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Contents/Inhalt

Pavel Salák

Schatzfund im tschechischen Recht nach 1918

Abstrakt: Der Verfasser wendet sich im Text der Entwicklung der Rechtsregulierung in der tschechischen Rechtsregelung seit 1918 bis zur Gegenwart zu, sowie auch den Gründen, die zum Weglassen des Schatzfundes aus dem neuen Bürgerlichen Gesetzbuch von 2012 führten. Neben den geltenden Vorschriften setzt sich der Verfasser vor allem mit der Analyse des Schatzfundes in den Bemühungen um Rekodifikation der Zwischenkriegszeit auseinander. Es zeigt sich, dass der Wechsel der Auffassung „der Wertsache" zum guten Teil die Aufhebung dieses Rechtsinstituts beeinflusste. Denn man setzte im Allgemeinen voraus, dass das Institut eher in den Bereich des Denkmalschutzes als in den des Bürgerlichen Gesetzbuches gehört.

Schlüsselwörte: Schatz – archäologischer Fund – ABGB – Tschechisches BGB 1950 – Tschechisches BGB 1964 – Tschechisches BGB 2012 – Entwurf BGB 1924 – Entwurf BGB 1931 – Entwurf BGB 1937

1 Das neue Bürgerliche Gesetzbuch

Am 1. Januar 2014 trat in der Tschechischen Republik das Gesetz Nr. 89/2012 Slg., Bürgerliches Gesetzbuch (im folgenden BGB 2012 genannt) in Kraft. Seit der Wende der politischen Verhältnisse von 1989 waren natürlich die Juristen bemüht, die Frage der Abfassung des neuen bürgerlichen Gesetzbuches zu lösen. Zu Anfang der 90er Jahre wurde aber das Handelsgesetzbuch bevorzugt und das geltende Bürgerliche Gesetzbuch Nr. 40/1964 Slg. (im folgenden BGB 1964) wurde nur erheblich novelliert (Novelle Nr. 509/1991 Slg.). Trotz der Tatsache, dass diese Novelle das „sozialistische"[1] bürgerliche Gesetzbuch näher an die Verhältnisse der Marktwirtschaft, als an das ABGB anpassen sollte, knüpfte sie in der Tat an das Gesetz Nr. 141/1950 Slg. an – das sog. mittlere Gesetzbuch[2] (im folgenden BGB 1950 genannt).[3]

Die Arbeit am neuen bürgerlichen Gesetzbuch wurde erst im Jahre 2000 in Angriff genommen,[4] zur führenden Persönlichkeit der Rekodifikation ist prof. K. Eliáš geworden.

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1 Das Bürgerliche Gesetzbuch von 1964 fällt in die Kodifikationswelle des Anfangs der 60er Jahre, als Hauptgrund dieser Kodifikation galt eine Aussage in der Verfassung von 1960, nach der der Sozialismus in der Tschechoslowakei schon errichtet sei. Es bestand daher ein dringendes politisches Interesse an der Änderung der wichtigsten Gesetze. Das Gesetz war in seiner ursprünglichen Gestalt noch „sozialistischer" als das mustergültige bürgerliche Gesetz für die einzelnen Staaten der UdSSR. Das Leugnen und die Aufgabe vieler typischer Institute des Privatrechts riefen die Notwendigkeit einer erheblichen Novellierung noch im Zeitalter des Kommunismus hervor.

2 Eine weitere Inspirationsquelle stellte das Gesetzbuch des internationalen Handels Nr. 101/1963 Slg dar. Die Gesetzesbegründung zum neuen Bürgerlichen Gesetzbuch (konsolidierte Fassung) I. Allgemeiner Teil, 8. Online abrufbar: http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf, 10. 2. 2014, 13:00 Uhr.

3 Das avisierte Ziel des BGB 1950 stellte die allmähliche Umstellung der Gesellschaft aus der „bürgerlichen" in die „sozialistische" Stufe dar. Auch wenn diese Vorschrift aus den 50er Jahren stammte, stand sie dem ABGB viel näher als das Gesetz Nr. 40/1964 Slg., u.a. wurde darin immer noch die klassische Gliederung der bürgerlichen Gesetze respektiert sowie auch die Mehrzahl der Institute, wenn auch mit einigermaßen unterschiedlichem Inhalt.

4 Im Januar 2000 initiierte der damalige Justizminister O. Motejl den Beginn der Arbeiten an der Kodifikation, im April des folgenden Jahres wurde durch die Regierung die sachliche Absicht des Gesetzes bestätigt. Es gaben zwar davor zwei Versuche um die Kodifikation, diese liefen aber ins Leere und das neue Gesetz knüpfte

Die Inspirationsquellen des neuen bürgerlichen Gesetzbuches (im folgenden BGB 2012 genannt) stellten insbesondere die ABGB, BGB, ZGB und Code civil Québec dar. Zur Hauptinspirationsquelle wurde aber das Bürgerliche Gesetzbuch, das in der Zwischenkriegszeit vorbereitet wurde – Der Entwurf des Bürgerlichen Gesetzbuches von 1937 (im Folgenden Entwurf 1937 genannt). Obwohl alle angeführten Gesetze auch die den Erwerb des Eigentumsrechtes an dem Schatz betreffenden Bestimmungen beinhalten, fehlen diese im BGB 2012, ähnlich sieht die Situation in den beiden vorangehenden Gesetzbüchern aus dem Zeitalter des Kommunismus aus.

Auf den ersten Blick erweckt es daher den Anschein, dass die Auslassung der den Schatz betreffenden Rechtsregelung auf das Recht des totalitären Zeitalters zurückzuführen ist, die Realität ist aber viel komplizierter. Das Ziel dieser Untersuchung ist es, an den Ansatz des prof. Theo Mayer-Maly anzuknüpfen, der sich in mehreren Studien der Problematik des Schatzfundes im ABGB und auch in den vorangegangenen Vorschriften widmete,[5] darüber hinaus war er bemüht, die Entwicklung des Instituts des Schatzfundes auf dem Gebiet der böhmischen Länder seit 1918 bis in die Gegenwart zu untersuchen. Die Grundlage meiner Studie stellen die Bemühungen um die Rekodifikation in der Zwischenkriegszeit dar. Obwohl sie weder gültig noch wirksam wurden, verraten sie Vieles über den Wechsel der Auffassung des Bedarfs an der Rechtsregulierung dieses Instituts im böhmischen Rechtsmilieu. Neben den Vorschriften als solchen und den entsprechenden Gesetzvorschriften beruht diese Untersuchung auf den Archivquellen, vor allem auf den des Fonds des Justizministeriums in Prag (Ministerstvo spravedlnosti v Praze 1918–1953) und des Unifizierungsministeriums (Ministerstvo unifikací 1919–1938), die im Nationalarchiv in Prag aufbewahrt werden.

2 Die geltende Rechtsregelung in der Tschechoslowakei nach 1918

Das Jahr 1918 ist nicht lediglich mit dem Ende des Ersten Weltkrieges, sondern auch mit der Entstehung einer Reihe von neuen Staaten verbunden, darunter auch der Tschechoslowakischen Republik. Zum Taufschein des neuen Staates wurde das Gesetz Nr. 11/1918 Slg., das gewöhnlich als Rezeptionsnorm bezeichnet wird.[6] Im zweiten Artikel dieses Gesetzes wurde die Gültigkeit des bestehenden Rechtes auf dem Gebiet des neuentstandenen Staates beibehalten. Somit wurden österreichische, ungarische, und für kurze Zeit auch deutsche Normen (Hlučínsko/Hultschiner Ländchen in Schlesien) in die Verfassung aufgenommen.

an sie nicht an, siehe die Gesetzesbegründung zum neuen Bürgerlichen Gesetzbuch (konsolidierte Fassung). I. Allgemeiner Teil, 10. Online abrufbar: http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf, 10. 2. 2014, 13:00 Uhr.

5 Siehe vor allem MAYER-MALY, T.: Aus den rechtshistorischen Grundlagen der Regelung des Schatzfundes im österreichischen Privatrecht. In *Festschrift Nikolaus Grass*: *Zum 70. Geburtstag Dargebracht von Fachkollegen und Freunden*. Innsbruck : Universitätsverlag Wagner**,** 1986, S. 317–322; MAYER-MALY, T.: Die Erblosigkeit der Schätze. In RECHBERGER, W. H./WELSER, R. (eds.): *Verfahrensrecht-Privatrecht*. *Festschrift für Winfried Kralik zum 65.Geburtstag*. Wien : MANZ Verlag, 1986, S. 485–493 und MAYER-MALY, T.: Die Zukunft der Schätze. In *Juristische Blätter*. 2000, S. 535–536.

6 Näher dazu HORÁK, O.: Vznik Československa a recepce práva. K právní povaze a významu zákona čís. 11/1918 Sb. z. a n. s přihlédnutím k otázce recepce právního řádu [Die Entstehung der Tschechoslowakei und die Rechtsrezeption. Zur Rechtsnatur und Bedeutung des Gesetzes Nr. 11/1918 Slg., mit Berücksichtigung der Frage der Rezeption der Rechtsordnung]. In *Právněhistorické studie*. 2007, S. 153–169.

2. 1 Rechtsregelung in Böhmen, Mähren und Schlesien

Auf diesem Gebiet wurde das Institut des Schatzfundes in die Rechtsordnung so aufgenommen, wie es im Grunde der römisch-rechtlichen Auffassung des Kaisers Hadrian entsprach, wo der Anspruch an das Eigentumsrecht halbiert wurde (d.h., dem Finder und dem Grundeigentümer stand je eine Hälfte des Anspruches zu). Diese Regelung des ABGB entstammte aber erst in der Mitte des 19. Jahrhunderts, denn in der ursprünglichen Fassung, ähnlich wie in allen vorangehenden entworfenen Kodifikationen seit Codex Theresianus, wurde die Dreiteilung in Anspruch genommen. Neben dem Finder und dem Grundeigentümer erhob auch der Staat seinen Anspruch.[7] Diese Auffassung beruhte auf dem Feudalrecht und auch der Verfasser von ABGB – F. von Zeiller – stellte fest, dass der Anspruch des Finders und des Grundeigentümers auf den Anteil am Schatz vielmehr der „politischen Erträglichkeit" zuzuschreiben sei als dass ihnen ein faktisches Eigentumsrecht zustehe.[8] Der Grund, der den Gesetzgeber zur Änderung seines Standpunktes bewogen hat, wird gleich zu Anfang des Hofdekretes Nr. 970 JGS vom 15. Juni 1846 genannt. Es war die oft vorkommende Verheimlichung der Funde. Es gilt einigermaßen als Ironie des Schicksals, dass zu Ende des 20. Jahrhunderts das ABGB auf kurze Zeit zu seinem ursprünglichen Wortlaut zurückkehrte, die Dreiteilung des Eigentumsrechtes an den Schatz wurde dann aber wieder aufgegeben.[9]

2. 2 Rechtsregelung in der Slowakei und der Karpatenukraine

In der Slowakei und der Karpatenukraine sah die Situation anders aus. Abgesehen von der kurzen Periode des Absolutismus unter dem Taktstock des Ministers Alexander von Bach, besaß das ABGB in diesen Regionen keine Rechtskraft. Die Problematik der Schatzfunde wurde somit immer noch durch die Vorschriften aus der Zeit von Maria Theresia und Franz reguliert, die zwar ursprünglich für Einzelfälle vorgesehen waren, später aber Allgemeingültigkeit erlangt haben.[10] In der Frage des Eigentumsrechtes an dem Schatz ging es vor allem um die Verordnung Nr. 102 vom 27. 1. 1776, Nr. 111 vom 3. 1. 1777 und Nr. 56 vom 5. 4. 1792. Danach sollen alle Schatzfunde bis zum Wert von drei hundert Kronen zwischen den Finder und den Grundeigentümer geteilt werden, beim höheren Wert des Fundes wurde das Eigentum in Drittel aufgeteilt, wobei noch der Staat hinzukam.[11]

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7 Dazu siehe MAYER-MALY, T.: Aus den rechtshistorischen Grundlagen der Regelung des Schatzfundes im österreichischen Privatrecht. In *Festschrift Nikolaus Grass*: *Zum 70. Geburtstag Dargebracht von Fachkollegen und Freunden*. Innsbruck : Universitätsverlag Wagner, 1986, S. 317–322.

8 ZEILLER, F. Von: *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie*. Zweiter Band. Erste Abtheilung, Zweite Abtheilung. [§ 285–§ 858]. Wien : Seistingers Verlaghandlung, 1812, S. 182f.

9 Es geht vor allem um diejenigen Änderungen, die in die Rechtsregelung des Fundes im ABGB das Erste Bundesrechtsbereinigungsgesetz (Gesetz vom 19. 8. 1999, Nr. 191 BGBl.) und folglich die Sicherheitspolizeigesetz-Novelle (durch das Gesetz vom 16. 7. 2002 Nr. 104 BGBl) brachten. MAYER-MALY, T.: op. cit. 5, S. 535f.

10 ROUČEK, F./SEDLÁČEK, J.: *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi*. 2. díl. [Der Kommentar zum tschechoslowakischen Allgemeinen Bürgerlichen Gesetzbuch und das in der Slowakei und in der Karpatenukraine geltende bürgerliche Recht. 2. Teil]. Praha : V. Linhart, 1935, S. 407.

11 Ibid., S. 411.

Ferner wurde die Situation behandelt, wo der Grundeigentümer eine Privatperson, der Staat oder eine Stadt war. Durch weitere Vorschriften wurde die Frage des Schatzes geregelt, der Gegenstände von wissenschaftlichem oder künstlerischem Wert umfasst, wobei ursprünglich das Wiener Münzkabinett[12] und seit 1867 auch das ungarische Museum und Universität in Pest den Anspruch auf diese Gegenstände hatten.[13] Die Nachfolgeinstitutionen in der Tschechoslowakei waren das Heimatmuseum in Turz-Sankt Martin (heute Stadt Martin in der Slowakei), wobei die Überprüfung des Wertes vom Staatsreferat des Denkmalschutzes in Preßburg durchgeführt wurde.[14]

Durch den Erlass des ungarischen Finanzministeriums Nr. 47.711 vom 27. 12. 1871 P.M. wurde festgesetzt, dass jeder Schatz unabhängig von seinem Wert dem Finanzministerium abgegeben werden soll. Das Ministerium, bzw. die Staatsverwaltung schlechthin sollte dann den Wert des Schatzes ermitteln und in Erfahrung bringen, ob Museen oder Universitätsinstitutionen an dem Schatz Interesse hätten und folglich den gefundenen Schatz aufteilen.[15] Der Schatz sollte im Idealfall in natura aufgeteilt, ansonsten zu einem gewöhnlichen Preis verkauft werden.[16]

3 Kodifizierung des tschechischen Privatrechts in der Zwischenkriegszeit[17]

3. 1 Kodifikationsbemühungen 1918–1938

Es ist begreiflich, dass man gleich nach der Konsolidierung der politischen Situation bemüht war, die Rechtsordnung zu vereinheitlichen. Neben dem Umstand, dass es mehrere Rechtsordnungen gegeben hatte, spielte auch die Rezeption dieser Vorschriften und schließlich auch die Sprachbarriere ihre Rolle. Die tschechischen Juristen beherrschten zwar im Prinzip das Deutsche, doch ihre Vertrautheit mit dem Ungarischen lag praktisch bei Null und diesem Umstand entsprachen auch ihre Kenntnisse des in der Slowakei und Karpatenukraine geltenden ungarischen Rechtes. Das bezeugt z.B. auch die Aussage von prof. Jan Krčmář[18], der während der Verhandlung über die Notwendigkeit eines neuen

[12] Königliche Verordnungen Nr. 30.227/261 vom 12. 11. 1812, Nr. 15.501/1389 vom 18. 6. 1813 und Nr. 8353 vom 17. 7 1831.

[13] Vor allem die Verordnung Nr. 37.668/1343 vom 10. 9. 1816.

[14] Aufgrund des Ministeriumsantrags konnte dann ein Teil oder der ganze Schatz vom Staat gekauft werden. ROUČEK, F./SEDLÁČEK, J.: op. cit. 10, S. 408.

[15] Diese Details wurden durch mehrere Verordnungen des ungarischen Innenministeriums geregelt, vor allem die Verordnung Nr. 15.501/1889 B.M. vom 28. 6. 1888 und die Verordnung Nr. 14.136/1872 B.M.

[16] Der finanzielle Ersatz betrifft auch diejenigen Gegenstände, die die Museen und ähnliche Institutionen behielten. Hinsichtlich der Münzen sollte der Staat seinen Anteil in die öffentliche Versteigerung geben. ROUČEK, F./SEDLÁČEK, J.: op. cit. 10, S. 408.

[17] HORÁK, O.: Dějiny kodifikace soukromého práva v českých zemích [Geschichte der Kodifikation des Privatrechts in den böhmischen Ländern]. In MELZER, F./TÉGL, P. (eds.): *Občanský zákoník – velký komentář*. Svazek I – § 1–117 Obecná ustanovení. Praha : Leges, 2013, S. XXVII–LVII.

[18] Jan Krčmář (1877 Prag–1950 Prag), Professor des Privatrechts an der Karlsuniversität, Mitglied des Ständigen Schiedsgerichts in Haag, in der Zwischenkriegszeit mehrmaliger Minister für Bildung. Jan Krčmář war die führende Persönlichkeit der Kodifikation des Privatrechts in der Ersten Republik. Als sich sein Leben zu Ende neigte, nahm er auch an den Vorbereitungen der Kodifikation des bürgerlichen Rechtes nach 1948 teil, auch wenn die Frage seiner tatsächlichen Einflussnahme auf das BGB von 1950 umstritten ist.

bürgerlichen Gesetzbuches am 6. März 1920 die Meinung geäußert hat, dass in der Slowakei ein ähnliches Recht gelte, da hier für eine gewisse Zeit auch das ABGB gegolten habe. Nach seiner Rede hat laut Protokoll der Vertreter des Unifizierungsministers das Wort ergriffen, der – kulant formuliert – „ausführlich den gegenwärtigen Rechtszustand darlegte".[19]

Die erwähnte Beratung stellt einen wichtigen Bestandteil der Kodifikationsbemühungen im Bereich des Privatrechts in der Zwischenkriegszeit dar. Am Geburtstag des Präsidenten T. G. Masaryk fanden sich auf dem Justizministerium die Vertreter des Justiz- und Unifizierungsministerien, akademische Mitarbeiter, aber auch Rechtsanwälte, Notare und Richter ein. Das Ziel ihres Zusammentreffens bestand darin, die Möglichkeiten der Rekodifikation des Bürgerrechtes zu erwägen. Es wurden damals mehrere Varianten erwogen, beginnend mit den völlig absurden – denen die Übersetzung und Übernahme des französischen Code civile zuzurechnen ist, über die offizielle Übersetzung des ABGB[20] bis hin zur Abfassung eines völlig neuen bürgerlichen Gesetzbuches.[21] Viele der Beteiligten waren sich wohl der Tatsache bewusst, dass das ABGB in mehreren Fragen eine veraltete Vorschrift darstellt, und zwar nicht nur hinsichtlich einzelner Bestimmungen, sondern auch in Betracht der Systematik, was sich insbesondere im Vergleich mit den BGB[22] und ZGB zeigte. Darüber hinaus wussten alle Beteiligten, dass die Abfassung eines völlig neuen Gesetzbuches eine Aufgabe ist, die zu viel Zeit in Anspruch nimmt. Deshalb fiel die

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19 Prof. Krčmář hat folglich vorgeschlagen, dass für den Bedarf der Rekodifikation auf dem Ministerium ein Auszug des in der Slowakei geltenden bürgerlichen Rechtes entstehen soll. Zápis z porady konané na ministerstvu spravedlnosti dne 6. března 1920 [Protokoll der am 6. März 1920 auf dem Justizministerium stattgefundenen Beratung]. Národní archiv (NA), fond Ministerstvo spravedlnosti v Praze 1918–1953, K 301.

20 Obwohl das ABGB ins Tschechische mehrmals übersetzt wurde, erstmal sogar im Jahre 1812, keine dieser Übersetzungen war offizieller Natur, somit galt bis zum definitiven Außerkrafttreten dieser Vorschrift auf dem böhmischen Gebiet (durch das Gesetz Nr. 65/1965 Slg., Arbeitsgesetzbuch) offiziell der deutsche Wortlaut.

21 Zur Problematik der Kodifikationsbemühungen des BGB vgl. vor allem KUKLÍK, J.: Pokusy o přijetí československého občanského zákoníku 1918–1948 [Die Versuche um die Annahme des tschechoslowakischen Bürgerlichen Gesetzbuches 1918–1948]. In DVOŘÁK, J./MALÝ, K. a kol.: *200 let Všeobecného občanského zákoníku*. Praha : Wolters Kluwer, 2011, S. 93–104. Zur Situation in der Slowakei LUBY, Š.: Unifikačné snahy v oblasti československého súkromného práva v rokoch 1918–1948 [Unifizierungsbemühungen im Bereich des tschechoslowakischen Privatrechts in den Jahren 1918–1948]. In *Právny obzor*. 1967, S. 571–586; GÁBRIŠ, T.: Revízia vecného a záväzkového práva v procese unifikácie československého občianského práva v rokoch 1918–1938 [Revision des Sachen- und Schuldrechts im Prozess der Unifizierung des tschechoslowakischen bürgerlichen Rechtes in den Jahren 1918–1938]. In DVOŘÁK, J./MALÝ, K. a kol.: *200 let Všeobecného občanského zákoníku*. Praha : Wolters Kluwer, 2011, S. 105–129 und LACLAVÍKOVÁ, M.: Riešenie problému unifikácie a kodifikácie súkromnoprávnych noriem v medzivojonovom Československu a Poľsku [Die Lösung des Problems der Unifizierung und Kodifikation der privatrechtlichen Normen in der Tschechoslowakei und in Polen im Zwischenkriegszeitalter]. In SCHELLE, K. (ed.): *Vývoj právních kodifikací*. Brno : Masarykova univerzita, 2004, S. 187–219. In der deutschen Sprache vor allem SCHUBERT, W.: Der tschechoslowakische Entwurf zu einem Bürgerlichen Gesetzbuch und das ABGB von 1937. In *ZSS*. 1995, S. 271–315; SLAPNICKA, H.: Die Beteiligung deutscher Professoren an den tschechoslowakischen Kodifikationsplänen (1919–1938). In VELEK, L. a kol. (eds.): *Magister noster. Sborník statí věnovaných in memoriam prof. PhDr. Janu Havránkovi, CSc*. Praha : Karolinum, 2005, S. 253–259.

22 Im Zusammenhang mit dem BGB wird oft die Tatsache erwähnt, dass dieses Gesetz aus politischen Gründen nicht als Inspirationsquelle gewählt werden konnte. In der offiziellen Rhetorik galt zwar dieser Vorsatz, dessen ungeachtet kann den Einträgen der Beratungen des Subkomitees für Sachenrecht entnommen werden, dass die Juristen das BGB nicht ignoriert haben und oft mit diesem Rechtsbuch sogar argumentiert haben. Es gilt aber zugleich, dass im Falle des Fundes von verborgenen Sachen und Schätzen als Inspirationsquelle vielmehr das ZGB zur Geltung kam. Nach dem Gründebericht zum Entwurf 1937 fiel aber das Verhältnis des BGB zum ZGB als Inspirationsquelle der Bestimmungen des Entwurfs 23 zu 9 zugunsten des BGB. GÁBRIŠ, T.: op. cit. 21, S. 124f.

Entscheidung zugunsten der Variante, die zwischen den zwei letzterwähnten lag. Der Text des ABGB sollte vorgelegt und zugleich einer Revision unterzogen werden, veraltete oder überflüssige Bestimmungen sollten dann gestrichen werden.

Zugleich wurde vereinbart, dass mehrere Kommissionen gebildet werden müssen, die zuständig für die Modifizierung einzelner Teile des Gesetzes sein werden. In diesen zumeist sechs- bis achtköpfigen Kommissionen waren nur ganz wenige Slowaken vertreten. Die geringe Beteiligung der Slowaken an den Kodifikationsbemühungen ist vor allem dem Umstand zuzuschreiben, dass es nur wenige Slowaken mit Rechtsbildung gab, zumal sie von ihrer Rechtspraxis maximal in Anspruch genommen wurden.[23] Im Falle der deutschen Juristen war ihre aktive Beteiligung durch die Sprachbarriere erschwert, dennoch nahmen an den Kodifikationsarbeiten auch bedeutende Professoren der deutschen Universität in Prag teil, wie z.B. Bruno Kafka[24] oder Egon Weiss.[25]

Die einzelnen Kommissionen haben ihre Entwürfe im Laufe der Jahre 1921 und 1923 vorgelegt, diese wurden folglich gedruckt und im Fachmilieu diskutiert. Die Entwürfe wurden auf Tschechisch publiziert, in der Folgezeit wurde auch die deutsche Übersetzung einzelner beantragter Teile publiziert, welche aber erst auf Ansuchen der deutschen Rechtsanwälte entstand.[26] Im Jahre 1926 wurde dann eine Superrevisionskommission gebildet, deren Aufgabe es war, aus den vorgelegten Konzepten einen Gesetzentwurf zu erarbeiten. Der Auftrag wurde zwar im Juni 1931 (im folgenden Entwurf 1931 genannt) erfüllt, doch neben Rechtspolemiken gab es ablehnende Stimmen auch in den Reihen der politischen Repräsentation.[27] In den Rechtszeitschriften wurde parallel eine Fachdiskussion geführt. Der Entwurf von 1931 wurde auch zur Einlegung von Einsprüchen an einzelne Ressorts versandt. Dieses Verfahren war ursprünglich schriftlich, doch wegen Verzögerungen wurde es in ein mündliches abgewandelt. In den folgenden Jahren dauerte trotz der stetigen Versuche um die Beschleunigung der Arbeit die Diskussion über das Gesetz auf rechtlicher und politischer Ebene an, was schließlich zu einer Reihe von grundlegenden Änderungen führte. Die endgültige Fassung des Entwurfs wurde durch die Regierung erst am 3. März

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23 Zu Ende des Jahres entstand unter der Leitung von V. Fajnor die sog. Slowakische Kommission, als Vertreter des Ministeriums für Unifizierung nahm an der Tätigkeit dieser Kommission F. Rouček aktiv teil. Die Aufgabe der Kommission war es, sich zu den einzelnen Teilen des Entwurfs aus Sicht des geltenden Rechts in der Slowakei und Ukraine zu äußern. KUKLÍK, J.: op. cit. 21, S. 95.

24 Bruno Kafka (1881 Prag–1931 Prag), der Verwandte des Schriftstellers F. Kafka war als Professor des bürgerlichen Rechtes an der deutschen Universität in Prag tätig, er war zugleich Politiker (er nahm u.a. an der Entstehung der Deutschen Arbeits- und Wahlgemeinschaft – DAWG teil). Er zählte zu den Gründervätern der vorbereiteten Kodifikation, er war als Referent des Subkomitees für das Familienrecht und folglich als einer der Referenten der Superrevisionskommission tätig. In *Prager Juristische Zeitschrift*. 1931, S. 593–597.

25 Egon Weiss (1880 Brünn–1953 Innsbruck) war seit 1919 an der deutschen Universität in Prag als außerordentlicher Professor des römischen und bürgerlichen Rechtes tätig. Wegen seiner Abstammung musste er seine Tätigkeit an der Schule im Jahre 1938 beenden. Seit 1946 war er dann an der Universität in Innsbruck tätig. Q.v. BOLLA, S. Von: Egon Weiß, † 1. Februar 1953. In *ZSS. Romanistische Abteilung*. 1953, S. 518ff; DOSKOCIL, W.: Egon Weiß. Ein Gedenken zu seinem 90. Geburtstag. In *Bohemia*. 1970, S. 418–432.

26 Die Herausgabe wurde zwar durch das Justizministerium unterstützt, aber die bereitgestellte Summe reichte nicht für die Übersetzung aus, weswegen auch die tschechische Rechtsanwaltskammer zugunsten ihrer deutschen Kollegen intervenierte um die Erhöhung des Betrags. NA, fond Ministerstvo spravedlnosti v Praze 1918–1953, K 303. Das Gesetz wurde schließlich unter dem Titel Herausgegeben vom Justizministerium der Čechoslovakischen Republik: *Das bürgerliche Gesetzbuch für die Čechoslovakische Republik übersetzt* : *Übersetzung des Entwurfes der Komission für die Revision des ABGB*. Reichenberg : Gebrüder Stiepel, 1924.

27 Vor allem seitens der christlich orientierten politischen Parteien in den Fragen des Familienrechtes und in der Frage des Arbeitsrechtes gerieten die Linkspolitiker in den Streit mit den Liberalen. Diese Streitigkeiten mündeten in die Auslassung einiger Teile aus dem Entwurf 1937.

1937 beschlossen. Der Text des Entwurfs wurde dann gleichzeitig beiden Kammern der Nationalversammlung unter dem Titel „Regierungsentwurf des Gesetzes, indem das Bürgerliche Gesetzbuch herausgegeben wird" vorgelegt (Sněmovní tisk 844/1937 im Folgenden als Entwurf 1937 genannt).[28] Die Verfassungsausschüsse beider Kammern bildeten zur Besprechung des Gesetzes einen gemeinsamen Unterausschuss, wo die Abgeordneten weiterhin bemüht waren, ihre politische Anschauung durchzusetzen. Die Abgeordneten und Senatoren forderten dann von den zuständigen Ressorts die Ausarbeitung von Gutachten über diese Anschauungen. Der Herbst 1938 brachte aber dem Tschechoslowakischen Staat ganz andere Sorgen. Die sog. Zweite Republik dauerte zu kurz und nach der Entstehung des Protektorats konnte die Annahme des Gesetzes nicht erfolgen. Obwohl gleich nach dem Ende des Krieges, noch im Jahre 1945, die Arbeiten an dem Entwurf wieder in Angriff genommen wurden, hat man sich vorrangig mit denjenigen Änderungen beschäftigt, die im Privatrecht durch das Münchener Abkommen und die folgenden Kriegsereignisse zustande kamen.[29] Durch kommunistische Machtergreifung im Februar 1948 war das Schicksal der Rekodifikationsbemühungen der Ersten Republik definitiv besiegelt.

3. 2 Subkomitee für Sachenrecht

Mit der Leitung des Subkomitees war Professor der Karlsuniversität – Miloslav Stieber – beauftragt, dessen Aufgabe es war, das Gebiet des Sachenrechts zu bearbeiten.[30] Die übrigen acht Mitglieder waren Notare, Anwälte, Richter und Vertreter der Ministerien für Justiz und für Unifizierungen. Unter den bedeutendsten ist vor allem Vojtěch Kasanda zu nennen,[31] den M. Stieber zum Korreferenten des Subkomitees ernannte. Die Zahl der nominierten Mitglieder konnte aber nicht eingehalten werden, denn einer von ihnen nahm an den Verhandlungen überhaupt nicht teil und zwei andere kamen ihren Arbeitspflichten in Brünn, bzw. in der Slowakei nach, weswegen sie ihre Tätigkeit im Subkomitee beendet haben. Einen empfindlichen Verlust stellte für die Kommission der Tod des schon erwähnten Dr. Kasanda (15. Juni 1922) dar. Entgegen dem ursprünglichen Plan nahm auf Einladung von prof. Stieber an den Verhandlungen des Komitees auch prof. Egon Weiss teil, dessen Anwesenheit sich als förderlich zeigte. Die Kommission überreichte erfolgreich ihren Entwurf am 6. Juni 1923 dem Justizministerium, das ihn folglich drucken ließ und zur

[28] KUKLÍK, J.: op. cit. 21, S. 102.

[29] Ibid., S. 104.

[30] Miloslav Stieber (1865 Slaný/Schlan–1934 Prag), seit 1911 ordentlicher Professor für deutsche Geschichte, später für die Geschichte des mitteleuropäischen Rechtes. Neben der Rechtsgeschichte äußerte er sich auch zu den Gegenwartsproblemen (bis 1911 war er neben seiner akademischen Praxis auch als Rechtsanwalt in Slaný tätig). Trotz seines Widerstandes gegen die Kodifikationen, die er als „Bremse" der Rechtsentwicklung bezeichnete, nahm er seine Aufgabe ernst wahr, auch wenn er oft mit seinen Vorschlägen von der geplanten Auffassung abwich. Es hat ihn sehr gestört, dass sich wegen den politischen Zerwürfnissen die Arbeit an der Kodifikation in die Länge zieht. KIDL, V.: Miloslav Stieber. In SKŘEJPKOVÁ, P. (eds.): *Antologie československé právní vědy v meziválečném období v letech 1918–1939* [Anthologie der tschechoslowakischen Rechtswissenschaft im Zwischenkriegszeitalter in den Jahren 1918–1938]. Praha : Linde, 2009, S. 75ff. Am ausführlichsten dazu KAPRAS, J.: *Miloslav Stieber*. Praha : Česká akademie věd, 1934.

[31] Dr. Vojtěch (Adalbert) Kasanda (1850 Prag–1922 Prag) war ein bedeutender Prager Rechtsanwalt, von 1919 bis 1922 war er Vorsteher des Vereins der tschechischen Juristen (der erste, der nicht zu den Professoren der Rechtsfakultät gehörte). Weitere Kandidatur gab er wegen seiner Krankheit auf.

Einreichung der Einsprüche verbreitete.[32] Die Frage des Eigentumsrechtes am Schatzfund war keinesfalls zu den heikelsten Fragen der neuen Kodifikation zu zählen, das war die im Bereich des Sachenrechtes neu konzipierte Auffassung des Pfandrechtes und des Besitzes.[33]

3. 3 Entwurf der Schatzregulierung in den Jahren 1921–1923 und seine Kritik

Es wurde schon angedeutet, dass die Problematik des Schatzfundes nicht zu den heikelsten Problemen zu zählen war, trotzdem nahm diese Frage insgesamt drei (vier) Verhandlungen des Subkomitees in Anspruch und auf die endgültige Fassung der betreffenden Bestimmung nahm erheblichen Einfluss auch prof. Egon Weiss aus der deutschen Universität in Prag.

Die erste Verhandlung fand auf der 15. Sitzung des Subkomitees am 21. April 1921 statt, also etwa einen Monat, nachdem der Korreferent Dr. Kasanda seinen Entwurf zur Problematik des Eigentumsrechtes im Bürgerlichen Gesetzbuch gestellt hatte (vorgelegt am 28. März 1921).[34] Der Vorschlag von Kasanda war im Prinzip nur die Übersetzung des ABGB nach seiner Novellierung durch das Hofdekret Nr. 970 JGS vom 15. Juni 1846. Der Text wurde aber um einen Paragraphen ergänzt, der hinter den § 400 eingefügt wurde (Nummerierung nach ABGB), wo von der Meldepflicht für die Funde mit archäologischem und numismatischem Wert die Rede war.[35] Auch diese Bestimmung ist nicht auf Dr. Kasanda zurückzuführen, sondern er ließ sich hierbei offenkundig durch das Hofdekret Nr. 970 JGS inspirieren. Dieses Dekret bestritt dem Staat nicht nur den Anspruch auf ein Drittel des Schatzes, sondern darüber hinaus begrenzte es das Vorkaufsrecht der staatlichen Anstalten und Institutionen bei den Gegenständen von kulturellem und wissenschaftlichem Wert. Als problematisch galt weiterhin die Meldepflicht nach § 398.[36]

In der Diskussion am 21. April 1921 erkannten einige Mitglieder der Kommission die Schwäche der bestehenden Auffassung des Eigentumsrechtes am Schatz in Bezug auf den Schutz des Kulturerbes.[37] Es ist Ironie des Schicksals, dass eben in Bezug auf die

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[32] In der gegebenen Zeit fanden insgesamt 86 Sitzungen des Subkomitees statt, wobei am 8. November 1922 die zweite Lesung des Antrags (26 Sitzungen) stattfand. STIEBER, M.: *Věcné právo. Návrh subkomitétu pro revisi občanského zákoníka pro Československou republiku* [Sachenrecht. Entwurf des Subkomitees zur Revision des BGB für die Tschechoslowakische Republik/Antrag des Subkomitees auf die Revision des BGB für die Tschechoslowakische Republik]. Praha : Ministerstvo spravedlnosti, 1923, S. 5.

