an dem letzten Teilprojekt des Unternehmens, dem Handwörterbuch zur Antiken Sklaverei, mit 8 Lexikonartikeln hervorheben und zwar zu folgenden Lemmata: *Accusatio ingrati liberti; Freigelassene, juristisch; Humanitas im Römischen Recht; Obsequium; Operae libertorum, operae servorum; Patronat/Patron, juristisch; Revocatio in servitutem; Theorien der Sklaverei, juristisch.* Das lexikalisch aufgebaute Handwörterbuch stellt sozusagen eine Bilanz des Langzeitprojektes der Akademie und eine Gesamtdarstellung und Bewertung des Phänomens antike Sklaverei unter Einbeziehung seiner mehrhundertjährigen Rezeptionsgeschichte dar. Nach dem finanzierten Ende des Projektes 2012 und dem Tod von Heinz Heinen 2013, haben die neun Fachgebietsherausgeber, unter der Leitung des neuen Projektleiters und Nachfolgers, Winfried Schmitz, Professor für Alte Geschichte an der Universität Bonn, dieses Teilprojekt mit der Publikation von drei Teilbänden 2017 zu Ende geführt.[25] Wolfgang Waldstein unterstand der Fachherausgeberschaft für das Römische Recht von Prof. Dr. Peter Gröschler (Mainz). Aus dem mir vorliegenden Briefwechsel der beiden Professoren geht hervor, dass alle Artikel von Waldstein ohne Beanstandung aufgenommen wurden. Das war bei der großen lebenslangen

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[23] Am 21. Februar 2002 erfolgte die Übergabe der Projektleitung an Heinz Heinen. Heinz Bellen verstarb am 27.7.2002. Zur Leitung des Projektes durch Heinz Heinen 2002–2012 s. Johannes Deissler: Forschungen zur Antiken Sklaverei. In: *Handwörterbuch der antiken Sklaverei*. I. 2017. Sp. 1014–1019.

[24] Schermaier (2024) op. cit. Schriftenverzeichnis: 716–727.

[25] Ibid. Anm.4.; Deissler (2017) op. cit. 1017.

wissenschaftlichen Kompetenz des Romanisten und Rechtsphilosophen auch gar nicht anders zu erwarten gewesen.

## 4. Die Bedeutung der Sklaverei in den Forschungen Wolfgang Waldsteins

In seinem fundamentalen Beitrag zu den *Entscheidungsgrundlagen der klassischen römischen Juristen* beschäftigt sich Waldstein u.a. mit dem *ius naturale* und der *Gerechtigkeit* als Grundlagen und Kriterien außerhalb der Norm, die die Juristen zur Rechtsfindung herangezogen haben. Nachdem er die komplizierte Verbindung zwischen beiden Prinzipien im komplexen Kontext der anderen Kriterien wie u.a. der *fides,* herausgearbeitet hat, stellt er sowohl beim Naturrecht wie auch bei der *iustitia* als der Tugend schlechthin fest, dass sie im Bereich der Sklaverei nicht gelten. Der Vorrang des *ius naturale* vor dem *ius civile* und dem *ius gentium* ist hier außer Kraft gesetzt, das Prinzip der Gerechtigkeit, jedem sein Recht zukommen zu lassen *(suum cuique)*, ist auf die Sklaven nicht anwendbar. Mehr als diese am Rande erwähnte, an sich fundamentale Feststellung ist hier erstaunlicherweise nicht zu finden. Sklaverei scheint damals noch kein Thema für Waldstein gewesen zu sein.[26]

Das änderte sich grundlegend während und vor allem nach seiner mehrjährigen Beschäftigung mit den *operae libertorum*. Wolfgang Waldstein schreibt hierzu rückblickend in einem Brief an Heinz Heinen vom 2. August 2005: „Sie sehen, das Mainzer Projekt hat mein eigenes Leben nachhaltig in eine andere Richtung geführt, als ich sie mir gedacht hatte. Gleichwohl meinte ich, die Zusage gegenüber Herrn Bellen, auch wenn sie damals recht ahnungslos erfolgte, vielleicht doch nicht bereuen zu müssen. Jedenfalls habe ich bei dieser Arbeit mehr über historische Forschung lernen können als je zuvor, obwohl ich schon bei meiner Habilitationsschrift über das römische Begnadigungsrecht mit den grundsätzlichen Problemen der Quellenbehandlung konfrontiert war."

Bestätigend schreibt Martin Schermaier im Nachruf auf seinen Lehrer:[27] „Die Arbeit an diesem Projekt nahm viele Jahre in Anspruch, lenkte ihn zwar von seinem Lieblingsthema ab, doch gewann er dadurch ein neues. Aus ihm ging neben dem eindrucksvollen Buch eine Anzahl von Aufsätzen hervor, die sich teils mit sozialhistorischen, teils mit dogmatischen Aspekten der Dienstpflicht von Freigelassenen beschäftigen. Seine Forschungen machten ihn zu einem der besten Kenner des römischen Freilassungsrechts."

Das Thema nicht nur neben sondern stets verwoben mit seinen rechtsphilosophischen Untersuchungen ist nun die Sklaverei, vor allem aber deren Beendigung durch die Freilassung und die dadurch bewirkte veränderte Rechtsstellung der Freigelassenen gegenüber ihrem Patron. Beiträgen wie *Soziale Schutzrechte im klassischen römischen Recht* (1991), *Recht und Gesellschaftsordnung in der römischen Antike* (1992), *Ius naturale im nachklassischen römischen Recht und bei Justinian* (1994), *Zur juristischen Relevanz der Gerechtigkeit bei Aristoteles, Cicero und Ulpian* (1996), um nur einige

[26] Waldstein (1976) op. cit. 85–98., speziell zur Sklaverei: 86., 92.

[27] Schermaier (2024) op. cit. 712.

Publikationen aus den 90er-Jahren zu nennen,[28] waren in den 80er-Jahren sogenannte Nebenprodukte aus den *operae* vorausgegangen, wie etwa: *Zum Reskript Hadrians über operae bei fideikommissarischer Freilassung* (1984), *Paramone und operae libertorum* (1986), *Bemerkungen zum ius naturale bei den klassischen Juristen* (1988).[29]

Alle diese Beiträge umkreisen die Sklaverei als juristische Institution. Als Rechtsverhältnis steht sie zwar im Gegensatz zu der großen, für Waldstein von der griechischen Philosophie beeinflussten Erkenntnis der römischen Juristen, dass alle Menschen nach Naturrecht frei und gleich geboren sind. Im Kontrast zur Naturrechtswidrigkeit der Sklaverei wird er jedoch nicht müde, auf die vielen Schutzmaßnahmen und Schutzrechte für die ehemaligen Sklaven gegenüber ihrem Patron hinzuweisen. Sie wurden bereits im 2. Jh. v. Chr. von den Prätoren eingeleitet und ihre Durchsetzung überwacht. In den folgenden Jahrhunderten wurden sie in Edikten, Reskripten und Konstitutionen von den Kaisern auf breiterer Ebene weiter ausgebaut und von den Juristen fallweise ausgearbeitet.[30] Dem ist Wolfgang Waldstein in genauer Auswertung des gesamten juristischen Quellenmaterials nachgegangen, wodurch vor allem seine monographische Untersuchung der *Operae Libertorum*, d.h. der Dienstpflicht freigelassener Sklaven gegenüber ihrem Patron, verstanden als Gegenleistung für die Freilassung, zu einem handbuchartigen Standardwerk auf diesem Gebiet geworden ist.[31] Trotz der ökonomischen Bedeutung, die die in Tagewerken zwischen einem und 1000 Tagen berechneten und vereinbarten Dienstleistungen zwischen Patron und Freigelassenem dargestellt haben werden, sind sie außerhalb der juristischen Quellen kaum greifbar. Diese Einseitigkeit der Quellenauswahl, die einige Rezensenten zu Unrecht dem Autor vorgeworfen haben, hat Waldstein in späteren Beiträgen u.a. mit ganz spärlich überlieferten epigraphischen Zeugnissen etwas auszugleichen versucht. Der Schwerpunkt der Quellenexegese bleibt jedoch weiterhin auf die juristischen Zeugnisse fokussiert.[32]

In einer knappen Zusammenfassung sollen die wichtigsten Hauptergebnisse der umfangreichen Forschungsarbeit widergegeben werden: Nur die Herren, die ihre Sklaven freiwillig ohne Zwang freigelassen haben, konnten genau geregelte Dienstverträge vereinbaren. Die dienstlichen Forderungen durften weder das Alter, noch den Status, die Gesundheit, das Ansehen *(dignitas)* oder Geschlecht der Freigelassenen verletzen.

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[28] Schermaier (2024) op. cit. Schriftenverzeichnis: Nr. 56., 61., 68., 74. mit genauen bibliographischen Angaben.

[29] Ibid. Nr. 35., 40., 42.

[30] Waldstein (1986) op. cit. § 9., 29., 30. Wolfgang Waldstein: Soziale Schutzrechte im klassischen römischen Recht. In: Erik Jaymer et al. (ed.): *Festschrift für H. Niederländer zum 70. Geburtstag.* Heidelberg, 1991. 181–194.

[31] Waldstein (1986) op. cit. § 8.; Waldstein (1991) op. cit. 184.

[32] Zum Vorwurf der Monokausalität durch Beschränkung auf juristische Quellen s. Thomas Wiedemann: The Duties of Freedmen. In: *The Classical Review* 38, (1988), 331–333. https://doi.org/10.1017/S0009840X00121766; Waldstein (1991) op. cit. 190–191. zu CIL XI 600. In Ermangelung anderer Quellen ist die umfassende Erschließung des juristischen Materials durch Wolfgang Waldstein für die weitere sozialpolitische und ökonomische Bewertung der *operae libertorum* kaum zu überschätzen. Zur Quellenproblematik s. Waldstein (1986) op. cit. § 2.

Die Dienste mussten am Ort des Patrons geleistet werden, wodurch die Reisetage, die Erholungsphasen von der Arbeit, sowie die Unterhaltsbeschaffung, wenn sie nicht vom Patron gestellt wurde, zu dessen Lasten gingen, d.h. als geleistete Tagwerke galten. Gleiches galt auch hinsichtlich des Ausfalls des Freigelassenen durch Krankheit. Nachdem die Dienstleistungen durch *indictio* des Patrons angefordert worden waren, konnten sie im Krankheitsfalle des *libertus* vom ehemaligen Herrn nicht eingeklagt werden. Geschützt gegen die Ableistung vereinbarter *operae* waren verheiratete *liberti*, wenn sie die *patria potestas* über frei und legitim geborene eigene Kinder ausübten. Gleicher Schutz galt für *libertae*, die mit Zustimmung des *patronus* geheiratet hatten, solange ihre Ehe bestand.[33]

Neben den differenzierten Schutzrechten für die Freigelassenen gab es kaiserrechtliche Einschränkungen bei bestimmten Freilassungsarten, bei denen der Freilasser keine *operae* vereinbaren konnte, z.B. grundsätzlich bei fideikommissarischen Freilassungen, sowie im Falle von nicht durchgeführten Freilassungen, die auf der Grundlage von Kaufverträgen bzw. Loskaufverträgen vereinbart worden waren. In den beiden zuletzt genannten Fällen wurden die Sklaven nach kaiserlichem Gesetz sofort frei. Die säumigen Freilasser verloren alle Anrechte, nicht nur auf die *operae*.[34]

Eine inhaltliche Bestimmung der Dienstverpflichtungen liegt bei den *operae fabriles* vor, die alle möglichen Berufstätigkeiten, soweit sie nicht zu den infamen Berufen gehörten, umfassen konnten und vom *libertus* zur Ableistung auch an eine dritte Person übergeben werden konnten. Nur die *operae officiales* waren persönlich vereinbarte Dienstleistungen zwischen *libertus* und *patronus*, die zwar ebenfalls bestimmten, bereits oben erwähnten Schutzkriterien unterlagen, aber nur vom *libertus* selbst als sogenannte Ehrendienste geleistet werden konnten.[35]

Weitere z.T. kontroverse Fragen betreffen die Vererbbarkeit von *operae*, die Einklagbarkeit nicht geleisteter oder irrtümlich geleisteter *operae*, sowie etwaige Konkurrenzregeln für Freigelassene, die denselben Beruf wie ihr Patron ausübten.[36]

Ich möchte meinen sehr unvollständigen Überblick, der stark aus dem Blickwinkel sozialpolitischer Probleme geschrieben ist, hier abbrechen. Wolfgang Waldstein hat selbstverständlich in seiner umfassenden Monographie und weiteren Aufsätzen, Lexikonartikeln und Rezensionen die Thematik viel breiter und komplexer behandelt. Als verantwortungsvoller, der Suche nach der Wahrheit im ciceronianischen Sinne verpflichteter Forscher, ist er sich stets bewusst geblieben, dass alle herangezogenen antiken Quellen juristischer oder philosophischer Provenienz, die eine Verbesserung der Lage der Freigelassenen widerzuspiegeln scheinen, von genauso vielen gegenteiligen antiken Quellenaussagen widerlegt werden können.[37]

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33 Ibid. § 10., 11.

34 Ibid. § 12., 13.

35 Ibid. § 16., 18. Carla Masi Doria: *Civitas operae obsequium. Tre studi della condizione giuridica di liberti*. Napoli, 1993. 58–73.

36 Ibid. § 23., 24., 26., 21., 22. Überblick gesonderter Publikationen zu Spezialproblemen s.o. in Kap. 3.

37 Waldstein: Zum Menschsein von Sklaven (2001) op. cit. (Anm.22), 47/8.

Trotz dieser Vorsicht ist der Rechtshistoriker mit seiner aus der griechisch-hellenistischen Philosophie hergeleiteten Naturrechtslehre teilweise bei seinen eigenen Fachkollegen in die Kritik geraten. Diese internen Fachdiskussionen sind sehr ausführlich geführt worden und umfassen nicht nur Herkunft und Bedeutung des *ius naturale* bei den römischen Juristen, sein eigentliches „Lieblingsthema", sondern zugleich dessen Auswirkung auf die in den Dienstverträgen vereinbarte Arbeit der *liberti* im Rahmen ihrer Freilassung.[38]

Als Historikerin möchte ich mich abschließend mit der Kritik einiger meiner althistorischen Kollegen beschäftigen, die sie in Rezensionen der *Operae Libertorum* vorgebracht haben. Der Vorwurf der Monokausalität bedingt durch Waldsteins Beschränkung auf die juristischen Quellen wurde bereits entkräftet.[39] Gravierender erscheint mir die Kritik am *humanitas*-Begriff, mit welchem Waldstein die Verbesserungs- = Humanisierungstendenzen gegenüber Sklaven und Freigelassenen in Rom meinte benennen und bemessen zu können. Die Anwendung des schillernden Begriffes der Humanität, der sich nicht nur von der griechischen zur römischen Antike gewandelt hat, sondern grundlegende Uminterpretationen in den folgenden zwei Jahrtausenden erfahren hat, ist bedenklich.[40] Er hat Historiker u.a. dazu verleitet, nicht nur an der alten Mommsen'schen These von der totalen Abhängigkeit der *liberti* von ihren früheren Herren und ihrer Ausbeutung durch die vereinbarten *operae* festzuhalten, sondern in Anknüpfung an die Finley-Vogt Debatte ein wachsendes humanitäres Ethos bei den Kaisern als eine Art Verharmlosungsstrategie der antiken Sklaverei zu brandmarken.[41] Sehr viel differenzierter argumentiert Wilfried Nippel, der keinen grundsätzlichen Einwand gegen Waldsteins These vom humanitären Ethos der Kaiser erheben würde, „wenn der Verf. darüber nicht alternative oder auch komplementäre Deutungsmöglichkeiten, die vom Interesse an sozialer Stabilität ausgingen, ignorierte."[42] Auch einige der juristischen Kollegen teilen die Bedenken

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38 S. hierzu ausführlich u.a. den großen Überblick der Forschungsdiskussionen zwischen Waldstein und seinen juristischen Kollegen: zu den vorpositiven Ordnungselementen, der Ciceronianischen Interpretation der griechischen Philosophen, der *vera philosophia* bei Ulpian und der Bedeutung der *iustitia* bei der Rechtsfindung der römischen Juristen von Johannes Michael Rainer: Postfazione. In: Wolfgang Waldsteins: *Vera Philosophia. Scritti romanistici scelti.* Antiqua 102. Neapel, 2013. 409–429. Zur Kritik an der Unwandelbarkeit des Naturrechts bei Wolfgang Waldstein: Schermaier (2024) op. cit. 707–711. Zu grundlegenden Forschungsdiskussionen zwischen Waldstein und Wieacker: Nadja El Beheiri: „Ein relativ einfaches Deutungsschema" – Ein Gespräch zwischen Franz Wieacker und Wolfgang Waldstein, zwei prägende Gestalten zur Rechtsgeschichte. *Pro manuscripto.*

39 Ibid. Anm. 32.

40 Stefan Knoch: s.v. Humanitas. I. Historisch. In. *Handwörterbuch der antiken Sklaverei.* II. 2017. Sp. 1453–1455.

41 Elemér Pólay: Rezension. *Deutsche Literaturzeitung* 100, (1988), 560–563.; Wiedemann (1988) op. cit. 331–333. Sklavenhaltergesellschaft, humanitäre Ideen, fehlende Behandlung des *obsequium* und Kritik am Katholizismus des Autors werden erhoben. Zur Finley-Vogt Debatte s. Johannes Deissler: Cold Case? Die Finley-Vogt Kontroverse aus deutscher Sicht. In: Heinz Heinen (ed.): *Rückblick und Ausblick*. Stuttgart, Franz Steiner Verlag, 2010. 77–93.

