FORUM IURIS EUROPAEUM

Journal for Legal Science
Zeitschrift für die Rechtswissenschaft

3/2015/Nr. 1

Právnická fakulta Trnavskej univerzity v Trnave

TRNAVA

FORUM IURIS EUROPAEUM
Journal for Legal Science
Zeitschrift für die Rechtswissenschaft

Editor-in-chief/Chefredakteur:
doc. JUDr. Vojtech Vladár, PhD.

Editorial board/Redaktionsbeirat:
Uni.- Doz. Dr. Christian Alunaru
Universitatea de Vest „Vasile Goldiș", România
Vasile Goldiș Western University of Arad, Romania
prof. JUDr. Helena Barancová, DrSc.
Trnavská univerzita v Trnave, Slovenská republika
Trnava University in Trnava, Slovak Republic
Prof. Jur. Dr. Michael Bogdan, B.A., LL.M.
Lunds universitet, Konungariket Sverige
University of Lund, Kingdom of Sweden
prof. JUDr. Alexander Bröstl, CSc.
Univerzita Pavla Jozefa Šafárika v Košiciach, Slovenská republika
Pavol Jozef Šafárik University in Košice, Slovak Republic
Prof. Dr. Maximilian Fuchs
Katolische Universität Eichstätt–Ingolstadt, Budesrepublik Deutschland
Catholic University of Eichstätt–Ingolstadt, Federal Republic of Germany
Prof. JUDr. Jan Hurdík, DrSc.
Masarykova univerzita v Brne, Česká republika
Masaryk University in Brno, Czech Republic
Prof. JUDr. Soňa Košičiarová, PhD.
Trnavská univerzita v Trnave, Slovenská republika
Trnava University in Trnava, Slovak Republic
Doz. Dr. sc. Aleksandra Maganić
Sveučilište u Zagrebu, Republika Hrvatska
University of Zagreb, Republic of Croatia
Prof. Dr. Dušan Nikolić
Univerzitet u Novom Sadu, Republika Srbija
University of Novi Sad, Republic of Serbia
prof. JUDr. Mária Patakyová, CSc.
Univerzita Komenského v Bratislave, Slovenská republika
Comenius University in Bratislava, Slovak Republic
prof. JUDr. Ivan Šimovček, CSc.
Trnavská univerzita v Trnave, Slovenská republika
Trnava University in Trnava, Slovak Republic
prof. doc. JUDr. Marek Šmid, PhD.
Trnavská univerzita v Trnave, Slovenská republika
Trnava University in Trnava, Slovak Republic
doc. JUDr. Miroslava Vráblová, PhD.
Trnavská univerzita v Trnave, Slovenská republika
Trnava University in Trnava, Slovak Republic
em. o. Univ. – Prof. DDr. h. c. Dr. Rudolf Welser
Universität Wien, Republic Österreich
University of Vienna, Republic of Austria

Editors and proofreaders/Sprachredakteure und Redakteure:
Andrew Billingham
PhDr. Peter Gergel
Mgr. Marek Káčer, PhD.
Mgr. Peter Mach, PhD.
Mgr. Matej Pekarik, PhD.
doc. JUDr. Vojtech Vladár, PhD.
PhDr. Jozef Molitor

Address of editorial office/Redaktionsanschrift: Kollárova 10, SK-918 43 Trnava
E-mail: fie@truni.sk

ISSN 1339-4401

© Trnavská univerzita v Trnave, Právnická fakulta 2015

Contents/Inhalt

Marianna Novotná/Peter Varga

Limits of the Civil Nuclear Liability Regime and the State Interventions Resulting Therefrom[1]

Abstract: The article deals with the basic principles of international nuclear liability regimes introduced by the Vienna Convention and the Paris Convention as two parallel nuclear liability conventions of the "first generation" emphasizing the limits of the civil-law based concept of the existing regime. The benefits of the use of nuclear energy need to be weighed against possible risks associated with the operation of nuclear installations, which is connected with the probability of extensive damage to life, health and property. As the liability of the operator of a nuclear installation is limited both in time and amount, some of the claims for nuclear damage may remain uncompensated. To minimize the negative effects of the limits of the nuclear liability regime, states (as contracting parties of the nuclear liability conventions) have to undertake specific steps reflected at the international level to protect victims of nuclear accidents.

Keywords: nuclear liability – principles of nuclear liability – civil liability – international liability of state – state interventions – Vienna convention on civil liability for nuclear damage – Paris convention on third party liability in the field of nuclear energy – limits of nuclear liability regime – nuclear catastrophes

Introducion

The history of peaceful uses of nuclear energy has been affected in many different ways by four major reactor accidents. The first occurred at Windscale nuclear power plant (England) in 1957, the second case was the accident at the Three Mile Island nuclear power plant in the USA in 1979, the third and most tragic accident happened in the former Soviet Union in 1986 in the fourth unit of the Chernobyl nuclear power plant,[2] and the last one occurred at the Fukushima Dai-ichi nuclear power plant in 2011.

While in the early second half of the 20th century most of the developed world saw nuclear energy as a promising energy source for the future, even anticipating nuclear incidents and accidents, the enthusiasm for nuclear energy subsequently abated and particularly after the Chernobyl accident the public's perception of nuclear risk completely changed.

It became clear that the nuclear liability regime established in the 1960s by the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 (hereinafter the "*Paris Convention*") and the Vienna Convention on Civil Liability for Nuclear Damage (hereinafter "the *Vienna Convention*") had suffered from flaws resulting in the situation in which the former Soviet Union as owner of the Chernobyl nuclear power plant refused

[1] This study was prepared as the outcome of research project VEGA 1/0256/12 "*Nuclear Third Party Liability – Prospects for the Slovak, International and European Legal Framework*" conducted at the Faculty of Law of Trnava University in Trnava.

[2] For more on nuclear accidents and their consequences see: Nuclear Energy Agency, Organization for Economic Co-operation and Development: *Chernobyl. Assessment of Radiological and Health Impacts. Update of Chernobyl: Ten Years On*. Paris : OECD, 2002; PELZER, N.: Focus on the Future of Nuclear Liability Law. In OECD Nuclear Energy Agency: *Reform of civil nuclear liability. International symposium*. Budapest : OECD, 2000 and BOEHLER, M.-C.: Reflections on Liability and Radiological or Nuclear Accidents: The Accidents at Goiania, Forbach, Three Mile Island and Chernobyl. In *Nuclear Law Bulletin*, No. 59/1997.

to accept liability for nuclear damage caused in other countries. Correspondingly, no compensation was paid out to any of the neighbouring countries.[3]

Despite promising developments in nuclear energy at the very beginning of the new millennium, the accident in the Japanese "Fukushima Dai-ichi" nuclear power plant once again triggered public concerns over the risks arising even from peaceful uses of nuclear energy. The reactions of national governments were twofold. Some of them withdrew their previously announced plans for constructing new nuclear power plants (Italy). Others declared their intention to cease using nuclear energy for producing electric energy in their territory in the near future (Germany, Switzerland). However, there is a considerable group of governments which continue to support the "nuclear renaissance" and still identify nuclear as a promising source of energy.[4]

1 International nuclear liability regime – its basic principles

The international nuclear liability regime currently in force governs liability based on the system of civil law, conceptually founded on the analogy of liability for activities involving increased danger (abnormally dangerous activities) under the national laws of various states.[5] It is based on two underlying international conventions that establish comprehensive and almost identical regimes for civil liability for nuclear damage. International conventions on the subject of liability for nuclear damage adopted in the 1960s were the Paris Convention[6] covering nuclear damage regulation of regional character, and the Vienna Convention[7] covering nuclear damage regulation of global character.[8]

After the Chernobyl accident, states under the auspices of the IAEA carried out a review of the existing nuclear liability regime and of the regulations specified in the 1960s, taking especially into account the lessons learned from that accident. This exercise resulted in three new instruments, namely the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention,[9] which broadened the coverage of the two Conventions combining them into one expanded liability regime; the 1997 Convention on Supplementary Compensation for Nuclear Damage,[10] which provides for the payment

3 The former Soviet Union had not acceded to any of the conventions and at the time of the Chernobyl nuclear accident, had no national nuclear liability law either. With the new political situation (Soviet Union decay) the Parliaments of the Republics concerned (Belarus and Ukraine) finally filled the legal vacuum in this field by adopting the 1991 legislation on the status and social protection of the victims of the Chernobyl disaster, namely the clean-up staff, those persons evacuated and those remaining in the contaminated areas of the former USSR. BOEHLER, M.-C.: op. cit. 2, p. 59.

4 HANDRLICA, J./NOVOTNÁ, M.: Legal framework and perspectives of nuclear third party liability in the Czech and Slovak Republic. In *Forum Iuris Europaeum,* No. 2/2013.

5 LAMM, V.: The Protocol amending the 1963 Vienna Convention. In *Nuclear Law Bulletin*, No. 61/1998, p. 10.

6 The Convention on Third Party Liability in the Field of Nuclear Energy was established on 29 July 1960 under the auspices of the OECD Nuclear Energy Agency (NEA).

7 The Vienna Convention on Civil Liability for Nuclear Damage was established on 21 May 1963 under the auspices of the International Atomic Energy Agency (IAEA).

8 For more on the nuclear liability regime see HANDRLICA, J.: Právna úprava zodpovednosti za škodu spôsobenú jadrovou nehodou. In *Právny obzor*, No. 3/2008.

9 BUSEKIST, O.: A bridge between two conventions on civil liability for nuclear damage: The Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. In *Nuclear Law Bulletin*, No. 43/1989.

10 The 1997 Convention on Supplementary Compensation defines additional amounts to be provided through contributions by States Parties collectively based on installed nuclear capacity and a UN rate of assessment,

of additional compensation out of public funds in the event of damage in excess of the operator's liability amount; and the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage,[11] revising the "old Vienna liability regime".

To provide adequate protection to the public from possible damage and to ensure fair and sufficient compensation for the victims of a nuclear accident, the nuclear liability regime established by the above-mentioned conventions was founded on several principles[12] which had become binding on their respective Contracting Parties[13] under public international law and had established an international standard of risk-adequate liability legislation, which was also implemented by non-contracting parties at national level.[14]

According to the basic principles, all liability for a nuclear accident should be channelled to one responsible entity, i.e. the operator of the nuclear installation involved (the entity designated or recognized by the relevant state as the operator of the nuclear installation)[15], who is exclusively liable for accidents at and in relation to that installation, including during the course of transport of nuclear materials. The operators of nuclear installations cannot be held liable under other legal provisions (e.g. tort law).[16] They bear exclusive liability for nuclear damage (*legal channelling of liability onto the operator*),[17] so no other persons (such as builders or suppliers potentially liable under general tort law) associated with the construction or operation of the nuclear installation should be held liable.

Under the Conventions, the operator of a nuclear installation is held liable, regardless of whether fault can be established. It follows that the claimant does not need to prove negligence or any other type of fault on the part of the operator. The simple existence of causation of damage is an adequate basis for the operator's strict liability. This simplifies the litigation process, eliminating potential obstacles, especially such as might exist with the burden of proof.

---

at 300 SDRs per MW thermal. The Convention is an instrument to which all States may adhere regardless of whether they are parties to any existing nuclear liability conventions or have nuclear installations on their territories. For more on the 1997 Convention on Supplementary Compensation see: McRAE, B.: Overview of the Convention on Supplementary Compensation. In *Reform of civil nuclear liability*. *Budapest symposium*. Paris : OECD, 1999; LAGORCE, M.: *The Brussels Supplementary Convention and its Joint Intergovernmental Security Fund*. *Nuclear Law for a Developing World*. Vienna : IAEA, 1968 and BOULANENKOV, V.: Main Features of the Convention on Supplementary Compensation for Nuclear Damage – an Overview. In *Reform of civil nuclear liability*. *Budapest symposium*. Paris : OECD, 1999.

11 For more on the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage see: LAMM, V.: op. cit. 5 and HANDRLICA, J.: The Protocol of 1997 to Amend the Vienna Convention on Nuclear Liability and European Union. In *Czech Yearbook of Public and Private International Law*. Praha : Juris Publishing, 2013.

12 For more on the basic principles of the nuclear civil liability regime see: TREVOR, J. P. H.: *Principles of civil liability for nuclear damage*. *Nuclear Law for a Developing World*. Vienna : IAEA, 1968.

13 PELZER, N.: op. cit. 2, p. 424.

14 See KOSNÁČOVÁ (NOVOTNÁ), M.: K princípom právneho režimu zodpovednosti za jadrovú škodu. In *Právny obzor*, No. 6/2005. K princípom právneho režimu zodpovednosti za jadrovú škodu. In: *Právny obzor*. No. 6/2005 a NOVOTNÁ, M./HANDRLICA, J.: *Zodpovednosť za jadrové škody*. *Výzva pre medzinárodnú a národnú zodpovednostnú legislatívu v post-fukušimskom období*. Bratislava : Veda, vydavateľstvo Slovenskej akadémie vied, 2011.

15 The Installation State, in relation to a nuclear installation, means the contracting party within whose territory that installation is situated or, if it is not situated within the territory of any State, the contracting party by which or under the authority of which the nuclear installation is operated. See Article I (1) (d) of the Vienna Convention and Article 1 (a) (vi) of the Paris Convention and Article I (1) (c) of the Vienna Convention.

16 STOIBER, C./BAER, A./PELZER, N./TONHAUSER, W.: *Handbook on nuclear law*. Austria : IAEA, 2003, p. 112.

17 See HANDRLICA, J.: Channelling of nuclear third party liability towards the operator: jeopardised by the Brussels regulation. In *Czech Yearbook of Public and Private International Law*. Praha : Juris Publishing, 2011.

The Conventions qualify the operator's liability as "absolute", in order to make it clear that it is not subject to the traditional grounds of exoneration such as force majeure, acts of God or intervening acts of third persons.[18] However the operator may be exonerated from nuclear liability under special circumstances provided in the Vienna Convention, for example if they prove that the nuclear incident was directly due to an armed conflict, hostilities, civil war or insurrection, or that it resulted from a grave natural disaster of exceptional character (if the law of the installation state provides so).[19]

While the liability imposed upon the operator is exclusive and absolute, it is limited in both amount[20] and time. Under the Paris Convention, the maximum liability of an operator is set at 15 million SDRs.[21] A contracting state may establish a greater or lesser amount by its legislation to a lower limit of 5 million SDRs, taking into account the availability of obtaining insurance or other financial security. The Vienna Convention provides primarily for unlimited liability, but under national legislation it could be limited to a smaller amount not less than USD 5 million.[22] Under the amended Vienna Convention implemented by the Protocol,[23] the possible limit of the operator's liability is set at not less than 300 million SDR.[24] Naturally, under national law the upper limit may be a higher amount. Provided the upper limit of the operator's liability is less than 300 million SDRs, the difference between that upper limit and 300 million SDRs must be secured from public funds.

For economically weaker states or for states who are currently coping with significant economic difficulties, a special regulation was introduced[25] to encourage participation in the revised regime by states with nuclear installations which might be dissuaded from joining the new regime by the increased limits.[26]

---

18 IAEA (ed.): *The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage. Explanatory Texts*. Vienna : IAEA, 2007, p. 9.

19 Article 9 of the Paris Convention; Article IV (2) of the Vienna Convention.

20 Limitation of nuclear liability by amount was considered to be necessary in order not to jeopardize the development of the nuclear industry. It was a consequence of the congruence principle between liability and mandatory coverage, i.e. limitations of liability amounts in national legislation are dependent on the insurance market and its insurance offers.

21 SDR stands for the Special Drawing Right as defined by the International Monetary Fund. This unit of account is calculated on the basis of a basket of currencies of five of the most important trading nations.

22 Defined by reference to its value in terms of gold on 29 April 1963, which is USD 35 per one troy ounce of fine gold.

23 According to Article 19 of the Protocol "A State which is Party to this Protocol but not to the 1963 Vienna Convention shall be bound by the provisions of that Convention as amended by this Protocol in relation to other States Parties hereto, and failing an expression of a different intention by that State at the time of deposit of an instrument referred to in Article 20 shall be bound by the provisions of the 1963 Vienna Convention in relation to States which are only Parties thereto." This means that after the entry into force of the Protocol (4 October 2003) there are "two" Vienna Conventions in force: the original text of the 1963 Vienna Convention and its new version as amended by the Protocol.

24 The increase in liability amounts can be explained by the fact that one of the main motives for revising the Convention was the consideration that the US 5 million dollar limit, as the lowest amount of the operator's liability, had become unrealistic in view of the extent of damage that might result from an eventual nuclear incident. (LAMM, V.: op. cit. 5, p. 15).

25 From the time the protocol entered into force, these states were given the opportunity to define a transitional period of 15 years during which the minimum limit of liability of an operator could be set at 100 million SDRs.

26 ŠURANSKY, F.: Increased Liability Amounts under the 1997 Vienna Protocol and Elsewhere. In *Reform of civil nuclear liability. Budapest symposium*. Paris : OECD, 1999, p. 120.

The nuclear liability regime provides a time limit for the submission of claims as an instrument which helps to re-establish legal peace after a certain period of time.[27] The Vienna and Paris Conventions provide an extinction period of ten years, which may be prolonged by national legislation, provided coverage is available. There is also a possibility of establishing a period of two or three years respectively, running from the time when the damage and the operator liable become known to the victim, provided that the ten-year period is not exceeded.

Taking into account that personal injury caused by radioactive contamination might not become apparent for a longer time after exposure and to strengthen the principle of victim protection, the Protocol to Amend the Vienna Convention established a longer extinction period of 30 years for compensation for loss of life and personal injury, while retaining the ten-year prescription period for all other types of damage. The extension of the extinction period and the split of periods between personal injury and all other damage inevitably give rise to certain practical problems, when it comes to compensating for damage. According to Prof. Pelzer, as the period for personal injury is considerably longer than the period for other damage, money has to be set aside to make sure that there are still funds available to compensate for late personal injury. This could however inhibit the prompt compensation of other damage.[28]

The operator liable for nuclear damage is obliged to have and to maintain an insurance policy or other financial security to cover the nuclear liability. This congruence principle ensures that the liability amount of the operator is covered by an equal amount of money so that the claims of victims are financially ensured. In most cases, the coverage of the operator's liability is to be provided by the insurance industry, but it may be provided by financial security other than insurance (e.g. bank guarantees or the capital markets).

Compensation of victims of a nuclear event is based on the system of individual actions brought in civil process. Jurisdiction over actions lies exclusively with the courts of the Contracting Party in whose territory the nuclear incident occurred,[29] and each State Party must ensure that only one of its courts has jurisdiction in relation to any one nuclear incident.[30]

The concentration of procedures within one exclusive competent court not only creates legal certainty and a fair distribution of the available amount, but also excludes the possibility that victims of nuclear incidents might seek to submit their claims in states in which they are more likely to receive favourable treatment.[31]

Nevertheless, the system of individual actions seems to be unconvincing in the main, as it could be considered appropriate for the compensation of minor incidents, but it would be hardly conceivable in the event of a catastrophic nuclear accident resulting in thousands or millions of claims. In the case of a major nuclear accident, serious barriers could be involved such as the administrative and technical capacities of the national courts adjudicating the compensation for nuclear damage, or from the perspective of victims, distances in the case of transborder damage, expenses or the duration of the individual case decision.[32]

---

27 PELZER, N., op. cit. 2, p. 429.

28 Ibid., p. 430.

29 Article XI (1) of Vienna Convention; Article 13 (a) of Paris Convention.

30 Article 12 (4) of Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (Article XI (4) of the revised Vienna Convention).

31 STOIBER, C./BAER, A./PELZER, N./TONHAUSER, W.: op. cit. 16, p. 115.

32 See KISS, A.: State Responsibility and Liability for Nuclear Damage. In STOCKINGER, H./Van LA FAYETTE, L.: Towards a New Regime of State Responsibility for Nuclear Activities. In *Nuclear Law Bulletin,* No. 50/1992, pp. 16–17.

Accordingly the point at issue is whether the civil liability system based upon the liability of the operator is appropriate to cope with a catastrophic nuclear accident of Chernobyl magnitude and if it is adequate to compensate the victims of such a major nuclear accident. Given that civil liability law is only designed to deal with damage which can normally be compensated using the resources of the tortfeasor,[33] the obvious conclusion in nuclear liability theory is that in addition to the civil liability principle, there must be some other sources of funding such as state liability to achieve the primary goal of protecting and fully compensating the victims of nuclear damage.[34]

2 Exploring the limits of the civil-law regime of nuclear liability

As stated above, the limits of the current civil-law legal regulation in the area of nuclear liability law may be significant in the case of nuclear accidents of exceptional character, as the civil law rules of tort law will be an obstacle to dealing in any adequate way with the quantitative high number of harmed subjects, the high extent of damage significantly exceeding the limits of the operator's liability, and the associated qualitatively different kinds of damage (e.g. damage to property, health or the environment).[35]

From a real perspective it is hard to imagine how the internal courts of the state where the nuclear installation that caused the nuclear damage is situated will decide in civil-law procedures on thousands and millions of claims for nuclear damage compensation from several countries.[36] It is also questionable whether there is a suitable personal and material facility for solutions of such a very specific and (due to the impacts) also significant agenda. In addition, it must be mentioned that the private character of claims may well be an inordinate load for the courts, thus threatening the prompt satisfaction of their claims.[37]

As both the Vienna Convention and the Paris Convention only unify the material law, most of the persons harmed by a nuclear accident will be forced to file their claims at foreign courts that apply their procedural law (*lex fori*). This puts the harmed persons into a less favourable position in comparison to the perpetrator of the damage.[38]

---

33 PELZER, N., op. cit. 2, p 445. Q.v. KISS, A.: op. cit. 32, p. 16.

34 KISS, A.: op. cit. 32, pp. 16–17.

35 The tort law possibilities in the case of events of catastrophic disasters are dependent on the reason for the catastrophic event. When the event is of natural origin, the reason for their occurrence is usually vis maior, so the extent of application of tort law is significantly limited (although some degree of liability may be attributable to public law bodies which were for example obliged to carry out some preventive measures which they neglected). In contrast, in the case of disasters of technological character (including those that arise due to use of nuclear energy), the extent of tort law application is much higher. (Cf. FAURE, M. G.: *Financial Compensation in Case of Catastrophes: A European Law and Economics perspective*. Maastricht : Metro Institute, 2004. Available at: http://junon.u-3mrs.fr/afa10w21/wp-content/uploads/workingpapers/DR_10_0304_faure.pdf).

36 Cf. KISS, A.: op. cit. 32, p. 16.

37 Within the meaning of the Canadian Nuclear Liability Act, if the liability of the operator exceeds CAD 75 billion, or if it is in the public interest to set special compensation measures, a special damage claims commission is established (Nuclear Damage Claims Commission). Members of that commission may only be persons who have legal education and who fulfil other conditions set by the Act. This commission has exclusive jurisdiction to review all the claims and to provide compensation. The compensation is provided from public funds (Consolidated Revenue Fund).

38 See ŠTURMA, P.: Mezinárodní odpovědnost za škodlivé následky činností nezakázaných mezinárodním právem. In ČEPELKA, Č./JÍLEK, D./ŠTURMA, P.: *Mezinárodní odpovědnost*. Brno : Masarykova univerzita, 2003, p. 138.

Another disadvantage for the harmed persons arising from the civil-law principle of the limitation of liability is that after exhaustion of all funds up to the amount equal to the liability of an operator, all claims exceeding this amount will remain unsatisfied. This will especially be the case of nuclear accidents (see the experience from the Chernobyl disaster), where the damages greatly exceed the limits of the liability established by the nuclear legislation.

The problem connected with the compensation of claims exceeding the limits of liability is also the provision regulating the principles for division of compensatory refunds, if the funds do not suffice to cover all the claims. International conventions leave this problem to internal courts, which will also decide if they favour some types of actions (e.g. claims to compensate for health damage) in accordance with the priority principle, or if they will use the proportionality principle.[39] If the court favours the priority principle, there is a high risk of breach of the basic nuclear liability principle: the principle of non-discrimination of the harmed persons. On the other hand, if the court favours the proportionality principle, the most probable scenario will be that the harmed persons who filed their claims before the court decides will be compensated with a minimum amount due to the low level of the maximum liability of the operator. All the other claims, despite being legitimate, will not be satisfied due to the compensatory funds being spent.

Regarding the application of civil-law liability principles to nuclear damage in the case of nuclear accidents (the highest degree of nuclear accidents), there is still an open problem. Who will compensate the uncountable number of victims in cases where the operator of a nuclear facility get rid of its objective liability based on the liberation grounds established in both the Paris and Vienna Conventions.[40] Based on civil-law principles it would be the harmed persons who had to bear the damage that was caused to them. This however cannot be accepted due to the large number of victims of a nuclear disaster and the character of the harm they have suffered.

It is not disputed and can even be fully agreed that there is a much greater likelihood that nuclear accidents will be of smaller extent and significance than the nuclear disasters with far-reaching consequences with extreme damage and character, and in the light of this fact the existing civil-law liability regime for nuclear damage may seem an adequate means to compensate the harmed persons, without the need of its further revision. However, we cannot forget that there is still a risk of a nuclear disaster (although its probability is low) that needs to be fitted into an effective legislation framework.

From the demonstrative enumeration of the insufficiencies of the current legislation on civil liability for nuclear damage in relation to nuclear disasters, it is clear that the civil-law principles can be applicable only to the margins of a nuclear disaster.[41] Beyond these margins they lose their effectiveness and even functionality. It is necessary therefore to look for other adequate means, outside (or if possible inside) civil law, including mainly state interventions.

---

[39] For more information on the issue of the distribution of compensation for nuclear damage, see REITSMA, S.: An Equitable Distribution of Compensation: Realistic or Wishful Thinking? In OECD Nuclear Energy Agency: *Reform of civil nuclear liability. International symposium*. Budapest : OECD, 2000, pp. 347ff.

[40] See Article IV par. 2, Article IV par. 3 and Article IV par. 5 of the Vienna Convention and Article 9 of the Paris Convention.

[41] Cf. PELZER, N.: op. cit. 2, p. 445.

3 Intervention of states into legal liability relations for nuclear damage

The legal regime of nuclear liability is primarily built on international conventions which have a law-unification purpose.[42] They regulate the principles forming the basis for nuclear liability as well as the minimum standard of requirements and obligations the contracting states are bound to observe after ratification or accession to these conventions.

Despite the character of the legal regime of nuclear liability as an international regime, it has some specifics and shows some differences from the traditional international contractual praxis. Unlike the standard international treaties on damage liability, the nuclear liability treaties are not based, as could be reasonably expected, on direct and exclusive liability of a state for nuclear damage, but primarily on the civil-law liability of an operator of a nuclear facility, who should be exclusively liable for damage caused by a nuclear accident arising in its nuclear equipment or in connection with transportation of nuclear material to or from the nuclear facility it operates.

The liability relationship in which one party has an obligation to compensate for damage caused and the other party has a right to compensation for nuclear damage suffered, is established directly between the operator of a nuclear facility and the damaged party. The state as a public entity and a subject of international law is not liable for nuclear damage.

The state as a public entity is not however completely excluded from nuclear liability legal relations. Primarily, it is the operator of a nuclear facility who, under current legal regulation, becomes liable, even in a situation where there is possible state involvement.

The obligation of a state to provide compensation to harmed persons in certain situations cannot, however, be qualified as a "liability" in its standard meaning. It can just be called a legal obligation not based on liability of a subsidiary or supplementary character.

The subsidiary obligation of a state to provide nuclear damage compensation is regulated by Article VII par. 1 of the Vienna Convention as the only possibility of state intervention, i.e. intervention of a public entity in nuclear damage compensation which has the character of a private-law liability relationship. The state has an obligation, established in Article VII par. 1 of the Vienna Convention, to enter into nuclear damage compensation and to ensure fulfilment of nuclear damage compensation claims which have been admitted to harmed persons in the extent where the indemnity from insurance or other financial guarantee is not sufficient to satisfy these claims. This would happen in situations where the operator of nuclear equipment does not arrange insurance or some other kind of financial guarantee to the amount required by Article V of the Vienna Convention, which regulates the minimum liability of the operator of nuclear equipment. The Vienna Convention indirectly empowers states to enable the operators of nuclear equipment to agree lower financial coverage, as it leaves it up to states to regulate the adjustment of the amount, form and conditions of insurance or other kind of financial guarantee.

In case of a nuclear accident where the obligation to compensate for nuclear damage is higher than the amount covered by the insurer of the provider of the financial guarantee, the state is obliged to ensure the payment of nuclear damage compensation at an amount equal to the difference between the insurance paid and the amount of nuclear damage.

The specific feature of the supplementary liability of the state is the fact that the liability of a state to provide the missing finances is limited. The national law of the concerned state

[42] Cf. ŠTURMA, P.: op. cit. 38, p. 132.

may set the maximum limits of the liability of the nuclear facility operator, if the law of the state concerned uses the principle of limited liability of the operator.

The state does not become an entity liable for nuclear damage; only a non-liability obligation to cover financial resources is established in cases where the provider (or the insurer or the provider of another form of a guarantee) is not able to fulfil its obligation for damage compensation established by the relevant legal provisions of international or national law.[43]

State intervention in the process of compensating for damage to harmed persons is applicable especially in the case of bankruptcy of the financial guarantor of the liability, or in cases where the insurance for the specific nuclear equipment was agreed for a fixed period, and after the first nuclear event it is no longer possible to return the financial guarantee to the original amount. Similarly, the state must intervene and provide damage compensation if it has established in its law the unlimited liability of the operator, or equally if it has limited the liability of the operator. If the state limits the liability of the operator, it is obliged to cover the difference exceeding the amount the operator is liable for (due to non-respecting the congruence principle of liability and its coverage).

From the nature of subsidiarity it arises that the "liability" of a state to cover a certain extent of the nuclear damage is not applied if the reparatory mechanism based on liability of the operator is functional. As soon as the operator is not able to cover its obligations (for whatever reason) towards harmed persons, the state enters into these obligations.

The above-mentioned provision of the Vienna Convention shows several unsettled legal correlations. The most obvious is the ambiguous relationship between the state and the operator of nuclear equipment connected with the impossibility of the state to apply the right of recourse towards the operator, who would be obliged to reimburse to the state all amounts paid by the state instead of the operator. This insufficiency would require regulation by internal laws, establishing the mechanism of the right of recourse of the state towards the operator of nuclear equipment.

A specific form of supplementary obligation of the state to compensate for nuclear damage may be identified in Protocol 1997 in situations where a contracting state, in accordance with Article 7 par. 1.1 letters b) and c), limits in its internal law the liability of the operator to an amount not exceeding 300 million SDR (or during the transition period to an amount not exceeding 100 million SDR). In this case the state must provide nuclear damage compensation amounting to the difference between the extent of the limited liability of the operator and the amount of 300 million SDR (or 100 million SDR during the transition period) from public funds. From the text of the relevant provision of the Protocol it is clear that it does not establish a legal relationship of a liability nature between the state and the harmed persons. But it establishes for the contracting state an obligation under international law to provide, under specific conditions, finances from public funds. This fact, however, does not exclude the possibility that the state's liability exceeding the liability of the operator would be established by internal laws within the implementation of this international obligation by the contracting states.[44]

---

[43] Cf. Article VII par. 1 of the Vienna Convention. This obligation is similarly applicable in cases where the state itself is an operator of a nuclear installation.

[44] IAEA: *The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage. Explanatory Texts. A comprehensive study of the Agency's nuclear liability regime by the IAEA International Expert Group on Nuclear Liability* (*INLEX*) *to aid the understanding and authoritative interpretation of that regime.* Vienna : IAEA, 2004, p. 24.

Apart from the above-mentioned special case of intervention of a state (as a public entity) into civil-law nuclear liability relations, the nuclear legislation accepts the state's liability only in cases where the state is the operator of a nuclear installation. The state as operator may be sued in nuclear liability damage compensation cases. The state will however have the position of a subject of private law.[45]

The thesis of the civil-law character of nuclear liability relations may be demonstrated on Article XVIII of the Vienna Convention, which established that no provision of this convention may be construed as affecting the rights, if any, of a Contracting Party under the general rules of public international law in respect of nuclear damage. From this provision it is clear that any rights acknowledged by international public law do not fall within the scope of the convention, which pursues the aim of harmonizing internal civil law on nuclear liability damage; on the other hand, the formulation of that provision in fine doubts the existence of these rights related to nuclear damage[46] acknowledged by international public law.

A similar provision may be found in Annex II of the Paris Convention, which stipulates that the Paris Convention *shall not be interpreted as depriving a Contracting Party, on whose territory damage was caused by a nuclear incident occurring on the territory of another Contracting Party, of any recourse which might be available to it under international law*. Although the Paris Convention does not directly doubt by this provision the existence of such international rules, the conditional formulation in the text regarding these rules does not show their undisputed existence.

4 (Possible) international liability of a state?

Generally considered, international liability of a state does not stem from its fault or the wrongfulness of its acts, but from the injurious consequences suffered by persons beyond its boundaries. Under international liability, a breach of primary rules and obligations generates secondary obligations that must be fulfilled under the law of state responsibility.[47]

Despite the time that has elapsed since the adoption of the first generation conventions, we may still say that international public law does not offer any contractual legal framework for the state's nuclear damage liability. Neither the investigation of case law, nor the analysis of the non-contractual practice of states towards specific generally-applicable rules on international liability of states for harmful results of actions not prohibited by international law[48] and established in international common law, have sufficiently demonstrated the

[45] Cf. § 21 of the Civil Code, Article I par. 1 letter a) of the Vienna Convention in connection with Article. XIV of the Vienna Convention.

[46] Article XVIII of the Vienna Convention is probably not applicable to subjective rights arising from international contract law, but exclusively to rights arising from "generally accepted rules" of international public law relating to nuclear damage.

[47] SUCHARITKUL, S.: *State Responsibility and International Liability under International Law*. Loyola of Los Angeles International and Comparative Law Review. No. 18/1996, p. 833.

[48] For further information on international liability for harmful consequences arising out of acts not prohibited by international law see JANKUV, J.: Medzinárodnoprávna zodpovednosť za škodlivé dôsledky činností, ktoré nie sú medzinárodným právom zakázané. In *Societas et Iurisprudentia*, Vol. 1, No. 1 (2013).

existence of such rules in international customary law. Consequently, the state's liability may only be established by convention.[49]

While there are some different opinions[50] deducing the state's liability for transnational nuclear damage from the concept of the liability of a state for international illegal actions,[51] international custom does not form (despite some applicable decisions by international courts or arbitration courts,[52] or some relevant and by their nature similar cases which have not been resolved by international courts or arbitration courts)[53] a sufficient basis for action for damages against the state in the case of nuclear accident.[54]

In the history of the formation of nuclear liability legislation, the issue of the state's contractual liability has been the subject of several discussions, both academic and institutional. The issue of international liability for nuclear damage and the working out of principles of international liability became subjects of discussion in late 1980s and early 1990s, when the Board of Governors of the International Atomic Energy Agency (IAEA[55]) decided to establish a working group to review all aspects of liability for nuclear damage. The activity of this working group was stopped within one year and the Board of Governors re-established a Permanent Committee for nuclear damage liability.[56] This was also delegated to deal with aspects of the state's liability for nuclear damage, including international civil-law liability, international liability of a state as well as the mutual relation between both these types of liability.[57]

The issue of state's international liability for nuclear damage as subjects of international law and the associated means of applying international actions against states with nuclear potential were rejected very quickly both by experts and some states (especially the USA,

---

49 Cf. ZEMANEK, K.: Causes and Forms of International Liability. In CHENG, B./BROWN, E. D. (eds.): *Contemporary problems of international law*: *essays in honour of Georg Schwarzenberger on his eightieth birthday*. London : Stevens and Sons, 1988, p. 326 and ŠTURMA, P.: op. cit. 38, pp. 126 and 129.

50 See KISS, A.: State responsibility and liability for nuclear damage. In *Denver Journal of International Law and Policy*, No. 1/2006; Van DYKE, M.: Liability and compensation for harm caused by nuclear activities. In *Denver Journal of International Law and Policy*, No. 1/2006; NANDA, V. P.: International environmental norms applicable to nuclear activities, with particular focus on decisions of international tribunals and international settlements. In *Denver Journal of International Law and Policy*, No. 1/2006.

51 For more on the concept of international liability of states for harmful results of actions not prohibited by international law see "Articles on responsibility of States for internationally wrongful acts" prepared under the auspices of the UN International Law Commission. Available on-line www.un.org./law/ilc.

52 Trail Smelter Case [R.I.A.A. (1941), vol. III, pp. 1905ff.]; Corfu Channel Case [I.C.J. Reports 1949, pp. 4ff.] and Lac Lanoux Arbitration [R.I.A.A. (1957), vol. XII, pp. 281ff.].

53 E.g. The Chernobyl catastrophic nuclear accident in 1986; the Daigo Fukuryū Maru incident: a Japanese fishing boat exposed to and contaminated by nuclear fallout from the United States' thermonuclear device test on Bikini Atoll in 1954; or pollution of the Canadian sea shore by the maritime oil spill near Cherry Point (Washington) in 1973.

54 See PELZER, N.: op. cit. 2, pp. 450–451. Q.v. KISS, A.: State Responsibility and Liability for Nuclear Damage. In STOCKINGER, H./Van DYKE, J. M. et al. (eds.): *Updating International Nuclear Law*. Wien : Neuer wissenschaftlicher Verlag, 2007, pp. 61–74 and Van DYKE, J. M.: *The Inadequate Liability and Compensation Regime for Damage Caused by Nuclear Activities*. Dostupné on-line na http://www.cefos.gu.se/digitalAssets/1291/1291824_Van_Dyke__paper_.pdf.

55 For further information on IAEA see HANDRLICA, J.: *Jaderné právo. Právní rámec pro mírové využívání jaderné energie a jeho vývojové souvislosti.* Praha : Auditorium, 2012.