[33] Von dieser Auffassung des Besitzes ließ sich auch das neue Bürgerliche Gesetzbuch inspirieren. Q.v. DOSTALÍK, P.: Držba věci nebo držba práva [Sachen- oder Rechtsbesitz]. In DVOŘÁK, J./MALÝ, K. a kol.: *200 let Všeobecného občanského zákoníku*. Praha : Wolters Kluwer, 2011, S. 529–537.

[34] NA, fond Ministerstvo spravedlnosti v Praze 1918–1953, K 301, složka [Faszikel] 1921.

[35] Antrag von Dr. Kasanda im Wortlaut der §§ 380–403. Ibid.

[36] Durch dieses Dekret sollte die Meldepflicht aufgehoben, bzw. auf die numismatischen und archäologischen Denkmäler beschränkt werden. Q.v. ROUČEK, F./SEDLÁČEK, J.: op. cit. 10, S. 406. Da sich dieses Dekret nicht auf den Wortlaut des Gesetzes auswirkte, war man um die Besserung bemüht. Prof. Sedláček empfahl aber eine ständige Meldepflicht, denn es war nicht unbedingt immer klar, ob es um eine verborgene Sache oder um den Schatz geht. Durch die Anmeldung vermeidet der Finder nach § 393 die Sanktion. SEDLÁČEK, J.: *Vlastnické právo: komentář k §§ 353–446 všeob. obč. zák. se zřetelem ku právu na Slovensku a Podkarpatské Rusi platnému* [Eigentumsrecht: Kommentar zu den §§ 353–446 des ABGB in Bezug auf das in der Slowakei und in der Karpatenukraine geltende Recht]. Praha : V. Linhart, 1935, S. 239f.

[37] Es ist ziemlich logisch, denn einem ähnlichen Ansatz (hinsichtlich des Schatzes) begegnen wir in der Antike kaum, obwohl es nicht an Versuchen fehlte. Q.v. MALAVÉ OSUNA, M. B.: „Pecunia, monilia y mobilia" como objeto del tresoro. In LÓPEZ ROSA, R./PINO-TOSCANO, F. del (eds.): *El derecho de familia y los derechos reales en la romanistica espanola* (*1940–2000*). Huelva : Universidad de Huelva, 2000, S. 449ff.

Kompliziertheit des Prozesses und der Verheimlichung der archäologischen Funde die erwähnte Novelle im Jahre 1846 angenommen wurde, wodurch der Staat seinen Anteil an dem Schatz eingebüßt hatte. Seit dem Ende des 19. Jahrhunderts wuchs aber ständig das Interesse am Kulturerbe nicht nur seitens der Bürger,[38] sondern immer mehr auch seitens des Staates.[39] Die Mitglieder der Kommission suchten nach Inspiration im Art. 723 des ZGB, letztendlich wurde aber eine andere Variante gewählt. Die Kommission ließ die geltende Verteilung des Eigentumsrechtes bestehen, allerdings mit dem Zusatz, dass bei den archäologischen und numismatischen Funden dem Staat das sechsmonatige Recht auf Forderung garantiert war. Der Ersatz für die gefundenen Sachen sollte dabei „gebührend" sein. Prof. Weiss bemerkte dazu, dass somit eine de facto neue Art des Erwerbs des Eigentumsrechtes eingeführt wurde. Obwohl bei den Beratungen während der zweiten Lesung[40] dieser Ansatz zu kritischen Einwänden führte, wurde schließlich das Argument von prof. Stieber akzeptiert. Denn, wenn der Schatz automatisch dem Staat verfiele, entstünde dann eine Lücke im Gesetz für diejenigen Situationen, wo der Staat kein Interesse an dem Schatz habe.

Die Definition des Schatzes wurde gekürzt, so dass lediglich von kostbarem Gegenstand (tsch. „drahocenná věc") gesprochen wurde, denn dieser Terminus umfasste auch Geld und Juwelen, die auch im ABGB aufgezählt waren. Prof. Weiss entfaltete in der zweiten Lesung im Zusammenhang mit dieser Änderung einen terminologischen Streit, denn seiner Ansicht nach entsprach der tschechische Termin „drahocenný" (kostbar) nicht völlig dem Termin „Wertgegenstand" im schweizerischen Gesetzbuch, woraus die Mitglieder des Subkomitees bei der Definition ihre Inspiration gewonnen haben. Seiner Meinung nach entsprach diesem Wort viel besser die Bezeichnung „Kostbarkeit". Es stimmt zwar, dass bei der demonstrativen Aufzählung im § 398 des ABGB: „…Geld, Schmuck, oder andern Kostbarkeiten..", das Wort Kostbarkeiten als „drahocenná věc" übersetzt wurde. Jedoch dachten die übrigen Mitglieder der Kommission, dass durch die Auslassung der zwei erstgenannten Ausdrücke das Wort „drahocenná věc" ein viel breiteres Bedeutungsfeld gewinnt.[41]

Im Zusammenhang mit der Definition des Schatzes wurde auf der Sitzung am 20. Dezember 1922 auf Antrag von prof. Rouček[42] der Wortlaut der Bestimmung des § 399

[38] Der anscheinend bekannteste Verein auf dem böhmischen Gebiet stellt der Club für das alte Prag, der im Jahre 1900 entstanden ist, als Reaktion auf die Bemühungen der damaligen Bauherren, möglichst viele Baugrundstücke im Zentrum Prags zum Nachteil der historischen Bebauung zu gewinnen. Noch vor dem Ersten Weltkrieg unterhielt der Club viele Niederlassungen in weiteren böhmischen Städten.

[39] Z.B. im Jahre 1919 wurde das Staatliche archäologische Institut gegründet, das in den Verantwortungsbereich des Ministeriums für Schulwesen und nationale Bildung fiel. Das neu gegründete Institut leitete bis 1924 Lubor Niederle, der gute Beziehungen mit T. G. Masaryk unterhielt. Auch ihm sind im Zusammenhang der Baumaßnahmen, die auf der Prager Burg seit 1925 stattgefunden haben, weitgehende archäologische Untersuchungen zu verdanken. Zu dieser Zeit wurde auf der Prager Burg eine außerordentliche archäologische Arbeitsstelle errichtet, die ununterbrochen bis heute funktioniert.

[40] Am 20. Dezember 1922 und am 10. und 17. Januar 1923 (67., 68. und 69. Sitzung) – auf der letzten Sitzung wurde aber die erzielte Absprache zusammengefasst und man überging dann zu anderen Themen.

[41] Ihrer Meinung nach habe der Wortlaut des ABGB dazu verführt, dass dieser Begriff nur im Sinne kostbare geld- und juwelenähnliche Sache gedeutet werde. Siehe das Protokoll aus der 68. Sitzung des Subkomitees vom 10. Januar 1923, s. 1, 2. NA, fond Ministerstvo spravedlnosti v Praze 1918–1953, K 303, složka [Faszikel] 1924–1926.

[42] František Rouček (1891 Nové Strašecí/Neu Straschitz–1967 Addis Abeba) vertrat bei den Kodifikationsarbeiten das Ministerium für Unifizierungen, neben der einzelnen Subkomitees war er als Referent der slowakischen Kommission tätig. Folglich wurde er zum Professor des Handels- und Wechselrechtes auf der Masaryk-Universität in Brünn ernannt. Er ist vor allem als Mitverfasser des Kommentars zum ABGB bekannt. Nach 1948 emigrierte er ins Ausland, wo er in Äthiopien mit der Einführung neuer Kodifikationen behilflich war.

geändert. Denn im ABGB war nur vom Grundeigentümer die Rede, was zur Auslegung der Richter führte, die darin bestand, das als Schatz nur ein im Boden gefundener Wertgegenstand, nicht aber dasjenige, das in einer beweglichen Sache aufgefunden wurde (typisch war vor allem Geheimschublade eines Schrankes), zu qualifizieren ist. Der Wortlaut der Bestimmung wurde deswegen geändert, damit sie sich auch auf die in Mobilien versteckten Sachen bezieht, ähnlich wie im BGB oder ZGB.[43]

Ferner wurde schon bei der ersten Lesung am 21. April 1921 vereinbart, dass der § 401 auf den Satz „Wer zur Aufsuchung eines Schatzes gedungen wurde, wird nicht als Finder angesehen"[44] gekürzt wird und auf derselben Sitzung wurde der § 400 ausgelassen, wodurch die Verheimlichung des Schatzes strafrechtlich verfolgt wurde. Der scheinbar unlogische Antrag von prof. Stieber auf die Auslassung des § 400 wurde durch den zweiten Satz dieser Bestimmung motiviert. Die Kommission hat sich darüber geeinigt, dass es unmoralisch sei, wenn ein Denunziant für seine Tat noch eine Belohnung bekommen solle. Der Meinung von prof. Stieber ist zweifellos zuzustimmen, denn die Bestimmung über den Denunzianten entsprach der Zeit der Verabschiedung dieses Gesetzes und nicht dem Anfang des 20. Jahrhunderts. Das Fehlen dieser Bestimmung wurde aber berechtigterweise bei der Einlegung der Einsprüche als Schwäche betrachtet.[45] Zur Verteidigung der Kommission muss man jedoch erwähnen, dass eine strafrechtliche Sanktion erwogen wurde und in Bezug darauf wurde der Kontakt zur Kommission von prof. A. Miřička aufgenommen, die die Kodifikation des Strafrechtes vorbereitet hat.[46]

In der zweiten Lesung auf der 67. Sitzung (20. Dezember 1922) trat prof. Weiss mit der Auffassung auf, dass die Bestimmung nicht den Fund von Gegenständen betraf, deren Preis durch ihren wissenschaftlichen Wert gegeben war – z.B. der Naturdenkmäler. Aufgrund dieses Antrags wurde dann vom prof. Stieber auf der folgenden Sitzung (10. Januar 1923) ein neuer Antrag des Wortlauts der Bestimmung über den Schatz vorgelegt. Wenn im ABGB der Fund der a) verlorenen von der b) versteckten Sache und c) dem Schatz unterschieden wird, kam noch d) der Fund von Sachen mit wissenschaftlichem Wert hinzu. Die Inspiration durch das schweizerische Recht ist zwar offensichtlich (Art. 724 ZGB), doch es wurde auch der Anspruch des Grundeigentümers auf den Anteil am Finderlohn anerkannt, mit Berufung auf die römischrechtliche Tradition, auf der das tschechische Recht beruht.[47] Bei der Fertigstellung des Entwurfes 1924 wurde auf die ursprüngliche Nummerierung nach ABGB verzichtet und die Bestimmungen wurden neu als §§ 374, 375 und 376 nummeriert (urspr. §§ 398, 399 und 401 des ABGB) und § 377 über Sachen von wissenschaftlichem Werte.[48]

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43 In der zeitgenössischen Rechtsprechung wurden die in beweglichen Sachen gefundene „Schätze" nach § 395 als verborgene Sachen betrachtet.

44 Im Original des maschinenschriftlichen Textes, der dem Ministerium überreicht wurde, fehlt diese Bestimmung und wurde handschriftlich nachgetragen. Siehe die endgültige Fassung des Entwurfs des Subkomitees für Sachenrecht NA, fond Ministerstvo spravedlnosti v Praze 1918–1953, K 302, složka [Faszikel] 1923–1924.

45 Die Stellungnahme des Höchsten Gerichtes zur Frage des Sachenrechtes in der Revision des Bürgerlichen Gesetzbuches vom 2. August 1924, S. 15 und ähnlich auch das Gutachten der Notariatskammers in Brünn. NA, fond Ministerstvo spravedlnosti v Praze 1918–1953, K 303, složka [Faszikel] 1924–1926.

46 Siehe das Protokoll aus der 69. Sitzung des Subkomitees vom 17. Januar 1923, S. 1.

47 Das Protokoll aus der 68. Sitzung des Subkomitees vom 10. Januar 1923, S. 1.

48 Herausgegeben vom Justizministerium der Čechoslovakischen Republik: *Das bürgerliche Gesetzbuch für die Čechoslovakische Republik übersetzt*. Reichenberg: Gebrüder Stiepel, 1924.

3. 4 Änderungen des Entwurfs 1931

Der Entwurf 1931 war das Ergebnis der Verhandlungen der Superrevisionskommission und ihre Gestaltung/seine Gestaltung (wenn es um den Entwurf geht) widerspiegelte sich auch in den ersten Bänden des bekanntesten (und umfangreichsten) Kommentars zum ABGB, das auf dem tschechischen Gebiet herausgegeben wurde – im Kommentar Rouček-Sedláček.[49] Allem Anschein nach wurden entgegen dem ursprünglichen Antrag von Stieber die Bestimmungen über den Schatz geändert. Zunächst wurde die Nummerierung des ABGB verlassen, die entsprechenden Bestimmungen waren nun unter den §§ 311–314 zu finden.

In der Definition des Schatzes im § 311 sowie in der endgültigen Fassung des Antrags des Subkomitees von 1923 standen anstatt der demonstrativen Aufzählung des ABGB nur die „Wertgegenstände". Der zweite Satz der Bestimmung ersetzte den ursprünglich nicht nummerierten Paragraphen des Antrags von 1923, wo auch die Schöpfungen mit wissenschaftlichem und künstlerischem Wert explizite als Wertgegenstände bezeichnet werden.

Im Unterschied zum Antrag des Entwurfes von 1923 kehrte die Regelung des Eigentumsrechtes wieder zur rein hadrianischen Auffassung zurück, indem aus dem Wortlaut des § 312 der Forderungsanspruch des Staates auf die Gegenstände mit archäologischem oder numismatischem Wert ausgelassen wurde. Laut dem Gründebericht zum Entwurf von 1931 geschah dies aus dem Grund, dass der Aufbau der beantragten Bestimmung zu kompliziert war. Zugleich wurde festgehalten, dass diese „Sache in den Bereich des Denkmalschutzgesetzes gehört."[50] Da das Denkmalschutzgesetz in der gegebenen Zeit vorbereitet wurde, wurde der Satz ausgelassen.[51] Gleichfalls wurde die dem § 401 des ABGB entsprechende Bestimmung ausgelassen, welche zudem auch im Kommentar Rouček-Sedláček als überflüssig und teilweise unpräzise bezeichnet wurde.[52]

Der Paragraph, aufgrund dessen die Verheimlichung des Fundes verfolgt wurde, wurde dagegen wieder in den Gesetzestext eingefügt.[53] Der ursprünglich umfangreiche und nicht nummerierte Paragraph des Entwurfs 1923 über die Naturerzeugnisse wurde aufgrund der

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[49] ROUČEK, F./SEDLÁČEK, J.: *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi* [Kommentar zum tschechischen ABGB und das in der Slowakei und in der Karpatenukraine geltende bürgerliche Recht]. 1.–6. díl. Praha : V. Linhart, 1935–37. F. Rouček siehe oben Anm. 42. Jaromír Sedláček (1885 Slavkov u Brna/Austerlitz –1945 Brünn) studierte Jura in Wien, Prag und Berlin, zunächst war er in der Rechtspraxis tätig, später lehrte er das Recht an der Technischen Hochschule in Brünn und schließlich an der Rechtsfakultät der Masaryk-Universität. Er bekannte sich zu der normativen Schule und zählte zu den bedeutendsten Zivilisten des Zwischenkriegszeitalters. Seine Haltung zur Frage der Rekodifikation war im Grunde negativ, weil dieses Konzept veraltet war. HORÁK, O.: Jaromír Sedláček a brněnská normativní škola [Jaromír Sedláček und die Brünner normative Schule]. In *Časopis pro právní vědu a praxi*. 2010, S. 411ff.

[50] *Zákon, kterým se vydává všeobecný zákoník občanský. Návrh superrevisní komise. Díl II.* (*Důvodová zpráva*) [Das Gesetz, wodurch das ABGB herausgegeben wird. Der Antrag der Superrevisionskommission. Teil II (Gründebericht)]. Praha : Ministerstvo spravedlnosti, 1931, S. 127.

[51] Der Entwurf des Denkmalschutzgesetzes erschien mit dem Gründebericht von 1934. *Osnova zákona o památkách* [Der Entwurf des Denkmalschutzgesetzes]. Praha : Ministerstvo školství a národní osvěty, 1934.

[52] ROUČEK, F./SEDLÁČEK, J.: op. cit. 10, S. 413 und 414f.

[53] *Zákon, kterým se vydává všeobecný zákoník občanský. Návrh superrevisní komise. Díl I.* (*Text zákona*) [Das Gesetz, wodurch das ABGB erlassen wird. Der Antrag der Superrevisionskommission. Teil I (Das Gesetz)]. Praha : Ministerstvo spravedlnosti, 1931. Die Texte der Bestimmungen auch in den betreffenden Paragraphen des ABGB siehe bei ROUČEK, F./SEDLÁČEK, J.: op. cit. 10, S. 404, 408, 411 und 413.

Änderung der Definition des Schatzes auf die Feststellung reduziert, „dass die Bestimmung über den Schatz angemessen auch für die Naturerzeugnisse mit wissenschaftlichem Wert gilt". (§ 314 des Entwurfs 1931).

3. 5 Änderungen des Entwurfs 1937

Auch der Entwurf von 1931 wurde noch geändert. Das Ergebnis war, wie schon erwähnt, der endgültige Gesetzesantrag der Regierung – der Entwurf 1937. Wegen der Weglassung der Bestimmung über das Familienrecht wurden die entsprechenden Paragraphen auf §§ 169–172 umnummeriert. Die Definition des Schatzes hat sich im Entwurf 1937 nicht wesentlich geändert.

Eine wesentliche Änderung brachte aber der § 170 im Wortlaut: „Von einem gefundenen Schatze erhält den Drittel der Finder und die übrigen Drittel der Eigentümer der Sache, in der der Schatz gefunden wurde, und der Staat. Handelt es sich um eine unteilbare Sache, erwerben alle Miteigentum."[54] Somit kehrte praktisch nach neunzig Jahren das Eigentum des aufgefundenen Schatzes in die Form, in der es im Jahre 1811 kodifiziert wurde und die in der Slowakei immer noch gilt. Wie aber der Gründebericht zeigt, geht diese Änderung weder auf die Rückkehr zum ursprünglichen Wortlaut des ABGB noch auf die Bemühungen um die Vereinheitlichung mit der slowakischen Regelung zurück.

Der Gründebericht bringt uns auch keine Informationen von der Heftigkeit der Auseinandersetzungen um diese Bestimmung. Den wahren Grund stellte offensichtlich die kompromisslose Stellungnahme des Finanzministeriums dar, das sich der Anforderung angeschlossen hat, die vom Höchsten Rechnungs- und Kontrollamt im zwischenbehördlichen Verfahren zu Anfang des Jahres 1935 gestellt wurde.[55] Der Antrag auf den Drittelanteil des Staates stieß auf Widerstand seitens der Ministerien für Justiz und für die Unifizierung, sowie aber auch der Juristen, die die endgültige Revision des Entwurfstextes vorbereitet haben.[56] Die Verhandlungen wurden von nun an auf der politischen Ebene geführt. Die hartnäckige Haltung hat sich dem Finanzministerium gelohnt, denn am 4. November 1936 gab schließlich das Justizministerium nach und führte die Änderung des betreffenden Paragraphen durch.[57]

Im Entwurf 1931 wurde der Anspruch des Staates weggelassen, im Entwurf 1937 war dagegen dieser Anspruch dem Staat wieder zuerkannt. Trotzdem kann man nicht voraussetzen, dass im erstgenannten Falle die Anhänger der Privateigentümer und im zweitgenannten die Anhänger des Staates Oberhand behielten. Denn weder 1923 noch in den folgenden Jahren hat man die Tatsache bezweifelt, dass der Staat Rechte auf die Sachen von materiellem und vor allem kulturellem Wert besitzt. Die Mitglieder der

[54] Im ähnlichen Geiste wurde auch der § 171 konzipiert, wo die Sanktionen für die Verheimlichung des Schatzes behandelt wurden, sonst entsprach er im Grunde dem § 313 des Entwurfs 1937.

[55] Die Anträge keiner der Institution waren von kulturhistorischem Interesse motiviert, vielmehr standen dahinter finanzielle Gründe. Laut dem Kontrollamt sollten dadurch die Schätze im höheren Wert als 100 Kronen betroffen werden, das Finanzministerium versuchte das Limit auf zwei, drei tausend Kronen zu erhöhen. Siehe das Protokoll der XVII. zwischenbehördlichen Beratung zum Entwurf des BGB vom 19. 2. 1935, 16. Národní archiv, fond Ministerstvo unifikací, karton [Karton] 155.

[56] Als Hauptargument diente das bereits erwähnte Dekret von 1846, denn es gab Befürchtungen, dass es wieder zu Verheimlichung von Funden kommen würde.

[57] Der Brief des Justizministeriums dem Vorstand des Ministerrates Nr. 56937/36–8, 3. NA, fond Ministerstvo unifikací, K 156.

Superrevisionskommission wollten keinesfalls durch die Weglassung im Entwurf 1931 den Anspruch des Staates auf diese Gegenstände bestreiten. Vielmehr setzten sie baldige Annahme der Rechtsregelung des Denkmalschutzes voraus, wo diese Frage geregelt werden sollte. Die Schicksale des Entwurfs des Denkmalschutzgesetzes unterschieden sich aber nicht viel von den Schicksalen des Entwurfs des Bürgerlichen Gesetzbuches, denn beide wurden in den fachmännischen und politischen Diskussionen wesentlich verzögert. Eben die zwischenbehördlichen Verzögerungen führten schrittweise dazu, dass die Arbeit an dem Denkmalschutzgesetz völlig eingestellt wurde.[58]

Die Existenz einer getrennten Rechtsregulierung der Denkmäler führte die Juristen und auch die Politiker zu der Frage, ob es überhaupt zweckhaft ist, im Bürgerlichen Gesetzbuch eine spezifische Gattung der gefundenen Sache – nämlich die des Schatzes – aufrechtzuerhalten. Manche waren der Meinung, dass dieses Institut in die Kategorie der verborgenen Sachen einbezogen werden soll. Obwohl im Entwurf von 1937 das selbstständige Institut des Schatzes aufrechterhalten blieb, stellten die Verfasser des Kommentars im Schlussteil des Textes fest, „dass die beantragten Bestimmungen über den Fund eines Schatzes sehr an praktischem Wert verlieren, bis das vorbereitete Gesetz die Rechtsverhältnisse an Denkmälern eingehend regelt;…".[59] Weiter unten heißt es aber, dass „…sie aber auch dann nicht bedeutungslos werden, denn nicht alle Sachen, auf die sich die §§ 169 bis 172 beziehen, werden Denkmäler sein."[60] Es ergibt sich die Frage, ob die Beibehaltung des Schatzes im Antrag des Entwurfes von 1937 nicht vielmehr durch die Kenntnis des damaligen Standes der Verhandlungen über die einzelnen Vorschriften zu erklären ist, sowie auch durch die sich verschärfende politische Situation, die andeutete, dass die Problematik der Kodifikation auf den Abstellgleis geschoben wird.

Der Entwurf erfuhr aber Veränderungen, was seine Gestaltung angeht, auch in den Verhandlungen der Unterausschüsse des Parlaments und Senats. Und wiederum kam es zu einer Änderung, wenn auch nicht einer wesentlichen. Denn im neuen Wortlaut des § 170 wurde der ganze aufgefundene Schatz dem Staat zuerkannt. Seine Pflicht war es aber, dem Finder und dem Eigentümer der Sache, in der der Schatz gefunden wurde, entweder je ein Drittel des allgemeines Schatzpreises auszuzahlen, oder auf sie das betreffende Drittel zu überweisen.[61]

Während die Durchsetzung des Drittelanteils für den Staat bei dem Justizministerium und dem Höchsten Rechnungs- und Kontrollamt praktisch mehrere Jahre in Anspruch nahm, die Verhandlungen der Unterausschüsse vierliefen glatt und die Änderung wurde – wenn auch nach heftigen Diskussionen – in einer einzigen Sitzung am 7. Oktober 1937 angenommen. Außer Schutz des Kulturerbes spielte auch der Schutz der Funde eine Rolle,

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58 ŠTONCNER, P.: Příspěvky k dějinám památkové péče v Československé republice v letech 1918–1938. Část 4. – Snahy o vydání památkového zákona [Beiträge zur Geschichte des Denkmalschutzes in der Tschechoslowakischen Republik in den Jahren 1918–1938. Teil 4. – Die Bemühungen um die Erlassung des Denkmalschutzgesetzes]. In *Zprávy památkové péče*. 2005, S. 249f.

59 Gründebericht zum Abschnitt 7 (§§ 156 bis 173) *Sněmovní tisk 844. Vládní návrh zákona, kterým se vydává občanský zákoník* [Parlamentsdruck 844. Der Regierungsantrag, indem das Bürgerliche Gesetzbuch erlassen wird]. Praha : Státní tiskárna, 1937, S. 267.

60 Ibid.

61 Der Antrag wirkte sich im Text des Entwurfs des BGB 1946 aus. Dieser wurde von Š. Luby, einschließlich des Vergleichs mit dem slowakischen Antrag, in der Zeitschrift „Právny obzor" in den Jahren 1947–48 publiziert. Die Publizierung wurde aber bei dem § 1247 abgebrochen. Zur Bestimmung zum Schatz siehe LUBY, Š.: Československý občiansky zákonník a slovenské súkromné právo [Das tschechoslowakische bürgerliche Gesetzbuch und slowakisches Privatrecht]. In *Právny obzor*. 1947, S. 98f.

viele sind in die Hände der Zwischenhändler gefallen und die Finder bekamen für ihre wertvollen Gegenstände nur ganz wenig Geld.[62] Die folgende Entwicklung der Situation im Jahre 1938 und in den folgenden Jahren schob schließlich auch den Entwurf des Bürgerlichen Gesetzbuches auf das Abstellgleis.

4. Kriegs- und Nachkriegsentwicklung

4. 1 Protektorat

Während die Arbeiten an der Rekodifikation des bürgerlichen Rechtes im Kriegszeitalter nachließen, wurde erstaunlicherweise die Problematik des Denkmalschutzes in Angriff genommen. Am 12. Juni 1941 verabschiedete die Protektoratsregierung die Verordnung Nr. 274/1941 Slg. über die Bodenaltertümer, die als erste erfolgreiche Kodifikation der Problematik ihres Schutzes zu betrachten ist. Die Gründe, die dazu geführt haben, werden wahrscheinlich nie völlig geklärt, denn wegen der fehlenden gesetzgebenden Körperschaft wurden den Regierungsverordnungen im Prinzip nicht die Gründeberichte beigelegt.

Bodenaltertümer waren im Sinne dieser Verordnung „…Schöpfungen von Menschenhand oder von Menschen verwendete Naturgebilde aus vorgeschichtlicher und frühgeschichtlicher Zeit,… deren Erhaltung wegen ihres wissenschaftlichen, künstlerischen oder heimatkundlichen Wertes im öffentlichen Interesse liegt." (§ 1 der Regierungsverordnung). In dieser Vorschrift wurde ferner klar festgestellt, dass die Ausgrabungen ausschließlich von der Anstalt für Vor- und Frühgeschichte oder von anderen Einrichtungen mit geschulten Fachleuten und mit Zustimmung der Anstalt durchgeführt werden können (§ 5 der Verordnung). Die beweglichen Bodenaltertümer, die durch Ausgrabungen gewonnen wurden, fielen in das Eigentum des Protektorats, bei Bodenaltertümern aus Edelmetallen musste aber das Protektorat diese für einen gemeinen Wert ersetzen (§ 7 Abs. 1 der Verordnung), bei Zufallsfunden galten die Vorschriften des bürgerlichen Rechtes (§ 7 Abs. 2 der Verordnung), dabei konnte das Protektorat auch diesen Fund für einen Ersatz in der Höhe des gemeinen Wertes kaufen (§ 7 Abs. 3). Diese Verordnung blieb trotz der Zeit ihrer Entstehung bis zum Jahre 1958 in Kraft.

4. 2 Bürgerliche Gesetzbücher nach 1948

Von dem fehlgeschlagenen Versuch, die Arbeiten am Entwurf nach dem Krieg fortzusetzen, wurde schon berichtet. Die politische Wende, zu der es im Februar 1948 kam, änderte völlig die Anforderungen der Gesellschaft an die rechtliche Regelung des Privatrechts. Obwohl die tatsächliche Einflussnahme des sowjetischen Rechtes auf das Bürgerliche Gesetzbuch von 1950 manchmal überschätzt wird, kann man behaupten, dass man eben mit diesem Recht den definitiven Untergang des Instituts des Schatzes in der tschechischen Rechtsordnung verbinden kann. In einer Gesellschaft, wo das Privateigentum

[62] Zum Verfasser des Antrags wurde der Abgeordnete Dominik, aber teilweise wurde er von den Anregungen des Abgeordneten Dr. Mayr-Harting inspiriert. Siehe das Protokoll der Verhandlung der Subkomitees vom 7. Oktober 1937. NA Praha, fond Ministerstvo unifikací, K 157.

als Anachronismus galt, der allmählich verschwinden soll,[63] ist es klar, dass der Schatzfund als Erwerbstitel kaum vorstellbar ist. Der Wortlaut des Gesetzes vereinfachte wesentlich die bisherige Kategorisierung der verschollenen, verborgenen Sachen und des Schatzes, da durch die Bestimmung des § 120 des BGB 1950 die aufgefundenen Sachen dem Nationalausschuss pflichtmäßig abgegeben werden mussten. Falls sich der Eigentümer ein Jahr lang nicht gemeldet hat, erwarb der Finder das Eigentum an den Sachen nur in dem Falle, wenn der Wert dieser Sachen gering war (§ 121 Abs. 2 BGB 1950). Sonst erwarb das Eigentum der Staat und der Finder konnte nur den Finderlohn in der Höhe von zehn Prozent des Sachwertes beanspruchen (§ 122 BGB 1950). Der Schatzfund wurde gemeinsam mit den verborgenen Sachen in den § 123 BGB 1950 einbezogen, wobei vom Schatz in diesem Zusammenhang nur im Gründebericht die Rede war.[64]

Das Bürgerliche Gesetzbuch von 1964 wies im ursprünglichen Wortlaut die Sachen, die niemandem gehören, aufgefunden wurden und verborgen waren, deren Eigentümer nicht bekannt sind, ausschließlich dem Eigentum des Staates zu und ihre Beibehaltung wurde als unberechtigter Vermögensvorteil bezeichnet (§ 453 BGB 1964 im ursprünglichen Wortlaut). Der Finder hatte nur den Anspruch auf das Begleichen von notwendigen Ausgaben, nicht aber auf den Finderlohn. Keine wesentlichen Änderungen brachten die Novellen des Bürgerlichen Gesetzesbuches aus den 90. Jahren des 20. Jahrhunderts, die durch die politische Wende von 1989 hervorgerufen worden waren. Durch die Bestimmung des § 135 BGB 1964 (im Wortlaut der Novelle 509/1991 Slg.) kehrte man nur zu dem Finderlohn in der Höhe von zehn Prozent des gemeinen Wertes zurück und das Eigentum der aufgefundenen Sache erwarb neulich nicht der Staat, sondern die betreffende Ortschaft, und zwar schon nach sechs Monaten.

4. 3 Denkmalschutzgesetze[65]

Wie bereits früher angedeutet, zeigte sich immer stärker die Verknüpfung des Schatzfundes mit den Sachen von archäologischem, kulturellem oder wissenschaftlichem Wert. Obwohl selbstverständlich auch der tschechoslowakische Staat der Zwischenkriegszeit um den Schutz dieser Sachen bemüht war, verstärkten sich diese Tendenzen nach 1948, wo der Schutz von Kulturdenkmälern beinahe zum Staatsmonopol wurde.

Die Problematik der archäologischen Funde wurde zunächst im Gesetz über die Kulturdenkmäler geregelt, das als Nr. 22/1958 Slg. (insbesondere §§ 16 und 17) angenommen und publiziert wurde. Folglich dann im ähnlichem Geiste im Gesetz Nr. 20/1987 über den staatlichen Denkmalschutz, das trotz vielen Novellen bis heute gültig ist. Beide Gesetze zuerkannten dem Finder im Falle eines Fundes den Anspruch auf die Belohnung in

63 Dieser Gedanke wurde am ausdrücklichsten im Gesetz Nr. 40/1964 Slg., BGB, zum Ausdruck gebracht, wo in der ursprünglichen Fassung das Institut des Privateigentums unter die Übergangs- und Schlussbestimmungen eingeordnet wurde.

64 Občanský zákoník [BGB], 1950, 244 (Gründebericht zu §§ 120–123).

65 Zur Problematik des Schutzes der archäologischen Denkmäler in der Tschechischen Republik siehe PROKOPOVÁ, K.: Fenomén soukromých archeologických sbírek a vývoj vlastnictví archeologických nálezů [Das Phänomen der archäologischen Privatsammlungen und die Entwicklung des Eigentums an archäologischen Funden]. In *Dny práva 2011 – Days of Law 2011*. Brno : Masarykova univerzuita, 2012, S. 147–154. Online verfügbar: http://www.law.muni.cz/sborniky/dny_prava_2011/files/prispevky/10%20Ovlivnovani%20sfery/15%20prokopova.pdf.

der Höhe von zehn Prozent des gemeinen Wertes. Wenn aber die gefundene Sache aus Edelmetall hergestellt war, berechnete man die Belohnung, und dies gilt immer noch, nur aus dem Wert dieses Materials (§ 23 Abs. 4 des Gesetzes Nr. 20/1987 Slg.).[66] Obwohl es oft auch seitens der zuständigen Staatsorgane nicht an Intention fehlt, z.B. die Münzen dank den Beimengungen von anderen Stoffen nicht als „Edelmetall" zu betrachten, wirkt die Belohnung nicht besonders motivierend. Oft verheimlichen dann die Finder den Schatz und nur selten gelingt es dem Staat, diesen Schatz zu erlangen.[67]

Zusammenfassung

Der Schatzfund als einer der Erwerbstitel des Eigentumsrechtes verschwand aus der Rechtsordnung auf dem Gebiet der gegenwärtigen Tschechischen Republik gemeinsam mit dem Bürgerlichen Gesetzbuch Nr. 141/1950 Slg. Ein näherer Blick auf die Kodifikationsversuche in der Zwischenkriegszeit zeigt, dass seine Entfernung aus der Rechtsordnung nur die kontinuierliche Ausmündung von denjenigen Diskussionen war, die im Rahmen der Vorbereitung dieser Kodifikationen geführt wurden.