42 Wilfried Nippel: Rezension. In: *Gnomon* 63, (1991), 230–233., Zitat: 233. Er weist vor allem die Behauptung Waldsteins zurück, einen unabhängigen Beweis für Vogts These von der fortschreitenden

gegen die Notwendigkeit des Rückgriffs auf die griechischen Philosophen Platon, Aristoteles und die Stoa, um die aus den *operae* sich ergebenden Probleme zwischen *liberti* und ihren *patroni* zu lösen. Das juristische Instrumentarium, das den römischen Juristen in Praxis und Theorie zur Verfügung stand, war an sich ausreichend. Der auf keinen Fall zu leugnende wachsende juristische Schutz der Rechte der *liberti* in der Kaiserzeit kann auch weniger dominant bzw. ohne die ideengeschichtliche Perspektive von Waldstein beantwortet werden. Das hat er sogar selbst in seinem späteren Lexikonartikel zu den *operae* getan.[43]

Wenn wir davon ausgehen, dass die römischen Freigelassenen in den staatlich anerkannten öffentlichen Freilassungsarten sowohl die volle Freiheit wie auch das römische Bürgerrecht erhielten, dann waren sie als römische Bürger voll in den römischen Staat und seine Gesellschaft integriert und ihre Rechte schützenswert, wenn diese durch ihre ehemaligen Herren oder andere Personen beeinträchtigt wurden. Das lag ganz im Rahmen der *utilitas publica* und der von den Kaisern verfolgten demographischen Politik. Zwar musste das Eigentum der Reichsbewohner an Sklaven geschützt werden. Aber nach der Freilassung waren diese zu römischen Bürgern geworden, die die römische Bevölkerung vergrößerten, in rechtmäßigen Ehen durch ihren legitimen Nachwuchs die römische Bürgerschaft erweiterten, Steuern zahlten, die Wirtschaftskraft stärkten und in zweiter und dritter Generation die militärischen und politischen Führungsschichten auffüllten. Auch im römischen Denken ist die *humanitas* eine der höchsten Tugenden, und zwar eine Standestugend, die orientiert ist an den Sitten der Vorfahren, den *mores maiorum.* Sie stellt eine sogenannte pragmatische Richtschnur für das soziale und politische Verhalten der *cives Romani* innerhalb der römischen Gesellschaft dar. Wer diese verletzte, hatte sich der *res publica Romana* als unwürdig erwiesen und konnte in verschiedener Weise sanktioniert werden. Das galt nicht erst ab der Freilassung gegenüber den *liberti* sondern bereits schon für die *servi*, zu deren Fürsorge die Herren im Rahmen dieses Sittencodex verpflichtet waren.[44] Das sich ständig erweiternde Netz der Schutzrechte für Freigelassene sowie angehende und zukünftige Freigelassene und Sklaven zeigt das große Interesse der Kaiser und ihrer Juristen am Wohl des Staates, der *utilitas publica*, die nur dann gewährleistet ist, wenn der römische Tugendkanon eingehalten wird. So entwickelte sich die römische *humanitas* in der Kaiserzeit nach und nach zu einem Ehrenkodex der Oberschicht und zugleich einem machtpolitischen Instrument zur Legitimation und Sicherung des *Imperium Romanum*. Aus diesem Grunde bleiben Freiheit und freie Geburt im römischen Gemeinwesen und seinen Rechten immer verhandelbar, trotz der Erkenntnis der römischen Juristen, dass nach dem *ius naturale* alle Menschen frei und gleich geboren sind. Trotz des juristischen Schutzes von Freigelassen und Sklaven konnte es nie zur Abschaffung der Sklaverei kommen, die nach *ius gentium* eine gerechte war.

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Humanisierung der Sklaverei vorgelegt zu haben. Wolfgang Waldstein: s.v. Humanitas. II. Humanitas im römischen Recht. In: *Handwörterbuch der Antiken Sklaverei.* II. 2017. Sp. 1455–1457. bes. 1455.

43 Wolfgang Waldstein: s.v. Operae. In: *Handwörterbuch der antiken Sklaverei*. II. 2017. Sp. 2101–2104.

44 Stefan Knoch: *Sklavenfürsorge im Römischen Reich. Formen und Motive zwischen humanitas und utilitas.* Hildesheim, Georg Olms Verlag, 2017. 2.akt. u. erw. Aufl.

Folglich gab es auch keine unveräußerlichen Menschenrechte, die sich erst aus einem neuen Verständnis von Humanität und Naturrecht in der Moderne entwickelt haben.

Die Untersuchungen Wolfgang Waldsteins zu den Dienstpflichten freigelassener Sklaven haben einen unverzichtbaren Beitrag zur Erforschung der römischen Sozialgeschichte im Spiegel des römischen Rechts geleistet, wie hoch oder gering auch immer man den ideengeschichtlichen Einfluss einschätzt. Unabhängig davon hat der Romanist und Rechtshistoriker mit seinen vielen Publikationen grundlegend zur tieferen Erforschung des Phänomens der römischen Sklaverei und zur Aufschlüsselung der antiken Arbeitswelt der Freigelassenen beigetragen. Wir sind dem großen Gelehrten dankbar für seine lebenslange Teilnahme und Förderung des Sklavereiprojektes an der Mainzer Akademie der Wissenschaften.

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# THE LEGAL THOUGHT OF JÁNOS ZLINSZKY

## *Reflections on Iul. D. 40, 4, 16 and Paul. D. 19, 1, 21, 6*

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**Abstract**

This study examines János Zlinszky's legal thought through his interpretations of two Digest passages: Paul. D. 19, 1, 21, 6 and Iul. D. 40, 4, 16. In both cases, his interpretations led him to conclusions different from those preserved in the Digest. The analysis explores the relationship between legal entitlement and equity, the tension between intention and declaration, and the role of Roman law in legal education. Read alongside his writings on law and ethics, these interpretations suggest that his approach combined concern for the legitimate interests of others with an emphasis on precise legal formulation and responsible judgement. The study argues that Roman law served Zlinszky as a framework for developing both legal reasoning and the ethical responsibility of future lawyers.

**Keywords:** János Zlinszky; Roman law; legal interpretation; legal ethics; legal education

### 1. Introduction[1]

János Zlinszky (1928–2015) was a legal scholar whose life was marked by remarkable resilience and an unwavering dedication to academic work. Coming from a family with a strong legal tradition, he began his studies as an exceptionally talented and diligent

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1 An oral version of this paper was presented at the 78th SIHDA Conference, held in Budapest on 26–30 August 2025, in a panel devoted specifically to Roman-law scholarship in the region, with the participation of, and in close cooperation with, Polish colleagues, under the title „The Legal Thought of János Zlinszky: The Exegeses of Iul. D. 40, 4, 16 and Paul. D. 19, 1, 21, 6."

student, showing early academic promise. His flourishing academic path was abruptly interrupted in 1951, when, following a show trial, he was excluded from all universities and forced to work as a construction labourer. Eventually readmitted, Zlinszky obtained his law degree in 1957. He subsequently supported his family as a corporate lawyer and provincial solicitor, while continuing his scholarly work independently. His persistence eventually brought him back to academia in 1981, allowing him to fulfil, after three decades, his aspiration to teach and conduct research in Roman law. The establishment of the Faculty of Law and Political Science of Pázmány Péter Catholic University was to become one of the culminating achievements of his academic career.

Zlinszky also served as a judge of the first Hungarian Constitutional Court and played an important role as a mediator of legal culture. At the same time, he was remarkably generous in sharing his ideas and devoted particular attention to mentoring future generations of scholars.

Although I was not one of Zlinszky's direct students, I attended several of his lectures during my undergraduate studies, including lectures on the Law of the Twelve Tables, the trial of Jesus Christ, and the relationship between Christian morality and legal ethics, as well as in postgraduate education, where he spoke on Roman law in Hungary. His words also remained vividly alive in the recollections and teaching of those who had attended his Roman law seminars and lectures. It was partly through their recollections and teaching, shaped by his influence, that his approach was transmitted to subsequent generations of students. [2]

A personal recollection may serve to illustrate this dimension of Zlinszky's personality and academic outlook. In September 2013, the SIHDA conference was held in Salzburg. I was then a young doctoral candidate travelling with colleagues from our department and preparing to give a paper on the final morning of the conference. As my presentation was scheduled for Friday morning, I decided not to attend the Thursday evening programme and instead remained at the hotel to prepare and rest. That evening, while I was putting the final touches to my notes, there was a knock on the door. To my surprise, it was Professor Zlinszky. Having heard that I would not be attending the evening programme, he had come to make sure that I would not go without dinner and invited me to a small Italian restaurant nearby. His thoughtfulness helped me remain grounded and composed in the face of the nervous anticipation of the

[2] On Zlinszky's life and academic career, see, inter alia, András Koltay: In Memoriam János Zlinszky. *Pázmány Law Review* 3, (2015), 35–45. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/19537/16091; on the foundations of his legal thought and conception of values, Nadja El Beheiri: Grundlagen der Wertordnung bei János Zlinszky. *Pázmány Law Review* 6, (2018), 5–18. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/19410/15975; Nadja El Beheiri: Die Rolle der Tradition zwischen Legalität und Legitimität im ungarischen Staatsrecht: Die Anfänge des Ungarischen Verfassungsgerichts aus der Perspektive von János Zlinszky. *Pázmány Law Review* 7, (2019-2020), 5–16. https://ojs.mtak.hu/index.php/pazmany_law_review/article/view/8405/6936; and, on his approach to teaching Roman law and the formation of the next generation of scholars, János Erdődy: *Qui missilia iactant in vulgus: A nép közé történő pénzszórás a római jogban*. 11. Budapest, Pázmány Press, 2014. 7–8.

following morning. Shortly before my presentation, he introduced me to the professors attending the conference as his 'Enkelschülerin' – his academic granddaughter.

This combination of intellectual seriousness, humanity, and responsibility towards younger scholars was characteristic of Zlinszky. As the two cases examined below will suggest, this sense of responsibility towards the next generation was also an important aspect of his approach to legal education.

The immediate occasion for the present study was another SIHDA conference, held in Budapest in 2025 under the title *Centre and Periphery: The Jurists of Rome, Imperial Legislation, and Practice in the Provinces*. Its theme drew attention to the diversity and plurality of legal thought and practice within the Roman world and, in particular, to the shifting boundaries between 'exception' and 'rule'.[3] The two cases examined in this study do not concern the relationship between central Roman law and provincial legal practice. They nevertheless provide an opportunity to consider, from a different perspective, how different legal reasoners may arrive at different solutions to the same legal problem. Both cases have a solution preserved in the Digest, yet János Zlinszky, when discussing them with his students, arrived at a different conclusion.

The present study therefore examines Zlinszky's interpretation of two passages from the Digest, Paul. D. 19, 1, 21, 6 (33 ad ed.) and Iul. D. 40, 4, 16 (36 dig.), and asks what his divergence from the solutions preserved in these texts may reveal about his approach to legal interpretation and legal reasoning. Why did he reach a different conclusion from the Roman jurists, and can the reasons for these differences reveal broader characteristics of his legal thought?

## 2. Two Cases from the Digest

The two Digest passages share an important structural feature. Each concerns the interpretation of a clause contained in a legal act. Paul. D. 19, 1, 21, 6 concerns a contract for the sale of a house in which the seller reserved for himself either a right of habitation *(habitatio)* for life or an annual payment of ten. Iul. D. 40, 4, 16 concerns a testamentary provision relating to the manumission of a slave and a legacy of land. In the first case, the central question is whether the buyer may change the form of performance from one year to another; in the second, it is how the testamentary clause should be interpreted when the event referred to in its wording can no longer occur.

The two cases also formed part of the Roman-law material discussed with first-year students and were usually taught by Professor Zlinszky during his years of active teaching at the university. [4]

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[3] See the official Call for Papers for SIHDA 2025, *Centre and Periphery: The Jurists of Rome, Imperial Legislation, and Practice in the Provinces*. https://sihda2025.hu/#call-for-papers (Accessed on: 12 October 2026).

[4] Cf. for example, Róbert Brósz: *Római jogi gyakorlatok*. Budapest, Nemzeti tankönyvkiadó, 1999. , a widely used collection of Roman-law cases for teaching purposes, which includes both cases discussed here. See the case based on Paul. D. 19, 1, 21, 6 at 33. and the case based on Iul. D. 40, 4, 16 at 5.

2.1. Paul. D. 19, 1, 21, 6 (33 ad ed.)

Paul. D. 19, 1, 21, 6 (33 ad ed.) provides:

> *Qui domum vendebat, excepit sibi habitationem, donec viveret, aut in singulos annos decem: emptor primo anno maluit decem praestare, secundo anno habitationem praestare. Trebatius ait mutandae voluntatis potestatem eum habere singulisque annis alterutrum praestare posse et quamdiu paratus sit alterutrum praestare, petitionem non esse.*

In Watson's English translation, the passage reads as follows:

> "The seller of a house withheld for himself the right of occupancy for as long as he lived or ten per year instead. In the first year, the buyer preferred to pay the ten, in the second year, to proffer the right of occupancy. Trebatius says that he has the power to change his mind, and each year he can offer either one, so long as he was ready to offer one or the other, there are no grounds for action."[5]

The passage concerns a contract of sale (*emptio venditio*) containing a clause under which the seller reserved for himself either a lifelong right of habitation or an annual payment of ten. In the first year, the buyer chose to pay the ten; in the second, he offered habitation instead. The resulting question is whether the seller may nevertheless claim payment of the ten.