56 The concept of international civil liability is understood as civil-law liability under the international convention that imposes on its contracting parties, according to international public law, an obligation to apply these liability rules in their national laws. (Cf. WETTERSTEIN, P.: Current Trends in International Civil Liability for Environmental Damage. In *Annual Survey of International and Comparative Law*, No. 1/1994, pp. 7–8.).

57 Also compare the documents IAEA GC (XXXVI) 1009 (1.7.1992), pp. 1–2.

UK and France). Their negative attitude was based on the opinion that the concept of state liability may not be reasonable due to its nature. They argued that state liability may be realized through the creation of a system of additional compensation for nuclear damage which exceeds the liability of the operator of a nuclear installation.[58]

Due to strong disagreement, the scenario of the state's international nuclear liability has not been realized,[59] and the idea of international state liability has been replaced with the more effective system of additional funding.

However, during the revisions of the Vienna Convention, its Article XVIII was changed. According to this provision, the Convention shall not be applicable to the rights and obligations of the contracting party under general rules of international public law. The clause doubting these rules, including the reference to rules regulating nuclear damage, has been removed.

This provision leaves open to the future the possibility that an international convention might be adopted establishing international state liability for nuclear damage (or the possibility of using customary law as a legal basis for action against a state) to compensate the victims of a nuclear disaster also on a state liability basis.

5 Overcoming the limits of the civil nuclear liability regime?

An acceptable solution to the problems of civil-law based nuclear liability, in the event of nuclear disasters, might be found in the proposal to include substantial elements of state liability into nuclear liability legislation. Alternatively, a mechanism of non-contractual state obligations could be established which would enable compensation exceeding the liability of the operator to be provided, as the state is an entity which enables through a system of licences and permits the operation of nuclear facilities at which or in relation to which nuclear damage my occur in the event of a nuclear disaster.

Given the nature of nuclear disasters and their associated consequences, which are not limited to the territory of one state as they do not respect state boundaries, this issue cannot be dealt with separately and only within the legislation of the respective state, but it is necessary to proceed on the issue of liability in international law.

Pointing out the need for intervention by the state as a public entity into the existing legal nuclear liability regime in relation to nuclear catastrophic events should not lead to false conclusions identifying the preceding statement with the necessary insufficiencies of the existing legal regime which were formulated above.

Instead, this opinion is merely a legal consequence of the fact that civil-law liability is not generally appropriate for application to catastrophic events as it is only limited to damage that can be remedied under normal circumstances by compensation from the funds of the responsible person (tortfeasor).[60] The mechanisms of civil liability should be supplemented in cases of nuclear disasters by legal means of state involvement. This involvement of the

[58] Also compare the documents NL/2/4, pp. 7–9; SCNL/1/INF.4, pp. 15–18; SCNL/2/INF.2, pp. 2–3; SCNL/3/INF.2/Rev.1, Annex II; SCNL/4/INF.6, pp. 5–6 and 6–7; SCNL/6/INF.4, pp. 9–10; SCNL/7/INF.6, p. 9; SCNL/16/INF.3, p. 3.

[59] POLITI, M.: International and Civil Liability for Nuclear Damage: Some Recent Developments of State Practice. In *La réparation des dommages catastrophiques*: *les risques technologiques majeurs en droit international et en droit communautaire*. Bruxelles : Bruylant, 1990, p. 332.

[60] See PELZER, N.: op. cit. 2, p. 445.

state should affect the private character of the relationship between the harmed persons and the operator, or it should exist alongside this relationship in the form of international liability of the state.

This approach does not imply an underestimation of the role of national law in the implementation of international commitments. But in the age of globalization, even the best internal regulation for prevention of such damage and liability in one state, including its effective enforcement, is insufficient to solve problems of an international character.[61]

Conclusion

The system of civil liability for nuclear damage is built upon the principle of international conventions of unifying character.[62] As opposed to the typically designed international treaties regulating liability for damage, the international conventions on nuclear liability do not stem from direct and exclusive international liability of states, but primarily from civil liability of the operator of a nuclear installation.[63]

The limits of civil-law legal regulation may be crucial in the case of nuclear accidents of exceptional character, as the history of commercial functioning of nuclear plants shows us (even though it does not consist only of catastrophes and accidents) that major nuclear accidents have inevitable transborder implications, and their consequences could directly or indirectly affect many countries even at large distances from the accident site.

In such a situation, the rules of tort law will be an obstacle to dealing in an adequate way with the large number of harmed persons, the great extent of damage significantly exceeding the limits of the operator's liability, and the associated qualitatively different kinds of damage (e.g. damage to property, health, or the environment).

Nevertheless, international public law does not offer any contractual legal framework of the state's nuclear damage liability. Neither the investigation of case law, nor the analysis of the non-contractual practice of states have sufficiently demonstrated the existence of such rules in international customary law. Consequently, liability may only be established on the basis of civil law rules which have been (partially) unified by the international civil nuclear liability regime.

From this point of view, it seems even more tragic that many states are not parties to either the Paris or the Vienna Convention, including several countries with significant nuclear industries,[64] with the consequence that of the over 400 nuclear power plants worldwide, more than two thirds do not come under the provisions of either Convention.[65]

---

61 ŠTURMA, P.: op. cit. 38, p. 114.

62 Vienna Convention on civil liability for nuclear damage, Protocol to amend the 1963 Vienna Convention on civil liability for nuclear damage, Convention on supplementary compensation for nuclear damage, Paris convention on third party liability in the field of nuclear energy of 1960, Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, 2004 Protocol to amend the Paris convention on third party liability in the field of nuclear energy, 1963 Brussels supplementary convention on nuclear third party liability, 2004 Protocol to amend the Brussels supplementary convention on third party liability.

63 ŠTURMA, P.: op. cit. 38, pp. 132–136.

64 E.g. United States, Canada, Japan and the countries of the former USSR.

65 NEA Issue Brief: An analysis of principal nuclear issues, No. 4 – 1st revision, November 1993, International nuclear third-party liability, www.nea.fr.

Súhrn

Limity občianskoprávneho režimu zodpovednosti za jadrové škody a ingerencia štátu ako ich dôsledok

Právny režim zodpovednosti za jadrovú škodu je prioritne vybudovaný na princípe medzinárodných dohovorov unifikačnej povahy, ktoré upravujú zásady, na ktorých zodpovednosť za jadrovú škodu spočíva, ako i minimálny rozsah požiadaviek a povinností, ktoré zmluvné štáty týchto dohovorov na seba prevzali ich ratifikáciou resp. pristúpením.

Napriek charakteru právneho režimu zodpovednosti za jadrovú škodu ako režimu medzinárodného, vykazuje tento v oblasti medzinárodnoprávnej úpravy určité špecifiká a odchýlky od zaužívanej medzinárodnoprávnej zmluvnej praxe. Na rozdiel od typicky konštruovaných medzinárodných zmlúv, upravujúcich náhradu škody, nevychádzajú medzinárodné dohovory upravujúce otázky zodpovednosti za jadrovú škodu z priamej a výlučnej zodpovednosti štátu za spôsobenú jadrovú škodu, ale primárne z občianskoprávne konštruovanej zodpovednosti prevádzkovateľa jadrového zariadenia

Štát ako verejnoprávny subjekt síce nie je úplne vylúčený z právnych vzťahov zodpovednosti za jadrovú škodu, nositeľom zodpovednosti však aj v prípade akejkoľvek za súčasného stavu prípustnej ingerencie štátu naďalej ostáva prevádzkovateľ jadrového zariadenia. Povinnosť štátu poskytnúť v určitých prípadoch kompenzáciu poškodeným jadrovou udalosťou nemožno označiť za „zodpovednosť" v pravom slova zmysle ale iba za akúsi mimozodpovednostnú právnu povinnosť subsidiárneho alebo suplementárneho charakteru.

Subsidiárnu povinnosť štátu poskytnúť náhradu jadrovej škody upravuje čl. VII ods. 1 Viedenského dohovoru ako jedinú možnosť ingerencie štátu ako verejnoprávneho subjektu do svojím charakterom súkromnoprávneho zodpovednostného právneho vzťahu kompenzácie jadrovej škody. Štát zariadenia je v zmysle čl. VII ods. 1 Viedenského dohovoru povinný vstúpiť do právneho vzťahu náhrady jadrovej škody a zaistiť uspokojenie nárokov na náhradu jadrovej škody, ktoré boli priznané poškodeným voči prevádzkovateľovi, v rozsahu, v ktorom výnos z poistenia alebo z inej finančnej záruky nie je dostačujúci k uspokojeniu týchto nárokov, v prípadoch, ak prevádzkovateľ jadrového zariadenia zabezpečí krytie svojej zodpovednosti poistením alebo iným druhom finančnej zábezpeky do výšky nižšej, ako článkom V Viedenského dohovoru ustanovenej minimálnej zodpovednosti prevádzkovateľa.

Predmetné ustanovenie Viedenského dohovoru vykazuje viacero nedoriešených právnych súvzťažností, z ktorých najviac rezonuje nejasná povaha vzťahu štát a prevádzkovateľ jadrového zariadenia a z toho vyplývajúca (ne)možnosť uplatňovania práva následného regresu štátu voči prevádzkovateľovi, v rámci ktorého by mu prevádzkovateľ nahradil v rozsahu jeho zodpovednosti všetko, čo štát zaňho plnil. Uvedený nedostatok bude potrebné doriešiť vo vnútroštátnej úprave zakotvením mechanizmu práva regresu štátu voči prevádzkovateľovi jadrového zariadenia.

Určitú formu suplementárnej povinnosti štátu na náhradu jadrovej škody možno identifikovať v rámci Protokolu z r. 1997 v prípade, ak zmluvný štát v súlade s čl. 7 ods. 1.1 písm. b) a c) Protokolu obmedzí vo svojom vnútroštátnom poriadku zodpovednosť prevádzkovateľa na sumu nižšiu ako 300 mil. SDR (alebo počas prechodného obdobia na sumu nižšiu ako 100 mil. SDR). V tomto prípade musí štát poskytnúť kompenzáciu jadrovej škody vo výške rozdielu medzi rozsahom obmedzenej zodpovednosti prevádzkovateľa

a sumou 300 mil. SDR z verejných fondov (príp. sumou 100 mil. SDR počas prechodného obdobia). Z formulácie predmetného ustanovenia Protokolu je zrejmé, že nezakladá vo vzťahu štát a poškodený subjekt právny vzťah zodpovednostného charakteru ale ukladá zmluvnému štátu povinnosť medzinárodnoprávneho charakteru poskytnúť za stanovených podmienok finančné prostriedky z verejných fondov. Táto skutočnosť však nevylučuje, aby zodpovednosť štátu v rozsahu presahujúcom zodpovednosť prevádzkovateľa bola založená vnútroštátnym právnym poriadkom v rámci implementácie tohto medzinárodného záväzku zmluvnými štátmi.[66]

Odhliadnuc od vyššie uvedených osobitných prípadov ingerencie štátu ako verejnoprávneho subjektu do občianskoprávneho vzťahu zodpovednosti za jadrovú škodu, pripúšťa jadrová legislatíva zodpovednosť štátu za jadrovú škodu výlučne v prípadoch, v ktorých štát vystupuje ako prevádzkovateľ jadrového zariadenia. Štát ako prevádzkovateľ môže byť v tomto prípade žalovaný v zodpovednostných vzťahoch jadrového práva na náhradu jadrovej škody, v týchto vzťahoch však bude vystupovať ako subjekt súkromného práva.

Medzinárodné právo verejné neponúka aj napriek dobe, ktorá uplynula od prijatia zodpovednostných jadrových dohovorov prvej generácie (Viedenský dohovor a Parížsky dohovor v pôvodnom znení), žiadny zmluvný právny rámec úpravy zodpovednosti štátu za škodu spôsobenú jadrovou katastrofou, pričom rozbor kazuistiky[67] ani iná mimozmluvná prax štátov vo vzťahu k určitým všeobecne platným pravidlám o medzinárodnej zodpovednosti štátu za škodlivé následky činností nezakázaných medzinárodným právom zakotvených v obyčajovom medzinárodnom práve nepreukázali v uspokojivom rozsahu existenciu takýchto pravidiel v obyčajovom medzinárodnom práve, v dôsledku čoho môže byť takáto zodpovednosť štátu založená iba zmluvnou cestou.

Napriek niektorým odlišným názorom[68] odvodzujúcim možnosť vyvodiť zodpovednosť štátu za cezhraničný vznik jadrovej škody z konceptu zodpovednosti štátu za medzinárodne protiprávne konanie, nie je medzinárodná obyčaj – napriek niektorým, na predmetnú problematiku použiteľným rozhodnutiam medzinárodných súdov alebo arbitrážnych orgánov, ako i niektorým relevantným svojou povahou obdobným prípadom, ktoré neboli riešené medzinárodnými súdmi ani arbitrážou – uspokojivým podkladom pre vznesenie žaloby na náhradu jadrovej škody voči štátu, v ktorom došlo k jadrovej udalosti.

Limity v súčasnosti použiteľného občianskoprávneho charakteru zodpovednosti na poli zodpovednostného jadrového práva sa pravdepodobne najvýraznejšie môžu prejavovať v prípade vzniku jadrových udalostí výnimočného charakteru (jadrových katastrof), kedy práve civilnoprávne východiská deliktuálneho práva budú tvoriť prekážku vysporiadania sa uspokojivým spôsobom s kvantitatívne vysokým počtom poškodených, s rozsahom škôd výrazne prekračujúcim limity zodpovednosti prevádzkovateľa a s tým súvisiacimi kvalitatívne rozdielnymi druhmi škôd (na majetku, na živote, na zdraví, na životnom prostredí atď.).

---

66 IAEA: op. cit. 44, p. 24.

67 Trail Smelter Case [R.I.A.A. (1941), vol. III, pp. 1905ff.]; Corfu Channel Case [I.C.J. Reports 1949, pp. 4ff.] and Lac Lanoux Arbitration [R.I.A.A. (1957), vol. XII, pp. 281ff.].

68 Pozri napr. KISS, A.: op. cit. 32; Van DYKE, M.: op. cit. 32 and NANDA, V. P.: op. cit. 50. Napriek presvedčeniu o reálnej využiteľnosti medzinárodného obyčajového práva (zásada *sic utere tuo ut alienum non leades*, t. j. zásada nespôsobenia ujmy, zásada znečisťovateľ platí) v otázke uloženia zodpovednosti štátu pod jurisdikciu ktorého spadá jadrové zariadenie, ktoré bolo zdrojom vzniku jadrovej udalosti s následným vznikom ujmy, pripúšťajú autori, že otázky jednotlivých druhov kompenzovateľnej ujmy a rozsahu náhrady škôd naďalej zostávajú predmetom odborných polemík.

Keďže tak Viedenský dohovor ako i Parížsky dohovor unifikujú iba materiálne právo, bude väčšina poškodených osôb nútená v prípade jadrovej katastrofy s cezhraničnými dôsledkami uplatňovať svoje nároky spravidla pred cudzími súdmi, ktoré aplikujú – pokiaľ ide o procesné právo – *lex fori*, čo poškodený subjekt jednoznačne znevýhodňuje oproti pôvodcovi škody.

Ďalšou nevýhodou pre poškodený subjekt, vyplývajúcou z občianskoprávneho princípu limitácie zodpovednosti je, že po vyčerpaní finančných prostriedkov do výšky zodpovednosti prevádzkovateľa, ostane každý ďalší nárok na náhradu škody neuspokojený. Neuspokojenie nárokov na náhradu škodu je viac ako pravdepodobné práve pri jadrových udalostiach katastrofického charakteru, kde škody, vychádzajúc zo skúseností z jadrovej nehody v Černobyle, vysoko prevyšujú limity zodpovednosti ustanovené jadrovou legislatívou.

Problémom, súvisiacim s otázkou kompenzačných nárokov presahujúcich limity zodpovednosti, je i ustanovenie zásad rozdeľovania kompenzačných náhrad, ak finančné prostriedky nepostačujú na pokrytie všetkých nárokov. Medzinárodné dohovory ponechávajú túto otázku na vnútroštátne súdy, na ktorých závisí, či sa rozhodnú pre uprednostnenie niektorých typov žalôb (napr. nároky na náhradu škody spôsobenej na zdraví) v zmysle zásady priority alebo rozdelia dostupné finančné prostriedky v zmysle zásady proporcionality.

I keď je nesporné a v plnom rozsahu možno súhlasiť s názorom, že existuje oveľa väčšia pravdepodobnosť, že dôjde k jadrovým nehodám menšieho rozsahu a významu, ako k jadrovým katastrofám s ďalekosiahlymi konzekvenciami, následkom ktorých budú škody extrémnej výšky a charakteru a vo svetle tejto skutočnosti by sa existujúci občianskoprávny režim zodpovednosti za jadrové škody mohol javiť ako adekvátny prostriedok kompenzácie poškodeného subjektu bez potreby jeho ďalšej revízie, nemožno opomenúť skutočnosť, že riziko vzniku jadrovej katastrofy, napriek nízkej pravdepodobnosti, tu stále je a treba ho vtesnať do účinného rámca právnej úpravy.

Z demonštratívneho výpočtu deficitov súčasne platnej právnej úpravy občianskoprávnej zodpovednosti za jadrovú škodu vo vzťahu k jadrovým katastrofám jednoznačne vyplýva, že občianskoprávne princípy náhrady škody sú použiteľné iba po hranicu jadrovej katastrofy. Od tejto hranice strácajú svoju efektívnosť, ba až funkčnosť, preto je na zvládnutie takýchto situácií potrebné hľadať iné adekvátne prostriedky, mimo rámca občianskoprávnej úpravy.

Bibliography

BOEHLER, M.-C.: Reflections on Liability and Radiological or Nuclear Accidents: The Accidents at Goiania, Forbach, Three Mile Island and Chernobyl. In *Nuclear Law Bulletin*, No. 59/1997;

BOULANENKOV, V.: Main Features of the Convention on Supplementary Compensation for Nuclear Damage – an Overview. In *Reform of civil nuclear liability*. *Budapest symposium*. Paris : OECD, 1999;

BUSEKIST, O.: A bridge between two conventions on civil liability for nuclear damage: The Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. In *Nuclear Law Bulletin*, No. 43/1989;

FAURE, M. G.: *Financial Compensation in Case of Catastrophes*: *A European Law and Economics perspective*. Maastricht : Metro Institute, 2004. Available at http://junon.u-3mrs.fr/afa10w21/wp-content/uploads/workingpapers/DR_10_0304_faure.pdf;

HANDRLICA, J.: Právna úprava zodpovednosti za škodu spôsobenú jadrovou nehodou. In *Právny obzor*, No. 3/2008;

HANDRLICA, J.: Channelling of nuclear third party liability towards the operator: jeopardised by the Brussels regulation. In *Czech Yearbook of Public and Private International Law*. Praha : Juris Publishing, 2011;

HANDRLICA, J.: The Protocol of 1997 to Amend the Vienna Convention on Nuclear Liability and European Union. In *Czech Yearbook of Public and Private International Law*. Praha : Juris Publishing, 2013;

HANDRLICA, J.: *Jaderné právo. Právní rámec pro mírové využívání jaderné energie a jeho vývojové souvislosti*. Praha : Auditorium, 2012;

HANDRLICA, J./NOVOTNÁ, M.: Legal framework and perspectives of nuclear third party liability in the Czech and Slovak Republic. In *Forum Iuris Europaeum*, No. 2/2013;

IAEA: *The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage. Explanatory Texts. A comprehensive study of the Agency's nuclear liability regime by the IAEA International Expert Group on Nuclear Liability* (*INLEX*) *to aid the understanding and authoritative interpretation of that regime*. Vienna : IAEA, 2004;

IAEA (ed.): *The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage. Explanatory Texts*. Vienna : IAEA, 2007;

JANKUV, J.: Medzinárodnoprávna zodpovednosť za škodlivé dôsledky činností, ktoré nie sú medzinárodným právom zakázané. In *Societas et Iurisprudentia*, Vol. 1, No. 1 (2013);

KISS, A.: State Responsibility and Liability for Nuclear Damage. In STOCKINGER, H./Van LA FAYETTE, L.: Towards a New Regime of State Responsibility for Nuclear Activities. In *Nuclear Law Bulletin*, No. 50/1992;

KISS, A.: State responsibility and liability for nuclear damage. In *Denver Journal of International Law and Policy*, No. 1/2006;

KISS, A.: State Responsibility and Liability for Nuclear Damage. In STOCKINGER, H./Van DYKE, J. M. et al. (eds.): *Updating International Nuclear Law*. Wien : Neuer wissenschaftlicher Verlag, 2007;

KOSNÁČOVÁ, M.: K princípom právneho režimu zodpovednosti za jadrovú škodu. In *Právny obzor*, No. 6/2005;

LAGORCE, M.: *The Brussels Supplementary Convention and its Joint Intergovernmental Security Fund. Nuclear Law for a Developing World*. Vienna : IAEA, 1968;

LAMM, V.: The Protocol amending the 1963 Vienna Convention. In *Nuclear Law Bulletin*, No. 61/1998;

McRAE, B.: Overview of the Convention on Supplementary Compensation. In *Reform of civil nuclear liability. Budapest symposium*. Paris : OECD, 1999;

NANDA, V. P.: International environmental norms applicable to nuclear activities, with particular focus on decisions of international tribunals and international settlements. In *Denver Journal of International Law and Policy*, No. 1/2006;

NOVOTNÁ, M./Handrlica, J.: *Zodpovednosť za jadrové škody. Výzva pre medzinárodnú a národnú zodpovednostnú legislatívu v post-fukušimskom období*. Bratislava : Veda, vydavateľstvo Slovenskej akadémie vied, 2011;

Nuclear Energy Agency, Organization for Economic Co-operation and Development: *Chernobyl. Assessment of Radiological and Health Impacts. Update of Chernobyl: Ten Years On*. Paris : OECD, 2002;

PELZER, N.: Focus on the Future of Nuclear Liability Law. In OECD Nuclear Energy Agency: *Reform of civil nuclear liability. International symposium*. Budapest : OECD, 2000;

POLITI, M.: International and Civil Liability for Nuclear Damage: Some Recent Developments of State Practice. In *La réparation des dommages catastrophiques: les risques technologiques majeurs en droit international et en droit communautaire*. Bruxelles : Bruylant, 1990;

REITSMA, S.: An Equitable Distribution of Compensation: Realistic or Wishful Thinking? In OECD Nuclear Energy Agency: *Reform of civil nuclear liability. International symposium*. Budapest : OECD, 2000;

STOIBER, C./BAER, A./PELZER, N./TONHAUSER, W.: *Handbook on nuclear law*. Austria : IAEA, 2003;

SUCHARITKUL, S.: *State Responsibility and International Liability under International Law*. Loyola of Los Angeles International and Comparative Law Review. No. 18/1996;

ŠURANSKY, F.: Increased Liability Amounts under the 1997 Vienna Protocol and Elsewhere. In *Reform of civil nuclear liability. Budapest symposium*. Paris : OECD, 1999;

ŠTURMA, P.: Mezinárodní odpovědnost za škodlivé následky činností nezakázaných mezinárodním právem. In ČEPELKA, Č./JÍLEK, D./ŠTURMA, P.: *Mezinárodní odpovědnost*. Brno : Masarykova univerzita, 2003;

TREVOR, J. P. H.: *Principles of civil liability for nuclear damage. Nuclear Law for a Developing World*. Vienna : IAEA, 1968;

Van DYKE, J. M.: *The Inadequate Liability and Compensation Regime for Damage Caused by Nuclear Activities*. Dostupné on-line na http://www.cefos.gu.se/digitalAssets/1291/1291824_Van_Dyke__paper_.pdf;

Van DYKE, M.: Liability and compensation for harm caused by nuclear activities. In *Denver Journal of International Law and Policy*, No. 1/2006;

WETTERSTEIN, P.: Current Trends in International Civil Liability for Environmental Damage. In *Annual Survey of International and Comparative Law*, No. 1/1994;

ZEMANEK, K.: Causes and Forms of International Liability. In CHENG, B./BROWN, E. D. (eds.): *Contemporary problems of international law: essays in honour of Georg Schwarzenberger on his eightieth birthday*. London : Stevens and Sons, 1988.

Viktor Vaculčík

Eva Dudová & Zdeněk Duda versus Tschechische Republik

Abstrakt: Diese Analyse eines wichtigen Rechtsstreites der ehemaligen Priester der Tschechoslowakischen Hussitischen Kirche in der Tschechischen Republik hat sich zur Aufgabe gemacht zu zeigen, dass die kirchliche Autonomie auf der einen Seite und der Rechtsschutz von Grundrechten von Einzelpersonen auf der anderen Seite auf eventuelle Konflikte stoßen kann, wobei es sehr schwer fällt, die Rechte aller Beteiligten – das Recht einer Kirche als autonomer Organisation und das Recht einer Einzelperson auf den Schutz ihrer Grundrechte, zu gewährleisten.

Schlüsselworte: Tschechoslowakische Hussitische Kirche – Priesteramt – Beendigung des Dienstverhältnisses – Zuständigkeit der Gerichte – Verletzung der Grundrechte – Europäische Menschenrechtskonvention – Kirchliche Autonomie

1 Sachverhalt

Eva Dudová und Zdeněk Duda übten seit dem 1. Februar 1993 den Priesteramt auf Grund zweier Ernennungsdekreten des Diözesanrates (*Diecézní rada*) in Pilsen (*Plzeň*) vom 28. Januar 1993 in der Tschechoslowakischen Hussitischen Kirche (*Církev československá husitská*) in den Städten Budweis (*České Budějovice*) und Křemž aus. Ihr Verhältnis zur Kirche wurde als Dienstverhältnis bezeichnet (*služební poměr*). Aber bereits noch in demselben Jahr (den 21. Juni, respektive den 1. Juli 1993) verlangten Eva Dudová und Zdeněk Duda die Beendigung ihres Dienstverhältnisses wegen schlechter Verhältnisse mit ihren Arbeitskollegen.

Der Diözesanrat der Tschechoslowakischen Hussitischen Kirche (*Diecézní rada Církve československé husitské*) konstatierte durch zwei Entscheidungen am 20. Juli 1993, dass Frau Dudová und Herr Duda bereits einen Monat früher, am 22. Juni Ihre Dienstwohnung verlassen hatten und seitdem auch ihre Dienstverpflichtungen nicht ausgeübt haben. Nach der Meinung des Diözesanrates endeten mit dem Tag der Verkündigung dieser zwei Entscheidungen des Diözesanrates an Frau Dudová und an Herr Duda ihre Dienstverhältnisse zu der Tschechoslowakischen Hussitischen Kirche.

Dem Diözesanrat der Tschechoslowakischen Hussitischen Kirche wurde gar nicht bewußt, dass die interne Dienstordnung (*Organizační řád*) der Tschechoslowakischen Hussitischen Kirche eine derartige Beendigung des Diensverhältnisses eines Geistlichen (Priester) überhaupt nicht kennt.

Nach der Dienstordnung der Tschechoslowakischen Hussitischen Kirche darf eine Kündigung des Dienstverhältnisses eines Priesters der Kirche nur der Zentralrat der Tschechoslowakischen Hussitischen Kirche (*Ústřední rada Církve československé husitské*) begutachten und darüber entscheiden.

2 Die erste Klage

Am 17. Januar 1994 reichten Frau Dudová und Herr Duda (weiter als „Beschwerdeführer“) eine Klage gegen den Erzbischof der Geistlichen Verwaltung der

Diözese der Tschechoslowakischen Hussitischen Kirche (*Duchovní správa diecéze Církve československé husitské*), mit dem Sitz in Pilsen (*Plzeň*), mit dem sie die Nichtigerklärung der Entscheidungen des Diözesanrates vom 20. Juli 1993 (über die Beendigung ihres Dienstverhältnisses) *ex tunc* verlangten, ein. Die Beschwerdeführer klagten außerdem auch auf den entgangenen Verdienstentgang (37.380 tschechische Kronen – CZK, respektive 35.980 CZK).[1]

Das Bezirksgericht in Pilsen (*Okresní soud v Plzni*) lehnte jedoch die Klage am 8. September 1994 ab. Der Grund dafür war, dass nach der Ansicht des Bezirksgerichtes die Kläger das falsche Subjekt klagten, da der Erzbischof nicht die Partei im Verfahren sein konnte, gerade deshalb, weil die Kläger nicht im Dienstverhältnis zum Erzbischof gestanden haben.[2]

Am 28. März 1995 hob aber das Landesgericht in Pilsen (*Krajský soud v Plzni*) die Entscheidung des Bezirksgerichtes in Pilsen vom 8. September 1994 auf und entschied selbst über die Klage der Beschwerdeführer.

Der Grund dafür war die Satzung des § 7 der Zivilprozessordnung (ZPO) der Tschechischen Republik (*Občanský soudní řád*) und das Gesetz Nummer 308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften mit dem Titel „Zuständigkeit der Gerichte" (*Pravomoc*):

„Im Zivilprozessverfahren verhandeln und entscheiden die Gerichte Streitigkeiten und andere rechtliche Angelegenheiten, die aus zivilrechtlichen, arbeitsrechtlichen, familienrechtlichen und aus den handelsrechtlichen Verhältnissen hervorgehen, soweit nach dem Gesetz über sie nicht andere Organe verhandeln und entscheiden."[3]

Gerade der letzte Halbsatz war der Grund, warum das Landesgericht (*Krajský soud*) die Auffassung vertritt, dass Streitigkeiten zwischen Geistlichen der Kirche und der Kirche selbst aus der Zuständigkeit der Gerichte herausgenommen sind.

Das ist unter anderem auch durch das Gesetz Nr. 308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften[4] bekräftigt worden.[5] Relevant ist vor allem der § 5 und der § 7 des obengenannten Gesetzes. Der § 5 Abs. 2 besagt:

„(2) Die Kirchen und Religionsgemeinschaften verwalten ihre Angelengenheiten, vor allem bestellen sie eigene Organe und ihre (eigenen) Geistlichen und errichten Orden und andere Institute unabhängig von den staatlichen Organen[1]."[6]

Die Fußnote Nr. 1 bei diesem Absatz beruft sich auf das Verfassungsgesetz Nr. 23/1991 mit dem die Charta der Grundrechte und Grundfreiheiten eigeführt wurde.[7]

---

1 Zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností, § 7 Abs. 1 des ZPO (Občanský soudní řád – zákon číslo 99/1963 Sb.).

2 Ein Paradox – Geistliche werden in der Tschechischen Republik im überwiegenden Maße nicht für Arbeitnehmer gehalten. Und das obwohl gerade die Beendigung des Dienstverhältnisses eines Geistlichen zu den meist behandelten Streitfragen im Zusammenhang mit der kirchlichen Autonomie gehört. ŠTEFKO, M.: Skončení pracovního poměru u osob konajících duchovenskou činnost. In KROŠLÁK, D./MORAVČÍKOVÁ, M. (eds.): *Rozhodovacia činnosť súdov a náboženstvo.* Bratislava : Wolters Kluwer, 2015, S. 172.

3 Die Zivilprozessordnung (Občanský soudní řád – zákon číslo 99/1963 Sb.), § 7 Abs. 1.

4 Zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností.

5 An dieser Stelle muss man jedoch darauf hinweisen, dass das Gesetz nicht näher darauf eingeht, wer für einen Geistlichen zu halten ist und wer nicht. Der Inhalt des Begriffes „Geistlicher" wird also gerade durch die einzelnen Kirchen und Religionsgemeinschaften definiert und kann von Kirche zu Kirche (Religionsgemeinschaft) verschieden sein. ŠTEFKO, M.: op. cit. 2, S. 173.

6 Das Gesetz Nr. 308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften (zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností), § 5 Abs. 2.

7 Ústavní zákon č. 23/1991 Sb., kterým se uvozuje Listina základních práv a svobod.

Und weiter besagen § 7 Abs. 1, 2 und 3 Folgendes:

„(1) Personen, die die geistliche Tätigkeit ausüben, üben diese auf Grund der Beuftragung der Kirchen und Religionsgemeinschaften nach ihren internen Vorschriften und allgemein verbindlichen rechtlichen Vorschriften.[6]

(2) Die Kirchen und Religionsgemeinschaften beurteilen die Befähigung von Personen für die Ausübung geistlicher Tätigkeit und dem folgend legen sie (ihre Zuteilung) ihre Aufgabenverteilung und Zuständigkeiten fest.

(3) Die Kirchen und Religionsgemeinschaften bestellen nach ihren internen Vorschriften Personen, die die geistliche Tätigkeit ausüben und Religionslehrer, gegebenfalls für einen bestimmten Sprengel.“ [8]

Die Fußnote Nr. 6 bei dem Absatz 1 beruft sich auf das Arbeitsgesetz Nr. 65/1965.[9]

Schließlich zog das Landesgericht (*Krajský soud*) den Art. 16 Abs. 2 des Verfassungsgesetzes Nr. 23/1991, mit dem die Charta der Grundrechte und Grundfreiheiten eingeführt wurde[10] heran:

„(2) Die Kirchen und Religionsgemeinschaften verwalten ihre Angelengenheiten, vor allem bestellen sie ihre Organe, ihre Geistlichen[11] und errichten Orden und andere Institute unabhängig von den staatlichen Organen.“[12]

Diese Bestimmung ist weitgehend mit dem § 5 des Gesetzes Nr. 308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften[13] identisch. Da die Verwaltung der kirchlichen Angelegenheiten zum Privatrecht und nicht etwa zum öffentlichen Recht gehört, war auch die Verwaltungsgerichtsbarkeit ausgeschlossen.

Da also die II. Instanz – das Landesgericht in Pilsen (*Krajský soud v Plzni*) am 28. März 1995 zu dem Schluß kam, dass die Sache nicht in die Zuständigkeit der Gerichte fällt, erklärte sie die Entscheidung der I. Instanz – des Bezirksgerichtes in Pilsen (*Okresní soud v Plzni*) vom 8. September 1994 für nichtig, stellte das Verfahren ein und übergab es dem zuständigen Organ – dem Zentralrat der Tschechoslowakischen Hussitischen Kirche (*Ústřední rada Církve československé husitské*).

3 Die zweite Klage

Am 11. April 1995 klagten die Beschwerdeführer den Zentralrat der Tschechoslowakischen Hussitischen Kirche (*Ústřední rada Církve československé husitské*) beim Bezirksgericht für Prag 6 (*Obvodní soud pro Prahu 6*) an.

Die Beschwerdeführer forderten, dass der Zentralrat ihr Dienstverhältnis für nichtig erklärt und für sie die Bestätigung der abgearbeiteten Tage – das Anrechnungsblatt (*zápočtový list*) ausfertigt und diesen den Beschwerdeführern übergibt.

---

8 Das Gesetz Nr.308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften (zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností), § 7 Abs. 1, 2 und 3.

9 Zákoník práce č. 65/1965 Sb., ve znění pozdějších předpisů.

10 Ústavní zákon č. 23/1991 Sb., kterým se uvozuje Listina základních práv a svobod.

11 Diese Bestimmung ist so zu verstehen, dass nur die konkrete Kirche (Religionsgemeinschaft) selbst beurteilen kann, wer für einen Geistlichen zu halten ist. Denn der Geistliche ist eine Person die die Glaubensgemeinde nach der Lehre der Kirche geistlich führen soll. ŠTEFKO, M.: op. cit. 2, S. 174.

12 Charta der Grundrechte und Freiheiten (Listina základních práv a svobod), Art. 16.

13 Zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností.

Nach dem tschechischen Arbeitsgesetz ist die Ausfertigung eines Anrechnungsblattes nach der Kündigung eines Arbeitsverhältnisses oder Dienstverhältnisses eine der Bedingungen, um einen weiteren Arbeitsvertrag schließen zu können. Nach der Meinung von den Beschwerdeführern sollte ihren Antrag auf Beendigung ihres Dienstverhältnisses der Zentralrat der Tschechoslowakischen Hussitischen Kirche begutachten. Da über diese Angelegenheit der Diözesanrat der Tschechoslowakischen Hussitischen Kirche (*Diecézní rada Církve československé husitské*) entschied, kam es zu einer eindeutigen Verletzung des Art. 34 der Dienstordnung der Tschechoslowakischen Hussitischen Kirche (*Organizační řád Církve československé husitské*) in der damaligen Fassung (weil nämlich der Diözesanrat damals dazu nicht zuständig war).

Außerdem klagten die Beschwerdeführer auf Schadenersatz in der Form des Verdienstentganges (weil ihr Dienstverhältnis nicht rechtsgültig beendet wurde und sie keine Bestätigung der abgearbeiteten Tage bekamen, konnten sie ohne das Anrechnungsblatt (*zápočtový list*), kein anderes Dienstverhältnis oder Arbeitsverhältnis eingehen).

Einen Monat später, am 11. Mai 1995, erweiterten die Beschwerdeführer ihre Klage und forderten, dass das Bezirksgericht ihre Dienstverhältnisse (20. Juni 1993) *ex tunc* für nichtig erklärt.

Am 8. Januar 1996 stellte das Bezirksgericht für Prag 6 (*Obvodní soud pro Prahu 6*) das Verfahren ein und übergab das Verfahren dem Zentralrat der Tschechoslowakischen Hussitischen Kirche (*Ústřední rada Církve československé husitské*).