Das Subkomitee für das Sachenrecht, das von prof. Stieber geführt wurde, wich vom ursprünglichen Auftrag der Rekodifikation ab und anstatt der Übersetzung von ABGB ließ er sich in einem hohen Maße von der Rechtsregelung des Schatzes im ZGB beeinflussen. Im Unterschied zum ZGB blieb er aber der römischrechtlichen Tradition treu und überließ das Eigentumsrecht am Schatz dem Finder und dem Eigentümer der Sache, in der der Schatz aufgefunden wurde. Die Kommission aber behielt das Recht auf Forderung bei Funden von archäologischem und numismatischem Wert dem Staat vor. Nach dem Muster der schweizerischen Regelung, zugleich mit einer leichten Abweichung seitens des Anspruchs des Eigentümers des betreffenden Grundstücks, regelte der Entwurf auch das Recht auf die Naturerzeugnisse von wissenschaftlichem Wert.

Der ursprüngliche Vorschlag hinsichtlich des Forderungsrechtes des Staates wurde wegen seiner Kompliziertheit von der Superrevisionskommission zurückgewiesen und im Entwurf des Bürgerlichen Gesetzbuches von 1931, der in der zwischenbehördlichen Diskussion neu vorgelegt wurde, werden wieder nur der Finder und der Eigentümer der Sache genannt, in der der Schatz aufgefunden wurde. Das Bildungsministerium, in dessen Tätigkeitsbereich in der Zeit der Ersten Republik auch die archäologischen Arbeiten fielen, hat in dieser Frage keinen Antrag gestellt. Und zwar deshalb, weil allgemein angenommen wurde, dass auch die Problematik der archäologischen Funde das Gesetz über die Kulturdenkmäler behandeln soll, das in Vorbereitung war. Das Höchste Rechnungs- und Kontrollamt beanspruchte aber gemeinsam mit dem Finanzministerium aus Fiskalgründen die Zuerkennung eines Drittels der wertvolleren Schätze dem Staat. Trotz vieler ablehnenden Stellungnahmen gelang es zu Anfang November 1936 dem Finanzministerium nach mehr als einem Jahr diese Forderung schließlich durchzusetzen. Wenn der Entwurf des Bürgerlichen Gesetzes in der Gestalt der Paragraphen von 1937 in das Abgeordnetenhaus gelangte, kamen die Politiker mit einer

[66] In der ursprünglichen Fassung des Gesetzes gab es noch eine Bestimmung, laut der der Bezirksnationalausschuss den Finderlohn angemessen reduzieren kann, wenn der volle Finderlohn als nicht angemessener Gewinn zu betrachten ist (§ 17 Abs. 2 in fine Gesetz Nr. 22/1958 Slg. über die Kulturdenkmäler).

[67] So gelang es aufgrund einer anonymen Anzeige im März 2013 einen Schatz zu erlangen, der im Jahre 2010 nahe der Burg Boskovice (Anhöhe Zlatník) gefunden wurde. Die Polizei hat dabei ein Gefäß mit 2267 Silbermünzen aus dem 15.Jh.–1. Hälfte des 17. Jhs. sichergestellt.

noch radikaleren Lösung. Dem Staat wurde der ganze Schatz zuerkannt und der Finder und der Eigentümer der Sache, in der der Schatz aufgefunden wurde, hatten Anspruch nur auf je ein Drittel seines gemeinen Wertes, ggfls. auf ein Drittel des Schatzes. Die Entscheidung hing vom Staat ab. Die Ereignisse des Jahres 1938 haben aber weitere Arbeiten an der Kodifikation des Bürgerlichen Gesetzbuches unmöglich gemacht und obwohl nach 1945 das Verfahren mit den schon eingearbeiteten Einsprüchen fortgesetzt wurde, brachte es die kommunistische Machtergreifung im Februar 1948 endgültig zu Ende.

Während der ganzen Zeit dieser Vorbereitungen waren sich die Autoren dessen bewusst, dass sich das Institut des Schatzfundes im Wesentlichen mit der Problematik des Denkmalschutzes deckt, somit wurde es als provisorisches Institut betrachtet, bevor das betreffende Denkmalschutzgesetz verabschiedet wird. Dieses legislative Verfahren ist aber noch früher als der Entwurf 1937 zum Stillstand gekommen.

Die Bemühungen, das Privateigentum in einem hohen Maße einzuschränken, führten in diesem Zeitalter nicht nur zum Verschwinden des Schatzes als selbstständigen Rechtsinstituts aus der Rechtsordnung, sondern auch dazu, dass das Eigentum an der aufgefundenen Sache im Prinzip der Staat erwarb. Der etwaige Finderlohn betrug nur 10 Prozent des gemeinen Wertes der Sache. Ähnliches galt auch in den Vorschriften des Denkmalschutzes, wo darüber hinaus festgelegt war, dass bei Sachen aus Edelmetall ihr Wert vom Wert des Metalls berechnet wird und nicht des Fundes.

Obwohl der Fund im Sinne des Privatrechts und der archäologische Fund im Sinne der Denkmalschutzvorschriften (derzeit das Gesetz Nr. 20/1987 Slg. im Wortlaut der späteren Novellen) nicht identisch sind,[68] ihre Durchdringungskraft ist dermaßen umfassend, dass die Verfasser des neuen Bürgerlichen Gesetzbuches im Unterschied von anderen Instituten den Schatzfund im Bürgerlichen Gesetz vermieden haben. Sie verwirklichten somit den Gedanken, der schon in den Rekodifikationsbemühungen im Zwischenkriegszeitalter zu finden ist – sie haben den Schatzfund und den Fund von verborgenen Sachen in einem Institut zusammengeschlossen (§§ 1063–1065 BGB 2012) und den Hauptteil dieser Problematik haben sie in die Vorschriften des Denkmalschutzes übertragen.

Súhrn

Nález pokladu v českém právu po r. 1918

Text se zabývá vývojem regulace nálezu pokladu v právu v Československu od r. 1918. Rozebírá platnou právní úpravu rakouskou a uherskou, která byla převzata na základě recepční normy. Hlavní pozornost ale věnuje problematice rekodifikačních prací za první republiky resp. od dvacátých let 20. stol., až po osnovu občanského zákoníku z r. 1946. Institut pokladu je pro sledování rekodifikačních prací mimořádně vhodný, neboť v každém z návrhů byla jeho problematika upravena jinak. Text vychází především z archivních materiálů, takže umožňuje sledovat nejen změny v navrhovaných úpravách, ale také důvody a iniciátory těchto změn.

[68] Als archäologischer Fund ist laut § 23 Abs. 1 des Gesetzes Nr. 20/1987 Slg. ein Gegenstand (eine Gruppe von Gegenständen) zu betrachten, der als Beleg oder Überrest des Lebens des Menschen und seiner Tätigkeit vom Anfang seiner Entwicklung bis zur Neuzeit zu deuten ist und der sich in der Regel im Boden erhalten hat.

Text ukazuje na skutečnost, že od počátku si autoři uvědomovali, že nález pokladu je svým způsobem již přežitek a že by daná problematika měla být upravena památkovým zákonem. První takový předpis však byl přijat až v období protektorátu, avšak ten měl jen dílčí dosah a tak skutečný zánik nálezu pokladu jako občanskoprávního institutu nastal až následkem společenských změn po r. 1948. Pro současnou dobu by měla být důležitou zejména myšlenka, že nálezce těchto předmětů je třeba nikoliv perzekuovat, ale především motivovat náležitou odměnou k tomu, aby své nálezy odevzdaly. Bohužel, současná ochrana památkové péče jak v České, tak i Slovenské republice, stojí spíše na perzekuci, než na motivaci.

Tomáš Strémy/Marianna D'Andraia

Alternative Sanctions in Italian Criminal Law

Abstract: At the beginning of the article we analyze restorative justice and its main features. Then we briefly characterize alternative sanctions as one of the representative elements of restorative justice. The article mainly focuses on alternative sanctions, which are regulated in Italian criminal law as compulsory labour, house arrest, fines, or prohibition of attending public places or public events. We suppose that Slovakian criminal law is not so far in developing alternative sanctions as Italian criminal law, and this is the main reason why we have chosen this title for the article. The Criminal Code currently in force in Italy is called the "Rocco Code" (its name is connected to the Keeper of the Sales of the time, named Alfredo Rocco), and it introduced the "double track" system. This means that there are two kinds of sanctions in the criminal law: penalties and safety measures. Both of them have the commission of a crime as their prerequisite, but the biggest difference between them is that the former are applied considering the crime; they have to respect the fundamental principle of proportionality between crime and penalty.

Key words: restorative justice – alternative sanctions – compulsory labour – house arrest – fine – prohibition of attending public places or public events

1 Restorative justice and alternative sanctions

During recent years in Western industrial countries, more and more traditional forms of dealing with crime have been re-discovered that was used hundreds of years ago in "traditional" societies. These forms of handling crime were often discussed under the topic of "mediation" or "restorative justice". Meanwhile we have gathered a good deal of literature on the topic.[1] The background for re-discovering these "old" forms of dealing with crime lies in the findings of empirical criminological research from the last few decades, which show more and more that the handling of the problem of crime used today, especially "short, sharp" punishments like those used especially in the USA, is clearly not the best way to deal with crime, or to reduce conflict in society. Imprisonment is also more expensive than the "alternatives", as can be seen especially in the USA, the country with the absolute highest incarceration rate all over the world, and at the same time a very high rate of violent crime.[2] Especially the increasingly studied field of victimology and the establishment of victimology as an important part of criminology point out correctly that for a long time the victims of crime have been forgotten.[3]

In the following part of the article we discuss the main features of restorative justice and the main differences between restorative and retributive justice. In our opinion the main alternative sanctions to actual punishment are: compulsory labour, house arrest, fines, prohibition of attending public places or public events. The next question is whether restorative punishment and mediation can help prevent crime more effectively and cheaply.

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1 HOPT, K. J./STEFFEK, F. (eds.): *Mediation. Rechtstatsachen, Rechtsvergleich, Regelungen*. Tübingen : Mohr Siebeck, 2008 and ŠERBA, F.: The use of alternative measures in the Czech Republic. In *Baltic Journal of Law and Politics*. 2013, pp. 89–105.

2 KURY, H.: Zur (Nicht-)Wirkung von Sanktionen – Ergebnisse internationaler empirischer Untersuchungen. In KURY, H./SCHERR, A. (eds.): *Zur (Nicht-)Wirkung von Sanktionen. Immer härtere Strafen – immer weniger Kriminalität? Soziale Probleme*. 24, 2013, pp. 11–41.

3 BRAITHWAITE, J.: *Crime, shame and reintegration*. Cambridge : Cambridge University Press, 1989.

Criminal justice in Slovakia and also in Italy is being influenced by current European trends, such as extending use of alternative sentences in substantive criminal law and diversions in procedural criminal law. International standards have also played an important role in the process of re-codification of Slovak criminal law by introducing restorative measures.

The criminal justice system in the Slovak Republic and also in Italy is based on traditional continental criminal procedure. Substantive criminal law as well as procedural criminal law is more or less rigid and there is not enough space for the independent actions of judges, attorneys-general, prosecutors and police officers to determine the best practices to cope with criminality and at the same time protect the interests of victims, the public and offenders as well. Modern features of restorative justice are appearing in the Slovakian criminal justice system, and they could be the way out of the crisis affecting criminal justice in Slovakia.[4]

It is clear that the main reforms of Slovak criminal procedure were implemented in 2005 during the process of re-codification of Slovak criminal law. Some restorative measures and concepts came into effect on 1st January 2006, when the Criminal Code No. 300/2005 Coll. and Code of Criminal Procedure No. 301/2005 Coll. came into effect by means of Law No. 215/2006 Coll. on Compensation to Persons Harmed due to Violent Criminal Offences, as well as the Probation and Mediation Officers Law No. 550/2003 Coll., which had come into force few years before.[5]

First of all, criminal procedure was amended with the aim of strengthening the position of victims and other injured persons (better chance to claim damages). There was another progressive move, an effort to make victims and other injured persons take part in the criminal proceedings in order to ensure quick and satisfactory claims for damages (using so-called diversions). Finally, some modern informal processes were implemented, e.g. conditional discharge, reconciliation and plea bargaining (arbitration and mitigation in criminal proceedings).

Last but not least, substantive criminal law was amended through implementation and application of alternative sentences. The most important of them are community service orders and the opportunity to impose protective supervision over juvenile offenders carried out by the Probation and Mediation Officer in the case of conditional suspension of prison sentence with probation supervision and waiver of sentence with probation supervision.

There is now also a new institution of Mediation, a form of formal arbitration or mitigation proceedings outside the criminal procedure. It is an alternative to the criminal procedure which creates an opportunity for imposing alternative sentences, using diversions in criminal procedure or replacing protective custody with less harmful protective measures. However, several concepts of restorative justice have never been implemented in Italy (or the Slovak Republic), namely restorative group conferencing, police cautioning, community reparation boards and sentencing circles.

Restorative justice requires, at minimum:

- compensating the victims and addressing their needs,
- preparation of offenders and holding them accountable to restore the damage and subsequently the involvement of victims and offenders and society in this process.[6]

[4] VRÁBLOVÁ, M.: *Slovak substantive criminal law*. Trnava : Trnava University in Trnava, 2013.

[5] DIANIŠKA, G. a kol.: *Kriminológia*. 2. vyd. Plzeň : Aleš Čeněk, 2011.

[6] ZEHR, H.: *The little book of Restorative Justice*. Intercourse : Good Books, 2002, pp. 22–25.

Features of restorative justice:

1. Focusing on the consequences of the crime more than on the fact that the law was breached.
2. Showing the same concern and resolution towards the victim and the offender, which involves the participation of both in the justice process.
3. Working on the compensation of victims, to strengthen them in addressing their needs as they perceive them.
4. Supporting and encouraging offenders in the understanding and acceptance of obligations, to make them fulfil their obligations.
5. Recognizing obligations which might be more difficult for the offender, which should not be seen as something harmful, and which should be, at the same time, attainable.
6. Providing opportunity for dialogue, direct or indirect, between the victim and the offender.
7. Finding meaningful ways of involving society in the process.
8. Supporting cooperation and reintegration of victims and offenders, rather than applying coercion and isolation.
9. Paying attention to the potential consequences of one's own thoughtless acts.
10. Respecting all parties: the victim, the offender and society.[7]

In the opinion of Conrad Brun, the theoretical and philosophical scopes of the terms „restorative justice" and „retributive justice" are not opposites, as some people might assume.[8] Restorative justice introduces new elements into traditional criminal justice, such as mediation between the offender and the victim, extra-judicial group hearings of minor offences by juvenile delinquents (so-called family group conferences), and also emphasizing the compensation for harm caused to the victim.[9] At the same time, restorative justice represents a traditional form of criminal justice that focuses mainly on punishing the offender but also on the restoration of previous conditions.

The characteristic feature of both theories is compensation for damage to the victim. The difference between the two theories arises in the application of specific settlements of affairs.

Retributive theory means that the punishment is deserved, which in practice is often counter-productive for the victims and the offenders. On the other hand, restorative justice theory shows that addressing the needs of and harms done to the victim is required in combination with active efforts to support offenders in accepting responsibility for the crimes committed, and focus on the causes of their behaviour.[10]

According to Howard Zehr, the differences between restorative and retributive justice are:

Restorative justice:

– The crime represents a disruption of personal and interpersonal relations.
– The disruption leads to obligations.
– In the restoration process, justice involves: victims, offenders and society.
– Focus: needs of the victim and offenders and responsibility for restoration of damage.

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7 BECK, E./KROPF, N. P./BLUME LEONARD, P.: *Social work and restorative justice*. Oxford : University press, 2011, p. 43.

8 BRUNK, C.: Restorative Justice and the Philosophical Theories of Criminal Punishment. In HADLEY, M. L.: *The Spiritual Roots of Restorative Justice*. 31, 2001.

9 SCHEINOST, M.: Restoratívní justice. In *Sborník příspevku a dokumentu*. Praha : Institut pro kriminologii a sociální prevenci, 2003, p. 4.

10 ZEHR, H.: op. cit. 6, pp. 58–59.

Retributive justice:
- The crime represents a disruption of law and the interests of state.
- The disruption leads to guilt.
- Justice requires the state to decide on the guilt and impose punishment.
- Focus: offenders should get what they deserve.[11]

Retribution theory believes that the harm caused to the victim will be remedied, but it is often counter-productive in practice for the victim and the offender. On the other hand, the restorative theory of justice argues, or more precisely really advocates becoming aware of the damage that offenders cause to their victims, together with making efforts to encourage them to assume responsibility for their offences. At the same time, restorative justice has the potential to transform the lives of the offender and the victim in a positive way.[12]

The proponents of restorative justice have a different opinion to the traditional reformers of criminal law. Besides victims, they also see offenders and how to get them back into society, i.e. how to reintegrate them. Naturally, the victims are people who have been "hurt" by the offence, but at the same time they should be able to empathize with the offender as a person who could be punished in another way than by a sentence of imprisonment. Restorative justice focuses, inter alia, on the return of the offender into society.[13]

2 Compulsory labour in Italian criminal law

2. 1 Introduction

Article 1 paragraph 1 of the Italian Constitution claims that "Italy is a democratic republic founded on labour". The presence of the word labour in this article shows the preeminent position that labour[14] occupies in Italian society, because the original authors of the Constitution decided to introduce the topic of work in the first article to underline its importance. Labour is one of the fundamental rights of Italian Law and it consists in whatever activity a person decides to implement freely, as long as it favours the material or spiritual progress of society (Art. 4 paragraph 2 of the Constitution: "Every citizen has the duty to engage, according to his own possibilities and choice, in an activity or a position that contributes to the material or spiritual progress of society"). Labour has three aspects: it is a fundamental right which has to be granted to everyone; it is a moral duty because each person is supposed to contribute to society's development as a part of it; and finally it is also considered as a way by which it is possible to facilitate the re-education of convicts. The dilemma is that the penalties are compulsory so the convict is obliged to undergo them, although the right/duty to work should be chosen freely by the people: thus there is a contrast between these two positions. To understand how it is possible to consider lawful that a person is forced to undertake some activity, it is necessary to study the contents and the foundation of this institution in the light of the Constitutional principles, considering

11 Ibid., p. 21.
12 Ibid., p. 59.
13 CLEAR, T. R.: Community justice versus restorative justice: contrasts in family of value. In SULLIVAN, D./TIFFT, L. (eds.): *Handbook of Restorative Justice*. London : Routledge International Handbooks, 2008, p. 464.
14 MORTATI, C.: Il lavoro nella Costituzione. In *Diritto del lavoro*. 1954, I, p. 148.

both the rules included in the O.P. (Law relating to prisons) and those of international law. Compulsory labour is recognized as a lawful measure applicable in the prisons by CEDU, which was ratified by Italy on 8th August 1955 with Law 848, whose article 4 deals with the matter of prohibition of slavery and forced labour; it specifies some circumstances where it is impossible to talk about compulsory or forced labour, and among them there is the activity or services required from convicts during their term of imprisonment (article 4 paragraph 1: "a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention."). The European Court of Human Rights stated that compulsory labour is not in contrast with the principles expressed in the Convention[15], as long as it does not involve dehumanizing practices and it has special prevention as its aim. Compulsory labour is also included in the minimum rules governing convicts' treatment established by the Resolution adopted by the UN on 30th August 1955 (named the "Charter of Convicts' Rights and Duties"); compulsory labour is contemplated by the International Agreement of New York pertaining to civil and political rights (16th December 1966), the Recommendation of the Committee of Ministers of the Council of Europe (12th February 1987) concerning European Penitentiary Rules, and finally it is included in another Recommendation (11th January 2006) pertaining to "new" European Penitentiary Rules.

2. 2 Compulsory labour according to Italian criminal law

The connection between criminal law and compulsory labour arose at the beginning of the 1930s because the general director of the institutions of prevention and punishment (Giovanni Novelli) did not recognize the right to work of the prisoners, but considered it as a fundamental part of the penalty,[16] labour represented a way by which the State could impose other restrictions on them, so it was an expression of *ius puniendi* of the State (it is easy to understand this point of view because in those years there was the Fascist Regime in Italy, which was founded on the idea that the authority of the State had precedence over the citizens and their rights), but it had a function of preventing crime as well. This was not the only reason; indeed labour was a social duty as defined in the Charter of Labour of 21st April 1927.[17] Furthermore, the convict could pay for the prison through the money that he received for the work; in this way the State did not sustain the economic burden of the prisoners. After the XII International Conference concerning penal and penitentiary questions, which took place at Aia Court in 1950, some started talking about the right to work of prisoners, and during the process of drawing up a new set of rules relating to imprisonment the possibility of eliminating compulsory labour in prison was considered.

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15 Case of Stummer v. Austria – Application no. 37452/02, judgment of 7th July 2011; case of Floroiu v. Romania – Application no. 15303/10, judgment of 12th March 2013.

16 NOVELLI, G.: Il lavoro dei detenuti. In *Rivista di Diritto Penitenziario*. 1930, p. 31. The study of Penitentiary Law is of great importance with Rivista di Diritto Penitenziario (that originated in 1931) under the direction of Giovanni Novelli. For more detail on this issue see VITO, C. G. de: Writing a Global History of Convict Labour. In *International Review of Social History*. 2013, pp. 285–325 and CARSON, A.: Short Talk on Penal Servitude. In *Descant*. 1991, p. 18.

17 Article 2 of the Charter of Labour of 21st April 1927 claims "Work, in all its intellectual, technical, and manual forms, is a social obligation. To this end, and only to this end, it is safeguarded by the State. The totality of production is unitary from the national point of view; its objectives are unitary and comprise the well-being of the producers and the development of national strength".

Finally Law 354 of 1975 specified in article 20 paragraph 3 that "Labour is compulsory for convicts and people subjected to security measures in penal agricultural settlements and workhouses," as enacted in the O.P. Although there are no differences between convicts and people subjected to these other treatments, some authors share the idea that in the second kind of punishment labour represents a central part of these particular penalties,[18] unlike the condition of the convicts, because labour is something other than the real penalty, indeed it is one of the means through which rehabilitation can be effective. Compulsory labour can be performed by people subjected to prevention measures in nursing homes or institutions or in a penal psychiatric hospital, as long as the requirement pursues therapeutic aims.[19] While the situation regarding defendants is different, because they have to be considered innocent until the court's verdict according to the principle of presumption of innocence, labour is optional rather than compulsory, and there is another procedure to obtain it. This kind of labour cannot be afflictive; in fact it has to be directed towards promoting re-education and also the re-integration of the convict into society. It is not like forced labour because it is not intended to worsen the penalty of the convicts through physical effort, so for that purpose the organization and the kinds of labour are really important. It is impossible therefore to consider labour as "a good thing *per se*" without evaluating the manner, in which it is implemented, or the results that it will produce and also the prospects that it offers. Although labour is said to be compulsory, this does not mean that the prisoners are forced to do it, but instead that the convicts can decide whether they want to take part in the project of re-education or not, because reformation cannot be imposed; it has to be chosen. On the other hand it is the duty of the prison to offer this chance to them and the opportunity to develop their professional aptitudes by partaking in some courses of vocational education. In this way they can insert themselves easily into the world of work again, and they should have the same possibility as other people to find a job. The detainee is supposed to do these activities as long as they are suitable to his physical and mental conditions as certified by a doctor. He has the right to receive equitable remuneration which has to be proportionate to the quantity and the quality of the activity; in other words he should have the same treatment as free workers, even if some differences between them (free worker and convict) are legitimate. He can use part of the remuneration to buy personal things which the prison allows him to have, and he has the possibility of sending part of his wage to his family. In addition, the prison's administration saves another part of it that is given to the convict at the end of his sentence. It is really important that the labour is remunerative,[20] because if it was not, the convict would be unfairly used and then he would not understand the practical utility of his work. On the other hand the prison cannot consider this labour as a way of gaining profit. Another function of compulsory labour is the reduction of the cruel monotony of prison life because it gives the convicts something they can do during the day. The penitentiary has to regulate the working conditions as well as safeguarding the health and the security of the convicts. Furthermore it has to respect the regulation about insurance against accidents and occupational disease, thereby supplying the same services to the convicts as free workers enjoy. Similarly the work schedule has to be organized.

[18] In terms of case law, the work is conceived as a central value of the Italian penitentiary system, Cass. Feb. 3, 1989, n. 685.

[19] Article 20 paragraph 4 O.P.; it is important to remember that the legislators decided to close the penal psychiatric hospitals with Law 81 of 2014, but they were closed only after 31st March 2015, and they have been replaced with REMS, namely residences for the application of prevention measures.

[20] FOUCAULT, M.: *Sorvegliare e punier*. Torino : Einaudi, 1976, p. 265.

2. 3 Conclusion

The question of compulsory labour is complicated; indeed there are opposite doctrines on it. Some authors claim that the institution contradicts Article 2 of the Constitution, which stipulates the inviolability of fundamental rights (which include the right to work) both in the individual sphere and social formations. According to these authors the community of prisoners can be considered as a social formation and the prisoner is always a person, so although he has committed a crime he maintains the right to work, hence he has to choose whether he wants to work or not, and also which job he would like to do.[21] But labour is compulsory in prisons. Nevertheless, as a free man the convict has the social duty to work (Article 4 paragraph 2 of the Constitution), to contribute to the progress of society; in this way the doctrinal position admits compulsory labour on the grounds that the prisoner fulfils one of his duties, and then he can pursue his re-education. The problem is that it is not possible to equalize the duty and the obligation: both of them are legal passive positions but they do not have the same contents. Another matter is that convicts can decide to take part in the process of re-education either involving compulsory labour or not, and this voluntary behaviour contrasts with the concept of compulsory labour. To this day these contradictions have not yet been resolved, and it would be better if the legislators changed the regulation of it in the coming years, or otherwise specified its nature. The paradox is that the institution of compulsory labour is considered very important, even essential for the re-education of prisoners, although its legal foundation is still full of shadows.

3 House arrest in Italian criminal law

3. 1 Introduction

The rules applying to prisoners have changed in recent years after the introduction of O.P., and one of the most important modifications was implemented by Law 663 of 1986 (known as the Gozzini Law), which introduced various new institutions including house arrest. This Law wanted to highlight the importance of the re-education of convicts, and in order to achieve this purpose it presented new means which should be more efficient, because through this institution the convict has the possibility of spending the term of imprisonment in a different building than the prison, so he can have more contact with the society into which he will return after serving the sentence. Law 663 materializes the principles written in Article 27 paragraph 3 of the Italian Constitution, which states: "The penalties cannot consist in inhuman treatment and they are supposed to tend towards re-education". Following this regulatory intervention, there have been many others: some of them established restrictions to access to the institutions involving alternative ways of serving the punishment (the reason being the priority of protecting society from crime), while others favoured it, considering the position of the convict and his rehabilitation more important than the general protection of society. In fact house arrest is not based only on this laudable reason; indeed everybody knows that the prisons are full of convicts and in many cases the number of prisoners is more than could be contained by the specific

[21] PAVARINI, M.: La Corte Costituzionale di fronte al problema penitenziario: un primo approccio in tema di lavoro carcerario. In *Rivista italiana di diritto e procedura penale*. 1976, p. 262.

penitentiary.[22] This is the central point. The legislators thought to resolve this emergency through the institution of house arrest, because in this way not only do convicts have to stay in other premises, but they also have to maintain themselves and the State does not pay for their accommodation.

3. 2 House arrest according to Italian criminal law

This institution consists in the fact that the convict can spend the term of his imprisonment at home or in other private or public buildings rather than in prison, but it does not mean that he is a free man; indeed he cannot leave his accommodation without the authorization of a judge, who can allow him to leave the accommodation only if there are serious reasons for doing so. The judge arranges the way in which the house arrest is supposed to be realized. It is different from home confinement, which is a precautionary measure, while house arrest can be considered as a lenient alternative penalty to the prison sentence.[23] Precautionary measures can be imposed during the penal process when there is the necessity to defend some rights, while alternative measures can be imposed on the convict only after sentencing. The institution is regulated by Article 47c of the O.P., which specifies the conditions that allow convicts to benefit from it. Firstly it is not possible for every convict, but only for those who fall within the circumstances indicated in the article, namely: a pregnant woman or a mother with a child younger than ten years who lives with her; a father carrying out parental responsibilities towards a child younger than ten years who lives with him, as long as the child's mother has died or she cannot take care of the child; a person having serious problems for which they need to go into a health institution; a person over sixty years of age who is at least partially mentally disabled; a person under twenty-one years of age who has serious issues with their health, education, employment or family. In these cases house arrest can be applied when the prison penalty combined with the arrest period do not exceed four years. Even when the above-mentioned circumstances do not apply, house arrest may be granted when the prison sentence consists of two years of imprisonment (both when this represents the whole penalty or part of a longer one), as long as the prerequisites for probation under the social services do not exist and there is no danger that the convict will commit the crime again. Furthermore, there is an absolute limit concerning the application of this institution: in practice it cannot be applied to convicts who have committed one of the crimes mentioned in Article 4 of the O.P. This article, but also many others of the O.P, have been modified, the last change taking place in 2014;[24] house arrest is allowed for a person who was over seventy years of age when he started to serve the sentence, or also after the beginning of it as long as he has not been defined as a habitual, professional criminal, or tending towards delinquency, and he has never

[22] GIUNCHEDI, F.: La polifunzionalità della detenzione domiciliare a garanzia dell'assistenza ai figli invalidi: la portata innovativa della sentenza e le problematiche interpretative (Nota a C. Cost. 5 dicembre 2003, n. 350). In *Giurisprudenza costituzionale*. 2004, p. 750. For more detail on this issue see STAPLES, W. G./DECKER, S. K.: Between 'home' and 'institutional' worlds: Tensions and contradictions in the practice of house arrest. In *Critical Criminology*. 2010, pp. 1–20; MARTIN, J. S./HANRAHAN, K./BOWERS Jr., J. H.: Offenders' perceptions of house arrest and electronic monitoring. In *Journal of Offender Rehabilitation*. 2009, pp. 547–570 and ROSEN, J.: House arrest. In *New Republic*. 2006, pp. 12–14.

[23] D'ONOFRIO, M./SARTORI, M.: *Le misure alternative alla detenzione*. Milano : Giuffrè, 2004, p. 609.

[24] The law no. 10 of 21st February 2014.

been convicted because of recidivism. In the event that the serving of the punishment is compulsorily or discretionally postponed, the supervisory court can decide to grant house arrest to the convict even if the sentence exceeds the limits set out in paragraph 1, setting a term for the duration of the same. This term may also be prolonged. Because the convict does not spend the time in a prison but in another building, the penitentiary system cannot be applied in the same way that the prison is supposed to provide for him, his care or his health assistance. Having said that it is easy to understand that this institution is granted to convicts who have not committed serious crimes,[25] and in every case the supervisory court has to evaluate the personality of the convict before granting it;[26] indeed it is essential to ascertain if it represents the best solution for the convict, so the judge has to decide whether or not the convict might break the law again, taking advantage of this institution. Another question which certainly has to be considered is re-education as a result of house arrest. During the serving of the punishment, the control effectuated by the supervisory court is very important; in some countries offenders can be controlled through technical means such as electronic sensors which are fixed to their ankles, serving to indicate the real location of the offender by sending a GPS signal to a base handset so that the authorities can intervene in case the offender wants to violate the restrictions. This product is really efficient, because it is also possible to know if there have been attempts at its removal. There is another way to control the offender electronically: automatic calls are made to the accommodation of the convict and the voice of the respondent is recorded. Then this voice is compared with the real voice of the offender, and it confirms whether it was his or not. These methods are useful for the prisons, because all costs connected with electronic monitoring have to be paid by the offender. The court can also decide to revoke the house arrest when the offender does not respect the limits imposed on him, but this is not sufficient. Indeed it is necessary that the judge verify whether the personality of the offender is compatible with the observance of this institution. This conclusion can be connected with the behaviour of the convict, such as attempts to abscond from the accommodation; another case is when the offender does not return home before the end of his leave. But if this happens the offender will not have to spend all the time equivalent to his sentence in prison, but he will spend only the time remaining; if this were not so, the principle of proportionality between crimes and penalties would be violated, and also it is not permitted in law to apply another measure replicating the previous one.

3. 3 Conclusion

The institution of house arrest is a compromise between the necessity to reduce the number of prisoners and the requirement to apply the law in such a way that society is protected from crime. It is fundamental that prisoners are seen as future free men, and the worst opinion that a person could have is that a prisoner's life is less important than a free man's life. Although he has committed a crime, he is a person and his rights and personality have to be respected and protected too. In many Italian prisons the problem is that there

[25] GENNARO, G. Di/BREDA, R./La GRECA, G.: *Ordinamento penitenziario e misure alternative alla detenzione*. Milano : Giuffrè, 1997, p. 249.

[26] PORCEDDA, V.: Detenzione domiciliare (Nota a ord. C. Cost. 20 luglio 2005 n. 255). In *Legislazione penale*. 2005, p. 635.

are too many people, so it is inevitable that their living conditions are bad. For this reason the laws mentioned in this work agree with the respect of the person and his fundamental human rights underpinning this institution. But, on the other hand, people seeing that convicts are not imprisoned, even if they have committed a crime, could lose their trust in the judicial and legal systems. In fact this has already happened because of the improper use of this institution and others like it by the judges. Ultimately the very presence of these institutions in the legal system generates mistrust, but maybe this depends on the mistaken idea that the only proper penalty is imprisonment; this is a legacy of our cultural heritage. Fortunately the law is developing and is still changing, trying to give people the correct means to defend themselves from crime; but it sometimes happens that what society expects from the legal system is different from the legal regulation.

4 Fines in Italian criminal law

4. 1 Introduction

The word "fine" comes from Roman Law, where it was connected with the concept of multiplication, so that if someone transgressed against the property of another person, he had to pay an amount of money which was two or four times more than the extent of the damage. The word "fine" is not used in every country, but specifically in Anglo-Saxon countries, while there is the word "amend" in Francophone countries; "multa" is used in Spanish and Portuguese countries and in Italy, and finally in the countries where people speak German and Austrian languages there is Geldstrafe or Geldbusse. But the discrepancy between some definitions of "fine" is more interesting than the terminological differences. A great many authors have given their definitions of "fine", such as: Garraud and Labourde Lacoste said that the financial penalty was a personal obligation of the convict, who had to pay a certain amount of money to the State for the committed crime; Neymark considered a fine as a financial penalty established by the State in retribution for some crimes. A Swiss academic Stoos described a fine as a reaction against the culprit, justified by the crime but intended to put pressure to the culprit and his will through the reduction of his money. Another important definition is given by Zipf, who said that the State has penal sovereignty and this is the reason why it can inflict penalties, such as a fine. Although there are many definitions, it is possible to find the same general features of "fine" in each judicial system: the culprit has to pay some money for his crime. In the past a fine was considered as a secondary penalty which could be inflicted in addition to a prison sentence; today the situation is quite different, because the fine has autonomy and it can be imposed without other penalties. According to Italian criminal law, penalties can be divided into prison sentences and financial penalties. This distinction is based on the seriousness of committed crimes, because the first condition which is meant to be respected by judges in inflicting penalties on convicts is the principle of proportionality between crime and punishment. In fact it cannot be considered as a way in which to take revenge because of some crime: a fine is not afflictive in nature, but it has to pursue the re-education of the convict, and for this reason the important thing is that it has to be calculated considering the economic position of the convict. Criminal law establishes the cases where the convict has committed so serious a crime as to deserve a prison sentence, and the other circumstances in which it is sufficient to impose only a financial penalty.