### *2.1.1. The Legal Qualification of the Clause*

A preliminary issue concerns the legal qualification of the clause. One possibility is to regard it as establishing an alternative obligation. In such an obligation, two performances are contemplated, while performance of either releases the debtor. Unless otherwise agreed, the right of choice belongs to the debtor. On this qualification, the seller must accept the habitation offered by the buyer.[6]

Another possible qualification is *facultas alternativa*. In this case, one performance is primarily due, while another may substitute for it under the relevant conditions. Applied to the present case, the right of habitation would constitute the primary performance, while the annual payment of ten would constitute the alternative. On this

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[5] Cf. Alan Watson – Theodor Mommsen – Paul Krueger: *The Digest of Justinian I-IV.* Philadelphia, Pennsylvania, University of Pennsylvania Press, 1985.

[6] See inter alia Ulrike Babusiaux – Christian Baldus – Wolfgang Ernst – Franz-Stefan Meissel – Johannes Platschek – Thomas Rüfner (ed): *Handbuch des römischen Privatrechts Band I–III.* Tübingen, Mohr Siebeck, 2023. 584–585.

approach too, the seller could not reject the offered habitation and demand the monetary payment instead.[7]

The wording of the passage appears to support the first qualification. In particular, the use of *aut* points towards an alternative obligation, whereas a formulation such as *si non* might be expected in a case involving *facultas alternativa*. [8]

### *2.1.2. The Right to Change the Form of Performance*

The preliminary classification, however, does not resolve the central problem raised by the passage. The crucial words are *in singulos annos*. The dispute arises in the second year, when the buyer no longer wishes to provide the same performance as in the first. The more precise question is therefore whether the buyer may change the form of performance from year to year.

The Digest gives a clear answer. Paul reports the opinion of Trebatius, according to whom the buyer has *mutandae voluntatis potestatem* and may provide either performance in each year (*singulisque annis alterutrum praestare posse*). As long as the debtor remains prepared to provide one or the other, there is no ground for an action.

Zlinszky accepted that the buyer was entitled to make the initial choice. He nevertheless took a different view of the possibility of changing the form of performance year after year. According to his interpretation, the possibility of changing the form of performance from year to year would constitute an abuse of rights and should therefore not be permitted. Such repeated changes would make the seller's position dependent from year to year on the buyer's changing choice and would deprive the performance arrangement of a reasonable degree of predictability. On this view, the exercise of a right expressly granted by the agreement could nevertheless become abusive where the manner of its exercise disproportionately affected the legitimate interests of the other party.

This position may be considered in the light of Zlinszky's broader understanding of the relationship between strict law and equity. In *Roman Law and Rule-of-Law Legislation*, discussing the maxim *summum ius, summa iniuria*, he writes:

> "There can be no doubt that, if the law is applied with absolute rigidity, it may become unjust and lose its underlying value. *Summum ius summa iniuria.* Legal norms also require a degree of flexibility: law is *ius aequum*, and it is the norm that we all perceive as equitable that lends legitimacy to the legal order. *Ius est ars boni et aequi.* Yet in this art, as in every art, sound judgement must be able to discern precisely when recourse may be had to equity without thereby causing injustice to the

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[7] See Güzide Burcu Günveren: The Concept and Performance of Alternative Obligation (Obligatio Alternativa) in Roman Law. *Hacettepe Law Review*, 2 (2021), 838–839., especially on the distinction between *obligatio alternativa* and *facultas alternativa*.

[8] See for example Iul. D. 36, 2, 19 pr: „*Si decem legata fuerint et, si parum dedisset, fundum, decem peti non poterunt, nisi fundus peti non possit.*"

> other party – or parties – who have placed their trust in the stability of the legal order. Equity serves to remedy disadvantages for which the disadvantaged party bears no responsibility; it cannot, however, serve to assist those who are inattentive, foolish, negligent, or in breach of their duties."[9]

This passage does not, of course, provide a direct explanation of Zlinszky's interpretation of D. 19, 1, 21, 6. It does, however, reveal a broader conception of legal reasoning that is consistent with the solution he proposed in this case. The decisive point is not simply whether the buyer's repeated exercise of the choice can be reconciled with the wording of the agreement, but whether the exercise of that right, although formally available to him, remains acceptable in view of its effects on the other party. In this sense, Zlinszky's solution may be understood as reflecting the very concern expressed in the passage above: the application of a legal entitlement should not become a source of injustice to the party who relies on the stability and predictability of the legal relationship.

2.2. Iul. D. 40, 4, 16 (36 dig.)

The second case is preserved in Iul. D. 40, 4, 16 (36 dig.):

> *Si ita scriptum fuerit: "Cum Titius annorum triginta erit, Stichus liber esto eique heres meus fundum dato," et Titius, antequam ad annum trigensimum perveniret, decesserit, Sticho libertas competet, sed legatum non debebitur. Nam favore libertatis receptum est, ut mortuo Titio tempus superesse videretur, quo impleto libertas contingeret: circa legatum defecisse condicio visa est.*

In Watson's translation, the text is rendered as follows:

> "If it has been written in the will, "when Titius reaches the age of thirty, let Stichus be free and let my heir give him a farm," and if Titius has died before reaching his thirtieth year, freedom belongs to Stichus, but the legacy will not be due. For by the principle favoring freedom, it has been accepted that after Titius's death a period of time evidently remained on whose expiry freedom accrued; regarding the legacy, the condition is thought to have failed."[10]

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[9] János Zlinszky: Római jog és jogállami jogalkotás. In: Miklós Király – Péter Gyertyánfy (ed.): *Liber amicorum. Studia Gy. Boytha dedicata. Ünnepi dolgozatok Boytha György tiszteletére*. Budapest, ELTE ÁJK Polgári Jogi Tanszék, 2004. 369–376. Also available online at the Zlinszky János Research Workshop website. https://me-l.co/xy4yq5v7 (Accessed on: 12 October 2026). English translation by the author.

[10] Cf. Watson – Mommsen – Krueger op. cit.

### *2.2.1. The Testamentary Clause and the Sequence of Events*

The passage concerns a testamentary provision under which Stichus is to become free when Titius reaches the age of thirty, and the testator's heir is to give Stichus a piece of land. Titius, however, dies before reaching the specified age. Julian concludes that Stichus obtains his freedom but is not entitled to the legacy. In the version of the case presented in Brósz's collection of Roman-law exercises, Titius is expressly identified as the testator's heir. Zlinszky's reconstruction of the case appears to have followed this version.[11]

The reference to Titius reaching the age of thirty raises the question whether the testamentary provision should be understood as a *condicio* or as a *dies*. The distinction becomes particularly relevant because Titius dies before reaching the specified age. The sequence of events is therefore essential to understanding the problem: Titius dies before his thirtieth birthday, but the date on which he would have reached that age can still be determined.

Julian's solution reflects a distinction between the two dispositions contained in the testamentary clause. In favour of freedom (*favor libertatis*), the period of time is treated as continuing after Titius's death, so that Stichus obtains his freedom when that period has elapsed. With regard to the legacy, however, the condition is considered to have failed, and Stichus is therefore not entitled to the land.

The passage also raises further doctrinal questions, including the legal structure of testamentary manumission and the form of the legacy. For present purposes, however, the relevant issue is narrower: the interpretation of the testamentary wording and the different approaches taken to that wording by Zlinszky, his students, and Julian.

### *2.2.2. Intention and Declaration: Different Approaches to the Testament*

According to recollections of Zlinszky's teaching, students approached the passage by emphasising the testator's intention.

Their argument could be based on the principle *in testamentis plenius voluntates testantium interpretamur*.[12] On this view, the primary task is to give effect to the testator's intention. It might be inferred that the testator intended Stichus, after the passage of the specified period, both to obtain his freedom and to receive land from which he could support himself. The argument could further be connected to *favor libertatis*, under which questions concerning a prospective manumission may be resolved in favour of freedom.

According to the same recollections, Zlinszky approached the passage from a different starting point. For him, interpretation had to begin with the text of the legal act. The clause states: '*Cum Titius annorum triginta erit*.' On his reading, the relevant condition was not fulfilled because Titius died before reaching the age of thirty. He therefore concluded that neither freedom nor the land should be due to Stichus.

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11 See Brósz op. cit. 5.

12 Cf. Paul. D. 50, 17, 12 (3 ad Sab.).

Julian's solution differs from both positions. Invoking *favor libertatis*, he treats the passage of time relevant to the manumission as capable of continuing notwithstanding Titius's death and consequently recognises Stichus's freedom. In relation to the legacy, however, he regards the condition as having failed and therefore denies Stichus the land.

One possible explanation for this distinction may lie in the protection of the heir's patrimonial interests. While the principle of *favor libertatis* justified granting Stichus his freedom, extending the same reasoning to the legacy would also have required the heir to transfer a piece of land. Julian's solution thus secured Stichus's freedom without imposing this additional burden on the estate. It is conceivable that consideration of the heir's interests played a role in drawing this distinction, although the text itself does not expressly identify such a concern.[13]

The disagreement between Zlinszky and his students over the interpretation of the testamentary provision can thus be understood, at least for analytical purposes, as a tension between two approaches to the interpretation of legal acts: one emphasising the underlying intention of the testator and the other giving priority to the outward declaration embodied in the text. While the students' reasoning focused on the presumed intention of the testator, Zlinszky insisted on the wording of the testamentary clause and the legal consequences attached to it.

According to recollections of the classroom discussion, Zlinszky and his students did not reach agreement before consulting the Digest. Zlinszky eventually proposed: "Let us see what the Digest says." Julian's responsum then revealed that neither position corresponded entirely to the solution preserved in the Roman source: Stichus obtained his freedom but was not entitled to the land.

This episode also illustrates an important aspect of Zlinszky's approach to legal education. Rather than simply providing the solution, he allowed different interpretations to emerge and encouraged his students to develop and defend their reasoning. The subsequent examination of the Roman source demonstrated that even carefully argued interpretations might lead to conclusions different from those reached by the Roman jurists. In this way, the discussion became not merely an exercise in finding the correct answer, but also an opportunity to reflect on the methods and responsibilities of legal interpretation.

## 3. Conclusion: Legal Interpretation, Equity, and the Education of Lawyers

The two cases reveal different forms of disagreement between Zlinszky's reasoning and the solutions preserved in the Digest. Their significance, however, extends beyond the fact that Zlinszky reached different answers from the Roman jurists. The cases therefore provide an opportunity to examine the considerations that informed

[13] See for example Jakob Fortunat Stagl: Favor libertatis: Slaveholders as Freedom Fighters. In: Martin J. Schermaier (ed.): *The Position of Roman Slaves: Social Realities and Legal Differences*. Berlin, Boston, De Gruyter, 2023. especially 209.

his interpretation of Roman law and the role that Roman legal sources played in his understanding of legal education.

Zlinszky was a Christian legal thinker whose approach to law was strongly informed by historical experience and tradition. As El Beheiri has observed, Zlinszky's own intellectual outlook may be characterised by a tendency to seek the present in history and practice in theory. This connection between past and present was not confined to his work on Roman law: El Beheiri also points to the importance of Hungarian legal tradition in his reasoning as a constitutional judge.[14] Against this broader intellectual background, Roman law may be understood in Zlinszky's work not merely as an object of historical inquiry, but also as a means of reflecting on contemporary legal problems and on the responsibilities of lawyers.

The reasons for Zlinszky's divergence from the solutions preserved in the Digest appear to differ in the two cases. In the case reported by Paul, his objection to allowing the buyer to change the form of performance annually may reflect a practical conception of contractual responsibility and of the limits placed on the exercise of legal rights. His long experience in legal practice may also have contributed to this approach. His characterisation of repeated changes in performance as an abuse of rights is, in any event, consistent with his published reflections on the limits of rigid legal entitlement and the proper role of equity.

The second case brings the didactic dimension of Zlinszky's approach more clearly into view. His insistence on the wording of the testamentary provision may be understood as part of a broader concern with the formation of lawyers and their professional responsibility. Zlinszky expressly regarded ethical education as a necessary component of legal education, and his conception of legal training extended beyond the transmission of doctrinal knowledge to the development of responsible legal judgement.[15] Against this background, his treatment of the testamentary clause may also have conveyed a more specific lesson: legal acts must be formulated with precision, and lawyers must remain aware of the consequences attached to the words they use. In this respect, Zlinszky's approach may also be seen as echoing the Roman-law maxim '*ius civile vigilantibus scriptum est*'[16]: the responsibility of the lawyer extends not only to the interpretation of legal texts, but also to the careful formulation of legal acts and an awareness of the consequences of the words employed.

Despite these differences, the two interpretations may have a common foundation in Zlinszky's conception of the education and responsibility of lawyers. Teaching Roman law was not merely a matter of transmitting doctrinal knowledge. It was also connected with the formation of lawyers capable of exercising legal rights responsibly, interpreting legal texts carefully, and recognising the relationship between law, fairness, and individual responsibility.

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14 El Beheiri (2018) op. cit. 5–6.; 17.

15 János Zlinszky: *A XII táblától a 12 ponton át a magánjog új törvénykönyvéig: Válogatott tanulmányok*. Budapest, Szent István Társulat, 2013. 11–12.

16 Cf. Scaev. D. 42, 8, 24 (lib. sing. quaest. publ. tract.).

This dimension of his thinking is particularly visible in *Christian Morality and Legal Ethics*, a textbook connected to a course that he taught for many years as part of legal education. There he wrote:

> "The law expects more from a person performing a contract than mere compliance with its literal terms. It expects more from an owner than simply disposing of his property as he pleases. It not only prohibits the abuse of rights and conduct of a destructive nature, but also requires us properly to assess the consequences of our actions, to exercise careful and reasonable management of the assets entrusted to us, to perform contracts reasonably and in good faith, and likewise to cooperate in good faith in the enforcement of debts."[17]

Read together with the two Digest cases examined above, this passage suggests that Zlinszky did not treat Roman law exclusively as an object of historical reconstruction or doctrinal analysis. The Roman sources also provided a framework within which questions of legal responsibility, fairness, precise legal formulation, and the professional formation of lawyers could be explored. His willingness to depart from the solutions preserved in the Digest should therefore not necessarily be understood as a rejection of the authority of Roman legal thought. Rather, the two examples considered here suggest a mode of engagement in which Roman law remained a living instrument of legal reasoning and legal education. In Zlinszky's approach, practical experience, sensitivity to equity, precision in legal drafting, and the education of future lawyers thus appear to have been united by a common concern: the responsibility of lawyers for the legal and human consequences of their decisions.

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# FREEDOM AND RESPONSIBILITY IN SOCIAL AND INDIVIDUAL LIFE

## *Adolf Reinach's Influence on Edith Stein*

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**Abstract**

This article examines Adolf Reinach's influence on Edith Stein's phenomenology through the interconnected concepts of freedom and responsibility. It argues that Reinach's theory of social acts provided Stein with a decisive conceptual framework that she subsequently transformed across three domains: communal life, political organization, and religious experience. Reinach's analysis demonstrates how freely performed interpersonal acts, such as promising, can establish objective relations of obligation without eliminating the freedom of the acting person. Building on this insight, Stein develops an account of community in which supra-individual unity and collective responsibility remain grounded in the free acts and ultimate responsibility of individual persons. Her political philosophy extends this structure to the state, showing that authority and responsibility may be distributed or concentrated while remaining dependent upon personal agency and relations of representation and trust. Finally, Stein's writings on grace reinterpret freedom as a responsive capacity through which the person may freely accept or reject the divine call. The article concludes that Reinach's influence on Stein is best understood not as the adoption of a finished doctrine but as a phenomenological impulse that enabled her to articulate a unified account of freedom becoming responsibility through interpersonal, communal, political, and religious relations.