Das Gericht zitierte in der Begründung die Artikel 33 und 34 der Dienstordnung der Tschechoslowakischen Hussitischen Kirche: „Dem folgend beginnt das Dienstverhältnis des Geistlichen (in der Stellung eines Arbeitnehmers) durch deren Aufnahme durch den Zentralrat der Tschechoslowakischen Hussitischen Kirche. Das Dienstverhältnis beginnt mit dem Antritt an der Dienststelle bei den Organisationseinheiten der Kirche, die die Arbeigeber darstellen. Die Dienstordnung (Art. 34) kennt sechs Gründe der Beendigung[14] des Dienstverhältnisses:

[14] Vergleichsweise ermöglicht das Kanonische Recht (der Römisch-Katholischen Kirche) eine Priesteramtsenthebung (Kanon 192–195) und zwar durch ein Dekret der kompetenten Autorität aus schwerwiegenden Gründen (*gravis causa* – Kanon 193 §1), resp. eines gerechten Grundes (*iusta causa*) unter Einhaltung eines rechtmäßigen Vorgehens oder *ipso iure* durch das Eintreten der (sogenanntes *amotio*) beschriebenen Fälle (Kanon 194 §1) – 1) der Verlust des Klerikerstandes, 2) der öffentliche Abfall vom katholischen Glauben oder der Gemeinschaft der Kirche, 3) eine zivile Eheschließung (inklusive des Versuchs einer Eheschließung) der Geistlichen. In http://www.vatican.va/archive/DEU0036/__PQ.HTM (14. 8. 2015) HRDINA, A.: *Kanonické právo*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, 2011, S. 157–159 und NEMEC, M.: *Základy kánonického práva*. Bratislava–Trnava : Iura Edition, 2006, S. 75–77. Die Prozedur der Priesteramtsenthebung wird im Kanon 1740–1747 geregelt, wobei der Bischof zuständig ist. Hier kommt es auf eine schädliche oder unwirksame Wirkung des Priesterdienstes an, eine grobe Fahrlässigkeit ist nicht notwendig. Die Gründe werden im Kanon 1741 aufgelistet: „1. die Art des Handelns, das der Kirchengemeinschaft einen großen Schaden oder Trubel bringt, 2. eine Unerfahrenheit oder eine dauerhafte psychische oder physische Krankheit, 3. Verlust des guten Rufes, 4. eine grobe Vernachlässigung von Pflichten, 5° eine schlechte Verwaltung des Kirchenvermögens." In http://www.vatican.va/archive/DEU0036/__P6Z.HTM (14. 8. 2015) Weiters kann der Priester seines Amtes durch einen strafrechtlichen Akt (*privatio*) nach Kanon 196 enthoben werden (§ 1 – „Die Absetzung von Amt, als Strafe für eine Straftat, kann nur nach Maßgabe des Rechtes erfolgen"; § 2 – „Die Absetzung erlangt Rechtswirkung gemäß den Vorschriften der Canones des Strafrechts". In http://www.documentacatholicaomnia.eu/03d/1983-01-25,_Absens,_Codex_Iuris_Canonici,_GE.pdf (14. 8. 2015). Dieser Akt gehört zu Ordnungsstrafen (*poenae expiatoriae*) nach Kanon 1336 §1 Abs.2 („Entzug einer Vollmacht, eines Amtes, einer Aufgabe, eines Rechtes, eines Privilegs, einer Befugnis, eines Gunsterweises, eines Titels, einer Auszeichnung, auch wenn sie nur ehrenhalber verliehen wurde.") In http://www.vatican.va/archive/DEU0036/__P4Y.HTM (14. 8. 2015). *Codex Iuris Canonici/Kodex kanonického práva*. Praha : Zvon, 1994, S. 79, 80, 589, 763–767; HRDINA, A.: op. cit., S. 157–159 und NEMEC, M.: op. cit., S. 75–77.

1. die Entlassung,
2. den Verlust der Befähigung zur Ausübung des geistlichen Dienstes,
3. die Annahme einer Resignation,
4. den Abgang in den Ruhestand,
5. das Verlassen der Kirche und
6. den Tod."[15]

Nach dem Gesetz Nr. 308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften[16], als auch nach der Dienstordnung der Tschechoslowakischen Hussitischen Kirche (*Organizační řád Církve československé husitské*) beginnt das Dienstverhältnis eines Geistlichen mit keiner der Möglichkeiten, die im § 45 des Arbeitsgesetzes (*Zákoník práce*) genannt sind.

Die Geistlichen werden in den Dienst durch einen internen Akt des Organs der Kirche (der im Einklang mit der Dienstordnung der Kirche steht) bestellt. „Nach diesen Bestimmungen gibt es keine Zweifel, dass sich das Dienstverhältniss der Geistlichen zur Kirche ausschließlich nach der Dienstordnung und nicht nach dem Arbeitsgesetz richtet ... Das Eingreifen von der Seite des Staates würde eine Einschränkung der kirchlichen Zuständigkeiten darstellen und zwar in einer Situation, wo die Freiheit des Glaubens garantiert ist (...). Die gerichtliche Entscheidung über die Dauer des Dienstverhältnisses des Geistlichen in einer Kirche wäre ein unzulässiger Eingriff in die innere Autonomie der Kirche und in ihre Entscheidungsunabhängigkeit, die durch das Verfassunggesetz Nr. 23/1991, mit dem die Charta der Grundrechte und Grundfreiheiten eingeführt wurde[17], so wie auch durch das Gesetz Nr. 308/1991[18] über die Freiheit der Religion und die Stellung von Kirchen und Religionsgemeinschaften, garantiert ist." [19]

Die Beschwerdeführer legten gegen die Entscheidung des Bezirksgerichtes für Prag 6 (*Obvodní soud pro Prahu 6*) vom 8. Januar 1996 eine Berufung ein. Das Berufungsgericht in Prag (*Městský soud v Praze*) bestätigte aber am 30. April 1996 die Entscheidung der I. Instanz – d. h. die Entscheidung des Bezirksgerichtes für Prag 6 vom 8. Januar 1996.

4 Die Verfassungsbeschwerde bei dem tschechischen Verfassungsgerichtshof

Am 29. Juli 1996 reichten die Beschwerdeführer bei dem tschechischen Verfassungsgerichtshof in Brünn (*Ústavní soud v Brne*) eine Verfassungsbeschwerde (*ústavní stížnost*) ein. Die Beschwerdeführer verlangten, dass der Verfassungsgerichtshof die Enscheidung des Bezirksgerichtes für Prag 6 (*Obvodní soud pro Prahu 6*) vom 8. Januar 1996 und die Enscheidung des Berufungsgerichts in Prag (*Městský soud v Praze*) vom 30. April 1996 für nichtig erklärt.

Sie behaupteten, dass durch diese zwei Gerichtsentscheidungen ihre Rechte, die

15 Die Dienstordnung (Organizační řád) der Tschechoslowakischen Hussitischen Kirche, Art. 33 und 34.

16 Zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností.

17 Ústavní zákon č. 23/1991 Sb., kterým se uvozuje Listina základních práv a svobod.

18 Zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností.

19 Die Entscheidung des Verfassungsgerichthofes vom 26. März 1997 Nr. I.ÚS 211/96 (Nález ústavního soudu ze dne 26. března 1997 sp.zn. I.ÚS 211/96).

im Art. 26 Abs. 1 und 3 und des Art. 36 Abs. 1 und 2 der Charta der Grundrechte und Grundfreiheiten[20]verankert sind, verletzt wurden.

Der Verfassungsgerichtshof entschied über die Verfassungsbeschwerde am 26. März 1997. Bei der Beurteilung der Verfassungsbeschwerde befasste sich der Verfassungsgerichtshof erstmals von der formellen Seite her damit, ob die Beschwerdeführer die Frist für die Einreichung der Verfassungsbeschwerde eingehalten haben. Der Verfassungsgerichtshof kam zum Schluß, dass die Frist von 60 Tagen, gerechnet von dem Tag nach dem die Enscheidung des Berufungsgerichtes (*Městský soud v Praze*) von dem 30. April 1996 den Beschwerdeführern übermittelt wurde, für die Einreichung der Verfassungsbeschwerde gemäß § 72 Abs. 3 des Gesetzes Nr. 182/1993 Sb. über den Verfassungsgerichtshof der Tschechischen Republik[21] eingehalten wurde.

Dann befasste sich der Verfassungsgerichtshof mit der Beurteilung der Nichtigkeit der Lösung der Diensverhältnisse der Beschwerdeführer. Der Verfassungsgerichtshof kam zu dem Schluß (zu dem gleichen, wie übrigens auch das Berufungsgericht in Prag den 30. April 1996), dass gemäß des Art. 16 Abs. 2 der Charta der Grundrechte und Grundfreiheiten[22] die Kirchen ihre Angelegenheiten selbst verwalten, vor allem bestellen sie ihre eigenen Geistlichen, sowie auch ihre eigenen Institutionen und zwar unabhängig von den staatlichen Organen.[23]

Der Verfassungsgerichtshof zog auch den § 7 Abs. 1 und 2 des Gesetzes Nr. 308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften in Betracht. Nach diesen Bestimmungen üben Personen die geistliche Tätigkeit in der Ermächtigung der Kirchen und Religionsgemeinschaften nach deren internen Vorschriften aus, auch sind es die Kirchen, die die Fähigkeit von Personen zur geistlichen Tätigkeit beurteilen. Deshalb war auch die Einstellung der Gerichte, über die Diensttätigkeit nicht zu entscheiden, richtig, da es sich um einen unzulässigen Eingriff in die Autonomie der Kirche handeln würde.

Als Folge wies der Verfassungsgerichtshof die Verfassungsbeschwerde in der Sache der Feststellung der Nichtigkeit der Lösung des Dienstverhältnisses der Beschwerdeführer ab.

In der Sache des Entschädigungsanspruches – bei der Forderung auf Verdienstentgang (*uplatnění náhrady mzdy*) war der Verfassungsgerichtshof (*Ústavní soud*) jedoch einer anderer Meinung als das Bezirksgericht für Prag 6 (*Obvodní soud pro Prahu 6*) und das Berufungsgericht in Prag (*Městský soud v Praze*).

Wir sehen also, dass sich hier insoweit die Entscheidung des Verfassungsgerichtshofes spaltet. Denn – in der Sache des Verdienstentganges, gegebenfalls auch in anderen Vermögensansprüchen, handelt es sich nicht mehr um einen Eingriff in die innere

---

20 Listina základních práv a svobod.

21 Zákon č. 182/1993 Sb. o Ústavním soudu.

22 Listina základních práv a svobod.

23 In der Literatur ist das Einfügen dieser Bestimmung in die Liste der Grundfreiheiten kritisiert worden, da dieses Recht selbst eine nicht eindeutige Charakteristik aufweist – auf der einen Seite könnte man dieses Recht als einen Ausdruck der Kollektivrechte der Bürger auf Ausübung ihres Glaubens deuten, auf der anderen Seite kann man diese verfassungsrechtliche Verankerung auch als ein besonderes *favor religionis* im Sinne einer Bevorzugung des Verfassungsgesetzgebers hinsichtlich der individuellen und kollektiven Ausübung der Religion im Staat betrachten. Die Bestimmung selbst weist keinen klaren Inhalt hinsichtlich der kirchlichen Autonomie im Zusammenhang mit dem sekulären (staatlichen) Recht auf, weswegen hier gerade die Auslegung durch den (Tschechischen) Verfassungsgerichtshof zum Tragen kommt. PŘIBYL, S.: Vnitrocírkevní autonomie v rozhodování ústavních soudů České republiky a Slovenské republiky o služebním poměru duchovních. In *Revue církevního práva 30* (1/05), S. 41. https://www.yumpu.com/sk/document/view/24585689/revue-cirkevniho-prava-church-law-review-spolecnost-pro-cirkevni- (14. 8. 2015).

Autonomie der Kirche und ihrer Entscheidungsbefugnis. Hier kommt der privatrechtliche Charakter der Kirche in der Gestalt einer juristischen Person in den Vordergrund.

Die Kirche als eine juristische Person hat also entweder Verpflichtungen, oder hat keine Verpflichtungen gegenüber Dritten – d. h. gegen andere physische oder juristische Personen. Diese Personen nehmen die gleiche Stellung vor dem Gesetz ein.

Nach § 7 der Zivilprozessordnung (*Občanský soudní řád – zákon číslo 99/1963 Sb.*) verhandeln und entscheiden die Gerichte im Zivilprozessverfahren Sachen, die sich aus zivilrechtlichen, arbeitsrechtlichen und anderen Beziehungen ergeben. Deshalb müssen die Gerichte in diesen Angelegenheiten nach Zustellung von rechtlichen Unterlagen von den Prozessparteien beurteilen, ob sie das Bürgerliche Gesetzbuch (*Občanský zákoník*), oder das Arbeitsgesetzbuch – siehe § 7 Abs. 1 des Gesetzes Nr. 308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften anwenden und dann müssen sie in der Sache entscheiden :

„(1) Personen, die die geistliche Tätigkeit ausüben, üben diese auf Grund der Beuftragung der Kirchen und Religionsgemeinschaften nach ihren internen Vorschriften und allgemein verbindlichen rechtlichen Vorschriften aus."[24]

Die Fußnote Nr. 6 bei dem Absatz 1 beruft sich auf das Arbeitsgesetz Nr. 65/1965[25].

Kurz gesagt, erklärte der Verfassungsgerichtshof die Enscheidung des Bezirksgerichts für Prag 6 (*Obvodní soud pro Prahu 6*) vom 8. Januar 1996, sowie auch die Entscheidung des Berufungsgerichtes (*Městský soud v Praze*) vom 30. April 1996 für nichtig.

5 Das Verfahren nach der Entscheidung des Verfassungsgerichtshofes

Nach der Entscheidung des Verfassungsgerichtshofes (*Ústavní soud*) vom 26. März 1997 befasste sich mit dem Fall erneut das Bezirksgericht für Prag 6 (*Obvodní soud pro Prahu 6*).

Am 8. Januar 1998 wies das Bezirksgericht für Prag 6 (*Obvodní soud pro Prahu 6*) die Klage der Beschwerdeführer ab. Die Beschwerdeführer forderten mit dieser Klage von dem Zentralrat der Tschechoslowakischen Hussitischen Kirche (*Ústřední rada Církve československé husitské*) auf Grund des Verdienstentganges die Auszahlung von 423.388 CZK und 407.765 CZK samt Zinsen.

Am 16. Juni 1998 erklärte das Berufungsgericht (*Městský soud v Praze*) die Enscheidung des Bezirksgerichtes für Prag 6 für nichtig und hat den Rechtsstreit für eine neue Entscheidung dem Bezirksgericht für Prag 6 (*Obvodní soud pro Prahu 6*) abgetreten.

Das Bezirksgericht für Prag 6 ordnete am 26. Februar 1999 dem Zentralrat der Tschechoslowakischen Hussitischen Kirche an, dass dieser den Beschwerdeführern die Summen von 118.480 CZK samt Zinsen und 114.080 CZK samt Zinsen auf Grund des Verdienstentganges vom 20. Juli 1993 bis zum 30. April 1995 auszahlen soll.

Das Bezirksgericht für Prag 6 legte fest, dass die Tschechoslowakische Hussitische Kirche ihre eigene Dienstordnung, in der über die Beendigung des Diensverhältnisses der Beschwerdeführer, die als Geistliche (Priester) in der Kirche tätig waren, nicht der Zentralrat der Tschechoslowakischen Hussitischen Kirche, sondern der Diözesanrat entschied, verletzte.

[24] Das Gesetz Nr.308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften (zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností), § 7 Abs. 1.

[25] Zákoník práce č. 65/1965 Sb., ve znění pozdějších předpisů.

Allerdings wies das Bezirksgericht für Prag 6 darauf hin, dass die Beschwerdeführer nur vom 20. Juli 1993 bis zum 30. April 1995 ein Recht auf Verdienstentgang haben, da sie nach der Erhaltung des Anrechnungsblattes (*zápočtový list*) ein neues Arbeitsverhältnis eingehen konnten (das Anrechnungsblatt wurde am 15. April 1995 ausgefertigt). Die Enscheidung des Bezirksgerichtes für Prag 6 vom 26. Februar 1999 bestätigte in der Folge das Berufungsgericht in Prag (*Městský soud v Praze*) am 24. September 1999.

6 Die Beschwerde bei dem EGMR

Mit der Entscheidung des Berufungsgerichtes in Prag von dem 24. September 1999 wollten sich aber anscheinend Eva Dudová mit Zdeněk Duda nicht zufrieden geben, denn sie haben beide eine Beschwerde gegen die Tschechische Republik beim Gericht für Menschenrechte in Strassburg eingereicht.

Die Beschwerdeführer haben sich über die Verletzung ihres Rechtes des Zuganges zu den Gerichten (gestützt auf Art. 6 Abs. 1 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten – EMRK) beschwert. Sie haben eine Einwendung in dem Sinne erhoben, dass sich die allgemeinen Gerichte, so wie auch der Verfassungsgerichtshof, nicht mit der Frage der Gültigkeit der Beendigung ihres Dienstverhältnisses befasst haben.

Der Europäische Gerichtshof für Menschenrechte (*La Cour européenne des Droits de l'Homme*) tagte über die Beschwerde am 30. Januar 2001.

In der vorläufigen Beurteilung (*à titre préliminaire*) fand der Europäische Gerichtshof für Menschenrechte (EGMR) für notwendig zu bestimmen, ob tschechische Gerichte über eine Streitigkeit entschieden, die auf einem verteidigungsbaren, nationalen (innerstaatlichen – tschechischen) Recht im Sinne des Art. 6 Abs. 1 EMRK fußte.

Der Europäische Gerichtshof für Menschenrechte zitierte in der Folge seine eigene Judikatur: „Der Gerichtshof errinnert in diesem Sinne, dass der Art. 6 Abs. 1 nicht zum Ziel hat, neue materielle Rechte, die keine gesetzlichen Grundlagen im betreffendem Staat haben, zu schaffen, sondern (nur) einen prozessualen Schutz den Rechten, die in innerstaatlicher Gesetzbegung annerkannt sind, zu gewährleisten ... Es [der Artikel 6 der EMRK] verwaltet nur Streitigkeiten, die sich auf Rechte und Verpflichtungen von einem zivilrechtlichen Charakter beziehen, die verteidigungsbar und in dem nationalen (innerstaatlichen) Recht annerkannt sind. Dieser Artikel garantiert nicht Rechte und Verpflichtungen vom prozessualen Charakter, die keinen materiellen Inhalt haben und die in der Gesetzgebung der Vertragsstaatten nicht verankert sind. Der Ausgang des Verfahrens muss unmittelbar determinierbar für das fragliche Recht sein. Der Gerichtshof hat (schon) immer gemeint, dass eine engere Verbindung oder weite Reflexionen für die Geltendmachung des Art. 6 Abs. 1 EMRK unzureichend seien."[26]

Weiter konstatierte der Gerichtshof in Strassburg, dass die Beschwerdeführer, die durch die Entscheidung des Diözesanrates ohne jede Einmischung des Staates entlassen wurden, vor den nationalen Gerichten den Einspruch erhoben haben, dass die Beendigung ihres Dienstverhältnisses ungültig war. Der Grund dafür war, dass über die Beendigung des Dienstverhältnisses der Beschwerdeführer ein unzuständiges Organ der Tschechoslowakischen Hussitischen Kirche (*Církev československá husitská*) entschied.

[26] Die Entscheidung des EGMR Nr.40224/98 Dudová & Duda contre la République tchèque.

Die Beschwerdeführer verlangten weiter einen Schadenersatz, dem in der Folge stattgegeben wurde. Deshalb war es nach der Meinung des Europäischen Gerichtshofes notwendig zu berurteilen, ob man das Recht auf Untersuchung der Gültigkeit der Beendigung des Dienstverhältnisses der Beschwerdeführer für ein materielles Recht in der innerstaatlichen Gesetzgebung halten kann.

Die erste Klage der Beschwerdeführer gegen den Erzbischof von Pilsen (*arcibiskup duchovní správy diecéze Církve československé husitské z Plzně*) endete durch die Entscheidung des Landesgerichtes in Pilsen (*Krajský soud v Plzni*), dass es unzuständig sei, da Streitigkeiten zwischen Kirchen und Geistlichen von der Zuständigkeit der Zivilgerichten ausgeschlossen sind.[27] Denn: „...eine Entscheidung der Gerichte über die Existenz einer Dienstentlassung zwischen einem Geistlichen und einer Kirche würde einen unzulässigen Eingriff in die interne Autonomie der Kirche bedeuten, sowie auch ihre Entscheidungsunabhängigkeit, wodurch der Art. 16 Abs. 2 der Charta der Grundrechte und Freiheiten (*Listina základních práv a svobod*) verletzt wäre."[28]

Die zweite Klage der Beschwerdeführer richtete sich dann gegen den Zentralrat der Tschechoslowakischen Hussitischen Kirche (*Ústřední rada Církve československé husitské*). Diese Klage wurde sowohl vom Bezirksgericht für Prag 6 (*Obvodní soud pro Prahu 6*), als auch vom Berufungsgericht (*Městský soud v Praze*) abgewiesen. Vor allem wurde hervorgehoben, dass die Dienstverhältnisse der Geistlichen ausschließlich durch die Dienstordnung (*Organizační řád*) geregelt sind und dass das Arbeitsgesetzbuch nicht zur Anwendung kommt. Das Dienstverhältnis beginnt durch einen internen Akt des Organs, das nach der Dienstordnung für die Zulassung zum Dienstverhältnis zuständig ist. Nach der Meinung beider Gerichte wäre es ein unzulässiger Eingriff in die interne Autonomie der Kirche und ihrer Entscheidungsbefugnis, über die Beendigung des Dienstverhältnisses des Geistlichen mit der Kirche zu entscheiden (wie schon oben detailliert dargestellt wurde).

Der Verfassungsgerichtshof bestätigte dies auch in der Folge. Das Bezirksgericht für Prag 6 und das Berufungsgericht (*Městský soud v Praze*) konstatierten bei der Beurteilung des Verdienstentganges, dass die Tschechoslowakische Hussitische Kirche (*Církev československá husitská*) in der Sache ihre eigenen Vorschriften – die Dienstordnung (*Organizační řád*) verletzte, nämlich, dass an der Stelle des Zentralrates (*Ústřední rada*) der Diözesanrat (*Diecézní rada*) das Dienstverhältnis der Beschwerdeführer beendete.

Jedoch betrafen diese Feststellungen keinesfalls die Unzuständigkeit der tschechischen Gerichte, die über die Gültigkeit oder Nichtigkeit der Beendigung des Dienstverhältnisses der Beschwerdeführer nicht entscheiden durften, weil es sich um Geistliche (Priester) der Tschechoslowakischen Hussitischen Kirche (*Církev československá husitská*) handelte.

Deshalb meinte auch das Europäische Gericht für Menschenrechte: „Deswegen war der Art. 6 Abs. 1 EMRK auf das betreffende Verfahren nicht anwendbar. Also muss dieser Teil der Beschwerde abgewiesen werden als unvereinbar mit dem Prinzip *ratione materiae* bei Anwendungen der Bestimmungen des Artikels 35 Abs. 3 und 4 EMRK".[29]

Die Beschwerdefürer haben weiters die Verletzung der Art. 4 Abs. 2, Art. 9 und Art. 14 EMRK geltend gemacht, die durch die Entscheidung der nationalen (tschechischen) Gerichte nach der Meinung der Beschwerdeführer verletzt worden waren. Der EGMR hat

[27] § 5 Abs. 2 und § 7 des Gesetzes Nummer 308/1991 über die Freiheit der Religion und der Stellung von Kirchen und Religionsgemeinschaften (zákon č. 308/1991 Sb. o svobodě náboženské víry a postavení církví a náboženských společností).

[28] Die Entscheidung des EGMR Nr.40224/98 Dudová & Duda contre la République tchèque.

[29] Ibid.

sich mit diesem zweiten Teil der Beschwerde nicht mal befasst und wies auf den Art. 35 Abs. 1 EMRK hin:

„Der Gerichtshof kann sich mit einer Angelegenheit erst nach Erschöpfung aller innerstaatlichen Rechtsbehelfe in Übereinstimmung mit den allgemein anerkannten Grundsätzen des Völkerrechts und nur innerhalb einer Frist von sechs Monaten nach der endgültigen innerstaatlichen Entscheidung befassen."[30] Die Regel der Ausschöpfung sämtlicher innerstaatlicher Rechtsmittel dient dazu, dem betreffenden Staat noch bevor sich der Beschwerdeführer an ein internationales Gericht wendet, eine Möglichkeit zu geben, durch innerstaatliche Mittel Verletzungen zu vermeiden, zu beheben, wiedergutzumachen (und dem EGMR die Arbeit zu sparen). Die einzige Einschränkung sei, dass die Rechtsmittel wirkungsvoll und ausreichend sein müssen („*efficaces et suffisantes*").[31]

Der EGMR bemerkte weiter, dass die EMRK als Teil der tschechischen Gesetzgebung gar den Vorrang genießt, ergo die Art. 4, 9, 14 EMRK unmittelbar anwendbar sind.

Die Beschwerdeführer beriefen sich aber vor den tschechischen Gerichten weder auf die Art. 4, 9, 14 EMRK noch auf die Art. 3, 9, 15, 16 der Charta der Grundrechte und Grundfreiheiten (*Listina základních práv a svobod*). Die Beschwerdeführer stützten ihre Beweisführung vor den tschechischen Gerichten auf der Verletzung des Art. 26 Abs. 1 und Abs. 3 und des Art. 36 Abs. 1 und Abs. 2 der Charta der Grundrechte und Grundfreiheiten (*Listina základních práv a svobod*). Letztendlich führte der EGMR auf, dass zwar die tschechischen Gerichte die EMRK *ex offo* anwenden sollten, was jedoch nach seiner Judikatur die Beschwerdeführer der Pflicht nicht befreite, vor den tschechischen Gerichten die EMRK ins Auge zu führen und so die Aufmerksamkeit auf ihr Problem zu lenken.

Der EGMR beendete schließlich den Fall mit dem Aufsatz: „Wegen dieser Umstände nimmt der Gerichtshof (EGMR) an, dass die Beschwerdeführer nicht die Voraussetzung betreffend der Ausschöpfung der innerstaatlichen Rechtsmittel erfüllt haben und dass dieser Teil der Beschwerde nach dem Art. 35 Abs. 1 und 4 der EMRK zurückgewiesen sein muss. Wegen dieser Gründe erklärt der Gerichtshof mit der Mehrheit der Stimmen die Beschwerde für unzulässig."[32]

[30] Die Konvention zum Schutze der Menschenrechte und Grundfreiheiten abgeschlossen in Rom am 4. November 1950 in der Fassung des Protokolls Nr. 11 in Kraft getreten am 1. November 1998, Art. 35 Abs. 1.

[31] In der Literatur ist das Verlangen nach der Ausschöpfung sämtlicher Rechtsmittel kritisiert worden, denn im Fall, wo die kirchliche Autonomie zum Tragen kommt, sind außer den weltlichen Gerichten auch die kirchlichen Gerichte zuständig, wobei die sekulären Gerichte wohl kaum feststellen können, ob die Beschwerdeführer auch sämtliche Rechtsmittel bei den kirchlichen Gerichten ausgeschöpft haben, da sie ausschließlich das sekuläre Recht und nicht etwa z.B. das Kanonische Recht anwenden dürfen. Insofern ergibt sich daraus eine paralelle Zuständigkeit der weltlichen und kirchlichen Gerichte, wobei die Zuständigkeit der sekulären Gerichte auf Grund der kirchlichen Autonomie ziemlich eingeschränkt ist. Dementsprechend gibt es Meinungen, die verlangen, dass sich Rechtsstreite hinsichtlicich der Beendigung eines Deinstverhältnisses eines Geistlichen vor den zuständigen kirchlichen Gerichten abspielen sollten. Q.v. PŘIBYL, S.: op. cit. 23, S. 51. In diesem Sinne bestimmt auch das kanonisches Recht im Canon 221 – § 1 : „Den Gläubigen steht es zu, ihre Rechte, die sie in der Kirche besitzen, rechtmäßig geltend zu machen und sie nach Maßgabe des Rechts vor der zuständigen kirchlichen Behörde zu verteidigen." In *Der Codex des kanonischen Rechts*. In http://www.documentacatholicaomnia.eu/03d/1983-01-25,_Absens,_Codex_Iuris_Canonici,_GE.pdf (14. 8. 2015).

[32] Die Entscheidung des EGMR Nr. 40224/98 Dudová & Duda contre la République tchèque.

Zusammenfassung

Die Beschwerdeführer verfolgten ihr Recht zuerst vor den innerstaatlichen Gerichten, dann auch vor dem Tschechischen Verafssungsgerichtshof.

Zuletzt klagten sie vor dem EMGR, der sich mit einer behaupteten Verletzung der Art.6 (Recht auf einen fairen Prozess), Art.6 Abs.1 (Zivilverfahren), Art.35 (Zulässigkeitskriterien) und Art.35 Abs.1 (die Ausschöpfung der innerstaatlichen Rechtsmittel) befassen musste.

Dieser Fall zeigte auch die Schwierigkeiten der Feststellung der Rechte, die als zivile Rechte noch in den Schutz des Art. 6 EMRK hineinkommen. Zugleich wurde auf den Rest hingewiesen, der den Schutz des Art.6 nicht genießt.[33]

Denn nach der Judikatur des EGMR wird der Art.6 Abs.1 so ausgelegt, dass keine neuen materiellen Rechte geschaffen werden können, sondern es sollen nur die Rechte prozessrechtlich geschützt werden, die bereits in der innerstaatlichen Gesetzgebung anerkannt sind.

Der Art.6 EMRK bezieht sich insofern nur auf zivilrechtliche Streitigkeiten, die erstens verteidigungsbar und zweitens auch innerstaatlich anerkannt sind.

Ausgeschlossen sind prozessuale Rechte und Verpflichtungen, die in der nationalen Gesetzgebung keine Grundlage haben.[34]

In der Literatur wurde allerdings die Zurückweisung der Beschwerde durch das Gericht auch als eine Art Verweigerung des EGMR, sich zu der durchaus delikaten Frage der Verhältnisse zwischen dem Staat und Kirche zu äußern, gewertet.[35]

Der Rechtsstreit Eva Dudová & Zdeněk Duda v. Tschechische Republik stellt ein wichtiges Beispiel eventueller Konflikte dar, die immanent mit der Ko-existenz der Kirchengemeinschaften und des Staates selbst verbunden sind.

Die Kirchen haben Ihr Recht auf Autonomie und zwar unabhängig vom Staat und seiner Organe.

Die Autonomie ist dabei ein wichtiges Merkmal der Religionsgemeinschaften, denn sonst würde der Staat in den religiösen Bereich eindringen.[36]Diese Gefahr des Einmischens des Staates in den religiösen Bereich ist auch in der Literatur betont worden.[37]

Auf der anderen Seite stellt sich die Frage des Schutzes der Menschenrechte innerhalb solcher autonomer Organe – der Kirchen, wo eben der Einfluss des Staates stark begrenzt zu sein scheint.

Das schwierige Finden eines gerechten Weges zwischen diesen zwei Kreisen – die für sich selbst Schutz in Anspruch nehmen – die kirchliche Autonomie einerseits und der Schutz des Einzelnen innerhalb dieser autonomen Strukturen andererseits, wird zweifellos eine Herausforedrung für die Gesetzgebung und die Judikatur der Verfassungsgerichte und des EGMR auch für die nächste Jahrzente darstellen.

---

33 ENGLISH, R.: *Duda v Czech Republic*. Human Rights & Public Law Update. http://www.1cor.com/1315/?form_1155.replyids=546 (7. 7. 2015).

34 Die Entscheidung des EGMR Nr.40224/98 Dudová & Duda contre la République tchèque.

35 ENGLISH, R.: op. cit. 33.

36 ECLJ – European Centre for Law and Justice. Sindicatul Pastorul cel bun c. Roumanie (n° 2330/09) – Observations de l'ECLJ pour la Grande Chambre. eclj.org/pdf/observations-eclj-gc-s-p-c-roumanie.pdf (7. 7. 2015), S. 2.

37 ŠTEFKO, M.: op. cit. 2, S. 187.

Súhrn

Eva Dudová & Zdeněk Duda versus Česká republika

Článok si dal za úlohu analyzovať významný precedens Dudová a Duda proti Českej republike, ktorý výrazne ovplyvnil právne myslenie v oblasti ochrany základných ľudských práv, a to ako na vnútroštátnej, tak i na európskej úrovni ochrany ľudských práv.

Cirkvi požívajú autonómne práva v štáte. Právny konflikt nastal v momente, keď sa jednotlivci domáhali ochrany svojich práv, pričom sa však súdy pri samotnom posudzovaní žalôb dostali do konfliktu práve s autonómnosťou cirkví.

Obrátili sa teda na Ústavný súd ČR.

Keďže zalobcom nebolo vyhovené v plnej miere, obrátili sa na Európsky súd pre ľudské súdy v Štrasburgu, ktorý im však nevyhovel.

Analyzovaný prípad je súčasťou významných precedensov case-law Štrasburského súdu.

Bibliografie

a) Judikatur

Cour européenne des Droits de l'Homme (troisième section) – Décision sur la recevabilité de la requête n° 40224/98 présentée par Eva DUDOVÁ & Zdeněk DUDA contre la République tchèque, www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/;

Rozhodnutí Evropského soudu pro lidská práva ve věci E. Dudová a Z. Duda proti České republice (přeložil T. Zadražil). In *Revue církevního práva*. Revue církevního práva 20 (3/01);

Nález Ústavního soudu České republiky ze dne 26. března 1997, sp. zn. I. ÚS 211/96, publikován ve Sb. n. a u. ÚS, svazek 7, pod č. 34, p. 227.

b) Gesetze, internationale Verträge

Codex des kanonischen Rechts. In http://www.vatican.va/archive/DEU0036/_INDEX.HTM *(*14. 8. 2015);

Der Codex des kanonischen Rechts. In

http://www.documentacatholicaomnia.eu/03d/1983-01-25,_Absens,_Codex_Iuris_Canonici,_GE.pdf (14. 8. 2015);

Codex Iuris Canonici/Kodex kanonického práva. Praha: Zvon, 1994. 812 p. ISBN 80-7113-082-6;

Usnesení České národní rady č. 2/1993 Sb., o vyhlášení LISTINY ZÁKLADNÍCH PRÁV A SVOBOD jako součásti ústavního pořádku České republiky, Sbírka zákonů České republiky, částka 1/1993, p. 17;

Zákon č. 99/1963 Zb. v znení neskorších predpisov – Občiansky súdny poriadok (Fassung vom 1. 1.1996);

Zákon č. 308/1991 Zb. o slobode náboženskej viery a postavení cirkví a náboženských spoločností (Fassung vom 1. 1.1996);

Zákonník práce – zák. č. 65/1965 Zb. v znení neskorších predpisov (Fassung vom 1. 1. 1993);

Die Konvention zum Schutze der Menschenrechte und Grundfreiheitenabgeschlossen in Rom am 4. November 1950 in der Fassung des Protokolls Nr. 11in Kraft getreten am 1. November 1998. www.echr.coe.int/Documents/Convention_DEU.pdf (17. 8. 2015).

c) Literatur

COUGHLIN, J. J.: *Canon Law*. New York : Oxford University Press, 2011. 226 p. ISBN 978-0-19-537297-7;

ENGLISH, R.: *Duda v Czech Republic*. Human Rights & Public Law Update. http://www.1cor.com/1315/?form_1155.replyids=546 (7. 7. 2015);

HRDINA, A.: *Kanonické právo*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, 2011. 367 p. ISBN 978-80-7380-152-6;

KROŠLÁK, D./MORAVČÍKOVÁ, M. (eds.): *Rozhodovacia činnosť súdov a náboženstvo.* Bratislava : Wolters Kluwer, 2015. 189 p. ISBN 978-80-8168-181-3;

NEMEC, M. *Základy kánonického práva*. Bratislava–Trnava : Iura Edition, 2006. 249 p. ISBN 80-8078-130-3;

PŘIBYL, S.: Vnitrocírkevní autonomie v rozhodování ústavních soudů České republiky a Slovenské republiky o služebním poměru duchovních. In *Revue církevního práva 30* (1/05), p. 40–59. https://www.yumpu.com/sk/document/view/24585689/revue-cirkevniho-prava-church-law-review-spolecnost-pro-cirkevni- (14. 8. 2015);

SVÁK, J.: *Ochrana ľudských práv v troch zväzkoch*. Bratislava : Eurokódex, 2011. 1.zväzok. 520 p. ISBN 978-80-89447-44-2;

SVÁK, J.: *Ochrana ľudských práv v troch zväzkoch*. Bratislava : Eurokódex, 2011. 2.zväzok. 624 p. ISBN 978-80-89447-45-9;

SVÁK, J.: *Ochrana ľudských práv v troch zväzkoch*. Bratislava : Eurokódex, 2011. 3.zväzok. 592 p. ISBN 978-80-89447-46-6;

SVÁK, J.: *Ochrana ľudských práv v troch zväzkoch*. Bratislava : Eurokódex, 2011. Príloha. 168 p. ISBN 978-80-89447-43-5.

d) Weitere Quellen im Internet

ECLJ – European Centre for Law and Justice. Sindicatul Pastorul cel bun c. Roumanie (n° 2330/09) – Observations de l'ECLJ pour la Grande Chambre.
In www.eclj.org/pdf/observations-eclj-gc-s-p-c-roumanie.pdf (7. 7. 2015);

COUNCIL OF EUROPE/EUROPEAN COURT OF HUMAN RIGHTS. Guide on Article 6. 2013. In http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c= (7. 7. 2015);

COUNCIL OF EUROPE/EUROPEAN COURT OF HUMAN RIGHTS (Research Division/Division de la recherche). Overview of the Court´s Case Law on freedom of religion. 2011, 2013. In http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c= (7. 7. 2015);

http://spcp.prf.cuni.cz/judikat/es-duda.htm (14. 8. 2015);

http://www.ccsh.cz/view.php?id=338 (7. 7. 2015);

http://www.usoud.cz/pruvodce-rizenim-o-ustavni-stiznosti/ (14. 8. 2015);

http://www3.mkcr.cz/cns_internet/ (14. 8. 2015).