4. 2 Fines according to Italian criminal law

A fine is defined by Article 24 of the Criminal Code, which states "A fine is a certain amount of money more than fifty euros and less than fifty thousand euros that a convict is supposed to pay to the State. For certain crimes on the grounds of profit, if the law regulates only the penalty of imprisonment, the court may add a fine of fifty to twenty-five thousand euros." Firstly it is important to explain the expression included in the above-mentioned article, namely "crimes on the grounds of profit"; it relates to those crimes in which this purpose is a fundamental element in the occurrence of this crime, or when it is the sole aim of the criminal behaviour, or also when there are various purposes but profit represents the decisive aim compared with the others. The limits of the financial penalty before Law 689 of 24th November 1981 were very wide, for it was established that the fine had not to be less than 2000 Lira and not more than 2 million Lira. Furthermore, the previous Law allowed judges to raise the amount of the fine even beyond that maximum, up to triple the amount. This rule was repealed, but now if a judge considers the maximum penalty according to this article insufficient, he can decide to raise it (as set out in Article 133b) and in the opposite case, if the judge thinks that the penalty, although it is the minimum, is too onerous for the offender, he can impose a lower financial penalty. In some countries the term fine is used to indicate all financial penalties, whereas in Italian criminal law there are two kinds of financial penalties, and the fine is heavier than the other one.[27] In order to specify the fine the judge is supposed to evaluate some important parameters: the seriousness of the crime and the ability to commit the crime. With regard to the first point the judge has to analyze the importance of the offense or the danger caused to the injured person, the intensity of fraud or the level of negligence, and elements concerning the offender (time, space, means, nature, object and each feature of the action). The second point concerns other features such as the ability to commit that crime, but it is also evaluated whether the offender would have committed another crime in the future, or rather whether he has an aptitude for the crime or not. Financial penalties can be imposed on the guilty parties individually, or as an addition to the prison sentence, or also as an alternative to it, as long as the prison sentence lasts less than six months; in the latter case Article 135 of the Criminal Code has to be applied, which specifies that one day of prison sentence is equivalent to two hundred and fifty euros, or a proportion of it. This article was modified by Law 94 of 15th July 2006.[28] If the financial penalty is not paid by the offender, it can be changed into another punishment, or more precisely, it becomes a limitation of his personal liberty because he is put under the control of the authorities and his freedom is restricted by imprisonment. There can be another solution: the offender can ask to do some activity, to take part in compulsory labour. This is the current regulation of the institution of conversion of an unfulfilled financial penalty, but it is the result of many findings of the Constitutional Court, because in the past there was another one; when an offender did not pay the fine, it was automatically transformed into a prison sentence. This regulation was subjected to criticism, and two different opinions took shape: on the one hand the conversion was considered lawful because it allowed the law to be applied, and the principle of inderogability of penalties to be respected, and then

[27] Article 17, 2 of the Italian Criminal Code "Le pene principali stabilite per le contravvenzioni sono: 1) l'arresto;2) l'ammenda".

[28] Before modification it was established that a day of prison sentence was equivalent to thirty-eight euros, or a proportion of that sum.

in this way people trusted the legal system. On the other hand, people who committed the same crime were subjected to different penalties, breaching Article 3 of the Constitution, and through this system a convict was subjected to a restriction of his personal liberty instead of reduction of his personal assets. After a series of findings the Constitutional Court decided to partially repeal Article 136 of the Criminal Code[29] and Article 586 of the Code of Criminal Procedure: now the conversion is not automatic but it is necessary to ascertain the impossibility for the offender to pay a certain amount of money, then it is possible to allow the offender to pay it by instalments, and finally the conversion of the fine is not a measure that deprives the offender of his liberty, but one which merely reduces it. In particular the function of the fine as an alternative penalty to a brief prison penalty is very interesting; in effect it has been proved that when a convict spends even a little time in prison, he may come know criminality more deeply, which is not good because he can then be encouraged to commit another crime.[30] Having said that, it is easy to understand why the legislators decided to replace brief prison sentences with fines, which are more effective and less dangerous for society, because in this way the offender is not stimulated to commit another crime, and on the other hand because he has not committed a serious crime, he does not need much time for rehabilitation; so this institution respects the principle of proportionality between crimes and penalties.

4. 3 Conclusion

At first sight financial penalties are only based on the principle of proportionality between crime and punishment, but if we pay more attention it is possible to see other hidden reasons which favour their application and also their regulation by the legislators: indeed, through them it is possible to resolve the problem of prisons being full of prisoners, especially in the cases where financial penalties are substitutes for prison sentences. Although a fine is an effective solution, it could lead people to think that it is possible to get away with a crime because afterwards you have only to pay some money; in other words, the law could lose its power to deter people from committing crime. General prevention is certainly one of the most important functions performed by the criminal law and penalty system, but at the same time it is necessary to recall that the essential function of law is to protect society from criminal behaviour without trampling on people's rights, so it is not possible to use fines in order to pursue the aims of criminal policy. Another question that is still discussed is the legitimacy of the institution of conversion in the event that the offender cannot pay their fine, in particular when that financial penalty is paid by a person other than the offender, because in this way the principle of personality of penalty would be violated. In the light of these contradictions existing in the Italian criminal law, the only thing that it is possible to do now is to hope for early new regulation of this institution by the legislators.

[29] This provision was introduced by Law 689 of 24th November 1981 (Art. 101), following Ruling 131 of 21st November 1979 in which the Constitutional Court declared the article unconstitutional, as it provided for the automatic conversion of the "multa" and the "ammenda" to imprisonment, charged to the condemned insolvent. So it was a norm which involved the risk of serious inequality of treatment between richer and poorer, and therefore contrary to the principle of equality. This explains the subsequent legislative action, i.e. the regulation of 1981 which introduced the conversion mode into probation and substitutive labour.

[30] Law 689 of 24th November 1981.

5. Prohibition of attending public places or public events

5. 1 Introduction

In every country there is the freedom of assembly and association, which consists in the right that people have to meet in a public place, with or without previous agreement, because they are interested in the same things and they want to share opinions, spend some time together or celebrate a sporting victory, and many other things. As a result this includes many kinds of meetings such as sporting events, political meetings, or processions. This liberty is also written in international treaties, for example in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (CEDU)[31] or Article 20 of the Universal Declaration of Human Rights.[32] These two articles appear in different treaties, but actually express the same concept: in effect they say that it is possible to join in public events or demonstrations in public places, as long as these meetings are peaceful and the participants do not carry any weapons. It is also stated by Article 17 paragraph 1 of the Italian Constitution: "Citizens have the right to assembly peacefully and without any weapons". It is difficult to specify what can be considered as a meeting: the problem concerns the exact number of people that should take part in these events in order that they can be called a meeting; and another problem lies in the aims of the meetings, as they are not specified by the legislators. In general it is possible to define a meeting as a way of satisfying a common interest, and for this reason people come together for an event having been invited by the promoters. The freedom of assembly is a collective one, because it is attributed to an individual but it is necessary for many people to exercise it. Furthermore this freedom is considered as a means by which people can enjoy other rights or freedoms, such as the freedom to express their ideas and opinions, so it is a way of achieving other aims. It is said that the law does not indicate which purposes are legal, but instead it states that it is impossible to have an assembly that intends to achieve illegal aims (these are the aims banned by the criminal law). Then Article 13 of the Constitution establishes a fundamental right and personal freedom that is inviolable, which means that it can be subjected to restriction only if there are specific situations predicted by law, in a provision which specifies the way in which that restriction can be implemented. The liberty to attend public places and to take part in public events also falls within the scope of this essential freedom.

5. 2 Prohibition of attending public places or public events according to Italian criminal law

Having established the freedom of assembly, now it is possible to talk about the limitations

[31] Freedom of assembly and association: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

[32] "Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association".

of this freedom. They can be implemented through the imposition of measures of prevention, which can be confused with measures of safety but actually they are different: in fact in order to apply measures of safety it has to be ascertained that a crime has been committed by a person who will be subjected to them, while concerning measures of prevention the prerequisite of their application is not that a person has committed a crime, but that his behaviour is considered as potentially dangerous.[33] Both of these measures are based on the grounds that a person could commit a crime or another crime, and the law wants to impede it. Thus social danger rests in their legal foundation. Prevention measures are applied to those people who may not have committed a crime (so they cannot be subjected to any penalties or safety measures), but there is a well-founded reason for suspecting that they will commit one; it is not a certainty but only a probability; for this reason they are called measures *ante delictum* or *praeter delictum*. There are various prevention measures, and they can be distinguished generally as personal or property measures. Concerning the former, they are regulated by Law 1423 of 1956, modified by D.lgs. 159 of 2011 and nicknamed the "Mafia Code", and they establish particular limitations affecting personal liberty, for instance special surveillance. In order to impose these measures it is necessary that the judicial authority ascertains the hypothetical dangerousness of a person, analyzing some features and elements that are not specified by the legislators, so the final decision is in the hands of the judicial authority. For sure the judge has to justify the sentence and prove the existence of prerequisites to apply the rules of this institution, but it is known that in this context the required probative level is lower than that required during a criminal trial, in which a person is accused of having committed a crime. The persons subject to this legal institution can be divided into three groups: those who must be considered, on the basis of the evidence, as usually engaged in criminal trafficking; those who, because of their conduct and standard of living, must be considered on the grounds of the evidence, as usually living off the proceeds of criminal activities, even partially; and those who must be considered, on the basis of the evidence, as dedicated to the commission of crime which offends or endangers the physical or moral integrity of minors, society, safety and public peace. D.Lgs. 159/2011 extended the application of prevention measures to other categories of people, such as those suspected of taking part in mafia organizations, or who have carried out, individually or with other people, preparatory acts aimed at subverting state order. One of these prevention measures is the prohibition of attending places where sporting events are held.[34] This consists in the fact that a person cannot go to places connected with sporting events, and the judge can also require this person to go to a police station or headquarters during the period in which the event takes place. This restriction of personal freedom can be imposed on persons (even if they are minors) who have been convicted or sentenced, even if not finally, for specific crimes in the last five years, or when although a person has not been convicted or sentenced for any crimes, he has engaged in behaviour conducive to taking active part in episodes of violence or endangering public safety. If the person does not respect the above-mentioned limitations, s/he is punished with detention or a fine. But if s/he is caught *in flagrante delicto* s/he can be arrested.

[33] PONTI, G./BETSOS, I. M.: *Compendio di Criminologia*. Milano : Cortina, 1990, p. 490.

[34] This rule was introduced by Law 401 of 13th December of 1989.

5. 3 Conclusion

Although the purpose of this institution is clear, it was and is subjected to various criticism. The European Court of Human Rights has expressed its opinion about it several times so far[35] (for example in its judgment of 13th November 2007), stating that the current prevention measures are in conflict with the right to fair trial because they are indeterminate, but at the same time it acknowledged wide discretion of the state in the battle against organized criminality. Concerning domestic law, the legislators have already started regulating these measures in a better way; now they can be considered as administrative sanctions although they are applied by a criminal tribunal. At the end of this process of reformation they should be defined as criminal penalties, making it possible to impose them only after a criminal trial.

Conclusion

The Italian system pertaining to penalties is quite complicated. First of all it is important to say that the Criminal Code in force in Italy (enacted in 1930 and called the "Rocco Code", the namedafter the Keeper of the Sales of the time, Alfredo Rocco) introduced the system of "double track".[36] This means that there are two kinds of sanctions in Italian criminal law: penalties and safety measures. Both of them have as their prerequisite the commission of a crime, but the biggest difference between them is that the first are applied considering the crime; they have to respect the fundamental principle of proportionality between crime and penalty. The penalty is imposed on the basis of the objective situation which has taken place, and it is possible to give a punishment only to those people who are considered capable of discernment, because only in this way is it possible to discipline the perpetrator. The perpetrator cannot receive any penalty unless he is held liable for it. (Article 27 of the Italian Constitution). Concerning safety measures, they are imposed when the judge considers the perpetrator of a crime as a dangerous person for society, because he could commit the crime again. Safety measures have as their subjects both people who are considered responsible for their crime, in other words, people who have full capability to understand the enormity of their behaviour and its impact on other people, and also the will to realize it, as well as those who are deemed incapable of discerning it (totally or partially). Safety measures are proportional not to the act committed, but to the dangerousness of the perpetrator of the criminal activity. The aim of safety measures is to prevent the commission of other crimes, to safeguard society from crimes (which is also the aim of penalties, even though they operate in a different way). Despite this essential discrepancy, they have many elements in common: of course Article 27 of the Italian Constitution has to be mentioned here, because it establishes their essence: they cannot consist in inhuman treatment and they have to tend to the re-education of convicts. This article has been subjected to a good deal of criticism, because according to some authors supporting the theory by which a penalty represents the fair price that the perpetrator of a crime has to pay for it (Theory of compensation of penalties), the original authors of the Constitution supported this theory because they placed two sentences in paragraph 3 of Article 27: the first states that "penalties cannot

[35] Case of Bocellari and Rizza v. Italy – Application no. 399/02, judgment of 13th November 2007.

[36] FIANDACA, G./MUSCO, E.: *Diritto Penale Parte Generale*. Bologna : Zanichelli, 2010.

consist in inhuman treatment" and the second that "they have to tend to the re-education of convicts". The first concerns the content of a penalty, while the second identifies re-education as an important aim that the penalty should achieve. According to those authors this order was not accidental, but instead the Founding Fathers decided to write it in this way to specify that penalties must firstly be compensation for the committed crime, and then they have to try to re-educate the convict. But, in opposition to this theory, other authors replied that if the Founding Fathers had wanted to support the theory of compensation they could have specified it by writing the article in a different way, and then they claimed that the first sentence of the third paragraph of Article 27 is connected with penalties and safety measures too. Another criticism of this paragraph is based on the grounds that it uses the verb "tend", so that re-education is only probable, but it is not the primary purpose of the penalties. On the other hand it is claimed that re-education is naturally only probable because it cannot be imposed; it is necessary that the convict decide to collaborate, otherwise it means that he does not understand the seriousness of his activity. In this way they explained the presence of this verb in Article 27. Criminal sanctions pursue different aims: to protect society from crime, to re-educate convicts, and to impede the commission of crime. Concerning the last purpose, there are two differents kind of prevention: general and special. General prevention consists in the power of the penalties, fixed by law, to orient the behaviour of citizens, because the existence of a threat of receiving a penalty as a consequence of activity defined as criminal by law, should induce people not to commit crimes, so as to avoid some penalties. This prevention is said to be general because it has an impact on every person, so it does not refer to a specific subject but to society as a whole. Special prevention on the other hand appears when a crime has been committed and there is the perpetrator of it who receives a penalty. The imposition of the penalty should be conducive to re-educating the convict, to make him aware of his behaviour in order to understand the importance of the values at the basis of our society; in this way it is possible to impede the commission of another crime. This kind of prevention is defined as special because it is addressed to the perpetrator of the crime, so it concerns a specific situation. In the past it was thought that only safety measures involved special prevention, while nowadays both penalties and safety measures pursue general and special prevention alike; for this reason according to some authors there is no difference between criminal sanctions, and it would be better to have only one sanction that should be a sort of combination of them. Currently not many authors support that thesis because it is claimed that although penalties and safety measures pursue the same aims, they apply criminal law in different ways, so it is impossible to eliminate one of them. Another serious question concerning the existence of two kinds of criminal sanction concerns their application. Indeed in order to apply a penalty the judge has to respect Article 133 of the Criminal Code, which establishes the elements through which he can decide which penalty is right in every case. In fact this Article does not specify which element prevails over the other, so in a paradoxical case in which some elements are in contrast with each other, the judge must decide which of them is more important than the others. This situation is criticized because the judge has too much power in his hands in this way. Among the criteria included in the Article there is also the capability to commit a crime; in other words it relates to the social dangerousness that falls within the scope of application of safety measures. On the other hand, Article 203 of the Criminal Code, concerning the application of safety measures, specifies that the judge is supposed to use Article 133 to ascertain the social dangerousness of the person in order to impose a safety measure. So in the light of these rules, some authors claim that there is not a substantial difference between these two kinds

of criminal penalty, because it is possible to apply them on the basis of the same elements. Despite these criticisms, the double track system is still fundamental in the Italian criminal system, and it will continue to exist until a total legal reformation of the Criminal Code is carried out. Focusing on penalties, it is important to remember that the Criminal Code lists how many and what they consist of; prison sentences are distinguished from financial penalties, and also principal from accessory penalties. In addition, every crime has its related penalty, but this does not mean a specific punishment because the judge has to decide between the minimum and maximum penalty that the legislators have established for each crime; this range between the lowest and the highest penalty is called "the space prescribed by law". Hence the role of the judge is fundamental for the application of the law, in opposition to the 18th century view according to which the judge was only considered "the mouth of the law", namely that he had to read the law and use it without doing anything else, without interpreting it. Nowadays this point of view is unacceptable and the hermeneutic work done by each judge is considered essential to achieving justice and to applying the law in the best way.

The law is not only a sum of rules; this is a "cold" view of it, and in the opinion of this author also incorrect, because it does not allow understanding of the essence and the usefulness of the law. A proper law is able to adapt itself to current social conditions, to understand the new necessities of citizens, and to change on the grounds that other values and also problems occur, different from those in the past. So the law is supposed to be considered like a living instrument in the hands of men: in this way it is possible to have not only a valid law but also an effective law that is appreciated and followed by people who consider it really useful. Only considering this point of view is it possible to understand the modifications which have affected Italian criminal law throughout the ages until now. One of the most important changes concerning criminal law, especially the penal system, is the increase in use of alternative sanctions. According to many people this is not good, because it seems a sort of a privilege, a reduction of penalty for the criminals. They focus their attention on the notion that a person who commits a crime deserves the punishment provided for by law first and foremost; people seek to be protected by law and the juridical system; hence, they do not consider fair the application of alternative sanctions. But the situation has changed. Indeed nowadays, there are so many practical problems, such as prisons which are full of prisoners, the economic crisis making it impossible to build new penitentiaries, the increase in the importance of human rights and their safeguards, the pressure which the European Court of Human Rights as well as the institutions of the EU put on member states including Italy, the greater consideration for the re-education of criminals, and the occurrence of different kinds of crimes (because society changes, people's needs and interests change, and the crimes committed change too, so there are other expectations in society, and new duties for the legislators and the judges). All these things enable us to understand why Italian criminal law has changed and why now alternative sanctions are applied more than in the past. I believe that it is the correct direction although I know that it could bring certain negative consequences, first of all decreased confidence in the judicial system, if this institution is not used in a contemplated way. The negative atmosphere that you can sense in Italy about alternative sanctions originates from the wrong application and political manipulation of them which have occurred in recent years; they have been imposed too easily, causing loss of power of the judiciary. I think that it is fundamental that the rules are applied, but it is more important not to forget that criminals are persons before becoming delinquents, so the aim of the law should not be to avenge but instead to

try to correct their bad behaviour, and at the same time to respect them and their rights. Alternative sanctions are founded on this principle and pursue this purpose. Furthermore, having talked about the current social situation, alternative sanctions seem the only way which can be used to overcome the problems without stopping the evolution of the law. This work does not pretend to provide a total explanation of this topic, but only a detailed study of part of the scope within which alternative sanctions fall, in order to give readers a clearer view of the subject, and also to encourage reflection on the changes in our society. Knowledge of the institutions and their evolution allow us to understand the efforts made by law to create the right means to make human life better; in this way people can see the law under a different light, not as an obligation but as a benefit for them.

Súhrn

Alternatívne tresty v talianskom trestnom práve

V článku sme sa zamerali na štyri druhy alternatívnych trestov upravených v talianskom trestnom zákone, a to trest domáceho väzenia, trest povinnej práce, peňažný trest a trest zákazu účasti na verejných podujatiach. Viaceré z týchto trestov sú považované aj za prvky restoratívnej justície, ktoré slovenský trestný zákon upravuje len v minimálnej miere v porovnaní so západnou Európou. Z tohto dôvodu sme si vybrali pre spracovanie článku taliansku právnu úpravu alternatívnych trestov. Podľa Howarda Zehra je restoratívna justícia „proces, v maximálnej miere zapájajúci všetkých, ktorých sa dané konanie dotklo, usilujúc sa o maximálnu mieru uzdravenia a obnovy trestným činom narušených vzťahov". Podľa nášho názoru tradičná trestná politika vyčerpala svoje možnosti, nie je schopná dostatočne zabrániť nárastu kriminality, a taktiež problémom trestnej justície. Problematika restoratívnej justície neostáva len záležitosťou vnútroštátnou, ale v posledných desaťročiach sa prejavujú snahy o zavedenie alternatív v trestnom práve aj na medzinárodnej pôde. Rozvíjajúcim sa problémom nie je len fakt, že trest odňatia slobody sa v niektorých prípadoch ukazuje byť kontraproduktívnym pri dosahovaní nápravy (resocializácii) páchateľa a jeho ukladaním nie je dostatočne zabezpečená ochrana spoločnosti, ale realitou je aj zvyšujúci sa počet väzňov a s tým v niektorých prípadoch súvisiace porušovanie ľudských štandardov OSN. Z hľadiska právnych aktov Rady Európy je z historického hľadiska významným medzníkom zasadnutie Výboru ministrov Rady Európy, na ktorom prijali v roku 1976 rezolúciu č. 10 „Niektoré alternatívne tresty k väzeniu". Prostredníctvom medzinárodnoprávnych aktov sa kladie dôraz na individualizáciu (restoratívneho, resp. alternatívneho) prístupu k obvineným a poškodeným, sú odporúčané rôzne formy zjednodušených konaní a zdôrazňuje sa význam tzv. komunitných sankcií, ktorými sú napr. trest povinnej práce, trest domáceho väzenia, peňažný trest, trest zákazu účasti na verejných podujatiach, podmienečné odsúdenie, podmienečný odklad výkonu trestu odňatia slobody atď.

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Vojtech Vladár

The Concept of Private Property in the Social Doctrine of the Catholic Church[1]

Abstract: Private property is one of the most often disputed institutions in history, owing among other things to developing political-legal ideas. The conceptual approach to this right had to be proclaimed necessarily even by the Magisterium of the Catholic Church, which accepted it with certain modifications in the dimension of Natural Law, expressed in basic characteristics also by Roman lawyers. Traditional Roman-Law ideas were therefore replenished with the ideas of the representatives of highest magisterial power of the Church, rigorously making provision for the premises of Natural Law and the sources of Revelation. Especially on this basis, according to the considerations of legal Romanists, the principle of private law was fundamentally accepted; alongside this however, the axiom of Universal Destination of All Goods was primarily established, which enables multiple exceptions from the first principle and denies the character of this law as acting *erga omnes*. The main aim of the article is to analyze the institution of private property in the Social Doctrine of the Church, pointing out the Roman-Law and Natural-Law bases which determine its elementary concepts.

Key words: private property – Roman Law – Natural Divine Law – Revelation – Magisterium – Social Doctrine of the Catholic Church – Universal Destination of All Goods – Common Good

Introduction

Even though the Catholic Church from its very beginning devoted itself to social and charitable care and developed its own doctrine in this area, the real initiator of these activities in social science is regarded as the encyclical letter *Rerum novarum* of Pope Leo XIII (1878–1903) from 1891.[2] This came into existence in a complicated period of the development of human society during the progress of the Industrial Revolution and negative impacts connected with it, as well as the beginnings of the New Era.[3] The central topic of this inspiring document was in the first place to establish a just social order founded on the truths contained in recognized sources of Revelation, which are constantly adapting to contemporary circumstances through the dynamic activity of the Holy Ghost.[4] The bases of *Rerum novarum* themselves were followed by the endeavours of the successors of Leo XIII on the papal throne, who tried to update the truths contained in this work, pursuing the interests of the protection of the rights of the poor and weak above all.[5] These premises

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2 In *Acta Leonis XIII.*, 11 (1892), pp. 97–144. Cf. VALLELY, P. (ed.): *The New Politics. Catholic Social Teaching for the Twenty-First Century*. London : SCM Press, 1998, p. 29.

3 In this context the authors most frequently present demand exceeding supply of work on the part of labourers, wages set at the lowest possible level, necessity of working for practically unlimited working time to achieve earnings barely sufficient to cover basic living costs, migration of the population from the countryside to cities, and growth of the consumer way of life. Cf. HIMES, K. R.: *Modern Catholic Social Teaching. Commentaries and Interpretations*. Washington : Georgetown University Press, 2004, pp. 134ff.

4 Cf. Compendium of the Social Doctrine of the Church 89. Cited according to PAPEŽSKÁ RADA PRO SPRAVEDLNOST A MÍR: *Kompendium sociální nauky Církve*. Kostelní Vydří : Karmelitánské nakladatelství, 2008.

5 HIMES, K. R.: op. cit. 3, p. 137 and Quadragesimo anno 35–36 and 79–88. In AAS 23 (1931), pp. 177–228.

were adopted not only by the popes but also by the representatives of particular churches (especially diocesan bishops), who tried to adapt the Christian spirit to various programs intended for the support of labourers. Especially by virtue of the appeals of the first social encyclical letter, multiple private associations also came into existence pursuing analogous goals.[6] Even though the present legislation of individual states in the area of Labour Law does not identify with the ideas of Leo XIII in every aspect, we can state that his recommendations contributed significantly to the improvement of the conditions of labourers, and helped to establish contemporary Labour-Law standards as a whole. Evidently, in addition to the older sources with the papal encyclical letters themselves as most important, the Social Doctrine of the Church draws its principles and directives especially from Divine Law.[7] The most important means for the solution of social matters, particularly those concerning the general building of stable society, is considered to be primarily Natural Law. Social life itself also springs from the same naturalness, and has to develop according to the laws of nature.[8]

Natural Law determines to a wide extent also the institution of private property, so often treated in historical literature, namely in the ideas of the representatives of politics and law. As the establishment of Christianity happened within the period of bloom of the Roman Empire, the concept of private property in the times of the Primary Church (*Ecclesia primitivae formae*) was reflected within the context of the ideas of Roman lawyers. Even these, affected especially by the then considerably popular Stoic philosophy, were looking beyond legal rules for something natural to every human being, whereby these considerations were projected thanks to them into multiple legal institutions. The basic conception of private property was therefore more closely specified by recognized sources of Roman Law, which however understood private property as a right acting *erga omnes*, thus as an unconditional right. Quite naturally, these conclusions had to be modified by the Church, namely in an effort to prefer the biblical ideals and ideas of the Apostolic and Church Fathers.[9] That is to say, the patristic tradition understood property especially as an imperative to administer tangible goods in the service of God and Christian love. Regarding later developments, we can assert that in subsequent centuries the handbooks of moral theology too often neglected this particular aspect of ownership, and as a result treated it in rather isolated manner. Furthermore, they too often gave way to civil legislation, thereby contributing to the separation of this right from its deeper theological bases and to its understanding as a value in itself. For this reason especially, contemporary theology endeavours to break down this attitude and to restore the elements of patristic theory into the doctrine on ownership. That is to say, similarly as all goods are inferior to the universal dominion of God, who is the

6 Cf. Rerum novarum 23–24.

7 The author of the norms of Divine Law is God himself as legislator. If the rules are cognizable from the laws of Creation (*ex Creatione*) by the natural capacity of reason, we speak of Natural Divine Law, which morally obliges every human (Christian or unbeliever). Positive Divine Law comes from Revelation (*ex Revelatione*) and is obligatory only to baptized members of the Catholic Church who have completed their seventh year of life and use reason sufficiently. Cf. cann. 11 CIC 1983 and 1490 CCEO 1990. For more detail on the definitions and differences between Natural and Positive Law see for example NEMEC, M.: *Základy kánonického práva*. Bratislava : Iura Edition, 2001, pp. 9ff and TRETERA, J. R.: *Církevní právo*. Praha : Jan Krigl, 1993, p. 78.

8 WELTY, E.: *A Handbook of Christian Social Ethics*. *Volume One*. *Man in Society*. Freiburg : Herder, 1960, p. 20.

9 Cf. VALLELY, P. (ed.): op. cit. 2, p. 28. For example Church Father Ambrose (*Aurelius Ambrosius*, † 397) stated that all superfluous goods belong to the poor, stating specifically: "You give back to the poor something of their ownership." Cf. De nabuthe 12,53. Church Father Augustine (*Aurelius Augustinus*, † 430) again in one of his homilies declared: "Any surplus that you own must surely be to the poor something they need for life." Cf. Sermo 61.

owner of all goods, so ownership itself has to be characterized in the sense of an instrument, and has to be subordinated to the development of human beings, the needs of society and the realization of God's plan in the world.[10]

1 Roman Law

The concept of private property in traditional legal understanding emerges in Roman Law only in the later period of its development, along with that of individual (private) property. Specifically, the first objects of private property in Rome were most likely just movable property, that is to say especially the personal property of the head of family (*pater familias*), considered as the only person in the family with full legal rights. Nevertheless, he could be denoted as the real private owner of the whole family property, including land, only after gaining the capacity to dispose of it also in the case of his death (*mortis causa*). After all, this arrangement was laid down also in the Laws of the Twelve Tables.[11] Especially on this basis the character of dominion over property is derived from the absolute dominion of the Roman *pater familias* over the family, that is to say over persons and property pertaining to his household.[12] Of these absolute rights, the only ones classed as rights to property are the real rights (*iura rerum*). In general it was admitted that the right to property was considered as "better" right to possession, and therefore some Romanists speak of so-called "relative ownership".[13] Later introduced terms such as "*dominium*" or "*proprietas*" emerged only in the period of Pre-classical or Classical Roman Law, when the concept of relative ownership ceased to exist.[14] Regarding procedural-law probation of the right to property, it was based primarily on the cause of its acquisition, which assured the owner the position "towards everyone" (*erga omnes*). Only at this point can we speak of the right to property as **a subjective absolute right**. It then became evident in the course of time that *dominium ex iure Quiritium* as the dominion over movable property was separated from the absolute power of the *pater familias* over his household (*manus*).[15] From that time on, the concept of this institution, on which the system of all property relations was based, was stabilized. This statement is valid in spite of the fact that in Roman sources we can not find the definition of the right to property.[16]

In developed Roman Law ownership was understood as the widest private right that anyone could enjoy, namely as general legal dominion over a thing. Consequently it was the kind of right to property opposed on the one hand to possession (*possession*) as factual

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10 Cf. PESCHKE, K. H.: *Kresťanská etika*. Praha : Vyšehrad, 2004, pp. 578–579.

11 Leges duodecim tabularum V,3.

12 Cf. REBRO, K./BLAHO, P.: *Rímske právo*. Bratislava : Iura Edition, 2003, pp. 246–247.

13 Cf. PLESSIS, P. du: *Roman Law*. 4th edition. Oxford : Oxford University Press, 2010, p. 155. As a matter of interest we can mention that the idea of relative right to possession, contrary to the absolute Roman dominion, is typical especially to English law and Germanic legal systems. Cf. JOLOWICZ, H. F./NICHOLAS, B.: *Historical Introduction to the Study of Roman Law*. Third edition. Cambridge : Cambridge University Press, 1972, p. 141.

14 For more detail on these terms see BUCKLAND, W. W.: *A Text-Book of Roman Law from Augustus to Justinian*. Third Edition. Cambridge : Cambridge University Press, 1963, pp. 186ff.

15 Cf. SOMMER, O.: *Učebnice soukromého práva římského. Díl II. Právo majetkové*. Praha : Nákladem vlastním, 1935, pp. 179–180.

16 Cf. REBRO, K./BLAHO, P.: op. cit. 12, p. 248.

power over a thing, and on the other to so-called "limited real rights" (*iura in re aliena*).[17] Except for the owner himself it was forbidden to everyone else to act on a thing against the owner's will, or to prevent him from exercising his right. These negative obligations ensured that the owner could deal with his property in any way (the so-called "positive aspect of ownership") and at the same time could in principle prevent anyone else from using his property or handling it in any way (the so-called "negative aspect of ownership").[18] This negative obligation applied to everyone else apart from the owner himself, assumes such importance for the concept of real right that the right to property was understood in practice as the complex of requirements applying to all other people (*erga omnes*) not to interfere with any owner's right.[19] The status of a person enjoying a right to property was characterized by the fact that he could exclude anyone else from handling the property controlled by himself, and he was entitled to initiate *actio in rem* against any violator to enforce his exclusive dominion over that property.[20] In general it was recognized that like other property-right institutions, ownership also represented the relationship of an owner to a thing and simultaneously the relationship of an owner to the other members of society (non-owners).[21]

In Roman-Law understanding the right to property was considered to be the most important of real rights, whereas other real rights were practically construed as restrictions on the right to property.[22] Only the right to property could be qualitatively as well as quantitatively the strongest subjective right, in terms of quantity the widest, since no other right was more extensive, and of quality the highest, since in the system of absolute subjective rights it played the most significant role. From the time of the German Pandectist School at the latest, the Roman right to property was characterized as exclusive, with regard to its nature

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17 For more detail on this issue see for example KINCL, J./URFUS, V./SKŘEJPEK, M.: *Římské právo*. Praha : C. H. Beck, 1995, pp. 190ff.

18 From the positive point of view we can mention as individual rights of an owner the right to possess property (*ius possidendi*), to use it (*ius utendi*) and to reap fruits or profits (*ius fruendi*), including the right to abuse it, that is to say the right to destroy or use up the thing altogether (*ius abutendi*). Cf. HEYROVSKÝ, L.: *Dějiny a system soukromého práva římského*. Praha : J. Otto, 1910, p. 312. This implies that whereas relative rights always lead to a certain person being obliged to fulfill an obligation (law of obligation), absolute rights (law of property, family law and law of succession) inhering in the dominion over property or person, exclude anyone from acting on a thing or person controlled and therefore make towards anyone. At the same time, the status of a person qualified in the right to property is stronger than that of a person qualified in the right to obligation, because a person qualified in the right to property can defend his right against the interference of anyone else, whereas a person qualified in the right to obligation is entirely dependent on the person specified in the legal relationship as obliged. Cf. SOMMER, O.: *Učebnice soukromého práva římského. Díl I. Obecné nauky*. Praha : Nákladem vlastním, 1933, p. 24.

19 Cf. BUCKLAND, W. W.: op. cit. 14, p. 187.

20 Nevertheless, the majority of authors agree that the term of right to property came into existence on the basis that these rights were protected by actions specified by the Romans as "real". Namely, it was typical for its usage that the right to property was asserted in court. Cf. KINCL, J./URFUS, V./SKŘEJPEK, M.: op. cit. 17, pp. 152–153.