**Keywords:** responsibility, freedom, social act, community life, promise, empathy, grace

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## 1. Introduction

Adolf Reinach, a jurist and phenomenologist, exerted a decisive influence on Edith Stein from the beginning of her studies in Göttingen. His intellectual formation itself resists any simple division between philosophy and law. Reinach completed his doctoral studies in philosophy under Theodor Lipps, yet his dissertation, Über den Ursachenbegriff im geltenden Strafrecht, already addressed a problem in criminal law. He subsequently undertook serious legal studies in Tübingen with Ernst Beling, spent a semester in Göttingen with Edmund Husserl, and eventually completed his habilitation under Husserl. Philosophy and jurisprudence therefore did not constitute separate phases of his career; rather, each repeatedly challenged and shaped the other. Because Reinach's understanding of phenomenology was grounded in Husserl's *Logical Investigations* and developed in sustained engagement with law, his work was particularly attentive to the social structures of experience.[1]

Stein began her university studies in Breslau in 1911 and moved to Göttingen in 1913 in order to study with Husserl. She encountered Reinach immediately upon her arrival: as she later recalled, "when arrive to Göttingen, one goes first to Reinach […]". Reinach's gifts as a teacher were highly valued not only by Stein but throughout the Munich–Göttingen Circle of the Husserlian phenomenology, whose members regarded him as a possible successor to Husserl's chair. Husserl, for his part, appreciated Reinach's achievements in his own way, even while recognizing the growing difference between their philosophical orientations.

After Reinach's death in 1917, his former students Hedwig Conrad-Martius and Edith Stein edited and prepared his philosophical legacy for publication. The resulting *Gesammelte Schriften* appeared with Max Niemeyer in 1921. Conrad-Martius's editorial preface contains an observation of particular importance here: "Reinach was a philosopher in the fullest sense of the word. And precisely what is remarkable is that we can truly understand him as a philosopher, and grasp the structure and central significance of his philosophical world, only if we begin from the fact that, for him, philosophy is capable of attaining and realizing, within its own domain, just as much strict objectivity and factual rigor as the natural sciences do within theirs. An objectivity that manifests itself directly in the precise, categorical graspability of its results."[2] Although Conrad-Martius also refers to Reinach's work in legal philosophy and legal theory, her characterization suggests a stronger interpretive claim: Reinach's philosophy of law is not a peripheral application of his phenomenology. It provides a privileged perspective from which the systematic character of his philosophical project can be understood.

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1 More about the historical background see: Anna Jani: A fenomenológiai mozgalom korai szakasza. In: Péter András Varga – Deodath Zuh: *Husserl és a* Logikai vizsgálódások. Budapest, L'Harmattan, 2009. 200–225.

2 Adolf Reinach: *Gesammelte Schriften. Herausgegeben von seinen Schülern*. Halle, Max Niemeyer, 1921. VII.

Alexandro Salice similarly argues that Reinach's distinctive contribution emerged through the integration of impulses derived from the Munich phenomenology associated with Theodor Lipps into his own philosophy of law.[3] Central to this development is the notion of the state of affairs (*Sachverhalt*). Through it, phenomenological attention shifts from an isolated thing to the objective relation articulated in judgment and intended in consciousness. A state of affairs does not concern a single thing taken by itself; it involves a plurality of elements that together constitute an objectivity or fact.[4] Reinach's legal studies also supplied an important impulse for his analysis of social acts.[5] The philosophy of law was therefore both a field of application and a source of phenomenological discovery.

This point helps clarify an important contrast between Husserl and Reinach. Husserl increasingly describes intersubjective world-experience in constitutional and transcendental terms. Reinach, by contrast, emphasizes the realistic structure of social situations and the states of affairs disclosed from the shared standpoint made possible by expression. Stein occupies a productive position between these tendencies. She describes communal life both as a shared life directed toward common states of affairs and as a unity whose constitution remains founded in individual experience. Her account neither dissolves the community into a collection of isolated subjects nor treats it as a free-standing personal subject identical in structure to the individual.

Reinach's relation to Husserl must accordingly be stated with some precision. On the one hand, Reinach was a leading figure of the early phenomenological movement. Conrad-Martius called him "the phenomenologist among the phenomenologists,"[6] while Stein wrote to Roman Ingarden that "all Reinach-phenomenologists were decisive realists who are not on the ground of idealism".[7] On the other hand, the period of the close collaboration of Husserl and Reinach was comparatively short, extending

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3 Cf. Alexandro Salice: *Urteile und Sachverhalte: ein Vergleich zwischen Alexios Meinong und Adolf Reinach*. München, Philosophia, 2009.

4 Cf. Salice op. cit. 310: "In particular, it remains open how the facts and the underlying factual facts are related. From Reinach's examples in this regard, it can be seen that he does not understand the facts as a simple matter. Rather, it seems to be the case that different facts can build on the same complex objectivity. The same rose is involved in different issues."

5 According to MacIntyre, Husserl's impulse on Reinach makes itself visible first of all on Reinach's philosophy of law. Cf. Alasdair MacIntyre: *Edith Stein. A philosophical Prologue*. London, Continuum, 2006. 52: "Yet for Reinach it was just this possibility that Husserl's phenomenology had opened up. For he took it that Husserl had provided the means for showing that we not only apprehend essential properties of the objects that are presented in perception, but also those of changes in those objects that occur to them and the necessary relationships that may hold between such changes."

6 Hedwig Conrad-Martius: Vorwort. In: Adolf Reinach: *Was ist Phänomenologie*. München, Kösel 1951. 5–17.

7 Cf. Edith Stein: *Self Portrait in Letters. Letters to Roman Ingarden*. The Collected Works of Edith Stein. Vol. 12. Transl. by Hugh Candler Hunt, ICS Publication, 2014. Nr. 83. September 30th, 1922.

principally from 1909 to 1914,[8] and Reinach developed a conception of phenomenology that cannot be reduced to Husserl's later transcendental project.[9]

Against this background, the present essay examines Reinach's influence on Stein's early writings through the concepts of freedom and responsibility. Its central claim is that Reinach's theory of social acts gave Stein a conceptual impulse that she transformed in three connected domains: the life of community, the juridical order of the state, and the person's religious response to grace. The continuity among these domains lies neither in a direct identification of social, political, and religious acts nor in a claim that Stein simply adopted Reinach's conclusions. It lies in a shared structural problem: how can a free personal act enter an objective order of relations and obligations without surrendering the individual responsibility of the acting person?

## 2. Reinach's Social Acts: Freedom, Obligation, and Community

From a phenomenological perspective, one of Reinach's most important legacies is his analysis of social acts as irreducibly interpersonal acts. The legal and phenomenological significance of the state of affairs converges in this analysis. A social act is not merely an interior experience that happens to concern another person. It is an act whose performance requires an outward orientation and whose validity depends upon its being apprehended by its addressee. In *The Apriori Foundations of the Civil Law*, Reinach characterizes such acts as acts which "not only belong to a self, but in which the self shows itself as active".[10] Promising, commanding, requesting, and granting are not passive psychic occurrences. In performing them, the person intervenes in a shared normative world.

The social act has both an individual and a communal dimension. At the individual level, it is performed by a person who takes a position – *pro* or *contra* – toward a state of affairs. At the communal level, it contributes to the dynamic structure of social life by establishing relations that did not previously exist. Expression is necessary to this structure, but embodiment in a particular physical sign is not. Reinach illustrates the point through a limiting case: "If we imagine a community of beings who can directly and immediately percieve each other's experiences, we will have to recognize that in such a community social acts could perfectly well be performed which have only a soul and no body."[11] What is essential is not the material form of the expression but the act's need to be perceived by another person.

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[8] Cf. Karl Schumann: Husserl und Reinach. In: Karl Schumann – Barry Smith – Kevin Mulligan (ed.): *Speech Act and Sachverhalt. Reinach and the Foundation of Realist Phenomenology*. Springer, 1987. 239. https://doi.org/10.1007/978-94-009-3521-1_11

[9] More about the differences between Husserl and Reinach see in: Anna Jani: *The Ontological Roots of Phenomenology. Rethinking the History of Phenomenology and Its Religious Turn*. New York, Lexington (Bloomsbury Academic), 2022.

[10] Adolf Reinach: "The Apriori Foundations of the Civil Law". (trans. John F. Crosby). *Aletheia. An International Journal of Philosophy* 3, (1983), 1–143., 18.

[11] Reinach (1983) op. cit. 20–21.

Freedom first appears here as the subject's active participation in the act. The ego does not merely register an already completed social reality; through its decision and expression, it helps constitute a new interpersonal state of affairs. Yet the distinction between one's own experience and participation in the experience of another remains decisive. Reinach writes:

> "We also have to distinguish experiencing in dependence on another, from sympathetically feeling oneself into the experiencing of another. The disciple who lives according to the pattern of his master is certainly not free in his experiencing; but is still *his* experiencing which he derives from the person of the master. This dependency in his experiencing makes for an unfree experiencing of his own, but it is his own. By contrast, sympathetically feeling oneself into the experiencing of another is beyond the antithesis of freedom and unfreedom, for it involves no experiencing of one's own at all."[12]

Freedom and unfreedom apply to experiences that remain the subject's own. Empathic participation, by contrast, cannot simply be classified as a free or unfree instance of one's own experience, because its content is given as belonging to another.

This distinction prevents a premature identification of sociality with collective consciousness. The social field is constituted through acts of persons, but those persons do not thereby lose the ownership of their experiences. At the same time, once a social act has been validly performed, it can create an objective relation that is no longer at the performer's arbitrary disposal. A promise is freely made; the obligation generated by it is not freely revocable at will. Freedom thus has a twofold significance. It is the condition of entering the social relation, while the relation thereby established imposes a normative constraint upon subsequent action.

Reinach makes this consequence explicit by contrasting social with non-social acts. Social acts affect communal life; they leave something behind "when they are completed. All civil law is based on this:"[13] Non-social acts, by themselves, do not institute comparable relations in the external social world. The basic structures of obligation are not created ex nihilo by the state or community. They are rooted in a priori relations disclosed through ordinary interpersonal experience and presupposed by positive law. As Reinach states: "Legal relationships are built up in and through social acts. This is neither a natural social right, nor an ideal right, but the basis of law. Civil and similar rights, mandatory liabilities and claims are based on these files."[14] Positive legislation can regulate, modify, or extinguish such relations, but it does not first invent the essential structures of promising, claiming, obligating, or granting.

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12 Ibid. 84.

13 Adolf Reinach: Nachgelassene Texte. Nichtsoziale und soziale Akte. In: Idem. *Sämtliche Werke. Textkritische Ausgabe in zwei Bänden*, vol. I. (eds. Karl Schumann – Barry Smith). München, Philosophia, 1989. 355–361., 357. https://doi.org/10.2307/j.ctv2x8v8xh.17

14 Reinach (1989) op. cit. 358.

The ethical importance of social acts follows from their interpersonal character. They arise in verbal communication, gestures, and other forms of expression; through them, persons enter relations that can ground claims and obligations. Yet every social act also presupposes an interior experience. Reinach explains: "We have distinguished the social acts as sharply as possible from all those experiences which do not necessarily express themselves to others. We now have to take note of the remarkable fact that all social acts presuppose such internal experiences. As a matter of apriori necessity every social act presupposes as its foundation some internally complete experience whose intentional object coincides with the intentional object of the social act or is at least somehow related to it."[15] An act of promising, for example, presupposes an intention concerning the promised performance; a question presupposes an uncertainty or absence of conviction. The internal experience grounds the social act but is not identical with it.

In his notes on "Nichtsoziale und soziale Akte," Reinach distinguishes the two classes of act according to their manifestation in communal life. A social act is not defined merely by having another person as an intentional object, as hatred or envy may have. It contains a specifically interpersonal direction: "It is also intentional, but there is also something more. This leads us into a whole new class of acts that are particularly important to civil law. You have a social moment, direction towards another subject. This direction is not intentionality in relation to a subject. But a question is intentional in relation to its object. As a result, these acts are different from the act of hate, envy and like. They have a direction to someone about something."[16] The other person is not simply objectified. Rather, the act is addressed to someone concerning something; the subject–subject relation is therefore integral to its intentional structure.

The common state of affairs supplies the objective term of this relation. Social acts obtain their significance within a shared world, and their inner foundation and outward performance jointly explain their connection to freedom. The individual is free with respect to the performance of the act but cannot unilaterally determine all the consequences of the relation that the act institutes. Reinach summarizes the dependence of the social act upon its non-social foundation as follows: "Every social act is based on an experience that is not a social act. E. g. a question presupposes non-conviction, a promise presupposes the will that what is promised happens through the addressee. A distinction must therefore be made: an inner experience that underlies the social acts. Building social acts on the experience, which may or may not be free."[17]

This structure provides the basis for a phenomenological account of responsibility. A person voluntarily performs an act directed to another and thereby assumes responsibility for an interpersonal state of affairs. Reinach's engagement with Kant is relevant here because it links imputability to freedom. He observes: "Freedom in Kant is therefore still not unambiguously defined. The capacity to be free is itself free, as is the possibility of freeing oneself from sensibility. The human being as noumenon is genuinely free in

[15] Reinach (1983) op. cit. 21–22.

[16] Reinach (1989) op. cit. 356.

[17] Ibid. 357.

this second sense. It is from this alone that Kant derives responsibility, imputability, and the like. Evil, too, is a product of freedom."[18] Reinach does not simply reproduce Kant's moral theory, but he retains the fundamental connection between freedom and the attribution of responsibility. The promise is the clearest juridical example. It is not merely a report about an existing volition or an expression of a psychological state. It is an independent spontaneous act that places the promisor under an obligation.[19] The proposition that the will alone produces the obligation would therefore presuppose precisely what needs to be demonstrated.[20] The claim of the promisee arises through the social act itself, once the act has been expressed and apprehended. The promisor's freedom is not cancelled by the obligation; rather, the obligation is intelligible because a free act has instituted it.

Reinach's account can also accommodate rights and obligations held by a plurality. He writes: "As we know from our earlier reflections, a group of persons can be the holder of rights and obligations in such a way that each person *participates* in them; such relations of right can derive from acts of promising, granting, and other social acts which address the members of group all together. But what is required in the present case is that a group of persons is for example the owner or co-owner of the thing."[21] Participation in a common right or obligation does not erase the persons who participate. The group's juridical unity is constituted through relations in which individuals remain implicated.

Reinach's analysis therefore establishes a bridge between personal and communal life. It explains how an act issuing from an individual can acquire an objective interpersonal validity and how a common normative order can bind persons without becoming a separate will that absolves them of responsibility. This bridge is the point at which Stein's transformation of Reinach's insights begins.

### 3. Stein on Individual and Communal Responsibility

Stein develops the relation between individuality and community more systematically than Reinach. In *Philosophy of Psychology and the Humanities* and *An Investigation Concerning the State*, she differentiates personal, social, and communal acts and asks how individual acts can sustain a supra-individual unity. Her terminology should not be treated as a simple repetition of Reinach's. Reinach's social act is essentially other-directed and requires apprehension by an addressee. Stein's communal experience concerns the participation of several individuals in a shared experiential unity. Her "free acts," moreover, include personal position-takings such as love and hatred that are not social acts in Reinach's strict juridical sense. The relation between the two

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[18] Adolf Reinach: Kants Ethik. In: Idem. *Sämtliche Werke. Textkritische Ausgabe in zwei Bänden*, vol. I. (ed. Karl Schumann – Barry Smith). München, Philosophia, 1989. 497–515. 500.

[19] Cf. Reinach (1983) op. cit. 26.

[20] Cf. Reinach (1989) op. cit. 359: "This presupposes what is to be proven."

[21] Reinach (1983) op. cit. 129.

thinkers is thus one of appropriation and transformation rather than terminological identity.[22]

Stein had already prepared this problem in *On the Problem of Empathy*. The second part of the dissertation analyzes empathy in relation to other acts and places the individuality of the other person at the center of the investigation. Empathy provides a bridge from the analysis of individual consciousness to the possibility of communal life. The foreign physical body is apprehended as a living body through an act in which bodily and psychical dimensions are co-given. Stein calls the unity of these dimensions the psycho-physical individual. The other is neither a pure ego inferred behind an object nor a mere physical body. As she writes, "my own hand feels the foreign hand's sensation 'with,' precisely through the empathy whose essence we earlier differentiated from our own experience and every other kind of representation."[23]

Empathy makes the other's experience accessible as the other's without converting it into my own. This point corresponds to Reinach's distinction between dependent experience and empathic participation. It also gives Stein the basis for explaining how individuals can constitute a community while preserving their personal distinctness. Cultural objects, values, and shared purposes are apprehended within a world that is both individually experienced and communally meaningful. The last part of the dissertation is consequently developed further in the essay *Individual and Community*, where Stein interprets individual psychic life as embedded within communal life.