Vojtech Vladár

The Contribution of Christianity to the Development of European Legal Culture[1]

Abstract: As is generally known, since the Age of Reason at the latest, scientists as well as the lay community have markedly ascribed to the notion doubting the contribution of Christianity to the development of mankind as a whole, a notion that has also been applied in the area of legal science or in jurisprudence as such. The main reason for this could be found in the wide secularization of human society, when the values that were successfully protected by Christian morality, either in natural or positive Divine law, were supplanted by temporal values. Nevertheless, the influence of the Catholic Church and its moral-legal rules that had lasted for centuries could not be erased entirely, not even in more recent periods, and its stamp is still evident in the law of the European states. Since this question is broadly discussed by several legal historians or scientists dealing with positive law, it remains highly topical. Theological-legal concepts, norms of Canon Law and its postulates, norms and principles of Roman Law included, which became a solid part of the common law system (*ius commune*), can not be marked as the reality of positive law in the Middle Ages alone, since first and foremost they represent a perfect system of legal thinking, and an inexhaustible source of authentic values at the same time. We can therefore legitimately highlight the credit of the concepts of Canon Law, which lies especially in the continuous provision of important conceptual bases for historical legal institutions that have influenced various concepts of positive law. Moreover, it is not appropriate to forget the fact that the historical norms or positive law examples of respected civil codes, to which several historical legal institutions were related, have influenced and still influence the legal systems of states around the whole world, namely by means of acceptance as a whole, or otherwise through inspiration by their principles or institutions.

Key words: Canon Law – Roman Law – legal science – Church judicial system – *ius commune* – Middle Ages – Modern Times – transformation – codifications – positive law

Introduction

The negotiation of the Peace of Westphalia (*Westfälischer Friede*, 1648) and the end of the Thirty Years' War (1618–1648), which was waged on religious grounds, started the process of great secularization of Europe, and this term has been used since that time exactly. It culminated especially in the 19th century, and in the present times it is reaching another imaginary peak. Besides religious wars themselves, the representatives of the Age of Reason assisted this process markedly, doubting everything supernatural, and denying the status and influence of the Catholic Church, which had been unequivocally respected until then. These tendencies also affected Canon Law, which along with Roman Law still dominated legal science and practice, adumbrating the next legal development on the European continent in a determining way. Within this context we can definitely mention the "Roman-Canonical Process" in particular, which represented practically the most important and most influential part of the system of *ius commune*. In medieval society this became one of the most important factors that overcame the judicial customs of the past, and by its perfection and precision influenced to a great extent the form of procedural law in all European legal systems, including the Anglo-American. Apart from its qualities, the exceptionally solid status of the Catholic Church and its close interconnection with

[1] This paper is the output of the VEGA research project entitled "*Teológia a právo – Prínos kresťanstva k rozvoju európskej právnej kultúry*", registered under number 1/0495/11.

whole of medieval society, whose form was practically determined by the Church's moral and legal norms, emphatically contributed to these processes. Simultaneously, it played a major role in the formation and development of legal science and the legal profession, helped especially by the expansion of legal studies at the universities of those times, in which the Church had a most important share as well.[2] Despite these facts, among legal experts there is a generally accepted theory of the acceptance of Roman Law and the influences of Romance studies on the development of European legal science, forgetting the equal contribution of Canon Law and its studies at the same time. Not only the area of procedural law, but practically all legal branches were influenced by the law advanced by medieval Romanists and canonists, but gradually the extensive transformation of particular institutions into secular law happened. These overlaps were not only evident in the Middle Ages; they persist also in Modern Times. Despite the distinct weakening of the status of the Catholic Church in secular society, the influence of Canon Law has remained well-preserved in more recent periods as well.

1 The connection between Christian religion and law in Antiquity and the Early Middle Ages

As is commonly known, Christianity was closely interconnected with law practically from its foundation. Even though primarily the Church put the accent on the norms of its moral codex, as set out by Jesus Christ in "the Sermon on the Mount"[3], at first, since in the area of law the life of Christians was regulated especially by **legal customs**, Canon Law originated in parallel with the establishment and development of the Catholic Church as a legally perfect society (*societas iuridica perfecta*).[4] The interconnection between law and Christian morality in Canon Law has its model partly in the symbiosis of Roman Law and pagan cults, and it is due to this that Roman Law (with the exception of the legislation of Christian emperors) is considered to this day to be pagan law. This fact was apparent in the process of formation of the first written Church law norms (*leges scriptae*), created authoritatively by the possessors of episcopal office, regarded in the early Christian communities as the supreme authorities.[5] Although Christianity shortly after its foundation got on with acquiring sympathies among people, particularly emphasizing the fact that it contained the maximum of all moral values which the people of those times were ostensibly looking for, it was accepted by the state only in the second decade of the 4th century after Christ, in the times of the first Christian emperor Constantine the Great (*Constantinus*

[2] After all, from the early Middle Ages onwards the Church enjoyed a monopoly in the area of culture and science, because of its interest in the cultural and educational development of mankind. The educational system initially developed especially in the monasteries; later a system of parochial schools developed, and finally cathedral schools reached the first place. In the 10th and 11th centuries a network of episcopal schools covered the whole of Europe. For more detail on this issue see for example WOODS, T. E.: *Jak katolická církev budovala západní civilizaci*. Praha : Res Claritatis, 2008, pp. 15ff.

[3] Mt 5,1–7,29 and Lk 6,17–49.

[4] By this term we understand a society with its own legal system, institutional instruments and social relevance that has no superior (human) law-giver.

[5] Norms of individual bishops for the clergy of their own diocese were entitled „*capitula episcoporum*". Many of these norms were more precisely formulated in the provincial councils, whereby they became obligatory for wider territorial units. Cf. MICHAL, J.: *Dějiny pramenů poznání kanonického práva s přihlédnutím k dějinám práva římského*. Praha : Ústřední církevní nakladatelství, 1967, p. 33.

Magnus, 306–337).[6] Alongside the Christianization of Roman society, Roman Law and Christian morality were from that time more frequently connected and the latter's values were incorporated into the legal system of the Roman Empire. These tendencies culminated especially in the Theodosian Code (*Codex Theodosianus*, 438) of the emperor Theodosius II (408–450), indeed above all in the famous codification of Roman Law (*ius Romanum Iustinianeum*, 528–534) by the emperor Justinian I (*Iustinianus*, 527–565).[7] Thanks to these developments Church law started to rise, not only as an important element of Christian religious life, but also as an autonomous legal system supplementing the legal system of the late Roman government.[8]

The situation in the Christian West changed after the fall of the Western Roman Empire (476), when, from the first part of the 5th century, the so-called "barbarian states" started to rise. Their custom law was from that time influenced not only by Roman Law, but because of the adoption of Christianity (in the form of Arianism) also by Christian doctrine and partly by Canon Law.[9] This fact became evident especially in the so-called "barbarian codes" (*leges barbarorum*) written from the 5th to 9th century in Latin (with the exception of the Anglo-Saxon codes). The persisting particularism of the German nations was successfully broken only by the external politics of the Frankish king and later emperor Charles the Great (*Carolus Magnus*, *Charlemagne*, 768/800–814), unifying the Germanic tribes and ensuring the ethnical difference of the Frankish Empire against the danger menacing from the future migration of Germanic tribes in the West.[10] The overall result of the conquests of Charlemagne and his evangelization was the unification of almost the whole of Western Europe under one government, and the creation of an empire of Christian nature. Outside his dominion remained only Hispania, occupied by Muslims; England and Ireland, endangered by Normans (Vikings); and the Byzantine point of southern Italy.[11] Charles the Great therefore disposed of wide possibilities to influence future development in Europe

---

6 First and foremost it asserted the equality of people before one God, regardless of status, gender, social or national origin. Cf. 1 Cor 12,13; Gal 3,26–28; Mt 22,34–40; Mk 12,28–34; Lk 10,25–28ff and Jn 13,34–35.

7 This fact is clearly testified by the constitutions *Deo auctore* and *Tanta* passed in 533 on the occasion of promulgation of the compilation *Digesta*. Once more, the first book of the Code of Justinian (*Codex Iustinianus*) contains in the first title itself the famous edict *De fide catholica* (*Cunctos Populos*) from 380. I have dealt with this problem before in the paper VLADÁR, V.: Vzťah cirkevného práva k rímskemu právu. In MACH, P./NEMEC, M./PEKARIK, M. (eds.): *Ius romanum schola sapientiae. Pocta Petrovi Blahovi k 70. narodeninám*. Trnava : Právnická fakulta Trnavskej univerzity v Trnave, 2009, pp. 449–486.

8 Cf. BRUNDAGE, J. A.: *Medieval Canon Law*. London : Longman, 1995, p. 12.

9 Cf. ŘÍČAN, R./MOLNÁR, A.: *Dvanáct století církevních dějin*. Praha : Kalich, 2008, pp. 183–184.

10 Even though the progenitors granted Charles the title "the Great", he was proclaimed a "saint" in 1165 by the antipope Paschal III (*Paschalis*, 1164–1168) at the request of the emperor Frederick I (*Fridericus*, 1152/1155–1190). Otherwise this canonization was not accepted by Rome, though almost nothing was done to prevent his worshipping. Cf. KUMOR, B.: *Cirkevné dejiny 2. Raný kresťanský stredovek.* Levoča : Polypress, 2001, p. 86.

11 Although this empire, called the "Holy Roman Empire" (*Sacrum imperium Romanum*), was neither national nor worldwide, it had universal nature and unified within its boundaries almost the whole Christian West. Cf. DOLINSKÝ, J.: *Dejiny Cirkvi. Druhý diel. Stredovek.* Bratislava : Dobrá kniha, 1997, p. 43. From that time two empires existed, respecting each other mutually, one in the West and the other in the East. In addition, through the renovation of the Western Empire the popes acquired for themselves the right that they were the only ones to grant the crown of the emperor. On that account the papacy started to rise and prepared its way for future aspirations to world supremacy, not only in the universal Church. Cf. BUŠEK, V.: *Učebnice dějin práva církevního I.* Praha : Všehrd, 1946, p. 139. The solid bond between papacy and Empire therefore emerged as the bearing pillars of medieval Europe, through which God's kingdom obtained the form of political reality. Cf. WIEL, C. Van de: *History of Canon Law*. Louvain : Peeters Press, 1991, p. 34 and ŠPIRKO, J.: *Cirkevné dejiny II.* Martin : Neografia, 1943, p. 285.

according to his visions, which came true to a great extent. From the point of view of the concept of power, as a whole-hearted supporter of St. Augustine (*Aurelius Augustinus*, † 430), he imagined Christian society managed by two heads: the emperor and the pope. He was convinced that spiritual and secular power could cooperate to bring about God's empire on Earth (*civitas Dei in terris*) and to reach the ultimate goal of whole mankind, that is to say eternal salvation and blessedness of all men. Augustine's work "*De civitate Dei*" in particular, finished in 422, was in various interpretations decisive for the medieval understanding of the philosophy of history of state and law.[12]

Progressive promoting of the pope's primacy, which started in Antiquity and its acceptance by the secular authorities, finally succeeded and the pope was considered then to be the only acknowledged spiritual head of the universal Church. At last, from the times of Charles the Great the political system of the West stood on new foundations, whereby spiritual matters were principally preferred. These ideas found external expression especially in the distinctive clericalism and sacralisation of medieval social life, and later also in the efforts to create a theocratic **Christian republic** (*res publica Christiana*) with the pope at its head.[13] Thus, Christian principles started increasingly to penetrate through the whole of human society and the life of individuals, so that not only science and the arts, but also business, economy and the state were filled with Christian spirit too, which had many positive consequences throughout society.[14] After the fall of the Carolingian Empire, under the weak successors of Louis the Pious (*Ludovicus Pius*, *Louis le Débonnaire*, 813/814–840) the Realm was revived only under the king and first emperor of Saxony (Ottonian) dynasty (919–1024) Otto the Great (*Otto Magnus*, 936/962–973), that succeeded in replacing the Carolingian one.[15] Since religion was one of the strongest powers of the new state, as in the times of Charles the Great, the emperors of the Ottonian (and later Salic) dynasty also understood its status in a religious-political way, and in this manner they asserted and

[12] St. Augustine in this writing outlined the concept of the ideal state, on whose realization several Church or secular authorities worked, starting with Charles the Great. According to this writing, the Church had to represent one community (*Ecclesia universalis*), with Christ at the head of it. In it dual nations (clerics and laymen), dual governments (clergy and kingdom) and dual governance (Divine and human) existed. Cf. DOLINSKÝ, J.: op. cit. 11, pp. 41 and 44. In this community, according to the later words of bishop Stephen of Tournai (*Stephanus Tornacensis*, 1192–1203), it was sufficient when everyone gave the others what belonged to them and everything was in harmony. On that account, the effort of entire Middle Ages was to find a way to unity (*ordinatio ad unum*) with two kinds of people living in one community, the Catholic Church. This abstract community of God connected all God's chosen ones, living, dead and those not even born in an invisible corpus, whose members could by identified only by God himself. Cf. EVANS, G. R.: *Law and Theology in the Middle Ages*. London : Taylor And Francis, 2002, p. 23. According to this idea, the Church, especially the invisible part of the Divine elect, had to embrace all the nations, preach the gospel and bring them to the above-mentioned ultimate goal. Even the state had to participate in this task, insofar as its representatives were willing to conform to Christian principles and serve the true faith and its sharing. Cf. ŘÍČAN, R./MOLNÁR, A.: op. cit. 9, pp. 160–161.

[13] Cf. BUŠEK, V.: op. cit. 11, pp. 146–149.

[14] From the law's point of view, this fact was manifested for example at the state courts, when the Church vow was taken to process law, and decisions were issued in the name of the Holy Trinity. Other public or private documents also started with words *"In nomine Dei"*. Cf. ŠPIRKO, J.: op. cit. 11, p. 197 and KUMOR, B.: op. cit. 10, pp. 9–10 and 73.

[15] East Francia (*Francia Orientalis*), increasingly called Germany (*regnum Teutonicorum*), was finally severed from the Carolingian community in 887, but still governed by Carolingians themselves. The final representative of this dynasty, Louis the Child (900–911), son of Arnulf of Carinthia (887/896–899), was crowned king of East Francia as a seven-year-old. Cf. KUMOR, B.: op. cit. 10, p. 98.

built it up.[16] Especially Otto the Great through his internal politics built on the bishops and abbots with secular power, practically laid the foundations not only of the power of princes-spiritual but also the medieval feudal Church, which determined the nature of Germany until the Great Secularization in 1803.[17] The ideals of the Carolingian Realm and later Roman-Germanic Empire were also adopted by other European monarchs, which found its reflection in subsequent historical developments. It was precisely in those times that the process started by which Christian values expressed in the theological-legal norms of Canon Law started to determine the nature of secular (feudal) law, and obsolete legal constructions emanating from older customs were replaced with more modern concepts. This culminated especially in the High Middle Ages, which are considered to be the golden period of Church history, when Christianity and human society were practically merged in one harmonic corpus.

2 The bases of European legal culture in the High Middle Ages and later developments

2. 1 Historical-legal background

As already stated, the time of the High Middle Ages, when Canon Law was constituted as an autonomous scientific and pedagogic discipline, is still considered to this day to be the golden period of Church history in all its complexity, and it is viewed by many specialists as the beginning of modernity (*modernitas*) of human society (the so-called "renaissance of the 12th century")[18]. Because the Church achieved victory in the investiture struggle with secular power by means of the Concordat of Worms (*Vormatiae concordatus*, 1122), on this basis it was not only freed from dependence on secular authorities, but after the successful Gregorian Reform of the pope Gregory VII (*Gregorius*, 1073–1085) it gained enormous influence over the whole of medieval society (*fideles Christi*). Especially this complex reform, which lasted approximately 150 years and only ended with the pontificate of Eugene III (*Eugenius*, 1145–1153), paved the way for a period of bloom of the Church and medieval culture, and encouraged closer connection between social life and religion.[19] The majority of Church historians therefore start counting the years of **free acting of the Church** between secular powers after the conclusion of the Concordat of Worms. The Church not only won the investiture struggle, but thanks to the Concordat it managed to keep the ideas of

[16] Cf. BUŠEK, V.: op. cit. 11, p. 137.

[17] Cf. FRANZEN, A.: *Malé dějiny církve*. 3. vyd. Kostelní Vydří : Karmelitánské nakladatelství, 2006, p. 132.

[18] In fact, according to American legal historian Harold J. Berman († 2007), this epoch even started in the second half of the 11th century. Cf. BERMAN, H. J.: *Law and Revolution. The Formation of the Western Legal Tradition*. London : Harvard University Press, 1983, pp. 4 and 103.

[19] The distinct growth of science and cultural life in this period was especially linked with the development of religious life. The Church took credit in the civilizing progress of mankind by founding and supporting the institutions which cultivated schooling, culture and art. As in Carolingian and Ottonian times the Roman style evolved, labelled as such due to certain parallels with the phenomenon of formation of Romance languages, in the High Middle Ages the culture tended, especially in connection with the development of theology and law, to Gothic heights (*sursum corda*). At the same time, it was a period of research and writing activity of the greatest Christian thinkers, who had taken from the Old-Christian apologists the idea of harmonization of Christian faith and human knowledge. Cf. KUMOR, B.: *Cirkevné dejiny 3. Zlaté obdobie kresťanského stredoveku*. Levoča : Polypress, 2001, p. 175 and ŠPIRKO, J.: op. cit. 11, p. 424.

Gregorian Reform alive during the entire High Middle Ages. The Empire withdrew from action considerably weakened, since from this time Church prelates were not imperial officers but vassals, swearing individual oaths of fidelity to the emperor, by which he could not claim absolute obedience from them.[20]

In the High Middle Ages, as a result of the growing needs of richer and richer society, economic life flourished and commerce thrived, and thereby the role of money grew.[21] New impulses came out of the reviving cities, which had almost completely ceased to exist in the agrarian community of the Early Middle Ages. In addition, the gradual growth of wealth encouraged the cities‘ ambition to autonomy gained after overthrowing the supremacy of the bishops, who had wielded power over them until then.[22] In connection with these processes, in the period from the 11th to the 15th century by estimation more than 5 000 new cities and small towns emerged in Europe, attracting the attention of new active populations from the countryside, and leading in a most distinctive way to the rise of Western Europe as the most dynamic region of the world for the first time. Within the period of the 12th to 14th century, the long-lasting process of Christianization of Europe was finished by the promotion of Christiniaty among the nations of the north-east (especially Latvians, Lithuanians, Estonians, Prussians and Slavic tribes in the east of the river Elbe) and in northern Europe (Scandinavian tribes).[23] Deducing from universal thoughts, all the nations of the Christian West in this period really represented a "united Christian corpus" (*unicum corpus Christianorum*), or "Christian people" (*populus Christianus*), led by two heads: the pope and the emperor.[24] An important role in this was played by the ancient idea of preservation of antique heritage, when practically the whole known world was unified under the government of the Roman Empire.[25]

---

[20] Porov. RAPP, F.: *Svatá říše římská národa německého*. *Od Oty Velikého po Karla V*. Praha – Litomyšl : Paseka, 2007, p. 9.

[21] Some authors therefore use the term "commercial revolution" to mark this process. For more detail on this issue see BRUNDAGE, J. A.: *The Medieval Origins of the Legal Profession*: *Canonists*, *Civilians*, *and Courts*. Chicago : The University of Chicago Press, 2008, p. 77.

[22] Cf. ŘÍČAN, R./MOLNÁR, A.: op. cit. 9, p. 300. From that time onwards, urban communities endeavoured to gain independence from every feudal authority. They elected aldermen (*consules*) and started to usurp royal privileges such as market, coin and customs rights. Especially in Italy and some transalpine regions (primarily the Rhineland) several small urban republics (communities) emerged, which gradually extended their power into their neighbourhoods and forced the lower nobility to enter the municipal bond. In addition, with time the cities obtained various new extensive privileges from the monarchs and started to govern themselves with their own municipal laws. For these reasons some authors declare that analogous to the Church of that time, European cities were becoming practically modern states, disposing of autonomous legislative, executive and judicial powers, including competences to impose taxes, mint coins, set scales and measures, organize an army, enter into alliances, and make war. Cf. RAPP, F.: op. cit. 20, pp. 146, 172 and 177.

[23] Cf. ŠPIRKO, J.: op. cit. 11, pp. 217ff.

[24] Cf. KUMOR, B.: op. cit. 19, p. 288.

[25] While in the Christian East the supreme ideal still consisted in the fusion of Church and state (concept of monism), the Western philosophy of state and history had its solid basis in St. Augustine‘s idea of two powers on Earth (concept of dualism), whose task was to cooperate in close harmony on the earthly and eternal welfare of all mankind. Augustinism stemmed especially from the philosophy of Plato († 347 ACN), while politics and social philosophy started to incline in this period to the ideas of the philosopher Aristotle († 322 ACN) expressed in his work "Politics" (*Politika*). Cf. FRÖHLICH, R.: *Dva tisíce let dějin církve*. Praha : Vyšehrad, 2008, pp. 106–107. Following the ideas of St. Augustine and his disciple, the theologian Paulus Orosius († after 418), bishop Otto of Freising (1138–1158) developed theories of ideal government in the work "*Chronica sive Historia de duabus civitatibus*". For him the Empire represented the heritage of royal power transferred from one nation to other, i.e. from Babylon to Rome, whence the emperor Constantine the Great made one Christian

From the Church internal point of view, on the basis of the successes of Gregorian Reform the papacy managed to extend its rule over the whole universal Church. The pope from that time applied extensive rights in the jurisdictional area, and through his legates interfered in a centralistic way into the various matters of particular churches. In connection with recognition of the pope as the head of the Catholic Church and his jurisdictional primacy and plenitude of power (*plenitudo potestatis*), the ecumenical councils were considered to be a papal advisory body.[26] Following these successes, the Church, which had had to defend itself anxiously against secular influences for centuries, started to be conscious of its supremacy and more noble status compared to secular power.[27] Especially by virtue of this process the hierocratic ideas of pope Gregory VII were successfully asserted, declaring the principled supremacy of Church over state and papacy over Empire.[28] Moreover the activities

community (*civitas una*), and the control over it was entrusted to the above-mentioned two heads. Romans were subsequently replaced by Franks and Franks by Germans. This transferring of power from one nation to another (*translatio*) was intended to assure the continuity of both instruments (secular and spiritual) which were considered to be absolutely necessary for the salvation of the whole Christian community. For more detail on this issue see RAPP, F.: op. cit. 20, p. 151.

[26] Cf. BUŠEK, V.: op. cit. 11, pp. 146–147. The peak of power reached by the papacy manifested itself in this period in multiple aspects of Church life. The pope became practically the unlimited ruler of the whole Church with plenitude of power as the highest legislator (bound by God's law only), administrator and judge in relation to the laity or clerics. He was the only one to be entitled "universal bishop" (*episcopus universalis*) and disposed of the right to install, transfer (*translatio*) and dismiss bishops, regardless of any synodal court verdict. Cf. BERMAN, H. J.: op. cit. 18, p. 205. The pope alone had the right to convoke not only the universal council, but also to preside over particular synods (through legates), accept appeals and judge cases concerning the whole Church. Papal primacy and infallibility (*infallibilitas*) in matters of faith and morals, accepted practically from Antiquity (*Epistola dogmatica ad Flavianum*, 449; *Formula Hormisdae*, 519; and pope Agatho, 680), were theologically confirmed by Thomas Aquinas (Summa Theol. II,II q. 1. a. 10). For more detail on this issue see DOLINSKÝ, J.: op. cit. 11, p. 174. In addition, in the High and Late Middle Ages the pope's will was perceived as the most important criterion for developing Canon Law, and in various aspects he directly created law. In the area of Church administration, the primatial faculties of the pope related especially to supervision over the whole of religious life, founding, dividing and revoking of bishoprics, confirmation of new orders and their rules, instituting of abbeys, exempting monasteries and bishoprics from the jurisdiction of diocesan bishops or metropolitans (*exemptio*), and from the end of the 12th century also confirmation of bishops elected by cathedral canonries. Finally, from the 12th century onwards the popes started reserving the right to absolve individuals from qualified misconducts. Only with regard to consecratory power (*potestas ordinis seu munus sanctificandi*) was the pope no different from other bishops, with the natural exception of its illimitable practice in the whole universal Church. Cf. KADLEC, J.: *Církevní dějiny. II. Raný středověk*. 3. přepracované vydání. Praha : Česká katolická Charita, 1983, p. 70.

[27] This fact was manifested especially in framing the theological-philosophical basis which used comparisons to help people grasp the mutual ratio between them, such as sun and moon, heaven or earth, gold and lead, or spirit and body. Cf. FRANZEN, A.: op. cit. 17, pp. 166–167.

[28] Gregory VII himself initiated the spreading of ideas of papal supremacy throughout the world. His concept of the state was that it was a servant of Church, empowered to decide on its tasks but obliged to leave to the pope the functions it could not deal with. Even though this pope respected the immediate origin in God not only of the Church but of secular power too, at the same time he asserted the idea of unity of all mankind in the Christian religion (*unitas ecclesiae universalis*), represented externally by the pope himself. Cf. BUŠEK, V.: op. cit. 11, p. 147. Moreover, to reason and support his programme Gregory VII formulated the theory of direct spiritual power (*potestas directa*) (personalized in the papacy) over secular power (personalized in the emperor), referring to the papal right to "loose or bind whatever on earth" (Mt 18,18). He especially and fundamentally asserted the spiritual rule of the pope over the whole world, which practically appeared as political sovereignty of the Church over all of the secular authorities. On that account the imperial office was considered to be a papal feudary subordinated to the pope by an oath of fidelity. In any case, the popes started considering the emperor as their own officer (vassal), and towards him other kings were equivalent to vavasours. Cf. FRÖHLICH, R.: op. cit. 25, pp. 88–90. Following the advanced theory on direct or indirect

of the popes and canonists contributed to its development also through renovation of centralist principles in state administration, returning to the system of salaried bureaucracy, development of the emperor's imperialism, as well as the acceptance of Roman Justinian law.[29] The High Middle Ages in particular became the period of the **greatest political glory of the papacy,** which succeeded not only in establishing centralism in Church government, but also in strengthening its status against the secular powers. The protection of the papacy in those times covered religious orders, citizens of individual states, including teachers and students of the medieval schools. Thus the forming relationship between Church and state found its final resolution, namely in favour of the Church.[30] The renewed honour of the Empire also greatly promoted the above-mentioned processes of unification and converging of Western nations, which corresponded similarly to the interpreted ideas of God's state.

After the period of superiority of state over Church and Empire over papacy in the Carolingian and Ottonian times, the High Middle Ages was the period of superiority of papacy over Empire. However, the mutual relationship between emperor and pope was not one of superiority and subordination, since both were formally independent and reciprocally took only a **vow of fidelity**, never a vassal oath. Despite multiple efforts by the Church to achieve the contrary, the emperor's vow never really had the nature of an oath taken by a vassal to his master (*homagium*).[31] The future emperor therefore had to take a vow of protection and fidelity to the Church (*fidelitas*) before his coronation, which represented the authentic and proper crown oath, while the pope reciprocally gave the emperor a vow of fidelity and constancy. Similarly, the coronations of national kings of other Christian countries became solemn acts of Church liturgy which imitated in many repects the ritual of episcopal consecration. Thus the national kings in the Middle Ages represented together with the holy emperor some kind of abstract political hierarchy, similar to the sacred hierarchy of bishops with the pope at the head of it.[32] Especially given this background we can agree with the conclusions of researchers who contend that the idea of "common Christianity" (*Christianitas*), one of the most frequently used collocations in the 12th and 13th centuries, together with expressions like "Christian people" (*populus Christianus*), "Christian nation" (*gens Christiana*), or directly "Christian world" (*orbis Christianus*), characterized in the most outstanding way the whole of society.[33] Especially in connection with these developments and the status acquired by organizing the crusades, the real centre of unity in Europe and the head of the whole Christian Western world became the papacy, not the Empire.

Despite several conflicts we can describe the High Middle Ages in principle as a period of cooperation between the spiritual and secular powers.[34] In contrast, the Late Middle

power (*potestas indirecta*) of the pope over secular power, the pontiff arrogated to himself the right to punish secular monarchs, especially with the penalty of excommunication, deprivation, acquittal of serfs from the obligation of fidelity, and in certain cases also nullifying secular laws. Therefore, although medieval popes in general accepted the sovereignty of the emperor and other monarchs in purely secular matters, in consequence of this procedure they did not punish them only as believers, but also as secular monarchs. Cf. ŠPIRKO, J.: op. cit. 11, p. 321.

29 Cf. BUŠEK, V.: *Učebnice dějin práva církevního II*. Praha : Všehrd, 1946, pp. 115–121.

30 Cf. KUMOR, B.: op. cit. 19, p. 175.

31 The persisting religious nature of the emperor's office can be seen especially in the fact that at his coronation the emperor was assumed as a member of St. Peter's canonry and dressed in clerical vestments as a subdeacon. Cf. ŠPIRKO, J.: op. cit. 11, pp. 248 and 319.

32 For more detail on this issue see RAPP, F.: op. cit. 20, p. 9.

33 Cf. DOLINSKÝ, J.: op. cit. 11, p. 182.

34 It is evident that Western dualism endured also the period of imposition of hierocratic claims by the papacy,

Ages started to characterize itself with expressive rivalry between the representatives of both powers, which led progressively to their ultimate mutual alienation. In the long-term struggle the Empire decayed through its surrender of various privileges in favour of local monarchs (princes), which contributed even more to the **particularism of the Late Middle Ages**.[35] Especially in the vortex of political fights and endeavours to maintain its acquired status, the papacy also declined and everything started heading towards the final extinction of Church universalism. This decline was accelerated especially by the Avignon Papacy (1309–1378), the events of the Great Western Schism and the Renaissance popes, princes who preferred to realize their political ambitions at the expense of fulfilling their spiritual roles. The cultural unity of the West started to break up, opening the way to evident and permanent development of national states built on the power of national kings and asserting their personal interests, which logically found its reflection also in the area of law.[36] In spiritual life the objectivism that had prevailed until then was replaced with subjective points of view, whereby laymen started engaging increasingly in politics and culture. Counter to the privileges of knighthood and clergy emerged democratic ideas which analogously found their opportunity to rise precisely in this period.[37] Nevertheless, despite the gradual weakening of the position of Catholic Church, its influence remained preserved in distinguished measure, as will be pointed out in the next section.

2. 2 The formation and development of legal science and legal profession

As mentioned above, just in the period of the High Middle Ages Canon Law separated itself from disciplinary theology as an autonomous scientific and pedagogical discipline (*scientia iuris Ecclesiae*).[38] The beginning of this gradual process, which culminated in the work of Gratian (*Decretum Gratiani*, circa 1140)[39], can be found especially in the **development of scholasticism**, striving to establish a versatile world-view unifying faith with knowledge and reason with Revelation.[40] The roots of early scholasticism can already be found at the end of the patristic period of Church history (8th century) in the area of present-day France, and its founder is in principle considered to be Anselm of Canterbury (*Anselmus Cantuariensis*, 1093–1109).[41] The title of this orientation itself implies that the new science grew from the needs of theological and philosophical teaching, whereby it was objectively connected with the scientific work of the 11th century dialecticians,

as declared by evolving legal science too. In the words of the famous Italian lawyer Accurius († 1263), the following conclusion was accepted: "*Nec papa in temporalibus nec imperator in spiritualibus se debeant immiscere*". Auth. Coll. I,6. For more detail on this issue see BELLOMO, M.: *The Common Legal Past of Europe, 1000-1800*. Washington : The Catholic University of America Press, 1995, p. 75.

35 For more detail on this issue see for example RAPP, F.: *Církev a náboženský život západu na sklonku středověku*. Brno : Centrum pro studium demokracie a kultury, 1996, pp. 28ff.

36 Cf. BERMAN, H. J.: op. cit. 18, pp. 428ff and DOLINSKÝ, J.: op. cit. 11, p. 132.

37 Cf. ŠPIRKO, J.: op. cit. 11, pp. 5–6.

38 Cf. SCHERER, R. R. von: *Handbuch des Kirchenrechtes*. Erster Band. Graz : Verlag von Ulrich Moser's Buchhandlung, 1886, pp. 256–257.

39 I had dealt with this problem before in the paper VLADÁR, V.: Graciánov dekrét a jeho miesto v systéme prameňov kánonického práva. In *Súkromné a verejné právo súčasnosti. Zborník z Vedeckej konferencie doktorandov PF TU*. Trnava : Iura Edition, 2006, pp. 85–103.

40 Cf. DOLINSKÝ, J.: op. cit. 11, p. 217.

41 Cf. KUMOR, B.: op. cit. 19, p. 125.

as well as their opponents.[42] While theology until that time had focused especially on the interpretation of Holy Scripture and the works of the Church Fathers (especially St. Augustine), the study of the newly-discovered writings of Aristotle († 322 ACN) opened up new possibilities of theological orientation for the purposes of reasoning of Christian truth using the philosophy of the ancient Greeks.[43] Thus Aristotelian philosophy expressively contributed to the formation of the new scholastic method, especially thanks to Thomas Aquinas († 1274), who succeeded in linking the wisdom of the ancient Greek philosophers with Christian truth in his work. Besides new theological concepts, scholasticism itself successfully asserted new methods whose aim was to remove various contradictions within the framework of theological writings and achieve their synchronizing, and thus concordance.[44]

Scholastic methods started being applied to legal texts before the end of the 11th century by the famous lawyer Irnerius (*Guarnerius*, † circa 1125), who rediscovered the old text of Justinian's compilation of Roman Law called *Digesta,* and started to make the study of Roman Law (*ius civile*) attractive to students in Bologna, at first from Italy and later from all over Europe (especially Germany, England, France, Hungary and Hispania)[45]. From the Canon Law point of view, the first to consistently apply the new scientific methods to the matter of Church law was the monk Gratian (*Gratianus*), and because of this he is still considered to be the founder of Canon Law as a science.[46] In this way the new scholastic method evolved from the very beginning especially through its application to theological texts, then to texts of Roman and soon Canon Law as well. In fact the greatest growth was achieved at the **universities** (*universitas magistrorum et scholarium*), which had already started forming themselves in the free cities at the end of the 11th century, and represented the only institutions providing the highest available education of that time.[47] Within this context we can mention especially the famous universities in Bologna

---

42 Cf. BELLOMO, M.: op. cit. 34, p. 181.

43 Since philosophy was perceived in this period as an aid to understanding and explaining theological terms, it was commonly entitled "the handmaid of theology" (*ancilla theologiae*). For more detail on this issue see for example STÖRIG, H. J.: *Malé dějiny filosofie*. Kostelní Vydří : Karmelitánské nakladatelství, 2000, pp. 179–181 and 193ff; KUMOR, B.: op. cit. 19, p. 123 and ŠPIRKO, J.: op. cit. 11, p. 415.

44 This method was used in efforts to settle virtual controversies between science and faith by means of formal logical dialectic argumentation. This reached its peak in the 12th and 13th centuries in the famous theological and legal works of the High Middle Ages. Cf. BUŠEK, V.: op. cit. 11, p. 81. Using the scholastic-dialectical method the author primarily chooses the topic, introduces the opinions of the opponents and finally presents his own reasoned thesis. For more detail on this issue see KAŠNÝ, J.: Metoda v kanonickém právu. In *Revue církevního práva*. Praha : Společnost pro církevní právo, 2007. No. 1 (2007), p. 9.

45 Cf. TIERNEY, B.: *Religion Law and the Growth of Constitutional Thought*, *1150-1650*. Cambridge : Cambridge University Press, 2008, p. 22 and BRUNDAGE, J. A.: op. cit. 21, pp. 106ff. Among other things, legal historians have awarded Irnerius the merit of being the scholar who succeeded in separating law from ethics and logic. Cf. CALASSO, F.: *Medio Evo del diritto*. Vol. 1. Milan : Giuffrè, 1954, pp. 503ff and 557 and BELLOMO, M.: op. cit. 34, p. 160.

46 Gratian's usage of the historical-critical method in particular linked history, present and future and therefore found its place not only at the developing medieval universities, but also in the practice of Church courts. A specific description of his methods of work is presented in the Decree itself, namely in: Distinctiones XXIX–XXXI. For more detail on this issue see KUTTNER, S.: The Father of the Science of Canon Law. In *The Jurist*. Washington : Catholic University of America, 1941. No. 1 (1941), pp. 2–19 and HOVE, A. van: *Commentarium Lovaniense in Codicem Iuris Canonici*. Volumen I. Tomus I. Michliniae – Romae : H. Dessain, 1945, p. 242.