21 Cf. HEYROVSKÝ, L.: op. cit. 18, p. 309 and PLESSIS, P. du: op. cit. 13, pp. 157ff.

22 Other legal relationships qualified as proprietary restrictions on the right to property were also recognized as absolute, that is to say acting towards (against) anyone else. Such restrictions were admitted only in strictly defined types of relationships which in terms of content had nothing in common with each other. They were connected mutually only by an absolute character that can be expressed especially by the mentioned *actio in rem*. This implies that an owner cannot have any other right to propriety except for ownership (*nemini res sua servit*) and moreover that a thing that is subject to the right to property has to be specified individually. Cf. SOMMER, O.: op. cit. 15, p. 181.

establishing the inseparable, definite and total dominion of an owner over a certain thing, whereby this understanding also found its way into **modern civil codes**.[23] Even though the right to property represented total dominion over a thing (*plena in re potestas*) even in the case of simple possession, since the oldest times quite a number of proprietary restrictions equally existed.[24] Concerning the right to property, not every natural person could hold it, but only persons with full legal capacity (*sui iuris*), and all other natural persons (including slaves) were excluded from the right to property. Ownership was accessible to foreigners (*peregrini*) only on the basis of their own national law, or of the Roman *ius gentium*.[25] In general it was recognized that in principle all things could be objects of the right to property, except for those excluded from legal commerce. The extent of private property was not restricted by any means either.[26] Inasmuch as the right to property was understood as a conceptually unlimited subjective right, it was recognized that when a specific restriction ceased to exist, the right to property was automatically (*ipso iure*) restored to the full right. In this case we speak of so-called "elasticity of the right to property" (*ius recadens*), which indirectly results in the illimitability of ownership on the grounds of passage of time.[27] Deducing from the above, we can characterize the Roman right to property as a general, exclusive (absolute), direct and elastic right over a thing.[28]

2 Natural Law

As already mentioned, the concept of private property is recognized in the Natural-Law dimension not only by the Catholic Church. From the historical point of view, this sense of property was accepted in early Roman Law thanks to the Stoic philosophy, which was very popular in Ancient Rome. In general it is recognized that Natural Law is allied with human beings as such, with their nature which is independent from the specific historical nature of any person. It is therefore something which defines human beings metaphysically in every period and culture. Natural-Law rights are appropriate to every human being also in the Church's understanding, since everyone was created as a person by God himself. According to the generally-accepted doctrine of Thomas Aquinas († 1274), we can identify Natural Law as a part of natural moral law entrenched in the **Eternal Law** (*lex aeterna*) of the Creator himself, and in those terms it obliges all human beings unconditionally in their conscience.[29] From the content point of view, the Church Fathers originally distinguished

[23] Cf. REBRO, K./BLAHO, P.: op. cit. 12, p. 249.

[24] For example, an owner could be obliged not to act on a thing in a certain way, or to suffer the action of other person on a thing. It also includes restriction of the right to property in favour of public or private interest. Even so, it is not appropriate to denote such a restriction of legal dominion over a thing as a typical conceptual sign of the right to property. Analogously, neither could the above-mentioned *iura in re aliena* be considered as a part of the right to property which could be separated from it in some way and as individual rights transferred to other persons. Cf. HEYROVSKÝ, L.: op. cit. 18, pp. 312–313 and KINCL, J./URFUS, V./SKŘEJPEK, M.: op. cit. 17, p. 155.

[25] Cf. JOLOWICZ, H. F./NICHOLAS, B.: op. cit. 13, p. 268.

[26] At the same time, the subjects of the right to property did not include only manageable things and bounded pieces of the external world, but even unfree persons. Cf. REBRO, K./BLAHO, P.: op. cit. 12, p. 250.

[27] Cf. SOMMER, O.: op. cit. 15, p. 190.

[28] Cf. KINCL, J./URFUS, V./SKŘEJPEK, M.: op. cit. 17, pp. 153–154.

[29] This term was used by Thomas Aquinas to denote the performance of God's plan (Providence) in every human being and in the whole society. Cf. Summa Theol. I–II, q. 91, a. 2. In contrast to Natural Law, human law is

between Primary Natural Law, valid independently from original sin (*peccatum originale*), and Secondary Natural Law, supposing the condition of the fallen nature of mankind. Thus the majority of authors have reached agreement for example that whereas the right to life can be labelled as Primary Natural Law, the institution of private property belongs within Secondary Natural Law.[30] For both areas it is still recognized that they contain the highest supertemporal and universal fundamental norms emanating from the very nature of human beings. The most important attributes of Natural Law we can mention are especially its general validity, immutability and natural conceptual knowability. Following these postulates it is logical that since time immemorial the Church has protected the basic rights of human beings against any attacks, declaring that neither interests of state or even the Common Good can be preferred at their expense.[31] From the point of view of appraising the character of a certain legal norms having the character of Natural Divine Law, the representatives of the Church Magisterium dispose of this right, hence they are holders of magisterial power (*potestas magisterii seu munus docendi*) in the Church.[32]

The general concept of private property stems in the comprehension of the Catholic Church from another Natural-Law principle, namely the axiom of Universal Destination of All Goods (*usus communis*).[33] It results from the sources of Revelation and Church doctrine that God intended the Earth and everything on it to be used by all people and nations. Everyone is supposed to enjoy their just measure of all created goods, since justice accompanied with Christian love requires this.[34] This principle is based on the fact that the original source of all goods is the act of God himself in creating the world and human beings, and giving them the Earth to subdue it by their work and to enjoy its fruits.[35] That is to say, God gave the Earth to all human beings to provide a livelihood to everyone, without excluding anyone from its use and without penalizing them in any way. On account of its fertility and ability to satisfy human needs, the Earth is therefore considered to be the most important gift of God, namely regarding not only human livelihood and growth,

addressed to people who are not perfectly virtuous. Human law does not suppress all the depravities, but only more serious ones, that is to say those that endanger the functioning of human society. At the same time, human law settles for external fulfilment of norms only, without examination of the internal attitudes of individual persons. Cf. HÖFFNER, J.: *Kresťanská náuka o spoločnosti*. Trnava : Dobrá kniha, 2007, pp. 48–50.

30 Precisely the example of private property allows us to demonstrate that even the institution of Natural Law is inferior in certain aspects to historicity. Cf. Quadragesimo anno 49.

31 Cf. GUERRY, E.: *The Social Doctrine of the Catholic Church*. New York : Alba House, 1961, p. 82. As already stated by Pope Pius XII (1939–1958), if this principle was respected, it would prevent multiple tragedies and several ongoing menaces would be overcome too. Cf. Allocution to members of the Congress of Humanistic Studies on 25th September 1949. Even publication of the first social encyclical letter was reasoned by Pope Leo XIII from the perspective of Natural Law, which stressed that the Church must submit solutions to various problems in society. Cf. Rerum novarum 1. For more detail on this issue see HIMES, K. R. (ed.): *Modern Catholic Social Teaching. Commentaries and Interpretations*. Washington : Georgetown University Press, 2005, p. 135.

32 Dignitatis humanae 14. In AAS 58 (1966), pp. 929–946. At the same time, Thomas Aquinas stated in general that it was not the task of whoever but of wise people to resolve the core of law written by God in the hearts of the people (Rom 2,15), including its specialities. Even given this background it is not surprising that history is full of proofs of errors resulting from misinterpretation of Natural Law and its application to specific life circumstances. Of course, reasons for these failures can be found especially in the boundedness of the human spirit and its obscuration by original sin. Cf. HÖFFNER, J.: op. cit. 29, pp. 59–60.

33 Cf. Ex 22,24; 23,1; Deut 14,28ff; 15,11–12; 24,19–22; 26,12–14; 23,20ff; Lev 19,9ff; 25,36ff; Isa 5,8; Jer 5,27ff and Lk 16,19–31.

34 Gaudium et spes 69. In AAS 58 (1966), pp. 1025–1120.

35 Cf. Gen 1,28–29.

but also the realization of the noblest aims to which human beings are summoned.[36] Given this background in particular it should be recognized that every person should be able to reach the level of prosperity necessary for the full development of their personality.[37] On that account this principle is denoted as the first and most important axiom of the whole social-moral order, and the Church considered its definition as a matter of highest interest. In contrast to the principle of private property itself, this axiom is qualified as **Primary Natural Law,** which is not fixed to any historical circumstances. This right hence belongs to every person and at all events has to be preferred to any human decision on goods, any legal regulation of ownership and any economic method or social system.[38] At the same time it is necessary to emphasize that this principle does not mean that everything is available to any one person, nor that everything should serve or belong to everyone without any individual share. To ensure the just using of resources, therefore, certain regulatory interventions are essential in the form of national or international legal regulations.[39]

The principle of Universal Destination of All Goods is closely associated with the term **Social Justice**, whose concept is analogously constructed on the basis of Natural Law-type elements.[40] All social relationships are meant to be regulated by this principle, functioning namely as an interlinking axiom, making provisions for the good and utility of human beings.[41] It also results from this that the main object of Social Justice should be social good, consisting of the right of society to claim from every person some contribution to the production of goods and simultaneously the right of every person to enjoy this right in relationship to society. In accordance with the doctrine of the Church, this bilateral relationship is regulated in more detail by the claims of Commutative Justice, Distributive Justice, Legal Justice and the concept of Common Good. In general, we can define **Commutative Justice** as some form of contract made between at least two persons, each of whom is obliged to perform their part of the duty or obligation and is then also qualified to claim restitution of justice in the case when the second party omits to carry out their duty or obligation. From the content point of view, this term covers the whole area associated with problems of allocation of common capital and other property, teaching the just sharing of goods between individual persons (including social groups).[42] Thus it is evident that

[36] Compendium of the Social Doctrine of the Church 171.

[37] One of the appeals when applying this principle is the necessity to pay attention to the poor on the periphery of society. Precisely here we can find the specific and main form of demonstrating of Christian love, which the whole Church tradition testifies to. Such action should relate to every Christian, since thereby the life of Jesus Christ is imitated. Cf. cann. 222 § 2 CIC 1983 and 25 § 2 CCEO 1990 and Compendium of the Social Doctrine of the Church 182.

[38] Cf. Compendium of the Social Doctrine of the Church 172.

[39] At the same time this principle challenges us to assert the economy inspired by moral values and which never diverges far from this axiom. Only in this case it is possible to build justice and a stable world where generating wealth can be understood as a positive activity. In this way nations will be protected from exclusion from common use of goods, and from being exploited during it. Cf. Compendium of the Social Doctrine of the Church 173–174.

[40] This term was used in the present meaning of the Catholic Social Doctrine by Pope Pius XI (1922–1939) in the encyclical letter *Quadragesimo anno*, whereas its full definition can be found in article 51 of the encyclical letter *Divini Redemptoris*. In AAS 29 (1937), pp. 65–106.

[41] Cf. Summa Theol. I–II, q. 94 a. 5; II–II, q. 32, a. 5; q. 66, a. 2 and q. 66, a. 7. Fore more detail on this issue see UANAN, G. M. C.: *Canonical Provisions on Social Justice*: *Legislations on the Social Doctrine of the Church*. *Dissertatio ad Lauream in Facultate Iuris Canonici apud Pontificiam Universitatem S. Thomae in Urbe*. Romae : Pontificia Studiorum Universitas A S. Thoma Aq. in Urbe, 2013, pp. 34 and 39–40.

[42] Cf. FINNIS, J.: *Natural Law and Natural Rights*. Oxford : Oxford University Press, 1980, p. 179.

Social Justice also involves Commutative Justice, namely in the sense that it deprives every individual who does not do any duty resulting from some obligation of another kind of good, in order to ensure the restitution of justice.[43]

Regarding **Distributive Justice**, we can define this as the requirements of the whole towards its individual parts which correspond to the requirements of every person as a member of society towards the whole of society. This relationship itself is regulated by Distributive Justice, which adequately redistributes common goods. Equality in this sense means that justice, according to proportional equality in redistributing of burdens as well as benefits, should be considered in first place.[44] Since individuals and groups are not equally equipped, in relation to their qualification, facilities or endeavour for the Common Good, at the same time it is necessary to redistribute help, burdens and honours correspondingly according to their needs, abilities and merits.[45] It results from the above that an abundance of property in the hands of one individual is a sign of inequality in the distribution of wealth.[46] Unjust distribution of wealth therefore commands wealthy individuals to respect Distributive Justice, namely not only by repudiating selfish control of their wealth, but by sharing it in some way with the poor.[47] Following this, Social Justice implies Distributive Justice, since it requires effective cooperation of persons and distribution of goods by various social institutions.[48] The concept of **Legal Justice** involving the obligations of individuals towards the whole was developed by Thomas Aquinas, utilizing Aristotle's concept (*Ἀριστοτέλης*, † 322 ACN) of universal justice. This results from the premise that the members of a community are in relation to this community in the position of parts to a whole. Since every part as such belongs to the whole, what is good for a part can be simultaneously directed to the good of the whole.[49] According to several scholars Legal Justice itself is the fundamental form of every justice and the basis of all obligations, distributive or commutative.[50]

In Aristotle's work "*Ηθικὰ Νικομάχεια*" (*Ethica Nicomachea*) the term **Common Good** also appeared. In the spirit of Thomas Aquinas' interpretations it is necessary to say that it is not possible to identify this concept with the good of an individual. As stated in the

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43 Cf. McMAHON, T.: *Ethical Leadership Through Transforming Justice*. New York : University Press of America, 2004, p. 84.

44 Cf. UANAN, G. M. C.: op. cit. 41, pp. 35–36.

45 PESCHKE, K. H.: op. cit. 10, p. 214.

46 Cf. FINNIS, J.: op. cit. 42, p. 174.

47 Cf. CHARLES, R./MACLAREN, D.: *The Social Teaching of Vatican II. Its Origin and Development. Catholic Social Ethics*: *An Historical and Comparative Study*. Oxford : Plater Publications, 1982, p. 306.

48 RAWLS, J.: *A Theory of Justice*. Revised Edition. Massachusetts : The Belknap Press of Harvard University Press, 1999, p. 6.

49 "*Manifestum est autem quod omnes qui sub communitate aliqua continentur comparantur ad communitatem sicut partes ad totum. Pars autem id quod est totius est, unde et quodlibet bonum partis est ordinabile in bonum totius. Secundum hoc igitur bonum cuiuslibet virtutis, sive ordinantis aliquem hominem ad se ipsum sive ordinantis ipsum ad aliquas alias personas singulares, est referibile ad bonum commune, ad quod ordinat iustitia. Et secundum hoc actus omnium virtutum possunt ad iustitiam pertinere, secundum quod ordinat hominem ad bonum commune. Et quantum ad hoc iustitia dicitur virtus generalis. Et quia ad legem pertinet ordinare in bonum commune, ut supra habitum est, inde est quod talis iustitia, praedicto modo generalis, dicitur iustitia legalis, quia scilicet per eam homo concordat legi ordinanti actus omnium virtutum in bonum commune*". Summa Theol. II–II, q. 58, a. 5.

50 Cf. FINNIS, J.: op. cit. 42, p. 186. Pope Pius XI in his encyclical letter *Studiorum ducem*, published on the occasion of the 600th anniversary of the canonization of Thomas Aquinas on 29th July 1923, even directly identified Legal Justice with Social Justice. The pope specifically stated on this subject: "*Omnino enim Modernistarum in omni genere Thomas opinionum commenta convincit* [...] *in iure recte principia ponendo de iustitia legali aut de sociali*". In AAS 15 (1923), pp. 309–326.

document of the Second Vatican Council (*Concilium Vaticanum Secundum*, 1962–1965) entitled *Gaudium et spes*, every social group must take into account the needs and legitimate ambitions of other groups and make provision for the Common Good of the whole human family.[51] In accordance with this we can say that every person should bear in mind and suffer the obligation to guarantee the Common Good. On this basis, the partial good of individuals must contribute in a way to the Common Good too. Similarly on this basis, it is not permitted to state that the concept of Social Justice is in opposition to the right to private property, not even on account of the fact that it includes the principle of administration, which springs from the understanding of all things belonging to God.[52] This axiom requires all individuals and groups to use their property responsibly, respecting the good of the whole of society. All goods, but especially those representing a surplus, must be used by their owners in such a way as to contribute to the good of all. Given this background we can mention that Catholic Social Doctrine recognizes Social Justice in the first place in relation to the Common Good as a goal which should be realized. The Doctrine therefore examines several political or social institutions and points out their shortcomings regarding the Common Good and Justice. Compared to the rigid division of Justice into Legal, Distributive and Cumulative, the concept of Social Justice is dominated by the idea of specific contribution, which represents the duty of everyone towards the Common Good, and at the same time the right to claim benefits due to various social necessities.[53]

Considering the term **private property**, its Natural-Law conception was for centuries a frequent subject of discussion. Several scholars, including the most famous representatives of scholasticism, namely taught that the real source of this right was law common to all the nations (*ius gentium*).[54] The notion of private property as being of the character of Natural Law became indisputably topical from the mid-19th century, when it was definitively incorporated into the neo-scholastic literature.[55] This notion was also accepted by Pope

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51 Gaudium et spes 26.

52 Ps 24,1.

53 BOILEAU, D. (ed.): *Principles of Catholic Social Teaching*. Milwaukee : Marquette University Press, 1998, p. 91.

54 Cf. DWYER, J. A. (ed.): *The New Dictionary of Catholic Social Thought*. Collegeville, Minnesota : The Liturgical Press, 1994, p. 787. This right was historically established from *ius gentium* in the form of Roman foreign law valid for all foreigners, whereas Roman citizens followed their own national *ius proprium*. From the legal philosophy point of view the doctrine on *ius gentium* was constructed by the Stoic school, which is evident from the writings of Marcus Tullius Cicero († 43 ACN). Nevertheless he identified the term *ius gentium* with *ius naturale*, since he considered the norms natural not only to all nations but also to all people to be part of it. Therefore we can denote this law as "law of all nations" (*ius omnium gentium*). Later Roman lawyers (as for example Domitius Ulpianus, † 223) contributed to a certain deformation of the term Natural Law, identifying it with matters common to people and animals. At the same time they denoted *ius gentium* as "rational law" that is natural to humans and accepted by all nations. Cf. D. 1,1,1,3. While Christian doctrine was established especially on the theses of Ambrose and Augustine, but later primarily by Thomas Aquinas, it also followed on from Stoicism, although it finally went much further. In their conceptual understanding it contained all the basic norms of human coexistence founded on the natural order of being, and thereby originating in consequence with God the Creator, norms which are cognizable on the basis of natural using of reason. Cf. HÖFFNER, J.: op. cit. 29, pp. 195ff.

55 This conclusion was maintained and asserted especially by the Catholic scholar Luigi Taparelli d'Azeglio († 1862). As a matter of fact he did not introduce anything new or unknown to previous generations. The same line was taken more or less also by Alphonsus Maria de' Liguori († 1787), Luis de Molina († 1600), Johannes de Lugo († 1660), and even Johannes de Medina († 1546). At the same time, several authors responded to traditional recognition of the paradisiacal condition, where the use of goods was enjoyed in common, and the condition of fallen mankind wherein, disregarding family and monastery, private property was practically prescribed. For more detail on this issue see DWYER, J. A. (ed.): op. cit. 54, p. 831.

Leo XIII in the encyclical letter *Rerum novarum*, defining this institution as founded in Natural Law.[56] These postulates have moreover always been connected with the demand that the sovereign in the state (*rector multitudinis*) institutes the right of private property. Both lines of opinion in principle accepted that the "real division of goods" (*actualis rerum division*) appertains to Positive Law, since this process must be understood as historically conditioned and variable in dependence on the circumstances of each period.[57] Even the scholastic authorities approached *ius gentium* within the limits that human reason could grasp it, making provision based on Natural-Law principles for the condition of human nature after the Fall.[58] Nevertheless, Thomas Aquinas distinguished between control and consumption of goods, thus between the area of consumption (*usus*) and that of economy and administration of goods (*potestas procurandi et dispensandi*). Especially in the area of consumption people cannot understand earthly goods as their own, but as held in common, so they must be able and ready to share with others in need. In the area of economy and administration people should recognize the principle that they are entitled to appropriate earthly goods in order to cultivate and administer them (the situation in Paradise), whereas (after the Fall) that right became necessity and obligation instead.[59]

3 Magisterium

3. 1 Holy Scriptures and history

Even though the right to private property (and other above-mentioned principles) is considered to be of Natural-Law character by the Magisterium of the Catholic Church, its expression can also be found in several moral (theological-moral) norms of the Old or respectively the New Testament. In this case the norms of Natural Divine Law were confirmed by their declaration in the form of Positive Divine Law. In general, it is recognized that whereas the Old Testament regards wealth first and foremost as a blessing,[60] the New Testament attaches much greater significance to the instability and danger of owning a large fortune.[61] This conclusion is in fact, though not quite correctly,

[56] Rerum novarum 5.

[57] Cf. HÖFFNER, J.: op. cit. 29, p. 194.

[58] Cf. Summa Theol. I–II, q. 95, a. 4. A typical example of such a derivation is often found in the institution of private property itself. Cf. DIRKSON, C.: *Catholic Social Principles*. St. Louis : Herder & Herder, 1961, p. 208.

[59] Cf. CHARLES, R./MACLAREN, D.: op. cit. 47, p. 305. The content of scholastic *ius gentium* coincided within the limits of common understanding of Catholic social philosophy of the 19th and 20th century objectively with the content of Secondary Natural Law. The reason for non-disclosure of the traditional doctrine on *ius gentium* by Pope Leo XIII in *Rerum novarum* can be found especially in the fact that this term was reduced to the concept of national law in the modern sense by the end of 16th century, thanks to the conclusions of Francisco Suárez († 1617). Cf. DWYER, J. A. (ed.): op. cit. 54, p. 787. For more detail on this issue see RUIZ, F. T. B.: El concepto de derecho subjetivo y el derecho a la propiedad privada en Suárezy Locke. In *Anuario Filosofico*. Vol. 45 (2012), pp. 391–421.

[60] Cf. Gn 24,34ff; 26,12–14; 1 Kgs 3,11–13; 2 Kgs 32,27–29; Prv 10,4; 10,15 and 22; 14,20; 20,13; 21,17; 22,4 and 24,3ff.

[61] Mt 5,3; 6,19–21; 6,24; 10,8–10; 19,21; Mk 4,19; 6,3 and 8ff; 7,22; 10,23–27; Lk 2,24; 6,20 and 24; 12,15; 16,10–13; Rom 1,29; 1 Cor 5,11; 6,9ff; 1 Tm 6,6–10; 2 Tm 3,2; Eph 5,3; 5,5 and Heb 13,5. The New Testament prefers expressly spiritual good at the expense of endeavours to come into property, and points out the obligation to share property with the poor for the purpose of collecting "an inexhaustible treasure in heaven". Cf. Mt 4,18–22; 6,2–4 and 24–34; 13,18–23; 19,16–30; Mk 1,16–20; 4,13–20; 10,17–31 and 28–30; 12,41–44; Lk 5,1–11; 8,11–

explained in a complementary manner, namely in the sense that although wealth is dangerous, it is not so because of itself, but for the easy possibility of becoming an obstacle to true love of God.[62] Nevertheless, it is recognized that neither the Old nor the New Testament by any means call into doubt ownership as an institution, but rather confirm **the necessity of its existence**, with reference to the demands of justice.[63] After all, Jesus Christ did not make poverty into some kind of social program, or law for everybody, to whom the evangelical message should be enunciated.[64] On the other hand we can mention some Christian communities who were inspired by the spirit of the ideals of Christ and Natural Law to establish social structures with common ownership of goods, not forgetting the early Church community of Jerusalem.[65] The necessity of a practical solution to the question of status and moral obligations of wealthy members became topical in Christian communities from the second half of the 2nd century, when adherents of higher classes started joining them in large numbers. Referring to this development some Church Fathers (for example Cyprian, † circa 268; and the already-mentioned Ambrose) indeed confirmed the right of every person to private property, but at the same time recommended giving up any large fortune with the aim of better following Christ.[66] A similar attitude was also assumed by later Fathers such as Basil the Great (*Basilius Magnus*,

15; 12,16–32 and 33; 16,13 and 19–31; 18,28–31; 19–31; 21,1–4 and Sk 10,2–4. Even the Old Testament drew attention to the dangers associated with owning property. Cf. Dt 21,20ff; Prv 30,7–9 and Sir 14,5–10. Once more, there are also references in different places to the necessity of performing deeds of charity. Cf. Dt 15,11; Tb 4,8; 12,8ff; Sir 7,10 and 29,12.

62 In this context it is necessary to mention that in the New Testament the eschatological expectation of the Second Coming (παρουσία) was primarily established, and therefore property and the values of this life were considerably relativised. This attitude can thus be marked as the general historical perspective of the New Testament, which outreached the Old Testament point of view. For more detail on this issue see PESCHKE, K. H.: op. cit. 10, pp. 578ff.

63 Cf. Ex 20,15 and 17; 21,37–22,14; Lv 19,35; Nm 5,6ff; Dt 5,19 and 21; 19,14; 25,13–16; Prv 11,1; Mt 24,45–51 and 25,14–30.

64 Cf. Mt 19,18; 20,1–16; Lk 7,36; 8,2ff; 10,38–42; 14,1; Jn 11,1ff; 12,1–8; Rom 13,9; 1 Cor 6,9ff; Eph 4,28; 1 Thes 4,6; 1 Tm 6,17–19; 1 Pt 4,15 and 1 Jn 3,17. For more detail on this issue see PESCHKE, K. H.: op. cit. 10, pp. 580ff.

65 Cf. Acts 2,44–45; 4,34–35 and 5,1–11. Analogous attempts at communitarian ownership of all goods in the manner of certain forms of religious-ethical communism or anarchy did not emerge until the Modern Era, in the sense of the so-called "Indian Reductions" (*reducciones de indios*) which the Jesuits were permitted to establish by the Spanish and Portuguese king Philip III (*Felipe*, 1598–1621). They consisted of free settlements based on the principles of general equality and common use of all property, and formally they were not subject to any secular authority. At the head of each was a parson appointed by the governor, who carried out judicial competences by virtue of the government, whereas spiritual jurisdiction was received from the Pope. Reductions were from the beginning established by Jesuits, Franciscans and Dominicans, whereby it is necessary to mention specifically the so-called "Jesuit state", which functioned in the years 1649 to 1767 in the territory of Paraguay and can be denoted as a practical attempt to realize a community with a theocratic-patriarchal regime, described in period political novels (especially *Utopia* of 1516 by Thomas More and *La Città del Sole* of 1623 by Tomasso Campanella). Only after approximately 150 years of its functioning were all the South American reductions almost completely destroyed by brutal intervention from Portugal, followed by the decisions of Spanish king Charles III (*Carlos*, 1759–1788) on expulsion of the Jesuits from Spain and the whole Spanish empire. For more detail on this issue see for example VYŠNÝ, P.: *Historicko-právne súvislosti dobytia Nového sveta Španielmi*. Trnava : Typi Universitatis Tyrnaviensis, 2015, p. 178 and PUCHOVSKÝ, J.: *Štát a právo v juhoamerických kolóniách Španielska*. Bratislava : Univerzita Komenského v Bratislave, 2013, pp. 109–111. It is indeed questionable whether we can agree with such a rigid conclusion that all similar communities ultimately malfunctioned. Cf. DIRKSON, C.: op. cit. 58, p. 212.

66 DWYER, J. A. (ed.): op. cit. 54, p. 787.

† 379), John Chrysostom (*Ioannes Chrysostomos*, † 407), Jerome (*Hieronymus*, † 420), and the already-mentioned Augustine.[67]

Augustine himself with his views on private property also influenced the most important theologian of the Christian West, Thomas Aquinas.[68] On this basis he latter admitted for example that the division of property itself did not happen by itself according to Natural-Law principles, but emerged from the agreement between people pertaining to Natural Law.[69] Using of property therefore does not stem from Natural Law according to him, but property as an institution can be considered rather to be the instrumental supplement of Natural Law.[70] The opinions of the Church Fathers and Thomas Aquinas in relation to private property were more or less accepted until the times of the Enlightenment, when in the 17th and 18th centuries, in the spirit of liberalistic tendencies, conclusions as to its **sacredness and inviolability** started to gain ground.[71] Several authors have reached agreement that during those times lawyers managed to erase the distinction between Natural and Positive Law, namely by commonly identifying the claims of Positive Law with those of Natural Law. It is also appropriate in this context to recall the influences of Calvinist (especially puritan) doctrine on worldly fortune, according to which wealth must be considered as a sign of an individual's being called to salvation.[72] But then after the fashion of Jean Jacques Rousseau († 1778), several philosophical movements emerged during the 19th century that refused this institution (especially Romantic socialism, communism and anarchism). While several of their representatives were influenced by idealistic materialism, in the case of others it was a reaction to the excessive and ever-growing claims of the liberals. Once more, the motivation of Romantic idealists resided in religious zeal, and on this basis they most frequently referred in their works to the ideal of social structure of the Primary Church.[73]

From the legal science point of view, the general shape of the institution of private property was formed primarily by the opinions of the representatives of Romance legal studies, namely first of all of the German Pandectist School, which by means of interpretations took up again the line of ancient Roman lawyers. They started to proclaim

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67 However, the Church Fathers in general did not think a great deal of ownership as a moral value, because it reminded them of the Fall of Man from original innocence, and his greediness and avidity. Cf. CHARLES, R./MACLAREN, D.: op. cit. 47, p. 303.

68 Cf. In Joann. Ev. 6,25–26 and Ep. 93,12,50.

69 DWYER, J. A. (ed.): op. cit. 54, pp. 787–787.

70 At the same time, Thomas Aquinas stated that for every person ownership is restricted by the needs of others. But common ownership was denoted by him as a primary source of conflicts. Cf. Summa Theol. II–II, q. 57, a. 3; q. 66, a. 1,2 and 6.

71 For example, John Locke († 1704) specifically justified the unlimited accumulation of property in the hands of an individual, arguing that such a surplus can be aggregated fairly through its deposition in the form of money. According to these conclusions, in this way the prevention of spoliation was possible, which he denoted as acting in conflict with the law of nature. For more detail on this issue see DIRKSON, C.: op. cit. 58, pp. 206–207 and MANDA, V.: Koncept vlastníctva v Lockovej politickej filozofii. In *Filozofia*. Vol. 67 (2012), pp. 291–302.

72 Calvinism was namely interesting for potential new sympathizers from the time of its foundation also due to the doctrine that every believer could know his selection for eternal salvation or damnation by the outcomes of his work and fulfilment of prescribed duties. These conclusions were derived from the teaching on utmost dual predestination, that is to say predetermination of every human for salvation or damnation. Especially on this basis considerable development of economy and industry happened in Calvinist countries. German sociologists Max Weber († 1920) and Wener Sombart († 1941) therefore denoted John Calvin (*Jean Calvin*, *Jehan Chauvin*, † 1564) as the ideological founder of capitalism and economic liberalism. For more detail on this issue see for example KUMOR, B.: *Cirkevné dejiny 5. Novovek. Rozkol v západnom kresťanstve*. Levoča : Polypress, 2002, pp. 96ff.

73 DIRKSON, C.: op. cit. 58, pp. 208–209.

the thesis of the illimitability of ownership, considered to be an inviolable and sacred right in the conception of absolute private autonomy, satisfying in many respects the global feeling of the 19th century and the climate of strengthening **Industrial Revolution**. Potential restriction of the right to property was therefore not qualified as immanent, but came into account on the basis of regulations of moral or Positive Law, which accessed this institution outwardly.[74] Even though these theses were rejected in principle even in the 19th century itself, at the same time they found several sympathizers, especially among the political representatives of individual states. Moreover, since their conclusions influenced the form of multiple national codifications, progressing strongly in those times, they are crucial to this day for understanding the status of private property.[75] Especially given this background, by the end of the 19th century it was necessary to refer to traditional Church doctrine in relation to this question, namely by returning to the teaching of the Church Fathers.[76] These tendencies were finally reflected in the encyclical letter *Rerum novarum*, the first writing where the Church Magisterium expressed its official opinion on private property. There **Leo XIII** emphasized the need of existence of this institution, refusing the arguments of several modernists denying this right.[77] The Pope himself found it to be of Natural-Law character, stating that any restrictions to it should be constituted not only on moral grounds, but even through state legislation.[78]

In contrast to the first social encyclical letter, in his work *Quadragesimo anno* **Pius XI** distinctively emphasized the dual aspect of ownership, at the same time individual and social.[79] In an effort to protect the doctrine of his predecessor, he also highlighted that Leo XIII had insisted on the necessity to distinguish strictly the right to property itself from the using of it. Moreover, Pius XI pointed out that Commutative Justice requires fair respect not only for the needs of others, but even for their ownership. In addition, he clearly stressed that no-one can assert, under any circumstances, on the basis of applying the principle of Common Good, the annihilation or weakening of the individual character of ownership.[80]

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74 CHARLES, R./MACLAREN, D.: op. cit. 47, pp. 303ff.

75 For more detail on this issue see HÖFFNER, J.: op. cit. 29, pp. 197ff.

76 Cf. CHARLES, R./MACLAREN, D.: op. cit. 47, p. 305. The necessity of reaction was also stimulated by new forms of ownership, connected with the formation of joint-stock companies, whereby wealth was kept in the form of investors' shares. Cf. DIRKSON, C.: op. cit. 58, p. 213.

77 Rerum novarum 46.

78 Several scholars have reached agreement that when Leo XIII approved the character of the right to private property, he was in fact in opposition to the opinions of Thomas Aquinas, who accepted this institution primarily in its social dimension. The Pope thus preferred the principle of individualism following the necessity to respect the private property of an individual, giving way thereby to the opinions typical for the 19th century. This thesis penetrated his work through the above-mentioned scholar Luigi Taparelli d'Azeglio, who presented it in 1840 in his writing "*Saggio teoretico di dritto naturale appogiatto sul fatto*", thanks to which this opinion gradually succeeded in neo-scholastic science. Leo XIII diverged from Thomas Aquinas also in the consideration of accepting private property as an institution of Primary Natural Law, whereas Aquinas had accepted it within the limits of Secondary Natural Law. Cf. HIMES, K. R.: op. cit. 3, pp. 141ff; DWYER, J. A. (ed.): op. cit. 54, pp. 830ff; VALLELY, P. (ed.): op. cit. 2, p. 38 and ARCHER, M./MALINVAUD, E.: (eds.): *The Future of Labour and Labour in the Future*. Vatican City : Pontifical Academy of Social Sciences, 1998, p. 65.

79 According to majority of scholars Pius XI considered, analogously to Leo XIII, the obligation of an owner to use his property in relation to people in need not in the sense of a duty (in the spirit of the doctrine of Thomas Aquinas), but rather of Christian charity, beneficence and generosity. Cf. Rerum novarum 19 and Quadragesimo anno 50.

80 HIMES, K. R.: op. cit. 3, pp. 147–148. Pius XI accordingly accepted the conclusion that private property was in accordance with natural human character, and was therefore granted to humans by the Creator himself. Cf. Quadragesimo anno 45.