For Stein, communal experience presupposes individual streams of consciousness but cannot be reduced to their mere sum. A community has a unity and a history of its own insofar as individuals live, feel, and act as members of it. Nevertheless, it is not a free subject in the same sense as the person. This limitation is crucial for the relation between freedom and responsibility. Individuals remain responsible for the free acts through which communal life is sustained. Stein writes: "The community as such is no free subject, so neither is it 'responsible' in the same sense that the individuals are. Individuals bear the ultimate responsibility for the community's actions, which they perform in its name. And even if they do something in the service of the community which they wouldn't do from personal motives, the entire weight of the responsibility rests upon them and they have no possibility of shifting the blame to the community. This seems to stand in contradiction to the *solidarity* that we are claiming for the community and that includes a *collective* responsibility."[24]

The apparent contradiction is resolved by distinguishing ultimate personal responsibility from solidarity-based co-responsibility. A community may have a collective history, shared ethos, and common actions. Its members may participate in the

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[22] In Anna Jani's *Edith Steins Denkweg von der Phänomenologie zur Seinsphilosophie*, one chapter is dedicated to Reinach's influence on Edith Stein's philosophy. See: Anna Jani: Adolf Reinachs Einfluss auf Edith Steins Philosophie In: *Edith Stein's Denkweg von der Phänomenologie zur Seinsphilosophie*. Würzburg, Königshausen & Neumann, 2015. 62–79.

[23] Edith Stein: *On the Problem of Empathy*. The Collected Works of Edith Stein, vol. 3. Washington D. C., ICS Publication, 1989. 54.

[24] Edith Stein: *Philosophy of Psychology and the Humanities*. The Collected Works of Edith Stein 7. (transl. by Marianne Sawicki). Washington D. C., ICS Publication, 2000. 222.

consequences of acts that they did not individually initiate. Yet the community cannot become an alibi behind which the acting person disappears. Collective responsibility is borne through persons, not transferred to an independently willing collective subject.

This argument sharpens Reinach's insight into plural rights and obligations. In Reinach, members may jointly participate in a right or obligation constituted by social acts addressed to them as a group. In Stein, the unity of communal life explains how persons can share a history and bear responsibility in solidarity. In both cases, participation does not eliminate individuality. Stein, however, makes explicit the asymmetry between the community's supra-individual life and the personal freedom required for responsibility.

## 4. Political Freedom and Responsibility in the State

Stein develops the political implications of this analysis in *An Investigation Concerning the State*. The state is sovereign and has a distinctive life, but its acts are performed through persons and institutions. Stein therefore approaches responsibility from the personal level even when discussing co-responsibility or its apparent suspension. The transfer of political authority to a single juridical person can concentrate responsibility, but it cannot transform the state into a person whose freedom replaces that of its members.

Her discussion of political forms makes the relation between the carrier of state life and the whole especially clear:

> "In absolute monarchy, the ruler is the carrier of the life of the state and so is necessarily the 'number one servant of the state'. He carries the full responsibility for the life of the state, and there cannot be anyone else who stands in the same relation to the whole. […] Whereas the consciousness of community that holds the state together is concentrated in the monarch, with tyranny the bond of community between ruler and ruled is ripped to shreds. With tyranny, each regards the other as an object, which means there has been the closest imaginable approximation to a relationship of unadulterated association, bringing with it the possibility of an arbitrary destruction of the whole at any time. Solidarity in opposition to the ruler can unite those whom he rules into a community, but that community is not a state for it does not take on the form of state. Analogously, in aristocracy we have a select circle of carriers of the life of the state who stand in for the whole, while its opposite, oligarchy, manifests a degeneration into a community of 'exploiters' and a community of 'exploited,' or even into two special-interest groups, each of which is held together by its opposition to the other. Finally, in demokracy, by its very idea, all citiziens are carriers of the life of the state (whereby the concept of citizien actually is first defined and determined). Here, the state is resting upon the broadest base. But on the other hand, you have got the

> caricature that goes with it – mob rule – the most severe atomization of civil community imaginable."[25]

The passage does not merely classify constitutions. It identifies different distributions of participation and responsibility. In monarchy, the life of the state is concentrated in a single bearer who assumes comprehensive responsibility for the whole. In aristocracy and democracy, responsibility is distributed among a narrower or broader plurality of carriers. The corrupted forms – tyranny, oligarchy, and mob rule – destroy the communal bond by converting persons into objects, opposing exploiters to exploited, or dissolving civic unity into atomized interests. The freedom secured by the state therefore depends upon fidelity within relations of representation and trust. The ruler or institutional office-holder functions as a juridical person only insofar as that person reliably serves the whole. When the bearer of authority substitutes private interest for the common life and no longer honors the obligations attached to office, the freedom of citizens becomes subjection to arbitrary power. This political unfreedom should not be confused with the voluntary self-surrender that Stein later describes in religious terms. Despotism negates the subject's responsible agency; religious self-surrender, by contrast, is meaningful only as a free personal response.

Here the structural connection to Reinach becomes visible. Political authority is not merely the expression of a superior will. Like the promise, it establishes and presupposes objective interpersonal relations. Its legitimacy depends upon the relation between the person's free assumption of an office and the obligations that follow from that assumption. Neither the community nor the state can release an individual from responsibility for acts performed in its name.

## 5. Natural and Supernatural Freedom

At first sight, Stein's social and political phenomenology may appear only loosely connected with her writings on religion from the same period, even though Reinach's religious notes also influenced her. The connection becomes clearer when these early writings are read in light of *Finite and Eternal Being*. Across these works, Stein repeatedly asks how a person can be receptive to an order that transcends the person without ceasing to be free and responsible.

In *On the Problem of Empathy*, Stein distinguishes psycho-physical causality from motivation, the meaningful order in which one spiritual act arises from another. In *Freedom and Grace*[26], she reformulates the boundary between natural and supernatural life in terms of the freedom of the will. The arguments of the two works should not be identified, but a clear continuity remains. *Philosophy of Psychology and the Humanities* confirms the centrality of free will and responsibility: "For the person, however, there

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[25] Edith Stein: *An Investigation Concerning the State*. The Collected Works of Edith Stein 10. (transl. by Marianne Sawicki). ICS Publications, 2006. 49–50.

[26] Cf. Edith Stein: *Freedom and Grace*. Transl. and Introd. by Joseph T. Papa. In: *Edith Stein's Freedom and Grace*. Bloomsbury Academic 2026.

is a freedom of the will, over against both the 'influence of the environment' and 'natural predisposition' alike. The 'responsibility' of the person can't be suspended by appeal to either environmental influences or natural predispositions."[27] Neither causal explanation nor social conditioning is sufficient to remove personal responsibility. This principle is important for both communal and religious life. A person is formed by dispositions, environment, and community, but is not reducible to them. The person can take a position toward motives and values. Such position-taking does not mean that human freedom is absolute; it means that the person can answer for the orientation of his or her will.

The opening section of *Freedom and Grace*, "Nature, Freedom, and Grace," is closely related to §5.5 of *Finite and Eternal Being*, where Stein describes the efficacy of grace as calling for a free human response. She writes:

> "[…] grace calls for a 'personal' receptive response. It is a call or a knocking of God, and the person who is thus called is to listen and to open: to open the door of his or her own self so that God may enter. The ready capacity to receive or the potentia obedientialis in the more restricted and authentic sense, therefore, is a capacity to obey, to listen to God and to freely surrender one's self to him. The person-to-person relationship makes possible that being-one [*Einssein*] which can come to pass only among persons. And in the relationship between God and the free creature, being one results from the communication and communion of grace. Grace thus presupposes freedom as well as nature, since there must be free creatures if the efficacy of grace is to find fertile ground."[28]

Two claims are decisive here. First, personal being is disclosed and actualized through free response. Second, freedom reaches a distinctive fulfillment in obedience to God's call. Obedience does not signify the external cancellation of the will. It is the conscious decision to accept a personal relation with God. Grace may call and enable, but the person must open – or refuse to open – the self.

In *Finite and Eternal Being*, Stein emphasizes that creaturely freedom is real but limited. "No creature is absolutely or unconditionally free. Only the Creator is absolutely and unconditionally free, because his self is his freedom. And yet there exists in free creatures – in angels and in human beings – a possibility of saying 'yes' or 'no' to their own natures, which is equivalent to a possibility of saying 'yes' or 'no' to the Creator."[29] The yes or no of the creature is not creative freedom in the divine sense. It is responsive freedom: the capacity to accept or reject the order and vocation given with one's being. This responsive structure supplies the deepest point of contact with Reinach's analysis of social acts. The relation to God is not a social act in the

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27 Stein (2000) op. cit. 300.

28 Edith Stein: *Finite and Eternal Being. An Attempt at an Ascent to the Meaning of Being.* The Collected Works of Edith Stein 9. (transl. by Kurt F Reinhardt). Washington D. C. ICS Publication, 2002. 399. f.

29 Stein (2002) op. cit. 400.

technical juridical sense, and grace is not a civil-law obligation. Nevertheless, both accounts illuminate a personal act that is addressed, received, and answered within an objective relation. In Reinach, a social act such as promising creates a claim and obligation through free interpersonal performance. In Stein, the divine call elicits a free response that can culminate in communion. The analogy concerns the form of responsible response, not the identity of the relations.

Stein's development also clarifies the limits of the analogy. In a human social act, the parties stand within a shared worldly state of affairs and may reciprocally create claims. In the relation of grace, the initiative belongs to God, and the creature's freedom is receptive rather than originating. Yet self-surrender remains free precisely because it cannot be coerced. Religious obedience is therefore the opposite of political despotism: despotism treats the person as an object, whereas grace addresses the person as a person capable of response.

## 6. Conclusion

Reinach's influence on Stein is most illuminating when it is understood as a set of phenomenological impulses rather than as the transmission of a finished doctrine. His theory of social acts showed how personal acts can establish objective interpersonal relations, how freely assumed obligations can bind without ceasing to be rooted in freedom, and how juridical structures are founded in a priori features of social experience. Stein adopted these problems while substantially enlarging their scope.

In her phenomenology of community, Stein distinguishes the supra-individual unity of communal life from the freedom of the persons who sustain it. The community can possess solidarity, history, and collective responsibility, but it cannot displace the ultimate responsibility of individuals. In her theory of the state, she applies the same insight to political representation: authority and responsibility may be concentrated or distributed, but the state's acts continue to be borne by persons. Corrupted political forms arise when the relation of service and representation collapses into objectification, exploitation, or atomization.

Finally, Stein's phenomenology of religion transforms the structure of responsible response into an account of grace. The person's freedom is neither absolute autonomy nor passive submission. It is the finite capacity to say yes or no – to a communal vocation, to a political obligation, and, at its highest level, to the divine call. The unity of Stein's account therefore lies in the preservation of personal responsibility across increasingly comprehensive forms of sociality. Community, state, and communion with God each transcend the isolated individual, but none becomes meaningful by abolishing freedom. On the contrary, each reveals a different way in which freedom becomes responsibility through relation.

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# THE TYPES AND HISTORICAL DEVELOPMENT OF ASSISTED REPRODUCTIVE TECHNOLOGIES IN THE CONTEXT OF EARLY ETHICAL AND LEGAL REACTIONS

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**Abstract**

The paper sets forth the explanation of the main types of assisted reproductive technologies and their medical, cultural and historical evolution. First, it deals with artificial insemination and sperm cryopresevation, after that the research explores the development of in vitro fertilisation in connection with egg and embryo donation. The study lays special emphasis on the early ethical and legal attempts to regulate the field of assisted reproduction, considering ethical documents and organizations, legal regulation and case law in the United States, England, Germany and Hungary.
The essay's conclusion is in general, that for most states, there was an early period when assisted reproduction was actually prohibited. After that, in almost all countries, various regulatory bodies and legal regulations have classified assisted reproductive technologies as permissible procedures for the treatment of infertility. Consequently, limitations on the human embryo and the family, which had been established on long traditional development, were gradually dismantled.

**Keywords:** assisted reproductive technologies, ethical concerns of ART, historical background of ART, sperm donation, surrogacy

## 1. Introduction

Assisted Reproductive Technologies (ART) is the umbrella term for artificial reproductive techniques to treat infertility. They require the involvement not only of the woman and the man but also of a third party to help make conception possible.

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The explosion of medical progress in recent decades has made it possible to develop and refine methods for intervening in this initial stage of procreation, the process of creating new life.

Infertility as a disease, a reproductive disorder, as defined by the WHO, is the failure to become pregnant after at least 12 months of regular and unprotected sex.[1] The causes of infertility can occur on either the male or the female side. It is estimated that concerning infertile couples in 40–50 % of the cases the woman, 30–40 % the man and 10–20 % both are affected by infertility. The number of infertile people has increased gradually over the last quarter of a century and is now estimated at between 15 % and 20 % of couples.[2] Changes in lifestyle and family planning in societies are trends that contribute to this phenomenon.

Among the methods of treating infertility, only assisted reproductive techniques might be effective when therapeutic or surgical treatment is not an option. However, given that they are often very complex operations involving several steps, each of which must be carried out correctly, they are far from being always successful. Even today, the average success rate of assisted reproduction techniques is still only around 40 %.[3]

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1 Infertility was declared a disease by the World Health Organization (WHO) in 1988. However, it should be noted, that infertility is a normative concept, and its legal definition and minimum duration may vary from country to country. Crystal Liu: Restricting access to infertility services: What is a justified limitation on reproductive freedom? *Minnesota Journal of Law, Science & Technology* 10, 1. (2009), 293. https://doi.org/10.24926/15529541.3556; Eva Maria K. Rütz: *Heterologe Insemination – Die rechtliche Stellung des Samenspenders.* Berlin, Springer, 2008. 5–6.; Fernando Zegers-Hochschild et al.: International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology. *Fertility and Sterility* 92, 5. (2009), 1520–1524. https://doi.org/10.1016/j.fertnstert.2009.09.009

2 For the latest WHO data see World Health Organizatinon: 1 in 6 people globally affected by infertility. https://www.who.int/news/item/04-04-2023-1-in-6-people-globally-affected-by-infertility. In addition see also Albin Eser – Marcus von Lutterotti – Paul Sporken: *Lexikon Medizin, Ethik, Recht.* Freiburg, Herder, 1989. 348–349.; Theresa M. Erickson – Megan T. Erickson: What happens to embryos when a marriage dissolves? Embryo disposition and divorce. *William Mitchell Law Review* 35, 2. (2009), 469.; Petra Thorn: *Familiengründung mit Samenspende.* Stuttgart, Kohlhammer Verlag, 2008. 19.; Gábor Szendi: A női funkcionális meddőség evolúciós értelmezése [The evolutionary interpretation of female functional infertility]. *Mentálhigiéné és Pszichoszomatika* 1. (2007), 5–6.; Hans-Rudolf Tinneberg: Zum aktuellen Leistungsstand der In-Vitro-Fertilisation. In: Christian Dierks – Albrecht Wienke – Wolfgang Eisenmenger (ed.): *Rechtsfragen der Präimplantationsdiagnostik*. Berlin, New York, Springer, 2007. 1.