47 Cf. ŘÍČAN, R./MOLNÁR, A.: op. cit. 9, p. 373; WIEL, C. Van de: op. cit. 11, p. 93 and RICHÉ, P./VERGER, J.: *Učitelé a žáci ve středověku*. Praha : Vyšehrad, 2011, pp. 153ff. Their formation was connected with the gradual asserting of the lay element in society of that time, since Church schools started employing laymen as

(*Universitas Bononiensis*), Paris (*Universitas Parisiensis*), Oxford (*Universitas Oxoniensis*) and Cambridge (*Universitas Cantabrigiensis*).[48] While Paris (*Lutetia*, *Paris*) came to be known especially for the application of dialectical methods to the study of philosophy and theology (*civitas philosophorum*),[49] the University of Bologna became famous for the use of dialectics in Roman and Canon Law, and legal education at other medieval universities was also introduced according to the Bologna model.[50] As mentioned above, around the mid-12th century ancient Bologna itself became the main centre of European legal studies, a status that endured for many generations.[51]

masters too, particularly in the areas of medicine, law and free arts. Cf. BRUNDAGE, J. A.: op. cit. 21, p. 225[21]. University general study (*studium generale*) differed from local schools (*studium particulare*) especially in accepting students and teachers from the whole world and acknowledging the granted titles (*gradus*) throughout the Christian West (*licentia ubique docendi*). Students had first to complete a philosophical faculty course (*facultas artium*, *artes liberales*) and only then could choose specialized schooling at the theological, law or medical faculty. Especially thanks to the universities, theology emerged from isolation and entered into ideal communion with other disciplines. The most frequent educational branch was law, and the only university teaching language remained Latin. Cf. BERMAN, H. J.: op. cit. 18, p. 162. The exceptionality of status of the medieval universities can also be seen in the fact that graduation as doctor at some universities corresponded to the granting of an aristocratic title. Cf. URFUS, V.: *Historické základy novodobého práva súkromného*. Praha : C.H. Beck, 2001, p. 51. The high respectability of the professors of law and the effort to maintain prestige at any cost was manifested also in an ordinance of the city of Bologna which imposed punishment on every professor of the place over 50 years old who presumed to leave the city without permission of municipal authorities with the aim of taking up a position of teacher of law elsewhere. Cf. RASHDALL, H.: *The Universities of Europe in the Middle Ages*. Vol. 1. Part 1. Oxford : Clarendon Press, 1895, p. 171. If a professor wanted to leave the town for a certain time during the academic year, he first had to obtain the agreement of his students, then the rector, and finally had to deposit the amount of 100 Bolognian libras (approximately his annual income) as a guarantee of his return. From today's point of view we can certainly reconstruct the content of lectures, books and glosses, most frequently disputed questions, including various academic exercises and educational courses that led to obtaining the titles in Civil and Canon Law and theology. Cf. HARTMANN, W./PENNINGTON K. (eds.): *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*. *History of Medieval Canon Law*. Washington : The Catholic University of America Press, 2008, pp. 117 and 408.

48 The first of them came into existence on the basis of the original cathedral schools, and the other two based on informal meetings of teachers and students. The universities in Salerno, Padova, Naples, Montpellier, Toulouse, Palencia and Salamanca were established analogously. Cf. KUMOR, B.: op. cit. 19, p. 257.

49 The University of Paris originated in particular on the basis of a decision by the Franciscans (1217) and Dominicans (1219) on the education of their youth there, whereby the majority of teaching positions were held precisely by the members of those two orders. Cf. WIEL, C. Van de: op. cit. 11, p. 93.

50 Cf. DOLINSKÝ, J.: op. cit. 11, pp. 280–281.

51 In particular, many scholars agree that the University of Bologna, founded by all appearances back in the late 11th century, became the most important centre for the education of law, at least from the year 1120, and kept this status until the 16th century. For example it is documented that during the 13th century every important canonist tutored in Bologna. The internationalism of this city was manifested especially in the period of 1150 to 1250, when students from all over Europe studied there. Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, pp. 125, 216 and 227. In 1155 Bolognian teachers and students achieved considerable prestige especially when the German king and emperor Frederick Barbarossa issued the decree known as "*Authentica*" (*Habita*), which guaranteed them imperial protection and ordering judges to impose the penalty of quadruple of the compensation of damage to anyone who would dare to importune them in the future. Further, the emperor granted exclusive jurisdiction over students to the teachers and bishop in the town where they studied. In this manner the emperor exempted them in principle from the jurisdiction of local or communal authorities, and made them responsible for their crimes exclusively to the academy and local Church authority. Cf. BRUNDAGE, J. A.: op. cit. 8, pp. 44–46. That decree is generally considered to be the first law to regulate the status of medieval universities. Cf. URFUS, V.: op. cit. 47, p. 18. Regarding the development of legal studies during this period, English legal historian Frederic William Maitland († 1906) stated that in no other period

While the early scholasticism was cultivated from the beginning specifically in monastic, episcopal or court schools (*scholae palatinae*), the high scholasticism of the early 13th century expanded especially with the help of the universities and the Dominican and Franciscan orders. Concerning **Roman Law**, which was congenial with Canon Law, its matter was not taught at the universities from the beginning of legal studies in the form of post-Classical or common law, but texts from the Justinian codification were preferred, and this fact influenced the development of Church law too. Its "long night" („*la notte lunga*"), as the period of ignorance of the Justinian codification was labelled by the outstanding Italian legal historian Manlio Bellomo, which lasted approximately six centuries, ended with the revival of Roman Law studies based on the activities of Irnerius.[52] Justinian's abstract in particular and his perfectly comprehended legal conceptions and principles represented the precious sources on which lawyers could draw during the following period and apply them in increasingly developing urban and commercial terms. At the early universities Canon Law was taught alongside Roman Law, and on the basis of this fact we can state that university Canon Law education is almost as old as the universities themselves.[53] Nevertheless, from the Church's point of view scientific work was removed from the monasteries to the universities, and thanks to the development of study of Roman Law in this period, the science of Canon

since the classical times of Roman Law was the total quantity of intellectual endeavour dedicated in such a range to legal science. Especially on this basis he entitled the 12th century as "the legal century". For more detail on this issue see BERMAN, H. J.: op. cit. 18, p. 120 and TIERNEY, B.: op. cit. 45, p. 13.

52 Cf. BELLOMO, M.: op. cit. 34, pp. 40 and 58. Concerning the individual parts of the Justinian codification, the texts that remained in use usually omitted several of the original parts and contained various interpolations as well. While the *Digesta* as a whole was almost completely unknown in the Christian West, in the period from the late 7th century to the early 8th century the Codex was rearranged by scholars. Nevertheless, they left in use only the first nine books, putting aside the last three (*Tres libri*). The Novels (*Novellae Constitutiones*, *Novellae Leges*) survived only in edited form known as "*Epitome Iuliani*". The Institutions (*Institutiones*, *Elementa*) remained the only part of the Justinian codification that was known as a whole in the period of the Early Middle Ages. Cf. CONRAT, M.: *Geschichte der Quellen und Literatur des römischen Rechts im frühen Mittelalter*. Leipzig : J. C. Hinrichs, 1891, pp. 53–57, 132–137, 187–191 and 354–355 and LAURIN, F.: *Introductio in Corpus Juris Canonici cum appendice brevem introductionem in Corpus Juris Civilis continente*. Vindibonae : Freiburgi Brisgoviae, 1889, pp. 266–268. One of the most important factors in the survival of Roman Law in this period was the text tradition of Canon Law, which preserved its texts until the times of revival of legal science in the 12th century. Thus quotations of various parts from the Codex and Institutions appeared for example in the second part of the 9th century in the North-Italian compilations *Lex Romana Canonice Compta* and *Collectio Anselmo Dedicata*. The Novels in their *Epitome Iuliani* versions were transferred into the compilations *Collectio in IX Libris*, *Collectio Veronensis* and *Collectio XI Partium*, as well as into the works of the canonists Anselm of Lucca († 1086) and Ivo of Chartres († 1115). As a result of the preservation of only a small number of medieval manuscripts of these compilations, it is very hard to discover the means by which this incorporation of original Roman Law into Canon Law actually happened. Shortly after the rediscovery of the *Digesta*, the first mention of which can be found in a document from Tuscany dating back to 1076, two Canon Law works emerged, referring to the *Digestum vetus* (that is to say books 1 to 24). More specifically, this was the anonymous *Collectio Britannica*, finished in the period between 1090 and 1093, and the Decree of Ivo of Chartres that appeared a little later. Cf. FOURNIER, P./LeBRAS, G.: *Histoire des collections canoniques en Occident*: *depuis les fausses décrétales jusqu´au Décret de Gratien*. Tome II. Paris : Recueil Sirey, 1932, pp. 55–99 and 155–163. Finally, in the next century cardinal Gregory of San Grisogono († 1113) also included three quotations from the *Digestum novum* (books 35 to 50) in his work "*Polycarpus*". Books 24 to 35 were rediscovered last, and were usually called the "*Infortiatum*". References to the Justinian codification started appearing in papal documents in the mid-11th century at the latest, whereby the *Codex* and *Digesta* were applied procedurally by the Roman court (*curia Romana*) after 1125. For more detail on this issue see HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, pp. 3–4 and BRUNDAGE, J. A.: op. cit. 21, pp. 59 and 134[29].

53 Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 98. For more detail on this issue see RASHDALL, H.: op. cit. 47.

Law started being deliberately freed from Germanic elements and restored to its Roman Law roots (de-germanization of Church law).[54]

From the time of writing of the most important source of Canon Law, that is to say Gratian's Decree, the experts at Roman Law (legists) figured alongside the experts at Canon Law (canonists), and the so-called "**learned laws**" (*iura docta*) were represented in the period from 12th to 18th century only by Roman Law and Canon Law. They were entitled to be so on the basis of the contrast to customary law (*consuetudines loci*) and municipal statutory law (*statuta*), which were not subjects of formal study at the university faculties of law.[55] On account of this development, from this period onwards it became common to join the legal complexes of Roman and Canon Law in one course of study, which manifested itself in the rise of traditional study of both laws (*ius utrumque*) that persists at high-class faculties of law to this day, finding its external expression in the academic title "JUDr." (*iuris utriusque doctor*, doctor of both laws).[56] The first holder of this title was most probably the glossator of Gratian's Decree Bazianus († 1197).[57] From the point of view of subsequent developments we can state that shortly after its expansion the study of law became highly attractive for students, since successful graduation in it promised them almost certain improvement in social status and increase in their wealth.[58] Especially from the 13th century lawyers became the most prominent persons in almost every part of medieval society, whether considering work in civil administration (especially municipal management) or in Church administrative bodies.[59]

---

54 Cf. BUŠEK, V.: op. cit. 11, pp. 86ff.

55 Cf. BRUNDAGE, J. A.: op. cit. 8, pp. 59–60.

56 For more detail on this issue see BUBELOVÁ, K.: Juris utriusque doctor bez znalosti církevního práva? In JERMANOVÁ, H./MASOPUST, Z. (eds.): *Dvacet let poté*: *Právo ve víru metamorfóz*. Ediční řada Ústavu státu a práva AV ČR. Praha : Aleš Čeněk, 2010, pp. 380–387. The teachers of Roman Law used the title "doctor of laws" from the second half of the 12th century. At the beginning it was only a title of honour indicating any person who had studied law, whereby only during the 13th century it was acknowledged as a particular academic degree. Those that finished the study of Canon Law were entitled as „*magister decretorum*" or „*doctor decretorum*", which gradually entered into practice and by the mid-13th century it was considered to be the regular title for qualified canonists. Only they who not only completed this course of study lasting usually more than 5 years, but at the same time successfully handled both private exams and the following public exams could use this title. In addition, they had to stay and lecture on Canon Law at the university which granted the title. Cf. BRUNDAGE, J. A.: op. cit. 8, p. 62 and HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 105.

57 Cf. HRDINA, A.: *Prameny ke studiu kanonického práva*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, 2007, p. 36. This scholar was a major figure of legal science in Bologna and his opinions were quoted in common in multiple publications, glosses or sums. Bazianus was often renamed as the legal Romanist Johannes Bassianus. In the 1990s the historian Annalise Belloni succeeded in providing a plenitude of evidence for the statement that the lawyer known as "Johannes Bassianus" and the canonist "Bazianus" were the same person. This conclusion was also confirmed by the legal historian Domenico Mafei († 2009). On the other hand, the canonist Rudolf Weigand († 1998) persuasively argued that these two lawyers were in fact different persons after all. In any case, the very example of canonist Bazianus demonstrates the incoming Romanisation of Canon Law and canonistics. For more detail on this polemic see HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 141. Graduation in the study of both laws was considered to be a matter of highest prestige in medieval society, especially on the grounds of its considerable temporal and financial severity. Cf. BRUNDAGE, J. A.: op. cit. 21, p. 263.

58 Cf. EVANS, G. R.: op. cit. 12, p. 49.

59 Finally, at the end of the 12th century pope Innocent III (*Innocentius*, 1198–1216) described lawyers as a privileged class (*ordo*) in the Church. Cf. c 12 X de haereticis 5,7. The standard gloss on Gratian's Decree confirmed that advocates were entitled to be treated as knights, while other authorities declared that professors of law of twenty years' practice were ranked equivalent to counts, or even dukes. Cf. Glos. Ord. ad c 5 C XXIII qu 1. Some canonists proceeded to extremities in certain ways, attributing to doctors of law as judges at Church

Concerning Canon Law, according to American historian James A. Brundage it became a profession in every respect approximately between 1200 and 1250.[60] This happened because in the late 12th century the bishops started delegating the majority of their judicial competences to legal experts (episcopal delegates, or episcopal officials), expecting them to have completed their legal education.[61] In addition, relatively informal, sometimes *ad hoc* processes were gradually replaced in the period from the 12th to 14th century with more complicated procedural practices which demanded the abilities of professional experts.[62] Even from the end of 12th century canonists performed the majority of the most important Church offices, as well as forming one of the most important creative components of intellectual and practical life in the European Middle Ages. The ever-increasing popularity of Canon Law in society of that time can be seen especially in the fact that in the 14th and 15th centuries it exceeded in interest even the study of theology.[63] Close interconnection between Canon Law and Roman Law is also evident from the situation that by the end of the 12th century no canonist could practise without perfect knowledge of Justinian Roman Law.[64] Nevertheless, some universities expressly required future canonists to obtain their title

courts the right to pass judgements of excommunication simply from the position of cleric. This status was meant to be granted to them on the grounds of their title, in spite of their being commonly married laymen. Cf. BRUNDAGE, J. A.: op. cit. 8, pp. 68–69.

60 This process started in the Kingdom of France, then continued in the Anglo-Norman Empire and Sicily, whence it expanded to many other regions of Western Europe. Cf. BRUNDAGE, J. A.: op. cit. 21, p. 283.

61 Cf. HOBZA, A./TUREČEK, J.: *Úvod do církevního práva*. Praha : Všehrd, 1936, p. 143.

62 Moreover, in the same way we can explain why the canonists started dealing with problems of legal philosophy and jurisprudence increasingly at this time. For more detail on this issue see BRUNDAGE, J. A.: op. cit. 8, p. 153.

63 Given this development it is not surprising that during the 15th and early 16th century canonists often became bishops and cardinals, not to mention popes. Their domination in the Roman curia and diocesan courts throughout the Christian West was not threatened even by the Protestant Reformation. Cf. BRUNDAGE, J. A.: op. cit. 21, p. 166.

64 On the other hand, the fact that the Church did not exaggerate affection for Roman Law is evident from the decretal of pope Honorius III (1216–1227) called *"Super speculam"* from 1219 (c 28 X de privilegiis et excessibus privilegiatorum 5,33), which suppressed the education of Roman Law in all of Paris and its neighbourhood. This order was reconfirmed in 1254 by pope Innocent IV (1243–1254), and was modified in 1307 by Clement V (*Clemens*, 1305–1314). Simultaneously, this decretal forbade all secular priests and religious clerics, and anyone else who kept the Church benefices, to study medicine in Paris (*scientiae lucrativae*). Cf. HOVE, A. van: op. cit. 46, p. 466. The original papal intent consisted apparently in an effort to increase the prestige and attractiveness of theological study, particularly at the famous Parisian theological faculty, particularly because from the end of the 12th century students started abandoning the study of arts and theology in favour of more lucrative legal and medical study. Those who wanted to become canonists in Paris therefore had to start their Civil Law studies somewhere else, usually at the University of Orléans (*Aurelianum, Cenabum*). Pope Gregory IX interpreted the mentioned source strictly, in the sense that the order of Honorius forbade the study of Roman Law only in Paris, not in Orléans. That university hence profited most from the decretal, and in the second half of the 13th century even became a serious rival of Bologna. Cf. WIEL, C. Van de: op. cit. 11, p. 131 and BRUNDAGE, J. A.: op. cit. 21, p. 233. Another reason for issuing *Super speculam* could be found in the fact that French theological schools at that time referred too often in their theological argumentation to the texts of Roman Law. In any case, as a result of Honorius' decree Roman Law was subsequently not taught in Paris. Even though the approach of religious orders to Roman Law was considerably freer, internal religious rules of some orders specifically forbade their members to study at university. For example, in the 13th century the general chapter of English Benedictines explicitly decreed that monks could study Canon Law only in private schools administered by the members of its own religious community. Similarly, Cistercians forbade the members of their order to study Canon Law at universities and even banished monks who did not obey this prohibition. The study of Canon Law and Roman Law was permitted only if it took place within the educational institution of the order. Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, pp. 101, 114, 208, 237, 243 and 245.

in Civil Law before starting the study of Canon Law.[65] Moreover, despite not usually having to do so, canonists were occasionally also required to complete some kind of theological course. The success of appeals to clerics to study law on the part of their superiors is also evident from the fact that while papal letters reproaching the ignorance of law of episcopal addressees are quite common in the 12th and early 13th century, after 1234 they do not appear at all.[66]

Not only university schooling, but also the science of Canon Law expanded on the basis of cooperation between Roman Law and theology.[67] While civilians primarily dealt with the study of the Justinian compilations *Digesta* and *Codex Iustinianus*, canonists studied Gratian's Decree and from the second half of the 12th century increasingly papal decretals as well.[68] Mutual interconnection between civilians and canonists can be supported with many examples. For instance, canonists in the late 12th century usually borrowed terms, ideas, concepts and institutions from civilians, while civilian writers compared the institutions and norms of Canon Law with those commonly found in the normative texts of Roman Law.[69] Concerning the methods of scientific work, after the fashion of the theologians

[65] In order to acquaint Canon Law students with the subject matter of Roman Law, individual manuals were composed, of which the best known was the work "*Liber Pauperum*" by the lawyer Vacarius († circa 1200). Mutual practical dependence and interconnection between both scientific areas can also be seen in the fact that analogous manuals containing the essentials of Canon Law were prepared for the students of Roman Law. Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 100 and BRUNDAGE, J. A.: op. cit. 21, p. 234. Concerning the manuals for other areas of secular law, they started to appear much later, and were not at all comparable in quantity or in quality to the legal literature produced by canonists and Romanists. Cf. BERMAN, H. J.: op. cit. 18, p. 274.

[66] Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, pp. 125 and 245.

[67] The canonist Hostiensis († 1271) expressed himself in a similar way, arguing that Civil and Canon Law represented one unit with theology. Theological concepts projected into law were noticeable also in the ideas of Christ as the highest advocate speaking "for mankind" before the Father, without asserting any claim for reward. In this context Church Father Ambrose (*Aurelius Ambrosius*, † 397) remarked that Christ is our advocate daily (*Cotidie advocatus pro nobis est apud patrem*), because we repeat our offences daily and our case is never definitely closed. Cf. Aurelius Ambrosius, De Jacob et Vita Beata I,VI,21. The Holy Ghost too was understood in legal terminology as an advocate sent to men by the Father to teach them and reside with them (1 Jn 2,1). From the point of view of scientists dealing with Roman Law, the commentary of Baldus de Ubaldis († 1400) to the *Digesta* (D 1,1,2) stated that the "mother" and "doorway" (*mater et ianua*) to every law is moral philosophy. De iustitia et iure 6, Comment. ad Digestum vetus. In the canonistic commentary to Gratian's Decree called "*Summa Elegantius*" (circa 1150–1200) we can find the statement that the essence of Canon Law is "*ius et iustitia Divina*". The main goal of its knowledge was presented as an appeal to people for obedience, because whoever neglects the law confuses good and evil (*fas nefasque confundit*). For more detail on this issue see EVANS, G. R.: op. cit. 12, pp. 52–53, 62 and 175.

[68] Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 18.

[69] COPPENS, E. C. C.: L´interprétation analogique des termes de droit romain en droit canonique médiéval. In *Actes du colloque Terminologie de la vie intellectuelle au Moyen Âge*. Turnhout : Brepols, 1988, pp. 54–64. As an example we can mention the rule constituting the requirement for the performance of profession of canonist, taken from Roman Justinian law. According to this rule, men performing Canon Law practice had to be single, Catholic and born from legitimate marriage. In addition, they could not be deaf, dumb, blind or ill-famed (*infamis*). Cf. D 3,1,1,3; 3,1,4; 3,3,41 and 50,17,2. As a second example we can mention the advocate service fees in the High and Late Middle Ages. In this case honourable tradition dictated that the amount of legal fees had to reflect primarily the nature of the case, the abilities of the advocate, financial status of the client, and the customs of court where the action was filed. This rule returned by analogy to the norm of classical Roman Law recorded in the *Digesta*. Cf. D 50,13,1,10. Similarly Johannes Teutonicus (*Johannes Zemeca*, † circa 1245) accepted it later on the strength of authority of his work "*Glossa Ordinaria*". Glos. Ord. ad c 71 C XI qu 3. For more detail on this issue see BRUNDAGE, J. A.: op. cit. 21, p. 119. Thus the revival of Roman Law was progressively strengthened in the High Middle Ages by the traditional inclination of canonists to seek ideas that could be applied to settle

(dialecticians) the exegetical-scholastic method was reasserted in the 12th century in the science of Roman and Canon Law, which led to the formation of Roman and Canon Law **glossator schools**. Typically, this activity was limited to interpretation and explanation of texts of legal regulations in which glosses were marked at obscure and hardly comprehensible places.[70] From that time, reading of compilations was not possible without reading the glosses, whereby the method of continuous explaining, specifying and commenting on the original work made it a really living text. In the Classical period the most important factor for the existence and development of scientific methods in academia, as well as in practice, was the communication between popes and universities.[71] On that account especially, the Bolognian glossator school became one of the most solid pillars of medieval Canon Law, determining the trends in its development from the late 12th to early 13th century.[72] It was precisely in this period that a certain interesting differentiation in legal science originated. The experts dealing with the study and lecturing on Gratian's Decree were called "decretists", while those dealing with Roman Law were entitled "legists". Those who were interpreting the papal decretals (*ius decretalium*) were called "decretalists".[73]

Canon Law problems in the principles and rules of Roman Law. Although Roman Law had long been used by the Church whenever a case could not be resolved using the norms of Canon Law, we can consider the formal beginning of its subsidiary validity in Canon Law as dating from the decretal of pope Lucius III (1181–1185) called "*Intelleximus*". He decreed the use of Roman Law in specific cases where "… the canons do not constitute anything" („*nihil... sit in canonibus definitum*"). Since this decretal was later included in the compilation *Liber Extra* of pope Gregory IX in 1234, as a part of the set of *Corpus Iuris Canonici* it was valid in the West until 1918, when the first Code of Canon Law came into effect. Its significance for Church law, as well as secular law, has to be considered in the light of the broad usage of Canon Law in legal science and practice. Cf. PEJŠKA, J.: *Cirkevní právo I. Ústavní právo cirkevní*. Semily : Nákladem vlastním, 1932, pp. 22–23.

70 Later also systematic writings of short length started appearing, separate from the texts of legal compilations, and were called "sums" (*summae*). Besides Gratian's Decree, glosses and sums were also attached to later compilations of this period. Well-known sums were, for example, written for the Canon Law collections *Liber Extra* (1234) and *Liber Sextus* (1298). Cf. KAŠNÝ, J.: op. cit. 44, p. 13. For more detail on this issue see SCHERER, R. R. von: op. cit. 38, pp. 254ff.

71 Only popes and emperors vested the early universities with several privileges, including guarantees of independence from particular authorities (*studia privilegiata*). Such prerogatives played a major role because they supported the diffusion of culture and the idea of an international scientific community. Within the framework of guaranteed autonomy universities disposed of the right to elect a rector, apply their own judicial system (*privilegium conservatorium*) and self-administration, enjoy immunity from taxation, securing of personal safety for professors and students, and the right to grant academic titles, including the important right to exempt studying clergy from the duty of residence. Nevertheless, the universities gained legal recognition as independent corporations only during the 13th century. Cf. BRUNDAGE, J. A.: op. cit. 21, pp. 270–271. Acceptance of a school as a university initially belonged especially among the duties of the popes who founded and materially supported them. University professors lived on prebends (especially the canonry) belonging to the Church, and students had multiple benefits pertaining to the clerical status. The interconnection of Church and religion with the universities was also apparent in the rule according to which all teachers in monastic schools, university professors included (with the exception of medical faculties), had to have minor order at least. In order to ensure material support of students, the above-mentioned Johannes Teutonicus argued that all university students should dispose of benefices, whereby pope Innocent III specifically approbated this practice in 1207 (c 12 X de clericis non residentibus in ecclesia vel praebenda 3,4). The right of a student to a benefice was considerably wide-spread by 1219 due to the above-mentioned decretal of Honorius III *Super speculam*, whose advantages in fact affected only students of theology. Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 111.

72 According to several scientists the University of Bologna achieved a monopoly in academic study which paralyzed other centres in certain ways only after recognition of Teutonicus' glossator-compilatory work on Gratian's Decree as "*Glossa Ordinaria*". Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 210.

73 Cf. WIEL, C. Van de: op. cit. 11, pp. 116ff.

Contributing meanwhile not only to the perfection of legal study but also to the further development of legal science were **the continuing disputes on the freedom of the Church** and enforcement of its independence from secular power (especially the Empire). As already mentioned, each part tried to maintain its position based on traditional arguments coming from the old normative texts of Roman and Church law. While the canonists, along with Gratian, proclaimed clear duality in relation to the origin and circle of powers, the legists tried to enforce the form of establishment wherein the emperor disposed, analogous to the antique Roman imperator, of high power over the whole world (*princeps legibus solutus*).[74] These ideas were adopted especially by the emperors from the German Hohenstaufen house, who endangered in many acts the autonomy of the Church, and on that account were in permanent conflict with the papacy.[75] A little later, the monarchs of national states followed them, namely the French kings, with Philip IV (*Philippe le Bel*, 1285–1314) at their head. The popes therefore started to assert that Roman Law was not valid in the Church on the basis of the emperor's will, but because of its approbation by the Church and papal confirmation.[76] Especially in connection with this development and the continuously strengthening status of medieval society, knowledge of Canon and Roman Law formed the basis of education for every scholar at university, and referring to legal sources in philosophical and theological tractates or disputes became standard.

2. 3 The Church judicial system

It is necessary to begin by saying that in the High Middle Ages a general and definite shift took place in the prerogative of privilege of the legal forum (*privilegium fori*), applied in the times of Antiquity and occasionally in the Early Middle Ages, according to which solely Church tribunals, not secular courts, were competent to decide on the cases of clerics and members of religious orders. For all that, this privilege applied to the clergy as a whole, and potential renunciation of it by any individual was qualified as invalid and subject to penalty under Canon Law.[77] In addition, in connection with the long-term expansion of competences of Church courts also in matters of Civil Law, the Church judicial system

[74] Cf. KUMOR, B.: op. cit. 19, pp. 36 and 127–128 and ŠPIRKO, J.: op. cit. 11, p. 340.

[75] Following the commentary on Roman Law we can state that the emperors of the Holy Roman Empire themselves continued in making imperial, thus Roman, or rather Roman-German law. Nevertheless, their regulations were only occasionally added to the corpus of compilations of Justinian law by the Romanists of that time. In this respect, we can mention as examples the constitution *Habita* of Frederick Barbarossa, several laws on heresy of Frederick II (1212/1220–1250) and the whole text of the Lombard compilation *Consuetudines Feudorum* (*Libri Feudorum*), simultaneously containing several imperial laws that supplied material enriching the compilation of Justinian Novels. Cf. BELLOMO, M.: op. cit. 34, p. 68. Relevant place was given in the manuscripts of Justinian legal books also to Barbarossa's instruction of 1158 concerning matters of possession. Cf. BERMAN, H. J.: op. cit. 18, p. 496.

[76] Cf. PEJŠKA, J.: op. cit. 69, p. 23.

[77] Priority for protection of the clergy is evident also from the papal decree of Alexander III (1159–1181) *Ex parte Ade*, declaring that Church courts must strictly refuse to accept the actions of laymen against clerics. This meant that the only way for laymen to gain access to these courts was by deceit. Cf. PENNINGTON, K./ SOMERVILLE, R. (eds.): *Law*, *Church*, *and Society*. Philadelphia : University of Pennsylvania, 1977, p. 196. The only exception for laymen to bring action against clerics laid in public crimes (*in criminibus publicis*) such as heresy, simony, deceit or treason. Within this context we can mention in particular the regulation according to which any cleric could be brought to court without the approval of his bishop. Cf. Summa Eleg. IX,3 and 9 and Coll. Can. III,29. For more detail on this issue see EVANS, G. R.: op. cit. 12, p. 88.

achieved **predominance over the secular judicial system**. Every diocese in Western Christendom therefore maintained a local Church court in order to enforce Church rules and provide a forum for resolving disputes in which the Catholic Church was interested. Nevertheless, the system of Church courts managed to establish itself definitively only in the later 13th century at most.[78] Church judicial instances consisted of synodal, archidiaconal, episcopal, metropolitan and papal courts. At this time the episcopal courts (held usually by the bishop's officers) was regularly the court of first instance for all disputes related to Civil and Penal Law on which the Church was competent to decide. At these sessions the gathered clergy usually worked as the jury, with the bishop as presiding judge and his general representatives and experts giving him advice on legal or procedural matters.[79] The clerical college served frequently as an auxiliary legislative assembly that could set standards of behaviour and make laws and regulations binding on all believers within that region, by means of the jurisdictional power of the bishop.[80]

Although from the penal agency's point of view, the Church tribunals were specifically meant to judge crimes relating to faith or the Church itself, they also decided on other cases. Thus the Church authorities and academic canonists declared that Church courts disposed of **full and exclusive jurisdiction** over all crimes and offences perpetrated by clerics, or by anyone else with their status. That meant that all persons in holy orders along with others enjoying the privileges of clerical status (e.g. students, monks, nuns, hermits, or regular canons) were responsible for their offences only to Church tribunals, regardless of the case itself (*ratione personarum*).[81] In civilian matters (especially in all non-penal matters of dispute) the competence of the court was always constituted when the treated case was connected with Church life in some way, for example in matters of Church offices, properties and matrimonies (*ratione causarum*).[82] For example, the Church tribunals exercised jurisdiction over matrimonies, setting the conditions for assessing the legitimacy of children, all types of sexual behaviour,[83] questions of commerce and finances (e.g. taxation, borrowings, or

78 Cf. EVANS, G. R.: op. cit. 12, p. 42.

79 Cf. BUŠEK, V.: *Učebnice dějin práva církevního*. Bratislava : Právnická fakulta Univerzity Komenského, 1929, p. 63.

80 Regarding these experts, the most important episcopal officers from the 11th century onwards were archdeacons disposing of multiple extensive jurisdictional competences. Although they were only assistants of the bishop, mostly in the areas of disciplinary, judicial and property law in older times (archdeacons of older order), they gradually usurped jurisdiction independent from the bishop, which they executed in their own names (archdeacons of newer order). From that time they presided over diocesan courts and pastoral visitations, executed disciplinary jurisdiction over parochial clergy, and decided various legal cases in common. As a result, during the 12th century bishops started to endeavour to limit the archdeacons' competences, and they were gradually functionally replaced with episcopal general vicars (*vicari generales*) and officials (*officiales*) disposing of the right to act as bishops' substitutes in the administration of the diocese, and to accept appeals against the sentences of archdeacons. In connection with these arrangements the office of archdeacon was on the wane, and the Council of Trent (*Concilium Tridentinum*, 1545–1563) took away almost all of their jurisdictional competences in the end. Cf. BUŠEK, V.: op. cit. 29, p. 11. As specifically delegated judges we can also mention papal legates. They were sent by popes to individual countries in common to deal with controversies and disputes that local authorities were unable or unwilling to resolve. Moreover, the legates simultaneously operated as plaintiffs delegated to bring action against those who infringed the provisions of Church laws, and were commissioned as judges to hear and decide cases in the name of the pope and with the power of papal authority. Cf. BRUNDAGE, J. A.: op. cit. 8, pp. 41–42 and 72.

81 For example, Church courts assumed the right to decide cases involving rape, murder, arson, robbery or deceit, if committed or supposed to have been committed by clerics. Cf. BERMAN, H. J.: op. cit. 18, p. 192.

82 Cf. HOBZA, A./TUREČEK, J.: op. cit. 61, pp. 145–146.

83 The family especially represented the ideal community in terms of the spreading of Christian morals and religious education of individuals. For this reason the rules concerning proximity of blood, bigamy, divorce,

insolvency of debtors), working conditions and other aspects of work, including various remissions for poor and destitute people (*personae miserabiles*).[84] Even inheritance disputes, especially of testamentary succession, or cases connected with slander or defamation, were no exception.[85] Anyone who was not willing to fulfil the decision of a Church court was threatened with Church penalties (not excluding excommunication), or otherwise the state intervened using its coercive authority.[86] Although the later Church courts lost their

gifting between husbands, but also the property of family relatives taking clerical orders, were regulated by the Church. Cf. BELLOMO, M.: op. cit. 34, pp. 76–77. Within this context we can also mention the compulsory penal jurisdiction of Church courts over all types of extramarital sexual behaviour. The subject of trials by Church (mainly archdiaconal) courts were therefore commonly fornication, adultery, bigamy, rape, incest, prostitution and sodomy. Rules on sexual morals were enforced from time to time also by diocesan courts. In canonistics ideas also emerged that cases could be taken from a secular court and transferred to a Church court, even against the will of the other party to an action, in the case of inappropriateness of secular justice. Cf. BRUNDAGE, J. A.: op. cit. 8, p. 74.

84 Cf. BERMAN, H. J.: op. cit. 18, pp. 221–222 and 260–261.

85 Cf. URFUS, V.: op. cit. 47, p. 22. For more detail on the issue of law of succession and potential incidence of Church courts in this area in our region, see ŠVECOVÁ, A.: Dedičské právo šľachty v Uhorsku s prihliadnutím na právne pomery neskorého novoveku a slobodného kráľovského mesta Trnavy. In *Zemianstvo na Slovensku v novoveku*. Martin : Slovenská národná knižnica, Národný bibliografický ústav v Martine, 2010, pp. 199–291 and ŠVECOVÁ, A.: *Formálno-právna stránka zriadenia úkonov posledného poriadku na Slovensku do roku 1950*. Bratislava : Veda, vydavateľstvo Slovenskej akadémie vied, 2010. On the issue of application of terminology from the law of succession in legal history, see ŠVECOVÁ, A.: Úkony mortis causa v právnej histórii Slovenska – exkurz do staršej právnej terminológie. In *Historia et theoria iuris: printový a e-časopis pre mladých vedeckých pracovníkov právnických fakúlt na Slovensku*. Bratislava : Právnická fakulta UK, 2010. No. 3/2 (2010), pp. 83–98. As a matter of interest we can mention that many disputed cases ended up before Church courts without final judgment. They were usually concluded by extrajudicial settlement, achieving compromise between the parties. Thus in such cases the Church judges acted as mediators. Cf. BRUNDAGE, J. A.: op. cit. 21, p. 445.

86 Within this context we can specifically mention that Church judges usually summoned secular officers to execute their judgements in matters of heresy, blasphemy and sacrilege, which quite naturally fell under canonical jurisdiction. In general, though, it was stipulated that clerics were forbidden to be involved in carrying out corporal punishments such as tagging, mutilation and execution. Cf. c 5,9 X ne clerici vel monachi saecularibus negotiis se immisceant 3,50. For more detail on this issue see BRUNDAGE, J. A.: op. cit. 8, p. 92. Even if episcopal courts punished religious delicts in the Early Middle Ages, the sanctions imposed on heretics were typically limited to Church penalties, namely excommunication, penitence through whipping, or monastery imprisonment. Following this development as well as medieval interpretations of theological texts (especially the idea of St. Augustine on "*compelle intrare*", interpreting the regulation of Lk 14,23; Corr. Don. 6,24; Ep. 93,5; C. Gaud. 1,25,28 and Serm. 112,7,8) and juristic works (primarily Gratian's Decree, c 38 C 23 qu 4), throughout the 12th century several particular Church synods started challenging the role of representatives of secular power in punishing heretics. Cf. KADLEC, J.: *Církevní dějiny. I. Církevní starověk*. 3. přepracované vydání. Praha : Česká katolická Charita, 1983, p. 148. A decisive step was taken in this regard after agreement was reached at the Synod of Verona in 1184, when the pope Lucius III and the emperor Frederick Barbarossa inflicted upon heretics and their followers the penalties of excommunication, including exile from the Empire and confiscation of wealth (the so-called "imperial ban", hence "*acht*"). Cf. DOLINSKÝ, J.: op. cit. 11, pp. 161 and 193 and KUMOR, B.: op. cit. 19, pp. 43 and 273. Simultaneously, the pope decreed in a bull from that same year that bishops (or archdeacons) should seek out heretics in their dioceses once or twice a year, either personally or by means of appointed commissars (*exploratores*), and this episcopal inquisition was confirmed in 1215 by the conclusions of the Fourth Lateran Council (*Concilium Lateranense Quintum*, can. 3). Even under this regulations all the secular authorities had to cooperate in this activity with the clergy under threat of excommunication and interdict. Penalty of death by burning was officially imposed on heretics in Aragon on the basis of a decision by king Peter II (*Pedro de Aragón*, 1196–1213), whose regulation was adopted in 1224 at first in Italy and later also in Sicily and Germany by the emperor Frederick II, and in 1229 by king Louis VIII (1223–1226) in France. Their example was soon followed by almost all the European monarchs. The next development leading to completion of organisation of the inquisition, as the tribunal for questions of faith was later called, happened only in the 13th century,

popularity because of collecting charges, they enjoyed large support from citizens until the Early Modern Times.[87]

Regarding natural overlaps of the Church judicial system with the secular area, Innocent III (1198–1216) himself established the competence of Church courts in all disputes in which one party to the case accused the other of sin (*ratione peccati*, *denuntiatio evangelica*).[88] Considering the old customs and decrees of pope Gregory IX (1227–1241), pope Boniface VIII (1294–1303) expanded the competence of Church tribunals in a most extensive way, prescribing that all disputes stemming from contracts furnished with the then generally-used oath clause pertained to Church courts.[89] Although many cases subject to the agency of Church courts overlapped, from today's point of view, with the competences of the secular courts, in the High Middle Ages Church tribunals also respected the exclusive

when the papal inquisition was established because of the negligence of bishops in seeking out heretics. Cf. FRANZEN, A.: op. cit. 17, pp. 159–161.