This tradition was continued also by Pope **Pius XII** (1939–1958), who expressed in his speeches and documents that the Church recognized in every period the naturally-given right to property.[81] On the other hand, in his encyclical letter *Mater et Magistra* **John XXIII** (1958–1963) highlighted that private property may be regarded in relation to the common using of all goods of the Earth as a secondary right only. He also pointed out that this right must be extended to all classes of citizens, since it secures everyone's freedom.[82] This doctrine was taken up by the **Second Vatican Council** itself, instructing that every use of property, defined in various phases of the history of mankind by legitimate government, must always be primarily connected with the stipulation of the Universal Destination of All Goods.[83] In relation to the then existing situation, the Council emphasized that the Common Good can under some circumstances require the redistribution of insufficiently-cultivated land, and that this process should be governed by the state. Similarly the Council Fathers recognized that in cases of extreme need it is possible for people to assure their livelihoods and other necessary goods from the property of the wealthier.[84] **Paul VI** (1963–1978) in his encyclical letter also highlighted the Natural-Law principle of private property, although he subordinated it strictly to its social function.[85] Following his predecessors, Pope **John Paul II** (1978–2005) preferred the principle of Universal Destination of All Goods, which should replace the natural right of individuals to acquire the things necessary for their survival.[86]

3. 2 Characteristics

It should be evident from the previous explanation that until the times of the Industrial Revolution, when the individualistic element of ownership started to emerge, the doctrine on private property from the early Church, through the Church Fathers of the Christian East and West, including the most important authority of Catholic theology, that is to say Thomas Aquinas, underwent almost no change at all. Despite the endeavours of some

81 Cf. HÖFFNER, J.: op. cit. 29, p. 197.

82 He pointed out the fact that this right enjoys permanent validity, namely regarding the ontological primacy of individuals before society. Cf. Mater et Magistra 96, 109 and 112–113. In AAS 53 (1961), pp. 401–464. Once more, in the encyclical letter Pacem in terris, he insisted on the fact that the social duty of a whole community consists especially in its acceptance of the right to private property. Cf. Pacem in terris 21–22. In AAS 55 (1963), pp. 257–304.

83 For more detail on this issue see DWYER, J. A. (ed.): op. cit. 54, pp. 584ff. This postulate concerns especially persons who are willing to work but through no fault of their own cannot work in fact, since they are unemployed, ill or otherwise handicapped. Therefore it is necessary to establish an order of ownership that would permit appropriate participation of all in the enjoyment of earthly goods, according to the personal function of every individual. In this context Catholic Social Doctrine recognizes that as far as these tasks are not assured by the order of private property, it must be improved, or in the case of necessity supplemented (not replaced) by the forms of common or collective ownership. Cf. PESCHKE, K. H.: op. cit. 10, p. 587.

84 Cf. Gaudium et spes 69–71.

85 Cf. Populorum progressio 14, 22–23 and 48–49. In AAS 59 (1967), pp. 257–299. For more detail on this issue see CHARLES, R./MACLAREN, D.: op. cit. 47, p. 311.

86 Cf. Laborem exercens 14. In AAS 73 (1981), pp. 577–647. In addition, he emphasized that although the right to private property must be considered fundamental for the autonomy and development of a person, it cannot be qualified as absolute. Namely, its limits were inscribed in advance in the nature of human beings. Since the supremacy provided to humans by the Creator is not absolute, no-one can speak of freedom of using and disposing of property in an unlimited way. Cf. Sollicitudo rei socialis 34. In AAS 80 (1988), pp. 513–586 and Centesimus annus 30–43. In AAS 83 (1991), pp. 793–867.

Church Fathers to promote the system of common ownership of goods, the approach of the Magisterium was in principle built on the idea that after the Fall of Man only the system of private property comes into consideration to ensure the good functioning of society.[87] Besides recognition of the right to property as of Natural-Law character, within the limits of Roman Law it was also accepted that this institution represented the **exclusive dispositional right to a thing**. No one is therefore entitled to use or treat a thing in any way against the will of its owner. As already mentioned, God did not intend that all the created goods are to be at the disposal of each person individually, and thus allowed people and their governments the right to set up the limits of private property with regard to human industry and other criteria.[88] Even though the Earth produces a great abundance of goods, it cannot be productive without human cultivation and care.[89] At the same time, the right to property does not refer only to real and movable property, but even to intellectual and spiritual products.[90] By the term private property we do not understand only the legally-recognized dispositional right of natural persons, legal entities or communities of people over their property, excluding interference with it by other people, but also the obligations resulting from that right (for example in the case of stocks and shares).[91]

In Canon and Civil Law it is generally recognized that a proprietary title generates property rights which grant people the direct and immediate power to dispose of their property, and determine the conditions of its legitimate possession, use and enjoyment.[92] Moreover, the Social Doctrine of the Church accepts that ownership can be acquired especially by occupation, labour or transfer. At the same time it is recognized that the first and permanent source of the right to private property is productivity, namely starting with manual labour and extending to scientific and technical work.[93] With reference to **its functions**, analogously to human nature itself and all demonstrations and institutions of human life, ownership is characterized by two aspects, the individual and the social.[94] The social function represents primarily the internal social correlation of ownership as such. Consequently, whereas the individual function of consumable goods consists especially in satisfying the common needs of individuals, the social function requires that all classes of human society should have dignified livelihoods and the chance to acquire ownership of permanent goods (e.g. proper accommodation, or the means of production).[95] The social character of ownership therefore requires owners to regard not only their own needs and advantages, but on the other hand also the good of all society and its members. As

87 Cf. CHARLES, R./MACLAREN, D.: op. cit. 47, p. 301.

88 Cf. The Social Agenda. A Collection of Magisterial Texts 205. Cited according to the PONTIFICAL COUNCIL FOR JUSTICE AND PEACE: *The Social Agenda. A Collection of Magisterial Texts*. Città del Vaticano : Libreria Editrice Vaticana, 2000. This implies an important connection between ownership and performed work, since the innate human sense of justice speaks of the right to the fruits of one's work. John Paul II even stated that ownership, especially of the means of production, is intended in such a way to benefit labour. Therefore he denoted it as the most important principle of the whole ethical and social order, including Christian Social Doctrine. Cf. Laborem exercens 14 and 52–58; Sollicitudo rei socialis 42; HIMES, K. R.: op. cit. 3, p. 141 a HOWARD, Ch.: *The Social Teaching of the Church*. Springs : Order of Preachers, 1986, 73–74.

89 Cf. Rerum novarum 8 and 9.

90 Cf. PESCHKE, K. H.: op. cit. 10, p. 578.

91 HÖFFNER, J.: op. cit. 29, pp. 187–188.

92 Cf. DWYER, J. A. (ed.): op. cit. 54, p. 785.

93 Cf. SPIAZZI, R.: *Sociálny kódex Cirkvi*. Trnava : Dobrá kniha, 2000, pp. 184–185.

94 Cf. PERCY, A. G.: *The Entepreneur in the Social Teaching of the Catholic Church. From the New Testament to Pope John Paul II*. Theses ad Doctoratum in S. Theologia. Roma : Pontificia Universita Lateranense, 2008, p. 176.

95 Cf. HÖFFNER, J.: op. cit. 29, p. 198.

already stated, defining the obligations relating to the Common Good is primarily the task of individual governments, whereby the state actually protects even the requirements of Natural Divine Law.[96] Especially in the case when state representatives manage to regulate legally the right to private property in such a way that its form will be accommodated to the needs of the Common Good, then greater justice will result from it, and the legitimate right of every person to private property will be analogously strengthened too.[97]

As mentioned above, Catholic Social Doctrine recognizes that every person has a right to make use of the external portion of the world and not to be interfered with by others in that use.[98] In addition, it is evident that this right is protected not only by Natural Divine Law, but also by Positive Divine Law. For example, the Seventh Commandment of the Decalogue prohibits people from taking something which does not belong to them, that is anything that is not an object of their private property.[99] Here again the statement of Roman Law that every right has its corresponding obligation is recognized, thus the right to property of one person corresponds to the obligation of others not to interfere with their use of that property.[100] An owner therefore exerts his dominion over a thing, disposing of the rights to appropriate and use it, and not to be prevented in doing so at the hands of another person.[101] At the same time, the Church also recognizes the Natural-Law character of the right to succession (inheritance),

[96] Ownership is therefore characterized especially by its service function and should be considered as an instrument for the fulfilment of the tasks appointed by the Creator himself. Cf. DIRKSON, C.: op. cit. 58, p. 206.

[97] For more detail on this issue see HIMES, K. R.: op. cit. 3, pp. 157–158 and DORFMAN, A.: The Normativity of the Private Ownership Form. In *Modern Law Review*. Vol. 75 (2012), pp. 981–1009. In general, it is recognized that the Church admits pluralism of the forms of ownership (private, social, community, as well as state property), while strictly refusing the types of community property without differentiation of property. The interconnection and the extent of these forms determine the system of ownership in every country, regulated in principle by positive state law. Cf. Rerum novarum 21; Centesimus annus 6 and PIWOWARSKI, W. a kol.: *Slovník katolíckej sociálnej náuky*. Trnava : Dobrá kniha, 1996, p. 190. Catholic Social Doctrine hence accepts even state property, which comes into consideration also in the case of the means of production, namely if their being owned by individuals could be dangerous for the Common Good. In addition, according to the principle of subsidiarity, the extent of public ownership must be proportional to the real needs of the Common Good. Precisely this principle, based on the necessity to fulfil and support private property and its social functions, makes most sense in relation to it and also represents its foundation. Cf. Quadragesimo anno 114; SPIAZZI, R.: op. cit. 93, p. 187 and CHARLES, R./MACLAREN, D.: op. cit. 47, p. 300. Here it is necessary to mention that from the beginning the Church reproached the theories of the representatives of Socialism and Communism, denoting their ideal of establishment as some kind of slavery. It was considered a matter of fact that by requiring the abolition of private property they introduced chaos into society and contribute to people's loss of interest in work. Cf. Gaudium et spes 71; ROUSSEAU, R. W.: *Human Dignity and the Common Good*. *The Great Papal Social Encyclicals from Leo XVIII to John Paul II*. London : Greenwood Press, 2002, 120ff and SPIAZZI, R.: op. cit. 93, 185. Catholic social teaching refuses even the system of liberalism that, in the sense of the "winner takes all" principle, ignores the social responsibility that results from private property. Generalizing, it is recognized that whereas liberals failed in rejecting the social function of ownership, socialists failed in its exaggeration. Cf. DIRKSON, C.: op. cit. 58, p. 212 and GUERRY, E.: op. cit. 31, p. 96.

[98] HIMES, K. R.: op. cit. 3, p. 135.

[99] The right to private property was recognized in the Old as well as the New Testament as a moral good, not only as a concession to human weakness. In this context we can mention especially the institutions of serfdom and marital divorce, which were accepted as necessary vices lasting until the time when mankind would be led to superior knowledge. Private property is therefore considered to be a positive moral good, if honestly acquired and correctly used. Cf. CHARLES, R.: *An Introduction to Catholic Social Teaching*. Oxford : Family Publications, 1999, p. 67 and CHARLES, R./MACLAREN, D.: op. cit. 47, p. 304.

[100] DIRKSON, C.: op. cit. 58, p. 205.

[101] COULTER, M. L./KRASON, S. M./MYERS, R. S./VARACALLI, J. A.: *Encyclopedia of Catholic Social Thought*. *Volume 2*. Lanham : The Scarecrow Press, 2007, p. 878.

as well as the right to compensatory damages exacted on the property of another person.[102] Namely, the right to private property is realistic only in the case that an owner is **entitled to reclaim** his possessions from those who have usurped or kept them (or damaged them), or in other words that the wrongdoer is obliged either to return the possessions or recompense the owner for them.[103] As mentioned many times, Church doctrine differentiates between the right to dispose of and administer goods and on the other hand the right to use them. In accordance with the teaching of the Church, owners can use their possessions freely, though at the same time they must pay regard to the aim of the Common Good. This means especially that the use of possessions is subordinated to the moral law that obliges every owner in their conscience.[104] Precisely here we find the difference between the conclusions of Catholic Social Doctrine and historical Roman as well as contemporary Civil Law. The Church namely accepts private property as a right within certain limits, on the basis of which it is possible to use possessions and to dispose of them absolutely freely (within the frame of law that protects others from damage), but at the same time the Church emphasizes that owners are not absolute masters.[105] They cannot therefore use their possessions egoistically only in order to satisfy their own caprices and exclusively for their own benefit.[106]

On the basis of the above it is recognized that the right to private property is not absolute and should be characterized by a certain social aspect. The absolute owner of all created things is considered to be only God himself, and hence when humans own something, they possess it as a matter of fact in the form of a pledge (*pignus*), and in relation to the goods of this world they are considered to be only the administrators of the given property.[107] God gave to humans, specifically to all human beings bar none, delimited dominion over the Earth and everything inhering in it, teaching that all natural resources were destined for their service and their behalf. The Earth should therefore be managed primarily with the aid of their intelligence and labour, on the basis of which they could then dispose of the right to use its portions.[108] Precisely here resides the principle of **Universal Destination of All Goods**, which provides the institution of private property with appropriate perspective, contributing to the personal freedom and family independence of every human being.[109]

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[102] Cf. Ex 21,37–22; Tb 2,11–13; Ez 33,13–15; Lk 19,8; Quadragesimo anno 49 and DWYER, J. A. (ed.): op. cit. 54, p. 584. Abolition of right to succession by the state would not only undermine the institution of private property, but potentially destroy it completely, since a very important motive for acquiring property would disappear. Cf. PESCHKE, K. H.: op. cit. 10, pp. 595ff. On the other hand, it is praiseworthy if the legator entails some part of his property not only in favour of his cognates, primarily when they are sufficiently assured, but bethinks himself also of the poor and other good purposes. Following this, Canon Law emphasizes that disposal of property devised for the account of the Church represents an obligation for the interested parties, even in the case that the testament is formally null and void. Cf. cann. 1299 § 2 CIC 1983 and 1043 § 2 CCEO 1990.

[103] Cf. PESCHKE, K. H.: op. cit. 10, p. 609 and HOWARD, Ch.: op. cit. 88, 39.

[104] GUERRY, E.: op. cit. 31, pp. 85ff.

[105] Some scholars even consider the finding of law on absoluteness of ownership and its acting erga omnes as a "pagan opinion" which was later reanimated by the ideas of the Enlightenment and liberalism. After this manner they denoted Roman Law as pagan, in spite of the fact that from the times of Emperor Constantine the Great (Constantinus Magnus, 306–337) the Christian spirit in it increasingly gained ground. Cf. Ibid., p. 96.

[106] Cf. MUNDIA, CH. W.: *Globalization, Technological Development and Wealth Distribution: a Study on The Social Magisterium of the Church*. Thesis ad Doctoratum in Sacra Theologia totaliter edita. Romae : Pontificia Universitas Sanctae Crucis, 2008, p. 211.

[107] Sollicitudo rei socialis 42.

[108] Centesimus annus 31.

[109] Cf. Rerum novarum 3–12 and 19; Mater et Magistra 113–115; Gaudium et spes 71; KRIŽAN, V.: Právo na rodinu a pracovnoprávne vzťahy. In MORAVČÍKOVÁ, M./KRIŽAN, V. (eds.): *Sloboda jednotlivca a svet práce*.

This very principle carries conditions in order to provide that all created things will tend not only to the development of individuals but of the whole of mankind as well.[110] At the same time, this axiom is not in opposition to the right to private property, although it points out the necessity of its basic regulation. Especially with this in mind, its limits should be determined by the state, which should simultaneously specify the ways of legitimate using of property.[111] Since private property is substantially considered to be only one of the tools towards respecting the principle of Universal Destination of All Goods, on this account it is not appropriate to denote it as an aim, but only as an instrument.[112] On the grounds of the above it is clear that every person should comprehend the things possessed by him not only as his, but also as common property, and precisely in this sense they should be used not only for self-profit, but also for the profit of others.[113] This implies the obligation of owners to prevent inactivity in using goods in the case that someone else would like and is able to use them productively in favour of the whole of society.[114] If this aim is blocked, then private property has no justification, and in the eyes of God and humanity this is qualified as misuse. Indeed, it is clear that in such a case, when owners do not conduct themselves according to these postulates, although they do not lose their right to property, they trespass against God and their fellows, thus committing sin.[115]

It follows from the above that the purpose of all created things is not their accumulation, and certainly not as much accumulation as possible. Since all people have their own material

Praha : Leges, 2014, pp. 91–108 and DWYER, J. A. (ed.): op. cit. 54, p. 584. After all, it is documented that in political regimes that do not recognize the right to private property (including the means of production), the enjoyment of freedom is in almost every aspect suppressed. Cf. CRONIN, J. F.: *The Social Teaching of Pope John XXIII*. Milwaukee : The Bruce Publishing Company, 1963, 109. Even though God intended the distribution of the fruits of nature to all individuals, the real basis of the institution of private property must be found in the very nature of human beings and their relation to the matters of nature. They therefore do not dispose of the creative faculty in the sense of God the Creator, but in the sense of the opportunity to subdue things, whereby its fulfilment is necessary for the full expression of human personality. Especially on this basis several scholars state that private property can be denoted in a certain respect as some kind of extension of the personality of human beings. Cf. DIRKSON, C.: op. cit. 58, p. 209.

110 The principle of Universal Destination of All Goods permeates the whole Catholic Social Doctrine and in relation to good and fair functioning of human society can be denoted as one of its most important elements. Cf. Gn 1,27–28; Prv 21,3; Is 1,11ff; 3,14ff; 10,1–3; 61,1ff; Jer 6,18–21; 7,4–7; 22,13–17; Ez 16,49; 22,29; 45,9ff; Hos 4,1–3; 6,6; Am 5,21–27; 8,4–8; Mi 6,6–8; Sir 13,19ff; 34,22; Lk 4,16ff; 7,22; Rerum novarum 21; Quadragesimo anno 45, 49, 57–58, 61, 78–80 and 114–115; Mater et Magistra 43, 119 and 120; Gaudium et spes 69; Laborem exercens 14 and 18–19; Sollicitudo rei socialis 42 and Centesimus annus 31, 36, 40 and 42.

111 Cf. CHARLES, R./MACLAREN, D.: op. cit. 47, p. 300.

112 Cf. Populorum progressio 22–23.

113 Gaudium et spes 69.

114 This conclusion can be applied especially to the means of production, which cannot be owned to the exclusion of labour, or for the sake of owning itself. That ownership would therefore be illegitimate if it is not used properly and prevents others from working, with the only aim of gaining profit which would not result from overall increase in the capacity of labour and common wealth. Cf. Compendium of the Social Doctrine of the Church 178 and 282. In this context we can mention some new forms of good that were unknown until recently, namely the results of contemporary economic and technological development. It is recognized in general that the wealth of industrial states is based rather on this ownership than on the ownership of natural resources. Technical and scientific knowledge itself should be utilized in the service of humanity and with the aim of increasing the common heritage of all mankind. If they are abused, these things become sources of unemployment and deepening of differences between developed and undeveloped areas. Cf. Centesimus annus 32. Analogously the people owning wealth in the form of money are morally obliged to invest it on behalf of the whole community. Cf. CHARLES, R./MACLAREN, D.: op. cit. 47, p. 306.

115 Cf. Centesimus annus 43.

needs and are called to celebrate God with their aid, it is evident that all are specifically qualified to take their share in the goods of this Earth. Moreover, no-one is obliged to assist others using up what is required for their own needs or those of their family, or even to give to others what they themselves need to maintain their station in life becomingly and decently.[116] Concerning wealth, even though the Church does not reproach it, nevertheless it points out the appeals of Holy Scriptures emphasizing that possession of a large fortune is very risky for the human spirit.[117] Given this background, the majority of moral theologians have reached agreement that when individuals or society aspire to absolutism of the function of property and succumb to the idolatry of worshipping goods, they ultimately end up by lapsing into deepest slavery.[118] Solely when it is generally recognized that all property depends on God the Creator and must be oriented to the Common Good, it is possible to assign to material goods the function of means which are useful for the development of individuals and nations.[119] For wealthy people therefore this results in more obligations deriving from the principle of Universal Destination of All Goods. Superfluous profit in particular cannot be left to the arbitrariness of the receivers, since it is their obligation to use it in a socially profitable way, for example by using it for charitable purposes, generating new job opportunities, or in other helpful ways.[120] On this basis Catholic Social Doctrine accepts several **justified interventions to individual ownership**.[121] For example, we cannot denote a case as aberrance against the principle of private property in which the owner must reasonably agree that another person took some of his property out of pure need, which is recognized as so-called "theft in case of necessity".[122] According to Roman Law and

[116] The Social Agenda. A Collection of Magisterial Texts 204. Moreover, some people are too poor to contribute to the sharing of goods. For more detail on this issue see CRONIN, J. F.: *Social Principles and Economic Life*. Milwaukee : The Bruce Publishing Company, 1959, pp. 144–145.

[117] Cf. CHARLES, R.: op. cit. 99, p. 67. The obligations resulting from the principle of Universal Destination of All Goods are not related only to individuals, but even the representatives of individual countries, since wealthy nations are obliged to help people who suffer from insufficiency and hunger. Cf. Gaudium et spes 69. Regarding wealth it is necessary to distinguish the prosperity that can be specified as the result of exceeding of average level of satisfying material needs in a given society. Cf. PIWOWARSKI, W. a kol.: op. cit. 97, p. 16.

[118] Cf. Mt 6,24; 19,21–26 and Lk 16,13.

[119] Quadragesimo anno 45–46, 49 and 57–58; Mater et Magistra, 119–121; Populorum progressio 23 and CHARLES, R./MACLAREN, D.: op. cit. 47, p. 306.

[120] Cf. Summa Theol. II–II, q. 66, a. 2 and PESCHKE, K. H.: op. cit. 10, pp. 586–587.

[121] For more detail on this issue see for example COULTER, M. L./KRASON, S. M./MYERS, R. S./VARACALLI, J. A.: op. cit. 101, pp. 878–879.

[122] Cf. Summa Theol. II—II, q. 66, a. 7. Necessity entitles a man to take possession of a thing from another person in case of need to overcome the indigence. Cf. Gaudium et spes 69. This right corresponds to the obligation imposed on wealthier people to give from their surplus to others in need, or to permit them to take what they need, whereby such action is not qualified only as the obligation of love, but also of justice. Necessity can be denoted as the situation when the danger of losing life, health, freedom or other important goods menaces someone and he is not able to help himself by using his own property. The right to appropriate alien property comes into consideration even in cases when help is required due to the need of a third person. Since the things of necessity are typically foodstuffs, this action is often referred to as "theft from hunger". In such a case it is recognized that common ownership of all goods should be preferred to the right to private property. Nevertheless, this theft is permitted only after the summary fulfilment of the following conditions: 1. extreme and not only serious necessity must occur; 2. it is not possible to acquire the necessary thing in any other way; 3. the person from whom the things are taken may not be brought into similar need by such acting; 4. it is not allowed to take more than is necessary to eliminate the situation of necessity; 5. the things should as far as possible be considered as a loan, and after the necessity is relieved they should be compensated to the owner. Cf. Summa Theol. II–II, q. 32, a. 5 and q. 66, a. 2 and 7; Gaudium et spes 69; PESCHKE, K. H.: op. cit. 10, pp. 614–615; CRONIN, J. F.: op. cit. 109, 88 and HOWARD, Ch.: op. cit. 88, 69.

contemporary secular legal systems, such an action would be qualified as theft. Within this context it is necessary to mention that using the principle of *aequitas* it is possible to desist from penalizing the perpetrator in such a case in the majority of modern states.

Another justified intervention to ownership we could mention is agrarian reform initiated by the state in an effort to achieve new and just distribution of land intended for agriculture.[123] More specifically, the public authority can and must engage in interventions in the form of adequate reforms, especially in economically less developed countries where large agricultural property exists, but for speculative reasons the land is cultivated at below average productivity. At the same time it is typical that the majority of citizens in such countries do not dispose of almost any land or are forced to work in inhuman conditions. In these cases the most important objective should be to increase agricultural production not only for the purpose of providing livelihoods to many people, but also to promote the important feelings of certainty, dignity and freedom.[124] In general, we can state that the public authority can and must execute various interventions with the aim of ensuring appropriate social distribution of financial yield, intending to prevent its unreasonable or dangerous retention either in private or in public hands, namely for the purpose of creating new opportunities for work.[125] Thus the state may not initiate the removal of the institution of private property, whose character is of Natural Law, although at the same time it must intervene with **strong reform decisions** in matters of state so as to regulate the use of property in accordance with the interests of the Common Good, the principle of Universal Destination of All Goods and the social functions of property. An extreme, but permitted action of the state is therefore considered to be the possibility of depriving citizens of their

[123] Namely, in several countries, especially in those that have abandoned the collectivistic or colonial systems, the situation happens when giant land ownership was gathered in the hands of a few landlords who were absent and did not care about the management of the land. Cf. Quadragesimo anno 59 and Gaudium et spes 71. On the other hand, it is necessary to mention that redistribution of land itself does not guarantee its productive utilization. Farmers should have the chance to manage their estates alone and not to be satisfied with obsolete methods of land management. Cf. PESCHKE, K. H.: op. cit. 10, p. 617. Social ownership is therefore principally rejected as a solution to all economic problems, and comes into consideration only as the last possible resort. Abuse of excessive land ownership can be prevented for example by means of the mentioned agrarian reform. As a matter of interest we can note that in the case of expropriation of large land properties or whole economic sections (for example as coal-mining or the railway transport), the requirement for compensation of the original owners in full value disappears, if the payment would exceed the sum of financial resources of the state. Even under these conditions the Common Good would be the highest rule for the amount of compensation. Cf. SPIAZZI, R.: op. cit. 93, p. 183; CHARLES, R./MACLAREN, D.: op. cit. 47, p. 312 and CHANG, Y. C.: *Private Property and Takings Compensation*: *Theoretical Framework and Empirical Analysis*. Cheltenham : Edward Elgar, 2013. This problem concerns especially the nations in which some archaic form of community property persists, and which is applied even in some economically developed countries. This form of property then influences economic, cultural and political life so seriously that it represents a basic element in their survival and welfare. It is evident that the Church refuses to prefer community property at the expense of other forms of ownership. Cf. Gaudium et spes 69; Compendium of the Social Doctrine of the Church 180; HOWARD, Ch.: op. cit. 88, 69; BRETTSCHNEIDER, C.: Public Justification and the Right to Private Property: Welfare Rights as Compensation for Exclusion. In O'NEIL, M./WILLIAMSON, T. (eds.): *Property-Owning Democracy. Rawls and Beyond*. New York : Wiley-Blackwell, 2012, pp. 53–74 and NIE, M.: On Private Property: Finding Common Ground on the Ownership of Land. In *Natural Resources Journal*. Vol. 48 (2008), pp. 533–536.

[124] For more detail on this issue see KRIŽAN, V.: Hospodárske a sociálne práva v náuke katolíckej cirkvi. In KROŠLÁK, D./MORAVČÍKOVÁ, M. (eds.): *Hodnotový system práva a náboženstva v medzikultúrnej perspektíve*. Praha : Leges, 2013, pp. 269–285.

[125] Cf. SPIAZZI, R.: op. cit. 93, pp. 188–189 and MERRILL, T. W.: Private Property and Public Rights. In AYOTTE, K./SMITH, H. E. (eds.): *Research Handbook on the Economics of Property Law*. Cheltenham : Edward Elgar, 2011, pp. 75–103.

property in return for just compensation, if the need arises in accordance with the above-mentioned principles.[126]

Conclusion

On the basis of the above we can state in summary that according to Catholic Social Doctrine property represents a form of good, or the sum of economic, material as well as non-material forms of good, which an individual or a social group can dispose of for the purpose of achieving their own profit, and for realizing the Common Good. Pope Leo XIII himself noted that whoever obtained from God's generosity a large portion of temporal goods, whether referring to material or mental gifts, could accept them with the aim of using them to the perfection of his own nature and simultaneously utilize them as an administrator of God's Providence for the benefit of others.[127] The basic conceptual principle of this institution was later confirmed by the statement of Pope Paul VI that private property is not afforded to anyone as an unconditional and unlimited right, which implies that no-one is entitled to reserve for his own benefit something that exceeds his own needs, when others are in material need.[128] Since this right emanates from the moral value of labour and simultaneously protects social order, its acquisition must be available to all people in a just way.[129] Once more, in this context it is necessary to recall that the key to proper understanding of the institution of private property is to remember its Natural Divine-Law origin, namely in the principle of Universal Destination of All Goods.[130] Since Natural Law aplies to every person, everyone is obliged to respect the solidarity resulting from it. Everyone is therefore obliged to examine their conscience continually as to whether they are genuinely prepared to contribute with their own part to the support of the Common Good, especially with regard to poorer people. Despite various obligations of the state in this area, it is recognized after all that individuals or groups of individuals are always and at all events able to put spiritual values into practice better and more effectively than the state.[131]

Even though the institution of private property has often been attacked and rejected, even its most stubborn opponents (for example hardline Communists) have always reserved for themselves the entitlement to at least minimal disposal of material goods. Catholic Social Doctrine has constantly rebutted these opinions, pointing out the multiple positive reasons for the existence of private property and at the same time enumerating all negative impacts resulting from its abolition.[132] Despite (or maybe because of) the present general promotion

[126] Cf. Gaudium et spes 71 and SPIAZZI, R.: op. cit. 93, pp. 186–187.

[127] Rerum novarum 22.

[128] Populorum progressio 23. For more detail on this issue see HÖFFNER, J.: op. cit. 29, p. 198.

[129] Cf. KRIŽAN, V.: Dôstojnosť práce v sociálnej náuke Katolíckej Cirkvi. In *Pracovní právo 2012. Závislá práce a její podoby. Sborník příspěvků z mezinárodní vědecké konference Zámecký hotel Třešť 3.–5. října 2012*. Brno : Masarykova univerzita 2012, pp. 224–231 and ROUSSEAU, R. W.: op. cit. 97, 113–114. The institution of private property represents at the same time the essential element of social and democratic economical politics and is considered to be the guarantee of proper social organization. Cf. CHARLES, R.: op. cit. 99, pp. 66–67.

[130] ROUSSEAU, R. W.: op. cit. 97, 11 and GUERRY, E.: op. cit. 31, p. 82.

[131] Cf. CRONIN, J. F.: op. cit. 109, 120 and PESCHKE, K. H.: op. cit. 10, pp. 602–603.

[132] For example the outstanding scholar, Cardinal Joseph Höffner († 1987) introduced five positive reasons confirming the necessity of this institution: 1. private property corresponds to ordered love of oneself, since it guarantees an individual independence, freedom and autonomy. Cf. Gaudium et spes 71; 2. private property guarantees the clear division and delimitation of competences and areas of responsibility within the frame

of private property in the world, it is increasingly common to speak of its multiple functional crises.[133] Of these we can especially mention the still topical problem of the participation of employees in the administration and capital of the corporations for which they work. In this respect, it is recognized as an ideal that every worker should be considered to be a "co-owner" of the company, together with other co-workers.[134] Even in present times it commonly happens that various firms, especially supranational corporations, regard their employees as cheap labour and easily replaceable workforces, forgetting and neglecting their human dimension. They therefore often do not make provision for the physical and spiritual needs of the workers, supposing that in case they are not capable of maintaining the constantly increasing tempo of production, they will be replaced by younger and more efficient individuals.[135]

In relation to the current state of affairs, it is also important to point out the absence of savings as protection from deterioration in people's economic situation in the future, which is analogously considered to be important in Catholic Social Doctrine. Namely, once income reaches the necessary level, after reasonable and appropriate meeting the costs of living for himself and his family, the employee should have something else in addition to save or invest. Here it is necessary to mention the contemporary trend where wage increases progress hand in hand with growth in the consumer way of life, which also manifests itself in the unwillingness of employees to save or to invest reasonably. While one consequence of consumerism is that it helps the functioning of the economy and development of prosperity in the state, on the other hand it shows the decline in traditional Christian values including a responsible attitude to property. Even these at first sight trivial facts indicate that the most important problem of people in relation to private property, and that is regardless of their living in wealthy or underdeveloped countries, is the neglect, ignorance and sporadically also explicit denial of spiritual values. Hence it commonly happens that people place material welfare on the highest pedestal, showing simultaneously that it is considered to be the one and only higher meaning of life. Whereas at present the progress of science, technology and economics is supported at any price, it tends to be forgotten at the same time that the private property which they develop should be only an instrument to achieve the final soteriological

of the economy; 3. private property corresponds to the human need for certainty and security, which is important also for material functioning of the family. Cf. Rerum novarum 10; 4. private property guarantees the economic exchange that mutually connects not only individual branches of the economy, but also nations themselves; 5. private property provides the individual the possibility to do good in non-egoistic love. As negative reasons he listed: 1. community ownership of goods leads to slowness and aversion to work. Cf. Rerum novarum 12; 2. community property leads to disorder and chaos, since everyone is expected to care for all the things that belongs to all, so they do it arbitrarily; 3. community property is the origin of social unrest; 4. in the contemporary enormous production mechanism of modern economy, community property connotes the large accumulation of power; 5. centrally controlled community property menaces the freedom and dignity of individuals. Cf. HÖFFNER, J.: op. cit. 29, pp. 188ff. Fore more detail on this issue see PESCHKE, K. H.: op. cit. 10, pp. 620ff; PIWOWARSKI, W. a kol.: op. cit. 97, pp. 190ff; CHARLES, R./MACLAREN, D.: op. cit. 47, pp. 300ff; PERCY, A. G.: op. cit. 94, pp. 160ff; DWYER, J. A. (ed.): op. cit. 54, pp. 832ff; GUERRY, E.: op. cit. 31, p. 82; HIMES, K. R.: op. cit. 3, p. 158; CHARLES, R.: op. cit. 99, p. 68; DIRKSON, C.: op. cit. 58, pp. 209ff and COULTER, M. L./KRASON, S. M./MYERS, R. S./VARACALLI, J. A.: op. cit. 101, pp. 878ff.

133 Fore more detail on this issue see for example HÖFFNER, J.: op. cit. 29, pp. 199ff.

134 The way to achieve such a goal could be the connection of work with owning of capital and the establishment of a number of intermediary organizations focusing on economic, social and cultural issues. These organizations should naturally enjoy real autonomy in relation to public power and pursue their own goals aimed at the Common Good. Cf. Compendium of the Social Doctrine of the Church 281.

135 Cf. Gaudium et spes 27.

goal of all mankind (*salus animarum*).[136] This conclusion is confirmed even by the scriptures of the Old Testament, which take wealth to be a form of good and blessing, but then put forward superior kinds of good such as peace of mind, justice, reputation, health and especially love and wisdom.[137] Therefore, when the majority of scholars state that within the context of traditional doctrine of the Church it is a legitimate and necessary task of the state to explain the inner character and limits of the use of private property, this implies that it is in fact **a moral issue** which needs to be emphasized, and which should be reflected even in the norms of state rules.[138] After all, no human law is able to guarantee the personal dignity and real freedom of human beings as surely as the Gospel of Christ entrusted to the Church.

Súhrn

Pojem súkromného vlastníctva v sociálnej náuke Katolíckej cirkvi

Súkromné vlastníctvo patrí medzi historicky často diskutované inštitúty, a to nielen na pozadí rozvíjania politicko-právnych úvah. Koncepčné poňatie tohto práva bolo nevyhnutné proklamovať aj Magistériom Katolíckej cirkvi, ktoré ho akceptovalo, s istými modifikáciami, v prirodzenoprávnom rozmere vyjadrenom v základných rysoch ešte rímskymi právnikmi. Tradičné rímskoprávne úvahy tak boli doplnené o idey nositeľov najvyššej učiteľskej cirkevnej moci, za prísneho zohľadnenia premís prirodzeného práva a prameňov Zjavenia. Na tomto pozadí bol síce, v súlade s úvahami právnych romanistov, zásadne akceptovaný princíp súkromného vlastníctva, avšak popri ňom bola zároveň do popredia postavená zásada všeobecného určenia všetkých statkov, ktorá umožňuje z prvého princípu viaceré výnimky a popiera charakter tohto práva ako pôsobiaceho *erga omnes*. Hlavným cieľom článku je analýza inštitútu súkromného vlastníctva v sociálnej náuke Cirkvi a poukázanie na rímskoprávne i prirodzenoprávne východiská determinujúce jeho základné koncepcie.