3 Catherine A. Clements: What about the children? A call for regulation of assisted reproductive technology. *Indiana Law Journal* 84, 1. (2009), 334.; Jan M. R. Gerris: Single embryo transfer and IVF/ICSI outcome: a balanced appraisal. *Human Reproduction Update* 11, 2. (2005), 105. https://doi.org/10.1093/humupd/dmh049; Michéle Hansen et al.: The risk of major birth defects after intracytoplasmic sperm injection and in vitro fertilization. *The New England Journal of Medicine* 346, 10. (2002), 729. https://doi.org/10.1056/NEJMoa010035; Urska Velikonja: The costs of multiple gestation pregnancies in assisted reproduction. *Harvard Journal of Law & Gender* 32, 2. (2009), 466., 471–472.

## 2. Main types of assisted reproductive techniques and their history

The longest history of assisted reproductive techniques is undoubtedly artificial insemination (AI), artificial reproduction initially exclusively meant this method.[4] Today, it is perhaps the easiest to perform and the most cost-effective. It involves fertilisation with the male gametes inside the mother's body. If the gametes of the husband or partner are used, it is called homologous (artificial insemination by husband–AIH), if the insemination is done with donated sperm from a donor, it is called heterologous (artificial insemination by donor–AID) artificial insemination. The procedure consists of inserting a male sperm into the fallopian tube during the woman's ovulation period in order to help fertilise the egg. It is used in cases of infertility in men, usually because the sperm are not in sufficient numbers or have a movement or shape disorder. Successful implementation of the homologous type of the method allows the parents to have a child who is genetically entirely their own.
The idea of impregnating a woman without sexual intercourse is not a recent one, dating back to the Jewish history of the second century. According to the Talmud, the institution of *fecundatio sine concubito* was achieved by bathing women in water containing male sperm.[5] From the 14th century onwards,[6] experiments in animal breeding were carried out continuously, and from the 16th century onwards, their application was also tested on humans, although the first definite information on human results dates from 1770, when John Hunter in England successfully introduced the procedure.[7] Since the second half of the 19th century, with expansion of medical knowledge and as processes had been observed more precisely, more successful attempts were reported, in connection with the work of Hunter in England, Girault in France and Sims in the USA in 1866. It is worth mentioning that the first person in Hungary to perform successfully artificial insemination was Endre Bánk in 1952.[8]

The method also raised the issue of frozen storage of sperm for the preservation of own or donor gametes very early on, with attempts dating back to 1776,[9] but the method was only successful from 1949, and the first child conceived from frozen

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4 Gábor Jobbágyi: *Az élet joga.* [The right to life]. Budapest, Szent István Társulat, 2004. 216.

5 Gerhard Ranner: Aspekte der künstliche Insemination. In: Erwin Bernat (ed.): *Lebensbeginn durch Menschenhand. Probleme künstlicher Befruchtungstechnologien aus medizinischer, ethischer und juristischer Sicht.* Graz, Leykam, 1985. 24.

6 Thomas Katzorke: Entstehung und Entwicklung der Spendersamenbehandlung in Deutschland. In: Gisela Bockenheimer-Lucius – Petra Thorn – Christiane Wendehorst (ed.): *Umwege zum eigenen Kind. Ethische und rechtliche Herausforderungen an die Reproduktionsmedizin 30 Jahre nach Louise Brown*. Göttingen, Universitätsverlag, 2008. 90.

7 Joshua Greenfield: Dad was born a thousand years ago? An examination of post-mortem conception and inheritance, with a focus on the rule against perpetuities. *Minnesota Journal of Law, Science & Technology* 8, 1. (2006). 280. https://doi.org/10.24926/15529541.3616

8 Béla Bodnár – Zoltán Bodnár: *Lombikbébi és társai.* [Test-tube baby and others]. Budapest, Kossuth Könyvkiadó, 1988. 29–31.

9 Ibid. 33.

sperm was born in Australia in 1977.[10] Consequently, there was a growing demand for sperm banks.[11] It should be noted that from then on, sperm donation was increasingly recognised both ethically and legally as a means of promoting the freedom to procreate. The first commercially legal sperm banks were established in the 1970s, the first in Minnesota in the United States,[12] and sperm banks have been operating in Hungary since the late 1960s.[13]

However, scientific progress did not stop at the stage of artificial insemination. After a long period of experimentation, in vitro fertilization – commonly referred to as test-tube-baby process – became the number one interest of medicine in the late 1970s. It involves fertilisation with a man's gametes outside the mother's body under laboratory conditions – *in vitro*, in a Petri dish. The embryo thus created is then transferred back into the mother's womb (embryo transfer). It can also be homologous, if the couple or partners use their own gametes, or heterologous, if the female egg or male sperm is from a donor. As with intrauterine insemination, the homologous form of this method allows parents genetically to produce their own child, but the success rate is much lower than the former.

The process of in vitro fertilisation is as follows: because only one or two eggs mature naturally in the woman's body, the ovaries are induced to mature abnormally high numbers of eggs by medication or hormone injections to ensure the procedure is effective and to ensure that more eggs are available for fertilisation. This treatment usually lasts two to three weeks. The prepared oocytes are extracted from the woman's body, with or without anesthesia, the follicular fluid is aspirated, usually by ultrasound (follicular puncture), and fertilised with the prepared sperm in a so-called Petri dish within hours. Successfully fertilised eggs soon begin to divide and within two to five days the developing embryos are ready to be transferred back into the mother's uterine cavity.[14]

At the same time as in vitro fertilisation, the so-called GIFT method (gamete intrafallopian transfer) was developed: as in vitro fertilisation, the prepared oocytes are removed from the mother's body, but they are placed back in the fallopian tube with the sperm, so fertilisation takes place in its natural environment.

This is similar to the so-called ZIFT method (zygote intrafallopian transfer), where the in vitro fertilised egg, the zygote, is transferred into the fallopian tube, so that, unlike in conventional in vitro fertilisation, once fertilisation has taken place, the zygote is returned to the mother's body, not to the uterine cavity but to the fallopian tube.[15]

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[10] Greenfield op. cit. 281.

[11] Naomi Cahn: Accidental incest: Drawing the line – or the curtain? – for reproductive technology. *Harvard Journal of Law & Gender* 32, (2009), 78.; Ranner op. cit. 29.

[12] Debora L. Spar: *The baby business: how money, science, and politics drive the commerce of conception.* Boston, Harvard Business Review Press, 2006. 35.

[13] Bodnár – Bodnár (1988) op. cit. 34.

[14] Gregory Dolin: A defence of embryonic stem cell research. *Indiana Law Journal* 84, 4. (2009), 1212–1213.

[15] Eser – Lutterotti – Sporken op. cit. 561.

In the event that the parent is unable to provide his or her own gametes for the process, or would pass on an abnormality to the offspring, they may choose to use donor gametes. Donor sperm can be used for both intra- and extra-uterine insemination, donor oocytes only for extra-uterine insemination. In this way, although the genetic link to the child will not be complete, at least one of the parents will have a genetic connection. However, if both parents need donor gametes, there will be no genetic link between the parents and the child.

It should also be pointed out that, unlike sperm donation, egg donation is a complex process and requires clinical management by both the recipient and the donor. The menstrual cycles of the donor and the recipient need to be synchronised and the recipient's uterus needs to be prepared to receive the fertilised donor egg, so hormone stimulation treatment is required for both parties. The donor's ovulation is influenced by the method described above, during which the recipient's cycle is also medically controlled by hormone therapy and her uterus is prepared to receive the embryo to be implanted. This is necessary because freezing eggs, unlike sperm, is less successful in practice. For a long time it was not even possible, although the experiments were promising.[16] It is worth mentioning a relatively new technique that allows the freezing of oocytes in the same way as sperm cells, but which involves the retrieval of immature oocytes and the ovulation of the eggs happens under laboratory conditions. This has the advantage of greatly reducing the need for hormonal treatment and eliminating the need to synchronise the cycles of the two women when donating eggs. However, there is currently limited data available on the method of egg freezing and the resulting children.[17]

In vitro fertilisation allows not only gamete donation, but also embryo donation, using embryos left over from in vitro fertilisation with other couples. It is not certain that the first treatment will be successful. Therefore, in order to avoid the need for the mother to undergo a second or subsequent clinical treatment to retrieve the eggs, it is possible to create more embryos than are retrieved at the first treatment and store them frozen until a possible later date. In addition, if the treatment is successful, these embryos can then be a surplus, allowing embryos to be donated to couples who would not be able to provide any gametes at all for the process.

Additionally, this method makes it possible for a homologous or heterologous fertilised egg is not implanted into the uterus of the intended mother, who would be medically unable to carry the pregnancy to term, but into the uterus of another woman who is willing to carry the child to term and hand it over to the intended parents. This

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[16] W. J. Dondorp: Freezing the hands of time: Fertility insurance for healthy women? In: F. Shenfield – C. Sureau (ed.): *Ethical dilemmas in reproduction.* London, Parthenon, 2002. 2–3.; Charis Thompson: *Making parents. The ontological choreography of reproductive technologies.* Cambridge, The MIT Press, 2005. 96.

[17] J. Brad Reich – Dawn Swink: You can't put the genie back in the bottle: Potential rights and obligations of egg donors in the cyberprocreation era. *Albany Journal of Law, Science & Technology* 20, 1. (2010), 13–15.

is known as surrogacy (commercial or altruistic surrogate motherhood). In the case of surrogacy, therefore, an additional actor is involved in the technique.[18]

As with artificial insemination, in vitro fertilisation was initially led by animal experiments, with data from as early as 1878. The Viennese embryologist Schenk tried to fertilise animal eggs outside the womb, which he claimed to have succeeded in doing, but the veracity of these early results is highly disputed. The conclusions and experience gained from animal experiments prompted researchers to broaden their horizons by studying humans. In the 1930s, the American George Pincus was the first to investigate the process of animal and later human ovulation, and the first to coin the term *in vitro* and report the first successful animal in vitro fertilisation birth.[19] It should be noted here that around this time, in 1932, Aldous Huxley's Brave New World was published, in which, although intended as a dystopian work, he describes in vitro fertilisation in many ways similar to what we know today.[20]

The first in vitro fertilisation using human gametes was carried out in 1948 by John Rock and Miriam Menken in Boston – unsuccessfully, in terms of results. Rock did this controversially given the circumstances at the time, by collecting eight hundred eggs from women who had undergone surgery at the clinic for other reasons. Soon afterwards, in the 1950s, Landrum Brewer Shettles began to investigate the possibility of treating infertility by in vitro fertilization. Moreover, in the early 1960s he kept a fertilised egg alive for six days and then transferred it to a woman's womb, where Shettles claimed the embryo developed, but the clinic director had the embryo removed at 10 weeks, claiming that he could not authorise unethical human experimentation.[21] In the early 1960s, the Italian Daniele Petrucci managed to keep an embryo alive in vitro for 29 days, which he destroyed on suspicion of malformation, but the huge outcry over the experiments and the protests of the Vatican might have played a part.[22] Around the same time, in 1959, Min Chueh Chang in the United States clearly demonstrated the success of in vitro fertilisation with animals.[23]

The scientific breakthrough came in 1978, when the first child conceived by in vitro fertilisation, Louise Brown, was born in the UK. Her birth was preceded by 15 years

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[18] It is important to note, that the types of assisted reproductive techniques are closed, and the relevant legislation in each country usually lists them in a taxonomy. In Hungary, Decree 30/1998 (VI. 24) NM lists the possible methods. For more details on earlier concepts see Béla Bodnár – Zoltán Bodnár: Lehet-e az anya személye kérdéses? [Can the identity of the mother be questionable?] *Magyar Jog* 12, (1985), 1088–1100.; Béla Bodnár – Zoltán Bodnár: A személyállományra vonatkozó perek lehetőségei az in vitro fertilisatio és embrió transfer eseteiben. [The possibilities of lawsuits concerning civil status in cases of in vitro fertilization and embryo transfer]. *Magyar Jog* 4, (1986), 323–333.

[19] W. Feichtinger – P. Kemeter: Über die In-vitro-Fertilisierung beim Menschen. In: Erwin Bernat (ed.): *Lebensbeginn durch Menschenhand.* Graz, Leykam, 1985. 60.; Alastair G. Sutcliff: *IVF children: The first generation: Assisted reproduction and child development*. London, CRC Press, 2002. 2.

[20] Jean Cohen et. al.: The early days of IVF outside the UK. *Human Reproduction Update* 11, 5. (2005), 445. https://doi.org/10.1093/humupd/dmi016; John Harris: *On cloning.* London, Routledge, 2004. 6. https://doi.org/10.4324/9780203440636

[21] Sutcliff op. cit. 3.

[22] Bodnár – Bodnár (1985) op. cit. 1093.

[23] Sutcliff op. cit. 3.

of laboratory work and experimentation by Patrick Steptoe and Robert Edwards.[24] According to Steptoe, a gynecologist, all the research was funded by relatively lucrative abortion income.[25] Steptoe and Edwards reported initial successes as early as 1969, but their experiments were blocked by the government, and the ban was only lifted in 1971.[26] In 1970, they introduced laparoscopy as an early method of egg retrieval. In 1976, they managed to achieve a pregnancy, but it was an ectopic pregnancy and had to be terminated. In the same year, Alexander Lopata of Australia also managed to induce a pregnancy, which also failed to result in a birth.[27]

However, Louise Brown's success was followed by several new successful births. The second test-tube-baby, like the one in England, was born in 1978 in Calcutta, India. The breakthrough came in 1980 in Australia under Lopata, in 1981 in the United States, in 1982 in the Czech Republic and in many other countries, and from then on the number of test-tube-babies increased rapidly. In the first five years alone, 58 research groups were set up and nearly 600 births took place,[28] and it is now estimated that around 12 million children have been born worldwide through in vitro fertilisation.[29]

In 1983, the first such pregnancy was achieved in England through embryo donation, although no child was born, but it was possible in the United States in 1984 from donated eggs, and in 1985 embryo donation in England also bore fruit.[30] In the 1980s, research into the possibility of freezing embryos began, and in 1984, thanks to the work of the medical team of Alan Trounson and Linda Mohr, a newborn baby was delivered in Australia after spending two months frozen as an embryo. Soon after, Steptoe and Edwards also had the first such birth in England.[31]

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[24] Robert Edwards was awarded the Nobel Prize in 2010 for his work in in vitro fertilisation.

[25] Brian Clowes: *The Facts of Life. An Authoritative Guide to Life & Family Issues*. Front Royal, Human Life Intl., 1997. 224.

[26] Bodnár – Bodnár (1988) op. cit. 49.

[27] Peter Hans Hofschneider: Embryonenforschung und Gentechnologie. In: Uwe Opolka (ed.): *Respekt vor dem werdenden Leben*. München, Max-. Planck-Gesellschaft, 1989. 30.

[28] Michael Pap: *Extrakorporale Befruchtung und Embriotransfer aus Arztrechtlicher Sicht: insbesondere: der Schutz des werdenden Lebens "in vitro"*. Frankfurt am Main, Peter Lang Verlag, 1987. 46–47.; Lyria Bennett Moses: Understanding legal responses to technological change of in vitro fertilization. *Minnesota Journal of Law, Science & Technology* 6, 2. (2005), 509–510.; Ingrid Schneider: Embryonen zwischen Virtualisierung und Materialisierung – Kontroll und Gestaltungswünsche an die technisierte Reproduktion. *Technikfolgenabschätzung. Theorie und Praxis* 11, 2. (2002), 45. https://doi.org/10.14512/tatup.11.2.45

[29] Focus on Reproduction: 'At least 12 million babies' since the first IVF birth in 1978. https://www.focusonreproduction.eu/article/ESHRE-News-COP23_adamson

[30] Peter Lutjen et al.: The establishment and maintenance of pregnancy using in vitro fertilization and embryo donation in a patient with primary ovarian failure. *Nature* 307, (1984), 174. https://doi.org/10.1038/307174a0; W. Feichtinger et al.: Pregnancy after total ovariectomy achieved by ovum donation. *The Lancet* 326, (1985), 722–23. https://doi.org/10.1016/S0140-6736(85)92956-3

[31] Pap op. cit. 74.