87 The most often reproached negative features of Church courts, except for salaries, were the formality and related slowness of procedural acts, and especially the great expense of the processes conducted by them. In addition, judges and various judicial officials were commonly accused of fostering bribery, and even if these accusations did not necessarily accord with the facts, certain cases gave these complaints some justification. For more detail on this issue and an interesting treatise see BRUNDAGE, J. A.: op. cit. 8, p. 178; BERMAN, H. J.: op. cit. 18, pp. 252–253 and RUFFINI, F.: *L'actio spolii-studio storico-giuridico*. Torino : *Fratelli* Bocca, 1889, p. 398.

88 The work „*Ordo iudiciarius*" written by Bolognian professor Tancred (*Tancredus*, † 1234), who was equally the author of the Fifth Ancient Compilation (*Compilatio Quinta*, 1226) directly stated four matters belonging under Church justice: penal, civilian, spiritual and mixed (*Et quidem causarum alia est criminalis*, *alia civilis*, *alia spritiualis*, *alia mixta*). It is evident that at least three of these categories could also be judged by civilian courts. We can take into consideration especially mixed disputes, the majority of which involved relationships between lay patrons and churches subsidized by them. In contrast the secular courts could not judge cases related to purely spiritual matters. Cf. PENNINGTON, K./SOMERVILLE, R. (eds.): op. cit. 77, pp. 58–59. As another example we can mention here the matter of testaments, considered analogously to be the subject of mixed jurisdiction. Church courts specifically disposed of the authority to judge disputes related to formalities of writing testaments, including controversies connected to legacies for charitable purposes (*piae causae*) and the testaments of clerics. However the jurisdiction of secular courts was principally reserved for all other disputes related to proprietary disposition on the basis of a testament. Cf. Cout. de Beauv. 11,317 and 333 and 12, 427–28. For more detail on this issue see BRUNDAGE, J. A.: op. cit. 8, p. 89.

89 Cf. BERMAN, H. J.: op. cit. 18, p. 223. The points of overlap of Church with the secular area are clear from the rubrics of several titles of the first two official exclusive Canon Law compilations, the *Liber Extra*, whose content and internal divisions were later respected also by the compilers of the collection *Liber Sextus*. Thus in the first of these compilations from today's point of view the Church overstepped the Church Law boundaries in the area of penal law, where it demanded jurisdiction for judging wrongful acts such as adultery and rape (X de eo, qui duxit in matrimonium quam polluit per adulterium 4,7 and X de adulteriis et strupro 5,16), bigamy (X de bigamis non ordinandis 1,21), calumny (X de calumniatoribus 5,2), defamation (X de iniuriis et damno dato 5,36), false testimony (X de crimine falsi 5,20), physical cruelty (X de iniuriis et damno dato 5,36) and even murder (X de homicidio voluntario vel casuali 5,12) and theft (X de furtis 5,18). In the area of private law, the focal points were especially the matters considered by Church to be notably dangerous to the soul and those that threatened the commission of sin. Of these we can mention especially commodates (X de commodato 3,15), deposits of money (X de deposito 3,16), buying and selling (X de emptione et venditione 3,17), moneylending and usury connected with it (X de usuris 5,19), borrowings with rights of lien and other forms of security (X de pignoribus et aliis cautionibus 3,21) and gifts (X de donationibus 3,24). For more detail on this issue see BELLOMO, M.: op. cit. 34, pp. 76–77. In connection with the above, it is necessary to highlight on the other hand that especially on the grounds of ongoing legal (but also jurisdictional) particularism, certain discrepancies emerged in medieval courts about their competences to act in individual types of cases. Namely, alongside Church tribunals the authority to judge certain types of cases was claimed also by royal, lordly and municipal courts. Cf. BRUNDAGE, J. A.: op. cit. 8, p. 188.

competence of civil courts in several mixed cases.[90] Only with the growth in self-confidence of national states and in connection with the increasing dominance of central royal power did the tension and conflicts between both legally perfect societies **gradually rise**.[91] Individual protests were lodged especially against the papal efforts to expand the agency of Church courts in matters of *rationis peccati*. As an example we can mention mortgage contracts and contracts connected with borrowing, which were qualified in principle as secular matters pertaining to secular court competences, but payment of interest was an object of judicial competence of Church tribunals.[92] Finally, especially due to deepening conflicts in the Late Middle Ages, but above all in Modern Times (markedly from the period of the Protestant Reformation), certain cases (especially of mixed character) were gradually removed from Church courts in favour of the secular courts.[93]

2. 4 *Ius commune*

The extensive activities of the Church courts distinctly supported the close connection between religion and Canon Law with public life in medieval society. Moreover, through the institution of Truce of God (*Treuga Dei*), the Church from now on also controlled the hardly achievable keeping of **inner peace within society** as a whole.[94] Similarly

[90] With the exception of the above-mentioned matters of testaments, the Church principally accepted the competence of secular courts also in cases of proprietary disputes between spouses which arose especially in connection with dowries and donations of groom to bride. Cf. BRUNDAGE, J. A.: op. cit. 8, pp. 72–73 and 97.

[91] Cf. EVANS, G. R.: op. cit. 12, p. 161.

[92] This induced the Italian lawyer Odofredus († 1265) to write sarcastically: „*Dominus papa ratione peccati intromittit se de omnibus*". Cf. Lectura in Cod. Iust. I,1,4. Similarly to him, a few decades later in the early 14th century his colleague Cino da Pistoia († circa 1337) expressed himself thus: „*Ecclesia sibi usurpavit ratione peccatti totam iurisdictionem*". Cf. Lectura in Auth. Clericus post Cod. I,3,32. For this reason it is logical that frequent legislative initiatives by popes extending Church competences into pure secular matters attracted increasing criticism. For more detail on this issue see BELLOMO, M.: op. cit. 34, p. 76.

[93] Cf. HOBZA, A./TUREČEK, J.: op. cit. 61, pp. 141 and 146. Civil courts across Europe started (at the beginning especially in England and later on the continent too) claiming the right to define the boundaries of Church jurisdiction, which was resolutely rejected by the Church authorities. Thus the agreements on the delimitation of jurisdictional boundaries between Church and secular courts varied from one region to another. Even so, the extent of jurisdiction of Church courts remained considerably wide, as far as judging questions related to every member of society at that time. Within this context we can particularly mention the area of marriage, family and sexual behaviour, which remained active components of the Church judicial system until the 19th century. Cf. BELLOMO, M.: op. cit. 34, p. 72 and BRUNDAGE, J. A.: op. cit. 21, pp. 4 and 72. Concerning England we can mention a specific case from the Middle Ages when bishop of Worcester was summoned to the royal court (*curia Regis*) under the rule of Edward I (1272–1307) to answer a charge of excommunication of servants of the king's uncle as a result of arresting a thief within the episcopal parts. The bishop was supposed to have erred in usurping royal jurisdiction over thieves. Cf. SYLES, G. O. (ed.): *Select Cases in the court of the King's Bench under Edward I*. Vol. II. London : Professional Books, 1938, p. 52. For more detail on this issue see EVANS, G. R.: op. cit. 12, pp. 2ff.

[94] Cf. KUMOR, B.: op. cit. 19, p. 24 and BEDNAŘÍKOVÁ, J.: *Stěhování národů*. Praha : Vyšehrad, 2007, p. 256. Although its basis could be found in the canons of the Frankish councils of the later 9th century, the institution of Truce of God was successfully promoted only in the 11th century, especially thanks to the activities of the Congregation of Clugny. Its essence consisted in the order to observe suspension of arms among all Christians in the period from Wednesday evening to Monday morning, including the whole of Advent, Lent and Easter time, and some other feasts. The main aim of this institution was to defend the status of peace in individual countries and the safety of unarmed serfs, who apart from their personal bond to the soil (so-called "first serfage") were also markedly affected by private wars of the aristocracy. Cf. ŘÍČAN, R./MOLNÁR, A.: op.

fundamental questions of social life, such as adequacy of rents, commercial incomes and taxes, even including loan interest, exceptionally admitted to Christians, were standardized by the Church. In addition, prelates who held important positions in state administration were commonly also in a position to reassert Christian principles in life through their participation in creating secular legislation. For example, in this way they managed to soften the exaggerated severity of medieval penal law, in which capital punishment was imposed also for venial delicts.[95] Church sanctions on the grounds of this close connection of medieval society with religion also affected believers from the civilian point of view, which was most evident when the strictest penalty in the form of excommunication (*excommunicatio*) was used.[96] Another area in which the Church accepted special responsibility was the moderation of poverty and providing support for the disadvantaged, or for those who got into hardship for any reason.[97] It was this very

cit. 9, p. 269. The Truce of God was assumed in the whole area of the Western and Eastern Frankish Empire, England and Hispania, and first three (ecumenical) Lateran councils (1123, can. 15; 1139, can. 12; and 1179, can. 21) extended it to the whole universal Church. Its violation was later punished in addition to the Church penalty of excommunication also by state power, since this institution was soon adopted and from the end of the 11th century frequently proclaimed as "imperial (provincial) peace" (*Landfriede*) also by secular authorities (for example by emperor Henry IV 1056/1084–1105; and the several times mentioned Frederick Barbarossa). Cf. KADLEC, J.: op. cit. 26, pp. 86–88.

95 Cf. BERMAN, H. J.: op. cit. 18, p. 531 and ŠPIRKO, J.: op. cit. 11, p. 293. Canon Law expressly declared that in the case of lesser offences mercy should be preferred to strictness (*Nocentem absolvere quam innocentem condemnare venialis est*, *leviusque misericordia quam crudelitate deviare*). Especially thanks to the Church it also proved possible to promote in medieval law specifically the public law concept of a criminal offence as harm done to the whole of society. Cf. EVANS, G. R.: op. cit. 12, p. 158.

96 After its infliction, the sinner was excluded not only from the Church community, divine services and receiving sacraments, but even from civil coexistence, offices, the right to litigation, military service, and also the possibility of entering into marriage (*excommunicatio maior*). If the excommunicated did not make amends in the given time, the secular authorities arrested them, confiscated their property, and ultimately exiled them. From as early as the 9th century, civil contact with the excommunicated resulted in the penalty of minor excommunication (*excommunicatio minor*), which was defined as prohibition to receive the sacraments. Cf. 2 The 3,14. Restrictions in relation to the rights of an excommunicated person reached their height in the 13th century in the legislation of Gregory IX. Cf. VODOLA, E.: *Excommunication in the Middle Ages*. Berkeley : University of California Press, 1986, p. 85. Church penal law also applied the principle of necessity of compensatory damages provided by an offender. This principle was respected not only by Tertullian (*Tertullianus*, † circa 220), the Church Fathers Ambrose and Augustine, regulations of local councils of the Early Church and early penitentials (especially of Celtic tradition), but also by the rules of Roman Law and the barbarian codes. Even though the Church penitential system preferred the principle of understanding an offence as a transgression before God which had be atoned for by means of penance and redress, on the other hand the obligation to redress the community or the victim himself was by no means excluded. Thus also in penitential cases the assumption was accepted that penitent acts had to provide reparation and satisfaction. Cf. LEGENDRE, P.: *Écrits juridiques du Moyen Âge occidental*. London : Variorum reprints, 1988, p. 557. It was precisely medieval canonistic theories of guilt, as manifested also in the above-mentioned ideas, which formed the basis of modern penal law that persists to this day, namely in the identification of an act as intentional or neglectful, deliberate or impulsive, and suchlike. These conclusions can be explained by the canonistic premise that the degree of blame depends on the mental or moral intention of the sinner, whereby violation of law itself is regarded basically only as a secondary matter. For more detail on this issue see EVANS, G. R.: op. cit. 12, pp. 26 and 172–173; BRUNDAGE, J. A.: op. cit. 8, pp. 171–172 and 181 and BERMAN, H. J.: op. cit. 18, p. 529.

97 Moreover, the Church tax system demanded fees from every working person, whereby its laws against usury directly affected money-changers, merchants, bankers and various other financiers. Church celebrations, festivals and feasts formed natural models for work and games. Similarly, its fasting rules controlled what and at what time people could eat. Cf. BRUNDAGE, J. A.: op. cit. 8, pp. 84 and 96.

interconnection between religion and life in medieval society which afforded Canon Law the possibility of extending its influence over subsequent social and legal developments in Europe.[98]

As mentioned above, medieval society in the Christian West was characterized from the legal point of view by considerable particularism. Europe then did not possess a unified system of norms that would be suitable for legal practice in the developing cities and rural areas in every region. Each local institution, whether a kingdom, principality, free city, feudal or territorial domain, corporation, brotherhood or monastery, was regulated by its own norms, which were respected by its subjects and applied by means of recognized authority. The latter's origin did not play an important role, since the rules promulgated by sovereign authority were applied in the same manner as the rules of customary law (*consuetudines*).[99] What was typical for the majority of them was considerable instability, systematic disunity and difficult enforcement. Especially on that account, until the 11th century people believed that conflicts could be solved rather *per pugnam* than *per iustitiam*. Moreover, in the 12th century various forms of law were in force side by side as "***iura propria***", including provincial (squirarchical) law, feudal law, municipal law, royal law, marine law and commercial law, whereby each of them was applied by its own judicial system.[100] This fact was connected with the emergence of several specific groups of citizens who felt the necessity of imposing their own norms.[101] It was precisely on this background that new values of legality and justice started to emerge, values which led to the ideal of solving social conflicts *per legem* exclusively.[102]

In the later Middle Ages, particularly from the 12th to the 14th century, legal particularism was overtaken especially through the dual establishment of Roman and Canon Law, which started being called „*utrumque ius*" in this very period. Moreover, their shared ideas were developed by important medieval jurists expressing new formalized values in the ideas of *aequitas*, human justice and legality. It has been pointed out that the Catholic Church disposed of quite extraordinary status, and according to several scientists no modern definition of the state exists which could not be applied to the medieval

98 Analogously, the enormous influence of Canon Law on contemporary society is evident especially from the records of the Church courts. They reflect a surprisingly high degree of folk knowledge, even among people of humble social status, regarding Canon Law doctrine relating to marriage consent, usury, observing of feasts, including formalities required for the validity of last wills and testaments. Cf. HELMHOLZ, R. H.: *Marriage Litigation in Medieval England*. Cambridge : Cambridge University Press, 1974, pp. 79–85 and BRUNDAGE, J. A.: op. cit. 8, pp. 175–176.

99 In general we can state that even in the 11th and 12th centuries custom was the main source of secular law, cotrolling the life of medieval communities in practical ways (*consuetudo loci*). Only during the 13th century did municipal statutes achieve massive growth as the expression of the above-mentioned endeavours for independence of wealthier cities from the feudal authorities. For more detail on this issue see BELLOMO, M.: op. cit. 34, pp. XI, 83–84. After this period a trend was established that aimed at ousting the old customs which were, especially after the fashion of Canon Law, gently replaced by newer, sophisticated written legal rules. Christianity itself succeeded in breaking through the traditional German fiction of immutability of folk customary law. This fact manifested itself in the doctrine of the equality of all people before God, which was in sharp conflict with German prejudices about gender, class, race or age. Moreover, for that purpose canonists developed the theory according to which all customs, similarly as all written law, ought to emerge from natural law to ensure their validity. Cf. BERMAN, H. J.: op. cit. 18, pp. 50, 65, 145, 147 and 527.

100 Cf. BERMAN, H. J.: op. cit. 18, p. 10.

101 In this regard we can mention various social groups, corporations, associations but also urban communities and gradually forming national kingdoms. Cf. BRUNDAGE, J. A.: op. cit. 8, p. 188.

102 Cf. BELLOMO, M.: op. cit. 34, pp. 50, 78 and 156.

Church.[103] Similarly it has been shown that the **rules of Canon Law** pervaded the whole of medieval society and influenced each member of it in almost every aspect of public or private life (with specific exceptions related to the Jewish religion).[104] The presented ideal of canonical equality in particular affected practically every single person regardless of gender, social class or status. This fact was even more accented after the establishing of university studies and canonistics. From then on the ideas of Canon Law played a major role in many aspects of medieval political, economic and social life, as well as representing an important element in the intellectual leaven of the High Middle Ages.[105] In addition, while the majority of medieval legal systems were limited to a particular region or locality, the law of the Catholic Church functioned effectively as international law.[106]

From the point of view of developing legal science, the legal school of the university in Bologna was the first to assert itself even before the end of the 11th, and certainly during the first half of the 12th century, hence probably even before the time of compiling of Gratian's Decree, whose work and schooling were built on the interpretations of *Digesta* collection of Roman Law and other books of the Justinian codification, later entitled jointly as „*Corpus Iuris Civilis*".[107] On account of this alone it was supposed that every lawyer, canonists included, had to know the rules and principles in the Justinian collections, since they contained the generally-recognized **terminology of legal science** (*variae causarum figurae*) established in the High and Late Middle Ages.[108] As indicated above, Justinian Roman Law found its application in the form developed by the Romanist legal glossators, as well as the glossators of Gratian's Decree and papal decretals.[109] The glossarists' work

[103] This line is also taken by the above-mentioned English legal historian Frederic William Maitland. Cf. MAITLAND, F. W.: *Roman Canon Law in the Church of England*. London : Methuen, 1898, p. 100.

[104] Cf. BERMAN, H. J.: op. cit. 18, p. 52. Given this background we can state that medieval popes endeavoured to extend their jurisdiction over unbelievers at the same time. According to the words of Innocent IV they were also part of Christ's flock, and hence had to be subordinated to the power of the Vicar of Christ. Cf. Apparatus ad c 8 X de voto et voti redemptione 3,34. In these terms the pope emphasized that his arguments also supported the generally-accepted proprietary rights of non-Christians, defined by Canon Law as being of God's natural character. Although the arguments of Innocent IV were soon rejected by the lawyer Hostiensis, the ideas on extending papal jurisdiction over non-Christians remained an important part of legal thought, and were also manifested in the ultimate document of papal hierocracy, the bull of Boniface VIII *Unam sanctam* of 1302. For more detail on this issue see BRUNDAGE, J. A.: op. cit. 8, pp. 163–164.

[105] Cf. TIERNEY, B.: op. cit. 45, pp. 9–10.

[106] Cf. BRUNDAGE, J. A.: op. cit. 8, p. 3.

[107] Even though this title appeared already in the period of the Middle Ages, it was used for the first time in printed version in the collective edition of the Justinian codification by the lawyer Denis Godefroy (*Dionysius Gothofredus*, † 1622) of 1598. He published all five parts of Justinian legislation in two volumes, specifically the Institutions and *Digesta* in the first one and the *Codex* and Novels in the second. Cf. BLAHO, P./HARAMIA, I./ŽIDLICKÁ, M.: *Základy rímskeho práva*. Bratislava : Manz, 1997, p. 68 and WIEL, C. Van de: op. cit. 11, p. 134. Nevertheless, Justinian himself modestly called his codification "*tria volumina*". Cf. HRDINA, A.: *Kanonické právo*. Praha : Eurolex Bohemia, 2002, p. 45. In this regard we can state as a matter of interest that although the Institutions and first nine books of the *Codex* were intensively used in legal science of the early 12th century, the first of these compilations became considerably neglected towards its end. Its preceding importance was partially regained only in the period of the 15th and 16th centuries. Cf. BELLOMO, M.: op. cit. 34, p. 128.

[108] Cf. D 44,7,1. For more detail on this issue see BELLOMO, M.: op. cit. 34, p. 152.

[109] This statement also points to the fact that medieval Canon and Civil Law were in close symbiotic relationship. As stated, whereas canonists had to complete at least some study of the basis of Roman Law, it was the duty of jurists studying Roman Law to gain a certain knowledge of Canon Law as well. They were led to this by practical needs, since practice then required specialists trained in this manner. Canonists commonly competed with jurists and tried to equal each other in resolving various scientific questions or practical cases. Numerous authors therefore take the line that both systems of law were closely connected, and it was

reached its peak in the first half of the 13th century, especially in the writings of Azo († 1230), Hugolinus († after 1233) and Accursius († 1263).[110] Concerning the subsequent development of legal science, the theories of the legal glossators were more clearly established by their successors, the commentators (1250–1500).[111] Since the lectures at the medieval universities were attended by great numbers of students from all over Europe, after their return home, especially when they then held office, they spread the concepts of Justinian Roman Law alongside those in Gratian's Decree and decretal Canon Law as well.[112]

Even though the law studied at medieval universities was labelled "learned", it was in any case too far removed from its very beginnings to be called purely academic.[113] Especially given the background described above, its subject-matter as scientifically interpreted by the jurisprudence of that time gradually became **all-European common law**, hence "*ius commune*".[114] From the second half of the 13th century, various sources started containing references to this term, by which the authors referred to Roman-Canonical norms and principles, and important rules of procedural law commonly used by the courts of the whole

often difficult and occasionally impossible to separate one from the other, namely not only from the point of view of legal science, but of practice too. Although the teaching plans of universities started to differ later within the schooling process between matters for civilians and canonists, in spite of this their symbiosis remained close henceforth. For more detail on this issue see BRUNDAGE, J. A.: op. cit. 8, pp. 50, 96 and 176.

110 Of the older master glossators of the compilation *Corpus Iuris Civilis* who were active in the 12th century we can highlight alongside Irnerius especially the so-called "four doctors" (*quattuor doctores*), namely Bulgarus, Martinus Gosia, Jacobus and Ugo de Porta Ravennate. Of the significant canonistic glossators active in the same period we can mention Paucapalea, Rufinus, Stephen of Tournai, Johannes Faventinus and Albertus Beneventanus. The initial scientific prevalence of Roman Law glossators can be explained by the fact that canonists started with their glossator activity only after their Romanist colleagues. This is not forgetting of course the private-law character of the compilation of Gratian's Decree, which represented the most frequent object of their interest. Cf. WIEL, C. Van de: op. cit. 11, pp. 117 and 131 and BELLOMO, M.: op. cit. 34, pp. 96, 130 and 176. The alternation of periods of dominance of the one or other group of lawyers found its reflection in the Middle Ages also in legal practice. Whereas during the 13th and early 14th century the canonists prevailed, from the mid-14th century civilians started asserting themselves and later replaced canonists in many functional working places. Cf. BRUNDAGE, J. A.: op. cit. 8, p. 176.

111 Many authors agree that using this term to indicate these legal scientists is rather inappropriate and inadequate. This naming adhered to them only on the grounds of their writing several important commentatory works in this period. Of them we can mention especially the works "*Lecturae*" by the already-mentioned Cino da Pistoia, the "*Commentaria*" by Giovanni d'Andrea (*Johannes Andreae*, † 1348) and the writings of the famous Bartolus of Saxoferrato (*Bartolo da Sassoferrato*, † 1357). Cf. BELLOMO, M.: op. cit. 34, p. 147.

112 Cf. FILO, V.: *Kánonické právo. Úvod a prvá kniha*. Bratislava : Rímskokatolícka bohoslovecká fakulta UK, 1997, p. 23 and HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 1. The modern estimates considering the number of legal students in Bologna in any period of the 12th and 13th centuries range from 1 000 to 10 000. Cf. BERMAN, H. J.: op. cit. 18, p. 124. Here we can refer to the enormous importance of canonists in the period after the creation of Gratian's Decree. It was precisely they who provided control not only over the papal judicial system, but also over diplomatic, financial and administrative Church offices. Canonists in this period became with increasing frequency cardinals, archbishops, bishops, abbots or archdeacons in every corner of the Western Church. From the 13th century onwards canonists already dominated a Church which was growing increasingly in "legality". Cf. BRUNDAGE, J. A.: op. cit. 21, p. 132. In addition, the 13th century represented the beginning of the period of modern bureaucracy, whereby lawyers were the most suitable persons in many respects to hold offices in Church or secular administration. Cf. BERMAN, H. J.: op. cit. 18, p. 67. As an example of the development of professional competence in Bologna, alongside the development of the academic branch of the legal profession we can mention a statute of that city dating from 1158. It stated that no one could be a judge or legal advisor who had not studied law for at least five years. Cf. EVANS, G. R.: op. cit. 12, p. 50.

113 Cf. PENNINGTON, K.: Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept. In *Rivista internazionale di diritto comune*. Roma : Il Cigno Galileo Galilei, 1994. No. 5 (1994), pp. 205–215.

114 Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 245.

Christian West.[115] These were applied in principle by customary, municipal or royal judges particularly if they could not deal with a case using local customs or municipal statutes.[116] The influence of contemporary legal science manifested itself especially in the fact that *ius commune* included besides traditional texts of Roman and Canon Law also standard glosses by glossators and generally-accepted opinions of commentators, which were analogously considered to be authoritative sources of law.[117] Although in the period from the 12th to 18th century Europe knew and practised innumerable particular legal systems (*iura propria*), it was in this very period that unified, universal and unique law was established in the form of *ius commune*, or rather *utrumque ius*, consisting of Justinian Roman combined with Gratian's and papal Canon Law.[118]

The reasons for the spreading of these legal systems can be found not only in university studies but also in the philosophical concepts developing in society at the time. Namely, instead of the imperfect and temporal nature of *ius proprium*, legal science and practice aimed towards absolute and perpetual values of immutable legal concepts and a standard which formalized a solid system of values, hence a real legal system *par excellence*.[119] The theory justifying the replacement of valid laws with the rules of learned laws stemmed from the conclusion that Roman Law included in each case the universal law of honourable antiquity, whereby it also became necessary at the same time to apply the principle of canonical *aequitas*. Bearing in mind the general concept of medieval Civil Law, it is evident that the then Romanists considered Justinian law to be alive and immutable. However, they did not find **the norms of ideal law**, by means of which any legal dispute could be solved, only in the rules of the Justinian codification, but also in the norms and ideas of developing Canon Law, established in connection with generally-accepted patristic and biblical writings.[120] Formally enclosed compilations of Roman (*Corpus Iuris Civilis*) and later Canon Law (*Corpus Iuris Canonici*) too, were considered to be a terrestrial, humanly comprehensible glimpse of eternal Truth and Justice, full understanding and admiration

115 Cf. BRUNDAGE, J. A.: op. cit. 8, p. 60.

116 Cf. WHITMAN, J. Q.: *The Legacy of Roman Law in the German Romantic Era*: *Historical Vision and Legal Change*. Princeton : Princeton University Press, 1990, pp. 7–9.

117 Analogous to theologians, lawyers also started accepting certain glosses by the most important glossators as standard "ordinary" apparatus to original collections over time. In the case of Canon Law it was possible to find such glosses in the mentioned work "*Glossa Ordinaria*" written by the scholar Johannes Teutonicus. This represented an ensemble collected in the manner of a glossator's tool, and alongside consistent commentary it also contained quotations from Gratian's Decree. This work was taught at the universities of that time as a regular and customary part of the legal curriculum, and was cited with almost the same authority as Canon Law texts at the courts. Thus it became a permanent element of subsequent editions of the Decree, and some of its parts even gained the character of a source of law by means of legal custom. Cf. MICHAL, J.: op. cit. 5, p. 46 and BRUNDAGE, J. A.: op. cit. 8, p. 201. Mentioned lawyer Accursius arranged in similar way from the texts of glosses to Justinian codification the Romanist writing entitled alike. Right listed additions (*additiones*) to original works reflected the best the development of legal thinking in times of its most dynamic period of development. Cf. BELLOMO, M.: op. cit. 34, p. 146.

118 Cf. BELLOMO, M.: op. cit. 34, p. XVIII.

119 Cf. BERMAN, H. J.: op. cit. 18, p. 205.

120 Lawyers thus found the most contemporary reflection of God's truth (*veritas Divina*) in antique and sacred texts by the grand emperors of the past and medieval Roman pontiffs, and hence in the laws of the two highest authorities in the world at that time. Medieval man in fact anticipated the existence of absolute justice, but was also very conscious of the impossibility of perfect knowledge of it. Even though he disposed of knowledge that terrestrial laws represented only a pale reflection of God's Justice, he was subordinated to their authority. For more detail on this issue see BELLOMO, M.: op. cit. 34, pp. XII, 60 and 165.

of which should later be a celestial reward for the best of the human race.[121] It was especially on this background that *ius commune* rose in Late Middle Ages and Early Modern Times as "make-peace law", enabling courts to settle disputes between procedural parties definitively and simultaneously prevent further conflicts.[122]

Although not all judges maintained the same opinion about common law, and may refused to apply various norms, the conclusion nevertheless asserted over time is that "*omnia in corpore iuris inveniuntur*", whereby this corpus was identified with *ius commune*.[123] Its judicial usage did not serve typically only to deny or confirm the validity of particular laws, but rather to fill in the blanks commonly existing in it.[124] Judges were in fact chosen for their ability to use discretion (*discretio*) in applying Roman-Canonical principles or rules, supposing them to be useful in resolving disputes and helping to keep order in society.[125] This very background of the application or otherwise non-application of *ius commune* at the medieval courts allows us to attain a certain set of theories on **the hierarchy of sources accepted by the then courts**. The highest authority for a judge was law expressing the will of the monarch or some collegiate body of government. From the times of establishment of royal law the conclusion was accepted that priority was first given to royal law in judicial application, then to statutes of urban communities, and only subsequently did norms of particular feudal law valid in territories controlled as a county, duchy or principality come into account.[126] Customary law was less important, and judges could apply it only in cases where they were not able to resolve an objective question using statutes. If they were "at their wits' end" using legal customs only, then they could decide a case by applying *aequitas*, or ultimately look for the proper norm in the corpuses of Civil or Canon Law. Therefore, generalizing, we can state that judges proceeded principally in this order: *ius regium*, *statutum*, *consuetudo* and *ius commune*.[127]

Concerning these connections we can mention that the spread of *ius commune* in Italy and later throughout Europe was distinctly promoted by the doctrine of the famous lawyer

---

121 Cf. BELLOMO, M.: op. cit. 34, pp. XIII and 126.

122 Since Roman and Canon Law represented from the practical point of view "everyone's general law" (*lex omnium generalis*), judges could legitimately turn back to them in any region of Western Christendom. The belief that Roman-Canonical Law constituted universally applied *ius commune* proved itself helpful in negotiating legal contradictions that arose in solving cases of persons coming from various places or regions. Regulations of learned laws helped judges in this situation to resolve cases by means of appeal to the impartial norm that afforded them a chance to avoid the exclusive application of laws which parties to a specific case pleaded to. Cf. BRUNDAGE, J. A.: op. cit. 8, p. 112 and HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 11.

123 Cf. Accursius, notitia ad D 1,1,10. For more detail on this issue see BELLOMO, M.: op. cit. 34, pp. 116 and 179ff.

124 Cf. BRUNDAGE, J. A.: op. cit. 8, p. 60.

125 Cf. WATSON, A.: *Sources of law, legal change, and ambiguity*. Philadelphia : University of Pennsylvania Press, 1984, pp. 51–75.

126 In principle, usage of the last two mentioned sources was acceptable in cases confirmed by the king as "just and approved" (*bonae et approbates*). Cf. BELLOMO, M.: op. cit. 34, pp. 70, 89 and 185.

127 Cf. BELLOMO, M.: op. cit. 34, p. 151. For better understanding of the application of legal custom as a source of law in our region in the past, see LACLAVÍKOVÁ, M.: Právna obyčaj v postavení prameňa (súkromného) práva platného na území Slovenska do roku 1848. *In Historia et theoria iuris : printový a e-časopis pre mladých vedeckých pracovníov právnických fakúlt na Slovensku*. Bratislava : Právnická fakulta UK, 2009. No. 1/1 (2009), pp. 29–44; LACLAVÍKOVÁ, M.: Právna obyčaj a formovanie novodobého (súkromného) práva na našom území. In *Historia et theoria iuris: printový a e-časopis pre mladých vedeckých pracovníkov právnických fakúlt na Slovensku*. Bratislava : Právnická fakulta UK, 2009. No. 2/1 (2009), pp. 36–52 and LACLAVÍKOVÁ, M.: Právna obyčaj – prameň práva na území Slovenska v období medzivojnovej ČSR. In *Historia et theoria iuris: printový a e-časopis pre mladých vedeckých pracovníkov právnických fakúlt na Slovensku*. Bratislava : Právnická fakulta UK, 2010. No. 4/2 (2010), pp. 22–35.

Bartolus de Saxoferrato († 1357), who took the line of insisting on the wide possibilities of using Roman-Canonical norms and principles. For example, according to him, municipal statutes submitted to passive interpretation of *ius commune*, namely in such a way that if a statute stated that "Bartolus is a citizen", all the norms of *ius commune* considering citizenship were relevant to him and hence applicable to his person.[128] Even during his lifetime his works attracted a large number of supporters in European legal circles, called "Bartolists", who continued in his work, sharing his approach to law and visions of legality.[129] **Bartolism** manifested itself most markedly in legal practice and under its influence alongside *ius proprium* lawyers approached the application of rules contained in "*libri legales*", of the joint corpuses of Civil and Canon Law.[130] Although in the period of the 16th and 17th centuries new trends in legal thinking (especially legal humanism, so-called "second scholastics" and *Usus modernus Pandectarum*) emerged confronting the traditional jurisprudence from the 14th century, Bartolism remained a determining factor for a long time in legal science and practice. The function of positive law was denied to legal systems of *ius commune*, especially from the times of expansion of absolutist monarchies. But then *ius commune* was not refused the value and status of "written reason" in this period either, and this has been confirmed by history.[131]

Concerning Europe, at the beginning *ius commune* achieved the highest influence in the Italian cities and later in Germany, since in both countries it was accorded the status of positive law. In **Germany** it was formally accepted only in 1495, after the founding of the highest Imperial Chamber Court (*Iudicium Imperii*, *Reichskammergericht*), when its application was constituted as obligatory as "*Juristenrecht*", or "*das gelehrte Recht*".[132]

---

128 Cf. BELLOMO, M.: op. cit. 34, p. 193.

129 The importance of this new school is evident in the sentence "*nemo iurista nisi sit Bartolista*". Of the most familiar disciples of Bartolus we can mention especially the lawyers Baldus de Ubaldis († 1400), Angelus de Ubaldus († circa 1400), Bartholomaeus de Saliceto († 1412), Johannes ab Imola († 1436), Ludovicus Pontanus Romanus († 1439), Paulus de Castro († 1441), Angelus Aretinus de Gambellionibus († after 1451), Alexander Tartagnus († 1475), Rochus Curtius († 1495), Jason de Mayno († 1519), Philippus Decius († 1536) and Andreas Tiraquellus († 1559). Cf. WIEL, C. Van de: op. cit. 11, p. 132.

130 Global research clearly demonstrates that Bartolists figured in large numbers among judges, lawyers, professors and students, and utilized a rich legacy of traditional works in their everyday activities, using them as tools of the living present, not the past. It could not happen therefore that a judge or lawyer did not dispose of at least one glossed Corpus of Canon Law or Corpus of Civil Law. After all, every lawyer's duty to own one was decreed even by some statutes of Italian cities (for example Padova). The numbers of copies of both legal compilations rose enormously especially in the 16th century, representing the golden age of typography. After successful experiments by Johannes Gutenberg († 1468) in Mainz in the period from 1440 to 1455 and the first clean typographical editions (*incunabula*), the massive production of books started. Moreover, disposing of one's own printing house was considered to be a matter of general prestige, and therefore it was possible to find one in almost every larger European city (at the beginning especially Mainz, Frankfurt am Main, Paris and Rome, but above all Venice and Lyon). To illustrate the complexity and costliness of preparing manuscripts, we can note that every larger volume or code contained at least 200 folios, that is to say the complete material for one larger legal book required approximately 100 sheeps. Cf. BELLOMO, M.: op. cit. 34, pp. 63, 174, 211, 215 and 216.

131 Cf. Ibid., pp. 204 and 224.

132 The Imperial Chamber Court consisted of assessors of whom one half was represented by doctors of law and other by semi-aristocrats and legal experts. The structure of the court itself also developed in accordance with the ideal of preference of *ius commune* in judicial application activity. The highest court thus had to decide cases and confirm decisions primarily on the grounds of common law of the Empire. Judges therefore had to know the regulations of Justinian Roman and Canon Law. The norms of *ius commune* practically became components of the imperial legal system, and were thus respected and applied. Local law persisting especially in legal customs was in a different position. Namely, the judges of the Imperial Chamber Court

However, the approach to the application of *ius commune* varied, not only comparing different countries, but even within one and the same country dissimilar approaches were common. As an example in this regard we can mention France, whose northern part was typical for its acceptance of written law (*pays de droit écrit*), while the south was characterized by the use of customary law (*pays de droit coutumier*). Thus, in the north the authority of positive law was not admitted to *ius commune* (*droit savant*), however its application was deemed appropriate when judges accepted it as "*ratio scripta*" for its wisdom, especially in cases when obscurities in law persisted. But in the south Roman Law was considered to be the positive, written law which ought to be applied in all events. Ultimately though, its usage in legal practice itself stabilized especially for resolving certain specific questions.[133] From the other regions' point of view, we can state by way of example that while in **Hispania** *ius commune* enjoyed great favour (*el derecho docto*), individual situations were decisive in relation to its application in England. Nevertheless, we can not declare that legal development in England was not influenced by *ius commune* at all.[134]

From the point of view of specific legal branches, *ius commune* achieved greatest influence on the development of procedural law. Namely, back in the 12th and 13th centuries the well-known so-called "**Roman-Canonical Process**" (*processus Romanus canonicus*) was established, which was adopted as a whole for the needs of *ius commune*. It came into existence on the basis of extensive application of Roman Law by Church courts, and represented the outcome of synthesis of elements of Roman Law (partially of German, but especially of Lombardian law) and Canon Law.[135] It was the Roman-Canonical

were not obliged to apply it, in accordance with the above-mentioned principle, and did not have to even know it. But if one of the parties to a case requested its application they were under obligation to admit it, however only in cases where it was in accord with the relevant norms of *ius commune*. Especially in this way the progressive acceptance of Roman and Canon Law in Germany came about, and these processes were current practically on the background of development of *Usus modrenus Pandectarum* until the 20th century. Cf. BELLOMO, M.: op. cit. 34, pp. 217–218 and RAPP, F.: op. cit. 20, p. 276. The course of procedural action was also determined at this court by the principles of the written Roman-Canonical Process which were put into practice obligatorily following the rules of procedure of 1500 and 1507. Cf. HOBZA, A./TUREČEK, J.: *Úvod do církevního práva*. Praha : Nákladem vlastním, 1929, p. 161.