[136] Cf. Apostolicam actuositatem 7. In AAS 59 (1966), pp. 837–864.

[137] Cf. 1 Kgs 3,11ff; Tb 12,8; Jb 28,15–19; Prv 2,1–5; 3,15; 8,11; 15,16ff; 16,8; 22,1; Sg 8,7; Wis 7,8ff and Sir 30, 14–16.

[138] Cf. ROUSSEAU, R. W.: op. cit. 97, 5, 13 and 48.

Peter Vyšný

The Valladolid Debate (1550–1551): An Overview of its Historical Background and Intellectual Content

Abstract: The Valladolid debate was the first official disputation in European history to examine seriously and thoroughly the rights and treatment of a colonized people (i.e. the Indians of the Caribbean islands and American continent) by the colonizers (i.e. the Spaniards). Held in the Spanish city of Valladolid, it was a moral, theological and juridical debate about the Spanish conquest and colonization of the New World and the main problems related to this historical process, such as the use of military power by the Spaniards to subjugate the Indians, the methods of converting them to Catholicism and Christian life style, or the mode of co-existence of the Spanish settlers and the Indians. The article briefly deals with the historical background and the intellectual content of the Valladolid debate. The intellectual content of the debate is presented as a short systematic overview of the opposing opinions of the debate's participants, Bartolomé de Las Casas and Juan Ginés de Sepúlveda.

Key words: New World – Indians – Spaniards – conquest – legitimacy – Valladolid debate – Las Casas – Sepúlveda

Introduction

Historians and legal historians use the term "the Valladolid debate" to designate a special *junta* or a formal session in the manner of a *quasi* jury trial, convoked by the Spanish king and Holy Roman Emperor Charles V to discuss and resolve certain key issues concerning the Spanish conquest and colonization of the New World, that is the Caribbean Islands and the Americas. The debate was the first official disputation in European history to examine seriously and thoroughly the rights and treatment of a colonized people (i.e. the Indians of the Caribbean islands and American continent) by the colonizers (i.e. the Spaniards). Held in the building of Colegio de San Gregorio, an academic institution of the Dominican Order located in the Spanish city of Valladolid, it was a moral, theological and juridical debate about the Spanish conquest and colonization of the New World and the main problems related to this very complex historical process, such as the use of military power by the Spaniards to subjugate the Indians (Could the Spanish conquest of the New World be considered a guerra justa, i.e. a just war?), the methods of converting the Indians to Catholicism and Christian life style (Could the Spaniards compel the Indians to become Catholics and live as Catholics by force?), or the mode of co-existence of the Spanish settlers and the Indians (Could the Spaniards, for example, force the Indians to work for Spanish settlers' benefit?).

The debate consisted of presentation and defence of two major opposing views on the debate's topics. The first view was that of Dominican friar and Bishop of Chiapas Bartolomé de Las Casas (1484–1566), who argued, *inter alia*, in favour of personal freedom, freedom of belief, unlimited property rights and self-government of the Indians. He also refused to accept that the Spanish conquering of the New World could be deemed a just war. The second view was that of humanist scholar Juan Ginés de Sepúlveda (1489–1573), who argued, *inter alia*, that Indians were "uncivilized barbarians" and therefore according to the Aristotelian theory of natural slavery, "natural slaves" of the highly-civilized Spaniards. Although both sides claimed to have won the disputation, there is no clear record supporting either interpretation.

The aim of this article is to summarize and analyze briefly Las Casas' and Sepúlveda's views and arguments related to the issues discussed in the Valladolid debate. As readers in central Europe may lack systematic knowledge of the somewhat "exotic" topic of this article, I consider it useful to describe, at least in short, the general historical background of the Spanish conquest and colonization of the New World, and especially of the Valladolid debate, before starting the investigation of the intellectual content of the debate itself. The Valladolid debate, be it in terms of its historical background or its intellectual content, is such a complex and multidimensional issue that it may be examined here only to a rather modest extent.

1 Historical background of the Spanish conquest and colonization of the New World, and the Valladolid debate

The successive Spanish conquest of the New World at the beginning of the Modern Era, that is the process of Spanish military occupation and annexation of many Caribbean islands and vast central and southern parts of the American continent, which started soon after the discovery of the West Indies by Christopher Columbus on 12th October 1492, and finished in the late 16th century, is an extremely important turning point in both general and legal histories. Columbus' opening the way to Central America is traditionally considered to be the divide between the Middle Ages and the Modern Era. The subsequent expansion overseas by Spain and several other European countries and the building of their colonial empires led to the growth of colonialism as a new complex global historical phenomenon with serious social, economic, political, as well as cultural consequences for almost the entire modern world. Besides this, colonialism so to speak "entangled" European social, economic, political and cultural developments with those of the colonized non-European territories.

Geographical discoveries and colonial expansion overseas induced Spaniards and other Europeans to transform their traditional world views based on knowledge originating from Antiquity and the Middle Ages, fundamentally affected by Christian doctrines and considerably limited due to ignorance of most non-European territories and cultures. In contrast to Europeans living in earlier periods, those of the early Modern Era were aware of the fact that the Earth was a sphere and much larger than anyone in Europe would have thought prior to the discovery of the New World. They had also found out that a great plurality of different cultures existed in the world, and began to build up a new European identity comparing European with non-European societies, whereby the distinctive features of European society and the absence or underdevelopment of these features in non-European societies were mostly interpreted by Europeans as a clear proof of the worldwide uniqueness, perfection and "greatness" of European civilization. In other words, Europeans viewed the early modern as well as modern Europe as the most evolved civilization of the world, be it in terms of technology, economics, way of life, political system, law, culture or morality and religion. From such a perception of Europe there was only a single step to the strong contemporary conviction of many Europeans that Europe was superior to all non-European societies and in all respects "much 'better'" than these societies were, and therefore Europe could, or even should "rule the whole world", being the only world civilization with the material and intellectual capacities to perform such a big task successfully. From the European point of view, European "rule over the whole world" could only have positive effects for non-Europeans dominated by Europeans, because it would introduce them to

"the only civilized, that is correct way of life", the European and Christian one. The prevailing image of non-Europeans in Europe at that time was namely negative: non-Europeans were often portrayed as "uncivilized", "barbarian", "wild", "primitive", "backward", pagan and very sinful people, and in some cases even as kinds of non-human beings.[1]

Even if colonialism and the complex ideologies that served to legitimize it[2] have existed during the whole Modern Era, and the extinction of the last colonial empires has taken place even since World War II, (legal) history knows a series of attempts to explore in depth the legitimacy of colonial expansion, starting with those undertaken in Spain during the 16th century, that is at the very beginning of colonialism. Spain was the only European colonial state to examine so early and furthermore seriously and thoroughly the legitimacy, or using the language of the period, the justice of its military expansion into the New World and its subsequent rule over indigenous Caribbean and American people, i.e. the Indians (*indios*).[3] These Spanish attempts found their expression in a dynamic discourse of which the protagonists were the Spanish (Castilian) Crown, high royal and Church dignitaries, as well as ordinary officials, priests and missionaries working in Spain or in the Indies (*Indias*), as the Spaniards called their overseas territories, and the academicians or the theologians and jurists mainly from the University of Salamanca. The discourse was produced by, *inter alia*, discussions supervised by the Crown, political decisions and legislative activities of the Crown related to Spanish settlers in the Indies and the Indians, the Church defending its interests in the Indies (besides the Indians' conversion to Catholicism, the Church had specific political and economic interests there) and academic works analyzing the legitimacy of the Spanish colonial expansion and rule over the Indies.

Within the Spanish discourse related to the New World, the crucial question whether the Spanish conquest of the New World was or was not legitimate (just), has never been resolved definitively. Nevertheless, the discourse as such helped to some extent to moderate the mistreatment of the Indians and the excessive exploitation of their work and resources by the Spaniards, as well as to improve the standard of living of many Indians. In addition, Spanish legislation concerning the Indies, the so-called "Laws of the Indies" (*Leyes de Indias*, *derecho indiano*), was "Indian-friendly". The Indians were granted various rights and privileges, and a system of administrative and judicial protection of the Indians against mistreatment by the Spanish colonists was created.

There was yet another importance of the Spanish discourse related to the conquest and colonization of the New World. Systematic examination of specific problems of the conquest and colonization resulted in development of complex theories about human (individual) freedoms or fundamental rights, as well as duties, in both public and private spheres, principles of just (legitimate) rule, the co-existence of Christians and non-Christians, the necessity of peaceful conversions to Christianity, and the concepts of a just war, natural

1 On this topic see, for example, PAGDEN, A.: *La caída del hombre natural. El indio americano y los orígenes de la etnología comparativa*. Madrid : Alianza Editorial, 1988.

2 On colonialism in general see, for example, OSTERHAMMEL, J./JANSEN, J. C.: *Kolonialismus. Geschichte, Formen und Folgen*. München : C. H. Beck, 2009. On ideologies related to colonialism see PAGDEN, A.: *Lords of all the World. Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800*. New Haven : Yale University Press, 1995.

3 On this topic see, for example, HANKE, L.: *The Spanish Struggle for Justice in the Conquest of America*. Boston : Little, Brown and Company, 1949; PEREÑA, L.: *La idea de justicia en la conquista de América*. Madrid : MAPFRE, 1992 and PÉREZ LUÑO, A.-E.: *La polémica sobre el Nuevo Mundo. Los clásicos españoles de la Filosofía del Derecho*. Madrid : Editorial Trotta, 1995.

law, the law of nations (*ius gentium*), or international law (*ius inter gentes*), which represent landmarks in the history of political and legal philosophy and have some topicality even today.

The Valladolid debate took place in the years 1550 to 1551, at a time when Spanish colonization of the New World has already been well under way. Conquering of various areas of the New World successfully continued, and the number of Spaniards established in the New World was increasing. Furthermore both main territorial-administrative units of the Spanish Indies, the Viceroyalty of New Spain (*Virreinato de Nueva España*), whose capital was Ciudad de México, and the Viceroyalty of Peru (*Virreinato del Perú*), whose capital was Lima, then already existed.

From the very beginning of the process of building the Spanish colonial empire in the Caribbean islands and the Americas, the real position of the Indians in relation to the Spanish colonizers was constantly problematic and unfavourable. The majority of Indians were subjected to oppression and violence in many forms. For example, some Indians defeated in wars which the Spaniards waged against them were enslaved in favour of the colonizers. Other Indians were forced to work lifelong for the benefit of the Spanish *encomenderos*, and so lived almost as slaves. An *encomendero* was a Spaniard settled in the New World who was granted an *encomienda*, that is a right to exploit the work of a local group of Indians. In exchange for this, he was obliged to ensure that the Indians of his *encomienda* would live and behave as good Catholics and in a "civilized manner". It is probably not necessary to add that the *encomenderos* soon began to mistreat the Indians and abuse their capacity for work.[4]

On the other hand, the Castilian (Spanish) Crown had been constantly attempting to improve the position of the Indians, to protect them against mistreatment by Spaniards and guarantee them the legal status of free subjects of the Crown with rights and duties largely comparable with those of its European subjects. The incentive for this only partially successful paternalistic policy of the Crown was pragmatic: in the 16th century Indies, the Crown had to struggle for direct and efficient control of the Indians with Spanish settlers and *encomenderos* alike, as well as with the Church.[5] By providing the Indians with that legal status, the Crown could gain and to some extent really gained such control. However, on closer examination the legal status conceded by the Crown to the Indians was of a specific nature. Apart from some Indian elites, the masses of ordinary Indians were given a legal status resembling that of the so-called "*personae miserabiles*" (miserable persons). According to the widespread, even if not generally accepted, contemporary view, the Indians (or at least many of them) were people with limited physical and mental capabilities and therefore they reportedly needed somebody to guide them and help them, as well as to introduce them to the Christian faith and "the only really civilized" way of life, the Christian and European one. This resulted in a legal status for the Indians with two opposite, but complementary dimensions: on the one hand, the Indians lacked full legal capacity and so were under the control of a kind of public tutor, the Crown; on the other hand, as "miserable people" (from the Spanish point of view) the Indians were given a series of privileges to make their protection more efficient.[6]

Prior to the Valladolid debate, there were in principle two major landmarks in the legal

4 On the *encomienda* system see ZAVALA, S.: *La encomienda indiana*. México : Porrúa, 1992.

5 See, for example, CUNILL, C.: El indio miserable: nacimiento de la teoría legal en la América colonial en el siglo XVI. In *Cuadernos Intercambio*. Vol. 8, Núm. 9, 2011, pp. 229–248.

6 See, for example, CUNILL, C.: op. cit. 5 and DOUGNAC RODRÍGUEZ, A.: *Manual de historia del derecho indiano*. Segunda edición. México : McGraw-Hill, 1998, pp. 228ff.

history of the Crown's efforts to improve the position of the Indians in the emergent colonial society of the Spanish Indies. The first landmark consisted in the so-called "Laws of Burgos" (*Ordenanzas para el Tratamiento de los Indios*) issued in the city of Burgos on 27th December 1512 and again on 23rd January 1513. These "Laws" gave a series of rights to Caribbean Indians, men and women, and children as well, living under the *encomienda* regime. They improved the Indians' standard of living, limited the work they owed to their *encomenderos*, banned the mistreatment of the Indians by their *encomenderos* and established a mechanism of administrative control of the *encomiendas* and *encomenderos*' conduct.[7] Nevertheless, the possibility to apply the Laws in practice consistently was very restricted, as for example Las Casas directly observed on the Caribbean island *La Española*[8] (today the territories of Haiti and Dominican Republic).

The second landmark consisted in the so-called "New Laws" (*Leyes y ordenanzas nuevamente hechas por S. M. para la gobernación de la Indias y buen tratamiento y conservación de los Indios*) issued by Charles V in Barcelona on 20th November 1542. The incentive, even if not the only one, for issuing these Laws was the continuing mistreatment of the Indians by Spaniards and especially the abuse of the Indians' work by *encomenderos* for their own benefit. The New Laws, *inter alia*, decreed the personal liberty (or rather prohibited enslavement) and the status of the Indians as direct subjects of the Crown, reinforced the protection of the Indians in certain respects, and established a new legal regime for the *encomienda* system which was meant to ensure the early disappearance of this system in the Spanish Indies. No surprise then that many Spaniards protested intensively against the New Laws. Their protest was successful moreover, as on 20th October 1545 they achieved the derogation of those parts of the New Laws which were supposed to enable the extinction of the *encomiendas*.[9]

Besides the above-mentioned landmarks, there was also an important intervention by the Church in the contemporary attempts to define the Indians' legal status. On 2nd June 1537 Pope Paul III issued the bull *Sublimis Deus*, also known as *Veritas ipsa*, in which he ordered that the Indians be considered free persons and unlimited owners (*domini*) of their things, as well as rational people with full capacity to take on Catholicism and live their lives as good Catholics. The Crown accepted the bull because it confirmed that the plan to convert the Indians to Catholicism and make them follow the Catholic and European way of life, that is to make the Indians largely comparable with the Crown's European subjects directly controlled by the Crown, was possible. On the other hand, the Crown was left out by the Church from the process of the preparation of the bull, which aroused discontent of the Crown. The Crown declared that all papal legal acts concerning the Indies and Indians issued henceforward were not valid until the Crown approved them.[10]

In the first half of the 16th century Spain's conquering and colonization of the New World inspired persistent debate regarding the predominately military, that is violent character of Spain's acquisition of sovereignty over various territories in the New World, compulsory Christianization of the Indians, the political and legal status of the Indians, as

7 For more detail on this issue see VYŠNÝ, P.: *Historicko-právne súvislosti dobytia Nového sveta Španielmi*. Trnava : Typi Universitatis Tyrnaviensis, 2015, pp. 167–172.

8 LAS CASAS, B. de.: *Historia de las Indias*, *III*, pp. 57–68 [2015–10–30]. Available at: http://bibliotecayacucho.gob.ve/fba/index.php?id=97&backPID=103&begin_at=96&tt_products=111.

9 For more detail on this issue see VYŠNÝ, P.: op. cit. 7, pp. 175–177.

10 SEED, P.: 'Are These Not Also Men?': The Indians' Humanity and Capacity for Spanish civilization. In *Journal of Latin American Studies*. Vol. 25, Issue 3, 1993, pp. 629–652.

well as the treatment of the Indians by Spaniards in general. It was an intellectual debate, but it influenced considerably the colonial policies of Spain. A group of participants in this debate, for example the Dominican friar Francisco de Vitoria (1483/1486–1546),[11] questioned the reasons used to support the right of Spain to conquer Indian territories, e.g. the conviction that conquest was a kind of just punishment of the Indians for their paganism and vitiation, and thus a just war. They also demanded that the Indians be treated humanely as free persons (that is, not as if they were slaves) and equal to the Spaniards. Another group of the debate's participants defended the violent character of the conquest as a series of just wars waged against Indians for several reasons, but especially because they were frequently reluctant to accept Spanish sovereignty or, using the contemporary language, the *dominium* over the Indies. Pope Alexander VI as "*dominus totius orbis*" gave such a *dominium* to the Castilian Crown in 1493 on condition that the Indians be Christianized and inducted into the Western/Christian way of life. After 1513 any Spanish military action against the Indians had to be preceded by the Spaniards' reading of the document *Requerimiento* to the Indians. The document informed the Indians that the Pope as the "lord of the whole world" authorized the Crown to govern the Indies and therefore the Indians should accept the Spanish rule. If they refused to do so, the Spaniards would subjugate them by means of a "just war".[12] The second group of the debate's participants also encouraged the presentation of the Indians as "uncivilized people" who lacked the fully-developed essential attributes of human beings (e.g. full rationality), and advocated the *encomienda* system and thus also the *quasi* slave status of many Indians. Notwithstanding the sometimes very different opinions of the debate's participants, it should be emphasised that none of them demanded that the Crown give up its rule over the Indies and the Indians, or that the Spanish colonists return to Spain.

Bartolomé de Las Casas, a prominent participant in the debate, worked for years to oppose forced conversions and to expose mistreatment of the Indians in the *encomiendas*. His efforts influenced the passage of the Laws of Burgos (1512) and the papal bull *Sublimis Deus* (1537). More significantly, Las Casas was instrumental in the passage of the New Laws (1542).

Moved by Las Casas and others, on 16th April 1550 Charles V ordered further military expansion in the Indies to cease until a correct (just) method of further conquests was determined.[13] For this purpose the king assembled in Valladolid a *junta* (jury) of eminent personalities who were "…to inquire into and develop the forms and laws to preach and promote our Holy Catholic Faith in the New World that God has discovered to us",[14] and "...to examine how those peoples may be subjected to his majesty the emperor, our lord,

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11 See VITORIA, F. de: *Relecciones del estado, de los indios, y del derecho de la guerra*. México : Editorial Porrúa, 1985, pp. 22ff.

12 For more detail on this issue see VYŠNÝ, P.: op. cit. 7, pp. 78–81.

13 HANKE, L.: op. cit. 3, p. 117.

14 "*... inquerir e constituir la forma y leyes cómo nuestra sancta fé cathólica se pueda predicar e promulgar en aquel nuevo orbe que Díos nos ha decubierto*". LAS CASAS, B. de: *Aqui se contiene una disputa, o controversia: entre el Obispo don fray Bartholome de las Casas, o Casaus, obispo que fue de la ciudad Real de Chiapa, que es en las Indias, parte de la nueva España, y el doctor Gines de Sepulveda Coronista del Emperador nuestro señor: sobre que el doctor contendia: que las conquistas de las Indias contra los Indios eran licitas: y el obispo por el contrario defendio y affirmo aber sido y ser impossible no serlo: tiranicas, injustas y iniquas. La qual question se ventilo y disputo en presencia de muchos letrados theologos y juristas en una congregacion que mando su magestad juntar el año de mil y quinientos y cincuenta en la villa de Valladolid*. [30–10–2015] Available at: http://digicoll.library.wisc.edu/cgibin/IbrAmerTxt/IbrAmerTxtidx?type=HTML&rgn=div1&byte=1401467&pview=hide.

without damage of his royal conscience, according to the bull of Alexander",[15] i.e. according to *inter alia* the first bull *Inter caetera* issued by Pope Alexander VI on 3rd May 1493, which conceded the New World to the Spanish Crown on condition that it organized the Christianization of the Indians. This was initially therefore a deliberation about just methods of evangelization and the exercise of imperial sovereignty in the Indies. However, the debate went beyond its initial purpose and became a discussion of "whether it is lawful for His Majesty to make war on those Indians before preaching the faith to them, in order to subject them to his Empire, so that once subjugated, they can be more effectively and easily instructed and enlightened by the evangelical doctrine, becoming aware of their errors as well as of the Christian truth".[16]

The Valladolid debate was not about the *encomienda* system, the Spanish empire, or the nature of the Indians, although these topics were addressed in the course of it. It was fundamentally a dispute about the justice or injustice of war as a way of fulfilling the evangelical mission dictated by pontifical bulls (i.e. the two bulls *Inter caetera* and the bull *Eximiae devotionis*, all issued in 1493 by Pope Alexander VI) and of exercising imperial sovereignty. The debate was symptomatic of the new Spanish imperialism that emerged in the course of the 16th century, replacing its military conquering *telos* with an evangelical *telos*: the Spanish empire fashioned itself not as a conquering power but as a loving father figure. But the debate was also, in a way, the epilogue of a long controversy concerning imperial reason (*ratio imperii*) and Spanish sovereignty over the New World, a controversy that could be traced back to the time of Columbus.[17]

The *junta* which was to deliberate and decide the above outlined issues was formed by Dominicans and theologians Domingo de Soto, Melchor Cano and Bartolomé Carranza de Miranda, Franciscan Bernardino de Arévalo and ten members of either the Council of the Indies or the Council of Castile (these councils belonged among the central governmental institutions of Spain).[18] It was meant to carefully hear the different opinions about the debate's issues of two contemporary prominent personalities, Las Casas and Sepúlveda, who attended the *junta* (even if not at the same time) and presented and defended their diverging views on the issues discussed at the *junta*.

Las Casas' view found some support from the monarchy, which wanted to control the power of the *encomenderos*, and within the Catholic Church. In contrast, Sepúlveda's arguments supported the interests of the colonists and *encomenderos* who benefited from the system existing in the Indies.

The confrontation between Las Casas and Sepúlveda had started even before the *junta* at Valladolid began. Las Casas secured prohibition of the publishing of Sepúlveda's work "*Democrates alter* (*secundus*) *sive de iustis belli causis apud Indios*" (1545) which contained opinions on colonial conquest and the Indians that were opposite to those of Las Casas. Sepúlveda later (in 1550) published an apologetical summary of his work ("*Apologia Ioannis*

[15] "*... examinar qué forma puede haber cómo quedasen aquellas gentes subjectas a la majestad del Emperador nuestro señor, sin lesion de su real conciencia, conforme a la bulla de Alejandro*". Ibid.

[16] "*si es lícito a Su Magestad hacer Guerra a aquellos indios antes que se les predique la fe, para subjectallos a su Imperio, y que después de subjectados puedan mas fácil y cómodamente ser enseñados y alumbrados por la doctrina evangélica del conoscimiento de sus errores y de la verdad Cristiana*". Ibid.

[17] JÁUREGUI, C. A./RESTREPO, L. F.: Imperial Reason, War Theory, and Human Rights in Las Casas's Apología and the Valladolid Debate. In ARIAS, S./MEREDIZ, M. E. (eds.): *Approaches to Teaching the Writings of Bartolomé de Las Casas*. New York : The Modern Language Association of America, 2008, p. 108.

[18] HANKE, L.: op. cit. 3, p. 117–118.

Genesii Sepulvedae pro Libro de Iustis Belli Causis...") in Rome, but Las Casas gained a royal ban on promotion of this summary in Spanish territory.[19]

The *junta* of Valladolid had two sessions. The first lasted from mid-August to mid-September of 1550.[20] It started with Sepúlveda defending his work "*Democrates alter*" against the objections raised against it by Las Casas and others, which prevented it from being published in Spain. Las Casas then presented his arguments to Sepúlveda, which Sepúlveda commented on and then spoke to Las Casas again. Given the breadth of the material presented by both sides, the debate was suspended and Soto was entrusted with writing a summary of the issues discussed so far. The *junta* continued from mid-April to mid-May of 1551. The issues dealt with, however, remained unresolved, meaning that neither Las Casas nor Sepúlveda was the clear winner of the debate, even if both claimed to be.[21]

The Valladolid debate cemented Las Casas' position as the leading defender of the Indians in the Spanish Empire, and further weakened the *encomienda* system. However, it did not substantially alter Spanish treatment of the Indians.

2 The intellectual content of the Valladolid debate

The primary sources informing us about the intellectual content of the Valladolid debate are Sepúlveda's work "*Democrates alter*",[22] Las Casas' work "*Apologia*",[23] written in the late 1540s, and Soto's summary of the debate,[24] issued on behalf of Las Casas in 1552.

The Valladolid debate developed around Sepúlveda's four complex and independent, even if partially overlapping theses related to the Spanish conquest of the New World and the analysis, questioning and rebuttal of these theses by Las Casas. Both sides of the debate, that is, Sepúlveda and Las Casas, offered to the members of the *junta* an extensive overview of their opinions and arguments regarding the legitimacy (justice) of the conquest, as well as the nature and political and legal status of the Indians and Indian societies respectively.

According to Soto's summary, Sepúlveda claimed before the *junta* that the Spanish conquering wars against the Indians were lawful and just for the following reasons: first, because of the gravity of the sins the Indians had committed, especially their idolatries and their sins against nature; second, on account of the rudeness of their nature, which obliged them to serve persons having a more refined nature, such as the Spaniards; third, in order to spread the Christian faith (Catholicism), a task more easily accomplished by the subjugation of the Indians; and fourth, to protect the innocents among the Indians themselves from unjust injuries and (human) sacrifices.[25]

In other words, Sepúlveda was convinced that there were several reasons for waging wars against the Indians, which were so serious that one could cast no doubt on the justice of such wars. Sepúlveda was aware of the fact that any war could easily degenerate into the

[19] For more detail on this issue see VYŠNÝ, P.: op. cit. 7, p. 148.

[20] HANKE, L.: op. cit. 3, p. 118.

[21] HANKE, L.: op. cit. 3, pp. 118–119.

[22] SEPÚLVEDA, J. G. de: *Tratado sobre las justas causas de la guerra contra los indios*. México : Fondo de Cultura Económica, 1996.

[23] LAS CASAS, B. de: *Apología o declaración y defensa universal de los derechos del hombre y de los pueblos*. Salamanca : Junta de Castilla y León, Consejería de Educación y Cultura, 2000.

[24] LAS CASAS, B. de: *Aqui se contiene una disputa, o controversia*..., op. cit. 14.

[25] Ibid., pp. 4–4 verso.

abuse of military power for plundering and looting in the enemy's territory, slaughter or maltreatment of enemy soldiers as well as non-soldiers, and the like, and that the Spanish conquest of the New World was accompanied by such negative phenomena, but he did not consider the Indians' suffering caused by Spaniards to be completely groundless or unjust, for he believed that the Indians deserved severe punishment for their extremely vitiated life style, and moreover that such punishment might "emend" them.[26] On the other hand, Sepúlveda stated that any war (including the Spanish conquering of the New World) could be considered just not only when a just reason (*casus belli*) for it existed, but also when it was declared by a legitimate authority (a sovereign ruler),[27] waged with a good intention (waging a war in order to gain the enemy's riches was not a good intention for Sepúlveda)[28], and conducted in a correct manner such that, for example, no excessive injuries and damage were caused to the enemy.[29]

In the following subchapters Sepúlveda's theses and Las Casas' responses to them are briefly presented and examined.

2. 1 The first thesis

In his first thesis Sepúlveda ascertained that the Indians were great sinners, especially idolaters, and committed acts (crimes) which were contrary to natural law, which proved that they were of barbarian nature and that the Spaniards as good Christians and rational and civilized people were entitled to punish them for their behaviour, that is to wage a just war against them.

Broadly speaking, within the Christian tradition the barbarians were identified with pagans,[30] however for Sepúlveda, the Spanish wars waged against the Indians (that is, the Spanish successive conquest of the New World) were not solely justified by the Indians' paganism, but rather on the grounds of specific elements of the Indians' life styles related to their pagan religions and beliefs, which from Sepúlveda's point of view were irrational, primitive, bestial, violent, contrary to natural law, and therefore sinful: "Unbelief is not the only reason for this most just war against the barbarians [Indians], but their shameless immorality, mass human sacrifices, extreme injuries they have caused to many innocent people, horrible cannibalistic feasts, and impious cults of their idols".[31]

Sepúlveda deduced the existence of the Spaniards' right to punish the Indians as extremely vitiated people from, *inter alia*, some examples of extremely corrupt people in Holy Scripture (e.g. the inhabitants of Sodom and Gomorrah), who were exterminated by God or by people whom God ordered to exterminate them.[32] As Sepúlveda saw it, the

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26 SEPÚLVEDA, J. G. de: op. cit. 22, p. 97.

27 Ibid., pp. 69–71.

28 Ibid., p. 71.

29 Ibid., p. 73.

30 KŘÍŽOVÁ, M.: The Strength and Sinews of this Western World. African slavery, American colonies and the effort for reform of European Society in the Early Modern Era. In *Ibero-Americana Pragensia. Supplementum*. 21, 2007. Prague : The Karolinum Press, 2008, p. 60.

31 "*Non igitur sola infidelitas, sed nefariae libidines, prodigiosa humanis victimis facta sacrificia, extremae plurimorum innocentium injuriae, horribiles humanorum corporum epulae, impius idolorum cultus causas belli faciunt in hos barbaros justissimas*". SEPÚLVEDA, J. G. de: op. cit. 22, pp. 132–133.

32 Ibid., pp. 113–115. See also LAS CASAS, B. de: *Aqui se contiene una disputa, o controversia*..., op. cit. 14, pp. 4 verso–5.

Spanish conquest of Indian countries had its prototypes in certain declarations and deeds of God, as well as of some Biblical protagonists, and these led him to consider the conquest as the realization of God's will.

Las Casas responded to Sepúlveda's first thesis by arguing that even if the Indians were great sinners and committed crimes against natural law, it was not lawful for the Spaniards to punish them, since the Spaniards had no jurisdiction over them. According to Las Casas, a Christian monarch had no justification to punish unbelievers (non-Christians), even if these were his subjects as Jews and Muslims were in the case of the Spanish king, for the reason that their life styles differed strikingly from Christian ways, and all the less did he have the right to punish the Indians, who prior to the Spanish conquest of the New World were not even under the jurisdiction of the Spanish king. In addition, the Church could not concede such a right to the Spanish king, for as Las Casas asserted, the Church had no temporal power to punish sinful pagans using military force. He was convinced that the Church should introduce the pagans to Christendom and the Christian way of life by peaceful means. The Mother Church should look on the pagans with love and mercy and consider them as fellow men of the Christians; she should forgive the pagans their sins and preach the Catholic faith to them serenely; and she should patiently wait until the pagans voluntarily decided to become Catholics.[33]

2. 2 The second thesis

According to Sepúlveda, the Indians were uncivilized barbarians and therefore so-called "natural slaves" in the Aristotelian sense, whereupon they could be militarily subjugated by the civilized Spaniards, and that subjugation would be the just result of a just war waged by fully rational and highly civilized people against irrational and primitive people "naturally" predestined to live under their guidance and rule.

Sepúlveda depicted the Indians as uncivilized barbarians principally in his work "*Democrates alter*".[34] For Sepúlveda the Indians were barbarians and thus inferior in terms of technology, life style, values, moral code, religion and system of government as compared to the Spaniards (Europeans, Christians) with their highly-developed civilization. Moreover, he dismissed the view of the Indians as normal human beings (*humani*) and classified them as kinds of so-called "*similitudines hominis*", that is as somewhat "incomplete humans" or even as non-humans resembling humans only to a very limited extent. This classification found its expression in Sepúlveda's negative and oversimplified descriptions of the Indians at various places in the "*Democrates alter*", as well as in the disdainful term *homunculi* (little men) used by Sepúlveda to denominate the Indians. With this classification Sepúlveda set the stage for his thesis that the Indians were the natural slaves whom Spaniards as members of a developed civilization superior to Indian societies in every respect could justly subjugate to their rule, which could moreover be preceded by a war justly waged by Spaniards against the Indians.

Sepúlveda considered the intellectual capacity (rationality) of the Indians and the level of the Indians' material and immaterial culture to be very low. Even if he accepted that some

[33] HANKE, L.: *Uno es todo el género humano*. México: Gobierno del Estado de Chiapas, 1974, pp. 99–101.

[34] SEPÚLVEDA, J. G. de: op. cit. 22, passim. See also FERNANDEZ-SANTAMARIA, J. A.: Juan Gines de Sepulveda on the Nature of the American Indians. In *The Americas*. Vol. 31, No. 4, 1975, pp. 434–451.

Indians possessed capabilities which, for example, enabled them to dedicate themselves to crafts or arts, he asserted that this did not mean the Indians were not barbarians or natural slaves, because some animals such as bees or spiders were able to do things no man could imitate (to produce honey or weave webs). Nor could the Indians' houses, villages and in some cases even towns and cities, as well as the Indians' less or more rational systems of government, according to Sepúlveda, controvert the thesis that the Indians were barbarians and natural slaves, because they merely proved that the Indians were not completely irrational beings such as bears or monkeys. Further, Sepúlveda claimed that the Indians should gladly accept Spanish rule as it was the only way to achieve progressive development of their societies towards "the only true" civilization, the European and Christian one.[35]

As we have seen, Sepúlveda did not view paganism alone, but also the striking cultural difference (a broader term than paganism) of the Indians as sufficient reason to subjugate them to Spanish rule using military means. For this war to be just, it should pursue the objective of creation of conditions for general progressive development ("civilizing") and Christianization of Indian societies managed by the Spaniards. For this reason, according to Sepúlveda looting, excessive exploitation of the enemy's (i.e. the Indians') human and material resources, or reckless conduct of military actions and the like, were not allowed in a just war, although they were known for being frequent during the Spanish conquest and colonization of the New World.[36]

The Indians were barbarians and should become the slaves of the civilized Spaniards, because this corresponded to the Aristotelian natural order of things wherein barbarians as irrational and imperfect beings should be subordinated to the rational and perfect people who form a civilization. If barbarians refused to subject themselves to the rule of a civilized people voluntarily, they could be subdued to such rule using military force, that is by a just war.[37]

Although Sepúlveda considered subjugation of the Indians to Spanish rule to be a result of the naturally correct course of history, he never asserted that this subjugation should last forever, or that it could not be moderated as time passed. Upon successful completion of the process of Christianizing and "civilizing" the Indians, the Spanish rule over them could be removed or at least be alleviated in some way.[38] Even if Sepúlveda designated the status of the Indians under Spanish rule with the Latin term *servi* (sg. *servus*), he probably did not use this term in its original (ancient Roman) sense of permanently enslaved people lacking any rights, who could rarely improve their social position (gain personal freedom and some fundamental rights), but rather in the feudal sense of the monarch's vassals and subjects, or servants, and not completely unfree and devoid of rights.[39] This thesis of the modern-day researcher Horst Pietschmann seems to be supported by Sepúlveda himself. He was aware of certain vagueness in the term *servus* and distinguished between the juridical notion of a slave and another which he called "philosophical", and which he applied to the Indians.[40] From the juridical point of view, a slave was somebody who became such according to law,

35 Ibid., pp. 105ff.

36 Ibid. pp. 71–73.

37 See ARISTOTELES: *Politica* I, 4,5,6,7.

38 SEPÚLVEDA, J. G. de: op. cit. 22, p. 173.

39 PIETSCHMANN, H.: Aristotelischer Humanismus oder Inhumanität? Sepúlveda und die amerikanischen Ureinwohner. In INCIARTE, F./WALD, B. (eds.): *Menschenrechte und Entwicklung im Dialog mit Lateinamerika*. Frankfurt (Main) : Vervuert, 1992, p. 161.