Interestingly, the first record of surrogacy dates back to the Old Testament, although there the fertilisation of a surrogate mother was natural rather than artificial.[32] In the history of assisted reproduction, the first reliable data on surrogacy come from the United States, where the first surrogacy relationships, by artificial insemination, were established in the mid to late 1970s.[33]

The first child conceived in Hungary using the GIFT method was born in 1988.[34] The first baby was born in Hungary in 1992 through egg donation, the interesting circumstances being that a woman volunteering was artificially inseminated with the husband's gametes, the embryo was retrieved and transferred back into the wife's womb.[35]

The various methods mentioned above existed in a legal vacuum at the time of their development and even afterwards in most countries, including Hungary. Their legal status was in many cases unclear. New methods were introduced and successfully applied, but it was ambiguous whether they were experiments, treatments or services.[36] With a few exceptions, ethical statements were published only in the 1980s, based on the findings of various committees, and the first legislation was only passed in Australia in 1984.[37] The first pioneering legislation in Europe – the Swedish *Lag om insemination* – also dates from 1984.[38] In many cases, despite the regulation, heated debates have arisen, preparatory work has not sufficiently clarified the status and protection of the embryo in IVF, or the rules on new testing technologies closely linked to in vitro fertilisation.

## 3. Ethical and legal reactions – A general overview

Centuries of medical research have made it possible for parents, whose natural ability to procreate for some health reason was hindered, to have a child. Nothing would seem more natural than to accept these remedies without reservation. In reality, however, we are faced with very complex and often contradictory issues, and representatives of the natural and social sciences have put forward a wide variety of arguments in opposition to or in favour of assisted reproduction.

Since Louis Brown's birth in the summer of 1978, a wide-ranging debate has unfolded on the ethical and legal aspects of egg and embryo donation, surrogacy, egg

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32 Think of the story of Abraham and Sarah, or Jacob and Rachel. See the book of Genesis 16.1–4.; 30.3–8.; 30.9–30.

33 Willibald Posch: Das Recht der künstlichen Humanreproduktion im Wandel. In: Erwin Bernat (ed.): *Lebensbeginn durch Menschenhand.* Graz, Leykam, 1985. 203.; Carol Sanger: Developing markets in baby-making: In the matter of Baby M. *Harvard Journal of Law & Gender* 30, 1. (2007), 83.

34 Bodnár – Bodnár (1988) op. cit. 54.

35 Kálmán Széll: *Egészségügyi Etika.* [Healthcare ethics]. Pécs, POTE EFK, 1995. 174.

36 Iván László Arnold: Az emberi lényeg, a mesterséges utódnemzés és a jog. [The human essence, artificial procreation, and the law]. *Társadalmi Szemle* 12, (1996), 45.

37 Judit Sándor: A humán reprodukciós orvosi eljárások jogi szabályozásáról. [On the legal regulation of assisted medical procreation]. *Acta Humana* 7, 25. (1996), 31.

38 Posch op. cit. 242.

freezing and the ethical and legal aspects of genetic engineering reaching beyond the scope of natural sciences. The in vitro fertilisation procedure itself was not only important from a purely medical point of view, but it was also very soon faced with the fact that it created family types that could no longer be integrated into the traditional framework and that would not have existed without the success of the procedure.[39] It also had to be realised that in vitro fertilisation, which involves the creation of embryos outside the mother's body, requires a much more complex, sensitive and complex legal and ethical approach than artificial insemination, as it interferes even more with the natural process of procreation. This has led to problems such as the initial uncertainties about the effectiveness of the procedure, the potential for manipulation and abuse of the embryo, the fate of surplus embryos, sex selection of the unborn child, and the post-mortem use of gametes from the deceased partner. Referring to the unpredictability of the consequences, an editorial in Nature in 1978 compared the possibilities offered by assisted reproduction to nuclear experiments.[40]

From a social science point of view, significant events began to unfold as early as the end of the 19th century. The first to examine the ethical aspects of artificial insemination was the French society *Do Vitam*, founded in 1880, which, after exploring the aspects of artificial insemination, took a position that declared the procedure immoral and unnatural. In 1884, on the other hand, the Paris Society of Forensic Medicine considered it permissible as a last resort, with the husband's consent, to allow couples to have children. At the same time, in the absence of legislation the Bordeaux tribunal convicted the French gynecologist Lajarte.[41] In 1905, for the first time in German jurisprudence, the Cologne Supreme Court also rejected the method.[42] From a legal and ethical point of view, the technical possibility of sperm donation was therefore far from unproblematic at the outset, since until then, unbreakable taboos and traditions had stood in the way of legal recognition of the medical procedure. This perspective almost immediately led to the breakdown of the traditional structure of the family and a new perspective on parenthood. In many countries, artificial insemination was long considered adultery, regardless of whether the medical procedure involved the use of the husband's own gametes or gametes from a donor.[43]

The ethical controversy surrounding assisted reproduction is demonstrated by the fact that in Germany, a 1962 reform proposal to the penal code, citing constitutional considerations, sought to criminalise heterologous insemination as evidence of the brief

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[39] Sozos J. Fasouliotis – Joseph G. Schenker: Social aspects in assisted reproduction. *Human Reproduction Update* 5, 1. (1999), 26. https://doi.org/10.1093/humupd/5.1.26

[40] János László: Határkő a meddőség elleni küzdelem történetében. [A milestone in the history of the fight against infertility]. *Magyar Tudomány* 86, 1. (1979), 24.

[41] Katzorke op. cit. 91–92.

[42] Bodnár – Bodnár (1988) op. cit. 58.

[43] Noa Ben-Asher: The curing law: On the evolution of baby-making markets. *Cardozo Law Review* 30, 5. (2009), 1895.; Julia Schlüter: Schutzkonzepte für menschliche Keimbahnzellen in der Fortpflanzungsmedizin. Berlin, LIT Verlag, 2008. 161.

natural law renaissance that followed the Second World War.[44] However, the reform proposal was quickly rejected and the German Medical Congress in 1970 also deemed acceptable the heterologous, donor form of artificial insemination.[45] In Germany, the most significant was the work of the committee set up in 1985 by the ministers responsible for justice and research, chaired by the former constitutional judge Ernst Benda, whose resolutions set out the wishes of a strict, restrictive legal regime. The resolutions of the German Doctors' Day in 1985 and the German Lawyers' Day in 1986 also considered certain types of assisted reproduction to be permissible only within a strictly defined legal framework.[46] At the end of this process, the German Embryo Protection Act *(Embryonenschutzgesetz)* came into force in 1991. Its regulatory concept still retains much of the influence of ethical considerations. The law was the strictest in this area, as it provided legal protection for embryos from the moment of conception and excluded and penalised the donation of eggs and embryos, which exists in other countries, from the scope of assisted reproduction.[47] Today egg donation is permissible under some circumstances.

In the United States in the early 1960s, artificial insemination was considered adultery, as in other countries, whether or not the husband consented, and the child born was considered illegitimate in all cases.[48] The change in this concept in the United States was brought about by case law. The turning point came with the case of People v. Sorensen (1968) in California. It gave rise to the notion that adultery requires two persons acting in unity of will; this neither applies to the doctor because she may be a woman, nor to the donor because he is not present at the time of insemination, so to classify the procedure as adultery is obviously absurd.[49] First, in 1968, the State of Georgia passed a law stating that a child born as a result of a procedure carried out with the husband's consent is the legitimate child of the husband and wife.[50] In 1979, the first document on ethical issues was published here, and in 1984 the American Fertility Society took a stand, followed by a series of declarations at both federal and state level. A curiosity is the 1979 Illinois law that extended the scope of an 1877 statute on the abuse of minors to in vitro fertilisation practitioners.[51] Beyond that, however, US law – both federal and state – today reflects a very heterogeneous picture regarding the use of assisted reproductive technology.

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44 Armin Stolz: Grundrechtsaspekte künstlicher Befruchtungsmethoden. In: Erwin Bernat (ed.): *Lebensbeginn durch Menschenhand*. Graz, Leykam, 1985. 110.

45 Bodnár – Bodnár (1988) op. cit. 59.

46 Gábor Jobbágyi: *Orvosi jog. Hippokratésztől a klónozásig.* [Medical law: From Hippocrates to cloning]. Budapest, Szent István Társulat, 2008.; Hinner Schütze: *Embryonale Humanstammzellen. Eine rechtsvergleichende Untersuchung der deutschen, französischen, britischen und US-amerikanischen Rechtslage.* Berlin, Springer, 2007. 298.

47 Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – EschG) 1991.

48 Ben-Asher op. cit. 1889–1890.; Posch op. cit. 212.

49 Ben-Asher op. cit. 1893–1895.

50 Bodnár – Bodnár (1988) op. cit. 112.

51 Pap op. cit. 100–101.

In England, at a conference in 1946, only doctors approved, but two years later, lawyers and theologians were no longer opposed to the homologous form of artificial insemination.[52] First, in 1960, a body was set up to review artificial insemination and published the Feversham report, named after its chairman.[53] In 1982, the Warnock Committee, named after its chair, Mary Warnock, was set up, consisting of a large number of doctors and lawyers, and was the most historically significant, publishing its position after two years of preparatory work.[54] Based on its proposals, a very comprehensive piece of legislation, the Human Fertilisation and Embryology Act (1990), was passed in England in 1990.[55] Whereas in Germany, for example, there are criminal restrictions, the English legislation has from the outset sought to regulate rather than to prohibit, its provisions and ethos favouring scientific research rather than embryo protection.[56]

In addition, international organisations have also expressed their views on assisted reproduction. The fact that the Council of Europe issued directives to its Member States in the year Louise Brown was born and the European Parliament also addressed the issue is a pioneering step in this area.[57] Most of these documents draw attention to the need to protect the embryo, for example by calling for a ban on the creation of embryos for research purposes.[58] In 1985, the European Society of Human Reproduction and Embryology held its first general assembly, and it continues to monitor assisted reproduction practices in European countries. In 1997, the Council of Europe adopted the Oviedo Convention, which aims to protect life and human dignity in the field of biomedicine.[59]

In Hungary, there was no committee or body like the foreign ones to consider the ethical aspects of the issue, although the Scientific Council for Health had been in existence since the 1950s. Assisted reproductive techniques were not yet mentioned in the 1972 Act II on Health Care, but were regulated by the Minister of Health in a lower-level law, the narrow and incomplete Decree 12/1981 (IX. 29) of the Ministry of Health. Only the Act CLIV of 1997 on Health Care and Decree 30/1998 NM regulated

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52 Bodnár – Bodnár (1988) op. cit. 59.

53 Posch op. cit. 205.

54 Report of the Committee of Inquiry into Human Fertilisation and Embryology 1984.; Royal College of Obstetrics and Gynecology: Report on in-vitro Fertilisation and Embryo-Replacement 1983.

55 Human Fertilisation and Embryology Act 1990 (c. 37).

56 See in detail e.g. Sándor op. cit. 31. Oberfrank Ferenc: A biomedicinális etika és az emberi jogok: európai helyzetkép [Biomedical ethics and human rights: A European overview]. *Acta Humana* 7, 25. (1996) 8.

57 Holger Hassmann: *Embryonenschutz im Spannungsfeld internationaler Menschenrechte, staatlicher Grundrechte und nationaler Regelungsmodelle zur Embryonenforschung.* Berlin, Springer, 2003. 6. https://doi.org/10.1007/978-3-642-55491-9; Jobbágyi (2004) op. cit. 222–223.

58 Jobbágyi (2007) op. cit. 142.

59 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164). Signed in Oviedo, April 4, 1997. Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings (ETS No. 168) Signed in Paris, January 12, 1998.

the possibility of using assisted reproductive procedures in detail.[60] In Hungary, the activities of the Scientific Health Council, including the Human Reproduction Committee, which acts as a proposing, advisory and decision-making body to the Minister responsible for health and also participates in the licensing procedure of the institutions carrying out the interventions, should also be mentioned from the years following the change of regime.

From among the historic churches, the Catholic Church became involved in ethical issues relatively early on. It was the most consistently opposed to new reproductive techniques. The first to reject heterologous insemination was the Holy See in 1897, but its homologous form was still considered permissible by Pope Pius XI. Pius XII, however, in a speech in 1949, categorically prohibited both types, citing the natural, personal, one-body union nature of the conjugal act.[61] In 1987, the Congregation for the Doctrine of the Faith issued the document Donum Vitae, followed in 1995 by Pope John Paul II's encyclical Evangelium Vitae. On this basis, heterologous insemination is morally impermissible, contrary to the unity of marriage, the dignity of the spouses and the parental vocation. It is also affirmed that homologous in vitro conception is neither an expression nor the fruit of a specific act of union between spouses. Homologous artificial insemination is permitted only if the technical assistance does not replace the conjugal act but merely facilitates its natural purpose. Experiments with the embryo are forbidden by the document, since, according to Church teaching, it is a human being from conception, and the possibilities of manipulation are contrary to the respect due to all human beings. Accordingly, however, certain interventions are permissible if they are aimed at healing the embryo or improving his health.[62]

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60 Gábor Jobbágyi: A művi megtermékenyítés jogi és erkölcsi kérdőjelei [Legal and moral dilemmas of artificial procreation]. *Iustum, Aequum, Salutare* 2, 1–2. (2006), 149.

61 Kurt Weinke: Gedanken zu künstlichen Befruchtungstechniken aus philosophisch-ethischer Sicht In: Erwin Bernat (ed.): *Lebensbeginn durch Menschenhand*. Graz, Leykam, 1985. 77–78.

62 Congregation for the Doctrine of the Faith, Donum Vitae. Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation (The Holy See 1987); Ioannes Paulus Pp. II, Evangelium Vitae To the Bishops, Priests and Deacons, Men and Women religious lay Faithful and all People of Good Will on the Value and Inviolability of Human Life (The Holy See 1995). A comprehensive picture provides from a life protection perspective Juan de Dios Vial Correa – Elio Sgreccia (ed.): *Identity and Status of the Human Embryo: Proceedings of the Third Assembly of the Pontifical Academy for Life*. Vatican City, Libreria Editrice Vaticana, 1998. In addition to the teaching of the Catholic Church, it is worth mentioning that the Reformed and Evangelical Churches, while critical, do not completely reject certain methods of reproduction, but are unanimous in the defence of embryos. See in detail e.g. Ulrich Eibach: Experimente mit menschlichen Embryonen? – Die Sicht der evangelischen Kirchen und Theologie. In: Uwe Opolka (ed.): *Respekt vor dem werdenden Leben*. München, Max-Planck-Gesellschaft, 1989. 157–174. Jewish theology is not united on the issue. The Talmud accepts conception without intercourse ("fecundatio sine concubito"), and the conservative position allows embryo experimentation because it considers the fetus to be human only from the fortieth day after conception, while the orthodox position considers it human from the moment of gestation. Conservative and orthodox views have in common that an embryo created outside the womb has no humanity. The idea of "procreate and multiply" is the basis for a more progressive view of the possibilities of assisted reproduction. Childbearing is seen as a cultural imperative, advocating the birth of children, even through in vitro fertilisation. Given the Old Testament stories of Sarah or Rachel, who used surrogacy to overcome their infertility, it is not

## 4. Summary

In summary, in general, for most states there was an early and relatively short period when assisted reproduction – but in reality only artificial insemination – was actually prohibited in this initial phase. The stigmatisation that took place during this period illustrates the moral rejection of the procedure, which was a kind of evil against the spouse and the family for a number of reasons, mainly traditional. On the one hand, it dismantled the traditional social structure of the family, which was the relationship between a man and a woman, from which everyone else had been excluded until then. On the other hand, the procedure was seen as an open attack on paternal inheritance in the patriarchal view of the time. Thirdly, it was feared that the increasing number of anonymous donor inseminations would not prevent the occurrence of incestuous relationships and marriages in the future.[63]

After that, in almost all countries, various bodies and legal regulations have classified assisted reproductive interventions as permissible procedures for the treatment of infertility and procreation, sometimes with more and sometimes with fewer restrictions. Conventions on the human embryo, marriage and the family, which had been established based on long traditional development, were gradually dismantled. With the shift in case law and legislative practice, the issue, previously strictly confined to the bedroom, increasingly began to be placed in a medical and health context. The 1970s saw the beginning of a gradual liberalisation of this area, which continues to the present day, and the legal situation today is radically different from that of half a century ago.