133 The above-mentioned Italian historian Manlio Bellomo found the reasons for this development in the fact that precisely in the south of France there were two important legal schools, namely in Montpellier and Toulouse, where quite naturally only *iura docta* were taught. Given this background, the similarity between developments in Italy and southern France was considerable, especially thanks to Italian professors teaching at those French universities and French students studying in Italy (especially in Bologna). Cf. BELLOMO, M.: op. cit. 34, pp. 91, 102 and 106.

134 I demonstrated in more detail the extensive influences of the institutions of process Canon Law known as "*remedia spolii*" on positive secular law in medieval and modern England in the monograph VLADÁR, V.: *Remedia spolii v stredovekom kánonickom práve*. Praha : Leges, 2014, pp. 177ff.

135 Cf. RUFFINI, F.: op. cit. 87, p. 272 and BERMAN, H. J.: op. cit. 18, p. 51. This union found its expression in elaborated form especially in the work "*Speculum iudiciale*", written about 1217 by the later bishop of Mende, William Durandus (*Guillielmus Durantis*, *Guillaume Durand*, 1286–1296). This particular writing became standard for procedural-law treatment from the time of its composition and maintained this status at least until the end of the Middle Ages. Cf. KANTOROWICZ, H.: *Studies in the Glossators of the Roman Law*. Cambridge : University Press, 1938, p. 123; EVANS, G. R.: op. cit. 12, p. 93 and HOBZA, A./TUREČEK, J.: op. cit. 132, p. 149. This presupposes that Durandus finished his work serving as a judge, and later revised it during his holding of the office of bishop. According to several scientists, the *Speculum iudiciale* itself assured him of a position among the most important legal scientists of all time. Cf. BRUNDAGE, J. A.: op. cit. 8, p. 58. For a more detailed treatise on the Roman-Canonical Process and its influences on medieval and modern legal culture, see especially NÖRR, K. W.: *Römanisch-Kanonisches Prozessrecht*. *Erkenntnisverfahren erster Instanz in civilibus*. Enzyklopädie der Rechts- und Staatswissenschaft Abteilung Rechtswissenschaft. Berlin –

Process itself which turned out to be the most important factor that overcame the judicial customs of national laws and influenced considerably through its perfection and precision the form of procedural law of almost all continental legal systems (including the Anglo-American).[136] It penetrated the secular judicial systems in most countries in advance of the acceptance of Roman Law, and contributed distinctively to the extension of Canon Law influence in private law.[137] Its innovative character manifested itself especially in the putting into practice of the principles of equality of parties before law, presumption of innocence and right of appeal, as well as preferring the corrective purpose of punishments, including investigation of questions of culpability and intention of the perpetrator. In addition, procedural law itself expressly incorporated the principle of canonical equity (*aequitas canonica*), permitting judges to adapt procedural rules to the conditions of each specific situation.[138] Its practical application especially contributed to the so-called "wave of acceptance" of Roman Law in Europe in the period from the 14th to 16th century, thanks to which the most important terms, definitions and institutions, as well as individual norms and systematic division of the whole to parts, were taken from both Classical legal systems into the secular legal systems.[139]

It was precisely the enormous influence exerted by *ius commune* on the whole of life in medieval society and newly-passed secular particular law which drew the attention of secular authorities. This manifested itself in endeavours aimed at its suppression by the new generally-conceived feudal law, imposed especially in the period from the 15th to 17th century by national kings or regional princes as exclusive and sovereign legislators.[140] That period was therefore characterized by criticism and denial of the universality and perpetuity of *ius commune*, accompanied by emphasis on the need for the existence of one strong authority competent to pass generally-conceived laws for the whole community.[141]

Heidelberg : Springer, 2012 and LITEWSKI, W.: *Der römisch-kanonische Zivilprozeß nach den älteren ordines iudiciarii*. Kraków : Wydawnictvo Uniwersytetu Jagiellońskiego, 1999.

136 Cf. BRUNDAGE, J. A.: op. cit. 21, p. 156.

137 Cf. HOBZA, A./TUREČEK, J.: op. cit. 132, p. 161 and WESENBERG, G./WESENER, G.: *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung*. Vierte, berbesserte und ergänzte Auflage. Wien – Köln : Böhlau Verlag, 1985, p. 18.

138 Cf. BRUNDAGE, J. A.: op. cit. 8, p. 60.

139 In general we can state that the pre-reception and acceptance of Roman Law was the outcome of a slow and continuing historical process, established by the graduates of the grand university centres in Italy and France, initiating the norms and ideas of *ius commune* into legal science and practice. Cf. BELLOMO, M.: op. cit. 34, p. 219.

140 On the other hand, it was precisely the ongoing legal particularism in Europe which helped in asserting and developing *ius commune* in the position of perfect and generally-accepted law. The mutual relationship between *iura propria* and *ius commune* was understood in the appropriate way by the above-mentioned Italian historian Manlio Bellomo, who stated that as national languages appreciated Latin, accepted it and intermingled with it, in a similar manner *iura propria* intermingled with *ius commune,* both of which were derived analogously to Romance languages after their separation from Latin. Again, we can compare his ideas on the forming of Romance languages in the High Middle Ages in certain respects to the process of developing of Roman style in architecture, which was put to end by Gothic style and was connected freely to antiquity and the Carolingian and Ottonian Renaissance. Cf. BELLOMO, M.: op. cit. 34, pp. XIII, 97, 100, 103, 156 and 179. The process of asserting of national royal law at the expense of *ius commune* and any universalistic tendencies started well before this period, for the first time possibly in the legislation of the Norman king Roger II (1130–1154) and then also in the legislative activities of English and French kings. For more detail on this issue see BERMAN, H. J.: op. cit. 18, pp. 462 and 536.

141 Following several postulates of legal humanism, the normative texts of the Justinian codification were not yet considered to be sacred, authoritative, complex and perfect, thus with no inner contradictions and antinomies.

Finally, despite all efforts, royal legislation, presented as the new and only law for the whole kingdom, there remained in contrast to *utrumque ius* only **one of *ius proprium***, although at the highest degree within the hierarchy of sources of law.[142] Meanwhile it also remained quite natural that regulations of a particular locality or community (*iura propria*) had to reflect to a certain extent as well the norms common to all who believed in Christ (*ius commune*). Thus *iura propria* found in *ius commune* eminently usable concepts, principles, norms and sophisticated legal terminology which adumbrated its development, and in many respects still influence it to this day. Given this background especially, we can state that without knowledge of the forms, culture and thinking of *ius commune* it is impossible to understand not only the normative texts of historical particular law itself, but even the spirit of that law. Without *ius commune*, moreover, *iura propria* could never have been so vital and would not have had such impact on human consciences, the necessary impact which provides every legal system with natural acceptability and respect from its recipients.[143]

Conclusion

With regard to the preceding comments, it is also appropriate to highlight the merits of the theological-legal concepts of Canon Law, lying especially in the continuous provision of important conceptual bases of historical institutions which have influenced various concepts in positive law. It should be remembered that some highly-respected civil codes, featuring instances of positive law and incorporating several of those historical legal institutions, have influenced and influence to this day the legal systems of many states all over the world, whether through their implementation as a whole or by inspiration from their principles and institutions.[144] The activities of the Catholic Church, the development of Christian (especially scholastic) theology and application of Canon Law in medieval society adumbrated in a conspicuous way the subsequent direction of legal development in almost all European states, including those with common law systems. Within this context it is necessary to highlight the qualities of the frequently-mentioned Roman-

Alongside several errors it was to a large extent reproached especially for the inner organization of its texts, which was deemed chaotic. Cf. WIEL, C. Van de: op. cit. 11, p. 133. Within this context we can mention for example the lawyer François Hotman († 1590), who wrote his work "*Antitribonianus*" in 1567 and tried to sum up all the deficiencies and errors of the Justinian compilers. It is not surprising that Hotman's critical conclusions were overtly aimed at supporting French national law at the expense of legal universalistic tendencies proclaimed through *ius commune*. Cf. MAFFEI, D.: *Gli inizi dell'umanesimo giuridico*. Milan : Giuffrè, 1956, pp. 61–63.

142 These processes can be illustrated using the example of emperor Frederick II, who in 1231 proscribed the legal compilation *Liber Augustalis* (*Constitutiones Siculae sive Neapolitanae*) as the main and general source in *Regnum Sicilium*, putting *ius commune* expressly on the lowest degree of subsidiary law. On the other hand, when he established university legal studies in Naples in 1224 he ordered only traditional classical systems of *ius commune* to be taught. Cf. BELLOMO, M.: op. cit. 34, pp. 94 and 100–101 and DOLINSKÝ, J.: op. cit. 11, p. 233.

143 Cf. BELLOMO, M.: op. cit. 34, p. 156. Nevertheless, these very processes manifested the reflection of persisting neo-Platonic ideas in the philosophy of St. Augustine, since *iura propria* drew its spirit from ideal law, existing in ideas of Divine Providence, expressed in most perfect form in the systems of *ius commune*. Cf. BERMAN, H. J.: op. cit. 18, p. 152.

144 For example, the German BGB served as a model for Civil Law legislation in Japan, the Chinese Republic, People's Republic of China, South Korea, Thailand, Portugal, Greece, or Ukraine; the Swiss ZGB was taken almost in its entirety by Turkey; the French *Code civil* influenced to wide extent the legal development of Italy, Netherlands, Belgium, Spain, Romania, Egypt and the majority of Latin American countries.

Canonical Process, which became standard as an inseparable component of *ius commune* in Europe practically until the 19th century,[145] and which has influenced the form of several process-law institutions, not only in European states. Long-term application of the norms and premises of the Roman-Canonical Process has ultimately found its reflection in the great number of superior conceptions of process law which continuously influence the developing concepts and legal practice of bodies of executive and judicial power to this day.

Of the institutions influenced by the Roman-Canonical Process we can mention especially the canonistic postulates of the equality of positions of procedural parties in a legal action, removal of the burden of evidence on the petitioner or suitor, presumption of innocence of the accused and natural distrust of the charge brought, the need to submit strong evidence to have a condemnatory judgment delivered, protection of witnesses, the impossibility of trying a person for the same deed twice, definitions of guilt and culpability, the necessity of establishing considerably higher standards of impartiality at appellate courts, imposing severe penalties on judges for abuse of their authority, including the fundamental impossibility of delivering a judgment in the absence of the accused, or without otherwise affording the proper opportunity to defend themselves by means of ordinary process (*ordinabiliter*).[146] As a matter of interest we can mention that the majority of these principles emerged in older (early-medieval) Canon Law, and were later accepted by Gratian and the canonists as components of ordinary "*ordo iudiciarius*", which contributed to establishing the standards of process law for many generations.[147] Besides process law we can observe distinct influences of medieval Canon Law also in family law and the law of succession, not excluding the regulation of legal institutions concerning contracts, delicts, or proprietary, financial and corporate law.[148] As a matter of interest we can also mention that the ideas and hypotheses of the early canonists prefigured in many respects even the arrival of modernity and contemporary secularism. For example, in their writings we can find the seeds of concepts typical for the constitutional state, manifested especially in the idea of limiting of the power of governments by means of law, endeavours

[145] Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, pp. 45–46 and HOBZA, A./TUREČEK, J.: op. cit. 132, pp. 161–162.

[146] Cf. Dec. Grat. c 7 C II qu 1 and c 14 C II qu 1 and Dec. Burch. XVI,9; 13–14. Even though several of these postulates also appeared in the sources of Roman Law, some scientists find reasons for the domination of Canon Law elements in the Roman-Canonical Process in the fact that Roman Law did not provide systematic and complex directives of process law which were supposed to make provision primarily for the rules of natural justice. In addition, according to various scholars, the compilers of the Justinian codification deliberately cut out the majority of passages dealing with procedural matters, and these were therefore not available to medieval legists. Cf. BRUNDAGE, J. A.: op. cit. 21, p. 152. As a traditional example of reflecting natural justice the canonists proposed the model of Jesus Christ, who did not banish Judas, despite his being a thief, because he was not formally accused properly by the person qualified to bring an action against him, and thus did not have any possibility to pass through ordinary judicial process. As another example we can mention the behaviour of God the Father, who when supposedly investigating the case of eating the forbidden fruit from the Tree of Life, asked Adam despite his omniscience "Adam, where are you?", in order to afford him the possibility to defend himself. Cf. Ge 3,9. Even the necessity of acceptance of the presumption of innocence of the accused by a court until their guilt is proven was manifested with biblical references. In this case reference was typically made to the action of Jesus Christ, who never labelled Judas as a traitor, though saying: "One of you will betray me". Cf. Mt 26,21; Mk 14,18 and Jn 13,21. For more detail on this issue see EVANS, G. R.: op. cit. 12, pp. 99, 103, 106–107, 109, 114–118, 127, 135–136, 152 and 157 and BERMAN, H. J.: op. cit. 18, p. 251[33].

[147] Cf. BRUNDAGE, J. A.: op. cit. 21, p. 153.

[148] Cf. BRUNDAGE, J. A.: op. cit. 8, pp. 188–189 and BERMAN, H. J.: op. cit. 18, pp. 218–219 and 245.

to explore the legitimism of papal and royal power, or initiatives tending towards the establishment of parliamentary representative assemblies.[149]

These influences of Canon Law on secular society were possible ideally in the period of the Middle Ages, when the Catholic Church enjoyed its strongest position ever. As already mentioned, the prominent English historian Frederic William Maitland († 1906) even declared that it was practically impossible to formulate a definition of statehood that could not also fit the Catholic Church in the High Middle Ages.[150] Its "citizenship" was granted by baptism, and the secular *res publica* factually consisted of the same corpus of citizens as its spiritual counterpart.[151] In addition, in that same period a large number of new legal norms and doctrines were issued, of which several had their foundations in history (especially in Roman Law) and were interpreted by lawyers throughout the Christian West.[152] Those doctrines were quite naturally, within the limits given by St. Augustine, filled with Christian spirit, and their application led to even more expressive deepening of the theological-religious character of society in that period. Everything is evident from the fact that the main theological authorities of the Holy Scriptures and Church Fathers had pride of place not only in theological, but even in legal terms.[153] Justinian law too, itself adapted to Christian principles by the emperor Justinian I, was analogously interpreted within these bounds.[154] For these reasons we cannot describe these theological-legal concepts, Canon Law norms and postulates, including the norms and principles of Roman Law, which together became the constituent components of common law (*ius commune*) only as features of medieval positive law reality, since first and foremost they represented a perfect system of legal thinking and inexhaustible source of genuine values.[155]

As mentioned above, later endeavours to suppress the influence of the Church on secular society and eliminate the status of *ius commune* were by no means successful. Thanks to university schooling and the inner perfection of its norms, the Church's postulates penetrated the whole legal argument mechanism and significantly contributed alongside implemented legal concepts to the creation of legal logic and terminology. Only during the 18th and 19th centuries, on the background of codification endeavours, did the notions idealizing national law, which was enforced on its receivers in an absolutist way, start being asserted successfully in practice.[156] Despite later democratizing changes in the government

[149] Cf. BERMAN, H. J.: op. cit. 18, pp. 221ff. These concepts started emerging in secular society especially during the 13th and 14th centuries, and from the Church's point of view manifested themselves in the endeavours to subordinate the papacy under the authority of the ecumenical council (the so-called "conciliar" or "conciliarist movement"). Cf. BELLOMO, M.: op. cit. 34, p. 108. Within this context we can state that the canonist Laurentius († 1248) himself found a source of legislative authority in the will of the prince, which he distinguished from rationality, laying in this way the intellectual foundation for the later-developed voluntaristic tradition in political thinking. According to that thinking, even though the state or prince could exercise their power regardless of rationality, they could do it only within boundaries specified by law. Cf. HARTMANN, W./PENNINGTON K. (eds.): op. cit. 47, p. 230.

[150] For more detail on this issue see BRUNDAGE, J. A.: op. cit. 8, p. 187 and BERMAN, H. J.: op. cit. 18, p. 553.

[151] Cf. EVANS, G. R.: op. cit. 12, p. 23 and BELLOMO, M.: op. cit. 34, p. 65.

[152] Cf. BRUNDAGE, J. A.: op. cit. 8, p. 164.

[153] Cf. EVANS, G. R.: op. cit. 12, p. 53. Even Gratian himself ultimately presented as the most important principle of every law the rule that no-one should do to others what he does not want others to do to him. For more detail on this issue see TIERNEY, B.: op. cit. 45, p. 13.

[154] Cf. HOVE, A. van: op. cit. 46, p. 465.

[155] Cf. BELLOMO, M.: op. cit. 34, p. 183.

[156] Several scientists have reached agreement that in the period of codifications the maxim of legal security started to emerge as the dominating principle which was set in contrast to the older legal particularism and

systems of individual countries and several amendments of codex norms, it is not possible to say that the seal of *ius commune* has been wholly erased. In any case, these processes could not eliminate the centuries-old influences of Roman-Canonical Law, which were balanced in the 19th century by the ideas of Romanticism and newly interpreted by the German Pandectist school. On the other hand it is necessary to admit that in the 20th century the Christian aspect of *ius commune* representing from its beginning the genuine and inseparable essence of its principles and values became suppressed. The gradual secularization of human society ultimately manifested itself sadly in the terrors of the World War II (1939–1945), which can in many respects be presented as the outcome of abandoning the Christian values and norms of natural law inscribed into the heart of every human being by demiurgic Divine activity.[157]

Even the suppression of supernatural Revelation (contained in Holy Scriptures and oral Tradition) supported the above-mentioned processes, which became current especially from the times of philosophical activity of the representatives of the Age of Enlightenment, who promoted new ways in education, science, politics and culture as a whole. In general we can state that since that time, return to the values professed by Western society in the High Middle Ages and Early Modern Times has not happened, and regarding the contemporary situation it is difficult to assume it will happen in the foreseeable future. Basic axiomatic concepts of Christian religion were replaced after World War II with virtual (and sometimes bare) constructions of universal human rights and liberties, which only partially cover the value starting-points expressed in the ideas of Christianity, conceived in an extensive way and natural to every human being, preferring matter-of-fact prosperity at the expense of yearning to do good, practising self-sacrifice and cultivating disinterestedness. These very premises of ideal values were veiled behind the norms of Roman-Canonical Law, and promoted to a great extent the solid development of human society. Especially given this background, we can state that natural law concepts originating in God's law ought at least to be respected by every legal system, or rather ought to become solid components of generally-accepted human morality again. Just as the pope is limited by God's law, similarly secular legislators or political representatives of individual states ought to be limited by certain timeless Divine principles. It is evident nowadays that development tends towards suppression or deformation of the things that used to be natural to people, and that for many of us this has become "normal" because of our living in contemporary society. The implication is that we will have to learn to apply natural law again, and return to things initially inscribed into our nature and conscience by the Creator himself.

In conclusion we can restate the principle confirmed over time that as every valid norm is connected with history, similarly every individual act is connected with certain experience, which provides form and measure and a certain sense for perspective and balance. This postulate is distinctly topical in relation to Canon Law, whose boundaries with Civil (especially Roman) Law have remained, not only since the Middle Ages, but

obsolescence of its norms. Especially the Napoleonic *Code civil des Français* of 1804, imposed during the period of the Napoleonic wars on other countries as well (Kingdom of Italy, 1806; Principality of Lucca and Piombino, 1806–1813; Kingdom of Naples, 1085–115; and Grand Duchy of Tuscany, 1808), was considered to be the image of real triumph and its regulations were widely copied by several secular legislators. The principle of equality of all citizens before law was also the basis for composing the Austrian ABGB of 1811, which succeeded analogously. Cf. BELLOMO, M.: op. cit. 34, pp. 8–9 and 11.

157 Cf. Rm 2,14–15 and Heb 10,16.

even in Modern Times, high penetrable.[158] *Ius commune* in particular, which developed on the European continent based on the ideas of learned law and Christian doctrine, did not only contribute to the creation of unified legal civilization, but simultaneously provided a basic platform on which several secular legal systems rested until the 19th century, and in many respect's still rest to this day. On that account it is not possible and absolutely not appropriate to draw a thick line under history and on the background of rising secularization of human society to neglect the existence and signification of the legal system of the Catholic Church, which can be identified alongside Roman Law as the origin and bearer of the modern Western legal tradition. Within this context we might recall an idea of the Italian Romanist Manlio Bellomo which nicely expresses wherein the main power of the legacy of *ius commune* for legal science and practice resided, and ultimately still resides. He wrote that when any lawyer in a fleeting moment of his professional life declines to be only "a man of law", but aspires instead to be "a man of justice", in that moment the medieval system of *ius commune* re-emerges with its extraordinary potential as grand spiritual reality and essential expression of civilization. Then both sides of the coin, theology and law, will not only be confronted again, but also re-embodied.[159]

Súhrn

Prínos kresťanstva k rozvoju európskej právnej kultúry

Ako je všeobecne známe, medzi odbornou i laickou verejnosťou bol najneskôr od čias osvietenstva výrazne presadzovaný záver spochybňujúci prínos kresťanstva k rozvoju ľudstva ako celku, čo platilo aj pre oblasť právnej vedy, respektíve právnictva ako takého. Dôvodom bola najmä rozsiahla sekularizácia ľudskej spoločnosti, keď boli hodnoty, do toho času úspešne chránené kresťanskou morálkou, respektíve prirodzeným či pozitívnym Božím právom, nahrádzané hodnotami časnými. Stáročia trvajúci vplyv Katolíckej cirkvi a jej morálno-právnych noriem však nemohol byť ani v ďalšom období celkom zmazaný a jeho pečať je dodnes zrejmá v práve všetkých európskych štátov. Keďže táto otázka je stále viacerými právnymi historikmi či odborníkmi zaoberajúcimi sa pozitívnym právom široko diskutovaná, zostáva naďalej vysoko aktuálnou. Teologicko-právnické koncepcie, kánonickoprávne normy a postuláty, vrátane noriem a princípov rímskeho práva, ktoré sa stali pevnou súčasťou spoločného práva, nemožno ani dnes označiť len za stredovekú pozitívnoprávnu realitu, keďže na prvom mieste predstavujú dokonalý systém právnického myslenia a zároveň nevyčerpateľný prameň tých pravých hodnôt. Aj z toho dôvodu možno oprávnene vyzdvihnúť zásluhy koncepcií kánonického práva, spočívajúcich najmä v kontinuálnom poskytovaní dôležitých koncepčných východísk historickým právnym inštitútom, ktoré ovplyvnili viaceré pozitívnoprávne koncepcie. Netreba taktiež zabúdať

[158] For more detailed illustration of the Roman Law influences in Canon codified law, see for example MACH, P.: Odraz rímskej *restitutio in integrum* v kódexovom práve Latinskej cirkvi. In MASLEN, M./ŠVECOVÁ, A. (eds.): *Rozhodovacia činnosť národných, medzinárodných a európskych súdov*. *Dies iuris Tyrnavienses*. *Trnavské právnické dni*. *Zborník z konferencie konanej v dňoch 25.–26. 9. 2014 na Právnickej fakulte Trnavskej univerzity v Trnave*. Trnava : Trnavská univerzita v Trnave, Právnická fakulta, 2015, pp. 140–148.

[159] BELLOMO, M.: op. cit. 34, p. XIV.

na skutočnosť, že historické, či pozitívnoprávne príklady rešpektovaných občianskych zákonníkov, do ktorých boli viaceré historické právne inštitúty prebrané, ovplyvnili a dodnes ovplyvňujú právne poriadky štátov celého sveta, a to či už prostredníctvom ich recipovania ako celku, poprípade inšpirovaním sa ich princípmi a inštitútmi.

Matej Pekarik

Římské právo v moderních kodifikacích (Römisches Recht in modernen Kodifikationen). 17. Konferenz der Romanisten der Tschechischen Republik und der Slowakischen Republik

Schon seit 1994 findet jedes Jahr ein freundliches und angenehmes Treffen lieber Kollegen an einer tschechischen oder slowakischen juristischen Fakultät statt, die sich der wunderschönen und mysteriösen Disziplin der Rechtswissenschaft, nämlich der Romanistik verschrieben haben. Im Vorjahr beschlossen die Teilnehmer der 16. Konferenz in Olomouc Prag als Ort des nächsten Treffens.

Am Freitag, den 15. Mai 2015 begann die Konferenz mit einem prächtigen gemeinsamen Abendessen der allmählich anreisenden, insgesamt 35 Vertreter der juristischen Fakultäten aus Plzeň, Brno, Olomouc, Bratislava und Trnava, die alle von den Gastgebern herzlichst begrüßt und willkommen geheißen wurden. Trotz der hohen Teilnahme war die Abwesenheit eines Romanisten spürbar – der geistliche Vater des schönen Gedankens, ein jährliches Treffen der Romanisten zu veranstalten, Professor Peter Blaho aus der Juristischen Fakultät der Trnavaer Universität in Trnava, konnte wegen einer plötzlichen Erkrankung an diesem Treffen leider nicht teilnehmen. Die anwesenden Teilnehmer brachten ihr Bedauern zum Ausdruck und wünschten Herrn Professor gute Besserung. Auch die Romanisten aus Banská Bystrica und Košice konnten an diesem Treffen aus verschiedenen Gründen leider nicht teilnehmen. Nachdem alle Konferenzteilnehmer angekommen waren, trafen sie sich zu einem inoffiziellen gemütlichen Beisammensein in der angenehmen Atmosphäre der Pizzeria Maestro.

Durch die angenehmen Ereignisse des Vorabends gut gelaunt und zum wissenschaftlichen Forschen stark motiviert, versammelten sich die Teilnehmer am Samstag, den 16. Mai früh am Morgen im Tagungssaal der Prager juristischen Fakultät. Die Tagung eröffnete Professor Michal Skřejpek, Leiter des Lehrstuhls für Rechtsgeschichte an der hiesigen Fakultät, ein hervorragender Romanist. Er begrüßte herzlichst die Teilnehmer und brachte seine Freude über die hohe Teilnahme zum Ausdruck. Demnächst übergab Professor Skřejpek seinem Kollegen, Professor Jan Dvořák, Prodekan der Prager Fakultät und Leiter deren Lehrstuhls für bürgerliches Recht, als Vertreter der Fakultätsleitung das Wort. Professor Dvořák begrüßte die Teilnehmer auch im Namen der Fakultätsleitung und hob das zentrale Thema der Konferenz hervor; es sei immer vom Vorteil, wenn das Alte und das Moderne zu einem bereichernden Treffen zusammengebracht werden, wenn das Alte modern gefasst und wiederum das Moderne historisch, im geschichtlichen Kontext betrachtet wird, betonte er. Zum Schluss seiner Rede wünschte Professor Dvořák den Anwesenden viel Erfolg bei ihrer schöpferischen Forschungstätigkeit.

Als erste Rednerin trat Mgr. Eva Dudásová aus der Juristischen Fakultät der Comenius-Universität in Bratislava mit ihrem Beitrag zum Thema „**Rímske právo v moderných kodifikáciách: historické, právne a spoločenské príčiny (Das römische Recht in den modernen Kodifikationen: historische, rechtliche und gesellschaftliche Ursachen)**“ auf. Dieser Beitrag bot einen umfassenden Überblick durch das Weiterleben des römischen Rechts, vor allem im frühen Mittelalter. In diesem Zusammenhang konnte auch der

Kodifikationsprozess des römischen Rechts nicht unerwähnt bleiben, denn die Kodifikation, bzw. die Kodifizierung des römischen Rechts war eine der grundsätzlichsten Voraussetzungen für sein Überleben nach dem Ableben des römischen Staats. Mgr. Dudásová beendete ihren Beitrag mit einer synthetisierender Betrachtung der drei Arten, in denen das römische Recht für die Zukunft beibehalten blieb, nämlich die Aufrechterhaltung des römischen Rechts im engeren Sinne, die „Wiederholung" des römischen Rechts auf den Gebieten, wo es schon einmal gegolten hatte, und die Rezeption des römischen Rechts in die lokalen Rechtsordnungen.

Der nächste Beitrag von Doc. JUDr. Michaela Židlická, Dr. behandelte das Thema „***Personae* v novém občanském zákonníku (*Personae* im neuen Bürgerlichen Gesetzbuch)**". Sie konzentrierte sich auf die Suche nach Parallelen zwischen dem Schutz des Einzelnen im antiken Rom und den modernen Konzepten der Menschenrechte. Zuerst analysierte sie die Rechtslage im antiken Rom. Hierbei stellte sie zuerst fest, obwohl es sich in Rom um eine Sklavenhaltergesellschaft handelte, genossen die Menschen, die das Recht als Rechtssubjekte anerkannte (*personae*), in gewissen Situationen deren Schutz. Es ging vor allem um den Schutz der Schwächeren gegen die Stärkeren, das heißt, den Personen, die nicht in der Lage waren, ihre Angelegenheiten selbst zu verwalten, das Recht mittels Partizipation anderer Personen an diesem Verwalten vor potenzieller Schädigung Schutz besorgte Die wichtigsten Institute dieses Schutzes waren die Vormundschaft (*tutela*) und die Pflegschaft (*cura*). Frau Doc. Židlická betrachtete näher die Pflegschaft des Verschwenderischen (*cura prodigi*); ihr Entstehen, den Umfang der Rechte und Pflichten des Pflegers, und auch das Erlöschen dieser Pflegschaft im historischen Kontext der Existenz des römischen Rechts. Demnächst stellte sie sich die Frage, ob es etwa auch heutzutage ähnliche Schwächere wie die römischen Verschwenderischen gibt. Die Antwort scheint ihrer Meinung nach auf der Hand zu liegen – die heutige Welt stellt für den natürlich schwachen und beeinflussbaren Menschen so viele Köder bereit, seien es die Banken oder ähnliche Institutionen, die miteinander wetteifern, je mehr Geld den Menschen als Darlehen zur Verfügung zu stellen, und dafür „fast gar nichts" als Gegenleistung zu fördern, seien es die Händler, die möglichst viel Ware verkaufen wollen, bestens auf Kredit, mit „fast keinem Aufpreis", sei es die immer aggressivere Werbung, die diese Dienstleistungen fast aufdrängt, sei es das Phänomen des Glückspiels, und in den letzten Jahren immer mehr das virtuelle Glückspiel im Internet, dass es eigentlich Wunder ist, dass nur so wenige Menschen in finanzielle Probleme geraten und im Konkursverfahren einen Privatbankrott durchmachen müssen. Mit anderen Worten, heute ist es viel einfacher, Verschwender zu werden, als in Rom ein *prodigus*. Deswegen ist auch die Frage ganz aktuell, wie das Gesetz die moderne Entsprechung des römischen *prodigus*, den „finanziellen Analphabeten" schützt. Als Antwort auf diese Frage wies Frau Doc. Židlická auf manche Bestimmungen des neuen tschechischen bürgerlichen Gesetzbuches hin, die die Pflegschaft regeln, und auf diejenigen, in denen das Wort „verschwenderisch" als Rechtskategorie benutzt wird.

Doc. JUDr. Petr Bělovský, Dr. aus der Gastgeberfakultät bearbeitete in seinem Beitrag das Thema „**Nabývání vlastnictví v českém občanském zákoníku v kontextu římského práva (Eigentumserwerb im neuen tschechischen Bürgerlichen Gesetzbuch im Kontext des römischen Rechts)**". Insbesondere konzentrierte er sich auf dessen § 1099, demgemäß das Eigentum schon mit Perfektion des Vertrags übertragen wird. Herr Doc. Bělovský befasste sich in seinem Beitrag mit der Suche nach den historischen Wurzeln, bzw. Begründungen für diese Konstruktion, die sich mit der römischen Lehre über *titulus* und *modus* auseinandersetzt. Als römischrechtlicher Ausgangspunkte bediente er sich

einerseits der Pomponiusstelle (D 18,1,19), die besagt, dass es zur Eigentumsübertragung beim Kauf der Bezahlung des Kaufpreises bedarf, und andererseits des römischen Instituts des Eigentumsvorbehalts. Demnächst untersuchte Doc. Bělovský die mittelalterlichen romanistischen Schulen, die der Glossatoren und die der Kommentatoren, die eigentlich die Lehre vom *titulus* und *modus* anhand der Quellen ausgearbeitet hatten. Trotz dieser Tatsache waren es gerade die Kommentatoren, die mit den ersten Denkfiguren in Richtung *translatio solo consensu* kamen. Diese ersten Vorstufen stellte dann Samuel Pufendorf in einer komplexen Theorie dar. Diese Theorie inspirierte dann auch die Verfasser des napoleonischen Code civil, die diese Übereignung ohne faktische Übergabe der Sache auch in das französische Gesetzbuch inkorporierten. Aber auch außer Code civil gab es einige Rechtsordnungen, die diese Muster anerkannten. Zum Schluss seines Beitrags wies Doc. Bělovský auf einige Unklarheiten, bzw. problematische Bestimmungen der neuen tschechischen Rechtsregelung hin.

Mit dem neuen tschechischen Bürgerlichen Gesetzbuch beschäftigte sich auch JUDr. Petr Dostalík, Ph.D., Vertreter der Juristischen Fakultät von Palacký Universität in Olomouc. Seine Erörterung trug den Namen „***Condictiones* římského práva a moderní bezdůvodné obohacení (*Condictiones* des römischen Rechts und das moderne ungerechtfertigte Bereicherung)**". Zum Anfang wies Dr. Dostalík auf die römischrechtliche Inspiration der Verfasser des neuen tschechischen Bürgerlichen Gesetzbuches hin, namentlich auf die ausdrückliche Berufung auf eine Digestenstelle (Pomp. D 12,6,14) in der Gesetzesbegründung. Danach folgte eine detaillierte historische Untersuchung sowohl der philosophischen Grundlage, als auch der römischrechtlichen Bearbeitung der ungerechtfertigten Bereicherung. Dr. Dostalík erwähnte auch andere Arten der Bereicherung als die aus den Kondiktionen, nämlich solche, die durch die Verarbeitung, Verbindung, Verschmelzung, oder durch Investition in eine fremde Sache entstehen. An diese Untersuchungen knüpfte eine Analyse der gegenwärtigen und der vorigen tschechischen Gesetze an, was die ungerechtfertigte Bereicherung betrifft. Analysiert wurde vor allem die dogmatische und theoretische Konstruktion der einzelnen Fälle und gesucht wurde nach einer allgemeinen Klausel der ungerechtfertigten Bereicherung. Diese fand Dr. Dostalík im neuen tschechischen Bürgerlichen Gesetzbuch, abweichend vom römischen Recht, das keine allgemeine Klausel der ungerechtfertigten Bereicherung kannte.

Die Eigenart des Beitrags von Doc. JUDr. Jiří L. Bílý, Ph.D., Eq.M. von der Juristischen Fakultät der Comenius-Universität in Bratislava „**Římské vinohradní právo a jeho recepce v moderních právních řádech (Das römische Weinbaurecht und dessen Rezeption in modernen Rechten)**" lag im untersuchten Zeitraum. Doc. Bílý berichtete über die rechtliche Stellung von *procuratores* – Verwalter der kaiserlichen Weingärten in der Steiermark des 17. Und 18. Jahrhunderts. Die Bezeichnung, als auch die Befugnisse dieses Amts stammen aus dem römischen Recht, wo *procurator* als selbständiger Verwalter eine gewisse Wirtschaftseinheit (sei es eine Manufaktur, ein Bauernhof oder ein Frachtschiff usw.) leitete, und innerhalb dieser Einheit und gegenüber Dritten eine vollkommen souveräne, dem Eigentümer gleiche Position innehatte. Materiell war die Stellung des steierischen kaiserlichen „*procuratores*" dieselbe wie im antiken Rom; zu Umwandlungen kam es vor allem in formeller Hinsicht, zwecks Anpassung den veränderten gesellschaftlichen und staatsrechtlichen Beziehungen. Als Vertreter eines Monarchen – des Kaisers war der Verwalter als eine Art von Staatsbeamten zu betrachten, und damit hing auch dementsprechende Staatsgewalt zusammen. So hatte der Verwalter Jurisdiktion in Sachen der auf dem Gebiet des Weingartens ansässigen Leibeigenen, und auch eine Art

„diplomatischer" Berechtigungen gegenüber den umliegenden Körperschaften, seien es freie Städte oder andere Landesherren.

Jan Ullmann, Student der Prager Fakultät, wählte für seinen Beitrag das Thema „***Crimen falsi* v římském právu a dnes (*Crimen falsi* im römischen Recht und heute)**". Er präsentierte einen umfassenden und komplexen Überblick der Entwicklung des Verbrechens der Fälschung. Besprochen wurde der Tatbestand dieses Verbrechens, die zu verhängenden Strafen und auch die entsprechende strafrechtliche Jurisdiktion. Dieser Analyse folgte eine ebenfalls umfassende und detaillierte Präsentation der heutigen strafrechtlichen Regelung dieses Verbrechens. Der Beitrag von Herrn Ullmann war konsistent und sehr gut vorgetragen, was vermuten lässt, dass an der hiesigen Fakultät für Nachwuchs gesorgt ist.