40 SEPÚLVEDA, J. G. de: op. cit. 22, pp. 81ff.

that is given a legal reason for it (for example a prisoner of war). The slave was under the rigorous control (*mancipium*) of his owner, whom he was obliged to serve (to work for his benefit). This control was based on law and included the owner's right to coerce the slave using physical power, and Sepúlveda likened it to the rule of the soul (*anima*) over the passions, which were often in conflict with the soul and therefore needed to be repressed constantly. In contrast, in its "philosophical" significance, the slave status of a people was a natural result of the primitive and barbarian, and even inhuman, characteristics of their mode of thinking, physical state, life style and other elements of their form of existence. Yet the rule of rational and civilized people (Spaniards) over natural slaves (Indians) should differ from the *mancipium*: Spaniards were supposed by Sepúlveda not to treat Indians as if they were slaves *stricto sensu* (slaves in the juridical sense), but rather as a kind of domestic servants (*ministri*) who had some rights, even if they could not act individually of their free will (at least, until their "civilizing" was completed). As Sepúlveda saw it, between the Spaniards and their Indian servants would exist a kind of partnership or friendship to some extent, since both sides would be in positions which were naturally optimal for them and would share some common interests and needs resulting from their naturally emerged mode of coexistence. He likened this type of relation to that of mind (*mens*) and body [41] (the body allows mental processes to be materialized, for people to have sensations, to execute their purposes and the like).

Las Casas rebutted Sepúlveda's second thesis (the war against the Indians was legitimate because it was a natural, even if not necessarily permanent condition of the barbarians to be ruled by a civilized people) claiming that the overwhelming majority of Indians were not barbarians in the Aristotelian sense of natural slaves. According to Las Casas, there were four contemporary uses of the term "barbarian", and only one that could really be defined as a true barbarian or a natural slave: there were barbarians whose values, world views, conduct or life style were far less rational and civilized than among Christians, but they lived in societies with well-functioning political organizations and therefore were capable of governing themselves; linguistic barbarians (as in its original meaning, as non-Greek speakers); barbarians in the strict sense of the word (i.e. those incapable of governing themselves, considered by Aristotle as natural slaves), and religious barbarians (non-Christians). For Las Casas, the Indians could only be considered barbarians linguistically and religiously, neither of which justified war.[42]

2. 3 The third thesis

According to Sepúlveda, another reason why Indians should be subjugated to the Spaniards by military force might have been the fact that only after such subjugation were the efficient Christianization and "civilizing" of the Indians by the Spaniards possible.

Las Casas refused this next thesis of Sepúlveda's categorically because of his strong conviction that the Christian faith was to be received by non-Christians voluntarily and that this faith should be preached to them by peaceful means only. He argued, for example, that

41 PAGDEN, A.: op. cit. 1, pp. 163–164.

42 For more detail on Las Casas' classification and description of barbarians see LAS CASAS, B. de: *Apología*..., op. cit. 23, pp. 17ff. See also BRUNSTETTER, D. R./ZARTNER, D.: Just War against Barbarians: Revisiting the Valladolid Debates between Sepúlveda and Las Casas. In *Political Studies*. Vol. 59, Issue 3, p. 733–752 and DELGADO, M.: Bartolomé de Las Casas y las culturas amerindias. In *Anthropos*. 102, 2007, pp. 91–97.

the Indians would not respect and would even hate the Spaniards and thus would naturally be reluctant to become Christians when they could observe that the immoral and violent conduct of many Christians (Spaniards) during, as well as after the conquest of the New World completely disregarded Christian values and norms (for example the Spaniards robbed, injured or killed many Indians, and they forced them into inhuman work).[43]

Las Casas also dismissed the opinion of Sepúlveda and others that it was allowed by God to use force to spread the Christian faith and further the process of Christianization of non-Christians, based on the so-called "*compelle eos intrare*" doctrine. According to the Gospel of Luke (14,15–24), in his "Parable of the Great Banquet" Jesus requires his servant to make as many people as possible enter (*compelle eos intrare*) his house,[44] meaning that Christians are obliged to spread their faith and make still more non-Christians receive it, whereby some thought God allowed the use of force if necessary for this great purpose. But in Las Casas' opinion, non-Christians as persons with free will and even with complete freedom of thought, conscience and religion[45] should accept Christinity voluntarily and therefore Christians were not allowed to use (military) force to convert non-Christians to the Christian faith. To support his opinion, Las Casas mentions St Augustine for example, who admitted the use of force for returning heretics to the true faith, for they were once adherents of it, but not to convert pagans, who never were Christians and moreover never heard about the existence of the Christian faith and civilization and the Church.[46]

3. 4 The fourth thesis

In his last thesis Sepúlveda claimed that Indians oppressed innocent people (other Indians), as well as capturing and killing them (especially sacrificing them to other Indian gods), and that they did all this without any reasonable or just reason and moreover in a very wide range. To save and protect those innocents was for Sepúlveda and others, for example Francisco de Vitoria,[47] a duty of the Spaniards according to natural law, which could be fulfilled using military force.

By his fourth just reason of the Spanish conquest of the New World, to prevent the Indians from unjustly injuring one another, Sepúlveda advocated for the imposition, by force if necessary, of an international legal order for the benefit of all (*bonum commune totius orbis*) that superseded the sovereignty of individual countries of the world. Las Casas, in contrast, defended the sovereignty of the Indians and stated that neither Christian monarchs nor the Church had any secular jurisdiction over the Indians as non-Christians, since they were neither legally nor factually subjected to them (prior to the Spanish conquest of the Indian countries).[48]

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43 LAS CASAS, B. de: *Apología*..., op. cit. 23, pp. 285ff.

44 *God's Word. The Holy Bible*. *New International Version*. Colorado Springs : International Bible Society, 1984.

45 For more detail on this issue see VYŠNÝ, P.: op. cit. 7, p. 142. For more detail on Las Casas' conception of human freedom and rights see GSCHWEND, L./GOOD, Ch.: Die spanische Conquista und die Idee der Menschenrechte im Werk des Bartolomé de Las Casas (1484–1566). In *Zeitschrift der Savigny – Stiftung für Rechtsgeschichte – Kanonistische Abteilung*. Band 95, 2009, pp. 217–256.

46 See HANKE, L.: *Uno es todo el género humano*, op. cit. 33, pp. 108–113.

47 VITORIA, F. de: op. cit. 11, p. 69.

48 JÁUREGUI, C. A./RESTREPO, L. F.: op. cit. 17, p. 111. See also GSCHWEND, L./GOOD, Ch.: op. cit. 45, pp. 217–256 and QUIJANO, F.: Ser libres bajo el poder del rey, el republicanismo y constitucionalismo de Bartolomé de las Casas. In *Historia Mexicana*. Vol. 65, Núm. 1, 2015, pp. 7–64.

There was another argument used by Las Casas to show that the Spaniards could not intervene with military force into the internal affairs of the Indian countries, which were completely sovereign in his understanding. This argument was at odds with the then prevalent interpretation of Indian religions and especially the practices associated with them, such as human sacrifices or ritual cannibalism (the eating of some parts of sacrificed persons' bodies) as extraordinary idolatry and ample violation of natural law common to and binding all rational and civilized people, be they Christians or not,[49] and moreover as an abominable work of the devil under whose dominance, many Spaniards believed, the Indians were in the time of their paganism.[50] From this interpretation there was only a single step to a very unfavourable image of the Indians as irrational primitives, savage people resembling beasts, uncivilized barbarians and the like, but Las Casas offered another, to some extent positive interpretation of the doctrines and cults of the Indian religions, which allowed him to depict a far less negative image of the Indians, as well as to question the right of Christians (Spaniards) to protect innocent pagans (Indians) from unjust death.

Las Casas viewed the Indian religions and religious rituals as an integral part of Indian societies (cultures), for which they had considerable importance, since they facilitated the internal integration and overall functioning of these societies, and gave direction to the everyday life and behaviour of the Indians. Las Casas did not consider even the Indian cult ceremonies connected with human sacrifices to be the work of the devil or purposeless violence, because for him sacrifices, including human ones which had often been practised in earlier stages of the development of mankind as a whole, were an elementary means common to all humans around the globe of worshipping divine beings and imploring their aid and protection. Further, he ascertained that the Indian religions and religious rituals were a material demonstration of their subconscious desire to learn about and receive the only true (Christian) God, however that desire was imperfect and due to the Indians' invincible ignorance (*ignorantia invincibilis*) of this God, objectively existing prior to their subjugation and Christianization by the Spaniards, it had necessarily to be imperfect. The Spaniards therefore should not punish the Indians for this ignorance by force, but they should help them to overcome it using only peaceful means for it; that is, the Spaniards should calmly explain to the Indians the deficiencies of their religions and wrongness of their cult practices, and patiently wait until the Indians gave up their pagan religions of their free will and accept Catholicism.[51]

Conclusion

There is no known formal verdict of the Valladolid debate, but even if it did not result in any specific, immediate decision, the debate is significant for several reasons. First, it summarizes the complex theological and juridical issues that the Spanish conquest of the New World had generated up to 1550. Second, in the debate we already find the use of the new imperial language of peaceful Spanish colonization of the New World that would

[49] See, for example, VYŠNÝ, P.: op. cit. 7, p. 173.

[50] See, for example, MOTOLINÍA, T.: *Memoriales e Historia de los Indios de la Nueva España*. Madrid : Atlas, 1970, passim.

[51] See HANKE, L.: *Uno es todo el género humano*, op. cit. 33, pp. 101–108. See also PASTOR, M.: La interpretación de los pecados de la carne en la Escuela de Salamanca. In *Iberoamericana*. Vol. 5, Núm. 58, 2015, pp. 45–62.

be key in King Philip II's 1573 legal act *Ordenanzas de descubrimiento, nueva población y pacificación de las Indias* which, for example, ordered colonizers not to "conquer" but instead to "pacify" the Indians.[52] Third, the Valladolid debate transcends the 16th century Iberian context. In their exchanges, Las Casas and Sepúlveda touched on some of the fundamental political and legal issues of modern global history such as sovereignty, international and intercultural relations, or universal human rights.

The purpose of this article was not to examine the historical background and the intellectual content of the Valladolid debate in detail and comprehensively. Rather, it offers the reader a short, even if systematically composed overview of these interrelated topics, into which further investigation is planned by the author.

Súhrn

Debata vo Valladolide (1550–1551): prehľad o jej historickom pozadí a ideovom obsahu

Článok je stručnou prehľadnou charakteristikou historického pozadia a ideového obsahu tzv. Valladolidskej debaty. Valladolidská debata sa konala v španielskom meste Valladolid pred výborom (resp. porotou; špan. *junta*) zloženým z predstaviteľov Cirkvi a Španielskej Koruny a zahŕňajúcim viacerých popredných dobových intelektuálov alebo tzv. teológov – juristov, a to najskôr od polovice augusta do polovice septembra 1550 a potom (po dočasnom prerušení) od polovice apríla do polovice mája 1551. Cieľom debaty, ktorý sa však nepodarilo dosiahnuť, malo byť jednoznačné vyriešenie otázky, či španielske zväčša vojenské dobýjanie (špan. *conquista*) Nového sveta (t. j. karibských ostrovov a americkej pevniny) je, alebo nie je možné legitimizovať jeho vyhlásením za spravodlivú vojnu. Popritom sa v rámci debaty riešili aj viaceré súvisiace otázky, najmä: Je možné masy pôvodných, pohanských obyvateľov Nového sveta, t. j. Indiánov, christianizovať a priviesť ku kresťanskému spôsobu života (= „scivilizovať") použitím vojenskej sily v záujme akcelerácie a zefektívnenia tohto problematicky prebiehajúceho procesu, ktorého uskutočňovaním a úspešným zavŕšením bola (aspoň teoreticky, resp. v prvých desaťročiach *conquisty*) podmienená vláda Španielskej Koruny nad Novým svetom? (Pápež Alexander VI. ako „*dominus totius orbis*" totiž v roku 1493 daroval kastílskej kráľovnej Izabele a jej manželovi Ferdinandovi, ako aj ich nástupcom na tróne, t. j. španielskym kráľom, Nový svet pod podmienkou, že zabezpečia christianizáciu všetkých Indiánov.) Je možné Indiánov nútiť, aby pracovali v prospech španielskych osadníkov? Mohla Španielska Koruna nadobudnúť nad indiánskymi krajinami suverenitu, v dobovej terminológii nazývanú „*dominium*", bez súhlasu ich indiánskych vládcov a indiánskeho ľudu? Tieto a ďalšie otázky sa na Valladolidskej debate pokúsili podrobne a ucelene rozobrať a zodpovedať dominikán Bartolomé de Las Casas (1484–1566) a jeho ideový protivník humanista Juan Ginés de Sepúlveda (1489–1573). Ich konfrontácia (= Valladolidská debata) nemala jasného víťaza; rozhodne neohrozila španielske panstvo v Novom svete závažnejším spochybnením jeho legitimity, ani jeho ďalšie rozširovanie (t. j. *conquista* po skončení debaty pokračovala), a neviedla tiež k zásadnejšiemu zlepšeniu nepriaznivého reálneho postavenia Indiánov vo vznikajúcej koloniálnej spoločnosti

[52] For more detail on this issue see VYŠNÝ, P.: op. cit. 7, p. 81.

riadenej Španielmi. Na druhej strane, debata prispela k presadeniu chápania Indiánov ako slobodných ľudí, ktorých nemožno svojvoľne usmrcovať či zotročovať, v nadmernom rozsahu nútiť ťažko pracovať pre španielskych osadníkov, zbavovať majetku a pod. (čo sa v Novom svete bežne dialo), a podnietila Korunu k istému obmedzeniu použitia vojenskej sily pri obsadzovaní amerických území v druhej polovici 16. storočia (tento proces sa dokonca z rozhodnutia Koruny od roku 1573 nesmel nazývať „*conquista*", t. j. vojenské dobývanie, ale „pacifikácia"). Avšak ak aj Valladolidská debata mala viac intelektuálno-kultúrny význam ako výrazný hmatateľný vplyv na španielsku *conquistu* a kolonizáciu Nového sveta, práve týmto významom vystúpila z rámca španielskych právnych dejín a stala sa významným východiskovým medzníkom moderných európskych, ale aj mimoeurópskych právnych dejín, ktorých kľúčové problémy ako ľudské práva, štátna suverenita, právna regulácia medzinárodných vzťahov, vojnové právo, právo uskutočňovať vojenskú/koloniálnu expanziu a pod., sa prvýkrát – seriózne – diskutovali práve vo Valladolide.

S istou dávkou zjednodušenia možno konštatovať, že jadrom Valladolidskej debaty boli štyri komplexné a samostatné, hoci sčasti sa prekrývajúce tézy, ktoré sformuloval a podoprel ucelenými argumentmi Sepúlveda, a ktoré Las Casas závažne spochybnil až úplne odmietol svojimi nemenej ucelenými a zložitými argumentmi. Sepúlveda, po prvé, tvrdil, že Indiáni sú ľudia páchajúci dlhodobo a vo veľkom rozsahu ťažké hriechy, osobitne ťažký hriech modloslužobníctva, za čo ich Španieli ako dobrí kresťania a imitujúc biblických hrdinov trestajúcich hriešnikov na Boží príkaz, môžu či dokonca majú prísne potrestať, t. j. ak Španieli vedú proti Indiánom (dobyvačné) vojny, tieto vojny majú spravodlivý charakter. Las Casas túto tézu vyvrátil o. i. poukázaním na skutočnosť, že Indiáni pred *conquistou* neboli poddanými španielskeho kráľa a príslušníkmi Cirkvi, a preto nad nimi ani španielsky kráľ, ani Cirkev (pápež) nemajú právomoc, ktorá by umožňovala súdiť a trestať.

Po druhé, Sepúlveda tvrdil, že Indiáni sú iracionálni a necivilizovaní barbari, a tak aj, podľa príslušnej Aristotelovej teórie, tzv. prirodzení otroci, t. j. ľudia s veľmi obmedzenými rozumovými schopnosťami, primitívnou kultúrou a pod., ktorí sú „prirodzene" predurčení byť otrokmi racionálnych a civilizovaných ľudí, akými boli v Sepúlvedovom chápaní Španieli. Sepúlveda však netvrdil, že by Indiáni mali byť doslovne otrokmi Španielov, t. j. v postavení neslobodných a úplne bezprávnych ľudí; skôr im priznával postavenie akýchsi služobníkov Španielov s obmedzenou osobnou slobodou a právami, ktoré sa, navyše, mohlo zlepšiť, len čo by Indiáni dosiahli (vďaka španielskej vláde) stav istej „civilizovanosti". Las Casas odmietol túto Sepúlvedovu tézu vypracovaním vlastnej komplexnej teórie pojmu „barbar", v ktorej rozlíšil štyri kategórie barbarov, z ktorých iba jednu kategóriu tvorili barbari zodpovedajúci aristotelovskému konceptu prirodzených otrokov; Las Casas však podrobne ukázal, že drvivá väčšina Indiánov do tejto kategórie nepatrila, a preto *conquistu* nemožno legitimizovať ako akciu zameranú na podriadenie Indiánov moci ich údajne „prirodzených" pánov – Španielov.

Sepúlveda, po tretie, tvrdil, že je dovolené podrobiť si Indiánov (spravodlivou) vojnou na účel vytvorenia podmienok pre ich efektívnu christianizáciu a „scivilizovanie". Las Casas to odmietol, keďže bol presvedčený (o. i. na základe príslušných názorov sv. Augustína), že kresťanská viera sa nemá šíriť násilím a nekresťania nemajú byť donucovaní konvertovať na kresťanstvo, resp. nekresťania sú ľudia vybavení slobodnou vôľou a slobodou vierovyznania a majú tak právo, bez akéhokoľvek nátlaku sa rozhodnúť, či sa stanú kresťanmi, alebo nie.

Konečne, po štvrté, Sepúlveda tvrdil, že Španieli majú podľa prirodzeného práva povinnosť brániť a ochraňovať nevinných Indiánov, ktorých ich súkmeňovci nespravodlivo

utláčajú alebo chcú obetovať indiánskym bohom, t. j. nespravodlivo (a nezmyselne) usmrtiť, a to aj pomocou vojenskej sily, ak by sa to ukázalo ako potrebné. Pre Sepúlvedu a iných boli indiánske náboženské predstavy a najmä obrady spojené s ľudskými obeťami a konzumáciou telesných zvyškov obetovaných osôb (rituálny kanibalizmus) evidentným dôkazom ovládania Indiánov diablom, ako aj primitívnosti, iracionálnosti a mimoriadnej hriešnosti Indiánov a tiež ich neschopnosti žiť v súlade s prirodzeným právom zaväzujúcim všetkých racionálnych a civilizovaných ľudí, tak kresťanov, ako aj nekresťanov. Indiáni preto mali byť za svoje správanie potrestaní (vojenskou silou) a následne podriadení španielskej vláde, ktorá jediná ich mohla christianizovať a „scivilizovať", a tým v konečnom dôsledku zásadne „napraviť a polepšiť".

Las Casas však indiánske náboženské predstavy a obrady interpretoval odlišne. Považoval ich za integrálnu súčasť indiánskych spoločností (kultúr), ktoré mali v rámci týchto spoločností dôležitú úlohu – stmeľovali ich členov a riadili ich každodenný život a správanie, napomáhali fungovanie indiánskych správnych, hospodárskych a iných inštitúcií a pod. Navyše, Las Casas do určitej miery pripisoval pozitívny význam aj indiánskym kultovým obradom spojeným s prinášaním obetí bohom, vrátane ľudských obetí, tvrdiac, že prinášanie obetí, vrátane ľudských, nie je niečím diabolským alebo samoúčelným násilím, ale základným nástrojom, ktorým ľudia kdekoľvek na svete a odpradávna uctievajú božské bytosti a žiadajú si ich pomoc a ochranu, pričom v skorších štádiách vývoja ľudstva boli ľudské obete pomerne bežné, teda sa nevyskytovali iba u Indiánov. Zároveň tvrdil, že indiánske náboženské predstavy a obrady sú výrazom podvedomej túžby Indiánov spoznať a prijať pravého (= kresťanského) Boha, ktorý však bol a vzhľadom na neprekonateľnú nevedomosť (*ignorantia invincibilis*) Indiánov o existencii tohto Boha do príchodu Španielov, aj objektívne musel byť nedokonalý. Španieli by potom podľa Las Casasa mali Indiánom pomôcť túto nevedomosť prekonať, t. j. christianizovať ich nenásilnými prostriedkami, a nie ich za ňu násilne trestať.

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Lucia Šimunová

Review of the International Conference "Restoratívna justícia a alternatívne tresty v aplikačnej praxi" (Restorative Justice and Alternative Punishments as Applied in Practice), 29. 9. 2015, Trnava

The issue of criminal sanctions belongs among the basic questions of criminal policy. The protective function of criminal law is typically implemented by the application and enforcement of punishments and safety measures. Nowadays we can see an increasing number of alternative ways to the solution of criminal cases, which are in reaction to the inefficiency of traditional criminal policy. Alternative ways of punishment are meant to be equivalent partners of imprisonment. The latest version of the Criminal Code No. 300/2005 expects decreasing numbers in the prison population, decreasing financial costs of prisons, minor intervention in the basic human rights and freedoms of prisoners, and acceleration of courts' use of alternative sanctions.

Alternative sanctions were established ten years ago. We can see a lot of changes, advantages and disadvantages in Slovakia connected with this institution. Deeper study of the issues involved is needed. Further criminological research in this area is also necessary.

The selection of criminal sanction is a difficult process which is connected with effective evaluation of individual circumstances in each case. It is necessary to carry out criminological research in this area, and for those involved to meet each other and discuss problems in sanction policy connected with restorative justice and alternative sanctions.

The international conference on "Restorative justice and alternative sanctions as applied in practice" was organized by the Department of Criminal law and Criminology with the cooperation of the Department of Legal Propaedeutics on the 29th of September 2015. It took place in the Peter Pázmaň Conference Hall on Rybníková Street in Trnava.

It was funded by the Slovak Research and Development Agency from project No. APVV-0179-12. The principal researcher in this project is Assoc. Prof. JUDr. Tomáš Strémy, PhD.

The international conference was guaranteed by the academic committee of the conference, consisting of Prof. JUDr. Pavel Baláž, CSc., Prof. PhDr. Gustáv Dianiška, CSc., Prof. JUDr. Ivan Šimovček, CSc., and Assoc. Prof. JUDr. Tomáš Strémy, PhD.

This conference was opened by principal researcher and organizer Assoc. Prof. JUDr. Tomáš Strémy, PhD. After that the participants could listen to speeches made by Vice Chancellor Prof. JUDr. Marek Šmid, PhD. and JUDr. Mgr. Martina Gajdošová, PhD., who is the Vice Dean for internal bachelor study, internal master study and social care for students at the Faculty of Law, Trnava University in Trnava.

Many criminologist and criminal lawyers came to this conference from the Slovak Republic and Czech Republic. But there were also people from legal praxice. Altogether twenty-six presenting participants and seventeen audience participants were involved. There were many experts from the Czech Republic such as Assoc. Prof. JUDr. Jana Tlapák Navrátilová, Ph.D. from the Faculty of Law at Charles University in Prague, JUDr. Filip Ščerba, Ph.D. and Mgr. Veronika Pochylá from the Faculty of Law at Palacký University in Olomouc, and PhDr. Miroslav Scheinost, JUDr. Michaela Štefunková, Ph.D. and Mgr. Jiří Vlach from the Institute of Criminology and Social Prevention in Prague.

Among the Slovak presenting participants were Prof. JUDr. Jozef Záhora, PhD. from the Faculty of Law at the Pan-European University in Bratislava, Assoc. Prof. JUDr. Sergej Romža, PhD. from the Faculty of Law at Pavol Jozef Šafárik University in Košice, Assoc. Prof. JUDr. Lucia Kurilovská, PhD. and JUDr. Rudolf Kasinec, PhD. from the Faculty of Law at Comenius University in Bratislava, Assoc. Prof. PhDr. Gabriela Lubelcová, CSc. from the Faculty of Arts at Comenius University in Bratislava, and Assoc. Prof. JUDr. Jaroslav Klátik, PhD. from the Faculty of Law at Matej Bel University in Banská Bystrica. Local presenting participants from the Faculty of Law at Trnava University in Trnava included Prof. JUDr. Ivan Šimovček, CSc, Prof. PhDr. Gustáv Dianiška, CSc., Assoc. Prof. JUDr. Tomáš Strémy, PhD., Assoc. Prof. JUDr. Darina Mašľanyová, CSc., Assoc. Prof. JUDr. Miroslava Vráblová, PhD., and Assoc. Prof. JUDr. Adrián Jalč, PhD.

This conference had four sessions of presentations. The first two sessions focused on information about restorative justice and the application and enforcement of alternative sanctions. They constituted the basics of theoretical and practical knowledge, and dealt with each alternative sanction, particularly electronic monitoring as a new solution in Slovakia and the question of victims in criminal proceeding.

The third session consisted of outputs from criminological research and methodology of alternative sanctions. Participants in the APVV project (Assoc. Prof. JUDr. Tomáš Strémy, PhD., Prof. PhDr. Gustáv Dianiška, CSc., JUDr. Lucia Šimunová, PhD., JUDr. Andrea Gregušová and Mgr. Kristína Jurišová) published their results from criminological research about the application of alternative sanctions in judicial practice, since this conference was connected with the second phase of solutions called the individual research phase.

The first presentation was given by Assoc. Prof. JUDr. Tomáš Strémy, PhD. He talked about the criminal geography of application of alternative sanctions in each region of the Slovak Republic. Prof. PhDr. Gustáv Dianiška, CSc. appeared with a contribution about methodology and its application in restorative justice research.

After that JUDr. Lucia Šimunová, PhD. and her colleague JUDr. Andrea Gregušová talked about the application of alternative sanctions in judicial practice. The presented data came from their own criminological research. They described the experience of judges with imposing alternative sanctions and the opinion of judges on the application of alternative sanctions. The last presentation in this section was made by Mgr. Kristína Jurišová. She spoke about public opinion on alternative sanctions, using data gained from pilot research on social networks.

The last session gave space to young researchers, criminologists and criminal lawyers. It focused on basic information about the new alternative sanction of prohibition of participation in public events, and on alternative sanctions related to extremism.

Inter alia, this conference had many accompanying programs: participants could see the new football stadium in Trnava (the Anton Malatinský Stadium), and they also had a traditional lunch connected with more informal meeting of participants.

The conference was closed by Assoc. Prof. JUDr. Tomáš Strémy, PhD. He expressed his thanks for the interesting presentations and results of the participants. The proceedings from this conference are going to be published in print version in a peer review journal. All contributions by presenting conference participants will be included.

Finally, we can say that this conference had a scientific background created by experts in the fields of criminology and criminal law, and from other university departments such as sociology and psychology, so the conference had interdisciplinary character. It also brought

together many people from Slovakia and the Czech Republic. This conference was one of the APVV project aims.

As one of the committee members I would like to express our gratitude to the principal researcher in the APVV project, Assoc. Prof. JUDr. Tomáš Strémy, PhD., and to Prof. PhDr. Gustáv Dianiška, CSc., who dealt with the methodology of criminological research as a whole, the members of the academic committee of the conference, the presenting and the audience participants alike, the leaders of the Faculty of Law at Trnava University in Trnava, and also the administrative staff who took care of the coffee breaks.

I hope that this conference was not the last, and that we will see each other again at similar meetings.

Andrea Frťalová

IHERING, Rudolf von: *Boj za právo (The Struggle for Law)*.
(Eds.: BRÖSTL, A./HOLLÄNDER, P.). Bratislava : Kalligram, 2009. 107 pp.
ISBN 978-80-8101-063-7

Rudolf von Ihering dedicated his active career life to juristic theory and to Roman law in the academia (Basel, Rostock, Kiel, Giessen, Strasbourg, Göttingen). A master of elegant rhetorical style, he is often labelled the last Romance scholar and a reformer of positive jurisprudence, especially with regard to pre-contractual liability (*culpa in contrahendo*). The scholarly interest in the works of this author lasts to this day. His arguments are available today as they were in the past; one can engage them, taking either an affirmative or contradictory stand. The work under review here counts among the most influential works of European legal history. It is a written version of the author's lecture on this topic, and an experimental attempt to argue didactically that the defence of a subjective right represents the defence of an objective right in a special sense. He took his subject matter from two images originating in the world of belles-lettres. In the first, he reflected on Shakespeare's tragicomedy "The Merchant of Venice", in the second on the novel Michael Kohlhaas by Heinrich von Kleist. Using these images he explicated an intrusion on a subjective right which goes beyond its subject matter and touches upon human dignity, evoking affronted legal feeling. In the intentional breach of a right he observed not only an assault on the subject matter of the right, but also on the person as such. The work represents an appeal to the struggle for rights which the author regards as a duty and a fundamental substance of the existence of law. This, in turn, enabled him to broaden his readership. The uniqueness of the work therefore does not lie in its refreshing and brilliant stylistics, inspiring the liberal mind to consideration exceeding the thematic framework, as much as in its motivational dynamo. The author illustrates the fundamental idea of the relational nexus between subjective and objective rights by way of the argument that the decline of a subjective right effectively represents the fall of the law as such. The bill of debt of the merchant of Venice would be absolutely void *per se* because it included an immoral obligation. However, the Venetian court of law did not reject the claim. It acknowledged its validity with a statement which negated the possibility of law enforcement. Therein lies the comical tragicality of the destiny of one who believes in the validity of an immoral law or one who lets the monetary value and the desire to undo an offense take precedence over the value of human life. The tragic destiny of Michael Kohlhaas is different. The power of legal feeling and the resistance with which the epic hero faces the disparagement of law are characterized by the author as the poetry of character, while the nature of the time when the story takes place renders the uneven position of the rivals. He set the presumption on the nature of law lying in the struggle for and winning of recognition (historically applicable, for example, to slaves) against Savigny and Puchta's then generally accepted parallel on the nonviolent origin of law. Regardless of the aforementioned, it can be stated that even the ancient Romans regarded law not only as generally-binding legal rules, but also as a reflection of the truth of natural law, juridically rendered in the form of a law as appropriately as possible through legal philosophical reasoning. In this way they grasped the meaning of *ius*; law becomes a means to pursue justice and an empirical life philosophy.

The author generates the dependence of a particular right from an abstract right, analyzing the existence of the opposing direction of such a relationship of dependence as well. He deduces the paralysis of the objective legal principle, which gives birth to a particular right, from the toleration of an illegitimate interference. The defence of a subjective right as a rationalization, drawing from the guarantee of rights, is perfectly correct. However, it can only sceptically be related to the subjective duty of struggle in the name of law due to a loss of efficiency of the legal principle, even if the subjective right used to be enforced regularly before the interference. He defined the aforementioned hypothetical duty as a moral self-preservation imperative to be a universal maxim for action, arguing that the absence of resistance against injustice reinforces the power of the rival, increasing his or her courage and boldness. The aforementioned rationalization is of a hypothetical-preventive nature.

The struggle for rights can be labelled as the belles-lettres of philosophical-legal literature whose author regards the legal feeling of the reader and acknowledges his or her own status, thus directing the legal perspective toward a teleological interpretation. The fundamental idea of struggle for rights takes the reader from the position of an eligible subject to one of an obliged subject and to the enforcement of the immaterial damage related to the intrusion on human dignity as a most fundamental right, from which all of the other subjective rights are derived and which occurs, by way of a logical necessity, together with an intentional breach of each subjective right. The author regards the possibility of enforcing immaterial damage due to affronted legal feeling as completely justifiable, similarly to the so-called *actiones vindictam spirantes* in Roman law. These sorts of charges were declared void if it emerged that the injured party did not internally feel an intrusion on his or her dignity. The calculation of immaterial damage based on the psychological criterion of the subjective nature of a person, such as the emotion of affronted legal feeling, implies a different result in otherwise quite identical cases. The reduction of the risk of abuse of this variable category would thus become unattainable. It seems that the perception of law, generalized in the argument that it must be ready for the assault of injustice, leads us to conclude that the right to maintain human dignity is a particular right of every human being with a legal claim, and not an abstract legal principle. This issue can be debated, and it is difficult to assess even from a contemporary perspective.

The duty of struggle and the implementation of law reflect contrasts which are not genetically related. The meaning of law and its nature is not so much the struggle for law as the preservation of legal peace and of the legal state of freedom, and the justification to correct another person so that his or her actions do not violate the practical pursuit of rights and freedoms which would infringe on the rights and freedoms of others. As Socrates said, "… the secret of change is to focus all of one's energy, not on fighting the old, but on building the new". Here we are moving to the Iheringian understanding of the concept of law, according to which not only individual rights have their purposes, but the whole legal system as such is utilitarian. Conversely, H. L. A. Hart refused partial purposes in law. He saw the purpose of law in the establishment of norms, on the basis of which it is possible to assess the compliance of human conduct with such norms. Lon L. Fuller attributed purposefulness to individual rights only.

The author does not develop the question of the struggle for rights into a simple arithmetical operation, where potential advantages and disadvantages with regard to the value of the subject matter in question would be assessed on the opposite sides. Rather, he points out the processes in which the value of the subject matter is not related to the subject matter of the invested effort and costs. He explains the ideal goal which is self-respect and

appreciation, and the self-defence of personality and honour through law. It is not the issue of a sober financial interest, therefore, which would urge the injured party to start a suit. It is the issue of emotional pain over the suffered injustice. For that person the suit changes from a simple issue of interest to an issue of character and disrupted legal feeling, which presupposes the intention on the part of the opponent. He perceives struggle as the most characteristic element of law and compares it to the perennial work of law. If we were to implement this version today, the legal system might collapse under the burden of workload. The final idea, "in struggle you shall find your right", represents the circumstances of an individual who seems to resist blindly as he or she does not know the conditions of his or her right. First and foremost, it is convenient to identify with one's own right so that one will be able to defend oneself effectively if a future response is needed. If we are to express our opinion in several words, it is not the issue of the struggle for one's rights anymore as much as the struggle for truth through the interpretation of law as potential advise regarding its application. In the figurative sense, "… justice is where human relationships are ordered according to law; law, however, is where injustice is possible". Aristotle: Nicomachean Ethics (5:10).

List of authors/Die Autoren

Marianna D'Andraia
Università degli Studi di Salerno, Dipartimento di Scienze Giuridiche
University of Salerno, Faculty of Law

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

JUDr. Pavel Salák jr., Ph.D.
Masarykova univerzita v Brně, Právnická fakulta
Masaryk University in Brno, Faculty of Law

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

JUDr. Lucia Šimunová, 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

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

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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.
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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