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63 Ben-Asher op. cit. 1890–1891.

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# BOOK REVIEW

## FESTSCHRIFT FÜR JOHANNES MICHAEL RAINER[1]

*Zum siebzigsten Geburtstag am 30. April 2026*
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Fachkolleginnen und Fachkollegen haben J. Michael Rainer anlässlich seines 70. Geburtstags ein Œuvre bereitet, das als Spiegel seiner gelebten Internationalität, interdisziplinären Expertise sowie wertschätzender Kollegalität gesehen werden kann. Die Autorinnen und Autoren wirken an Universitäten und juristischen Einrichtungen in neunzehn Ländern auf vier Kontinenten, vor allem in Österreich, Deutschland, Italien und Spanien. Des Weiteren im Vereinigten Königreich, in Frankreich und in Ungarn. Hinzu kommen Beiträge aus Belgien, Dänemark, Finnland, Griechenland, Kroatien, Slowenien und der Schweiz. Länder, die Michael Rainers vielfältige akademische Verbindungen ebenfalls widerspiegeln, wenngleich die Festschriftbeiträge nur den sichtbaren Ausschnitt eines noch weit größeren Netzwerks zeigen. Auch außereuropäische Verfasserinnen und Verfasser aus Kanada, den USA, Südafrika und China sind vertreten. Diese geographische Breite spiegelt sich auch sprachlich, denn die Festschrift versammelt Beiträge in fünf Wissenschaftssprachen, Deutsch, Italienisch, Spanisch, Französisch und Englisch.

Was die Festschrift trotz ihrer fachlichen Vielschichtigkeit eint, ist weniger ein einzelnes Thema als das Œuvre des Geehrten selbst. Der Jubilar, in Rom aufgewachsen und in Innsbruck, Graz, München und Salzburg akademisch beheimatet, hat Rechtswissenschaften von Beginn an mit dem Studium der Geschichte, der Archäologie und der klassischen, wie modernen Philologie verbunden, was eine vielfache Qualifikation darstellt und sich wie das Vorwort es treffend formuliert, in „Reisen in viele Dimensionen" niedergeschlagen hat. Sei es zeitlich vom antiken Bau- und Nachbarrecht bis zur Rechtsvergleichung der Gegenwart, oder sei es horizontal quer durch die europäischen Rechtsordnungen. Nahezu jeder Beitrag der Festschrift

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1 Wolfgang Faber – Rudolf Mosler – Johanna Filip-Froeschl et al. (ed): *Festschrift für Johannes Michael Rainer.* Wien, Jan Sramek Verlag, 2026. https://doi.org/10.52018/INKB-00409-B000

lässt sich einem dieser Forschungsfelder zuordnen, die das Vorwort benennt: dem römischen Bürger, -Staats- und Sachenrecht, der Privatrechtsgeschichte und Kodifikationsforschung, der historisch fundierten Rechtsvergleichung oder Staatslehre. Im Folgenden werden die Beiträge daher nicht einzeln besprochen, sondern nach thematischen Schwerpunkten vorgestellt, wobei es anzumerken gilt, dass manche Beiträge freilich mehreren Gebieten zuzuordnen wären. Die Gliederung erhebt daher keinen Anspruch auf eine erschöpfende Systematik.

Ein erster Schwerpunkt gilt dem römischen, öffentlichen Recht. Die Beiträge umkreisen die Frage nach Kontinuität und Bruch beim Übergang von der Republik zum Prinzipat. Behandelt werden dabei das Verfassungsprogramm Ciceros in der Spätphase der Republik, die Rechtsnatur der augusteischen Ordnung samt der Frage, ob die Gewalten des *princeps* durch Gesetz verliehen wurden und die schrittweise Verrechtlichung der Ämterlaufbahn. Ein weiterer Beitrag verlagert den Blick nach Athen und fragt nach Gnadenakt und Amnestie im ersten mithradatischen Krieg. Charakteristisch für den gesamten Block ist, dass literarische wie epigraphische Zeugnisse gleichberechtigt nebeneinander stehen und Inschriftenkunde mehrfach als Kontrollinstanz gegenüber den handschriftlichen Überlieferungen dient.

Einen zentralen Block bilden die Beiträge zu Bürgerrecht, Status und Integration, einem Themenfeld von zentraler Bedeutung im wissenschaftlichen Werk des Jubilars. Behandelt werden Voraussetzungen und Schranken des Bürgerrechtserwerbs, die Rechtsstellung von Freigelassenen und Statusunischeren, die municipale Ordnung in den Provincen sowie die Mittel der dauerhaften Einbindung Unterworfener. Zwei Beiträge richten dabei den Blick gezielt auf Frauen. Der eine zeigt, wie der rechtliche Status einer Frau in hohem Maß vom Willen und Handeln des Ehemanns, des Patrons oder des *dominus* abhing, der andere zeigt mit Iunia Rustica das Gegenbild einer selbstständig, *sui iuris* handelnden munizipalen Wohltäterin.

Die zeitliche Spannweite reicht von der *lex Aelia Sentia* bis zur gegenwärtigen Auseinandersetzung um *ius sanguinis* und *ius soli* in Italien und den Vereinigten Staaten.

Den umfangreichsten Block bildet die klassische Quellenexegese zum römischen Privatrecht. Im Zentrum stehen Rechtsinstitute und ihre dogmatische Rekonstruktion wie die *donatio mortis causa,* das Nachbarrecht der gemeinsamen Mauer, Gesellschafts- und Freilassungsrecht, das Testamentsrecht, die Stellvertretung zugunsten Dritter, der Kauf, das Sachenrecht der Servituten sowie der flüchtige Sklave als Grenzfalls des Besitz- und Deliktsrechts. Zwei Beiträge hingegen greifen mit Themen über das Sakralrecht der Königszeit und die frühe Noxalhaftung der Zwölftafeln auf eine ältere, archaische Rechtsschicht zurück.

Ein weiterer Block versammelt Beiträge zur juristischen Methode und fragt, wie Richter und Juristen zu ihren Entscheidungen kommen, wenn Gesetzestext und Literatur keine eindeutige Lösung liefern. Behandelt werden die analoge Rechtsfortbildung durch den Prätor, objektive Entscheidungskriterien bei atypischen Sachverhalten, die richterliche Urteilsfindung ohne juristische Ausbildung, die rhetorische Formung eines Prozessberichts durch Cicero sowie der praktische Nutzen juristischer Expertise für die Amtsführung eines Provinzstatthalters. Ein Beitrag deutet den Prozess zwischen Naevius und Quinctius vor dem Hintergrund der *lex Valeria de aere alieno* neu.

Ein kleinerer, methodisch eigenständiger Block fragt nach den Wegen, auf denen sich römische Rechtstexte überliefert haben und wie sich diese Überlieferung wissenschaftlich erschließen lässt. Behandelt werden die Forschungsgeschichte vor Bluhmes Entdeckung der Digestenordnung, die stilistische Einordnung der *Fragmenta Augustodunensia* sowie der Versuch, mithilfe computerlinguistischer Verfahren die römische Rechtssprache wortwörtlich neu zu vermessen.

Ein weiterer Bereich verfolgt das Fortwirken römischrechtlicher Institute und Denkfiguren über die Antike hinaus, in ganz unterschiedlichen Räumen und Epochen. Behandelt werden die Ausbildung im römischen Recht an der Universität Glasgow im 18. Jahrhundert, die dogmatische Fortentwicklung des Zugangsbegriff bei Willenserklärungen von der Pandektistik bis zur Gegenwart, die Übertragung eines römischrechtlichen Haftungsinstituts in das slowenische Zivilrecht sowie eine hypothetische Vermittlung römischen Rechts von Kastilien nach Norwegen im 13. Jahrhundert. Ein Beitrag untersucht zudem den Wandel des Ehrbegriffs *iniuria* in der niederländischen Rechtsprechung der Frühen Neuzeit.

Den zweitgrößten Block bilden die Beiträge zur Wissenschafts- und Personengeschichte der Romanistik und benachbarter Disziplinen. Behandelt werden das Selbstverständnis wissenschaftlicher Schulen am Beispiel Turins, das Wirken eines Rechtsgelehrten als Sprachschöpfer für das Bündnerromanische, eine der vier schweizer Landessprachen, die Aufarbeitung antijüdischer Ressentiments im Briefwechsel zweier deutscher Rechtsprofessoren sowie die Rezeption von Carl Schmitts Krisenschrift im Licht seiner Kriegstagebücher. Eigens behandelt wird zudem Theodor Däublers Versepos *das Nordlicht*. Hinzu kommen die strafrechtliche Rechtsprechung eines französischen Kassationspräsidenten des 19. Jahrhunderts, der österreichische Privatrechtler Josef von Schey zwischen Tradition und Reform um 1900, die paradoxe Randstellung des rechtstheoretisch einflussreichen, aber wenig rezipierten Yan Thomas, sowie eine vergessene Frühschrift Puchtas zu den altrömischen Wegeservituten. Einen Sprung in eine andere Rechtskultur und Epoche unternimmt David Pugsley, der den Diebstahlprozess gegen Jane Austens Tante aus dem Jahr 1800 rekonstruiert.

Ein weiterer Bereich widmet sich der Kodifikationsgeschichte und der historischen Auslegung neuzeitlicher Privatrechtsordnungen. Behandelt werden die Entstehungsstufen des deutsch-österreichischen Handelsrechts, der Streit um Vorgang und Grenzen der historischen Auslegung des ABGB, die Genese der Entstehungsgründe persönlicher Rechte in §859 ABGB und der Anteil Franz von Zeilers daran, das Richterbild Portalis‘ zwischen Gesetzesbindung und richterlicher Billigkeit sowie die Rolle der Juristen bei Entstehung und Krise von Kodifikationen im Allgemeinen. Hinzu kommen das Verhältnis mitgliedsstaatlicher Privatrechtskodifikationen zu den europäischen Vereinheitlichungsbestrebungen, mit besonderem Blick auf die Frage, wie sich EU-Richtlinien am sinnvollsten in nationale Zivilgesetzbücher integrieren lassen, zudem dem gegenübergestellt, die spezifisch nordische Kodifikationsgeschichte, die bewusst auf eine große Gesamtkodifikation verzichtet.

Ein umfangreicher Block versammelt Beiträge zum geltenden Privatrecht verschiedener europäischer Rechtsordnungen, stets mit einem rechtsvergleichenden oder historischen Bezug. Behandelt werden die Entbehrlichkeit einer Sondernorm zum

Doppelkauf im spanischen Recht, die Anforderungen an ein künftiges österreichisches Mobiliarsicherheitenregister, die funktionale Äquivalenz von Verwirkung und Estoppel by Laches, die Spannung zwischen Grundbuchsöffentlichkeit und Datenschutz im österreichischen Recht, die kritische Bewertung der griechischen Leihmutterschaftsregelung sowie der Begriff der Vulnerabilität als neues Schutzkonzept des Vertragsrechts. Hinzu kommen die wachsende Bedeutung des guten Glaubens im schottischen Sachenrecht, Reformvorschläge zum italienischen Pflichtteilsrecht nach österreichischem Vorbild sowie die Rolle der EuGH-Rechtsprechung bei der Harmonisierung des europäischen Privatrechts. Ein Beitrag reflektiert methodisch über die Rechtsvergleichung selbst, am Beispiel der von Michael Rainer im Jahr 2000 gegründeten Salzburger Summer School, die inzwischen als Summer School on Global Comparative Private Law fortgeführt wird. Der Beitrag deutet das zweiwöchige Programm über mehr als dreißig Rechtsordnungen als methodisch tragfähiges Modell, das auf Gleichrangigkeit aller Rechtsordnungen und dem Vorrang der Innenperspektive und einer erfahrungsbasierten Didaktik beruht. Damit würdigt dieser Beitrag zugleich die wohl sichtbarste institutionelle Schöpfung des Jubilars und deren pluralistisches, weltoffenes Rechtsverständnis.

Ein Block zum geltenden österreichischen öffentlichen Recht versammelt Beiträge, die den größten Abstand zur Antike markieren und den Jubilar als langjährigen Universitätsjuristen adressieren. Von 2003 bis 2013 saß er dem Universitätsrat der Universität Innsbruck vor, von 2015 bis 2024 leitete er die Salzburger Fakultät als Dekan, ein Wirken an das der Beitrag zur Reform der universitären Gleichbehandlungsorgane im Licht neuer EU-Richtlinien unmittelbar anschließt. Hinzu kommen die Entwicklung des Streikrechts von der bloßen Streikfreiheit zum subjektiven Recht sowie die Abgrenzung von Sklaverei und Menschenhandel im österreichischen Strafrecht.

Exkursionen spielten im akademischen Leben von Michael Rainer seit jeher eine besondere Rolle. Erinnert wird im Vorwort an die von ihm über die Jahre angebotenen Fahrten, vornehmlich nach Italien, auf denen sich enzyklopädisches historisches und kunstgeschichtliches Wissen mit der Freude am gemeinsamen Erkunden verband. Viola Heutger greift diesen Topos auf und erinnert an einen gemeinsamen Stadtspaziergang mit dem Jubilar durch Istanbul, den sie mit rechtshistorischem Material zur spätantiken Sonntagsgesetzgebung und ihrer topographischen Verankerung im Stadtbild verwebt.

Abschließend lässt sich festhalten, dass die Festschrift ein auffällig breites methodisches Spektrum vereint, ohne dass die einzelnen Zugänge miteinander in Widerspruch träten. Klassische Quellenexegesen und computerlinguistische Verfahren stehen ebenso nebeneinander wie archivalische Rekonstruktion, rechtsvergleichende Analyse und dogmengeschichtliche Untersuchung. Zudem sind die Quellengattungen auffällig heterogen und reichen von Digestenstellen, Inschriften, Papyri, Archivmaterial, Gerichtsprotokollen bis hin zu aktueller Judikatur. Bemerkenswert ist ferner der Gegenwartsbezug, denn neben der erwartbaren Mehrheit antiker und neuzeitlicher Inhalte behandelt eine beachtliche Zahl an Beiträgen unmittelbar geltendes Recht. Auf beinahe 900 Seiten zeigt sich damit eindrucksvoll, dass römischrechtliche Inhalte niemals nur historisches Relikt sind, sondern als Ausgangspunkt gegenwärtiger Rechtsentwicklung unverzichtbar bleiben. Diese methodische und gegenständliche Spannweite ist letztendlich kein Zufall der Zusammenstellung, sondern folgt der

Person, der sie gilt. Der Umfang und die internationale Zusammensetzung des Autor*innenkreises selbst bezeugen dabei deutlich, in welchem Maß der Jubilar über Jahrzehnte fachliche und persönliche Verbundenheit aufgebaut hat. Was die Festschrift zu seinen Ehren an Methoden, Quellengattungen und Epochen nebeneinanderstellt, hat Michael Rainer in seinem eigenen wissenschaftlichen Schaffen stets miteinander verbunden, zwischen Antike und Gegenwart, zwischen Rechtsordnungen, zwischen Disziplinen reisend.