Theoretisch fasste seine Darlegung Mgr. Matej Mlkvý, PhD., LL.M. aus der Juristischen Fakultät der Comenius-Universität in Bratislava. Sie trug den Namen „**Vplyv rímskeho práva na civilistické vymedzenie pojmu vecných práv (Einfluss des römischen Rechts auf die zivilistische Definition des Begriffs „Sachenrecht)**"". Zunächst konzentrierte er sich auf die Charakterisierung des objektiven Sachenrechts und der subjektiven Sachenrechte. Demnächst nahm er die Zuhörer auf eine spektakuläre Reise durch die Geschichte, nach dem Begriff des Sachenrechts suchend. Er begann mit römischem Recht, wo er bei den römischen Juristen einige Spuren des abstrakten Begriffs Sachenrecht fand. Nächster Halt waren die Glossatoren, bei denen Dr. Mlkvý auf die *causa actionis* aufmerksam machte. Die Kommentatoren definierten das Eigentum, und konstruierten die Dichotomie *dominium directum – dominium utile*. Das war ein weiterer Schritt zum abstrakten Begriff des Sachenrechts. Hugo Donellus war der Erste, der zwischen *iura in re propria* und *iura in re aliena* unterschied. Den letzten und wichtigsten Schritt machte Friedrich Karl von Savigny in seinem monumentalen Werk System des heutigen römischen Rechts, in dem er ein selbständiges Kapitel dem Sachenrecht widmete, womit er diesen Begriff einführte.

Mgr. et Mgr. Lenka Šmídová Malárová, Doktorandin an der Juristischen Fakultät der Masaryk-Universität in Brno, trug ihren Beitrag mit dem Titel „***Insula in flumine nata*" v novém občanském zákoníku a předchozích občanskoprávních úpravách (Die „*Insula in flumine nata*" im neuen Bürgerlichen Gesetzbuch und in den vorigen zivilrechtlichen Regelungen)**" vor . In ihrem Beitrag behandelte sie die Rechtswirkungen des Entstehens einer Insel im Fluss. Sie begann mit der römischen Regelung, die, wie später in ihrem Beitrag bewiesen wurde, maßgebend für alle anderen Regelungen war. Sie setzte ihre Untersuchungen mit dem ABGB, dem ersten tschechoslowakischen Bürgerlichen Gesetzbuch aus dem Jahre 1950 und demjenigen aus dem Jahre 1964 fort. Zu Ende ihres Beitrags analysierte sie die gültige Fassung des neuen tschechischen Bürgerlichen Gesetzbuches und die daraus folgenden potentiellen Unklarheiten.

Die nächste Vortragende war Mgr. Bc. Lucie Obrovská, Ph.D., Absolventin des Doktorstudiums an der Juristischen Fakultät der Masaryk-Universität in Brno, derzeit im Büro des tschechischen Ombudsmanns als Abteilungsleiterin tätig. Sie beschäftigte sich mit dem Thema „**Právní pojetí zvířete v římském právu a právu moderním (Die rechtliche Betrachtung des Tiers im römischen Recht und im modernen Recht)**". Dr. Obrovská präsentierte zuerst die römischen und auch die griechischen philosophischen Vorstellungen im Bereich Tiere. Nach einem kurzen Überblick der rechtlichen Stellung der Tiere im antiken Rom erläuterte sie die philosophische Beurteilung von Tieren im Mittelalter und in der Neuzeit. Das war für sie eine notwendige metajuristische Grundlage, mithilfe deren sie die *ratio legis* der gültigen Fassung des § 494 des neuen tschechischen Bürgerlichen Gesetzbuchs erklärte. Diese Bestimmung erklärt, dass ein lebendiges Tier nicht als Sache

(Objekt der Rechtsbeziehungen) betrachtet werden soll, sondern als mit Sinnen versorgtes Lebewesen von besonderem Wert und besonderer Bedeutung zu betrachten ist. Diese Abgrenzung sei allerdings problematisch, denn ein Tier sei weder Sache noch Person. Um dieses legislative Räsel zu lösen, verglich Dr. Obrovská diese Bestimmung mit analogen ausländischen Bestimmungen.

Nach einem gemeinsamen Mittagessen folgten weitere interessante Beiträge. Marek Novák, Student der Prager juristischen Fakultät, berichtete in seinem Vortrag „**Nabytí držby v římském právu a současnosti (Besitzerwerb im römischen Recht und in der Gegenwart)**" über die vielfältigen Umwandlungen des römischen Besitzes im 20. Jahrhundert in der tschechischen Provenienz. Als Ausgangspunkt seiner Ausführungen bediente er sich einer kurzen Zusammenfassung der römischen Besitzlehre, um dann seine Analyse mit einer Komparation fortsetzten zu können. Demnächst untersuchte er, wie die jeweils gültige Regelung der römischen Lehre aufrechterhalten wurde, bzw. welche Abweichungen da festgestellt werden können. So untersuchte er das österreichische ABGB, den BGB-Entwurf der tschechoslowakischen Regierung aus dem Jahre 1937, das tschechoslowakische Bürgerliche Gesetzbuch aus dem Jahre 1950 und dasjenige aus dem Jahre 1964, und als Letztes das neue tschechische Bürgerliche Gesetzbuch. Zum Schluss seines Vortrags wies Marek Novák auf einige potentielle Applikationsprobleme der neuen Rechtsregelung hin.

Einen ähnlichen Charakter hatte der Beitrag von Mgr. Veronika Štětinová aus der Prager juristischen Fakultät, die über „**Vydržení v římském právu a dnes (Ersitzung im römischen Recht und heute)**" berichtete. Ihr Vortrag hatte ebenso ein hohes Niveau, was die Vorbereitung, die Konsistenz, als auch die Wiedergabe betrifft.

„***Heres ex re certa* versus singulární sukcese (*Heres ex re certa* versus Singularsukzession)**" war der Titel der Erörterung von JUDr. Pavel Salák, Ph.D. aus der Juristischen Fakultät der Masaryk-Universität in Brno. Zum Anfang erklärte Dr. Salák die Herkunft dieses auf ersten Blick ostentativen Widerspruchs; ein *heres* (Erbe) ist ein Universalsukzessor, und mit dieser seiner Eigenschaft ist das Vererben einer bestimmten Sache ausgeschlossen. Doch wer eine bestimmte Sache aus der Erbschaft bekommen soll, ist kein Erbe, sondern ein Legatar. Nachdem er sich mit diesem dogmatisch-theoretischen Problem auseinandergesetzt hatte, untersuchte Dr. Salák die einschlägigen Bestimmungen der modernen Kodifikationen, nämlich die des österreichischen ABGB und des deutschen BGB. Zum Schluss seines Beitrags erörterte er die Regelung des neuen tschechischen Bürgerlichen Gesetzbuchs, vor allem was das Sprachliche hinsichtlich der Begriffe „Erbe" und „Legatar" angeht.

Eine komplexe Analyse der römischen Rechtsquellen war kennzeichnend auch für den Beitrag „**Požívací právo – starý institut nově pojatý? (Nießbrauch – ein altes Institut neu begriffen?)**" von JUDr. Kamila Bubelová, Ph.D. aus der Juristischen Fakultät der Palacký-Universität in Olomouc. Im Mittelpunkt ihres Beitrags stand der Nießbrauch zum Haus. Frau Dr. Bubelová wies auf die Differenzen zwischen Nießbrauch zum Haus und einer anderen persönlichen Dienstbarkeit – der *habitatio* – hin, definierte den Kreis der Berechtigten zur Ausübung dieses Rechts, besprach den Inhalt des Rechts, wobei sie einige Grenzsituationen erwähnte, die ein gutes Material für Kasuistik römischer Juristen darstellten, und erörterte auch einige Regeln betreffend die Kaution für den Eigentümer. Demnächst untersuchte Dr. Bubelová die Regelung des neuen tschechischen Bürgerlichen Gesetzbuchs und brachte einige kritische Wahrnehmungen zum Ausdruck. Die neue tschechische Regelung, so sie, weiche in vielen Punkten von der römischrechtlichen Überlieferung ab, obwohl sie sich ausdrücklich auf sie berufe.

Nicht nur die römischen Rechtsquellen, sondern auch die nichtjuristischen lateinischen Quellen analysierte sehr umfangreich in seinem Beitrag „**Vztah Falcidiánské kvarty a povinného dílu (Das Verhältnis der Falcidianischer Viertel und des Pflichtanteils)**" JUDr. Bc. Radek Černoch aus der Juristischen Fakultät der Masaryk-Universität in Brno. Unter anderen erörterte er die zweite Gerichtsrede *In Verrem* von Marcus Tullius Cicero, einige Werke von Jacobus Cuiacius, und natürlich die klassischen und justinianischen römischen Rechtsquellen. Er untersuchte die Herkunft, die Funktion und die Umwandlung beider erbrechtlichen Institute. Nach der Analyse der deutschen und österreichischen Kodifikation (BGB, bzw. ABGB) stellte er fest, dass keine von ihnen die *Quarta Falcidia* enthält; eine ähnliche Funktion wie die *Quarta Falcidia* hat die sog. Sozinische Klausel im § 2306 BGB. Die *Quarta Falcidia* entdeckte er im § 1598 und den Pflichtanteil im § 1643 des neuen tschechischen Bürgerlichen Gesetzbuchs und beide wurden kurz dargestellt.

Einem ähnlichen Thema widmete seine Aufmerksamkeit Mgr. Adam Talanda, Mitarbeiter der Juristischen Fakultät der Palacký Universität in Olomouc. Seine Darlegung trug den Namen „**Darování pro případ smrti (Schenkung von Todes wegen)**". Auch Mgr. Talanda eröffnete seine Darlegung mit der Analyse der römischen Rechtsquellen, der eine kurze Präsentation der Umwandlung dieses Instituts im römischen Recht folgte. Als Nächstes fügte er die Untersuchungen des ABGB, des BGB-Entwurfs der tschechoslowakischen Regierung aus dem Jahre 1937, des ersten tschechoslowakischen Bürgerlichen Gesetzbuchs aus dem Jahre 1950 und desjenigen aus dem Jahre 1964 ein. Zu Ende seiner Darlegung analysierte er die gültige Fassung des neuen tschechischen Bürgerlichen Gesetzbuches und die daraus folgenden potentiellen Unklarheiten.

Ein nicht frequentiertes romanistisches Thema wählte für seinen Beitrag Mgr. Martin Šlosar aus der Prager juristischen Fakultät. Er beschäftigte sich mit „**Srovnání právní úpravy odpovědnosti představitelů státu v římském právu a dnes (Vergleich der Rechtsregelung der Staatsbeamtenverantwortung im römischen Recht und heute)**". Aus seiner Analyse einiger Institute des römischen öffentlichen Rechts ergab sich, dass schon im antiken Rom manche Grundsätze der Staatsgewaltausübung funktionierten, die auch heute anerkannt sind, wie zum Beispiel die Indemnität der Staatsbeamten oder die Verbundenheit der Staatsgewalt mit Verantwortlichkeit, und dass es Rechtsmittel gegen Dysfunktionen im Staatsapparat gab, vor allem die Enthebung (*abrogatio*) oder die Absetzung des Königs (*affectatio regni*).

Im Unterschied zu anderen Teilnehmern beschäftigte sich Mgr. Matej Pekarik, PhD. aus der Juristischen Fakultät der Trnavaer Universität in Trnava in seinem Beitrag „**Prvky rímskeho rodinného práva v moderných kodifikáciách (Merkmale des römischen Familienrechts in den modernen Kodifikationen)**" mit dem neuen ungarischen Bürgerlichen Gesetzbuch. Nach einer kurzen Einführung in die Geschichte des gesetzgeberischen Werks und nachfolgender Übersicht im Bereich der familienrechtlichen Regelung des Gesetzbuchs untersuchte er das neu gestaltete Ehegüterrecht, wo er Spuren der römischen *affectio maritalis*, *praesumptio Muciana* und *actio de in rem verso* fand.

Der nächste Vortrag beschäftigte sich auch mit Familienrecht. Mgr. Bc. Barbora Platzerová, Ph.D. aus der Prager juristischen Fakultät bearbeitete das Thema „***Deductio in domum mariti* a povinnost soužití manželů v taiwanském občanském zákonníku (*Deductio in domum mariti* und die Pflicht des ehelichen Zusammenlebens im taiwanischem Bürgerlichen Gesetzbuch)**". Als Erste untersuchte sie die römische Ehe als Ganzes und speziell das Hineinführen der Ehefrau in das Haus ihres Mannes, um es dann mit der chinesischen und taiwanischen Regelung zu vergleichen. Die chinesische Regelung

konstruiert das eheliche Zusammenleben als eine klagbare und vollstreckbare Pflicht der Eheleute, anders als das römische Recht, das das faktische eheliche Zusammenleben zur Entstehungs- und Bestehungsvoraussetzung einer Ehe benötigte. Doch die chinesische Regelung hatte bis 1998 ein gemeinsames Merkmal mit dem römischen Recht: die Eheschließung erfolgte ohne Partizipation der Staatsgewalt; dies wurde mit der neuen Kodifikation 1998 verändert.

Ein hervorragender Beweis für die weder von Zeit noch von Raum abhängige Anwendbarkeit und sich immer wieder beweisende Weisheit des römischen Rechts war der Beitrag von Mgr. Ján Šurkala aus der Juristischen Fakultät der Comenius-Universität in Bratislava. Sein Beitrag trug den Namen „**Rímskoprávne inšpirácie vybraných inštitútov ukrajinského pozemkového práva (Römischrechtliche Inspirationen der gewählten Institute des ukrainischen Liegenschaftsrechts)**". Nachdem Mgr. Šurkala das Auditorium in die Problematik des ukrainischen Liegenschaftsrechts eingeführt hatte, dessen auffälligstes Merkmal das zwingende Staatseigentum an Liegenschaften ist, analysierte er zwei Rechtsinstitute des neuen ukrainischen Liegenschaftsgesetzes, die das Privateigentum an Liegenschaften ersetzen, nämlich das *superficies* und die *emphyteusis*. Beide Institute wurden in den ukrainischen Kodex samt Namen aus dem römischen Recht inkorporiert, und auch dessen Inhalt, bis auf kleine zeit- und raumgebundene Ausnahmen, entspricht dem römischen Recht.

Nach allen diesen (insgesamt 19) Beiträgen ergriff das Wort Professor Skřejpek. Er bedankte sich im Namen der Organisatoren allen Beitragenden für ihre Vorträge, richtete an sie aufrichtig würdigende Worte für die hohe Qualität aller Beiträge und lud die Teilnehmer zu einer kurzen Abschiedsveranstaltung ein.

Diese Konferenz zeigte, wie wichtig das römische Recht ist, und zwar sowohl für die Rechtswissenschaft, als auch für den Rechtsunterricht. Alles Neue, was das Leben vor allem im Privatrecht, aber auch im öffentlichen Recht, mit sich bringt, kann mithilfe der römischen Weisheit gar oder besser behandelt werden, so dass das Recht ein *ars boni et aequi* wird und bleibt. Glücklicherweise hat die hohe Anzahl von Teilnehmern, die ebenfalls hohe Anzahl der Beiträge, und vor allem deren hohe Qualität bewiesen, dass das römische Recht nicht vergessen wird und die tschechische und slowakische Romanistik tatkräftiges Gegengewicht den kontraproduktiven positivistischen Tendenzen der letzten Jahren bleibt.

Jana Koprlová

Multi-Language International Scientific Online Journal *Societas et Iurisprudentia* on the Threshold of the Third Year of Existence

Societas et Iurisprudentia (SEI) is a multi-language international scientific online journal for the study of legal issues in the interdisciplinary context. It is issued under the auspices of the Faculty of Law at Trnava University in Trnava, Slovakia, and it thematically focuses on social relevant interdisciplinary relations on the issues of public law and private law at the national, transnational and international levels, represented by all known branches of law, and connected to the key areas of social science disciplines in the broadest understanding.

The journal accepts and publishes exclusively original, hitherto unpublished contributions in the Slovak, Czech, English, German, Russian, French, Slovenian, Polish, Spanish, Serbian, Japanese, and Persian Dari languages and by mutual agreement in relation to current possibilities of the editorial office also in other world languages. SEI is issued in an electronic on-line version four times a year, regularly on March 31st, June 30th, September 30th and December 31st, and it offers a platform for publication of contributions in the form of separate papers and scientific studies as well as scientific studies in cycles, essays on current social topics or events, reviews on publications related to the main orientation of the journal and also information as well as reports connected with the inherent mission of the journal. At the end of every entire volume the journal's editorial office releases in electronic on-line version in the English language prepared abstract proceedings *Societas et Iurisprudentia*: Abstract Proceedings summarizing the all individual contributions published in the journal SEI in the corresponding volume.

The mission of SEI is to provide a stimulating and inspirational platform for communication both on the professional level and the level of the civic society, as well as for scientific and society-wide beneficial solutions to current legal issues in context of their broadest interdisciplinary social relations, in like manner at national, regional and international levels.

Since the first issue of SEI, published on December 31st, 2013, till the present six numbers of SEI have been released in the form a complete numbers as well as separate papers in a total of 60 contributions in six various languages, namely the English, German, Spanish, Slovenian, Czech, and Slovak languages, thanks to nearly 50 authors coming from nine European and Asian countries (Slovakia, the Czech Republic, Germany, Austria, Poland, Latvia, Slovenia, Bulgaria, and India).

The first and the only one number of the journal SEI issued in year 2013 offers a total of ten separate scientific studies in four languages – in the English, German, Slovenian, and Slovak languages. The first study presents readers a unique masterpiece of codification in the form of the Austrian Civil Code, also known by the acronym ABGB. The following study is devoted to analytical issues and historical background of the implementation of the principle of equal treatment in connection with the Directive of the European Parliament and Council 2008/104/EC on temporary agency work on the example of several European Union member states. Also the third study analyzes and clarifies employment law issues, this time from the perspective of the collective agreement law in terms of the law of the

Slovak Republic. The next study systematically and in detail explains the questions of international legal liability for injurious consequences arising out of acts not prohibited by international law. The fifth study is devoted to a comprehensive analysis of the judicature of international judicial and quasi-judicial bodies in the field of human rights related to Romany ethnic group. The sixth study is devoted to the wide-spread discussed very serious questions of Nuremberg Laws. The following study, based on set hypothesis and applying regression analysis, verifies the assumption of existing competition between states, driven from unequal rates of corporation income tax in various countries of the European Union. The eighth study presents and analyzes in detail the issue of prevention of social exclusion in connection with education, specifically on the example of immigrants and their descendants as socially vulnerable groups of population. In order the penultimate study comprehensively explains, analyzes and evaluates on the example of Latvia the aspects of a properly-functioning national innovation system. The final study clarifies, analyzes and illustrates the term and definition of the risk-free assets, their basic concepts as well as their role and application on the current financial markets.

The first issue of the second volume of the journal SEI offers a total of ten separate scientific papers in four languages – in the English, Spanish, Czech, and Slovak languages. The first study presents readers the Polish police, its mission and tasks in the role of the agent for the protection of human rights in Poland. The following study entitled "Prolegomena in the Canon Law – the Charismas and Their Institutionalization in the Early Church" analyzes key questions of the Canon law. Also the third study analyzes and clarifies historical context, this time from the view of kinship and family law applied in the Aztec urban state of Tenochtitlan in prehispanic Mexico. The next study systematically and in detail explains the questions of current and anticipated future possibilities to identify individuals based on the DNA analysis in favour of forensic genetics. The fifth study is devoted to a comprehensive analysis of the questions of the procedural aspects of liability for nuclear damage, particularly in terms of its current international provisions. The following study offers readers clarifying the issue of the right to privacy of employees from the view of the legal practice of courts in the Slovak Republic and the Czech Republic. The seventh study presents and analyzes in detail the legal context of abortion and infanticide in the modern Hungarian criminal law. The following scientific paper comprehensively explains, analyzes and evaluates the functions of the personnel marketing in the perception of business managements in the Slovak Republic. In order the penultimate scientific paper defines and on the example of the construction sector explains the questions of work injuries in small and medium-sized enterprises in the Slovak Republic, and the final scientific paper clarifies, analyzes and illustrates the term and definition of the disparity focused personnel audit.

The second issue of the second volume of the journal SEI offers a total of nine separate scientific papers in two languages – in the English and Slovak languages. The first of a total of seven studies presents readers the questions of the inheritance law and especially of the last will from the view of new technologies as offering challenges for the corresponding recodification of the Polish civil law. The following study analyzes key issues integrating in the current labour law, namely mobbing and chicanery of the employee as a form of abuse of right. The third study analyzes and clarifies in detail the fundamental questions of civil liability for nuclear damage in terms of the Slovak Republic. The following study, based on the analysis of specific cases, concentrates on maintaining of remuneration and/or entitlement to an adequate allowance of a pregnant worker. The following scientific paper offers readers clarifying the questions of prohibition of discrimination on grounds of

sexual orientation on the examples of selected case law of the European Court of Human Rights. The sixth study, based on realized research, comprehensively presents, analyzes and evaluates the questions of the structure of personality properties and its contribution to long-term employability. In order the final study defines and very precisely analyzes and evaluates the websites' accessibility of the central state administration bodies in the Slovak Republic from the view of applying the skip navigation mechanism. The following scientific paper in the form of an essay explains in detail, analyzes and judges the contribution of the Bruce G. Trigger's book "Understanding Early Civilizations" to the General and Comparative History of State and Law, and the final contribution offers the readers information on establishing a new scientific journal for legal science in the Slovak Republic named Forum Iuris Europaeum.

The third issue of the second volume of the journal SEI offers a total of nine separate scientific studies in two languages – in the English and Slovak languages. The first study offers readers very carefully, systematically and in detail the questions of the case law of international arbitration, judicial and quasi-judicial authorities in the area of protection of the rights of indigenous (native) peoples. The following study analyzes the key issues of the legal framework of the mediation institute and the mediator status under the Bulgarian law. The third study analyzes and on basis of individual cases explains the fundamental questions of legal protection of the intangible cultural heritage. The following study concentrates on questions of possibilities, limits as well as mutual interaction between the European Union law and the nuclear liability legislation. The fifth study streamlines and clarifies the current issues of criminal liability of legal entities in the Slovak Republic. The following scientific paper offers readers clarifying the questions of education and training in the field of safety and health at work, specifically from the perspective of the Slovak Republic. The seventh study, based on research realized in the Slovak business companies, comprehensively clarifies and evaluates the issues related to need of realizing the personnel audit. In order the penultimate study defines and comprehensively explains the issues connected with performance management and work performance appraisal in business companies. And finally, the last study very precisely analyzes and deeply evaluates the websites' accessibility of the all individual self-governing regions in the Slovak Republic from the view of applying the skip navigation mechanism.

The fourth issue of the second volume of the journal SEI offers a total of seven separate scientific studies, one review of notable scientific publication as well as two pieces of interesting information in three different languages – in the English, Czech, and Slovak languages. Within the section "Studies" the first study offers readers very carefully, systematically, and in detail the questions of the factual employment as an immanent part of the Slovak labour law. The following study analyzes the key issues of the youth detention centers and shelter homes in Poland, with the core of the analysis laid on their organization and functioning. The third study accurately analyzes and on basis of individual cases explains the fundamental questions of legal protection of book as the cultural good and medium of data storage from the view of the selected legal regulations under the Polish law. The following study concentrates on detailed clarification and in-depth analysis of the application of the Corporate Governance models, especially in connection with the possibility of the convergence and adaptation of the Anglo-American model of Corporate Governance in China's current economic environment. The fifth study analyzes in detail, streamlines and clarifies the conclusions which brought the latest Slovak survey on the issue of working hours and its impact on quality of sleep and motivation. The following scientific

paper offers readers clarifying the questions of research objectives, key issues and conclusions of the current research in the area of the town's image management conducted in selected towns and one region in the Czech Republic. The last study very precisely analyzes and deeply evaluates the websites' accessibility of the central public administration bodies in the Bratislava region from the view of applying the skip navigation mechanism. The following section "Review" offers readers a review of a new unique scientific work – Lexicon of the Slovak Law History, and the final section "Information" provides information on studying the English study program "European Legal Studies" as well as the mobility ERASMUS+ program at the Faculty of Law of the Trnava University in Trnava, Slovakia, and also the information on Forum Iuris Europaeum – the scientific journal for legal science issued by the Faculty of Law of the Trnava University in Trnava.

The first issue of the third volume of the journal SEI offers a total of nine separate scientific studies, one review of notable scientific publication as well as two pieces of interesting information in two different languages – in the English and Slovak languages. Within the section "Studies" the first study offers readers very broadly, systematically, and in detail the questions of new legislative rules of agency work in the Slovak Republic. The following study analyzes the key issues of tenancy law in Slovakia from the view of the housing situation as well as economic, urban, and social factors of housing. The third study accurately analyzes and on basis of individual cases explains the fundamental questions of the employment contract as a central institute of labour law, particularly in the context of comparing the past and present status. The following study concentrates on the example of Poland on detailed clarification and in-depth analysis of selected questions of identity of criminal law at the time of the European integration. The fifth study analyzes in detail, streamlines, and clarifies the issues of liability aspects of cross-border transport of nuclear material, with special accent laid on the "Vienna Regime" in the field of nuclear law. The following study offers readers qualifying and clarifying the key definitions and models of restorative justice. The seventh study is devoted to socially determining questions of legislation of abortion and neonaticide in socialist criminal law. In order further scientific paper offers basic legislative facts of the relationship between assets positions and financial autonomy of the self-governing regions in the Slovak Republic and at the same time analyzes their utilization rate of assets related to obtaining additional sources of funding. The last study very precisely analyzes and deeply evaluates the websites' accessibility of the central public administration bodies in the Trnava region from the view of applying the skip navigation mechanism. The following section "Reviews" offers readers review of a new unique scientific book – History of the State and Law on the Territory of Slovakia II. (1848 – 1948), and the final section "Information" provides key answers to the question why to study law at the Faculty of Law of the Trnava University in Trnava, Slovakia, and also the overview of scientific events organized by the Faculty of Law, Trnava University in Trnava, Slovakia, until the end of the year 2015.

The website of the journal offers the reading public information in the common graphical user interface as well as in the blind-friendly interface designed for visually handicapped readers, both parallel in the Slovak, English as well as German languages. In all those languages the journal's editorial office provides also feedback communication through its own e-mail address. At the same time the website of the journal offers readers due to the use of dynamic responsive web design accession and browsing by using any equipment that allows transmission of information via the global Internet network.

Currently, the journal SEI is known and read in 84 countries on all continents of the world,

namely in Afghanistan, Algeria, Argentina, Armenia, Australia, Austria, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, China, Colombia, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Dominican Republic, Egypt, Estonia, Finland, France, Germany, Ghana, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Kosovo, Kuwait, Latvia, Lithuania, Malaysia, Malta, Mexico, Moldova, Mongolia, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Puerto Rico, Romania, Russia, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, The Netherlands, Tunisia, Turkey, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uruguay, Venezuela, and Vietnam.

The journal SEI is available on the website:
http://sei.iuridica.truni.sk/international-scientific-journal/

Journal's permanent contact e-mail address is:
sei.journal@gmail.com

Eva Dudásová

HAMZA, Gábor: Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto romano. Santiago de Compostela : Andavira Editora, 2013. 714 p. ISBN 978-84-8408-727-4

The presented book, which is written in Italian, is an excellent work based on detailed research related to the origin and development of private law in modern legal orders with reference to Roman law. The overall content reflects the idea that the tradition of Roman law still exists nowadays. It represents an integrated part of legal cultural identity in Europe as well as in other countries all over the world. Professor Hamza markedly emphasizes the influence of Roman law on the development of modern private law. The author initiates his explanation with the issue of harmonization of private law and the tradition of Roman law in Europe. He continues with a precise description of the impact of Roman law on legal orders from antiquity till current times. The language used by the author is pleasantly readable, thus contributing to the evident and clear formulation of his findings. Moreover the text, rich in information, is regularly supplemented with extensive and valuable bibliographies corresponding with the issues considered in the particular chapters.

The book is divided into four chapters and a preface, which outlines the process of harmonization of private law and the tradition of Roman law in Europe. The first chapter (pp. 37–58) is dedicated to the origin of private law in Europe, where the author pays attention to the survival of Roman law after the fall of the Western Roman Empire in 476 A. D. He considers primarily the barbarian law called *lex barbarorum*, thus dealing with *Edictum Eurici*, *Breviarium Alaricianum*, *Lex Romana Burgundionum* as well as with other collections of law from the beginning of the Middle Ages. An extensive subchapter provides valuable information about the codification of Roman law in the Eastern Roman Empire during the era of Justinian. It includes a description of the aim and the process of this codification itself. At the same time the author also illustrates the final works of the codification commissions.

The development of private law in the Middle Ages represents the main issue of the second chapter (pp. 59–172). It starts with a short introduction which includes a reference to three "models" confirming the survival of legal materials from the time of Emperor Justinian. A brief explanation is followed by subchapters related to *ius commune* and *ius canonicum*. Besides this, the author also pays attention to the development of law in the Eastern Roman Empire after the Justinian codification. He also considers the fall of Visigothic Kingdom and the development of law on its ex-territories. Moreover the author provides information related to the development of law in France, the Iberian Peninsula, the Holy Roman Empire, Poland and Lithuania, Hungary, England and Wales, Scotland, Northern Europe, the Balkan states and Danubian principalities as well as in the Russian principalities.

After the chapters dedicated to the issues of Antiquity and Middle Ages, the most extensive one focuses on the development and codification of private law in Europe and the Caucasus in the modern period. This third chapter (pp. 173–546) outlines the influence of Roman law in various countries. It starts by presenting the development of law in

Germany with regard to principal tendencies in the science of private law. The codification of private law in Germany is considered in the context of *Codex Maximilianeus Bavaricus Civilis*, Allgemeines *Landrecht für die Preußischen Staaten, Bürgerliches Gesetzbuch für das Königreich Sachsen and Bürgerliches Gesetzbuch.* Further attention is paid to *Zivilgesetzbuch* and codes of commercial law. With regard to the issue of Austrian hereditary regions, the unification of private law and the Civil Code, *Allgemeines Bürgerliches Gesetzbuch*, are accentuated. In this chapter the author also deals with the codification of private law in Switzerland, and highlights the significance of *Schweizerisches Zivilgesetzbuch*. Elsewhere we can find valuable information about the influence of Roman law in Belgium, Luxemburg or the Netherlands. The explanation related to the Netherlands is considered in the context of works created by various significant professors, for instance B. Williams (*De ratione emendandi leges*), P. Voet (*De usu juris civilis et canonici in Belgio Unito* or *In quattuor Libros Institutionum imperialium commentarius*), C. Van Eck (*De septem damnatis legibus Pandectarum seu crucibus jurisconsultorum* or *Principia juris civilis secundum ordinem Digestorum*, I–II.). The author also quotes one of the "fathers" of modern (public) international law, H. Grotius. His work *De iure belli ac pacis*, rich in philosophical aspects, influenced numerous other authors such as S. Pufendorf, G. W. Leibniz or CH. Wolf. Among the descriptions of private law in many other countries included in the third chapter of this book, an interesting part relates to the law of Hungary. The author points out the importance of *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae*. Its author, I. Werbőczy, adapted the Roman law only formally, but nevertheless it became "the Bible of the nobility". Roman law played a significant role during the codification of private law and it developed into an important part of education at universities in Hungary. The influence of Roman law is noticeable also in England. J. Selden analysed it in his work Fleta. Further attention to Roman law has been paid at the universities of Cambridge and Oxford. Professor Hamza includes in the third chapter of his book also brief notes related to private law especially in Finland, Sweden, Norway, Slovakia, Poland, Romania, Bulgaria, Serbia, Croatia, Greece and Cyprus.

The fourth chapter (pp. 547–644) considers the influence of the European continental private law tradition in non-European countries. At the beginning, the development of law of the United States is taken into account. The author highlights the fact that the influence of European continental law is emphasized in its context only rarely. With regard to the law of the United States, more attention is usually paid to the influence of common law. However, for instance the first Louisiana Civil Code includes many elements of the Code civil. Thus it also contains some aspects of Roman law. The legal history of some other states (e.g. Texas, Arizona, New Mexico, California, Utah, Nevada, some territories of southern Colorado) also demonstrates the influence of Roman law in the United States. Moreover the author pays special attention to private law in Canada, as well as in Central and South America. The author also provides information about private law in South Africa and Asia. Due to the rare nature of this topic, the findings which are included in this work become more worthy and significant.

In conclusion the great importance of this book has to be pointed out. The overall work of Professor Hamza reflects his precise and detailed research on the topic, and his findings significantly contribute to the knowledge of Roman law in modern codifications. The content of the book means that it is primarily intended for the professional community. However, the clarity of the text enables it to be of service to everyone who is interested in legal history, the influence of Roman law and its survival in current times.

List of authors/Die Autoren

Mgr. Eva Dudásová
Univerzita Komenského v Bratislave, Právnická fakulta
Comenius University in Bratislava, Faculty of Law

Ing. Jana Koprlová
Trnavská univerzita v Trnave, Právnická fakulta
Trnava University in Trnava, Faculty of Law

JUDr. Marianna Novotná, PhD.
Trnavská univerzita v Trnave, Právnická fakulta
Trnava University in Trnava, Faculty of Law

Mgr. Matej Pekarik, PhD.
Trnavská univerzita v Trnave, Právnická fakulta
Trnava University in Trnava, Faculty of Law

JUDr. Peter Varga, PhD.
Trnavská univerzita v Trnave, Právnická fakulta
Trnava University in Trnava, Faculty of Law

doc. JUDr. Vojtech Vladár, PhD.
Trnavská univerzita v Trnave, Právnická fakulta
Trnava University in Trnava, Faculty of Law

Pokyny pre autorov

Rukopis musí byť spracovaný v anglickom alebo nemeckom jazyku.

Redakcia prijíma iba rukopisy v elektronickej podobe vo formáte kompatibilnom s programom MS Word 2010. Formálne náležitosti rukopisu: typ písma Times New Roman 12; riadkovanie 1,5; v poznámkach pod čiarou Times New Roman 10; slová na konci riadku nedeliť; strany rukopisu nečíslovať.

Citácie a poznámky prosíme uvádzať pomocou programu MS Word pod čiaru na príslušnej strane pod seba a číslovať priebežne. Číslo poznámky je potrebné uviesť ako index. Pri citovaní bibliografických údajov sa vychádza z normy ISO 690.

Rozsah vedeckého článku je v rozmedzí cca 20 až 30 normostrán. Príspevok zaslaný ako podnet do diskusie má najviac 20 strán. Recenzie a anotácie majú najviac 10 strán.

Príspevok musí mať náležite zvolený názov, prípadne podnázov, musí obsahovať tituly, meno, priezvisko a miesto vedeckého pôsobenia autora. Vedecký článok má okrem toho mať abstrakt v rozsahu najviac 15 riadkov, kľúčové slová v rozsahu najviac 10 výrazov a záverečný súhrn podstatných myšlienok v materinskom jazyku autora. Kapitoly a podkapitoly sa číslujú arabskými číslicami.

Vedecký článok je predmetom obojstranne anonymného recenzného konania, pričom recenzný posudok vyhotovia nezávislí recenzenti. Ak recenzent podmieňuje publikáciu rukopisu zapracovaním pripomienok, redakcia autora vyzve, aby rukopis prepracoval. Recenzné posudky majú odporúčajúci charakter; o zaradení rukopisu do tlače rozhoduje redakčná rada.

E-mailová adresa, na ktorú je možné zasielať príspevky, je **fie@truni.sk**.

FORUM IURIS EUROPAEUM

3/2015/Nr. 1

Published by the Faculty of Law, Trnava University in Trnava, Kollárova 10, SK-918 43 Trnava, IČO: 31825249, in the publishing house TYPI UNIVERSITATIS TYRNAVIENSIS, spoločné pracovisko Trnavskej univerzity v Trnave a VEDY, vydavateľstva Slovenskej akadémie vied.
The journal is published twice a year.
Editor-in-chief: doc. JUDr. Vojtech Vladár, PhD.

Editorial office: Kollárova 10, SK-918 43 Trnava, e-mail: fie@truni.sk
For distribution, reservations and subscriptions, also to foreign countries, contact: VEDA, vydavateľstvo Slovenskej akadémie vied, Dúbravská cesta 9, SK-845 02 Bratislava

Herausgeber: Juristischen Fakultät der Trnavaer Universität in Trnava, Kollárova 10, SK-918 43 Trnava, IČO: 31825249, im Verlag TYPI UNIVERSITATIS TYRNAVIENSIS, spoločné pracovisko Trnavskej univerzity v Trnave a VEDY, vydavateľstva Slovenskej akadémie vied.
Erscheint zweimal pro Jahr.
Chefredakteur: doc. JUDr. Vojtech Vladár, PhD.

Redaktionsanschrift: Kollárova 10, SK-918 43 Trnava, e-mail: fie@truni.sk
Verbreitet, Bestellungen und Abonnements (auch ins Ausland) bearbeitet: VEDA, vydavateľstvo Slovenskej akadémie vied, Dúbravská cesta 9, SK-845 02 Bratislava

Vydáva Právnická fakulta Trnavskej univerzity v Trnave, Kollárova 10, SK-918 43 Trnava, IČO: 31825249, vo vydavateľstve TYPI UNIVERSITATIS TYRNAVIENSIS, spoločné pracovisko Trnavskej univerzity v Trnave a VEDY, vydavateľstva Slovenskej akadémie vied.
Časopis vychádza ročne dva razy.
Hlavný redaktor: doc. JUDr. Vojtech Vladár, PhD.

Adresa redakcie: Kollárova 10, SK-918 43 Trnava, e-mail: fie@truni.sk
Rozširuje, objednávky a predplatné i do zahraničia prijíma: VEDA, vydavateľstvo Slovenskej akadémie vied, Dúbravská cesta 9, SK-845 02 Bratislava

© Trnavská univerzita v Trnave, Právnická fakulta 2015